

PROPERTY, PRIVACY, AND JUSTICE GORSUCH'S EXPANSIVE FOURTH AMENDMENT ORIGINALISM

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In Carpenter v. United States, the Supreme Court reaffirmed the continuing vitality of the privacy framework Katz v. United States established in 1967 for identifying Fourth Amendment searches. Justice Gorsuch, in dissent, critiqued Katz as indeterminate and inconsistent with democratic values. In this Article, I analyze Justice Gorsuch's proposed alternative framework, which he described as the "traditional approach" to determining Fourth Amendment interests. Instead of grappling with the indefinite and textually and historically unfounded "reasonable expectations of privacy" framework of Katz, Justice Gorsuch asserted, this traditional test would require judges to focus on whether a "house, paper, or effect was yours under law." Although Justice Gorsuch offered preliminary thoughts on this rubric, his opinion left open important questions, including the sources of law to which the Court should look in identifying property interests; the breadth of the definitions of "papers" and "effects" and the kinds of property closely enough associated with the person for potential implication of Fourth Amendment rights; and the ways in which government conduct impinging on such property interests might trigger Fourth Amendment protection. Several passages in Justice Gorsuch's opinion suggest that he would take a broad, flexible approach to each of these issues. Overall, whatever ambiguities exist in Justice Gorsuch's dissent, it is certain that his property model would be more expansive than the pre-Katz trespass test that the Court rehabilitated in 2012. If that is the case, however, then the results that courts would be likely to reach under this framework might closely resemble outcomes under a prin-

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ciplined privacy-based analysis. Additionally, because a broad property rubric would involve a significant degree of judicial discretion, it would replicate Katz's indeterminacy. Thus, while Justice Gorsuch's approach might carry forward the benefits associated with Katz's flexibility, it would also reproduce Katz's associated flaws, including manipulability and democratic illegitimacy. Nonetheless, Justice Gorsuch might favor a flexible "traditional approach" over Katz because its explicit attention to the language of the Fourth Amendment is more conceptually elegant and, at least aesthetically, more consistent with Justice Gorsuch's originalist sympathies.

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INTRODUCTION

In *Carpenter v. United States*,¹ the Supreme Court reaffirmed the continuing vitality of the privacy framework *Katz v. United States*² established in 1967 for identifying Fourth Amendment searches.³ At the same time, the Court dramatically qualified a line of cases under *Katz* that had established the so-called third-party doctrine, which left government action to acquire information an individual has shared with corporations and other third parties entirely unregulated by the Constitution.⁴ Instead, the Court held that use of a court order to obtain a customer's historical cell-site location information (CSLI) from a cellular

1. 138 S. Ct. 2206 (2018).

2. 389 U.S. 347 (1967).

3. *Carpenter*, 138 S. Ct. at 2213–14 (citing *Katz*, 389 U.S. at 351).

4. *Id.* at 2216–20 (discussing *Smith v. Maryland*, 442 U.S. 735 (1979), and *United States v. Miller*, 425 U.S. 435 (1976)).

service provider, at least for seven days of data or more, constitutes a search subject to the Fourth Amendment's presumptive warrant requirement.⁵ While asserting that the decision would not affect "conventional" forms of surveillance,⁶ the Court declared that the dramatic enhancement of the government's ability to surveil the citizenry wrought by advancements in digital technology,⁷ the deeply revealing nature of CSLI,⁸ and the essentially involuntary nature of the communication of that data from customers to service providers⁹ necessitated its conclusion.

Between the early twentieth century and the 1960s, the Court determined whether a Fourth Amendment search had occurred by using a trespass test: in the absence of a physical intrusion into a constitutionally protected area ("persons, houses, papers, and effects"¹⁰) to gather information, surveillance by the state would not implicate the Fourth Amendment.¹¹ The Court's opinion in *Olmstead v. United States*¹² was the quintessential expression of this model.¹³ In that case, because government agents wiretapped the defendants' phone lines without physical intrusion into their homes or offices, the Court held the surveillance to be a non-search.¹⁴ In *Katz*, the Court decisively repudiated the *Olmstead* framework.¹⁵ Instead, Justice Harlan's concurring opinion in *Katz*, which the Court later accepted as the holding of the case,¹⁶ established that a search occurs when

5. *Id.* at 2217 & n.3, 2220–21.

6. *Id.* at 2220.

7. *See id.* at 2219.

8. *Id.* at 2217–18.

9. *See id.* at 2220.

10. U.S. CONST. amend. IV.

11. *See Carpenter*, 138 S. Ct. at 2213 (citing *United States v. Jones*, 565 U.S. 400, 405, 406 n.3 (2012)). *But cf.* Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 69 (observing that the Court's emphasis on physical intrusions between the 1920s and the 1960s "eschewed reliance on the technicalities of trespass law").

12. 277 U.S. 438 (1928), *overruled by Katz v. United States*, 389 U.S. 347 (1967).

13. *See id.* at 464.

14. *Id.*

15. *Katz*, 389 U.S. at 353 (asserting that the "premise that property interests control the right of the Government to search and seize has been discredited" (quoting *Warden v. Hayden*, 387 U.S. 294, 304 (1967)) (internal quotations marks omitted)).

16. *See Smith v. Maryland*, 442 U.S. 735, 740 (1979) (citing *Katz*, 389 U.S. at 361 (Harlan, J., concurring)).

the government intrudes on an expectation of privacy that “society is prepared to recognize as ‘reasonable.’”¹⁷

In 2012, in *United States v. Jones*,¹⁸ the Court resuscitated the old trespass test, insisting, contrary to common understandings, that *Katz* had supplemented rather than supplanted *Olmstead*.¹⁹ Thus, in *Jones*, because the government had placed a GPS monitor on the underside of the defendant’s Jeep to track its movements (a physical intrusion on an effect to gather information), a search had occurred.²⁰ Although the Court concluded that a benefit of this trespass test was that it avoided the “vexing” problems of *Katz*’s indeterminate privacy standard, it also insisted that *Katz* remained available as an alternative in cases in which the government engages in investigatory activity without a physical intrusion.²¹ Overall, although every Justice on the Court at the time of *Carpenter* had signed or authored an opinion acknowledging *Katz*’s shortcomings, a majority of those Justices have also signaled their continuing commitment to the *Katz* standard (at least as a second-line test), most recently in *Carpenter* itself.²²

Nonetheless, Justice Thomas expressed the view in his *Carpenter* dissent that *Katz* should be overturned,²³ and Justice Gorsuch, dissenting separately, also critiqued *Katz* as indeterminate,²⁴ insufficiently protective,²⁵ and inconsistent with democratic values.²⁶

In this article, I will analyze Justice Gorsuch’s dissent in *Carpenter*, in which he urged the Court to employ a “traditional approach” to determining Fourth Amendment interests.²⁷ Instead of grappling with the indefinite and textually and his-

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

18. 565 U.S. 400 (2012).

19. *Id.* at 409.

20. *Id.* at 406 n.3.

21. *Id.* at 411.

22. Nicholas A. Kahn-Fogel, *Katz, Carpenter, and Classical Conservatism*, 29 CORNELL J.L. & PUB. POL’Y (forthcoming 2020) (manuscript at 14–15), <https://ssrn.com/abstract=3279871> [<https://perma.cc/C925-BZZ2>].

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

24. *Id.* at 2265–66 (Gorsuch, J., dissenting).

25. *See id.* at 2261–62.

26. *See id.* at 2268.

27. *Id.* at 2267–68.

torically unfounded “reasonable expectation of privacy” framework of *Katz*, Justice Gorsuch asserted, this traditional test would require judges to focus on whether “a house, paper, or effect was *yours* under law.”²⁸ Although Justice Gorsuch offered preliminary thoughts on this rubric, his opinion left open important questions, including the sources of law to which the Court should look in identifying property interests; the breadth of the definitions of “papers” and “effects” and the kinds of property associated closely enough with the person for potential implication of Fourth Amendment rights; and the ways in which government conduct impinging on such property interests might trigger Fourth Amendment protection. Several passages in Justice Gorsuch’s opinion suggest that he would take a broad, flexible approach to each of these issues. Overall, whatever ambiguities exist in Justice Gorsuch’s dissent, it is certain that his property model would be more expansive than the pre-*Katz* trespass test that the Court rehabilitated in 2012. If that is the case, however, then the results that courts would be likely to reach under this framework might closely resemble outcomes under a principled privacy-based analysis. Moreover, in situations in which his proposed approach fails to protect asserted Fourth Amendment rights, Justice Gorsuch might be willing to rely on *Katz* despite its shortcomings.²⁹ Finally, because a broad property rubric would involve a significant degree of judicial discretion, such a model could negate its own ostensible virtues, such as greater determinacy and democratic legitimacy. Thus, although this “traditional approach” would, like *Katz*, be flexible enough to allow the Court to adjust Fourth Amendment rules in the face of emerging threats to individual liberty or collective security, it would also perpetuate *Katz*’s putative flaws. Nonetheless, Justice Gorsuch might prefer a flexible property framework over *Katz* because its explicit attention to the language of the Fourth Amendment is more conceptually elegant and, at least aesthetically, more consistent with Justice Gorsuch’s originalist sympathies.

This Article will track the organization of Justice Gorsuch’s dissent. Part I will discuss Justice Gorsuch’s critique of the

28. *Id.*

29. *See id.* at 2272.

Court's cases implementing third-party doctrine and *Katz* more broadly and his consideration of the desirability of revisiting these flawed decisions using the *Katz* standard. Part II will evaluate Justice Gorsuch's proposed model and will compare that approach with the use of property in Justice Kennedy's and Justice Thomas's dissenting opinions. Part III will discuss potential lessons from scholarly proposals for expansive property frameworks.

I. JUSTICE GORSUCH'S CRITIQUE OF *KATZ*

Justice Gorsuch began his assessment of *Katz* with a discussion of *Smith v. Maryland*³⁰ and *United States v. Miller*,³¹ a pair of decisions from the 1970s establishing that one lacks any reasonable expectation of privacy in information shared with third parties, including, in those cases, the dialed numbers that telephone users convey to telephone companies and bank records, respectively.³² *Smith* and *Miller* provided the basis for the Sixth Circuit's determination in *Carpenter* that law enforcement obtainment of Carpenter's CSLI from his cellular carriers was not a Fourth Amendment search.³³ Those cases also seemingly led inexorably to the conclusion that "[e]ven our most private documents—those that, in other eras, we would have locked safely in a desk drawer or destroyed," which "now reside on third party servers," lack any Fourth Amendment protection because "no one reasonably expects any of it will be kept private."³⁴ As Justice Gorsuch aptly observed, however, "no one believes that, if they ever did."³⁵

First, Justice Gorsuch examined the possibility of living with the holdings of *Smith* and *Miller* despite the incompatibility of their implications with common intuitions about the kinds of information that will or should be kept private.³⁶ Justice Gorsuch concluded that this option was both normatively "unattractive"

30. 442 U.S. 735 (1979).

31. 425 U.S. 435 (1976).

32. *Smith*, 442 U.S. at 742; *Miller*, 425 U.S. at 442.

33. See *United States v. Carpenter*, 819 F.3d 880, 888–89 (6th Cir. 2016).

34. *Carpenter*, 138 S. Ct. at 2262 (Gorsuch, J., dissenting).

35. *Id.*

36. *Id.* at 2262–64.

and doctrinally dubious.³⁷ Doctrinally, the Court's justification of the third-party doctrine as a reflection of voluntary assumption of the risk that information that one shares with a third party will reach the government represented a distortion of that principle as developed in tort law.³⁸ Under traditional conceptions of the doctrine, it applies only when one has explicitly or implicitly agreed to absolve another for harms resulting from risks the other person has created, not solely based on one's recognition that such risks exist.³⁹ Thus, the mere fact that a pedestrian realizes there is a risk that a car might veer off the street and onto the sidewalk where he is walking is insufficient to support a conclusion that the pedestrian has agreed to absolve the negligent driver of liability for the resulting harm.⁴⁰ Likewise, one's recognition of the possibility that a person or corporation with whom one has shared sensitive information will betray one's confidence by giving it to the government does not mean one has agreed to accept that risk, let alone the risk that the government will "pry the document" from the third party's hands and "read it *without* his consent."⁴¹ Furthermore, the clarity of the rule that such information is never protected is insufficient to justify it; the opposite rule, that such information is always protected, would be just as clear.⁴² Ultimately, Justice Gorsuch concluded that *Smith* and *Miller* represented a "doubtful application of *Katz* that lets the government search almost whatever it wants whenever it wants."⁴³

Second, Justice Gorsuch considered the possibility of revisiting the holdings of *Smith* and *Miller* using the *Katz* framework. Initially, Justice Gorsuch feared that "[r]ather than solve the problem with the third party doctrine . . . this option only risks returning us to its source: After all, it was *Katz* that produced *Smith* and *Miller* in the first place."⁴⁴ If *Smith* and *Miller* are problematic, however, Justice Gorsuch's fear makes *Katz* the

37. *Id.*

38. *Id.* at 2263.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 2263–64.

43. *Id.* at 2264.

44. *Id.*

wrong vehicle for revisiting third-party doctrine only if the historical manipulation of the *Katz* standard to produce unprincipled results suggests that *Katz*'s privacy test is unsusceptible to principled application and if Justice Gorsuch's proposed alternative would be resilient to similar manipulation. As I will discuss, there is reason for skepticism of both of these potential contentions.

Justice Gorsuch then argued, in line with Justice Thomas,⁴⁵ that *Katz*'s privacy standard is inconsistent with the text and original understanding of the Fourth Amendment.⁴⁶ The Amendment's reference to "persons, houses, papers, and effects" demonstrated, for Justice Gorsuch, that the Framers intended not to protect some abstract notion of privacy rights, dependent on "whether a judge happens to agree that your subjective expectation [of] privacy is a 'reasonable' one," but to guard against specific, enumerated intrusions.⁴⁷ Likewise, the cases that inspired the Fourth Amendment involved intrusions on homes and papers, further demonstrating the Framers' intention to safeguard against particularized threats to privacy rather than "to protect privacy in some ethereal way dependent on judicial intuitions."⁴⁸

Aside from his textualist and originalist objections to *Katz*, Justice Gorsuch argued that the test had failed even on its own terms.⁴⁹ He asserted that, after over fifty years, it was still un-

45. *Id.* at 2237–44 (Thomas, J., dissenting).

46. *Id.* at 2264 (Gorsuch, J., dissenting). This line of criticism began with Justice Black's dissent in *Katz*. See *infra* notes 98–102 and accompanying text. It has been a common critique since then. See, e.g., *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring) (arguing that when *Katz* is applied "to determine whether a 'search or seizure' within the meaning of the Constitution has occurred (as opposed to whether that 'search or seizure' is an 'unreasonable' one), it has no plausible foundation in the text of the Fourth Amendment"); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 769 (1994) ("These word games are unconvincing and unworthy."); Ricardo J. Bascuas, *The Fourth Amendment in the Information Age*, 1 VA. J. CRIM. L. 481, 499 (2013) ("The Court's notion that the law could protect abstract privacy directly was a doomed exercise in 'perfectionist' or 'noninterpretivist' constitutional interpretation with little connection to the Fourth Amendment's wording." (footnotes omitted)); David Gray, *The Fourth Amendment Categorical Imperative*, 116 MICH. L. REV. ONLINE 14, 15 (2017) (asserting that *Katz* "has no footing in the text or history of the Fourth Amendment").

47. *Carpenter*, 138 S. Ct. at 2264 (Gorsuch, J., dissenting).

48. *Id.*

49. *Id.* at 2265.

clear whether the standard was meant to be empirical or normative.⁵⁰ If *Katz* requires a normative inquiry about “whether society *should* be prepared to recognize an expectation of privacy as legitimate,” Justice Gorsuch contended, then judges are ill suited to undertake it.⁵¹ Rather, according to Justice Gorsuch, such an inquiry “often calls for a pure policy choice,” which “calls for the exercise of raw political will belonging to legislatures, not the legal judgment proper to courts.”⁵² Likewise, if the essential function of judges applying *Katz* were to ascertain society’s actual expectations of privacy, then, according to Justice Gorsuch, legislators, with their greater institutional resources and responsiveness to constituent concerns, would be better suited to conduct the inquiry and implement majoritarian preferences.⁵³

As I have recently argued, if *Katz*’s empirical imperative is to assess society’s immediate, fleeting preferences, then Justice Gorsuch’s argument would be well taken.⁵⁴ Not only would legislatures be better situated to evaluate the existence of such commitments, but constitutionalization of such preferences

50. *Id.* *Katz*’s indeterminacy and the related idea that the test is doctrinally circular have been sources of widespread, longstanding criticism of the standard. See *Carter*, 525 U.S. at 97 (Scalia, J., concurring) (“In my view, the only thing the past three decades have established about the *Katz* test . . . is that, unsurprisingly, those ‘actual (subjective) expectation[s] of privacy’ ‘that society is prepared to recognize as “reasonable”’ bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable.” (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring))). For a summary of similar scholarly critiques, see Kahn-Fogel, *supra* note 22 (manuscript at 5–15).

51. *Carpenter*, 138 S. Ct. at 2265 (Gorsuch, J., dissenting).

52. *Id.* It is, nonetheless, possible to see the Fourth Amendment’s prohibition of “unreasonable” searches and seizures, taken in the “intellectual context” in which the Amendment was adopted, as a mandate for judges to use moral reasoning in interpreting the Amendment. Richard M. Re, *Fourth Amendment Fairness*, 116 MICH. L. REV. 1409, 1415–17 (2018). Additionally, given the deontological character of the Bill of Rights, judges might use something like contractualist principles as the basis for a normative model, as opposed to the utilitarian balancing that has often characterized Fourth Amendment decisionmaking, and which Justice Gorsuch seemed to envision as the only potential normative approach to *Katz* with his reference to a policy choice “between incommensurable goods—between the value of privacy in a particular setting and society’s interest in combating crime.” *Carpenter*, 138 S. Ct. at 2265 (Gorsuch, J., dissenting). Yet, if the normative framework were deontological rather than consequentialist, courts might be best tasked with implementing it, given their “traditional rights-enforcing role distinct from the political branches’ frequent pursuit of aggregate interests.” Re, *supra* at 1425.

53. *Carpenter*, 138 S. Ct. at 2265 (Gorsuch, J., dissenting).

54. Kahn-Fogel, *supra* note 22 (manuscript at 30–31).

would be inconsistent with an essential function of constitutional decisionmaking; at the very least, a constitution must reflect some idea of constraint of majoritarian whim and a reconciliation of popular preferences with society's core values.⁵⁵ As even proponents of the use of surveys to guide Fourth Amendment adjudication have conceded, the technique seems to run "against the constitutional grain."⁵⁶ On the other hand, if one views *Katz* as a command to assess not popular whim but society's deeper, enduring commitments, reflected in national tradition, then the standard would be both consistent with constitutional imperatives and well suited for judicial implementation. Traditionalist models, which require reference to the past, but which allow for incremental reform using a process associated with common law methodology, including reliance on analogy and precedent, represent a "distinctly legal form of reasoning" in which "it makes sense for courts to have a prominent role."⁵⁷

Justice Gorsuch accepted, "*Sometimes . . . judges may be able to discern and describe existing societal norms.*"⁵⁸ He observed that this is particularly likely to be feasible when a judge can draw on positive law rather than intuition in identifying such norms.⁵⁹ Nonetheless, Justice Gorsuch mused that applying *Katz* in this manner might end up resembling the "traditional approach" he ultimately preferred in any case.⁶⁰

Yet, as I will discuss below, if Justice Gorsuch's model were tied to a narrow conception of property rights, this would be likely to be true only in some cases. Sometimes, for example, property law deals with kinds of property that cannot reasonably be classified as papers or effects. Moreover, in cases where some source of positive law other than property law delineates a societal norm, using the law to determine *Katz's* reach would

55. Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 78 (1998) ("Constitutionalism may be much more, but it cannot be less.").

56. Christopher Slobogin, *Proportionality, Privacy, and Public Opinion: A Reply to Kerr and Swire*, 94 MINN. L. REV. 1588, 1602 (2010).

57. Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 680–81 (1994).

58. *Carpenter*, 138 S. Ct. at 2265 (Gorsuch, J., dissenting).

59. *Id.*

60. *Id.* at 2265–66.

not approximate Justice Gorsuch's model, unless, that is, Justice Gorsuch were willing to view "papers," "effects," and property rights more generally in an expansive sense.

Justice Thomas, in his own dissent in *Carpenter*, revealed a potentially narrower perspective in his textualist critique of a broad positive law model, noting that:

To come within the text of the Fourth Amendment, *Carpenter* must prove that the cell-site records are *his*; positive law is potentially relevant only insofar as it answers that question. The text of the Fourth Amendment cannot plausibly be read to mean "any violation of positive law" any more than it can plausibly be read to mean "any violation of a reasonable expectation of privacy."⁶¹

In any case, if the task is to evaluate *Katz* on its own terms, which Justices Thomas and Gorsuch each did in their respective dissents, then positive law other than property law could be a valuable guide. As has long been recognized, positive law in general is often the best evidence of deep-seated societal norms.⁶² Nonetheless, sociologists have also long understood that informal norms often play a more significant role in social life than formally enacted law.⁶³ As I have argued elsewhere, it is often possible to identify established social norms even when those norms are not codified in positive law.⁶⁴ Justice Gorsuch's own analysis reveals this to be true. Toward the end of his evaluation of *Katz*, he critiqued two additional opinions decided using the *Katz* rubric, *Florida v. Riley*⁶⁵ and *California v. Greenwood*.⁶⁶ In *Riley*, the Court held that a homeowner has no

61. *Id.* at 2242 (Thomas, J., dissenting).

62. EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 24 (The Free Press 1st paperback ed. 1997) (1933) ("[S]ocial solidarity is a wholly moral phenomenon which by itself is not amenable to exact observation and especially not to measurement. To arrive at this classification, as well as this comparison, we must therefore substitute for this internal datum, which escapes us, an external one which symbolises it, and then study the former through the latter. That visible symbol is the law."); cf. *Stanford v. Kentucky*, 492 U.S. 361, 373 (1989) ("[T]he primary and most reliable indication of [a national] consensus is . . . the pattern of enacted laws . . .").

63. See WILLIAM GRAHAM SUMNER, *FOLKWAYS: A STUDY OF THE SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS, MORES, AND MORALS* 75–81 (1906).

64. Kahn-Fogel, *supra* note 22 (manuscript at 47).

65. 488 U.S. 445 (1989).

66. 486 U.S. 35 (1988); *Carpenter*, 138 S. Ct. at 2266 (Gorsuch, J., dissenting).

reasonable expectation of privacy against naked-eye surveillance of his curtilage from a helicopter hovering over the property at 400 feet.⁶⁷ In *Greenwood*, the Court held that people have no reasonable expectation of privacy in garbage they put out for collection, even if they seal it in opaque plastic bags.⁶⁸ Yet, Justice Gorsuch's criticism of *Riley* and *Greenwood* hinged on his conclusion that the holdings were contrary to clear societal conventions, not that such conventions were indecipherable.⁶⁹ "Try that one out on your neighbors," Justice Gorsuch quipped in response to the *Riley* holding.⁷⁰ Similarly, Justice Gorsuch doubted "that most people spotting a neighbor rummaging through their garbage would think they lacked reasonable grounds to confront the rummager."⁷¹

Finally, Justice Gorsuch mused that using *Katz* in data privacy cases will prove just as problematic as its use in other realms, as the majority opinion in *Carpenter* itself demonstrated.⁷² Although the majority stated that "no single rubric" could definitively delineate reasonable expectations of privacy under *Katz* in every case, it emphasized the imperative of guarding against "arbitrary power"⁷³ and a "too permeating police surveillance."⁷⁴ Justice Gorsuch found this guidance insufficient. Responding to the majority's determination that collection of CSLI would be a search at least when the government requests seven days of data or more, Justice Gorsuch wondered how these principles would help lower courts determine how long is too long.⁷⁵ Responding to the majority's reassurance that its

67. 488 U.S. at 447–48, 452 (plurality opinion).

68. 486 U.S. at 37, 39.

69. *Carpenter*, 138 S. Ct. at 2266 (Gorsuch, J., dissenting). *Greenwood* did involve a violation of positive law. *Id.* As Justice Gorsuch noted, California law at the time of the conduct in question protected a homeowner's rights in discarded trash. *Id.* Nonetheless, California's constitutional protection of discarded refuse would be insufficient on its own to establish the kind of national consensus I have proposed should be required under *Katz*. See Kahn-Fogel, *supra* note 22 (manuscript at 46).

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

71. *Id.*

72. *Id.* at 2266–67.

73. *Id.* at 2213–14 (majority opinion) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)) (internal quotation marks omitted).

74. *Id.* at 2213–14 (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)) (internal quotation marks omitted).

75. *Id.* at 2266–67 (Gorsuch, J., dissenting).

holding would not affect conventional surveillance, Justice Gorsuch wondered what differentiates conventional surveillance from nonconventional surveillance and why courts should distinguish between the two if the former might lead to a “too permeating police surveillance” as well.⁷⁶ Certainly, these are reasonable questions under the majority’s specialized application of *Katz* in *Carpenter*. Other authors have begun attempting to address some of these quandaries.⁷⁷ Alternatively, as I have suggested elsewhere, the Court could achieve principled results by retreating from the *Carpenter* majority’s refinement of *Katz* for the digital age and applying, instead, a Burkean approach that would draw on firmly rooted societal commitments reflected in national tradition as expressed through positive law, informal practices, or both.⁷⁸

Thus, despite Justice Gorsuch’s contention that *Katz* “inevitably leads” to unprincipled decisionmaking based on largely unfettered judicial intuition,⁷⁹ the Court might rededicate itself to applying *Katz* in a manner more consistent with established conventions. Furthermore, an expansive property model like that which Justice Gorsuch ultimately favors would also be susceptible to manipulation. In the next section, I will describe and evaluate that model and the relationship between property and privacy evinced in the other dissenting opinions in *Carpenter*.

II. JUSTICE GORSUCH’S “TRADITIONAL APPROACH” AND ITS RELATIONSHIP TO PRECEDENT, HISTORICAL UNDERSTANDINGS, AND THE OTHER *CARPENTER* OPINIONS

Having considered and rejected living with the implications of *Miller* and *Smith* and revisiting those decisions using the *Katz* framework, Justice Gorsuch offered a third possibility: to use the “traditional approach” to Fourth Amendment interpreta-

76. *Id.* at 2267.

77. See, e.g., ORIN S. KERR, *Implementing Carpenter*, in *THE DIGITAL FOURTH AMENDMENT* (forthcoming), https://papers.ssrn.com/abstract_id=3301257 [<https://perma.cc/FVT4-C2G4>]; Paul Ohm, *The Many Revolutions of Carpenter*, 32 *HARV. J.L. & TECH* 357 (2019).

78. See Kahn-Fogel, *supra* note 22 (manuscript at 46).

79. See *Carpenter*, 138 S. Ct. at 2267 (Gorsuch, J., dissenting).

tion.⁸⁰ This approach, Justice Gorsuch stated, asked whether “a house, paper or effect was *yours* under law. No more was needed to trigger the Fourth Amendment.”⁸¹ Yet, the seemingly straightforward elegance of this formula belies critical ambiguities Justice Gorsuch left unresolved. These ambiguities include the sources of law that might determine whether someone has a sufficient property interest to invoke Fourth Amendment protection; whether those sources should narrowly confine judicial decisionmaking or, instead, should serve as broad, flexible guides; the degree of liberality permissible in construing the textual limitation of Fourth Amendment protection to “persons, houses, papers, and effects”; and the kinds of government conduct that could impinge sufficiently on one’s property interests to implicate the Fourth Amendment. Overall, however, Justice Gorsuch’s dissent suggests that he would take a broad, flexible approach to these issues. Although such a framework would allow courts to adapt Fourth Amendment doctrine to address emerging threats to individual liberty or, on the other hand, to societal security, it would also preserve some of *Katz*’s putative flaws, including its indeterminacy and ostensible lack of democratic legitimacy.

First, Justice Gorsuch left open the potential sources of law that might confer a sufficient property interest to trigger Fourth Amendment protection. Although he invoked both current positive law and eighteenth-century common law as possibilities, Justice Gorsuch declined to elaborate on the precise contours of the framework, instead suggesting that both sources might be relevant and acknowledging that “[m]uch work is needed to revitalize this area and answer these questions.”⁸² Additionally, although Justice Gorsuch was somewhat coy about the issue, several passages in his dissent suggest that whatever concatenation of common law and contemporary property rules might inform the analysis, such law might serve as a loose guide to assessment of Fourth Amendment interests rather than as a rigid, literalistic set of marching orders. Initially, one might note that Justice Gorsuch cited *Jones* and *Florida v.*

80. *Id.* at 2267–68.

81. *Id.* at 2268.

82. *Id.*

*Jardines*⁸³ for the proposition that the traditional understanding of the Fourth Amendment survived *Katz*.⁸⁴ As I will explain below, Justice Gorsuch's dissent implies that he would favor a significantly more expansive use of property concepts than that found in *Jones* and *Jardines*. Nonetheless, in at least one sense these cases deviated from the narrowest potential approach to using property law to identify Fourth Amendment rights. As Professors William Baude and James Stern have observed, the *Jones* and *Jardines* Courts relied on a sort of Platonic conception of property law rather than on the actual positive law of any particular jurisdiction.⁸⁵

Justice Gorsuch further hinted that, under his model, positive property law might provide only a rough framework for Fourth Amendment analysis in his suggestion that in drawing on common law norms from 1791, judges might "extend[] [such rules] by analogy to modern times" as they assess Fourth Amendment claims.⁸⁶ Likewise, Justice Gorsuch's dissent indicates that the language of the Fourth Amendment might confine judicial decisionmaking only within broad limits, as evidenced by his assertion that judges should rely on "democratically legitimate sources of law," including "positive law or analogies to items protected by the enacted Constitution—rather than their own biases or personal policy preferences."⁸⁷ Together, these statements imply Justice Gorsuch's openness to a model in which the text of the Fourth Amendment would confine judicial discretion regarding the kinds of property eligible for constitutional protection only within broad limits, and in which positive property law would serve only as a loose guide in determining whether a person asserting a Fourth Amendment claim had a property interest sufficient for potential implication of his or her Fourth Amendment rights.

83. 569 U.S. 1 (2013).

84. *Carpenter*, 138 S. Ct. at 2267 (Gorsuch, J., dissenting) (citing *Jardines*, 569 U.S. at 11; *United States v. Jones*, 565 U.S. 400, 405 (2012)).

85. See William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1835–36 (2016).

86. *Carpenter*, 138 S. Ct. at 2268 (Gorsuch, J., dissenting).

87. *Id.* (emphasis added) (quoting Todd E. Pettys, *Judicial Discretion in Constitutional Cases*, 26 J.L. & POL. 123, 127 (2011)) (internal quotation marks omitted).

With regard to the constraints of the Fourth Amendment's text, which limits protection to "persons, houses, papers, and effects," Justice Gorsuch even more clearly communicated his willingness to interpret the language expansively as he entertained the possibility that cell-site location information might qualify as a person's papers or effects.⁸⁸ Justice Gorsuch preceded this suggestion with the observation that state and federal law often create "rights in both tangible and intangible things."⁸⁹ Moreover, according to Justice Gorsuch, because federal law restricts telephone company use of CSLI and disclosure of CSLI to third parties, gives customers a right of access to such information, and confers a private cause of action against carriers who violate the federal law, customers might have interests that rise to the level of a property right in the information.⁹⁰

Of course, that one might identify a property interest is not automatically tantamount to a determination that the property in question is a "paper" or an "effect." Thus, as Justice Thomas aptly pointed out in his separate *Carpenter* dissent, one of the few revisions the House Committee of Eleven made to James Madison's first draft of the Fourth Amendment was to substitute in the word "effects" for "other property."⁹¹ Although this change might have extended the scope of the Fourth Amendment's coverage by "clarifying that it protects commercial goods, not just personal possessions," it also may have narrowed its scope by suggesting it would not apply to real property other than houses.⁹² Accordingly, the Court in *Hester v. United States*⁹³ declined to use the Fourth Amendment to regulate government intrusion into an open field because such property was not a person, house, paper, or effect.⁹⁴ Sixty years later, after the ostensible ascendance of privacy as the organizing rubric for Fourth Amendment interpretation, the Court reaffirmed the

88. *Id.* at 2272.

89. *Id.* at 2270 (quoting a statute defining "property" as including "property held in any digital or electronic medium" and cases referring to an email account and a web account as a "form of property" and "intangible property," respectively (citations omitted) (internal quotation marks omitted)).

90. *Id.* at 2272 (citing 47 U.S.C. § 222 (2018)).

91. *Id.* at 2241 (Thomas, J., dissenting) (citations omitted).

92. *Id.* (citations omitted).

93. 265 U.S. 57 (1924).

94. *Id.* at 59.

open fields doctrine based in part on its conclusion that an open field could not be described as an effect.⁹⁵

The Court adhered to this sort of narrow, textualist, property-based approach most famously in a line of cases beginning in the early twentieth century with *Olmstead*, in which the majority declined to apply the Amendment to government wiretapping of phone lines without any physical intrusion into the defendants' homes or offices.⁹⁶ Writing for the Court, Chief Justice Taft argued that the language of the Fourth Amendment "shows that the search is to be of material things—the person, the house, his papers or his effects. The description of the warrant necessary to make the proceeding lawful, is that it must specify the place to be searched and the person or *things* to be seized."⁹⁷ Echoing this sentiment, Justice Black protested in his *Katz* dissent against the majority's putative abandonment of property rights as a Fourth Amendment lodestar,⁹⁸ and against the *Katz* Court's apparent abandonment of principled adherence to the Amendment's text.⁹⁹ Acknowledging that "an argument based on the meaning of words lacks the scope, and no doubt the appeal, of broad policy discussions and philosophical discourses on such nebulous subjects as privacy," Justice Black nonetheless felt constrained by the language of the Fourth Amendment to conclude that the Constitution had

95. *Oliver v. United States*, 466 U.S. 170, 176–77 (1984).

96. *Olmstead v. United States*, 277 U.S. 438, 464 (1928) ("The Amendment does not forbid what was done here. There was no searching. There was no seizure.").

97. *Id.*

98. *Katz*, 389 U.S. at 353 (1967) (stating that "property interests control the right of the Government to search and seize has been discredited" (quoting *Warden v. Hayden*, 387 U.S. 294, 304 (1967)) (internal quotation marks omitted)). Despite the common conception that *Katz* rejected property principles to determine Fourth Amendment interests, property concepts have remained important in assessing Fourth Amendment claims. See Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 807 (2004) ("The *Katz* 'reasonable expectation of privacy' test has proven more a revolution on paper than in practice; *Katz* has had a surprisingly limited effect on the largely property-based contours of traditional Fourth Amendment law. As a result, courts rarely accept claims to Fourth Amendment protection in new technologies that do not involve interference with property rights, and have rejected broad claims to privacy in developing technologies with surprising consistency.").

99. *Katz*, 389 U.S. at 364–65 (Black, J., dissenting).

nothing to say about electronic eavesdropping.¹⁰⁰ Rather, Justice Black opined, the Amendment's reference to persons, houses, papers, and effects signified "the idea of tangible things with size, form, and weight, things capable of being searched, seized, or both."¹⁰¹ Although *Katz's* flexible, privacy-based framework, equipped for adaptation of Fourth Amendment rules to address emerging technologies, seemed to be a potential bulwark against pervasive government surveillance of the citizenry, Justice Black saw in the abandonment of more disciplined reliance on text and history a potential threat to liberty as well; his reading of history convinced him that judges endowed with lawmaking discretion are not always apt to use it to advance individual rights.¹⁰²

Since *Katz*, most scholars have, in fact, agreed that the Court generally failed to use the new test to enhance protection of individual privacy against government intrusion. Instead, the Court regularly reaffirmed under *Katz* government-friendly rules from the earlier property regime and, in some cases, further tipped the balance of power between government and citizen in the government's favor.¹⁰³ Occasionally, the Court explicitly reinforced its privacy analysis with reference to the textual limitations *Katz* had supposedly transcended. Thus, the Court in *Oliver v. United States*,¹⁰⁴ in rejecting the notion that an open field could qualify as an effect, defined the term as referring to

100. *Id.* at 365.

101. *Id.*

102. *Id.* at 374 ("Certainly the Framers, well acquainted as they were with the excesses of governmental power, did not intend to grant this Court such omnipotent lawmaking authority as that. The history of governments proves that it is dangerous to freedom to repose such powers in courts.").

103. See, e.g., Bascuas, *supra* note 46, at 481; Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 537–38 (2011); Ira Mickenberg, *Fourth Amendment Standing After Rakas v. Illinois: From Property to Privacy and Back*, 16 NEW ENG. L. REV. 197, 226 (1981) (stating that *Katz's* amorphous standard "has proved just as useful for restricting constitutional protections late in the 1970's [sic] as it was for expanding those protections a decade ago"); Luke M. Milligan, *Concreteness Drift and the Fourth Amendment*, 82 MISS. L.J. 891, 891–92 (2013).

104. 466 U.S. 170 (1984).

personal property, as opposed to real property.¹⁰⁵ This is consistent with Founding-era sources.¹⁰⁶

Today, the term “personal property” includes “[a]ny moveable or intangible thing that is subject to ownership and not classified as real property.”¹⁰⁷ Yet, “effects” generally connotes tangible personal property, as evidenced by the primary entry in *Black’s Law Dictionary*, which defines the term as “[m]ovable property; goods.”¹⁰⁸ The Framers also would have understood “effects” in this way, as Founding-era debates revealed the connection between “protection for effects” and “the law prohibiting interferences with another’s possession of personal property, including dispossession, damage, and unwanted manipulation.”¹⁰⁹

Despite this evidence that the original understanding of the text reflected the Framers’ focus on material things, Justice Gorsuch moved seamlessly from his unremarkable observation that people can have property interests in both tangible and intangible things to his assertion, two pages later, that digital information held by a telephone company concerning the historical location of a customer’s cell phone might constitute the customer’s papers or effects.¹¹⁰ Thus, having already established the propriety under his model of applying constitutional norms based on “analogies to items protected by the enacted Constitution,”¹¹¹ Justice Gorsuch, through an act of linguistic legerdemain, abandoned reliance on analogy and posited that this digital information held by cellular carriers might simply *be* the customer’s papers or effects.

In *Carpenter* itself, Justice Gorsuch at least believed that actual positive law might confer a property interest in CSLI on cellular telephone customers;¹¹² his dissent ultimately turned on his

105. *Id.* at 177 n.7.

106. See *Doe v. Dring* (1814) 105 Eng. Rep. 447, 449; 2 M. & S. 448, 452–54; 2 WILLIAM BLACKSTONE, COMMENTARIES *16, *384–85.

107. *Property*, BLACK’S LAW DICTIONARY (11th ed. 2019).

108. *Effects*, BLACK’S LAW DICTIONARY (11th ed. 2019).

109. Maureen E. Brady, *The Lost “Effects” of the Fourth Amendment: Giving Personal Property Due Protection*, 125 YALE L.J. 946, 951 (2016).

110. See *Carpenter v. United States*, 138 S. Ct. 2206, 2270, 2272 (2018) (Gorsuch, J., dissenting).

111. *Id.* at 2268.

112. *Id.* at 2272.

conclusion that, in failing to assert property-based arguments below, the petitioner had forfeited them.¹¹³ Yet, as I have briefly discussed,¹¹⁴ Justice Gorsuch suggested that, in addition to his willingness to give a broad construction to terms like “papers” and “effects,” he would also be open to finding property rights in such things based on sources other than actual positive law. As I have noted, like his apparent willingness to use analogy to identify what qualifies as a paper or effect, Justice Gorsuch’s willingness to rely again on analogy rather than actual law to determine whether such “papers” or “effects” were the property of a Fourth Amendment claimant is a sign of the potentially loose constraints positive law would impose on analysis under the “traditional approach” he propounded. Thus, after speculating that analogies to common law rules might provide a basis for finding constitutionally significant property interests,¹¹⁵ Justice Gorsuch declared that Carpenter’s forfeiture of potentially winning traditional arguments involved a failure to invoke “the law of property or any analogies to the common law.”¹¹⁶

Of course, analogical reasoning forms the core of common law analysis.¹¹⁷ Nonetheless, the most rigid forms of originalism would minimize the significance of the evolutionary, analogical developments reflected in Supreme Court precedent in favor of interpretive models that prioritize fine-grained, eighteenth-century common law rules as the ultimate and definitive source of constitutional authority.¹¹⁸ In the Fourth Amendment

113. *Id.*

114. *See supra* note 87 and accompanying text.

115. *Carpenter*, 138 S. Ct. at 2268 (Gorsuch, J., dissenting).

116. *Id.* at 2272.

117. *See, e.g.*, J. Lyn Entrikin, *The Death of Common Law*, 42 HARV. J.L. & PUB. POL’Y 351, 434–35 (2019) (“Common law reasoning relies primarily on analogizing from caselaw . . .”); Christopher Serkin & Nelson Tebbe, *Is the Constitution Special?*, 101 CORNELL L. REV. 701, 748 (2016) (“[A]s any lawyer knows, the process of common-law reasoning involves analogizing and distinguishing . . . prior decisions . . .”).

118. *See, e.g.*, Donald A. Dripps, *Responding to the Challenges of Contextual Change and Legal Dynamism in Interpreting the Fourth Amendment*, 81 MISS. L.J. 1085, 1090–91 (2012); David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1744 (2000). Outside the Fourth Amendment context, originalists such as Justices Scalia and Thomas have also supported this sort of originalism in Eighth Amendment decisionmaking. *See, e.g.*, *Graham v. Florida*, 560 U.S. 48, 99 (2010) (Thomas, J., dissenting); *Harmelin v. Michigan*, 501 U.S. 957, 966–85 (1991)

context, Professor David Sklansky has referred to this approach as “the new Fourth Amendment originalism.”¹¹⁹ Likewise, Professor Donald Dripps has described the approach as “specific-practice originalism.”¹²⁰

In *Wyoming v. Houghton*,¹²¹ the first Fourth Amendment case to adopt this approach, Justice Scalia explained that, to determine the reasonableness of a Fourth Amendment search or seizure, the Court should look first to “whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed.”¹²² Only if that inquiry yielded no clear answer would the Court resort to balancing the significance of the intrusion on individual privacy against the extent of the need to engage in the conduct for “legitimate governmental interests.”¹²³ As I and others have chronicled,¹²⁴ the lack of sufficiently developed common law rules on most aspects of search and seizure has resulted in the Court’s resorting to balancing in each of the cases it has decided under this

(opinion of Scalia, J.); see also Craig S. Lerner, *Originalism and the Common Law Infancy Defense*, 67 AM. U. L. REV. 1577, 1582 (2018) (“Justice Thomas and the late Justice Scalia consistently argued that the original meaning of the Eighth Amendment was to foreclose only those modes or acts of punishment that were considered cruel and unusual at the time the Bill of Rights was enacted.”). This is not to say that proponents of this sort of specific-practice originalism would uniformly give no weight to precedent. For Justice Scalia, for example, some deference to precedent would be appropriate in spite of contrary common law norms, but Justice Scalia would have given very little weight, at least, to recent precedent inconsistent with the common law. See, e.g., *South Carolina v. Gathers*, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting) (“The freshness of error not only deprives [precedent] of the respect to which long-established practice is entitled, but also counsels that the opportunity of correction be seized at once, before state and federal laws and practices have been adjusted to embody it.”). Justice Thomas, on the other hand, is widely viewed as according less significance to precedent. See, e.g., Eric R. Claeys, Raich and *Judicial Conservatism at the Close of the Rehnquist Court*, 9 LEWIS & CLARK L. REV. 791, 797 (2005).

119. Sklansky, *supra* note 118, at 1744.

120. Dripps, *supra* note 118, at 1089–91.

121. 526 U.S. 295 (1999).

122. *Id.* at 299 (citing *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995); *California v. Hodari D.*, 499 U.S. 621, 624 (1991)).

123. *Id.* at 300.

124. See Dripps, *supra* note 118, at 1091–92; Nicholas Kahn-Fogel, *An Examination of the Coherence of Fourth Amendment Jurisprudence*, 26 CORNELL J.L. & PUB. POL’Y 275, 324–25 (2016); Kahn-Fogel, *supra* note 22 (manuscript at 1).

rubric since *Houghton*,¹²⁵ thus negating the primary theoretical virtues of narrow forms of originalism—restriction of judicial discretion and achievement of determinacy in the law.¹²⁶ Moreover, the impossibility of ascertaining how the Framers would have viewed common law rules in the extraordinarily different context of twenty-first century professionalized police forces and modern technology vitiates the supposed democratic legitimacy of the approach even in cases in which it is possible to identify a well-established common law norm.¹²⁷ Likewise, even if the Framers understood the Fourth Amendment to incorporate common law rules, they also understood that the common law is not static; rather, new circumstances lead judges to distinguish and, on occasion, overrule precedent, resulting in an evolutionary process in which society's changing needs lead gradually to new rules of law.¹²⁸

In any case, Justice Gorsuch's openness to analogical reasoning represents a straightforward rejection of this sort of specific-practice originalism. Justice Gorsuch most clearly articulated this rejection in his suggestion that there may be circumstances in which a person could successfully assert a Fourth Amendment claim despite the absence of an identifiable property right reflected in contemporary positive law or in eighteenth-century common law.¹²⁹ Justice Gorsuch mused that legislatures could not, for example, destroy Fourth Amendment interests in papers or houses by "declaring your house or papers to be your property except to the extent the police wish to search them without cause."¹³⁰ Instead, Justice Gorsuch argued that, in such circumstances, the Court should refer to Founding-era values to "assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was

125. See *Riley v. California*, 573 U.S. 373, 385–86 (2014); *Virginia v. Moore*, 553 U.S. 164, 171–76 (2008); *Atwater v. City of Lago Vista*, 532 U.S. 318, 345–54 (2001).

126. See Sklansky, *supra* note 118, at 1739 ("[A]nchoring the Fourth Amendment in common law will do little to make it more principled or predictable, in part because common-law limits on searches and seizures were thinner, vaguer, and far more varied than the Court seems to suppose.").

127. See Dripps, *supra* note 118, at 1107–16.

128. Sklansky, *supra* note 118, at 1788.

129. *Carpenter v. United States*, 138 S. Ct. 2206, 2270–71 (2018) (Gorsuch, J., dissenting).

130. *Id.*

adopted.”¹³¹ Further elaborating on this point, Justice Gorsuch clarified that such an exercise would go beyond enshrinement of “only the specific rights known at the founding; it means protecting their modern analogues too.”¹³² In one fell swoop, therefore, Justice Gorsuch endorsed a “traditional approach” in which a person might have sufficient property interests to invoke Fourth Amendment protection despite having no property right reflected in any sort of actual positive law, ancient or contemporary.

Justice Gorsuch’s assertion of the imperative of preserving the degree of privacy against government intrusion that existed at the time of the framing of the Fourth Amendment drew directly on the majority opinion in *Kyllo v. United States*.¹³³ Thus, Justice Gorsuch, referring to the facts of *Kyllo*, noted that although “thermal imaging was unknown in 1791, this Court has recognized that using that technology to look inside a home constitutes a Fourth Amendment ‘search’ of that ‘home’ no less than a physical inspection might.”¹³⁴ Significantly, *Kyllo*’s focus on maintaining the eighteenth-century balance of power between government and citizen, rather than on freezing specific common law rules in “amber”¹³⁵ represented a far more flexible, values-based form of originalism than the Court’s approach in *Houghton* and its progeny.¹³⁶

Several features of this approach are worth highlighting. First, although one might characterize *Kyllo*’s focus on preservation of the Framing-era “balance of advantage” between government and citizen as a kind of originalism,¹³⁷ the allowance for evolution of the precise rules regulating that relationship

131. *Id.* at 2271 (alteration in original) (quoting *United States v. Jones*, 565 U.S. 400, 406 (2012)) (internal quotation marks omitted).

132. *Id.*

133. 533 U.S. 27 (2001).

134. *Carpenter*, 138 S. Ct. at 2271 (Gorsuch, J., dissenting) (citing *Kyllo*, 533 U.S. at 40).

135. Amar, *supra* note 46, at 818.

136. See, e.g., David A. Sklansky, *Back to the Future: Kyllo, Katz, and Common Law*, 72 *MISS. L.J.* 143, 146 (2002) (“And the originalism in *Kyllo* is not the originalism the Court has applied in other recent Fourth Amendment cases. The use of history in *Kyllo* is looser, and it has a different focus: the Court has shifted its attention, if only temporarily, from the *content* of eighteenth-century rules of search and seizure to what those rules *accomplished*.”).

137. Dripps, *supra* note 118, at 1126–31.

blurs the line between originalism and the living constitutionalism epitomized by decisions like *Katz*.¹³⁸ In that regard, it is also significant that Justice Scalia, writing for the *Kyllo* majority, considered the opinion to represent a refinement of *Katz*'s privacy rubric rather than a return to the strict property framework epitomized by *Olmstead*.¹³⁹ This was true despite *Kyllo*'s explicit elevation of property concerns in its declaration that the use of sense-enhancing technology to gather information about the interior of a home that would otherwise have been unavailable without a *physical intrusion into a constitutionally protected area* would constitute a search, at least in cases in which the technology in question was not in general public use.¹⁴⁰

The potential relationship between privacy and property was evident in *Katz* itself. Justice Stewart's majority opinion rejected the formulation of the issue as whether a public telephone booth is a constitutionally protected area,¹⁴¹ declared that "the Fourth Amendment protects people, not places,"¹⁴² and proclaimed that the notion that "property interests control the right of the Government to search and seize has been discredited."¹⁴³ Instead, while purporting also to reject the idea that the Fourth Amendment enshrines any generalized right of privacy, Justice Stewart, without offering a workable standard for future cases, concluded that the government's electronic eavesdropping on *Katz*'s conversation "violated the privacy upon which he justifiably relied while using the telephone booth."¹⁴⁴ Despite Justice

138. See Donald A. Dripps, Perspectives on the Fourth Amendment *Forty Years Later: Toward the Realization of an Inclusive Regulatory Model*, 100 MINN. L. REV. 1885, 1904, 1905 n.76 (2016) (discussing *Kyllo* and positing that "the more sophisticated the originalism the more closely it resembles openly normative accounts").

139. *Kyllo*, 533 U.S. at 34 ("While it may be difficult to refine *Katz* when the search of areas such as telephone booths, automobiles, or even the curtilage and uncovered portions of residences is at issue, in the case of the search of the interior of homes—the prototypical and hence most commonly litigated area of protected privacy—there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*.").

140. *Id.* (citing *Silverman v. United States*, 365 U.S. 505, 512 (1961)).

141. *Katz v. United States*, 389 U.S. 347, 350–53 (1967).

142. *Id.* at 351.

143. *Id.* at 353 (quoting *Warden v. Hayden*, 387 U.S. 294, 304 (1967)) (internal quotation marks omitted).

144. *Id.*

Stewart's protestations, Justice Harlan's much more influential concurrence embraced the concept of "constitutionally protected area[s]" and observed that the question of what protection the Fourth Amendment provides to people often "requires reference to a 'place.'"¹⁴⁵

This is not to say that Justice Harlan endorsed a strict focus on tangible property or physical intrusions. As Justice Harlan made clear, he approved of the holding in *Silverman v. United States*¹⁴⁶ that "examination or taking of physical property [is] not required" to trigger Fourth Amendment protection.¹⁴⁷ He also agreed with the majority that *Goldman v. United States*¹⁴⁸—which held that electronic surveillance without physical penetration of the premises with a tangible object could not implicate the Fourth Amendment¹⁴⁹—should be overruled.¹⁵⁰ Nonetheless, Justice Harlan's self-conscious tethering of expectations of privacy to electronic or physical intrusion into a constitutionally protected area evokes the property concerns the *Katz* Court putatively rejected.¹⁵¹

On numerous subsequent occasions, the Court has recognized the connection between *Katz's* privacy framework and property rights. Perhaps most famously, in *Rakas v. Illinois*,¹⁵² the Court stated that assessment of the expectations of privacy that society is prepared to recognize as reasonable must be made with reference either to "concepts of real or personal property law or to understandings that are recognized and permitted by society."¹⁵³ Although the *Rakas* Court accepted that *Katz* had rejected the notion that Fourth Amendment claims depend on "a common-law interest in real or personal property, or on the invasion of such an interest," the Court also averred that the elevation of privacy as the lodestar of Fourth Amendment decisionmaking was not a wholesale abandon-

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

146. 365 U.S. 505 (1961).

147. *Katz*, 389 U.S. at 361–62 (Harlan, J., concurring).

148. 316 U.S. 129 (1942).

149. *Id.* at 134–35.

150. *Katz*, 389 U.S. at 362 (Harlan, J., concurring).

151. *See id.* at 360–61.

152. 439 U.S. 128 (1978).

153. *Id.* at 144 n.12.

ment of the use of property concepts.¹⁵⁴ Rather, “One of the main rights attaching to property is the right to exclude others and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude.”¹⁵⁵ Ultimately, the *Rakas* Court held that the petitioners had no reasonable expectation of privacy against a search of a car in which they were passengers because they “asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized.”¹⁵⁶

In *Oliver*, the majority downplayed the significance of property rights in a post-*Katz* world. Dismissing the idea that police trespass into an open field could infringe on an expectation of privacy that society would be prepared to recognize as reasonable, the Court cited *Katz* for the proposition that property rights no longer control Fourth Amendment interests,¹⁵⁷ asserted that existence of a property right is merely “one element” in assessing Fourth Amendment claims,¹⁵⁸ and concluded that “in the case of open fields, the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment.”¹⁵⁹ Justice Marshall responded in his dissent by emphasizing that, whatever other interests property rights protect, one indisputable function of property law “is to define and enforce privacy interests—to empower some people to make whatever use they wish of certain tracts of land without fear that other people will intrude upon their activities.”¹⁶⁰

In 2012, in *United States v. Jones*, the Court rehabilitated the *Olmstead*-era property framework, holding that a physical intrusion into a constitutionally protected area to gather information constitutes a search,¹⁶¹ and asserting that *Katz* had sup-

154. *Id.*

155. *Id.* at 143–44 n.12 (citation omitted).

156. *Id.* at 148.

157. *Oliver v. United States*, 466 U.S. 170, 183 (1984) (citing *Katz v. United States*, 389 U.S. 347, 353 (1967); *Rakas*, 439 U.S. at 144 n.12)).

158. *Id.*

159. *Id.* at 183–84.

160. *Id.* at 190 n.10 (Marshall, J., dissenting).

161. 565 U.S. 400, 406 n.3 (2012).

plemented *Olmstead* rather than supplanted it.¹⁶² Under this new regime, *Katz* and *Olmstead* would provide alternative mechanisms for identifying Fourth Amendment searches.¹⁶³ One year later in *Florida v. Jardines*, the Court would again use property principles to characterize government conduct as a search: the government’s unlicensed use of a drug-sniffing dog on a person’s curtilage qualified as a physical intrusion into a constitutionally protected area to obtain evidence and thus was a search.¹⁶⁴ In a concurrence joined by Justices Ginsburg and Sotomayor, Justice Kagan endorsed the majority’s property analysis and asserted that evaluation of privacy concepts under *Katz* led inexorably to the same result.¹⁶⁵ For Justice Kagan, the alignment of property law and privacy concepts was unsurprising, for “[t]he law of property ‘naturally enough influence[s]’ our ‘shared social expectations’ of what places should be free from governmental incursions.”¹⁶⁶ Likewise, despite the origin in property law of the notion that “my home is my own,” the sentiment also reflects “a common understanding—extending even beyond that law’s formal protections—about an especially private sphere. *Jardines*’ home was his property; it was also his most intimate and familiar space.”¹⁶⁷

The *Carpenter* majority also acknowledged that “property rights are often informative” in identifying legitimate privacy interests,¹⁶⁸ but the Court declared that “no single rubric definitively resolves which expectations of privacy are entitled to

162. *Id.* at 409.

163. *Id.* at 411 (“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.” (alteration in original) (quoting *id.* at 426 (Alito, J., concurring in the judgment))).

164. 569 U.S. 1, 11–12 (2013).

165. *Id.* at 12–13 (Kagan, J., concurring).

166. *Id.* at 13 (second alteration in original) (first quoting *Georgia v. Randolph*, 547 U.S. 103, 111 (2006); and then citing *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978)).

167. *Id.* at 14.

168. *Carpenter v. United States*, 138 S. Ct. 2206, 2214 n.1 (2018).

protection.”¹⁶⁹ Moreover, the Court denied that property law is “fundamental” or “dispositive” to the *Katz* inquiry.¹⁷⁰ Ultimately, as I have noted, the Court’s determination that government collection of CSLI implicates the Fourth Amendment turned not on identification of any property interest telephone users might have in the data but on the “seismic shifts in digital technology” that have made long-term, pervasive tracking of the citizenry feasible,¹⁷¹ the potentially deeply revealing nature of the data,¹⁷² and the effectively involuntary nature of the exposure of such data to cell phone carriers.¹⁷³ Critically, just as Justice Gorsuch relied on *Kyllo* to delineate the contours of his property test, the *Carpenter* majority drew explicitly on *Kyllo*’s imperative of maintaining the balance of power between citizen and government that existed in the late eighteenth century, adjusting Fourth Amendment rules to protect individuals against threats posed by “advancing technology.”¹⁷⁴ Thus, the Court at once insisted that “conventional surveillance techniques and tools” remained unregulated by the Constitution,¹⁷⁵ and differentiated collection of CSLI as a product of “seismic shifts in digital technology that made possible the tracking of not only Carpenter’s location but also everyone else’s, not for a short period but for years and years.”¹⁷⁶

In contrast to the majority’s description of property law as merely a factor in a constellation of considerations regarding constitutionally significant privacy interests, Justice Kennedy’s *Carpenter* dissent described property concepts as critical to the Court’s analysis under *Katz*.¹⁷⁷ Although Justice Kennedy acknowledged that *Katz* “sought to look beyond the ‘arcane distinctions developed in property and tort law,’” he insisted

169. *Id.* at 2213–14.

170. *Id.* at 2214 n.1 (quoting *id.* at 2227–28 (Kennedy, J., dissenting)) (internal quotation marks omitted).

171. *Id.* at 2219.

172. *Id.* at 2217.

173. *Id.* at 2220.

174. *Id.* at 2214 (quoting *Kyllo v. United States*, 533 U.S. 27, 35 (2001)) (internal quotation marks omitted).

175. *Id.* at 2220.

176. *Id.* at 2219.

177. *Id.* at 2227–28 (Kennedy, J., dissenting) (citing *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978)).

that “‘property concepts’ are, nonetheless, fundamental” to the Court’s assessment of legitimate privacy interests.¹⁷⁸ In fact, Justice Kennedy viewed the *Katz* majority opinion itself as reflecting that focus.¹⁷⁹ Drawing on the *Katz* Court’s analogy of the phone booth to “a friend’s apartment, a taxicab, and a hotel room,”¹⁸⁰ Justice Kennedy concluded that when Katz “‘shu[t] the door behind him’ and ‘pa[id] the toll,’ he had a temporary interest in the space and a legitimate expectation that others would not intrude, much like the interest a hotel guest has in a hotel room.”¹⁸¹ Ultimately, Justice Kennedy’s dissent depended on his conclusion that, under federal law, cell-site location information belongs to cellular carriers rather than customers.¹⁸² According to Justice Kennedy, because Carpenter had no property interest in the records, he could “not claim a reasonable expectation of privacy in them.”¹⁸³

Similarly, Justice Alito’s *Carpenter* dissent concluded that the Telecommunications Act’s confidentiality provisions could not be construed as creating a property right, given the Act’s “express exception for any disclosure of records that is ‘required by law.’”¹⁸⁴ For Justice Alito, Carpenter’s lack of a property right in the records was established by the facts that he lacked “the right to use the property to the exclusion of others” and

178. *Id.* at 2227 (quoting *Rakas*, 439 U.S. at 143, 144 n.12); see also Kerr, *supra* note 98, at 807.

179. *Carpenter*, 138 S. Ct. at 2227–28 (Kennedy, J., dissenting).

180. *Id.* at 2227 (citing *Katz v. United States*, 389 U.S. 347, 352, 359 (1967)).

181. *Id.* (alterations in original) (first quoting *Katz*, 389 U.S. at 352; and then citing *Stoner v. California*, 376 U.S. 483 (1964)).

182. *Id.* at 2229–30; see also Brief of Professor Orin S. Kerr as Amicus Curiae in Support of Respondent at 29–30, *Carpenter*, 138 S. Ct. 2206 (No. 16-402) [hereinafter Kerr *Carpenter* Brief] (“The cell-site records collected in this case were the ‘papers’ of the phone companies, not Carpenter. Cell-site records are information that a company creates, and a company then decides to store on its computers, about how the company’s network was used. . . . Carpenter’s argument to the contrary is based on 47 U.S.C. § 222, which imposes certain limitations on the disclosure of customer-related records. The problem is that rules regulating disclosure do not create a property right in the regulated facts that belong to the subject of the disclosure. Confidentiality is not property. The fact that information concerns someone does not make that information his stuff. If the law limits when Alice can tell the world about what she saw Bob do, Alice’s recollection does not become Bob’s ‘papers’ or ‘effects.’ Alice’s recollections belong to Alice, not Bob.”).

183. *Carpenter*, 138 S. Ct. at 2230 (Kennedy, J., dissenting).

184. *Id.* at 2258–59 (Alito, J., dissenting) (quoting 47 U.S.C. § 222(c)(1) (2018)).

that he could not “even exclude the party he would most like to keep out, namely, the Government.”¹⁸⁵

Even Justice Thomas, in his separate dissent in *Carpenter*, acknowledged the connection between property and privacy, though he advocated a return to a property rubric for deciding what government conduct qualifies as a search.¹⁸⁶ Justice Thomas began his critique of *Katz* by observing, “The most glaring problem with [the] test is that it has ‘no plausible foundation in the text’” or original understanding of the Fourth Amendment.¹⁸⁷ First, Justice Thomas noted that the *Katz* Court, in categorizing any government conduct that “violates someone’s ‘reasonable expectation of privacy’” as a search, defined the term in a manner inconsistent with ordinary understandings of the word, either in the late eighteenth century or today.¹⁸⁸ In fact, Justice Thomas asserted, the ordinary meaning of the word is the same today as it was then: “[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.”¹⁸⁹ Only with the publication of Justice Harlan’s *Katz* concurrence in 1967 did the word transform into a term of art associated with “reasonable” expectations of privacy.¹⁹⁰ Moreover, Justice Thomas argued, *Katz*’s focus on “privacy,” a word that appears nowhere in the Constitution, let alone the Fourth Amendment, distorts the original meaning of the Amendment, the language of which reflects the Framers’ concern with property rights.¹⁹¹ On the other hand, privacy “was not part of the political vocabulary of the [founding]. Instead, liberty and privacy rights were understood largely in

185. *Id.* at 2259.

186. *Id.* at 2238–43, 2246 (Thomas, J., dissenting).

187. *Id.* at 2238 (quoting *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring)).

188. *Id.*

189. *Id.* (alteration in original) (quoting *Kyllo v. United States*, 533 U.S. 27, 32 n.1 (2001) (quoting NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 66 (reprt. 6th ed. 1989) (1828))).

190. *Id.*

191. *Id.* at 2239.

terms of property rights.”¹⁹² Ultimately, although Justice Thomas acknowledged that the Framers “understood that, by securing their property [rights], the Fourth Amendment would often protect their privacy as well,” he critiqued *Katz* for making privacy the dispositive test for determining Fourth Amendment interests.¹⁹³ As Justice Thomas observed, even the *Katz* majority accepted that the Fourth Amendment “cannot be translated into a general constitutional ‘right to privacy,’ as its protections ‘often have nothing to do with privacy at all.’”¹⁹⁴

Like Justice Kennedy, Justice Thomas would have disposed of the case based on Carpenter’s lack of any property interest in the cell-site records. Justice Thomas viewed the federal Telecommunications Act’s restrictions on disclosure of the information as insufficient to create a property right,¹⁹⁵ and he further noted that Carpenter had failed to “explain how he has a property right in the companies’ records under the law of any jurisdiction at any point in American history.”¹⁹⁶ In explaining why federal law was insufficient to aid Carpenter, Justice Thomas also rejected Carpenter’s argument that identification of any positive law that protects against public access to the relevant data without consent would be adequate to trigger Fourth Amendment protection.¹⁹⁷ Rather, Justice Thomas argued, “To come within the text of the Fourth Amendment, Carpenter must prove that the cell-site records are *his*; positive law is potentially relevant only insofar as it answers that question.”¹⁹⁸

It is noteworthy, then, that Justice Gorsuch mused that a potentially principled way to apply *Katz* would be to look to positive law to discern “existing societal norms.”¹⁹⁹ As I have discussed, Justice Gorsuch then suggested that such an approach would look much like the “traditional” model he ulti-

192. *Id.* (alteration in original) (quoting Morgan Cloud, *Property is Privacy: Locke and Brandeis in the Twenty-First Century*, 55 AM. CRIM. L. REV. 37, 42 (2018)) (internal quotation marks omitted).

193. *Id.* at 2240.

194. *Id.* (quoting *Katz v. United States*, 389 U.S. 347, 350 (1967)) (internal quotation marks omitted).

195. *Id.* at 2242–43.

196. *Id.* at 2242.

197. *Id.*

198. *Id.*

199. *Id.* at 2265 (Gorsuch, J., dissenting).

mately preferred.²⁰⁰ Yet, this would be true only if the relevant positive law under *Katz* were limited to property law or, on the other hand, if positive law under the “traditional approach” might actually include norms derived from sources other than property law in its strictest sense. In that regard, it is significant that Justice Gorsuch, in introducing his “traditional approach,” cited with approval Professors Baude and Stern’s article advocating for a positive law model for identifying Fourth Amendment searches.²⁰¹ That model would draw not only on property law, but also on a wide variety of other sources of law, including “privacy torts, consumer laws, eavesdropping and wiretapping legislation, anti-stalking statutes, and other provisions of law generally applicable to private actors.”²⁰²

Thus, the three dissenting opinions of Justices Kennedy, Thomas, and Gorsuch represent subtly varying visions of the relationship between property and privacy in identifying Fourth Amendment interests. Justice Kennedy would retain *Katz*’s privacy test, but he would apply it primarily with reference to property concepts. Furthermore, in at least some respects, he would apply those property concepts in a fairly rigid, literalistic manner, as reflected in his refusal to entertain the notion that Carpenter’s federal statutory rights against disclosure of his CSLI could create a sufficient interest in the data to make it his papers or effects for Fourth Amendment purposes.²⁰³ Justice Thomas proposed an abandonment of any explicit focus on privacy in favor of a rededication to the property-based origins of the Fourth Amendment. Additionally, like Justice Kennedy, he betrayed a relatively narrow perspective on the identification of constitutionally significant property rights in his conclusion that the Telecommunications Act could not make the CSLI Carpenter’s papers. Justice Gorsuch, like Justice Thomas, largely favored an abandonment of *Katz*’s privacy test in favor of a property model, but several aspects of his opinion, including his apparent willingness to consider CSLI as a customer’s papers or effects, reveal that his test might, at least in some re-

200. *Id.* at 2265–66.

201. *Id.* at 2268 (citing Baude & Stern, *supra* note 85, at 1852).

202. Baude & Stern, *supra* note 85, at 1823.

203. *Carpenter*, 138 S. Ct. at 2229–30 (Kennedy, J., dissenting).

spects, be looser and more open textured even than Justice Kennedy's approach to *Katz*.

In at least one respect, Justice Kennedy, like Justice Gorsuch, endorsed a more flexible approach to incorporation of property concepts into Fourth Amendment decisionmaking than that of the *Olmstead* regime's narrow focus on material things. Like Justice Gorsuch,²⁰⁴ Justice Kennedy was willing to entertain the notion that intangible property, like a person's emails held by an internet service provider, might constitute "the modern-day equivalents of an individual's own 'papers' or 'effects,' even when those papers or effects are held by a third party."²⁰⁵ Even Justice Thomas's opinion, which rejected Carpenter's assertion that the cell-site records were his "papers" based on his conclusion that Carpenter had no property interest in the data,²⁰⁶ suggested a potential openness to construing "papers" and "effects" as encompassing intangible property.²⁰⁷

In that regard, it is evident that Justice Gorsuch's citations to *Jones* and *Jardines* at the outset of his description of the "traditional approach" belie a more liberal property test than that reflected in those cases.²⁰⁸ Although *Jones* essentially resurrected *Olmstead*'s trespass test in concluding that a search occurs when the government physically intrudes into a constitutionally protected area to gather information,²⁰⁹ Justice Gorsuch's willingness to protect intangible property necessarily entails an implicit rejection of any requirement of physical intrusion to bring government conduct within the scope of the Fourth Amendment. Although Justice Gorsuch did not elaborate on the kinds of government conduct that might implicate a person's rights in

204. *Id.* at 2269 (Gorsuch, J., dissenting) ("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. Whatever may be left of *Smith* and *Miller*, few doubt that e-mail should be treated much like the traditional mail it has largely supplanted—as a bailment in which the owner retains a vital and protected legal interest." (citing *id.* at 2230 (Kennedy, J., dissenting))).

205. *Id.* at 2229–30 (Kennedy, J., dissenting) (citing *United States v. Warshak*, 631 F.3d 266, 283–88 (6th Cir. 2010)).

206. *Id.* at 2242–43 (Thomas, J., dissenting).

207. *See id.* at 2241–42.

208. *See id.* at 2267–68 (Gorsuch, J., dissenting) (citing *Florida v. Jardines*, 569 U.S. 1, 11 (2013); *United States v. Jones*, 565 U.S. 400, 405 (2012)).

209. *Jones*, 565 U.S. at 406 n.3.

digital property, the thrust of his opinion is more consistent with Justice Thomas's commonsense conception of a Fourth Amendment search as congruent with colloquial usage, including "examin[ing] by inspection" or "look[ing] over or through for the purpose of finding something."²¹⁰ Thus, despite the lack of any trespass, one might conclude that government analysis of Carpenter's CSLI, an examination of his digital papers or effects, was a search. Likewise, one might conclude that government assessment of such data was a search because it was an attempt to locate a person, Carpenter himself, and one of his effects, his cell phone.²¹¹

III. POTENTIAL LESSONS FROM SCHOLARLY PROPOSALS FOR EXPANSIVE PROPERTY FRAMEWORKS

That a property framework might be far more flexible than that of the *Olmstead* regime has long been apparent. As Professor Morgan Cloud has observed, the Framers were familiar with a broad, Lockean conception of property that included not only material things, but also "a person's rights, ideas, beliefs, and the creative products of her labor."²¹² As Locke articulated the issue, people abandoned the state of nature to form societies and governments "for the mutual *preservation* of their lives, liberties and estates, which I call by the general name, *property*."²¹³ Professor Cloud has chronicled the consistency of James Madison's expansive theory of property with that of Locke.²¹⁴ For example, in an essay Madison published three months after the ratification of the Bill of Rights, he declared that "a man has a property in his opinions and the free communication of them";²¹⁵ that the "'safety and liberty of his person' is 'property

210. *Carpenter*, 138 S. Ct. at 2238 (Thomas, J., dissenting) (quoting *Kyllo v. United States*, 533 U.S. 27, 32 n.1 (2001)).

211. Brief of Scholars of the History and Original Meaning of the Fourth Amendment as *Amici Curiae* in Support of Petitioner at 12, *Carpenter*, 138 S. Ct. 2206 (No. 16-402) [hereinafter *Scholars Carpenter Brief*].

212. Cloud, *supra* note 192, at 37.

213. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 75 (Richard H. Cox ed., Harlan Davidson, Inc. 1982) (1690).

214. See Cloud, *supra* note 192, at 47–50.

215. *Id.* at 48 (quoting 6 JAMES MADISON, *Property*, in *THE WRITINGS OF JAMES MADISON* 101, 101 (Gaillard Hunt ed., 1906)) (internal quotation marks omitted).

very dear to him";²¹⁶ and that just as "man is said to have a right to his property, he may be equally said to have a property in his rights."²¹⁷ Furthermore, Locke's theory of property rights arising by virtue of "productive labor" gave rise to "Whig theories of liberty" in the late eighteenth century that influenced the Framers and that emphasized that papers were a form of expressive property, including protection not merely of the physical papers themselves, but also of their contents.²¹⁸

In support of the notion that the Framers sought to protect a broad conception of property rights, Professor Cloud evaluates Lord Camden's 1765 opinion in *Entick v. Carrington*,²¹⁹ which the United States Supreme Court has repeatedly described as a "'monument of English freedom' 'undoubtedly familiar' to 'every American statesman' at the time the Constitution was adopted, and considered to be 'the true and ultimate expression of constitutional law' with regard to search and seizure."²²⁰ Professor Cloud observes that the *Entick* court, in holding that the British secretary of state lacked authority to order the search of a dwelling house for the publishers of a dissident publication and their papers, emphasized that reading the papers was a greater offense than the necessarily antecedent physical trespass.²²¹ As the *Entick* court put it:

Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and therefore it is too much for us without such authority to pronounce a prac-

216. *Id.*

217. *Id.* (internal quotation marks omitted).

218. *Id.* at 47.

219. (1765) 19 How. St. Tr. 1029; (1765) 95 Eng. Rep. 807; 2 Wils. K.B. 275.

220. *United States v. Jones*, 565 U.S. 400, 405 (2012) (quoting *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989) (quoting *Boyd v. United States*, 116 U.S. 616, 626 (1886))).

221. Cloud, *supra* note 192, at 54–55.

tice legal, which would be subversive of all the comforts of society.²²²

For Professor Cloud, the preceding passage demonstrates that the essence of the court's concern was the invasion of the writer's mind. As Professor Cloud argues, "Value attached not to the physical paper but to the intangible thoughts expressed in written language."²²³ Although this analysis aptly recognizes that the reasons the Framers cared about physical intrusions included the protection of more ethereal forms of property, it neglects the passage's concomitant revelation that tangible intrusion remained a *sine qua non* for a successful action; the eye cannot be guilty of a trespass, but if one *does* carry away another's papers, the private nature of the contents enhances the injury. And, as Justice Scalia noted for the *Jones* majority, Lord Camden's opinion in the case emphasized the significance of unauthorized physical intrusions, asserting that property rights were "so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law."²²⁴ Analogously, Justice Thomas accepted in his *Carpenter* dissent that "the founding generation understood that, by securing their property, the Fourth Amendment would often protect their privacy as well," but that did not justify the "elevation of privacy as the *sine qua non* of the Amendment."²²⁵

Ultimately, however, Professor Cloud does not quite assert that the Framers actually contemplated that the Fourth Amendment would apply to nontrespassory activity. Rather, he argues that the Amendment "embodied . . . an attempt to protect property in both its narrow and broad meanings"²²⁶ and that the Court has, at times, espoused an expansive property rubric to instantiate the Framers' core values.²²⁷ Finally, Professor Cloud views Justice Harlan's *Katz* test as a misstep and con-

222. *Entick*, 19 How. St. Tr. at 1066.

223. Cloud, *supra* note 192, at 55.

224. See *Jones*, 565 U.S. at 405 (quoting *Entick*, 95 Eng. Rep. at 817; 2 Wils. K.B. at 291).

225. *Carpenter v. United States*, 138 S. Ct. 2206, 2240 (2018) (Thomas, J., dissenting) (citations omitted).

226. Cloud, *supra* note 192, at 50.

227. See *id.* at 50–52.

tends that “the Court could have avoided this error by reclaiming prominent seventeenth, eighteenth, and nineteenth century theories” consistent with those values.²²⁸

For Professor Cloud, the Court’s seminal treatment of Fourth Amendment theory in *Boyd v. United States*²²⁹ embodies this values-based property framework.²³⁰ In *Boyd*, as Professor Cloud notes, the Court established the close connection between property interests and Fourth Amendment rights.²³¹ Yet, drawing on *Entick*, the Court also clarified that the crucial principle to be vindicated involved the protection of the contents of private papers,²³² as opposed to the *Olmstead* regime’s elevation of a form of “constricted materialism” almost forty years later,²³³ with its focus on tangible things and physical intrusions. In holding that the use of a subpoena to obtain Boyd’s papers violated the Fourth Amendment, the Court “acknowledged that ‘certain aggravating incidents of actual search and seizure, such as forcible entry into a man’s house and searching amongst his papers, are wanting’ when the Government relies on compulsory process.”²³⁴ Nonetheless, the Court insisted that “the Fourth Amendment ought to be ‘liberally construed,’ and further reasoned that compulsory process ‘effects the sole object and purpose of search and seizure’ by ‘forcing from a party evidence against himself.’”²³⁵ Perhaps even more revealingly, the *Boyd* Court declared that the Fourth Amendment applies:

to all invasions on the part of the government and its employes of the sanctity of a man’s home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property²³⁶

228. *See id.* at 42.

229. 116 U.S. 616 (1886).

230. Cloud, *supra* note 192, at 52.

231. *Id.* at 51 (citing *Boyd*, 116 U.S. at 630).

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

233. Cloud, *supra* note 192, at 71.

234. *Carpenter v. United States*, 138 S. Ct. 2206, 2253 (2018) (Alito, J., dissenting) (quoting *Boyd*, 116 U.S. at 622).

235. *Id.* (first quoting *Boyd*, 116 U.S. at 635; and then quoting *id.* at 622).

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

Likewise, in the years leading up to *Katz*, the Court, while retaining a focus on property, began to retreat from *Olmstead*'s rigid approach.²³⁷ Thus, in *Silverman v. United States*, the Court held that the government's use of a "spike mike" to eavesdrop on conversations inside a home implicated the Fourth Amendment.²³⁸ Although the Court predicated its decision on the physical intrusion of the microphone into a constitutionally protected area, it glossed over the *Olmstead* Court's conclusion that "intangible conversations are not 'persons, houses, papers, [or] effects.'"²³⁹ Two years later, in *Wong Sun v. United States*,²⁴⁰ the Court confirmed what was implicit in *Silverman*, that "the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects.'"²⁴¹ In the term before *Katz*, in *Berger v. New York*,²⁴² the Court even more clearly explained its reconciliation of a broad, values-based property framework with the Amendment's text in declaring that *Olmstead*'s holding that "a conversation passing over a telephone wire cannot be said to come within the Fourth Amendment's enumeration of 'persons, houses, papers, and effects' ha[s] been negated by our subsequent cases."²⁴³ Finally, of course, in *Katz*, the Court, in shifting toward a privacy regime, eliminated the requirement of any physical intrusion to activate the Fourth Amendment's protection.²⁴⁴

Like several other authors who have searched for solutions to the widespread perception that Justice Harlan's *Katz* test was flawed from the outset, Professor Cloud proposes rededication to a framework based on expansive property concepts for assessing the applicability of the Fourth Amendment. For Professor Cloud, such an approach would entail recognition that "a person's ideas are protected against uninvited intrusions" and that

237. See *Carpenter*, 138 S. Ct. at 2236 (Thomas, J., dissenting).

238. 365 U.S. 505, 512 (1961).

239. *Carpenter*, 138 S. Ct. at 2236 (Thomas, J., dissenting).

240. 371 U.S. 471 (1963).

241. *Carpenter*, 138 S. Ct. at 2236 (Thomas, J., dissenting) (quoting *Wong Sun*, 371 U.S. at 485) (internal quotation marks omitted).

242. 388 U.S. 41 (1967).

243. *Id.* at 51.

244. *Carpenter*, 138 S. Ct. at 2237 (Thomas, J., dissenting) (citing *Katz v. United States*, 389 U.S. 347, 353 (1967)).

such “protections are strongest when private ideas are memorialized in an expressive form, whether written on paper or recorded on a digital device.”²⁴⁵ Likewise, it might draw on Justice Scalia’s majority opinion in *Kyllo*, which “melded property theory and nontrespassory technological surveillance” by using “physical trespass as an objective measure of an intrusion triggering constitutional scrutiny, while extending this protection to analogous nontrespassory technological intrusions.”²⁴⁶

Similarly, Professor Ricardo Bascuas has proposed a rejuvenated focus on property concepts to evaluate the Fourth Amendment’s scope.²⁴⁷ Professor Bascuas laments *Katz*’s abandonment of property for the amorphous “expectations of privacy” test as enabling the Court to erode dramatically the Fourth Amendment’s safeguards.²⁴⁸ Specifically, Professor Bascuas argues that *Katz* set the stage for the withdrawal of Fourth Amendment protection “from virtually all modern records and communications and from contraband—two types of property that the Fourth Amendment was most certainly meant to protect.”²⁴⁹ Yet, Professor Bascuas sees promise not in the *Jones* and *Jardines* Courts’ rehabilitation of *Olmstead*’s narrow materialist perspective, but rather in a return to what he views as the “pragmatic, flexible understanding of ‘papers’ and ‘effects’” evident in cases like *Silverman*, *Wong Sun*, and *Berger*, which accepted that “technological innovation yields new forms of property entitled to full Fourth Amendment protection.”²⁵⁰ Professor Bascuas recommends that the Court delineate constitutionally relevant property rights by drawing on the Court’s flexible approach to interpretation of federal fraud statutes, including recognition of rights in intangible property and acceptance of the significance of any deprivation of the right holder’s exclusive use of the property,²⁵¹ as compared with the Court’s current, parsimonious definition of a Fourth

245. See Cloud, *supra* note 192, at 73.

246. *Id.* at 69–70.

247. See Bascuas, *supra* note 46.

248. See *id.* at 490.

249. *Id.*

250. *Id.*

251. *Id.* at 529–30.

Amendment seizure as requiring “meaningful interference” with one’s possessory interest in property.²⁵²

Thus, Professor Bascuas notes, in an insider trading case in which a *Wall Street Journal* reporter traded on information published in his “Heard on the Street” column, the Court recognized the newspaper’s property rights in the intangible information the journalist had expropriated, and it accepted that there had been fraud despite the newspaper having been able “to use the information exactly as it would have in the absence of any scheme.”²⁵³ What mattered was that the *Journal* had “been deprived of its right to exclusive use of the information, for exclusivity is an important aspect of confidential business information and most private property for that matter.”²⁵⁴

Among other benefits, Professor Bascuas views adoption of this sort of broad, flexible, property-based approach as having the potential to reverse the harms to individual liberty wrought by the development of the third-party doctrine under *Katz*.²⁵⁵ As Professor Bascuas observes, the Court’s fraud analysis imposed no penalty on the *Journal* for sharing its informational property with another and did not suggest that the newspaper had “assumed the risk” that its employee would use the information for his own purposes.²⁵⁶ Instead, the Court focused on the employee’s breach of his “fiduciary obligation to protect confidential information obtained during the course of his employment.”²⁵⁷ Using this mode of analysis, Professor Bascuas suggests, would have avoided, for example, the holding in *United States v. Miller* that a bank customer has no reasonable expectation of privacy against government acquisition of records of his transactions from the bank.²⁵⁸ Ultimately, for Professor Bascuas, determination of relevant property rights would depend not on any sterile reference to state or federal positive law, for just as “whether an interest constitutes property in a federal fraud case is a matter of federal common law, whether

252. *Id.* at 520–21.

253. *Id.* at 530–31.

254. *Carpenter v. United States*, 484 U.S. 19, 26–27 (1987).

255. Bascuas, *supra* note 46, at 531.

256. *Id.*

257. *Id.* (quoting *Carpenter*, 484 U.S. at 27) (internal quotation marks omitted).

258. *Id.* (discussing *United States v. Miller*, 425 U.S. 435 (1976)).

a tangible or intangible thing constitutes a ‘paper’ or an ‘effect’ has been, since at least the time of *Olmstead*, a matter of federal constitutional law.”²⁵⁹

Professor Christian Halliburton has also proposed an expansive property rubric, which would allow for Fourth Amendment protection of intangible property and that would “differentiate informational interests based on the extent to which the information is ‘closely bound up with personhood’ or otherwise forms ‘part of the way we constitute ourselves as continuing entities in the world.’”²⁶⁰ Recognizing that “the right to convey or withhold information is . . . a matter affecting the development of a full person,” Professor Halliburton would provide the greatest protection to categories of information “closely bound up with identity, or necessary to the development of the fully realized person.”²⁶¹ On the other hand, property not closely bound up with identity, which would be dubbed “fungible . . . property,” would merit lesser protection or, in some cases, no protection at all.²⁶²

Within the category of tangible and informational property that would qualify as “personal,” Professor Halliburton would make further distinctions. Thus, personal property would receive absolute protection “when the individual cannot tolerate any interference with such property without experiencing severe harm or loss of aspects of her personhood, or disruption of her development as a full person.”²⁶³ On the other hand, the Fourth Amendment would protect, but not absolutely, personal property “with which the government might interfere without causing severe hardship to or loss of aspects of the individual’s personhood, or where the risk of harm or loss is substantially outweighed by overriding law enforcement obligations to engage in the challenged behavior.”²⁶⁴ Likewise, on the other end of the spectrum, some information would be so disconnected

259. *Id.* at 534.

260. Christian M. Halliburton, *How Privacy Killed Katz: A Tale of Cognitive Freedom and the Property of Personhood as Fourth Amendment Norm*, 42 AKRON L. REV. 803, 863 (2009) (footnotes omitted).

261. *Id.* at 864.

262. *Id.*

263. *Id.* at 865.

264. *Id.*

from personal identity that it would give rise to no property interest whatsoever, and some would qualify as fungible property, which might merit weak protection.²⁶⁵

For Professors Bascuas and Halliburton, it is evident that a person's conversations could qualify as a form of property and that government eavesdropping, as occurred in *Katz* itself, could implicate the Fourth Amendment. As noted, Professor Bascuas views cases like *Silverman*, *Wong Sun*, and *Berger*, which recognized that conversations were a form of property capable of being "seized," as a reflection of the Court's conversion of its older trespass test "into a highly flexible but principled tool for applying the Fourth Amendment to new forms of property without risking diminution of its traditional protection."²⁶⁶ Professor Halliburton also asserts that, under his framework, conversations could constitute a kind of "intangible property of personhood."²⁶⁷ For Professor Halliburton, *Katz*'s conversations merited Fourth Amendment protection because they "contained sensitive information."²⁶⁸

It is somewhat less clear under what circumstances Professor Cloud's property model might protect conversations. Although Professor Cloud emphasizes the importance of protecting the expression of ideas, and although he references *Kyllo*'s functional-equivalent-of-trespass test as emblematic of recent decisions that an expansive property framework might explain better than a privacy rubric, he also avers that "protections are strongest when private ideas are memorialized in an expressive form, whether written on paper or recorded on a digital device."²⁶⁹ Ultimately, somewhat mysteriously, Professor Cloud also suggests that use of privacy principles, rather than property concepts, might still be appropriate in cases "like *Katz* itself, where government agents did not trespass upon property to install and use an electronic eavesdropping device."²⁷⁰

Although he had no occasion to address the issue in *Carpenter*, it seems plausible that Justice Gorsuch himself would be will-

265. *Id.* at 866.

266. Bascuas, *supra* note 46, at 516–17.

267. Halliburton, *supra* note 260, at 861.

268. *Id.* at 862 (emphasis omitted).

269. Cloud, *supra* note 192, at 73.

270. *Id.* at 38–39.

ing to classify conversations as a kind of expressive property capable of being searched or seized for Fourth Amendment purposes. Justice Gorsuch's unequivocal amenability to safeguarding intangible property, his openness to the use of analogy rather than actual positive law to determine both the existence of a property right and whether the property in question qualifies as a paper or an effect, and his invocation of *Kyllo's* imperative to maintain the balance of power between government and citizen that existed at the time of the framing all suggest this possibility. With regard to the latter point, one might note that contemporary technology makes it feasible to listen in on conversations using nontrespassory intrusions in circumstances in which eighteenth-century interlocutors would have been free from prying ears. Thus, maintaining the level of security Framing-era citizens had against government eavesdropping would necessitate constitutional regulation of electronic surveillance.

Ultimately, examination of the broad property models proffered by Professors Cloud, Bascuas, and Halliburton reveals the potential to reproduce some of the same critical flaws widely attributed to *Katz*, including its indeterminacy and lack of democratic legitimacy. The very flexibility that Professor Bascuas lauds in the Court's approach to interpreting federal fraud statutes creates the possibility that the Court, using his recommended framework, might arrive at results antithetical to Professor Bascuas's commitments. It is unclear, for example, that the Court would view information shared by customers with banks or telephone companies as giving rise to the same sorts of informational property rights as the "[c]onfidential information acquired or compiled by a corporation in the course and conduct of its business" that the Court found to be a "species of property" in the insider trading case.²⁷¹ For one thing, the Court might not consider data such as CSLI to be "information acquired or compiled" by cellular customers. Moreover, if the inquiry were to hinge on the characterization of information as confidential or nonconfidential, this could generate the same potential for manipulation and imposition of the subjective preferences of individual Justices that has been possible

271. *Carpenter v. United States*, 484 U.S. 19, 26 (1987) (citation omitted) (internal quotation marks omitted).

with the ostensible assessment of “society’s” expectations of privacy under *Katz*. There would also be no ready-made criterion to which the Court could look in every case under Professor Bascuas’s proposal. The focus on confidentiality in the insider trading case was intertwined with the Court’s conclusion that the *Wall Street Journal* employee owed fiduciary duties to his employer.²⁷² Yet, despite Professor Bascuas’s assertion that these principles apply equally to telephone companies and banks,²⁷³ these are not the kinds of contractual relationships that have been traditionally characterized as fiduciary.²⁷⁴ Additionally, recognition of the possibility of intangible “papers” and “effects” would not, in and of itself, lead inexorably to the conclusion that customer information held by banks and telephone companies is customer property, as evidenced by the apparent openness of Justices Kennedy and Thomas to recognizing Fourth Amendment protection of intangible property and simultaneous rejection of the idea that Timothy Carpenter had any property interest in his cell-site data.

Similarly, Professor Halliburton’s taxonomy for characterizing property interests is susceptible to the same sort of manipulation attributed to the *Katz* framework. Just as it is possible for judges to “confuse their own expectations of privacy with those of the hypothetical reasonable person to which the *Katz* test looks,”²⁷⁵ it is also highly likely that inquiries about the extent to which tangible and informational property are “closely bound up with identity, or necessary to the development of the fully realized person”²⁷⁶ would be inflected with the Justices’ subjective value judgments. As an illustration of how his property-based approach would produce superior results to

272. *Id.* at 27.

273. Bascuas, *supra* note 46, at 531.

274. See, e.g., *Existence of fiduciary relationship between bank and depositor or customer so as to impose special duty of disclosure upon bank*, 70 A.L.R. 3d 1344, *2[a] (2020) (“The courts have traditionally viewed the relationship between a bank and a depositor to be one of debtor-creditor, the bank’s obligation being merely to return the sum deposited, upon demand properly made by the depositor. And this relationship, it has been further recognized, does not ordinarily impose a fiduciary duty of disclosure upon the bank.” (footnote omitted)).

275. *United States v. Jones*, 565 U.S. 400, 427 (2012) (Alito, J., concurring in the judgment) (citing *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring)).

276. Halliburton, *supra* note 260, at 864.

Katz, Professor Halliburton discusses the Court's holding in *Oliver* that open fields merit no Fourth Amendment protection.²⁷⁷ First, Professor Halliburton asserts that the Court's strict textualist analysis, which was "irreconcilable with *Katz* and all *Katz*-based precedent," demonstrated "the weakness of the privacy rationale by its inability to overcome or displace a form of textualism antithetical to privacy norms."²⁷⁸ Yet, Professor Halliburton's contention here refutes itself. If the Court's mode of analysis in *Oliver* was antithetical to privacy norms and inconsistent with *Katz*, then the Court's assessment evinces its infidelity to *Katz*'s privacy test rather than problems inherent to *Katz*. Likewise, the Court could apply Professor Halliburton's property test unfaithfully and arrive at results inconsistent with Professor Halliburton's commitments.

Professor Halliburton also attributes the Court's "arbitrary and unsupported conclusion" that open fields are not often settings of the kinds of intimate activity worthy of Fourth Amendment protection to flaws intrinsic to *Katz*'s privacy framework, which "allow[s] the Court to define societal norms and values without any reference to established objective standards or actual public opinion."²⁷⁹ Yet, many authors, myself included, have proposed mechanisms for disciplining the *Katz* analysis by requiring reference to objective societal norms.²⁸⁰ Furthermore, Professor Halliburton himself would recognize forms of property not reflected in positive law, including a person's conversations.²⁸¹ In delineating property interests under such a rubric, the Court might well be tempted to stray from the use of objective guideposts, and, even if it did not, it would be free to choose among often competing norms,

277. *Id.* at 870–76.

278. *Id.* at 872.

279. *Id.*

280. See, e.g., CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT* 33 (2007); Kahn-Fogel, *supra* note 22; Matthew B. Kugler & Lior Jacob Strahilevitz, *Actual Expectations of Privacy, Fourth Amendment Doctrine, and the Mosaic Theory*, 2015 SUP. CT. REV. 205, 212; Christine S. Scott-Hayward, Henry F. Fradella & Ryan G. Fischer, *Does Privacy Require Secrecy? Societal Expectations of Privacy in the Digital Age*, 43 AM. J. CRIM. L. 19, 58 (2015); Jonathan Simon, *Katz at Forty: A Sociological Jurisprudence Whose Time Has Come*, 41 U.C. DAVIS L. REV. 935 (2008).

281. See Halliburton, *supra* note 260, at 861.

thus enabling the Justices to impose their own values on the analysis. This would be all the more the case when, under Professor Halliburton's model, the Court undertook to determine not the existence of the property interest, but its character as either fungible or, on the other hand, sufficiently bound up with personhood to merit strong Fourth Amendment protection.

Professor Halliburton additionally critiques the *Oliver* Court for its rejection of the significance of fences and "no trespassing" signs around open fields based on the majority's conclusion that such measures are often ineffective at deterring trespassers.²⁸² As Professor Halliburton puts it, "by premising the propriety of law enforcement conduct upon the possibility of anti-social and unlawful private behavior, the Court uses privacy to facilitate complete disregard for well established social moral beliefs even when they are clearly expressed in the positive law."²⁸³ This critique is reminiscent of Justice Gorsuch's observation in *Carpenter* that the Court disregarded well-established social norms in cases like *Riley* and *Greenwood* in finding that helicopter surveillance of the curtilage from 400 feet and collection and examination of a person's sealed garbage bags, respectively, were not Fourth Amendment searches.²⁸⁴ In each of those cases, however, the existence of clear norms suggests the Court applied *Katz* poorly, not that *Katz* is impervious to principled application.

Professor Halliburton also faults the *Oliver* Court for categorically excluding open fields from constitutional regulation instead of examining the issue on a case-by-case basis.²⁸⁵ For Professor Halliburton, some open fields would qualify only as fungible property, including, like the open fields in the consolidated cases in *Oliver* itself, land being used to grow commercial crops.²⁸⁶ On the other hand, land used to meet lovers would deserve greater protection, based on its status as more

282. *Id.* at 873.

283. *Id.*

284. *Carpenter v. United States*, 138 S. Ct. 2206, 2266 (2018) (Gorsuch, J., dissenting) (discussing *Florida v. Riley*, 488 U.S. 445 (1989), and *California v. Greenwood*, 486 U.S. 35 (1988)).

285. Halliburton, *supra* note 260, at 875.

286. *See id.*

“proximate to personhood.”²⁸⁷ Once again, however, categorical exclusion of open fields from Fourth Amendment regulation was not an inevitable result of the *Katz* framework. Indeed, Justice Marshall, in dissent in *Oliver*, scolded the majority for eschewing a case-by-case approach.²⁸⁸ Likewise, however, the level of generality at which the Court might examine difficult issues under a property framework such as the one Professor Halliburton proposes would be susceptible to manipulation.

Professor Cloud’s explanation that an essential function of a privacy or property theory of Fourth Amendment interpretation is the protection of ideas against uninvited intrusions leaves numerous details to later development.²⁸⁹ His assertion that such protection is “strongest when private ideas are memorialized in an expressive form, whether written on paper or recorded on a digital device,”²⁹⁰ also raises as many questions as it answers. What sorts of factors would guide judicial determination of whether an idea should be classified as private? For example, would a person’s bank records, which are also the business records of the bank, be considered private? Would such records qualify as the expression of an idea at all? If memorializing an idea in an expressive form merits greater protection, how much weight should be assigned to that factor? Should it matter whether the individual whose ideas the government hopes to gather as evidence chose to memorialize the ideas herself, as opposed to the government or some third party recording them? Whatever the answers to these questions, it is likely that judges would be invested with significant discretion in addressing them; the crux of Professor Cloud’s thesis is that a broad, flexible property framework could be reconciled with privacy theories and that such a property model might better explain the Court’s recent decisions.²⁹¹ Additionally, as noted, Professor Cloud would retain a privacy rubric for situations

287. *Id.*

288. *Oliver v. United States*, 466 U.S. 170, 193–95 (1984) (Marshall, J., dissenting).

289. See Cloud, *supra* note 192, at 73.

290. *Id.*

291. *Id.* at 38.

like *Katz* itself,²⁹² although he rejects Justice Harlan's *Katz* test as flawed.²⁹³

None of this is to suggest that it would be impossible to formulate predictable rules to protect intangible property under the Fourth Amendment. Professor Laura Donohue, for example, has offered a property-based theory of Fourth Amendment interpretation drawing in part on insights from Justice Gorsuch's opinion in *Carpenter*.²⁹⁴ Like Justice Gorsuch, Professor Donohue would rely on positive law to help determine constitutionally relevant property rights.²⁹⁵ Additionally, like Justice Gorsuch, she refers to the law of bailment to suggest that, even if a person has entrusted property, including informational property, to a third-party bailee, the property remains the bailor's papers or effects.²⁹⁶ But, even in the absence of state or federal law explicitly conferring a property interest, Professor Donohue would find customer information to be the customer's property based on a straightforward but-for causation test: "where the underlying data arise from the actions of an individual, and that person has the original legal right to determine whether and with whom it is shared, they hold an ownership interest in it."²⁹⁷

In the context of CSLI, Professor Donohue observes that cellular customers generate location data by exercising their freedom of movement, and the data "would not exist *but for* the individual's actions: purchasing a mobile device, charging it, turning it on, carrying it, and going to particular places at particular times."²⁹⁸ Professor Donohue then states, "If the individual did not have an original right to the information, he or she could not contract to share it However, it clearly *is* hers to provide."²⁹⁹ Likewise, Professor Donohue would apparently

292. *Id.* at 38–39.

293. *Id.* at 42.

294. Laura K. Donohue, *Functional Equivalence and Residual Rights Post-Carpenter: Framing a Test Consistent with Precedent and Original Meaning*, 2018 SUP. CT. REV. 347.

295. *Id.* at 410.

296. *Id.* at 353–54, 392–400 (discussing *Carpenter v. United States*, 138 S. Ct. 2206, 2268–69 (2018) (Gorsuch, J., dissenting)).

297. *Id.* at 409.

298. *Id.* at 392.

299. *Id.*

conclude that bank records like those at issue in *Miller* were customer property because, unlike “confiding illegal behavior in (supposed) coconspirators,” the records resulted from the customer’s exercise of a right to share information in the context of an “entirely legal, contractual relationship to conduct business.”³⁰⁰

Like pre-*Carpenter* third-party doctrine, Professor Donohue’s rule has the benefit of clarity.³⁰¹ Equally, however, clarity alone cannot justify the rule.³⁰² Crucially, Professor Donohue’s proposed rule is inconsistent with mainstream conceptions of how property rights are created,³⁰³ and consistent application of the rule as articulated would lead to results that most people would likely consider odd. Imagine, for example, that I hire a plumber to fix a broken toilet in my home. The plumber arrives and fixes the toilet. A security camera at my home records the plumber’s image. I pay him, and he leaves. Eventually, the plumber becomes a suspect in a murder committed on the same evening that he was at my home. His alibi is that he was in another state on the day in question. The plumber had the right to choose with whom to share his location, and I learned of his location only in the course of a legitimate contractual relationship. Alternatively, imagine that the plumber used an unusual and distinctive tool to fix my toilet. After the plumber leaves, I draw a sketch of the tool. That tool becomes the suspected murder weapon. That I have this information arose from the plumber’s actions. He had the right to choose whether to share with me that he possessed such a tool, and my knowledge of his possession arose in the course of a legitimate contractual relationship. Under Professor Donohue’s test, it would seemingly be a search implicating the plumber’s rights if the government took steps to obtain my security footage, the sketch I drew, or perhaps even my testimony.

300. See *id.* at 362.

301. See *Carpenter*, 138 S. Ct. at 2263–64 (Gorsuch, J., dissenting) (“Another justification sometimes offered for third party doctrine is clarity. You (and the police) know exactly how much protection you have in information confided to others: none. As rules go, ‘the king always wins’ is admirably clear. But the opposite rule would be clear too So clarity alone cannot justify the third party doctrine.”).

302. See *id.* at 2264.

303. See, e.g., *id.* at 2230 (Kennedy, J., dissenting); *id.* at 2242–43 (Thomas, J., dissenting); *id.* at 2258–59 (Alito, J., dissenting); Kerr *Carpenter* Brief, *supra* note 182.

To be sure, there are other circumstances in which property-based theories that focus on the plain meaning of the Fourth Amendment's text could provide greater clarity and predictability with regard to the threshold question of what sorts of conduct constitute searches than is possible under *Katz*. Such theories would often lead courts to characterize conduct as a search despite the conclusion under either *Katz* or *Olmstead* that it would be a non-search. For example, in an amicus brief in *Carpenter* coauthored by Professor Cloud, a group of scholars cited with approval the idea that even visual observation of the exterior of a home should be considered a search.³⁰⁴ The most obvious justification for allowing such surveillance without a warrant, these scholars suggested, is not that it does not constitute a search, but, rather, that this kind of visual observation is not an "'unreasonable' one."³⁰⁵ Using this sort of plain meaning approach, these scholars contended, would free the Court from the "fruitless quest" of identifying societal norms and would allow the Court instead to focus on the more "straightforward question" of whether giving law enforcement "unfettered discretion" to engage in the relevant conduct constitutes an "unreasonable" search.³⁰⁶ Although this sort of argument has some appeal, it ignores that *Katz* asks essentially the same question: should the government be permitted to engage in the conduct at issue without constraint?³⁰⁷ Shifting the focus of the inquiry to the reasonableness of a search rather than to whether a search has occurred at all may be more conceptually elegant, but it does not relieve the Court of its obligation to examine societal norms to determine the limits of government power.

304. Scholars *Carpenter* Brief, *supra* note 211, at 13 (citing *Kyllo v. United States*, 533 U.S. 27, 32 (2001)).

305. *Id.*

306. *See id.* at 13–14.

307. Professor Anthony Amsterdam famously summarized the essential question underlying the *Katz* test as "whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society." Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 403 (1974).

CONCLUSION

This brings us back to Justice Gorsuch's "traditional approach." Justice Gorsuch favored his approach because, unlike *Katz*, the traditional approach "was tied to the law."³⁰⁸ Yet, a principled application of *Katz* would require examination of law broadly construed: either positive law reflecting longstanding national tradition or traditional norms that regulate intrusions on people's security in their persons, houses, papers, and effects, but not formally enshrined in positive law.³⁰⁹ Justice Gorsuch himself acknowledged that using law as a guide to implementation of the *Katz* standard would approximate his "traditional" model.³¹⁰ Ultimately, moreover, Justice Gorsuch's willingness to use analogy rather than positive law to determine the limits of what might qualify as "papers" or "effects" and to establish the existence of a property right sufficient to legitimate a Fourth Amendment claim demonstrates the expansive scope of the "law" that would undergird his preferred model.

That expansive property concepts might lead to similar outcomes to those one would expect under a privacy regime has been evident since future-Justice Louis Brandeis and his law partner, Samuel Warren, introduced the legal concept of privacy in their seminal article on the topic in 1890.³¹¹ Warren and Brandeis developed their broad "right to be let alone" from common law decisions that had used the terminology of property rights, and they acknowledged that their new theory, based on a reformulation of these decisions as instantiating a right to privacy, could produce the same results.³¹² This result

308. *Carpenter v. United States*, 138 S. Ct. 2206, 2267–68 (2018) (Gorsuch, J., dissenting).

309. See Kahn-Fogel, *supra* note 22; see also Michael J. Zydney Mannheimer, *Decentralizing Fourth Amendment Search Doctrine*, 107 KY. L.J. 169, 170 (2018) (arguing that under either a trespass test or *Katz*, a search occurs when, "for the purpose of gathering information, government agents act contrary to law, broadly conceived").

310. *Carpenter*, 138 S. Ct. at 2265–66 (Gorsuch, J., dissenting).

311. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

312. *Id.* at 193, 213; see also Cloud, *supra* note 192, at 60 (describing the Warren and Brandeis article as espousing values "redolent of Madison's essay, published ninety-eight years earlier, expounding a very Lockean theory of broad property rights that encompassed tangible property and the expressions of a person's ideas").

might be even more likely under Justice Gorsuch's proposed regime, given his contemplation that "*Katz* may still supply one way to prove a Fourth Amendment interest."³¹³ Perhaps that would be the case when the property rules Justice Gorsuch envisioned would seem to allow the sorts of government surveillance that he believes merit some measure of constitutional regulation in a free and open society.

Overall, however, because a relatively constrained privacy model and a broad property approach would give judges similar levels of flexibility and discretion, each would implicate the same concerns about democratic legitimacy Justice Gorsuch expressed in his dissent.³¹⁴ Under neither framework would judges be mere umpires, mechanically deciding cases by calling balls and strikes using rules developed by the Framers or by legislative bodies.

Perhaps, then, the primary appeal of a property model of Fourth Amendment interpretation for Justice Gorsuch is aesthetic. Because privacy was not part of the political vocabulary of the Framers, reverting to the language of property with which they were familiar appears, at least superficially, more consistent with the originalist imperative of "enforcing the will of the enduring and fundamental democratic majority that ratified" the Fourth Amendment.³¹⁵ In any case, Justice Gorsuch's model, if adopted, would likely provide the flexibility to protect the people against emerging threats to their right to be secure in their persons, houses, papers, and effects. Necessarily, however, that flexibility would perpetuate the indeterminacy Justice Gorsuch and others have equated with the *Katz* regime. In the final analysis, if "indeterminacy is both the strength and weakness of the *Katz* test,"³¹⁶ the same can be said of the model Justice Gorsuch has promoted to supplement or replace it.

313. *Carpenter*, 138 S. Ct. at 2272 (Gorsuch, J., dissenting).

314. *Id.* at 2268.

315. Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL'Y 5, 10 (1988).

316. Dripps, *supra* note 138, at 1908 (citing Amsterdam, *supra* note 307, at 385).