

# Katz Nipped and Katz Cradled: Carpenter and the Evolving Fourth Amendment

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## Introduction

In October of 1983, Motorola sold the first commercial version of its portable, mobile telephone for the equivalent of \$10,000 in today's dollars.<sup>1</sup> In the three-and-a-half decades since that first sale, cell phones have become so ubiquitous as to be “almost a ‘feature of human anatomy.’”<sup>2</sup> While Motorola's original 1983 product was truly just a phone, modern smartphones are “in fact minicomputers that also happen to have the capacity to be used as a telephone.”<sup>3</sup> Because of the vast array of functions available on smartphones, individuals “compulsively carry cell phones with them all the time”<sup>4</sup> such that “nearly three-quarters of smart phone users report being within five feet of their phones most of the time.”<sup>5</sup> This means that if you know where a person's phone is, you likely know where they are as well. And, because of the way cell phone networks have been structured, carriers *do* know approximately where a customer's phone is whenever it connects to the network, which is to say most of the time.

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<sup>1</sup> Tas Anjarwalla, *Inventor of the Cell Phone: We Knew Someday Everybody Would Have One*, CNN, Jul. 9, 2010, <http://www.cnn.com/2010/TECH/mobile/07/09/cooper.cell.phone.inventor/index.html>.

<sup>2</sup> *Carpenter v. United States*, 138 S. Ct. 2206, 2218 (2018) (quoting *Riley v. California*, 134 S. Ct. 2473, 2484 (2014)).

<sup>3</sup> *Riley*, 134 S. Ct. at 2489.

<sup>4</sup> *Carpenter*, 138 S. Ct. at 2218.

<sup>5</sup> *Riley*, 134 S. Ct. at 2490 (citing Harris Interactive, 2013 Mobile Consumer Habits Study (June 2013)).

When the phone connects to the network, its approximate location is automatically stored by the carrier in a “time-stamped record known as cell-site location information (CSLI).”<sup>6</sup> CSLI allows anyone accessing it to virtually “travel back in time to retrace a person’s whereabouts, subject only to the retention policies of the wireless carriers, which currently maintain records for up to five years.”<sup>7</sup> This “provides an intimate window into a person’s life, revealing not only his particular movements, but through them his ‘familial, political, professional, religious, and sexual associations.’”<sup>8</sup> Despite the sensitive nature of CSLI, the government could, until recently, acquire, access, and inspect these records without first obtaining a warrant, because CSLI was believed to fall into a gap in Fourth Amendment protection known as the “third-party doctrine.”

In *Carpenter v. United States*, the Supreme Court was asked to decide whether the warrantless seizure and search of 127 days of a customer’s CSLI was permitted by the Fourth Amendment. The case promised to be one of the biggest Fourth Amendment decisions in recent history, and it did not disappoint. Whereas much of the Court’s usual Fourth Amendment docket consists of narrow, fact-bound issues that only moderately tinker with the existing doctrine, *Carpenter* held the possibility of radically overhauling that jurisprudence.

In the end, the majority opinion mostly tinkered with the law, but in an important and privacy-protecting way. And while the result in *Carpenter* is a significant victory for civil liberties, the case will eventually be bigger than its holding. Due to the conceptual shortcomings of the majority opinion, coupled with individual dissents from Justices Clarence Thomas and Neil Gorsuch calling for Fourth Amendment jurisprudence to be rethought from the ground up, *Carpenter* will likely be seen by future generations as the beginning of significant changes to the law of the Fourth Amendment.

Justice Gorsuch’s dissent in particular reads like the opening salvo in what will likely be a career-long attempt to re-work the Court’s Fourth Amendment jurisprudence. Only in his second term on the Court, Gorsuch seems to have chosen the Fourth Amendment as one

<sup>6</sup> *Carpenter*, 138 S. Ct. at 2211.

<sup>7</sup> *Id.* at 2218.

<sup>8</sup> *Id.* at 2217.

of his battlegrounds. His timing could not be better, as technological changes in both data storage and surveillance have led many scholars to question the continued viability of the framework created a half-century ago by the famous case of *Katz v. United States*.<sup>9</sup>

In *Katz*, the Court rejected the textual, property-based approach to the Fourth Amendment that had been followed until that point and substituted an inquiry into whether the challenged government action violated an individual's "reasonable expectation of privacy."<sup>10</sup> In the 1970s, in *United States v. Miller* and *Smith v. Maryland*, the Court, using this new Fourth Amendment test, concluded that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties" and that such information is therefore not entitled to Fourth Amendment protection.<sup>11</sup> Because CSLI is held by carriers, not customers, it appeared to fall under this doctrine. The confluence of cellular network architecture and judicial reinterpretation of the Fourth Amendment had thus appeared to create a situation where the government could legally engage in warrantless, retrospective location-tracking of U.S. citizens.

The Court in *Carpenter* sought to rectify this unintended consequence of its Fourth Amendment jurisprudence, explicitly taking up Justice Louis Brandeis's call for the Court "to ensure that the 'progress of science' does not erode Fourth Amendment protections."<sup>12</sup> Unwilling to disturb *Katz* or its offspring *Miller* and *Smith*, the Court instead crafted a narrow exception to the third-party doctrine designed for the "unique nature of cell phone location information" and requiring the government to obtain a warrant in most cases before compelling carriers to turn over a customer's CSLI.<sup>13</sup>

In this article, we will first explore the factual and legal background of the *Carpenter* case, including a brief overview of the development of the Fourth Amendment leading up to the decision. Next, we turn

<sup>9</sup> 389 U.S. 347 (1967).

<sup>10</sup> *Id.* at 361 (1967) (Harlan, J., concurring). The reasonable-expectation-of-privacy standard set out in Justice Harlan's concurrence was adopted by a majority of the Court the following year in *Terry v. Ohio*, 392 U.S. 1, 9 (1968).

<sup>11</sup> *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979); *United States v. Miller*, 425 U.S. 435, 443 (1976).

<sup>12</sup> *Carpenter*, 138 S. Ct. at 2223 (quoting *Olmstead v. United States*, 277 U.S. 438, 473–74 (1928) (Brandeis, J., dissenting)).

<sup>13</sup> *Id.* at 2220.

to the Court's decision itself. Chief Justice John Roberts's majority opinion is of course important for establishing the ultimate holding in the case, and the dissents of Justices Anthony Kennedy, Thomas, and Samuel Alito provide valuable critiques of the majority opinion. But we focus more on Justice Gorsuch's dissent, which calls for a rethinking of Fourth Amendment law. We will try to help with that rethinking by placing the Fourth Amendment into philosophical and legal context. By using positive law to help delineate when the Fourth Amendment has been triggered, future jurists can help create a more textually grounded and philosophically justified jurisprudence. Ultimately, we believe that is the appropriate result both as a matter of originalism and as a matter of privacy protection.

### I. Fourth Amendment Background

The Fourth Amendment places limitations on the government's search-and-seizure powers. In relevant part, the amendment reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."<sup>14</sup> The Supreme Court's jurisprudence on the amendment through the late-19th and early-20th centuries remained close to the literal meaning of the text, with the Court focusing on the amendment's property-centric language in cases such as *Ex parte Jackson* (1878), *Weeks v. United States* (1914), and *Agnello v. United States* (1925).<sup>15</sup> In *Ex parte Jackson*, for example, the Court held that the Fourth Amendment's protections of a person's "papers" and "effects" were not limited to those papers and effects which are kept in the safety of one's own home. Letters and packages in the mail were just as protected, and the Fourth Amendment protects against "unreasonable searches and seizures" of a person's papers and effects "wherever they may be."<sup>16</sup>

The property-centric view of the Fourth Amendment continued in *Olmstead v. United States* (1927), when the Court held that the warrantless wiretapping of defendants' phone lines, was not a "search" or "seizure" of "persons, houses, papers, [or] effects," rejecting a

<sup>14</sup> U.S. Const. amend. IV.

<sup>15</sup> *Ex parte Jackson*, 96 U.S. 727 (1878); *Weeks v. United States*, 232 U.S. 383 (1914); *Agnello v. United States*, 269 U.S. 20 (1925).

<sup>16</sup> *Ex parte Jackson*, 96 U.S. at 732–33.

proposed analogy to *Ex parte Jackson's* protection of letters in the mail.<sup>17</sup> In the following decades the Court drew a hard line on a physical property-based interpretation of the amendment, finding that microphones placed against the wall of an adjoining room did not trigger Fourth Amendment protections,<sup>18</sup> but a “spike mike” that physically pierced the property did.<sup>19</sup>

In 1967, *Katz* overturned *Olmstead*, but instead of simply adapting the Fourth Amendment’s protection of “persons, houses, papers, and effects” to reflect new forms of intrusions on those things, the Court rejected the property-based approach entirely, holding that “the Fourth Amendment protects people, not places.”<sup>20</sup> While the *Katz* majority did not develop a test laying out precisely what this change meant, Justice John Marshall Harlan’s concurring opinion formulated what is now referred to as the *Katz* “reasonable expectation of privacy” test.<sup>21</sup> This test, adopted by a majority of the Court the following year in *Terry v. Ohio*,<sup>22</sup> essentially replaced the Fourth Amendment inquiry of whether a search or seizure of a person, house, paper, or effect has occurred with an inquiry into whether the government had invaded a person’s “actual (subjective) expectation of privacy . . . that society is prepared to recognize as ‘reasonable.’”<sup>23</sup>

Despite the rise of the “reasonable expectation of privacy” doctrine in Fourth Amendment jurisprudence, modern cases have demonstrated that the traditional, property-based protections still apply. In *Soldal v. Cook County*, for example, the Court unanimously found that local sheriffs’ aid of a landlord in conducting a self-help eviction through physical removal of a tenant’s mobile home constituted a Fourth Amendment seizure despite there being no privacy violation.<sup>24</sup> The Court was “unconvinced that any of [its] prior cases supports the view that the Fourth Amendment protects against unreasonable seizures of property only where privacy or liberty is also

<sup>17</sup> *Olmstead v. United States*, 277 U.S. 438, 464 (1928).

<sup>18</sup> *Goldman v. United States*, 316 U.S. 129, 135 (1942).

<sup>19</sup> *Silverman v. United States*, 365 U.S. 505, 511 (1961).

<sup>20</sup> *Katz*, 389 U.S. at 351.

<sup>21</sup> *Id.* at 361 (Harlan, J., concurring).

<sup>22</sup> *Terry*, 392 U.S. at 9.

<sup>23</sup> *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

<sup>24</sup> *Soldal v. Cook Cty, Ill.*, 506 U.S. 56 (1992).

implicated,” noting examples of existing Fourth Amendment jurisprudence, such as the “plain view” rule, that provided similar protection in the absence of privacy interests.<sup>25</sup>

The Court reaffirmed the principle behind this holding in 2012 in *United States v. Jones*, where the warrantless placement of a GPS tracker on defendant’s vehicle with the aim of tracking his movements was found to be a Fourth Amendment violation on the grounds that the tracker was a “physical intrusion” that undoubtedly “would have been considered a ‘search’ within the meaning of the Fourth Amendment when it was adopted.”<sup>26</sup> Writing for the majority, Justice Antonin Scalia reaffirmed the holding of *Soldal*, noting that “the *Katz* reasonable-expectation-of-privacy test had been *added to*, not *substituted for*, the common-law trespassory test.”<sup>27</sup> Scalia clarifies that *Katz* “did not repudiate [the] understanding” held for “most of our history” that the Fourth Amendment embodies “a particular concern for government trespass upon areas . . . it enumerates.”<sup>28</sup>

*Jones* was the most significant case dealing with mass data surveillance before *Carpenter*. Some thought that *Jones* presaged the possible end of the third-party doctrine, and others thought it more significant for its use of traditional trespass concepts applied to modern surveillance. With CSLI, however, there is nothing “attached” that could count as a trespass. Just having your phone turned on and on your person is all that is needed to track your location.

## II. *Carpenter v. United States*

Cell phones function by sending signals to and from “cell sites,” sets of radio antennas mounted on “tower[s] . . . light posts, flag poles, church steeples, or the sides of buildings.”<sup>29</sup> Cell phones connect to these cell sites whenever they send or receive texts, phone calls, and data.<sup>30</sup> CSLI is protected under the Stored Communications Act (SCA), which allows the government to use a court order to compel carriers to turn over such records whenever it could offer “specific

<sup>25</sup> *Id.* at 65–66.

<sup>26</sup> *United States v. Jones*, 565 U.S. 400, 404–05 (2012).

<sup>27</sup> *Id.* at 409.

<sup>28</sup> *Id.* at 406–07.

<sup>29</sup> *Carpenter*, 138 S. Ct. at 2211.

<sup>30</sup> *Id.* at 2211–12.

and articulable facts showing that there are reasonable grounds to believe' that the records sought 'are relevant and material to an ongoing criminal investigation.'"<sup>31</sup> Notably, this standard is lower than the probable-cause standard required for warrants.

In 2011, federal prosecutors and law enforcement officers were attempting to catch the perpetrators of a series of robberies in the Detroit area. From a previous suspect arrested in the case, officers had received a list of suspects, their phone numbers, and the arrested suspect's call records from the time of the robberies. Using this information, "the prosecutors applied for court orders under the Stored Communications Act to obtain cell phone records for petitioner Timothy Carpenter and several other suspects." Federal magistrate judges granted the prosecutors' requests, signing two orders compelling MetroPCS and Sprint, two wireless carriers with whom Carpenter had accounts, to disclose CSLI for the "origination and . . . termination [of] incoming and outgoing calls" to Carpenter's cell phone "during the four-month period when the string of robberies occurred."<sup>32</sup>

These requests resulted in "the Government obtain[ing] 12,898 location points cataloging Carpenter's movements—an average of 101 data points per day."<sup>33</sup> Using these location points, the prosecution was able to place Carpenter's phone near four of the robberies. After presenting that information at trial, Carpenter was convicted of almost all counts charged and received a prison sentence of more than 100 years.

Following his conviction, Carpenter appealed to the Sixth Circuit. The court affirmed his conviction on third-party doctrine grounds, finding that "Carpenter lacked a reasonable expectation of privacy in the location information collected."<sup>34</sup> Because the location data is voluntarily shared with the wireless carrier by the user, the court ruled that the "the resulting [CSLI] business records are not entitled to Fourth Amendment protection."<sup>35</sup> Carpenter then filed a petition for certiorari, which the Supreme Court granted.

<sup>31</sup> *Id.* at 2212 (quoting 18 U.S.C. § 2703(d)).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 2213.

<sup>35</sup> *Id.*

*A. Katz Cradled: Chief Justice Roberts’s Majority Opinion*

Chief Justice Roberts wrote the majority opinion, joined by Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan. Roberts framed the issue of government requests for CSLI within the *Katz* framework, which determines whether a “search” has occurred—and thus whether Fourth Amendment protections are triggered—by asking whether the government has infringed upon a person’s “reasonable expectation of privacy.” Roberts explicitly rejected a contention by Justice Kennedy that, even under *Katz*, “property-based concepts” provide the rubric for resolving “which expectations of privacy are entitled to protection.”<sup>36</sup> The Court has “repeatedly emphasized,” argued Roberts, “that privacy interests do not rise or fall with property rights.”<sup>37</sup> Instead, Roberts took a more holistic approach, arguing that “the analysis is informed by historical understandings ‘of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted,’” and that prior case law gives us “basic guideposts of Fourth Amendment privacy concerns.”<sup>38</sup> Among these guideposts are “securing the privacies of life against arbitrary power, and placing obstacles in the way of a too permeating police surveillance.”<sup>39</sup>

Roberts wrote, “As technology has enhanced the Government’s capacity to encroach upon areas normally guarded from inquisitive eyes, this Court has sought to ‘assure[ ] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.’”<sup>40</sup> Combined with the guideposts he identifies above, language such as this strongly implies that a chief rationale behind the *Carpenter* decision is, as Orin Kerr has argued, “equilibrium-adjustment.”<sup>41</sup> Kerr argues that “[w]hen technology dramatically expands the government’s power under an old legal rule . . . the Court changes the legal rule to restore the prior level

<sup>36</sup> *Id.* at 2213–14, 2214 n.1.

<sup>37</sup> *Id.* at 2214 n.1.

<sup>38</sup> *Id.* at 2213–14 (quoting *Carroll v. United States*, 267 U.S. 132, 149 (1925)).

<sup>39</sup> *Id.* at 2214 (cleaned up).

<sup>40</sup> *Id.* (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001)).

<sup>41</sup> See, e.g., Orin Kerr, When Does a *Carpenter* Search Start—and When Does It Stop?, *Lawfare*, Jul. 6, 2018, <https://www.lawfareblog.com/when-does-carpenter-search-start-and-when-does-it-stop>.



of government power.”<sup>42</sup> Roberts, ever the incrementalist, appears to have taken that approach in *Riley v. California*, where he wrote for a unanimous Court that a warrant is required before searching the digital contents of a cell phone incident to an arrest.<sup>43</sup> In *Carpenter*, Roberts also saw something “qualitatively different” distorting the existing legal protections.<sup>44</sup> The existing rules of the Court’s Fourth Amendment doctrine would dictate less protection than Roberts thinks the amendment requires, but instead of reassessing the Court’s entire Fourth Amendment jurisprudence to judge whether this deviation is justified, Roberts carved out a special “cell phone exception.”

This exception comes about because Roberts saw government acquisition of CSLI as sitting “at the intersection of two lines of cases, both of which inform our understanding of the privacy interests at stake.”<sup>45</sup> The first line of cases he referred to, exemplified by *Jones*, “addresses a person’s expectation of privacy in his physical location and movements,” while the second is the third-party doctrine of *Smith* and *Miller* where, Roberts wrote, “the Court has drawn a line between what a person keeps to himself and what he shares with others.”<sup>46</sup> While the first line of cases would appear to grant Fourth Amendment protection to CSLI as highly sensitive location data, the second rules out such protection on the grounds that CSLI is held by a third party.

It is notable that Roberts focused not on *Jones*’s majority opinion, which resolved the case on property grounds, but rather on the concurrences of Justices Alito and Sotomayor, who both used broader *Katz* privacy analysis to determine that “longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.”<sup>47</sup> Both lines of cases that Roberts analyzes are thus attempts to apply the *Katz* test, and yet the two applications appear to contradict one another in the case of CSLI. Roberts, however, did

<sup>42</sup> *Id.*

<sup>43</sup> 134 S. Ct. 2473, 2489–93 (2014).

<sup>44</sup> *Carpenter*, 138 S. Ct. at 2216.

<sup>45</sup> *Id.* at 2214–15.

<sup>46</sup> *Id.* at 2215–16.

<sup>47</sup> *Jones*, 565 U.S. at 430 (Alito, J., concurring in judgment); see also *id.* at 415 (Sotomayor, J., concurring).

not seem to take this internal contradiction as a mark against *Katz*. Instead, he simply treated CSLI, which is both location data and third-party information, as a special category, emphasizing that it is a “new phenomenon,” is “qualitatively different from telephone numbers and bank records,” and has a “unique nature.”<sup>48</sup> This “unique nature” thus allowed Roberts to take the novel approach of applying both lines of precedent to CSLI, balancing the concerns against one another.

On the location side, Roberts discussed how the time and expense that tailing someone for extended periods used to require has resulted in a societal expectation against extensive secret monitoring of a person’s movements, an expectation which warrantless acquisition of CSLI contravenes. The private nature of a person’s movements, the sensitive information it may reveal, and the extensive set of retrospective data that CSLI offers all weigh in favor of strong privacy interests for Roberts. “Accordingly, when the Government accessed CSLI from the wireless carriers, it invaded Carpenter’s reasonable expectation of privacy in the whole of his physical movements.”<sup>49</sup>

Against this conclusion Roberts weighed the third-party doctrine concerns of *Smith* and *Miller*. Here again he emphasized that CSLI is a “distinct category of information” from the categories already covered by the doctrine and deemphasized the determinacy of the act of sharing within the third-party doctrine.<sup>50</sup> Instead, Roberts argued that *Smith* and *Miller* “considered ‘the nature of the particular documents sought’ to determine whether ‘there is a legitimate expectation of privacy concerning their contents.’”<sup>51</sup> A “detailed chronicle of a person’s physical presence compiled every day, every moment, over several years . . . implicates privacy concerns far beyond those considered in *Smith* and *Miller*.”<sup>52</sup> Accordingly, while the expectation of privacy was not present in *Smith* and *Miller*, it was present as strongly in *Carpenter* as it was in *Jones*.

Combined with an increased expectation of privacy is a decreased presence of third-party sharing. CSLI “is not truly ‘shared’ as one

<sup>48</sup> *Carpenter*, 138 S. Ct. at 2216–17.

<sup>49</sup> *Id.* at 2219.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* (quoting *Miller*, 425 U.S. at 442).

<sup>52</sup> *Id.* at 2220.

normally understands the term," since the "sharing" occurs automatically "without any affirmative act on the part of the user beyond powering up."<sup>53</sup> Roberts's solution to the intersection between *Jones's* locational privacy interest and *Smith* and *Miller's* third-party doctrine was to weigh them against one another. With the increased privacy interest and the decreased degree of third-party sharing, Roberts came to the "narrow" holding that cell phone location data is a special case worthy of special protection, and thus the government must obtain a warrant for CSLI in most cases.

*B. Justice Kennedy's Dissent*

Justice Kennedy dissented from the majority, writing an opinion joined by Justices Thomas and Alito. Kennedy's primary criticism of the court's ruling was that it misconstrued precedent in such a way as to put "needed, reasonable, accepted, lawful, and congressionally authorized criminal investigations at serious risk in serious cases" through undue restrictions on law enforcement.<sup>54</sup> Specifically, Kennedy was critical of the line the Court attempted to draw between CSLI and other types of business records that traditionally fell under the third-party doctrine, calling the distinction "unprincipled and unworkable."<sup>55</sup> He argued that cell-site records are far less accurate than GPS, revealing only "the general location of the cell phone user," that the contracts users sign with carriers authorizes the carriers to keep CSLI records, and that law enforcement access to these records "can serve as an important investigative function."<sup>56</sup> Kennedy also criticized the methodology Roberts employed, arguing that the third-party doctrine does not involve balancing privacy interests with third-party disclosure.

While Kennedy did not advocate abandoning *Katz*, he did take a far more property-centric view of the *Katz* test than Roberts, writing that "property-based concepts . . . have long grounded the analytic framework that pertains in these cases."<sup>57</sup> For Kennedy, "the only question necessary to decide was whether the Government searched

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 2223 (Kennedy, J., dissenting).

<sup>55</sup> *Id.* at 2224.

<sup>56</sup> *Id.* at 2225.

<sup>57</sup> *Id.* at 2224.

anything of Carpenter's when it used compulsory process to obtain cell-site records from Carpenter's cell phone service providers."<sup>58</sup> And, according to Kennedy, the third-party doctrine dictates that "the answer is no."<sup>59</sup>

Kennedy believed that *Katz* was a useful way to move beyond "arcane distinctions developed in property and tort law" but that "'property concepts' are, nonetheless, fundamental 'in determining the presence or absence of the privacy interests protected by that Amendment.'"<sup>60</sup> This is true, he argued, both because "individuals often have greater expectations of privacy in things and places that belong to them, not to others," and because "the Fourth Amendment's protections must remain tethered to the text," and therefore to "persons, houses, papers, and effects."<sup>61</sup> The closest Carpenter came to meeting this property-based standard was when he argued that 47 U.S.C. § 222 gave him a Fourth Amendment interest in the cell-site records, but Kennedy found this unconvincing, citing the statute's limited confidentiality protections and the customer's lack of "practical control over the records."<sup>62</sup>

### C. *Katz Nipped, Part I: Justice Thomas's Dissent*

Although Justice Thomas joined Justice Kennedy's dissent, agreeing that Supreme Court precedent would dictate the result Kennedy advocated, he separately argued that the entire *Katz* doctrine should be overruled and the Court should return to a more originalist, textualist, and property-based interpretation of the Fourth Amendment. "This case should not turn on 'whether' a search occurred. It should turn, instead, on *whose* property was searched."<sup>63</sup>

Thomas believed that under this inquiry, Carpenter could not assert a Fourth Amendment right to the CSLI, arguing that the cell-site records belonged solely to the carriers in question. Carpenter "did not create the records, he does not maintain them, he cannot control them, and he cannot destroy them. Neither the terms of his

<sup>58</sup> *Id.* at 2226.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 2227 (quoting *Rakas v. Illinois*, 439 U.S. 128, 143, 143–44 n.12 (1978)).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 2229.

<sup>63</sup> *Id.* at 2235 (Thomas, J., dissenting).

contracts nor any provisions of law make the records his.”<sup>64</sup> Accordingly, none of Carpenter’s property was searched, and he can make no Fourth Amendment claim.

Though Thomas thought that the case at hand was straightforward, he used it as an opportunity to argue that “the *Katz* test has no basis in the text or history of the Fourth Amendment,” and that it therefore “invites courts to make judgments about policy, not law,” “distort[s] Fourth Amendment jurisprudence,” and should be abandoned.<sup>65</sup> Thomas conducted a lengthy review of 20th-century Fourth Amendment doctrine and underscored the lack of legal grounding for *Katz* and the reasonable-expectation-of-privacy standard: “Justice Harlan did not cite anything for this ‘expectation of privacy’ test, and the parties did not discuss it in their briefs.”<sup>66</sup> Indeed, “[t]he test appears to have been presented for the first time at oral argument by one of the defendant’s lawyers” who drew an analogy to the “reasonable person” test in tort law.<sup>67</sup> The resultant test defines “‘search’ to mean ‘any violation of a reasonable expectation of privacy,’” which, Thomas argued, is “not a normal definition of the word ‘search’” and “misconstrues virtually every one” of the words of the relevant part of the Fourth Amendment.<sup>68</sup>

For Thomas, a central flaw of the *Katz* test is its focus on “the concept of ‘privacy,’” as “[t]he word ‘privacy’ does not appear in the Fourth Amendment (or anywhere else in the Constitution for that matter).”<sup>69</sup> Instead, Thomas wrote, the right protected by the Fourth Amendment is “‘[t]he right of the people to be secure,’” limited to “‘persons’ and three specific types of property.”<sup>70</sup> The Fourth Amendment is thus closely connected with property, not privacy. Thomas described how the Fourth Amendment’s protection of security in property was a reaction to the Crown’s use of writs of assistance against the American colonists in the years leading up to the

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 2236–38 (quoting *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring)).

<sup>66</sup> *Id.* at 2237.

<sup>67</sup> *Id.* (citing Peter Winn, *Katz* and the Origins of the “Reasonable Expectation of Privacy” Test, 40 *McGeorge L. Rev.* 1, 9–10 (2009); Harvey A. Schneider, *Katz v. United States: The Untold Story*, 40 *McGeorge L. Rev.* 13, 18 (2009)).

<sup>68</sup> *Id.* at 2238.

<sup>69</sup> *Id.* at 2239.

<sup>70</sup> *Id.* (quoting U.S. Const. amend. IV).

revolution, undermining *Katz's* assertion that “the Fourth Amendment protects people, not places.”<sup>71</sup>

Thomas argued that *Katz's* emphasis on “expectations of privacy” has now led the Court to further distort the text of the Fourth Amendment—while the text’s use of the word “their” makes clear that “at the very least, [ ] individuals do not have Fourth Amendment rights in *someone else's* property,” “under the *Katz* test, individuals can have a reasonable expectation of privacy in another person’s property.”<sup>72</sup> Thomas found Carpenter’s arguments that the cell-site records are his “papers” unpersuasive as “[n]othing in the text [of § 222] pre-empts state property law or gives customers a property interest in the companies’ business records.”<sup>73</sup> If Section 222 or another statute *did* explicitly give Carpenter such a property interest in his CSLI, it seems that Thomas would be willing to find Fourth Amendment protection, though he appeared to have reservations concerning Congress’s authority in this area.<sup>74</sup>

Finally, Thomas found *Katz* unclear and potentially circular because, even as the Court is supposed to enforce society’s privacy expectations, those expectations are in turn shaped by the Court’s rulings. Thomas argued that the Court is really asking the normative question of “whether a particular practice *should* be considered a search under the Fourth Amendment,” rather than the descriptive question that the *Katz* test purports to require.<sup>75</sup>

#### *D. Justice Alito’s Dissent*

Justice Alito focused his dissent (which was joined by Justice Thomas) on the negative effects he saw the majority decision having on subpoena law, arguing that “the Court ignores the basic distinction between an actual search . . . and an order merely requiring a party to look through its own records and produce specified documents.”<sup>76</sup> Actual searches, Alito argued, require probable cause, while a subpoena doesn’t. Not only can Carpenter not assert that the

<sup>71</sup> *Id.* at 2239–41.

<sup>72</sup> *Id.* at 2242.

<sup>73</sup> *Id.* at 2243.

<sup>74</sup> *Id.* at 2242.

<sup>75</sup> *Id.* at 2246.

<sup>76</sup> *Id.* at 2247 (Alito, J., dissenting).

SCA court order here requires probable cause, Alito wrote, he cannot object at all, because it is “object[ing] to the search of a third party’s property.” The Court, he warned, “will be making repairs—or picking up the pieces—for a long time to come.”<sup>77</sup>

Alito argued that the SCA court order was “the functional equivalent” of a subpoena, and that there “is no evidence that these writs were regarded as ‘searches’ at the time of the founding.”<sup>78</sup> To illustrate this point, Alito traced the development of subpoenas from the Court of Chancery and argued that “the Fourth Amendment, as originally understood, did not apply to the compulsory production of documents at all.”<sup>79</sup> Instead, it was targeted at “physical intrusion” and the “taking of property by agents of the state.”<sup>80</sup> Absent these violations, people in the Founding Era would not have thought that the Fourth Amendment applied.

The majority opinion, Alito argued, places at risk long-settled precedents concerning subpoenas and the vital law enforcement purposes they serve. The government met the requirements for a subpoena and conducted neither a search nor a seizure, particularly not of any property belonging to Carpenter. Alito viewed the Court’s decision as confusingly and improperly granting Carpenter “greater Fourth Amendment protection than the party actually being subpoenaed,” namely the carrier.<sup>81</sup> Rejecting Carpenter’s Section 222 argument that he had a property interest in the CSLI, Alito concluded that “there is no plausible ground for maintaining that the information at issue here represents Carpenter’s ‘papers’ or ‘effects.’”<sup>82</sup>

#### *E. Katz Nipped Part II: Justice Gorsuch’s Dissent*

As discussed previously, *Katz* and its progeny did not completely excise property law from the Fourth Amendment. Property law featured prominently in *Jones*, as well as in *Florida v. Jardines*, when the Court held that bringing a drug sniffing dog on a porch was a search because *Katz* did “not subtract anything from the Amendment’s

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 2250.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 2255.

<sup>82</sup> *Id.* at 2259.

protections when the Government does engage in a physical intrusion of a constitutionally protected area.”<sup>83</sup>

And in *Byrd v. United States*, also decided last term, the Court wrestled with whether and how positive property rights affect the reasonable expectation of privacy for the driver of a rental car who is not listed as an authorized driver on the rental agreement.<sup>84</sup> Examining some of the issues in *Byrd*, as well as some of the questions Gorsuch asked, can help us better contextualize Gorsuch’s *Carpenter* opinion.

Byrd was pulled over driving a rental car for which his fiancé had signed the agreement and then given him permission to drive. Because of this, the troopers reasoned that they did not need his consent to search the trunk, and they subsequently discovered drugs. At oral argument, Justice Gorsuch pursued a line of questioning that predicted his *Carpenter* dissent. There were two theories advanced by Byrd’s counsel: “One, a property law theory, essentially, as I understand it, that possession is good title against everybody except for people with superior title. And – and I understand that. That’s an ancient common law rule. I can go back and find that in treatises all the way back to Joseph Story.”<sup>85</sup> The other theory was the reasonable-expectation-of-privacy test, which seemed inadequate to Gorsuch for the same reasons he would later express in his *Carpenter* dissent. In fact, since *Carpenter* was argued in late November 2017 and *Byrd* was argued in January 2018, Gorsuch may have already been researching and writing his *Carpenter* dissent.

Justice Kennedy wrote for a unanimous Court in *Byrd*, holding that the unauthorized driver does enjoy a reasonable expectation of privacy. Kennedy’s opinion examined “property concepts” in order to inform “the presence or absence of the privacy interests protected by that Amendment.”<sup>86</sup> However, the problem with the property law theory raised by Byrd—arguing that “common-law property interest in the rental car as a second bailee that would have provided him with a cognizable Fourth Amendment interest in the vehicle”—was he did not “raise this argument before the District Court or Court of Appeals, and those courts did not have occasion to address whether

<sup>83</sup> *Florida v. Jardines*, 569 U.S. 1, 5 (2013) (cleaned up).

<sup>84</sup> *Byrd v. United States*, 138 S. Ct. 1518 (2018).

<sup>85</sup> Transcript of Oral Arg. at 24, *Byrd v. United States*, 138 S. Ct. 1518 (2018) (No. 16-1371).

<sup>86</sup> *Byrd*, 138 S. Ct. at 1526 (quoting *Rakas*, 439 U.S. at 144).



Byrd was a second bailee or what consequences might follow from that determination.”<sup>87</sup> The Court was left to apply the reasonable-expectation-of-privacy test, yet still borrowed heavily from positive property law to aid “the Court in assessing the precise question.”<sup>88</sup> Gorsuch would lament Byrd’s belated attempt to raise arguments based on positive property law in his *Carpenter* dissent.

Gorsuch begins his *Carpenter* dissent with many of the same criticisms posed by the other dissenters, finding the line Roberts attempted to draw between CSLI and other types of third-party business records unsatisfying. Unlike the other dissenters, however, Gorsuch believes that the line should have been pushed the other way, such that many of the types of information now covered by the third-party doctrine should be protected by the Fourth Amendment. Regardless of the eventual solution, however, he thinks the current distinctions are untenable and that the Court was left with three options: (1) “ignore the problem, maintain *Smith* and *Miller*, and live with the consequences”; (2) “set *Smith* and *Miller* aside and try again using the *Katz* ‘reasonable expectation of privacy’ jurisprudence that produced them”; or (3) “look for answers elsewhere.”<sup>89</sup>

Weighing the first option, Gorsuch concluded that *Smith* and *Miller* seem to be unprincipled and would lead to untenable results. “Can the government demand a copy of all your e-mails from Google or Microsoft without implicating your Fourth Amendment rights?” Gorsuch asked. “*Smith* and *Miller* say yes it can—at least without running afoul of *Katz*. But that results strikes most lawyers and judges today—me included—as pretty unlikely.”<sup>90</sup> Both subjectively and objectively, Gorsuch found it hard to believe that a person should *never* expect privacy in the “information they entrust to third parties, especially information subject to confidentiality agreements.”<sup>91</sup> He concluded his analysis of *Smith* and *Miller* by characterizing the third-party doctrine as “[a] doubtful application of *Katz* that lets the government search almost whatever it wants whenever it wants.”<sup>92</sup>

<sup>87</sup> *Id.* at 1526–27.

<sup>88</sup> *Id.* at 1527.

<sup>89</sup> *Carpenter*, 138 S. Ct. at 2262 (Gorsuch, J., dissenting).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 2263.

<sup>92</sup> *Id.* at 2264.

The second option Gorsuch offered is scrapping *Smith* and *Miller* and returning to *Katz*'s straight "reasonable expectation of privacy" approach. This too is unappealing, however, because he found many of the same problems with *Katz*'s interpretation of the text of the Fourth Amendment as Justice Thomas. "[T]he framers chose not to protect privacy in some ethereal way dependent on judicial intuitions. They chose instead to protect privacy in particular places and things—'persons, houses, papers, and effects'—and against particular threats—'unreasonable' governmental 'searches and seizures.'"<sup>93</sup> "Even on its own terms," Gorsuch argued, "*Katz* has never been sufficiently justified" since it is not clear where one should look for "reasonable expectations of privacy" nor "why judges rather than legislators should" be doing the looking.<sup>94</sup> "As a result" of these issues, "*Katz* has yielded an often unpredictable—and sometimes unbelievable—jurisprudence."<sup>95</sup> As examples of this tendency, Gorsuch criticized the two "guideposts" named by the Roberts in the majority opinion, asking, "[a]t what point does access to electronic data amount to 'arbitrary' authority? When does police surveillance become 'too permeating'? And what sort of 'obstacles' should judges 'place' in law enforcement's path when it does? We simply do not know."<sup>96</sup>

In the face of these unappealing, unworkable, and unprincipled options, Gorsuch wrote that there was another way to go. This other way is the traditional, pre-*Katz* Fourth Amendment approach, but with updates to deal with the problems posed by modern technology. "[T]he traditional approach asked if a house, paper or effect was *yours* under law. No more was needed to trigger the Fourth Amendment."<sup>97</sup> This approach has several advantages, not least that it removes from a judge the ability to decide Fourth Amendment cases based on "personal sensibilities about the 'reasonableness of your expectations or privacy,'" or to supplant the legislature's judgments on matters of policy.<sup>98</sup> "Under this more

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 2265.

<sup>95</sup> *Id.* at 2266.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 2267–68.

<sup>98</sup> *Id.*

traditional approach, Fourth Amendment protections for your papers and effects do not automatically disappear just because you share them with third parties.”<sup>99</sup>

This line of reasoning raises the questions of “what kind of legal interest is sufficient to make something *yours*? And what source of law determines that? Current positive law? The common law at 1791, extended by analogy to modern times? Both?”<sup>100</sup> Gorsuch acknowledged that more work needs to be done before this theory could be fully implemented, but he offered five thoughts.

First, he proposed using a legal concept known as a bailment to partially address the third-party doctrine issue. “A bailment is the ‘delivery of personal property by one person (the *bailor*) to another (the *bailee*) who holds the property for a certain purpose’” and “normally owes a legal duty to keep the item safe.” Adopting this property-law principle into Fourth Amendment jurisprudence could help to preserve Fourth Amendment interests even after information is transferred to a third-party. His starting point for applying bailments to Fourth Amendment law was *Ex parte Jackson*, where the Court wrote that “[t]he constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to *their papers*, thus closed against inspection, *wherever they may be*.” Similarly, “[j]ust because you entrust your data—in some case, your modern-day papers and effects—to a third party may not mean you lose any Fourth Amendment interest in its contents.”<sup>101</sup>

While on the U.S. Court of Appeals for the Tenth Circuit, Gorsuch applied similar reasoning to email and found that, under *Jones*, the government had improperly performed a warrantless search when it opened an email obtained from defendant’s email provider on the grounds that opening the message constituted a trespass into the defendant’s “effects.”<sup>102</sup> Applying similar reasoning to other types of

<sup>99</sup> *Id.* at 2268.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 2269.

<sup>102</sup> *United States v. Ackerman*, 831 F.3d 1292, 1308 (10th Cir. 2016) (“Of course, the framers were concerned with the protection of physical rather than virtual correspondence. But a more obvious analogy from principle to new technology is hard to imagine and, indeed, many courts have already applied the common law’s ancient trespass to chattels doctrine to electronic, not just written, communications.”).

digital analogues of “papers” and “effects” seems like the first step towards a modernized, originalist Fourth Amendment doctrine.

Second, and somewhat contrary to his fellow dissenters’ skepticism of Carpenter’s Section 222 argument, Gorsuch “doubt[ed] that complete ownership or exclusive control of property is always a necessary condition to the assertion of a Fourth Amendment right.”<sup>103</sup> This principle is already reflected in Fourth Amendment law because tenants and resident family members without legal title still “have standing to complain about searches of the houses in which they live.”<sup>104</sup> One of the largest hurdles to Carpenter’s case was that the CSLI was not a record over which he retained full ownership. The carrier had, at the very least, part ownership of the CSLI it had created and maintained. For Gorsuch’s property-centric approach to work in *Carpenter*, allowing people to claim Fourth Amendment protection on property in which they have an incomplete ownership interest is essential.

Seemingly as an aside, Gorsuch also noted that the Court’s language in *Riley* concerning how the “use of technology is functionally compelled by the demands of modern day life,” could be used to argue that “stor[ing] data with third parties may amount to a sort of involuntary bailment.”<sup>105</sup> In this way, even though the carrier is the originator of the data, it could be treated as a bailee under law, providing another path around partial ownership.

Third, Gorsuch was open to the notion of positive law “provid[ing] detailed guidance on evolving technologies without resort to judicial intuition. State (or sometimes federal) law often creates rights in both tangible and intangible things.”<sup>106</sup> As he did in *Byrd*, Gorsuch explored the idea of state-created, positive-law digital property rights during oral arguments when he asked Carpenter’s lawyer whether, if “a thief broke into T-Mobile, stole this information and sought to make economic value of it,” would Carpenter “have a conversion claim . . . under state law?”<sup>107</sup> Carpenter’s lawyer seemed to have

<sup>103</sup> *Carpenter*, 138 S. Ct. at 2269 (Gorsuch, J., dissenting).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 2270.

<sup>106</sup> *Id.* at 2269–70.

<sup>107</sup> Transcript of Oral Arg. at 38, *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (No. 16-402).

been caught off-guard by the question. Gorsuch later brought up the topic with the government's counsel, asking whether the existence of a viable conversion claim would make accessing CLSI "a search of . . . paper or effect under the property-based approach approved and reminded us in *Jones*?"<sup>108</sup> The government lawyer fought the hypothetical and refused to answer the question on the grounds that no such positive-law property right existed, but the exchange demonstrates that this approach to Fourth Amendment law had been on Gorsuch's mind throughout the case and was also on his mind in *Byrd*. If legislatures start acting to create these positive-law property rights, Gorsuch believes that "that may supply a sounder basis for judicial decisionmaking than judicial guesswork about societal expectations."<sup>109</sup>

Gorsuch's fourth point is, in truth, a caveat to his third. He wanted to make clear that the positive-law train goes only one way: "while positive law may help establish a person's Fourth Amendment interest there may be some circumstances where positive law cannot be used to defeat it." *Ex parte Jackson*, for instance, "suggests the existence of a constitutional floor below which Fourth Amendment rights may not descend. Legislatures cannot pass laws declaring your house or papers to be your property except to the extent the police wish to search them without cause."<sup>110</sup>

Fifth, Gorsuch made a brief remark concerning subpoenas, noting that "this constitutional floor may, in some instances, bar efforts to circumvent the Fourth Amendment's protection through the use of subpoenas."<sup>111</sup> He largely left this up to further historical research on the original meaning of the amendment, but noted that the Fifth Amendment may be the source of stronger protection against subpoenas, not the Fourth. At the same time, he was wary of returning to *Boyd v. United States*, a case which, on similar reasoning, restricted the use of nearly all subpoenas and eventually proved unworkable.<sup>112</sup>

Finally, Gorsuch understood that constructing a non-*Katz* version of the Fourth Amendment based in property rights and positive

<sup>108</sup> *Id.* at 52.

<sup>109</sup> *Carpenter*, 138 S. Ct. at 2270.

<sup>110</sup> *Id.* at 2271.

<sup>111</sup> *Id.*

<sup>112</sup> *Boyd v. United States*, 116 U.S. 616 (1886).

law was difficult and underexplored. This is particularly true when there is a lack of complete ownership, as in the case with transfers of rental cars and the third-party doctrine. Unlike Justices Thomas and Kennedy, Gorsuch thought it was “entirely possible a person’s cell-site data could qualify as *his* papers or effects under existing law.”<sup>113</sup> *Carpenter* argued in his merits brief that a “property-based analysis under the Fourth Amendment provides an independent ground for holding that the government conducts a search.”<sup>114</sup> Those arguments, however, were not developed before the district court and the court of appeals. For Gorsuch, “Mr. Carpenter’s discussion of his positive law rights in cell-site data was cursory.” “He offered no analysis, for example, of what rights state law might provide him with” in addition to federal law.<sup>115</sup>

Despite the limited briefing, Gorsuch pointed out that, while the telephone carrier possesses the customer’s information in some sense, the Wireless Communication and Public Safety Act of 1999 (WCPSA) describes that information as “customer proprietary network information”<sup>116</sup> (CPNI) and “generally forbids a carrier to ‘use, disclose, or permit access to individually identifiable’ CPNI without the customer’s consent, except as needed to provide the customer’s telecommunications services.”<sup>117</sup> Moreover, “Congress even afforded customers a private cause of action for damages against carriers who violate the Act’s terms.”<sup>118</sup>

Given those federal protections, “those interests might even rise to the level of a property right,” but the “problem is that we don’t know anything more” due to Carpenter’s unwillingness to develop the argument further.<sup>119</sup> Thus, to Gorsuch, the *Carpenter* case “offers a cautionary example” to those in the future who fail to adequately explore the relationship between the Fourth Amendment and positive law in their briefs to the Court.

<sup>113</sup> *Carpenter*, 138 S. Ct. at 2272 (Gorsuch, J., dissenting).

<sup>114</sup> Brief for Petitioner at 32, *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (No. 16-402).

<sup>115</sup> *Carpenter*, 138 S. Ct. at 2272 (Gorsuch, J., dissenting).

<sup>116</sup> 47 U.S.C. § 222 (2012).

<sup>117</sup> *Carpenter*, 138 S. Ct. at 2272 (quoting 47 U.S.C. § 222(c)(1)).

<sup>118</sup> *Id.* (citing 47 U.S.C. § 207).

<sup>119</sup> *Id.*

### III. The Evolving Fourth Amendment<sup>120</sup>

Justice Gorsuch's dissent offered many stirring and interesting critiques of Fourth Amendment doctrine post-*Katz*. If the Fourth Amendment were to be based on positive property law and other positive law, what would that look like? Moreover, are there any philosophical and jurisprudential reasons to re-think Fourth Amendment jurisprudence as grounded in positive law?

We believe there are. In this section we will examine the philosophical justifications for grounding the Fourth Amendment in positive law—namely, that a Fourth Amendment rooted in positive law is a source of legitimacy for state actors' presumptive violations of property rights. Positive law delineates where non-state actors are allowed to go and what non-state actors are allowed to do. Positive law determines, or can determine, whether non-state actors are allowed to fly a drone over another's yard, secretly record someone's conversations in a phone booth, collect someone's DNA, or attach a GPS monitor to someone's car. It also determines when someone has been falsely imprisoned, harassed, stalked, or had his privacy otherwise invaded. If a state actor violates one of those rules, something must differentiate his actions from that of a common thief or kidnapper. In our view, the Fourth Amendment's reasonableness and warrant requirements are the source of that legitimacy, and the requirements kick-in as soon as a state actor has done what a non-state actor is prohibited from doing—namely, violating positive law.

Next, we will explore how positive property law has been used in the context of the Takings Clause, allowing it to evolve but keeping it rooted in the text and original meaning. It may seem strange to ground a constitutional provision in rules and definitions created by state and federal law, but it's been done before. Finally, we will briefly explore how positive law can help clarify the application of the Fourth Amendment in two emerging areas: drones and DNA collection.

#### *A. The Fourth Amendment and the Legitimacy of State Action*

Governments have special privileges and powers that ordinary people do not. Those powers are exemptions to general rules of conduct

<sup>120</sup> This section was heavily influenced by William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 Harv. L. Rev. 1821 (2016). It seems that Justice Gorsuch also found the article illuminating, as he cites it twice in his dissent. This prescient scholarship made our task much easier.

that are applicable to everyone in nearly every circumstance: don't steal, assault, murder, kidnap, trespass, extort, or break into and search someone's property. On initial reflection, it's not clear why government officials are allowed to break generally applicable moral rules, especially after it becomes clear that "the mass of mankind has not been born with saddles on their backs, nor a favored few booted and spurred, ready to ride them legitimately, by the grace of God."<sup>121</sup> Enlightenment thinkers such as Locke, Montesquieu, and Hobbes spent much of their lives articulating justifications and limitations for the moral exemptions granted to governments. Thomas Jefferson was greatly influenced by those thinkers, particularly Locke, when he wrote:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. *That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.*<sup>122</sup>

Our Constitution is based on those founding tenets and on the understanding that a government that is sufficiently powerful to accomplish useful public functions is also one powerful enough to trample on the rights of the people. That was James Madison's "great difficulty": "You must first enable the government to control the governed; and in the next place oblige it to control itself."<sup>123</sup> In order to ensure that government officials don't abuse the moral exemptions granted to them, the Constitution imposes numerous restrictions on when, where, and how those officials can use their powers.

Within the Bill of Rights, the Fourth Amendment is somewhat unique in that it describes how the government is to carry out certain rights-endangering activities. This differentiates it from many of the other provisions of the Bill of Rights that are described as outright prohibitions rather than descriptions of how state actors are to behave. Thus, when the First Amendment says "Congress shall make no law . . . abridging the freedom of speech, or of the press," it doesn't describe the strictures to be obeyed in making such a law. Similarly, "the right

<sup>121</sup> Letter from Thomas Jefferson to Roger Weightman, Mayor of Wash. D.C. (June 24, 1826), <http://www.loc.gov/exhibits/jefferson/214.html>.

<sup>122</sup> Declaration of Independence para. 2 (U.S. 1776) (emphasis added).

<sup>123</sup> The Federalist No. 51 (Madison).



to keep and bear arms shall not be infringed,"<sup>124</sup> and "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted,"<sup>125</sup> to name a few more. In this way, the Fourth Amendment is like the Takings Clause—both implicitly acknowledge that, if done properly, searching and taking property are legitimate functions of government in a way that suppressing speech is not. And, as will be discussed more *infra*, the Fourth Amendment and the Takings Clause are also similar in their reliance on positive law.

The Fourth Amendment, like the Takings Clause, presupposes property through its use of the term "their"—that is, "the right of the people to be secure in *their* persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."<sup>126</sup> Understanding that state officials would be given exemptions to violate individual's property rights, the Fourth Amendment attempts to limit and define how those exemptions are granted. As Professors Lillian BeVier and John Harrison write:

Under the sub-constitutional law that protects private property, people are not free to enter another's home, or physically seize another's person, without permission. As a result, it is much easier for people to keep secrets from one another than it otherwise would be. But governments routinely authorize their agents to search for evidence of wrongdoing in ways that would be unlawful for a private person. Search warrants are a classic example; they empower officers to use physical force, if necessary, to enter private property without the owner's permission. Warrants, and other sources of special authority to search, thus present a threat to rights-holders that the private law does not deal with because it does not apply to the government as it does to others. The Fourth Amendment adds an additional layer of rules that the ordinary legislative process may not alter—rules designed specifically for the special search and seizure powers of officials. It does permit searches that a private person could never undertake, but requires that they be reasonable. It does allow the special exception to private rights created by warrants but regulates their issuance and content.<sup>127</sup>

<sup>124</sup> U.S. Const. amend. II.

<sup>125</sup> U.S. Const. amend. VIII.

<sup>126</sup> U.S. Const. amend. IV (emphasis added).

<sup>127</sup> Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 Va. L. Rev. 1767, 1790 (2010).

If we understand the Fourth Amendment as delineating limits on the exemptions granted to government, it becomes important to clarify what, precisely, government actors are being exempted from—namely, what can normal people (that is, non-state actors) do and what are they prohibited from doing? Government actors can certainly do what normal people do—in ordinary circumstances, joining the government doesn't reduce your rights as a private citizen—but they must act in accordance with the strictures of the Fourth Amendment when doing what is prohibited to normal people, such as forcibly entering a house, searching it, and/or seizing another person's property or body.

Viewed this way, the Fourth Amendment restrictions on searches and seizures by government officials are not merely there to protect the people from abuses, although they do that too. More fundamentally, the restrictions of the Fourth Amendment are a source of *legitimacy* for state action. A bill must pass both houses of Congress and be signed by the president to become a law<sup>128</sup>—thus becoming a presumptive justification for the legitimate use of force by state agents. But, just as the president doesn't wield kingly authority to pronounce the laws,<sup>129</sup> a properly conducted search or seizure must conform to the Fourth Amendment to be legitimate.

Such requirements of legitimate state action are what separate, at least in theory, state officials from common criminals, or, perhaps, mere “stationary bandits.”<sup>130</sup> A burglar and a searching-and-seizing police officer are quite similar at first glance, but it is not the uniform that authorizes the police officer to commit ostensibly immoral actions. The officer must carry out his search according to law to be legitimate, and he is subsequently liable if he transgresses those requirements.

At least, that's how it used to be, before the growth of qualified immunity and the advent of the exclusionary rule.<sup>131</sup> As Professor Richard Re notes, “Early in American history—many decades before

<sup>128</sup> *INS v. Chadha*, 462 U.S. 919, 952–59 (1983).

<sup>129</sup> The myriad problems with the administrative state notwithstanding. See generally, Philip Hamburger, *Is Administrative Law Unlawful?* (2014) (spoiler: yes it is).

<sup>130</sup> Mancur Olson, *Dictatorship, Democracy, and Development*, 87 *Am. Pol. Sci. Rev.* 567 (1993).

<sup>131</sup> Richard M. Re, *The Due Process Exclusionary Rule*, 127 *Harv. L. Rev.* 1885, 1918–20 (2014).

the modern category of constitutional criminal procedure was invented—unreasonable searches and seizures were generally viewed as a species of tort in the same legal category as trespasses perpetrated by private parties.”<sup>132</sup> For most of American history “[u]nconstitutional searches were adjudicated according to a three-step process: (i) the aggrieved party brought a trespass action; (ii) the federal officer claimed immunity, usually based on a warrant; and (iii) to overcome the asserted immunity defense, the aggrieved party alleged violation of the Fourth Amendment.”<sup>133</sup>

Note what happened in this process, particularly in the context of classical liberal theories of legitimate government action: (1) A citizen claims that a government agent was a mere trespasser, as any normal person would be if they searched private property without consent; (2) the government agent claims that, no, he should be given the benefit of the special governmental exemption from standard moral rules, or in other words, he deserves the special *immunity* conferred upon state actors who commit presumptively immoral property violations; and (3) the citizen responds by arguing that such exemptions are *only* granted by acting in conformity with the Fourth Amendment, which the state actor did not. In a sense, by not acting in conformity with the Fourth Amendment, the state actor has converted himself into a private actor, stripping himself of the cloak of immunity derived from acting in conformity with law.

This is, in essence, what famed and influential English jurist Sir Matthew Hale meant when he attacked the legitimacy of general warrants in 1736. By being illegitimate, such warrants gave state officials no exemption from general property rules: “searches made by pretense of such general warrants give no more power to the officer or party than what they may do by law without them.”<sup>134</sup>

Under this understanding, it’s no wonder that alleged Fourth Amendment violations were adjudicated as private-law tort claims because the argument was, in essence, that the state actor became a private actor by performing an unreasonable search or seizure. In so doing, the state actor became someone who, according to law and custom, had gone where he wasn’t allowed to go and done what

<sup>132</sup> *Id.* at 1918–19 (footnote omitted).

<sup>133</sup> *Id.* at 1920.

<sup>134</sup> Matthew Hale, 2 *Historia Placitorum Coronae* 150 (Rider 1800).

he wasn't allowed to do. As Professor Re writes, the original Fourth Amendment "ensured that 'unreasonable' federal officials would be treated just like private common law trespassers."<sup>135</sup>

*B. The Use of Property Law in the Takings Clause*

Positive law informs the acceptable behavior of normal people and, therefore, also informs when state actors have moved beyond that acceptable behavior. An examination of positive law can lead us to an alternative way of defining when a "search" occurred, free from the unpredictable *Katz* framework. When the rules of positive law are not obeyed, the Fourth Amendment kicks in and a "search" or "seizure" has occurred. This may seem like a radical departure from standard Fourth Amendment law, but in many ways it's not.

Using positive law to illuminate the meaning of constitutional provisions is not new, and in fact, is often necessary. The Takings Clause of the Fifth Amendment is the most obvious example. As Justice Gorsuch says in his *Carpenter* dissent, "In the context of the Takings Clause we often ask whether those state-created property rights are sufficient to make something someone's property for constitutional purposes. A similar inquiry may be appropriate for the Fourth Amendment."<sup>136</sup>

By prohibiting the taking of private property except for public use and with just compensation, the Takings Clause presupposes the existence of private property. The states, as the pre-existing sovereigns that came together to create the Constitution, define property law. "Because the Constitution protects rather than creates property interests," the Court has said, "the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'"<sup>137</sup>

Perhaps, in an alternate constitutional historical timeline, a creative justice would have severed the Takings Clause from its roots in independent sources of state property law. Opining that the Takings Clause "protects people, not places,"<sup>138</sup> our hypothetical justice

<sup>135</sup> Re, *supra* note 131, at 1920.

<sup>136</sup> *Carpenter*, 138 S. Ct. at 2270 (Gorsuch, J., dissenting).

<sup>137</sup> *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998) (quoting *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)).

<sup>138</sup> *Katz*, 389 U.S. at 351.

creates a test that protects an individual's "reasonable expectation of property." That test would then be applied to situations such as occurred in *Murr v. Wisconsin*: two adjacent lots are purchased separately but are later effectively merged by subsequent state and local rules.<sup>139</sup> The reasonable expectation of property test would protect the reasonable expectation that the lots would remain separate.<sup>140</sup>

This, of course, did not happen, but if it did, many scholars and judges would be complaining that the Takings Clause had become unmoored from the Constitution. Instead, the Takings Clause has been consistently connected to evolving concepts of property law, and the Court has held that "a mere unilateral expectation or an abstract need is not a property interest entitled to protection."<sup>141</sup> As positive law delineates new species of property not known at the Founding, the Court has taken those changes into account. Thus, the Court has extended the Takings Clause to cover a materialman's lien established by Maine law,<sup>142</sup> real estate liens,<sup>143</sup> trade secrets,<sup>144</sup> and valid contracts.<sup>145</sup> Few if any justices have argued that the Takings Clause should only protect forms of property recognized at the Founding (at least these authors couldn't find one). In fact, expanding the Takings Clause to cover new forms of property is more often characterized as closely adhering to the original intent. In applying the Takings Clause to "the interest accruing on an interpleader fund deposited in the registry of the county court," the Court said that "this is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent."<sup>146</sup>

It's doubtful, of course, that something as specific as interest on a bank account was "the very kind of thing" that the Framers intended the Takings Clause to prevent. What the Court meant was that the Takings Clause was meant to prevent the more abstract

<sup>139</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017).

<sup>140</sup> In applying the "reasonable investment-backed expectations" prong of the *Penn Central* test, the courts already arguably do something relatively similar. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 127–29 (1978).

<sup>141</sup> *Webb's Fabulous Pharms. v. Beckwith*, 449 U.S. 155, 161 (1980).

<sup>142</sup> *Armstrong v. United States*, 364 U.S. 40, 44, 46 (1960).

<sup>143</sup> *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 596–602 (1935).

<sup>144</sup> *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

<sup>145</sup> *Lynch v. United States*, 292 U.S. 571, 579 (1934).

<sup>146</sup> *Webb's Fabulous Pharms.*, 449 U.S. at 155, 164.

concern of turning “private property into public property without compensation.”<sup>147</sup> That abstract concern is not dissimilar from the abstract concerns animating the Fourth Amendment. State actors are granted a privilege that normal people don’t have—namely, the ability to forcibly take someone’s property for a public use—and therefore certain strictures must be obeyed if that taking is not mere theft for personal gain. Like the Fourth Amendment, the requirements of the Takings Clause are about legitimacy; by obeying certain constraints, a presumptive violation of general moral rules can become a legitimate state action.

### *C. How Positive Law Can Be Used in the Fourth Amendment*

You’ve received a new drone for Christmas. It flies nimbly through the air and constantly films high-resolution video. You take it outside to try it out and direct it to hover over your neighbor’s yard. He’s always had this strange building on his lot, and you know the ceiling is glass. Even at 300 feet in the air, the drone’s zoom is good enough to get a glimpse.

Or, perhaps you’ve always wondered about the ethnicity of your co-worker. Sure, she says she’s English with a little bit of Polish, but you’re pretty sure that she has some South Asian in her. If she is South Asian, she can come to your monthly South Asian meet-up, which you think she’ll enjoy. Plus, it might be a nice surprise for her to find out something about her genetic history. One day you grab from the trash a coffee cup she used and swab it for DNA, which you send to 23andMe.

Most people would question the legality of the actions in both these situations—and they would be right to do so. On the question of drones, common law defined trespass by aircraft fairly narrowly: an aircraft flown “above the land of another is a trespass if, but only if, (a) it enters into the immediate reaches of the air space next to the land, and (b) it interferes substantially with the other’s use and enjoyment of his land.”<sup>148</sup> That rule seems somewhat antiquated in a world of drones, and states throughout the country have been passing laws regulating their use. According to the National Conference of State Legislatures, “41 states have enacted laws addressing

<sup>147</sup> *Id.* at 164.

<sup>148</sup> Restatement (Second) of Torts § 159(2) (Am. Law. Inst. 1965).

[drones] and an additional three states have adopted resolutions.”<sup>149</sup> Some laws, such as North Dakota’s, prohibit “any private person to conduct surveillance on any other private person” via a drone.<sup>150</sup>

States have also begun regulating “DNA theft.”<sup>151</sup> In Alaska, for example, “a person may not collect a DNA sample from a person, perform a DNA analysis on a sample, retain a DNA sample or the results of a DNA analysis, or disclose the results of a DNA analysis unless the person has first obtained the informed and written consent of the person.”<sup>152</sup> Alaska also creates a property right in your “DNA sample and the results of a DNA analysis performed on the sample.”<sup>153</sup>

While states are experimenting with various positive laws that can help manage the emerging problems associated with drones and DNA testing, the Supreme Court is stuck in the past. In 1985, the Supreme Court, relying on *Katz’s* reasonable expectation of privacy test, ruled that the Fourth Amendment “simply does not require the police traveling in the public airways . . . to obtain a warrant in order to observe what is visible to the naked eye.”<sup>154</sup> And in 2013, in *Maryland v. King*, the Court ruled that “taking and analyzing a cheek swab of the arrestee’s DNA is . . . a legitimate police booking procedure that is reasonable under the Fourth Amendment.”<sup>155</sup>

With both aerial surveillance and DNA, we see how a positive-law theory of the Fourth Amendment can illuminate whether and how these emerging technologies should be restricted under the Fourth Amendment. A state’s drone laws define what private people can do with their unmanned aircraft and should also define when state-actors have searched private property. And while the Court in *King* ruled that a cheek swab of an arrestee was search, albeit a reasonable one, future cases will have to deal with the surreptitious

<sup>149</sup> Current Unmanned Aircraft State Law Landscape, Nat. Conf. of State Legislatures, Feb. 1, 2018, <http://www.ncsl.org/research/transportation/current-unmanned-aircraft-state-law-landscape.aspx>.

<sup>150</sup> N.D. Cent. Code § 29.29.4-05(2) (2015).

<sup>151</sup> See generally, Elizabeth E. Joh, DNA Theft: Recognizing the Crime of Nonconsensual Genetic Collection and Testing, 91 B.U. L. Rev. 665 (2011).

<sup>152</sup> Alaska Stat. § 18.13.010(a)(1) (2004).

<sup>153</sup> *Id.* at (a)(2).

<sup>154</sup> *California v. Ciralo*, 476 U.S. 207, 215 (1985).

<sup>155</sup> *Maryland v. King*, 569 U.S. 435, 465–66 (2013).

collection of DNA, as occurred when the “Golden State Killer” was captured by comparing a clandestinely obtained sample from a suspect with an online genetic database.<sup>156</sup>

Finally, it is important to highlight the sense of unlawfulness that most people would experience if they either surveilled a neighbor with a drone or furtively collected a colleague’s DNA. In some sense, such actions *feel* wrong, and rightfully so. Yet police across the country are currently free to conduct aerial surveillance and collect DNA without asking for an exemption to general moral rules—that is, a warrant or a determination that a search is reasonable. Ultimately, bringing the Fourth Amendment into better alignment with the rules that govern private actors could help police earn more legitimacy and respect. There’s nothing quite so upsetting as a state-sanctioned lawbreaker.

## Conclusion

*Carpenter v. United States* was a blockbuster case, but perhaps not for the reasons many expected. Cell-site location information is now protected by the Fourth Amendment, albeit in a still unclear manner. That’s a victory for privacy.

But it’s still a small victory. The unworkable and antiquated third-party doctrine remains, and it is unclear whether the holes punched in it by *Carpenter* will expand. The third-party doctrine, as well as the *Katz* reasonable-expectation-of-privacy test, still stand on shaky doctrinal and theoretical grounds, and it’s likely shakier now due to *Carpenter*.

Yet for those who have long been frustrated by the Fourth Amendment’s bizarre reasonable-expectation-of-privacy test, *Carpenter* represents the beginning of what will likely be growing shift away from *Katz* and its progeny. Justice Thomas expressed extreme skepticism towards *Katz*—just as in *Jones*, both Justice Sotomayor and Justice Alito indicated doubts that the Fourth Amendment condoned the uses of certain types of mass surveillance.

Ultimately, it is Justice Gorsuch’s opinion that will prove to be the most important aspect of *Carpenter*. Not only did Gorsuch raise

<sup>156</sup> Matt Ford, How the Supreme Court Could Rewrite the Rules for DNA Searches, *New Republic*, Apr. 30, 2018, <https://newrepublic.com/article/148170/supreme-court-rewrite-rules-dna-searches>.



trenchant criticisms of *Katz*, but he took the time to offer an alternative: A Fourth Amendment jurisprudence based in property law and positive law rather than one based in the bizarre and atextual use of the reasonable expectation of privacy. And while that view is still undertheorized, Gorsuch has signaled that he's willing to listen.

And that's how Fourth Amendment law slowly begins to change. Savvy future litigants will no longer ignore positive-law arguments when bringing their cases to the Court. When warranted, Justice Gorsuch is likely to write separate opinions expounding upon positive-law theory and, in so doing, slowly develop a coherent alternative to current Fourth Amendment jurisprudence rooted in classical liberal philosophy and better committed to the text. Whether any justices will go along with him remains to be seen, but it will be exciting to watch.

