Decentering Property in Fourth Amendment Law

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For the past several decades, privacy has been the primary conceptual foundation for Fourth Amendment search law. The canonical test for Fourth Amendment searches accordingly looks to whether the government has violated a person's reasonable expectation of privacy. Yet privacy is no longer the sole determinant of Fourth Amendment protection, as the Supreme Court has recently added a property-based test to address cases involving physical intrusions on land or chattel. Further, given the ambiguity of the reasonable expectation of privacy test, a variety of influential judges and scholars have proposed relying primarily, or even exclusively, on property in determining the Fourth Amendment's scope. And the current Supreme Court, which has changed substantially since its last major Fourth Amendment case, seems especially likely to be receptive to property-based approaches.

This Article exposes the overlooked challenges and flaws of a property-centered Fourth Amendment. Pushing past simple hypotheticals, it examines the complications of real-world property law and demonstrates its complexity and uncertainty. It also explores the malleability of property rights and reveals how governments can manipulate them in order to facilitate pervasive surveillance.

Turning to the normative justifications for Fourth Amendment protections, the Article addresses the narrowness and arbitrariness of property-based approaches. Fourth Amendment regimes based on property are likely to be underinclusive, offering little protection for the digital data that is often the focus of modern government surveillance. And property-centered approaches tend to ground Fourth Amendment law on trivial physical contact while ignoring far greater intrusions that raise concerns about pervasive surveillance and fundamental rights. Finally, the Article contends that, because property is unequally distributed along race and class lines, its use as a determinant of Fourth Amendment protections risks leaving the most disadvantaged members of society with the least protection. While property concepts will be relevant in certain cases, they should be used very carefully, and very little, in Fourth Amendment law.

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INTRODUCTION

Property concepts like ownership, occupancy, possession, and abandonment arise frequently throughout the law—not just in property cases, but in contracts, wills, bankruptcy, tax, and many other areas. If a person wants to sue in tort for damage to property, they will typically have to establish that they own the property in question. Even First Amendment cases often involve disputes over uses of property, and speakers' rights are often dependent on their ownership of or access to property.[1] And in the Fourth Amendment context, whether someone owns or possesses property may determine whether they can challenge a police search of that property.[2] In short, property concepts are often part of the factual context of

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[1] *See* Louis Michael Seidman, *The* Dale *Problem: Property and Speech Under the Regulatory State*, 75 U. CHI. L. REV. 1541, 1566 (2008).

[2] *E.g.*, Rawlings v. Kentucky, 448 U.S. 98, 104–05 (1980); Rakas v. Illinois, 439 U.S. 128, 134 (1978).

cases in other areas of law. Because the world is full of property, these concepts are likely to arise in virtually any legal setting.

In recent years, several influential judges have sought to elevate property's role in Fourth Amendment law, arguing that it should be the primary determinant of Fourth Amendment protection, rather than mere context or background.[3] The Supreme Court has not yet gone quite that far, but it has recently articulated a property-based test[4] that operates alongside the well-known reasonable expectation of privacy test developed in *Katz v. United States*.[5] And the composition of the Court has changed since the last major Fourth Amendment search case, such that proponents of a property-centered Fourth Amendment may now have a majority, depending on the unknown proclivities of the newest Justices.[6]

At the same time, some of the nation's most prominent scholars are engaged in a robust discussion, providing theoretical and doctrinal support for a property-centered approach.[7] Like those of

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3 *See, e.g.*, Carpenter v. United States, 138 S. Ct. 2206, 2239–41 (2018) (Thomas, J., dissenting) (arguing that the Fourth Amendment's text limits its reach to a person's property); *id.* at 2227–28 (Kennedy, J., dissenting) (arguing that people have "greater expectations of privacy in things and places that belong to them, not to others," such that "the absence of property law analogues can be dispositive of privacy expectations"); Morgan v. Fairfield County, 903 F.3d 553, 570 (6th Cir. 2018) (Thapar, J., concurring in part and dissenting in part) ("This history thus shows that when the Framers used the word 'search,' they meant something specific: investigating a suspect's property with the goal of finding something.").

4 *See, e.g.*, Florida v. Jardines, 569 U.S. 1, 11 (2013); United States v. Jones, 565 U.S. 400, 406 (2012). The reasonable expectation of privacy test was first articulated in Justice John Marshall Harlan II's influential concurrence in *Katz v. United States*, 389 U.S. 347 (1967), which instructs courts to evaluate whether a search has occurred within the meaning of the Fourth Amendment by asking whether the officers intruded on the subject's "reasonable expectations of privacy." *Id.* at 362 (Harlan, J., concurring).

5 389 U.S. 347 (1967).

6 *See* Matthew Tokson, *The Aftermath of* Carpenter*: An Empirical Study of Fourth Amendment Law, 2018–2021*, 135 HARV. L. REV. 1790, 1834–36 (2022) [hereinafter Tokson, *Aftermath*].

7 *See generally, e.g.*, Danielle D'Onfro & Daniel Epps, *The Fourth Amendment and General Law*, 132 YALE L.J. 910 (2023); Mailyn Fidler, *Warranted Exclusion: A Case for a Fourth Amendment Built on the Right to Exclude*, 76 SMU L. REV. 315 (2023); Sam Kamin, Katz *and* Dobbs*: Imagining the Fourth Amendment Without a Right to Privacy*, 101 TEX. L. REV. ONLINE 80 (2022); João Marinotti, *Escaping Circularity: The Fourth Amendment and Property Law*, 81 MD. L. REV. 641 (2022); Michael J. O'Connor, *Digital Bailments*, 22 U. PA. J. CONST. L. 1271 (2020); Morgan Cloud, *Property Is Privacy: Locke and Brandeis in the Twenty-First Century*, 55 AM. CRIM. L. REV. 37 (2018) [hereinafter Cloud, *Property Is Privacy*]; Laura K. Donohue, *Functional Equivalence and Residual Rights Post-*Carpenter*: Framing a Test Consistent with Precedent and Original Meaning*, 2018 SUP. CT. REV. 347 [hereinafter Donohue, *Functional Equivalence and Residual Rights*];

their judicial counterparts, these scholars' arguments have been rooted in a number of foundations, including the belief that a property-based Fourth Amendment would be clearer, more predictable, and more logically coherent than a privacy-based approach.[8] There are a variety of property-based proposals in the literature, ranging from overt calls to incorporate property law into Fourth Amendment doctrine to unique theories inspired by general property concepts.[9] Missing from this discussion, however, is a careful analysis of what the applicable property principles actually look like. Proponents assume that property law is clear, straightforward, and more resistant to manipulation than allegedly airy principles like privacy.[10]

We challenge that premise. This Article is the first to tackle this question from a predominantly property-based perspective, and it demonstrates that property law is neither sufficiently clear nor sufficiently resistant to manipulation to justify making it the fulcrum of the Fourth Amendment.[11]

Property is as capacious, multifaceted, and potentially complicated as privacy, with numerous forms of ownership that are divisible and combinable across people and time.[12] The rights

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

8 *See supra* note 7 (collecting sources); *cf. Carpenter*, 138 S. Ct. at 2244–45 (Thomas, J., dissenting) ("[T]he *Katz* test also has proved unworkable in practice."); *id.* at 2227–28 (Kennedy, J., dissenting). Some have also offered originalist justifications, which we discuss and critique below. *See infra* notes 112–21 and accompanying text.

9 *See infra* Part I.C (elaborating on these proposals).

10 *See, e.g.*, *Carpenter*, 138 S. Ct. at 2245 (Thomas, J., dissenting) ("As for 'understandings that are recognized or permitted in society,' this Court has never answered even the most basic questions about what this means." (quoting *Rakas*, 439 U.S. at 144 n.12)); O'Connor, *supra* note 7, at 1274 ("Privacy law necessarily entails uncertainty. By contrast, property law provides certainty by design."); Morgan Cloud, *Rube Goldberg Meets the Constitution: The Supreme Court, Technology and the Fourth Amendment*, 72 MISS. L.J. 5, 28 (2002) [hereinafter Cloud, *Rube Goldberg*] ("[S]ubstantive property rights no longer served as a limit on searches and seizures. . . . Instead, some evanescent and barely articulated concepts of privacy were to be protected."); *see also* Baude & Stern, *supra* note 7, at 1836, 1850–51 (addressing positive law as a whole, expressly including property law); Cloud, *Property Is Privacy*, *supra* note 7, at 60–61 (arguing that the modern concept of a right to privacy was, from the start, grounded in property); *Carpenter*, 138 S. Ct. at 2227–28 (Kennedy, J., dissenting) (arguing that the *Katz* test requires reference to property interests both as normative and textual matters).

11 Professor Maureen Brady has written insightfully about the administrability and disuniformity issues associated with Professors Danielle D'Onfro and Daniel Epps's general law approach to the Fourth Amendment, which is largely centered around property law. *See* Maureen E. Brady, *The Illusory Promise of General Property Law*, 132 YALE L.J.F. 1010, 1022–42 (2023); D'Onfro & Epps, *supra* note 7, at 955.

12 *See infra* Part II.A.

that flow from ownership can also be called into question by the nuances of others' claims and actions pursuant to concepts like adverse possession;[13] statutes like recording acts;[14] bailments and gift law;[15] the niceties of easements;[16] and more. In addition to these complications, property law does not address every issue likely to arise in police search cases, and it is accordingly unable to satisfactorily answer many Fourth Amendment questions. When property law "runs out," these cases are likely to be resolved by retreating yet again to intuitions about privacy.[17]

Perhaps even worse, property is particularly vulnerable to manipulation by the very governments from which the Fourth Amendment is meant to offer protection.[18] Governments can successfully negotiate with developers and landlords for the forfeiture of property interests, and they can sometimes even demand it.[19] Governments can also shape, in the first instance, the contours of what property is and what rights may flow from ownership of something.[20] On top of all of that, property is also unequally distributed across society, with wealthy white people owning more property, in less manipulated forms, than less wealthy people and people of color.[21] The more that property principles shape the Fourth Amendment, the more that these disparities threaten to create one Fourth Amendment for the haves and another for the have-nots, who are already those most surveilled and most at risk of harm by law enforcement.[22]

Moreover, some of the most pressing Fourth Amendment questions—now and in the foreseeable future—involve electronic data and other forms of information largely outside the realm of property law.[23] Grounding the Fourth Amendment in property principles thus risks excluding wide swaths of private information from its protection.[24] Further, because government surveillance itself has become decoupled from property over the last century, and particularly in the digital era, basing the Fourth

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13 *See infra* Part II.B.1.
14 *See infra* Part II.B.2.
15 *See infra* Part II.B.3.
16 *See infra* Part II.C.
17 *See, e.g.*, *infra* notes 147–49, 191–93, and accompanying text.
18 *See infra* Part III.
19 *See infra* Part III.C.
20 *See infra* Part III.A.
21 *See infra* Part V.C.
22 *See infra* note 242.
23 *See infra* Part IV.A.
24 *See infra* Part IV.

Amendment's scope on property will often result in extremely arbitrary outcomes. In many cases, the government's property intrusions are purely incidental to gathering sensitive data about individuals—like a microphone that touches an apartment's heating duct while it secretly records the occupant's personal conversations.[25] Making the Fourth Amendment turn on the grazing of the heating duct, rather than the recording of people's conversations, badly misses the point. The real concern is the collection of sensitive information about people's lives, not the incidental touching of their property.

The drawbacks and risks of property-centered approaches have gone largely unappreciated in scholarly and judicial debates. This Article demonstrates that basing Fourth Amendment law on property concepts would be a serious mistake and would risk making the scope of the Fourth Amendment more ambiguous, more complex, more arbitrary, and more susceptible to government manipulation.

The Article then turns to alternative approaches to the Fourth Amendment that may offer the clarity and predictability that property fails to deliver. First, while giving due credit to criticisms of the *Katz* test as vague and unpredictable in frontier cases, we describe how the Supreme Court has addressed a wide variety of Fourth Amendment questions over the decades and has clarified Fourth Amendment law through the gradual accretion of precedent.[26] Second, we consider a new privacy-based approach emerging in the lower courts that draws on factors discussed in the Supreme Court's recent decision in *Carpenter v. United States*.[27] This nascent test looks to the characteristics of the government surveillance practice rather than expectations of privacy.[28] Its conceptual foundation and well-defined structure is likely to make it more predictable and stable than *Katz*'s existing standard.[29]

Finally, the Article addresses the ideal role that property concepts should play in Fourth Amendment law. They will, inevitably, play some role, at least in some disputes. The questions are *how* courts should analyze property law in Fourth Amendment

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25 *See, e.g.*, Silverman v. United States, 365 U.S. 505, 509–10 (1961).

26 *See infra* Part V.A.

27 138 S. Ct. 2206 (2018); *see also* Tokson, *Aftermath*, *supra* note 6, at 1831–32.

28 *See Carpenter*, 138 S. Ct. at 2222.

29 Matthew Tokson, *The* Carpenter *Test as a Transformation of Fourth Amendment Law*, 2023 U. ILL. L. REV. 507, 527 [hereinafter Tokson, *Transformation*].

cases and *how often* property principles should determine case outcomes. Our answers: very carefully and very rarely. Property law is best suited for a background role in Fourth Amendment cases, establishing the factual context of certain disputes without dictating fundamental rights or expectations of privacy. This is especially the case given the tendency of property distributions to reinforce race and class inequalities in society.[30] While property rights may influence who can claim the Fourth Amendment's protection in certain places or for certain things, they should not be determinative, and courts should be cautious not to exacerbate existing differences in wealth and privilege by relying on them too heavily. Property—like general social norms, local conditions and opinions, practical and political circumstances, and other relevant considerations—functions best in the contextual backdrop of Fourth Amendment cases, not at center stage.

This Article proceeds in five parts. Part I briefly sets out the historical and current Fourth Amendment landscape before introducing the various proposals that bring property law into the constitutional analysis. Parts II and III dig deep into property law to catalog the numerous ways in which it is not well suited to govern the Fourth Amendment. Part II highlights how property law's nuances can create more complexity and ambiguity than Fourth Amendment law can reasonably accept. Part III demonstrates how easily the rights that flow from ownership and possession can be shaped and limited by government. Part IV explores the normative and functional considerations surrounding property-centered approaches, addressing the narrowness of their scope and the arbitrariness of what they protect and fail to protect. Part V closes by offering a qualified defense of the status quo, exploring an alternative approach emerging in the lower courts, and articulating the limited ways in which property principles can justifiably enter Fourth Amendment analysis.

I. PROPERTY AND THE FOURTH AMENDMENT'S SCOPE

There is a long-standing and complex relationship between property concepts and Fourth Amendment jurisprudence. This Part details the historical interplay between these two sources of law. It also examines the Supreme Court's recent turn to property in determining the Fourth Amendment's scope. It then explores some of the most prominent scholarly proposals for incorporating

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[30] *See infra* Part V.C.

property law and related concepts into substantive Fourth Amendment law.

A. Property and Fourth Amendment History

The history of Fourth Amendment law is, in a sense, one long back-and-forth between property-centered and privacy-centered approaches. The major British, pre-Founding search and seizure cases, some of which inspired the later drafting of the Fourth Amendment, were based on trespass tort actions—a property claim—where plaintiffs sought damages for government officers' unlawful entry into their houses.[31] The factual background of these cases therefore featured the plaintiffs' ownership of their homes and the constables' setting foot on their property.[32] But these cases predate the Fourth Amendment, and they can serve only as examples of government activity likely prohibited under the Amendment, rather than guides to its broader meaning. They shed no light on whether the Fourth Amendment's protections might apply in the absence of such a physical intrusion on an individual's land, or in any other context.[33]

During the first century after the Founding, Fourth Amendment search law largely lay dormant. Most crimes were investigated by the victims rather than government constables, and independent police departments did not exist for much of this period.[34] Further, the Amendment applied only to federal officials until the mid-twentieth century.[35] There was also no exclusionary remedy for Fourth Amendment violations until the twentieth century, which further limited the relevance of the Amendment.[36]

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[31] *See generally, e.g.*, Entick v. Carrington (1765) 95 Eng. Rep. 807; 2 Wils. K.B. 275; Wilkes v. Wood (1763) 98 Eng. Rep. 489; Lofft 1.

[32] *See, e.g.*, *Wilkes*, 98 Eng. Rep. at 490; Lofft at 3.

[33] *See* Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 73 [hereinafter Kerr, *Curious History*] ("Devising a test from a set of examples raises a level-of-generality problem: Examples alone cannot identify how far beyond their facts the principle should extend.").

[34] Wesley MacNeil Oliver, *The Neglected History of Criminal Procedure, 1850–1940*, 62 RUTGERS L. REV. 447, 449–59 (2010); David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1205–09 (1999).

[35] *See* Wolf v. Colorado, 338 U.S. 25, 27–28 (1949) (incorporating the Fourth Amendment against the states via the Due Process Clause of the Fourteenth Amendment), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

[36] *See Mapp*, 367 U.S. at 655 (creating an exclusionary remedy for Fourth Amendment violations by state officers); Weeks v. United States, 232 U.S. 383, 393–94 (1914) (establishing an exclusionary remedy for Fourth Amendment violations by federal officers); Kerr, *Curious History*, *supra* note 33, at 71.

When the Supreme Court finally addressed the scope of the Fourth Amendment in 1886, it emphasized privacy and liberty as much as property rights.[37] In *Boyd v. United States*,[38] the Court ruled that the Fourth Amendment prohibited the government from obtaining a court order to compel a suspect to disclose his financial records.[39] Though the case involved no physical intrusion on property, the Court reasoned that a physical intrusion was merely one of the "circumstances of aggravation" in Fourth Amendment cases, while the essence of the constitutional violation lay in its exposure of the "privacies" of the suspect's life.[40] Subsequent Supreme Court cases decided in the early 1900s reached similar conclusions,[41] with one emphasizing "an invasion of the defendant's privacy" as the conceptual core of a Fourth Amendment violation.[42]

The pendulum began to swing toward property in the late 1920s, as the Court grappled with new surveillance technologies and practices. In 1928, the Court held that government officers could wiretap suspects' telephone conversations without implicating the Fourth Amendment, so long as they did not physically enter the suspects' property.[43] Because the tapped telephone wires were not part of the residences or other buildings where the suspects' conversations took place, the Court held that the Fourth Amendment did not apply.[44] Similarly, in the 1942 case *Goldman v. United States*,[45]

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37 *See* Boyd v. United States, 116 U.S. 616, 630 (1886) ("[The protections of the Fourth Amendment] apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life."); *see also Ex Parte* Jackson, 96 U.S. 727, 732–33 (1877) ("[A]ll regulations adopted as to [invade the secrecy of letters] must be in subordination to the great principle embodied in the fourth amendment of the Constitution."); Morgan Cloud, *The Fourth Amendment during the* Lochner *Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 573 (1996) (describing how the Court in *Boyd* "employed deductive reasoning and categorical concepts of property rights to define expansive liberty and privacy rights protected by the Fourth and Fifth Amendments").

38 116 U.S. 616 (1886).

39 *Id.* at 634–35.

40 *Id.* at 630.

41 *See* Hale v. Henkel, 201 U.S. 43, 76–77 (1906) (holding that an order for production may constitute an unreasonable search within the meaning of the Fourth Amendment).

42 Perlman v. United States, 247 U.S. 7, 14 (1918) (noting the difference between the involuntary seizure of a person's papers and the voluntary production of those papers to the court); *see also Weeks*, 232 U.S. at 393–94 ("[It was not] within the authority of the United States marshal to thus invade the house and *privacy* of the accused." (emphasis added)).

43 Olmstead v. United States, 277 U.S. 438, 464 (1928), *overruled by Katz*, 389 U.S. 347, *and* Berger v. New York, 388 U.S. 41 (1967).

44 *Id.* at 465.

45 316 U.S. 129 (1942), *overruled by Katz*, 389 U.S. 347.

the Court found that federal agents did not violate the Fourth Amendment when they pressed an electronic listening device against the wall of a suspect's office in order to hear his conversations.[46] Because the device did not penetrate the wall or enter the suspect's office, its use was not a Fourth Amendment search.[47] By contrast, in 1961's *Silverman v. United States*,[48] the Court held that when police officers' microphone touched the heating duct of a suspect's house and recorded his conversations, there was a "physical invasion" that constituted an unlawful search.[49]

Yet by the time *Silverman* was decided, the Court had already begun to question the property-based reasoning of its prior cases. In a case involving the search of an apartment where the suspect was a guest, the Court rejected the use of property categories like licensees and invitees.[50] The opinion concluded "that it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions . . . [from] private property law."[51] In a 1967 case, the Court similarly declared that "[t]he premise that property interests control the right of the Government to search and seize has been discredited. . . . We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts."[52] A few months later, in a case that drives Fourth Amendment search law even today, the Court expressly overturned its property-based cases.

B. The Development of Modern Fourth Amendment Law

In *Katz*, the Supreme Court held that recording a suspect's conversations via a microphone placed on the outside of a phone booth violates the Fourth Amendment.[53] The majority proclaimed that "the Fourth Amendment protects people, not

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46 *Id.* at 131–32, 134–35.

47 *Id.* at 134–35.

48 365 U.S. 505 (1961).

49 *Id.* at 506–07, 510–11.

50 Jones v. United States, 362 U.S. 257, 265–66 (1960), *overruled by* United States v. Salvucci, 448 U.S. 83 (1980).

51 *Id.* at 266.

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

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

places."[54] Justice John Marshall Harlan II's influential concurrence developed what would come to be called the *Katz* test, a two-part inquiry that examines first whether a person has "exhibited an actual (subjective) expectation of privacy" and, second, whether that expectation is "one that society is prepared to recognize as 'reasonable.'"[55] In practice, most courts apply this test as a single standard, focusing on whether the government has violated a person's "reasonable expectation of privacy."[56]

Courts have applied different theories of what makes an expectation of privacy reasonable, and the Supreme Court's interpretations of the standard are often inconsistent.[57] Without an overarching theory of reasonableness, Fourth Amendment search law has largely progressed case by case.[58] Accordingly, it is often difficult to predict which approach a court will take or which outcome it will reach.

Indeed, the *Katz* test has been widely criticized along those lines. Scholars have attacked it for being vague,[59] circular,[60]

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[54] *Id.* at 351; *see also id.* at 353 ("The fact that the electronic device employed to [eavesdrop] did not happen to penetrate the wall of the booth can have no constitutional significance.").

[55] *Id.* at 361 (Harlan, J., concurring).

[56] *See, e.g.*, United States v. May-Shaw, 955 F.3d 563, 567 (6th Cir. 2020) (noting that the *Katz* test has two prongs but not distinguishing between them during the reasonable expectation of privacy analysis); United States v. Houston, 813 F.3d 282, 288 (6th Cir. 2016) (failing to note any distinction between the two prongs in determining that the claimant had no reasonable expectation of privacy that had been violated); *see also* Matthew Tokson, *Telephone Pole Cameras Under Fourth Amendment Law*, 83 OHIO STATE L.J. 977, 981–82 (2022) [hereinafter Tokson, *Pole Cameras*] (collecting cases, some of which analyze both prongs of the *Katz* test and some that do not); Amitai Etzioni, *Eight Nails into* Katz*'s Coffin*, 65 CASE W. RSRV. L. REV. 413, 421 (2014) ("In practice, courts have increasingly ignored the first prong as a 'practical matter,' for 'defendants virtually always claim to have a subjective expectation of privacy' and such claims are difficult to disprove." (quoting Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 933 n.35 (2005))).

[57] *See, e.g.*, Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 508, 538–39 (2007) [hereinafter Kerr, *Four Models*]; Tokson, *Transformation*, *supra* note 29, at 513–15 ("The scholarly consensus is that [the Court] applies a series of contradictory concepts and does so unpredictably and seemingly at random.").

[58] *See* Ronald J. Allen & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 ST. JOHN'S L. REV. 1149, 1153–54 (1998); Kerr, *Four Models*, *supra* note 57, at 539.

[59] *E.g.*, Daniel J. Solove, *Fourth Amendment Pragmatism*, 51 B.C. L. REV. 1511, 1521 (2010) [hereinafter Solove, *Pragmatism*]; Michael Campbell, *Defining a Fourth Amendment Search: A Critique of the Supreme Court's Post-*Katz *Jurisprudence*, 61 WASH. L. REV. 191, 209 (1986).

[60] *E.g.*, Raff Donelson, *The Real Problem with* Katz *Circularity*, 65 ST. LOUIS U. L.J. 809, 811–12 (2021); Nicholas A. Kahn-Fogel, Katz*,* Carpenter*, and Classical Conservatism*, 29 CORNELL J.L. & PUB. POL'Y 95, 103–04 (2019). *But see* Matthew B.

unpredictable,[61] underinclusive of important constitutional values,[62] and underprotective of privacy.[63] Others have argued that societal expectations, or the normative values that undergird them, are indeterminate and difficult to assess, such that the test fails to constrain judges.[64]

Nonetheless, the *Katz* test endures. But widespread discontent with the test and its vagaries has led scholars, and increasingly the Supreme Court, to look elsewhere for guidance. Two recent, major developments in Fourth Amendment search law have unsettled the familiar *Katz* paradigm.

The first involves the Supreme Court readopting a property-based physical intrusion test for identifying certain Fourth Amendment searches. The twist is that this modern physical-intrusion test has been added to *Katz*'s privacy-based test, rather than being used as a replacement for it. In 2012's *United States v. Jones*,[65] the Court held that government agents violated the Fourth Amendment when they attached a GPS tracking device to the underside of a suspect's Jeep.[66] The majority opinion's rationale was based on the property intrusion that occurred when the agents attached the device to the Jeep, rather than any

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Kugler & Lior Jacob Strahilevitz, *The Myth of Fourth Amendment Circularity*, 84 U. CHI. L. REV. 1747, 1751 (2017) (expressing skepticism that the Fourth Amendment test is circular based on survey evidence). Professor João Marinotti posited that property law can address the circularity problems that some identify in the Fourth Amendment, but only if property law itself is rethought and replaced with what he called a "new intensional definition of property." Marinotti, *supra* note 7, at 646.

61 *E.g.*, Marinotti, *supra* note 7, at 648; Allen & Rosenberg, *supra* note 58, at 1166.

62 *E.g.*, David Alan Sklansky, *Too Much Information: How Not to Think About Privacy and the Fourth Amendment*, 102 CALIF. L. REV. 1069, 1077–79 (2014); Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 118 (2008); William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1020 (1995).

63 *E.g.*, Etzioni, *supra* note 56, at 413–15 (arguing that, over time, courts applying the reasonable expectation test have whittled away Fourth Amendment protections); Sherry F. Colb, *What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119, 126–27 (2002).

64 *See* Minnesota v. Carter, 525 U.S. 83, 97–98 (1998) (Scalia, J., concurring); *see also* Cloud, *Rube Goldberg*, *supra* note 10, at 28 ("[T]he outcomes of these cases have turned on the subjective views of a majority of the Justices about what privacy expectations are objectively 'reasonable.'"); Solove, *Pragmatism*, *supra* note 59, at 1521–22; Kamin, *supra* note 7, at 97–98 ("[A] test that focuses on reasonable expectations of privacy always depends on which expectations five members of the Court deem to be reasonable."); *Carpenter*, 138 S. Ct. at 2246 (Thomas, J., dissenting) ("[A] normative understanding is the only way to make sense of this Court's precedents, which bear the hallmarks of subjective policymaking instead of neutral legal decisionmaking.").

65 565 U.S. 400 (2012).

66 *Id.* at 404–06.

privacy interest affected by the tracking.[67] The Court thus held that a Fourth Amendment search can now occur either under *Katz* or when "[t]he Government physically occupie[s] private property for the purpose of obtaining information."[68]

Unfortunately, this seemingly clear additional test rapidly became confusing and ambiguous. Just a year later, in *Florida v. Jardines*,[69] the Court found that police violated the Fourth Amendment when they walked onto a suspect's yard accompanied by a drug-sniffing dog.[70] While police officers and others generally have an implied license to approach a front door, doing so with a drug-sniffing dog was said to have violated this license because it breached the complex web of "background social norms" that surrounds guests and houses.[71] As scholars have noted, these social norms and implied license inquiries may be even more amorphous than the *Katz* test.[72] In any event, the physical-intrusion test has generated many strange and difficult questions in the lower courts. Is it a Fourth Amendment search to try a key in a lock?[73] Does it violate the Fourth Amendment to press the button on a garage door opener?[74] Does the possessor of child sexual abuse material (CSAM) have a constitutionally relevant property right in their email accounts or video chats?[75] What may have seemed like a clear-cut test has been murky in practice.

Reviving a property-based approach is not the only major change the Supreme Court has recently made to Fourth

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67 *Id.*

68 *Id.* at 404. This rule is apparently limited to the "persons, houses, papers, and effects" mentioned in the Fourth Amendment. *Id.* at 406.

69 569 U.S. 1 (2013).

70 *Id.* at 7–10.

71 *Id.* at 8–9.

72 *See, e.g.*, Matthew Tokson, *The Normative Fourth Amendment*, 104 MINN. L. REV. 741, 746 n.30 (2019) [hereinafter Tokson, *Normative*]; George M. Dery III, *Failing to Keep "Easy Cases Easy":* Florida v. Jardines *Refuses to Reconcile Inconsistencies in Fourth Amendment Privacy Law by Instead Focusing on Physical Trespass*, 47 LOYOLA L.A. L. REV. 451, 471–79 (2014).

73 *See* United States v. Dixon, 984 F.3d 814, 820–21 (9th Cir. 2020) (holding that testing a key in the lock of a car was a Fourth Amendment search, albeit a reasonable one in the context of searching a parolee).

74 *See* United States v. Correa, 908 F.3d 208, 217–20 (7th Cir. 2018) (holding that opening a garage with an opener was not a search of the garage, but pushing the buttons on the opener was a search of the opener, albeit a reasonable search even without a warrant).

75 *Compare* United States v. Clark, 673 F. Supp. 3d 1245, 1262 (D. Kan. 2023) (holding that a person had no property interest in their video chat involving CSAM on a website's chat service), *with* United States v. Ackerman, 831 F.3d 1292, 1307–08 (10th Cir. 2016) (finding that the government intruded on a defendant's property rights in their email in a CSAM case).

Amendment law. In 2018's *Carpenter*, the Supreme Court expanded the scope of the Fourth Amendment, holding for the first time that individuals can retain Fourth Amendment rights in certain information they disclose to a third party, namely cell site location information.[76] The opinion discusses several factors that drove its decision, yet aside from articulating these factors, the *Carpenter* opinion does not explicitly set out a test to guide future decisions.[77] Nonetheless, its rationale has been widely embraced in the lower courts, which have applied some or all of its factors to a variety of Fourth Amendment contexts.[78] Yet *Carpenter* parts ways with *Jones* and *Jardines* and is premised in part on a *rejection* of property concepts as a central determinant of the Fourth Amendment's scope. The opinion quoted *Katz*'s "people, not places" language and expressly rejected the suggestion that "property-based concepts" should decide Fourth Amendment cases—at least in the absence of a physical intrusion.[79]

What these recent decisions show is that the Supreme Court has employed novel privacy concepts, novel property concepts, and both at the same time, with the upshot that the Fourth Amendment's scope has been significantly reshaped—and significantly muddled. Not only has the Court extended Fourth Amendment protection to modern, digital information, but it has declared that even minor physical intrusions on most forms of property constitute a Fourth Amendment search.[80] Yet this awkward combination is unlikely to hold. Only five Justices voted in favor of the supplemental property test in *Jones*, and only five—a very different five—voted in the *Carpenter* majority.[81] The composition of the Court has changed substantially since these decisions, and the Fourth Amendment approaches of the new Justices are largely unknown.[82] The dissenting Justices in *Carpenter*, many of whom favor a more exclusively property-based approach

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76 *Carpenter*, 138 S. Ct. at 2223.

77 *Id.* at 2218–23 (discussing the deeply revealing nature of cellphone location data, the amount collected, the cost of the surveillance, and whether the defendant had voluntarily disclosed the data, among other factors).

78 *See* Tokson, *Aftermath*, *supra* note 6, at 1807; *infra* notes 307–17.

79 *Carpenter*, 138 S. Ct. at 2213–14, 2214 n.1.

80 *See id.* at 2223; *Jones*, 565 U.S. at 404, 406.

81 The Justices in the *Jones* majority were Chief Justice John Roberts and Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Sonia Sotomayor. *See Jones*, 565 U.S. at 401. The Justices in the *Carpenter* majority were Chief Justice Roberts and Justices Ruth Bader Ginsburg, Stephen Breyer, Sotomayor, and Elena Kagan. *See Carpenter*, 138 S. Ct. at 2211.

82 *See* Tokson, *Aftermath*, *supra* note 6, at 1835–36.

to the Fourth Amendment, may now have a majority. Meanwhile, a number of prominent scholars have recently developed property-focused theories of Fourth Amendment protection—theories that may appeal to the newly constituted Court.

C. Proposals for a Property-Centered Fourth Amendment

Over the last decade, scholars and Justices have proposed that Fourth Amendment law move toward a greater, or even exclusive, reliance on property law and related concepts. These proposals tend to range widely, from plans to radically narrow the Fourth Amendment's scope to designs for expanding it to cover virtually all forms of information. Perhaps the only shared attribute of these regimes is a key argument made on their behalf: compared to current law, property law would provide a clearer, less amorphous basis for the Fourth Amendment.[83] This Section reviews and categorizes these proposals.

The first set of proposals directly advocates for deciding Fourth Amendment disputes by reference to property law. For example, in his dissent in *Carpenter*, Justice Clarence Thomas proposed that the Supreme Court overturn *Katz* and adopt an exclusively property-based theory of the Fourth Amendment.[84] He argued that property was the sole value that the Fourth Amendment was meant to protect, while other values like liberty and privacy were derivative and "understood largely in terms of property rights."[85] For Justice Thomas, the Amendment's protections should thus be governed by applicable "real or personal property law."[86] For example, he would have held that cellphone users have no Fourth

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[83] *See supra* note 10.

[84] *Carpenter*, 138 S. Ct. at 2239–40 (Thomas, J., dissenting).

[85] *Id.* at 2239 (quotation marks omitted) (quoting Cloud, *Property Is Privacy*, *supra* note 7, at 42).

[86] *Id.* at 2245 (quotation marks omitted) (quoting Rakas v. Illinois, 439 U.S. 128, 144 n.12 (1978)). Justice Thomas has acknowledged that his suggested property test leaves several important questions to be answered. It is not, in other words, a fully developed alternative. For example, it remains unclear "what kind of property interest [ ] individuals need before something can be considered 'their . . . effec[t]'" under the Fourth Amendment. Byrd v. United States, 138 S. Ct. 1518, 1531 (2018) (Thomas, J., concurring) (alteration in original). Nor is it clear "what body of law determines whether that property interest is present—modern state law, the common law of 1791, or something else?" *Id.* But Justice Thomas's proposal is relatively clear—it would adopt property law, old or new, in order to answer Fourth Amendment questions. *Carpenter*, 138 S. Ct. at 2235 (Thomas, J., dissenting) ("This case should not turn on 'whether' a search occurred. It should turn, instead, on *whose* property was searched." (emphasis in original) (citation omitted) (quoting *Carpenter*, 138 S. Ct. at 2223–24 (Kennedy, J., dissenting))).

Amendment right in their cellphone location data because they have no property right in such data.[87]

Some scholars have also argued that Fourth Amendment law should incorporate property law, though they have generally done so as part of a broader proposal to incorporate other sources of law. An influential article by Professors William Baude and James Stern suggests that courts should base the concept of a Fourth Amendment search on whether a police action would violate some applicable positive law, including property, tort, and statutory laws.[88] Baude and Stern specifically emphasized property law, framing their proposal as "another way of describing th[e] property-centered view of Fourth Amendment law" reflected in cases like *Jones* and *Jardines*.[89] But somewhat different from those cases, Baude and Stern would require the Court to look at the actual property and trespass law of the states where *Jones* and *Jardines* arose.[90] Only if an applicable state law were violated would the Fourth Amendment apply. Likewise, Baude and Stern proposed that the constitutionality of DNA testing of discarded items like coffee cups should turn on the property law of abandonment.[91] In states without specific statutes barring DNA testing, property law would deem discarded items abandoned, and the police could accordingly collect and test DNA from those items without having to comply with the Fourth Amendment's requirements.[92]

Professors Danielle D'Onfro and Daniel Epps offered a modified version of this positive law approach, arguing that courts should instead apply a "general law" of property and other sources of positive law rather than looking to the laws of the particular states.[93] General law refers to a consensus common law that can be derived from the generally prevailing positive law of the states, along with predominant customs and norms.[94] D'Onfro and Epps focused primarily on property law and related torts in describing how to apply their approach, examining how the positive law of trespass, abandonment, and bailment might be used to set the

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87 *Carpenter*, 138 S. Ct. at 2242 (Thomas, J., dissenting).
88 Baude & Stern, *supra* note 7, at 1829–31.
89 *Id.* at 1834.
90 *Id.* at 1835–36.
91 *Id.* at 1882–83.
92 *Id.* at 1883.
93 D'Onfro & Epps, *supra* note 7, at 932–36.
94 *Id.* at 931.

boundaries of the Fourth Amendment.[95] For instance, in cases involving rented vehicles, they would base Fourth Amendment protections on bailment law.[96] Accordingly, whether the owner of a rented car could consent to a police search of the car over a renter's objection would turn on whether the owner had the legal right to reclaim possession of the car at the time.[97] In the real property context, whether a guest in a home had a Fourth Amendment right against searches of the home would turn on the extent of their license or invitation and their associated property rights.[98] Other scholars have proposed applying general property doctrines to particular search questions, rather than to the entirety of Fourth Amendment law.[99]

A second set of proposals does not expressly call for the incorporation of property law into Fourth Amendment law, but rather advocates for a Fourth Amendment based on broad property law concepts, instead of concepts of privacy or liberty. These proposals tend to be more flexible and less clear than those based in actual property doctrine. They are also generally, although not always, associated with calls to apply the Fourth Amendment narrowly. Justice Anthony Kennedy's dissent in *Carpenter* is a paradigm example. He advocated a Fourth Amendment jurisprudence grounded in "property-based concepts."[100] While he acknowledged the validity of *Katz* and its rejection of the specifics of property law as a guide to Fourth Amendment protection, he nonetheless asserted that property law concepts are fundamental in determining whether a reasonable expectation of privacy exists.[101] Justice Kennedy's use of property law concepts was no less definitive for being uncoupled from actual property law; he argued that "the absence of property law analogues can be dispositive of privacy expectations."[102] He contended that the Fourth Amendment's

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95 *Id.* at 956–79. While general law is a somewhat amorphous concept, their proposals are largely theoretically grounded in the actual property law of the states. *See id.* at 969, 975–77.

96 *Id.* at 976.

97 D'Onfro & Epps, *supra* note 7, at 976.

98 *Id.* at 964.

99 *See* O'Connor, *supra* note 7, at 1312–17 (applying federal statutory law and bailment law to analyze searches of cloud-stored digital documents, emails, and other electronic data).

100 *Carpenter*, 138 S. Ct. at 2227–28 (Kennedy, J., dissenting) (arguing that *Katz* did not do away with the requirement that a claimant have a property-based interest in order to show a reasonable expectation of privacy).

101 *Id.*

102 *Id.* at 2228.

protections should be limited to scenarios where a suspect has ownership or control over the searched property, even though he would define those concepts less by actually applicable property law than by broader property law principles.[103] Accordingly, Justice Kennedy would not have found that the Fourth Amendment protected a cellphone user's location information, which users neither own nor control.[104]

Scholars and other commentators have made similar arguments positing, for example, that the Fourth Amendment's application should largely be confined to things with clear analogues in traditional property law and should exclude items or intangible data that property law would not consider an individual to occupy or control.[105] Others have argued that some traditional property doctrines can provide a basis for a broader Fourth Amendment, even if they do not technically protect certain forms of data or chattels under current law.[106]

Finally, a third set of proposals uses property law and principles as a kind of inspiration for novel proposals to reshape Fourth Amendment search law. These property-inspired approaches differ in their uses of property principles, but they share both an appreciation of property law as a traditional source of Fourth Amendment protection and a willingness to transform or set aside existing property concepts where necessary. They are generally associated with calls to expand the Fourth Amendment's scope.

Justice Neil Gorsuch's dissent in *Carpenter* is best characterized as a property-inspired proposal. He suggested that the Fourth Amendment could be expanded to cover cellphone location data (and similar data) on a property theory of the Amendment, but was vague about the source of this property-related protection.[107] Perhaps it comes from the law of bailment, from laws in some states granting property rights in email accounts, or from federal telecommunications statutes limiting the circumstances in which cellphone providers can disclose customer data.[108] Scholars have

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103 *Id.* at 2227–31.

104 *Id.* at 2228–29.

105 *See* Morgan v. Fairfield County, 903 F.3d 553, 574–75 (6th Cir. 2018) (Thapar, J., concurring in part and dissenting in part) (contending that Fourth Amendment law should center around intrusions into "constitutionally-protected zones"); Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 809–20 (2004) (contending that the Supreme Court generally uses property concepts as the basis for Fourth Amendment search law under the *Katz* test).

106 Donohue, *Functional Equivalence and Residual Rights*, *supra* note 7, at 398–400.

107 *Carpenter*, 138 S. Ct. at 2268–70 (Gorsuch, J., dissenting).

108 *Id.* at 2268–72.

made similar suggestions, espousing a property-based approach without concretely connecting their proposed Fourth Amendment regime to a specific property law or set of concepts.[109]

Other scholars have offered more detailed property-inspired Fourth Amendment regimes. For example, Professor Morgan Cloud has argued, based on Lockean theories of property, that a values-centered Fourth Amendment regime encompassing privacy rights could still be characterized as a property regime.[110] For her part, Professor Mailyn Fidler has suggested a "flexible concept derived from property law" that protects anything in which a person has a right to exclude other people in any circumstance, and that also covers data wherever statutes restrict the right of a data owner to disseminate information about others.[111] What these proposals have in common is that they do not look to existing property law itself as a basis for Fourth Amendment protection, but instead draw on property-related concepts as inspiration for novel constitutional law regimes.

Many of the above proposals argue in favor of property-centered approaches not only on grounds of administrability and clarity but also on originalist grounds, albeit typically in a conclusory fashion, without much discussion of the legislative or contextual history of the Fourth Amendment.[112] Given the cursory treatment that the original role of property law typically receives, we address it only briefly here. While Founding Era searches generally involved intrusions on property—in the preelectronic era, the constable had to be physically present to conduct a

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[109] *See* Kamin, *supra* note 7, at 98–100.

[110] Cloud, *Property Is Privacy*, *supra* note 7, at 44–47, 75.

[111] Fidler, *supra* note 7, at 315, 334–41, 348–49.

[112] *See, e.g.*, *Carpenter*, 138 S. Ct. at 2238–41 (Thomas, J., dissenting) (briefly discussing Founding Era definitions of, and attitudes toward, property and trespassory searches, in addition to James Madison's original proposed text for the Amendment); *id.* at 2226–27 (Kennedy, J., dissenting) (cursorily mentioning the text of the Fourth Amendment in an opinion that otherwise focuses on modern precedents); *id.* at 2264, 2267–68 (Gorsuch, J., dissenting) (briefly critiquing *Katz* on originalist grounds but declining to offer historical support for a property-based approach beyond cursory allusions to the Fourth Amendment's text, and then noting the further work needed to answer the key question of "what kind of legal interest is sufficient to make something *yours*" (emphasis in original)); Kamin, *supra* note 7, at 82–83 (beginning its account of the evolution of Fourth Amendment law with *Boyd* and subsequent precedent). Professors Baude and Stern largely disavowed a direct originalist foundation for their positive law approach, although they noted that each of the prominent pre-Founding cases involved an intrusion on property and suggested, on this basis, the existence of a historical pedigree for a prominent role for property law in Fourth Amendment doctrine. Baude & Stern, *supra* note 7, at 1836–39.

search—those examples cannot establish that *only* physical intrusions could constitute an unreasonable search.[113] There is a somewhat stronger, although still flawed, originalist argument to be made that the scope and force of the Fourth Amendment should be limited to personal tort recovery against individual officers, as was the practice at the Founding.[114] But this is not the argument made by any of the property-centered proposals, and in any event, several of the historically relevant torts have little to do with property concepts.[115]

Likewise, while the Fourth Amendment itself states that it protects certain tangible things—"persons, houses, papers, and effects"[116]—there is nothing in history or text that suggests a limit on how or to what extent these things might be protected. Indeed, they might be protected from nonphysical as well as physical intrusions.[117] More broadly, this phrase might plausibly be interpreted as exemplary rather than an exhaustive list of the only things the Amendment can protect, given that telephones, microphones, and digital data did not exist when the Amendment was written.[118] Further, "persons" fits awkwardly with a property-centered concept of the Fourth Amendment. And the concept of "papers," unless it is wholly redundant with "effects," likely refers to the intangible data that the papers contain. Indeed, Founding Era sources repeatedly express concern about the privacy of a

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113 *See, e.g.*, Kerr, *Curious History*, *supra* note 33, at 73–74 (arguing that the physical intrusions which served as the paradigmatic examples of searches in the Founding Era could also evidence a prohibition on "interfere[nce by officials] with privacy, with physical intrusion being just one example of government acts that violate privacy interests").

114 One of us has addressed this tort-based argument in a blog post and will address it further in an upcoming article. *See* Matthew Tokson, *Fractional Originalism and the Fourth Amendment's Trespass Test*, DORF ON LAW (Sept. 12, 2022), https://perma.cc/A5KP-RGR6; Matthew Tokson, Fourth Amendment Originalism and the Trespass Test 14–15 (unpublished manuscript) (available at https://perma.cc/J973-6AF5).

115 *See, e.g.*, Baude & Stern, *supra* note 7, at 1839–40.

116 U.S. CONST. amend. IV.

117 *See* D'Onfro & Epps, *supra* note 7, at 981, 986 ("[A] violation of the right to privacy could be seen as a threat to the security of the 'person' for Fourth Amendment purposes."); Matthew Tokson, *Blank Slates*, 59 B.C. L. REV. 591, 631 (2018) [hereinafter Tokson, *Blank Slates*].

118 *See, e.g.*, Tokson, *Blank Slates*, *supra* note 117, at 631; Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 811 (1994) ("Yet a great many government actions can be properly understood as 'searches' or 'seizures,' especially when we remember that a person's 'effects' may be intangible."); Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 826 (1986) (suggesting that judges should identify constitutional freedoms unforeseeable during the Founding Era based on the core values stated in the text of the Constitution); RAOUL BERGER, DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE 73 (1982).

man's papers and the prospect of a government agent relaying their contents in open court.[119]

Finally, the most common originalist claim about property, that the Founders were uniquely concerned about property rights to the exclusion of concepts like privacy and liberty, doesn't hold up to scrutiny.[120] Rather, Founding Era treatises, cases, and commentary repeatedly emphasize concerns about government intrusions on privacy and liberty, as well as property.[121] A Fourth Amendment centered on property, ignoring the other purposes and goals of the Amendment, finds little support in original meaning or history. It also, as we explore below, does a poor job of clarifying Fourth Amendment law, fails to prevent government manipulation, is too narrow to adequately protect individuals from government surveillance, and is poorly suited to addressing what actually matters in Fourth Amendment cases.

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[119] *See, e.g.*, T.T. Arvind & Christian R. Burset, *A New Report of* Entick v. Carrington *(1765)*, 110 KY. L.J. 265, 287 (2022) (offering a more accurate report of *Entick* than the two widely available versions, emphasizing the importance of the secrets that the papers contained rather than the papers themselves); HERBERT BROOM, CONSTITUTIONAL LAW VIEWED IN RELATION TO COMMON LAW; AND EXEMPLIFIED BY CASES 607–09 (George L. Denman ed., London, W. Maxwell & Son 2d ed. 1885) (reporting a debate in Parliament in 1765 expressing concerns about private information coming to light in legal proceedings and otherwise); J. ALMON, A LETTER CONCERNING LIBELS, WARRANTS, AND THE SEIZURE OF PAPERS 43–44 (London, 2d ed. 1764) (discussing the importance of the information contained in papers); CHARLES WYNDHAM & GEORGE MONTAGU-DUNK, A LETTER TO THE RIGHT HONOURABLE THE EARLS OF EGREMONT AND HALIFAX, HIS MAJESTY'S PRINCIPAL SECRETARIES OF STATE, ON THE SEIZURE OF PAPERS 9–10 (London 1763) (writing, in a widely reprinted pamphlet, about the importance of the information contained in seized papers).

[120] For examples of this claim, see *Carpenter*, 138 S. Ct. at 2239–40 (Thomas, J., dissenting); and *Morgan*, 903 F.3d at 570 (Thapar, J., concurring in part and dissenting in part). Note that, among other issues, the commonly quoted passage from *Entick* about the centrality of property rights to society and law is likely apocryphal and is nowhere to be found in a recently rediscovered, more accurate report of the *Entick* case. *See* Arvind & Burset, *supra* note 119, at 286–87.

[121] *See, e.g.*, *supra* note 119 (collecting sources); Money v. Leach (1765) 97 Eng. Rep. 1075, 1086; 3 Burr. 1742, 1762–63; *Wilkes* 98 Eng. Rep. at 498; Lofft at 18; Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1316–18 (2016) (describing English and American legal commentary that highlights the privacy interests at stake in exposing a person's papers); WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING, 602–1791, at lix–lxviii (2009) (collecting sources objecting to general warrants on privacy grounds); 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 184 (P.R. Glazebrook ed., Pro. Books Ltd. 1973) (1716); WYNDHAM & MONTAGU-DUNK, *supra* note 119, at 50–51, 54–55.

II. PROPERTY'S COMPLEXITY

As the foregoing discussion has demonstrated, critics of *Katz*'s reasonable expectations of privacy test are particularly concerned about its alleged haziness, unpredictability, and subjectivity. One of the chief benefits of a property-based, or even property-inspired, Fourth Amendment is said to be greater clarity and predictability. Indeed, to be worth the candle and to be any more workable than the status quo, a property-centered Fourth Amendment would require sufficiently clear lines of who owns what and when. At the same time, we think it is also vital that the Fourth Amendment strike an appropriate balance between privacy on the one hand and legitimate law enforcement and public safety needs on the other.[122]

Property-centered Fourth Amendment approaches fail on all of these counts, as the next two Parts explore. First, this Part explains why property law is not a clear, predictable, or stable foundation for Fourth Amendment doctrine. In doing so, this Part highlights the distinct role of state law in defining property rights and resolving disputes among claimants. Next, and equally important, Part III explains why property-inspired approaches are not well suited to protecting privacy. Specifically, the rights that flow from property are vulnerable to government manipulation, and that manipulability makes property law an especially poor fit for a doctrine designed to protect people from the government.

When it comes to promoting clarity, stability, and predictability of ownership, property law talks a big game. One of the first property cases that law students read, *Pierson v. Post*,[123] is all about promoting "certainty, and preserving peace and order in society."[124] Clarity, stability, and predictability run through many other foundational property law concepts too.[125] So it's easy to see why property law feels like a firm and reliable basis for Fourth Amendment jurisprudence.

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[122] *See* United States v. Di Re, 332 U.S. 581, 595 (1948) ("[T]he forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance . . . .").

[123] 3 Cai. 175 (N.Y. Sup. Ct. 1805).

[124] *Id.* at 179.

[125] *See, e.g.*, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 591–92 (1823) (doctrine of discovery); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1, 3–4, 8 (2000) (*numerus clausus*); Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. 2465, 2470–71 (2006) (rule against perpetuities).

The problem is that the *type* of stability and clarity that property law prizes is very different from the type necessary for the Fourth Amendment. Property law achieves its stability in the long run, and it does this by tolerating a substantial amount of instability in the interim in order to serve other, equally important goals like enabling the alienability of property, respecting the wishes of grantors and testators, promoting investment, and more.[126] More fundamentally, property law is *relational*. When it comes to claims of ownership, property law speaks in relative terms rather than absolute terms, and it again tolerates a great deal of instability in order to advance long-run stability and to serve an array of other economic and interpersonal goals.

By comparison, the Fourth Amendment's goals are extremely short-term. In the space of moments or days, the government needs to know what it can search. People need to know what their rights are to be free of those searches. And courts reviewing those searches cannot wait to evaluate their constitutionality.

A. Varieties of Ownership

One of the most complicated aspects of property law is that one does not "own" a piece of land. Rather, one owns a particular *interest* in that land.[127] One type of interest, called the fee simple absolute, comes closest to the common assumption of what ownership means.[128] The fee simple absolute is perpetual in duration, which means there is no time or event that will cause one's interest to end.[129] That, in turn, means that the interest is freely conveyable and freely devisable at one's death.[130] When we speak of owning something, we tend to assume fee simple ownership as the descriptive and normative default. And fee simple ownership is, in fact, by far the most common form of property ownership in the United States.[131]

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[126] *Cf.* Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 590–97 (1988) (describing several theories of why property rules oscillate between bright-line rules and fuzzy standards).

[127] *See* JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER, MICHAEL H. SCHILL & LIOR JACOB STRAHILEVITZ, PROPERTY 269 (10th ed. 2022).

[128] *See* Kevin Gray, *Property in Thin Air*, 50 CAMBRIDGE L.J. 252, 252 (1991) (calling the fee simple "the nearest approximation to absolute ownership known in our modern system of law").

[129] *See, e.g.*, Lee Anne Fennell, *Fee Simple Obsolete*, 91 N.Y.U. L. REV. 1457, 1458 (2016).

[130] *See id.* at 1458–59.

[131] *Id.* at 1458.

But the fee simple is not the only interest one can own. Interests in property can be divided over time,[132] set to terminate upon the occurrence of specific events,[133] layered on top of one another consecutively and concurrently,[134] and so on.[135] A truly property-based Fourth Amendment would need to grapple with all of this. And answering the question "Who does this belong to?" is more fraught than it may appear. Does ownership mean *possession*? Does it mean *exclusive* possession? Does it mean *unfettered* possession? Do the holders of various future interests "own" something? If so, what exactly is it that they own?[136]

Property law simply does not resolve most of these questions—because it does not need to. Property law's long time horizon means that the doctrine is satisfied that, eventually, we will know which people come into fee simple ownership; in the meantime, property law is happy to tolerate a good deal of ambiguity, and it deploys a few specific doctrines to manage it.[137] But this approach would be intolerable in the Fourth Amendment context, where immediately and clearly determining the identity of a rights holder and the extent of their rights is essential.

Consider, too, that corporations, partnerships, trusts, and other nonhuman legal persons are capable of buying, selling, and owning property.[138] For property and corporate law, the benefits and burdens of ownership inure to the entity alone. For example,

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[132] *See* DUKEMINIER ET AL., *supra* note 127, at 279–80 (discussing present and future interests).

[133] *See id*. at 295–98 (discussing defeasible estates).

[134] *See id*. at 396–97 (discussing joint tenancy and tenancy in common).

[135] Justice Gorsuch, at least, recognized some of this in *Carpenter*. *See* 138 S. Ct. at 2269–70 (Gorsuch, J., dissenting). And Professors Baude and Stern likewise recognized that their approach would mean "that some claimants might be able to challenge a seizure on the basis of a nonpossessory positive law interest, such as a future interest." Baude & Stern, *supra* note 7, at 1885.

[136] For the property lawyers: What are the Fourth Amendment rights of the holders of future interests during the pendency of a life estate? Does it matter how soon the life estate is likely to end? Does it matter if the future interest is contingent or not? Does it matter how likely it is that the contingency will resolve in their favor, or how soon it is to do so? What are the Fourth Amendment rights of the holders of defeasible estates after the triggering event has occurred but while they are still in possession? Does it matter if the holder of the corresponding future interest has shown up to retake possession or not? And so on.

[137] Property law answers to some of these questions are governed by doctrines like the rule against perpetuities, waste, ouster, and partition. *See, e.g.*, Michael C. Pollack & Lior Jacob Strahilevitz, *Property Law for the Ages*, 63 WILLIAM & MARY L. REV. 561, 592, 599 (2021).

[138] *See, e.g.*, MODEL BUS. CORP. ACT § 3.02(d) (AM. BAR ASS'N 2024); Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1638.

the entity, rather than the individual owners, is responsible for paying real estate taxes, bears tort liability with respect to the premises the entity owns, and can post the property as collateral for a loan.[139] Indeed, separating the individuals from the entity is largely the purpose of the corporate form.[140] In the trust context, the trustee has the powers of an owner but may be limited by instructions in the trust instrument and owes fiduciary duties to the beneficiaries.[141] At the same time, the beneficiaries are not the legal owners of the property and are not liable for obligations of the trust,[142] but they—and not the trustee—receive the benefits that come from ownership.[143]

None of this is particularly troublesome for property law, but translate it to the Fourth Amendment context and some difficult questions arise. Do the individual owners of an entity enjoy any Fourth Amendment rights with respect to the entity-owned premises? Because title records are public, people who are jealous of their privacy might be inclined to put their house in an LLC to avoid strangers discovering their home address;[144] in so doing, might those people forfeit their Fourth Amendment rights under a property-based Fourth Amendment?[145] Which of the various individuals related to a trust would enjoy the benefits of a property-inspired Fourth Amendment? The beneficiaries are not the owners, and, during the pendency of the trust, they enjoy no other privileges of ownership and bear none of the responsibilities or costs of ownership.[146] On the other hand, even though the trustee does have the power to act as an owner, they are not entitled to benefit from the property at issue. These may sound like marginal

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139 *See* MODEL BUS. CORP. ACT §§ 3.02(e)–(f), 6.22(b).

140 *See, e.g.*, Dole Food Co. v. Patrickson, 538 U.S. 468, 474 (2003) ("A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities."); Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 393 (2000).

141 *See* RESTATEMENT (THIRD) OF TRUSTS §§ 70, 75, 76–84 (AM. L. INST. 2007) (discussing duties of trustees).

142 *See* RESTATEMENT (THIRD) OF TRUSTS § 103 (AM. L. INST. 2012).

143 *See* RESTATEMENT (THIRD) OF TRUSTS § 3 cmt. d (AM. L. INST. 2003); DUKEMINIER ET AL., *supra* note 127, at 346.

144 *See* Reid Kress Weisbord & Stewart E. Sterk, *The Commodification of Public Land Records*, 97 NOTRE DAME L. REV. 507, 528–36 (2022) (noting the public nature of title records and opportunities for exploitation); Amy Fanshawe, *How Can I Protect My Privacy in Real Estate Transactions?*, GOLDMAN SACHS AYCO (Oct. 30, 2019), https://perma.cc/NS4Z-E3ZY (advising the use of privacy vehicles like LLCs and trusts).

145 Will the answer to that question turn on whether, in a given case's circumstances, the corporate veil can be pierced under highly contextual state law tests?

146 *See* RESTATEMENT (THIRD) OF TRUSTS § 103.

questions, but under any approach to the Fourth Amendment, the marginal cases are the ones where the action is and where the doctrine will need to do the most work. And introducing property-based approaches may make questions like these more common by changing the incentives of people who wish to claim the Fourth Amendment's protection.

In offering his property-based approach to the Fourth Amendment, Justice Thomas has forthrightly acknowledged that the Court would need to determine "what kind of property interest" would suffice.[147] But given the large universe of property interests and the numerous combinations in which they can exist—all of which are equally "property" in property law—this is a fundamental question. And answering it necessarily requires privileging some interests over others. Doing so would inevitably entail resorting to some set of intuitions or principles outside of property law about what sorts of interests are most important for Fourth Amendment purposes.[148] For an approach designed to minimize subjectivity and increase clarity, this strikes us as a significant shortcoming, and it is one of the ways in which property principles risk "running out" in Fourth Amendment cases. One might try to square the circle by noting that one of the things *Katz* does is tell us which interests are important for Fourth Amendment purposes: the ones tethered to expectations of privacy. This is where Justice Kennedy, more or less, seemed to land in his *Carpenter* dissent.[149] But while it is dressed up in property law terms, this approach will often collapse back into *Katz*.

A final response to these sorts of concerns is to focus on lawful *possession*, or even just lawful *use*, rather than ownership. That is, the Fourth Amendment rights holder could be identified as the present possessor (or the concurrent present possessors) of the place. For example, Professor Fidler argued that any person with any right to exclude even one other person has a sufficient property right to trigger the Fourth Amendment.[150] Professors D'Onfro and Epps gestured toward a similar suggestion within their "general law" paradigm, while at the same time recognizing some

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147 Byrd v. United States, 138 S. Ct. 1518, 1531 (2018) (Thomas, J., concurring); *see supra* Part I.C.

148 *Cf.* Marinotti, *supra* note 7, at 662 (observing that property law's "bundle of rights" metaphor "leaves us with no legal methodology to distinguish between the legal positions" of multiple people with different slices of rights in the same property).

149 *See Carpenter*, 138 S. Ct. at 2223–35 (Kennedy, J., dissenting).

150 *See* Fidler, *supra* note 7, at 341.

of its potential shortcomings.[151] A possession-based approach could avoid many of the problems discussed above. For that reason, we will not dwell much further on this particular set of complications here. But two points bear mentioning. First, whatever a possession-based or use-based Fourth Amendment has going for it, it is not "property law," since property law entails a number of interests that do not equate to present possession or use.[152] Second, determining who is in lawful possession of a place or thing, without reference to actual property interests, is likely to be difficult. Again, getting past this hurdle will either require ad hoc inventions or a retreat to intuitions about who has a reasonable expectation of privacy.

B. Competing and Ambiguous Possessory Claims

Even if one focuses solely on possession, things are not as clear as they may seem. This is because multiple people sometimes assert the same exclusive right of possession (and indeed ownership) over the same property at the same time. And because each asserts *exclusive* rights, only one logically ought to bear any Fourth Amendment rights that flow from lawful possession, let alone flow from ownership.[153]

1. Adverse possession.

One way these sorts of questions can arise is with adverse possession. Adverse possession allows an illegitimate possessor—a trespasser—to become the sole legitimate possessor (that is, the owner) of land. The trespasser must be continuously present on the land for a prescribed period of time in a manner that is sufficiently "open and notorious" to make the world aware of their presence.[154] As with some of the doctrines discussed at the beginning of this Part, adverse possession is often framed as bringing clarity to otherwise unclear circumstances by settling

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[151] *See* D'Onfro & Epps, *supra* note 7, at 932–33 ("[G]eneral law recognizes various kinds of relative property interests extending beyond fee simple that should suffice for triggering Fourth Amendment protections. An intrusion onto one of the protected categories is presumptively unlawful . . . ."); *id.* at 933–34 (acknowledging that some property-based cases "are harder" than others).

[152] *See supra* note 132 and accompanying text.

[153] One plausible way around some of these issues could be to permit anyone with some (perhaps "reasonable," "legitimate," or some other vague adjective) possessory claim to assert Fourth Amendment rights, but that would hardly help clarify cases.

[154] *E.g.*, N.Y. REAL PROP. ACTS. LAW §§ 501, 521–522 (McKinney 2024); *see also* Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2423–24 (2001).

the competing claims of an absentee owner and a possessor who appears to all the world to be the owner—and by settling them in favor of the expectations of observers who would attribute ownership to the possessor.[155]

But at the same time, adverse possession tolerates and fosters ambiguity every day until the possessor's claim ripens. The precise length of time required for adverse possession varies by state, but it is usually on the order of ten to thirty years.[156] This means that, for a decade or more, the absentee true owner really is the owner and lawful possessor, while the apparent possessor is legally a trespasser, but for all intents and purposes it may appear that the trespasser is the legitimate possessor and owner. And when it comes to claims of neighbors against one another for partial encroachments, for example, it might even appear to the parties *themselves* that the trespasser is really the lawful possessor. In other words, suppose Anne and Bob live next door to one another and both behave as if Anne's property line is on the far side of a tree, but, unbeknownst to them both, the property line is actually on the near side of the tree. After the prescribed period of time, it's possible that the property line would actually move by adverse possession,[157] but before then, the area with the tree really is Bob's property. Again, property law is content to wait, but importing property law into the Fourth Amendment would inject substantial uncertainty while seeming to prioritize the formal "truth" of lawful possession and ownership over the reality shared by all the relevant players. Or it would not: Perhaps both Anne and Bob have Fourth Amendment rights in the space? Perhaps it depends on what exactly Anne and Bob have each done there in the preceding years? Perhaps even their expectations of privacy might matter? In these cases, again, we must ask what property law has actually clarified or contributed to the analysis.

2. Deed contests.

Another way that competing simultaneous claims to land can arise is in the context of erroneous deeds. For reasons either

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[155] *See* Stake, *supra* note 154, at 2441–49 (offering, and questioning, this rationale).

[156] *See, e.g.*, MASS. GEN. LAWS ch. 260, § 21 (2024) (twenty years); N.J. STAT. ANN. § 2A:14-30 (West 2024) (thirty years for most land types); N.Y. C.P.L.R. § 212(a) (MCKINNEY 2024) (ten years).

[157] *But see* Mannillo v. Gorski, 255 A.2d 258, 264 (N.J. 1969) (holding that, in cases of minor encroachments along a property line, adverse possession against the true owner will arise only "where the true owner has actual knowledge" of the encroachment).

mistaken or nefarious, a legitimate owner of land may sometimes purport to exclusively convey the same piece of land to multiple people such that they each end up with deeds purporting to bestow ownership.[158] For example, suppose Anne sells a piece of land to Bob in 2020 and promptly forgets she has done so. Then, in 2024, she sells the same parcel to Carl. Carl genuinely has no idea that the 2020 conveyance ever happened, and Bob has done nothing with the land. On the premise that he duly purchased the land, Carl sells it to Denise. Who is the owner, and thus the lawful possessor: Denise or Bob? It can be only one of them, not both (as neither of their deeds purports to convey to them any sort of concurrent or shared interest) and not neither (as both of their deeds purport to lawfully convey to them something they purchased in good faith).

Property law resolves these disputes by resorting to state laws called recording statutes. These statutes determine the priority between particular claimants based on criteria like who recorded their deed first or whether the subsequent claimant had constructive notice of a prior claim.[159] The details of title recording are beyond the scope of the present discussion, but a few observations are essential.

First, just as with adverse possession, the legal truth may be quite different from the experienced reality of the people involved, and it might take quite some time for the two to align. Suppose Bob camped on the land for a month in 2020 but then never made any further use of the land, while Denise built a house and planted an apple orchard in 2024. Bob's claim would start off superior to Denise's simply because he was the first grantee, which would mean that Denise's possessory rights are at least in some degree of legal doubt and at most absent. But in some states, if Denise took steps at any point to record her deed and Bob had not, Denise's claim of ownership would suddenly become superior to Bob's and her possession would become lawful.[160] Prioritizing ownership for Fourth Amendment purposes would

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158 *See, e.g.*, Allen v. Allen, 16 N.E.3d 1078, 1081–82 (Mass. App. Ct. 2014); Stewart E. Sterk, *Title Theft*, 81 WASH. & LEE L. REV. ONLINE 161, 167 (2023) (describing the process of forging deeds).

159 *Compare, e.g.*, FLA. STAT. ANN. § 695.01(1) (West 2024) (requiring only that the subsequent purchaser lack notice of a prior claim), *with* N.Y. REAL PROP. LAW § 291 (McKinney 2024) (requiring that the subsequent purchaser lack notice of a prior claim and record her deed before the first claimant does so).

160 This would be the outcome under New York's recording statute, for example. *See* N.Y. REAL PROP. LAW § 291.

thus risk either waiting in ways that simply do not work for the Fourth Amendment or unsettling real-life expectations and understandings.

Even prioritizing *possession* rather than ownership for Fourth Amendment purposes may be unclear and raises potential unintended consequences. That is, it would seem that Denise would be the rights holder under a possession-based Fourth Amendment—either when she first builds the house and orchard or, at least, once she records her deed. But that would mean that Bob gets punished from a Fourth Amendment perspective simply because in 2020 he stopped being in active possession of land he owned. Suppose he had left behind some evidence of a crime, fully intending to retain ownership of it (he left it on his own land, after all).[161] Do his Fourth Amendment rights turn on the validity of Denise's claim to the land? It eludes us why doing so would make either theoretical or practical sense. To say that one's Fourth Amendment rights rise and fall with whether and when one promptly records one's deed strikes us as incoherent: the two legal rules are wholly orthogonal to one another, and they are designed to achieve wholly distinct goals in wholly distinct contexts—achieving predictable and reliable transfers between private parties versus limiting government's power to invade and surveil one's life.

Second, recording conflicts again highlight the relational nature of property law. That is, Bob may have a superior claim to Carl's but an inferior claim to Denise's. And the inferiority of his claim will emerge only if Denise, an otherwise unrelated third party, decides to stake a claim in the first place. Recording contests are thus resolved as between the parties, not in categorical terms.[162] After all, the tribunal may not even be aware of a third or fourth claimant until they emerge, so the best that can be done is determining relational priority. This is yet another aspect of property law that is poorly suited to the more absolute legal determinations required under the Fourth Amendment.

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[161] *Cf.* Eduardo M. Peñalver, *The Illusory Right to Abandon*, 109 MICH. L. REV. 191, 196 (2010) ("The focus of the standard test [for abandonment] is on the subjective intentions of the owner. And, consistent with this focus, the voluntariness of abandonment is crucial.").

[162] *See* Sterk, *supra* note 158, at 166 n.24 ("Recording statutes illustrate application of the relative title concept with respect to real property.").

3. Gifts and bailments.

Finally, turning to personal property—that is, items rather than land—reveals a few other areas in which law and experience may diverge and illustrates the relational nature of property law. First, consider the law of gifts. Anne may hand an item to Bob, and Bob may believe that Anne has a made a gift of that item to him such that it is now his property, but the law may disagree and consider the thing to be Anne's after all. For a gift to legally transfer title, (a) the giver must intend to make a gift, (b) the giver must actually hand over the item, and (c) the recipient must accept the item.[163] Simple though they may sound, these rules can be anything but in application.[164] For example, determining the giver's intent—perhaps years after the fact—can be difficult.[165] And if a court later concludes that the giver lacked the requisite intent, the consequence would be that the item was never the recipient's property at all.[166] Suppose, then, a Fourth Amendment question arises with respect to that item. Determining whether Bob had Fourth Amendment rights would turn, under a property-based analysis, on whether Anne had intended to make a gift of it—perhaps decades earlier. We struggle to perceive a basis for grounding Bob's Fourth Amendment rights on that fact, which again is likely to have little to do with how Bob and all those he interacts with understand the nature of his interest in the item.

The law of found property and bailments is another prime example. As between the finder of a thing and a stranger, the finder has superior title, but as between the finder and the "rightful" owner of the thing, the finder has the inferior claim and would not be entitled to keep it.[167] In this way, found property is similar to a bailment. Simple examples of bailments are coat checks and dry cleaners: the owner (the bailor) voluntarily gives temporary possession of their personal property to someone else

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163 DUKEMINIER ET AL., *supra* note 127, at 118.

164 *See* Roy Kreitner, *The Gift Beyond the Grave: Revising the Question of Consideration*, 101 COLUM. L. REV. 1876, 1906 (2001) ("[A] close examination of the cases leaves a reader with the sense that ad hoc considerations of fairness and justice or propriety do much of the work in leading judges to decisions.").

165 *See, e.g.*, Gruen v. Gruen, 496 N.E.2d 869, 872–74 (N.Y. 1986) (ascertaining donative intent based in part on destroyed letters and alleged replacement letters).

166 *See, e.g.*, Barter v. Stewart, 378 A.2d 1371, 1372–73 (N.H. 1977) (finding "no real interest in the property" on the part of the alleged recipient where the giver lacked donative intent).

167 *See* Armory v. Delamirie (1722) 93 Eng. Rep. 664, 664; 1 Strange 505, 505.

(the bailee).[168] The owner's claim is superior to that of the bailee, but the bailee's claim is superior to that of everyone else.[169] Found property simply creates an involuntary or de facto bailment: the finder is, for all intents and purposes, the bailee with respect to the true owner, yet with respect to the rest of the world she is the superior claimant.[170] Just as with recording, then, we see ownership of personal property being conceived of in relative terms rather than in absolute ones.

To be fair, and in contrast to areas like adverse possession, there is at least little overlap in claims in this context and there are likely fewer temporal problems, which makes for two fewer Fourth Amendment complications. And the specific case of the voluntary bailment of *physical* personal property may be one of the situations where a property-inspired Fourth Amendment avoids most of the problems discussed in this Section.[171]

But many proponents of a property-based Fourth Amendment also argue that *digital* information is ripe for analysis under bailment law.[172] These claims are premature at best. Most fundamentally, much digital information is not (at least yet) considered property in the first place.[173] As Professor Pamela Samuelson has put it, "[T]he traditional view in American law has been that information as such cannot be owned by any person."[174] To be sure, there are cases where courts or individual judges have concluded in particular contexts that there is a property interest in certain kinds of data.[175] But there is nothing

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168 *See* Daniel B. Kelly, *The Right to Include*, 63 EMORY L.J. 857, 901 (2014). Professor Kelly argued that "the ability of owners to 'include' others in their property is a central attribute of ownership." *Id.* at 859. One implication of that attribute is, as we have argued, significant complication of a property-based Fourth Amendment.

169 For example, the bailee may sue those who negligently damage property in the bailee's lawful possession even though the bailee is not the owner. *See* The Winkfield [1902] P. 42 at 54 (UK); DUKEMINIER ET AL., *supra* note 127, at 57 & n.2.

170 R.H. Helmholz, *Bailment Theories and the Liability of Bailees: The Elusive Uniform Standard of Reasonable Care*, 41 KAN. L. REV. 97, 98 (1992).

171 *See* D'Onfro & Epps, *supra* note 7, at 973 ("[B]ecause the bailee has the right to exclude—and often a duty to exclude—third parties from the bailed goods, police may not search the goods absent a warrant.").

172 *See, e.g.*, *id.* at 972; Donohue, *Functional Equivalence and Residual Rights*, *supra* note 7, at 396–99; O'Connor, *supra* note 7, at 1309, 1312–17.

173 *See* Brady, *supra* note 11, at 1042 (questioning whether users have property interests in their automatically generated data or in data deemed abandoned); *infra* note 207 and accompanying text.

174 Pamela Samuelson, *Privacy as Intellectual Property?*, 52 STAN. L. REV. 1125, 1131 (2000).

175 *See, e.g.*, Thyroff v. Nationwide Mut. Ins., 864 N.E.2d 1272, 1278 (N.Y. 2007) (holding that a claim for conversion of electronic data is cognizable because "it generally

approaching a consensus, and as long as data is not generally understood to be property, a bailment approach to the Fourth Amendment will have trouble getting off the ground.[176] Indeed, as Professor Maureen Brady has explained, Fourth Amendment rights in digital information seem like a particularly poor fit for bailment law given that the Fourth Amendment is about "wrongful *access* by others," while bailment law is concerned with loss of one's *own* access and possession of one's own property.[177] After all, "individuals do not lose and often retain access to their data even when it is searched."[178] Second, many privacy scholars contend that there are good reasons not to consider data to be property—namely, that doing so will commodify and thus erode the value of privacy.[179] For one, propertizing data might "encourage[ ] transactions in data that most of us would prefer be discouraged,"[180] and for another, information asymmetries and power imbalances might lead people to sell or sign away too much of their data.[181] Those waivers might also result in waivers of Fourth Amendment rights that are unintended and unanticipated by the individuals who made them.[182] In all of these ways, property law is not the bulwark of digital privacy rights that some believe it could be.

C. Easements and Privately Owned Public Spaces

Even when ownership is relatively clear, property rights sweep more widely than just ownership. People often have

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is not the physical nature of a document that determines its worth, it is the information memorialized in the document that has intrinsic value").

176 *See, e.g.*, CHRISTOPHER SLOBOGIN, VIRTUAL SEARCHES: REGULATING THE COVERT WORLD OF TECHNOLOGICAL POLICING 32 (2022) [hereinafter SLOBOGIN, VIRTUAL SEARCHES] ("Contrary to Gorsuch's suggestion in *Carpenter*, there is no common law basis for saying that one's location, or a record of it, is one's property that can be bailed to another."); Barry Friedman, *Lawless Surveillance*, 97 N.Y.U. L. REV. 1143, 1208 n.338 (2022).

177 Brady, *supra* note 11, at 1041 (emphasis in original).

178 *Id.*

179 *See, e.g.*, Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2056, 2057 (2004) ("Legal scholars interested in protecting information privacy [ ] have been suspicious of treating personal data as a form of property.").

180 Jessica Litman, *Information Privacy/Information Property*, 52 STAN. L. REV. 1283, 1303 (2000).

181 *See* Mark A. Lemley, *Private Property*, 52 STAN. L. REV. 1545, 1551 (2000); Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1396 (2000) ("Freedom of choice in markets requires . . . enough power—in terms of wealth, numbers, or control over resources—to have choices. The privacy-as-choice model reinforces persistent inequalities on both counts."); Samuelson, *supra* note 174, at 1145.

182 *See* Brady, *supra* note 11, at 1042; *cf. infra* Part II.C (discussing other ways in which property approaches can lead to unintended losses of Fourth Amendment rights).

property rights that are subsidiary to ownership, and these also raise questions for a propertized Fourth Amendment.

One common example arises in the context of easements. An easement is the right to enter another person's land and to perform some act on that land: cross it with a vehicle, access a well, and so on.[183] Easements are distinct from licenses, which simply signify the owner's freely revocable permission.[184] An easement is normally irrevocable by the landowner; it is a *property right* held by the person who enjoys the power of access.[185] Suppose, then, that Anne owns a home and yard and Bob owns an easement to cross her yard to access a beach. Suppose further that law enforcement suspects Bob of a crime and wishes to search the pathway to the beach for evidence. Is Bob's easement sufficient to invoke the Fourth Amendment? Or does it matter that his property interest is weaker than ownership and lacks the full panoply of rights that come from ownership? Suppose instead that Anne is the suspect. She owns the land, but her ownership is burdened by Bob's easement. Is that intrusion on her title sufficient to erode the protections of the Fourth Amendment? Would it matter how many people enjoyed this easement? (Hold that thought for a moment.) Finally, suppose that Bob had merely been given permission—a license, not an easement, and therefore not a property right—to use the pathway. Is the simple fact that Bob's permission was revocable by Anne sufficient to eliminate the protections of the Fourth Amendment? Courts might eventually develop defensible answers to all of these questions, but it is hard to justify from first principles why any of these property law niceties ought to bear on the ultimate Fourth Amendment question.

It gets tougher. Easements may be expressly created—the product of a written agreement—and properly recorded in the chain of title.[186] But they may also be impliedly created—either by adverse possession,[187] estoppel, a particular sort of use prior to subdivision of a larger parcel, or necessity.[188] Insofar as the application of the Fourth Amendment would turn on whether such an easement were present, criminal procedure cases could effectively

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183 RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2(1) (AM. L. INST. 2000).

184 *Id.* § 2.2 cmt. h.

185 *Id.*; *see id.* § 2.2 cmt. a.

186 *Id.* § 2.1(1).

187 RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 2.16–2.17 (discussing servitudes created by prescription, including adverse possession); *cf. supra* Part II.B.2.

188 RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 2.10, 2.12, 2.15 (describing the requirements for servitudes created by estoppel, implied prior use, and necessity).

become quite complex property law cases, and the outcomes might be both strange and difficult to predict. Take the final hypothetical where Bob had merely been given permission to use the pathway. An easement by estoppel can arise out of such a license. A licensee who makes substantial investment in reasonable reliance on that license may consequently be able to claim that that license has become irrevocable—that the licensor is thus estopped from revoking it.[189] Making Fourth Amendment cases turn on whether Bob made a substantial investment in reliance on beach access is certainly feasible; courts have experience resolving those questions in the property law context.[190] But it is difficult to explain why the scope and protections of the Fourth Amendment should turn on the nature of Bob's previous investments in reliance on Anne's permission—unless, of course, one both retreats to privacy and considers Bob's actions to reflect something about his expectations with respect to the space. Otherwise, the property law analysis simply does not coherently map onto the Fourth Amendment analysis. And even if it did, it brings no further ex ante clarity than the status quo and does not help litigants, courts, individuals, or law enforcement.

Finally, return to the question whether it might matter how many people enjoyed an easement on Anne's property. Sometimes the general public may have an easement over someone's land. For example, sidewalks in many states sit atop land owned by the owner of the adjacent lot; the public simply has an easement to walk there.[191] Does the fact of that ownership "beneath" the easement endow the adjacent property owner with special Fourth Amendment rights with respect to the sidewalk? That would make little realistic sense in light of how the space is actually used and understood by society, but concluding that the owner is no different than the general public overlooks the fact that, as a matter of property law, she is indeed different. In fact, she is obligated to maintain the sidewalk and clear it of snow, among other things, *because* she is the owner.[192] The sidewalks thus represent

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[189] *Id.* § 2.10; *see also, e.g.*, Mund v. English, 684 P.2d 1248, 1249 (Or. Ct. App. 1984) ("[W]hen a licensee makes valuable improvements on the basis of a promise, the licensor will not be permitted to assert that the license could be revoked.").

[190] *See, e.g.*, *Mund*, 684 P.2d at 1250 (finding that because the plaintiffs had made substantial investments in their home in reliance on continued access to a well on the defendant's property, the defendant could not revoke their license to use the well).

[191] *See, e.g.*, CAL. CIV. CODE § 831 (West 2024); IDAHO CODE § 55-309 (2024); N.D. CENT. CODE § 47-01-16 (2023); OKLA. STAT. tit. 69, § 1202 (2024).

[192] *See* Michael C. Pollack, *Sidewalk Government*, 122 MICH. L. REV. 613, 638–39 (2024).

a salient space where either property principles lead the Fourth Amendment to a strange result, or achieving a reasonable Fourth Amendment rule means abandoning property principles and resorting to something like notions of privacy. Other areas common in urban environments, like "privately owned public spaces"—where a landowner sets aside some of their space and makes it available to the public for a garden, plaza, or the like—present similarly difficult questions.[193]

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Whatever the practical shortcomings of the *Katz* approach, turning to property principles will often make things worse. Ownership is not standardized, but rather divisible across time, space, and person. It is not absolute, but rather relative across claimants. It is not straightforward, but rather often reliant on entity intermediaries like corporations and trusts. And ownership is not even the only type of property interest one can have. Fourth Amendment law would be poorly served by taking on board all the attendant property law questions that this complexity inevitably raises. Even in the best-case scenario, property-inspired approaches often run out before they can satisfactorily answer a number of important Fourth Amendment questions, which means they may have to fall back on some version of privacy principles.

What's more, as the foregoing discussion illustrates, those property law questions themselves rarely admit of uniform answers. Instead, they often turn on state law. Different states are governed by different recording statutes, which means the priority among similarly situated claimants may be different across states.[194] Different states are governed by different adverse

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[193] *See, e.g.*, N.Y.C., N.Y., ZONING RESOL. § 37-752 (2024) (regulating the signage that can be used in public plazas, i.e., areas in private lots that are intended for public use); JEROLD KAYDEN, THE N.Y.C. DEP'T OF CITY PLAN. & THE MUN. ART SOC'Y OF N.Y., PRIVATELY OWNED PUBLIC SPACE: THE NEW YORK CITY EXPERIENCE 38 (2000); Sarah Schindler, *The "Publicization" of Private Space*, 103 IOWA L. REV. 1093, 1114–15 (2018). The owner of a privately owned public space (POPS) remains the owner despite the fact that they cannot exclude people from the space. But whether they retain property-based Fourth Amendment rights with respect to the space is harder to say. And what about the rights of the visitors to the POPS? Does the fact of another person's ownership of the land eliminate the visitor's Fourth Amendment rights? To be sure, many people in that setting would likely lack reasonable expectations of privacy under *Katz*, so perhaps the cases come out the same way, but that only points out how unnecessary the detour through property law is.

[194] *See supra* note 159 and accompanying text.

possession rules,[195] or have different laws with respect to easement creation.[196] And so on.[197] "Even the simplest property concepts—like trespass . . . —vary between states."[198] One consequence of grounding the Fourth Amendment in property principles is that the content of a federal constitutional right would vary across states, and would do so based on differences in state property law that would seem to have little to do with law enforcement, surveillance, or any of the values underlying the Fourth Amendment. Another consequence is that Fourth Amendment jurisprudence may be less able to build on and clarify itself over time because the applicable precedents may be so rooted in state-specific property law that they are of little use, even as analogies.

On the one hand, Professor Brady has argued that there is little to fear from such disuniformity and that property law is well suited to "tailoring" for local practices and circumstances.[199] But on the other hand, she has pointed out that federal courts deciding property-based Fourth Amendment cases might well shape and distort state property law.[200] We agree entirely about the latter problem, and we remain concerned about the former too. Even if the Fourth Amendment need not be entirely uniform—and even if it may vary at the margins based on jurisdictional differences in substantive criminal law—transforming a universal constitutional right into a fractured, contingent one based on the intricacies of state and local property law is unnecessary and unappealing. In the takings context, at least, the right at issue is inextricably bound to property. The Fourth Amendment right need

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195 *See supra* note 156 and accompanying text (classifying statutes of limitations). *Compare* N.Y. REAL PROP. ACTS. LAW § 501(3) (requiring the possessor to have a "reasonable basis for the belief that the property belongs" to them), *with Mannillo*, 255 A.2d at 260–63 (holding that the possessor's state of mind or basis thereof is irrelevant).

196 *Compare, e.g.*, Willard v. First Church of Christ, Scientist, 498 P.2d 987, 991–92 (Cal. 1972) (holding that an easement can be created in favor of a third-party stranger to a real estate transaction), *with* Estate of Thomson v. Wade, 509 N.E.2d 309, 310 (N.Y. 1987) ("[A] deed with a reservation or exception by the grantor in favor of a third party, a so-called 'stranger to the deed,' does not create a valid interest.").

197 *See, e.g.*, *Jones*, 565 U.S. at 425–26 (Alito, J., concurring in the judgment) (highlighting that under the Court's property-based approach to the decision, the defendant's Fourth Amendment claim would turn on whether he lived in a community-property state and thus shared a property interest in his wife's vehicle).

198 Brady, *supra* note 11, at 1036.

199 *Id.* at 1025–26. Professors D'Onfro and Epps share our concern for uniformity, *see* D'Onfro & Epps, *supra* note 7, at 936, 952–53, 959, as does Professor Richard Re, *see* Richard M. Re, *The Positive Law Floor*, 129 HARV. L. REV. F. 313, 334 (2016).

200 Brady, *supra* note 11, at 1053 ("If federal courts take the lead on developing the common law, it could have the effect of homogenizing state rules and chilling beneficial experimentation.").

not be, as the last fifty years have proved. And while federal courts evaluate state and local property law in the context of constitutional claims under the Takings Clause of the Fifth Amendment,[201] that practice is not without flaws and dangers of its own[202]—including, as Professor Brady pointed out, the feedback effect on state property law.[203]

III. PROPERTY'S MANIPULABILITY

The problems just explored all have to do with the lack of short-term clarity of a property-inspired Fourth Amendment and the difficulties of administering it. But as troubling as those are, it gets worse. Even if none of those problems existed, a property-inspired Fourth Amendment would raise serious manipulability concerns that could keep it from being a meaningful guardian of security and liberty.

First, property rights are themselves *defined* by government: state, federal, and even sometimes local. This means that government could alter the scope of Fourth Amendment protection simply by adjusting the legal classification of things and tweaking the rights that flow from those classifications. This concern is particularly acute for things with fuzzy property statuses—data, intellectual property, and the like. Second, property rights are also subject to being *taken* by government. This means that governments could eliminate Fourth Amendment protection altogether by taking the property in question. Third, property rights are subject to being *narrowed* by government, predecessors in title, or landlords acting in concert with the state. This means that the scope of Fourth Amendment protection may differ across owners and residents of equivalent property as a result of choices made by others. It also means that the state can use a variety of tools to incentivize those individuals to make choices that expand the government's investigatory power and narrow people's Fourth Amendment rights.

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[201] *See id.* at 1032.

[202] Stewart E. Sterk & Michael C. Pollack, *A Knock on* Knick*'s Revival of Federal Takings Litigation*, 72 FLA. L. REV. 419, 437–48 (2020) (discussing a wide range of practical issues for federal courts adjudicating takings claims that rely on state property law).

[203] *See* Brady, *supra* note 11, at 1053–57.

A. Baselines and Classifications

The most basic way in which property is vulnerable to government manipulation is simply that law defines what property is. Mostly, but not entirely, that law is state law.[204] The Supreme Court has, on numerous occasions, made clear that property rights "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."[205] For example, the question whether a person has a property interest in their body parts or cells is a question of state law.[206] Perhaps most timely, there is a robust debate about whether and how to conceive of rights in data and private information as property rights, and this debate recognizes the defining role of both state and federal law.[207] Meanwhile, it is federal law that defines many intellectual property rights like copyrights and patents.[208]

All of this would suggest that a property-based Fourth Amendment would enable government to define property rights, particularly in newer territory like data and privacy, in order to limit the scope of Fourth Amendment protection. That fox-guarding-the-henhouse situation ought to be alarming. Fortunately, circumstances are not that dramatic, yet unfortunately, it has proven exceedingly difficult to determine just where the line

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[204] *See* Tyler v. Hennepin County, 143 S. Ct. 1369, 1375 (2023) (noting that the Court looks to state law, as well as other forms of positive law); Murr v. Wisconsin, 137 S. Ct. 1933, 1944–45 (2017) (expressing "caution [toward] the view that property rights under the Takings Clause should be coextensive with those under state law" because states "do not have the unfettered authority" to reshape property law).

[205] Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972); *see also* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Protection, 560 U.S. 702, 707 (2010) ("Generally speaking, state law defines property interests."); Phillips v. Wash. Legal Found., 524 U.S. 156, 164 (1998).

[206] *See, e.g.*, Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 489–90 (Cal. 1990) (holding that a person does not have such a property interest once the body part has been removed from their body).

[207] *See, e.g.*, Samuelson, *supra* note 174, at 1133–36, 1142 ("Grants of property rights are generally the province of state law."); *cf.* Michael C. Pollack, *Taking Data*, 86 U. CHI. L. REV. 77, 102, 106–112, 107 n.152 (2019) [hereinafter Pollack, *Taking Data*] (discussing the debate and exploring a role for federal law, but not to the exclusion of state law); Orin Kerr, *Can the Federal Government Define "Property" for Purposes of Federal Law?*, THE VOLOKH CONSPIRACY (Mar. 28, 2013), https://perma.cc/9CFV-V6XB (exploring a role for federal law).

[208] *See, e.g.*, Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 592 (1834) (holding that copyright is a right created by federal statute); Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 531 (2004).

really is.[209] The Supreme Court has never disavowed its position that property rights are creatures of positive law, but it consistently follows that thought by cautioning, for example, that "[s]tate[s] may not sidestep" constitutional protections like the Takings Clause simply by cleverly defining those rights.[210] So, the Court says, it looks at state law along with "'traditional property law principles,' plus historical practice and [its] precedents" to determine what property rights look like for purposes of the Takings Clause.[211] The same would seem to apply with respect to a property-based Fourth Amendment.[212] (And if not, we wonder, what would?)

This is good news for those concerned about government's sweeping power to determine the scope of its investigatory power by manipulating property rights, but it is very bad news for the administrability of a property-based Fourth Amendment. The door is not wide open to government baseline setting and, therefore, to government manipulation of Fourth Amendment rights, but neither is it firmly closed.

One area of property law in which the role of baseline setting has proven particularly vexing is in the context of what are known as regulatory takings cases. These are cases in which government regulation has reduced the value of a person's property and the owner sues the regulating government demanding compensation for that reduction in value under the Takings Clause.[213] The question naturally arises: How much value has been lost? And answering that question requires some baseline against which to measure the loss. Is it the entire parcel of land, or is it the affected piece of the parcel?[214] What if a person owns multiple adjacent

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209 Professor Brady may have a bit more faith than we do in the power of Supreme Court guardrails, *see* Brady, *supra* note 11, at 1043, though she ultimately recognized their "unpredictability," *see id.* at 1048. In any event, as the discussion that follows illustrates, the problem rears its head in even more ways than she explored in her piece.

210 *Phillips*, 524 U.S. at 167; *see also Tyler*, 143 S. Ct. at 638; *Murr*, 137 S. Ct. at 1944–45; Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980).

211 *Tyler*, 143 S. Ct. at 1375 (quoting *Phillips*, 524 U.S. at 167).

212 This seems somewhat similar to Professors D'Onfro and Epps's "general law" proposal. *See* D'Onfro & Epps, *supra* note 7, at 927–36.

213 For more on the Takings Clause, see *infra* Part III.B.

214 *Compare* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130–31 (1978) (focusing on the "extent of the interference with rights in the parcel as a whole—here, the city tax block"), *with* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1054 (1992) (Blackmun, J., dissenting) ("The composition of the denominator . . . is the dispositive inquiry. Yet there is no objective way to define what that denominator should be." (quotation marks omitted) (quoting *Lucas*, 505 U.S. at 1016–17 n.7 (majority opinion))).

parcels, only some of which are affected?[215] The Court has recently held that "no single consideration can supply the exclusive test" for determining the baseline and that "courts must consider a number of factors," including "the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land."[216]

It is not hard to imagine similar questions arising in the context of a property-based Fourth Amendment: How much of an intrusion is a search? What is the property law baseline? How do data and personal information fit in?[217] The sorts of complicated questions that plague the Takings Clause, and that the Supreme Court has found itself unable to clearly resolve there, would likely infect the Fourth Amendment too. And when it comes to edge cases like data, a property-based Fourth Amendment would need to engage with the extraordinarily difficult positive and normative questions about the "property-ness" of data noted above.[218] For those looking to improve on *Katz* and to simplify Fourth Amendment matters, the imprecise role of state and federal law in defining property rights ought to make property law an unattractive source of inspiration. And it is yet another way that property-based approaches open the door to resolving cases by falling back on privacy and related principles.

B. Eminent Domain and Exactions

Even if we could get past the baseline and definitional problems, the vulnerability of property rights to governmental manipulation would remain. Both federal and state governments have the sovereign power to take private property.[219] Most municipalities have been delegated that power by their respective state governments as well.[220] This takings power is generally limited in two respects: first, the taking needs to be for a "public use," and second, the government doing the taking needs to compensate the

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215 *See Murr*, 137 S. Ct. at 1941.

216 *Id.* at 1945.

217 *See supra* notes 172–82 and accompanying text.

218 *See supra* note 207 and accompanying text.

219 U.S. CONST. amend. V; *e.g.*, ARIZ. CONST. art. II, § 17; CAL. CONST. art. I, § 19; FLA. CONST. art. X, § 6; ILL. CONST. art. I, § 15; N.Y. CONST. art. I, § 7(a); TEX. CONST. art. I, § 17.

220 *See* EUGENE MCQUILLIN, CLARK A. NICHOLS, WILLIAM Q. DE FUNIAK, HIGBEE WILLIAMS, RALPH J. MOORE & H.B. CLARK, THE LAW OF MUNICIPAL CORPORATIONS 279 (Ray Smith ed., 3d ed. 1950) (collecting cases and stating that the "[t]he rule is well settled by a multitude of authorities that the power to exercise the right of eminent domain may be delegated to a municipality by the legislature.").

owner for the fair market value of the property that has been taken.[221] This power applies not only to land but also to personal property, intangible property, and intellectual property.[222] And the public use requirement has been significantly watered down, both in federal law and in many states' laws, to simply require some plausible public benefit.[223]

It seems to us unlikely that government could or would defeat a property-based Fourth Amendment right by simply exercising its power to take the property in question. Among other reasons, governments may not have the resources to pay the requisite compensation every time they want to search or seize property, and courts may reject such an obvious end run around a constitutional right.[224]

But there still remains a plausible version of the eminent domain problem for a property-inspired Fourth Amendment. A branch of takings law called exactions allows a government to demand, on behalf of the public, certain property interests short of ownership in order to offset harmful impacts of development. So, for example, a government may require a landowner to dedicate a public easement in exchange for approving construction of a building that would otherwise obstruct public access.[225] Pursuant to its general takings power, a government may demand these property interests and compensate the property owner for their

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221 *See* Pollack, *Taking Data*, *supra* note 207, at 100.

222 *See* Horne v. Dep't of Agric., 576 U.S. 351, 358–59 (2015) (personal property); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003–04 (1984) (trade secrets); Kimball Laundry Co. v. United States, 338 U.S. 1, 16 (1949) (laundry company's trade routes); James v. Campbell, 104 U.S. 356, 357–58 (1882) (patents); *see also* W. River Bridge Co. v. Dix, 47 U.S. (6 How.) 507, 533–34 (1848) (explaining that a distinction for purposes of the Takings Clause between "property [that] is corporeal" and property that is not "has no foundation in reason").

223 *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 480–84 (2005) (holding that a "public use" under the U.S. Constitution is established by a "public purpose" for the taking, and clarifying that courts must "define[ ] that concept broadly" to include economic development and must defer "to legislative judgments" of what will achieve that goal).

224 In previous work, one of us argued that a takings-based regime for searches would actually be a good thing in that it would raise the cost of searches for government to a higher, but still manageable, level and thus enhance privacy without neutering the government's investigatory functions. *See generally* Pollack, *Taking Data*, *supra* note 207. But that argument was limited to contexts that are likely currently outside the Fourth Amendment—specifically, data shared with one's internet service provider. *See id.* at 85–89, 115. Where the Fourth Amendment does not apply at all, a takings-based regime would have the salutary effects just discussed and set out in further detail in that article. *See id.* at 116–31. Simply put, it would replace zero protection with liability rule protection. But the question here has to do with contexts *inside* the Fourth Amendment's scope, where the exclusionary rule presently offers property rule protection.

225 *See, e.g.*, Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 828 (1987).

value. But the government may be able to avoid compensation altogether if the demand exhibits a "nexus" with the harm of the development and is in "rough proportionality" to the extent of that harm.[226] Where these conditions exist, the exaction is not considered a taking at all, but rather a legitimate permitting condition, which the government can impose for free.[227]

Suppose, then, that a city government is considering a developer's plan to build a large rental apartment building in a "high-crime area."[228] The building would substantially increase the number of residents in the area. The developer and the city both hope that this investment will help to turn the tide in the neighborhood and attract capital, but the city is concerned that the development might increase the number of potential crimes and threats to public safety. So the city grants the necessary permits but requires the developer to dedicate an easement for law enforcement—perhaps to place a closed-circuit television or security camera in the lobby; to enter the building or even individual apartments whenever officers have reasonable suspicion of criminal activity (that is, less than the probable cause required by the Fourth Amendment); or to bring a drug-sniffing dog through the premises on a monthly basis. We will call these "search easements." The permits are issued, the search easement is created, and the Fourth Amendment has effectively been eroded within the premises as a result of the government's manipulation of the property rights at stake.

This might feel speculative right now, but that's precisely because we have a Fourth Amendment doctrine that expressly prohibits this sort of manipulation.[229] But if property principles were to dominate in the Fourth Amendment context, this sort of move would be much more plausible. Perhaps it would be considered a taking and the government would have to compensate the developer for the value of the easement. In contrast to the investigation-specific eminent domain story set out above, it

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[226] *See id.* at 836–37; Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

[227] *See* Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 605–06 (2013).

[228] *Cf.* Illinois v. Wardlow, 528 U.S. 119, 123–25 (2000) (holding that whether an area is "high crime" can inform whether an officer has reasonable suspicion to conduct an investigative stop).

[229] *See* Smith v. Maryland, 442 U.S. 735, 740 n.5 (1979) (stating that courts would not rely on subjective expectations of privacy if the government were to manipulate them); *see also* Hudson v. Palmer, 468 U.S. 517, 525 n.7 (1984) (emphasizing the *objective* reasonableness prong of the *Katz* test rather than potentially manipulated "privacy expectations of particular defendants in particular situations" (quoting United States v. White, 401 U.S. 745, 751 (1971))).

strikes us as not so fanciful that a government might go down that path, particularly in communities that are already highly policed. Note too that the compensation would flow to the *developer* rather than to the people who would actually have to live in the building subject to that search easement. The developer may therefore have little reason to protest and may readily agree to such an arrangement in exchange for that compensation. (Indeed, the developer may even offer such an arrangement, a possibility we explore in Part III.C.) But perhaps the search-easement gambit would not even be considered a taking at all. A reviewing court could conclude that the requisite nexus to public safety and rough proportionality exist. In that case, with a wave of a hand, the government would have altered the scope of the property-based Fourth Amendment at zero cost to itself.[230]

These potential manipulations demonstrate that the more the Fourth Amendment turns on property principles, the more the government's power over property risks becoming the government's power over the Fourth Amendment itself.

C. Benefit Agreements (and Covenants and Leases)

In practice, takings and exactions would rarely be necessary to manipulate a property-based Fourth Amendment. Governments routinely offer a range of benefits to developers, and these carrots could entice developers to voluntarily forfeit significant property interests—and, in turn, the Fourth Amendment interests of future residents.[231] Like its exactions cousin, this possibility is one that our colleagues have overlooked thus far, and one that poses a serious problem for property-based approaches.

Consider first that nearly every municipality in the country practices some form of zoning.[232] This means that land uses are tightly regulated, with certain uses and certain heights, densities,

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[230] Even the possibility of such an outcome is a vivid illustration of the government's power over property and demonstrates that, in reality, property rights are not protected against government intrusion by property rules but are instead protected by liability rules. *Cf.* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092, 1105 (1972) ("Whenever someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it, an entitlement is protected by a liability rule.").

[231] *See supra* notes 224–27.

[232] *See* Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 588 (2017).

and so on being permitted only in certain places.[233] Though property owners may seek variances—essentially, permission to violate the zoning ordinance—from local administrative agencies, variances are generally authorized only under relatively narrow circumstances.[234] Developers may therefore often want or need a parcel to be rezoned in order to enable the construction of a larger project or a different use. The local government and the developer may then negotiate what is called a "development agreement": a legally binding contract between a property owner and a local government.[235] Development agreements generally entail the government agreeing to rezone a parcel and to "freeze" the new land use regulations in place through the course of the development, while the developer provides "funding, land, and other support for schools, parks, community facilities, or affordable housing projects."[236]

Additionally, municipalities and states often offer tax abatements and other financial incentives to developers. The theory behind these sorts of deals is that they will attract development that is desired but that may not otherwise materialize. For example, New York State had for decades offered a tax abatement for the construction of affordable housing in certain parts of New York City.[237] Houston, Texas, offers a similar tax abatement for "high-employment facilit[ies]" and other economic development projects in designated "reinvestment zones."[238] Plenty of other examples abound.[239] These financial giveaways are both attractive to developers and opportunities for municipalities to impose conditions and to shape the path of development.

Suppose, then, that rather than demand a search easement of the kind discussed above, a municipal government simply

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[233] *See id.* (observing that zoning laws "set the acceptable terms not only of use—residential, commercial, industrial, and the like—but also of building height, setbacks, materials, fire protection, energy use, waste treatment, and myriad other minutiae").

[234] *E.g.*, Commons v. Westwood Zoning Bd. of Adjustment, 410 A.2d 1138, 1142–43 (N.J. 1980) (explaining the "undue hardship" standard for granting a variance under New Jersey law).

[235] Dorothy D. Nachman, *When Mixed Use Development Moves In Next Door: Finding a Home for Public Discourse and Input*, 23 FORDHAM ENVTL. L. REV. 55, 80 (2011).

[236] *Id.* at 79–80; *see also* Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 STAN. L. REV. 591, 602–04 (2011).

[237] *See* N.Y. REAL PROP. TAX LAW § 421-a (McKinney 2024). This tax abatement expired for new projects in 2022 and has not yet been reauthorized by the state legislature. *See, e.g.*, Louis Finley, *Controversial Tax Break for Developers Set to Expire This Week*, SPECTRUM NEWS NY1 (June 13, 2022), https://perma.cc/3VTN-SQE9.

[238] HOUSTON, TEX., CODE OF ORDINANCES §§ 44-120(b)(1), 44-122 (2025).

[239] *See* Michael C. Pollack, *Reallocating Redevelopment Risk*, 73 FLA. L. REV. 1081, 1089–1100 (2021) (collecting stories).

incentivized it in one of these ways. Whatever the specific incentive structure may be, rental developers may readily agree.[240] First, they get something for it—whether it's extra space to build, a tax abatement, or the ability to build at all. Second, assuming the developers do not live in the building themselves, they do not actually have to live with that search easement and so do not personalize its cost. The obvious rejoinder here is that the market will force the developers to internalize the cost of the search easement in the form of a reduction in the rent that tenants will be willing to pay. But this is unlikely to be the case. Tenants may not be aware of or understand the easement (and the landlord may feel little need to disclose it), and many tenants are not in any position to bargain or to turn their nose up at affordable housing. Indeed, poorer people, people of color, and older people are all already vulnerable in the housing market and are unable to effectively negotiate with landlords or be particularly choosy when shopping for housing.[241] Of course, these groups overlap with those already most overpoliced, which only further underscores the potential for abuse.[242] Finally, it strikes us as plausible that many prospective tenants may not care about the search easement in the first place. They may put fairly little value on their privacy or their freedom from searches—either because they are confident they have nothing to hide or because they consider privacy a luxury—in which case the market will not respond

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[240] These hypotheticals are likely not far off, with municipalities and police departments taking steps in this direction by, for example, offering people free doorbell cameras which law enforcement can monitor. *See, e.g.*, Louise Matsakis, *Cops Are Offering Ring Doorbell Cameras in Exchange for Info*, WIRED (Aug. 2, 2019), https://perma.cc/TL7N-KT3D; *see also* Avi Asher-Schapiro, *Privacy or Safety? U.S. Brings "Surveillance City to the Suburbs"*, CONTEXT (May 11, 2023), https://perma.cc/QT4W-Y4ZT.

[241] *See, e.g.*, Pollack & Strahilevitz, *supra* note 137, at 609–10 (noting that Black, Native American, and Hispanic households, along with older households, "are significantly more likely than white [and younger] households to be low-income renters" and to be vulnerable to low-quality leases and rental conditions).

[242] *See, e.g.*, Utah v. Strieff, 579 U.S. 232, 254 (2016) (Sotomayor, J., dissenting) (citation omitted):

> [I]t is no secret that people of color are disproportionate victims of [unlawful searches]. For generations, black and brown parents have given their children "the talk"—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.

See also MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 95–136 (2010); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2068–72 (2017); Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 974–75 (2002).

much at all to the landlord's cession of the search easement.[243] And even if rents were depressed in buildings with search easements, a carefully designed tax abatement might make the landlord whole or better-off anyway. In sum, with little effective deterrent, there would not be much to stop landlords from taking the incentive offered by the government—and, in concert with government, reducing their tenants' property-based Fourth Amendment rights.

The same story could be told about homeownership in planned communities like homeowners' associations or condominium developments. Developers of these sorts of communities can make the same choices and respond to the same governmental incentives as landlords and rental developers. And their choices will bind the new homeowners all the same. Easements and other such covenants and restrictions generally "run with the land" once established and properly recorded,[244] so any buyer of the land will succeed to the same obligations to which the developer agreed—including the obligation to provide law enforcement access to their home. Of course, purchasers of real property tend to retain lawyers who check for these sorts of things, so it is less likely that a buyer would be unaware of a search easement or similar restriction in the way a tenant might be. But it remains possible that at least some buyers may not care enough to walk away from the deal or may simply negotiate a reduced purchase price (but one that still leaves the developer in a better position than if they had never made the deal with the municipality).

In these ways, governments need not even resort to their power to take or exact property interests from developers. Governments can negotiate their way to the same outcome because they hold many of the cards in terms of authorizing development in the first place—and they can do this over and over again until they cover more and more homes. A world in which prospective buyers and renters have to rely on developers to stand up for their rights in the face of attractive development incentives is not one in which those rights are likely to receive much protection. Unless prices respond negatively—and for the reasons discussed above, we cannot be so sure they will—developers have little reason to

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[243] *See, e.g.*, Omri Ben-Shahar & Lior Jacob Strahilevitz, *Contracting over Privacy: Introduction*, 45 J. LEGAL STUD. S1, S5 (2016) (finding that people are "strikingly stingy" when asked to value privacy, and finding, for example, that people are willing to pay no more than $15 per year to avoid automated content analysis of email messages).

[244] *See* DUKEMINIER ET AL., *supra* note 127, at 804 (easements); *id.* at 847 (covenants).

put up a fight and many reasons to take the government's privacy-eroding deal.

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The popular conception of one's home as one's castle—of property as some zone of inviolable protection from the government—is false. Property rights are defined and manipulated by government, sometimes at a cost to government, but sometimes for free. And property rights are further shaped by developers and landlords acting in concert with the government or responding to government incentives. The more that the Fourth Amendment leans on property principles, the more that those constitutional protections risk being likewise opened to manipulation by the very government against which those protections are meant to operate. At a minimum, the potential for that sort of gameplaying will raise difficult questions of constitutional law and of property law—questions that courts have already had trouble resolving in the property context and that they would very likely continue to struggle with in the Fourth Amendment context.

IV. NORMATIVE AND FUNCTIONAL CONSIDERATIONS

In addition to their manipulability and complexity, property-based regimes often fit poorly with other Fourth Amendment values. In the past, it may have been true that property and privacy went hand in hand, and that privacy was largely subsumed within the concept of property.[245] In the modern era, that's no longer the case. Today, Fourth Amendment regimes based on property are likely to be excessively narrow, offering little protection for the digital data that is often the focus of modern government surveillance. Further, the protections that property-based approaches offer can be arbitrary, centering the Fourth Amendment around de minimis physical contact while ignoring far greater intrusions that raise concerns about government power and fundamental rights.

A. Narrowness

In the modern era, much of the information useful to government investigations can be found in digital data. This can include

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[245] *See Carpenter*, 138 S. Ct. at 2239–40 (Thomas, J., dissenting); Cloud, *Property Is Privacy*, *supra* note 7, at 42.

web surfing data, chats and direct messages, communications metadata, subscriber information, medical and biometric data, location information, and more.[246] These types of data raise difficulties for a property-based Fourth Amendment approach. First, as discussed above, information, particularly intangible data, is generally not considered property.[247] Second, even if it were property, this sort of data is generally not only in the hands of third parties but is assembled or even created by those third parties, and it is rarely, if ever, in the possession of or controlled by the individuals targeted by government surveillance.[248] It is therefore unlikely to be meaningfully protected under a property-based Fourth Amendment approach. Rather, property-based protection is likely to be limited to contexts that are closely analogous to predigital property, such as digital document storage or email contents, where the target created the information and entered into something that could be analogized to a bailment relationship with the service provider.[249]

The lack of protection for most forms of data is concerning in an age when cellphone services, apps, websites, and other service providers can generate and store information that reveals the intimate details of their users' lives. Indeed, many of our activities generate a trail of personal, sometimes sensitive, digital data. Google Maps and other navigation apps collect data on users' movements and destinations, as do rideshare apps like Uber and Lyft.[250] Dating apps gather large quantities of information on their users, much of it especially intimate.[251] Tinder collects the identity, age, and race of a user's matches; the location and timing of online conversations between matches; the frequency of the words that each user types; how much time users spend looking at others' pictures before swiping; and more.[252] Health and

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[246] *See, e.g.*, Matthew Tokson, *Automation and the Fourth Amendment*, 96 IOWA L. REV. 581, 601–02 (2011) [hereinafter Tokson, *Automation*] (noting that third-party doctrine precedents are problematic in an age where individuals store enormous amounts of personal information on various third-party platforms).

[247] *See supra* note 176 and accompanying text.

[248] *See* Tokson, *Automation*, *supra* note 246, at 604 ("[M]ost cloud documents are created on a third party's equipment . . . ."); *Jones*, 565 U.S. at 417–18 (Sotomayor, J., concurring) (urging reconsideration of the third-party doctrine in light of the nature of digital data).

[249] *See* O'Connor, *supra* note 7, at 1311–17.

[250] *See* Matthew Tokson, *Inescapable Surveillance*, 106 CORNELL L. REV. 409, 433–34 (2021).

[251] *Id.* at 435–36; Thomas Germain, *How Private Is Your Online Dating Data?*, CONSUMER REPS. (Sept. 21, 2019), https://perma.cc/JCF2-Y5AC.

[252] Judith Duportail, *I Asked Tinder for My Data. It Sent Me 800 Pages of My Deepest, Darkest Secrets*, THE GUARDIAN (Sept. 26, 2017), https://perma.cc/JY85-CQL7.

menstruation apps collect sensitive information about users that may expose them to criminal liability for obtaining an abortion or gender-affirming care.[253] Internet service providers often collect IP address NetFlow records, detailing the website servers and computers with which a user connects.[254] Merely walking around with a cellphone generates location data that can disclose users' movements and activities.[255]

Government requests for such data have increased sharply in recent years.[256] Indeed, several government agencies have engaged in suspicionless, bulk collection of digital data on millions of people in the United States.[257] For example, even after *Carpenter* placed legal restrictions on obtaining data about cellphone users, government agencies and local police departments have sought ways to circumvent those restrictions, for instance by purchasing sensitive information from data brokers for use in law enforcement and intelligence gathering.[258] Digital data about users grows in quantity and depth every year and provides a tempting target for government surveillance. Yet, under applicable property law, a property-centered approach to the Fourth Amendment would likely not protect it. On top of the reasons we've already articulated, even now, decades after email became a fundamental part of our lives, the question of who actually owns email accounts has proven stubbornly difficult to resolve.[259]

Future forms of data have even dimmer prospects of Fourth Amendment protection under a property regime. As artificial intelligence and machine learning have advanced in recent years, they've become increasingly capable of inferring sensitive details

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253 *See* Barry Friedman & Danielle Keats Citron, *Indiscriminate Data Surveillance*, 110 VA. L. REV. 1351, 1354–55 (2024); DANIELLE KEATS CITRON, THE FIGHT FOR PRIVACY: PROTECTING DIGNITY, IDENTITY, AND LOVE IN THE DIGITAL AGE 15–16 (2022).

254 *See* Dell Cameron & Mack DeGeurin, *Whistleblower: Pentagon Purchased Mass Surveillance Tool Collecting Americans' Web Browsing Data*, GIZMODO (Sept. 21, 2022), https://perma.cc/MM7H-QZT4.

255 *See Carpenter*, 138 S. Ct. at 2211–12.

256 *See, e.g.*, Laura Vozzella & Gregory S. Schneider, *Youngkin Opposes Effort to Shield Menstrual Data from Law Enforcement*, WASH. POST (Feb. 14, 2023), https://perma.cc/2EAA-JGRU; Zack Whittaker, *Uber Reports a Sharp Rise in Government Demands for User Data*, TECHCRUNCH (Nov. 20, 2019), https://perma.cc/LR6Z-6ME5.

257 *See, e.g.*, Friedman & Citron, *supra* note 253, at 1375–76.

258 *See generally* Matthew Tokson, *Government Purchases of Private Data*, 59 WAKE FOREST L. REV. 269 (2024).

259 *See* Pollack, *Taking Data*, *supra* note 207, at 103 n.136 (noting that who owns the data associated with an email account has proven difficult to answer as a matter of law).

of individuals' lives from seemingly innocuous sources of data.[260] Cellphone and app use, internet traffic information, purchase data from stores, and even facial expressions or speech captured on surveillance video—all of these can be leveraged by AI algorithms to discern the details of a person's life, activities, and emotional states.[261] While these advanced surveillance techniques may implicate user privacy, they typically don't involve any kind of personal property, focusing instead on data or video owned by corporations.

Indeed, property-centered regimes are likely to leave vast quantities of digital information unprotected by the Fourth Amendment. The same is true of telephone conversations, which are not the property of any person or entity.[262] To be sure, a federal statute, the Wiretap Act,[263] now prohibits wiretapping except when government agents have probable cause and meet especially stringent statutory warrant requirements.[264] But nothing remotely like it exists for any of the other forms of digital information discussed above. Antisurveillance laws are often difficult to pass, and, as with the Wiretap Act, Congress often waits for the courts to protect privacy under the Fourth Amendment before reinforcing those protections via statute.[265] Given this political environment, it is important that courts' applications of the Fourth Amendment be capable of addressing modern surveillance contexts. A property-based approach is not well suited to these contexts. It threatens to leave unregulated a variety of potentially severe intrusions into suspects' personal lives and activities. And it fails to address the digital surveillance that so often characterizes modern government investigations.

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[260] *See* Alicia Solow-Niederman, *Information Privacy and the Inference Economy*, 117 NW. U. L. REV. 357, 382–83 (2022).

[261] *See, e.g.*, Dennis D. Hirsch, *From Individual Control to Social Protection: New Paradigms for Privacy Law in the Age of Predictive Analytics*, 79 MD. L. REV. 439, 455–57 (2020); Evan Selinger & Woodrow Hartzog, *The Inconsentability of Facial Surveillance*, 66 LOYOLA L. REV. 33, 43–44 (2020).

[262] *See* Olmstead v. United States, 277 U.S. 438, 465 (1928) ("The language of the [Fourth] [A]mendment can not be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office."), *overruled by Katz*, 389 U.S. 347, *and* Berger v. New York, 388 U.S. 41 (1967); Cloud, *Property Is Privacy*, *supra* note 7, at 39 (noting that *Olmstead* held that intangible conversations cannot be property for Fourth Amendment purposes).

[263] 18 U.S.C. §§ 2511–2518.

[264] *See id.*

[265] *See* Daniel J. Solove, *Fourth Amendment Codification and Professor Kerr's Misguided Call for Judicial Deference*, 74 FORDHAM L. REV. 747, 776 (2005).

B. Arbitrariness

The Supreme Court has recognized several purposes of the Fourth Amendment, including protecting privacy and limiting surveillance,[266] guarding against the "arbitrary power" of unregulated government agents,[267] and defending one's property.[268] In the paradigmatic example of a Fourth Amendment violation—a warrantless invasion of the home by government officers—these goals overlap, and the privacy and property interests at stake are essentially the same. The police officer's intrusion into the intimate space of the home violates the security of the owner's property and, by the officer's mere presence, infringes the privacy of the home. Moreover, in the preelectronic era, the government typically could not violate a person's privacy without also violating their property. But that hasn't been true for over a century, and it becomes less true with every advance in surveillance technology. In the modern world, property, privacy, and other Fourth Amendment interests often diverge.

Because of these changes, basing the Fourth Amendment's scope on property will often result in extremely arbitrary outcomes. In other words, property theories will lead courts to apply or withhold Fourth Amendment protection based on considerations that have nothing to do with what really matters in a given case. In many cases, the government may have no interest in searching suspects' property, and any property intrusions that occur will be purely incidental to gathering sensitive data about individuals.[269] Likewise, the people targeted will be largely indifferent to the government's de minimis encroachment on their property. Their concern—and the broader concern of a society that wishes to limit police surveillance and the potential for government oppression—is the gathering of detailed information about their lives, not the incidental touching of their stuff.

Take GPS tracking devices, for example. It makes little difference whether the government monitors a person by attaching a GPS device to their car or by tracking their car via surveillance aircraft.[270] But the former is a search on a property theory, "while

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266 *Katz*, 389 U.S. at 353; United States v. Di Re, 332 U.S. 581, 595 (1948).

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

268 *Olmstead*, 277 U.S. at 463–64.

269 *See, e.g.*, *Jones*, 565 U.S. at 403.

270 Both surveillance techniques have been used in recent years. *See id.* (describing the use of a GPS tracking device to monitor the movement of a vehicle); Leaders of a Beautiful

the latter would be wholly unregulated by [a property-based] Fourth Amendment."[271] It's the constant monitoring of individuals, not the incidental touching of a car, that the police and their targets care about, and that raises concerns about unchecked police power.[272] But under a property test, only the touching matters.[273]

A similar arbitrariness can be seen in the pre-*Katz* property cases. To set the boundaries of the Fourth Amendment based on whether the government's microphone touches one's heating duct, as in *Silverman*, or does not, as in *Goldman*, misses the point.[274] The problem was that government agents were secretly recording people's conversations. In the mid-twentieth century, the FBI's pervasive tracking of personal communications threatened to chill free speech, violate the privacy of hundreds of thousands of citizens, compromise the civil rights movement and other activist movements, and ultimately undermine the integrity and functioning of the legislative and judicial branches.[275] These are the concerns raised by modern government surveillance, and property often has little to do with them.

Going forward, asking whether people have a property right in their web browsing data or Google searches, or what they do on a dating app, fails to capture what is meaningful about police surveillance of people's lives. While Fourth Amendment approaches that focus on protecting privacy, limiting surveillance, or checking government power may be far from perfect, they are better suited than property regimes to address the issues that matter in modern Fourth Amendment cases.

V. WHAT COMES NEXT

If not property law and property principles, where should courts look for guidance in Fourth Amendment cases? In this last

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Struggle v. Balt. Police Dep't, 2 F.4th 330, 333–34 (4th Cir. 2021) (detailing the use of constantly flying surveillance airplanes to monitor the movements of vehicles and people).

[271] Tokson, *Normative*, *supra* note 72, at 796; *see also Jones*, 565 U.S. at 425 (Alito, J., concurring in the judgment).

[272] Tokson, *Normative*, *supra* note 72, at 796–97.

[273] *Id.* at 797.

[274] *See supra* notes 45–49 and accompanying text.

[275] *See, e.g.*, ALEXANDER CHARNS, CLOAK AND GAVEL: FBI WIRETAPS, BUGS, INFORMERS, AND THE SUPREME COURT 17, 24–31 (1992) (discussing the FBI's use of wiretapping to attempt to influence the selection of a Supreme Court Justice); CURT GENTRY, J. EDGAR HOOVER: THE MAN AND THE SECRETS 529, 571–76 (1991) (discussing the FBI's use of wiretapping to attempt to blackmail Martin Luther King Jr. and undermine the civil rights movement); Tokson, *Automation*, *supra* note 246, at 583 (discussing the FBI's surreptitious collection of wiretap evidence from citizens and members of Congress).

Part, we argue that courts are doing more or less fine under *Katz*, as they draw on the Supreme Court's extensive case law addressing a variety of Fourth Amendment questions over the past several decades. We then consider how a multifactor test based on *Carpenter* emerging in the lower courts may lend more predictability and coherence to Fourth Amendment law going forward. Finally, we acknowledge that property concepts may have a justifiable role to play in the background of many cases, and they can offer additional jurisprudential justification for rules that flow from *Katz* and *Carpenter*. But they must be used sparingly and with caution in order to avoid discriminatory and inequitable effects, given the sharply unequal distribution of property, as well as the cascade of problems and unanswered questions explored above.

A. The Wisdom of Precedent

The criticisms that scholars have leveled at *Katz*'s reasonable expectation of privacy test for several decades are largely accurate, at least in the abstract. On its own, the test is confusing, vague, and unpredictable, and it fails to constrain judicial decision-making in any meaningful way.[276] But *Katz* has also been the law for more than fifty years, and the Supreme Court has applied it in a wide variety of situations. Almost in spite of itself, the Court has clarified Fourth Amendment law through this gradual accretion of precedent.

Consider the many contexts where the Court has elucidated how the Fourth Amendment applies. The Court has defined the contours of house searches under the reasonable expectation of privacy test, from the home itself to the curtilage and beyond.[277]

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[276] *See supra* notes 59–64 and accompanying text.

[277] *See* Allen & Rosenberg, *supra* note 58, at 1153–54 (arguing that Fourth Amendment law is clear); *see also, e.g.*, Kyllo v. United States, 533 U.S. 27, 34–35 (2001) (thermal imaging cameras used on homes); Minnesota v. Olson, 495 U.S. 91, 98–100 (1990) (overnight guests); Florida v. Riley, 488 U.S. 445, 448–49 (1989) (aerial surveillance); United States v. Dunn, 480 U.S. 294, 301 (1987) (inspections of barns, fields, and yards); California v. Ciraolo, 476 U.S. 207, 209 (1986) (surveillance from public airways); United States v. Karo, 468 U.S. 705, 714–15 (1984) (monitoring of a beeper in a private residence); Oliver v. United States, 466 U.S. 170, 176–79 (1984) (fields surrounding a home); Michigan v. Tyler, 436 U.S. 499, 508 (1978) (entry by firefighters); United States v. White, 401 U.S. 745, 751 (1971) (recording devices).

It has addressed searches of cars,[278] workplaces,[279] phone calls,[280] suspects themselves,[281] open fields,[282] retail stores,[283] drug tests,[284] financial records,[285] handbags,[286] trash bags,[287] and luggage.[288] In these numerous, commonly encountered areas, Fourth Amendment law is quite clear.[289]

To be sure, the reasonable expectation of privacy test itself offers little practical guidance to lower courts on novel Fourth Amendment questions. But property law approaches will often be ambiguous on the same questions, or else clear only because they nearly always fail to protect new forms of sensitive data.[290] Further, abandoning the *Katz* test and transitioning to a property-based approach could destabilize the substantial body of precedent that currently clarifies the law in a variety of areas. Property-based theories vary, and some may hew fairly closely to *Katz*.[291] But a Fourth Amendment centered on property law would be a radical departure from the prevailing approach of the past five decades. Most of the Supreme Court's Fourth Amendment search cases would have to be reconsidered under a property law approach, with the Court weighing stare decisis considerations against property doctrines of varying complexity and ambiguity, overruling some cases while preserving others in a muddled inquiry that defies prediction.

More broadly, despite its downsides, privacy has significant advantages as an organizing concept of Fourth Amendment law. It is conceptually capacious and can apply to new surveillance

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278 *E.g.*, Byrd v. United States, 138 S. Ct. 1518, 1523 (2018); Illinois v. Caballes, 543 U.S. 405, 409 (2005); New York v. Class, 475 U.S. 106, 107–08, 114 (1986); Texas v. Brown, 460 U.S. 730, 738–41 (1983); Rakas v. Illinois, 439 U.S. 128, 129–30 (1978).

279 O'Connor v. Ortega, 480 U.S. 709, 717 (1987); Mancusi v. DeForte, 392 U.S. 364, 369–70 (1968).

280 *Katz*, 389 U.S. at 348.

281 Terry v. Ohio, 392 U.S. 1, 27 (1968); Minnesota v. Dickerson, 508 U.S. 366, 371 (1993).

282 *Oliver*, 466 U.S. at 173.

283 Maryland v. Macon, 472 U.S. 463, 469 (1985).

284 Ferguson v. City of Charleston, 532 U.S. 67, 76–81 (2001); Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602, 609–11 (1989).

285 United States v. Miller, 425 U.S. 435, 440–42 (1976).

286 Rawlings v. Kentucky, 448 U.S. 98, 104–05 (1980).

287 California v. Greenwood, 486 U.S. 35, 40 (1988).

288 Bond v. United States, 529 U.S. 334, 337–38 (2000).

289 *See* Allen & Rosenberg, *supra* note 58, at 1153.

290 *See supra* Parts II.B.3, III.A.

291 *See supra* notes 100–04 and accompanying text.

technologies and contexts as well as traditional ones.[292] It enables courts to consider the seriousness of a violation, permitting actions that only minimally impact privacy while preventing more serious intrusions in ways that concepts like ownership or the right to exclude do not.[293] And privacy is a value in which everyone can be said to have a similar legal interest.[294] The same is not true of property, the uneven distribution of which can contribute to inequality and discrimination, as we discuss in Part V.C below.

The status quo of the reasonable expectation of privacy test is hardly perfect. But its preservation would maintain longstanding protections against a host of search methods, perform comparably to a property-centered regime in terms of complexity and administrability, prevent the political branches from eroding Fourth Amendment rights by manipulating property rights, potentially protect the digital data that modern surveillance often targets, and preserve the extensive body of *Katz*-based precedents that the Supreme Court has built up over the years. Compared to centering the Fourth Amendment around property law, doing nothing has much to recommend it.

B. A New Approach

Even putting aside *Katz*'s gradual clarification of the law, complaints about its ambiguity are decreasingly relevant to today's Fourth Amendment jurisprudence. In the Supreme Court and the lower courts, the *Katz* test is no longer the exclusive method of determining whether a Fourth Amendment search has occurred in the absence of a physical intrusion.

The *Carpenter* approach, briefly described in Part I.B, has begun to transform Fourth Amendment law in a variety of ways. Scholars and commentators recognized its paradigm-shifting nature from the start, hailing it as "revolutionary,"[295] a "landmark,"[296] "a major victory for digital privacy,"[297] and a "show-stopper" that

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[292] *See* Christopher Slobogin, *A Defense of Privacy as the Central Value Protected by the Fourth Amendment's Prohibition on Unreasonable Searches*, 48 TEX. TECH L. REV. 143, 158, 161 (2015) (discussing the flexibility of conceptions of privacy in response to new technologies).

[293] *Id.* at 160 (noting that other constructs outside of privacy are "not as easily divided into strong and weak varieties").

[294] *See* SLOBOGIN, VIRTUAL SEARCHES, *supra* note 176, at 34.

[295] Paul Ohm, *The Many Revolutions of* Carpenter, 32 HARV. J.L. & TECH. 357, 399 (2019).

[296] Rachel Levinson-Waldman & Alexia Ramirez, *Supreme Court Strengthens Digital Privacy*, BRENNAN CTR. FOR JUST. (June 22, 2018), https://perma.cc/H85F-DCA7.

[297] Ren LaForme, *The Supreme Court Just Struck a Major Victory for Digital Privacy*, POYNTER (June 25, 2018), https://perma.cc/4EK4-KM76.

"upsets the apple cart of Fourth Amendment jurisprudence in a fundamental way."[298] Like *Katz*, *Carpenter*'s conceptual foundation is based on privacy, but it is not grounded in societal expectations or any particular privacy model; rather, it focuses on the invasiveness and scope of the surveillance at issue. As many have acknowledged, *Carpenter* has the potential to expand the Fourth Amendment's reach and preserve its relevance in the digital era.[299] More to the point, it can greatly improve the predictability of Fourth Amendment law relative to the reasonable expectation of privacy test.

Over the past few years, as lower courts have applied *Carpenter* in hundreds of cases, a "*Carpenter* test" has begun to emerge.[300] "It consists of three factors: (1) the revealing nature of the data collected; (2) the amount of data collected; and (3) whether the suspect voluntarily disclosed their information to others."[301] The more revealing the information targeted, the greater the quantity collected, and the less that one has voluntarily disclosed it to others, the more likely it is that collecting such information will be a Fourth Amendment search.[302] When some or all of these factors are present, the information obtained is likely to be sensitive and expose the private life of its subject.[303] And vice versa: when the information is not revealing, is not voluminous, or is voluntarily disclosed, its collection is less likely to be a search.[304]

One or more of these factors have appeared in a large proportion of substantive post-*Carpenter* decisions.[305] According to a recent empirical study of these decisions (conducted by one of us), the guidance offered by these factors correlates strongly with case outcomes.[306] Courts have applied some or all of the three factors to a variety of contexts, including internet subscriber

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298 Lior Strahilevitz & Matthew Tokson, *Ten Thoughts on Today's Blockbuster Fourth Amendment Decision*—Carpenter v. United States, CONCURRING OPS. (June 22, 2018), https://perma.cc/Y94X-PTXR.

299 *See, e.g.*, Ohm, *supra* note 295, at 399; Levinson-Waldman & Ramirez, *supra* note 296.

300 Tokson, *Transformation*, *supra* note 29, at 518.

301 *Id.* The other factors mentioned in *Carpenter* (cost, inescapability, and number of people affected) either do not appear nearly as often in the lower courts, are not as influential when they do appear, or both. Tokson, *Aftermath*, *supra* note 6, at 1823–26.

302 *See* Tokson, *Aftermath*, *supra* note 6, at 1831.

303 *See Carpenter*, 138 S. Ct. at 2217–20.

304 Tokson, *Aftermath*, *supra* note 6, at 1831.

305 *See id.* at 1821.

306 *Id.* at 1824–27; *see also, e.g.*, United States v. Diggs, 385 F. Supp. 3d 648, 652–53 (N.D. Ill. 2019) (assessing the three factors).

information,[307] automatic license plate readers,[308] telephone pole cameras aimed at a suspect's house,[309] surveillance cameras in an apartment hallway,[310] surveillance airplanes observing an entire city,[311] IP connection logs,[312] online friends lists,[313] Bitcoin transaction records,[314] urine samples,[315] ankle monitors,[316] and more.[317]

Of course, the Supreme Court has not yet explicitly adopted these *Carpenter* factors as an official test. Yet there are many similarities between the early years of the *Carpenter* test and those of Justice Harlan's *Katz* test, which was not officially adopted by the Supreme Court for several years after its development.[318] Lower courts' embrace of the *Carpenter* factors also recalls lower courts' quick adoption of Justice Harlan's approach.[319]

Indeed, the *Carpenter* test has begun to displace the *Katz* test in many lower court cases. Lower courts sometimes apply only the *Carpenter* factors, ignoring *Katz* entirely.[320] In other cases, courts apply a blend of the two, or they emphasize *Carpenter* while mentioning *Katz* only in passing.[321] While *Katz* is still widely used, the *Carpenter* approach governs a growing number of Fourth Amendment cases.[322]

This ongoing doctrinal shift may give rise to a more coherent Fourth Amendment standard. The emerging *Carpenter* test is largely based on identifiable characteristics of a surveillance practice. Judges may disagree about a factor, or about how to

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307 United States v. Tolbert, 2019 WL 2006464, at *3 (D.N.M. May 7, 2019).

308 Commonwealth v. McCarthy, 142 N.E.3d 1090, 1106 (Mass. 2020).

309 People v. Tafoya, 490 P.3d 532, 542 (Colo. App. 2019).

310 United States v. Harris, 2021 WL 268322, at *3 (E.D. Wis. Jan. 27, 2021).

311 Leaders of a Beautiful Struggle v. Balt. Police Dep't, 2 F.4th 330, 341 (4th Cir. 2021).

312 *Tolbert*, 2019 WL 2006464, at *3.

313 *Id.*

314 United States v. Gratkowski, 964 F.3d 307, 310 (5th Cir. 2020).

315 State v. Eads, 154 N.E.3d 538, 541, 547–48 (Ohio Ct. App. 2020).

316 Commonwealth v. Johnson, 119 N.E.3d 669, 675–76, 683–86 (Mass. 2019).

317 *See, e.g.*, People v. Alexander, 193 N.E.3d 644, 652 (Ill. App. Ct. 2021) (addressing information associated with an IP address); State v. Martinez, 570 S.W.3d 278, 288 (Tex. Crim. App. 2019) (discussing an analysis of the defendant's blood sample originally taken for medical purposes).

318 Tokson, *Transformation*, *supra* note 29, at 519; Smith v. Maryland, 442 U.S. 735, 740 (1979) (adopting and applying Justice Harlan's two-pronged *Katz* test).

319 Tokson, *Transformation*, *supra* note 29, at 519.

320 *See, e.g.*, United States v. Norris, 942 F.3d 902, 907 (9th Cir. 2019); United States v. Bronner, 2020 WL 3491965, at *21–23 (M.D. Fla. May 18, 2020); *see also* Tokson, *Transformation*, *supra* note 29, at 521.

321 *See, e.g.*, *Gratkowski*, 964 F.3d at 311–13; Bailey v. State, 311 So. 3d 303, 310–11 (Fla. Dist. Ct. App. 2020).

322 Tokson, *Transformation*, *supra* note 29, at 521–22.

weigh the factors against each other, but the spectrum of potential disagreement is narrow compared to the near-limitless range of divergence possible under *Katz*.[323] While it's not a bright-line rule, this approach is likely to be far more predictable than *Katz*'s vague reasonableness standard.[324]

In other words, the *Carpenter* test is a real standard, one with teeth.[325] Judges faced with high volumes of revealing data not voluntarily disclosed to others will find it hard to withhold Fourth Amendment protection.[326] Judges considering small quantities of unrevealing information voluntarily disclosed to others will have difficulty extending Fourth Amendment protection.[327] The test's relative concreteness can lend predictability to Fourth Amendment search law. And even if *Carpenter* ultimately displaced *Katz*, it would not overturn *Katz* or reject its theoretical emphasis on privacy.[328] It would generally leave the Supreme Court's myriad *Katz* precedents in place, preserving their case-by-case guidance in many familiar search contexts.[329]

C. Property in the Background

Nothing we have said should be taken to suggest that we would exile all considerations of property law from Fourth Amendment analysis. Doing so would be impossible in any event, and property principles are likely to play a useful role in certain situations. The ideal approach is not to ignore property law but to account for it carefully and with full recognition of its shortcomings and its consequences.

First, many Fourth Amendment cases are fundamentally about government accessing a person's "stuff"—be it real property like a house or personal property like a car or a suitcase. In these cases, property talk is unavoidable. It is a significant part of the factual background. It is frequently part of the context in which investigators and judges make their decisions. In addition, ownership and possession will often influence courts' analyses of

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323 *See* Ohm, *supra* note 295, at 389.

324 Tokson, *Transformation*, *supra* note 29, at 527.

325 *See* Tokson, *Pole Cameras*, *supra* note 56, at 1001 (arguing that *Carpenter* is clear and focuses "courts' analysis on discernable facts in well-defined categories").

326 Tokson, *Transformation*, *supra* note 29, at 528; *see also, e.g.*, *Diggs*, 385 F. Supp. 3d at 653; *Eads*, 154 N.E.3d at 541.

327 Tokson, *Transformation*, *supra* note 29, at 528; *see also, e.g.*, United States v. Tolbert, 326 F. Supp. 3d 1211, 1225 (D.N.M. 2018); *Alexander*, 193 N.E.3d at 652.

328 Tokson, *Transformation*, *supra* note 29, at 534.

329 *Id.*

reasonable expectations of privacy. This often makes sense. For example, by several metrics, an owner is likely to have a greater expectation of privacy in a place or thing than a guest or a stranger. But the influence of property law and property concepts is not sufficient to control the Fourth Amendment analysis across the board. A yearslong squatter is likely to have a reasonable expectation of privacy in a place, and an absentee owner might not. And in many cases, especially those involving modern surveillance practices, privacy issues will arise that do not track property rights at all.[330] Property accordingly has a role to play in Fourth Amendment law, but not a determinative one. Rather, like norms, practical and political circumstances, and so much else, it is best suited for a background, contextual role in Fourth Amendment cases.

Second, property talk is a reasonable basis on which to draw some inspiration for non-*Katz* approaches to Fourth Amendment questions. After all, the text of the Fourth Amendment mentions types of property, and even if its list is not exhaustive, it is clear that the Amendment is attuned, at least in part, to intrusions on one's property.[331] So using property as a jumping-off point for novel approaches to Fourth Amendment law strikes us as fair game. If property-inspired approaches help people uncomfortable with *Katz* and *Carpenter* to conceptualize the Fourth Amendment's scope in a manner that fits better with their jurisprudential priors, then such approaches may play a useful role in building consensus or clarifying rules.

But property-inspired approaches risk being almost as unsound as property-centered approaches if done wrong. That is, as we have demonstrated, the more one imports property law and property concepts root and branch into Fourth Amendment questions, the more one is likely to err as a matter of constitutional law, property law, practical implementation, or all three. If, instead, one merely browses in the property law shop for intuitions or analogies, the less likely those errors are—but the less those outcomes can be fairly sold as rooted in property law.[332] Additionally, if one is not careful, those dashes of property law in the

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[330] *See supra* Part III.A.

[331] U.S. CONST. amend. IV; *see also* BERGER, *supra* note 118, at 73 (arguing that the Fourth Amendment's list of covered items is illustrative, not exclusive).

[332] Analogies to prior technologies or practices are particularly difficult in the Fourth Amendment context, where rapid and profound technological change tends to confuse analogies and make the translation from prior doctrines to new contexts especially difficult. *See* BARRY FRIEDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION 252–53 (2017).

Fourth Amendment mix can be misunderstood or given greater logical importance than intended—or worse, be misapplied to property cases in federal or state courts.[333] Moreover, picking and choosing among the property muses without sufficient explanation risks charges of motivated reasoning or incoherence. Property-inspired approaches require careful explanation as to why a particular property insight or doctrine ought to play a role in a particular set of cases, how those property concepts will be applied in practice, how that property approach might affect the rest of Fourth Amendment and property law, and how that approach might be cabined. Fourth Amendment proposals drawing inspiration from property will, ultimately, have to be assessed on their own merits based on how they address these challenges.

But there is one more danger in any Fourth Amendment consideration of property that courts and scholars should also take into account. It is not internal to property doctrine or property theory, and it is not about constitutional moorings. It is that property law—even as something that informs intuitions or norms—can create and exacerbate discriminatory effects in Fourth Amendment cases.

Property ownership is not evenly distributed in our society. Almost 80% of families with household incomes greater than the median own a home, but only 52.1% of families with household incomes less than the median do.[334] People of color are substantially less likely to own homes.[335] Census data for the second quarter of 2024 shows that the homeownership rate for "non-Hispanic white" Americans is 74.4%; for Black Americans it is just 45.3%, and for Hispanic Americans it is 48.5%.[336] The Asian American and Pacific Islander population has the highest rate of homeownership among people of color, but, at 62.8%, it remains meaningfully less than the rate for white Americans.[337] This is not a new phenomenon; these rates have been stable since before the COVID-19 pandemic.[338] Younger people own less property than older people. For Americans under 35, the homeownership rate is

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[333] *See* Brady, *supra* note 11, at 1056 (discussing how property decisions in the Fourth Amendment context could affect state legislatures' and courts' latitude to shape property law).

[334] U.S. CENSUS BUREAU, RELEASE NO. CB24-114, QUARTERLY RESIDENTIAL VACANCIES AND HOMEOWNERSHIP, SECOND QUARTER 2024, at tbl.8 (2024).

[335] *Id.* at tbl.7.

[336] *Id.*

[337] *Id.*

[338] *Id.*

just 37.4%.[339] That number jumps to 62.2% for Americans aged 35 to 44 and continues to steadily rise until reaching 78.6% for Americans aged 65 and over; these differences, too, have been stable for years.[340] Similar phenomena play out even looking beyond real property. For example, 18% of Black households lack a vehicle of their own, compared to 11% of Asian American households, 10% of Latino households, and just 6% of white households.[341]

Placing too much weight on property concepts risks exacerbating the Fourth Amendment implications of these differences in wealth and privilege. The more property a person owns (or possesses, or has whatever version of a property interest we might choose to care about), the wider and more robust their Fourth Amendment rights would be. Moreover, the less bargaining or market power one has, the more likely one is to end up in housing burdened by a landlord's or a developer's cession of property interests to the government for policing purposes as discussed in Part III.[342] In these ways, incorporating property even in a modest way risks creating a very different Fourth Amendment for wealthier, whiter, and older Americans than for everyone else. To be sure, any standard risks being applied unequally, and judges evaluating expectations of privacy are not always sensitive to race and class. But property is a standard that is unequal from the start.

Property concepts should accordingly be used with caution—certainly if they are being used to inspire Fourth Amendment approaches, but even when they are just operating in the factual context of Fourth Amendment cases. For example, courts have held under *Katz* that individuals have a Fourth Amendment interest in the yards surrounding their detached homes or the shared areas of small multiunit homes.[343] Yet courts typically hold that the Fourth Amendment does not protect the shared areas and hallways of apartment buildings, over which apartment residents typically have less control and more limited rights of

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339 U.S. CENSUS BUREAU, *supra* note 334, at tbl.6.

340 *Id.*

341 *Car Access*, NAT'L EQUITY ATLAS, https://perma.cc/Z5PU-XE6D.

342 *See supra* Part III.C.

343 *E.g.*, Collins v. Virginia, 138 S. Ct. 1663, 1671 (2018) (finding a violation when police officers entered a home's curtilage to examine a motorcycle parked there); United States v. Fluker, 543 F.2d 709, 716 (9th Cir. 1976) (finding that tenants had a reasonable expectation of privacy in a small multiunit home's shared hallway); Fixel v. Wainwright, 492 F.2d 480, 483–84 (5th Cir. 1974) (holding unconstitutional a police officer's warrantless inspection of the shared backyard of a four-unit apartment house).

exclusion.[344] Whatever the merits of this distinction as an assessment of legal or practical control over space, it is likely to discriminate along class, race, and age lines between those who own houses and those who cannot afford to, as well as between those who live in rural areas and those who live in large cities.[345] Courts might instead consider more universal, less property-relevant approaches in cases involving the exterior of a dwelling. A more equitable approach could be based on the principle that all dwellings, even apartments, are surrounded by some measure of privacy, and the area immediately surrounding them is accordingly off limits to warrantless police surveillance.[346]

Decentering property and its disparities, and elevating the role of privacy, puts the focus on a universal human value in which, at a minimum, everyone can be said to have a protectable interest. There are likely to be a number of other circumstances where, whether for reasons of equity or for reasons of theory and practice—like those discussed throughout this Article—property principles are not the right source of inspiration for Fourth Amendment law. In those situations, judges and scholars should acknowledge as much and turn away from property and toward other conceptual foundations.

CONCLUSION

Property law and property principles play a small but meaningful role in many Fourth Amendment cases. Several prominent judges and scholars have advocated drawing more fulsomely on property principles, or even basing the Fourth Amendment's scope largely or entirely on property law. But as we have demonstrated, these calls for a more property-centered Fourth Amendment are misguided. They overlook that property, no less than privacy, is complex, multifaceted, and vulnerable to manipulation by government. They fail to account for some of the most pressing questions in Fourth Amendment law involving new technologies, data storage, and surveillance methods. And they risk exacerbating

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344 *See, e.g.*, United States v. Nohara, 3 F.3d 1239, 1241 (9th Cir. 1993) (finding no reasonable expectation of privacy in an apartment hallway); United States v. Concepcion, 942 F.2d 1170, 1172 (7th Cir. 1991) ("The vestibule and other common areas are used by postal carriers, custodians, and peddlers.").

345 *See* Matthew Tokson & Ari Ezra Waldman, *Social Norms in Fourth Amendment Law*, 120 MICH. L. REV. 265, 294 (2021) ("[S]ubtle distinctions between the social practices surrounding yards and hallways have driven the case outcomes, despite their disparate impacts.").

346 *See id.* at 294.

racial and socioeconomic inequalities in the protection offered by the Fourth Amendment by reifying disparities in property ownership. At the same time, the status quo is far less vague and far more workable than opponents contend. Abandoning it in favor of greater reliance on property law would be a serious mistake.

Instead of turning to property, courts should focus on privacy-based approaches while seeking to make Fourth Amendment law clearer and more predictable. In most cases, judges can continue to draw on the Supreme Court's extensive case law addressing a variety of Fourth Amendment questions over the past several decades. Radically changing Fourth Amendment law and abandoning this vast collection of precedent can only destabilize and confuse things further—especially since, as we show, property law is frequently even less clear than existing Fourth Amendment doctrine. Further, judges facing novel questions can look to a multifactor test emerging in the lower courts that will likely lend more predictability and coherence to Fourth Amendment law going forward. And while some judicial consideration of property is inevitable in certain cases, judges should be cautious to avoid the conceptual and practical pitfalls we have identified. In the end, property is best suited to a background, contextual role in Fourth Amendment law.