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There is No Place Like Home: The Supreme Court's Refusal to Allow Searches of the Home Based on Disputed Consent in Georgia v. Randolph

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I. Introduction

The Fourth Amendment protects individuals against unreasonable government searches of their homes, persons, and property.[1] Over the years, the courts have equated "unreasonable" with "warrantless," and have generally required a warrant issued upon probable cause before law enforcement officers may conduct a search.[2] Nevertheless, several exceptions to this requirement have emerged. One of the most commonly used exceptions covers searches based upon voluntary consent of the individual whose home the police desire to search.[3] In *United States v. Matlock*,[4] the United States Supreme Court expanded this exception to allow searches based upon the consent of third parties who share common authority over the property.[5] The Court's decision in *Matlock*, however, left many lower courts speculating as to what limits, if any, applied to the third-party consent exception. In *Georgia v. Randolph*,[6] the Supreme Court provided an answer, holding that searches based on third-party consent violate the Fourth Amendment if a present co-occupant objects to the search.[7] This note argues that, although the Court drew a fine line in distinguishing *Randolph* from its prior ruling in *Matlock*, the decision in *Randolph* was justified because it upholds the general requirement for a search warrant, protects the heightened expectation of privacy traditionally given to the home, and provides police with a practical, bright-line rule.

Part II of this note discusses the history of the warrant requirement and the development of the consent search exception leading to the Court's decision in *Randolph*. Part III addresses the facts and holding of *Randolph*, including the rationale from the majority and dissenting opinions. Part IV analyzes how the Court's ruling upholds traditional Fourth Amendment privacy rights, while

1. U.S. CONST. amend. IV.

2. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971); Chambers v. Maroney, 399 U.S. 42, 51 (1970); Katz v. United States, 389 U.S. 347, 357 (1967); United States v. Ventresca, 380 U.S. 103, 107 (1965); Johnson v. United States, 333 U.S. 10, 14 (1948); United States v. Lefkowitz, 285 U.S. 452, 464 (1932).

3. *See Schneckloth*, 412 U.S. at 219; Zap v. United States, 328 U.S. 624, 630 (1946); Davis v. United States, 328 U.S. 582, 593-94 (1946).

4. 415 U.S. 164 (1974).

5. *Id.* at 169-70.

6. 547 U.S. 103 (2006).

7. *Id.* at 122-23.

also examining the Court's failure to address the critical issue of whether Janet Randolph possessed authority to consent to the search of the bedroom. Part V discusses the possible impact of this decision on lower courts and law enforcement. This note will conclude in Part VI.

II. Development of the Law Before Georgia v. Randolph

A. Searches and the General Requirement of Warrants

The Fourth Amendment to the United States Constitution protects individuals against unreasonable searches and seizures of their persons, houses, papers, and effects.[8] The seminal case in Fourth Amendment privacy rights is the Supreme Court case of *Katz v. United States*.[9] In *Katz*, the Court held that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[10] Justice Harlan's concurrence, which evolved into the rule, articulated a two-pronged test for determining when government action amounts to a search that invokes an individual's Fourth Amendment privacy rights.[11] The first prong of the test states that an individual must have exhibited an actual, subjective expectation of privacy.[12] The second prong requires that the expectation must be one that society is prepared to recognize as reasonable.[13] A search invokes Fourth Amendment scrutiny only when the government infringes upon an expectation of privacy that passes both prongs of the test.[14] Although the Constitution does not expressly require a warrant for a search to be reasonable, the Court presumes that "a search conducted without a warrant issued upon probable cause is *per se* unreasonable."[15] Accordingly, the Court has generally found warrantless searches unconstitutional.[16]

The Court adopted the exclusionary rule specifically to deter unconstitutional searches by police officers.[17] The exclusionary rule prohibits

8. U.S. CONST. amend. IV.
9. 389 U.S. 347 (1967).
10. *Id.* at 351 (citations omitted).
11. *Id.* at 361 (Harlan, J., concurring).
12. *Id.*
13. *Id.*
14. *Id.* at 353 (majority opinion).
15. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (quoting *Katz*, 389 U.S. at 357) (internal quotation marks omitted).
16. *See supra* note 2 and accompanying text.
17. Mapp v. Ohio, 367 U.S. 643, 655-56 (1961), *overruling* Wolf v. Colorado, 338 U.S. 25 (1949), *and* Weeks v. United States, 232 U.S. 383 (1914).

the prosecution from introducing evidence obtained as a result of an illegal search.[18] Because the Constitution does not explicitly call for the exclusion of evidence, the exclusionary rule exists as a judicially created method of deterring Fourth Amendment violations.[19] In theory, the threat of excluding incriminating evidence destroys the motivation for police to conduct unlawful searches.[20] The exclusionary rule, first articulated in *Weeks v. United States*[21] and expanded in *Wolf v. Colorado*,[22] became applicable to state governments in *Mapp v. Ohio*.[23] In *Mapp*, the Court suppressed evidence of obscene material that police obtained from a warrantless search of Ms. Mapp's home.[24] The Court held that effective enforcement of the Fourth Amendment required adherence to the exclusionary rule at both the state and federal level.[25]

B. Consent Search Exception

Fourth Amendment jurisprudence includes a well established exception that law enforcement officers need not obtain a warrant if they receive consent from the individual whose premises, effects, or person they seek to search.[26] The consent must be voluntary, not forced or coerced.[27] Courts determine voluntariness by applying a "totality of the circumstances" test.[28] Further, the Supreme Court has upheld searches based on consent given by a third party who has, or appears to have, joint authority over the premises.[29]

In *United States v. Matock*,[30] police arrested a bank robbery suspect in his front yard and placed him in a patrol car.[31] Police officers then went to the door of his home and received permission to search the premises from Gayle Graff, a co-occupant of the house.[32] The officers conducted a warrantless search of the premises and found evidence of the robbery in the closet of the

18. *See Mapp*, 467 U.S. 643.
19. United States v. Leon, 468 U.S. 897, 906 (1984).
20. *See, e.g.*, *id.*; *Mapp*, 367 U.S. at 656; *Wolf*, 338 U.S. at 31; *Weeks*, 232 U.S. at 392.
21. 232 U.S. 383.
22. 338 U.S. 25.
23. 367 U.S. 643.
24. *Id.* at 660.
25. *Id.* at 655.
26. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); Zap v. United States, 328 U.S. 624, 630 (1946); Davis v. United States, 328 U.S. 582, 593-94 (1946).
27. *See Schneckloth*, 412 U.S. 218.
28. *See id.* at 227; *see also* United States v. Mendenhall, 446 U.S. 544, 547 (1980).
29. *See* Illinois v. Rodriguez, 497 U.S. 177 (1990); United States v. Matlock, 415 U.S. 164 (1974).
30. 415 U.S. 164.
31. *Id.* at 166.
32. *Id.*

bedroom shared by Matlock and Graff.[33] Matlock moved to suppress the evidence at trial, claiming that police obtained it during an unreasonable search in violation of the Fourth Amendment.[34] The Court held that consent to a warrantless search by an individual possessing joint authority over an area is valid against an absent, non-consenting individual who shares the joint authority.[35] Additionally, the Court noted that joint authority does not rest merely on the law of property, rather it depends on common access or control over the area.[36] Plainly stated, the Court held that consent from a co-occupant allows police to search, so long as no other physically present occupants object.

In *Illinois v. Rodriguez*,[37] the Supreme Court further expanded the scope of consent searches. Police arrived at Dorothy Jackson's home, where her daughter, Gail Fischer, showed signs of severe physical abuse.[38] Fischer informed the officers that her boyfriend, Rodriguez, assaulted her earlier that day.[39] She agreed to travel with the officers to the apartment where the assault had taken place and to unlock the door with her key so that officers could arrest Rodriguez.[40] Several times, she referred to the apartment as "our" apartment, and claimed to have clothes and furniture inside.[41] Upon arrival at the apartment, which the officers never secured a warrant to search, Fischer gave the police permission to enter.[42] Once inside, the officers found drugs and drug paraphernalia in plain view and arrested the sleeping Rodriguez for possession with intent to distribute.[43] Rodriguez moved to have the evidence suppressed, claiming that Fischer had moved out several weeks earlier and did not have authority to consent to a search.[44] The Court ruled that warrantless entry is valid when based upon the consent of a third party whom the police, at time of the entry, reasonably believe to possess common authority over the premises, but who, in fact, does not.[45]

The Court reasoned that Fourth Amendment warrant exceptions have historically required reasonableness and good faith, rather than complete

33. *Id.* at 166-67.
34. *Id.* at 166.
35. *Id.* at 170.
36. *Id.* at 172 n.7.
37. 497 U.S. 177 (1990).
38. *Id.* at 179.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 180.
43. *Id.*
44. *Id.*
45. *Id.* at 188-89.

accuracy.[46] Under the circumstances of the case, if the officers believed that Fischer exercised joint authority as a co-occupant, then they did not search the apartment unreasonably.[47] The decision also stated that courts must judge determinations of consent by an objective standard of reasonableness, using the facts available to the officers at the moment of the consent.[48]

C. Application of Matlock *Prior to the Court's Decision in* Randolph

After the Supreme Court's ruling in *Matlock*, many lower courts broadly interpreted its holding as allowing third-party consent searches in any situation where the co-occupant seemed to have joint authority over the premises.[49] Many of these cases upheld the third party's consent over the objections of a physically present co-tenant.[50] Courts that ruled in this manner focused primarily on *Matlock's* reasoning that one who shares a home assumes the risk that other co-occupant's may consent to a search.[51] These rulings gave little consideration to the absence of the defendant in *Matlock* and the fact that the co-occupant's consent did not conflict with any express refusal by another occupant.

III. Georgia v. Randolph

A. Facts of the Case

Scott Randolph and his wife Janet separated in late May 2001.[52] Janet then left the marital residence and took their son to stay with her parents in Canada.[53] At some point in early July, Janet returned to the marital residence.[54] On July 6, she informed the police that her husband took their son away following a domestic dispute.[55] After the officers arrived at the house, Janet also complained that her husband used cocaine.[56] After Scott returned to the home, he explained to the officers that he took their son to a neighbor's

46. *Id.* at 185.
47. *Id.* at 189.
48. *Id.* at 188.
49. *See* United States v. Morning, 64 F.3d 531 (9th Cir. 1995); United States v. Donlin, 982 F.2d 31 (1st Cir. 1992); United States v. Hendrix, 595 F.2d 883 (D.C. Cir. 1979); United States v. Sumlin, 567 F.2d 684 (6th Cir. 1977); Love v. State, 138 S.W.3d 676 (Ark. 2003); City of Laramie v. Hysong, 808 P.2d 199 (Wyo. 1991).
50. *See, e.g.*, *Hendrix*, 595 F.2d at 885; *Sumlin*, 567 F.2d at 686.
51. *See, e.g.*, *Morning*, 64 F.3d at 534; *Donlin*, 982 F.2d at 33; *Hendrix*, 595 F.2d at 885.
52. Georgia v. Randolph, 547 U.S. 103, 106 (2006).
53. *Id.*
54. *Id.*
55. *Id.* at 107.
56. *Id.*

house in order to prevent Janet from taking him out of the country again.[57] When one of the officers accompanied Janet to reclaim her child, she again complained about her husband's drug use, while also volunteering that there were "items of drug evidence" inside the house.[58] An officer asked Scott for permission to search the house, "which he unequivocally refused."[59] The officer then turned to Janet for consent to search, which she gave.[60] She proceeded to lead the officers to an upstairs bedroom, which she identified as Scott's, where an officer "noticed a section of a drinking straw with a powdery residue he suspected was cocaine."[61] The officer left the house to retrieve an evidence bag from his car and to call the district attorney's office.[62] The district attorney's office told him to stop the search and apply for a warrant.[63] Once officers obtained a search warrant, "they returned to the house and seized further evidence of drug use, on the basis of which Scott Randolph was indicted for possession of cocaine."[64]

Scott moved to suppress the evidence, claiming that the warrantless search of his room violated his Fourth Amendment protection against unreasonable searches.[65] Scott argued that his express refusal negated the consent given by his wife.[66] The trial court denied the motion based on Janet's common authority to consent to the search.[67] The Georgia Court of Appeals reversed, and the Supreme Court of Georgia sustained their decision, claiming "the consent to conduct a warrantless search of a residence given by one occupant is not valid in the face of the refusal of another occupant who is physically present at the scene to permit a warrantless search."[68]

The United States Supreme Court granted certiorari "to resolve a split of authority on whether one occupant may give law enforcement effective consent to search shared premises, as against a co-tenant who is present and states a refusal to permit the search."[69]

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57. *Id.*
58. *Id.* (internal quotation marks omitted).
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at 107-08.
68. *Id.* at 108 (quoting State v. Randolph, 604 S.E.2d 835, 836 (Ga. 2004)) (internal quotation marks omitted).
69. *Id.*

B. The Majority Opinion

The Court held that a present and objecting co-tenant's refusal to permit a search prevails, rendering the warrantless search unreasonable as to the objecting co-tenant.[70] Consequently, the Court found the warrantless search of Scott Randolph's house, over his express refusal, unreasonable and therefore unconstitutional.[71] The Court affirmed the judgment of the Supreme Court of Georgia which excluded the section of straw obtained during the search.[72]

Writing for the majority, Justice Souter claims that searches based upon third-party consent represents an established exception to the warrant requirement.[73] None of the Court's previous cases, however, involved the situation of a physically present co-occupant objecting to a search.[74] This presence of an objecting co-occupant served as the Court's basis for distinguishing this case from *Matlock* and other instances of co-occupant consent.[75] The Court states that "Fourth Amendment rights are not limited by the law of property," and that a co-occupant's common authority "is not synonymous with a technical property interest."[76] Instead, reasonableness governs the Fourth Amendment, and reasonableness relies largely on social expectations.[77] The Court states that its decision in *Matlock* relied on the understanding that co-occupants live together with the assumption that one may admit an unwanted visitor in the other's absence, including the police.[78] Therefore, the police acted reasonably in searching the house after obtaining the consent of one co-occupant in the other occupant's absence.[79] The Court reasons that no common understanding or expectation existed to support the contention that one co-occupant "has a right or authority to prevail over the express wishes of another, whether the issue is the color of the curtains or invitations to outsiders."[80] Further, the Court holds that because one cotenant has "no recognized authority in law or social practice"[81] to admit a third party into the shared residence over a present and objecting co-occupant, the consent of the other occupant gives the police "no better claim to reasonableness in

70. *Id.* at 106.
71. *Id.*
72. *Id.* at 123.
73. *Id.* at 113.
74. *Id.* at 109.
75. *Id.* at 110.
76. *Id.*
77. *Id.* at 111.
78. *Id.*
79. *Id.*
80. *Id.* at 114.
81. *Id.*

entering than the officer would have in the absence of any consent at all."[82] The Court makes reference to the special protection of privacy the home has always received from the courts, pointing to "the ancient adage that a man's house is his castle."[83] The Court states that disputed permission to search does not outweigh the protection of privacy inside the home, which embodies the central value of the Fourth Amendment.[84]

The majority opinion recognizes that a co-occupant has an interest in bringing to light the criminal activities of another occupant.[85] Yet, the majority claims that alternative ways exist to achieve this goal without disregarding a co-occupant's refusal to allow a warrantless search.[86] For example, a co-occupant may independently bring evidence to police who can use the evidence to obtain a warrant.[87] The majority realizes that this rule might easily make evidence inside a home inaccessible in situations lacking sufficient probable cause to secure a search warrant.[88] Nevertheless, the unfortunate consequence of evidence occasionally eluding police does not outweigh the value placed on requiring officers to have clear justification before entering the home.[89]

C. Dissenting Opinions

Chief Justice Roberts, Justice Scalia, and Justice Thomas dissented from the majority opinion.[90] Roberts' dissent, which Scalia joined, criticizes the majority's rule, claiming that it protects privacy only on a "random and happenstance basis."[91] This occurs because the rule protects the privacy of a co-occupant who happens to be at the front door when another occupant consents, but will not protect a co-occupant momentarily away from the home or napping in the next room.[92] Roberts writes that "[u]sually when the development of Fourth Amendment jurisprudence leads to such arbitrary lines, we take it as a signal that the rules need to be rethought."[93]

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82. *Id.*
83. *Id.* at 115 (quoting Miller v. United States, 357 U.S. 301, 307 (1958)) (internal quotation marks omitted).
84. *Id.*
85. *Id.* at 115-16.
86. *Id.* at 116.
87. *Id.*
88. *Id.* at 120.
89. *Id.*
90. *Id.* at 105.
91. *Id.* at 127 (Roberts, C.J., dissenting).
92. *Id.*
93. *Id*. at 137.

Roberts's dissent argues that the correct rule would state that "[a] warrantless search is reasonable if police obtain the voluntary consent of a person authorized to give it," even in the face of a present and objecting co-occupant.[94] He comes to this conclusion based on the understanding that when an individual shares things or places with another, the individual assumes the risk that the other person will possibly share access to those things or places with the government.[95] Roberts disagrees with the majority's view on social expectations, claiming that a constitutional rule should not emanate from social expectations, but instead from a legitimate expectation of privacy, which individuals knowingly risk losing when they share things with other individuals.[96] He cites cases involving a locker, duffel bag, and a conversation where courts ruled that individuals had assumed the risk of losing their privacy rights by sharing with other individuals, and thereby, claimed that searches of shared living spaces should receive similar treatment.[97]

Roberts also expresses concern that the new rule may deprive innocent co-occupants the opportunity to disassociate themselves from criminal activity because the other occupant will simply refuse the police's search request.[98] Moreover, he claims the rule will effectively render police helpless to stop a threat of domestic violence, as the abuser will deny them entry and the police might not otherwise have sufficient cause or exigency to enter the premises.[99]

Justice Thomas dissents because he does not believe that a search occurred.[100] He claims that *Coolidge v. New Hampshire*[101] "squarely controls this case," and that no Fourth Amendment search had taken place because Janet Randolph led police directly to the evidence.[102] He claims that the Court need not address the issue of whether Janet's consent authorized the warrantless search.[103] Janet, Thomas explains, did not act as an agent of the police when she led them to the evidence, and the Fourth Amendment only applies to government agents. Therefore, Thomas argues that this case did not implicate the Fourth Amendment protection against unreasonable searches and seizures, and the evidence was admissible.[104]

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94. *Id.* at 128.
95. *Id.*
96. *Id.* at 131.
97. *Id.* at 131-33.
98. *Id.* at 138.
99. *Id.* at 139-40.
100. *Id.* at 145 (Thomas, J., dissenting).
101. 403 U.S. 443 (1971).
102. *Randolph*, 547 U.S. at 145 (Thomas, J., dissenting).
103. *Id.*
104. *Id.* at 145-48.

IV. Analysis

The Supreme Court's decision in *Randolph* illustrates both a deliberate and curious application of Fourth Amendment jurisprudence. The Court astutely recognizes that the presence of an objecting co-occupant distinguishes *Randolph* from the situation in *United States v. Matlock*,[105] and therefore, required the Court to conduct a traditional Fourth Amendment analysis. The decision clarifies any ambiguity present in *Matlock* regarding third-party consent,[106] upholds traditional Fourth Amendment privacy rights, and supplies police with a bright-line rule. Indeed, the Court's ruling inculcates all of these advantages without disturbing its previous holdings in *Matlock* and *Illinois v. Rodriguez*.[107] Nevertheless, the Court inexplicably failed to address the fundamental and dispositive issue of whether Janet Randolph shared common authority over the bedroom. Despite this major oversight, the Court ultimately reached the correct conclusion. By refusing to allow searches based on disputed consent, the Supreme Court reclaims crucial privacy rights that broad interpretations of *Matlock* by lower courts had diminished.[108] Most importantly, the Court reinforces the general warrant requirement for searches and the heightened degree of privacy given to the home.

A. Continuation of the Warrant Requirement

The Court's decision in *Randolph*, declaring searches based on disputed consent unreasonable, affirms the Court's long-held preference for searches authorized by warrants over "the hurried action of officers."[109] Searches based on disputed consent do not represent one of the "few specifically established and well-delineated exceptions"[110] to the warrant requirement.[111] In *Matlock*, the Court specifically limited its holding, describing the cotenant's consent as only valid against "the absent, nonconsenting person."[112] Therefore, since no established exception to the warrant requirement applied in *Randolph*, the majority took the correct approach of considering the warrantless search unreasonable unless outweighed by countervailing constitutional interests.

In his dissent, Chief Justice Roberts argues that the interest in protecting victims of spousal abuse should outweigh the requirement of a warrant in the

105. 415 U.S. 164 (1974).

106. Most courts had interpreted *Matlock* broadly. *See supra* notes 49-50 and accompanying text.

107. 497 U.S. 177 (1990).

108. *See supra* notes 49-50 and accompanying text.

109. United States v. Lefkowitz, 285 U.S. 452, 464 (1932).

110. Katz v. United States, 389 U.S. 347, 357 (1967).

111. *See supra* text accompanying notes 26-29.

112. United States v. Matlock, 415 U.S. 164, 170 (1974).

circumstance of disputed consent.[113] Roberts harbors concern that the majority's rule would force police to stand outside a residence unable to help a suspected victim of abuse, because the abuser's objection to police entry would negate the victim's consent.[114] As the majority emphasizes, however, Roberts fails to distinguish the concept of police entry based on consent from entry based on exigent circumstances.[115] The exception to warrants based on exigency is separate and unrelated to the consent exception.[116] Courts have consistently held that the threat of immediate harm to an individual justifies warrantless entry based on exigency.[117] Thus, if police have reason to believe a threat of violence exists, they may enter a residence to protect an occupant from domestic abuse, regardless of whether they have a warrant or consent.

The state of Georgia advanced an equally unconvincing argument, claiming that a consenting co-tenant's interest in bringing criminal activity to light should outweigh the Fourth Amendment's general warrant requirement.[118] As the majority points out, the co-tenant can act independently to deliver evidence to the police or give them information to help obtain probable cause for a warrant.[119] Either option achieves the cotenant's goal without violating fundamental Fourth Amendment values. Therefore, none of the countervailing interests presented outweighed the Fourth Amendment interest in protecting individuals from unreasonable searches and seizures.[120]

B. Greater Protection for the Home

The Court's decision in *Randolph* adheres to "the ancient adage that a man's house is his castle."[121] In *Payton v. New York*, the Court declared that "the Fourth Amendment has drawn a firm line at the entrance to the house."[122] The "reasonable expectation of privacy" doctrine,[123] drawn from *Katz*, further supports the tradition of granting the home heightened Fourth Amendment protection. Under the two-pronged *Katz* analysis, no location would receive

113. Georgia v. Randolph, 547 U.S. 103, 127 (2006) (Roberts, C.J., dissenting).
114. *Id.* at 139.
115. *Id.* at 118-19 (majority opinion).
116. *Compare* United States v. Costa, 356 F. Supp. 606 (D.D.C. 1973) (exception to the warrant requirement based on exigency), *with* Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (exception based on consent).
117. *See, e.g.*, United States v. Hendrix, 595 F.2d 883, 885-86 (D.C. Cir. 1979); People v. Sanders, 904 P.2d 1311, 1313-15 (Colo. 1995).
118. *Randolph*, 547 U.S. at 116.
119. *Id.*
120. *Id.*
121. Miller v. United States, 357 U.S. 301, 307 (1958).
122. 445 U.S. 573, 590 (1980).
123. Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

a greater expectation of privacy than an individual's home. Therefore, allowing a search of an individual's home over his express objection would violate traditional Fourth Amendment privacy protections.

Chief Justice Roberts presents the strongest case against such heightened protection of the home in his "assumption of the risk" argument. Roberts asserts that the Fourth Amendment only protects against "unreasonable" searches.[124] He argues that the consent of a co-tenant makes a search reasonable because the objecting tenant assumed the risk that "those who have access to and control over his shared property might consent to a search."[125] Roberts supports his argument with several cases where the Court upheld searches based on third-party consent because the individual had assumed the risk of a search by sharing space or information with a third-party.[126] Roberts cites *Frazier v. Cupp*[127] as a prime example of the Court's application of the "assumption of the risk" analysis. In *Frazier*, the Court held that by sharing his duffel bag with his cousin, the defendant assumed the risk that his cousin would allow someone to look inside.[128] Roberts claims that this same reasoning also applied to shared living space.[129] He relies largely on the Court's statement in *Matlock* that co-occupants have "assumed the risk that one of their number might permit [a] common area to be searched."[130]

Although Chief Justice Roberts correctly analyzes how the Court has deemed individuals to "assume the risk" when they share things or ideas with a third party, he fails to realize that, as a product of the heightened protection the Court has given to the home, this same analysis cannot be identically applied to a residence. In *Minnesota v. Carter*, Justice Kennedy declared that "it is beyond a dispute that the home is entitled to special protection as the center of the private lives of our people."[131] By equating a duffel bag or phone conversation with an individual's home, Roberts ignores firmly rooted precedent that accords the home greater protection under the Fourth Amendment than other places or things.[132] None of the examples cited by Roberts involve the "assumption of the risk" analysis as it pertains to the home.

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124. *Randolph*, 547 U.S. at 130-31 (Roberts, C.J., dissenting).
125. *Id.* at 134.
126. *Id.* at 131-35.
127. 394 U.S. 731 (1969).
128. *Id.* at 740.
129. *Randolph*, 547 U.S. at 133 (Roberts, C.J., dissenting).
130. United States v. Matlock, 415 U.S. 164, 171 n.7 (1974).
131. 525 U.S. 83, 99 (1998) (Kennedy, J., concurring).
132. *See* Wilson v. Layne, 526 U.S. 603, 610 (1999); *Carter*, 525 U.S. at 99 (Kennedy, J., concurring); Payton v. New York, 445 U.S. 573, 589 (1980); United States v. U.S. Dist. Court, 407 U.S. 297, 313 (1972); Miller v. United States, 357 U.S. 301, 307 (1958).

Nevertheless, an individual who chooses to share living space with another does assume some degree of risk. As stated in *Matlock*, co-occupants assume the risk that another occupant might permit a search of a common area.[133] The risk assumed, however, is the risk that a co-occupant might permit a search of the premises during the occupant's absence, and not the risk of a search taking place over his present objection.[134] A co-occupant's expectation of privacy in the home only diminishes when he chooses to leave the home, knowing that other occupants may allow someone into the shared premises. On the other hand, when a co-occupant remains at home, he assumes no risk of losing control over access to the residence and thus retains the same expectation of privacy as if he lived alone.

C. Examination of the Court's Alternatives

Fundamentally, the Court's decision upholds core Fourth Amendment values. Nevertheless, Chief Justice Roberts indicates that the decision seemed to provide protection "on a random and happenstance basis" by protecting an objecting co-occupant who happened to be at home but not a co-occupant who left the home momentarily.[135] Indeed, the *Randolph* majority admits that "a fine line" has been drawn by factually distinguishing *Randolph* from *Matlock*.[136] Even so, a brief discussion of the Court's alternatives demonstrates why concern for efficiency and Fourth Amendment privacy rights prevented the Court from reaching any other decision.

1. Option 1: Never Allow Third-Party Consent Searches

The *Randolph* Court could have chosen to never allow third-party consent searches. This option would uphold the Fourth Amendment interest in protecting individuals from unreasonable searches, but, as previously discussed, third-party consent searches have long existed as an exception to the warrant requirement.[137] Consequently, prohibiting third-party consent searches would contradict years of precedent. Furthermore, this rule would burden law enforcement and the courts by requiring an extraordinary amount of time and work, especially since consent forms the basis of a large number of searches.[138] Despite the possibility of expediting the search through a third party's consent, this rule would require officers to undergo the lengthy process of producing an affidavit demonstrating probable cause for the search, submitting it to a

133. *Matlock*, 415 U.S. at 171 n.7.
134. 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 8.3(d), at 155-62 (4th ed. 2004).
135. Georgia v. Randolph, 547 U.S. 103, 127 (2006) (Roberts, C.J., dissenting).
136. *Id.* at 121 (majority opinion).
137. *See supra* text accompanying note 29.
138. *See Randolph*, 547 U.S. at 122 n.9.

magistrate, and waiting for the magistrate to issue a search warrant. Meanwhile, the third party might have voluntarily permitted a search of the premises the entire time. Moreover, in many situations, officers requesting consent to search do not have enough factual information to secure a search warrant. Therefore, the only means for obtaining authority to search for the suspected evidence originates from the consent of a co-occupant. Placing an absolute prohibition on third-party consent searches would leave law enforcement officers with no way to collect the evidence. Consequently, fewer criminals would be brought to justice. Prohibiting third-party consent searches fails as a viable alternative because such policy abandons the traditional exception and would not engender efficient or effective use of law enforcement resources.

2. Option 2: Always Allow Third-Party Consent Searches, Even When Disputed

Alternatively, the Court could have chosen to always allow third-party consent searches, even over the objections of a physically present co-occupant. Although this alternative provides a more convenient rule for law enforcement, it violates fundamental Fourth Amendment values. The Court has repeatedly held that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed . . . ."[139] Allowing warrantless searches based on disputed consent would require an individual who shares a home to relinquish all expectations of privacy in the shared quarters. This result conflicts with the Court's declaration in *Payton* that nowhere "is the zone of privacy more clearly defined than . . . [the] home."[140] Certainly, the Court did not intend for the home's "zone of privacy" to only protect individuals who live alone. Consequently, this option utterly fails to protect individuals' constitutionally guaranteed privacy rights.

3. The Court's Rule: Simple Yet Effective

The *Georgia v. Randolph* rule protects the heightened privacy rights traditionally given to the home while honoring the established exception for searches based on third-party consent. Further, the Court's rule has the added benefit of supplying law enforcement with a bright-line rule to guide their search policies. Plainly stated, if any occupant objects to the search, officers must stop and obtain a warrant before proceeding. The Court expressly held that police have no obligation to seek out potential objectors;[141] therefore, if

139. United States v. U.S. Dist. Court, 407 U.S. 297, 313 (1972).
140. Payton v. New York, 445 U.S. 573, 589 (1980).
141. *Randolph*, 547 U.S. at 122.

no present occupants object, the traditional rule allowing third-party consent searches applies. The Court's rule does draw a "fine line" by applying different requirements to the situations encountered in *Matlock* and *Randolph*. This differentiation, however, flows naturally from the understanding that the presence of an objecting tenant fundamentally changes the constitutional analysis. As a result of this change, "there is practical value in the simple clarity of complementary rules . . . ."[142]

D. Disputed Consent Was an Unnecessary Issue.

Although the Court arrives at the correct decision regarding disputed consent, the Court should never have reached the issue because Janet Randolph had no authority to consent to the search. Consent to search may only be given by an individual who has joint authority or common control over the particular area to be searched.[143] Janet and Scott Randolph were separated and Janet moved out of the marital residence over a month before the search occurred.[144] She apparently returned to the home for the limited purpose of collecting her remaining belongings.[145] The police acquired this information while attempting to resolve the Randolphs' dispute prior to the search of the bedroom.[146] Furthermore, as she lead police to the bedroom where the search occurred, Janet identified the room as "Scott's" and never referred to it as "mine" or "ours."[147] The officers should have recognized Janet's questionable relationship to the bedroom and conducted a more thorough investigation before searching based on her consent. The good faith mistake exception articulated in *Rodriguez* would not salvage the evidence seized, because *Rodriguez* requires police to reasonably believe that the individual has common authority.[148] In this case, police had a substantial amount of information indicating that Janet did not possess joint authority over the bedroom. Therefore, they could not claim that they reasonably believed Janet's consent to be valid.[149]

The Court's deliberate treatment of the common authority issue in *Matlock* and *Rodriguez* makes its failure to address the issue in *Randolph* even more perplexing. In *Matlock*, the Court devoted a substantial part of its opinion to

142. *Id.* at 121.
143. *See* United States v. Matlock, 415 U.S. 164, 171 (1974).
144. *Randolph*, 547 U.S. at 106.
145. Brief of Amicus Curiae Nat'l Ass'n of Criminal Defense Lawyers Supporting Respondent at 3, *Randolph*, 547 U.S. 103 (No. 04-1067), 2005 WL 2147326.
146. *Randolph*, 547 U.S. at 106.
147. *Id.* at 107.
148. Illinois v. Rodriguez, 497 U.S. 177, 185-86 (1990).
149. *Randolph*, 544 U.S. 106-08.

the discussion of whether the defendant's girlfriend had authority to consent to a search of their shared bedroom.[150] The *Rodriguez* decision contained a similar lengthy analysis of the common authority issue.[151] In contrast, the Court in *Randolph* treated the common authority issue as a foregone conclusion.[152] The Court seemed so focused on setting precedent for the disputed consent issue that they overlooked the more basic issue of whether Janet actually had common authority. Although generally upheld, consent from a spouse only authorizes a search if the spouse has common control over the specific area or effects.[153] Even if the Court determined that Scott did not possess sole authority over the bedroom, it could not deny that Janet had an inferior interest in the bedroom since she had lived with her parents for over a month. Thus, her consent would remain invalid because an objection by an individual with a superior interest trumps consent given by a person with a lesser interest.[154] Fortunately, the Court's oversight did not affect the final outcome of the case. Nevertheless, the Court inexplicably failed to address an essential issue in third-party consent searches.

Justice Thomas believes that no governmental search took place, rendering the issue of disputed consent irrelevant.[155] Citing *Coolidge*[156] as the controlling case, Thomas claims that Janet Randolph delivered evidence to the police on her own accord, therefore not implicating Fourth Amendment protections.[157] In *Coolidge*, the defendant's wife retrieved the evidence from the bedroom closet and physically handed it over to the officers.[158] In contrast, Janet simply led police to the bedroom where the drug evidence was located.[159] Janet neither assisted officers in the search, nor did she instruct the officers as to what type of drug evidence she believed they would find.[160] In *Randolph*, police action, not the actions of Janet, led to the discovery of evidence, thus

150. United States v. Matlock, 415 U.S. 164, 167-77 (1974).

151. *Rodriguez*, 497 U.S. at 183-90.

152. *Randolph*, 547 U.S. at 106-09.

153. *See* State v. Evans, 372 P.2d 365, 372-73 (Haw. 1962).

154. *See* LAFAVE, *supra* note 134, § 8.3(d), at 160 ("[A]n objection by the person with the superior interest would prevail over a consent given by a person with a lesser interest."); *see also* Lucero v. Donovan, 354 F.2d 16, 20-21 (9th Cir. 1965) (holding that a visitor's consent was not valid over a resident's objection).

155. *Randolph*, 547 U.S. at 145 (Thomas, J., dissenting).

156. Coolidge v. New Hampshire, 403 U.S. 443 (1971) (holding that when the spouse of the defendant delivered evidence to police officers on her own free will it did not constitute a Fourth Amendment search).

157. *Randolph*, 547 U.S. at 146 (Thomas, J., dissenting).

158. *Coolidge*, 403 U.S. at 486.

159. *Randolph*, 547 U.S. at 107.

160. *Id.*

invoking the Fourth Amendment protection against unreasonable searches. Thomas's contention that no search occurred would only hold true if Janet had personally delivered the cocaine-laced straw to the officers before they searched the home. Thomas correctly identifies the issue of disputed consent as irrelevant, but he employs the wrong reasoning to supporting his argument.

V. Impact of Georgia v. Randolph *on Courts and Law Enforcement*

Despite the limited nature of the holding in *Randolph*, the decision will have a large impact on courts, police, and citizens. Because the majority of courts read *Matlock* as allowing searches based on disputed consent, courts should expect an onslaught of appeals and petitions for writs of habeas corpus from individuals convicted under the previous rule. Courts will have to determine to what extent they will apply *Randolph* retroactively. Additionally, given the limited scope of *Randolph's* rule, overzealous police officers will inevitably attempt to circumvent the new rule. While *Randolph* definitively put to rest the issue of disputed consent, the decision leaves courts with a whole new array of issues to address.

A. Will Courts Apply the Rule Retroactively?

The *Randolph* decision included no ruling on the matter of retroactive effect. The Constitution neither prohibits nor requires retroactive operation of a new or overruling decision.[161] Courts have a variety of options when dealing with retroactivity, ranging from no effect whatsoever[162] to full effect, even in cases that have already entered final judgments.[163] Generally, courts do not apply new rules of criminal procedure established by a Supreme Court decision retroactively to cases that became final prior to the decision's announcement,[164] especially in cases involving issues of illegal searches or seizures.[165] In the early stages, courts have applied the *Randolph* decision in this manner. Courts have extended the benefits of the new rule to defendants with pending appeals,[166] while denying writs of habeas corpus to defendants

161. S.R. Shapiro, Annotation, *Prospective or Retroactive Operation of Overuling Decision*, 10 A.L.R.3D 1371, § 6, at 1391 (1966).

162. *Id.* § 7(a), at 1393-95.

163. *Id.*; *id.* § 8(a), at 1397-99.

164. United States v. Brown, 305 F.3d 304, 306 (5th Cir. 2002).

165. Stone v. Powell, 428 U.S. 465 (1976) (stating that as long as a state prisoner got a fair chance to argue that evidence was a result of an illegal search or seizure, the prisoner cannot make this argument later in a habeas petition, even if the federal court is convinced that the state court reached the wrong conclusion).

166. *See* United States v. Diaz, 199 F. App'x 604 (9th Cir. 2006) (mem.); United States v. Marasco, 446 F. Supp. 2d 1073 (D. Neb. 2006), *rev'd in part*, 487 F.3d 543 (8th Cir. 2007);

who exhausted their appeals before the ruling.[167] Most likely, for a collateral review to succeed, the Supreme Court itself would have to make its ruling retroactive to cases already final at the time of the decision. Currently, the Supreme Court has made no indication that the *Randolph* decision should apply retroactively to cases on collateral review.[168]

B. Potential for Abuse of the New Rule

In *Randolph*, the Supreme Court set out a bright-line rule regarding disputed consent, however, opportunities still exist for abuse of the rule by law enforcement. Two tactics which police might employ in order to bypass the new rule immediately stand out. First, police could remove the potentially objecting occupant from the home in an effort to deprive him of the opportunity to refuse the search. Second, police might seek consent to search at a time when they know the potentially objecting occupant has left the home. The courts must limit these potential tactics by examining the officers' conduct under the "totality of the circumstances" test to determine whether their actions were in good faith or deliberately aimed at avoiding the new rule.

Several courts have already confronted the issue of officers removing a potentially objecting occupant and subsequently acquiring consent to search from a co-occupant.[169] Even though the majority of courts have found that the occupant's removal comported with valid law enforcement objectives,[170] they have also exhibited an awareness of the potential for abuse in these situations. In a few instances, courts have excluded evidence when avoidance of the new rule, rather than legitimate law enforcement concerns, clearly motivated police action.[171]

In contrast, courts will likely show reluctance to suppress evidence based upon consent obtained at a time when the police know the potentially objecting tenant is away from the home. In *Commonwealth v. Yancoskie*, the Superior Court of Pennsylvania found that the officers deliberately timed their visit to coincide with the defendant's fishing trip and received consent from

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United States v. Sims, 435 F. Supp. 2d 542 (S.D. Miss. 2006).

167. Love v. Norris, No. 5:04CV00122-WRW, 2006 WL 2381838, at *11 (E.D. Ark. Aug. 17, 2006).

168. *Id.* at *15.

169. *See, e.g.*, United States v. Parker, 469 F.3d 1074, (7th Cir. 2006); United States v. Brown, No. 1:06-CR-168 WSD, 2006 WL 3760383 (N.D. Ga. Dec. 19, 2006); United States v. Williams, No. 06-20051-B, 2006 WL 3151548 (W.D. Tenn. Nov. 1, 2006); People v. Lapworth, 730 N.W.2d 258 (Mich. Ct. App. 2006).

170. *See, e.g.*, *Parker*, 469 F.3d 1074; *Brown*, 2006 WL 3760383; *Williams*, 2006 WL 3151548; *Lapworth*, 730 N.W.2d 258.

171. United States v. Hudspeth, 459 F.3d 922, 931 (8th Cir. 2006); United States v. Henderson, No. 04 CR 697, 2006 WL 3469538, at *2-3 (N.D. Ill. Nov. 29, 2006) (mem.).

his wife to search the home.[172] The court refused, however, to suppress the evidence resulting from the search, claiming that, because the defendant left voluntarily, he assumed the risk of his wife consenting to the search.[173] Given that *Randolph* leaves the holding of *Matlock* undisturbed, and given that *Randolph* places no affirmative requirement on officers to seek out potentially objecting co-tenants,[174] many courts will probably adopt the view articulated by the Pennsylvania court. In order for evidence to be suppressed under this scenario, the courts will likely require a showing that police coerced the defendant into leaving the home for the purpose of obtaining consent from another occupant.

VI. Conclusion

In *Georgia v. Randolph*, the Court establishes a bright-line rule prohibiting searches based on disputed consent. The Court's decision in *Randolph* leaves its prior decision in *Matlock* undisturbed, but limits the scope of *Matlock*'s holding to situations where no physically present co-occupant objects to the search. By doing so, the Court preserves the heightened expectation of privacy individuals exhibit in their home. Furthermore, in an area of law where the exceptions nearly swallow the rule,[175] *Randolph* reinforces the tradition of presuming warrantless searches unreasonable unless proven otherwise. Because of the limited nature of the Court's holding, lower courts must make a conscious effort to prevent law enforcement from avoiding the scope of *Randolph*'s rule. Otherwise, individuals will never receive the full protection the rule intends to provide. Although the Court's failure to address the issue of Janet Randolph's common authority over the bedroom created a somewhat flawed analysis, the Court came to the correct conclusion. Indeed, "[d]isputed permission is [] no match for this central value of the Fourth Amendment . . . ."[176]

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172. 915 A.2d 111, 115 (Pa. Super. Ct. 2006).

173. *Id.*

174. Georgia v. Randolph, 547 U.S. 103, 122 (2006).

175. *See* Illinois v. McArthur, 531 U.S. 326 (2001) (exigent circumstances exception); New York v. Belton, 453 U.S. 454 (1981) (automobile exception); United States v. Robinson, 414 U.S. 218 (1973) (search incident to arrest exception); Terry v. Ohio, 392 U.S. 1 (1968) (stop and frisk exception).

176. *Randolph*, 547 U.S. at 115.