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MUCH ADO ABOUT *RANDOLPH*: THE SUPREME COURT REVISITS THIRD PARTY CONSENT

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I. INTRODUCTION

In a surprising break with its decades-long trend towards expanding the consent doctrine, the Supreme Court recently held that a co-tenant could not give valid consent for police to search a residence for evidence where the target of the search was physically present and expressly objected to the search. In *Georgia v. Randolph*,[1] the 2006 Court resolved a split in the lower courts over whose wishes should control law enforcement authority to conduct a warrantless search when co-tenants disagree. While this ruling lies at the intersection of criminal procedure and constitutional law, its ultimate significance as a tool for strengthening Fourth Amendment privacy protections remains uncertain.

The case involved a fairly narrow issue, but *Randolph* generated a heated debate amongst the members of the Court. Notable as the first case in which the newly appointed Chief Justice filed a dissenting opinion, *Randolph* features a somewhat persuasive majority opinion, two separate concurrences, and three separate dissents. The decision's six parts encompass, among other things, disagreements over the correct interpretation of precedent, a duel over the proper use of originalism, and a debate over the case's relevance to the issue of domestic violence.

Although *Randolph* reaffirms the centuries-old notion of the inherent sanctity of the home, the case is not without its flaws. The narrowness of its holding, the Court's use of social expectations, and errors in its discussion of exigent circumstances may compromise the decision's precedential value. In addition, the Court's lack of clarity with respect to two issues—the limits on removal of targets from the scene of the search and the relevance of the plain view seizure doctrine to searches conducted among disagreeing co-tenants—may generate much future litigation.

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1. 126 S. Ct. 1515 (2006).

This article provides an overview of the Supreme Court's third party consent jurisprudence, analyzes the Court's holding in *Georgia v. Randolph*, and discusses the holding's potential impact on future third-party consent cases. The analysis proceeds as follows: Part II provides an overview of the Supreme Court's Fourth Amendment jurisprudence with respect to consent searches. Part III examines the state of third party consent after the pivotal cases of *United States v. Matlock*[2] and *Illinois v. Rodriguez*,[3] which together gave rise to the common authority and apparent authority doctrines underpinning the Court's understanding of consent. Part IV analyzes the Court's decision in *Randolph*, paying particular attention to the Court's difficulty in reconciling the holding in that case with *Matlock*. Part V assesses possible limitations of the holding in *Randolph*, including its narrowness, its use of social expectations, and its treatment of exigent circumstances, and Part VI addresses future concerns posed by ambiguous language in the majority opinion with respect to the removal of targets from the premises being searched and the relevance of the plain view doctrine to situations similar to *Randolph*.

II. CONTEXT: THE FOURTH AMENDMENT AND CONSENT SEARCHES

A. *The Fourth Amendment: Origins*

The Fourth Amendment to the Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.[4]

Following the American struggle against British colonial domination and abuse, the framers drafted the Fourth Amendment in an effort to help safeguard individual liberty against unchecked governmental intrusion.[5] Of particular importance to the framers was preservation of the home as a place of refuge and safety.[6] While early British law also recognized the inherent sanctity of the home,[7] the British government's willingness to abandon such a long-held principle for its own ends convinced the framers that more proactive steps were necessary to prevent similar abuses in the United States. As a result, the Fourth Amendment was adopted, in part, as a means of ensuring that

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2. 415 U.S. 164, 171 (1974).
3. 497 U.S. 177 (1990).
4. U.S. Const. amend. IV.
5. "[T]he Fourth Amendment, like other provisions of the Bill of Rights, 'was intended to be an additional structure to keep the federal government within its prescribed boundaries.'" Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. Rev. 895, 970 (2002) (quoting Lucas A. Powe, Jr., *The Fourth Estate and the Constitution. Freedom of the Press in America* 48 (U. Calif. Press 1991)).
6. *See Kyllo v. U.S.*, 533 U.S. 27, 31 (2001) (stating that the core of the Fourth Amendment is concerned with "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion" (quoting *Silverman v. U.S.*, 365 U.S. 505, 511 (1961))).
7. *See e.g. Semayne's Case*, 77 Eng. Rep. 194, 195 (K.B. 1604) ("[T]he house of every one is to him as his . . . castle and fortress, as well for his defen[s]e against injury and violence, as for his repose.").

American citizens would no longer be subjected to the types of "unrestrained and judicially unsupervised searches"[8] the British were prone to conduct in the years preceding the Revolution.[9]

B. Fourth Amendment Search Jurisprudence

In light of the Fourth Amendment's prohibition against unreasonable searches and seizures, the touchstone of the Supreme Court's Fourth Amendment jurisprudence is reasonableness. Using the two-pronged approach originally articulated by Justice Harlan in *Katz v. United States* to help distinguish reasonable searches from unreasonable ones,[10] the courts assess whether a search's target had a reasonable expectation of privacy in the location searched.[11] Under this approach, a target must have a subjective expectation of privacy that is recognized by society as reasonable[12] for the Fourth Amendment to apply.

In more recent times, the desire for far-reaching privacy protections under the Fourth Amendment has come into conflict with concerns for the public interest—specifically, the notion that some privacy must be sacrificed for the greater goods of public safety and expediency in criminal investigations.[13] In response, the Court has begun balancing the two interests[14] in a manner that has often proved detrimental to the integrity of the Fourth Amendment. It has created several exceptions to the Fourth Amendment's warrant requirement, including exigent circumstances,[15] the automobile exception,[16] and consent.[17] Despite the Supreme Court's assurance that exceptions to

8. Jacob W. Landynski, *Search and Seizure and the Supreme Court: A Study in Constitutional Interpretation* 20 (Johns Hopkins Press 1966).

9. *See* Nathan Vaughan, Student Author, *Overgeneralization of the Hot Pursuit Doctrine Provides Another Blow to the Fourth Amendment in* Middletown v. Flinchum, 37 Akron L. Rev. 509, 513 (2004) (discussing the "countless searches based on little or even no suspicion" directed at colonists in the early 1700s (footnote omitted)); *see also* Landynski, *supra* n. 8 (abuses were largely concentrated within the fifteen years before the Revolution).

10. *See Kyllo*, 389 U.S. at 33 ("As Justice Harlan's oft-quoted concurrence described it, a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable."); *see also Katz v. U.S.*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring) (stating that "a person has a constitutionally protected reasonable expectation of privacy").

11. *See e.g. U.S. v. Butts*, 710 F.2d 1139, 1147 (5th Cir. 1983); *Widgren v. Maple Grove*, 429 F.3d 575, 585 (6th Cir. 2005); *U.S. v. Taketa*, 932 F.2d 665, 678 (9th Cir. 1991); *U.S. v. Robinson*, 62 F.3d 1325, 1330 (11th Cir. 1995).

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

13. *See* Vaughan, *supra* n. 9, at 514–15. This sentiment bears special significance in a post-9/11 world in which there is heightened concern for national security. *See* Matthew Brezinski, *Fortress America*, N.Y. Times Mag. 38 (Feb. 23, 2003) (discussing the nation's attempt to balance public safety and privacy after 9/11).

14. *See Wyo. v. Houghton*, 526 U.S. 295, 300 (1999) (evaluation of the reasonableness of a search must consider, "on the one hand, the degree to which [the search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests"); *Camara v. Mun. Ct.*, 387 U.S. 523 (1967); Vaughan, *supra* n. 9, at 515.

15. An exigent circumstance is one in which "a police officer must take immediate action to effectively make an arrest, search, or seizure for which probable cause exists." *Black's Law Dictionary* 260 (Bryan A. Gardner ed., 8th ed., West 2004). Threats to life or safety, imminent escape of a suspect, or the removal or destruction of evidence are possible exigent circumstances. *Id.*; *see Warden v. Hayden*, 387 U.S. 294 (1967); *see e.g. Ill. v. McArthur*, 531 U.S. 326, 331 (2001) (holding that temporary seizure of the defendant's residence was justified by the "specially pressing [and] urgent law enforcement need" to preserve evidence).

16. Under the automobile exception, police officers may search a vehicle without a warrant so long as they

the Fourth Amendment's requirements amount to only "a few specifically established and well-delineated exceptions,"[18] many have decried these alterations as erosive[19] of the Fourth Amendment's protections. In particular, concern over the diminishing scope of individual privacy has been quite persistent with regard to the ever-expanding reach of the consent exception.[20]

C. *The Consent Exception*

It is generally recognized that a warrantless search is unreasonable per se under the terms of the Fourth Amendment.[21] However, a search conducted pursuant to a target's consent is among those few "jealously and carefully drawn"[22] exceptions to the warrant requirement.[23] Where consent is "freely and voluntarily given,"[24] law enforcement officers may rely on such consent as the basis for conducting a search in the absence of a warrant. Any search conducted pursuant to such consent falls outside the bounds of the Fourth Amendment's protection.

Courts assess the voluntariness of consent by examining the totality of the circumstances to ensure that the consenting party has not been coerced.[25] Thus, the factors relevant to the voluntariness determination will encompass "both the characteristics of the accused and the details of the interrogation."[26] It is not necessary, however, that the consenting party be aware of his right to refuse consent.[27] Such knowledge is only one of the many factors considered in a court's analysis.[28]

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have probable cause to believe there is evidence in the vehicle. *Carroll v U.S*, 267 U.S. 132, 149 (1925).

17. "[O]ne of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (citations omitted).

18. *Katz*, 389 U.S. at 357 (footnote omitted).

19. *See e.g.* Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 Vand. L. Rev. 473, 512 (1991) ("[T]he warrant has evolved from being an absolute prerequisite . . . to a procedural requirement sometimes acknowledged and rarely enforced." (internal citations omitted)), Charles W. Chotvacs, Student Author, *The Fourth Amendment Warrant Requirement: Constitutional Protection or Legal Fiction? Noted Exceptions Recognized by the Tenth Circuit*, 79 Denv. U. L. Rev. 331, 331 (2002) (commenting that the Supreme Court's assurance that there are only a few narrow exceptions to the warrant requirement "seem[s] to be fatally flawed" (footnote omitted)); *see also* Nancy J. Kloster, Student Author, *An Analysis of the Gradual Erosion of the Fourth Amendment Regarding Voluntary Third Party Consent Searches: The Defendant's Perspective*, 72 N.D. L. Rev. 99, 104 (1996); Michael C. Wieber, Student Author, *The Theory and Practice of* Illinois v. Rodriguez: *Why an Officer's Reasonable Belief about a Third Party's Authority to Consent Does Not Protect a Criminal Suspect's Rights*, 84 J. Crim. L. & Criminology 604, 628 (1993).

20. *See supra* n. 19.

21. *Kyllo*, 533 U.S. at 31; *see also Payton v. N.Y.*, 445 U.S. 573, 586 (1980).

22. *Jones v U.S.*, 357 U.S. 493, 499 (1958).

23. *Schneckloth*, 412 U.S. at 219. Despite the Court's assertion to the contrary, the view that the exceptions to the warrant requirement have been "jealously and carefully drawn" is hardly sustainable.

24. *Bumper v N.C.*, 391 U.S. 543, 548 (1968) (footnote omitted).

25. *Schneckloth*, 412 U.S. at 227 ("[W]hether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.").

26. *Id.* at 226.

27. *Id.* at 234.

28. *Id.* at 249.

D. Third Party Consent

Initially, only the target of a search could provide consent; however, that limitation began to disappear in 1961 when the Supreme Court first heard arguments seeking to establish the validity of third party consent.[29] Rejecting property law as the guiding force on matters of third party consent, the Supreme Court held in *Chapman v. United States* that a landlord could not consent to the search of the tenant's residence merely because of his property interest therein.[30] The Court later reached a similar conclusion in *Stoner v. California*, where it invalidated a hotel clerk's consent to the search of a guest's room.[31] At that time, it appeared the Court was moving in the direction of using agency theory as a basis for third party consent, as the consent in *Stoner* was invalidated in part because the guest had not given implied or express consent for the clerk to enter the room without his knowledge.[32] However, that line of reasoning was later foreclosed with the Supreme Court's adoption of the common authority approach in *United States v. Matlock*,[33] which was later modified by the apparent authority doctrine of *Illinois v. Rodriguez.*[34]

1. *Matlock* and Common Authority

The main doctrinal concern before *Matlock* was whether third party consent should be permitted under an agency theory (as suggested in *Stoner*[35]) or under an assumption of risk theory, which surfaced in *Frazier v. Cupp.*[36] In *Frazier*, the Supreme Court upheld a warrantless search of a duffel bag by finding that the target, who shared the bag with his cousin, had assumed the risk that his cousin might permit others (including police) to look inside the bag.[37] This latter theory ultimately captured the attention of the Court, as it adopted in *United States v. Matlock* a theoretical basis for third party consent that incorporated considerations of assumption of risk.[38]

The issue in *Matlock* was whether the consent of the target's common-law wife was sufficient to validate a warrantless search of their shared living space for purposes of gathering evidence against him.[39] In that case, police officers arrested a bank robbery suspect, Matlock, in the front yard of his home and placed him in a nearby squad car.[40] The officers then met Mrs. Graff at the front door of the home, and she told them that she

29. *See Chapman v. U.S.*, 365 U.S. 610 (1961).
30. *Id.* at 616–17.
31. 376 U.S. 483, 489 (1964).
32. *Id.*
33. 415 U.S. 164, 171 (1974).
34. 497 U.S. 177 (1990).
35. *Stoner*, 376 U.S. at 489.
36. 394 U.S. 731, 740 (1969).
37. *Id.*
38. *See Matlock*, 415 U S. at 171 & n. 7.
39. *Matlock*, 415 U.S. at 166.
40 *Id.* The police did not ask the suspect if he lived at the home or if he would consent to it being searched. *Id.*

and Matlock shared a room there.[41] Graff consented to a search of the home, which yielded $4,995 in cash as evidence of the suspect's alleged bank robbery.[42] Matlock asserted that Graff's consent was insufficient to support a search conducted against him and moved to suppress the evidence obtained.[43] The Supreme Court, however, rejected Matlock's argument and concluded that Graff's consent was sufficient to validate a search against him because of their shared living arrangement and common authority over the space.[44]

The Court held that the consent of the absent suspect's[45] common law wife was legally sufficient to validate a warrantless search of the home because she "possessed common authority over . . . the premises or effects sought to be inspected."[46] Specifically, the Court concluded that it could be inferred from the co-occupants' mutual use of property that "any of the co-inhabitants has the right to permit the inspection in his own right" and that by living together the co-inhabitants have each "assumed the risk that one of their number might permit the common area to be searched."[47] The Court reiterated that this concept of common authority rested not on the law of property[48] but on the mutual use of the property and the reasonable inferences which could be drawn from that mutual use.[49] In other words, by sharing a room with Mrs. Graff, Matlock assumed the risk that in his absence she might allow another to enter the common space they shared and retrieve evidence against him. He thus retained no reasonable expectation of privacy in their shared living space, rendering the search conducted by the officers outside the protections of the Fourth Amendment.

Notwithstanding Justice Douglas' dissent, in which he expressed the belief that exceptions to the warrant requirement encompassed a much narrower range of possibilities than those entertained by the majority,[50] the majority opinion in *Matlock* reaffirmed the validity of third party consent and provided a welcome clarification of the Court's position on the subject. The Court's shaping of the doctrine did not end there, however, as law enforcement agencies continued to push the bounds of permissible conduct with respect to searches and seizures.

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41. *Id.*

42. *Id.* at 166–67.

43. *Matlock*, 415 U.S. at 166–167.

44. *Id.* at 171, 177. The money was found in a closet in a bedroom shared by Matlock and Mrs. Graff. *Id.* at 166–167.

45. *Id.* at 170. At the time Graff gave her consent, Matlock was in the back seat of a squad car parked near the property. Thus, one can argue that he was not actually absent from the scene. Perhaps the Court characterized him as such because he never explicitly refused consent. However, law enforcement never explicitly asked for his consent either

46 *Id* at 171.

47 *Matlock*, 415 U.S. at 171 n. 7.

48. *Id.*; *see Chapman*, 365 U.S. at 617.

49. *Matlock*, 415 U.S. at 171 n. 7.

50. According to Justice Douglas, only a "grave emergency, such as the imminent loss of evidence or danger to human life" would excuse the government's failure to obtain a warrant. *Id.* at 187 (Douglas, J., dissenting).

2. *Illinois v. Rodriguez* and Apparent Authority

Nearly two decades later, *Illinois v. Rodriguez* added a more controversial wrinkle to the concept of third party consent. Unlike *Matlock*, which went relatively undisputed because of the clarification it brought to the doctrine, *Rodriguez* was not so well-regarded. Specifically, the case's expansion of third party consent doctrine to include the murky concept of apparent authority, a concept which the Court appeared to have rejected in *Stoner*,[51] was viewed as erosive rather than supportive of Fourth Amendment protections.[52]

At issue in *Rodriguez* was whether a third party who did not possess common authority, but whom the police reasonably believed possessed common authority, could be relied upon for third party consent.[53] In that case, police accompanied Gail Fischer, who bore the signs of a severe beating, to the home of her former live-in boyfriend whom she claimed was responsible for the assault.[54] Fischer had a key to the suspect's apartment, referred to it as "our" apartment, and spoke of clothes and furniture which she was keeping there.[55] For this reason, the police assumed that she had the authority to permit them to enter the apartment without a search warrant.[56] After Fischer unlocked the door for them, the police entered the apartment, found drug paraphernalia, and arrested the sleeping suspect for possession of a controlled substance with intent to deliver.[57] The suspect subsequently moved to suppress the evidence seized in the search because Fischer was not living there at the time and, therefore, had no authority to consent to a search of the premises.[58]

The Supreme Court concluded that, notwithstanding Fischer's lack of actual authority over the premises, the police could still rely upon her consent if they reasonably believed that she had the necessary authority.[59] In this way, the *Rodriguez* decision pushed the possibility of third party consent beyond the requisite "common authority"[60] discussed in *Matlock* and into the realm of apparent authority.[61] The Court premised its finding on the notion that the Fourth Amendment does not prohibit searches conducted against an occupant's wishes but rather that it protects only against

51. *Stoner*, 376 U.S. at 488 ("[T]he rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority.'").

52. *See e.g.* Thomas Y. Davies, *Denying a Right by Disregarding Doctrine. How* Illinois v. Rodriguez *Demeans Consent, Trivializes Fourth Amendment Reasonableness, and Exaggerates the Excusability of Police Error*, 59 Tenn. L. Rev. 1 (1991).

53. *Rodriguez*, 497 U.S. at 179.

54. *Id.*

55. *Id.*

56 *See id.* at 180.

57. *Id.*

58. *Rodriguez*, 497 U.S at 180.

59. *Id.* at 186.

60. 415 U.S. at 171.

61 *Rodriguez*, 497 U.S. at 186. The Court noted the difference between what police were told at the time and what they learned later about the Fischer-Rodriguez living situation and remanded the case to the Illinois Appellate Court to decide whether the former facts were sufficient to create the reasonable appearance of authority. *Id.* at 189.

"unreasonable" searches.[62] Because "reasonableness" in the context of probable cause findings and search warrants, two other methods of validating searches, does not require that the government be "factually correct," the Court surmised that the government need not be factually correct in gauging an individual's ability to consent to a search either.[63] Thus, after *Rodriguez*, police who incorrectly believed a third party had authority to consent would not be penalized for conducting a warrantless search so long as their belief was a reasonable one.[64]

The outcome in *Rodriguez* was not well-received outside the law enforcement community. Critics assailed the result as yet another blow to Fourth Amendment protections.[65] One of the major concerns was that the case had gone too far in expanding police powers at the expense of individual privacy protections.[66] Errors and actions that were inexcusable before the ratification of apparent authority had become, under *Rodriguez*, constitutionally reasonable; critics feared these practices would therefore become more commonplace afterward, posing a serious threat to individual rights.[67]

Moreover, the majority's validation of consent given by third parties with no common authority undermined the assumption-of-risk rationale relied upon in *Matlock*.[68] As the dissent pointed out in *Rodriguez*, apparent authority permits the "trampling [of] the rights of a person who has not . . . relinquished any of his privacy expectation."[69] By detaching third party consent from the "relinquishment of expectations" theory that had previously justified its warrant-exception status, the Court subordinated reliance on precedent to the further expansion of police powers, resulting in a more restricted Fourth Amendment.

III. POST-*RODRIGUEZ*: THE CASE OF THE PRESENT OBJECTOR

In the shadow of these decisions—*Matlock* and *Rodriguez*—and of these concerns—expediency in criminal procedure and individual privacy—the Supreme Court's most recent third party consent case made its way through the justice system.

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62 *Id.* at 183 (quoting U.S. Const. amend. IV).

63 *Id.* at 184–86.

64. *Id.* at 188–89.

65. *See e.g.* S. Jeffrey Gately, Student Author, *Criminal Procedure—Search and Seizure—A Reasonable Belief That a Third Party Had Authority to Consent to a Search Is an Exception to the Warrant Requirement*, 22 St. Mary's L.J. 541, 554 (1990) (With *Rodriguez*, "the Court overlooks the intent of the [F]ourth [A]mendment's authors to restrict the government's power to impinge upon the citizens' right of privacy. In so doing, the Court has significantly diminished the [F]ourth [A]mendment's power to protect individual privacy."); Daniel L. Rotenberg, *An Essay on Consent(less) Police Searches*, 69 Wash. U. L.Q. 175, 184 (1991) ("The *Rodriguez* approach, while supplying strong support for law enforcement, completely ignores the constitutional interest of the privacy holder.").

66. *Rodriguez*, 497 U.S. at 198 (Marshall, Brennan & Stevens, JJ., dissenting).

67. *See* Davies, *supra* n. 52, at 96 ("*Rodriguez* may well turn out to be a major step toward a generalized doctrine of forgiveness of all kinds of 'understandable' police errors under the colloquialized notion of 'reasonableness.'" (footnote omitted)).

68. Elizabeth A. Wright, Student Author, *Third Party Consent Searches and the Fourth Amendment: Refusal, Consent, and Reasonableness*, 62 Wash. & Lee L. Rev. 1841, 1859 (2005) ("*Rodriguez* cuts the legs out from under the assumption of the risk theory.").

69. *Rodriguez*, 497 U.S. at 198 (Marshall, Brennan & Stevens, JJ., dissenting).

Although *Matlock* and *Rodriguez* helped to flesh out modern third party consent doctrine, they did not specifically address the issue at the core of *Georgia v. Randolph*: whether a present, objecting target could overrule a co-tenant's consent.[70] While numerous lower courts had already tackled the issue of disagreeing co-tenants,[71] a split of authority had emerged over what the correct outcome should be.

A. The Majority View

After *Rodriguez*, a majority of state courts that addressed the issue of disagreeing co-tenants held that a present target's objection could not invalidate another co-tenant's consent to a warrantless search of their shared premises.[72] By combining the common authority approach from *Matlock* with their knowledge of the trend evident in *Rodriguez* toward expansion of the consent exception, numerous courts concluded that the opinion of present objectors was irrelevant in the face of their co-tenant's consent.[73] Finding that a co-tenant who had voluntarily shared his authority over a common space had no reasonable expectation of privacy in that space, the courts saw no reason to allow the co-tenant's reasonable objection to constrain officers' authority to search.

Although the holding in *Matlock* stated that a third party possessing common authority may consent to a search in his co-tenant's absence, courts interpreted this rule very broadly and successfully used it to validate consent in the face of present, objecting co-tenants. In doing so, proponents of the majority view pointed to the fact that, although the holding in *Matlock* applied to absent targets, the defendant in the case was actually in a squad car right outside the home[74]—not present at the threshold but not altogether absent from the scene either.[75] Thus, although the Supreme Court stated that it was granting the authority to consent only against absent co-tenants, in *Matlock* it actually granted consent against a present one.

B. The Minority View

In contrast, a minority of the courts faced with the issue prioritized the privacy right of the present objector over any consent obtained from a co-tenant. Sticking closely to the literal holding of *Matlock*, the courts in the minority found the

70. 126 S. Ct. 1515, 1518–19 (2006).

71. Four Circuit Courts of Appeals held that the present objector could not invalidate a co-tenant's consent. *See U.S. v. Donlin*, 982 F.2d 31, 33 (1st Cir. 1992); *U.S. v. Sumlin*, 567 F.2d 684, 687–88 (6th Cir. 1977); *U.S. v. Morning*, 64 F.3d 531, 533–36 (9th Cir. 1995); *U.S. v. Hendrix*, 595 F.2d 883, 885 (D.C. Cir. 1979). A number of state courts had addressed the issue as well. *See e.g. Love v. State*, 138 S.W.3d 676, 680 (Ark. 2003) (finding valid third party consent); *State v. Leach*, 782 P.2d 1035, 1040 (Wash. 1989) (finding invalid third party consent in the face of a co-tenant's objection).

72. *See e g. Love*, 138 S.W.3d at 680; *Laramie v. Hysong*, 808 P.2d 199, 203–205 (Wyo. 1991)

73 *See Morning*, 64 F.3d at 535 ("The rationale behind [the *Matlock*] rule is that a joint occupant assumes the risk of his co-occupant exposing their common areas to such a search. There is no reasonable expectation of privacy to be protected under such circumstances." (quoting *Sumlin*, 567 F.2d at 688 (brackets in original)).

74. *Matlock*, 415 U.S. at 179 (Douglas, J., dissenting).

75. *See e.g. Sumlin*, 567 F.2d at 687 (asserting that the outcome in *Matlock* "did not depend on the defendant's absence for the defendant there had just been arrested in the front yard of the residence when the third person's consent to search was procured").

circumstances of a *present*, objecting target squarely outside the scope of *Matlock*.[76] Consequently, those courts viewed the presence of the target as obviating the need for third party consent altogether.[77]

IV. *GEORGIA V. RANDOLPH*: THIRD PARTY CONSENT FINDS ITS LIMIT

In its 2006 term, the Supreme Court squarely addressed whether the Fourth Amendment governed a search for evidence based on the consent of a co-tenant in the face of an express objection by the present target of the search.[78] However, the larger question on the minds of spectators was whether the Court would continue with the expansion of third party consent doctrine or begin to place limits on the government's ability to rely on third party consent. To the surprise of many, the Court adopted the minority view on the issue and declined to expand the doctrine further.

A. *Facts and Procedural History*

On the morning of July 6, 2001, Scott Randolph's estranged wife, Janet, notified police that her husband had taken their son away after a domestic dispute.[79] Upon arriving at the Randolphs' Americus, Georgia, residence, a police officer escorted Mrs. Randolph to a neighbor's home to retrieve the child.[80] Mrs. Randolph informed the police that she and her husband were having financial problems because of his cocaine use.[81] She also told officers that evidence of her husband's costly cocaine habit could be found inside the home.[82] The police found Mr. Randolph at home and asked him for permission to search the premises, but he refused to grant it.[83] Subsequently, they approached Mrs. Randolph for her consent, which she readily provided.[84] Once inside,[85] the police discovered a drinking straw covered in cocaine residue.[86] They took the straw to the police station, used it to obtain a search warrant,[87] and returned to the home to seize more evidence.[88] At trial, Mr. Randolph moved to suppress the evidence

76. *See Saavedra v State*, 576 So. 2d 953, 958–59 (Fla. Dist. Ct. App. 1991), *aff'd*, 622 So. 2d 952 (Fla. 1993) (recognizing that joint control makes third party consent possible only when the target of the search is absent); *Pinyan v State*, 523 So. 2d 718, 721 (Fla. Dist. Ct. App. 1988).

77 *See e.g. State v. Leach*, 782 P.2d 1035, 1040 (Wash. 1989) ("[W]hen confronted with [the defendant's] presence, not having obtained a warrant, the officer should have requested [the defendant's] consent as well.").

78. *Randolph*, 126 S. Ct. at 1518–19.

79 *Id.* at 1519. The couple had separated in May 2001, when Mrs. Randolph and her son went to stay with her parents in Canada. *Id.* But by July 6, Mrs. Randolph had returned to the marital residence; it is unclear if the motive for her return was reconciliation. *Id.*

80. *Id.* Mr. Randolph claimed that he took the boy away because he feared his wife would take the child out of the country again. *Randolph*, 126 S. Ct. at 1519.

81. *Id* Mr. Randolph countered that his wife was the one with the drug problem. *Id.*

82. *Id.*

83. *Id.*

84. *Randolph*, 126 S. Ct. at 1519.

85. *Id.* Mrs. Randolph led police to her husband's bedroom. *Id.*

86. *Id*

87 *Id.* Mrs. Randolph withdrew her consent for the search when the police officer who found the straw went to his car to retrieve an evidence bag. *Randolph*, 126 S. Ct. at 1519.

88. *Id.* Upon their return, the police found additional evidence of drug use, which formed the basis for the defendant's indictment for cocaine possession. *Id.*

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obtained from the search, claiming that his wife could not authorize a warrantless search of their home over his own express objections.[89] The trial court denied Mr. Randolph's motion to suppress the evidence against him, ruling that Mrs. Randolph did possess the authority to consent to a search of the home.[90] The Court of Appeals of Georgia reversed, ruling which that the wife's consent was not valid in the face of her husband's express refusal.[91] The Supreme Court of Georgia affirmed that decision, finding that a contrary ruling would "exalt[] expediency over an individual's Fourth Amendment guaranties."[92] The State of Georgia filed a petition for certiorari,[93] which the U.S. Supreme Court granted on April 18, 2005.[94]

B. *The Majority Opinion*

Writing for the majority, Justice Souter began his analysis with the premise that conceptions of reasonableness under the Fourth Amendment tend to turn on "widely shared social expectations."[95] This consideration of social expectations, according to the Court, was evident in *Matlock*'s emphasis on the reasonable inferences arising from co-tenants' mutual use of the property.[96] Thus, the Court concluded that *Matlock* stood not only for its recognition of a solitary co-tenant's ability to consent to the search of shared premises but also for the idea that such a search's reasonableness is largely "a function of commonly held understanding about the authority that co-inhabitants may exercise in ways that affect each other's interests."[97] By building its analytical framework around the broad concept of social expectations rather than starting with *Matlock*'s common authority test, the Court ensured that it would have both greater interpretative freedom over the case and an easier time justifying its ultimate decision.[98]

Next, the Court set out to determine which social expectations were present in the situation in *Randolph*, i.e., what could reasonably be inferred from the disagreement of two co-tenants over whether to permit the entry of another.[99] It analogized the situation in *Randolph* to that involving overnight guests, who have a legitimate expectation of privacy because their host would be unlikely to admit a third party over their objection.[100] Where co-tenants are involved, the expectation that one's objection will be

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89. *Id.*

90. *Id*

91. *Randolph v. State*, 590 S.E.2d 834, 839 (Ga. App. 2003).

92. *State v. Randolph*, 604 S.E.2d 835, 837 (Ga. 2004) (quoting *Leach,* 782 P.2d at 1040).

93. 2005 WL 309364 (Feb. 4, 2005).

94. 544 U.S. 973 (2005).

95. *Randolph*, 126 S. Ct. at 1521. Consistent with the Court's prior decisions, it also noted that such expectations were influenced, but not controlled, by property law. *Id.*

96 *Id.*

97. *Id.* For example, a child may have the power to permit police to enter into the "part of the house where any caller, such as a pollster or salesman, might well be admitted" but could not be "reasonably expect[ed]" to be able to authorize their rummaging through his parents' bedroom. *Id* at 1522 (citation omitted).

98. Of course, the Court relies on social expectations in its analyses all of the time. The unabashed nature of its reliance on social expectations in Randolph is what is striking. For more commentary about the propriety of this approach, see text accompanying notes 115 to 117.

99. *Randolph*, 126 S. Ct. at 1522.

100. *Id.* (citing *Minn. V. Olson*, 485 U.S. 91 (1990).

heeded is even greater, said Justice Souter.[101] Moreover, a reasonable person would not take one co-tenant's invitation to be a "sufficiently good reason to enter when a fellow tenant stood there saying, 'stay out.'"[102] Given these guidelines, the majority concluded that if no hierarchical relationship exists between the disagreeing parties, they must voluntarily come to a resolution.[103] Where no such agreement is reached, a police officer who seeks entry for purposes of conducting a warrantless search for evidence would have "no better claim to reasonableness in entering than the officer would have in the absence of any consent at all."[104] *Randolph* thus stands for the proposition that a search for evidence conducted on the basis of one co-tenant's consent in the face of the express objection by the other could not be a reasonable one. In other words, "a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant."[105]

In support of its decision to discourage warrantless searches when present co-tenants expressly disagree, the majority appealed to the "centuries-old principle of respect for the privacy of the home."[106] It characterized the dissent as believing that "privacy shared with another individual is privacy waived for all purposes" and maintained that the privacy of the dwelling place is significantly more valuable than that of a secret, for example.[107] But the high value afforded to home-based privacy concerns is not just an abstraction for Justice Souter; it also has practical implications, namely that police should not be allowed to take short-cuts when searches of the home are at issue. Instead of ignoring one co-tenant's refusal to consent and forging ahead with the search, the majority instructs that the police should pursue alternative avenues for gathering information, like encouraging the other co-tenant to deliver evidence directly to the police or provide information that the police can use to obtain a search warrant.[108]

The importance of the Court's decision to couch its analysis in terms of social expectations rather than using *Matlock*'s common authority test became most apparent when it attempted to square its holding in *Randolph* in that case.[109] From *Matlock* came the notion that a co-tenant has the right to permit a search in his own right;[110] the *Randolph* holding reached the opposite conclusion where an objecting co-tenant is present as well.[111] Recognizing this inconsistency, the majority insisted that the "right" discussed in *Matlock* was itself a product of the social expectations surrounding that particular situation but "not an enduring and enforceable ownership right" like that

101. *Id.*

102. *Id.* at 1522–23.

103. *Id* at 1523. This argument assumes that police have no other authority to enter—i.e., no arrest warrant and no exigent circumstances.

104. *Randolph*, 126 S. Ct. at 1523.

105. *Id.* at 1528.

106 *Id* at 1523 (quoting *Wilson v. Layne*, 526 U.S. 603, 610 (1999) (internal quotations omitted)).

107. *Id.* at 1524 n. 4.

108 *Id.* at 1524.

109. *Randolph*, 126 S. Ct. at 1527.

110. *Matlock*, 415 U.S. at 171.

111. *Randolph*, 126 S. Ct. at 1528.

recognized in the (non-controlling) law of property.[112] In an effort to distinguish the case once and for all, the majority emphasized that *Matlock*'s holding applied to "absent, nonconsenting resident[s]" only.[113] Where the target of the search is present and objects, *Randolph* is the authority to be followed.

By narrowing the holding in *Randolph* such that it applied to objecting co-tenants who were present at the threshold, the Court acknowledged that it was "drawing a fine line" in the sense that a target who was away, asleep, or otherwise unaware of police presence would lose out if his co-tenant consented to a search.[114] In the interest of simplicity, however, the Court concluded that such a result would be acceptable, provided there was no evidence that police intentionally removed the potentially objecting co-tenant from the entrance so that he could not object.[115]

C. *The Chief Justice's Dissent*[116]

Chief Justice Roberts was not persuaded by the Court's use of social expectations to circumvent an outcome he believed was dictated by *Matlock*. He saw the fine line drawn by the majority as providing protection "on a random and happenstance basis" by protecting a co-tenant at the front door but not one sleeping in the next room.[117] Citing *Matlock*'s reasoning that a person who shares a common space assumes the risk that her roommate might permit another to enter that space, the Chief Justice concluded that the consent of one co-tenant should be sufficient to make a search reasonable, even in the face of an objection by another co-tenant.[118] He accused the majority of manufacturing, through its appeal to social expectations, an unnecessary and unclear exception to *Matlock*'s validation of third party consent.[119]

In addition, the Chief Justice vehemently disagreed with the use of social expectations as a basis for future third party consent decisions. He pointed out that, despite the Court's assertion that one co-tenant could not prevail over the express wishes of another, the objecting co-tenant in *Randolph* nevertheless seemed to prevail over his co-tenant's express wish that the police search for evidence.[120] Moreover, he noted that the inconstancy of social expectations across various social situations makes "[s]uch shifting expectations [an unpromising] foundation on which to ground a constitutional

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112. *Id* at 1527.

113. *Id.* (quoting *Matlock*, 415 U.S. at 170 (quotations omitted)).

114. *Id.* The Court acknowledged that if both the targets in *Matlock* and *Rodriguez* had been asked if they objected to the search, they would have had the opportunity to enforce their privacy rights, as Mr. Matlock was in a nearby squad car and Mr. Rodriguez was asleep inside the apartment that was searched. *Id.* Even so, the Court chose not to disturb those precedents. *Randolph*, 126 S. Ct. at 1527.

115. *Id.* Ironically, Mr. Matlock was "removed" by being placed in a police car.

116. The Chief Justice's dissent was joined by Justice Scalia, who also wrote a separate opinion in which he engaged in a dispute with Justice Stevens over originalism. *Id.* at 1539 (Scalia, J., dissenting). Justice Thomas wrote a separate dissent because he thought an entirely different case, *Coolidge v. N.H.*, 403 U.S. 443 (1971), should have controlled the outcome. *Id.* at 1541 (Thomas, J., dissenting).

117 *Randolph*, 126 S. Ct. at 1531 (Roberts, C.J. & Scalia, J., dissenting).

118. *Id* ("Just as Mrs. Randolph could walk upstairs, come down, and turn her husband's cocaine straw over to the police, she can consent to police entry and search of what is, after all, her home, too.").

119 *Id.* at 1532.

120. *Id.*

rule."[121] In his view, social expectations are irrelevant because the Constitution protects not social expectations but privacy, "and once privacy has been shared . . . [it] remain[s] private only at the discretion of the confidant."[122] Thus, a more consistent rule would recognize that sharing a living space necessarily "entails a limited yielding of privacy" to co-tenants who might in turn share that space with the government.[123]

Chief Justice Roberts also warned that the majority's rule might disadvantage victims of domestic violence by allowing their abusers to stop police from gaining entry.[124] The majority dismissed this concern as a "red herring,"[125] calling it irrelevant to the main issue in *Randolph*.[126] It pointed out the Chief Justice's failure to distinguish when police entry is permissible in general from when police entry is permissible for the gathering of evidence.[127] The majority maintained that "so long as they have good reason to believe [that] a threat exists," police may lawfully enter premises despite a co-tenant's objection under the theory of exigent circumstances.[128] Hence, given the high correlation between on-going domestic violence and exigent circumstances, domestic violence arrests or investigations would not be stymied by *Randolph*'s consent rule.

V. *RANDOLPH* AS PRECEDENT

Motivated in part by the desire to avoid creating a rule which automatically divests co-tenants of their privacy protection and in part by the desire to preserve the sanctity of the home, the Court fashioned a very case-specific yet very thin line of protection with its holding in *Randolph*. The case itself represents a notable move for the Court in terms of curbing the disintegration of Fourth Amendment protections; however, its impact may be lessened because of the specificity of its holding and by the inconsistencies in the analytical framework used by the Court. What follows is a discussion of the characteristics likely to mitigate and dilute *Randolph*'s precedential value.

A. *Narrowness*

The narrowness of the holding in *Randolph* illustrates just how little a majority of the Court was able to agree upon.[129] The case "bitterly divided"[130] the Court, and the

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121. *Id.* The "reasonable expectation of privacy" test employed by the Court is grounded in part in the Court's assessment of social expectations, as it requires the Court to determine what expectations of privacy are recognized by society as reasonable ones. Thus, it appears the Chief Justice's separation of privacy and social expectations, where the former is portrayed as solid and the latter is portrayed as ephemeral, is an artificial one.

122. *Randolph*, 126 S. Ct. at 1533 (Roberts, C.J. & Scalia, J., dissenting). The Chief Justice continued, "[t]o the extent a person wants to ensure that his possessions will be subject to a consent search only due to his *own* consent, he is free to place these items in an area over which others do *not* share access and control, be it a private room or a locked suitcase under a bed." *Id.* at 1535 (emphasis in original).

123. *Id* at 1536. The Chief Justice argued that social expectations guide the Court's assessment of legitimate expectations of privacy—the threshold inquiry for when a search occurs—but have never been used to ascertain the reasonableness of context-based searches. *Id.* at 1532–33.

124 *Id* at 1537–38.

125. *Id.* at 1526 (majority).

126 *Randolph*, 126 S. Ct. at 1525.

127. *Id.*

128. *Id.*

129. Justice Breyer cited the "case-specific nature" of the holding as a reason for his concurrence.

six separate opinions it generated represented a momentary setback in Chief Justice Roberts' objective of creating a more cohesive judiciary. In his effort to confine the scope of the holding to bounds agreeable to a majority of the Court, Justice Souter ensured that the holding's scope would not reach too far outside the case and left prior precedents in place.

The third party consent rule articulated in *Randolph* will likely be applicable to only a narrow set of circumstances.[131] For this reason, difficulty may arise when the time comes to apply it to future third party consent cases.[132] The many components of the case's holding—present, objecting co-tenant versus present, consenting co-tenant of equal stature—provides courts with a number of facts upon which they may distinguish the case. Moreover, the holding only applies to searches of dwellings—searches of cars and offices, for example, fall outside its bounds. If *Randolph* is so easily distinguished that it fades into the background, its impact will be significantly lessened and the case may soon become "of almost no precedential value."[133]

B. The Social Expectations Test

Central to the decision in *Randolph* was the Court's reliance on social expectations in its reasonableness assessment. The Court set out to determine which inferences society generally attached to the situation at issue in the case; yet it is questionable whether the social expectations the Court identified as controlling were accurate, let alone broadly applicable.[134] It is difficult to discern what a society's beliefs are at any given time, especially in a heterogeneous society, where beliefs are unlikely to be consistent across such categories as race, class, gender, or religion. Of course, this has not stopped the Court from declaring what "society is prepared to recognize as reasonable" in Fourth Amendment search cases,[135] but such monolithic constructions are no more supportable when used to invalidate law enforcement practices as when used to defend them. Moreover, as a matter of opinion[136] and of empirics,[137] the Court has not been a particularly competent judge of social expectations in its Fourth Amendment

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Randolph, 126 S. Ct. at 1531 (Breyer, J., concurring).

130. David A. Moran, *The End of the Exclusionary Rule, Among Other Things: The Roberts Court Takes on the Fourth Amendment*, 2006 Cato S. Ct Rev. 283, 285.

131. Indeed, the case "concerned a narrow and relatively uncommon issue of Fourth Amendment consent law" to begin with. Craig M Bradley, *Supreme Court Review. The Case of the Uncooperative Husband*, 42 Trial 68, 68 (June 2006).

132. *Randolph*, 126 S. Ct. at 1531–32 (Roberts, C.J. & Scalia, J., dissenting).

133. Moran, *supra* n. 130, at 285.

134. *See Randolph*, 126 S. Ct. at 1532 (Roberts, C.J. & Scalia, J , dissenting) (noting that "the majority has no support for its basic assumption—that an invited guest encountering two disagreeing co-occupants would flee").

135. *Katz*, 389 U.S. at 361

136. *Fourth Amendment—Consent Search Doctrine—Co-occupant Refusal to Consent.* Georgia v. Randolph, 120 Harv. L. Rev. 163, 170 (2006) (noting that "the judiciary is poorly suited to determine rules of social convention").

137. Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases. An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 Duke L.J. 727, 732 (1993) (examining the degree to which courts' and citizens' perceptions of privacy interests differ).

jurisprudence.

Taking a closer look at the expectations at issue in this case, the majority confidently explained that "no sensible person would go inside" a home at the invitation of one co-tenant when another co-tenant urges him to "stay out."[138] From there, it concluded that Mr. Randolph had a reasonable expectation of privacy because no one in his position would expect someone to enter his home over his objections. It is plausible that under some circumstances a guest might be hesitant to enter a home when the roommates disagree; however, it seems just as plausible that a guest might ignore the dissenting co-tenant. As the Chief Justice pointed out, if co-tenants have commensurate authority over the premises, it is as likely that the objecting co-tenant would not be able to keep the guest from coming in.[139] Furthermore, while the majority noted that co-tenants must come to a "voluntary accommodation"[140] to resolve the situation before police may enter, not every roommate (or even most, depending on whom one asks) may be as accommodating as the majority seemed to suggest.

It is also not surprising that the majority chose to use the term "co-occupants" or "co-tenants" instead of "spouses" to describe the parties in *Randolph,* given that the Supreme Court has traditionally held that the "laws of marriage and domestic relations" are more appropriately handled by the states.[141] Nor did the Court characterize its holding as an attempt to promote marital harmony, as some state courts have done.[142] Nonetheless, while the Court did not explicitly consider the Randolphs' marital status, that fact likely played some role in the Court's social expectations analysis. As a long-standing social institution, marriage and the social expectations that accompany it have evolved for centuries. Thus, it is a short step from the concept of marriage to the modern ideas of equality and "voluntary accommodation" upon which the majority's decision is based. Even Justice Stevens noted in his concurrence that the decision is a reasonable one because of the current view that spouses are equals.[143]

Thus, the outcome in *Randolph* makes sense in part because it resolves a dispute between two people who are married and presumably equals, and in part because the search at issue concerns their marital home. However, any variation in the number of co-tenants present, or in the quality and duration of their relationship, or in the location to be searched would likely change the social expectations accompanying the situation.[144] Marriage, for example, is accompanied by fairly clear social expectations because of its

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138. *Randolph,* 126 S. Ct. at 1523.

139. *Id.* at 1532 (Roberts, C.J. & Scalia, J., dissenting).

140. *Id.* at 1523 (majority).

141. *Trammel v. United States,* 445 U.S. 40, 50 (1980) ("[L]aws of marriage and domestic relations are traditionally reserved to the states."). Of course, the recent federal enactment of the Defense of Marriage Act challenges this longstanding view of marriage as a state-regulated activity. *See* 1 U.S.C. § 7 (2000); 28 U.S.C. § 1738C (2000).

142. *See e.g Randolph,* 590 S.E.2d at 837 ("When possible, Georgia courts strive to promote the sanctity of marriage and to avoid circumstances that create adversity between spouses. Allowing a wife's consent to search to override her husband's previous assertion of his right to privacy threatens domestic tranquility."); *Lawton v. State,* 320 So. 2d 463, 465 (Fla. Dist. Ct. App. 1975) (recognizing that a rule respecting the objections of a present adult co-occupant is "more likely to promote peace and tranquility").

143. *Randolph,* 126 S. Ct. at 1529 (Stevens, J., concurring).

144. *See id.* at 1532 (Roberts, C.J. & Scalia, J., dissenting).

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long-standing history as a social institution, but relationships that are less common or not socially accepted may not carry such clear expectations.[145] The sheer breadth of possible interpretations with regard to the proper social expectations would preclude a consistent body of case law from developing around such a foundation.

It has been suggested that the uncertainty inherent in the social expectations test might be remedied by a return to the use of the common law of property rights as a foundation for third party consent.[146] While both the common law and social expectations are capable of changing over time, the common law's consistency and predictability are qualities missing from a doctrine based on social expectations. The common law encourages gradual changes through the use of traditional legal tools and the development of a coherent body of case law.[147] It encourages the absorption of social conventions into the legal system "incrementally and indirectly."[148] With a doctrine based on social expectations, however, the law is linked only to the judiciary's perception of current social norms. Thus, the resulting law is only as good as the judge's ability to discern current trends in social expectations.

Even so, it may be the case that reattaching privacy interests to property rights would be even more limiting. Indeed, the main point of unlatching the consent doctrine from property law was to broaden the scope of individual protections under the Fourth Amendment. Now it seems that this breadth has to some extent undermined the doctrine's consistency.

C. *The Muddying of Exigent Circumstances*

In addition to these larger conceptual shifts, the Court was somewhat inconsistent with respect to its treatment of exigent circumstances.[149] In response to the Chief Justice's contention that the case's holding may disadvantage victims of domestic violence, the majority stated that police officers may enter a dwelling, despite present objections from the suspect, provided that they have "good reason to believe such a threat exists."[150] However, the majority obscured its position[151] by citing a treatise excerpt[152] that suggests that in an emergency situation, the consent of a victimized third party would validate a warrantless search over the defendant's objections.

The majority's reliance on this treatise authority makes it appear that police now

145. For example, same- and opposite-sex domestic partnerships do not have the same history of social acceptance as marital relationships do. Hence, people who participate in these alternative forms of committed relationships may be denied certain privacy protections because of the lack of socially recognized expectations in that area.

146 *Consent Search Doctrine*, *supra* n. 136, at 170 ("This indeterminacy—and therefore instability and unpredictability—is the natural result of a jurisprudence untethered from its historical roots in the common law and set adrift with only a vague mandate to reflect social expectations.").

147. *Id.*

148. *Id.* at 171.

149. *See* Bradley, *supra* n. 131, at 169.

150 *Randolph*, 126 S. Ct. at 1525.

151 *Id* at 1538 (Roberts, C.J. & Scalia, J., dissenting).

152 *Id* at 1525–26 (majority) (citing Warne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 8.3(d), 732–33 (3d ed., West 1996)).

might need "a good reason" to enter, coupled with "one occupant's consent," to justify a warrantless entry and search during the period of exigency.[153] While the majority may have intended future courts to treat the victim's consent statement as a potential (non-necessary) component of the exigency showing, the majority's choice of citation inappropriately seems to blend third party consent with exigent circumstances even though each is a distinct exception to the warrant requirement.

VI. FUTURE CONCERNS

Two important issues require clarification after *Randolph*: the limits on removal of targets from the scene and the relevance of the plain view seizure doctrine to searches conducted in violation of *Randolph*. The majority declined to address either of these issues with sufficient specificity to forestall future litigation, thus ensuring that lower courts will grapple with new challenges in the third party consent context for years to come.

The removal issue involves a contingency placed on the case's holding. Specifically, the Court suggested that the formalism of its holding—that an objecting target must be present at the threshold to be protected—is a "practical" complement to the rule in *Matlock*, provided "there is no evidence that the police have removed the potentially objecting tenant" to prevent him from making a "dispositive" objection.[154] However, the Court did not describe what form this removal evidence might take, and this omission generates a host of new questions. For example, will we see the development of actual and constructive removal jurisprudence, similar to the analysis used to equate constructive with actual arrests?[155] Will courts read into the contingency a requirement of specific intent, such that officers who remove a suspect for the purpose of keeping him quiet will be prevented from searching, but officers who remove a suspect for other reasons will be in the clear? Will a good faith exception emerge, excluding from *Randolph*'s reach searches by police officers who sincerely yet unreasonably believed they had not crossed the boundary from mere restraint of a target into full removal?[156] In short, the ability of police to re-locate a target so that the case falls squarely under *Matlock* instead of *Randolph* may blur the lines between the two cases, particularly given the facts of *Matlock*.[157]

The plain view issue stems from language in the majority opinion regarding the power of the co-tenant's objection to forestall a search. The majority states that a present target's objection is dispositive "as to him," a statement that "implies entry and search would be reasonable 'as to' someone else."[158] In other words, when faced with an

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153. *See Ill. v. McArthur*, 531 U.S 326, 331–32 (2001).

154. *Randolph*, 126 S. Ct. at 1527.

155. *See Dunaway v. N.Y.*, 442 U.S. 200 (1979).

156 *See U.S. v. Leon*, 468 U.S. 897, 909 (1984) (adopting the good faith exception to the exclusionary rule, which deems evidence collected pursuant to a warrant later declared invalid admissible provided police reasonably relied on the warrant's validity).

157. *See supra* nn. 40–42 & accompanying text (Mr. Matlock was placed in a squad car right outside the home.).

158. *Randolph*, 126 S. Ct. at 1536 (Roberts, C.J & Scalia, J., dissenting).

objecting co-tenant and a consenting co-tenant, police may, on the authority of the consentor, enter and seize evidence for use against anyone other than the objector. For example, in *Randolph* police could enter based on Mrs. Randolph's consent and use the evidence found to prosecute Mrs. Randolph but not Mr. Randolph.

Restricting use of the evidence obtained in a third party consent search to prosecution of anyone other than the objector seems, on the one hand, to violate the plain view exception, which authorizes police to seize obviously incriminating evidence from places in which they have a lawful right of access.[159] Under this doctrine, if police lawfully enter the house based on one co-tenant's consent, they should be able to seize whatever is in plain view and to use such items to prosecute whomever is in possession of those items, the objector included. In the dissent's view,[160] the majority opinion prevents this result and therefore unnecessarily restricts prosecution of offenders.

A more charitable (and equally plausible) interpretation of the majority's language would reconcile the two doctrines in the interests of practicality. Under such an approach, while evidence found during a third party search could not be introduced against the objector under the consent exception, it could be used against him if the prosecution has another theory to justify its discovery and seizure. The majority opinion recognizes that the consent of the co-tenant provides the police with lawful access to the premises for all reasons other than collection of evidence against the objector; hence, plain view emerges as a viable option once the police are inside and looking where they are allowed to look. Thus, if police can satisfy other elements of the plain view exception, they can use evidence seized in accordance with its terms against the objector, despite his objection to the original search. Consent doctrine thereby remains appropriately limited but plain view picks up where consent leaves off.

In sum, while *Randolph* succeeded in clarifying the ability of police to search in the face of a present objector, the majority's failure to be clear on subjects like removal and plain view promises to generate much future litigation on a number of issues.

VII. CONCLUSION

The *Randolph* Court struggled to balance simplicity and functionality with the desired level of privacy protection for home residents. It met with moderate success in this regard, augmenting privacy protections for those who actively object to searches of their residences but leaving multiple issues unresolved or unclear. The majority rejected a bright-line rule proclaiming co-occupant consent as valid under all circumstances, as such a rule might penetrate too deeply into the special privacy protections afforded the home.[161] Yet it also left in place prior precedents—*Matlock* and *Rodriguez*—thereby signaling that police authority to search based on consent would only be constrained in limited circumstances.

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159 *Minn v. Dickerson*, 508 U.S. 366, 375 (1993) (Under the "plain view" exception, "if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if officers have a lawful right of access to the object, they may seize it without a warrant.").

160. *Randolph*, 126 S. Ct. at 1537 (Roberts, C J. & Scalia, J., dissenting).

161. *Id.* at 1523–24 (majority).

In the event that a sufficiently different case comes up, the Court might choose to emphasize the case-specific nature of its holding and decline to extend it further; alternatively, it might continue to reshape its third party consent doctrine in a way that makes it a more consistent one. Given the variation in living arrangements among twenty-first-century American households, *Randolph* leaves many loose ends with respect to searches conducted in the presence of disagreeing co-tenants. The Court must provide guidance to law enforcement while ensuring that the people's privacy expectations receive adequate protection. This is of special significance to those in alternative living arrangements, whose households may be in danger of receiving fewer protections because they do not fit the more traditional nuclear family model. Furthermore, because police still have several options available to them when faced with an express refusal of consent by a co-tenant—entering based on exigent circumstances, encouraging a cooperative co-tenant to bring evidence out to them, or applying for a search warrant based on the cooperative co-tenant's statements—it seems unlikely that the holding of *Randolph* will thwart a significant number of searches. In sum, although *Randolph* marks a change of direction with respect to the expansion of police powers, its ultimate impact on citizen privacy is likely to be slight.