DePaul Law Review

Volume 55
Issue 2 *Winter 2006: Symposium - Who Feels their Pain? The Challenge of Noneconomic Damages in Civil Litigation*

Article 19

Right of Return: Lee v. City of Chicago and Continuing Seizure in the Property Context

Graham Miller

RIGHT OF RETURN: *LEE V. CITY OF CHICAGO* AND CONTINUING SEIZURE IN THE PROPERTY CONTEXT

INTRODUCTION

You are heading home from a Chicago Bulls game at the United Center when, as you pulled out of the parking lot onto Wood Street, you hear two loud cracks, screaming, and your rear window shattering. You have just witnessed an attempted murder and, unfortunately, you and your car happened to be right in the middle of a drive-by shooting that you had nothing to do with. You wait with your car while the police question you and eventually tell you they are going to take your car as evidence of the crime. Of course you acquiesce—it is your duty to assist the police in finding and prosecuting this lawless criminal. A month later you get a letter notifying you that the police no longer need your car for evidentiary purposes, and that you are free to pick it up whenever you want—so long as you pay the towing fees and a month's worth of storage fees. What is more, the letter informs you that if you cannot come up with this money within thirty days, your vehicle will be sold at auction or destroyed.[1]

Up until this point you have played the role of model citizen and have surrendered your car so that police may use it as evidence in prosecuting a dangerous criminal. But now that the government no longer has any use for your car, is it fair that you should pay to get it back? Would your answer be the same if the police pinned you as a suspect, arrested you and took your car, but later realized they were wrong and dropped the charges? What if there was no fee to get your car back, but in order to reclaim it you had to find the officer who took your car, had to ask him to fill out some paperwork, and then had to wait another month for the government to process your claim—is that a reasonable policy? Just what are your rights with respect to reclaiming property voluntarily given up for use as evidence?

The above situations are all examples of how the government can legally seize property and keep it (or condition its return upon payment of fees) after the initial justification for the seizure—the property's evidentiary value—has expired. If the intention behind such continued retention of private property is an attempt to make it so difficult to get the property back that it amounts to a de facto taking—

1. This fact pattern is similar to the facts in *Lee v. City of Chicago*, 330 F.3d 456 (7th Cir. 2003).

a disguised attempt to convert private property—a court should have no trouble invalidating such a policy.[2] In some instances, however, the government may only be acting unreasonably, given the fact that it has no further use for the property. Citizens in the latter case, especially innocent bystanders, are equally deserving of recourse when government takes their property, initially with probable cause, but then refuses its return even when that cause no longer exists.

When state or local governments infringe on our rights, we usually turn to 42 U.S.C. § 1983 for relief.[3] Under that statute, one states a claim for relief when the government has violated a constitutional right under "color of law."[4] But what constitutional right has the government violated when it takes your property and keeps it even after the government has no use for the property? Has the government unjustifiably interfered with an individual's property rights without due process of law under the Fifth and Fourteenth Amendments? Has the government taken property without just compensation under the Fifth Amendment? Has the government made an unreasonable seizure under the Fourth Amendment?

Some courts reject this last notion because they view a Fourth Amendment seizure as an instantaneous event. From this perspective, the Fourth Amendment only protects a person's property interest at the moment the property is taken from him or her. The Seventh Circuit recently applied this approach in *Lee v. City of Chicago*.[5] Judge Diane P. Wood, however, in a concurring opinion, was not so quick to hold the Fourth Amendment "utterly irrelevant to the reasonableness of a decision to refuse to relinquish seized property once the government has no need for it."[6]

This Note discusses the feasibility and desirability of interpreting Fourth Amendment protections as extending past the actual moment the government takes one's property. Part II outlines the background of the concept of "continuing seizure" as it developed in the context of excessive force cases.[7] Part III then reviews the theory's brief treatment in the property context, focusing on the Seventh Circuit's decision in *Lee*.[8] Part IV examines whether the text of the Fourth

2. *See* United States v. Premises Known as 608 Taylor Ave., 584 F.2d 1297, 1302 (3d Cir. 1978) (discussing various constitutional limitations on government's power to seize property and keep it indefinitely).

3. *See infra* note 25 and accompanying text.

4. *See infra* note 25 and accompanying text.

5. 330 F.3d 456.

6. *Id.* at 472 (Wood, J., concurring).

7. *See infra* notes 22–111 and accompanying text.

8. *See infra* notes 112–143 and accompanying text.

Amendment supports the notion of continuing seizure, and whether application of the Fourth Amendment's reasonableness standard in return of property cases is practical and wise.[9] This section then sets out how a Fourth Amendment analysis might look in the return of property context, pointing out that the need to balance law enforcement interests with individuals' property interests is what makes application of the Fourth Amendment appropriate in these cases.[10] Part V addresses the possible ramifications of holding the Fourth Amendment "irrelevant" to government conduct concerning the return of private property used as evidence.[11] Specifically, Part V speaks to the inadequacy of due process protections in this context,[12] and addresses the possible risks of relying on a successful takings claim.[13] Ultimately, this Note concludes that the continuing seizure approach is supported by the text of the Constitution, and is the most practical approach to, and affords the most protection against, unwarranted government retention of property.[14]

II. Background: How Courts Have Dealt With the Question of When Seizure Ends

The federal courts first addressed the question of when a Fourth Amendment seizure ends in the excessive force context.[15] The issue there was whether force applied after the actual arrest should be evaluated under the Fourth Amendment reasonableness standard or under the principles of due process.[16] The federal courts are split on the issue, with some recognizing that seizure can continue past arrest and others holding that Fourth Amendment protections end after the moment of arrest.[17] Most courts extend the Fourth Amendment up to the determination of probable cause.[18]

The few courts that have addressed the issue of when seizure ends in the property context, however, have held that the Fourth Amendment is irrelevant after the initial taking of the property.[19] The most

9. *See infra* notes 148–237 and accompanying text.

10. *See infra* notes 238–258 and accompanying text. The *Lee* court's rejection of the Fourth Amendment in favor of the Due Process Clause of the Fifth and Fourteenth Amendments is discussed in notes 259–263 and accompanying text.

11. *See infra* notes 264–307 and accompanying text.

12. *See infra* notes 264–287 and accompanying text.

13. *See infra* notes 288–307 and accompanying text.

14. *See infra* notes 308–309 and accompanying text.

15. *See infra* notes 31–71 and accompanying text.

16. *See infra* notes 31–71 and accompanying text.

17. *See infra* notes 31–71 and accompanying text.

18. *See infra* notes 31–71 and accompanying text.

19. *See infra* notes 88–111 and accompanying text.

recent case adopting this approach is *Lee*, where the Seventh Circuit broadly held that the Fourth Amendment's reasonableness standard does not control government conduct with respect to the return of personal property.[20]

A. History of the Continuing Seizure Doctrine

Courts first discovered the need to determine the temporal scope of the Fourth Amendment in cases where police used unreasonable force shortly after arrest. The federal circuits are split on the issue of how long a seizure continues after the initial act of arrest in this context.[21]

1. The Temporal Quality of Fourth Amendment Seizures

The Fourth Amendment protects citizens from "unreasonable searches and seizures."[22] The Fourth Amendment is "commonly thought of as a limitation on the power of police to search for and seize evidence, instrumentalities, and fruits of crime."[23] The police can violate the Fourth Amendment by executing an illegal arrest or other unreasonable seizure of a person,[24] for which a victim can obtain subsequent relief through a civil suit brought under § 1983.[25] It was regarding this latter intrusion—the unreasonable seizure of a person in the context of postarrest excessive force claims—that the question of how long a seizure actually occurs was first the subject of some controversy.[26]

In the postarrest excessive force context, the issue is not whether a seizure has occurred, since the suspect is already in custody, but

---

20. *See infra* notes 112–135 and accompanying text.

21. *See infra* notes 31–84 and accompanying text.

22. "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV.

23. WAYNE R. LAFAVE, SEARCH AND SEIZURE § 5.1 (4th ed. Supp. 2004).

24. *Id.*

25. 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (2000).

Pursuant to this statute, damages may be brought in a federal court against municipal and state officers by a plaintiff who sufficiently alleges a violation of his constitutional rights. *See* LAFAVE, *supra* note 23, § 1.10 ("[T]he fourth amendment prohibition against unreasonable searches and seizures has been a popular vehicle for section 1983 claims," and "actions have been undertaken with some frequency for illegal arrests, ... illegal seizures of property, . . . and accompanying use of unreasonable force.") (internal quotation marks omitted).

26. *See infra* notes 31–84 and accompanying text.

"whether the seizure is still taking place at the time the force is exerted."[27] If the suspect is still being "seized" when the officer applies the force, the officer's conduct can be evaluated under the Fourth Amendment standard of reasonableness.[28] If "the seizure has ended, however, the Fourth Amendment will be inapplicable."[29] Thus, the *temporal* scope of seizure under the Fourth Amendment is critical in this context.[30]

2. *The Concept of Continuing Seizure as Developed Through Excessive Force Claims in the Federal Circuits*

The United States Supreme Court has refused to address the question of how long after the point of arrest the Fourth Amendment continues to provide protection against excessive force—and has thus not explained when a seizure actually ends.[31] This has led some courts adjudicating excessive force claims to hold that a seizure *continues* beyond arrest to some point farther down the custodial process.[32] The effect of this reasoning is that the government must conduct itself in a reasonable manner past the moment of initial seizure, or the "continuing seizure" violates the Fourth Amendment.

---

27. Eamonn O'Hagan, Note, *Judicial Illumination of the Constitutional "Twilight Zone": Protecting Post-Arrest, Pretrial Suspects from Excessive Force at the Hands of Law Enforcement*, 44 B.C. L. REV. 1357, 1363 (2003).

28. *Id.*

29. *Id.*

30. For example, if the Fourth Amendment only controls until a suspect is handcuffed and restrained, it probably has nothing to say about how much force a police officer uses in putting the suspect into the police car.

31. *See* O'Hagan, *supra* note 27, at 1367–68 (discussing the implications of *Graham v. Connor*, 490 U.S. 386 (1989), in which the Supreme Court left open the question of whether the Fourth Amendment provides protection against the use of excessive force beyond the point at which arrest ends and pretrial detention begins). In *Graham*, the Supreme Court determined that the Fourteenth Amendment's "Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." *Graham*, 490 U.S. at 395. Thus, the critical issue is whether the Fourth Amendment continues to provide protection to persons "who have been arrested but have yet to make their first judicial appearance." Erica Haber, Note, *Demystifying a Legal Twilight Zone: Resolving the Circuit Court Split on When Seizure Ends and Pretrial Detention Begins in § 1983 Excessive Force Cases*, 19 N.Y.L. SCH. J. HUM. RTS. 939, 947 (2003). The question of when seizure ends is even more confusing in the property context, because there typically is no "first judicial appearance" for seized property.

32. Robins v. Harum, 773 F.2d 1004, 1010 (9th Cir. 1985) (stating that "once a seizure has occurred, it continues throughout the time the arrestee is in custody of the arresting officers"); *see also* Phelps v. Coy, 286 F.3d 295, 300 (6th Cir. 2002) (concluding that "the seizure that occurs when a person is arrested continues [throughout the time] the person remains in the custody of the arresting officers") (internal quotation marks and citations omitted); Powell v. Gardner, 891 F.2d 1039, 1044 (2d Cir. 1989) (indicating that "the Fourth Amendment standard probably should be applied at least to the period prior to the time when the person arrested is arraigned or formally charged").

The Ninth Circuit was the first federal circuit to hold the government to this standard in an excessive force case. In *Robins v. Harum*,[33] the Ninth Circuit held that "excessive use of force by a law enforcement officer in the course of transporting an arrestee gives rise to a section 1983 claim based upon a violation of the Fourth Amendment."[34] Police had arrested the plaintiffs in *Robins* for littering and obstructing traffic and had placed them in the rear of a patrol car.[35] The Robinses' excessive force claim derived from a struggle with their arresting officers "en route" to jail.[36] In affirming the district court's finding for the plaintiffs, the Ninth Circuit conceded that the excessive force in the case was applied subsequent to the Robinses' arrest, but concluded that "once a seizure has occurred, it *continues throughout* the time the arrestee is in the custody of the arresting officers."[37] Because the arrests in *Robins* "plainly constituted seizures for Fourth Amendment purposes" and "[t]hese seizures continued while the Robinses were en route to the sheriff's department in the custody of the arresting officers," the officers' conduct should be evaluated under the Fourth Amendment's reasonableness requirement.[38] In a more recent case,[39] the Ninth Circuit confirmed that a seizure under the Fourth Amendment is not confined to the initial moment of arrest—that "acts of continuing dominion upon already seized suspects [are] . . . enough to implicate the Fourth Amendment."[40]

The Sixth and Eighth Circuits also adopted the continuing seizure approach, applying the Fourth Amendment reasonableness standard in cases where excessive force is used while a person is still in the custody of the arresting officers.[41] Both circuits extended Fourth Amendment protection through the booking process.[42] The Sixth Cir-

33. *See generally Robins*, 773 F.2d at 1004.

34. *Id.* at 1010.

35. *Id.* at 1006.

36. *Id.*

37. *Id.* at 1010 (emphasis added).

38. *Id.*

39. Fontana v. Haskin, 262 F.3d 871 (9th Cir. 2001).

40. *Id.* at 879.

41. *See* Mayard v. Hopwood, 105 F.3d 1226, 1228 (8th Cir. 1997) (applying the Fourth Amendment reasonableness standard to analyze a claim of excessive force where plaintiff was in the back seat of a police car en route to police headquarters); McDowell v. Rogers, 863 F.2d 1302, 1306 (6th Cir. 1988) (explaining that "the seizure that occurs when a person is arrested continues throughout the time the person remains in the custody of the arresting officers").

42. *See* Phelps v. Coy, 286 F.3d 295, 300 (6th Cir. 2002) (holding the Fourth Amendment reasonableness standard is proper during booking where arrestee is still in the custody of the arresting officers); Moore v. Novak, 146 F.3d 531, 535 (8th Cir. 1998) (applying the Fourth Amendment objective reasonableness standard to excessive force claim arising from a struggle and the use of a stun gun during the booking process).

cuit, in *Phelps v. Coy*, emphasized that "the reasonableness standard governs *throughout* the seizure of a person,"[43] and that "creating a different Fourth Amendment standard applicable to the use of force in a post-arrest situation than is applicable to pre-arrest conduct [would introduce] a distinction in meaning of the Fourth Amendment that is found nowhere in its language."[44] Crucial to the court's reasoning in *Phelps* was the fact that the plaintiff was still in his arresting officer's custody when force was applied.[45] Although the Eighth Circuit is decidedly (and perhaps intentionally) unclear about what drives the determination of when a seizure ends, it may also have found significant the fact that the plaintiff was still in the arresting officer's custody when force was applied in *Wilson v. Spain*.[46] In that case, the court applied the Fourth Amendment reasonableness standard to an altercation between the plaintiff and the arresting officer.[47] The altercation occurred *after* arrest and *after* booking, while the plaintiff was being detained in a holding cell.[48] Thus, in the Sixth and Eighth Circuits, the temporal scope of the Fourth Amendment appears to be defined by the arresting officer's presence or control over the arrestee, rather than by the actual event of arrest.

The Second and Tenth Circuits continue to apply Fourth Amendment protections beyond the point of initial seizure in the excessive force context, but seem to focus more on the determination of probable cause as the relevant temporal guideline that signals when seizure ends. For instance, the Second Circuit, in *Powell v. Gardner*,[49] held that the Fourth Amendment continues to protect an arrestee from excessive force while he is being detained at the police station.[50] In so holding, the *Powell* court submitted that "the Fourth Amendment standard probably should be applied at least to the period prior to the time when the person arrested is arraigned or formally charged, and

43. *Phelps*, 286 F.3d at 300 (emphasis added).

44. *Id.* (quoting Cox v. Treadway, 75 F.3d 230, 241 (6th Cir. 1996)) (alteration in original) (internal quotation marks omitted).

45. *See id.* ("Whatever arguments can be made about [whether the Fourth Amendment applies to] pretrial detainees' rights are beside the point in this case, in which the plaintiff was still in the custody of the arresting officers and was never incarcerated. . . . [O]ur precedent establishes that an arrestee in the custody of the arresting officers is still sheltered by the Fourth Amendment.").

46. *See* Wilson v. Spain, 209 F.3d 713, 715–17 (8th Cir. 2000) (reviewing precedent and electing to apply the Fourth Amendment to analyze plaintiff's claim of excessive force arising from arresting officer knocking plaintiff unconscious by opening his cell door).

47. *Id.* at 716.

48. *Id.* at 714.

49. 891 F.2d 1039 (2d Cir. 1989).

50. *Id.* at 1044.

remains in the custody (sole or joint) of the arresting officer."[51] Similarly, in *Austin v. Hamilton*,[52] the Tenth Circuit held that the "fourth amendment's strictures continue in effect to set the applicable constitutional limitations . . . on the treatment of the arrestee detained without a warrant."[53] The *Austin* court found this conclusion controlling where the plaintiffs alleged that they were repeatedly beaten and denied use of a bathroom while being detained for more than twelve hours, "because the incidents alleged occurred prior to any probable cause hearing" and "[i]n fact, [the] plaintiffs were never formally charged by defendants or brought before a judicial officer."[54] Thus, an initial judicial determination of probable cause appears to dictate the temporal scope of the Fourth Amendment in the Second and Tenth Circuits.

The notion that seizure can continue, and with it Fourth Amendment protections, past the initial act of seizure received some recognition by the Supreme Court in *Albright v. Oliver*.[55] In *Albright*, the plaintiff had turned himself in after learning of an outstanding warrant for his arrest for the sale of a substance which looked like an illegal drug.[56] Plaintiff's arresting officer testified at a preliminary hearing that the plaintiff sold the look-alike drug to a third party, and that court found probable cause to detain him for trial.[57] Later, however, that court dismissed the action because "the charge did not state an offense under [state] law."[58] Subsequently, the plaintiff filed suit under § 1983, alleging that the officer had transgressed the plaintiff's Fourteenth Amendment substantive due process rights by depriving him of his liberty interest to be free from criminal prosecution without probable cause.[59] Thus, the time in question in *Albright* was after the initial seizure but before trial, when the plaintiff was essentially a pretrial detainee.[60] A plurality of the Court held that the Fourth Amendment was the applicable constitutional framework for this period.[61]

51. *Id.* It is unclear whether the Fourth Amendment protects the arrestee from the conduct of a *nonarresting* officer prior to arraignment. If it does not, then the determinative question, as it is in Sixth and Eighth Circuits, may be whether the arrestee is still in the custody of the arresting officer.

52. 945 F.2d 1155 (10th Cir. 1991), *abrogated by* Johnson v. Jones, 515 U.S. 304 (1995).

53. *Id.* at 1160.

54. *Id.*

55. 510 U.S. 266 (1994).

56. *Id.* at 268.

57. *Id.* at 269.

58. *Id.*

59. *Id.*

60. *See id.* at 268–69.

61. *Albright*, 510 U.S. at 271 (holding that "it is the Fourth Amendment, and not substantive due process, under which petitioner Albright's claim must be judged").

Chief Justice Rehnquist posited: "The Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it."[62] Thus, the Supreme Court recognized that the protection of the Fourth Amendment extends beyond the initial act of arrest and into the period before trial.[63]

In a concurring opinion, Justice Ginsburg adopted a more expansive definition of seizure.[64] Justice Ginsburg argued that "[a]t common law, an arrested person's seizure was deemed to continue even after release from official custody."[65] According to this construction, a person is considered seized even if he is released before trial, because he

> is hardly freed from the state's control upon his release from a police officer's physical grip: He is required to appear in court at the state's command. He is often subject . . . to the condition that he seek formal permission from the court (at significant expense) before exercising what would otherwise be his unquestioned right to travel outside the jurisdiction.[66]

Accordingly, a defendant is also seized throughout trial, since he is still bound to appear.[67] Such a person, Justice Ginsburg argued, "is scarcely at liberty; he remains apprehended, arrested in his movements, indeed 'seized' for trial, so long as he is bound to appear in court and answer to the state's charges."[68] Justice Ginsburg opined that this conception of continuing seizure "comports with common sense and common understanding"[69] and "recognizes that the vitality of the Fourth Amendment depends upon its constant observance by police officers."[70] While this conception of Fourth Amendment protection against unreasonable government seizures may or may not make "sense" in the context of seizure of a person, this Note contends that such an approach undoubtedly should be applied to unreasonable seizures of property.[71]

---

62. *Id.* at 274.

63. Tiffany Ritchie, Comment, *A Legal Twilight Zone: From the Fourth to the Fourteenth Amendment, What Constitutional Protection is Afforded a Pretrial Detainee?*, 27 S. ILL. U. L.J. 613, 624 (2003).

64. *Albright*, 510 U.S. at 276–81 (Ginsburg, J., concurring).

65. *Id.* at 278.

66. *Id.*

67. *Id.* at 279.

68. *Id.*

69. *Id.* at 278.

70. *Albright*, 510 U.S. at 278–79 (Ginsburg, J., concurring).

71. *See* discussion *infra* notes 144–263 and accompanying text.

3. *Other Circuits Refuse to Apply the Fourth Amendment After the Initial Act of Seizure*

In *Wilkins v. May*,[72] the Seventh Circuit rejected the continuing seizure approach and confined Fourth Amendment seizure to the initial act of seizing.[73] Judge Richard A. Posner, writing for the court in *Wilkins*, declined to extend Fourth Amendment protection to arrestees who had yet to be charged.[74] *Wilkins* involved a § 1983 action brought by an arrestee who alleged that two FBI agents had violated his constitutional rights by extracting a confession for bank robbery from him at gunpoint.[75] Wilkins, the plaintiff, had been arrested and put in a cell but had not yet been charged when Agents May and McDaniel brought him into a separate interrogation room and allegedly extracted his confession by holding a gun to his head.[76] Posner refused to analyze the agents' conduct under the Fourth Amendment reasonableness standard because Wilkins "had already been seized" when he was in the interrogation room.[77] Posner opined: "A natural although not inevitable interpretation of the word 'seizure' would limit it to the initial act of seizing, with the result that subsequent events would be deemed to have occurred after rather than during seizure."[78] Because the Seventh Circuit viewed the word "seizure" as describing a single act, and because practical considerations[79] persuaded the court that the Fourth Amendment was ill-suited to determine the limits of permissible postarrest, pre-charge government conduct, the Seventh Circuit in *Wilkins* rejected the concept of continuing seizure.[80]

---

72. 872 F.2d 190 (7th Cir. 1989).

73. *Id.* at 193.

74. *Id.*

75. *Id.* at 191–92.

76. *Id.*

77. *Id.* at 192.

78. *Wilkins*, 872 F.2d at 192–93.

79. These practical objections are analyzed in *infra* notes 215–237 and accompanying text.

80. *Wilkins*, 872 F.2d at 194. The Fourth and Fifth Circuits followed suit and similarly refused to apply the Fourth Amendment in excessive force cases past the point of arrest. In *Riley v. Dorton*, 115 F.3d 1159 (4th Cir. 1997), the Fourth Circuit held that the Fourth Amendment does not extend to the mistreatment of arrestees or pretrial detainees in custody. *Id.* at 1162. The *Riley* court, analyzing Supreme Court precedent, found the defining nature of seizure, at least in the context of arrest, to be a "single act, and not a continuous fact." *Id.* at 1163 (quoting California v. Hodari D., 499 U.S. 621, 625 (1991)) (internal quotation marks omitted). In *Valencia v. Wiggins*, 981 F.2d 1440 (5th Cir. 1993), the Fifth Circuit did not specifically decide when seizure ends but held that the Fourth Amendment was "not so capacious or elastic as to cover pretrial detention," at least where the alleged misconduct happened three weeks after the initial arrest. *Id.* at 1444. The Fifth Circuit found "weak textual support" for the extension of Fourth Amendment protection against unreasonable seizures in the context of arrest, concluding that the

Despite the strong language used in *Wilkins* confining seizure to the moment of arrest,[81] the Seventh Circuit later interpreted this holding to extend Fourth Amendment protections until the determination of probable cause.[82] Whether police conduct that occurs after arrest but before determination of probable cause is still the "initial act of seizing" and not a "subsequent event . . . [occurring] after rather than during seizure" is questionable.[83] In any event, Judge Posner's cramped but "natural" definition of seizure severely confines the temporal scope of Fourth Amendment protections, especially in a context where there *is* no determination of probable cause, as in the case with seizures of property. The Seventh Circuit confirmed this inference in *Lee*.[84]

B. Continuing Seizure in the Property Context

The Fourth Amendment also protects individuals' property interests from unreasonable government intrusion, and because these interests can be interfered with after an initial seizure of property, the temporal quality of the Fourth Amendment is also important in the property context.[85] The Second and Sixth Circuits first addressed the issue[86] before the Seventh Circuit defined the Amendment's scope with respect to property in *Lee*.[87]

1. Does Government Violate the Fourth Amendment When It Reasonably Seizes Property But Later Unlawfully Retains That Property?

The Fourth Amendment not only protects against the unreasonable seizure of the "person," but also establishes the "right of the people to be secure in their . . . houses, papers, and effects."[88] Importantly, the

---

Amendment "seems primarily directed to the *initial* act of restraining an individual's liberty . . . ." *Id.*

81. *Wilkins*, 872 F.2d at 192 ("[Wilkins] was seized when he was arrested.").

82. *See* Reed v. City of Chicago, 77 F.3d 1049, 1052 (7th Cir. 1996) (explaining that "based on our conclusion [in *Wilkins*] that the Fourth Amendment did not apply between arrest and conviction on the fact that the 'seizure' of an arrestee ends after the *Gerstein* hearing."); *see also* Wiley v. City of Chicago, 361 F.3d 994, 998 (7th Cir. 2004) (emphasizing that "We have repeatedly rejected the 'continuing seizure' approach. . . . Instead, we have held that the scope of a Fourth Amendment claim is limited up until the point of arraignment.") (internal citations omitted).

83. *Wilkins*, 872 F. 2d at 192–93. *Wilkins* does not appear to have been overruled.

84. Lee v. City of Chicago, 330 F.3d 456, 466 (7th Cir. 2003).

85. *See infra* notes 88–94 and accompanying text.

86. *See infra* notes 95–111 and accompanying text.

87. *See infra* notes 112–143 and accompanying text.

88. U.S. CONST. amend. IV.

United States Supreme Court held that "[a] 'seizure' of property . . . occurs when 'there is some meaningful interference with an individual's possessory interest in that property.'"[89] Government seizures of property will often be reasonable, for instance, when it is necessary to procure evidence for trial,[90] or when the property is contraband and subject to forfeiture.[91] But "government should not, by virtue of its authority to seize, effect *de facto* forfeitures of property by retaining items indefinitely."[92] The D.C. Circuit in *Wilson* opined that "it is fundamental to the integrity of the criminal justice process that property involved in the proceeding, against which no Government claim lies, be returned promptly to its rightful owner."[93] Moreover, as one commentator explained, "it is not fanciful to suggest . . . that the continuing custody of objects lawfully seized but later found not to be of evidentiary value becomes, at some point, unreasonable under the Fourth Amendment."[94] Thus, it is possible that government may reasonably seize property, but later be in violation of the Fourth Amendment if it unreasonably refuses to return that property after it no longer has any use for the property and the individual's possessory interest remains intact.

But what is the remedy for such a situation? If seizure under the Fourth Amendment is confined to the initial act of seizing, the Fourth Amendment is inapplicable when government refuses to relinquish property that was once lawfully seized but then unreasonably retained. Thus, while it may seem like the Fourth Amendment proscription against unreasonable seizures would be an ideal candidate under which to bring a § 1983 action when property is taken and not properly returned, this is not the case in jurisdictions with a more limited conception of the temporal scope of the Fourth Amendment.

---

89. Soldal v. Cook County, 506 U.S. 56, 61 (1992) (quoting United States v. Jacobsen, 466 U.S. 109, 113 (1984)).

90. *See* United States v. Premises Known as 608 Taylor Ave., 584 F.2d 1297, 1302 (3d Cir. 1978) (citing Warden v. Hayden, 387 U.S. 294 (1967)).

91. 68 AM. JUR. 2D *Searches and Seizures* § 304 (2000) ("Individuals have no property right in contraband materials, so contraband materials will not be returned to them regardless of whether the initial seizure of such materials was improper or whether any person connected with the seizure was convicted of a crime.").

92. Lee v. City of Chicago, 330 F.3d 456, 466 (7th Cir. 2003) (citing *Premises Known as 608 Taylor Ave.*, 584 F.2d at 1302).

93. United States v. Wilson, 540 F.2d 1100, 1103 (D.C. Cir. 1976) (holding that a district court had the duty to return to defendant property seized during an investigation of drug charges which when it was no longer needed as evidence). *Id.*

94. LAFAVE, *supra* note 23, § 1.5(e) (discussing, in the context of the exclusionary rule, the possibility that a seizure can *become* unreasonable in violation of the Fourth Amendment when evidence is transferred to one jurisdiction even though it was once legally seized in the transferring jurisdiction).

2. *The Second and Sixth Circuits Reject the Continuing Seizure Doctrine in the Property Context*

Whether the government's "refusal to return once lawfully obtained property can amount to an unreasonable seizure, or, alternatively, transform a seizure from reasonable to unreasonable," was briefly considered in the Second and Sixth Circuits before the Seventh Circuit in *Lee* sweepingly decided the issue.[95] Both of these courts held that the Fourth Amendment provided no recourse where the government held on to property after it no longer needed the property.[96]

In *United States v. Jakobetz*,[97] the Second Circuit held that the use of evidence lawfully acquired but retained in violation of a statute did not constitute the kind of seizure "that deserves the special protections provided by the fourth amendment."[98] In *Jakobetz*, a criminal case, the defendant argued that photographic evidence obtained by the New York State police from an earlier, unrelated investigation should have been excluded at trial because the photographs were not returned to him, a violation of a New York statute.[99] New York law required that, upon dismissal of charges, a court must issue an order directing the return of all photographs and other evidence belonging to the former defendant.[100] Jakobetz argued that because no such order was issued, the State's continued possession of the evidence for use at the later trial constituted an illegal seizure.[101] The Second Circuit rejected this argument, finding "no authority to indicate that Jakobetz's constitutional rights have been violated."[102] Because the State's only "error" was its failure to *return* Jakobetz's property, the Second Circuit held the Fourth Amendment was inapplicable.[103]

The Sixth Circuit similarly held that no seizure occurs when there is an initial, "lawful seizure of" property followed by government refusal to return it.[104] *Fox v. Van Oosterum* involved a § 1983 suit brought by a plaintiff alleging that county officials had violated his Fourth Amendment rights by refusing to return his suspended driver's license

95. *See Lee*, 330 F.3d at 460.

96. *See id.* at 460–61.

97. 955 F.2d 786, 802 (2d Cir. 1992).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *See Jakobetz*, 955 F.2d at 802 (holding that "[t]he only error here was the failure of the New York court to issue a timely order to return the photograph—an oversight that does not offend the fourth amendment's protection against unreasonable searches and seizures").

104. Fox v. Van Oosterum, 176 F.3d 342, 351 (6th Cir. 1999).

after he had paid off several outstanding traffic tickets that had caused the initial suspension.[105] The police legally seized Fox's license while investigating several car thefts but later refused to return the license because Fox had two additional outstanding tickets, even though these tickets had no impact on his driving privileges.[106] The Sixth Circuit held that the government's refusal to return the license did not constitute a seizure and, therefore, did not violate the Fourth Amendment.[107] In reaching this conclusion, the court reasoned that the refusal to return the license "neither brought about an additional seizure nor changed the character of the [original] seizure from [reasonable to unreasonable] because the seizure was already complete when the defendants refused to return the license."[108] The Sixth Circuit buttressed its reasoning by pointing out that the Supreme Court has only defined seizure as a "meaningful interference with possessory interests" in cases where the challenged government conduct involved the initial act of "taking property away."[109] Therefore, the *Fox* court concluded, "the Fourth Amendment protects an individual's interest in *retaining* possession of property but not the interest in *regaining* possession of property."[110] Accordingly, the Sixth Circuit adopted the view that once the "act of taking the property is complete, the seizure has ended and the Fourth Amendment no longer applies."[111]

---

105. *See id.* at 345–47.

106. *Id.* at 345.

107. *Id.* at 349. The Sixth Circuit limited its holding to the situation where there was an initial, lawful seizure of property followed by a refusal to return that property. *Id.* at 351. The *Fox* Court explicitly did not address "whether the term 'seizure' in the Fourth Amendment has a different temporal scope when a person rather than property is at issue" or whether the Fourth Amendment is so limited when a person voluntarily gives property to the government and the government later refuses to return it, as was the case in *Lee*. *Id.* The effect this uncertainty has had with respect to the strength of the *Fox* court's argument is discussed in *infra* notes 112–143 and accompanying text.

108. *Fox*, 176 F.3d at 350. Judge Eric L. Clay dissented on this point, arguing that "[t]he concept that a seizure of property may, just as seizures of individuals, begin as reasonable but may then ripen into a seizure that violates the Fourth Amendment is not new to constitutional jurisprudence." *Id.* at 355–57 (Clay, J., concurring in part and dissenting in part) (citing *United States v. Place*, 462 U.S. 696 (1983), for the proposition that an initial, lawful seizure of property might, "with the passage of time and the expiration or diminution of government interests, become unlawful").

109. *Id.* at 351 (majority opinion).

110. *Id.* (emphasis added).

111. *Id.* The Sixth Circuit explained that its holding that no seizure had occurred was also motivated by reluctance to require Fourth Amendment analysis in the return of property context where there is already a "well-developed procedural due process analysis that provides the states with the first chance to prevent possible constitutional wrongs." *Id.* at 352. The implications of relying on procedural due process as an alternative is discussed in *infra* notes 267–287 and accompanying text.

III. SUBJECT OPINION: *Lee v. City of Chicago*

A. The Seventh Circuit: Seizure Is "Complete" When the Owner Is Dispossessed—The Fourth Amendment Is "Irrelevant" to the Return of Property

In *Lee v. City of Chicago*, the Seventh Circuit agreed with the *Fox* court that once property is taken, seizure is complete and the "government's decision regarding how and when to return once lawfully obtained property 'raises different issues, which the text, history, and judicial interpretations of the Fourth Amendment do not illuminate.'"[112] Mark Lee's car was struck by a stray bullet while driving on a Chicago street.[113] Hoping to find evidence of the shooter's identity, Chicago police seized and "impounded Lee's car to search for, retrieve, and analyze any bullets that might have become lodged in it."[114] Ten days after the incident, the City of Chicago (City) informed Lee that it no longer needed his car as evidence.[115] The City sent Lee a notice advising him that he could retrieve his car,[116] but that he was responsible for all towing and storage fees unless he requested a hearing.[117] Further, the notice advised Lee that if he failed to pay or request a hearing within thirty days, the City could crush his car or sell it at auction.[118] "Lee wanted to retrieve his car as soon as possible" but could not afford to pay the fees, so he retained a lawyer who helped him negotiate the fees down to an acceptable amount.[119] When Lee went to retrieve his car, however, "he found that the City had spray-painted large, bright red" inventory numbers on its hood and side panels.[120] The City refused to pay for the damage, offer Lee a discount, or refund the money he had just paid the City to get his car back.[121]

Frustrated by the City's policy concerning the return of innocent bystanders' property used for evidentiary purposes, Lee sued the City of Chicago under § 1983, alleging a violation of his Fourth Amend-

112. Lee v. City of Chicago, 330 F.3d 456, 465 (7th Cir. 2003) (quoting Wilkins v. May, 872 F.2d 190, 194 (7th Cir. 1989)).

113. *Id.* at 458.

114. *Id.* at 458–59.

115. *Id.* at 459.

116. The notice was actually sent two days after the incident, before the City informed Lee that it no longer had use for his car. *Id.*

117. *Id.*

118. *Lee*, 330 F.3d at 459.

119. *Id.*

120. *Id.* When Lee finally retrieved his car, it was thirty-one days after the impoundment, one day after the City's deadline for retrieval. *Id.*

121. *Id.*

ment[122] right to be free of unreasonable searches and seizures.[123] The district court dismissed the suit, holding that Lee could not state "a claim under either the Fourth or Fourteenth Amendment regarding the City's practice of charging towing and storage fees."[124] On appeal, the Seventh Circuit did not evaluate the district court's finding that the City's demands for returning Lee's car were reasonable;[125] it held that once an owner has been dispossessed of his property, the seizure is complete, and therefore the Fourth Amendment reasonableness standard is inapplicable to the return of the seized property.[126]

In reaching its decision, the court rejected Lee's arguments that (1) the City's refusal to return his car to him after it had concluded its search (unless he paid the fees) constituted a second seizure which was unreasonable; and, alternatively, that (2) the otherwise reasonable seizure of his car *became* unreasonable when the City's interest in the car as evidence expired but his possessory interest survived.[127] The Seventh Circuit expressed disagreement with the reasoning in both *Jakobetz* and *Fox*, but determined that there were "other justifications"[128] for reaching the same conclusion as those courts and "restrict[ing] Fourth Amendment seizures temporally."[129]

---

122. The Fourth Amendment applies to cities through the Fourteenth Amendment. *Id.* at 460 n.1.

123. *Lee*, 330 F.3d at 459. Lee also alleged that the City had violated his Fourteenth Amendment substantive due process rights because requiring him to "pay money for the vehicle's release when it was no longer required for such evidentiary or investigative purposes by the City is totally arbitrary, unauthorized by statute or ordinance." Brief of Appellant at 4, *Lee*, 330 F.3d 456 (No. 02-1503), 2002 WL 32170366, at *7. Additionally, Lee brought pendant state-law claims for implied bailment, trespass, and conversion. *See Lee*, 330 F.3d at 459. The court eventually found that Fourteenth Amendment substantive due process was the proper principle under which to bring Lee's claim. *Id.* at 466–67. Nonetheless it held that Lee could not recover under substantive due process because his claim did not implicate a fundamental right, involving only the deprivation of a property interest. *Id.* at 467. Moreover, Lee did not establish that state law remedies were inadequate. *Id.* at 467–68. These requirements and the desirability of the due process approach in general are discussed in *infra* notes 265–286 and accompanying text.

124. *Lee*, 330 F.3d at 459. The district court also held that Lee had no cognizable property interest in his car at the time it was spray painted, and thus lacked standing to challenge the spray painting. *Id.* The Seventh Circuit reversed this part of the district court's decision, holding that although Lee's property interest in his car may have become "defeasible" after the thirtieth day of impoundment, he still had some residual interest in reclaiming his property and that such an interest did not expire until the car was either sold or destroyed. *Id.* at 470.

125. Lee v. City of Chicago, No. 01-C-6751, 2002 WL 169322, at *4 (N.D. Ill. 2002) (holding that it is not unreasonable to expect Lee to assume some of the costs of a criminal investigation in which everyone benefits, especially when he had the option of challenging the impoundment at a hearing).

126. *Lee*, 330 F.3d at 466.

127. *See id.* at 460–66.

128. *Id.* at 462.

129. *Id.* at 463.

First, the court argued that the text of the Fourth Amendment, specifically the words "to be secure," suggests a state of being that, once disturbed by an act of dispossession, is extinguished.[130] The court buttressed this argument by citing to the *Oxford English Dictionary*, which purportedly defined the meaning of seizure at the time of the Fourth Amendment's drafting as: "a confiscation or forcible taking possession (of land or goods); a sudden and forcible taking hold"—in other words, a temporally limited act.[131] Second, the Seventh Circuit pointed out that *Wilkins* required the court to reject the continuing seizure approach and restrict Fourth Amendment seizures temporally.[132] The court found that the two practical objections to continuing seizure both applied in Lee's case: (1) traditional considerations used to give meaning to the word "reasonable" are unhelpful in resolving cases after the initial act of seizure has occurred; and (2) "allowing the analysis to proceed outside this traditional context, under the amendment's general reasonableness requirement, would lead to an 'unwarranted expansion of constitutional law.'"[133] Accordingly, because the Fourth Amendment's protection against unreasonable seizures is limited to the initial act of taking possession, the Seventh Circuit concluded that Lee had no claim against the City and its policy concerning the return of property it obtained lawfully but no longer needed as evidence.[134] Such a claim "concerns the fairness and integrity of the criminal-justice process, and does not seek to constrain unlawful *intrusions* into the constitutionally protected areas of the Fourth Amendment."[135]

B. Judge Wood Refuses to Hold the Fourth Amendment "Utterly Irrelevant"

Concurring in the judgment, Judge Wood ultimately agreed that Lee should not prevail on his Fourth Amendment claim but was not "so confident that the Fourth Amendment is utterly irrelevant to the reasonableness of a decision to refuse to relinquish seized property

130. *Id.* at 462.

131. *Id.* (citing OXFORD ENGLISH DICTIONARY (2d ed. 1989)) (internal quotation marks omitted).

132. *Lee*, 330 F.3d at 463.

133. *Id.* (quoting Wilkins v. May, 872 F.2d 190, 194 (7th Cir. 1989)). The court stated that "[a]ttempting to extend the Fourth Amendment through *Place* or . . . consent cases to address the situation before us would implicate the same practical concerns we found unsettling in *Wilkins*. *Id.* at 465.

134. *Id.*

135. *Id.*

once the government has no need for it."[136] Judge Wood formulated the question in *Lee* as "whether there is any recourse for an innocent party like Lee when the government takes his property, initially for law enforcement purposes, and then refuses to return it unconditionally when the original *raison d'etre* of the seizure has expired."[137] She was not convinced that "simply saying that a seizure is a temporally limited act . . . is enough to resolve the question."[138] Judge Wood expressed concern that the majority's broad holding that the Fourth Amendment "has nothing to say about a seizure beyond the instant when that seizure occurs,"[139] risks "creating an unwarranted gap in the constitutional protections that exist with respect to governmental takings of property."[140] In other words, according to Judge Wood, confining the temporal scope of seizure under the Fourth Amendment to the instant when the initial seizure occurs perilously suggests that no remedy exists for people whose property is taken by government and not properly returned.[141] Judge Wood opined that because the "protection of private property is a high enough value in the Constitution,"[142] she would hesitate to "hold sweepingly that the Fourth Amendment has nothing to do with the reasonableness of the continued detention of property after the rationale for supporting that initial seizure no longer holds."[143]

---

136. *Id.* at 472 (Wood, J., concurring). Judge Wood posited that on the facts of Lee's case, even if the Fourth Amendment applied, the City's demands in this case would not be unreasonable because towing and storage fees are not free services, and to the extent that it is constitutional for government to apportion these costs to victims of crimes, the City's conditional release of the car upon payment of these fees is reasonable. *See Lee*, 330 F.3d at 473. In concluding that the City's "continued seizure" of Lee's car was not unreasonable, Judge Wood found it important that "(1) the second seizure was brief in duration, (2) the condition imposed on Lee was only to pay the actual cost of the towing and storage (*i.e.*, an objectively reasonable sum), and (3) the City never carried out its threat to destroy the car." *Id.*

137. *Id.* at 472.

138. *Id.* at 474.

139. *Id.*

140. *Id.* at 472.

141. *Lee*, 330 F.3d at 474 (admitting that "it is troubling indeed to think that no remedy at all exists for people whose property is taken by the government and not properly returned"). Judge Wood went on to make the argument that if the Fourth Amendment does not speak to the issue then there is the possibility that one could make a Fifth Amendment Takings Clause claim argument. *Id.* at 474–77. The feasibility of a Takings claim as an alternative remedy to situations where government has unreasonably refused to return lawfully taken property is discussed in *infra* notes 288–307 and accompanying text.

142. *Lee*, 330 F.3d at 476 (Wood, J., concurring).

143. *Id.* at 472.

IV. ANALYSIS: FILLING THE GAP WITH THE FOURTH AMENDMENT

Confining the temporal scope of seizure under the Fourth Amendment as the Seventh Circuit did in *Lee* creates a constitutional gap that threatens to leave citizens with no remedy when government seizes their property and does not properly return it.[144] Because the text of the Constitution does not require such a limited reading of the Fourth Amendment,[145] and because the practical reasons offered by the Seventh Circuit and other courts in rejecting the notion of continuing seizure are unpersuasive in the context of seizures of property,[146] creating such a gap is unwarranted and unwise. Accordingly, when government legally seizes property under the Fourth Amendment, its conduct in retaining and returning that property should be evaluated under the Fourth Amendment reasonableness standard, even though the *initial* act of seizing has already taken place.[147]

A. Requiring Government To Be Reasonable When Returning Property Is Consistent With the Text of the Fourth Amendment

At the outset, it must be determined whether the text of the Fourth Amendment can support the theory of continuing seizure. In other words, when the Constitution prescribes "[t]he right of the people to be secure in their persons, houses, papers, and effects, against all unreasonable searches and seizures," is it concerned only with the initial act of seizure, or does it continue to ensure that government is acting reasonably with respect to the property it has already taken? Because the government has seized a person's property whenever there is "some meaningful interference with an individual's possessory interests in that property,"[148] it follows that a seizure continues as long as that person retains that interest, and the Fourth Amendment's protections continue with it.

---

144. Other possible remedies and their inability to fill the "gap" absent the Fourth Amendment's protections are discussed in *infra* notes 146–261 and accompanying text.

145. *See infra* notes 146–212 and accompanying text.

146. *See infra* notes 213–236 and accompanying text.

147. *See infra* notes 237–256 and accompanying text.

148. United States v. Jacobsen, 466 U.S. 109, 113 (1984); *see also* Fox v. Van Oosterum, 176 F.3d 342, 354 (6th Cir. 1999) (Clay, J., concurring in part and dissenting in part) (applying the principles of the Supreme Court's seizure of property jurisprudence to conclude that "*whenever* the government meaningfully interferes with an individual's interest in property, a 'seizure' subject to the reasonableness analysis of the Fourth Amendment takes place") (emphasis added).

1. *The Second and Sixth Circuits Stretch to Shrink the Fourth Amendment*

The *Jakobetz*, *Fox*, and *Lee* courts, however, all rejected the premise that seizure parallels possessory interest. In *Jakobetz*, the Second Circuit summarily dismissed Jakobetz's argument that the government's continued possession of his photographs constituted an illegal seizure when those photographs, initially legally taken for a prior investigation, should have been returned to him by statute.[149] The court found Jakobetz's argument "novel," but did not think that this kind of seizure deserves the "special protections provided by the fourth amendment."[150] It is difficult from the court's brief treatment of the issue to determine whether the Second Circuit rejected Jakobetz's argument because it did not believe a seizure could exist beyond the initial act, or simply, as it stated, could find "no authority to indicate that Jakobetz's constitutional rights [had] been violated."[151] In any event, where the Supreme Court has expressly held that a seizure occurs when government meaningfully interferes with an individual's possessory interest in property, unless Jakobetz had no property interest in his photographs, it seems premature to set aside Jakobetz's claim as falling short of the Fourth Amendment's "special protections."[152]

The Sixth Circuit in *Fox*, on the other hand, employed a much more elaborate textual analysis in rejecting the argument that a refusal to return lawfully seized property can constitute a seizure.[153] The *Fox* court first recognized that the "Supreme Court has established that one of the purposes of the prohibition on unreasonable seizures of property is the protection of the individual's property rights in the seized item."[154] The court noted, however, that the Supreme Court cases dealing with seizures of property "all concern state actors' role in *taking possession* of property."[155] The Sixth Circuit selected language from Justice Stevens's concurrence in *Texas v. Brown*:[156] "The

149. *See* United States v. Jakobetz, 955 F.2d 786, 802–03 (2d Cir. 1992).

150. *Id.* at 802.

151. *Id.* The Second Circuit may have been more persuaded by the fact that Jakobetz was attempting to use the Fourth Amendment to invoke the exclusionary rule where there was an absence of willful intent on the part of the police. Following its short discussion of Jakobetz's "novel" illegal seizure claim, the Court asserted that "there would be no purpose in applying the [exclusionary] rule to this case, where there was no [police] misconduct" since that rule is designed only to deter such misconduct. *Id.*

152. *See id.*

153. *See Fox*, 176 F.3d at 349–51.

154. *Id.* at 350 (citing Soldal v. Cook County, 506 U.S. 56, 62–63 (1992)).

155. *Id.* (emphasis added).

156. 460 U.S. 730, 747 (1983) (Stevens, J., concurring in the judgment).

[Fourth] Amendment protects two different interests of the citizen—the interest in *retaining* possession of property and the interest in maintaining personal privacy,"[157] and incorporated it into the "meaningful interference with possessory interest" definition of seizure.[158] The conclusion the *Fox* court drew from this handiwork was that "the Fourth Amendment protects an individual's interest in *retaining* possession of property but not the interest in *regaining* possession of property."[159] Therefore, "[o]nce [the] act of taking the property is complete, the seizure has ended and the Fourth Amendment no longer applies."[160]

There are several problems with the Sixth Circuit's analysis. First, the *expressio unius est exclusio alterius* canon the *Fox* court employed—that because Justice Stevens's construction of the Fourth Amendment mentions only retaining property it therefore excludes any other property interest the Fourth Amendment might protect—is unpersuasive considering the context of the *Brown* case. Justice Stevens, in distinguishing between a property interest and a privacy interest, was merely trying to explain how the plain view doctrine allows the seizure of a closed container when police have probable cause to believe it contains contraband but still requires that police obtain a search warrant to actually open it and look inside.[161] In other words, Justice Stevens was suggesting that a particular police action (seizing a closed container) may threaten one interest (retaining possession of one's property) while leaving one's privacy interest fully intact.[162] It does not necessarily follow that Justice Stevens was suggesting that the *only* interest in one's property the Fourth Amendment protects is one of retention. *Brown* involved the seizure of a green balloon that police had probable cause to think contained heroin; it did not speak to whether police could arbitrarily refuse to return the balloon if they found it contained nothing but hot air.[163]

Even the *Lee* majority, which ultimately came to the same conclusion as the *Fox* majority, found the Sixth Circuit's analysis to be problematic.[164] The *Lee* court first observed that there is nothing in Justice Stevens's "retention" definition of seizure that "suggest[s] that he had

157. *Fox*, 176 F.3d at 350 (citing *Brown*, 460 U.S. at 747 (Stevens, J., concurring in the judgment)).

158. *See id.* at 351.

159. *Id.* (emphasis added).

160. *Id.*

161. *See Brown*, 460 U.S. at 747–48 (Stevens, J., concurring in the judgment).

162. *See id.*

163. *See id.* at 733–35 (majority opinion).

164. *See* Lee v. City of Chicago, 330 F.3d 456, 462 (7th Cir. 2003).

a *temporal* restriction in mind when he described the property interest."[165] The court noted that Justice Stevens's analysis, in fact, is more consistent with the idea "that an individual's Fourth Amendment rights do not dissipate upon the loss of physical possession" because Justice Stevens, at the very least, believed that an individual's *privacy* interest continues past the point at which the property was taken.[166] Furthermore, the Seventh Circuit recognized that although the Supreme Court adopted Justice Stevens's distinction between Fourth Amendment privacy and possessory interests, it did not necessarily assign precedential value to the idea that the Fourth Amendment possessory interest is strictly one of retention.[167]

Judge Clay echoed this sentiment in his dissent in *Fox*, arguing that the Supreme Court "has long rejected such a limited view of the term 'seizure' under the Fourth Amendment, in favor of the concept that a 'seizure' may take place over a period of time."[168] Judge Clay pointed out that the Supreme Court, in *United States v. Place*, held that a brief detention of a traveler's luggage may not initially (at the precise moment of seizure) violate the Fourth Amendment, but retention of the luggage for over ninety minutes may turn that once reasonable seizure into an unreasonable one.[169] In other words, the majority's holding in *Fox*—that the Fourth Amendment only protects an individual's interest in retaining property—is inconsistent with the Supreme Court's holding in *Place* because the Fourth Amendment violation in *Place* did not occur until *after* the luggage had already been confiscated.

A final problem with the Sixth Circuit's textual analysis in *Fox* is that its ultimate conclusion—that no seizure can occur after an initial lawful seizure of property—[170] is inapplicable in different but indistinguishable factual circumstances. Specifically, such a restrictive definition of seizure is inconsistent with the Sixth Circuit's construction of seizure when a person, rather than property, is at issue. In addition, that court's restrictive definition does not hold up when a person voluntarily gives property to the government and is later refused its return. Understandably, the *Fox* court refused to address these two issues.[171] Recall that in *Phelps*,[172] the Sixth Circuit recognized that

165. *Id.* (emphasis added).

166. *Id.*

167. *Id.*

168. Fox v. Van Oosterum, 176 F.3d 342, 356 (6th Cir. 1999) (Clay, J., concurring in part and dissenting in part).

169. *Id.* (citing United States v. Place, 462 U.S. 696 (1983)).

170. *Id.* at 351 (majority opinion).

171. *Id.*

172. *See supra* notes 42–45 and accompanying text.

applying different standards to police conduct before and after arrest would create a "distinction in meaning of the Fourth Amendment that is found nowhere in its language," and thus the reasonableness standard should govern *throughout* seizure.[173] Whatever can be said about the merits of restricting seizure temporally, it is difficult to see how, looking solely at the text of the Fourth Amendment, the Sixth Circuit's view in *Phelps* (that seizure can last beyond the arrest of a person) can be reconciled with its position in *Fox* (that the Fourth Amendment's protections end the minute that property is taken away).[174] Furthermore, the *Fox* court explicitly did not address "whether a 'seizure' occurs when a person voluntarily gives a thing to a state actor, then asks the state actor to return that thing, and the state actor refuses to do so."[175] The *Fox* majority distinguished this situation even though, as the dissent points out, the seizure in both cases "would occur well after the government had completed the act of taking the property away from its rightful owner . . . ."[176] If by not addressing the issue the *Fox* majority was indeed suggesting that a seizure could occur in this voluntary surrender scenario, it would be more consistent with Judge Clay's assertion that "the government's possession of private property, even where it did not begin as a seizure, might ripen into a seizure with the passage of time . . . ."[177] The inapplicability of the *Fox* court's "retention" analysis to other indistinguishable seizure contexts suggests that its underlying fidelity to the text of the Fourth Amendment is lacking.

2. Lee *Ignores Supreme Court Precedent*

The complexities and inconsistencies in the *Fox* court's analysis may be the reason the Seventh Circuit in *Lee* adopted a much more simplistic and literal definition of seizure in ultimately concluding that the

173. Phelps v. Coy, 286 F.3d 295, 300 (6th Cir. 2002) (quoting Cox v. Treadway, 75 F.3d 230, 241 (6th Cir. 1996) (Ryan, J., concurring in part)) (internal quotation marks omitted). While *Phelps* was decided after *Fox*, *Treadway*, with its language rejecting a distinction between a pre-arrest and post-arrest standard, was decided before *Fox*.

174. It did appear that the *Phelps* court thought it important that the plaintiff was still in the arresting officer's custody when the excessive force claim arose. The holding in *Fox* could be brought into line with those in *Phelps* and *Treadway* if seizure of property extended at least as long as the government official who initially seized the property still possessed it. On the other hand, the *Fox* court's "retention" formula could not be applied consistently in that scenario because, under that approach, once the official took the property away, the interest in retaining the property would have expired. Any claim after that would be based on the individual's interest in regaining the property from the official, which the *Fox* court concludes is beyond the scope of the Fourth Amendment.

175. *Fox*, 176 F.3d at 351.

176. *Id.* at 357 (Clay, J., concurring in part and dissenting in part).

177. *See id.*

Fourth Amendment only protects an individual's interest in retaining property.[178] The court in *Lee* put forth two textual justifications for the view that once an individual is initially dispossessed of his property, the seizure is complete and the Fourth Amendment cannot be invoked to regain that property.[179] First, the court argued that the Amendment protects a person's right "'to be secure' in one's home, person, or effects [, which] suggests a *state of being* that is protected against intrusion by unlawful government action."[180] Accordingly, the court reasoned, "once that state has been disturbed by an act of dispossession, the individual is no longer secure in his possessory interest within the meaning of the amendment."[181] Second, the Seventh Circuit cited several sources supporting the idea that "at the time of the fourth amendment's drafting, the word 'seizure' was defined as a temporally limited act, one involving the 'confiscation or forcible taking possession (of land or goods); a sudden and forcible taking hold.'"[182] From this strict construction of the Fourth Amendment, the *Lee* court found that "Justice Stevens's description [of Fourth Amendment protections]—even if lacking in independent precedental value—is consistent with [the Amendment's] literal reading."[183] Thus, while acknowledging that the Supreme Court has defined seizure as some "meaningful interference with a possessory interest," the Seventh Circuit in *Lee* held that such a possessory interest "is limited to an individual's interest in *retaining* his property".[184]

Such a literal reading of seizure, however, does not fit so easily within the Supreme Court's construction of seizure as "some meaningful interference with a possessory interest."[185] First, while the text of the Fourth Amendment does suggest a state of being, it does not limit that state to the time before dispossession. A reading more in line with the Supreme Court's definition would be that the Fourth Amendment protects an individual's right to be secure in his property *whenever* he has a possessory interest in that property—and such an interest exists not only before the act of dispossession, but also while

178. *See* Lee v. City of Chicago, 330 F.3d 456, 462–63, 466 (7th Cir. 2003).

179. *See id.* at 462–63.

180. *Id.* at 462.

181. *Id.*

182. *Id.* (quoting OXFORD ENGLISH DICTIONARY, *supra* note 131). The Seventh Circuit also cited *California v. Hodari D.*, 499 U.S. 621, 624 (1991), in which Justice Scalia determined from three additional dictionaries that the word "seizure" has meant a "taking possession" since the founding of the United States, and *Thompson v. Whitman*, 85 U.S. (18 Wall.) 457, 462–63 (1873), which stated that "[a] seizure is a single act, and not a continuous fact."

183. *Lee*, 330 F.3d at 463.

184. *Id.* at 466.

185. *Id.*

the government has actual possession.[186] For example, when the City no longer needed Lee's car as evidence, he had the right to reclaim his car.[187] Indeed, it could be argued that when the City was still using Lee's car, he had some residual property interest even then.[188] It follows that whenever such an interest exists, any meaningful interference with that right would be a seizure, and the Fourth Amendment therefore requires the government's conduct concerning that interference to be reasonable. In other words, the Fourth Amendment ensures not only that the government will act reasonably when taking property away, but also that individuals are to be secure from unreasonable government action when the right to reacquire their property still exists.

This reading is also more consistent with the Seventh Circuit's interpretation of the Fourth Amendment in the excessive force context. In *Reed*, the Seventh Circuit held that Fourth Amendment protections extend at least up until the determination of probable cause.[189] It could be argued, however, that Reed's "state" of security in his person was "disturbed" at the time of his arrest. Applying the *Lee* analysis to *Reed*: because Reed was no longer "secure" in his "person" after arrest, any conduct occurring after that point would be outside the scope of the Fourth Amendment. Thus, the *Lee* court's literal reading of Fourth Amendment seizure in the property context is inconsistent even with its restrictive interpretation of seizure in the excessive force context. A more symmetrical construction of property seizure would extend Fourth Amendment protections as long as an individual has a possessory interest in the seized property, just as Fourth Amendment protections in the excessive force context extend for as long as an individual has the right to be free from unlawful arrest (which presumably exists until the arrest is deemed lawful).[190] In sum, the *Lee* court's

186. *Id.* at 470 (noting that "Lee maintained a cognizable property interest in his vehicle throughout the City's possession of it").

187. *See* Fox v. Van Oosterum, 176 F.3d 342, 355–57 (6th Cir. 1999) (Clay, J., concurring in part and dissenting in part).

188. *See Lee*, 330 F.3d at 470 (Wood, J., concurring) (discussing Lee's residual property interest in reclaiming his car even after the City had the right to dispose of it following the thirty day expiration period). Of course, the City had a much stronger argument for the reasonableness of the car's retention during this period, where its law enforcement interests are so prevalent.

189. Reed v. City of Chicago, 77 F.3d 1049, 1053 (7th Cir. 1996).

190. One reason courts may be hesitant to analogize the seizure of a person to the seizure of property is that there is no required interruption where the probable cause for or reasonableness of the seizure is determined in seizure of property cases, as the *Gerstein* hearing does in the seizure of person context. In cases where there is no forfeiture hearing, there may never be a determination of whether the seizure of property was reasonable—and thus no obvious point along the continuum for a court to definitively say that the property seizure has ended. Without such an interruption, courts appear to have two options: hold the seizure complete after the

argument that the Fourth Amendment's implicit reference to a state of being necessarily confines the Amendment's protections to the period before that initial state is first disturbed ignores the Supreme Court's construction that a seizure occurs any time there is a meaningful interference with a possessory interest. Moreover, the argument is unpersuasive in light of the Seventh Circuit's construction in the excessive force context.

The *Lee* court's second textual argument, that a literal reading of seizure as a temporally limited act justifies restricting Fourth Amendment property rights to those of retention, is also unpersuasive given the Supreme Court's holding in *Place* that an initial detention of property may, over time, ripen into a seizure that violates the Fourth Amendment.[191] In *Place*, the Supreme Court flatly rejected the idea that there are no degrees of government intrusion and that once the property is seized, the dispossession is absolute.[192] It noted that "[t]he intrusion on possessory interests occasioned by a seizure of one's personal effects can vary both in its nature and extent."[193] In fact, Justice O'Connor noted, "[t]he seizure may be made *after* the owner has relinquished control of the property to a third party or . . . from the immediate custody and control of the owner."[194] The notion that time can turn a detention of property from reasonable to unreasonable under the Fourth Amendment is inconsistent with the *Lee* court's interpretation of seizure as a single act which, once accomplished, ends all Fourth Amendment inquiry. If the Fourth Amendment only protected Raymond Place's interest in *retaining* his luggage, the Supreme Court would have ended its inquiry after the initial seizure of the luggage. Instead, the Court went on to find that the initial seizure, under *Terry* principles,[195] did not violate the Fourth Amendment, but that as time went on the seizure became unreasonable as justified on those grounds.[196] As the dissent in *Fox* stated:

> [W]hile a seizure may technically occur at the moment the government actually takes an item of personal property, the Court has

---

initial dispossession as the court in *Lee* did, or hold that property is seized as long as the owner still has a legally cognizable property interest. This Note argues for the latter, more protective alternative.

191. *See Fox*, 176 F.3d at 355–56 (Clay, J., concurring in part and dissenting in part) (citing *Place* as evidence that the concept that initially lawful seizures can transform into unlawful seizure is not new to constitutional jurisprudence).

192. United States v. Place, 462 U.S. 696, 705 (1983).

193. *Id.*

194. *Id.* (emphasis added).

195. Terry v. Ohio, 392 U.S. 1, 31 (1968) (holding that a brief investigatory stop and frisk without probable cause is not an unreasonable seizure violative of the Fourth Amendment).

196. *See Place*, 462 U.S. at 703–10.

> long rejected such a limited view of the term 'seizure' under the Fourth Amendment, in favor of the concept that a 'seizure' may take place over a period of time.[197]

Both the *Lee* and *Fox* courts attempted to explain away the Supreme Court's holding in *Place* by asserting that *Place* merely "provide[s] a framework for analyzing when law enforcement agents may hold someone's property for a very short time on less than probable cause to pursue a limited course of investigation."[198] The *Lee* court reasoned that because *Place* only dealt with the initial loss of possessory interest and whether that loss is reasonable without probable cause, "[i]t has no application after probable cause to seize has been established."[199] Accordingly, the *Lee* court concluded that the "time can turn a reasonable seizure into an unreasonable seizure" analysis only applies up to the time when a possessory interest is justified by probable cause. After that, the argument goes, the property is considered seized and the Fourth Amendment is inapplicable.[200]

But this incomplete interpretation of *Place* ignores the essence of its holding: brief detentions of personal property may be so minimally intrusive of Fourth Amendment possessory interests that strong countervailing governmental interests can justify seizure on less than probably cause,[201] *but as the intrusion becomes stronger, that seizure can become unreasonable and therefore violate the Fourth Amendment.*[202] In other words, the Supreme Court in *Place* emphasized balancing the individual's Fourth Amendment interests against the government interest that justified the intrusion as a way to determine whether a seizure *is reasonable*, not whether one *has occurred.*[203] Indeed, the Court in *Place* made clear:

> There is no doubt that the agents made a 'seizure' of Place's luggage for purposes of the Fourth Amendment when, following his refusal to consent to a search, the agent told Place that he was going to take the luggage to a federal judge to secure issuance of a warrant.[204]

---

197. Fox v. Van Oosterum, 176 F.3d 342, 356 (6th Cir. 1999) (Clay, J., concurring in part and dissenting in part).

198. *Id.* at 351 n.6 (majority opinion); *see also* Lee v. City of Chicago, 330 F.3d 456, 464 (7th Cir. 2003) (quoting *Fox*, 176 F.3d at 351 n.6).

199. *Lee*, 330 F.3d at 464.

200. *See id.* at 462–64.

201. *Place*, 462 U.S. at 706.

202. *See Fox*, 176 F.3d at 355–56 (Clay, J., concurring in part and dissenting in part) (quoting and discussing the holding in *Place*, 462 U.S. at 706, 710).

203. *See id.*

204. *Place*, 462 U.S. at 707.

Thus, the *Place* Court first determined that there was in fact a seizure, then determined that that seizure was reasonable by balancing interests, but later found that the seizure became unreasonable as the relative intrusions and interests changed.[205] The Court did not, as the *Lee* majority argued, "deal only with the transformation of a momentary, investigative detention into a seizure"[206] but rather dealt with the transformation of a momentary, investigative, reasonable seizure into an unreasonable seizure.[207] Therefore, the *Lee* court's holding that the Fourth Amendment protects only an individual's interest in retaining his property cannot account for the Supreme Court's finding that Place's Fourth Amendment rights were violated ninety minutes after an initial, reasonable seizure of his property had taken place.[208]

3. *Government "Seizes" Property as Long as the Individual Has the Right to Get It Back*

A more useful and "common sense" construction of seizure in the property context will take into account the Supreme Court's "meaningful interference with possessory interest" definition and may look analogous to Justice Ginsburg's view of the definition and duration of seizure in *Albright*.[209] While *Albright* dealt with a different issue—whether an individual is still seized as a pretrial detainee when he has been released on bail—Justice Ginsburg's analysis of the temporal scope of the Fourth Amendment is nevertheless informative.[210] In her concurrence, Justice Ginsburg argued that a criminal defendant, even after being released on bail, is still seized under the Fourth Amendment because he or she is required to appear in court upon command and he or she is restricted from otherwise exercising unquestionable rights, such as the right to travel.[211] In other words, even though an individual is not technically being detained, his liberty interest is still diminished—"he remains apprehended, arrested in his movements, indeed 'seized' for trial . . . ."[212] This conception of continuing seizure suggests that as long as the government is interfering with some interest protected by the Fourth Amendment, a liberty interest in Albright's case, he or she remains seized within the meaning of the Amendment. Similarly, when the government interferes with one's

205. *See id.* at 707–11.
206. Lee v. City of Chicago, 330 F.3d 456, 464 (7th Cir. 2003).
207. *Place*, 462 U.S. at 710.
208. *Id.* at 707.
209. *See* Albright v. Oliver, 510 U.S. 266, 276–81 (1994) (Ginsburg, J., concurring).
210. *See id.*
211. *Id.* at 278.
212. *Id.* at 279.

possessory interest under the Fourth Amendment by taking possession of his or her property, that property is seized within the meaning of the Amendment. If the property was, for example, contraband, the individual probably would not have a possessory interest in that property and the seizure would be complete, with no Fourth Amendment claim available after the initial detention.[213] On the other hand, when an individual such as Lee still has a possessory interest in his property, any meaningful interference by government with that interest should be evaluated under the Fourth Amendment reasonableness standard. This conception also comports with the idea that the Framers meant for "people to be secure" in their property against *any* unlawful intrusion by government, and most likely did not intend to forbid government from arbitrarily taking property while sanctioning its arbitrary retention of that property. Justice Ginsburg's "common sense" understanding of seizure, where seizure continues as long as an otherwise "unquestioned" right is subject to government's control, is both consistent with the Supreme Court's "meaningful interference with possessory interest" definition of seizure and true to the text of the Fourth Amendment.[214]

B. Seventh Circuit Excessive Force Precedent Does Not Analogize in the Property Context

In addition to arguing that the text of the Fourth Amendment cannot support the notion of continuing seizure, the Seventh Circuit in *Lee* also offered the two practical objections first put forth in *Wilkins* to justify limiting the temporal scope of the Fourth Amendment.[215] In *Wilkins*, the Seventh Circuit rejected continuing seizure in the excessive force context because: (1) traditional Fourth Amendment jurisprudence would "prove unhelpful" in cases where the suspect was already in custody, and (2) allowing Fourth Amendment analysis to extend beyond that traditional context "would lead to an 'unwarranted expansion of constitutional law.'"[216] Because the Fourth Amendment reasonableness standard is already used in and is well

213. In the case of contraband, an individual may actually have a property interest sufficient to invoke the exclusionary rule as a result of an illegal seizure, but he of course would not have the right, relevant in this situation, to have the contraband returned to him. *See generally* United States v. Jeffers, 342 U.S. 48 (1951) (holding that defendant was not entitled to have narcotics, as contraband, returned to him, although narcotics could be considered his property to the effect that he could suppress them at trial because they were seized illegally); *see also* 68 AM. JUR. 2D, *supra* note 91, § 304.

214. *See Albright*, 510 U.S. at 278–79 (Ginsburg, J., concurring).

215. Lee v. City of Chicago, 330 F.3d 456, 463–64 (7th Cir. 2003).

216. *Id.* at 463 (quoting Wilkins v. May, 872 F.2d 190, 194 (7th Cir. 1989)).

equipped to deal with return of property cases, these objections are unpersuasive in the seizure of property context.

1. *Fourth Amendment Jurisprudence Would Be Useful in Return of Property Cases*

The *Lee* court offers the first *Wilkins* objection—that prior decisions applying the reasonableness standard to police conduct during arrest are "inapplicable" once the arrest has already taken place—as support for its conclusion that the Fourth Amendment standard would similarly be unhelpful in resolving issues concerning the time after the initial seizure of *property*.[217] In *Wilkins*, the Seventh Circuit held that because Fourth Amendment jurisprudence concerning the seizure of a person has focused on "whether the force used to seize the suspect was excessive in relation to the danger he posed,"[218] the "text, history and judicial interpretations of the Fourth Amendment"[219] would be unhelpful in resolving excessive force cases where a suspect is already lawfully in custody.[220] Because Fourth Amendment principles apparently do not "illuminate" whether an interrogation was too coercive, the *Wilkins* court decided due process principles were a better guide in cases where excessive force was applied after arrest.[221] The *Lee* court analogized this argument in the property context and proclaimed that "a government's decision regarding how and when to return once lawfully obtained property 'raises different issues, which the text, history, and judicial interpretations of the Fourth Amendment do not illuminate.'"[222] The argument is that because Fourth Amendment precedent has focused on the initial deprivation of property (usually issues involving whether there was probable cause to seize the property), due process law (which involves requirements such as forfeiture hearings) would be more useful in weighing government interests in retaining property against an individual's interest in regaining that property.[223]

But the availability of due process principles to decide issues concerning the return of once lawfully seized property does not obviate or make impractical the application of Fourth Amendment principles to the same issues. First, where both the Fourth Amendment and the Due Process Clause appear to be applicable, the Supreme Court has

217. *See id.* at 463, 465.
218. *Wilkins*, 872 F.2d at 193.
219. *Id.* at 194.
220. *Id.* at 193–94; *see also Lee*, 330 F.3d at 463.
221. *See Wilkins*, 872 F.2d at 193–94.
222. *Lee*, 330 F.3d at 465 (paraphrasing *Wilkins*, 872 F.2d at 194).
223. *See id.* at 465–66.

preferred to apply the Fourth Amendment reasonableness standard because it is an "explicit textual source of constitutional protection" against the particular type of government misconduct asserted.[224] To the extent that government's refusal to return once legally obtained property constitutes a seizure,[225] the reasonableness standard is more appropriate than generalized due process principles and is certainly not foreclosed merely because due process elements may be involved. Moreover, when the *Wilkins* court decided traditional due process principles better guided courts when a suspect was already in custody, it was because the usual issue in cases where the excessive force was applied during the arrest was "whether the force used to seize the suspect was excessive in relation to the danger he posed . . . if left at large."[226] This inquiry is obviously extraneous when the suspect is already in custody. On the other hand, the usual inquiry in seizure of property cases is whether the particular government interest at issue justifies the interference with an individual's property interest.[227] This inquiry is still relevant and informative when evaluating a government's decision to return once lawfully seized property. Finally, as the dissent in *Fox* points out, federal courts already apply the Fourth Amendment reasonableness standard when deciding, under a motion invoking Rule 41 of the Federal Rules of Criminal Procedure,[228] whether to return seized property after criminal proceedings have terminated.[229] The *Fox* dissent notes that "Rule 41(e) recognizes the

224. Graham v. Connor, 490 U.S. 386, 395 (1989) (holding that "[b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection against . . . physically intrusive governmental conduct [in excessive force cases], that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims"). Compare this to Justice Stevens's dissent in *Albright*, where he argued that "[n]othing in *Graham*, however, forecloses a general due process claim when a more specific source of protection is absent or, [is] open to question," and thus recognized that both due process and Fourth Amendment principles may be applicable. Albright v. Oliver, 510 U.S. 266, 305–06 (1994) (Stevens, J., dissenting).

225. *See supra* notes 149–208 and accompanying text.

226. *Wilkins*, 872 F.2d at 193.

227. *See* United States v. Place, 462 U.S. 696, 703–06 (1983) (evaluating whether law enforcement interests in investigating possible narcotics trafficking justifies the brief detention of a traveler's luggage on less than probable cause).

228. Rule 41(g) provides:

> A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

FED. R. CRIM. P. 41(g).

229. Fox v. Van Oosterum, 176 F.3d 342, 356 (6th Cir. 1999) (Clay, J., concurring in part and dissenting in part) (referring to what then was the relevant provision, FED. R. CRIM. P. 41(e)).

right of a person to obtain the return of lawfully seized property 'when aggrieved by the government's possession of it,' and not just at the time of the initial seizure."[230] Thus, the Fourth Amendment reasonableness standard not only "illuminates" issues regarding government conduct after an initial seizure, but is already considered "helpful" in weighing the competing interests at stake in such cases.

2. *Balancing Interests Would Protect Against Expansion of Constitutional Law*

The Seventh Circuit also argues in *Lee*, as it did in *Wilkins*, that employing Fourth Amendment analysis outside its "traditional context . . . would lead to an 'unwarranted expansion of constitutional law.'"[231] *Lee* repeated Judge Posner's classic example from *Wilkins*, that if an officer were to stick out his tongue at a suspect in an interrogation it would certainly be considered unreasonable, but

> [w]ould it therefore make the "continuing seizure" . . . violative of the Fourth Amendment? Surely not. But why not? There are no obvious limiting principles within the amendment itself. The problem is that the concept of continuing seizure attenuated the element that makes police conduct in the arrest situation problematic: the police are taking away a person's liberty. Custodial interrogation does not curtail a person's freedom of action; it presupposes that he has already lost that freedom—for by definition he is already in custody.[232]

Similar to the first objection, this argument maintains that the Fourth Amendment reasonableness standard focuses on the initial deprivation of liberty and thus is ill-suited to deal with problems arising from government misconduct outside that context.[233] Here, however, Judge Posner is apparently concerned that the balancing of interests using that standard may extend constitutional protections to trivial claims.[234] The *Lee* court reasoned that when deprivation of property is at issue, the Fourth Amendment reasonableness standard would similarly be ill-suited to evaluate government conduct after the initial detention of property has taken place.[235]

This argument, however, ignores the fact that after the initial seizure of property, a person still has a property interest that the

230. *Id.* (quoting the advisory committee's note to the 1989 amendments).

231. Lee v. City of Chicago, 330 F.3d 456, 463 (7th Cir. 2003) (quoting *Wilkins*, 872 F.2d at 194).

232. *Id.* at 463–64 (quoting *Wilkins*, 872 F.2d at 194).

233. *See id.* at 465.

234. *See* Austin v. Hamilton, 945 F.2d 1155, 1160 n.3 (10th Cir. 1991) (rejecting the practical objections in *Wilkins*).

235. *See Lee*, 330 F.3d at 465–66.

Fourth Amendment protects, and if that interest was indeed trivial, it would be outweighed by a more pressing government interest. Unlike the custodial interrogation context, where one could argue that a person has already lost his liberty interest, a seizure in the property context occurs whenever government meaningfully interferes with a property interest. For someone like Lee, this property interest would be his right to possession of his car when the City no longer had any use for it. It is not then an "unwarranted expansion," but actually quite appropriate to apply Fourth Amendment principles to government's refusal to return once lawfully seized property because there continues to be a Fourth Amendment interest to protect. Moreover, courts can easily apply the balancing test outlined in *Place*, weighing the quality of the intrusion on the individual's Fourth Amendment interest against the government's countervailing interest in procuring evidence, when evaluating a government's decision not to return property.[236] Applying this test would summarily dispense with trivial claims because the individual's interest in reacquiring his property would be substantially outweighed by government's interest in keeping the property. Therefore, although it may not be useful to ask whether government misconduct in the interrogation room was reasonable, it certainly makes sense to require government's conduct concerning the return of an individual's private property to be reasonable.[237] Accordingly, the argument that extending Fourth Amendment protections into this area is an "unwarranted expansion" is unpersuasive as a practical objection.

C. *Applying the Fourth Amendment to Return of Property Cases*

What *should* a return of property case look like? Simply enough, it should look like any Fourth Amendment seizure of property case, the only difference being that the government may already have possession of the property when the seizure occurs. If the seizure is unreasonable, there is a Fourth Amendment violation and the owner of the property is entitled to its unconditional return.

---

236. *See* Fox v. Van Oosterum, 176 F.3d 342, 355–57 (6th Cir. 1999) (Clay, J., concurring in part and dissenting in part).

237. And even in the interrogation context, Judge Posner's example is unpersuasive. The policeman's sticking out his tongue is undoubtedly stupid and childish, but it does not make the detention unreasonable. It is hard to believe that, in applying the Fourth Amendment to this scenario, a court would actually find a violation. Indeed, it is unlikely that many § 1983 actions would be brought on such facts. But even if they were, a court balancing interests under the Fourth Amendment should not have difficulty dismissing such a suit. The due process clause may be a tougher standard to conquer, but it does not follow that a reasonableness requirement could not adequately dispose of truly trivial claims (while leaving more room for meritous cases).

The threshold question is whether a seizure has occurred.[238] Employing the Supreme Court's construction as "some meaningful interference with an individual's possessory interest,"[239] a seizure of property occurs whenever government action intrudes on such an interest.[240] Thus, in a return of property case, the seizure continues as long as the individual still retains a possessory interest—whenever he has the right to its eventual return, for instance.[241] For example, when the police take your camcorder because they suspect it may contain a recording of a famous pop star's indiscretions, the police have seized your property and it continues to be seized until you get it back.[242] During that seizure, the Fourth Amendment applies and mandates that the government's conduct be reasonable.[243] Therefore, when you petition the police for the return of your camcorder, an unreasonable refusal could constitute a seizure violative of the Fourth Amendment.

When might such a seizure be unreasonable? According to *Place*:

> We must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. When the nature and extent of the detention are minimally intrusive of the individual's Fourth Amendment interests, the opposing law enforce-

238. Minnesota v. Carter, 525 U.S. 83, 91–92 (1998) (Scalia, J., concurring) (espousing the desirability of answering the "threshold question" of whether a search or seizure "covered" by the Fourth Amendment "*has occurred*" before "leap[ing]" to the question of whether a search or seizure was reasonable).

239. Soldal v. Cook County, 506 U.S. 56, 61 (1992) (quoting United States v. Jacobsen, 466 U.S. 109, 113 (1984)).

240. *See infra* notes 204–209 and accompanying text.

241. *See infra* notes 204–209 and accompanying text.

242. An alternative construction that the plaintiff in *Fox* put forth, and that Lee argued in the alternative, is that there was an initial seizure—the taking of Fox's license and Lee's car—followed by a second, "additional" seizure, which occurred when the government no longer needed the property and refused to return it. *See* Fox v. Van Oosterum, 176 F.3d 342, 349 (6th Cir. 1982); *see also* Lee v. City of Chicago, 330 F.3d 456, 460 (7th Cir. 2003). While appealing because of its apparent simplicity, this approach confuses the question of when a seizure occurs with when it is unreasonable. This is because a court must determine whether the government's diminished interest in the property justifies the property's return before the court determines whether the refusal constitutes a "second seizure." *See Lee*, 330 F.3d at 460 (summarizing Lee's argument that the initial impoundment of his car to search for evidence was reasonable but the "additional" seizure, which occurred only after the City had concluded its search, was not). This approach would also be inconsistent with the "meaningful interference with possessory interest" definition, because it implies that the property is not seized between the initial and "additional" seizure, even though the possessory interest remains constant throughout. Either construction would likely yield the same result, but to stay consistent with traditional Fourth Amendment jurisprudence, the threshold question of whether a seizure has occurred (has there been a meaningful interference with a possessory interest), should be answered before the reasonableness of that seizure is evaluated. *See supra* note 238 and accompanying text.

243. U.S. CONST. amend. IV (guaranteeing the people the right to be secure against unreasonable seizures).

> ment interests can support a seizure based on less than probable cause.[244]

As the dissent in *Fox* points out, this balancing test has clear application in return of property cases.[245] The advisory committee's note for Rule 41(e) (the former return of property rule) of the Federal Rules of Criminal Procedure already urges this standard in such cases:

> [R]easonableness under all the circumstances must be the test when a person seeks to obtain the return of property. If the United States has a need for the property in an investigation or prosecution, its retention of the property generally is reasonable. But, if the United States' legitimate interests can be satisfied even if the property is returned, continued retention of the property would become unreasonable.[246]

Thus, notwithstanding the potential elusiveness of a reasonableness standard, a clear rule emerges when the Fourth Amendment commands return of property cases: if the property is no longer needed, give it back.

Of course, it will not always be so simple. In *Lee*, for example, the City incurred the expense of towing and storing Lee's car. The decision to condition the car's return upon Lee's paying the towing and storage fees must be evaluated with that expense in mind. In other words, it certainly would be unreasonable for the City to charge Lee if it incurred *no* expense while using the car in its investigation—the City would have no legitimate interest in keeping it. On the other hand, if the City accepted responsibility for every expense associated with procuring evidence, it would likely draw little complaint from Lee and others in his position—but it would not be reasonable. Such an allocation of the City's resources would divert substantial funds away from other important law enforcement functions, as well as many other government functions, and the cost to the public of such a policy would likely outweigh Lee's interest in not paying the fees. This, in fact, is why Judge Wood concurred in *Lee* and disagreed only with the majority's refusal to employ the Fourth Amendment to come to the same conclusion.[247] But what if the City had indeed destroyed Lee's car after thirty days, or did not destroy it but refused to negotiate the price for its return, keeping the car indeterminately while storage fees accumulated? The City could put forth a legitimate law

244. United States v. Place, 462 U.S. 696, 703 (1983), *quoted in Fox*, 176 F.3d at 355 (Clay, J., concurring in part and dissenting in part).

245. *Fox*, 176 F.3d at 356 (Clay, J., concurring in part and dissenting in part).

246. *Id.* (quoting FED. R. CRIM. P. 41(e) advisory committee's note (1989)).

247. *See Lee*, 330 F.3d at 473–74 (Wood, J., concurring) (stating that "[o]n these facts, I would say that there was no Fourth Amendment violation commencing with the second seizure, because whatever continued seizure occurred in this particular situation was not unreasonable").

enforcement interest in these scenarios, but as they become more intrusive on Lee's property interests, they are more likely to be unreasonable, and more likely to violate the Fourth Amendment. Weighing these interests in each case will protect private citizens from arbitrary government interference while recognizing that lesser intrusions are appropriate where the public's right to efficient and effective law enforcement is compelling.

What are some guideposts to help determine whether refusing to return property is reasonable under this standard? Because each case should be evaluated on its facts, different considerations will be applicable in different cases—but several factors will likely always be relevant. Judge Wood, for example, thought it important that the length of time the City kept Lee's car after it lost its evidentiary value was brief.[248] She also required that the condition imposed for the car's return was an objectively reasonable sum—the actual cost of towing and storage but no more.[249] That the City never carried out its threat to destroy the car was also a consideration.[250] The length of the seizure, the reasonableness of any monetary conditions imposed, and disposition of the property in the event those conditions are not immediately met, will all likely be helpful to a court in evaluating the reasonableness of a particular intrusion. In addition, the relative value of the property to the individual should be relevant—an individual's home or a family's only car will likely carry more weight than the camcorder might.[251] Another consideration should be the accessibility of information regarding how and when the property can be retrieved. These factors should be weighed against the government's law enforcement needs in the particular case: the evidentiary value of the property to the case, the need to extend the seizure to assure a thorough investigation, and the cost incurred by placing the burden on the public rather than apportioning it to the individual. The circumstances of the initial seizure may also be relevant here. For example, if Lee were implicated in the shooting and arrested, but later found to be innocent, he likely regains his full possessory interest in his car, but it may be more reasonable for the City to demand towing and storage fees in this scenario because Lee's possible involvement in the crime made the initial seizure and any subsequent expenses more justifia-

248. *Id.* at 473.

249. *Id.*

250. *Id.*

251. This factor should take into account each individual's circumstances but should be viewed as objectively as possible since most plaintiffs will argue that all of their property is invaluable.

ble.[252] A court should evaluate the events of a particular seizure "as a whole."[253] As the relevant countervailing interests shift throughout the duration of the seizure, it is possible that a seizure that was once reasonable becomes unreasonable,[254] at which point the return of the individual's property should be unconditional.

What is important to remember is that the "essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order 'to safeguard the privacy and security of individuals against arbitrary invasions.'"[255] This protection was meant to encompass individuals' property interests,[256] and the Amendment seeks to "strike[ ] a balance" between these important rights and the public's right in "effecting searches and seizures for law enforcement purposes."[257] Return of property cases will invariably involve both of these opposing interests and will necessarily require balancing to ensure that neither is overlooked. It is illogical to distinguish between the situation where government acts unreasonably in taking property and where it acts just as unreasonably with regard to the property's return. As noted above, the practical objections to applying the Fourth Amendment in these cases are unavailing, as are superficial arguments professing that a seizure can only refer to a single moment in time. Given the importance the Framer's placed on property interests[258] and the explicit formula outlined in the Fourth Amendment to protect these interests in the law enforcement context,

252. *Cf.* Hudson v. Palmer, 468 U.S. 517, 538–39 (1984) (O'Connor, J., concurring) (stating that the Fourth Amendment is inapplicable to return of property cases where the property owner is incarcerated). Considering the property owner's possible implication in the crime as a *factor* can explain the *Fox* majority's hesitation in extending its holding to cases where an individual *voluntarily* relinquishes his property. *See supra* notes 149–177 and accompanying text.

253. *Lee*, 330 F.3d at 473 (Wood, J., concurring).

254. *See* United States v. Place, 462 U.S. 696, 707–10 (1983) (holding that the length of the seizure aggravated the "brevity" of the intrusion which, coupled with a lack of diligence on the part of the police in pursuing their investigation, made what may have been a reasonable investigative seizure, an unreasonable seizure under the Fourth Amendment).

255. Delaware v. Prouse, 440 U.S. 648, 653–54 (1979) (quoting Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978)); *see also* Camara v. Mun. Court, 387 U.S. 523, 528 (1967) (observing that "[t]he basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials").

256. U.S. CONST. amend. IV. (guaranteeing "[t]he right of the people to be secure in their . . . houses, papers, and effects"); *see also* Soldal v. Cook County, 506 U.S. 56, 62 (1992) (noting that "[Supreme Court] cases unmistakably hold that the Amendment protects property as well as privacy").

257. United States v. James Daniel Good Real Prop., 510 U.S. 43, 67 (1993) (Rehnquist, C.J., concurring in part and dissenting in part).

258. *See infra* note 309 and accompanying text.

holding the Fourth Amendment "irrelevant" to return of property cases is incorrect, and borders on irresponsible.

D. *The* Lee *Court Adopts Due Process*

Unwilling to "extend" Fourth Amendment protections to the return of seized property and finding that the text of the Fourth Amendment speaks only to the retention of property, the Seventh Circuit in *Lee* found the Fifth and Fourteenth Amendment's due process requirements to be a better approach.[259] Specifically, the Seventh Circuit found the issue of the City's refusal to return Lee's car to be one which "concerns the fairness and integrity of the criminal justice process,"[260] and that the text, history, and judicial interpretations of the Fifth Amendment Due Process Clause create the proper framework for balancing the legitimacy of a government's fiscal interests[261] in retaining property against an individual's competing interest in regaining his property.[262] But denying Lee and others in a similar position the protection of the Fourth Amendment and relying on Fifth and Fourteenth Amendment guarantees or other alternatives may have broad and sweeping consequences. The Seventh Circuit's holding in *Lee* creates an unwarranted constitutional gap which, as discussed in the next section, may leave individuals unprotected when government takes their property and unreasonably refuses to give it back.[263]

V. Impact: The Broad Implications of *Lee v. City of Chicago*

As Judge Wood notes in her concurrence, the majority in *Lee* "hold[s] sweepingly that the Fourth Amendment has nothing to do with the reasonableness of the continued detention of property after the rationale supporting the initial seizure no longer holds."[264] Proclaiming her doubt that the Fourth Amendment "is utterly irrelevant to the reasonableness of a decision to refuse to relinquish seized property once the government has no need for it" Judge Wood focuses on

259. Lee v. City of Chicago, 330 F.3d 456, 466 (7th Cir. 2003). The Fifth Amendment provides that "[n]o person shall . . . be deprived of . . . property without due process of the law," U.S. Const. amend. V, and the Fourteenth Amendment provides that "[n]o State . . . shall deprive any person of . . . property . . . without due process of the law." U.S. Const. amend. XIV.

260. *Lee*, 330 F.3d at 465.

261. *Id.* at 466. The court found that because probable cause was no longer the City's justification for keeping Lee's car, the government interest was not a law enforcement interest but was better characterized as "fiscal." *Id.* at 465.

262. *See id.* at 464–66.

263. *See id.* at 472–77 (Wood, J., concurring).

264. *Id.* at 472.

the "risk[s of] creating an unwarranted gap in the constitutional protections that exist with respect to governmental takings of property."[265] This section discusses the implications of rejecting the continuing seizure approach with respect to property.[266]

A. Due Process Tips the Scale

The danger of finding the Fourth Amendment inapplicable to government conduct after the initial seizure of an individual's property is that it may leave that person with no recourse against government conduct which amounts to a de facto forfeiture of personal property.[267] Both the *Lee* and *Fox* majority rely on the Due Process Clauses of the Fifth and Fourteenth Amendments for this protection.[268] The Supreme Court has held that a person has a valid procedural due process claim when a state system destroys a property interest "without according him proper procedural safeguards."[269] Furthermore, an individual has a valid substantive due process challenge when government conduct deprives him either of a fundamental right or of a property interest after all state law remedies have been exhausted.[270] Each of these avenues has limitations which, absent Fourth Amendment protection, may leave individuals whose property rights have been infringed upon out in the cold.

The problem with relying on procedural due process is that it is too easily satisfied—it does not itself hold government to a specific standard of conduct. Generally, due process is satisfied where there is notice and a hearing.[271] Thus, the City of Chicago most likely provided Lee with due process when it warned him that he had thirty

265. *Lee*, 330 F.3d at 472 (Wood, J., concurring).

266. *See infra* notes 267–307 and accompanying text.

267. *Lee*, 330 F.3d at 474 (Wood, J., concurring).

268. *See id.* at 466 (majority opinion); Fox v. Van Oosterum, 176 F.3d 342, 352 (6th Cir. 1999) (noting that stretching the Fourth Amendment temporally would "replace for many cases the well-developed procedural due process analysis that provides the states with first chance to prevent possible constitutional wrongs").

269. Logan v. Zimmerman Brush Co., 455 U.S. 422, 423 (1982) (holding that where a state employment commission failed to file a timely conference to hear a complaint, and that system then barred itself from hearing the action as a result of the such a failure, the complainant has been denied his property interest without due process of law).

270. *Lee*, 330 F.3d at 467.

271. *Fox*, 176 F.3d at 349. Notice and hearing are the requirements for predeprivation process, which is most relevant to the issues discussed in this Note, even though the individual will already be physically deprived of the property as a result of the initial seizure. This is because in return of property cases, the relevant period of deprivation does not accrue until the original justification for seizing the property is extinguished—at which point notice and hearing are required to satisfy due process. Postdeprivation due process is satisfied when state tort remedies are adequate. *Id.*

days to pay the towing and storage fees or to request a hearing.[272] While the constitutionality of requiring Lee to pay these fees is debatable,[273] the question turns on the reasonableness of the fees, not on whether Lee was provided notice and a hearing. For instance, as Judge Wood points out, requiring Lee to pay $100,000 or sign over the deed to his home in order to retrieve his car would be "plainly unlawful."[274] But it is not so obvious that such a condition would violate the Due Process Clause, provided that the City gave Lee adequate notice and some sort of forfeiture hearing. Moreover, these basic elements can be satisfied facially but may be so burdensome as to constructively prohibit an individual from reacquiring his property, for example a policy which compels the owner of seized property to secure a release order from his arresting officer.[275] Authorizing any government-imposed condition for return of property—assuming notice and a forfeiture hearing were provided—without requiring that condition to be reasonable places perilously few restrictions on government's power to seize, and keep, a person's property.

Similarly, relying on broad substantive due process principles as a guide to analyze whether government has overstepped its bounds with regard to returning an individual's private property may also unjustifiably restrict possible recourse for that individual. The Supreme Court has held "that '[t]he touchstone of due process is protection of the

272. "Most likely" because Lee did not actually bring a procedural due process challenge. *See Lee*, 330 F.3d at 466.

273. *See supra* notes 231–258 and accompanying text.

274. *Lee*, 330 F.3d at 473 (Wood, J., concurring).

275. *See generally* Gates v. Towery, 331 F. Supp. 2d 666, 668 (N.D. Ill. 2004) (reconsidering plaintiff's due process claim alleging that the City of Chicago had a "policy of issuing incomplete, false, and misleading receipts to arrestees whose property is taken for inventory purposes at the time of arrest [which] 'is designed to prevent, delay, and impede the return of non-forfeitable property to the rightful owners' "). Consider a variation of the facts in *Robins v. Harum*, 773 F.2d 1004 (9th Cir. 1985), where the defendant officers dragged the plaintiffs out of the car after an argument about whether plaintiffs could smoke in the back seat. Suppose the officers had confiscated two hundred dollars at arrest. Even if the officers' conduct in that case was reasonable, one would not blame the Robinses for being hesitant to track down those officers and demand their signature on a release form. To the extent that such a signature is unnecessary and the requirement is employed only to "impede the return of non-forfeitable property to the rightful owners," it certainly would be unreasonable, but likely meets the requirements of due process. Compare *Gates*, 331 F. Supp. 2d at 670, where the court deemed the due process challenge worthy of reconsideration but only because the policy directly interfered with the notice and hearing requirements through issuance of an inventory receipt "which falsely represent[ed] the process through which arrestees can recover their property." It seems likely that the motion to dismiss in *Gates* would have been granted had the policy been "designed to prevent, delay, and impede the return of non-forfeitable property" through means other than interfering with notice and hearing.

individual against arbitrary action by government'"[276] but that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense . . . .'"[277] Thus, unless a fundamental right is at stake,[278] "[S]ubstantive due process requires only that the practice be rationally related to a legitimate government interest, or alternatively phrased, that the practice be neither arbitrary nor irrational."[279] Furthermore, when the challenge "involves only the deprivation of a property interest,"[280] the aggrieved must show the inadequacy of state law remedies "before the court will even engage in this deferential rational-basis review."[281]

Of course, the inherent difficulty in bringing a successful substantive due process claim does not compel a broadening of the Fourth Amendment to cover a potential constitutional gap, but it does create the danger that the standard used for balancing an individual's interest in his or her property against the government's countervailing law enforcement interests will be unjustly skewed in favor of the government. Consider Judge Wood's response to the majority's point[282] in *Lee* that evaluating an individual's interest in regaining his property is better analyzed under due process principles than under the Fourth Amendment:

> [A]ll individuals in society are benefited by law enforcement activities, and all (presumably including crime victims) must therefore bear some of the burdens that go along with police activity. . . . Even so, the government's law enforcement interests surely do not confer on police a roving warrant to seize and keep any private property they want, for however long they want to keep it. Our task is to find the proper balance between those law enforcement interests and the general citizen's interest in her property. I therefore disagree with the majority, to the extent it has taken the position that the City's interest was primarily fiscal by the time Lee wanted to retrieve the car. Instead, we need to look at the events as a whole. Doing so, it is important to me that the (1) the second seizure was brief in duration, (2) the condition imposed on Lee was only to pay the actual cost of the towing and storage (*i.e.*, an objec-

276. County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998) (quoting Wolff v. McDonnell, 418 U.S. 539, 558 (1974)).

277. Collins v. Harker Heights, 503 U.S. 115, 129 (1992) (internal quotation marks omitted).

278. This *would* be the case if the conduct involved a Fourth Amendment violation.

279. *Lee*, 330 F.3d at 467. Predictably, this is a hard standard to meet. *See Lewis*, 523 U.S. at 860–62 (Scalia, J., concurring in the judgment) (advocating judicial restraint in finding substantive due process violations).

280. *Lee*, 330 F.3d at 467.

281. *Id.*

282. *Id.* at 465.

> tively reasonable sum), and (3) the City never carried out its threat to destroy the car.[283]

Judge Wood's concern that precluding Fourth Amendment protections in this context and only requiring that government not act arbitrarily or irrationally would endow government with a "roving warrant" is well taken. It is hard to imagine a situation where government cannot espouse *some* interest furthered by its retention of personal property, especially when any "fiscal" interest is adequate. Indeed, concern about the ease with which government might initially seize personal property was likely the impetus behind the Fourth Amendment reasonableness requirement.[284] Again, it is inconsistent to hold that the Constitution forbids government from being unreasonable when acquiring an individual's property but permits government to act unreasonably (albeit rationally) in refusing its return. This inconsistency suggests that such a constitutional gap was never meant to exist, and that while such "gaps can and do exist, it is not a good idea to create them inadvertently."[285]

The Supreme Court has held that where "a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process."[286] Relying on generalized due process guarantees instead of applying a standard explicitly set out in the Constitution to govern a particular situation risks subjecting citizens to less protection of their property interests than the Constitution requires. To the extent that the Fourth Amendment protects an individual's interest in reacquiring his property, as is argued in this Note, applying the lesser standard of the Fifth and Fourteenth Amendments may mean that "no remedy at all exists for people whose property is taken and not properly returned."[287]

---

283. *Id.* at 473 (Wood, J., concurring) (internal citations omitted).

284. *See* Camara v. Mun. Court, 387 U.S. 523, 528 (1967) (explaining that "[t]he basic purpose of [the Fourth] Amendment, as recognized in countless decisions of [the Supreme] Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials"); *see also* BERNARD H. SIEGAN, PROPERTY AND FREEDOM: THE CONSTITUTION, THE COURTS, AND LAND-USE REGULATION 13–46 (1997) (discussing generally the intent of the Framers of the Constitution and the Bill of Rights to shield private property interests against federal intrusion).

285. *Lee*, 330 F.3d at 472 (Wood, J., concurring).

286. United States v. Lanier, 520 U.S. 259, 272 n.7 (1997) (interpreting Graham v. O'Connor, 490 U.S. 386 (1989)).

287. *Lee*, 330 F.3d at 474 (Wood, J., concurring).

B. *Takings: A Risky Alternative*

One likely implication of holding the Fourth Amendment "irrelevant" to return of property cases is that courts will look to the Fifth Amendment Takings Clause to fill the constitutional gap widened by the inadequacy of the due process clauses. The Constitution's imperative that "private property [not] be taken for public use, without just compensation"[288] may be the only viable alternative when courts refuse to hold that no constitutional restrictions exist with respect to government's power to seize and keep private property.[289] Supreme Court precedent dealing with the duty to provide evidence, however, in addition to the pervasiveness of the same temporal issues that plague the Fourth Amendment, may severely limit the applicability of the Takings Clause to these kinds of cases. The Fourth Amendment's specific parameters with respect to government treatment of private property will better safeguard these important property rights in the criminal procedure context.

1. *Judge Wood's Takings Claim*

Lee himself did not argue that the City's refusal to return his car constituted a taking for which he should be compensated,[290] but Judge Wood's concurrence outlined a hypothetical takings claim that she felt should at least be an alternative if Lee was barred from relief under the Fourth Amendment.[291] According to Judge Wood, Lee's case appears to meet the criteria of a valid takings claim.[292] In other words, (1) Lee had a property interest in his car; (2) the City actually *took* his car ("physical occupation is enough"[293] and "[t]he fact that the taking . . . was temporary rather than permanent is of no consequence");[294] and (3) and the City took Lee's car for a public purpose.[295] If successful, Wood posited, Lee might seek compensation for the "reasonable value of the use of the car during the period that it was held by the

288. U.S. CONST. amend. V.

289. *See Lee*, 330 F.3d at 476–77 (Wood, J., concurring).

290. *Id.* at 466 n.5 (majority opinion) (observing that "[o]ther courts have likened continued retention of evidence as a taking without just compensation. . . . [But] Lee makes no such argument before this court").

291. *See id.* at 475–77 (Wood, J., concurring).

292. *See id.* at 474–75.

293. *Id.* at 475.

294. *Id.* at 474.

295. *Lee*, 330 F.3d at 474 (Wood, J., concurring).

City after the initial seizure was finished" or for any damage done to the car while the City temporarily used it.[296]

Because individuals in Lee's position are concerned with ensuring that their property rights are not subrogated to every whim of public exigency, the Takings Clause does seem to be the logical Constitutional safeguard in such cases. After all, as one commentator put it: "The just compensation requirement functions as an important check on a government's temptation to provide services by expropriating private property."[297] The issue is whether the property owner is being forced to "bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[298]

Individuals in Lee's shoes—innocent bystanders whose property is needed by police for a criminal prosecution—are in a good position to argue that requiring them alone to bear the cost of the investigation is unjust.[299] Moreover, even if the initial seizure of Lee's property (the period during which the City actually had need of the car for its inves-

---

296. *Id.* at 475. These remedies illustrate the awkward fit a takings claim might have in this context. For instance, does prevailing on a takings claim mean that the City must drop all of the towing and storage fees *in addition* to "just compensation" for the loss of use of the car, or is the compensation for use of and damage to the car merely to be credited against the usual fees? If the latter, what is to stop the City, which impliedly already has the right to charge these fees (because the fiscal justification behind them meets rational basis review), from charging even more to hedge against possible takings claim liability?

297. Lior J. Strahilevitz, Note, *When the Taking Itself is Just Compensation*, 107 YALE L.J. 1975, 1979 (1998).

298. C. Wayne Owen, Jr., Note, *Everyone Benefits, Everyone Pays: Does the Fifth Amendment Mandate Compensation When Property is Damaged During the Course of Police Activities?*, 9 WM. & MARY BILL RTS. J. 277, 277 (2000) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960) (internal quotation marks omitted) and arguing that the Fifth Amendment requires compensation for innocent third party landowners when police cause damage to property while executing their official duties).

299. *See generally* Spencer M. Punnett II, Note, *The "Takings" Clause and the Duty to Provide Evidence: An Alternative Analysis of* Emery v. State, 80 NW. U. L. REV. 1094 (1985–1986) (arguing that whether government must compensate for damage to property used as evidence in a criminal proceeding should depend on the culpability of the plaintiff); *see also* Owen, *supra* note 298, at 300 (arguing that "[t]he clear mandate of the Just Compensation Clause is to provide recompense for the innocent third party whose property has been damaged by government action"). *But see* Strahilevitz, *supra* note 297, at 1977–78 (arguing that in the case of an innocent owner of an apartment complex whose property is damaged during the arrest of a drug-dealing tenant, the "positive spillover effects," the expulsion of a "nuisance tenant," for example, all lead to the conclusion that "the taking itself [constitutes] just compensation") (internal quotation marks omitted). These arguments derive from situations where property was actually damaged or destroyed. While Lee's car was damaged when it was spray painted, the primary focus of this Note is whether Lee should be compensated for the temporary loss of possession of his car, or specifically, whether he should have to pay fees to regain possession of the car. For the purposes of this Note, we assume that this would be a taking tantamount to damage or destruction. *See Lee*, 330 F.3d at 475 (Wood, J., concurring) (explaining that "a claimant need only prove that 'property,' in the sense of 'the group of rights inhering in the citizen's relation to [a] physical thing,' has been 'taken'").

tigation) is noncompensable, surely requiring Lee to shoulder the burden of the secondary costs of towing and storage (as opposed to just allowing Lee to reclaim the car when the City was done with it) constitutes a valid takings claim. Indeed, such "burden-bearing" analysis would provide Lee with far more protection than the Fourth Amendment might because the City could not fall back on the argument that such fees were reasonable, as they may have been in Lee's case.[300] This result is possible because the Takings Clause, like the Due Process Clauses, does not boast an express standard by which to balance interests. But this also means courts will be forced to ad lib when confronted with cases where the constitutional provision is facially relevant, but good judgment, or merely common sense, militate against its application. In other words, because the Takings Clause has no inherent standard by which courts can balance countervailing interests, courts' wariness of binding government in trivial takings claims may preclude legitimate takings claims in the return of property context. As two commentators have noted: "It can't be the case, can it, that the government must provide market-rate compensation for every service that it extracts from citizens, including the duty to provide evidence in court proceedings?"[301]

2. *Bringing A Takings Claim Would Be an Uphill Battle*

The Supreme Court, in fact, echoed this sentiment in *Hurtado v. United States*,[302] where it held that the detention of pretrial witnesses in order to assure their testimony is not a compensable taking of those witnesses' time and labor—and lower federal courts and state courts with analogous takings provisions have expanded this holding to physical evidence.[303] And while, as Judge Wood notes, *Hurtado* "speaks narrowly" of giving testimony and may not have been meant to extend to temporary forfeitures of property,[304] the actual language is not so narrow:

> But the Fifth Amendment does not require that the Government pay for the performance of a public duty [if] it is already owed. . . . It is beyond dispute that there is in fact a public obligation to pro-

300. *See supra* notes 231–258 and accompanying text.

301. Gary Lawson & Guy Seidman, *Taking Notes: Subpoenas and Just Compensation*, 66 U. CHI. L. REV. 1081, 1084 (1999) (offering this "powerful intuition" as one reason why the question of whether the enforcement of a subpoena *duces tecum* calling for the production of evidence is a taking that requires just compensation has attracted little interest).

302. 410 U.S. 578 (1973).

303. Lawson & Seidman, *supra* note 301, at 1083–84.

304. *Lee*, 330 F.3d at 476 (Wood, J., concurring).

> vide evidence . . . and that this obligation persists no matter how financially burdensome it may be.[305]

Indeed, courts have cited the language in *Hurtado* in rejecting takings claims where physical property was involved, refusing to make the distinction between the sacrifice of personal services and the taking of personal property.[306] This precedent establishes a high hurdle for claimants relying on the Fifth Amendment Takings Clause to regulate government conduct with respect to property needed as evidence. In light of *Hurtado*, the *Lee* court would not have had to stray far to hold Lee's "public duty" and "obligation to provide evidence" precluded any grievance he may have had with the City's policy concerning automobiles needed as evidence in criminal proceedings.

Lee's best takings argument would be that the taking did not occur until after the City no longer needed his car as evidence, but given the Seventh Circuit's approach to the Fourth Amendment, this also would be a tough sell. Why would the court recognize the transformation of a noncompensable taking to a compensable taking when it summarily dismissed the idea that a reasonable seizure could transform into an unreasonable seizure? Is a "taking" less of a temporally limited act than a "seizure"?[307] Moreover, the "obligation to provide evidence" justification hardly disappears when government ceases to actually need the property—the City need only point out that towing and storage are necessary costs incurred during the criminal investigation. Again, because courts will be hesitant to open the door to takings challenges every time the government requires a citizen's help with a criminal case—they will feel compelled to dismiss claims even in cases where the burden placed on the citizen is clearly unjust. Without a vehicle to balance an individual's interest in his private property

---

305. *Hurtado*, 410 U.S. at 588–89 (internal citations omitted).

306. *See* Emery v. State, 688 P.2d 72, 77–79 (Or. 1984) (holding that the dismantling of a pickup truck necessary for a murder prosecution was not a compensable taking); *see also* Soucy v. State, 506 A.2d 288, 293 (N.H. 1985) (requiring owner of a burned down apartment building to preserve the damage as evidence in a criminal prosecution is not a compensable taking under the New Hampshire constitution); Eggleston v. Pierce County, 64 P.3d 618, 626 (Wash. 2003) (holding search during murder prosecution and preservation order rendering plaintiff's home uninhabitable was not a compensable taking under the Washington constitution).

307. In fact, *Webster's New College Dictionary* defines to "take" as follows: "[T]o get into one's possession by force, skill, or artifice, esp.: to capture physically: SEIZE . . . ." WEBSTER'S II NEW COLLEGE DICTIONARY 1123 (1999). Moreover, the Supreme Court describes a taking as the "deprivation" of an individual's property rights in "relation to a physical thing," United States v. General Motors Corp., 323 U.S. 373, 378 (1945); that is, "it deals with what lawyers term the individual's 'interest' in the thing in question," *id.* at 378, which sounds like *Place*'s "meaningful interference with possessory interest" definition of seizure. *See* United States v. Place, 462 U.S. 696 (1983). Neither definition implies a temporal limitation, but the Seventh Circuit had no trouble attaching one to the Fourth Amendment.

against countervailing government's law enforcement interests, courts will be wary of inviting the Fifth Amendment Takings Clause into return of property cases like *Lee*.

The bottom line is that while the Takings Clause *could* be the answer for individuals whose property is seized and not properly returned, relying on its applicability in the criminal context could be risky. Given the inadequacy of the due process clauses in these cases, precluding Fourth Amendment protection to citizen's suffering from the unreasonable detention of their private property may create a constitutional gap where important property rights are left exposed to autocratic government interference.

VI. CONCLUSION

Most people have no qualms about allowing the government to temporarily take and use their private property if it will help remove a dangerous criminal from the streets. Most people, however, also have the expectation that their property will be returned to them as soon as it is no longer needed, and that any conditions on that return will be reasonable. People expect this because they know that the Constitution places a very high value on the protection of private property.[308]

The Seventh Circuit in *Lee* held that the Fourth Amendment is not the source of this protection because seizure is limited temporally to the moment property is physically taken. This narrow reading of the Fourth Amendment does not comport with Supreme Court precedent which defines seizure as a meaningful interference with a possessory interest—suggesting that any interference, no matter when it occurs, constitutes a seizure while the individual still has a legal interest in that property. What is more, the Fourth Amendment reasonableness standard, which seeks to balance law enforcement interests against an individual's private property interests, is well equipped to govern return of property cases. This is in stark contrast to the practicality of applying due process principles, which invariably will give deference to government interests, in the return of property context.

Finally, while the Takings Clause may be an apt candidate to curb government discretion and protect these important rights, reliance on a takings claim in the criminal context is risky, especially in light of Supreme Court precedent rejecting such claims where there is a duty to provide evidence. If this route is closed, *Lee*'s broad holding precluding Fourth Amendment protections to individuals whose property has been lawfully taken but not properly returned means that a consti-

308. *See Lee*, 330 F.3d at 476–77 (Wood, J., concurring).

tutional gap exists with respect to important property rights. It is possible that the Constitution is silent with respect to this interest—that the Framer's meant only to require the government to act reasonably when taking property, and left it free to be unreasonable regarding its return. But this does not reflect the temperament of the Framers in 1787. As one commentator noted, James Madison believed an essential object of the law in a civilized society is the preservation of personal property rights: "A government 'which [even] indirectly violates [individuals'] property in their actual possessions is not a pattern for the Unites States.'"[309] The best way to avoid this "pattern" in cases like Lee's is to apply the Fourth Amendment.

*Graham Miller**

309. SAUL K. PADOVER, THE COMPLETE MADISON 268–69 (1953) (quoting remarks published in NATIONAL GAZETTE, Mar. 29, 1792); SIEGAN, *supra* note 284, at 14 (citing 1 THE RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787, at 450 (Max Farrand ed., 1911)).

* B.A. University of Wisconsin-Madison; J.D. expected May 2006, DePaul University College of Law. I would like to thank Tom Peters for his insight and advice, Dr. Jeffrey Miller for his inspiration, and Cassandra Peters for her understanding and support.