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## Collect Call for Clarification: How Carpenter Has (and Has Not) Changed Modern Fourth Amendment Jurisprudence

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# COLLECT CALL FOR CLARIFICATION: HOW *CARPENTER* HAS (AND HAS NOT) CHANGED MODERN FOURTH AMENDMENT JURISPRUDENCE

**Abstract:** Since the 1800s, the United States Supreme Court has struggled to define the limits of the Fourth Amendment and adapt the scope of its protection to advances in technology. The new ways we use technology to interact, and the role such technology plays in society, create unique questions that judicial precedent based on old technology has trouble answering. Most recently, cell phones and mobile applications have changed the way millions of Americans communicate with each other, and access and store information. For years the government accessed this shared information through subpoenas without triggering the Fourth Amendment’s protection from unwarranted searches and seizures. This was justified under the third-party doctrine—when an individual shares information with a third party they lose their expectation of privacy to it, and, thus, Fourth Amendment protection. In *Carpenter v. United States*, the Supreme Court qualified this analysis, and held that despite the information being shared with a third party, an individual maintains an expectation of privacy to their cell site location information, a pervasive and historical record of personal whereabouts derived from cell phone communication with cell towers. The Supreme Court’s narrow decision leaves questions about what other types of data may be protected. This Note argues that the implicit logic found in the history of the Fourth Amendment and its jurisprudence suggests that the Fourth Amendment will continue to protect pervasive means for exercising other rights secured in the Constitution.

## INTRODUCTION

As you read this, the cell phone in your purse or pocket is continuously communicating with nearby cell towers, sharing data and identifying its location.<sup>1</sup> As frequently as every seven seconds, this cell site location information (“CSLI”) is updated.<sup>2</sup> CSLI from a single tower contains sufficient data to accurately pinpoint your location within 200 feet, and CSLI from multiple towers

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<sup>1</sup> See Eric Lode, Annotation, *Validity of Use of Cellular Telephone or Tower to Track Prospective, Real Time, or Historical Position of Possessor of Phone Under Fourth Amendment*, 92 A.L.R. FED. 2d 1, § 2 (2015) (collecting and discussing state court cases regarding the application and validity of Fourth Amendment protection to cellular phone location information shared with cell towers).

<sup>2</sup> See *Commonwealth v. Princiotta*, No. 2009-0965, 2013 WL 1363901, at \*2 (Mass. Dist. Ct. Apr. 1, 2013) (noting that registration with cell towers occurs roughly every seven seconds); Lode, *supra* note 1, § 2 (citing *State v. Earls*, 214 N.J. 564, 568 (2013)) (noting the frequency with which cell phones communicate with cell towers).

can be triangulated to determine an even more precise location.<sup>3</sup> Determining whether the Fourth Amendment protects this information from unwarranted searches and seizures is the latest chapter in the quest to unearth what exactly the Fourth Amendment protects and why.<sup>4</sup>

The Fourth Amendment protects citizens' rights "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and provides that "no Warrants shall [be] issue[d], but upon probable cause . . . particularly describing the place to be searched, and the persons or things to be seized."<sup>5</sup> The language makes it clear that persons, papers, and homes are protected, but the United States Supreme Court has continued to expand the Fourth Amendment's protection while struggling to coherently explain its reasons for doing so.<sup>6</sup> The owner of the various types of property enumerated in the Fourth Amendment has protection against their search and seizure, but the Justices of the Court still dispute whether property rights or privacy drive the Fourth Amendment.<sup>7</sup>

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<sup>3</sup> Lode, *supra* note 1, § 2. This phenomenon exists because the demand for services necessitates having multiple towers to service customers. *See id.* As the phone communicates with more than one tower at once, more than one relative location is recorded. *See id.* (discussing the accuracy of location information through CSLI and triangulating location with more than one CSLI).

<sup>4</sup> *See, e.g.,* *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018) (declining to extend the third-party doctrine to cover CSLI and holding that the disclosure of this information to third-parties "does not by itself overcome the user's claim to Fourth Amendment protection"); *United States v. Miller*, 425 U.S. 435, 443 (1976) (developing the third-party doctrine: one who conveys information, even if only for a limited purpose, to a third party assumes the risk that the third party will convey the information to the police); *Katz v. United States*, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring) (articulating the reasonable expectation of privacy test); *Boyd v. United States*, 116 U.S. 616, 630 (1886) (holding that to protect the individual's right from self-incrimination under the Fifth Amendment the papers had to be protected under the Fourth Amendment from warrantless search and seizure). *See generally* Lode, *supra* note 1 (collecting and discussing state court cases regarding the application and validity of Fourth Amendment protection to cellular phone location information shared with cell towers). This Note takes a descriptive approach, analyzing the Fourth Amendment's history and precedent to identify a unifying logic illustrated in the *Carpenter* decision.

<sup>5</sup> U.S. CONST. amend. IV.

<sup>6</sup> *See Carpenter*, 138 S. Ct. at 2217; *Miller*, 425 U.S. at 443; *Katz*, 389 U.S. at 360–61 (Harlan, J., concurring); *Boyd*, 116 U.S. at 630.

<sup>7</sup> *See Carpenter*, 138 S. Ct. at 2267–72 (Gorsuch, J., dissenting) (arguing in favor of the employment of a positive law approach to the Fourth Amendment and discussing what its application to CSLI might look like); William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1827–29 (2016) (developing a model of positive law anchors to Fourth Amendment protection based on legal rights recognized under other substantive areas of law such as property and torts); Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 570–73 (2009) (defending the third-party doctrine but collecting and discussing the doctrinal and functional critiques of the doctrine found in both scholarship and dissenting opinions by Supreme Court justices); Daniel J. Solove, *Fourth Amendment Pragmatism*, 51 B.C. L. REV. 1511, 1528–29 (2010) ("The Fourth Amendment should regulate government information gathering whenever it causes problems of reasonable significance. Government information gathering often poses significant problems affecting freedom and democracy. Government information gathering activities can invade privacy and inhibit freedom of speech and association.") (arguing that the significance of the problems

In the late 1960s, the United States Supreme Court formally adopted the rationale that a reasonable expectation of privacy, and not solely property rights, triggered Fourth Amendment protection.<sup>8</sup> In *Katz v. United States*, the Court articulated a two-prong test requiring: (1) a subjective expectation of privacy by the individual; and (2) that the expectation of privacy be one that society is willing to accept as reasonable.<sup>9</sup> This second objective prong has proved hard to employ, given what many scholars have identified as a circularity in the logic of what society is willing to accept as reasonable.<sup>10</sup> Before the Court clarified how to apply the reasonable expectation of privacy test, it introduced the third-party doctrine—by sharing information with a third party, the individual assumes the risk that the recipient may share that information with the government and, thus, the individual loses their expectation of privacy.<sup>11</sup> Instead of analyzing what made an expectation of privacy society was willing to recognize as reasonable, the Court shifted its focus to the more narrow question of whether the information was shared.<sup>12</sup> Meanwhile, advances in

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caused by the surveillance should determine the scope of the Fourth Amendment in place of the reasonable expectation of privacy standard). As Baude and Stern discuss in their article, Justice Scalia repeatedly used positive law rights to supplement the reasonable expectation of privacy test. Baude & Stern, *supra*, at 1827 n.21 (citing *Fernandez v. California*, 571 U.S. 292, 308 (2014) (Scalia, J., concurring) (stressing that the reasonable expectation of privacy test was added as a supplement to, not a substitute for, the property understanding of the Fourth Amendment); *Florida v. Jardines*, 569 U.S. 1, 11 (2013) (same); *United States v. Jones*, 565 U.S. 400, 407–08 (2012) (same); *Georgia v. Randolph*, 547 U.S. 103, 143–44 (2006) (Scalia, J., dissenting) (arguing that changes in property law affect changes in Fourth Amendment application)).

<sup>8</sup> See *Katz*, 389 U.S. at 360–61 (Harlan, J., concurring) (articulating the two-prong reasonable expectation of privacy test despite the majority not providing a test for its holding). The subjective prong of the test requires that the individual subjectively believe he has a reasonable expectation of privacy and the objective prong requires that the expectation of privacy be one that society is willing to recognize. *Id.* Harlan, when laying out the test in his concurrence, fails to explain the criteria for when an expectation of privacy satisfies the second prong of the test. *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See JEFFERY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* 60 (2001) (“Harlan’s test was applauded as a victory for privacy, but it soon became clear that it was entirely circular.”); Baude & Stern, *supra* note 7, at 1825 (noting the circularity of the reasonable expectation of privacy test); Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 808–09 n.23 (2004) (noting that the reasonable expectation of privacy test is circular because there is only a reasonable expectation of privacy when the courts decide that that expectation should be protected) (citing Michael Abramowicz, *Constitutional Circularity*, 49 UCLA L. REV. 1, 60–61 (2001) (“Fourth Amendment doctrine, moreover, is circular, for someone can have a reasonable expectation of privacy in an area if and only if the Court has held that a search in that area would be unreasonable.”)). This Note suggests that one way to solve the circularity of Justice Harlan’s test is by grounding the objective prong in the premise that the Fourth Amendment protects the pervasive means through which citizens exercise their other constitutionally secured rights, an implicit logic in many of the Supreme Court’s decisions. See *infra* Part III.

<sup>11</sup> See *Miller*, 425 U.S. at 443; *Katz*, 389 U.S. at 360–61 (Harlan, J., concurring).

<sup>12</sup> See *Miller*, 425 U.S. at 442–43 (holding that a customer at a bank does not have a reasonable expectation of privacy to the information he shared to a third party).

technology continued to assume new roles in society and change the way members of society interacted with each other, challenging the Court's own notion that sharing information put Fourth Amendment protection out of reach.<sup>13</sup>

Most recently, in 2018, the Supreme Court reinterpreted these doctrines in *Carpenter v. United States* to determine what protection the Fourth Amendment provides to an individual's historical CSLI.<sup>14</sup> *Carpenter's* majority and dissents frame their arguments along the two principal schools of Fourth Amendment thinking.<sup>15</sup> The majority supported its decision using the reasonable expectation of privacy test adopted in the late 1960s, and held, for the first time, that a person maintained an expectation of privacy society was willing to recognize even after they shared that information with a third party.<sup>16</sup> The dis-

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<sup>13</sup> See, e.g., *Carpenter*, 138 S. Ct. at 2217 (noting the prevalence of cell phones in society and holding that historical CSLI warranted Fourth Amendment protection); *Riley v. California*, 134 S. Ct. 2473, 2488–89 (2014) (noting the unique nature of the data stored on cell phones in society and holding that police officers could not search the content of cell phones on arrest without a warrant); *Kyllo v. United States*, 533 U.S. 27, 34–35 (2001) (using noninvasive technology to collect information otherwise not made readily available to the public infringes upon Fourth Amendment protection from warrantless searches and seizures); *Katz*, 389 U.S. at 360–61 (Harlan, J., concurring) (noting the prevalence of telephones in society and holding that an individual has a reasonable expectation of privacy when they enter a telephone booth, shut the door behind them, and communicate through the telephone).

<sup>14</sup> See *Carpenter*, 138 S. Ct. at 2217.

<sup>15</sup> See *id.* at 2217–21, 2235, 2257, 2272 (applying the majority's reasonable expectation of privacy test and applying the dissent's property concepts). Compare *Katz*, 389 U.S. at 360–61 (Harlan, J., concurring) (articulating the reasonable expectation of privacy test and its two prongs: (1) subjective belief that there was a reasonable expectation of privacy; and (2) willingness of society to accept that expectation of privacy as reasonable), with *Baude & Stern*, *supra* note 7, at 1827 n.21 (citing *Fernandez*, 571 U.S. at 308 (Scalia, J., concurring) (stressing that the reasonable expectation of privacy test was added as a supplement to, not a substitute for the property understanding of the Fourth Amendment); *Jardines*, 569 U.S. at 11 (same); *Jones*, 565 U.S. at 407–08 (same); *Randolph*, 547 U.S. at 143–45 (2006) (Scalia, J., dissenting) (arguing that changes in property law affect changes in Fourth Amendment application)).

<sup>16</sup> *Carpenter*, 138 S. Ct. at 2216–17, 2220–21. The Court declined to extend the third-party doctrine to CSLI, holding that the disclosure of this information to third-parties “does not by itself overcome the user’s claim to Fourth Amendment protection.” *Id.* at 2217. Individuals maintain an expectation of privacy towards the CSLI tracking their movement and, therefore, government-compelled disclosure of the location information under the Stored Communications Act constitutes a search. *Id.* at 2221. The Act provides that when law enforcement officials “‘offer[] specific and articulable facts showing that there are reasonable grounds to believe’ that the records sought ‘are relevant and material to an ongoing criminal investigation,’” the government may compel disclosure of information under the jurisdiction of the Act. *Id.* at 2212 (quoting 18 U.S.C. § 2703(d) (2018)). The resultant discrepancy between the probable cause standard and the standard enumerated in the Act was rectified by the Court in *Carpenter* by requiring the government to have probable cause to compel disclosure. See *id.* at 2221; Lode, *supra* note 1, § 2 (noting that the standard for disclosure under the Stored Communications Act is lower than the standard applied for probable cause). The standard for probable cause “usually requires ‘some quantum of individualized suspicion.’” *Carpenter*, 138 S. Ct. at 2221 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 560–61 (1976)) (noting that unlike the general standard, the Fourth Amendment does not have one “irreducible” standard when it comes to warrants, but

sents refuted protection of CSLI and, instead, advocated for a property-based conception of the Fourth Amendment that has fallen in and out of practice throughout its jurisprudence.<sup>17</sup>

In *Carpenter*'s wake, it is clear that historical CSLI is protected by the Fourth Amendment and that society is willing to recognize an expectation of privacy in historical CSLI as reasonable, despite the fact that it is shared with a third party.<sup>18</sup> The Supreme Court, however, was equally clear that *Carpenter* was a narrow ruling.<sup>19</sup> As a result, it is unclear how *Carpenter*'s adjustments to Fourth Amendment analysis will extend to other aspects of modern life on the Internet.<sup>20</sup> As Justice Gorsuch notes in his dissent, much of our lives are now online and companies are both keeping records for us and keeping records about us.<sup>21</sup> Our private papers, once kept locked away, are now held on servers

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rather the protection differs with the reasonable expectation of privacy associated with the area subject to the warrant). The Stored Communications Act, however, essentially required law enforcement officials to show that the requested information might be pertinent to their ongoing investigation, a discrepancy that the Court emphasized was "gigantic." *Id.* The *Carpenter* Court recharacterized the breadth of the third-party doctrine, reasoning that although disclosure to a third party diminishes the expectation of privacy when an individual shares the information, the diminished expectation does not necessarily put the Fourth Amendment out of reach. *Id.* at 2219 (citing *Riley*, 134 S. Ct. at 2485, 2488 (2014) (holding that police officers could not search the content of cell phones on arrest without a warrant)).

<sup>17</sup> See *Carpenter*, 138 S. Ct. at 2235 (Kennedy, J., dissenting) ("This case should be resolved by interpreting accepted property principles as the baseline for reasonable expectations of privacy."); *id.* at 2235 (Thomas, J., dissenting) ("[This case] should turn . . . on whose property was searched . . . . By obtaining the cell-site records of MetroPCS and Sprint, the government did not search Carpenter's property. He did not create the records . . . [or] maintain them, he cannot control them . . . [or] destroy them."); *id.* at 2257 (Alito, J., dissenting) ("[T]he cell-site records obtained by the Government belong to Carpenter's cell service providers, not to Carpenter . . . . Carpenter . . . has no meaningful control over the cell-site records, which are created, maintained, altered, used, and eventually destroyed by his cell service providers."); *id.* at 2272 (Gorsuch, J., dissenting) (arguing that Carpenter had some property rights to his CSLI under the Stored Communications Act but that this argument was not made and thus the case could not be resolved on these grounds).

<sup>18</sup> *Id.* at 2212, 2216–17 (majority opinion).

<sup>19</sup> See *id.* at 2220. The Court said that their holding did not apply to real-time CSLI or "tower dumps." *Id.* Tower dumps are the "download of information on all the devices that connected to a particular cell site during a particular interval." *Id.* The Court also made it clear that its decision did not disturb the application of an unqualified third-party doctrine in other contexts, that it did not disturb the jurisprudence of conventional surveillance techniques and tools, and that it did not mean to address other business records covered by the third-party doctrine that might incidentally reveal location information. *Id.*

<sup>20</sup> See *id.* (noting that the Court's decision was narrow to the facts before it regarding historical CSLI).

<sup>21</sup> *Id.* at 2262 (Gorsuch, J., dissenting). Although dissenting, Justice Gorsuch agreed with protecting the CSLI—however, he dissented in order to advocate an approach through arguments that were not preserved. *Id.* at 2272.

for our convenience.<sup>22</sup> With this shift comes the need for Fourth Amendment protection suited for modern society.<sup>23</sup>

Analyzing the history of the Fourth Amendment and its precedent reveals an implicit logic to the Amendment, and the Supreme Court reemphasized this logic in *Carpenter*.<sup>24</sup> The Fourth Amendment protects more than just the instruments enumerated in the Amendment's language—it protects the means used for exercising other constitutionally secured rights.<sup>25</sup> Not only does this logic help to explain the Fourth Amendment's strained history, but it also grounds the objective prong of the *Katz* test.<sup>26</sup> This logic also informs us how *Carpenter*'s qualification of the third-party doctrine may be extended to other advances in technology.<sup>27</sup>

Part I of this Note discusses the historical context within which the Framers adopted the Fourth Amendment and tracks the Fourth Amendment's judi-

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<sup>22</sup> *Id.* at 2262.

<sup>23</sup> *Id.* (arguing that given how much of our lives are shared on the Internet there is an open question regarding what is left of the Fourth Amendment under the third-party doctrine).

<sup>24</sup> *See id.* at 2219, 2221 (majority opinion) (noting the prevalence and variety of cell phone use and reasoning that although CSLI is not personal papers, the information from CSLI is so pervasive and revealing that an individual's reasonable expectation of privacy is lessened but not destroyed when shared with a third party); *Jones*, 565 U.S. at 415–16 (Sotomayor, J., concurring) (noting that unlike in the past where information gathered was limited and thus painted a limited picture of the life monitored, the volume of easily accessible data can paint a picture of an individual's religious, political, and personal identity, creating a potentially chilling effect on the rights of expression and association and that such effect on the exercise of rights must be considered in any balance); *Smith v. Maryland*, 442 U.S. 735, 751 (1979) (Marshall, J., dissenting) (noting the increasing prevalence of using phones in the late 1970s and warning of the potential impediments that warrantless government surveillance could have on First Amendment freedoms, such as political associations and the press).

<sup>25</sup> *See* Melody J. Brannon, *Carpenter v. United States: Building a Property-Based Fourth Amendment Approach for Digital Data*, CRIM. JUST., Winter 2019, at 20, 22–23 (noting that the *Carpenter* majority, which included Justice Sotomayor, seemed to embrace the position of Justice Sotomayor's concurrence in *Jones*, which held that the pervasiveness of digital communication makes the third-party doctrine “ill suited” and warned of its chilling effects) (emphasis in original omitted) (citing *Jones*, 565 U.S. at 417 (Sotomayor, J., concurring)); H. Brian Holland, *A Cognitive Theory of the Third-Party Doctrine and Digital Papers*, 91 TEMP. L. REV. 55, 60, 95–96 (2018) (accepting that only persons, houses, papers, and effects are covered by the Fourth Amendment and arguing that papers are a special subclass protected by the Fourth Amendment because they are “cognitive artifacts” of the “freedom of thought” protected by the Constitution). Holland argues that unchecked application of the third-party doctrine to all digital media has a chilling effect on rights enjoyed under the Constitution. Holland, *supra*, at 95.

<sup>26</sup> *See Carpenter*, 138 S. Ct. at 2217–19 (analyzing the nature of the information, and how pervasively identifying it is before determining whether the third-party doctrine diminished or extinguished the individual's reasonable expectation of privacy); *Katz*, 389 U.S. at 360–61 (Harlan, J., concurring) (articulating the reasonable expectation of privacy test but not explaining what warrants the willingness of society to accept an expectation of privacy as reasonable).

<sup>27</sup> *See Carpenter*, 138 S. Ct. at 2221 (noting the prevalence of cell phone use and reasoning that although CSLI is not personal papers, the information from CSLI is so pervasive and revealing that an individual's reasonable expectation of privacy is lessened but not destroyed when CSLI is shared with a third party).

cial interpretation over time.<sup>28</sup> Part II discusses the *Carpenter* decision and focuses on the approaches taken by each of the dissents.<sup>29</sup> Part III analyzes the implicit logic of the Fourth Amendment and how it is expressed in *Carpenter*.<sup>30</sup>

## I. WHERE DID THE FOURTH AMENDMENT COME FROM?

The Framers considered it essential to provide protection against the “general warrants” and “writs of assistance” employed by the British Crown during the colonial era.<sup>31</sup> Too fresh were the memories of these arbitrary, unrestrained invasions into the home, and patriots rallied around the condemnation of the practices.<sup>32</sup> Informed by state constitutions adopted in the early republic, the language of the Fourth Amendment reflects colonial attitudes towards three cases of the 1760s.<sup>33</sup> The first two cases, *Entick v. Carrington* and *Wilkes v. Wood*, took place in England and concerned the authors of political writings that angered the British Crown.<sup>34</sup> In *Entick*, agents of the Crown executed general warrants issued by the British secretary of state for the seizure of the defendant, along with his books and papers.<sup>35</sup> In *Wilkes*, the warrant charged agents to search and seize any “authors, printers and publishers” of the “seditious paper” at issue.<sup>36</sup> Lord Camden ruled in favor of both defendants; his decisions stand for the proposition that cause is necessary for searches, seizures, and arrests to be valid.<sup>37</sup> Moreover, the reasoning in *Entick* emphasized the “importance of the private interest in homes and papers.”<sup>38</sup> Lord Camden described the papers, which were the means for communication in that day, as the

<sup>28</sup> See *infra* notes 31–115 and accompanying text.

<sup>29</sup> See *infra* notes 116–177 and accompanying text.

<sup>30</sup> See *infra* notes 178–231 and accompanying text.

<sup>31</sup> *Carpenter*, 138 S. Ct. at 2213–14 (discussing the history preceding the Fourth Amendment).

<sup>32</sup> *Id.* (quoting 10 JOHN ADAMS, THE WORKS OF JOHN ADAMS 248 (1856)).

<sup>33</sup> See William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 396–97 (1995) (discussing the context during which the Fourth Amendment was adopted and its early history thereafter); see also U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

<sup>34</sup> See *Entick v. Carrington*, 19 Howell’s St. Tr. 1029, 1029–31, 1066–67, (C.P. 1765) (*original at Harvard University*) (standing for the principle that cause is needed for search and seizure); *Wilkes v. Wood*, 19 Howell’s St. Tr. 1153, 1169–70 (C.P. 1763) (*original at Harvard University*) (standing for the proposition that cause is necessary for such searches, seizures, and arrests to be valid); see also Stuntz, *supra* note 33, at 397 (noting *Entick* as an influential case during the framing of the U.S. Constitution).

<sup>35</sup> *Entick*, 19 Howell’s St. Tr. at 1029–31; Stuntz, *supra* note 33, at 397.

<sup>36</sup> *Wilkes*, 19 Howell’s St. Tr. at 1163, 1169–70.

<sup>37</sup> *Entick*, 19 Howell’s St. Tr. at 1066–67; *Wilkes*, 19 Howell’s St. Tr. at 1163, 1169–70; Stuntz, *supra* note 33, at 400.

<sup>38</sup> *Entick*, 19 Howell’s St. Tr. at 1066; Stuntz, *supra* note 33, at 399.



“dearest property” with a “secret nature.”<sup>39</sup> Although the defendant had property rights to his papers, Lord Camden reasoned that the privacy interest in this “dearest property” aggravates the circumstances of the initial trespass.<sup>40</sup> Thus, the private interest appears at once rooted in and independent from the rights of property.<sup>41</sup>

The third case, the Boston *Writs of Assistance Case*, took place in the Colonies but did not result in the same protection as *Entick* and *Wilkes*.<sup>42</sup> The Acts of Frauds, passed in 1662 and 1696, allowed customs officers to break into and seize any prohibited or uncustomed goods or merchandise without cause.<sup>43</sup> Merchants in Boston challenged the Acts as invalid because the writs authorized the unchecked discretion of customs agents to infringe on the privilege of privacy in the home.<sup>44</sup> Although the writs were upheld, the Fourth Amendment’s probable cause requirement reflects the position that unchecked discretion to infringe on the privilege of privacy is unacceptable.<sup>45</sup>

Section A of this Part discusses the United States Supreme Court’s pre-*Katz* approach to interpreting the Fourth Amendment.<sup>46</sup> Section B presents the approach taken by the United States Supreme Court after *Katz*.<sup>47</sup>

### A. How We Used to Apply the Fourth Amendment

Confusion regarding the purpose and breadth of the Fourth Amendment began early in its jurisprudence.<sup>48</sup> In 1878, in *Ex parte Jackson*, the United States Supreme Court held that letters and other sealed packages in the mail are “guarded from examination and inspection.”<sup>49</sup> Echoing the language of

<sup>39</sup> *Entick*, 19 Howell’s St. Tr. at 1066.

<sup>40</sup> *See id.* at 1066–67 (standing for the principle that cause is needed for search and seizure); Stuntz, *supra* note 33, at 399–400 (tracing the privacy and property themes throughout the *Entick* and *Wilkes* decisions).

<sup>41</sup> *See Entick*, 19 Howell’s St. Tr. at 1066 (noting that the privacy interest at stake aggravated the harm of the offense); Stuntz, *supra* note 33, at 419 (“To put it differently, privacy protection always limits the government’s substantive power, and if that limit was not the prime reason for these restrictions on criminal law enforcement, it was at least a happy byproduct.”) (footnote omitted).

<sup>42</sup> *Entick*, 19 Howell’s St. Tr. at 1066–67; *Wilkes*, 19 Howell’s St. Tr. at 1169–70; Stuntz, *supra* note 33, at 406.

<sup>43</sup> Stuntz, *supra* note 33, at 406 (quoting Acts of Frauds § 5(2) (1662)).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 404–06.

<sup>46</sup> *See infra* notes 48–70 and accompanying text.

<sup>47</sup> *See infra* notes 71–115 and accompanying text.

<sup>48</sup> *See Boyd*, 116 U.S. at 630 (merging the analysis of the Fourth and Fifth Amendments); *Ex parte Jackson*, 96 U.S. 727, 733 (1878) (holding that Congress’s duty to facilitate the postal service did not deny protection under the Fourth Amendment); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 788 (1994) (noting the merging of the Fourth and Fifth Amendments analysis in *Boyd*).

<sup>49</sup> *Jackson*, 96 U.S. at 733. The only permissible inspection absent a warrant was outwardly apparent observations, such as the letter’s or package’s weight and shape. *Id.*

*Entick*, the Supreme Court made clear that individuals' right to be free from unwarranted searches and seizures extended to their papers, wherever they were.<sup>50</sup> Thus, the powers vested in Congress to create and facilitate a mail system did not extinguish the rights of individuals protected in the Fourth Amendment.<sup>51</sup>

In 1886, the Supreme Court reinforced the Fourth Amendment's protection of an individual's papers in *Boyd v. United States*.<sup>52</sup> The Court held unconstitutional a statute that authorized the use of subpoenas to order the production of invoices for use in an action against the defendant.<sup>53</sup> The Court found this to be equivalent to compelling production of the papers and thus functionally the same as a warrantless search and seizure because it "effects the sole object and purpose of search and seizure."<sup>54</sup> The Court did not stop here, however, and went on to merge the analysis of production of documents under the Fourth Amendment with the Fifth Amendment's protection from self-incrimination.<sup>55</sup> The Court held that the Fourth Amendment protected the papers because if it did not, and the defendant had to turn over the papers, then the defendant could not exercise his Fifth Amendment protection against self-incrimination.<sup>56</sup> After quoting Lord Camden's decision in *Entick*, the Court concluded that property rights were not the only rights infringed during a search and seizure.<sup>57</sup> Rather, "the essence of the offence" was the invasion of a privacy interest—INFRINGEMENT on the "privacies of life" by "arbitrary power."<sup>58</sup> Thus, the analysis in *Boyd* hinged more on the privacy interest at stake

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<sup>50</sup> *Id.*; see *Entick*, 19 Howell's St. Tr. at 1066–67.

<sup>51</sup> *Jackson*, 96 U.S. at 733–37. This protection prevailed regardless of the reality that people gave their property to the government for the property to be delivered elsewhere. *Id.* at 733. Justice Gorsuch, in his dissent in *Carpenter*, noted that *Jackson* suggests a "constitutional floor" for the protection of the Fourth Amendment. *Carpenter*, 138 S. Ct. at 2270–71 (Gorsuch, J., dissenting); see also *Jackson*, 96 U.S. at 733 (ruling that the subordination of Congress's postal power to the Fourth Amendment prevented the mailer's rights to their mailed property from being infringed upon via search and seizure). In his dissent, Justice Gorsuch argued that this mail carrier relationship is a bailment and emphasizes the strength of the property interests protected when the bailment to the government in *Jackson* did not diminish the constitutional guarantees to be free from search and seizure. *Carpenter*, 138 S. Ct. at 2269–71 (Gorsuch, J., dissenting).

<sup>52</sup> See *Boyd*, 116 U.S. at 630 (protecting papers under the Fourth Amendment that could have been self-incriminating under the Fifth Amendment).

<sup>53</sup> *Id.* at 617–20, 622. Under the statute, if the defendant did not produce the subpoenaed documents, it would be presumed that he confessed to the allegations. *Id.* at 621.

<sup>54</sup> *Id.* at 621–22.

<sup>55</sup> *Id.* at 630; see also U.S. CONST. amend. V (securing, in relevant part, prohibition against self-incrimination).

<sup>56</sup> See *Boyd*, 116 U.S. at 630; see also U.S. CONST. amend. V.

<sup>57</sup> *Boyd*, 116 U.S. at 630; see also *Entick*, 19 Howell's St. Tr. at 1029–31, 1066–67.

<sup>58</sup> *Boyd*, 116 U.S. at 630.

and the protection of other constitutional rights than the property interests the individual had in the items.<sup>59</sup>

Conversely, in 1927, in *Olmstead v. United States*, the Supreme Court began to move away from this privacy interest as the guiding principle for Fourth Amendment protection.<sup>60</sup> In *Olmstead*, law enforcement officials wiretapped the defendant's residence and office phonelines without trespassing on his property.<sup>61</sup> The Court limited Fourth Amendment protection to material objects and held that absent any trespass of the defendant's property, the conduct of the agents did not amount to a search and seizure.<sup>62</sup> Fourth Amendment protection did not extend to "wires reaching to the whole world from the defendant's house or office," despite those wires carrying the defendant's private conversations.<sup>63</sup>

Similarly, in 1942, in *Goldman v. United States*, the Supreme Court held that the use of a listening device in an adjacent room to eavesdrop on a telephone conversation held in the privacy of one's office was not a search and seizure under the Fourth Amendment.<sup>64</sup> The agents did not trespass on the defendant's property, and therefore the Court held that the Fourth Amendment did not apply—and the privacy interest so important to Lord Camden in *Entick* and emphasized in *Boyd* was not a factor in the Court's analysis.<sup>65</sup>

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<sup>59</sup> See *id.* at 628–30 (stressing the privacy interest at stake and quoting Lord Camden's decision in *Entick*); see also *Entick*, 19 Howell's St. Tr. at 1066 (discussing the privacy interest infringed upon when there is an unwarranted search and seizure). Although the Court noted that this was an "invasion of [Boyd's] indefeasible right of personal security, personal liberty and private property," it emphasized the infringement of Boyd's privacy interest and not his property rights as the "essence of the offense." *Boyd*, 116 U.S. at 630.

<sup>60</sup> Compare *Boyd*, 116 U.S. at 630 (emphasizing both privacy and property interests at the heart of the Fourth Amendment), with *Olmstead v. United States*, 277 U.S. 438, 466 (1928) (using property concepts, not privacy rights, as the logic behind the Fourth Amendment), *overruled in part by Katz*, 389 U.S. at 360–61 (1967) (Harlan, J., concurring) (using privacy interest infringement as the anchor of the Fourth Amendment).

<sup>61</sup> *Olmstead*, 277 U.S. at 457. The law enforcement officers avoided trespassing on the defendant's property by making the office wiretap in the basement of the building and the residential wiretaps on the streets adjacent to the defendant's residence. *Id.*

<sup>62</sup> *Id.* at 466. The Court in *Olmstead* declined to analogize the relationship between the phone company and the government as a mail carrier. *Id.* at 464. The Court focused on the monopoly held by the government over mail delivery and the fact that the letters were sealed. *Id.*

<sup>63</sup> *Id.* at 465.

<sup>64</sup> *Goldman v. United States*, 316 U.S. 129, 134 (1942), *overruled in part by Katz*, 389 U.S. at 360–61 (Harlan, J., concurring). The apparatus that allowed law enforcement agents to listen to Goldman's conversation was pressed against the wall of an adjoining office. *Id.*

<sup>65</sup> *Id.* at 134–35; see also *Boyd*, 116 U.S. at 628–30 (stressing the privacy interest at stake and quoting Lord Camden's decision in *Entick*); *Entick*, 19 Howell's St. Tr. at 1066 (discussing the privacy interest infringed upon when there is an unwarranted search and seizure). This absence did not go unnoticed, however, and as Justice Murphy noted in his dissent, the privacy interest emphasized as a principal concern in the *Entick* and *Boyd* cases provides the Fourth Amendment the ability to accommodate individuals' protections against modern technology that no longer required entry to search a home and seize information. See *Goldman*, 316 U.S. at 137 (Murphy, J., dissenting).

The absence of a trespass onto the individual's property continued to be a barrier to Fourth Amendment protection until the 1960s.<sup>66</sup> In 1961, the Supreme Court held in *Silverman v. United States* that technical trespass under local law need not be established for the Fourth Amendment's protection to prohibit the recording of oral statements.<sup>67</sup> Law enforcement officials used a device concealed in a heating duct in the defendant's apartment to overhear conversations, and the government argued its permissibility on the technicality of whether a trespass had occurred.<sup>68</sup> The Court did not rest its decision on the law of trespass; rather, it held that government agents intruded into a "constitutionally protected area," absent any further explanation besides suggesting that a house is always one such area.<sup>69</sup> Thus, as the foregoing demonstrates, from the 1880s through the early 1960s, it remained unclear whether property interests or privacy interests triggered the Fourth Amendment as the Supreme Court shifted the essence of the infringement from privacy interests to property interests and back to somewhere in between, without explaining whether "constitutionally protected area[s]" were privacy- or property-oriented.<sup>70</sup>

### B. How Katz Changed All That

It was not until 1967, in *Katz v. United States*, that the Supreme Court embraced privacy interests as the guiding principle for application of Fourth Amendment protection.<sup>71</sup> Law enforcement agents attached a listening device to the outside of a public phone booth to overhear and record the defendant's conversations.<sup>72</sup> The Court held that this search infringed on the defendant's privacy, on which he had "justifiably relied," and thus warranted Fourth

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<sup>66</sup> See *Katz*, 389 U.S. at 360–61 (Harlan, J., concurring); *Silverman v. United States*, 365 U.S. 505, 511–12 (1961) (holding that trespass need not be established for Fourth Amendment protection to be applicable).

<sup>67</sup> *Silverman*, 365 U.S. at 511–12.

<sup>68</sup> *Id.* at 506–07, 511–12. The Court noted that the scope of the Fourth Amendment was not solely measured by infringement on substantive property and torts rights. *Id.* at 511.

<sup>69</sup> *Id.* at 506–07, 511–12. The Court began to chip away at the core principles of the Fourth Amendment articulated in *Entick* and *Boyd*, emphasizing a principal purpose of the Fourth Amendment to be "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion," albeit they were still focused on property in terms of a "constitutionally protected area." *Id.* at 511–12. Justice Douglas in his concurrence went further than simply claiming property rights to be nondeterminative when analyzing the scope of the Fourth Amendment; he argued for privacy to take a greater place in the analysis, finding its infringement to be the aggravating factor instead of the degree of intrusion into a protected area. *Id.* at 512–13 (Douglas, J., concurring).

<sup>70</sup> Compare *Boyd*, 116 U.S. at 630 (emphasizing privacy interests as the "essence of the offense"), with *Silverman*, 365 U.S. at 512 (holding that trespass was not necessary to trigger Fourth Amendment protection, rather infringement into "constitutionally protected area[s]" triggered Fourth Amendment protection), and *Olmstead*, 277 U.S. at 466 (limiting Fourth Amendment protection because government agents did not trespass onto the individual's property).

<sup>71</sup> *Katz*, 389 U.S. at 350–53; *id.* at 360–61 (Harlan, J., concurring).

<sup>72</sup> *Id.* at 348, 357–59 (majority opinion).

Amendment protection.<sup>73</sup> The Court definitively stated that “the Fourth Amendment protects people, not places,” and moved away from the concept of “constitutionally protected area[s]” articulated in *Silverman*.<sup>74</sup>

The Court recognized a privacy interest protected by the Fourth Amendment that was less general than a constitutional right to privacy but broader than the right to privacy individuals enjoy in the exercise of their intimate relations.<sup>75</sup> This privacy interest is less general than a constitutional right to privacy because it only protects against improper government intrusion through searches and seizures when an individual seeks to preserve something as private.<sup>76</sup> This interest is still, however, broader than the right to privacy individuals enjoy in the exercise of their intimate relations articulated by the Court two years earlier in *Griswold v. Connecticut*.<sup>77</sup> Unlike the *Griswold* right to privacy, the privacy interest protected by the Fourth Amendment followed the individual outside the bedroom or home and shielded that which the individual sought to keep private, even in a public place.<sup>78</sup> Thus, the right to privacy followed the defendant out of his home and into the phone booth that he used in the exercise of his right to communicate with others.<sup>79</sup>

Justice Harlan further articulated the standard that should be used when assessing potential Fourth Amendment violations in his concurrence and termed this standard the “reasonable expectation of privacy.”<sup>80</sup> The requirement has two prongs, with a subjective prong requiring that the individual “exhibit[] an actual (subjective) expectation of privacy,” and an objective prong requiring that the individual’s expectation be recognized by society as “reason-

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<sup>73</sup> *Id.* at 353.

<sup>74</sup> *Id.* at 350–52; see also *Silverman*, 365 U.S. at 512 (identifying the “intrusion into a constitutionally protected area” as the infringement determining the scope of the Fourth Amendment).

<sup>75</sup> See *Katz*, 389 U.S. at 350–51 (discussing the parameters of the privacy interest protected by the Fourth Amendment).

<sup>76</sup> See *id.* at 350–52 (explaining that what an individual seeks to keep private, even in a public place, may still be protected by the Fourth Amendment).

<sup>77</sup> Compare *id.* at 350–52 (explaining the privacy interest protected by the Fourth Amendment follows the individual out of their home), with *Griswold v. Connecticut*, 381 U.S. 479, 484–85 (1965) (finding a general right to privacy regarding intimacy in the bedroom). Ironically, *Griswold* cited *Boyd* and another Fourth Amendment case, *Mapp v. Ohio*, when justifying the existence of a right to privacy that was implicit to the rights protected by other amendments. *Griswold*, 381 U.S. at 484–85; see also *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (ruling that evidence seized illegally is inadmissible under the Fourth Amendment); *Boyd*, 116 U.S. at 630 (holding the Fourth Amendment protects “the sanctity of a man’s home and the privacies of life” from government intrusion).

<sup>78</sup> *Katz*, 389 U.S. at 350–52. The Court’s description of this right in the majority opinion appears to be one influenced by the efforts of the individual. *Id.* at 351–52 (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”).

<sup>79</sup> See *id.* at 350–52.

<sup>80</sup> *Id.* at 360–61 (Harlan, J., concurring).

able.”<sup>81</sup> Applying this test, Harlan first reasoned that the defendant expressed his subjective expectation of privacy by shutting the door of the phone booth behind him before he made his call.<sup>82</sup> Harlan then reasoned that the phone booth was a “temporarily private place” once the door was shut and the occupant paid the toll to place a call, entitling the occupant to assume that the conversation was not being overheard by law enforcement.<sup>83</sup> Although Harlan ultimately concluded that society was willing to recognize this expectation of privacy as reasonable, he never articulated what factors to consider in the test’s analysis.<sup>84</sup> Subsequently, the Court did not articulate the parameters for this test, but rather shifted its focus to the question of whether an expectation of privacy survived when the information was shared with a third party.<sup>85</sup>

In 1976, in *United States v. Miller*, the Supreme Court created the third-party doctrine and held that the government may subpoena the records of a third-party bank for information given to the bank by its customers.<sup>86</sup> It made no difference in the analysis that the customers believed that the information was confidential and only used for a limited purpose.<sup>87</sup> The Supreme Court reasoned that the papers were not the defendant’s property; rather, they were the property of the bank.<sup>88</sup> For example, the Court characterized the checks that the defendant gave the bank as “negotiable instruments” rather than “pri-

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<sup>81</sup> *Id.* This expectation generally refers to a place in application, such as a home or a telephone booth; however, it is the person in the area, not the area itself, that is protected by the Fourth Amendment because it is the person’s expectations that protect their conduct in that space. *Id.* at 360–61.

<sup>82</sup> *Id.* at 361.

<sup>83</sup> *Id.*

<sup>84</sup> See *id.* at 360–61 (noting that the objective expectation of privacy was reasonable without articulating any standards or considerations to factor into its analysis); Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 504–05 (2007) (noting that the reasonable expectation of privacy test remains “opaque” and that justices have yet to define what objectively qualifies as reasonable).

<sup>85</sup> See *Smith*, 442 U.S. at 742–43 (holding the numbers dialed shared with a third-party phone company diminishes the expectation of privacy the individual has therein); *Miller*, 425 U.S. at 442–44 (holding there to be no Fourth Amendment infringement when information is shared with a third-party bank); see also Kerr, *supra* note 84, at 505 (noting that the Supreme Court has refrained from providing a single comprehensive test for what makes an expectation of privacy reasonable).

<sup>86</sup> See *Miller*, 425 U.S. at 442–44 (holding there to be no Fourth Amendment infringement when information is subpoenaed from a third party to whom the information was consensually shared).

<sup>87</sup> *Id.* The Court began its opinion by quoting a pre-*Katz* decision, *Hoffa v. United States*, where the Court stated that interests were not protected by the Fourth Amendment unless there was an “intrusion into a zone of privacy, into ‘the security a man relied upon when he places himself or his property within a constitutionally protected area.’” *Id.* at 440 (quoting *Hoffa v. United States*, 385 U.S. 293, 301–02 (1966)). The Court’s ruling thereby returned to a circular reasoning familiar in the case law, where protection from an unconstitutional search and seizure was predicated on an intrusion into a constitutionally protected space left undefined, until the moment the Court found it infringed upon and thus defined it as constitutionally protected. See *supra* note 10 and accompanying text.

<sup>88</sup> *Miller*, 425 U.S. at 440.

vate papers.”<sup>89</sup> The Court premised the newly formulated third-party doctrine on the theory that the defendant assumed the risk that the party he or she voluntarily conveyed information to might convey said information to the government.<sup>90</sup>

The Supreme Court soon extended the third-party doctrine to information individuals share with communication companies to use their services.<sup>91</sup> In 1979, in *Smith v. Maryland*, the telephone company, at the request of law enforcement officials, installed a pen register, a device used to record the numbers dialed from the phone placing the call.<sup>92</sup> The Court found that no legitimate expectation of privacy existed regarding the numbers dialed because those numbers were voluntarily and immediately turned over to the phone company in order for the call to be connected.<sup>93</sup> This voluntary sharing of information with the phone company meant that the dialer assumed the risk of disclosure, and when compared with the facts from *Katz*, the Court held that pen registers do not acquire the contents of the conversation and thus warranted distinction.<sup>94</sup> This extension of the third-party doctrine caused concern for some on the Court.<sup>95</sup> In his dissent, Justice Marshall noted the prevalence of phone use in the lives of Americans in the late 1970s.<sup>96</sup> He warned of the po-

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<sup>89</sup> *Id.* at 440, 442–43. The Court went further, distinguishing the language of *Boyd*’s protection of papers, making the distinction that the papers at issue in *Boyd*, *Boyd*’s business records, were personal papers. *See id.* at 440–43; *Boyd*, 116 U.S. at 618, 630 (emphasizing the privacy and property interests protected in personal papers through the Fourth Amendment). The records at issue—records the bank kept on Miller’s activity such as canceled checks, deposit slips, and monthly statements—were “business records of the bank.” *Miller*, 425 U.S. at 440–43. The Supreme Court considered the means for which the records were being used, and concluded that those records created by Miller, namely the checks, shared no expectation of privacy because they were being used as “negotiable instruments” in Miller’s commercial transactions. *Id.* The Court also justified this lack of privacy interest on the absence of property rights to the records the bank created with Miller’s information. *Id.*

<sup>90</sup> *Miller*, 425 U.S. at 440–43.

<sup>91</sup> *See Smith*, 442 U.S. at 742–44 (holding the numbers dialed are voluntarily divulged to the third-party phone company when a call is placed, thus diminishing the expectation of privacy the individual has thereto).

<sup>92</sup> *Id.* at 737. Despite having previously articulated that property rights were not the fulcrum of the Fourth Amendment analysis, the Court still felt compelled to make clear that no trespass had been committed because the pen register was installed on telephone company property, leaving only the potential infringement of the defendant’s expectation of privacy. *Id.* at 741.

<sup>93</sup> *Id.* at 744–45.

<sup>94</sup> *Id.* at 741, 744–45. In his dissent, Justice Marshall makes the point that “whether privacy expectations are legitimate within the meaning of *Katz* depends not on the risks an individual can be presumed to accept when imparting information to third parties, but on the risks he should be forced to assume in a free and open society.” *Id.* at 750 (Marshall, J., dissenting). Noting the increasing prevalence of using phones in the late 1970s, Justice Marshall warned of the potential impediments that warrantless government surveillance could have on First Amendment freedoms such as political association and the press. *Id.* at 751. Just as the defendant did not expect his conversation in the phone booth to be broadcast to the public, Justice Marshall reasoned that the individual had a similar expectation of privacy when dialing the phone number. *Id.* at 751–52.

<sup>95</sup> *Id.* at 750–51 (Marshall, J., dissenting).

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

tential impediments that warrantless government surveillance could have on the use of that technology in the exercise of other rights secured by the Constitution, such as the First Amendment freedoms of political association and the press.<sup>97</sup>

The 21st century brought more difficult challenges to the scope of the Fourth Amendment.<sup>98</sup> These challenges raised questions regarding whether advances in technology would continue to “shrink the realm of guaranteed privacy” protected by the Fourth Amendment.<sup>99</sup> In 2001, in *Kyllo v. United States*,

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<sup>97</sup> *Id.*; see also U.S. CONST. amend. I (securing, in relevant part, the right to free speech, press, and association).

<sup>98</sup> See *Kyllo*, 533 U.S. at 34–35 (using noninvasive technology to collect information otherwise not made readily available to the public infringes upon Fourth Amendment protection from warrantless searches and seizures). The 1980s also experienced a period of technological advances and new opportunities to push the limits of warrantless tracking, but the means proved less infringing to the Court. Compare *United States v. Knotts*, 460 U.S. 276, 277–80 (1983) (holding there was infringement when otherwise permissible means of tracking are used to collect information otherwise not made available to the public), with *Jones*, 565 U.S. at 404–06 (holding use of GPS tracking attached to the tracked vehicle after it was already in the defendant’s control infringes Fourth Amendment protection from warrantless searches and seizures), *Kyllo*, 533 U.S. at 34–35 (2001) (using noninvasive technology to collect information otherwise not made readily available to the public infringes Fourth Amendment protection from warrantless searches and seizures), and *United States v. Karo*, 468 U.S. 705, 713–15 (1984) (holding there was an infringement when tracking device was used to collect information otherwise made available to the public).

It is worth noting that in *Kyllo*, *Karo*, and *Knotts* the Supreme Court developed the distinction between information made available to the public and that which was not observable to the public with the naked eye. *Kyllo*, 533 U.S. at 32–35; *Karo*, 468 U.S. at 713–15; *Knotts*, 460 U.S. at 277–80. In *Knotts*, a radio transmitter that allowed police to track its location was hidden in a product sold to the defendant. 460 U.S. at 278, 281. The Court held that information obtained was voluntarily made available to the public when one uses public roadways and areas within sight of the roadways. *Id.* Due to this lower expectation of privacy, the use of a radio transmitter to know what is already made available to the public through visual surveillance did not infringe on Fourth Amendment protections. *Id.* The Court did not take issue with the fact that visual surveillance had limitations the tracker did not; rather, the Court equated the information collected by the two and declined to consider whether the installation of a tracking device in the property of a third party by that third party and later sold to the defendant is a search. *Id.* at 278, 281. The next year, the Court answered the questions it declined to rule on in *Knotts*. In *Karo*, the Court ruled that in buying the container, Karo accepted it in its present condition, compromised by the tracking device or not, and therefore there was no search because the container came to him that way. 468 U.S. at 712–14. Although the method employed was acceptable to the Court, the use of the technology was not, and the actions of the government were found to be an infringement of the Fourth Amendment because the tracker was used to determine information that was not made available to the public. *Id.* at 714–16. Here, law enforcement officials had used the tracker to determine that the barrel was inside a residence. *Id.* This information could not have also been collected by visual surveillance because it had not been conveyed to the public and therefore could only have been otherwise collected by a physical intrusion into the home. *Id.* The distinction between information made available to the public and information not observable by the public with the naked eye did not factor into the Court’s analysis in *Carpenter*, therefore further development of this line of reasoning is outside the scope of this Note. See *Carpenter*, 138 S. Ct. at 2217 (analyzing the nature of the information and the nature of the instrument used in collection to determine that historical CSLI warranted Fourth Amendment protection).

<sup>99</sup> See *Kyllo*, 533 U.S. at 33–34 (noting that “[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of



the Supreme Court held that a Fourth Amendment infringement occurred when law enforcement officials aimed a thermal-imaging device at a residence to gather information about the heat signatures of the house.<sup>100</sup> Suspicious that the defendant grew marijuana in his home, agents used the information to determine whether said heat signatures were consistent with other marijuana growing operations.<sup>101</sup> The Court held that collecting the information in this manner was an unreasonable search because the “sense-enhancing technology” obtained information that otherwise could not be collected without physical intrusion into the home.<sup>102</sup>

Amidst these new challenges, the Supreme Court began a slight return to using property law in its Fourth Amendment analysis.<sup>103</sup> In 2012, in *United States v. Jones*, the Supreme Court held that the use of a global positioning system (“GPS”) tracker to collect location information constituted an unreasonable search under the Fourth Amendment.<sup>104</sup> Law enforcement agents attached the GPS tracking device to the defendant’s wife’s car and monitored it remotely.<sup>105</sup> The Court emphasized the Fourth Amendment’s close relationship to property interests and recharacterized the Court’s previous deviation from the property-oriented jurisprudence of the Fourth Amendment.<sup>106</sup> Specifically, the Court characterized *Katz* and the expectation of privacy approach as supplementing, not replacing, the property-based conception of the Fourth Amendment, and therefore *Katz* did not nullify the protections previously reasoned under property law.<sup>107</sup> Importantly, in her concurrence, Justice Sotomayor noted the ease of location tracking given the technology and resources at the gov-

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technology,” and framing the issue before the Court as a question of “what limits there are upon this power of technology to shrink the realm of guaranteed privacy”).

<sup>100</sup> *Id.* at 29–31.

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

<sup>102</sup> *Id.* at 34–35. The Court did, however, note that public use of the technology might render its use by law enforcement agents to be reasonable. *Id.*

<sup>103</sup> See Baude & Stern, *supra* note 7, at 1827 n.21 (noting positive property law approaches taken by Justices of the Supreme Court). As Baude and Stern discuss in their article, Justice Scalia repeatedly used positive law rights to supplement the reasonable expectation of privacy test. *Id.* (citing *Fernandez*, 571 U.S. at 308 (Scalia, J., concurring) (stressing that the reasonable expectation of privacy test was added as a supplement to, not a substitute for, a property understanding of the Fourth Amendment); *Jardines*, 569 U.S. at 11 (same); *Jones*, 565 U.S. at 407–08 (same); *Randolph*, 547 U.S. at 143–45 (2006) (Scalia, J., dissenting) (arguing that changes in property law affect changes in Fourth Amendment application)).

<sup>104</sup> *Jones*, 565 U.S. at 404–07. Although law enforcement officials originally acquired a warrant to place the GPS, time limitation had tolled by the time the device was installed. *Id.* at 402.

<sup>105</sup> *Id.* at 404–07.

<sup>106</sup> *Id.* at 405–10.

<sup>107</sup> *Id.* at 407–09; *id.* at 414 (Sotomayor, J., concurring) (noting that in *Katz*, the Supreme Court enlarged the scope of the Fourth Amendment to include intrusions into reasonable expectations of privacy in addition to and without diminishing the protection from intrusions identified through infringements of property rights).

ernment's disposal.<sup>108</sup> She reasoned that, unlike in the past where the confines of the collection device limited the information gathered and painted a limited picture, the volume of data now easily accessed by the government paints a far more complete picture of an individual's religious, political, and personal identity.<sup>109</sup> Alarmed by the potential chilling effect on the rights of expression and association by this power of surveillance, Justice Sotomayor argued that the potential harm from easy access to information should be weighed when considering the expectation of privacy citizens have in this information.<sup>110</sup>

In 2014, in *Riley v. California*, the Supreme Court ruled that police officers could not search the content of cell phones without a warrant under the search incident to arrest doctrine.<sup>111</sup> Despite the general rule that searches incident to arrest do not require a warrant, the Court held that the purposes of searches incident to arrest—officer safety and protection of evidence—are not applicable to cell phones once they are in the officer's custody.<sup>112</sup> Furthermore, the Court emphasized the “immense storage capacity” of cell phones that makes them unique from that which had traditionally been subject to these searches, given the volume of private information stored on cell phones.<sup>113</sup> The “pervasiveness” of the sensitive information in phones made them unique from other property containing information that police could search incident to arrest.<sup>114</sup> Absent danger to the officer or the potential to destroy evidence, this privacy interest warranted Fourth Amendment protection.<sup>115</sup>

## II. WHAT DID *CARPENTER* DO TO ALL OF THIS?

In 2018, in *Carpenter v. United States*, the Supreme Court made its most recent alteration to its Fourth Amendment analysis.<sup>116</sup> As discussed above, cell phones communicate with cell towers to produce time-stamped location information and cell phone carriers collect this information.<sup>117</sup> Although carriers

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<sup>108</sup> *Id.* at 415–16 (Sotomayor, J., concurring).

<sup>109</sup> *Id.*

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

<sup>111</sup> See *Riley*, 134 S. Ct. 2473, 2485, 2488–90 (2014) (holding that on arrest, police officers cannot search the contents of cell phones without a warrant). Searches incident to an arrest are generally a recognized exception to the Fourth Amendment. *Cupp v. Murphy*, 412 U.S. 291, 295 (1973). These searches permit the arresting police officer to search the individual under arrest without a warrant because it is reasonable for an arresting officer to search for weapons or evidence that could be destroyed. *Id.*

<sup>112</sup> *Riley*, 134 S. Ct. at 2485–86.

<sup>113</sup> *Id.* at 2489–90.

<sup>114</sup> *Id.* at 2490–91.

<sup>115</sup> *Id.*

<sup>116</sup> See *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018) (declining to extend the third-party doctrine to cover CSLI and holding that the disclosure of this information to third-parties “does not by itself overcome the user’s claim to Fourth Amendment protection”).

<sup>117</sup> *Id.* at 2211–12.

primarily use this information for business purposes, under the Stored Wire and Electronic Communications and Transactional Records Access Act these companies disclose this information to law enforcement officials.<sup>118</sup>

The Act provides the rights retained by, and the protections afforded to, users of internet services by providing causes of action to customers when companies improperly handle their information.<sup>119</sup> The rights users have to this information is limited by § 2707 of the Act, which covers content that the government may compel disclosure of without a warrant.<sup>120</sup> This information includes names, addresses, telephone connection records, the lengths of services rendered and the types of services utilized, telephone or instrument numbers, and credit card or bank account numbers.<sup>121</sup> Under the Act, a lower standard than probable cause is utilized when government officials request access to said information.<sup>122</sup>

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<sup>118</sup> *Id.* at 2212. The Act provides that when law enforcement officials “‘offer[] specific and articulable facts showing that there are reasonable grounds to believe’ that the records sought ‘are relevant and material to an ongoing criminal investigation,’” the government may compel disclosure of information under the jurisdiction of the Act. *Id.* (quoting 18 U.S.C. § 2703(d) (2018)). The issue that arises is the discrepancy between the probable cause standard and the standard enumerated in the Act. *Id.* at 2221; Lode, *supra* note 1, § 2 (noting that the standard for disclosure under the Stored Communications Act is lower than the standard applied for probable cause). “The Court usually requires ‘some quantum of individualized suspicion’ before a search or seizure may take place.” *Carpenter*, 138 S. Ct. at 2221 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 560–61 (1976) (noting that unlike the general standard, the Fourth Amendment does not have one “irreducible” standard when it comes to warrants, but rather the protection differs according to the reasonable expectation of privacy associated with the area subject to the warrant)). The Act, however, essentially requires that the law enforcement officials show that the requested information might be “pertinent to their ongoing investigation,” a discrepancy the Court emphasized as “gigantic.” *Id.* Over 12,000 time-stamped location points pertaining to the defendant’s location were collected over 127 days. *Id.* at 2212.

<sup>119</sup> 18 U.S.C. §§ 2701–2712. Regulating providers of electronic communication service (“ECS”) and providers of remote computing service (“RCS”), the Act gives certain, albeit limited, rights to users. Orin S. Kerr, *A User’s Guide to the Stored Communications Act, and a Legislator’s Guide to Amending It*, 72 GEO. WASH. L. REV. 1208, 1214 (2004) (explaining 18 U.S.C. §§ 2701–2712 and recommending amendments to it). Identifying how many of these rights are statutorily provided is the first step in determining what positive law rights exist, and whether the infringement of said rights qualifies as a search or seizure under the positive law approach to the Fourth Amendment. *See* Baude & Stern, *supra* note 7, at 1836–42 (defining search or seizure under the positive law approach and using infringement of rights under other substantive areas of law as the critical inquiry for the Fourth Amendment).

<sup>120</sup> 18 U.S.C. §§ 2701–2712; Kerr, *supra* note 119, at 1236.

<sup>121</sup> 18 U.S.C. § 2707; Kerr, *supra* note 119, at 1236.

<sup>122</sup> 18 U.S.C. §§ 2701–2712; Lode, *supra* note 1, § 2 (noting that the standard for disclosure under the Stored Communications Act is lower than the standard applied for probable cause). Section 2702 also covers the type of information that may be voluntarily disclosed by an ECS or RCS; most of them pertain to circumstances where danger or harm to others would compel the servicer to recognize that the information should be disclosed. *See* § 2702; Kerr, *supra* note 119, at 1236 (explaining the type of information that may be subject to voluntary disclosure). Also relevant to *Carpenter* was the Telecommunications Act of 1996, which gave users the right to have their provider disclose their cell-site information on request. 47 U.S.C. § 222(c)(2) (2012). *See generally* *Carpenter*, 138 S. Ct. at 2211–12.

Section A discusses the majority's holding in *Carpenter*.<sup>123</sup> Section B discusses the dissents in *Carpenter*.<sup>124</sup> Section C discusses scholarship on the Fourth Amendment before and after *Carpenter*.<sup>125</sup>

### A. The Majority's New Approach

In *Carpenter*, the Supreme Court declined to extend the third-party doctrine articulated in *Smith v. Maryland* in 1979 and *United States v. Miller* in 1976, instead holding that the doctrine diminished but did not extinguish the expectation of privacy an individual had in historical CSLI.<sup>126</sup> The automatic sharing of this location information to third-party carriers when the individual's phone was activated did not overcome the individual's reasonable expectation of privacy protected by the Fourth Amendment.<sup>127</sup> The Court reasoned that although disclosure to a third party diminishes the individual's expectation of privacy, the diminished expectation does not necessarily put the Fourth Amendment out of reach.<sup>128</sup> Thus, the information received by the government through its use of a subpoena was an unreasonable search because individuals maintained an expectation of privacy in historical CSLI within reach of the Fourth Amendment.<sup>129</sup>

The Supreme Court held that the unique nature of CSLI warranted this protection because *Smith* and *Miller* considered both the nature of the information collected and the capabilities of the tools used in the collection when determining the legitimacy of the expectation of privacy.<sup>130</sup> As for the first consideration, CSLI provided both historical and contemporaneous time-stamped location information—as if the government had “attached an ankle

<sup>123</sup> See *infra* notes 126–137 and accompanying text.

<sup>124</sup> See *infra* notes 138–155 and accompanying text.

<sup>125</sup> See *infra* notes 156–177 and accompanying text.

<sup>126</sup> *Carpenter*, 138 S. Ct. at 2217; *Smith v. Maryland*, 442 U.S. 735, 742–43 (1979) (holding an individual did not have an expectation of privacy in the numbers shared with a third-party phone company); *United States v. Miller*, 425 U.S. 435, 442–44 (1976) (holding an individual did not have an expectation of privacy in information shared with a third-party bank).

<sup>127</sup> See *Carpenter*, 138 S. Ct. at 2217, 2220.

<sup>128</sup> *Id.* at 2217, 2219–20.

<sup>129</sup> *Id.* at 2219–20 (citing *Riley v. California*, 134 S. Ct. 2473, 2485, 2488–89 (2014)) (holding that on arrest, police officers cannot search the contents of cell phones without a warrant).

<sup>130</sup> *Id.* (citing *Miller*, 425 U.S. at 442); *Smith*, 442 U.S. at 742–43 (holding the numbers dialed are voluntarily divulged to the third-party phone company when a call is placed, thus diminishing the expectation of privacy the individual has thereto); *Katz v. United States*, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring) (articulating the reasonable expectation of privacy test). The Supreme Court held that pen registers, collecting the limited information of numbers dialed, and checks, negotiable instruments, both lack the capabilities to reveal comparably “identifying information” as the cell towers at bar. See *Carpenter*, 138 S. Ct. at 2216–17, 2219–20 (considering the capabilities of the surveillance systems as well as the information collected when considering the expectation of privacy); see also *Riley*, 134 S. Ct. at 2490 (considering the capacities and volume of sensitive information stored by cell phones in determining the expectation of privacy).

monitor” to the suspect.<sup>131</sup> The Court then considered the capabilities of CSLI.<sup>132</sup> Here, the Court found no limitations on the pervasive information collected because carriers compiled CSLI automatically and the government effortlessly received this information by requesting it via subpoena.<sup>133</sup>

Not only was this information and its form of collection distinguishable from *Smith and Miller*, but the Court also discussed a third consideration in reasoning that the third-party doctrine should not apply to CSLI: the user did not voluntarily share their CSLI.<sup>134</sup> The user did not meaningfully assume the risk of potential disclosure because only by disconnecting the phone from its service could the user stop the information from being shared.<sup>135</sup> The Court premised the significance of this factor on cell phones being a “pervasive and insistent part of daily life,” such that “carrying one is indispensable to participation in modern society.”<sup>136</sup> Nevertheless, the Court made it clear that its decision was narrow and stressed that the subject of its decision was the “unique” nature of historical CSLI, and not the use of real-time CSLI or “tower dumps” not before the Court.<sup>137</sup>

### B. Diverging Dissents

In *Carpenter*, four justices dissented and framed their dissents using property-based conceptions of the Fourth Amendment.<sup>138</sup> A property-based approach to the Fourth Amendment requires a property interest to be infringed upon for the Court to find a “search” that triggers the application of the Fourth Amendment.<sup>139</sup> A similar but broader approach to the property conception is

<sup>131</sup> *Carpenter*, 138 S. Ct. at 2218.

<sup>132</sup> *See id.* at 2219.

<sup>133</sup> *Id.* at 2216–17, 2219–20.

<sup>134</sup> *Id.* at 2220.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* (quoting *Riley*, 134 S. Ct. at 2484).

<sup>137</sup> *Id.*

<sup>138</sup> *See id.* at 2235 (Kennedy, J., dissenting) (“This case should be resolved by interpreting accepted property principles as the baseline for reasonable expectations of privacy.”); *id.* at 2235 (Thomas, J., dissenting) (“[This case] should turn . . . on *whose* property was searched . . . . By obtaining the cell-site records of MetroPCS and Sprint, the Government did not search Carpenter’s property. He did not create the records . . . [or] maintain them, he cannot control them . . . [or] destroy them.”); *id.* at 2257 (Alito, J., dissenting) (“[T]he cell-site records obtained by the government belong to Carpenter’s cell service providers, not to Carpenter . . . . Carpenter . . . has no meaningful control over the cell-site records, which are created, maintained, altered, used, and eventually destroyed by his cell service providers.”); *id.* at 2272 (Gorsuch, J., dissenting) (arguing that the defendant had some property rights to his CSLI under the Stored Communications Act but that this argument was not made and thus the case could not be resolved on these grounds).

<sup>139</sup> *See Olmstead v. United States*, 277 U.S. 438, 466 (1928), *overruled in part by Katz*, 389 U.S. at 360–61 (Harlan, J., concurring) (holding absent a trespass on the suspect’s property there was no search sufficient to trigger the Fourth Amendment); Baude & Stern, *supra* note 7, at 1827 n.21 (noting that property rights as triggers for the Fourth Amendment have seen intermittent application but a

the positive law model for Fourth Amendment jurisprudence, which replaces inquiries into reasonableness with the question of whether the investigative acts taken would be unlawful if the government actor was a similarly situated private actor.<sup>140</sup> The appeal of these approaches is that analysis for Fourth Amendment protection is grounded in principles less circular than the second objective prong of the reasonable expectation of privacy test, which in some cases appears to reduce to judicial determinations about social norms and policy judgments.<sup>141</sup>

In his dissent in *Carpenter*, Justice Kennedy argued that a reasonable expectation of privacy should be determined by property principles.<sup>142</sup> Justice Kennedy reasoned that the defendant did not own the business records that contained sensitive information about him and thus, under *Smith* and *Miller*, they were subject to the third-party doctrine and the defendant had no reasonable expectation of privacy in them.<sup>143</sup> Justice Alito's dissent followed similar form and concluded that the defendant had no property rights to the CSLI.<sup>144</sup> Justice Alito went further to emphasize that no such property rights could be found under the Stored Communications Act because the Act included express exemptions for disclosure to the government.<sup>145</sup>

Justice Thomas, in his dissent, echoed Justice Kennedy's conclusion that the defendant had no property rights to the records and thus the Fourth Amendment afforded him no protection.<sup>146</sup> Justice Thomas's dissent is distinct, however, in that it argues that *Katz* should be abandoned because the "expectations of privacy," integral to its test, were never the aim of the Fourth Amendment.<sup>147</sup> Rather, the primary purpose of the Fourth Amendment is the protec-

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comprehensive theory has not been argued before the Court) (citing *Fernandez v. California*, 571 U.S. 292, 308 (2014) (Scalia, J., concurring) (stressing that the reasonable expectation of privacy test was added as a supplement to, not a substitute for the property understanding of the Fourth Amendment); *Florida v. Jardines*, 569 U.S. 1, 11 (2013) (same); *United States v. Jones*, 565 U.S. 400, 407 (2012) (same); *Georgia v. Randolph*, 547 U.S. 103, 143–45 (2006) (Scalia, J., dissenting) (arguing that changes in property law affect changes in Fourth Amendment application)).

<sup>140</sup> Baude & Stern, *supra* note 7, at 1825; *see also* Kerr, *supra* note 84, at 516–19 (noting that the positive law approach has deep roots in the history of the Fourth Amendment). Professor Orin Kerr, in his article, *Four Models of Fourth Amendment Protection*, explains that the model has been adopted or rejected by multiple opinions. Kerr, *supra* note 84, at 516–19. Baude and Stern note some of the wavering arguments and lines of reasoning traced in the line of cases above as support for the idea that the Court has already been using aspects of positive law for years, particularly when defining seizure as distinct from search and reasoning why police may fly over one's property. Baude & Stern, *supra* note 7, at 1827.

<sup>141</sup> *See supra* note 10 and accompanying text.

<sup>142</sup> *Carpenter*, 138 S. Ct. at 2235 (Kennedy, J., dissenting).

<sup>143</sup> *Id.* at 2224.

<sup>144</sup> *Id.* at 2257–58 (Alito, J., dissenting).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 2235–36 (Thomas, J., dissenting).

<sup>147</sup> *Id.* at 2238–40, 2244.

tion of property and any protection of privacy is incidental to the protected property.<sup>148</sup>

Finally, Justice Gorsuch agreed with Justice Thomas's argument that the history of the Fourth Amendment does not support the *Katz* test.<sup>149</sup> Wondering what is left of the Fourth Amendment under the third-party doctrine, he noted that given the use of the Internet today for most tasks—from keeping calendars, to communicating, to banking, to entertainment—companies accessed through the Internet are as much keeping records *for* us as they are keeping records *about* us.<sup>150</sup> The sensitivity of the documents kept by these companies is similar to those that were once “locked safely in desk drawer or destroyed” and because of this sensitivity, Justice Gorsuch argued for alternative means to protect them.<sup>151</sup>

Justice Gorsuch suggested supplementing the *Katz* test by adopting positive law anchors.<sup>152</sup> Reading the Stored Communications Act and the Telecommunications Act of 1996, Justice Gorsuch argued that the statutes give cus-

<sup>148</sup> *Id.* at 2240. Justice Thomas recognizes that *Entick, Wilkes, The Writs of Assistance Case*, and *Boyd* all discussed the protection of privacy, but posits that the primary aim of the Fourth Amendment was the protection of property and that any protection of privacy was incidental to the protected property, and, thus, *Katz* elevating the protection of privacy over property was erroneous. *Id.* (citing THOMAS CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* § 3.4.4 (2008)); see *Katz*, 389 U.S. at 360–61 (Harlan, J., concurring) (articulating the reasonable expectation of privacy test). Clancy suggests that, in *Katz*, the Supreme Court confused the reason for the Fourth Amendment's protection with the rights secured by the Amendment itself. CLANCY, *supra*, at 78. Clancy discusses the following syllogism to illustrate the confusion:

[The Fourth Amendment's] operative function is exclusionary: it works negatively to keep out the unwelcome agencies of government. It logically follows, however, that where something is to be kept out, that from which it is barred deserves recognition in a positive sense. It is for this reason that the fourth amendment should be looked upon as safeguarding an affirmative right of privacy.

*Id.* (internal quotations omitted). Clancy concedes that the right is exclusionary but warns against seeking positive attributes beyond the right of exclusion itself because they may limit the right itself. *Id.* The attributes of privacy are “mere motivations for exercising the right; they do not define it.” *Id.*

<sup>149</sup> *Carpenter*, 138 S. Ct. at 2264–65, 2272 (Gorsuch, J., dissenting).

<sup>150</sup> *Id.* at 2262. Justice Gorsuch also takes issue with the use of assumption of risk as a guiding principle for the Court in the application of the Fourth Amendment. *Id.* at 2263 (citing Richard A. Epstein, *Privacy and the Third Hand: Lessons from the Common Law of Reasonable Expectations*, 24 BERKELEY TECH. L.J. 1199, 1204 (2009)) (distinguishing the knowledge of a risk from assumption of the risk by consent). Epstein notes there is a distinction between knowing the risk of being hit by a car when walking down a street and consenting to being hit by a random motorist as if an agreement had been reached between the driver and victim. Epstein, *supra*, at 1204. This distinction suggests that the concept has little practical application in the context of sharing information given the development and principles of assumption of risk—namely that an assumption of risk entails an agreement, whereby one accepts the risk of harms that might result, either expressly or implied. See *Carpenter*, 138 S. Ct. at 2263 (Gorsuch, J., dissenting).

<sup>151</sup> *Id.* at 2262.

<sup>152</sup> *Id.* at 2268. Positive law anchors refer to rights conferred to the individual under a substantive body of law such as property or tort. See Kerr, *supra* note 84, at 516.

tomers some form of a right to exclude and control the collected information.<sup>153</sup> Given these limited rights to the information and the relationship that this storage takes, Justice Gorsuch suggested that this relationship is a bailment, thus preserving the rights statutorily retained in the information.<sup>154</sup> Justice Gorsuch noted that, had this argument been preserved, the expectations of privacy in this information might not be diminished because of the bailment.<sup>155</sup>

### C. Scholarly Interpretations

Before *Carpenter*, many scholars focused on what warranted a “reasonable” search under the Fourth Amendment to better understand the Supreme Court’s inconsistent approaches.<sup>156</sup> Some scholars suggest that reasonableness should be informed by both common-sense tort reasonableness standards and the values that inform other constitutional rights.<sup>157</sup> Recognizing that, at times, some constitutional rights are “independent hurdles” for a reasonableness standard, these scholars suggest that other constitutional rights can be used as benchmarks.<sup>158</sup> They reason that when a search or seizure is accompanied by other government action that approaches the limits of these other constitutional rights, the search may be unreasonable.<sup>159</sup>

Other scholars suggest that the Supreme Court uses four models of Fourth Amendment analysis—(1) the probabilistic model;<sup>160</sup> (2) the private facts model;<sup>161</sup> (3) the positive law model;<sup>162</sup> and (4) the policy model.<sup>163</sup> The bene-

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<sup>153</sup> § 222(c)(1)–(2), (h)(1)(A); *Carpenter*, 138 S. Ct. at 2272 (Gorsuch, J., dissenting). Justice Gorsuch suggests the Acts do so by requiring that carriers do not “use, disclose, or permit access” to this information absent the customer’s consent, while allowing customers the right to disclose the information at their discretion. *Carpenter*, 138 S. Ct. at 2272 (Gorsuch, J., dissenting); see also § 222(c)(1).

<sup>154</sup> *Carpenter*, 138 S. Ct. at 2270 (Gorsuch, J., dissenting). Justice Gorsuch notes that *Ex parte Jackson* suggests a constitutional floor for the protection of the Fourth Amendment. *Id.* at 2270–71; see also *Ex parte Jackson*, 96 U.S. 727, 733 (1878) (essentially ruling that Congress’s postal power could not trump the Fourth Amendment’s protection of the mailer’s rights to their property mailed). Justice Gorsuch labeled this mail carrier relationship in *Jackson* as a bailment and noted the property interests protected when the defendant’s bailment to the government did not diminish the constitutional guarantees to be free from search and seizure. *Carpenter*, 138 S. Ct. at 2269–71 (Gorsuch, J., dissenting).

<sup>155</sup> *Carpenter*, 138 S. Ct. at 2272 (Gorsuch, J., dissenting).

<sup>156</sup> Amar, *supra* note 48, at 804–05; see also, Kerr, *supra* note 84.

<sup>157</sup> See Amar, *supra* note 48, at 801, 804–05.

<sup>158</sup> *Id.* at 804–05.

<sup>159</sup> *Id.* at 805.

<sup>160</sup> See Kerr, *supra* note 84 at 506, 542, 549–51. The probabilistic model is a descriptive approach premised on prevailing social norms. *Id.* at 508–09. The higher the perceived probability that the individual’s affairs will not be surveilled, the more likely it is that the Court will afford Fourth Amendment protection. *Id.*

<sup>161</sup> *Id.* at 512. The private facts model is a normative assessment that considers the nature of the information collected and considers whether that information warrants constitutional protection. *Id.*



fit of the Court using these four models is their flexibility.<sup>164</sup> Flexibility provides value to the Court because the justices do not share a unifying goal in their application of the Fourth Amendment.<sup>165</sup> Although some of these approaches can be seen in *Carpenter*'s reasoning—the majority employed a form of the private facts model by considering the revealing nature of the CSLI and Justice Gorsuch's dissent argued for the adoption of a positive law approach—scholars continue to search for a unifying theory of the Fourth Amendment.<sup>166</sup>

Scholars publishing post-*Carpenter* have tried to decipher what factors the Supreme Court used implicitly in its decision, so as to better understand the Court and try to predict how Fourth Amendment protection may apply in the future.<sup>167</sup> Some scholars have identified five implicit factors in Fourth Amendment precedent and the majority's approach to the second, objective prong of the expectation of privacy test.<sup>168</sup> These factors are: (1) whether a technique is hidden; (2) whether the technique is continuous; (3) how indiscriminate the technique is; (4) how intrusive the technique is; and (5) the expense and effort required by the technique.<sup>169</sup> Scholars applying these factors to *Carpenter* argue that the CSLI acquisition was hidden because society did not expect their every movement to be monitored by government agents.<sup>170</sup> They also proffered that the technique was continuous because it not only gave the suspects' current location but also a time-stamped history of where they were as far back as the companies collected CSLI.<sup>171</sup> These scholars argue that

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<sup>162</sup> *Id.* at 516. The positive law model is a descriptive approach that considers whether another substantive area of law prohibits the government's actions during the search or seizure. *Id.*

<sup>163</sup> *Id.* at 519. The policy model is the approach employed when judges make normative value judgements to determine the reasonableness of a search. *Id.*

<sup>164</sup> *Id.* at 542, 550–51.

<sup>165</sup> *See id.* at 506.

<sup>166</sup> *See Carpenter*, 138 S. Ct. at 2217–19 (holding, in a five to four decision, that the third-party doctrine does not extinguish the expectation of privacy afforded to CSLI under the Fourth Amendment, despite this information being shared with a third party, because of the revealing nature of the information); *id.* at 2262, 2272 (Gorsuch, J., dissenting) (arguing that the defendant had some property rights to his CSLI under federal statutes and that positive rights should be used to ground the *Katz* test); Susan Freiwald & Stephen Wm. Smith, *The Carpenter Chronicle: A Near-Perfect Surveillance*, 132 HARV. L. REV. 205, 219–21 (2018) (identifying factors the Court implicitly considered when determining the second objective prong of the reasonable expectation of privacy test); Holland, *supra* note 25, at 60, 95–96 (accepting that only persons, houses, papers, and effects are covered by the Fourth Amendment and arguing that papers are a special subclass protected by the Fourth Amendment because they are “cognitive artifacts” of the “freedom of thought” protected by the Constitution).

<sup>167</sup> *See Freiwald & Smith, supra* note 166, at 219–21 (identifying five factors that may help analyzing how the Supreme Court may rule in future cases); Holland, *supra* note 25 at 60, 95–96 (arguing that papers, as cognitive artifacts of the freedom of thought protected by the Constitution, should continue to be protected in future cases).

<sup>168</sup> Freiwald & Smith, *supra* note 166, at 219–21.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

the acquisition of CSLI was indiscriminate because information unrelated to the cause of the investigation could be revealed and that the technique was unacceptably intrusive, revealing the intimacies of the person's life as if they were wearing an "ankle monitor."<sup>172</sup> These scholars also conclude that the expense and effort was too minimal for the government with this technique, arguing that these costs provide a friction that itself protects privacy interests.<sup>173</sup>

Other scholars take a different approach by accepting that only "persons, houses, papers, and effects" are covered by the Fourth Amendment.<sup>174</sup> Nevertheless, these scholars argue that functionally a special subclass of papers—undisclosed papers, shared confidences, and directed transmissions—are protected by the Fourth Amendment because they are "cognitive artifacts" of the "freedom of thought" protected by the Constitution.<sup>175</sup> They note that unchecked application of the third-party doctrine to all digital media has a chilling effect on rights enjoyed under the Constitution.<sup>176</sup> Thus, these scholars argue that such "cognitive artifacts" require protection from the third-party doctrine in their newer digital forms as proxies for the personal papers of the past.<sup>177</sup>

### III. FINDING ANOTHER FACTOR

Analyzing the history of the Fourth Amendment and its precedent reveals an implicit logic to the Amendment that the United States Supreme Court reemphasized in *Carpenter v. United States*.<sup>178</sup> The Fourth Amendment pro-

<sup>172</sup> *Id.* (citing *Carpenter*, 138 S. Ct. at 2218).

<sup>173</sup> *Id.* at 220–21.

<sup>174</sup> Holland, *supra* note 25, at 60; *see also* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

<sup>175</sup> Holland, *supra* note 25, at 63, 87–90, 95. Cognitive artifacts are any means used to aid one's mental faculties. *Id.* at 63. Cognitive science suggests that these means are integral to cognitive systems. *Id.* at 87–90. Freedom of thought is a liberty interest implicitly protected by the rights to privacy, free speech, association, assembly, and religion. *See id.* at 61, 78–80.

<sup>176</sup> *Id.* at 95.

<sup>177</sup> *Id.* at 81, 95–99 (arguing that cognitive science supports the role they play as a means for exercising freedom of thought).

<sup>178</sup> *See* *Carpenter v. United States*, 138 S. Ct. 2206, 2218–21 (2018); *United States v. Jones*, 565 U.S. 400, 415–16 (2012) (Sotomayor, J., concurring); *Smith v. Maryland*, 442 U.S. 735, 751 (1979) (Marshall, J., dissenting); *Katz v. United States*, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring) (articulating the reasonable expectation of privacy test and its two prongs: (1) subjective belief that there was a reasonable expectation of privacy; and (2) willingness of society to accept that expectation of privacy as reasonable); Amar, *supra* note 48, at 804–05 (arguing the values of other constitutional rights should inform the reasonableness of the search); Brannon, *supra* note 25, at 20, 22–23 (noting that the *Carpenter* majority, which included Justice Sotomayor, seemed to embrace the position of Justice Sotomayor's concurrence in *Jones* that considered the effect of the search on revealing the exercise of other rights) (citing *Jones*, 565 U.S. at 417 (Sotomayor, J., concurring)); Holland, *supra* note 25, at 64, 95–96 (accepting that only "persons, houses, papers, and effects" are covered by the

pects more than just the instruments enumerated in the Amendment's language; it implicitly protects the means used for exercising other constitutionally secured rights from unwarranted searches and seizures.<sup>179</sup> Not only does this logic help explain the Fourth Amendment's strained history, it also grounds the objective prong of the *Katz v. United States* test.<sup>180</sup> This logic also informs us how *Carpenter's* qualification of the third-party doctrine may be extended to other advances in technology.<sup>181</sup>

Although the aforementioned scholarship helps us determine when a technique of surveillance might go too far, these approaches still miss a critical, albeit implicit, factor to understanding what the Fourth Amendment is protecting and why.<sup>182</sup> By analyzing whether the instrument being searched or the information incident to its function is a pervasive means for exercising other rights, we develop greater consistency in understanding the Court's precedents and understand what future technology might warrant protection.<sup>183</sup> This factor

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Fourth Amendment and arguing that papers are a special subclass protected by the Fourth Amendment because they are "cognitive artifacts" of the "freedom of thought" protected by the Constitution); Kerr, *supra* note 84, at 512 (explaining the private rights approach to Fourth Amendment application—a normative approach that considers the nature of the information and whether or not it warrants protection). Holland notes that unchecked application of the third-party doctrine to all digital media has a chilling effect on rights enjoyed under the Constitution. See Holland, *supra* note 25, at 95.

<sup>179</sup> See *Carpenter*, 138 S. Ct. at 2218–21 (noting the prevalence and variety of cell phone use and reasoning that although CSLI is not personal papers, the information from CSLI is so pervasive and revealing that their reasonable expectation of privacy is lessened but not destroyed when shared with a third party); *Jones*, 565 U.S. at 415–16 (Sotomayor, J., concurring) (noting that unlike in the past where gathered information was limited and thus painted a limited picture of the life monitored, the volume of data now easily accessed by the government can paint a picture of an individual's religious, political, and personal identity, creating a potential chilling effect on the rights of expression and association with pervasive surveillance and that such effect on exercise of rights must be considered in any balance); Amar, *supra* note 48, at 804–05 (arguing the values of other constitutional rights should inform the reasonableness of the search).

<sup>180</sup> See Brannon, *supra* note 25, at 20, 22 (noting that the *Carpenter* majority, which included Justice Sotomayor, seemed to embrace the position of Justice Sotomayor's concurrence in *Jones*, which held that the pervasiveness of digital communication makes the third-party doctrine "ill suited" and warned of its chilling effects) (citing *Jones*, 565 U.S. at 417 (Sotomayor, J., concurring)); Holland, *supra* note 25, at 64, 95–96 (accepting that only "persons, houses, papers, and effects" are covered by the Fourth Amendment and arguing that papers are a special subclass protected by the Fourth Amendment because they are "cognitive artifacts" of the "freedom of thought" protected by the Constitution). Holland notes that unchecked application of the third-party doctrine to all digital media has a chilling effect on rights enjoyed under the Constitution. See Holland, *supra* note 25, at 95.

<sup>181</sup> See *Carpenter*, 138 S. Ct. at 2218–21.

<sup>182</sup> See generally Freiwald & Smith, *supra* note 166 (identifying factors the Court implicitly considered when determining the second objective prong of the reasonable expectation of privacy test); Holland, *supra* note 25 (accepting that only "persons, houses, papers, and effects" are covered by the Fourth Amendment).

<sup>183</sup> See *supra* notes 178–179 and accompanying text; see also *Boyd v. United States*, 116 U.S. 616, 630 (1886) (holding that to protect the individual's right from self-incrimination under the Fifth Amendment the papers had to be protected under the Fourth Amendment from warrantless search and seizure).

complements scholarship that encourages consideration of other constitutional rights as a benchmark in determining reasonableness;<sup>184</sup> however, instead of the values of the other rights informing reasonableness, judges are effectively deciding a search's reasonableness by considering whether the search intimately reveals the exercise of the other rights.<sup>185</sup> Furthermore, this factor refines the private facts model because it identifies the type of revealing information with which the Supreme Court is concerned.<sup>186</sup> Analysis of the concerns expressed throughout the Court's precedent further illustrates that this factor implicitly grounds the second, objective prong of the reasonable expectation of privacy test.<sup>187</sup> Section A of this Part demonstrates the presence of this factor in the history and precedent of the Fourth Amendment.<sup>188</sup> Section B analyzes this factor as part of the reasonable expectation of privacy test.<sup>189</sup> Section C analyzes this factor in the *Carpenter* decision.<sup>190</sup>

### A. Historical Trends

The English cases discussed above—*Entick v. Carrington*, decided in 1765, and *Wilkes v. Wood*, decided in 1763—regard the warrantless search of the means used to express the speaker's other rights, namely political speech, that angered the Crown.<sup>191</sup> Lord Camden's rulings in favor of both defendants stand for the proposition that cause is necessary for such searches, seizures, and arrests to be valid, ensuring procedural guards protect the then-pervasive means of communication.<sup>192</sup> This idea is reinforced in *Ex parte Jackson*, where

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<sup>184</sup> See Amar, *supra* note 48, at 801, 804–05 (arguing that the values of other constitutional rights should inform the reasonableness of the search).

<sup>185</sup> See *supra* notes 178–179 and accompanying text.

<sup>186</sup> See Kerr, *supra* note 84, at 512 (explaining the private facts approach that considers the nature of the information and whether it warrants Fourth Amendment protection).

<sup>187</sup> See *Jones*, 565 U.S. at 415–16 (Sotomayor, J., concurring) (noting that the GPS device gives the government information about the familial, political, professional, religious and sexual associations of the person); *Smith*, 442 U.S. at 751 (Marshall, J., dissenting) (noting the increasing prevalence of using phones in the late 1970s and warning of the potential impediments that warrantless government surveillance could have on first amendment freedoms such as political associations and the press); *Ex parte Jackson*, 96 U.S. 727, 733 (1878) (protecting means of communication from unwarranted search and seizures in the mail); *Entick v. Carrington*, 19 Howell's St. Tr. 1029, 1029–31, 1066–67 (C.P. 1765) (*original at Harvard University*) (standing for the principle that cause is needed for search and seizure); *Wilkes v. Wood*, 19 Howell's St. Tr. 1153, 1169–70 (C.P. 1763) (*original at Harvard University*) (standing for the proposition that cause is necessary for such searches, seizures, and arrests to be valid); see also U.S. CONST. amend. I (securing, in relevant part, the right to free speech, press, and association).

<sup>188</sup> See *infra* notes 191–202 and accompanying text.

<sup>189</sup> See *infra* notes 203–213 and accompanying text.

<sup>190</sup> See *infra* notes 214–231 and accompanying text.

<sup>191</sup> *Entick*, 19 Howell's St. Tr. at 1029–31, 1066–67; *Wilkes*, 19 Howell's St. Tr. at 1169–70; see also Stuntz, *supra* note 33, at 397, 400 (noting *Entick* as an influential case at the founding).

<sup>192</sup> See *Entick*, 19 Howell's St. Tr. at 1066–67; Stuntz, *supra* note 33, at 400.

the United States Supreme Court held that letters and other sealed packages in the mail are “fully guarded from examination and inspection.”<sup>193</sup> Inspection of the letters delivered by the postal service would have revealed the content of the communication in the exercise of the constitutionally protected right to free speech and press.<sup>194</sup>

In *Boyd v. United States*, the Supreme Court held unconstitutional a statute that authorized the use of subpoenas to order the production of invoices in an action against the defendant because this was functionally the same as a warrantless search and seizure.<sup>195</sup> Here, the means of communication were used in the course of business and as the Supreme Court suggested in *United States v. Miller*, it is unwilling to protect these means of communication.<sup>196</sup> The warrantless search of these means, however, affected the defendant’s ability to exercise a different right, namely the right against self-incrimination.<sup>197</sup> Thus, despite the charges being civil, not criminal, the Court went on to use the Fourth Amendment’s protection to secure the Fifth Amendment’s protection from self-incrimination.<sup>198</sup> The Court explicitly stated that the Fourth Amendment protected rights broader than just privacy or property, encompassing an “indefeasible right of personal security, personal liberty and private property.”<sup>199</sup>

In 1961, in *Silverman v. United States*, the Supreme Court found law enforcement officials intruded a “constitutionally protected area” absent any fur-

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<sup>193</sup> See *Jackson*, 96 U.S. at 733 (holding Congress’s right to facilitate the postal service did not extinguish the rights enjoyed under the Fourth Amendment).

<sup>194</sup> See *id.* (holding Congress’s right to facilitate the postal service did not extinguish the rights enjoyed under the Fourth Amendment); see also U.S. CONST. amend. I (securing, in relevant part, the right to free speech, press, and association). The only permissible inspection absent a warrant was outwardly apparent observations, such as the letter or package’s weight and shape. *Jackson*, 96 U.S. at 733.

<sup>195</sup> See *Boyd*, 116 U.S. at 617–20, 630 (1886) (holding that to protect the individual’s right from self-incrimination under the Fifth Amendment the papers had to be protected under the Fourth Amendment from warrantless search and seizure); Amar, *supra* note 48, at 787 (noting the merging of the Fourth and Fifth Amendments’ analysis in *Boyd*). Under the statute, if the subpoenaed documents were not produced, the allegations reliant on such papers would be presumed confessed. *Boyd*, 116 U.S. at 619–21; see also U.S. CONST. amend. I (securing, in relevant part, the right to free speech, press, and association).

<sup>196</sup> See *United States v. Miller*, 425 U.S. 435, 440, 442–44 (1976) (holding checks and the bank’s business records were not protected by the Fourth Amendment once the information was shared with a third party); *Boyd*, 116 U.S. at 617–20, 630 (protecting business records to protect the individual’s right against self-incrimination).

<sup>197</sup> See *Boyd*, 116 U.S. at 617–20, 630 (protecting business records subpoenaed by the government because failure to do so would prevent the individual from exercising his right to not self-incriminate); see also U.S. CONST. amend. V (securing, in relevant part, an individual’s right to refrain from self-incriminating).

<sup>198</sup> See *Boyd*, 116 U.S. at 630.

<sup>199</sup> *Id.*

ther explanation besides suggesting that a house is always one such area.<sup>200</sup> Implicit in this reasoning, however, is the role the home plays in terms of the exercise of constitutionally protected rights, suggestive of the personal security and liberty the Supreme Court protected in *Boyd*.<sup>201</sup> Given the role the home plays in the exercise of many constitutional rights, including the right to privacy recognized in *Griswold v. Connecticut*, protecting the home functionally protects the exercise of these rights from being revealed.<sup>202</sup>

### B. Factor in Katz

In *Katz v. United States*, in 1967, the Court continued to consider this implicit factor—whether the subject of the search was a pervasive means for exercising other rights—but buried it in the second objective prong of the reasonable expectation of privacy test.<sup>203</sup> The Court explicitly noted the “vital role” that telephones play in society as a means for private communication and reasoned that the Fourth Amendment must be adaptable for such advances.<sup>204</sup> As the aforementioned scholars suggest, the Court seemed concerned with this warrantless surveillance because it indiscriminately surveilled those private constitutionally protected conversations unrelated to the investigation.<sup>205</sup> As shown throughout the Court’s Fourth Amendment decisions, this concern about collateral surveillance of protected conversations is only relevant if the Court recognizes that telephones are, in the broader society, a medium sufficiently pervasive in the exercise of other constitutionally protected rights.<sup>206</sup>

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<sup>200</sup> See *Silverman v. United States*, 365 U.S. 506–07, 511–12 (1961) (holding that trespass need not be established for Fourth Amendment protection to be applicable). The Court made clear that the scope of the Fourth Amendment was not measured by infringement on substantive property and tort rights but did not say those rights were irrelevant to determining its limits. See *id.* at 511–12. The Court began to return to the core principles of the Fourth Amendment articulated in *Entick* and *Boyd*, emphasizing that one principle of the Fourth Amendment is “the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion,” albeit they were still focused on property in terms of a “constitutionally protected area.” *Id.*; see *Boyd*, 16 U.S. at 617–20, 630 (protecting business records to protect *Boyd*’s right against self-incrimination); *Entick*, 19 Howell’s St. Tr., at 1066–67 (1765) (standing for the principle that cause is needed for search and seizure).

<sup>201</sup> See *Boyd*, 116 U.S. at 630 (holding the Fourth Amendment protected an “indefeasible right of personal security, personal liberty and private property”); *supra* note 200 and accompanying text.

<sup>202</sup> See *Silverman*, 365 U.S. at 512 (using the “intrusion into a constitutionally protected area” as the infringement determining the scope of the Fourth Amendment); *Griswold v. Connecticut*, 381 U.S. 479, 484–85 (1965) (finding a general right to privacy regarding intimacy in the bedroom).

<sup>203</sup> See *Katz*, 389 U.S. at 350–52 (noting the “vital role” telephones play in private communication throughout society and describing the privacy interest protected by the Fourth Amendment); *id.* at 360–61 (Harlan, J., concurring) (describing the reasonable expectation of privacy test).

<sup>204</sup> *Id.* at 350–52 (majority opinion).

<sup>205</sup> See *Freiwald & Smith*, *supra* note 166, at 219–21 (identifying factors the Court implicitly considered when determining the second objective prong of the reasonable expectation of privacy test).

<sup>206</sup> See *supra* notes 178–179 and accompanying text; see also *Brannon*, *supra* note 25, at 20, 22–23 (noting that the *Carpenter* majority, which included Justice Sotomayor, seemed to embrace the

This idea is further supported by scholars who argue the intimate role papers played in society warranted their protection under the Fourth Amendment.<sup>207</sup> Whether the instrument being searched is a pervasive means for exercising other rights helps us understand what the Court meant when it said that the expectation of privacy must be one that society is willing to recognize as reasonable.<sup>208</sup>

The Supreme Court in *Katz* made it clear that “the Fourth Amendment protects people, not places,” and viewed in light of the Supreme Court’s holding in *Ex parte Jackson* and *Boyd*, this extends to the means used to exercise the people’s rights secured under the Constitution.<sup>209</sup> The Supreme Court defined the privacy interest as, at once, less general but broader than a constitutional right to privacy.<sup>210</sup> This distinction reflects the language of the Court in *Boyd* that the Fourth Amendment protected rights broader than just privacy or property, including an “indefeasible right of personal security, personal liberty and private property.”<sup>211</sup> *Boyd*’s language reflects many of the rights secured by the Constitution, such as the property and liberty interests protected by the Fifth Amendment.<sup>212</sup> Understanding that, at its core, the Fourth Amendment warrants society to recognize an expectation of privacy as reasonable when a search would reveal the exercise of other rights provides clarity to the *Katz* test and greater coherence throughout the Court’s precedent.<sup>213</sup>

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position of Justice Sotomayor’s concurrence in *Jones*, which held that the pervasiveness of digital communication makes the third-party doctrine “ill suited” and warned of its chilling effects) (emphasis in original omitted) (citing *Jones*, 565 U.S. at 417 (Sotomayor, J., concurring)); Freiwald & Smith, *supra* note 166, at 219–21 (identifying factors the Court implicitly considered when determining the second objective prong of the reasonable expectation of privacy test).

<sup>207</sup> See Holland, *supra* note 25, at 64, 95–96.

<sup>208</sup> See *Katz*, 389 U.S. at 360–61 (Harlan, J., concurring) (describing the reasonable expectation of privacy test); Amar, *supra* note 48, at 804–05 (arguing that the values of other constitutional rights should inform the reasonableness of the search).

<sup>209</sup> See *Katz*, 389 U.S. at 350–52 (noting the “vital role” telephones play in private communication throughout society and describing the privacy interest protected by the Fourth Amendment); *id.* at 360–61 (Harlan, J., concurring) (describing the reasonable expectation of privacy test); *Boyd*, 116 U.S. at 617–20, 630 (merging the analysis of the Fourth and Fifth Amendments such that the Fourth Amendment protects the suspect’s Fifth Amendment right against self-incrimination); *Jackson*, 96 U.S. at 733 (warrantless search of letters in the mail by the government infringes Fourth Amendment protection).

<sup>210</sup> *Katz*, 389 U.S. at 350–53; see *supra* notes 76–77 and accompanying text.

<sup>211</sup> See *Katz*, 389 U.S. at 350–53 (describing the privacy protected under the reasonable expectation of privacy test); *Boyd*, 116 U.S. at 630 (describing the protection of the Fourth Amendment to be broader than just property or privacy rights).

<sup>212</sup> *Boyd*, 116 U.S. at 630; see U.S. CONST. amend. V (“[No]r be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”).

<sup>213</sup> See *Katz*, 389 U.S. at 360–61 (Harlan, J., concurring) (describing the reasonable expectation of privacy test); *Boyd*, 116 U.S. at 630 (describing the protection of the Fourth Amendment to be broader than just property or privacy rights); Amar, *supra* note 48, at 804–05 (arguing the values of other constitutional rights should inform the reasonableness of the search).

### C. Factor in Carpenter

Grounding the *Katz* test in this implicit threshold question better explains the Supreme Court's holding in *Carpenter*.<sup>214</sup> The Court begins its decision by noting the prevalence of phones, stating that cell phones are a "pervasive and insistent part of daily life" such that "carrying one is indispensable to participation in modern society."<sup>215</sup> The Court's emphasis on the role cell phones play mirrors the determination the Court made in *Katz* when it noted the vital role that telephones play in society as a means for communication before reasoning that the Fourth Amendment must be adaptable for such advances.<sup>216</sup>

In recharacterizing the scope of the third-party doctrine, the Court reasoned that although disclosure to a third party diminishes the individual's expectation of privacy to the information, the diminished expectation does not necessarily put the Fourth Amendment out of reach.<sup>217</sup> The Court implicitly considered the role the phone played in the life of the individual being tracked when it found that CSLI warranted protection, noting that only by disconnecting the phone from its service could the user not share this information.<sup>218</sup>

Furthermore, the manner in which the Court distinguished the surveilled information in *Smith v. Maryland* from CSLI further supports this theory that the Court is protecting the exercise of other rights through the Fourth Amendment.<sup>219</sup> Unlike the information in *Smith*, which was limited, the CSLI in *Carpenter* "provide[d] an intimate window" into the defendant's life and "reveal[ed] not only [the defendant's] particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'"<sup>220</sup> The

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<sup>214</sup> See *Carpenter*, 138 S. Ct. at 2217 (declining to extend the third-party doctrine to cover CSLI and holding that the disclosure of this information to third-parties "does not by itself overcome the user's claim to Fourth Amendment protection").

<sup>215</sup> *Id.* at 2220 (quoting *Riley v. California*, 134 S. Ct. 2473, 2484 (2014)).

<sup>216</sup> Compare *id.* (noting the pervasiveness of cell phones), with *Katz*, 389 U.S. at 350–52 (noting the wide use of telephones for private communication).

<sup>217</sup> See *Carpenter*, 138 S. Ct. at 2219 (citing *Riley*, 134 S. Ct. at 2488).

<sup>218</sup> See *id.* at 2219–20.

<sup>219</sup> See *id.* at 2217, 2220 ("Yet this case is not about 'using a phone' or a person's movement at a particular time. It is about a detailed chronicle of a person's physical presence compiled every day, every moment, over several years. Such a chronicle implicates privacy concerns far beyond those considered in *Smith* and *Miller*."); see also U.S. CONST. amend. I (securing, in relevant part, the right to free speech, press, and association); *Smith*, 422 U.S. at 751 (Marshall, J., dissenting) (noting the increasing prevalence of using phones in the late 1970s and warning of the potential impediments that warrantless government surveillance could have on First Amendment freedoms such as political associations and the press).

<sup>220</sup> *Carpenter*, 138 S. Ct. at 2217 (citing *Jones*, 565 U.S. at 415–16) (Sotomayor, J., concurring); *Smith*, 422 U.S. at 742–44 (holding the numbers dialed are voluntarily divulged to the third-party phone company and do not warrant protection by the Fourth Amendment under the third-party doctrine).



CSLI was essentially an imprint of the defendant exercising his other rights, and the Supreme Court found this mass-surveillance unacceptable.<sup>221</sup>

Although the *Carpenter* dissents and their property-based approaches are supported by the Supreme Court's former use of these concepts, in cases like *Olmstead v. United States* and *Goldman v. United States*, the Court had long since departed from this strict line of reasoning.<sup>222</sup> As the Supreme Court recognized in *Jones v. United States*, *Katz* supplemented the property-based approach.<sup>223</sup> To argue that property rights alone should dictate the outcome in *Carpenter* deviates from the implicit factor discussed above and the coherence it reveals in the Fourth Amendment's precedent.<sup>224</sup> Furthermore, as more individuals move their information online and use third-party services to organize their lives, the dissents' conception of the Fourth Amendment would provide them with little to no protection because it does not take the information's revealing nature into consideration.<sup>225</sup>

In *Carpenter*, the Supreme Court quoted Justice Sotomayor's concurrence in *Jones*, where she noted that unlike in the past, where the confines of the collection device limited the information gathered and painted a limited picture of the life monitored, the volume of data now easily accessed by the government could have a potential chilling effect on the rights of expression and association.<sup>226</sup> Justice Sotomayor, in *Jones*, argued that the potential harms from easy

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<sup>221</sup> See *Carpenter*, 138 S. Ct. at 2217 (citing *Jones*, 565 U.S. at 400, 415–16 (Sotomayor, J., concurring)) (noting that the CSLI gives the government information about the familial, political, professional, religious, and sexual associations of the person).

<sup>222</sup> See *Carpenter*, 138 S. Ct. at 2235 (Kennedy, J., dissenting) (“This case should be resolved by interpreting accepted property principles as the baseline for reasonable expectations of privacy.”); *id.* at 2235 (Thomas, J., dissenting) (“[This case] should turn . . . on whose property was searched . . . . By obtaining the cell-site records of MetroPCS and Sprint, the government did not search Carpenter’s property. He did not create the records . . . [or] maintain them, he cannot control them . . . [or] destroy them.”); *id.* at 2257 (Alito, J., dissenting) (“[T]he cell-site records obtained by the Government belong to Carpenter’s cell service providers, not to Carpenter . . . . Carpenter . . . has no meaningful control over the cell-site records, which are created, maintained, altered, used, and eventually destroyed by his cell service providers.”); *id.* at 2272 (Gorsuch, J., dissenting) (arguing that the defendant had some property rights to his CSLI under the Stored Communications Act but that this argument was not made and thus the case could not be resolved on these grounds); *Goldman v. United States*, 316 U.S. 129, 134–35 (1942) (holding the Fourth Amendment was not triggered by wiretapping in the absence of a trespass onto the individual’s property); *Olmstead v. United States*, 277 U.S. 438, 457, 466 (1928) (holding the Fourth Amendment was not triggered by eavesdropping in the absence of a trespass onto the individual’s property).

<sup>223</sup> *Jones*, 565 U.S. at 407–09 (characterizing *Katz* and the expectation of privacy approach as supplementing, not replacing, the property-based conception of the Fourth Amendment); see also *Katz*, 389 U.S. at 360–61 (Harlan, J., concurring) (describing the reasonable expectation of privacy test).

<sup>224</sup> See *supra* notes 222–223 and accompanying text.

<sup>225</sup> See *supra* note 219 (discussing the extent of the information CSLI reveals); *supra* note 222 (illustrating the property-based approaches taken by the dissents).

<sup>226</sup> *Carpenter*, 138 S. Ct. at 2217; see *Jones*, 565 U.S. at 415–16 (Sotomayor, J., concurring); see also Brannon, *supra* note 25, at 20, 22–23 (noting that the *Carpenter* majority, which included Justice

access to this information should be considered when determining the expectation of privacy.<sup>227</sup> This concern echoes Justice Marshall's dissent in *Smith* when he noted that allowing warrantless surveillance could create potential impediments on First Amendment freedoms, such as political association and press, because of the increasing prevalence of phones.<sup>228</sup>

The implicit factor discussed above—that at its core the Fourth Amendment protects pervasive means of exercising other constitutional rights—helps explain the Court's reasoning in *Carpenter* and informs how Fourth Amendment protection may be extended in the future.<sup>229</sup> *Carpenter* illustrates that the Supreme Court has shifted its focus to the revealing nature of the search and not simply whether the individual shared the information.<sup>230</sup> It also illustrates how revealing the information in question must be to warrant protection, and reinforced that it will protect information that reveals the exercise of other rights.<sup>231</sup>

## CONCLUSION

Analysis of the history of the Fourth Amendment and its precedent reveals the Court's concern with applying the third-party doctrine to widely used means of exercising other constitutionally secured rights. When the pervasiveness of the information would allow the government to track these activities without a warrant and potentially have a chilling effect on the exercise of these rights, the means should be protected. This will be done under the guise of the second prong of the *Katz* test. Accepting this principle as the implicit logic that the Court employs allows us to understand that *Carpenter*'s qualification of the third-party doctrine will likely be extended to other advances in technology

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Sotomayor, seemed to embrace the position of Justice Sotomayor's concurrence in *Jones*, which held that the pervasiveness of digital communication makes the third-party doctrine "ill suited" and warned of its chilling effects).

<sup>227</sup> *Jones*, 565 U.S. at 415–16 (Sotomayor, J., concurring).

<sup>228</sup> *Compare id.* at 415–16 (Sotomayor, J., concurring) (noting that the volume of data now easily accessed by the Government can paint a picture of an individual's religious, political, and personal identity, creating a potential chilling effect on the rights of expression and association with pervasive surveillance), *with Smith*, 422 U.S. at 751 (Marshall, J., dissenting) (warning of the potential impediments that warrantless government surveillance could have on First Amendment freedoms such as political associations and the press). *See also* U.S. CONST. amend. I (securing, in relevant part, the right to free speech, press, and association).

<sup>229</sup> *See supra* notes 178–179 and accompanying text.

<sup>230</sup> *See Carpenter*, 138 S. Ct. at 2217–19 (discussing how using CSLI was like "attach[ing] an ankle monitor" to the suspect and the types of intimate information the data could reveal).

<sup>231</sup> *Compare id.* (citing *Jones*, 565 U.S. at 415–16 (Sotomayor, J., concurring)) (emphasizing that the CSLI in *Carpenter* "provided an intimate window" into the defendant's life and "reveal[ed] not only [the defendant's] particular movements, but through them his 'familial, political, professional, religious, and sexual associations'"), *with Smith*, 422 U.S. at 742–44 (holding that the numbers dialed are voluntarily divulged to the third-party phone company and do not warrant protection by the Fourth Amendment under the third-party doctrine).

that become pervasive forms of communication and integral to the exercise of other rights. It grounds the second prong of the *Katz* test, better defining what expectations of privacy are those that society is willing to accept as reasonable.

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