SMU | Dedman School of Law

SMU Law Review

Volume 76 | Issue 2 Article 5

2023

Warranted Exclusion: A Case for a Fourth Amendment Built on the Right to Exclude

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WARRANTED EXCLUSION: A CASE FOR A FOURTH AMENDMENT BUILT ON THE RIGHT TO EXCLUDE

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ABSTRACT

Searches intrude; fundamentally, they infringe on a right to exclude. So that right should form the basis of Fourth Amendment protections. Current Fourth Amendment doctrine—the reasonable expectation of privacy test—struggles with conceptual clarity and predictability. The Supreme Court's recent decision to overturn Roe v. Wade *casts further doubt on the reception of other privacy-based approaches with this Court. But the replacement approach that several Justices on the Court favor, what I call the "maximalist" property approach, risks troublingly narrow results. This Article provides a new alternative: Fourth Amendment protection should be anchored in a flexible concept derived from property law—what this Article terms a "situational right to exclude." When a searchee has a right to exclude some law-abiding person from the thing to be searched, in some circumstance, the government must obtain a warrant before gathering information from that item. Keeping the government out is warranted when an individual has a situational right to exclude; it is exactly then that the government must get a warrant.*

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https://doi.org/10.25172/smulr.76.2.5

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I. INTRODUCTION

FOURTH Amendment doctrine has struggled to fulfill its two objectives: placing meaningful restraints on government action and providing a conceptually workable basis for deciding what those restraints are. The doctrine's evolution has often placed these objectives at odds. The prevailing reasonable expectation of privacy test frequently produces privacy-protective results at the expense of conceptual clarity, while a recently favored, property-based approach offers clearer tests but

risks being austere in application. This Article provides a new alternative: Fourth Amendment doctrine should be built around the right to exclude.

In my approach, Fourth Amendment protections apply when one has at least a *situational right to exclude*—that is, a right to exclude certain actors in certain situations, even if that right is not enjoyed in all contexts. Having only this one stick of the "bundle of sticks" that makes up a traditional property right is sufficient to trigger Fourth Amendment protections, even if it is not sufficient to constitute a full property right over the thing to be searched.[1] In other words, when the world is allowed in, so is the government. But if an individual retains any right to restrict a lawful private person's access, even absent any other indications of a property right, Fourth Amendment protections apply.[2] Under this view, a search occurs when the police obtain information from anywhere a searchee has a situational right to exclude, unless they do so with the naked eye deployed from a public vantage point.[3]

Compare this view to the primary existing approaches. Consider the case of a D.C. rowhouse owner who opens her home to protesters as a refuge from aggressive police tactics.[4] Any protester is welcome inside. Under the reasonable expectation of privacy test, does this homeowner still retain Fourth Amendment protections? Both "yes" and "no" seem plausible answers, illustrating the fuzziness of this test. Yes: it is still her home, traditionally recognized as the most private sphere, and she selectively invited only certain guests into it, even if the category of "invitee" is broad. No: she invited seventy digitally literate (live-streaming?) strangers into her house, and she cannot reasonably expect its contents and activities will be kept out of the public eye. In addition, current doctrine holds that she forfeits any expectation of privacy with respect to an undercover operative she invites into her home. That both answers are plausible illustrates the main problem with the reasonable expectation of privacy test, developed in greater detail below: "reasonable expectations" can be a poor guide.

Let's consider a "maximalist" property-oriented approach, increasingly embraced in varying forms by the Supreme Court's conservative Justices: government agents would violate this homeowner's Fourth Amendment rights only if (a) she had all applicable property rights in the home, and

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1. Indeed, one may have a situational right to exclude over something that is not itself real or chattel property. *See infra* Part IV.

2. See *infra* Part III.C for a discussion of the law-abider limitation.

3. This view, like current doctrine, does not demand that the police shield their eyes from a crime taking place in front of their eyes as long as they are lawfully in the location to witness it. See *infra* Part III.E for a discussion of voluntary disclosures to law enforcement and undercover informants.

4. I draw this hypothetical from a real case where a D.C. resident allowed protesters into his home during a protest that encountered aggressive police tactics. Unlike my example, police did not try to search the home. *See* Bill Chappell & Mano Sundaresan, *D.C. Protesters Hail the Hero of Swann St., Who Sheltered Them from Arrest*, NPR (Jun. 2, 2020), https://www.npr.org/2020/06/02/868324634/d-c-protesters-hail-the-hero-of-swann-st-who-sheltered-them-from-arrest [https://perma.cc/ABQ8-UBNC].

(b) they trespassed on her property during a search.[5] Here, our homeowner does have all applicable property rights, so the first condition is met. But the second condition is harder to meet. Let's say the police were interested in seeing if any protesters had illegal drugs. Under a trespass view, the police could not bring a dog onto the homeowner's porch to sniff for drugs without a warrant because that area is the home's "curtilage," and entering that area with a sniffer dog exceeds the implied license to enter, essentially becoming a trespass.[6] But let's imagine that the D.C. police have a new super-sniffer dog that can detect drugs from the public sidewalk. Now, the police are gaining the same information but without trespassing. Under the trespass view, the police would no longer need a warrant, only because of a dog's improved olfactory capabilities.[7]

Under the situational right-to-exclude approach, the rowhouse owner retains Fourth Amendment protections. To reach this result, my approach asks: does the homeowner retain the right to exclude any private, law-abiding person in some situation? If yes, the police must get a warrant before searching the rowhouse. Here, the owner retains such a right: she may still turn away, for instance, a traveling salesman, a counter-protester, or anyone else she has not invited.

This view provides a sounder theoretical foundation for Fourth Amendment rights. It focuses on exactly the right the government violates when its agents search: one's right to exclude. In other words, searches *intrude*. This is the heart of my case for adopting this approach: focusing on a right to exclude hones in on the very thing the Fourth Amendment protects. In the rowhouse case, for instance, a valid warrant means a person may not prevent the entry of government agents; the government has sufficiently overcome her right to exclude. And where the Court has dealt with searches not involving real property, from papers to data, a right-to-exclude logic still underpins those decisions, even if the Court has not used such words.[8] In other words, the right to be free of unreasonable government searches is simply a (superable) right to exclude.

Let's revisit the fundamental case of *Katz* under this view.[9] The Court there decided whether the government needed a warrant to attach a listening device to the top of a public phone booth where someone was

5. *See infra* Part II.B.

6. *See infra* Part II.B.

7. However, the court used a different approach in *Kyllo v. United States*, 533 U.S. 27 (2001). Under that framework, the super sniffer scenario might come out differently. *See infra* Part III.D. In *Florida v. Jardines*, 569 U.S. 1 (2013), the case on which this hypothetical is based, the Supreme Court did not use the *Kyllo* approach, relying instead on implied license reasoning.

8. For instance, *Ex parte Jackson* spoke of letters "as fully guarded from examination and inspection" as if they were "retained by the parties forwarding them in their own domiciles." *Ex parte* Jackson, 96 U.S. 727, 733 (1877). Letters in the mail were to be treated the same as letters in the home, in which a person retained a right to exclude. *See id.* For a discussion of trespass logic extended to papers in the home, see *infra* Part II.B.

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

making a call.[10] The Court found that the government did;[11] Justice Harlan's concurrence introduced the reasonable expectation of privacy test that has become the touchstone of modern Fourth Amendment analysis.[12]

One phrase in the majority opinion stands out as relevant to an exclusion rights view of the Fourth Amendment: "One who occupies [the phone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world."[13] Orin Kerr characterizes the majority's language here as originalist, explaining that the approach remains true to the property-oriented understandings of the Fourth Amendment in this way: "When a person entered the booth, shut the door, and paid for their call, the booth became understood as *their booth* for the duration of the call."[14]

But in what way is the booth *theirs*? Neither Kerr nor the Court offered an answer to this question. The booth did not become the caller's because they gained a temporary right to sell the booth, nor a right to destroy it at that moment without consequence. A caller also does not have a perpetual right to exclude, nor necessarily a right to exclude, even at that moment, a repairman. So what is it?

My view answers that question: the booth was *theirs* because the caller had a situational right to exclude. She could exclude some people (a passersby or other waiting callers) in some circumstances (when she is in the booth, the door is closed, and the call is paid for). As this Article discusses later, this right to exclude could be found in, perhaps, the common law of assault and battery or in anti-wiretapping statutes.[15]

So, to recap, my view is built around the theoretical core of the Fourth Amendment: searches intrude. It is a *focused* property-inspired view. For instance, a valid warrant would not necessarily interfere with the rowhouse owner's ability to possess, control, use, or transfer the property. The right to exclude is the relevant stick in the property bundle of rights for search purposes. So we need not insist on the presence of these other sticks before requiring a warrant. Indeed, we need *only* look for a situational right to exclude, without asking whether that exclusion right derives from something the law calls property rights.[16]

Alongside these foundational arguments, I make arguments aimed at two different sets of readers. First, for readers already predisposed to a property-oriented view, the situational right to exclude view better reflects the way we use property concepts in the law in general. My view

10. *See id.* at 349–50.
11. *See id.* at 357–59.
12. *See id.* at 360–62 (Harlan, J., concurring).
13. *Id.* at 352.
14. Orin S. Kerr, Katz *as Originalism*, 71 DUKE L.J. 1047, 1058 (2022) (emphasis in original).
15. *See infra* Part IV.
16. *See infra* Part IV.

draws on a robust practice of recognizing the centrality of the right to exclude in private ordering.[17] And second, my view reflects our tradition of respecting property rights even where a right to exclude is not held against all.[18] As Part III discusses, the law facilitates widespread recognition of property rights not held in rem, and we should allow such recognition in the Fourth Amendment context, too.[19]

Second, for *Katz*-preferring readers skeptical of a property approach, I argue that, of current property-inspired approaches, mine will get the most privacy-protective results in the face of a property-curious judiciary deeply skeptical of *Katz*.[20] As this Article discusses, my case gets privacy-protective results in most cases. As with other views, it does not get perfect results. But its outcomes are more predictable and its analytical approach harder to undermine than the *Katz* test. The reversal of *Roe v. Wade* should also give those who favor a privacy-based approach to the Fourth Amendment pause.[21] Indeed, the majority in *Dobbs* expressed deep skepticism of the *Roe* Court's argument that the Fourth Amendment, with other constitutional provisions, creates a right to privacy.[22] These linkages should make privacy advocates uneasy. My view offers a more palatable alternative than might otherwise emerge from ongoing property-centric debates.

One might rightly wonder, at this point, where someone *gets* a situational right to exclude, especially because I say it need not only come from recognized property rights. In addition to property law, I argue we should also locate situational rights to exclude in the positive law—that is,

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17. *See* Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998) (arguing that the right to exclude is the *sine qua non* of property); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *125, *135; Shyamkrishna Balganesh, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL'Y 593, 593 (2008) (expanding the theory of why the right to exclude is as central as it is to property law); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) ("The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."); Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (referring to the right to exclude as "one of the most essential sticks in the bundle of rights that are commonly characterized as property"); Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) ("One of the principal purposes of the Takings Clause is to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." (internal quotation omitted)); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 673 (1999) ("[T]he hallmark of a protected property interest is the right to exclude others."); *but see* Jane E. Baron, *Rescuing the Bundle-of-Rights Metaphor in Property Law*, 82 U. CIN. L. REV. 57, 62–67 (2013) (discussing legal realist critiques); Gregory S. Alexander, Eduardo M. Penalver, Joseph W. Singer & Laura S. Underkuffler, *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 744 (2009) (discussing progressive property critiques).

18. *See infra* Part III.B.

19. *See infra* Part III.B.

20. *See, e.g.*, João Marinotti, *Escaping Circularity: The Fourth Amendment and Property Law*, 81 MD. L. REV. 641, 645 (2022) ("[R]egardless of whether one believes that property law *should* define Fourth Amendment protections, property law is here to stay." (emphasis in original)).

21. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

22. *Id.* at 2245–46.

common law, statutes, and contracts. So, for example, if a statute grants you the right to exclude certain actors from reviewing your medical records, you have a situational right to exclude for Fourth Amendment purposes—even though it might be foolish to argue that you have a statutory basis for full property rights in your medical records.

I am not the first scholar to advocate for a positive law approach to the Fourth Amendment.[23] But I argue for a narrower species of the positive law approach that fixes some of the main criticisms leveled at the prevailing approach advanced by William Baude and James Stern.[24] While Baude and Stern look to what investigative actions a private actor may not do to define the scope of what a government actor may not do, I look at the situational rights to exclude held by the person to be searched.[25] While Baude and Stern look to positive law for limits on "investigative" actions, I look to positive law to locate something very specific, a situational right to exclude.[26] I explore the workings of this approach, its criticisms, and the contrast between Baude and Stern's broad view and my narrow one in greater depth below.

The situational right-to-exclude approach has traction even if you disagree with the positive law approach. The theory is workable as a replacement judicial test: warrants are required where one has a situational right to exclude, as determined by a court. Even as a purely judicial test, this concept offers more guidance than the reasonable expectation of privacy approach. That is so because we know what a situational right to exclude looks like at common law. In contrast, we do not have a common law corollary for a reasonable expectation of privacy. Having this reference point would likely increase uniformity and the conceptual rigor underlying Fourth Amendment decisions even without adopting a positive law approach. That said, allowing this approach to remain a judicial test risks some of the same problems as the *Katz* approach: how does one determine if one has a right to exclude in one's data, for instance?[27]

A situational right to exclude offers a further benefit. It can provide a solution for a source of difficulty for current Fourth Amendment doc-

23. *See* Orin Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 516–19 (2007) (describing the positive law approach); William Baude & James Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1829–36 (2016) (articulating a positive law approach); *see* Richard M. Re, *The Positive Law Floor*, 129 HARV. L. REV. F. 313, 315–21 (2016) (same); Laura K. Donohue, *Functional Equivalence and Residual Rights Post-*Carpenter: *Framing a Test Consistent with Precedent and Original Meaning*, 2018 SUP. CT. REV. 347, 354 (2019) ("Positive law, in turn, may prove probative in regard to the existence of a property right: where federal or state law has *acknowledged a property right* and placed a correlative *duty of noninterference* on others, government instructions may constitute a search or seizure within the meaning of the Fourth Amendment." (emphasis in original)); *see also* Andrew Guthrie Ferguson, *Structural Sensor Surveillance*, 106 IOWA L. REV. 47, 101–02 (2020) (arguing for a "digital positive law floor" without doing away with underlying constitutional protections).

24. *See* Baude & Stern, *supra* note 23.

25. *See generally id.* at 1829–33.

26. *See generally id.* at 1824–29.

27. *See infra* Part V.

trine: digital data and the third-party doctrine.[28] The third-party doctrine holds that when individuals voluntarily share information with a third party, they lose their expectation of privacy in it, and thus their Fourth Amendment rights.[29] The situational right-to-exclude approach allows actors to waive a right against one without waiving that right against all. A situational right to exclude inverts these assumptions by allowing an actor to waive a right to exclude against one (the third party) without waiving that right against all (the government). Below, I discuss how my view handles other aspects of the third-party doctrine, including police informants and undercover agents.

In sum, a situational right-to-exclude approach maintains the flexible protections of the reasonable expectation of privacy approach while being grounded in a conceptually robust body of law. It also focuses the Fourth Amendment inquiry on the nature of the exact right violated by a government search: the right to exclude.

Part II of this Article critiques the two main, opposing interpretive views of the Fourth Amendment. Part III makes a case for my view in three steps, laying out a theoretical argument in Part III.A-III.C and a pragmatic argument in Part III.D. Part IV argues for this view as a positive law view of the Fourth Amendment. Part V closes with a discussion of how the view operates as applied to data, a particular challenge for Fourth Amendment doctrine.

II. AGAINST THE STANDARD APPROACHES

Dominant judicial views of the Fourth Amendment fall into two opposing camps. The first is the *Katz*, or privacy, approach. The second is a property-based approach. Before developing a middle way between these poles, I explore the primary criticisms of each approach. The privacy view and the property view each have a primary limitation: the privacy view is too amorphous, and the property view is too narrow. These limitations do not have the same valence to all; some prefer to err on the side that risks over-protection, and others prefer risking under-protection. My goal in this section is not to disabuse you of your preference. My goal is to offer a few examples of the failings of these approaches to show that neither is flawless and that there is room for an alternative view.

A. Against the Reasonable Expectation of Privacy Approach

The Supreme Court adopted the "reasonable expectation of privacy" doctrine in *Katz* to achieve what is, in my view, a laudable result: to bring private, oral conversations into the ambit of Fourth Amendment protec-

28. *See, e.g.*, Steven M. Bellovin, Matt Blaze, Susan Landau & Stephanie K. Pell, *It's Too Complicated: How the Internet Upends* Katz, Smith, *and Electronic Surveillance Law*, 30 Harv. J.L. & Tech. 1, 2–11 (2016).

29. *See* United States v. Miller, 425 U.S. 435, 443 (1976); Smith v. Maryland, 442 U.S. 735, 743–44 (1979).

tion.[30] In that case, in the language of the concurrence, the Court found that a caller using a phone booth had a reasonable expectation of privacy in that booth.[31]

Privacy advocates, including me, are often content with the results the reasonable expectation of privacy test gets, as in the case of private conversations. But this test has deep flaws, as even privacy advocates admit.[32] These critiques are well-worn; I provide just an overview here.[33]

First, the test is not analytically robust. The test essentially grants you privacy when you have privacy. It is circular: the government is restrained from invading your privacy when you expect privacy. The test does not provide an independent point by which we can adjudicate when you can expect privacy. Its very framing as a reasonableness test invites the obvious question: what reasons warrant an expectation of privacy? Failing to provide those reasons passes the buck; it is a reasonableness test that provides no reasons. In addition, originalists and textualists critique the test as constitutionally unmoored, departing from founding-era notions of search and from the words of the Fourth Amendment.[34]

Second, the test can be subjective. Consider the case of a D.C. rowhouse owner who opens her home to protesters, as discussed above.[35] As we saw there, one could make a convincing argument that the homeowner did, or did not, give up a reasonable expectation of privacy. That her constitutional protection depends on this kind of coin-toss reasoning seems unwise. As another example, in discussing drafts of this Article with readers, some thought it obvious that you have less of an expectation of privacy in cars than in hotel rooms; others did not. Judges display similar inconsistencies.

The open fields doctrine presents another example of the failure of the reasonable expectation of privacy approach. The Supreme Court has held that people do not have a reasonable expectation of privacy in open fields—"there is no societal interest" in doing so—although people do retain the right to enforce trespass at common law over open fields.[36] But my relatives who farm in the Midwest *do* expect privacy in their open fields, at least the parts away from roads, and could list many societal benefits of such privacy, despite the Court's decades-old declaration that

30. *See* Katz v. United States, 389 U.S. 347, 359 (1967); *see also id.* at 360–61 (Harlan, J., concurring).

31. *See id.* at 360–61.

32. *See, e.g.*, Donohue, *supra* note 23, at 349 (Explaining *Katz* "took the doctrine further from its original purpose, placing it in a make-believe land of relativistic determinations.").

33. *See, e.g.*, Kerr, *supra* note 23, at 1084–1103 (collecting criticism); David A. Sklansky, *Back to the Future:* Kyllo*,* Katz*, and Common Law*, 72 MISS. L.J. 143, 150–68 (2002) (summarizing judicial criticism); Matthew Tokson, *The Normative Fourth Amendment*, 104 MINN. L. REV. 741, 742–44, 746–52 (2019) (summarizing criticism).

34. *See, e.g.*, Jeffrey Bellin, *Fourth Amendment Textualism*, 118 MICH. L. REV. 233, 237–38 (2019); Carpenter v. United States, 138 S. Ct. 2206, 2235–46 (2018) (Thomas, J., dissenting); Minnesota v. Carter, 525 U.S. 83, 91–103 (1998) (Scalia, J., concurring).

35. *See* Chappell & Sundaresan, *supra* note 4.

36. *See* Oliver v. United States, 466 U.S. 170, 179, 183–84 (1984).

thinking so is unreasonable. One could argue that the reasonable expectation of privacy test can get the right result in open fields cases, but the Court simply erred by deciding no reasonable expectation of privacy exists in open fields. But, at bottom, the inquiry still asks whether you have privacy in order to get privacy protections, a subjective inquiry.

The Court is also inconsistent in whether it turns to trespass logic or reasonable expectation of privacy logic in certain cases. Why did the Court plumb the murky depths of implied licenses to enter a property when deciding whether the police need a warrant to have a sniffer dog smell that area but jettisoned the entire body of trespass law when dealing with open fields?[37] The Court offers no compelling reason other than the following: keeping property in the mix keeps "easy cases easy."[38]

The subjective nature of this test is evident even in the canonical instance where this test "beats out" the property test: private conversations. We clearly do not have a property interest, traditionally conceived, in an oral conversation. And most people also agree that the government should not wirelessly eavesdrop on our conversations.[39] That said, how do you determine whether you still have a reasonable expectation of privacy in a conversation if you have it in a place where others can hear you? What if you take steps to avoid being heard? What if one of those steps was ducking into a phone booth, but the phone booth you duck into has flimsy walls and so was ineffective at shielding your privacy? You might still be justified in asking a person waiting to use the booth to move a bit farther away so they can't hear you—just as farmers can still enforce trespass actions against interlopers in their fields—but, under current doctrine, you generally do not have a reasonable expectation of privacy against eavesdroppers in public places.[40] But at what decibel level or degree of wall-flimsiness does that expectation disappear?

The test is also unpredictable: with new technologies, there is no guarantee as to the outcome of the test. Consider *Kyllo*, which dealt with remote thermal sensing of a house.[41] Five total circuits had denied protection to defendants before the Supreme Court ruled that the device did violate a reasonable expectation of privacy.[42] That discrepancy indicates that whether such privacy existed was deeply contested and not at all clear under the reasonable expectation of privacy test.

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37. *Compare* Florida v. Jardines, 569 U.S. 1, 5–11 (2013), *with* Katz v. United States, 389 U.S. 347, 359–61 (1967).

38. *Jardines*, 569 U.S. at 11.

39. *But see generally* Bellin, *supra* note 34. Bellin is one of the few scholars to argue that the correct interpretation of the Fourth Amendment does not reach conversations, on textualist grounds.

40. *See generally Katz*, 389 U.S. at 359–61.

41. *See* Kyllo v. United States, 533 U.S. 27, 29 (2001).

42. *Id.* at 40–41; *see* United States v. Kyllo, 190 F.3d 1041, 1047 (9th Cir. 1999), *rev'd*, 533 U.S. 27 (2001); United States v. Robinson, 62 F.3d 1325, 1332 (11th Cir. 1995); United States v. Ishmael, 48 F.3d 850, 857 (5th Cir. 1995); United States v. Myers, 46 F.3d 668, 670 (7th Cir. 1995); United States v. Pinson, 24 F.3d 1056, 1059 (8th Cir. 1994). *But cf.* United States v. Cusumano, 67 F.3d 1497, 1510 (10th Cir. 1995) (warrantless use of thermal imager ran afoul of Fourth Amendment), *rev'd on other grounds*, 83 F.3d 1247 (10th Cir. 1996).

These scenarios raise a further concern about subjectivity: is the test supposed to be a majoritarian one or one of judicial intuition?[43] Scholars have entrenched views on both sides.[44] A recent opinion from the Massachusetts District Court illustrates the stakes of relying on judicial intuition well.[45] The court there mused that suburban residents have a greater claim to Fourth Amendment protections than urban dwellers because its residents can expect more privacy given the greater available space in the suburbs.[46] This carries with it clear racial and class-based implications. It is exactly these kinds of divergent results that I find troubling. At worst, this judge's approach is classist and racist. At best, it misapplies the reasonableness test. But to see that he has misapplied the test, we must look extra-"test"-ually to other sources that tell us such assessments of reasonableness are inappropriate. The test itself does not provide such guardrails.

Digital data illustrates the risk of a majoritarian approach well. Would Fourth Amendment protections be rendered meaningless if people stop expecting privacy—not unthinkable in a digital world?[47] Indeed, the reasonable expectations test has struggled to deal with digital data. Consider the Supreme Court's holding that people have a reasonable expectation of privacy in seven days of historical cell site location data but not necessarily in data covering a shorter period of time.[48]

Third and finally, the reasonable expectation of privacy test has also given rise to the third-party doctrine, the "Fourth Amendment rule schol-

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43. Justice Scalia was one of the sharpest critics on these grounds. He termed this approach to the Fourth Amendment one that put constitutional protections at the whim of "judicial predilection," see *County of Riverside v. McLaughlin*, 500 U.S. 44, 66 (1991) (Scalia, J., dissenting), and argued that the test protects only "those expectations of privacy that this Court considers reasonable." *See* Minnesota v. Carter, 525 U.S. 83, 97 (1998) (Scalia, J., concurring).

44. *See generally*, Jeremy A. Blumenthal, Meera Adya & Jacqueline Mogle, *The Multiple Dimensions of Privacy: Testing Lay "Expectations of Privacy"*, 11 U. PA. J. CONST. L. 331 (2009); Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society"*, 42 DUKE L.J. 727 (1993); Emma W. Marshall, Jennifer L. Groscup, Eve M. Brank, Analay Perez & Lori A. Hoetger, *Police Surveillance of Cell Phone Location Data: Supreme Court Versus Public Opinion*, 37 BEHAV. SCI. & L. 751 (2019); Carpenter v. United States, 138 S. Ct. 2206, 2235 (2018) (Gorsuch, J., dissenting); *but see* Kerr, *supra* note 14, at 1047 (arguing that the test does not create a constitutional free-for-all, but rather fortifies the original meaning of the Fourth Amendment against technological change).

45. *See* United States v. Moore-Bush, 381 F. Supp. 3d 139 (D. Mass. 2019), *rev'd*, 36 F.4th 320 (1st Cir. 2022).

46. *See id.* at 143–44.

47. *See generally* Josephine Wolff, *Losing Our Fourth Amendment Data Protection*, N.Y. TIMES (Apr. 28, 2019), https://www.nytimes.com/2019/04/28/opinion/fourth-amendment-privacy.html [https://perma.cc/TX8P-66WF]; Blumenthal et al., *supra* note 44; Slobogin & Schumacher, *supra* note 44.

48. *Carpenter*, 138 S. Ct. at 2217 n.3 ("[W]e need not decide whether there is a limited period for which the Government may obtain an individual's historical CSLI free from Fourth Amendment scrutiny, and if so, how long that period might be. It is sufficient for our purposes today that accessing seven days of CSLI constitutes a Fourth Amendment search."); *id.* at 2220 ("We do not express a view on matters not before us: real-time CSLI . . . .").

ars love to hate."[49] This doctrine states that any information *A* reveals to *B* voluntarily, "even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed," does not receive Fourth Amendment protection from government actors.[50] That is, the government need not get a warrant to access that information. Sherry Colb encapsulates the criticisms of this doctrine as "treating exposure to a limited audience as identical to exposure to the world," failing to recognize that privacy comes in degrees, not an on-off switch.[51]

Some have argued that *Katz* does not necessarily give rise to the third-party doctrine; one could have an expectation of privacy against *C* even when you don't against *B* (indeed, these are the reasons to accept the third-party doctrine in the case of undercover agents, but not necessarily in business records cases). But the *Katz* test provides no basis for distinguishing between directed rights and obligations; mine does. Under my test, you can maintain exclusion rights against *C* and waive them for *B*.

Furthermore, the two tests are so closely intertwined at this point that courts have seemed hesitant to let them stand and fall separately; even in *Carpenter*, the Court carved out an exception to *Smith* and *Miller*—sometimes you do have an expectation of privacy in third-party location data—but did not overturn wholesale the precedents underlying the third-party doctrine.[52] It is unclear how broadly the Court will apply the *Carpenter* exception going forward or whether the Court will confine this third-party limitation to the facts of the case.

Not all scholars are so pessimistic about the reasonable expectation of privacy test. In particular, Orin Kerr has pushed back against the arguments that the test is subjective,[53] circular,[54] and not constitutionally grounded.[55] He argues that "[t]he best way to understand *Katz* is as a means of identifying modern equivalents to the physical-entry invasions that occurred in 1791," which "inevitably requires judgment," and "[j]udgement implies discretion" about "equivalence based on current realities."[56] But his defense actually highlights one of the key originalist objections to a rehabilitation of *Katz*: judgment and discretion are exactly

49. *See* Orin Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 563 (2009). Documenting criticism of the third-party doctrine would result in a very unwieldy footnote. For a concise summary of the debate, see Kerr's article and Erin Murphy's response. *See generally* Kerr, *supra*; Erin Murphy, *The Case Against the Case for Third-Party Doctrine: A Response to Epstein and Kerr*, 24 BERKELEY TECH. L.J. 1239 (2009).

50. United States v. Miller, 425 U.S. 435, 443 (1976); Smith v. Maryland, 442 U.S. 735, 744 (1979).

51. *See* Sherry F. Colb, *What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remed*y, 55 STAN. L. REV. 119, 122 (2002).

52. *See Carpenter*, 138 S. Ct. at 2220.

53. *See* Orin Kerr, Katz *Has Only One Step: The Irrelevance of Subjective Expectations*, 82 U. CHI. L. REV. 113, 124–27 (2015).

54. *See* Kerr, *supra* note 14, at 1057 n. 42 (citing Matthew Kugler & Lior Strahilevitz, *The Myth of Fourth Amendment Circularity*, 84 U. CHI. L. REV. 1747 (2017)).

55. *See generally id.*

56. *See id.* at 1050, 1058.

what the problem (purportedly) is. Deciding based on parallels between "current realities" and 1791 circumstances implies agreement on those parallels. But this gap is exactly where so much of the Fourth Amendment scrum happens. And overall, conservative judges in the judicial system have not been receptive to these attempts at rehabilitation, as Kerr himself admits.[57] Instead, they have taken steps towards a "new originalist" approach to the Fourth Amendment based on property rights.

B. Against New Originalism's Maximalist Property Approach

The primary alternative camp of Fourth Amendment approaches is one broadly termed "the new Fourth Amendment originalism."[58] This collection of views has been present in judicial opinions and scholarly articles for a few decades.[59]

A key feature of this new originalism is the centrality of property logic to Fourth Amendment rights. Since 2000, the Supreme Court has looked to or decided several key cases using property logic.[60] For example, in *Florida v. Jardines*, involving a dog sniff of a porch, the Court stated that "we need not decide whether the officers' investigation of Jardines' home violated his expectation of privacy" because "*physically intruding* on Jardines' property to gather evidence is enough to establish that a search occurred."[61] The Court has also insisted that *Katz* "supplements, rather than displaces" a property-based approach to the Fourth Amendment.[62]

This new originalism is not a strictly textualist approach. Textualists, broadly speaking, view the Fourth Amendment as protecting only "persons, houses, papers, and effects."[63] Indeed, this Article does not directly address my view's advantages vis-à-vis strict textualist arguments about the Fourth Amendment for two reasons. First, doing so largely involves debating the soundness of textualism versus other methods of interpretation, a more general conversation that needs broader context than an article solely about the Fourth Amendment can provide. Second, more Supreme Court Justices are open to a property-based "new Fourth

57. *See id.* at 1047 ("The recent ascendancy of originalists to the Supreme Court creates a serious risk that the reasonable expectation of privacy test will be overturned and replaced by whatever an originalist approach might produce.").

58. *See, e.g.*, David A. Sklansky, *The Fourth Amendment and Common Law*, 100 Colum. L. Rev. 1739, 1744 (2000).

59. *See* Wyoming v. Houghton, 526 U.S. 295, 299–307 (1999) (largely considered the first majority opinion taking a "new originalism" approach to the Fourth Amendment); *see, e.g.*, Sklansky, *supra* note 58, at 1739 (characterizing property-based Fourth Amendment jurisprudence as a "new form of Fourth Amendment originalism" and critiquing it); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 759 (1994); Carol S. Steiker, *Second Thoughts About First Principles*, 107 Harv. L. Rev. 820, 846–57 (1994); William Cuddihy & B. Carmon Hardy, *A Man's House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution*, 37 Wm. & Mary Q. 371, 371–77 (1980).

60. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 34 (2001); United States v. Jones, 565 U.S. 400, 402 (2012).

61. Florida v. Jardines, 569 U.S. 1, 11 (2013) (emphasis added).

62. Byrd v. United States, 138 S. Ct. 1518, 1526 (2018) (citation omitted).

63. Bellin, *supra* note 34, at 239.

Amendment originalism" than to a strict textualist approach, giving strict textualism less likelihood of becoming the majority view.[64] I focus instead on this locus of growing interest from the Court: new originalism.

As the Court has dealt with cases involving searched items that are not traditional property—including data[65]—a particular species of the property view has been gaining ground with a set of Justices. I term this view the "maximalist" property approach. It generally requires two things before affording Fourth Amendment protection. First, all "sticks" in the property "bundle of sticks" must be present before something can be recognized as property and thus protected for Fourth Amendment purposes.[66] Generally, those sticks include the right of possession, control, exclusion, use, and alienation (most commonly selling). Essentially, the maximalist approach takes a "whole log" view of property rights, not a "bundle of sticks" view. Second, this view holds that a search must constitute a common law trespass—physically entering someone's property—to violate someone's Fourth Amendment rights. Property maximalist Justices do not always discuss the "whole log" and "trespass" elements together in the same case; for instance, the maximalist property dissents in *Carpenter*, discussed below, only addressed the "whole log" aspect. But more often than not, each part of the view entails the other.

The maximalist view suffers from four key flaws. First, it generates a narrow set of protections that can be nonsensical in application. Second, it is historically suspect. Third, it suffers from a focus problem: it myopically focuses on the way a search occurs, not the underlying right that the Amendment secures. Fourth, when the test doesn't work, its proponents tweak the concept of trespass to get it to work, undermining the view's touted advantages of reliability and clarity.

The maximalist approach generates a narrow set of results; taken literally, this approach would dramatically reduce Fourth Amendment rights in rental homes, for instance, cutting against the language of the Fourth Amendment itself. First, one must have the "whole log" of property rights in the thing to be searched.[67] These views of property result in narrow protections under the Fourth Amendment: data would not be protected, and neither would, necessarily, a rental car. For instance, in *Carpenter*, Justices Kennedy, Thomas, and Alito took a formalist view of

64. Of the current Court, as of January 2023, I would characterize only Justice Thomas as a strict textualist about the Fourth Amendment.

65. *See, e.g.*, *Jones*, 565 U.S. at 402.

66. *But see* Marinotti, *supra* note 20, at 642–47 (characterizing the Court's current approach to the bundle of sticks as a flexible one that they mold to policy ends). But Marinotti looks to the Court's views of property rights across all types of cases. I look to their treatment of property in the Fourth Amendment, which is where this formalist view emerges. In fact, that gap between what Marinotti observes and what I observe is exactly my point: the Court, or at least individual Justices, are stricter about their conception of property in the Fourth Amendment context than in other areas of the law. This gap also reflects Marinotti's point: property is not inherently a "static" referent. *See id.* at 690.

67. This view has largely been articulated in conservative Justices' dissents in cases where the reasonable expectation of privacy test was applied. *See, e.g.*, Carpenter v. United States, 138 S. Ct. 2206, 2235–36 (2018) (Thomas, J., dissenting).

how property-like an item must be to trigger Fourth Amendment protection.[68] Data did not qualify as property under this formalist view.[69] Because, Justice Thomas wrote, Carpenter "did not create the records, he does not maintain them, he cannot control them, and he cannot destroy them," outlining the numerous property "sticks" Carpenter did not have with respect to his data.[70] Justice Kennedy similarly remarked that customers cannot control their records (providers may do many things with the records without their permission), cannot use (modify) their records, and cannot destroy their records.[71] Justice Alito required use, exclusion, and control rights for Fourth Amendment protections to attach, although he did rank use rights as most important.[72] He stated that Carpenter lacked "'the most essential and beneficial' of the 'constituent elements' of property—i.e., the right to use the property to the exclusion of others" and noted that Carpenter also did not have "dominion and control."[73]

In *Byrd*, which dealt with the search of a rental car driven by a motorist not on the rental agreement, concurring Justice Thomas, with whom Justice Gorsuch joined, also raised the issue of a maximalist approach, asking for more precise consideration of what sticks in the bundle an individual must have in an item for it to be considered an "effect."[74] Data and rental cars aren't the only things that might miss out on Fourth Amendment protection under such a maximalist approach; phone calls, other kinds of location information, and property not owned outright might not get protection under this approach as well.

Adding a trespass requirement to a maximalist approach generates even narrower results. It is necessary, but not sufficient, that one has property rights in the thing to be searched. The additional trespass requirement focuses the inquiry on whether the government agent's actions violated the defendants' common law trespass rights—not on the nature of the rights of the searched individual.[75] Consider some recent opinions where this concept has appeared. In *United States v. Jones*, the Court found that installing a GPS tracker on a car required a warrant because its installation required the government to physically occupy private property, a trespass.[76] The Court specifically called out trespass: the "*Katz* reasonable-expectation-of-privacy test has been *added to*, not *sub-*

68. *See, e.g.*, Carpenter v. United States, 138 S. Ct. 2206, 2223–35 (2018) (Kennedy, J., dissenting) (noting that "the Government did not search anything over which Carpenter could assert ownership or control").

69. *See id.*

70. *Id.* at 2235 (Thomas, J., dissenting).

71. *See id.* at 2229–30 (Kennedy, J., dissenting).

72. *See id.* at 2247–61 (Alito, J., dissenting).

73. *Id.* at 2259 (Alito, J., dissenting) (internal citations and quotations omitted).

74. *See* Byrd v. United States, 138 S. Ct. 1518, 1531 (2018) (Thomas, J., concurring).

75. *See generally* United States v. Jones, 565 U.S. 400, 405–07 (2012).

76. *See id.* at 402. On trespass logic, the Court suppressed the GPS data from the parking lot and allowed the rest of the data from public movements in evidence, in which one did not have a reasonable expectation of privacy in those. Orin Kerr raises questions about this trespass logic, because placing a device on a car does not meet the traditional definition of trespass. *See* Kerr, *supra* note 14, at 1086.

stituted for, the common-law trespassory test."[77] But this reasoning only protected a car from the attaching of a location tracker, not the gathering of public location information itself.

The second problem with the maximalist approach pertains to its questionable claims of originalist virtue. Justices have characterized one of the virtues of this approach as a move back towards an originalist and reliable basis for Fourth Amendment protections.[78] These features together constitute one of the main justifications for adopting this approach. But the veracity of both parts of this claim are debatable. The claim that early search case law relied on property or trespass reasoning alone has two limitations. First, most early search case law involved arrests rather than investigatory (pre-charge) searches.[79] Arresting someone usually involves trespassing. When such cases did involve searches of papers and effects, government agents typically had to trespass, entering a home, to obtain them.[80] Second, early remedies against wrongful searches were not as developed, so the common law of trespass was often invoked against intruding officers.[81] Third, most of what we can draw from early case law are just examples. We do not get a full record of the early history of searches: "Examples alone cannot identify how far beyond their facts the principle should extend."[82]

Another claim supporters of the maximalist approach make is that this approach provides a more reliable and predictable basis for deciding Fourth Amendment cases. But this assertion also struggles. The Court has played fast and loose with the concept of trespass, decreasing predictability. *Jones* did not explain why placing a GPS tracker on a car was a common law trespass; was it trespass because government agents crossed owned land, or was the Court using trespass to chattel logic?[83] And in *Jardines*, the Court reasoned that bringing an investigatory dog onto someone's property went beyond the implied license granted to people to knock on neighbors' doors.[84] But it is not obvious that a homeowner could sue a neighbor who brought a sniffer dog onto her porch for trespass. So why does the purpose of the knock turn an action into a licensed one or, essentially, a trespass?[85] The Court stretches trespass logic in direct contrast to one of the approach's purported benefits, its predictabil-

77. *See Jones*, 565 U.S. at 409 (emphasis in original).

78. *See, e.g.*, *Carpenter*, 138 S. Ct. at 2267 (Gorsuch, J., dissenting) ("From the founding until the 1960s, the right to assert a Fourth Amendment claim didn't depend on your ability to appeal to a judge's personal sensibilities about the 'reasonableness' of your expectations or privacy. It was tied to the law.").

79. *See* Kerr, *supra* note 14, at 1077.

80. *See generally* Sklansky, *supra* note 58, at 1759.

81. *See* Kerr, *supra* note 14, at 1079.

82. Orin Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 73 (2012).

83. *See* Kerr, *supra* note 14, at 1086.

84. *See* Florida v. Jardines, 569 U.S. 1, 10–12 (2013).

85. *See* Baude & Stern, *supra* note 23, at 1834. Granted, the *Jardines* majority opinion did not use the term trespass. But exceeding an implied license to enter a property is a trespass.

ity, and beyond the confines of its originalist origins.[86] The concept does not actually do the work its supporters want it to do—supplying a reasoned and stable basis for deciding Fourth Amendment rights.

Third, the trespass angle of the maximalist approach makes the Fourth Amendment test about the wrong thing. It asks how a government agent got the information. Even on originalist terms, we should be asking whether that information was meant to be protected ("persons, houses, papers, and effects") and why.[87] In other words, it mistakes the regulation of *ways* of violating a right with prohibiting a violation of that right. The trespass test's problem in focus leads to a problem of technological variability. The same activity, talking on one's private phone line, seems to enjoy different protections depending on the state's technological prowess. What matters is the caller's *rights* concerning the call, not *how* those rights might be impinged. Consider an analogous attempt to define murder as stabbing, shooting, or beating someone to death; even if such a definition was long enough to include all types of murder, defining murder that way mistakes regulating *how* murder happens with a prohibition on murder itself. Put back in property terms, to be protected by the Fourth Amendment, it should be sufficient that you have a property right, not a right to be free from trespass.[88]

One other slight variation of property views is worth addressing. Justice Gorsuch has floated a non-maximalist variation on the property rights approach to the Fourth Amendment that would avoid the third-party doctrine problem in *Carpenter*. He suggested incorporating the concept of bailments into Fourth Amendment jurisprudence.[89] A bailment involves the "delivery of personal property by one person (the *bailor*) to another (the *bailee*) who holds the property for a certain purpose."[90] Justice Gorsuch suggested that extending Fourth Amendment protections to bailments would solve the third-party doctrine by providing a reasoned basis for maintaining a reasonable expectation of privacy in, say, data shared with your provider.[91] This approach, however, still runs up against the fundamental narrowness problem with the property approach to the Fourth Amendment: data is not property at common law, so it cannot be

86. *See* Matthew Tokson, *Fractional Originalism and the Fourth Amendment's Trespass Test*, DORF ON LAW (Sept. 12, 2022), http://www.dorfonlaw.org/2022/09/fractional-originalism-and-fourth.html [https://perma.cc/5SAA-DEEM].

87. *See* Matthew Tokson, *Knowledge and Fourth Amendment Privacy*, 111 NW. U. L. REV. 139, 194 (2016); Tokson, *supra* note 33, at 798–801 (critiquing Justice Thomas's dissent in *Carpenter*).

88. Despite the Court's claim that they stuck to a simple trespassory logic because doing so keeps "easy cases easy," their conclusion that police presence on the curtilage of a home is a trespass still draws on reasonable expectation of privacy logic. *See Jardines*, 569 U.S. at 11. The Court explicitly acknowledges this when it describes that area as "psychologically" sensitive. *See id.* at 7. Despite claims of property purity, the reasonable expectation of privacy test is everywhere.

89. *See* Carpenter v. United States, 138 S. Ct. 2206, 2267–69 (2018) (Gorsuch, J., dissenting).

90. *Bailment*, BLACK'S LAW DICTIONARY (10th ed. 2014).

91. *See Carpenter*, 138 S. Ct. at 2267–69 (Gorsuch, J., dissenting).

a bailment.[92] His view has so far found little uptake with the other Justices.

III. THE CASE FOR THE SITUATIONAL RIGHT TO EXCLUDE APPROACH

Perhaps you agree that the reasonable expectation of privacy test—at least as applied—is too ungrounded and unpredictable. But you might object that property is not the correct place to look for concepts to fill that theoretical void. I think property is the correct inspiration for several reasons.

First, and most importantly, the right to exclude makes theoretical sense as the center of the Fourth Amendment. This is the most important reason.

Second, centering a situational right to exclude as the basis for the Fourth Amendment more accurately reflects the directed rights and obligations central to property law.

Third, practically speaking, the Court is already on its way to viewing property as the "great right," including in the Fourth Amendment context. Privacy advocates—myself included—may do well to advance palatable Fourth Amendment views that engage with this trend in meaningful ways.

The situational right-to-exclude approach articulates Fourth Amendment protections as follows: a person has Fourth Amendment rights against the government with respect to something exactly when she has the right to exclude a non-lawbreaker at least some of the time from that resource (note that I use the term "resource" here to avoid real property-based language; for instance, I'll count data, not just houses).[93] The government may access that resource without a warrant if all comers are allowed. But if an individual retains any right to restrict any law-abider[94] from the resource, that situational right to exclude triggers Fourth Amendment protections.[95]

Any non-*Katz* view faces the challenge of not only defining Fourth Amendment protections but also creating an acceptable definition of a "search." The *Katz* reasonable expectation of privacy test defines that which violates that privacy as a search.[96] Setting aside that definition leaves little to work with: the pre-*Katz* cases did not explicitly define

92. *See* Nicholas A. Kahn-Fogel, *Property, Privacy, and Justice Gorsuch's Expansive Fourth Amendment Originalism*, 43 HARV. J.L. & PUB. POL'Y 425, 438–39 (2020).

93. I think the situational right to exclude is necessary and sufficient for Fourth Amendment protections both because of the case law it emerges from and considering the results it achieves when applied to existing cases. But most of what this Article argues for holds if one holds the weaker view that claims only that a situational right to exclude is sufficient for Fourth Amendment protection.

94. *See infra* Part III.C.

95. I propose one limiting exception in cases where the thing searched is generally open to the public. *See infra* Part III.E and accompanying text.

96. *See generally* Katz v. United States, 389 U.S. 347 (1967).

"search," nor does the text of the Fourth Amendment.[97] I define search as an action by a government actor intended to obtain information from the thing to be searched.[98] Notably, this focus on information is not unique to my proposal; for instance, this definition is very similar to one adopted by a leading Fourth Amendment textualist, Jeffrey Bellin; he defines a search as an examination of a thing itself.[99] It is also similar to Baude and Stern's definition, "an action generally likely to obtain information."[100] All these definitions focus on information. My proposal also echoes the Court's approach in *Kyllo*, in which the Court considered warrantless gathering of information from a house using a thermal gun as a violation of the Fourth Amendment.[101] There, getting private facts *from* the house was the central problem.[102]

A search does not encompass all instances of collecting information *about* something. Let's say the police read, in a newly released memoir, information about a meth lab in a particular house in their jurisdiction. This reading is not a search for Fourth Amendment purposes; it is gathering information *from* a book *about* a residence, but not *from* that residence. The "from" helps us locate and analyze the search: we ask, was the "from" part allowable? Meaning, did it violate the suspect's right to exclude? Here, did reading a public book violate the suspect's right to exclude? No. But, going to that residence and peering through the windows to identify the meth lab would constitute a search; that conduct gathers information *from* the residence and would be an examination of the thing itself. As Part III.E discusses in greater detail, police also do not search when they ask potential witnesses to share information voluntarily.[103]

With these background considerations in place, the theoretical argument for my view proceeds in two steps. First, the view is essentialist about the right to exclude. That is, one need not have all of the "bundle of sticks" of a property right for Fourth Amendment purposes. One needs only have a right to exclude some law abider in some circumstance.

Second, the view holds that such a right need not be held against all (in rem). Initially, this assumption might sound wrong. The very quality that sets property rights apart from other forms of rights, such as contract rights, is this in rem characteristic.[104] As William Blackstone put it, property is a right one exercises against "any other individual in the uni-

97. *See* Bellin, *supra* note 34, at 238.

98. The action need not actually obtain information but must be intended to gain information.

99. *See* Bellin, *supra* note 34, at 238.

100. Baude & Stern, *supra* note 23, at 1833.

101. *See* United States v. Kyllo, 533 U.S. 26, 39–40 (2001).

102. *See id.*

103. My proposal does not change standing requirements; the searchee must possess the relevant rights to challenge the search directly. For example, a security guard tasked with excluding unwelcome comers from a CEO's office would not have Fourth Amendment standing to challenge a search of that office for evidence of a crime committed by the CEO. *See infra* Part III.E.

104. *See* Shyamkrishna Balganesh, *Quasi-Property: Like, But Not Quite Property*, 160 U. PA. L. REV. 1889, 1892 (2012).

verse."[105] But I will show that loosening this in rem requirement is not so odd, and courts are quite willing to recognize property rights absent in rem status. We should follow suit in the Fourth Amendment context. I defend each of these premises in the following sections.

With the theoretical argument on the table, I will also argue that, given current trends in the judiciary, both privacy activists and originalists have reason to endorse my view.

A. The Case for Fourth Amendment Right to Exclude Essentialism

The situational right to exclude view of the Fourth Amendment depends first on the premise that the right to exclude is the core of the Fourth Amendment. This section defends that premise. We need not anchor Fourth Amendment protections in a maximalist definition of property. That is, one doesn't need the entire bundle of sticks of a property right for Fourth Amendment purposes; a right to exclude against at least one non-lawbreaker is enough. In this way, my view is right-to-exclude essentialist.

1. Right-to-Exclude Essentialism in Property Law

Scholars have developed arguments for right-to-exclude essentialism in property law at large. I am agnostic about the success of this view outside of the Fourth Amendment context. But I review these justifications because their analogs in the Fourth Amendment context, discussed below, are convincing.

Right-to-exclude essentialists make a compelling case for the right to exclude as the core "stick" in the bundle of property rights.[106] They argue that a right to exclude is the necessary and sufficient condition of identifying property and that other associated rights are contingent on this right.[107] This view is deeply rooted in the common law. Blackstone's famous definition of property couches this right in exclusionary language: one possesses "that sole and despotic dominion . . . in total exclusion of the right of any other individual in the universe."[108] Others subscribe to a more moderate form of the view, which considers the right to exclude necessary but not sufficient; without the right to exclude, no property exists.[109]

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105. 2 William Blackstone's Commentaries on the Laws of England *2.

106. Various scholarship exists discussing versions of right-to-exclude essentialism. *See id.*; Blackstone, *supra* note 17, at *138; Jeremy Bentham, Of Laws in General 156–57, 177 (H.L.A. Hart ed., 1970); Felix S. Cohen, *Dialogue on Private Property*, 9 Rutgers L. Rev. 357, 370–73 (1954); A.M. Honoré, *Ownership*, *in* Oxford Essays in Jurisprudence 107–47 (A.G. Guest ed., 1961); Richard Epstein, Takings: Private Property and the Power of Eminent Domain 58–59 (1985); Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 Mich. L. Rev. 1835, 1838–41 (2006); Balganesh, *supra* note 17, at 595–601.

107. *See* Merrill, *supra* note 17, at 731.

108. Blackstone, *supra* note 105, at *2.

109. *See* Merrill, *supra* note 17, at 736.

Right-to-exclude essentialists advance three primary arguments for right-to-exclude essentialism in broader property scholarship: a "logical," historical, and associative argument.[110] The "logical" argument holds, as articulated by Thomas Merrill, that one can "derive most of the other attributes commonly associated with property through the addition of relatively minor clarifications about the domain of the exclusion right."[111] To give but one example, one can logically derive a right to use from a right to exclude: "A's right to exclude with respect to Blackacre leads directly to A's right to dictate the uses of Blackacre, because no one else will be in a position to interfere with the particular uses designated by A."[112] J.E. Penner argues that the right to use is theoretically at the core of property rights, but in the legal realm "we must look to the way that the law contours the duties it imposes on people to exclude themselves from the property of others, rather than regarding the law as instituting a series of positive liberties or powers to use particular things."[113] He characterizes use and exclusion as "opposite sides of the same coin," but that is because "[i]t is difficult in the extreme to quantify the many different uses one can make of one's property" and "more practical to say" that one has property "only in so far as . . . specific duties [are imposed] on others to exclude themselves."[114] Penner, like Merrill, holds that from this "exclusion thesis," undergirded by the justificatory right to use, we can derive the rest of what we do with property.

The historical argument looks at what rights first develop in emerging property systems and finds that a type of right to exclude—indeed, one akin to a situational right to exclude—tends to emerge first.[115] Emerging property systems tend to manifest a usufruct right first, that is, a right to exclude others if they interfere with the purpose for which the land is being used. One could prevent others from interfering with land in a way that damages crops, for example, but not necessarily prevent them from physically using the land to get from one place to another (unless, of course, they were trampling the crops when doing so).[116] This usufruct right can be considered a right to exclude some people in some, but not all, circumstances.

Third, the associative argument is an inductive claim that, in mature property regimes, a right to exclude is "invariably associated with those interests identified as property rights."[117] Where property rights go, there

110. *See id.* at 740–52.

111. *Id.* at 740.

112. *Id.* at 741. Note that this logical argument does not entail that the two rights are coterminous; they can still be severed; the right to use may be contractually assigned to another while the right to exclude is maintained. For additional examples, see *id.* at 742–45.

113. *See* J.E. PENNER, THE IDEA OF PROPERTY IN LAW 71 (1997).

114. *Id.* at 71–72 (emphasis omitted).

115. *See* Merrill, *supra* note 17, at 745–46; *see also* Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1364–65 (1993); WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND 62 (1983).

116. *See* Merrill, *supra* note 17, at 745.

117. *See id.* at 747.

too goes a right to exclude. For instance, present possessory estates all include the right to exclude; consider a life estate.[118]

Furthermore, with modern variations of property, such as intellectual property, where traditional notions of trespass do not make sense, the core of these new property-esque rights is also a right to exclude.[119] Copyright's set of exclusive rights "closely parallels landowners' 'right to exclude'" by giving authors "the right to exclude others from what they own," albeit with certain exceptions like fair use.[120] The patent statute is written in the language of the right to exclude.[121] The Supreme Court has written, "With respect to a trade secret, the right to exclude others is central to the very definition of the property interest. Once the data that constitute a trade secret are disclosed to others, or others are allowed to use those data, the trade secret holder has lost his property interest in the data."[122]

2. Right-to-Exclude Essentialism in the Fourth Amendment Context

A logical, historical, and associative case can likewise be made with respect to the right to exclude in the Fourth Amendment context. The right to exclude is at the logical heart of what is violated when a government agent conducts a search. The right to exclude *just is* what is infringed, rightly with a warrant or wrongly without a warrant, when a government agent searches. To review the D.C. rowhouse example, if a government agent sought to search that rowhouse, that search directly implicates the owner's right to exclude.[123] The owner may not prevent entry if a government agent shows up with a valid warrant. In other words, the government has justified infringing her right to exclude. However, a valid warrant would not necessarily interfere with the rowhouse owner's ability to possess, control, use, or transfer the property. And, for instance, if use is curtailed temporarily during the execution of a warrant, it is only done so when it is needed to secure the justified infringement of the right to exclude; the police don't get a warrant that prevents someone simply from using their kitchen, for example.[124] In other words, searches intrude; the relevant stick in the property bundle of rights, for search purposes, is the right to exclude. While quick and simple, this is the strongest

118. *Id.*
119. *Id.* at 749.
120. Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1370 (1989) (internal citation omitted); *see also* Brian M. Hoffstadt, *Dispossession, Intellectual Property, and the Sin of Theoretical Homogeneity*, 80 S. CAL. L. REV. 909, 910–17 (2007) (arguing that the right to exclude is the common thread through intellectual property types).
121. *See* 35 U.S.C. § 154.
122. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1011 (1984).
123. *See* Chappell & Sundaresan, *supra* note 4.
124. The growing practice of preservation orders in the digital realm poses an interesting edge case for this assertion. One could conceive of them as orders not to dispose, or orders to use in a particular way. Whether and how the Fourth Amendment regulates these orders is under debate. *See* Orin Kerr, *The Fourth Amendment Limits of Internet Content Preservation*, 65 ST. LOUIS U. L. REV. J. 753, 753 (2021).

argument for the view: the Fourth Amendment protects what searches infringe, a right to exclude.

The right to exclude is also at the historical heart of the Fourth Amendment. Setting originalism's merits and demerits aside for a moment, it is undisputed that general warrants and writs of assistance played some role in motivating the Fourth Amendment.[125] General warrants allowed officials to search and arrest offenders, typically printers or publishers, as well as to search for and seize their papers; these warrants lacked particularity.[126] Writs of assistance granted the power to customs officials to search whenever and wherever untaxed goods might be.[127] Both of these practices involved an unjustified abrogation of rights to exclude from the places where the people, papers, or goods in question might be.

The associational argument is harder to make in the Fourth Amendment context because the argument's structure is difficult to parallel. The associational argument in the broader property context goes—where mature property rights go, so too go rights to exclude. The parallel is harder to construct in the Fourth Amendment context—what do we substitute in place of a "mature property right" in the Fourth Amendment context? One way to do so is to consider what the Fourth Amendment is universally thought to protect—persons, houses, papers, and effects[128]—as equivalent to a mature property right. These categories enjoy "mature" protections from search. All of these easily involve rights to exclude in trespass, trespass to persons, and trespass to chattels. The category of "papers" is the trickiest one to articulate in terms of a right to exclude. But the Court's decision in *Ex parte Jackson* follows a right to exclude logic, even if not articulated in such terms.[129] The Court found that mailed letters were "as fully guarded from examination and inspection" as if they were "retained by the parties forwarding them in their own domiciles."[130] So letters in the mail were to be treated the same as letters in the home, in which a person retained a right to exclude.[131] Even though the letters were under the control and dominion of the postal service, the sender retained a right to exclude them.[132]

Even when considering more modern problems of search doctrine, the Court has generally granted a right to privacy on what is essentially a right to exclude logic, although not in the traditional property sense. Consider *Walter v. State*, where government agencies had come into lawful

125. *See* Sklansky, *supra* note 33, at 150–51.

126. *See id.* at 151.

127. *See* Steiker, *supra* note 59, at 823 n.19; Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 Wm. & Mary L. Rev. 197, 218–19 (1993).

128. *See* Bellin, *supra* note 34, at 239.

129. *See Ex parte* Jackson, 96 U.S. 727 (1877).

130. *Id.* at 733.

131. *See id.*

132. That said, this right to exclude from papers is defeasible if one leaves papers in public view.

possession of film reels; there was no trespass or invasion of the home.[133] Justice Stevens announced the plurality judgment of the Court and wrote that the seizure of the film nonetheless left a "remaining unfrustrated portion of" an expectation of privacy in the content of the films.[134] Put differently, even though the agents had lawful possession of the films—and the films were labeled as pornographic—the film owner still had a right to exclude those agents from the content of the films.[135] Merely viewing them infringed on that right.[136]

Right-to-exclude essentialism in property law at large has been subject to much criticism.[137] But one of the most important objections to right-to-exclude essentialism does not apply to right-to-exclude essentialism in the narrow Fourth Amendment context. As articulated by Stern, the right to exclude is "incomplete as an account of property" because, outside of a few traditional items of property, like land, the "right to exclude is a rather awkward description of the legal position of an owner in relation to nonowners" and may endow the owner with "practically nothing."[138] In particular, critics argue that the right to exclude without the right to use is useless.[139] In the Fourth Amendment context, this objection is not applicable. Having a right to exclude gives a person a right against interference with property, real or otherwise, which is precisely what is at issue with a search. As I remarked above, a warrant does not come in the form of "you may not use your kitchen." A warrant may let government agents search your kitchen, which means you temporarily might not be able to use it, but that use deprivation is not the point of the warrant. The agents also may not themselves use your kitchen, only search it. The right to exclude addresses exactly that "infringement" at issue in a search, making it an appropriate basis for Fourth Amendment rights—even if one considers possession or control more essential for property rights more broadly. This point undercuts the force of objections such as Justice Thomas's that Carpenter "did not create the records, [did] not maintain them, . . . cannot control them, and . . . cannot destroy them."[140] For the Fourth Amendment, in my view, those objections are irrelevant.

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133. *See* Walter v. State, 447 U.S. 649, 651–52 (1980). For a full consideration of this argument, see Nita A. Farahany, *Searching Secrets*, 160 U. PA. L. REV. 1239 (2012).

134. *See Walter*, 447 U.S. at 659. Five Justices agreed with the judgment of the Court, but only two Justices joined the "opinion" of the Court. Four Justices agreed on the logic quoted above. *See id.* at 660–62.

135. *See id.* at 658–60.

136. *See id.*

137. A competing essentialist theory is right to use essentialism. *See generally* James Y. Stern, *What is the Right to Exclude and Why Does it Matter?*, *in* PROPERTY THEORY: LEGAL AND POLITICAL PERSPECTIVES 38 (M.H. Otsuka & J.E. Penner, eds., 2018) (critiquing exclusion as basis for property); Henry E. Smith, *The Thing About Exclusion*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 95 (2014).

138. James Stern, *Property's Constitution*, 101 CAL. L. REV. 277, 301–02 (2013).

139. *See* Stern, *supra* note 137, at 38; Smith, *supra* note 137, at 95–96.

140. *See* Carpenter v. United States, 138 S. Ct. 2206, 2235 (2018) (Thomas, J., dissenting).

Easements provide a negative example of this centrality of the right to exclude in the Fourth Amendment context: where one cannot exercise even a situational right to exclude, one has no Fourth Amendment protections. An easement holder has a right to use an easement but nothing else.[141] Take, for instance, the common hallways of apartment buildings. Traditionally, tenants have an easement in these hallways: they can use them to enter and exit their units. But they do not have the same rights (and duties) with respect to the hallway as they do to their units: they do not possess or control it, they cannot alienate it, and they cannot exclude others from it. The landlord retains those rights associated with the hallway.[142]

Under current Fourth Amendment doctrine, courts have generally held that tenants do not have Fourth Amendment rights in common hallways.[143] Critically, courts use the language of right to exclude in their analyses, making assessments such as defendants, apartment dwellers, had "no right to exclude . . . from the common hallway"[144] because any other resident could "admit guests, delivery people, repair workers, postal carriers, custodians, and others into the common areas"[145] at any time

141. Thomas Merrill actually conceptualizes an easement in terms of a right to exclude: even an easement holder can exclude others in so far as they interfere with her use of the easement. *See* Merrill, *supra* note 17, at 748; *see also* THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 986–90 (2d ed. 2012) (describing types and creation of easements); *see, e.g.*, Holbrook v. Taylor, 532 S.W.2d 763, 764–66 (1976) (finding easement established by estoppel); *see also* Fontainebleu Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So.2d 357, 358–61 (1959) (finding no express or implied easement for light and air across property).

142. Easements can come with exclusion rights, if the owner explicitly grants them. For instance, the Tenth Circuit recently interpreted the General Railroad Right-of-Way Act of 1875, which granted Union Pacific a right of way across public land (an easement), to include exclusionary rights. *See* L.K.L. Assocs. v. Union Pac. R.R. Co., 17 F.4th 1287, 1303 (10th Cir. 2021).

143. *See* United States v. Acosta, 965 F.2d 1248, 1251–53 (3d Cir. 1992) (defendants did not have Fourth Amendment rights in hallway of apartment building, in which they had an easement of access); United States v. Holland, 755 F.2d 253, 256 (2d Cir. 1985) (defendant had "no right to exclude . . . from the common hallway"); United States v. Dickens, 695 F.2d 765, 777–78 (3d Cir. 1982) (no Fourth Amendment rights in common stairwell, even if defendant was temporarily living in the stairwell); United States v. Correa, 653 F.3d 187, 191 (3d Cir. 2011) (no Fourth Amendment rights in common areas of building even if locked, as residents did not possess a right to exclude since any other resident could "admit guests, delivery people, repair workers, postal carriers, custodians, and others into the common areas"); United States v. Perkins, 286 F.Supp. 259, 260–64 (D.D.C. 1968), *aff'd*, 432 F.2d 612 (D.C. Cir. 1970) (entry into public areas of rooming house through open door without a warrant or announcing police presence did not violate Fourth Amendment); United States v. Concepcion, 742 F.Supp. 503, 505 (N.D. Ill. 1990), *aff'd*, 942 F.2d 1170 (7th Cir. 1991) (defendant "could not legitimately exclude anyone from the common area"); United States v. Eisler, 567 F.2d 814, 815–18 (8th Cir. 1977) (agent's testimony about observations and overheard conversations while standing in hallway of an apartment building were admissible and did not violate the Fourth Amendment); United States v. Cruz Pagan, 537 F.2d 554, 555–59 (1st Cir. 1976) (warrantless entry into underground garage and search of delivery van did not violate Fourth Amendment because the area was not within the curtilage of the dwelling); *see generally* Sean M. Lewis, Note, *The Fourth Amendment in the Hallway: Do Tenants Have a Constitutionally Protected Privacy Interest in the Locked Common Areas of Their Apartment Buildings?*, 101 MICH. L. REV. 273, 273–77 (2002).

144. *Holland*, 755 F.2d at 256.

145. *Correa*, 653 F.3d at 191.

without their say. Courts have found that tenants have no reasonable expectation of privacy in those same areas without this right to exclude.[146]

In my view, the treatment of hallways in apartment buildings at common law—an easement—similarly determines that tenants have no situational right to exclude. Granted, tenants may refuse to buzz in guests who request entry from them, but they have no ultimate right to prevent other tenants or the landlord from admitting those same guests or forcing them to leave after they were granted entry by another.[147] This result tracks the formal property right that an easement conveys: a right of use but not exclusion; thus, no warrant requirement should attach.

3. Exclusion Rights as the Basis for Privacy?

A conciliatory way of viewing my approach is as an explanation of the reasons we can expect privacy.[148] As the Court demonstrated in *Byrd*, one can use a situational right to exclude as a basis for deciding whether a reasonable expectation of privacy exists.[149] Briefly, the majority opinion in *Byrd* found that the right to exclude underpinned the defendant's right to privacy.[150] So, one could understand my approach as filling in the reasonableness gap in *Katz*: if one has a situational right to exclude, one also has a reasonable expectation of privacy.

In this way, treating a situational right to exclude as a judicial test would be an improvement from current doctrine because it would focus judicial inquiries with greater specificity on what it means to have privacy. We know what it looks like to exclude. And, as other scholars have suggested, we can use the right to exclude as an analogy in new technological contexts, especially when viewed as more than just an in rem right.[151]

One could object that basing reasonable expectations of privacy on ex-

146. *See Holland*, 755 F.2d at 256–57; *Correa*, 653 F.3d at 191 (defendant "lacked a reasonable expectation of privacy in the building's common areas because he did not have control over [access to] these areas").

147. A restraining order would be an exception. But the order does not grant those tenants a right to exclude. Rather, the government is placing a duty on the restrained individual to stay away from the protected individual, regardless of location. A restraining order is, in other words, a criminal-sanctions backed remedy for a right to exclude from your person.

148. Defining privacy as the right to exclude does not work for all private instances of privacy. For instance, conceiving of the traditional privacy torts as rights to exclude does not always work; consider the tort of publicity in false light. *See* G. Alex Sinha, *A Real-Property Model of Privacy*, 68 DEPAUL L. REV. 567, 591 (2019) ("[A]n essentialist account that accepts a sufficiently nuanced position on the right to exclude could still shed substantial light on privacy and might even be fully capable of providing a model for privacy as articulated here.").

149. *See* Byrd v. United States, 138 S. Ct. 1518, 1523–31 (2018).

150. *See id.* at 1527.

151. *See* Jace C. Gatewood, *The Evolution of the Right to Exclude—More Than a Property Right, a Privacy Right*, 32 MISS. COLL. L. REV. 447, 449–50 (2014) ("[T]he right to exclude has evolved beyond the in rem conception of property first articulated by Blackstone, to also include an *in personam* conception of property that attaches to people as people . . . ."); Kerr, *supra* note 14, at 1050, 1058; Donohue, *supra* note 23, at 354.

clusion results in an impoverished view of privacy.[152] Privacy is important in its own right. And exclusion does not cover every dimension of privacy; consider the tort of publicity in a false light.[153] I am not offering situational rights to exclude as a full account of societal privacy. But I do think it provides a precise account of the species of privacy that the Fourth Amendment protects, privacy against government intrusion. That said, I still argue for conceiving of this test on its own rather than as a gloss on *Katz* for the reasons articulated throughout this Part.

B. A Case for Exclusion Rights Not Held In Rem

My view claims that a right to exclude, even against just one in one circumstance,[154] is sufficient to trigger Fourth Amendment protections. That is to say, for Fourth Amendment purposes, property rights do not need to be held in rem, against the world. Initially, this assumption might sound wrong. The very quality that sets property rights apart from other forms of rights, such as contract rights, is supposed to be this in rem characteristic.[155]

But this facet of the view is not as odd as it initially might seem. Property law readily employs notions of ownership that do not require in rem status.[156] The existence of these *situational* rights (*i.e.* not in rem) shows that the right at the center of my proposal—a right to exclude some in some circumstances—is not aberrant, ad hoc, or too diluted to stand as a genuine basis of a Fourth Amendment right. Below, I review such examples of property rights, starting with a type of property that is almost in rem and working towards a type that can be held against all but one.

1. Finder's Interests

With finder's interests, a finder has a right to exclude everyone except the true owner of the item.[157] In this way, a finder has a right to exclude that is not absolute and that varies by the identity of the possible intruder.[158] Finder's interests are, admittedly, not a common form of ownership. But this form of property ownership helps underscore that

152. *See* Abraham Bell & Gideon Parchomovsky, *The Privacy Interest in Property*, 167 U. Pa. L. Rev. 869, 905 (2019) (arguing that the right to exclude should respond to the strength of a privacy right, not vice versa).

153. For one account of the manifold ways that privacy is used in legal discourse, see Jeffrey Bellin, *Pure Privacy*, 116 Nw. U. L. Rev. 463 (2021).

154. *See infra* Part III.C (discussing the law-abider limitation).

155. *See* Balganesh, *supra* note 104, at 1892.

156. *See, e.g.*, *id.*

157. *See* Armory v. Delamirie (1722) 93 Eng. Rep. 664, 664 (KB) (stating that a finder has a right to keep a found object "against all but the rightful owner, and consequently may maintain trover"); Hannah v. Peel (1945) 2 All ER 288, 291 (KB) (noting "[t]he general right of the finder to any article which has been lost, as against all the world, except the true owner"); Bridges v. Hawkesworth (1851) QB 424, 430–31 (holding that finder's rights run to person who found parcel of banknotes in a shop, not the shopkeeper); McAvoy v. Medina, 93 Mass. (11 Allen) 548, 549 (1866) (finding that lost items can be claimed by finder, mislaid items can be claimed by owner of land).

158. *See McAvoy*, 93 Mass. (11 Allen) at 549.

property was a flexible notion at common law; one need not have a right to exclude against all for a property right to be recognized. That said, this example only provides a case where you have rights against all except one. Let's look at other cases where the group of excludable people gets smaller.

2. Easements & Licenses

I thoroughly discussed easements, a right to use another's land for a certain purpose, earlier in this Article, so I will recap this idea only briefly.[159] Someone who grants an easement does not relinquish ownership over that property.[160] In essence, in this common way of using property, ownership is not lost once the right to exclude is no longer exercised in rem.[161] Easements will often only be granted to one person.[162] But consider an easement on private land granted to a city to allow access to a public park: there, the landowner may not exclude any person headed to that public park. The group of people the landowner may exclude gets smaller.

Similar to easements, licenses provide varied degrees of property rights: they may encompass only so much as permission to enter a property to fix a sink.[163] Other licenses only come with a right to use.[164] But guest licenses, at least in the context of renting hotel rooms and such, usually encompass both a right to use *and* a right to exclude.[165] Such a license might encompass a right to exclude all except the hotel staff at certain times, for instance.[166] So, again, private ordering recognizes instances in which rights to exclude are attenuated without eviscerating that kind of property right. And licenses can apply to many; for instance all patrons may enter a restaurant, again shrinking the group one may exclude.[167]

Indeed, courts have relied on right to exclude reasoning, rather than right to use logic, in Fourth Amendment cases involving licenses. Under current doctrine, guests maintain an expectation of privacy because they retain a right to exclude at least some.[168] For instance, the Supreme Court

159. *See supra* Part III.A.

160. JOHN H. PEARSON, 7 THOMPSON ON REAL PROPERTY § 60.02(f)(5), LEXIS (database updated Sept. 2022); Soderberg v. Weisel, 687 A.2d 839, 843 (Pa. Super. Ct. 1997) ("In the case of prescriptive easements, however, the dominant estate never holds title to the easement.").

161. *See* Humphreys v. Wooldridge, 408 S.W.3d 261, 267 (Mo. Ct. App. 2013) ("An easement does not grant title to land; instead, it merely grants a right to use land for particular purposes.").

162. *See* PEARSON, *supra* note 160, § 60.02(a).

163. *See* RONALD W. POLSTON, 8 THOMPSON ON REAL PROPERTY § 64.02(a), LEXIS (database updated Sept. 2022).

164. *See* Merrill, *supra* note 17, at 744.

165. *See, e.g.*, Stoner v. California, 376 U.S. 483, 489 (1964).

166. *See, e.g.*, TENN. CODE § 62-7-109.

167. *See, e.g.*, CAL. CIV. CODE § 51(b).

168. *See Stoner*, 376 U.S. at 489 (finding the search of a hotel room at the permission of the clerk but not the occupant to violate the Fourth Amendment); United States v. Jeffers, 342 U.S. 48, 52 (1951); United States v. Matlock, 415 U.S. 164, 169 (1974) (holding that in a

has written that "when a person engages a hotel room he undoubtedly gives implied or express permission to such persons as maids, janitors or repairmen to enter his room in the performance of their duties."[169] But such allowances do not erase the guest's right to exclude others from his room.[170] In essence, a guest possesses the property rights of use and exclusion, the latter of which is held against some but not others. This situation demonstrates the directed nature of property rights.

3. Intellectual Property

Deviating for a moment from real property, intellectual property is built on the notion that one can exclude some but not all and still retain a right.[171] The courts interpret copyright law in the language of exclusion rights: "[A] copyright holder possesses 'the right to exclude others from using his property.'"[172] That said, key exceptions such as fair use exist.[173] But the fact that a copyright owner might be required to allow fair users as a class does not mean the owner loses the ability to exclude other non-fair users.[174] True, it's plausible that all users could be fair users; but the copyright owner still maintains the right to exclude any non-fair users, should they arise. Just as if every person in a town decides to use an easement to get to a public park, we don't say the owner has lost all exclusion rights. He or she still retains exclusion rights against any non-park users, should they arise. So, despite fair use, copyright holders can still exclude some, but not all, without losing their underlying right—another example of situational exclusion rights.

The patent statute is also written in the right to exclude language: "Every patent shall contain . . . a grant . . . of the right to exclude others from making, using, offering for sale, or selling the invention" during the grant's pendency.[175] Conceivably, a patent holder could grant the right to use the invention to any comer but one; doing so would not invalidate the patent.

The Supreme Court's decision in *International News Service v. Associated Press*, although not dealing with intellectual property, is worth mentioning as another case that found a quasi-property right in intangibles even where *only one* party is excluded: a competitor.[176] For instance, even when breaking news is exhibited for all the world to see on bulletin boards, for example, a competitor can be excluded from using it in its

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third-party consent case, officers must have joint access or control for most purposes); Chapman v. United States, 365 U.S. 610, 616 (1961) (finding the search of tenant's house without a warrant but with the owner's consent violated Fourth Amendment).

169. *Stoner*, 376 U.S. at 489 (internal quotations and citation omitted).

170. *See id.* at 490.

171. *See* Merrill, *supra* note 17, at 749.

172. *E.g.*, eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 392 (2006) (quoting Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932)).

173. *See, e.g.*, 17 U.S.C. § 107.

174. *See* Merrill, *supra* note 17, at 749.

175. 35 U.S.C. § 154(a)(1).

176. *See* Int'l News Serv. v. Associated Press, 248 U.S. 215, 236 (1918).

own publication.[177] So this quasi-property doctrine recognizes a right even when held against only one competitor.[178]

These examples underscore that a right to exclude against even just one is not an anomaly in terms of broader law. Forms of private ordering recognize the premise that a right to exclude—even only held against one—does not invalidate the underlying right.[179] Recognizing that feature in Fourth Amendment law, rather than demanding exclusion rights be held in rem to trigger protection, better reflects property law at large.

C. Exclusion Rights Held Against Law-Abiders

My view holds that Fourth Amendment rights attach when one has a right to exclude some law-abiding person in some situation. The Court's exploration of exclusion concepts in *Byrd* demonstrates why this qualification must accompany my view. In its unanimous 2018 decision in *Byrd*, the Supreme Court used the fact that the defendant had a right to exclude against some in some situations to underpin his reasonable expectation of privacy.[180] The Court concluded that an expectation of privacy should not differ "depending on whether the car in question is rented or privately owned by someone other than the person in current possession of it."[181]

But the opinion used a clumsy example to explain why an unauthorized driver would be permitted to exclude someone.[182] The Court noted that even such unauthorized drivers "would be permitted to exclude third parties from it, such as a carjacker."[183] The difficulty with this example is that any concerned passerby would also have a right to exclude a carjacker from someone else's vehicle. Under the Court's formulation, then, any passerby would also have Fourth Amendment rights in that other person's vehicle! There's no difference between an unauthorized driver and a passerby. This articulation of a situational right to exclude results in absurdity: I could object to the search of my neighbor's house on the grounds that I am allowed to prevent a burglar from entering it.

177. *See id.* at 236–40.

178. Quasi-property concepts, especially with respect to data, have received some attention as an alternative in the Fourth Amendment context. For instance, Lauren Scholz has argued for quasi-property as the basis for recognizing privacy interests in the private sphere. *See* Lauren Henry Scholz, *Privacy as Quasi-Property*, 101 Iowa L. Rev. 1113, 1115 (2016). Quasi-property rights "operate against a *specified class of actors*" but are further limited because they are vested "only ever upon the occurrence of a *specific triggering event*." Balganesh, *supra* note 104, at 1892 (emphasis in original). Quasi-property rights are generally confined to very specific circumstances, most prominently the right of sepulcher, or that of next of kin with respect to a body. *See id.* at 1891. I chose not to make quasi-property a central focus of this Article for two reasons: courts have been hesitant to expand its bounds due to its historical roots, and quasi-property rights usually require a triggering circumstance.

179. Nita Farahany has argued that intellectual property and its attendant system of exclusion rights provide a good basis on which to model Fourth Amendment rights, especially over information. *See* Farahany, *supra* note 133, at 1256–57.

180. *See* Byrd v. United States, 138 S. Ct. 1518, 1528 (2018).

181. *Id.*

182. *See id.* at 1528–29.

183. *Id.*

A more precise formulation, which my view adopts, would be the existence of a right to exclude some other law-abiding person. Indeed, Justice Gorsuch raised a hypothetical of this kind in oral arguments in *Byrd*.[184] He raised the example of an unauthorized driver possessing the right to exclude a (lawful) hitchhiker, even one he initially allowed into the car but who overstayed his welcome.[185] But the Court did not include that example in its final opinion. So, to avoid the carjacker problem, my view states that you must have an exclusion right against at least one law-abiding person. Put slightly differently: one must actually have a right to exclude, not just a right to enforce another's right to exclude.

D. The View's Advantage with the Court

So far, I have given a theoretical argument for the view. To recap: a right to exclude is what is violated when government agents search; it's at the core of the Fourth Amendment. It takes seriously the historical grounding of the Fourth Amendment in property rights and better reflects the directed nature of property rights than the maximalist "whole log" view. This view also enjoys a practical advantage; this kind of view already has some traction with the Supreme Court as a middle ground between Justices favoring maximalist property approaches and those closer to the privacy camp. The Court's demonstrated solicitude provides a practical reason for litigants to endorse a situational right to exclude approach to the Fourth Amendment; it might actually work.

To illustrate this traction, I'll use *Byrd* as a primary example, a case where the Court addressed the warrantless search of a rental car driven by someone who had the renter's permission but was not listed as an authorized driver with the rental car company.[186] This case posed a difficult question for any Fourth Amendment approach: what rights, privacy, property, or otherwise, does an unauthorized guest of an authorized guest of an owner have?[187] The Court found that the warrantless search violated the driver's reasonable expectation of privacy and located that expectation of privacy in his right to exclude.[188]

The Government contended that drivers "not listed on rental agreements always lack an expectation of privacy" in that car.[189] The unauthorized driver argued that "the sole occupant of a rental car always has an expectation of privacy in it based on mere possession and control."[190]

The Court disagreed with both of these arguments.[191] With respect to the driver's argument, the Court dismissed basing an expectation of pri-

184. *See* Transcript of Oral Argument at 46–48, Byrd v. United States, 138 S. Ct. 1518 (2018) (No. 16-1371).
185. *See id.*
186. *Byrd*, 138 S. Ct. at 1526.
187. *See id.* at 1526–27.
188. *Id.* at 1528–29.
189. *Id.* at 1527.
190. *Id.* at 1528.
191. *See id.*

vacy on possession and control because doing so "would include within its ambit thieves."[192] What it is to be a thief, after all, is to have ill-gotten possession and control. With respect to the Government's argument, the Court disagreed and instead found a reasonable expectation of privacy located in the right to exclude.[193]

Invoking Blackstone's definition of property as based on the right to exclude, the Court found that having "a legitimate expectation of privacy by virtue of the right to exclude" informs the "resolution of this case."[194] And, as discussed above, the Court found that even an unauthorized driver retained the right to exclude some individuals from the car.[195]

Importantly, the Court expressly noted that possession and control alone were not sufficient to trigger Fourth Amendment protections (a car thief, "[n]o matter the degree of possession and control . . . would not have a reasonable expectation of privacy in a stolen car")—that honor is reserved for a right to exclude.[196] This majority opinion shows signs of pushing back against property formalists as well as possession/control essentialists. Yet it also shows signs of the Court's willingness to hook privacy concepts to property ones to ground its Fourth Amendment analysis. In sum, the situational right to exclude present in *Byrd* is sufficient to merit reasonable expectations of privacy, and thus Fourth Amendment protection.[197] This opinion, and the constellation of strategic compromises it represents, is a pragmatic point in favor of adopting my situational right to exclude view of the Fourth Amendment.

E. Compatibility with Existing Fourth Amendment Exceptions

My view still makes room for important, existing Fourth Amendment exceptions. For instance, the logic of my view is still compatible with the public view doctrine.[198] Even if someone has situational rights to exclude, the Fourth Amendment does not "require law enforcement officers to shield their eyes" from conduct or information visible when standing on "public thoroughfares."[199] Consider a cell phone found incident to arrest, one that is clearly the arrestee's. The arrestee has exclusion rights over the phone. So, the government would need a warrant to get information from the phone. But the brand of the phone, and even whether the lock screen has an incriminating photo on it, is exposed to the public. So, the government would not need a warrant to obtain that information.[200]

192. *Id.*
193. *See id.* at 1528–29.
194. *Id.* at 1527 (quotations and citations omitted).
195. *See id.* at 1528–29.
196. *See id.* at 1529.
197. *See id.* at 1526–30.
198. In my own eyes, public view doctrine can and should be constrained, including being limited to the naked eye and excluding the kind of long-term data collection that would be costly for humans to do. But those arguments are for another paper.
199. California v. Ciraolo, 476 U.S. 207, 213 (1986).
200. *See generally* Baude & Stern, *supra* note 23, at 1875.

My view also still allows for police questioning and for people to share information with the police voluntarily. To recap, in my view, a search occurs when the police gather information *from* a thing in which people have rights to exclude, except with the naked eye in a public place. Knocking on doors and asking if anyone witnessed a crime or allowing a nosy neighbor to head to the station to share information do not meet this definition of a search. In these situations, police are receiving information *from* a helpfully situated individual (the search), which that individual *already* possessed, *about* a potential defendant. That potential defendant has no rights to exclude *over* that helpfully situated individual. The police are not acquiring the information directly *from* anything over which that potential defendant has situational exclusion rights.[201]

This logic mirrors current doctrine. If I have a journal in which I have recorded incriminating information about Person *X*, I may turn over the journal to the police voluntarily. But the police must subpoena me to force me to reveal that information. In either case, they need not serve anything on *X*.

Undercover informants present a trickier case under my view. Suppose an undercover informant is acting at the direction of the police (as an agent of the police) and gathers information from a thing over which the defendant possesses situational exclusion rights. In that case, I liken this to using a thermal imaging gun or sniffer dog, requiring a warrant.[202] Here, the undercover agent is a proxy for the police and is prompted to gather information not already known. Admittedly, undercover informants are sometimes hard to classify along the spectrum between helpfully situated individuals and agents of the police.[203] But once located along that spectrum, my view supplies a framework to decide whether a warrant is needed.

F. A Few Notes on Scope

This view is about Fourth Amendment searches. It does not—at least in this Article—extend to seizures. That topic requires separate scholarship.

We also need not insist that adopting a situational right-to-exclude approach for the purposes of the Fourth Amendment means all other constitutional provisions must similarly treat property in that way. Constitutional law has devised different definitions of property for the purposes of different constitutional rights.[204] Most saliently, the Supreme Court considers government benefits property for due process[205] but not

201. I address one additional wrinkle in the positive law section below. *See infra* Part IV.

202. *See* Baude & Stern, *supra* note 23, at 1830.

203. *See generally id.* at 1855–58.

204. *See id.* at 1843.

205. *See* Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970).

for Takings Clause purposes.[206] The Supreme Court, in these two areas, veers away from the bundle of rights metaphor and speaks in terms of "important interests" and "legitimate claim of entitlement[s]."[207] In essence, constitutional property is already a flexible concept.

In addition, although my view prioritizes the right to exclude for Fourth Amendment purposes, it does not "suggest[ ] anything about how extensive or unqualified this right must or should be."[208] Whether and how the state may curtail rights to exclude carries with it clear considerations of equity and is a separate question from whether the Fourth Amendment should reflect rights to exclude.[209] For instance, the Supreme Court's recent decision in *Cedar Point Nursery v. Hassid* brought the right to exclude to the forefront of debates about government takings.[210] The Court held that a California regulation allowing union organizers access to farm property for short periods of time infringed on the farm owner's right to exclude and thus constituted a taking.[211] That said, the case dubiously differentiated between infringing on a right to use and a right to exclude.[212] The questions of equity raised by this case—centrally, how much a state can curtail the right to exclude in service of other legitimate aims, including regulatory inspections—are deeply important. But they are separate from the question of what provides the best basis for determining Fourth Amendment rights. And one can coherently reject this interpretation of a right to exclude as a sufficient basis for a taking while accepting my view about search. After all, takings arguably have more to do with the use or control of property than exclusion rights; whereas, exclusion is at the heart of search.

IV. THE RIGHT TO EXCLUDE IN POSITIVE LAW

Where does one get a right to exclude? If my view does not answer that question, it falls prey to Kerr's criticism that, like other alternatives, my test is essentially a restatement of *Katz*: judges determine what counts as a right to exclude in the same way they determine what a reasonable

206. *See* Richardson v. Belcher, 404 U.S. 78, 81 (1971) ("[T]he analogy drawn in *Goldberg* between social welfare and 'property' cannot be stretched to impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits." (internal citation omitted)).

207. *See* Bell v. Burson, 402 U.S. 535, 539 (1971) (triggering due process when incident "involves state action that adjudicates important interests of the licensees"); *but see* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972) ("To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.").

208. Merrill, *supra* note 17, at 753.

209. *See generally id.* at 753–54.

210. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2080 (2021).

211. *Id.* at 2072.

212. Indeed, the case used language I disagree with to describe the right to exclude in the Fourth Amendment context: "[A] property owner traditionally had no right to exclude an official engaged in a reasonable search." *Id.* at 2079. I would say the property owner had a right to exclude that the government sufficiently overcame.

expectation of privacy is—or in the same way they generously invoke the term trespass.[213] One option would be to look solely to rights to exclude over property. But the logic of the right to exclude as the core of what is violated by a search works equally well for intangibles. And we have long used statutes to fill in gaps in the common law.[214] So I argue that we should look to the positive law as the source of a situational right to exclude. That means judges should look to property, certainly, but also to common law more broadly, statutes, and contracts to determine when someone has a situational right to exclude.

To give a brief example: statutes give you a right to exclude actors from your bank accounts. At common law, stealing from a bank account wouldn't necessarily constitute a trespass.[215] But statutes have filled that gap with laws that "function in a manner directly parallel to the laws against trespass."[216] In other words, even though the common law of property does not directly give you a right to exclude others from your bank accounts, legislatures have added to the positive law an essentially comparable regime through statute.[217] The positive law—including statutes, contracts, and the common law—thus provides a right to exclude for many intangibles.

A. Various Fourth Amendment Positive Law Proposals

I am not the first to argue for a positive law basis for the Fourth Amendment.[218] The Supreme Court has sometimes turned to positive law, particularly since its opinion in *Rakas v. Illinois*, where it stated that "[l]egitimation of expectations of privacy by law must have a source outside of the Fourth Amendment."[219] As mentioned in the introduction, Orin Kerr first described this *genus* of Fourth Amendment interpretation as the positive law model.[220]

William Baude and James Stern articulated the most well-developed *species* of this positive law model.[221] They argue that a government actor should be restrained from searching or seizing without a warrant where a similarly situated private actor is also restrained.[222] The question they

213. *See* Kerr, *supra* note 14, at 1050 ("[T]his is primarily a question of form, not substance. No matter what formal test is used, or how the doctrine is expressed, judges seeking a textualist or originalist alternative to *Katz* will encounter the same task of identifying modern equivalents to traditional physical entries into private spaces that *Katz* prompts. They will tend to use the same concepts, with the same limits, regardless of what label they use.").

214. *See, e.g.*, Merrill, *supra* note 17, at 751.

215. *See id.*

216. *Id.* ("[T]he law of theft (together with its cognate civil actions) gives the holders of interests in choses in action the right to exclude others from interfering with the exchange value of these interests, and that is all one needs to give them the status of property.").

217. *See id.*

218. *See, e.g.*, Baude & Stern, *supra* note 23, at 1829–33.

219. Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978).

220. *See* Kerr, *supra* note 23, at 516–19.

221. *See* Baude & Stern, *supra* note 23, at 1829–33.

222. *See id.* at 1825; *see* Re, *supra* note 23, at 326.

would ask to identify Fourth Amendment violations is the following: "[H]as a government actor done something that would be unlawful for a similarly situated nongovernment actor to do?"[223] To define the scope of lawful action, Baude and Stern would look to any legislative, judicial, or administrative source of law, including, but not limited to, the common law.[224] Richard Re responded by proposing a softer positive law approach: a positive law "floor."[225] He argues that "privacy-related measures applicable to private parties" should be treated as "presumptively triggering" the Fourth Amendment.[226] And even some in the privacy world have embraced other variations of this positive law approach.[227]

Essentially, I advocate for a species of this common law view that is narrower than Baude and Stern's version. My approach asks: does positive law provide the *searchee* with a situational right to exclude? Unlike Baude and Stern's, my approach does not have to decide (a) what counts as a similarly situated nongovernment actor, or (b) what counts as an "investigatory" action.[228] And unlike Re's approach, my approach does not need to determine what counts as a "privacy-related measure" in the positive law.[229] The actor, in my view, is clearly identified—the searchee—and the relevant right is clear: whether the searchee has a situational right to exclude in the thing to be searched.

B. Justifications for the Positive Law Approach as a Genus

The positive law approach, as a genus, has advantages that my view shares. First, it picks up on some of the intuitiveness and historical nature of the property law approach: we define what should be off-limits to the government by what is off-limits to other citizens.[230] The positive law has "deep roots in several different ways of thinking about the Fourth Amendment," including the history of the early Fourth Amendment and the Court's embrace of trespass tests—which, as a common law notion, is part of positive law.[231] Turning to the positive law responds to a key intuition around government searches: if private parties aren't allowed to do something, why should the government have greater permissions?[232]

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223. Baude & Stern, *supra* note 23, at 1831 (emphasis omitted).

224. *See id.* at 1833.

225. Re, *supra* note 23, at 314.

226. *Id.*

227. *See* Donohue, *supra* note 23, at 354 ("Positive law, in turn, may prove probative in regard to the existence of a property right: where federal or state law has *acknowledged a property right* and placed a correlative *duty of noninterference* on others, government intrusions may constitute a search or seizure within the meaning of the Fourth Amendment."); *see also* Ferguson, *supra* note 23, at 101–02 (arguing for a "digital positive law floor" without doing away with underlying constitutional protections).

228. *See* Baude & Stern, *supra* note 23, at 1830–31.

229. *See* Re, *supra* note 23, at 314.

230. *See generally* Baude & Stern, *supra* note 23, at 1829–33.

231. *See id.* at 1836–41.

232. Re views this as the best feature of the positive law approach. *See* Re, *supra* note 23, at 337.

Second, a positive law approach is consistent with other constitutional approaches to property. Consider Fifth Amendment Takings Clause analysis, in which courts look to "independent source[s] such as state law" to determine whether someone has a property right.[233]

This proposal has also received some judicial interest. As of this writing, Baude and Stern's positive law proposition has been cited approvingly by Justice Gorsuch in his *Carpenter* dissent,[234] by a majority opinion drafted by a Democratic judicial nominee in the Seventh Circuit,[235] and in opinions written by Iowa Supreme Court justices.[236]

C. Objections to the Positive Law Approach as a Genus

The positive law approach has also received substantial criticism. As I discuss each criticism below, I will also show what is distinctive and attractive about my approach in relation to each criticism.

A major criticism of the positive law approach is that relying on positive law allows constitutional protections to "vary from place to place" according to the legislative, administrative, and other protections offered by state law.[237] This criticism responds to the idea that some stable idea should ground constitutional rights for every person, regardless of domicile. Justice Gorsuch articulated another version of this criticism at the *Carpenter* oral arguments.[238] There, the petitioner argued that § 222 of the Telecommunications Act provided a basis for requiring a warrant.[239] Justice Gorsuch objected: "Why does the statute control the Constitution? I think you are saying the statute controls the Constitution."[240]

My species of the positive law view is also somewhat susceptible to this criticism. I will give a few general responses and then some view-specific responses to this objection.

First, this type of variation—at least with respect to how courts interpret property when adjudicating constitutional rights—is not unusual. Takings Clause jurisprudence is built on this very idea that "the Constitution protects rather than creates property interests" and that property

233. *See* Baude & Stern, supra note 23, at 1842 n.111 (quoting Phillips v. Wash. Legal Found., 524 U.S. 156, 164 (1998)).

234. *See* Carpenter v. United States, 138 S. Ct. 2206, 2268 (2018) (Gorsuch, J., dissenting). Justice Thomas, however, cited this proposal somewhat disapprovingly. *See id.* at 2242 (Thomas, J., dissenting).

235. *See* Doornbos v. City of Chicago, 868 F.3d 572, 585 (7th Cir. 2017) (looking to tort law to "further support[ ]" the case's result, citing Baude and Stern).

236. *See* Lennette v. State, 975 N.W.2d 380, 415 (Iowa 2022) (McDonald, J., concurring); State v. Wright, 961 N.W.2d 396, 410–11 (Iowa 2021). Baude and Stern's article has been cited by judges in a number of circuits, including the Sixth, for slightly different propositions. *See, e.g.*, Morgan v. Fairfield Cnty., 903 F.3d 553, 571 (6th Cir. 2018) (Thapar, J., concurring in part and dissenting in part); United States v. Christian, 925 F.3d 305, 315 (6th Cir. 2019) (Thapar, J., concurring).

237. Baude & Stern, *supra* note 23, at 1858 (quoting Virginia v. Moore, 553 U.S. 164, 176 (2008)).

238. *See* Transcript of Oral Argument at 59, United States v. Carpenter, 138 S. Ct. 2206 (2018) (No. 16-402).

239. *See* United States v. Carpenter, 138 S. Ct. 2206, 2229 (2018).

240. Transcript of Oral Argument, *supra* note 238, at 59.

rights, as protected by the Constitution, are "determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'"[241] Whether government action constitutes a taking will depend on whether the thing taken is considered property by that state's law.[242] Similarly, whether government action constitutes a search depends on whether the thing searched is protected by a situational right to exclude by the relevant state's law.[243]

Second, and most centrally, under a positive law view, constitutional entitlements remain the same even when the background positive law of states vary.[244] For instance, in my view, all people have constitutional protections with respect to an item over which they have rights to exclude, but what that item is varies, not the entitlement.[245] The Supreme Court has articulated a version of this response in a due process case: "Although the underlying substantive interest is created by 'an independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement.'"[246]

Third, reliance on some idea of stable constitutional rights at the national level is misplaced. The current Court shows every sign of being willing to alter the scope of longstanding constitutional rights.[247] My view allows democratic localities some control over constitutional provisions in the face of their erosion.[248]

But without fighting the premise of the objection, my view also has some advantages over other positive law views concerning this objection. My proposal, by relying only on one "element" of the property bundle of sticks, has an additional advantage over other property-based positive law views. Because my view does not require items to be searched to be treated as "full" property outside of the constitutional context—it requires only a right to exclude—my view is less dependent on state property law and more responsive to federal regulation, which will provide some degree of uniformity.

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241. Phillips v. Wash. Legal Found., 524 U.S. 156, 164 (1998) (quoting Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972)). Baude and Stern also quote this decision in their justification of geographic variability. *See* Baude & Stern, *supra* note 23, at 1842 n.111.

242. *See Phillips*, 524 U.S. at 164.

243. *See id.*

244. *See generally* Baude & Stern, *supra* note 23, at 1843.

245. Re attempts to solve the geographic variability problem by looking only to "deliberately adopted laws," allowing courts to pick and choose from positive law analogies, and looking only at privacy laws that extend "widespread protections" rather than local rules. *See* Re, *supra* note 23, at 334. Re acknowledges that these tweaks might "come at the price of clarity," but suggests his version is preferable because it favors Fourth Amendment claimants, where the clarity offered by the positive law argument often benefits the government. *See id.*

246. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9 (1978) (quoting Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972)).

247. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

248. *See, e.g.*, Mailyn Fidler, *Local Police Surveillance and the Administrative Fourth Amendment*, 36 SANTA CLARA HIGH TECH. L.J. 481, 485–89 (2020).

D. Objections to the Baude & Stern Proposal as a Species

Baude and Stern's proposal, the leading species of positive law views, has received substantial criticism. My view responds to these criticisms.

First, Baude and Stern's view has been criticized as relying on too broad a swath of the positive law.[249] They attempt to cabin the scope of their proposal by saying only positive restrictions on "investigative act[ions]" or "searches" count, so a "police officer who cheats on his income taxes does not thereby violate the Fourth Amendment."[250] And a search "requires an action generally likely to obtain information."[251] So, they attempt to cabin the scope of the positive law on which their view relies. That said, Richard Re and Orin Kerr each identify a key flaw in this limitation: a cop seeking to catch a speeding motorist would likely have to speed to catch that motorist.[252] Speeding is prohibited for private actors, and pulling over a person for speeding is "an action generally likely to obtain information," to use Baude and Stern's terminology.[253] This situation thus triggers both halves of the Baude and Stern positive law view: it involves a restriction on a similarly situated private actor and a search situation.[254] So, under their view, it seems plausible that cops might be prohibited from doing this. Perhaps not: the search itself comes after the speeding. But Baude and Stern also argue that their test equally applies to seizure, an "assertion of physical control," which pulling a motorist over generally is.[255] So Baude and Stern have no way of restricting their view to the correct set of positive law referents; it goes wrong in casting too wide a net. And Re's reformulation hardly fares better: looking to any "privacy-related measure[ ] applicable to private parties" leaves open the question of what counts as a privacy-related measure.[256]

My view—that we should look to positive law to locate rights to exclude—addresses this concern by offering a well-defined narrowing principle. In my view, a cop would not be prohibited from speeding to catch a speeder because no rights to exclude are at issue in anti-speeding laws. In my view, we look only for positive law that gives a searchee a right to exclude one law-abider in some situations. And, speeding has nothing to do with a motorist's right to exclude others from her car.

The second major criticism leveled at Baude and Stern's view is that it only imposes restrictions on government actors when such restrictions have been placed on "similarly situated" private actors.[257] This requirement risks overlooking arguments that government action is substantially

249. *See* Re, *supra* note 23, at 314.
250. Baude & Stern, *supra* note 23, at 1824–25, 1832.
251. *Id.* at 1833.
252. *See* Re, *supra* note 23, at 315 (Re's variation involves other positive law restrictions broken in the course of pursuing a motorist); Kerr, *supra* note 14, at 1099. I use Kerr's speeding example for simplicity.
253. Baude & Stern, *supra* note 23, at 1833.
254. *See id.* at 1823–33.
255. *See id.* at 1833.
256. *See* Re, *supra* note 23, at 314.
257. *See id.* at 325–26.

different and often more deserving of restriction than similar conduct by private parties.[258] Baude and Stern themselves acknowledge that it might be "artificial to liken the government to a private party . . . because the government can exert coercive force in ways whose uniqueness is not easily detected by the [positive] law."[259] Re expands on this criticism: government capabilities, incentives, and social roles differ vastly from private actors in ways that affect the government's participation in searches.[260] Governments have particular resources for conducting surveillance, an interest in suppressing dissent, a (relative) monopoly on violence, and a particular moral authority.[261]

My view responds to this criticism in two ways. First, because my view requires only some right to exclude before triggering Fourth Amendment protections, people can let some private individuals in while still keeping the government out. Where Baude and Stern's conception of the Fourth Amendment requires a *similarly situated* nongovernment actor to be restrained,[262] I only require *some actor in some context* to be excludable. Thus, my view allows that *many* or even *most* (even *all but one!*) nongovernment actors can do some activity while still holding the government to a higher standard. So my view allows directed rights and duties to form in the positive law before affecting the threshold at which the government is let in. Second, my view looks to the positive law to determine what rights a *searchee* has, whereas Baude and Stern look to what restrictions are placed on potential private *searchers*.[263] This approach is also conceptually attractive in elevating the importance of the rights of the searchee, not just the means by which a government agent cannot do something. Any resulting prohibitions on government action are grounded squarely in the right of the person rather than on restrictions on another source.

A similar criticism arising from linking restrictions on government officials to restrictions on private actors is that doing so might turn debates about private regulation into proxy fights over the Fourth Amendment.[264] Baude and Stern largely dismiss this criticism: "[W]e aren't aware of widespread attempts by lawmakers . . . to dilute property rights in private law so as to facilitate government regulation."[265] My view also carries this risk. But the risk is much more limited: because my view only involves situational rights to exclude, the swath of positive law that will be free of this possibility is larger. And disallowing individuals any right to exclude any private party in any situation is a risky proposition for

258. *See id.* at 322.
259. Baude & Stern, *supra* note 23, at 1865.
260. *See* Re, *supra* note 23, at 322.
261. *See id.*
262. *See* Baude & Stern, *supra* note 23, at 1831.
263. *See id.* at 1825.
264. *See id.* at 1866.
265. *Id.*

regulators, which is what they would need to do to allow government access, in my view. This aspect further lowers the risk of proxy debates.

Baude and Stern's proposal has also been criticized as ahistorical. As Kerr put it, their "choice of a test here isn't coming from eighteenth-century history."[266] Instead, it comes from "circa 2016."[267] In contrast, my proposal keeps the positive law approach focused on a concept taken from property law, which has long been at least a component of Fourth Amendment analysis.[268]

More so than a positive law approach that relies on any kind of restriction on private actors to inform restrictions on government actors,[269] the situational right-to-exclude approach keeps the positive law inquiry focused on property-relevant positive law.

E. Worries about Contracts as a Positive Law Basis

An additional aspect of a positive law view with both benefits and drawbacks is the inclusion of contracts as part of the body of positive law to which judges can look to locate a situational right to exclude.[270] For instance, consider a contract for cell phone service that includes a clause such as "no one shall access data generated by this user except the user and the provider." One of the benefits of including contracts as such a source is that it allows the Fourth Amendment doctrine to reflect private ordering of privacy relations much more than current third-party doctrine does. Baude, Stern, and Re all note variations of this benefit but do not address potential objections to this point.[271] I will address the most troubling objections here and return to another in Part V where I discuss contracts and digital data.

The primary objection to including contracts in the scope of a positive law proposal for Fourth Amendment protections is the worry that it puts too much power over state searches into private, and maybe nefarious, hands. One might object that such contracts serve no private purpose other than restricting the government's power.

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266. Kerr, *supra* note 14, at 1103.

267. *Id.*

268. *See* Laura K. Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181, 1299–301 (2016) (cataloguing ways in which property concepts infused early thinking about the Fourth Amendment); Maureen E. Brady, *The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection*, 125 Yale L.J. 946, 982–87 (2016) (arguing that the drafters intended that "effects" be synonymous with personal, chattel property); George C. Thomas III, *The Common Law Endures in the Fourth Amendment*, 27 Wm. & Mary Bill Rts. J. 85, 85 (2018) (reviewing ties between the common law of property and the Fourth Amendment); Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security*, 33 Wake Forest L. Rev. 307, 308 (2009) ("The Supreme Court initially grounded Fourth Amendment protections in common law property concepts."). *But see* Amar, *supra* note 59, at 759 (arguing that the first principles of the Fourth Amendment favor emphasizing reasonableness above other grounding concepts).

269. *See* Baude & Stern, *supra* note 23, at 1825–26.

270. *See id.* at 1874 n.259 (citing Randy Barnett, *Why the NSA Data Seizures are Unconstitutional*, 38 Harv. J.L. & Pub. Pol'y 3, 13 (2015)).

271. *See id.* at 1874, 1879; Re, *supra* note 23, at 336.

Consider a contract that waives a right to exclude against all but one entity, or only where the right is held only against one, regardless of whether it is waived against others; perhaps the contract is even made expressly to manipulate the Fourth Amendment treatment of a thing. Let's consider a base scenario in which:

- a mafioso signs a contract with his cousin Vinny,
- stating that Vinny, and only Vinny, is excluded from something,
- which the mafioso wants the police not to be able to search warrantlessly.

The "Public View" Variation

Let's say that the thing from which Vinny is excluded is a public park. This contract would not trigger the warrant requirement because the police are otherwise lawfully able to be present.[272]

The "Illegal" or "Against Public Policy" Variation

Let's say the contract is either illegal or against public policy. Such contracts would not trigger warrant protections.[273]

The "Ex Nihilo" Contractual Exclusion Right Variation

Most of the objections raised to my view's use of contracts go something like this: let's say the mafioso and Vinny sign a contract stating that the mafioso can exclude Vinny from St. Albans School for Boys in Denver, Colorado. Even though the contract is valid, it's a weird kind of contract, concocted out of thin air—St. Albans is an institution with which neither contracting party has any relationship, let alone property rights. According to my view, don't the police now have to get a warrant to search St. Albans for incriminating evidence against the mafioso because he holds a valid, contractual right to exclude from the school? Moreover, does the mafioso's "concocted" right mean that even if the school consented to the search, the police would still have to get a warrant?

To deal with this somewhat recherché situation, my view requires a limitation. Situational rights may not be created *ex nihilo* by private parties. Rather, where a primary source of rights over an object exists, contractual exclusion rights provide a valid Fourth Amendment basis only where those rights flow from that primary source of rights.[274] In other words, where a full or fuller bundle of sticks exists, situational rights to exclude that trigger warrant protections must, in some way, be connected to that bundle.[275]

For instance, a landlord grants a tenant a right to exclude from their apartment as part of their rental agreement. In that circumstance, the tenant's right to exclude "flows" from the reservoir of rights held by the primary rightsholder. That does not mean that the primary rightsholder's

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272. *See supra* Part III.E; Baude & Stern, *supra* note 23, at 1869.

273. *See* George A. Strong, *The Enforceability of Illegal Contracts*, 12 HASTINGS L.J. 347, 347 (1961).

274. *See Sua Sponte*, BLACK'S LAW DICTIONARY (11th ed. 2019).

275. Thank you to Josh Goldfoot, Kyle Langvardt, and Rob Denicola for fleshing out this objection, and to Quinn White for discussing possible solutions.

exclusion rights trump the tenant's; rather, where even a trickle of a situational right flows from that reservoir, warrant protections follow. But let's say two neighbors under standard leases decide to contract for a right to exclude in a place where they only have an easement: neighbor *A* pays neighbor *B* a sum for the right to exclude a certain person from the hallway. Although the tenants have a right to exclude from their apartments that flows from the primary rightsholder, the hallway exclusion rights are *ex nihilo* and thus do not generate Fourth Amendment protections.

Revisit the mafioso and Vinny contracting over St. Albans school. There, the contractual exclusionary right is entirely divorced from the primary reservoir of rights over the school, so that contract would not generate warrant protections.

To give a non-real-property example, consider a telecommunications provider and customer who contract so that the customer can elect to prevent the provider from sharing certain data with third-parties. This contract would generate Fourth Amendment protection; it does not generate *ex nihilo* exclusion rights because the right is granted by the party with the other "sticks in the bundle" with respect to the data, the telecommunications provider. The telecommunications provider can otherwise destroy, use, etc., the data. But a contract between two customers preventing the provider from third-party sharing would run afoul of the *ex nihilo* limitation.

F. Summing Up: Results of the Positive Law Approach

Here, I briefly survey classic Fourth Amendment cases and briefly explain the result of my view for each one. The goal of this section is twofold. First, these cases help illuminate the contours of the view. Second, I use these cases to make a results-oriented case for my view: privacy advocates who critique the property approach have reason to embrace my approach over other property views. This approach offers strong Fourth Amendment protections—an improvement over existing property tests—in ways that are more reliable and harder to eliminate than the reasonable expectation of privacy test.[276] It doesn't work in every case, but as I have argued, neither does *Katz*. As Fourth Amendment scholars are fond of saying, no one view of the Fourth Amendment fits every case.[277] In the table below, I compare scenarios under the reasonable expectation of privacy view, maximalist property view, and situational right to exclude view.

The key question to ask under the situational right to exclude view is the following: does the searchee have some right to exclude some lawabider, in some situation, from the thing to be searched? If so, the government cannot obtain information from that thing to be searched without a warrant. That said, as a reminder, the public exposure doctrine also

276. I thank Orin Kerr for this suggested phrasing.
277. *See, e.g.*, Amar, *supra* note 59, at 760 n.4.

applies to my view as it does under the current doctrine.[278]

Table 1: Results of Cases Under Different Fourth Amendment Views

Red indicates unprotected, green indicates protected, and yellow indicates "it depends."

Case	Reasonable Expectation of Privacy View	Maximalist Property View	Situational Right to Exclude (SRE) View	Example Source of Protection Under SRE
House[279]	Protected	Protected	Protected	Real property
Open field[280]	Not protected	Protected (note: open fields would be unprotected under a purely *textualist* view)	Protected	Real property
Aerial search[281]	Not protected, via public exposure, if police are lawfully in a publicly navigable airspace	Not protected, unless police are flying at an altitude that would constitute a trespass on air rights	Not protected, via public exposure, unless police are flying at an altitude over which searchee has situational exclusion rights	Real property
Cell phone, search incident to arrest[282]	Protected, if cell phone is demonstrably arrestee's	Depends on whether conduct constitutes a trespass	Protected, if cell phone is demonstrably arrestee's	Chattel property
Phone call				
In phone booth[283]	Protected	Unprotected (no trespass)	Protected	Common law assault; anti-wiretapping statutes; license

278. See *infra* Part V for further discussion of public view or exposure. There is an interesting, ongoing, and unresolved debate about the application of public view doctrine when sense-enhancing technologies are used. *See, e.g.*, Thomas K. Clancy, *What is a "Search" Within the Meaning of the Fourth Amendment?*, 70 ALB. L. REV. 1, 23–26 (2006). I personally view sense-enhancing technologies as outside of the bounds of public view. But my view would adopt whatever the public view test doctrine is.

279. *See* U.S. CONST. amend. IV.

280. *See* Oliver v. United States, 466 U.S. 170, 182–83 (1984).

281. *See* California v. Ciraolo, 476 U.S. 207, 215 (1986) (discussing aerial surveillance at 1000 feet); Florida v. Riley, 488 U.S. 445, 450–51 (1989) (discussing aerial surveillance at 400 feet).

282. *See* Riley v. California, 573 U.S. 373, 403 (2014).

283. *See* Katz v. United States, 389 U.S. 347, 353 (1967).

Case	Reasonable Expectation of Privacy View	Maximalist Property View	Situational Right to Exclude (SRE) View	Example Source of Protection Under SRE
Call in private[284]	Protected	Depends on method of search[285]	Protected	License; chattel property over phone
Call in public[286]	Unprotected via public exposure, protected from remote surveillance	Unprotected	Unprotected via public exposure, protected from remote surveillance	Chattel property
***				
Content of letters[287]	Protected	Depends (on whether papers are considered chattel and whether trespass to chattel counts) Note: originalist view would say protected	Protected (right to exclude other private citizens from your letters)	Sometimes considered chattel property; mail theft statutes
Remote sensing of properties (e.g., thermal imaging)[288]	Protected	Unprotected	Protected[289]	Real property
Protester rowhouse case[290]	Debatable (although likely protected given sanctity of home)	Protected	Protected	Real property

284. This scenario embodies a call on a communications device and assumes no public exposure to eavesdroppers. *See id.* at 351.

285. *See* Olmstead v. United States, 277 U.S. 438, 457, 466 (1928) (holding that no warrant was needed when no trespass occurred).

286. *See Katz*, 389 U.S. at 351.

287. *See Ex parte* Jackson, 96 U.S. 727, 733 (1877).

288. *See* Kyllo v. United States, 533 U.S. 27, 40 (2001).

289. To illustrate: a person has situational rights to exclude over a home. When the police use a thermal imaging gun on a home, they are attempting to get information from a location where a searchee has a situational right to exclude, meeting the definition of search under my view (they go beyond using the naked eye from a public vantage point).

290. *See supra* Part I.

Case	Reasonable Expectation of Privacy View	Maximalist Property View	Situational Right to Exclude (SRE) View	Example Source of Protection Under SRE
Dog sniff at front door[291]	Depends (on violating "knock" license)	Depends (on trespass)	Protected (presence of "knock" license does not defeat overall right to exclude.)[292]	Real property
Dog sniff during traffic stop[293]	Unprotected	Unprotected	Protected	Chattel property
Rental car driven by unauthorized driver[294]	Protected	Unprotected	Protected	License
Location data				
Of car[295]	Unprotected in public, protected in private	Unprotected in public, protected in private	Unprotected in public, protected in private	Chattel property, license
Of cell phone[296]	Protected (at least seven days' worth)	Unprotected	(More) protected (no time restriction, see Part V)[297]	Chattel property, other statutes (see Part V)

291. *See* Florida v. Jardines, 569 U.S. 1, 8, 11–12 (2013).

292. An occupant of a home has a right to exclude people from his porch—even if those people have a temporary license to be there. *See id.* at 8 ("This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave."). Even if friendly neighbors, Girl Scouts, or even the police have at common law an implied license to enter the porch to knock on the door, that license is limited. *See, e.g.*, State v. Grice, 767 S.E.2d 312, 319 (N.C. 2015) ("The implicit license enjoyed by law enforcement and citizens alike to approach the front doors of homes may be limited or rescinded by clear demonstrations by the homeowners and is already limited by our social customs."). For instance, such license typically expires after knocks go unanswered. *See Jardines*, 569 U.S. at 8. More importantly, occupants are well within their rights to *ask* a Girl Scout to go away. *See id.* So the fact that some people have an implied license does not abrogate a person's Fourth Amendment rights under this view because a person retains a situational right to exclude even given a license.

293. *See* Illinois v. Caballes, 543 U.S. 405, 410 (2005).

294. *See* Byrd v. United States, 138 S. Ct. 1518, 1531 (2018).

295. *See* United States v. Jones, 565 U.S. 400, 404 (2012).

296. *See* Carpenter v. United States, 138 S. Ct. 2206, 2220 (2018).

297. Alternatively, without recourse to the positive law view, one does have a right to exclude over a phone. *See Riley*, 573 U.S. at 401. Because the information sought is derived from that protected thing, one has a right to exclude. *See id.*

V. SITUATIONAL EXCLUSION RIGHTS APPLIED TO DATA

Formulated at a basic level, the situational right-to-exclude approach applies to data just as it does to other objects of searches: if someone has a right to exclude at least one non-lawbreaker in at least one situation from certain data, the government would need a warrant to access that data.[298]

This view can operate with respect to data in two ways. First, if one has exclusion rights over a device via normal property law, such as a cell phone, those exclusion rights would mean that the government would need a warrant before getting any information from that device.[299] Second, the positive law can step in and afford exclusion rights in other ways.[300] This latter, more complicated scenario is the focus of this Part.

Concerning data, the situational right-to-exclude approach offers two key benefits. First, the third-party doctrine cannot be sustained under a situational right-to-exclude approach. Adopting a situational right-to-exclude approach allows private parties the option to structure their relationships in ways that would not otherwise be possible under the third-party doctrine. Second, the situational right-to-exclude approach allows Fourth Amendment law to reflect understandings of data privacy in positive law in ways that are not currently possible. In doing so, this Part demonstrates a key advantage of any positive law view: empowering legislatures to respond to new technological realities.

A. Situational Rights to Exclude and the Third-Party Doctrine

Basing Fourth Amendment protections on a situational right to exclude would do away with the third-party doctrine outside of the context of voluntary questioning.[301] To recap, this doctrine states that any information *A* reveals to *B* voluntarily, "even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed," does not receive Fourth Amendment protection from government actors.[302]

A situational right-to-exclude approach would allow recognition of a spectrum of privacy. The relevant question would be whether the data subject maintains the right to exclude—under positive law or a judicial test, depending on how the view is operationalized—some other person in some other circumstance from the data shared with a third party, not whether the data subject shared the data with any third party, period. Briefly looking at *Miller,* one of the two foundational third-party cases,

298. I reemphasize one qualification to this rule that is particularly important to the data below: that of data generally open to the public.

299. *See supra* Part IV.F.

300. *See, e.g.*, Baude & Stern, *supra* note 23, at 1827.

301. *See supra* Part III.E.

302. United States v. Miller, 425 U.S. 435, 443 (1976); *see also* Smith v. Maryland, 442 U.S. 735, 744 (1979).

through this lens, the Court's words already suggest end users retain a situational right to exclude in phone call data: users share information with phone companies for a limited purpose "on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed."[303] In other words, phone users maintain a situational right to exclude in what they share with the phone company. In sum, the situational right-to-exclude approach inverts the relevant presumption from "any sharing negates the need for a warrant" to "any restriction implicates a need for a warrant." The third-party doctrine essentially forecloses Fourth Amendment law from recognizing complex forms of private ordering.[304] So my view allows private parties more creativity in structuring their relationships in ways that shield their data from the government.[305]

B. Data and Positive Law

This section focuses on the question of exclusion rights over data that are not derived from rights to exclude over a device. Without reference to a physical device, how do we identify whether one has a right to exclude in data? Data is not currently treated in private law as property, either at common law or through the kinds of extensive statutory regimes that govern intellectual property—another key type of intangible in which we recognize property rights.[306] But even though we do not treat data explicitly as property, we can still find situational rights to exclude from data.

In essence, any kind of exclusion-based obligation on data holders has relevance to whether the government needs a warrant. Furthermore, with respect to statutes, my view is more flexible than the positive law approach put forward by Baude and Stern. In my view, a statute would only have to allow a situational right to exclude, rather than explicitly prohibit a similarly situated private actor from accessing the data or treating data as full property. As long as one private actor has a duty to exclude themselves from the data, the government must also.

That said, statutes—at least currently—do not always enumerate rights with respect to the data subject; rather, they place restrictions on the data holder.[307] We can still locate a right to exclude in such statutes for Fourth Amendment purposes. To do this, let's consider an example from the oral

303. *See Miller*, 425 U.S. at 443.

304. *See* Cong. Rsch. Serv., R43586, The Fourth Amendment Third-Party Doctrine 2 (2014).

305. For an account highlighting the importance of such private ordering, see Barnett, *supra* note 270, at 13 ("[B]y availing themselves of the law of property and contract, people create their own zones of privacy. In short, *first comes property and contract, then comes privacy*.").

306. *See, e.g.*, Remijas v. Neiman Marcus Grp., LLC, 794 F.3d 688, 695 (7th Cir. 2015) ("[Plaintiffs' theory that loss of private information as an intangible commodity is a concrete injury] assumes that federal law recognizes such a property right. Plaintiffs refer us to no authority that would support such a finding.").

307. *See* Stephen P. Mulligan & Chris D. Linebaugh, Cong. Rsch. Serv., R45631, Data Protection Law: An Overview 2 (2019).

arguments of *Carpenter*. Justice Gorsuch posed the following hypothetical about common law conversion and cell site location information (CSLI) to the petitioner's attorney: "[S]ay a thief broke into T-Mobile, stole this [CSLI] and sought to make economic value of it . . . would your client have a conversion claim, for example, under state law?"[308] A conversion claim usually involves two of the property bundle of sticks, exclusion and deriving value from the thing, variably called a right to alienation or a right to the income.[309] The petitioner's attorney responded that "in roughly analogous contexts, like trade secrets . . . certainly conversion applies . . . but not directly here."[310] In other words, most states do not recognize an individual's right to bring a conversion action for theft of data.[311] Thus, if the Court were to require two sticks to trigger Fourth Amendment protections, a right to exclude and a right to derive value, no warrant would be required here since data holders lack the second stick.

But the petitioner's attorney directed the Justices back to § 222(c) of the Telecommunications Act as the more relevant source of law.[312] Neither this provision nor any other in § 222 provides a right to recover for conversion if the data is so used.[313] This provision also does not explicitly use the language of a "right to exclude," but it does state the following:

> Except as required by law or with the approval of the customer, a telecommunications carrier hat receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.[314]

This statutory language restricts the data holder such that if the data holder violates them, the data *subject* is the wronged party. Whenever *A* owes it to *B* to do *X*, *B* has a right to *A* doing *X*.[315] So the statute derivatively grants the data subject a right to exclude: the provider owes it to the subject to exclude others from this data at the subject's discretion.[316] Broken down, the statute obligates providers to only disclose at the data subject's discretion. The data subject has a right against the carrier that the carrier exclude some people, agents, etc.

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308. Transcript of Oral Argument, *supra* note 238, at 38.
309. *See* Honoré, *supra* note 106, at 370.
310. Transcript of Oral Argument, *supra* note 238, at 39 (answer condensed from several lines and verbal fillers omitted).
311. *See, e.g.*, Intel Corp. v. Hamidi, 71 P.3d 296, 311 (Cal. 2003).
312. Transcript of Oral Argument, *supra* note 238, at 39; 47 U.S.C. § 222(c).
313. *See* 47 U.S.C. § 222.
314. *Id.* § 222(c)(1).
315. *See* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 750 (1917).
316. *See* 47 U.S.C. § 222(c)(1).

In this statutory example, the data subject can waive his exclusionary rights against particular agents, allowing disclosure.[317] But even without that power, a derivative right to exclude still exists. Most relevant statutes—consider the Stored Communications Act and the Health Insurance Portability and Accountability Act (HIPAA)—provide some power over the exclusion right to data subjects, avoiding the need to consider the power over a right versus derivative rights question, even if standing doctrine increasingly forecloses data subjects from legally seeking a remedy.[318]

Looking to these kinds of restrictions placed on private parties by legislatures—or even parties wishing to tie their own hands via contract—allows Fourth Amendment law to recognize existing value judgments about data without a total revolution in property law. Presumably, we place restrictions on personally identifiable health information because it is *private*; locating the derivative right to exclude from such restrictions recognizes the underlying purpose of these statutes.

Some might object that this approach casts too wide a net and raises the stakes of any data regulation. I think this is a reasonable objection, but I welcome this result; it means that Fourth Amendment law better reflects existing societal judgments about data.

Some might object to the approach I have outlined on the basis that it sweeps into consideration far more statutes than those that give a private right of action to the data subject. This objection argues that real property rights come with a remedy. So why should we "count" situational rights to exclude that come from statutes that do not afford a private right of action? This criticism is a general one about the nature of rights, not about my proposal; I disagree that the absence of an enforcement mechanism entails the absence of a right.[319] Consider the general hesitance of the courts to enforce the exclusionary rule in Fourth Amendment contexts even when they rule a violation of a defendant's rights occurred.[320] Fourth Amendment rights still exist even if the Court declines to extend the remedy. In fact, the Court routinely takes away remedies while insisting rights are still present.[321]

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317. *See id.* § 222(c)(2).

318. *See* Stored Communications Act, 18 U.S.C. § 2701(c)(2) (obtaining, altering, or preventing access to an electronic communication is not unlawful if authorized "by a user of that service with respect to a communication of or intended for that user"); Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996); 45 C.F.R. § 164.524(a)(1) (2022) ("[A]n individual has a right of access to inspect and obtain a copy of protected health information about the individual," with some enumerated exceptions.); *see also* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2214 (2021) (illustrating a recent example of tightening standing doctrine with respect to data harms).

319. *See generally* Balganesh, *supra* note 17, at 638 (discussing the existence of rights separate from remedies).

320. *See, e.g.*, Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1956 (2014); Andrew Guthrie Ferguson, *Constitutional Culpability: Questioning the New Exclusionary Rules*, 66 FLA. L. REV. 623, 625 (2014).

321. *See, e.g.*, Vega v. Tekoh, 142 S. Ct. 2095, 2106–07 (2022) (holding there is no remedy under § 1983 for *Miranda* rights violations).

The above approach should be palatable as a solution to the many critics who argue that data should not be treated as property in the private sphere.[322] A situational right to exclude should be sufficient for Fourth Amendment purposes, but I do not argue that possessing a situational right to exclude endows data subjects with *full* property rights at common law or under statute. This approach allows us to use property concepts to resolve thorny constitutional issues presented by new search technologies and to make progress on these issues without resolving debates about whether full property rights should attach to data. The existing practice of defining property differently for constitutional purposes, discussed in Part I, further bolsters this move.

C. "Public" Data and Rights to Exclude

I want to return to an objection addressed in Parts III.B and IV.E. There, I defended against the potential objection that allowing rights to exclude against just one casts too wide a warrant net.[323] That is, Fourth Amendment rights should not be triggered when an individual has a right to exclude against only one. This objection becomes most relevant in the contract context where individuals might contract just to obtain Fourth Amendment protections.[324] Here, I return to this view in the context of data. Since data is not treated as property at common law, contracts and statutes become the two relevant sources of rights to exclude.

In the extreme case, my view does support triggering Fourth Amendment rights in an instance where a contract reserves a right to exclude only against one. This circumstance is highly unlikely, however, partly because it assumes the absence of any other statutory regimes that apply to that data. So, consider a new communications device, a "bleeper," to which no statutory regimes yet apply. The bleeper's data is stored on servers with no direct public access. In its standard contract, the bleeper company reserves the right to share the relevant data with anyone except for one person the user specifies, who must submit a request to the company to view the data. In this circumstance, the contractual right to exclude against one *would* generate a Fourth Amendment-relevant right to exclude; this is a natural consequence of the view.

However, there is a related scenario that is troubling in my view and requires an exception. But we can solve it by applying an existing Fourth Amendment exception. Consider a public Facebook page: the person

322. *See, e.g.*, Alan F. Westin, Privacy and Freedom 324–25 (1967); Raymond T. Nimmer & Patricia A. Krauthaus, *Information as Property Databases and Commercial Property*, 1 Int'l J.L. & Info. Tech. 3, 30 (1993); Jacqueline Lipton, *Information Property: Rights and Responsibilities*, 56 Fla. L. Rev. 135, 147–48 (2004); Vera Bergelson, *It's Personal But Is It Mine? Toward Property Rights in Personal Information*, 37 U.C. Davis L. Rev. 379, 443–44 (2003); Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 Tex. L. Rev. 783, 786 (2007); Jamie Lund, *Property Rights to Information*, 10 Nw. J. Tech. & Intell. Prop. 1, 9–10 (2011).

323. *Supra* Part I.

324. *See supra* Part IV.E.

who creates that page has a right to block (exclude) certain individuals from that page, even while the page remains accessible to the public at large. That right to exclude is granted to the creator of the page by Facebook, which retains superior exclusion rights (to shut down the entire page, etc.). In my view, the account holder retains a situational right to exclude based on the terms of service, which would seemingly trigger the warrant requirement. This would lead to the unintuitive result of requiring the government to get a warrant to see what anyone generally can see.

Application of the public view doctrine, an exception to existing Fourth Amendment doctrine, solves this puzzle. As discussed above, the Fourth Amendment does not "require law enforcement officers to shield their eyes" from conduct or information visible when standing on "public thoroughfares."[325] Even if someone has undertaken some efforts to shield an area, those efforts do not "preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible."[326] Although this doctrine originated in the context of searches of the home, the Court has extended its logic to other contexts, such as personal effects carried or placed in areas considered public.[327] Just as a police officer would be able to use information obtained by looking at a house from a public street, searching through garbage placed beyond the curtilage of the home, or minimally handling passenger luggage, public exposure would allow officers to view this kind of "public" data. Putting the public exposure doctrine into a situational right to exclude terms, an officer must not have violated a situational right to exclude in coming to view the thing to be searched (i.e., the officer must not herself be blocked from the public page). Even if a Facebook user has set up some access controls, if the officer can still view the information lawfully, the public exposure doctrine would apply.

VI. CONCLUSION

Possessing a right to exclude at least one law-abider in at least one situation should trigger the Fourth Amendment's warrant requirement. Basing Fourth Amendment protections on a situational right to exclude provides a middle way between the reasonable expectation of privacy approach and the maximalist property approach. This focused, property-inspired view provides an approach that is privacy-protective and conceptually grounded. Exclusion rights are "[t]he hallmark of a pro-

325. California v. Ciraolo, 476 U.S. 207, 213 (1986).

326. *Id.*

327. *See* California v. Greenwood, 486 U.S. 35, 55–56 (1988) (holding no warrant was needed to search garbage placed beyond the curtilage of the home); Bond v. United States, 529 U.S. 334, 338–39 (2000) (holding that while passengers might expect others to handle personal luggage on a public bus minimally because such luggage was exposed to the public, physically invasive searches of those same bags required a warrant).

tected property interest."[328] My view makes situational exclusion rights the hallmark of a Fourth Amendment interest. For Blackstone, property was "that sole and despotic dominion," exercised to the exclusion of any other.[329] The situational right-to-exclude approach employs this concept to ward off a different despotism, that of the searching state.

328. *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 673 (1999).

329. BLACKSTONE, *supra* note 105, at *2.