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Katz and *Dobbs*: Imagining the Fourth Amendment Without a Right to Privacy

Sam Kamin†

Introduction

On June 24, 2022, the United States Supreme Court decided *Dobbs v. Jackson Women's Health Organization*,[1] explicitly overturning both *Roe v. Wade*[2] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*[3] and signaling, at least for now, the end of a federal right to abortion in the United States. The Court held that the unenumerated right to abortion, which itself derived from the unenumerated right to privacy, had no home in the Constitution.[4] In a concurrence for himself alone, Justice Thomas made clear that for him *Dobbs* was merely the first volley in a much broader war. He called for a reexamination of the entirety of the Court's Substantive Due Process jurisprudence, specifically targeting the rights to obtain contraception, to engage in private, consensual sex, and to marry the person of one's choosing.[5]

As broad as the impending attack on individual liberties may be—and it has the potential to be almost unfathomably broad—a significant front in that

† Chauncey G. Wilson Memorial Research Chair, University of Denver, Sturm College of Law. I would like to thank Alan Chen, G. Jack Chin, Martin Katz, Orin Kerr, Nancy Leong, Laurent Sacharoff, and Chris Slobogin, and for their thoughts on this paper. All errors and omissions are mine alone.

1. 142 S. Ct. 2228 (2022).
2. 410 U.S. 113 (1973).
3. 505 U.S. 833 (1992).
4. *Dobbs*, 142 S. Ct. at 2245 ("[*Roe*] held that the abortion right, which is not mentioned in the Constitution, is part of a right to privacy, which is also not mentioned.").
5. *Id.* at 2301 (Thomas, J., concurring) ("[W]e should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.").

war has so far been overlooked in the early coverage of *Dobbs*:[6] the effect the decision may have on the Fourth Amendment's protection against unreasonable searches and seizures. In its 1967 decision of *Katz v. United States*,[7] the Supreme Court moved away from a textual, property-based conception of the Fourth Amendment, choosing to define the Amendment's scope instead with reference to reasonable expectations of privacy.[8] As a result, many of the bedrocks of the last half century of Fourth Amendment jurisprudence may now be as vulnerable as *Roe*, *Casey*, and the Substantive Due Process decisions directly targeted by Justice Thomas. To the extent that the privacy right is weakened by the decision in *Dobbs*, there is every reason to think that privacy as a metric for the scope of the Fourth Amendment is similarly imperiled. As a result, important protections against electronic eavesdropping,[9] data collection from third parties,[10] and remote surveillance technologies,[11] among many other modern intrusions, are all endangered by the possible return to the narrow, property-focused view of the Fourth Amendment that preceded *Katz.*

This Essay is the first to consider what the Fourth Amendment would look like without reference to privacy. Briefly put, protection for any area not specifically named in the Constitution—anything that cannot be fairly described as a person, house, paper, or effect[12]—is at risk after *Dobbs*. In an era when the greatest threats from government involve the use of advanced technology to eavesdrop, surveil, and aggregate data, abandonment of a right to privacy should be particularly troubling to those concerned with government overreach. But all is not necessarily lost. A careful reading of Justice Gorsuch's dissenting opinion in 2018's *Carpenter v. United States*[13] provides a roadmap for how an expansive property-based Fourth Amendment

6. *See, e.g.*, Opinion, *'Abortion Is Just the Beginning': Six Experts on the Decision Overturning* Roe, N.Y. TIMES (June 24, 2022), https://www.nytimes.com/interactive/2022/06/24/opinion/politics/dobbs-decision-perspectives.html [https://perma.cc/W9GJ-X66G]; Erwin Chemerinsky, Opinion, *Op-Ed: Ending Roe Is a Pure Exercise of Republican Power, Wielded to Reduce Women's Freedom and Equality*, L.A. TIMES (June 24, 2022, 9:22 AM), https://www.latimes.com/opinion/story/2022-06-24/roe-wade-scotus-supreme-court-dobbs-abortion-end [https://perma.cc/SJK5-7HAP]; Erik Larson & Emma Kinery, *Same-Sex Marriage, Contraception at Risk After Roe Ruling (3)*, BLOOMBERG L. (June 24, 2022, 2:54 PM), https://news.bloomberglaw.com/us-law-week/supreme-court-justices-disagree-on-scope-of-dobbs-ruling [https://perma.cc/DHG8-FDZ8].

7. 389 U.S. 347 (1967).

8. *Id.* at 351–52.

9. *Id.* at 353. (finding that electronic wiretapping of a public phone booth is a search under the Fourth Amendment).

10. Carpenter v. United States, 138 S. Ct. 2206, 2223 (2018) (finding that the collection of cell tower data is a search under the Fourth Amendment).

11. Kyllo v. United States, 533 U.S. 27, 40 (2001) (finding that the use of a thermal imaging device to measure the heat coming off a roof is a search under the Fourth Amendment).

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

13. 138 S. Ct. 2206 (2018).

might evolve.[14] Given what we know about the current Court—particularly its affection for textual and originalist readings of the Constitution and its manifest skepticism of privacy as a constitutional metric—Justice Gorsuch's *Carpenter* dissent will become required reading in the event that *Katz* soon joins *Roe* and *Casey* on the ash heap of history.

I. The Fourth Amendment: From Property to Privacy

To see how gravely *Dobbs* imperils our current understanding of the Fourth Amendment, it is necessary to recognize how we have arrived at the present understanding of that Amendment. This Part briefly traces a century of the Court's Fourth Amendment jurisprudence, from a doctrine based on property to one based on privacy to one based on *both* privacy and property.

The Fourth Amendment is a short, if convoluted, text which is perhaps uniquely unhelpful in regulating twenty-first-century government conduct. It states, in full:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[15]

The text is fundamentally indeterminate: the intended relationship between the two clauses—the so-called reasonableness and warrant clauses—is anyone's guess. The reasonableness clause describes both the areas protected—persons, houses, papers, and effects—and the acts from which they are protected—unreasonable searches and seizures. Note that the Fourth Amendment does not make the named areas inviolate—the point is not, in fact, that the King of England may never enter a man's home.[16] Rather, the Amendment states that only *unreasonable* searches and seizures are prohibited with the definition of reasonableness presumably provided by the warrant clause.[17] In this Essay, however, I focus entirely on the question of whether a search or seizure has occurred; in the absence of a search or seizure

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14. *See infra* Part III.

15. U.S. CONST. amend. IV.

16. *See* 1 HENRY LORD BROUGHAM, HISTORICAL SKETCHES OF STATESMEN WHO FLOURISHED IN THE TIME OF GEORGE III ser. 1, at 41–42 (London, Charles Knight & Co. Ludgate-Street 1839) ("The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain may enter—but the King of England cannot enter! . . . ." (quoting William Pitt the Elder)).

17. Although hardly uncontroversial, the Supreme Court has held that the Fourth Amendment expresses a preference for warrants. *See, e.g.*, David Gray, *Fourth Amendment Remedies as Rights: The Warrant Requirement*, 96 B.U. L. REV. 425, 427 (2016) ("The conventional understanding of the warrant requirement holds that it is implied by the warrant clause. Critics such as Antonin Scalia, Telford Taylor, and Akhil Amar have long criticized this view, pointing out that neither the text of the Fourth Amendment nor its history supports a broad warrant requirement.") (footnote omitted).

the Fourth Amendment cannot be violated and the Constitution provides no protection from the relevant government conduct.

One of the first Supreme Court cases defining the scope of the Fourth Amendment was *Boyd v. United States*,[18] decided in 1886.[19] *Boyd* involved the issuance of a subpoena requiring the defendant to produce certain business documents.[20] Although the case was civil rather than criminal in nature and the papers were subpoenaed rather than searched for and then seized by the government, the Court nonetheless held that the Fourth Amendment applied to the government's document demand.[21] In doing so it relied on notions of both privacy and property, holding that the Fourth Amendment protects both "the sanctity of a man's home and the privacies of life."[22] It went on to explain that while physical intrusions into the home were the *principal* evil that motivated the founders, they were not the only threat posed by governmental investigations: "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . ."[23] Requiring the defendant to produce documents might not be particularly egregious conduct, the Court conceded, but:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.[24]

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18. 116 U.S. 616 (1886).

19. *See, e.g.*, Brandon R. Teachout, *On Originalism's Originality: The Supreme Court's Historical Analysis of the Fourth Amendment From* Boyd *to* Carpenter, 55 TULSA L. REV. 63, 76 (2019) ("The Supreme Court's seminal Fourth Amendment decision did not come until 1886, more than a century after ratification.").

20. *Boyd*, 116 U.S. at 618.

21. *Id.* at 622.

22. *Id.* at 630.

23. *Id.* The Court grounded its decision in both the Fourth and Fifth Amendment, concluding that in this context, the two "run almost into each other." *Id.* Today the Court has held that the production of documents does not implicate the Fifth Amendment unless the government also compelled the document's creation. *See*, *e.g.*, Fisher v. United States, 425 U.S. 391, 409–10, 410 n.11 (1976).

24. *Boyd*, 116 U.S. at 635.

Boyd, therefore, used notions of both privacy and property to check government investigations; it was not just physical intrusions into constitutionally protected areas that had concerned the founders and implicated the Amendment's protections. Rather, the Fourth Amendment was designed as well to protect against those government actions that would infringe on the defendant's privacy and security in other, subtler ways.

Notwithstanding *Boyd*'s exhortation to read constitutional provisions fostering liberty broadly, one of the Court's next major pronouncements on the Fourth Amendment's scope involved a very narrow reading of the Fourth Amendment. In 1928's *Olmstead v. United States*,[25] the Supreme Court refused to extend Fourth Amendment protection to a telephone call intercepted by federal officials listening in over public lines.[26] Rather than treating electronic eavesdropping—a practice obviously unknown during the founding period—as a "stealthy encroachment" on the rights of the citizen, the Court read the Amendment as providing no protection in this context whatsoever.[27] "The Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants."[28] Because a conversation was not a person, house, paper, or effect, in other words—and because it was difficult to see how a conversation could be either searched or seized—the Court determined that the conduct fell entirely outside of the Amendment's protection and that it did not need to examine whether it was reasonable.

Justice Brandeis's dissent in *Olmstead* is justifiably one of the most famous in the Court's long history.[29] Like the *Boyd* Court, Brandeis argued for an expansive view of the Fourth Amendment, one that takes into account new circumstances the founders could not have anticipated: "Clauses guaranteeing to the individual protection against specific abuses of power, must have a . . . capacity of adaptation to a changing world."[30] For him, there was danger in reading the Fourth Amendment to cover only those areas explicitly named, a danger that would only become more profound as surveillance technology evolved:

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25. 277 U.S. 438 (1928).

26. *See id.* at 464.

27. *See id.* at 465–66.

28. *Id.* at 464.

29. *See, e.g.*, Carol S. Steiker, *Brandeis in* Olmstead*: "Our Government Is the Potent, the Omnipresent Teacher"*, 79 MISS. L.J. 149, 149 (2009) ("Justice Louis Brandeis's dissent in *Olmstead v. United States* from the Taft Court's decision to exempt governmental wiretapping from constitutional regulation is a natural choice for the category of 'great dissents' because there is widespread consensus about its greatness.") (footnote omitted).

30. *Olmstead*, 277 U.S. at 472 (Brandeis, J., dissenting).

> Ways may someday be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. . . . Can it be that the Constitution affords no protection against such invasions of individual security?[31]

The founders, Brandeis assured us,

> conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.[32]

For the next half century, however, the *Olmstead* majority's narrow reading of the text largely defined the scope of the Fourth Amendment: searches occurred only when the government intruded into a constitutionally protected area.[33] That understanding was shaken (though, as will become apparent, not entirely undone) by the Court's 1967 decision in *Katz v. United States*.[34] In *Katz*, federal agents once again listened in on a criminal suspect's phone call without trespassing against his property, this time by bugging the outside of the phone booth he used to share gambling information with those in other states.[35] Using the evidence thus obtained, Katz was convicted of violating federal law and appealed, arguing that the evidence against him was seized in violation of the Fourth Amendment.[36]

The Court's opinion in *Katz* is difficult to parse, and its meaning is now generally ascribed to what Justice Harlan wrote in his separate concurrence.[37] But the gist is that the Constitution protects people, not places: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally

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31. *Id.* at 474.

32. *Id.* at 478.

33. *See* Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 85 ("The path from *Olmstead* to *Silverman* shows the Court eventually focusing on physical penetration into a protected space as the primary test for a Fourth Amendment search."). In *Silverman v. United States*, 365 U.S. 505 (1961), the Court held that the use of a microphone to eavesdrop on the defendants from an adjoining row house was a search because the microphone touched a heating duct inside the defendant's home. Without mentioning the word privacy, the Court simply concluded that "[e]avesdropping accomplished by means of such a physical intrusion is beyond the pale . . . ." *Silveman*, 365 U.S. at 509.

34. 389 U.S. 347 (1967). That same year saw the Court's decision in *Warden v. Hayden*, 387 U.S. 294 (1967), rejecting the mere evidence rule and further decoupling the Fourth Amendment from property notions. *See id.* at 309–10.

35. *Katz*, 389 U.S. at 348.

36. *Id.* at 348–50.

37. *See id.* at 360–62; *see also* United States v. Jones, 565 U.S. 400, 406 (2012).

protected."[38] The focus, in other words, had seemingly shifted from property to privacy;[39] a search occurs when the government intrudes upon a subjective expectation of privacy that society is willing to recognize as reasonable, whether or not it physically interferes with a constitutionally protected area.[40] Katz did not own the public phone booth from which he made his call, and although the government conduct involved neither the searching nor seizing of a person, house, paper, or effect, the Court nonetheless held that the government's intrusion on Katz's reasonable expectation of privacy was sufficient to require the government to answer under the Fourth Amendment for the techniques it had employed.[41]

Almost from the start, *Katz*'s reasonable-expectation-of-privacy test was the subject of intense criticism. Justice Hugo Black was the lone *Katz* dissenter. Although he was willing to give the Fourth Amendment a broad construction, Black wrote, he could not stretch its words as far as the Court seemed willing to do:

> No general right is created by the Amendment so as to give this Court the unlimited power to hold unconstitutional everything which affects privacy. Certainly the Framers, well acquainted as they were with the excesses of governmental power, did not intend to grant this Court such omnipotent lawmaking authority as that. The history of governments proves that it is dangerous to freedom to repose such powers in courts.[42]

Black's warning might initially seem counterintuitive: the formulation of the *Katz* test placed a greater restraint on government power than did the property-based test it seemingly displaced, yet Black decried it as government overreach. But, as Justice Black had written two years earlier in dissent in *Griswold v. Connecticut*,[43] there is danger inherent in substituting other words for the words actually contained in the constitutional text.[44]

> One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or

38. *Katz*, 389 U.S. at 351–52 (citations omitted).

39. I refer throughout to the *Olmstead* approach as either textual or property-based. These ideas are closely related but obviously not identical. The *Olmstead* approach focuses not just on the text of the amendment but on whose person or property is being searched or seized. It is not enough that the thing searched be a house, a person, a paper, or an effect—it must be the house, person, paper, or effect of the one objecting to the search. *See* Olmstead v. United States, 277 U.S. 438, 466 (1928).

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

41. *Id.* at 353 ("The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment.").

42. *Id*. at 374 (Black, J., dissenting).

43. 381 U.S. 479 (1965).

44. *Id.* at 509 (Black, J., dissenting).

> less flexible and more or less restricted in meaning. This fact is well illustrated by the use of the term "right of privacy" as a comprehensive substitute for the Fourth Amendment's guarantee against "unreasonable searches and seizures."[45]

Once a Court deviates from the text of the Constitution, that Court, rather than the text, Black argued, becomes the determiner of the scope of individual rights.[46] And, although the *Griswold* and *Katz* Courts had used an expansive reading of the constitution to extend rights, Black implied, a future Court could just as easily use that same discretion to contract constitutional rights.

Black's critique of *Katz* as having no basis in the text or history of the Constitution has been echoed by several members of the Court in the decades that followed.[47] Yet, *Katz*'s privacy-based conception of the Fourth Amendment held sway for the next half century, serving for most of that time as the sole test for determining when the Fourth Amendment applies to government conduct.[48] It is important, though, not to draw too bright a line in the Court's Fourth Amendment jurisprudence; in the years preceding *Katz*, the Supreme Court did occasionally refer to the Amendment as protecting privacy,[49] and in the years that followed *Katz*, it still occasionally reverted to

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45. *Id.*

46. *See id.* at 525–26.

47. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 34 (2001) ("The *Katz* test—whether the individual has an expectation of privacy that society is prepared to recognize as reasonable—has often been criticized as circular, and hence subjective and unpredictable."); Minnesota v. Carter, 525 U.S. 83, 97 (1998) (Scalia, J., concurring) ("When [the] self-indulgent [*Katz*] test is employed (as the dissent would . . . here) to determine whether a 'search or seizure' within the meaning of the Constitution has *occurred* (as opposed to whether that 'search or seizure' is an 'unreasonable' one), it has no plausible foundation in . . . the Fourth Amendment."); Carpenter v. United States, 138 S. Ct. 2206, 2236 (2018) (Thomas, J., dissenting) ("The *Katz* test has no basis in the text or history of the Fourth Amendment. And, it invites courts to make judgments about policy, not law. Until we confront the problems with this test, *Katz* will continue to distort Fourth Amendment jurisprudence."); *id.* at 2265 (Gorsuch, J., dissenting) ("*Katz* has never been sufficiently justified. In fact, we still don't even know what its 'reasonable expectation of privacy' test *is*. Is it supposed to pose an empirical question (what privacy expectations do people *actually* have) or a normative one (what expectations *should* they have)? Either way brings problems.").

48. *See, e.g.*, United States v. Jones, 565 U.S. 400, 405–06 (2012) (discussing the various cases that applied the analysis from Justice Harlan's concurrence).

49. *See, e.g.*, Jones v. United States, 362 U.S. 257, 261 (1960). In *Jones v. United States*, the Court explained:

> The restrictions upon searches and seizures were obviously designed for protection against official invasion of privacy and the security of property. They are not exclusionary provisions against the admission of kinds of evidence deemed inherently unreliable or prejudicial. The exclusion in federal trials of evidence otherwise competent but gathered by federal officials in violation of the Fourth Amendment is a means for making effective the protection of privacy.

Id.

a narrow, textual reading of the Fourth Amendment to limit its scope.[50] But for the forty-five years after *Katz*, it remained the principal test for whether the Fourth Amendment was implicated by government conduct.

When the Court decided *United States v. Jones*[51] in 2012, however, it signaled a significant shift in the Court's Fourth Amendment analysis.[52] In *Jones*, federal officials attached a GPS tracking device to the defendant's Jeep in order to follow his movements remotely; they then used the information thus gathered to prosecute him for drug trafficking.[53] Under the *Katz* test, the answer to the question of whether the use of the GPS device was a search or seizure would be a complicated one.[54] The Court would have to determine whether Jones had a reasonable expectation of privacy in his location over the long period of observation provided by the tracker. Previous cases involving inferior "beeper" technology had held that there was no such expectation,[55] but the Court would have had to decide whether the wealth of information the GPS tracker would provide made a constitutional difference.

However, Justice Scalia, one of *Katz*'s most vocal critics, surprised many when he wrote that it was unnecessary to apply *Katz* to resolve the case. *Katz*, Scalia explained, was but a blip in the Court's long history of using property conceptions to measure the scope of the Fourth Amendment: "[F]or most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates. *Katz* did not repudiate that understanding."[56] Thus, Scalia concluded, it was not necessary to answer the

50. *See, e.g.*, Oliver v. United States, 466 U.S. 170, 177 (1984) (holding that open fields were not entitled to constitutional protection because they were not among the areas listed as protected under the Fourth Amendment.).

51. 565 U.S. 400 (2012).

52. *See id.* at 406 ("Fourth Amendment rights do not rise or fall with the *Katz* formulation.").

53. *Id.* at 402–04.

54. Interestingly, at least five members of the Court concluded that such surveillance did intrude on a reasonable expectation of privacy, complicating the question of what, exactly, *Jones* stands for. *See*, *e.g.*, Carpenter v. United States, 138 S. Ct. 2206, 2215 (2018) ("[F]ive Justices agreed [in *Jones*] that related privacy concerns would be raised by, for example, 'surreptitiously activating a stolen vehicle detection system' in Jones's car to track Jones himself, or conducting GPS tracking of his cell phone") (quoting *Jones*, 565 U.S. at 426, 428).

55. *See, e.g.*, Knotts v. United States, 460 U.S, 276, 282, 285 (1983) (holding that because a beeper merely makes public surveillance of a suspect easier, it does not constitute a search or seizure under the Fourth Amendment); United States v. Karo, 468 U.S. 705, 711–13 (1984) (holding that the installation and use of a beeper in a can of ether later transferred to defendant and carried in his trunk was not a search under the Fourth Amendment).

56. United States v. Jones, 565 U.S. 400, 406–07 (footnote omitted). This last sentence came as a surprise to many. For example, the Bluebook citation guide used *Katz* and *Olmstead* as an example of how to cite to one case overruling another. *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 111 (Columbia L. Rev. Ass'n et al. eds., 19th ed. 2010). In fact, in a bit of irony, the only time *Katz* is cited in the majority opinion in *Dobbs* is as an example of the regular tradition of the

difficult *Katz* question when an easier, more historically grounded one would resolve the case: Did the use of the GPS device constitute a physical intrusion into a constitutionally protected area?[57] He and the Court answered that question in the affirmative: The attachment (not necessarily the use) of the device interfered with Jones's use of his property and thus constituted a search under the Fourth Amendment.[58] Because the search was done without a valid warrant, it was presumptively unconstitutional.[59]

To those who decried the return to a textual, property-based conception of the Fourth Amendment,[60] Justice Scalia urged caution. The property-based reading of the Fourth Amendment that the Court adopted in *Jones* supplemented, but did not replace, the privacy-based conception that had largely held sway since *Katz*.[61] Justice Scalia argued that the majority opinion, which left room for both property- and privacy-based Fourth Amendment tests, was more expansive than the concurrence, which would use a single test—*Katz*—to determine the Fourth Amendment's scope.[62]

Court overruling its prior precedents. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2263 n.48 (2022) ("*Katz v. United States*, 389 U.S. 347 . . . (1967) (Fourth Amendment 'protects people, not places,' and extends to what a person 'seeks to preserve as private'), overruling *Olmstead v. United States*, 277 U.S. 438 . . . (1928)."). Furthermore, the fact that *Katz* did not overturn *Olmstead* would likely have shocked its principal author. *See* Katz v. United States, 389 U.S. 347, 362 n.* (1967) (Harlan J., concurring) ("[T]oday's decision must be recognized as overruling *Olmstead v. United States*, 277 U. S. 438, which essentially rested on the ground that conversations were not subject to the protection of the Fourth Amendment."). Westlaw also continues to list *Olmstead* as having been overruled by *Katz*.

57. *Jones*, 565 U.S. at 407–08.

58. *Id.* at 404–05.

59. *Id.* at 403 n.1, 404. The officers had obtained a court order to install the device but were out of compliance with the order. *Id.* at 402–03. The Court thus treated the case as involving a warrantless search which was presumptively unconstitutional. *Id.* at 403 n.1, 404.

60. *See, e.g.*, *id.* at 418 (Alito, J., concurring). In his concurrence, Justice Alito criticized the majority's analysis:

> This case requires us to apply the Fourth Amendment's prohibition of unreasonable searches and seizures to a 21st-century surveillance technique, the use of a Global Positioning System (GPS) device to monitor a vehicle's movements for an extended period of time. Ironically, the Court has chosen to decide this case based on 18th-century tort law.

Id.

61. *Id.* at 411 (majority opinion). Responding to criticism from the concurrence, Justice Scalia asserted:

> The concurrence begins by accusing us of applying "18th-century tort law." That is a distortion. What we apply is an 18th-century guarantee against unreasonable searches, which we believe must provide *at a minimum* the degree of protection it afforded when it was adopted. The concurrence does not share that belief. It would apply *exclusively Katz*'s reasonable-expectation-of-privacy test, even when that eliminates rights that previously existed.

Id. (citation omitted).

62. *Id.*

And in the years following *Jones*, the two tests did seem to peacefully coexist. For example, in *Florida v. Jardines*,[63] decided the year after *Jones*, the Court held that the use of a drug-sniffing police dog to look for marijuana odors on the defendant's front porch was a search for Fourth Amendment purposes.[64] Mentioning *Katz* only in passing, Justice Scalia concluded for the majority that the officers had no license to be on Jardines's front porch, making their physical intrusion into his curtilage a search under *Jones*.[65] Justice Kagan, joined by Justices Sotomayor and Ginsburg, wrote that the same result could have been reached, and more happily, under the *Katz* test.[66] While Jardines might welcome Girl Scouts, postmen, and political canvassers onto his front porch, Kagan wrote, it was reasonable for him to expect that the government would not bring a trained narcotics dog onto his porch, seeking to find evidence to use against him in a criminal court:

> For me, a simple analogy clinches this case—and does so on privacy as well as property grounds. A stranger comes to the front door of your home carrying super-high-powered binoculars. He doesn't knock or say hello. Instead, he stands on the porch and uses the binoculars to peer through your windows, into your home's furthest corners. It doesn't take long (the binoculars are really very fine): In just a couple of minutes, his uncommon behavior allows him to learn details of your life you disclose to no one. Has your "visitor" trespassed on your property, exceeding the license you have granted to members of the public to, say, drop off the mail or distribute campaign flyers? Yes, he has. And has he also invaded your "reasonable expectation of privacy," by nosing into intimacies you sensibly thought protected from disclosure? Yes, of course, he has done that too.[67]

For the concurring Justices, all of whom also joined the majority opinion, this was an easy case twice over: Easy under *Katz* and easy under *Jones*.[68]

The tests developed in *Katz* and *Jones* would not always point to the same result, however. In *Carpenter v. United States*,[69] decided in 2018, the Court held that the defendant had a reasonable expectation of privacy in data that the government obtained from his cellular carrier and used to establish

63. 569 U.S. 1 (2013).

64. *Id.* at 3–4, 11–12.

65. *Id.* at 5–8.

66. *Id.* at 12–13 (Kagan, J., concurring).

67. *Id.* at 12 (citations omitted) (quoting Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)).

68. Easy though the case might have been under either test, neither Justice Thomas nor Justice Scalia joined Justice Kagan's concurrence. *Id.*

69. 138 S. Ct. 2206 (2018).

his location at the time of a series of armed robberies.[70] Unlike in *Jones* and *Jardines*, the Court could not find a physical intrusion into a constitutionally protected area.[71] The surveillance was conducted remotely, after the fact, and without any interference with either Carpenter's person or his property.[72] Whether the government conduct constituted a search, therefore, came down to whether there was a reasonable expectation of privacy under *Katz*. That question fractured the Court 5–4 and produced separate opinions from each of the four dissenters.[73] But a bare majority of the Court held that, at least on the facts of this case, the use of the cell tower data was a search and was presumptively unconstitutional in the absence of a warrant.[74] The majority cited Justice Brandeis's *Olmstead* dissent, finding that cell site location data was exactly the sort of technological advance that the Founders could not have anticipated, but from which they would want to protect the public.[75] Although previous cases had held that one does not have a reasonable expectation of privacy in one's public location,[76] the *Carpenter* Court held that advances in technology required a different result on these facts.[77]

The development of the *Jones* test had, as Justice Scalia promised, not proven fatal to *Katz*. Although Justice Thomas would have found for the government in *Carpenter* solely because Carpenter could not demonstrate that he owned the records obtained by the government,[78] establishing a

70. *Id.* at 2212, 2217. The data was obtained pursuant to a court order, but that order was issued on a showing of less than probable cause. *Id.* at 2221 (quoting 18 U.S.C. § 2703(d)). Since if obtaining the data was a search, *id.* at 2223, it was likely a search that violated the Fourth Amendment, which holds that no warrant shall issue, except upon a showing of probable cause. U.S. CONST. amend. IV.

71. *See Carpenter*, 138 S. Ct. at 2213–14 (discussing the *Jones* test but noting that government access to digital personal location data does not fit neatly under existing precedents). But see Justice Gorsuch's dissent, discussed below, arguing that Carpenter might have had a property right in his cell tower data. *Id.* at 2270 (Gorsuch, J., dissenting).

72. *See id.* at 2212 (majority opinion) (describing how the location data was acquired).

73. *See id.* at 2223 (Kennedy, J., dissenting); *id.* at 2235 (Thomas, J., dissenting); *id.* at 2246 (Alito, J., dissenting); *id.* at 2261 (Gorsuch, J., dissenting).

74. *Id.* at 2220–21 (majority opinion). While the request for cell tower data had been made to the cell carrier pursuant to a court order under a procedure set out by Congress, the Court noted that the order required only reasonable grounds to believe that the records were relevant to an ongoing criminal investigation. *Id.* at 2212 (quoting 18 U.S.C. § 2703(d)). This falls below the Constitutional standard which mandates that warrants may issue only upon probable cause. U.S. CONST. amend. IV.

75. *Carpenter*, 138 S. Ct. at 2223 ("As Justice Brandeis explained in his famous dissent, the Court is obligated—as '[s]ubtler and more far-reaching means of invading privacy have become available to the Government'—to ensure that the 'progress of science' does not erode Fourth Amendment protections.") (alteration in original) (quoting Olmstead v. United States, 277 U.S. 438, 473–74 (1928) (Brandeis, J., dissenting)).

76. *Id.* at 2215 (quoting United States v. Knotts, 460 U.S. 276, 281–82 (1983)).

77. *See id.* at 2216–18.

78. *Id.* at 2235 (Thomas, J., dissenting). Justice Thomas stated:

property right in the thing searched had not in fact become the *sina qua non* of demonstrating that a Fourth Amendment search had occurred. Thus, it seemed, as recently as just a few years ago, there was an uneasy truce between those on the Court who were content with *Katz* and those who favored the older, property-based approach that traced its roots to *Olmstead*. The *Jones* opinion had, seemingly, left room for both.

II. The Fourth Amendment Without a Privacy Right?

Which brings us to *Dobbs v. Jackson Women's Health Organization*. In *Dobbs* the Court upheld Mississippi's fifteen-week abortion ban but did so much more.[79] Rather than simply stating that Mississippi's ban was not an undue burden on the right to abortion, as Chief Justice Roberts wished in his concurrence that his colleagues had done,[80] the Court went on to explicitly overturn both *Roe v. Wade* and its successor, *Planned Parenthood v. Casey*.[81] *Roe* had located a privacy right in the Due Process Clause of the Fourteenth Amendment's "concept of personal liberty and restrictions upon state action," deciding that the privacy right "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[82] The Court in *Dobbs* critiqued this approach, decrying the abortion right's questionable provenance in either the text or history of the Constitution: "*Roe* . . . was remarkably loose in its treatment of the constitutional text. It held that the abortion right, which is not mentioned in the Constitution, is part of a right to privacy, which is also not mentioned."[83] Given a constitutional text that mentioned neither abortion nor privacy and what Justice Alito described as a legislative history that was openly hostile to abortion as a practice,[84] the majority could come to only one conclusion:

> By obtaining the cell-site records of MetroPCS and Sprint, the Government did not search Carpenter's property. He did not create the records, he does not maintain them, he cannot control them, and he cannot destroy them. Neither the terms of his contracts nor any provision of law makes the records his. The records belong to MetroPCS and Sprint.

Id.

79. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022).

80. *Id.* at 2311 (Roberts, C.J., concurring) ("The Court's opinion is thoughtful and thorough, but those virtues cannot compensate for the fact that its dramatic and consequential ruling is unnecessary to decide the case before us.").

81. *Id.* at 2242 (majority opinion).

82. Roe v. Wade, 410 U.S. 113, 153 (1973).

83. *Dobbs*, 142 S. Ct. at 2245 (citing *Roe*, 410 U.S. at 152–53).

84. *See id.* at 2251. The Organization of American Historians and American Historical Association, which had filed an amicus brief in the case, slammed the *Dobbs* decision when it was released:

> [T]he court adopted a flawed interpretation of abortion criminalization that has been pressed by anti-abortion advocates for more than thirty years. The opinion

> We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."
>
> The right to abortion does not fall within this category.[85]

Both the majority opinion and Justice Kavanaugh's concurrence took pains to distinguish the right to abortion from other Substantive Due Process rights on the grounds that only abortion required balancing the rights of the mother against the rights of a fetus.[86] The *Dobbs* decision, we were assured by both the Court and Justice Kavanaugh, did not threaten any other unenumerated rights. For its part, the dissent was unconvinced:

> [O]ne of two things must be true. Either the majority does not really believe in its own reasoning. Or if it does, all rights that have no history stretching back to the mid-19th century are insecure. Either the mass of the majority's opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other.[87]

And Justice Thomas made clear in his solo concurrence that as far as he was concerned, the entirety of the Court's Substantive Due Process jurisprudence *was* now on the table. For him, Substantive Due Process was oxymoronic: how could a clause that guarantees fair process give rise to substantive rights?[88] He called for the Court to revisit all of the unenumerated rights that

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> inadequately represents the history of the common law, the significance of quickening in state law and practice in the United States, and the nineteenth-century forces that turned early abortion into a crime.

Press Release, Org. of Am. Historians & Am. Hist. Ass'n., Joint OAH-AHA Statement on the *Dobbs v. Jackson* Decision (July 5, 2022), https://www.oah.org/insights/posts/2022/july/joint-oah-aha-statement-on-the-dobbs-v-jackson-decision [https://perma.cc/AWZ6-R7Z6].

85. *Dobbs*, 142 S. Ct. at 2242 (citation omitted).

86. *Id.* at 2277–78 ("[T]o ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion."); *Id.* at 2304, 2309 (Kavanaugh, J., concurring) ("I emphasize what the Court today states: Overruling *Roe* does *not* mean the overruling of those precedents, and does *not* threaten or cast doubt on those precedents.").

87. *Id.* at 2319 (Breyer, J., dissenting).

88. *Id.* at 2301 (Thomas, J., concurring) ("As I have previously explained, 'substantive due process' is an oxymoron that 'lack[s] any basis in the Constitution.'") (quoting Johnson v. United States, 576 U.S. 591, 607–08 (2015) (Thomas, J., concurring)). Justice Thomas, of course, was not the first to discover this seeming contradiction. *See, e.g.*, Jamal Greene, *The Meming of Substantive*

had been recognized under the Due Process Clause, naming specifically the right of married persons to obtain contraceptives, the right to engage in consensual sexual activity, and the right to marry the person of one's choosing.[89] "Because any substantive due process decision is 'demonstrably erroneous,' we have a duty to 'correct the error' established in those precedents."[90]

Dobbs was seismic enough on its own terms. As a harbinger of the Court's vision of the future, however, it has the potential to be something far more ominous. So many of the rights Americans had come to take for granted—from the right to marry,[91] to the right to live in an arrangement of one's choosing,[92] to the right to sexual autonomy,[93] to the right to procreate,[94] to the right to educate one's children[95]—are not expressly enumerated in the Constitution and derive from the Due Process clause. A reexamination of all of those rights would strike at some of the most intimate associations and activities Americans had come to assume were settled.

Although the Fourth Amendment was not directly implicated by the *Dobbs* decision, the consequences of its holding, and particularly of Justice Thomas's concurrence, could be profound for how searches and seizures are defined going forward. If the right to privacy is held in contempt by the current Court, then *Katz*'s reasonable expectation of privacy test is likely imperiled along with it. Justice Thomas, it should be remembered, has long been an opponent of privacy as a metric for determining the scope of the Fourth Amendment.[96] For him and other members of the Court who have long critiqued *Katz*, *Dobbs* may provide the final impetus they need to do away with *Katz* entirely.

Without *Katz* and its progeny, all that would remain of the Fourth Amendment is the *Jones* test, with its property-based, textual reading of the Amendment. Justice Scalia told us in *Jones* not to worry that *Katz* had been replaced, and the first several years of Fourth Amendment cases after *Jones*

Due Process, 31 CONST. COMMENTARY 253, 256 (2016) ("Whether or not substantive due process is logically a contradiction in terms, its status as an oxymoron has become what I call a constitutional meme.") *See also id.* at 254 n.4 (collecting descriptions of substantive due process as oxymoronic).

89. *Id.* (first citing Griswold v. Connecticut, 381 U.S. 479 (1965); then citing Lawrence v. Texas, 539 U.S. 558 (2003); and then citing Obergefell v. Hodges, 576 U.S. 644 (2015)).

90. *Id.* (citations omitted) (first quoting Ramos v. Louisiana, 140 S. Ct. 1390, 1424 (2020) (Thomas, J., concurring); and then quoting Gamble v. United States, 139 S. Ct. 1960, 1984–85 (2019) (Thomas, J., concurring)).

91. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967).

92. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494 (1977).

93. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003).

94. *See, e.g.*, Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

95. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923).

96. *See* Byrd v. United States, 138 S. Ct. 1518, 1531 (2018) (Thomas, J., concurring); Carpenter v. United States, 138 S. Ct. 2206, 2236 (2018) (Thomas, J., dissenting).

largely bore this out.[97] But after *Dobbs*, it seems clear that a test that makes explicit reference to the text of the Fourth Amendment more closely aligns with the constitutional philosophy of the current Court than does one grounded in evolving notions of privacy.

It could be argued at this point that I am overselling the peril that *Dobbs* creates for the reasonable expectation of privacy test. The right to privacy ridiculed by the Court in *Dobbs* is a free-floating, unenumerated right that the Court originally grounded in the penumbras and emanations of the Bill of Rights[98] and then later located in the Fourteenth Amendment's guarantee of Due Process of Law.[99] As Justice Rehnquist wrote in *Roe v. Wade*, the right to privacy on which the Court based the abortion right in that case is not "even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment to the Constitution, which the Court has referred to as embodying a right to privacy."[100] That argument would have more sway had Justice Thomas and others on the Court not been assailing privacy as a metric for the Fourth Amendment for decades.[101] Picking up on Justice Black's critique in *Katz* itself—the same critique, it should be remembered, that Justice Black had made against the right to contraception in *Griswold*—conservative Justices on the Court have long assailed the reasonable expectation of privacy test with the same disdain they have directed at the unenumerated rights the Court has identified under the Substantive Due Process doctrine.[102] Both have been assailed as ahistorical and lacking any

97. *See supra* notes 60–64 and accompanying text.

98. Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.").

99. *See* Roe v. Wade, 410 U.S. 113, 153 (1973) ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

100. *Id.* at 172 (Rehnquist, J., dissenting); *see also* Anna Lvovsky, *Fourth Amendment Moralism*, 166 U. PA. L. REV. 1189, 1191–92 (2018) (distinguishing privacy as it is used in the Fourth Amendment context from the way it is used in the Court's Substantive Due Process jurisprudence).

101. *See Byrd*, 138 S. Ct. at 1531 (Thomas, J., concurring); *Carpenter*, 138 S. Ct. at 2236 (Thomas, J., dissenting). The criticism of *Katz* has not been limited to the Court or to those on the political right. For example, Professor Nicholas Kahn-Fogel observes:

> [T]here is broad consensus that *Katz* largely failed to make good on [its] promise. Instead, in cases after case, the Court either reaffirmed older, restrictive conceptions of what constitutes a Fourth Amendment search or, in some instances, interpreted the Fourth Amendment's scope as even narrower than one might have predicted under the older model.

Nicholas A. Kahn-Fogel, Katz*,* Carpenter*, and Classical Conservatism*, 29 CORNELL J.L. & PUB. POL'Y 95, 101 (2019).

102. *See supra* notes 42–47, 85–87 and accompanying text.

support in the text of the Constitution.[103] Furthermore, while it is true that the Court in *Casey* moved away from privacy as the core underpinning of the abortion right,[104] the majority in *Dobbs* went out of its way to mention the privacy right as the original font of the abortion right, lumping the two together for critique.[105]

For that reason, I believe that it is worth reckoning with what will change if I'm right and the Court ends up discarding *Katz* the same way it did *Roe* and *Casey*. Returning to a reading of the Fourth Amendment based solely on property conceptions would profoundly impact which aspects of daily life are protected from government intrusion and which are not. In recent years, technology-based surveillance has moved to the fore and has come to constitute a correspondingly high share of the courts' Fourth Amendment cases.[106] Many of the Court's important twenty-first century Fourth Amendment cases have involved adapting the Court's traditional holdings to take account of technological innovation. Not just *Carpenter*—which required reexamination of the rule that information shared with third parties could not support a reasonable expectation of privacy—and *Jones*—which required reexamination of those cases finding no reasonable expectation of privacy in one's public location—but also cases involving thermal imaging of a home,[107] searches of cell phones incident to arrest,[108] and the DNA testing of arrestees[109] have all required the Court to evaluate the impact that changes in technology should have on existing Fourth Amendment doctrine. Other cases on the horizon—from the extended use of telephone pole

103. *See, e.g.*, *Carpenter*, 138 S. Ct. at 2236 (Thomas, J., dissenting) ("The *Katz* test has no basis in the text or history of the Fourth Amendment."); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring) ("As I have previously explained, 'substantive due process' is an oxymoron that 'lack[s] any basis in the Constitution.'") (quoting Johnson v. United States, 576 U.S. 591, 607–08 (2015) (Thomas, J., concurring)).

104. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992) (plurality opinion) ("The doctor-patient relation does not underlie or override the two more general rights under which the abortion right is justified: the right to make family decisions and the right to physical autonomy."); *but see id.* at 926 (Blackmun, J., concurring in part, concurring in judgment in part, and dissenting in part) ("The Court today reaffirms the long recognized rights of privacy and bodily integrity.").

105. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2236 (2022).

106. *See, e.g.*, Neil Richards, *The Third-Party Doctrine and the Future of the Cloud*, 94 WASH. U. L. REV. 1441, 1447–48 (2017) (describing the struggles the Fourth Amendment has always had in keeping up with new technologies and the social expectations that go along with them); Fabio Arcila, Jr., *GPS Tracking Out of Fourth Amendment Dead Ends:* United States v. Jones *and the* Katz *Conundrum*, 91 N.C. L. REV. 1, 48 (2012) ("A consistent theme in Fourth Amendment jurisprudence is that courts have struggled with the question of whether, and how, to adapt it to technological change. The recent, rapid pace of technological change . . . has brought new urgency to this issue.").

107. Kyllo v. United States, 533 U.S. 27 (2001).

108. Riley v. California, 573 U.S. 373 (2014).

109. Maryland v. King, 569 U.S. 435 (2013).

cameras[110] to drone surveillance[111]—may someday test the Court's ability to create a Fourth Amendment jurisprudence that can adapt to changing technologies. The *Jones* test seems particularly ill-suited to this task. In the same way that *Jones* offered no protection to Carpenter—because the government was able to track him without interfering in a meaningful way with his person, house, papers, or effects—there is real reason to doubt that it will provide much protection as surveillance technologies continue to advance.

III. Where Do We Go from Here?

It is important not to romanticize fifty-five years of cases decided under *Katz*. The *Katz* test was never particularly good at either protecting individual liberty or adapting to changes in technology. It allowed officers to use drug-sniffing dogs (so long as they weren't on front porches),[112] traipse through private property searching for marijuana plants (so long as they stayed in the open fields),[113] peer down from airplanes[114] or helicopters (so long as they were in FAA navigable airspace),[115] acquire records from third parties (so long as they didn't obtain *too* much information),[116] and on and on. So maybe Justice Black was right to warn us that the move from the language of the Fourth Amendment to the amorphous concept of privacy would not invariably be a boon for individual liberty. As he told us, a test that focuses

110. *See, e.g.*, United States v. Tuggle, 4 F.4th 505 (7th Cir. 2021) (holding, as a matter of first impression, that the defendant had not demonstrated a reasonable expectation of privacy where the government surveilled his home over a period of eighteen months using three cameras mounted on public property), *cert. denied*, 142 S. Ct. 1107 (2022).

111. *See, e.g.*, Dircks v. Ind. Dep't of Child Servs., No. 21-CV-00451, 2022 WL 742435, at *18 (S.D. Ind. Mar. 11, 2022) (holding that plaintiff had sufficiently pled a Fourth Amendment violation by alleging government agents flew a drone over his property).

112. *See, e.g.*, United States v. Place, 462 U.S. 696, 707 (1983) (holding that a luggage sniff by a trained narcotics dog is not a search for Fourth Amendment purposes).

113. *See, e.g.*, Oliver v. United States, 466 U.S. 170, 177 (1984) (holding that government intrusion into open fields outside the curtilage of the home is not a search for Fourth Amendment purposes).

114. *See, e.g.*, California v. Ciraolo, 476 U.S. 207, 215 (1986) (finding that the use of an airplane to peer into the defendant's backyard from FAA-approved airspace is not a search for Fourth Amendment purposes).

115. *See, e.g.*, Florida v. Riley, 488 U.S. 445, 450–52 (1989) (applying *Ciraolo* to observation from a helicopter).

116. *See, e.g.*, Smith v. Maryland, 442 U.S. 735, 742 (1979) (finding no reasonable expectation of privacy in the numbers dialed from one's phone because that information had been voluntarily shared with the phone company); United States v. Miller, 425 U.S. 435, 442–43 (1976) (finding that defendant had no reasonable expectation of privacy in check subpoenaed from his bank both because that check was no longer his personal paper and because he could not have a reasonable expectation of privacy in information voluntarily conveyed to a third party).

on reasonable expectations of privacy always depends on which expectations five members of the Court deem to be reasonable.[117]

As Justice Gorsuch reminded us in his dissent in *Carpenter*, however, "[t]here is another way."[118] Although he was dissenting from the Court's finding of a reasonable expectation of privacy in cell tower data, Justice Gorsuch's opinion presents a vision of how a property-based Fourth Amendment might provide significant Fourth Amendment protections. Like his dissenting colleagues, he critiqued the *Katz* test as subjective, circular, and unpredictable.[119] To make his point, he cited *California v. Greenwood*,[120] in which the Court had found no reasonable expectation of privacy in trash bags left at the curb for collection.[121] This result puzzled Gorsuch: Although, as the *Greenwood* Court reasoned, one's neighbors might go through one's trash without permission, a homeowner would certainly have the right to confront them for doing so.[122] But more than that, the California Supreme Court had previously held that the state constitution protected trash from intrusion by others.[123] For the Court to substitute its subjective sense of whether there was an expectation of privacy in trash bags for those of the relevant state high court seemed to strike Justice Gorsuch as arrogant.[124]

In place of *Katz*, Justice Gorsuch would adopt a property-based approach that actually considers property law. He takes particular issue with cases like *Smith v. Maryland*[125] and *United States v. Miller*,[126] which established the Court's third-party doctrine.[127] These cases—which held that information shared with others cannot support a reasonable expectation of privacy[128]—seem to Justice Gorsuch to simply be wrong.[129] To demonstrate, he gives the example of valet parking.[130] The driver (a bailor) gives the car to the valet (a bailee) but only for some purposes and uses; he is parting with

117. *See* Katz v. United States, 389 U.S. 347, 374 (1967) (Black, J., dissenting) ("No general right is created by the Amendment so as to give this Court the unlimited power to hold unconstitutional everything which affects privacy.").

118. Carpenter v. United States, 138 S. Ct. 2206, 2267 (2018) (Gorsuch, J., dissenting).

119. *Id.* at 2266–67.

120. 486 U.S. 35 (1988).

121. *Id.* at 37.

122. *Carpenter*, 138 S. Ct. at 2266 (Gorsuch, J., dissenting).

123. *Id.* (citing California v. Greenwood, 486 U.S. 35, 43 (1988)).

124. *Id.* at 2266 ("[R]ather than defer to that as evidence of the people's habits and reasonable expectations of privacy, the Court substituted its own curious judgment.").

125. 442 U.S. 735 (1979).

126. 425 U.S. 435 (1976).

127. *See, e.g.*, *Carpenter*, 138 S. Ct. at 2216 (2018) ("We have previously held that 'a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.'") (quoting *Smith*, 442 U.S. at 743–44 (1979)).

128. *See Smith*, 442 U.S. at 745; *Miller*, 425 U.S. at 442.

129. *Id.* at 2261–62 (Gorsuch, J., dissenting).

130. *Id.* at 2268.

only a small part of his bundle of sticks.[131] If the bailee were to exceed the authority entrusted in her, she could be liable to the bailor for conversion.[132] While the *Katz* test as applied in *Smith* and *Miller* is all or nothing—either one has carefully guarded one's sensitive information or one has lost any expectation of privacy in it—Justice Gorsuch's approach is more nuanced and is governed not by judges' intuitions about societal expectations but by actual law.[133]

Importantly, one kind of law Justice Gorsuch envisions providing guidance in Fourth Amendment matters is legislative enactments: "If state legislators or state courts say that a digital record has the attributes that normally make something property, that may supply a sounder basis for judicial decisionmaking than judicial guesswork about societal expectations."[134] Taking these positive laws into account when considering the scope of the Fourth Amendment would signal a significant deviation from the current state of the law. Under *Katz*, the Supreme Court has repeatedly ignored such legislative pronouncements, rejecting not just Greenwood's claim that his trash was entitled to protection under state law,[135] but also those of a property owner asserting that officers were trespassing in his fields when they discovered his marijuana[136] and those of a motorist that his arrest was unreasonable because the state statute under which he was arrested did not

131. *See, e.g.*, Anna di Robilant, *Property: A Bundle of Sticks or a Tree?*, 66 VAND. L. REV. 869, 871 (2013). Describing the history of the "bundle of sticks" concept, Professor Robilant observes:

> In the United States, every first-year law student learns that property is a "bundle of sticks." Introduced by Hohfeld, and further developed by the realists, the bundle of sticks concept characterizes property as a bundle of entitlements regulating relations among persons concerning a valued resource. The metaphor suggests that the bundle is malleable (i.e., that private actors, courts, and lawmakers may add or remove sticks, and that the bundle structures relations among persons, only secondarily and incidentally involving a thing).

Id. (footnote omitted).

132. *See Carpenter*, 138 S. Ct. at 2268–69 (Gorsuch, J., dissenting).

133. *Id.* at 2270.

134. *Id.*

135. There, the Court noted that it has "never intimated . . . that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs." California v. Greenwood, 486 U.S. 35, 43 (1988).

136. Oliver v. United States, 466 U.S. 170, 183–84 (1984). Delivering the opinion of the Court in *Oliver v. United States*, Justice Powell writes:

> The law of trespass . . . forbids intrusions upon land that the Fourth Amendment would not proscribe. For trespass law extends to instances where the exercise of the right to exclude vindicates no legitimate privacy interest. Thus, in the case of open fields, the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment.

Id. (footnote omitted).

authorize arrest,[137] among others. In these cases, the Court found that the scope of the federal right could not be determined by the acts of a state or municipality.[138]

By making space for legislative enactments in the constitutional calculus, Justice Gorsuch imagines an expansive conception of property, one that could actually provide far more protection than the privacy-based notion it might replace. Justice Gorsuch freely admits that he is only sketching the outlines of how a thoughtful property-based Fourth Amendment might work.[139] But when contemplating a Fourth Amendment without *Katz*, his thoughts may matter quite a bit. Although they have long been critical of textual, property-based conceptions of the Fourth Amendment, it may be time for civil libertarians to think, and to think imaginatively, about how such a property-based conception might work to protect individual liberty. In doing so, privacy advocates should consider pushing for legislative strategies alongside litigation; positive law is likely to play a far greater role in a property-based Fourth Amendment regime than it has in the past.[140]

Conclusion

Law students notoriously hate reading concurring and dissenting opinions. Yet law professors continue to assign them and with good reason. The evolution of the Supreme Court's Fourth Amendment jurisprudence over the last century shows that yesterday's dissent or concurrence can easily become tomorrow's majority opinion: Justice Brandeis's dissent in *Olmstead* became Justice Harlan's concurrence in *Katz*, which became the law. Justice Black's cautionary words about privacy in his dissents in *Griswold* and *Katz* were picked up by Justices Scalia and Thomas and eventually became part of the basis for Justice Thomas's concurrence in *Dobbs*. They also provided a framework for the Court's critique of unenumerated rights more generally. Whether Justice Thomas's call for a reexamination of all of Substantive Due Process will come to control a majority of the Court is anyone's guess at this point, but it would be foolish to dismiss that opinion as a lone voice on the Court.

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137. Virginia v. Moore, 553 U.S. 164, 174 (2008) ("A State is free to prefer one search-and-seizure policy among the range of constitutionally permissible options, but its choice of a more restrictive option does not render the less restrictive ones unreasonable, and hence unconstitutional.").

138. *Greenwood*, 486 U.S. at 43; *Oliver*, 466 U.S. at 175 n.5; *Moore*, 553 U.S. at 176.

139. *Carpenter*, 138 S. Ct. at 2268 (Gorsuch, J., dissenting) ("I do not begin to claim all the answers today, but (unlike with *Katz*) at least I have a pretty good idea what the questions *are*.").

140. Justice Gorsuch is careful to note that such legislative pronouncements can expand, but cannot contract, the scope of rights: "[W]hile positive law may help establish a person's Fourth Amendment interest there may be some circumstances where positive law cannot be used to defeat it." *Id.* at 2270.

In that vein, I argue that litigants and advocates should plan for a Fourth Amendment without a privacy right. As they do so, they would be wise to look to Justice Gorsuch's *Carpenter* dissent and to see it for what it is. It calls for much more than a return to the rote formalism of the *Olmstead* Court; that is the specter of Justice Thomas's *Carpenter* dissent—because the records were subpoenaed from the cell provider and not the customer, they were not his papers, and he can raise no objection to their discovery by the government. Justice Gorsuch's approach, by contrast, is based on property considerations, but in a way that takes into account the realities of modern life and the people's stated views about what should be shielded from the government and what ultimately should not.