NOTE

Could Justice Gorsuch's Libertarian Fourth Amendment Be the Future of Digital Privacy? A "Moderate" Contracts Approach to Protecting Defendants After *Carpenter*

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INTRODUCTION

> "The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by private law, are various. Distresses, executions, forfeitures, taxes, etc., are all of this description; wherein every man by common consent gives up that right, for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license . . . ."
>
> — Lord Camden on general search warrants, Entick v. Carrington (1765)[1]

Lord Camden's here-quoted colloquy, which has endured as a famous English dictum on the nature of property and policing,[2] was cited by the Supreme Court in *Boyd v. United States*, an early search and seizure case.[3] Lord Camden's dictum represented an extolling of property rights which was Lockean in scope, form, and devotional character.[4] In the time since *Entick*, the United States Constitution has been seen by some as an institution designed to protect the Enlightenment-era values of life, liberty, and property that underlie the American Revolution.[5] In the

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[1] Entick v. Carrington (1765), 19 Howell's State Trials 1029 (K.B.).

[2] *See* Timothy Endicott, *Was* Entick v. Carrington *a Landmark?*, *in* ENTICK V. CARRINGTON: 250 YEARS OF THE RULE OF LAW 109, 118 (2015) ("But the case's role as a landmark lies not only in [its doctrinal contribution that general warrants are unlawful]. The decision has an important role in the wider development of the law . . . . It is a landmark in advocacy.").

[3] *See* Boyd v. United States, 116 U.S. 616, 617 (1886). *Entick* provides an insight into the kind of government action against which the drafters of the Fourth Amendment were reacting. The basic facts are as follows: John Entick brought an action against various agents of the government for trespass after four armed agents of the King of England broke into John Entick's house without his consent, broke into all rooms and boxes, and confiscated a large volume of political materials. *Entick*, 19 Howell's State Trials 1029.

[4] *See generally* Alex Tuckness, *Locke's Political Philosophy*, STAN. ENCYCLOPEDIA OF PHIL., https://plato.stanford.edu/entries/locke-political/ (last updated Jan. 11, 2016) [https://perma.cc/3F9S-RMRX] (explaining, *inter alia*, Locke's idea that individuals have certain natural rights, among them the right to life, liberty, and property).

[5] *See, e.g.*, Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 979-80 (2011) [hereinafter *The Framers' Intent*]; Morgan Cloud, *Property Is Privacy: Locke and Brandeis in the Twenty-First Century*, 55

tradition expounded by those such as Lord Camden, a conception of an individual's privacy is derived from the dominion over that individual's own property.[6] Even in the early stages of developments such as the dot-com boom and mass surveillance, members of the Court were still framing their understanding of property on this Enlightenment-era ideal: the late Justice Antonin Scalia wrote in 1993 that the purpose of the Amendment was to "preserve that degree of respect for the privacy of persons and the *inviolability of their property* that existed when the provision was adopted."[7]

Property looks qualitatively and quantitatively different in 2018 than it did in 1886 when the Court authored *Boyd*.[8] Where once a person's property consisted only of one's land, physical effects, livestock, papers, and a few simple intangible assets, a person's property now also consists of digital devices connected to the internet, purely nonphysical assets contained in thousands of lines of code, apps, widgets, and more.[9] Further, where property interests were once located only on one's land and in one's physical effects, easily locatable and controllable, one's assets and interests may now be contained on third-party servers, clouds, and even in decentralized sharing services that scatter such interests across devices owned by thousands of people.[10] In a world where once a person could declare that one's home is one's castle, distinct and fenced off from the world and prying eyes, the practical

AM. CRIM. L. REV. 37, 42-50 (2018); David E. Steinberg, *The Uses and Misuses of Fourth Amendment History*, 10 U. PA. J. CONST. L. 581, 592-96 (2008).

[6] *See, e.g.*, Mary Chlopecki, *The Property Rights Origins of Privacy Rights*, FOUND. FOR ECON. EDUC. (Aug. 1, 1992), http://fee.org/articles/theproperty-rights-origins-of-privacy-rights/ [https://perma.cc/NER8-TT88].

[7] Minnesota v. Dickerson, 508 U.S. 366, 380 (1993) (Scalia, J., concurring) (emphasis added).

[8] *Compare Boyd*, 116 U.S. at 617-22 (holding the compulsory requirement to produce a party's private books and papers to be used against them in trial unconstitutional), *with* Brian F. Fitzgerald, *Digital Property: The Ultimate Boundary?* , 7 ROGER WILLIAMS U. L. REV. 47, 47-48 (2001) (discussing the development of digital property concepts and ways the law has grappled with and accommodated them).

[9] *See, e.g.*, *Take Back Control: How Digital Devices Challenge the Nature of Ownership*, ECONOMIST (Sept. 30, 2017), https://www.economist.com/leaders/2017/09/30/how-digital-devices-challenge-the-nature-of-ownership [https://perma.cc/X6L6-K6P4].

[10] *See* Tom Terado, *What Is Decentralized Storage?*, MEDIUM (July 3, 2018), https://medium.com/bitfwd/what-is-decentralised-storage-ipfs-filecoin-sia-storj-swarm-5509e476995f [https://perma.cc/R9L8-UGQX] (describing decentralized storage technologies such as blockchain). *See generally* Neil Richards, *The Third-Party Doctrine and the Future of the Cloud*, 94 WASH. U. L. REV. 1441 (2017) (identifying issues relating to third-party cloud storage and its intersection with Fourth Amendment doctrine and positive law).

dominion of property owners is now scattered and conceptually obscure.[11]

This Note is situated in a long line of literature which attempts to wrap the Fourth Amendment around developing and paradigm-shifting technologies. On its face, the Fourth Amendment offers constitutional protection against unreasonable searches of one's own person, house, papers, and effects.[12] By this plain language, this means that most searches are measured by the presence or absence of a physical invasion of property.[13] In the half-century since the landmark Fourth Amendment case *Katz v. United States*,[14] however, the Supreme Court has emphasized that "[t]he premise that property interests control the right of the Government to search and seize has been discredited."[15] Instead, the post-*Katz* Court has consistently applied the "reasonable expectation" test to determine whether a defendant had a reasonable expectation of privacy in the subject of the government's search.[16] A corollary of the "reasonable expectations" test is the third-party doctrine, which holds that a person has a reduced expectation of privacy in things he voluntarily vests in third parties.[17] Thus, the government acquisition of such things is most often not a search for Fourth Amendment purposes.[18]

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[11] *See* Natalie M. Banta, *Property Interests in Digital Assets: The Rise of Digital Feudalism*, 38 CARDOZO L. REV. 1099, 1101-06 (2017) (highlighting the barriers to conveyance of "digital assets" and explaining the complex interplay between these assets and contract law); Richards, *supra* note 10, at 1441-47 (discussing how cloud-sharing resists a traditional Fourth Amendment analysis).

[12] *See* Minnesota v. Carter, 525 U.S. 83, 91-92 (1998) (Scalia, J., concurring) (quoting U.S. CONST. amend. IV) ("The obvious meaning of the provision is that *each* person has the right to be secure against unreasonable searches and seizures in *his own* person, house, papers, and effects.").

[13] *See id.*

[14] 389 U.S. 347 (1967) (holding that placing listening devices on the exterior of a public phone booth is considered a violation of one's Fourth Amendment rights because there would have been a reasonable expectation of auditory privacy in the enclosed phone booth).

[15] *Id.* at 353 (citing Warden v. Hayden, 387 U.S. 294, 304 (1967)).

[16] *See* Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 327-29 (1998) (describing the rise of the "reasonable expectations" test and the concurrent demise of a property-rights based privacy doctrine) [hereinafter *What Does the Fourth Amendment Protect*].

[17] *See* RICHARD M. THOMPSON II, CONG. RES. SERV., R43586, THE FOURTH AMENDMENT THIRD-PARTY DOCTRINE 1-2 (2014); *see also* Clancy, *What Does the Fourth Amendment Protect*, *supra* note 16, at 331-34 (providing examples of situations in which the Court finds either no expectations of privacy or reduced expectations).

[18] *See* Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 563 (2009) [hereinafter *Third-Party Doctrine*].

This Note examines the most recent challenge to both the *Katz* "reasonable expectations" test and the third-party doctrine lodged by Justice Neil Gorsuch in a solitary dissent to the majority opinion in *Carpenter v. United States*.[19] Justice Gorsuch argued for a rejection of both *Katz* and the third-party doctrine, which he alleged was its ill-conceived progeny.[20] He posited that a renewed emphasis on property rights and concepts provides a better basis for protecting defendants' rights against government searches of new technologies and digital assets.[21] As constructed, the argument rests on both originalist, history-centric grounds and practical, policy-focused rationales.[22] Justice Gorsuch's approach appears uniquely situated to appeal both to the conservative end of the Court, which values tradition, and the progressive end of the Court, which is particularly sensitive to the effect of advancing technology on government searches.[23] By its nature, this Note must consider present political and jurisprudential realities. With the retirement of Justice Anthony M. Kennedy (who emphasized the importance of not limiting law enforcement in his *Carpenter* dissent),[24] the ideological balance of the Court is particularly susceptible to shifts in values and doctrine. As legal commentators continue to grapple with the continued legacy of the "Roberts Court," its volatile center has potential to shrink around the Court's newest Justices: Neil Gorsuch and Brett Kavanaugh. Given this precarious doctrinal reality, Justice Gorsuch's lone jurisprudential position in *Carpenter* could swiftly gain a sort of "moderate" appeal.[25]

In Part I, this Note surveys the development of the Fourth Amendment from its roots in traditional Anglo-American property concepts to the development of *Katz* and the third-party doctrine. It also presents the central arguments Justice Gorsuch establishes in his *Carpenter* dissent and explains their roots in the text and tradition of the Fourth Amendment. In Part II, the Note argues that a property-based Fourth Amendment can both adhere to the Amendment's text and tradition while offering robust protection to defendants against advancing law enforcement technologies. Part III offers a modification to a property rights-based approach advanced by Justice Gorsuch and

[19] Carpenter v. United States, 138 S. Ct. 2206, 2261 (2018) (Gorsuch, J., dissenting).

[20] *See id.* at 2262-65.

[21] *See id.* at 2267-72.

[22] *See id.*

[23] *See infra* notes 248–288 and accompanying text.

[24] *Carpenter*, 138 S. Ct. at 2223-25 (Kennedy, J., dissenting).

[25] *See infra* notes 248–288 and accompanying text.

others, arguing that contract law can help courts ascertain the nature of digital property interests such that their owners retain Fourth Amendment claims to them. The Note concludes in Part IV that given the post-*Carpenter* landscape and the nature of digital property, a contracts approach can both adequately protect defendants' privacy interests and resolve the Court's longstanding doctrinal disagreements.

I. BACKGROUND

A. The Historical Fourth Amendment and the Rise of the Katz *Regime*

The Fourth Amendment provides that,

> "[t]he 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 [w]arrants shall issue, but upon probable cause, supported by [o]ath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[26]

Scholars of the Fourth Amendment suggest that the primary catalyst for its creation was a series of controversial cases that took place in Britain and the colonial United States.[27] These cases[28] featured "general warrants" issued by the English Crown, which equipped its messengers to search political enemies without cause.[29] The Fourth Amendment

[26] U.S. CONST. amend. IV. The Fourth Amendment is commonly understood to contain two independent clauses: the Reasonableness Clause and the Warrant Clause. *See* Clancy, *The Framers' Intent*, *supra* note 5, at 983.

[27] *See, e.g.*, Barry Friedman & Orin Kerr, *The Fourth Amendment*, CONSTITUTION CTR., https://constitutioncenter.org/interactive-constitution/interpretation/amendment-iv/interps/121 (last visited Nov. 13, 2019) [https://perma.cc/7NBF-ZDF6]; *see also* James Otis, *Against Writs of Assistance*, NAT'L HUMAN. INST., http://www.nhinet.org/ccs/docs/writs.htm (last visited Nov. 13, 2019) [https://perma.cc/XZ8W-4AJ7] ("Now, one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege."). For more information about general warrant practices in the colonial era, see generally William J. Cuddihy, The Fourth Amendment: Origins and Original Meaning 602, 507-27, 969-85 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (on file with University Microfilms International).

[28] *See, e.g.*, Wilkes v. Wood (1763) 98 Eng. Rep. 489; Entick v. Carrington (1765), 19 Howell's State Trials 1029.

[29] *See Wilkes*, 98 Eng. Rep. at 498; *Entick*, 19 Howell's State Trials at 1029; CUDDIHY, *supra* note 27, at 507-27. For more information about the origins and development of modern policing practices and how they inform the present realities of searches and seizures, see generally Michael Parker Banton et al., *Police: The History of Policing in the*

was written into the Bill of Rights largely to correct for these perceived evils. For most of the history of the Fourth Amendment, the Court looked for a physical intrusion or trespass to determine whether a search occurred.[30] This continued to be the case even in the face of developing technology. In *Olmstead v. United States*,[31] the Court held that a wiretap of the defendant's phone did not violate the Fourth Amendment because no search had occurred.[32] It is no coincidence that *Olmstead* and *Katz* would both examine telephone wiretapping and reach decidedly different doctrinal results; after all, the start of wiretapping in the early twentieth century marked a shift in the practical search capabilities of law enforcement, which suddenly did not have to trespass on to a suspect's land to surveil him.[33]

In 1961, the Supreme Court in *Katz* radically reconstructed its Fourth Amendment inquiry to address the use of a listening device on a public telephone booth.[34] The *Katz* standard was offered by Justice Harlan in a concurring opinion, and has, since its inception, been the primary mechanism courts have used to evaluate searches: "[F]irst, that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize

West, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/police/The-history-of-policing-in-the-West (last updated Sept. 12, 2019) [https://perma.cc/8SB4-UB3N]. For a more exhaustive description of the impact of these English cases on developing Fourth Amendment doctrine, see generally Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 70-82 (2012).

30 *See* Martin R. Gardner, *Rediscovering Trespass: Towards a Regulatory Approach to Defining Fourth Amendment Scope in a World of Advancing Technology*, 62 BUFF. L. REV. 1027, 1030-32 (2014) ("In articulating the meaning of searches and seizures, the Supreme Court initially required a physical trespass by the government into a protected area for the purpose of gathering evidence . . . . Arguably, such an approach made sense at a time when the government's primary means of discovering information about people amounted to physically interfering with their property.").

31 277 U.S. 438 (1928).

32 *See id.* at 465-66 ("By the invention of the telephone 50 years ago, and its application for the purpose of extending communications, one can talk with another at a far distant place. The language of the [Fourth Amendment] cannot be extended and expanded to include telephone wires, reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office, any more than are the highways along which they are stretched.").

33 *See* April White, *A Brief History of Surveillance in America*, SMITHSONIAN MAG. (Apr. 2018), https://www.smithsonianmag.com/history/brief-history-surveillance-america-180968399/ [https://perma.cc/QKY7-EEG6] (chronicling the history of wiretapping by police agencies in an interview with Professor Brian Hochman).

34 *See* Katz v. United States, 389 U.S. 347, 353-54 (1967) ("We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling.").

as 'reasonable.'"[35] Fifty years later, this mechanism, ostensibly simple on its face, has continued to confound courts ill-equipped to measure the degree to which it is supposed to protect the privacy interests of criminal defendants.

B. The Third-Party Doctrine and Reduced Expectations of Privacy

The third-party doctrine's notion that property vested in others has a lower level of Fourth Amendment protection predates the shift to the *Katz* reasonable expectation standard. [36] In this pre-*Katz* era of jurisprudence, the Court emphasized the voluntary nature of the disclosure made by criminal defendants to third parties.[37] In the first case to apply *Katz* to third-party disclosure scenarios, the Court explicitly noted that it saw "no indication in *Katz* that the Court meant to disturb" the third-party reasoning put forth by the court in previous cases.[38] The Court accordingly preserved the essential logical structure of its reasoning regarding third parties and set the stage for the expansion of the doctrine five years later.

The formal advent of the third-party doctrine, informed by *Katz*, arose out of the Court's decision in *United States v. Miller*.[39] In *Miller*, the defendant was convicted after the government acquired the defendant's bank records as evidence of impropriety.[40] The Court upheld the conviction on the grounds that the documents subpoenaed belonged to his bank.[41] Importantly, the Court rejected the defendant's contention that the *Katz* decision altered the outcome of the case when

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[35] *Id.* at 361 (Harlan, J., concurring). By the plain language of Harlan's concurrence, this creates a subjective and objective component to the *Katz* test. *See id.*

[36] In a series of informant cases pre-dating *Katz*, the Court held that the Fourth Amendment did not provide protection from the government's use of information that defendants had voluntarily provided to disguised government agents. *See, e.g.*, Hoffa v. United States, 385 U.S. 293, 302 (1966); Lewis v. United States, 385 U.S. 206, 211-12 (1966); On Lee v. United States, 343 U.S. 747, 757-58 (1952); *see also* Kerr, *Third-Party Doctrine*, *supra* note 18, at 567-68 (outlining in detail this series of cases and the application of the Court's thinking on third-party searches before and after *Katz*).

[37] *See, e.g.*, *Hoffa*, 385 U.S. at 302 (arguing that the Fourth Amendment does not institutionalize any constitutional protections for "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it").

[38] United States v. White, 401 U.S. 745, 750 (1971). In a footnote, the Court approvingly lists other courts of appeals which "considered *On Lee* viable despite *Katz*." *Id.* at n.4.

[39] United States v. Miller, 425 U.S. 435, 443-45 (1976); *see* THOMAS K. CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION 85-86 (2008).

[40] *Miller*, 425 U.S. at 436-37.

[41] *See id.* at 440-41.

Katz rejected a "narrow view" that "property interests control the right of the Government to search and seize."[42] In other words, the Court found that the defendant had a lower expectation of privacy in the documents because they were held by the third party rather than in his own possession.

C. Carpenter *and the Third-Party Doctrine*

In June 2017, the Supreme Court announced that it would review the Sixth Circuit's opinion in *Carpenter v. United States*.[43] Justice Gorsuch had just assumed the seat long held by Justice Scalia in April of that year, the first shift in the Court since Justice Elena Kagan was nominated and confirmed in 2010.[44] In the aftermath of his confirmation, writers speculated as to whether his professed emphasis on the Constitution's text and original meaning would impact the future of the Fourth Amendment and other constitutional doctrines.[45]

The focus of *Carpenter* was a type of data not yet known in the public vernacular: "cell-site location information."[46] Cell-site location information ("CSLI") is generated when a cell phone taps into a wireless network, a process that happens several times a minute.[47] This

[42] *Id.* at 442 (citing Warden v. Hayden, 387 U.S. 294, 304 (1967)). The Court solidified this principle in *Smith v. Maryland*, where it held that the defendant had no legitimate expectation of privacy in numbers dialed which he had voluntarily provided to a third party. Smith v. Maryland, 442 U.S. 735, 735-36 (1979). In *Smith*, the Court upheld the use of a "pen register," installed at the phone company's physical location, to track the phone numbers dialed by the defendant. *Id.*

[43] Orin Kerr, Opinion, *Supreme Court Agrees to Hear 'Carpenter v. United States,' the Fourth Amendment Historical Cell-Site Case*, WASH. POST (June 5, 2017, 12:32 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/05/supreme-court-agrees-to-hear-carpenter-v-united-states-the-fourth-amendment-historical-cell-site-case/ [https://perma.cc/6NUB-ZCYZ].

[44] Ariane de Vogue & Dan Berman, *Neil Gorsuch Confirmed to the Supreme Court*, CNN POLITICS, https://www.cnn.com/2017/04/07/politics/neil-gorsuch-senate-vote/ (last updated Apr. 7, 2017, 12:17 PM) [https://perma.cc/T5ES-XY3Y]. *See generally* Paulina Firozi, *Kagan Once Gave Gorsuch a Lesson in Being the Junior Supreme Court Justice*, HILL (Apr. 9, 2017, 9:03 PM), https://thehill.com/regulation/court-battles/328046-kagan-says-there-are-three-things-the-junior-supreme-court-justice [https://perma.cc/SS2S-CWVY] (explaining that before the nomination of Justice Gorsuch, Justice Kagan was the last justice to join the Court).

[45] *See, e.g.*, Sophie J. Hart & Dennis M. Martin, *Judge Gorsuch and the Fourth Amendment*, 69 STAN. L. REV. ONLINE 132, 138-39 (2017).

[46] *See* Carpenter v. United States, 138 S. Ct. 2206, 2211-12, 2217-23 (2018).

[47] *See id.* at 2211 ("Most modern devices, such as smartphones, tap into the wireless network several times a minute whenever their signal is on, even if the owner is not using one of the phone's features."). *See generally* V. Alexander Monteith, *Cell Site Location Information: A Catalyst for Change in Fourth Amendment Jurisprudence*, KAN. J.L.

information is time-stamped and provides an approximate indicator of the cell phone's location.[48] In urban areas, increased data usage has led to increasingly accurate geographic information from CSLI.[49] In the case before the Court, petitioner Timothy Carpenter was arrested after the government used compulsory process to gain access to CSLI data from a number of suspected cell phones.[50] The government collected 12,898 total "location points,"[51] placing him near the scene of several robberies.[52] Carpenter was convicted on this basis and the Sixth Circuit affirmed the conviction.[53]

1. *Carpenter*'s Majority Opinion

Chief Justice Roberts wrote for the majority in invalidating Carpenter's conviction.[54] The Court cited the "deeply revealing" nature of CSLI, "its depth, breadth, and comprehensive reach," and "the inescapable and automatic nature of its collection" in exempting it from the scope of the third-party doctrine.[55] The Court did not use *Carpenter* as an opportunity to strike down the third-party doctrine, as some had argued they should or might.[56] Instead, the Court situated the issue of CSLI "at the intersection of two lines of cases."[57] These include cases which address Global Positioning System ("GPS") tracking and visual

& PUB. POL'Y 82, 82-86 (2017) (describing the technology and privacy implications of CSLI data).

[48] *Carpenter*, 138 S. Ct. at 2211.

[49] *See id.* at 2211-12.

[50] *See id.* at 2212.

[51] *Id.*

[52] *Id.* at 2213.

[53] *Id.*

[54] *Id.* at 2211, 2223.

[55] *Id.* at 2223.

[56] *See, e.g.*, Brief for the Cato Institute as Amicus Curiae in Support of Petitioner at 14-18, *Carpenter*, 138 S. Ct. 2206 (No. 16-402), 2016 WL 6473000 (explaining inadequacy of third-party doctrine in the context of big data storage); Ronald J. Hedges, *What Might Happen After the Demise of the Third-Party Doctrine?*, 32 CRIM. JUST. 62, 63 (2018) (arguing for an alternative to the third-party doctrine); Stephen E. Henderson, Carpenter v. United States *and the Fourth Amendment: The Best Way Forward*, 26 WM. & MARY BILL RTS. J. 495, 495 (2018) ("Thus, the Court should hold that law enforcement acquisition of longer term cell site location information (CSLI) constitutes a Fourth Amendment search, ending the monolithic, anachronistic third party doctrine."); Peter C. Ormerod & Lawrence J. Trautman, *A Descriptive Analysis of the Fourth Amendment and the Third-Party Doctrine in the Digital Age*, 28 ALB. L.J. SCI. & TECH. 73, 145-46 (2018) (describing as "desirable" the judicial rejection of the third-party doctrine's applicability in the digital age).

[57] *Carpenter*, 138 S. Ct. at 2214-15.

surveillance on one hand and those which address the third-party doctrine.[58] Because of this intersection of precedent and the unique nature of CSLI, the Court held that CSLI was categorically distinct from the sorts of information previously covered by the third-party doctrine.[59] It emphasized the rapid development of technology and the ability of new technology to create a "detailed and comprehensive record of the person's movements."[60] As such, while some expected the Court to reconsider the third-party doctrine, it merely exempted a category of information from its reach on the basis of its unique characteristics.[61]

Critics of the third-party doctrine were not the only ones disappointed in the Court's preservation of the doctrine.[62] While the dissents authored by Justices Kennedy, Thomas, and Alito reaffirmed a commitment to the principle that a person accedes some constitutional protections in things vested in third parties, only Justice Gorsuch wrote in opposition to the doctrine.[63] Justice Gorsuch situated his view of the Fourth Amendment in a broader skepticism of the *Katz* doctrine, positing that the proper response to the problem in *Carpenter* is to reject both the third-party doctrine and the underlying philosophy of *Katz* that created it.[64] This placed him doctrinally at odds with both the Majority and, in some respects, each of the three other dissenting justices. For this Note's purposes and for the future of the Court's

[58] *See id.* at 2214-16.

[59] *See id.* at 2217 ("Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection."); *see also id.* at 2214 ("This sort of digital data — personal location information maintained by a third party — does not fit neatly under existing precedents."). The Court cites *United States v. Jones*, 565 U.S. 400 (2012), as a representative of the GPS tracker line of cases. *Carpenter*, 138 S. Ct. at 2209. *Carpenter* is distinct from this line of cases because GPS tracker cases address "a person's expectation of privacy in his physical location and movements" where the government used a tracking device attached to the defendant's vehicle. *Id.*; *Jones*, 565 U.S. at 403-05.

[60] *Carpenter*, 138 S. Ct. at 2217.

[61] *See id.*

[62] For examples of such critics, see Kerr, *Third-Party Doctrine*, *supra* note 18, at 570-72.

[63] *Compare Carpenter*, 138 S. Ct. at 2272 (Gorsuch, J., dissenting) (agreeing that CSLI should not be subject to the third-party doctrine but criticizing the majority for maintaining the third-party doctrine), *with id.* at 2224 (Kennedy, J., dissenting) (arguing that the government did not interfere with Carpenter's Fourth Amendment rights because Carpenter did not own CSLI), *id.* at 2244 (Thomas, J., dissenting) (emphasizing that the government should be able to access third-party documents), *and id.* at 2247 (Alito, J., dissenting) (describing the majority's CSLI exception to the third-party doctrine as a fracturing of Fourth Amendment pillars).

[64] *See id.* at 2272 (Gorsuch, J., dissenting).

willingness to protect civil liberties, this tension between Justice Gorsuch and both wings of the Court is instructive and consequential because it informs what doctrinal approaches might be both sustainable and desirable going forward.

2. Justice Gorsuch's Dissent

Justice Gorsuch argues in his dissent that the underlying law from *Katz* should be reconsidered altogether. He roots this argument in three primary rationales: its lack of foundation in the text, original meaning, or history of the Fourth Amendment; its lack of clarity and efficacy from a judicial standpoint; and its strange and insufficiently protective results from a public policy standpoint.[65] Moreover, from a future-facing standpoint, Justice Gorsuch argues that the doctrine is insufficient to withstand future technological advancements.[66]

a. The Third-Party Doctrine

In evaluating the continued efficacy of the third-party doctrine, Justice Gorsuch points to seminal third-party doctrine cases to create a categorical rule regarding disclosure to third parties: "Once you disclose information to third parties, you forfeit any reasonable expectation of privacy you might have had in it."[67] He notes that this Court appears to have covertly added a new prong to that test.[68] Chief Justice Robert's opinion, functionally, now requires courts to determine "whether to 'extend' [*Smith* and *Miller*] to particular classes of information, depending on their sensitivity."[69] Justice Gorsuch argued that the doctrine under this view is not an accurate description of what society actually considers reasonable, nor is it a reasonable standard for what society *should* expect.[70] Moreover, Justice Gorsuch rejects defenses of the doctrine based on the torts-derived "assumption of risk" doctrine, consent, and knowledge.[71]

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[65] *See id.* at 2266-68.

[66] *See id.*

[67] *Id.* at 2262.

[68] *See id.*

[69] *Id.* (Gorsuch, J., dissenting). Justice Gorsuch notes that while the majority reads *Smith* and *Miller* to necessitate this test, no test of the sort can be found in either opinion. *Id.*

[70] *See id.* at 2262-63. To this point, Justice Gorsuch appeals not to a systematic treatment of ethics but to common sense. For example, he questions whether a person really forfeits a reasonable expectation of privacy in a person's DNA when it is submitted to a company like 23andMe. *See id.* at 2262.

[71] *See id.* at 2263.

b. Textualism and the Fourth Amendment

Stepping from the particularities of his dissent to its underlying values, Justice Gorsuch's emphasis on the third-party doctrine's lack of backing in the text of the Fourth Amendment reflects his originalist approach to the law.[72] While originalism as a jurisprudential philosophy can be difficult to define, the late Justice Antonin Scalia provided a comprehensive model for its use.[73] Justice Scalia's prolific tenure on the Court provides the model for the blend of textualism and originalism to which Justice Gorsuch adheres and to which modern conservative legal thought largely owes its ideological debt.[74] The textualism model requires a strict adherence to a "fair reading" of the text of whatever document is being interpreted in a given case.[75] Justice Scalia synthesized this textualism with "original meaning" originalism, which sought to examine the language of the document as it was commonly understood at the time.[76] He justified this reliance on original public meaning on the grounds that it produced the best results, limited judicial discretion and subjectivity, and promoted stability.[77] Justice Gorsuch recently summarized Scalia's synthesis of textualism and

[72] *See Supreme Court Justice Neil Gorsuch Defends 'Originalist' Approach During Louisville Speech*, WDRB (Sept. 21, 2017), http://www.wdrb.com/story/36424261/supreme-court-justice-neil-gorsuch-defends-originalist-approach-during-louisville-speech [https://perma.cc/EPB3-V53D]; *see also* Josh Gerstein, *Gorsuch Takes Victory Lap at Federalist Dinner*, POLITICO (Nov. 16, 2017, 11:54 PM), https://www.politico.com/story/2017/11/16/neil-gorsuch-federalist-society-speech-scotus-246538 [https://perma.cc/B3PZ-GX2W] (Justice Gorsuch identifies himself as a "committed originalist and textualist"). Later in the speech, Justice Gorsuch proclaimed that "[o]riginalism has regained its place at the table . . . textualism has triumphed . . . and neither one is going anywhere on my watch." Ryan Lovelace, *Neil Gorsuch: Scalia's Views on the Constitution Aren't 'Going Anywhere on My Watch*,' WASH. EXAMINER (Nov. 16, 2017, 11:53 PM), https://www.washingtonexaminer.com/neil-gorsuch-scalias-views-on-the-constitution-arent-going-anywhere-on-my-watch [https://perma.cc/7Y6G-AJ8Y].

[73] *See* RALPH A. ROSSUM, ANTONIN SCALIA'S JURISPRUDENCE: TEXT AND TRADITION 27-51 (2006) (discussing the late Justice's emphasis on the common meaning of the text of the Constitution at the time it was ratified).

[74] *See* DAVID M. DORSEN, THE UNEXPECTED SCALIA 14-19 (2017). Notably, in some meaningful ways the reach of originalism now extends beyond the late Scalia and his devotees. Justice Kagan famously declared on the second day of her confirmation hearing that "we are all originalists," a statement that would have turned heads if uttered by a Democrat-nominated Justice in the era of Robert Bork. *See Kagan: 'We Are All Originalists*,' BLOG OF LEGAL TIMES (June 29, 2010), https://legaltimes.typepad.com/blt/2010/06/kagan-we-are-all-originalists.html [https://perma.cc/BK9K-4VBA].

[75] *See* DORSEN, *supra* note 74, at 14-15 (emphasizing that a textual interpretation is not to be strict or broad, but "reasonably, to contain all that it fairly means").

[76] *See id.* at 16-19.

[77] *See id.* at 17-18.

originalism in a book on Gorsuch's jurisprudence: "Bring him evidence about what the written words on the pages of the law books mean — evidence from the law's text, structure, and history — and you could win his vote."[78]

Justice Scalia provides necessary background for a Justice Gorsuch-featured Court because Justice Gorsuch promised that his tenure on the Court would maintain Justice Scalia's longstanding textualist-originalist approach.[79] Justice Gorsuch argues that *Katz* is insufficiently founded in the text of the Fourth Amendment because it sets forth a standard not contained within its language, which explicitly prohibits unreasonable searches and seizures of one's person, "houses, papers, and effects."[80] Not only does the Amendment by its plain language root the constitutional protection in particular places and things, but no "expectation of privacy" test is mentioned or implied.[81] Justice Thomas in his separate dissent also details the origin of the test, which appears to have first arisen in the oral arguments of the defendants in *Katz*.[82] An understanding of originalism is crucial to understand the way Justice Gorsuch reads and applies the Fourth Amendment, especially in light of shifting technology.

II. A PROPERTY-CENTRIC APPROACH TO THE FOURTH AMENDMENT REMAINS GROUNDED IN THE TEXT AND HISTORY OF THE CONSTITUTION, ADJUSTS FOR NEW TECHNOLOGICAL DEVELOPMENTS, AND ADEQUATELY PROTECTS DEFENDANTS

Before approaching a post-*Carpenter* Fourth Amendment under Justice Gorsuch's model, it is important to look briefly at where *Carpenter* has left the Court.[83] As a matter of precedent, *Carpenter* did

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[78] NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 22 (2019). Notably, in the chapter discussing textualism, Justice Gorsuch begins with a discussion of a case upholding a defendant's conviction, decided during his time on the Tenth Circuit, in which he dissented. *Id.* at 128-29.

[79] *See* Lovelace, *supra* note 72. It is no accident, given this background, that Justice Gorsuch approvingly cites Justice Scalia's opinion in *Minnesota v. Carter* both to criticize the *Katz* doctrine and provide a basis for a property rights-based Fourth Amendment. *See* Carpenter v. United States, 138 S. Ct. 2206, 2265 (2018) (Gorsuch, J., dissenting).

[80] *Carpenter*, 138 S. Ct. at 2264 (Gorsuch, J., dissenting) (citing *id.* at 2235-46 (Thomas, J., dissenting)).

[81] *See id.*

[82] *See id.* at 2235-46 (Thomas, J., dissenting).

[83] Justice Gorsuch notes for his part that the Court merely left the third-party doctrine on "life support," and the majority emphasizes that its decision is narrow and does not upset much doctrine. *Id.* at 2272 (Gorsuch, J., dissenting); *see id.* at 2220 (majority opinion).

not resolve the issues created by the prior rulings.[84] It did not resolve the third-party doctrine and instead, made it more confusing and less workable.[85] And while it exempts a category of information from the third-party doctrine's reach, it did so only narrowly and left a series of line-drawing questions in the decision's wake.[86] Justice Gorsuch wrote that he believed three possible paths were possible following the Court's decision: to maintain the path created by *Carpenter*, to abandon the third-party doctrine but maintain *Katz*, or to reconsider the foundation of both *Katz* and the third-party doctrine.[87] The last of these three options is analyzed next.

A. The Text and Tradition of the Fourth Amendment, Combined with Existing and Future Positive Law, Provide a Foundation for a Property-Based Fourth Amendment

Justice Gorsuch repeatedly emphasizes in his dissent that property-based concepts should shape Fourth Amendment jurisprudence.[88] He argues that both the past and future of the Fourth Amendment support such a doctrine.[89] A central premise in this argument is that a traditional, property rights-focused Fourth Amendment is not only more textually supported, but also more protective of defendants' privacy.[90] In other words, this approach protects one's constitutionally protected interest in things vested in third parties because a third-party disclosure is not dispositive to whether protections will apply.[91] He

[84] *See* Orin S. Kerr, *First Thoughts on* Carpenter v. United States, REASON (June 22, 2018, 12:20 PM), https://reason.com/volokh/2018/06/22/first-thoughts-on-carpenter-v-united-sta [https://perma.cc/9EFK-QDHZ] [hereinafter *First Thoughts on* Carpenter] (emphasizing, *inter alia*, the limited scope of the ruling).

[85] *See Carpenter*, 138 S. Ct. at 2262-68 (Gorsuch, J., dissenting) (outlining a series of line-drawing problems in *Carpenter*'s wake and its unclear new requirement to look at the quantity and sensitivity of the data collected).

[86] *See id.* at 2220-23 (majority opinion) (clarifying the scope of the holding); *see also id.* at 2266-67 (Gorsuch, J., dissenting) (observing that the Court did not provide a mechanism for determining how much fewer CSLI information would be permissible without a warrant under the ruling).

[87] *Id.* at 2262 (Gorsuch, J., dissenting).

[88] *See id.* at 2263-72.

[89] *See id.* at 2268-71 (outlining the possibility of looking to property law for guidance in identifying Fourth Amendment interests).

[90] *See id.*

[91] *See id.* at 2269-70 (arguing that property law can maintain a sufficient interest in such property to maintain Fourth Amendment protections).

acknowledged two primary ways for utilizing property concepts and law for purposes of search and seizure inquiries.[92]

The first possible property-oriented approach to the Fourth Amendment utilizes analogies to property-based concepts that existed at the time of the Amendment's ratification, including an analogy to Common Law concepts.[93] Justice Gorsuch does this when he analogizes between the traditional concept of a bailment[94] (as it pertains to, for example, letters) and emails, arguing that digital communications remain protected in transit from government searches, just as letters are, despite the fact that a third-party disclosure occurs.[95]

This approach was also used by Justice Scalia.[96] For instance, in *United States v. Jones*, Justice Scalia argued that the government's Fourth Amendment violation via the warrantless act of placing a tracker on the defendant's vehicle was analogous to Common Law trespass onto a person's property, a paradigmatic instance of a search.[97] At its most basic level, this method of inquiry harkens back to the face of the Fourth Amendment by cutting to the question of whether one's person, effects, papers, or house was searched (rather than a mere evaluation of a reasonable expectation of privacy).[98] This was the primary approach until the *Katz* regime: look to whether the government had physically trespassed upon one of the spaces protected on the face of the Fourth Amendment.[99] Courts even today, under the *Katz* regime, could find a search unlawful solely on a trespass theory without need for abstraction.[100] Justice Scalia's continued reliance on this approach into

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92 *See id.* at 2268-70.

93 *See id.* ("We know that if a house, paper, or effect is yours, you have a Fourth Amendment interest in its protection. But what kind of interest is sufficient to make something *yours*? And what source of law determines that? Current positive law? The common law at 1791, extended by analogy to modern times?").

94 For definitions of a bailment, see, for example, *Watson v. State*, 70 Ala. 13, 14-15 (1881). The court in *Watson* quotes then-Judge Joseph Story in defining a bailment as "a delivery of a thing in trust for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust." *Id.* It notes that bailments may involve a host of different rights and duties depending on the contract. *Id.*

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

96 *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 34-40 (2001) (analogizing between a physical invasion of a home and the use of thermal imaging technology to measure whether marijuana was being grown in the defendant's residence).

97 *See* United States v. Jones, 565 U.S. 400, 410-13 (2012).

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

99 *See Jones*, 565 U.S. at 405-06.

100 *See, e.g.*, *id.* at 405-07 (citing Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 816 (2004)). A classic example of this would be officers entering a home without a warrant,

the twenty-first century has occasionally been questioned by other jurists and scholars, leaving questions about its efficacy and foundation.[101] However, his approach shows that the analogy approach may have potential, with further levels of abstraction, to adapt to technological developments unforeseen by the Amendment's ratifiers.[102] In *Kyllo v. United States*,[103] Justice Scalia made use of analogy to declare the warrantless use of heat-sensing technology to see into a defendant's home unlawful.[104] However, for property concepts to be useful as a means to protect a broad range of digital property interests, the analogy approach on its own is likely insufficient.[105]

The second approach requires an examination of existing property law to determine the nature of a property interest.[106] Specifically, Justice Gorsuch entertains the possibility that "positive law," existing state and federal statutes and regulations, may be useful as guideposts for courts to determine what constitutes a sufficient Fourth Amendment interest.[107] He argues that employing positive law like 47 U.S.C. § 222, a federal regulation of communications companies in commercial transactions, may help shape what should constitute property while limiting judicial discretion.[108] In situations where somebody *has* to determine the contours of property, the argument goes, the legislature is better situated to do so than the judiciary.[109] Such a practice is also checked against a constitutional floor in the text of the Fourth

which is a paradigmatic instance of trespass. For one such example, *see generally* People v. Ovieda, 7 Cal. 5th 1034, 1038-42 (2019) (describing a case where the California Supreme Court invalidated a search by officers, who entered the defendant's home without a warrant, in part because physical entry of the home by the government is presumptively unreasonable).

101 *See, e.g.*, *Jones*, 565 U.S. at 413-18 (Sotomayor, J., concurring); Erin Murphy, *Back to the Future: The Curious Case of* United States v. Jones, 10 OHIO ST. J. CRIM. L. 325, 331-37 (2012).

102 *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 34-40 (2001).

103 *Id.*

104 *See id.* at 40 ("Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant.").

105 *See infra* text accompanying notes 106–46.

106 *See* Carpenter v. United States, 138 S. Ct. 2206, 2267-68 (2018) (Gorsuch, J., dissenting).

107 *Id.*

108 *See id.* at 2268-72. For an argument that positive law would have compelled Fourth Amendment protections without the use of *Katz* in the present case, see Brief of Institute for Justice et al. as Amici Curiae in Support of Petitioner at 35-36, *Carpenter*, 138 S. Ct. 2206 (No. 16-402).

109 *See Carpenter*, 138 S. Ct. at 2270-71 (Gorsuch, J., dissenting).

Amendment, which guarantees that positive law offering only a low level of protection cannot violate the Fourth Amendment.[110] In the lead-up to this argument, Justice Gorsuch approvingly cites legal scholars Will Baude and James Stern's argument for the "positive law model" of the Fourth Amendment.[111] Relevantly for the Court's conservatives, Baude has separately argued that the positive law model of Fourth Amendment jurisprudence is originalist.[112] Important distinctions differentiate Baude and Stern's model from a primarily property-focused Fourth Amendment, but it provides important insights into the use of laws and regulations to shape a workable Fourth Amendment.[113]

B. A Property-Centric Fourth Amendment Can Encapsulate Sufficiently Broad and New Types of Interest to Afford Adequate Protection to Defendants Against Advancing Government Searches

Given the interplay of the two approaches outlined above, a property-based jurisprudence can be conceived as broader and more inclusive than a theory merely depending on physical trespass.[114] This differentiates Justice Gorsuch's contemplated theory of property and privacy from Scalia's decidedly more trespass-based theory.[115] The

[110] *Id.* at 2270-72. For example, a piece of positive law which explicitly provides no protection to a home's curtilage would run afoul of existing precedent and could not be used in such an analysis.

[111] *See id.* at 2262-63, 2268. While this is the only citation to this article in the section discussing property rights and the Fourth Amendment, Gorsuch's argument is similar and appears indebted to Baude and Stern's. *See* William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1829-31 (2016).

[112] *See* Will Baude, *Yes, the Positive Law Model of the Fourth Amendment is Originalist*, REASON (Jan. 12, 2018), http://reason.com/volokh/2018/01/12/yes-the-positive-law-model-of-the-fourth [https://perma.cc/YE76-XNMN] (arguing against Orin Kerr's contention that their Fourth Amendment model is exclusive of an originalist, property-trespass model). *But see* Orin S. Kerr, *Three Reactions to the Oral Argument in* Byrd v. United States, REASON (Jan. 12, 2018), http://reason.com/volokh/2018/01/12/reactions-to-the-oral-argument-in-byrd-v [https://perma.cc/G5WG-SCF5]. Baude and Stern propose a model of Fourth Amendment jurisprudence that uses existing state and federal legislation to determine whether it would be illegal for a private citizen to take the action taken by the government actor in question. *See* Baude & Stern, *supra* note 111, at 1826-27. If it is, then it constitutes a search under the Fourth Amendment. *See id.*

[113] For more information on the "Positive Law Model," see Baude & Stern, *supra* note 111, at 1826, which proposes that the question of whether a search occurred for Fourth Amendment purposes should be guided by whether the government's actions would have been illegal had they been committed by private citizens.

[114] For Gorsuch's introduction of this point in dissent, see *Carpenter*, 138 S. Ct. at 2268-72.

[115] For a further criticism of the "Trespass Doctrine" approach preferred by the late Justice Scalia and others, see Brittany Boatman, United States v. Jones*: The Foolish*

trespass model of Fourth Amendment jurisprudence was relatively narrow in function even in its pre-*Katz* forms, largely because of the limited and concrete nature of property.[116] Whether a search was improper was seen to depend on whether the government physically trespassed onto private property.[117] Even in Justice Scalia's property-based jurisprudence, he usually emphasized this approach to understanding privacy.[118] A narrow application of trespass by itself is ill-suited for the digital age, as Justice Sotomayor persuasively argues in her *Jones* concurrence.[119] The tension between Scalia's narrow trespass-based approach and Justice Sotomayor's pressing on behalf of defendants in the face of emerging technologies is informative in this analysis. It highlights the need for a jurisprudence that, on a sharply divided Court, can adapt to new technology while satisfying the traditionalist leanings of its conservative end. It is necessary to contend with this limited trespass doctrine because Justice Gorsuch proposes a more comprehensive system that might adequately dispense with the objections that Justice Sotomayor and others have raised.

As Justice Gorsuch notes, property law recognizes and protects interests which extend far beyond one's dominion over physical tracts of land.[120] Even in *Katz*, which set the course for courts testing whether a reasonable expectation of privacy exists, some have argued that property concepts on their own were sufficient to protect the defendant.[121] After all, the defendant had sought to conceal his voice within an enclosed area he had license to use and the government

Revival of the "Trespass Doctrine" in Addressing GPS Technology and the Fourth Amendment, 47 VAL. U. L. REV. 277 (2013).

116 *See* Morgan Cloud, *The Fourth Amendment During the* Lochner *Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 578-79 (1996); Gardner, *supra* note 30, at 1030-32.

117 *See* Cloud, *supra* note 116, at 578-79.

118 *See, e.g.*, United States v. Jones, 565 U.S. 400, 404-06 (2012) (discussing the roots of trespass in the Fourth Amendment); Kyllo v. United States, 533 U.S. 27, 31-33 (2001) (same); Minnesota v. Carter, 525 U.S. 83, 94-96 (1998) (same).

119 *See Jones*, 565 U.S. at 413-18 (Sotomayor, J., concurring).

120 *See* Carpenter v. United States, 138 S. Ct. 2206, 2269-71 (2018) (Gorsuch, J., dissenting); *see also, e.g.*, Robert Thibadeau, *Thomas Jefferson and Intellectual Property Including Copyrights and Patents*, ANOTHER SATURDAY AFTERNOON ON THE INTERNET (Aug. 28, 2004), http://rack1.ul.cs.cmu.edu/jefferson/ [http://perma.cc/HPT3-FEJU] (describing Thomas Jefferson's belief in the importance of copyright and patent protections).

121 *See* Brief for the Cato Institute as Amici Curiae in Support of Petitioner at 12-13, *Carpenter*, 138 S. Ct. 2206 (No. 16-402).

intruded upon that space to gather the sound waves emitted within.[122] A similar analogy was employed by Justice Scalia in *Kyllo*,[123] where he held that the use of thermal imaging on the defendant's house constituted a physical intrusion which violated the Fourth Amendment.[124] By stepping away from a strict and narrow view of property intrusions as only occurring upon a trespass, the Court avoids having to parse the physics of less readily measurable phenomena like soundwaves and heat.[125] But this can be done without abandoning property concepts or original understandings of the Fourth Amendment wholesale.

Further, some scholars have argued that expansion of property concepts may be especially useful in the area of "papers," as the Court itself once recognized in the since-overturned *Boyd*.[126] This is salient in the task of defining digital property: because of the unique capacity for digital items to carry large volumes of intimate and revealing information, the Court's tendency to treat papers and effects interchangeably has been deemed problematic.[127] An approach which considers digital evidence to be "papers," and thus especially sensitive, may provide a Fourth Amendment shield where a mere inquiry into

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[122] *See id.* ("The government's use of a secreted listening and recording device to enhance ordinary perception overcame the physical concealment Katz had given to his voice. Gathering the sound waves seized something of Katz's."); *see also* Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 815-27 (2004) [hereinafter *The Fourth Amendment and New Technologies*] (arguing that *Katz*, too, can be interpreted as attempting to apply a looser but still property-based Fourth Amendment than a narrow trespass-based theory).

[123] *Kyllo*, 533 U.S. 27.

[124] *See* Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 HARV. L. REV. 531, 553-54 (2005) ("For the holding in *Kyllo* to make sense, it must be the transformation of the existing signal into a form that communicates information to a person that constitutes the search. What made the conduct in *Kyllo* a search was not the existence of the radiation signal in the air, but the output of the thermal image machine and what it exposed to human observation."); Kerr, *The Fourth Amendment and New Technologies*, *supra* note 122, at 831-37 (2004) (describing jurisprudence regarding "property-defeating surveillance technologies").

[125] *See* Kerr, *The Fourth Amendment and New Technologies*, *supra* note 122, at 831-37 (2004) (praising the *Kyllo* decision as helping to prevent the intrusiveness of "tracking devices and thermal imaging devices").

[126] *See* Boyd v. United States, 116 U.S. 616, 622-24 (1886) (arguing that papers warrant particular Fourth Amendment protection by virtue of their sensitive contents and ability to function as testimony against their author).

[127] *See* Donald A. Dripps, *"Dearest Property": Digital Evidence and the History of Private "Papers" as Special Objects of Search and Seizure*, 103 J. CRIM. L. & CRIMINOLOGY 49, 50-51, 54-55 (2013).

reasonable expectations of privacy may not.[128] It is also, in a meaningful way, "originalist."[129]

Such an approach expands the number of ways a court can look at a given searched material. A "note" saved on someone's phone, for instance, could be conceived of either as a digital effect or paper.[130] This doctrinal flexibility avoids the pitfall of arbitrary line-drawing. At the very least, directly examining the text of the Fourth Amendment and accordingly identifying papers or effects circumvents the need to balance the reasonableness of a subjective expectation of privacy.[131] It also accords with the conservative preference for Fourth Amendment jurisprudence, returning to the plain language of the text and its traditional association with property.[132]

Indeed, an extensive volume of scholarship has assessed the nature and contours of digital property.[133] While most of such scholarship has been in the area of property or intellectual property law, it has occasionally sought to provide insight into civil liberties jurisprudence.[134] These efforts reflect that at the Constitution's ratification, the drafters (and their intellectual forebears) recognized property as a foundational element of liberty.[135] In the late eighteenth century, "property" primarily referred to a person's land and personal items.[136] But it also referred to intangible things like future interests, easements, remainders and reversions; these were intangible interests

128 *See id.*

129 For more information about the historic roots of the particular sensitivity of papers, see *Boyd*, 116 U.S. at 622-28.

130 *See* Andrew Guthrie Ferguson, *The Internet of Things and the Fourth Amendment of Effects*, 104 CALIF. L. REV. 805, 809 (2016).

131 *See* Baude & Stern, *supra* note 111, at 1831-33 ("*Katz* instructs a court to resolve such questions by asking whether 'society is prepared to recognize as "reasonable" a person's expectation to be free from such acts.' That question, however, is ambiguous in critical respects and, if taken at face value, daunting to answer.").

132 *See* Minnesota v. Carter, 525 U.S. 83, 92-93, 95-96 (1998) (Scalia, J., concurring) ("The obvious meaning of the provision is that *each* person has the right to be secure against unreasonable searches and seizures in *his own* person, house, papers, and effects."). For further background on the Founders' understanding of property in the Constitution, see generally Paul J. Larkin, Jr., *The Original Understanding of "Property" in the Constitution*, 100 MARQ. L. REV. 1 (2016).

133 *See, e.g.*, Megan Blass, *The New Data Marketplace: Protecting Personal Data, Electronic Communications, and Individual Privacy in the Age of Mass Surveillance Through a Return to a Property-Based Approach to the Fourth Amendment*, 42 HASTINGS CONST. L.Q. 577 (2015); Patricia Mell, *Seeking Shade in a Land of Perpetual Sunlight: Privacy as Property in the Electronic Wilderness*, 11 BERKELEY TECH. L.J. 1 (1996).

134 *See, e.g.*, Blass, *supra* note 133, at 577-89; Mell, *supra* note 133, at 47-54.

135 *See* Larkin, *supra* note 132, at 1-11.

136 *See id.* at 4.

in tangible goods.[137] As early colonists also engaged in trading with credit and promissory notes, "property" included the right to possess, use, and dispose of such currencies and interests.[138] The founders also recognized a person's right to their own writings, ideas, and discoveries.[139]

Modern digital property includes complex and intangible items and ideas of a high level of abstraction.[140] One cognizable argument against a property-based Fourth Amendment is that property concepts cannot reasonably encompass this expansive body of digital property interests.[141] These are often nonexcludable and non-rivalrous, and include things like software, websites, and computer code.[142] This might include everything from simple cell phone applications to complex blueprints for 3D printers.[143] These types of property range from relatively straightforward interests to individual blocks of code.[144] It is undoubtedly true that these types of "property" were of a technological level unforeseeable to those who ratified the Fourth Amendment. But what is clear is that even then, the idea of intangible, non-rivalrous, and nonexcludable property existed within the notion of property.[145] This suggests that constructions of property even in the eighteenth century were expansive and susceptible to paradigmatic expansion. By extension, a property-based Fourth Amendment can, in theory, survive technological advances.

Positive law must also be factored in.[146] The Court has often been skeptical of reliance upon positive law to shape Fourth Amendment

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137 *See id.* at 4-6.

138 *See id.*

139 *See* U.S. CONST. art. I, § 8, cl. 8 (providing Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

140 *See* LESLEY ELLEN HARRIS, DIGITAL PROPERTY: CURRENCY OF THE 21ST CENTURY 12-13 (1998).

141 This is an argument raised by the Court in *Carpenter*, when it argues that the Fourth Amendment is not controlled by "common-law trespass" and instead protects "people, not places." Carpenter v. United States, 138 S. Ct. 2206, 2213-14 (2018).

142 *See* Daniel Martin, Note, *Dispersing the Cloud: Reaffirming the Right to Destroy in a New Era of Digital Property*, 74 WASH. & LEE L. REV. 467, 467-73 (2017).

143 *See, e.g.*, Porter Wright, *The Next Big Fight: 3D Printing and Intellectual Property*, TECH. LAW SOURCE (Jan. 31, 2014), https://www.technologylawsource.com/2014/01/articles/intellectual-property-1/the-next-big-fight-3d-printing-and-intellectual-property/ [https://perma.cc/67HT-MKC9].

144 *See* Martin, *supra* note 142, at 486-87.

145 *Cf.* Larkin, *supra* note 132, at 2-11.

146 *See Carpenter*, 138 S. Ct. at 2268 (Gorsuch, J., dissenting).

interests.[147] However, Professors Will Baude and James Stern argue that a "comprehensive model of the Fourth Amendment grounded in positive law" has never been properly considered by the Court.[148] Their model for utilizing positive law promotes the use of state and federal laws which recognize property interests as a way of quantifying whether a property interest is sufficient to receive Fourth Amendment protections in a given case.[149] Aspects of this approach are useful for forming a property-based model of Fourth Amendment jurisprudence that protects digital property.[150] This is a benefit that Justice Gorsuch himself recognizes; he argues that positive law can help judges evaluate social norms regarding the nature of property interests and privacy.[151] To the extent the Fourth Amendment can be based on property concepts, its jurisprudence can be based on analogies, direct import of property concepts, *and* positive law suggestions. The goal then is to determine how to properly employ both in a way that protects the concededly complicated nature of digital property.[152] The following Part contends that contract law plays an important role in helping courts navigate the fraught nature of digital privacy.

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147 *See* Baude & Stern, *supra* note 111, at 1827.

148 *Id.*

149 *See id.* at 1836. It is important to note that Baude and Stern's approach considers substantive law outside the realm of property law, and significant differences exist between their approach and the one proposed by this Note.

150 *See id.* at 1883-85 (describing the application of positive property law to different types of searches, extending to nonpossessory interests). For some examples of federal privacy legislation which might be useful for this purpose, see Mell, *supra* note 133, at 41-42.

151 *See Carpenter*, 138 S. Ct. at 2268-69 (Gorsuch, J., dissenting). He poses the question which guides his analysis like this:

> We know that if a house, paper, or effect is yours, you have a Fourth Amendment interest in its protection. But what kind of legal interest is sufficient to make something *yours*? And what source of law determines that? Current positive law? The common law at 1791, extended by analogy to modern times?

Id. For an examination of how positive law could be used to recognize intellectual property rights in personal data, for example, see Pamela Samuelson, *Privacy as Intellectual Property?*, 52 STAN. L. REV. 1125, 1130-37 (2000).

152 For some criticisms and applications of property concepts to digital property, see, for example, Ferguson, *supra* note 130, at 807-12 (importing the property concept of curtilage to the Internet of Things); Gardner, *supra* note 30, at 1030-32 (describing the physical trespass doctrine as inadequate "to address governmental intrusions in an era of developing technology").

III. TO ACCOMMODATE THE NATURE OF DIGITAL PROPERTY AND THE DIGITAL MARKETPLACE, A PROPERTY-CENTRIC FOURTH AMENDMENT MUST ALSO UTILIZE CONTRACT LAW PRINCIPLES AND MECHANISMS

The previous Part argued that property concepts can form the basis of a Fourth Amendment that is protective of defendants, roughly originalist in nature, and responsive to technological advancement. But while property concepts are expansive enough to accommodate digital interests, the digital marketplace is interpersonal in nature and the exchange of interests must be considered.[153] Large amounts of data interests, for instance, are contained on cloud storage.[154] Because of cloud storage, these data interests may be scattered across servers owned and controlled by other parties.[155] This directly implicates the question of what kind of interest is retained in things vested in third parties.[156] Further, blockchain and other decentralized ledger technologies make an even more decentralized digital storage likely in the future[157] Many digital assets, like those contained in applications on cell phones and within electronic games, are derived explicitly from contracts and held in property interests more akin to rents and licenses than full ownership.[158] As such, contract law plays an important role in helping to shape property interests in digital assets.[159] Stated differently, where contracts play a necessary role in shaping a property interest, accompanying contract law necessarily does as well. This Part argues that Justice Gorsuch's property-based Fourth Amendment approach

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153 *See* Martin, *supra* note 142, at 486-89.

154 *See id.* at 491-93.

155 *See id.* at 493. Interestingly for the purposes of this Note, such server relationships are often governed by explicit contracts.

156 *See Carpenter*, 138 S. Ct. at 2262 (Gorsuch, J., dissenting) ("Even our most private documents — those that, in other eras, we would have locked safely in a desk drawer or destroyed — now reside on third party servers. *Smith* and *Miller* teach that the police can review all of this material . . . .").

157 For a brief explanation of these emerging technologies and how they may reshape how digital assets are stored, see *How Blockchain Will Disrupt Data Storage*, BLOCKAPPS (Dec. 13, 2017), https://blockapps.net/blockchain-disrupt-data-storage/ [https://perma.cc/KXN2-VP9R]. *See generally* Maryanne Murray, *Blockchain Explained*, REUTERS (June 15, 2018), http://graphics.reuters.com/technology-blockchain/010070P11GN/index.html [https://perma.cc/K9VX-TGCR] ("A blockchain is a database that is shared across a network of computers. Once a record has been added to the chain it is very difficult to change. To ensure all copies of the database are the same, the network makes constant checks. Blockchains have been used to underpin cyber-currencies like bitcoin, but many other possible uses are emerging.").

158 *See* Banta, *supra* note 11, at 1102-03.

159 *See id.*

cannot fully accommodate digital property unless adequately supplemented by contract law.

A. Property Law and Contract Law Are Supplemental and Work Together to Fully Shape Property Interests

Property law and contract law are discrete bodies of law that are often viewed independently of each other.[160] However, there is a necessary interplay between the two in how they are applied within the courtroom and how they shape a person's property interests.[161] Lockean property theory, on which early American political thought was partially based,[162] provides one way to understand why that interplay exists.[163] This theory teaches that one generates a property interest in something by mixing one's labor with something unowned in nature.[164] Once a person has generated property by way of labor, he may contract with others who have done the same on mutually beneficial terms.[165] Because this theory starts from a theoretical beginning stage where all property is unconverted, the reality is that now, most property is acquired by contract rather than by labor.[166] In such a socioeconomic context, most property has already been converted from a state of nature to ownership. Accordingly, the reality is that most individuals acquire property by contract.[167]

Contract law is guided, *inter alia*, by the value of individual freedom to engage in mutually beneficial exchanges free of government

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[160] *See, e.g.*, Rongxin Zeng, *Interactive Relationship Between Property and Contract Law — Security Rights Perspective*, 12 U.S.-CHINA L. REV. 1026 (2015) (observing that "properties are usually caused and influenced by contracts" and "the validity and forms of contracts are also influenced by property law").

[161] *See id.* at 1040-41.

[162] *See* William Uzgalis, *The Influence of John Locke's Works*, STAN. ENCYCLOPEDIA PHIL. (2018), https://plato.stanford.edu/entries/locke/influence.html [https://perma.cc/7W3Q-N6EK] ("The original claim that Locke's thought had considerable influence on the colonists was challenged and has more recently been reaffirmed.").

[163] *See, e.g.*, ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 150-53 (1974) (discussing "justice in acquisition," i.e., acquisition of property, and "justice in transfer," i.e., in contractual relationships between parties); J.P. Day, *Locke on Property*, 16 PHIL. Q. 207, 207-08 (reading Locke's theory of property to say that a person makes something his when he asserts his labor onto it).

[164] *See* Day, *supra* note 163, at 207-08.

[165] For an explanation of this phenomenon by a prominent political theorist, see NOZICK, *supra* note 163, at 64-65.

[166] *See id.* at 10-12 (describing Locke's "state of nature" and resultant contracts-based society).

[167] *See id.*

coercion.[168] A central premise of freedom of contract is that individual parties, not the State, are, within limits, best situated to select the terms and requirements which will guide their agreements.[169] Contract law generally assumes competence and consent on the part of all contracting parties, allowing them the freedom to contract how they like.[170] It is also generally less interventionist than property law, which limits the control people have over their property by way of zoning regulations, housing and building codes, government-forced sales, and other legal mechanisms.[171] However, contract law does exert some important limits on contractual freedom.[172] These limits are guided in part by two ancillary values of contract law: to implement the reasonable expectations of the parties and "to ensure the right of private parties to design their future interests . . . ."[173] Harnessing these legal mechanisms, which contemplate a refusal to enforce, for instance, contracts of adhesion and otherwise unconscionable contracts,[174] can allow for a fuller toolbox of ways to shape property interests.[175] In other words, as the following Sections will illustrate, the enforceability of a contract necessarily impacts the contours of the property interest that

168 *See* Tamar Frankel, *The Legal Infrastructure of Markets: The Role of Contract and Property Law*, 73 B.U. L. REV. 389, 393 (1993).

169 *See, e.g.*, F.A. Hayek, *The Constitution of Liberty: The Definitive Edition*, *in* 17 THE COLLECTED WORKS OF F.A. HAYEK 1, 338-39 (Ronald Hamowy ed., 2011) ("In the first place, the question is not what contracts will be allowed to make but rather what contracts the state will enforce. No modern state has tried to enforce all contracts, nor is it desirable that it should . . . . Freedom of contract, like freedom in other fields, really means that the permissibility of a particular act depends only on general rules and not on its specific approval by authority.").

170 *See* Frankel, *supra* note 168, at 393.

171 *Id.* at 397.

172 *See* Hayek, *supra* note 169, at 339.

173 *See* Lorelei Ritchie, *Reconciling Contract Doctrine with Intellectual Property Law: An Interdisciplinary Solution*, 25 SANTA CLARA & HIGH TECH. L.J. 105, 115 (2008) (contending that intellectual property law can better incorporate contract law principles given overlapping normative values).

174 *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §§ 178-185, 208 (AM. LAW INST. 1981). For a discussion of the circumstances in which contracts of adhesion, for example, can be voided on unconscionability grounds, see Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1247-73 (2003).

175 For an overview of equitable contract doctrine and an argument for its present usefulness, see *Korobkin*, *supra* note 174, at 1251-78, 1279-80. Of course, the phrasing here might suggest incorrectly that the use of contract law to shape property-based Fourth Amendment inquiries is useful but artificial legal device. Instead, it is more accurate to say that it merely recognizes what is already organically true of property in modernity: its contours are fundamentally reliant on what society is willing to accept as a valid contract.

results from that contract. Moreover, courts' reliance on equity mechanisms is historically rooted, which may fit nicely with a conservative preference for doctrine derived from the text and tradition of the Fourth Amendment.[176]

B. Modern Digital Property Is Especially Dependent on Contracts and Contract Law to Define the Contours of Relevant Property Interests

The importance of contracts in shaping property interests is amplified in the digital age, where most third parties mentioned by Justice Gorsuch are acting *because of* a contract.[177] Technology contracts are the subject of substantial literature by virtue of the rapidly evolving nature of the industry and its implication of privacy concerns.[178] This underscores the importance of accurately defining the contours of digital property such that courts know how to treat digital property interests. In some ways, the interplay between contract and property law in the area of digital property is as much fraught with problems as it is empowering for users.[179] As Professor Natalie M. Banta notes, even the title of many such contracts — for example, "Terms of Use," or "Terms of Service Agreement" — suggest explicitly that they merely confer access to a service rather than providing property interest in fee simple absolute.[180] Indeed, contractual access to services without full and unrestricted ownership is a feature of the "sharing economy."[181]

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[176] *See* IRMA S. RUSSELL & BARBARA K. BUCHOLTZ, MASTERING CONTRACT LAW 182-83 (2011) (describing the historical evolution of promissory estoppel from the ancient legal theory of equitable estoppel); Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 537-41 (outlining the history of equity doctrine at English Common Law and in early colonial jurisprudence).

[177] *See* Carpenter v. United States, 138 S. Ct. 2206, 2262-63 (2018) (Gorsuch, J., dissenting) (arguing that under the third-party doctrine, the government can procure a defendant's emails, online DNA profile, and other data without violating the *Katz* standard); *see also* Banta, *supra* note 11, at 1105-09 (outlining a number of instances of digital assets and how they are shaped and protected by contract law).

[178] *See, e.g.*, Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 GEO. L.J. 2381, 2381-84 (1996) (discussing how modern technology has created new problems surrounding privacy); Ritchie, *supra* note 173, at 106-09 (suggesting an interdisciplinary framework to look at the convergence of contract and intellectual property law); Samuelson, *supra* note 151, at 1126-30 (assessing the possibility of awarding people property rights over their personal data with which to negotiate with firms).

[179] *See* Banta, *supra* note 11, at 1150-51.

[180] *See id.* at 1130-31.

[181] *See, e.g.*, *The Rise of the Sharing Economy*, ECONOMIST (Mar. 9, 2013), https://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy [https://perma.cc/D6W6-ZSXH].

This could be problematic for a narrow, Justice Scalia-modeled approach to the Fourth Amendment which looks primarily to trespass doctrine.[182] Professor Banta notes that, in a fraught new digital landscape, traditional property concepts like rights to use and exclude may bolster users' rights apart from a contract.[183] For example, property rights can arise from something less than a fee simple absolute-type interest (i.e., some sort of interest less than a full and unrestricted one).[184] But contracts can supplement these property concepts even in places where the lack of an absolute property interest is not dispositive and can occasionally specifically provide for privacy interests.[185] Just as a renter of a home retains Fourth Amendment protections without holding the house title, so can a digital license give rise to a cognizable Fourth Amendment interest.[186] Further, contracts are also governed by more than just the terms on their face; they are governed too by contract law and equity concepts.[187]

Tech contracts in particular are a place where contracts of adhesion are particularly likely to arise and such contracts are especially likely to be unenforceable because of power imbalances and the consumers' lack of negotiation power.[188] This power imbalance may permit a court to

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[182] *See, e.g.*, Florida v. Jardines, 569 U.S. 1, 10-11 (2013) (emphasizing the threshold question of whether the government "use[d] a physical intrusion to explore details of the home").

[183] *See* Banta, *supra* note 11, at 1108-33. For an alternative approach which considers intellectual property law as a remedy for personal data, see Samuelson, *supra* note 151 (proposing that positive law can grant some intellectual property rights to one's own data).

[184] *See* RESTATEMENT (SECOND) OF PROPERTY § 15 (AM. LAW INST. 1977).

[185] For more information on the ways that contracts can provide for privacy interests which function like property interests, see Murphy, *supra* note 178, at 2407-17 (describing privacy as it can arrive explicitly and implicitly in a variety of contractual contexts).

[186] *See, e.g.*, Ilya Shapiro, *Don't Renters Have Fourth Amendment Rights?*, CATO INST. (Dec. 26, 2012, 12:09 PM), https://www.cato.org/blog/dont-renters-have-fourth-amendment-rights [https://perma.cc/7PED-B9W3]. For more information on licenses and rents and how they impact property interests, see HARRIS, *supra* note 140, at 79-98 (describing various partial digital property interests resulting from licensing arrangements).

[187] *See* Emily L. Sherwin, *Law and Equity in Contract Enforcement*, 50 MD. L. REV. 253, 253-57 (1991).

[188] *See* Adam Peck, *Adhesion Contracts: Are They Enforceable?*, PECK LAW GROUP (Jan. 15, 2013), https://www.premierlegal.org/adhesion-contracts-are-they-enforceable/ [https://perma.cc/J6C6-QR5H] ("While adhesion contracts, in and of themselves, are not illegal per se, there exists a very real possibility for unconscionability.").

declare a provision of the contract unconscionable and unenforceable.[189] All these factors reflect a pragmatic approach to property law and privacy — courts should consider statutes and common law equitable mechanisms which impact property interests received by contract when evaluating the scope of a defendant's interest. Said differently, it makes little sense to empower courts with mechanisms to determine what interest a party receives in a contract but disallow courts to use the same mechanism to determine the nature of that interest when it is subsequently searched by the police.

The T-Mobile service contract used by the defendant in *Carpenter* may illustrate one way contracts can help shape property interests.[190] In *Carpenter*, the government contended — and without real disagreement by the Court — that the phone companies had the only meaningful property interest in the CSLI data.[191] After all, the phone company created and controlled the records and the petitioner himself played no part in that process.[192] But a contract existed between the phone company and Carpenter which governed his use of their services.[193] In T-Mobile's privacy statement, the company specifies that under the terms of the contract it will collect and store network and location data.[194] The contract states when the company can share information with third parties, including upon service of compulsory process.[195] It also appears to recognize a customer's interest in the data, given that it requires customer consent before certain disclosures.[196] Lastly, the contract acknowledges that the data is a type of property interest, given that it reserves the right to sell the information in the case of a merger.[197]

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189 *See* Sierra David Sterkin, Comment, *Challenging Adhesion Contracts in California: A Consumer's Guide*, 34 GOLDEN GATE U. L. REV. 285, 294-98 (2004); *see also* M. Neil Browne & Lauren Biksacky, *Unconscionability and the Contingent Assumptions of Contract Theory*, 2013 MICH. ST. L. REV. 211, 216-23 (documenting the history of unconscionability doctrine from ancient Roman law and the early 1800s American jurisprudence to present).

190 *See T-Mobile Privacy Statement*, T-MOBILE (Oct. 11, 2019), https://www.t-mobile.com/responsibility/privacy/privacy-policy [https://perma.cc/2GKT-ZPTS].

191 *See* Carpenter v. United States, 138 S. Ct. 2206, 2219 (2018) ("In [the government's] view, cell-site records are fair game because they are 'business records' created and maintained by the wireless carriers.").

192 *See id.*

193 *See id.* at 2225 (Kennedy, J., dissenting) (specifying that Carpenter had contracts with the relevant cell carriers).

194 *T-Mobile Privacy Statement*, *supra* note 190.

195 *See id.*

196 *See id.*

197 *See id.*

Contracts create a type of property interest for both parties and shape the scope and nature of that interest in the ongoing relationships.[198] When considering the role of contracts in evaluating such interests, courts should identify the interest at stake, review the components of the contract which pertain to that interest, and then ask whether the resultant interest is sufficient to receive Fourth Amendment protection.[199] These steps are required to ask whose property is being searched, a necessary inquiry by the text of the Fourth Amendment.[200] It must be remembered that the Fourth Amendment by its text protects a subject's *own* person, house, papers, and effects.[201] Therefore contracts are useful in Fourth Amendment jurisprudence insofar as they help to define a person's interests in those things.

While this question might face some line-drawing problems regarding the sufficiency of a given property interest, past mechanisms provided by the Court can combine with contract law to provide guidance; this Note does not offer a definitive methodology for applying contract law and principles to such cases.[202] For instance, in *Minnesota v. Carter*, Justice Scalia wrote in concurrence to provide a property rights-oriented explanation for why the Fourth Amendment did not protect the

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198 *See* Ilya Shapiro, *To Apply the Fourth Amendment in the Digital Age, Go Back to Its Text*, CATO INST. (Aug. 13, 2017, 7:03 PM), https://www.cato.org/blog/apply-fourth-amendment-digital-age-go-back-its-text [https://perma.cc/RVC9-FY3V] (arguing that the contract in *Carpenter* created a sufficient property interest to warrant Fourth Amendment protection).

199 A model for this analysis may be found in Justice Scalia's concurring opinion in *Minnesota v. Carter*, 525 U.S. 83, 91-97 (1998). There, Justice Scalia first looks to the text of the Fourth Amendment: Was there a search of a person, house, paper or effect? *See id.* Justice Scalia echoed the reasoning from *Minnesota v. Olson*, which held that an overnight guest had a sufficient Fourth Amendment interest in the home he was inhabiting. *Id.* at 91-97 (citing *Minnesota* v. Olson, 495 U.S. 91 (1990)). Justice Scalia argued that recognizing such an interest for an overnight guest was the "absolute limit of what text and tradition permit." *Carter*, 525 U.S. at 96. The interest could also be restated in contractual language: was the property interest created by license sufficient to give rise to a Fourth Amendment interest?

200 For a fuller look at why it is necessary to undergo these steps under the text of the Fourth Amendment, see Brief for the Cato Institute as Amicus Curiae in Support of Petitioner at 12-13, Carpenter v. United States, 138 S. Ct. 2206 (2018) (No. 16-402), 2016 WL 6473000, at *12-13.

201 *See Carter*, 525 U.S. at 92 ("The obvious meaning of the provision is that *each* person has the right to be secure against unreasonable searches and seizures in *his own* person, house, papers, and effects.").

202 This is consistent with Justice Gorsuch's approach, which advocates in part looking to precedent to determine the extent of property interests. *See Carpenter*, 138 S. Ct. at 2263-72 (Gorsuch, J., dissenting).

petitioners when they packaged cocaine in someone else's home.[203] He compared the petitioners' property interest in the home unfavorably to a leaseholder's interest in his apartment[204] and an overnight guest's interest in that guest's temporary residence.[205] While it might be difficult to set clear standards for what could be a broad and varied range of types of property interests, employing Justice Scalia's preference for analogies helps evaluate different interests by setting standards for both paradigmatic instances of protected property interests and those which are "the absolute limit of what text and tradition permit."[206] For instance, if a given property interest is more attenuated from full ownership than the guest's interest in *Carter*, a court can deduce by analogy that it is too weak an interest to receive protection by contract.[207]

It might be, though, that on its face, a contract does not appear to shape an adequate property interest or is vague enough to leave courts unsure as to how to treat the interest for Fourth Amendment purposes. In such cases, other doctrinal mechanisms may be useful. Equitable contract doctrines can help to shape property interests even though their express purpose is to control what portions of contracts are enforceable.[208] Under equitable contract doctrines like those governing enforceability, a contract may be enforceable against one party but not the other, or enforceable in part but not in full.[209] On its face, such legal mechanisms only measure the terms of a contractual agreement rather than the resultant property interests.[210] However, because contracts control the degree of interests that each party is entitled to, only partially enforceable contracts can result in a more substantial property interest than what the terms on their face suggest.[211]

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203 *See Carter*, 525 U.S. at 91-97.

204 *See id.* (citing Chapman v. United States, 365 U.S. 610, 610-13 (1961)).

205 *See Carter*, 525 U.S. at 96-97 (citing Minnesota v. Olson, 495 U.S. 91, 91 (1990)).

206 *See Carter*, 525 U.S. at 96.

207 For an example of how Justice Gorsuch envisions this process of analogizing, see, e.g., *Carpenter*, 138 S. Ct. at 2269-72 (Gorsuch, J., dissenting).

208 *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS, § 8 cmt. a, illus. 1 (AM. LAW INST. 1981).

209 *See id.* § 8.

210 *See id.*

211 If property rights are bundles of various allowed and forbidden uses, then contracts necessarily affect the totality of that bundle. For a survey of different views of how contractual terms relate to property interests, see generally Peter Benson, *Contract as a Transfer of Ownership*, 48 WM. & MARY L. REV. 1673, 1719-31 (2007) (outlining a theory for transfer of certain property interests by contract, including in service contracts).

In other words, for any contract which controls the use or transfer of property, unenforceability doctrine plays a role in shaping the parties' interests. This is especially true in standard form contracts, such as cell phone service contracts, where the parties' obligations are ongoing.[212] If a court starts from the beginning in asking whether a person, house, paper, or effect was searched, and then asks *whose*, these contract mechanisms can help measure the relevant interests. In doing so, courts can also consider whether portions of a contract would be unconscionable under equitable doctrines.[213] If a portion of the contract would be unenforceable in court, then that affects the defendant's property interest by increasing the defendant's interest commensurately.

One potential objection to a shift toward contracts as a way to define Fourth Amendment interests comes from an efficacy perspective. Justice Sotomayor's objection to the Court's rationale in *Jones* provides a compelling foundation for such an objection.[214] Justice Sotomayor is concerned less with the *form* of the search in *Jones* and more with ensuring that the Court adequately shapes its Fourth Amendment jurisprudence to protect against the ease and invasiveness of technological governmental searches.[215] With the comparative ease of location tracking, searches through data, electronic surveillance, and other methods of intrusion by the government, the argument goes that something more than a property rights-centric Fourth Amendment must protect defendants' rights. Justice Sotomayor's primary objection to Justice Scalia's argument was to the narrow trespass rationale which underlies it.[216] To some degree, broadening the scope of the property doctrine to properly account for the rights people gain from contracts will account for this objection. But the broader concern is that a property-centric approach will fail to protect defendants where the *Katz* test would provide protection.[217] In some ways, this is a primarily

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[212] *See* Dahlia Lithwick, *Supreme Court Dispatches: Can You Hear Them Now?*, SLATE (Nov. 9, 2010, 6:54 PM), https://slate.com/news-and-politics/2010/11/the-supreme-court-reads-the-fine-print-on-your-cell-phone-contract.html [https://perma.cc/SMT6-M5FC] (discussing standard form cell phone contracts, arbitration clauses, and the issue of enforceability).

[213] *See Adhesion Contract (Contract of Adhesion)*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/adhesion_contract_(contract_of_adhesion) (last visited Nov. 12, 2019) [https://perma.cc/LX4K-K4QQ].

[214] *See* United States v. Jones, 565 U.S. 400, 413-18 (2012) (Sotomayor, J., concurring).

[215] *See id.*

[216] *See id.* at 414-15.

[217] *See id.* at 416-18.

empirical question; it can be tested. But because the Court has had few occasions to test electronic searches and has yet to seriously examine contract implications in such cases, a contracts-centric approach may not be the most efficient method to address Fourth Amendment concerns. However, an examination of potential cases is appropriate. If the doctrine appears to present adequate protections in such cases, it can be considered efficacious by the progressive justices' standards.

C. Commercial DNA-Testing Companies Provide a Demonstrative Example of Where a Contracts-Oriented Fourth Amendment May Preserve Crucial Fourth Amendment Interests

This formulation of a contract theory of the Fourth Amendment has so far been abstract, but this model can be tested with concrete examples. In his dissent, Justice Gorsuch highlighted the question of whether DNA reports from a company like 23andMe would be protected under the *Katz* regime.[218] DNA report companies present pending privacy issues given their use by police agencies to solve high-profile cold cases.[219] DNA material has long been held by the Court to be one's "person" for purposes of the Fourth Amendment.[220] But, like the CSLI reports in *Carpenter*, the DNA analyses prepared by the company are their own work done without any affirmative actions on the part of the customer.[221] Per the terms of the contract, the customer provides stipulated DNA material and the company then provides its analysis.[222] But if the government subpoenas the DNA *analysis* run by the company, a contracts theory of Fourth Amendment jurisprudence would look to determine *what level of property interest* the customer has

[218] Carpenter v. United States, 138 S. Ct. 2206, 2262 (2018) (Gorsuch, J., dissenting) ("Can it secure your DNA from 23andMe without a warrant or probable cause?").

[219] *See* Brian Resnick, *How Your Third Cousin's Ancestry DNA Test Could Jeopardize Your Privacy*, VOX, https://www.vox.com/science-and-health/2018/10/12/17957268/science-ancestry-dna-privacy (last updated Oct. 15, 2018, 10:20 AM) [https://perma.cc/732P-VGTZ] (describing police use of genealogical databases to supplement investigations into cold cases). Interestingly, while the inculpating evidence in the case of the alleged Golden State Killer was found on a public database, the police did subpoena the records of at least one DNA testing site during their investigation. *See* Kristen V. Brown, *Report: Police Forced a DNA Testing Company to Share a Customer's Identity in the Golden State Killer Case*, GIZMODO (May 1, 2018, 1:55 PM), https://gizmodo.com/report-police-forced-a-dna-testing-company-to-share-a-1825687924 [https://perma.cc/6293-RRRS].

[220] *See, e.g.*, Maryland v. King, 569 U.S. 435, 446 (2013).

[221] *See Our Science*, 23ANDME, https://www.23andme.com/genetic-science/ (last visited Nov. 22, 2019) [https://perma.cc/T7U3-9RTS].

[222] *Terms of Service*, 23ANDME, https://www.23andme.com/about/tos/ (last updated Sept. 30, 2019) [https://perma.cc/38WU-37HJ].

in the resultant test.[223] In contrast, the *Katz* regime would instead look to whether the customer had a reasonable expectation in something vested in and maintained by a third party; that answer will usually be "no" solely by virtue of the third-party disclosure.[224]

Under a contracts theory-supplemented Fourth Amendment, the courts would look to whether the defendant's person, house, papers, or effects were implicated by the search.[225] A written or computer-generated DNA analysis is almost certainly a paper for purposes of the Fourth Amendment because it contains a person's writings.[226] The question then is what level of property interest the customer holds in that report. Is it in some way *his*, to a high enough degree to warrant Fourth Amendment protections?[227] To determine this, courts would need to look to the contract.[228] Two interests are being exchanged: a monetary fee for analysis of a submitted DNA sample.[229] The contract is specific about consumer interests. First, regarding the genetic material itself, section 13 of 23andMe's "Terms of Service" specifies that users gain no new property rights in "any research or commercial products" developed by 23andMe and its partners.[230] But the same section also

[223] And, on the other end of the equation, if the government requests the actual DNA sample, the question concerns what level of interest the customer *retains* in the sample vested in the company. *See Carpenter*, 138 S. Ct. at 2262-70 (Gorsuch, J., dissenting) (outlining why the third-party doctrine applies in such cases).

[224] *See id.* at 2262-63 (arguing that the *Katz* test would leave this property interest unprotected). In addition, it is almost certainly true that even the carved-out exception in *Carpenter* would leave the sample unprotected. After all, it is not especially broad and invasive in the same sense as CSLI data. *See also id.* at 2268-72. Note that there may be a difference between searches of the data resulting from the company's analysis and the genetic material itself. *See, e.g.*, Matt Ford, *How the Supreme Court Could Rewrite the Rules for DNA Searches*, NEW REPUBLIC (Apr. 30, 2018), https://newrepublic.com/article/148170/supreme-court-rewrite-rules-dna-searches [https://perma.cc/26YV-D47L] (quoting law professor Elizabeth Joh, clarifying that the issue of searches like that in the Golden State Killer prosecution "isn't really a DNA story . . . [but] a story about data").

[225] *See supra* text accompanying notes 140–201.

[226] *See, e.g.*, Boyd v. United States, 116 U.S. 616, 622-24 (1886) (explaining how "a man's private papers" are protected from search and seizure because the Fourth Amendment explicitly extends protection to "papers").

[227] *See Carpenter*, 138 S. Ct. at 2267-70 (Gorsuch, J., dissenting) (laying out the relevant questions to ask when determining "what kind of legal interest is sufficient to make something *yours*"); *see also* Brief for the Cato Institute as Amicus Curiae in Support of Petitioner at 8-10, *Carpenter*, 138 S. Ct. 2206 (No. 16-402) (discussing the issue of Fourth Amendment protection for publicly exposed information regarding the transfer of other information or property).

[228] *See Carpenter*, 138 S. Ct. at 2268-71 (Gorsuch, J., dissenting).

[229] *See Terms of Service*, *supra* note 222.

[230] *Id.*

clarifies that the company will not disclose "Individual-Level Genetic and/or Self-Reported Information" unless compelled to by law or upon consent.[231] Further, the genetic material itself is destroyed after testing unless the customer gives explicit consent otherwise.[232]

Regarding the reports, the contract is explicit in shaping the customer's contractual interest in his DNA report.[233] Under the section "Control: Your Choices," the contract allows for customer control over storage or destruction of samples, with whom their information is shared, whether their information can be used for research, the destruction of the user's account, *and* the user's data.[234] The contract also promises to heavily secure the information through "De-identification/Pseudonymization, encryption, and data segmentation."[235]

Thus, when the court asks whose property was searched in a case pertaining to such a contract, it is not dispositive that the information was vested in a third party. Instead, the contract makes plain that the user has retained interests in the report and associated data subpoenaed by the government.[236] Having reserved to the user control over the use of the data as well as its destruction, the contract has delineated the scope of the user's property interest. Moreover, equity doctrines may still apply. Even if a court believes that this property interest does not rise to the level required to receive Fourth Amendment protection on the face of the contract, it may look at whether the contract should be enforced under equity principles.[237] A court may examine the contract's nature as a contract of adhesion and determine that the differences in bargaining power and the overall unfairness of enforcement mandate voiding a portion of the contract.[238]

If the court does decide that a portion should be voided on those grounds, that can contribute to determining the overall property interest.[239] For instance, a court could decide that a clause allowing for

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[231] *Id.* The section does not clarify what it means by "required by law."

[232] *See Privacy Highlights*, 23ANDME, https://www.23andme.com/about/privacy/ (last updated Sept. 30, 2019) [https://perma.cc/NE6E-9FD5] ("Unless you consent to sample storage ('Biobanking') and additional analyses, your saliva sample and DNA are destroyed after the laboratory completes its work . . . .").

[233] *See id.*

[234] *See id.*

[235] *See id.*

[236] *See id.*

[237] *See Adhesion Contract (Contract of Adhesion)*, *supra* note 213.

[238] *Id.*

[239] *See id.*; *see also* Paul Bennett Marrow, *Contractual Unconscionability: Identifying and Understanding Its Potential Elements*, 72 N.Y. ST. B. ASS'N J. 18, 20 (2000).

third-party disclosure — such as to the government — is unconscionable.[240] In short, where the third-party doctrine extinguishes a Fourth Amendment interest once it has been vested in a third party, property and contract law can work together to preserve such interests. It can also be strengthened by positive law, such as the expanding list of federal and state regulations which seek to protect property interests and privacy online.[241] For example, searches by California law enforcement agencies of California citizens could invoke protections created by the California Consumer Privacy Act.[242]

Such a method returns to the text and tradition of the Fourth Amendment by asking whether a person, house, paper, or effect was searched and whose person, house, paper, or effect it was.[243] The question of *whose* is merely a dynamic, adjustable analysis of property concepts, relevant contracts, governing contract and property doctrines, and positive law. Such an approach also may have an important normative function: if the Court were to adopt this model of analyzing digital property interest protections, contracting parties more

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[240] There is no exhaustive list of requirements for unconscionability to apply; rather, the court will look at "gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party." RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (AM. LAW INST. 1981). Such factors include:

> [B]elief by the stronger party that there is no reasonable probability that the weaker party will fully perform the contract; knowledge of the stronger party that the weaker party will be unable to receive substantial benefits from the contract; knowledge of the stronger party that the weaker party is unable reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement, or similar factors.

Id.

[241] *See, e.g.*, *State Laws Related to Internet Privacy*, NAT'L CONF. ST. LEGIS. (Aug. 13, 2019), http://www.ncsl.org/research/telecommunications-and-information-technology/state-laws-related-to-internet-privacy.aspx [https://perma.cc/UW6B-RKZT] (enumerating state legislation designed to protect digital privacy).

[242] *See* Daisuke Wakabayashi, *California Passes Sweeping Law to Protect Online Privacy*, N.Y. TIMES (June 28, 2018), https://www.nytimes.com/2018/06/28/technology/california-online-privacy-law.html [https://perma.cc/C3TY-WZHZ] (describing protections under the California Consumer Privacy Act that could be applied to Fourth Amendment searches under a positive law model). *But see Kerr, The Fourth Amendment and New Technologies*, *supra* note 100, at 838-41 (arguing that legislative solutions are needed, but may be beyond the purview of the Fourth Amendment).

[243] *See, e.g.*, Minnesota v. Carter, 525 U.S. 83, 88-91 (1998).

powerfully situated may face more pressure to contract in such a way as to protect the less powerful bargaining party's privacy rights.[244]

IV. A CONTRACTS-ORIENTED FOURTH AMENDMENT PRESENTS A DIVIDED COURT WITH A VIABLE MODERATE APPROACH TO PROTECTING DEFENDANTS AND HONORING THE TEXT AND TRADITION OF THE FOURTH AMENDMENT

In Part II, this Note established the basis of a property-based Fourth Amendment that is attendant to defendants' rights, responsive to technological developments, and was based in the text and history of the Fourth Amendment.[245] Part III supplemented this theory with a crucial twenty-first century Fourth Amendment ingredient: the nuanced use of contract doctrines to shape property interests.[246] It then applied a brief outline of the property and contract law approach to the question of DNA reports provided by genealogical testing companies, an example of a fraught modern Fourth Amendment problem.[247] This Part seeks to briefly place the property/contract approach to the Fourth Amendment in context of the present Court, which now seats Brett Kavanaugh in Justice Kennedy's seat.

One does not have to look closely at the spread of opinions in *Carpenter* to intuit some uncertainty on the Court.[248] The Chief Justice, writing for the majority, expressed continued concern that technological advancements might undermine Fourth Amendment protections.[249] And while the Court emphasized the importance of the issue and appeared to hand down a momentous ruling, it ruled only very narrowly and opted to "decide no more than the case before [it]."[250]

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244 *See, e.g.*, Murphy, *supra* note 178, at 2407-17 (describing privacy as it can arrive explicitly and implicitly in a variety of contractual contexts).

245 *See supra* Part I.

246 *See supra* text accompanying notes 153–232.

247 *See supra* text accompanying notes 225–244.

248 In fact, *Carpenter* was treated as more-or-less a pivotal moment in Fourth Amendment jurisprudence both before and after the Court handed down its opinion. *See, e.g.*, Ronald J. Hedges, *What Might Happen After the Demise of the Third-Party Doctrine?*, 32 CRIM. JUST. 62, 62-63, 67 (2017) ("Presumably, the Court will take the opportunity [in *Carpenter*] to revisit the third-party doctrine it articulated . . . ."); Henderson, *supra* note 56, at 495 ("The case squarely presents how the twentieth-century third party doctrine will fare in contemporary times, and the stakes could not be higher."); Kerr, *First Thoughts on* Carpenter, *supra* note 84 (describing *Carpenter* as "a big case" that allows the third-party doctrine to live on, "but there is an equilibrium-adjustment cap on [the doctrine now]").

249 Carpenter v. United States, 138 S. Ct. 2206, 2216-20 (2018).

250 *See id.* at 2220 n.4.

It declined to answer the threshold question of what scope of CSLI or analogous data constitutes an unlawful search and it left the third-party doctrine largely intact apart from the decision's apparent narrow exception.[251] Interestingly, the joining Justices offered no concurring opinions, leaving one majority opinion and separate dissents by each of the four dissenting conservative Justices.[252] Thus, the progressive Fourth Amendment as it pertains to electronic searches following *Carpenter* is monolithic but precariously narrow: the *Katz* standard controls the analysis, with looming questions regarding how large the *Carpenter* exception can go and how viable the third-party doctrine will remain.[253]

The state of the conservatives in *Carpenter* is even more uncertain.[254] Remarkably, all five *Carpenter* opinions were authored by the Court's conservatives.[255] Of the four dissents, Justice Kennedy's was the only one to garner more than one joining Justice (only Justice Thomas joined Justice Alito's dissent), and both Justices Gorsuch and Thomas wrote solitary dissents.[256] The four dissenters also wildly differed on primary arguments.[257] Justice Alito, for instance, focused almost entirely on the historical differences between actual searches and the government's use of compulsory process.[258] Justice Kennedy's was the most comprehensive, focusing on the original and property-centric meaning of the Fourth Amendment, defending the principles behind the third-party doctrine, and echoing Justice Alito's subpoena analysis.[259] Justice Thomas's dissent focused primarily on a narrow originalist analysis of the Fourth Amendment.[260]

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[251] *See id.* at 2223.

[252] *See id.*

[253] *See id.* at 2221-23; Sabrina McCubbin, *Summary: The Supreme Court Rules in* Carpenter v. United States, LAWFARE (June 22, 2018, 2:05 PM), https://www.lawfareblog.com/summary-supreme-court-rules-carpenter-v-united-states [https://perma.cc/SV2T-A45N] (summarizing the varying opinions in *Carpenter*).

[254] "Conservative" here is meant to denote the common category for jurisprudence which emphasizes (to varying degrees) stability, adherence to tradition, judicial restraint, textualism and originalism. It is not meant to denote deeper political conservatism, though all justices to varying degrees might adhere to it. *See* J. Harvie Wilkinson, *Is There a Distinctive Conservative Jurisprudence?*, AM. ENTERPRISE INST. (Mar. 5, 2001), https://www.aei.org/articles/is-there-a-distinctive-conservative-jurisprudence-2/.

[255] *See Carpenter*, 138 S. Ct. at 2206.

[256] *Id.*

[257] *See* McCubbin, *supra* note 253.

[258] *See Carpenter*, 138 S. Ct. at 2246-61 (Alito, J., dissenting).

[259] *See id.* at 2223-26 (Kennedy, J., dissenting).

[260] *See id.* at 2235-46 (Thomas, J., dissenting).

This doctrinal spread matters because the man who authored the most signed-onto and comprehensive dissent in *Carpenter* is no longer on the Court.[261] On October 6, 2018, Justice Kavanaugh assumed Justice Kennedy's seat, and speculation immediately began that his jurisprudence would be more conservative.[262] Most significantly, Justice Kavanaugh seemed primed to be deferential to law enforcement in search and seizure cases, echoing Justice Kennedy's concerns in *Carpenter*.[263] Even in the case of the smoothest transition, in which Justice Kavanaugh took on an approach to the Fourth Amendment similar to Justice Kennedy's, the future alignment of the conservative majority on search cases was far from clear.[264]

This Note, originally drafted after *Carpenter* was decided but before the 2018-19 Supreme Court term, has now benefited from a year of decisions with both Justices Gorsuch and Kavanaugh on the bench. While the Court did not directly address a Fourth Amendment question, a clear conservative-libertarian split emerged between Justices Kavanaugh and Gorsuch that corroborates this Note's concerns.[265]

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[261] *See* Richard Wolf, *Justice Anthony Kennedy's Retirement from Supreme Court Leaves Federal Government Even More Divided*, USA TODAY (July 30, 2018, 2:08 PM), https://www.usatoday.com/story/news/politics/2018/07/30/justice-anthony-kennedy-retirement-leaves-void-middle/799973002/ [https://perma.cc/G8FD-V92B].

[262] *See, e.g.*, Dylan Matthews, *America Under Brett Kavanaugh*, VOX (Oct. 5, 2018, 3:50 PM), https://www.vox.com/2018/7/11/17555974/brett-kavanaugh-anthony-kennedy-supreme-court-transform [https://perma.cc/GD78-PXHS] (speculating on how then-Judge Kavanaugh "will affect abortion, prisons, affirmative action, and gay rights").

[263] *See* Orin S. Kerr, *Judge Kavanaugh on the Fourth Amendment*, SCOTUSBLOG (July 20, 2018, 6:16 PM), http://www.scotusblog.com/2018/07/judge-kavanaugh-on-the-fourth-amendment/ [https://perma.cc/9ZME-3R93] [hereinafter *Judge Kavanaugh on the Fourth Amendment*].

[264] *See id.* (projecting Justice Kavanaugh's Fourth Amendment jurisprudence to be somewhere between Justice Rehnquist and Justice Kennedy); Oliver Roeder, *John Roberts Has Cast a Pivotal Liberal Vote Only 5 Times*, FIVETHIRTYEIGHT (July 5, 2018, 11:02 AM), https://fivethirtyeight.com/features/john-roberts-has-cast-a-pivotal-liberal-vote-only-5-times/ [https://perma.cc/MMC8-DGHU].

[265] *See, e.g.*, Terry Higgins, *Trump's Two Supreme Court Justices Kavanaugh and Gorsuch Split in the First Term Together*, CNBC (June 29, 2019, 10:00 AM), https://www.cnbc.com/2019/06/28/trumps-two-supreme-court-justices-kavanaugh-and-gorsuch-diverge.html [https://perma.cc/TM8K-F6T3] ("Justices Neil Gorsuch and Brett Kavanaugh, President Trump's two Supreme Court appointees, disagreed more in their first term than any such pairing since Kennedy was president."); Mark Joseph Stern, *Neil Gorsuch and Brett Kavanaugh Just Fought Over the Rights of the Accused. Gorsuch Won*, SLATE (June 24, 2019, 6:56 PM), https://slate.com/news-and-politics/2019/06/neil-gorsuch-brett-kavanaugh-davis-gun-sentencing-enhancements.html [https://perma.cc/9329-JLE6] [hereinafter *Neil Gorsuch and Brett Kavanaugh*] (discussing Gorsuch's libertarian views on rights of the accused as compared to Kavanaugh's more conventionally conservative views); Amelia Thomson-DeVeaux, *The*

Amelia Thomson-DeVeaux, writing for analytics publication *FiveThirtyEight*, observed that after their first term together, Justice Kavanaugh voted most frequently with Justices Roberts and Alito, while Justice Gorsuch was the "most likely to join the liberals in closely decided cases."[266] Justices Kavanaugh and Gorsuch agreed about as often as Justices Kavanaugh and Kagan did.[267] Most importantly for this Note's purposes, "Justice Gorsuch cast several tie-breaking votes that favored criminal defendants" and strong civil liberties protections.[268] For example, during the 2018-19 term, Justice Gorsuch authored the majority opinion in a 5-4 decision invalidating a congressional statute which empowered a federal judge to find issues of guilt without a jury or a finding beyond a reasonable doubt;[269] authored the majority opinion in a 5-4 decision invalidating a federal criminal statute on vagueness grounds;[270] offered a critique of congressional delegation which harmed people registered as sex offenders in dissent in a 4-4 decision;[271] and dissented alongside Justice Ginsburg in a case upholding the "dual sovereignty" doctrine which allows a person to be tried twice for the same crime.[272] This pro-defendant posture, which

Supreme Court Might Have Three Swing Justices Now, FIVETHIRTYEIGHT (Jul. 2, 2019, 6:00 AM), https://fivethirtyeight.com/features/the-supreme-court-might-have-three-swing-justices-now/ [https://perma.cc/5PF6-6QU2] (noting that Justice Kavanaugh voted with Justices Kagan and Breyer as often as he voted with Justice Gorsuch).

266 *See* Thomson-DeVeaux, *supra* note 265.

267 *See id.*

268 *See id.*

269 *See* United States v. Haymond, 139 S. Ct. 2369, 2373 (2019); *see also* Lawrence Hurley, *Conservative U.S. Justice Gorsuch Again Sides with Liberals in Criminal Case*, REUTERS (June 26, 2019, 11:50 AM), https://www.reuters.com/article/us-usa-court-pornography/conservative-u-s-justice-gorsuch-again-sides-with-liberals-in-criminal-case-idUSKCN1TR2WD [https://perma.cc/J3ZQ-5FE3].

270 *See* United States v. Davis, 139 S. Ct. 2319, 2323-24 (2019); *see also* Hurley, *supra* note 269; Stern, *Neil Gorsuch and Brett Kavanaugh*, *supra* note 265.

271 *See* Gundy v. United States, 139 S. Ct. 2116, 2131-34 (2019) (Gorsuch, J., dissenting). Note that while *Gundy* is an administrative law case that may not appear on its face to be concerned with civil liberties, Justice Gorsuch frames it in part as a battle over the ability of a prosecutorial body to write unchecked laws that affect the liberty interests of citizens. *See id.* at 2131 ("The Constitution promises that only the people's elected representatives may adopt new federal laws restricting liberty. Yet the statute before us scrambles that design. It purports to endow the nation's chief prosecutor with the power to write his own criminal code governing the lives of a half-million citizens. Yes, those affected are some of the least popular among us. But if a single executive branch official can write laws restricting the liberty of this group of persons, what does that mean for the next?").

272 *See* Gamble v. United States, 139 S. Ct. 1960, 1961-63 (2019); *see also* Jacob Sullum, *Gorsuch Joins Ginsburg in Decrying a 'Colossal Exception' to the Ban on Double Jeopardy*, REASON (June 18, 2019, 11:20 AM), https://reason.com/2019/06/18/gorsuch-

sometimes came this term in direct ideological opposition to other conservative justices, leaves Justice Gorsuch as a potential swing Justice where such issues are in question.[273]

Given these doctrinal uncertainties, two developments seem most pressing. First, *Carpenter* does not seem to have left the third-party doctrine any more sustainable, and in fact highlights the continued need for its reconsideration.[274] Second, while the five-Justice majority remains on the Court, the narrowness of the margin and the tentativeness of the holding in *Carpenter* invite a "moderate" doctrine.[275]

A contract-infused property model can provide such a moderate doctrinal approach.[276] Where an altogether paradigm shifting approach like Baude and Stern's "positive law model" may draw criticism for being too radical,[277] a property-based Fourth Amendment has long been at least a prong of the Court's approach.[278] The Court's departure in *Katz* was primarily rooted in a skepticism that a property-based doctrine would remain viable with technological increase.[279] Where a property-based approach can use contract and property concepts and laws to fully protect defendants from technological advancements, that approach succeeds by the progressive majority's own guideposts of protecting

joins-ginsburg-in-decrying-a-colossal-exception-to-the-ban-on-double-jeopardy/ [https://perma.cc/MT28-W7S5]. A clear — and puzzling — exception to this trend was Gorsuch's decision to sign on to Justice Thomas's dissent in the Curtis Flowers case, the majority opinion of which was authored by Justice Kavanaugh.

[273] And more complicatedly, there seem to be three potential swing votes depending on the issue, all of whom sit on the conservative end of the jurisprudential spectrum. *See* Thomson-DeVeaux, *supra* note 265.

[274] *See* Carpenter v. United States, 138 S. Ct. 2206, 2272 (2018) (Gorsuch, J., dissenting) (describing the third-party doctrine as having been put on "life support" as a result of the decision).

[275] *See, e.g.*, Jeffrey Rosen, *A Liberal-Conservative Alliance on the Supreme Court Against Digital Surveillance*, ATLANTIC (Nov. 30, 2017), https://www.theatlantic.com/politics/archive/2017/11/bipartisanship-supreme-court/547124/ [https://perma.cc/QCD3-MQYL] (discussing how some Justices, conservative and liberal, see "the urgent need to translate the Fourth Amendment into an electronic age").

[276] For a closer view of where and how doctrinal middle ground exists between Justice Gorsuch's Fourth Amendment construction and the progressive majority's, see *id.*

[277] *See, e.g.*, Orin Kerr, Opinion, *Against the Positive Law Model in the Carpenter Cell-Site Case*, WASH. POST (Nov. 22, 2017, 10:06 AM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/11/22/against-the-positive-law-model-in-the-carpenter-cell-site-case/?utm_term=.a8dcc768885e [https://perma.cc/9Q2M-F6MB].

[278] *See Carpenter*, 138 S. Ct. at 2264-72 (Gorsuch, J., dissenting); Minnesota v. Carter, 525 U.S. 83, 91-92 (1998) (Scalia, J., concurring).

[279] *See* Katz v. United States, 389 U.S. 347, 352-56 (1967).

privacy and curbing overreaching surveillance.[280] Where a property approach returns the Court to the question of *whether* a property interest was searched and *to whom* it belongs, it is likely to appeal to the conservative end of the Court.[281] Having a fundamentally originalist Fourth Amendment that retains its protective edge for defendants would also prevent against receding conservative support for historically rooted civil liberty values. For those concerned with defendants' rights, this is made crucial by the addition of a Justice Kavanaugh whose Fourth Amendment is likely to be deferential to law enforcement.[282] Accordingly, a property-rooted Fourth Amendment can present "moderate" appeal by offering the protectiveness and doctrinal adaptiveness of the kind valued by the progressive *Carpenter* majority, while adhering to the text and tradition of the Fourth Amendment in a way valued by the Court's conservatives.

Further, a contract-infused Fourth Amendment all but extinguishes the third-party doctrine in the digital age. If courts are required to examine partial interests reserved in contractual relationships with third parties, by definition a third-party disclosure cannot be dispositive.[283] This is likely to appeal to Justice Sotomayor in particular given her *Jones* concurrence and would assuage the *Carpenter* majority's concerns about the practical effect of so much data being stored with third parties.[284] Together with its protectiveness and adaptiveness, such an approach would allow for coalition-building between progressives in the *Carpenter* majority and at least a portion of conservatives scattered across its four dissents. As the majority notes in approvingly citing *Kyllo*, "any rule the Court adopts 'must take account of more sophisticated systems that are already in use or in development.'"[285] As the Court's progressives continue to look about for a doctrine which can accordingly avoid "seismic shifts in digital technology" that

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[280] *See Carpenter*, 138 S. Ct. at 2214 (citing Boyd v. United States, 116 U.S. 616, 630 (1886); United States v. Di Re, 332 U.S. 581, 595 (1948)) (citation omitted) ("On this score, our cases have recognized some basic guideposts. First, that the [Fourth] Amendment seeks to secure the 'privacies of life' against 'arbitrary power.' Second, and relatedly, that a central aim of the Framers was 'to place obstacles in the way of a too permeating police surveillance.'").

[281] *See id.* at 2235-43 (Thomas, J., dissenting) (emphasizing the importance of an originalist and textually-derived Fourth Amendment).

[282] *See* Kerr, *Judge Kavanaugh on the Fourth Amendment*, *supra* note 263.

[283] *See supra* Part II.

[284] *See Carpenter*, 138 S. Ct. at 2215-20; United States v. Jones, 565 U.S. 400, 413-31 (2012) (Sotomayor, J., concurring).

[285] *Carpenter*, 138 S. Ct. at 2218-19.

threaten individual liberties, this approach may become more attractive for its capability to do so.[286]

From a strategic standpoint, it may seem unwise to assign so much persuasive power to a lone dissent that was not even joined by Justice Thomas, the Court's fiercest post-Justice Scalia originalist.[287] But a shifted center of the Court can affect not only the overall alignment of justices but the strategies and legal arguments of litigants, which in turn can impact outcomes.[288] If Justice Gorsuch becomes the *de facto* new center of the Court in Fourth Amendment cases, litigant arguments which fuse a concern for individual liberty with conservative textualism will become more common.[289] A contracts-infused, property-based Fourth Amendment, appealing to both the pragmatic progressive end of the Court and the traditionalist right end, provides just such a balance.

CONCLUSION

The Bill of Rights was a radical development in the eighteenth century: it sought to limit the powers of the government against the people, including the government's policing powers.[290] The Fourth Amendment epitomized this development by limiting the power of government agents to search citizens' property without a warrant or

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[286] *See id.* at 2219.

[287] *See* David A. Patten, *Justice Clarence Thomas Hailed as No. 1 Originalist in SCOTUS History*, NEWSMAX (July 1, 2016, 7:14 AM), https://www.newsmax.com/newsfront/justice-clarence-thomas-orginalist-scotus-history/2016/07/01/id/736608/ [https://perma.cc/QWN9-NHLQ].

[288] *See* Mark Joseph Stern, *Neil Gorsuch's Independent Streak*, SLATE (Nov. 30, 2017, 2:52 PM), https://slate.com/news-and-politics/2017/11/in-carpenter-v-united-states-neil-gorsuch-showed-his-independent-streak.html [https://perma.cc/6YKZ-QFEG]; *see, e.g.*, Mark Joseph Stern, *The Gorsuch Brief*, SLATE (Oct. 11, 2018, 6:29 PM), https://slate.com/news-and-politics/2018/10/nielsen-preap-aclu-neil-gorsuch-briefs.html [https://perma.cc/A964-KPAS] [hereinafter *The Gorsuch Brief*] ("During Anthony Kennedy's long reign as the Supreme Court's swing vote, advocates perfected the art of 'the Kennedy brief': a legal argument designed to win his support by rhapsodizing about 'dignity' and 'liberty.' While the Kennedy brief went extinct upon his retirement, it may now be replaced by the Gorsuch brief, which replaces florid encomia to freedom with highly technical textualist arguments.").

[289] *See* Stern, *The Gorsuch Brief*, *supra* note 288.

[290] *See* Jay Cost, *Our Radical Founders*, NAT'L REV. (Sept. 25, 2017, 8:00 AM), https://www.nationalreview.com/2017/09/americas-founders-radical-then-now/ [https://perma.cc/E93C-VNYF] (discussing how the Bill of Rights poses principles that are "deeply libertarian and profoundly republican" both by eighteenth century and modern standards).

probable cause.[291] At its point of origin, this was gauged by whether a person's home, person, effects, or papers was searched, and this was indivisible from notions of private property.[292] In deciding *Katz*, the Court declared that this basic foundation was insufficient to protect citizens from the advancing technological capabilities of the State.[293]

Fifty years later, technology continues to evolve at a rapid pace. In *Carpenter*, the Court was faced with an unprecedented seizure and scope of data.[294] Its answer was unsatisfying: the third-party doctrine was left limping but alive and only a narrow category of information was recognized as especially protected.[295] Justice Gorsuch argued that the best way to protect defendants from the looming technological State was not to continue to run above and beyond the text of the Fourth Amendment but to return to its face.[296]

While Justice Gorsuch's dissent only briefly outlined how such an approach might proceed, this Note has argued that its primary mechanism would need to account for contract law and concepts.[297] Digital property is largely contracts-based, given the prevalence of service contracts and third-party storage mechanisms.[298] With most property interests held in something less than a full interest akin to a fee simple absolute, contracts must be closely examined to properly estimate the contours of the resultant property interests.[299] While it will not be the case that all contracts will be sufficiently adequate on their face to give rise to Fourth Amendment protections, equity doctrines can be employed and expanded to supplement the difference.[300] Doing so will provide protection where *Katz* and the third-party doctrine do not.[301] Given the uncertainties facing the Court, and the continued advancements of technology which are likely to continue to raise search and seizure questions after *Carpenter*, a protective "moderate" doctrine is needed. A Fourth Amendment doctrine which both protects defendants from advancing government search capabilities and remains true to its text and original meaning can provide such a middle path.

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

292 *See id.*; Minnesota v. Carter, 525 U.S. 83, 91-92 (1998) (Scalia, J., concurring).

293 *See* Katz v. United States, 389 U.S. 347, 352-56 (1967).

294 *See* Carpenter v. United States, 138 S. Ct. 2206, 2214-15 (2018).

295 *See id.* at 2219-22; McCubbin, *supra* note 253.

296 *See supra* text accompanying notes 88–113.

297 *See supra* text accompanying notes 153–217.

298 *See supra* Part III.B.

299 *See id.*

300 *See supra* Part III.A-B.

301 *See, e.g.*, *supra* text accompanying notes 218–244.