AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era – Criminal Justice/Search and Seizure

**Carpenter v. United States, \_\_\_ U.S. \_\_\_** (2018)

*Timothy Carpenter was identified by an accomplice as a participant in a series of robberies in the Detroit area. Based on this information, federal prosecutors invoked the Stored Communications Act, which permitted them to obtain Carpenter’s cell phone records without obtaining a warrant as long as they had “reasonable grounds to believe” that the cell phone records were “relevant and material to an ongoing criminal investigation.” These records demonstrated that Carpenter was in the vicinity of at least four of the robberies. The trial court rejected Carpenter’s motion to suppress the records on the ground that the Fourth Amended required federal prosecutors to obtain a warrant and meet a probable cause standard. Carpenter was then convicted and sentenced to more than one hundred years in prison. The Court of Appeals for the Sixth Circuit affirmed the conviction and sentence. Carpenter appealed to the Supreme Court.*

 *The Supreme Court reversed the Carpenter’s conviction by a 5-4 vote. Chief Justice John Roberts’s majority opinion held that a warrant was required because persons under* Katz v. United States *(1967) had a reasonable expectation that their cell phone records would be kept private. The majority and dissents debate the significance of three precedents.*

* Katz v. United States *(1967) which held that government must seek a warrant whenever persons have a reasonable expectation that information about themselves will be kept private.*
* Smith v. Maryland *(1979) which held that persons have no reasonable expectation that the telephone company will keep their phone records private*
* United States v. Miller *(1976)* *which held that persons have no reasonable expectation that their bank would keep their financial information private.*

*How do the opinions in the case interpret these precedents? How well do they believe these precedents encompass technological changes? Which do they think should remain good law and which should be modified? Which do you think should remain good law and which should be modified. Many dissents insist that in a time of rapid technological change, legislators are better able than courts to determine how best to regulate. How does the majority respond to that concern? Might* Carpenter *become outdated in a few years? All five of the more conservative justices on the Roberts Court wrote opinions. Do their opinions indicate the range of opinions and interpretive methodologies in contemporary constitutional conservatives or are the differences between the justices largely idiosyncratic? No liberal wrote an opinion? Why is that the case? Is there an opinion to be written to the left of the Chief Justice?*

CHIEF JUSTICE [ROBERTS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0258116001&originatingDoc=Iebe9c7e2761f11e89d59c04243316042&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) delivered the opinion of the Court.

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For much of our history, Fourth Amendment search doctrine was “tied to common-law trespass” and focused on whether the Government “obtains information by physically intruding on a constitutionally protected area.” More recently, the Court has recognized that “property rights are not the sole measure of Fourth Amendment violations.” In *Katz v. United States* (1967), we established that “the Fourth Amendment protects people, not places,” and expanded our conception of the Amendment to protect certain expectations of privacy as well. When an individual “seeks to preserve something as private,” and his expectation of privacy is “one that society is prepared to recognize as reasonable,” we have held that official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause.

Although no single rubric definitively resolves which expectations of privacy are entitled to protection,[1](https://1.next.westlaw.com/Document/Iebe9c7e2761f11e89d59c04243316042/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad6ad3c00000164300ed6c870f5a7b7%3FNav%3DCASE%26fragmentIdentifier%3DIebe9c7e2761f11e89d59c04243316042%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=46462644e9a525d8550c23f69ad8f887&list=CASE&rank=4&sessionScopeId=bd6ca2f3d02b3e600f5f1383af2fac8f289e3972022a4f09aaf3de909992c48c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00212044792536) the analysis is informed by historical understandings “of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted.” On this score, our cases have recognized some basic guideposts. First, that the 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.”

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. . . . [R]equests for cell-site records lie at the intersection of two lines of cases, both of which inform our understanding of the privacy interests at stake. The first set of cases addresses a person's expectation of privacy in his physical location and movements. In *United States v. Knotts* (1983), we considered the Government's use of a “beeper” to aid in tracking a vehicle through traffic. . . . The Court concluded that the “augment[ed]” visual surveillance did not constitute a search because “[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.” In *United States v. Jones*, FBI agents installed a GPS tracking device on Jones's vehicle and remotely monitored the vehicle's movements for 28 days. The Court decided the case based on the Government's physical trespass of the vehicle. At the same time, five Justices agreed that related privacy concerns would be raised by, for example, “surreptitiously activating a stolen vehicle detection system” in Jones's car to track Jones himself, or conducting GPS tracking of his cell phone.” . . .

In a second set of decisions, the Court has drawn a line between what a person keeps to himself and what he shares with others. We have previously held that “a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.” That remains true “even if the information is revealed on the assumption that it will be used only for a limited purpose.” *United States v. Miller* (1976). . . [In *Miller*] [t]he Court rejected a Fourth Amendment challenge to the [collection of bank records]. For one, Miller could “assert neither ownership nor possession” of the documents; they were business records of the banks.” . . . The Court ruled in [*Smith v. Maryland* (1979)] that the Government's use of a pen register—a device that recorded the outgoing phone numbers dialed on a landline telephone—was not a search. . . . When Smith placed a call, he “voluntarily conveyed” the dialed numbers to the phone company by “expos[ing] that information to its equipment in the ordinary course of business.” . . .

 The question we confront today is how to apply the Fourth Amendment to a new phenomenon: the ability to chronicle a person's past movements through the record of his cell phone signals. Such tracking partakes of many of the qualities of the GPS monitoring we considered in *Jones*. Much like GPS tracking of a vehicle, cell phone location information is detailed, encyclopedic, and effortlessly compiled. At the same time, the fact that the individual continuously reveals his location to his wireless carrier implicates the third-party principle of *Smith* and *Miller*. . . . We decline to extend *Smith* and *Miller* to cover these novel circumstances. 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. Whether the Government employs its own surveillance technology as in *Jones* or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI. . . .

A person does not surrender all Fourth Amendment protection by venturing into the public sphere. . . . Prior to the digital age, law enforcement might have pursued a suspect for a brief stretch, but doing so “for any extended period of time was difficult and costly and therefore rarely undertaken.” For that reason, “society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period.”

Allowing government access to cell-site records contravenes that expectation. . . . Mapping a cell phone's location over the course of 127 days provides an all-encompassing record of the holder's whereabouts. As with GPS information, the time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his “familial, political, professional, religious, and sexual associations.” These location records “hold for many Americans the ‘privacies of life.’ “And like GPS monitoring, cell phone tracking is remarkably easy, cheap, and efficient compared to traditional investigative tools. With just the click of a button, the Government can access each carrier's deep repository of historical location information at practically no expense.

In fact, historical cell-site records present even greater privacy concerns than the GPS monitoring of a vehicle we considered in *Jones*. . . . While individuals regularly leave their vehicles, they compulsively carry cell phones with them all the time. A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales. . . . Accordingly, when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user. . . . While the records in this case reflect the state of technology at the start of the decade, the accuracy of CSLI is rapidly approaching GPS-level precision. . . . [W]ireless carriers already have the capability to pinpoint a phone's location within 50 meters.

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The third-party doctrine partly stems from the notion that an individual has a reduced expectation of privacy in information knowingly shared with another. But the fact of “diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely.” *Smith* pointed out the limited capabilities of a pen register; as explained in Riley, telephone call logs reveal little in the way of “identifying information.” *Miller* likewise noted that checks were “not confidential communications but negotiable instruments to be used in commercial transactions.” In mechanically applying the third-party doctrine to this case, the Government fails to appreciate that there are no comparable limitations on the revealing nature of CSLI. . . . [T]his case is not about “using a phone” or a person's movement at a particular time. It is about a detailed chronicle of a person's physical presence compiled every day, every moment, over several years. . . .

. . . . Cell phone location information is not truly “shared” as one normally understands the term. In the first place, cell phones and the services they provide are “such a pervasive and insistent part of daily life” that carrying one is indispensable to participation in modern society. Second, a cell phone logs a cell-site record by dint of its operation, without any affirmative act on the part of the user beyond powering up. . . . As a result, in no meaningful sense does the user voluntarily “assume[ ] the risk” of turning over a comprehensive dossier of his physical movements.

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Having found that the acquisition of Carpenter's CSLI was a search, we also conclude that the Government must generally obtain a warrant supported by probable cause before acquiring such records. Although the “ultimate measure of the constitutionality of a governmental search is ‘reasonableness,’ “ our cases establish that warrantless searches are typically unreasonable where “a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing.” . . . The Government acquired the cell-site records pursuant to a court order issued under the Stored Communications Act, which required the Government to show “reasonable grounds” for believing that the records were “relevant and material to an ongoing investigation.” That showing falls well short of the probable cause required for a warrant. The Court usually requires “some quantum of individualized suspicion” before a search or seizure may take place. . . .

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. . . [T]his Court has never held that the Government may subpoena third parties for records in which the suspect has a reasonable expectation of privacy. . . . CSLI is an entirely different species of business record—something that implicates basic Fourth Amendment concerns about arbitrary government power much more directly than corporate tax or payroll ledgers. . . . If the choice to proceed by subpoena provided a categorical limitation on Fourth Amendment protection, no type of record would ever be protected by the warrant requirement. . . .

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JUSTICE KENNEDY, with whom JUSTICE THOMAS and JUSTICE ALITO join, dissenting.

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The first Clause of the Fourth Amendment provides that “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” The customary beginning point in any Fourth Amendment search case is whether the Government's actions constitute a “search” of the defendant's person, house, papers, or effects, within the meaning of the constitutional provision. If so, the next question is whether that search was reasonable.

Here the only question necessary to decide is whether the Government searched anything of Carpenter's when it used compulsory process to obtain cell-site records from Carpenter's cell phone service providers. This Court's decisions in *Miller* and *Smith* dictate that the answer is no. . . .

*Miller* and *Smith* hold that individuals lack any protected Fourth Amendment interests in records that are possessed, owned, and controlled only by a third party. . . . *Miller* and *Smith* have been criticized as being based on too narrow a view of reasonable expectations of privacy. Those criticisms, however, are unwarranted. *Miller* and *Smith* placed necessary limits on the ability of individuals to assert Fourth Amendment interests in property to which they lack a “requisite connection.” Fourth Amendment rights, after all, are personal. . . . The concept of reasonable expectations of privacy, first announced in *Katz v. United States* (1967), sought to look beyond the “arcane distinctions developed in property and tort law” in evaluating whether a person has a sufficient connection to the thing or place searched to assert Fourth Amendment interests in it. Yet “property concepts” are, nonetheless, fundamental “in determining the presence or absence of the privacy interests protected by that Amendment.” This is so for at least two reasons. First, as a matter of settled expectations from the law of property, individuals often have greater expectations of privacy in things and places that belong to them, not to others. And second, the Fourth Amendment's protections must remain tethered to the text of that Amendment, which, again, protects only a person's own “persons, houses, papers, and effects.” *Katz* did not abandon reliance on property-based concepts. The Court in *Katz* analogized the phone booth used in that case to a friend's apartment, a taxicab, and a hotel room. . . .

*Miller* and *Smith* set forth an important and necessary limitation on the *Katz* framework. They rest upon the commonsense principle that the absence of property law analogues can be dispositive of privacy expectations. . . . The defendants could make no argument that the records were their own papers or effects. The records were the business entities' records, plain and simple. The defendants had no reason to believe the records were owned or controlled by them and so could not assert a reasonable expectation of privacy in the records.

The second principle supporting *Miller* and *Smith* is the longstanding rule that the Government may use compulsory process to compel persons to disclose documents and other evidence within their possession and control. . . . . For those reasons this Court has held that a subpoena for records, although a “constructive” search subject to Fourth Amendment constraints, need not comply with the procedures applicable to warrants—even when challenged by the person to whom the records belong. Rather, a subpoena complies with the Fourth Amendment's reasonableness requirement so long as it is “‘sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.’ Persons with no meaningful interests in the records sought by a subpoena, like the defendants in *Miller* and *Smith*, have no rights to object to the records' disclosure—much less to assert that the Government must obtain a warrant to compel disclosure of the records.

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Cell-site records, like all the examples just discussed, are created, kept, classified, owned, and controlled by cell phone service providers, which aggregate and sell this information to third parties. As in *Miller*, Carpenter can “assert neither ownership nor possession” of the records and has no control over them. . . . Because Carpenter lacks a requisite connection to the cell-site records, he also may not claim a reasonable expectation of privacy in them. He could expect that a third party—the cell phone service provider—could use the information it collected, stored, and classified as its own for a variety of business and commercial purposes. All this is not to say that *Miller* and *Smith* are without limits. *Miller* and *Smith* may not apply when the Government obtains the modern-day equivalents of an individual's own “papers” or “effects,” even when those papers or effects are held by a third party.

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Those “different constitutional principles” mentioned in *Knotts* . . . do not apply in this case. Here the Stored Communications Act requires a neutral judicial officer to confirm in each case that the Government has “reasonable grounds to believe” the cell-site records “are relevant and material to an ongoing criminal investigation.” This judicial check mitigates the Court's concerns about “‘a too permeating police surveillance.’“ . . . *Jones* involved direct governmental surveillance of a defendant's automobile without judicial authorization—specifically, GPS surveillance accurate within 50 to 100 feet. Even assuming that the different constitutional principles mentioned in *Knotts* would apply in a case like *Jones*—a proposition the Court was careful not to announce in *Jones*, those principles are inapplicable here. Cases like this one, where the Government uses court-approved compulsory process to obtain records owned and controlled by a third party, are governed by the two majority opinions in *Miller* and *Smith*.

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[C]ell-site records, as already discussed, disclose a person's location only in a general area. The records at issue here, for example, revealed Carpenter's location within an area covering between around a dozen and several hundred city blocks. . . . . By contrast, financial records and telephone records do “‘revea[l] ... personal affairs, opinions, habits and associations.’ “What persons purchase and to whom they talk might disclose how much money they make; the political and religious organizations to which they donate; whether they have visited a psychiatrist, plastic surgeon, abortion clinic, or AIDS treatment center; whether they go to gay bars or straight ones; and who are their closest friends and family members. The troves of intimate information the Government can and does obtain using financial records and telephone records dwarfs what can be gathered from cell-site records.

Still, the Court maintains, cell-site records are “unique” because they are “comprehensive” in their reach; allow for retrospective collection; are “easy, cheap, and efficient compared to traditional investigative tools”; and are not exposed to cell phone service providers in a meaningfully voluntary manner. But many other kinds of business records can be so described. Financial records are of vast scope. Banks and credit card companies keep a comprehensive account of almost every transaction an individual makes on a daily basis. . . .

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Technological changes involving cell phones have complex effects on crime and law enforcement. . . . . How those competing effects balance against each other, and how property norms and expectations of privacy form around new technology, often will be difficult to determine during periods of rapid technological change. In those instances, and where the governing legal standard is one of reasonableness, it is wise to defer to legislative judgments like the one embodied in § 2703(d) of the Stored Communications Act. . . .

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Most immediately, the Court's holding that the Government must get a warrant to obtain more than six days of cell-site records limits the effectiveness of an important investigative tool for solving serious crimes. As this case demonstrates, cell-site records are uniquely suited to help the Government develop probable cause to apprehend some of the Nation's most dangerous criminals: serial killers, rapists, arsonists, robbers, and so forth. . . .

[T]he Court's holding is premised on cell-site records being a “distinct category of information” from other business records. But the Court does not explain what makes something a distinct category of information. Whether credit card records are distinct from bank records; whether payment records from digital wallet applications are distinct from either; whether the electronic bank records available today are distinct from the paper and microfilm records at issue in *Miller* ; or whether cell-phone call records are distinct from the home-phone call records at issue in *Smith*, are just a few of the difficult questions that require answers under the Court's novel conception of *Miller* and *Smith*.

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This case should be resolved by interpreting accepted property principles as the baseline for reasonable expectations of privacy. Here the Government did not search anything over which Carpenter could assert ownership or control. Instead, it issued a court-authorized subpoena to a third party to disclose information it alone owned and controlled. That should suffice to resolve this case.

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JUSTICE [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=Iebe9c7e2761f11e89d59c04243316042&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), dissenting.

This case should not turn on “whether” a search occurred. It should turn, instead, on whose property was searched. The Fourth Amendment guarantees individuals the right to be secure from unreasonable searches of “their persons, houses, papers, and effects.” By obtaining the cell-site records of MetroPCS and Sprint, the Government did not search Carpenter's property. He did not create the records, he does not maintain them, he cannot control them, and he cannot destroy them. Neither the terms of his contracts nor any provision of law makes the records his. The records belong to MetroPCS and Sprint.

. . . . The more fundamental problem with the Court's opinion, however, is its use of the “reasonable expectation of privacy” test, which was first articulated by Justice Harlan in *Katz v. United States* (1967) (concurring opinion). The *Katz* test has no basis in the text or history of the Fourth Amendment. . . .

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The *Katz* test distorts the original meaning of “searc[h]”—the word in the Fourth Amendment that it purports to define. Under the *Katz* test, the government conducts a search anytime it violates someone's “reasonable expectation of privacy.” That is not a normal definition of the word “search.”

At the founding, “search” did not mean a violation of someone's reasonable expectation of privacy. The word was probably not a term of art, as it does not appear in legal dictionaries from the era. And its ordinary meaning was the same as it is today: “ ‘[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to search the house for a book; to search the wood for a thief.’” . . . The word “search” was not associated with “reasonable expectation of privacy” until Justice Harlan coined that phrase in 1967. . . .

The *Katz* test strays even further from the text by focusing on the concept of “privacy.” The word “privacy” does not appear in the Fourth Amendment (or anywhere else in the Constitution for that matter). . . . “[P]rivacy . . . was not part of the political vocabulary of the [founding]. Instead, liberty and privacy rights were understood largely in terms of property rights.”

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The concept of security in property recognized by Locke and the English legal tradition appeared throughout the materials that inspired the Fourth Amendment. In *Entick v. Carrington* (C.P. 1765)—a heralded decision that the founding generation considered “the true and ultimate expression of constitutional law,” Lord Camden explained that “[t]he great end, for which men entered into society, was to secure their property.” . . . Of course, the founding generation understood that, by securing their property, the Fourth Amendment would often protect their privacy as well. But the Fourth Amendment's attendant protection of privacy does not justify *Katz*'s elevation of privacy as the sine qua non of the Amendment. . . .

In shifting the focus of the Fourth Amendment from property to privacy, the *Katz* test also reads the words “persons, houses, papers, and effects” out of the text. The Court today, for example, does not ask whether cell-site location records are “persons, houses, papers, [or] effects” within the meaning of the Fourth Amendment. Yet “persons, houses, papers, and effects” cannot mean “anywhere” or “anything.” *Katz*'s catchphrase that “the Fourth Amendment protects people, not places,” is not a serious attempt to reconcile the constitutional text. . . .

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“[P]ersons, houses, papers, and effects” are not the only words that the *Katz* test reads out of the Fourth Amendment. The Fourth Amendment specifies that the people have a right to be secure from unreasonable searches of “their” persons, houses, papers, and effects. Although phrased in the plural, “[t]he obvious meaning of [‘their’] is that each person has the right to be secure against unreasonable searches and seizures in his own person, house, papers, and effects.” . . . . Until today, our precedents have not acknowledged that individuals can claim a reasonable expectation of privacy in someone else's business records. But the Court erases that line in this case, at least for cell-site location records. In doing so, it confirms that the *Katz* test does not necessarily require an individual to prove that the government searched his person, house, paper, or effect. . . . If someone stole these records from Sprint or MetroPCS, Carpenter does not argue that he could recover in a traditional tort action. . . . [T]he Telecommunications Act is insufficient because it does not give Carpenter a property right in the cell-site records. Nothing in the text pre-empts state property law or gives customers a property interest in the companies' business records (assuming Congress even has that authority). . . .

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Although the Court today maintains that its decision is based on “Founding-era understandings,” the Founders would be puzzled by the Court's conclusion as well as its reasoning. The Court holds that the Government unreasonably searched Carpenter by subpoenaing the cell-site records of Sprint and MetroPCS without a warrant. But the Founders would not recognize the Court's “warrant requirement.” The common law required warrants for some types of searches and seizures, but not for many others. The relevant rule depended on context. In cases like this one, a subpoena for third-party documents was not a “search” to begin with, and the common law did not limit the government's authority to subpoena third parties. Suffice it to say, the Founders would be confused by this Court's transformation of their common-law protection of property into a “warrant requirement” and a vague inquiry into “reasonable expectations of privacy.”

Because the *Katz* test is a failed experiment, this Court is duty bound to reconsider it. Until it does, I agree with my dissenting colleagues' reading of our precedents. Accordingly, I respectfully dissent.

JUSTICE ALITO, with whom JUSTICE THOMAS joins, dissenting.

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First, the Court ignores the basic distinction between an actual search (dispatching law enforcement officers to enter private premises and root through private papers and effects) and an order merely requiring a party to look through its own records and produce specified documents. The former, which intrudes on personal privacy far more deeply, requires probable cause; the latter does not. Treating an order to produce like an actual search, as today's decision does, is revolutionary. It violates both the original understanding of the Fourth Amendment and more than a century of Supreme Court precedent. . . .

Second, the Court allows a defendant to object to the search of a third party's property. This also is revolutionary. The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects” (emphasis added), not the persons, houses, papers, and effects of others. . . .

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The order in this case was the functional equivalent of a subpoena for documents, and there is no evidence that these writs were regarded as “searches” at the time of the founding. Subpoenas duces tecum and other forms of compulsory document production were well known to the founding generation. . . . In the United States, the First Congress established the federal court system in the Judiciary Act of 1789. As part of that Act, Congress authorized “all the said courts of the United States ... in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery.” From that point forward, federal courts in the United States could compel the production of documents regardless of whether those documents were held by parties to the case or by third parties. . . . Th[is] history makes it abundantly clear that the Fourth Amendment, as originally understood, did not apply to the compulsory production of documents at all.

The Fourth Amendment does not regulate all methods by which the Government obtains documents. Rather, it prohibits only those “searches and seizures” of “persons, houses, papers, and effects” that are “unreasonable.” Consistent with that language, “at least until the latter half of the 20th century” “our Fourth Amendment jurisprudence was tied to common-law trespass.” *United States v. Jones* (2012). So by its terms, the Fourth Amendment does not apply to the compulsory production of documents, a practice that involves neither any physical intrusion into private space nor any taking of property by agents of the state. . . .

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General warrants and writs of assistance were noxious not because they allowed the Government to acquire evidence in criminal investigations, but because of the means by which they permitted the Government to acquire that evidence. Then, as today, searches could be quite invasive. Searches generally begin with officers “mak[ing] nonconsensual entries into areas not open to the public.” Once there, officers are necessarily in a position to observe private spaces generally shielded from the public and discernible only with the owner's consent. Private area after private area becomes exposed to the officers' eyes as they rummage through the owner's property in their hunt for the object or objects of the search. . . . Compliance with a subpoena *duces tecum* requires none of that. A subpoena *duces tecum* permits a subpoenaed individual to conduct the search for the relevant documents himself, without law enforcement officers entering his home or rooting through his papers and effects. As a result, subpoenas avoid the many incidental invasions of privacy that necessarily accompany any actual search. And it was those invasions of privacy—which, although incidental, could often be extremely intrusive and damaging—that led to the adoption of the Fourth Amendment.

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As a matter of original understanding, the Fourth Amendment does not regulate the compelled production of documents at all. Here the Government received the relevant cell-site records pursuant to a court order compelling Carpenter's cell service provider to turn them over. That process is thus immune from challenge under the original understanding of the Fourth Amendment.

As a matter of modern doctrine, this case is equally straightforward. . . . [N]o search or seizure of Carpenter or his property occurred in this case. . . . [A] court order must “ ‘be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.’” Here, the type of order obtained by the Government almost necessarily satisfies that standard. The Stored Communications Act allows a court to issue the relevant type of order “only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that ... the records ... sough[t] are relevant and material to an ongoing criminal investigation.” And the court “may quash or modify such order” if the provider objects that the “records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider.” . . .

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Against centuries of precedent and practice, all that the Court can muster is the observation that “this Court has never held that the Government may subpoena third parties for records in which the suspect has a reasonable expectation of privacy.” Frankly, I cannot imagine a concession more damning to the Court's argument than that. As the Court well knows, the reason that we have never seen such a case is because—until today—defendants categorically had no “reasonable expectation of privacy” and no property interest in records belonging to third parties. . . .

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Compounding its initial error, the Court also holds that a defendant has the right under the Fourth Amendment to object to the search of a third party's property. This holding flouts the clear text of the Fourth Amendment, and it cannot be defended under either a property-based interpretation of that Amendment or our decisions applying the reasonable-expectations-of-privacy test adopted in *Katz*.

It bears repeating that the Fourth Amendment guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects.” The Fourth Amendment does not confer rights with respect to the persons, houses, papers, and effects of others. Its language makes clear that “Fourth Amendment rights are personal,” and as a result, this Court has long insisted that they “may not be asserted vicariously.” . . . In this case, the cell-site records obtained by the Government belong to Carpenter's cell service providers, not to Carpenter. Carpenter did not create the cell-site records. Nor did he have possession of them; at all relevant times, they were kept by the providers. . . .

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Nor does the Telecommunications Act give Carpenter a property right in the cell-site records simply because they are subject to confidentiality restrictions. . . . Many federal statutes impose similar restrictions on private entities' use or dissemination of information in their own records without conferring a property right on third parties.

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Legislation is much preferable to the development of an entirely new body of Fourth Amendment caselaw for many reasons, including the enormous complexity of the subject, the need to respond to rapidly changing technology, and the Fourth Amendment's limited scope. The Fourth Amendment restricts the conduct of the Federal Government and the States; it does not apply to private actors. But today, some of the greatest threats to individual privacy may come from powerful private companies that collect and sometimes misuse vast quantities of data about the lives of ordinary Americans. If today's decision encourages the public to think that this Court can protect them from this looming threat to their privacy, the decision will mislead as well as disrupt. And if holding a provision of the Stored Communications Act to be unconstitutional dissuades Congress from further legislation in this field, the goal of protecting privacy will be greatly disserved.

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JUSTICE GORSUCH, dissenting.

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Today we use the Internet to do most everything. Smartphones make it easy to keep a calendar, correspond with friends, make calls, conduct banking, and even watch the game. Countless Internet companies maintain records about us and, increasingly, for us. 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, on the theory that no one reasonably expects any of it will be kept private. But no one believes that, if they ever did.

. . . It seems to me we could respond in at least three ways. The first is to ignore the problem, maintain *Smith* and *Miller*, and live with the consequences. If the confluence of these decisions and modern technology means our Fourth Amendment rights are reduced to nearly nothing, so be it. The second choice is to set *Smith* and *Miller* aside and try again using the *Katz* “reasonable expectation of privacy” jurisprudence that produced them. The third is to look for answers elsewhere.

*. . .* [*Smith* and *Miller*]announced a categorical rule: Once you disclose information to third parties, you forfeit any reasonable expectation of privacy you might have had in it. And even if *Smith* and *Miller* did permit courts to conduct a balancing contest of the kind the Court now suggests, it's still hard to see how that would help the petitioner in this case. Why is someone's location when using a phone so much more sensitive than who he was talking to (*Smith*) or what financial transactions he engaged in (*Miller*)? . . .

The problem isn't with the Sixth Circuit's application of *Smith* and *Miller* but with the cases themselves. Can the government demand a copy of all your e-mails from Google or Microsoft without implicating your Fourth Amendment rights? . . . In the years since its adoption, countless scholars, too, have come to conclude that the “third-party doctrine is not only wrong, but horribly wrong.” . . . People often do reasonably expect that information they entrust to third parties, especially information subject to confidentiality agreements, will be kept private. . . .

. . . The Court has said that by conveying information to a third party you “‘assum[e] the risk’ “it will be revealed to the police and therefore lack a reasonable expectation of privacy in it. . . . Suppose I entrust a friend with a letter and he promises to keep it secret until he delivers it to an intended recipient. In what sense have I agreed to bear the risk that he will turn around, break his promise, and spill its contents to someone else? . . . Some have suggested the third party doctrine is better understood to rest on consent than assumption of risk. . . . Consenting to give a third party access to private papers that remain my property is not the same thing as consenting to a search of those papers by the government. . . .

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*Katz*'s problems start with the text and original understanding of the Fourth Amendment, as Justice Thomas thoughtfully explains today. . . . Under its plain terms, the Amendment grants you the right to invoke its guarantees whenever one of your protected things (your person, your house, your papers, or your effects) is unreasonably searched or seized. History too holds problems for *Katz*. Little like it can be found in the law that led to the adoption of the Fourth Amendment or in this Court's jurisprudence until the late 1960s. . . . Even taken on its own terms, *Katz* has never been sufficiently justified. In fact, we still don't even know what its “reasonable expectation of privacy” test is. Is it supposed to pose an empirical question (what privacy expectations do people actually have) or a normative one (what expectations should they have)? If the test is supposed to be an empirical one, it's unclear why judges rather than legislators should conduct it. Legislators are responsive to their constituents and have institutional resources designed to help them discern and enact majoritarian preferences. Maybe, then, the *Katz* test should be conceived as a normative question. But if that's the case, why (again) do judges, rather than legislators, get to determine whether society should be prepared to recognize an expectation of privacy as legitimate? . . .

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. . . . The Fourth Amendment protects “the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures.” True to those words and their original understanding, the traditional approach asked if a house, paper or effect was *yours* under law. No more was needed to trigger the Fourth Amendment. . . .

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. . . . [T]hat a third party has access to or possession of your papers and effects does not necessarily eliminate your interest in them. Ever hand a private document to a friend to be returned? . . . A bailment is the “delivery of personal property by one person (the *bailor*) to another (the *bailee*) who holds the property for a certain purpose.” . . . A bailee normally owes a legal duty to keep the item safe, according to the terms of the parties' contract if they have one, and according to the “implication[s] from their conduct” if they don't. This approach is quite different from *Smith* and *Miller*'s (counter)-intuitive approach to reasonable expectations of privacy; where those cases extinguish Fourth Amendment interests once records are given to a third party, property law may preserve them.

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. . . . Just because you entrust your data—in some cases, your modern-day papers and effects—to a third party may not mean you lose any Fourth Amendment interest in its contents. Whatever may be left of *Smith* and *Miller,* few doubt that e-mail should be treated much like the traditional mail it has largely supplanted—as a bailment in which the owner retains a vital and protected legal interest.

I doubt that complete ownership or exclusive control of property is always a necessary condition to the assertion of a Fourth Amendment right. Where houses are concerned, for example, individuals can enjoy Fourth Amendment protection without fee simple title. . . . “People call a house ‘their’ home when legal title is in the bank, when they rent it, and even when they merely occupy it rent free.” . . . That is why tenants and resident family members—though they have no legal title—have standing to complain about searches of the houses in which they live.

Another point seems equally true: just because you *have* to entrust a third party with your data doesn't necessarily mean you should lose all Fourth Amendment protections in it. . . . At least some of this Court's decisions have already suggested that use of technology is functionally compelled by the demands of modern life, and in that way the fact that we store data with third parties may amount to a sort of involuntary bailment too.

. . . [P]ositive law may help provide detailed guidance on evolving technologies without resort to judicial intuition. . . . Both the States and federal government are actively legislating in the area of third party data storage and the rights users enjoy. . . . If state legislators or state courts say that a digital record has the attributes that normally make something property, that may supply a sounder basis for judicial decisionmaking than judicial guesswork about societal expectations. . . . [W]hile positive law may help establish a person's Fourth Amendment interest there may be some circumstances where positive law cannot be used to defeat it. . . . Legislatures cannot pass laws declaring your house or papers to be your property except to the extent the police wish to search them without cause. As the Court has previously explained, “we must ‘assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.’”

. . . [T]his constitutional floor may, in some instances, bar efforts to circumvent the Fourth Amendment's protection through the use of subpoenas. . . . It may be that, as an original matter, a subpoena requiring the recipient to produce records wasn't thought of as a “search or seizure” by the government implicating the Fourth Amendment, but instead as an act of compelled self-incrimination implicating the Fifth Amendment. But the common law of searches and seizures does not appear to have confronted a case where private documents equivalent to a mailed letter were entrusted to a bailee and then subpoenaed. As a result, “[t]he common-law rule regarding subpoenas for documents held by third parties entrusted with information from the target is ... unknown and perhaps unknowable.” . . .

. . . . It seems to me entirely possible a person's cell-site data could qualify as *his* papers or effects under existing law. Yes, the telephone carrier holds the information. But [federal law] designates a customer's cell-site location information as “customer proprietary network information”(CPNI) and gives customers certain rights to control use of and access to CPNI about themselves. The statute generally forbids a carrier to “use, disclose, or permit access to individually identifiable” . . . Plainly, customers have substantial legal interests in this information, including at least some right to include, exclude, and control its use. Those interests might even rise to the level of a property right.

The problem is that we do not know anything more. Before the district court and court of appeals, Mr. Carpenter pursued only a *Katz* “reasonable expectations” argument. . . . In these circumstances, I cannot help but conclude—reluctantly—that Mr. Carpenter forfeited perhaps his most promising line of argument.

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