

THE DEMISE OF FOURTH AMENDMENT STANDING: FROM STANDING ROOM TO CENTER ORCHESTRA

Nadia B. Soree*

“It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*.”¹

I. INTRODUCTION

More than 120 years after Justice Bradley’s call to vigilance against “stealthy encroachments,” the federal government has more than taken its first steps towards crossing the constitutional boundaries of the people’s right to privacy; it has walked for miles. Recently, the Inspector General of the Department of Justice issued a scathing report, detailing “widespread abuse of the FBI’s authority to seize personal details about tens of thousands of people without court oversight” and further finding that the FBI “hatched an agreement with telephone companies allowing the agency to ask for information on more than 3,000 phone numbers—often without a subpoena, without an emergency or even without an investigative case.”² Justice Bradley might wonder what has happened to his expansive conception of the Fourth Amendment,³ and how (or if) today’s Court might heed his warning. He might ask, “Isn’t this a violation of the Fourth Amendment?” Today’s Court might answer, “What’s it to you?”

Nearly thirty years ago, in a trio of decisions authored by then Justice Rehnquist, the Supreme Court answered defendants with precisely the same question. In *Rakas v. Illinois*,⁴ *United States v. Salvucci*,⁵ and *Rawlings v.*

* Visiting Assistant Professor, St. Thomas University School of Law. B.M. 1991, The Juilliard School; M.M. 1993, Rutgers University; J.D. 2005, Yale Law School. I wish to thank Alfredo Garcia, Molly Lothamer, Robert Pushaw, Christopher Slobogin, and Kate Stith for helpful comments and suggestions on earlier drafts of this article.

¹ *Boyd v. United States*, 116 U.S. 616, 635 (1886). The Latin phrase, *obsta principiis*, translates to “oppose beginnings” or “oppose first attempts.”

² Dan Eggen & John Solomon, *FBI Audit Prompts Calls for Reform: Some Lawmakers Suggest Limits on Patriot Act*, WASH. POST, Mar. 10, 2007, at A1.

³ The Fourth Amendment states:

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

U.S. CONST. amend. IV.

⁴ *Rakas v. Illinois*, 439 U.S. 128 (1978).

⁵ *United States v. Salvucci*, 448 U.S. 83 (1980).

Kentucky,⁶ the Court held that unless a defendant has a legitimate expectation of privacy in the place searched, she will not be permitted to assert a Fourth Amendment violation arising from that search as the basis for suppressing the evidence being offered against her in a criminal prosecution. However, while the suitability of a given litigant to invoke the powers of the court for relief has traditionally been referred to under the rubric of “standing,” the Court, in *Rakas*, disapproved of the continued use of that term, instead merging the concept of a defendant’s ability to seek the benefit of the exclusionary rule with the inquiry into the substantive scope of the Fourth Amendment.⁷

Many scholars have critiqued the Court’s Fourth Amendment standing doctrine for a variety of reasons,⁸ and I join the chorus with my view that the Court has developed an unduly narrow vision of standing (and thus, the Fourth Amendment) that fails to take into account the collective, regulatory objective of the Amendment and of its primary remedy—exclusion. However, the main focus of this Article is the Court’s collapse of the standing inquiry into the merits of a Fourth Amendment claim, a doctrinal move that, while noted by scholars, has not generally been the primary focus of analysis.⁹ I hope to demonstrate that with this move, the Court not only effectively restricted the scope of the Fourth Amendment, but helped ensure that its narrow, individualistic view would endure.

To form a backdrop against which this argument can be developed, it is necessary to begin with a few thoughts on judicial activism in general and with respect to criminal procedure rules in particular. In an excellent article, Professor Stephen F. Smith provides a highly useful, ideologically neutral definition of judicial activism, in both its substantive and procedural dimensions.¹⁰ According to Professor Smith, substantive activism is implicated when a court reaches a decision at odds with the text or structure of the constitutional or

⁶ *Rawlings v. Kentucky*, 448 U.S. 98 (1980).

⁷ *Rakas*, 439 U.S. at 139 (“But we think the better analysis forthrightly focuses on the extent of a particular defendant’s rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing.”). I will continue to use the term as a useful shorthand to describe the legal ability of a particular defendant to suppress evidence on the basis of an alleged Fourth Amendment violation.

⁸ See, e.g., Albert W. Alschuler, *Interpersonal Privacy and the Fourth Amendment*, 4 N. ILL. U. L. REV. 1 (1983); Donald L. Doernberg, “*The Right of the People*”: *Reconciling Collective and Individual Interests Under the Fourth Amendment*, 58 N.Y.U. L. REV. 259 (1983); William A. Knox, *Some Thoughts on the Scope of the Fourth Amendment and Standing to Challenge Searches and Seizures*, 40 MO. L. REV. 1 (1975); Richard B. Kuhns, *The Concept of Personal Aggrievement in Fourth Amendment Standing Cases*, 65 IOWA L. REV. 493 (1980); Ira Mickenberg, *Fourth Amendment Standing After Rakas v. Illinois: From Property to Privacy and Back*, 16 NEW ENG. L. REV. 197 (1981); Eulis Simien, Jr., *The Interrelationship of the Scope of the Fourth Amendment and Standing to Object to Unreasonable Searches*, 41 ARK. L. REV. 487 (1988); Christopher Slobogin, *Capacity to Contest a Search and Seizure: The Passing of Old Rules and Some Suggestions for New Ones*, 18 AM. CRIM. L. REV. 387 (1981); Richard A. Williamson, *Fourth Amendment Standing and Expectations of Privacy: Rakas v. Illinois and New Directions for Some Old Concepts*, 31 U. FLA. L. REV. 831 (1979).

⁹ But see Kuhns, *supra* note 8, at 539-51, for a thorough and insightful discussion of the abolition of standing as an independent inquiry.

¹⁰ Stephen F. Smith, *Activism as Restraint: Lessons from Criminal Procedure*, 80 TEX. L. REV. 1057 (2002).

statutory provision being adjudicated, when a court overrules precedent without proper justification under relevant stare decisis rules, or when a court distinguishes or limits precedent on tenuous grounds.¹¹ Procedural activism, on the other hand, may be suspected when a court chooses to reach the merits of an issue despite justiciability rules that would (or should) otherwise restrain the court from so doing, or when a court decides more than is necessary to dispose of the case before it.¹²

There is little doubt that the Court's decisions in *Rakas*, *Salvucci*, and *Rawlings* are substantively activist decisions. After all, in the course of these three opinions, the Court *in effect* rewrote the Fourth Amendment by erasing "effects" from the text itself, obliterated several existing standing doctrines, and arguably misread or misapplied prior cases.¹³ Whether these decisions are also procedurally activist is somewhat less clear. Standing is one aspect of justiciability that inhabits two worlds at once: the question of who may raise a claim under a given constitutional or statutory provision is informed by the substance of the relevant provision.¹⁴ I propose that these decisions are procedurally as well as substantively activist—the Court decided more, and less, than was necessary.

So, how activist were the Burger and Rehnquist Courts? When Richard Nixon had (and took) the opportunity to change the composition of the Court with four of his own appointees, including a replacement for Chief Justice Earl Warren, it was widely thought that many of the Warren-era criminal procedure landmarks would not survive.¹⁵ Yet today there is considerable disagreement as to the extent of the Counter-Revolution (if it was).¹⁶ Commentators suggest that "the basic structure of the Warren Court's criminal procedure jurisprudence is firmly 'entrenched.'" ¹⁷ The post-Warren Courts overruled "surprisingly few"¹⁸ of the Warren Court's criminal procedure decisions, and, in fact, in *Dickerson v. United States*,¹⁹ not only did Chief Justice Rehnquist, in his opinion for the Court, not overrule the (then) highly controversial *Miranda v.*

¹¹ *Id.* at 1089.

¹² *Id.* at 1093-94.

¹³ See discussion *infra* Part IV.

¹⁴ See discussion *infra* Part III.

¹⁵ The Warren Court's criminal procedure jurisprudence is commonly referred to as the "Criminal Procedure Revolution," as during the tenure of Chief Justice Warren, the rights of criminal defendants were significantly expanded. Some scholars mark the start of the Revolution as the Court's decision in *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding the Fourth Amendment exclusionary rule applicable to the states through the Fourteenth Amendment).

¹⁶ See generally THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (Vincent Blasi ed., 1983). Professor Smith also uses a variation of Professor Blasi's title as a subsection heading: "The Counterrevolution That Was (And Is)." Smith, *supra* note 10, at 1069.

¹⁷ Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2467 (1996) (quoting Stephen A. Saltzburg, *Foreword: The Flow and Ebb of Constitutional Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151, 208 (1980)).

¹⁸ Smith, *supra* note 10, at 1114.

¹⁹ *Dickerson v. United States*, 530 U.S. 428 (2000) (holding that Congress may not, by statute, govern the admissibility of statements made in the absence of *Miranda* warnings).

Arizona,²⁰ he elevated the *Miranda* rule to constitutional status.²¹ However, by the time *Dickerson* came before the Court, *Miranda* had already been significantly tamed in a variety of ways, and in Justice Rehnquist's own words, "our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling"²²

In fact, this is precisely the source of the disagreement mentioned above: in a variety of criminal procedure contexts, the Burger and Rehnquist Courts left intact the Warren Court's constitutional norms, instead focusing their counter-revolutionary efforts on the consequences for violations of those norms. In an insightful article, Professor Carol Steiker argues that the most dramatic departures from the Warren Court's vision of criminal procedure have occurred at the level of what she terms "decision rules" (rules addressed to the courts), while "conduct rules" (rules addressed to the police, delineating constitutional requirements) have been less prone to attack.²³

Professor Steiker presents an additional descriptive claim as well: that the result of this disparity between decision rules and conduct rules creates an "acoustic separation" between the police and the public, in that the police, through training and work experience, have direct access to the Court's decision rules, while the public, through the media, has access primarily to the conduct rules, which have remained relatively constant.²⁴ Thus, the police have a much more sophisticated view of criminal procedure,²⁵ while the public remains confident that individual rights continue to flourish long after the War-

²⁰ *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that statements made by suspects during the course of custodial interrogations in the absence of certain warnings are inadmissible).

²¹ *Dickerson*, 530 U.S. at 432 ("We hold that *Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves.").

²² *Id.* at 443. For a thorough discussion of the ways in which the impact of *Miranda* has been reduced, see Smith, *supra* note 10, at 1110; Steiker, *supra* note 17, at 2479-85.

²³ Steiker, *supra* note 17, at 2469-70. Professor Steiker adapts these terms from Professor Meir Dan-Cohen, originally by way of Jeremy Bentham. See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 626 (1984) (quoting JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 430 (Wilfrid Harrison ed., Basil Blackwell & Mott, Ltd. 1948) (1776 & 1789)). Professor Steiker points to the proliferation of what she terms "inclusionary rules," which permit the introduction at trial of unconstitutionally derived evidence or uphold convictions based on such evidence. Steiker, *supra* note 17, at 2504-05.

²⁴ Steiker, *supra* note 17, at 2470-71. The term "acoustic separation" is also borrowed from Professor Dan-Cohen. See *supra* note 23.

²⁵ One obvious example of law enforcement's sophistication with respect to the Court's decision rules can be found in *United States v. Payner*, 447 U.S. 727 (1980). In *Payner*, government agents, in a carefully planned operation, unlawfully seized the briefcase of a bank officer in order to view and photograph defendant's bank records, contained in the briefcase. In the subsequent trial, the defendant was convicted of filing a falsified tax return and was, as expected by the agents, in light of recent standing rules, denied standing to suppress the evidence stemming from the search and seizure of the bank officer's briefcase. Doernberg, *supra* note 8, at 291. "[T]he Burger Court's new standing rules . . . have actually encouraged law enforcement officials deliberately to violate fourth amendment principles because they know that the fruits of such violations will not be excluded and will benefit the government's case." *Id.*

ren Court Revolution.²⁶ Professor Steiker rejects the strong purposive account that the Court was not only aware of this separation, but in fact, intended it “as a strategy for ‘bluffing’ the public while essentially winking at the police.”²⁷ However, she posits a more modest purposive account. By this account, a conservative Court, while antagonistic towards the Warren Court’s criminal procedure doctrines, will choose a less dramatic route to alter these doctrines for various reasons, including its perception of its proper judicial role, deference to the rules of stare decisis, and reputational considerations.²⁸

It is with this second, more modest purposive account in mind that I turn to the Fourth Amendment. Maintaining this decision-conduct rule dichotomy, Fourth Amendment scope decisions may also be categorized along three dimensions, the first two of which coincide roughly with conduct-rule decisions and the third with decision-rule decisions: (1) decisions defining the substance of the Amendment,²⁹ (2) decisions delineating the exceptions to the requirements of the Amendment (once it is clear that the Amendment is triggered by the police behavior at issue),³⁰ and (3) decisions that indicate whether or not a remedy is available (once it is clear that the Amendment has been violated).³¹ While it is beyond the scope of this Article to comprehensively categorize the myriad of Supreme Court decisions interpreting the Fourth Amendment, I do hope to provide a simplified, but helpful, framework for analyzing the different avenues by which the Court has narrowed the scope of the Fourth Amend-

²⁶ There are a variety of reasons for the public’s more limited access to decision rules, including the relative complexity of these rules as compared to that of conduct rules, making them more difficult for the public to digest and the media to report.

²⁷ Steiker, *supra* note 17, at 2541.

²⁸ *Id.* at 2542.

²⁹ I refer, for the most part, to decisions defining the core terms such as “searches” and “seizures,” or defining what constitutes “probable cause.” For example, *United States v. Place* defines a search (in the negative) by holding that a canine sniff of a suitcase is not one for Fourth Amendment purposes. 462 U.S. 696 (1983); see also *Cardwell v. Lewis*, 417 U.S. 583 (1974) (examination of paint scrapings from exterior of defendant’s car invades no legitimate expectation of privacy). As an example delineating the contours of a Fourth Amendment seizure, see *Florida v. Bostick*, 501 U.S. 429 (1991), in which the Court held that the encounter between police and a passenger on a bus, in light of all the circumstances, was not a seizure.

³⁰ Most notably, *Terry v. Ohio*, 392 U.S. 1 (1968), relaxed the probable cause standard by requiring a reasonable articulable suspicion to conduct a protective frisk in certain situations. As another example, the Court held, in *South Dakota v. Opperman*, 428 U.S. 364 (1976), that neither probable cause nor a warrant is required when police conduct a nonpretextual inventory search pursuant to established procedures. Decisions pertaining to consent searches and so-called “special needs” searches would also fall into this category. See *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602 (1989) (special needs, beyond normal law enforcement needs, such as the need to investigate railroad accidents to ensure public safety, may justify searches, such as drug testing, without warrant or individualized suspicion); *United States v. Matlock*, 415 U.S. 164 (1974) (consent valid from third party with sufficient relationship to searched premises).

³¹ The paradigmatic case for this category is, of course, *United States v. Leon*, 468 U.S. 897 (1984), establishing the good-faith exception to the exclusionary rule, when officers act in objectively reasonable reliance on a warrant later determined to be lacking in probable cause. Many scholars also see standing decisions as limitations on the availability of the exclusionary rule remedy. See, e.g., Donald Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1 (2001); Knox, *supra* note 8, at 1.

ment's protection and how, in the case of standing, it has increased the durability of its constricted view.³²

If one accepts pre-*Rakas* standing as a category (3) decision rule, acting as a limitation on the availability of the exclusionary rule, and one also accepts Professor Steiker's observation that the Burger and Rehnquist Courts have altered decision rules to a much greater extent than conduct rules, the implications of the elimination of an independent standing inquiry are striking. By merging standing with the substantive Fourth Amendment inquiry, the Court has in effect shifted standing from a decision rule to a conduct rule. Keeping in mind a given Court's awareness of its judicial role, hesitation to overrule major precedents, and reluctance to appear activist or politically motivated, one can predict that post-*Rakas* "standing" doctrine is much more secure from future judicial modification than it otherwise might have been.

In Part II of this Article, I further develop the tension between judicial restraint and activism, and conduct rules versus decision rules, and elaborate on the various pressures that promote constancy in judicial doctrine. In Part III, I discuss traditional notions of standing, primarily in the context of other constitutional provisions, to demonstrate the inconsistency of the Court's standing doctrine. In this discussion, I focus on the Court's third-party standing jurisprudence because the Court has chosen to frame the denial of Fourth Amendment standing in third-party terms, despite the obvious inconsistency of insisting on an individualistic reading of the Amendment for standing purposes in order to limit the application of the decidedly (and purposefully) collective exclusionary remedy.³³ Here, I hope to demonstrate that the doctrine of third-party standing is an inherently policy-laden and flexible one, leading to the argument that if the Court wanted to preserve its narrow view of Fourth Amendment standing against future shifts in policy, it needed to make the doctrinal move it made in *Rakas*, bumping standing up to a level (1) conduct rule status.

In Part IV, I discuss the development of Fourth Amendment standing doctrine, with particular emphasis on the Court's decisions in *Rakas*, *Rawlings*, and *Salvucci*.³⁴ I ask the reader's indulgence in advance, for I have chosen to quote abundantly from the cases, in order to best illustrate the extent to which

³² I wish to point out that, in categorizing Fourth Amendment decisions along these three dimensions, I presume a warrant and probable cause requirement for all searches and seizures, with exceptions thereto, rather than a general reasonableness requirement. I do this for clarity of classification only, without expressing a preference for either construction.

³³ It is precisely the collective, deterrent nature of the exclusionary rule that also permits the Court to limit its application, even when the evidence is being included against a defendant who, by the Court's definition, clearly would have standing to contest the search.

³⁴ Although, in the *United States Reports*, *United States v. Salvucci*, 448 U.S. 83 (1980), appears before *Rawlings v. Kentucky*, 448 U.S. 98 (1980), both were decided on the same day, and I discuss *Rawlings* first because the Court will rely on that decision heavily in crafting its opinion in *Salvucci*. I wish to clarify that this Article is concerned with standing in the context of searches and seizures of *effects* pursuant to those searches. This is not to say that a defendant whose *person*, as opposed to effects, has been unlawfully seized may not contest the legality of the seizure and move to suppress evidence discovered in a search conducted pursuant to the allegedly unlawful seizure of her person. In fact, even though after *Rakas v. Illinois*, 439 U.S. 128 (1978), mere passengers cannot claim a legitimate expectation of privacy in the searched automobile, passengers in an automobile subject to a

the Burger Court's decisions departed from, and at times completely misstated, prior precedent. To ensure, therefore, that I myself am not guilty of doing the same, I prefer the Court's words to my own wherever feasible.

In Part V, I offer a few alternatives to current doctrine, each of which in my view would offer a more attractive approach to Fourth Amendment standing than the one taken by the Court. Finally, in Part VI, I discuss several consequences, theoretical and practical, of the Court's decision to merge standing with the merits of the Fourth Amendment claim, although Justice Rehnquist himself underplayed the potential effects of this approach.³⁵ Perhaps I see more in this doctrinal move than there really is to see. After all, nothing much has changed in standing doctrine since *Rakas*, *Rawlings*, and *Salvucci*, but that might be precisely the point! The actual (as opposed to theoretical) effect of this move may not be fully realized until the ideological composition of the Court changes significantly, or such cases come before the Court that compel it to reconsider its individualistic view of the Fourth Amendment. In the meantime, in its standing decisions, the Court did what I have on occasion done myself: it started the performance in the standing room section, then at intermission, discreetly moved to Center Orchestra.

II. RESTRAINT AS ACTIVISM

The heading for this section is inspired by the title of Professor Smith's article, in which he argues that a Court's activism, in response to a prior Court's activism in the opposite ideological direction, is actually a form of restraint that helps to restore equilibrium to the law.³⁶ As mentioned above, the Burger Court's standing doctrine, as constructed by Justice Rehnquist, was quite activist, although standing rules are generally thought to promote the value of judicial restraint. As will be further discussed in the following Part, standing rules prevent the counter-majoritarian judiciary from encroaching on the prerogative of the political branches to decide questions of wide public significance. In addition, however, standing rules also serve as a restraint on a current Court in relation to future Courts.³⁷ Because future Courts are bound, at least to a degree, by rules of stare decisis, a current Court should refrain from deciding too much or from setting too many precedents, in order to give the law the opportunity to develop over time and to avoid putting a future Court in the

traffic stop are seized for purposes of the Fourth Amendment. *Brendlin v. California*, 127 S. Ct. 2400 (2007).

³⁵ See *Rakas*, 439 U.S. at 139 ("Rigorous application of the principle that the rights secured by this Amendment are personal, in place of a notion of 'standing,' will produce no additional situations in which evidence must be excluded. The inquiry under either approach is the same.").

³⁶ Smith, *supra* note 10, at 1098. Professor Smith calls this type of responsorial activism "reactivism," and while reactivism is an ideologically neutral concept, it is demonstrated by examining the conservative reaction of the Burger and Rehnquist Courts to the activism of the liberal Warren Court. *Id.*

³⁷ Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 304-05 (1979).

uncomfortable position of having to exercise a wholesale repudiation of doctrines with which it strongly disagrees.³⁸

There are, of course, benefits to adhering to stare decisis rules, including expediency and stability of doctrine, and long-standing precedents have often generated significant reliance interests that the Court may be reluctant to ignore, even if it feels those precedents were incorrectly decided. In fact, the Rehnquist Court, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,³⁹ stated that “a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.”⁴⁰ The types of special reasons that the Rehnquist Court has accepted as justification for overruling precedent have tended to be policy-oriented, for example, finding that a precedent has proved unworkable due to subsequent factual developments, rather than finding (or acknowledging) error in the Court’s prior interpretation of the Constitution, resulting in a more “Court-centered than Constitution-centered” vision of constitutional law.⁴¹

In addition to stare decisis rules, Professor Akhil Amar describes other subtle pressures at work that further insulate precedents from future assault, whether correctly decided or not. First, the Court views itself as a continuous entity⁴²: “Justices casually refer to what ‘we’ the Court decided a century ago. Thus, a later Court that rejects an earlier ‘proposal’ must admit that ‘we’ made a mistake.”⁴³ This, of course, is difficult to admit, especially when the integrity of the Court as an institution is at stake! New appointees, who often, especially recently, have been appointed from the lower federal courts,⁴⁴ may feel obliged to defer to the judgment of their more senior colleagues. As they gain seniority, the case law increasingly reflects their input, and even if they question their earlier votes, it may be just as hard for the individual Justices to admit that “I” was wrong, as it is for the Court as a whole to admit that “we” were wrong.⁴⁵

Professor Amar’s account of the constraints upon Justices when revisiting precedent fits well with Professor Steiker’s observation, discussed earlier, that the Burger Court waged its Counter-Revolution on the Warren Court’s precedents by altering decision rules (rules addressed to courts, such as those dealing

³⁸ *Id.* When a Court overrules too many precedents, it risks being perceived as activist, and the integrity of the Court may be called into question. Commentators have noted the number of precedents the Warren Court overruled during the Criminal Procedure Revolution. See Smith, *supra* note 10, at 1069. An additional concern, however, is that, especially in the context of criminal procedure, the Court’s major decisions tend to generate an extensive body of doctrine, so Courts are all the more reluctant to pull the thread that may unravel the entire fabric. See *id.* at 1113.

³⁹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); see also Akhil Reed Amar, *The Supreme Court 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 81 (2000).

⁴⁰ *Casey*, 505 U.S. at 864.

⁴¹ Amar, *supra* note 39, at 82.

⁴² Article III of the Constitution envisions a continuous body, as Justices are appointed for life, and thus, the face of the Court changes gradually, rather than all at once every set number of years, as is the case with the political branches. *Id.* at 40.

⁴³ *Id.*

⁴⁴ While serving on the lower courts, judges are, of course, bound to follow Supreme Court precedent. See *id.* at 88.

⁴⁵ *Id.*

with the admission of evidence) more extensively than conduct rules (rules addressed to the police, delineating the parameters of constitutionally acceptable conduct), which are more accessible to the public.⁴⁶ Because of their high public visibility, the concerns for reputational harm outlined above will be magnified in the context of conduct rules, and it logically follows that a given Court would be more reluctant to overrule these types of decisions.⁴⁷

Although Professor Steiker notes that this preference for altering decision rules while leaving the doctrine more or less intact is somewhat less pronounced in the post-Warren Courts' Fourth Amendment jurisprudence when compared to that of the Fifth and Sixth Amendments, she maintains that the decision rule departures are nonetheless more extreme.⁴⁸ The Burger and Rehnquist Courts did indeed alter the Warren Court's conduct rules (and not always in ways that are accommodating to law enforcement).⁴⁹ The post-Warren Courts narrowed the scope of Fourth Amendment protection by their definitions of searches,⁵⁰ seizures,⁵¹ and consent,⁵² and with the proliferation of "special needs" exceptions.⁵³ Recalling the classification model I sketched out in Part I,⁵⁴ those decisions defining searches and seizures, and thus the substantive reach of the Fourth Amendment, would be placed in category (1), while those decisions defining consent and characterizing special needs would be placed in category (2), as they delineate exceptions to those substantive requirements.

We turn now to decision rules, which would be placed in category (3), as this species of rule governs the availability and scope of what is considered virtually the only remedy for a Fourth amendment violation: the exclusionary rule. Relying ever more exclusively on its deterrent rationale, the post-Warren Courts propagated a host of exceptions to the exclusionary rule, including, most significantly, the "good-faith" exception, when a search or seizure is conducted

⁴⁶ See *supra* text accompanying notes 23-28.

⁴⁷ Professor Smith, however, observes that the particular makeup of the Warren Court, consisting largely of individuals with considerable political experience, may have contributed to the apparent ease with which that Court overruled so many prior precedents. Smith, *supra* note 10, at 1104 n.188.

⁴⁸ Steiker, *supra* note 17, at 2503.

⁴⁹ See *id.* at 2485-2503 for an excellent analysis of the various doctrinal departures from the Warren Court's Fourth Amendment jurisprudence, including a discussion of the ways in which the Warren Court's own precedents set the stage for these departures. It is interesting to note the various ways in which the post-Warren Courts actually bolstered the warrant requirement.

⁵⁰ See, e.g., *California v. Greenwood*, 486 U.S. 35 (1988) (no legitimate expectation of privacy in curbside garbage left out for collection); *California v. Ciraolo*, 476 U.S. 207 (1986) (no Fourth Amendment search when officers fly over and photograph fenced back yard from navigable airspace); *Smith v. Maryland*, 442 U.S. 735 (1979) (no legitimate expectation of privacy in phone numbers dialed and recorded by a "pen register").

⁵¹ See *Florida v. Bostick*, 501 U.S. 429 (1991) (bus sweep not a seizure).

⁵² See *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (consent to search valid even if consenting individual unaware that he may withhold such consent).

⁵³ See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (holding that school officials conducting searches of students do not require warrants or probable cause); see also *supra* text accompanying note 30.

⁵⁴ See *supra* notes 29-32 and accompanying text.

in good-faith reliance on what is eventually deemed to be an invalid warrant.⁵⁵ In addition to the good-faith exception, the Burger and Rehnquist Courts also narrowed the conception of what is considered a “fruit” of an unlawful search or seizure,⁵⁶ while expanding the permitted uses of unlawfully obtained evidence to impeach a defendant at trial.⁵⁷

Paradoxically, these exceptions to the exclusionary rule are all justified by the Court’s reasoning that excluding reliable evidence in these situations will either fail to promote the rule’s deterrent purpose or will deter police misconduct only minimally, especially when balanced against society’s interest in punishing obviously guilty defendants.⁵⁸ On the other hand, however, in formulating its standing doctrine, the Burger Court espoused an individualistic, personal-right view of the Fourth Amendment that is completely at odds with the deterrent purpose of the exclusionary rule.⁵⁹ While I do not intend in this Article to attack or defend the exclusionary rule,⁶⁰ I would argue that the Court’s own view of the rule as something less than a true remedy meant to compensate the victim of a violation, and more (or exclusively) for purposes of deterring future violations, would ordinarily place exclusionary rule decisions at the most risk of being overturned or altered, either by future Courts or, potentially, by Congress. After all, the Court has declined to grant the exclusionary rule the sanctity of constitutional status, although it chose to do so for the *Miranda* rule in *Dickerson*.⁶¹ What has been noted by many scholars, however, is that despite the exclusionary rule’s non-constitutional stature, concern with its “costs”⁶² seems to be the driving force behind most of the Court’s substantive scope decisions, and these, as we shall see, are not so easily modified. In Justice White’s words: “If the Court is troubled by the practical impact of the exclusionary rule, it should face the issue of that rule’s continued validity

⁵⁵ *United States v. Leon*, 468 U.S. 897 (1984).

⁵⁶ *See, e.g., Murray v. United States*, 487 U.S. 533 (1988) (evidence not excluded if it can be shown to be derived from a source independent of the illegal search); *Nix v. Williams*, 467 U.S. 431 (1984) (evidence not excluded if it would have been inevitably discovered).

⁵⁷ *See United States v. Havens*, 446 U.S. 620 (1980) (illegally seized evidence may be used to impeach defendant’s statements, elicited on cross-examination, after general denial of guilt on direct examination).

⁵⁸ It is, however, certainly conceivable that the above exceptions to the exclusionary rule will actually provide incentive to officers to violate the Fourth Amendment.

⁵⁹ Kuhns, *supra* note 8, at 501 (“[T]he standing requirement . . . necessarily undermines the rule’s regulatory objectives.”); Simien, *supra* note 8, at 532 (“The personal nature of the standing inquiry and the deterrence rationale of the exclusionary rule are fundamentally at war with each other. . . . As these concepts serve different masters, they should be maintained as separate as possible in the Court’s analysis.”); *see also* Sherry F. Colb, *Standing Room Only: Why Fourth Amendment Exclusion and Standing Can No Longer Logically Coexist*, 28 *CARDOZO L. REV.* 1663, 1666-67 (2007) (“I propose that standing doctrine is not simply *in tension* with the goals of the exclusionary rule, but that, properly applied with the *ex post* perspective that defines Fourth Amendment standing, the doctrine altogether *precludes* the assertion of Fourth Amendment rights by any defendant bringing a suppression motion at his or her criminal trial.”).

⁶⁰ For an excellent exposition of the various arguments on either side of the exclusionary rule fence, *see* Dripps, *supra* note 31, at 5-22.

⁶¹ *Dickerson v. United States*, 530 U.S. 428, 436 (2000); *see supra* note 21.

⁶² *See Rakas v. Illinois*, 439 U.S. 128, 137 (1978) (“Each time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights.”).

squarely instead of distorting other doctrines in an attempt to reach what are perceived as the correct results in specific cases.”⁶³

If standing doctrine is viewed as an exception to the exclusionary rule, then the Burger Court’s move to eliminate an independent standing inquiry by folding it into the substantive Fourth Amendment determination is, to my mind, a fascinating one. After *Rakas*, standing doctrine has been elevated from a level (3) decision-rule status to a level (1) conduct-rule status, potentially insulating it from alteration for all the reasons already noted. While, as will be discussed in the next Part, it is entirely proper to view standing in relation to the substantive scope of the Fourth Amendment (or whichever statutory or constitutional provision is at issue in a given case),⁶⁴ the standing inquiry should not be completely substituted for a decision on the merits. Under such a construction, standing is asked to do too much, and, in the context of the Fourth Amendment, too little is asked of substance in return, as the police conduct that uncovered the evidence is potentially left completely unexamined.⁶⁵ Arguably, in the Burger Court’s standing decisions, from the perspective of the police, the Fourth Amendment was violated.⁶⁶ The question becomes one of whose Fourth Amendment rights were violated, from the perspective of the defendant, or rather, from the Court’s perspective of the defendant’s perspective.⁶⁷

It seems curious, then, that a rule that does not address police conduct would essentially become a conduct rule. As we shall see, this has some troubling implications. Perhaps, however, the trouble has less to do with the structure of standing than with the test that, after *Rakas*, *Salvucci*, and *Rawlings*, defines both a search and whether a defendant has standing to suppress evidence gathered as a result of an allegedly unlawful search and seizure: the “legitimate expectation of privacy” test.⁶⁸ Of all the terms contained in the

⁶³ *Id.* at 157 (White, J., dissenting).

⁶⁴ See discussion *infra* Part III.

⁶⁵ See discussion *infra* Part VI.

⁶⁶ See Colb, *supra* note 59, at 1665-73. Professor Sherry Colb argues that substantive violations of the Fourth Amendment are assessed on the basis of the police officer’s *ex ante* perspective. For example, whether there was probable cause for a search depends on what the officer knew at the time of the search. However, the standing determination hinges on the defendant’s *ex post* perspective, and the factual reality of the defendant’s relationship to the location searched, regardless of what the police officer believed that relationship to be. *Id.*

⁶⁷ *Id.*

⁶⁸ Professor Amar contrasts the *United States Reports*, “filled with a mindnumbing array of formulas, tests, prongs, and tiers, often phrased in highly abstract legal jargon . . . that insulates and anesthetizes” with the brevity and concreteness of the document the Court seeks to interpret—the Constitution. Amar, *supra* note 39, at 46. Professor Amar continues, “But often doctrine-speak becomes an end in itself, displacing candid discussion of substantive constitutional values and distancing the people from our supreme law.” *Id.* The “legitimate expectation of privacy” is an example of just such a formula, which, through the Court’s treatment, has become far removed from the societal expectations it purports to represent. I have argued elsewhere that, in the context of voluntariness determinations for confessions, the “totality of circumstances” test has also become “jargon,” and rather than engaging in a meaningful review, as the name of the test urges, courts “use the totality test much like a checklist, maneuvering through and balancing the factors on one or the other side of the voluntariness scale, without careful review of any one factor to determine its actual coercive effect on the defendant, to arrive at the decision they wish to reach.” Nadia Soree, Com-

Fourth Amendment, the term “search” lends itself the most easily to definition and redefinition. Ironically, it was the Warren Court’s expansive vision of the Fourth Amendment that led to the “legitimate expectation of privacy” test⁶⁹ that in turn provided conservative Courts with an ideally malleable standard by which to define a search.⁷⁰ That standard, it turns out, was also well suited to the Burger Court’s undertaking of limiting the class of persons permitted to raise a Fourth Amendment claim to suppress unconstitutionally obtained evidence. Before turning to a detailed discussion of Fourth Amendment standing, the next Part provides an overview of general standing principles that inform the discussion of standing in the Fourth Amendment context to follow.

III. STANDING OUTSIDE THE FOURTH AMENDMENT

A. *An Overview*

Traditionally understood, the concept of standing, as one of the factors determining justiciability, hinges on the ability of a given litigant to invoke the powers of the court for relief.⁷¹ The first hurdle a potential litigant must overcome has its source in Article III of the Constitution, which limits the role of the federal courts to adjudicating “cases” and “controversies.”⁷² This limitation has been interpreted to require of a litigant, as a constitutionally mandated minimum, a showing that “he has suffered ‘injury in fact’ or ‘distinct and palpable’ injury, that his injury has been caused by the conduct complained of, and that his injury is fairly redressable by the remedy sought.”⁷³

ment, *When the Innocent Speak: False Confessions, Constitutional Safeguards, and the Role of Expert Testimony*, 32 AM. J. CRIM. L. 191, 206 (2005). In a like manner, in the Court’s hands, the “legitimate expectation of privacy” test has generated hierarchies of privacy interests and holders, without any careful analysis of what the actual expectations, of either defendants or society, may be.

⁶⁹ The “legitimate expectation of privacy” test was born out of Justice Harlan’s concurring opinion in *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (“My understanding of the rule . . . is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”).

⁷⁰ Reframing the interest at stake in terms of reasonable expectations of privacy without offering any guidance as to reasonableness created a “normative vacuum for later Courts to fill.” Steiker, *supra* note 17, at 2495. However, the *Katz* formulation was meant to supplement traditional property interests and was not meant to completely replace them. Alschuler, *supra* note 8, at 7 n.12 (“Much of the trepidation that scholars have voiced concerning *Katz* may stem from a failure to recognize that *Katz* supplemented earlier visions of [F]ourth [A]mendment protections but did not supplant them.”); *see also* Simien, *supra* note 8, at 490.

⁷¹ *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968).

⁷² U.S. CONST. art. III, § 2, cl. 1. Related to the requirement of standing, the broader doctrine of justiciability prohibits the federal courts from determining political questions, issuing advisory opinions, and adjudicating issues that have been “mooted by subsequent developments.” *Flast*, 392 U.S. at 95.

⁷³ William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222 (1988) (footnotes omitted) (citing, e.g., *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26 (1976); *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152 (1970)).

The interests advanced by these requirements may be “numbingly familiar”⁷⁴ but bear repeating nonetheless. It is presumed that truly adverse parties will litigate the case effectively and vigorously, illuminating the arguments for the court, and ensuring the court’s awareness of the concrete repercussions of its decision.⁷⁵ Additionally, the case or controversy requirement seeks to prevent the counter-majoritarian judiciary from encroaching on the political branches or from issuing advisory opinions.⁷⁶

However, even if a litigant has met her Article III burden, which any defendant seeking to suppress unlawfully obtained evidence arguably has, she must meet additional, judicially created prudential standing requirements as well.⁷⁷ She must show, for example, that her injury is personal as to her, and not one suffered equally by large numbers of the citizenry, as a matter of judicial self-restraint in avoiding “be[ing] called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions.”⁷⁸ Or, she *may*, and I emphasize the word “may” to demonstrate the Court’s flexibility on this matter, be required to

⁷⁴ *Id.*

⁷⁵ *Id.*; see *Baker v. Carr*, 369 U.S. 186, 204 (1962) (“Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions?”).

⁷⁶ Fletcher, *supra* note 73, at 222. The standing requirement has generally been seen as a limitation on the Court but was used by Justice Marshall to justify his argument, in *Marbury v. Madison*, 5 U.S. 137 (1803), for the propriety of judicial review. John C. Reitz, *Standing to Raise Constitutional Issues*, 50 AM. J. COMP. L. 437, 441 (2002) (“In that 1803 decision, Justice Marshall justified the exercise of judicial review as a power the courts assert only reluctantly, pursuant to their obligation under Article III to decide concrete ‘cases and controversies’ according to the law, including the Constitution as the supreme law of the land.”). However, the Court is increasingly moving from a paradigm in which constitutional adjudication stems from the Court’s function of protecting individual rights, to one in which “[j]udicial protection of private rights has now become a by-product of—albeit an important one—not the justification for constitutional adjudication.” Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 280 (1984); see also Fletcher, *supra* note 73, at 227 (“[F]ederal litigation in the 1960’s and 1970’s increasingly involved attempts to establish and enforce public, often constitutional, values by litigants who were not individually affected by the conduct of which they complained in any way markedly different from most of the population.”).

⁷⁷ Prudential standing requirements are rooted in policy, and in fact, “there are at work in the standing doctrine the many subtle pressures which tend to cause policy considerations to blend into constitutional limitations.” *Flast*, 392 U.S. at 99.

⁷⁸ *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (citing *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974)). In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), however, the Court rather clearly stated that the ban against recognizing standing for generalized grievances has its foundation in the requirements of Article III, rather than on the basis of prudential standing.

[A] plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.

Id. at 573-74. Under either understanding, the criminal defendant seeking to suppress evidence at her trial clearly suffers an injury that is particularized and unique from a generalized injury suffered by the citizenry when the government violates the Fourth Amendment.

show that her injury “belongs” to her and not to a third party.⁷⁹ Justice Douglas, writing for the Court in *Ass’n of Data Processing Service Organizations v. Camp*,⁸⁰ formulated a two-part test that combines elements of Article III and prudential standing: in order for a plaintiff to have standing, she must allege “injury in fact” as well as that “the interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”⁸¹

Of course, determining the “zone of interests” of a given provision is a normative, and extremely policy-laden, endeavor, and the Court’s standing doctrine has been widely criticized as inconsistent, to put it mildly.⁸² As Professor John Reitz states, “The concern is that judges may manipulate the accordion folds of standing doctrine to open or shut the courthouse door based on their views on the merits.”⁸³ That concern, as will be demonstrated, is well founded in the context of Fourth Amendment standing: not only did the Court shut the courthouse door, but locked it and hid the key.

Professor William Fletcher addresses the perceived incoherence of current standing doctrine, proposing that courts

abandon the attempt to capture the question of who should be able to enforce legal rights in a single formula, abandon the idea that standing is a preliminary jurisdictional issue, and abandon the idea that Article III requires a showing of “injury in fact.” Instead, standing should simply be a question on the merits of plaintiff’s claim. . . . If a duty is constitutional, the constitutional clause should be seen not only as the source of the duty, but also as the primary description of those entitled to enforce it.⁸⁴

According to this account of standing, injury cannot be defined in a non-normative way,⁸⁵ but must be determined within the context of the particular provision against which the claim is being litigated. As for causation and redressability, which are two sides of the same coin, these, too, are functions of the merits of the claim, completely dependent on the court’s definition of the injury, which is, again, a normative endeavor.⁸⁶

⁷⁹ Although this is the traditional rule, litigants are increasingly permitted to raise the rights of parties not before the court. Monaghan, *supra* note 76, at 278.

⁸⁰ *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970).

⁸¹ *Id.* at 152-53. Professor Fletcher notes that “[m]ore damage to the intellectual structure of the law of standing can be traced to *Data Processing* than to any other single decision,” in that this was the Court’s first decision to announce the “injury in fact” requirement, and that, since this decision, the Court has treated “injury in fact” as a component of the Article III requirement. Fletcher, *supra* note 73, at 229-30.

⁸² See, e.g., Fletcher, *supra* note 73, at 221 (“The structure of standing law in the federal courts has long been criticized as incoherent.”).

⁸³ Reitz, *supra* note 76, at 444. Professor Reitz, however, while not “absolv[ing]” the courts of this charge, does allow that trying to maintain consistency, while leaving the door open to significant private enforcement of constitutional rights, will naturally involve “difficult and inconsistent line drawing.” *Id.*

⁸⁴ Fletcher, *supra* note 73, at 223-24 (footnote omitted).

⁸⁵ *Id.* A plaintiff will show injury in fact any time the allegations in her complaint are proved. The question is whether the injury is one that the court is willing to recognize, or, put differently, whether the provision in question has conferred a cause of action on the plaintiff.

⁸⁶ See *id.* at 241-42 (discussing the true nature of the injury in *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), in which the Court denied standing to a mother of an illegitimate child

Justice Rehnquist, at least in the context of the Fourth Amendment, has chosen to see standing in precisely this light. While this analysis is appealing, and certainly correct insofar as the assertion that the injury is a function of the scope of the constitutional right (much as the remedy is also), it is problematic in the Fourth Amendment context. It is especially so in light of the requirement of a legitimate expectation of privacy with respect to the place searched as the exclusive test for determining whether the defendant seeking to exclude evidence obtained through an allegedly unlawful search has suffered a Fourth Amendment injury.⁸⁷ Thus, the fundamental point of contention is how the Court has chosen to define the Fourth Amendment injury. However, when the Court uses standing, in particular the denial of standing, to define the injury and, consequently, the right, the Court takes a bottom-up approach that promotes a narrow, stagnant interpretation of the right at stake. Before turning to Fourth Amendment standing in greater detail, however, it is helpful to briefly examine the flexibility and inconsistency of standing doctrine, particularly in the contexts of taxpayer suits and third-party claims, to illustrate that “factual” determinations of injury are in fact often normative judgments infused with policy considerations and subjective interpretations.

B. *Taxpayers and Other Suits*

In 1923, the Court, in *Frothingham v. Mellon*,⁸⁸ denied standing to a taxpayer claiming a due process takings violation where Congress, through the Maternity Act of 1921, authorized a program of federal grants for states implementing measures to reduce infant and maternal mortality rates.⁸⁹ In reaching its decision that the taxpayer failed to show such a direct injury as would confer standing, the Court commented on the “comparatively minute and indeterminable” interest of one taxpayer among millions when weighed against the federal treasury.⁹⁰ In addition, the Court mentioned its concern that allowing such a suit could possibly inundate the courts with countless such challenges to any federal spending program that meets with opposition.⁹¹

More than forty years later, the Court had the opportunity to reexamine a “barrier . . . erected against federal taxpayer suits [that had] never been breached” to that point.⁹² The Court, in *Flast v. Cohen*, discussed the confu-

seeking to enjoin the State of Texas from discriminatory non-prosecution of child support laws (delinquent fathers of illegitimate children were routinely not being prosecuted) because a favorable disposition to her case was not likely to actually resolve what the Court perceived to be her injury—the fact that she had not received support payments from her child’s father). Professor Fletcher argues that “[t]he critical question is not what Linda R.S. ‘really’ wanted. Rather the question is whether she has a right under the equal protection clause to force the prosecutor to stop discriminating between the fathers of legitimate and illegitimate children.” *Id.* at 242.

⁸⁷ See discussion *infra* Part IV.

⁸⁸ *Frothingham v. Mellon*, 262 U.S. 447 (1923).

⁸⁹ *Id.* at 479-80.

⁹⁰ *Id.* at 486-87 (comparing the much greater proportional interest of a municipal taxpayer to a smaller, municipal treasury).

⁹¹ *Id.* at 487 (“If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same . . .”).

⁹² *Flast v. Cohen*, 392 U.S. 83, 92 (1968).

sion and controversy generated by the *Frothingham* decision because of the uncertainty of the underlying source of its reasoning.⁹³ While concerns of the judiciary's interference with the acts of another co-equal branch of government are clearly informed by constitutional limitations inherent in the doctrine of separation of powers, the Court's apparent concern with the size of a taxpayer's tax bill and the fear of excessive litigation "suggest[] pure policy considerations."⁹⁴ The *Flast* Court noted that the factors influencing the Court's decision in 1923 were in some ways no longer applicable in 1968.⁹⁵ At the very least, the Court reasoned that the "very existence [of the debate over *Frothingham*] suggests that [it] should undertake a fresh examination of the limitations upon standing to sue in a federal court and the application of those limitations to taxpayer suits."⁹⁶ The Court held that Article III presented no "absolute bar" to federal taxpayers challenging the constitutionality of federal taxation or spending programs.⁹⁷ However, in order to establish the requisite Article III concrete adverseness, the party seeking standing must establish a "logical nexus between the status asserted and the claim sought to be adjudicated."⁹⁸

Mrs. *Flast* was granted standing to pursue her claim, yet Mrs. *Frothingham* was denied her opportunity to be heard. Was the "injury in fact" any different? Was the Court's decision really based on a forty-year transformation in policy and procedural considerations? Perhaps. Or was the Court instead making a normative judgment that it was not objectionable to use Mrs. *Frothingham*'s money to support a federal Maternity Act, but on the other hand, using Mrs. *Flast*'s tax dollars to support parochial schools, violating the Establishment Clause, might be?⁹⁹ Thus, depending upon the constitutional violation

⁹³ *Id.*

⁹⁴ *Id.* at 93.

⁹⁵ *Id.* at 94. For example, the Court mentioned as a factor not at issue in 1923, the corporate taxpayer who may have federal tax interest of "hundreds of millions of dollars," and thus, a much greater proportional interest to the federal treasury than to any given municipal treasury. In addition, the Court noted the subsequent development, under the Federal Rules of Civil Procedure, of such devices as joinder and class actions, which would alleviate the fear of excessive burden on the court system from countless suits.

⁹⁶ *Id.*

⁹⁷ *Id.* at 101.

⁹⁸ *Id.* at 102. The Court held that the nexus required of a taxpayer required a two-part inquiry. First, the taxpayer needed to show a relationship between his status and the type of act being challenged. This required a relationship between the status as a taxpayer and the government's action pursuant to its taxing and spending power under Article I. U.S. CONST. art. I, § 8, cl. 1. Second, the taxpayer had to establish a nexus between his status and a specific constitutional violation. Thus, the taxpayer needed to show not only that Congress had exceeded its powers, but that in doing so, Congress exceeded a "specific constitutional limitation[]" on the exercise of its taxing and spending ability, such as implied by the Establishment Clause, U.S. CONST. amend. I. *Flast*, 392 U.S. at 102-03. The Court has reaffirmed the rights of federal taxpayers to challenge expenditures that violate the Establishment Clause, but has limited taxpayer standing to that particular grievance. *Compare* *Bowen v. Kendrick*, 487 U.S. 589 (1988) (taxpayers had standing to raise an Establishment Clause claim with respect to the application of the adolescent Family Life Act), *with* *United States v. Richardson*, 418 U.S. 166 (1974) (taxpayers denied standing to challenge expenditures allegedly violating Article I, Section 9, Clause 7 of the Constitution).

⁹⁹ *See* *Fletcher*, *supra* note 73, at 228 ("Yet the Court granted standing because it sensed, without being able to articulate it fully, that a broad grant of standing was an appropriate mechanism to implement the establishment clause interest at stake.").

claimed, the same “injury in fact” may or may not confer standing upon an individual.

This point is particularly well illustrated by *McGowan v. Maryland*,¹⁰⁰ although not a case involving taxpayer standing. In *McGowan*, several store employees convicted of violating Maryland’s Sunday Closing Laws were denied standing when they claimed these so-called Blue Laws violated their right to free exercise of religion because, as the Court noted, they alleged only economic harm and not that they were in any way denied religious liberty.¹⁰¹

However, the Court found that the employees *did* have standing when alleging that the state laws were contrary to the Establishment Clause,¹⁰² and engaged in an examination of the underlying policy behind the doctrine of “separation of church and state.”¹⁰³ The Court reasoned that had the Framers been simply concerned with preserving individual religious freedom of choice, the employees surely would have lacked standing for the reasons mentioned above.¹⁰⁴ The Court deferred to the “writings of Madison . . . [that] demonstrate that the establishment of a religion was equally feared because of its tendencies to political tyranny and subversion of civil authority.”¹⁰⁵ Once the Court viewed the Establishment Clause of the First Amendment as a regulatory provision, offering protection from a possibly tyrannical government by way of concrete and enforceable limitations rather than a provision establishing individual freedoms, the economic injury suffered by the employees as a result of “the imposition on them of the tenets of the Christian religion” was sufficient to confer standing.¹⁰⁶

As we shall see, the similarities to standing in the Fourth Amendment context are striking. If one sees the Fourth Amendment as a regulatory provision imposing restrictions on the government’s conduct (as the Court apparently does not, or at least no longer does), rather than as a purely personal right, the inquiry, whether couched in terms of standing or substance, would produce entirely different results. However, because the Court has chosen to interpret the Fourth Amendment right as a personal right to privacy and has denied standing to one whose own constitutional rights (in the Court’s view) have not been violated, it is useful to briefly examine the Court’s third-party standing jurisprudence, with particular attention to the flexibility with which the Court applies its self-imposed third-party standing rules.

The rule against allowing standing to press the constitutional claims of third parties stems from broader justiciability concerns and the limitation of the

¹⁰⁰ *McGowan v. Maryland*, 366 U.S. 420 (1961).

¹⁰¹ *Id.* at 429-30. Interestingly, the Court also mentioned that the appellants failed to allege that the religious beliefs of their potential patrons were affected, although the Court went on to say that those whose rights were infringed could effectively assert their own rights. *Id.* This statement indicates that the Court at least contemplated the possibility of third-party standing. Further, the Court noted that the “[a]ppellants present[ed] no weighty countervailing policies here to cause an exception to [its] general principles.” *Id.* at 430. This statement, of course, indicates that prudential standing rules are, ultimately, policy-driven.

¹⁰² U.S. CONST. amend. I.

¹⁰³ *McGowan*, 366 U.S. at 430-31.

¹⁰⁴ *Id.* at 430.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

judiciary not to “anticipate a question of constitutional law in advance of the necessity of deciding it . . . [or] to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.”¹⁰⁷ However, as the Court noted in *United States v. Raines*, the rule against third-party standing is “a rule of practice,” and as such may be subject to exception when “weighty countervailing policies have been and are recognized.”¹⁰⁸

Among the rights deemed sufficiently “weighty” to allow the Court in its discretion to relax its standing rules are the penumbral First Amendment¹⁰⁹ right to privacy and the Fourteenth Amendment right to equal protection.¹¹⁰ Following a line of cases in which the Court has allowed standing to assert the rights of others, it seems that apart from requiring the constitutionally mandated Article III “stake in the outcome,” the Court has exercised some flexibility in defining the factors necessary to allow third-party standing.¹¹¹

For example, in *Griswold v. Connecticut*, the Court granted third-party standing in the context of First Amendment privacy rights, and specifically in the context of married persons and their right to use contraception.¹¹² The appellants, the Executive Director of the Planned Parenthood League of Connecticut and the doctor serving as the Medical Director of its New Haven branch, were convicted as accessories in aiding and abetting the married persons whom they counseled as to contraception and to whom they prescribed a contraceptive device, despite the existence of a criminal statute prohibiting the use of contraception.¹¹³ The Court used this case primarily as a vehicle to expand on the idea that the “specific guarantees in the Bill of Rights have penumbras . . . creat[ing] zones of privacy.”¹¹⁴ To illustrate its point,¹¹⁵ the Court enlisted the aid of the First Amendment with its inherent right of association;¹¹⁶ the Third Amendment, prohibiting the nonconsensual quartering of soldiers during peacetime;¹¹⁷ the Fourth Amendment with its guarantees against unreasonable searches;¹¹⁸ the Fifth Amendment’s Self-Incrimination Clause, which “enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment”;¹¹⁹ and the Ninth

¹⁰⁷ *United States v. Raines*, 362 U.S. 17, 21 (1960).

¹⁰⁸ *Id.* at 22. The Court listed several examples of such “countervailing policies.”

¹⁰⁹ U.S. CONST. amend. I.

¹¹⁰ *Id.* amend. XIV, § 1.

¹¹¹ See *Craig v. Boren*, 429 U.S. 190 (1976); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Barrows v. Jackson*, 346 U.S. 249 (1953); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925). The factors weighed by the Court in deciding whether to allow third-party standing, although discussed to different degrees in the above cases, include the impact of the challenged statute on the rights of the absent parties, the relationship between the party before the court and the absent parties, and whether the absent parties could raise the claim on their own behalf.

¹¹² *Griswold*, 381 U.S. at 481.

¹¹³ *Id.* at 480.

¹¹⁴ *Id.* at 484.

¹¹⁵ See *id.*

¹¹⁶ U.S. CONST. amend. I.

¹¹⁷ *Id.* amend. III.

¹¹⁸ *Id.* amend. IV.

¹¹⁹ *Griswold*, 381 U.S. at 484 (discussing U.S. CONST. amend. V).

Amendment, specifying that certain rights are “retained by the people.”¹²⁰ The Court focused heavily on the Fourth and Fifth Amendments’ guarantees of “protection against all governmental invasions ‘of the sanctity of a man’s home and the privacies of life.’”¹²¹

The Court’s discussion of third-party standing was, in comparison, rather cursory. The Court mentioned the professional relationship between the appellants and the married persons whose rights they assert, noted that the Article III requirements are certainly met by a criminal conviction, and concluded that “[t]he rights of husband and wife, pressed here, are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them.”¹²² However brief its discussion of standing, the Court clearly set forth two factors relevant to the ability of a party to assert the rights of others: the relationship between the parties and the effect of the success or failure of the plaintiff’s claim on the rights of the absent parties.¹²³

Seven years later, in *Eisenstadt v. Baird*, the Court revisited the controversy surrounding the ability of a state to legislate morality.¹²⁴ This time, the defendant had directly violated a statute forbidding the furnishing of contraceptives by anyone other than a physician or pharmacist (pursuant to a valid prescription, of course) to anyone other than a married person, when, during the course of a lecture on contraception at Boston University, he not only exhibited contraceptives, but also gave an unmarried woman a sample.¹²⁵ The Massachusetts Supreme Judicial Court reversed the conviction for exhibiting the contraceptive devices as a violation of the defendant’s First Amendment rights but upheld the conviction for having given away the contraceptive device.¹²⁶

In challenging that conviction, the defendant raised the equal protection claim of unmarried persons without access to contraception.¹²⁷ Again, the Court decided that this situation warranted a relaxation of its self-imposed standing rules.¹²⁸ However, the Court took great pains to assert that the relationship it found only seven years ago to be a crucial predicate to assert stand-

¹²⁰ U.S. CONST. amend. IX.

¹²¹ *Griswold*, 381 U.S. at 484 (quoting extensively from *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

¹²² *Id.* at 481 (citing *Barrows v. Jackson*, 346 U.S. 249 (1953); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *Truax v. Raich*, 239 U.S. 33 (1915)).

¹²³ *Griswold* represents the high water mark for the requirement of a specific relationship between the claimant and the absent party, as in this case the relationship is of the most personal, confidential nature of a doctor and his patient. While in the preceding cases, there had always been an underlying requirement that the absent party’s rights be adversely affected should the claim not go forward, this requirement was most clearly stated here. However, no mention was made of the ability of the absent parties to pursue their own claims. The second factor, the effect on the absent rightholder, presents the biggest obstacle to framing a Fourth Amendment suppression hearing in third-party standing terms, depending, of course, on how the Fourth Amendment interest is defined. *See infra* text accompanying notes 260-61.

¹²⁴ *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

¹²⁵ *Id.* at 440-42.

¹²⁶ *Commonwealth v. Baird*, 247 N.E.2d 574 (Mass. 1969).

¹²⁷ *Eisenstadt*, 405 U.S. at 443.

¹²⁸ *Id.* at 444.

ing, such as between a doctor and patient or accessory and principal, was no longer necessary to assert another's rights.¹²⁹ In order to step away a bit (but careful not to step back too far) from the extent of relationship required in *Griswold v. Connecticut*,¹³⁰ the Court framed the relationship between the parties as "not simply the fortuitous connection between a vendor and potential vendees, but the relationship between one who acted to protect the rights of a minority and the minority itself."¹³¹ Once again, standing "rules" gave way to the Court's normative judgment as to what can and cannot be properly legislated.

One final demonstration of the Court's less than rigid approach to third-party standing can be seen in its willingness to relax the rules, not only for "weighty" policy considerations, but as a matter of judicial convenience. In a challenge to the constitutionality of a statute proscribing the sale of "nonintoxicating" (3.2%) beer to males under the age of twenty-one and females under the age of eighteen, the vendor of such beer was given standing to assert the equal protection claim of males between the ages of eighteen and twenty in seeking declaratory and injunctive relief from the challenged statute.¹³² Although the vendor had not been convicted nor even arrested, the fact that she was "subject to sanctions and loss of license for violation of the statute," on the one hand, or economic injury for compliance on the other, gave her the requisite Article III concreteness.¹³³

A major factor considered by the Court in allowing the vendor standing was the fact that her standing had not been challenged below and the constitutional claim had already been considered.¹³⁴ The Court reasoned that the main purpose to deny third-party standing was to "minimize unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative."¹³⁵ Because the court below had already considered the constitutional challenge, the Court stated, "In such circumstances, a decision by us to forgo consideration of the constitutional merits in order to await the initiation of a new challenge to the statute by injured third parties would be impermissibly to foster repetitive and time-consuming litigation under the guise of caution and prudence."¹³⁶ Thus, the primary consideration in granting standing in this case was one of convenience and judicial expediency. In addition, the Court mentioned that the statute's prohibition on the sale of the beer "leav[es] [the] vendor as the obvious claimant."¹³⁷

¹²⁹ See *id.* at 445.

¹³⁰ *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965).

¹³¹ *Eisenstadt*, 405 U.S. at 445.

¹³² *Craig v. Boren*, 429 U.S. 190, 191-93 (1976).

¹³³ *Id.* at 193-94.

¹³⁴ *Id.*

¹³⁵ *Id.* at 193.

¹³⁶ *Id.* at 193-94.

¹³⁷ *Id.* at 197. The Court compared this statute to the one challenged in *Eisenstadt v. Baird*, 405 U.S. 438 (1972). However, in *Eisenstadt*, the Court had stated unequivocally that without the threat of conviction, the absent unmarried persons had no forum in which to vindicate their rights. *Id.* at 446. Here, the Court backed down from this assertion, claiming only that the defendant in *Eisenstadt* was "the least awkward challenger" to the statute. *Craig*, 429 U.S. at 197. It is of interest to note that, at the onset of this case, one of the plaintiffs seeking

In a vigorous and colorful dissent, Chief Justice Burger attacked the Court's apparent easing of the requirement of some specific relationship between the litigant and the absent right-holder, remarking, "I cannot agree that appellant . . . has standing arising from her status as a saloonkeeper to assert the constitutional rights of her customers."¹³⁸ He went on to mention that this case fit into none of the exceptions to the rule against third-party standing, and that "there [was] here no barrier whatever to Oklahoma males 18-20 years of age asserting, in an appropriate forum, any constitutional rights they may claim to purchase 3.2% beer."¹³⁹ However, the crux of his argument rested on his contention that "[i]t borders on the ludicrous to draw a parallel between a vendor of beer and the intimate professional physician-patient relationship which undergirded the relaxation of standing rules in [*Griswold v. Connecticut*]."¹⁴⁰ Having seen the flexibility and inconsistency of current standing doctrine, and the relative ease with which the Court can maneuver within its own rules and limitations to reach a particular substantive decision, we now turn to the Fourth Amendment.

IV. FOURTH AMENDMENT STANDING: FOURTH AMENDMENT NOTWITHSTANDING

A. *Standing in a Pre-Rakas World*¹⁴¹

The Supreme Court first broached the issue of Fourth Amendment standing for purposes of analogy to certain sections of the Federal Communications Act of 1934¹⁴² and held that those not parties to conversations that were illegally intercepted in violation of the Act lacked standing to object to the use of evidence and testimony gained as fruit of those conversations.¹⁴³ In making its analogy, the Court stated, "While this court has never been called upon to

declaratory and injunctive relief was indeed one of the adversely affected males, who subsequently lost his standing when the onset of time mooted his claim upon his twenty-first birthday. *Id.* at 192.

¹³⁸ *Craig*, 429 U.S. at 215 (Burger, C.J., dissenting).

¹³⁹ *Id.* at 216 (noting the fact that plaintiff Craig had indeed litigated his rights until his twenty-first birthday prevented him from continuing in the suit).

¹⁴⁰ *Id.* (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)). The Chief Justice implied that even though the relationship factor was a bit more relaxed in *Eisenstadt*, 405 U.S. at 445, the Court there was careful to limit the exception to the third-party standing rule to situations in which the relationship between the litigant and the third party was based on something more than a mere vendor-potential vendee relationship, but between one who championed the rights of some minority and that minority.

¹⁴¹ I begin my discussion with the Supreme Court's consideration of Fourth Amendment standing. For a discussion of Fourth Amendment standing in the lower federal courts, see Kuhns, *supra* note 8, at 493-94. Professor Kuhns notes that "[a]lmost immediately" after the Supreme Court's decision in *Weeks v. United States*, 232 U.S. 383 (1914), establishing the exclusionary rule for federal criminal prosecutions, lower federal courts responded by developing standing requirements to limit the rule's application. Kuhns, *supra* note 8, at 493.

¹⁴² 47 U.S.C. §§ 501, 605 (2000). Very broadly, the relevant portions of the Act prohibit the interception of communications, and any revelation of the information or contents therein, and additionally forbid any person who has received such information to divulge or use it for his or another's benefit.

¹⁴³ *Goldstein v. United States*, 316 U.S. 114 (1942).

decide the point, the federal courts in numerous cases, and with unanimity, have denied standing to one not the victim of an unconstitutional search and seizure to object to the introduction in evidence of that which was seized.”¹⁴⁴

The dissent argued, however, that although the analogy to the Fourth Amendment was imperfect,¹⁴⁵ the lower court decisions relied on by the majority were “hard to square with [the] statements by Mr. Justice Holmes”¹⁴⁶ in *Silverthorne Lumber Co. v. United States*,¹⁴⁷ continuing: “It is evident that to allow the Government to use evidence obtained in violation of the Fourth Amendment against parties not victims of the unconstitutional search and seizure is to allow the Government to profit by its wrong and to reduce in large measure the protection of the Amendment.”¹⁴⁸

Two years before Earl Warren was appointed as Chief Justice by President Eisenhower, the Court had occasion to consider the issue of Fourth Amendment standing directly. In *United States v. Jeffers*,¹⁴⁹ the Court held that the defendant had standing to suppress the evidence of contraband narcotics seized in conjunction with a search of a hotel room registered to the defendant’s two aunts, based on his possessory interest in the contraband.¹⁵⁰ The government had conceded that the search of a hotel room was illegal as to the registered occupants of that room but argued that the seizure of the defendant’s narcotics did not violate any privacy right as to him.¹⁵¹ The Court firmly disagreed that the search and the seizure could be so separated, stating that “they are bound together by one sole purpose—to locate and seize the narcotics of respondent. The search and seizure are, therefore, incapable of being untied.”¹⁵² In the Court’s view, to hold that the government’s actions were legal as to the defendant “would permit a quibbling distinction to overturn a principle which was designed to protect a fundamental right.”¹⁵³ As to the government’s contention that the defendant had no property right in contraband, the Court held, “Since the evidence illegally seized was contraband the respondent was not entitled to have it returned to him. It being his property, for purposes of the exclusionary

¹⁴⁴ *Id.* at 121 & n.12 (stating application of that principle in “at least fifty cases by the Circuit Courts of Appeals in nine circuits and in the Court of Appeals for the District of Columbia, not to mention many decisions by District Courts”).

¹⁴⁵ *Id.* at 127-28 (Murphy, J., dissenting) (arguing that the analogy to the Fourth Amendment is not perfect because the act forbids “all interception, divulgence, or use,” as opposed to the Fourth Amendment’s proscription of only *unreasonable* searches and seizures) (emphasis added)).

¹⁴⁶ *Id.* at 127.

¹⁴⁷ *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (“The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.”).

¹⁴⁸ *Goldstein*, 316 U.S. at 127 n.4 (Murphy, J., dissenting).

¹⁴⁹ *United States v. Jeffers*, 342 U.S. 48 (1951).

¹⁵⁰ The defendant had a key to the hotel room, as well as permission to make use of the room, although not for purposes of storing narcotics, of which the aunts had no knowledge. *Id.* at 50.

¹⁵¹ *Id.* at 51-52.

¹⁵² *Id.* at 52.

¹⁵³ *Id.*

rule, he was entitled on motion to have it suppressed as evidence on his trial.”¹⁵⁴

The *Jeffers* Court’s conception of Fourth Amendment rights was still quite property-based, as compared to the Warren Court’s emphasis on privacy, exemplified many years later, of course, by *Katz v. United States*.¹⁵⁵ That aside, there are two important principles with regard to seizures that are particularly worth noting: first, the principle that if a defendant has standing to contest the seizure based on her possession of the seized items, she has standing to contest the underlying search that revealed those items, and second, the reiteration of the principle that, for exclusionary rule purposes, one can have a possessory interest sufficient to confer standing in contraband. As I will later discuss, the Burger Court chose to ignore the first principle and misstated the holding of *Jeffers* in order to reach its desired result in *United States v. Salvucci*.¹⁵⁶ However, as I will also illustrate, a result-oriented Court could have reached the same result with less damage to the Fourth Amendment, at least from a theoretical standpoint, had it overruled the second principle instead.¹⁵⁷

We come now to 1960, a very good year for proponents of a broad concept of Fourth Amendment standing. The Court, in an opinion written by Justice Frankfurter, one of the dissenters in *Goldstein*,¹⁵⁸ introduced not one, not two, but three theories under which a defendant can claim the protection of the Fourth Amendment if he fails to claim a possessory interest in either the place searched or the items seized.¹⁵⁹ The defendant in *Jones v. United States* appealed from a conviction of two counts of federal narcotics violations, both of which required proof of possession to establish guilt.¹⁶⁰ The narcotics the prosecution sought to use as evidence against the defendant were found as the result of a search of the apartment in which the defendant was staying as a guest.¹⁶¹

The Court began its analysis by looking for guidance within the framework of the Federal Rules of Criminal Procedure,¹⁶² which provided that a

¹⁵⁴ *Id.* at 54.

¹⁵⁵ *Katz v. United States*, 389 U.S. 347 (1967). Although *Katz* is often cited as the paradigmatic case signaling the shift from a property-based to a privacy-based conception of the Fourth Amendment, Professor Morgan Cloud argues that “*Warden v. Hayden*—not *Katz*—was the opinion that actually shattered the link between property and Fourth Amendment rights . . .” Morgan Cloud, *A Liberal House Divided: How the Warren Court Dismantled the Fourth Amendment*, 3 OHIO ST. J. CRIM. L. 33, 35 (2005). *Warden v. Hayden*, 387 U.S. 294 (1967), abolished the “mere evidence” rule, *see infra* notes 275-77 and accompanying text, and evidenced Justice Brennan’s view that the Fourth Amendment’s procedural requirements would provide sufficient protection for the Amendment’s substantive values.

¹⁵⁶ *United States v. Salvucci*, 448 U.S. 83 (1980); *see infra* text accompanying notes 246-51.

¹⁵⁷ *See infra* notes 272-73 and accompanying text.

¹⁵⁸ *Goldstein v. United States*, 316 U.S. 114, 122 (1942) (Murphy, J., dissenting).

¹⁵⁹ *Jones v. United States*, 362 U.S. 257 (1960).

¹⁶⁰ *Id.* at 258.

¹⁶¹ *Id.* at 259. The defendant had testified that the apartment belonged to a friend who had given him permission to stay there, had given him a key, and had been away from the apartment for approximately five days, during which time the defendant had stayed there “‘maybe a night.’” *Id.*

¹⁶² FED. R. CRIM. P. 41(e).

person “aggrieved by an unlawful search and seizure may move the district court . . . for the return of the property and to suppress for use as evidence anything so obtained”¹⁶³ In defining who is in fact “aggrieved,” the Court asserted that one who seeks to suppress evidence “must have been a victim of a search or seizure, *one against whom the search was directed*, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.”¹⁶⁴ The italicized language, quoted above and consisting of merely seven words, would become the source for the “target theory” of standing, which was later characterized as dicta and unequivocally dismissed by the *Rakas* Court.¹⁶⁵

However one characterizes the “target” language, there is no question that the *Jones* Court produced two bona fide holdings in its disposition of the standing issue, giving birth to both the “automatic standing” rule¹⁶⁶ and the “legitimately on premises” doctrine.¹⁶⁷ Turning to automatic standing, the Court affirmed the rule established by the circuit courts: to demonstrate standing, a “movant [must] claim either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched.”¹⁶⁸ The Court recognized that when possession is an element of the crime charged, to require compliance with the usual standing rules would place the defendant in the dilemma of having to admit to the very facts that would secure his conviction.¹⁶⁹ In addition, the state would essentially be tossing a double-headed coin, denying the defendant’s possession of the seized item to maintain the legality of the search, or at least to prevent the suppression of the evidence at trial, while asserting that very possession to garner the conviction.¹⁷⁰ These two concerns prompted the Court to create the doctrine of automatic standing: “The same element in this prosecution which has caused a dilemma, *i.e.*, that possession both convicts and confers standing, eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized, which ordinarily is required when standing is challenged.”¹⁷¹

In announcing the “legitimately on premises” test, the *Jones* Court sought to broaden the class of people who could claim a requisite interest in the invaded place by eliminating a hierarchy of types of possessors that would ensure standing for some, but not for others:

¹⁶³ *Jones*, 362 U.S. at 260.

¹⁶⁴ *Id.* at 261 (emphasis added). The *Jones* Court, thus, also adopted an individualistic view of the Fourth Amendment, although a much broader one than the Burger Court would embrace. In addition, the *Jones* Court characterized the search as an “invasion of privacy,” *id.*, but fostered an expansive conception of privacy when determining who and under what circumstances one could allege such an invasion.

¹⁶⁵ *Rakas v. Illinois*, 439 U.S. 128, 134-35 (1978); *see infra* notes 204-07 and accompanying text.

¹⁶⁶ *Jones*, 362 U.S. at 263.

¹⁶⁷ *Id.* at 267. (“No just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him.”).

¹⁶⁸ *Id.* at 261.

¹⁶⁹ *Id.* at 261-62.

¹⁷⁰ *Id.* at 263.

¹⁷¹ *Id.*

We are persuaded, however, that it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law . . . Distinctions such as those between “lessee,” “licensee,” “invitee” and “guest,” often only of gossamer strength, ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards.¹⁷²

The “legitimately on premises” test has been critiqued both by members of the Court and the legal academy as too broad to be the proper measure of standing.¹⁷³ If asked to perform the dual functions of gatekeeper and ultimate arbiter, and taken to its literal limit, as in hypotheticals involving janitors¹⁷⁴ and casual visitors in kitchens while basements are being ransacked,¹⁷⁵ it probably is.¹⁷⁶ What, then, has been perceived as one of the benefits of the “legitimately on premises” test, that it seems to offer a bright-line rule that will be simple for courts to administer,¹⁷⁷ turns out also to be its primary weakness, in that when mechanically applied, it can lead to extreme results. However, as I will further develop in my discussion of *Rakas*, the majority opinion in that case simply discarded the test based on its literal meaning, although it bemoans the same literal application of the phrase by the lower courts, rather than searching for some meaning beyond the surface.¹⁷⁸

¹⁷² *Id.* at 266.

¹⁷³ See *Mancusi v. DeForte*, 392 U.S. 364, 375 (1968) (Black, J., dissenting) (“[T]his sweeping dictum is taken somewhat out of context and cannot possibly have the literal meaning attributed to it.”). The Court, in *Rakas*, of course, overruled that basis for standing. *Rakas v. Illinois*, 439 U.S. 128, 142 (1978) (“Nonetheless, we believe that the phrase ‘legitimately on premises’ coined in *Jones* creates too broad a gauge for measurement of Fourth Amendment rights.”); see also, e.g., Simien, *supra* note 8, at 551 (“However, ‘legitimately on the premises’ too broadly defines the requisite relationship [to the premises].”).

¹⁷⁴ *Mancusi*, 392 U.S. at 375-76 (Black, J., dissenting) (“[W]ould that dictum enable a janitor to escape the use of evidence illegally seized from his boss?”).

¹⁷⁵ *Rakas*, 439 U.S. at 142 (“For example, applied literally, this statement would permit a casual visitor who has never seen, or been permitted to visit, the basement of another’s house to object to a search of the basement if the visitor happened to be in the kitchen of the house at the time of the search.”).

¹⁷⁶ Although, as Professor Daniel B. Yeager points out, the janitor and casual guest alike have a relationship with the searched premises. Daniel B. Yeager, *Search, Seizure and the Positive Law: Expectations of Privacy Outside the Fourth Amendment*, 84 J. CRIM. L. & CRIMINOLOGY 249, 290 (1993). As I will develop further, the key to the viability of this test is to engage in a careful inquiry as to the extent of the legitimacy of the presence. See *infra* notes 286-93 and accompanying text. However, rather than replacing this test with just such an inquiry, the *Rakas* Court reinstated the hierarchies the *Jones* Court sought to eliminate, except the Court now distinguishes between classes of nontrespassers when deciding who is worthy of Fourth Amendment protection. See Yeager, *supra*, at 288-91; see also *infra* note 225.

¹⁷⁷ See *Rakas*, 439 U.S. at 168 (White, J., dissenting) (“The *Jones* rule is relatively easily applied by police and courts; the rule announced today will not provide law enforcement officials with a bright line between the protected and the unprotected.”). As Justice Rehnquist pointed out in response, however, the decisions purporting to apply this bright-line test have been anything but consistent. *Id.* at 145 n.13 (majority opinion).

¹⁷⁸ *Id.* at 142 n.10 (“Unfortunately, with few exceptions, lower courts have literally applied this language from *Jones* and have held that anyone legitimately on premises at the time of the search may contest its legality.”); see discussion *infra* Part V.

Approximately twenty years later, *Jones* was emphatically overruled with the Burger Court eradicating both of its (undisputed) holdings through its decisions in *Rakas*, *Rawlings*, and *Salvucci*. Of course, a few things happened in between. The first nail in the coffin of automatic standing came in 1968, with the Court's decision in *Simmons v. United States*.¹⁷⁹ The *Simmons* Court recognized and alleviated the dilemma at the heart of the justification for automatic standing, and while the predicament facing one charged with a possessory crime is most obvious, the defendant charged with a nonpossessory crime faces a similar one in that the "[t]estimony . . . which links a defendant to evidence which the Government considers important enough to seize and to seek to have admitted at trial, must often be highly prejudicial . . ." ¹⁸⁰ Thus, "a defendant who knows that his testimony may be admissible against him at trial will sometimes be deterred from presenting the testimonial proof of standing necessary to assert a Fourth Amendment claim."¹⁸¹ The Court framed this as an impermissible Hobson's choice between the protections of the Fourth Amendment and those of the Fifth¹⁸²:

Thus, in this case [defendant] was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another. We therefore hold that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection.¹⁸³

Before the Court was to deliver the next blow to automatic standing, it emphatically reiterated its principles on Fourth Amendment standing in general.¹⁸⁴ In *Alderman*, the Fourth Amendment violation occurred by virtue of the government's unauthorized electronic surveillance of one codefendant's premises.¹⁸⁵ Neither of the two defendants was a participant in the illegally recorded conversations (which, had they been, would have been sufficient to establish standing), but the Court nevertheless granted standing to the owner of

¹⁷⁹ *Simmons v. United States*, 390 U.S. 377 (1968). The Court's decision in *Simmons* provided one justification for the abolition of the automatic standing rule in *United States v. Salvucci*, 448 U.S. 83, 89-90 (1980).

¹⁸⁰ *Simmons*, 390 U.S. at 391.

¹⁸¹ *Id.* at 392-93. The Court discussed lower court opinions supporting that a defendant's testimony during a suppression hearing is admissible at trial should the motion to suppress fail, but left open the possibility that testimony could be admitted even should the motion succeed.

¹⁸² The lower courts, in permitting the testimony to be admitted, reasoned that there was in fact no Fifth Amendment violation because the defendant was not "compelled" to testify. However, the Court pointed out that the implied choice is between testifying or "giv[ing] up the benefit." *Id.* at 393-94.

¹⁸³ *Id.* at 394.

¹⁸⁴ See *Alderman v. United States*, 394 U.S. 165 (1969).

¹⁸⁵ *Id.* at 167-69.

the premises.¹⁸⁶ The Court equated the recorded conversations with “tangible property,” analogizing that

[i]f the police make an unwarranted search of a house and seize tangible property belonging to third parties—even a transcript of a third-party conversation—the homeowner may object to its use against him, not because he had any interest in the seized items as “effects” protected by the Fourth Amendment, but because they were the fruits of an unauthorized search of his house, which is itself expressly protected by the Fourth amendment.¹⁸⁷

The Court refused, however, to extend the protection of the Fourth Amendment to include in its reach a codefendant whose *own* Fourth Amendment rights were not violated, restating “[t]he established principle . . . that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence.”¹⁸⁸ Thus, even after *Katz*, the Court still exhibited a great deal of deference to property rights. Too much so for Justice Harlan, in fact, who dissented as to the Court’s decision to grant standing to the homeowner, stating that “the right to conversational privacy is a personal right, not a property right. It follows from this that the Court’s rule permits property owners to assert vicariously the personal rights of others. Indeed, granting standing to property owners compromises the personal privacy of others.”¹⁸⁹

Despite Justice Harlan’s argument that conversations are not tangible items, the Court chose to see them in this light, emphatically stating that *Katz* held that “the Fourth Amendment protects a person’s private conversations *as well as* his private premises”¹⁹⁰ Thus, at the time *Alderman* was decided, the Fourth Amendment clearly protected owners of both premises and effects (including conversations). While the Burger Court did retain the protection for owners of premises, in *Rakas*, *Rawlings*, and *Salvucci*, it nonetheless departed sharply from the established rule by denying the same protection to owners of seized effects.

However, even in that departure, the Burger Court, in *Rakas*, took note of, and relied on, several concepts articulated in *Alderman* for support. First, *Alderman* asserted that Fourth Amendment rights are personal.¹⁹¹ Second, *Alderman* rejected any justification for allowing third-party standing in the context of the Fourth Amendment, although it framed its rejection in terms of the desirability of applying the exclusionary rule:

¹⁸⁶ *Id.* at 176-80. “Such [Fourth Amendment] violation would occur if the United States unlawfully overheard conversations of a petitioner himself or conversations occurring on his premises, whether or not he was present or participated in those conversations.” *Id.* at 176.

¹⁸⁷ *Id.* at 176-77.

¹⁸⁸ *Id.* at 171-72.

¹⁸⁹ *Id.* at 194 (Harlan, J., dissenting). For Justice Harlan, conversations are not akin to tangible effects that often are or must be, by their nature, left inside the home, thus justifying a strong protection for the premises in order to protect the privacy of the items kept there. *Id.* at 194-95. Going further, in fact, Justice Harlan urged that the Court should “reject traditional property concepts entirely.” *Id.* at 191.

¹⁹⁰ *Id.* at 178 (majority opinion) (emphasis added).

¹⁹¹ *Id.* at 174; *see also* *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978).

There is no necessity to exclude evidence against one defendant in order to protect the rights of another. No rights of the victim of an illegal search are at stake when the evidence is offered against some other party. The victim can and very probably will object for himself when and if it becomes important for him to do so.¹⁹²

The *Rakas* Court also reiterated *Alderman*'s position that not everything that deters Fourth Amendment violations is constitutionally required, and that, on balance, the Court remained "[un]convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth."¹⁹³

Finally, there is another important idea expressed in *Alderman* that the Burger Court may well have taken note of, but did not repeat in its *Rakas* decision: "Of course, Congress or state legislatures may extend the exclusionary rule and provide that illegally seized evidence is inadmissible against anyone for any purpose."¹⁹⁴ In fact, far from simply not repeating this invitation to Congress, the *Rakas* Court rescinded it and cancelled the party. While it is true that state courts may interpret their state constitutional provisions more expansively than the Court has chosen to interpret the corresponding federal provisions, Congress may not, even under its Fourteenth Amendment, Section 5, enforcement powers,¹⁹⁵ interpret a constitutional provision more generously than its coequal branch, the judiciary, has.¹⁹⁶ Thus, by merging standing with substance, the Court has virtually shut the door on any congressional expansion of the exclusionary rule, although, theoretically, Congress remains perfectly free to abolish the rule entirely.

B. *Rakas*, *Rawlings*, and *Salvucci*: *Standing No More*

In *Rakas v. Illinois*, the Court, in an opinion authored by then Justice Rehnquist, held that passengers in an automobile had no legitimate expectation of privacy in the place searched and, thus, were not permitted to contest the search that revealed a box of rifle shells and a sawed-off rifle, in which they failed to claim ownership and which were hidden, respectively, in the locked glove compartment and beneath the front passenger seat.¹⁹⁷ In reaching this decision, the Court made three major pronouncements: it repudiated the "target" theory as well as the "legitimately on premises" test, both derived from *Jones*,¹⁹⁸ and also eliminated standing as an independent preliminary inquiry,

¹⁹² *Alderman*, 394 U.S. at 174; see also *Rakas*, 439 U.S. at 134.

¹⁹³ *Alderman*, 394 U.S. at 174-75; see also *Rakas*, 439 U.S. at 137.

¹⁹⁴ *Alderman*, 394 U.S. at 175.

¹⁹⁵ U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.")

¹⁹⁶ *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) ("Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the 'provisions of [the Fourteenth Amendment].'" (alteration in original)).

¹⁹⁷ *Rakas*, 439 U.S. 128.

¹⁹⁸ See *Jones v. United States*, 362 U.S. 257, 267 (1960); see also *supra* text accompanying notes 164-72.

finding it more properly subsumed by the substantive Fourth Amendment analysis.

To begin, the Court emphasized its conception of the personal nature of Fourth Amendment rights, as supported by *Alderman*.¹⁹⁹ The Court's choice of words, however, is interesting to note and illustrates the tension between a regulatory and individualistic view of the Fourth Amendment: "A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed."²⁰⁰ I find it awkward, at least linguistically, if not logically, that one can be aggrieved by a search and seizure that violates the requirements of the Fourth Amendment and yet is not aggrieved for purposes of the Fourth Amendment.²⁰¹

Next, the Court subtly shifted the focus of the exclusionary rule away from its deterrent purpose and towards a remedial view, stating that "since the exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment, it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections."²⁰² With the exclusionary rule now sounding more in remedy than in general deterrence, the Court has even stronger justification for the personal-right view of the Fourth Amendment that it seeks to enforce vigorously.²⁰³

Turning now to its task of dispensing with the target theory, the Court addressed the phrase "'one against whom the search was directed,'"²⁰⁴ and characterized it "merely as a parenthetical equivalent of the previous phrase 'a victim of a search or seizure.'"²⁰⁵ Again, it strikes me as awkward to say that the target of a search is the equivalent of the victim of the search or seizure but not for purposes of standing. But it matters not, in any case, because the Court tells us next that this language, however it is read, is only dicta.²⁰⁶ After all, had the *Jones* Court really meant that language to be an independent ground for standing, it would not have needed any, let alone two, additional holdings.²⁰⁷ But why stop there? Why did the *Jones* Court supply two alternate grounds for

¹⁹⁹ *Rakas*, 439 U.S. at 133-34.

²⁰⁰ *Id.* at 134 (emphasis added).

²⁰¹ This language is adapted from *Alderman*, but the original formulation avoids the linguistic awkwardness I identify in the *Rakas* version. See *supra* text accompanying note 188.

²⁰² *Rakas*, 439 U.S. at 134 (citation omitted).

²⁰³ Many scholars have outlined the various justifications for the exclusionary rule, as well as its evolution, from its origins in common law property actions, such as replevin, with a focus on the return of seized items to the rightful possessor, through its role as a guardian of judicial integrity, and, most recently, as a deterrent device, with an emphasis on suppression, rather than return, of seized property. See, e.g., Doernberg, *supra* note 8, at 273-80; Yeager, *supra* note 176, at 272-76.

²⁰⁴ *Rakas*, 439 U.S. at 134-35 (emphasis omitted) (quoting *Jones v. United States*, 362 U.S. 257, 261 (1960)).

²⁰⁵ *Id.* at 135 (quoting *Jones*, 362 U.S. at 261).

²⁰⁶ *Id.*

²⁰⁷ *Id.* Justice Black made a similar argument in his dissenting opinion in *Mancusi*, arguing that had the Court truly believed that being "legitimately on [the] premises" was a sufficient prerequisite for standing, it would not have needed any discussion of reasonable expectations or other limiting factors to decide that the defendant did in fact have standing. *Mancusi v. DeForte*, 392 U.S. 364, 376 (1968) (Black, J., dissenting) (alteration in original).

standing? Perhaps the *Jones* Court was itself guilty of a little activism by deciding more than was absolutely necessary to dispose of the case before it!

The Court made short work of repudiating the target theory, focusing on the administrative difficulties involved in determining who is actually the target of a search,²⁰⁸ and simply concluding, without any real discussion of why, that the target theory allows a defendant to “assert a violation, not of his own constitutional rights but of someone else’s”²⁰⁹ In reaching its conclusion, the Court reflected on the cost of the exclusionary rule and asserted the propriety of considering this cost when deciding whether to expand standing, and consequently, the incidence of exclusion.²¹⁰ Imagine for a moment, however, that the Court instead had announced, “We have generally held that one whose Fourth Amendment rights are violated may successfully suppress evidence obtained as a consequence of such a violation. However, we think it entirely proper to consider the substantial social cost extracted by this judicially created remedy, which we have determined to be the only effective deterrent of Fourth Amendment violations, when we interpret and define the meaning of the Amendment.” One might think this an entirely improper line of reasoning, and Justice White most certainly thought so.²¹¹ But that is, in essence, what the Court proceeded to do (without an announcement, that is).

Having repudiated the target theory, and reiterated its personal-right view of the Fourth Amendment, the Court indicated that “the question necessarily arises whether it serves any useful analytical purpose to consider this principle a matter of standing, distinct from the merits of a defendant’s Fourth Amendment claim.”²¹² The Court, obviously, answered this question in the negative.²¹³ But, did that question *necessarily* arise? Or, did the Court have something more in mind than it let on? The Court underplayed the impact of this shift, indicating that the inquiry is the same and “will produce no additional

²⁰⁸ *Rakas*, 439 U.S. at 136-37. I would think, however, that it shouldn’t be much more difficult for a judge to determine the target of a search than it is for a magistrate to determine whether a police officer has probable cause when he is seeking a warrant, unless, the real concern is police perjury. Oddly enough, if the target theory were to be adopted, with nothing more, a police officer would have the incentive to maintain at a suppression hearing that the defendant was *not* the target of the search, or, that the officer, in conducting the search, had no reason to suspect that he would find evidence against the defendant. This seems a perverse result, when one of the primary (if not the primary) objects of the Fourth Amendment is to curb officers’ discretion and prevent random searches by ensuring that all searches are based on probable cause, as determined by a magistrate in advance of the search.

²⁰⁹ *Id.* at 137.

²¹⁰ *Id.* at 137-38 (“Since our cases generally have held that one whose Fourth Amendment rights are violated may successfully suppress evidence obtained in the course of an illegal search and seizure, misgivings as to the benefit of enlarging the class of persons who may invoke that rule are properly considered when deciding whether to expand standing to assert Fourth Amendment violations.”).

²¹¹ *See id.* at 157 (White, J., dissenting) (“If the Court is troubled by the practical impact of the exclusionary rule, it should face the issue of that rule’s continued validity squarely instead of distorting other doctrines in an attempt to reach what are perceived as the correct results in specific cases.”).

²¹² *Id.* at 138-39 (majority opinion).

²¹³ *Id.* at 139 (“But we think the better analysis forthrightly focuses on the extent of a particular defendant’s rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing.”).

situations in which evidence must be excluded.”²¹⁴ Nonetheless, might there not be some benefit to retaining the concept of standing? After all, as long as Article III’s requirements are satisfied, has the Court not, in the past, granted standing to third parties in certain contexts? Might it not, should the proper circumstances arise, be persuaded to do so in the context of the Fourth Amendment as well?

The Court did acknowledge its past decisions regarding standing in general, and the traditional inquiries of whether there is an “injury in fact” and whether the claimant is pressing his own rights, or those of another.²¹⁵ Perhaps mindful that the latter inquiry has prudential rather than constitutional implications, and that as such, is subject, albeit infrequently, to exception, the Court made sure to quickly dismiss this possibility, indicating that “this Court’s long history of insistence that Fourth Amendment rights are personal in nature has already answered many of these traditional standing inquiries”²¹⁶ The Court may have well continued, “so there is no need to revisit them again. (Ever.)”²¹⁷

Coming to the substantive Fourth Amendment inquiry, the *Rakas* opinion attacked not the *Jones* doctrine of automatic standing, but the language of its alternative holding, that one who is “legitimately on premises” where a search occurs has standing to object to that search.²¹⁸ The *Rakas* majority limited the application of that phrase to the facts of *Jones*, and to the “unremarkable proposition that a person can have a legally sufficient interest in a place other than his own home” so as to be protected by the guarantees of the Fourth Amendment against “unreasonable governmental intrusion.”²¹⁹ Ironically, the *Rakas* Court used a concept that was initially designed to broaden the scope of the Fourth Amendment’s protection effectively to narrow it. The Court, citing to *Katz*, stated that the “capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.”²²⁰

²¹⁴ *Id.* The Court fails to make the same claim, however, with regard to additional situations in which evidence might be included.

²¹⁵ *Id.*

²¹⁶ *Id.* at 140.

²¹⁷ The dissent does not mention the collapse of standing into substance. Justice White’s primary focus is on advocating for the retention of the “legitimately on premises” test and on critiquing the majority’s return to a property-based conception of the Fourth Amendment, despite its reliance on expectations of privacy. However, three sentences in the dissenting opinion come closest to questioning the elimination of the standing inquiry:

At most, one could say that perhaps the Constitution provides some degree less protection for the personal freedom from unreasonable governmental intrusion when one does not have a possessory interest in the invaded private place. But that would only change the extent of the protection; it would not free police to do the unreasonable, as does the decision today. And since the accused should be entitled to litigate the application of the Fourth Amendment where his privacy interest is merely arguable, the failure to allow such litigation here is the more incomprehensible.

Id. at 166 (White, J., dissenting) (footnote omitted).

²¹⁸ See *id.* at 142-43 (majority opinion).

²¹⁹ *Id.* at 142.

²²⁰ *Id.* at 143. *Katz*, deciding the constitutionality of electronic surveillance of conversations held in a telephone booth, did not actually adopt the phrase, “legitimate expectation of

off rifles. Or perhaps it has more to do with the nature of automobiles and the already diminished expectation of privacy associated with motor vehicles.²²⁵

The Court maintained, however, that the defendants' claim would fail even had the search occurred in a house,

since they made no showing that they had any legitimate expectation of privacy in the glove compartment or area under the seat of the car in which they were merely passengers. Like the trunk of an automobile, these are areas in which a passenger *qua* passenger simply would not normally have a legitimate expectation of privacy.²²⁶

What the Court failed to note, however, is that, unlike the hypothetical kitchen guest who has never stepped foot in the basement, it is likely, or at least possible, that it was the front-seat passenger and not the owner/driver who, as the group hastily (I would imagine) dove into their getaway car after having just committed a robbery, actually placed the incriminating items safely out of sight, in the glove compartment and under the front seat. And, unlike our kitchen guest, each passenger in that automobile knew what was hidden in those areas, and hoped, if not expected, that those items would remain so.

Summing up its holding as to the defendants' motion to suppress evidence seized from the car in which they were simply passengers, the Court made the following statements:

Judged by the foregoing analysis, petitioners' claims must fail. They asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized. And as we have previously indicated, the fact that they were "legitimately on [the] premises" . . . is not determinative of whether they had a legitimate expectation of privacy in the particular areas of the automobile searched.²²⁷

²²⁵ Although, I do not believe that a Court could justify not permitting automobile passengers to have standing by finding that passengers have a lesser expectation of privacy than owners, and since owners already have a diminished expectation, passengers simply have none. It seems, at least for now, that once a class of persons, be it owners or guests, is determined to have a legitimate expectation of privacy in an area, be it in a home or in a car, such as to trigger Fourth Amendment protection, one does not make further distinctions between the owner and the guest for purposes of applying that protection. While, to this point, a diminished (rather than nonexistent) expectation of privacy has not actually turned a search into a non-search, it has become a factor when the Court balances the nature of the privacy interest with the extent of the intrusion in order to relax the Amendment's requirements. *See, e.g.,* United States v. Biswell, 406 U.S. 311 (1972) (holding warrantless regulatory search of firearms dealer permissible due in part to a diminished expectation of privacy when one engages in a highly regulated industry). Thus, one further danger of collapsing standing with substance is that, while the Court now has created a hierarchy of privacy interests and classes of nontrespassers (for example, guests conducting business, *see* Minnesota v. Carter, 525 U.S. 83 (1998), versus overnight guests, *see* Minnesota v. Olson, 495 U.S. 91 (1990)), the Court could conceivably create classes of "legitimate expectation of privacy" holders, in the substantive Fourth Amendment doctrine, to permit certain conduct towards an overnight guest, for example, that would not be permitted towards the owner of the home. While a Court could do this even leaving the standing inquiry intact, it seems somehow more awkward to say that one individual has "less" standing than another (one either does or does not have standing), or that although two individuals have standing to contest the same search and seizure, they will be treated differently.

²²⁶ *Rakas*, 439 U.S. at 148-49.

²²⁷ *Id.* at 148 (alteration in original).

On my reading, the “legitimate expectation of privacy” test is a second level test, applicable if a defendant has failed to assert either the property or possessory interest in the place searched, or such similar interest in the item(s) seized, that had been formerly thought sufficient (and necessary, prior to *Katz*) to trigger Fourth Amendment protections (or standing, in *Alderman* terms). As I can see, *nowhere* in the *Rakas* holding did the Court state that a possessory interest in the property seized, in and of itself, would not entitle the defendant to claim the protection of the Fourth Amendment. In fact, relegated to a footnote after its discussion illustrating, by example, how attenuated the privacy interests of certain visitors to a property can be, the Court stated, “This is not to say that such visitors could not contest the lawfulness of the seizure of evidence or the search if their own property were seized during the search.”²²⁸

However, two years later, the Court, with twenty/fifty hindsight, apparently saw something that I could not. I rest my understanding of *Rakas*, and my conclusion that the Court’s opinions in *Rawlings v. Kentucky*²²⁹ and *United States v. Salvucci*²³⁰ misstated, or at the very least overstated, the *Rakas* holding, on my own vision. However, I acknowledge that the reader may well be inclined to accept the interpretation provided by then Justice Rehnquist, as he authored all three opinions. In *Rawlings*, one of two Fourth Amendment cases decided on the same day, the Court held that a defendant was not entitled to challenge the validity of the search that revealed the drugs, *to which he claimed ownership*, in another’s purse because he lacked a “legitimate expectation of privacy” in the searched purse.²³¹ The Court enlisted the aid of *Rakas*, holding that “[w]hile petitioner’s ownership of the drugs is undoubtedly one fact to be considered in this case, *Rakas* emphatically rejected the notion that ‘arcane’ concepts of property law ought to control the ability to claim the protections of

²²⁸ *Id.* at 142 n.11. Professor Christopher Slobogin argues that the *Rakas* Court may have actually left open the question of whether legitimate presence coupled with a possessory interest in the seized item would have been sufficient to confer standing on the passengers, which would mean that possessory interest in the seized effect, while not determinative of standing, is at the very least not irrelevant. See Slobogin, *supra* note 8, at 405.

²²⁹ *Rawlings v. Kentucky*, 448 U.S. 98 (1980).

²³⁰ *United States v. Salvucci*, 448 U.S. 83 (1980).

²³¹ *Rawlings*, 448 U.S. at 105-06. The Court used a hypothetical example of a defendant placing his drugs in plain view to illustrate that, although he would certainly still have ownership of the drugs, there would be no “legitimate expectation of privacy” and no Fourth Amendment violation. This analogy is flawed, as plain view is an established exception to the warrant requirement. Certainly one cannot expect an officer to turn a blind eye to what she sees directly in front of her through no effort of her own. This is not quite the same as an officer searching one party illegally, and then claiming what she found to have been in plain view as to another party. Recall, that when one places something in plain view, the thought is that one “knowingly exposes” the item to the public, including the police. See *Katz v. United States*, 389 U.S. 347, 351 (1967). Yes, the defendant in the hypothetical would probably lose on the merits—if the officer had probable cause to believe that the items seized were, in fact, contraband. Thus, there is still more to the merits determination than simply whether one places an item in plain view and thus cannot maintain an expectation of privacy. See Alschuler, *supra* note 8, at 16-17 (illustrating, by example, the fallacy of the *Rakas* plain view example, in that the seizure of items in plain view may not violate privacy rights, but may nonetheless be unlawful); see also Slobogin, *supra* note 8, at 414 (noting that the Court, in *Rakas* and *Rawlings*, “fail[ed] to differentiate between searches and seizures” when dismissing traditional property concepts as “arcane”).

the Fourth Amendment.” This seems a bit like adding insult to irony, for while *Rakas* did indeed mention “arcane” property classifications, it was clearly in the context of the location searched, and not of the property seized.²³² Further, the *Rakas* Court’s use of the argument was cited from *Jones*’s use to expand defendants’ Fourth Amendment rights, where the “arcane” property distinctions of “gossamer strength” were those “between ‘lessee,’ ‘licensee,’ ‘invitee’ and ‘guest.’”²³³ Professor Albert Alschuler notes this irony as well:

Rakas had emphasized the defendants’ failure to allege ownership of the property seized, and it had said that an owner of property would “in all likelihood” have standing to challenge its search or seizure “by virtue of [his] right to exclude.” Accordingly, the defendant in *Rawlings* said to the Supreme Court, “I am the owner.” And the Court responded, “Mr. Rawlings, don’t be arcane.”²³⁴

And so, in the space of a few sentences, the *Rawlings* Court “cavalierly reject[ed] the fundamental principle, unquestioned until [that day], that an interest in either the place searched or the property seized is sufficient to invoke the Constitution’s protections against unreasonable searches and seizures.”²³⁵

With “effects” now virtually erased from the Fourth Amendment, the Court, in *Salvucci*,²³⁶ was free to move on to the doctrine of automatic standing (all in a day’s work). To accomplish this, the Court relied on its holding in *Simmons v. United States*,²³⁷ as well as that day’s holding in *Rawlings*, based on its purported support from *Rakas*. The Court first set forth the two reasons for which the doctrine of automatic standing was created and then stated why those reasons were no longer applicable.²³⁸

The first concern of the *Jones* Court, “that a defendant charged with a possessory offense might only be able to establish his standing to challenge a search and seizure by giving self-incriminating testimony admissible as evidence of his guilt,” was all but mooted by the Court’s decision in *Simmons*, which held that the testimony given by a defendant in a suppression hearing could not be admitted as evidence against him at trial.²³⁹ However, the

²³² *Rakas*, 439 U.S. at 143 (“In defining the scope of that interest, we adhere to the view expressed in *Jones* and echoed in later cases that arcane distinctions developed in property and tort law between guests, licensees, invitees, and the like, ought not to control.”).

²³³ *Jones v. United States*, 362 U.S. 257, 265-66 (1960).

²³⁴ Alschuler, *supra* note 8, at 15 (alteration in original) (footnote omitted).

²³⁵ *Rawlings*, 448 U.S. at 114 (Marshall, J., dissenting). Justice Marshall’s dissent quite effectively exposes the weaknesses in the majority opinion, in particular in its reliance on *Rakas*:

The Court’s examination of previous Fourth Amendment cases begins and ends—as it must if it is to reach its desired conclusion—with *Rakas v. Illinois*. Contrary to the Court’s assertion, however, *Rakas* did not establish that the Fourth Amendment protects individuals against unreasonable searches and seizures only if they have a privacy interest in the place searched. The question before the Court in *Rakas* was whether the defendants could establish their right to Fourth Amendment protection simply by showing that they were “legitimately on [the] premises” searched.

Id. at 114-15 (alteration in original) (citation omitted).

²³⁶ *United States v. Salvucci*, 448 U.S. 83, 86 (1980).

²³⁷ *Simmons v. United States*, 390 U.S. 377 (1968).

²³⁸ *Salvucci*, 448 U.S. at 87-88.

²³⁹ *Id.* at 89-90; see *supra* text accompanying notes 179-83. The Court correctly stated that in some ways, *Simmons* offered broader protection than *Jones*, in that its “use immunity” extended to all cases and not just those involving possessory crimes.

Salvucci Court made no determination as to whether a prosecutor could use a defendant's suppression hearing testimony to impeach him should he decide to testify at his trial as well, finding that to be "an issue which more aptly relates to the proper breadth of the *Simmons* privilege, and not to the need for retaining automatic standing."²⁴⁰

The second justification for *Jones*'s adoption of automatic standing was in precluding the government from taking "advantage of contradictory positions"²⁴¹ by "assert[ing] that the defendant possessed the goods for purposes of criminal liability, while simultaneously asserting that he did not possess them for the purposes of claiming the protections of the Fourth Amendment."²⁴² Twenty years later, the Court stated that interim decisions, particularly *Rakas*,

clearly establish that a prosecutor may simultaneously maintain that a defendant criminally possessed the seized good, but was not subject to Fourth Amendment deprivation, without legal contradiction. To conclude that a prosecutor engaged in self-contradiction in *Jones*, the Court necessarily relied on the unexamined assumption that a defendant's possession of a seized good sufficient to establish criminal culpability was also sufficient to establish Fourth Amendment "standing." This assumption, however, even if correct at the time, is no longer so.²⁴³

Although the issue of the continued validity of the automatic standing doctrine was not before the Court in *Rakas*, that Court, in a footnote, stated that "[s]uch a rule is, of course, one which may allow a defendant to assert the Fourth Amendment rights of another."²⁴⁴ The *Jones* Court most certainly would have disagreed with this assertion, relying instead on the principle that one's "effects" are entitled to as much protection as the space searched (perhaps "examining" the language of the Amendment itself), regardless of whether possession of the seized effect is an element of the charge or not. While automatic standing was applied in prosecutions involving possessory offenses only, the underlying premise of the automatic standing doctrine is that possession of any seized item is always sufficient to establish standing to claim the protection of the Fourth Amendment. However, when the government has already taken the trouble to claim that possession on the defendant's "behalf" through its charge, it "eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized, which ordinarily is required when standing is challenged."²⁴⁵

The *Salvucci* Court, in a footnote, also disagreed with the defendant's reliance on *United States v. Jeffers*²⁴⁶ for support of the idea that ownership of seized items conferred Fourth Amendment standing.²⁴⁷ The Court cited to

²⁴⁰ *Salvucci*, 448 U.S. at 93-94. The Court cited to the decisions of numerous courts holding that the prosecution may indeed use such testimony for impeachment purposes in the main trial. See *id.* at 93 n.8.

²⁴¹ *Id.* at 88 (quoting *Jones v. United States*, 362 U.S. 257, 263 (1960)).

²⁴² *Id.* at 88.

²⁴³ *Id.* at 90.

²⁴⁴ *Rakas v. Illinois*, 439 U.S. 128, 135 n.4 (1978).

²⁴⁵ *Jones*, 362 U.S. at 263 (emphasis added); see also *Rawlings v. Kentucky*, 448 U.S. 98, 116-17 (1980) (Marshall, J., dissenting).

²⁴⁶ *United States v. Jeffers*, 342 U.S. 48 (1951).

²⁴⁷ *Salvucci*, 448 U.S. at 90 n.5.

Rakas, rather than reexamining *Jeffers* directly, and declared (quite correctly) that “[i]n *Rakas* . . . we stated that ‘[s]tanding in *Jeffers* was based on *Jeffers*’ possessory interest in *both* the premises searched and the property seized.’”²⁴⁸ However, in *Rakas*, the Court discussed *Jeffers* in its repudiation of the target theory, indicating simply its post hoc interpretation of the facts, and did not make any unequivocal statements that in order to claim a Fourth Amendment violation, a defendant would indeed be required to sustain both such interests.²⁴⁹ In fact, on my reading, *Jeffers* proposed the exact opposite. While it is true that the record in *Jeffers* could have supported a finding that the defendant had a substantial possessory interest in the place searched,²⁵⁰ the Court made no such finding, and indeed no such finding was necessary.²⁵¹

While the Court in *Salvucci* did correctly state the holding of its sibling decision in *Rawlings* that “legal possession of a seized good is not a proxy for determining whether the owner had a Fourth Amendment interest, for it does not invariably represent the protected Fourth Amendment interest,”²⁵² its statement of the *Rakas* holding was less than accurate.²⁵³ The Court proposed that *Rakas* held “that an illegal search *only* violates the rights of those who have ‘a legitimate expectation of privacy in the invaded place.’”²⁵⁴ Read narrowly, and in my view correctly, *Rakas* held that being “legitimately on the premises” in the absence of other factors (such as a ownership of premises searched or property seized) is not sufficient grounds for claiming a violation of one’s Fourth Amendment rights and that a claimant must at the very least demonstrate “a legitimate expectation of privacy in the invaded place.”²⁵⁵ Not only did *Rakas* explicitly leave open the possibility that possession of the seized goods would be sufficient to confer standing,²⁵⁶ but, as Justice Marshall pointed out, because the defendants in *Rakas* never acknowledged ownership of the seized goods for purposes of claiming the protection of the Fourth Amendment, that issue was not before the Court, “and, consequently, the Court did not and could not have decided whether such a claim could be main-

²⁴⁸ *Id.* at 91 n.5 (second alteration in original) (quoting *Rakas*, 439 U.S. at 136). The Court did state that under certain conditions, a defendant would be able to petition for return of property on the basis of ownership “if the seizure, as opposed to the search, was illegal.” *Id.* at n.6.

²⁴⁹ *Rakas*, 439 U.S. at 135-36.

²⁵⁰ *See supra* note 150.

²⁵¹ *See supra* text accompanying notes 149-54. One could actually read the Court’s holding that the search and seizure could not be separated as conceding, at least arguendo, that Mr. *Jeffers* did not have a sufficient interest in the searched premises. Professor Slobogin, however, suggests that the Court’s treatment of *Jeffers* in *Rakas* and *Rawlings* demonstrates that the Court would be willing to recognize standing in the event that a defendant “can show previous, continuing access to the searched area *and* a possessory interest in the seized item.” *See Slobogin, supra* note 8, at 405. I still maintain, however, that the *Rakas* opinion, rather than stating what *Jeffers* actually held, indicates what *Jeffers* would have held had it been decided in 1978.

²⁵² *Salvucci*, 448 U.S. at 91.

²⁵³ *See id.* at 91-92.

²⁵⁴ *Id.* (emphasis added).

²⁵⁵ *Rakas v. Illinois*, 439 U.S. 128, 143 (1978).

²⁵⁶ *Id.* at 142 n.11.

tained.”²⁵⁷ Indeed, to do so would have been engaging in activism! Nevertheless, whatever the accurate reading of *Rakas*, the holding of *Rawlings* made it clear that in the Court’s view, at least, possession or even ownership of the seized item was not enough to claim the protection of the Fourth Amendment, and thus the second justification for *Jones*’s automatic standing rule crumbled.

V. AN ALTERNATIVE (OR TWO OR THREE)

Although the primary focus of this Article is the annexation of standing into the substantive Fourth Amendment determination, and the repercussions of this maneuver, I thought I might sketch out a few alternatives to the current standing doctrine.²⁵⁸ I begin with an approach to standing that would classify the standing of defendants such as those in *Rakas*, *Rawlings*, and *Salvucci* in terms of third parties. While I actually believe that all of those defendants had a first-party claim,²⁵⁹ the Court has not chosen to acknowledge a more collective view of the Fourth Amendment that would permit, indeed require, such defendants to have standing in their own right. Although, as a matter of prudential standing, a Court can permit third-party standing in certain circumstances (as we have seen),²⁶⁰ it is slightly problematic to fit Fourth Amendment standing into the third-party mold. However flexible it seems the Court may have been with the factors used in its determinations (most notably in the strength of relationship between the parties or in the ability of the third party to press its own claim), it seems that a constant requirement has been a direct effect on the rights of the absent third party should the court refuse to adjudicate the “plaintiff’s” claim. It would seem an almost Herculean task for a defendant to show how the absent party, against whom there is no criminal prosecution, would benefit directly from the adjudication of *his* Fourth Amendment violation as it affects the party who is in fact being prosecuted.

It is difficult to see the benefit to the third party, that is, if one has an “atomistic” rather than regulatory view of the Fourth Amendment.²⁶¹ If, however, the Court were to embrace the deterrent rationale of the exclusionary rule wholly, yes, even when making standing determinations, then third (and fourth and fifth) parties would benefit when the rule is vigorously applied and future police misconduct is more fully deterred. In fact, if the exclusionary rule is viewed solely as a deterrent, and not as a remedy to compensate the victim of an unlawful search or seizure (and it must be seen this way if the “good faith” exception has any justification), then every time a defendant seeks to invoke the exclusionary rule, he is, in fact, championing the right of third parties to be free from Fourth Amendment violations.

²⁵⁷ *Rawlings v. Kentucky*, 448 U.S. 98, 115 (1980) (Marshall, J., dissenting).

²⁵⁸ My discussion of these alternatives will be somewhat abbreviated, as I hope to develop these further in a subsequent article.

²⁵⁹ See *infra* notes 279-313 and accompanying text.

²⁶⁰ See *supra* text accompanying notes 107-40.

²⁶¹ I adopt the term, “atomistic,” from Professor Anthony Amsterdam, as have others before me. See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 367 (1974).

Another standing decision stemming from a Fourth Amendment seizure violation, although not involving the suppression of evidence, is worth examining here. In *City of Los Angeles v. Lyons*,²⁶² the Court held that the petitioner, who had been subjected to a choke hold during a traffic stop, had no Article III standing to seek an injunction to prevent the city from using choke holds in the future because he could not show a substantial enough probability that he himself would be subjected to another choke hold absent such an injunction.²⁶³

Professor Pamela Karlan captures the flawed reasoning of this opinion:

The only reason . . . why Lyons could even sue the city for injuries he had already suffered was because the city had a *policy* that permitted the choke hold to which he had been subjected. It was almost a dead certainty, literally, that there would be future injurious choke holds. The only question was *who* would be victimized. If Lyons could not seek injunctive relief, then no one could. And so the city could go on choke holding individuals in violation of the Fourth Amendment as long as it was willing to pay damages at the back end—damages that were not likely to capture the full measure of the constitutional injury, and were thus unlikely to fully deter unconstitutional conduct, precisely because the city's policy was politically popular. Thus, to the extent that constitutional litigation is intended not only to compensate past victims but to change future practices, the *Lyons* standing rule is counterproductive.²⁶⁴

It follows from *Lyons*, then, that if the exclusionary rule is seen only as a deterrent mechanism, intended to prevent future violations, then each and every defendant would lack standing on the basis that he or she would not be able to show a reasonable likelihood of being the victim of a future Fourth Amendment violation. The difference between a Fourth Amendment suppression hearing, however, and the situation in *Lyons* is that the criminal defendant, because she is seeking suppression of evidence in her own criminal prosecution, has the Article III injury that Mr. Lyons ostensibly did not. Thus, it makes little sense to distinguish among criminal defendants, each of whom has established the constitutionally required Article III injury through the prosecution itself, unless only to limit what the Court perceives to be the high costs of exclusion.

Staying, for the time being, with the third-party standing paradigm, one can view the defendant seeking to suppress evidence as a private attorney general of sorts.²⁶⁵ This framework is especially fitting when one considers criminal procedure as a species of criminal law for police.²⁶⁶ With this perspective, it has been proposed that, as a counterbalance to the good-faith exception to the warrant requirement, courts should apply the exclusionary rule broadly and lib-

²⁶² *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

²⁶³ *Id.* at 105-10.

²⁶⁴ Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 *FORDHAM L. REV.* 1913, 1917 (2007) (footnotes omitted).

²⁶⁵ See Monaghan, *supra* note 76, at 310-16. In fact, Professor Monaghan asserts that the private attorney general theory is the only logical basis for all exclusionary rule cases, as long as the Court maintains its view of Fourth Amendment exclusion neither as a prevention for a separate, future violation of the Amendment, nor a remedy for a completed one. *Id.* at 314-15.

²⁶⁶ See, e.g., George C. Thomas III & Barry S. Pollack, *Balancing the Fourth Amendment Scales: The Bad-Faith "Exception" to Exclusionary Rule Limitations*, 45 *HASTINGS L.J.* 21 (1993) (discussing the parallel between government and citizens when either is a wrongdoer, and defending their endorsement of proportional treatment).

erally when police officers act in bad faith.²⁶⁷ There is something appealing about permitting defendants to act as prosecutors in the context of unjustified Fourth Amendment violations. When the state seeks to convict a defendant, the state is not seeking redress for a personal harm but is safeguarding its citizens' collective right to be protected from criminal activity.²⁶⁸

Continuing in the vein of fair play and reciprocity, the *Jones* "legitimately on premises" formulation deserves another look. I agree that if the *Jones* Court meant simply that a nontrespasser has standing to challenge any search occurring on the entire premises, then this would create too broad a standard.²⁶⁹ I propose that being legitimately on the premises provides a court with two separate, but related, pieces of information by which to determine the level of protection a defendant can claim with respect to the premises searched, the second of which I will discuss when I turn, a bit later, to a more collective view of standing. Meanwhile, the first bit of information we learn when one is legitimately on the premises is that one is not trespassing. The idea here is that if one is wrongfully present, i.e., trespassing, one should not benefit from the privacy of the premises, regardless of the police conduct in breaching that privacy.²⁷⁰ Justice Rehnquist, in his opinion for the Court in *Rakas*, puts a slightly different twist on this idea with his hypothetical "burglar plying his trade in a summer cabin during the off season."²⁷¹ For Justice Rehnquist, the burglar is without a valid Fourth Amendment claim because his expectation of privacy, however strong it might be subjectively, is not "legitimate" because society would not recognize it as being reasonable. Thus, he conflated the "legitimately on premises" test with the "legitimate expectation of privacy" test.

If one leaves society's expectations out of the picture for a moment, however, and frames the issue as a matter of estoppel, as the *Jones* Court did, then why not treat the police similarly? If the police officer is wrongfully present, and arguably the officer is trespassing if she enters onto private property without a warrant (unless an exception is applicable) or valid consent, then the government should also be estopped from benefiting from the intrusion. If however, both the defendant and the police are trespassing, then a court would need to decide which party will be permitted to benefit from its wrongdoing, as this is not a zero sum game. This may require some balancing of interests, or perhaps a comparison of the respective gravity of the wrongful behavior, but I

²⁶⁷ *Id.* at 23.

²⁶⁸ Indeed, although a bit of a stretch, one can make an analogous argument regarding a prosecution to one that is often made against permitting third-party standing, in that the individual victims of crime, like other third parties, are free to seek compensation for their injuries directly through tort law. Of course, this argument does not take into account the state's own, collective interest in prosecuting wrongdoing, as, of course, the argument against third-party standing in the Fourth Amendment context fails to do.

²⁶⁹ This inquiry, however, should only be necessary if the defendant must show a connection to the premises, by virtue of having no possessory interest in the seized items.

²⁷⁰ In other words, the trespassing defendant would be estopped from claiming any privacy in the invaded place. "This would of course not avail those who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched." *Jones v. United States*, 362 U.S. 257, 267 (1960).

²⁷¹ *Rakas v. Illinois*, 439 U.S. 128, 143 n.12. (1978).

think it is fair to predict that, most likely, the evidence against the trespassing defendant would come in.

We turn now to standing analyzed in first-party terms, but still with an individualistic reading of the Fourth Amendment. As an alternative to the decision in *Rawlings*, the Court could have overruled *Jeffers* inasmuch as that decision recognized a possessory interest in contraband for purposes of the exclusionary rule.²⁷² While this alternative is not attractive from a libertarian perspective, it is still more attractive than the Court's current version of standing. The result in the case is the same either way, but the contraband distinction would have left intact the Fourth Amendment's protection of "effects" by simply redefining "effects" so as not to include contraband. This is not so far-fetched, as the legislature has determined that there is no ownership interest in contraband.²⁷³

Further, possessory crimes are unique in that, once the possession is established, all that really needs to be determined from the seized substance itself is whether it is contraband. To that end, the substance can be chemically tested but it cannot, or need not for purposes of a conviction for possession, provide any information beyond its composition, which the Court noted in *United States v. Jacobsen*.²⁷⁴ Thus, even maintaining a privacy-based, rather than property-based, conception of the Fourth Amendment, the Court could potentially treat contraband differently from other effects for purposes of establishing standing based on the seizure of such effects.

I was struck, in studying the cases comprising the Burger Court's "standing" trio, with a parallel to the "mere evidence" rule. The mere evidence rule had its strongest statement in *Gouled v. United States*,²⁷⁵ which held that a warrant could not issue, and thus there could be no lawful search for, or seizure of, anything other than contraband, fruits of a crime, or instrumentalities of a

²⁷² *United States v. Jeffers*, 342 U.S. 48, 54 (1951).

²⁷³ I am not alone in making this proposal. See Alschuler, *supra* note 8, at 17-18 ("If the *Rawlings* opinion had overruled *Jeffers* and had emphasized the contraband nature of the property seized, its dismissal of the claim based on ownership might not have been objectionable."). But see Simien, *supra* note 8, at 503 n.69 ("However, viewing the scope of the [F]ourth [A]mendment as not protecting one's interests in contraband is inconsistent with the history of the amendment."). Professor Simien points out that the dreaded writs of assistance at the center of the colonial grievances against the Crown were used to search for smuggled items (particularly molasses), in which England did not recognize legitimate ownership. *Id.* at 510-12. I agree with Professor Simien that the proposed approach departs from history. However, the approach I suggest is still more attractive than the one the Court actually took, in which protection for all effects, contraband or not, was eliminated.

²⁷⁴ *United States v. Jacobsen*, 466 U.S. 109, 122-23 (1984) ("The field test at issue could disclose only one fact previously unknown to the agent—whether or not a suspicious white powder was cocaine. It could tell him nothing more, not even whether the substance was sugar or talcum powder. . . . A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy."). As to the seizure of a minimal amount of the substance in order to test it, the Court held that the "destruction of the powder during the course of the field test was reasonable. . . . [T]he 'seizure' could, at most, have only a *de minimis* impact on any protected property interest." *Id.* at 125.

²⁷⁵ *Gouled v. United States*, 255 U.S. 298 (1921).

crime.²⁷⁶ Thus, searches for “mere evidence” were prohibited by the Fourth Amendment. The rule found its basis in the idea that the government could only seize those items to which it had a property interest superior to that of the present possessor. Many years later, the mere evidence rule was rejected by the Warren Court in its war against the dominance of property rights in Fourth Amendment discourse and doctrine.²⁷⁷

Thus, a variation on the contraband exception to the general protection of effects comes to mind that would act as a sort of weakened mere evidence rule. While the mere evidence rule in its original form permitted only searches for contraband and fruits or instrumentalities of crime, a relaxed version of the rule could deny standing to contest seizures of those three types of effects, yet permit standing in the context of all other items. I must repeat that I do not think either of these variations is correct or desirable to import into standing doctrine, and wish to stress that I am here addressing standing based solely on possession of the seized effects. As the Fourth Amendment protects against both searches and seizures, and, like the Court in *Jeffers*, I do not think the two are so easily severed,²⁷⁸ one should have standing to suppress the government’s method of obtaining evidence if either interest—in the place searched or the items seized—is even arguably infringed. Nonetheless, these alternatives, which would have permitted the Court to reach the same results, are still more protective of Fourth Amendment values and more theoretically (and textually) sound than the doctrine announced in *Rawlings*.

I explore next an account of standing that may be characterized as a modified individualistic approach. Many so-called third-party claims can, and properly should, be recast as first-party claims, implicating the right to interact with others free from impermissible restraints.²⁷⁹ Thus, recalling *Craig v. Boren*,²⁸⁰ our saloonkeeper has a reciprocal right, selling beer, to the right of the underage males to purchase it free from discrimination that violates the Equal Protection Clause.²⁸¹ When viewed in terms of “interactive liberty,”²⁸² the Fourth Amendment right can be perceived to run between a property owner and her invitee.²⁸³ Professor Alschuler provides the term that captures the concept of interactive liberty in the context of the Fourth Amendment with respect to privacy and information that we share with others: “interpersonal privacy.”²⁸⁴ Under a theory that acknowledges a right to interpersonal privacy, the Fourth Amendment protects the right to interact with others, to invite others into our homes, and to choose when and with whom to share information, and recog-

²⁷⁶ *Id.* at 308. In *Rakas*, the seized goods were instrumentalities (the rifle and the shells), in *Rawlings*, contraband (various drugs, including 1,800 tablets of LSD), and in *Salvucci*, fruits of crime (stolen mail).

²⁷⁷ *Warden v. Hayden*, 387 U.S. 294 (1967).

²⁷⁸ *See United States v. Jeffers*, 342 U.S. 48, 52 (1951).

²⁷⁹ *Monaghan*, *supra* note 76, at 297.

²⁸⁰ *Craig v. Boren*, 429 U.S. 190 (1976); *see supra* notes 132-37 and accompanying text.

²⁸¹ *See Monaghan*, *supra* note 76, at 300.

²⁸² *Id.* at 297.

²⁸³ *Id.* at 302.

²⁸⁴ Alschuler, *supra* note 8.

nizes that sharing information with a few chosen individuals is not the equivalent of sharing it with either the public or the government.²⁸⁵

It is in reference to a notion of interpersonal privacy that we can tease out an additional understanding of the “legitimately on premises” test, one that goes beyond simply indicating that an individual is not trespassing. In its discussion of the test, the *Jones* Court thrice mentioned the consent of the owner.²⁸⁶ When determining the legitimacy of an individual’s presence on the premises, then, one should examine how much privacy the owner of the premises has chosen to extend to her guest.²⁸⁷ The Court implicitly recognized this interpersonal right to privacy in *Minnesota v. Olson*, holding that “an overnight guest has a legitimate expectation of privacy in his host’s home”²⁸⁸ Although Justice White’s opinion for the Court observed that its holding “merely recognizes the everyday expectations of privacy that we all share,”²⁸⁹ and that an overnight visit is considered a “longstanding social custom,”²⁹⁰ the Court moved in the direction of acknowledging that, ultimately, it is the host who has extended his privacy to the guest:

That the guest has a host who has ultimate control of the house is not inconsistent with the guest having a legitimate expectation of privacy. The houseguest is there with the permission of his host, who is willing to share his house and his privacy with his guest. It is unlikely that the guest will be confined to a restricted area of the house; and when the host is away or asleep, the guest will have a measure of control over the premises.²⁹¹

While looking to the “legitimately on premises” test to measure the privacy extended to a guest by her host is still a somewhat property-based approach, it embraces an expansive view of privacy, in that it recognizes that the property owner can extend as little or as much of the privacy of her home to her guests, regardless of whether they have a possessory or ownership interest

²⁸⁵ *Id.*

²⁸⁶ *Jones v. United States*, 362 U.S. 257, 259 (1960) (“[T]he apartment belonged to a friend, Evans, who had given him the use of it.”); *id.* at 265 (“[P]etitioner was present in the apartment with the permission of Evans, whose apartment it was.”); *id.* at 267 (“As petitioner’s testimony established Evans’ consent to his presence in the apartment, he was entitled to have the merits of his motion to suppress adjudicated.”). Note that the opinion does not say that being legitimately on the premises is sufficient to win on the merits.

²⁸⁷ I use the term owner, rather than lessee, for example, because ultimately, permission to be on privately owned premises must stem from the owner, in whatever form it takes. Even an owner, however, cannot invade the privacy of “his” property when a tenant is in possession, but this can be seen again in terms of how much of the privacy of the premises has been transferred to the tenant through the instrument of the lease.

²⁸⁸ *Minnesota v. Olson*, 495 U.S. 91, 98 (1990).

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.* at 99. Chief Justice Rehnquist dissented from the decision in *Olson*. However, eight years later, in *Minnesota v. Carter*, the Chief Justice authored the opinion of the Court, finding that, as opposed to overnight guests, defendants simply on the premises for a short time for purposes of engaging in a commercial endeavor (bagging cocaine, as it was) lacked such a personal connection to the premises as could support a legitimate expectation of privacy. 525 U.S. 83 (1998). Justice Ginsburg, in her dissent, cites to Professor Alschuler’s article, *supra* note 8, for support of her assertion that an individual may choose “to share her home and her associations there with persons she selects.” *Id.* at 107 (Ginsburg, J., dissenting).

in the premises, or whether they spend the night! Will the “legitimately on premises” test, when seen in this light, offer a simple, bright-line rule to courts? Certainly not, and line-drawing and careful examination of the relationship between guest and host, and guest and premises, will still be required. However, this is preferable to a “legitimate expectation of privacy” test applied mechanistically to categories of non-owners, such as “mere” passengers, overnight guests, or those simply conducting business.²⁹² And, as the Court’s thorough discussion of the relationship between host and guest in *Olson* demonstrates, courts are completely capable of performing just the type of analysis that would be required.²⁹³

We come, finally, to consider the broadest alternative to current standing doctrine presented in this Article, and here, I enlist the assistance of Justice Fortas in his concurring and dissenting *Alderman* opinion.²⁹⁴ Justice Fortas, in support of the target theory of standing, condemned the use of evidence obtained in violation of the Fourth Amendment in the most sweeping terms: “‘Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.’”²⁹⁵ The opinion continues, “In recognition of the principle that lawlessness on the part of the Government must be stoutly condemned, this Court has ruled that when such lawless conduct occurs, the Government may not profit from its fruits.”²⁹⁶ Justice Fortas also drew a distinction between the Fourth and Fifth Amendments, in that the Fifth Amendment provides a prohibition on the government’s use of the compelled testimony of a given defendant,²⁹⁷ whereas the Fourth Amendment “is couched in terms of a guarantee that the Government will not engage in unreasonable searches and seizures.”²⁹⁸ Thus, Justice Fortas clearly envisioned a regulatory Fourth Amendment, and if the exclusionary rule arises from such a Fourth Amendment, then there is no reason to limit the availability of the rule only to

²⁹² While the first time a court applies the test may involve some inquiry into actual expectations, once a category is established, it will be exceedingly difficult for a lower court to reexamine a higher court’s finding in light of its own views of what society is prepared to recognize as reasonable. That is the nature of the common law, despite Justice Rehnquist’s assertion, in *Rakas*, that

it would, of course, be merely tautological to fall back on the notion that those expectations of privacy which are legitimate depend primarily on cases deciding exclusionary-rule issues in criminal cases. Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.

Rakas v. Illinois, 439 U.S. 128, 144 n.12 (1978).

²⁹³ In addition, courts are accustomed to looking at a variety of facts, or the “totality of the circumstances,” to come to a conclusion, as they must when called on to determine the voluntariness of a confession. See *supra* note 68.

²⁹⁴ *Alderman v. United States*, 394 U.S. 165, 200 (1969) (Fortas, J., concurring and dissenting).

²⁹⁵ *Id.* at 202-03 (quoting *Brinegar v. United States*, 338 U.S. 160, 180-81 (1949) (Jackson, J., dissenting)).

²⁹⁶ *Id.* at 203.

²⁹⁷ U.S. CONST. amend. V.

²⁹⁸ *Alderman*, 394 U.S. at 205 (Fortas, J., concurring and dissenting).

defendants who have had their own privacy violated by the unlawful search or seizure.²⁹⁹

However, Justice Fortas's opinion went further, and posits what I would call, although he did not, a due process model of Fourth Amendment standing:

The Fourth Amendment is not merely a privilege accorded to him whose domain has been lawlessly invaded. It grants the individual a personal right, not to privacy, but to insist that the state utilize only lawful means of proceeding against him. . . . [I]t is enough to give him "standing" to object that the government agents conducted their unlawful search and seizure in order to obtain evidence to use against him. *The Government violates his rights when it seeks to deprive him of his liberty by unlawfully seizing evidence in the course of an investigation of him and using it against him at trial.*³⁰⁰

When the State has convicted a defendant based on unconstitutionally obtained evidence, the convicted defendant has suffered a due process violation of his own, regardless that the evidence was obtained in violation of another's Fourth Amendment right.

In fact, I suggest that a robust due process model might not even be dependent on the defendant having been a target of the search. The question becomes, then, might the fact that the government simply seeks to *use* unlawfully obtained evidence be enough to trigger standing, on due process grounds, to claim a Fourth Amendment violation? This, obviously, goes further than either the *Jones* Court or Justice Fortas was willing to go. Professor Arnold Loewy argues that there is a difference between substantive and procedural rights.³⁰¹ According to Professor Loewy, the Fourth Amendment is a substantive right, and, in fact, because it permits searches on probable cause, is meant to protect the innocent, with the guilty being "incidental beneficiaries."³⁰² Contrast this with the Fifth and Sixth Amendments, which offer procedural safeguards for, respectively, a "person . . . in any criminal case"³⁰³ and "the accused."³⁰⁴ The Fifth Amendment's self-incrimination clause, for example, is itself an exclusionary rule, prohibiting the use of compelled testimony "in any criminal case." Thus, Professor Loewy argues, a violation of a procedural right such as the self-incrimination clause demands exclusion of evidence, without any balancing of interests or talk of deterrence, while a violation of a substantive right, such as the Fourth Amendment does not, even if it is sound policy.³⁰⁵

What if the Fourth Amendment is read, however, to protect all suspects, innocent and guilty alike, by prescribing the procedural mechanism with which the government must comply in order to conduct the search or seizure? Look-

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 206-09 (emphasis added).

³⁰¹ Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907 (1989).

³⁰² *Id.* at 910; *see also* Colb, *supra* note 59, at 1669 (arguing that the Fourth Amendment aspires to maximize searches of factually guilty persons, and minimize searches of the innocent).

³⁰³ U.S. CONST. amend. V.

³⁰⁴ *Id.* amend. VI.

³⁰⁵ Loewy, *supra* note 301, at 910.

ing for guidance to the most famous and oft cited English precedent for the Fourth Amendment, the plaintiff in *Entick v. Carrington*³⁰⁶ was victorious in his trespass action alleging an unlawful search and seizure (conducted pursuant to a general warrant) *despite* the fact that the search was successful in turning up evidence of seditious libel (the seized papers).³⁰⁷

While the Fourth Amendment speaks of probable cause and thus, contemplates searches for evidence of wrongdoing, certain seizures are not addressed by the Fourth Amendment at all and require no suspicion whatsoever, and thus, no warrant. I do not here refer to those seizures that the Court has determined are not seizures for purposes of the Fourth Amendment exclusionary rule.³⁰⁸ For example, seizures of one's property are permitted, with just compensation, under the Fifth Amendment's takings clause,³⁰⁹ and seizures of one's home are also permitted (as provided for by law) during wartime under the Third Amendment.³¹⁰ If the Fourth Amendment, on the other hand, is concerned primarily with the gathering of evidence, for what purpose would such evidence be gathered other than to use against the suspect at trial? Continuing along this line, if the Fourth Amendment addresses the proper procedures for obtaining evidence to use at trial, then the *use* of illegally obtained evidence against a defendant violates due process (if not the Fourth Amendment itself).

The due process model of the Fourth Amendment I have sketched out would, of course, promote a value of the exclusionary rule that has been all but forgotten by the Court: that of judicial integrity.³¹¹ By this account, a defendant potentially suffers a due process violation not only when the government

³⁰⁶ *Entick v. Carrington*, (1765) 95 Eng. Rep. 807 (K.B.).

³⁰⁷ See Knox, *supra* note 8, at 3-14, for a discussion of the historical background and precedents, both English and colonial, of the Fourth Amendment.

³⁰⁸ See *supra* text accompanying note 29.

³⁰⁹ U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

³¹⁰ *Id.* amend. III ("No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.").

³¹¹ Judicial integrity was alive and well, a proud witness to the birth of the exclusionary rule, in *Weeks v. United States*. 232 U.S. 383, 393 (1914) ("The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."). *Mapp v. Ohio*, by holding the exclusionary rule applicable to the states, "close[d] the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct." 367 U.S. 643, 654-55 (1961). In *United States v. Calandra*, Justice Brennan invoked the principle of judicial integrity, but his pleas did not reach the ears of the majority, which held the exclusionary rule inapplicable to grand jury proceedings. 414 U.S. 338 (1974).

But curtailment of the evil, if a consideration at all, was at best only a hoped-for effect of the exclusionary rule, not its ultimate objective. . . . Their concern as guardians of the Bill of Rights was to fashion an enforcement tool to give content and meaning to the Fourth Amendment's guarantees. . . . The exclusionary rule, if not perfect, accomplished the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior

Id. at 356-57 (Brennan, J., dissenting).

introduces unlawfully obtained evidence, but also when a court permits the inclusion of such evidence over the objections of the defendant. The Court, in *Barrows v. Jackson*,³¹² recognized as much when it held that the enforcement by a state court of a restrictive covenant by the award of damages constitutes state action for purposes of the Fourteenth Amendment.³¹³ When the Court is seen as a party to the due process violation, then not only does exclusion promote judicial integrity, it actually becomes the correct remedy that fits perfectly with the violation it addresses.

VI. CONDUCT RULE BUT NO CONDUCT: WHY IT MATTERS

Whatever approach to standing one favors, it is clear that the Burger Court's version was a dramatic departure from what came before³¹⁴ and from the text of the Fourth Amendment itself. It is equally clear, recalling the definition of judicial activism provided by Professor Smith,³¹⁵ that significant activism was afoot, in both its substantive and procedural dimensions. The Court in *Rakas* used standing, generally thought of as a decision not to decide, to decide quite a lot and to narrow significantly the substantive scope of Fourth Amendment protection against unreasonable searches and seizures. While I disagree with the *Salvucci* and *Rawlings* Courts' interpretation of *Rakas*, what *Rakas* did unequivocally hold, that the inquiry of Fourth Amendment standing would no longer be a separate threshold inquiry but be enveloped by the substantive Fourth Amendment analysis, was equally (if not more) detrimental to the cause of a broad, inclusive, regulatory view of the Fourth Amendment than were the concrete restrictions of *Rawlings* and *Salvucci*.

Merging standing with the merits, especially in the context of the Fourth Amendment, is troubling for many reasons, particularly in light of the test used by the Court to determine both: the "legitimate expectation of privacy" test. Despite Justice Rehnquist's assertion that it rests on "sounder logical footing"³¹⁶ to combine the two inquiries, that is not the case. Take, for example, *Florida v. Riley*.³¹⁷ The Court held that the police violated no legitimate expectation of privacy in the defendant's greenhouse when they observed, with unaided eyes, marijuana plants from a helicopter flying at 400 feet.³¹⁸ Obviously, Mr. Riley had standing to claim a Fourth Amendment violation, and he did indeed make such a claim. After all, he was the owner of the greenhouse. And yet, he lost on the merits because he had no reasonable expectation that the contents of his greenhouse (especially with the roof open) would remain private from the general public, let alone the police, in light of the frequency of air

³¹² *Barrows v. Jackson*, 346 U.S. 249 (1953).

³¹³ *Id.* at 254 ("To that extent, the State would act to put its sanction behind the covenants.").

³¹⁴ As previously discussed, the Warren Court provided the means by which the Burger and Rehnquist Courts would narrow Fourth Amendment protections. See *supra* notes 69-70, 220 and accompanying text; see also *infra* note 326 and accompanying text.

³¹⁵ See *supra* text accompanying notes 10-12.

³¹⁶ *Rakas v. Illinois*, 439 U.S. 128, 140 (1978).

³¹⁷ *Florida v. Riley*, 488 U.S. 445 (1989).

³¹⁸ *Id.* at 451-52.

travel in this day and age. Clearly, as this case demonstrates, standing is not synonymous with the merits.

The problem is rooted in the shortcomings of the “legitimate expectation of privacy” test and especially in the use of that test to determine both standing and merits. Merging standing with the merits of a Fourth Amendment claim magnifies those shortcomings, one of which, of course, is the indeterminate nature of the test.³¹⁹ While it is beyond the scope of this Article to set forth all the shortcomings of this particular test comprehensively, a few are particularly worth noting. First, as formulated by the Court, the legitimacy of the expectation is based on the consent of society. The proper measure of a constitutional protection should be what an individual has the right to expect, rather than what society at any given time does actually expect or is willing to permit.³²⁰

That aside, however, even if society’s expectation is the proper gauge of legitimate expectations of privacy, how accurately do judges evaluate what society accepts as reasonable? Professors Christopher Slobogin and Joseph Schumacher offer compelling empirical evidence that judges often miss the mark with their assertions of reasonableness.³²¹ Justice White said as much in his *Rakas* dissent: “The Court’s holding is contrary not only to our past decisions and the logic of the Fourth Amendment but also to the everyday expectations of privacy that we all share.”³²²

Further, the “legitimate expectation of privacy” test is almost necessarily a one-way ratchet. Although the *Rakas* majority cautions that “it would, of course, be merely tautological to fall back on the notion that those expectations of privacy which are legitimate depend primarily on cases deciding the exclusionary-rule issues in criminal cases,” and clarifies that “[l]egitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society,” what lower court judge, after *Rakas*, will reexamine for herself what people actually expect when they travel in their friends’ automobiles? Indeed, while it is a given that a lower court judge cannot decide that the Supreme Court Justices simply got it wrong, how likely is it that a future Court would level the same charge against a past Court? Recalling the earlier discussion of the difficulty for the Court to admit its mistakes,³²³ I venture to suppose that it would be even more difficult (and damaging to the Court’s reputation as an institution) to admit that it was

³¹⁹ See Mickenberg, *supra* note 8, at 210 (describing the “legitimate expectation of privacy” test as “a totally subjective test subject to political and social pressures and the personal attitudes of individual judges and courts” that can be “turned completely on its head if a future court should decide that society only views a defendant’s expectation of privacy as reasonable when a property right also exists”).

³²⁰ See Simien, *supra* note 8, at 524 n.156 (quoting Ronald J. Bacigal, *Some Observations and Proposals on the Nature of the Fourth Amendment*, 46 GEO. WASH. L. REV. 529, 536 (1978)).

³²¹ Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at ‘Understandings Recognized and Permitted By Society,’* 42 DUKE L.J. 727 (1993).

³²² *Rakas v. Illinois*, 439 U.S. 128, 167 (1978) (White, J., dissenting).

³²³ See *supra* notes 42-45 and accompanying text.

completely out of touch with societal norms when asserting, on society's behalf, what the general public does and does not consider reasonable.

Finally, it is the nature of the world we live in that our subjective expectations for privacy are constantly diminishing, in part through the government's own actions.³²⁴ As Professor Thomas Clancy aptly observes, "The peculiar logic of the diminished expectation of privacy rationale, therefore, is that it permits the scope of Fourth Amendment protections to diminish as governmental regulation increases. Yet, the mandates of the Fourth Amendment demand heightened, not lowered, respect, as the intrusive regulatory authority of government expands."³²⁵

Another major concern with the "legitimate expectation of privacy" test is that it shifts the focus of the Amendment itself. Under a regulatory view, the focus of the Amendment is most certainly on the action of the government, and the proper substantive inquiry remains whether the government exceeded its constitutional limitations and acted improperly. After *Rakas*, the focus shifted from scrutiny of the government's actions, which is precisely what the Fourth Amendment is designed to regulate, to scrutiny of the subjective, and objectively legitimate, expectations of those whom the Amendment was designed to protect. Thus, the government's actions, even if blatantly illegal, settled into a position of secondary importance or, indeed, of no importance at all.

I must acknowledge what other scholars have pointed out, that *Katz* was the first step in this shift of focus, with its talk of knowing exposure and what a defendant "seeks to preserve as private."³²⁶ Even so, an individual's exposure of objects or information is (or should be) less about depriving that individual of Fourth Amendment protection and more about informing the determination of whether the police acted in accordance with the Constitution. If I, therefore, place an item in open view on the sidewalk in front of my home, the police officer walking by has not violated my (or anybody else's) Fourth Amendment right by *seeing* it. The officer simply has not violated the Fourth Amendment, period. Returning to greenhouses and helicopters, and putting aside the question of whether the Court reached the correct result, the police in *Riley* did not violate the Fourth Amendment, not because Mr. Riley had no protected interest in his greenhouse, but because when the roof was left open, the police did not act improperly by seeing what was, in fact, available (at least in theory) to any member of the public to see.³²⁷

³²⁴ See *supra* note 225.

³²⁵ Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 342 (1998) (footnote omitted) (internal quotations omitted).

³²⁶ *Katz v. United States*, 389 U.S. 347, 351 (1967); see, e.g., Mickenberg, *supra* note 8, at 209.

³²⁷ *Florida v. Riley*, 488 U.S. 445, 451 (1989) ("Any member of the public could legally have been flying over Riley's property in a helicopter at the altitude of 400 feet and could have observed Riley's greenhouse. The police officer did no more."). The Court also places a great deal of emphasis on the fact that the police, in flying at 400 feet, were not breaking the law. The legality of the police conduct informs the expectation of privacy from such an intrusion. This is hard to square, however, with any searches and seizures where officers are acting unlawfully, and even harder to square with the open fields line of cases, such as *Oliver v. United States*, 466 U.S. 170 (1984), in which the officers were clearly trespassing.

In the “standing” cases, however, the police *did* act improperly. As Professor Ira Mickenberg notes, we know two things about *Rakas*: “First, the police action . . . was indisputably illegal and without probable cause. Second, it was equally indisputable that the defendants were guilty.”³²⁸ Thus, the only way to allow the conviction to stand and to avoid the suppression of evidence on remand was to decide the Fourth Amendment merits without ever considering the police conduct at all.³²⁹ However, *if* one accepts that the primary (or only) rationale of the exclusionary rule is to deter future Fourth Amendment violations, then any decision as to whether or not the rule should be applied should consider the police conduct underlying the search or seizure at issue. Thus, it is entirely appropriate for the formulation of decision rules to be informed by the relevant conduct rules the courts seek to enforce. However, this does not imply the reciprocal propriety of permitting decision rules to influence the formulation of constitutional norms, or conduct rules.

By converting a decision rule such as standing, into a Fourth Amendment conduct rule, as I believe the Court effectively did in *Rakas*, the Court is telling the police, *sotto voce*, that if certain individuals (such as automobile passengers) have no legitimate expectation of privacy in certain places (such as the cars in which they are riding), the police may search. And while the officers conducting the search may be violating the owner’s Fourth Amendment rights, they are not violating the passenger’s rights. Thus, *vis-à-vis* the passengers, the officers are acting constitutionally. If you take this one step further, which the Court thankfully has not, the standing of the passengers (or lack thereof), when perceived as defining constitutionally permissible conduct, could potentially affect the scope of Fourth Amendment protection even as to the owner, leading to the absurd result that any time you or I choose to share the privacy of our cars with others, we lose our own expectation of privacy. After all, how can I, driving down the freeway on my way to work, reasonably expect that the government will not intrude into my car when my coworker, to whom I have

³²⁸ Mickenberg, *supra* note 8, at 220. Professor William Stuntz describes the problem of post-search bias when judges are deciding suppression motions as one justification for the pre-search warrant procedure. William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 911-13 (1991). I imagine this bias would be magnified when an appellate court is deciding, post-conviction, whether a Fourth Amendment violation occurred that would require reversal.

³²⁹ Mickenberg, *supra* note 8, at 220. (“That was accomplished by finding that the defendant had no expectation of privacy and therefore no right to complain about the police behavior.”). What if, however, the police conduct *is* proper? For example, in *Minnesota v. Carter*, a police officer, acting on an informant’s tip, looked through a gap in a closed window blind, observing the defendants bagging cocaine in a ground-floor apartment loaned to them for such purpose. 525 U.S. 83, 85 (1998). The majority focused solely on the defendants’ relationship with the premises, and the purely commercial nature of their activities there, to hold that they had no legitimate expectation of privacy in the apartment. *Id.* at 91. Thus, according to the majority, there was no need to examine the officer’s conduct. *Id.* Justice Breyer, however, points out that, while he would have found that the defendants had the right to expect the protection of the Fourth Amendment in the apartment, or, in other words, that they had a privacy interest in the premises, they failed to take precautions that anybody living in a basement apartment should ordinarily take in order to keep their activities hidden from the general public. *Id.* at 103, 105 (Breyer, J., concurring). In other words, the officer saw no more than any member of the public could have seen as well.

offered a lift, sitting alongside me in the same car, expects exactly the opposite?³³⁰

VII. CONCLUSION

Whether or not the Burger Court intended to solidify its personal-right vision of the Fourth Amendment by merging standing into the substantive inquiry (a strong purposive account) cannot be known. Taking into consideration, however, factors such as the known flexibility of standing doctrine generally and the pressures, both internal, such as stare decisis rules and group dynamics, and external, such as public perception, it is entirely possible that the Burger Court intended precisely this result. After all, ten years before *Rakas*, the Court had already hinted, in *Mancusi v. DeForte*,³³¹ that, although *Mancusi* was not the case in which to do so, there might come a time when it would be “necessary to decide whether the traditional doctrine that Fourth Amendment rights ‘are personal rights . . .’ should be modified.”³³²

I have argued that the doctrinal move in *Rakas*, eliminating standing as a preliminary inquiry and collapsing it into the decision on the merits, has made it significantly more difficult for a future Court to make the decision referred to in *Mancusi*. Moreover, after *Rakas*, Congress is no longer free to expand the application of the exclusionary rule, as the Court in *Alderman* had once invited it to do,³³³ for now the applicability of the exclusionary remedy has become coextensive with the scope of the constitutional right, as defined by the Court, and *that* Congress may not alter.

I will save, for a future endeavor, a more thorough treatment of the various standing alternatives touched on in Part V, but urge, for now, that the Court begin by freeing standing from under the shadow of the merits. If standing is conceived once again as an independent, preliminary inquiry, the Court will be free to reformulate standing in a way that will more readily permit a determination of the merits that takes into account the disputed government conduct as well as the nature of the allegedly infringed interest. Like the search and seizure in *Jeffers*,³³⁴ the two should not be considered in isolation. A liberal notion of standing becomes increasingly urgent as the Court will be called upon to reconsider its understanding of legitimate expectations of privacy in light of advances in technology, increasing governmental regulation, and the growing necessity of storing information, such as the websites we visit or the emails we write, with third parties, such as Internet service providers. As our subjective expectations of privacy diminish, the focus on government conduct must pro-

³³⁰ Kuhns, *supra* note 8, at 543. Justice Ginsburg, in her dissenting opinion in *Carter*, voices a similar concern that denying a legitimate expectation of privacy to guests (other than overnight guests) affects the homeowner’s security as well. *Carter*, 525 U.S. at 107 (Ginsburg, J., dissenting) (“A homedweller places her own privacy at risk, the Court’s approach indicates, when she opens her home to others, uncertain whether the duration of their stay, their purpose, and their ‘acceptance into the household’ will earn protection.”).

³³¹ *Mancusi v. DeForte*, 392 U.S. 364 (1968).

³³² *Id.* at 366 (citation omitted).

³³³ *Alderman v. United States*, 394 U.S. 165, 175 (1969).

³³⁴ *United States v. Jeffers*, 342 U.S. 48, 52 (1951).

portionally increase, or the protections envisioned by the Framers over 200 years ago will be eviscerated simply by the passage of time.

There is no question that the Court, in *Rakas*,³³⁵ completely failed to address the police (mis)conduct. In fact, the Court began its substantive discussion rather ominously: “[W]e are not here concerned with the issue of probable cause”³³⁶ Thus, with the shift in focus from the conduct of police officers to the expectations of defendants, and with the incorporation of standing into the decision on the merits, the *Rakas* Court set the stage for the subsequent decisions that would rewrite the Constitution by ignoring the plain meaning of “seizures” and “effects.” Justice Black, in his dissent from the *Katz* decision and its abandonment of the plain meaning of ordinary words, albeit to broaden the scope of protection, hoped that the Court was finished with its “rewriting of the Fourth Amendment.”³³⁷ Approximately a decade later, Justice Black’s hopes may have been realized. With its decisions in *Rakas*, *Rawlings*, and *Salvucci*, the Court took a substantial step towards making sure that, at the very least, its draft of the Fourth Amendment would not be unwritten.

³³⁵ *Rakas v. Illinois*, 439 U.S. 128 (1978).

³³⁶ *Id.* at 130.

³³⁷ *Katz v. United States*, 389 U.S. 347, 373 (1967) (Black, J., dissenting) (“With this decision the Court has completed, I hope, its rewriting of the Fourth Amendment”).