

1-1-2007

Georgia v. Randolph: Whose Castle Is It, Anyway?

Lesley McCall

University of Richmond School of Law

Follow this and additional works at: <https://scholarship.richmond.edu/lawreview>

Part of the [Criminal Procedure Commons](#), [Evidence Commons](#), [Fourth Amendment Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Lesley McCall, *Georgia v. Randolph: Whose Castle Is It, Anyway?*, 41 U. Rich. L. Rev. 589 (2019).

Available at: <https://scholarship.richmond.edu/lawreview/vol41/iss2/9>

This Casenote is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

CASENOTE

GEORGIA V. RANDOLPH: WHOSE CASTLE IS IT, ANYWAY?

I. INTRODUCTION

The Fourth Amendment protects individuals against unreasonable searches and seizures.¹ Generally, a warrant is required to conduct a lawful search of a person's home, and a warrantless search is unreasonable *per se*.² However, there are some exceptions to this requirement.³ A warrantless search is reasonable if police obtain voluntary consent from a person to search their home or effects.⁴ The Supreme Court has also recognized that a third party with common authority over a household may consent to a police search affecting an absent co-occupant.⁵ The Supreme Court of the United States recently addressed whether third-party consent was effective as to a present, objecting co-occupant in *Georgia v. Randolph*,⁶ in which a wife granted police permission to search the marital home over the protestations of her husband, and found that it was not.⁷

1. U.S. CONST. amend. IV.

2. *Payton v. New York*, 445 U.S. 573, 586 (1980) (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 474–75 (1971)); *see also Katz v. United States*, 389 U.S. 347, 357 (1967) (“[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.”) (footnotes omitted).

3. Examples include seizure of items in plain view, exigent circumstances, hot pursuit, vehicle searches, searches incident to a valid arrest, and consent searches, among others. *See Twenty-Fifth Annual Review of Criminal Procedure Investigation and Police Practices*, 84 GEO. L.J. 717, 743 (1996).

4. *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973).

5. *United States v. Matlock*, 415 U.S. 164, 171 (1974).

6. 126 S. Ct. 1515 (2006).

7. *Id.* at 1519.

The rule announced by the majority is murky and will probably require further refinement. Both the majority and dissenting opinions failed to recognize the importance of the absent versus present distinction in reference to Fourth Amendment rights; instead, each opinion is aimed at undermining the other, resulting in a decision that never fully appreciates the dangers of limiting the scope of Fourth Amendment protections in favor of expanding a judicially created exception.⁸ This note examines the Court's decision in *Randolph* and its shortcomings. Part II traces the development of the third-party consent exception and the different theories the Court has utilized in justifying its decisions. Part III discusses the history and background of the *Randolph* case. Part IV reports the majority, concurring, and dissenting opinions, analyzing weaknesses in each and the interplay between them. Part V considers the impact the *Randolph* decision may have on the law of search and seizure, in light of the problems noted in Part IV.

II. HISTORY OF THIRD-PARTY CONSENT TO WARRANTLESS SEARCH AND SEIZURE

A. *Origins, and the "Reasonable Expectation of Privacy" Test*

The law regarding warrantless search and seizure has undergone much change over time; the *Randolph* decision continues a tradition of the Court's inconsistent interpretation of the Fourth Amendment.⁹ The Court held in early third-party consent cases that persons with an inferior property interest in the searched premises did not have sufficient authority to authorize a consent search.¹⁰ Later, the Supreme Court's declaration in *Katz v.*

8. Cf. Nancy J. Kloster, Note, *An Analysis of the Gradual Erosion of the Fourth Amendment Regarding Voluntary Third Party Consent Searches: The Defendant's Perspective*, 72 N.D. L. REV. 99, 106-13 (1996) (criticizing the Court's Fourth Amendment jurisprudence and tracing its development in the federal system).

9. See generally Kathryn R. Urbonya, *Rhetorically Reasonable Police Practices: Viewing the Supreme Court's Multiple Discourse Paths*, 40 AM. CRIM. L. REV. 1387 (2003).

10. See *Stoner v. California*, 376 U.S. 483 (1964) (finding that a hotel clerk lacked authority to consent to a search of guest's room); *Chapman v. United States*, 365 U.S. 610 (1961) (holding that a landlord did not have authority to consent to a search of tenant's house, where a distillery was found within).

*United States*¹¹ that “the Fourth Amendment protects people, not places” paved the way for a Fourth Amendment jurisprudence independent of the law of property.¹² Justice Harlan’s concurrence in that case set forth a two-part test for applying the majority’s rule: first, a person must have exhibited a subjective expectation of privacy; and second, society is prepared to recognize that expectation as “reasonable.”¹³ This concurring opinion came to be adopted by many lower courts and eventually the Supreme Court,¹⁴ and forms the basis of the “touchstone of Fourth Amendment analysis”: the reasonable expectation of privacy theory.¹⁵

The Court further refined this theory in *Rakas v. Illinois*,¹⁶ explaining that a reasonable expectation of privacy must have a source outside of the Fourth Amendment; either property rights or notions recognized by society may provide such a basis.¹⁷ The *Rakas* Court recognized that in embracing the reasonable expectation test, it was ostensibly abandoning a “thoroughly workable, ‘bright line’ test in favor of a less certain analysis of whether the facts of a particular case give rise to a legitimate expectation of privacy.”¹⁸

11. 389 U.S. 347 (1967).

12. *Id.* at 351, 353 (abrogating the “trespass” paradigm of the Fourth Amendment’s protections in favor of a reasonable expectation of privacy theory).

13. *Id.* at 361 (Harlan, J., concurring).

14. 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 2.1(b) (4th ed. 2004).

15. *California v. Ciraolo*, 476 U.S. 207, 211 (1986). Justice Harlan himself later asserted that the *Katz* analysis “must . . . transcend the search for subjective expectations or legal attribution of assumptions of risk,” because social expectations are largely shaped by the laws themselves. *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting).

16. 439 U.S. 128 (1978).

17. *Id.* at 143 n.12 (“[B]y focusing on legitimate expectations of privacy in Fourth Amendment jurisprudence, the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment.”).

18. *Id.* at 144. The “bright line” referred to here is the test developed in *Jones v. United States*, 362 U.S. 257 (1960), in which the Court found that “anyone legitimately on premises where a search occurs may challenge its legality.” *Id.* at 267. The *Rakas* Court’s rationale for rejecting the “legitimately on the premises” test was that the test created too broad a range of Fourth Amendment rights. *Rakas*, 439 U.S. at 142. Therefore, the Court concluded, *Jones* offered only a superficially “bright line” test which had led to inconsistent results. See *id.* at 145 n.13 (discussing the widely varying results the *Jones* test had engendered).

B. *The Assumption of Risk Theory*

In *United States v. Matlock*¹⁹ the Court qualified the reasonable expectation of privacy test, holding that third-party consent searches are reasonable under the theory that a person "assumes the risk" that a co-occupant with "common authority" over the premises will admit police to search in his absence.²⁰ The assumption of risk theory as applied to Fourth Amendment cases originated in the Court's 1969 decision in *Frazier v. Cupp*,²¹ where a search of a shared duffel bag was held valid against the absent co-user of the bag.²² In *Matlock*, the respondent was arrested in front of the house where he lived and was detained in a squad car while police officers obtained consent from a woman inside the house to search the room she shared with the respondent.²³ The search turned up a large sum of cash, and the respondent sought to suppress this evidence by arguing that his cohabitant's consent was not binding on him.²⁴ However, the Court held that the government met its burden by showing that the co-occupant's voluntary consent was legally sufficient,²⁵ and therefore the search was reasonable under the Fourth Amendment.²⁶

The Court's decision in *Matlock*, which allowed for third-party consent by a person with "common authority" over a shared prem-

19. 415 U.S. 164 (1974).

20. *Id.* at 170-71.

21. 394 U.S. 731 (1969).

22. *Id.* at 740 ("Petitioner, in allowing [his cousin] to use the bag and in leaving it in his house, must be taken to have assumed the risk that [the cousin] would allow someone else to look inside.")

23. 415 U.S. at 166, 179.

24. *See id.* at 166-67. Suppression of evidence gathered in the course of an illegal search or seizure has been the standard remedy for such unconstitutional searches since the Court's decision in *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (applying the exclusionary rule to searches unconstitutionally undertaken by state officials, incorporating the Fourth Amendment as binding on states through the Due Process Clause of the Fourteenth Amendment). *See also Weeks v. United States*, 232 U.S. 383, 398 (1914) (holding that use of illegally seized evidence in federal prosecutions is "a denial of the constitutional rights of the accused.")

25. That is, the consent was voluntarily given and not the result of duress or coercion. *See Schneekloth v. Bustamonte*, 412 U.S. 218, 248 (1973).

26. *Matlock*, 415 U.S. at 177. *But see id.* at 178-79 (Douglas, J., dissenting) (arguing that the lack of a search warrant rendered the search unreasonable, particularly in light of the fact that the police never attempted to procure one in the course of three searches of the premises).

ises, may be viewed as a foreseeable consequence of its decision in *Schneckloth v. Bustamonte*,²⁷ which the Court decided in the term prior to *Matlock*.²⁸ *Schneckloth* provided guidelines for determining whether warrantless consent searches are reasonable under the Fourth Amendment: the consent must “in fact [be] voluntarily given, and not the result of duress or coercion.”²⁹ In addition, “knowledge of a right to refuse [consent] is not a prerequisite of a voluntary consent.”³⁰ The Court accepted the utility of a “totality of the circumstances” approach in assessing whether any implicit or explicit coercion had occurred.³¹ *Schneckloth* thus clarified the notion of consent searches and what was necessary for such to be reasonable.³²

C. *Post-Matlock, Pre-Randolph Third Party Consent Law*

A majority of jurisdictions addressing the issue of third-party consent expanded *Matlock* to allow searches to proceed as long as one occupant gave consent, regardless of whether another occupant objected.³³ The Supreme Court itself expanded the *Matlock* rule; in *Illinois v. Rodriguez*³⁴ it held that warrantless third-party consent searches are valid as long as the third party had “apparent authority” to grant consent to a search.³⁵ This case abrogated

27. 412 U.S. 218 (1973).

28. *Schneckloth* was decided May 29, 1973, during the Court’s 1972 term, while *Matlock* was decided February 20, 1974, during the Court’s 1973 term.

29. 412 U.S. at 248.

30. *Id.* at 234. The *Schneckloth* decision reversed a Ninth Circuit rule that for a consent search to be reasonable, the prosecution must prove that the subject of the search had knowledge of his right to refuse consent. *Id.* at 229.

31. *See id.* at 226 (noting Fourth Amendment cases in which the Court took into account various factors, none of which were necessarily dispositive).

32. *Cf.* 4 LAFAVE, *supra* note 14, § 8.1(a) (summarizing legal commentators’ criticisms of the *Schneckloth* decision).

33. *See Georgia v. Randolph*, 126 S. Ct. 1515, 1520 n.1 (2006) The *Randolph* majority cited four courts of appeals’ decisions holding that third-party consent remains effective in the face of an express objection: *United States v. Morning*, 64 F.3d 531, 533, 536 (9th Cir. 1995); *United States v. Donlin*, 982 F.2d 31, 33 (1st Cir. 1992); *United States v. Hendrix*, 595 F.2d 883 (D.C. Cir. 1979) (per curiam); and *United States v. Sumlin*, 567 F.2d 684, 687–88 (6th Cir. 1977). The Court also noted that a majority of state courts reached the same conclusion as the federal appellate courts, citing *Love v. State*, 138 S.W.3d 676, 680 (Ark. 2003) and *City of Laramie v. Hysong*, 808 P.2d 199, 203–05 (Wyo. 1991).

34. 497 U.S. 177 (1990).

35. *Id.* at 179–80, 189 (holding a search constitutional where consent was granted by petitioner’s ex-girlfriend, whom police reasonably believed to possess common authority over the apartment because she had a key and did not indicate to them that she no longer

the burden of showing that the consenting third party actually possessed "common authority," as required by *Frazier* and *Matlock*, making it easier for police to conduct warrantless searches of an absent party's property and demonstrating a willingness of the Court to value police efficiency over an individual's privacy expectation.³⁶ Justice Marshall explained in his dissent that under the "assumption of risk" analysis, a search based on the consent of a third party with apparent, but not actual, authority cannot be reasonable because the subject of the search does not have a diminished privacy expectation, which is the underlying rationale in cases such as *Matlock* and *Frazier*.³⁷ The stark difference in focus of the majority and dissenting opinions in *Rodriguez*—Justice Scalia's concern was with law enforcement efficacy and practicality,³⁸ while Justice Marshall found this an insufficiently compelling reason to expand an exception to the general rule that warrantless searches are unreasonable³⁹—foreshadowed the outcome in *Randolph*, in which all of the Justices authoring opinions demonstrated diverse perspectives on this tension.

Prior to the Supreme Court of Georgia's *Randolph* decision, only four state supreme courts had found third-party consent invalid as to a present, objecting co-occupant.⁴⁰ These cases found that although a consenting party may permit a search in their

lived there).

36. *Id.* at 186 ("Whether the basis for . . . authority [to consent to a search] exists is the sort of recurring factual question to which law enforcement officials must be expected to apply their judgment; and all the Fourth Amendment requires is that they answer it reasonably."). *Cf. id.* at 189–90 (Marshall, J., dissenting) ("The majority's defense of [its] position rests on a misconception of the basis for third-party consent searches. That such searches do not give rise to claims of constitutional violations rests not on the premise that they are 'reasonable' under the Fourth Amendment, but on the premise that a person may voluntarily limit his expectation of privacy by allowing others to exercise authority over his possessions." (citations omitted)).

37. *Id.* at 193–94 (Marshall, J., dissenting).

38. *Id.* at 185–86 (holding that all the Fourth Amendment requires is that police be reasonable in their search, not necessarily correct, because a determination of consent is a "recurring factual question to which law enforcement officials must be expected to apply their judgment.").

39. *Id.* at 192 (Marshall, J., dissenting) ("In the absence of an exigency, then, warrantless home searches and seizures are unreasonable under the Fourth Amendment. . . . [O]nly the minimal interest in avoiding the inconvenience of obtaining a warrant weighs in on the law enforcement side.").

40. Florida, Washington, New York and Minnesota. *See, e.g.,* *Silva v. State*, 344 So. 2d 559 (Fla. 1977); *State v. Leach*, 782 P.2d 1035 (Wash. 1989).

own right, it is unreasonable to presume that a co-occupant assumes this risk when present at the shared premises.⁴¹ Unlike the federal appellate decisions, these state courts found the distinction between the absence and presence of the defendant to be dispositive because a person's expectation of privacy is greater when they are at home than when they are not.⁴² These four courts were clearly in the minority among those to have considered the issue.⁴³

None of the Supreme Court's prior third-party consent cases addressed the issue of whether an evidentiary seizure is lawful "with the permission of one occupant when the other . . . is present at the scene and expressly refuses to consent."⁴⁴ The Court granted certiorari to address the split among the courts.⁴⁵ However, it is questionable whether *Randolph* meaningfully resolved this split. Justice Souter's majority opinion did not clearly enunciate the obvious tension between a Fourth Amendment guarantee to refuse police entry to search without a warrant and the relatively recent, judicially created exception of third-party consent.⁴⁶ Instead, the opinion is largely aimed at addressing issues raised in the dissent written by Chief Justice Roberts. *Randolph* was one of the first contentious cases to be decided by the Roberts Court, and it is evident that the Justices struggled in finding equilibrium after a long string of unanimous decisions.⁴⁷

41. See, e.g., *Leach*, 782 P.2d at 1038–40.

42. See, e.g., *id.* at 1040.

43. See *Georgia v. Randolph*, 126 S. Ct. 1515, 1520 n.1 (2006); *supra* note 33 and accompanying text.

44. *Randolph*, 126 S. Ct. at 1519.

45. *Id.* at 1520.

46. See *Leach*, 782 P.2d at 1038–39 (“[A] present, objecting party should not have his constitutional rights ignored because of a leasehold or other property interest shared with another. This is particularly true where the police are aware that the person objecting is the one whose constitutional rights are at stake.”) (quoting *Silva v. State*, 344 So. 2d 559, 562–63 (Fla. 1977)).

47. Chief Justice Roberts's dissent referred to “what becomes the majority opinion,” 126 S. Ct. at 1539 (Roberts, C.J., dissenting), suggesting that his dissent was originally intended to be the majority opinion. Other animosity is evident as well; Justice Souter called the dissent's apparent concern for domestic violence a “red herring,” *id.* at 1526, while Chief Justice Roberts's dissent repeatedly called the majority opinion “random” and “arbitrary.” *Id.* at 1531, 1536–37, 1539 (Roberts, C.J., dissenting). Justices Scalia and Stevens appear to have written separate opinions solely for the purpose of attacking the other's conception of constitutional interpretation, though their discussion is better-natured than the exchange between Justice Souter and Chief Justice Roberts. See generally David L. Hudson Jr., *Fourth Amendment Case Shows Cracks in the Court*, 5 No. 12

III. BACKGROUND OF THE *RANDOLPH* DECISION

A. *Factual Background*

Scott and Janet Randolph had been separated for over a month, with Mrs. Randolph and the couple's son staying with relatives in Canada before their return to the marital home in Americus, Georgia, in July 2001.⁴⁸ Mrs. Randolph sought police intervention when, following a domestic dispute, she determined that Mr. Randolph had removed their son without her knowledge.⁴⁹ Mr. Randolph arrived at the home after the police and explained that he had taken the boy to a neighbor's house because he feared his wife would flee to Canada with their son.⁵⁰ A police officer went with Mrs. Randolph to retrieve the boy.⁵¹ When they returned, Mrs. Randolph told the police officer that Mr. Randolph was a drug user, and that evidence of Mr. Randolph's illegal drug use could be found in the house.⁵² The police officer asked Mr. Randolph for "permission to search the house, which he unequivocally refused."⁵³ The sergeant then asked Mrs. Randolph, who gave her consent.⁵⁴ Inside the house, Mrs. Randolph led the police officer to Mr. Randolph's bedroom, where the officer noticed a piece of a plastic straw and white powdery residue, which he suspected to be cocaine.⁵⁵

The police officer left the bedroom to retrieve an evidence bag, and when he returned to the house, Mrs. Randolph withdrew her consent.⁵⁶ The police then obtained a warrant for a full search of the house, and the subsequent search turned up further evidence of drug use.⁵⁷

A.B.A. J. E-REPORT 2 (2006), available at 5 No. 12 ABAJEREP 2.

48. *Randolph*, 126 S. Ct. at 1519. The statement of facts does not explain whether Mrs. Randolph's intention in returning was to reconcile with her husband, or merely to retrieve her remaining possessions. See *id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

B. Procedural History

Mr. Randolph was indicted for possession of cocaine on the basis of evidence collected during the general search of his home.⁵⁸ He sought to suppress the drug evidence, claiming that the first search over his express objection, which provided the probable cause for the second search, violated his Fourth Amendment rights.⁵⁹ The trial court denied the motion, and the Georgia Court of Appeals reversed on Mr. Randolph's interlocutory appeal.⁶⁰ The Supreme Court of Georgia affirmed the Court of Appeals's decision to suppress the evidence, relying on the Supreme Court of Washington's decision in *State v. Leach*⁶¹ that third-party consent given by an individual with equal control over the premises remains valid against a cohabitant only as long as the cohabitant is absent.⁶² Where the cohabitant is present, that court reasoned, "the police must also obtain the cohabitant's consent."⁶³ The State appealed, and the Supreme Court granted certiorari.⁶⁴ The Court affirmed the Supreme Court of Georgia's decision on the basis that social expectations provide a reasonable expectation of privacy that should not be overcome by a co-occupant's consent.⁶⁵

58. *Randolph v. State*, 590 S.E.2d 834, 836 (Ga. Ct. App. 2003), *aff'd*, 604 S.E.2d 835 (Ga. 2004), *aff'd*, 126 S. Ct. 1515 (2006).

59. *Randolph*, 126 S. Ct. at 1519.

60. *Randolph*, 590 S.E.2d at 835–36, *aff'd*, 604 S.E.2d 835 (Ga. 2004), *aff'd*, 126 S. Ct. 1515 (2006). The Georgia Court of Appeals declined to "expand[] [*Matlock*]" in a manner that is inconsistent with the Fourth Amendment," because "[t]his case is both legally and factually distinguishable from *Matlock*. Here, Mr. Randolph was not only present, but he affirmatively exercised his Fourth Amendment right to be free from police intrusion by refusing to consent to the search of his house." *Id.* at 837–38 (footnote omitted).

61. 782 P.2d 1035 (Wash. 1989).

62. *State v. Randolph*, 604 S.E.2d 835, 837 (Ga. 2004), *aff'd*, 126 S. Ct. 1515 (2006) (citing *Leach*, 782 P.2d at 1040).

63. *Id.* (quoting *Leach*, 782 P.2d at 1040). The Georgia court's endorsement of the rule in *Leach* is probably what led the Supreme Court to grant certiorari, since it implied that police officers must actively seek consent of all present cohabitants, not merely heed any objection. This stance, though a bright-line rule, is too cumbersome to law enforcement in the view of most judges and also contravened the Court's holding in *Matlock*.

64. *Georgia v. Randolph*, 544 U.S. 973 (2005).

65. *Georgia v. Randolph*, 126 S. Ct. 1515, 1523 (2006).

IV. ANALYSIS OF THE COURT'S DECISION

The Court fractured significantly in deciding *Randolph*, though the final outcome was 5–3.⁶⁶ The Justices authored six separate opinions, with Justices Stevens, Ginsburg, Kennedy and Breyer joining Justice Souter's majority opinion, of whom Justices Stevens and Breyer also wrote concurrences.⁶⁷ Chief Justice Roberts wrote a dissent joined by Justice Scalia; Justices Scalia and Thomas also each dissented separately.⁶⁸

A. *The Majority Decision*

1. Mrs. Randolph's Consent was Invalid as to Mr. Randolph

The majority affirmed the Supreme Court of Georgia's decision to suppress the evidence, holding "that a warrantless search of a shared dwelling . . . over the express refusal of consent by a physically present resident cannot be . . . reasonable as to him," regardless of consent given by a co-tenant.⁶⁹ Justice Souter relied heavily on "widely shared social expectations" of privacy in one's home in deciding whether the search of Mr. Randolph's house against his objection was unreasonable and thus violative of the Fourth Amendment.⁷⁰ Because no other source of authority, such as state-law property rights or common contractual arrangements, can offer a common and consistent understanding of authority to admit third parties to a shared premises without the consent of a co-occupant,⁷¹ explained Justice Souter, then it is proper to turn to social expectations as the "constant element in assessing Fourth Amendment reasonableness in the consent cases."⁷²

66. Justice Alito did not participate. *Id.* at 1528.

67. *Id.* at 1516. Justice Stevens's concurrence and Justice Scalia's dissent are not discussed at length in this note because they are not relevant to the resolution of the case, and appear to have been written solely for the sake of aggravating each other over their fundamental differences in interpreting the Constitution.

68. *Id.*

69. *Id.* at 1526.

70. *Id.* at 1521.

71. *Id.* at 1522.

72. *Id.* at 1521.

According to Justice Souter, the common understanding of reasonable privacy is that one occupant will not admit a guest over another occupant's objection.⁷³ The co-occupant wishing to admit a guest has "no recognized authority in law or social practice to prevail over a present and objecting co-tenant."⁷⁴ Therefore, Justice Souter concluded that a police officer would have no better claim to enter than the invited guest.⁷⁵ Justice Souter explained that in many consent-to-search cases, the Court impliedly took into account what a person's reasonable expectation of privacy would be in order to determine whether a search was reasonable as to them.⁷⁶ Since it has always been part of our national understanding that "a man's home is his castle," the majority held, disputed consent cannot overcome the privacy protection of the Fourth Amendment.⁷⁷

Justice Souter reached the right decision in *Randolph*, but failed to use the strongest reasoning to reach the conclusion that the search was invalid. The most obvious available argument, which Justice Souter declined to utilize, is the language of the Fourth Amendment itself and the importance of interpreting its protections broadly.⁷⁸ He only referred to this argument once,⁷⁹ then undermined it by recognizing the competing interests of a co-occupant's desire to bring criminal activity to light and side with police in order to insulate oneself from a co-occupant's criminal activity.⁸⁰ It was clear to the courts below,⁸¹ and to a constitu-

73. *Id.* at 1522.

74. *Id.* at 1523.

75. *Id.*

76. *Id.* at 1522 (citing *Minnesota v. Olson*, 495 U.S. 91, 99 (1990) (holding that overnight houseguests have a legitimate expectation of privacy in their temporary quarters because "it is unlikely that [the host] will admit someone who wants to see or meet with the guest over the objection of the guest"). *See also* *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (setting forth a two-pronged test considering the search subject's subjective expectation of privacy and whether that expectation is reasonable).

77. *Randolph*, 126 S. Ct. at 1524 (citing *Miller v. United States*, 357 U.S. 301, 307 (1958)).

78. *Cf. Coolidge v. New Hampshire*, 403 U.S. 443, 453 (1971) ("In considering [the State's arguments for validity of the search], we must not lose sight of the Fourth Amendment's fundamental guarantee."). The *Coolidge* majority also made an important point in quoting Justice Bradley's opinion in *Boyd v. United States*: "It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Id.* at 454 (quoting *Boyd*, 116 U.S. 616, 635 (1886)).

79. *See Randolph*, 126 S. Ct. at 1524.

80. *See id.*

81. *See State v. Randolph*, 604 S.E.2d 835, 837 (Ga. 2004), *aff'd*, 126 S. Ct. 1515 (2006) (distinguishing *Matlock* because "a present, objecting party should not have his

tionally minded observer, that the *Randolph* Court was presented with choosing between expanding the judicially created doctrine of third-party consent, and protecting the constitutional right to be free from unreasonable search and seizure. Yet Justice Souter's opinion seems to lose sight of the threat to an important constitutional right, instead choosing to focus on the rebuttable argument that the search was invalid because of "social expectations" that if one occupant invited a friend over, and the other occupant told the invitee to stay out, "no sensible person would go inside under those conditions."⁸²

Using "social expectations" as a basis for determining the scope of the Fourth Amendment has its flaws, and alternative theories could have been used to support the outcome in this case. An empirical study of social expectations of privacy suggested that "some of the Court's decisions regarding the threshold of the Fourth Amendment . . . do not reflect societal understandings."⁸³ Justice Souter's conception of society's "common understanding" regarding relations between cohabitants⁸⁴ is entirely subjective and probably impossible to confirm. Furthermore, it is troubling for the Court to define the scope of the Fourth Amendment's protections by "social expectations" when, as some jurists have noted, laws and political systems often shape such expectations in the first place.⁸⁵

constitutional rights ignored . . . [due to a] property interest shared with another") (quoting *Silva v. State*, 344 So. 2d 559, 562 (Fla. 1977)); *Randolph v. State*, 590 S.E.2d 834, 837 (Ga. Ct. App. 2003), *aff'd*, 604 S.E.2d 835 (Ga. 2004), *aff'd*, 126 S. Ct. 1515 (2006) (finding it "inherently reasonable" to require police to "honor a present occupant's express objection to a search of his dwelling," and that "common authority" must work both ways: not only to consent to a search, but also to exercise privacy rights).

82. *Randolph*, 126 S. Ct. at 1522–23.

83. 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, 732 (1993).

84. *Randolph*, 126 S. Ct. at 1523 (stating that "there is no common understanding that one co-tenant generally has a right or authority to prevail over the express wishes of another, whether the issue is the color of the curtains or invitations to outsiders").

85. See, e.g., *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting); *United States v. Taborda*, 635 F.2d 131, 137–38 (2d Cir. 1980); 1 LAFAYE, *supra* note 14, § 2.1(c).

2. Majority's Disposition of *Matlock* and *Rodriguez*

The majority's treatment of *Matlock* and *Rodriguez* is lamentable,⁸⁶ as it did not squarely address the issue that brought *Randolph* to the Supreme Court docket in the first place: whether it was constitutional to expand *Matlock* and *Rodriguez* well beyond absent co-tenants to allow searches against present, objecting co-tenants.⁸⁷ Rather than address *Matlock* and *Rodriguez* directly, Justice Souter referred to these cases as "two loose ends" to be dealt with peripherally at the end of his opinion, *after* basing his conclusion on the weak "social expectation" theory.⁸⁸

In its attempt to avoid undercutting *Matlock*, the majority failed to distinguish "absent" and "present" in any significant way. This would have been an important distinction to clarify due to Mr. Matlock's proximity to the house at the time of the search.⁸⁹ Some jurists have described Mr. Matlock as "present" to suit their purposes in arguing for expansion of the rule to allow a search against a present objecting resident,⁹⁰ even though *Matlock* resolved the question of whether "the consent of one who possesses common authority over premises or effects is valid as against the *absent, nonconsenting* person with whom that authority is shared."⁹¹ The majority actually perpetuates the confusion by stating that the defendants in *Matlock* and *Rodriguez* were

86. The two cases are discussed together here because they form the body of modern third-party consent law prior to the Court's decision in *Randolph*; the facts in the cases are very similar, with the main difference being that in *Rodriguez* the defendant's girlfriend had apparent but not actual authority to consent to a search. *Illinois v. Rodriguez*, 497 U.S. 177, 188–89 (1990). Thus, any decision the Court came to in *Randolph* affecting *Matlock* would also affect *Rodriguez*, since there is no issue of "apparent authority" in this case.

87. See, e.g., *United States v. Morning*, 64 F.3d 531, 536 (9th Cir. 1995) (finding consent to remain effective even against a contemporaneous express objection because of the *Matlock* "common authority" rule).

88. See *Randolph*, 126 S. Ct. at 1527.

89. He was in a police car in the front yard of the house. *United States v. Matlock*, 415 U.S. 164, 166, (1974).

90. See *Randolph*, 126 S. Ct. at 1534 (Roberts, C.J., dissenting) (explaining that the searches in *Matlock* and *Rodriguez* were reasonable because the third parties had authority, and apparent authority, respectively, "to admit others into areas over which they exercised control, despite the almost certain wishes of their *present* co-occupants"); *Morning*, 64 F.3d at 534–35 (discussing *United States v. Sumlin*, 567 F.2d 684, 687–88 (6th Cir. 1977), in which the court declared that "the fact of the defendant's presence made no difference because the defendant in *Matlock* was present in the front yard").

91. *Matlock*, 415 U.S. at 170 (emphasis added).

“not far away.”⁹² This description weakens the majority’s argument and makes the holding so narrow as to resolve little of the ambiguity remaining from the *Matlock* and *Rodriguez* decisions.

3. Majority’s Opinion as a Reaction to Dissent’s Accusations

Justice Souter allowed the dissent to shape the context of his opinion instead of relying on straightforward, Constitution- and precedent-based arguments to support the outcome. Most of his responses to Chief Justice Roberts’s concerns in limiting the “common authority” third-party consent rule are unpersuasive. He never clearly asserted that the Fourth Amendment’s protection of privacy in one’s home should be paramount to police expediency,⁹³ nor that the “exigent circumstances” exception could suffice to allow for warrantless searches when truly necessary.⁹⁴ His approach to dealing with the dissent’s charge that his rule will shield spousal abusers, suggesting that fearful occupants can simply go outside to be within protective police custody, is practical but not particularly appealing.⁹⁵

Justice Souter and Chief Justice Roberts were not the only two Justices to trade pointed remarks in this case to the detriment of the clarity of the holding. Incidental to the important Fourth Amendment issues posed by the case, Justices Stevens and Scalia engaged in a lively debate over proper originalist interpretation of the Constitution. Justice Stevens claimed that “if ‘original under-

92. See *Randolph*, 126 S. Ct. at 1527. Consider also that *Randolph* is the first time such a case has reached the Supreme Court; since it is fairly rare for a contemporaneous consent dispute to occur between two residents with common authority over the premises, this decision does little to affect consent-to-search jurisprudence generally.

93. See *id.* at 1524 (discussing an individual’s interest in bringing criminal activity to light or deflecting suspicion from oneself when sharing quarters with a criminal and stating that “society can often have the benefit of these interests without relying on a theory of consent that ignores an inhabitant’s refusal to allow a warrantless search.”).

94. See *id.* at 1525. It would have been more straightforward to explain that justice, and society, are better served when a warrant “is the rule rather than the exception.” *Randolph v. State*, 590 S.E.2d 834, 837 (Ga. Ct. App. 2003), *aff’d*, 604 S.E.2d 835 (Ga. 2004), *aff’d*, 126 S. Ct. 1515 (2006).

95. See *Randolph*, 126 S. Ct. at 1526 (“In the circumstances of those cases, there is no danger that the fearful occupant will be kept behind the closed door of the house simply because the abusive tenant refuses to consent to a search.”). Justice Souter discussed cases cited by the dissent, noting that in many of the consent cases involving domestic abuse victims, the victim was either not present at the time of the police arrival, or the police were able to enter on the basis of the “exigent circumstance” exception without securing consent from the abuser. See *id.*

standing' were to govern the outcome of this case, the search was clearly invalid because the husband did not consent," since at the time of the Fourth Amendment's ratification the husband's decision to consent to a search or refuse would control over his wife's.⁹⁶ Justice Scalia, of course, did not let this go unanswered, claiming that the effect of the *Randolph* decision is to give men the power to prevent women from allowing police to enter a shared home, which is "precisely the power that Justice Stevens disapprovingly presumes men had in 1791."⁹⁷

The contentious nature of the *Randolph* opinions may be a harbinger of a bitterly divided Court to come, one with ideologically entrenched Justices whose positions reflect the growing polarization in American political culture. Although the Roberts Court handed down a slightly higher than average percentage of unanimous opinions in its first term,⁹⁸ *Randolph* exhibits the unraveling of Chief Justice Roberts's minimalist ideal.⁹⁹ In *Randolph*, the Court was presented with a difficult case requiring interpretation of inconsistent prior case law. Despite being decided on extremely narrow grounds, the Justices' *Randolph* opinions amount to personal attacks, to the detriment of the jurisprudence they are simultaneously creating. This contentiousness certainly undermined the force of the majority opinion here.

B. Justice Breyer's Concurring Opinion

Justice Breyer's brief concurrence suggests that he may have originally planned to join the Chief Justice.¹⁰⁰ He chose to side with the majority after "examining the totality of the circum-

96. *Id.* at 1529 (Stevens, J., concurring).

97. *Id.* at 1541 (Scalia, J., dissenting).

98. Linda Greenhouse, *Roberts Is at Court's Helm, but He Isn't Yet in Control*, N.Y. TIMES, July 2, 2006, § 1, at 1.

99. See Cass R. Sunstein, Op-Ed., *The Minimalist; Chief Justice Roberts Favors Narrow Court Rulings That Create Consensus and Tolerate Diversity*, L.A. TIMES, May 25, 2006, at B11 (discussing Chief Justice Roberts's commencement address at Georgetown University Law Center, in which the Chief Justice argued "in favor of unanimous or near-unanimous opinions, which . . . serve the rule of law" by preventing the Court's "internal divisions" from clouding the Court's message, and which tend to ensure that each case is decided on narrow, fact-specific grounds).

100. See *Randolph*, 126 S. Ct. at 1529 (Breyer, J., concurring) (stating that if he had to choose between "a rule that always found one tenant's consent sufficient," and "a rule that never did," he would choose the first).

stances” of the factual situation, an important analysis disregarded by the majority.¹⁰¹ He argued that using a “totality of the circumstances” analysis would prevent the majority’s ruling from having an adverse affect on victims of spousal abuse,¹⁰² because “were the circumstances to change significantly, so should the result.”¹⁰³

Justice Breyer’s conclusion that “the ‘totality of the circumstances’ present here do not suffice to justify abandoning the Fourth Amendment’s traditional hostility to police entry into a home without a warrant” is well-founded and concise because it takes into account the fact that Mr. Randolph was present and objecting.¹⁰⁴ The best argument for the majority’s position is that the Fourth Amendment should prevail over a judicially created abrogation of its protection; Justice Breyer alluded to it here without becoming mired in the sociological puffery Justice Souter uses to justify the majority position.¹⁰⁵ The “totality of the circumstances” test that Justice Breyer would use does not directly address *Matlock* and *Rodriguez*, but it is a judicially applicable test that would prevent law enforcement abuses in warrantless searches.

101. *Id.* (Breyer, J., concurring). Both *Schneckloth v. Bustamonte*, 412 U.S. 218, 248–49 (1973), and *Ohio v. Robinette*, 519 U.S. 33, 39 (1996), ruled that a court must take into account the “totality of the circumstances” in deciding whether a consent search was reasonable or not. Because these cases are still good law, the test is valid and could have made for a stronger argument than “social expectations,” while avoiding any bright-line test that could be arbitrarily applied and potentially infringe upon Fourth Amendment rights.

102. *Randolph*, 126 S. Ct. at 1530 (Breyer, J., concurring) (“In [the] context [of domestic abuse], an invitation (or consent) would provide for immediate, rather than later, police entry. And entry following invitation or consent by one party ordinarily would be reasonable even in the face of direct objection by the other. That being so . . . today’s decision will not adversely affect ordinary law enforcement practices.”). The majority opinion made its most forceful argument to this effect in a footnote, stating that “if a rule crediting consent over denial of consent were built on hoping to protect household victims, it would distort the Fourth Amendment with little, if any, constructive effect on domestic abuse investigations.” *Id.* at 1526 n.7.

103. *Id.* at 1530 (Breyer, J., concurring).

104. *Id.* (Breyer, J., concurring).

105. *See id.* (Breyer, J., concurring).

C. Chief Justice Roberts's Dissent

1. Assumption of Risk as a Basis for Validity of Consent

The Chief Justice derived his principal argument for allowing a warrantless search against an objecting co-occupant from his interpretation of *Matlock*: co-occupants “assume[] the risk that one of their number might permit [a] common area to be searched.”¹⁰⁶ Chief Justice Roberts explained that this is a more sound predicate on which to base a decision, because “a wide variety of differing social situations can readily be imagined, giving rise to quite different social expectations,” and “[s]uch shifting expectations are not a promising foundation on which to ground a constitutional rule, particularly because the majority has no support” for its assumption that an invited guest would flee the premises if told by another occupant to leave.¹⁰⁷

Though Justice Souter asserted in the majority opinion that “widely shared social expectations” are a “constant element in assessing Fourth Amendment reasonableness,”¹⁰⁸ Chief Justice Roberts refuted this claim, explaining that the social expectation analysis has historically only been used in deciding whether “a search has occurred and whether a particular person has standing to object to a search” in the first place, not in determining whether the consent itself was valid.¹⁰⁹ However, the Chief Justice’s own argument falls somewhat flat in his repeated statements that “[i]f an individual shares information, papers, or places with another, he assumes the risk that the other person will . . . share access” to such information, papers, or places.¹¹⁰ This is unpersuasive because he offers no authority for the proposition that the Constitution no longer protects an individual “once privacy has been shared.”¹¹¹

106. *Id.* at 1531 (Roberts, C.J., dissenting) (quoting *United States v. Matlock*, 415 U.S. 167, 171 n.7 (1974)).

107. *Id.* at 1532 (Roberts, C.J., dissenting).

108. *Id.* at 1521 (citing *Rakas v. Illinois*, 439 U.S. 128, 144 n.12 (1978)).

109. *Id.* at 1532–33 (Roberts, C.J., dissenting). *Rakas* actually rejected using the Fourth Amendment as a means for determining standing, finding that “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.” 439 U.S. at 139.

110. *Randolph*, 126 S. Ct. at 1531 (Roberts, C.J., dissenting).

111. *Id.* at 1533 (Roberts, C.J., dissenting). Chief Justice Roberts invoked the language

Thus, Chief Justice Roberts's reasoning would expand the *Matlock* "assumption of risk" theory to the point where it decimates the Fourth Amendment protections of the ninety percent of Americans who live with one or more other individuals.¹¹² This would be a fallacy, because the authority for the "assumption of risk" argument does not suggest that a present, objecting co-occupant surrenders his ability to object to a warrantless search merely by deciding to live with another person.¹¹³

2. *Matlock* Should Not Be Limited Because It Is a Clear Rule

In the Chief Justice's view, under *Matlock*, the government may "show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises," and the majority's holding would create "an exception to this otherwise clear rule."¹¹⁴ Chief Justice Roberts missed the irony that the "clear rule" he would interpret so broadly is itself an *exception* to the Fourth Amendment's guarantee against unreasonable (i.e., warrantless) searches. Amazingly, the Chief Justice's dissent suggests that the *Matlock* rule is "clear"¹¹⁵—which it must not have been, for the Court to have granted certiorari in this case¹¹⁶—while simultaneously disre-

of the Fourth Amendment in his assertion, but he did not cite it; nor did he cite any authority for his claim that sharing such "information, documents, or places" renders the Fourth Amendment impotent. *Id.* (Roberts, C.J., dissenting).

112. See FRANK HOBBS & NICOLE STOOBS, U.S. CENSUS BUREAU, DEMOGRAPHIC TRENDS IN THE 20TH CENTURY A-44 tbl.13 (2002), available at <http://www.census.gov/prod/2002pubs/censr-4.pdf> (noting that of the 281 million people in the United States, 27 million live alone).

113. See *United States v. Matlock*, 415 U.S. 164, 177 n.14 (1974) (limiting its holding by noting that "we do not reach another major contention of the United States . . . : that the Government in any event had only to satisfy the [court below] that the searching officers reasonably believed that Mrs. Graff had sufficient authority over the premises to consent to the search."). See also *supra* note 90 and accompanying text, discussing the Chief Justice's claims that the defendants in *Matlock* and *Rodriguez* were present. This is a semantic matter which should have been dealt with more directly by the majority in order to resolve once and for all the debate over whether the defendants in these cases were "present" or "absent." It seems evident that the more important characteristic shared by these defendants is that neither objected to the search at the time consent was granted—but that was by reason of their absence from the "threshold colloquy," for presumably they would have objected had they been present.

114. *Randolph*, 126 S. Ct. at 1531 (Roberts, C.J., dissenting) (quoting *Matlock*, 415 U.S. at 171).

115. *Id.* (Roberts, C.J., dissenting).

116. Consider that the Court that granted certiorari is different from the Court that

garding the text of the Fourth Amendment itself.¹¹⁷ *Matlock* is only “clear” if one misconstrues it to apply to present defendants as well as the absent defendants at whom the ruling was originally aimed, as the Chief Justice did here.¹¹⁸

It does not necessarily follow from *Matlock*, even taking the Chief Justice’s broad reading of that case, that an individual relinquishes his entire “expectation of privacy” merely by cohabitating with other individuals.¹¹⁹ Although there is merit in the dissent’s contention that “social expectations” are not the best basis on which to decide this case, the dissent’s use of the social problem of domestic violence to aggrandize police power at the expense of individual privacy rights is equally problematic.

3. Domestic Violence Concerns

Chief Justice Roberts’s dissent expressed concern that the majority’s ruling would have a serious consequence in domestic abuse situations.¹²⁰ He reasoned that the majority rule, by giving veto power to an objecting co-occupant over a resident who consents to a search, ignored the fact that “it is her castle, too” and the consenting co-occupant would suffer retribution when the police leave without conducting a search.¹²¹

The majority responded to this charge by properly characterizing the domestic violence issue as a “red herring.”¹²² Both sides acknowledged that domestic violence is a major problem in this country and has been a factor in several consent-to-search cases.¹²³ But according to the majority, “[t]he undoubted right of the police to enter in order to protect a victim . . . has nothing to

decided this case.

117. See U.S. CONST. amend. IV (“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 . . .”).

118. See *Randolph*, 126 S. Ct. at 1534 (Roberts, C.J., dissenting) (characterizing the *Matlock* and *Rodriguez* defendants as “present”).

119. Although Chief Justice Roberts asserted that “shared living space entails a limited yielding of privacy to others, and . . . the law historically permits those to whom we have yielded our privacy to in turn cooperate with the government,” he offered no supporting authority for this claim. *Id.* at 1536 (Roberts, C.J., dissenting).

120. *Id.* at 1537 (Roberts, C.J., dissenting).

121. *Id.* at 1538 n.2 (Roberts, C.J., dissenting).

122. *Id.* at 1526.

123. See, e.g., *United States v. Donlin*, 982 F.2d 31 (1st Cir. 1992).

do with the question in this case,"¹²⁴ because of the distinction between police entry to search for evidence and police entry to protect a fearful occupant. Thus, the police may always lawfully enter a dwelling over a co-occupant's objection in order to provide protection.¹²⁵ This is the better view of this pseudo-issue, which unfortunately distracted the Court from addressing the real issues at hand: whether or not to expand *Matlock*, and distinguishing "present" from "absent." As Justice Breyer sensibly noted, the exigent circumstance exception, rather than the consent exception, would render a warrantless search reasonable in a domestic violence event.¹²⁶

D. Justice Thomas's Dissent

Justice Thomas analyzed the third-party consent issue in *Randolph* not in the "widely shared social expectations" paradigm of the majority or the expansive interpretation of "assumption of risk" favored by the Chief Justice in his dissent; instead, Justice Thomas would resolve this case by avoiding *Matlock* and *Rodriguez* entirely.¹²⁷ He relied on *Coolidge v. New Hampshire*,¹²⁸ where the defendant's wife invited two police officers into her home and gave them four of her husband's guns as well as some clothes in an effort to clear suspicion of her husband's involvement in a murder.¹²⁹ That Court found that the wife's actions, in the absence of any coercion by the police, did not constitute a "search and seizure" under the Fourth Amendment.¹³⁰ Applying *Coolidge*, Justice Thomas believed that no Fourth Amendment search occurred in Mr. Randolph's case, rendering *Matlock* and *Rodriguez* inapplicable.¹³¹

124. *Randolph*, 126 S. Ct. at 1526.

125. *See id.* at 1525; *see also* 4 LAFAYETTE, *supra* note 14, § 8.3(d) (proposing that an emergency situation, such as victimization of one occupant by another, is a valid basis for a warrantless search, even if the abuser objects to the search).

126. *See Randolph*, 126 S. Ct. at 1530 (Breyer, J., concurring).

127. *See id.* at 1541 (Thomas, J., dissenting).

128. 403 U.S. 443 (1971).

129. *See id.* at 486.

130. *See id.* at 487-90 (finding that defendant's wife was not acting as an instrument of the state when she produced evidence incriminating her husband).

131. *See Randolph*, 126 S. Ct. at 1541 (Thomas, J., dissenting).

Justice Thomas erred in his analysis because he ignored the fact that the defendant in *Coolidge* was absent, while Mr. Randolph was present and actively objecting to the warrantless search. The Chief Justice's dissent is also guilty of ignoring the critical fact that Mr. Randolph actively sought to assert his Fourth Amendment rights,¹³² and both Justices were too quick to extend distinguishable situations to the instant case.

V. POTENTIAL IMPACT OF THE *RANDOLPH* DECISION

Although Chief Justice Roberts accused the majority's ruling of being "arbitrary"¹³³ and "random,"¹³⁴ the majority decision in *Randolph* is clear-cut but narrow: police must heed the objections of a co-occupant to a warrantless search, even when another co-occupant consents. This apparently bothered the Chief Justice because the rule would protect "a co-occupant who happens to be at the front door when the other occupant consents to a search, but not one napping . . . in the next room."¹³⁵ Justice Souter admitted that it is a formalistic rule, but contended that "there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication when he expresses it."¹³⁶ In Justice Souter's view, the Court's decision prevents the burden on police of taking "affirmative steps to find a potentially objecting co-tenant" before conducting a consent search.¹³⁷ Unfortunately, Justice Souter did not respond to the "arbitrary" and "random" accusations with the argument that there is nothing "arbitrary" or "random" about an individual's contemporaneous, verbal attempt to exercise his Fourth Amendment right against unreasonable search and seizure. Conceding the majority's rule as "formalistic" and assuaging fears of overburdening police efforts gives credence to the Chief Justice's allegations. Justice Souter should

132. See *supra* note 113 and accompanying text.

133. *Randolph*, 126 S. Ct. at 1539 (Roberts, C.J., dissenting).

134. *Id.* at 1531 (Roberts, C.J., dissenting).

135. *Id.* (Roberts, C.J., dissenting).

136. *Id.* at 1527 (referring to *Matlock* and suggesting that it can live side-by-side with the Court's decision in *Randolph*).

137. *Id.*

have simply referred to the most distinguishing facts in this case: Scott Randolph's presence, and his unequivocal refusal to consent to a search of his home. Perhaps lower courts will do this for him, having been given a basis with this holding to flesh out the Court's inconsistent prior treatment of third-party consent and to acknowledge the difference between objecting and absent occupants.

It does not appear that the majority's opinion will cause a "complete lack of practical guidance for the police in the field, let alone for the lower courts" as the Chief Justice charged.¹³⁸ The holding in *Randolph* simply requires that police honor a present, objecting resident's refusal of consent to search without a warrant by obtaining a warrant. It does leave open, however, the question of what police should do where one co-occupant objects to a warrantless search but two or more co-occupants consent.¹³⁹ *Randolph* presented a "tie" between individuals with common authority over the home;¹⁴⁰ will the objecting co-occupant win even when the disputed consent is not a "tie"?

Two recent consent-to-search cases demonstrate how narrow and distinguishable the Court's ruling in *Randolph* is. In *Casteel v. State*,¹⁴¹ the Supreme Court of Nevada found that a consent search of the defendant's gym bag was valid because the defendant, though physically present, did not object to the search and therefore *Randolph* had no bearing on the outcome.¹⁴² Similarly, the Court of Appeals of Indiana distinguished *Randolph* in *Starks v. State*,¹⁴³ in which an elderly homeowner had consented to a search of her house, because the defendant was not physically present at the time the homeowner granted consent, nor did he

138. *Id.* at 1539 (Roberts, C.J., dissenting).

139. *Id.* at 1526 n.8 (dismissing the dissent's criticism of the majority's failure to address such a situation: "We decide the case before us, not a different one.")

140. It is arguable whether Janet Randolph had common authority over the home that was searched, because she had not lived there for over a month, and the home was not jointly owned by the couple but rather Scott Randolph rented the home from his parents. See *id.* at 1519; Brief for the Respondent at 2, *Randolph*, 126 S. Ct. 1515 (No. 04-1067). Because *Rodriguez* held that one with "apparent authority" could consent to a search, 497 U.S. 177, 187-89 (1990), Mrs. Randolph's actual interest would not have had a bearing on the outcome of the case.

141. 131 P.3d 1 (Nev. 2006).

142. *Id.* at 2.

143. 846 N.E.2d 673 (Ind. Ct. App. 2006).

object to the search when it commenced.¹⁴⁴ Thus, two factors will be dispositive in future cases: “presence” or “absence” at the time of the request for consent, and whether or not the subject of the search actually refused consent at that time,¹⁴⁵ though the majority opinion addressed these issues only tangentially.¹⁴⁶

The Court decided another Fourth Amendment case, *Hudson v. Michigan*,¹⁴⁷ in the same term as *Randolph*, this time with all nine Justices participating. *Hudson* posed the question of whether police violation of the “knock and announce” rule¹⁴⁸ requires suppression of all evidence found in the search.¹⁴⁹ The Court had decided in *Wilson v. Arkansas*¹⁵⁰ that the “knock and announce” rule was required by the Fourth Amendment.¹⁵¹ Yet the *Hudson* majority found that the high social cost of allowing criminals to go free on the basis of indiscriminate application of the exclusionary rule outweighed the Fourth Amendment interests at stake,¹⁵² because “the police would have executed the warrant they had obtained, and would have discovered” the evidence regardless of how long they waited at the door before entering.¹⁵³ Justice Scalia, writing for the majority, noted that while the exclusionary rule is appropriate in cases of warrantless search, “[t]he interests protected by the knock-and-announce require-

144. *Id.* at 682 n.1. The court also found that the defendant had standing to contest the validity of the search because he had a “legitimate expectation of privacy” in the basement of the home where he was staying. *Id.* at 678–79.

145. *See, e.g.,* *United States v. Murphy*, 437 F. Supp. 2d 1184, 1192–93 (D. Kan. 2006) (finding that because the defendant did not clearly and unequivocally refuse consent, the court would not have extended *Randolph* to this case had defendant raised it); *Casteel*, 131 P.3d at 4 (requiring defendant be present and object).

146. Justice Souter referred to the event of a police request for consent to search without a warrant as the “threshold colloquy,” and made clear that the rule of *Randolph* would be applicable only at this fleeting moment. *Georgia v. Randolph*, 126 S. Ct. 1515, 1527 (2006).

147. 126 S. Ct. 2159 (2006).

148. *See* 18 U.S.C. § 3109 (2000) (codifying the common law requirement that police entering a home to execute a search warrant must give notice of their purpose and authority before breaking open a door or window).

149. *See Hudson*, 126 S. Ct. at 2163.

150. 514 U.S. 927 (1995).

151. *Id.* at 929.

152. *See Hudson*, 126 S. Ct. at 2163.

153. *Id.* at 2164.

ment are quite different—and do not include the shielding of potential evidence from the government's eyes."¹⁵⁴

Hudson offers a good contrast to *Randolph* because whether the evidence seized in the *Randolph*'s home was admissible was never seriously debated; instead, the threshold issue was whether a warrantless search was reasonable in light of disputed consent. Thus in *Randolph*, the evidence seizure resulted directly from the police entry into the home, which the Court decided was unreasonable. But in *Hudson*, "the interests that *were* violated . . . have nothing to do with the seizure of the evidence," rendering the exclusionary rule inapplicable.¹⁵⁵ The cases share some common strands, however. First, Justice Scalia was equally dismissive of the harm caused by violations of the Fourth Amendment in both cases.¹⁵⁶ Also, both cases suffer from the confusion in applying and interpreting a vastly inconsistent body of prior case law.¹⁵⁷ It is troubling that the Court relied heavily on the fact that the police in *Hudson* possessed a warrant in denying application of the exclusionary rule, while they accorded the lack of a warrant in *Randolph* so little weight.¹⁵⁸ It would appear that the Court over-emphasized the importance of the warrant in withholding Fourth Amendment protection in *Hudson* while minimizing its importance in *Randolph*. In light of the general unpredictability of the Court's Fourth Amendment jurisprudence, perhaps this result is not so surprising.

154. *Id.* at 2165.

155. *Id.*

156. Compare *id.* at 2164–65, with *Georgia v. Randolph*, 126 S. Ct. 1515, 1527 (2006).

157. Additionally, Justice Scalia's opinion in *Hudson* seemed aimed at antagonizing Justice Stevens, who dissented; at three points in the majority opinion he quoted Justice Stevens's dissenting opinion in *Segura v. United States*, 468 U.S. 796 (1984) (holding that evidence seized during an illegal entry was admissible because there was an independent source for a search warrant), in order to support his argument for denying suppression of the evidence. *Hudson*, 126 S. Ct. at 2164, 2168, 2169 n.1.

158. Cf. *United States v. Matlock*, 415 U.S. 164, 178 (1974) (Douglas, J., dissenting); *Illinois v. Rodriguez*, 497 U.S. 177, 190–92 (1990) (Marshall, J., dissenting). These dissents argued that in the absence of either a warrant or an exigency, searches of a home are unreasonable under the Fourth Amendment—even if the police believe they obtained consent from a third party.

VI. CONCLUSION

The Supreme Court's recent ruling in *Randolph* demonstrates the Court's willingness to uphold *Matlock*'s third-party consent, but not against present, objecting co-occupants. This ruling abrogated rules adopted in many jurisdictions that had allowed consent searches to proceed even against the objections of persons whose constitutional rights were at stake. *Randolph* thus does not limit *Matlock* itself, but protects individuals' Fourth Amendment rights against further expansion of that rule.

This case is notable for the fundamental difference in the majority and dissent approaches to third-party consent searches, with Justice Souter using "widely shared social expectations" of privacy in one's own home, and Chief Justice Roberts using the "assumption of risk" theory to find that anyone who shares a living space is giving up his right to have his objection to a warrantless search mean anything. As one commentator noted, "[e]ach construction is both true and misleading."¹⁵⁹ The result of this clash in interpretation of the issue presented is an unpersuasive outcome for what should have been a constitutionally dictated result. It might have been clear to the Justices that the Fourth Amendment should supersede any judicially created exception to it, but here that conclusion is obscured by the contention among them. If the issue were to come to the Court again, it would be wise to reconsider Justice Breyer's approach, as well as the wise words of Justice Bradley in the Court's first major Fourth Amendment case,¹⁶⁰ *Boyd v. United States*:¹⁶¹ "It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."¹⁶²

Lesley McCall

159. Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CAL. L. REV. 1593, 1642 (1987).

160. Urbonya, *supra* note 9, at 1397.

161. 116 U.S. 616 (1886).

162. *Id.* at 635.
