corrupted by the on-site determinations of the arresting officer.[50] Indeed, nondelegation has strong historical and textual roots:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.[51]

Anticipatory warrants improperly empower the police to initiate searches. Regardless of whether these warrants are effective, they undermine the historical constitutional scheme. Indeed, the requirement that an impartial judicial officer issue the warrant is part of the definition of a warrant itself.[52]

In sum, the Fourth Amendment has many textual protections, and *Grubbs* principally implicates probable cause, particularity, and issuance by an impartial magistrate. The *Grubbs* Court correctly ruled that particularity was satisfied, but it improperly defined and incorporated probable cause into its test. In addition, the Court's analysis of anticipatory warrants seemingly conflicts with judicial nondelegation principles. The Court should remedy these shortcomings by using the traditional definition of probable cause in the context of anticipatory warrants and by prohibiting magistrates from delegating their determinations of constitutionally significant facts.

4. Fourth Amendment — Consent Search Doctrine — Co-occupant Refusal To Consent. — The Fourth Amendment to the U.S. Constitution prohibits "unreasonable searches"[1] but does not define that phrase. The Supreme Court has labored to articulate a consistent

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[50] In *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), the Court found a warrant invalid because it was issued by the state attorney general. Although he was a state official who held a high office, his status as a law enforcement officer interfered with his ability to remain impartial and thus rendered the warrant unconstitutional. *Id.* at 449. Even if an anticipatory warrant is issued by a magistrate, the courts should be wary of permitting the police to have the final say over whether the warrant is executable.

[51] Johnson v. United States, 333 U.S. 10, 13–14 (1948) (footnote omitted).

[52] *See* BLACK'S LAW DICTIONARY, *supra* note 3, at 1379 (defining "search warrant"). However, allowing anticipatory warrants without a delegation limitation is more constitutionally sound than continuing down a path that would carve out yet another exception to the warrant requirement. The Court has held that there is no expectation of privacy in a container if the police have previously searched its contents. Illinois v. Andreas, 463 U.S. 765, 771 (1983). Although this rule currently does not permit warrantless searches of the home, it no longer seems too much of a stretch to permit a limited exception to the warrant requirement if the police have delivered the contraband themselves.

[1] U.S. CONST. amend. IV.

framework for assessing reasonableness, with various Justices arguing that history,[2] common sense,[3] or social norms[4] should govern the inquiry.[5] For the moment, the Court has settled on a presumptive requirement that searches be supported by warrants, but complicating the analysis are the multitude of exceptions, and exceptions to exceptions, that the Court developed over the years and has refused to jettison.[6] One of the most deeply rooted of these exceptions is the consent doctrine, which renders a search reasonable if undertaken with voluntary consent.[7] Last Term, in *Georgia v. Randolph*,[8] a divided Court held that the voluntary consent of a co-inhabitant cannot authorize a police search of common areas when the other co-inhabitant is present and objects to the search.[9] The Justices split over whether the objecting individual retained a reasonable expectation of privacy in the shared home, or surrendered this interest upon agreeing to the living arrangement — subjecting his own privacy interests to the risk that his housemate would turn on him. Although the Chief Justice's dissent employs a more sensible reading of precedent, neither the majority nor the dissenting opinion is doctrinally objectionable under the Court's flexible, modern approach to the Fourth Amendment. This indeterminacy highlights the Court's decades-old misstep in tethering the Fourth Amendment's constitutional boundaries to social expectations. *Randolph* reflects the symptoms of a jurisprudence torn from its common law roots in property and tort, and tied instead to a magic mirror held up to society by Court diviners.

When police officers in Americus, Georgia responded to a domestic disturbance report on a July morning in 2001, they arrived at the home of Scott and Janet Randolph to find a distraught woman.[10] Mrs. Randolph alleged that her husband had taken away their child, and

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[2] "The test is the reason underlying and expressed by the Fourth Amendment: the history and the experience which it embodies and the safeguards afforded by it against the evils to which it was a response." United States v. Rabinowitz, 339 U.S. 56, 83 (1950) (Frankfurter, J., dissenting).

[3] "[C]ommon sense dictates that reasonableness varies with the circumstances of the search." Vale v. Louisiana, 399 U.S. 30, 36 (1970) (Black, J., dissenting).

[4] "The settled rule is that the requisite connection is an expectation of privacy that society recognizes as reasonable. The application of that rule involves consideration of . . . what expectations of privacy are traditional and well recognized." Minnesota v. Carter, 525 U.S. 83, 101 (1998) (Kennedy, J., concurring) (citation omitted).

[5] Commentators have been no less divided. *See, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 801–11 (1994); Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse than the Disease*, 68 S. CAL. L. REV. 1, 5 (1994); Richard A. Posner, *Rethinking the Fourth Amendment,* 1981 SUP. CT. REV. 49, 74.

[6] *See* California v. Acevedo, 500 U.S. 565, 581–84 (1991) (Scalia, J., concurring in the judgment).

[7] *See* Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973).

[8] 126 S. Ct. 1515 (2006).

[9] *Id.* at 1519.

[10] Randolph v. State, 590 S.E.2d 834, 836 (Ga. Ct. App. 2003).

that his cocaine habit was wreaking havoc on the young family. After Mr. Randolph returned to the house and the child was recovered, the officers "confronted [him] about his wife's allegations."[11] When the police requested permission to search the home, Scott refused but Janet "[r]eadily" consented.[12] The police discovered a cocaine straw, and Scott Randolph was indicted on possession charges.

At trial, Randolph attempted to suppress the evidence, arguing that it was the fruit of a search that violated the Fourth Amendment. After the trial court denied the motion, he applied for an interlocutory appeal to the Georgia Court of Appeals, which granted the motion.[13]

Writing for the majority, Presiding Judge Ruffin acknowledged the Supreme Court's holding in *United States v. Matlock*[14] that a co-inhabitant's consent is sufficient when the other co-inhabitant is absent, but found the instant case "both legally and factually distinguishable."[15] According to the court's interpretation, third-party consent can authorize a search only given the presumption that the other party has waived its privacy rights.[16] In the instant case, this presumption was trumped by Mr. Randolph's explicit objection. Thus limiting the *Matlock* principle, the court determined that the search violated "the touchstone of Fourth Amendment jurisprudence": "reasonableness."[17]

Presiding Judge Blackburn dissented.[18] Lecturing his colleagues on the obligation to follow Supreme Court precedent, he argued that "[t]he present case is controlled by *Matlock*."[19] The dissent interpreted *Matlock* as standing for the proposition that "any co-inhabitant has the right to permit the inspection of shared property *in his own right*,"[20] and not as creating merely a rebuttable presumption.

The Supreme Court of Georgia affirmed. Recognizing that a "co-inhabitant has authority to consent to a search," the court nonetheless held that "the risk assumed by joint occupancy goes no further" than the *Matlock* situation — when the other co-inhabitant is absent.[21]

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[11] *Id.*

[12] *Id.*

[13] *Id.* at 835.

[14] 415 U.S. 164 (1974).

[15] *Randolph*, 590 S.E.2d at 838.

[16] *See id.*

[17] *Id.* at 836. Judge Ellington, joined by Chief Judge Smith and Judge Miller, concurred and concurred specially, emphasizing that exceptions to the warrant requirement should be "drawn as narrowly as possible." *Id.* at 840 (Ellington, J., concurring and concurring specially). Judge Phipps also concurred specially, preferring a case-by-case reasonableness inquiry. *Id.* (Phipps, J., concurring specially).

[18] *Id.* at 843 (Blackburn, P.J., dissenting). He was joined by Presiding Judge Andrews.

[19] *Id.* at 844.

[20] *Id.* at 847.

[21] *Id.* at 837. Justice Hunstein, joined by Justices Carley and Hines, dissented.

The Supreme Court granted certiorari and affirmed. Writing for the majority, Justice Souter[22] held that "a physically present co-occupant's stated refusal to permit entry prevails" over the other occupant's consent, rendering the search "unreasonable and invalid as to [the objecting occupant]."[23] The Court's analysis focused on reasonableness, which the majority found to be determined in large part by "widely shared social expectations";[24] the proper scope of the *Matlock* rule therefore must be "a function of commonly held understanding about the authority that co-inhabitants may exercise in ways that affect each other's interests."[25] Proceeding from this premise, the Court considered the fact pattern and pronounced that society recognizes that "when people living together disagree over the use of their common quarters, a resolution must come through voluntary accommodation."[26] Given the lack of a "common understanding that one cotenant generally has a right or authority to prevail over the express wishes of another,"[27] Mrs. Randolph's consent was insufficient to render the search reasonable. Using this rationale, the Court distinguished *Matlock* and justified the "formalis[t]" result — under which a co-inhabitant's lack of consent is relevant only if he is present at the time of the search — by adverting to the ease of its administration.[28]

Justice Stevens concurred, observing that this case would give pause to those who interpret the Constitution by placing "primary reliance on the search for original understanding" without recognizing "the relevance of changes in our society."[29] At the time of the framing, husbands and wives were far from equal, and it would be ludicrous to constitutionalize that inequality by reading the Constitution with originalist blinders. Justice Breyer also concurred, writing to emphasize the "case-specific nature of the Court's holding."[30] He stressed that in exigent circumstances — such as possible destruction of evidence,[31] an ongoing crime or violence,[32] or domestic abuse — the case would come out differently.[33]

Chief Justice Roberts, joined by Justice Scalia, dissented. Criticizing the majority's reasoning as misguided, its rule as arbitrary, and its

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[22] He was joined by Justices Stevens, Kennedy, Ginsburg, and Breyer.

[23] *Randolph*, 126 S. Ct. at 1519.

[24] *Id.* at 1521.

[25] *Id.*

[26] *Id.* at 1523.

[27] *Id.*

[28] *Id.* at 1527–28. Justice Souter noted that if *Matlock* were overruled, police would need to take highly impractical steps to ensure the consent of all inhabitants before searching.

[29] *Id.* at 1528 (Stevens, J., concurring).

[30] *Id.* at 1531 (Breyer, J., concurring).

[31] *See, e.g.*, Schmerber v. California, 384 U.S. 757, 770–71 (1966).

[32] *See, e.g.*, Brigham City, Utah v. Stuart, 126 S. Ct. 1943, 1947 (2006).

[33] *Randolph*, 126 S. Ct. at 1530 (Breyer, J., concurring).

result as dangerous, the Chief Justice instead analogized the case to one involving shared information. Just as one who shares private information with another individual assumes the risk that the confidant will release the secret,[34] one who shares living space with another assumes a similar risk and yields any expectation of privacy.[35] The dissent noted that the proper inquiry under *Katz v. United States*[36] is whether there existed an expectation of *privacy*, not just any social expectation that might arise under "courtesy, good manners, custom, protocol, even honor among thieves."[37] As a result of its misdirected analysis, the majority developed a rule giving "random and happenstance"[38] protection to co-occupants — protecting one who happens to be at the door when the police arrive, but not one who is "absent, asleep in the keep, or otherwise engaged"[39] at that precise moment. The Chief Justice lamented the foreseeable result of the rule: the hindering of police from effectively assisting domestic abuse victims.[40]

Justice Scalia also dissented separately as a response to Justice Stevens's concurrence,[41] questioning his historical account and critiquing his caricature of originalism. Justice Scalia pointed out that his colleague conflated the original understanding of the Fourth Amendment with "the background sources of law to which the Amendment" referred.[42] Historically, the constitutional provision was linked to common law trespass; if a state actor committed this tort, he violated the Fourth Amendment. As the common law changed, the proper application of the Amendment changed correspondingly. Justice Stevens's attack on originalism therefore missed its mark; properly understood and applied, originalism allows for flexibility when the "unchanging Constitution refers to other bodies of law that might themselves change."[43]

Justice Thomas dissented. He analogized the case to *Coolidge v. New Hampshire*,[44] in which the suspect's wife voluntarily took the police to her husband's bedroom and delivered evidence to them.[45] The Court refused a request to suppress the evidence, holding that the wife had acted on her own and no search had occurred.[46] Arguing that the police in the instant case had conducted only a limited search of an

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[34] *See* United States v. White, 401 U.S. 745, 752 (1971) (plurality opinion).
[35] *See Randolph*, 126 S. Ct. at 1533–36 (Roberts, C.J., dissenting).
[36] 389 U.S. 347 (1967).
[37] *Randolph*, 126 S. Ct. at 1532–33 (Roberts, C.J., dissenting).
[38] *Id.* at 1531.
[39] *Id.* at 1539.
[40] *Id.* at 1537–38.
[41] *See id.* at 1539 (Scalia, J., dissenting).
[42] *Id.* at 1540.
[43] *Id.*
[44] 403 U.S. 443 (1971).
[45] *Id.* at 486.
[46] *Id.* at 488–89.

area to which Mrs. Randolph led them, Justice Thomas suggested that it was "unduly formalistic" to distinguish these facts from the clearly constitutional hypothetical, analogous to *Coolidge*, in which Mrs. Randolph physically brought the cocaine straw to the officers.[47]

Although the Chief Justice's dissent is more consistent with *Matlock*, in a sense even the majority opinion reflects precedent fairly. For forty years the Court has decided Fourth Amendment cases based on social expectations of privacy.[48] To decide whether a violation has occurred, the Court asks whether a legitimate expectation of privacy, based on accepted social norms, existed and was invaded. *Randolph* reflects precedent, then, in that it is entirely unfalsifiable. As such, it is a helpful prism through which to view the failures of the Court's Fourth Amendment doctrine. By tearing the constitutional provision from its common law heritage and building in its place an edifice of social expectations, the Court has robbed the Fourth Amendment of its most faithful source of legal content, substituting in its place freestanding sociological inquiries poorly suited to constitutional adjudication. The ultimate disposition would not necessarily differ in any particular case, but the modern methodology fails to reap the systemic benefits available under the original tort-based jurisprudential framework.

As the Court acknowledged, the answer to the *Randolph* puzzle depends on the purpose of *Matlock* third-party consent doctrine.[49] If allowing a co-inhabitant's consent to bind his absent roommate is premised on a presumption that he would have consented as well, then extending the doctrine to reach *Randolph* would be illogical. But if the doctrine is founded on the co-inhabitants' mutual waiver of privacy rights, then including *Randolph* within its ambit makes sense. In *Matlock* itself, it was patently obvious that the suspect would not have been willing to allow a search.[50] Interpreting that decision as resting on a presumption of consent — as the Court does — is thus a weak reading of precedent, because no consent from Matlock could rationally have been presumed. The Chief Justice's reading, which views the doctrine as based on an assumption of risk by co-inhabitants, is more consistent with the facts and theory of *Matlock*.

From a broader perspective, however, neither opinion is inconsistent with the doctrine. The Court's rule for judging Fourth Amendment violations — social expectations of privacy — is fluid and flexible enough to accept either result; the outcome merely depends on assumptions about social relations and the level of generality with

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47 *Randolph*, 126 S. Ct. at 1543 (Thomas, J., dissenting).

48 *See, e.g.*, Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

49 *Randolph*, 126 S. Ct. at 1520.

50 Police asked a co-tenant for consent after arresting Matlock in his yard. Matlock v. United States, 415 U.S. 164, 166 (1974).

which the question is framed. According to Justice Souter, individuals reasonably expect that when they disagree with co-inhabitants over whom to admit to shared areas, deference and courtesy will govern.[51] According to the Chief Justice, individuals reasonably expect to give up unilateral control over shared spaces when they agree to live with others.[52] Both are plausible accounts, and under the Court's modern Fourth Amendment doctrine, either could easily be the law.

This indeterminacy — and therefore instability and unpredictability — is the natural result of a jurisprudence untethered from its historical roots in the common law and set adrift with only a vague mandate to reflect social expectations. The failure can be traced back to the Court's decision in *Katz*, when it declared conclusively that "the 'trespass' doctrine . . . can no longer be regarded as controlling."[53] Originally, the Fourth Amendment was tied to the common law;[54] a state actor who committed trespass had violated the Fourth Amendment, whereas one who had obtained a warrant or consent[55] was immune from trespass claims. If the police were not liable in tort, the Fourth Amendment had not been violated.[56] Over time, as the Court grew frustrated with privileging subtle "distinctions whose validity is largely historical"[57] and anxious to grant broader protection to "privacy rather than property,"[58] it abandoned this approach. Instead, courts now judge expectations of privacy by reference to "understandings that are recognized and permitted by society,"[59] and cite property law only to confirm their results[60] or to disavow its importance.[61]

In retrospect, it is somewhat bizarre that the Court resolved the tension between the common law and the Constitution by changing the Constitution. The central virtue of the common law is its evolving nature and ability to meet the changing needs of society; the central virtue of the Constitution is its ageless constancy. Courts could have confronted the old doctrine's weaknesses without unhitching the Fourth Amendment from its historic source of legal content. For ex-

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[51] *See Randolph*, 126 S. Ct. at 1522.

[52] *See id.* at 1533 (Roberts, C.J., dissenting).

[53] *Katz*, 389 U.S. at 353.

[54] *Randolph*, 126 S. Ct. at 1540 (Scalia, J., dissenting).

[55] *See, e.g.*, Fennemore v. Armstrong, 96 A. 204, 205 (Del. Super. Ct. 1915).

[56] *See* Kyllo v. United States, 533 U.S. 27, 31–32 (2001). The classic illustration is *Olmstead v. United States*, 277 U.S. 438 (1928), wherein the Court held wiretapping to be constitutional because it did not involve a trespass. *Id.* at 457, 464. *See also* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 624–27 (1999) (discussing the historical relationship between common law trespass and unlawful searches).

[57] Jones v. United States, 362 U.S. 257, 266 (1960).

[58] Warden v. Hayden, 387 U.S. 294, 304 (1967).

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

[60] *See, e.g.*, Chapman v. United States, 365 U.S. 610, 616–18 (1961).

[61] *See, e.g.*, *Rakas*, 439 U.S. at 142–43.

ample, *Katz* could have recognized that police can violate the Fourth Amendment by committing privacy torts in addition to property torts.[62] This reasoning would have provided the same degree of protection to "people, not places,"[63] but maintained the original meaning of the Fourth Amendment — forbidding searches that violate the (evolving) common law. To the extent that the tort-based approach provided insufficient protection for individuals without their own property — such as those living in their parents' homes[64] — liberalized standing rules could have avoided this problem while retaining the connection between the common law and the Constitution.[65]

If courts could have reached substantially similar results simply by altering the scope of the common law or by liberalizing standing rules, then does the decision to abandon the common law connection really matter? For three reasons, it does. As a *method* of constitutional interpretation, incorporating the evolving common law is superior to turning the social realities that undergird it into direct decisional criteria, even if the outcomes turn out to be identical in any given case.

First, as the *Randolph* majority opinion illustrates, the judiciary is poorly suited to determine rules of social convention. It is far better equipped to determine rules of law. As the Chief Justice argued in dissent, "shifting expectations are not a promising foundation on which to ground a constitutional rule."[66] Besides the circularity of the inquiry — law depends on expectations, but also plays a role in constructing them[67] — the question is not susceptible to principled judicial determination. The *Randolph* decision spends pages imagining what a reasonable person would do in the extraordinary situation of being invited into a home by one occupant and denied entry by another.[68] At oral argument, Justice Breyer candidly admitted he had "never been in [that] situation" and simply did not know "what the expectation is."[69] This is a task for sociologists. In contrast, judges are trained to draw analogies, make distinctions, and study the intricacies of case law.

Of course, the common law corpus inevitably will echo social realities, but it is far more judicially manageable for this development to occur naturally via the common law process rather than directly "by

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62 *See* RESTATEMENT (SECOND) OF TORTS § 652A–B (1977).

63 Katz v. United States, 389 U.S. 347, 351 (1967).

64 *Cf.* Minnesota v. Olson, 495 U.S. 91, 99–100 (1990) (holding that an overnight houseguest who lacks a property interest is entitled nonetheless to an expectation of privacy).

65 For example, a defendant who lived in his parents' home could be given standing to sue on their behalf. Surely modifying judicially created standing rules, *see* William A. Fletcher, *The Structure of Standing*, 98 YALE. L.J. 221, 224 (1988), is preferable to changing the Constitution.

66 *Randolph*, 126 S. Ct. at 1532 (Roberts, C.J., dissenting).

67 *But see* Rakas v. Illinois, 439 U.S. 128, 144 n.12 (1978) (denying that inquiry is tautological).

68 *Randolph*, 126 S. Ct. at 1522–23.

69 Transcript of Oral Argument at 49, *Randolph*, 126 S. Ct. 1515 (No. 04-1067).

unadorned fiat."[70] Indeed, the role of the common law is, and must be, to reflect shifting social expectations,[71] but asking judges to divine these expectations directly as the determinative factor in constitutional adjudication is an exercise in futility. The common law absorbs social conventions incrementally and indirectly; it provides a formalist framework within which judges can adjust to social progress gradually, via doctrine and analogy, without abandoning traditional judicial tools or historical practice. Unlike *Katz*'s ungrounded, direct inquiry into social custom, the common law yields a sturdy framework for principled adjudication. Moreover, the common law approach allows for a reliable and consistent reflection of social change in a way that *Katz* never could: it draws upon a sizeable, heterogeneous sample of cases and amalgamates the findings of multiple judges across multiple time periods. In contrast, *Katz* applies only in the criminal procedure context[72] and establishes binding constitutional holdings that cannot be refined through the common law process. *Katz* thus fails even on its own terms: would an intricate body of law, shaped over centuries by the natural pressures of social change, not reflect society's norms more reliably than one court's singular and static assessment?

Second, tying the Constitution to a body of common law allows for dynamic interaction between the two. On the one hand, giving the common law of property and tort an additional sphere of influence would provide an extra source of pressure to keep it up to date and robust. Conversely, interpreting the Constitution with reference to the common law would infuse the doctrines of the former with the virtues of the latter: predictability,[73] stable development, and conservative caution.[74] Looking directly to shifting social expectations, in contrast, creates a punctuated evolution of constitutional doctrine as judges make decisions without the prudential filter of the common law. For example, each of the circuits considering the question at issue in *Randolph* had reached a single result,[75] and one Supreme Court decision changed the law entirely and immediately.

Third, the marriage of the Fourth Amendment to the common law has profound federalist benefits, allowing individual states to play a

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[70] *Rakas*, 439 U.S. at 165 (White, J., dissenting).

[71] *See* AHARON BARAK, THE JUDGE IN A DEMOCRACY 10 (2006).

[72] Because every case applying *Katz* involves criminals, the resulting picture of social conventions is likely to be skewed. The exclusionary rule creates special pressure to find no constitutional violation, *see infra* note 86, and so judges may interpret the Fourth Amendment narrowly.

[73] The increased predictability of the common law approach could also lead to correspondingly easier administration for police. Police are better able to understand local rules of trespass — which they are trained to enforce — than to predict judicial views on social relations.

[74] *See generally* KARL N. LLEWELLYN, THE COMMON LAW TRADITION (1960).

[75] State v. Randolph, 604 S.E.2d 835, 837 n.2 (Ga. 2004) (Hunstein, J., dissenting) (compiling cases).

role in determining the scope of their protection without the usually inherent majoritarian danger that this involvement entails. Federal court interpretations of the Constitution are supreme,[76] but common law is state law.[77] If the Fourth Amendment remained tethered to common law trespass, state court precedent and state legislation[78] would thus be relevant to the constitutional determination. Allowing states to shape the scope of the privacy rights recognized within their jurisdictions would reflect the fact that social expectations do vary by state;[79] it would also serve the classic federalist goal of permitting each state to become a "laboratory" for "novel social . . . experiments."[80] In general, concerns of constitutional theory over the "tyranny of the majority"[81] preclude legislative participation in constitutional interpretation. However, if the Fourth Amendment remained tied to the common law, the democratic defect inherent in permitting majorities to determine the legal rights of a minority, such as criminal defendants, would be cured. If a state wanted to allow police searches without warrants or probable cause, it would have to abolish trespass and thus render lawful *anyone's* uninvited entrance into the home of another. Giving the rule such broad application alleviates the fear that a legislative majority would nullify constitutional rights.

It is true that with these benefits would come added complexity. Judges would have to delve into the intricate world of the common law and leave aside the ad hoc judgments about "objective" social expectations. But the difficulties were overstated by the Respondent's Brief in *Randolph*, which suggested that a property-based approach to the consent doctrine — under which consent would suffice if the consenter had the legal authority to shield the police from a trespass claim — would see landlords consenting on behalf of tenants, hosts on behalf of guests, parents on behalf of children, and so on.[82] Aside from oversimplifying the relevant law — landlords do not have unlimited power at common law to enter leased premises, for example[83] — this argu-

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[76] U.S. CONST. art. III, § 2; *id.* art. VI, § 1, cl. 2; Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[77] *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78–79 (1938).

[78] Classically, statutes merely alter the background common law: "Statutes are also either *declaratory* of the common law, or *remedial* of some defects therein." WILLIAM BLACKSTONE, 1 COMMENTARIES *86.

[79] It is not unheard of for constitutional law to vary by state. For example, the degree of First Amendment protection given to obscene expression depends in part upon community standards. Miller v. California, 413 U.S. 15, 30–32 (1973); Roth v. United States, 354 U.S. 476, 489 (1957).

[80] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[81] *See generally* JOHN STUART MILL, ON LIBERTY (1859).

[82] *See* Brief for the Respondent at 39–44, *Randolph*, 126 S. Ct. 1515 (No. 04-1067), 2005 WL2176603.

[83] *See, e.g.*, Chapman v. United States, 365 U.S. 610, 616 (1961) (noting that under Georgia common law, landlords do not have free rein to enter leased premises at will).

ment ignores that privacy rights can be protected by sources of law outside the Constitution: even if a hotel owner would not be violating the Fourth Amendment by allowing police to search a patron's room, he would be liable in contract if he had promised the patron privacy. The exclusionary rule would not be applicable, of course, but privacy rights can be vindicated in different ways, and limiting the scope of the exclusionary rule might not be such a negative result.[84]

It is interesting to note that using the common law approach, Randolph probably should have lost. Tenants in common have equal rights to use shared land, and a co-tenant's licensee is shielded from trespass actions.[85] The search of the Randolph residence, therefore, likely did not constitute a common law trespass.[86] Some might scoff at the idea that nineteenth-century property law cases could have any relevance to a modern-day criminal procedure puzzle, preferring the unguided search for social expectations. But interpreting the Fourth Amendment as incorporating the evolving common law offers the best of both worlds — a historically rooted and judicially constraining methodology capable of adapting to the demands of modernity and the unique cultures of individual states. It illustrates that old adage about the beauty and brilliance of our legal system: the law is a seamless web. The Court and scoffers alike would be wise to recall it.

5. Fourth Amendment — Exclusionary Rule — "Knock and Announce" Violations. — The Supreme Court developed a unique remedy to make good on the protections offered by the Fourth Amendment by holding that evidence obtained through an illegal search or seizure cannot be used in a federal prosecution.[1] When the Court applied this rule to the states in *Mapp v. Ohio*,[2] it declared that "all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible."[3] The Court quickly began to move away

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[84] Commentators have criticized the rule, condemning it for distorting the rest of the Court's criminal procedure jurisprudence. *See, e.g.*, Amar, *supra* note 5, at 785–800; Guido Calabresi, Debate, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111 (2003). The Court itself has cut back on the rule in recent cases. *See, e.g.*, Hudson v. Michigan, 126 S. Ct. 2159 (2006).

[85] Brief for the United States as Amicus Curiae Supporting Petitioner at 16 n.4, *Randolph*, 126 S. Ct. 1515 (No. 04-1067), 2005 WL 1453877; *see also* Buchanan v. Jencks, 96 A. 307, 309 (R.I. 1916); 86 C.J.S. *Tenancy in Common* § 144 (2006). *But see* Brief of Amicus Curiae Nat'l Ass'n of Criminal Def. Lawyers Supporting Respondent at 23–25, *Randolph*, 126 S. Ct. 1515 (No. 04-1067), 2005 WL 2147326 (contending different rule). The harshest form of the common law mandated that any action for trespass to property held by tenants in common must be joined by all tenants; if even one settled with the trespasser, the plaintiff lost. *See, e.g.*, Bradley v. Boynton, 22 Me. 287, 288 (1843); 20 AM. JUR. 2D *Cotenancy and Joint Ownership* § 113 (2005). A Georgia statute reversed this rule, however. *See* GA. CODE ANN. § 9-2-23 (1982).

[86] There are insufficient facts in the record to determine Mrs. Randolph's precise property interest and what tenancy arrangement was in effect, but this conclusion is a plausible one.

[1] Weeks v. United States, 232 U.S. 383, 392–93 (1914).

[2] 367 U.S. 643 (1961).

[3] *Id.* at 655.