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Georgia v. Randolph: Checking Potential Defendants' Fourth Amendment Rights at the Door

Adrienne Wineholt

Note

GEORGIA v. RANDOLPH: CHECKING POTENTIAL DEFENDANTS' FOURTH AMENDMENT RIGHTS AT THE DOOR

In *Georgia v. Randolph*,[1] the Supreme Court of the United States considered the novel question of whether a police officer may lawfully seize evidence from a shared premises with the consent of one co-occupant, but over the express objection of another co-occupant.[2] The Court held that a warrantless search for evidence in a shared residence is unreasonable as to the physically present and objecting co-occupant even though another co-occupant consented to the search.[3] In so holding, the Court conflated three distinct tests from prior Fourth Amendment cases, namely: (1) whether a search occurred; (2) whether a third party possessed the requisite authority to consent to the search; and (3) whether the search was reasonable.[4] Neglecting to apply a totality of the circumstances approach and in an attempt to reconcile its holding with two previous cases, the Court instead invented a bright-line rule that insufficiently protects the Fourth Amendment rights of potential defendants.[5] If the Court had properly employed a totality of the circumstances approach to determine the reasonableness of the search, the Court could have reached the same result without jeopardizing potential defendants' privacy interests.[6]

I. The Case

On July 6, 2001, Janet Randolph alerted the police that her husband, Scott Randolph, had taken their son from their home following a domestic dispute.[7] When the police arrived at the Randolph home, Janet Randolph appeared quite upset.[8] She informed the police that

1. 126 S. Ct. 1515 (2006).
2. *Id.* at 1518–19.
3. *Id.* at 1526.
4. *See infra* Part IV.A.
5. *See infra* Part IV.B.
6. *See infra* Part IV.C.
7. *Randolph*, 126 S. Ct. at 1519.
8. Randolph v. State, 590 S.E.2d 834, 836 (Ga. Ct. App. 2003).

she and her husband had marital problems[9] and that he used significant amounts of cocaine.[10] Not long after the police arrived, Scott Randolph returned home and informed the officers that he left the couple's son with a neighbor because he worried that his wife would take their child out of the country.[11] One of the police officers, Sergeant Murray, accompanied Janet Randolph to collect the couple's son, and when they returned Janet Randolph again claimed that her husband was a drug user.[12] She further informed the officers that evidence of his drug use existed within the residence.[13]

Sergeant Murray requested permission from Scott Randolph to search the home, but Scott Randolph expressly refused to consent.[14] Sergeant Murray next asked Janet Randolph for her permission, which she immediately granted.[15] Janet Randolph then led Sergeant Murray to her husband's bedroom, where the officer saw a portion of a drinking straw coated with what he suspected was cocaine.[16]

After this discovery, Sergeant Murray telephoned the district attorney's office for guidance and was instructed to discontinue the search until he obtained a warrant.[17] Meanwhile, Janet Randolph decided to withdraw her consent to the search after speaking with her husband.[18] The officers nevertheless seized the straw and brought the Randolphs to the police station.[19] Later on, the police returned with a search warrant[20] and seized approximately twenty-five more drug-related items as evidence of Scott Randolph's drug use.[21] Based on this evidence, Scott Randolph was indicted for possession of cocaine.[22]

Scott Randolph moved to suppress the drug evidence, alleging that the police acquired the items through an unlawful warrantless

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9. *Randolph*, 126 S. Ct. at 1519. In May 2001, the couple separated and Janet Randolph took their son to stay with her parents in Canada. *Id.* Janet Randolph and her son returned to their Georgia home a few days before this domestic dispute took place. *Randolph*, 590 S.E.2d at 836.

10. *Randolph*, 590 S.E.2d at 836.

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

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. Randolph v. State, 590 S.E.2d 834, 852 (Ga. Ct. App. 2003) (Blackburn, J., dissenting).

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

20. *Id.*

21. *Randolph*, 590 S.E.2d at 852 (Blackburn, J., dissenting).

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

search of his home.[23] The trial court denied the suppression motion, finding that Janet Randolph had properly authorized the search.[24] The Court of Appeals of Georgia reversed the trial court's decision, holding instead that it was reasonable for the police to abide by a present co-occupant's clear objection to a search.[25] Judge Phipps concurred, agreeing with the majority's decision to reverse the trial court, but criticizing the court's bright-line rule.[26] Instead of a rule, Judge Phipps advocated a balancing approach that considers the totality of the circumstances.[27]

The Supreme Court of Georgia subsequently affirmed the decision of the court of appeals, holding that the consent of one co-occupant could not override the express refusal of another physically present co-occupant.[28] In dissent, Justice Hunstein argued that Scott Randolph assumed the risk that his wife would consent to a search of their residence and, accordingly, his refusal to permit the search could not supersede Janet Randolph's consent.[29] Due to a split of authority among the lower federal courts,[30] the Supreme Court of the United States granted certiorari to decide whether a co-occupant can effectively consent to a search of a shared residence when another co-occupant is present and objects to the search.[31]

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23. *Id.* In particular, Scott Randolph contended that Janet Randolph's consent was invalid because she did not possess the authority to give it and because he had unequivocally refused to grant consent. *Id.*

24. *Id.*

25. *Randolph*, 590 S.E.2d at 837, 840. The Court of Appeals of Georgia considered the case after granting Scott Randolph's application for an interlocutory appeal. *Id.* at 836. The court of appeals reversed the trial court's decision because "common authority" should allow co-occupants to exercise privacy rights for other co-occupants. *Id.* at 837.

26. *Id.* at 840 (Phipps, J., concurring specially).

27. *Id.* at 840–41.

28. State v. Randolph, 604 S.E.2d 835 (Ga. 2004). The majority observed that although co-occupants assume the risk that they will be unable to control access to the property when absent, co-occupants do not assume the risk that the police will ignore their objection to a search at the scene. *Id.* at 837.

29. *Id.* at 838 (Hunstein, J., dissenting).

30. Georgia v. Randolph, 126 S. Ct. 1515, 1520 (2006). The *Randolph* Court explained that each of the federal circuits facing this issue concluded that a co-occupant's consent to search is effective despite another co-occupant's clear objection to the search. *Id.* at 1520 n.1 (citing United States v. Morning, 64 F.3d 531, 534–36 (9th Cir. 1995); United States v. Donlin, 982 F.2d 31, 33 (1st Cir. 1992); United States v. Hendrix, 595 F.2d 883, 885 (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 the majority of state courts deciding the issue reached a similar conclusion. *Id.* (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)). Nevertheless, the Court indicated that other state courts have reached the opposite result. *Id.* (citing State v. Leach, 782 P.2d 1035, 1040 (Wash. 1989)).

31. *Id.* at 1520.

II. LEGAL BACKGROUND

The Supreme Court applies a three-part analysis to Fourth Amendment consent to search cases to determine whether: (1) a search occurred; (2) a third party had authority to consent to the search; and (3) the search was reasonable.[32] In the first inquiry, the Court determines if a Fourth Amendment search actually occurred by analyzing whether a defendant had a subjective expectation of privacy in the searched area that society recognizes as reasonable.[33] In the second inquiry, where a third party has allowed law enforcement officers to conduct a search, the Court determines whether that third party had the requisite authority to consent by analyzing whether the absent occupant of the searched premises assumed this risk.[34] Finally, in the third inquiry, the Court assesses whether the search was reasonable under the Fourth Amendment by examining the totality of the circumstances.[35]

A. *The Supreme Court Uses the* Katz *Test to Determine Whether a Search Occurred Under the Fourth Amendment*

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[36] Its purpose is to protect the privacy of citizens by requiring that "neutral and detached" magistrates, rather than impassioned and competitive law enforcement officers, issue warrants.[37] The Court has long interpreted the Fourth Amendment as protecting individuals' privacy from governmental

32. *See infra* notes 33–123 and accompanying text.

33. *See infra* Part II.A.

34. *See infra* Part II.B.

35. *See infra* Part II.C.

36. U.S. CONST. amend. IV.

37. Johnson v. United States, 333 U.S. 10, 13–14 (1948). Consequently, the Court prefers that judicial officers, rather than police officers, determine when an individual's privacy interests must give way to the needs of law enforcement. *Id.* at 14.

intrusion,[38] and as a result, has grounded its analysis of whether a search occurred in the privacy expectations of potential defendants.[39]

The test for determining whether a Fourth Amendment search occurred originated in Justice Harlan's concurrence in *Katz v. United States*.[40] In *Katz*, government agents used an electronic device to listen to and record Katz, the defendant, as he conveyed wagering information over the telephone from a public telephone booth.[41] Although both lower federal courts found Katz guilty of violating a federal anti-wagering statute,[42] the Supreme Court reversed, holding that the government agents' surveillance violated Katz's Fourth Amendment rights.[43] Justice Harlan concurred, asserting that the Fourth Amendment protects individuals (1) who demonstrate that they have a subjective expectation of privacy in a particular place and (2) whose expectation of privacy in that place society considers reasonable.[44] Applying his rule to Katz's situation, Justice Harlan concluded that an individual who uses a public telephone booth has an expectation of privacy within the booth that society deems reasonable.[45]

The Court elaborated on this two-pronged approach in *Rakas v. Illinois*,[46] where police officers searched the inside of a vehicle that the defendants, who were passengers, did not own.[47] The *Rakas* Court upheld the search because the defendants failed to demonstrate a legitimate expectation of privacy in the searched areas of the automo-

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38. *E.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 453 (1971) (explaining that the Fourth Amendment protects an individual's privacy from arbitrary and invasive police action (quoting Wolf v. Colorado, 338 U.S. 25, 27–28 (1949))); Katz v. United States, 389 U.S. 347, 350 (1967) (noting that the Fourth Amendment is not a general "right to privacy," but rather protects an individual's privacy from some types of invasion by the government (internal quotation marks omitted)); *see also* Kyllo v. United States, 533 U.S. 27, 31 (2001) (observing that the Fourth Amendment focuses on an individual's right to retreat into his or her home and "there be free from unreasonable governmental intrusion" (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)) (internal quotation marks omitted)); Wilson v. Layne, 526 U.S. 603, 610 (1999) (indicating that the Fourth Amendment especially protects privacy in the home).

39. *E.g.*, *Kyllo*, 533 U.S. at 33 (noting that a Fourth Amendment search occurs when law enforcement officers violate a defendant's privacy expectations that society considers reasonable); United States v. Jacobsen, 466 U.S. 109, 122 (1984) (same).

40. 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

41. *Id.* at 348 (majority opinion).

42. *Id.*

43. *Id.* at 348–49, 359.

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

45. *Id.*

46. 439 U.S. 128 (1978).

47. *Id.* at 130. Police officers arrested the defendants after discovering rifle shells and a sawed-off rifle in the vehicle. *Id.* At trial, the defendants were convicted of armed robbery and their convictions were affirmed by the Illinois Appellate Court. *Id.* at 129.

bile.[48] In so holding, the Court explained that a legitimate expectation of privacy can stem from real or personal property law as well as through societal understandings.[49] Although the Court in *Rakas* did not find property law dispositive, it stated that such concepts were relevant in determining an individual's expectation of privacy in a particular area.[50] For example, an individual's right to exclude others may lead that individual to legitimately expect privacy in a searched area.[51]

Six years later, in *United States v. Jacobsen*,[52] the Court employed Justice Harlan's two-part test from *Katz* to determine whether a Fourth Amendment search had occurred.[53] The *Jacobsen* Court echoed Justice Harlan's rule that Fourth Amendment searches take place when the government violates a defendant's expectation of privacy that society recognizes as reasonable.[54] Additionally, the *Jacobsen* Court acknowledged the *Rakas* principle: a defendant's legitimate expectation of privacy must be anchored in property law concepts or societal understandings.[55]

The Court again used the *Katz* test in 1990 when it held in *Minnesota v. Olson*[56] that, according to societal standards, a houseguest has a reasonable expectation of privacy in temporary quarters. The Court opined that a houseguest has a legitimate expectation of privacy in the shared premises because a host will not usually admit a visitor over the guest's objection.[57] The *Olson* Court further explained that this privacy expectation was legitimate notwithstanding the houseguest's lack

48. *Id.* at 148–50.

49. *Id.* at 143 n.12.

50. *Id.*

51. *Id.* Justice White dissented in *Rakas*, complaining that the majority's reliance on property law erroneously returned the Court to a vision of the Fourth Amendment grounded in trespass. *Id.* at 163 (White, J., dissenting).

52. 466 U.S. 109 (1984).

53. *Id.* at 113.

54. *Id.* During the same Term, the Court applied the *Katz* rule in *United States v. Karo* and concluded that no search occurred when government agents installed a beeper into a can of ether and had an informant give the can to the defendant. 468 U.S. 705, 708, 712–13 (1984). Because the beeper did not transmit any information to the police upon installation or upon delivery to the defendant, only a potential privacy violation existed; consequently, no Fourth Amendment search occurred. *Id.* at 712–13.

55. *Jacobsen*, 466 U.S. at 122–23 n.22.

56. 495 U.S. 91 (1990). In so holding, the *Olson* Court determined that the defendant had standing to challenge his warrantless arrest under the Fourth Amendment. *Id.* at 93, 100.

57. *Id.* at 99.

of a "legal interest" in the property or an ability to control access to the host's home.[58]

Finally, in *Kyllo v. United States*,[59] the Court again employed the *Katz* test to assess whether a search occurred pursuant to the Fourth Amendment.[60] In *Kyllo*, a government agent used a thermal imager to scan the defendant's home to determine whether he was growing marijuana.[61] Based in part on the scan, a judge issued a warrant permitting a search of the defendant's home.[62] During the search, law enforcement officials discovered over one hundred marijuana plants.[63] The *Kyllo* Court held that the scan itself amounted to a search because the technology revealed information about the inside of the home that government officials otherwise could not have acquired without physical entry.[64] Again, the Court based its decision on the reasonable expectation of privacy that individuals possess in their homes.[65]

B. The Court's Approach to Valid Third Party Consent Has Shifted from an Agency Analysis to an Assumption of the Risk Inquiry

Due to the significant privacy interests at stake, the Court has consistently emphasized that warrantless searches are presumptively unreasonable under the Fourth Amendment.[66] The Court has, how-

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58. *Id.* Similarly, in *Minnesota v. Carter*, the Court evaluated whether defendants possessed a legitimate expectation of privacy in an apartment they had visited only once to package cocaine. 525 U.S. 83, 86–87 (1998). The lessee of the apartment allowed the defendants to use the premises in exchange for one-eighth of an ounce of cocaine. *Id.* at 86. The *Carter* Court distinguished the case from *Olson* because the defendants were not overnight guests, they visited the apartment solely for business reasons, and moreover, the *Carter* defendants had no prior relationship with the lessee of the apartment. *Id.* at 90. The *Carter* Court further explained that an individual's expectation of privacy in commercial property is weaker than a similar expectation in his or her home. *Id.* Consequently, the Court determined that the defendants did not possess a legitimate expectation of privacy in the apartment. *Id.* at 91.

59. 533 U.S. 27 (2001).

60. *Id.* at 29, 33.

61. *Id.* at 29.

62. *Id.* at 30.

63. *Id.* The Ninth Circuit ruled below that Kyllo had no subjective expectation of privacy because he did not attempt to contain the heat emanating from high-intensity lamps in his home and because the thermal imager only showed that certain exterior areas of Kyllo's home were hot. *Id.* at 30–31.

64. *Id.* at 34–35.

65. *Id.* at 34.

66. *E.g.*, *id.* at 31 (warrantless search of a home); United States v. Jacobsen, 466 U.S. 109, 114 (1984) (warrantless search of a sealed package); Coolidge v. New Hampshire, 403 U.S. 443, 474–75 (1971) (warrantless search of an automobile); Katz v. United States, 389 U.S. 347, 357 (1967) (warrantless search of a public telephone booth).

ever, established exceptions to this rule, one of which is voluntary consent.[67] Under the voluntary consent exception, individuals may consent to a law enforcement officer's request to search property—and thereby permit a warrantless search—without running afoul of the Fourth Amendment.[68] Third parties who possess the requisite authority may also consent to searches of another individual's property.[69]

1. Voluntary Consent

The Court's 1973 decision in *Schneckloth v. Bustamonte*[70] explicitly recognized a consent-based exception to the Fourth Amendment's ban on warrantless searches, asserting that law enforcement officers may conduct a warrantless search if they obtain the voluntary consent of the subject of the search.[71] The *Schneckloth* Court considered whether a car passenger could voluntarily consent to a police search of an automobile during a traffic stop even where the passenger did not know he could refuse to consent.[72] To determine whether the defendant's consent was voluntary, the Court explained that it must evaluate the totality of the circumstances surrounding the consent.[73] Although a defendant's knowledge of his right to refuse consent was an important consideration in assessing voluntariness, the *Schneckloth* Court concluded, such knowledge is only one factor among many for reviewing courts to consider.[74] Thus, the *Schneckloth* Court held that

67. *E.g.*, Illinois v. Rodriguez, 497 U.S. 177, 181 (1990) (explaining that voluntary consent is one exception to the Fourth Amendment's general prohibition of warrantless searches of individuals' homes); United States v. Matlock, 415 U.S. 164, 165–66, 170 (1974) (noting that a warrantless search is valid pursuant to the Fourth Amendment when the consenting co-occupant has common authority over the shared premises that law enforcement officers wish to search); Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (observing that consent is an exception to the general rule that warrantless searches are per se unreasonable).

68. *See infra* Part II.B.1.

69. *See infra* Part II.B.2.

70. 412 U.S. 218 (1973).

71. *Id.* at 243 ("[T]here is nothing constitutionally suspect in a person's voluntarily allowing a search.").

72. *Id.* at 220–22. The search of the automobile yielded stolen checks. *Id.* at 220.

73. *Id.* at 227.

74. *Id.* To determine whether consent is voluntary, the *Schneckloth* Court indicated that the necessity of a search must be weighed against the requirement that the defendant not be coerced to consent. *Id.* The Court further explained that several factors should be considered when determining the voluntariness of a defendant's confession: the defendant's age, the defendant's education and intelligence, the extent to which the defendant was aware of his or her constitutional rights, the length of questioning and detention, and the physical punishment to which law enforcement officers subjected the defendant. *Id.* at 226.

the defendant voluntarily consented to the automobile's search notwithstanding the fact that he did not know of his right to refuse.[75]

Twenty-three years later, in *Ohio v. Robinette*,[76] the Court similarly found that police officers do not need to advise detainees that they are free to leave before their consent to a search may be considered voluntary.[77] In *Robinette*, a police officer stopped a driver for speeding and subsequently received the driver's consent to search the automobile.[78] In holding that the officer was not required to inform the defendant driver that he was free to leave before obtaining his consent, the *Robinette* Court reaffirmed the principle from *Schneckloth*—although valid consent must be voluntary, this determination is based on the totality of the circumstances and not simply on the defendant's knowledge of his rights.[79]

2. *Third Party Consent*

The Court has extended the voluntary consent exception to encompass consent given by third parties. The Court's early third party consent cases, however, narrowly prescribed the instances in which a third party could validly consent to a Fourth Amendment search. For example, in *Chapman v. United States*,[80] the Court did not extend the voluntary consent exception where an absent defendant's landlord permitted police officers to enter and conduct a warrantless search of the defendant's residence.[81] The search uncovered evidence of unauthorized liquor distribution and later led to the defendant's indictment.[82] The *Chapman* Court found the search unlawful and explained that to hold otherwise would strip the defendant of his Fourth Amendment rights by conditioning the security of his home on the judgment of his landlord.[83]

The Court clarified its rationale in this type of consent case three years later in *Stoner v. California*,[84] when it explained that only the de-

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75. *Id.* at 249.

76. 519 U.S. 33 (1996).

77. *Id.* at 39–40.

78. *Id.* at 35–36. The search revealed controlled substances within the vehicle. *Id.* at 36.

79. *Id.* at 35, 39–40.

80. 365 U.S. 610 (1961).

81. *Id.* at 610, 615–17.

82. *Id.* at 610–11.

83. *Id.* at 616–18. The Court also explained that common law distinctions concerning private property rights should not enter into the Fourth Amendment search equation; the former are largely based on historical fact and should not influence the outcome of constitutional claims. *Id.* at 617 (citing Jones v. United States, 362 U.S. 257, 266–67 (1960)).

84. 376 U.S. 483 (1964).

fendant, or an authorized agent, could grant consent to a search and waive the defendant's Fourth Amendment rights.[85] In *Stoner*, the Court deemed a search unlawful when law enforcement officers used a hotel clerk's permission to conduct a warrantless search of a defendant's hotel room while the defendant was gone.[86] In setting aside the defendant's armed robbery conviction, the Court determined that the hotel clerk could not waive the defendant's Fourth Amendment rights because the defendant had not authorized the clerk to consent to a search of his room.[87]

In 1969, the Court moved away from its short-lived reliance on agency principles and introduced a new assumption of the risk analysis in *Frazier v. Cupp*.[88] The defendant in *Frazier* argued that the trial court should not have allowed some of his clothing into evidence.[89] Police officers had seized the clothing from a duffel bag shared by the defendant and his cousin after the cousin consented to its search.[90] The *Frazier* Court found that the defendant's cousin possessed the authority to validly consent to the bag's search because, as joint users, each had assumed the risk that the other would permit such a search.[91] The Court rejected the defendant's contention that his cousin only had permission to use one compartment of the duffel bag and thus could consent only to a partial search, remarking that it refused to "engage in such metaphysical subtleties in judging the efficacy of [the cousin's] consent."[92]

The Court again employed an assumption of the risk analysis five years later in *United States v. Matlock*.[93] In *Matlock*, the police arrived at the defendant's home, arrested him in the front yard,[94] and placed him in a police patrol car away from the home.[95] The officers then obtained consent to search the home from Gayle Graff, who shared a bedroom with the defendant.[96] At no time did the police ask the de-

85. *Id.* at 489.
86. *Id.* at 485, 490.
87. *Id.* at 484, 489–90.
88. 394 U.S. 731, 740 (1969).
89. *Id.* at 732, 740.
90. *Id.* at 740.
91. *Id.*
92. *Id.*
93. 415 U.S. 164, 171 n.7 (1974).
94. *Id.* at 166.
95. *Id.* at 179 (Douglas, J., dissenting).
96. *Id.* at 166 (majority opinion). The *Matlock* defendant did not own the home. *Id.* Rather, Graff's parents leased the residence and the defendant lived there with Graff and several members of Graff's family. *Id.*

fendant directly whether he consented to the search.[97] The Court concluded that a co-occupant with "common authority" over shared property could consent to a search of the premises in the absence of another non-consenting co-occupant.[98] In defining common authority, the Court renounced reliance upon property law and instead stated that a co-occupant's common authority rests upon joint use or control of the property.[99] In addition, the Court reasoned, mutual control made it reasonable for the co-occupants to have assumed the risk that any one of them would allow the police to search the shared premises.[100]

The Court expanded law enforcement officers' ability to conduct warrantless searches pursuant to third party consent in *Illinois v. Rodriguez*,[101] when it determined that a co-occupant with only apparent authority could consent to a search of a shared residence.[102] In *Rodriguez*, a woman allowed the police to enter her former residence while the lessee of the apartment slept in his bedroom.[103] The Court held that a police officer may enter a premises based upon the consent of an individual whom a reasonable person would believe had the authority to consent to a search of the premises.[104] Thus, although the Court's third party consent cases were initially grounded in restrictive agency principles, its recent decisions based on an assumption of the risk rationale afford officers broad latitude to receive consent from third parties with some reasonable relationship to the premises.

C. *The Court Looks to the Totality of the Circumstances to Determine Reasonableness Under the Fourth Amendment*

The Court has long evaluated the reasonableness of a Fourth Amendment search by examining the circumstances of the case and balancing competing privacy and governmental interests. For in-

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97. *Id.*

98. *Id.* at 170.

99. *Id.* at 171 n.7. Specifically, the *Matlock* Court asserted that common authority does not derive from a third party's property interest in the searched property. *See id.* (illustrating instances where an individual cannot consent to a search despite having a property interest in the premises (citing Stoner v. California, 376 U.S. 483, 490 (1964); and Chapman v. United States, 365 U.S. 610, 616–17 (1961)).

100. *Id.*

101. 497 U.S. 177 (1990).

102. *Id.* at 179, 186–89.

103. *Id.* at 179–80. The third party still had a key to the apartment and unlocked the door for police to enter. *Id.* The officers found drug paraphernalia and cocaine inside, and arrested the defendant, seized the evidence, and subsequently charged the defendant with possession of a controlled substance with intent to deliver. *Id.* at 180.

104. *Id.* at 188–89.

stance, the Court recognized in *Camara v. Municipal Court*[105] that the reasonableness of a Fourth Amendment search depends on the government's interest in searching a premises weighed against the resulting intrusion into the defendant's privacy.[106] Two years later, the Court expanded the number of factors that affect the reasonableness of a search when it decided *Chimel v. California*.[107] In *Chimel*, three police officers arrested the defendant in his home and conducted a warrantless search over his objection, characterizing their search authority as incident to the defendant's lawful arrest.[108] In finding the search unreasonable, the *Chimel* Court explained that all of the facts and circumstances surrounding the search inform the reasonableness inquiry.[109] The Court added that analyzing the totality of the circumstances does not occur in a vacuum; rather, such analysis must reflect the purpose and history of the Fourth Amendment.[110]

In 1978, the Court decided *Michigan v. Tyler*[111] and reaffirmed the necessity of balancing the governmental interest in searches with the resulting disturbance of individual privacy.[112] The *Tyler* Court addressed whether certain items obtained by police and fire officials through warrantless entries onto burned property could properly be admitted into evidence at the defendants' trial.[113] After proposing and addressing several factors to evaluate the reasonableness of an investigatory fire search, the Court reversed the defendants' convictions.[114]

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105. 387 U.S. 523 (1967).

106. *Id.* at 536–37.

107. 395 U.S. 752, 765 (1969).

108. *Id.* at 753–54. The *Chimel* defendant's wife accompanied the officers as they searched the house. *Id.* at 754.

109. *Id.* at 765, 768.

110. *See id.* at 765. For example, the Fourth Amendment was adopted in the historical context of government officials using general warrants to search individuals' property or conducting searches without any warrant at all, which "alienated the colonists and . . . helped speed the movement for independence." *Id.* at 761.

111. 436 U.S. 499 (1978).

112. *See id.* at 507.

113. *Id.* at 501.

114. *Id.* at 507, 512. Specifically, the Court suggested the following as relevant factors: how often government officials had entered the building, the scope of the search, the time of day of the search, the amount of time since the fire, whether the building was still in use, and the extent to which the building's owner had attempted to prevent intruders from entering the building. *Id.* at 507. In dissent, Justice Rehnquist examined all of the circumstances of the case and concluded that the searches were reasonable under the Fourth Amendment. *Id.* at 516–18 (Rehnquist, J., dissenting).

Two years later, the Court decided *Payton v. New York*[115] and characterized the standard of reasonableness as "amorphous."[116] In *Payton*, six police officers without a warrant forced open the door to the defendant's apartment, seized a .30 caliber shell casing in plain view, and later introduced it into evidence at the defendant's murder trial.[117] The Court held that the Fourth Amendment forbids law enforcement officers from entering a suspect's home without a warrant and without consent to effectuate a routine felony arrest.[118] In so holding, the Court noted that norms and custom are an important part of its Fourth Amendment reasonableness inquiry.[119]

More recently, the Court explicitly adopted a totality of the circumstances approach to Fourth Amendment reasonableness. In *Whren v. United States*,[120] the Court stated that, in theory, every case that arises under the Fourth Amendment requires the Court to balance "all relevant factors."[121] The Court explained that in reality, however, when probable cause is present the Court methodically applies this balancing test to the facts of particular cases only when police officers perform searches or seizures in ways that particularly offend defendants' privacy interests.[122] The *Whren* Court noted that one example of this type of conduct is a police officer's warrantless entry into a potential defendant's home.[123]

III. THE COURT'S REASONING

In *Georgia v. Randolph*,[124] the Supreme Court of the United States affirmed the judgment of the Supreme Court of Georgia and held that a warrantless search for evidence of a shared premises is unreasonable with regard to a physically present and objecting co-occupant, notwithstanding another co-occupant's consent to the search.[125] Writing for the majority, Justice Souter opened by explaining that the Fourth Amendment generally forbids warrantless entry into a person's

115. 445 U.S. 573 (1980).
116. *Id.* at 600.
117. *Id.* at 576–77.
118. *Id.* at 576.
119. *Id.* at 600.
120. 517 U.S. 806 (1996).
121. *Id.* at 817.
122. *Id.* at 818.
123. *Id.* Later that year, the Court also decided *Ohio v. Robinette* and observed that reasonableness is the "touchstone of the Fourth Amendment," which courts must evaluate by reviewing the totality of the circumstances. 519 U.S. 33, 39 (1996) (internal quotation marks omitted) (quoting Florida v. Jimeno, 500 U.S. 248, 250 (1991)).
124. 126 S. Ct. 1515 (2006).
125. *Id.* at 1526, 1528.

home as unreasonable per se, but that voluntary consent is one exception to this rule.[126]

The Court then explained that in consent cases, the Fourth Amendment reasonableness requirement turns on "widely shared social expectations."[127] In other words, the majority reasoned, Fourth Amendment reasonableness depends largely on common societal understandings regarding co-occupants' authority to influence other co-occupants' interests.[128] The Court decided that no common understanding exists that would allow one co-occupant's authority to prevail over another co-occupant's articulated desires.[129]

Based on this analysis, the Court explained that the consent of one co-occupant over another's objection does not make a warrantless search any more reasonable than if neither party had consented.[130] Thus, the majority explained, one co-occupant's consent would in no way enhance the government's claim when weighed against the nonconsenting individual's interests in privacy and security.[131] As a result, the Court formulated the following rule: a physically present co-occupant's explicit objection to a search of a shared residence is determinative as to that co-occupant, despite another co-occupant's consent.[132] Admitting to drawing a "fine line,"[133] the Court applied

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126. *Id.* at 1520.

127. *Id.* at 1521.

128. *Id.* According to the majority, *United States v. Matlock*, 415 U.S. 164 (1974), exhibited an example of this type of common understanding. *Randolph*, 126 S. Ct. at 1521. The *Randolph* Court explained that in *Matlock*, the police officers were justified in believing that an individual lived in the searched premises when she answered the door to the home while carrying her baby; therefore, she possessed the requisite common authority to allow visitors "obnoxious" to other co-occupants to enter in their absence. *Id.* at 1521–22.

129. *Randolph*, 126 S. Ct. at 1523. To arrive at this conclusion, the Court explained that co-occupants legitimately expect privacy within a shared premises because it is improbable that one co-occupant will admit a visitor over another co-occupant's objection. *Id.* at 1522. This understanding is apparent when a visitor arrives at the door, as the majority maintained that a visitor would feel uncomfortable entering the premises over one co-occupant's clear objection even though another co-occupant had invited the visitor into the residence. *Id.* at 1522–23.

130. *Id.* at 1523.

131. *Id.* The Court acknowledged the consenting co-occupant's interest in aiding the police. *Id.* at 1524. Nevertheless, the majority explained that sufficient alternatives existed to protect this interest. *Id.*

132. *Id.* at 1528.

133. *Id.* at 1527. The Court recognized that although its rule protects a potential defendant who is present at the door to object to a police officer's search, the rule does not protect an absent defendant. *Id.* Nevertheless, the Court noted that the clarity of its rule would aid law enforcement officers in the field. *Id.*

its new rule to the facts of the case and found no justification for the search of Scott Randolph's home.[134]

Justice Stevens wrote a concurring opinion to emphasize that studying history alone is insufficient to ascertain the meaning of the Fourth Amendment.[135] He noted that the evolving nature of consent demonstrates why constitutional interpretation must take societal changes into account.[136] Specifically, with regard to police officers who inform co-occupants of their constitutional rights pertaining to consent, Justice Stevens explained that only a husband's consent would have mattered when the Fourth Amendment was adopted.[137] Because male and female individuals are presently recognized as equal partners, however, Justice Stevens declared that police officers should now inform each co-occupant, regardless of gender, of their independent constitutional rights.[138]

In a separate concurrence, Justice Breyer maintained that the Fourth Amendment does not require bright-line rules, but rather insists upon an inquiry into the reasonableness of a search measured by the totality of the circumstances.[139] According to Justice Breyer's review of the circumstances, the Court properly found Janet Randolph's consent ineffective in the face of her husband's objection to the search.[140] Nevertheless, Justice Breyer noted that if the surrounding circumstances varied significantly from those at hand, the results would change accordingly.[141]

Chief Justice Roberts dissented, criticizing the majority's reliance on widely shared social expectations to determine reasonableness in

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134. *Id.* at 1528. The Court also noted two arguments that the prosecution did not make: (1) that Janet Randolph needed police protection in the area of the residence where the officers found the drug evidence; or (2) that exigent circumstances justified the warrantless search. *Id.*

In this vein and in response to Chief Justice Roberts's critique, the majority noted that as long as the police had "good reason" to believe that the threat of domestic violence existed, an officer would not commit the tort of trespass by entering a home to resolve such a dispute. *Id.* at 1525. The majority also stated that the exigent circumstances exception to the Fourth Amendment proscription against warrantless searches would justify police entry in domestic violence cases. *Id.* at 1526 (citing United States v. Hendrix, 595 F.2d 883, 885–86 (D.C. Cir. 1979) (per curiam); and People v. Sanders, 904 P.2d 1311, 1313–15 (Colo. 1995)).

135. *Id.* at 1528 (Stevens, J., concurring).

136. *Id.*

137. *Id.* at 1529.

138. *Id.*

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

140. *Id.* at 1530.

141. *Id.*

Fourth Amendment consent cases.[142] Instead, Chief Justice Roberts argued that the voluntary consent of a co-occupant with the requisite authority renders a warrantless search reasonable.[143] He further contended that the majority's rule will lead to severe consequences, especially in cases of domestic abuse.[144] Specifically, Chief Justice Roberts complained that the majority's rule will prevent the police from entering a home to stop a domestic dispute should the abuser, as a co-occupant, object to police entry.[145]

In a separate dissent, Justice Scalia responded to Justice Stevens's concurrence and argued that changes in property law dictating who may consent to a search do not modify the meaning of the Fourth Amendment.[146] Additionally, Justice Scalia predicted that the majority's decision portends the opposite of equality between the sexes, as the decision will actually allow men to prevent women from consenting to police entry into their homes.[147]

Finally, Justice Thomas wrote his own dissent, contending that *Coolidge v. New Hampshire* squarely controlled the outcome.[148] Justice Thomas interpreted *Coolidge* as holding that a Fourth Amendment search does not occur when an accused's spouse leads the police to possible evidence of the accused's misconduct.[149] As a result, Justice Thomas concluded that the Court need not have considered whether Janet Randolph's consent was valid because no general search took place.[150]

IV. ANALYSIS

In *Georgia v. Randolph*, the Supreme Court held that the Fourth Amendment prohibits a warrantless search of a shared residence

142. *Id.* at 1531–33 (Roberts, C.J., dissenting) (internal quotation marks omitted). Justice Scalia joined the Chief Justice in dissent. *Id.* at 1531. Specifically, Chief Justice Roberts asserted that varying social situations lead to varying social expectations. *Id.* at 1532. For example, Chief Justice Roberts suggested that the place that a visitor enters, such as a bedroom shared between bickering roommates versus a common area, and the number of co-occupants who invite a visitor into the residence, would affect the parties' social expectations. *Id.*

143. *Id.* at 1531. Chief Justice Roberts reasoned that when co-occupants decide to live together, they assume the risk that another co-occupant will allow the police to search their shared residence. *Id.*

144. *Id.* at 1537.

145. *Id.* at 1538.

146. *Id.* at 1540 (Scalia, J., dissenting).

147. *Id.* at 1541.

148. *Id.* (Thomas, J., dissenting).

149. *Id.* at 1541–42 (citing Coolidge v. New Hampshire, 403 U.S. 443, 486–90 (1971)).

150. *Id.* at 1541.

when one physically present co-occupant expressly objects to a search, even though another co-occupant consents.[151] In so holding, the Court borrowed features from three separate Fourth Amendment inquiries concerning: (1) the existence of a search; (2) a third party's authority to consent to a search; and (3) the reasonableness of a search.[152] This patchwork reasoning led the *Randolph* Court to create an unnecessary and arbitrary bright-line rule that dilutes potential defendants' Fourth Amendment rights.[153] Although the Court properly found Janet Randolph's consent ineffective in the face of her husband's express objection, the Court should have adopted a totality of the circumstances approach to analyze Fourth Amendment reasonableness.[154]

A. *The* Randolph *Court Conflated Three Distinct Fourth Amendment Inquiries to Resolve the Constitutionality of the Search of Scott Randolph's Home*

In reaching its conclusion that Scott Randolph's objection rendered Janet Randolph's consent invalid, the *Randolph* Court confused three separate questions that arise in Fourth Amendment consent cases. Specifically, the Court improperly used the tests for whether Janet Randolph possessed the requisite consent authority and for whether a search occurred to address the reasonableness of the search of the Randolph home.[155] In so doing, the Court ignored precedent by failing to use a totality of the circumstances approach to determine the reasonableness of the search.[156] The Court's conflation of these tests will result in confusion for lower courts.[157]

1. *The Court Erroneously Considered "Widely Shared Social Expectations" to Evaluate Both Janet Randolph's Authority to Consent and the Reasonableness of the Search*

The *Randolph* Court improperly used the test for determining whether a third party possesses the authority to consent to a search to evaluate the reasonableness of a search. In particular, the *Randolph* Court indicated that the reasonableness of a Fourth Amendment search depends, in part, on the risks that co-occupants assume in shar-

151. *Id.* at 1526 (majority opinion).
152. *See infra* Part IV.A.
153. *See infra* Part IV.B.
154. *See infra* Part IV.C.
155. *See infra* Part IV.A.1.
156. *See infra* Part IV.A.2.
157. *See infra* Part IV.A.3.

ing a residence.[158] In *Frazier v. Cupp* and *United States v. Matlock*, however, the Court used an assumption of the risk analysis only to decide if a third party possessed the requisite authority to consent to a search, not to evaluate the reasonableness of a search.[159]

Instead of inappropriately using the assumption of the risk analysis to bolster its argument that widely shared social expectations measure the reasonableness of a search, the Court should have used the assumption of the risk analysis only as it had in *Matlock* and *Frazier*—to determine if Janet Randolph had the authority to consent to the search of her shared residence.[160] The *Randolph* Court should have followed *Matlock* and *Frazier*'s use of the assumption of the risk analysis because those cases also analyzed a third party's authority to consent to a search of shared property.[161] By commingling its consent and reasonableness inquiries, however, the Court confused the standards of its previous cases and thus undermined the strength of its decision.

The *Randolph* Court also failed to follow precedent by using widely shared social expectations to determine the reasonableness of

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158. *See* Georgia v. Randolph, 126 S. Ct. 1515, 1521–22 (2006) (explaining that Fourth Amendment reasonableness is based on "commonly held understanding[s] about the authority that co-inhabitants may exercise in ways that affect each other's interests" and that such living arrangements "include an 'assumption of risk,' on which police officers are entitled to rely").

159. *See* United States v. Matlock, 415 U.S. 164, 171 n.7 (1974) (noting that the authority necessary to validate third party consent derives from joint use of and access to the property "so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed [this] risk"); Frazier v. Cupp, 394 U.S. 731, 740 (1969) ("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 [his cousin] would allow someone else to look inside.").

160. *See supra* note 159 and accompanying text. The Court also improperly relied upon widely shared social expectations to explain that some third parties, such as hotel clerks and landlords, do not possess the requisite authority to consent to searches of another's property, even though the holdings of the cited decisions rested on other grounds. *Compare* Stoner v. California, 376 U.S. 483, 489 (1964) (stating that a hotel patron impliedly allows certain hotel employees to enter the hotel room to carry out their duties, but basing its decision on the fact that the defendant had not waived his Fourth Amendment rights personally or through an agent), *and* Chapman v. United States, 365 U.S. 610, 616–17 (1961) (rejecting the prosecution's argument that a landlord could consent to the search of a tenant's residence if the landlord's purpose was to view waste and cautioning that "subtle distinctions" from the law of property should not be used to determine the reasonableness of a search under the Fourth Amendment), *with Randolph*, 126 S. Ct. at 1522 (citing *Stoner* and *Chapman* to illustrate situations where society would not recognize common authority).

161. *See Matlock*, 415 U.S. at 167 (examining whether an individual possessed the requisite authority to consent to a search of the premises that she shared with the defendant); *Frazier*, 394 U.S. at 740 (determining whether the defendant's cousin had the authority to consent to a search of a duffel bag he shared with the defendant).

the search of the Randolph residence.[162] However, as past cases indicate, the Court has consistently only considered widely shared social expectations in the *Katz* context, and predominantly to evaluate whether a search had occurred.[163] As the Court clarified in *Rakas v. Illinois*, widely shared social expectations constitute one way of deciding the second element of the *Katz* test—whether a defendant has a reasonable, or legitimate, expectation of privacy in searched property.[164] The Court further confirmed the validity of the *Katz* test in the search context with its decision in *Minnesota v. Olson*, when it considered common societal standards to determine that a houseguest has a legitimate expectation of privacy in his or her temporary residence.[165] These cases demonstrate that the *Randolph* Court's application of widely shared social expectations to its Fourth Amendment reasonableness inquiry was in direct contrast to its past cases, which had confined this assessment to the second step of the *Katz* inquiry.

2. *The* Randolph *Court Failed to Assess the Totality of the Circumstances to Determine Fourth Amendment Reasonableness*

By substituting widely shared social expectations as its measure of reasonableness, the *Randolph* Court neglected to examine the totality of the circumstances, which is the Court's usual test for evaluating the

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162. *See Randolph*, 126 S. Ct. at 1521 ("The constant element in assessing Fourth Amendment reasonableness in the consent cases . . . is the great significance given to widely shared social expectations . . . .").

163. *See id.* at 1532 (Roberts, C.J., dissenting) (noting that although the Court has used societal expectations to analyze whether a search occurred and if an individual has standing to object to a search, it has not considered social expectations in the consent context (citing Minnesota v. Olson, 495 U.S. 91, 95–96, 100 (1990); and Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring))).

164. Rakas v. Illinois, 439 U.S. 128, 143–44 n.12 (1978). The Court employed the *Rakas* principle in *United States v. Jacobsen* to emphasize the difference between a defendant's subjective and objective expectations of privacy. 466 U.S. 109, 122 & n.22 (1984).

165. *Olson*, 495 U.S. at 96–97, 99. The *Olson* Court did not weaken the reasoning underlying prior cases when it used the *Katz* test to decide that the defendant had standing to object to his warrantless arrest; rather, the issues of whether a search occurred and whether a defendant has standing to invoke the Fourth Amendment each speak to the ultimate question of Fourth Amendment coverage and are, consequently, analyzed using the same test. *See id.* at 95–100 (employing the *Katz* test to resolve whether the defendant could find protection in the Fourth Amendment when challenging his warrantless arrest); *see also Jacobsen*, 466 U.S. at 113, 117 (noting that one type of expectation that the Fourth Amendment covers involves searches, which occur according to the *Katz* test, and further explaining that "[t]he Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated"). Similarly, in *Kyllo v. United States*, the Court explained that potential defendants possess at least a minimal expectation of privacy that society recognizes as reasonable in their homes. 533 U.S. 27, 34 (2001).

reasonableness of a search under the Fourth Amendment. The Court's reliance on widely shared social expectations in its reasonableness inquiry prompted it to only summarily weigh Scott Randolph's interests against the government's interests.[166] The Court did not, however, engage in a full analysis of the circumstances surrounding the case.[167] Merely concluding that there is no common understanding that a consenting co-occupant may allow an objectionable guest into a shared premises over another co-occupant's objection does not adequately assess the *circumstances* of a case.[168] Because this type of analysis is insufficient, the Court has "consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry."[169] Therefore, the *Randolph* Court's failure to analyze

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166. *See Randolph*, 126 S. Ct. at 1523 (stating simply that one co-occupant's consent "adds nothing to the government's side to counter the force of an objecting individual's claim to security against the government's intrusion into his dwelling place").

The *Randolph* Court may, however, have implicitly approved of a totality of the circumstances approach in the limited case of domestic violence. *See id.* at 1525 (explaining that a co-occupant's consent would be valid when a law enforcement officer had a "good reason" to think that domestic violence might occur inside a shared premises). In effect, this approach would validate the consent of one co-occupant over the objection of another because an additional circumstance—a police officer's suspicion of domestic violence—would exist to make the search reasonable despite a co-occupant's objection.

167. The Court has stressed that reviewing courts should assess all of the circumstances of a case in the Fourth Amendment reasonableness context. *See, e.g.*, Ohio v. Robinette, 519 U.S. 33, 39 (1996) (stating unequivocally that the Court uses a totality of the circumstances approach to determine reasonableness); Michigan v. Tyler, 436 U.S. 499, 507 (1978) (weighing a potential defendant's interests in privacy against the government's interest in effective law enforcement by considering six fact-specific inquiries); Chimel v. California, 395 U.S. 752, 765 (1969) (noting that the reasonableness of a search is measured by considering the facts and circumstances of the case).

168. Even the Court's earlier cases that seem to promote a standard requiring slightly less than a full analysis of the facts do not fall back on commonly held social understandings to support the reasonableness of a search. *See* Whren v. United States, 517 U.S. 806, 817–18 (1996) (explaining that the Court must decide the reasonableness of a warrantless search of a defendant's home by weighing "all relevant factors"); Camara v. Mun. Court, 387 U.S. 523, 536–37 (1967) (remarking that a test of reasonableness requires balancing the intrusiveness of the search against the necessity of the search for law enforcement). *But see* Payton v. New York, 445 U.S. 573, 600 (1980) (observing that a "longstanding, widespread practice is not immune from constitutional scrutiny. But neither is it to be lightly brushed aside. This is particularly so when the constitutional standard is as amorphous as the word 'reasonable,' and when custom and contemporary norms necessarily play such a large role in the constitutional analysis."). In his concurring opinion, Justice Breyer better evaluated the circumstances present in *Randolph*. *See infra* Part IV.C.

169. *Robinette*, 519 U.S. at 39. Similarly, the Court has consistently employed a totality of the circumstances approach as a workable standard when assessing the voluntariness of an individual's consent. *See id.* at 39–40 (noting that the voluntariness of consent is determined by evaluating all circumstances); Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973) (same).

the totality of the circumstances departed from precedent and resulted in a cursory assessment of reasonableness.

3. *The Court's Hybrid Reasoning Provides Lower Courts with an Unworkable Standard*

The *Randolph* Court's conflation of the tests to determine whether a search occurred, whether a third party possessed the authority to validly consent to a search, and whether the search was reasonable, will result in confusion for lower courts.[170] By essentially merging all three inquiries into one overarching question of reasonableness, lower courts are left to wonder to what extent these three distinct analytic inquiries persist and how to resolve them.[171] Had the Court adhered to precedent, not only would lower courts now have a clearer understanding of how to approach third party consent cases under the Fourth Amendment, but courts could also avoid the weakening of potential defendants' Fourth Amendment rights that will occur because of the Court's new bright-line rule.[172]

B. *The Court's Blending of Different Fourth Amendment Inquiries Led to a Bright-Line Rule that Insufficiently Protects Potential Defendants*

The *Randolph* Court's confounding of the three separate tests provided in its earlier Fourth Amendment cases forced the Court to create a bright-line rule.[173] The Court had to adopt this bright-line rule because (1) it did not adopt a totality of the circumstances approach to determine reasonableness; and (2) to preserve the integrity of *United States v. Matlock* and *Illinois v. Rodriguez*.[174] The Court's bright-line rule, however, only arbitrarily protects potential defendants' Fourth Amendment rights.[175]

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170. *See* Peter B. Rutledge, Miranda *and Reasonableness*, 42 AM. CRIM. L. REV. 1011, 1018 (2005) (contending that "blended approaches" offer little guidance to lower courts seeking to apply them).

171. *See* Todd Witten, Note, Wilson v. Arkansas*: Thirty Years After* Ker *the Supreme Court Addresses the Knock and Announce Issue*, 29 AKRON L. REV. 447, 465 (1996) ("Without a clear legal framework to decipher the boundaries of a 'reasonable search,' the courts will be unable to uniformly reconcile the competing policy goals of effective law enforcement and protection of individual liberty.").

172. *See infra* Part IV.B.2.

173. *See infra* Part IV.B.1.

174. *See infra* Part IV.B.1.

175. *See infra* Part IV.B.2.

1. *Without a Totality of the Circumstances Approach and to Preserve* Matlock *and* Rodriguez*, the* Randolph *Court Resorted to the Creation of a Bright-Line Rule*

The Court's confusion of the three tests set forth above forced it to develop an avoidable bright-line rule under which the Fourth Amendment protects only a present defendant who objects to a police officer's request to search, after a third party has consented to the search.[176] Instead of adopting a totality of the circumstances approach to determine the reasonableness of the search of Scott Randolph's home, the *Randolph* Court assessed the reasonableness of the search by utilizing the tests that determine whether a search occurred and whether a third party possesses the authority to validly consent to the search.[177] If the Court had refrained from conflating these standards, it could have properly employed a totality of the circumstances approach to find the search of the Randolph residence unreasonable; a bright-line rule was unnecessary.[178]

Additionally, because it did not apply the totality of the circumstances test and instead relied on widely shared social expectations to determine reasonableness, the Court had to fashion a bright-line rule to explain the continued significance of *Matlock* and *Rodriguez*. The Court acknowledged that the factual circumstances of these third party consent cases were similar to the facts of *Randolph*.[179] As a result, to maintain the reasoning of these cases, the Court crafted its narrow rule to resolve the particular facts of *Randolph* in which Janet Randolph consented to the search of the shared residence over Scott Randolph's express objection.[180]

2. *The Court's Bright-Line Rule Exposes Potential Defendants to Privacy Violations*

Although the *Randolph* Court found its bright-line rule justified by practicality and simplicity,[181] the application of this rule will not likely be as beneficial as the Court suggests because it provides only arbitrary protection to a potential defendant and contradicts the

176. *See* Georgia v. Randolph, 126 S. Ct. 1515, 1536 (2006) (Roberts, C.J., dissenting) (discussing the "random" protection of the majority's bright-line rule).

177. *See supra* Part IV.A.1–2.

178. *See infra* Part IV.C.1.

179. *See Randolph*, 126 S. Ct. at 1527 (noting that while the police obtained third party consent and searched the premises, the *Matlock* defendant was nearby in a police car and the *Rodriguez* defendant slept in his apartment).

180. *See id.* (admitting that its bright-line rule "draw[s] a fine line" with precedent).

181. *Id.*

Court's long-standing emphasis on guarding privacy interests in the home. The Court's bright-line rule will often allow police officers to enter potential defendants' homes due to the random protection that it affords.[182] Thus, as Chief Justice Roberts argued in dissent, if the Court believes as strongly as it stated that the home is one's castle,[183] its strained and uncommon usage of the word "present," which it used to distinguish a defendant at the door from a defendant unfortunately asleep in the next room, is unconvincing.[184]

In contrast to the *Randolph* Court's minimal emphasis on potential defendants' privacy interests, in *Payton v. New York*, the Court asserted that the "chief evil" against which the Fourth Amendment protects is a law enforcement officer's warrantless entry into an individual's home.[185] The Court has also described the Fourth Amendment's protection of privacy in the home as "centuries-old" and "at the core of the Fourth Amendment."[186] Similarly, the principle expressed in *Kyllo v. United States* and in *United States v. Karo*—that potential defendants have legitimate expectations of privacy in their homes which society recognizes as reasonable—further underscores the premium that the Court has placed on protecting privacy within the home.[187] Given this well-established focus on privacy in the home, the *Randolph* Court's fine line does not adequately protect a potential defendant's privacy interests.

Not only does the Court's bright-line rule minimize a potential defendant's privacy interests by making Fourth Amendment rights heavily dependent on a potential defendant's location in the home, but the Court's reasoning could also prevent a potential defendant from controlling this location. Although the *Randolph* Court indicated that its decision does not permit law enforcement officers to remove a defendant from the doorway to prevent his or her objection

182. *See id.* (commenting that a nearby potential defendant who would object to a search of a shared premises will not receive Fourth Amendment protection because he is not present and objecting when law enforcement officers obtain the consent of another co-occupant).

183. *Id.* at 1524.

184. *See id.* at 1535 n.1 (Roberts, C.J., dissenting) (contending that the differential treatment afforded by the majority's rule to a defendant present at the doorway to his residence versus a defendant asleep in his residence does not offer "great protection to a man in his castle").

185. 445 U.S. 573, 585 (1980) (internal quotation marks omitted) (quoting United States v. U.S. Dist. Court, 407 U.S. 297, 313 (1972)).

186. Wilson v. Layne, 526 U.S. 603, 610, 612 (1999). The Court has further emphasized that a defendant has a greater expectation of privacy in his or her home than in commercial property. Minnesota v. Carter, 525 U.S. 83, 90 (1998).

187. Kyllo v. United States, 533 U.S. 27, 34 (2001); United States v. Karo, 468 U.S. 705, 714 (1984).

to a search,[188] its decision will likely do the opposite. For example, in *United States v. Matlock*,[189] the police effectively eliminated the defendant's opportunity to object to the search by removing him from the front yard of his shared residence and placing him in a police car away from the residence.[190] Under the *Randolph* rule, a police officer could get away with removing a defendant from the scene to prevent an objection if the evidence does not reveal the reason for the defendant's absence.[191] This unintended result stems from the Court's desire to refrain from turning every consent case into "a test about the adequacy of the police's efforts" and, therefore, a reviewing court would not likely examine the officer's motives in such a situation.[192] Such a result, however, again contradicts the purpose of the Fourth Amendment and the Court's emphasis on protecting potential defendants' privacy interests.[193]

C. *Instead of Adopting Its Bright-Line Rule, the* Randolph *Court Should Have Expressly Adopted a Totality of the Circumstances Approach to Resolve Reasonableness*

The *Randolph* Court should have employed a totality of the circumstances approach to determine reasonableness; it would have reached the same ultimate result and invalidated Janet Randolph's consent in the face of Scott Randolph's express objection to the search.[194] Moreover, had the Court analyzed the totality of the cir-

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188. *Randolph*, 126 S. Ct. at 1527.

189. 415 U.S. 164 (1974).

190. *See id.* at 179 (Douglas, J., dissenting) (expounding upon the *Matlock* facts); *see also* Elizabeth A. Wright, Note, *Third Party Consent Searches and the Fourth Amendment: Refusal, Consent, and Reasonableness*, 62 WASH. & LEE L. REV. 1841, 1871 (2005) (surmising that after *Matlock* a law enforcement officer could avoid obtaining a potential defendant's consent by removing the potential defendant from the premises to be searched).

191. *See Randolph*, 126 S. Ct. at 1527 ("So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in the simple clarity of [the Court's bright-line rule] . . . .").

192. *See id.* at 1527–28 (justifying its decision to draw a line between present and absent objectors because the Court did not want consent cases to hinge entirely upon the officer's attempts to locate the potential defendant).

193. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 453 (1971) (noting that the Fourth Amendment protects individuals' privacy from capricious invasion by police officers (citing Wolf v. Colorado, 338 U.S. 25, 27–28 (1949))); Johnson v. United States, 333 U.S. 10, 13–14 (1948) (explaining that the Fourth Amendment sought to interpose a "neutral and detached magistrate" between law enforcement officers and potential defendants); *see also supra* notes 185–187 and accompanying text.

194. *See infra* Part IV.C.1.

cumstances instead of creating a bright-line rule, it could have better protected potential defendants' Fourth Amendment rights.[195]

1. *The* Randolph *Court Could Have Properly Invalidated the Search with a Totality of the Circumstances Approach*

Although the Court's reasoning confused three separate Fourth Amendment tests, it nevertheless reached a result consistent with the proper application of precedent.[196] Although *Matlock* and *Frazier* dictate that Janet Randolph had the authority to consent to the search because both she and Scott Randolph had assumed this risk,[197] the Court could have used a totality of the circumstances analysis to determine that the search was unreasonable because Scott Randolph, as a co-occupant, was present and objected to the search.[198]

If the Court had adopted a totality of the circumstances approach to decide reasonableness, in addition to considering Scott Randolph's objection, the Court could have taken into account other surrounding circumstances.[199] As Justice Breyer noted in his concurrence, this case involved only a search for evidence and Sergeant Murray did not conduct the search out of concern that Scott Randolph would destroy the drug evidence.[200] Additionally, as Judge Phipps emphasized in his concurrence to the majority opinion of the Court of Appeals of Georgia, Janet Randolph merely accused Scott Randolph of illicit conduct and no objective indication existed to suggest that Scott Randolph had committed a crime prior to the search.[201] Based on these circum-

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195. *See infra* Part IV.C.2.

196. Specifically, the *Randolph* Court properly concluded that, despite Janet Randolph's consent, the search was unreasonable as to Scott Randolph because he expressly objected to the police officer's request to search. *Randolph*, 126 S. Ct. at 1519, 1528.

197. *See* United States v. Matlock, 415 U.S. 164, 170–71 & n.7 (1974) (explaining that a third party possesses the requisite authority to consent to a search if the parties use and have access to the property, which makes it reasonable for each co-occupant to assume the risk that another co-occupant will allow a law enforcement officer to search the shared premises); Frazier v. Cupp, 394 U.S. 731, 740 (1969) (recognizing that an individual sharing a duffel bag with another assumed the risk that the other user would permit police officers to search the bag).

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

199. *See, e.g.*, Ohio v. Robinette, 519 U.S. 33, 39 (1996) (indicating explicitly that reasonableness is determined by objectively evaluating the totality of the circumstances); Michigan v. Tyler, 436 U.S. 499, 507 (1978) (listing several factual inquiries to undertake in assessing the reasonableness of an investigatory fire search); Chimel v. California, 395 U.S. 752, 765 (1969) (explaining that the Court examines the "total atmosphere of the case" when it measures the reasonableness of a search (citing United States v. Rabinowitz, 399 U.S. 56, 66 (1950)) (internal quotation marks omitted)).

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

201. Randolph v. State, 590 S.E.2d 834, 843 (Ga. Ct. App. 2003) (Phipps, J., concurring specially).

stances, the Court could have properly found the search of Scott Randolph's property unreasonable despite Janet Randolph's consent.[202]

2. *A Totality of the Circumstances Analysis Would Have Better Protected Potential Defendants' Fourth Amendment Rights*

If the *Randolph* Court had adopted the totality of the circumstances test to assess reasonableness instead of inventing a new rule, it could have refrained from arbitrarily conditioning defendants' Fourth Amendment rights on their location by leaving the resolution of different cases open for the future.[203] For example, one could imagine a deaf or mute defendant who, unlike Scott Randolph, is unable to explicitly object to a search for physical reasons despite his or her presence at the doorway. As Chief Justice Roberts pointed out in dissent, the majority does not indicate that its bright-line rule would consider these types of circumstances;[204] however, a more fact-based totality of the circumstances approach could take such considerations into account when evaluating reasonableness.[205]

Furthermore, the majority explained that it would not take a potential defendant's location into account if he or she is not present at the doorway to the searched residence when a police officer requests consent.[206] This approach may, however, create an incentive for police officers to avoid making their presence known to a potential defendant who is nearby, when consent might easily be obtained from another co-occupant.[207] A totality of the circumstances analysis that

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202. *See Randolph*, 126 S. Ct. at 1530–31 (Breyer, J., concurring) (concurring in the Court's opinion because of the specific circumstances present in the case); *Randolph*, 590 S.E.2d at 840–43 (Phipps, J., concurring specially) (advocating and applying a totality of the circumstances approach to conclude that Janet Randolph's consent was ineffective in the face of her husband's objection to the search).

203. *See Randolph*, 126 S. Ct. at 1530 (Breyer, J., concurring) (noting that the results of future cases should depend on the circumstances presented in those cases).

204. *See id.* at 1528 (majority opinion) ("This case invites a straightforward application of the rule that a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant."). Chief Justice Roberts underscored this point when he stated that the majority had not adopted a case-specific holding, but rather created a rule. *Id.* at 1539 (Roberts, C.J., dissenting).

205. *Cf.* Ohio v. Robinette, 519 U.S. 33, 39 (1996) (insisting that Fourth Amendment reasonableness turns on the facts of a case); Michigan v. Tyler, 436 U.S. 499, 507 (1978) (considering the facts of the case in comparing a potential defendant's privacy interests with the government's law enforcement needs); Chimel v. California, 395 U.S. 752, 765 (1969) (resolving reasonableness by examining the facts and circumstances of the case).

206. *See Randolph*, 126 S. Ct. at 1527 (clarifying that a police officer has no affirmative duty to awake a potential defendant who is asleep in his apartment when the police receive consent to search the premises from a third party).

207. *See, e.g.*, Tammy Campbell, Note, Illinois v. Rodriguez*: Should Apparent Authority Validate Third-Party Consent Searches?*, 63 U. COLO. L. REV. 481, 500 (1992) (arguing that *Illinois*

considers a potential defendant's whereabouts and whether a police officer knew, or reasonably should have known, of the potential defendant when he or she obtained consent would counteract this incentive and remain consistent with the standard to which police officers are held under *Illinois v. Rodriguez*.[208] While the majority appropriately decided only the case before it,[209] the above examples illustrate why the Court should have explicitly adopted the totality of the circumstances approach advocated in Justice Breyer's concurrence.[210]

V. CONCLUSION

In *Georgia v. Randolph*, the Supreme Court properly held that Janet Randolph's consent could not override Scott Randolph's express objection to the search of their shared home.[211] In so holding, however, the Court failed to distinguish three separate Fourth Amendment inquiries, and borrowed elements from each in its reasoning.[212] The conflation of these tests forced the Court to draw an extremely fine line that will only precariously protect the Fourth Amendment rights of future defendants.[213] Although the Court reached the proper result, it could have avoided articulating an arbitrary rule by expressly adopting a totality of the circumstances approach for disputed consent cases.[214]

ADRIENNE WINEHOLT

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v. Rodriguez provides an incentive for law enforcement officers to ignore significant facts that signal whether a third party has the authority to validly consent to a search); Michael C. Wieber, Comment, *The Theory and Practice of* Illinois v. Rodriguez*: Why an Officer's Reasonable Belief About a Third Party's Authority to Consent Does Not Protect a Criminal Suspect's Rights*, 84 J. CRIM. L. & CRIMINOLOGY 604, 620 (1993) (same).

208. *See* 497 U.S. 177, 185–86 (1990) (holding police officers to the standard of a reasonable person).

209. *See Randolph*, 126 S. Ct. at 1526 n.8 (responding to the dissent's criticism that the *Randolph* majority did not determine the constitutionality of a search of a third co-occupant's property if one co-occupant consented while another co-occupant simultaneously objected).

210. *Id.* at 1529–30 (Breyer, J., concurring).

211. *Id.* at 1528 (majority opinion).

212. *See supra* Part IV.A.

213. *See supra* Part IV.B.

214. *See supra* Part IV.C.