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THE EFFECTS, THIRTY YEARS IN HINDSIGHT, OF ELIMINATING THE CONCEPT OF FOURTH AMENDMENT “STANDING”

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INTRODUCTION

In the year 1978, the U. S. Supreme Court decided in *Rakas v. Illinois* to “dispense[e] with the rubric of standing” used in earlier cases.¹ The Court went on to say that standing analysis “is more properly subsumed under substantive Fourth Amendment doctrine.”² Twenty years hence, the Court appeared to assertively reaffirm *Rakas* when it chastised state courts for conducting Fourth Amendment standing analysis: “[t]he Minnesota courts analyzed whether respondents had a legitimate expectation of privacy under the rubric of ‘standing’ doctrine, an analysis which this Court expressly rejected 20 years ago in *Rakas*.”³

The Court has never expressly undertaken to eliminate standing⁴ analysis from any other area of constitutional inquiry.⁵ Was the elimination of standing in *Rakas* a grand experiment? If

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¹ 439 U.S. 128, 140 (1978) (the earlier case specifically referred to was *Jones v. United States*, 362 U.S. 257 (1960), holding that the criminal defendant who was “legitimately on the premises” had Fourth Amendment standing to seek suppression at criminal trial of evidence seized by government during a search of those “premises”).
² *Id.* at 139.
³ *Minnesota v. Carter*, 525 U.S. 83, 87 (1998). The admonition in *Carter* had the effect of prompting at least one state supreme court to issue a similar admonition to lower courts in its jurisdiction: “[a]s did the United States Supreme Court, we admonish courts against analyzing a legitimate expectation of privacy issue under the rubric of ‘standing.’” *People v. Pitman*, 813 N.E.2d 93, 106 (Ill. 2004) (citing *Carter*, 525 U.S. at 87-88).
⁴ Though the reader may be looking for some definition of “standing” at the beginning stages of this article, I am reluctant to try to provide one. Part of my very thesis in the article stems from the difficulty of satisfactorily defining “standing.” The United States Supreme Court seems to have acknowledged as much: “The standing requirement is born partly of “ ‘an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.’ ” *Elk Grove United School District v. Newdow*, 542 U.S. 1, 11 (2004) (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)). Ultimately, of course, to define standing is to define an aspect of the judicial function. “Generations of scholars have tried to define the judicial function . . . . The literature is sometimes complementary, sometimes conflicting, and ultimately unsatisfying.” Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 Harv. L. Rev. 1833, 1908-09 (2001) (citations omitted). Nonetheless, the reader may wish to be aware of classic descriptions of the “standing” concept. One scholar has said that “[t]he essence of a true standing question is the following: Does the plaintiff have a legal right to judicial enforcement of an asserted legal duty.” William A. Fletcher, *The Structure of Standing*, 98 Yale L. J. 221, 229 (1988). Consider also, the U. S. Supreme Court’s well known description of standing to bring a constitutional claim: “Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adversenenss
so, how successful was the experiment? How, if at all, did it affect Fourth Amendment doctrine looking back now after 30 years?

In the pages that follow, I seek to provide some answers to these questions. More specifically, Part I sets forth a brief background description of relevant U. S. Supreme Court rulings in the decades leading up to *Rakas*. Part I ends with references to *Rakas* itself that clarify the basis for my thesis. Part II examines the confusion generated by *Rakas* in federal circuit courts, in state courts, as well as varied reactions in the views of legal scholars. Starting with a look at *Carter*, Part III examines some federal cases where search and seizure fact patterns illuminate the central difficulty created by *Rakas* and *Carter*. In Part IV I summarize the surprising conclusions to be drawn from the foregoing. Those conclusions support the thesis that, in *Rakas*, the Court undertook a bold and far-sighted attempt to streamline threshold analysis for this heavily litigated Bill of Rights provision – only to have the endeavor paralyzed in 1998 by the Court’s decision in *Carter*. In conclusion, I suggest reasons to credit this view of the *Rakas* decision, and that the Court could reinvigorate *Rakas* without overruling *Carter*.

I. STANDING DOCTRINE PRIOR TO RAKAS

which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions. This is the gist of the question of standing.” Baker v. Carr, 369 U.S. 186, 204 (1962). *See also, Newdow*, 542 U.S. at 11 (“In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.”) (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)). The Court did observe in a *Rakas* footnote that “[t]his approach is consonant with that which the Court already has taken with respect to the Fifth Amendment privilege against self-incrimination, which is also a purely personal right.” *Rakas*, 439 U.S. 128, 140 n. 8 (citing Bellis v. United States., 417 U.S. 85, 89-90 (1974) holding that the “Fifth Amendment privilege is a purely personal one” so that the former partner of a law firm could not invoke the privilege for partnership records.” *Id.* at 90). However, unlike *Rakas* no language in *Bellis* suggests that the Court is altering the law of standing in any way or that standing analysis is being otherwise subsumed in substantive Fifth Amendment analysis. *See Bellis*, 417 U.S. 85. *See infra* notes 170-77 for further discussion of suggestions that the concept of standing may be superfluous in constitutional individual rights adjudication.
Without discussing “standing” as such, in early Twentieth Century the U. S. Supreme Court observed that the “privacy of the accused” was invaded when Government unlawfully seized private papers in a person’s home. The Court then wrote sweepingly in *Weeks v. U.S.* that the Fourth Amendment’s “protection reaches all alike, whether accused of crime or not.”

Moreover, according to the Court, the Amendment “might as well be stricken from the Constitution” if Government can hold and introduce at trial evidence unlawfully seized from a citizen.

By the year 1942 at least, the Court was referring to the term “standing” when the capacity-to-make-a-claim issue arose in Fourth Amendment cases. In 1942 the Court wrote, “[w]hile this Court has never been called upon to decide the point, the federal courts in numerous cases, and with unanimity, have denied standing to one not the victim of an unconstitutional search and seizure to object to the introduction in evidence of that which was seized.”

And, by the time of the “civil rights” era in the 1960s, the Court fleshed out a rule of law for Fourth Amendment standing consistent with the capacious language of *Weeks* quoted above.

Justice Frankfurter’s opinion, unanimous on this point, articulated the rule as follows:

“anyone legitimately on premises where a search occurs may challenge its legality by way of a

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6 In early twentieth century “no general doctrine of standing existed. Nor, indeed, was the term ‘standing’ used as the doctrinal heading under which a person’s right to sue was determined.” Fletcher, *supra* note 4 at 224-25.

7 *Weeks v. United States*, 232 U.S. 383, 392 (1914). I start my brief history with *Weeks* because, from the time of the framing until well into twentieth century, the Court did not talk in terms of “standing” at all. See, Steven L. Winter, *The Metaphor of Standing and the Problem of Self-governance*, 40 Stan. L. Rev. 1371, 1395 (1988) (observing that “[w]hat a court looked for was whether the matter before it fit one of the recognized forms of action.”).

8 *Weeks*, 232 U.S. at 392.

9 *Id.* at 393. The landmark status of *Weeks* emanates from the necessary consequence of this view, which is, of course, that evidence seized in violation of the Fourth Amendment must be suppressed from trial. *Id.* at 346 (“In holding them and permitting their use upon the trial, we think prejudicial error was committed.”).

10 Goldstein v. United States, 316 U.S. 114, 121 (1942) (emphasis added) (footnotes omitted).

11 See text accompanying notes 8 and 9. By the 1960s, the Court’s explicit recognition of “standing” doctrine was not, of course, confined to the Fourth Amendment setting. It was occurring for “public values” generally. See Fletcher, *supra* note 4 at 225 (observing that “[t]he creation of a separately articulated and self-conscious law of standing can be traced to . . . an increase in litigation to articulate and enforce public, primarily constitutional, values”).
motion to suppress, when its fruits are proposed to be used against him.”

Jones was staying at a friend’s apartment with permission when federal narcotics officers executed a search warrant and found illegal narcotics there. The court of appeals affirmed the district court’s denial of Jones’s motion on the basis that he lacked standing to challenge the Fourth Amendment legality of the search. Government argued that the lower courts were correct in denying standing since Jones was only a “guest” or “invitee” at the searched premises, and that lower court decisions had routinely denied standing to those classes of persons. The Court prefaced its ruling that Jones had standing by noting that it did not “lightly depart from this course of decisions by the lower courts.” The Court then reasoned that private property concepts from the common law “ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards.”

The Jones “legitimately on the premises” rule of standing was implicitly overruled in 1978 in Rakas v. Illinois. Even prior to 1978 the Court had “virtually ignored Jones” in deciding Fourth Amendment standing issues in the late 1960s. Rakas occupied the front passenger seat of a car which yielded a sawed-off rifle from under that seat when the car was searched by police. Rifle shells were found in the glove compartment. Rakas claimed no possessory interest in the rifle or shells, nor did he claim any proprietary interest in the car in

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13 Id. at 259.
14 Id. at 260.
15 Id. at 266-67.
16 Id. at 266. This view became the basis seven years later for the Court’s explicit transformation of substantive Fourth Amendment doctrine in Katz v. United States, 389 U.S. 347 (1967). In Katz the Court ruled that the Fourth Amendment’s protections applied to defendant’s phone conversation from a public booth even though government had not intruded into the physical space of the booth in eavesdropping on defendant’s spoken words. In concluding that the Fourth Amendment protects “privacy” regardless of previously controlling property concepts, the Court articulated the now long-famous epigram that the “Fourth Amendment protects people, not places.” Id. at 351.
17 439 U.S. 128, 143 (“[T]he Jones statement that a person need only be ‘legitimately on the premises’ in order to challenge the validity of a search of a dwelling place cannot be taken in its full sweep beyond the facts of that case.”).
which he was simply a passenger while the owner was driving it.\textsuperscript{19} No one disputed that Rakas was in the car “legitimately” at the invitation of the owner-driver, so under the rule of \textit{Jones} he would likely have had standing to challenge the incriminating search. But, under the Court’s new rule, he did not have standing to bring such a challenge: the fact that Rakas (and his co-defendant) “were ‘legitimately on the premises’ in the sense that they were in the car with the permission of the owner is not determinative of whether they had a \textit{legitimate expectation of privacy} in the particular areas of the automobile searched.”\textsuperscript{20}

From 1967 until the time of the decision in Rakas, the “expectation of privacy” concept had been employed to define the term “search” as that term appears in the text of the Fourth Amendment.\textsuperscript{21} In \textit{Rakas} the Court stated at the outset that it would determine “the necessity for continued adherence to the notion of standing discussed in \textit{Jones} as a concept that is theoretically distinct from the merits of a defendant’s Fourth Amendment claim”\textsuperscript{22} before considering the “proper disposition of petitioner’s ultimate claim.”\textsuperscript{23} Accordingly, the Court collapsed the standing inquiry into the threshold Fourth Amendment inquiry on whether a “search” has occurred.

The question necessarily arises whether it serves any useful analytical purpose to consider this principle as a matter of standing, distinct from the merits of a defendant’s Fourth Amendment claim. We can think of no decided cases of this Court that would have come out differently had we concluded, as we do now, that the type of standing requirement discussed in \textit{Jones} and reaffirmed today is more properly subsumed under substantive Fourth

\textsuperscript{19} \textit{Rakas}, 439 U.S. at 130-31.
\textsuperscript{20} \textit{Id.} at 148 (emphasis added).
\textsuperscript{21} See \textit{Katz v. United States}, 389 U.S. 347, 353 (1967) (where the Court held that “[t]he Government’s activities in electronically listening to and recording the petitioner’s words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a ‘search and seizure’ within the meaning of the Fourth Amendment”). The actual phrase “expectation of privacy” appears in Justice Harlan’s concurring opinion where, as is well known, he separated the rule into subjective and objective components. \textit{Id.} at 361. \textit{See also, e.g.}, United States v. Miller, 425 U.S. 435, 442 (referring to the “lack of any legitimate expectation of privacy” in deciding whether subpoenaing one’s bank records amounted to a “search” under the Fourth Amendment).\textsuperscript{22} \textit{Rakas}, 439 U.S. at 133.
\textsuperscript{23} \textit{Id.}
Amendment doctrine. . . . The inquiry under either approach is the same. But we think the better analysis forthrightly focuses on the extent of a particular defendant’s rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing.\(^{24}\)

The Court went on to note that “by frankly recognizing that this aspect of the analysis belongs more properly under the heading of substantive Fourth Amendment than under the heading of standing, we think the decision of this issue will rest on sounder logical footing.”\(^{25}\)

While the Court did not specify just what it meant by “sounder logical footing,” it did criticize the former standing rule of *Jones*: “the phrase ‘legitimately on the premises’ has not been shown to be an easily applicable measure of Fourth Amendment rights so much as it has proved to be simply a label placed by the courts on results which have not been subjected to careful analysis.”\(^{26}\)

The balance of this article is concerned with the effect of the ruling in *Rakas* during the decades after its issuance.\(^{27}\)

II. THE EFFECTS OF THE RAKAS RULING

A. Federal Circuit Courts:\(^{28}\) The Difficulty of Conforming Prior to *Carter.*

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\(^{24}\) *Id.* at 138-39 (citation omitted).

\(^{25}\) *Id.* at 140.

\(^{26}\) *Id.* at 148. The Court did observe in a footnote that “[u]nfortunately, with few exceptions, the lower courts have literally applied this language from *Jones* and have held that anyone legitimately on premises at the time of the search may contest its legality.” *Id.* at 142, n. 10 (citations omitted).

\(^{27}\) Not of concern for purposes of this article is the ideological leaning of the Court that inevitably provides some of the explanation for the *Rakas* Court’s dismantling of *Jones*. That well known explanation is, of course, that the Burger Court was bound to cut back on the breadth of some of the “civil rights” rulings of the Warren Court in the 1960s. Within a short time after his appointment as Chief Justice in 1969, Chief Justice Burger was overtly critical of the Fourth Amendment’s exclusionary rule. *See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (Burger, J., dissenting). One way to lessen the effect of the exclusionary rule *ala Rakas* was to decrease the number of potential claimants who could invoke it. Completely consistent with this view, the Court had ruled in 1976, just two years before *Rakas*, that the availability of federal court review of Fourth Amendment claims by state court litigants should be sharply curtailed. *See Stone v. Powell*, 428 U.S. 465 (1976).

\(^{28}\) I refer to federal circuit court cases in this subsection on the thinking that they would be the courts most likely to have heeded the ruling in *Rakas* since their immediate “boss,” so to speak, is the issuing court, the United States Supreme Court.
In the years following the decision in *Rakas*, many courts apparently did not understand that the Supreme Court meant to be taken literally when it stated that it was “dispensing with the rubric of standing” for Fourth Amendment cases. That is, many courts continued to analyze a defendant’s “standing” to assert a Fourth Amendment claim, often with no articulated recognition at all of the *Rakas* ruling eliminating “standing.” Sometimes the word “standing” even appeared as a heading within a court’s discussion of issues. But, this could vary within the same court even within the same term. Some courts apparently thought *Rakas* eliminated the concept of standing without eliminating use of the term “standing.” A court might have heeded *Rakas*’s elimination of “standing” when *Rakas* was highly visible in its recency, yet have forgotten about this aspect of *Rakas* over time. Or, a court may have used the term “standing” while setting forth a disclaimer for its use based on *Rakas*. All of this is

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29 *Rakas* 439 U.S. at 140. *See supra* notes 22-25 and accompanying text (setting forth the essence of the Court’s discussion supporting its collapse of standing into the merits of Fourth Amendment inquiry).

30 *E.g.*, United States v. McFillin, 713 F.2d 57, 59 (4th Cir. 1981); United States v. Obregon, 748 F. 2d 1371, 1374-75 (10th cir. 1984); United States v. Suarez, 820 F.2d 1158, 1161 (11th Cir. 1987); United States v. Eyster, 948 F. 2d 1196, 1208-10 (11th Cir. 1991); United States v. Christian, 43 F. 3d 527, 530-31 (10th Cir. 1994).

31 *E.g.*, United States v. Sagineto-Miranda, 859 F.2d 1501, 1510 (6th Cir. 1988); United States v. McHugh, 769 F.2d 1158, 1161 (11th Cir. 1987); United States v. Eyster, 948 F. 2d 1196, 1208-10 (11th Cir. 1991); United States v. Christian, 43 F. 3d 527, 530-31 (10th Cir. 1994).

32 *Compare*, McHugh, 769 F.2d at 864 (setting forth “standing” as a heading in the opinion’s text), with United States v. Gomez, 770 F.2d 251, 252-54 (1st cir. 1985) (repeatedly using the term “standing” in quotation marks in the opinion’s text and observing in a footnote that “[t]his inquiry is often referred to as a ‘standing’ issue, although it is not an inquiry that serves the function of traditional standing doctrine . . . .” *Id.* at 253, n.1 (citations omitted).

33 *E.g.*, United States v. Hastamorir, 881 F.2d 1551, 1560 (11th Cir. 1989) (using the term “standing” not in quotation marks at least six times in a page while observing in the middle of the “standing” discussion that “[a]fter *Rakas v. Illinois* the proper analysis proceeds directly to the substance of a defendant’s Fourth Amendment claim . . . .” (citation omitted) (quoting United States v. Hawkins, 681 F.2d 1343, 1344 (11th Cir. 1982)).

34 *E.g.*, United States v. Davis, 617 F. 2d 677, 689-90 (D.C. Cir. 1979) (“In determining whether a defendant may benefit from the exclusionary rule, courts often have framed the issue as one of ‘standing’ to raise the fourth amendment claim. Recently, however, the Supreme Court has instructed us to consider this question not under the rubric of ‘standing’ but as a substantive element of the challenging party’s fourth amendment claim.” (citing *Rakas* and avoiding use of the term “standing” throughout the relevant discussion).

35 *E.g.*, United States v. Hicks, 978 F. 2d 722, 723-25 (D.C. Cir. 1993) (discussing “standing” not in quotation marks and citing *Rakas* for propositions other than the elimination of standing).

36 *E.g.*, United States v. Sanchez, 943 F. 2d 110, 113 n. 1 (1st Cir. 1991) (“Technically, the concept of ‘standing’ has not had a place in Fourth Amendment jurisprudence for more than a decade [citing *Rakas*] . . . . We therefore use the term ‘standing’ somewhat imprecisely to refer to this threshold substantive determination.”).
not to deny, of course, that some court decisions picked up the *Rakas* banner with explicit observance of the responsibility to do so.\(^{37}\)

The point here is that *Rakas* spawned considerable confusion in the federal courts of appeals regarding the status of the Fourth Amendment standing inquiry. If these courts, presumably being ones especially attentive to Supreme Court rulings, suffered this confusion, one can imagine that other courts throughout the land would be at least equally puzzled by this aspect of the *Rakas* ruling.\(^{38}\) In fact, within a few years of the *Rakas* ruling, one Justice of the Supreme Court itself was referring to the “formalism and confusion in this Court’s recent attempts to redefine Fourth Amendment standing.”\(^{39}\)

Perhaps not surprising, then, was the Court’s reminder issued in *Minnesota v. Carter* that Fourth Amendment “ ‘standing’ doctrine [involved] an analysis that this Court expressly rejected 20 years ago in *Rakas*.”\(^{40}\) For purposes of this article, that raises the question of whether, after *Carter*, courts around the country made efforts to more fully understand and accept *Rakas’s* elimination of “standing” from Fourth Amendment doctrine.

**B. Federal Circuit Courts: the Difficulty of Conforming After *Carter*.**

\(^{37}\) *E.g.*, United States v. Felton, 753 F. 2d 256, 258-59 (3rd Cir. 1985) (“At the outset, we must make one point clear. Before us, the government insists on phrasing our inquiry in terms of ‘standing’ to invoke the fourth amendment. Yet, we are instructed that in *Rakas v. Illinois*, the Supreme Court ‘abandoned a separate inquiry into a defendant’s standing to contest an allegedly illegal search in favor of an inquiry that focused directly on the substance of the defendant’s claim that he or she possessed a legitimate expectation of privacy in the area searched.’ Conforming to this direction, we have decided this case on the basis of this expectation rather than on ‘standing.’” (citations omitted) (footnote omitted).


\(^{39}\) *See* United States v. Knotts, 460 U.S. 276, 287 (1983) (Brennan, J., dissenting) (citations omitted). Also interesting to note is that the Court was aware about the time of issuing *Rakas* that threshold issues, including that of standing, sometimes cause confusion in the lower courts: “[t]he Court of Appeals appeared to confuse the question of whether petitioner had standing with the question of whether she had asserted a proper cause of action.” *Davis v. Passman*, 442 U.S. 228, 239 n. 18 (1979) (citation omitted).

In the years after the *Carter* decision in 1998, some court decisions included an explicit reference to the Supreme Court’s admonition about Fourth Amendment standing.\footnote{E.g., United States v. Nerber, 222 F. 3d 597, 599 n.1 (9th Cir. 2000) (“Although this issue is often discussed in terms of ‘standing’ to invoke the Fourth Amendment, the Supreme Court has repeatedly cautioned against invoking this concept . . . .”) (citing *Carter*, 525 U.S. 83 and *Rakas*, 439 U.S. 128 (1978)); *See also*, United States v. Davis, 332 F. 3d 1163, 1167 n. 2 (9th Cir. 2003) (quoting this language from Nerber after observing disapprovingly that “[t]he district court framed this issue as a question of ‘standing’ and the government, in its brief, does likewise.” *Id.*); *and* United States v. Chaves, 169 F. 3d 687, 690 (11th Cir. 1999) (“Although the parties label this inquiry as a question of standing, as did the district court, the Supreme Court recently reminded us that the question ‘is more properly placed within the purview of substantive Fourth Amendment law than within that of standing.’”) (quoting *Carter*, 119 S. Ct. at 472 quoting *Rakas*, 439 U.S. at 140).} Yet, another panel of the same court in the same term might have referred to the *Rakas-Carter* directive, but gone on to discuss “standing” anyway.\footnote{E.g., United States v. Gamez-Orduno, 235 F. 3d 453, 458 n. 7 (9th Cir. 2000) (“Although courts continue to discuss whether a criminal defendant has a legitimate expectation of privacy under the rubric of ‘standing,’ the issue is not one of standing in the Article III sense but rather purely one of Fourth Amendment doctrine.”) The court then goes on to discuss “standing,” mostly not in quotation marks, throughout the opinion. *Id.* at 458-62) (citations omitted).\footnote{E.g. United States v. Green, 275 F. 3d 694, 698 n. 3 (8th Cir. 2001) (“We use the term ‘standing’ as a shorthand reference to the issue of whether the defendants’ Fourth Amendment’s interests were implicated by the challenged government actions. ‘Technically, the concept of “standing” has not had a place in Fourth Amendment jurisprudence . . . .’”) (citing *Rakas*, 439 U.S. 128) (citation omitted); *see also*, United States v. Smith, 263 F. 3d 571, 581-82 (6th Cir. 2001) (“[W]e recognize that the Supreme Court rejected the concept of ‘standing’ in *Rakas v. Illinois* . . . . In the present case, we also use ‘standing’ to refer to the threshold substantive determination of whether Smith has a reasonable expectation of privacy under the Fourth Amendment.”) (citations omitted).} Or, a court might have recognized the directive, but then expressly stated why it used the term “standing” anyway.\footnote{E.g. United States v. Paradis, 351 F. 3d 21, 27 (1st Cir. 2003) (“The Supreme Court has suggested moving away from analyzing a defendant’s Fourth Amendment [sic] interest as a separate issue of ‘standing.’”) (citing *Carter*, 525 U.S. at 88 citing *Rakas*, 439 U.S. at 140).} Then, again, a court might have recognized the *Rakas-Carter* directive,\footnote{E.g. *Paradis*, 351 F. 3d at 27 (“protectible Fourth Amendment interest”).} and gone on to find a phrase to use in substitution for “standing,”\footnote{E.g. *Id.* (“Whatever the label for the analysis, we agree with the district court’s conclusion . . . .”) (emphasis added).} all while equivocating about the desirability of following the directive.\footnote{E.g. United States v. Grant, 349 F. 3d 192, 195 (5th Cir. 2003); *and* United States v. Way Quoe Long, 301 F. 3d 1095, 1099 (9th Cir. 2002).} Without mention of *Rakas* or *Carter*, some courts unapologetically emphasized their use of “standing” by setting it forth in a captioned heading within the opinion’s discussion.\footnote{E.g. United States v. Grant, 349 F. 3d 192, 195 (5th Cir. 2003); *and* United States v. Way Quoe Long, 301 F. 3d 1095, 1099 (9th Cir. 2002).} And, as with pre-*Carter*
opinions, frequent simple references to “standing” without any mention of the Rakas-Carter directive at all were not rare.\(^{48}\)

C. State Courts

Over the years since Rakas, a number of top state courts have, under their respective state constitutions, issued rulings maintaining standing as a threshold inquiry separate from the merits inquiry of whether a defendant suffered an invasion of a legitimate expectation of privacy.\(^{49}\) Of particular interest for purposes here are those state courts that were expressly critical of the Rakas ruling. Given that state courts have a freer hand to be critical of U. S. Supreme Court rulings than do federal courts, perhaps some insights into the effects of Rakas can be gained from these cases.

The 1981 New Jersey Supreme Court decision in State v. Alston\(^{50}\) may be the most informative of the state cases. On its facts, Alston is similar to Rakas in that the challenged search produced weapons contained in the interior of an automobile.\(^{51}\) And, like Rakas, Alston’s co-defendants, having no connection to Alston’s car except as “mere passengers,” may not have had an expectation of privacy in searched areas of the car’s interior that produced the contraband weapons.\(^{52}\) The New Jersey Supreme Court, employing the State Constitution, rejected the Rakas expectation of privacy approach as governing capacity to claim protection from overly

\(^{48}\)E.g. United States v. Baker, 221 F. 3d 438, 439-44 (3\(^{rd}\) Cir. 2000); United States v. Gomez, 276 F. 3d 694 (5\(^{th}\) Cir. 2001); United States v. Haywood, 324 F. 3d 514, 515-17 (7\(^{th}\) Cir. 2003). Others here


\(^{50}\)440 A. 2d 1311 (N. J. 1981).

\(^{51}\)Id at 1314.

\(^{52}\)Id at 1315.
intrusive searches and seizures. In doing so, the court described Rakas’s elimination of “standing” in the following terms:

[W]e view the apparent change in the Court’s labeling of this inquiry as a semantic difference without much significant analytic distinction, for the essential question remains whether the defendant moving to suppress evidence obtained and sought to be used against him has Fourth Amendment interests sufficient to qualify him as a person aggrieved by an unlawful search and seizure. Therefore, being well aware of the substantive Fourth Amendment law involved, we adhere to the simple expedient term of “standing” in making reference to this threshold inquiry.

The court’s language makes clear that it viewed the “threshold” inquiry of standing as separate analytically from the “substantive” inquiries of the Fourth Amendment. The court was also clear about the major reason for its departure from Rakas:

[a]dherence to the vague ‘legitimate expectation of privacy’ standard, subject as it is to the potential for inconsistent and capricious application, will in many instances produce results contrary to commonly held and accepted expectations of privacy. The court was buoyed in its explicit criticism of Rakas by noting the condemning language of Rakas’s four person dissent. Using the term “standing” throughout, the court accordingly ruled that all four defendants (Alston, the driver, and the three passengers) had standing to challenge the search producing the

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53 Id. at 1319 (“[W]e respectfully part company with the Supreme Court’s view of standing and construe Article I, paragraph 7 of our State Constitution to afford greater protection.”).
54 Id at 1314 n. 2 (emphases added).
55 The Alston Court thoroughly reviewed the U. S. Supreme Court’s companion decisions in Rawlings v. Kentucky, 448 U.S. 98 (1980) and United States v. Salvucci, 448 U. S. 83 (1980), in addition to the decision in Rakas before concluding that “it would appear that nothing short of ownership of, some possessory interest in, or control over the vehicle searched would be sufficient to confer standing on automobile passengers under Rakas, Salvucci and Rawlings . . . .” Alston, 440 A. 2d at 1317. Language from Rawlings makes particularly clear what prompted the New Jersey Supreme Court’s criticism. “Prior to Rakas, petitioner might have been given ‘standing’ in such a case to challenge a ‘search’ that netted those drugs but probably would have lost his claim on the merits. After Rakas, the two inquiries merged into one: whether government officials violated any legitimate expectation of privacy held by petitioner.” Rawlings, 448 U. S. at 106 (emphasis added).
56 Alston, 440 A. 2d at 1319.
57 Id at 1318 (citing Rakas, 439 U. S. at 168) (observing that the four dissenting Justices in Rakas referred to the majority’s decision as inviting “patently unreasonable searches every time an automobile contains more than one occupant”).
incriminating evidence from Alston’s car. And despite the passage of many years, the New Jersey Supreme Court has steadfastly adhered to the Alston ruling.

Like New Jersey, Pennsylvania was bluntly critical of Rakas in a decision rejecting the elimination of standing approach.

We decline to undermine the clear language of Article I, section 8 by making the fourth amendment’s amorphous ‘legitimate expectation of privacy’ standard a part of our state guarantee against unreasonable searches and seizures. We do so not only because we find the United States Supreme Court’s analytical distinction between ‘standing’ and ‘threshold substantive question’ unhelpful to Article I, section 8’s protection, but also because we believe the United States Supreme Court’s current use of the ‘legitimate expectation of privacy’ concept needlessly detracts from the critical element of unreasonable government intrusion.

The Pennsylvania Supreme Court went so far as to imply that Rakas’s claim of basing the change away from “standing” on “sounder logical footing” was in fact disingenuous: “[t]he concept of a ‘legitimate expectation of privacy’ [was] ultimately employed by the United States Supreme Court to circumscribe Fourth Amendment protection and render the standing inquiry ineffectual under the resulting Fourth Amendment doctrine . . . .”

We have seen considerable lingering confusion about, and resistance to, Rakas in the federal circuit courts; we have seen resistance and some harsh criticism in the state courts; and we have seen some reference to “formalism and confusion” bred by Rakas from some Justices on the High Court itself. Like the Pennsylvania Supreme Court, but now thirty years later, one might wonder whether Rakas was correct that the “better” approach, one resting on “sounder

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58 Alston, 440 A. 2d at 1320 (“automatic standing as to all four defendants is appropriate”).
59 E.g., State v. Bruns, 796 A. 2d 226, 235-36 (2002) (“We see no reason to depart from the broad standing rule that entitles a defendant to challenge an unreasonable search and seizure under Article I, paragraph 7 of the New Jersey Constitution if he or she can demonstrate a proprietary, possessory or participatory interest in the place searched or items seized.”) (citation omitted).
61 Rakas, 439 U. S. at 140; see also supra note 25 and accompanying text.
62 Sell, 470 A. 2d at 463 (emphasis added). As part of the context for this observation, the Pennsylvania Supreme Court also noted that “the Supreme Court was at the same time curtailing Fourth Amendment protection on numerous fronts.” Id at n. 6. (citations omitted).
logical footing,” is one in which standing analysis “is more properly subsumed under substantive Fourth Amendment doctrine.”

D. Commentaries

Given the effects of Rakas on the courts as described, one might wonder whether scholarly commentaries are similarly scattered. First, and most obvious, “criminal procedure” casebooks tend to set forth post-Rakas Fourth Amendment capacity-to-make-a-claim material under the heading of “standing.” This may be significant for two reasons. First, the scholars producing those casebooks obviously did not themselves follow the Rakas-Carter directive to eliminate the “standing” concept from their materials. Second, and more significant perhaps, the scholars tend to see in common the need to analyze certain post-Rakas U. S. Supreme Court cases as “standing” cases distinct from cases turning on Fourth Amendment merits.

In the notes just after the reprinting of Rakas, one of the casebooks poses the question of whether “‘standing’ [is] a relevant concept after Rakas?” and then states:

64 Rakas, 470 U. S. at 140.
65 Id. at 139.
66 See e.g., Phillip E. Johnson and Morgan Cloud, Constitutional Criminal Procedure: From Investigation to Trial 476-500 (4th ed. 2005) (the term “standing” appears in the title of the chapter and the first subsection of the chapter is devoted to Fourth Amendment and captioned “Standing to Suppress Evidence”); Russell L. Weaver et. al., Criminal Procedure: Cases, Problems and Exercises 624-44 (2nd ed. 2004) (the indicated pages contain material devoted to Fourth Amendment “standing” except for two short paragraphs on 5th Amendment standing at the very beginning of the section on “standing”); Joshua Dressler and George C. Thomas III, Criminal Procedure: Principles, Policies and Perspectives 442-64 (2nd ed. 2003) (the indicated pages contain material devoted exclusively to Fourth Amendment “standing”); Yale Kamisar et al., Modern Criminal Procedure: Cases – Comments – Questions 891-906 (11th ed. 2005) (“Section 1” encompassing the indicated pages is captioned “‘Standing’ to Object to the Admission of Evidence (or ‘The Extent of a Particular Defendant’s Rights Under the Fourth Amendment’)” (citing Rakas as source for the quoted clause)); and Myron Moskovitz, Cases and Problems in Criminal Procedure: The Police 881-931 (4th ed. 2004) (the indicated pages comprise an entire chapter which is captioned “standing” and sets forth only Fourth Amendment material except for one short paragraph on 5th Amendment “standing” at the very end of the chapter); but see, Stephen A. Saltzburg and Daniel J. Capra, American Criminal Procedure: Cases and Commentary 515-34 (7th ed. 2004) (the sub-chapter heading reads: “Establishing a Violation of a Personal Fourth Amendment Right” although the three immediately following subsection captions under this sub-chapter contain the term “standing”).
67 See Id. Those cases are United States v Payner, 447 U. S. 727 (1980); Rawlings v. Kentucky, 448 U. S. 98 (1980); Minnesota v. Olson, 495 U. S. 91 (1990); and Minnesota v. Carter, 525 U. S. 83 (1998). Carter, the most recent of the Court’s “standing” cases, was the most frequently reprinted “standing” case in the casebooks examined. See Johnson and Cloud, supra note 66 at 491; Dressler and Thomas, supra note 66 at 455; Kamisar et al., supra note 66 at 900; Moskovitz supra note 66 at 916; and Saltzburg and Capra, supra note 66 at 523.
Justice Rehnquist in *Rakas* dispenses with the concept of “standing,” as such, in the Fourth Amendment context. Previously, a defense lawyer would seek to prove that her client had standing to challenge the police action; if that obstacle was overcome, she would raise the merits of the Fourth Amendment claim. Now, *Rakas* teaches, there is just one step: to answer the substantive question of whether the defendant’s Fourth Amendment rights were violated. But, this approach of converting a two-step process into one can result in unintended confusion.

To explain how this “confusion” might occur, the editors quote from Justice Blackmun’s concurring opinion in *Rawlings v. Kentucky* decided two years after *Rakas*. Blackmun noted how it might “invite confusion” unless lower courts could treat the “standing” inquiry and the merits inquiry separately: “[i]t remains possible for a defendant to prove that his legitimate expectation of privacy was invaded, and yet fail to prove that the police acted illegally in doing so. And, it is equally possible for a defendant to prove that the police acted illegally, and yet fail to prove that his own privacy interest was affected.”

Lafave’s widely used criminal procedure treatise takes a more critical approach: “this notion that the search and standing ‘inquiries merge into one’ is best avoided.” The treatise goes on to explain:

the question traditionally labelled as standing (did the police intrude upon this defendant’s justified expectation of privacy) is not identical to the question of whether any Fourth Amendment search occurred (did the police intrude upon anyone’s justified expectation of privacy?), and thus the former inquiry deserves separate attention no matter what label is put upon it.

Another widely used treatise more readily accepts the *Rakas* notion that the standing and trigger merits inquires should be treated as one. In fact, the treatise reformulates the inquiry into

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68 Dressler and Thomas, *supra* note 66, at 453.
69 448 U. S. 98 (1980).
70 Interestingly, this is exactly what one Justice found to exist on the facts of *Carter*, 525 U.S. at 103 (Breyer, J., concurring). *See infra* notes 91-92 and accompanying text.
71 Dressler and Thomas, *supra* note 66, at 453 (quoting *Rawlings*, 448 U. S. at 112 (Blackmun, J., concurring)). The casebook editors do not state whether they agree or disagree with Justice Blackmun’s analysis other than to ask, “[c]an you see why Justice Blackmun might be correct in this regard?” *See also*, Kamisar et al., *supra* note 66, at 899 (quoting this same language from *Rawlings*, 448 U. S. at 112 (Blackmun, J., concurring)).
72 Wayne R. LaFave et al., *Criminal Procedure* at 490 (3rd ed. 2000) (emphasis added) (the “merge into one” language is quoted from *Rawlings v. Kentucky*, 448 U. S. 98, 106 (1980)).
73 *Id* (emphasis in original).
language creating the appearance of a single thought: “[t]he [Rakas] Court held that standing should depend on whether the police action sought to be challenged is a search (i.e. a violation of a legitimate expectation of privacy) with respect to the person challenging the intrusion.” This language is similar to that used by the Court two years after Rakas in Rawlings v. Kentucky where it described the merged inquiry as “whether governmental officials violated any legitimate expectation of privacy held by petitioner.”

Citing Rakas, one practice treatise states that the Supreme Court “made a firm effort in 1978 to abolish use of the term [standing].” The treatise then goes on to observe that “[i]t is unlikely that talk of standing will depart from Fourth Amendment cases. The Supreme Court itself has since spoken of standing . . . .” On this point, it is interesting to note that, since that reference to “standing” in 1980, the term did not appear, other than in quoted material, in the Court’s majority in Olson in 1990. Nor did the Court employ the term in Carter in 1998 other than in quoted material or in reference to lower court decisions. Given Justice Rehnquist’s stern admonition in that case that the Court had rejected the “rubric” of “standing” twenty years earlier, it is unsurprising that the term is there avoided by the Justices.

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75 448 U. S. 98 (1980).
76 Id. at 106.
78 Time has born out the complete accuracy of this prediction, especially in trial level courts. See e.g., Chicago Park District v. Chicago Bears Football club, Inc., 2006WL2331099 (N. D. Ill. 2006) (using the term “standing” repeatedly in a short memorandum decision and even using the term in a sentence referring to Rakas as precedent: “The CPD’s complaint seeks to assert a vicarious Fourth Amendment claim, but under Rakas and its progeny, it lacks standing to do so.”).
79 Id. (citing United States v. Payner, 447 U. S. 727, 731-32 (1980) where Justice Powell’s majority opinion uses the term once other than in quoted material, but see Justice Marshall’s dissent where the term appears several times. Id. at 738-49)).
80 Minnesota v. Olson, 495 U. S. 91 (1990) (The term “standing” does, however, appear three times in the text of Justice Stevens brief concurring opinion. Id. at 101 (Stevens, J., concurring)).
82 Id. at 86-87 (using the term a few times in quotation marks or otherwise in the context of reference to its use by lower courts).
III. The Problems Created by Rakas

A. The Carter Decision

Despite the U. S. Supreme Court’s emphatic statement in *Minnesota v. Carter*\(^83\) that Fourth Amendment “standing” analysis had been “expressly rejected twenty years ago,”\(^84\) the *Carter* decision itself demonstrates that the concept of Fourth Amendment standing remained alive and fully distinct from Fourth Amendment merits inquiry. A brief consideration of the case makes this clear.

A police officer observed Carter and two others bagging a white powder in a residential apartment. This led to the stop of a car, in which Carter was an occupant, leaving the apartment. And, it led to the issuance of a search warrant for the apartment. Police seized incriminating evidence in plain view in the car, as well as in the apartment pursuant to the search warrant. Charged with controlled substance offenses based on these seizures, Carter moved to suppress all the evidence seized from the car and the apartment.\(^85\)

The Court focused on the nature of Carter’s *connection* to the apartment in deciding that the state supreme court had erred by its holding that Carter had “standing” to pursue a Fourth Amendment claim. Carter was in the apartment only for a short time; he was there, not as a social guest, but only to engage in commercial activity; and he lacked any previous connection to the lessee of the apartment.\(^86\)

In contrast to those facts, consider facts that focused on the *nature of government’s activity* in the case. Based on an informant’s tip, a police officer went to the apartment. From

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\(^83\) *Id.*
\(^84\) *Id.* at 87. *See supra* note 3 and accompanying text.
\(^85\) *Id.* at 85-86.
\(^86\) *Id.* at 91.
outside the building, the officer peered into the apartment through a gap in a closed window blind to observe the drug packaging activity. At the very end of its opinion, the Court referred to this observation activity by the police officer: “[w]e need not decide whether the police officer’s observation constituted a ‘search.’” Putting this sentence into even more explanatory form, the Court might have said: since Carter lacks standing to bring a Fourth Amendment claim, we need not go on to decide the trigger-merits question of whether government conducted a “search” in this case.

My point is that, whatever the intended effect of the Rakas decision, the Carter opinion itself suggests that the concept of Fourth Amendment standing has not been lost or truly collapsed into the merits of Fourth Amendment inquiry. Fourth Amendment “standing” remains analytically distinct from Fourth Amendment substance.

Further support from the Court for this view, if any is needed, can be found in Justice Breyer’s concurring opinion in Carter. Justice Breyer agreed with the dissenters that Carter could “claim the Fourth Amendment’s protection.” He then noted that Carter “raises a second question,” that being whether the police officer’s observation through the window blinds from outside the residence violated Carter’s rights under the Fourth Amendment. Justice Breyer then examined, more closely than had the Court, the record facts describing the police officer’s

87 Id. at 85.
88 Id. at 91. The rationale for this conclusion was that the Court had already made the dispositive finding that Carter was not sufficiently connected to the apartment to raise the Fourth Amendment claim. Id.
89 See also, State v. Carter, 569 N.W. 2d 169 (Minn. 1997), rev’d, 525 U.S. 83 (1998) (The Minnesota Supreme Court’s opinion is divided into distinct sections, the first of which is labeled “I. Standing.” Id. at 173. The second section is labeled “II. The Search” and is introduced with a sentence that reads, “Having determined that Carter had standing to assert a violation of the Fourth Amendment, we now turn to the question of whether Thielen’s [the officer] observation constituted a search.” Id at 176.).
90 Given the clarity of this proposition, the Court’s language choice in Carter is all the more curious: “[t]he Minnesota courts analyzed whether respondents had a legitimate expectation of privacy under the rubric of ‘standing’ doctrine, an analysis that this Court expressly rejected 20 years ago in Rakas.” Id. at 87 (citation omitted) (emphasis added).
91 Id. at 103 (Breyer, J., concurring) (avoiding, of course, use of the word, “standing”).
92 Id.
activity in positioning himself to make the challenged observation. Like the Court’s opinion, Justice Breyer’s concurrence thus expressly and distinctly separates standing analysis from any inquiry on the merits.

Accordingly, after Carter one would find it nearly impossible to argue that the Rakas Court had truly accomplished a rejection of the concept of standing.\(^{93}\) Readily apparent, therefore, is a major reason for the confusion and uncertainty in lower courts about the meaning and effect of Rakas. Completely natural and logical is the traditional inclination of jurists to view the issue of standing as separate from, and precedent to, issues on the merits.

Beginning in the first year of law school, jurists in our system learn that the “general rule is that a court should first confirm the existence of rudiments such as jurisdiction and standing before tackling the merits of a controverted case.”\(^{94}\) In civil Fourth Amendment cases (where the relief sought is necessarily something other than suppression of evidence), this “general rule” is usually followed.\(^{95}\) In fact, the existence of a logical conundrum has been suggested if standing is not considered separately from the merits: “Whether a plaintiff has a legally protected interest (and thus standing) does not depend on whether he can demonstrate that he will succeed on the merits. Otherwise, every unsuccessful plaintiff will have lacked standing in the first place.”\(^{96}\) Relatedly, because Rakas purported to collapse standing into the merits inquiry, lower courts routinely bypass difficult standing issues despite recognition of their separate existence.\(^{97}\)

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\(^{93}\) See supra note 89.

\(^{94}\) Berner v. Delahanty, 129 F.3d 20, 23 (1st Cir. 1997).

\(^{95}\) See, e.g., Heartland Academy Community Church v. Waddle, 335 F.3d 684, 688 (8th Cir. 2003); Skull Valley Band v. Leavitt, 215 F. Supp.2d 1232, 1240 (D. Utah, 2002).

\(^{96}\) Claybrook v. Slater, 111 F.3d 904, 907 (D.C. Cir. 1997). In some very rare instances, standing inquiry literally cannot be made without consideration of the “merits” – the most notable Bill of Rights example emanating from the ongoing controversy over whether the Second Amendment sets forth an individual or a collective right. See Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007).

\(^{97}\) See, e.g., State v. Otte, 660 N.E.2d 711, 718 (Oh. 1996) (“even if Otte does have standing to challenge the search of the vehicle, we find that the items were properly seized . . . .”); U.S. v Schofield, 80 Fed. Appx. 798, 802 (3rd Cir. 2003) (unpub) (“But we need not decide this standing aspect today . . . [because] nothing in the record indicates that
But, with this much in mind, let us go on to further examine some Fourth Amendment fact patterns where the application of *Rakas* doctrine can be considered.

B. Thermal Imaging

One of the most instructional fact patterns to consider involves the thermal imaging cases decided in the years leading up to 2001 when the U. S. Supreme resolved the issue in *Kyllo v. U. S.* 98 Thermal imaging came into use by law enforcement during this period as a method to investigate for the existence of indoor marijuana growing operations. Because “[i]ndoor marijuana growth typically requires high-intensity lamps”99 as a light source, government’s knowledge of unusual amounts and patterns of heat emanating from a building may, coupled with other evidence, provide probable cause to search within for evidence of marijuana growing operations.100 Using an imager, police can “scan” a building from a short distance away within a few minutes thereby potentially enabling them to gather relevant evidence without detection that they are doing so.101

Prior to *Kyllo* several lower courts had ruled on whether thermal imaging triggered Fourth Amendment concerns. Most of these courts, including the Ninth Circuit in *Kyllo*, found that no expectation of privacy was invaded by government’s use of an imager directed at defendant’s home.102 Of interest here is the rationale employed by those courts because it has implications for evaluating effects of the *Rakas* doctrine.

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99 *Id.* at 29.
100 *Id.* at 30 (“Based on tips from informants, utility bills, and the thermal imaging, a Federal Magistrate Judge issued a warrant authorizing a search of petitioner’s home . . . .”).
101 *Id.*
102 United States v. Kyllo, 190 F.3d 1041 (9th Cir. 1999), rev’d 533 U.S. 27 (2001). Even as *Kyllo* went up on *certiorari* before the Supreme Court, the Ninth Circuit reaffirmed its position that thermal imaging did not implicate the Fourth Amendment. U. S. v, Depew, 210 F.3d 1061 (9th Cir. 2000). See also, e.g., *Commonwealth v.*
To determine whether government’s thermal imaging activity triggered Fourth Amendment concerns, the federal circuit courts focused on the heat emanating from a defendant’s home. The question posed was: does defendant have a reasonable expectation of privacy in the “waste heat,” thrown off by high intensity lights, emanating from his or her home. In answering “no” to that question, the Seventh Circuit stated, “[w]e conclude that society is similarly not willing to protect as reasonable an expectation of privacy in the wasted heat emitted from a home.”103 Similarly, the Eighth Circuit wrote, “[t]he detection of heat waste was not an intrusion into the home . . . and there was no intrusion upon the privacy of the individuals within.”104 Likewise, the Eleventh Circuit ruled, “[g]iven the . . . similarities between Ford’s waste heat and other emissions not protected by the Fourth Amendment, we conclude that Ford did not have an objectively reasonable expectation of privacy in the heat emanating from his mobile home.”105

Surprisingly, when the Supreme Court decided Kyllo in 2001, it did not consider “waste heat” at all. Instead, it examined whether government’s thermal imager was used “to explore details of the home that would previously have been unknowable without physical intrusion.”106

How does the Rakas doctrine work on these two different approaches to analyzing thermal imaging fact patterns? If a court performs its analysis of “waste heat” as the item searched, the Rakas doctrine works well. That is, Rakas’s collapse of the concept of standing into the trigger merits question makes sense when the item analyzed is “waste heat.” “Waste heat” patterns only exist in the context of government’s activity, use of the thermal imager.

Gindlesperger, 743 A.2d 898, 900-01 (Pa. 1999) (noting cases from the Seventh, Eighth, Ninth and Eleventh Federal Circuits holding the same, but disagreeing with those outcomes for the State of Pennsylvania. Id. at 906).

103 United States v. Myers, 46 F.3d 668, 670 (7th Cir. 1995).
104 United States v. Pinson, 24 F.3d 1056, 1059 (8th Cir. 1994).
105 United States v. Ford, 34 F.3d 992, 997 (11th Cir. 1994).
Otherwise, the patterns are undetectable and, therefore as a practical matter, have no separate existence. Accordingly, it seems to make sense to consider whether defendant has a protectable privacy interest in the thing searched (the heat patterns) at the same time as the government activity claimed to amount to a “search” (creating an image of the heat patterns).

However, if a court performs its analysis of details inside the home instead of “waste heat” as the item searched, the Rakas doctrine does not work as well because it blurs the asking of two separate questions. Unlike “waste heat,” the interior of a home has a specific identifiable and tangible presence to which people may be closely or not so closely attached. The standing inquiry examines which people may be closely enough attached to the interior of the home to have a Fourth Amendment protectable interest in it. That inquiry is quite separate from one that looks at the nature of the challenged government activity – here, police officers aiming the thermal imager at defendant’s home from a squad car positioned across the street.

C. Standing Sub-issues

Consider a fact pattern in which government conducts a search for tangible evidence in a workplace office and also sets up videotape surveillance of that office. Consider further that government seizes evidence in the physical search of the office, and later also acquires videotape evidence of the activity of two defendants while in the office. Such a fact pattern arose in United States v. Taketa. Taketa and O’Brien were the two defendants prosecuted for illegal wiretapping. They each had small offices in the Las Vegas airport where they were assigned to

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107 The Kyllo majority specifically observed that “[t]he dissent’s repeated assertion that the thermal imaging did not obtain information from the interior of the home . . . is simply inaccurate.” Id. at 30, n. 2.
108 Id. at 30.
109 923 F.2d 665 (9th Cir. 1991).
carry out investigations of illegal drug activity. The challenged physical search occurred when government agents forced the lock on the door to O’Brien’s office where they acquired evidence that defendants were operating an illegal pen register and audio surveillance. The searchers then hid a video camera in the ceiling of the office where it could record images of anyone handling the pen register and audio surveillance equipment. Based on the physical evidence seized, together with incriminating images of defendants shown on the videotapes, government acquired a search warrant to search the office complex where more incriminating evidence was seized on the warrant. Defendants moved to suppress all of the mentioned evidence alleging the Fourth Amendment illegality of the warrantless office search and video surveillance.

The incriminating evidence was seized by government from O’Brien’s office. Accordingly, the court stated that it was obligated to “first consider, therefore, whether Taketa has standing to challenge a search of O’Brien’s office.” But, the government had not raised this issue – at least not in the language of “standing.” Government had “generally asserted that appellants lacked reasonable expectations of privacy in their offices.” Here is an example of Rakas-generated confusion because now the court went on to spend a page of its decision determining whether government had waived the issue of Taketa’s standing. Entirely unclear is whether government’s “general assertion” of defendants’ lack of expectations of privacy in their offices did actually raise the issue under Rakas doctrine collapsing “standing” into the merits inquiry.

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110 Id at 668 (defendants were themselves law enforcement officers).
111 Id at 669 (a “pen register” records the phone numbers of outgoing calls while the “audio surveillance” recorded conversations in the phone calls).
112 Id.
113 Id. (citing Rakas, the court dutifully continued by noted that Fourth Amendment standing “is a matter of substantive fourth amendment law; to say that a party lacks fourth Amendment standing is to say that his reasonable expectation of privacy has not been infringed. It is with this understanding that we use ‘standing’ as a shorthand term.”). Id. (citation omitted) (emphasis in original).
114 Id. at 670.
115 Id.
The court determined that government had not waived the issue of Taketa’s standing so it went on to consider the standing issue. This inquiry, too, seemed needlessly confusing under *Rakas*. Even if Taketa did not have a sufficient interest in O’Brien’s office to claim reasonable a personal expectation of privacy therein, he could arguably prevail on “what might be termed a ‘coconspirator exception’ to the general *Rakas* rule against contesting the violation of another person’s fourth amendment rights.” According to a line of Ninth Circuit cases cited by the court, the exception may exist when a person in Taketa’s position can show a “formal arrangement” with the primary possessor that yields a measure of “joint control” over the area at issue. The court went on to lament, “[o]ur case law, however, is far from clear on the question of what ‘formal arrangements for joint control’ actually means.”

The major point to be taken from both the procedural waiver issue and the substantive (on standing) exception issue is that their conceptual clarity depends on argument arising purely from “standing” – entirely independent of merits of the constitutional claim. Simply put, neither of these issues is related at all to the merits inquiry of expectation of privacy. The *Rakas* approach suggesting that the standing and merits inquiry are so intertwined that the same rule of law essentially governs both lends itself to conceptual confusion when the “standing” portion of the inquiry tracks off into some subsumed issue as with the waiver and exception issues that were analyzed in *Taketa*.

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116 Id. at 671.
117 Id.
118 Id.
119 A waiver claim looks at the nature of the record below and the appellate brief. The coconspirator exception claim looks at facts supporting (or not) the existence of a “formal arrangement” between the constitutional challenger and a co-defendant who has standing. See supra text accompanying notes 117 and 118.
120 Cf United States v. French, 974 F.2d 687, 692-93 (6th Cir. 1992) (discussing the “convoy” theory of standing in which multiple vehicles traveling in tandem on the roadway would be viewed as a single unit); and United States v. Nava-Ramirez, 210 F.3d 1128, 1131-32 (10th Cir. 2000) (discussing the “factual nexus” theory of standing in which the “nexus” between a Fourth Amendment seizure of person violation and an area searched is analyzed). Yacht cases here?
In fact, the opinion in *Taketa* was written with full awareness of this very problem. In addressing the issue of Taketa’s “standing,” the court used the term “standing” repeatedly in that section of its opinion.\(^{121}\) In remarkable contrast, the very next section of the opinion, which considers O’Brien’s standing, does not use the term “standing” at all, but instead refers to O’Brien’s “expectations of privacy.”\(^{122}\) This stark shift in terminology would be unfathomable absent the explanation that the court was virtually compelled to discuss “standing” for Taketa so as to maintain some clarity of discussion of the non-merits sub-issues.

Another visible example of *Rakas*-generated confusion exists in passages such as this one: “We find that O’Brien had a reasonable expectation of privacy in his office. We move to the question whether the warrantless search of O’Brien’s office violated his reasonable expectation of privacy.”\(^{123}\) Anyone not steeped in niceties of *Rakas* doctrine might legitimately wonder whether the court was “mov[ing] to the question” it had resolved a bare sentence earlier.

D. Electronic Audio and Video Surveillance

Beyond the aspects of *Taketa* discussed up to now, the case raises a consideration even more central to the thesis of this essay. Having analyzed Defendants’ Fourth Amendment rights regarding the physical search of O’Brien’s office, the court prefaced discussion of the next issue by stating that “[n]o circuit or district court has yet considered video surveillance in terms of fourth amendment standing.”\(^{124}\) The court went on, “Taketa has no general privacy interest in O’Brien’s office, but he may have an expectation of privacy against being videotaped in it.”\(^{125}\) And, that is what the court found: “We accept the proposition that a person filmed by

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\(^{121}\) *Taketa*, 923 F.2d at 669-72 (section “II” of the opinion).

\(^{122}\) *Id.* at 672-74 (section “III” of the opinion).

\(^{123}\) *Id.* at 673.

\(^{124}\) *Id.* at 676.

\(^{125}\) *Id.*
government agents searching for evidence of crime, in a colleagues personal office in his place of business, has sufficient standing by virtue of his appearance on the tape, to contest its admission on fourth amendment grounds.”

Consider what has happened in this analysis of videotaping defendant as opposed to analysis of defendant’s connection to the co-worker’s office. The videotape only exists in the context of government’s activity, the video surveillance. Accordingly, the Rakas collapse of standing into the trigger merits question works well because the inevitable focus now is on government activity just as it was for the “waste heat” cases described earlier.

The Taketa case at once exemplifies, on the negative side, the confusion caused by Rakas doctrine and, on the positive side, the streamlining envisioned by the Rakas decision.

A more recent Ninth Circuit video surveillance case, U.S. v. Nerber, even more explicitly raises the issue of this divide between the harms and benefits of Rakas doctrine. Government agents rented a motel room for a “sting” operation in which government informants were to meet and sell cocaine to defendants. Without the authority of a warrant, government agents installed a hidden video camera in the motel room. Through the video surveillance, government monitored defendants’ incriminating activities in the room for some three hours after the informants had departed. Government opposed defendants’ motion to suppress evidence from the videotape on the ground that this fact pattern is essentially indistinguishable from the Carter fact pattern.

Government’s argument seemed persuasive. In Carter, the police officer’s deliberate observation of defendants through a small opening in drawn window blinds had nothing to do

126 Id. at 677.
127 In its analysis of Taketa’s “standing” to contest admissibility of the videotape, the Ninth Circuit Panel considered such factors as “the video search was directed straight at him” and “the silent, unblinking lens of the camera was intrusive in a way that no temporary search of the office could have been.” Id.
128 See supra note 106 and accompanying text.
129 United States. V. Nerber, 222 F.3d 597 (9th Cir. 2000).
130 Id. at 600 (see supra notes 85-87 and accompanying text for a description of the facts in Minnesota v.Carter, 525 U.S. 83 (1998)).
with the extent of defendants’ connectedness to the apartment where they were observed.\textsuperscript{131} Similarly, in \textit{Nerber}, government’s video surveillance seemingly had nothing to do with the extent of defendants’ connectedness to the motel room in which the surveillance occurred.

Yet, the Ninth Circuit stated: “[b]ut numerous Supreme Court and appellate decisions – handed down before and after \textit{Carter} -- suggest a contrary principle: the legitimacy of a citizen’s expectation of privacy in a particular place may be affected by the nature of the intrusion that occurs.”\textsuperscript{132} Accordingly, the \textit{Nerber} court held that defendants had “standing” to contest the search in this case,\textsuperscript{133} despite being even less connected to the \textit{place}, the motel room, than were the \textit{Carter} defendants to the apartment of their acquaintance.\textsuperscript{134}

In 2003, the Eighth Circuit decided a case that, like \textit{Taketa} and \textit{Nerber}, involved issues of defendant’s degree of connectedness to place as well as defendant’s degree of expectation of privacy in something less tangible – his hotel room \textit{meeting} with another person to take delivery of illegal drugs.\textsuperscript{135} Guided by \textit{Carter}, the court ruled that defendant had no expectation of privacy in another’s hotel room “where he was present for five minutes in connection with a commercial transaction with a stranger.”\textsuperscript{136} But, the case was more complex than that. Government had videotaped defendant’s meeting in the hotel room with the person delivering the drugs. Citing \textit{Nerber}, the court recognized the need to separately analyze whether defendant had an expectation of privacy against being videotaped in the meeting.\textsuperscript{137} Ultimately, the court

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\textsuperscript{131} \textit{Carter}, 525 U.S. at ____.
\textsuperscript{132} \textit{Nerber}, 222 F.3d at 601 (immediately following this assertion, the court went on to write about two pages discussing various federal cases supporting the assertion. \textit{Id.} at 601-03).
\textsuperscript{133} \textit{Id.} at 604.
\textsuperscript{134} At least one court has explicitly raised the question “whether Nerber’s reasoning is consistent with \textit{Minnesota v. Carter}.” \textit{United States v. Corona-Chavez}, 328 F.3d 974, 980 (8th Cir. 2003). \textit{See infra} notes 136-39 and accompanying text (discussing \textit{Corona-Chavez}).
\textsuperscript{135} \textit{United States v. Corona-Chavez}, 328 F.3d 974 (8th Cir. 2003).
\textsuperscript{136} \textit{Id.} at 979.
\textsuperscript{137} \textit{Id.} at 980.
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concluded that “[n]ot only did he lack an expectation of privacy in the place, but he also lacked an expectation of privacy in the meeting itself.”

This divide between a person’s connectedness to place and expectation of privacy in something less tangible also arose in an unusual fact pattern in a Fifth Circuit case.\textsuperscript{139} Government law enforcement placed an electronic audio recording device in an urn at a cemetery where it recorded conversations and prayers of plaintiffs during a gravesite memorial service for two murdered children who were family members of plaintiffs.\textsuperscript{140} In a section of the opinion labeled “Reasonable Expectation of Privacy in Oral Communications,” the court criticized the lower court’s analysis for relying on factors laid out by the circuit in an earlier case concerning “standing” in an outdoor shed. Factors from the shed case were an “imprecise framework” for analysis given the “non-real property context of the instant case.”\textsuperscript{141} In other words, the court continued, “while appropriate to determine the expectation of privacy in the context of searches of physical real property, the [shed case] factors fail to engage the more difficult questions arising from oral communications . . . .”\textsuperscript{142}

On that “more difficult question,” the court ruled that plaintiffs had “failed to present evidence demonstrating any affirmative steps taken to preserve their privacy”\textsuperscript{143} given the open air setting of a “publicly accessible cemetery” containing “no barriers” against the “assembled media and onlookers.”\textsuperscript{144} However, the court conceded that plaintiffs “did not expect

\textsuperscript{138} Id.
\textsuperscript{139} Kee v. City of Rowlett, 247 F.3d 206 (5th Cir. 2001) (the case bears a civil caption as a civil rights claim under 42 U.S.C. §1983 although plaintiffs were targeted by government as possibly harboring information, at least, regarding a homicide case) Id.
\textsuperscript{140} Id. at 208.
\textsuperscript{141} Id. at 211.
\textsuperscript{142} Id. at 213 (emphasis added).
\textsuperscript{143} Id. at 216.
\textsuperscript{144} Id. at 217.
government agents surreptitiously to be recording their prayers"\(^{145}\) and, accordingly, that their “strongest argument” is that the recording was produced through technological enhancements.\(^{146}\) On this aspect of the issue, the court ruled against plaintiffs because their “vague affidavits” did not adequately support their contention that government’s conduct violated their subjective expectations of privacy.\(^{147}\)

So, what is the point of my discussion of the cases in this section (Taketa, Nerber, Corona-Chavez and Kee)? The opinion in Taketa is broadly and overtly confusing on the issue of the Rakas-Carter directive.\(^{148}\) By contrast, the Nerber court’s bold recognition that defendant had “standing” largely because of the “nature of the [governmental] intrusion”\(^{149}\) brought logical clarity to the opinion, but seemed explicitly inconsistent with the outcome in Carter\(^{150}\) -- this latter point being voiced in Corona-Chavez.\(^{151}\) Corona-Chavez and Kee, provide further examples, from circuits beyond the ninth, of courts finding it necessary to analyze Fourth Amendment standing both as to a physical location and as to something far less tangible -- a meeting, or prayers at a funeral.

The Kee opinion, though lacking the explicit relevance of Taketa and Nerber to my topic, may be illuminating because of its unusual fact pattern. The court described the issue in the case as whether plaintiffs had shown a sufficient subjective expectation of privacy in their conversations and prayers spoken at a gravesite service for their murdered child family

\(^{145}\) Id. at 216.
\(^{146}\) Id. at 217. In fact the court explicitly noted that the “possibility [of violation of one’s expectation of privacy] may be increased when technological enhancements such as wiretaps are used . . . .” Id.
\(^{147}\) Id.
\(^{148}\) See supra notes 113-22 and accompanying text.
\(^{149}\) See supra note 132-33 and accompanying text.
\(^{150}\) See supra notes 130-31, 134 and accompanying text.
\(^{151}\) See supra note 134.
members.¹⁵² Though the court ruled against plaintiffs because they failed to set forth sufficient facts to withstand the motion for summary judgment,¹⁵³ as noted earlier, the court gave obligatory, if passing, credence to plaintiffs’ argument concerning the overly intrusive nature of government’s conduct.¹⁵⁴ In a word, the nature of the government intrusion here, using electronic listening enhancement to overhear and record words spoken during such deeply personal moments, causes it to be an integral factor in the expectation of privacy analysis.

IV. Additional Thoughts on sources of Post-\textit{Rakas} Confusion

Based on the circuit court cases described in this section, then, we have identified one source of the confusion spawned by \textit{Rakas} doctrine. For technological enhancement intrusions on intangible interests, at least, the quality of government’s activity is frequently an inescapable factor in expectation of privacy analysis.¹⁵⁵ These kinds of cases arise frequently¹⁵⁶ – and are likely, given the current pace of technological advancement, to do so increasingly over time.¹⁵⁷

For these kinds of cases where “standing” analysis is inseparable from the nature of government activity, \textit{Rakas} doctrine collapsing standing into the merits inquiry works well. The threshold merits inquiry (has a “search” occurred) is all that is needed insofar as it asks the question: has government intruded on one’s reasonable expectation of privacy. A separate

¹⁵² Kee v. City of Rowlett, 247 F.3d 206, 216 (5th Cir. 2001) (Plaintiffs’ characterization of facts was stronger by asserting that “their ‘grieving conversations and statements’ and ‘oral prayers and communications to ourselves and our God’ should be private and not subject to government wiretaps.”). \textit{Id.}

¹⁵³ \textit{Id.} at 217. See supra notes 144-45 and accompanying text.

¹⁵⁴ See supra notes 146-47 and accompanying text.

¹⁵⁵ This may help explain the error, rectified in \textit{Kyllo}, of the circuit court holdings in the “waste heat” cases where the circuit courts did in fact try to omit government’s thermal imaging activity from their analyses of expectations of privacy. To analyze a home dweller’s interest in “waste heat” in isolation from the high-tech government activity that produced it seemed common-sensically unsatisfying. See supra section “III.B Thermal Imaging.”

¹⁵⁶ See \textit{Katz} v. United States, 389 U.S. 347 (1967), the landmark “expectation of privacy” case itself (holding that defendant had a reasonable expectation of privacy against having his conversation in a phone booth electronically monitored by government).

¹⁵⁷ See, David E. Steinberg, \textit{Sense-Enhanced Searches and the Irrelevance of the Fourth Amendment}, 16 Wm. And Mary Bill of Rts. J. 465, 466 (2007) (the opening sentence of the article reads: “With increasing frequency law enforcement agencies are turning to sense-enhanced searches.”) (citation omitted).
“standing” inquiry asking only, to what extent is the constitutional challenger connected to the item intruded on often distorts the inquiry because it is considered in isolation from the nature of government’s activity, no matter how intrusive.

Since, as discussed, Rakas actually tends to ameliorate this problem, the ongoing confusion, particularly in the technology cases, results largely from Carter’s perpetuation of traditional Fourth Amendment standing analysis because the case so clearly separates that issue from the trigger-merits issue.158 Stated differently, Carter could certainly lead one to the conclusion that the Court viewed Rakas as having eliminated the label, but not the concept of Fourth Amendment standing.159 But, we have seen that, for many common technology cases anyway, the best view of Rakas is that it intended a true collapse of standing into the merits.

Again in hindsight, another factor generating confusion around the Rakas-Carter directive is the Court’s use, consistent in both Rakas and Carter, of the “reasonable expectation of privacy” rule of law to guide the separate-from-merits standing analysis. It is a major flaw for two reasons – one completely obvious – the other less obvious, but much discussed.

The obvious flaw is simply in using the same rule of law to guide two separate inquiries. Standing has always been viewed as a threshold issue separate from merits analysis across the jurisprudential board.160 For constitutional challenges on grounds other than Fourth Amendment, the rule of standing is separate from merits inquiries.161 For Rakas to have

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158 See supra notes 86-92 and accompanying text.
159 See supra notes 41-48 and accompanying text (discussing circuit court decisions post Carter manifesting confusion best explained by attributing this view to the decisions).
160 See supra note 94-96 and accompanying text. In 1984 Judge Friendly of the Second Federal Circuit made this point when he referred to the reasonable expectation of privacy test in the following language: “When Justice Harlan’s much-quoted observation is read in context, it becomes apparent that he was speaking of the places where society would be prepared to recognize an individual’s reasonable expectation of privacy, not adumbrating a doctrine whereby certain classes of persons could be denied Fourth Amendment protections that would otherwise extend to them.” United States v. Roy, 734 F.2d 108, 112 (2nd Cir. 1984) (Friendly, J., concurring) (footnote omitted) (emphasis added).
161 See supra note 4 and accompanying text.
suggested, with something less than clarity at that, the elimination of a separate standing concept in Fourth Amendment cases was inevitably destined to invite the kind of confusion discussed earlier in this article.\textsuperscript{162} And, this is doubly so given Carter’s later implicit message that Rakas did not truly eliminate a standing inquiry separate from the merits.

A major flaw also surrounds the expectation of privacy rule itself. It has been criticized over many years for being vague and overly malleable in application. This was part of the reason for the New Jersey Supreme Court’s early rejection of Rakas under its state constitution.\textsuperscript{163} At least one U. S. Supreme Court justice considers the “reasonable expectation of privacy” test to be the major culprit in creating “an inconsistent jurisprudence that has been with us for years.”\textsuperscript{164} Long ago a prominent jurist pointed out that the reasonable expectation of privacy rule was not created with the intention to support a “doctrine whereby certain classes of persons could be denied Fourth Amendment protections that would otherwise extend to them.”\textsuperscript{165} And, Fourth Amendment scholars have been overwhelmingly critical of the rule in application.\textsuperscript{166} One writer recently concluded that, “[a]lthough four decades have passed since Justice Harlan introduced the test in his concurrence in Katz v. United States, the meaning of the phrase ‘reasonable expectation of privacy’ remains remarkably opaque.”\textsuperscript{167} Put succinctly as a

\textsuperscript{162} See supra Part II.
\textsuperscript{163} State v. Alston, 440 A.2d 1311 (N.J. 1981) (also, referring to the legitimate expectation of privacy rule’s “potential for inconsistent and capricious application” Id. at 1319). See supra notes 50-59 and accompanying text for discussion of Alston.
\textsuperscript{165} United States v. Roy, 734 F.2d 108, 112 (2nd Cir. 1984) (Friendly, J., concurring in the result) (referring to Justice Harlan’s concurring opinion in Katz v. United States, 389 U.S. 347, 361 (1967) where the rule was set forth). See supra note 160.
\textsuperscript{166} See e.g., Tracey Maclin, \textit{The Good and Bad News About Consent Searches in the Supreme Court}, 39 McGeorge L. Rev. 27, 72 note 296 (2008) (“Legal scholarship criticizing Katz’s expectation of privacy test is pervasive.”) (citing numerous articles in support); Orin S. Kerr, \textit{Four Models of Fourth Amendment Protection}, 60 Stan. L. Rev. 503, 505 (2007) (“The consensus among scholars is that the Supreme Court’s ‘reasonable expectation of privacy’ cases are a failure.”).
\textsuperscript{167} Kerr, \textit{Supra} note 166 at 504-05.
matter of common sense, the Rakas Court might have done better to avoid taking the amorphous expectation of privacy rule and actually expanding its realm of application.

V. CONCLUSION

No easy answer exists to rectify the Rakas-Carter generated confusion described in this article. One of two avenues could be taken. One would be to determine that Carter had it right by implicitly expressing that Rakas had eliminated the label, but not the concept of Fourth Amendment standing.\textsuperscript{168} The other would be to credit the view that the Rakas Court truly meant what it said when it determined the lack of “necessity for continued adherence to the notion of standing . . . as a concept that is theoretically distinct from the merits of a defendant’s Fourth amendment claim.”\textsuperscript{169} Although neither approach will eliminate all of the confusion generated around this issue, I prefer the latter approach.

The elimination of a Fourth Amendment standing analysis actually works well in settings where threshold merits analysis incorporates consideration of the nature of government activity – a factor without which separate expectation of privacy standing analysis just does not work in those (frequently surveillance technology) settings.\textsuperscript{170} Maybe then, Rakas was indeed a grand experiment designed to streamline application of “search” doctrine under the Fourth Amendment. It may have been an “experiment” in the sense that if collapsing standing analysis into the threshold merits question proved a success, it might have served as a basis for validating the technique for some other Bill of Rights provisions. Perhaps the Rakas Court should be

\textsuperscript{168} See supra notes 88-93 and accompanying text (describing why this conclusion must be drawn from the Carter opinion).


\textsuperscript{170} See supra note 5 and accompanying text.
applauded, not condemned, if, as it appears, the Court’s endeavor was genuinely to collapse the standing inquiry into the merits of Fourth Amendment analysis.

But, one might ask, what reasons exists to believe that this was truly the Court’s design in the *Rakas* decision. Foremost is the plain language of the *Rakas* opinion. Also, as noted earlier, the *Rakas* Court’s reference to *Bellis v. U. S.* implies that the Court had there similarly not considered the concept of standing for the self-incrimination clause of the Fifth Amendment "which is also a purely personal right." So, the Court was saying, to do the same for the Fourth Amendment would not be a radical departure from existing doctrine. This is particularly true given that the 1978 *Rakas* Court was undoubtedly quite aware of its then-recent decision in *Paul v. Davis*. In that case, the Court held that a person’s reputation is neither “‘liberty’ nor ‘property’ by itself sufficient to invoke the procedural protection of the Due Process Clause.” In other words, without ever raising the concept of standing, the Court ruled directly on the merits question of whether one’s reputation is “liberty” or “property” within the meaning of the 14th Amendment. A separate analysis of whether Davis had asserted a sufficient “liberty” or “property” interest in his reputation would have been duplicative and superfluous. If standing was effectively subsumed in the analysis there, why would not the same be effective for

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171 See supra notes 22-26 and accompanying text (quoting and discussing the *Rakas* Court’s several references to its goals in the case). Carefully examined, the language in *Carter* is equivocal about the goal in *Rakas* (“The Minnesota courts analyzed whether respondents had a legitimate expectation of privacy under the rubric of ‘standing’ doctrine, an analysis which this Court expressly rejected 20 years ago in *Rakas*.” Minnesota v. Carter, 525 U.S. 83, 87 (1998) (emphasis added). Because “rubric” (a heading, name, title, category. *Webster’s College Dictionary*, p. 785, c2003) is not at all synonymous with “analysis,” the sentence quoted from *Carter* seems to equivocate about whether *Rakas* eliminated the label or the analytical concept of standing.).
174 Id. at 701 (Respondent Davis claimed that the local police chief had damaged his reputation by including his name on an active shoplifters flyer in violation of the 14th Amendment’s Due Process Clause. *Id.* at 694-95). See also, *Humphries v. County of Los Angeles*, 2009WL102101 (2009) (finding, with no discussion of standing, a sufficient liberty interest under *Paul* to trigger due process protections in response to placement of names on a government child abuser listing).
consideration of whether one asserted a sufficient interest in a “search” within the meaning of the Fourth Amendment?

Moreover, scholarly commentary and other U. S. Supreme Court cases in the years leading up to Rakas contained “fragments” of the approach of eliminating a standing concept separate from consideration on the merits of constitutional claims.175 For civil claims under Article III at least, William A. Fletcher’s influential article in 1988 forcefully advocated that “standing should simply be a question on the merits of plaintiff’s claim.”176 Fletcher went on to observe that “[i]f a duty is constitutional, the constitutional clause should be seen not only as the source of the duty, but also the primary description of those entitled to enforce it.”177 Referring to Rakas, another scholar has remarked that “[t]he Supreme Court in one arena, at least, appears to have embraced the Fletcher approach explicitly.”178 Some more recent scholarly commentary has continued this line of thought about eliminating standing analysis separated from merits inquiry.179

Given all of this, the Court should reinvigorate the Rakas view that standing is subsumed in trigger-merits analysis for Fourth amendment cases. The Court need not overrule Carter since the outcome in Carter would have been the same even with standing genuinely subsumed in the

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175 William A. Fletcher, The Structure of Standing, 98 Yale L. J. 221, 223 note 18 (1988) (citing references to two U.S. Supreme Court cases and several scholarly commentaries suggesting that standing cannot be separated out as an inquiry wholly separate from the merits of a claim). The context for Professor Fletcher’s discussion appears to be civil cases, but the point is still clear that the U.S. Supreme Court, by the time of Rakas in 1978, was well aware of jurisprudential thinking about collapsing standing inquiry into merits analysis.
176 Id. at 223.
177 Id. at 224.
178 Leroy D. Clarke, Employment Discrimination Testing: Theories of Standing and a Reply to Professor Yelnosky, 28 U. Mich. J. L. Reform 1, 16 (1994) (emphasis added since Professor Clarke, like the rest of us, was presumably not entirely clear on the Court’s larger goal in Rakas). Clarke then observed that “[a]s shown by Fletcher and Rakas, the merits of the claim are integral to deciding the issue of standing.” Id. at 17.
trigger-metrics inquiry.\textsuperscript{180} That is, analyzing a constitutional challenger’s connectedness to the item searched is not alone determinative of anything because it is only one factor to be evaluated in balance with the nature of government’s search activity.

This approach assumes a famous predicate that would seem uncontroversial in this era of expanding technology: “the Fourth Amendment protects people, not places.”\textsuperscript{181} Accordingly, viewing standing as truly subsumed in trigger-metrics analysis, Justice Breyer’s concurrence in \textit{Carter}\textsuperscript{182} would have been superfluous. The majority opinion would have considered the nature of government’s activity (peering into residence through a small gap in closed window blinds)\textsuperscript{183} in balance with Carter’s degree of connectedness to the residence. If government’s activity had been more invasive from a reasonable person’s viewpoint, say the mounting of a tiny video camera to see and record through the gap in the blinds, the outcome in \textit{Carter} would have been different.\textsuperscript{184}

Similarly, the outcome in the case of \textit{Kee v. City of Rowlett}\textsuperscript{185} would have been different under a truly unified threshold Fourth Amendment inquiry. The extraordinary intrusiveness of government electronic eavesdropping and recording of grieving family members’ prayers at a funeral for their loved one would clearly have outweighed even the low expectation of privacy in words spoken at the open-air location of the cemetery.\textsuperscript{186}

\textsuperscript{181} Katz v. United States, 389 U.S. 347, 351 (1967). Similarly, this approach would preclude a return to any threshold Fourth Amendment inquiry that focuses entirely on the constitutional challenger’s connectedness to place such as the “legitimately on premises” test that existed under Jones v. United States, 362 U.S. 257 (1960). See \textit{Supra} notes 12 – 17 and accompanying text for discussion of \textit{Jones}.
\textsuperscript{182} \textit{Carter}, 525 U.S. 83.
\textsuperscript{183} \textit{Id.} at 471.
\textsuperscript{184} See e.g., Part III, D, \textit{supra}, (describing \textit{Rakas} implications in cases where government employed electronic surveillance devices).
\textsuperscript{185} 247 F.3d 206 (5th Cir. 2001). See \textit{supra} notes 139 -47 and 152-54 and accompanying text (describing the significance of the case).
\textsuperscript{186} See \textit{supra} notes 140-45 and accompanying text (reciting the relevant facts of the case).
Similarly, this analytical approach can maintain conceptual clarity even for cases in which standing sub-issues seemingly forced courts to isolate standing analysis. For example, a purely procedural “waiver” of standing issue would have no viability. And an “exception” to third party standing would be just another factor to be evaluated on the defendant’s connectedness-to-item-searched side of the balance in the threshold merits inquiry.

Even if the Court decides to redefine “search” activity by modifying or eliminating the much-criticized expectation of privacy rule, the Rakas principle should continue to be employed. That is, the Fourth Amendment trigger-merits inquiry, as long as it is framed to “protect[] people,” can effectively subsume any otherwise separate standing inquiry. The trigger-merits inquiry will thus acknowledge that consideration of one’s connectedness to the item searched is, in this era of increasingly frequent government intrusions by technological enhancement, part of the same constitutional inquiry that examines the nature of government’s intrusion.

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187 See supra notes 115-22 and accompanying text (discussing a case decision analyzing “waiver” of standing and the “co-conspirator” exception to third party standing).

188 Id.

189 Id.

190 See supra notes 163-67 and accompanying text (discussing criticisms of the “reasonable expectation of privacy” rule).
