

KATZ AS ORIGINALISM

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ABSTRACT

The “reasonable expectation of privacy” test of Katz v. United States is a common target of attack by originalist Justices and originalist scholars. They argue that the Katz test for identifying a Fourth Amendment search should be rejected because it lacks a foundation in the Constitution’s text or original public meaning. This is not just an academic debate. The recent ascendancy of originalists to the Supreme Court creates a serious risk that the reasonable expectation of privacy test will be overturned and replaced by whatever an originalist approach might produce.

This Article argues that originalist opposition to Katz is misplaced. Properly understood, the Katz test is consistent with both originalism and textualism. The reasonable expectation of privacy framework both accurately tracks the constitutional text and reflects a sound interpretation of its original public meaning. Instead of creating a constitutional free-for-all, the test merely preserves the original role of the Fourth Amendment against the threat of technological change. Ironically, the alternatives that originalist and textualist critics have proposed are either Katz in disguise or are less rooted in text and original public meaning than Katz itself. An originalist might want to restate Katz using the constitutional text. But that is a matter of form, not substance.

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INTRODUCTION

In *Katz v. United States*,¹ the Supreme Court famously introduced the “reasonable expectation of privacy” test for what is a Fourth Amendment search.² A search occurs, the *Katz* test says, when government action violates a subjective expectation of privacy “that society is prepared to recognize as ‘reasonable.’”³ Over fifty years later, the *Katz* expectation of privacy test has come under widespread attack.⁴ No one likes *Katz*, it seems. Everyone wants to replace it with

1. *Katz v. United States*, 389 U.S. 347 (1967).

2. *See id.* at 360–61 (Harlan, J., concurring). The test was later adopted by a majority of the Court. *See, e.g., Smith v. Maryland*, 442 U.S. 735, 740 (1979) (citing cases).

3. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

4. *See, e.g.,* John F. Stinneford, *The “Not a Search” Game*, 38 HARV. J.L. & PUB. POL’Y 17, 18–21 (2015) (describing the Supreme Court’s cases holding various surveillance practices to be nonsearches as a “game” that the Justices play to wrongly label reasonable searches as nonsearches); Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 28–29 (1988); Gerald G. Ashdown, *The Fourth Amendment and the “Legitimate Expectation of Privacy”*, 34 VAND. L. REV. 1289, 1312–15 (1981).

something else, even if no one agrees on what its replacement should be.⁵

The most important attacks on *Katz* in recent years have come from originalists and textualists.⁶ According to these critics, the reasonable expectation of privacy test has no basis in the text or original understanding of the Fourth Amendment.⁷ The test is just judicial policymaking, made up by the Warren Court, that empowers judges to do as they please regardless of what the Constitution actually says.⁸ This objection has led to recent calls to reject and replace *Katz* from originalist Supreme Court Justices,⁹ originalist lower-court judges,¹⁰ and originalist scholars¹¹ alike. No more made-up law, the argument runs. It's finally time for some *serious* constitutional interpretation. And with the ascendancy of originalists on the Supreme Court,¹² it is possible that the Supreme Court may soon consider whether to overturn and replace *Katz* with an expressly originalist test.

5. See *infra* Part III.

6. Although the meaning of the terms “originalist” and “textualist” are contested, for my purposes I intend broad and pluralist definitions of the terms.

7. See *infra* Part III.

8. An early and still influential originalist critique was provided by Justice Scalia. See *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring in the judgment) (describing the “reasonable expectation of privacy” test as “self-indulgent” and claiming that “it has no plausible foundation in the text of the Fourth Amendment”).

9. On the current Supreme Court, Justice Thomas and Justice Gorsuch have expressed this view. See, e.g., *Carpenter v. United States*, 138 S. Ct. 2206, 2236 (2018) (Thomas, J., dissenting) (“The *Katz* test has no basis in the text or history of the Fourth Amendment. And, it invites courts to make judgments about policy, not law. Until we confront the problems with this test, *Katz* will continue to distort Fourth Amendment jurisprudence.”); see *id.* at 2264–67 (Gorsuch, J., dissenting) (agreeing with Justice Thomas).

10. See, e.g., *Morgan v. Fairfield County*, 903 F.3d 553, 567–75 (6th Cir. 2018) (Thapar, J., concurring in part and dissenting in part); *Thompson v. State*, 824 S.E.2d 62, 65 n.9 (Ga. Ct. App. 2019) (Dillard, C.J.) (“[T]he Supreme Court of the United States has ‘not set forth a single metric or exhaustive list of considerations to resolve the circumstances in which a person can be said to have a reasonable expectation of privacy’” (quoting *Byrd v. United States*, 138 S. Ct. 1518, 1527 (2018))).

11. See, e.g., William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1823 (2016); Jeffrey Bellin, *Fourth Amendment Textualism*, 118 MICH. L. REV. 233, 254 (2019). These articles are discussed at length in Part III.

12. There are now three avowed originalists on the Supreme Court: Justice Clarence Thomas, Justice Neil Gorsuch, and Justice Amy Coney Barrett. Several other Justices are influenced by originalism to varying degrees. Cf. *The Nomination of Elena Kagan To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the Comm. on the Judiciary*, 111th Cong. 62 (2010) (statement of Elena Kagan) (“Either way we apply what they say, what they meant to do. So in that sense, we are all originalists.”).

This Article argues that textualist and originalist critiques of *Katz* are misguided. Properly understood, *Katz*'s reasonable expectation of privacy test is perfectly consistent with textualism and originalism. Granted, at first blush the test doesn't *sound* rooted in text or history. But first appearances can be deceiving. The reasonable expectation of privacy test is readily reconciled with a close textual reading of the Fourth Amendment. Further, the test offers a persuasive interpretation of the Fourth Amendment's original public meaning. Viewed as a whole, *Katz* provides a sound textualist and originalist basis for interpreting what is a "search" of "persons, houses, papers, and effects."¹³

This argument has two important corollaries. First, *Katz* is not the free-for-all that many judges and scholars assume. Many originalists hear the phrase "reasonable expectation of privacy" and imagine it calls for judges to just make things up. But it doesn't. The best way to understand *Katz* is as a means of identifying modern equivalents to the physical-entry invasions that occurred in 1791.¹⁴ A modern-day equivalent of a physical invasion into persons, houses, papers, or effects violates a "reasonable expectation of privacy," and is therefore a Fourth Amendment search. Identifying what counts as equivalent inevitably requires judgment. Judgment implies discretion. But *Katz*'s primary role is simply to ensure technology-neutrality in the Fourth Amendment's coverage of what is a search. Instead of being an inkblot, the *Katz* test ensures that the original Fourth Amendment does not become outdated as a result of technological change.

The second corollary is that efforts to reject *Katz* and find a textual or originalist alternative generally end up recreating it. Granted, the alternatives use different language. There is nothing magic about the term-of-art "reasonable expectation of privacy." Courts could profitably root search doctrine more explicitly in the text and history. But this is primarily a question of form, not substance. No matter what formal test is used, or how the doctrine is expressed, judges seeking a textualist or originalist alternative to *Katz* will encounter the same task of identifying modern equivalents to traditional physical entries into private spaces that *Katz* prompts. They will tend to use the same concepts, with the same limits, regardless of what label they use.

13. U.S. CONST. amend. IV.

14. See *infra* Part I.A.

This Article proceeds in three parts. Part I explains how the *Katz* reasonable expectation of privacy test is easily reconciled with the text of the Fourth Amendment. Part II explains how *Katz* is consistent with the Fourth Amendment's original public meaning. Part III explores and responds to prominent originalist and textualist alternatives offered by both judges and scholars.

I. A TEXTUALIST UNDERSTANDING OF *KATZ*

My first claim is that the *Katz* reasonable expectation of privacy test is consistent with the text of the Fourth Amendment. This Part breaks down the constitutional text and shows how the *Katz* framework matches it. From a textualist perspective, *Katz* asks all the right textualist questions. Although *Katz* is sometimes dismissed as a doctrine unrooted from text, that is only a matter of form. Understood in context, the substance of *Katz* neatly tracks a textualist approach to constitutional interpretation.

This Part has five sections. It starts by studying the constitutional text and identifies the four questions the text raises. It turns next to the *Katz* test and shows how it aligns nicely with the text. Third, it explains the erroneous premises of the textualist objections to *Katz*. It then shows the long historical pedigree of using privacy as a guide to the Fourth Amendment search test. It concludes by explaining the weakness in Justice Hugo Black's textualist *Katz* dissent.

A. *Breaking Down the Constitutional Text*

We start, of course, with the text:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹⁵

The single sentence of the Fourth Amendment divides into two parts. The second part, the warrant clause, is narrowly about search warrants and need not concern us here. To understand when a search triggers the Fourth Amendment, it's the first part that matters: the right

15. U.S. CONST. amend. IV.

of the people “against unreasonable searches and seizures” of “their persons, houses, papers, and effects.”¹⁶

From a textualist perspective, the search inquiry breaks into four questions:

(1) *Is the item to be protected a person, house, paper, or effect?* The Fourth Amendment only extends protections to “persons, houses, papers, and effects.” We need to know if the government action involves one of those four enumerated items.

(2) *If so, was the protected item searched or seized?* The Fourth Amendment only limits “searches” or “seizures” of persons, houses, papers, and effects. We need to know if the protected item was subjected to a search or seizure.

(3) *If so, was the item that was searched or seized “their” person, house, paper, or effect?* The constitutional text says the people have a Fourth Amendment right in “their” persons, houses, papers, and effects. We need to know when such a thing is theirs, as compared to someone else’s.

(4) *If so, was the search or seizure “unreasonable”?* The Fourth Amendment only prohibits unreasonable searches and seizures, so we need to know when searches or seizures are reasonable and when they are unreasonable.

At first blush, the *Katz* test might seem unrelated to the textual questions above. The formal doctrine is often stated as a two-step test announced in Justice John Marshall Harlan’s *Katz* concurrence: Did the person “exhibit[] an actual (subjective) expectation of privacy”?¹⁷ Second, if so, was “the expectation . . . one that society is prepared to recognize as ‘reasonable’”?¹⁸ That sure *sounds* unmoored from the text. The language of the Fourth Amendment doesn’t mention “privacy,” or any role of “expectations” about it. And who is “society,” and why should its view of what is reasonable matter? We have legislatures to consider societal views. And judges seeking to know what “society” thinks presumably will just channel their own opinions. At first blush, the *Katz* test sounds entirely nontextual.

16. *Id.*

17. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

18. *Id.*

This view is common.¹⁹ But it is also wrong, because it misunderstands the *Katz* test. It misunderstands where the test comes from and what it is doing. And most importantly, for our purposes, it misunderstands how the question in *Katz*, and the answer that its test provides, neatly fits within the text of the Fourth Amendment. Properly understood, the *Katz* test aims to answer what is a Fourth Amendment search of a person, house, paper, or effect.²⁰

B. *How Katz Fits the Text*

We can appreciate how *Katz* fits the text of the Fourth Amendment by starting with the case's facts. The FBI taped a microphone to the top of a public phone booth that Charles Katz used to place illegal bets.²¹ When Katz went into the phone booth, closed the door, and paid for the call, the FBI turned on the microphone and recorded his side of the call.²² In a famously cryptic opinion by Justice Potter Stewart, the Court ruled that listening in on Katz's call was a search that violated his Fourth Amendment rights.²³ But it was Justice Harlan's concurrence, not the majority opinion, that had the primary impact on Fourth Amendment doctrine through the introduction of the "reasonable expectation of privacy" test.²⁴ Harlan's approach was later adopted by the Court,²⁵ so a close reading of Harlan's concurrence is useful.

Justice Harlan began by summarizing his view of the three holdings found in the majority's opinion:

I join the opinion of the Court, which I read to hold only (a) that an enclosed telephone booth is an area where, like a home, *Weeks v. United States*, 232 U.S. 383, and unlike a field, *Hester v. United States*, 265 U.S. 57, a person has a constitutionally protected reasonable expectation of privacy; (b) that electronic as well as physical intrusion

19. Indeed, it is almost universal in the originalist and textualist criticisms of *Katz*. See *supra* notes 8–11 and accompanying text.

20. My discussion puts aside what is a "seizure" and focuses only on what is a "search."

21. See *Katz*, 389 U.S. at 348.

22. See *id.* at 348–49.

23. See *id.* at 353 ("The 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.").

24. See *id.* at 360–61 (Harlan, J., concurring).

25. See *supra* note 2 and accompanying text.

into a place that is in this sense private may constitute a violation of the Fourth Amendment; and (c) that the invasion of a constitutionally protected area by federal authorities is, as the Court has long held, presumptively unreasonable in the absence of a search warrant.²⁶

Note that these holdings match up nicely with the four textual questions. The first holding, that an enclosed telephone booth is an area protected by the Fourth Amendment, is in textual terms saying that an enclosed telephone booth was one of the places the Fourth Amendment protected—a temporary virtual “house,” or, possibly, an “effect.”²⁷ The Fourth Amendment protected homes (that is, “houses”), and yet it did not protect fields (that were neither “persons, houses, papers, [or] effects”). The first holding of *Katz* answers Question 1 of the text. It holds that a public phone booth falls among the “houses, persons, papers, [or] effects” that the Fourth Amendment protects.

The second holding, that electronic as well as physical intrusion can violate the Fourth Amendment, was in textual terms saying that an electronic intrusion can be a “search” of the Fourth Amendment “house” of the phone booth. It was answering Question 2—whether the house was searched or seized. Before *Katz*, it was uncertain whether interception of electronic signals could effectuate a “search.”²⁸ It isn’t entirely clear in which way the search in *Katz* was “electronic,” as the facts simply involved a microphone taped atop a phone booth. The microphone recorded sound, and the sound traveled through the wire back to the FBI listening station. But the second holding of *Katz* was that a search of a phone booth could occur without physical intrusion.²⁹

The third holding of *Katz*, that a warrant was required, was in textual terms just as Justice Harlan recognized: it was Question 4,

26. *Katz*, 389 U.S. at 360–61 (Harlan, J., concurring).

27. I do not have a particular view of whether listening in on private calls made in the phone booth is better understood as a search of a virtual house or of an effect. Cf. Bellin, *supra* note 11, at 265 n.213 (considering whether a phone booth is a house or an effect). For the sake of simplicity, however, for the rest of the Article, I will refer to it as a virtual house.

28. See *Silverman v. United States*, 365 U.S. 505, 511–12 (1961) (stating that physical entry was a search, but the open question was whether surveillance without physical entry was a search).

29. See *Katz*, 389 U.S. at 360–61 (Harlan, J., concurring) (“[E]lectronic as well as physical intrusion into a place that is in this sense private may constitute a violation of the Fourth Amendment . . .”).

which asks whether a search or seizure is unreasonable without a warrant. *Katz* held that the installation and use of the recording device was a search that was only reasonable with a warrant or some other exception to the warrant requirement.³⁰

The only step explicitly missing in Justice Harlan’s summary of *Katz* was the Question 3 inquiry into whether the search that occurred was of Mr. Katz’s protected space or someone else’s protected space. But that was made clear in what Justice Harlan called the “critical”³¹ point of the majority opinion: it was “a person in a telephone booth” who “may rely upon the protection of the Fourth Amendment.”³² As Justice Stewart wrote for the majority:

One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.³³

This answers Question 3. The phone booth became the constitutionally protected space of the person who occupied the phone booth and paid the toll during the period of the call.

The upshot of all of this is that we can easily understand *Katz* using the constitutional text. In textual terms, *Katz* held that the phone booth was acting as a “house” that the Constitution protects (Question 1); that listening in from a microphone taped to the top of the phone booth was a “search” of that house (Question 2); that when callers occupy the booth and pay the toll, the phone booth becomes “their” house (Question 3); and that the search of their house was “unreasonable” without a warrant (Question 4). Every point nicely matches the text of the Fourth Amendment.

C. *The “Reasonable Expectation of Privacy” Test As Textualism*

But wait, you may be thinking, there is nothing in the text of the Fourth Amendment about reasonable expectations of privacy.³⁴ True. But the *concept* that the reasonable expectation of privacy test captures is certainly there. *Katz* required the Court to deal with a problem of changing technology: How should the Fourth Amendment apply to

30. *See id.* at 357 (majority opinion).

31. *Id.* at 360 (Harlan, J., concurring).

32. *Id.* at 352 (majority opinion).

33. *Id.*

34. As noted earlier, this is the near-universal textualist objection to *Katz*. *See supra* notes 8–11 and accompanying text.

new surveillance technologies and new surveillance methods that invaded privacy in new ways? The notion of a government act that violates a reasonable expectation of privacy can be helpfully understood as a way to ensure that the limit on “search[ing] . . . persons, houses, papers, and effects” retains its vitality as technology changes. Government conduct would amount to a search of a person, house, paper, or effect when it invades a reasonable expectation of privacy.³⁵

It may at first seem nontextual to rely on a vague phrase like “reasonable expectation of privacy” to identify what counts as “searches” of “persons, houses, papers, [or] effects.” But I don’t think it is, and some context is helpful to understand why. Courts before *Katz* did not provide a particular test for what constituted a search.³⁶ The early cases on the meaning of “searches” used an uncertain mix of privacy concepts and analogies to property without ever stating a particular test for what made something a search.³⁷ Indeed, the first effort to articulate what counts as a search was Justice Harlan’s effort in *Katz*. And that articulation did not express a new test. Harlan introduced it in his *Katz* concurrence as a summary of pre-*Katz* precedents, “the rule that has emerged from prior decisions.”³⁸

Contrary to widespread belief, Harlan’s test was not designed to make vague notions of privacy the core of the Fourth Amendment. It is true that the test he expressed included the word “privacy.” But Harlan had something specific in mind. The puzzle in *Katz* was which kinds of spaces could receive Fourth Amendment protection from searches. Precedents had established that homes, taxicabs, and rented

35. At least so long as the person, house, paper, or effect has been covered up from outside observation, thus manifesting a subjective expectation of privacy. As I have explained elsewhere, the subjective expectation of privacy test merely reflects the simple idea that a protected space had to be covered to be protected. That is, if a protected space such as a home or a car was open to the public, so anyone could see inside, the government did not conduct a search triggering the Fourth Amendment by merely looking at it to see what was exposed. See Orin S. Kerr, *Katz Has Only One Step: The Irrelevance of Subjective Expectations*, 82 U. CHI. L. REV. 113, 124–27 (2015).

36. See Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 68–69 [hereinafter Kerr, *Curious History*].

37. See *id.* at 69, 77–85.

38. See *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

hotel rooms could, while open fields could not.³⁹ The specific question in *Katz*, as articulated by Harlan at the beginning of his concurrence, was how to treat a phone call placed inside a public phone booth with glass walls and a door.⁴⁰ Was that more like a rented hotel room (protectable) or an open field (not protectable)?⁴¹

From this perspective, the idea of expectations that “society is prepared to recognize as reasonable” is not a free-floating or circular standard but rather a more specific idea rooted in Fourth Amendment history.⁴² Some places were treated like the home and others were not. Some surveillance was a functional equivalent to physical entry, and some was not. What’s the line? It wasn’t the common law of property, a standard that the Court had never embraced and instead had rather

39. See *id.* at 352 (majority opinion) (observing the precedent on taxicabs); see *id.* at 359 (Douglas, J., concurring) (observing the precedent on hotel rooms); see *id.* at 361 (Harlan, J., concurring) (observing the precedent on homes and open fields).

40. See *id.* at 361 (Harlan, J., concurring); see also *id.* at 352 (majority opinion) (describing the phone booth).

41. See *id.* at 360–61 (Harlan, J., concurring).

42. The common claim that *Katz* is circular reflects a basic misunderstanding of Fourth Amendment doctrine. The apparent thinking is that a person would reasonably expect privacy when the Supreme Court has said there is privacy, so the test for what the Fourth Amendment covers is what the Supreme Court has said the Fourth Amendment covers. The most glaring flaw in this argument is that *Katz* does not ask what privacy a reasonable person would expect. How *Katz* applies cannot be answered by a poll about expectations. The Fourth Amendment protects against invasions into protected spaces, not against surprises. See *United States v. Jacobsen*, 466 U.S. 109, 122 (1984) (“The concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the authorities.”).

It is true that Supreme Court decisions on what violates a reasonable expectation of privacy provide a useful guide to what violates a reasonable expectation of privacy. But that’s because the phrase is a legal term of art, not because the test is circular. As with any legal term of art, a good starting point for understanding when it applies is when it has been applied before. For example, to know what violates the Due Process Clause, you might begin with cases on what the Supreme Court has said violates the Due Process Clause. That does not mean that due process is circular. Rather, it merely reflects the fact that understanding a legal concept often begins with reading cases that apply it.

I should add, on the claimed circularity of the *Katz* test, that Professors Matthew Kugler and Lior Strahilevitz contend based on an empirical study that Supreme Court Fourth Amendment decisions do not actually impact what most people expect to be private. See Matthew B. Kugler & Lior Jacob Strahilevitz, *The Myth of Fourth Amendment Circularity*, 84 U. CHI. L. REV. 1747 (2017). This seems right, as far as it goes, in that normal people are likely to be blissfully unaware of Supreme Court doctrine. But I disagree with Kugler and Strahilevitz’s assumption that *Katz* calls for an empirical inquiry into what privacy people expect.

harshly dismissed.⁴³ Rather, it was an idea that some places were broadly understood by people as home-like, and some monitoring was the functional equivalent of a physical entry. That explained *Katz*. When a person entered the booth, shut the door, and paid for their call, the booth became understood as *their booth* for the duration of the call.⁴⁴ Taping a microphone to the top of the booth and listening in revealed information much like physical intrusion would have. It was therefore covered by the Fourth Amendment.

Justice Harlan's formulation can be readily articulated using the Fourth Amendment text. The reasonable expectation of privacy test asks if the government's action amounts to a search of the individual's person, houses, papers, or effects. Identifying what "society is prepared to recognize" asks what counts as a modern-day technological equivalent of a search-by-entry into a person's property. In *Katz*, the public phone booth was the caller's "home" during the call because it became, in Harlan's words, "a temporarily private place."⁴⁵ The caller did not obtain title to the phone booth in fee simple. He did not sign a rental agreement. But the booth was a space that temporarily became *his*.

It's true that the reasonable expectation of privacy test calls for an inquiry into current social practices and values. But that simply reflects the fact that, as technology and social practices change, the societal meaning of a place or monitoring practice can change. Determining the modern technological equivalent of a physical entry into a protected space requires a judgment about equivalence based on current realities. In 1960s America, a phone booth was a private place. Phone calls from inside a public phone booth were the equivalent of private conversations inside a home.⁴⁶ As a result, *Katz* stressed, to exclude bugging a phone booth from the constitutional protection against

43. See, e.g., *Silverman v. United States*, 365 U.S. 505, 511 (1961) (citing cases to support that "[i]nherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law").

44. See *Katz*, 389 U.S. at 352 ("One who occupies [a phone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.")

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

46. SAMUEL DASH, RICHARD F. SCHWARTZ & ROBERT E. KNOWLTON, *THE EAVESDROPPERS* 3 (1959) (discussing public fears of wiretapping telephones, including in phone booths).

unreasonable searches of a person's house or effect would "ignore the vital role that the public telephone has come to play in private communication."⁴⁷

D. "Privacy" Back to the Beginning

But still there is that word: privacy. For some textualists and originalists, invoking a Warren Court precedent that inserted *privacy* into constitutional rights jurisprudence may be like waving a red flag in front of a bull. It can bring to mind *Roe v. Wade*,⁴⁸ where the Court announced a new right to abortion in the name of "a right of personal privacy" that the Court said had "roots" elsewhere in the Constitution.⁴⁹ Indeed, *Katz* was one of the cases *Roe* cited as demonstrating "a right of personal privacy, or a guarantee of certain areas or zones of privacy" from prior caselaw.⁵⁰ *Roe* is anathema to most self-identified originalists and textualists.⁵¹ With a lineage like that, perhaps *Katz* should also be suspect?

Not so. The idea of relying on privacy to describe the scope of Fourth Amendment protection was no Warren Court innovation. Justice Harlan's use of that word had a venerable historical pedigree in Fourth Amendment law. From the beginning, courts had referred to and interpreted the ban on unreasonable searches and seizures using privacy principles.

A useful starting point is *Jones v. Gibson*,⁵² a New Hampshire case from 1818. The plaintiff sued a customs inspector for searching his stagecoach and seizing his goods without a warrant.⁵³ According to the plaintiff, the search violated the terms of a 1799 federal statute, echoing the Fourth Amendment, that prohibited warrantless searches of a "ship, vessel, dwelling house, store, building or other place."⁵⁴ In construing the statute, the court considered what kind of searches would violate privacy:

47. *Katz*, 389 U.S. at 352.

48. *Roe v. Wade*, 410 U.S. 113 (1973).

49. *Id.* at 152.

50. *Id.*

51. See generally Mary Ziegler, *Originalism Talk: A Legal History*, 2014 BYU L. REV. 869 (discussing conservative originalism and the backlash to *Roe*).

52. *Jones v. Gibson*, 1 N.H. 266 (1818).

53. *Id.* at 266.

54. *Id.* at 272.

This prohibition of entering certain places, for the purpose of searching for and seizing goods without a magistrate's warrant, was clearly intended to guard individuals against improper intrusion into their buildings, where they had the exclusive right of possession *and privacy* . . . and the words, "other place" mean other place, where the occupant has this exclusive right of possession *and privacy*.⁵⁵

No warrant was needed to search a stage coach, as "[a] stage coach is not such a place."⁵⁶

Other courts in the nineteenth century shared the association between privacy and search and seizure protections. Consider the Missouri Supreme Court's 1880 ruling in *Ex parte Brown*,⁵⁷ which held that the state constitution's search and seizure provision—essentially identical to the federal Fourth Amendment—forbade a broad subpoena to compel Western Union to divulge telegram messages.⁵⁸ The subpoena violated the constitutional prohibition on searches and seizures, the court held, "by subjecting to exposure the private affairs of persons . . . to the prying curiosity of idle gossips, or the malice of malignant mischief-makers."⁵⁹ The court also lauded the dissent below,⁶⁰ in which the presiding judge had interpreted the constitutional rule as protecting a "right of privacy with respect to one's personal affairs"⁶¹ that required good cause before "the privacy of [a person's] accounts" could be "ruthlessly sacrificed."⁶²

The U.S. Supreme Court followed suit in 1886, issuing what is arguably its first major decision interpreting the Fourth Amendment, *Boyd v. United States*.⁶³ *Boyd* held that the Fourth Amendment prohibited an order to compel a person to hand over their own papers—in that case, an invoice for items Boyd had recently

55. *Id.* (emphasis added).

56. *Id.*

57. *Ex parte Brown*, 72 Mo. 83 (1880).

58. *Id.* at 94–95.

59. *Id.* at 95.

60. *Id.* at 97 ("In the dissenting opinion of Judge Lewis, of the court of appeals, in *Ex parte Brown*, the question on which he differed from his associates . . . is discussed with great ability and clearness.")

61. *Ex parte Brown*, 7 Mo. App. 484, 495 (1879) (Lewis, J., dissenting), *aff'd*, 72 Mo. 83 (1880).

62. *Id.* at 496.

63. *Boyd v. United States*, 116 U.S. 616 (1886).

imported.⁶⁴ The Fourth Amendment must “be liberally construed,” the Court reasoned, as “[a] close and literal construction deprives [it] of half [its] efficacy, and leads to gradual depreciation of the right.”⁶⁵ According to the Supreme Court in *Boyd*, the Fourth Amendment “appl[ies] to all invasions on the part of the government and its employés [sic] of the sanctity of a man’s home and the privacies of life.”⁶⁶ As far back as *Boyd* in 1886, the Court saw the Fourth Amendment’s scope as about privacy.

The privacy focus continued into the twentieth century in the years before the Warren Court. In 1918, the Court rejected a search claim involving government access to exhibits left behind in prior litigation, in part on privacy grounds: the government’s acts were distinguishable from entry into a home, the Court reasoned, because only the latter involved “an invasion of the defendant’s privacy, a taking from his immediate and personal possession.”⁶⁷ In 1932, the Court declared that the Fourth Amendment must be “construed liberally to safeguard the right of privacy.”⁶⁸ The Court similarly described the Fourth Amendment as protecting a “right of privacy” in 1946,⁶⁹ 1947,⁷⁰ 1948,⁷¹ and 1950.⁷²

This history teaches a helpful lesson. Justice Harlan’s use of the term “privacy” to describe Fourth Amendment protections in *Katz* was nothing new. It did not begin with the Warren Court in the 1960s. It had nothing to do with *Roe* or abortion rights. The Supreme Court had been using “privacy” to describe Fourth Amendment coverage since its first major Fourth Amendment ruling in 1886. Other courts had

64. *Id.* at 622.

65. *Id.* at 635.

66. *Id.* at 630.

67. *Perlman v. United States*, 247 U.S. 7, 14 (1918).

68. *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932).

69. *Davis v. United States*, 328 U.S. 582, 593 (1946) (“The right of privacy, of course, remains.”).

70. *Harris v. United States*, 331 U.S. 145, 150 (1947) (“This Court has consistently asserted that the rights of privacy and personal security protected by the Fourth Amendment ‘. . . are to be regarded as of the very essence of constitutional liberty.’” (alteration in original) (quoting *Gouled v. United States*, 255 U.S. 298, 304 (1921))).

71. *Johnson v. United States*, 333 U.S. 10, 14 (1948) (“When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.”).

72. *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950) (“It is a sufficient precaution that law officers must justify their conduct before courts which have always been, and must be, jealous of the individual’s right of privacy within the broad sweep of the Fourth Amendment.”).

used the same word in similar ways decades before that. We can of course want further explanation of why “privacy” is an illuminating or appropriate word for an originalist to adopt—an explanation offered in Part II below. But for now, we should simply recognize that there was nothing novel about employing the word “privacy” in *Katz*. It has been used to describe the scope of Fourth Amendment protection for about as long as courts have been interpreting the Fourth Amendment.

E. The Weak Textualism of Justice Black’s Dissent

One last textualist objection remains—Justice Hugo Black’s *Katz* dissent.⁷³ In Black’s view, the majority’s holding could not be justified by the Fourth Amendment’s text and was therefore wrong.⁷⁴ But it is Black who was wrong. His textualist method was fine, but his application of that method was strangely narrow. Black ignored the most obvious textual grounding for *Katz*. He dissented by rejecting only a narrow argument in its favor.

Recall that the question in *Katz* was whether government agents committed a Fourth Amendment “search” when they taped a microphone to the top of a public phone booth to listen to *Katz*’s voice inside during calls. According to Black, this was not a Fourth Amendment search because the Fourth Amendment gave rights in tangible things, and the conversation was intangible:

The first clause protects “persons, houses, papers, and effects, against unreasonable searches and seizures” These words connote the idea of tangible things with size, form, and weight, things capable of being searched, seized, or both. The second clause of the Amendment still further establishes its Framers’ purpose to limit its protection to tangible things by providing that no warrants shall issue but those “particularly describing the place to be searched, and the persons or

73. See *Katz v. United States*, 389 U.S. 347, 364 (1967) (Black, J., dissenting).

74. Justice Black memorably wrote:

Since I see no way in which the words of the Fourth Amendment can be construed to apply to eavesdropping, that closes the matter for me. In interpreting the Bill of Rights, I willingly go as far as a liberal construction of the language takes me, but I simply cannot in good conscience give a meaning to words which they have never before been thought to have and which they certainly do not have in common ordinary usage. I will not distort the words of the Amendment in order to “keep the Constitution up to date” or “to bring it into harmony with the times.” It was never meant that this Court have such power, which in effect would make us a continuously functioning constitutional convention.

Id. at 373.

things to be seized.” A conversation overheard by eavesdropping, whether by plain snooping or wiretapping, is not tangible and, under the normally accepted meanings of the words, can neither be searched nor seized.⁷⁵

Black’s error was his assumption that the only person, house, paper, or effect that could be searched or seized was the conversation itself.⁷⁶ He ignored the more obvious textual basis for the majority’s decision. Even if the Fourth Amendment text is read to require that the item searched be tangible—an uncertain claim, but accept it for the sake of argument—that was easily satisfied in *Katz*. The item searched was the very tangible phone booth, not the intangible conversation. The government’s use of a microphone to acquire the noises inside the phone booth was a “search” of the tangible enclosure. The conversations overheard were the fruits of the search, not the place searched. Even on its own terms, Justice Black’s objection is surprisingly weak.

II. AN ORIGINALIST UNDERSTANDING OF *KATZ*

The first part of this Article focused on the constitutional text. We now turn from textualism to originalism. Even if *Katz* can be reconciled with the constitutional text, can it be reconciled with the original understanding of the Fourth Amendment? Contemporary academic originalism comes in many flavors.⁷⁷ The most widely adopted originalist method today is “original public meaning” originalism,⁷⁸ which asks, what would an informed observer at the time of the text’s enactment believe the text meant?⁷⁹ This Part addresses whether *Katz* is consistent with original public meaning originalism.

75. *Id.* at 365.

76. *Id.*

77. Although public meaning originalism is the dominant form of originalist constitutional theory, the originalist family also includes original intentions originalism, original methods originalism, and original law originalism. See Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1251, 1253–54 (2019).

78. See *id.* at 1251.

79. See, e.g., Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 12, 22–24, 33 (Grant Huscroft & Bradley W. Miller eds., 2011) (framing the originalist inquiry).

The answer is yes. At the time of the Fourth Amendment's enactment, the text would have been understood as embodying the famous cases and arguments that inspired its enactment, especially *Entick v. Carrington*,⁸⁰ *Wilkes v. Wood*,⁸¹ and the *Writs of Assistance* case.⁸² All of those disputes involved physical entry into the home. They did not address the meaning of "searches" of "persons, houses, papers, and effects." Instead, they focused on the legality of warrants that could permit physical entries. That focus was reflected in the search and seizure restrictions in state constitutions and the federal Fourth Amendment. Nor did the common law of search and seizure at the time of the Fourth Amendment's adoption address what was a search. Although the word "search" had several contemporary meanings, the primacy of disputes such as *Entick* and *Wilkes* would have made those cases the focus of contemporary public understanding.

Sourcing the meaning of the Fourth Amendment in representative cases gives originalists a few options. One option might be to limit the search doctrine to the facts that the cases involved, namely physical entry. But another option would be to root the search doctrine in a more timeless principle. Because technology can readily alter the scope of constitutional protection, one option would be to interpret the Fourth Amendment search doctrine to ensure its protection as technology advances. This would require interpreting the search doctrine to encompass *both* physical intrusion *and* its technologically created equivalents. The result would, as Justice Scalia put it in *Kyllo v. United States*,⁸³ "assure[] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted."⁸⁴

And this is what *Katz* does. The best reading of *Katz* is that it provides an equivalence test. *Katz* covers physical intrusion, but it does more: it identifies conduct as a "search" of "persons, houses, papers,

80. See *Entick v. Carrington* (1765) 95 Eng. Rep. 807, 817; 19 Howell's State Trials 1029, 1063 (KB).

81. See *Wilkes v. Wood* (1763) 98 Eng. Rep. 489, 498 (KB).

82. See generally MAURICE HENRY SMITH, *THE WRITS OF ASSISTANCE CASE* (1978) (recounting the *Writs of Assistance* case, which challenged the authorization of customs officials to invade private property in search of smuggled goods).

83. *Kyllo v. United States*, 533 U.S. 27 (2001).

84. *Id.* at 34.

and effects” when it amounts to the modern-day technological equivalent of physical entry at the time of the founding. Identifying those equivalents requires judgment, and judgment implies discretion. But an originalist can and should adopt *Katz* as a way to retain the original protections of the Fourth Amendment in a world of technological change.⁸⁵

This Part makes that argument in four steps. First, it explores the historical disputes that inspired the passage of the Fourth Amendment. Second, it shows how the drafting and enactment of state constitutional equivalents and later the Fourth Amendment itself shed no useful light on what is a search beyond those famous disputes. Third, it shows that the same is true of the common law. Last, this Part puts the pieces together, showing how the modern *Katz* doctrine is consistent with originalism as a construction of the Fourth Amendment’s original public meaning in light of technological change.

A. *The Disputes That Inspired the Fourth Amendment Involved Physical Entry*

The first place to look for framing-era understandings of the Fourth Amendment “search” doctrine is the major disputes that inspired the Fourth Amendment’s passage. We know that the Fourth Amendment was a response to a series of prominent legal disputes in the mid-eighteenth century, both in England and in the Colonies, primarily consisting of *Entick v. Carrington*,⁸⁶ *Wilkes v. Wood*,⁸⁷ and the *Writs of Assistance* case.⁸⁸ Those disputes inspired search and seizure amendments in several state constitutions and then, later, in the federal Constitution. We can look to those disputes to get an idea of what contemporary observers would have understood the search and seizure provisions to mean.

Two lessons emerge. First, the cases that inspired the Fourth Amendment did not address what was a search of persons, houses, papers, or effects. Instead, the disputes were exclusively about the

85. To use the interpretation/construction distinction favored by originalist scholars such as Randy Barnett and Lawrence Solum, *Katz* is a persuasive construction of the Fourth Amendment’s original public meaning. See, e.g., Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65, 68–72 (2011); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 457 (2013).

86. *Entick v. Carrington* (1765) 95 Eng. Rep. 807, 817; 19 Howell’s State Trials 1029, 1063 (KB).

87. *Wilkes v. Wood* (1763) 98 Eng. Rep. 489, 490 (KB).

88. See generally SMITH, *supra* note 82 (recounting the *Writs of Assistance* case).

lawful scope of search warrants—that is, court orders that allowed officers to go places and remove items. Second, the disputes all arose in the context of physical entries into enclosed spaces. Officers entered homes and offices, rifled through a suspect’s property, and removed possible evidence. The cases suggest that contemporary observers would have thought of physical entry into physical spaces as the problem that the Fourth Amendment addressed. There apparently was no consideration of whether a broader principle was in play—or, if so, what it might be.

Start with *Entick v. Carrington*. The King’s officials obtained a warrant “to make strict and diligent search for John Entick,” and then, upon finding him, “to seize and apprehend, and to bring [him], together with his books and papers, in safe custody before [the Earl of Halifax, one of the King’s principal secretaries of state] to be examined concerning the premises, and further dealt with according to law.”⁸⁹ The agents “entered the plaintiff’s dwelling-house . . . to search for and seize the plaintiff and his books and papers in order to bring him and them before the earl of Halifax, according to the warrant.”⁹⁰ Over four hours, the officers “broke open the doors to the rooms, the locks, iron bars, etc. thereto affixed, and broke open the boxes, chests, drawers, etc. of the plaintiff in his house, and broke the locks thereto affixed, and searched and examined all the rooms, etc., in his dwelling-house, and all the boxes, etc. so broke open, and read over, pried into and examined all the private papers, books, etc.”⁹¹

Lord Camden condemned the general warrant used to justify the entry and removal of property: “To search, seize, and carry away all the papers of the subject upon the first warrant: that such a right should have existed from the time whereof the memory of man runneth not to the contrary, and never yet have found a place in any book of law; is incredible.”⁹² The general warrant in *Entick* allowed “the lock and doors of every room, box, or trunk” to be “broken open,” the court noted.⁹³ Imposing limits on warrants was needed so that “the secret

89. *Entick*, 19 Howell’s State Trials at 1029, 1031, 1034.

90. *Id.* at 1031.

91. *Id.* at 1030.

92. *See id.* at 1068.

93. *Id.* at 1063–64.

cabinets and bureaus of every subject in this kingdom” would not be “thrown open to the search and inspection of a messenger.”⁹⁴

Entick has often been considered the leading inspiration for the Fourth Amendment.⁹⁵ But note how it refers to searches and seizures. It addresses them only in the context of the facts of that case, involving direct physical entry: breaking open locks and then rifling through what was inside and taking property there. *Entick* gives no guidance on whether acts beyond physical entry might have triggered the same concerns or been considered as part of the same problem.⁹⁶ The dispute was only about the justification needed to break open locks and enter physical spaces.

Wilkes v. Wood, an antecedent to *Entick* decided by the same judge two years earlier, provides no additional guidance about the understanding of searches. Messengers entered Wilkes’s house with a general warrant.⁹⁷ Wilkes sued the messengers for “entering [his] house, breaking his locks, and seizing his papers.”⁹⁸ The messengers “claimed a right, under precedents, to force persons houses, break open [writing desks], seize their papers, &c. upon a general warrant, where no inventory is made of the things thus taken away, and where no offenders names are specified in the warrant[.]”⁹⁹ In their view, the messengers had “a discretionary power . . . to search wherever their suspicions may chance to fall.”¹⁰⁰

The court disagreed: “If such a power is truly invested in a Secretary of State, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is

94. *Id.* at 1063.

95. The Supreme Court set the tone for its treatment of *Entick* in 1886:

As every American statesmen, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures.

Boyd v. United States, 116 U.S. 616, 626–27 (1886).

96. See Kerr, *Curious History*, *supra* note 36, at 72–73 (observing that while *Entick* does discuss the law of trespass, that does not imply that a legal trespass would be understood as constituting a search; it seems more likely that *Entick* discussed the technical law of trespass because the cause of action in *Entick* happened to be trespass).

97. *Wilkes v. Wood* (1763) 98 Eng. Rep. 489, 490 (KB).

98. *Id.* at 489.

99. *Id.* at 498.

100. *Id.*

totally subversive of the liberty of the subject.”¹⁰¹ Like *Entick, Wood* sheds no particular light on what a search of persons, houses, papers, or effects might mean. Both cases focus on the limits of warrants to physically enter a home. But the report of the opinion gives no sign of how broadly the court’s concerns go, if it all, beyond physical entry.

The third major inspiration for the Fourth Amendment, the *Writs of Assistance* case, is notable for its nearly singular focus on physical entry into the home. The case was argued by James Otis in 1761 to try to stop the practice of general warrants in the colonies.¹⁰² Although the court rejected the argument and held the writs of assistance lawful, Otis’s arguments against the legality of the writs were influential and understood to have helped inspire the adoption of search and seizure protections in state constitutions and later the federal Constitution.¹⁰³ Notably, Otis’s attack on the writs of assistance focused on how they enabled government officials to invade homes. According to the notes that John Adams took of Otis’s arguments, Otis argued to the court that the writ was “against the fundamental Principles of Law.—The Privilege of House.”¹⁰⁴ As Otis explained weeks later, in a summary of his arguments:

[O]ne of the most essential branches of English liberty is the freedom of one’s house. A man’s house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom-house

101. *Id.*

102. See generally SMITH, *supra* note 82 (describing how the *Writs* case challenged the authorization of customs officials to invade private property). For a more accessible summary, see also Thomas Clancy, *The Framers’ Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 992–1006 (2011) (explaining how the *Writs* case may have been the most influential on Adams’s views).

103. The Supreme Court recalled that:

The historic occasion of that denunciation, in 1761 at Boston, has been characterized as “perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. ‘Then and there,’ said John Adams, ‘then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.’”

Payton v. New York, 445 U.S. 573, 583 n.21 (1980) (citing *Boyd v. United States*, 116 U.S. 616, 625 (1886)).

104. JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY, BETWEEN 1761 AND 1772, at 471 (1865).

officers may enter our houses, when they please; we are commanded to permit their entry.¹⁰⁵

Otis also expanded on his claims in the *Boston Gazette* through an article that was unsigned but nonetheless attributed to him:¹⁰⁶

[E]very housholder in this province, will necessarily become *less secure* than he was before this writ had any existence among us; for by it, *a custom house officer* or ANY OTHER PERSON *has a power given him, with the assistance of a peace officer, to ENTER FORCEABLY into a DWELLING HOUSE, and rifle every part of it where he shall PLEASE to suspect uncustomed goods are lodgd!*—Will any man put so great a value on his freehold, after such a power commences as he did before?—every man in this province, will be liable to be insulted, by a *petty officer*, and threat[e]ned to have his house *ransack'd . . .*¹⁰⁷

In *Entick, Wilkes*, and the *Writs of Assistance* case, the evil to be addressed was the unlimited power of a government official to physically enter a home and rifle through what was inside. Whether other government wrongs outside the home might be similarly troublesome was not addressed. Of course, the fact that the events that inspired the Fourth Amendment all involved physical invasion of homes does not mean that the Fourth Amendment's scope should be limited to physical invasion of homes. The text extends to persons, papers, and effects, as well.¹⁰⁸ But the disputes that inspired the Fourth Amendment might aid in interpretation by telling us the kind of problems that the public would have understood the Fourth Amendment to address. Unfortunately, none offer any guidance to what counts as a search beyond the obvious facts of physical entry into a home.

B. The Drafting and Ratification History of the Fourth Amendment Does Not Answer What Is A Search of Persons, Houses, Papers and Effects

Of course, the Fourth Amendment did not merely enact *Entick, Wilkes*, and Otis's argument in the *Writs of Assistance* case. The Fourth

105. 2 CHARLES FRANCIS ADAMS, *THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES* 524 (Boston, Charles C. Little and James Brown 1850).

106. Clancy, *supra* note 102, at 993.

107. QUINCY, JR., *supra* note 104, at 489 (cleaned up).

108. The relationship among these terms is discussed later in notes 137–141 and accompanying text.

Amendment has its own text. A reasonable observer at the time of the Fourth Amendment's ratification in 1791 would have read that text to draw meaning from its words. That brings us to the drafting and ratification of the Fourth Amendment. What would a reasonable observer in 1791 have believed the limit on "searches" of "persons, houses, papers, and effects" to be? What if any principle beyond physical entry into particular spaces would count?

The drafting and ratification history unfortunately sheds no particular light on this question. The materials are too sparse, and the particular words are too general, to have a clear meaning beyond the basic concerns from *Entick, Wilkes*, and Otis's argument in the *Writs of Assistance* case. We can see this by starting with the state constitutions that served as models for the Fourth Amendment, then consider the Fourth Amendment's drafting history, and conclude with contemporary dictionary definitions of the key terms.

The federal Fourth Amendment was inspired by state constitutions that had enacted prohibitions relating to general warrants such as those condemned in *Entick* and *Wilkes*. The first such provision appeared in 1776 in the form of Virginia's Declaration of Rights, drafted by George Mason.¹⁰⁹ It adopted a search and seizure provision focused narrowly on prohibiting general warrants:

That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive and ought not to be granted.¹¹⁰

The language here seems closely tied to *Entick, Wilkes*, and Otis's argument in the *Writs of Assistance* case. General warrants are prohibited.

Pennsylvania's 1776 constitution elaborated on the concept by adding a prefatory clause. It stated:

That the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure, and therefore warrants without oaths or affirmations first made, affording a sufficient

109. NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 79 (1937).

110. VA. DECLARATION OF RIGHTS of 1776, art. X.

foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are contrary to that right, and ought not to be granted.¹¹¹

Unlike Virginia's effort, the Pennsylvania text identifies what the prohibition on general warrants would address—specifically, “a right” of “the people” to “hold themselves, their houses, papers, and possessions free from search and seizure.”¹¹² Most of the language that ended up in the Fourth Amendment can be found here. But the primary focus on general warrants remained.

Massachusetts added a search and seizure provision in its 1780 constitution that echoed the Pennsylvanian language by stating a general right against searches and seizures—here, for the first time, described as a right against “unreasonable” searches and seizures—and describing what it covered, a subject's “person,” “houses,” “papers,” and “all his possessions.”¹¹³ Drafted by John Adams,¹¹⁴ the full text stated:

Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.¹¹⁵

The Massachusetts language seems largely equivalent to—if less concise than—the Fourth Amendment that was ratified a decade or so later.

Let's turn to that federal effort. The direct inspiration for the Fourth Amendment were the debates over the ratification of the U.S. Constitution. The ratification debates led to calls for the enactment of

111. PENN. CONST. OF 1776, art. X.

112. *Id.*

113. MASS. CONST. art. XIV.

114. Clancy, *supra* note 102, at 980–81.

115. MASS. CONST. art. XIV.

a bill of rights resembling those in state constitutions.¹¹⁶ During Virginia's 1788 convention to vote on the ratification of the Constitution, for example, Patrick Henry spoke against ratification in part on the ground that the Constitution contained no protections against unreasonable searches and seizures.¹¹⁷ Henry's concerns largely mirrored Otis's arguments from the *Writs of Assistance* case in being specifically about protecting the home.¹¹⁸

In response to objections such as Henry's, the Virginia convention that ratified the U.S. Constitution recommended in 1788 that Congress should consider enacting a bill of rights.¹¹⁹ Virginia's proposed language for a search and seizure provision echoed the 1780 Massachusetts text, stating that "every freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers, and property."¹²⁰ New York's ratifying convention endorsed that language, declaring that "every Freeman has a right to be secure from all unreasonable searches and seizures of his person his papers or his property."¹²¹

This brings us, finally, to the federal Fourth Amendment. James Madison drafted and introduced the language that would become the Fourth Amendment.¹²² The version he submitted to the House of Representatives for consideration in 1789 read as follows:

The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without

116. See PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788*, at 459-64 (2010).

117. See Patrick Henry, *Debates, the Virginia Convention (June 16, 1788)*, in 10 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 1301 (John P. Kaminski & Gaspare J. Saladino eds., State Historical Society of Wisconsin, 1993).

118. Henry argued: "Suppose an exciseman will demand leave to enter your cellar or house, by virtue of his office; perhaps he may call on the militia to enable him to go. If Congress be informed of it, will they give you redress?" *Id.* Protections were needed to prevent the exciseman from "go[ing] into your cellars and rooms, and search[ing], ransack[ing] and measur[ing], every thing you eat, drink and wear." *Id.* at 1331.

119. 3 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 657 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott & Co. 1888) (1836).

120. *Id.* at 658.

121. 23 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 2328 (John P. Kaminski et al. eds., 2009).

122. See LASSON, *supra* note 109, at 100 & n.77.

probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.¹²³

Madison's 1789 proposal broke no new ground insofar as constitutional scope is concerned.¹²⁴ The "right to be secure from all unreasonable searches" was from the 1780 Massachusetts constitution.¹²⁵ The Massachusetts language had been recommended by the Virginia and New York ratifying conventions in 1788.¹²⁶ Madison's initial draft also applied to "their persons, their houses, their papers, and their other property," which was functionally identical to the list of protected items in the Massachusetts constitution and the Virginia and New York recommendations.¹²⁷

Madison's initial proposal underwent only very minor changes before being enacted. The Committee of Eleven, made up of representatives of each state, slightly altered the language.¹²⁸ Unfortunately, no explanations exist for why the changes were made.¹²⁹ But three changes stand out. First, and most significantly, the phrase "other property" was replaced with "effects." That is, the new language offered protection to the people in their persons, houses, papers, and "effects" instead of in their persons, houses, papers, and "their other property." Dictionaries of the era defined "effects" as "personal property, and particularly . . . goods or moveables."¹³⁰ Second, the word "all" was removed so that the protection against "all unreasonable searches and seizures" became a protection against "unreasonable searches and seizures." This was presumably a nonsubstantive change, as the word "all" seems redundant. Finally, the

123. 1 ANNALS OF CONG. 452 (1789) (Joseph Gales ed., 1834).

124. It did break new ground in the warrant clause, however, by stating expressly that warrants required probable cause. See LASSON, *supra* note 109, at 100.

125. MASS. CONST. art. XIV.

126. See *supra* notes 113–115, 120–121.

127. See *supra* notes 119–122.

128. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 710 (1999).

129. See Davies, *supra* note 128, at 710–12.

130. Judge Luttig, in *Altman v. City of High Point*, cited the following dictionary sources:

Dictionarium Britannicum (Nathan Baily ed., 1730) (defining "effects" as "the goods of a merchant, tradesman, & c"); Samuel Johnson, *A Dictionary of the English Language* (1755) (defining the plural of "effect" as "Goods; moveables"); 1 Noah Webster, *First Edition of an American Dictionary of the English Language* (1828) (defining "effect" as "[i]n the plural, effects are goods; moveables; personal estate").

330 F.3d 194, 201 (4th Cir. 2003).

right to be “secured” against unreasonable searches and seizures was rephrased as the right to be “secure” against unreasonable searches and seizures. Again, this presumably is just a stylistic change. The end result was the constitutional text ratified on December 15, 1791,¹³¹ that we still have today.

Let’s return to the key question: What would an informed member of the public conclude about the meaning of “searches” of “persons, houses, papers, and effects” in 1791? Very little in the way of specifics, I think. The text of the Fourth Amendment as a whole echoed existing state constitutions in prohibiting general warrants. The famous abuses involving general warrants were focused on physical invasion of homes. The occasional discussion of the language hewed closely to the animating fact patterns from *Entick, Wilkes*, and the *Writs of Assistance* case. But there is nothing in the debates, history, or text of the Fourth Amendment that sheds light on any specific test for what a “search” of “persons, houses, papers, or effects” entails.

A physical intrusion into a house or person surely counted. But no one today disputes that. The important question is what sort of physical intrusion counts. Is merely looking at a house a search? Looking extra closely? Using technology to see what the unaided eye could not see? Obtaining records about someone outside the home that reveals the amount of detail about someone that could be learned by home intrusion? These are the kinds of questions that matter. But the road to the Fourth Amendment’s enactment seems to offer no particular answer.

Nor do the words alone seem to shed any particular light. Take the word “searches.” The 1775 edition of Samuel Johnson’s dictionary¹³² offers four meanings for the noun “search”:

1. Inquiry by looking into every suspected place.
2. Examination.
3. Inquiry; act of seeking: with of, for, or after.
4. Quest; pursuit¹³³

131. *See* *Raffone v. Adams*, 468 F.2d 860, 864 n.4 (2d Cir. 1972) (noting the date on which the Bill of Rights was ratified).

132. SAMUEL JOHNSON, *DICTIONARY OF THE ENGLISH LANGUAGE* (4th ed. 1775).

133. *Id.* (entry for “search; noun”).

These definitions encompass a range of possible meanings. The first definition (“Inquiry by looking into every suspected place”) suggests a physical entry and brings to mind how the agents in *Entick* “broke open the doors to the rooms” of John Entick’s house, “broke open the boxes, . . . and broke the locks thereto affixed, and searched and examined all the rooms.”¹³⁴ The second definition (“Examination”) suggests some sort of close look that might reveal nonobvious facts about an item. The third definition (“Inquiry; act of seeking: with *of*, *for*, or *after*”) suggests more of an effort to find, without requiring an act of entry or approach, but also seems limited to uses paired with *of*, *for*, or *after* that are absent in the constitutional text. Finally, the fourth definition (“Quest; pursuit”) suggests more of a goal than a particular act.

In short, the word “search” in 1775 had the same range of meanings that it has today, from physically rifling through a place to any effort to find something.¹³⁵ The history suggests that physical entry was the paradigmatic example that the public would have understood by the language. That was the issue in the disputes in *Entick*, *Wilkes*, and the *Writs of Assistance* case that motivated the state amendments and then the federal Fourth Amendment. But neither the history nor the words seem to answer whether the public would have understood a broader concept to be appropriate as well.

It’s true we have the changes made by the Committee of Eleven, but it seems to me that they shed no particular light. Consider how the Committee changed what items were protected by the Fourth Amendment, narrowing the coverage from “all property” to only “effects.”¹³⁶ That doesn’t tell us much, as the list of protected items is an unclear mix of places that could be searched and things that could be seized. Textually, the Fourth Amendment applies to both searches and seizures of those items. In cases like *Entick*, for example, the government *searched* the house and then *seized* the papers inside it.¹³⁷ Given that context, it would not have been clear what the enumeration of a protected item was supposed to mean. Was it a thing that could

134. *Entick v. Carrington* (1765) 95 Eng. Rep. 807, 807; 19 Howell’s State Trials 1029, 1030 (KB).

135. See Kerr, *Curious History*, *supra* note 36, at 70 (noting the range of textual meanings of “search”).

136. See *supra* notes 129–130 and accompanying text.

137. See *supra* notes 89–96 and accompanying text.

not be unreasonably searched, or an item that could not be unreasonably seized, or both? Perhaps the change from “all property” to “effects” was meant to limit the Fourth Amendment’s scope, as some have claimed.¹³⁸ Or perhaps it was merely a more specific description of what property could be seized. We can’t know, and an informed member of the public in 1791 would not have known either. The text and history alone cannot furnish the answer.

C. The Common Law Does Not Provide the Needed Answers

Another way to determine the original public meaning might be through a study of the common law of searches and seizures.¹³⁹ The Supreme Court has reasoned that the Fourth Amendment incorporates some common law rules of search and seizure, especially those found in prominent common law treatises.¹⁴⁰ Can common law rules shed light on what would have been understood as searches of persons, houses, papers, or effects? Unfortunately, the common law fails to provide those answers. The issue just didn’t come up, primarily because the law at the time did not focus on what was a search or what items were protected by search rules.

We can appreciate the absence of law on this issue by reviewing the classic common law treatises often relied on by the Supreme Court to understand common law criminal procedure rules.¹⁴¹ The treatises include extensive discussion of topics that today are covered by the Fourth Amendment. But when read today, the treatises seem oddly limited: the discussion of search and seizure rules generally start with a suspect’s arrest instead of with an investigation.¹⁴² That is, the rules

138. See, e.g., Davies, *supra* note 128, at 710–12.

139. See generally WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 602–1791* (2009) (providing historical context of the Fourth Amendment and its meaning).

140. See, e.g., *Wilson v. Arkansas*, 514 U.S. 927, 932–33 (1995) (looking to a discussion of search and seizure law from “[s]everal prominent founding-era commentators” to help determine that the knock-and-announce rule was sufficiently engrained in the law of search and seizure to be considered part of the Fourth Amendment). It was not necessarily just “common law” in the sense of caselaw, as it combined case decisions with statutes over many years. *Id.* at 933. This is a striking lesson from reading the criminal procedure treatises below: the rules stated had a mix of origins, from cases to prior treatises to then-existing practices and other treatises. See *infra* notes 143–60.

141. See *infra* notes 143–60.

142. See *infra* notes 143–60.

begin when a suspect is brought into custody and the chain of events leading to the suspect's trial begins. The government's investigation leading up to the arrest—the part that we care most about today, especially for purposes of identifying “searches”—generally doesn't come up.

Consider one of the most prominent period treatises, William Hawkins's *Pleas of the Crown*.¹⁴³ Reading over Hawkins's treatise,¹⁴⁴ the materials on criminal procedure seem to modern eyes to be conspicuously missing the investigation stage. Hawkins goes into great detail on arrests,¹⁴⁵ starting with arrests by private persons,¹⁴⁶ then arrests by public officers.¹⁴⁷ He then has a page and a half on the rules for breaking into houses to make arrests.¹⁴⁸ Next, he covers the rules for bail,¹⁴⁹ commitment to prison,¹⁵⁰ and liability for escaping prisons.¹⁵¹ But there is almost no mention of what investigative techniques are allowed *before* the suspect's arrest.¹⁵² This is of course what we care about most today. We want to know what the police can do without triggering the Fourth Amendment. But Hawkins says almost nothing about the law of search and seizure before arrests occurred.

The same is true of other period treatises. Blackstone's famous *Commentaries* begins its treatment of criminal procedure with a chapter on arrests, followed by a chapter on commitment and bail.¹⁵³ It then turns to the method of prosecution, indictments, and arraignments.¹⁵⁴ But there is no chapter, and no discussion, on what criminal procedure looked like *before* an arrest occurred. The law was focused on detaining suspects, interrogating them, and bringing them

143. 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN (6th ed. 1787).

144. I am selecting the founding-era 6th edition published in 1787, although other editions around the same time are similar.

145. See HAWKINS, *supra* note 143, at xiii (“The first thing to be done in order to the bringing a criminal to justice is to arrest him.”).

146. *Id.* at 115–28.

147. *Id.* at 128–38.

148. *Id.* at 138–39.

149. *Id.* at 140–79.

150. *Id.* at 179–88.

151. *Id.* at 190–213.

152. The only exception is a very brief mention of the *Wilkes* cases. See *id.* at 131.

153. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 286–97 (4th ed. 1770). The arrest chapter is Chapter 21, while the commitment and bail chapter is Chapter 22. *Id.*

154. *Id.* at 298–325.

to trial. There was no treatment of what investigative steps could be taken before the arrest.

The closest the treatises come to explaining the rules of investigation are the comparatively brief materials on search warrants. Consider the 1793 edition of the four-volume treatise by Richard Burn, *The Justice of the Peace, and the Parish Officer*.¹⁵⁵ Burn's treatise is organized alphabetically by subject. The arrest section is eleven pages long, and it details the rules for how arrests can be made, how much force can be used in making arrests, and what must happen after an arrest occurs.¹⁵⁶ In contrast, the material on search warrants is less than three pages long.¹⁵⁷ It summarizes what Hawkins and the influential English jurist Matthew Hale had written in their respective treatises about the form and execution of warrants, and it includes a sample search warrant form for stolen goods.¹⁵⁸ There is no discussion of what was considered a search.

There are two primary explanations for the absence of coverage on investigatory law that, if it existed, might shed light on what was understood as a search. First, modern-style law enforcement investigations did not exist—or at least were exceedingly rare—in 1791.¹⁵⁹ Today we have a vast law enforcement apparatus that investigates crimes and gathers evidence. Determining what counts as a “search” is essential in our world because it tells us what steps the police can take before triggering constitutional rules. The police are governed by the Fourth Amendment, and what the police can do is in turn governed significantly by what counts as a search.

That was not true in the common law era. At that time, the role of the state in investigating crimes was minimal. Grand juries existed, and a part-time constable might help a private party execute a warrant for stolen goods.¹⁶⁰ But the notion of a full-time police officer did not arise until the nineteenth century.¹⁶¹ Investigations, if they occurred, were

155. The 1793 edition is the 18th edition, edited by John Burn, the son of the original author.
1 RICHARD BURN, *THE JUSTICE OF THE PEACE, AND PARISH OFFICER* (18th ed. 1793).

156. *Id.* at 102–12.

157. *Id.* at vol. 4, 131–33.

158. *See id.*

159. *See* David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1202–08 (1999).

160. *See* Wesley MacNeil Oliver, *The Neglected History of Criminal Procedure, 1850–1940*, 62 RUTGERS L. REV. 447, 449–57 (2010).

161. *See* Sklansky, *supra* note 159.

often conducted by the victims.¹⁶² The idea of police professionally gathering evidence of a crime before making an arrest was foreign to the common law. Warrants could be obtained, but generally only to retrieve stolen goods.¹⁶³ And that means that today's critical question—how much can the government watch and learn about a person without triggering legal oversight—rarely arose.

A second reason the meaning of “search” did not come up was the lack of remedies for searches. Today, a government search begets a remedy—or at least litigation over a remedy—that marks out precise lines of what counts as a search. A person who is searched unlawfully has a range of remedies to pursue. If the search does not lead to evidence, a civil suit can be filed under 42 U.S.C. § 1983 or *Bivens*.¹⁶⁴ If the search leads to evidence and charges, the person searched, now a defendant, can file a motion to suppress. In either context, a common threshold issue for litigation is whether a Fourth Amendment “search” occurred. This leads to many cases on what is a search, and the volume of cases leads to considerable clarity about what counts as one.

Such remedies were nonexistent in 1791 when the Fourth Amendment was ratified. There was no cause of action for unreasonable searches and seizures. The exclusionary rule was not yet established.¹⁶⁵ A subject of a search would need to bring a legal claim against the government agent using some other cause of action, such as a trespass, and the legality of the government's act could be litigated as a defense to liability.¹⁶⁶ In that setting, what counted as a “search” had no legal significance.

D. Katz and the Fourth Amendment's Original Public Meaning

What's the upshot of this history? The lesson, I think, is that a well-informed member of the public at the time of the Fourth Amendment's adoption would have been aware that the language regulated physical

162. See MacNeil Oliver, *supra* note 160.

163. See *id.*

164. See generally *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) (providing an implied right of action for constitutional claims against officers).

165. The history on this question is somewhat complex, as there were hints of an exclusionary rule beforehand. See generally Roger Roots, *The Originalist Case for the Fourth Amendment Exclusionary Rule*, 45 GONZ. L. REV. 1 (2009) (arguing that the common law featured remedies akin to the modern exclusionary rule). However, the exclusionary rule was not expressly adopted by the Supreme Court until *Weeks v. United States*, 232 U.S. 383, 398 (1914).

166. As the discussion in the next Part shows, this was how several of the major disputes that led to the adoption of the Fourth Amendment arose. See *infra* Part II.D.

entry into homes and other listed items such as “effects”—the facts of *Entick*, *Wilkes*, and the *Writs of Assistance* case—without having a sense of whether the language covered any broader principle or method beyond physical entry into those spaces. Whether a broader principle might be implicated by the Fourth Amendment’s limit on “searches” of “persons, houses, papers, and effects,” and, if so, what it might be, simply did not come up. Nothing in the text or history suggested the question, much less an answer.

Times have changed. In our modern world, the Fourth Amendment search doctrine requires a truly astonishing amount of line drawing. Modern policing involves hundreds of different law enforcement techniques that the government might use to gather evidence. In a typical case, the police might consider a dizzying array of techniques enabled by modern technology. They might follow a suspect using a drone;¹⁶⁷ try to see him more clearly by using binoculars; place a GPS device on his car;¹⁶⁸ get his cell-site records;¹⁶⁹ ask neighbors about him; monitor his mail; tap his phone;¹⁷⁰ collect his credit card records; search his car; Google him; go undercover to obtain intimate information;¹⁷¹ and try many other methods. Any Fourth Amendment search doctrine must say which of these technology-enhanced techniques are searches under the Fourth Amendment.

What is an originalist to do? I offer a modest suggestion. Because the new fact patterns requiring answers generally involve new practices and new technologies, and technology can threaten to cut back on the amount of protection that a prior rule guarantees, an originalist seeking a rule that can stand the test of time—that will not threaten the meaning of the Fourth Amendment as technology changes—may seek an approach that aims to provide for technological neutrality. As Justice Scalia explained in *Kyllo v. United States*, the Fourth

167. Cf. *United States v. Knotts*, 460 U.S. 276, 281 (1983) (“A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.”).

168. See, e.g., *United States v. Jones*, 565 U.S. 400, 402, 412 (2012) (holding that secretly installing a GPS device on a suspect’s car is a Fourth Amendment search).

169. See *Carpenter v. United States*, 138 S. Ct. 2206, 2211, 2221 (2018) (holding that compelling at least seven days of cell-site records is a Fourth Amendment search).

170. See, e.g., *Katz v. United States*, 389 U.S. 347, 348 (1967).

171. See, e.g., *Hoffa v. United States*, 385 U.S. 293, 302, 311 (1966) (holding that such conduct is not an unreasonable search subject to Fourth Amendment protections).

Amendment should be interpreted to “assure[] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.”¹⁷²

From this perspective, an originalist seeking to interpret the Fourth Amendment might seek a rule of equivalence: the Fourth Amendment should protect against the physical entry that was the focus of *Entick, Wilkes*, and the *Writs of Assistance* case as well as their modern-day technological equivalents. The question might be this: Given that society uses new technologies in new ways, what kinds of surveillance techniques are the current-day equivalents of physical entry into houses, persons, papers, and effects, that should be treated as searches to maintain the role of the Fourth Amendment as technology changes?

As Part I explained, that is precisely the test that *Katz* provides. Properly understood, the reasonable expectation of privacy test is not a free-floating test into what seems private.¹⁷³ As a close reading of Justice Harlan’s concurrence shows, *Katz* is about identifying which spaces are home-like, or like repositories of protected effects and papers, based on an understanding of how society uses different spaces and how information is stored.¹⁷⁴ From this perspective, the *Katz* test offers a sound construction of the Fourth Amendment search test. *Katz* looks for an equivalent violation to physical entry: a place is protected by the Fourth Amendment when “society is prepared to recognize”¹⁷⁵ an expectation of privacy as “reasonable” because the judgment of what spaces are modern-day “persons, houses, papers, and effects”¹⁷⁶ is not simply a matter of property law.

And in a technological world, the judgment of what counts as a sufficient invasion of that thing to be called a “search” cannot readily be reduced to a simple rule. It requires an assessment of what rises to the modern equivalent of a home invasion or an analogous search of effects, or papers, or persons. That can change as society changes, which was the core issue in *Katz* itself. Recall that *Katz* involved placing a microphone on the top of a phone booth to listen to a suspect’s conversations inside. The first issue in *Katz* was whether a

172. *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

173. *See supra* Part I.B.

174. *See supra* Part I.C.

175. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

176. U.S. CONST. amend. IV.

person using a phone booth to place a call is entitled to constitutional protection. The question, put another way, was whether the public in 1967 used phone booths in a way that made searching a phone booth to listen to private calls the modern equivalent of searching a home, effects, or papers.

This does not require that the place searched must physically resemble a home. Consider *Ex parte Jackson* from 1878,¹⁷⁷ almost a century before *Katz*, in which the Supreme Court concluded that sealed postal letters were entitled to Fourth Amendment protection during transmission through the postal network.¹⁷⁸ “Whilst in the mail,” the Court reasoned, sealed letters were entitled to the same protection against searches as “papers [that] are subjected to search in one’s own household.”¹⁷⁹ The post office obviously was not a person’s home. But whether a sealed letter was inside a home or being carried by a government official entrusted to deliver it without opening it, made no difference. Breaking through the seal of the envelope “invade[d] the secrecy of letters” in the same way “wherever they may be.”¹⁸⁰ The nature of the invasion was the same, as the entrusting of a private letter with a postal carrier did not yield any rights to open the letter.¹⁸¹

The Supreme Court’s caselaw applying the *Katz* reasonable expectation of privacy test can be broadly reconciled with this equivalence understanding. Standing across the street and directing a thermal imaging device to learn the temperature of the inside of a house is akin to a home entry because it reveals details of the home.¹⁸² As long as the government avoids the space right near the home, it is

177. *Ex parte Jackson*, 96 U.S. 727 (1878).

178. *Id.* at 733.

179. *Id.*

180. *Id.*

181. It’s true that the Fourth Amendment expressly protects “papers,” a textual hook that *Jackson* also notes. *Id.* at 733 (“The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be.”). But *Jackson* also stressed that the same “papers” received no Fourth Amendment protection if they were unsealed or otherwise “open to inspection” by postal carriers. *Id.* The fact that the letters were “papers” was not enough: for “the great principle embodied in the fourth amendment of the Constitution” to apply, the letters had to be carried with the understanding that they would “be kept free from inspection.” *Id.* The shared understanding that the postal service was not supposed to open the letters was essential to Fourth Amendment protection. This is the reasonable expectation of privacy concept in all but name.

182. *See Kylo v. United States*, 533 U.S. 27, 40 (2001).

merely observing from outside, and no search occurs (the so-called open-fields doctrine).¹⁸³ A person does not retain Fourth Amendment rights in what they knowingly disclose to others (the so-called “third-party doctrine”).¹⁸⁴ Placing a beeper in someone’s property that reveals where they are in their home is a search.¹⁸⁵ All of these cases are consistent with the notion of *Katz* as a modern-day technological equivalence test that roughly maintains prior levels of Fourth Amendment rights as technology changes.

From this perspective, *Katz* can be understood as an originalist search inquiry that internalizes equilibrium adjustment.¹⁸⁶ When the Supreme Court engages in equilibrium adjustment, it adjusts the scope of Fourth Amendment protections as technology and social practice change to maintain the role of the Fourth Amendment over time.¹⁸⁷ The reasonable expectation of privacy test serves this function for searches: in effect, it interprets “persons, houses, papers, and effects” at a level of generality that enables the Supreme Court to identify current technological equivalents of framing-era invasions. The facts of the present are very different from those in 1791. But *Katz* enables the original role of the Fourth Amendment’s search doctrine to be maintained as new technologies and social practices alter the dynamics of government investigations.

The body of Fourth Amendment search caselaw is vast, and no single theory can explain every case. This prompts the question, are there any prominent cases inconsistent with my approach? The reasoning of *Illinois v. Caballes*¹⁸⁸—although not necessarily its result—is one candidate. *Caballes* held that using a drug-sniffing dog outside of a car to smell for illegal drugs inside the car is not a search.¹⁸⁹ The Court reasoned that the sniff would not reveal a fact that justified privacy protection: it could reveal only the presence or absence of

183. See *United States v. Dunn*, 480 U.S. 294, 300 (1987).

184. See *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979).

185. See *United States v. Karo*, 468 U.S. 705, 719 (1984).

186. See generally Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 480 (2011) (introducing the theory of equilibrium-adjustment).

187. See *id.* at 480–88.

188. *Illinois v. Caballes*, 543 U.S. 405 (2005).

189. *Id.* at 410 (“A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.”).

contraband, neither of which were private facts that alone justified constitutional protection.¹⁹⁰

Under my approach, *Caballes* should have focused instead on whether a dog sniffing the air in a public place near the suspect's "effect" of the car was a virtual entry into that effect.¹⁹¹ The result in *Caballes* seems at least plausible from that perspective. The odor of marijuana reflected marijuana particles in the air, and it was detected in a public place without entry or learning anything about what was exclusively inside the car.¹⁹² In my view, *Caballes* should have focused on whether the effect was effectively intruded upon and not whether the facts learned were sufficiently private. But this is a quibble as to reasoning rather than result. And it is only one case in an ocean of Fourth Amendment rulings that is overwhelmingly consistent with the textualist and originalist understanding of *Katz*.

III. RESPONSES TO PROPOSED TEXTUALIST AND ORIGINALIST ALTERNATIVES TO *KATZ*

Prominent judges and scholars have recently advocated replacing *Katz* with textualist or originalist alternatives. This Part addresses those alternatives. It contends that the purported textualist or originalist alternatives to *Katz* are no more textualist or originalist than *Katz*. In several cases, the proclaimed alternatives are *Katz* in disguise, rejecting *Katz* in form but embracing *Katz* in substance. And in other cases, purportedly originalist alternatives to *Katz* reflect considerable departures from history unpersuasively presented as originalist.

This Part takes on four of the prominent alternatives: two from Justices, and two from scholars. The first is Justice Antonin Scalia's trespass or physical intrusion test adopted by the Court in *United States*

190. *Id.* at 409–10.

191. A car, the Supreme Court has held, is an "effect." *See United States v. Jones*, 565 U.S. 400, 404 (2012) ("It is beyond dispute that a vehicle is an 'effect' as that term is used in the Amendment.").

192. The opposite result is also plausible, I think. The dog's unusual olfactory powers could be seen as a technological tool to virtually expose what is in the car. *See Florida v. Jardines*, 569 U.S. 1, 12 (2013) (Kagan, J., concurring) (describing a drug-sniffing dog as "a super-sensitive instrument, which [the police] deployed to detect things inside that they could not perceive unassisted").

*v. Jones*¹⁹³ and *Florida v. Jardines*.¹⁹⁴ The second is Justice Neil Gorsuch’s approach articulated in his dissenting opinion in *Carpenter v. United States*.¹⁹⁵ The third is Professor Jeffrey Bellin’s recent argument in favor of Fourth Amendment textualism.¹⁹⁶ Each of these theories is easily reconciled with *Katz*. The last alternative considered is the positive law model of the Fourth Amendment offered by Professors Will Baude and James Stern,¹⁹⁷ which is difficult to see as originalist.

A. Justice Scalia’s Alternatives in *Jones* and *Jardines*

Justice Scalia was an early and strong critic of the *Katz* test, and late in his career he led the Court in recognizing an alternative. But a close look at the alternative—or really, the two alternatives—shows that they are hardly a departure from *Katz*. Scalia rephrased the *Katz* inquiry, but his two alternatives are not obvious departures from the *Katz* test.

Start with *United States v. Jones*. Agents placed a GPS device on the underbody of a car Antoine Jones drove and tracked his location for twenty-eight days.¹⁹⁸ Writing for the Court, Scalia reasoned that a search occurred because “[t]he [g]overnment ‘physically occupied private property for the purpose of obtaining information.’”¹⁹⁹ Although the facts were modern, “such a physical intrusion would have been considered a ‘search’ within the meaning of the Fourth Amendment when it was adopted,” he concluded, citing *Entick*.²⁰⁰ Scalia reasoned that a historical strand of the search inquiry was “exclusively property-based,”²⁰¹ and in particular was based on “common-law trespass.”²⁰² Attaching a GPS device to the “effect”²⁰³ of a car was “trespassory,”²⁰⁴ Scalia reasoned, and doing so with the intent

193. *Jones*, 565 U.S. at 406–08.

194. *Jardines*, 569 U.S. at 5.

195. *Carpenter v. United States*, 138 S. Ct. 2206, 2261–72 (2018) (Gorsuch, J., dissenting).

196. See Bellin, *supra* note 11, at 237–40.

197. See Baude & Stern, *supra* note 11, at 1825–26.

198. *Jones*, 565 U.S. at 403.

199. *Id.* at 404.

200. *Id.* at 404–05.

201. See *id.* at 405.

202. *Id.*

203. See *id.* at 411.

204. See *id.* at 409.

to obtain information rendered it a search.²⁰⁵ And all of this was outside the *Katz* reasonable expectation of privacy test, Scalia insisted: “[T]he *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test.”²⁰⁶

But how different is Scalia’s trespass test in *Jones* from *Katz* itself? The two cases are strikingly similar. In *Katz*, the FBI taped a microphone to a phone booth to listen to conversations. In *Jones*, agents fastened a GPS device to a car to record its whereabouts. In both cases, there was a physical intrusion into a constitutionally protected item. The phone booth became *Katz*’s protected space while he made the call by placing the coin in the phone and using it with the phone company’s permission, just like the car was *Jones*’s effect when he borrowed it from his wife with her permission.²⁰⁷ *Katz* was not written in a textually focused way. *Jones* was. But the two cases are close cousins. *Jones* could have been written as a *Katz* case as easily as *Katz* could have been written as a *Jones* case.

Further, *Jones*’s apparent foundation in pre-*Katz* common law turns out to be faulty. As I have detailed at length in prior scholarship, there was no common law trespass test before *Katz*.²⁰⁸ The caselaw before *Katz* relied on a mix of privacy and property reasoning that largely echoes the *Katz* era.²⁰⁹ The first Supreme Court decision to apply a common law trespass test was *Jones* itself.²¹⁰ And even if such a test existed, *Jones* does not explain why installing a GPS device on *Jones*’s car would have been a common law trespass. That conclusion is simply announced, not analyzed. How far *Jones* differs from *Katz* remains unclear.

Scalia next applied his approach in *Florida v. Jardines*.²¹¹ Officers walked a drug-sniffing dog up onto the porch and front door of a home in an effort to sniff for narcotics inside.²¹² Writing for the Court, Scalia held that a search occurred because officers “physically intrud[ed] on” a “constitutionally protected area[]” outside of any “implied

205. *See id.* at 404.

206. *Id.* at 409.

207. *See id.* at 402 (noting that the car was “registered to *Jones*’s wife”).

208. *See Kerr, Curious History, supra* note 36, at 70–90.

209. *See id.*

210. *See id.* at 69.

211. *Florida v. Jardines*, 569 U.S. 1, 10–11 (2013).

212. *Id.* at 3–4.

license.”²¹³ Because the porch was part of the curtilage of the home, an area traditionally considered part of the home, walking up onto the porch was a physical intrusion into the home.²¹⁴ And because there was no “customary invitation” for “a trained police dog to explore the area around the home in hopes of discovering incriminating evidence,” the conduct exceeded any implied license and was a Fourth Amendment search.²¹⁵

Two things stand out about *Jardines*. First, its failure to mention trespass leaves the doctrine especially muddled. *Jones* focused on “common-law trespass” but also mentioned “physical intrusion.” This suggested that the search test was probably common-law trespass, of which physical intrusion was an example. But it left uncertain whether the test might simply be physical intrusion. In contrast, *Jardines* speaks exclusively of physical intrusion and never mentions trespass. It’s not obvious what to make of the terminological switch. Perhaps the test that emerges from *Jones* and *Jardines* is just physical intrusion, with *Katz* bolstering the search test to cover technologically enhanced equivalents such as *Kyllo*’s thermal imaging surveillance that revealed details of the inside of the home.²¹⁶ Or perhaps the *Jones/Jardines* test is an independent trespass test, using some version of trespass doctrine,²¹⁷ that will also encompass acts of physical intrusion.

Second, the *Jardines* “implied license” test closely resembles the societal expectations inquiry from *Katz*.²¹⁸ *Katz* asks what “society is prepared to recognize as ‘reasonable,’”²¹⁹ while *Jardines* asks judges to identify “customary invitation[s]”²²⁰ based on “the habits of the country.”²²¹ If there are any differences, they are modest ones. As Justice Elena Kagan noted in her *Jardines* concurrence, deciding the *Jardines*’ case on *Katz* grounds “would have looked . . . well, much like this one.”²²² Given that property and privacy interests in a home tend

213. *Id.*

214. *Id.* at 6–7.

215. *Id.* at 9.

216. *See Kyllo v. United States*, 533 U.S. 27, 29–30 (2001).

217. *See Kerr, Curious History*, *supra* note 36, at 90–93 (exploring the uncertainty about what trespass test applies under *Jones*).

218. *See Jardines*, 569 U.S. at 10.

219. *See Katz v. United States*, 389 U.S. 347, 361 (Harlan, J., concurring).

220. *Jardines*, 569 U.S. at 9.

221. *Id.* at 8 (quoting *McKee v. Gratz*, 260 U.S. 127, 136 (1922)).

222. *Id.* at 13 (Kagan, J., concurring).

to match, a decision framed one way “runs mostly along the same path”²²³ as a decision framed the other way.

Viewing the cases together, it is not clear how much or even whether *Jones* and *Jardines* differ from *Katz*. Although *Jones* and *Jardines* were written to be distinct from *Katz*, their overlap in practice is substantial. The facts of *Jones* closely resemble the facts of *Katz*, and the special expectations language from *Katz* closely resembles the implied license inquiry from *Jardines*. Indeed, almost a decade after *Jones* and *Jardines*, it is still difficult to identify situations in which their introduction actually changed the outcome of any cases. *Jones* and *Jardines* give courts a second ground to consider when evaluating what is a Fourth Amendment search, but the difference between that and *Katz* may be more of form than substance.²²⁴

The similarities between *Katz* and *Jones/Jardines* suggest two possible reconciliations. As noted above, perhaps they are just two sides of the same coin: *Jones* and *Jardines* cover physical intrusion, while *Katz* expands beyond physical intrusion to include its technologically enhanced functional equivalents. Alternatively, perhaps *Jones* and *Jardines* adopt a particular approach to trespass that acts as a property-based variant of *Katz*. On that view, perhaps *Jones* and *Jardines* are a particular rule-based fulfillment of *Katz*'s traditional respect for property law.²²⁵ However the cases are reconciled, we are playing variations on a theme rather than a new melody.

223. *Id.* at 14.

224. Notable cases that have found rights under *Jones/Jardines* but not *Katz* have tended to be ones where both are close calls. For example, *United States v. Dixon*, 984 F.3d 814, 819–20 (9th Cir. 2020), ruled that inserting a key in a lock is a search under a *Jones* property-analysis even though earlier circuit precedent had held that it was not a search under *Katz*. This is a hard issue under both frameworks, however, and for similar reasons. Under *Jones/Jardines*, the question is whether inserting the key is beyond the implied license. *See supra* text accompanying notes 211–215. Under *Katz*, the analogous question is whether the inside of the lock is deemed exposed or hidden based on social norms and practices. *See, e.g.*, *United States v. Lyons*, 898 F.2d 210, 212 (1st Cir. 1990) (noting that “because public exposure vitiates any reasonable expectation of privacy[.] . . . whether trying the key in order to identify the lock’s owner was a ‘search’ is a tricky question”). As in *Jardines*, the inquiries are similar.

225. *See, e.g.*, *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978) (“One of the main rights attaching to property is the right to exclude others, see W. Blackstone, *Commentaries*, Book 2, ch. 1, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude.”).

B. Justice Gorsuch's Approach in Carpenter

We turn next to Justice Neil Gorsuch's separate opinion in *Carpenter v. United States*. In *Carpenter*, the Court applied the reasonable expectation of privacy test to hold that compelling a cell service provider to disclose at least seven days' worth of a person's historical cell-site location records was a Fourth Amendment search.²²⁶ Gorsuch filed a dissent to the Court's reasoning rather than to its result.²²⁷ Gorsuch's opinion has two parts that are relevant to this Article. First, he rejected *Katz* on the ground that it was not consistent with originalism.²²⁸ Second, he proposed that courts should adopt a new Fourth Amendment search test that would be consistent with an originalist approach.²²⁹ A close look at Gorsuch's opinion suggests, however, that his quest to find an originalist standard leads back where he started. Gorsuch's insights into what an originalist search test might look like ends up inadvertently calling for the adoption of *Katz*.

Gorsuch's critique of *Katz* starts with familiar ground. Instead of basing Fourth Amendment law on real law, Gorsuch argues, the Supreme Court in *Katz* "chose . . . to protect privacy in some ethereal way dependent on judicial intuitions."²³⁰ Gorsuch acknowledges that he was not sure if the test was descriptive or normative: Did it ask, "what privacy expectations do people *actually* have" or "what expectations *should* they have?"²³¹ But either is problematic, in his view. If the test is descriptive, it is a failure. Judges do not know what expectations of privacy people actually have, and therefore often apply the test incorrectly.²³² And if the test is normative, then it is a "pure

226. See *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018) ("[W]e hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI. The location information obtained from Carpenter's wireless carriers was the product of a search." (footnote omitted)).

227. Justice Gorsuch contended that the petitioner had waived the claim that collecting cell-site location information was a search for any reason other than that it violated a reasonable expectation of privacy under *Katz*. See *id.* at 2272 (Gorsuch, J., dissenting). Because Gorsuch rejected *Katz*, the sole issue he saw as before the Court, he dissented. Gorsuch then offered thoughts on what a non-*Katz* Fourth Amendment search test might have looked like had the Court been able to reach it. See *id.* Because Gorsuch's approach seems sympathetic to the result reached by the majority, his opinion is technically a dissent but reads more like a concurrence.

228. See *id.* at 2264.

229. See *id.* at 2267–68.

230. See *id.* at 2264–65.

231. *Id.* at 2265.

232. *Id.*

policy choice . . . that calls for the exercise of raw political will belonging to legislatures, not the legal judgment proper to courts.”²³³

So what should be applied instead of *Katz*? Gorsuch starts on solid ground with text and history. The framers were inspired by *Entick*, *Wilkes*, and the *Writs of Assistance* case, which led them to choose “to protect privacy in particular places and things—‘persons, houses, papers, and effects’—and against particular threats—‘unreasonable’ governmental ‘searches and seizures.’”²³⁴ So far, so good. But then Justice Gorsuch claims that before *Katz* came around, there was a real constitutional test for what was a search:

From the founding until the 1960s, the right to assert a Fourth Amendment claim didn’t depend on your ability to appeal to a judge’s personal sensibilities about the “reasonableness” of your expectations or privacy. It was tied to the law.²³⁵

Gorsuch cites *United States v. Jones*²³⁶ and *Florida v. Jardines*²³⁷ in support of his claim that the Fourth Amendment used to be “tied to the law.”²³⁸ According to Gorsuch, *Jones* and *Jardines* reflected a “traditional approach,” “[t]rue to th[e] words” of the Fourth Amendment “and their original understanding,” that “asked if a house, paper or effect was *yours* under law.”²³⁹

But what exactly was this “traditional approach” that was “true” to the text and the original understanding? Here’s the tricky part. After confidently announcing that a real originalist and textualist test had existed, Gorsuch can’t come up with a description of it. Instead, he presents the traditional test as a puzzle left to be solved in the future:

Given the prominence *Katz* has claimed in our doctrine, American courts are pretty rusty at applying the traditional approach to the Fourth Amendment. We know that if a house, paper, or effect is yours, you have a Fourth Amendment interest in its protection. But what kind of legal interest is sufficient to make something *yours*? And what source of law determines that? Current positive law? The

233. *Id.*

234. *Id.* at 2264.

235. *Id.* at 2267.

236. *United States v. Jones*, 565 U.S. 400 (2012).

237. *Florida v. Jardines*, 569 U.S. 1 (2013).

238. *Carpenter*, 138 S. Ct. at 2267 (Gorsuch, J., dissenting).

239. *Id.* at 2267–68.

common law at 1791, extended by analogy to modern times? Both? . . . Much work is needed to revitalize this area and answer these questions. I do not begin to claim all the answers today, but (unlike with *Katz*) at least I have a pretty good idea what the questions *are*.²⁴⁰

Gorsuch presents this inability to state the traditional test as judicial modesty. “American courts are pretty rusty at applying” the test, he contends, and “[m]uch work is needed to revitalize this area and answer” what the test is.²⁴¹ But legal doctrine isn’t like muscle memory that needs revitalization after a period of dormancy. If there was a test as a matter of history, every resource explaining it is a few keystrokes away. This Article has shown the real challenge Gorsuch confronted in *Carpenter*: there simply is no “traditional approach” to apply other than *Katz* itself. The *Katz* test that Gorsuch rejected is entirely consistent with the history and text that Gorsuch is hoping to follow.

We can see this problem in Gorsuch’s subsequent explanation of the factors that he thinks should go into this traditional test. They turn out to be the same questions and factors the Supreme Court has considered when interpreting *Katz*. After scoffing at *Katz* as mere judicial invention, Gorsuch introduces a few notions of his own that strongly echo *Katz*. These suggestions are best understood not as replacements for *Katz* but as a reframing of it using more explicitly textual and historical language. Bringing out the historical and textual basis of *Katz* seems helpful; indeed, it is a large part of the goal of this Article. But it’s helpful to understand that Gorsuch’s effort is repeating *Katz*, not replacing it.

Consider the guidance that Gorsuch offers. First, “complete ownership or exclusive control of property” should probably not be a “necessary condition to the assertion of a Fourth Amendment right.”²⁴² For a home, for example, something less than “fee simple title” suffices: “People call a house ‘their’ home when legal title is in the bank, when they rent it, and even when they merely occupy it rent free.”²⁴³ He writes, “[t]hat is why tenants and resident family

240. *Id.* at 2268.

241. *Id.*

242. *Id.* at 2269.

243. *Id.* (citing *Minnesota v. Carter*, 525 U.S. 83, 95–96 (1998) (Scalia, J., concurring)).

members—though they have no legal title—have standing to complain about searches of the houses in which they live.”²⁴⁴

This is true, of course, under *Katz*. In applying *Katz*, the Supreme Court has considered whether a person has enough of a relationship with the property for it to be considered theirs.²⁴⁵ For example, in *Minnesota v. Olson*,²⁴⁶ an overnight guest was deemed to have a reasonable expectation of privacy because prevailing social norms recognize that the overnight guest is ordinarily treated as a person who (temporarily) lives there.²⁴⁷ And of course this was exactly the problem that *Katz* answered: How much relationship did Charlie Katz need to have Fourth Amendment rights in the telephone booth? The answer was when the booth was effectively his: when he “occupies [the phone booth], shuts the door behind him, and pays the toll that permits him to place a call.”²⁴⁸

Gorsuch next contends that if you ask someone to hold your property for you, you should maintain Fourth Amendment rights in that property.²⁴⁹ This is a common law bailment, Gorsuch contends, and Fourth Amendment law should recognize that common law principle.²⁵⁰ But it already does, under *Katz*. If you ask a friend to hold your bag, you retain a reasonable expectation of privacy in it.²⁵¹ Same if you leave a bag with a grocery store clerk while you go shopping,²⁵² or at a baggage counter if you leave it there.²⁵³ You retain a reasonable expectation of privacy as long as you keep the contents of the bag hidden from the person holding it. This is the same principle underlying *Ex parte Jackson* from 1878, the postal mail case discussed earlier: the

244. *Id.* at 2269–70.

245. *See, e.g.*, *Minnesota v. Olson*, 495 U.S. 91, 93, 96–97 (1990).

246. *Id.*

247. *See id.* at 99 (“[W]hen the host is away or asleep, the guest will have a measure of control over the premises. . . . [I]t is unlikely that [the host] will admit someone who wants to see or meet with the guest over the objection of the guest.”).

248. *Katz v. United States*, 389 U.S. 347, 352 (1967).

249. *Carpenter*, 138 S. Ct. at 2270 (Gorsuch, J., dissenting).

250. *See id.* at 2268–69.

251. *See United States v. Presler*, 610 F.2d 1206, 1213–14 (4th Cir. 1979) (finding a reasonable expectation of privacy in locked briefcases stored with the defendant’s friend for safekeeping).

252. *See United States v. Most*, 876 F.2d 191, 192, 197–98 (D.C. Cir. 1989) (finding a reasonable expectation of privacy in the contents of a plastic bag left with a grocery store clerk).

253. *See United States v. Barry*, 853 F.2d 1479, 1481–83 (8th Cir. 1988) (finding a reasonable expectation of privacy in a locked suitcase stored at an airport baggage counter).

condition that the holder cannot inspect the contents of the sealed item results in full retention of Fourth Amendment rights.²⁵⁴

Gorsuch next suggests that “positive law may help provide detailed guidance on evolving technologies.”²⁵⁵ By positive law, Gorsuch means legal principles outside Fourth Amendment law, such as statutory privacy laws.²⁵⁶ Looking to outside law for guidance on what counts as a search “may be appropriate for the Fourth Amendment.”²⁵⁷ But it already is, under *Katz*. As I have explained in depth elsewhere,²⁵⁸ the “positive law model” is an existing approach to interpreting *Katz*. Under this approach, courts sometimes argue that existing statutes or the common law help define reasonable expectations of privacy.²⁵⁹ Gorsuch’s new suggestion has long been part of the *Katz* test.

Gorsuch finally warns that reliance on positive law perhaps should not always matter, even if it is possibly relevant. “[W]hile positive law may help establish a person’s Fourth Amendment interest,” he writes, “there may be some circumstances where positive law cannot be used to defeat it.”²⁶⁰ In particular, legislatures should not be able to legislate away Fourth Amendment privacy interests. Regardless of positive law, the Fourth Amendment should protect the “modern analogues” to “the specific rights known at the founding,”²⁶¹ such as entry into a home. Again, this already is the case under *Katz*. And the notion of considering positive law and rejecting efforts to legislate away privacy is already found in the *Katz* caselaw.²⁶²

Katz has long been portrayed as a nontextual, nonoriginalist decision. We can understand why an originalist such as Gorsuch would disapprove of the way *Katz* is expressed. But it is telling that when

254. See *supra* notes 178–181 and accompanying text (discussing *Ex parte Jackson*, 96 U.S. 727 (1877)).

255. *Carpenter*, 138 S. Ct. at 2270 (Gorsuch, J., dissenting).

256. See *id.*

257. *Id.*

258. Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 516–18 (2007) [hereinafter Kerr, *Four Models*].

259. See *id.*

260. *Carpenter*, 138 S. Ct. at 2270 (Gorsuch, J., dissenting).

261. *Id.* at 2271.

262. See Kerr, *Four Models*, *supra* note 258, at 516–18; see also Orin S. Kerr, *The Effect of Legislation on Fourth Amendment Protection*, 115 MICH. L. REV. 1117, 1125–35 (2017) (discussing how existing caselaw approaches the impact of legislation on the scope of Fourth Amendment protection).

Gorsuch has the opportunity to chart out what a textualist, originalist Fourth Amendment search doctrine would look like, he offers a string of principles that largely encapsulates the *Katz* doctrine. A close engagement with text and history leads us back to *Katz*.²⁶³

C. *Professor Bellin's Fourth Amendment Textualism*

We turn now to scholarly alternatives to *Katz*, and in particular, scholarly alternatives to *Katz* that are framed as originalist or textualist. The first example is articulated in Professor Jeffrey Bellin's recent article, "Fourth Amendment Textualism."²⁶⁴ Although presented as a first-principles rethinking of Fourth Amendment law in contrast to the "made-up" and unpredictable *Katz* test, Bellin's textual and historical approach replicates existing doctrine under the reasonable expectation of privacy test. Much like Gorsuch's opinion in *Carpenter*, Bellin's textualist and originalist alternative to *Katz* ends up taking us back to *Katz*.

Bellin's criticism of *Katz* resembles Gorsuch's. You know the argument by now: the doctrine is entirely circular, leaves each decision to the policy whims of judges, and has no historical or textual basis.²⁶⁵ In its place, Bellin argues that courts should root Fourth Amendment law in the text of the Fourth Amendment as interpreted by its founding-era history.²⁶⁶ According to Bellin, a textual and historical approach produces clear and stable answers firmly rooted in the law.²⁶⁷

Bellin interprets the Fourth Amendment textually in three parts: first, he covers "searches"; second, he addresses "persons, houses, papers, and effects"; and third, he includes the limit of the word "their." To arrive at a textual definition of searches, Bellin reviews the

263. Professor Laura K. Donohue's effort to use the concepts from Justice Gorsuch's *Carpenter* opinion to craft a new search test inadvertently echoes the point. See Laura K. Donohue, *Functional Equivalence and Residual Rights Post-Carpenter: Framing a Test Consistent with Precedent and Original Meaning*, 2018 SUP. CT. REV. 347, 389, 400. After working through Gorsuch's approach and largely endorsing and expanding upon his insights, Donohue arrives at "a property-based approach, which, happily, is compatible with both precedent and the original meaning of the text." *Id.* at 408. If precedent, original meaning, and a Gorsuch-based property approach are all "compatible," this seems to be a debate more about form than substance.

264. Bellin, *supra* note 11.

265. See *id.* at 243, 251, 253–54, 282.

266. See *id.* at 238 ("All the Court needs is a dictionary, a touch of history, and some common sense.").

267. See *id.* at 282.

framing-era history of search doctrine (such as *Entick, Wilkes*, and the *Writs of Assistance* case) and framing-era dictionaries. These materials suggest a definition, Bellin argues: “A ‘search,’ as contemplated in the Fourth Amendment, is *an examination of an object or space to uncover information.*”²⁶⁸ “[E]xamination,” in Bellin’s view, includes (a) “open[ing] [an item] and look[ing] inside” and (b) any physical “manipulation of an item,” but (c) does not include a mere “gaze in the direction of a phenomenon of interest.”²⁶⁹

Applying these principles brings Bellin to a few conclusions. A Fourth Amendment search occurs in a few important situations: “when police enter residences, offices, and cars looking for information”; “when they look inside a bag, pat down someone’s pockets, or manipulate a smart phone to access the data inside”; when they use “metal detectors or heat sensors”; when they “[t]ap[] into wires to access digital information”; and when they “intercept electronic signals travelling through the air.”²⁷⁰

Of course, a person’s Fourth Amendment rights are only implicated when a search is of their person, house, papers, or effect. These must be defined as well. The meaning of “persons” is obvious, Bellin contends. As a result, “[w]hen police look inside a body cavity, take blood or fingerprints, scrape a cheek for a DNA sample, or administer a breathalyzer test, they conduct a search of the ‘person.’”²⁷¹ “Houses” should include both dwellings and “a whole host of home-like settings,”²⁷² including the curtilage around the house.²⁷³ The term “papers” must be “updated to capture modern practice,”²⁷⁴ Bellin argues, so it includes the contents of all electronic communications but not metadata about those communications.²⁷⁵ And “effects” should, as a matter of history, be defined as “all moveable personal property,”²⁷⁶ which would include luggage, computers, and electronic data.

268. *Id.* at 257.

269. *Id.*

270. *Id.* at 259.

271. *Id.* at 260.

272. *Id.* at 262 (quoting Andrew Guthrie Ferguson, *The Internet of Things and the Fourth Amendment of Effects*, 104 CALIF. L. REV. 805, 857 (2016)).

273. *Id.*

274. *Id.* at 261.

275. *See id.* at 261–62 (“By contrast, electronic information that is not consciously communicated or stored . . . would not constitute one’s ‘papers.’”).

276. *Id.* at 265.

Bellin's final textual lesson is that the possessive "their" that limits the protection of persons, houses, papers and effects is a textual directive that Fourth Amendment rights are personal.²⁷⁷ On its face, Fourth Amendment protections for people only apply to a search of "their" items. Bellin argues that this explains and justifies both Fourth Amendment standing doctrine,²⁷⁸ as well as the basic contours of the third-party doctrine, which holds that a person lacks Fourth Amendment rights in what they have voluntarily disclosed to third parties.²⁷⁹ Echoing a point Justice Clarence Thomas and I have both made,²⁸⁰ Bellin reasons that when a person discloses information to a third party, a search of the third party is ordinarily a search of that third party, not the discloser.²⁸¹

At this point you may be wondering: How far from *Katz* is this? And there's the rub. Although Bellin intends his textual approach as a replacement for *Katz*, it reconstructs *Katz* almost perfectly. Bellin's theory of what the Fourth Amendment would mean if it were only interpreted consistently with its history and text from first principles ends up describing current law almost exactly. His definition of what is a search neatly matches *Katz* and its progeny. His definitions of persons, houses, papers, and effects are also perfect matches with current law. And his reliance on the possessive "their" is a match, too. The results Bellin advocates for under his textualist and originalist approach are strikingly similar to what the Supreme Court has produced by applying *Katz*.

This is not just a coincidence. Bellin has not so much replaced *Katz* as he has inadvertently demonstrated the thesis of this Article: *Katz* is

277. *Id.* at 266–72.

278. This point was made long ago by Justice Scalia, then joined by Justice Thomas. *See Minnesota v. Carter*, 525 U.S. 83, 92 (1998) (Scalia, J., concurring) ("The obvious meaning of the provision is that *each* person has the right to be secure against unreasonable searches and seizures in *his own* person, house, papers, and effects."). Justice Thomas has made the same point more recently, joined by Justice Gorsuch. *See Byrd v. United States*, 138 S. Ct. 1518, 1532 (2018) (Thomas, J., concurring).

279. *See supra* note 184 and accompanying text.

280. *See generally* *Carpenter v. United States*, 138 S. Ct. 2206, 2235 (2018) (Thomas, J., dissenting) (arguing that cellphone metadata generated by service providers belongs to the provider and not the end user); Orin Kerr, Opinion, *How Should An Originalist Rule in the Fourth Amendment Cell Site Case?*, WASH. POST: VOLOKH CONSPIRACY (June 13, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/13/how-should-an-originalist-rule-in-the-fourth-amendment-cell-site-case> [<https://perma.cc/SVK5-6S4W>] (arguing that phone records are not the "papers" or "effects" of the customer but rather of the service provider).

281. *See* Bellin, *supra* note 11, at 268–69.

easily understood as both originalist and textualist. A self-consciously textualist or originalist methodology leads you right back to *Katz*. Both Bellin and I would like the Supreme Court to interpret the Fourth Amendment in a way consistent with its text and original public meaning, and I suspect we would both be satisfied if the Supreme Court were to write its Fourth Amendment opinions in a more explicitly textualist and originalist way. But where we differ is whether that requires a change in substance or a change in form. In Bellin's view, a sea change in doctrine is needed to replace current search law with a textualist approach. But as it happens, that "change" would largely match current law. In my view, current law is already consistent with a textualist and originalist approach. All that is needed is an appreciation of how *Katz* is best understood as consistent with textualism and originalism.

D. Professors Baude and Stern's Positive Law Model

In a *Harvard Law Review* article published in 2016, Professors Will Baude and James Stern advocated for another alternative to *Katz*: the positive law model.²⁸² Baude and Stern's proposal has been cited approvingly by originalist judges considering alternatives to *Katz*. Justice Gorsuch's *Carpenter* dissent quotes it twice,²⁸³ and Gorsuch also mentioned it by name as a possible test at the oral argument for *Byrd v. United States*.²⁸⁴ Baude and Stern's article was also cited prominently in an opinion by Sixth Circuit Judge Amul Thapar that called for a rethinking of the Fourth Amendment doctrine along originalist and textualist grounds.²⁸⁵

The attention paid to Baude and Stern's article in originalist circles naturally prompts the question of whether it provides a serious originalist alternative to *Katz*. The answer is no. Invented by law professors in 2016, the model is unrelated to text, divorced from history, and has no plausible connection to the original meaning of the Fourth Amendment. The bizarre results that the model produces further underscore how far removed it is from Fourth Amendment

282. Baude & Stern, *supra* note 11, at 1823.

283. *Carpenter*, 138 S. Ct. at 2263, 2268 (Gorsuch, J., dissenting).

284. Transcript of Oral Argument at 24, *Byrd v. United States*, 138 S. Ct. 1518 (2018) (No. 16-1371) ("Gosh, it's very complicated. Professors Baude and Stern, among many others, suggest maybe we ought to look back at that property test again. What do you think?").

285. See *Morgan v. Fairfield County*, 903 F.3d 553, 567-75 (6th Cir. 2018) (Thapar, J., concurring in part and dissenting in part).

history. Judges can understand and appreciate *Katz* on textualist and originalist grounds, but they should leave the positive law model in the faculty lounge.

Some context may be helpful. An early article of mine, “Four Models of Fourth Amendment Protection” (“*Four Models*”),²⁸⁶ explained how Supreme Court applications of *Katz* mixed and matched among four different models for what makes an expectation of privacy “reasonable.” Some opinions looked to a *probabilistic model* and considered the likelihood of a privacy invasion.²⁸⁷ Other cases looked to a *private facts model* and considered whether the outcome of the conduct was acquisition of particularly private information.²⁸⁸ In some cases, the Court looked to a *positive law model* and considered whether the government violated a law other than the Fourth Amendment.²⁸⁹ And in most cases, the Justices looked to a *policy model* and considered whether it was desirable to regulate the government practice.²⁹⁰ Supreme Court opinions mixed and matched among the models, sometimes invoking multiple models and sometimes rejecting others.

I argued in *Four Models* that this pluralism was desirable.²⁹¹ In applying the reasonable expectation of privacy test, the Supreme Court distinguished less invasive practices from more invasive practices.²⁹² But there was no universal method to do that. The Court naturally developed proxy tests for distinguishing more invasive practices that accurately tracked invasiveness in some cases but not all cases. Because no one test accurately distinguished more and less invasive practices, the Court couldn’t adopt any one model.²⁹³ Instead, it developed localized models to guide lower courts: the Supreme Court tended to use whatever models accurately divided less from more invasive practices in that kind of case, and then lower courts would reason by analogy and apply those same models to similar cases.²⁹⁴ This allowed the Court to distinguish less and more invasive police practices in a

286. Kerr, *Four Models*, *supra* note 258.

287. *Id.* at 508–12 (describing the probabilistic model and identifying its applications).

288. *Id.* at 512–15 (describing the private facts model and identifying its applications).

289. *Id.* at 516–19 (describing the positive law model and identifying its applications).

290. *Id.* at 519–22 (describing the policy model and identifying its applications).

291. *Id.* at 525–26.

292. *See id.* at 529.

293. *See id.* at 542.

294. *Id.*

decentralized system in which there are thousands of lower court decisions and few Supreme Court rulings.²⁹⁵

In their article, Baude and Stern focus on one of the four models and say it should be the exclusive test for what is a search:

The touchstone of the search-and-seizure analysis should be whether government officials have done something forbidden to private parties. It is those actions that should be subjected to Fourth Amendment reasonableness review and the presumptive requirement to obtain a warrant. In short, Fourth Amendment protection should depend on property law, privacy torts, consumer laws, eavesdropping and wiretapping legislation, anti-stalking statutes, and other provisions of law generally applicable to private actors, rather than a freestanding doctrine of privacy fashioned by courts on the fly.²⁹⁶

Under Baude and Stern’s proposal, courts assessing whether a search (or even a seizure) has been committed should ask this question: “[H]as a government actor done something that would be unlawful for a similarly situated nongovernment actor to do?”²⁹⁷ Put another way, has the government “employ[ed] special legal powers beyond those conferred under generally applicable background law”?²⁹⁸ If they did so through an act “generally likely to obtain information,” it is a search, while if they did so in an act that includes an “assertion of physical control,” Baude and Stern argue, the act is a Fourth Amendment seizure.²⁹⁹

It is worth noting at the outset that Baude and Stern’s test would create startling results. Imagine that a police officer sees a car driving at seventy miles per hour in a forty-miles-per-hour zone. The officer, wanting to catch up to identify the car and driver and write a ticket or make an arrest, speeds at eighty miles per hour to catch the speeder. Under the positive law model, the officer’s speeding would be a “search” that would presumptively require a warrant. This seems odd, as it doesn’t have anything to do with any traditional concerns implicated in the Fourth Amendment. An officer likely can’t stop speeding violations if the officer himself can’t speed to catch speeders.

295. *Id.* at 542–45.

296. Baude & Stern, *supra* note 11, at 1823.

297. *Id.* at 1831 (emphasis omitted).

298. *Id.* at 1832.

299. *Id.* at 1833.

So it seems odd, to put it mildly, that the enactment of speeding laws should make the officer's chase after the speeder a "search."

And is the positive law model even originalist? Baude has said it is,³⁰⁰ although the article itself is noncommittal. Most of Baude and Stern's case for the positive law approach is based on nonoriginalist arguments for why their test is a good one, largely based on a particular theory of the state outside Fourth Amendment law. For example, Baude and Stern base their proposal on the principle that "exemptions from general law stand in tension with liberal notions of political equality and ordered liberty."³⁰¹ This is an interesting claim. But it's a claim rooted in political theory, not the history or text of the Fourth Amendment.

Given the interest among originalists in the positive law model, however, as well as Baude's claim that his theory is originalist, it is worth taking a closer look at the positive law model's originalist bona fides (or lack thereof). The closest that Baude and Stern come to reconciling their proposed test with the Fourth Amendment's text and history is notably brief—it spans only five pages in a sixty-six-page article.³⁰² And it concludes with more of a question than a conclusion: "the time has come to consider . . . whether [the positive law model] is compatible with the history leading up to the Fourth Amendment's adoption."³⁰³ But with the time now come, what is the answer?

Baude and Stern suggest it is compatible on the following grounds. First, the cases that inspired the enactment of the Fourth Amendment involved entering and ransacking homes that sometimes led to trespass actions such as *Entick* and *Wilkes*. "These episodes," Baude and Stern write, "have contributed to a longstanding conventional wisdom that until the mid-twentieth century, trespass was the central test for a

300. Baude wrote two years after his article with Stern:

I do think that our view is an originalist one, derived from what we know of the original law of the Fourth Amendment. In our article, we discuss both the original history of the Fourth Amendment and the original remedial structure, and I will let interested readers judge those arguments for themselves. But originalists should have no qualms about subscribing to it.

Will Baude, *Yes, the Positive Law Model of the Fourth Amendment Is Originalist*, REASON: VOLOKH CONSPIRACY (Jan. 12, 2018, 5:48 PM), <https://reason.com/volokh/2018/01/12/yes-the-positive-law-model-of-the-fourth> [<https://perma.cc/3F8P-79KY>].

301. Baude & Stern, *supra* note 11, at 1846.

302. *Id.* at 1837–41.

303. *Id.* at 1841.

Fourth Amendment search.”³⁰⁴ So far, that’s a pretty standard account. It is inaccurate, I think, as I noted earlier: there actually was no trespass test for what was a Fourth Amendment search until 2012 in *Jones*.³⁰⁵ Although this claim is erroneous, it is indeed a common account.

But assuming a trespass test, how do we go from defining a trespass as a search to defining any violation of any positive law as a search? Their explanation is worth quoting in full:

The positive law model does not stop at the law of property, however, and neither did this history, though this part of the story is frequently overlooked. Wilkes (and the printers arrested along with him) had sued not just for a property violation but also for false imprisonment. Other suits similarly challenged searches and seizures as false imprisonment or other violations of what would today be thought of as torts relating to personal security. Of course we do not know exactly how far this went, or more accurately, would have gone. We cannot say for sure whether the same Founding-era principles would apply to a suit for, say, “intrusion upon seclusion” because no such right of action was then recognized. But the history is at least suggestive, and the most straightforward extrapolation is that the search-and-seizure principle — the idea that some actions by government officials raised questions demanding judicial scrutiny — was marked by violations of positive law, and moreover, by violations extending beyond the law of property.³⁰⁶

Mull that over. The idea is that some lawsuits filed against what today would be seen as unreasonable searches and seizures claimed torts other than trespass—in particular, false imprisonment or some other (unnamed) personal security torts. We don’t know that those other torts were significant in those cases. We don’t know that the nontrespass claims were significant in the cases that influenced the enactment of the Fourth Amendment. But based on the fact that there were some nontrespass claims alleged in some of the cases, Baude and Stern conclude that “the most straightforward extrapolation”³⁰⁷ is that a search occurs when *any* positive law is violated.³⁰⁸

This is anything but a “straightforward extrapolation” of the Fourth Amendment’s history. Why should the presence of nontrespass

304. *Id.* at 1839.

305. *See supra* notes 208–210.

306. Baude & Stern, *supra* note 11, at 1839–40.

307. *Id.* at 1839.

308. *Id.* at 1839–40.

claims asserted in a few cases expand the original public meaning of what is a “search”? And even if false imprisonment torts and maybe some other torts about personal security were considered part of the picture at the time of the framing, why would that mean that *any* violation of *any* positive law—not just torts, or crimes, but any statute, any regulation, *anything legal*—would be a search?

The leap to an “any positive law” test is particularly puzzling because there’s a simple explanation for why false imprisonment and other personal security torts would be claimed in search and seizure cases in the eighteenth century. As noted earlier, the common law of search and seizure had a lot of law on the standards for arrests.³⁰⁹ Arrests are seizures of persons.³¹⁰ And the way that the law of arrest would be raised was often as an affirmative defense to a tort claiming false imprisonment or some other tort relating to personal security. If the investigator broke into a house, the tort was trespass and the defense would be that the search was reasonable.³¹¹ If the investigator made an arrest, the tort was false imprisonment, and the defense would be that the seizure was reasonable. The common law of searches and seizures provided an affirmative defense to these particular torts. That context provides no basis for expanding Fourth Amendment protections to any positive law.

Baude and Stern also try to justify the jump from trespass to positive law by claiming that “the original remedial structure of the Fourth Amendment”³¹² echoes their positive law test. Because search and seizure rules originally acted as a privilege for those enforcing the law, they reason, Fourth Amendment issues came up when there was some source of positive law that created a cause of action for which search and seizure rules could be a defense. “[T]he structure of the inquiry matches our vision,” they argue, in that there had to be a positive law violation alleged to trigger litigation on search and seizure law.³¹³

But that conclusion suffers from a level-of-generality problem. True, search and seizure issues were litigated when there was a cause of action for which a search and seizure privilege provided a defense.

309. See *supra* notes 143–151.

310. See *Dunaway v. New York*, 442 U.S. 200, 208 (1979).

311. This was the basic dynamic of *Entick* and *Wilkes*, of course.

312. Baude & Stern, *supra* note 11, at 1840.

313. *Id.*

But those search and seizure claims involved a limited set of tort claims, like trespass and false imprisonment, that involved searches and seizures of persons, houses, papers, and effects. In contrast, what makes Baude and Stern's test unique is that it goes beyond those traditional tort claims to cover *any law*, even apparently when it provides no cause of action at all, and even if it has nothing to do with persons, houses, papers, or effects—and even if it doesn't in any way involve acts that resemble searches or seizures. What makes the Baude and Stern test unique is its departure from the history, not its allegiance to it.

That gap seems particularly challenging from a textualist perspective. As Baude and Stern recognize, the scenarios that triggered the Fourth Amendment involved breaking into homes, taking away property, and arresting people. The text of the Fourth Amendment expressly limits the right along those lines, declaring a right of the people “to be secure *in their persons, houses, papers, and effects*, against unreasonable searches and seizures.” The Baude and Stern positive law model appears to ignore that text and history. Not only does it drop the idea of any kind of invasion being required, whether physical or virtual, but it also drops the textual requirement that the invasion be of one's person, house, papers, or effects *at all*. It replaces that with the rather different idea that any kind of law violation triggers the Fourth Amendment. It flips the textual and historical focus from protecting persons, houses, papers, and effects into a new principle against government exceptionalism in the law. The choice of a test here isn't coming from eighteenth-century history. Instead, the work of arriving at the test appears to come from Professors Baude and Stern, circa 2016.

CONCLUSION

For many originalists, the Supreme Court's decision in *Katz v. United States* has suspicious origins. It is the product of the Warren Court's heyday (check). It is not expressly based on the text (check). It invokes the concept of “privacy” (check). It's easy to assume that *Katz* is a made-up doctrine that has blocked the development of a true legal test, one based in text and history, that an originalist should seek to develop and apply.

Not so. The existing *Katz* framework is readily reconciled with both text and history. It identifies a “search” of “persons, houses, papers, and effects,” going beyond the originating facts of physical

entry to include its technological equivalents. Identifying an “expectation of privacy” that “society is prepared to recognize as ‘reasonable’”³¹⁴ is not a call for judicial policymaking. Rather, it calls for a judgment about what kinds of information collection from and about “persons, houses, papers, and effects” are the modern-day equivalents of the physical entry that inspired the Fourth Amendment’s enactment.

An originalist may want to rephrase the *Katz* test to be more explicitly rooted in text and history. But that is about form, not substance. The substance of the *Katz* inquiry is entirely consistent with the Fourth Amendment’s text and history. An effort to reject *Katz* and look instead for a textualist and originalist replacement will likely end up right back where it started—with a doctrine that closely resembles, and perhaps exactly replicates, *Katz*.

314. See *Katz v. United States*, 389 U.S. 347, 361 (Harlan, J., concurring).