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Recommended Citation

Michael Gentithes, 59 Hous. L. Rev. 1 (2021)

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ARTICLE

RULIFYING REASONABLE EXPECTATIONS: WHY JUDICIAL TESTS, NOT ORIGINALISM, CREATE A MORE DETERMINATE FOURTH AMENDMENT

*Michael Gentithes**

ABSTRACT

For decades, commentators have decried the Supreme Court’s Fourth Amendment search jurisprudence as a hopelessly confusing jumble. Critics save their harshest barbs for the judicially created “reasonable expectations of privacy” test, suggesting that it provides little guidance and leaves search cases open to wide judicial discretion. Motivated by such critiques, several Justices have recently claimed that an originalist approach could replace the reasonable expectations test, limit judicial discretion, and clarify the Fourth Amendment’s meaning.

This Article provides a comprehensive defense of the reasonable expectations test against originalist calls to abandon it. It notes two flaws in the originalist response. First, search jurisprudence is already largely “rulified”; courts use the reasonable expectations standard to create sub-rules addressing most search cases. Second, originalist models of the Fourth Amendment would not cabin judicial discretion more than the reasonable expectations test. Both require discretionary choices

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amongst the possible sources that give meaning to legal rules, and thus both can produce indeterminate legal tests.

Judges should continue to rely upon the reasonable expectations test to develop a rule-like search jurisprudence that will resolve most cases. Originalist models may supplement that process occasionally—such as in cases involving physical invasions of property—but a policy-focused reasonable expectations test should resolve most issues, including those involving new investigatory technologies and techniques. Reasonable expectations can guide investigators in the field, allowing them to work quickly within constitutional strictures without engaging in cognitively taxing interpretive debates. A search doctrine that becomes more rulified under the reasonable expectations test will further limit judicial discretion, both for lower courts and the Supreme Court.

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I. INTRODUCTION

A clear definition of a Fourth Amendment “search” is elusive in the modern digital world. Does the government conduct a search by warrantlessly collecting a record of all the cell phone towers that a citizen’s phone has recently accessed?¹ Is it a search if investigators contact the makers of a GPS mapping app to discover who used the app around the time and place of a particular crime?² What if police officers collect health information citizens have permitted data collection companies to harvest from their digital profiles?³ To answer such Fourth Amendment search questions, the Supreme Court has long looked to Justice Harlan’s “understanding” that a search occurs whenever a person has a “constitutionally protected reasonable expectation of privacy” in the place or information the government examines.⁴ But that reasonable expectations test has come under nearly constant criticism,⁵ including accusations that it is so hopelessly

1. This was roughly the question presented in *Carpenter v. United States*, 138 S. Ct. 2206, 2211–12, 2214 (2018).

2. This practice, sometimes known as geofencing, is frequently the subject of warrants whose constitutionality has also been questioned. See Wendy Davis, *Law Enforcement Is Using Location Tracking on Mobile Devices to Identify Suspects, But Is It Unconstitutional?*, ABA J., (Dec. 1, 2020, 1:50 AM), <https://www.abajournal.com/magazine/article/law-enforcement-is-using-location-tracking-on-mobile-devices-to-identify-suspects-geofence> [<https://perma.cc/2UUN-XJ38>].

3. For a description of this practice, see Michael Gentithes, *App Permissions and the Third-Party Doctrine*, 59 WASHBURN L.J. 35, 45–47 (2020).

4. *Katz v. United States*, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring). The Court subsequently elevated that understanding into the reasonable expectations test that is “[t]he touchstone of Fourth Amendment analysis.” *California v. Ciraolo*, 476 U.S. 207, 211 (1986). Harlan’s concurrence was first cited by the Court in *Terry v. Ohio*, where Chief Justice Warren asserted that “wherever an individual may harbor a reasonable ‘expectation of privacy,’ he is entitled to be free from unreasonable governmental intrusion.” *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring)). By 1979, the Court could comfortably declare that the Fourth Amendment’s “lodestar” was Justice Harlan’s reasonable expectations of privacy test. *Smith v. Maryland*, 442 U.S. 735, 739–40 (1979).

5. See, e.g., William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1825 & n.7 (2016) (collecting sources); Nicholas Kahn-Fogel, *An Examination of the Coherence of Fourth Amendment Jurisprudence*, 26 CORNELL J.L. & PUB. POL’Y 275, 278–79 (2016) (collecting sources); Jeffrey Bellin, *Fourth*

indeterminate that it is “fundamentally un-legal.”⁶ Critiques have gained steam amongst the Supreme Court Justices in recent years, leading some to champion originalist theories that define a search based upon property rights or positive law.⁷ In 2018, several Justices suggested that the reasonable expectations test generates unwieldy judicial discretion and indeterminate rulings,⁸ then claimed that an originalist approach would limit discretion and clarify the Fourth Amendment’s meaning.⁹

This Article provides the most comprehensive defense of reasonable expectations to date against originalist calls to abandon that test. The Article notes two primary flaws in the originalist response. First, the originalist response wrongly posits that search jurisprudence is hopelessly fuzzy and open to

Amendment Textualism, 118 MICH. L. REV. 233, 273 (2019) (referring to *Katz* as “amorphous nothingness”); STEPHEN J. SCHULHOFER, MORE ESSENTIAL THAN EVER: THE FOURTH AMENDMENT IN THE TWENTY-FIRST CENTURY 104 (2012); Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 120–21 (2008); David E. Steinberg, *The Original Understanding of Unreasonable Searches and Seizures*, 56 FLA. L. REV. 1051, 1084, 1095 (2004); Daniel J. Solove, *Fourth Amendment Pragmatism*, 51 B.C. L. REV. 1511, 1522 (2010); Matthew Tokson, *Knowledge and Fourth Amendment Privacy*, 111 NW. U. L. REV. 139, 143 (2016).

6. Baude & Stern, *supra* note 5, at 1888. In a similar vein, Justice Gorsuch has suggested that the reasonable expectations test improperly calls “for the exercise of raw political will belonging to legislatures, not the legal judgment proper to courts.” *Carpenter*, 138 S. Ct. at 2264–65 (Gorsuch, J., dissenting).

7. See *Carpenter*, 138 S. Ct. at 2238–39 (Thomas, J., dissenting); *id.* at 2264 (Gorsuch, J., dissenting); *id.* at 2260, 2268 (Alito, J., dissenting).

8. Justice Thomas argued that *Katz* lacked a plausible grounding in the Fourth Amendment’s text and did not fit into the ordinary meaning of search found in dictionaries of the Founding Era. *Id.* at 2238, 2244 (Thomas, J., dissenting). Thus, *Katz* “[b]ore] the hallmarks of subjective policymaking instead of neutral legal decisionmaking.” *Id.* at 2246. Justice Gorsuch’s separate dissent credited Justice Thomas for “thoughtfully explain[ing]” the original understanding of the Fourth Amendment, which “do[es] not depend on the breach of some abstract ‘expectation of privacy’ whose contours are left to the judicial imagination.” *Id.* at 2264 (Gorsuch, J., dissenting).

For similar critiques of *Katz*’s reasonable expectations test from outside the originalist perspective, see, for example, ROBERT M. BLOOM, SEARCHES, SEIZURES, AND WARRANTS 46–48 (2003) (“How do we know what society is prepared to accept as reasonable? Because there is no straightforward answer to this question, ‘reasonable’ has largely come to mean what a majority of the Supreme Court Justices says is reasonable.”); Solove, *supra* note 5, at 1512 (claiming the Fourth Amendment is mired in “theoretical chaos”).

9. Justice Thomas argued that the correct, original understanding of search protected only against government invasions of citizen’s property rights. *Carpenter*, 138 S. Ct. at 2238–40 (Thomas, J., dissenting). Justice Gorsuch wrote that although the *Katz* test sometimes captures societal norms, the *Katz* test was most useful when it “approximat[ed] the more traditional option” that would find a search when the government violates positive law. *Id.* at 2266–68 (Gorsuch, J., dissenting). Justice Alito similarly emphasized that the reasonable expectations test must be closely tied to the property rights of defendants, not allowing them to claim invasions of the property of third parties. *Id.* at 2260 (Alito, J., dissenting). Otherwise, the reasonable expectations test “would have disregarded the clear text of the Fourth Amendment.” *Id.*

discretionary interpretation. In reality, in the half-century since *Katz*, courts have slowly “rulified” search jurisprudence by applying the reasonable expectations test to “promulgate sub-rules to address particular situations [until] . . . eventually a large proportion of cases is governed by rules.”¹⁰ The Supreme Court first elevated Justice Harlan’s descriptive concurrence into a controlling standard through a series of factually specific cases.¹¹ The Court then used the reasonable expectations test to explain how the Fourth Amendment applies to an extremely wide range of facts in clear, rule-like holdings.¹² At the same time, lower courts¹³ have deployed *Katz*’s permissive standard to define society’s reasonable expectations with rule-like directives for government investigators¹⁴ and largely without the need for the Supreme Court to correct mistakes any more often than in other areas of constitutional law.¹⁵ Courts have generated rules for specific categories of investigatory activity—such as those involving houses, cars, borders, checkpoints, and so on—based upon the general guidance provided by the reasonable expectations standard.¹⁶

Second, recent originalist theories of Fourth Amendment searches have wrongly assumed that their approach would cabin judicial discretion far more than *Katz*. In truth, originalism shares many of the same problems that make the Fourth Amendment

10. Matthew Tokson, *Blank Slates*, 59 B.C. L. REV. 591, 651 (2018) (citing Frederick Schauer, *The Tyranny of Choice and the Rulification of Standards*, 14 J. CONTEMP. LEGAL ISSUES 803, 805–06 (2005)); see also Michael Coenen, *Rules Against Rulification*, 124 YALE L.J. 644, 654–55, 654 n.26 (2014); Niva Elkin-Koren & Orit Fischman-Afori, *Rulifying Fair Use*, 59 ARIZ. L. REV. 161, 168 (2017).

11. See *infra* Section IV.C (describing the decade-long evolution of the reasonable expectations language in Justice Harlan’s *Katz* concurrence from a description of prior definitions of a search to the Fourth Amendment’s lodestar through a series of factually specific, rule-like decisions).

12. Ronald J. Allen & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 ST. JOHN’S L. REV. 1149, 1153 (1998). The Supreme Court has recently applied a categorical approach to exclude some types of data from warrantless collection, even after it had been disclosed to a third party. See Michael Gentithes, *The End of Miller’s Time: How Sensitivity Can Categorize Third-Party Data After Carpenter*, 53 GA. L. REV. 1039, 1057 (2019).

13. “The Fourth Amendment implications of most police practices never reach the Supreme Court; rather, they are decided bottom up from lower federal courts and state courts.” Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 536 (2007).

14. See *infra* Section IV.C.1.

15. Kahn-Fogel, *supra* note 5, at 277.

16. “Although the modern intellectual tendency is to map our understanding of the Fourth Amendment using general claims about reasonable expectations of privacy, in practice the focus is on houses, cars, borders, arrests, and so on.” Allen & Rosenberg, *supra* note 12, at 1159.

appear directionless. It requires discretionary choices amongst the possible sources that give meaning to legal rules.¹⁷ While reasonableness tests like *Katz* require courts to decide whose reasonable perspective controls (from amongst police officers themselves, citizens in general, or a subset of citizens with characteristics similar to the defendant in a particular case),¹⁸ originalist interpretations require courts to decide which of a limited set of Founding Era interpretive sources control (from amongst the drafter's intent, pre- and post-enactment history, judicial tradition, contemporaneous dictionary definitions, or other sources upon which the litigators or politicians of the Founding Era would have relied).¹⁹ And originalist models suffer from indeterminacy problems,²⁰ causing them to grow more discretionary over time.²¹ While critics have long decried *Katz*'s failure to provide a fixed set of reasonable expectations,²² the dissenting Justices in 2018's *Carpenter v. United States* illustrated that there is no singular original meaning of a Fourth Amendment search—which might include only property rights,²³ property

17. See *infra* Part II.

18. The same might be said of similar reasonableness tests in criminal procedure that define the criteria for a brief police stop, see *Terry v. Ohio*, 392 U.S. 1, 26–27 (1968) (requiring officers to have “reasonable suspicion” to justify a brief stop), or that distinguish such stops from a full-blown arrest, see *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (holding that officers have seized an individual when, “in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave”).

19. As David Sklansky has argued, “eighteenth-century rules of search and seizure . . . were both hazier and less comprehensive” than originalists have suggested, providing “guidance we should hesitate to follow.” David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1744 (2000).

20. “More often than not, eighteenth-century ‘common law’ itself is wildly indeterminate—so much so that the new Fourth Amendment originalism may make search-and-seizure law more rather than less responsive to the vicissitudes of judicial predisposition.” *Id.* at 1794.

21. See *infra* Part III.

22. See, e.g., Baude & Stern, *supra* note 5, at 1825 & n.7 (collecting sources).

23. Justice Thomas claimed that the founding generation understood the Fourth Amendment to protect only property rights, which would incidentally provide some protection for citizens' privacy. *Carpenter v. United States*, 138 S. Ct. 2206, 2240 (2018) (Thomas, J., dissenting).

rights plus some positive law,²⁴ or positive law combined with some index of privacy.²⁵

Contrary to the originalist critique, the reasonable expectations test can generate a more rule-like Fourth Amendment jurisprudence that guides judges and investigators in most cases. Originalist interpretations can aid in some cases—such as those involving physical invasions of property—leaving a policy-focused reasonable expectations test to resolve the remainder of cases, including those involving new investigatory technologies and techniques.²⁶ Far from reading *Katz*’s last rites, judges should use its permissive standard to provide clear guidance to investigators in the field, allowing them to work quickly within constitutional strictures without engaging in cognitively taxing interpretive debates. And as search doctrine becomes more rulified, it will further limit judicial discretion, both for lower courts and for the Supreme Court.

Below, Part II highlights the source problems common to originalist interpretive theories, using the Court’s decision in *District of Columbia v. Heller*²⁷ as one primary example and noting the shift in originalism between original intent and original public meaning theories.²⁸ This Part also notes that many judge-made reasonableness tests in criminal procedure suffer from similar source problems, though of a different genus.²⁹ Part III shows that

24. Justice Gorsuch suggested that, although property rights were a fundamental component of the Fourth Amendment, the Amendment was understood originally to protect against any government violations of positive law—though he was not ready to commit to either the positive law of the Founding Era or of modern times. *Id.* at 2267–68 (Gorsuch, J., dissenting). Gorsuch’s fluid interpretation of original understandings of the Fourth Amendment also extended to *Katz*, which could sometimes supplement a positive-law model of the Amendment. *Id.* at 2265.

25. Justice Alito suggested that the Fourth Amendment’s authors were concerned with privacy and intimacy and that the *Katz* reasonable expectations test could coexist with a property-based view of the Fourth Amendment. *Id.* at 2247, 2254–55, 2260 (Alito, J., dissenting).

26. See *infra* Part IV; see also Richard M. Re, *The Positive Law Floor*, 129 HARV. L. REV. F. 313, 332–33, 336–37 (2016) (suggesting that only positive laws directly addressing privacy should help define the scope of a Fourth Amendment search, while some searches can still occur with no positive law violation at all); Orin S. Kerr, *The Challenge of Fourth Amendment Originalism and the Positive Law Test*, VOLOKH CONSPIRACY (Jan. 19, 2018, 6:39 AM), <https://reason.com/2018/01/19/what-is-fourth-amendment-originalism/> [<https://perma.cc/Z8YD-CEW8>] (“To use a football analogy, originalist methods can say that the rule is somewhere in the wide center of the field, say, between the 20 yard lines. But because the needs of modern doctrine demand a test for searches, you need some non-originalist principle to pick it.”).

27. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

28. See *infra* Part II.

29. See *infra* Section II.B.

these source problems lead to widespread indeterminacy in originalist interpretations of the Fourth Amendment's term "search."³⁰ Part IV envisions a rulified future for the reasonable expectations test.³¹ Reasonable expectations should coexist with limited originalist input as part of that ongoing rulification process, generating a more determinate search jurisprudence over time.³²

II. SOURCES AND DISCRETION

In this Part, I discuss the variety in originalist interpretive methods, using the Court's decision in *District of Columbia v. Heller* as a primary example and noting the shift from original intent to original public meaning theories.³³ I then demonstrate that any originalist interpretation of the Fourth Amendment will have only a few historical sources that can provide insight into the meaning of the term "search."³⁴ Thus, originalist interpretations are necessarily indeterminate.³⁵

30. See *infra* Part III.

31. See *infra* Part IV.

32. See *infra* Section IV.C.

33. See *infra* Section II.A.

34. See *infra* Section II.B.

35. I do not mean to suggest that originalism alone suffers from problems in defining the appropriate sources for interpretation, as well as the appropriate level of abstraction from which to view those sources. The reasonableness tests that predominate modern constitutional criminal procedure, including *Katz*'s reasonable expectations as the most prominent example, require judges to make discretionary choices amongst possible sources of interpretation. *Katz* provides judges with little guidance as to the proper source of reasonable expectations. It seemingly invites judges to rely upon themselves as the source of meaning. Judges could use their own subjective attitudes to determine the scope of the Fourth Amendment, estimating what society reasonably expects as best they can. But judges could reasonably disagree about the degree to which they should allow their own life experiences to filter into their judgments about what expectations are reasonable, or whether they should also consider the likely life experiences of citizens from other walks of life. Alternatively, judges might decide that *Katz* requires an empirical investigation into what most citizens expect to keep away from government investigators, though such an empirical approach would be extremely difficult for judges to implement. Judges applying *Katz* must also decide whether government investigators can control society's reasonable expectations through their influence on popular conceptions of privacy. Michael Gentithes, *Tranquility & Mosaics in the Fourth Amendment: How Our Collective Interest in Constitutional Tranquility Renders Data Dragnets Like the NSA's Telephony Metadata Program a Search*, 82 TENN. L. REV. 937, 943 (2015). Even if judges decide that the government's view itself is a permissible source for interpretation of reasonable expectations, they must again determine the level of abstraction at which to analyze that "government" view. Should only the perspective of federal investigators control? Should more nuanced rules be developed in different jurisdictions whose investigators deploy technology and investigatory techniques differently?

A. Versions of Originalism

Originalists argue that their method of interpretation significantly limits judicial discretion, constraining judges to rule in accordance with the original intent, however defined, behind constitutional clauses.³⁶ Originalist interpretation, it is said, limits the power of unelected judges to change the law.³⁷ Originalism promises to winnow the field of permissible opinions on a question based upon the single, discernible meaning of the constitutional text.³⁸ It thereby reins in the activist judge that seeks to rule according to their policy preferences rather than according to the law.³⁹

But despite originalists' broad agreement over the goals of their interpretive method, they maintain widespread disagreements about the best way to implement originalism.⁴⁰

36. See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) ("Originalism does not aggravate the principal weakness of the [constitutional] system, for it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself."); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 35 (1971) ("The Supreme Court's constitutional role appears to be justified only if the Court applies principles that are neutrally derived, defined and applied."); MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 9 (1982); Raoul Berger, *Ely's "Theory of Judicial Review"*, 42 OHIO ST. L.J. 87, 87 (1981) ("[A]ctivist judicial review is inconsistent with democratic theory because it substitutes the policy choices of unelected, unaccountable judges for those of the people's representatives . . ."); Mark Tushnet, *Heller and the New Originalism*, 69 OHIO ST. L.J. 609, 610 (2008) (stating that originalism aims to "minimize[] the role contested judgments play in constitutional interpretation").

37. See, e.g., Bork, *supra* note 36, at 6 ("[A] legitimate Court must be controlled by principles exterior to the will of the Justices."). Bork went on to suggest

two proper methods of deriving rights from the Constitution. The first is to take from the document rather specific values that text or history show the framers actually to have intended and which are capable of being translated into principled rules. We may call these specified rights. The second method derives rights from governmental processes established by the Constitution. These are secondary or derived individual rights.

Id. at 17. Lawrence Solum describes this as originalism's "Constraint Principle," which "claims that constitutional actors (e.g., judges, officials, and citizens) ought to be constrained by the original meaning when they engage in constitutional practice (paradigmatically, deciding constitutional cases)." Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 7 (2015).

38. "[T]he Constitution, though it has an effect superior to other laws, is in its nature the sort of 'law' that is the business of the courts—an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law." Scalia, *supra* note 36, at 854.

39. See, e.g., sources cited *supra* note 36.

40.

Determining what qualifies as originalist constitutional adjudication is no easy matter. Some originalist scholars, for example, contend that the Framers' intent should be the focus of constitutional interpretation. Others reject inquiry into

Much of this disagreement boils down to a problem with defining the appropriate sources for originalist interpretation, as well as the levels of abstraction at which they interpret those limited sources. Though intended to be a discretion-reducing interpretive method, originalism still requires discretionary choices about which sources to deploy and how broadly to interpret them in order to give meaning to legal rules. A prominent example arises from the majority and dissenting opinions in 2008's *District of Columbia v. Heller*,⁴¹ which highlight the distinction between originalism that focuses upon the popular understanding of a text at the time it was written and originalism that instead derives meaning from the specific intent of the authors of that text.⁴²

Justice Scalia's majority opinion examined the popularly understood meanings of the Second Amendment's terms at the time of its enactment. Justice Scalia posited that the Constitution's text should be interpreted according to the "normal meaning" of the terms at the time it was adopted, which may include "an idiomatic meaning" but "excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation."⁴³ Justice Scalia's focus, then, was on the meaning that "ordinary citizens" would attribute to the text.⁴⁴ That formulation includes the authors of the text themselves⁴⁵ but also broadens the acceptable sources significantly to include dictionaries,⁴⁶ popular writings,⁴⁷ well-known commentaries,⁴⁸

authorial intentions, and instead, treat the manner in which the Framing-era public would have understood the text as binding. Still others focus on how a hypothetical reasonable person in the Framing era would have understood the text.

Lawrence Rosenthal, *An Empirical Inquiry into the Use of Originalism: Fourth Amendment Jurisprudence During the Career of Justice Scalia*, 70 HASTINGS L.J. 75, 81 (2018) (footnotes omitted).

41. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

42. Tushnet, *supra* note 36, at 611–12 (describing the widespread belief that Justice Scalia's *Heller* opinion represented a form of "new originalism" focused upon popular understandings of constitutional terms, while Justice Stevens's *Heller* opinion relied upon "old originalism" that focused on the intent of the drafters of a constitutional provision).

43. *Heller*, 554 U.S. at 576–77.

44. *Id.*

45. Tushnet, *supra* note 36, at 612 ("[N]early everything examined by old originalists is relevant to the new originalist inquiry. What a drafter believed a constitutional provision to mean is evidence of what at least one reasonably well-informed contemporary understood the provision to mean." (footnote omitted)).

46. *Heller*, 554 U.S. at 582–83.

47. *Id.* at 583 n.7, 594 (referring to popular newspapers of the era).

48. *Id.* at 593–94, 597, 606–08 (referring to commentaries by Blackstone, Joseph Story, and William Rawle).

pre-enactment legal texts,⁴⁹ or even some post-enactment history.⁵⁰ For instance, Justice Scalia began his discussion of the Second Amendment's text by dividing it into prefatory and operative clauses, then looked to "other legal documents of the founding era, particularly individual-rights provisions of state constitutions," to discern the meaning of the two clauses read together.⁵¹ He asserted that the Amendment's "right of the people" was likely individual because of its similarity to the language in the First and Fourth Amendments as well as state constitutions of the era that established individual rights.⁵² Interestingly, Justice Scalia's opinion also discounted the value of the drafting history of the Amendment, noting the perils of ascertaining meaning from provisions deleted during the drafting process.⁵³ This again highlights Justice Scalia's focus not on the specific intent of the drafters of a constitutional provision but rather on the broad understanding that members of society at the time may have held.

In contrast, Justice Stevens's dissenting opinion in *Heller* focused largely on the intent of the Second Amendment's drafters⁵⁴ and thus emphasized the drafting history of the document.⁵⁵ In some cases, Justice Stevens relied upon sources similar to those of the majority, such as other state constitutions,⁵⁶ dictionary definitions,⁵⁷ or contemporary writings.⁵⁸ But Justice Stevens also expressed broad disagreement with reliance upon many of the sources the majority discussed at length.⁵⁹ Justice Stevens argued that the majority improperly relied upon the 1689 English Bill of Rights and commentaries upon it, claiming that it addressed

49. *Id.* at 592–94 (discussing the right to arms in the 1689 English Bill of Rights).

50. *Id.* at 606–08, 610, 614 (discussing post-ratification commentary, nineteenth-century cases, and post-Civil War decisions).

51. *Id.* at 577.

52. *Id.* at 579–80, 580 n.6.

53. *Id.* at 590, 603.

54. *Id.* at 655, 660 (Stevens, J., dissenting) (examining the personal writings of George Mason and James Madison).

55. *Id.* at 656–57 (discussing several proposals for amendment from several states).

56. *Id.* at 640–41.

57. *Id.* at 646–47 (discussing dictionary definitions of "bear arms").

58. *Id.* at 647 n.9 (arguing that books, pamphlets, and other sources disseminated prior to the adoption of the Second Amendment supported an idiomatic meaning of "bear arms" defined as military service).

59. *Id.* at 662 ("Although it gives short shrift to the drafting history of the Second Amendment, the Court dwells at length on four other sources: the 17th-century English Bill of Rights; Blackstone's Commentaries on the Laws of England; postenactment commentary on the Second Amendment; and post-Civil War legislative history. All of these sources shed only indirect light on the question before us, and in any event offer little support for the Court's conclusion." (footnote omitted)).

different concerns with different language from the Second Amendment.⁶⁰ Similarly, the post-enactment commentary and post-Civil War legal opinions that the majority discussed were too distant from the enactment and “cannot possibly supply any insight into the intent of the Framers.”⁶¹

Even when the *Heller* majority and dissent found the same categories of sources relevant to originalist interpretation, they emphasized different specific sources within those categories. Though both looked to the language of state declarations of rights, Justice Stevens emphasized state provisions that expressly placed the right to bear arms in a military context,⁶² while Justice Scalia touted language in several others that referred to a right of the people “to bear arms in defence of themselves.”⁶³ Though both examined dictionary definitions of the phrase “bear arms,” Justice Stevens chose three sources that emphasized the military connotation of the phrase,⁶⁴ while Justice Scalia discussed different sources that separately defined “arms” as offensive weapons and “bear” as “to carry.”⁶⁵

Justice Scalia’s *Heller* opinion culminated a shift in originalist theory that relies upon a wider array of sources to derive the original public meaning of a text, rather than merely the original

60. *Id.* at 665–66.

61. *Id.* at 666–71. Postenactment commentary received a similarly chilly reception by the Court in *Gamble v. United States*, where Justice Alito’s majority opinion chided the petitioner for relying upon treatises published after the Fifth Amendment’s adoption. *Gamble v. United States*, 139 S. Ct. 1960, 1975–76 (2019). Though Justice Alito acknowledged that the *Heller* court relied upon treatises of a “similar vintage,” he claimed that “the *Heller* Court turned to these later treatises only after surveying what it regarded as a wealth of authority for its reading—including the text of the Second Amendment and state constitutions. The 19th-century treatises were treated as mere confirmation of what the Court thought had already been established.” *Id.*

62. *Heller*, 554 U.S. at 641 n.5 (Stevens, J., dissenting) (analyzing the declarations of rights in Virginia, Maryland, Delaware, and New Hampshire).

63. *Id.* at 602 (majority opinion) (analyzing the declarations of rights in Kentucky, Ohio, Indiana, and Missouri). While Justice Scalia largely dismissed Justice Stevens’s references to the Second Amendment’s drafting history, he did assert that the “highly influential minority proposal in Pennsylvania” described an individual right. *Id.* at 604. As Mark Tushnet noted, it is difficult to discern what might make one contemporary provision more “highly influential” than another. Tushnet, *supra* note 36, at 615–16.

64. *Heller*, 554 U.S. at 646–47 (Stevens, J., dissenting) (citing 1 OXFORD ENGLISH DICTIONARY 634 (2d ed. 1989); 1 S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755); 1 J. TRUSLER, THE DISTINCTION BETWEEN WORDS ESTEEMED SYNONYMOUS IN THE ENGLISH LANGUAGE 37 (3d ed. 1794)).

65. *Id.* at 581–84 (majority opinion) (citing 1 TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY (1771); N. WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828); T. SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1796)).

intent of its authors.⁶⁶ The earlier efforts to derive the original intent of the authors were heavily criticized for several decades, in part because of the difficulty in determining the specific intent of a group of individuals at the proper level of generality and flexibility.⁶⁷ Original public meaning theory, in contrast, focuses upon the meaning of constitutional terms as understood by the public at the time of enactment, as in Justice Scalia's *Heller* opinion.⁶⁸ That includes not only the drafters themselves, but also a significantly wider group of individuals and viewpoints, and thus a significantly wider set of possible sources.⁶⁹ It thus introduces new discretionary choices amongst those possible sources into originalist theory.⁷⁰

Additional threads of originalist theory have emerged in the years since *Heller*. Professors John O. McGinnis and Michael B. Rappaport recently coined original methods originalism, which interprets the Constitution "using the conventional legal interpretive rules that would have been deemed applicable to a document of its type at the time it was enacted."⁷¹ This method

66. See, e.g., Tushnet, *supra* note 36, at 609, 619; Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory* 1, 8, 13–14 (Geo. L. Fac. Publ'ns & Other Works, No. 1353, 2011), <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2362&context=facpub> [https://perma.cc/A625-SXLE].

67. See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 214–15 (1980); Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 476 (1981); see also H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 903 (1985) (arguing that the Constitution's authors themselves did not expect others to interpret the text according to their intentions).

68. Tushnet, *supra* note 36, at 611–12 ("The new originalists . . . attempt to determine the original public meaning of constitutional terms, where 'public' refers to a reasonably well-informed set of voters."); see also Lawrence B. Solum, *Surprising Originalism: The Regula Lecture*, 9 CONLAWNOW 235, 241–46 (2018); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 92–105 (2004); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 152–57 (1999).

69. Tushnet, *supra* note 36, at 612 ("[N]early everything examined by old originalists is relevant to the new originalist inquiry. What a drafter believed a constitutional provision to mean is evidence of what at least one reasonably well-informed contemporary understood the provision to mean. Further, what a drafter believed a constitutional provision would *do* is similar evidence, to the extent that meaning resides at least in part in use." (footnote omitted)). Some theorists, such as Jack Balkin, contend that the original expected application that the founders had for a constitutional provision is distinct from the original public meaning of the text. The former may be informative of original public meaning but is not determinative of that public meaning. See generally JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

70. Critics have argued that such original meaning originalism is also highly indeterminate given both the instability and inconsistency of popularly understood meanings at any given time. See, e.g., Tushnet, *supra* note 36, at 613, 617.

71. John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371, 1373 (2019).

requires the Court to determine the interpretive rules that would have been deployed at the time of enactment—which in turn requires “asking what conventional interpretive rules a reasonable observer would have deemed applicable to the Constitution”—and then to apply those rules to the text.⁷²

This quick sketch of trends in originalist theory is not aimed to resolve the internal debate amongst originalists but merely to highlight that the debate is ongoing and contains widely varying answers to the same constitutional questions.⁷³ Though originalists aim to reduce judicial discretion, this debate has created a panoply of potential sources of meaning from which originalist judges must choose when interpreting a text.⁷⁴ Some originalist theories even inject a calculation of reasonableness into the interpretive process, albeit an understanding of reasonableness at the time of the Constitution’s enactment.⁷⁵ So long as that debate continues, originalism falls prey to at least some degree of the very flaws it seeks to correct in judicial interpretation.

B. Limited Originalist Sources for Fourth Amendment Interpretation

When originalist interpretation is loosed upon the Fourth Amendment term “search,” the results are marred by difficulties finding authoritative sources. Originalist interpretation of the Fourth Amendment must rely upon somewhat limited primary source material to demonstrate either the subjective intent of the drafters and ratifiers or the original public meaning of the text.⁷⁶ Even after they have settled on the right sources, originalists struggle to define the level of abstraction at which to read those

72. *Id.* at 1374. McGinnis and Rappaport suggest that this method, though it appears complex, would actually unite originalists behind a single method for constitutional interpretation and reduce many of the source and indeterminacy issues discussed in this section. *Id.* at 1374–75.

73. Indeed, the variety of originalist methodologies is far greater than I could present as an introduction to this paper. For a more thorough taxonomy of originalist theories, see Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 247–55 (2009).

74. As Lawrence B. Solum helpfully notes, though originalists agree that the meaning of a provision is fixed at the time of its enactment, “[o]riginalists disagree about the question as to *what* determines original meaning (intentions, public meanings, methods).” Solum, *supra* note 66, at 29.

75. McGinnis & Rappaport, *supra* note 71, at 1376–77.

76. “There is very little direct historical evidence relating to the Fourth Amendment’s scope. Indeed, the Founding-era history of the Fourth Amendment as a whole is sparse and ambiguous.” Tokson, *supra* note 10, at 632 (footnote omitted).

sources, leading to further disagreement even within particular originalist theories.

Some historical material offers insight into the intent of the Fourth Amendment's drafters, which original intent supporters might emphasize heavily in interpretation. Scholars generally agree that the Fourth Amendment's authors were inspired by British abuse of "writ[s] of assistance," which gave Colonial Era customs officials authority to enter buildings at will and look for suspected customs violations.⁷⁷ Those abuses led to broad attacks from eighteenth-century politicians and litigators, most famously from James Otis, whose arguments were influential to the view of a young John Adams.⁷⁸ In a series of speeches and official complaints on behalf of the people of Boston, Otis argued that such writs allowed agents of the Crown to "break through the sacred Rights of the *Domicil*, ransack Mens Houses, destroy their Securities, carry off their Property, and with little Danger to themselves commit the most horrid Murders."⁷⁹ "Otis's arguments were [also] widely repeated throughout the colonies" and well-known to the authors of the Fourth Amendment.⁸⁰

Two English cases from the late eighteenth century, *Wilkes v. Wood*⁸¹ and *Entick v. Carrington*,⁸² are similarly canonical sources of insight into Founding Era motivations for the Fourth Amendment⁸³ that again might be particularly useful for original intent interpretation and carry some limited weight in original

77. Baude & Stern, *supra* note 5, at 1837 (quoting NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 54 (Da Capo Press 1970) (1937)); Steinberg, *supra* note 5, at 1063–68; Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, in 2012 THE SUPREME COURT REVIEW 67, 70–71 (Dennis J. Hutchinson et al. eds., 2013); see Gentithes, *supra* note 12, at 1049.

78. Baude & Stern, *supra* note 5, at 1837–38; William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 404–06 (1995) (noting John Adams's view that James Otis's arguments in the Boston writ-of-assistance case "fired the first shot of the Revolution").

79. Baude & Stern, *supra* note 5, at 1837–38 (quoting Report of the Committee of Boston on Rights of Colonists (1772), as published by Order of the Town, 15–17, reprinted in 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, app. I, at 466–67 (Boston, Little, Brown & Co. 1865)).

80. *Id.* at 1838 (citing WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 396 (2009)).

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

82. *Entick v. Carrington* (1765) 95 Eng. Rep. 807 (KB).

83. "*Wilkes v. Wood*, whose plot and cast of characters were familiar to every schoolboy in America, and whose lessons the Fourth Amendment was undeniably designed to embody . . . was the paradigm search and seizure case for Americans." Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 772 (1994) (footnotes omitted). See Kerr, *supra* note 77, at 72–73.

public meaning theories. In each of those cases, the plaintiff brought an action against agents of the Crown for a destructive entry into a home pursuant to a general warrant; in each case, the defense claimed that the actions were permissible under those general warrants.⁸⁴ The decisions did not offer a broad definition of the term “search,” instead suggesting that the facts in those cases were paradigmatic examples. In *Wilkes*, the court noted that the defense argued for a right to force entry into a person’s home and break open their desks, allowing them to then seize their papers.⁸⁵ In *Entick*, the court highlighted that a ruling for the defense would permit the government to unlock the doors of rooms and open their desks and cabinets.⁸⁶ The decisions thus imply that a common example of a search involved the “forcing open of persons’ houses and the breaking open of their desks and cabinets in an effort to find the evidence inside.”⁸⁷

Even if originalists agreed on the weight to apply to such cases as a source of meaning, they have limited value in providing a concrete definition of a search because they only tangentially addressed the scope of constitutional searches. The issue was not litigated directly because at the time criminal defendants did not have the benefit of the exclusionary rule that would prohibit the government from introducing evidence collected through violations of the defendants’ rights.⁸⁸ Thus, criminal defendants had no reason to litigate the scope of a search that might have violated their rights. Instead, search principles only arose as part of a civil defense theory, usually from an officer named as a defendant for allegedly committing a tort against an individual

84. Kerr, *supra* note 77, at 72.

85. *Id.* at 72 (citing *Wilkes v. Wood* (1763) 98 Eng. 489, 498 (KB)).

86. *Id.* at 72–73 (citing *Entick v. Carrington*, 10 Howell’s State Trials 1029, 1063–64 (1765)).

87. *Id.* at 73. Some have argued that this limited historical material implies a rather limited scope for the Fourth Amendment. Because those sources show “that the Framers were focused on a single, narrow problem: physical trespasses into houses by government agents,” the Fourth Amendment narrowly addresses that problem by requiring warrants before entering a home: “Outside of house searches, the Fourth Amendment was simply inapplicable.” David E. Steinberg, *The Uses and Misuses of Fourth Amendment History*, 10 U. PA. J. CONST. L. 581, 583 (2008).

88. Kerr, *supra* note 77, at 71 & n.12.

plaintiff.⁸⁹ This was the case in both *Wilkes* and *Entick*.⁹⁰ “The meaning of ‘searches’ was neither an element of the tort nor part of the affirmative defense[,]” and thus “[a]ttention primarily focused elsewhere, such as on whether a warrant was valid and therefore established a defense.”⁹¹ And because these early cases involved a physical violation of the home or other property, they did not give meaningful guidance for the myriad technological advances in investigatory techniques to come in the following centuries.⁹²

Because the definition of search was not directly litigated, judicial decisions of the era did not attempt to define the term.⁹³ Instead, they offered examples of “paradigmatic searches” from which future thinkers might inductively reason.⁹⁴ Such an inductive approach necessarily yields indeterminate conclusions for originalists. As David Sklansky argued twenty years ago, originalist sources for Fourth Amendment interpretation “were both hazier and less comprehensive” than originalists suggest, providing little clear guidance for the interpretive project.⁹⁵ Rather than working from a clear, rule-like definition of search and reasoning by syllogism to a conclusion, originalists must work from examples to try to build a rule of their own that courts might

89. *See id.*

[A]ny official who searched or seized could be sued by the citizen target in an ordinary trespass suit—with both parties represented at trial and a jury deciding between the government and the citizen. If the jury deemed the search or seizure unreasonable—and reasonableness was a classic jury question—the citizen plaintiff would win and the official would be obliged to pay (often heavy) damages.

Amar, *supra* note 83, at 774 (footnote omitted).

90. Kerr, *supra* note 77, at 72.

91. *Id.* at 71. There is an “absence of any known historical instance of people complaining about a Fourth Amendment violation that was not also a positive law violation.” Baude & Stern, *supra* note 5, at 1839–40.

92. “The Founders had little reason to specify the scope of the ‘search’ concept because most Founding-era searches involved a physical violation of the home or other property and were thus easy to identify.” Tokson, *supra* note 10, at 604–05.

93. Kerr, *supra* note 77, at 71 & n.12.

94. *See, e.g.*, Amar, *supra* note 83, at 772 (calling *Wilkes* “the paradigm search and seizure case for Americans”); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 399 (1974) (“What we do know, because the language of the fourth amendment says so, is that the framers were disposed to generalize to some extent beyond the evils of the immediate past.”); Sklansky, *supra* note 19, at 1744 (“Neither the text nor the background of the Fourth Amendment suggests it aims merely to codify eighteenth-century rules of search and seizure.”). In the spirit of such inductive reasoning, Jeffrey Bellin argues that a plausible definition of search can be induced from “[h]istorical sources, context, and common sense.” Bellin, *supra* note 5, at 257. Bellin goes on to define the term as “an examination of an object or space to uncover information.” *Id.* at 257.

95. Sklansky, *supra* note 19, at 1744.

then use to decide future cases.⁹⁶ This effort to inductively reason to a Fourth Amendment rule in many ways mirrors the judge-driven, common-law process of refining the law over time and with more experience,⁹⁷ rather than an originalist technique that would suggest a clear, correct answer existed at a specific point in history. These paradigm cases may offer less a reflection of the original public meaning of the term search than they do a reflection of the original expected applications of that term, which many originalists themselves would not find controlling.

Originalist interpretations of “searches” thus vary depending upon the level of abstraction from which one tries to induce a rule from the few specific historical sources available. After examining these sources, originalists might conclude that a search is narrowly defined as only a physical entry by government officials into one’s residence;⁹⁸ they might also take “[a] broader approach . . . focus[ed] on whether the officials interfered with property interests, such as whether a trespass occurred,” or an even broader approach still that examines “whether the government interfered with privacy, with physical intrusion being just one example of government acts that violate privacy interests.”⁹⁹ Though these conclusions vary widely, they are equally plausible based upon the limited source material available for originalist interpretation.¹⁰⁰ That limited source material forces originalist interpreters to define the meaning of the text at a high level of abstraction, leaving many possible views that are reconcilable with that reading.¹⁰¹

96. Inductive reasoning requires one to “make generalizations after observing a number of analogous facts (e.g., Every green apple that I bit into had a sour taste. All green apples must be sour.)” EDWARD P. J. CORBETT & ROBERT J. CONNORS, *CLASSICAL RHETORIC FOR THE MODERN STUDENT* 18 (4th ed. 1999). For more on inductive versus deductive reasoning in the law, see Brett G. Scharffs, *The Character of Legal Reasoning*, 61 WASH. & LEE L. REV. 733, 752–54 (2004).

97. “A sophisticated judge may decide a new case by discerning the unstated rationales of previous cases and using them to reach the optimal outcome. This process of comparison and analogy to previous cases is at the core of the common law . . .” Tokson, *supra* note 10, at 600–01 (footnote omitted).

98. Steinberg, *supra* note 5, at 1076–77 (focusing on the intent of the Amendment’s authors).

99. Kerr, *supra* note 77, at 73–74. “Examples alone cannot identify which principle to use.” *Id.* at 74.

100. *See id.* at 76–77.

101. “Especially when the original meaning of constitutional text is framed at a high level of generality, a great many holdings may be reconcilable with originalism, but some other adjudicative modality is nevertheless required to pick among them.” Rosenthal, *supra* note 40, at 83.

The drafting history of the Fourth Amendment itself provides little additional clarity.¹⁰² James Madison's proposed draft in June of 1789 described a right of citizens "in their persons, their houses, their papers, and their other property,"¹⁰³ rather than specifically delineated categories of property, "papers and effects," that appears in the Fourth Amendment.¹⁰⁴ But the meaning of the change is unclear; it might indicate a more narrow scope for the right based upon property law or a more expansive understanding of the term "effects" that does not align with property law principles. At the time, many states had already enacted search and seizure restrictions in their constitutions, though again it is unclear what effect those restrictions had beyond banning general warrants.¹⁰⁵ Madison's draft itself resembled the structure of Article Fourteen of the Massachusetts Declaration of Rights, which was drafted by John Adams; however, there is no record of any commentary by Adams on that provision.¹⁰⁶ Furthermore, "[t]he Fourth Amendment generated virtually no recorded debate in Congress."¹⁰⁷ Constitutional ratification debates in the states occasionally discussed the need for protection against unreasonable searches, lest the government be able to physically enter citizens' homes at will.¹⁰⁸ But these debates again provided only paradigmatic examples of "searches," rather than a specific, rule-like definition from which thinkers might deductively reason.

Some originalists might look to the history of litigation after the Fourth Amendment's enactment, but that history is similarly unclear. To begin, the Supreme Court did not directly address the meaning of searches for nearly 100 years. When the Court did confront the question, it tried to reason inductively from paradigmatic examples such as *Wilkes* and *Entick*, providing little

102. Drafting history might provide additional insight into state constitutional analogues to the Fourth Amendment, but again that history will be widely varied and, to the extent it predates the exclusionary rule, largely unilluminating as to the meaning of search in the text.

103. WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 692 (2009) (quoting Speech of James Madison (June 8, 1789), in 1 CONGRESSIONAL REGISTER 428 (Lloyd ed. 1789)).

104. Kerr, *supra* note 77, at 75.

105. Kerr, *supra* note 26.

106. Tokson, *supra* note 10, at 632.

107. *Id.*

108. Kerr, *supra* note 77, at 73 (citing 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)).

clarity.¹⁰⁹ For example, in 1886's *Boyd v. United States*, the Court noted that breaking down the doors on a man's home was an example of a search drawn from *Entick*, but the Fourth Amendment "should be liberally construed" to "apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life."¹¹⁰ Whether the term search should be driven by invasions of property rights in a man's home or some broader sense of privacy remained an open question.¹¹¹

Interpretations with an originalist bent thus unsurprisingly generate varying meanings of Fourth Amendment searches. Part III will illustrate the variety of conclusions an originalist might plausibly reach about the meaning of a Fourth Amendment search based upon the limited primary source material.¹¹²

III. INDETERMINACY IN ORIGINALIST INTERPRETATIONS OF THE FOURTH AMENDMENT

Given the limited primary source material available and the varying levels of abstraction through which judges can read them, originalist interpretations of the Fourth Amendment lead to often disparate and quite indeterminate decisions. In other words, the same problems that originalism hoped to remove from the *Katz* reasonable expectations test tend to follow originalist interpretations despite originalists' best efforts. In this Part, I describe three variants of originalist interpretation of the term search: a property-based conception,¹¹³ a broader positive law model,¹¹⁴ and a model that combines originalism and privacy.¹¹⁵

109.

From the period of the Fourth Amendment's ratification until *Olmstead v. United States*, 277 U.S. 438 (1928)], the Supreme Court classified government conduct as searches or nonsearches by analogy: The Court construed the government's act either as analogous or disanalogous to physical intrusion into private spaces. But no particular framework guided the analogy, and the Court often referred to privacy as much as property.

Kerr, *supra* note 77, at 77–78.

110. *Boyd v. United States*, 116 U.S. 616, 630, 635 (1886).

111. For further discussion of pre-*Olmstead* cases, which emphasized both property and privacy rights, see Kerr, *supra* note 77, at 77–81.

112. See *infra* Part III.

113. See *infra* Section III.A.

114. See *infra* Section III.B.

115. See *infra* Section III.C.

Finally, I assess the value of originalism in defining a Fourth Amendment search.¹¹⁶

A. *Property and Trespass*

In recent years, originalist interpretations that emphasize the public meaning at the time of enactment have generated the trespass theory of the Fourth Amendment.¹¹⁷ This is illustrated most vividly in a pair of the late Justice Scalia's opinions, *United States v. Jones* and *Florida v. Jardines*. *Jones* concerned investigators placing a GPS tracking device on the defendant's car outside the parameters of a warrant they obtained.¹¹⁸ Justice Scalia noted that the Fourth Amendment has a "close connection to property," then noted that the Fourth Amendment's textual reference to categories of property—persons, houses, papers, and effects—suggested a similarly close tie to property law.¹¹⁹ He thus asserted that "Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century."¹²⁰ Thus, using the limited sources for originalist interpretation, Justice Scalia reached a narrow conclusion: that the Fourth Amendment incorporates property-based trespass theories, but not all positive law violations.¹²¹

Justice Scalia reinforced his view in *Florida v. Jardines*, which concerned officers' use of a drug-sniffing dog on the defendant's front porch.¹²² Justice Scalia reiterated that searches occur "[w]hen 'the Government obtains information by physically intruding' on persons, houses, papers, or effects."¹²³ Again, Justice Scalia did not find that this original meaning meant the Fourth Amendment was coextensive with all positive law violations or even all intrusions upon property. But when the intrusion involved

116. See *infra* Section III.D.

117. For an earlier argument that the Fourth Amendment proscribes only physical searches of homes pursuant to a general warrant or no warrant at all, see Steinberg, *supra* note 5, at 1061.

118. *United States v. Jones*, 565 U.S. 400, 402–03 (2012).

119. *Id.* at 405.

120. *Id.*

121. "[T]he Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates." *Id.* at 406. The government in *Jones* conducted a search because "the Government trespassorily inserted [an] information-gathering device"—a GPS tracker—on the defendant's car. *Id.* at 410.

122. *Florida v. Jardines*, 569 U.S. 1, 3–4 (2013).

123. *Id.* at 5 (quoting *Jones*, 565 U.S. at 406 n.3).

the home—“first among equals” for Fourth Amendment purposes—it was undoubtedly a search.¹²⁴

These opinions “appear to rely on a sort of idealized conception of property law,” not on the actual trespass laws that would have applied to the officer’s actions.¹²⁵ The GPS device installed on the defendant’s car in *Jones* may have been a *de minimis* incursion on chattel that would not qualify as a common law trespass.¹²⁶ Similarly, the drug-sniffing dog in *Jardines* did not commit a trespass under Florida law by reaching the defendant’s front porch.¹²⁷ Thus, Justice Scalia’s trespass theory of the Fourth Amendment is not strictly tied to trespass law itself. Nor, some commentators argue, did Justice Scalia’s opinions clearly “identif[y] any Framing-era evidence to support such a definition” of searches based upon “physically intruding” to acquire information.¹²⁸ Instead, those decisions base Fourth Amendment violations on police activities that roughly appear to violate property rights and might be offensive to most citizens—draining the trespassory theory of precision.¹²⁹

In recent years, Justice Thomas has followed Justice Scalia’s lead in establishing a theory of the Fourth Amendment that would rest exclusively upon property rights violations.¹³⁰ For Justice Thomas, search was probably not a term of art at the time of the founding because it is not in legal dictionaries of the time.¹³¹ However, ordinary dictionaries from the late eighteenth century suggest that the “ordinary meaning” of “search” was “[t]o look over or through” something in order to find something else.¹³² Thus, Justice Thomas has looked to sources he believed contained the

124. *Id.* at 6.

125. Kahn-Fogel, *supra* note 5, at 286.

126. Kiel Brennan-Marquez & Andrew Tutt, *Offensive Searches: Toward a Two-Tier Theory of Fourth Amendment Protection*, 52 HARV. C.R.-C.L. L. REV. 103, 109–10 (2017).

127. *Id.* at 110. “[T]he Court was divided five to four on the question of whether a police officer with a drug-sniffing dog has an implicit license to enter the curtilage of a home for a brief period of time and, thus, whether such conduct constituted a search.” Kahn-Fogel, *supra* note 5, at 326.

128. Rosenthal, *supra* note 40, at 119–20.

129. Brennan-Marquez and Tutt argue that Justice Scalia’s opinions do not protect property rights; instead, they protect the dignitary interests of the defendant, irrespective of whether the government’s actions would qualify as a trespass under the jurisdiction’s positive law. Brennan-Marquez & Tutt, *supra* note 126, at 110.

130. *Carpenter v. United States*, 138 S. Ct. 2206, 2235 (2018) (Thomas, J., dissenting). Notably, Justice Thomas did so in the very same case, and using the very same originalist methods, that led Justice Gorsuch to embrace the positive law model. *See infra* Section III.B.

131. *Carpenter*, 138 S. Ct. at 2238 (Thomas, J., dissenting).

132. *Id.* (quoting *Kyllo v. United States*, 533 U.S. 27, 32 n.1 (2001)).

general public understanding of the term search at the time the Amendment was written. Justice Thomas added that the founders did not intend the Fourth Amendment to protect privacy; he claims that the founding generation “understood” that protecting property would also protect privacy, but that was merely an “attendant protection,” not one which justifies elevating privacy to the “*sine qua non* of the [Fourth] Amendment.”¹³³ Again, this view focuses on common understandings of property rights at the time the Amendment was authored, including Lockean notions of property rights that predominated “the 18th-century political scene” and could be found “throughout the materials that inspired the Fourth Amendment,” including *Entick* and the Boston Writs of Assistance case.¹³⁴

Jeffrey Bellin’s recent “Fourth Amendment textualist” approach similarly posits that a search only occurs when investigators access “persons, houses, papers, and effects” that belong to the suspect.¹³⁵ Bellin argues that a defendant’s Fourth Amendment rights are only triggered by searches of “their” things that plausibly fit one of those four categories, suggesting it is an exclusive list of possibilities and not an illustration of examples.¹³⁶

Bellin’s definitions of those terms are somewhat inconsistent. Bellin claims that the term “papers,” though understood at the founding to include only things printed on a particular tangible substance, “must be updated to capture modern practice” and includes today’s electronic records.¹³⁷ Yet Bellin is less forgiving about the term “effects.” He admits that “[e]ffects’ was used in the Framing era as a catchall term that included all tangible objects a person might possess,” claiming that Framing Era will contests

133. *Id.* at 2240.

134. *Id.* at 2239–40. Justice Thomas also used an original understandings argument to suggest that the term “unreasonable” in the Fourth Amendment meant only contrary to common law. *Id.* at 2243. To support this argument, Justice Thomas looks to the arguments presented in the Writs of Assistance case and as described by Lord Coke. *Id.* at 2240, 2243.

135. Bellin, *supra* note 5, at 238–40. Bellin is highly critical of the *Katz* reasonable expectations test, arguing that his approach “beats an inherently subjective approach of questionable legitimacy that turns on the shifting policy preferences of an increasingly politicized Supreme Court.” *Id.* at 243.

136. *Id.* at 259–60. Bellin claims that his answers to difficult search questions “do not turn on the applicable property laws or statutory protections” any more than they turn on reasonable expectations. *Id.* at 272. But he offers no clear explanation of when a defendant can call something “theirs” under the Amendment without appealing to some concept of property. Given that seemingly necessary appeal to property law, I classify his theory here as a property-based one.

137. *Id.* at 261.

show that term was meant to exclude real property.¹³⁸ He then adds a claim that “[i]ntangible items,” like one’s image or cell phone signals, are not effects because Founding Era citizens would not think that such items could be included in someone’s estate.¹³⁹ Thus, Bellin seems to allow updates that include intangible items for the “papers” category, but not the “effects” category. Though modern electronic records are visible when the right computer program is opened to display them, they remain intangible in that they are not readily viewable without the proper computer programs that make digital files accessible. Thus, through the microchips upon which electronic records are stored, digital records themselves remain somewhat intangible (and unimaginable) to the Founding Era. While Bellin suggests electronic records still fall into the category of “papers,” Bellin’s reading of “effect” permits no such updating to include modern intangibles. Given Bellin’s admission that “effects” was a catchall term following the first three categories, his narrower reading of that term is counterintuitive.¹⁴⁰

B. *The Positive Law Model*

Originalist interpretations have not coalesced around the trespass theory of the Fourth Amendment; they have also generated a positive law model, which relies on a broader array of historical sources to derive further insight into the intention of the Amendment’s authors. William Baude and James Stern proposed an understanding of the Amendment whereby a government actor conducts a search when she does “something that would be unlawful for a similarly situated nongovernment actor to do.”¹⁴¹ Without officially claiming the originalist mantle, Baude and

138. *Id.* at 262–64.

139. *Id.* at 266.

140. Bellin’s argument seems premised in the canon of construction *expressio unius est exclusio alterius*, meaning that the express mention of one thing excludes all others. *Expressio unius est exclusio alterius*, BLACK’S LAW DICTIONARY (11th ed. 2019). Yet the presumption that a list is exclusive can be overcome when the list includes general catch-all terms at its end, as Bellin admits is at least possible in the text of the Fourth Amendment. Though Madison’s original draft of the Fourth Amendment used the broader phrase “other property” for the catch-all term, there is no direct evidence of why the House of Representatives’ Committee of Eleven changed that term to merely “effects.” *Id.* at 263 (first quoting Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1301 (2016); and then citing Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 710 (1999)). This may have merely removed some forms of real property from the Amendment’s coverage while maintaining the broad catch-all nature of the term.

141. Baude & Stern, *supra* note 5, at 1831 (emphasis omitted).

Stern claim that their account “is compatible with the history leading up to the Fourth Amendment’s adoption.”¹⁴² They discuss “[t]he ordinary meanings of ‘searches’ and ‘seizures’” insofar as they “function as terms of art, with a particularly legal flavor.”¹⁴³ They use that lens to read the historical record broadly, suggesting that a violation of almost any positive law amounts to a search.¹⁴⁴ They emphasize both the close relationship between early examples of searches in cases like *Wilkes* and *Entick* and property rights,¹⁴⁵ and then add that those cases arose from positive law civil claims.¹⁴⁶

Baude and Stern then argue that Fourth Amendment searches can include violations of modern positive law—not merely the positive law of the late eighteenth century.¹⁴⁷ But that position seems ripe for challenge from other originalists; Baude and Stern’s only justification is a discussion of other constitutional principles that are not tied to original understandings of background legal principles,¹⁴⁸ rendering it “too far removed from the Amendment’s text” for some critics.¹⁴⁹ Furthermore, privacy torts and trespass laws can themselves be amorphous, often including reasonableness standards of their own.¹⁵⁰ And if those sometimes ambiguous positive laws control the extent of the Fourth Amendment, the Amendment itself does little work; the

142. *Id.* at 1841.

143. *Id.* at 1836.

144. “[W]e do not limit ourselves to laws on any particular subject matter or legal interest. Laws about trash that are designed to profit a waste-hauling monopoly are just as much a part of our model as laws about drones that are designed to protect property or privacy rights.” *Id.* at 1833 (emphasis omitted).

145. *Id.* at 1838–39.

146. *Id.* at 1839–40. Richard M. Re has argued that a more plausible reading of these early cases providing Fourth Amendment protection to the home “is that the Fourth Amendment was meant to bar Congress from using its lawmaking powers to erode the people’s security in the home, including by authorizing general warrants.” Re, *supra* note 26, at 316.

147. Baude & Stern, *supra* note 5, at 1835–36.

148.

Neither, we add, is the property protected by the Due Process and Takings Clauses defined by the property law of the Founding era but rather by modern law, which recognizes property in intangibles like trade secrets, bank accounts, and even welfare benefits. These doctrines show that it is possible to bottom constitutional rights on ordinary positive law, and that this is indeed the chosen approach when it comes to other related areas of constitutional law.

Id. at 1843 (footnotes omitted).

149. Bellin, *supra* note 5, at 237.

150. Tokson, *supra* note 10, at 644 (quoting Re, *supra* note 26, at 320). Noting the indeterminacy, Jeffrey Bellin argued that Baude and Stern’s proposal “promise[s] as much complexity and uncertainty as *Katz* itself.” Bellin, *supra* note 5, at 237.

need for a higher-order constitutional protection against government intrusion seems unnecessary if the only protection it offers is generated through the ordinary legislative process in subsequent years.¹⁵¹

In his dissent in 2018's *Carpenter v. United States*, Justice Gorsuch signaled his sympathy to Baude and Stern's positive law model, relying upon the same originalist sources Justice Thomas used to support the trespassory theory in the same case.¹⁵² But Justice Gorsuch's take came with its own wrinkles, beginning with a far more explicit claim that the positive law model was in fact an originalist interpretation of the Fourth Amendment. Justice Gorsuch argued that "[t]rue to [the Fourth Amendment's] words and their original understanding, the traditional approach asked if a house, paper or effect was *yours* under law."¹⁵³ Justice Gorsuch then claimed both that this positive law approach had "provenance in the text and original understanding of the Amendment" and that it would root the Fourth Amendment in more "democratically legitimate sources of law" than *Katz*'s reasonable expectations test.¹⁵⁴ But Justice Gorsuch did not wholly adopt Baude and Stern's suggestion that the definition of a Fourth Amendment search can draw upon modern positive law. He asked rhetorically whether the common law in 1791, current positive law, or some combination thereof should define searches, and then admitted to lacking the answers to these pressing questions that would presumably be resolved by originalist interpretations in the future if his position were adopted.¹⁵⁵ Thus, even while claiming the mantle of originalism for the positive law model, Justice Gorsuch admitted that the model generates significant indeterminacy.¹⁵⁶

151. In a brief critique of Baude and Stern, Richard M. Re has argued that positive law could act as a constitutional floor, establishing that government actions are presumptively unreasonable under the Fourth Amendment when they violate positive laws created to guard against privacy intrusions by private parties. Re, *supra* note 26, at 332. That presumptive unconstitutionality could only be overcome where investigators had sufficient individualized suspicion to justify the positive law violation. *Id.* at 333. Re's reasonableness-centered approach would still allow parties to raise Fourth Amendment claims where investigators did not violate any positive laws, thereby avoiding the presumption that the legislature approves of all government activities upon which it has not passed positive law restrictions. *Id.* at 333–35.

152. *Carpenter v. United States*, 138 S. Ct. 2206, 2268 (2018) (Gorsuch, J., dissenting) (quoting Baude & Stern, *supra* note 5, at 1852).

153. *Id.* at 2267–68.

154. *Id.* at 2268 (quoting Todd E. Pettys, *Judicial Discretion in Constitutional Cases*, 26 J.L. & POL. 123, 127 (2011)).

155. *Id.* (citing Re, *supra* note 26).

156. *Id.* Others have argued that Baude and Stern's positive law model "promise[s] as much complexity and uncertainty as *Katz* itself." Bellin, *supra* note 5, at 237.

C. *Originalism and Privacy*

Yet another strand of originalist thinking on the meaning of the Fourth Amendment emerged in *Carpenter* via Justice Alito's dissent, in ways that surprisingly turned originalism back towards protecting reasonable expectations of privacy. Justice Alito again heavily emphasized "what was on the minds of those who ratified the Fourth Amendment and how they understood its scope."¹⁵⁷ Relying upon more recent interpretations of the original meaning of the Fourth Amendment, which in turn looked to the writs of assistance cases, Justice Alito suggested that the founders' concerns included the potential for government investigators to "observe private spaces generally shielded from the public."¹⁵⁸ General warrants and writs of assistance ensured that "[p]rivate area after private area becomes exposed to the officers' eyes as they rummage through the owner's property."¹⁵⁹ When agents of the Crown searched for documents, they often "rifle[d] through many other papers—potentially filled with the most intimate details of a person's thoughts and life."¹⁶⁰

For Justice Alito, then, the Fourth Amendment's authors *were* concerned with privacy and intimacy, and the original understanding of the Fourth Amendment's purpose included protecting such privacy. This led Justice Alito to conclude, contrary to Justice Thomas, that the *Katz* reasonable expectations test can coexist with originalist interpretations of the Fourth Amendment.¹⁶¹ Although *Katz* "broadened the Amendment's reach,"¹⁶² the third-party doctrine ensured that a property-based view of the Amendment survived because that doctrine prevents defendants from claiming a Fourth Amendment interest in property owned by a third party.¹⁶³

Orin Kerr has taken a similar view of the historical record surrounding the Fourth Amendment. Kerr suggests that the decisions in *Entick* and *Wilkes*, as well as the writs of assistance

157. *Carpenter*, 138 S. Ct. at 2250 (Alito, J., dissenting).

158. *Id.* at 2251 (citing *Riley v. California*, 573 U.S. 373, 403 (2014); *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 414 (1984)).

159. *Id.*

160. *Id.*

161. *Id.* at 2246 (Thomas, J., dissenting); *id.* at 2247 (Alito, J., dissenting).

162. *Id.* at 2247 (Alito, J., dissenting).

163. *Id.* at 2260. For Justice Alito, cases like *United States v. Miller*, 425 U.S. 435 (1976) and *Smith v. Maryland*, 442 U.S. 735 (1979) "did not forge a new doctrine; instead, they rejected an argument that would have disregarded the clear text of the Fourth Amendment and a formidable body of precedent." *Id.*

cases, demonstrate “a mix of property, privacy, and policy concerns not entirely dissimilar to those that have influenced the *Katz* test.”¹⁶⁴ For Kerr, these cases “shed almost no light on the original public meaning of what today is the most important issue, the scope of ‘searches.’”¹⁶⁵ For that reason, early Supreme Court decisions were based upon analogies to paradigmatic search examples like breaking into a home and rummaging through drawers.¹⁶⁶ Kerr argues that much of the trespass theory of the Fourth Amendment arose in the language of *Katz* itself; the privacy concerns that *Katz* elevated to the fore were not new but were actually inherent in the historical material that motivated the Fourth Amendment.¹⁶⁷

D. Using Originalism to Define Searches

The defining characteristic of originalist analysis of the Fourth Amendment is indeterminacy. The historical record itself, as well as the interpretations of that record from both scholars and Supreme Court Justices, includes a mix of protections for property rights, positive law violations more broadly, and privacy rights more broadly still.¹⁶⁸ None of those views lack support. Indeed, all may be plausible readings of the original intent or original public meaning of the term “search.”¹⁶⁹ The plausibility of those competing originalist interpretations highlights the limited utility of originalism in interpreting the Fourth Amendment.¹⁷⁰ As Kerr puts it, “to articulate a doctrine for what is a search[,] one must adopt a non-originalist method for choosing among these possibilities.”¹⁷¹ Originalist methods merely suggest that a rule-like definition of search falls into a wide spectrum of possibilities, in part because, as David Sklansky has argued, the common law of “searches” at the time of enactment was “wildly

164. Kerr, *supra* note 77, at 69, 72–73.

165. Kerr, *supra* note 26.

166. Kerr, *supra* note 77, at 77.

167. *Id.* at 70, 86.

168. *See id.* at 69.

169. Orin Kerr refers to both his own privacy-based interpretation and the trespass theory as “plausible standard[s]” that courts “might use to fashion a deductive test that is consistent with the recognized examples of searches from the late eighteenth century.” *See id.* at 70, 73–74, 76. In other work, Kerr admits that “[a]s far as I have been able to discern, at least there just isn’t a useful discoverable historical answer.” Kerr, *supra* note 26.

170. “[H]istory itself gives us little concrete guidance in determining what exactly is and is not a Fourth Amendment search. It can inspire us, but it does not compel us.” Tokson, *supra* note 10, at 634.

171. Kerr, *supra* note 26.

indeterminate.”¹⁷² Looking to those eighteenth-century understandings of searches fails to produce a singular, reliable answer absent some additional, and likely discretionary, decision-making.¹⁷³ Perhaps some form of “nonoriginalism is inescapable; original meaning simply does not provide an answer in most [Fourth Amendment] cases before the Supreme Court.”¹⁷⁴

A recent empirical study of the Court’s Fourth Amendment opinions suggests that even professed originalists recognize the limited guidance that originalist theory provides in the area. Lawrence Rosenthal studied all Fourth Amendment opinions issued during Justice Scalia’s career on the Court, coding them as either originalist, nonoriginalist, or “Nonoriginalist But Original Meaning Considered.”¹⁷⁵ Opinions in the third category “referenced historical evidence or otherwise invoked original meaning (potentially reflecting fixation), but found original meaning inadequate to resolve the issue before the Court or otherwise made no use of original meaning to resolve the issue before the Court.”¹⁷⁶ During Justice Scalia’s time on the bench, 18.63% of all Fourth Amendment opinions were “nonoriginalist but original meaning considered” while only 13.73% were resolved on originalist grounds.¹⁷⁷ The trends were even starker for the Court’s most fervent originalists of the era, Justice Scalia and Justice Thomas. Of Justice Scalia’s Fourth Amendment opinions, 20.59% were nonoriginalist but original meaning considered while 18.63% were originalist; for Justice Thomas, 25.71% were nonoriginalist but original meaning considered and just 15.71% were originalist.¹⁷⁸ Even the Court’s originalists themselves have often acknowledged the indeterminacy in originalist interpretations of the Fourth Amendment.¹⁷⁹

172. Sklansky, *supra* note 19, at 1794.

173. “To use a football analogy, originalist methods can say that the rule is somewhere in the wide center of the field, say, between the 20 yard lines. But because the needs of modern doctrine demand a test for searches, you need some non-originalist principle to pick it.” Kerr, *supra* note 26. Jeffrey Bellin admits that his Fourth Amendment textualist approach leaves lingering “judgment calls,” though he argues that it injects search jurisprudence with “a heavy dose of legitimacy and determinacy.” Bellin, *supra* note 5, at 283.

174. Rosenthal, *supra* note 40, at 133.

175. *Id.* at 95.

176. *Id.* at 96.

177. *Id.* at 98.

178. *Id.* at 99.

179. As Rosenthal put it:

Part of that indeterminacy arises from choices amongst public law sources. Both the trespassory theory and the positive law model discussed above imply that some other areas of law can provide meaning for the Fourth Amendment's text. But which laws should control? Justice Scalia's opinions alluded to, but did not encapsulate, modern trespass law. Those opinions illustrate how any other area of law read into the definition of a Fourth Amendment search may be just as indeterminate as the Fourth Amendment itself, especially if that area of law explicitly incorporates reasonableness standards similar to the *Katz* reasonable expectations test.¹⁸⁰ Baude and Stern suggested a wider range of modern positive laws should control¹⁸¹ but did not explain why a wide range of legislation—which elected representatives composed without considering the potential implications for limiting the scope of government investigatory capabilities—is either a normatively desirable Fourth Amendment benchmark or the kinds of laws that the Amendment's authors thought should control. While critiquing the positive law model, Richard Re noted that that model would make many police activities widely accepted today—such as changing lanes illegally while following a suspicious vehicle or using GPS tracking technology that violates a patent—an unconstitutional search.¹⁸² Perhaps, as Re suggests, only positive laws directly addressing privacy should help define the scope of a Fourth Amendment search, while some searches still occur with no positive law violation at all.¹⁸³ Justice Gorsuch's positive law approach in *Carpenter* also noted the difficulty in determining whether modern or Founding Era positive law dictates the contours of a Fourth Amendment search.¹⁸⁴ This problem would be

It is not that Justices Scalia and Thomas rejected originalist grounds of decision in the cases in this study in favor of some alternative, or that the results somehow obscure their commitment to originalism; instead, the available historical evidence suggests that originalism does not offer much in the way of useful guidance in deciding the cases coded [nonoriginalist] or [nonoriginalist but originalist meaning considered]. The voting patterns of Justices Scalia and Thomas are likely the result of the inability of originalism to offer a vehicle for deciding the cases before them.

Id. at 103.

180. Re, *supra* note 26, at 320.

181. Baude & Stern, *supra* note 5, at 1835–36.

182. Re, *supra* note 26, at 315–16.

183. *Id.* at 332–34.

184. *Carpenter v. United States*, 138 S. Ct. 2206, 2268 (2018) (Gorsuch, J., dissenting) (citing Re, *supra* note 26).

magnified further when future cases arise in a state with unique positive laws that could apply to the facts.¹⁸⁵

IV. A RULIFIED FUTURE

Despite the vastly different methodologies of originalism and judge-made reasonableness tests, judges that deploy both have a similar goal—to create a clearer, more “rulified”¹⁸⁶ jurisprudence that both citizens and government investigators can understand and apply in their everyday relationships. In this Part, after first defining rulification and the process through which courts rulify flexible standards,¹⁸⁷ I will demonstrate how rulification is a shared goal amongst both originalists and followers of *Katz*.¹⁸⁸ I then make the descriptive claim that lower courts are already engaged in slowly rulifying search jurisprudence under *Katz*, occasionally assisted by the Supreme Court in highly salient cases.¹⁸⁹ I conclude this Part with a two-part normative claim. First, the rulification of search jurisprudence is normatively desirable and should continue.¹⁹⁰ Second, judicial interpretations of *Katz*’s reasonable expectations test can perpetuate rulification of search jurisprudence, with minimal aid from originalist theory.¹⁹¹ Borrowing from prior scholarship that identifies several models of Fourth Amendment interpretation¹⁹² and suggests that

185. Admittedly, indeterminacy abounds in judge-made reasonableness tests like *Katz* to a similar degree—though that indeterminacy is of a different genus. The indeterminacy in *Katz*’s reasonable expectations test, for example, arises from efforts to define what citizens should expect to remain private without injecting the judge’s own policy preferences into the decision. *Katz v. United States*, 389 U.S. 347 (1967).

186. “Rulification occurs when courts applying a standard promulgate sub-rules to address particular situations. The overarching standard remains, but eventually a large proportion of cases is governed by rules.” Tokson, *supra* note 10, at 651 (footnotes omitted).

187. See *infra* Section IV.A.

188. See *infra* Section IV.B.

189. See *infra* Section IV.C.1.

190. See *infra* Section IV.C.2.

191. See *infra* Section IV.C.3.

192. Kerr, *supra* note 13, at 506 (“The *probabilistic model* considers the likelihood that the subject’s information would become known to others or the police. The lower the likelihood, the more likely it is that a reasonable expectation of privacy exists. The *private facts model* asks whether the government’s conduct reveals particularly private and personal information deserving of protection. This approach focuses on the information the government collects rather than how it is collected. The *positive law model* considers whether the government conduct interferes with property rights or other legal standards outside the Fourth Amendment. When courts apply the positive law model, an expectation of privacy becomes reasonable when it is backed by positive law such as trespass. The fourth and final model, the *policy model*, reflects the direct approach. Courts applying the policy model focus directly on whether the police practice should be regulated by the Fourth Amendment.”).

a positive law model can act as a “floor” for future interpretations,¹⁹³ I suggest that the reasonable expectations test should continue to drive search jurisprudence forward towards a more rulified form.

A. *The Rulification of Standards*

Though rules and standards appear to be distinct classes of legal norms, they are part of a continuum of possible norms that vary in their stringency and effects.¹⁹⁴ In their purest forms, rules and standards offer differing benefits and drawbacks. Rules garner “uniformity, predictability, and low decision costs, at the expense of rigidity, inflexibility, and arbitrary-seeming outcomes”; in contrast, standards create “nuance, flexibility, and case-specific deliberation, at the expense of uncertainty, variability, and high decision costs.”¹⁹⁵ Rules are an unyielding reflection of the norm creator’s choices, while standards leave most of the choices to the norm’s subjects, enforcers, and interpreters “at the moment of application.”¹⁹⁶

Given the drawbacks of either a pure rule or a pure standard, decision-makers, including judges, resist both extremes. It is banal to note that judges often create exceptions to hard-edged rules that generate unjust results. But the opposite phenomenon—where judges resist the high decision costs that come with discretion-empowering standards—is equally common.¹⁹⁷

Perhaps unexpectedly, social psychologists have found that decision-makers often prefer fewer discretionary choices rather than more. Making choices amongst fewer options is less cognitively taxing, increasing one’s confidence in the resulting decision.¹⁹⁸ Judges, too, seek to avoid the paralyzing “tyranny of

193. Re, *supra* note 26, at 332.

194. “[T]he rule/standard distinction reflects a continuum, rather than a sharp binary division.” Elkin-Koren & Fischman-Afori, *supra* note 10, at 163.

195. Coenen, *supra* note 10, at 646, 652–53; *see also* Elkin-Koren & Fischman-Afori, *supra* note 10, at 168 (“While rules offer a higher level of certainty and predictability *ex ante*, standards give the court a broad range of discretion to define the content of the norm *ex post*. This presumably makes standards less predictable, since they provide relatively little guidance for prospective users, *ex ante*.”).

196. Schauer, *supra* note 10, at 804.

197. *Id.* at 804–05 (“Rather than embracing standards as the logical corollary to resisting rules, interpreters and enforcers have systematically resisted standards almost as much as they have resisted rules, sharpening the soft edges of standards just as they have rounded off the crisp corners of rules.”); *see also* Tokson, *supra* note 10, at 651.

198.

choice” that follows having too many discretionary options but little guidance on how to make the best selection.¹⁹⁹ This is especially true where judges have low confidence in their ability to make the best choices *sua sponte*, either because their preferences amongst the options are weak or because the results are particularly fraught with political peril.²⁰⁰

In a common-law system, judicial resistance to pure rules or standards creates a complex, codependent relationship between the two norm types. Judges often soften the hard-edge results of pure rules by adding some exceptions.²⁰¹ Importantly, judges also “rulify” standards over time, creating more discretion-reducing guidance for future application of an otherwise discretionary norm.²⁰² This occurs naturally as judges decide cases that provide

[T]o take some amusing examples from recent research, when consumers are confronted in the supermarket with 250 varieties of mustard, 75 kinds of olive oil, and 300 types of jam, they turn out to buy less than if their choice set is smaller. In the abstract they might say that more choice is good, and perhaps might even choose a larger choice set to a smaller one, but they tend to buy less with the larger choice set with the smaller. When in the 1990s Proctor and Gamble reduced the number of varieties of Head and Shoulders shampoo from 26 to 15, both its sales and market share rose dramatically. And when investors are given the option of whether they want a larger or smaller number of options in their retirement plans, they systematically choose smaller.

Schauer, *supra* note 10, at 812 (footnote omitted) (discussing Sheena Iyengar & Mark Lepper, *When Choice Is Demotivating: Can One Desire Too Much of a Good Thing?*, 79 J. PERSONALITY & SOC. PSYCH. 995 (2000)); Sheena S. Iyengar & Mark R. Lepper, *Rethinking the Value of Choice: A Cultural Perspective on Intrinsic Motivation*, 76 J. PERSONALITY & SOC. PSYCH. 349, 362–63 (1999); Shlomo Benartzi & Richard H. Thaler, *How Much Is Investor Autonomy Worth?*, 57 J. FIN. 1593, 1610–11 (2002)).

199. Schauer, *supra* note 10, at 811–12 (citing BARRY SCHWARTZ, *THE PARADOX OF CHOICE, WHY MORE IS LESS* (2004)) (“The basic point is that people desire choice less than is often thought, that excess choice can be disturbing and paralyzing, that having too many options is frustrating and suboptimal, and that when faced with too much choice people will seek to narrow the range of choices by quick heuristics.”).

200. *See id.* at 812–13. Schauer notes that “[d]ecision-makers, even for decisions they themselves perceive to be important, believe that they can decide better and with less anguish if they have fewer options and fewer factors to take into account.” *Id.* at 813.

201. *Id.* at 804–05; Elkin-Koren & Fischman-Afori, *supra* note 10, at 163.

202. “Rulification occurs when courts applying a standard promulgate sub-rules to address particular situations. The overarching standard remains, but eventually a large proportion of cases is governed by rules.” Tokson, *supra* note 10, at 651 (footnote omitted); *see also* Schauer, *supra* note 10, at 806 (“[I]nterpreters and enforcers of standards have tried to convert those standards into rules to a surprising degree, surprising especially because the effect of such action is to constrain the very choices that those interpreters and enforcers would otherwise have had, and thus in part to falsify the belief throughout modern American legal theory that enforcers and interpreters relish choice, and the more the better.”); Elkin-Koren & Fischman-Afori, *supra* note 10, at 163 (“Judges soften rules through interpretation and, in a similar fashion, rulify standards by elaborating discrete categories and developing contextual guidelines.”).

specific examples of a standard's application.²⁰³ As that process repeats itself, a series of precedential decisions emerges that can "translate the initially articulated standard into a rule-like formulation."²⁰⁴

That natural common-law process gives judges on higher appellate courts—including the Supreme Court—a choice to make. Such courts might adopt a "permissive standard," under which "lower courts may (or may not) choose to fill in the relevant gaps with bright-line boundaries, safe harbor presumptions, categorical exceptions, multi-factor tests, and the like."²⁰⁵ Alternatively, high courts might adopt a "mandatory standard" that "restrict[s] the extent to which lower courts may experiment with doctrine"—using what Michael Coenen has coined a "rule against rulification."²⁰⁶ Coenen also notes that high courts can announce a "pro-rulification rule" that actively encourages lower courts to experiment with more detailed rules to guide the application of an otherwise fuzzy standard.²⁰⁷

Whether the Court should adopt a permissive or mandatory standard varies with the context. Mandatory standards prevent lower-level decision-makers from relying upon checklists or other decisional heuristics in their decisions.²⁰⁸ But in turn, mandatory standards increase the cognitive effort required to reach a decision in each individual case, often leading to unpredictable outcomes across jurisdictions.²⁰⁹ Thus, where new cases are likely to arise under significantly uncertain conditions, the Court may prefer a permissive standard, which allows lower-court experimentation, reduces decisional costs, and creates more predictability and

203. "As cases begin to arise under a non-specific standard, courts must decide whether a particular set of facts satisfies the standard's triggering criteria. By rendering such decisions—which carry precedential force—courts will begin to elaborate on the content of the norm itself." Coenen, *supra* note 10, at 653.

204. *Id.* at 655.

205. *Id.* at 648.

206. *Id.* at 650–51; *see also* Elkin-Koren & Fischman-Afori, *supra* note 10, at 170.

207. Coenen, *supra* note 10, at 651. Coenen later argues in favor of some pro-rulification rules, noting that where the Supreme Court "really wished to spur lower court experimentation, perhaps it should do more than simply *not prohibit* lower courts from rulifying. Maybe, that is, the Court should affirmatively *require* lower courts to rulify." *Id.* at 708. "Insofar as greater clarity and specificity of the doctrine are the overarching desiderata, and insofar as the Court seeks lower court input on how the doctrine should be clarified and specified, then a 'pro-rulification rule' might best serve the interests of the Court itself." *Id.* at 710.

208. *See id.* at 681.

209. *Id.* at 681–82.

certainty over time (at least within, if not across, jurisdictions).²¹⁰ Permissive standards also incentivize judges to fully disclose the reasons for their decisions in hopes that those reasons will become a rule for use in future cases.²¹¹ Further, the Justices can articulate a norm necessary to resolve the facts immediately presented to it without dictating the outcome in new factual scenarios before they have had the chance to percolate in the lower courts.²¹²

B. Rulification as a Shared Goal

As noted earlier, originalists aim, at least in part, to create an interpretive method that will limit judicial discretion by binding judges to a rule that fits with some conception of the original intent or meaning behind a textual provision.²¹³ For instance, Justice Thomas has decried “the hallmarks of subjective policymaking” found in *Katz*, calling instead for a return to “the Founders['] . . . common-law protection of property.”²¹⁴ Justice Gorsuch has similarly claimed that the original understanding of the Fourth Amendment “do[es] not depend on the breach of some abstract ‘expectation of privacy,’” but instead applies only to “your protected things Period.”²¹⁵

Judge-made reasonableness tests set out a more flexible standard for application in future cases. But permissive standards like *Katz*’s reasonable expectations test are actually a starting

210. *Id.* at 687 (“Rather than specify what an operative norm does and does not permit, the enactor of a legal standard leaves such matters for lower-ranking actors to decide—via the repeated resolution of cases arising under the standard’s open-ended terms.”).

211. *See id.* at 693.

212. *See id.* at 695.

213. *See, e.g.,* Scalia, *supra* note 36, at 864 (“Originalism does not aggravate the principal weakness of the [constitutional] system, for it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself.”); Bork, *supra* note 36, at 35 (“The Supreme Court’s constitutional role appears to be justified only if the Court applies principles that are neutrally derived, defined and applied.”); PERRY, *supra* note 36, at 10; Berger, *supra* note 36, at 87 (“[A]ctivist judicial review is inconsistent with democratic theory because it substitutes the policy choices of unelected, unaccountable judges for those of the people’s representatives”); Tushnet, *supra* note 36, at 610 (originalism aims to “minimize[] the role contested judgments play in constitutional interpretation”).

214. *Carpenter v. United States*, 138 S. Ct. 2206, 2244, 2246 (2018) (Thomas, J., dissenting).

215. *Id.* at 2264 (Gorsuch, J., dissenting). Jeffrey Bellin has similarly suggested that “[t]he only searches that count for Fourth Amendment purposes are searches of ‘persons, houses, papers, and effects.’” Bellin, *supra* note 5, at 238–39. Bellin adds that “intangible items like a person’s voice, image, or cell phone signals do not constitute ‘effects’ under any plausible interpretation of the term,” which would have resolved the controversy in *Carpenter*. *Id.* at 239.

point in a long-term project to rulyfy search jurisprudence over time, leading to similar discretion-reducing results.

The Supreme Court often highlights the need to create bright-line rules of criminal procedure that officers can implement easily in the field.²¹⁶ As early as 1979's *Dunaway v. New York*, Justice Brennan voiced the need to provide "[a] single, familiar standard" that defined the grounds for custodial interrogation, which would "guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."²¹⁷ The Court returned to the theme in 1981's *New York v. Belton*, where it claimed that Fourth Amendment doctrine should "regulate the police in their day-to-day activities" by providing "a set of rules which, in most instances, makes it possible to reach a correct determination beforehand" as to whether police conduct is constitutional.²¹⁸

The Court's support for clear rules guiding police conduct continued into the new millennium. In 2001's *Atwater v. City of Lago Vista*, Justice Souter argued that "a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need," arguing instead that "the object . . . is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing."²¹⁹ Justice Kennedy similarly noted in 2010's *Berghuis v. Thompson* the need to avoid ambiguity in a rule defining the point at which a defendant invokes their *Miranda* rights.²²⁰ Justice Kennedy sought "an

216. "[T]he feeling persists that fourth amendment doctrine should be expressed in the form of clear, precise rules that are easily applied by the police in routine law enforcement activities." Gerald G. Ashdown, *Good Faith, the Exclusionary Remedy, and Rule-Oriented Adjudication in the Criminal Process*, 24 WM. & MARY L. REV. 335, 336, 353 (1983); see also Steinberg, *supra* note 5, at 1094 (citing *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001); *New York v. Belton*, 453 U.S. 454, 458 (1981)).

217. *Dunaway v. New York*, 442 U.S. 200, 213–14 (1979). The Court made a similar allusion to the need for clear rules to guide officers' conduct six years earlier in *United States v. Robinson*. There, Chief Justice Rehnquist declared that

[a] police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search.

United States v. Robinson, 414 U.S. 218, 235 (1973).

218. *Belton*, 453 U.S. at 458 (quoting Wayne R. LaFave, "Case-By-Case Adjudication" Versus "Standardized Procedures": *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 141–42 (1974)); see also *United States v. Ross*, 456 U.S. 798, 821 (1982).

219. *Atwater*, 532 U.S. at 347 (citing *Robinson*, 414 U.S. at 234–35).

220. *Berghuis v. Thompson*, 560 U.S. 370, 381–82 (2010).

objective inquiry that ‘avoid[s] difficulties of proof and . . . provide[s] guidance to officers’ on how to proceed in the face of ambiguity.”²²¹ In 2014’s *Riley v. California*, Chief Justice Roberts again noted the Court’s “general preference to provide clear guidance to law enforcement through categorical rules.”²²²

This pressure to rulify search jurisprudence is enhanced by the specter of the exclusionary rule. Because an officer’s mistaken interpretation of search jurisprudence will likely lead to the suppression of evidence under the exclusionary rule, and in turn may lead to the dismissal of charges against a guilty criminal, the Court sees the stakes of search jurisprudence as particularly high, even when deploying reasonableness standards like *Katz*.²²³ To avoid frequently exonerating otherwise-guilty defendants, the Court prioritizes clear, easy-to-implement rules that will guide officers’ conduct.²²⁴

As courts establish clear Fourth Amendment rules, they might also narrow the scope of qualified immunity protection in civil suits naming officers as defendants. Qualified immunity protects officers from civil liability so long as they have not violated clearly established constitutional or statutory law.²²⁵ To the frustration of many civil plaintiffs, many factual scenarios

221. *Id.* (quoting *Davis v. United States*, 512 U.S. 452, 458–59 (1994)); *see also* Schauer, *supra* note 10, at 811 (discussing *Miranda v. Arizona*, 384 U.S. 436 (1966)). In a 2016 study of the internal coherence of Fourth Amendment jurisprudence, Nicholas Kahn-Fogel examined seventy-three Supreme Court decisions addressing Fourth Amendment questions between the 1995 and 2014 Terms. Kahn-Fogel, *supra* note 5, at 292–93, 315. He found that

[i]n forty-seven of the seventy-three Supreme Court cases in the Study, the Court embraced a rule-like directive to guide future courts and law enforcement officers. In twenty-six cases, the Court selected a standard-like directive. It appears, therefore, that the Court frequently provides the kind of relatively straightforward guidance that can assist lower courts in reaching conclusions the Court will deem correct in future cases.

Id. at 324.

222. *Riley v. California*, 573 U.S. 373, 398 (2014).

223. “The Fourth Amendment’s suppression remedy exerts a profound influence on the shape of Fourth Amendment doctrine. In particular, it generates tremendous pressure on the courts to implement the Fourth Amendment using clear ex ante rules rather than vague ex post standards.” Kerr, *supra* note 13, at 527 (citing *Ashdown*, *supra* note 216, at 336–37).

224. *Id.* at 528 (“To minimize this cost while ensuring the enforcement of Fourth Amendment rules, courts turn where possible to clear rules police can readily follow.”); *see also* *Ashdown*, *supra* note 216, at 336–37 (“Although the case-by-case approach may retain needed flexibility, its amorphous nature provides little guidance to the police as to what investigatory practices will be viewed retrospectively as reasonable on balance with the individual interest affected.”).

225. *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Plumhoff v. Rickard*, 572 U.S. 765, 778 (2014); *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011).

presented in cases of officer misconduct have not been directly addressed in previous decisions, and thus officers can readily present the defense that their conduct did not contradict clearly established law.²²⁶ A more rulified Fourth Amendment may help address the overbreadth of qualified immunity by establishing more clear law on the constitutionality of officer behavior. Over time, rulification can meaningfully discourage officer misconduct through both the exclusionary rule and limits on qualified immunity doctrine.

Both originalist and living constitutionalist judges may also have strategic reasons to create a rulified search jurisprudence. Categorical rules, whether based upon originalist interpretation or judge-made standards, restrain the discretion of future judges. That in turn solidifies the original judges' evaluations of difficult questions.²²⁷ Judges may turn to this technique for a variety of reasons, including to limit the decision costs facing future courts by settling some close questions or to surreptitiously consolidate their own policy preferences in law.²²⁸ In either case, a rule-like approach to ambiguous areas of law, like search-and-seizure jurisprudence, is attractive.

Perhaps because of its desire to generate rule-like guidance for officers in the field, the Court has often relied upon permissive standards in criminal procedure, thereby allowing lower courts to rulify those standards as new facts arise before them. For instance, when defining a "custodial interrogation" that requires officers to provide the well-known *Miranda* warnings to a suspect, the Court has offered only broad guidance while delegating authority to lower courts to specify the conditions of a custodial interrogation in more detail.²²⁹ In turn, lower courts have created some per se rules for custodial interrogation, such as the Third Circuit's holding that "admissibility-related questioning of individuals at border checkpoints" is per se noncustodial, or several circuits' rulings that *Terry* stops are generally

226. See Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 17 (2017); *Pearson v. Callahan*, 555 U.S. 223, 237–39 (2009).

227. Schauer, *supra* note 10, at 809 ("[W]hen a court, say, makes a standard more precise and limits the choices available to that court in future cases, it also limits the choices available to future courts in future cases.").

228. Frederick Schauer explains why decision-makers in general want their successors' discretion to be limited: "Not only is it rare for decision-makers to trust the judgment of their successors more than they trust their own, but decision-makers, like the rest of us, are likely to exaggerate the harms of (others') bad decisions and minimize the benefits of good ones." *Id.* at 809–10.

229. Coenen, *supra* note 10, at 674.

noncustodial.²³⁰ Similarly, when defining who constitutes a “government agent” whose questions will trigger the Sixth Amendment’s right to counsel, the Court has permitted circuit courts to develop some bright-line tests with limited rule-like guidance from above.²³¹ This is not to say that every criminal procedure standard the Court has announced permits lower court rulification.²³² But the Court has readily deployed many permissive standards in criminal procedure over the last half-century.

C. Rulifying the Permissive Standard of Reasonable Expectations

The *Katz* reasonable expectations test is a “permissive standard” that encourages lower courts to rulify search jurisprudence over time.²³³ This process will in turn slowly limit the discretion of future actors to determine which government activities amount to a search. Such a permissive standard is normatively desirable given the ever-changing investigatory technologies and techniques that search and seizure cases must address.²³⁴ *Katz* can play a leading role in responding to those cases by generating further clear rules to guide investigators’ behavior.²³⁵ While originalism can provide straightforward answers in some cases that address physical access to property roughly analogous to the Fourth Amendment’s “houses, papers, and effects,”²³⁶ in the lion’s share of cases where originalist interpretation fails to provide clear answers, courts should deploy the reasonable expectations test. Over time, courts deploying *Katz* can render decisions that align with the best policies to protect privacy for ordinary citizens.

230. *Id.* at 675 (discussing *United States v. Kiam*, 432 F.3d 524, 530 (3d Cir. 2005); *United States v. Trueber*, 238 F.3d 79, 92 (1st Cir. 2001); *United States v. Perdue*, 8 F.3d 1455, 1464 (10th Cir. 1993); *United States v. Bautista*, 684 F.2d 1286, 1291 (9th Cir. 1982)).

231. *Id.* at 676 (discussing *Moore v. United States*, 178 F.3d 994, 999 (8th Cir. 1999); *United States v. Birbal*, 113 F.3d 342, 346 (2d Cir. 1997); *Ayers v. Hudson*, 623 F.3d 301, 310 (6th Cir. 2010)).

232. As examples of rules against rulification, Coenen cites the Court’s mandatory standards for defining probable cause, the voluntariness of consent to search, exigent circumstances, and seizures of a person. *Id.* at 663.

233. *See infra* Section IV.C.1.

234. *See infra* Section IV.C.2.

235. *See infra* Section IV.C.3.

236. U.S. CONST. amend. IV.

1. *The Reasonable Expectations Test Is a Permissive Standard.* As it has been deployed in the Supreme Court and lower courts, the reasonable expectations test is a permissive standard that rulifies search jurisprudence over time. Before it became a “touchstone of Fourth Amendment analysis,”²³⁷ the reasonable expectations test was a single Justice’s descriptive gloss on the direction that the definition of a Fourth Amendment search had taken prior to 1967.²³⁸ In his concurring *Katz* opinion, Justice Harlan announced his “understanding of the rule that has emerged from prior decisions” defining a search.²³⁹ Justice Harlan’s understanding was that a search occurs when the government accesses something that (1) the defendant subjectively expects to be private and (2) that society thinks is reasonable to expect will remain private.²⁴⁰

The Court slowly elevated that reasonable expectations test into the leading norm of the Fourth Amendment in a series of decisions that mentioned the general test before announcing new, factually specific applications of it. Justice Harlan’s concurrence was first cited by the Court in *Terry v. Ohio*, where Chief Justice Warren asserted that “wherever an individual may harbor a reasonable ‘expectation of privacy,’ he is entitled to be free from unreasonable governmental intrusion.”²⁴¹ In 1971’s *United States v. White*, the Court noted that a search occurred in *Katz* when officers “violat[ed] the privacy on which [Katz] justifiably relied while using the telephone in those circumstances.”²⁴² The Court then held that there was no such violation of privacy expectations when an informant recorded conversations with the defendant surreptitiously on a radio transmitter.²⁴³ The Court returned to a variation on this theme in 1973’s *Couch v. United States*, holding that the petitioner there could not claim “either for Fourth or Fifth Amendment purposes, an expectation of protected privacy or confidentiality” in business and tax records the defendant delivered to her accountant.²⁴⁴ With a citation to *Terry*, the Court noted in 1973’s *United States v. Dionisio* that “wherever an

237. *California v. Ciraolo*, 476 U.S. 207, 211 (1986).

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

239. *Id.*

240. *Id.*

241. *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (Harlan, J., concurring) (citation omitted) (quoting *Katz*, 389 U.S. at 361). The Court again referred to the reasonable expectations test in *Mancusi v. DeForte*, 392 U.S. 364, 368 (1968).

242. *United States v. White*, 401 U.S. 745, 748–49 (1971).

243. *Id.* at 751–52, 754.

244. *Couch v. United States*, 409 U.S. 322, 335–36 (1973).

individual may harbor a reasonable ‘expectation of privacy,’ . . . he is entitled to be free from unreasonable governmental intrusion.”²⁴⁵ The Court applied that language to hold that requiring a grand jury witness to produce voice exemplars did not violate the witness’s Fourth Amendment rights.²⁴⁶ While addressing an issue of statutory construction in 1974’s *Gooding v. United States*, the Court cited directly to Justice Harlan’s concurrence and noted that “[t]he Fourth Amendment was intended to protect our reasonable expectations of privacy from unjustified governmental intrusion.”²⁴⁷ In 1974’s *Cardwell v. Lewis*, the Court cited *Katz* to note that “[t]he decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy.”²⁴⁸ The Court then ruled that the defendant lacked an expectation of privacy in the tire or paint on an automobile parked in a public place, and thus the government’s examination of the car’s exterior did not constitute a search.²⁴⁹ In 1976’s *United States v. Miller*, the Court cited *Katz* while holding that “there was no intrusion into any area in which respondent had a protected Fourth Amendment interest” when investigators obtained his bank records via subpoena.²⁵⁰ In light of these decisions, the Court could comfortably declare in 1979’s *Smith v. Maryland* that the Fourth Amendment’s “lodestar” was Justice Harlan’s reasonable expectations of privacy test.²⁵¹

This slow elevation of a descriptive concurring opinion into a controlling test, through a series of factually specific cases, demonstrates that the reasonable expectations test is a permissive standard. It is broadly worded and discretionary, but that discretion allows subsequent courts, including the Supreme Court itself, to apply it to a wide variety of new factual scenarios while

245. *United States v. Dionisio*, 410 U.S. 1, 8 (1973).

246. *Id.* at 14–16. Similarly, in 1974’s *California Bankers Ass’n v. Shultz*, the Court cited *Katz*’s majority opinion and emphasized that in Fourth Amendment cases, “the question is ‘what expectations of privacy’ will be protected by the Fourth Amendment ‘in the absence of a warrant.’” *Cal. Bankers Ass’n v. Shultz*, 416 U.S. 21, 88–89 (1974) (quoting *White*, 401 U.S. at 752).

247. *Gooding v. United States*, 416 U.S. 430, 462 (1974).

248. *Cardwell v. Lewis*, 417 U.S. 583, 589 (1974) (quoting *Jones v. United States*, 357 U.S. 493, 498 (1958)).

249. *Id.* at 589–92.

250. *United States v. Miller*, 425 U.S. 435, 437, 440, 442 (1976).

251. *Smith v. Maryland*, 442 U.S. 735, 739–40 (1979).

creating new rules to address those scenarios.²⁵² The Court never asserted that the reasonable expectations test is a “mandatory standard” that lower-level actors in the criminal justice system should apply without devising clearer rules or new decision-making heuristics. Instead, the reasonable expectations test described the rules that courts had already devised, all while guiding the creation of more rules in the future.

Since *Katz* was elevated to the controlling test for defining a “search,” both lower courts and the Supreme Court have continued to deploy it to slowly rulify Fourth Amendment search jurisprudence, thereby limiting judicial discretion just as an originalist theory might. Looking first at the Supreme Court, in the decades since *Katz* the Court has addressed several unique factual scenarios and defined society’s reasonable expectations, rightly or wrongly, with clearer, rule-like directives for government investigators.²⁵³ For instance, the Court has offered clear guidance requiring a warrant based upon probable cause to enter a home, absent exigent circumstances, though a parolee’s home can be searched based upon a statute providing for such searches on “reasonable grounds.”²⁵⁴ Incident to a valid arrest in a home, officers can search the arrestee’s person, the area in her immediate control, and spaces immediately adjacent to the arrest from which a confederate might attack officers and threaten their safety (or throughout the remainder of the house if officers reasonably suspect an attack will be launched).²⁵⁵ The Court has promulgated equally clear rules regarding vehicles. First, officers can lawfully execute a traffic stop with reasonable cause to believe the driver has committed any traffic violation, including a misdemeanor.²⁵⁶ If officers lawfully arrest the driver, they can

252.

The test does not, of course, dictate what a reasonable expectation of privacy is, or what results should be reached. Rather, it provides the structure in which the debate can take place, thus allowing courts to engage in a process of common law rulemaking. As such, the flexibility of the test is not a shortcoming, but a strength.

Peter Winn, *Katz and the Origins of the “Reasonable Expectation of Privacy” Test*, 40 MCGEORGE L. REV. 1, 12 (2009).

253. “[H]ow the Fourth Amendment applies to an extremely wide range of human behavior has already been worked out fairly clearly by the Supreme Court—certainly clearly enough for government to work” Allen & Rosenberg, *supra* note 12, at 1151.

254. See *Minnesota v. Olson*, 495 U.S. 91, 95–96, 98–100 (1990); *Griffin v. Wisconsin*, 483 U.S. 868, 880 & n.8 (1987).

255. See *Chimel v. California*, 395 U.S. 752, 763 (1969); *Maryland v. Buie*, 494 U.S. 325, 333–34 (1990).

256. See *Whren v. United States*, 517 U.S. 806, 818 (1996); *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001).

search the vehicle only if the arrestee is unrestrained and “within reaching distance of the passenger compartment at the time of the search” or if officers reasonably “believe[] the vehicle contains evidence of the offense.”²⁵⁷

More recently, the Court has taken a categorical approach to decide whether the government has conducted a search by warrantlessly accessing data maintained by third-party service providers.²⁵⁸ The Court had long held that when citizens disclose information to any nongovernmental third party, they relinquish their expectation that the information is private, and thus the government can collect that information without conducting a search.²⁵⁹ But there are many categorical exceptions from that third-party doctrine. While investigators can warrantlessly collect dialed telephone numbers,²⁶⁰ they cannot collect the words spoken in the subsequent conversation, which are also provided to third parties.²⁶¹ Similarly, the government cannot warrantlessly collect the results of medical diagnostic tests maintained by third-party doctors.²⁶² Nor can investigators search a suspect’s hotel room without a warrant, despite the fact that third-party housekeepers or maintenance people may have accessed the room or even moved the suspect’s belongings.²⁶³ In 2018’s *Carpenter v. United States*,

257. See *Arizona v. Gant*, 556 U.S. 332, 351 (2009).

258. See *Gentithes*, *supra* note 12, at 1043 (“The *Carpenter* majority suggested that some categories of data—such as digital location information collected from cell phones—do not neatly fall into the third-party doctrine’s dichotomy between unprotected, disclosed information and protected, undisclosed information.”).

259. See *United States v. Miller*, 425 U.S. 435, 442–43 (1976).

260. See *Smith v. Maryland*, 442 U.S. 735, 745–46 (1979).

261. See Transcript of Oral Argument at 51, *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (No. 16-402) (“People disclose the content of telephone calls to third parties. But we said the government can’t intrude without a warrant in that situation.”).

262. See *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001); see also Transcript of Oral Argument, *supra* note 261, at 23 (“We limited it when -- in *Bond* and *Ferguson* when we said police can’t get your medical records without your consent, even though you’ve disclosed your medical records to doctors at a hospital.”).

263. See *United States v. Davis*, 785 F.3d 498, 527 (11th Cir. 2015) (Rosenbaum, J., concurring) (“[T]he Supreme Court has held that ‘[a] hotel room can clearly be the object of Fourth Amendment protection as much as a home or an office.’ This is so, even though housekeepers and maintenance people commonly have access to hotel rooms during a guest’s stay and can view and even move around a guest’s belongings in order to conduct their duties. But the fact that a hotel guest has exposed his or her belongings to hotel workers does not, in and of itself, entitle the government to enter a rented hotel room and conduct a warrantless search.” (citations omitted) (quoting *Hoffa v. United States*, 385 U.S. 293, 301 (1966)) (citing *Minnesota v. Carter*, 525 U.S. 83, 95–96 (1998) (Scalia, J., concurring))); see also *Minnesota v. Olson*, 495 U.S. 91, 96–97 (1990); *United States v. Warshak*, 631 F.3d 266, 287 (6th Cir. 2010) (“Hotel guests, for example, have a reasonable expectation of privacy in their rooms. This is so even though maids routinely enter hotel

the Court excluded large amounts of cell-site location information from the third-party doctrine, adding it to this collection of clear limitations on that doctrine.²⁶⁴

This categorical approach, based upon the general guidance provided by the reasonable expectations test, has created a fairly concrete jurisprudence regarding most Fourth Amendment searches.²⁶⁵ In fact, this approach has generated rules so clear and understandable that lower courts very often apply them correctly, without the need for Supreme Court intervention to correct course.²⁶⁶

Beyond the Supreme Court, much of the rulifying action takes place in lower courts that apply the reasonable expectations test to myriad factually nuanced cases.²⁶⁷ In so doing, those courts have rulified search jurisprudence without the Supreme Court's intervention. Professor Orin Kerr has provided a helpful catalogue of lower courts opinions that give specific rule-like interpretations of *Katz's* reasonable expectations test,²⁶⁸ including rules to guide searching stolen goods,²⁶⁹ opening screen doors,²⁷⁰ searching hotel rooms before or after checkout,²⁷¹ accessing computer files, entering squatters' temporary housing, and peering through

rooms to replace the towels and tidy the furniture. Similarly, tenants have a legitimate expectation of privacy in their apartments. That expectation persists, regardless of the incursions of handymen to fix leaky faucets." (citations omitted)).

264. See Gentithes, *supra* note 12, at 1057.

265. "Although the modern intellectual tendency is to map our understanding of the Fourth Amendment using general claims about reasonable expectations of privacy, in practice the focus is on houses, cars, borders, arrests, and so on." Allen & Rosenberg, *supra* note 12, at 1159–60.

266.

[I]n recent decades, lower courts have reached the "right" answers to Fourth Amendment questions most of the time. Additionally, the performance of lower courts on Fourth Amendment issues has been roughly comparable to the performance of lower courts on all issues the Supreme Court addresses, as revealed by comparison to other studies that have analyzed lower court performance for other purposes. The Court also has not felt compelled to address Fourth Amendment questions at a rate that seems disproportionate to its overall criminal procedure docket or to its treatment of other important constitutional matters.

Kahn-Fogel, *supra* note 5, at 277.

267. "Although the Supreme Court grabs the headlines, the job of announcing rules that govern the reasonable expectation of privacy test falls mostly to the hundreds of decentralized lower courts." Kerr, *supra* note 13, at 525.

268. *Id.* at 530–31.

269. See *United States v. Caymen*, 404 F.3d 1196, 1199–200 (9th Cir. 2005).

270. See *United States v. Arellano-Ochoa*, 461 F.3d 1142, 1145 (9th Cir. 2006).

271. See *United States v. Dorais*, 241 F.3d 1124, 1128 (9th Cir. 2001); see also *United States v. Nerber*, 222 F.3d 597, 600 & n.2 (9th Cir. 2000).

windows.²⁷² Lower courts even turn standards within search jurisprudence into rule-like directives over time, such as circuit court interpretations of the standard used to distinguish open fields from curtilage.²⁷³

Though commentators often bristle at the normative desirability of the categorical rules generated under *Katz*'s permissive standard, the rules do effectively limit discretion, both for future judges and for police officers.²⁷⁴ In part, the very clarity of decisions defining a Fourth Amendment search are the source of commentators' frustration. The rules themselves are relatively clear, even if those rules defy a broader theoretical explanation or undermine normative theories of the Amendment's essential purpose,²⁷⁵ making them appear as an "un-legal" collection without a guiding ideal.²⁷⁶ But there is little doubt that courts, driven by the need to provide lower-level actors in the criminal justice system with *ex ante* guidance, have created relatively clear rules to guide most Fourth Amendment cases.²⁷⁷

Katz's reasonable expectations test, and the many rule-like decisions that have followed in its wake, may simply be the next evolution of the centuries-long project to liquidate the meaning of

272. Kerr, *supra* note 13, at 530–31 & nn.136–38.

273. *Id.* at 530 & n.130 (discussing *United States v. Seckman*, 175 F. App'x 193, 196 (10th Cir. 2006) (noting that the open fields doctrine allows officers to warrantlessly inspect "places where visitors could be expected to go, i.e. walkways, driveways, or porches")).

274.

In fact, Fourth Amendment law is close to a model of clarity. Virtually every significant aspect of human interaction has already been provided for in a relatively clear set of rules. The justification of any particular result and how it bears on results reached in other areas are different matters.

Allen & Rosenberg, *supra* note 12, at 1153.

275. "It is because we know so much about what the police can search . . . that the 'why' questions are pressing." *Id.* at 1157.

276. Baude & Stern, *supra* note 5, at 1888; *see also* *Carpenter v. United States*, 138 S. Ct. 2206, 2265 (2018) (Gorsuch, J., dissenting) (arguing that the reasonable expectations test "calls for the exercise of raw political will belonging to legislatures, not the legal judgment proper to courts").

277.

The need for clear *ex ante* rules also pushes courts to announce when government conduct violates a reasonable expectation of privacy using rules rather than standards. The courts may justify outcomes using models, but the outcomes themselves tend to be articulated as rules that provide clear *ex ante* guidance to law enforcement as to whether police practices violate a reasonable expectation of privacy.

Kerr, *supra* note 13, at 529 (footnote omitted) (citing FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991); Louis Kaplow, *Rules v. Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 955 (1995)).

the vague term search in the Fourth Amendment.²⁷⁸ These decisions use the same inductive reasoning process originalists have used to derive broader theories of the Amendment. They look to the reasonable expectations test as a guide, examine specific examples of its application to the idiosyncratic facts of other decided cases, and attempt to create new categorical rules to deploy in future cases.

2. *Lower Courts Should Feel Free to Rulify the Definition of a Fourth Amendment Search over Time.* The slow rulification of search jurisprudence, which clarifies the Fourth Amendment's scope in fits and starts while adapting to changing technologies and investigatory techniques, is normatively desirable. That process addresses the factual idiosyncrasy that is a frustrating but unavoidable facet of criminal procedure.²⁷⁹ No matter how well a judge might capture the policy reasoning that dictates specific outcomes in cases A through Y, new factual nuances are almost certain to arise in future case Z given the boundless ingenuity of human actors that commit and investigate crime. Any broader theories we might derive to handle all of those facts will appear incoherent in the future, whether those theories be originalist or judge-made.²⁸⁰ Because each individual case involves a discrete set of facts unlike any other, courts must try to place that case within a category of existing cases subject to well-known rules to determine whether a warrant is required.²⁸¹ And new bespoke facts will always require new bespoke rules. Lower courts should feel free to create such rules in myriad new factual scenarios, comforted by the fact that the reasonable expectations test is actually a permissive standard that promotes such decisions. The reasonable expectations test not only permits further rulification to deal with new factual developments; the test requires such

278. See William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 9 (2019) (describing the Madisonian concept of constitutional liquidation as a means to settle the indeterminacy of the legal text through subsequent practice).

279. "In essence, the Fourth Amendment is, as we have been suggesting, a grown, spontaneous system, in Hayek's terminology. In ours, it has too many variables to yield its essence to logical analysis designed to generate decision algorithms." Allen & Rosenberg, *supra* note 12, at 1198–99.

280. "Rather than more futile efforts at grand theorizing, attention should be paid to the localities. . . . The model to apply to the Fourth Amendment is the model of the common law, with its tremendous capacity to adjust to quite fine distinctions." *Id.* at 1199.

281. "Because each Fourth Amendment case involves a single discrete set of facts, courts must imagine each case as within a category of cases before determining whether that category of police practices is troublesome enough to require a warrant." Kerr, *supra* note 13, at 506.

rulification in order to remain a useful guide to government actors and citizens.

To rulify reasonable expectations effectively, lower courts should rely on the particularized expertise and localized knowledge that they, and the parties before them, develop over time. New factual scenarios may not have been addressed in prior cases, but trial courts, and eventually intermediate appellate courts, can begin honing their expertise to address those new facts. Over time, in jurisdictions where a new investigatory technique or criminal effort has become commonplace, courts will become thought-leaders that provide early sketches of how those factual scenarios fit Fourth Amendment search jurisprudence. Those early sketches can be sharpened over time into the next generation of clear rules generated by the reasonable expectations test.

As noted above, critics of search jurisprudence are often upset by the particular rules that control. Those rules may conflict with broader policy goals or normative ends that the critics harbor. But the rules themselves become relatively clear over time. Claims of incoherence arise from the lack of a single, broader theoretical explanation of each clear rule.²⁸² The pursuit of such a broader theory may be a fool's errand. Search jurisprudence can do its job of providing clear guidance to lower-level actors in the criminal justice system without a single unifying theory.²⁸³ As long as the understanding of Fourth Amendment searches is sufficiently rulified and knowable, those actors can implement the rules they internalize reliably and consistently. Perhaps the most cohesive theory for Fourth Amendment jurisprudence is one that acknowledges the limits of most broad theories and relies upon rulification, largely in the lower courts and with occasional Supreme Court guidance, to adapt to the myriad ever-changing circumstances of the government's criminal investigations.

Some might argue that this will leave "lower courts, citizens, and the police . . . guessing about what the Constitution permits."²⁸⁴ But the lower courts need not guess; recent history has shown that they are capable of rulifying search jurisprudence in

282. See Allen & Rosenberg, *supra* note 12, at 1157.

283. "The appearance of confusion in the Supreme Court's cases partly reflects the incorrect assumption that there must be a single test for when an expectation of privacy is reasonable," and hence officers have conducted a search. See Kerr, *supra* note 13, at 507.

284. Bellin, *supra* note 5, at 236. Bellin later claims that "[a] doctrine of uncertainty is toxic for police and citizens who do not know what the Constitution permits, and lower courts who receive little guidance on what to tell them." *Id.* at 282.

the many new factual scenarios that police practice will present.²⁸⁵ Any model of Fourth Amendment interpretation, even one that hews closely to the text's focus on "persons, houses, papers, and effects,"²⁸⁶ will inevitably require lower courts to apply it to myriad new factual scenarios. A permissive standard for defining a search empowers those courts to deploy localized knowledge and expertise on those new facts. New evolutions in investigative technique can percolate in lower courts and largely be addressed by actors with direct, on-the-ground experience of those techniques. For its part, the Supreme Court can use its limited review capacity to supervise such lower court application occasionally, intervening only when necessary to correct widely misguided rulings.

To be clear, clarity is not the only normative value that the Fourth Amendment should serve. A myriad of other values—such as dignity, liberty, information control, or even the avoidance of arbitrary exercises of power—are at stake.²⁸⁷ But the reasonable expectations test can serve many of those values alongside clarity. As Christopher Slobogin argues, privacy, which is at the heart of the *Katz* test, is a value "capacious enough . . . to accommodate virtually all of the values commentators have said it does not encompass."²⁸⁸ It is also scalable; varying government actions can invade privacy to varying extents, and a test focused upon that value can respond flexibly, especially in light of new facts and evolving technologies.²⁸⁹ Beyond protecting those substantive values, the reasonable expectations test has normative legitimacy through the adjudicatory process it promotes. The reasonable expectations test relies on a common-law style of adjudication familiar to courts and to other areas of constitutional jurisprudence. Over time, broad constitutional precepts can be refined and clarified to respond to new factual scenarios that arise in the real world. The reasonable expectations test gives courts permission to follow that familiar procedure towards a clearer understanding of Fourth Amendment rights over time.

285. See *supra* notes 269–76 and accompanying text.

286. Bellin, *supra* note 5, at 238–39.

287. Christopher Slobogin, *A Defense of Privacy as the Central Value Protected by the Fourth Amendment's Prohibition on Unreasonable Searches*, 48 TEX. TECH L. REV. 143, 151 (2015).

288. *Id.* at 152.

289. *Id.* at 159–61. Slobogin also persuasively argues that the value of privacy explains why technological surveillance should be governed by the Fourth Amendment. *Id.* at 161–62.

Using reasonable expectations as a permissive standard need not generate disuniformity in the definition of a search amongst circuits and states.²⁹⁰ First, as noted above, the reasonable expectations test already has been treated by lower courts as a permissive standard, and the results have largely been clear rules. Though some disuniformity persists, that is a feature of a permissive standard for defining a search not a bug. Occasional intracircuit disagreement will refine the arguments on both sides of a search question, allowing those with localized knowledge of new technologies and investigative techniques to generate their best arguments before Supreme Court review can resolve the dispute.²⁹¹

There is reason to think that lower courts already do an adequate job of rulifying search jurisprudence without creating confusing, disuniform results. Nicholas Kahn-Fogel's study of more than seventy Supreme Court cases addressing the Fourth Amendment between 1995 and 2014 revealed that "lower courts have reached the 'right' answers [approved by the Supreme Court] to Fourth Amendment questions most of the time."²⁹² In fact, "the performance of lower courts on Fourth Amendment issues has been roughly comparable to the performance of lower courts on all issues the Supreme Court addresses, as revealed by comparison to other studies that have analyzed lower-court performance for other purposes."²⁹³ Rulifying search jurisprudence is a complex task that will take time and great effort from multiple actors in the criminal justice system, but lower courts have so far proven themselves well up to the task. *Katz*'s permissive standard guides the lower courts in that ongoing rulification process.

Justice Harlan's *Katz* test did not claim to be an all-encompassing theory incapable of more precise delineation by future courts. Nor did it attempt to draw a line in the sand as to

290. Though not directly addressing Fourth Amendment search questions, Michael Coenen notes that when the Supreme Court issues a permissive standard, it may generate such intracircuit uniformity, though he emphasizes that uniformity within circuits should remain relatively high. Coenen, *supra* note 10, at 691.

291. The same can be said of splits between states, with the added caveat that different states may define the limits of their Fourth Amendment analogues slightly differently from the federal right. Again, in small amounts such disagreement is desirable, as it allows various jurisdictions space to develop the best approaches to new and emerging factual scenarios, technological advances, and investigatory techniques.

292. Kahn-Fogel, *supra* note 5, at 277, 292–93, 315–16.

293. *Id.* at 277. "The Court also has not felt compelled to address Fourth Amendment questions at a rate that seems disproportionate to its overall criminal procedure docket or to its treatment of other important constitutional matters." *Id.*

what defined a search at a specific moment in time. Instead, it is a fluid test that can respond to rapidly changing factual conditions.²⁹⁴ This offers an advantage over purely originalist accounts. To the extent those accounts are constraining, they limit the Fourth Amendment's ability to respond to the rapid changes in technology and government investigatory capability that abounds in modern society. Reasonableness tests like *Katz* can respond fluidly under changing factual conditions, rather than remaining dedicated to a single original meaning often incapable of rapid adjustment. But importantly, that response can still be rule-like, creating clear commands that actors in the field can quickly operationalize even in the life-or-death factual scenarios prevalent in modern policing.

Admittedly, rulifying search jurisprudence over time is not easy. Just as factual nuances in new cases render previous broad theories of the Fourth Amendment incoherent, those factual nuances can render bright-line rules unsuccessful.²⁹⁵ Although bright-line rules "provide some guidance," they are often "incapable of addressing in advance all the factual situations that police may encounter."²⁹⁶ But that does not mean that rulification should be abandoned. The effort to generate clear rules will be ongoing in light of new cases, new facts, and new technologies. But it is better to press onward toward responses to those new facts, creating at least some guidance for lower courts and on-the-ground actors, than to provide only broad theories that cannot possibly be implemented in the heat of the moment in the vast majority of cases.

Critics might also object that the Supreme Court's efforts to rulify search jurisprudence have often expanded police power over time.²⁹⁷ But rulification can just as easily expand Fourth Amendment rights over time if judges choose to deploy it that way. In the abstract, rulification does not favor either expansion or reduction of Fourth Amendment protection. Rather, judicial

294. "Insofar as greater clarity and specificity of the doctrine are the overarching desiderata, and insofar as the Court seeks lower court input on how the doctrine should be clarified and specified, then a 'pro-rulification rule' might best serve the interests of the Court itself." Coenen, *supra* note 10, at 710.

295. Ashdown, *supra* note 216, at 365.

296. *Id.*

297. See *id.* at 375 ("While the Court has strived to eliminate uncertainties and ambiguities from prior rules in order to provide clear instructions to the police, the area of permissible police investigatory practices has expanded at the expense of fourth amendment protection.").

choices made while rulifying will determine the Fourth Amendment balance.

Given how rapidly investigatory techniques and technologies evolve, the best the Court can do is set out a broad normative balancing standard for slow rulification over time in specific factual scenarios, mostly by lower courts.²⁹⁸ Commentators should not hope for a more adept broad theory to emerge, because the facts evolve too fast and too often.²⁹⁹

3. *The Process of Rulifying Reasonable Expectations.* Rulifying reasonable expectations over time will allow courts to align search jurisprudence with the best policies to protect privacy for ordinary citizens. The *Katz* test can largely achieve such rulification on its own, with only occasional support from the rules generated by originalist theories in cases that address physical access to property roughly analogous to the Fourth Amendment's "houses, papers, and effects."³⁰⁰ In fact, letting *Katz* take the leading role will lead to more of the kind of determinacy in search jurisprudence that often motivates originalists.

Occasional reliance upon originalist interpretations that point to the law of property or positive law follows Richard Re's suggestion that courts use privacy-related positive law to establish a floor of constitutional conduct below which government investigators cannot sink.³⁰¹ Such reliance is particularly helpful in cases where the law of property or some other positive law clearly applies to the government's conduct. For instance, originalist interpretations might create rules for issues involving physical access to property roughly analogous to the Amendment's "houses, papers, and effects."³⁰² In those physical intrusion cases, originalist interpretations will point courts to ready, rule-like

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[T]he real fight is over the new fact patterns not settled by existing rules, and the same need to distinguish between per se and contextually reasonable police practices exists regardless of the Supreme Court's latest decision. What the Supreme Court says in individual cases matters, but it matters much less than most commentators assume it does.

Kerr, *supra* note 13, at 550.

299. "Rulification occurs when courts applying a standard promulgate sub-rules to address particular situations. The overarching standard remains, but eventually a large proportion of cases is governed by rules." Tokson, *supra* note 10, at 651. For a similar call for courts to slowly reach specific rules based upon the open-ended fair use standard in copyright law, see Elkin-Koren & Fischman-Afori, *supra* note 10, at 199–200.

300. U.S. CONST. amend. IV.

301. Re, *supra* note 26, at 333–34.

302. U.S. CONST. amend. IV.

solutions to otherwise thorny constitutional problems.³⁰³ The *Jones* case discussed earlier provides a ready example.³⁰⁴ The Court faced an extremely complex question about when officers' use of a GPS tracking device—which replicated the officers' ability to physically follow a car on public roads but much more precisely and over a longer time period—amounted to a search.³⁰⁵ Using principles closely connected to the law of property, the Court skirted many of the difficult policy issues that question presented, instead reaching the narrow conclusion that officers conduct a search when they “trespassorily inserted [an] information-gathering device” on a citizen’s car by physically attaching it there.³⁰⁶

The Supreme Court may already be deploying originalist interpretation as a supplement to *Katz*’s reasonable expectations test in its search jurisprudence. Nicholas Kahn-Fogel’s study of more than seventy Supreme Court cases addressing the Fourth Amendment between 1995 and 2014 revealed that the Court “is willing to engage in detailed analysis of the law during the founding era only when it believes that body of law might provide insight on the Framers’ disposition on the particular issue before the Court, rather than for guidance on broader principles underlying the adoption of the Fourth Amendment.”³⁰⁷ This is reflected by Scalia’s trespassory theory in *Jones* and *Jardines*.³⁰⁸ For Justice Scalia, whatever else may be included in the definition of a search, originalist interpretation at least established that “government trespass upon the areas (‘persons, houses, papers, and effects’) [the Fourth Amendment] enumerates” amount to a search.³⁰⁹

Though originalist theories may resolve some cases, such as those involving actual physical intrusions of a defendant’s real property, they are unlikely to resolve the wide remainder of cases. The historical record itself supports a variety of possible originalist interpretations, as discussed earlier.³¹⁰ And even within those

303. “The selection of the positive law model in physical entry cases makes sense: it provides clear and familiar ex ante guidance for police, and in this context it resonates with our intuitions as to what kind of investigative steps are only modestly invasive and what steps are highly invasive.” Kerr, *supra* note 13, at 544.

304. See *supra* Section III.A.

305. United States v. Jones, 565 U.S. 400, 402–06 (2012).

306. *Id.* at 404–05, 410.

307. Kahn-Fogel, *supra* note 5, at 292–93, 315–16, 324.

308. *Jones*, 565 U.S. at 406; Florida v. Jardines, 569 U.S. 1, 5 (2013).

309. See *Jones*, 565 U.S. at 406.

310. See *supra* Part II.

theories that emerge from originalist interpretations of the historical record, indeterminacy reigns, rather than clarified rulemaking. For instance, the positive law model struggles to clarify which positive law applies—candidates include a historical version around the amendment’s passage, a modern national model, or a jurisdiction-specific view of the positive law at the time of the crime.³¹¹ Thus far, when the Court has implemented property-based theories, it has struggled to adhere to controlling property rules at the time and place of the alleged government intrusion;³¹² the future direction of such decisions remains unclear, and applying property rules to government actions will be no simple task for judges in any event. Perhaps the best originalism can do is suggest that a rule-like definition of search falls into a wide spectrum of possibilities, without providing a singular, reliable answer in all cases.³¹³

Where originalism fails, courts should continue deploying the *Katz* test in a way that closely approximates Professor Orin Kerr’s “policy model” of the Fourth Amendment.³¹⁴ Under that model, courts decide whether “the consequences of leaving [police] conduct unregulated are particularly troublesome to civil liberties” and should be discontinued.³¹⁵ This approximates my own previous call for judges to consider the sensitivity of the information investigators collect, especially when collecting it

311. *Carpenter v. United States*, 138 S. Ct. 2206, 2268 (2018) (Gorsuch, J., dissenting) (citing *Re*, *supra* note 26).

312. See Kahn-Fogel, *supra* note 5, at 286; Brennan-Marquez & Tutt, *supra* note 126, at 109–10.

313. Kerr, *supra* note 26.

314. Kerr has theorized that courts have deployed four different models of the Fourth Amendment in the post-*Katz* era. Kerr, *supra* note 13. According to Kerr, courts need several proxies for whether a police practice requires regulation in order to draw clear lines under the diverse factual settings presented to them. *Id.* at 506. Kerr suggested that a diversity of interpretive models is a feature of Fourth Amendment jurisprudence, not a bug: “Whereas no one model suffices in every case, the use of multiple models permits the Supreme Court to generate localized guidance.” *Id.* at 541–42. Kerr’s four models include a *probabilistic model* [that] considers the likelihood that the subject’s information would become known to others or the police . . . [a] *private facts model* [that] asks whether the government’s conduct reveals particularly private and personal information deserving of protection . . . [a] *positive law model* [that] considers whether the government conduct interferes with property rights or other legal standards outside the Fourth Amendment . . . [and a] *policy model* . . . [whereby courts] focus directly on whether the police practice should be regulated by the Fourth Amendment.

Id. at 506. Kerr suggests that courts use all four models when applying *Katz*’s reasonable expectations test and that all four can be deployed in different situations to define reasonable police practices and promote consistency across jurisdictions. *Id.* at 542.

315. *Id.* at 519.

warrantlessly from a third party.³¹⁶ By relying on the reasonable expectations test when originalism fails, courts can continue to slowly rulify search jurisprudence and apply it in nuanced factual situations presented by modern investigative techniques.³¹⁷

For example, originalist interpretations should often yield to policy-centered decisions under the reasonable expectations test when cases involve new technological advances for either investigating or committing a crime. Originalist interpretations based upon existing legal frameworks will almost certainly fail to generate reliable answers in such cases. “[T]echnology destabilizes the link between privacy and positive law,”³¹⁸ such that it will take years, and often decades, before positive legal developments can catch up to the most recent investigatory advancements. Thus, where officers deploy new investigative technologies, or where wrongdoers utilize new technological advances to commit their crimes, courts must deploy the reasonable expectations test to accurately capture the factual nuances in an evolving area of modern life. Courts should generate tests that attempt to address new and evolving categories of information that investigators might warrantlessly collect, which will take on a rule-like form over time as more and more such cases arise. This process will be slow and halting, but it is the same rulification process that courts have deployed in the past several decades, alongside the tacit approval and occasional contribution of the Supreme Court, to generate clear guidance in myriad areas of police procedure.

V. CONCLUSION

Reports of *Katz*’s death have been greatly exaggerated. This Article demonstrates that, though the reasonable expectations test itself does not provide answers in every Fourth Amendment search case, it establishes a permissive standard through which lower courts can rulify search jurisprudence and provide guidance to officers in the field. That is a project that originalists should champion, rather than calling for *Katz*’s replacement with originalist theories that, in the end, leave just as much room for judicial discretion as *Katz*. Instead, reasonable expectations, with just occasional support from originalist theories, should continue rulifying search jurisprudence. Originalist models can generate

316. See Gentithes, *supra* note 12, at 1068–70.

317. Kerr, *supra* note 13, at 542–45.

318. *Id.* at 543.

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rules in some search cases involving physical invasions of property, while a policy-focused reasonable expectations test resolves the lion's share of cases involving new investigatory technologies and techniques. Over time, lower courts, with occasional Supreme Court supervision, will generate the kind of clear, discretion-limiting Fourth Amendment guidance that courts and commentators so often seek.