

# KATZ, CARPENTER, AND CLASSICAL CONSERVATISM

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*In 1967, in Katz v. United States, the Supreme Court adopted a privacy-based framework for determining whether government conduct constitutes a Fourth Amendment search. Under that standard, a search occurs when the government infringes on an expectation of privacy that “society is prepared to recognize as ‘reasonable.’” Although the Court qualified its commitment to Katz in 2012 by asserting that an older, property-based approach survived Katz and remains the first-line test for identifying Fourth Amendment searches, most of the Court today is committed to preserving a role for the Katz standard. Yet, most of the justices have also recognized problems with Katz, including its indeterminacy and potential for doctrinal circularity and the superior capacity of legislatures to address Katz’s seemingly ahistorical directive. In this Article, I offer a traditionalist alternative to the mainstream conception of Katz as ahistorical. I draw on classically conservative, or Burkean, constitutional theory, which rejects both rigid forms of originalism and ahistorical living constitutionalism. Such a model requires reference to history and tradition as a basis for identifying society’s core commitments, but it allows for incremental reform as tradition evolves over time. This rubric is consistent with the way the Court has sometimes applied Katz, and it addresses the primary flaws commentators have associated with the Katz framework. The Court should apply this traditionalist approach to Katz in a more consistent, self-conscious way to achieve more principled outcomes in the future.*

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INTRODUCTION

In 1967, in *Katz v. United States*,<sup>1</sup> the Supreme Court adopted a new test for determining whether investigative conduct constitutes a Fourth Amendment search. Justice John Marshall Harlan’s *Katz* concurrence, which the Court subsequently accepted as the holding of the case,<sup>2</sup> concluded that a search occurs when the government intrudes on an expectation of privacy that “society is prepared to recognize as ‘reasonable.’”<sup>3</sup> Since then, scholars and Supreme Court justices alike have criticized *Katz* on numerous grounds, including its lack of foundation in text, history, or precedent, its failure to live up to its potential to radically reorient Fourth Amendment interpretation, and its contribution to the conceptual incoherence of Fourth Amendment jurisprudence.<sup>4</sup> Observers have also critiqued *Katz* on the related grounds that the test is indeterminate and circular: while *Katz* seems to call for empirical assessment of contemporary societal norms, the argument goes, Supreme Court justices have, in fact, simply applied their own conceptions of what constitutes a reasonable expectation of privacy, and they have done so in an ad hoc, unpredictable fashion;<sup>5</sup> this indeterminacy is also a source of doctrinal circularity—an expectation of privacy is reasonable if five Supreme Court justices are willing to characterize it as reasonable.<sup>6</sup> Finally, *Katz*’s seemingly ahistorical directive reasonably raises the question of why judges rather than legislatures should be conducting the inquiry.<sup>7</sup>

The Court’s rehabilitation in 2012 of a property-based rubric as a first-line approach to identifying Fourth Amendment searches was largely an attempt to avoid the morass of *Katz*, to “keep easy cases easy,”

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<sup>1</sup> 389 U.S. 347 (1967).

<sup>2</sup> See, e.g., *United States v. Jones*, 565 U.S. 400, 406 (2012) (“Our later cases have applied the analysis of Justice Harlan’s concurrence in that case.”).

<sup>3</sup> *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

<sup>4</sup> See *infra* Part I.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> See *infra* notes 165–179 and accompanying text.

as the Court would describe this model in 2013.<sup>8</sup> Nonetheless, *Katz* provided the foundation for the Court's 2018 determination that collection of historical cell-site location information [CSLI] is a search,<sup>9</sup> and, notwithstanding Justice Thomas's protestations and Justice Gorsuch's doubts,<sup>10</sup> the *Katz* standard is, for now, alive and well. This Article suggests an approach to *Katz* grounded in history and tradition. The model offers the potential to reduce the indeterminacy and doctrinal circularity of the test. It is also consistent with a classically conservative approach to constitutional interpretation that steers a middle ground between originalism and an application of *Katz* rooted solely in contemporary mores.

In Part I of this Article, I will summarize *Katz*'s seemingly ahistorical approach and critical analysis of *Katz* from scholars and Supreme Court justices. In Part II, I will describe an incrementalist approach to constitutional interpretation that requires courts to look to history and tradition as a guide to deciding whether investigative conduct qualifies as a Fourth Amendment search. This paradigm recognizes that the very notion of constitutional interpretation entails reference to something more enduring than a snapshot of contemporary attitudes. Other scholars have defended this sort of Burkean model, a method grounded in something other than the idiosyncratic values of Supreme Court justices or the whims of the populace, but one that is also more responsive to society's gradually evolving, deeply held commitments than a rubric inexorably anchored to eighteenth-century common law or the property-based concerns of the framers.<sup>11</sup> Before discussing this framework, however, I will describe both originalism and ostensibly ahistorical approaches to constitutional interpretation. That examination is important because traditionalist scholars of the last few decades developed their theories largely in response to flaws they perceived in each of the polar extremes of rigid originalism and ahistorical modes of analysis. In the course of the discussion, I will evaluate the consequences of originalist thought and of ahistorical constitutionalism in the context of Fourth Amendment interpretation.

In Part III.A, I will explain how one might interpret the *Katz* standard as consistent with traditionalist theory, and I will offer guidance on

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<sup>8</sup> *United States v. Jones*, 565 U.S. 400, 412 (2012); *Florida v. Jardines*, 569 U.S. 1, 11 (2013).

<sup>9</sup> *See* *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

<sup>10</sup> *Id.* at 2235–46 (Thomas, J., dissenting); *id.* at 2261–72 (Gorsuch, J., dissenting).

<sup>11</sup> *See* Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2601–02 (2003); Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1 (1998); Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619 (1994); *see also* Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509 (1996).

how to achieve principled application of such a model. I will compare my approach with some of the refinements and explanations of *Katz* and alternatives to the standard that other commentators have offered and that share some commonalities with my suggestions. In particular, while the model I suggest is similar in some respects to the methodology Professor David Sklansky has advocated, Sklansky's traditionalism refers primarily to the Court's own traditions;<sup>12</sup> in contrast, the approach I describe here requires reliance, in the first instance, on traditions extrinsic to prior Supreme Court pronouncements, though such traditions may be reflected in precedent. My model is consistent with the way the Court has actually applied *Katz* in some instances. Because my proposed model would draw on any carefully described, historically rooted tradition regarding privacy interests, whether the tradition relates only to private actors or includes insight about the limits of governmental power, this approach would lead to characterization of more official investigative conduct as a Fourth Amendment search. For that reason, the Court might find it propitious to move further away from its inconsistent rhetorical commitment to the notion that, "subject only to a few specifically established and well-delineated exceptions," warrantless searches are per se unreasonable.<sup>13</sup> In Part III.B, I will discuss some practical consequences of my proposed framework, with a focus on how the model would affect current Fourth Amendment doctrine on what qualifies as a search.

### I. *KATZ* AND ITS CRITICS

The text of the Fourth Amendment includes two grammatically independent clauses.<sup>14</sup> The first protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."<sup>15</sup> The second clause describes the procedure for obtaining a valid warrant, including the requirements of probable cause and particularized description of the "place to be searched, and the persons or things to be seized."<sup>16</sup> Despite their grammatical independence, during most of the twentieth century the Supreme Court adhered, at least rhetorically, to the view that the two clauses were not conceptually independent.<sup>17</sup> Rather, according to the Court, the Warrant Clause modified

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<sup>12</sup> David A. Sklansky, *Back to the Future: Katz, Kyllo, and Common Law*, 102 Miss. L.J. 143 (2002) [hereinafter Sklansky, *Back to the Future*]; David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739 (2000) [hereinafter Sklansky, *The Fourth Amendment and Common Law*].

<sup>13</sup> *Katz v. United States*, 389 U.S. 347, 357 (1967).

<sup>14</sup> U.S. CONST. amend. IV.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See, e.g., Sklansky, *Back to the Future*, *supra* note 12, at 151–52.

the Reasonableness Clause.<sup>18</sup> Thus, in general, in order for a search to be reasonable, the government required a warrant.<sup>19</sup> This fairly stringent requirement, in turn, lent critical significance to the question of what kind of government conduct qualified as a search in the first place: if the government's investigative activity was not a search, the Fourth Amendment left that conduct completely unregulated; if government conduct did constitute a Fourth Amendment search, investigators presumptively required a warrant.<sup>20</sup>

During the early part of the twentieth century, the Court focused the search inquiry on whether the government had effected a physical intrusion into an area the Fourth Amendment protects.<sup>21</sup> Thus, if the government could wiretap a suspect's phone conversations simply by accessing the phone lines in a public place, without any trespass into the defendant's home or office, its surveillance would not qualify as a "search."<sup>22</sup> By the latter half of the century, however, with the government's increasing ability to harness technological advances to surveil the citizenry, the Court found the old paradigm untenable.<sup>23</sup> Thus, in *Katz* the Court declared the property-based rubric for identifying Fourth Amendment searches to be "discredited."<sup>24</sup> Instead, the question of whether a Fourth Amendment search had occurred would turn on whether the government had impinged on an "expectation of privacy . . . that society is prepared to recognize as 'reasonable.'"<sup>25</sup> Accordingly, although the Federal Bureau of Investigation listened to defendant Katz's conversations in a telephone booth without any trespass, because Katz had a reasonable expectation that his conversation would be private, he was a victim of a Fourth Amendment search.<sup>26</sup>

Criticism of *Katz* began immediately, starting with Justice Hugo Black's dissenting opinion in the case. While Black acknowledged the

<sup>18</sup> See *id.*

<sup>19</sup> See, e.g., *Katz v. United States*, 389 U.S. 347, 357 (1967).

<sup>20</sup> *Id.*

<sup>21</sup> See *Olmstead v. United States*, 277 U.S. 438, 463–64 (1928); *United States v. Jones*, 565 U.S. 400, 405 (2012) ("The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to 'the right of the people to be secure against unreasonable searches and seizures'; the phrase 'in their persons, houses, papers, and effects' would have been superfluous. Consistent with this understanding, our Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century."); but see Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 67–69, 77 (2012) (noting that the Court's Fourth Amendment opinions mentioned privacy as often as property throughout the late nineteenth and early twentieth centuries and that, although the Court began to focus on physical intrusion in the 1920s, it nonetheless "eschewed reliance on the technicalities of trespass law").

<sup>22</sup> *Olmstead*, 277 U.S. at 463–64.

<sup>23</sup> See generally *Katz*, 389 U.S. 347.

<sup>24</sup> *Id.* at 353.

<sup>25</sup> *Id.* at 361 (Harlan, J., concurring).

<sup>26</sup> *Id.*

desirability of giving the Amendment a “liberal construction,” he averred that the Amendment’s clear reference to material things (“persons, houses, papers, and effects”) could not be stretched to include protection against eavesdropping.<sup>27</sup> According to Justice Black, the Warrant Clause reinforced the notion that the framers intended the Amendment to protect only tangible things, with its requirement of particular description of the “place to be searched[ ] and the persons or things to be seized.”<sup>28</sup> A conversation, Justice Black asserted, could neither be searched nor seized under traditional conceptions of those terms.<sup>29</sup> Moreover, the requirement of particular description suggested not only tangible things, but also things already in existence, as opposed to a future conversation.<sup>30</sup>

In the decades after *Katz*, observers continued to attack the test for its lack of foundation in the text or history of the Fourth Amendment.<sup>31</sup> As Justice Scalia stated in 1998, when *Katz* is applied “to determine whether a ‘search or seizure’ within the meaning of the Constitution has occurred (as opposed to whether that ‘search or seizure’ is an ‘unreasonable’ one), it has no plausible foundation in the text of the Fourth Amendment.”<sup>32</sup> Instead, for Scalia, a search, today as in 1791, would include any examination or inspection of a person, house, paper, or effect.<sup>33</sup> Most recently, in two 2018 opinions, Justice Thomas and Justice Gorsuch criticized *Katz*, in one instance explicitly because of its lack of foundation “in the text or history of the Fourth Amendment.”<sup>34</sup>

While *Katz*’s novelty was a basis for criticism for some, for others *Katz*’s doctrinal innovation was its strength; it held the revolutionary po-

<sup>27</sup> *Id.* at 364–66 (Black, J., dissenting).

<sup>28</sup> *Id.* at 365–66.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> See, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 769 (1994) (“These word games are unconvincing and unworthy.”); Ricardo J. Bascuas, *The Fourth Amendment in the Information Age*, 1 VA. J. CRIM. L. 481, 499 (2013) (“The Court’s notion that the law could protect abstract privacy directly was a doomed exercise in ‘perfectionist’ or ‘noninterpretivist’ constitutional interpretation with little connection to the Fourth Amendment’s wording.”); David Gray, *The Fourth Amendment Categorical Imperative*, 116 MICH. L. REV. ONLINE 14, 15 (2017) (asserting that *Katz* “has no footing in the text or history of the Fourth Amendment.”).

<sup>32</sup> *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring).

<sup>33</sup> See *Kyllo v. United States*, 533 U.S. 27, 32 n.1 (2001) (“When the Fourth Amendment was adopted, as now, to ‘search’ meant [t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to search the house for a book; to search the wood for a thief.”) (quoting NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 66 (6th ed. 1989) (1828)).

<sup>34</sup> *Carpenter v. United States*, 138 S. Ct. 2206, 2236 (2018) (Thomas, J., dissenting); *Byrd v. United States*, 138 S. Ct. 1518, 1531 (2018) (Thomas, J., concurring) (expressing “serious doubts about the ‘reasonable expectation of privacy’ test from *Katz* . . .”); *Carpenter*, 138 S. Ct. at 2264 (Gorsuch, J., dissenting) (“*Katz*’s problems start with the text and original understanding of the Fourth Amendment, as Justice Thomas thoughtfully explains today.”).

tential to expand constitutional protection against new forms of governmental intrusion that the Court's previous, parsimonious approach had left to the unfettered discretion of law enforcement.<sup>35</sup> Because *Katz*'s reference to expectations of privacy that "society is prepared to recognize as reasonable" seemed to contemplate an ahistorical assessment of contemporary attitudes,<sup>36</sup> *Katz* appeared to have unlimited potential to provide adaptive protection against emerging threats to individual privacy. Yet there is broad consensus that *Katz* largely failed to make good on this promise. Instead, in case after case, the Court either reaffirmed older, restrictive conceptions of what constitutes a Fourth Amendment search or, in some instances, interpreted the Fourth Amendment's scope as even narrower than one might have predicted under the older model.<sup>37</sup>

Academic commentators have attributed *Katz*'s failure to live up to its promise to fundamentally reorient Fourth Amendment interpretation to the inaccessibility of reliable empirical data about society's actual expectations,<sup>38</sup> to the tendency of the Court to interpret the Fourth Amendment to maintain the status quo balance between government power and individual privacy,<sup>39</sup> and to the psycholinguistic tendency to revert to prior understandings when a concrete word (like "search") is redefined with reference to more abstract words (like "reasonable expectations of privacy").<sup>40</sup> Additionally, limiting the range of investigative activity that would qualify as a Fourth Amendment search in the first place allowed the Court partially to sustain its rhetorical commitment to the idea that warrants are virtually always required to render searches reasonable, while also implementing the consensus among the justices that a wide range of investigative activity is reasonable without advance judicial oversight.<sup>41</sup> The Court accomplished this feat, however, only at the cost of sowing confusion by distorting the plain meaning of "search,"

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<sup>35</sup> See, e.g., Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 515–16 (2011) ("Justice Harlan never explained what made an expectation of privacy reasonable, or how the Justices on the Supreme Court can tell what 'society' thinks. This open-ended aspect to Justice Harlan's test became its strength."); Luke M. Milligan, *Concreteness Drift and the Fourth Amendment*, 82 MISS. L.J. 891, 891 (2013).

<sup>36</sup> Sklansky, *Back to the Future*, *supra* note 12, at 156; see, e.g., Justin F. Marceau, *The Fourth Amendment at a Three-Way Stop*, 62 ALA. L. REV. 687, 708, 708 n.94 (2011).

<sup>37</sup> See, e.g., Bascuas, *supra* note 31, at 481; Ira Mickenberg, *Fourth Amendment Standing After Rakas v. Illinois: From Property to Privacy and Back*, 16 NEW ENG. L. REV. 197, 226 (1981) (stating that *Katz*'s amorphous standard "has proved just as useful for restricting constitutional protections late in the 1970's as it was for expanding those protections a decade ago.").

<sup>38</sup> See Milligan, *supra* note 35, at 892.

<sup>39</sup> Kerr, *supra* note 35, at 537–38.

<sup>40</sup> See Milligan, *supra* note 35.

<sup>41</sup> *California v. Acevedo*, 500 U.S. 565, 583 (1991) (Scalia, J., concurring); Amar, *supra* note 31, at 769.

designating a great deal of conduct that clearly falls within ordinary definitions of the word not a search for Fourth Amendment purposes.<sup>42</sup>

Numerous authors have noted the fundamental indeterminacy of *Katz*.<sup>43</sup> Although the test refers to public norms, Justice Harlan's *Katz* concurrence offered no mechanism for measuring the expectations of the society to which it referred. In fact, several observers have argued that the Court's *Katz* analysis actually hinges on "normative assessments of the costs and benefits of subjecting a legal technique to constitutional regulation," rather than on any attempt to gauge popular attitudes.<sup>44</sup> Additionally, notwithstanding Justice Harlan's authorship of the *Katz* standard, he later explained his own interpretation of the test as involving normative judgments rather than as primarily a descriptive enterprise.<sup>45</sup> For Harlan, the fundamental task in applying *Katz* was not merely to "recite the expectations and risks without examining the desirability of saddling them upon society."<sup>46</sup> Rather, it was the "task of the law to form and project, as well as to mirror and reflect."<sup>47</sup> For Harlan, this enterprise entailed balancing the likely effect of investigative activity "on the individual's sense of security . . . against the utility of the conduct as a technique of law enforcement."<sup>48</sup>

Whether *Katz* is best read as empirical or normative,<sup>49</sup> many have attributed the general incoherence of Fourth Amendment jurisprudence at least in part to the open-ended nature of the test.<sup>50</sup> According to this line

<sup>42</sup> See Amar, *supra* note 31, at 768–69; Gray, *supra* note 31, at 14 ("The vast majority of current Fourth Amendment doctrine is unfounded, incoherent, and dangerous. The culprit is the Supreme Court's 1967 decision in *Katz v. United States*, which defines 'search' as government conduct that violates subjectively manifested expectations of privacy 'that society is prepared to recognize as 'reasonable.' This is pure applesauce. Nowhere will you find a standard dictionary that defines 'search' in these terms.").

<sup>43</sup> See *supra* note 31.

<sup>44</sup> See, e.g., *Carpenter v. United States*, 138 S. Ct. 2206, 2246 (2018) (Thomas, J., dissenting) ("Truth be told, this Court does not treat the *Katz* test as a descriptive inquiry. Although the *Katz* test is phrased in descriptive terms about society's views, this Court treats it like a normative question—whether a particular practice *should* be considered a search under the Fourth Amendment."); Orin S. Kerr, *Do We Need a New Fourth Amendment?*, 107 MICH. L. REV. 951, 961 n.14 (2009); Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503 (2007) [hereinafter Kerr, *Four Models*].

<sup>45</sup> See *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Carpenter*, 138 S. Ct. at 2265 (Gorsuch, J., dissenting) ("In fact, we still don't even know what [*Katz*'s] 'reasonable expectation of privacy' test *is*. Is it supposed to pose an empirical question (what privacy expectations do people *actually* have) or a normative one (what expectations *should* they have)?").

<sup>50</sup> See, e.g., Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CAL. L. REV. 1593, 1611 (1987) ("By defining the scope of the [F]ourth [A]mendment in terms of privacy expectations and relegating property interests to a secondary role, the Court has left lower courts without a coherent body of law with which to analyze

of thought, *Katz*'s nebulous, abstract formula has a Rorschach-like quality, and, ultimately, the expectations of privacy “‘that society is prepared to recognize as reasonable’ bear an uncanny resemblance to those expectations of privacy that [the Supreme] Court considers reasonable.”<sup>51</sup> Only occasionally has an author defended the Court’s jurisprudence applying *Katz* as following a generally coherent pattern.<sup>52</sup>

Closely related to *Katz*'s putative indeterminacy is the argument that the standard is doctrinally circular,<sup>53</sup> or tautological.<sup>54</sup> If the standard, in effect, lacks substantive content, then a “reasonable expectation of privacy” becomes whatever five justices happen to characterize as a reasonable expectation of privacy. The Court itself recognized this as a potential problem in *Rakas v. Illinois* when it stated that it “would, of course, be merely tautological to fall back on the notion that those expectations of privacy which are legitimate depend primarily on cases deciding exclusionary-rule issues in criminal cases.”<sup>55</sup> More than two decades later, Justice Scalia took note of the same issue, observing that *Katz* had “often been criticized as circular, and hence subjective and unpredictable.”<sup>56</sup> Justice Kennedy also seemed to recognize the difficulty in stating that, “If you prevail in this case and a member of the Court sits down to write the opinion, does he or she have to use the phrase ‘reasonable expectation of privacy’ and say there is no reasonable expectation of privacy in our society, in our culture, in our day, or do we just forget that

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[F]ourth [A]mendment claims.”); Luke M. Milligan, *The Fourth Amendment Rights of Trespassers: Searching for the Legitimacy of the Government-Notification Doctrine*, 50 EMORY L.J. 1357, 1362 (2001) (“Thirty-five years later, the *Katz* ‘legitimate expectations of privacy’ test remains heavily criticized by scholars and courts as inconsistent, unprincipled, and theoretically incoherent.”); Jonathan Simon, *Katz at Forty: A Sociological Jurisprudence Whose Time Has Come*, 41 U.C. DAVIS L. REV. 935, 956–57 (2008) (“While Justice Harlan has been seen as giving the potentially incoherent *Katz* decision the look and feel of a legal doctrine, his innovation may have ultimately led to the . . . most significant claims made by critics of the *Katz* doctrine . . . *Katz* is accused of leading the Court into making highly subjective decisions without foundation in clearly discernable principles.”); Matthew Tokson, *Blank Slates*, 59 B.C. L. REV. 591, 637 (2018) (“The *Katz* test has been emphatically and almost universally criticized. Critics have called it incoherent, unpredictable, tautological, and unhelpful in practice . . .”).

<sup>51</sup> *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring); ROBERT M. BLOOM, *SEARCHES, SEIZURES, AND WARRANTS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 46 (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. . . .”).

<sup>52</sup> See, e.g., Kerr, *Four Models*, *supra* note 44.

<sup>53</sup> See Matthew B. Kugler & Lior Jacob Strahilevitz, *The Myth of Fourth Amendment Circularity*, 84 U. CHI. L. REV. 1747, 1752–53 (2017).

<sup>54</sup> See Amitai Etzioni, *Eight Nails into Katz's Coffin*, 65 CASE W. RES. L. REV. 413, 413–14 (2014) (“In other words, when the Court holds that it heeds the *vox populi*, it actually follows the echo of its own voice.”).

<sup>55</sup> *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978).

<sup>56</sup> *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

phrase? In — in a way, as we all know it’s circular, that if we say there is a reasonable expectation, then there is.”<sup>57</sup>

Doctrinal circularity is, in turn, to be distinguished from attitudinal circularity. The *Rakas* Court’s solution to the problem of doctrinal circularity was to use norms extrinsic to the Court’s own pronouncements, namely “property law or . . . understandings that are recognized and permitted by society.”<sup>58</sup> Yet looking to society’s actual beliefs avoids doctrinal circularity only if public attitudes are independent of the Court’s previous Fourth Amendment judgments. If, instead, societal expectations depend on the Court’s Fourth Amendment pronouncements, then “the content of the doctrine would still depend on the content of the doctrine, just with the additional step of popular expectations being influenced by, and in turn influencing, doctrine.”<sup>59</sup> Although a great deal of commentary since *Katz* has taken for granted the reality of the problem of attitudinal circularity, a recent empirical analysis by Professors Matthew Kugler and Lior Strahilevitz demonstrates the durability of public expectations in the wake of even widely publicized Fourth Amendment decisions by the Court.<sup>60</sup> As I will discuss below, however, there are reasons other than attitudinal circularity that one might object to using contemporary attitudes as a lodestar for constitutional decision-making.<sup>61</sup> Additionally, as I have noted, the Court has sometimes treated *Katz* not as an invitation to conduct anything like a public opinion survey, but, rather, as a normative endeavor.

In response to these perceived deficiencies in the *Katz* framework, the Court in 2012 resuscitated the pre-*Katz*, property-based rubric for determining whether a Fourth Amendment search has occurred.<sup>62</sup> In concluding that the government’s use of a GPS monitor attached to the underside of the defendant’s Jeep constituted a search, the Court asserted

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<sup>57</sup> Justice Kennedy, Transcript of Oral Argument at \*12, *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015) (No. 13-1175).

<sup>58</sup> *Rakas*, 439 U.S. at 143 n.12.

<sup>59</sup> Kugler & Strahilevitz, *supra* note 53, at 1753. The Supreme Court first took note of the possibility of attitudinal circularity in *Smith v. Maryland*, 442 U.S. 735 (1979). The Court stated: “Situations can be imagined, of course, in which *Katz*’ two-pronged inquiry would provide an inadequate index of Fourth Amendment protection. For example, if the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry, individuals thereafter might not in fact entertain any actual expectation [of] privacy regarding their homes, papers, and effects. . . . In such circumstances, where an individual’s subjective expectations had been ‘conditioned’ by influences alien to well-recognized Fourth Amendment freedoms, those subjective expectations obviously could play no meaningful role in ascertaining what the scope of Fourth Amendment protection was. In determining whether a ‘legitimate expectation of privacy’ existed in such cases, a normative inquiry would be proper.” *Id.* at 740 n.5.

<sup>60</sup> See Kugler & Strahilevitz, *supra* note 53.

<sup>61</sup> See *infra* Part II.

<sup>62</sup> *United States v. Jones*, 565 U.S. 400 (2012).

that application of a simple formula led to its holding: if the government physically intrudes into a constitutionally protected area to gather information, then the government has conducted a Fourth Amendment search.<sup>63</sup> For Justice Scalia's majority, an advantage of reliance on this formula was that it avoided the "vexing," indeterminate inquiry into whether long-term electronic tracking infringed the defendant's "reasonable expectation of privacy"; if so, at what point the surveillance would become sufficiently extensive to trigger such a reasonable expectation; and whether longer periods of tracking might nonetheless qualify as non-searches so long as the crime under investigation was sufficiently serious.<sup>64</sup> In 2013, in *Florida v. Jardines*, the Court would again aver that a signal advantage of using a property-based approach to defining Fourth Amendment searches is that it "keeps easy cases easy."<sup>65</sup> Because officers brought a drug-sniffing dog onto the defendant's curtilage without any implicit invitation to do so, they engaged in a search, and there was no need to determine whether the activity "violated his expectation of privacy under *Katz*."<sup>66</sup>

Nonetheless, *Jones* and *Jardines* left *Katz* intact as a secondary framework for determining the applicability of the Fourth Amendment.<sup>67</sup> In his *Jones* concurrence, Justice Alito alleged that the Court's rehabilitated trespass model would present particular difficulties in cases not involving physical intrusions.<sup>68</sup> Justice Scalia responded by insisting that in such cases *Katz* would remain the relevant standard.<sup>69</sup> In fact, according to Scalia's account of the Court's precedent, *Katz* had never supplanted the trespass model, but had merely supplemented it.<sup>70</sup>

Justice Scalia's previous criticisms of *Katz* might reasonably have led to skepticism of his assurances in *Jones* of *Katz*'s continuing vitality.<sup>71</sup> Even Justice Alito, who offered a vigorous defense of exclusive reliance on *Katz* in his *Jones* concurrence, acknowledged *Katz*'s shortcomings, including its circularity and the tendency of judges applying it to "confuse their own expectations of privacy with those of the hypothet-

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<sup>63</sup> *Id.* at 406 n.3.

<sup>64</sup> *Id.* at 412–13.

<sup>65</sup> 569 U.S. 1, 11 (2013).

<sup>66</sup> *Id.* Notwithstanding the *Jardines* majority's position regarding the relative simplicity of the property-based framework, deciding such cases is not always straightforward. In fact, the *Jardines* Court was divided 5-4 on whether the customary, implied license to approach the front door of a residence included permission to do so with a drug-sniffing dog. *Id.*

<sup>67</sup> See *Jones*, 565 U.S. at 411; *Jardines*, 569 U.S. at 11.

<sup>68</sup> *Jones*, 565 U.S. at 426 (Alito, J., concurring).

<sup>69</sup> *Id.* at 411.

<sup>70</sup> *Id.* at 409.

<sup>71</sup> See *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring); *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

ical reasonable person to which the *Katz* test looks.”<sup>72</sup> Yet the Court dramatically reaffirmed *Katz*’s relevance in its 2018 decision in *Carpenter v. United States*.<sup>73</sup> In *Carpenter*, the Court relied on *Katz* to determine that people have a reasonable expectation of privacy against the government’s collection of historical CSLI.<sup>74</sup> In doing so, the Court echoed the *Jones* Court’s assertion that trespass is not the exclusive test for Fourth Amendment searches and that “privacy interests do not rise or fall with property rights.”<sup>75</sup>

Yet each of the Justices on the *Carpenter* Court, including those in the majority and all of the dissenters, has, at some point, either authored or joined an opinion critical of *Katz*, or at least conceding the difficulty of applying its nebulous standard. Justices Ginsburg, Breyer, and Kagan joined Justice Alito’s *Jones* concurrence acknowledging the imperfections in the *Katz* standard.<sup>76</sup> Justices Ginsburg, Kagan, and Sotomayor, along with Justice Thomas, also joined Justice Scalia’s *Jardines* majority, with its implicit critique of *Katz*’s vague, abstract formula in its declaration that the benefit of using the property framework, as compared with *Katz*, is that it “keeps easy cases easy.”<sup>77</sup> Justices Thomas, Breyer, and Ginsburg joined Justice Scalia’s majority opinion in *Kyllo v. United States*, which included an account of criticisms of the test as circular and subjective and a concession that refinement of the standard is difficult in most circumstances.<sup>78</sup> Chief Justice Roberts, Justice Kennedy, Justice Thomas, and Justice Sotomayor joined Scalia’s majority in *Jones*, which also compared the resurrected trespass theory favorably with the privacy model in opining that use of the latter approach would present “particularly vexing problems.”<sup>79</sup> Finally, as noted above, both Justice Gorsuch and Justice Thomas openly attacked *Katz* in 2018, though Justice Gorsuch left open the possibility that there may be some residual space for *Katz*.<sup>80</sup> In his *Carpenter* dissent, Gorsuch noted the majority’s reference to “laudable” founding era principles against arbitrary use of power and

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<sup>72</sup> *Jones*, 565 U.S. at 427 (Alito, J., concurring).

<sup>73</sup> 138 S. Ct. 2206 (2018).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 2214 n.1. The *Carpenter* Court’s only nod to the possibility of refining or abandoning *Katz* was its observation that “[n]either party has asked the Court to reconsider *Katz* in this case.” *Id.*

<sup>76</sup> *Jones*, 565 U.S. at 418.

<sup>77</sup> *Florida v. Jardines*, 569 U.S. 1, 11 (2013). Justices Ginsburg and Sotomayor did, however, join Justice Kagan’s *Jardines* concurrence, asserting that, in that case, they would find the government’s conduct to be a search using the *Katz* framework as well, and contending that the consistency of the results was unsurprising given the influence of property law on our collective expectations about the kinds of places that should be free from government intrusion. *Id.* at 13–14 (Kagan, J., concurring).

<sup>78</sup> 533 U.S. 27, 34 (2001).

<sup>79</sup> *Jones*, 565 U.S. at 412.

<sup>80</sup> *Carpenter*, 138 S. Ct. at 2272 (Gorsuch, J., dissenting).

against a “too permeating police surveillance,” but he stated that these tenets offered little guidance to lower courts.<sup>81</sup> In fact, although the *Carpenter* majority stated that *Katz* analysis “is informed by these historical understandings ‘of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted,’” it concluded that “no single rubric definitively resolves which expectations of privacy are entitled to protection.”<sup>82</sup> As I will discuss in further detail below, Justice Gorsuch also asserted that, whether the *Katz* standard is best read as requiring an empirical or normative inquiry, legislators rather than judges are best equipped to conduct the analysis.<sup>83</sup>

Ultimately, despite decades of criticism of the standard, most Supreme Court Justices remain committed to preserving a role for *Katz* in determining the scope of Fourth Amendment protection. Yet the opinions of those same Justices evince ambivalence about *Katz* as the Court has applied it. In short, *Katz* appears to be here to stay, but those who defend the test often acknowledge its flaws. In Part III, I will describe an approach to constitutional interpretation rooted in history and tradition. Before embarking on this discussion, I will describe both originalist jurisprudence and theories of constitutional interpretation based on ostensibly timeless values in response to which such classically conservative, “Burkean” authors have crafted their arguments. In Part III, I will explain how one can read *Katz* as consistent with such a traditionalist model and how doing so addresses major criticisms of *Katz*. I will also compare my proposal with suggestions other authors and Supreme Court Justices have offered to refine, supplement, or replace *Katz*.

## II. ORIGINALISM, AHISTORICISM, AND THE TRADITIONALIST ALTERNATIVE

Before offering a full exposition of my historically rooted model for applying *Katz*, it is worth acknowledging the potential appearance of tension between that model and the essence of *Katz* itself. As I have noted, commentators on *Katz* have often characterized the test as ahistorical. The standard’s reference to expectations that society is prepared to recognize as reasonable may seem to invite invocation only of contemporary norms, whether or not those norms have any sort of established pedigree. In fact, *Katz*’s rejection at least of rigid adherence to eighteenth-century common law rules is critical to the test’s ability to adapt to threats posed by practices and technologies the framers never contemplated. Nonetheless, while the use of history as a primary guide to constitutional interpretation is sometimes seen as synonymous with

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<sup>81</sup> *Id.* at 2266 (Gorsuch, J., dissenting).

<sup>82</sup> *Id.* at 2213–14.

<sup>83</sup> *Id.* at 2265 (Gorsuch, J., dissenting).

originalism,<sup>84</sup> and while *Katz*'s emphasis on privacy is certainly ahistorical in that sense, one can view both *Katz*'s focus on privacy and its reference to societal expectations as consistent with the use of historically rooted traditions. I will give a more detailed defense of *Katz* as consistent with incrementalist jurisprudence in Part III. First, however, I will describe Burkean critiques of originalism and of ahistorical approaches to constitutional interpretation based on normative theory or immediate popular preferences, and I will discuss the framework that traditionalist scholars have defended as an alternative to these extremes.

#### A. *The Targets of Traditionalist Theory: Originalism and Ahistoricism*

The most prominent exponents of the sort of historically grounded model I will describe, rooted in tradition yet allowing for evolutionary development, wrote in the 1990s, largely in reaction to originalism's near monopoly on the use of history in contemporary literature.<sup>85</sup> The proponents of incrementalist models have also sometimes included critiques of ahistorical living constitutionalism in their analyses.<sup>86</sup> Their assessments have included both positive and normative components. Descriptively, these authors have argued that identifying original understandings is often impossible or, at least, too difficult for judges and their clerks, who are untrained in historical methodology and not immersed in the culture of the late eighteenth century.<sup>87</sup> Identifying original intent is, perforce, an endeavor fraught with indeterminacy when confronting modern problems the framers never contemplated.<sup>88</sup> Even when it is possible to ascertain

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<sup>84</sup> See, e.g., Friedman & Smith, *supra* note 11, at 4–5 (“It is a weary fact of constitutional interpretation and constitutional theory that when lawyers, judges, and legal academics discuss our *historical* Constitution, they usually are referring to a Constitution written in 1787 and amended formally on occasions thereafter. As Larry Kramer recently wrote: ‘What . . . scholars all share in common, . . . is a belief that when we ask about the role of history in constitutional interpretation we are asking about the Founding. . . . [C]onstitutional theory can fairly be described as ‘Founding obsessed’ in its use of history.’”).

<sup>85</sup> See, e.g., *id.*; Merrill, *supra* note 11; David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996); Young, *supra* note 11.

<sup>86</sup> See, e.g., Friedman & Smith, *supra* note 11, at 51–55; Barry Friedman, *The Turn to History*, Book Review, 72 N.Y.U. L. REV. 928, 961 (1997) (reviewing LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (1996)) (“But for those who ‘value continuity,’ and lawyers join the rest of society in this natural yearning, the idea of a ‘living Constitution,’ which fails altogether to integrate our past, is not much more appealing.”).

<sup>87</sup> See, e.g., Friedman & Smith, *supra* note 11, at 20–21; David A. Strauss, *Why Conservatives Shouldn't be Originalists*, 31 HARV. J.L. & PUB. POL'Y 969, 970 (2008); Young, *supra* note 11, at 669 (“[I]n many or most cases, we cannot know the actual intent of the Framers. Although this argument may be made in a strong form that denies the ability of the Framers to communicate a single, determinate meaning through a text like the Constitution, the more common criticism is that divination of the Framers' intent is impracticable as a matter of historical research.”).

<sup>88</sup> See Strauss, *supra* note 87, at 971.

the framers' position on the precise problem a court faces, "if the provision is an old one, it is routinely not going to be clear what those understandings say about that issue today."<sup>89</sup> Additionally, because the prospect of discarding centuries of accumulated tradition is so unpalatable even to self-described originalists, these jurists have often, in fact, engaged in incrementalist interpretation, drawing not only on the history of 1787, 1791, or 1868, but on the accumulated, evolving traditions of the years since those dates.<sup>90</sup> Incrementalist scholars have also noted the irony of the association of originalism with conservatism, given the ostensible willingness of many originalists to abandon longstanding tradition, thereby effecting revolutionary constitutional change.<sup>91</sup> Instead, these authors have argued that a "sedimentary," "Burkean," or "common law" approach to constitutional interpretation is one showing true fidelity to classically conservative thinking.<sup>92</sup> Likewise, these authors have rejected the chimerical notion that one can discard history entirely in favor of a constitution rooted only in "timeless values."<sup>93</sup>

As a normative matter, traditionalist scholars have argued that originalism is undesirable.<sup>94</sup> Even if originalist jurists could identify founding-era understandings, application of those understandings to contemporary problems would lead to unacceptable results.<sup>95</sup> Moreover, although finding original intent is often infeasible, an originalist can

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<sup>89</sup> *Id.* at 972 ("Unless the original understanding was 'here is how we are going to answer this question now and forever,' it will be difficult to respond to the argument that the original understanding dealt with the problems people were confronting at the time, in the society in which they lived, with the technology they had, and with the population they had.").

<sup>90</sup> Friedman & Smith, *supra* note 11, at 50–51.

<sup>91</sup> *See, e.g.*, Strauss, *supra* note 87; Young, *supra* note 11, at 622–23 (" . . . I hope to demonstrate not only that conservatism is a coherent philosophy, but also that those generally identified as paradigms of conservative jurisprudence—such as Justice Antonin Scalia or Judge Robert Bork—are not really conservative at all. . . . 'conservatism' is a term with both a plain meaning—based on its root 'conserve'—and a history; to the extent that modern 'conservative' jurisprudence is inconsistent with the political theory that has historically been used to conserve and protect existing social institutions, it is simply inaccurate to call the jurisprudence 'conservative.'").

<sup>92</sup> *See generally* Merrill, *supra* note 11; Strauss, *supra* note 87; Young, *supra* note 11.

<sup>93</sup> *See, e.g.*, Friedman & Smith, *supra* note 11, at 51–55.

<sup>94</sup> *Id.* at 35 ("Normatively, the hope is to convince constitutional interpreters to do self-consciously what is innate but frequently misplaced because of the felt tension between fidelity to the Founding and the necessities of the time."); Young, *supra* note 11, at 660 ("To the extent that Burke's classical position is persuasive, however, my critique takes on a more normative focus. If Burke is basically right about the limitations of human reason, the importance of tradition, etc., then modern conservative constitutional jurisprudence is sorely misguided.").

<sup>95</sup> *See, e.g.*, Friedman & Smith, *supra* note 11, at 42 ("What is most important is that as we mediate between our past and our present, we simultaneously carry constitutional values with us and transform them. This account explains why the more recent tellings of our history *should be*, and often are, privileged in constitutional law. On this understanding of history, it becomes evident that our constitutional values largely will be found in the upper layers of our sedimentary constitution.") (emphasis added); Young, *supra* note 11, at 708–10.

frequently identify some evidence from the founding era to support a variety positions on most constitutional questions.<sup>96</sup> Thus, the vague, complex, and multifarious historical record allows originalists to invoke history to cloak the application of their idiosyncratic policy preferences to constitutional problems.<sup>97</sup> On the other hand, the rejection of history entirely in favor of any passing majoritarian fancy would render judicial involvement in constitutional interpretation moot. An essential function of a constitution must be to counteract society's ephemeral excesses by reminding the populace of its deeper commitments, and judges tasked with interpreting the Constitution must enforce those commitments.<sup>98</sup>

Originalism, of course, is not a monolith. Some originalists attempt to discern the actual intentions of the ratifiers of the Constitution, often using evidence of the intentions of the framers as a proxy.<sup>99</sup> For these jurists, the intentions of those who adopted the Constitution would control even if contrary to common contemporary understandings about the meaning of the text.<sup>100</sup> Other originalists have emphasized adherence to constitutional language, relying on public understandings of what the text would have meant at the time of ratification rather than the subjective intentions of those who adopted it.<sup>101</sup> Though public-understanding originalism has come to be the dominant strain of originalist thought,<sup>102</sup> in practice the two approaches will often produce identical results, given

<sup>96</sup> See generally Friedman & Smith *supra* note 11; Young *supra* note 11.

<sup>97</sup> See, e.g., Strauss, *supra* note 85, at 928 (“Disputes that in fact concern matters of morality or policy masquerade as hermeneutic disputes about the ‘meaning’ of the text, or historians’ disputes about what the Framers did. By contrast, in common law constitutional interpretation, the difficult questions are on the surface and must be confronted forthrightly.”); H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 661 (1987) (“The pressures created by the need to defend a client or justify a viewpoint are so enormous, and the value of respect for historical method so abstract, that it is probably inevitable that the historical arguments of constitutionalists are historically irresponsible far more often than not.”); Young, *supra* note 11, at 670.

<sup>98</sup> Friedman & Smith, *supra* note 11, at 78.

<sup>99</sup> Young, *supra* note 11, at 628 n.37.

<sup>100</sup> *Id.* at 628; see also Donald A. Dripps, *Responding to the Challenges of Contextual Change and Legal Dynamism in Interpreting the Fourth Amendment*, 81 MISS. L.J. 1085, 1110–11 (2012); Richard S. Kay, “Originalist” Values and Constitutional Interpretation, 19 HARV. J.L. & PUB. POL’Y 335, 336–37 (1996).

<sup>101</sup> Young, *supra* note 11, at 627, 627 n.34. Richard Kay, taking note of various strains of originalism, further subdivides textualist originalism into two camps: 1) those who would focus on dictionary definitions of constitutional language at the time of adoption; and 2) those who would emphasize not only dictionary definitions, but also meanings that are compatible with “the historical context in which the Constitution was enacted.” Kay, *supra* note 100, at 336–37.

<sup>102</sup> See, e.g., Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1762 (2015); Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEO. L.J. 329, 338 (2011).

that people generally intend to use language in ways consistent with widely accepted meanings of the words they choose.<sup>103</sup>

A third species of originalist thought involves an attempt to apply broad values consistent with the general aims of those who adopted the Constitution, rather than interpreting the Constitution as prescribing a rigid set of granular rules.<sup>104</sup> This approach might involve either a conclusion that the framers themselves intended that future generations would interpret the Constitution primarily as a set of abstract principles rather than precise dictates, or it might involve a self-conscious application of constitutional commands at a higher level of generality than the framers intended.<sup>105</sup> Numerous prominent originalists concede at least that many constitutional provisions are sufficiently abstract that judicial decision-making necessarily plays a prominent role in the construction of constitutional meaning in cases contesting the significance of those provisions.<sup>106</sup>

Some originalists who acknowledge the indeterminacy of many constitutional provisions argue that courts should generally defer to the political branches when original meaning is unascertainable.<sup>107</sup> Even among these scholars, however, there is some recognition that the framers intentionally conferred judicial discretion in determining the effect of the Constitution when constitutional directives take the form of a standard rather than a bright-line rule.<sup>108</sup> Other originalists would seek to confine decision-making even in these realms by linking seemingly open-ended standards to eighteenth century common law rules, at least when such rules are ascertainable.

As noted, incrementalist critics of originalism have voiced skepticism in general about the ability of originalists to discern original mean-

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<sup>103</sup> Kay, *supra* note 100, at 337–38; Young, *supra* note 11, at 628.

<sup>104</sup> Kay, *supra* note 100, at 339.

<sup>105</sup> *Id.*

<sup>106</sup> See, e.g., Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling Planned Parenthood of Southeastern Pennsylvania v. Casey*, 22 CONST. COMMENT. 311, 327 (2005) (“[I]t is certainly the case that many parts of our constitutional text are worded at a high level of generality and the caselaw construing the text is thus of critical importance.”); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013).

<sup>107</sup> Solum, *supra* note 106, at 511–23 (describing the views of Professors Gary Lawson and Michael Paulsen); Calabresi, *supra* note 106, at 328.

<sup>108</sup> See Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for its Own Interpretation?*, 103 NW. U. L. REV. 857, 881 (2009) (listing the Fourth Amendment ban on unreasonable searches and seizures, the Eighth Amendment prohibition of cruel and unusual punishment, and the Eighth Amendment proscription against excessive fines); Sklansky, *The Fourth Amendment and Common Law*, *supra* note 12, at 1791 (“Nonetheless, even most dyed-in-the-wool originalists concede that certain constitutional provisions seem to cry out for open-ended interpretation—seem to embody abstract concepts rather than particular conceptions. . . . And few parts of the Constitution seem to call more loudly for this kind of interpretation than the opening clause of the Fourth Amendment.”).

ing through historical analysis. Of course, this is not to assert the impossibility of determining clear original meaning of any constitutional provision. For example, virtually all non-originalists would accept both that the constitutional requirement that the President be at least thirty-five-years old has a clearly identifiable original meaning and that that meaning remains dispositive in the twenty-first century.<sup>109</sup> Rather, non-originalists contend that much constitutional language is vague, that such provisions are the most likely to be litigated,<sup>110</sup> and that attempts to identify original understandings of such provisions as applied to particular, contemporary conflicts are quixotic. Incrementalist scholars have chronicled the uncertainty and manipulability inherent to the originalist enterprise even with regard to strains of originalism that attempt to constrain judicial discretion in interpreting broad constitutional provisions by linking abstract commands to fine-grained, eighteenth-century common law rules.<sup>111</sup> For an originalist applying putatively original values at a high level of abstraction, the ostensible determinacy celebrated as a cardinal benefit of originalist jurisprudence is, necessarily, all the more elusive.

Although incrementalist scholars have crafted their arguments primarily in response to perceived shortcomings in originalist methodology, traditionalists have sometimes also addressed the pitfalls of ahistorical interpretive schemes based on ostensibly timeless values or popular whim. Indeed, contemporary incrementalists have often explicitly modeled their views on the ideas of Edmund Burke,<sup>112</sup> who wrote largely in response to what he viewed as the excessively optimistic rationalism of moral abstraction associated with enlightenment political theory.<sup>113</sup> Barry Friedman and Scott Smith have likewise chronicled and critiqued the Court's periodic indulgence in ahistorical modes of constitutional analysis, beginning in the late nineteenth century and continuing intermittently through the time of their writing.<sup>114</sup> In addition to asserting the impossibility of eliminating historical concerns from ostensibly timeless philosophical abstraction, Friedman and Smith criticized any mode of constitutional interpretation based on present-day popular preferences as inconsistent with the very notion of constitutionalism, which necessarily

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<sup>109</sup> See, e.g., Peter J. Smith, *How Different are Originalism and Non-Originalism?*, 62 HASTINGS L.J. 707, 722 (2011) (citing U.S. CONST., art. II, § 1, cl. 5).

<sup>110</sup> See *id.* at 723.

<sup>111</sup> See, e.g., Sklansky, *The Fourth Amendment and Common Law*, *supra* note 12; Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 954–55 (2002) (“Generally speaking, disagreement among common-law scholars on the authority of a particular legal norm should be expected.”).

<sup>112</sup> See *infra* Part II.C.

<sup>113</sup> *Id.*

<sup>114</sup> See Friedman & Smith, *supra* note 11, at 15–33.

includes an idea of restraint of majoritarian caprice through reference to more enduring values.<sup>115</sup>

Today, those who embrace various forms of living constitutionalism generally accept that historical analysis has a role to play in constitutional interpretation.<sup>116</sup> They insist merely, in contrast to originalists, that historical understandings, including those at the time of ratification, are only one factor in a diverse array of hermeneutic considerations, including consequences, moral reasoning, and doctrine.<sup>117</sup> Nonetheless, critiques of ahistoricism, like that of Friedman and Smith, are salient to this discussion in light of the conventional view of *Katz* as representing a rigid rejection of historical analysis.

### B. *Originalism and Ahistoricism in Fourth Amendment Jurisprudence*

In the context of determining the reasonableness of a Fourth Amendment search or seizure, the Supreme Court has, in recent decades, at times endorsed an approach that gives primacy to eighteenth-century common law rules.<sup>118</sup> Under this model, the Court looks, in the first instance, to whether “a particular governmental action . . . was regarded as an unlawful search or seizure under the common law when the Amendment was framed.”<sup>119</sup> If, however, this inquiry fails to provide an answer, the Court will then balance “the degree to which [the government’s conduct] intrudes upon an individual’s privacy” against “the degree to which it is needed for the promotion of legitimate governmental interests.”<sup>120</sup>

Fourth Amendment scholars have faulted the Court’s “new Fourth Amendment originalism”<sup>121</sup> on several grounds consistent with non-originalist critiques of originalism in general. First, despite the potential such a framework might seem to provide for disciplining and restraining judicial discretion or for providing some measure of certainty to judicial decision-making, in fact, various common law sources in 1791 were often in a state of irresolvable conflict regarding search and seizure.<sup>122</sup>

<sup>115</sup> *Id.* at 78.

<sup>116</sup> *See, e.g.*, Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353, 358, 360–61 (2007).

<sup>117</sup> *Id.* at 360–61 (asserting that living constitutionalists tend to “concede . . . that the living have undeniable connections with the dead—that we share a collective memory and fate with them. Yet, a living constitutionalist insists that the document is only ours when our consent to it today is something other than completely fictive. Therefore, any first-order constitutional interpretation that prevents the full range of interpretive modalities from destabilizing original meaning risks betraying the entire ‘social contract.’”).

<sup>118</sup> *See* *Riley v. California*, 573 U.S. 373, 385 (2014); *Virginia v. Moore*, 553 U.S. 164, 168 (2008); *Atwater v. City of Lago Vista*, 532 U.S. 318, 326–27 (2001); *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999).

<sup>119</sup> *Houghton*, 526 U.S. at 299.

<sup>120</sup> *Id.*; *see also* *Riley*, 573 U.S. at 385–86; *Moore*, 553 U.S. at 168.

<sup>121</sup> Sklansky, *The Fourth Amendment and Common Law*, *supra* note 12, at 1744.

<sup>122</sup> *Id.* at 1794–1805.

Just as frequently, the common law had very little to say whatsoever about search and seizure practices.<sup>123</sup> Scholars have chronicled the absence of robust common law sources even with regard to searches and seizures that might have been common in the eighteenth century; the common law necessarily could provide no guidance on the legality of specific practices that would become possible only with subsequent technological developments.<sup>124</sup> Overall, the failure of eighteenth-century law to provide the Court with precise guidance on contemporary problems is perhaps best revealed by the Court's own opinions in its cases purporting to follow this sort of "specific practice originalism."<sup>125</sup> In those cases, the Court has tended to resort to the balancing it claimed would be necessary only when the common law failed to provide an answer,<sup>126</sup> either because the Court found (explicitly or implicitly) that the law at the time of ratification provided no clear resolution of the issue in question, or because the Court apparently lacked confidence in its assertion that eighteenth-century law did resolve the issue.<sup>127</sup>

Furthermore, even when it is possible to identify with some certainty whether the framers would have considered a particular kind of search or seizure to be unreasonable, it is impossible to know whether they would have considered an identical practice to be reasonable in the extraordinarily different twenty-first century context. Even if we can conclude, for example, that the framers expected officers conducting searches and seizures to be strictly liable in tort for Fourth Amendment violations, we might question whether they would draw the same conclusions in our vastly different world of professionalized police forces.<sup>128</sup> Likewise, the evidence that the framers believed the seizure of private

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<sup>123</sup> *Id.* at 1804 (noting that the common law had "almost nothing to say" about searches of persons).

<sup>124</sup> *See, e.g., Riley*, 573 U.S. at 385–86 (noting that the Court balances the government's need to advance legitimate law enforcement interests against the severity of privacy intrusions in cases in which the law at the time of founding provides no clear answer, and moving directly to such balancing in case involving the constitutionality of searching the digital contents of cell phones incident to arrest).

<sup>125</sup> Professor Donald Dripps has used the term "specific practice originalism" to describe the same approach to interpreting the Fourth Amendment that David Sklansky has labeled "the new Fourth Amendment originalism." *See* Dripps, *supra* note 100, at 1087–88.

<sup>126</sup> *Id.*; *Virginia v. Moore*, 553 U.S. 164, 171–76 (2008); *Wyoming v. Houghton*, 526 U.S. 295, 303–07 (1999).

<sup>127</sup> *Houghton*, 526 U.S. at 311 n.3 (Stevens, J., dissenting) ("To my knowledge, we have never restricted ourselves to a two-step Fourth Amendment approach wherein the privacy and governmental interests at stake must be considered only if 18th-century common law 'yields no answer.' Neither the precedent cited by the Court, nor the majority's opinion in this case, mandate that approach. In a later discussion, the Court does attempt to address the contemporary privacy and governmental interests at issue in cases of this nature. Either the majority is unconvinced by its own recitation of the historical materials, or it has determined that considering additional factors is appropriate in any event.") (citations omitted).

<sup>128</sup> Dripps, *supra* note 100, at 1107–08.

papers of mere evidentiary value (as opposed to those that qualified as contraband or the fruits or instrumentalities of crime) to be prohibited by the Fourth Amendment might tell us little about what they would think given the need to “combat fraud and terrorism in a computer age.”<sup>129</sup> And it is similarly impossible to know whether people who considered nighttime searches, with all the terror they entailed in the eighteenth century, to be unreasonable, would consider nocturnal searches today to be unreasonable, given the ameliorating effects of electric lighting, uniformed police officers, and telephone communication.<sup>130</sup>

In addition to these problems with specific-practice originalism, it is likely that the framers themselves had every expectation that the particular common law rules of search and seizure in existence in 1791 would eventually change, and there is no evidence that they believed the Reasonableness Clause of the Fourth Amendment would both constitutionalize those rules and freeze them forever as they existed at the time of ratification.<sup>131</sup> Rather, even if the framers did expect the Reasonableness Clause to incorporate common law norms,<sup>132</sup> they understood that common law rules evolve over time.<sup>133</sup> More broadly speaking, numerous authors have argued that the framers themselves expected that future courts would interpret constitutional language through “case-by-case interpretation” and that “they anticipated that departures from their literal language would be occasioned by new and unforeseen circumstances, not by efforts to give effect to their own, unexpressed intentions.”<sup>134</sup>

As a general proposition, the proponents of the notion that the framers expected understandings of the meaning of the Constitution to evolve

<sup>129</sup> *Id.* at 1113.

<sup>130</sup> *Id.* at 1116.

<sup>131</sup> *See, e.g.,* Amar, *supra* note 31, at 818 n.230 (“‘Reasonableness’ is not some set of specific rules, frozen in 1791 or 1868 amber. . . .”).

<sup>132</sup> *See* Dripps, *supra* note 100, at 1091 (asserting that “reading ‘unreasonable searches and seizures’ as a term of art incorporating the body of common-law tort rules enjoys weighty support in the historical record.”) (citing WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 602–1791, at 739–58 (2009)). Not all scholars share the opinion that this view should be taken seriously. *See, e.g.,* Sklansky, *The Fourth Amendment and Common Law*, *supra* note 12, at 1788 (arguing that there is “no reason to think the Fourth Amendment was intended to codify specific common-law rules”).

<sup>133</sup> Dripps, *supra* note 100, at 1122–23; Maclin, *supra* note 111, at 955 (“Common-law rules, like constitutional principles, do evolve with time.”); Sklansky, *The Fourth Amendment and Common Law*, *supra* note 12, at 1788 (“By 1791, as Charles Wolfram has noted, ‘a commonly understood concept of “common-law” had become that of a process characterized by occasional flexibility and capacity for growth in order to respond to changing social pressures, rather than that of a fixed and immutable body of unchanging rules.’ That Madison, the principal author of the Bill of Rights, shared this view of the common law is suggested by his 1799 report on the Virginia resolutions concerning the Alien and Sedition Acts.”) (citation omitted).

<sup>134</sup> *See, e.g.,* Sklansky, *The Fourth Amendment and Common Law*, *supra* note 12, at 1792 (citing H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 903–04 (1985)).

invoke originalist methodology to refute originalist claims, resulting in a sort of “faint-hearted originalism,”<sup>135</sup> or an argument that “originalism refutes originalism.”<sup>136</sup> To the extent that these contentions are accurate, they also vitiate the supposed virtue of originalism of confining constitutional interpretation to application of norms whose legitimacy derives from ratification, “‘one of the most profoundly democratic moments in human history.’”<sup>137</sup> Rather, originalist jurisprudence would amount to the very sort of judge-made law that originalists typically decry.<sup>138</sup> And, of course, none of the originalists on the Court are likely eager to implement these original understandings by abolishing qualified immunity, reinstating the “mere evidence” rule, or broadly prohibiting nighttime searches.

When it has applied “the new Fourth Amendment originalism,” the Court has generally done so in considering whether a Fourth Amendment search or seizure is a reasonable one.<sup>139</sup> In deciding what constitutes a search in the first place, Chief Justice William Howard Taft’s majority opinion in *Olmstead v. United States* has been described as “the classic originalist statement” of the Fourth Amendment.<sup>140</sup> Indeed, Taft justified the Court’s pegging of Fourth Amendment protection to property-based concerns with reference to both the “well-known historical purpose of the Fourth Amendment” and to the Amendment’s text.<sup>141</sup> Likewise, Justice Black’s *Katz* dissent was expressly originalist; although Justice Black saw value in giving the Fourth Amendment a “liberal construction,” he could not reconcile the text of the Amendment or his conviction that the framers intended to limit its application to tangible things with what might be desirable results in light of contemporary needs.<sup>142</sup> Consequently, he disapproved of the majority’s “rewrit[ing] the Amendment in order ‘to bring it into harmony with the times.’”<sup>143</sup> In contrast, *Katz*’s seemingly ahistorical directive, untethered from the Amendment’s text, to determine society’s willingness to characterize an expectation of pri-

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<sup>135</sup> Young, *supra* note 11, at 628–29.

<sup>136</sup> Friedman & Smith, *supra* note 11, at 29.

<sup>137</sup> See, e.g., James W. Fox, Jr., *Counterpublic Originalism and the Exclusionary Critique*, 67 ALA. L. REV. 675, 682 (2016) (citing Lawrence B. Solum, *We Are All Originalists Now*, in CONSTITUTIONAL ORIGINALISM: A DEBATE 43 (Robert W. Bennett & Lawrence B. Solum, eds., 2011)).

<sup>138</sup> See Sklansky, *The Fourth Amendment and Common Law*, *supra* note 12, at 1794.

<sup>139</sup> See *id.* at 1758, 1793.

<sup>140</sup> Craig S. Lerner, Professor of Law, George Mason University School of Law, Originalism and Criminal Law and Procedure, Address at 2005 National Lawyer’s Convention (Nov. 10, 2005), in 11 CHAP. L. REV. 277, 283 (2008).

<sup>141</sup> *Olmstead v. United States*, 277 U.S. 438, 463–64 (1928).

<sup>142</sup> *Katz v. United States*, 389 U.S. 347, 364–67 (1967) (Black, J., dissenting).

<sup>143</sup> *Id.* at 364.

vacy as reasonable is just as classic an expression of non-originalism.<sup>144</sup> Since then, attacks on *Katz* by Justices Scalia, Thomas, and Gorsuch have included explicitly originalist arguments that the decision had no basis in text or history.<sup>145</sup>

Of course, scholars have applied the originalist label to such a broad array of approaches to constitutional interpretation that the occasional author has described even *Katz* in originalist terms.<sup>146</sup> Moreover, Justice Scalia's majority opinion in *Kyllo* specifically invoked the founding era in "refin[ing]" the *Katz* standard with regard to the use of sense-enhancing technology to gather information about the interior of a home.<sup>147</sup> In holding that the use of such technology would constitute a search when the information "could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area . . . ' at least where . . . the technology in question is not in general public use," the Court claimed that its rule would ensure "preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted."<sup>148</sup> Like those who would interpret the Constitution as instantiating broad, founding-era values, a commitment to maintaining the "degree of privacy" one could expect in the eighteenth century allows for the evolution of specific rules in the service of a more abstract principle. Thus, it is unsurprising that some originalists would decry Scalia's turn in *Kyllo* as an abandonment of "rigorous originalism."<sup>149</sup> Donald Dripps has described this paradigm as a sort of "balance of advantage" originalism.<sup>150</sup> Yet, as he has noted, this kind of endeavor blurs the line between originalism and living constitutionalism.<sup>151</sup>

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<sup>144</sup> See, e.g., Lerner, *supra* note 140, at 282–83; Marceau, *supra* note 36, at 708; Sklansky, *Back to the Future*, *supra* note 12, at 146 (describing *Katz* as "firmly ahistoric"); Sklansky, *The Fourth Amendment and Common Law*, *supra* note 12, at 1808 (characterizing *Katz* as "not originalist").

<sup>145</sup> *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring); *Carpenter v. United States*, 138 S. Ct. 2206, 2236 (2018) (Thomas, J., dissenting); *id.* at 2264 (Gorsuch, J., dissenting); *Byrd v. United States*, 138 S. Ct. 1518, 1531 (2018) (Thomas, J., concurring).

<sup>146</sup> See, e.g., William C. Heffernan, *Criminal Procedure: Property, Privacy, and the Fourth Amendment*, 60 BROOK. L. REV. 633, 641–45 (1994) (reading eighteenth-century sources as reflecting a concern for informational privacy and describing *Katz* as implementing "a form of principle-based originalism.").

<sup>147</sup> *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

<sup>148</sup> *Id.*

<sup>149</sup> Lerner, *supra* note 140, at 284.

<sup>150</sup> Dripps, *supra* note 100, at 1126–31 (differentiating between *Kyllo*'s descriptive "balance of advantage" model and Professor Dripps' proposed "aspirational balance of advantage" approach, which would implement the balance of advantage the framing generation hoped for, rather than that which actually existed in the late eighteenth century).

<sup>151</sup> Donald A. Dripps, "Perspectives on the Fourth Amendment" *Forty Years Later: Toward the Realization of an Inclusive Regulatory Model*, 100 MINN. L. REV. 1885, 1904, 1905 n.76 (2016) ("[T]he more sophisticated the originalism the more closely it resembles openly normative accounts.").

*Kyllo*'s specialized application of *Katz* is, to be sure, not the Court's primary approach to implementing the "reasonable expectation of privacy" standard. In general, the consensus view of *Katz* as antithetical to originalism is certainly correct.<sup>152</sup> The *Carpenter* Court's references to the framers' concerns with "arbitrary power" and a "too permeating police surveillance"<sup>153</sup> hardly merit reevaluation of that conclusion. Yet, as with originalism in general, in the context of determining what constitutes a Fourth Amendment search, even if it is clear the framers never contemplated that the Amendment would apply to eavesdropping accomplished without a trespass, there remains the problem of translation.<sup>154</sup> Given that the framers were "as ignorant of eavesdropping by proactive professional law-enforcement agents as they were of wiretapping," as well as of the horrors of totalitarian police states such as Nazi Germany and the Soviet Union, it is impossible to know what they would have thought to be appropriate boundaries for Fourth Amendment protection in the twentieth and twenty-first centuries.<sup>155</sup> In the face of these threats, one cannot say whether the framers would have favored a Fourth Amendment tied to property rather than privacy.

Ultimately, it is clear that even originalists on the Court would not be willing to follow framing-era history wherever it leads when it comes to assessing the scope of Fourth Amendment coverage. Justice Scalia, for example, cited with approval the work of Professors Akhil Amar and Telford Taylor disputing the historical basis for the warrant preference theory, the notion that warrants are presumptively necessary to render a search reasonable.<sup>156</sup> Instead, Amar and Taylor argued that the Reasonableness Clause is independent of the Warrant Clause and that the overarching command of the Fourth Amendment is that all searches and seizures be reasonable, not that they be conducted pursuant to warrants.<sup>157</sup> Originalists on the Court have often found this theory appealing.<sup>158</sup> Yet Professor Thomas Davies has conducted rigorous historical

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<sup>152</sup> See Sklansky, *The Fourth Amendment and Common Law*, *supra* note 12, at 1759.

<sup>153</sup> *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018).

<sup>154</sup> See Strauss, *supra* note 87, at 971.

<sup>155</sup> Dripps, *supra* note 100, at 1117–19 ("The founders, as we have seen, knew constables and the night watch. To investigate their understanding of the Fourth Amendment in an institutional world where law enforcement power is used, and abused, by the modern police is at least as nonsensical as investigating the founders' views of modern surveillance technology.").

<sup>156</sup> *California v. Acevedo*, 500 U.S. 565, 581–82 (1991) (Scalia, J., concurring) (citing TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 41 (1969); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 *YALE L.J.* 1131, 1178–80 (1991)).

<sup>157</sup> See TAYLOR, *supra* note 156, at 23, 41; Amar, *supra* note 31, at 759.

<sup>158</sup> See, e.g., *Acevedo*, 500 U.S. at 583–84 (Scalia, J., concurring); *Florida v. White*, 526 U.S. 559, 563 (1999) (majority opinion by Justice Thomas) ("In deciding whether a challenged governmental action violates the Amendment, we have taken care to inquire whether the action was regarded as an unlawful search and seizure when the Amendment was framed."); *id.* at 568–69 (Stevens, J., dissenting) (criticizing the majority for discarding a presumption in favor

analysis and concluded that, in fact, the framers never expected any broad standard of Fourth Amendment reasonableness to regulate most governmental investigative conduct.<sup>159</sup> Rather, according to Davies, the original understanding of the Amendment was that it applied only to prohibit general warrants to search homes and that it simply did not address any other searches and seizures.<sup>160</sup> It is difficult to imagine, however, that Justice Scalia would have advocated, or that any current originalists on the Court would advocate, if they found Davies' evidence convincing, such a parsimonious construction of the Fourth Amendment's scope.

In fact, as I have noted, despite his disdain for *Katz*, Justice Scalia considered his opinion for the Court in *Kyllo* to be a refinement of Justice Harlan's standard, not a rejection of it.<sup>161</sup> And, even as he diminished *Katz*'s significance with his rehabilitation of a property-based approach to deciding whether a Fourth Amendment search has occurred, Justice Scalia reaffirmed *Katz*'s continued relevance as a second-line test.<sup>162</sup> Justice Gorsuch, too, while largely agreeing with Justice Thomas' originalist critique of *Katz*, left open the possibility that his vision of an updated property rubric, including an expansive definition of "effects," would not entirely preclude reliance on *Katz* as a secondary means of assessing whether government conduct implicates the Fourth Amendment.<sup>163</sup> In part, this reflects considerable respect for precedent even among most originalists.<sup>164</sup> In the final analysis, in any case, *Katz* continues to play a vital role in ascertaining the scope of Fourth Amendment protection. The question, therefore, remains how best to interpret its di-

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of warrants: "I would apply to the present case our longstanding warrant presumption. . . . The Court does not expressly disavow the warrant presumption urged by White and followed by the Florida Supreme Court, but its decision suggests that the exceptions have all but swallowed the general rule.").

<sup>159</sup> See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 551, 736 (1999).

<sup>160</sup> *Id.* at 603.

<sup>161</sup> See *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

<sup>162</sup> *United States v. Jones*, 565 U.S. 400, 412–14 (2012).

<sup>163</sup> *Carpenter v. United States*, 138 S. Ct. 2206, 2272 (2018) (Gorsuch, J., dissenting) ("Even if *Katz* may still supply one way to prove a Fourth Amendment interest, it has never been the only way.").

<sup>164</sup> See, e.g., Fallon, *supra* note 102, at 1800–01 ("But I know of no Justice of the Supreme Court, including those presently serving, who has held consistently to the view that subsequent historical developments can never displace the authority of original constitutional meaning. The self-identified originalist Justices Antonin Scalia and Clarence Thomas exemplify the historical pattern. Justice Scalia defends judicial practice in sometimes adhering to initially mistaken precedents as an 'exception' to his otherwise originalist philosophy. Justice Thomas, too, has joined opinions that would be difficult or impossible to support on originalist grounds. Qualified acceptance of the authority of nonoriginalist precedent expands, rather than contracts, the range of historical considerations pertinent to constitutional adjudication.").

rective to identify which expectations of privacy society is prepared to recognize as reasonable.

One possibility would be to apply *Katz* according to the predominant understanding of its formula as an unqualified embrace of an ahistorical approach to Fourth Amendment decision-making. As David Sklansky has observed, unlike the previous *Olmstead* framework, “Justice Stewart’s opinion for the Court in *Katz* was strikingly forward-looking—or at least present-looking. It alluded repeatedly to the realities of modern life, but contained not a word about the background of the Fourth Amendment.”<sup>165</sup> This view is broad enough to encompass both the notion that *Katz* requires an empirical analysis of contemporary attitudes and the contrary belief that it demands a normative attempt by Supreme Court Justices to balance contemporary interests. It is, in either case, premised on the idea that *Katz* represented a wholesale rejection of history as a guide to the parameters of the Fourth Amendment.

If this is the only cogent way to interpret *Katz*, then Justice Gorsuch’s musings about the superior institutional capacities of legislatures have considerable force. As Gorsuch argued in his *Carpenter* dissent, if *Katz* demands a normative assessment of whether “society *should* be prepared to recognize an expectation of privacy as legitimate,”<sup>166</sup> then it is unclear why courts should be making the determination rather than legislatures. Deciding which privacy interests “*should* be recognized” seems to call for a “pure policy choice,” an “exercise of raw political will belonging to legislatures, not the legal judgment proper to courts.”<sup>167</sup>

It is certainly possible to interpret the concept of “reasonableness” in Fourth Amendment doctrine as an invitation to judges to use ahistorical, abstract moral reasoning to resolve Fourth Amendment problems. For example, Richard Re has argued that both eighteenth-century definitions of the word “reasonable” and the “intellectual context” in which the Amendment was adopted suggest that the Fourth Amendment “calls for new moral reasoning.”<sup>168</sup> That “reasonable” in the eighteenth century meant “agreeable to reason” or “just” is alone sufficient to convince Re of the plausibility of the notion that the framing generation understood that those interpreting the Amendment would use moral theory in doing so.<sup>169</sup> Additionally, to the extent that the text incorporated “broad common law principles,” it is significant to Re that early American jurists understood that courts were to interpret the common law “in accord

<sup>165</sup> Sklansky, *Back to the Future*, *supra* note 12, at 153.

<sup>166</sup> *Carpenter*, 138 S. Ct. at 2265 (Gorsuch, J., dissenting).

<sup>167</sup> *Id.*

<sup>168</sup> Richard M. Re, *Fourth Amendment Fairness*, 116 MICH. L. REV. 1409, 1415–17 (2018).

<sup>169</sup> *Id.* at 1415.

with equity, reason, and good sense.’”<sup>170</sup> Finally, Re notes that a problem with a historical approach to Fourth Amendment interpretation is that, unlike a framework emphasizing moral reasoning, such a method, rooted in “centuries-old answers,” is unable effectively to address modern problems.<sup>171</sup> Yet Re’s argument against a historical approach largely treats the use of history as synonymous with originalist history,<sup>172</sup> and, as I will argue in more detail below, to disregard history entirely in favor of timeless abstraction is neither feasible nor desirable.<sup>173</sup>

Like ahistorical normative arguments, if *Katz* calls for an empirical inquiry into the expectations contemporary society actually regards as reasonable, even if those expectations reflect only fleeting preferences, “it’s unclear why judges rather than legislators should conduct it.”<sup>174</sup> As Justice Gorsuch noted:

Legislators are responsive to their constituents and have institutional resources designed to help them discern and enact majoritarian preferences. Politically insulated judges come armed with only the attorneys’ briefs, a few law clerks, and their own idiosyncratic experiences. They are hardly the representative group you’d expect (or want) to be making empirical judgments for hundreds of millions of people.<sup>175</sup>

To be sure, *Katz*’s directive to define searches according to the expectations that “society is prepared to recognize as reasonable” might seem to call for application of an opinion poll. Likewise, in the analogous context of determining Fourth Amendment standing, part of the *Rakas* Court’s solution to the problem of doctrinal circularity was to assert that it would be proper to decide the scope of Fourth Amendment protection with reference to “understandings that are recognized and permitted by society.”<sup>176</sup> Yet, to interpret *Katz* as a purely ahistorical exami-

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<sup>170</sup> *Id.* at 1416 n.35 (quoting Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less*, 56 WASH. & LEE L. REV. 787, 799 (1999)).

<sup>171</sup> *Id.* at 1415.

<sup>172</sup> *Id.* at 1415, 1415 n.31 (describing “historical approaches” as involving the application of “centuries-old answers” and citing opinions that called, in the first instance, for examination of framing-era practices to find answers to contemporary problems).

<sup>173</sup> Re’s contractualist model does, however, offer a potential response to Justice Gorsuch’s questions about the relative institutional capacities of courts and legislatures. Because of contractualism’s deontological character, as opposed to utilitarian interest aggregation, courts might be best tasked with implementing such a framework, given their “traditional rights-enforcing role distinct from the political branches’ frequent pursuit of aggregate interests.” *Id.* at 1425.

<sup>174</sup> *Carpenter v. United States*, 138 S. Ct. 2206, 2265 (2018) (Gorsuch, J., dissenting).

<sup>175</sup> *Id.*

<sup>176</sup> *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978).

nation of modern preferences is contrary to the very essence of constitutional decision-making. As Friedman and Smith have argued, constitutionalism, at its core, requires some kind of restraint of immediate, popular preferences and a reconciliation of those preferences with deeper, more enduring commitments.<sup>177</sup> Thus, authors who have advocated the use of surveys assessing popular understandings of the intrusiveness of various law enforcement techniques to delineate the boundaries of the Fourth Amendment's application<sup>178</sup> promote a technique in conflict with a central purpose of constitutional decision-making. As even Professor Christopher Slobogin, a prominent proponent of the use of surveys in Fourth Amendment jurisprudence, has conceded, the technique "does smack of putting search and seizure law up for a vote, which runs against the constitutional grain."<sup>179</sup>

### C. *The Traditionalist Alternative*

There is, however, another way. Ernest Young, an early incrementalist critic of originalist constitutional theory, presented the approach he promoted as following in the tradition of Edmund Burke, generally viewed among political theorists as the archetype of classical conservative thought.<sup>180</sup> Burke formulated his philosophy largely in response to the optimistic rationalism of enlightenment thinkers like John Locke.<sup>181</sup> Burke perceived such enlightenment ideals as culminating in the horrors and excesses of the French Revolution.<sup>182</sup> Unlike Locke and other enlightenment philosophers, Burke maintained a relatively pessimistic view of the human capacity for rationality.<sup>183</sup> Consequently, Burke sought to "economize on reason" by grounding political decision-making in the traditions reflected in "the ancient institutions of civil society."<sup>184</sup> While Burke perceived that an individual might have difficulty

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<sup>177</sup> Friedman & Smith, *supra* note 11, at 78 ("Constitutionalism may be much more, but it cannot be less.").

<sup>178</sup> See, e.g., Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727 (1993).

<sup>179</sup> Christopher Slobogin, *Proportionality, Privacy, and Public Opinion: A Reply to Kerr and Swire*, 94 MINN. L. REV. 1588, 1602 (2010).

<sup>180</sup> See Young, *supra* note 11. An earlier generation of so-called "common law constitutionalists" offered theories of incremental constitutional evolution in the late nineteenth century. See, e.g., Bruce Ackerman, *The Common Law Constitution of John Marshall Harlan*, 36 N.Y.L. SCH. L. REV. 5, 6–9 (1991). Young and others, however, offered a new wave of scholarship defending incrementalism in the late twentieth century in response to the originalism of jurists such as Robert Bork and Antonin Scalia.

<sup>181</sup> See Young, *supra* note 11, at 644.

<sup>182</sup> EDMUND BURKE, *Reflections on the Revolution in France*, in 8 THE WRITINGS AND SPEECHES OF EDMUND BURKE 53, 137 (L. G. Mitchell ed., Oxford University Press, 1989).

<sup>183</sup> Young, *supra* note 11, at 644.

<sup>184</sup> *Id.* at 648–49.

discerning the value of the structures and rules embodied in such institutions, they “reflect[ed] the accumulated wisdom of centuries of political decisions.”<sup>185</sup> In Burke’s words, this preference for tradition over abstract moral theory or fleeting, contemporary preferences was a “presumption in favour of any settled scheme of government against any untried project, that a nation has long existed and flourished under it,” a presumption “far better than any sudden and temporary arrangement by actual election.”<sup>186</sup>

Burke’s defense of tradition over abstract theory or immediate popular preference certainly offers a counterargument to anyone who would interpret the Constitution through the lens of pure moral theory or opinion polls. If enlightenment thinkers tended to overestimate the utility of pure reason and grand theoretical models as mechanisms for solving political and legal problems, then grounding decision-making in the accumulated experience of previous generations could compensate for the deficiencies of abstraction and in the rationality of individual decision-makers. Additionally, as Burke, Young, and others have argued, the notion that one could formulate a theory of justice independent of tradition is chimerical. Burke stated this position in stark terms, asserting that “[w]e know that we have made no discoveries, and we think that no discoveries are to be made, in morality . . . nor in the ideas of liberty, which were understood long before we were born.”<sup>187</sup> Likewise, Barry Friedman and Scott Smith have responded to theories of constitutional interpretation based on ostensibly timeless values by noting that any such values are “shaped inevitably against our history, and are path dependent upon it.”<sup>188</sup> Cass Sunstein has similarly opined that “[d]evelopment of a theory of justice that interprets the constitutional text but that is independent of the status quo is extremely difficult . . . even theories of distributive justice need to accept some grounds from which to proceed.”<sup>189</sup> Young himself noted that moral and philosophical discourse, even when it occurs at a high level of generality, “take[s] place within a tradition of commonly understood meanings attached to those terms; few participants in the mainstream of our political or philosophical discourse have felt the need (or displayed the ability) to come up with wholly ‘new’ principles of justice.”<sup>190</sup> Using John Rawls by way of example, Young observed that Rawls described “justice as fairness” as drawing on “‘the traditional conception of the social contract,’” while carrying that conventional con-

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185 *Id.* at 649.

186 EDMUND BURKE, *Speech on the Reform of the Representation in the House of Commons*, in 2 THE WORKS OF THE RIGHT HON. EDMUND BURKE 486 (Henry G. Bond ed., 1841).

187 BURKE, *supra* note 182.

188 Friedman & Smith, *supra* note 11, at 54.

189 Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 908 (1987).

190 Young, *supra* note 11, at 710.

ception to a “‘higher level of abstraction.’”<sup>191</sup> Thus, the common argument among these incrementalist thinkers has been that pure moral abstraction is not merely undesirable, but also impossible.

Young, however, intended his explication of Burkean philosophy primarily as a response not to ahistorical living constitutionalism, but to the resurgent originalist thought of jurists such as Antonin Scalia and Robert Bork.<sup>192</sup> Other incrementalists have similarly written largely in reaction to originalism.<sup>193</sup> In fact, Burke’s historicism stands in marked contrast to originalism, which limits its “historical inquiry to particular ‘constitutional moments in the discontinuous historical past.’”<sup>194</sup> Instead, Burkean conservatism draws on all of a nation’s history, allowing for the “evolution of legal principles over a continuous period from the Founding to the present.”<sup>195</sup> For Burke and numerous modern incrementalist scholars, the common law model has served as a paradigm for gradual, evolutionary reform.<sup>196</sup> Under such a framework, precedent serves as a primary guide for solving new problems. Nonetheless, while the tradition embodied in precedent provides a significant constraining force on decision-makers, common law rules have the potential to change in response to the imperatives of society’s accumulated experience over time.<sup>197</sup>

This contrast between a Burkean approach that draws on history but that allows for gradual reform, and rigid forms of originalism, which would freeze eighteenth-century rules “in amber,”<sup>198</sup> and which would revert to those rules despite generations of reliance on evolutionary decision-making, ultimately led Young and other traditionalists to decry what they have seen as originalism’s usurpation of the mantle of conservatism.<sup>199</sup> As I have noted above, an originalist’s willingness to discard the longstanding practice of incremental reform, rooted in evolving traditions, for a revolutionary reversion to some platonic conception of the norms associated with a founding moment in the distant past, would be antithetical to Burke’s philosophy and inconsistent with conservatism’s

<sup>191</sup> *Id.* at 710 n.468 (quoting JOHN RAWLS, *A THEORY OF JUSTICE* 3 (1971)).

<sup>192</sup> *See generally* Young, *supra* note 11.

<sup>193</sup> *See, e.g.*, Friedman & Smith, *supra* note 11; Merrill, *supra* note 11; Sklansky, *The Fourth Amendment and Common Law*, *supra* note 12; Strauss, *supra* note 85.

<sup>194</sup> Young, *supra* note 11, at 640 (quoting Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 *HARV. L. REV.* 22, 114 (1992)).

<sup>195</sup> Young, *supra* note 11, at 640.

<sup>196</sup> *See id.* at 649–50, 689; Sklansky, *The Fourth Amendment and Common Law*, *supra* note 12; Strauss, *supra* note 85; Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 *N.Y.U. L. REV.* 570, 572–73 (2001).

<sup>197</sup> *See, e.g.*, Fallon, *supra* note 196, at 572–73; Sklansky, *The Fourth Amendment and Common Law*, *supra* note 12, at 1785–86; Strauss, *supra* note 85; Young, *supra* note 11, at 689.

<sup>198</sup> Amar, *supra* note 31, at 818 n.230.

<sup>199</sup> Young, *supra* note 11, at 674.

central aim—the conservation of existing practices and institutions.<sup>200</sup> Moreover, given the practical impossibility of identifying prevailing eighteenth-century common law rules or the intentions of the framing generation in many circumstances, Young speculated that Burke himself would likely have viewed twentieth and twenty-first century originalism, which aspires to provide clear answers to contemporary problems with reference to the late 1700s, as merely another form of optimistic rationalism, to be viewed with the same skepticism as enlightenment philosophy more broadly.<sup>201</sup> Other incrementalists have made similar arguments.<sup>202</sup>

Given that incrementalist scholars have often invoked the common law process as emblematic of the Burkean models they promote, one might suppose that such authors would give Supreme Court precedent, in and of itself, paramount status as a guide to constitutional interpretation. Some of these traditionalists, however, have made clear that, although the common law system of *stare decisis* is exemplary of the kind of incremental constitutionalism they describe, the Court's precedent is a legitimate source of authority only because justices are expected to draw on societal traditions extrinsic to the Court's own pronouncements in formulating constitutional directives. Thus, for example, Friedman and Smith asserted that judges must rely on national tradition in interpreting the Constitution and that “[t]he evidence of historical commitments is not the creation of judges, but rather the product of all human existence.”<sup>203</sup> Likewise, despite Young's description of Burkean incrementalism as a “common-law model,”<sup>204</sup> and despite his statement that judicial precedent is the “primary tool of constitutional interpretation” under that model,<sup>205</sup> Young also insisted that “reflection on the values of society at large is essential if the inquiry is to constrain judges, for the common-law model insists that judges apply *society's* values and not their own.”<sup>206</sup>

In ascertaining society's deeper commitments, the Supreme Court has evaluated statutory law, the results of elections and referenda, the findings of expert commissions, evolving social practices,<sup>207</sup> and common law norms.<sup>208</sup> Additionally, proponents of incrementalism accept that evidence of original understandings will often be a useful interpre-

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<sup>200</sup> See Strauss, *supra* note 87, at 975; Young, *supra* note 11, at 623, 673–74.

<sup>201</sup> *Id.* at 669–70.

<sup>202</sup> See, e.g., Merrill, *supra* note 11, at 519–21.

<sup>203</sup> Friedman & Smith, *supra* note 11, at 88.

<sup>204</sup> Young, *supra* note 11, at 689.

<sup>205</sup> *Id.* at 691.

<sup>206</sup> *Id.* at 696.

<sup>207</sup> Friedman & Smith, *supra* note 11, at 88–89.

<sup>208</sup> *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 269 (1990) (discussing common law doctrine on informed consent in considering whether individuals have a constitutional right to require a hospital to “withdraw life-sustaining treatment”) (citation omitted).

tive device, at least as a starting point in constitutional analysis.<sup>209</sup> Instead of giving those understandings dispositive weight, however, incrementalist scholars find framing-era understandings useful primarily as a means of identifying and tracing the roots of deeply held present commitments.<sup>210</sup>

Yet, for these authors, at least to the extent that judges are able effectively to identify and implement societal norms rooted in national traditions, as opposed to merely channeling society's fleeting whims or applying their own unfettered preferences, precedent is a critical mechanism for translating society's deeply held values into binding constitutional directives. This, moreover, is as it should be. Given Justice Gorsuch's interpretation of *Katz* as requiring either reference to a snapshot of immediate popular preferences or unconstrained policy analysis, his skepticism about whether judges, rather than legislatures, should be conducting the analysis is plausible.<sup>211</sup> If, however, one can reasonably interpret *Katz*'s invocation of the expectations of privacy that "society is prepared to recognize as reasonable" as a reference to firmly entrenched, historically rooted present commitments, then courts may indeed be well suited to engage in the inquiry. That is, "[t]he telling of history is an evidentiary exercise. It requires judges to sift through competing evidence offered by litigants in support of their views as to what that history reveals about fundamental commitments."<sup>212</sup> This is an essential function of a judge. Likewise, to the extent that traditionalism involves processes associated with common law methodology, including "analogy, precedent, and incrementalism," it may represent a "distinctly legal form of reasoning" in which "it makes sense for courts to have a prominent role."<sup>213</sup>

For some incrementalist scholars, Burkean constitutionalism does, in fact, entail the elevation of Supreme Court precedent to a preferred position, even when precedent fails to identify and apply traditional societal commitments in the first instance. Professor Richard Fallon has adopted this perspective, based on the notion that stability is often more

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<sup>209</sup> See, e.g., Fallon, *supra* note 102, at 1797 (noting that virtually all observers agree that framing-era understandings "provisionally fix[ ] constitutional meaning," and stating that disagreement arises over "questions of whether and when a 'fixed' meaning might become unfixed as a result of stare decisis, historical gloss, traditional practice, or changed historical circumstances."); Friedman & Smith, *supra* note 11, at 61; Young, *supra* note 11, at 691.

<sup>210</sup> See, e.g., Friedman & Smith, *supra* note 11, at 61; Young, *supra* note 11, at 691 n.358 ("The question is not simply what the framers thought, but what has become of their ideas in the time between their age and ours.") (quoting Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1070 (1981)).

<sup>211</sup> *Carpenter v. United States*, 138 S. Ct. 2206, 2265 (2018) (Gorsuch, J., dissenting).

<sup>212</sup> Friedman & Smith, *supra* note 11, at 88 (citing Merrill, *supra* note 11, at 518).

<sup>213</sup> Young, *supra* note 11, at 680–81.

important than reaching optimal substantive results.<sup>214</sup> Professor David Strauss has been viewed as a leading proponent of this view,<sup>215</sup> and he has frequently expressed support for it.<sup>216</sup> Overall, although Strauss has made clear that the traditions external to Court precedent are also a legitimate foundation for constitutional change,<sup>217</sup> he has certainly made Court precedent the centerpiece of his Burkean theory. Thus, in describing the overturning of precedent under his vision of “common law constitutionalism,” Strauss analogized the Court’s evolution from *Plessy v. Ferguson*’s validation of official segregation to *Brown v. Board of Education*’s ultimate declaration of the unconstitutionality of “separate but equal” policies to then Judge Cardozo’s elimination of the privity requirement for negligence claims in *MacPherson v. Buick Motor Co.*<sup>218</sup> In each case, Strauss emphasized the way court precedents gradually undermined the original rules before *Brown* and *MacPherson* drove the final

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<sup>214</sup> See Fallon, *supra* note 196, at 585 (“My view, I should emphasize, does not rest on the premise that past Supreme Courts almost always have reached optimal decisions . . . My argument, instead, is that a good legal system requires reasonable stability; that while decisions that are severely misguided or dysfunctional surely should be overruled, continuity is presumptively desirable with respect to the rest”); see also Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 636–37 (2006) (describing Fallon as adopting a “sophisticated variant” of a Burkean approach that would prioritize Supreme Court precedent as the only valid source of constitutional law, even when precedent contradicts underlying national traditions).

<sup>215</sup> Calabresi, *supra* note 214, at 636–37 (describing Strauss as “most ably” setting forth the theory that Court precedent is the only valid source of constitutional law, even when the Court’s decisions fly in the face of tradition); Alexander Tsesis, *Maxim Constitutionalism: Liberal Equality for the Common Good*, 91 TEX. L. REV. 1609, 1666 (2013). Professor Tsesis, in the above-the-line text, asserts that Strauss argues that Supreme Court cases should be the “all-but-exclusive” source of constitutional change. *Id.* However, Professor Tsesis includes the full quote from Strauss’s work in a note that adds some nuance to the assertion. In that quote, Strauss states that “the evolution of precedents and traditions” are the “all-but-exclusive” mechanism for constitutional change. *Id.* at 1666 n.312 (citing DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 116 (2010)). Elsewhere, Professor Strauss makes clear that such traditions include norms extrinsic to Supreme Court precedent. He states that the traditions that form our living constitution are embodied not only in Court precedent, but also “importantly, in the traditions and understandings that have developed outside the courts.” *Id.* at 35.

<sup>216</sup> See, e.g., Strauss, *supra* note 85, at 913 (“There are familiar conventionalist arguments for adhering to precedent: the precedent may be wrong, but it is established, and it is not worth the cost and risk of reopening the issue. As I said, conventionalism of this form is prominent in the common law tradition. The adherence to precedent in constitutional law rests on conventionalist grounds as well as traditionalist grounds: the demands of stare decisis exceed the Burkean justification. That is, often it will be an exaggeration to say that a prior decision represents the kind of time-tested judgment that should be honored out of humility and a sense of one’s own limitations. Rather, the practice of following precedent is a focal point. Everyone can agree, relatively easily, that precedent should generally be followed, and potentially disruptive disagreements on the underlying substantive issues can then be bracketed.”).

<sup>217</sup> See *supra* note 215.

<sup>218</sup> See STRAUSS, *supra* note 215, at 77–92.

nails into the coffins of the old regimes.<sup>219</sup> In neither case did Strauss refer to evolving traditions extrinsic to court precedent.<sup>220</sup>

Additionally, in recent years Strauss has suggested that the mere fact that the Court itself has reaffirmed a potentially wrongly decided case is powerful evidence that the Court should continue to adhere to the ruling.<sup>221</sup> It is true that Professor Strauss's recent work has suggested that determining when the Court should overrule precedent is a "complex matter,"<sup>222</sup> and that there is no "algorithm for deciding when such a departure is warranted."<sup>223</sup> Nonetheless, he has consistently emphasized a presumption in favor of tradition, and, in particular, the Court's own traditions as embodied in precedent.<sup>224</sup> This, combined with Strauss's defense of *stare decisis* as a means of ensuring certainty, even when the precedent is wrong,<sup>225</sup> has led observers such as Professor Steven Calabresi to note that Strauss would sanctify precedent even when it flies in the face of tradition.<sup>226</sup> Finally, Strauss has extolled his common-law model in part because it "explicitly envisions that judges will be influenced by their own views about fairness and social policy," in areas "left open by precedent, or in the circumstances in which it is appropriate to overrule a precedent."<sup>227</sup> Once a majority of the Court has translated its moral and policy intuitions into precedent, those views, for Strauss, are presumably also entitled to a presumption of validity merely because of their status as precedent. This, for Strauss, compares favorably with originalism, which he believes tends to cloak personal preferences under the mantle of neutral historical analysis.<sup>228</sup>

As I will explain in greater detail below, my own vision of a Burkean approach to *Katz* would require the Court, in the first instance, to draw on national traditions rather than merely to enshrine in precedent the idiosyncratic judgments of the justices. As a general proposition, that is, Supreme Court precedent is not a legitimate independent source of the kinds of tradition that serve as the foundation of incrementalist constitutionalism. Rather, precedent should reflect traditions extrinsic to the Court's own pronouncements.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 96 ("When a precedent has been repeatedly reexamined and reaffirmed, over many years by a Court whose composition has changed, that should give us greater confidence that the precedent is correct.")

<sup>222</sup> *Id.* at 79.

<sup>223</sup> Strauss, *supra* note 85, at 895.

<sup>224</sup> *See generally id.*

<sup>225</sup> *Id.* at 913.

<sup>226</sup> Calabresi, *supra* note 214, at 636–37.

<sup>227</sup> STRAUSS, *supra* note 215, at 45.

<sup>228</sup> *Id.*

None of this is to suggest that identifying and applying national traditions is a straightforward or mechanical process. As incrementalist scholars have acknowledged, although Burkean constitutionalism constrains judges by requiring that they draw on a wellspring of tradition, the process is fraught with difficult questions and some degree of indeterminacy.<sup>229</sup> The outcome of a case might depend on whether one describes a tradition precisely or, alternatively, at a high level of generality.<sup>230</sup> In a pluralistic society, multiple traditions might contradict each other.<sup>231</sup> Additionally, decision-makers might encounter difficulty differentiating between ephemeral present preferences and deeper commitments, rooted in tradition.<sup>232</sup> In order to mitigate this indeterminacy, one might insist on defining traditions at the most specific level at which they can be identified.<sup>233</sup> Alternatively, one might require judges to define traditions at the level of generality dictated by prior precedent.<sup>234</sup> One might also observe that mediating the tension between fleeting desires and deeper commitments is something each of us does on a regular basis.<sup>235</sup>

Some incrementalists have referred to the Court's substantive due process jurisprudence as exemplary of the sort of traditionalism they describe and defend.<sup>236</sup> Indeed, history and tradition are the foundation of what was, for years, the Court's conventional approach to substantive due process cases. In ascertaining whether a claimed right was fundamental, thus triggering strict scrutiny of any law that infringed the right, the Court would look to whether the interest, as carefully described, was "deeply rooted in this Nation's history and tradition."<sup>237</sup> Yet the Court has not, in this realm, confined itself to originalist history in examining contested rights. Rather, it has evaluated all of the nation's history, drawing on statutes, executive action, common law norms, and the practices of the citizenry.<sup>238</sup>

Critically, conservative justices on the Court have seen this paradigm as providing a significant constraint on judges who might otherwise

<sup>229</sup> See, e.g., Friedman & Smith, *supra* note 11, at 77; Merrill, *supra* note 11, at 513–14; Young, *supra* note 11, at 698–706.

<sup>230</sup> See Young, *supra* note 11, at 698.

<sup>231</sup> See, e.g., Friedman & Smith, *supra* note 11, at 80; Merrill, *supra* note 11, at 514.

<sup>232</sup> Friedman & Smith, *supra* note 11, at 78.

<sup>233</sup> Young, *supra* note 11, at 698 (citing *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (plurality opinion)).

<sup>234</sup> *Id.* at 700 (citing *Michael H.*, 491 U.S. at 142 (Brennan, J., dissenting)).

<sup>235</sup> Friedman & Smith, *supra* note 11, at 78–79.

<sup>236</sup> See, e.g., *id.* at 57–58 ("The Supreme Court's understanding of substantive due process provides a rough formula for all of constitutional interpretation."); Young, *supra* note 11, at 694, 717.

<sup>237</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)).

<sup>238</sup> *Glucksberg*, 521 U.S. at 708–36.

be tempted to apply their own preferences in solving constitutional problems. Thus, for example, Chief Justice John Roberts lamented the Court's abandonment of this relatively disciplined framework when the majority found a due process right to same-sex marriage in 2015.<sup>239</sup> Echoing Burke, Roberts asserted that an "approach grounded in history imposes limits on the judiciary that are more meaningful than any based on [an] abstract formula."<sup>240</sup> Likewise, when the Court found a right to same-sex intimacy in 2003, deemphasizing the role of history,<sup>241</sup> Justice Scalia complained that the Court had made no attempt to contradict its earlier ruling that a right to "homosexual sodomy" was not deeply rooted in the nation's history and traditions.<sup>242</sup> In other words, both Scalia and Roberts saw the Court's traditional approach to substantive due process as providing a serious constraint on judicial discretion that the majority had discarded to follow its unfettered moral intuitions.

Overall, however, incrementalists accept that one cannot reduce Burkean constitutionalism to a simple formula that will solve every constitutional problem in a straightforward, uncontroversial manner. Rather, they defend traditionalism against both normativism and originalism because they believe traditionalism is more consistent with true conservative values of economizing on human reason and preserving existing institutions.<sup>243</sup> They argue that ahistorical normative accounts based on pure moral philosophy or immediate preferences are both unrealistic and inconsistent with the very idea of constitutionalism.<sup>244</sup> And they argue that originalist attempts to discern founding-era understandings are often chimerical and, even if possible, likely to lead to results even originalists find too unpalatable to accept.<sup>245</sup> In the end, advocates of incrementalism tend to acknowledge that traditionalism, like other methods of constitutional interpretation, cannot always provide easy answers.<sup>246</sup> They insist, however, that their approach directs our attention to the "correct 'hard questions.'"<sup>247</sup>

<sup>239</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2618 (2015) (Roberts, J., dissenting).

<sup>240</sup> *Id.* (quoting *Moore*, 431 U.S. at 504 n.12).

<sup>241</sup> *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) ("[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.") (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998)).

<sup>242</sup> *Id.* at 594, 598 (Scalia, J., dissenting) (citing *Bowers v. Hardwick*, 478 U.S. 186, 191–94 (1986)).

<sup>243</sup> See, e.g., Merrill, *supra* note 11, at 515–21; Young, *supra* note 11, at 670, 673–74.

<sup>244</sup> See, e.g., Friedman & Smith, *supra* note 11, at 55, 78.

<sup>245</sup> See, e.g., *id.* at 50–51; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) ("I hasten to confess that in a crunch I may prove a faint-hearted originalist. I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging.")

<sup>246</sup> See, e.g., Friedman & Smith, *supra* note 11, at 77.

<sup>247</sup> *Id.*

### III. TRADITIONALISM AND *KATZ*

#### A. *A Privacy-Based Framework and Societal Values*

Let us return, then, to *Katz*. As I have noted, although a majority of the Court is committed to *Katz*'s framework, even those who support it tend to accept that the test is flawed. Yet most of the justices' criticisms of *Katz*—criticisms based on indeterminacy, circularity, and the relative institutional capacities of courts and legislatures—depend on a firmly ahistorical conception of the Court's opinions in the case. It is, however, possible to view *Katz*'s privacy-based framework as consistent with the sort of Burkean incrementalism I have just described. As I will explain in Part III.B, one can also reconcile the specific holding of the case with traditionalist constitutionalism.

It is certainly plausible to assert, as did Justice Black in his *Katz* dissent, that the framers of the Fourth Amendment did not envision the Amendment as instantiating a concept as nebulous as privacy and that, instead, they expected the Amendment to protect, then and forevermore, only against tangible intrusions.<sup>248</sup> Nonetheless, by the late 1960s, the right to privacy had become ingrained in American practices and law. This was a consequence not only of the Court's interpretations of the First,<sup>249</sup> Third,<sup>250</sup> Fourth,<sup>251</sup> and Fifth Amendments,<sup>252</sup> or of its creative construction of a broader substantive due process right from "penumbras" emanating from those Amendments.<sup>253</sup> Rather, the concept had roots in common law decisions, initially tied to the protection of property, but reconceptualized in 1890 by Samuel Warren and Louis Brandeis as a more general "right to be let alone."<sup>254</sup> Courts gradually recognized a privacy tort as such in the years after publication of the Warren and Brandeis article.<sup>255</sup> While an *American Law Reports* entry of 1942 would

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<sup>248</sup> *Katz v. United States*, 389 U.S. 347, 364–68 (1967) (Black, J., dissenting). This is not, however, the only plausible conclusion. In perhaps the most rigorous historical analysis of the development of the Fourth Amendment to date, William Cuddihy asserted that "[p]rivacy was the bedrock concern of the amendment, not general warrants . . . The underlying theme of . . . opinion in the 1780's was that general warrants were wrong not just because they permitted general searches but because searches threatened privacy." CUDDIHY, *supra* note 132, at 766–67.

<sup>249</sup> See, e.g., *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (declaring the "vital relationship between freedom to associate and privacy in one's associations.").

<sup>250</sup> *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

<sup>251</sup> *Boyd v. United States*, 116 U.S. 616, 630 (1886) (describing the Fourth and Fifth Amendments as protecting the "sanctity of a man's home and the privacies of life."); *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (stating that the Fourth Amendment protects a "right to privacy, no less important than any other right carefully and particularly reserved to the people.").

<sup>252</sup> *Boyd*, 116 U.S. at 630.

<sup>253</sup> *Griswold*, 381 U.S. at 484–85.

<sup>254</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

<sup>255</sup> See, e.g., *Pavesich v. New England Mut. Life Ins. Co.*, 50 S.E. 68 (Ga. 1905).

describe the doctrine as “still very much in its infancy,” noting definitive recognition by only ten American jurisdictions,<sup>256</sup> the summary also observed that other jurisdictions had shown receptiveness to the idea and that a majority of courts that had taken a position on the matter had “affirmed the existence of the right of privacy, as such.”<sup>257</sup> By the time of the promulgation of the Restatement (Second) of Torts, most states, including the “great majority” of those that had considered the question,<sup>258</sup> recognized some form of privacy tort, and only three states continued to reject the idea.<sup>259</sup> Nearly all of those courts ultimately developed a framework dividing privacy claims into those involving intrusion on seclusion, public disclosure of private facts, misappropriation of a name or likeness, and portraying a person in a false light, in response both to the publication of William Prosser’s influential article on the topic in 1960, and to the Restatement (Second), for which Prosser served as the reporter until 1970.<sup>260</sup> In short, while a generalized right to privacy might have been alien to the framers of the Fourth Amendment, by the time of *Katz* the concept had become entrenched in the American consciousness through extensive scholarly commentary,<sup>261</sup> social practices, and legal developments over the course of more than three quarters of a century. Additionally, even if that consensus had not persisted for long enough by 1967 to qualify as a longstanding tradition, today it certainly has the time-tested pedigree to justify its continuing vitality.

Like the overarching privacy rubric, it is possible to view *Katz*’s directive to examine expectations that “society is prepared to recognize as reasonable” as a reference to society’s deeper, historically rooted commitments rather than as a requirement that courts constitutionalize any passing majoritarian whim. In fact, as I have argued, to interpret *Katz* as pegging Fourth Amendment protection only to contemporary preferences is contrary to the essential function of constitutional decision-making. Nonetheless, contemporary attitudes often reflect more enduring traditions, and the task of courts under this model is to identify present commitments firmly anchored in history and tradition.<sup>262</sup>

In practice, the Court has often applied *Katz* in a manner consistent with this model. Thus, for example, Professor Orin Kerr has argued that notwithstanding *Katz*’s seemingly “mystical” invocation of “‘reasonable

<sup>256</sup> R.T. Kimbrough, *Right of Privacy*, 138 A.L.R. 22 (1942).

<sup>257</sup> *Id.*

<sup>258</sup> RESTATEMENT (SECOND) OF TORTS § 652A cmt. a (AM. LAW. INST. 1977) (listing 36 states that had definitively recognized a right against tortious interference with privacy).

<sup>259</sup> *Id.* at app. (reporter’s note).

<sup>260</sup> J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:24 (2d ed. 2015).

<sup>261</sup> See RESTATEMENT (SECOND) OF TORTS § 652A, app. (reporter’s note) (AM. LAW. INST. 1977) (listing scholarly articles).

<sup>262</sup> See Friedman & Smith, *supra* note 11, at 74–75.

expectation[s] of privacy,'” in actuality, as applied by the Court, “in most (though not all) cases, an expectation of privacy becomes ‘reasonable’ only when it is backed by a right to exclude borrowed from . . . property law.”<sup>263</sup> Indeed, society’s traditional commitments are often reflected in positive property law, be it statutory law or common law principles. To the extent that the Court has applied *Katz* in a manner that tracks property interests, it has, to some extent, tethered Fourth Amendment protection to historically rooted societal conventions. Thus, Fourth Amendment protection of homes,<sup>264</sup> closed containers,<sup>265</sup> and automobiles<sup>266</sup> when police infringe a suspect’s property-based right to exclude others reflects longstanding societal conventions conferring advantages on those with property interests.

In the decades since *Katz*, several members of the Court have recognized the connection between property rights and reasonable expectations of privacy. Perhaps most famously, the *Rakas* majority asserted the fundamental relationship between privacy and property:

Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude.<sup>267</sup>

Since then, other opinions have also acknowledged the interdependence of property rights and privacy interests.<sup>268</sup> Most recently, Justice

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<sup>263</sup> Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 809–10 (2004).

<sup>264</sup> This is not to suggest that a formal right to exclude has always been necessary under *Katz* and related precedent. For example, the Court has held that an overnight guest has a reasonable expectation of privacy in a home based on “longstanding social custom” despite not having formal authority to admit or exclude others from the home. *Minnesota v. Olson*, 495 U.S. 91, 98–100 (1990).

<sup>265</sup> See *Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980) (holding that petitioner had no reasonable expectation of privacy against a search of an acquaintance’s purse, in part because he had no right to exclude others from accessing the purse).

<sup>266</sup> See *Rakas v. Illinois*, 439 U.S. 128, 148–49 (1978) (contrasting petitioners in acquaintance’s automobile with defendant in another case who had authority to exclude others from an apartment and observing that petitioners asserted no property or possessory interest in the automobile searched).

<sup>267</sup> *Id.* at 143 n.12.

<sup>268</sup> See, e.g., *Florida v. Jardines*, 569 U.S. 1, 13 (2013) (Kagan, J., concurring) (“The Court today treats this case under a property rubric; I write separately to note that I could just as happily have decided it by looking to Jardines’ privacy interests . . . It is not surprising that in a case involving a search of a home, property concepts and privacy concepts should so

Kennedy, in his *Carpenter* dissent, discussed the important connection between the two concepts.<sup>269</sup> Yet to the extent that the Court has failed explicitly and self-consciously to frame its decisions in such cases in terms of property interests, it has contributed to the perhaps unwarranted belief that the privacy inquiry has been unprincipled and unpredictable. Even when the Court does invoke property law to elucidate privacy interests, to the extent that it has failed to characterize its decisions in terms of historically rooted national norms, it has contributed to the possibly unjustified assessment that it has applied *Katz* in a manner antithetical to the essence of constitutional decision-making. Like opinion polls, one might view constitutionalization of contemporary majoritarian preferences embodied in property law as running “against the constitutional grain.”<sup>270</sup> To the extent, however, that one can reasonably characterize property concepts as embodying not merely immediate popular preferences but enduring tradition, reliance on such law is consistent with the incrementalist constitutional philosophy I have described in this Article.

Yet a Burkean approach to *Katz* need not limit the inquiry into the expectations of privacy society has traditionally viewed as legitimate only to property law. Other sources of positive law also reflect national traditions on which the Court can profitably draw for insight about the expectations of privacy that society deems reasonable. Professors Will Baude and James Stern recently proposed pegging the threshold question of whether government conduct constitutes a Fourth Amendment search to positive law more broadly.<sup>271</sup> Specifically, for Baude and Stern, government conduct that any source of positive law would prohibit private parties from engaging in would constitute a search.<sup>272</sup> For Baude and Stern, this would include not only property law, but also “privacy torts, consumer laws, eavesdropping and wiretapping legislation, anti-stalking statutes, and other provisions of law generally applicable to private actors.”<sup>273</sup>

In several ways, however, Baude and Stern’s model is inconsistent with the incrementalist approach I suggest here. For one thing, Baude and Stern’s model would replace *Katz* rather than serving as a refinement

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align. The law of property ‘naturally enough influence[s]’ our ‘shared social expectations’ of what places should be free from governmental incursions.” (citation omitted); *Oliver v. United States*, 466 U.S. 170, 189–90 (1984) (Marshall, J., dissenting) (“because ‘property rights reflect society’s explicit recognition of a person’s authority to act as he wishes in certain areas, [they] should be considered in determining whether an individual’s expectations of privacy are reasonable.’”) (citation omitted).

<sup>269</sup> *Carpenter v. United States*, 138 S. Ct. 2206, 2227–28 (2018) (Kennedy, J., dissenting).

<sup>270</sup> Slobogin, *supra* note 179, at 1602.

<sup>271</sup> William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1823 (2016).

<sup>272</sup> *Id.* at 1821.

<sup>273</sup> *Id.*

of the test.<sup>274</sup> Moreover, Baude and Stern's approach would exclude consideration of laws that proscribe only government conduct, but do not restrict the activity of private actors.<sup>275</sup> Such laws also often reflect national traditions. Critically, though, Baude and Stern do not condition their approach on positive law enshrining national tradition at all. Although law as a cultural artifact often reflects entrenched national traditions,<sup>276</sup> that is not always the case. First, Baude and Stern would constitutionalize a single state's idiosyncratic approach, without requiring that the state's law reflect national mores.<sup>277</sup> Second, because any new law passed in a single state would immediately define the parameters of Fourth Amendment protection in that state, Baude and Stern's framework would fail to ensure that Fourth Amendment protection reflects longstanding commitments even at the state level; rather, it might well represent only the fleeting popular preferences that traditionalists and Justice Gorsuch, by implication, have justifiably suggested are improper interpretive sources in constitutional decision-making.<sup>278</sup>

For this reason, I would rely on positive law as a guide to *Katz* only when a constellation of laws can serve as evidence of historically rooted national consensus. In a recent essay, I made a similar case regarding the use of investigative legislation in applying *Katz*, though without explicitly invoking Burkean traditionalism as a basis for the argument.<sup>279</sup> Yet because it takes time for legislatures and courts to translate popular preferences into law, by the time such consensus has emerged, it is likely to reflect not evanescent whim but more firmly established national tradition.

Although positive law may serve as a primary guide to traditional norms and core societal values,<sup>280</sup> it is by no means the only reference point available to courts. Longstanding social practices, even if not re-

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<sup>274</sup> *Id.* at 1829–31.

<sup>275</sup> For example, the Right to Financial Privacy Act restricts only federal government access to financial information. See 12 U.S.C. §§ 3401–3422 (2000).

<sup>276</sup> See, e.g., Friedman & Smith, *supra* note 11, at 75–76 (citing *Washington v. Glucksberg*, 521 U.S. 702 (1997)); Young, *supra* note 11, at 695 (“Legislation or the absence thereof may be evidence of conventional morality, but it cannot be dispositive in every case.”).

<sup>277</sup> In response to potential objections based on the difficulty of administering their model, however, Baude and Stern argue that the degree of non-uniformity in state law is “easy to overstate,” given “considerable consistency across the states” in important fields such as property law. Baude & Stern, *supra* note 271, at 1862.

<sup>278</sup> See *supra* notes 174–179 and accompanying text.

<sup>279</sup> Nicholas A. Kahn-Fogel, *The Benefits of Using Investigative Legislation to Interpret the Fourth Amendment: A Response to Orin Kerr*, 9 ALA. C.R. & C.L. L. REV. 379 (2018).

<sup>280</sup> EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 24 (Higher and Further Education Division trans., The Free Press) (1997) (“[S]ocial solidarity is a wholly moral phenomenon which by itself is not amenable to exact observation and especially not to measurement. To arrive at this classification, as well as this comparison, we must therefore substitute for this internal datum, which escapes us, an external one which symbolises it, and then study the former through the latter. That visible symbol is the law.”); cf. *Glucksberg*, 521 U.S. at 711

flected in formal law, can demonstrate society's fundamental commitments. Indeed, it has long been recognized that such informal norms can play a more significant role in social life than positive law.<sup>281</sup> In ascertaining society's traditional perspective on the kinds of privacy expectations that are reasonable, courts thus might also rely on observed practices over time, some of which may be encoded in the durable structures of the built environment.<sup>282</sup>

In order to reduce indeterminacy and to increase the odds that judges implementing a Burkean approach to *Katz* will apply society's values rather than their own, I would require a "careful description" of the asserted tradition providing the foundation for characterizing government conduct as a search.<sup>283</sup> Although defining relevant traditions at a high level of specificity can help to constrain judicial discretion, doing so can also entrench oppressive norms by preventing reliance on more abstract values as a source of "progressive pressure."<sup>284</sup> Nonetheless, several factors suggest the possibility of evolutionary reform.

First, the laws and practices that serve as repositories of tradition are not static; cultural norms can and do change over time. This is a fundamental feature of Burkean incrementalism. Second, it would be proper to qualify this approach by drawing on equal protection principles. Thus, if there were an entrenched tradition of allowing privacy intrusions on people from a disfavored race or religion, it would not do for the government to assert that the most specific identifiable tradition safeguards only the interests of members of the favored race or religion. Finally, I would qualify the rule by drawing on any tradition proscribing the kind of conduct at issue, whether the traditional proscription applies only to private conduct or also restricts investigative activity by the government. This would give effect to the widely recognized liberal constitutional value of curbing abuse of government power by "subjecting government officials to the laws they enact," which Professors Baude and Stern noted as a salutary feature of their positive law model.<sup>285</sup> As I will illustrate through examples below, such an approach would be likely to result in a more expansive set of practices that would be characterized as Fourth Amendment searches. Given that the Court has sustained (albeit incon-

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("[T]he primary and most reliable indication of [a national] consensus is . . . the pattern of enacted laws'") (citation omitted).

<sup>281</sup> See WILLIAM GRAHAM SUMNER, *FOLKWAYS: A STUDY OF THE SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS, MORES, AND MORALS* 75–81 (1906).

<sup>282</sup> See, e.g., Simon, *supra* note 50.

<sup>283</sup> *Glucksberg*, 521 U.S. at 721.

<sup>284</sup> LAURENCE H. TRIBE & MICHAEL C. DORF, *ON READING THE CONSTITUTION* 109 (1991).

<sup>285</sup> Baude & Stern, *supra* note 271, at 1846 (citing JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 326–28 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690)).

sistently) its rhetorical commitment to the notion that almost all Fourth Amendment searches require warrants only by defining a large array of investigative conduct as not a “search” at all, this more generous approach to delineating the Fourth Amendment’s scope might reasonably prompt the Court to move further toward an explicit recognition that many searches are reasonable without judicial preauthorization.

Following this traditionalist model in determining what constitutes a Fourth Amendment search under *Katz* would make serious progress toward addressing the major criticisms commentators have leveled at *Katz* for the last fifty years. Crucially, it would reduce *Katz*’s putative indeterminacy and doctrinal circularity. Critics view *Katz* as indeterminate largely because they have no idea what the standard means. This was an important aspect of Justice Gorsuch’s criticism in his *Carpenter* dissent.<sup>286</sup> That perception of indeterminacy has, in turn, led to the conclusion that the test is doctrinally circular: in the absence of a clear criterion (normative or empirical) for applying *Katz*, critics tend to perceive the Court’s determinations of the expectations of privacy that “society is prepared to recognize as reasonable” as, effectively, whatever a shifting majority of the Court happens to say is reasonable on any given day.<sup>287</sup> My traditionalist rubric for applying *Katz* answers Justice Gorsuch’s question about the meaning of the standard.<sup>288</sup> It is primarily empirical, not normative. The empirical inquiry, however, is not an examination of the whims of contemporary society; it is, instead, an investigation of society’s core commitments, as reflected in tradition. Grounding *Katz* in the nation’s traditions will not make solving problems under *Katz* easy or formulaic in every case. It will, however, make significant progress by clearly defining the essential question *Katz* requires judges to answer. Finally, that definition answers Justice Gorsuch’s query about why courts, rather than legislatures, should be the ones to answer the question.<sup>289</sup>

Other authors have also defended what they have described as incrementalist, traditionalist, or Burkean models of Fourth Amendment interpretation. David Sklansky’s critique of the “new Fourth Amendment originalism” offered tradition as an alternative to reliance on eighteenth-century common law rules as determinative of Fourth Amendment outcomes.<sup>290</sup> Although Sklansky has urged the Court to consider property and tort law in deciding which expectations of privacy society is prepared to recognize as reasonable,<sup>291</sup> when he has referred to tradition as a

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<sup>286</sup> See *Carpenter v. United States*, 138 S. Ct. 2206, 2265 (2018) (Gorsuch, J., dissenting).

<sup>287</sup> See *supra* notes 53–60 and accompanying text.

<sup>288</sup> See *Carpenter*, 138 S. Ct. at 2265 (Gorsuch, J., dissenting).

<sup>289</sup> See *supra* notes 211–213 and accompanying text.

<sup>290</sup> Sklansky, *Back to the Future*, *supra* note 12, at 146.

<sup>291</sup> *Id.* at 210.

guide to Fourth Amendment decision-making, crucially, he has been concerned above all with the Supreme Court's own evolving traditions.<sup>292</sup> In that regard, when Sklansky has praised the use of common law methodology in Fourth Amendment decision-making,<sup>293</sup> he has drawn explicitly on Professor Strauss's work.<sup>294</sup>

As I have suggested, contrary to Strauss,<sup>295</sup> I would make clear that in general the Court's job is to apply society's core commitments rather than to generate new traditions from whole cloth based on the unfettered discretion of the justices.<sup>296</sup> This is consistent with the arguments of some incrementalist scholars.<sup>297</sup> It is also consistent with the notion that a primary function of constitutionalism must be "some idea of restraint—of constraint,"<sup>298</sup> not only against contemporary popular passions, but also against the idiosyncratic preferences of Supreme Court justices. Of course, precedent itself serves as a constraint on judicial discretion.<sup>299</sup> Nonetheless, a model that prioritizes precedent even when it contravenes national tradition enshrines the preferences of previous justices even if it restricts the discretion of those currently on the Court. Moreover, such a model apparently allows such freedom even to contemporary justices when they face novel questions.

There is one caveat to this. In instances in which Court precedent originally represented judicial preferences rather than national commitments but that precedent itself has influenced the broader culture, generating new traditions and deeply held values, the model I am promoting here would sustain that precedent, not because it was originally valid but because it now reflects the kind of tradition that has legitimate constitutional significance. Strauss himself discussed this possibility in an early article describing what he saw as Justice Scalia's general respect for tradition but relatively low regard for precedent.<sup>300</sup> Strauss argued that Scalia's ostensibly paradoxical perspective was actually consistent with a form of Burkean conservatism.<sup>301</sup> Ultimately, Strauss rejected this brand of traditionalist jurisprudence.<sup>302</sup> In portraying Scalia's traditionalism at

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<sup>292</sup> *Id.* at 187–89; Sklansky, *The Fourth Amendment and Common Law*, *supra* note 12, at 1808–11.

<sup>293</sup> Sklansky, *The Fourth Amendment and Common Law*, *supra* note 12, at 1745.

<sup>294</sup> *Id.* at 1810–11.

<sup>295</sup> See Strauss, *supra* note 85; Calabresi, *supra* note 214, at 636–37 (describing Strauss as a leading proponent of the supremacy of Supreme Court precedent even when that precedent flies in the face of tradition).

<sup>296</sup> See *supra* notes 203–228 and accompanying text.

<sup>297</sup> See *supra* notes 203–213 and accompanying text.

<sup>298</sup> Friedman & Smith, *supra* note 11, at 78.

<sup>299</sup> See, e.g., Strauss, *supra* note 87, at 973.

<sup>300</sup> David A. Strauss, *Tradition, Precedent, and Justice Scalia*, 12 *CARDOZO L. REV.* 1699, 1706 (1991).

<sup>301</sup> *Id.* at 1700.

<sup>302</sup> *Id.* at 1708–16.

the time, however, Strauss observed that Scalia's form of Burkean jurisprudence would generally require judges to draw on traditions extrinsic to the Court's own precedent.<sup>303</sup> As Strauss stated, "[p]recedent overlaps tradition; it is not subsumed by it. Some precedents may be said to be part of a tradition. But not all are. Some are simply the decisions of a group of judges rendered a few years ago."<sup>304</sup> Burkean conservatism would usually call for such precedent to be discarded.<sup>305</sup> However, that would not always be the case. As Strauss asserted:

It is one thing if a judicial precedent has been followed on many occasions, has become widely accepted by society, and has created a web of institutions dependent on it. Then Burkean conservatism would call for honoring it. More precisely, it would call for honoring the consensus and network of institutions that have grown up around it.<sup>306</sup>

I would adhere to this wisdom.<sup>307</sup>

Orin Kerr has also described his equilibrium-adjustment theory of Fourth Amendment jurisprudence as Burkean.<sup>308</sup> Under Professor Kerr's theory, one can explain the Court's seemingly incoherent jumble of Fourth Amendment rules as the result of a consistent process by which the Court has intervened to restore the status quo ante (what he refers to as "Year Zero") level of protection against police intrusion in the face of changing practices and new technologies.<sup>309</sup> In response to Christopher Slobogin's charge that "equilibrium-adjustment theory is essentially originalism in disguise,"<sup>310</sup> Kerr argued that his theory was one of "maintaining the status quo balance of power, not an effort to restore eighteenth-century rules."<sup>311</sup> While this certainly demonstrates that Kerr's theory is not simply "the new Fourth Amendment originalism" in disguise, originalism, as I have discussed, includes enough variations to

<sup>303</sup> *Id.* at 1705.

<sup>304</sup> *Id.* at 1706.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> A prominent example of this approach in the criminal procedure context was Chief Justice Rehnquist's affirmation of the constitutional basis for, and legitimacy of, *Miranda v. Arizona*, 384 U.S. 436 (1966), in *Dickerson v. United States*, 530 U.S. 428 (2000). In *Dickerson*, Rehnquist, writing for the majority, expressed uncertainty about whether he would agree with *Miranda*'s reasoning were he facing the issue for the first time. *Id.* at 443. Nonetheless, the Court sustained *Miranda* in part because the decision had "become embedded in routine police practice to the point where the warnings have become part of our national culture." *Id.*

<sup>308</sup> Orin S. Kerr, *Defending Equilibrium-Adjustment*, 125 HARV. L. REV. F. 84, 86 (2012).

<sup>309</sup> Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 480 (2011).

<sup>310</sup> Christopher Slobogin, *An Original Take on Originalism*, 125 HARV. L. REV. 14, 19 (2011).

<sup>311</sup> Kerr, *supra* note 308, at 84.

encompass broad, values-based theories in addition to those that would implement fine-grained eighteenth-century common law rules.<sup>312</sup> In that regard, recall that Donald Dripps, in discussing *Kyllo*, referred to the majority opinion's invocation of the "degree of privacy against government that existed when the Fourth Amendment was adopted" as implementing a sort of "balance of advantage originalism."<sup>313</sup> It is worth noting that Kerr saw this aspect of Justice Scalia's opinion in *Kyllo* as a quintessential example of equilibrium adjustment at work.<sup>314</sup>

Yet Kerr also objected to Slobogin's characterization of his model as originalist because, according to Kerr, the founding era need not serve as the reference point for judges applying equilibrium-adjustment.<sup>315</sup> Instead, "harking back to some earlier time" under equilibrium adjustment "merely means looking back to a period before the relevant technological change occurred."<sup>316</sup> Furthermore, Kerr's reference to "Year Zero," an "imaginary time, a sort of beginning of the universe for criminal investigations,"<sup>317</sup> is not a reference to 1791, but a metaphorical construct, a "hypothetical baseline" to help illuminate "the previous generations of technological change, and the responses to them, embedded in existing doctrine."<sup>318</sup> Thus, according to Kerr, while his framework might be Burkean, it is not originalist.<sup>319</sup>

Despite Professor Kerr's protestations, his theory is that the Court has consistently adjusted specific Fourth Amendment rules to maintain the balance of power between citizens and the government. If the Court had, in fact, done so consistently throughout the nation's history, then the balance of power between citizens and government would be essentially the same as it was in 1791. Even if the Court began following an equilibrium adjustment approach only decades rather than centuries ago, equilibrium adjustment would nonetheless keep constant forever onward the balance of power that existed when the Court began implementing that paradigm. On the other hand, the incrementalist model I envision would allow for the evolution not only of specific Fourth Amendment rules, but also of the overarching balance of advantage between government and citizen. Although I would require courts to define national traditions carefully, there is no reason that gradual changes in those traditions might not also reflect changing underlying beliefs about the overall level of privacy one should reasonably expect. Consequently, even if one

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<sup>312</sup> See *supra* notes 146–151 and accompanying text.

<sup>313</sup> Dripps, *supra* note 100, at 1126–31.

<sup>314</sup> See Kerr, *supra* note 309, at 496–98.

<sup>315</sup> Kerr, *supra* note 308, at 86.

<sup>316</sup> *Id.*

<sup>317</sup> Kerr, *supra* note 309, at 483.

<sup>318</sup> Kerr, *supra* note 308, at 86.

<sup>319</sup> *Id.*

might, in some sense, describe Kerr's model as Burkean, it is different from the rubric I have advocated in this Article.

### B. *A Traditionalist Katz in Practice*

Because my traditionalist model for interpreting *Katz* overlaps with proposals other authors have offered, it is unsurprising that the model would lead to some outcomes similar to those other scholars have envisioned under their alternatives or refinements to the *Katz* framework. Nonetheless, as the following examples will demonstrate, the rationale for reaching such results often differs significantly, even if the outcomes might sometimes be the same. Finally, as these examples will show, like any constitutional methodology, the traditionalist approach to *Katz* cannot eliminate uncertainty from the process or relieve the Court from having to make difficult judgments.

#### 1. *Katz*

As I have argued above, the *Katz* Court's adoption of a privacy-based framework for defining the boundaries of Fourth Amendment protection is consistent with a traditionalist model of constitutional interpretation. The specific holding of *Katz*, that a person who enters a phone booth, "shuts the door behind him, and pays the toll" has a justified expectation that his conversation will remain private, was also in harmony with a traditionalist rubric. Although the law at the time of *Katz* may not have dictated that people accord a zone of privacy to users of public telephones, an established social convention of giving space to the booth's occupant while waiting one's turn, which could be observed and measured, demonstrated that society did find an expectation of privacy under such circumstances to be reasonable.<sup>320</sup> This convention was reflected in and reinforced by the very architecture of the phone booth. As Justice Stewart observed in his majority opinion, "the acoustic protections offered by the design of the telephone booth (even in the reduced form they often take) are integral to their social function."<sup>321</sup> Importantly, that design feature also helped to establish that the relevant norm was longstanding, for the built environment tends to be "'durable,' resisting momentary fluctuations in public passions."<sup>322</sup>

Several potential questions and objections might be raised. First, one might question how prevalent a tradition must be to have constitutional significance. As I have suggested, something like national consensus should be required.<sup>323</sup> Judges can gauge such consensus by taking

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<sup>320</sup> See Simon, *supra* note 50, at 952.

<sup>321</sup> *Id.* (citing *Katz v. United States*, 389 U.S. 347, 357 (1967)).

<sup>322</sup> Simon, *supra* note 50, at 951.

<sup>323</sup> See *supra* note 279 and accompanying text.

account of the prevalence of directives expressed through positive law or through sociological methods to measure the pervasiveness of informal social practices. In other contexts, although the Court has not precisely quantified the level of agreement necessary to establish consensus, it has nonetheless applied the concept in a reasonably principled manner.<sup>324</sup>

One might also wonder how long a practice must persist to become the kind of tradition that has constitutional significance. I would note first that the Court managed for years to apply its “deeply rooted” substantive due process framework in a manner that conservative justices have found principled without offering a precise demarcation point for the origins of the tradition at issue.<sup>325</sup> I would similarly resist setting out a specific time requirement in this context, though I would expect that a consensus that had persisted for most of a century would be sufficient to demonstrate society’s core commitments, even if that might not be enough to qualify as “deeply rooted” for due process purposes.<sup>326</sup> By 1967, public telephone booths had been a regular feature of American life for six decades.<sup>327</sup> Over the course of the years since *Katz*, not only did phone booths lose their walls,<sup>328</sup> but society has abandoned public pay phones altogether in favor of cellular phones. Newer conventions, reflected in federal and state wiretapping law,<sup>329</sup> demonstrate that society has now long expected privacy in such circumstances as well.

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<sup>324</sup> See, e.g., Kahn-Fogel, *supra* note 279, at 387–88 (discussing the Court’s Eighth Amendment jurisprudence).

<sup>325</sup> See *supra* notes 239–242 and accompanying text.

<sup>326</sup> In this regard, the “emerging awareness” that Justice Kennedy observed in his majority opinion in *Lawrence v. Texas* would likely be insufficient. In that case, although Kennedy invoked developments over the course of the “past half century,” he did not assert that any consensus in favor of protecting homosexual intimacy had persisted for that period of time. Rather, fifty years earlier, every state in the country had outlawed sodomy, and gradual developments up to the present suggested that by 2003 such a consensus had finally emerged. See 539 U.S. 558, 571–73. In an analogous Fourth Amendment situation, however, as I have suggested, the use of equal protection arguments might serve as a source of progressive pressure even in the absence of an established tradition protecting a disfavored minority. The *Lawrence* Court sidestepped the petitioners’ equal protection argument. *Id.* at 574–75.

<sup>327</sup> See Merrill Fabry, *Now You Know: Where was the First Public Telephone Booth?*, TIME (Aug. 3, 2016), <https://time.com/4425102/public-telephone-booth-history/> (stating that the first “telephone cabinet” received a patent in 1883 and that there were over 25,000 Model 50A pay telephones in New York City alone by 1912); *Public Telephones*, ENGINEERING AND TECHNOLOGY HISTORY WIKI (April 1, 2019), [https://ethw.org/Public\\_Telephones](https://ethw.org/Public_Telephones) (noting that “almost all” of the 25,000 Model A pay phones in New York by 1912 were “indoors in wooden booths”).

<sup>328</sup> Sklansky, *Back to the Future*, *supra* note 12, at 158.

<sup>329</sup> The original federal wiretapping statute was enacted in 1968, and state legislatures soon followed suit. See 18 U.S.C. §§ 2510-22 (2002); Patricia L. Bellia, *Federalization in Information Privacy Law*, 118 YALE L.J. 868, 877 (2009) (observing that Congress and state legislatures passed federal and state wiretapping statutes in the wake of *Katz*); Elisabeth Pride, *Down the Rabbit’s Hole: Baby Monitors, Family Movies and Wiretap Law*, 23 J. AM. ACAD. MATRIM. L. 131, 132 (2010) (noting that most state wiretapping laws are similar to the federal Act, though consent standards vary); *United States v. Torres*, 751 F.2d 875, 890–91 (7th Cir.

Next, there is the problem of “careful description.” This constraint is important because the more broadly one defines an interest, the more likely one is to find that it is one rooted in tradition.<sup>330</sup> An extreme example would be simply to define the relevant tradition as one of protecting privacy and then to protect against any conceivable infringement of the interest. Is an established tradition of giving space to phone booth users while waiting in line sufficient to create a right against government intrusion into the user’s privacy through another means—an electronic listening device? First, as I have argued, the fact that the relevant tradition is a norm regulating the conduct of private citizens should not preclude reliance on the tradition.<sup>331</sup> This is consistent, once again, with the Court’s substantive due process jurisprudence. For example, the Court supported the right it found to refuse lifesaving nourishment and medical treatment by relying on the torts of battery and informed consent, areas of law developed largely to regulate the conduct of private parties, not government actors.<sup>332</sup> Second, one need not focus on the specific tool used to accomplish the intrusion to provide a significant limit on judicial discretion. Rather, the telephone booth is a narrowly defined zone of privacy, and to draw on a tradition excluding “the uninvited ear,”<sup>333</sup> broadly defined, from the booth’s confines is sufficient, just as it was sufficient in *Cruzan v. Director, Missouri Department of Health* to draw on the doctrines of informed consent and battery, without having to define specific traditions for every possible kind of lifesaving medical treatment one might choose to refuse.<sup>334</sup>

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1984) (drawing on evidence from congressional committee reports to demonstrate that the Wiretap Act was passed partly in response to the perceived inadequacies of the Court’s Fourth Amendment decisions on the issue and noting that the Act “seem[s] to go far beyond anything the Constitution demands.”).

<sup>330</sup> Members of the Court have recognized that the breadth of the definition of the asserted right can determine the outcome of a case, and they have used that knowledge to their rhetorical advantage. For example, in *Lawrence*, Justice Kennedy described the claimed right fairly broadly, as a right to “private sexual conduct.” *Lawrence*, 539 U.S. at 578. Scalia’s dissent, on the other hand, described the asserted right narrowly, as a right to “homosexual sodomy,” and noted that the majority did not even try to claim that right was “deeply rooted” in history and tradition. *Id.* at 594 (Scalia, J., dissenting). Scalia’s framing mirrored the Court’s 1986 definition of the issue in *Bowers v. Hardwick*, which the *Lawrence* Court overruled. See *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986).

<sup>331</sup> See *supra* note 285 and accompanying text.

<sup>332</sup> *Washington v. Glucksberg*, 521 U.S. 702, 724 (1997) (citing *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 269, 277 (1990)).

<sup>333</sup> *Katz v. United States*, 389 U.S. 347, 352 (1967).

<sup>334</sup> This is not to suggest that the manner in which the government acquires information should never be relevant. The essence of a tradition ensuring the sanctity of a protected area (like a home) or a category of private information generally does not safeguard against every possible way in which others might learn of what would otherwise be private. For example, there is no traditional prohibition on people acquiring information about the interior of a home or a conversation that took place inside a telephone booth if they learn of the information through a television news report. Cf. Kerr, *Four Models*, *supra* note 44, at 534–35 (“On the

Of course, the constraints of a written constitution to some extent limit the potential for evolutionary change under an incrementalist model. Nonetheless, this “leaves open the question of whether the [text] ought to bind future generations within broad limits or narrow ones.”<sup>335</sup> Despite Justice Black’s objections, based largely on how the framers would have interpreted the Fourth Amendment’s text,<sup>336</sup> it does not seem a terrible stretch to view surveillance of a person’s conversations as, in essence, a search of the person, or perhaps of one of his effects, given that Katz had paid for use of the telephone booth. This, in any case, puts no more strain on the text than the expansive definition current originalists on the Court might be willing to give to “papers and effects.”<sup>337</sup>

## 2. Garbage

Unlike *Katz* itself, application of a traditionalist approach to the *Katz* standard would likely lead to reconsideration of other opinions decided under *Katz*. In one such opinion, *California v. Greenwood*, the Court held that people have no reasonable expectation of privacy in garbage they have left for collection outside the curtilage of their homes.<sup>338</sup>

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flip side, imagine a police officer turns on a TV set and watches a news program announcing that a basketball star is HIV-positive. Watching a broadcast is reasonable per se: surely no one would suggest that the officer should have to obtain a warrant before watching TV.”)

<sup>335</sup> Young, *supra* note 11, at 666; *see also* Strauss, *supra* note 85, at 912.

<sup>336</sup> *Katz*, 389 U.S. at 365–66 (1967) (Black, J., dissenting).

<sup>337</sup> *See* Carpenter v. United States, 138 S. Ct. 2206, 2269 (2018) (Gorsuch, J., dissenting) (“These ancient principles may help us address modern data cases too. Just because you entrust your data—in some cases, your modern-day papers and effects—to a third party may not mean you lose any *Fourth Amendment* interest in its contents.”). Digital information is not a paper if not reduced to tangible form, and Black’s Law Dictionary defines “effects” as “movable property; goods.” BLACK’S LAW DICTIONARY (10th ed. 2014). This is not to suggest, however, that such a reading is entirely implausible. Numerous cases, for example, have been willing to treat software as a good under Article 2 of the Uniform Commercial Code, either directly or by analogy. *See, e.g.*, Advent Sys. Ltd. v. Unisys Corp., 925 F.2d 670 (3d Cir. 1991); *Specht v. Netscape*, 150 F. Supp. 2d 585 (S.D.N.Y. 2001); *but see* *Specht v. Netscape*, 306 F.3d 17, 29 n.13 (2d Cir. 2002) (questioning whether licensing of software downloaded from the internet is a transaction in goods and noting a “trend in case law away from application of UCC provisions to software sales and licensing and toward application of intellectual property principles.”) (citation omitted); Brief of Professor Orin S. Kerr as Amicus Curiae in Support of Respondent at 29–30, *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (No. 16-402) (“The cell-site records collected in this case were the ‘papers’ of the phone companies, not Carpenter. Cell-site records are information that a company creates, and a company then decides to store on its computers, about how the company’s network was used. Carpenter’s argument to the contrary is based on 47 U.S.C. § 222, which imposes certain limitations on the disclosure of customer-related records. The problem is that rules regulating disclosure do not create a property right in the regulated facts that belong to the subject of the disclosure. Confidentiality is not property. The fact that information concerns someone does not make that information his stuff. If the law limits when Alice can tell the world about what she saw Bob do, Alice’s recollection does not become Bob’s ‘papers’ or ‘effects.’ Alice’s recollections belong to Alice, not Bob.”).

<sup>338</sup> 486 U.S. 35, 39–40 (1988).

An essential feature of the Court's determination was that it was "common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public."<sup>339</sup> Yet Justice White's majority opinion in *Greenwood* focused on whether it was foreseeable that people like scavengers and snoops *could* gain access to one's garbage rather than whether such conduct would contravene established social norms.<sup>340</sup> Tellingly, the one example the *Greenwood* majority offered to support its premise that snoops sometimes gain access to others' trash, the examination of Henry Kissinger's garbage by a tabloid journalist,<sup>341</sup> was, at the time, widely condemned as "'a disgusting invasion of personal privacy," as "'indefensible as civilized behavior' . . . and contrary to 'the way decent people behave in relation to each other.'"<sup>342</sup>

In his *Carpenter* dissent, Justice Gorsuch discussed *Greenwood* not as an example of a situation in which clear social norms were unavailable, but in which the Court simply failed to acknowledge existing conventions. As Justice Gorsuch stated, "the habits of raccoons don't prove much about the habits of the country. I doubt, too, that most people spotting a neighbor rummaging through their garbage would think they lacked reasonable grounds to confront the rummager."<sup>343</sup> Yet the Court's failure to acknowledge widespread convention need not lead to Justice Gorsuch's conclusion that a convention-based standard should be abandoned; rather, it could just as easily lead to the conclusion that the Court should strive to apply that standard in a more principled manner.

For the purposes of the traditionalist approach to *Katz*, however, the convention against rummaging through other people's garbage in search of personal information must be not only clear but also longstanding. Although a more rigorous empirical evaluation is merited, the possibility of this is evident in Justice William Brennan's now thirty-year-old documentation of the norm against such intrusions in his *Greenwood* dissent, including public reactions to the Kissinger episode, the laws of "many municipalities" restricting access to sealed garbage containers, and the protection California's Supreme Court had accorded against government intrusion under the state constitution.<sup>344</sup> Several of the sources Brennan cited date to significantly earlier: at least one of the ordinances he referenced dates to at least as early as 1967;<sup>345</sup> the California Supreme Court

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<sup>339</sup> *Id.* at 40.

<sup>340</sup> *Id.*

<sup>341</sup> *Id.* at 40 n.4.

<sup>342</sup> *Id.* at 52 (Brennan, J., dissenting) (citations omitted).

<sup>343</sup> *Carpenter v. United States*, 138 S. Ct. 2206, 2266 (Gorsuch, J., dissenting).

<sup>344</sup> *Greenwood*, 486 U.S. at 51–52 (Brennan, J., dissenting).

<sup>345</sup> See *United States v. Dzialak*, 441 F.2d 212, 215 (2d Cir. 1971) (describing an ordinance in place at the time of an investigation in 1967).

interpreted the state constitution as safeguarding the interest in 1971;<sup>346</sup> and the Kissinger affair occurred in 1975.<sup>347</sup> Additionally, Americans have regularly used opaque plastic bags for household waste since the 1970s, demonstrating “the extraordinarily high value middle class Americans [have] placed on hygiene and privacy” in such circumstances for at least the past five decades.<sup>348</sup> It is, therefore, at least plausible that the custom against interference with others’ refuse has endured long enough to have constitutional significance under a traditionalist approach to *Katz*.

### 3. Open Fields

A traditionalist model for applying *Katz* might also induce the Court to reconsider its conclusion that a person has no reasonable expectation of privacy against a government intrusion into an open field. In 1984, in *Oliver v. United States*, the Court reaffirmed its earlier holding that such an intrusion is not a Fourth Amendment search.<sup>349</sup> Using the *Katz* standard, the Court stated that open fields are usually not a setting of intimate activities and that “as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be.”<sup>350</sup> Moreover, because *Katz* declared that the “premise that property interests control the right of the Government to search and seize has been discredited,”<sup>351</sup> it was of “little or no relevance” to the Court that government agents had trespassed into the defendants’ open fields to find growing marijuana.<sup>352</sup>

For Baude and Stern, if the law of any state forbade entry into an open field, that fact would merit a reconsideration of *Oliver* in that state.<sup>353</sup> Under their positive law model, the law of trespass, rather than *Katz*, would merit such reconsideration.<sup>354</sup> Under my traditionalist model, although a single state’s law could never be dispositive in that state or anywhere else, because entering an open field without a license to do so would be a trespass almost anywhere in the country and because such trespass principles are longstanding, reconsideration under *Katz* of the *Oliver* Court’s conclusion that people have no reasonable expectation of privacy against such intrusions would be justified. Moreover, because

<sup>346</sup> *People v. Krivda*, 5 Cal. 3d 357 (1971).

<sup>347</sup> *Greenwood*, 486 U.S. at 52 (Brennan, J., dissenting).

<sup>348</sup> Simon, *supra* note 50, at 962.

<sup>349</sup> *Oliver v. United States*, 466 U.S. 170 (1984); *Hester v. United States*, 265 U.S. 57 (1924).

<sup>350</sup> *Oliver*, 466 U.S. at 179.

<sup>351</sup> *Katz v. United States*, 389 U.S. 347, 371 (1967).

<sup>352</sup> *Oliver*, 466 U.S. at 183–84.

<sup>353</sup> See Baude & Stern, *supra* note 271, at 1886–87.

<sup>354</sup> See *id.*

the tradition protecting against private intrusions would trump a contrary norm allowing a similar government intrusion, it would be irrelevant that police have long had broad powers to enter open fields to conduct investigations.<sup>355</sup>

Despite this, it is possible the Court should continue to consider intrusions into open fields non-searches for Fourth Amendment purposes. The Court's original holding on the issue, in 1924, was based on the notion that open fields are unprotected under the Amendment's language; that is, an open field is not a person, house, paper, or effect.<sup>356</sup> Although some have questioned whether such a narrow construction of "effects" is warranted,<sup>357</sup> the *Oliver* Court interpreted the term as encompassing only personal property,<sup>358</sup> and the Court has more recently reiterated that an open field is not among the "protected areas enumerated in the Fourth Amendment."<sup>359</sup> In any case, many intrusions into open fields are conducted in the hope of discovering people or things that would qualify as personal property.<sup>360</sup> Moreover, the concept of "effects" need not be forever limited to the framers' ideas about the meaning of the word or to our understanding of the term today as referring primarily to moveable property.<sup>361</sup> Under a traditionalist model, that too might evolve.

#### 4. *Carpenter*

Under a traditionalist approach to *Katz*, the decision in *Carpenter* would also merit reconsideration. Before *Carpenter*, two federal statutes regulated government access to historical CSLI. One of those statutes, the Wireless Communication and Public Safety Act of 1999, amended the Telecommunications Act "to extend privacy protection for the call location of cell phone users."<sup>362</sup> The Wireless Communication and Pub-

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<sup>355</sup> See Kerr, *supra* note 309, at 525 (citation omitted).

<sup>356</sup> *Hester v. United States*, 265 U.S. 57, 59 (1924).

<sup>357</sup> See Baude & Stern, *supra* note 271, at 1886, 1886 n.344.

<sup>358</sup> *Oliver v. United States*, 466 U.S. 170, 177 n.7 (1984).

<sup>359</sup> *United States v. Jones*, 565 U.S. 400, 410–11 (2012). The *Jones* Court made this assertion in relation to the rehabilitated property framework it described, rather than with regard to *Katz*, which decoupled Fourth Amendment analysis from rigid confinement to the areas enumerated in the Amendment's text. In fact, using the *Katz* framework, Justice Scalia, the author of the majority opinion in *Jones*, earlier concluded that examination of a government employee's office constitutes a Fourth Amendment search. *O'Connor v. Ortega*, 480 U.S. 709, 731 (1987) (Scalia, J., concurring). Nonetheless, as I have suggested above, the approach I describe would require some relationship of privacy interests to the Amendment's text, even if the text would confine analysis only within broad limits. See *supra* notes 335–337 and accompanying text.

<sup>360</sup> See Baude & Stern, *supra* note 271, at 1886 n.344.

<sup>361</sup> See *supra* note 337.

<sup>362</sup> In re Application of the United States for an Order (1) Authorizing the Use of a Pen Register and a Trap and Trace Device and (2) Authorizing Release of Subscriber Information

lic Safety Act, however, allows disclosure of such information “as required by law.”<sup>363</sup> The second statute, the Stored Communications Act, as amended in 1994, provided the mechanism by which law enforcement regularly acquired historical cell-site data.<sup>364</sup> In *Carpenter*, the prosecution relied on a provision of the statute authorizing the government to obtain a court order for the release of certain records on the basis of “specific and articulable facts showing that there are reasonable grounds to believe” the records “are relevant and material to an ongoing criminal investigation,”<sup>365</sup> a standard far lower than the probable cause required for a warrant.<sup>366</sup>

Although these federal statutes might be seen as proof of a national consensus that cell-site location information is worthy of at least some protection, exclusive reliance on them is problematic. First, attribution of constitutional significance to statutes passed in only one jurisdiction has the potential to have significant distorting effects on legislative and executive conduct in that jurisdiction.<sup>367</sup> If legislators are aware that providing any level of protection against a given intrusion will lead the Court to assert its own authority over the issue, possibly including greater safeguards than the legislature contemplated (such as subjecting the relevant conduct to the warrant requirement), then they might be incentivized not to act at all.<sup>368</sup> Likewise, given the executive’s dual function of approving legislation and prosecuting crime, the President and governors might be reluctant to sign any such legislation.<sup>369</sup> Thus, despite the plausible notion that a federal statute represents national consensus on an issue, the Court should be hesitant to give constitutional weight to such a law in the absence of significant additional evidence of consensus.

On the other hand, if the Court assigns constitutional significance to statutory authority only when a constellation of statutes from various jurisdictions around the country suggests national consensus, then the effect of any statute on the Fourth Amendment would be so attenuated that legislators and executives would be unlikely to consider the constitutional consequences of their actions when contemplating potential legislation.<sup>370</sup> In that regard, several states have conferred legislative or

and/or Cell Site Information, 396 F. Supp. 2d 294, 323 (E.D.N.Y. 2005) (citing 47 U.S.C. § 222(f)).

<sup>363</sup> 47 U.S.C. § 222(C)(1) (2008).

<sup>364</sup> 18 U.S.C. § 2703(d) (2019).

<sup>365</sup> *Id.*

<sup>366</sup> *Carpenter v. United States*, 138 S. Ct. 2206, 2221 (2018).

<sup>367</sup> Kahn-Fogel, *supra* note 279, at 398–99 (citing *Virginia v. Moore*, 553 U.S. 164, 174 (2008)).

<sup>368</sup> Orin S. Kerr, *The Effect of Legislation on Fourth Amendment Protection*, 115 MICH. L. REV. 1117, 1160–62 (2017).

<sup>369</sup> *Id.* at 1162–64.

<sup>370</sup> Kahn-Fogel, *supra* note 279, at 404–05.

judicial protection greater than federal law for historical cell-site location information. Even if these directives might be insufficient to prove a national consensus, perhaps it is reasonable to view the problem at a slightly higher level of generality. If it makes sense to view the interest in *Katz* as an interest in aural privacy inside of a telephone booth, then it might make sense to view the interest at stake in *Carpenter* as an interest against tracking of one's movements in public. The Supreme Court held in 1983 that there is no reasonable expectation of privacy in these circumstances, even against electronic tracking,<sup>371</sup> though it qualified that conclusion in *Jones* in 2012.<sup>372</sup> A number of states have regulated electronic tracking in general, including both statutory and judicial directives.<sup>373</sup> These directives address not only historical CSLI, but also real-time and prospective cell-site data, GPS monitoring, and other forms of surveillance.<sup>374</sup>

The problem, however, is that none of these laws are more than about thirty years old. Even the relevant language from the Stored Communications Act, originally passed as part of the Electronic Communications Privacy Act, dates back only to 1986.<sup>375</sup> Under these circumstances, any consensus one might identify looks more like an “emerging awareness”<sup>376</sup> than the kind of entrenched tradition that I would rely on as evidence of society's fundamental commitments. Looking to stalking statutes as a guide may also be unhelpful; although every state in the country now has anti-stalking legislation,<sup>377</sup> California passed the first stalking statute only in 1990.<sup>378</sup> Perhaps informal social norms against monitoring a person's public movements significantly pre-date these laws,<sup>379</sup> but gathering empirical evidence of national consensus based on any such norm could be challenging.

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<sup>371</sup> United States v. Knotts, 460 U.S. 276 (1983).

<sup>372</sup> United States v. Jones, 565 U.S. 400, 406 n.3 (2012) (finding that placing a GPS device on the underside of a Jeep constituted a search because the government effected a physical intrusion into a constitutionally protected area to gather information); *id.* at 430 (Alito, J., concurring) (finding, under *Katz*, that longer-term GPS monitoring of a person's public movements for the investigation of most offenses infringes the target's reasonable expectation of privacy).

<sup>373</sup> See, e.g., Paul Cividanes, Note, *Cellphones and the Fourth Amendment: Why Cellphone Users Have a Reasonable Expectation of Privacy in Their Location Information*, 25 J.L. & POL'Y 317, 343–45 (2016).

<sup>374</sup> *Id.*

<sup>375</sup> See Pub. L. No. 99-508, tit. II, § 2703, 100 Stat. 1848 (1986).

<sup>376</sup> See *Lawrence v. Texas*, 539 U.S. 558, 571–73 (2003).

<sup>377</sup> Andrea Mazingo, Note, *The Intersection of Dominance Feminism and Stalking Laws*, 9 Nw J. L. & Soc. POL'Y 335, 346 (2014).

<sup>378</sup> *Id.*

<sup>379</sup> Cf. Re, *supra* note 168, at 1450 (“By contrast, no settled social practices involve one person indulging his curiosity by engaging in long-term observations of another specific individual. Quite the contrary, most forms of long-term, covert observation are rare and socially

A significant caveat to this analysis is that even if there is no long-standing consensus against monitoring a person's public movements, there is certainly an enduring tradition protecting the sanctity of information about what goes on in a person's home. The Court recognized that tradition in *Kyllo*,<sup>380</sup> and it has held that electronic beeper monitoring inside a home is a Fourth Amendment search, even if such monitoring on a public street generally is not.<sup>381</sup> Because CSLI today can locate a telephone within 50 meters, and because the technology "is rapidly approaching GPS-level precision,"<sup>382</sup> the use of CSLI will often reveal information about the interior of the home or the curtilage. Moreover, despite the contention that cellular customers forfeit their privacy in any information they have voluntarily conveyed to the cellular provider, Justice Gorsuch effectively rebutted any argument that the Court's so-called third-party doctrine, at least broadly speaking, is actually based on accepted social norms.<sup>383</sup> In some circumstances, such as health information shared with a medical professional, there are clear, entrenched conventions of confidentiality.<sup>384</sup> In regard to information about one's location shared with a corporation, it seems unlikely, at the very least, that there is any enduring tradition to the contrary that could vitiate the time-honored societal expectation of privacy in the home. Thus, although the traditionalist *Katz* framework might lead to a different result in *Carpenter* in theory, in practice law enforcement would often need a warrant for CSLI to avoid the likelihood of acquiring protected information about the interior of targets' homes.<sup>385</sup>

Overall, however, for privacy advocates, the conclusion that *Carpenter* should have come out differently is likely to be disappointing. In general, incrementalist models are likely to be unsatisfying to "those who are impatient with continuing injustice."<sup>386</sup> But to suggest that *Carpenter* may have been wrongly decided is not to suggest the contrary result should endure forever. For a traditionalist, that is, reform is not pre-

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unacceptable, even if the observations pertain to someone's movement in public, and that conclusion finds added support in (but does not depend on) criminal stalking prohibitions.").

<sup>380</sup> 533 U.S. 27, 34, 37 (2001) ("[I]n the case of the search of the interior of homes—the prototypical and hence most commonly litigated area of protected privacy—there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*.").

<sup>381</sup> *United States v. Karo*, 468 U.S. 705 (1984).

<sup>382</sup> *Carpenter v. United States*, 138 S. Ct. 2206, 2219 (2018).

<sup>383</sup> *Id.* at 2262–64 (Gorsuch, J., dissenting).

<sup>384</sup> *See* AM. MED. ASS'N, ORIGINAL CODE OF MEDICAL ETHICS 93 (1847).

<sup>385</sup> *See, e.g.*, In re Application for Pen Register and Trap/Trace Device with Cell Site Location Authority, 396 F. Supp. 2d 747, 757 (S.D. Tex. 2005) ("As in any tracking situation, it is impossible to know in advance whether the requested phone monitoring will invade the target's Fourth Amendment rights. The mere possibility of such an invasion is sufficient to require the prudent prosecutor to seek a Rule 41 search warrant.").

<sup>386</sup> Young, *supra* note 11, at 655.

cluded, but it should occur slowly. Under such a model, decision-makers draw on tradition as a means of economizing on reason. They minimize “the risks of change by proceeding in small increments that [can] each be tested for consistency with the overall structure of government and society.”<sup>387</sup>

#### CONCLUSION

As the examples I have offered demonstrate, a traditionalist approach to *Katz* would not lead to easy, formulaic results in every case. There will always be some room for discretion, for example, in defining the relevant tradition, deciding how long it must have endured to have constitutional significance, and determining whether a tradition reflects national consensus. But no one has claimed that traditionalism can always offer easy answers. The issue, rather, is whether the framework requires judges to address the correct hard questions.

Does this traditionalist framework for applying *Katz* pose “the correct” questions? Certainly, there are alternatives to *Katz* that will be more attractive to some and that have their own appeal. My proposal is largely a pragmatic response to what seems to be an intractable problem: a majority of the Court has demonstrated an intent to preserve a role for *Katz*, but most justices have also recognized problems associated with the common conception of the test as ahistorical and with uncertainty about the meaning of its reference to what “society is prepared to recognize as ‘reasonable.’” A traditionalist reading of *Katz* helps to address these concerns and is in harmony with some outcomes the Court has reached in its application of the test. Given that *Katz* is here to stay, the Court should apply this traditionalist model in a more consistent, self-conscious way to achieve more principled outcomes in the future.

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<sup>387</sup> *Id.*

