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Fourth Amendment Textualism

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FOURTH AMENDMENT TEXTUALISM

Jeffrey Bellin*

The Fourth Amendment’s prohibition of “unreasonable searches” is one of the most storied constitutional commands. Yet after decades of Supreme Court jurisprudence, a coherent definition of the term “search” remains surprisingly elusive. Even the justices know they have a problem. Recent opinions only halfheartedly apply the controlling “reasonable expectation of privacy” test and its wildly unpopular cousin, “third-party doctrine,” with a few justices in open revolt.

These fissures hint at the Court’s openness to a new approach. Unfortunately, no viable alternatives appear on the horizon. The justices themselves offer little in the way of a replacement. And scholars’ proposals exhibit the same complexity, subjectivity, and illegitimacy that pervade the status quo.

This Article proposes a shift toward simplicity. Buried underneath the doctrinal complexity of the past fifty years is a straightforward constitutional directive. A three-part formula, derived from the constitutional text, deftly solves the Fourth Amendment “search” conundrums that continue to beguile the Court. This textualist approach offers clarity and legitimacy, both long missing from “search” jurisprudence. And by generating predictable and sensible answers, the proposed framework establishes clear boundaries for police investigation while incentivizing legislators to add additional privacy protections where needed.

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INTRODUCTION

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”

— *United States Constitution, Amendment IV*

The Fourth Amendment prohibits unreasonable “searches” and “seizures.” This places the Supreme Court’s definition of the term “search” at the center of the always-evolving balance between privacy and security. Technological advances offer the government a steady stream of novel investigative techniques, but only those that qualify as “searches” (or “seizures”¹) trigger Fourth Amendment protections.²

Ever since the 1967 case *Katz v. United States*, the Supreme Court has framed the “is-it-a-search?” inquiry by asking whether the police invaded the

1. This Article addresses “searches,” not “seizures.” Existing jurisprudence coherently defines “seizures” in light of the text and history of the Fourth Amendment. See *United States v. Jacobsen*, 466 U.S. 109, 113–14, 113 n.5 (1984) (explaining that a “‘seizure’ of a person within the meaning of the Fourth Amendment” constitutes “meaningful interference, however brief, with an individual’s freedom of movement,” and a “‘seizure’ of property occurs when there is some meaningful interference with an individual’s possessory interests in that property”); 1 WAYNE R. LAFAVE, *SEARCH AND SEIZURE* § 2.1(a), at 563–64 (5th ed. 2012) (“The word ‘seizures’ in the Fourth Amendment has, in the main, not been a source of difficulty.”). For an argument that the term “seizures” should be interpreted more broadly, see Paul Ohm, *The Olmsteadian Seizure Clause: The Fourth Amendment and the Seizure of Intangible Property*, 2008 STAN. TECH. L. REV. 2.

2. See U.S. CONST. amend. IV; Thomas K. Clancy, *What Is a “Search” Within the Meaning of the Fourth Amendment?*, 70 ALB. L. REV. 1, 1–2 (2006) (explaining that “[t]here are ‘few issues more important to a society’” (quoting Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 377 (1974))); Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083, 1118 (2002) (describing this as the “most important issue in Fourth Amendment analysis” since the Amendment “is limited to activities that constitute ‘searches’ and ‘seizures’”).

complaining party's "reasonable expectation of privacy."³ Scholarly commentary on this doctrine kills more trees than termites. Yet despite all the attention, the "reasonable expectation of privacy" test remains "the central mystery of Fourth Amendment law"; "no one seems to know what makes an expectation of privacy constitutionally 'reasonable.'"⁴

The *Katz* test's indeterminacy was on display in the Supreme Court's latest Fourth Amendment "blockbuster."⁵ In *Carpenter v. United States*, police obtained records containing "cell-site location information (CSLI)" from two wireless carriers.⁶ The records revealed Timothy Carpenter's location in the vicinity of a series of robberies in downtown Detroit.⁷ Precedent suggested this was not a "search." The Supreme Court had previously held that there was no reasonable expectation of privacy in (1) information obtained from third parties⁸ or (2) one's location in public areas.⁹ Highlighting "the unique nature of cell phone location information," however, the Court ruled (5–4) that the government "invaded Carpenter's reasonable expectation of privacy."¹⁰ Consequently, "accessing seven days of CSLI constitutes a Fourth Amendment search."¹¹ No principle emerges from the opinion (seven days?), or the laundry list of related scenarios where the Court cautioned that its analysis *might* not apply.¹² Instead, the justices in the majority emphasized the need to "tread carefully" to "ensure that we do not 'embarrass the future.'"¹³ The present gets no such reprieve.

3. See *Carpenter v. United States*, 138 S. Ct. 2206, 2227 (2018) (Kennedy, J., dissenting) (explaining that the "reasonable expectations of privacy" test was "first announced in *Katz v. United States*," 389 U.S. 347 (1967)).

4. Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 504 (2007); accord *Carpenter*, 138 S. Ct. at 2265 (Gorsuch, J., dissenting) ("[W]e still don't even know what [*Katz's*] 'reasonable expectation of privacy' test is").

5. Adam Liptak, *Justices Take Up Digital Privacy in Case with Roots in a Robbery*, N.Y. TIMES, Nov. 28, 2017, at A1.

6. 138 S. Ct. at 2211–12 (MetroPCS and Sprint).

7. *Carpenter*, 138 S. Ct. at 2213.

8. *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979) ("[A] person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.").

9. See *United States v. Knotts*, 460 U.S. 276, 281 (1983) (holding that a person "on public thoroughfares has no reasonable expectation of privacy in his movements").

10. *Carpenter*, 138 S. Ct. at 2219–20.

11. *Id.* at 2217 n.3.

12. The Court stressed that its opinion should not be read to encompass "real-time CSLI or 'tower dumps,'" the "application of *Smith* [pen registers] and *Miller* [bank records]," "conventional surveillance techniques and tools, such as security cameras," "other business records that might incidentally reveal location information," and "other collection techniques involving foreign affairs or national security." *Id.* at 2220; cf. Susan Freiwald & Stephen Wm. Smith, *The Carpenter Chronicle: A Near-Perfect Surveillance*, 132 HARV. L. REV. 205, 222 (2018) (noting that the "*Carpenter* Court fully embraced the normative approach of *Katz*" and acknowledging "that the *Katz* test provides little to tether an inquiry").

13. *Carpenter*, 138 S. Ct. at 2220 (quoting *Nw. Airlines, Inc. v. Minnesota*, 322 U.S. 292, 300 (1944)).

The irony of the Supreme Court's modern "search" jurisprudence is that the "reasonable expectation of privacy" test was supposed to avoid making "a crazy quilt of the Fourth Amendment."¹⁴ And yet here we are: "[A] fourth amendment with all of the character and consistency of a Rorschach blot."¹⁵ Extending the trendline into the future, there will be a line of cases for each "unique" technology and product: cell phones, GPS tracking, facial recognition, license plate readers, Alexa, Fitbit, and on and on. Reasoning by decree in a case or two each year, the Court will label applications of some technologies "searches," leave others unrestricted as "non-searches," and never opine on the rest. For the vast majority of potential search scenarios (six days of cell-site location information?), lower courts, citizens, and the police will be left guessing about what the Constitution permits.¹⁶

Despite its widely recognized indeterminacy, the "reasonable expectation of privacy" test endures. The best explanation for its longevity is a lack of viable alternatives.¹⁷ Judges and scholars rarely posit new formulations for defining a Fourth Amendment "search." Instead, reform proposals generally accept the *Katz* formula as an "inevitable first step in the direction of administrability"¹⁸ and seek to either cleanse the analysis of its perceived failings¹⁹ or incorporate new factors.²⁰ Some scholars advocate making the *Katz* test

14. See *Smith v. Maryland*, 442 U.S. 735, 743–45 (1979).

15. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 375 (1974).

16. *Carpenter*, 138 S. Ct. at 2267 (Gorsuch, J., dissenting) ("[O]ur lower court colleagues are left with two amorphous balancing tests, a series of weighty and incommensurable principles to consider in them, and a few illustrative examples that seem little more than the product of judicial intuition."); Evan Caminker, *Location Tracking and Digital Data: Can Carpenter Build a Stable Privacy Doctrine?*, 2019 SUP. CT. REV. (forthcoming 2019) (chronicling the many difficult questions spawned by *Carpenter*).

17. See Sam Kamin, *The Private Is Public: The Relevance of Private Actors in Defining the Fourth Amendment*, 46 B.C. L. REV. 83, 138 (2004) ("No clear alternative to *Katz*'s conception of the Fourth Amendment has yet emerged . . ."); cf. Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 581 (2009) (noting that while criticism of third-party doctrine is widespread, "[f]ew critics of the third-party doctrine have tried" to "develop some alternative test, with the same ex ante clarity, for identifying when information is protected under the Fourth Amendment").

18. Amsterdam, *supra* note 15, at 404; see also Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CALIF. L. REV. 1593, 1615 (1987) ("The indeterminacy of 'expectations of privacy' may be unavoidable if courts are to attempt to formulate rules that accommodate the messiness of ordinary life.").

19. See Sherry F. Colb, *What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119, 121 (2002) (criticizing cases following *Katz* for "steadily erod[ing] privacy in specific cases"); Scott E. Sundby, "Everyman"'s *Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1753 (1994) (characterizing scholarly criticism as broadly concluding that "the Court has not properly measured the individual's expectations of privacy").

20. See *United States v. Maynard*, 615 F.3d 544, 562–63 (D.C. Cir. 2010) (proposing a "mosaic theory" that considers whether surveillance "reveals an intimate picture of the subject's life that he expects no one to have"); Jeffrey Bellin, *Crime-Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World*, 97 IOWA L. REV. 1, 45

even more pliable so the Court can focus on the central policy question, “how best to regulate government information gathering.”²¹ The few efforts to dispense with *Katz*, like a recent proposal that ties searches and seizures to violations of “positive law,”²² promise as much complexity and uncertainty as *Katz* itself.²³ In the end, these alternatives all suffer from similar flaws. They are too complex, too subjective, too incomplete, and too far removed from the Amendment’s text to improve on the status quo. There is little to be gained by further tinkering with *Katz* or exchanging the “reasonable expectation” formula for another shiny but impenetrable framework. Fortunately, there is another option.

* * *

This Article proposes a simple alternative to the Supreme Court’s Fourth Amendment “search” jurisprudence: a return to the constitutional text. Step one is to scrap *Katz*’s “reasonable expectation of privacy” test as an unmitigated failure of constitutional interpretation, both incoherent and illegitimate. Step two is to adopt a straightforward methodology, “Fourth Amendment Textualism,” which derives a comprehensive “search” jurisprudence from three components of the Fourth Amendment’s text.²⁴ The pro-

(2011) (suggesting a “crime-severity variable” that could be incorporated into the “reasonable expectation of privacy” test); 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, 735–36 (1993) (suggesting that public opinion surveys could identify societally endorsed privacy expectations).

21. Daniel J. Solove, *Fourth Amendment Pragmatism*, 51 B.C. L. REV. 1511, 1528 (2010); see also Amsterdam, *supra* note 15, at 403 (suggesting that courts restrict police surveillance activities to those consistent “with the aims of a free and open society”).

22. William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1825 (2016) (“Instead of making Fourth Amendment protection hinge on whether it is ‘reasonable’ to expect privacy in a given situation, a court should ask whether government officials have engaged in an investigative act that would be unlawful for a similarly situated private actor to perform.”); see also Sundby, *supra* note 19, at 1812 (seeking to reorient Fourth Amendment analysis around “reciprocal government-citizen trust”).

23. For example, under a positive law approach, the question of whether tailing a suspect constitutes a “search” would turn on things like whether the pursuing officers violated local traffic ordinances, engaged in negligent driving, wore seatbelts, and (perhaps) had updated registration, insurance, and vehicle inspections. See Baude & Stern, *supra* note 22, at 1873 (“[T]he decisive question is whether the government has broken the law or relied on a governmental exemption from the law in obtaining information.”). All of this would be difficult to unravel, particularly in less regulated contexts (GPS tracking?), and has no intuitive connection to the term “search.” *Id.* at 1850 (noting that the proposed test is “only as predictable as the underlying positive law”).

24. The textualism referenced throughout this Article fits within the “new textualism” approach to constitutional interpretation described by James Ryan. See James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523, 1524 (2011) (“The core principle of new textualism is that constitutional interpretation must start with a determination, based on evidence from the text, structure, and enactment history, of what the

posal's defining theme is simplicity. If the Supreme Court can muster the will to cast aside the artificial complexity of the past fifty years, it will uncover a straightforward textual command. All the Court needs is a dictionary, a touch of history, and some common sense.

The proposal begins with the word "search." The term at the center of this morass is a common one, with an intuitive meaning supported by a clear historical imperative. There is no indication in the historical record or the pre-*Katz* case law that the Fourth Amendment's specification of "searches" as an event of constitutional interest was intended to be so inscrutable.²⁵ A definition can come in handy for difficult cases, but will typically be unnecessary. A "search" is an examination of an object or space to uncover information.²⁶ But you knew that already. The police search houses, pockets, papers, and cars. They also search electronic documents and devices by reading and scanning them for information. Importantly, while all searches seek to uncover information, not all information gathering qualifies as a search. Police do not "search" when they ask suspects or witnesses questions, ponder unsolved cases, or rearrange data already in their possession.²⁷ In sum, a "search" is a search.²⁸ It may be impossible to craft "a single test for when an expectation of privacy is reasonable."²⁹ But, as I hope to show, it is not nearly so difficult to define the term "search."³⁰

Next, a textualist approach reintroduces the often overlooked fact that the Fourth Amendment does not target all "searches." The only searches that count for Fourth Amendment purposes are searches of "persons, houses, pa-

language in the Constitution actually means."). Textualism may hold conservative overtones for some readers. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 n.11, 624 (1990) (using "new textualism" to describe a mode of statutory interpretation, pioneered by Justice Scalia, with its roots in "ideological conservatism"). Ryan, however, views "new textualism" as a way for "progressive academics" to engage "conservatives on their own turf," "showing how numerous constitutional provisions are more in line with contemporary progressive values than conservative ones." Ryan, *supra* at 1527. The textualism described by Ryan is, at its core, as progressive or conservative as the text it interprets. And it is the dominant mode of modern constitutional interpretation. See William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2352–53 (2015) (relating common positions of Justices Kagan and Alito); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1182 (1993) ("Firm within our legal culture is the conviction that if judges have any duty it is a duty of fidelity to texts drafted by others, whether by Congress or the Framers . . ."); Ryan, *supra* at 1552.

25. See *infra* Part I.

26. See *infra* Section II.A.

27. See *infra* note 166 and accompanying text for further discussion of examinations of data in the possession of the government.

28. Cf. *Arizona v. Hicks*, 480 U.S. 321, 325 (1987) ("A search is a search, even if it happens to disclose nothing but the bottom of a turntable."); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 769 (1994) ("A search is a search, whether with Raybans or x-rays").

29. Kerr, *supra* note 4, at 503, 507, 525; accord Ohm, *supra* note 1, para. 72 (expressing skepticism that a "unified theory" in this context "can ever be found").

30. See *infra* Section II.A.

pers, and effects.”³¹ Why? It says so in the Fourth Amendment. The Amendment’s enumeration of these “constitutionally protected areas”—a legal phrase once in vogue but largely abandoned after *Katz*³²—buttresses the sense that Fourth Amendment “searches” target tangible objects or spaces and further clarifies the Amendment’s scope.

As a result of the “persons, houses, papers, and effects” limit, many investigative techniques that satisfy a commonsense definition of “search” should not trigger Fourth Amendment protections. For example, restrictions on public surveillance must be left to the legislature. Visual and audio surveillance of public streets and parks might constitute a search, but not a search of a “person,” “paper,” “house,” or “effect.” (As I will explain, there is a subtle, but inescapable, textual distinction between searching a person and searching *for* a person.)³³ Importantly for this analysis—and as explained in detail below—intangible items like a person’s voice, image, or cell phone signals do not constitute “effects” under any plausible interpretation of the term.³⁴

There is one more piece. A Fourth Amendment textualist can jettison all of the baggage that comes along with *Katz*, including “third-party doctrine”: the much-maligned rule that holds that “a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.”³⁵ But hold the applause. The textualist will sometimes reach results that track third-party doctrine. This is not because anyone who interacts with humans “assumes the risk” of betrayal, or any of the various strained rationales offered by the Supreme Court.³⁶ Instead, a textualist would apply the textually and historically supported principle that Fourth Amendment rights are personal.³⁷ Claimants can only obtain redress for a “search” of “their persons, houses, papers, and effects.”³⁸ As a result, under a text-focused approach, a murder suspect cannot invoke the Fourth Amendment in response to a search of the victim’s papers.³⁹ Suspects can, however, invoke Fourth Amendment protection against government access of *their* papers stored by

31. U.S. CONST. amend. IV.

32. See *infra* Part I. The phrase is making a partial comeback in the “trespassory search” context. See *Florida v. Jardines*, 569 U.S. 1, 7 (2013); *infra* note 49.

33. See *infra* Section II.A.

34. See *infra* Section II.C.

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

36. See *Kerr*, *supra* note 17, at 564 (noting that “even the U.S. Supreme Court has never offered a clear argument in its favor”); Christopher Slobogin, *Subpoenas and Privacy*, 54 DEPAUL L. REV. 805, 829 (2005) (describing assumption-of-risk rationale as “pure judicial fiat”).

37. See *Rakas v. Illinois*, 439 U.S. 128, 133–34 (1978) (“Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.” (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969))); *infra* Section II.D.

38. U.S. CONST. amend. IV.

39. This is also true under current Fourth Amendment “standing” doctrine. See *infra* Section II.D.

others, such as those in “the cloud.”⁴⁰ This simple, textually grounded logic solves one of the toughest riddles spawned by the *Katz* test: Why doesn’t the “burglar plying his trade in a summer cabin during the off season . . . have a thoroughly justified subjective expectation of privacy”?⁴¹ The Supreme Court’s answer is that the burglar’s admittedly *reasonable* expectation “is not one which the law recognizes as ‘legitimate.’”⁴² A textualist need not engage in this vacuous wordplay. Police engage in a “search” of a house when they enter the summer cabin to detect the off-season burglar. The burglar has no redress because it is not a search of *the burglar’s* house.

That’s basically it: a comprehensive alternative to Fourth Amendment “search” jurisprudence in a couple paragraphs. A Fourth Amendment textualist need only isolate the challenged government conduct and discern if there was a “search”—as that term is commonly understood—of the complaining party’s (“their”) “person,” “house,” “papers,” or “effects.” This straightforward analysis replaces both prongs of *Katz’s* “reasonable expectation of privacy” test; the supplementary “trespassory search” test introduced by the Supreme Court in 2012⁴³; all of third-party doctrine; Fourth Amendment “standing”; and five decades of meandering musings in the cases applying *Katz*.⁴⁴

Applying a textual analysis, the easy questions remain easy. A pat down of a suspect is a search of his person.⁴⁵ Entry into the defendant’s apartment is a search of her house.⁴⁶ Hard questions get simplified. In 2013, the Court sputtered when it addressed the introduction of a drug-sniffing police dog onto a residential property.⁴⁷ Unable to reach consensus under *Katz*, the justices applied a new, supplemental “trespassory search” test to find an answer.⁴⁸ A textualist approach simplifies the case.⁴⁹ Having a trained dog sniff

40. See David A. Couillard, Note, *Defogging the Cloud: Applying Fourth Amendment Principles to Evolving Privacy Expectations in Cloud Computing*, 93 MINN. L. REV. 2205, 2216 (2009) (“An external cloud platform is storage or software access that is essentially rented from (or outsourced to) a remote public cloud service provider, such as Amazon or Google.”); see also *infra* Section II.D.

41. *Rakas*, 439 U.S. at 143–44 n.12.

42. *Id.*

43. See *United States v. Jones*, 565 U.S. 400, 412 (2012).

44. See *infra* Part II.

45. *Terry v. Ohio*, 392 U.S. 1, 16 (1968) (“[I]t is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person’s clothing all over his or her body in an attempt to find weapons is not a ‘search.’”).

46. *Cf. Weeks v. United States*, 232 U.S. 383, 393 (1914) (finding Fourth Amendment violation in search of defendant’s house).

47. See *Florida v. Jardines*, 569 U.S. 1, 3, 7 (2013).

48. See *id.* at 7, 11.

49. While still in its infancy, the “trespassory search” test first announced in *Jones*, 565 U.S. 400, 406–09 (2012), resonates with the instant proposal by targeting police efforts to obtain information from textually delineated areas. See *Jardines*, 569 U.S. at 5 (“When ‘the Government obtains information by physically intruding’ on persons, houses, papers, or effects, ‘a ‘search’ within the original meaning of the Fourth Amendment’ has ‘undoubtedly occurred.’”)

around the property for narcotics is a Fourth Amendment search. The police examined a tangible space to uncover information (a “search”); the space (the curtilage) is protected by the Fourth Amendment as part of the home;⁵⁰ and it was the suspect’s (“their”) curtilage.

A text-based approach easily solves one of the notoriously difficult Fourth Amendment cases: the “use of a thermal-imaging device aimed at a private home from a public street.”⁵¹ The Court’s 5–4 answer in *Kyllo v. United States* (“yes, it’s a search”) rested on a host of reasons, including that any other conclusion “would leave homeowners at the mercy of advancing technology”⁵² and that the “technology in question is not in general public use.”⁵³ Fourth Amendment Textualism gives a better answer: agents’ use of a thermal-imaging device to uncover information about what was occurring inside a residence constitutes a search (an examination of an object or space to uncover information) of a house.

Focusing on the text rather than reasonable expectations of privacy clears up other incoherent areas of Fourth Amendment jurisprudence. A longstanding line of cases holds that when police direct drug-sniffing dogs to detect narcotics in luggage or vehicles, there is no “search.”⁵⁴ This outgrowth of the “reasonable expectation of privacy” test fails textual analysis. There is most certainly a Fourth Amendment search: an examination of a protected item (“effects”) to uncover information. Any determination that warrantless dog sniffs are constitutional should hinge on “reasonableness” (a separate component of the Fourth Amendment), not strained redefinitions of the term “search.”

As attractive as this textualist approach may sound, change will not be easy. Resistance can be expected on two fronts. First, many will doubt that a straightforward interpretation of the words in the Fourth Amendment can take the place of the intricate framework of present-day “search” jurisprudence. This belief probably explains the strangely radical feel of a proposal to interpret the Fourth Amendment according to the commonly understood

(quoting *Jones*, 565 U.S. at 406–07 n.3)). The test parts ways with the proposal, however, by depending on an “unlicensed physical intrusion” (rather than a search) to trigger a “search” finding, and in its status as a complement to, rather than a replacement for, the *Katz* test. *Id.* at 7, 11. For example, under a textualist approach, directing a drug-sniffing dog to sniff a house from the sidewalk would be a “search” of the house. It would not constitute a “trespassory search.” *Id.* at 25–26 (Alito, J., dissenting).

50. See *infra* Section II.B (discussing curtilage).

51. *Kyllo v. United States*, 533 U.S. 27, 29 (2001).

52. *Id.* at 29, 35.

53. *Id.* at 34.

54. See *Illinois v. Caballes*, 543 U.S. 405, 408–09 (2005); *United States v. Place*, 462 U.S. 696, 707 (1983); see also *United States v. Jacobsen*, 466 U.S. 109, 123 (1984) (“A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy.”).

meaning of its terms.⁵⁵ Legendary Fourth Amendment scholar Anthony Amsterdam summed up this sentiment in 1974: “As applied to law enforcement activities, the terms ‘searches,’ ‘seizures,’ ‘persons,’ ‘houses,’ ‘papers’ and ‘effects’ could not be more capacious or less enlightening.”⁵⁶ Obviously, I disagree. As I intend to show, these terms are as clear as any in the English language. It is their modern interpreters who bear all the blame.

Second, many commentators and some justices will fear that a textualist approach will not sufficiently protect privacy rights in an age of technological change.⁵⁷ One answer is that desired policy outcomes should not drive the interpretation of straightforward constitutional terms.⁵⁸ Any principled

55. Others have noted that the Court’s “reasonable expectation of privacy” test over-complicates the inquiry, with negative consequences. But the resulting proposals include similarly soaring “search” definitions, and/or fail to connect the definition with other textually required aspects of the Amendment. *See, e.g.*, *Morgan v. Fairfield County*, 903 F.3d 553, 568 (6th Cir. 2018) (Thapar, J., concurring in part and dissenting in part) (“[O]fficers conduct a search when they engage in a purposeful, investigative act.”); *State v. Allen*, 241 P.3d 1045, 1079 (Mont. 2010) (Nelson, J., concurring) (proposing that “a search occurs where a government agent looks over or through, explores, examines, inspects, or otherwise engages in conduct or an activity designed to find, extract, acquire, or recover evidence”); DAVID GRAY, *THE FOURTH AMENDMENT IN AN AGE OF SURVEILLANCE* 159–60 (2017) (arguing for a commonsense understanding of “search” that includes “making inquiry” or “trying to find,” coupled with an additional inquiry into “whether that act of searching or seizing threatens the right of the people to be secure against unreasonable searches and seizures”); Amar, *supra* note 28, at 757, 769, 811 (“[A] great many government actions can be properly understood as ‘searches’ or ‘seizures,’ especially when we remember that a person’s ‘effects’ may be intangible—as the landmark *Katz* case teaches us.”); Clark D. Cunningham, *A Linguistic Analysis of the Meanings of “Search” in the Fourth Amendment: A Search for Common Sense*, 73 IOWA L. REV. 541, 608 (1988) (urging a “semantically sophisticated reworking of ‘search’” that allows courts to “use common sense meanings of ‘search’ as” the “raw material for a newly refined and powerful meaning of ‘search’”). Justice Thomas recently pointed out the disconnect between the term “search” and *Katz*’s definition in calling for the Court to “reconsider” the test, but does not propose an alternative. *See Carpenter v. United States*, 138 S. Ct. 2206, 2238, 2246 (2018) (Thomas, J., dissenting).

56. Amsterdam, *supra* note 15, at 395–96; *see also* Solove, *supra* note 21, at 1517 (emphasizing that the “Fourth Amendment was written centuries ago, long before modern technology dramatically altered the ways the government can gather information”).

57. *See, e.g.*, *United States v. Jones*, 565 U.S. 400, 416–17 (2012) (Sotomayor, J., concurring) (suggesting that new technologies require revisiting the doctrine in light of “the Fourth Amendment’s goal to curb arbitrary exercises of police power and prevent ‘a too permeating police surveillance’” (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948))); Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 364 (1998) (“A normative liberal approach is particularly necessary in today’s world, where technology threatens to make all the details of one’s life detectable.”); Kerr, *supra* note 17, at 573 (discussing critique of third-party doctrine based on fears of permitting too much government intrusion).

58. *See* Ryan, *supra* note 24, at 1539 (“Where the text is clear, no one suggests that judges, legislators, or executive branch officials are free to ignore it because they disagree with what it requires or because they believe it is outdated.”); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 363 (1981) (“Even if one assumes that some constitutional provisions were intended to be molded to contemporary needs, these provisions are plainly bounded by their language.”); *supra* note 24.

application of a timeworn textual command will lead to results that commentators might not choose as a policy matter. That is how constitutional rules work—if you follow them. And legislatures can provide additional protections where appropriate.

A second response to fears that textualism will unduly shrink privacy protections is that there is little cause to celebrate the privacy-protective benefits of the status quo. While *Katz*'s “reasonable expectation of privacy” test always holds the promise of a desirable outcome, it often disappoints.⁵⁹ Most typically, the test's “famous malleability” benefits the government, not criminal defendants.⁶⁰ In contrast to the Court's current approach, Fourth Amendment Textualism ties the hands of the justices, both those who are friendly to privacy and those who are friendly to police. As a result, all “sides” of the privacy-versus-security debate⁶¹ will find benefits in an analysis tethered to the constitutional text. And even if it sometimes leads away from preferred outcomes, Fourth Amendment Textualism beats an inherently subjective approach of questionable legitimacy that turns on the shifting policy preferences of an increasingly politicized Supreme Court.⁶² This is particularly true in a political space where legislators and state courts can, and do, enhance protections when the Court comes up short.⁶³

59. See Colb, *supra* note 19, at 186 (criticizing the Supreme Court's post-*Katz* search doctrine as placing “much of what government officials do to investigate private citizens . . . outside the scope of the Fourth Amendment's protection”); Solove, *supra* note 21, at 1519 (“[T]he test has failed to live up to aspirations.”); Sundby, *supra* note 19, at 1771 (“The Fourth Amendment as a privacy-focused doctrine has not fared well with the changing times of an increasingly non-private world and a judicial reluctance to expand individual rights.”).

60. See Ohm, *supra* note 1, paras. 52–53; see also GRAY, *supra* note 55, at 159 (contending that the *Katz* test shrinks privacy protections by departing from a broader intuitive interpretation); Colb, *supra* note 19, at 120 (noting numerous scholars observed that “the decisions that followed *Katz* very narrowly defined the scope of protected privacy”); Sundby, *supra* note 19, at 1763 (arguing that *Katz*, “over the long term, resulted in an overall decline in the Amendment's protections”).

61. In addition to the familiar pro-privacy and pro-police sides, there is another side to the debate that emphasizes not the perils of new technology for those subject to government scrutiny, but its promise. See, e.g., I. Bennett Capers, *Race, Policing, and Technology*, 95 N.C. L. REV. 1241, 1271 (2017) (emphasizing “the way technology can deracialize and de-bias policing”).

62. See Clancy, *supra* note 57, at 340 (“[W]hile a liberal Court substituted privacy in lieu of property analysis to expand protected interests, a conservative Court has employed privacy analysis as a vehicle to restrict Fourth Amendment protections.”).

63. For example, after the Supreme Court declined to extend Fourth Amendment protection to wiretaps, Congress enacted a statute governing federal and state wiretaps. See *infra* notes 100–101. For a summary of other congressional privacy legislation, see Freiwald & Smith, *supra* note 12, at 208–11 (describing provisions of the Electronic Communication Privacy Act, the Stored Communications Act, and the Tracking Device Statute). States, too, mandate greater protections than the federal constitution requires. See, e.g., N.H. CONST. art. 2-b (“An individual's right to live free from governmental intrusion in private or personal information is natural, essential, and inherent.”); *People v. De Bour*, 352 N.E.2d 562, 566–67 (1976) (mandating a series of requirements for police–citizen encounters under New York state law).

Not only is there a viable text-based alternative to today's broken-down "search" jurisprudence, there is a model for the required jurisprudential shift. Current Fourth Amendment "search" jurisprudence looks remarkably like the Supreme Court's pre-2004 treatment of the Sixth Amendment right to confront adverse witnesses.⁶⁴ Between 1980 and 2004, the Supreme Court applied a line of cases based on *Ohio v. Roberts*⁶⁵ that allowed prosecutors to introduce out-of-court statements from absent witnesses, so long as those statements were reliable.⁶⁶ This approach, the Court claimed, enforced the confrontation right's underlying "purpose to augment accuracy in the fact-finding process."⁶⁷ Over the years, the justices and lower courts employed a variety of shifting tests to assess reliability, resulting in inconsistency and a free hand for prosecutors to override defendants' confrontation rights.⁶⁸ After twenty-five years, the Supreme Court finally gave up. It recognized that its precedent created a reliability test that was "amorphous, if not entirely subjective"⁶⁹ and had "strayed far from the constitutional text and history."⁷⁰ Sound familiar? To take its place, an eight-justice majority (including three members of the current Court) crafted a new test derived from the Sixth Amendment text.⁷¹ The Court's Fourth Amendment "search" jurisprudence seems primed for the same evolution. This Article seeks to initiate that process.

The Article proceeds in three parts. Part I explains how we came to the present predicament. The Court's "search" jurisprudence follows a reasonably stable trajectory until *Katz*. Post-*Katz*, the doctrine's foundation on "reasonable expectations of privacy" causes the case law to spin out of control. Part II sets out the proposed textualist approach to Fourth Amendment

64. U.S. CONST. amend. VI.

65. 448 U.S. 56 (1980).

66. See *Crawford v. Washington*, 541 U.S. 36, 42 (2004) ("*Roberts* says that an unavailable witness's out-of-court statement may be admitted so long as it has adequate indicia of reliability . . ."); *Roberts*, 448 U.S. at 65 (setting out "a general approach" to the confrontation right).

67. *Roberts*, 448 U.S. at 65.

68. *Crawford*, 541 U.S. at 63 (summarizing these problems); see also *Ohio v. Clark*, 135 S. Ct. 2173, 2185 (2015) (Scalia, J., concurring) (describing the pre-*Crawford* period as the "halcyon era for prosecutors").

69. *Crawford*, 541 U.S. at 63.

70. Stephanos Bibas, Essay, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 190 (2005); see *Crawford*, 541 U.S. at 63 (identifying as the "unpardonable vice of the *Roberts* test" "its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude").

71. *Crawford*, 541 U.S. at 51 (relying on the text and definitions drawn from 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) [hereinafter WEBSTER'S], to craft a new framework). The Court later fudged the new Confrontation Clause framework a bit, sowing the seeds for jurisprudential slippage. But that is the story for another article. See Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause*, 92 B.U. L. REV. 1865, 1871 (2012) (praising and critiquing the Court's modern Confrontation Clause jurisprudence).

“search” analysis. This Part defines the operative terms and principles and illustrates how a textualist approach cleanly identifies Fourth Amendment “searches.” Part III applies Fourth Amendment Textualism to a broad variety of scenarios. The prevailing wisdom is that technological advances make straightforward Fourth Amendment “search” analysis impossible. Part III shows that this wisdom is unsound. Far from “embarrassing the future,” Fourth Amendment Textualism (1) produces straightforward answers in individual cases; and (2) generates a predictable, sensible, and legitimate Fourth Amendment “search” jurisprudence far superior to the status quo.

I. A SHORT HISTORY OF THE CURRENT PREDICAMENT

There are terms in the Constitution that are hard to define: “due process,”⁷² “cruel and unusual,”⁷³ “equal protection,”⁷⁴ “unreasonable.”⁷⁵ The list is long. “Search” is not on it. The word “search” is neither vague nor a legal term of art with a technical meaning. It was in common use at the time of the Framing, and meant then what it means now.⁷⁶

Until the Court decided *Katz v. United States*⁷⁷ in 1967, there were few indications that applying the term “search” required sophisticated legal analysis. Courts casually considered whether police conduct constituted a search in the colloquial sense—if so, the police typically needed a warrant. This Part summarizes the early jurisprudence (Section A), the Court’s sharp turn away from the text in *Katz* (Section B), and the resulting distortions in Fourth Amendment “search” jurisprudence (Section C).

A. *The Pre-Katz Era’s Casual Textualism*

Early Fourth Amendment cases typically did not dig into the privacy implications of police conduct. Instead, they sought to root out “the misuse of governmental power of compulsion.”⁷⁸ This focus on government abuse follows from the text and history of the Fourth Amendment.⁷⁹ The Amendment prohibits unreasonable “searches” and “seizures.” It does not mention “privacy.”⁸⁰

Unhindered by the task of assessing reasonable expectations of privacy, pre-*Katz* disputes about Fourth Amendment searches turned on characterizing the government conduct in question. The courts had no trouble labeling

72. U.S. CONST. amends. V, XIV.

73. U.S. CONST. amend. VIII.

74. U.S. CONST. amend. XIV.

75. U.S. CONST. amend. IV.

76. See *infra* Section II.A; *infra* note 142.

77. 389 U.S. 347 (1967).

78. *Olmstead v. United States*, 277 U.S. 438, 463 (1928) (highlighting “the misuse of governmental power of compulsion” as the core of the Fourth Amendment principle).

79. See *infra* Part II for further discussion of the history.

80. U.S. CONST. amend. IV.

intrusions into the home and other properties.⁸¹ Government efforts “to obtain entrance to a man’s house or office by force” and “seize his private papers” constituted paradigmatic Fourth Amendment “searches.”⁸² A “search” also occurred when an agent achieved the same end “by stealth,” gathering up the defendant’s papers after sneaking onto his property,⁸³ or obtaining entry after coming upon a spare key.⁸⁴

The only pre-telephone difficulty in the case law concerned indirect approaches to obtaining evidence, such as subpoenas. Despite some early resistance, the justices ultimately coalesced around the idea that a subpoena commanding a recipient to produce “private papers” constitutes a “search” under the Fourth Amendment.⁸⁵ This debate produced the most rhetorically ambitious of the early Fourth Amendment cases, *Boyd v. United States*.⁸⁶ Later justices and commentators commend *Boyd* for rejecting “a narrowly literal conception of ‘search and seizure.’”⁸⁷ But, in truth, the opinion remained faithful to the text, sensibly equating “a compulsory production of a man’s private papers” with a “search and seizure” of those same papers.⁸⁸

The idea underlying the subpoena cases, which remains sound today, is that the government cannot avoid the Fourth Amendment’s restrictions by commandeering a private citizen to search on its behalf. If the police order a

81. See, e.g., *Agnello v. United States*, 269 U.S. 20, 32 (1925) (“The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws.”); *Amos v. United States*, 255 U.S. 313, 316 (1921) (highlighting the “unconstitutional character of the seizure” where police entered defendant’s home without a warrant); *Gouled v. United States*, 255 U.S. 298, 305 (1921) (holding it unconstitutional to remove papers from defendant’s “house or office” without a warrant).

82. *Gouled*, 255 U.S. at 305; *Adams v. New York*, 192 U.S. 585, 598 (1904) (highlighting the purpose of the Fourth Amendment “to punish wrongful invasion of the home of the citizen or the unwarranted seizure of his papers and property”).

83. *Gouled*, 255 U.S. at 305.

84. *Weeks v. United States*, 232 U.S. 383, 386 (1914) (finding a Fourth Amendment violation where police searched defendant’s house after “being told by a neighbor where the key was kept, found it and entered the house”).

85. Compare *Boyd v. United States*, 116 U.S. 616, 630 (1886) (extending the Constitution’s protection to “any forcible and compulsory extortion of a man’s . . . private papers”), with *id.* at 639–41 (Miller, J., concurring) (arguing that there “is in fact no search and no seizure” generated by “the mere service of a notice to produce a paper”). For an endorsement of the *Boyd* Court’s conclusion, see *Olmstead v. United States*, 277 U.S. 438, 460 (1928).

86. 116 U.S. 616.

87. *Lopez v. United States*, 373 U.S. 427, 456 (1963) (Brennan, J., dissenting); *Boyd*, 116 U.S. at 635 (rejecting a “close and literal construction” of the Fourth and Fifth Amendments in favor of “the rule that constitutional provisions for the security of person and property should be liberally construed”); Clancy, *supra* note 57, at 312 (suggesting that *Boyd* represents a “liberal construction” of the Fourth Amendment as opposed to “a literal one”).

88. *Boyd*, 116 U.S. at 622 (“[A] compulsory production of a man’s private papers . . . is within the scope of the Fourth Amendment . . . in all cases in which a search and seizure would be”); accord *Olmstead*, 277 U.S. at 460 (“It was certainly no straining of the language to construe the search and seizure under the Fourth Amendment to include such official procedure.”).

neighbor to go into a suspect's house and ferret out the suspect's papers, it would constitute a "search" (and "seizure"). The result should be no different when the police direct their order at the suspect.⁸⁹

These early cases, although at times conclusory in their reasoning, recognized that Fourth Amendment protections only reached searches of the items enumerated in its text. As the Supreme Court emphasized in 1928: "The Amendment itself shows that the search is to be of material things—the person, the house, his papers or his effects."⁹⁰ This helped the Court identify a Fourth Amendment violation when the government opened sealed letters entrusted to the United States Postal Service.⁹¹ The Court's analysis contains no hand-wringing about assumptions of risk, entrustment to third parties (the government no less!), or privacy expectations.⁹² The reasoning is simple: "The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be."⁹³

The first signs of a coming storm appeared as the Supreme Court's emphasis on the Fourth Amendment's text generated a distinction between the government's ability to intercept written documents and oral conversations. The former were "papers"; the latter were not. This dichotomy led to the now-maligned principle that the interception of oral conversations outside any "house" or "effect" did not constitute a "search."⁹⁴ The principle featured most prominently in *Olmstead v. United States*, where federal Prohibition agents intercepted the defendant's private conversations by tapping into phone lines from a public street and an office building basement.⁹⁵ The *Olmstead* majority found no "search."⁹⁶ The Court reasoned that any other conclusion would strain "the possible practical meaning of houses, persons, papers, and effects" and "apply the words search and seizure" to "forbid

89. *Cf. Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 202 n.28 (1946) (describing cases as "figurative" or "constructive" search cases).

90. *Olmstead*, 277 U.S. at 464.

91. *Id.*

92. *See id.* ("The letter is a paper, an effect, and in the custody of a Government that forbids carriage, except under its protection."); *Weeks v. United States*, 232 U.S. 383, 390 (1914) (explaining that the Fourth Amendment protects "letters and sealed packages in the mail"); *Ex parte Jackson*, 96 U.S. 727, 733 (1877) (explaining that the Constitution's protections extend to a person's papers "wherever they may be").

93. *Ex parte Jackson*, 96 U.S. at 733.

94. *See United States v. White*, 401 U.S. 745, 748 (1971) (explaining that "[u]ntil *Katz v. United States*, neither wiretapping nor electronic eavesdropping violated a defendant's Fourth Amendment rights 'unless there has been . . . an actual physical invasion of his house "or curtilage"' (quoting *Olmstead*, 277 U.S. at 466)); Coombs, *supra* note 18, at 1608 (describing the pre-*Katz* distinctions as among the "patent absurdities in the case law").

95. *Olmstead*, 277 U.S. at 456–57; *accord Berger v. New York*, 388 U.S. 41, 50 (1967) (describing *Olmstead* as the Court's "first wiretap case").

96. *Olmstead*, 277 U.S. at 466 (holding that "the wire tapping here disclosed did not amount to a search or seizure within the meaning of the Fourth Amendment").

hearing or sight.”⁹⁷ Privacy advocates decried the result,⁹⁸ but it followed a familiar pattern: the Court measured the challenged conduct against the textual ingredients of the Fourth Amendment. The dissenters, predictably, criticized the majority’s “unduly literal construction” of the Fourth Amendment.⁹⁹

After *Olmstead*, privacy advocates obtained recourse from the legislature.¹⁰⁰ Congress crafted a comprehensive statutory regime restricting wiretaps to fill the clear void left by the Supreme Court’s interpretation of the Fourth Amendment.¹⁰¹ All in all, pre-*Katz* “search” doctrine is a success story built on narrow rulings and sensible legislative responses. These cases provide an initial answer to the objection that a simplified “search” test is not viable. It worked for two hundred years.

B. *Katz* and the “Reasonable Expectation of Privacy” Test

Katz changed everything. Dissatisfied with the formalistic tenor of its doctrine, the Supreme Court in *Katz v. United States* changed both the tone of its Fourth Amendment “search” decisions and the method of analysis. The consequences reverberate today.

The FBI agents in *Katz* knew their case law.¹⁰² They listened in on Charles Katz’s half of a private phone call using a technique analogous to the “detectaphone” the Court had approved in an earlier case, *Goldman v. United States*.¹⁰³ Specifically, the officers placed an electronic recording device on top of a public phone booth Katz frequented.¹⁰⁴ By not intruding onto the “person, papers, houses, or effects” of the suspect, the officers (who had no

97. *Id.* at 465.

98. See Solove, *supra* note 2, at 1131 (“At the time of *Olmstead*, many viewed wiretapping with great unease.”).

99. *Olmstead*, 277 U.S. at 476 (Brandeis, J., dissenting); see also *id.* at 488 (Butler, J., dissenting) (critiquing the majority for following the “literal meaning of the words” rather than the “principles” underlying them).

100. See *Berger*, 388 U.S. at 51 (“Congress soon thereafter, and some say in answer to *Olmstead*, specifically prohibited the interception without authorization and the divulging or publishing of the contents of telephonic communications.”).

101. See Omnibus Crime Control and Safe Streets Act of 1968, § 802, 18 U.S.C. §§ 2510–2520 (2012) (governing wiretaps); *United States v. Marion*, 535 F.2d 697, 702 (2d Cir. 1976) (emphasizing that federal statute places restrictions even on state wiretaps).

102. See Oral Argument at 1:02, 50:31, *Katz v. United States*, 389 U.S. 347 (1967) (No. 35), <https://www.oyez.org/cases/1967/35> (reporting Katz’s attorney’s acknowledgement that the agents “did their homework” and the government attorney’s explanation that agents did not seek a warrant because of their “reliance on *Goldman*”).

103. 316 U.S. 129, 135 (1942) (rejecting contention that agents triggered the Fourth Amendment when they attached a “detectaphone” to a wall to overhear conversations next door); see *Katz*, 389 U.S. at 348 (noting that FBI agents listened to “petitioner’s end of telephone conversations”).

104. *Katz*, 389 U.S. at 348.

warrant) sought to remain on the “no-search” side of the constitutional divide.¹⁰⁵

Unfortunately for the officers, the Supreme Court in *Katz* disavowed its precedents, concluding that “the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the ‘trespass’ doctrine there enunciated can no longer be regarded as controlling.”¹⁰⁶ Applying a new kind of Fourth Amendment analysis, the majority concluded, “The Government’s activities in electronically listening to and recording the petitioner’s words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a ‘search and seizure’ within the meaning of the Fourth Amendment.”¹⁰⁷

The *Katz* majority made no effort to connect this new analysis to the constitutional text. In fact, the opinion criticizes the parties for directing their arguments to whether the phone booth was a “constitutionally protected area”—and never reveals whether the FBI searched Katz’s “person,” “papers,” “houses,” or “effects.”¹⁰⁸ The majority avoided this question by famously proclaiming that “the Fourth Amendment protects people, not places”: Katz, having “shut[] the door behind him, and pa[id] the toll that permits him to place a call,” was entitled to his privacy.¹⁰⁹

Sensing that this seismic doctrinal shift required further explication, Justice Harlan added a short concurrence that summarized his understanding of the Court’s new approach. Harlan explained that the majority had crafted a “twofold requirement” to identify a Fourth Amendment “search”: “first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”¹¹⁰ The test became known as the “reasonable expectation of privacy” test, reflecting that, while the test nominally has two prongs, the second prong—whether the person’s expectation of privacy was reasonable—ultimately divides “searches” from non-searches.¹¹¹

It is worth pausing briefly to consider the origins of the *Katz* test. While strangely overlooked in contemporary discourse, the test’s bizarre beginnings foreshadow the maddening subjectivity that would come to define “search” doctrine. Commentators typically credit Justice Harlan for spinning

105. See *Goldman*, 316 U.S. at 135 (rejecting challenge to analogous procedure).

106. *Katz*, 389 U.S. at 353. Contrary to the Court’s characterization, its prior decisions “never adopted a trespass test.” Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 89.

107. *Katz*, 389 U.S. at 353.

108. *Id.* at 351.

109. *Id.* at 351–52.

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

111. See Orin S. Kerr, *Katz Has Only One Step: The Irrelevance of Subjective Expectations*, 82 U. CHI. L. REV. 113, 113–14 (2015) (“A majority of courts that apply *Katz* do not even mention the subjective inquiry; when it is mentioned, it is usually not applied; and when it is applied, it makes no difference to outcomes.”).

the “reasonable expectation of privacy” test out of “thin air.”¹¹² But in a recent law review article, Katz’s attorney claims credit, explaining that he pieced together the test just in time to unveil it at oral argument.¹¹³ Justice Thomas highlighted this inglorious pedigree to belittle the *Katz* test in his *Carpenter* dissent: “[T]he parties did not discuss it in their briefs. The test appears to have been presented for the first time at oral argument by one of the defendant’s lawyers.”¹¹⁴ It’s a good story. But the truth is even better. The “reasonable expectations of privacy” test *is* debated in the briefs in *Katz*, just not how you would expect. It first appears in the *government’s* brief, which states, “The rights of privacy reflected in the guarantees of the Fourth Amendment must be measured in terms of the reasonable expectations of a person in a given location that he is free from scrutiny.”¹¹⁵

Katz’s reply brief highlights this quote, but only to criticize it as “misinterpret[ing] the purport of the Fourth Amendment.”¹¹⁶ At oral argument the parties swapped positions. Katz’s attorney embraced something like the above-quoted test, repackaging it as the “tort reasonableness test” and focusing on whether an outside observer would think an intercepted statement had been made in confidence.¹¹⁷ That’s close to the *Katz* test, but Harlan’s

112. Peter Winn, *Katz and the Origins of the “Reasonable Expectation of Privacy” Test*, 40 MCGEORGE L. REV. 1, 9 (2009) (“Until recently, most observers treated the test as if Harlan made it up out of thin air.”); see Paul A. Clark, *Do Warrantless Breathalyzer Tests Violate the Fourth Amendment?*, 44 N.M. L. REV. 89, 90 n.8 (2014) (stating that Justice Harlan “first articulated the ‘reasonable expectation of privacy’ standard”); Paul Ohm, *The Fourth Amendment in a World Without Privacy*, 81 MISS. L.J. 1309, 1333 (2012) (stating that Justice Harlan “invented the reasonable expectation of privacy test in his *Katz* concurrence”).

113. Harvey A. Schneider, *Katz v. United States: The Untold Story*, 40 MCGEORGE L. REV. 13, 19 (2009) (“Then it hit me. We (both the Court and the attorneys) had it all wrong. . . . [T]he test was whether a reasonable person (TARM) could have expected his communication to be private.”); Winn, *supra* note 112, at 9 (“The test is not mentioned in the record of the lower courts, or in the pleadings and briefs filed in the Supreme Court. . . . [T]he idea came from the lawyers—specifically one lawyer—Harvey (now Judge) Schneider who, with Burton Marks, represented the petitioner, Charles Katz.”).

114. *Carpenter v. United States*, 138 S. Ct. 2206, 2237 (2018) (Thomas, J., dissenting) (“The lawyer, a recent law-school graduate, apparently had an ‘[e]piphan[y]’ while preparing for oral argument.” (alteration in original) (quoting Schneider, *supra* note 113, at 18)).

115. Brief for Respondent at 15, *Katz*, 389 U.S. 347 (No. 35), 1967 WL 113606, at *15. As this finding contradicts conventional wisdom and does not seem to be recognized in any case or secondary source, I compared the historical briefs available on Westlaw against the copies in another historical collection, *The Making of Modern Law: U.S. Supreme Court Records and Briefs, 1832-1978*, GALE, <https://www.gale.com/c/making-of-modern-law-us-supreme-court-records-and-briefs-1832-1978> [<https://perma.cc/8PFG-9T5X>]. The language is identical.

116. See Reply Brief for Petitioner at 5, *Katz*, 389 U.S. 347 (No. 35), 1967 WL 113607, at *5 (“Respondent’s statement that ‘The right of privacy reflected in the guarantees of the Fourth Amendment must be measured in terms of the reasonable expectations of a person in a given location that he is free from scrutiny’ misinterprets the purport of the Fourth Amendment.” (internal citation omitted) (quoting Brief for Respondent, *supra* note 115, at 15)).

117. See Oral Argument, *supra* note 102, at 23:16 (“[W]e propose a test using, in a way it’s not too dissimilar from . . . that tort reasonable man test. . . . [W]e would ask that the test be applied as to whether or not a third person, objectively looking at the entire scene, could rea-

“reasonable expectation of privacy” test mirrors the “reasonable expectations” formulation in the government’s brief. This confusion is all too fitting. Even the *Katz* test’s origins are misunderstood. And the truth is better than fiction. The first application of the “reasonable expectation of privacy” test was a historic loss for the party who proposed it.

Overlooking these unpromising origins, subsequent Supreme Court opinions adopted the “reasonable expectation of privacy” test as the controlling method for determining whether challenged conduct constitutes a Fourth Amendment “search.”¹¹⁸ These later decisions also embrace *Katz*’s methodology—abstracting to a principle underlying the Fourth Amendment (privacy) and then applying that principle rather than the Amendment’s text. After *Katz*, the Court consistently explains that “the application of the Fourth Amendment depends on whether the person invoking its protection can claim a ‘justifiable,’ a ‘reasonable,’ or a ‘legitimate expectation of privacy’ that has been invaded by government action.”¹¹⁹ Although the Court occasionally acknowledges the Amendment’s limited application to “persons, houses, papers, and effects,” *Katz*’s “people not places” directive renders this language largely superfluous.¹²⁰ After *Katz*, the definition that counts is a definition of “privacy.”

C. *Post-Katz Textual Drift*

The *Katz* test is circular.¹²¹ The privacy we can reasonably expect depends on the privacy the Supreme Court tells us we have.¹²² As a result, the test is best understood as a formulaic incantation that precedes an answer, “a mere ornament, not connected with the mechanism at all.”¹²³ The Court

sonably interpret, and could reasonably say, that the communicator intended his communication to be confidential.”)

118. See *Smith v. Maryland*, 442 U.S. 735, 739–40 (1979) (identifying *Katz* as “our lodestar” for “determining whether a particular form of government-initiated electronic surveillance is a ‘search’ within the meaning of the Fourth Amendment,” directing an inquiry as to whether (1) “the individual, by his conduct, has ‘exhibited an actual (subjective) expectation of privacy,’” and (2) “the individual’s subjective expectation of privacy is ‘one that society is prepared to recognize as ‘reasonable’” (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring))).

119. *Id.* at 740.

120. See *Katz*, 389 U.S. at 353; see *Freiwald & Smith*, *supra* note 12, at 222 (noting that the Court no longer “insists that the interest intruded upon be one of the categories explicitly mentioned in the Fourth Amendment”).

121. See *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (acknowledging criticism that the *Katz* test is “circular, and hence subjective and unpredictable”); H. Richard Uviller, *Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1137, 1195 (1987) (“The Court seems oddly and stubbornly oblivious to the obvious circularity”); Winn, *supra* note 112, at 1, 7 (“Harlan’s famous test appears to be circular.”).

122. See *Baude & Stern*, *supra* note 22, at 1824 (“Privacy is the answer to be given, not the question to be asked”).

123. *Id.* at 1825 (quoting LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 270, at 94–95 (G.E.M. Anscombe trans., 3d ed. 1953)).

barely plays along anymore, acknowledging that “no single rubric definitively resolves which expectations of privacy are entitled to protection.”¹²⁴ Expectations of privacy are reasonable or legitimate when the Court says so. The way to find out is to ask.¹²⁵ But be prepared to wait. “[O]n average, only about one case per year concerns some aspect of the reasonable expectation of privacy test.”¹²⁶

The Supreme Court’s sole effort to work through the mechanism of the *Katz* test appears in a footnote in the 1978 case *Rakas v. Illinois*.¹²⁷ There, the Court states, “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.”¹²⁸ You can drive a bus through that last bit, returning us to precisely where we started. It wasn’t long before justices started noticing that the reasonable expectations of privacy recognized by society “bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable.”¹²⁹

Courts attempting to apply *Katz* generally skip over the unhelpful “reasonable expectation of privacy” test to the three broad categories of government intrusions that dominate post-*Katz* jurisprudence: (1) information exposed to the public;¹³⁰ (2) information provided to a third party;¹³¹ and (3) information that reveals only the possession of contraband.¹³² When the government obtains information that falls into any of these three categories there is typically (but not always) no search because such conduct does not invade a “reasonable expectation of privacy.”

124. *Carpenter v. United States*, 138 S. Ct. 2206, 2213–14 (2018); *Byrd v. United States*, 138 S. Ct. 1518, 1527 (2018) (“[T]he Court has not set forth a single metric or exhaustive list of considerations to resolve the circumstances in which a person can be said to have a reasonable expectation of privacy”); *O’Connor v. Ortega*, 480 U.S. 709, 715 (1987) (“We have no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable.”).

125. *Cf. Kerr*, *supra* note 4, at 505 (“[S]ome suggest that the only way to identify when an expectation of privacy is reasonable is when five Justices say so.”).

126. *Id.* at 538.

127. 439 U.S. 128, 143 n.12 (1978); *see Slobogin & Schumacher*, *supra* note 20, at 731 (highlighting the *Rakas* footnote as providing the sole guidance in this context).

128. *Rakas*, 439 U.S. at 143 & n.12.

129. *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring).

130. *Katz v. United States*, 389 U.S. 347, 351 (1967) (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”).

131. *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979) (“This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.”).

132. *Illinois v. Caballes*, 543 U.S. 405, 408–09 (2005) (“We have held that any interest in possessing contraband cannot be deemed ‘legitimate,’ and thus, governmental conduct that *only* reveals the possession of contraband ‘compromises no legitimate privacy interest.’” (quoting *United States v. Jacobsen*, 466 U.S. 109, 123 (1984))).

When the government obtains information in a way that does not implicate these three “no-search” categories, the Supreme Court typically (but not always) deems the conduct a search. Thus, in *Kyllo v. United States*, (1) the defendant did not expose his marijuana grow-house to the public; (2) the government did not obtain knowledge of its existence through a third party; and (3) the government’s “thermal-imaging device” revealed more than just the presence of contraband (e.g., “that someone left a closet light on”).¹³³ That’s a “search.” Similarly, in *Arizona v. Hicks*, the Court found a “search” when, suspecting it was stolen, an officer moved a stereo to expose its serial number.¹³⁴ The serial number had not been exposed to public view or obtained from a third party, and the investigative technique was not restricted to discovering contraband.¹³⁵ (There might have been a treasure map pinned to the back of the stereo or embarrassing dust bunnies.)

But that’s just a descriptive guide. The three categories identified above do little analytical work. The engine driving modern “search” jurisprudence is an ever-expanding catalogue of Supreme Court opinions identifying which cases fall where—all striving to channel the elusive expectations of privacy that “society is prepared to recognize as ‘reasonable.’”¹³⁶ This means that the Court need not ever fully define the categories or adhere to their (unspecified) bounds. Instead, the Court embraces the free hand *Katz* provides to expand, contract, or ignore these categories to reach the “best” outcome. Perhaps no case illustrates this freedom more than *Carpenter*. The location information obtained by the government in *Carpenter* fit into both the first (exposed to public) and second (obtained from a third party) “no-search” categories.¹³⁷ The *Carpenter* majority simply moved the goalposts, depositing the case into its own category of one, something *Katz* not only allows but demands.

The Supreme Court has only itself to blame. *Katz*’s “reasonable expectation of privacy” test upended a fairly coherent methodology for identifying Fourth Amendment “searches.” Prior to *Katz*, some cases came out wrong and the reasoning was, at times, breezy and obscure, but the questions the Court asked made sense. Not so after *Katz*. As Justice Thomas pointed out in *Carpenter*, “[a]fter 50 years, it is still unclear what question the *Katz* test is even asking.”¹³⁸ The “cases are all over the map,” and the Court’s opinions “have declined to resolve the confusion.”¹³⁹ What more is there to say? “The

133. 533 U.S. 27, 29, 38 (2001).

134. 480 U.S. 321, 325 (1987).

135. *Hicks*, 480 U.S. at 325 (finding search where officer “exposed to view concealed portions of the apartment or its contents”).

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

137. See *supra* notes 6–12.

138. *Carpenter v. United States*, 138 S. Ct. 2206, 2245 (2018) (Thomas, J., dissenting).

139. Kerr, *supra* note 4, at 505; cf. Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 616–17 (1996) (“[O]ver the past thirty years the *Katz* approach has degenerated into a stand-

[Katz] test is ambiguous, ahistorical, unpredictable, and fundamentally un-legal.”¹⁴⁰ Un-textual too.¹⁴¹

II. A RETURN TO THE FOURTH AMENDMENT’S TEXT

As the preceding discussion illustrates, the ambitious approach pioneered by the Supreme Court in *Katz* is a failure. It is time to shift to another path. This Article proposes a return to the spirit of the pre-*Katz* case law, supplemented by the rigor of modern textual interpretation. Excising *Katz*’s “reasonable expectation of privacy” test from Fourth Amendment jurisprudence returns the Fourth Amendment’s text and its “constitutionally protected areas” to the center of the inquiry. Cases will turn on whether a challenged government intrusion constitutes a “search”—as the term is commonly understood—and, if so, whether it was a search of the claimant’s (“their”) “person,” “house,” “paper,” or “effect.” The Introduction sketched out the general approach. This Part fleshes out the inquiry, defining each of the essential terms. As the discussion shows, the definitions are straightforward, leading to a coherent, replicable analysis that can replace the entirety of post-*Katz* “search” jurisprudence.

A. Defining “Search”

The pre-*Katz* cases did not define the term “search.” The oversight is understandable. Past, present, and future, the word “search” has a well-understood meaning accessible to anyone with a command of the English language.¹⁴² That said, new technologies and innovative law enforcement

ardless ‘expectations’ analysis that has failed to protect either privacy or property interests.”); Colb, *supra* note 19, at 123 (describing “the instability and poverty of Fourth Amendment doctrine” in this context); Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 766 (2012) (“[B]y raising far more questions than it answered, *Katz*’s imprecise formulation spurred years of litigation.”).

140. Baude & Stern, *supra* note 22, at 1888.

141. See Freiwald & Smith, *supra* note 12, at 222 (recognizing that the Court’s current approach is not “a textual approach”).

142. See *Carpenter*, 138 S. Ct. at 2238 (Thomas, J., dissenting) (“The word was probably not a term of art, as it does not appear in legal dictionaries from the era. And its ordinary meaning was the same as it is today”); *Kyllo v. United States*, 533 U.S. 27, 33 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.’” (alteration in original) (quoting 2 WEBSTER’S, *supra* note 71)); GRAY, *supra* note 55, at 160 (explaining that the term “would not have carried the weight of any technical meaning for most eighteenth-century American readers”). The “Corpus of Founding Era American English,” a collection of 119,801 texts written between 1760 and 1799, includes 1,685 documents that use the term “search.” *Corpus of Founding Era American English (COFEA)*, BYU LAW, <https://lawcorpus.byu.edu/cofea/search/match;q=search> (search results on file with the *Michigan Law Review*).

tactics can challenge even a familiar term.¹⁴³ And the pre-*Katz* case law would have benefitted from more rigorous textual analysis, including serious reflection about what constitutes a “search.”¹⁴⁴ This Section lays out a comprehensive definition of the term “search,” drawing on historical sources, textual interpretation, and common sense.¹⁴⁵

Dictionaries of the Framing era define “search” in a familiar manner. James Barclay’s *Complete and Universal English Dictionary* from 1782 defines “search” as “to seek after something lost, hid, or unknown.”¹⁴⁶ Another from 1785 defines the verb as “[t]o examine; to try; to explore; to look through.”¹⁴⁷ Noah Webster’s 1828 American dictionary defines “search” as “[t]o look over or through for the purpose of finding something; to explore; to examine by inspection.”¹⁴⁸

Historical context sheds additional light on the intended meaning of the term “search.” The Framing-era controversies that gave birth to the Fourth Amendment all concerned paradigmatic searches: forced entries of homes, generally accompanied by a seizure of private papers.¹⁴⁹ In the “landmark cases” of *Entick v. Carrington*¹⁵⁰ and *Wilkes v. Wood*,¹⁵¹ the Crown tried to stamp out dissent by raiding the homes of disloyal printers and seizing them

143. Amsterdam, *supra* note 15, at 395–96 (emphasizing the difficulty of defining terms in the Fourth Amendment); Colb, *supra* note 19, at 119, 124 (“[S]earch’ is not a self-defining term.”).

144. The lack of a definition explains the Supreme Court’s initial failure to recognize that a search could *uncover* oral statements. See *Berger v. New York*, 388 U.S. 41, 51 (1967) (discussing failure). This failure infected subsequent cases where, rather than rule that police might “search” a phone booth or phone wires to detect oral conversations, the Court abandoned the text to reach that conclusion. See *supra* Part I.

145. See William N. Eskridge, Jr., *Should the Supreme Court Read The Federalist but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301, 1315 (1998) (highlighting that “new textualists” use historical sources as “evidence of how terms were used and what assumptions were made in the time of the Framers”); *supra* note 24 (describing the widely accepted “new textualism” approach to constitutional interpretation).

146. JAMES BARCLAY, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY ON A NEW PLAN (1782).

147. SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1785); see also N. BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (26th ed. 1789) (“To Search[:] To seek, look for, or be in quest of.”).

148. 2 WEBSTER’S, *supra* note 71; *accord* *Kyllo v. United States*, 533 U.S. 27, 33 n.1 (2001) (citing this definition).

149. See *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018) (“The Founding generation crafted the Fourth Amendment as a ‘response to the reviled “general warrants” and “writs of assistance” of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity.’” (quoting *Riley v. California*, 134 S. Ct. 2473, 2494 (2014))); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 602 (1999).

150. 19 Howell’s State Trials 1029 (C.P. 1765).

151. 19 Howell’s State Trials 1153 (C.P. 1763).

“together with their papers.”¹⁵² Lord Camden’s stirring opinion in *Entick* warned that if the Crown’s conduct were condoned, “the secret cabinets and bureaus of every subject in this kingdom will be thrown open to . . . search and inspection.”¹⁵³ In America, James Otis famously railed against the “hated writs of assistance” that gave “customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws.”¹⁵⁴ In an argument that John Adams claimed ignited the American Revolution,¹⁵⁵ Otis offered a chilling example of the potential for abuse.¹⁵⁶ Otis invoked a rogue writ holder (Mr. Ware) who used the writ to exact revenge on two public officials (a judge and a constable):

Well then, said Mr. Ware, I will show you a little of my power. I command you to permit me to search your house for uncustomed goods. And [Ware] went on to search [the judge’s] house from the garret to the cellar; and then served the constable in the same manner.¹⁵⁷

Anyone in possession of such a writ, Otis exclaimed, could similarly “inspect the inside of his neighbor’s house.”¹⁵⁸ Fourth Amendment history is rich and nuanced, but Otis’s example vividly depicts the core grievance of the era: officious explorations into homes. Legal historian Laura Donohue characterizes this conduct as “promiscuous search.”¹⁵⁹ Another historian, Thomas Davies, reports, “the historical record of prerevolutionary grievance reveals no legal complaints about other kinds of searches and seizures.”¹⁶⁰ It is safe to say, then, that Framing-era Americans thought the term “search” was self-explanatory. A “search” was a search. Until *Katz*, that sufficed.¹⁶¹

152. *Stanford v. Texas*, 379 U.S. 476, 483 (1965) (noting *Entick* and *Wilkes* are “landmark cases”); William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 396–97 (1995) (citing *Entick*, *Wilkes*, and the 1761 *Writs of Assistance Case* as “these three cases which were not only well known to the men who wrote and ratified the Bill of Rights, but famous throughout the colonial population”).

153. *Entick*, 19 Howell’s State Trials at 1063.

154. *Stanford*, 379 U.S. at 481.

155. Thomas K. Clancy, *Introduction to James Otis Lecture*, 74 MISS. L.J. 627, 628 (2004) (quoting Adams: “Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.”).

156. JOHN ADAMS, *THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES* 525 (1850).

157. *Id.*

158. *Id.*

159. Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1240 (2016) (discussing the historical basis of the Framing-era “objection to promiscuous search”); see also Davies, *supra* note 149, at 602 (noting the Framers’ disdain for “searches of houses under general warrants”).

160. See Davies, *supra* note 149, at 601, 603 (explaining that pertinent controversies “were focused on searches of houses under general warrants”).

161. Modern constitutional interpretation focuses on the “original public meaning” of the text’s provisions. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008); Lawrence B. Solum, *We Are All Originalists Now*, in ROBERT W. BENNETT & LAWRENCE B. SOLUM,

Historical sources, context, and common sense provide the raw material to generate a straightforward “search” definition. A “search,” as contemplated in the Fourth Amendment, is *an examination of an object or space to uncover information*. This short definition is imbued with layers of meaning. As explained below, each layer fleshes out an intuitive aspect of the widely understood meaning of the term.

The use of the term “*examination*” in the “search” definition signals the need for a degree of conscious effort beyond the visual and audio scanning that typifies human consciousness. An officer walking the beat who observes a suspect fleeing a crime scene gathers visual information, but does not conduct a “search.” A search requires more than a gaze in the direction of a phenomenon of interest. To search is to “examine by inspection,” not merely to look at something.¹⁶² Of course, searches may include hasty glances. For example, if an officer enters an apartment and glances around, there is a search of the apartment. The whole of the officer’s conduct—entering an apartment and visually perusing the interior—constitutes the requisite “examination by inspection.”¹⁶³ Similarly, police “search” a safe when they open it and look inside, even if it takes only a momentary glance to mentally catalogue the exposed contents. And while these examples all involve visual exploration, the term “examination” is not intended to exclude nonvisual inquiries. Any manipulation of an item to uncover information—such as a tactile pat down of the pockets of a coat or the squeezing of a bag to discern its contents—can qualify as an “examination.”¹⁶⁴

Limiting the “search” definition to an examination of “*objects or spaces*” reflects the understanding that while a search consists of an effort to gather information, not all quests for information are searches. For example, a trial is famously a “search for truth,”¹⁶⁵ but it is not a Fourth Amendment search.

CONSTITUTIONAL ORIGINALISM 1, 3 (2011) (suggesting that the interpretive “question should be, How would an ordinary American citizen fluent in English as spoken in the late eighteenth century have understood the words and phrases that make up its clauses?”); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1118 (2003) (highlighting as key “the *original meaning* of the Constitution—which we define as the meaning the words and phrases of the Constitution would have had, in context, to ordinary readers, speakers, and writers of the English language, reading a document of this type, at the time adopted”); Jennifer L. Mascott, *Who Are “Officers of the United States”?*, 70 STAN. L. REV. 443, 466 (2018) (“Modern theorists who emphasize the meaning of the text as the cornerstone of constitutional interpretation typically prioritize recovery of the text’s original public meaning.”).

162. 2 WEBSTER’S, *supra* note 71.

163. See *infra* note 167 (discussing the term “examine” further and suggesting “to inspect closely” as the appropriate definition of the term in this context); cf. *United States v. Karo*, 468 U.S. 705, 715 (1984) (concluding that tracking a beeper into a home “does reveal a critical fact about the interior of the premises that the Government is extremely interested in knowing and that it could not have otherwise obtained without a warrant”).

164. Cf. *Bond v. United States*, 529 U.S. 334, 339 (2000) (finding a search when agents felt bus passenger’s carry-on luggage “in an exploratory manner”); *Arizona v. Hicks*, 480 U.S. 321, 324–25 (1987) (finding a search when an officer moved stereo to see serial number).

165. *Nix v. Whiteside*, 475 U.S. 157, 166 (1986).

A modern-day Sherlock Holmes can search her brain for the solution to a tough case, but no one would suggest that doing so implicates the Fourth Amendment. Analyzing the data in one's own possession generates new insights and information, but it is not a Fourth Amendment search.¹⁶⁶ Along the same lines, asking someone questions is not a "search." When the police interrogate friends and family members about a suspect's daily activities there is no "search," no matter how intimate the details revealed.¹⁶⁷

The last part of the proposed "search" definition ("*to uncover information*") captures two intuitions. First, a search is not merely an intrusion. It is an intrusion with a purpose: a searcher tries to uncover information. This tracks current doctrine that specifies that "a *Katz* invasion of privacy" is "not alone a search unless it is done to obtain information."¹⁶⁸ Thus, a police officer who accidentally knocks over a stereo and reveals hidden items underneath does not conduct a "search," while an officer who moves the stereo to see its serial number does.¹⁶⁹ Scraping paint from a vehicle to obtain a sample for testing would be a search of an effect;¹⁷⁰ keying a car out of spite would not. Remedies, if any, for non-search intrusions would come through reference to the separate Fourth Amendment prohibition of unreasonable "seizures" or other statutory or constitutional provisions.

Second, in concert with the requirement of some type of "examination," the use of the word "*uncover*" indicates that a "search" seeks out information that is hidden or otherwise not apparent. The information can be limited, such as the presence of a fugitive in an apartment, or redundant, such as confirmation that a suspect who appears unarmed does not have a weapon. If the information obtained is already apparent through standard visual and audio observation, however, gleaning that information is not itself a search. For example, police might be interested in determining whether a suspect's height is consistent with eyewitness descriptions. An officer surreptitiously estimating the suspect's height as the suspect moves about in public gathers information of interest. But since a person's height is readily apparent to the officer who actually obtains that information, this conduct does not "uncov-

166. In typical scenarios along these lines, there is either no search or, often more obviously, no search of *the claimant's* person, house, paper, or effect. See *infra* Section II.D.

167. The various meanings of the word "examine" create potential for confusion in this context. See *Examine*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/examine> [<https://perma.cc/X496-HPN7>]. The use of "examine" in the proposed search definition is intended to invoke the primary definition, "to inspect closely," rather than the secondary definitions "to interrogate closely" or "to test by questioning." *Id.* Common sense dictates that this is the meaning intended in the Fourth Amendment. Framing-era citizens cared about coercive questioning, but addressed that topic separately in the Fifth Amendment. See U.S. CONST. amend. V.

168. *United States v. Jones*, 565 U.S. 400, 408 n.5 (2012); cf. *Florida v. Jardines*, 569 U.S. 1, 10 (2013) (concluding that a search occurred because, in part, the officers' "behavior objectively reveals a purpose to conduct a search"); Baude & Stern, *supra* note 22, at 1830 ("Textually, a search suggests an effort to glean information . . .").

169. Cf. *Hicks*, 480 U.S. at 325.

170. Cf. *Cardwell v. Lewis*, 417 U.S. 583, 588 (1974).

er” information and is not a “search.” The officer discerned the suspect’s height but she did not “search” the suspect to do so.¹⁷¹

Applying the commonsense definition of “search” sketched out above, searches occur when police enter residences, offices, and cars looking for information. Police search when they look inside a bag, pat down someone’s pockets, or manipulate a smart phone to access the data inside. Harder cases can be confidently handled as well. Police search when they attempt to gather information with metal detectors or heat sensors. Tapping into wires to access the digital information flow constitutes a search of the wires. It is also a search to intercept electronic signals travelling through the air. These are all searches—although, as discussed below, some of these searches do not implicate the Fourth Amendment.¹⁷²

The commonsense definition of “search” presented in this section resonates with Akhil Amar’s critique of Fourth Amendment doctrine as “an embarrassment.”¹⁷³ Amar ridicules the Supreme Court for failing to recognize that it is a search “[w]hen a Secret Service agent at a presidential event” is “wearing sunglasses and scanning the crowd in search of any small signal that something might be amiss.”¹⁷⁴ Amar explains: “A search is a search, whether with Raybans or x-rays.”¹⁷⁵ Amar’s exasperation builds with further examples: “A far more egregious example comes from the Court’s so-called open-field doctrine, whereby trespassing on a person’s property, climbing over her fences and peering into her barns is somehow not a search”¹⁷⁶

Amar’s indictment of the doctrine is compelling. But, as the next Section explains, this critique of the Court’s rulings loses force because it overlooks the rest of the Fourth Amendment. The Amendment is not triggered unless the searched item constitutes a “person, house, paper or effect.” Even if Amar is right, and the agents scanning public spaces and scurrying around on

171. Only the most basic information detection will evade constitutional regulation under the “examination . . . to uncover” proviso. This is because the fact that something is apparent to some member of the public through standard visual-audio observation does not make it apparent to the government. The constitutional inquiry is whether the police conducted a search—not whether they could theoretically have obtained the information without one. This focus on the government’s conduct in obtaining information, rather than the information’s private (or public) nature, is a key distinction between textualist analysis and *Katz*’s privacy-focused approach. See *United States v. Jacobsen*, 466 U.S. 109, 119 (1984) (concluding that because a private party had already observed the contents of a previously closed package, “it hardly infringed respondents’ privacy for the agents to reexamine the contents of the open package by brushing aside a crumpled newspaper and picking up the tube”); *United States v. Knotts*, 460 U.S. 276, 282 (1983) (finding no search in use of tracking device because “[v]isual surveillance from public places . . . would have sufficed to reveal all of these facts to the police”); see also *infra* Section III.B.

172. See *infra* Section II.B.

173. Amar, *supra* note 28, at 757.

174. *Id.* at 768.

175. *Id.* at 769. Amar suggests that these are searches, but “reasonable” searches and so constitutionally permitted. *Id.*

176. *Id.* at 768 n.38.

undeveloped lands are conducting searches, neither example presents a search of “persons, houses, papers, and effects.” As a result, these searches possess no Fourth Amendment significance.¹⁷⁷

B. “Persons, Houses, Papers”

The fact that the police conduct a “search” does not itself trigger Fourth Amendment protection. The Amendment’s protections only apply if the item searched can fairly be characterized as a person, house, paper, or effect.¹⁷⁸ This reflects the text and history of the Fourth Amendment. The zeitgeist that brought the Fourth Amendment into being targeted “practices [that] were offensive because they impinged upon things held dear by those subjected to the searches or seizures, such as their persons, homes, and private papers.”¹⁷⁹ This Section explores the three most straightforward aspects of this portion of the Fourth Amendment’s text: “persons,” “houses,” and “papers.” The next section fleshes out “effects.”

The first of the Fourth Amendment’s constitutionally protected areas—searches of “persons”—is important, but discrete. When police look inside a body cavity, take blood or fingerprints, scrape a cheek for a DNA sample, or administer a breathalyzer test, they conduct a search of the “person.” A pat down, a metal detector’s scan, or a command that suspects remove their clothes—all intended to detect concealed items—is a “search” of the “person.” In each scenario there is an examination of an object (the person’s body) to uncover information.

An important, if subtle, distinction that carries throughout the Fourth Amendment’s text is particularly important here. The terms “persons, houses, papers, and effects” are listed in the Fourth Amendment as potential objects of searches: things the police might search.¹⁸⁰ These terms are not search outcomes: things police might find. This follows from the text of the Amendment, which protects the people’s right to be “secure in their persons, houses, papers, and effects, against unreasonable searches.”¹⁸¹ People are secure in their houses against unreasonable searches, for example, when police do not search *their house*. The right is not fairly read to restrict a police officer’s ability to pass by houses of interest and observe them from the street.

It follows from this distinction that it is not sufficient to trigger the Fourth Amendment that the police observed or located a person. The Amendment’s protections only come into play when they search that person.

177. Cf. *Olmstead v. United States*, 277 U.S. 438, 465 (1928) (explaining “open fields” cases as follows: “While there was a trespass, there was no search of person, house, papers or effects.”).

178. U.S. CONST. amend. IV.

179. Clancy, *supra* note 57, at 310; Davies, *supra* note 149, at 590 (“[T]hey were concerned that legislation might make general warrants legal in the future, and thus undermine the right of security in person and house.”).

180. See U.S. CONST. amend. IV.

181. *Id.*

Thus, public surveillance cameras that capture a person's image and reveal that person's location at a particular time have not conducted a search of that person. At most, the cameras searched a public space (and found a person). By contrast, the use of an infrared camera to detect that the person is carrying a concealed weapon would constitute a search of the person.

The Fourth Amendment next restricts searches of "papers." The term is readily interpreted, even in light of sweeping changes to recording and communication practices. Samuel Johnson's 1785 dictionary defined "paper" as a "[s]ubstance on which men write and print," adding that the term is "used particularly of essays or journals, or any thing printed on a sheet."¹⁸² Noah Webster similarly defined "paper" in 1828 as "[a] substance formed into thin sheets on which letters and figures are written or printed."¹⁸³ This term, explicitly defined at the time of the Framing through the prism of then-existing recordkeeping technology, must be updated to capture modern practice. Now the "substance on which men [and women] write and print" is most often electronic. "Electronic records" created with computers and transmitted via email and text messaging are the precise equivalent of the physical "papers" that originally necessitated Fourth Amendment protection.¹⁸⁴ Books and journals are now "PDF" files and word-processing documents. Emails and text messages are today's letters and notes.

A common thread in fairly interpreting the term "papers" runs through physical to electronic documents, all consciously used to store and transmit information. The expansive language in the Framing-era "papers" cases, like *Entick v. Carrington*, ease any doubts that the concerns of the era expanded to any form of writing.¹⁸⁵ The Bill of Rights itself was memorialized on parchment (animal skin) not "paper."¹⁸⁶ By contrast, electronic information that is not consciously communicated or stored—such as a notification sound that rings out upon receipt of a text message or an electronic ping

182. JOHNSON, *supra* note 147.

183. 2 WEBSTER'S, *supra* note 71.

184. Cf. *Carpenter v. United States*, 138 S. Ct. 2206, 2222 (2018) (agreeing with Justice Kennedy's dissenting opinion that electronic records are "the modern-day equivalents of an individual's own 'papers' or 'effects'" (quoting *id.* at 2230 (Kennedy, J., dissenting))); *Entick v. Carrington*, 19 Howell's State Trials 1029, 1066 (C.P. 1765) ("Papers are the owner's . . . dearest property . . ."); Clancy, *supra* note 57, at 310 (explaining that the Framers specified items that were "held dear by those subjected to the searches or seizures"); Ryan, *supra* note 24, at 1543 (noting that the most faithful interpretation of constitutional provisions will often be to apply them to incorporate new technologies that "did not exist" at the time of the Framing).

185. See *Entick*, 19 HOWELL'S STATE TRIALS at 1064 (condemning the seizure of "all the papers and books without exception"); *id.* (criticizing the search and seizure of Entick's "most valuable secrets . . . before he is convicted either of writing, publishing, or being concerned in the paper"); *id.* at 1066 ("Papers are the owner's goods and chattels: they are his dearest property; . . . they will hardly bear an inspection . . ."). For a thorough discussion of the Framing-era controversies over searches and seizures of "papers," see Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 VA. L. REV. 869 (1985).

186. See Carlton F.W. Larson, *The Declaration of Independence: A 225th Anniversary Re-Interpretation*, 76 WASH. L. REV. 701, 786 (2001) (noting use of parchment).

emitted by a cell phone, remote control, or door opener—would not constitute one’s “papers.” Oral conversations, which were well known in the Framing era, also should not be included in the term.¹⁸⁷

Defining the term “houses” should not be difficult. Any dwelling should qualify.¹⁸⁸ Current doctrine casually extends the term’s reach to “commercial premises.”¹⁸⁹ Although work needs to be done to justify this expansion,¹⁹⁰ there is little controversy among judges or scholars that the term “house” extends to “a whole host of home-like settings,”¹⁹¹ including all the “places ‘where people live, work, and play.’”¹⁹² In addition, the “curtilage,” loosely defined as the area immediately surrounding the house, is “considered part of the home itself for Fourth Amendment purposes.”¹⁹³

C. “And Effects”

In the Fourth Amendment’s list of potential “search” targets, the term “effects” requires the most discussion. It is not as common as the other terms in the Fourth Amendment, and it is the most susceptible to fanciful interpretation. As explained below, the historical evidence allows for a relatively definitive interpretation. “Effects” was used in the Framing era as a catchall term that included all tangible objects a person might possess, but not real property (land) and structures (buildings). This understanding can be seamlessly translated into modern times, with “effects” capturing all personal property, including items unknown in the Framing era, like computers and smartphones, but excluding intangible items, whether modern or ancient.

The Fourth Amendment’s use of the term “effects” has an intriguing origin story. James Madison’s draft of the Amendment does not mention effects.¹⁹⁴ The draft drew from state constitutional provisions that also did not

187. For further discussion of “papers,” see *infra* Section III.C (applying Fourth Amendment Textualism in a variety of scenarios).

188. See 1 WEBSTER’S, *supra* note 71 (defining “house” as “a building or shed intended or used as a habitation or shelter for animals of any kind”).

189. *Mancusi v. DeForte*, 392 U.S. 364, 367 (1968).

190. See *Davies*, *supra* note 149, at 608 (“[T]here is little in the historical record to support the current assumption that the Framers intended the Fourth Amendment to protect commercial premises in addition to houses.”).

191. See Andrew Guthrie Ferguson, *The Internet of Things and the Fourth Amendment of Effects*, 104 CALIF. L. REV. 805, 857 (2016).

192. See Eulis Simien, Jr., *The Interrelationship of the Scope of the Fourth Amendment and Standing to Object to Unreasonable Searches*, 41 ARK. L. REV. 487, 554 (1988) (quoting William A. Knox, *Some Thoughts on the Scope of the Fourth Amendment and Standing to Challenge Searches and Seizures*, 40 MO. L. REV. 1, 20 (1975)).

193. *Oliver v. United States*, 466 U.S. 170, 180 (1984); accord *United States v. Dunn*, 480 U.S. 294, 300 (1987) (“The curtilage concept originated at common law to extend to the area immediately surrounding a dwelling house the same protection under the law of burglary as was afforded the house itself.”).

194. THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 333 (Neil H. Cogan ed., 2d ed. 2015) (text of proposal by Madison in House, June 8, 1789).

include the term.¹⁹⁵ Apart from this omission, the Massachusetts Constitution closely paralleled the ultimately enacted Fourth Amendment. It stated: “Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions.”¹⁹⁶ Madison’s fellow Virginians submitted a proposed federal right to the Constitutional Convention that took a similar approach, advocating “[t]hat every freeman has a right to be secure from all unreasonable searches and siezures [sic] of his person, his papers and his property.”¹⁹⁷

Madison’s draft of the Fourth Amendment united the Massachusetts and Virginia approaches. Madison adopted Massachusetts’s terms (two of which Virginia also employed) but preferred Virginia’s “property” to Massachusetts’s “possessions” as the catchall.¹⁹⁸ The House of Representatives routed Madison’s proposal to a Committee of Eleven, which produced the ultimately enacted text.¹⁹⁹ “The Committee changed Madison’s language that protected ‘persons, houses, papers, and *other property*,’ to ‘persons, houses, papers, and *effects*.’”²⁰⁰ There is no direct evidence of the Committee’s purpose.²⁰¹

In the Framing era, the term “effects” was invoked in will contests and proceedings to divide up the contents of lawfully seized ships.²⁰² In both contexts, the term broadly extended to all tangible items, but not real property (or the ships themselves).²⁰³ Helpfully, some Framing-era cases turn entirely

195. *Id.* at 344–45.

196. MASS. CONST. art. XIV; accord Osmond K. Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 362 (1921) (“The language of the Fourth Amendment, indeed, is almost identical with that in the Massachusetts Declaration of Rights of 1765, and in the same state’s Constitution of 1780.” (footnote omitted)); see THE COMPLETE BILL OF RIGHTS, *supra* note 194, at 344.

197. THE COMPLETE BILL OF RIGHTS, *supra* note 194, at 343 (alteration in original) (text of Virginia’s proposal).

198. *Id.* at 333 (text of Madison’s proposal to House).

199. See Maureen E. Brady, *The Lost “Effects” of the Fourth Amendment: Giving Personal Property Due Protection*, 125 YALE L.J. 946, 984 (2016) (explaining the Committee of Eleven as “a committee made up of a delegate from each state that had already ratified the Constitution”).

200. Donohue, *supra* note 159, at 1301 (emphases added by Donohue) (quoting U.S. CONST. amend. IV and THE COMPLETE BILL OF RIGHTS, *supra* note 194, at 333).

201. Davies, *supra* note 149, at 710 (“Because there are no records of the Committee’s deliberations, one can only speculate as to why the committee substituted ‘effects’ for Madison’s ‘property.’”).

202. See, e.g., *The Josefa Segunda*, 23 U.S. (20 Wheat.) 312, 322 (1825) (“The principal proceedings are certainly to be against the vessel, and the goods and effects found on board.”); *The Star*, 16 U.S. (3 Wheat.) 78, 81 (1818) (interpreting prize statute that listed “all vessels, goods and effects” (construing Act of June 26, 1812, ch. 107, 2 Stat. 759, 760)).

203. Davies, *supra* note 149, at 605 (arguing that “no late eighteenth-century lawyer would have imagined that ships were entitled to the same common-law protection due ‘houses, papers, and effects’”); see, e.g., *Doe v. Dring* (1814) 105 Eng. Rep. 447, 450; 2 M. & S. 448, 454 (Lord Ellenborough L.J.) (K.B.) (“We have a familiar meaning attached to the word effects, in its common use, and as it is used in the statutes relating to bankrupts, where estate and effects,

on how the term “effects” would be understood by a knowledgeable person of the era. One 1755 judicial opinion explained, “[t]he word effects is properly applicable only to personal estate. All the dictionaries explain it by the words ‘goods and moveables’”²⁰⁴ And a later case (1814) picked up the same thread: “[I]ndependently of all context, whenever the Court has had occasion to consider the primary import of the word effects, it has always held it to relate to things personal only.”²⁰⁵ Noah Webster’s often-invoked 1828 dictionary provides this helpful definition: “In the plural, *effects* are goods; movables; personal estate. The people escaped from the town with their *effects*.”²⁰⁶

The historical definitions and context suggest that the constitutional drafters selected the term “effects” as much for what it excludes as for what it includes. “Effects” is a broad term, but it was a word that functioned in the Founding era to exclude certain property, and particularly real property.²⁰⁷ The change brought Madison’s proposal closer to Massachusetts’s version of the same right, which limited its protections to persons, houses, papers, and *possessions*.²⁰⁸ This contrasted with Virginia’s broader term “property,”²⁰⁹ yet it also explains why the drafters did not simply adopt Massachusetts’s wording. “Property” seems to include buildings and land; “possessions” might include those items; “effects” does not. In light of this history, the Supreme Court has recognized: “The Framers would have understood the term ‘effects’ to be limited to personal, rather than real, property.”²¹⁰ Historians agree.²¹¹

reddendo singula singulis, denote, the one things personal, the other things real; and I am not aware of any case where it has been holden in its primary and original signification to mean things real.” (emphasis added)).

204. *Hogan v. Jackson* (1775) 98 Eng. Rep. 1096, 1098; 1 Cowp. 299, 302 (K.B.).

205. *Doe*, 105 Eng. Rep. at 449; 2 M. & S. at 453.

206. 1 WEBSTER’S, *supra* note 71 (emphasis in original); *cf.* *Arthur v. Morgan*, 112 U.S. 495, 499–500 (1884) (concluding that a carriage qualified as “household effects” because “[t]he word ‘effects’ means ‘property or worldly substance’”).

207. See *Carpenter v. United States*, 138 S. Ct. 2206, 2241 (2018) (Thomas, J., dissenting) (“This change might have narrowed the Fourth Amendment by clarifying that it does not protect real property (other than houses).”).

208. See *supra* note 195 and accompanying text.

209. See *supra* note 196 and accompanying text.

210. *Oliver v. United States*, 466 U.S. 170, 177 n.7 (1984). See *supra* note 161 for the modern view of constitutional interpretation, which focuses on “original public meaning” rather than the Framers’ intent.

211. Brady, *supra* note 199, at 985 (“[R]eaders generally agree that the consequence was to narrow the Amendment’s coverage.”); Thomas K. Clancy, *The Framers’ Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 1048 (2011) (“Those changes restored the amendment to the Madison draft proposal, with the sole substantive change being a narrowing of the objects protected from ‘other property’ to ‘effects.’”); Davies, *supra* note 149, at 710–11 (“Because ‘effects’ was usually understood to designate moveable goods or property (but not real property or premises), the most likely explanation for the substitution is that the Committee intended to narrow the scope of interests protected by Madison’s proposal.”); *cf.* Donohue, *supra* note 159, at 1301 (“In making this alteration, the Committee extended the

Thus, the term “effects” should be interpreted to encompass all moveable personal property. This is consistent with the Supreme Court’s characterization of luggage and vehicles as “effects.”²¹² Importantly, the term can fairly be construed to include computers in any form, such as routers, smartphones, or tablets, and other electronic accessories, like wires. Thus, tapping into a wire to intercept the signals flowing inside constitutes a “search” of an “effect” (the wire). Immoveable structures and real property are not covered by the term. This means no barns or phone booths (sorry Katz).²¹³ Also excluded would be discarded hair, saliva, urine, or dust,²¹⁴ although personal collections of such items (not recommended) could constitute a person’s effects.

Of particular interest to a modern audience, the term “effects” does not include ephemeral items like a person’s voice, image, or cell phone signals. Amar and other commentators urge the Court to expand the term “effects” to “intangibles,” like conversations and electronic pulses.²¹⁵ A textualist approach does not support this extension. As the foregoing discussion shows, the term “effects” applied to tangible personal property. Items fitting that description but unknown to the Framing era, like smartphones, can, of course, be placed in the category of modern “effects.” This parallels the seamless ex-

meaning beyond personal property or possessions (as implied in ‘other property’) to include commercial items and goods.”).

212. *United States v. Jones*, 565 U.S. 400, 404 (2012) (“It is beyond dispute that a vehicle is an ‘effect’ as that term is used in the Amendment.”); *Bond v. United States*, 529 U.S. 334, 336 (2000) (“A traveler’s personal luggage is clearly an ‘effect’ protected by the Amendment.”); Ferguson, *supra* note 191, at 828–29 (listing items characterized by the Court as “effects,” including “containers, packages held by a person, packages given to private carriers, footlockers, automobiles, as well as a variety of contraband” and noting that lower courts have “recognized such unusual things as apiaries (beehives) and dogs to be effects” (footnotes omitted)).

213. Phone booths and barns would more properly be considered under the term “house.” See *supra* Section II.B. The phone booth in the popular BBC show *Dr. Who* would constitute an “effect” since it is moveable, a “house” because it contains living quarters, and also a “person” since it seems sentient. See *The TARDIS, THE DOCTOR WHO SITE*, <http://www.thedoctorwhosite.co.uk/tardis/> [<https://perma.cc/BBW8-P6EZ>].

214. See *Ferguson v. City of Charleston*, 532 U.S. 67, 92 (2001) (Scalia, J., dissenting) (“[I]t is entirely unrealistic to regard urine as one of the ‘effects’ (i.e., part of the property) of the person who has passed and abandoned it.”); *State v. Reldan*, 495 A.2d 76, 83 (N.J. 1985) (rejecting contention that “common detritus—samples of dirt, debris, hair, and the like” could be considered “the personal effects or private property of the defendant”); cf. Brady, *supra* note 199, at 1003 (discussing urine and dirt examples). Extracting urine for testing would, however, be a search of the person. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 672–73 (1995) (O’Connor, J., dissenting) (“[T]he collection and testing of urine is, of course, a search of a person.”).

215. Amar, *supra* note 28, at 803 (contending that the Court should construe audio bugs to be searches that capture “some of [their target’s] most valuable ‘effects,’ namely, her private conversations”); *id.* at 811 (“[A] great many government actions can be properly understood as ‘searches’ or ‘seizures,’ especially when we remember that a person’s ‘effects’ may be intangible—as the landmark *Katz* case teaches us.”); Ferguson, *supra* note 191, at 874 (proposing to “semantically and theoretically redefine[] a Fourth Amendment effect to cover the internal data and external communications of an object connected to the Internet of Things.”).

tension of “papers” to electronic documents discussed in the preceding section. Intangible items, whether modern or ancient, cannot be labeled “effects.” There is no textual or historical connection between these items and the word “effects.” Neither the modern nor the Framing-era citizenry would think that a person who conveyed all his effects to his children conveyed conversations and wireless signals.²¹⁶ Nor could anyone read Noah Webster’s example—“The people escaped from the town with their *effects*”²¹⁷—to communicate that the refugees took flight with their conversations, memories, and, in a modern context, cell phone location information.

Having defined “search” and “persons, houses, papers, and effects,” there remains one last piece to Fourth Amendment Textualism. The Amendment’s text imposes an implicit restriction on the categories of persons who can claim Fourth Amendment violations. The next Section takes up this restriction.

D. “*Their*” Replaces *Third-Party Doctrine and Standing*

The Supreme Court has long held that “rights assured by the Fourth Amendment are personal rights” and “may be enforced . . . only at the instance of one whose own protection was infringed by the search and seizure.”²¹⁸ The Court’s rationale for this requirement has shifted over time.²¹⁹ From a textualist perspective, the principle follows from the use of the possessive “their” in the Amendment’s text. The Fourth Amendment states: “The right of the people to be secure in *their* persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”²²⁰

The textual argument is strengthened by the analogous state constitutional provisions and proposals from which the Amendment was crafted. Both the Massachusetts Constitution and the Virginia proposal, from which Madison drew, used wording that, while inelegant and gendered, made the possessive point explicit.²²¹ For example, the Massachusetts Constitution

216. Amar, *supra* note 28, at 803 (contending that “private conversations” are among one’s “most valuable ‘effects’”).

217. 1 WEBSTER’S, *supra* note 71.

218. *Simmons v. United States*, 390 U.S. 377, 389 (1968).

219. See *Byrd v. United States*, 138 S. Ct. 1518, 1530 (2018) (“Fourth Amendment standing is subsumed under substantive Fourth Amendment doctrine”); *Minnesota v. Carter*, 525 U.S. 83, 88 (1998) (highlighting textual argument); *Rakas v. Illinois*, 439 U.S. 128, 132–33 n.2 (1978) (explaining that the Fourth Amendment “standing” requirement derives from constitutional, not statutory, authority); *Simmons*, 390 U.S. at 389 (unstated); *Jones v. United States*, 362 U.S. 257, 260 (1960) (relying on FED. R. CRIM. P. 41(e)).

220. U.S. CONST. amend. IV (emphasis added).

221. See MASS. CONST. art. XIV; THE COMPLETE BILL OF RIGHTS, *supra* note 194, at 343 (Virginia proposal) (“[E]very freeman has a right to be secure from all unreasonable searches . . . of his person, his papers and his property”); cf. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1176 (1991) (“Madison was surely aware of these formulations, given his leading role in the Virginia convention”).

stated (and still states), “Every subject has a right to be secure from all unreasonable searches and seizures, of his person, his houses, his papers, and all his possessions.”²²² In his proposal to the House, Madison replaced “[e]very subject” with “the people,” and accordingly substituted a serial use of “their” for Massachusetts’s serial use of “his.”²²³ The Committee of Eleven edited Madison’s clunky serial “theirs” to a single “their” appearing at the head of the list of protected items in the final version of the Amendment.²²⁴ This same format (a single “their”) appeared in the Pennsylvania and Vermont Constitutions.²²⁵ There is no suggestion in the historical sources or the academic literature that these facially stylistic changes were intended to alter the underlying nature of the protected right.²²⁶

The Supreme Court adopted the textual interpretation set forth above in *Minnesota v. Carter*;²²⁷ in fact, Justice Scalia thought any contrary interpretation to be “so absurd that it has to my knowledge never been contemplated.”²²⁸ That is an overstatement,²²⁹ but the principle has a powerful allure—and strong historical and textual backing. In light of the alternatives, the most faithful interpretation of the Fourth Amendment’s text is that “each

222. MASS. CONST. art. XIV.

223. THE COMPLETE BILL OF RIGHTS, *supra* note 194, at 333 (stating the text of Madison’s proposal to the House, which protected “[t]he rights of the people to be secured in their persons, their houses, their papers. [sic] and their other property” (alteration in original)).

224. *Id.* at 334 (text of report of the Committee of Eleven).

225. PA. CONST. of 1776, cl. 10; VT. CONST. of 1777, ch. I, cl. 11.

226. See *Minnesota v. Carter*, 525 U.S. 83, 93–94 (1998) (Scalia, J., concurring) (“There is no indication anyone believed that the Massachusetts, New Hampshire, New York, and North Carolina texts, by using the word ‘his’ rather than ‘their,’ narrowed the protections contained in the Pennsylvania and Vermont Constitutions.”).

227. *Id.* at 89 (majority opinion) (“The text of the Amendment suggests that its protections extend only to people in ‘their’ houses.”); see also *Carpenter v. United States*, 138 S. Ct. 2206, 2235 (2018) (Thomas, J., dissenting) (emphasizing the same principle).

228. *Carter*, 525 U.S. at 92 (Scalia, J., concurring).

229. Commentators do not all accept the individual nature of the right. See, e.g., Amsterdam, *supra* note 15, at 367 (arguing that the language “[t]he right of the people” undermines treating the rights as “‘personal rights’ of isolated individuals”) (alteration in original) (quoting U.S. CONST. amend. IV and *Alderman v. United States*, 394 U.S. 165, 174 (1969)); Donald L. Doernberg, “*The Right of the People*”: *Reconciling Collective and Individual Interests Under the Fourth Amendment*, 58 N.Y.U. L. REV. 259, 294 (1983) (proposing that the Court view the Fourth Amendment as “a collective constitutional right” that can be invoked by anyone against whom the government uses improperly searched or seized evidence). An alternative way to view the concept is that while the right is personal, the remedy need not be. See Rachel A. Harmon, *Legal Remedies for Police Misconduct*, in 2 THE ACADEMY FOR JUSTICE, REFORMING CRIMINAL JUSTICE 27, 46–50 (Erik Luna ed., 2017), http://academyforjustice.org/wp-content/uploads/2017/10/Reforming-Criminal-Justice_Vol_2.pdf [<https://perma.cc/36XN-SARX>]. That framing could allow defendants to vicariously invoke the Fourth Amendment rights of others to suppress evidence. See *In re Lance W.*, 694 P.2d 744, 747 (1985) (describing California’s “vicarious exclusionary rule” and its abolition by state constitutional amendment).

person has the right to be secure against unreasonable searches and seizures in *his own* person, house, papers, and effects.”²³⁰

The personal nature of Fourth Amendment rights means that a person cannot claim a Fourth Amendment violation based on the government’s search of someone else’s “person, houses, papers, and effects.” Thus, a murder suspect cannot invoke the Fourth Amendment to object to an unreasonable search of the victim’s fingernails or phone. In such a scenario, the police search the victim’s person and effects, not those of the suspect.

The Supreme Court and commentators usually conceptualize the principle described above as a kind of “standing” requirement.²³¹ Defendants must show not only a violation of the Fourth Amendment but also a violation of “their” own Fourth Amendment rights.²³² In Supreme Court opinions, Fourth Amendment standing is sometimes dispositive²³³ and other times ignored.²³⁴

Periodically, the Court signals a desire to incorporate “standing” into the substantive Fourth Amendment analysis,²³⁵ but commentators²³⁶ and judges²³⁷ resist. Merging the two inquiries creates confusion. At present, the confusion stems from *Katz*. The *Katz* test asks whether the subject of a potential “search” possesses a “reasonable expectation of privacy.”²³⁸ It is difficult to conceptualize that inquiry separately from the “personal” nature of the Fourth Amendment right. Under current doctrine, the analysis also overlaps with third-party doctrine. One reason that I might not be able to show a vio-

230. *Carter*, 525 U.S. at 92 (Scalia, J., concurring) (emphasis in original).

231. *See* *Byrd v. United States*, 138 S. Ct. 1518, 1530 (2018) (“The concept of standing in Fourth Amendment cases can be a useful shorthand for capturing the idea that a person must have a cognizable Fourth Amendment interest in the place searched before seeking relief for an unconstitutional search . . .”).

232. *See* *United States v. Payner*, 447 U.S. 727, 731 (1980) (“[T]he defendant’s Fourth Amendment rights are violated only when the challenged conduct invaded *his* legitimate expectation of privacy rather than that of a third party.” (emphasis in original)); *Rakas v. Illinois*, 439 U.S. 128, 134 (1978) (“A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person’s premises or property has not had any of his Fourth Amendment rights infringed.”).

233. *E.g.*, *Rakas*, 439 U.S. at 148–50 (rejecting Fourth Amendment claim based on lack of standing).

234. *See, e.g.*, *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (failing to address defendant’s standing to contest search of phone company records).

235. *See* *Rawlings v. Kentucky*, 448 U.S. 98, 106 (1980) (“After *Rakas*, the two inquiries merge into one[:] whether governmental officials violated any legitimate expectation of privacy held by petitioner.”); *Rakas*, 439 U.S. at 139 (“[W]e think the better analysis forthrightly focuses on the extent of a particular defendant’s rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing.”).

236. *E.g.*, WAYNE R. LAFAYE ET AL., *CRIMINAL PROCEDURE* § 9.1(a) (6th ed. 2017) (emphasizing that the “inquiry deserves separate attention no matter what label is put upon it”).

237. *E.g.*, *Rawlings*, 448 U.S. at 112 (Blackmun, J., concurring) (explaining that merging the inquiries “would invite confusion”).

238. *See supra* notes 110–111 and accompanying text.

lation of my personal Fourth Amendment rights is that the government obtained my information from another party.²³⁹ Thus, three concepts, (1) the “personal” nature of Fourth Amendment rights; (2) the related if not identical notion of “standing”; and (3) third-party doctrine, all share common attributes—and common confusion. The root of the problem is always *Katz*. Once the Court abandons the “reasonable expectation of privacy” test in favor of Fourth Amendment Textualism, all three inquiries collapse neatly into the straightforward textual analysis described below.

The textualist need not determine “whether the person claiming the constitutional violation had a ‘legitimate expectation of privacy in the premises’ [or object] searched.”²⁴⁰ Instead, the text-based answer turns on a clearer inquiry: assessing whether the searched item was the person, house, paper, or effect of the Fourth Amendment claimant or someone else. The textualist inquiry will often lead to the same conclusion as current Fourth Amendment “standing” doctrine. The key distinction is the method of analysis. Fourth Amendment Textualism focuses on whose object or space was searched, rather than whose “reasonable expectation of privacy” was invaded. As a result, the inquiry is more concrete and does not overlap with the threshold question of whether a “search” occurred.

The textual analysis described above also eliminates the need for any distinct “third-party doctrine” in Fourth Amendment jurisprudence. Third-party doctrine is built upon the “reasonable expectation of privacy” test.²⁴¹ The eviction of *Katz* from Fourth Amendment jurisprudence ushers out third-party doctrine as well. Importantly, the abolition of third-party doctrine does not mean that Fourth Amendment protections will always survive transfers of information to third parties. As discussed below, under Fourth Amendment Textualism, there are three possibilities. In some cases currently resolved by third-party doctrine, a textualist approach reveals that there is no “search.” In others, the claimant cannot bring a Fourth Amendment challenge because the item searched is not “their” “person,” “house,” “paper,” or “effect.” And in still others, a text-focused approach reverses the “no-search” answer provided by current third-party doctrine.

A textualist approach resolves some third-party doctrine cases by highlighting the absence of any search. This is the result in the cases that gave

239. See, e.g., *United States v. Payner*, 447 U.S. 727, 732 (1980) (concluding that Payner had “no privacy interest in the Castle Bank documents that were seized from Wolstencroft” (quoting *United States v. Payner*, 434 F. Supp. 113, 126 (1977))).

240. *Byrd v. United States*, 138 S. Ct. 1518, 1526 (2018) (quoting *Rakas*, 439 U.S. at 143); *Rawlings*, 448 U.S. at 106 (asking “whether governmental officials violated any legitimate expectation of privacy held by petitioner”).

241. See *Carpenter v. United States*, 138 S. Ct. 2206, 2246 (2018) (Gorsuch, J., dissenting) (“[I]t was *Katz* that produced *Smith* and *Miller* in the first place.”); Kerr, *supra* note 17, at 589 (explaining the Court’s effort to “establish[] the third-party doctrine as an application of the *Katz* test” but recognizing that “this doctrinal home never fit”); *supra* Section I.C. Kerr suggests that the doctrine should be grounded in “consent law.” Kerr, *supra* note 17, at 589.

birth to third-party doctrine: the so-called “false friends,”²⁴² “pretend friend,”²⁴³ or “secret agent cases.”²⁴⁴ In this line of cases, decided both before and after *Katz*, the Supreme Court confronted related fact patterns involving defendants’ oral statements to government informants and undercover officers.²⁴⁵ In some cases the informants then testified to the incriminating statements; in others, the government recorded the disclosures and played them at trial.²⁴⁶

Attempting to filter the “false friend” cases through *Katz*’s “reasonable expectation of privacy” test invites chaos.²⁴⁷ Without *Katz*, however, the cases are simple. Recording a conversation, like asking questions and memorizing or writing down answers, is not a “search.”²⁴⁸ In fact, a line of pre-*Katz* cases involving agents listening in on a phone extension focuses on statutory claims and does not even reference the Fourth Amendment.²⁴⁹ Without *Katz*, there is typically no “search” to challenge when a government agent listens to a conversation, and certainly no search of the defendant’s person, house, papers or effects.²⁵⁰ The only reason these “false friend” cases are hard is because *Katz*’s privacy-focused “search” definition deprives the Court of this obvious textual answer. After *Katz*, the Court crafted third-party doctrine to avoid labeling these clear non-searches, “searches.”²⁵¹

A textualist approach resolves other iterations of third-party doctrine cases by revealing that there was a “search,” but not a search of the claimant. For example, in *Carpenter*, the government conducted a “search” by compelling Timothy Carpenter’s wireless carriers to turn over their papers for inspection.²⁵² Two of the three textual components of a Fourth Amendment violation were satisfied: there was a “search” of “papers.” Critically, however, the government searched the wireless carrier’s papers, not Carpenter’s pa-

242. On *Lee v. United States*, 343 U.S. 747, 757 (1952).

243. Colb, *supra* note 19, at 139.

244. Kerr, *supra* note 17, at 567–69.

245. See *United States v. White*, 401 U.S. 745, 752 (1971) (attempting to reconcile informant cases with *Katz*).

246. See *id.*

247. This is because it is perfectly reasonable to expect that one’s trusted associates will not divulge confidential communications. See *White*, 401 U.S. at 751. To avoid labeling such conduct a “search,” the Court concocted third-party doctrine. See *id.*; *supra* note 241.

248. See *supra* Section II.A.

249. See, e.g., *Rathbun v. United States*, 355 U.S. 107, 107–08 (1957).

250. Cf. *On Lee v. United States*, 343 U.S. 747, 754 (1952) (rejecting suggestion that “eavesdropping on a conversation, with the connivance of one of the parties,” can be analogized “to an unreasonable search or seizure”). The textual analysis shifts if the government surreptitiously plants a listening device on the defendant. See *infra* note 299 (discussing tracking devices on vehicles).

251. See *supra* note 241.

252. See *supra* Section I.A (explaining that compelling a party to produce its papers for inspection constitutes a search); *supra* Section II.B (defining “papers”).

pers.²⁵³ It is true that the government found information about Carpenter in the carrier's papers.²⁵⁴ But the Fourth Amendment does not protect information from disclosure. It restricts searches of papers, and its protections are personal. There was no search of Carpenter's papers—his Fourth Amendment claim should fail.²⁵⁵ (The task of identifying whose papers were searched is discussed further below.)

This does not mean that a textualist approach leads to government victories whenever someone provides information to third parties. First, defendants only lose protection when the government obtains information from the third party. If the government obtained location information from Carpenter's own records, or searched Carpenter's phone, that would constitute a search of Carpenter's papers and effects. It is irrelevant to the textual inquiry that the government could also obtain the same information from a third party. It is also worth noting that in all of these cases, the third party can invoke its own Fourth Amendment rights to challenge the government's request.²⁵⁶

Second, there will be times when the government does violate a suspect's Fourth Amendment rights by obtaining items from a third party. Third parties often have access to a suspect's papers or effects. That does not change the textual analysis. Obtaining a suspect's papers from a third party constitutes a "search" (or "seizure") of the suspect's "papers," and a potential Fourth Amendment violation.²⁵⁷ This complicates the government's win in the paradigmatic third-party doctrine case *Miller v. United States*.²⁵⁸ Among the records subpoenaed by the government in *Miller* were "copies of personal records that were made available to the banks for a limited purpose," such as "original checks and deposit slips" filled out by Mitchell Miller.²⁵⁹ Depending on the precise facts, these items may properly be characterized as Miller's "papers." If so, Miller should have been able to claim Fourth Amendment protection. This is a critical point in an age of "cloud compu-

253. *Carpenter v. United States*, 138 S. Ct. 2206, 2212 (2018).

254. *Id.* at 2214.

255. *Cf. id.* at 2235 (Thomas, J., dissenting) (emphasizing that "the Government did not search Carpenter's property"); *Smith v. Maryland*, 442 U.S. 735, 741 (1979) (finding no "search" when the phone company communicated the numbers dialed by a customer to the police).

256. *See Ohm*, *supra* note 1, para. 34 (noting that "third parties serve as gatekeepers between the data and the police" and can "serve as a brake on unchecked police access to data," although "some fear that they are merely a speed bump").

257. *Cf. supra* Section I.A (discussing indirect searches).

258. 425 U.S. 435 (1976).

259. *Miller*, 425 U.S. at 442. With respect to the records that the bank created and maintained, the analysis in that case tracks the conclusion here. *Id.* at 440 ("[T]he documents subpoenaed here are not respondent's 'private papers.' . . . [T]hese are the business records of the banks." (quoting *Boyd v. United States*, 116 U.S. 616, 622 (1886))).

ting.”²⁶⁰ Google may have access to all of my documents (including the Article I am typing), but they are still my “papers.”²⁶¹ Even if the government accesses them through Google, the government, by examining these documents, conducts a search of *my* papers in violation of my Fourth Amendment rights.

As the contrast between *Carpenter* and *Miller* reveals, a textual analysis hinges on the nature of the item searched. Whose paper is it? As in current Fourth Amendment standing doctrine, the answer turns on a commonsense understanding of whose object was searched.²⁶² Thus, a person can claim a Fourth Amendment violation for a search of a rented hotel room,²⁶³ a search of a borrowed car,²⁶⁴ or a search of a house in which the person was an overnight guest.²⁶⁵ These answers do not turn on the applicable property laws or statutory protections.²⁶⁶ And they should not turn on “reasonable expectations of privacy.” Instead, whether a Fourth Amendment claimant can object to a search of “their” house, papers, or effects should be a matter of straightforward textual application. Was the searched item (house, car, luggage, paper) “theirs”?²⁶⁷

A few examples from across the privacy spectrum illustrate the independence of the proposed approach from contract, property, or, most im-

260. See *United States v. Cotterman*, 709 F.3d 952, 965 (9th Cir. 2013) (“With the ubiquity of cloud computing, the government’s reach into private data becomes even more problematic.”); Couillard, *supra* note 40 (exploring complications to current “search” doctrine created by cloud computing).

261. See *Google Docs*, GOOGLE, <https://www.google.com/docs/about/> [<https://perma.cc/22CG-3WX5>] (offering service that allows users to store electronic documents on Google servers).

262. See *Minnesota v. Carter*, 525 U.S. 83, 95–96 (1998) (Scalia, J., concurring) (explaining that “this is not to say that the Fourth Amendment protects only the Lord of the Manor who holds his estate in fee simple” and encouraging analysis based on “the common-law background” against which the Fourth Amendment was enacted).

263. Cf. *United States v. Jeffers*, 342 U.S. 48, 51–52 (1951) (ruling that entry and search of hotel room violated Fourth Amendment).

264. Cf. *Byrd v. United States*, 138 S. Ct. 1518, 1531 (2018) (suggesting that a person who borrows a rental car from the renter will have a “reasonable expectation of privacy” in that car).

265. See *Minnesota v. Olson*, 495 U.S. 91, 96–97 (1990); see also *Mancusi v. DeForte*, 392 U.S. 364, 367–68 (1968) (“[T]he Amendment does not shield only those who have title to the searched premises. . . . [O]ne with a possessory interest in the premises might have standing.”).

266. Cf. *Byrd*, 138 S. Ct. at 1529 (holding unanimously that violation of rental contract terms did not undermine vehicle driver’s Fourth Amendment standing). For a contrary view, see *Carpenter v. United States*, 138 S. Ct. 2206, 2272 (2018) (Gorsuch, J., dissenting), which argues that statutory rights in records created by third parties might create a property right making government access a search of the customer. See also Slobogin, *supra* note 36, at 832 (highlighting circumstances where one might possess some statutory or even property rights to data voluntarily transferred to a third party).

267. Cf. *Fernandez v. California*, 571 U.S. 292, 303 (2014) (explaining that reasonableness of reliance on a person’s consent to a search should be evaluated based on “widely shared social expectations” or “customary social usage” (quoting *Georgia v. Randolph*, 547 U.S. 103, 111, 121 (2006))).

portantly, statutory law. A document posted to Google Docs or Facebook remains one of the poster's "papers" regardless of the terms of service of the Facebook or Google account, or any statute or regulation that might purport to extinguish the poster's rights. If police review the post or document through a request to Google or Facebook, they search the poster's papers.²⁶⁸ By contrast, a doctor's notes regarding treatment of a suspect, kept by the doctor, would be the doctor's papers. This remains true even though a variety of laws provide the patient-suspect with substantial rights in the papers.²⁶⁹ Consequently, only the doctor could lodge a Fourth Amendment objection to their production. The point here is not that statutory protections don't matter. Statutes can and should provide privacy in certain records, even against the government. The statutes must do so, however, by their own terms, not by altering Fourth Amendment analysis. (Evidentiary privileges may also apply.)²⁷⁰ This tracks existing Fourth Amendment doctrine regarding "searches,"²⁷¹ and more generally.²⁷²

Admittedly the inquiry into whose object was searched reintroduces a degree of complexity in borderline cases, but that complexity is already a facet of Fourth Amendment "standing" jurisprudence²⁷³ and is a world away from the amorphous nothingness of *Katz*. The typical analysis will be straightforward. If the third party generated the records for its own use (as in *Carpenter*), government access to the records constitutes a search of *the third party's* papers. Or if, like the phone number dialed in *Smith v. Maryland*, the third party is the ultimate destination for the information, the transferred information is that of the third party.²⁷⁴ And because Fourth Amendment rights are personal, only the third party can raise a Fourth Amendment objection to its production. If, on the other hand, the third party merely transmits or stores *the suspect's* papers or effects (for example, a cloud computing

268. In some circumstances a paper will belong to multiple persons. For example, if an intended recipient of a post, such as a Facebook friend (or Google Docs coauthor), forwards the post to police, the police "search" both persons' "paper" when they review the post. The search may be reasonable, however, based on the consent of any one of the persons. See, e.g., *Fernandez*, 571 U.S. at 303–04 (permitting occupant to consent to search of shared residence over objection of absent co-occupant).

269. Medical records are heavily regulated, including a patient right of access and restrictions on disclosure. See The Privacy Rule, 45 C.F.R. § 164.502 (2016) ("A covered entity or business associate may not use or disclose protected health information, except as permitted or required by this subpart . . .").

270. See, e.g., N.Y. C.P.L.R. 4504 (MCKINNEY 2019) (prohibiting doctors from disclosing "any information which he acquired in attending a patient in a professional capacity").

271. *California v. Greenwood*, 486 U.S. 35, 44 (1988) (rejecting suggestion that "concepts of privacy under the laws of each State are to determine the reach of the Fourth Amendment").

272. *Virginia v. Moore*, 553 U.S. 164, 176 (2008) ("[S]tate restrictions do not alter the Fourth Amendment's protections.").

273. See *Minnesota v. Olson*, 495 U.S. 91, 100 (1990) (explaining that standing inquiry proceeds by reference to "understandings that are recognized and permitted by society" (quoting *Rakas v. Illinois*, 439 U.S. 128, 144 n.12 (1978))).

274. 442 U.S. 735, 743 (1979).

service), it is irrelevant, in assessing whether there is an actionable search, that the government obtains the papers from the third party.²⁷⁵ As the Court explained in its 1877 analysis of the Fourth Amendment protection for letters placed in the mail, “[t]he constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, *wherever they may be.*”²⁷⁶

A textualist approach generates a clear principle that differentiates circumstances where a suspect can invoke the Fourth Amendment to block third-party transfers of information to the government and those where the suspect cannot. The suspect can block transfers of the suspect’s own papers to the government. The suspect cannot, however, block the third party’s transfer of the third party’s papers to the government, even if those papers contain information about the suspect. The text-based rule respects the third party’s agency in determining the disposition of its own papers; and it creates space for consumers and developers to seek out and offer products that take advantage of predictable Fourth Amendment protections. There may be factual circumstances that challenge the rule’s application,²⁷⁷ but the principle described above is a world apart from the caveated, ungeneralizable rules the Supreme Court now generates, such as that “accessing seven days of CSLI constitutes a Fourth Amendment search”²⁷⁸ or that “longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.”²⁷⁹ As the Court has recognized in other circumstances, the absence of clarity as to what is permitted can be as much of a threat to liberty as a flawed rule.²⁸⁰

III. APPLYING AN OLD TEXT TO NEW TECHNOLOGIES

The previous Parts set out an alternative framework for determining whether a challenged government action constitutes a Fourth Amendment “search.” There are two primary benefits to the framework. The first is legitimacy. As explained in the preceding Parts, the framework derives from, and gives effect to, the text of the Fourth Amendment. It also parallels various textually inspired lines of Fourth Amendment doctrine floating around the

275. *But cf.* *Couch v. United States*, 409 U.S. 322, 335 (1973) (concluding that the defendant could not invoke the Fourth Amendment to challenge subpoena compelling accountant to produce defendant’s papers).

276. *Ex parte Jackson*, 96 U.S. 727, 733 (1877) (emphasis added).

277. *See infra* Part III.

278. *Carpenter v. United States*, 138 S. Ct. 2206, 2217 n.3 (2018).

279. *Id.* at 2215, 2220 (emphasizing that “five Justices agreed” with this proposition in *Jones*); *United States v. Jones*, 565 U.S. 400, 430 (2012) (Alito, J., concurring) (“[T]he use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.”); *id.* at 415 (Sotomayor, J., concurring) (endorsing statement).

280. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992) (“Liberty finds no refuge in a jurisprudence of doubt.”).

byzantine jurisprudence.²⁸¹ This provides Fourth Amendment Textualism with a clearer path to adoption than competing approaches, and the potential to attract support across the ideological spectrum.²⁸²

The second benefit to Fourth Amendment Textualism is determinacy. The preceding Parts discussed application of the proposed framework in a variety of circumstances.²⁸³ This Part provides more detailed applications with a focus on complex, technologically advanced scenarios. Conventional wisdom suggests that technological advances make straightforward Fourth Amendment “search” analysis implausible. This Part challenges that wisdom. The point is not only to reveal the likely answers to some of the most complex “search” questions but also to illustrate how a concrete test creates a refreshing ability to predict outcomes—something lacking under *Katz*. The discussion closes with a brief summary of “winners” and “losers” under a textualist approach.

A. Searches of Persons

The Fourth Amendment prohibits unreasonable searches of persons.²⁸⁴ These searches are critically important as they have the potential to be uniquely abusive. A textualist approach unequivocally identifies searches of the person. When police obtain someone’s DNA by scraping their cheek, there is a search of the person. Similarly, taking someone’s fingerprints, drawing blood, or conducting a breathalyzer, pat down, or strip search all constitute searches of the person. These are all examinations of the body (as an object) to uncover information. And in each scenario, there is no question that the person searched possesses a cognizable Fourth Amendment claim based on a search of “their” person. Contrast the above examples to a scenario where the police obtain a suspect’s DNA or fingerprints from a crime scene, or on a glass left at a restaurant. This might be a search of an effect (the glass) or a person (the victim), but it is not a search of the suspect’s person or effects and so would not implicate the suspect’s Fourth Amendment rights.²⁸⁵ Similar analysis applies to a comparison of crime-

281. See, e.g., *supra* Section II.D (discussing parallel to Fourth Amendment standing inquiry).

282. Ryan, *supra* note 24, at 1526–27 (“The academic debate, in short, is increasingly focused on what the text of the Constitution means, not whether the text should control.”); see *supra* note 24.

283. See, e.g., *supra* Introduction (explaining that drug dog sniffs and thermal detection devices directed at homes or effects are Fourth Amendment searches); *supra* Part II (finding Fourth Amendment searches when the government accesses cloud storage, and some bank or tax records as in *United States v. Miller*, 425 U.S. 435, 442 (1976), but no Fourth Amendment searches in “false friends” cases, in *Carpenter*, and in intrusions to discover the off-season burglar).

284. See *supra* Section II.B.

285. See *supra* Section II.C (explaining that discarded saliva, urine and dirt would not be an “effect”). At least with respect to DNA analysis for solely identification purposes, see *Maryland v. King*, 569 U.S. 435, 464 (2013), it seems a stretch to suggest that analysis of discarded

scene DNA to samples contained in a government or public database, including so-called “familial DNA” searches.²⁸⁶

B. *Public Surveillance and Tracking*

Many of the novel challenges to Fourth Amendment doctrine hinge on applications of public surveillance. Recordings and observations obtained through public surveillance cameras may qualify under the “search” definition set out in Part I. But public surveillance typically does not constitute a search of a “person,” “house,” “paper,” or “effect.” The key for most applications is the distinction set out in Section II.B between a search that *finds* a person and a search *of* a person. For example, after a bank robbery, the police might search through the footage recorded by a nearby surveillance camera to uncover a suspect, but this is not a search *of* the person and so does not trigger Fourth Amendment protection.

Satellite imagery and other technologically advanced means of public surveillance are not Fourth Amendment “searches,” so long as all that is detected is a person, vehicle, house, and the like. Finding or locating a house or person is not the same as searching the house or person. The answers change, however, once the technology does more than merely find a person or vehicle. If, instead, the technology uncovers information about the detected person or item, such as a concealed weapon or the recent ingestion of drugs, there is a search of the person that triggers Fourth Amendment protection. This makes the thermal detection of temperature patterns inside the home, considered in *Kyllo v. United States*, a search of a home.²⁸⁷ Authorities reportedly now possess an analogous tool that detects the presence of people inside a structure.²⁸⁸ A text-focused approach would deem its use a “search” of a home.

Similar analysis applies to more rudimentary surveillance tactics.²⁸⁹ Pointing a flashlight or binoculars at a house to identify the address, or the source of a strange noise, is not a search of the house. Standing on a porch “to peer through your windows, into your home’s furthest corners,” however, is a search of the house.²⁹⁰ The distinction between the scenarios is intuitively

hair, saliva, or urine would constitute a search of the “person” who discarded the biological material.

286. See Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 MICH. L. REV. 291, 297 (2010) (“Familial searching refers generally to the idea of looking in a DNA database not for the person who left the crime-scene sample, but rather for a relative of that individual.”).

287. 533 U.S. 27, 29 (2001). For further discussion of the case, see *supra* Introduction.

288. See Brad Heath, *New Police Radars Can ‘See’ Inside Homes*, USA TODAY (Jan. 19, 2015, 6:26 PM), <https://www.usatoday.com/story/news/2015/01/19/police-radar-see-through-walls/22007615/> [<https://perma.cc/5ZYY-A5CT>].

289. Cf. *United States v. Lee*, 274 U.S. 559, 563 (1927) (“[N]o search on the high seas is shown. The testimony of the boatswain shows that he used a searchlight. It is not shown that there was any exploration below decks or under hatches.”).

290. *Florida v. Jardines*, 569 U.S. 1, 12 (2013) (Kagan, J., concurring).

tive, sensible, and fits the definition provided throughout this Article. The police officer who observes the house's exterior, and even what is displayed in a window, gleans only what is already apparent.²⁹¹ The officer does not conduct an "examination" of the house to "uncover" information. She looks at the house, but does not "search" it. The officer on the porch using a flashlight or binoculars to peer into the house examines the house to uncover information, conducting a Fourth Amendment "search."

Similarly, surveillance of vehicles, including the use of license plate readers,²⁹² will typically not be a search for Fourth Amendment purposes. Reading a license plate does not uncover any information. A license plate displays a sequence of letters and numbers that is immediately apparent to anyone who views it. Consequently, viewing that information is not a search of the license plate.²⁹³ Using the knowledge obtained to then generate additional information (for example, comparing the number to a database of license plates) is also not a Fourth Amendment search because it is, at most, a search of a database, not a search of the suspect's effect.²⁹⁴

An analysis of tracking devices provides a further illustration of the mechanics of a textualist approach. The most conventional means of tracking is visual surveillance. When the police tail suspects ("follow that car!") to see where they go, there is no Fourth Amendment "search." Observing the car's movements in public spaces is not a search of the vehicle.²⁹⁵ Electronic tracking devices change the analysis, leading to a Fourth Amendment search in almost every conceivable case.²⁹⁶ Imagine the police affix a tracking device to a suspect's vehicle while it is parked in a parking lot, as in *United States v. Jones*.²⁹⁷ During the affixing process, the government agents observe the parked vehicle and, perhaps, wave ironically as the suspect drives off. These observations, like those described immediately above ("follow that car!") do not constitute a search. The agents are merely observing what is already apparent, and have not (thus far) uncovered any information. Things change once the car is out of view, however, and the agents obtain further information about the car's location through the tracking software. The tracking device becomes a means by which the agents examine an object (the vehicle)

291. See *supra* Section II.A (defining "search" as an "examination of an object or space to uncover information" (emphasis added)).

292. See *ACLU Found. v. Superior Court*, 400 P.3d 432, 434 (Cal. 2017) (describing "automated license plate reader (ALPR) technology in order to locate vehicles linked to crimes under investigation").

293. See *supra* Section II.A.

294. See *supra* Section II.A.

295. See *supra* Section II.A (defining search).

296. This reverses the Supreme Court's "beeper cases," which held that surreptitiously planting a tracking device among a suspect's effects did not constitute a search unless the tracker revealed the suspect's location in a private residence. See *United States v. Karo*, 468 U.S. 705, 713 (1984); *United States v. Knotts*, 460 U.S. 276 (1983); *supra* note 171.

297. 565 U.S. 400, 403 (2012).

to uncover information (the vehicle's subsequent movements).²⁹⁸ Since the information obtained is no longer apparent (to them), the officers' use of a tracking device to uncover that information is a Fourth Amendment search.²⁹⁹

Relatedly, if the police access the computer system inside a modern car and download information, such as the car's speed and location, there is also a "search." In this scenario, the police are most obviously searching the computer connected to the vehicle, and a computer is an "effect."³⁰⁰ The same analysis would apply if the police sought past locations by hacking into Fitbit watches, iPhones, or laptop computers—all "effects."³⁰¹ A complaining party with a claim to the hacked computer will be able to establish a Fourth Amendment violation.

C. Intercepting Electronic Signals and the Internet of Things

Another crop of scenarios where new technology pushes Fourth Amendment "search" doctrine concerns electronic signals streaming through the air. These signals can reveal otherwise hidden information. For example, police currently employ a technology colloquially referred to as a "StingRay" to trigger and then intercept signals that identify the cell phones operating in a specified area.³⁰² This constitutes a Fourth Amendment

298. It is true that the government could obtain at least some of this information through a non-search (by physically observing the vehicle's movements in public spaces), but that is irrelevant when, as here, the government obtains the information in a different manner. The question for Fourth Amendment Textualism, in contrast to *Katz's* privacy-focused approach, is whether the police conducted a search, not whether they could have obtained the same information without one. See *supra* Section II.A; *supra* note 171.

299. This conclusion may seem to be in tension with the government's ability (described above) to obtain analogous information about a car's location through satellite imagery, public surveillance cameras, or traditional physical surveillance without triggering the Fourth Amendment. It is certainly possible that government conduct meeting these descriptions will constitute a "search." But in the public surveillance examples, police search a space (public roads and the like) to uncover information (a car's location). That is a "search" of the public spaces that finds a car. By contrast, in the electronic tracking example, the police do not search a public space to find a car. They uncover information about the car by attaching a device to the car itself. This seems most fairly characterized as a search of the car—an examination of a constitutionally protected object to uncover information. Following this reasoning, if the police attach a tracking (or listening) device to a person and use that device to obtain otherwise hidden information (the person's utterances or vital signs), there is similarly a search of that person (an examination of a person to uncover information).

300. See *supra* Section II.C. This analysis could also be relied on to reach the conclusion (noted immediately above) that tracking devices attached to a suspect's property constitute Fourth Amendment searches.

301. See *supra* Section II.C.

302. See *State v. Copes*, 165 A.3d 418, 422–23 (Md. 2017) (discussing technology); Stephanie K. Pell & Christopher Soghoian, *A Lot More than a Pen Register, and Less than a Wiretap: What the StingRay Teaches Us About How Congress Should Approach the Reform of Law Enforcement Surveillance Authorities*, 16 YALE J.L. & TECH. 134, 145–46 (2013) (defining a Sting-Ray as "a surveillance device that . . . tricks all nearby phones and other mobile devices into

“search” under a textualist approach. The phone is an “effect,” and the StingRay examines the phone to uncover information that is not already apparent (specifically, the phone’s unique serial number). The information uncovered is minimal, but a small search is still a search.³⁰³ A similar analysis would apply to police requests to a wireless carrier to “covertly ‘ping’ a subscriber’s phone in order to locate [the subscriber] when a call is not being made.”³⁰⁴

Much scholarly excitement surrounds the Internet of Things (IoT).³⁰⁵ This buzz-phrase loosely defines various forms of home electronic devices that interact wirelessly to make life easier.³⁰⁶ For example, a “smart” refrigerator might sense it is out of milk and then, at the owner’s request, notify Amazon to deliver a new carton. If the police intercept the notification, they have intercepted the electronic equivalent of the owner’s papers—a note sent to the store requesting more milk.³⁰⁷ By accessing that note, the government conducts a Fourth Amendment search. Also, if police access the information through an Amazon Alexa sitting on the owner’s kitchen counter, they search the owner’s effect (the Alexa). If, instead, Amazon keeps a record of all of a customer’s requests for billing purposes, and the police obtain that information through a subpoena to Amazon, they conduct a search of Amazon’s papers. Or, if the fridge communicates information to Amazon without customer involvement to enable product improvements, police can intercept that signal or obtain it from Amazon without infringing on the customer’s (as opposed to Amazon’s) Fourth Amendment rights. This information is not the customer’s papers. Parallel analysis applies throughout the IoT.

The same framework applies to the interception of text messages and email.³⁰⁸ Imagine Walter White regularly texts Jesse Pinkman.³⁰⁹ If the government issues a subpoena to Verizon seeking to intercept the texts, White’s Fourth Amendment rights are implicated. Verizon may have access to the text message, but it is White’s message (his “papers”) that Verizon is merely transporting. The result is a search of White’s papers, which are protected by

identifying themselves (by revealing their unique serial numbers) just as they would register with genuine base stations in the immediate vicinity”).

303. Cf. *Arizona v. Hicks*, 480 U.S. 321, 325 (1987) (“A search is a search, even if it happens to disclose nothing but the bottom of a turntable.”).

304. Stephanie K. Pell & Christopher Soghoian, *Can You See Me Now?: Toward Reasonable Standards for Law Enforcement Access to Location Data that Congress Could Enact*, 27 BERKELEY TECH. L.J. 117, 131 (2012).

305. See, e.g., Ferguson, *supra* note 191.

306. *Id.* at 812.

307. See *supra* Section II.B.

308. See discussion *supra* Introduction and Part II.

309. These are characters from the show *Breaking Bad*. See *Breaking Bad*, AMC, <https://www.amc.com/shows/breaking-bad/> [<https://perma.cc/YMT4-LNCV>]. Really, it is quite good.

the Fourth Amendment, “wherever they may be.”³¹⁰ Notably, the interception of airborne signals relaying White and Pinkman’s voice conversations would not be protected through this analysis since the oral communication would not fairly be characterized as White’s “papers.” But, of course, the interception of voice calls is restricted by a longstanding federal statute, rendering this gap a theoretical rather than a practical concern.³¹¹

As in the Amazon Alexa example used above, the hardest questions involve requests directed at the recipients of a suspect’s communications. For example, the government might issue a subpoena to Pinkman seeking all his text messages and by doing so obtain messages sent by White. This is not a search of White. White communicated confidential information to Pinkman via text, but absent additional facts, it seems strained to view text messages in the possession of their intended recipient as continuing to be part of the sender’s papers. (Just as it would be odd to view information conveyed orally to Pinkman as somehow belonging to White.) Once Pinkman received the text messages that were intended for him, they became part of Pinkman’s papers.³¹² As a result, the government searches Pinkman (or more precisely, his “papers”) when it obtains this text from him. The same logic would apply in less technologically sophisticated scenarios like police inspections of curbside trash. Trash contained in a bin on one’s property would remain the person’s “effects.” Once it is collected by the trash hauler, however, the trash becomes the “effects” of the hauler. A suspect could raise a Fourth Amendment objection to a search of the trash on the suspect’s property but loses that objection once the trash hauler carts the refuse away or deposits it in a landfill.³¹³

* * *

While no article can cover every possible “search” scenario, this is as robust a catalogue of examples as can be expected. Most proposals hint at new directions or considerations. This Article attempts (perhaps foolishly) to provide solutions to the past fifty years of search scenarios, plus the next ten years or so. The point is not to reveal winners and losers, or to put the courts

310. *Ex parte Jackson*, 96 U.S. 727, 733 (1877).

311. See *supra* note 101 and accompanying text. To avoid this result, White could transcribe his thoughts and transmit the resulting “papers” to Pinkman. This seemingly alarming ability to “game” the outcome is a feature, not a bug. The doctrine’s *ex ante* clarity should create the ability to tailor one’s practices to obtain Fourth Amendment protection.

312. Cf. *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979) (finding that telephone users do not have Fourth Amendment rights in the phone numbers they dial because they know they are conveying the phone number to the phone company); Kerr, *supra* note 17, at 561, 582 (“The sender has Fourth Amendment rights in the letter during transmission, but once it arrives at its destination, those rights disappear.”).

313. *But cf.* *California v. Greenwood*, 486 U.S. 35, 41 (1988) (“[S]ociety would not accept as reasonable respondents’ claim to an expectation of privacy in trash left for collection in an area accessible to the public . . .”).

out of business. The hope is to show that Fourth Amendment Textualism asks clearer questions and provides clearer answers than the *Katz* test, leaving fewer opportunities for subjectivity to infiltrate the doctrine. The cost of providing actual answers to difficult questions is that it invites disagreement. Judges and scholars will surely contest not only the proposed framework but also conclusions as to its proper application in particular scenarios. Disagreement is not fatal; it is the reason we have courts. And keep the benchmark in mind. A textualist approach is not perfect; it doesn't have to be. It simply needs to outperform *Katz*'s reasonable expectations of privacy test in important respects. And when it comes to clarity and determinacy, this Section tries to show that it meets that challenge.

More determinacy should lead to greater consistency in application across courts, both state and federal, and over time. Consistency and predictability are important features of Fourth Amendment doctrine which seeks to guide not just court decisions but police investigative activity as well.³¹⁴ Clear principles are especially important when the Supreme Court only takes one or two "search" cases each year, leaving most of the work to the lower courts. In addition, determinacy provides space for legislatures and state courts (interpreting state constitutions) to add protections when they perceive shortcomings in Fourth Amendment protections. And clear rules also allow consumers and product developers to adjust their preferences and products.

There remains the question of desirability. Many readers will evaluate Fourth Amendment Textualism on policy grounds—who "wins," who "loses." Even though I think this is the wrong metric, I also think the methodology discussed here fares surprisingly well. It does not protect everything, but it cleanly and unequivocally protects the things the Constitution sought to protect. Fourth Amendment Textualism reinforces protections for physical searches, such as government intrusions upon the body, the home, documents, vehicles, and luggage. It also protects against intrusions upon people's modern information-rich possessions—electronic devices, phones, computers. And it strengthens certain protections in the online world by unequivocally protecting a person's electronic papers regardless of where those items are located. This is critical as data increasingly migrates from personal computers to third-party servers and the cloud.³¹⁵ Facebook posts, Google Docs, text messages, and email all continue to receive protection as the author's "papers" "wherever they may be"—an enhancement of the privacy protection provided by *Katz*. As already discussed, Fourth Amendment Textualism does not protect against public surveillance. To the extent surveil-

314. See, e.g., *New York v. Belton*, 453 U.S. 454, 458 (1981) ("Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities . . .") (quoting Wayne R. LaFare, "Case-By-Case Adjudication" Versus "Standardized Procedures": *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 142)).

315. See Couillard, *supra* note 40, at 2216 (exploring complications to current "search" doctrine created by cloud computing).

lance cameras observe people without intruding upon “persons, houses or effects,” as is widespread in European cities like London,³¹⁶ Fourth Amendment Textualism provides no recourse. Whether *Katz* does so is in flux.³¹⁷ Another potential distinction arises in third-party scenarios. While Fourth Amendment Textualism protects a suspect’s papers—even those held by third parties—it does not empower a suspect to prohibit the third party from turning over the third party’s own papers to the government. *Katz*, as applied in *Carpenter*, does just that. Finally, while Fourth Amendment Textualism protects against the interception of emails and texts, it does not protect against the interception of pings and other automated electronic signals when these signals cannot fairly be characterized as the emitting device owner’s “papers” or “effects.” *Katz* might provide protection.

That’s the promised rough summary of winners and losers. In evaluating the summary, keep in mind that Fourth Amendment Textualism offers two more benefits that *Katz* cannot match: certainty and legitimacy. Fourth Amendment Textualism can unflinchingly protect a core of constitutionally protected areas, while leaving other areas to policy arguments and legislative debate. And it follows neatly from the Fourth Amendment’s text. In the long run, this may be the most concrete and stable form of privacy protection the Fourth Amendment can offer.

CONCLUSION

Current Fourth Amendment “search” jurisprudence frees the Supreme Court to reach the “right” result in each case. The sum total of all this freedom, however, is an unstable, unpredictable, and unprincipled Fourth Amendment jurisprudence untethered to the words of the Constitution. The Court’s search cases look like its obscenity jurisprudence³¹⁸: the Court knows a “search” when it sees one. This jurisprudence is hard to support even from a pure policy perspective. A doctrine of uncertainty is toxic for police and citizens who do not know what the Constitution permits, and lower courts who receive little guidance on what to tell them. Uncertainty about what the Fourth Amendment protects also slows state and federal legislative responses that could supplement constitutional protections. Legislators are understandably hesitant to intervene when it is unclear both what protections are needed and what investigative conduct can be authorized.³¹⁹

316. See Nick Taylor, *Closed Circuit Television: The British Experience*, 1999 STAN. TECH. L. REV. 11 (describing the widespread use of public surveillance in London and beyond).

317. See *Carpenter v. United States*, 138 S. Ct. 2206, 2216 (2018) (explaining that the pervasive “ability to chronicle a person’s past movements” requires a different type of Fourth Amendment analysis).

318. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I know it when I see it.”).

319. Cf. Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 31 (1975) (explaining that congressional action is unlikely “unless a problem area is clearly identified as one in which Congress may prescribe a solution”).

The good news is that the jurisprudence is ripe for change. The failings of the “reasonable expectation of privacy” test are no secret. Supreme Court justices, privacy advocates, and law enforcement seem frustrated with the oft-disparaged “reasonable expectation of privacy” test and its even more unpopular cousin, “third-party doctrine.”³²⁰ After almost a half century of *Katz*, the Supreme Court is in the market for an alternative.

This Article contends that the best alternative is the simplest. The Supreme Court can jettison *Katz* and all of the doctrinal baggage that case spawned. In its place, the justices can apply Fourth Amendment Textualism, a methodology that gives “search” its common meaning and limits the Amendment’s protection to searches of claimants’ (“their”) “persons, houses, papers, and effects.” This approach will not please everyone. And it too will require judgment calls. But Fourth Amendment Textualism infuses the jurisprudence with a heavy dose of legitimacy and determinacy, while safeguarding a precious core of constitutionally protected spaces against government abuse.

320. See *Carpenter*, 138 S. Ct. at 2246 (Thomas, J., dissenting) (“Because the *Katz* test is a failed experiment, this Court is dutybound to reconsider it.”); *id.* at 2267 (Gorsuch, J., dissenting) (seeking “another way” to approach “search” questions); *United States v. Jones*, 565 U.S. 400, 417 (2012) (Sotomayor, J., concurring) (questioning third-party doctrine); *supra* Section I.C.

