An Empirical Inquiry into the Use of Originalism: Fourth Amendment Jurisprudence During the Career of Justice Scalia

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There is likely no methodological question of greater importance to constitutional law than whether adjudication should be based on the original meaning of the Constitution's text, or instead reflect an evolving understanding in light of felt experience. Little effort, however, has been made to test empirically the claim of originalists that their methodology offers an effective vehicle for constitutional adjudication.

This study is the first to assess the extent to which original meaning, in practice, proves able to resolve constitutional litigation. To do so, it examines Fourth Amendment jurisprudence during the career of a self-proclaimed originalist, Justice Antonin Scalia. Cases involving the Fourth Amendment's prohibition on "unreasonable searches and seizures" were selected because stare decisis poses no apparent obstacle to the use of originalism in this area of constitutional law, and because the Fourth Amendment is typical of the kind of constitutional text likely to generate litigation.

Originalism played a small role in Fourth Amendment jurisprudence during the study period, with less than 14% of the opinions of the Court addressing a disputed question of Fourth Amendment law were originalist. Despite Justice Scalia's professed commitment to originalism, he voted on originalist grounds in only 18.63% of cases. The Court's other professed originalist, Justice Clarence Thomas, voted on originalist grounds in only 15.71% of cases. If anything, this study's coding methodology likely overstates the prevalence of originalism. Voting patterns were not markedly different for Justices who do not profess fealty to originalism. These results seemingly reflect the difficulty in applying original meaning in contemporary constitutional adjudication, rather than a lack of commitment to originalism. This difficulty is likely generalizable to other areas of constitutional law, and casts doubt on the utility of originalism as an adjudicative methodology.

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INTRODUCTION

There is likely no methodological question of greater importance to constitutional law than the question of whether adjudication should be based on the original meaning of the Constitution's text or, should instead reflect an understanding of the text's meaning that evolves over time.

Consider the Supreme Court's decision recognizing a constitutional right of same-sex couples to marry in *Obergefell v. Hodges*.[1] The opinion of the Court advanced a classic argument for an evolving understanding of constitutional law; after observing that "[t]he nature of injustice is that we may not always see it in our own times," Justice Kennedy wrote:

> The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.[2]

In his dissent, Justice Scalia offered a classic originalist response: "When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases."[3]

The debate is a familiar one. Originalist objections have appeared in dissenting opinions in virtually every instance in recent decades in which the Court recognized constitutional rights unknown when the Constitution was framed.[4] Originalist arguments, however, are not confined to dissenting opinions; they have often appeared in opinions of the Court rejecting efforts to expand the scope of constitutional rights beyond those that have been historically recognized.[5] Conversely, on other occasions, originalism has been

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1. 135 S. Ct. 2584 (2015).

2. *Id.* at 2598. This passage echoes what may be the paradigmatic statement of an evolving understanding of the Constitution:

> [W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.

Missouri v. Holland, 252 U.S. 416, 433 (1920).

3. *Obergefell*, 135 S. Ct. at 2628 (Scalia, J., dissenting).

4. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 595–98 (2003) (Scalia, J., dissenting) (disputing recognition of a right to engage in private, same-sex sexual acts); Roe v. Wade, 410 U.S. 113, 173–76 (1973) (Rehnquist, J., dissenting) (contesting the recognition of a right to abortion); Furman v. Georgia, 408 U.S. 238, 376–85 (1972) (Burger, C.J., dissenting) (rejecting the claim that the death penalty violates the Constitution).

5. *See, e.g.*, Town of Greece v. Galloway, 134 S. Ct. 1811, 1818–20 (2014) (rejecting the claim that the Establishment Clause prohibits legislative prayer); Washington v. Glucksberg, 521 U.S. 702, 722–28 (1997) (rejecting a claimed right to assisted suicide); DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 194–97 (1989) (rejecting the claim that a child had a right to be protected from his abusive father).

employed to expand the scope of constitutional protections.[6]

The case for originalism is familiar as well. Originalism is frequently defended on the ground that any legal text is properly understood based on its meaning when framed.[7] Its advocates also argue that originalism appropriately constrains judicial power by confining constitutional adjudication to the legal meaning of text,[8] and reflects the proper role of the judiciary by leaving the making of constitutional law to those who framed and ratified constitutional text.[9] Moreover, originalism is said to lead to desirable outcomes by protecting legal commitments that reflect fundamental values.[10]

Scientific theories gain acceptance when they generate hypotheses that are later tested and borne out; surely legal theories deserve testing as well.[11] Yet,

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6. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570 (2008) (invalidating an ordinance prohibiting the possession of handguns in the home and requiring handguns be locked when not being used); Crawford v. Washington, 541 U.S. 36 (2004) (invalidating under the Sixth Amendment's Confrontation Clause a rule of evidence permitting the use of out-of-court statements reflecting adequate indicia of reliability).

7. *See, e.g.*, JACK M. BALKIN, LIVING ORIGINALISM 35–37 (2011); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 102–11 (rev. ed. 2014); GREGORY BASSHAM, ORIGINAL INTENT AND THE CONSTITUTION: A PHILOSOPHICAL STUDY 67–90 (1992); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 160–212 (1999); Hans W. Baade, *"Original Intent" in Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1103–07 (1991); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 550–59 (1994); Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution,"* 72 IOWA L. REV. 1177, 1186–1259 (1987); Christopher R. Green, *"This Constitution": Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607, 1641–57 (2009); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 229–36 (1988); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1127–48 (2003); Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1833–36 (1997); Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269, 1278–87 (1997); Michael Stokes Paulsen, *How to Interpret the Constitution (and How Not To)*, 115 YALE L.J. 2037, 2056–62 (2006); Ronald D. Rotunda, *Original Intent, the View of the Framers, and the Role of the Ratifiers*, 41 VAND. L. REV. 507, 512–14 (1988); Saikrishna B. Prakash, *Unoriginalism's Law Without Meaning*, 15 CONST. COMMENT. 529, 541–45 (1998); Lawrence B. Solum, *We Are All Originalists Now*, *in* ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 38–42 (2011).

8. *See* BARNETT, *supra* note 7, at 111–15; MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? 31–38 (1994); WHITTINGTON, *supra* note 7, at 50–61; Lillian R. BeVier, *The Integrity and Impersonality of Originalism*, 19 HARV. J.L. & PUB. POL'Y 283, 288–91 (1996); Lino A. Graglia, *"Interpreting" the Constitution: Posner on Bork*, 44 STAN. L. REV. 1019, 1020–29 (1992); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989); Steven D. Smith, *Law Without Mind*, 88 MICH. L. REV. 104, 105–06 (1989); Solum, *supra* note 7, at 42–44.

9. *See* BALKIN, *supra* note 7, at 54–56; ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 143–60 (1990); WHITTINGTON, *supra* note 7, at 152–59; Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1121–26 (1998); Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse* Stare Decisis, 93 VA. L. REV. 1437, 1440, 1444–46 (2007); Jonathan R. Macey, *Originalism as an "Ism,"* 19 HARV. J.L. & PUB. POL'Y 301, 307–08 (1996); Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1132–37 (1998); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 844–58 (2015).

10. *See, e.g.*, JOHN O. MCGINNIS & MICHAEL D. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 62–99 (2013); Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 82–88 (2009).

11. *Cf.* Lawrence M. Friedman, *Law Reviews and Legal Scholarship: Some Comments*, 75 DENV. U. L. REV. 661, 668 (1998) ("In most fields, a theory has to be testable; it is a hypothesis, a prediction, and therefore

little effort has been made to test the hypotheses generated by originalism. After all, whether originalism produces its claimed virtues is ultimately an empirical question. If the case for originalism is sound, one should be able to demonstrate that originalism constrains judicial discretion by providing a basis in the demonstrable original meaning of constitutional text for resolving disputed questions of constitutional law in the broad range of cases that come before the courts. As one leading originalist scholar put it, original meaning has utility in constitutional adjudication "only *to the extent* that this meaning can be ascertained and applied to a case or controversy."[12] If, however, originalism yields no answer in most cases, resort to other modalities of adjudication is inescapable, and originalism's ability to deliver on its asserted virtues would be compromised.

Whether originalism produces its theorized virtues is hotly disputed. Nonoriginalists argue that the constitutional text most likely to generate litigation is framed at such a high level of generality that the original meaning of constitutional text offers little useful guidance.[13] Even many originalist scholars acknowledge that the original meaning of constitutional text is sometimes vague or ambiguous, necessitating resort to what they characterize as nonoriginalist construction.[14] Others, in contrast, reject the need for nonoriginalist construction contending instead that textual vagueness or ambiguity can be addressed through the same methods that were employed at the time constitutional text was originally framed.[15] This claim, as well, generates a testable hypothesis—that original methods can resolve textual vagueness and ambiguity and thereby facilitate adjudication on originalist grounds even in the face of seemingly vague or ambiguous constitutional text.[16]

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subject to proof. When legal scholars use the word 'theory,' they seem to mean (most of the time) something they consider deep, original, and completely untestable.").

12. Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 263 (2005).

13. DAVID A. STRAUSS, THE LIVING CONSTITUTION 7–10, 18–19 (2010); LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 31–64 (1991); Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 725–27 (2011); Eric J. Segall, *A Century Lost: The End of the Originalism Debate*, 15 CONST. COMMENT. 411, 432–33 (1998); Peter J. Smith, *How Different Are Originalism and Non-Originalism?*, 62 HASTINGS L.J. 707, 716–24 (2011); D.A. Jeremy Telman, *Originalism: A Thing Worth Doing . . .*, 42 OHIO N.U. L. REV. 539, 549–50, 566–67 (2016).

14. *See, e.g.*, BALKIN, *supra* note 7, at 14, 31–32; BARNETT, *supra* note 7, at 120–31; WHITTINGTON, *supra* note 7, at 5–14; Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 467–72 (2013); Grégoire C. N. Webber, *Originalism's Constitution*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 147, 173–76 (Grant Huscraft & Bradley W. Miller eds., 2011).

15. *See, e.g.*, MCGINNIS & RAPPAPORT, *supra* note 10, at 116–53; Sachs, *supra* note 9, at 874–83.

16. *Cf.* ERIC J. SEGALL, ORIGINALISM AS FAITH 118 (2018) ("Throughout the book, the authors claim that these original methods will reduce the vagueness and imprecision of much of the constitutional text, but nowhere do they show how that would work in practice. Their project suffers from the absence of applying theory to facts because simply alleging that originalist rules and methods will make the judicial case deciding function easier, without showing how that is true, makes their claim hard to evaluate.").

There have been a handful of scholarly efforts to examine the use of originalism in constitutional adjudication.[17] This small body of research, however, does not endeavor to determine how often judicial decisions, or the votes of individual judges, turn on original meaning. This study is the first to undertake that task, and thereby, to assess the extent to which originalism, in practice, proves able to constrain constitutional adjudication. To do so, this study examines Fourth Amendment jurisprudence during the career of self-proclaimed originalist Justice Antonin Scalia. Justice Scalia's career lasted long enough to supply a large, but manageable, set of Fourth Amendment decisions; moreover, cases involving the constitutional prohibition on "unreasonable searches and seizures"[18] were selected because stare decisis poses no apparent obstacle to the use of originalism in this area of constitutional adjudication.[19] Fourth Amendment cases during Justice Scalia's tenure on the Court, therefore, represent a good opportunity to test the hypothesis that originalism provides a workable methodology for constitutional adjudication, even when constitutional text is framed at a relatively high level of generality.

Part I explicates the methodology of the present study, including its definition of originalism and approach to coding opinions. If anything, the coding methodology utilized in this study likely overstates the prevalence of originalism. Part II presents the results, which indicate that originalism played a small role in Fourth Amendment jurisprudence: less than 14% of the opinions of the Court during Justice Scalia's service were originalist. A Justice's methodological commitments made little apparent difference; despite Justice Scalia's professed commitment to originalism, he voted on originalist grounds in only 18.63% of cases addressing disputed questions of Fourth Amendment law. The Court's other professed originalist, Justice Clarence Thomas, voted on originalist grounds in only 15.71% of cases. Voting patterns were not markedly different for Justices with different methodological commitments. Part III analyzes these results and suggests that they reflect neither a lack of commitment to originalism nor the influence of nonoriginalist precedent, but instead the difficulties in applying original meaning in contemporary constitutional adjudication. Part IV considers alternatives to Justice Scalia's approach to originalism that might increase the rate of originalist adjudication, and concludes that none are very promising.

I. METHODOLOGY

There are formidable methodological issues in studying the role of originalism in constitutional adjudication: originalism must be defined, a suitable dataset must be identified, and an approach must be developed for

17. This research is summarized in Subpart I.C below.

18. U.S. CONST. amend. IV.

19. The compatibility between Fourth Amendment originalism and stare decisis is explored in Subpart I.B below.

coding opinions.

A. DEFINING ORIGINALISM

Determining what qualifies as originalist constitutional adjudication is no easy matter. Some originalist scholars, for example, contend that the Framers' intent should be the focus of constitutional interpretation.[20] Others reject inquiry into authorial intentions, and instead, treat the manner in which the Framing-era public would have understood the text as binding.[21] Still others focus on how a hypothetical reasonable person in the Framing era would have understood the text.[22] This brief summary, however, considerably understates the diversity of thinking among originalists; Thomas Colby and Peter Smith's survey of originalist methodology, for example, identified a dizzying array of approaches.[23]

Nevertheless, there are some conceptual commonalities in the various originalist methodologies. Lawrence Solum has written:

> Contemporary originalism is . . . united by two core ideas, fixation and constraint. The Fixation Thesis claims the original meaning ("communicative content") of the constitutional text is fixed at the time each provision is framed and ratified. The Constraint Principle claims that constitutional actors (e.g., judges, officials, and citizens) ought to be constrained by the original meaning when they engage in constitutional practice (paradigmatically deciding constitutional cases).[24]

Professor Solum's account nicely sketches the boundaries of originalism: absent fixation (like Professor Solum, I use the phrase "original meaning" to denote fixation) and constraint, the legal meaning of the Constitution is capable of evolution. Indeed, this account seems consistent with the views of virtually all originalists, who consistently endorse some version of fixation and constraint.[25]

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20. *See, e.g.*, Larry Alexander, *Originalism, the Why and the What*, 82 FORDHAM L. REV. 539, 540–42 (2013); Kay, *supra* note 7, at 229–36; Steven D. Smith, *Reply to Koppelman: Originalism and the (Merely) Human Constitution*, 27 CONST. COMMENT. 189, 194–99 (2010).

21. *See* BORK, *supra* note 9, at 144–51; Randy E. Barnett, *Underlying Principles*, 24 CONST. COMMENT. 405, 410–16 (2007); Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663, 668–72 (2009); Aileen Kavanagh, *Original Intention, Enacted Text, and Constitutional Interpretation*, 47 AM. J. JURIS. 255, 271–79 (2002); Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. CONTEMP. LEGAL ISSUES 409, 411–15 (2009); Lee J. Strang, *Originalism and the "Challenge of Change": Abduced-Principle Originalism and Other Mechanisms by Which Originalism Sufficiently Accommodates Changed Social Conditions*, 60 HASTINGS L.J. 927, 972–80 (2009).

22. *See, e.g.*, Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 51–70 (2006).

23. Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 247–62 (2009).

24. Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 6–7 (2015) (footnotes omitted).

25. *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 78 (2012) ("Words must be given the meaning they had when the text was adopted."); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599 (2004) ("Originalism regards the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of

There is one possible dissent to this account. William Baude has argued for an "inclusive originalism," which, although it treats "the original meaning of the Constitution as the ultimate criterion for constitutional law," also permits consideration of "precedent, policy, or practice, but only *to the extent that the original meaning incorporates or permits them*."[26] Professor Baude claims that virtually all constitutional jurisprudence is originalist in this sense, writing that "the Court never contradicts originalism. Indeed, the canonical cases that are most frequently invoked as examples of anti-originalism are actually reconcilable with originalism."[27]

Critics have charged that this account of inclusive originalism is so inclusive as to make originalism virtually meaningless.[28] Yet, Professor Baude's qualification that nonoriginalist considerations are appropriate when permitted by original meaning crucially limits his claim. Professor Baude acknowledges that nonoriginalist methods of construction are inescapable when the Constitution's original meaning is vague or ambiguous, and that nonoriginalist precedent is binding to the extent that the original meaning of the Constitution was thought to embrace reliance on precedent.[29] Accordingly, Professor Baude's position does not differ from that of other originalists who argue that nonoriginalist construction is sometimes necessary.[30]

To the extent, however, that Professor Baude treats decisions as originalist merely because they do not purport to reject original meaning, his approach is problematic. A claim that decisions of the Supreme Court do not depart from the original meaning of the Constitution, after all, is quite different from a claim that these decisions rest on the original meaning of constitutional text fixed at the time of framing and ratification. If, for example, the original meaning of constitutional text is vague or ambiguous as applied to most cases, then original meaning is incapable of deciding them. Resort to nonoriginalism becomes

constitutional interpretation in the present."). Stephen Sachs has offered a qualification, arguing that originalism requires only a commitment to legal rules fixed in the past, even if not contained in a written text. Stephen E. Sachs, *Originalism Without Text*, 127 YALE L.J. 156, 157–59 (2017). For present purposes, the case for non-textual originalism is immaterial because this study focuses on the original meaning of text—the Fourth Amendment. As we will see, however, Fourth Amendment originalism often includes a commitment to framing-era legal practice not necessarily reflected in the Fourth Amendment's text, and therefore this Article's methodology is consistent with Professor Sachs's view of originalism.

26. William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2355, 2356–63 (2015).

27. *Id.* at 2371; *see also* William Baude, Adam S. Chilton, and Anup Malani, *Making Doctrinal Work More Rigorous: Lessons from Systematic Reviews*, 84 U. CHI. L. REV. 37, 55–57 (2017) (undertaking a systematic review of Supreme Court opinions and finding them "consistent with" inclusive originalism as defined by Baude). *But cf.* William Baude & Stephen E. Sachs, *Originalism's Bite*, 20 GREEN BAG 2D 103, 107–08 (2016) (opining that a substantial body of constitutional doctrine may be incompatible with originalism).

28. *See, e.g.*, JAMES E. FLEMING, FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS 15–19 (2015); SEGALL, *supra* note 16, at 104–15; Jamal Greene, *Rule Originalism*, 116 COLUM. L. REV. 1639, 1657–58 (2016); Richard A. Posner, *What Is Obviously Wrong with the Federal Judiciary, Yet Eminently Curable, Part II*, 19 GREEN BAG 2d 257, 264 n.12 (2016).

29. Baude, *supra* note 26, at 2357–61.

30. *See supra* note 14 and accompanying text.

inescapable.

Consider Professor Baude's claim that the holding in *Brown v. Board of Education*[31]—that racial segregation in public education violates the Fourteenth Amendment—can be reconciled with original meaning.[32] Perhaps this is so, but the *Brown* opinion states that the historical evidence before the Court regarding "the circumstances surrounding the adoption of the Fourteenth Amendment," including evidence relating to the "exhaustive[] consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment," were nevertheless "not enough to resolve the problem with which we are faced," being "[a]t best . . . inconclusive."[33] In light of this express denial that its decision rested on the historical evidence of original meaning, surely *Brown* cannot be characterized as a decision reflecting no more than fixation and constraint. That a decision may be "reconcilable" with originalism does not establish that historical evidence of the original meaning of constitutional text played any meaningful role in producing it. Especially when the original meaning of constitutional text is framed at a high level of generality, a great many holdings may be reconcilable with originalism, but some other adjudicative modality is nevertheless required to pick among them.[34]

Accordingly, one cannot treat an opinion as originalist when it makes no claim to rest on the meaning of the Constitution as fixed at the framing, at least if one wishes to determine as an empirical matter the frequency at which originalism produces outcomes in constitutional adjudication. Therefore, Professor Baude's account of inclusive originalism cannot address the empirical question of concern here. To determine the rate at which originalism produces answers to disputed questions of constitutional law that come before the courts, inquiry is required into whether a judicial resolution of a disputed question of

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31. 347 U.S. 483 (1954).

32. *See* Baude, *supra* note 26, at 2380–81 ("*Brown* spends several pages at the very beginning of the opinion fighting the original-meaning question to a draw" and accordingly "nothing in *Brown*'s official canonicity contradicts originalism's legal status.").

33. *Brown*, 347 U.S. at 489. For what is likely the leading originalist defense of *Brown* that relies primarily on the substantial support for efforts to end segregation during Reconstruction, see Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995). For a powerful response that, among other things, notes that legally-imposed racial segregation remained common, even in the North, after the ratification of the Fourteenth Amendment, see Michael J. Klarman, Brown*, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995). If the Fourteenth Amendment's original meaning forbade governmentally-imposed racial segregation, it is surely odd that the Fourteenth Amendment had so little demonstrable impact on the prevalence of segregation during the period in which its original meaning should have been apparent throughout the nation that had just ratified the Amendment.

34. *Cf.* Louis Michael Seidman, *This Essay Is Brilliant/This Essay Is Stupid: Positive and Negative Self-Reference in Constitutional Practice and Theory*, 46 UCLA L. REV. 501, 550 (1998) ("If originalism never requires judges to reach results that they would not reach using some other theory, it does no independent work and can be reduced to the rival theory that is in fact determining outcomes.").

law reflects fixation and constraint.

B. THE SCOPE OF THE STUDY

To assess the extent to which originalism is used as the basis for constitutional adjudication, this study focuses on Fourth Amendment jurisprudence during Justice Scalia's career on the United States Supreme Court. Throughout that time, Justice Scalia professed adherence to the original meaning of the Constitution as the basis for constitutional adjudication.[35] Justice Scalia embraced originalism as defined above; he described originalism as an example of what he called the "Fixed Meaning Canon."[36] Accordingly, Justice Scalia's career presents an opportunity to study the jurisprudence of a committed originalist.

1. Originalism and Fourth Amendment Jurisprudence

A study of originalist adjudication may be confounded by the doctrine of stare decisis. Although some originalist scholars argue that originalism requires repudiation of nonoriginalist precedent,[37] others believe that at least some types of nonoriginalist precedent deserve deference.[38] Justice Scalia was (mostly) in the latter camp: in his extrajudicial writings, he expressed reluctance to repudiate nonoriginalist precedent,[39] although there were occasions on which he did so.[40]

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35. *See, e.g.*, Ohio v. Clark, 135 S. Ct. 2173, 2184 (2015) (Scalia, J., concurring in the judgment); Kyllo v. United States, 533 U.S. 27, 40 (2001) (opinion of the Court delivered by Scalia, J.); Minnesota v. Dickerson 508 U.S. 366, 379–80 (1993) (Scalia, J., concurring); Harmelin v. Michigan, 501 U.S. 957, 962–85 (1991) (opinion of Scalia, J.); *see also* Antonin Scalia, *Foreword*, 31 HARV. J.L. & PUB. POL'Y 871, 871 (2008) ("Twenty years ago, when I joined the Supreme Court, I was the only originalist among its numbers.").

36. SCALIA & GARNER, *supra* note 25, at 78–92. To similar effect, see Scalia, *supra* note 8, at 862–64.

37. *See* Barnett, *supra* note 12, at 262–69; Steven G. Calabresi, *Text vs. Precedent in Constitutional Law*, 31 HARV. J.L. & PUB. POL'Y 947, 948–51 (2008); Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 13–22 (2007); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 298 (2005).

38. *See* MCGINNIS & RAPPAPORT, *supra* note 10, at 154–74 (arguing that the original meaning of the Constitution contemplates that federal courts will employ a doctrine of precedent); Baude, *supra* note 26, at 2358–61 (same); Randy J. Kozel, *Original Meaning and the Precedent Fallback*, 68 VAND. L. REV. 105, 121–47 (2015) (arguing that precedent can be used in the face of uncertainty about original meaning); Lash, *supra* note 9, at 1444–61 (arguing for deference to precedents that enhance popular sovereignty); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 739–72 (1988) (arguing that some precedents are too entrenched in constitutional adjudication to be repudiated); Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 5–50 (2001) (arguing that reliance on precedent as a method of addressing legal indeterminacy is rooted in Framing-era understandings); Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 436–79 (2006) (arguing that nonoriginalist precedent should be preserved if its repudiation would produce serious costs).

39. *See* SCALIA & GARNER, *supra* note 25, at 87, 411–14; Antonin Scalia, *Response*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 129–40 (Amy Gutmann ed., 1997).

40. *See, e.g.*, Tennessee v. Lane, 541 U.S. 509, 556–65 (2004) (Scalia, J., dissenting) (refusing to apply precedents regarding congressional power to enforce the Fourteenth Amendment outside the context of racial discrimination); Crawford v. Washington, 541 U.S. 36, 60–68 (2004) (overruling Ohio v. Roberts, 448 U.S. 56 (1980)); Dickerson v. United States, 530 U.S. 428, 447–50, 461–65 (2000) (Scalia, J., dissenting) (advocating that Miranda v. Arizona, 384 U.S. 436 (1966) be overruled); Planned Parenthood of Se. Pa. v. Casey, 505 U.S.

One could speculate that, at least in some cases, Justice Scalia may have failed to employ originalism in his jurisprudence out of deference to nonoriginalist precedent.[41]

To avoid this problem, this study examines Fourth Amendment jurisprudence. In this area, there is good reason to believe that stare decisis posed no obstacle to originalist adjudication. In fact, originalism has deep roots in Fourth Amendment precedent.

As early as *Boyd v. United States*,[42] "the first Fourth Amendment case of real consequence,"[43] the Court wrote that "to ascertain the nature of the proceedings intended by the Fourth Amendment to the Constitution under the terms 'unreasonable searches and seizures,'" it was necessary to consider the Framing-era "history of the controversies on the subject, both in this country and in England."[44] The Court then held that an order directing an importer to produce records relating to a shipment that had been seized for forfeiture was inconsistent with the Framing-era rule forbidding a search of private papers except when authorized by a valid warrant.[45] Subsequently, in the landmark decision of *Carroll v. United States*,[46] the Court, citing *Boyd*, wrote: "The Fourth Amendment is to be construed in the light of what was deemed an unreasonable

833, 996–1001 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (advocating that Roe v. Wade, 410 U.S. 113 (1973) be overruled).

41. Some regarded Justice Scalia's willingness to adhere to nonoriginalist precedent, as well as his skepticism about enforcing constitutional text that does not yield clear and readily administrable rules or that generates what seem to be perverse results, as important deviations from originalism. *See, e.g.*, Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 10–14 (2006). We will see, however, that nonoriginalist precedent and the absence of readily-administrable rules posed little apparent obstacle to originalism in Justice Scalia's Fourth Amendment jurisprudence. As for problematic results, Justice Scalia once acknowledged: "[I]n a crunch I may prove a faint-hearted originalist. I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging. But then I cannot imagine such a case's arising either." Scalia, *supra* note 8, at 864. Not only does this passage make clear that Justice Scalia did not regard it as likely that he would confront a case in which originalism produced an extreme result, but we will also see that there is no evident example of this problem infecting his Fourth Amendment jurisprudence. It is worth noting that Justice Scalia eventually repudiated his self-characterization as a "faint-hearted originalist," claiming that he adhered to originalism regardless of consequences. *See* Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 6, 2013), http://nymag.com/news/ features/antonin-scalia-2013-10.

42. 116 U.S. 616 (1886).

43. JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 49 (1966).

44. *Boyd*, 116 U.S. at 624–25.

45. *Id.* at 625–30.

46. 267 U.S. 132 (1925). For a helpful discussion of the importance of *Carroll* to the subsequent development of Fourth Amendment jurisprudence, see Thomas Y. Davies, *Can You Handle the Truth? The Framers Preserved Common-Law Criminal Arrest and Search Rules in "Due Process of Law"—"Fourth Amendment Reasonableness" Is Only a Modern, Destructive, Judicial Myth*, 43 TEX. TECH. L. REV. 51, 121–28 (2010).

search and seizure when it was adopted . . . ."[47] The Court then undertook an analysis of the law governing customs searches of ships and their cargo in the wake of the Fourth Amendment's framing, and concluded that a warrantless search of an automobile based on probable cause to believe it contained contraband was consistent with the original understanding of search and seizure authority.[48] Three years later, in *Olmstead v. United States*,[49] the Court, after observing that "[t]he well known historical purpose of the Fourth Amendment . . . was to prevent the use of governmental force to search a man's house, his person, his papers, and his effects; and to prevent their seizure against his will,"[50] held that the Fourth Amendment was not implicated by wiretapping undertaken to intercept telephonic conversations absent "actual physical invasion of [a] house 'or curtilage' for the purpose of making a seizure."[51]

Thus, originalism has long been employed in Fourth Amendment jurisprudence. To be sure, by the 1960s, the Court was less hospitable to Fourth Amendment originalism. For example, in *Katz v. United States*,[52] making no reference to any historical evidence of the original meaning of the Fourth Amendment, the Court repudiated *Olmstead* and held that warrantless wiretapping of a telephone booth violated the Fourth Amendment, reasoning: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[53] The next Term, in *Terry v. Ohio*, the Court rejected the view that "the authority of the police must be strictly circumscribed by the law of arrest and search as it has developed to date in the traditional jurisprudence of the Fourth Amendment,"[54] and concluded that the constitutional reasonableness of a contested search or seizure should be assessed by "balancing the need to search (or seize) against the invasion which the search (or seizure) entails."[55] On that basis, the Court held that the Fourth Amendment permitted the brief detention and frisk of a suspect for weapons based on reasonable suspicion, rather than the traditional standard of probable cause.[56]

Nevertheless, originalism did not disappear from Fourth Amendment jurisprudence. In *United States v. Watson*,[57] the Court relied on the prevailing common-law rule in the Framing era to hold that warrantless arrests in public places based on probable cause to believe that the arrestee had committed an

47. *Carroll*, 267 U.S. at 149.
48. *Id.* at 149–53.
49. 277 U.S. 438 (1928).
50. *Id.* at 463.
51. *Id.* at 466.
52. 389 U.S. 347 (1967).
53. *Id.* at 351–52 (citations omitted).
54. 392 U.S. 1, 11 (1968).
55. *Id.* at 21 (quoting Camara v. Mun. Court, 387 U.S. 523, 536–37 (1967)).
56. *Id.* at 27.
57. 423 U.S. 411 (1976).

offense are consistent with the Fourth Amendment.[58] In *Oliver v. United States*,[59] the Court concluded that nothing in *Katz*'s privacy-based approach required abandonment of the rule that the protection of the Fourth Amendment "is not extended to the open fields. The distinction between the latter and the house is as old as the common law."[60] The Court reasoned that "the common law implies, as we reaffirm today, that no expectation of privacy legitimately attaches to open fields."[61] In this fashion, the Court reconciled its doctrinal innovation in *Katz* with Framing-era understandings about the reach of the Fourth Amendment.

The effort to reconcile originalism with *Katz* became even more apparent in *Kyllo v. United States*.[62] When considering whether the use of a thermal imaging device to locate the sources of heat in a home was an unreasonable search within the meaning of the Fourth Amendment, Justice Scalia wrote the opinion of the Court, which, while acknowledging that the Court's "Fourth Amendment jurisprudence was tied to common-law trespass," added: "It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology."[63] Accordingly, he reasoned:

> [T]here is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*. To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment. . . . This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.[64]

Kyllo is hardly the only example of the persistence of Fourth Amendment originalism. For instance, in *Wilson v. Arkansas*, in the course of holding that the common-law requirement that an officer knock and announce his authority before making a forcible entry to execute a warrant was an aspect of reasonable search and seizure under the Fourth Amendment, the Court wrote that to identify Fourth Amendment protections, "[W]e have looked to the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing."[65] Subsequently, Justice Scalia wrote the opinion of the Court in *Wyoming v. Houghton*,[66] in which he echoed *Wilson*'s originalist methodology: "In determining whether a particular governmental action violates

58. *Id.* at 418–24.
59. 466 U.S. 170 (1984).
60. *Id.* at 176 (quoting Hester v. United States, 265 U.S. 57, 59 (1924)).
61. *Id.* at 180.
62. 533 U.S. 27 (2001).
63. *Id.* at 31, 33–34.
64. *Id.* at 34 (citation omitted).
65. 514 U.S. 927, 931 (1995) (citations omitted).
66. 526 U.S. 295 (1999).

the [Fourth Amendment], we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed."[67]

Thus, the evidence suggests that the force of precedent posed no apparent obstacle to the use of originalism in Fourth Amendment adjudication.[68]

2. Justice Scalia's Fourth Amendment Originalism

Houghton provides a useful illustration of Justice Scalia's Fourth Amendment originalism. Justice Scalia never claimed that the semantic meaning of the terms "search" or "seizure" had changed since the Framing-era. On the occasions in which he discussed the original meaning of those terms, Justice Scalia utilized definitions consistent with contemporary parlance.[69] In this sense, the Fourth Amendment may be typical of the Constitution's text, as John Harrison observed: "Reading the Constitution or the *Federalist Papers* or accounts of debates from the 1790s is not like reading Chaucer or even Shakespeare. Madison did not live in our time, but he did speak our language."[70]

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67. *Id.* at 299.

68. *Cf.* Joshua B. Fischman & Tonja Jacobi, *The Second Dimension of the Supreme Court*, 57 WM. & MARY L. REV. 1671, 1699–1713 (2015) (identifying Fourth Amendment jurisprudence as an area in which typical voting alignments on the Supreme Court tend not to hold and suggesting that Justices' varying methodological commitments to "legalism" or "pragmatism" explains this pattern).

69. *See, e.g.*, *Kyllo*, 533 U.S. at 32 n.1 (2001) ("When the Fourth Amendment was adopted, as now, to 'search' meant '[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to *search* the house for a book; to *search* the wood for a thief.'" (quoting NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 66 (1828) (reprint 6th ed. 1989)); California v. Hodari D., 499 U.S. 621, 624 (1991) ("From the time of the founding to the present, the word 'seizure' has meant a 'taking possession,' . . . ." (citations omitted)).

70. John Harrison, *Forms of Originalism and the Study of History*, 26 HARV. J.L. & PUB. POL'Y 83, 94 (2003). In this respect, it is illuminating to consider the examples of "linguistic drift" in the meaning of constitutional terms since the Framing era offered by Professor Solum, who has advanced what is likely the most fully theorized account of originalism. First, he observed that the constitutional obligation of the United States to "protect" the states "against domestic violence," U.S. CONST. art. IV, § 4, cl. 4, reflects an evolution in meaning since the phrase "domestic violence" has acquired a new meaning unknown during the framing era. Solum, *supra* note 24, at 16–17. Yet, as nonoriginalist scholars have observed, most contemporary readers of the Constitution would grasp from its context that the Constitution's reference to "domestic violence" connotes civil unrest and not violence between intimates. *See, e.g.*, Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2044 (2012) (reviewing BALKIN, *supra* note 7 & STRAUSS, *supra* note 13); Martin H. Redish & Matthew B. Arnold, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative*, 64 FLA. L. REV. 1485, 1529–30 (2012). Second, Professor Solum suggested that the constitutional prohibition on "cruel and unusual punishments," U.S. CONST. amend VIII, might have been understood in the Framing era to refer not to punishments that are rarely employed as in contemporary parlance, but instead as "a term of art that referred to governmental practices that are contrary to 'long usage' or 'immemorial usage.'" Solum, *supra* note 24, at 74 (quoting John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1745 (2008)). It is unclear, however, if this establishes linguistic drift, or merely textual ambiguity. Contemporary, no less than Framing-era, speakers might use the phrase "cruel and unusual punishments" to connote punishments regarded as archaic, even if they might also use it to refer to punishments that are rarely administered. It is, moreover, doubtful that the Framing-era understanding was free from ambiguity; the only discussion of the phrase on the floor of the House of Representatives as it considered what became the Eighth Amendment came from two representatives who complained that the proposal was vague, and might prohibit then-common punishments, including hanging. Furman v. Georgia, 408 U.S. 238, 261 n.3, 261–64 (1972) (Brennan, J., concurring); *cf.* 16

Nor did Justice Scalia attempt to illuminate original meaning by reference to the history of the drafting and ratification of the Fourth Amendment, perhaps because that history contains little discussion aside from expressions of concern about general warrants unsupported by any particularized showing or authorization.[71]

Instead, as in *Houghton*, Justice Scalia relied primarily on Framing-era practice to illustrate the original meaning of the Fourth Amendment.[72] Justice Scalia believed there was good reason to consult Framing-era practice in order to ascertain original meaning, even for constitutional text that is framed in "abstract and general rather than specific and concrete" terms, since "[t]he context suggests that the abstract and general terms, like the concrete and particular ones, are meant to nail down current rights, rather than aspire after future ones—that they are abstract and general references to *extant* rights and freedoms possessed under the then-current regime."[73] He later added that the Constitution "employ[ed] general terms such as *due process*, *equal protection*, [and] *cruel and unusual punishments*. What these generalities meant as applied to many phenomena that existed at the time of their adoption was well understood and accepted."[74]

By using historical evidence of the Framing-era understanding of lawful search or seizure, Justice Scalia's Fourth Amendment originalism utilized contextual evidence to identify the meaning of the unreasonable searches and seizures as fixed in the Framing era, rather than assessing reasonableness by reference to contemporary understandings. In this sense, Justice Scalia's Fourth Amendment originalism differed from nonoriginalist textualism; he read the Fourth Amendment through the lens of historical context, rather than utilizing its contemporary meaning. This approach is no outlier; there is widespread agreement among originalists that original meaning is illuminated by contextual evidence of the Framing-era understanding.[75] Many originalist scholars have

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DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 379, 381 (John P. Kaminiski & Gaspare J. Saladino eds., 1986) ("The expressions 'unusual and severe,' or 'cruel and unusual,' surely would have been too vague to have been of any consequence, since they admit of no clear and precise signification."). In any event, even if there has been linguistic drift with respect to some terms found in this Constitution, Professor Solum has not endeavored to demonstrate that this is a common phenomenon in constitutional interpretation.

71. For a helpful account of the drafting and ratification history, see WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING, 602–1791, at 691–98, 712–23 (2009).

72. *See, e.g.*, Virginia v. Moore, 553 U.S. 164, 168 (2008) ("We look to the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve.").

73. Scalia, *supra* note 39, at 135.

74. SCALIA & GARNER, *supra* note 25, at 85.

75. *See, e.g.*, Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 414 (2013) ("[T]o ascertain the original public meaning of the text, the New Originalism looks to the *publicly available communicative context* of these words to resolve problems of ambiguity."); Kay, *supra* note 7, at 241 ("[L]anguage [i]s part of the means employed by individuals to accomplish their objectives. Our job in trying to understand language is to discern those objectives. We can accomplish this only by participating in, or investigating, the system of conventions people use in a given time and place and by considering the likelihood of various objectives in light of the particular circumstances in which language is used—that is, by considering

also argued that Framing-era practice provides important contextual evidence that helpfully fleshes out the original meaning of constitutional text.[76] Others have added that emerging computer-assisted techniques involving "corpus linguistics" facilitate inquiry into original meaning by enabling Framing-era linguistic datasets to be analyzed to determine the manner and context in which constitutional text was most often employed.[77]

Although Justice Scalia never discussed the original meaning of the term "unreasonable" in the Fourth Amendment, there is reason to believe that its original meaning offers support for his focus on Framing-era practice and usage when undertaking Fourth Amendment originalism. While David Sklansky's review of the historical evidence convinced him that in the Framing era, the term "unreasonable" meant "what it means today: contrary to sound judgment, inappropriate, or excessive,"[78] Laura Donohue has argued that, at least in legal

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the 'context' of the particular utterance." (footnote omitted)); H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 674 (1987) ("[T]o translate the founders' thought we need to do more than construct a lexicon of late eighteenth- or mid-nineteenth-century political terms. We must also locate the cultural context that gave their constitutional views meaning and urgency."); Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 875 (1992) ("[T]he federal constitution should be interpreted in accordance with originalist textualism, understood as a method which searches for the ordinary public meanings that the Constitution's words, read in linguistic, structural, and historical context, had at the time of those words' origin."); Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 285 (2017) ("Bare semantic meanings are sparse. Lawyers are very familiar with the idea that the literal meaning of a text does not deliver the full contextual meaning. This point is related to the notion that the semantic content of a constitutional provision may underdetermine its legal effect . . . . Some of this underdeterminacy may be resolved by context . . . ."); Keith E. Whittington, *Dworkin's "Originalism": The Role of Intentions in Constitutional Interpretation*, 62 REV. POL. 197, 212 (2000) ("[H]istorical material is 'not merely relevant to,' but is required by the search for textual meaning. One cannot accurately interpret my descriptive statement, 'the children are playing,' if one does not also realize that 'the children' refers to my pet dogs. Likewise, one cannot understand the requirements of the due process clause, or recognize that the equal protection clause does not require wealth redistribution, without understanding the historical context and background of the clause, even if it does not amount to a legal term of art.").

76. *See* Kay, *supra* note 7, at 253; Larry Kramer, *Fidelity to History—and Through It*, 65 FORDHAM L. REV. 1627, 1654–55 (1997); John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 378–81 (2007); Smith, *supra* note 20, at 194–99; Strang, *supra* note 21, at 964–73; John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 172–74 (1996); *cf.* Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 525–39 (2003) (arguing that post-enactment practice can shed important light on original meaning).

77. *See*, *e.g.*, Solum, *supra* note 75, at 284 ("The evidence provided by corpus linguistics is primary evidence of the patterns of usage themselves, whereas dictionary definitions and linguistic intuitions are secondary evidence. Corpus linguistics enables the use of quantitative methods and hence minimizes the role of subjective, qualitative judgments."); Lee J. Strang, *How Big Data Can Increase Originalism's Methodological Rigor: Using Corpus Linguistics to Reveal Original Language Conventions*, 50 U.C. DAVIS L. REV. 1181, 1205 (2017) ("The originalist will identify and catalogue uses of the term uncovered by CART [computer-assisted research techniques], and then, from the text's immediate context, ascertain the language convention (if any) employed.").

78. David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1780 (2000). To similar effect, see DAVID GRAY, THE FOURTH AMENDMENT IN AN AGE OF SURVEILLANCE 160–61 (2017).

contexts, the term meant "going outside the boundaries of a settled rule,"[79] and Thomas Davies concluded that it "meant searches and seizures that were inherently illegal at common law."[80] These latter definitions suggest that the Fourth Amendment's original meaning is hospitable to Justice Scalia's approach; the prohibition on "unreasonable searches and seizures" may well have incorporated prevailing legal understandings about the lawful reach of governmental search and seizure authority.[81]

Application of Framing-era search and seizure to contemporary search and seizure litigation, however, can pose difficulties. Scholars frequently argue that when the context in which Framing-era doctrine developed has changed, continued application of Framing-era rules may become problematic.[82] For example, although the Court correctly noted in *Olmstead* that in the Framing era, the Fourth Amendment regulated only "an actual physical invasion . . . for the purpose of making a seizure,"[83] in the Framing-era there was little ability for the government to intrude upon the privacy of the home absent a physical invasion. For this reason, application of the Framing-era rule to modern methods of electronic surveillance could well prove unfaithful to the Framing-era conception of the Fourth Amendment as a limitation on the government's investigative authority.[84]

Justice Scalia was sensitive to this problem. He cautioned that constitutional interpretation should be based on "semantic intention" and not "the concrete expectations of lawgivers."[85] In this sense, he echoed the views of most originalist scholars, who argue that only the original meaning of constitutional text, and not the manner in which that text was to be applied in the Framing era, should be regarded as binding.[86] *Kyllo* provides a good

79. Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1275 (2016) (emphasis removed).

80. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 693 (1999).

81. *Cf.* William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1827–41 (2016) (arguing that the Fourth Amendment's Framing-era history suggests concern with protecting extant legal rights regarding search and seizure).

82. *See* BALKIN, *supra* note 7, at 10–16, 75–81; RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 291–94 (1996); Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1804–10 (1997); Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569, 591–617 (1998); Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1205–08; Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1169–71 (1993).

83. Olmstead v. United States, 277 U.S. 438, 466 (1928).

84. For a helpful discussion of this point that touches on wiretapping, see Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1367–79 (1997).

85. Scalia, *supra* note 39, at 144.

86. *See* BALKIN, *supra* note 7, at 6–14; Barnett, *supra* note 21, at 410; Mitchell N. Berman, *Originalism and Its Discontents (Plus a Thought or Two About Abortion)*, 24 CONST. COMMENT. 383, 385–89 (2007); Calabresi & Fine, *supra* note 21, at 668–72; Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 580–82 (2006); McConnell, *supra* note 7, at 1284–87; Paulsen, *supra* note 7, at 2059–62; James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L.

example. In that case, as we have seen, Justice Scalia rejected the Framing-era understanding that search and seizure involved some form of physical intrusion in favor of what he regarded as an underlying Framing-era baseline protection of privacy embedded within the original meaning of the Fourth Amendment.[87] "The purpose of the [Fourth Amendment]," he wrote in another case, "is to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted—even if a later, less virtuous age should become accustomed to considering all sorts of intrusion 'reasonable.'"[88]

Justice Scalia's sensitivity to changes in context was not confined to technological advances, it included attention to other contextual evidence that might render reliance on Framing-era rules suspect. For example, in *Georgia v. Randolph*,[89] Justice Scalia, in his separate opinion responding to the claim that under the Framing-era law of property a wife had no legal right to authorize a search of property owned by her husband, wrote:

> There is nothing new or surprising in the proposition that our unchanging Constitution refers to other bodies of law that might themselves change. . . . No one supposes that the *meaning* of the Constitution changes as States expand and contract property rights. If it is indeed true, therefore, that a wife in 1791 could not authorize the search of her husband's house, the fact that current property law provides otherwise is no more troublesome for the originalist than the well-established fact that a State must compensate its takings of even those property rights that did not exist at the time of the founding.[90]

Thus, Justice Scalia's Fourth Amendment jurisprudence is sensitive to altered historical contexts.

In sum, given the scope and sophistication of Justice Scalia's Fourth Amendment originalism, and the lack of any apparent precedential obstacle to the use of originalism in Fourth Amendment jurisprudence, Justice Scalia's work in this area provides an excellent opportunity to examine the behavior of a committed originalist jurist, and contrast his record to that of other members of the Court as they decided the same cases.[91]

REV. 1523, 1539–46 (2011); Solum, *supra* note 24, at 48–55.

87. *See supra* text accompanying notes 62–64.

88. Minnesota v. Dickerson, 508 U.S. 366, 380 (1993) (Scalia, J., concurring).

89. 547 U.S. 103 (2006).

90. *Id.* at 144 (Scalia, J., dissenting).

91. For a largely favorable assessment of Justice Scalia's Fourth Amendment originalism, see Timothy C. MacDonnell, *Justice Scalia's Fourth Amendment: Text, Context, Clarity, and Occasional Faint-Hearted Originalism*, 3 VA. J. CRIM. L. 175 (2015). For more critical assessments, see Michael J. Zydney Mannheimer, *The Contingent Fourth Amendment*, 64 EMORY L.J. 1229, 1235–45 (2015); M. Blane Michael, *Reading the Fourth Amendment: Guidance from the Mischief that Gave It Birth*, 85 N.Y.U. L. REV. 905, 912–19 (2010); and Sklansky, *supra* note 78, at 1775–813.

C. CODING OPINIONS

Developing a method to code opinions as either originalist or nonoriginalist presents difficulties. As Frank Cross, who undertook what is likely the most comprehensive effort to date to measure the prevalence of originalism in the Supreme Court's jurisprudence, observed, "Originalism is difficult to measure. In theory, one might read every opinion of the Court and assess its fealty to the originalist method. This approach is unrealistically difficult, though, and would also suffer from the subjective biases of the assessor."[92]

Presumably to avoid the potential for subjectivity in coding, most scholars who have endeavored to measure the prevalence of originalism have used references to historical evidence of original meaning in judicial opinions as a proxy for originalism. Professor Cross, for example, coded opinions that refer to *The Federalist*, the materials on the ratification of the original Constitution in *Elliot's Debates*, the *Farrand* compilation of Madison's notes on the proceedings of the Constitutional Convention, Framing-era dictionaries, and the Declaration of Independence as originalist.[93] Others who have attempted to measure the prevalence of originalism have used a similar approach.[94] These studies have consistently found that the use of originalist evidence did not predict the manner in which Members of the Court voted, suggesting that originalism is largely used as a pretext to mask ideological preferences.[95]

This approach avoids the dangers of subjectivity, but it has a critical weakness; it does not assess the extent to which a Justice's vote rested on whatever evidence of original meaning may be referenced in an opinion. Professor Cross, for example, concluded that his study showed that "originalist sources are simply used to 'decorate' opinions reached on other grounds."[96] Yet, judicial insincerity is not the only conceivable explanation for studies that find that the use of originalist evidence does not predict Justices' votes. A

92. FRANK B. CROSS, THE FAILED PROMISE OF ORIGINALISM 120 (2013).

93. *Id.* at 120–25.

94. *See, e.g.*, Pamela C. Corley et al., *The Supreme Court and Opinion Content: The Use of the Federalist Papers*, 58 POL. RES. Q. 329, 329–33 (2005) (surveying court citations to the *Federalist Papers*); Mathew J. Festa, *Dueling Federalists: Supreme Court Decisions with Multiple Opinions Citing* The Federalist*, 1986–2007*, 31 SEATTLE U. L. REV. 75, 93–95 (2007) (same); Robert M. Howard & Jeffrey A. Segal, *An Original Look at Originalism*, 36 LAW & SOC'Y REV. 113, 121–26 (2002) (reviewing parties' briefs and identifying claims based on the intent of the Framers); Louis J. Sirico, Jr., *The Supreme Court and the Constitutional Convention*, 27 J.L. & POL. 63, 70–71 (2011) (identifying references to the Constitutional Convention in opinions and briefs); Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning*, 52 UCLA L. REV. 217, 251–56 (2004) (identifying statements of Framing-era views on federalism in opinions addressing federalism issues).

95. *See, e.g.*, CROSS, *supra* note 92, at 173–89; Festa, *supra* note 94, at 99–103; Howard & Segal, *supra* note 94, at 126–34; Smith, *supra* note 94, at 256–86; *see also* Corley et al., *supra* note 94, at 335–38 (finding that citations to *The Federalist Papers* are driven by both attitudinal and tactical considerations); *cf.* Sirico, *supra* note 94, at 76–77 (finding that ideology did not predict a Justice's references to the Constitutional Convention).

96. CROSS, *supra* note 92, at 188.

methodology that asks only whether an opinion refers to historical evidence of original meaning may improperly code as originalist opinions that ultimately conclude that historical evidence of original meaning does not supply a basis to decide the cases, just as *Brown* concluded that the evidence of the Framing-era meaning of the Fourteenth Amendment did not supply a basis for decision in that case. A coding methodology that more rigorously assesses whether originalism drives judicial decision-making better gauges the impact of originalism on judicial decision-making, and for that reason could unearth meaningful differences in the jurisprudence of individual Justices related to their use of originalism.

Consider *Payton v. New York*.[97] In that case, the Court held that absent exigent circumstances, a warrant must issue before the authorities can make a forcible entry to arrest an individual in his residence.[98] The Court engaged in a lengthy discussion of the Framing-era law of arrest before concluding that "the issue is not one that can be said to have been definitively settled by the common law at the time the Fourth Amendment was adopted."[99] Justice White's dissenting opinion, in contrast, relied heavily on the Framing-era law of arrest, using it as the basis for his conclusion that the Fourth Amendment requires no warrant to make a forcible entry to the arrestee's home to effect an arrest for a felony.[100] A methodology that codes both opinions as originalist because both discuss historical evidence of original meaning would ignore the critical difference between the opinions. Justice White's opinion uses historical evidence of original meaning to decide the case, while the opinion of the Court does not. Under the definition of originalism advanced above, only Justice White's dissenting opinion in *Payton* qualifies as originalist.

Accordingly, coding opinions as originalist merely because they reference historical evidence of original meaning overlooks the reality that sometimes an opinion may consult evidence of original meaning, and yet, as in *Brown*, find it inadequate to decide the case before the Court.[101] To assess the extent to which originalism drives Fourth Amendment law, there is no substitute for reading opinions and identifying the claims that they make about original meaning. This represents no radical innovation in empirical legal scholarship; a standard social science technique—"content analysis"—has been increasingly used in empirical legal scholarship to analyze judicial opinions.[102] This study is the first to employ methods of content analysis to assess the prevalence of originalism in Supreme

97. 445 U.S. 573 (1980).

98. *Id.* at 586–90.

99. *Id.* at 598.

100. *Id.* at 604–15 (White, J., dissenting).

101. *Cf.* Melvyn R. Durchslag, *The Supreme Court and the Federalist Papers: Is There Less Here than Meets the Eye?*, 14 WM. & MARY BILL RTS. J. 243, 312–15 (2005) (concluding from a review of the pertinent opinions that citations to *The Federalist Papers* have rarely been important to Supreme Court decisions).

102. *See* Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63, 69–76 (2008).

Court jurisprudence.[103]

This study employed a straightforward approach to case selection and coding by employing methods of content analysis.[104] All cases decided by signed opinion of the Court during Justice Scalia's career, in which the Court decided a disputed issue of Fourth Amendment law, are included within the study.[105] After review of the opinions in those cases, each that expressed a view on a disputed question of Fourth Amendment law was coded. The study employed three codes: Originalist ("O"), Nonoriginalist ("NO"), and Nonoriginalist But Original Meaning Considered ("NOBOMC"). To code opinions, the two criteria for originalist adjudication stated above—fixation and constraint—were employed.

An opinion was coded O when it relied upon historical evidence or otherwise invoked the original meaning of the Fourth Amendment as fixed at framing and ratification—thereby reflecting fixation—and when it also utilized original meaning to reach a determination on the issue of Fourth Amendment law before the Court—thereby reflecting constraint. It would have been unrealistic, however, to code as originalist only opinions that rely on nothing

103. A somewhat similar methodology for coding, albeit to a different end and unaccompanied by anything approaching random case selection, was used by Jamal Greene, who, in order to assess the circumstances under which the Supreme Court employs originalism, coded as originalist those opinions in which references to debates over the Constitution's ratification or the views or expectations of the framing generation "form a significant part of the opinion's affirmative analysis," while cautioning that an opinion in which these materials "are not mentioned, are merely gestured at, or are described only as consistent with an outcome reached through other methods is not an originalist opinion." Greene, *supra* note 28, at 1659. Professor Greene did not purport to utilize a representative dataset, however, but instead selected particular cases to study. *Id.* at 1658–80. This methodology may be sufficient, as Professor Greene suggested, "to support a strong hypothesis that others are free to test, whether through intuition, anecdote, or more rigorous methods," *id.* at 1658, but given its potential for selection bias, it must be viewed with skepticism.

104. The following discussion sets out the protocol utilized for coding in this study. All Supreme Court opinions containing Fourth Amendment holdings within the relevant time frame, after initial review by student researchers, were reviewed and coded by the author. For a helpful discussion of best practices in undertaking content analysis of judicial opinions that informed the design of this study, see Hall & Wright, *supra* note 102, at 100–16. A complete list of opinions and their coding in this study is provided in the Appendix.

105. The study included two cases in which there was no opinion of the Court joined by a majority, but instead signed lead opinions announcing the judgment of the Court and joined by a plurality: *O'Connor v. Ortega*, 480 U.S. 709 (1987) (plurality), and *Florida v. Riley*, 488 U.S. 445 (1989) (plurality). Opinions in which Fourth Amendment law is discussed, but in which the Court does not actually decide any question of Fourth Amendment law, are not included in the study. For examples, see *Albright v. Oliver*, 510 U.S. 266 (1994) (plurality) (the Due Process Clause does not govern pretrial deprivations of liberty), and *Wallace v. Kato*, 549 U.S. 384 (2007) (the rule for accrual of damages claims arising from wrongful arrest). Unsigned per curiam opinions were excluded from the study because they are often issued in cases regarded as relatively routine that do not require a detailed explanation of the Court's reasoning. *See* Michael C. Gizzi & Stephen L. Wasby, *Per Curiams Revisited: Assessing the Unsigned Opinion*, 96 JUDICATURE 110, 112–13 (2012) ("Many per curiam opinions are used to resolve routine matters or issues that do not require a full explanation of the Court's reasoning."); *see also* STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE 350–57 (10th ed. 2013) (describing the Court's practice of summary reversal by per curiam opinion and the objections it has engendered).

more than original meaning; judicial opinions often invoke multiple considerations in support of their conclusions.[106] Accordingly, whenever an opinion employed historical evidence as part of an opinion's resolution of a disputed question of Fourth Amendment law, the opinion reflects, at least to some extent, both fixation and constraint, and was therefore coded O, even if an opinion also referenced nonoriginalist considerations.[107] However, an opinion's reference to the text of the Fourth Amendment, without more, did not suffice to code that opinion O. When an opinion gives the text the meaning that a contemporary reader would afford it, without reference to original meaning, fixation and constraint play no role in producing that meaning, and therefore the opinion does not fall within this study's definition of originalism.[108] In this fashion, the study's methodology observed a distinction between nonoriginalist textualism and originalism.

An opinion was coded NO when it made no reference to original meaning, invoking neither fixation nor constraint. Such opinions satisfy neither of the elements of the definition of originalism employed in this study, and were coded accordingly.

An opinion was coded as NOBOMC when the opinion referenced historical evidence or otherwise invoked original meaning (potentially reflecting fixation), but found original meaning inadequate to resolve the issue before the Court or otherwise made no use of original meaning to resolve the issue before the Court, thereby failing to satisfy the constraint principle.[109] Because these opinions do

106. *Cf.* Greene, *supra* note 28, at 1658–59 ("A typical constitutional opinion contains multiple modes of analysis. . . . To argue that an opinion is originalist only when originalism is the sole mode of analysis or when it is announced as dispositive is too demanding a measure.").

107. For example, in *Wyoming v. Houghton*, 526 U.S. 295 (1999), Justice Scalia's majority opinion concluded that on probable cause to search a vehicle, an officer can search packages belonging to a passenger based on both historical evidence of original meaning, *id.* at 300–02, and, "[e]ven if the historical evidence . . . were thought to be equivocal," *id.* at 303, by reference to a nonoriginalist balancing test. *Id.* at 303–07. *Houghton* was coded "O" because the opinion used original meaning to resolve the issue before the Court, even though it also advanced a nonoriginalist basis for decision.

108. For example, in *Groh v. Ramirez*, 540 U.S. 551 (2004), the Court held that a search authorized by a warrant that did not identify the items to be seized did not comport with the Fourth Amendment, even though the application for the warrant properly identified those items, because the warrant contravened the particularity requirement found in the text of the Fourth Amendment. *See id.* at 557–63. The opinion of the Court in *Groh* was coded "NO" because the Court neither made a reference to nor did it place any reliance on historical evidence of original meaning.

109. In opinions addressing multiple issues, only the portions of the opinion resolving a disputed question of Fourth Amendment law were coded. For example, in *Wilson v. Layne*, 526 U.S. 603 (1999), which involved questions of Fourth Amendment law and qualified immunity, only the portion of the opinion resolving a disputed question of Fourth Amendment law (whether the Fourth Amendment permits reporters to accompany officials executing an otherwise valid search warrant) was coded. When an opinion contained a discussion of more than one issue of Fourth Amendment law, only the portion of the opinion resolving the primary Fourth Amendment issue in the case was coded. The primary issue, in turn, was determined by reference to the length of the discussion addressing each question of Fourth Amendment law in the opinion. For example, in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), the Court rejected an argument that Atwater's warrantless custodial arrest violated the Fourth Amendment because it was inconsistent with Framing-era common law, *id.* at 326–45, and an argument that a custodial arrest for a nonjailable offense in the absence of a showing of need for immediate detention is an unreasonable seizure within the meaning of the Fourth Amendment, *id.* at 345–54. Because the

not reflect constraint, they do not fall within the definition of originalism employed by this study. Nevertheless, because these opinions consider evidence of original meaning, they reflect a high likelihood that their use of nonoriginalist grounds for decision is not the result of a failure to consider potential originalist grounds of decision, but instead the inadequacy of original meaning to resolve the issue before the Court.

Coding was based exclusively on the claims made in an opinion, and did not involve any assessment of the soundness of an opinion's use of originalism.[110]

To prevent stare decisis from skewing the study's results, when an opinion relied on a prior precedent to resolve a disputed issue of Fourth Amendment law, the earlier opinion was reviewed and coded, and the code was then applied to the subsequent case. Accordingly, opinions that relied on originalist precedent to decide a question of Fourth Amendment law were coded that way.[111] This procedure ensured that an opinion's reliance on precedent did not obscure the role of original meaning in Fourth Amendment jurisprudence.

Justices' individual votes were coded based on the code assigned to the opinions that each joined in each case. When a Justice joined more than one opinion, if any of the opinions that the Justice joined was coded O, the Justice's vote was coded that way; if not, and if any of the opinions that the Justice joined was coded as NOBOMC, the Justice's vote was coded that way.[112] This

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opinion devoted more words to the former holding, that was the holding coded in this study. The dissenting opinion, in contrast, considered only the latter argument. *id.* at 360–73 (O'Connor, J., dissenting). It was therefore this discussion that was coded for the dissenting opinion.

110. For example, the Court's treatment of the historical evidence of original meaning in *Atwater* has been subject to fierce criticism. *See generally* Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in* Atwater v. Lago Vista, 37 WAKE FOREST L. REV. 239 (2002) (offering a detailed critique of Justice Souter's majority opinion in *Atwater* and contending that the opinion's "supposed historical analysis" consisted entirely of "historical ploys and distortions of the historical sources"). Nevertheless, the opinion of the Court in *Atwater* was coded "O."

111. For example, in *Florida v. Riley*, 488 U.S. 445 (1989), neither Justice White's plurality opinion nor Justice O'Connor's concurring opinion, which assessed whether aerial observations of the interior of a greenhouse amounted to an unconstitutional search within the meaning of the Fourth Amendment, made any reference to historical evidence of Framing-era meaning. Rather, to determine the scope of the Fourth Amendment's protection, both opinions relied principally on the earlier decision involving aerial surveillance of a fenced-in backyard in *California v. Ciraolo*, 476 U.S. 207 (1986). *See Riley*, 488 U.S. at 449–52 (plurality opinon); *id.* at 452–55 (O'Connor, J., concurring in the judgment). *Ciraolo* was decided outside the study period, but it was reviewed and coded O because it made use of the Framing-era concept of "curtilage" as identifying the extent of the Fourth Amendment's protections for property associated with a home. *Ciraolo*, 476 U.S. at 212–13. Accordingly, the opinions of Justice White and Justice O'Connor in *Riley* were also coded O.

112. In cases in which Justices voted but did not write or join any opinion, their votes were not coded. For an example, see *Minnesota v. Olson*, 495 U.S. 91 (1990), in which Justice Rehnquist and Justice Blackmun dissented without opinion. In cases in which the only opinion that a Justice joined does not reach any question of Fourth Amendment law, even when the opinion of the Court in the same case did so, that vote was not coded. For an example, see *Arizona v. Evans*, 514 U.S. 1, 23–34 (1995), in which Justice Ginsburg filed a dissenting opinion, but only addressed the jurisdictional issue in the case.

procedure ensured that all references to original meaning were reflected in the coding of votes, even when a Justice also joined an opinion that relied on nonoriginalist grounds.

II. RESULTS

Table 1 endeavors to identify a baseline rate at which originalism appears in Fourth Amendment jurisprudence. It reflects the manner in which opinions of the Court during the study period (Justice Scalia's career on the Court) addressing disputed questions of Fourth Amendment law were coded:

TABLE 1: OPINIONS OF THE COURT[a]

1986–2016[b]	NO	NOBOMC	O
Opinions of the Court	69/102 67.64%	19/102 18.63%	14/102 13.73%

[a] Plurality opinions were coded as opinions of the Court in *O'Connor v. Ortega*, 480 U.S. 709 (1987), and *Florida v. Riley*, 488 U.S. 445 (1989).
[b] Includes only opinions in cases decided during Justice Scalia's tenure.

Table 1 shows that originalist decisions represent a small fraction of the Supreme Court's Fourth Amendment jurisprudence. Table 1 does not reflect, however, what may be varying individual commitments to originalist methodology among the Members of the Court.

To identify the methodology reflected in the voting behavior of individual Justices, Table 2 (below) reflects the coding of votes cast by each Member of the Court (listed in order of appointment) in cases in which the Justice wrote or joined an opinion addressing a disputed question of Fourth Amendment law:

TABLE 2: VOTES CAST BY EACH JUSTICE[c]

Justice	NO	NOBOMC	O
Brennan (1986–1990)	20/26 76.92%	3/26 11.54%	3/26 11.54%
White (1986–1993)	24/34 70.59%	5/34 14.705%	5/34 14.705%
Marshall (1986–1991)	23/32 71.875%	5/32 15.625%	4/32 12.50%
Blackmun (1986–1994)	26/34 76.47%	4/34 11.76%	4/34 11.765%
Powell (1986–1987)	5/8 62.50%	2/8 25.00%	1/8 12.50%
Rehnquist (1986–2005)	48/69 69.57%	10/69 14.49%	11/69 15.94%
Stevens (1986–2010)	56/84 66.67%	20/84 23.81%	8/84 9.52%
O'Connor (1986–2006)	50/72 69.44%	11/72 15.28%	11/72 15.28%
Scalia (1986–2016)	63/102 60.78%	21/102 20.59%	19/102 18.63%
Kennedy (1988–2016)	60/92 65.22%	21/92 22.83%	11/92 11.96%
Souter (1990–2009)	36/57 63.16%	12/57 21.05%	9/57 15.79%
Thomas (1991–2016)	41/70 58.57%	18/70 25.71%	11/70 15.71%
Ginsburg (1993–2016)	41/67 61.19%	21/67 31.34%	5/67 7.46%
Breyer (1994–2016)	43/67 64.18%	17/67 25.37%	7/67 10.45%
Roberts (2005–2016)	20/30 66.67%	9/30 30.00%	1/30 3.33%
Alito (2006–2016)	18/28 64.29%	10/28 35.71%	0/28 00.00%
Sotomayor (2009–2016)	10/18 55.56%	6/18 33.33%	2/18 11.11%
Kagan (2010–2016)	8/16 50.00%	7/16 43.75%	1/16 6.25%

[c] Includes only opinions in cases decided during Justice Scalia's tenure.

As Table 2 illustrates, despite his professed commitment to originalism, Justice Scalia voted on originalist grounds in only 18.63% of cases in which the Court decided a disputed question of Fourth Amendment law. This is the highest rate of any Justice in the study, but not strikingly higher than the rate at which

originalism appeared in opinions of the Court (13.73%). In a slightly higher percentage of cases (20.59%), Justice Scalia referenced historical evidence or other indicia of original meaning, but did not cast his vote on that basis.

Equally striking is the voting pattern of Justice Thomas, who has also professed fealty to originalism.[113] Nevertheless, his votes were premised on originalist grounds in only 15.71% of cases. Justice Thomas, however, considered original meaning in 25.71% of cases—a higher percentage than Justice Scalia. This suggests not so much a lack of methodological commitment to originalism by Justice Thomas as the inability of originalism, in his view, to provide answers to the questions of Fourth Amendment law before the Court.

Notably, virtually all members of the Court exhibited some willingness to base decisions on originalist grounds, despite their individual methodological commitments. For example, in his extrajudicial writing, Justice Breyer has professed opposition to originalism, cataloging what he regards as its defects.[114] Nevertheless, his votes were based on originalist grounds in 10.45% of cases, a rate of originalist voting about two-thirds the rate of Justice Thomas. Justice Brennan's rate of originalist voting in Fourth Amendment cases was even higher (11.54%), yet, in his extrajudicial writing, Justice Brennan argued that Justices should read the Constitution in light of its contemporary rather than original meaning, embracing a nonoriginalist textualism.[115] Only Justice Alito cast no votes on originalist grounds, although he considered original meaning in more than one-third of Fourth Amendment cases. It seems that all Justices are willing to consult original meaning when they regard it as helpful in deciding the case at hand.

To investigate the possibility that Justice Scalia is more likely to reflect his own methodological commitments in his own opinions, Table 3 reflects the manner in which opinions written by Justice Scalia were coded, distinguishing between opinions of the Court (in which he successfully obtained support of at least four other Justices) and separate opinions in which Justice Scalia experienced no evident need to gain support from other Justices with potentially differing methodological commitments.

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113. *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 812 (2010) (Thomas, J., concurring in part and concurring in the judgment in part); Van Orden v. Perry, 545 U.S. 677, 692–94 (2005) (Thomas, J., concurring); Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 6–7 (1996). Justice Scalia identified Justice Thomas as a fellow originalist. *See* Scalia, *supra* note 35, at 871 ("Today, the secret is out that I am an originalist, and there is even a second one sitting with me, Justice Clarence Thomas.").

114. *See* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 115–32 (2005).

115. *See, e.g.*, William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438 (1986) ("Current Justices read the Constitution in the only way that we can: as twentieth-century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be: What do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be the measure to the vision of our time.").

TABLE 3: OPINIONS WRITTEN BY JUSTICE SCALIA

	NO	NOBOMC	O
Opinions of the Court	8/19 42.10%	5/19 26.32%	6/19 31.58%
Separate Opinions	5/18 27.78%	7/18 38.89%	6/18 33.33%

Despite the need for a Justice assigned to write an opinion of Court to build a majority that must likely include Justices with a variety of methodological commitments, Table 3 indicates that Justice Scalia's methodology did not vary substantially based on whether he was writing an opinion of the Court or a separate opinion.

It is notable that Justice Scalia's rate of originalist voting in opinions that he authored is nearly twice the rate of his overall originalist voting reflected in Table 2, and his rate of considering original meaning in opinions that he authored is substantially higher as well. In cases in which he did not write an opinion, perhaps Justice Scalia was willing to defer to the methodological preferences of the author of the opinion. The soundness of this speculation, however, is open to question. After all, Justices hoping to have Justice Scalia join their opinions presumably had an incentive to write in a fashion likely to garner his support, and for that reason they would have had reason to advance originalist grounds for decision when available. Justice Scalia's rate of originalist grounds of decision in his own opinions may instead be a function of his greater willingness to write separately, or greater engagement in the case that might result in his being assigned the opinion of the Court or deciding to write separately, when a case presented an opportunity for consideration of original meaning.[116] Still, even when Justice Scalia was writing separately, with no apparent need to state any views but his own, he based his opinions on originalist grounds in only one-third of cases.

As we have seen, Justice Scalia professed adherence to originalism throughout his tenure on the Court.[117] Nevertheless, to investigate the possibility that Justice Scalia's commitment to originalism varied over time, Table 4 breaks down his opinions by five-year intervals:

116. A comparison between Tables 1 and 3 indicates that Justice Scalia was assigned to write opinions of the Court disproportionately; he wrote the opinion of the Court in 19 of the 102 cases in the study period (18.63%), almost double the rate (one-ninth) that one would expect if assignments were random.

117. *See supra* text accompanying notes 35–36.

TABLE 4: VOTES CAST BY JUSTICE SCALIA (5-YEAR INTERVALS)

	NO	NOBOMC	O
1986–1991	23/32 71.875%	2/32 6.25%	7/32 21.875%
1992–1996	4/8 50.00%	3/8 37.50%	1/8 12.50%
1997–2001	12/20 60.00%	2/20 10.00%	6/20 30.00%
2002–2006	10/17 58.82%	5/17 29.41%	2/17 11.76%
2007–2011	7/11 63.63%	4/11 36.36%	0/11 00.00%
2012–2016	6/14 42.86%	5/14 35.71%	3/14 21.43%

Table 4 reflects no obvious shift in Justice Scalia's methodological commitments over time. At the beginning and end of his career, Justice Scalia's rate of voting on originalist grounds differed little. Although Justice Scalia cast no originalist votes in the period 2007–2011, and only one in the period 1992–1996, his rate of originalist votes both before and after those periods was substantial. However, it is unlikely that this suggests a decreased commitment to originalism as the cases before the Court in those two periods were likely not resolvable through the Fourth Amendment's original meaning, at least in Justice Scalia's view.

III. DISCUSSION

Some commentators have argued that Justice Scalia's commitment to originalism was inconsistent, and therefore doubted the sincerity of his professed adherence to that methodology.[118] Indeed, this study indicates that at least when it comes to Fourth Amendment law, Justice Scalia (and Justice Thomas as well) frequently did not cast their votes on originalist grounds. Justices Scalia and

118. *See, e.g.*, DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 29–54 (2002); Barnett, *supra* note 41, at 13–16; Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385, 391–99 (2000); Gene R. Nichol, *Justice Scalia and the* Printz *Case: The Trials of an Occasional Originalist*, 70 U. COLO. L. REV. 953, 969–73 (1999); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 562–69 (2006); *see also* SEGALL, *supra* note 16, at 123–40 (also discussing Justice Thomas's commitment to originalism).

Thomas employed originalism to decide a disputed question of Fourth Amendment law in less than one-fifth of cases. This Part shifts from empiricism to analysis in an effort to explain the relatively low rate of originalist adjudication in the study.

One might speculate that the voting patterns of Justices Scalia and Thomas may be attributable to their lack of commitment to originalism, the influence of nonoriginalist precedent, the parties' failure to press originalist arguments, or perhaps a lack of any need to consider original meaning in some proportion of Fourth Amendment cases. A close analysis of the cases in the study, however, suggests that speculation along these lines is not a likely explanation. Instead, the difficulties in applying original meaning to contemporary search and seizure litigation suggest that even a sincere originalist determined to prioritize that method of adjudication above all others would find originalism of limited utility.[119] It is not that Justices Scalia and Thomas rejected originalist grounds of decision in the cases in this study in favor of some alternative, or that the results somehow obscure their commitment to originalism; instead, the available historical evidence suggests that originalism does not offer much in the way of useful guidance in deciding the cases coded NO or NOBOMC. The voting patterns of Justices Scalia and Thomas are likely the result of the inability of originalism to offer a vehicle for deciding the cases before them.

A. UNVARNISHED NONORIGINALISM

It is striking how many opinions in this study, even when authored by avowed originalists such as Justice Scalia, make no reference to the original meaning of the Fourth Amendment. When one considers the particular areas of Fourth Amendment law in which this result was observed, however, rather than finding an insincere commitment to originalism, the influence of nonoriginalist precedent, the lack of any need to consult original meaning, or a failure of the parties to press available originalist grounds of decision, one encounters instead the difficulties of constructing an originalist alternative to the nonoriginalist approach taken in the opinions coded NO. Consider the following examples.

1. Probable Cause

All of the opinions in this study that address the constitutional standard for

119. For scholarship arguing that the historical evidence surrounding the Fourth Amendment is often conflicting or indeterminate, see, for example, Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1732–47 (1996); Mannheimer, *supra* note 91, at 1237–63; and Sklansky, *supra* note 78, at 1794–1813. For scholarship considering the difficulties of applying historical evidence of original meaning to contemporary problems of search and seizure, see, for example, Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 395–401 (1974); Davies, *supra* note 80, at 740–50; and Donald A. Dripps, *Responding to the Challenges of Contextual Change and Legal Dynamism in Interpreting the Fourth Amendment*, 81 MISS. L.J. 1085, 1101–21 (2012).

probable cause were coded NO, and despite that, all of them were joined by both Justice Scalia and Justice Thomas (two were even written by Justice Scalia).[120] The historical record of probable cause, however, suggests that originalism has little to offer on this question.

In the Framing-era, there was little agreement on the meaning of probable cause, which was often stated in ways not clearly distinct from suspicion.[121] It was also not clear that officials assessed the adequacy of the evidence supporting the assertion of probable cause in applications for warrants.[122] In the face of this historical record, originalism offers little reliable guidance. Small wonder, then, that opinions addressing the standard of probable cause make little use of historical evidence of original meaning as fixed at the time of framing and ratification.

2. Warrantless Search and Seizure

The limits of the historical record similarly infect other basic questions of Fourth Amendment law. For example, consider the elemental question about whether search and seizure not previously authorized by a warrant should be regarded as "reasonable" within the meaning of the Fourth Amendment. Most

120. *See* Florida v. Harris, 568 U.S. 237, 240 (2013) (considering how a court should determine if the "alert" of a drug-detection dog during a traffic stop provides probable cause to search a vehicle); United States v. Grubbs, 547 U.S. 90, 97 (2006) (opinion of Scalia, J.) (holding that the affidavit established probable cause to believe that the triggering event, the delivery of child pornography, would be satisfied); Devenpeck v. Alford, 543 U.S. 146, 152–56 (2004) (opinion of Scalia, J.) (declining to require probable cause be closely related to the arresting offense because that would be inconsistent with the Court's precedent that an officer's state of mind is irrelevant to probable cause); Maryland v. Pringle, 540 U.S. 366, 374 (2003) (holding that the officer had probable cause to believe Pringle committed the offense). In an opinion issued shortly before the study period, the Court, in passing, sought a measure support for its definition of probable cause from an 1813 opinion of Chief Justice Marshall. *See* Illinois v. Gates, 462 U.S. 213, 235 (1983) ("[T]he term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation . . . . It imports a seizure made under circumstances which warrant suspicion." (quoting Locke v. United States, 11 U.S. (7 Cranch) 339, 348 (1813)) (internal quotation marks omitted))). This formulation, however, stops well short of the test the Court adopted in *Gates*: "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* at 238; *see also Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018) ("Probable cause 'is not a high bar.'" (citation omitted)).

121. *See, e.g.*, Fabio Arcila, Jr., *The Death of Suspicion*, 51 WM. & MARY L. REV. 1275, 1314 (2010); Wesley MacNeil Oliver, *The Modern History of Probable Cause*, 78 TENN. L. REV. 377, 384–98 (2011); *see also* Thomas Y. Davies, *How the Post-Framing Adoption of the Bare-Probable-Cause Standard Drastically Expanded Government Arrest and Search Power*, 73 LAW & CONTEMP. PROBS. 1, 35–50 (2010) (describing inconsistencies in Framing-era formulations of probable cause). Contemporary Fourth Amendment doctrine draws a clear distinction between probable cause and mere suspicion, even if reasonable. *See, e.g.*, Alabama v. White, 496 U.S. 325, 330–31 (1990); United States v. Sokolow, 490 U.S. 1, 7 (1989); New Jersey v. T.L.O., 469 U.S. 325, 340–47 (1985); Dunaway v. New York, 442 U.S. 200, 207–16 (1979); United States v. Brignoni-Ponce, 422 U.S. 873, 880–82 (1975).

122. *See, e.g.*, Fabio Arcila, Jr., *In the Trenches: Searches and the Misunderstood Common-Law History of Suspicion and Probable Cause*, 10 U. PA. J. CONST. L. 1, 17–54 (2007); Oliver, *supra* note 121, at 384–89. *But see* Davies, *supra* note 46, at 77 & n.122 (concluding that Framing-era judges reviewed the adequacy of warrant applications alleging probable cause).

of the opinions of the Court addressing this issue during the study period were coded NO, with even Justices Scalia and Thomas usually writing or joining opinions resting on nonoriginalist grounds.[123] This is a longstanding pattern; while the Court has sometimes required search and seizure to be authorized by warrant, the reasoning in these cases is nonoriginalist. Typical is the invocation of Justice Jackson's pragmatic, if nonoriginalist, admonition that "a warrant ensures that the inferences to support a search are 'drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'"[124]

There is good reason why an originalist inquiry into the breadth of a warrant requirement is rarely undertaken; the original meaning of the Fourth Amendment has little to offer. The text itself is silent on the question; it identifies the prerequisites for a valid warrant, but not whether a warrant is required to undertake search and seizure.[125] This suggests that the question was of little concern in the Framing era. As for the available historical evidence, there is little in the way of agreement among scholars. There is, to be sure, consensus that the

123. These opinions, all of which, unless otherwise indicated, were joined by Justice Scalia and, after he joined the Court, Justice Thomas, are: Fernandez v. California, 571 U.S. 292 (2014) (search of apartment based on consent of occupant after prior objection of co-occupant); Missouri v. McNeely, 569 U.S. 141 (2013) (blood test of arrestee) (Justice Thomas dissented on nonoriginalist grounds); Kentucky v. King, 563 U.S. 452 (2011) (forcible entry and search of residence on claim of exigent circumstances); City of Ontario v. Quon, 560 U.S. 746 (2010) (review of police officer's text messages); Arizona v. Gant, 556 U.S. 332 (2009) (search of vehicle incident to occupant's arrest); Samson v. California, 547 U.S. 843 (2006) (opinion of Thomas, J.) (search of parolee's residence); Brigham City v. Stuart, 547 U.S. 398 (2006) (entry of residence to provide emergency aid); Thornton v. United States, 541 U.S. 615 (2004) (search of vehicle incident to arrest); Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822 (2002) (drug testing of students); United States v. Knights, 534 U.S. 112 (2001) (search of probationer's home); Ferguson v. City of Charleston, 532 U.S. 67 (2001) (drug testing of obstetrics patients) (Justices Scalia and Thomas dissented on nonoriginalist grounds); Ohio v. Robinette, 519 U.S. 33 (1996) (validity of consent to search); Florida v. Jimeno, 500 U.S. 248 (1991) (scope of consent to search); Illinois v. Rodriguez, 497 U.S. 177 (1990) (opinion of Scalia, J.) (search of residence on consent of occupant); Horton v. California, 496 U.S. 128 (1990) (search of items in plain view); Minnesota v. Olson, 495 U.S. 91 (1990) (arrest of houseguest); Maryland v. Buie, 494 U.S. 325 (1990) (protective sweep of residence incident to arrest); Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656 (1989) (drug testing of law enforcement employees) (Justice Scalia dissented on nonoriginalist grounds); Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602 (1989) (drug testing of railway employees); Griffin v. Wisconsin, 483 U.S. 868 (1987) (opinion of Scalia, J.) (search of probationer's home); New York v. Burger, 482 U.S. 691 (1987) (search of automobile junkyard); Arizona v. Hicks, 480 U.S. 321 (1987) (opinion of Scalia, J.) (search and seizure of items in plain view); Colorado v. Bertine, 479 U.S. 367 (1987) (inventory search of vehicles).

124. Riley v. California, 134 S. Ct. 2473, 2482 (2014) (quoting Johnson v. United States, 333 U.S. 10, 14 (1948)). For examples of the Court's invocation of this rationale, see United States v. Karo, 468 U.S. 705, 717 (1984) (warrantless monitoring of electronic tracking device); Steagald v. United States, 451 U.S. 204, 212 (1981) (warrantless entry of home to arrest guest); Payton v. New York, 445 U.S. 573, 586 & n.24 (1980) (warrantless entry of home to arrest resident); Coolidge v. New Hampshire, 403 U.S. 443, 449 (1971) (warrant issued by state attorney general invalid).

125. *See* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

Fourth Amendment was originally understood to prohibit search and seizure based on general warrants.[126] After that, however, agreement breaks down. Some scholars have pointed to Framing-era evidence that warrantless search and seizure was often permitted to conclude that the Fourth Amendment's original meaning is inconsistent with a warrant requirement.[127] Others have noted the Framing-era acceptance of particularized warrants and argue that the original meaning of the Fourth Amendment treated judicial authorization as preferable to warrantless intrusions,[128] although some have cautioned that the Framing-era warrant requirement was likely confined to searches of residences.[129] Some think that the historical evidence points to no reliable conclusion.[130]

Beyond these difficulties, there is a perhaps more fundamental question about whether the Framing-era context renders the original understanding irrelevant to contemporary search and seizure. In the Framing-era, there was no equivalent to contemporary police; law enforcement was undertaken primarily by constables, sheriffs, and the night watch, whose duties were largely confined to executing judicial orders and responding to breaches of the peace.[131] As George Thomas put it, what Framing-era officials "did *not* do was investigate crime."[132] Instead, as Wesley Oliver observed, "For most crimes, [victims] alone conducted the investigation, identified suspects, and determined whether their suspicions were adequate to initiate a criminal prosecution."[133]

Moreover, tort liability circumscribed the authority of Framing-era law enforcement officials; although officers executing a warrant had immunity from tort liability, officers who sought warrants could face personal liability in tort if

126. CUDDIHY, *supra* note 71, at 770–72; GRAY, *supra* note 78, at 139–43; LANDYNSKI, *supra* note 43, at 19–48; NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 100–03 (1937); STEPHEN J. SCHULHOFER, MORE ESSENTIAL THAN EVER: THE FOURTH AMENDMENT IN THE TWENTY-FIRST CENTURY 22–34 (2012); TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION: SEARCH, SEIZURE, AND SURVEILLANCE AND FAIR TRIAL AND FREE PRESS 29–44 (1969); Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977, 978–90 (2004); Davies, *supra* note 80, at 600–18; Silas J. Wasserstrom, *The Fourth Amendment's Two Clauses*, 26 AM. CRIM. L. REV. 1389, 1391–94 (1989).

127. *See, e.g.*, AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 3–17 (1997); TAYLOR, *supra* note 126, at 38–44; Arcila, *supra* note 121, at 1280–1326.

128. *See, e.g.*, SCHULHOFER, *supra* note 126, at 30–36; ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789–1868, at 50–54, 61–65 (2006); Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 950–72 (1997).

129. *See, e.g.*, CUDDIHY, *supra* note 71, at 739–45, 773–77; Donohue, *supra* note 79, at 1276–80, 1321–24; David E. Steinberg, *Restoring the Fourth Amendment: The Original Understanding Revisited*, 33 HASTINGS CONST. L.Q. 47, 62–69 (2005).

130. *See, e.g.*, Cloud, *supra* note 119, at 1745–47; Davies, *supra* note 80, at 550–52; Wasserstrom, *supra* note 126, at 1394–96.

131. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 28–29, 68 (1993); Davies, *supra* note 110, at 419–32; Dripps, *supra* note 119, at 1094–97; Wesley MacNeil Oliver, *The Neglected History of Criminal Procedure, 1850-1940*, 62 RUTGERS L. REV. 447, 450–56 (2010); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 830–32 (1994); George C. Thomas III, *Stumbling Toward History: The Framers' Search and Seizure World*, 43 TEX. TECH L. REV. 199, 200–01, 225–28 (2010).

132. Thomas, *supra* note 131, at 201.

133. Oliver, *supra* note 121, at 382.

the search pursuant to warrant proved fruitless or if they undertook a warrantless search or seizure that a jury concluded had exceeded the officer's lawful authority.[134]

Given the limited duties of Framing-era public officers and the threat of personal liability that they faced, especially when they acted without authorization by warrant, warrantless search and seizure was likely a rarity. As one legal scholar concluded: "Warrantless searches and seizures were virtually nonexistent or at least uncontroversial."[135] Thus, there would have been little reason for the Framing generation to consider whether the Fourth Amendment embodied a preference for warrants in light of the limited authority and incentive for officers to act without them.

The Framing-era regime of law enforcement proved unsatisfactory; in the nineteenth century, in response to increasing crime and social instability, cities began to establish police forces with investigative responsibilities.[136] Moreover, as investigative responsibilities enlarged, to minimize the risk that newly-empowered law enforcement personnel would be inhibited in the performance of their duties, exposure to tort liability diminished. Soon after the Constitution's ratification, Congress began to expand the defenses available in actions arising from customs searches, apparently because of the perceived need to encourage officials to undertake such searches.[137] Congress also began to indemnify public officials for judgments against them arising from the performance of their duties.[138] Today, indemnification of police and other public officials is common.[139] Moreover, since the Framing, a doctrine of official immunity from

134. *See, e.g.*, Fabio Arcila, Jr., *The Framers' Search Power: The Misunderstood Statutory History of Suspicion & Probable Cause*, 50 B.C. L. REV. 363, 371–79 (2009); Davies, *supra* note 80, at 624–34, 650–54; Davies, *supr*a note 46, at 72–75, 91–93; Thomas, *supra* note 131, at 225–28; *see also* AMAR, *supra* note 127, at 10–17 (discussing the immunity from tort liability conferred by a particularized warrant).

135. THOMAS K. CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION § 2.2.1, at 41 (2d ed. 2014); *cf.* Davies, *supra* note 121, at 21 ("[T]he common-law authorities said virtually nothing about warrantless searches. The explanation for that silence seems to be partly that there was not much to search for (other than stolen property), and partly that it was assumed that an arrestee would routinely be searched for weapons or stolen goods whenever an arrest was made.").

136. *See, e.g.*, FRIEDMAN, *supra* note 131, at 68–71; DAVID R. JOHNSON, POLICING THE URBAN UNDERWORLD: THE IMPACT OF CRIME ON THE DEVELOPMENT OF THE AMERICAN POLICE, 1800–1887, at 12–40 (1979); THOMAS A. REPPETTO, THE BLUE PARADE 2–23 (1978); JAMES F. RICHARDSON, URBAN POLICE IN THE UNITED STATES 6–15, 19–32 (1974); SAMUEL WALKER, POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE 49–51 (1980); Dripps, *supra* note 119, at 1098–1101; Steiker, *supra* note 131, at 832–34. For a helpful discussion of the extent to which nineteenth-century police acquired new investigative powers, see Oliver, *supra* note 131, at 461–68.

137. *See, e.g.*, Arcila, *supra* note 134, at 392–420; Davies, *supra* note 46, at 91–93.

138. *See* James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1865–70 (2010).

139. *See, e.g.*, Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 812–13 & n.51, 819–20 (2007); Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 912–37 (2014).

tort liability has emerged.[140] As currently understood, qualified immunity grants law enforcement officials a qualified immunity for unconstitutional conduct that does not violate clearly established law,[141] and is justified by the potential for over-deterrence if public employees were strictly liable for their constitutional torts.[142]

Accordingly, in light of the radical expansion in responsibilities of those engaged in law enforcement, and the concomitantly reduced role of tort liability in circumscribing the discretionary authority of public officials, there is reason to question whether the apparent lack of a warrant requirement in the Framing era has fair application to contemporary search and seizure.[143] It may have been much easier to regard warrantless search and seizure as "reasonable" within the meaning of the Fourth Amendment in the Framing-era regime, in which official authority was far more circumscribed, and the threat of personal liability in tort far greater, than today.[144] The difficulties in applying historical evidence of original meaning to the vastly changed contemporary landscape of search and seizure seems to be the most likely explanation for the prevalence of nonoriginalism in cases considering a warrant requirement.

3. Exclusion

Similar difficulties arise in utilizing originalism to address whether evidence obtained in violation of the Fourth Amendment can be used in criminal prosecutions.

All the cases in the study period addressing the question of exclusion were coded NO (although some mention original meaning on issues other than exclusion), and in all of these cases, even Justice Scalia and (after his appointment) Justice Thomas joined opinions based on nonoriginalist grounds.[145] Notably, Justice Scalia wrote the opinion of the Court (as well as an

140. *See* Sina Kian, *The Path of the Constitution: The Original System of Remedies, How It Changed, and How the Court Responded*, 87 N.Y.U. L. REV. 132, 150–58 (2012).

141. *See, e.g.*, Pearson v. Callahan, 555 U.S. 223, 231–32 (2009); Saucier v. Katz, 533 U.S. 194, 203–07 (2001); Anderson v. Creighton, 483 U.S. 635, 643–44 (1987).

142. *See, e.g.*, Richardson v. McKnight, 521 U.S. 399, 407–08 (1997); Wyatt v. Cole, 504 U.S. 158, 167–68 (1992); Mitchell v. Forsyth, 472 U.S. 511, 525–26 (1985).

143. *Cf.* Davies, *supra* note 80, at 725 ("These developments . . . destroyed the common-law premises that had grounded the Framers' belief that a ban against general warrants would suffice to ensure the right to be secure in person and house. Likewise, these developments undermined trespass actions against individual officers as a means of enforcing legal limits on search and arrest authority. By the end of the nineteenth century, the warrantless officer posed a far more potent threat to the security of person and house than the Framers had ever anticipated." (footnote omitted)).

144. For incisive scholarly discussions along these lines, see Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down that Wrong Road Again*," 74 N.C. L. REV. 1559, 1595–603 (1996), and Steiker, *supra* note 131, at 830–38, 852–56.

145. *See generally* Davis v. United States, 564 U.S. 229 (2011) (relying on Fourth Amendment precedent, and not original meaning, to enforce the use of the exclusionary rule); Herring v. United States, 555 U.S. 135 (2009) (using the judicially-created deterrence effect rationale to hold that the exclusionary rule did not apply); Hudson v. Michigan, 547 U.S. 586 (2006) (coded NOBOMC because of references to the common-law knock-and-announce principle) (holding that the social costs balanced against deterrence weighed in favor of not applying the exclusionary rule); Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357 (1998) (opinion of Thomas, J.)

additional plurality opinion) in *Hudson v. Michigan* which, although doubtful of the case for exclusion, confined its criticism to nonoriginalist grounds.[146] Nevertheless, a handful of scholars have opposed the exclusionary rule on the ground that in the Framing era, the remedy for a wrongful search and seizure was an award of damages in tort.[147] But, even granting that in the Framing era tort liability rather than exclusion was the order of the day, there are a variety of difficulties in making an originalist case against the exclusionary rule.[148]

As we have seen, in the Framing era, search and seizure undertaken without a valid warrant presented a serious risk of personal liability in tort, and the Fourth Amendment had prohibited the general warrant—what the Framing generation likely perceived as the most serious threat of abusive search and seizure.[149] This reliance on personal tort liability to constrain search and seizure authority, to be sure, presented a serious risk of over-deterrence; but if officials are not expected to perform much in the way of investigative activity, over-deterrence is not of much concern.

Once police forces emerged that were expected to proactively investigate crime, however, over-deterrence became a greater concern, and the reduced threat of personal liability that accompanied the emergence of indemnification and tort immunities meant that the threat of damages liability was no longer as effective a constraint on the abuse of authority. Under contemporary

(using a balancing calculus, rather than original meaning or textualism, to find that the exclusionary rule did not apply); Arizona v. Evans, 514 U.S. 1 (1995) (noting that exclusion is not mandated by the text of the Fourth Amendment, but rather is a judicially created remedy); New York v. Harris, 495 U.S. 14 (1990) (coded NOBOMC because of references to the historical sanctity of the home) (using a balancing test to find that exclusion was not appropriate); James v. Illinois, 493 U.S. 307 (1990) (Justice Scalia joined Justice Kennedy's nonoriginalist dissent) (arguing that the exclusionary rule did not apply because of the lack of a deterrent effect); Murray v. United States, 487 U.S. 533 (1988) (opinion of Scalia, J.) (rooting the independent source doctrine in its lack of a deterrent effect rather than in a historical use); Illinois v. Krull, 480 U.S. 340 (1987) (same, except discussing the good-faith exception).

146. *Hudson*, 547 U.S. at 590–99; *id.* at 599–602 (plurality).

147. *See, e.g.*, AMAR, *supra* note 127, at 20–22; William Gangi, *The Exclusionary Rule: A Case Study in Judicial Usurpation*, 34 DRAKE L. REV. 33, 39–46, 125–29 (1984–1985). Indeed, in the Framing era, the fact that a search produced incriminating evidence was considered a defense to tort liability. AMAR, *supra* note 127, at 7; Arcila, *supra* note 121, at 1316–17. There is some debate, however, about whether this defense was recognized for a trespass to a residence. *Compare* Davies, *supra* note 80, at 647–49 (denying the existence of a defense), *with* Arcila, *supra* note 121, at 1317–24 (arguing that the defense was recognized).

148. For an effort to justify exclusion on originalist grounds, see Roger Roots, *The Originalist Case for the Fourth Amendment Exclusionary Rule*, 45 GONZ. L. REV. 1 (2009–2010); and Roger Roots, *The Framers' Fourth Amendment Exclusionary Rule: The Mounting Evidence*, 15 NEV. L.J. 42 (2014). For skeptical responses, see Lawrence Rosenthal, *Seven Theses in Grudging Defense of the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L. 525, 532–33 (2013); and Rohith V. Srinivas, *The Exclusionary Rule as Fourth Amendment Judicial Review*, 49 AM. CRIM. L. REV. 179, 205 (2012).

149. *See e.g.*, CUDDIHY, *supra* note 71, at 771–72; Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 571–79 (1983).

circumstances, accordingly, tort remedies have been drained of much of their potency, and therefore the case for an exclusionary remedy is far more powerful than in the Framing era.[150] This evidence suggests that the disappearance of the Framing-era regime of tort liability offers a compelling explanation for the absence of originalism in contemporary exclusionary rule jurisprudence. The nonoriginalism prevalent in exclusionary rule jurisprudence, in other words, is less an artifact of the force of nonoriginalist precedent than a reflection of the difficulties of developing an authentically originalist alternative to exclusion.

B. HISTORICALLY-MINDED NONORIGINALISM

Opinions were coded NOBOMC when they consulted original meaning yet found it inadequate to resolve the matter before the Court. These opinions are of special interest because they reflect a high likelihood that a failure to utilize original meaning to resolve the issue before the Court is not the result of judicial inadvertence, nonoriginalist precedent, or the parties' failure to press originalist arguments. Indeed, these opinions reflect the difficulties of applying original meaning to contemporary problems of search and seizure. Again, some examples illustrate the point.

1. Warrantless Search and Seizure

As we have seen, there is great difficulty in developing an originalist view of the circumstances under which the Fourth Amendment requires that search and seizure be authorized by warrant.[151] Thus, it should be unsurprising that the professed originalist Justices in this study, while taking some care to examine the historical evidence, ultimately found it inconclusive.

For example, Justice Thomas, in an opinion joined by Justice Scalia, wrote: "[T]he [Fourth] Amendment's history, which is clear as to the Amendment's principal target (general warrants), [is] not as clear with respect to when warrants were required, if ever."[152] Similarly, Justice Scalia acknowledged: "[C]hanges in the surrounding legal rules (for example, elimination of the common-law rule that reasonable, good-faith belief was no defense to absolute liability for trespass) may make a warrant indispensable to reasonableness where it once was not."[153] Thus, these opinions strongly suggest that it is the difficulties in utilizing the original meaning of the Fourth Amendment to illuminate the reach of warrantless search-and-seizure authority that explain the prevalence of nonoriginalist opinions in this area of Fourth Amendment jurisprudence.[154]

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150. For more extensive arguments along these lines, see Dripps, *supra* note 144, at 1598–1600; Rosenthal, *supra* note 148, at 532–37; and Steiker, *supra* note 131, at 847–52.

151. *See supra* Subpart III.A.2.

152. Groh v. Ramirez, 540 U.S. 551, 572 (2004) (Thomas, J., dissenting).

153. California v. Acevedo, 500 U.S. 565, 583 (1991) (Scalia, J., concurring in the judgment) (citations omitted).

154. Some scholars, focusing on the Fourth Amendment's incorporation within the Fourteenth, have argued that the Fourth Amendment's meaning should be assessed as it was understood at the time of the Fourteenth Amendment's ratification. *See, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND

2. School and Other Special-Needs Searches

Another example in which originalism has offered even originalist Justices little aid involves searches justified in terms of particular governmental interests with little in the way of Framing-era antecedents.

The Court confronted the question whether random drug testing of athletes at a public high school violated the Fourth Amendment in *Vernonia School District 47J v. Acton*.[155] Justice Scalia's opinion of the Court, joined by Justice Thomas, acknowledged the eighteenth-century rule that when parents place their children in schools the school acts *in loco parentis* and is permitted to exercise wide-ranging parental powers,[156] but nevertheless described the case as one "where there was no clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted," reasoning that the emergence of compulsory school attendance laws, as well as the drug problem and drug-testing technology called for a reasonableness test for assessing school searches not derived from historical evidence of fixed, original meaning, but instead "judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."[157]

In a later opinion joined by Justice Scalia, the Court applied this nonoriginalist balancing test to hold that requiring a student to remove her clothes down to her underwear as school officials searched for unauthorized prescription-strength medication violated the Fourth Amendment.[158] Justice

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RECONSTRUCTION 219–30, 267–68 (1998); TASLITZ, *supra* note 128, at 242–56. The prevailing understanding of the Fourth Amendment at the time, however, was little developed from the Framing era; the leading commentators of the era offered little more than the view that the Fourth Amendment forbade general warrants. *See, e.g.*, THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 299–308 (Little, Brown & Co. 1868); JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 153–54 (Hurd & Houghton 1868); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1902 (Little, Brown & Co. 4th ed. 1873) (1833). Moreover, an officer's exposure to tort liability for exceeding the scope of his authority persisted at the time of the Fourteenth Amendment's framing and ratification. *See, e.g.*, 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE §§ 168, 181 (Little, Brown & Co. 2d ed. 1872) (1866); WM. L. CLARK, JR., HAND-BOOK OF CRIMINAL PROCEDURE 20–21, 34–44, 47 (W. Publ'g Co. 1895). Contemporary commentators who have argued for a Reconstruction-era understanding of the Fourth Amendment argue only that it requires greater sensitivity to racial discrimination in search and seizure when administering the search-and-seizure law. *See, e.g.*, AMAR, *supra*, at 267–68; TASLITZ, *supra*, at 256–57; I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 36–37 (2011); Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of* Whren v. United States, 83 GEO. WASH. L. REV. 882, 918–26 (2015).

155. 515 U.S. 646 (1995).

156. *Id.* at 654–55.

157. *Id.* at 652–53 (quoting Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 619 (1989)) (internal quotation marks omitted).

158. Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 370–77 (2009).

Thomas, however, disagreed on originalist grounds, contending that the Framing-era rule of *in loco parentis* should be incorporated within the Fourth Amendment, thereby granting school officials essentially unlimited parental authority over students at school.[159] Yet, as we have seen, in *Acton* (which Justice Thomas joined), Justice Scalia rejected this approach, noting that the advent of contemporary compulsory school attendance laws rendered the Framing-era rule inapplicable.

It is far from clear that there is any originalist methodology available for determining whether the Framing-era doctrine of *in loco parentis* should retain its force once school attendance become compulsory, rather than purely a creature of contract. Justice Scalia's position on this issue appears to reflect the difficulties of applying Framing-era understanding in a changed context rather than an insufficient commitment to originalist adjudication.

School search cases are an example of the "special needs" doctrine, in which searches and seizures thought to "serve[] special governmental needs, beyond the normal need for law enforcement," are assessed not through an originalist methodology reflecting fixation and constraint, but instead by "balanc[ing] the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context."[160] All of the opinions in the study addressing special-needs justifications for search and seizure were coded as nonoriginalist, either NO or NOBOMC.[161] Because these cases involve governmental functions or interests that, like compulsory public education, lack

159. *Id.* at 398–402 (Thomas, J., concurring in the judgment in part and dissenting in part).

160. Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 665–66 (1989).

161. In addition to the school-search cases discussed above, the opinions in the special-needs cases, all of which, unless otherwise indicated, were joined by Justice Scalia and, after he joined the Court, Justice Thomas, are: City of Los Angeles v. Patel, 135 S. Ct. 2443 (2015) (record-keeping requirements for hotels) (Justice Scalia's dissent mentions Framing-era regulation of hotels but he does not base his dissenting vote on that ground); Maryland v. King, 569 U.S. 435 (2013) (DNA testing of arrestees) (Justice Scalia's dissent mentions a Framing-era rule against general warrants but he does not base his dissenting vote on that ground); Missouri v. McNeely, 569 U.S. 141 (2013) (blood test of arrestee) (Justice Thomas dissented on nonoriginalist grounds); City of Ontario v. Quon, 560 U.S. 746 (2010) (review of police officer's text messages); Samson v. California, 547 U.S. 843 (2006) (search of parolee's residence) (written by Justice Thomas); Illinois v. Lidster, 540 U.S. 419 (2004) (checkpoint to question potential witnesses); Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822 (2002) (drug testing of students); United States v. Knights, 534 U.S. 112 (2001) (search of probationer's home); Ferguson v. City of Charleston, 532 U.S. 67 (2001) (drug testing of obstetrics patients) (Justices Scalia and Thomas dissented on nonoriginalist grounds); Illinois v. McArthur, 531 U.S. 326 (2001) (officer's detention of suspect outside home pending issuance of warrant); City of Indianapolis v. Edmond, 531 U.S. 32 (2000) (drug-detection checkpoint in which Justice Thomas's dissent mentioned that the Framers might have disapproved of such a roadblock but he did not base his decision on that ground); Chandler v. Miller, 520 U.S. 305 (1997) (drug-testing of candidates); Mich. Dep't of St. Police v. Sitz, 496 U.S. 444 (1990) (sobriety checkpoint); Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656 (1989) (drug testing of law enforcement employees) (Justice Scalia dissented on nonoriginalist grounds); Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602 (1989) (drug testing of railway employees); Griffin v. Wisconsin, 483 U.S. 868 (1987) (written by Justice Scalia) (search of probationer's home); New York v. Burger, 482 U.S. 691 (1987) (search of automobile junkyard); O'Connor v. Ortega, 480 U.S. 709 (1987) (search of public employee's office) (Justice Scalia concurring on nonoriginalist grounds).

a Framing-era equivalent, it is perhaps unsurprising that originalism has offered little useful guidance even to members of the Court favorably inclined toward originalist adjudication.

3. Cellphone Searches

Yet another example of the inability of original meaning to offer a vehicle for deciding a disputed question of Fourth Amendment law involves the inspection of the digital contents of a cellphone incident to the otherwise lawful arrest of its owner. In *Riley v. California*,[162] Chief Justice Roberts's opinion of the Court (joined by Justices Scalia and Thomas) characterized the question whether the contents of a cellphone can be inspected incident to an arrest as one on which there was no "guidance from the founding era," therefore requiring the Court to evaluate the search "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."[163] The Court reached this decision despite acknowledging the longstanding rule permitting the search of property in the possession of an arrestee incident to the arrest,[164] reasoning that a search of the digital contents of a cellphone involves a far greater intrusion on privacy than an inspection of physical objects found on an arrestee's person.[165] It is hard to disagree with this assessment; but, it means that originalism offers little useful guidance. Assessments of reasonableness made when all searches were physical do not help much to identify the Fourth Amendment constraints on digital searches.

4. Stop and Frisk

Consider as well the paradigmatically nonoriginalist stop-and-frisk holding of *Terry*. *Terry* was called into question by Justice Scalia, who doubted whether a physical search of an individual temporarily detained on suspicion would have been regarded as reasonable in the Framing era.[166] Even so, Justice Scalia acknowledged the difficulties of an originalist assessment of *Terry*.

In the Framing era, Justice Scalia observed, "it had long been considered reasonable to detain suspicious persons . . . . This is suggested, in particular, by the so-called night-walker statutes," but, he added, "[w]hen . . . the detention did

162. 134 S. Ct. 2473 (2014).

163. *Id.* at 2484 (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999)) (internal quotation marks omitted).

164. *Id.* at 2482.

165. *Id.* at 2484–91.

166. Minnesota v. Dickerson, 508 U.S. 366, 380, 380–82 (1993) (Scalia, J., concurring). Scholars have also questioned the originalist credentials of *Terry*. *See, e.g.*, Davies, *supra* note 80, at 629 n.216; Sklansky, *supra* note 78, at 1804–05; George C. Thomas III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451, 1514–16 (2005).

not rise to the level of a full-blown arrest (and was not supported by the degree of cause needful for that purpose), there appears to be no clear support at common law for physically searching the suspect."[167] Nevertheless, under the night-walker statutes, "the temporary detention of a suspicious character [c]ould be elevated to a full custodial arrest on probable cause—as, for instance, when a suspect was unable to provide a sufficient accounting of himself."[168] Thus, although there was no Framing-era understanding that it was reasonable to stop and frisk an individual except during a search incident to arrest, it was regarded reasonable to detain and even arrest suspicious individuals. Moreover, as Justice Scalia acknowledged, the development since the Framing era of highly efficient firearms may alter the calculus for whether an investigative frisk is "reasonable" within the meaning of the Fourth Amendment when an officer approaches a potentially dangerous suspect.[169] Given this conflicting evidence, Justice Scalia could reach no conclusion as to whether *Terry*'s "result was wrong."[170] Thus, the persistence of *Terry* and its nonoriginalist progeny seems an artifact of the difficulty in developing an originalist approach to stop-and-frisk, rather than the continuing effects of nonoriginalist precedent. Indeed, as we have seen, that problem repeatedly surfaces in the opinions coded NOBOMC in this study. An analysis of the manner in which constitutional text was employed and understood in the Framing era must account for the possibility that Framing-era usage was critically dependent on Framing-era context, and for that reason may not offer useful guidance under contemporary circumstances.

C. LATENT NONORIGINALISM

The difficulties in applying original meaning to contemporary search-and-seizure litigation are reflected even in ostensibly originalist opinions. Indeed, there is reason to believe that this study's methodology overstates the prevalence of Fourth Amendment originalism.

Consider again *United States v. Watson*, in which the Court relied on a Framing-era rule to uphold warrantless felony arrests in public places based on probable cause.[171] In his dissent, Justice Marshall argued that the Court's reliance on the prevailing Framing-era rule permitting warrantless felony arrests was inapposite because "[o]nly the most serious crimes were felonies at common law, and many crimes now classified as felonies under federal or state law were

167. *Dickerson*, 508 U.S. at 380–81 (Scalia, J., concurring).

168. *Id.* at 381. This authority to arrest on suspicion persisted at the time of the ratification of the Fourteenth Amendment. *See generally* 1 BISHOP, *supra* note 154, at § 182; JOHNSON, *supra* note 136, at 131–33.

169. *See Dickerson*, 508 U.S. at 382 (Scalia, J., concurring) ("[E]ven if a 'frisk' prior to arrest would have been considered impermissible in 1791, perhaps it was considered permissible by 1868, when the Fourteenth Amendment (the basis for applying the Fourth Amendment to the States) was adopted. Or perhaps it is only since that time that concealed weapons capable of harming the interrogator quickly and from beyond arm's reach have become common—which might alter the judgment of what is 'reasonable' under the original standard.").

170. *Id.*

171. *See supra* text accompanying notes 57–58.

treated as misdemeanors."[172] Although this attack on the contemporary relevance of the Framing-era distinction between felonies and misdemeanors failed in *Watson*, in *Tennessee v. Garner*,[173] the Court held that the prevailing Framing-era rule authorizing the use of deadly force to apprehend a fleeing felon violated the Fourth Amendment, reasoning that this rule "arose at a time when virtually all felonies were punishable by death," and was premised on "the relative dangerousness of felons," while today, the distinction between felonies and misdemeanors is "minor and often arbitrary."[174]

Justice White was the author of both *Watson* and *Garner*. Yet, in *Garner*, Justice White, without explanation, embraced the same argument about the obsolescence of the Framing-era distinction between felonies and misdemeanors that he had implicitly rejected in *Watson*.[175] Perhaps the two opinions can be reconciled; for example, Arnold Loewy speculated that "the Court was more concerned about unnecessary loss of life (*Garner*) than the unnecessary loss of process (*Watson*)."[176] Whether this or some other ground explains the disparate outcomes, the conclusion seems inescapable that Justice White utilized some nonoriginalist methodology for justifying departures from Framing-era practice that led him to reject the contemporary relevance of Framing-era practice in some cases and not others.

While *Garner*'s nonoriginalism is apparent, *Watson* rests on a latent nonoriginalism. Justice White implicitly concluded that the Framing-era distinction between felony and misdemeanor arrests had continuing relevance in *Watson*; yet nothing in *Watson*'s account of original meaning explains why that distinction retained its vitality when it came to arrests, though not when it came to the use of deadly force to effect those arrests. Although the methodology employed in this study codes *Watson* as originalist, in reality, that opinion rests critically on a nonoriginalist, if unstated, assessment of Justice Marshall's claim that changes in distinction between felonies and misdemeanors rendered the Framing-era law of arrest inapposite.

Once one starts looking for latent nonoriginalism, it appears readily.[177] Consider, again, the discussion in *Boyd* characterizing an order directing an

172. United States v. Watson, 423 U.S. 411, 439–40 (1976) (Marshall, J., dissenting).

173. 471 U.S. 1 (1985).

174. *Id.* at 13–14 (citations omitted).

175. *See, e.g.*, Louis Michael Seidman, *Substitute Arguments in Constitutional Law*, 31 J.L. & POL. 237, 238 (2016) ("Justice White . . . nowhere explained why *Garner* was distinguishable from *Watson*."); Silas J. Wasserstrom, *The Court's Turn Toward a General Reasonableness Interpretation of the Fourth Amendment*, 27 AM. CRIM. L. REV. 119, 147 n.213 (1989) ("Justice White's opinion for the Court in *Watson* ignored just the sort of arguments that he relied on in *Garner*.").

176. Arnold H. Loewy, *The Fourth Amendment: History, Purpose, and Remedies*, 43 TEX. TECH L. REV. 1, 3 (2010).

177. *Cf.* Lawrence Rosenthal, *Originalism in Practice*, 87 IND. L.J. 1183, 1232–42 (2012) (questioning the prevalence of originalism in constitutional adjudication by examining opinions commonly regarded as originalist).

importer to produce business records as an unreasonable search and seizure, relying on Framing-era conceptions about the search and seizure of private papers.[178] When it described Framing-era "history of controversies on the subject," the Court referenced the colonial experience with "writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods," and the "practice of issuing general warrants . . . for searching private houses for the discovery and seizure of books and papers that might be used to convict their owner of the charge of libel."[179] The Court acknowledged, however, that in the case before it, "certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching amongst his papers, are wanting."[180]

Under scrutiny, *Boyd*'s originalism disappears; the Court identified no evidence that in the Framing era, an order to produce papers, unaccompanied by a forcible trespass onto private property, was considered an unreasonable search and seizure when not authorized by a warrant supported by a judicial finding of probable cause.[181] *Boyd*, in short, critically rests on a nonoriginalist argument that a requirement to produce business records or other property, even if unaccompanied by the type of force and coercion that inhered in the Framing-era conception of an unreasonable search and seizure, should nevertheless be regarded as a violation of the Fourth Amendment.[182] That conclusion may be sound, but it is not anchored in original meaning.

Latent nonoriginalism of this type is prevalent among the cases coded as originalist in this study.

1. Warrantless Search and Seizure

Cases in this study that relied on *Carroll*'s originalist justification for upholding warrantless search and seizure of vehicles based on the Framing-era rule that ships could be searched without a warrant were coded O.[183] Yet, it is unclear whether there is substance to *Carroll*'s professed originalism.

178. *See supra* text accompanying notes 42–45.

179. Boyd v. United States, 116 U.S. 616, 625–26 (1886).

180. *Id.* at 622.

181. In *Boyd*, Justice Miller made this very point; while acknowledging that the Fourth Amendment was crafted to "abolish[] searches under . . . general warrants," he denied that "requir[ing] the production of evidence in a suit by mere service of notice on the party, who has that evidence in his possession, can be held to authorize an unreasonable search or seizure." *Id.* at 641 (Miller, J., concurring in the judgment).

182. *Cf.* Davies, *supra* note 46, at 117 ("[T]he setting in *Boyd* was far removed from the Framers' concern for the sanctity of the dwelling house and private papers."); Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 72 ("Famous search and seizure cases leading up to the Fourth Amendment involved physical entries into homes, violent rummaging for incriminating items once inside, and then arrests and the taking away of evidence found.").

183. *See* Florida v. White, 526 U.S. 559 (1999) (looking to the laws of the "First, Second, and Fourth Congresses that authorized federal officers to conduct warrantless searches of ships and to seize concealed goods subject to duties"); Wyoming v. Houghton, 526 U.S. 295 (1999) (noting that around Framing customs officials had the ability to search any ship or vessel without a warrant if they had probable cause to believe that it contained goods subject to duty).

To equate contemporary searches of vehicles with Framing-era searches of ships, *Carroll* observed that for "a search of a ship, motor boat, wagon, or automobile . . . it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."[184] That contention, however, sounds more pragmatic than originalist.[185] Indeed, *Carroll* identified no historical evidence to support its claim that the Framing era search and seizure authority turned on mobility; there is, in fact, little Framing-era evidence that sheds light on whether warrantless search and seizure was permitted for carts, carriages, or other types of moveable property.[186] Perhaps the Framing-era tolerance for warrantless searches of ships rested on considerations other than mobility.

Carroll's originalism is, accordingly, dubious. Its claimed reliance on Framing-era practice sufficed to code it and its progeny originalist under this study's coding methodology, but that claim may not withstand scrutiny.[187]

2. Kyllo

Consider again the holding that the warrantless use of a thermal imager to identify patterns of heat emanating from a home was an unreasonable search in *Kyllo*. The Court's opinion was coded O because of its insistence on "preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted."[188] Yet, as we have seen in our consideration of *Boyd*, the Framing-era conception of an unreasonable search involved forcible entry and physical intrusion. What was regarded as an unreasonable search and seizure in the Framing era, accordingly, was far more coercive than passive electronic surveillance.[189] We have no reliable way of knowing if passive

184. Carroll v. United States, 267 U.S. 132, 153 (1925).

185. *Cf.* Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 130–31 (2006) ("Taft's heroic effort [in *Carroll*] to reinterpret Fourth Amendment doctrine in light of the pragmatic needs of law enforcement, balanced against the interests of citizens to be free from arbitrary interference, essentially set the framework for modern search and seizure jurisprudence." (footnote omitted)).

186. *See, e.g.*, CUDDIHY, *supra* note 71, at 767 ("[S]hips were subject to warrantless searches when the [Fourth] Amendment originated. The extent to which other vehicles were so subject is unknowable, however, for neither case law nor legislation had significantly illuminated the subject." (footnote omitted)); *cf.* Arizona v. Gant, 556 U.S. 332, 351 (2009) (Scalia, J., concurring) ("[T]he historical scope of officers' authority to search vehicles incident to arrest is uncertain.").

187. For attacks on the originalist bona fides of *Carroll*, see, for example, Davies, *supra* note 46, at 121–24; Davies, *supra* note 80, at 606–08; Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 502–07 (2011); and Sklansky, *supra* note 78, at 1766–70.

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

189. *Cf.* Katz v. United States, 389 U.S. 347, 364–67 (1967) (Black, J., dissenting) (arguing that wiretapping would have been regarded in the Framing era as eavesdropping not regulated by the Fourth Amendment); Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 177–88 (observing that the Framing-era conception may have offered protection against physical intrusion rather than protection for privacy).

electronic surveillance—whether electronic eavesdropping as in *Katz* or the more limited information collected in *Kyllo*—would have been regarded in the Framing era as an unreasonable search or seizure. Notably, in his dissenting opinion in *Kyllo*, Justice Stevens argued that the privacy interest at stake was too trivial to be considered a search.[190]

Orin Kerr has argued that both the majority and dissenting opinions in *Kyllo* reflect "equilibrium adjustment," in which the Court responds to new investigative technologies by imposing constitutional regulation that restores the preexisting equilibrium between investigative authority and privacy, albeit without claiming that equilibrium adjustment is embedded in the original meaning of the Fourth Amendment.[191] The lack of any evidence that concern about equilibrium adjustment is reflected in the historical evidence of original meaning should be unsurprising; as we have seen, in the Framing era, public officials had little in the way of investigative authority.[192] Maintaining equilibrium with respect to investigative authority, which was not yet an important feature of the criminal justice system, is an unlikely account of the Fourth Amendment's original meaning. But, even if equilibrium adjustment can properly be characterized as originalist, the fact that it can justify both the majority and dissenting opinions in *Kyllo* makes plain that this methodology does not offer an originalist rule of decision in *Kyllo*.

While it may be desirable to prevent advancing technology from eroding the privacy of the home, that view requires something more than an invocation of the original meaning of the Fourth Amendment; it requires a normative argument that any investigative technique that compromises the privacy of the home should be deemed an unreasonable search and seizure (absent a particularized warrant), even if unaccompanied by the type of force or coercion characteristic of search and seizure in the Framing era, and even if the privacy interest at stake may be trivial.[193] After all, the Framing-era conception of an unreasonable search and seizure involved *both* an invasion of privacy *and* the

190. *Kyllo*, 533 U.S. at 45–46 (Stevens, J., dissenting).

191. Kerr, *supra* note 187, at 496–99.

192. *See supra* text accompanying notes 131–143.

193. *Cf.* Amsterdam, *supra* note 119, at 403 ("The ultimate question, plainly, is a value judgment. It is whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society. That, in outright terms, is the judgment lurking underneath the Supreme Court's decision in *Katz*, and it seems to me the judgment that the fourth amendment inexorably requires the Court to make."). Even commentators sympathetic to *Kyllo* frequently acknowledge that it rests on a normative judgment and not unadorned original meaning. *See, e.g.*, Morgan Cloud, *Rube Goldberg Meets the Constitution: The Supreme Court, Technology, and the Fourth Amendment*, 72 MISS. L.J. 5, 41–48 (2002) (arguing that *Kyllo* reflects a judgment about the risks of surveillance that homeowners should be expected to bear); 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, 166–70 (2002) (same); Tracey Maclin, Katz, Kyllo, *and Technology: Virtual Fourth Amendment Protection in the Twenty-First Century*, 72 MISS. L.J. 51, 61–72 (2002) (arguing that *Kyllo* rests on an unwillingness to engage in balancing); David A. Sklansky, *Back to the Future:* Kyllo*,* Katz, *and Common Law*, 72 MISS. L.J. 143, 178–88 (2002) (arguing that *Kyllo* reflects a concern for privacy as a constitutional objective rather than adherence to Framing-era conceptions).

use of force to effect a physical intrusion. Electronic surveillance disaggregates the invasion of privacy from the use of force in a manner unknown in the Framing era. We have no reliable way of knowing whether the Framing-era conception of an unreasonable search and seizure included an invasion of privacy unaccompanied by the actual or threatened use of force against a suspect; the problem never arose. An invocation of original meaning, without more, will not enable us to decide whether electronic surveillance violates the Fourth Amendment.[194]

3. Jones *and* Jardine*s*

Consider the holding that attaching a GPS device to the undercarriage of a vehicle and subsequently monitoring the device to track its movements was a "search" within the meaning of the Fourth Amendment in *United States v. Jones*,[195] and its extension to the use of a narcotics-detection dog on the front porch of a home to detect contraband therein in *Florida v. Jardines*.[196]

Both opinions, written by Justice Scalia, were coded O because they rely on what they characterize as the original meaning of a "search" within the meaning of the Fourth Amendment: "physically intruding" to acquire information.[197] Yet, neither opinion identifies any Framing-era evidence to

194. A similar problem appears in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), a case in many respects similar to *Kyllo*, albeit outside the study period. *Carpenter* addressed the question whether the government's acquisition of historical cell-site location data from a cellphone provider, pursuant to a court order but in the absence of a valid warrant, which enabled it to determine the location of Carpenter's cellphone at the times that a number of robberies occurred, amounted to an unreasonable search and seizure. The majority opinion answered the question in the affirmative, relying on *Kyllo* and stressing the extent to which cell-site location data expands the government's ability to monitor individuals' movements. *Id.* at 2223. This study would have coded the opinion as originalist based on its fealty to *Kyllo*, but as we have seen, *Kyllo*'s originalism is dubious. In their dissenting opinions in *Carpenter*, in contrast, Justices Thomas and Gorsuch contended that the original meaning of the Fourth Amendment extended protection only when an individual's own person, house, papers, or effects were subject to search or seizure, and that Carpenter had not established that he had a property or other interest in the cell-location data sufficient to fall within that protection. *Id.* at 2241–43 (Thomas, J., dissenting); *id.* at 2272 (Gorsuch, J., dissenting). Of course, the same could have been said about the thermal data acquired in *Kyllo*. Justice Alito added that the original meaning of the Fourth Amendment was not understood to govern the production of documents or other information pursuant to legal process. *Id.* at 2250–51 (Alito, J., dissenting). The majority, however, rejected these arguments, observing that cell-site location data gives the government access to far more pervasive information than anything that could have been obtained previously. *Id.* at 2220. We have no way of knowing whether the Framing-era understandings that Justices Thomas, Alito, and Gorsuch invoked were critically dependent on the technological limitations of the era, which effectively constrained the volume of information about the activities of an investigative target that could be obtained from third parties. Originalism, in short, offers no ready vehicle for selecting between the approach taken by the majority in *Carpenter*, and the approach taken by Justices Thomas, Alito, and Gorsuch.

195. 565 U.S. 400, 404 (2012).

196. 569 U.S. 1 (2013).

197. *Id.* 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.'" (quoting *Jones*, 565 U.S. at 406 n.3)).

support such a definition.[198] Beyond that, the trespassory conduct in *Jones* and *Jardines* involved such minor intrusions that they might not have been regarded as problematic in the Framing era; Brian Sawers has demonstrated that in the Framing-era United States, the prevailing rule was that an unauthorized entry onto unfenced land of another was generally not regarded as an unlawful trespass absent damage to the property.[199] Moreover, as we have seen, the searches and seizures of concern in the Framing era involved substantial force and coercion of a type entirely absent in the covert surveillance in *Jones*, or the limited intrusion at stake in *Jardines*, in which the information gleaned from the dog's alert was far narrower than could be obtained by the type of forcible physical entry and physical search of concern in the Framing era.[200]

It may be desirable to treat unauthorized physical intrusions to obtain information as searches subject to constitutional regulation under the Fourth Amendment; indeed, some scholars have argued that *Jones* and *Jardines* are best anchored not in original meaning but in a normative view regarding need to regulate governmental trespass.[201] It is doubtful, however, that this conclusion can be fairly anchored in the original meaning of the Fourth Amendment.

4. Knock-and-Announce

It is also striking how quickly even seemingly originalist doctrine lapses into nonoriginalism. Consider the knock-and-announce requirement for executing a search warrant derived from Framing-era common law and held to be an aspect of Fourth Amendment reasonableness in *Wilson v. Arkansas*.[202] Although *Wilson* was coded O, the subsequent cases in the study period applying the requirement addressed claims of exigent circumstances, and while mentioning the rule's originalist origins, all were decided on nonoriginalist grounds, without any claim that the holdings were dictated by original meaning.[203]

198. For a helpful discussion of the inconclusive historical evidence regarding the Framing-era conception of a "search," see Kerr, *supra* note 182, at 71–76.

199. Brian Sawers, *Original Misunderstandings: The Implications of Misreading History in* Jones, 31 GA. ST. U. L. REV. 471, 490–510 (2015).

200. For a more extensive argument along these lines, see Lawrence Rosenthal, *Binary Searches and the Central Meaning of the Fourth Amendment*, 22 WM. & MARY BILL RTS. J. 881, 919–25 (2014).

201. *See, e.g.*, Kiel Brennan-Marquez & Andrew Tutt, *Offensive Searches: Toward a Two-Tier Theory of Fourth Amendment Protection*, 52 HARV. C.R.-C.L. L. REV. 103, 116–20 (2017) (arguing that *Jones* and *Jardines* rest on protection of dignitarian interests infringed by governmental trespass); Laurent Sacharoff, *Constitutional Trespass*, 81 TENN. L. REV. 877, 917–20 (2014) (arguing that *Jones* and *Jardines* are best understood to rest on a common-law approach to trespass sensitive to evolving norms).

202. 514 U.S. 927, 929 (1995).

203. *See* United States v. Banks, 540 U.S. 31, 33 (2003) (officers seeking cocaine acted reasonably in making forcible entry after announcing and waiting 15–20 seconds); United States v. Ramirez, 523 U.S. 65, 68 (1998) (officers executing no-knock warrant for suspect believed to possess guns and drugs could break garage window to accomplish covert entry); Richards v. Wisconsin, 520 U.S. 385, 388 (1997) (rejecting a blanket exception to knock-and-announce rule in drug cases but holding that the unannounced entry in the case at bar was properly premised on reasonable suspicion that Richards would destroy readily disposable drugs).

The root of this difficulty is found in *Wilson* itself; the Court acknowledged that "at the time of the framing, the common-law admonition that an officer 'ought to signify the cause of his coming,' had not been extended conclusively to the context of felony arrests," and only "gradually was applied to cases involving felonies, but at the same time the courts continued to recognize that under certain circumstances the presumption in favor of announcement necessarily would give way to contrary considerations."[204] Thus, *Wilson* acknowledged that the scope of the knock-and-announce requirement was unclear at the time of framing and ratification. This is yet another example of latent nonoriginalism, made evident by *Wilson*'s nonoriginalist progeny.

Perhaps *Wilson*'s account of the Framing-era understanding should not be taken as accurate. Tracey Maclin has argued that the exceptions to the knock-and-announce requirement were understood narrowly in the Framing era.[205] Even so, it is unclear whether the Framing-era view has fair application today; contemporary law enforcement faces exigencies little known in the Framing era. At the founding, the most common form of judicially-authorized search was a warrant to search for stolen goods.[206] Today, officers frequently seek far more readily disposable evidence,[207] and the development of efficient firearms means that officers executing warrants at present likely face far greater dangers than in the Framing era.[208]

Thus, even if *Wilson* overstated the indeterminacy of the historical record, there is good reason to believe that the Framing-era conception of the knock-and-announce requirement offers little useful guidance for judges addressing contemporary claims of exigency in an era of ubiquitous drug and gun crime. It should therefore be unsurprising that originalism has been of little use in determining the contemporary reach of the knock-and-announce requirement.

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204. 514 U.S. at 935 (citation omitted) (quoting Semayne's Case, 77 Eng. Rep. 194, 195 (Q.B. 1604)).

205. Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 911–14 (2002).

206. *E.g.*, Davies, *supra* note 121, at 16; Donald A. Dripps, *"Dearest Property": Digital Evidence and the History of Private "Papers" as Special Objects of Search and Seizure*, 103 J. CRIM. L. & CRIMINOLOGY 49, 75–76 (2013); Thomas, *supra* note 131, at 201. This remained the case even at the end of the nineteenth century. *See* Oliver, *supra* note 131, at 402 n.104.

207. *Cf. Richards*, 520 U.S. at 395–96 (holding that forcible entry into motel room to execute warrant to search for and seize drugs immediately after uniformed officers were observed by occupant was reasonable "given the disposable nature of the drugs").

208. *Cf.* Minnesota v. Dickerson, 508 U.S. 366, 382 (1993) (Scalia, J., concurring) ("[E]ven if a 'frisk' prior to arrest would have been considered impermissible in 1791, perhaps it was considered permissible by 1868, when the Fourteenth Amendment (the basis for applying the Fourth Amendment to the States) was adopted. Or perhaps it is only since that time that concealed weapons capable of harming the interrogator quickly and from beyond arm's reach have become common—which might alter the judgment of what is 'reasonable' under the original standard.").

IV. ALTERNATIVES TO SCALLIAN ORIGINALISM

An originalist might respond to this study by contending that Justice Scalia's apparent inability to utilize originalist grounds of decision in the bulk of Fourth Amendment cases reflects the defects of his approach to originalism (and perhaps that of Justice Thomas as well). For example, originalist scholars sometimes accused Justice Scalia of applying original meaning only in rule-like form, rather than utilizing more abstract standards.[209] This approach might be expected to be particularly problematic when it comes to the constitutional prohibition on "unreasonable" search and seizure. Others criticized Justice Scalia for his willingness to resort to nonoriginalist balancing when he could identify no Framing-era practice that reached the case before the Court.[210] There are considerable difficulties, however, in developing an alternative to Scalian originalism that would be more helpful in deciding the cases in this study on originalist grounds.

A. ANALOGY OR ADAPTATION

Some scholars, recognizing the perils of applying Framing-era rules to contemporary circumstances, have argued that original meaning should not be utilized through appropriation of Framing-era rules, but instead by a process of analogical reasoning from historical precedent,[211] or by adapting or "translating" original meaning in light of altered historical context.[212] Even Justice Scalia indulged this approach on occasion; as we have seen, *Kyllo* rests on an effort to adapt the Fourth Amendment to technological change.[213] Yet, as *Kyllo*'s contestable originalism demonstrates, analogical reasoning or adaptation presents considerable difficulties.[214] Examples of these difficulties, beyond *Kyllo* itself, are plentiful.

1. Warrantless Search and Seizure

Consider once again the difficulties with identifying an originalist rule for when a search or seizure must be authorized by warrant. Those difficulties do not disappear with the use of analogy or adaptation.

The seminal case upholding warrantless searches of vehicles was *Carroll*, in which, as we have seen, the Court drew an analogy between Framing-era customs searches of ships and contemporary searches of vehicles because both

209. *See, e.g.*, Barnett, *supra* note 41, at 11–12; Steven G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 NOTRE DAME L. REV. 483, 488–95 (2014).

210. *See*, *e.g.*, Michael, *supra* note 91, at 918–19.

211. *See, e.g.*, Strang, *supra* note 21, at 957 (arguing that originalists should utilize "analogy-warranting rationales" when considering the relevance of Framing-era practice to contemporary adjudication).

212. *See, e.g.*, Lessig, *supra* note 82, at 1189–211 (arguing that fidelity to original meaning requires efforts to adapt or "translate" original meaning in light of changes in historical context).

213. *See supra* text accompanying notes 62–64.

214. *See supra* Subpart III.C.2.

ships and vehicles are potentially mobile.[215] Professor Davies rejected this analogy, contending that customs searches of ships were not addressed by the Fourth Amendment, which prohibits unreasonable search and seizure of only "persons, houses, papers, and effects," adding that in the Framing era, ships "were not ordinary property at common law, but personalities subject to admiralty law—a branch of civil law."[216] A customs inspection of a vessel's cargo, however, would seem to involve a search and seizure of "effects" within the meaning of the Fourth Amendment, the text of which contains no exception for search and seizure governed by admiralty law. But, even if this objection to *Carroll*'s reasoning is set aside, the soundness of its analogy between ships and vehicles, based on the potential mobility of each, is open to serious question.

As we have seen, we lack reliable historical evidence demonstrating that in the Framing-era, other types of potentially mobile property, such as carts or carriages, could be searched without a warrant.[217] Moreover, in the Framing-era, not only the "effects" found on potentially mobile ships, but also those found on quite immobile commercial premises, could be searched without a warrant on the view that there were the special governmental interests in facilitating enforcement of customs, tax, and other regulatory laws at these locations.[218] When these interests were at stake, there is Framing-era precedent for dispensing with more than a warrant; the first Congress authorized not only customs officials to board and inspect vessels, but also tax officials to enter and search distilleries, without requiring warrants, probable cause, or even individualized suspicion.[219] Perhaps the particular governmental interests at stake in revenue collection, rather than potential mobility, explain the Framing-era willingness to dispense with a warrant in contexts involving revenue collection.[220]

Thus, an effort to utilize Framing-era customs searches of ships to lend support for warrantless searches of automobiles based on the mobility of each is imperfect; we cannot be confident that mobility was central to the Framing-era tolerance for warrantless search and seizure. Yet, once this effort to equate Framing-era customs searches and contemporary searches of vehicles is called

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215. *See supra* text accompanying notes 47–48, 184.

216. Davies, *supra* note 80, at 605–06 & n.151.

217. *See supra* text accompanying note 187.

218. *See, e.g.*, CUDDIHY, *supra* note 71, at 743–46; Davies, *supra* note 80, at 604–08.

219. *See, e.g.*, Akhil Reed Amar, *The Fourth Amendment, Boston, and Writs of Assistance*, 30 SUFFOLK U. L. REV. 53, 59 (1996); Arcila, *supra* note 121, at 1299–311; Louis Fisher, *Congress and the Fourth Amendment*, 21 GA. L. REV. 107, 112–15 (1986); *cf.* Cloud, *supra* note 119, at 1739–43 (arguing that these Framing-era precedents were limited to regulatory contexts); Maclin, *supra* note 128, at 950–55 (same). *See generally* United States v. Villamonte-Marquez, 462 U.S. 579, 583–84 (1983) (discussing the decision of the first Congress to authorize inspections of vessels under the Fourth Amendment).

220. *Cf.* Davies, *supra* note 121, at 30–31 ("Revenue searches differed from criminal searches in two important respects. First, because revenue was essential to the survival of the government, and thus an essential public good, revenue searches likely were regarded as being more important . . . . Second, revenue enforcement could not rely upon victim complaints to initiate prosecutions, as criminal justice did.").

into question, there is little evidence of any historically-fixed original meaning of a "reasonable" search and seizure that provides an originalist understanding of whether warrants are required to search vehicles or other potentially moveable property.

2. Exclusion

The same problem infects efforts to apply Framing-era conceptions to the question of what remedy should be offered when evidence is obtained in violation of the Fourth Amendment. As we have seen, the Framing-era regime of tort liability may present unacceptable risks of over-deterrence in light of the demands placed on contemporary law enforcement, and therefore seems ill-suited for the present.[221] Yet, contemporary tort remedies may be too circumscribed to deter unreasonable search and seizure effectively; indeed, the Supreme Court's embrace of the exclusionary rule was based primarily on its assessment that experience had demonstrated that damages remedies had proven ineffective.[222]

Lawrence Lessig has argued that the exclusionary rule is now justified as a faithful application of Framing-era principles in light of the inadequacy of contemporary tort remedies.[223] In contrast, Akhil Amar, while recognizing the difficulties with the Framing-era regime and the threat of over-deterrence, nevertheless opposed exclusion because of the lack of any Framing-era precedent for a remedy that protects the guilty, and argued instead for a reformed system of civil liability, including government-entity liability, class actions, punitive damages, and injunctions against police misconduct.[224] There are, however, reasons to be skeptical of the efficacy of these proposals; injunctive decrees enforced by contempt sanctions against individual officials might produce over-deterrence, and government-entity liability might have limited deterrent effects on individual officers and perverse effects on government budgets.[225]

However, one might assess the competing remedial regimes advanced by Professors Lessig and Amar, the key point for present purposes is that this debate cannot be resolved by reference to the original meaning of the Fourth Amendment. After all, the Framing-era regime of robust personal tort liability was utilized when there was no fair equivalent to modern police forces expected to take proactive measures to keep the peace and investigate crime. There is no obvious way to analogize or adapt this Framing-era regime to the present, when many will regard it as critical that the threat of damages liability or other sanctions does not unduly deter officers. The question whether exclusion has become justifiable, despite the benefits it confers on the guilty, in light of the

221. *See supra* Subpart III.A.3.
222. Mapp v. Ohio, 367 U.S. 643, 650–57 (1961).
223. Lessig, *supra* note 82, at 1228–33.
224. AMAR, *supra* note 127, at 29–31, 40–43.
225. For a more elaborate discussion of these issues, see Rosenthal, *supra* note 148, at 558–60, 565–68.

contemporary defects of the Framing-era regime personal tort liability and the difficulties that inhere in alternative regimes of civil remedies cannot be answered by mere reference to the original meaning of the Fourth Amendment.[226]

3. School and Other Special-Needs Searches

Similarly, consider again searches of public school students and other cases involving special-needs searches. This is another Fourth Amendment problem that does not readily yield to analogy or adaptation.

As we have seen, Justice Thomas once suggested an originalist approach to school searches through the use of analogy, arguing that the Framing-era rule of *in loco parentis* should be incorporated in the Fourth Amendment's conception of reasonableness, while Justice Scalia resisted this approach, noting the advent of contemporary compulsory school attendance laws.[227] There are indeed formidable difficulties in analogizing between the Framing-era authority of schools and contemporary public education.

When the relationship between parents and schools was entirely contractual, a delegation of parental authority to school officials had substance, and the exercise of that delegated authority by school officials to search students in their care could plausibly be regarded as reasonable within the meaning of the Fourth Amendment. When the relationship between parents and public schools becomes largely a creature of statute, however, the fairness of any comparison between an actual Framing-era contractual delegation of parental authority and a contemporary implied-in-law statutory delegation, regardless of the parent's individual wishes—or her ability to finance an alternative education at a private school—is doubtful. But, if one is persuaded that any effort to analogize to or adapt the Framing-era concept of *in loco parentis* to contemporary school searches is misguided, there does not seem to be any other Framing-era conception that offers a better candidate for analogy or adaptation when it comes to school searches. Nonoriginalism seems inevitable.

Other special-needs cases in this study also involve issues with no obvious Framing-era antecedent, as we have seen.[228] In these cases as well, no obvious method analogy or adaptation present themselves.

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226. *Cf.* Louis Michael Seidman, *Akhil Amar and the (Premature?) Demise of Criminal Procedure Liberalism*, 107 YALE L.J. 2281, 2299 (1998) (reviewing AMAR, *supra* note 127) ("[T]he argument about the relative merits of the exclusionary rule and civil damages, like the argument about the warrant requirement, must rest on judgments about systemic deterrence. What method of enforcement is most likely to make the 'people . . . secure' from the threat of unreasonable searches and seizures at the least cost? Viewed in this way, the exclusionary rule doubtless has problems, but there is once again more to say in its favor than Amar supposes.").

227. *See supra* text accompanying notes 155–159.

228. *See supra* Subpart III.B.2.

4. Cellphone Searches

Consider as well the question whether the digital contents of a modern cellphone can be inspected as part of a search incident to an arrest. As we have seen, although *Riley* discussed the historical basis for the search-incident-to-arrest doctrine, its holding was grounded in a nonoriginalist balancing test.[229] One might argue, however, that rummaging through the digital contents of a cellphone is the modern equivalent of a general search condemned under the original meaning of the Fourth Amendment. This comparison, however, is dubious. As Justice Scalia once noted, a search incident to a lawful arrest importantly differs from a general search: "The fact of prior lawful arrest distinguishes the arrestee from society at large, and distinguishes a search for evidence of *his* crime from general rummaging."[230] Perhaps an arrest should not be a sufficient basis for searching the contents of the arrestee's cellphone, but surely not because such a search is equivalent to the issuance of a general warrant, unsupported by any particularized showing of wrongdoing.

One might also try to compare the search of a cellphone's contents to a search and seizure of "private papers," which was condemned under the Framing-era view that such searches infringed property rights.[231] It is, however, unclear that what came to be known as the "mere evidence" rule,[232] is properly assimilated within the original meaning of the Fourth Amendment; the Amendment's text contains no absolute prohibition on the search or seizure of persons, houses, papers or effects, but only a rule against their "unreasonable" search and seizure.[233] In any event, the mere evidence rule seems not to have limited searches incident to a valid arrest in the Framing era. Under Framing-era law, items in the possession of an arrestee were subject to search,[234] and there is no indication that this rule did not reach papers in an arrestee's possession.[235] Thus, although there may be good reason to condemn warrantless inspection of the digital contents of a cellphone incident to arrest, a plausible rationale for that conclusion is not found by simple analogy to or adaptation of the Framing-era

229. *See supra* text accompanying notes 162–165.

230. Thornton v. United States, 541 U.S. 615, 630 (2004) (Scalia, J., concurring in the judgment).

231. *See, e.g.*, Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy or Security?*, 33 WAKE FOREST L. REV. 307, 309–16 (1998); Donohue, *supra* note 79, at 1308–13; Dripps, *supra* note 119, at 1108–13; Thomas, *supra* note 131, at 221–23.

232. *See* Warden v. Hayden, 387 U.S. 294, 300–10 (1967) (describing and ultimately repudiating the rule).

233. *See, e.g.*, Thomas, *supra* note 131, at 223 (observing that the mere evidence doctrine is "an odd interpretation of the Fourth Amendment, which specifically mentions 'papers' as one of the items that, presumably, could be described in a search warrant").

234. *See, e.g.*, CUDDIHY, *supra* note 71, at 751–53; TAYLOR, *supra* note 126, at 27–29, 39–46; Thomas, *supra* note 166, at 1474–75.

235. *See, e.g.*, Dripps, *supra* note 206, at 108 ("There is, moreover, a powerful argument that the original understanding did permit narrow, brief, and regulated seizures of papers. Search upon arrest was a familiar feature of Founding-era practice, and was not challenged on Fourth Amendment grounds until after *Boyd*. I have no specific instance of Founding-era seizures of papers incident to arrest, but likewise there is no known instance of a court holding the seizure of papers from an arrested person to be unconstitutional.").

conception of unreasonable search and seizure.[236]

5. Stop and Frisk

Or, consider *Terry*. As we have seen, Framing-era law did not recognize authority to stop and frisk a suspect on suspicion, but often permitted a full custodial arrest on suspicion under the night-walker statutes and their like.[237] Today, reliance on Framing-era arrest authority is perilous. As we have seen, the standard of probable cause has evolved in a way that more clearly distinguishes it from suspicion,[238] officers face a greatly reduced risk of personal liability in tort,[239] and statutes authorizing arrest on suspicion are now considered impermissibly vague, in violation of the Fourteenth Amendment.[240] How to properly analogize or adapt the Framing-era conception of authority to detain suspicious persons to contemporary search and seizure is far from clear.[241]

6. Jones

As the preceding examples illustrate, the basic problem with an effort to apply Framing-era understandings to far different contemporary search and seizure controversies is the dubious nature of the entire enterprise. There is great danger, as Stephen Griffin has observed, when "originalism depends on using history without historicism, the use of evidence from the past without paying attention to historical context."[242] When one gives proper attention to context, however, there may be no reliable means for analogizing or adapting Framing-era understandings in a vastly different historical context.[243] The past does not

236. *Cf. id.* at 108–09 (arguing for limitations on searches of digital evidence incident to arrest based on an "anti-rummaging norm" resolving "the tension between Founding-era respect for papers and Founding-era acceptance of search powers implied by lawful arrest"). Similarly, an effort to analogize warrantless inspection of the potentially vast digital contents of a cellphone to a warrantless search of a home incident to an arrest leads nowhere; as we have seen, *Payton* found inconclusive the historical evidence on whether a warrantless entry and search of a home incident to arrest was permitted in the Framing era. *See supra* text accompanying notes 97–99. This uncertainty persisted through the time of the Fourteenth Amendment's ratification. *See*, *e.g.*, 1 BISHOP, *supra* note 154, at §§ 194–99; CLARK, *supra* note 154, at 54. If anything, the weight of the historical evidence suggests that forcible entry without a warrant was permitted to effect an arrest if the officer had adequate cause to suspect that the suspect had committed a felony. *See, e.g.*, Davies, *supra* note 80, at 642–45; Thomas, *supra* note 131, at 231–34.

237. *See supra* Subpart III.B.4.

238. *See supra* Subpart III.A.1.

239. *See supra* text accompanying notes 135–143.

240. *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (night-walking ordinance).

241. For more extensive discussions of the difficulties in adapting the Framing-era conception of arrest on suspicion to contemporary search-and-seizure, see Dripps, *supra* note 119, at 1114–16; and Lawrence Rosenthal, *Pragmatism, Originalism, Race, and the Case Against* Terry v. Ohio, 43 TEX. TECH L. REV. 299, 330–37 (2010).

242. Griffin, *supra* note 82, at 1188.

243. *Cf.* Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 591-92 (2000) ("At best the historical analogy furnishes a lesson that may be applicable to a current problem. In the case of legal precedent, the cookie-cutter method will work sometimes; some cases are undeniably identical in all conceivably relevant respects to previously decided cases.

always contain neat parallels to the present.[244]

Justice Scalia, for one, grasped this point. In *Jones*, in response to Justice Scalia's reasoning that the attachment of a GPS device to a vehicle and its subsequent monitoring was a "search" within the original meaning of the Fourth Amendment because, in the Framing-era, any physical occupation of the property of another was regarded as a trespass,[245] Justice Alito wrote: "[I]t is almost impossible to think of late-18th-century situations that are analogous to what took place in this case," such as when "a constable secreted himself somewhere in a coach and remained there for a period of time in order to monitor the movements of the coach's owner," which "would have required either a gigantic coach, a very tiny constable, or both."[246] It is hard to disagree. Indeed, Justice Scalia responded: "[I]t is quite irrelevant whether there was an 18th-century analog."[247] That conclusion seems inescapable for an originalist, at least absent evidence that some methodology for conducting analogical reasoning or adaptation was somehow baked into the original meaning of the Fourth Amendment.

B. DEFAULT RULES

Given the difficulties of applying Framing-era understandings to contemporary litigation, one might be tempted to embrace a default rule. Some originalist scholars, for example, argue that in light of the importance of representative government to the constitutional structure, challenged legislative or executive action should be presumed constitutional.[248] Others, in contrast, argue that the constitutional scheme's regard for liberty justifies a presumption in its favor and against the government.[249] Since the Constitution contains no text prescribing a rule for its interpretation, however, it is difficult to root any type of default rule in original meaning.[250] It is even more difficult to identify a default rule lurking within the original meaning of the Fourth Amendment.[251]

But when they are merely 'analogous,' there is no metric of similarity that will enable a later case to be decided by reference to a former one, just as there is no metric of similarity that would have enabled Lyndon Johnson to figure out whether abandoning South Vietnam to her fate would have been 'another Munich.'").

244. For a useful discussion of the difficulties in adapting original meaning to changed circumstances, see Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 398–412 (1997).

245. United States v. Jones, 565 U.S. 400, 404–11 (2012).

246. *Id.* at 420 & n.3 (Alito, J., concurring in the judgment).

247. *Id.* at 406 n.3 (majority opinion).

248. *See, e.g.*, Calabresi & Fine, *supra* note 21, at 699; Graglia, *supra* note 8, at 1044; Gary Lawson, *Dead Document Walking*, 92 B.U. L. REV. 1225, 1234–35 (2012); Paulsen, *supra* note 7, at 2057.

249. *See, e.g.*, BARNETT, *supra* note 7, at 255–71; Glenn Harlan Reynolds, *Sex, Lies, and Jurisprudence: Robert Bork,* Griswold *and the Philosophy of Original Understanding*, 24 GA. L. REV. 1045, 1070–76 (1990).

250. To be sure, a default rule might be characterized as originalist if it reflected the original methods used to interpret the Constitution. Indeed, some have defended something like a presumption of constitutionality as reflecting the Framing-era approach to judicial review, although a comprehensive survey of Framing-era jurisprudence casts considerable doubt on this view. *See* William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455, 560–62 (2005).

251. For a more general argument against the originalist credentials of default rules, see Solum, *supra* note 14, at 511–23.

Because the Fourth Amendment is a limitation on governmental powers, it is hard to characterize it as reflecting some form of default in favor of legislative or executive action.[252] To be sure, the Fourth Amendment only prohibits "unreasonable" search and seizure, but this is no default rule; it is a function of the unadorned text, making no use of historical evidence of original meaning.

One could imagine a default rule limited to a proscription against search and seizures of the type understood to be forbidden in the Framing era. For example, some originalists have argued that because, in the Framing era, concerns about search and seizure were largely confined to searches of residences pursuant to inadequately particularized warrants, a contemporary Fourth Amendment should parallel that concern, without other types of search and seizure left unregulated.[253] In the Framing era, however, officers acting without warrants had much less authority and much greater exposure to tort liability than at present.[254] Thus, it is problematic to limit Fourth Amendment protections to only those practices thought unreasonable in a different historical context.[255]

Confining the Fourth Amendment to a prohibition on general warrants not only produces a prohibition narrower than reflected in the ratified text, but it also neglects the possibility that the Fourth Amendment is not properly read to be inapplicable to regimes of search and seizure that the Framing generation might not have anticipated.[256] Indeed, because constitutional text is generally framed more broadly than its original expected applications, most originalists draw a distinction between the original meaning of constitutional text and its original expected applications, and regard only the former as interpretively binding.[257]

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252. *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.").

253. *See, e.g.*, Gerard V. Bradley, *The Constitutional Theory of the Fourth Amendment*, 38 DEPAUL L. REV. 817, 833–55 (1989) (arguing that the Fourth Amendment is confined to a prohibition on general warrants); David E. Steinberg, *The Original Understanding of Unreasonable Searches and Seizures*, 56 FLA. L. REV. 1051, 1083–95 (2004) (arguing that the Fourth Amendment prevents only entry of houses with a general warrant or no warrant).

254. *See supra* text accompanying notes 122–142.

255. For a more elaborate argument along these lines, see Davies, *supra* note 80, at 740–44.

256. *See, e.g.*, CUDDIHY, *supra* note 71, at 772 ("Having uprooted the paramount cause of the incidents of unreasonable search and seizure with which they were familiar, the generation of the Fourth Amendment had little reason to foresee that devices other than the general warrant would someday imperil the right they sought to protect."); Davies, *supra* note 80, at 552 ("The modern interpretation of 'unreasonable searches and seizures' is the product of *post-framing* developments that the Framers did not anticipate. During the nineteenth century, courts and legislatures responded to heightened concerns about crime and disorder by expanding peace officers' *ex officio* authority to arrest and search. That expansion marginalized warrant authority and thus undercut the premises that had led the Framers to believe that they could control the officer by controlling the warrant.").

257. BALKIN, *supra* note 7, at 6–14; Barnett, *supra* note 21, at 410; Berman, *supra* note 86, at 385–89; Calabresi & Fine, *supra* note 21, at 668–72; Green, *supra* note 86, at 580–82; McConnell, *supra* note 7, at 1284–87; Paulsen, *supra* note 7, at 2059–62; Rotunda, *supra* note 7, at 513–14; Ryan, *supra* note 86, at 1539–46; Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 935 (2009). For examples of Justice Scalia's embrace of this approach, see *supra* text accompanying notes 82–90.

The original expected application of the Fourth Amendment may have been confined to general warrants and their like, but its text is inconsistent with the conclusion that only a general warrant could produce "unreasonable searches and seizures."[258]

Conversely, given that the Fourth Amendment prohibits only "unreasonable" search and seizure, it is equally hard to characterize the Fourth Amendment as reflecting a presumption against the constitutionality of any type of search or seizure not endorsed by Framing-era practice. This view neglects the possibility that new demands on law enforcement might render reasonable methods regarded as unreasonable in the Framing era; for example, as we have seen, the development of efficient firearms might bolster the case for the reasonableness of investigative stop and frisk.[259]

In short, no default rule looks very promising as an originalist approach to the Fourth Amendment.[260]

C. ORIGINAL MEANING AT HIGHER LEVELS OF GENERALITY

Another originalist response to the difficulties of applying historical evidence of original meaning to contemporary issues of search and seizure law is to state original meaning at a sufficiently high level of generality.

Many originalists argue that original meaning should be stated at the level of generality found in the pertinent constitutional text.[261] On this view, in light

258. *Cf.* JED RUBENFELD, REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW 99–124 (2005) (arguing that when a constitutional provision is directed at a paradigmatic evil, it should be understood as a commitment to prohibit the evil that gave it rise, without precluding an interpretation that proscribes additional practices within the ambit of the text).

259. *See supra* text accompanying note 169.

260. A type of originalist default rule is suggested by Michael Mannheimer's view that in light of the character of the antifederalist objections to the original Constitution that produced the Fourth Amendment, it should be understood to require simply that federal officials comply with state law when undertaking search and seizure. Mannheimer, *supra* note 91, at 1263–87. It is unclear, however, whether this rule qualifies as originalist; it hardly seems likely that the Fourth Amendment's original meaning would have required federal officials to obey a state law that prohibited them from undertaking inspections or searches to enforce federal customs or tax laws. Indeed, in an opinion by Justice Scalia, the Supreme Court found the evidence that the Fourth Amendment was understood in the Framing era to require compliance with state law inconclusive. *See* Virginia v. Moore, 553 U.S. 164, 168–71 (2008). Professor Mannheimer acknowledges the indeterminacy of the historical evidence and defends his proposal as an instance where "constitutional interpretation must give way to constitutional construction, 'and the meaning of the text must be *determined* rather than found.'" Mannheimer, *supra* note 91, at 1285 (quoting BARNETT, *supra* note 7, at 120). For that reason, his proposal more likely reflects nonoriginalist construction than fixation and constraint. Moreover, if the Fourth Amendment is deemed applicable to search and seizure by state and local officials by virtue of the Fourteenth Amendment, there is no evidence that the original meaning of the Fourteenth Amendment required only that state or local officials comply with state law, and Professor Mannheimer advances no such argument. *See id.* at 1234 n.6. The historical evidence of the original meaning of the Fourteenth Amendment, as we have seen, offers little support for the view that the Fourteenth Amendment did no more than require that search and seizure be undertaken in compliance with applicable state law. *See supra* note 154.

261. *See, e.g.*, BALKIN, *supra* note 7, at 12–63; BORK, *supra* note 9, at 149; Barnett, *supra* note 41, at 23; McConnell, *supra* note 7, at 1280.

of the level of generality reflected in the prohibition on "unreasonable searches and seizures," the original meaning of the Fourth Amendment could properly be stated at quite a high level of generality.[262] Indeed, some originalists have approached the Fourth Amendment in this way, arguing that its original meaning is properly stated in terms of a concern about excessive discretion exercised by law enforcement officials,[263] unwarranted governmental intrusions,[264] undue threats to individual liberty and privacy,[265] reasonableness,[266] individualized suspicion,[267] or as one scholar put it, combining related themes, "preserving judicial oversight, constraining discretion, and sacrificing individual privacy only to the extent necessary."[268]

Stating original meaning at such a high level of generality, however, is inevitably reductive; one cannot generalize about original meaning without losing important qualifications reflected in the historical evidence.[269] For example, characterizing the original meaning of the Fourth Amendment in terms of excessive discretion overlooks the fact that both the night-walker laws and warrantless inspections of ships and commercial premises involved a good deal of enforcement discretion, and seem to have been regarded as within the original ambit of lawful search-and-seizure authority.[270] Stating original meaning in terms of "reasonableness" overlooks the fact that Framing-era law never employed a test for search and seizure framed in those terms, but instead asked whether an official sued in tort had acted within the scope of his lawful duties.[271]

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262. For a general discussion of the difficulties originalists face when endeavoring to select the appropriate level of generality at which to state the original meaning of constitutional text, see Peter J. Smith, *Originalism and Level of Generality*, 51 GA. L. REV. 485, 532–49 (2017).

263. *See, e.g.*, United States v. Rabinowitz, 339 U.S. 56, 69–73 (1950) (Frankfurter, J., dissenting); Michael, *supra* note 91, at 919–22.

264. *See, e.g.*, Clancy, *supra* note 231, at 350–66; Donohue, *supra* note 79, at 1314–28.

265. *See, e.g.*, Dripps, *supra* note 119, at 1128–30; Thomas, *supra* note 166, at 1463–78.

266. *See, e.g.*, AMAR, *supra* note 127, at 10–20.

267. *See, e.g.*, TASLITZ, *supra* note 128, at 45–54; Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 526–31 (1995).

268. SCHULHOFER, *supra* note 126, at 177. To similar effect, see GRAY, *supra* note 78, at 168 ("Most founding-era readers would have read the reasonableness clause as commanding future governments not to injure or infringe upon the collective right of the people to live free from fear that their living spaces would be explored, their written and printed materials looked through or taken, their personal property examined or taken, and their persons sought, examined, or restrained for no reason, for insufficient reasons, for illegitimate reasons, or based solely on the unfettered discretion of executive agents acting beyond the reach of effective judicial constraint or review.").

269. *Cf.* Davies, *supra* note 80, at 745 ("[E]xtracting any 'principle' from a text that was written within the larger structure of common-law concepts and doctrines is inherently reductionist . . . ."); Graglia, *supra* note 8, at 1044 ("Originalism cannot realistically be said to restrain judges if it requires no more than that they be able to identify a principle or 'value' the ratifiers wanted to protect. Many principles or values are protected by the Constitution, and they necessarily come into conflict. None of them is or can be protected absolutely.").

270. *See supra* text accompanying notes 167–168, 217–220.

271. *See, e.g.*, Arcila, *supra* note 134, at 394–423; Cloud, *supra* note 119, at 1732–43; Davies, *supra* note 80, at 571–90; Donohue, *supra* note 79, at 1185–92; David E. Steinberg, *The Uses and Misuses of Fourth Amendment History*, 10 U. PA. J. CONST. L. 581, 586–94 (2008); Nikolaus Williams, Note, *The Supreme Court's*

A focus on individualized suspicion overlooks the fact that the Framing-era conception permitted suspicionless search and seizure when governmental interests regarded as particularly strong were at stake, as in the case of searches of ships, distilleries, and other commercial premises.[272]

Even more important, when original meaning is stated in terms of relatively general standards, original meaning ceases to do much, if any, analytical work. If original meaning is characterized in terms of excessive discretion, undue intrusion or threat to liberty or privacy, or simply reasonableness, then any distinction between original and contemporary meaning becomes of little significance. Instead, a prudential judgment is required about whether, under contemporary circumstances, there is adequate justification for whatever level of discretion, intrusion, or limitation on liberty or privacy is at stake. When original meaning is stated so capaciously, the distinction between originalism and nonoriginalism becomes vanishingly small. Constitutional adjudication is instead driven by a contemporary assessment of the costs and benefits of search and seizure.[273]

Thus, once one divorces the original meaning of the Fourth Amendment from Framing-era practice, the difference between originalism and nonoriginalism seems to disappear. If one simply defines original meaning as a prohibition on "unreasonable" search and seizure without tying reasonableness to Framing-era practice, one winds up reading the Fourth Amendment in contemporary terms, without need of original meaning. For example, consider again *Wilson*'s originalist justification for a knock-and-announce requirement. If evidence of Framing-era practice is not dispositive, then one wonders what originalism adds to the case for a Fourth Amendment knock-and-announce requirement. One hardly needs historical evidence of original meaning to conclude that an unannounced forcible entry without some rational justification is "unreasonable;" without justification, a forcible entry produces unnecessary property damage and an unwarranted risk of violent confrontation.[274] Thus, stating original meaning at a high level of generality is likely of little aid when addressing disputed questions of Fourth Amendment law. Perhaps the reason that Justice Scalia focused on Framing-era rules was that original meaning,

Ahistorical Reasonableness Approach to the Fourth Amendment, 89 N.Y.U. L. REV. 1522, 1535–54 (2014).

272. *See supra* text accompanying notes 217–220.

273. For helpful, if more general, discussions of the way originalists, by stating original meaning at a high level of generality, collapse the distinction between originalism and nonoriginalism, see Segall, *supra* note 13, at 432–33; and Smith, *supra* note 262, at 549–56.

274. *Cf.* McDonald v. United States, 335 U.S. 451, 460–61 (1948) (Jackson, J., concurring) ("Many home-owners in this crime-beset city doubtless are armed. When a woman sees a strange man, in plain clothes, prying up her bedroom window and climbing in, her natural impulse would be to shoot. A plea of justifiable homicide might result awkwardly for enforcement officers. But an officer seeing a gun being drawn on him might shoot first. Under the circumstances of this case, I should not want the task of convincing a jury that it was not murder. I have no reluctance in condemning as unconstitutional a method of law enforcement so reckless and so fraught with danger and discredit to the law enforcement agencies themselves.").

stated at a high level of generality, offered little help when it came to deciding the cases before him.

CONCLUSION

In his extrajudicial writing, Justice Scalia sometimes advanced what he seemed to regard as the originalist clincher: "The conclusive argument in favor of originalism," he wrote (with a co-author), is that "[i]t is the only objective standard of interpretation even competing for acceptance."[275] Or, as he put it on another occasion: "You can't beat somebody with nobody."[276] In this regard, Justice Scalia might have been a bit uncharitable; scholars have offered a variety of approaches to constitutional adjudication beyond original meaning that offer some hope of objectivity.[277] In any event, this study suggests that nonoriginalism is inescapable; original meaning simply does not provide an answer in most cases before the Supreme Court, at least when it comes to Fourth Amendment jurisprudence. Some alternative to originalism is essential if the Court is to do its work. Originalism likely offers meaningful guidance in only a small fraction of the kind of the cases that reach the Supreme Court.

One might believe, however, that the Fourth Amendment presents unusual difficulties for originalism. Perhaps it is framed at an unusually high level of generality, or the historical evidence of its original meaning is unusually indeterminate, that therefore this study has produced results not generalizable to other areas of constitutional law. There is, however, reason to think that the Fourth Amendment is typical of the kind of constitutional provisions likely to come before the Supreme Court.

Highly determinate text is unlikely to generate litigation; no one needs a court to decide whether a teenager can serve in the House of Representatives.[278] Open-ended constitutional text is more likely to produce litigation, and in this respect, the Fourth Amendment is hardly unique. As Thomas Colby put it: "Our Constitution . . . with its short list of lofty guarantees like 'equal protection of the laws,' 'freedom of speech,' and 'due process of law'—is *objectively* open-ended in many instances."[279] Thus, the Fourth Amendment may be typical of

275. SCALIA & GARNER, *supra* note 25, at 89.

276. Scalia, *supra* note 8, at 855.

277. *See, e.g.*, PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 11–22 (1991) (describing textual, historical, ethical, structural, prudential, and doctrinal arguments); Jack M. Balkin, *Arguing About the Constitution: The Topics in Constitutional Interpretation*, 33 CONST. COMMENT. 145, 182–85 (2018) (describing arguments from text, structure, purposes, consequences, judicial precedent, political convention, customs, natural law or rights, national ethos, political tradition, and honored authority); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1194–209 (1987) (describing arguments from text, the Framers' intent, constitutional theory, precedent, and values or policies).

278. *See* U.S. CONST. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years . . . .").

279. Colby, *supra* note 13, at 725 (footnotes omitted); *accord, e.g.*, Kent Greenawalt, *Philosophy of Language, Linguistics, and Possible Lessons about Originalism*, *in* THE NATURE OF LEGAL INTERPRETATION:

"the majestic generalities of the Bill of Rights."[280] Open-ended text, however, will often lack anything like a crystal-clear original meaning; for example, there is something approaching consensus among legal scholars that the original meaning of the First Amendment's protection for freedom of speech is unclear.[281]

There is also reason to believe that the difficulties in applying historical evidence of the Fourth Amendment's original meaning are typical. As we have seen, the original semantic meaning of the Constitution's text may not often differ from its contemporary meaning; the English language has not changed markedly since the Constitution's framing.[282] Accordingly, as reflected in Justice Scalia's Fourth Amendment originalism, original meaning often must be derived not by recovering archaic definitions of the words in the Constitution, but instead from evidence of the historical context in which the Constitution's text was framed and understood.[283] Yet, as reflected in the difficulties that Justice Scalia's Fourth Amendment originalism encountered, applying contextual evidence of original meaning, divorced from its historical context, presents great difficulties. Original meaning rarely has a neat and tidy application to the issues that arise in contemporary litigation.

Consider what may be the leading instance in which originalists claim that the nonoriginalist jurisprudence has departed from original meaning—the Fourteenth Amendment. Many have argued that the Supreme Court erred by

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WHAT JURISTS CAN LEARN ABOUT LEGAL INTERPRETATION FROM LINGUISTICS AND PHILOSOPHY 46, 63 (Brian G. Slocum ed., 2017) ("Many key constitutional provisions are cast in highly open-ended language; that in itself can greatly influence how far the text will provide answers to specific circumstances."). For an effort by two leading originalist scholars to demonstrate that the Constitution contains many relatively open-ended standards beyond the Fourth Amendment, see Calabresi & Lawson, *supra* note 209, at 496–504.

280. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

281. *See* ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES 16 (1941) ("The framers of the First Amendment make it plain that they regarded freedom of speech as very important . . . . But they say very little about its exact meaning."); LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 281 (1985) ("[W]e do not know what the First Amendment's freedom of speech-and-press clause meant to the men who drafted and ratified it at the time that they did so. Moreover, they [were] themselves at that time sharply divided and possessed no distinct understanding either."); LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA 23 (1991) ("[I]t is simply impossible to turn to discussions by the framers . . . for definitive answers on the scope of freedom of the press."); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 42 (2004) ("[T]he framers of the First Amendment . . . . embraced a broad and largely undefined constitutional principle, not a concrete, well-settled legal doctrine."); STRAUSS, *supra* note 13, at 52 ("[T]he actual views of the drafters and ratifiers of the First Amendment are in many ways unclear."); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 307 (1978) ("History tells us little . . . about the precise meaning contemplated by those who drafted the Bill of Rights."); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 22 (1971) ("The framers seem to have had no coherent theory of free speech . . . ."); Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 307 (2017) ("[I]t remains debatable whether the Speech and Press Clauses directly recognized ordinary natural rights, a set of more determinate legal rights, or both."); Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1, 26 (2011) ("[T]he evidence regarding the original meaning of the Speech and Press Clauses is anything but easy to sort out.").

282. *See supra* text accompanying note 70.

283. *See supra* text accompanying notes 72–77.

incorporating provisions of the Bill of Rights within the Fourteenth Amendment's Due Process Clause,[284] claiming instead that the original meaning of its Privileges or Immunities Clause[285] protected the individual rights enumerated in the Bill of Rights, and perhaps other rights regarded as fundamental, against abridgement by the states.[286] There is also, however, substantial historical evidence that the original understanding of due process included protection for substantive, if unenumerated, rights that were regarded as fundamental.[287] In any event, an originalist approach to the Fourteenth

284. For opinions making the case against due process incorporation, see McDonald v. City of Chicago, 561 U.S. 742, 810–12 (2010) (Thomas, J., concurring in part and concurring in the judgment in part); and Adamson v. California, 332 U.S. 46, 63–66 (1947) (Frankfurter, J., concurring).

285. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

286. *See* AMAR, *supra* note 154, at 163–80 (fundamental rights including the Bill of Rights); CHESTER JAMES ANTIEAU, THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT 56–67, 85–89 (1997) (same); BALKIN, *supra* note 7, at 190–219 (same); BARNETT, *supra* note 7, at 60–68, 326–37 (unjustified infringements on liberty); JAMES E. BOND, NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT 251–63 (1997) (fundamental rights); KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP 277–300 (2014) (enumerated personal constitutional rights); Richard L. Aynes, *Ink Blot or Not: The Meaning of Privileges and/or Immunities*, 11 U. PA. J. CONST. L. 1295, 1309–24 (2009) (fundamental rights including the Bill of Rights); Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071, 1145–51 (2000) (same); Douglas G. Smith, *Natural Law, Article IV, and Section One of the Fourteenth Amendment*, 47 AM. U. L. REV. 351, 395–417 (1997) (natural and common-law rights); Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67*, 68 OHIO ST. L.J. 1509, 1583–620 (2007) (protecting at least the Bill of Rights). To be sure, the claim that the Fourteenth Amendment incorporated substantive rights such as the Bill of Rights is not unassailable; the evidence that the Fourteenth Amendment was widely understood in the Framing era to impose the Bill of Rights against the states is thin and its ratification produced no discernable movement toward imposing the Bill of Rights against the States. *See, e.g.*, Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 STAN. L. REV. 5, 68–134 (1949); Lawrence Rosenthal, *The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 361, 385–400 (2009); *see also* Philip Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. 61, 122–34 (2011) (finding the evidence ambiguous).

287. *See, e.g.*, James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 324–38 (1999) (discussing the meaning of due process and explaining why "due process" refers to a "more encompassing protection of personal liberty"); Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 654–63 (2009) (finding historical evidence that supports a broad substantive understanding of the Due Process Clause of the Fifth Amendment); Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 943–63 (1990) (same); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE. L.J. 408, 460–90 (2010) ("Modern scholars who have surveyed the pre-Civil War case law for themselves have almost uniformly concluded that support for substantive due process in the antebellum era was far stronger than . . . critics of the doctrine had acknowledged."). *But cf.* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672 (2012) (arguing that due process prevented the legislature from exercising judicial powers or abrogating common-law procedural protections).

Amendment might protect only the specific "due process" rights or "privileges or immunities of citizens of the United States" recognized as fundamental at the time of framing and ratification.[288] The Fourteenth Amendment's text, however, is written at a higher level of generality; freezing "due process" and "privileges or immunities" as of 1868 may well amount to no more than preserving the original expected applications of the Fourteenth Amendment, rather than the original meaning of its open-ended text. Once original expected applications are rejected as the basis for constitutional adjudication, however, all the disagreements about identifying and protecting fundamental rights in a contemporary context—such as those confronted by the Court in *Obergefell*[289]—reemerge in originalist garb, even if Fourteenth Amendment jurisprudence were reformed along originalist lines.[290] Originalism, in short, may be no more determinate for the Fourteenth Amendment than the Fourth.

Of course, despite the foregoing, it is possible that some version of Fourth Amendment originalism might be devised that offers greater determinacy than the approaches considered above, or that the Fourth Amendment is atypical, and that original meaning could prove more useful in addressing the kind of cases that reach the Supreme Court under other constitutional provisions. This, however, is ultimately an empirical question. If originalists are serious about the theorized virtues of their preferred adjudicative methodology, it is time they undertook the empirical work necessary to prove themselves right, not by discussing their favorite, cherry-picked cases, but by demonstrating that originalism is a practicable method of constitutional adjudication in the broad range of cases.

In a published tribute to the jurist he later replaced, Justice Scalia's successor endorsed originalism, writing that judges should "strive (if humanly and so imperfectly) to apply the law as it is, focusing backward, not forward."[291] This study suggests that if judges only look backward, searching for original meaning, they may not be able to do their jobs.

288. For an example of this approach, see generally RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (2d ed. 1997).

289. *See supra* text accompanying notes 1–3.

290. *See, e.g.*, Jeffrey D. Jackson, *Be Careful What You Wish For: Why* McDonald v. City of Chicago*'s Rejection of the Privileges or Immunities Clause May Not Be Such a Bad Thing for Rights*, 115 PENN ST. L. REV. 561, 591 (2011) ("[T]he Privileges or Immunities Clause provides no more real guidance to its use than . . . the Due Process Clause. In fact, if the best that can be said of the Privileges or Immunities Clause is that its protection is limited to 'fundamental rights,' then it sounds suspiciously like the Court's interpretation of the Due Process Clause."); *cf.* Steven G. Calabresi & Hannah M. Bagley, *Originalism and Same-Sex Marriage*, 70 U. MIAMI L. REV. 648 (2016) (advancing an originalist argument against the constitutionality of bans on same-sex marriage).

291. Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905, 906 (2016).

APPENDIX

Case	**Code**	**Comments**
Colorado v. Bertine (1987) 479 U.S. 367		
Majority: (**Rehnquist,** White, Blackmun, Powell, Stevens, O'Connor, Scalia)	NO	
Concurrence: (**Blackmun,** Powell, O'Connor)	NO	
Dissent: (**Marshall**, Brennan)	NO	
Maryland v. Garrison (1987) 480 U.S. 79		
Majority: (**Stevens**, Rehnquist, White, Powell, O'Connor, Scalia)	NOBOMC	Coded primary issue: whether the execution of the warrant violated respondent's constitutional right to be secure in his home.
Dissent: (**Blackmun,** Brennan, Marshall)	NOBOMC	Coded primary issue: whether the execution of the warrant violated respondent's constitutional right to be secure in his home.
United States v. Dunn (1987) 480 U.S. 294		
Majority: (**White,** Rehnquist, Blackmun, Powell, Stevens, O'Connor, Scalia [all but paragraph 3 of part II].)	O	Makes reference to the common law concept of curtilage.
Concurrence: (**Scalia**)	O	Scalia coded as joining the majority.
Dissent: (**Brennan**, Marshall)	NO	

Arizona v. Hicks (1987) 480 U.S. 321		
Majority: (**Scalia,** Brennan, White, Marshall, Blackmun, Stevens)	NO	
Concurrence: (**White**)	NO	
Dissent: (**Powell**, Rehnquist, O'Connor)	NO	
Dissent: (**O'Connor**, Rehnquist, Powell)	NO	
Illinois v. Krull, (1987) 480 U.S. 340		
Majority: (**Blackmun,** Rehnquist, White, Powell, Scalia)	NO	
Dissent: (**Marshall**)	NOBOMC	Marshall coded as joining J. O'Connor's dissent.
Dissent: (**O'Connor**, Brennan, Marshall, Stevens)	NOBOMC	Mentioned that the original meaning of the Fourth Amendment included a prohibition on statutes that authorized unreasonable search and seizure, but the actual issue in the case was whether the exclusionary rule should be used as a remedy in such case.

O'Connor v. Ortega (1987) 480 U.S. 709		
Plurality: (**O'Connor**, Rehnquist, White, Powell)	NOBOMC	Coded primary issue: whether the search of an employee's office was reasonable under the Fourth Amendment. There is discussion of the Framing-era concern for places of work, however, the plurality employs a nonoriginalist balancing test to decide the case.
Concurrence: (**Scalia**)	NO	
Dissent: (**Blackmun**, Brennan. Marshall, Stevens)	NOBOMC	Coded primary issue: whether the search of an employee's office was reasonable under the Fourth Amendment. There is discussion of the Framing-era concern for places of work, however, the dissent employs a nonoriginalist balancing test.
New York v. Burger (1987) 482 U.S. 691		
Majority: (**Blackmun,** Rehnquist, White, Powell, Stevens, Scalia)	NO	
Dissent: (**Brennan**, Marshall, O'Connor)	NO	

Griffin v. Wisconsin (1987) 483 U.S. 868		
Majority: (**Scalia**, Rehnquist, White, Powell, O'Connor)	NO	
Dissent: (**Blackmun**, Marshall, Brennan [1-B, 1-C], Stevens [I-C])	NO	
Dissent: (**Stevens**, Marshall)	NO	
California v. Greenwood (1988) 486 U.S. 35 (Sans Kennedy)		
Majority: (**White**, Rehnquist, Blackmun, Stevens, O'Connor, Scalia)	NO	Kennedy took no part in this opinion.
Dissent: (**Brennan,** Marshall)	O	Dissent relies on *Oliver v. U.S.* and *Boyd v. U.S.*, stating that "at common law, the curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'"
Michigan v. Chesternut (1988) 486 U.S. 567		
Majority: (**Blackmun,** Unanimous)	NO	
Concurrence: (**Kennedy,** Scalia)	NO	

Murray v. United States (1988) 487 U.S. 533 (Sans Brennan and Kennedy)		
Majority: (**Scalia**, Rehnquist, White, Blackmun)	NO	Coded as majority; Brennan and Kennedy took no part in this opinion.
Dissent: (**Marshall**, Stevens, O'Connor)	NO	
Dissent: (**Stevens**)	NO	
Florida v. Riley (1989) 488 U.S. 445		
Plurality: (**White**, Rehnquist, Scalia, Kennedy)	O	References the common-law concept of curtilage in *California v. Ciraolo*, 476 U.S. 207 (1986).
Concurrence: (O'Connor)	O	References the common-law concept of curtilage in *California v. Ciraolo*, 476 U.S. 207 (1986).
Dissent: (**Brennan**, Marshal, Stevens)	NO	
Dissent: (**Blackmun**)	NO	
Brower v. County of Inyo (1989) 489 U.S. 593		
Majority: (**Scalia**, Rehnquist, White, O'Connor, Kennedy	O	References the general warrants issued by Lord Halifax in the 1760's and writs of assistance.
Concurrence: (**Stevens**, Brennan, Marshall, Blackmun)	NO	

Skinner v. Railway Labor Executives' Association (1989) 489 U.S. 602		
Majority: (**Kennedy**, Rehnquist, White, Blackmun, O'Connor, Scalia, Stevens [All but Part III])	NO	
Concurrence: (**Stevens**)	NO	
Dissent: (**Marshall**, Brennan)	NO	
National Treasury Employees Union v. Von Raab (1989) 489 U.S. 656		
Majority: (**Kennedy,** Rehnquist, White, Blackmun, O'Connor)	NO	
Dissent: (**Marshall,** Brennan)	NO	
Dissent: (**Scalia**, Stevens)	NO	
United States v. Sokolow (1989) 490 U.S. 1		
Majority: (**Rehnquist**, White, Blackmun, Stevens, O'Connor, Scalia, Kennedy)	NO	
Dissent: (**Marshall**, Brennan)	NO	

Graham v. Connor (1989) 490 U.S. 386		
Majority: (**Rehnquist**, White, Stevens, O'Connor, Scalia, Kennedy)	NO	
Concurrence: (**Blackmun**, Brennan, Marshall)	NO	
James v. Illinois (1990) 493 U.S. 307		
Majority: (**Brennan**, White, Marshall, Blackmun, Stevens)	NO	
Concurrence: (**Stevens**)	NO	
Dissent: (**Kennedy**, Rehnquist, O'Connor, Scalia)	NO	
United States v. Verdugo-Urquidez (1990) 494 U.S. 259		
Majority: (**Rehnquist**, White, O'Connor, Scalia, Kennedy)	O	References the drafting history of the Fourth Amendment, along with the *Federalist Papers*.
Concurrence: (Kennedy)	O	Kennedy coded as joining the majority.
Concurring in the judgment: (**Stevens**)	NO	
Dissent: (**Brennan**, Marshall)	O	References the drafting history of the Fourth Amendment.
Dissent: (**Blackmun**)	NO	

Maryland v. Buie (1990) 494 U.S. 325		
Majority: (**White**. Rehnquist, Blackmun, Stevens, O'Connor, Scalia, Kennedy)	NO	
Concurrence: (**Stevens**)	NO	
Concurrence: (**Kennedy**)	NO	
Dissent: (**Brennan**, Marshall)	NO	
Florida v. Wells (1990) 495 U.S. 1		
Majority: (**Rehnquist**, White, O'Connor, Scalia, Kennedy)	NO	
Concurrence: (**Brennan**, Marshall)	NO	
Concurrence: (**Blackmun**)	NO	
Concurrence: (**Stevens**)	NO	
New York v. Harris (1990) 495 U.S. 14		
Majority: (**White**, Rehnquist, O'Connor, Scalia, Kennedy)	NOBOMC	References the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic cited in *Payton v. New York*, 445 U.S. 573 (1980), but the actual issue in the case was whether the exclusionary rule should be used as a remedy in such case.
Dissent: (**Marshall**, Brennan, Blackmun, Stevens)	O	Bases the dissent on the history of privacy and sanctity in one's home, citing *Payton v. New York*, 445 U.S. 573 (1980) and *California v. Ciraolo*, 476 U.S. 207 (1986).

Minnesota v. Olson (1990) 495 U.S. 91		
Majority: (**White**, Brennan, Marshall, Stevens, O'Connor, Scalia, Kennedy)	NO	
Concurrence: (**Stevens**)	NO	
Concurrence: (**Kennedy**)	NO	
Dissent: (**Rehnquist**)		Vote not coded; dissented without opinion.
Dissent: (**Blackmun**)		Vote not coded; dissented without opinion.
Horton v. California (1990) 496 U.S. 128		
Majority: (**Stevens**, Rehnquist, White, Blackmun, O'Connor, Scalia, Kennedy)	NO	
Dissent: (**Brennan**, Marshall)	NO	
Alabama v. White (1990) 496 U.S. 325		
Majority: (**White**, Rehnquist, Blackmun, O'Connor, Scalia, Kennedy)	NO	
Dissent: (**Stevens**, Brennan, Marshall)	NO	

Michigan Department of State Police v. Sitz (1990) 496 U.S. 444		
Majority: (**Rehnquist**, White, Connor, Scalia, Kennedy)	NO	
Concurrence: (**Blackmun**)	NO	
Dissent: (**Brennan**, Marshall)	NO	
Dissent: (**Stevens**, Brennan [Parts I & II], Marshall [Parts I & II])	NO	
Illinois v. Rodriguez (1990) 497 U.S. 177		
Majority: (**Scalia**, Rehnquist, White, Blackmun, O'Connor, Kennedy)	NO	
Dissent: (**Marshall**, Brennan, Stevens)	NO	

California v. Hodari D. (1991) 499 U.S. 621		
Majority: (**Scalia**, Rehnquist, White, Blackmun, O'Connor, Kennedy, Souter)	O	References the common-law understanding of the word "seizure."
Dissent: (**Stevens**, Marshall)	NOBOMC	Acknowledges the common-law understanding of "seizure," but believes the Fourth Amendment is not rigidly confined by ancient common-law precept.
City of Riverside v. McLaughlin (1991) 500 U.S. 44		
Majority: (**O'Connor**, Rehnquist, White, Kennedy, Souter)	NO	Coded primary issue: whether the county's policy for providing post-arrest judicial determinations of probable cause complied with the Fourth Amendment.
Dissent: (**Marshall**, Blackmun, Stevens)	O	Agreeing with Scalia dissent.
Dissent: (**Scalia**)	O	Refers to the common-law traditions of arrest and prompt hearings. Endorsed a twenty-four-hour presumptive hearing requirement not based on original meaning.
Florida v. Jimeno (1991) 500 U.S. 248		
Majority: (**Rehnquist**, White, Blackmun, O'Connor, Scalia, Kennedy, Souter)	NO	
Dissent: (**Marshall,** Stevens)	NO	

California v. Acevedo (1991) 500 U.S. 565		
Majority: (**Blackmun**, Rehnquist, O'Connor, Kennedy, Souter)	NOBOMC	References *Carroll*'s discussion of Framing-era law
Concurrence: (**Scalia**)	O	Bases decision on the traditional common-law warrant requirement.
Dissent: (**White**)	NOBOMC	Agreeing with most of Stevens's dissent.
Dissent: (**Stevens**, Marshall)	NOBOMC	Provides background on the Fourth Amendment explaining the Framers' direct constitutional response to the unreasonable law enforcement practices.
Florida v. Bostick (1991) 501 U.S. 429		
Majority: (**O'Connor**, Rehnquist, White, Scalia, Kennedy, Souter)	NO	
Dissent: (**Marshall**, Blackmun, Stevens)	NO	
Soldal v. Cook County, Illinois (1992) 506 U.S. 56		
Majority: (unanimous, **White**)	NOBOMC	References the history of sanctity in one's home, citing *Payton v. New York*, 445 U.S. 573 (1980).

Minnesota v. Dickerson (1993) 508 U.S. 366		
Majority: (unanimous, **White** [Parts I and II])	NO	
Majority: **White** [Parts III and IV], Stevens, O'Connor, Scalia, Kennedy, Souter)	NO	
Concurrence: (**Scalia**)	NOBOMC	References the common-law view of stop and frisk to determine constitutionality of the frisk, but acknowledges that constitutionality of the "frisk" in the present case was neither challenged nor argued.
Concurring in Part/Dissenting in Part: (**Rehnquist**, Blackmun, Thomas)	NO	
Powell v. Nevada (1994) 511 U.S. 79		
Majority: (**Ginsburg**, Blackmun, Stevens, O'Connor, Scalia, Kennedy, Souter)	NO	
Dissent: (**Thomas**, Rehnquist)	NO	

Arizona v. Evans (1995) 514 U.S. 1		
Majority: (**Rehnquist**, O'Connor, Scalia, Kennedy, Souter, Thomas, Breyer)	NO	
Concurrence: (**O'Connor**, Souter, Breyer)	NO	
Concurrence: (**Souter**, Breyer)	NO	
Dissent: (**Stevens**)	NOBOMC	References the use of general warrants to search for evidence of violations of the Crown's revenue laws and how outraged the authors of the Bill of Rights were, but ultimately employs a cost-benefit analysis.
Dissent: (**Ginsburg**, Stevens)		Not coded because it did not discuss the Fourth Amendment.
Wilson v. Arkansas (1995) 514 U.S. 927		
Majority: (unanimous, **Thomas**)	O	Bases decision on the common law knock-and-announce principle.
Vernonia School District 47J v. Acton (1995) 515 U.S. 646		
Majority: (**Scalia**, Rehnquist, Kennedy, Thomas, Ginsburg, Breyer)	NOBOMC	References the Framing-era rule that schools could exercise parental rights, but adds that because we now have compulsory attendance laws, that approach should not be used, and instead applies a nonoriginalist balancing test.
Concurrence: (**Ginsburg**)	NOBOMC	Ginsburg coded as joining the majority opinion.
Dissent: (**O'Connor**, Stevens, Souter)	O	Bases decision on historical evidence explaining why the Framers believed general warrants were "intolerable and unreasonable".
Whren v. United States (1996) 517 U.S. 806		
Majority: (unanimous, **Scalia**)	NO	

Ohio v. Robinette (1996) 519 U.S. 33		
Majority: (**Rehnquist**, O'Connor, Scalia, Kennedy, Souter, Thomas, Breyer)	NO	Coded primary issue: whether the Fourth Amendment requires that a lawfully seized defendant must be advised that he is "free to go" before his consent to search will be recognized as voluntary.
Concurrence: (**Ginsburg**)	NO	
Dissent: (**Stevens**)	NO	Coded primary issue: whether the Fourth Amendment requires that a lawfully seized defendant must be advised that he is "free to go" before his consent to search will be recognized as voluntary.
Maryland v. Wilson (1997) 519 U.S. 408		
Majority: (**Rehnquist**, O'Connor, Scalia, Souter, Thomas, Ginsburg, Breyer)	NO	
Dissent: (**Stevens**, Kennedy)	NO	
Dissent: (**Kennedy**)	NO	
Chandler v. Miller (1997) 520 U.S. 305		
Majority: (**Ginsburg**, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Breyer)	NO	
Dissent: (**Rehnquist**)	NO	
Richards v. Wisconsin (1997) 520 U.S. 385		
Majority: (unanimous, **Stevens**)	NOBOMC	References the common-law knock-and-announce principle and acknowledges that the common law believed individuals should be provided the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry, but dispenses with the requirement given the circumstances.

United States v. Ramirez (1998) 523 U.S. 65		
Majority: (unanimous, **Rehnquist**)	NOBOMC	Coded primary issue: whether the Fourth Amendment holds officers to a higher standard than reasonable suspicion when a "no-knock" entry results in the destruction of property. References the common law knock and announce principle, but bases its decision on the reasonableness of the officers' actions.
Pennsylvania Bd. of Probation & Parole v. Scott (1998) 524 U.S. 357		
Majority: (**Thomas**, Rehnquist, O'Connor, Scalia, Kennedy)	NO	
Dissent: (**Stevens**)	NO	
Dissent: (**Souter**, Ginsburg, Breyer)	NO	
Minnesota v. Carter (1998) 525 U.S. 83		
Majority: (**Rehnquist**, O'Connor, Scalia, Kennedy, Thomas)	NO	
Concurrence: (**Scalia**, Thomas)	O	Examines and bases decision on Founding-era materials for the understood meaning of "their …houses."
Concurrence: (**Kennedy**)	NOBOMC	References historical evidence and makes note that the interpretation of the English authorities that were the historical basis for the Fourth Amendment are disputed.
Concurrence: (**Breyer**)	NO	
Dissent: (**Ginsburg**, Stevens, Souter)	NO	

Knowles v. Iowa (1998) 525 U.S. 113		
Majority: (unanimous, **Rehnquist**)	NO	
Wyoming v. Houghton (1999) 526 U.S. 295		
Majority: (**Scalia**, Rehnquist, O'Connor, Kennedy, Thomas, Breyer)	O	Cites to *Carroll v. United States,* 267 U.S. 132 (1925) to show that, historically, warrantless searches of containers, within an automobile, are reasonable.
Concurrence: (**Breyer**)	O	Breyer coded as joining the majority opinion.
Dissent: (**Stevens**, Souter, Ginsburg)	NO	
Florida v. White (1999) 526 U.S. 559		
Majority: (**Thomas**, Rehnquist, O'Connor, Scalia, Kennedy, Souter, Breyer)	O	Relies on the holding in *Carroll v. United States*, 267 U.S. 132 (1925), which mentions that warrantless searches of vessels, wagons, and carriages were historically viewed as reasonable.
Concurrence: (**Souter**, Breyer)	O	Breyer and Souter coded as joining the majority opinion.
Dissent: (**Stevens**, Ginsburg)	NOBOMC	
Wilson v. Layne (1999) 526 U.S. 603		
Majority: (unanimous, **Rehnquist** [Parts I and II])	O	Bases decision on the centuries-old principle of respect for the privacy of the home and the common-law tradition of parties directly aiding in the execution of the warrant.
Majority: (**Rehnquist** [Part III], O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer)	O	Coded as agreeing with the majority on the Fourth Amendment issue.
Concurring in Part, Dissenting in Part (**Stevens**)	O	Coded as agreeing with the majority on the Fourth Amendment issue.

Illinois v. Wardlow (2000) 528 U.S. 119		
Majority: (**Rehnquist**, O'Connor, Scalia, Kennedy, Thomas)	NO	
Concurring in Part, Dissenting in Part: (**Stevens**, Souter, Ginsburg, Breyer)	NOBOMC	Rejects Illinois's reliance on the common-law view that flight from an offense carries with it a strong presumption of guilt.
Florida v. J.L. (2000) 529 U.S. 266		
Majority: (unanimous, **Ginsburg**)	NO	
Concurrence: (**Kennedy**, Rehnquist)	NO	
Bond v. United States (2000) 529 U.S. 334		
Majority: (**Rehnquist**, Stevens, O'Connor, Kennedy, Souter, Thomas, Ginsburg)	NO	
Dissent: (**Breyer**, Scalia)	NO	
City of Indianapolis v. Edmond (2000) 531 U.S. 32		
Majority: (**O'Connor**, Stevens, Kennedy, Souter, Ginsburg, Breyer)	NO	
Dissent: (**Rehnquist**, Thomas, Scalia [Part I])	NO	
Dissent: (**Thomas**)	NOBOMC	Makes mention that the Framers might not have approved of the roadblock.

Illinois v. McArthur (2001) 531 U.S. 326		
Majority: (**Breyer,** Rehnquist, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg)	NO	
Concurrence: (**Souter**)	NO	
Dissent: (**Stevens**)	NOBOMC	References the centuries-old principle of respect for the privacy of the home, but actually applies the same nonoriginalist balancing test embraced by the Court.
Ferguson v. City of Charleston (2001) 532 U.S. 67		
Majority: (**Stevens**, O'Connor, Souter, Ginsburg, Breyer)	NO	
Concurrence: (**Kennedy**)	NO	
Dissent: (**Scalia**, Rehnquist [Part II], Thomas [Part II])	NO	
Atwater v. City of Lago Vista (2001) 532 U.S. 318		
Majority: (**Souter**, Rehnquist, Scalia, Kennedy, Thomas)	O	Coded primary issue: whether there is a breach of the peace requirement for warrantless misdemeanor arrests.
Dissent: (**O'Connor**, Stevens, Ginsburg, Breyer)	NOBOMC	Notes that misdemeanor arrests were not the subject of a clear and consistently applied rule at common law. The dissent then employs a nonoriginalist balancing test.
Kyllo v. United States (2001) 533 U.S. 27		
Majority: (**Scalia**, Souter, Thomas, Ginsburg, Breyer)	O	Believes the Fourth Amendment should preserve the privacy of the home recognized in the Framing-era.
Dissent: (**Stevens**, Rehnquist, O'Connor, Kennedy)	NO	

United States v. Knights (2001) 534 U.S. 112		
Majority: (unanimous, **Rehnquist**)	NO	
Concurrence: (**Souter**)	NO	
United States v. Arvizu (2002) 534 U.S. 266		
Majority: (unanimous, **Rehnquist**)	NO	
Concurrence: (**Scalia**)	NO	
United States v. Drayton (2002) 536 U.S. 194		
Majority: (**Kennedy**, Rehnquist, O'Connor, Scalia, Thomas, Breyer)	NO	
Dissent: (**Souter**, Stevens, Ginsburg)	NO	
Board of Education of Independent School District No. 92 of Pottawatomie County et al v. Earls (2002) 536 U.S. 822		
Majority: (**Thomas**, Rehnquist, Scalia, Kennedy, Breyer)	NO	
Concurrence: (**Breyer**)	NO	Breyer joined the majority and wrote a concurring opinion.
Dissent: (**O'Connor**, Souter)	NO	O'Connor and Souter joined both dissenting opinions.
Dissent: (**Ginsburg**, Stevens, O'Connor, Souter)	NO	
United States v. Banks (2003) 540 U.S. 31		
Majority: (Unanimous, **Scalia**)	NBMOC	Refers to common-law knock-and-announce rule from *Wilson v. Arkansas*.

Maryland v. Pringle (2003) 540 U.S. 366		
Majority: (Unanimous, **Rehnquist**)	NO	
Illinois v. Lidster (2004) 540 U.S. 419		
Majority: (**Breyer**, Rehnquist, O'Connor, Scalia, Kennedy, Thomas) Parts I and II: (Stevens, Souter, Ginsburg)	NO	Stevens, Souter, and Ginsburg joined the majority for Parts I and II, but together shared a partial concurrence/dissent to the judgment.
Partial Concurrence/Dissent: (**Stevens**, Souter, Ginsburg)	NO	
Groh v. Ramirez (2004) 540 U.S. 551		
Majority: (**Stevens**, O'Conner, Souter, Ginsburg, Breyer)	NO	
Dissent: (**Kennedy**, Rehnquist)	NO	
Dissent: (**Thomas**, Scalia) Part III: (Rehnquist)	NOBOMC	Rehnquist joins Thomas dissent in nonoriginalist Part III.
United States v. Flores-Montano (2004) 541 U.S. 149		
Majority: (Unanimous, **Rehnquist**)	O	Unanimous opinion with Breyer concurrence.
Concurrence: (**Breyer**)	O	

Thornton v. United States (2004) 541 U.S. 615		
Majority: (**Rehnquist**, Kennedy, Thomas, Breyer) Sans Footnote 4: (O'Connor)	NO	O'Connor joined the majority for all but footnote 4.
Concurrence: (**O'Connor**)	NO	
Concurrence: (**Scalia**, Ginsburg)	NOBOMC	
Dissent: (**Stevens**, Souter)	NO	
Hiibel v. Sixth Judicial District (2004) 542 U.S. 177		
Majority: (**Kennedy**, Rehnquist, O'Connor, Scalia, Thomas)	NOBOMC	
Dissent: (**Stevens**)	Not coded	Only addresses Fifth Amendment issue.
Dissent: (**Breyer**, Souter, Ginsburg)	NO	
Devenpeck v. Alford (2004) 543 U.S. 146 (Sans Rehnquist)		
Majority: (Unanimous, **Scalia**)	NO	Rehnquist took no part in this opinion.
Illinois v. Caballes (2004) 543 U.S. 405 (Sans Rehnquist)		
Majority: (**Stevens**, O'Connor, Scalia, Kennedy, Thomas, Breyer)	NO	Rehnquist took no part in this opinion.
Dissent: (**Souter**)	NO	
Dissent: (**Ginsburg**, Souter)	NO	

Muehler v. Mena (2005) 544 U.S. 93		
Majority: (**Rehnquist**, O'Connor, Scalia, Kennedy, Thomas)	NO	
Concurrence: (**Kennedy**)	NO	
Concurrence: (**Stevens**, Souter, Ginsburg, Breyer)	NO	
United States v. Grubbs (2006) 547 U.S. 90 (Sans Alito)		
Majority: (**Scalia**, Roberts, Kennedy, Thomas, Breyer, Stevens, Souter, Ginsburg)	NO	Alito took no part in this opinion. Stevens, Ginsburg, and Souter joined as to Parts I and II, but filed a separate concurrence.
Concurrence: (**Souter**, Stevens, Ginsburg)	NOBOMC	Cites to "the objectionable 18th century writs of assistance" (Pp. 100) and equates the "start date" of warrants as an established principle.

Georgia v. Randolph (2006) 547 U.S. 103 (Sans Alito)		
Majority: (**Souter**, Stevens, Kennedy, Ginsburg, Breyer)	NOBOMC	Alito took no part in this opinion. Cites to "ancient adage that a man's house is his castle."
Concurrence: (**Stevens**)	NOBOMC	Begins concurrence with a statement regarding the necessity of considering historical evidence and how it relates to our changing society, but ultimately relies on the changes in society for the reasoning behind the concurrence.
Concurrence: (**Breyer**)	NO	
Dissent: (**Roberts**, Scalia)	NO	
Dissent: (**Scalia**)	O	
Dissent: (**Thomas**)	NO	
Brigham City, Utah v. Stuart (2006) 547 U.S. 398		
Majority: (**Roberts**, Scalia, Kennedy, Souter, Ginsburg, Thomas, Breyer, Alito)	NO	
Concurrence: (**Stevens**)	NO	

Hudson v. Michigan (2006) 547 U.S. 586		
Majority: Parts I-III: (**Scalia**, Roberts, Kennedy, Thomas, Alito) Part IV: (**Scalia**, Roberts, Thomas, Alito)	NOBOMC	Identifies "common law principle" of knock-and-announce as "ancient," tracing its origin to English law.
Concurrence: (**Kennedy**)	NOBOMC	First part of Kennedy's concurrence discusses the privacy protection represented by knock-and-announce as "explained in our decisions and as understood since the beginnings of the Republic." Consistently refers to knock-and-announce as an "ancient" principle.
Dissent: (**Breyer**, Stevens, Souter, Ginsburg)	NOBOMC	Makes reference to "tracing the lineage of the knock-and-announce rule" which dates "back to the 13th century." Dissent further elaborates on the intent of the Framers of the Constitution and the meaning of reasonableness under this standard.
Samson v. California (2006) 547 U.S. 843		
Majority: (**Thomas**, Roberts, Scalia, Kennedy, Ginsburg, Alito)	NO	
Dissent: (**Stevens**, Souter, Breyer)	O	The dissent cites to the "pre-Revolutionary 'writs of innocence'" of arbitrary contraband searches and eventually cites to individualized suspicion as "the shield the Framers selected to guard against the evils of arbitrary action, caprice, and harassment."

Scott v. Harris (2007) 550 U.S. 372		
Majority: (**Scalia**, Roberts, Kennedy, Souter, Thomas, Ginsburg, Breyer, Alito)	NO	
Concurrence: (**Ginsburg**)	NO	
Concurrence: (**Breyer**)	NO	
Dissent: (**Stevens**)	NO	
Brendlin v. California (2007) 551 U.S. 249		
Majority: (**Souter**, Roberts, Kennedy, Ginsburg, Thomas, Breyer, Alito, Scalia, Stevens)	NOBOMC	The Court cites to *Brower v. County of Inyo*, a case coded as originalist, stating that the test for a seizure is found within this case.
Virginia v. Moore (2008) 553 U.S. 164		
Majority: (**Scalia**, Roberts, Stevens, Kennedy, Souter, Thomas, Breyer, Alito)	NOBOMC	The Court "begins with history" in its analysis of whether a search or seizure is unreasonable. "When history has not provided a conclusive answer," the Court states, governmental interests and privacy interests are weighed. *Id.* at 171. This is ultimately the test used by the Court for the facts of the case.
Concurrence: (**Ginsburg**)	NOBOMC	Ginsburg cites to the common law and "historical record" but ultimately rests opinion on belief that the arrest violated Virginia law, but not the Constitution.
Herring v. United States (2009) 555 U.S. 135		
Majority: (**Roberts**, Scalia, Kennedy, Thomas, Alito)	NO	
Dissent: (**Ginsburg**, Stevens, Souter, Breyer)	NOBOMC	Breyer joined opinion pp. 704-710 Equates failure to maintain a database as akin to "the use of general warrants that so outraged the authors of our Bill of Rights." (Pp. 156)
Dissent: (**Breyer**, Souter)	NOBOMC	Souter joined pp. 710-711

Arizona v. Johnson (2009) 555 U.S. 323		
Majority: (**Ginsburg**, Alito, Breyer, Kennedy, Roberts, Scalia, Souter, Stevens, Thomas)	NO	Unanimous Ginsburg opinion.
Arizona v. Gant (2009) 556 U.S. 332		
Majority: (**Stevens**, Scalia, Souter, Thomas, Ginsburg)	NO	Entire case calls into question the rules of *Belton, Thornton,* and *Chimel.*
Concurrence: (**Scalia**)	NOBOMC	Finds historical evidence inconclusive
Dissent: (**Breyer**)	NO	
Dissent: (**Alito**, Roberts, Kennedy, Breyer)	NO	Breyer joined except Part II-E; Alito's dissent makes brief reference to Scalia's concurrence in *Thornton*, which is coded NOBOMC.
Safford Unified School District No. 1 v. Redding (2009) 557 U.S. 364		
Majority: (**Souter**, Roberts, Scalia, Kennedy, Breyer, Alito) Partial (Parts I-III): (Stevens, Ginsburg)	NO	
Partial Concurrence/Dissent: (**Stevens**, Ginsburg)	NO	
Partial Concurrence/Dissent: (**Thomas**)	O	Thomas cites to common law doctrine of *in loco parentis*.
City of Ontario v. Quon (2010) 560 U.S. 746		
Majority: (**Kennedy**, Roberts, Stevens, Thomas, Ginsburg, Breyer, Alito, Sotomayor)	NO	
Concurrence: (**Stevens**)	NO	
Concurrence: (**Scalia**)	NO	

Kentucky v. King (2011) 563 U.S. 452		
Majority: (**Alito**, Roberts, Scalia, Kennedy, Thomas, Breyer, Sotomayor, Kagan)	NO	
Dissent: (**Ginsburg**)	NO	
Ashcroft v. Al-Kidd (2011) 563 U.S. 731		
Majority: (**Scalia**, Roberts, Kennedy, Thomas, Alito)	NOBOMC	Kagan took no part in this opinion. Cites to the "historical assertions" of the Court of Appeals, stating that "[t]he Fourth Amendment was a response to the English Crown's use of general warrants, which often allowed royal officials to search and seize whatever and whomever they pleased while investigating crimes or affronts to the Crown." The Court later states, "The principal evil of the general warrant was addressed by the Fourth Amendment's particularity requirement."
Concurrence: (**Kennedy**, Ginsburg, Breyer, Sotomayor)	NO	
Concurrence: (**Ginsburg**, Breyer, Sotomayor)	NO	
Concurrence: (**Sotomayor**, Ginsburg, Breyer)	NO	
Davis v. United States (2011) 564 U.S. 229		
Majority: (**Alito**, Roberts, Scalia, Kennedy, Thomas, Kagan)	NO	
Concurrence: (**Sotomayor**)	NO	
Dissent: (**Breyer**, Ginsburg)	NO	

United States v. Jones (2012) 565 U.S. 400		
Majority: (**Scalia**, Roberts, Kennedy, Thomas, Sotomayor)	O	The Court concludes its opinion with, "We have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted."
Concurrence: (**Sotomayor**)	O	
Concurrence: (**Alito**, Ginsburg, Breyer, Kagan)	NOBOMC	Alito discusses the Court's use of "18th-century tort law" relating to trespass to chattels and later says that "it is almost impossible to think of late-18th century situations that are analogous to what took place in this case." Alito acknowledges the importance of considering the purpose of the Fourth Amendment at its inception, but does not think it entirely representative of the violation in this case.
Florence v. Board of Chosen Freeholders of County of Burlington (2012) 566 U.S. 318		
Majority: (**Kennedy**, Roberts, Scalia, Alito, Thomas)	NO	Kennedy wrote all but Part IV. Roberts, Scalia, Alito joined in full. Thomas joined all but Part IV.
Concurrence: (**Roberts**)	NO	
Concurrence: (**Alito**)	NO	
Dissent: (**Breyer**, Ginsburg, Sotomayor, Kagan)	NO	

Bailey v. United States (2013) 568 U.S. 186		
Majority: (**Kennedy**, Roberts, Scalia, Ginsburg, Sotomayor, Kagan)	NOBOMC	Court applies the "immediate vicinity" rule of *Michigan v. Summers*, 452 U.S. 692 and determines that it does not apply to the facts of this case. *Michigan v. Summers* is coded NOBOMC.
Concurrence: (**Scalia**, Ginsburg, Kagan)	NOBOMC	P. 1044 quotes *Dunaway v. New York* regarding the concept that the Fourth Amendment "protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different causes."
Dissent: (**Breyer**, Thomas, Alito)	NOBOMC	
Florida v. Harris (2013) 568 U.S. 237		
Majority: (**Kagan**) Unanimous Court	NO	

Florida v. Jardines (2013) 569 U.S. 1		
Majority: (**Scalia**, Thomas, Ginsburg, Sotomayor, Kagan)	O	Section II makes reference to the Amendment's "simple baseline" of protection covering the government's physical intrusion onto private property. Section II-A, states that curtilage (specifically open fields) are excluded from Fourth Amendment protection "because such fields are not enumerated in the Amendment's text." Ultimately, because the government physically entered Jardines' home and the surrounding area, their activity constituted a search.
Concurrence: (**Kagan**, Ginsburg, Sotomayor)	O	
Dissent: (**Alito**, Roberts, Kennedy, Breyer)	NOBOMC	Makes repeated references to domestication of dogs being a centuries-old concept and that the use of dogs for investigative purposes is old enough to have been considered by the Framers, but it was not included.
Missouri v. McNeely (2013) 569 U.S. 141		
Majority: (**Sotomayor**) Parts I, II-A, II-B, and IV: (Scalia, Kennedy, Ginsburg, Kagan) Parts II-C and III: (Scalia, Ginsburg, Kagan)	NO	
Concurrence: (**Kennedy**)	NO	
Concurrence/Dissent: (**Roberts**, Breyer, Alito)	NO	
Dissent: (**Thomas**)	NO	

Maryland v. King (2013) 569 U.S. 435		
Majority: (**Kennedy**, Roberts, Thomas, Breyer, Alito)	NOBOMC	Part IV-A states, "Also uncontested is the 'right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested … 'The validity of the search of a person incident to a lawful arrest has been regarded as settled from the first enunciation, and has remained virtually unchallenged."
Dissent: (**Scalia**, Ginsburg, Sotomayor, Kagan)	NOBOMC	Part I-A states, "At the time of the Founding, Americans despised the British use of so-called 'general warrants'—warrants not grounded upon a sworn oath of a specific infraction by a particular individual, and thus not limited in scope and application." Paragraph continues to cite other evidence relating to the concept of general warrants. Ultimately, the intrusion on the person as an explicit violation of the Fourth Amendment is the reasoning behind this opinion.
Fernandez v. California (2014) 571 U.S. 292		
Majority: (**Alito**, Roberts, Scalia, Kennedy, Thomas, Breyer)	NO	
Concurrence: (**Scalia**)	O	Cites to the "traditional property-based understanding of the Fourth Amendment" (quoting *United States v. Jones*) and uses it to assess whether a violation occurred in this case.
Concurrence: (**Thomas**)	NOBOMC	
Dissent: (**Ginsburg**, Sotomayor, Kagan)	NOBOMC	P. 317 discusses the neutral magistrate's role in warrant distribution; "Because the Framers saw the neutral magistrate as shielding all of us, good or bad, saint or sinner, from unchecked police activity. . . ." and later says: "'But the Fourth Amendment' the Court has long recognized, 'reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of criminal law."

Navarette v. California (2014) 572 U.S. 393		
Majority: (**Thomas**, Roberts, Kennedy, Breyer, Alito)	NO	
Dissent: (**Scalia**, Ginsburg, Sotomayor, Kagan)	NOBOMC	In regard to anonymous calls becoming legitimate tips as long as the caller can identify his location, Scalia says, "This is not my concept, and I am sure would not be the Framers', of a people secure from unreasonable searches and seizures." (P. 405).
Plumhoff v. Rickard (2014) 134 S. Ct. 2012		
Majority: (**Alito**, Roberts, Scalia, Kennedy, Thomas, Sotomayor, Kagan, Ginsburg, Breyer)	NO	Ginsburg joined as to Parts I, II, and III-C. Breyer joined all except Part III-B-2.
Riley v. California (2014) 134 S. Ct. 2473		
Majority: (**Roberts**, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Sotomayor, Kagan)	NOBOMC	Discusses technological advancement re: cell phone use and concept of adopting procedures for law enforcement. The Court says of these protocols, "Probably a good idea, but the Founders did not fight a revolution to gain the right to government agency protocols." (P. 2491) Opinion also discusses the general warrants and writs of assistance of the colonial era and considers them as an analogy to the proposed compulsory procedures of forcing a citizen to surrender his phone and/or the information contained within it. Ultimately, the Court decides that the privacy interest in a cell phone was greater than a Founding-era argument.
Concurrence: (**Alito**)	NOBOMC	Cites to the "well-established . . . mid-eighteenth century" principle of search incident to arrest. Footnote on P. 2496 makes reference to searches of a person in the colonial era including "not only his surface clothing but his body, luggage, and saddlebags."

Heien v. North Carolina (2014) 135 S. Ct. 530		
Majority: (**Roberts**, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Kagan)	NO	
Concurrence: (**Kagan**, Ginsburg)	NO	
Dissent: (**Sotomayor**)	NO	
Rodriguez v. United States (2015) 135 S. Ct. 1609		
Majority: (**Ginsburg**, Roberts, Scalia, Breyer, Sotomayor, Kagan)	NO	
Dissent: (**Kennedy**)	NO	
Dissent: (**Thomas**, Alito, Kennedy)	NOBOMC	Kennedy joined all but Part III. Part I states: We have defied reasonableness "in objective terms by examining the totality of the circumstances," *Ohio v. Robinette,* 519 U.S. 33, 39 (1996), and by considering "the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing," *Atwater v. Lago Vista,* 532 U.S. 318, 326 (2001) (internal quotation marks omitted). When traditional protections have not provided a definitive answer, our precedents have "analyzed a search or seizure in light of traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Virginia v. Moore,* 553 U.S. 164, 171 (2008) (internal quotation marks omitted).
Dissent: (**Alito**)	NOBOMC	

City of Los Angeles v. Patel (2015) 135 S. Ct. 2443		
Majority: (**Sotomayor**, Kennedy, Ginsburg, Breyer, Kagan)	NOBOMC	Cites to "An Act For The Due Regulation Of Licensed Houses (1786)" which raises the point that hotels have been historically treated as public accommodations.
Dissent: (**Scalia**, Roberts, Thomas)	NOBOMC	Part II discusses textual interpretation of the Fourth Amendment. Part II-A elaborates on the majority's point re: hotels as public accommodations and cites to Blackstone's "Commentaries on the Laws of England 168 (1765).
Dissent: (**Alito**, Thomas)	NO	

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