
THE FOURTH AMENDMENT'S THIRD WAY

I. INTRODUCTION: SEARCHING FOR CONTENT

Scholars agree on very little concerning the Fourth Amendment, but one of the few propositions that nearly everyone accepts is the almost incomparable incoherence of its doctrine. Professor Lloyd Weinreb calls the jurisprudence “shifting, vague, and anything but transparent.”¹ Professor Akhil Amar criticizes it as “a vast jumble of judicial pronouncements that is not merely complex and contradictory, but often perverse.”² Professor Anthony Amsterdam politely observes that “[f]or clarity and consistency, the law of the fourth amendment is not the Supreme Court’s most successful product.”³

This Note confronts a “fundamental question about the fourth amendment” that lies beneath all of its doctrinal puzzles, namely, “what method should be used to identify the range of law enforcement practices that it governs and the abuses of those practices that it restrains.”⁴ It does so, in particular, by examining the relationship between the Fourth Amendment and state law. This Note argues that the Amendment should be interpreted as dynamically incorporating state law, and it explains how this interpretive method injects substantive legal content into the vague constitutional text and reconciles the tension between the Amendment’s two clauses.⁵ It contends that the dynamic incorporation method is pragmatically and normatively superior to the major alternatives while remaining justified by constitutional theory.

II. THREE METHODS OF INTERPRETATION

This Part outlines and contrasts two methods of interpreting the Fourth Amendment that currently have traction in the doctrine. Although these methods are in some ways complete opposites, both stand in contrast to a third method, dynamic incorporation, which has roots in a much older, now-discredited line of Fourth Amendment precedent.

¹ Lloyd L. Weinreb, *Your Place or Mine? Privacy of Presence Under the Fourth Amendment*, 1999 SUP. CT. REV. 253, 253.

² Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 758 (1994).

³ Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 349 (1974). The list of complaints goes on. See, e.g., Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 555 (1996) (“Fourth Amendment theory is in tatters . . .”).

⁴ Amsterdam, *supra* note 3, at 363.

⁵ The argument in this Note elaborates on themes introduced in *The Supreme Court, 2005 Term—Leading Cases*, 120 HARV. L. REV. 125, 169–73 (2006), which comments on *Georgia v. Randolph*, 126 S. Ct. 1515 (2006).

A. Social Convention

The dominant approach toward Fourth Amendment doctrine over the past half-century has centered on the notion of social convention. This is perhaps sensible, as the Fourth Amendment itself speaks in the language of reasonableness, and in the real world at least, what is reasonable is a function of society's norms and practices.

The Court most decisively embraced social convention as a source of legal content for the Fourth Amendment in *Katz v. United States*,⁶ which held that the Fourth Amendment protected a conversation in a public telephone booth.⁷ The doctrine has closely tracked Justice Harlan's concurring opinion: "My understanding of the rule . . . is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"⁸ Ultimately, both of Justice Harlan's prongs reduce to the concept of social convention, and indeed, courts rarely assess the two prongs independently.⁹

Katz was "a watershed in fourth amendment jurisprudence"¹⁰ because it actually defines the scope of the Fourth Amendment. It is true that the reasonable expectation of privacy test answers only the threshold question of what constitutes a search, but this formulation masks the true importance of the inquiry. Because warrantless searches are presumptively unreasonable and therefore violate the Constitution, the central question in the context of any warrantless search is whether a search occurred at all.

Furthermore, the language of *Katz* has permeated all sorts of other Fourth Amendment reasonableness inquiries. Although the Court has adopted a presumptive warrant requirement, it has also carved out a multitude of exceptions and exemptions.¹¹ Many of these exceptions are premised on notions of reasonableness, and their limits are correspondingly bounded by what is reasonable. Thus, when *Katz*'s dictates are imported into these doctrinal nooks and crannies, it is clear that social convention has become the defining ideal of the Fourth Amendment — the source of authority that gives reasonableness its shape. Justice Scalia has recognized that *Katz* plays this orienting role in the vast maze of Fourth Amendment doctrine: "Our intricate body

⁶ 389 U.S. 347 (1967).

⁷ *Id.* at 359.

⁸ *Id.* at 361 (Harlan, J., concurring).

⁹ See Eric Dean Bender, Note, *The Fourth Amendment in the Age of Aerial Surveillance: Curtains for the Curtilage?*, 60 N.Y.U. L. REV. 725, 744–45 (1985).

¹⁰ Amsterdam, *supra* note 3, at 382.

¹¹ See *California v. Acevedo*, 500 U.S. 565, 582–84 (1991) (Scalia, J., concurring in the judgment). These exceptions to the warrant requirement are too numerous to list.

of law regarding 'reasonable expectation of privacy' has been developed largely as a means of creating these exceptions [to the warrant requirement], enabling a search to be denominated not a Fourth Amendment 'search' and therefore not subject to the general warrant requirement."¹²

For example, consent has long been an exception to the warrant requirement.¹³ Yet when a truly difficult consent case came before the Supreme Court, the Court held that the answer must be divined by looking to "widely shared social expectations."¹⁴ The Court thus treated social convention as the determinant of reasonableness.¹⁵ The *Katz* language is ubiquitous, even outside its traditional scope of defining what constitutes a search.

Thus, the *Katz* model of the Fourth Amendment approaches an entire methodological philosophy, encompassing far more than just a doctrinal test.¹⁶ This method, probably dominant within the modern judiciary, interprets the Fourth Amendment by looking primarily to social norms and behavior. Police are held to these standards if they do not obtain a warrant, and actions that fall beyond reasonable social convention are unconstitutional.

B. Fourth Amendment Originalism

A new approach to the Fourth Amendment has recently sprouted in Supreme Court jurisprudence. Perhaps reacting to the flexible and judge-centered social norms model, the more conservative Justices have attempted to develop a method that restrains judicial discretion and provides more determinate answers. Labeled by Professor David Sklansky as "the new Fourth Amendment originalism,"¹⁷ this model asserts that the Fourth Amendment codified and constitutionalized

¹² *Id.* at 583.

¹³ See *Schneekloth v. Bustamonte*, 412 U.S. 218, 219, 222 (1973).

¹⁴ *Georgia v. Randolph*, 126 S. Ct. 1515, 1521 (2006).

¹⁵ Another example is the infamous "automobile exception," which exempts searches of cars from the presumptive warrant requirement. See *Carroll v. United States*, 267 U.S. 132, 153 (1925). Although this distinction was originally justified on the ground that cars are moveable and therefore obtaining a warrant would not be practicable, more recent precedent has shifted toward holding that the "expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office." *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976); see also *California v. Carney*, 471 U.S. 386, 391-93 (1985) (extending exception to include motor homes).

¹⁶ In this sense, the *Katz* model represents a particular application of the "consensus" approach to constitutional law, which rests on "[t]he idea that society's 'widely shared values' should give content to the Constitution's open-ended provisions — that 'constitutional law must now be understood as expressing contemporary norms.'" JOHN HART ELY, *DEMOCRACY AND DISTRUST* 63 (1980) (quoting Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1193 (1977)).

¹⁷ David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1744 (2000).

common law practices that existed before the ratification of the Bill of Rights.¹⁸

Using this approach, a court facing a novel Fourth Amendment question should look not to current social norms but to common law rules from the eighteenth century. If the practice can be analogized to a type of search that was unlawful at eighteenth-century common law, then it violates the Constitution; otherwise, it is permissible. The world has changed in nontrivial ways since the framing of the Constitution, so there will inevitably be gaps in this method,¹⁹ but founding-era common law certainly can provide a basic store of legal content that courts can use to interpret vague text.

Professor Sklansky traces the advent of the new Fourth Amendment originalism to Justice Scalia's opinion for the Court in *California v. Hodari D.*,²⁰ but judicial opinions since then have made the argument more overtly. For example, in *California v. Acevedo*,²¹ Justice Scalia, frustrated by the mass of exceptions and exceptions to exceptions engendered by the Court's Fourth Amendment precedents, argued that "the path out of this confusion should be sought by returning to the first principle that the 'reasonableness' requirement of the Fourth Amendment affords the protection that the common law afforded."²² The tenses he used suggest that it is founding-era common law that should be determinative: the Fourth Amendment "affords" those protections that the common law "afforded" in the past.²³ This approach periodically reappears in the pages of the *United States Reports*, usually employed by Justice Scalia or Justice Thomas.²⁴

C. *Dynamic Incorporation*

Among the numerous potential sources of legal content for the Fourth Amendment, one in particular has firm roots in the Amendment's jurisprudence yet has been subject to very little scholarly analysis. That source is state law.

¹⁸ See *id.* at 1743.

¹⁹ Proponents of this approach recognize this limitation. See, e.g., *County of Riverside v. McLaughlin*, 500 U.S. 44, 60 (1991) (Scalia, J., dissenting) (acknowledging that "[t]here is assuredly room for [a balancing] approach in resolving novel questions of search and seizure under the 'reasonableness' standard that the Fourth Amendment sets forth," but denying that such an approach is applicable "in resolving those questions on which a clear answer already existed in 1791").

²⁰ 499 U.S. 621 (1991); Sklansky, *supra* note 17, at 1754.

²¹ 500 U.S. 565 (1991).

²² *Id.* at 583 (Scalia, J., concurring in the judgment).

²³ *Id.* (emphases added).

²⁴ See, e.g., *Wyoming v. Houghton*, 526 U.S. 295, 299–302 (1999) (Scalia, J.); *Wilson v. Arkansas*, 514 U.S. 927, 931–36 (1995) (Thomas, J.); see also *Atwater v. City of Lago Vista*, 532 U.S. 318, 326–46 (2001) (Souter, J.).

1. *History of State Law in Fourth Amendment Jurisprudence.* — A very close relationship between the Fourth Amendment and the common law existed for most of the Amendment's jurisprudential history. "[U]ntil well into the 20th century, violation of the Amendment was tied to common-law trespass."²⁵ State officials were liable in tort for trespass unless they could satisfy a civil jury that their search was reasonable; a valid warrant provided absolute immunity.²⁶ With the exclusionary rule and *Bivens* actions not yet available,²⁷ tort claims against police or other state officers were the primary mechanism of enforcing the Amendment.²⁸

The relationship went far deeper, however. Its most striking application can be found in the pre-*Katz* decisions concerning the definition of a search. *Olmstead v. United States*²⁹ explicated the doctrine most infamously, holding that only a physical trespass could constitute a search for Fourth Amendment purposes. Wiretapping accordingly did not qualify.³⁰ The scope of the Fourth Amendment's protections thus depended on the nuances of property law, a result not inconsistent with the Court's traditional understanding that the Fourth Amendment was meant to protect property.³¹

Numerous courts applied the common law to determine the scope of the Fourth Amendment. Because trespass was a necessary element of a Fourth Amendment violation, technical rules of property were determinative at all stages of the analysis. For example, lower courts based their standing rules on possessory interests; only someone who had possessed the seized property was entitled to bring a tort claim, and therefore only such a person had standing to object under the Fourth Amendment.³² Whether officers had obtained valid consent also depended on property law: in *Chapman v. United States*,³³ the Court analyzed the contexts in which a landlord had a common law or

²⁵ *Georgia v. Randolph*, 126 S. Ct. 1515, 1540 (2006) (Scalia, J., dissenting).

²⁶ See Amar, *supra* note 2, at 771–72.

²⁷ Prior to *Weeks v. United States*, 232 U.S. 383 (1914), the exclusionary remedy was unavailable, and until *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), monetary damages were not automatically available under the Fourth Amendment.

²⁸ See Amar, *supra* note 2, at 785–87; Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 624–27 (1999); see also *Bivens*, 403 U.S. at 390–91.

²⁹ 277 U.S. 438 (1928).

³⁰ *Id.* at 457, 464. It should be noted that prior to *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), it was natural to speak of a general federal common law of property or tort. See generally Henry J. Friendly, *In Praise of Erie — And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964). Tort law is now understood to be state law.

³¹ See *Boyd v. United States*, 116 U.S. 616, 630 (1886).

³² See, e.g., *United States v. Eversole*, 209 F.2d 766, 768 (7th Cir. 1954); *Scoggins v. United States*, 202 F.2d 211, 212 (D.C. Cir. 1953); *Grainger v. United States*, 158 F.2d 236, 238 (4th Cir. 1946).

³³ 365 U.S. 610 (1961).

statutory right to enter leased premises in order to determine whether the landlord's consent to search was valid.³⁴ And of course, if there had been no trespass, then there could be no constitutional violation — *Olmstead* and its progeny make that clear.³⁵ Thus, as Justice Scalia argued in *Georgia v. Randolph*,³⁶ the scope of the constitutional protection automatically expands and contracts with the common law.³⁷

The relationship between state law and the Fourth Amendment came to a conclusive end, however, when the Court in the 1960s shunned the “subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical.”³⁸ *Katz* declared that “the ‘trespass’ doctrine . . . can no longer be regarded as controlling,”³⁹ and for the most part, nobody has looked back.

2. *State Law as Fourth Amendment Content.* — The dynamic incorporation model of the Fourth Amendment envisions a relationship between state law and the constitutional restraint that is both tighter and broader than that reflected in the pre-*Katz* case law.

From a textual perspective, dynamic incorporation offers clarity and common sense. The first clause of the Amendment provides the general rule: unreasonable searches by state actors are unconstitutional. Reasonableness should not be a fuzzy term with fluctuating meaning and does not call upon the federal judiciary to engage in value judgments or to balance competing interests. Rather, what is reasonable is that which is lawful under state law; inversely, what is unreasonable is that which is unlawful under state law. This interpretation is sensible, given that the “English common-law tradition to which the [American] revolutionaries appealed often tied legality to ‘reasonableness.’”⁴⁰

The second clause of the Amendment, which sets out the requirements for the use of warrants, answers the obvious question that would follow from reading the first clause in this manner: “Shouldn’t the state be treated differently?” In other words, why should the rules of common law property and tort be applied to police officers and

³⁴ See *id.* at 616–17; see also *id.* at 620–22 (Clark, J., dissenting) (disagreeing with the Court’s analysis of property law).

³⁵ See, e.g., *Goldman v. United States*, 316 U.S. 129, 134–35 (1942) (no trespass implied no violation); cf. *Silverman v. United States*, 365 U.S. 505, 509–10 (1961) (trespass implied violation).

³⁶ 126 S. Ct. 1515 (2006).

³⁷ “As property law developed, individuals who previously could not authorize a search might become able to do so, and those who once could grant such consent might no longer have that power.” *Id.* at 1540 (Scalia, J., dissenting).

³⁸ *Jones v. United States*, 362 U.S. 257, 266 (1960).

³⁹ *Katz v. United States*, 389 U.S. 347, 353 (1967).

⁴⁰ Sklansky, *supra* note 17, at 1777.

other state officials, who obviously have special needs given their duty to ensure public safety? The second clause provides the answer, which is the exception to the rule: the state has the power to use warrants. By obtaining a warrant, the state can exercise the special privileges that derive from its police power and thus exempt itself from the requirements of state tort law. Just as police officers were historically immune from tort claims if they obtained a valid warrant *ex ante*,⁴¹ the state would be immune from Fourth Amendment claims under the dynamic incorporation model as long as it acted with a valid warrant.

The two clauses of the Fourth Amendment appear integrated when interpreted in this fashion. The state should adhere to the general legal standards that govern ordinary citizens in their daily interactions with one another (hence the first clause), except to the extent that it may utilize particular warrant procedures (the second clause). This interpretation avoids the problematics of determining when reasonableness requires a warrant presumption because it establishes the two clauses as independent tests: searches and seizures conducted pursuant to warrants would be analyzed under the second clause, whereas warrantless searches and seizures would be analyzed for reasonableness under state standards of private law.

How would this model play out in practice? First, courts would ask whether, under state law, the challenged police actions would constitute an actionable offense if a private party had committed them.⁴² If the answer is yes — for example, if the search would have been actionable trespass — then the search would violate the Fourth Amendment. If the answer is no — for example, if common law decisions of the state's judiciary had established an exception or defense to the trespass — then the actions would be constitutional.

Second, searches or seizures conducted pursuant to a warrant would be constitutional provided that the warrant had been validly issued. Ancillary questions concerning the procedures for actions taken under a warrant, such as the applicability of the knock-and-announce requirement,⁴³ obviously cannot be tested under state law because private actors do not obtain warrants, and therefore no analogous body of state law deals with how private actors may interact when one has a warrant.⁴⁴ Accordingly, questions surrounding the constitutionality of

⁴¹ See Amar, *supra* note 2, at 771–72.

⁴² See Richard A. Epstein, *A Common Lawyer Looks at Constitutional Interpretation*, 72 B.U. L. REV. 699, 713 (1992) (“[T]he Constitution tracks the idea of the wrongs that one private party can commit against another, and uses them to define the wrongs that the state can commit against any person through its agents.”).

⁴³ See, e.g., *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995).

⁴⁴ The same is not true, however, of warrantless arrests. At least historically, the common law afforded to private parties a right to arrest even suspicious vagrants, or “night-walkers.” See *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 183 (2004); *Atwater v. City of Lago Vista*, 532

searches conducted pursuant to warrants cannot be analyzed using the dynamic incorporation approach. This constitutes a gap in the method, and answers would have to be sought elsewhere.⁴⁵

III. THE CASE FOR DYNAMIC INCORPORATION

Instead of deciding from first principles which criteria should be considered when selecting a constitutional rule, this Note adopts the premises underlying the two methods outlined above. Each of the two methods justifies itself based on its particular strengths, and the remainder of this Part holds the dynamic incorporation model up against these standards. Instead of rationalizing dynamic incorporation as the *best* possible way to interpret the Fourth Amendment, which would necessitate justifying the choice of criteria by which to measure its success, this Note seeks only to demonstrate that it is *superior* to the two other models — on their own terms.

The advantages claimed by the two models of the Fourth Amendment are relatively apparent. *Katz* serves the Amendment's normative goals. Its flexible standard allows judges to interpret the Fourth Amendment as incorporating social norms and thus to protect privacy in a changing, modern world.⁴⁶ In contrast, Fourth Amendment originalism developed in part as a backlash to the flexibility and indeterminacy of *Katz*.⁴⁷ The strength of this model is its ability to provide determinate answers and predictable rules.⁴⁸ The model has pragmatic advantages: It provides a rule of decision that is clear, gives judges the tools necessary to reach an answer, and creates stability and fairness in the judicial system as a result. Relative to *Katz*, at least, it

U.S. 318, 333–34 (2001). The right to engage in warrantless arrests can therefore be tested against private law standards.

⁴⁵ This shortcoming is not particularly troublesome, however, because neither founding-era common law nor social norms are capable of providing answers to every type of Fourth Amendment question, and this gap in the dynamic incorporation method is quite narrow.

⁴⁶ See *Olmstead v. United States*, 277 U.S. 438, 474, 478 (1928) (Brandeis, J., dissenting) (foreshadowing the *Katz* test by arguing that “every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment” and that the “progress of science” should not interfere with that mandate).

⁴⁷ “In my view, the only thing the past three decades have established about the *Katz* test . . . is that, unsurprisingly, those ‘actual (subjective) expectation[s] of privacy’ ‘that society is prepared to recognize as “reasonable”’ bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable.” *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring) (alteration in original) (citations omitted) (quoting *Katz v. United States*, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring)).

⁴⁸ Cf. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1184 (1989).

has the advantage of compatibility with a vision of judicial restraint and modesty.⁴⁹

Putting these premises together, in order to be clearly superior, the dynamic incorporation model must be at least as good as *Katz* in yielding substantive results that comport with the understanding of the Fourth Amendment embodied in *Katz*, and it must generate these results through a judicial method that is at least as consistent with the procedural and structural values prized by Fourth Amendment originalism.⁵⁰ The latter condition will be termed the pragmatic question, and the former condition the normative question.

A. Pragmatic Criteria

1. *Dynamic Incorporation Vis-à-Vis Social Convention.* — The problems with the *Katz* method are manifold. Most fundamentally, the judiciary is poorly suited to determine rules of social convention. Social norms are fluid, constantly changing, and difficult to pin down in any objective fashion. “Even if we assume . . . that there *is* a consensus lurking out there . . . , there would still remain the point, sufficient in itself, that that consensus is not reliably discoverable, at least not by courts.”⁵¹

In addition, the types of fact patterns that involve possible Fourth Amendment violations are rarely those for which an etiquette guide exists; the cases present scenarios that rarely arise in daily life, so it will rarely be clear that a particular social norm is applicable. It is unlikely that federal judges will generally be able to imagine the proper social convention to apply to the criminal cases before them. Simply put, the *Katz* inquiry is designed for sociologists, not judges.

The fact that *Katz* does not offer a judicially manageable standard causes other, related problems. For one, the indeterminacy allows judges to use social expectation as a “fudge factor.” For example, in the context of Fourth Amendment standing jurisprudence, which entails a variant of the *Katz* test,⁵² the Court has reached a conclusion about social expectations that Professor Weinreb decries as “so plainly incorrect that one has to wonder not whether it is mistaken but only how the mistake can have been made.”⁵³ Yet because the outcomes are determined so heavily by factual analysis — whether an expecta-

⁴⁹ See *Carter*, 525 U.S. at 98–99 (Scalia, J., concurring) (arguing that to decide a policy question — the answer to which is not in the Constitution — is to “go beyond our proper role as judges in a democratic society”).

⁵⁰ In economic terms, this means demonstrating that dynamic incorporation is Pareto preferred — that is, rational supporters of each of the alternate methods should prefer it to their own.

⁵¹ ELY, *supra* note 16, at 64 (critiquing the “consensus” approach to constitutional law).

⁵² See, e.g., *Rakas v. Illinois*, 439 U.S. 128, 143 (1978).

⁵³ Weinreb, *supra* note 1, at 263.

tion or a convention exists — courts can be critiqued only on empirical grounds; their decisions are never demonstrably erroneous in legal terms. How, then, can courts be held accountable? “[T]he one effective check upon arbitrary judges is criticism by the bar and the academy. But it is no more possible to demonstrate the inconsistency of two opinions based upon a ‘totality of the circumstances’ test than it is to demonstrate the inconsistency of two jury verdicts.”⁵⁴ The *Katz* test, by depending on factual particulars and necessitating the interpretation of ambiguous social norms, functions just like a traditional totality-of-the-circumstances test — its results are largely unfalsifiable. As such, it does not constrain the judiciary or allow the promulgation of general rules, thus precluding “another obvious advantage of establishing . . . a clear, general principle of decision: predictability.”⁵⁵

Dynamic incorporation ameliorates all of these problems. By instructing judges to look to an extant body of law — one replete with case law and doctrine — this model of the Fourth Amendment puts the judiciary back in its element. Instead of divining social expectations, judges can interpret cases, analyze doctrinal distinctions, draw analogies, and make comparisons — precisely the skills they are accustomed to using. Applying the common law of torts and property is a traditional judicial function and draws upon the institutional strengths of judges. As Professor Karl Llewellyn has pointed out, the use of legal doctrine and known doctrinal techniques are among the most important “strongly stabilizing factors” in the legal system.⁵⁶

The dynamic incorporation inquiry also constrains the judiciary to a greater extent than the *Katz* test. When judges are required to fit their solutions into a centuries-old common law fabric using traditional legal tools, they are more restricted than when they are required merely to justify their results by reference to social understandings. Moreover, state legislation will often be relevant to the dynamic incorporation model, which narrows the range of judicial discretion even further. In contrast to the *Katz* regime of facts and circumstances, looking to state law would construct a law of rules because “it is easier to arrive at categorical rules if one acknowledges that the content of evolving concepts is strictly limited by the actual practices of the society, as reflected in the laws enacted by its legislatures.”⁵⁷

Consequently, dynamic incorporation would generate more predictable results than the social convention method. When the outcome depends on legal reasoning rather than empirical judgments about the state of the world, attorneys and legal scholars are more adept at an-

⁵⁴ Scalia, *supra* note 48, at 1180.

⁵⁵ *Id.* at 1179.

⁵⁶ See KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* 19–23 (1960).

⁵⁷ Scalia, *supra* note 48, at 1184.

icipating how a court will rule. The same is true of police officers: Although the police do not have constant access to legal counsel, their work consists of enforcing the very laws of tort and property that would become applicable if the Fourth Amendment incorporated state law. They would thus be more capable of understanding what constitutes constitutional misconduct if dynamic incorporation replaced social convention as the model of the Fourth Amendment.

2. *Dynamic Incorporation Vis-à-Vis Fourth Amendment Originalism.* — Perhaps providing a more determinate, judicially manageable inquiry than *Katz* is not such a tall order. After all, flexibility is part of *Katz*'s attractiveness. Surprisingly, though, dynamic incorporation is superior on pragmatic grounds even to Fourth Amendment originalism, which is trumpeted by its proponents as providing clearer and more predictable results than the fluid *Katz* approach. Because dynamic incorporation looks to current state law instead of common law dating from the eighteenth century, it gives more concrete and useful direction to judges required to apply the vague mandates of the Fourth Amendment.

As even its proponents acknowledge, the “greatest defect” of the originalist method generally is “the difficulty of applying it correctly.”⁵⁸ Part of the difficulty derives from the historical nature of the inquiry: trying to find solutions in the common law is hard enough, but trying to find solutions in common law from over two centuries ago is nearly impossible. As Justice Scalia has stated:

Properly done, the task requires the consideration of an enormous mass of material — in the case of the Constitution and its Amendments, for example, to mention only one element, the records of the ratifying debates in all the states. Even beyond that, it requires an evaluation of the reliability of that material — many of the reports of the ratifying debates, for example, are thought to be quite unreliable. And further still, it requires immersing oneself in the political and intellectual atmosphere of the time — somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day.⁵⁹

All of these complications render the judicial inquiry required by Fourth Amendment originalism less manageable, less predictable, and less determinate. A citizen or police officer attempting to discern what is permissible and what is forbidden would need to do substantial historical research. This need for expertise substantially undermines rule-of-law values. Just as implementing the *Katz* test is a task better

⁵⁸ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856 (1989).

⁵⁹ *Id.* at 856–57.

sued to sociologists, applying Fourth Amendment originalism is “a task sometimes better suited to the historian than the lawyer.”⁶⁰

In contrast, dynamic incorporation requires judges to look at state common law and statutes. These are the sources of law that judges consult daily. The judiciary is well suited to interpret statutory law and decide how the acts of the legislature affect the common law background against which it operates. Statutory interpretation may require the analysis of some legislative history, but nothing on the scale of looking to pre-Bill of Rights common law.

In any case, it is not necessary to reprise the full debate over originalism in order to demonstrate that dynamic incorporation is preferable in its ability to generate clear, determinate answers that can be predicted ahead of time by both citizens and police officers. More constraining than the social convention approach, yet more susceptible to judicial determination than Fourth Amendment originalism, dynamic incorporation offers a superior method for finding Fourth Amendment legal content. As such, holding constant the substantive results it generates, the model should be preferred to each of its two major competitors.

B. Normative Criteria

Satisfying the normative constraint means demonstrating that no proponent of *Katz* would be willing to forgo the pragmatic benefits of dynamic incorporation based on disagreement with the substantive outcomes it would generate. This section will attempt to meet that condition in two steps, first by demonstrating that dynamic incorporation would not result in any major, systematic shift away from the outcomes generated under a *Katz* regime, and second by showing that dynamic incorporation is likely to generate results *more* consistent with the normative goals of *Katz*, simply by virtue of its method.

1. *Assumption of Average Outcome-Neutrality.* — Certainly dynamic incorporation of state law would result in a set of substantive outcomes different from those the current *Katz*-dominated approach generates. If that were not the case, this Note would hardly be worth writing. Nonetheless, this set of outcomes would not be systematically biased in either direction; that is, dynamic incorporation would not dramatically expand or contract Fourth Amendment rights. On average, adopting the dynamic incorporation model should be outcome-neutral.

Justifying this assumption of outcome-neutrality requires addressing several classes of scenarios that dynamic incorporation might appear to treat categorically differently than current doctrine. First, in

⁶⁰ *Id.* at 857.

several prototypical cases one might fear that dynamic incorporation would be grossly underinclusive, providing insufficient protection to privacy interests that current law recognizes. Second, one whose sympathies lie with the prosecution might be concerned that using tort and property law would unduly hamper law enforcement in a substantial class of situations. Neither of these fears, as it turns out, is warranted.

(a) *Underinclusivity*. — The most salient underinclusive facet of dynamic incorporation is that which gave rise to *Katz* in the first place. The pre-*Katz* framework looked to the common law of trespass to determine whether a Fourth Amendment violation had occurred, and trespass required a physical invasion of property. As such, the police wiretapping and eavesdropping at issue in *Olmstead* did not constitute trespass, making them permissible under the Fourth Amendment.⁶¹ Modern doctrine, of course, abhors such results and grants protection to privacy interests regardless of how they are invaded. A model of the Fourth Amendment that did otherwise would be seriously deficient.

The dynamic incorporation model does not present this problem. State tort law *does* protect privacy, not merely property interests.⁶² Invading someone's reasonable expectation of privacy is unlawful and supports an action in tort.⁶³ Using the dynamic incorporation approach, courts would find Fourth Amendment violations whenever the state's actions would have provided a basis for a tort claim.

Dynamic incorporation parts ways with the *Katz* Court not over the outcome it reached, but rather over the reasoning used to reach it. Instead of jettisoning the common law entirely and adopting the social norms approach in its place, the Court could simply have recognized that police violate the Fourth Amendment by committing privacy torts as well as property torts. The notion that individuals have a common law right to privacy is not a new one.⁶⁴ Expanding the scope of the common law inquiry in this fashion would provide the same degree of protection to "people, not places"⁶⁵ as *Katz* did while maintaining the pragmatic advantages of the dynamic incorporation method. As

⁶¹ See *Olmstead v. United States*, 277 U.S. 438, 466 (1928). In contrast, when a physical invasion had taken place, there was no judicial reluctance to label the eavesdropping unconstitutional. See, e.g., *Silverman v. United States*, 365 U.S. 505, 512 (1961).

⁶² See RESTATEMENT (SECOND) OF TORTS § 652B cmt. b (1977) ("The invasion may be by physical intrusion into a place in which the plaintiff has secluded himself It may also be by the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs").

⁶³ See 62A AM. JUR. 2D *Privacy* §§ 38–39 (2006).

⁶⁴ See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890) (noting that the traditional common law right to life and property has developed to encompass a broader "right to be let alone" that includes recognition of "intangible" interests).

⁶⁵ *Katz v. United States*, 389 U.S. 347, 351 (1967).

scholars have pointed out, common law courts deciding private law cases had made this leap from physical to nonphysical trespasses well before the Supreme Court decided *Katz*,⁶⁶ and this extension is entirely in accord with traditional interpretive tools.⁶⁷

The second major category of cases in which dynamic incorporation might be feared to prove substantively underinclusive is that of standing cases. In such cases, the criminal defendant raises a Fourth Amendment claim even though the property invaded by the police did not belong to him. Because the Fourth Amendment has been held to confer an individual right that cannot be asserted vicariously,⁶⁸ the constitutional wrong must have been directed at the defendant in order to allow him to move for suppression. Modern doctrine has folded the standing inquiry into the substantive merits of the Fourth Amendment claim under the reasoning that ownership of the property is no longer determinative for either question — the defendant has suffered a Fourth Amendment violation if *his* expectation of privacy was invaded, and he has standing to raise that claim in the same set of circumstances.⁶⁹ However, the elegance of this solution does not necessarily carry over to the dynamic incorporation model.

Arguably, if the courts look to state law to determine what constitutes a Fourth Amendment violation, they should also look to state law to determine who has standing. In other words, a criminal defendant who would have been able to sue the state official in tort should be permitted to make a Fourth Amendment suppression motion, whereas one who could not have brought such a suit should be denied standing. Generally, only the owner of property can sue for trespass,⁷⁰ and therefore dynamic incorporation would appear to leave criminal defendants unprotected in a number of notable cases in which current doctrine grants standing.⁷¹ Such an exclusion would create a systematic bias against criminal defendants.

Further analysis, however, reveals that this problem is not as difficult as it might first appear. Even under dynamic incorporation, many defendants in similar positions would be entitled to constitutional pro-

⁶⁶ See Epstein, *supra* note 42, at 715 (citing *Roach v. Harper*, 105 S.E.2d 564 (W. Va. 1958)).

⁶⁷ See *id.* at 713–17.

⁶⁸ *Alderman v. United States*, 394 U.S. 165, 174 (1969).

⁶⁹ See *Rakas v. Illinois*, 439 U.S. 128, 133–34 (1978).

⁷⁰ See 74 AM. JUR. 2D *Torts* § 48 (2006) (“A tort committed upon one person generally furnishes no cause of action to a third party.”); 75 AM. JUR. 2D *Trespass* § 8 (2006) (“To sustain a cause of action for trespass to real property, a plaintiff must allege a wrongful interference with *his actual possessory rights* in the property.” (emphasis added)).

⁷¹ See, e.g., *Minnesota v. Olson*, 495 U.S. 91 (1990) (defendant was overnight guest at friend’s home when arrested by police without a warrant); *Jones v. United States*, 362 U.S. 257 (1960) (defendant was in friend’s apartment when police searched and arrested him).

tection, and some specific doctrinal modifications could solve the problem even more fully.

To begin with, even though individuals who are searched or arrested while on the property of others may not have a common law right to bring a trespass claim, they may very well be entitled to bring an invasion of privacy claim. Plaintiffs do not need to be on their own property to sue in tort for intrusion upon seclusion.⁷² Doctrinally, the claim requires a showing of a “legitimate expectation of privacy”⁷³ on the part of the plaintiff — the very same test used both for the *Katz* Fourth Amendment inquiry and to determine whether a criminal defendant has standing to invoke that Amendment.⁷⁴ This overlap means that those who have standing under current law — anyone whose legitimate expectation of privacy was invaded by state actors — would almost certainly have standing under dynamic incorporation. Indeed, cases in which the Court granted standing can be matched up to cases in which common law courts have permitted privacy tort suits.⁷⁵

However, the overlap is not perfect; invasion of privacy claims usually require additional elements, such as conduct that is “highly offensive to a reasonable person.”⁷⁶ Although defendants who have been subject to warrantless searches by police will likely be able to meet these additional criteria in some cases, there will be a class of cases that do not give rise to tort claims even though current law would grant Fourth Amendment standing to the subject of the search. If this class of cases is large enough to constitute a serious normative obstacle to dynamic incorporation, altering standing doctrine itself might be an attractive solution.⁷⁷

⁷² See, e.g., *Sanders v. ABC, Inc.*, 978 P.2d 67 (Cal. 1999) (invasion took place at workplace); *Stessman v. Am. Black Hawk Broad. Co.*, 416 N.W.2d 685 (Iowa 1987) (invasion took place at restaurant); cf. *Olson*, 495 U.S. 91.

⁷³ E.g., *Fletcher v. Price Chopper Foods of Trumann, Inc.*, 220 F.3d 871, 877 (8th Cir. 2000) (applying Arkansas law to hold that a “legitimate expectation of privacy is the touchstone of the tort of intrusion upon seclusion”).

⁷⁴ See *Rakas*, 439 U.S. at 148.

⁷⁵ Compare, e.g., *United States v. Jeffers*, 342 U.S. 48, 54 (1951) (granting standing when defendant’s hotel room was searched), with *Carter v. Innisfree Hotel, Inc.*, 661 So. 2d 1174, 1179 (Ala. 1995) (“There can be no doubt that the possible intrusion of foreign eyes into the private seclusion of a customer’s hotel room is a [tortious] invasion of that customer’s privacy.”).

⁷⁶ RESTATEMENT (SECOND) OF TORTS § 652B (1977).

⁷⁷ Such a doctrinal change could be pursued through various avenues, including elimination of the principle that Fourth Amendment claims cannot be asserted vicariously, or by constructing independent federal common law standing rules. See, e.g., Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CAL. L. REV. 1593, 1594 (1987) (proposing a link between derivative standing and third-party consent). Importantly, these changes would raise no constitutional issues; only prudential standing is at stake here. See *id.* at 1601 n.25.

(b) *Overinclusivity*. — At the other end of the spectrum, one might fear that dynamic incorporation's strict application of tort and property doctrines would limit the flexibility of law enforcement. This fear is similarly unwarranted.

Under current law, there are various exceptions to the warrant requirement. For example, police are permitted to enter a home under exigent circumstances,⁷⁸ such as a reasonable suspicion of ongoing violence or possible destruction of evidence.⁷⁹ However, entering a home uninvited would constitute a prima facie tort if committed by a private party.⁸⁰ Would dynamic incorporation thus mean the end of these longstanding rules, which give police needed powers and room to maneuver? If so, the model would prove grossly overinclusive and thus normatively unacceptable.

The answer, however, is no. Even if a police action is a prima facie tort, there may be a defense available. Traditional tort defenses include consent⁸¹ — including implied consent in an emergency⁸² — self-defense,⁸³ and necessity.⁸⁴ The scope of these tort defenses may not overlap perfectly with the current exceptions to the warrant requirement — for example, the future of the automobile exception⁸⁵ would be uncertain in a dynamic incorporation world, and the open fields doctrine would be eliminated⁸⁶ — but the gap should not be substantial or systematic enough to raise a normative objection to the model. Self-defense and the necessity defense should provide police with roughly the same amount of flexibility as current law affords and protect the same values that the warrant requirement exceptions now uphold — the safety of officers and effective law enforcement.

2. *The Common Law Filter: Reflecting Social Convention More Accurately*. — Beyond being approximately in step with the normative goals of *Katz*, dynamic incorporation actually can generate results that are *more* consistent with underlying social norms. Through a number

⁷⁸ See, e.g., *Brigham City, Utah v. Stuart*, 126 S. Ct. 1943, 1947 (2006).

⁷⁹ See, e.g., *Schmerber v. California*, 384 U.S. 757, 770–71 (1966).

⁸⁰ See RESTATEMENT (SECOND) OF TORTS § 158(a).

⁸¹ See, e.g., *Bobo v. Young*, 61 So. 2d 814, 816 (Ala. 1952) (“Consent is always a good defense to an action for damages for trespass . . .”); cf. *Schneekloth v. Bustamonte*, 412 U.S. 218, 222 (1973) (reaffirming consent as an exception to the warrant requirement).

⁸² See, e.g., *Allore v. Flower Hosp.*, 699 N.E.2d 560, 564 (Ohio Ct. App. 1997); cf. *Brigham City*, 126 S. Ct. at 1947 (reaffirming exception to warrant requirement where there is ongoing violence).

⁸³ See, e.g., *Courvoisier v. Raymond*, 47 P. 284, 286–87 (Colo. 1896); cf. *Chimel v. California*, 395 U.S. 752, 763 (1969) (rationalizing searches incident to arrest as necessary for protecting “the officer’s safety”).

⁸⁴ See, e.g., *Ploof v. Putnam*, 71 A. 188, 189 (Vt. 1908).

⁸⁵ See *Carroll v. United States*, 267 U.S. 132, 149 (1925).

⁸⁶ See *Oliver v. United States*, 466 U.S. 170, 179 (1984). The Court has allowed an exception to the warrant requirement for open fields, but entering open fields clearly constitutes a trespass.

of mechanisms, dynamic incorporation of state law would produce a set of substantive outcomes that reflects social convention more accurately and reliably than the current inquiry, which is notably weak.⁸⁷

It is important to recognize that the common law *does* reflect social norms. Indeed, the common law system is rationalized in large part on its ability to afford judges the flexibility they need to adapt the law to new situations and changes in society. The role of the common law judge is to do just that — implement shifting social expectations.⁸⁸ The common law method, which often includes careful examination (and even incorporation) of custom,⁸⁹ is well-suited to meet that challenge. As a result, the common law ultimately reflects society's expectations more accurately than any *Katz*-like test. Various methodological and institutional differences would lead to this result.⁹⁰

First, the *orientation* of courts playing a role in the dynamic incorporation method relative to the *Katz* method should lead to more accurate results for the former. Courts applying *Katz* are necessarily sitting in criminal cases, and the precedents they are able to examine are also necessarily from criminal cases. This is troublesome for a few reasons. For one, it is unlikely that the class of situations that gives rise to criminal cases is the best sample from which to derive generalizable social norms. The cases will always involve individuals accused of crimes, often crimes that are morally repugnant to society. It is worrisome that courts are required to draw legal conclusions about the legitimacy of social expectations from these types of fact patterns. In contrast, common law courts will often confront analogous legal questions in cases involving more mundane facts drawn from a more heterogeneous class of situations, and therefore are likely to reflect actual social expectations more objectively and comprehensively.

Second, in a similar vein, it is instructive to recall the role that *remedies* might play in the two judicial determinations. Courts using *Katz* to decide Fourth Amendment questions must apply the exclu-

⁸⁷ See Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727, 741 (1993) (observing "[f]requent contrasts between the Court's decisions and the . . . results" of a survey about the intrusiveness of various searches that "call into question Supreme Court conclusions on the scope of the Fourth Amendment").

⁸⁸ See AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 10 (2006).

⁸⁹ See, e.g., *Ghen v. Rich*, 8 F. 159, 162 (D. Mass. 1881) (relying on usage and custom to establish property rights in beached whales); *Titus v. Bradford, B. & K. R.R. Co.*, 20 A. 517, 518 (Pa. 1890) (looking to industry custom to ascertain whether conduct was negligent).

⁹⁰ This section focuses on advantages of state common law relative to the *Katz* approach, but to the extent that state legislatures override or modify the common law, the argument appears even stronger. "[I]n any event the comparative judgment is devastating: as between courts and legislatures, it is clear that the latter are better situated to reflect consensus." ELY, *supra* note 16, at 67.

sionary remedy if they find a violation.⁹¹ As many scholars have noted, this remedy creates strong pressure on the judge to find that no violation has occurred.⁹² The constitutional remedy thus distorts the constitutional rule. Courts may feel that they need to narrow the Fourth Amendment beyond the normative boundaries implied by *Katz* in order to keep hardened criminals off the streets. Dynamic incorporation, in contrast, would mitigate this bias by giving a determinative role to common law decisions made without exclusionary rule pressures.

Third, the *number* of courts playing a role in the two processes instills greater confidence in dynamic incorporation. When a novel question of law comes before a court applying *Katz*, on what precedents can it rely? The only decisions the court can consult are criminal procedure cases decided since *Katz* itself. It is possible that some of the cases decided in the four decades since 1967 will be relevant, but probably only a few. In contrast, a court applying dynamic incorporation could look to the entire body of common law, accumulated and refined over centuries.

Fourth, the *nature of the holdings* that are given effect in each of the methods should lead to a normative preference for dynamic incorporation. When a court applying *Katz* decides an issue of law, the result is a constitutional holding. In contrast, dynamic incorporation instructs federal judges to evaluate state law when deciding Fourth Amendment questions, so the *determinative* holdings are only of the common law variety. Since social norms are fluid, flexible, and often difficult to interpret, entrenching them as constitutional holdings undermines the accuracy of future decisions. Allowing a number of courts to modify and refine one another's holdings over time is likely to result in a more accurate picture of society than if the Supreme Court is authorized to resolve the question authoritatively.

Fifth, the *indirectness* of the dynamic incorporation inquiry is likely to result in a fairer and more complete reflection of society than that obtained using a direct inquiry as in *Katz*. Because the direct inquiry instructs courts to make their decisions based on social expectations of privacy — a heavily fact-based question — they are less likely to refer to *any* precedent when reaching their result. Whether an expectation of privacy exists in situation A is not obviously relevant to the existence of any such expectation in situation B unless the two situations are very closely related and can be ordered in a clear hierarchy of privacy. Because the *Katz* test tells the courts to evaluate an

⁹¹ See *Mapp v. Ohio*, 367 U.S. 643, 655–56 (1961).

⁹² See, e.g., Amar, *supra* note 2, at 785–800; Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111, 112 (2003).

empirical fact, the importance of traditional judicial tools decreases dramatically.

In contrast, the common law — while ultimately reflecting social norms — does not ask direct questions about social convention, but rather creates formalistic legal doctrines designed to enable analogies, distinctions, and the gradual evolution of the law through case-by-case refinement of general rules. Although this circuitous tendency may be frustrating in the short term, it is more reliable in the long term to allow social norms to creep into the law gradually, cautiously, in a marginal fashion. In other words, dynamic incorporation would allow for the development and application of genuine *doctrine*, and as Professor Charles Fried has argued, doctrine is what gives law its coherence, continuity, and rule-of-law qualities.⁹³ Dynamic incorporation would thus discourage impulsive, dramatic shifts in law that may be based on erroneous factual predicates, caused by judges who incorrectly project social change or try to move too quickly.⁹⁴ Social norms evolve in an analogous gradualist fashion, so a method that by its nature features sharp discontinuities serves as a poor mirror. Ultimately, dynamic incorporation would result in a legal fabric that is smoother, more coherent, and more accurately tied to social norms, just as *Katz* demands.

Sixth, the *level* at which dynamic incorporation operates should lead to a normative preference for that method. *Katz* has been interpreted to create a de facto national standard, but if the goal is to reflect social convention accurately then the doctrinal test should recognize interstate differences. It is likely that commonly held understandings about privacy do indeed differ by state, and dynamic incorporation would allow the Fourth Amendment to reflect these nuances. *Katz*, by establishing a national standard for social norms, is incapable of recognizing differences among states, even though its normative underpinning — that police must respect privacy to the extent that it is recognized by the community — would be better served by a geographically narrower identification of social norms.

In sum, the common law would act as a filter, distilling social norms via a judicially manageable process and ultimately producing cleaner, more accurate results than the *Katz* inquiry. By eliminating the various distortions caused by the criminal nature of Fourth Amendment proceedings, the exclusionary rule remedy, the lack of relevant precedents, the constitutional imprimatur given to holdings on social norms, the direct nature of the fact-bound social norms test, and the overbreadth caused by measuring community standards on a na-

⁹³ See CHARLES FRIED, SAYING WHAT THE LAW IS 1–10 (2004); see also LLEWELLYN, *supra* note 56, at 20.

⁹⁴ Cf. ELY, *supra* note 16, at 65 (discussing the Court's death penalty jurisprudence in the 1970s).

tional level, dynamic incorporation of state law would defeat *Katz* on its own normative terms.

C. Constitutional Theory

Despite its clear benefits, there is something troubling about a model of constitutional rights that accords so much weight to majoritarian preferences expressed through state law. This section considers whether dynamic incorporation can be justified under the two prevailing accounts of constitutional rights: the traditional paradigm of the Constitution as protector of substantive individual liberties and Professor John Hart Ely's political process theory of the Constitution.

1. *Countermajoritarian Norms (and Others)*. — Conventional wisdom suggests that the Bill of Rights in general is countermajoritarian; why constitutionalize a norm if not to preclude legislative majorities from changing it? If that were true, it is hard to see how dynamic incorporation could be considered legitimate. As Professor Ely pointed out, "it makes no sense to employ the value judgments of the majority as the vehicle for protecting minorities from the value judgments of the majority."⁹⁵

Perhaps, however, just as there are two fears that motivate constitutionalization of rights — tyranny of the majority⁹⁶ and abuse of power⁹⁷ — there are two distinct types of constitutional norms: countermajoritarian norms and counterauthoritarian norms. Countermajoritarian norms, because they are intended to protect individual rights from invasion by more powerful collectives, are about *setting certain rules that government must follow*. In contrast, counterauthoritarian norms are about *making sure that governments follow the rules*, irrespective of the content of those rules. Norms designed to counter abuses of power are concerned primarily with the *arbitrary* exercise of power. Countermajoritarian norms are likely to target legislative acts, since the paradigmatic example of tyranny of the majority is a law passed by Parliament or Congress. In contrast, counterauthoritarian norms — which are derived from a fear that was more pronounced in an age of kings — tend to target executive action.

Thus, although it would be entirely inappropriate to incorporate state law when interpreting constitutional provisions that are primarily countermajoritarian in character,⁹⁸ dynamic incorporation seems quite sensible when interpreting counterauthoritarian provisions. The pur-

⁹⁵ *Id.* at 69.

⁹⁶ JOHN STUART MILL, ON LIBERTY 3 (Currin V. Shields ed., Prentice-Hall 1997) (1859).

⁹⁷ Cf. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2313 (2006) (explaining the original Madisonian scheme of separation of powers and its intent to "prevent tyrannical collusion").

⁹⁸ See ELY, *supra* note 16, at 68–69.

pose of these provisions is to hold the government to some standard, the specifics of which could be defined by the community, and not to build substantive content into the Constitution.

To a great extent, the Fourth Amendment displays the characteristics of a counterauthoritarian norm. Its origins can be found in sixteenth- and seventeenth-century England, when executive officials took advantage of general warrants to suppress dissent.⁹⁹ The fear motivating the protection against searches and seizures is not that the majority would search the homes of the minority, but rather that the state would use its vast power to search and oppress the citizens generally. Constraining discretion is a traditional rationale for the Fourth Amendment, and it is the abuse of discretion by officials that inspires fear — not abuse of discretion by a majoritarian electorate.¹⁰⁰ Although the Fourth Amendment certainly applies to legislative acts, it is usually raised to suppress evidence gathered by executive action. Even current doctrine recognizes that the Fourth Amendment is not particularly countermajoritarian: *Katz*'s call to look to social norms is widely seen as consistent with the purposes of the Fourth Amendment. In sum, dynamic incorporation does not threaten constitutional values in the context of the counterauthoritarian Fourth Amendment.

2. *Democracy and General Applicability.* — A different distinction can also be drawn, justifying the dynamic incorporation model of the Fourth Amendment using a political process argument. Professor Ely's representation reinforcement account of the Constitution views the document's provisions as protecting (and improving upon) the democratic system.¹⁰¹ Under this view, the rights of criminal defendants are constitutionalized because ordinary democratic politics fails to represent their interests; as an extremely unpopular minority group within society, defendants are unlikely to receive protection from legislatures.¹⁰² Given these understandings, allowing legislative "interpretation" of constitutional rights is perverse: the very same democratic defects that require the constitutionalization of the rights would taint any legislation used to interpret them.

⁹⁹ See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1180 (1991).

¹⁰⁰ See ELY, *supra* note 16, at 96–97 (suggesting a "fear of official discretion" as a motivation for the Amendment).

¹⁰¹ See *id.* at 102–03 (comparing Professor Ely's "approach to constitutional adjudication" to an antitrust model, in which a judge "intervenes only when the 'market,' in our case the political market, is systematically malfunctioning").

¹⁰² *But see* William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 791–92 (2006) (arguing that the "conventional wisdom . . . that elected legislators would never adequately protect the interests of criminal suspects and defendants" now seems "either wrong or self-fulfilling").

The dynamic incorporation model of the Fourth Amendment, however, avoids this pitfall of legislative constitutionalism by privileging *generally applicable* laws. The democratic dynamics that play into the creation of trespass and privacy law are distinct from those that construct protections for criminal defendants. Although legislative majorities might give insufficient consideration to the rights of criminal suspects, they are likely to function correctly when enacting laws of property and tort that affect all citizens. If anything, trespass disproportionately affects the wealthier members of society — those with the most access to the political process — because they are likely to own expansive real property. On balance, then, there should be no worry that legislative majorities would dramatically decrease the protections afforded by the common law, because the application of these rules to such broad constituencies means that majoritarian representation will indirectly take the concerns of criminal defendants into account.¹⁰³ Under dynamic incorporation, a state could in theory legislate such that no warrants or probable cause are ever needed to conduct searches — but in order to do so, it would be required to eliminate entirely the cause of action for trespass. Political process theory suggests that this outcome is unlikely and certainly not a situation warranting representation reinforcement in the form of constitutional insulation from democratic politics.¹⁰⁴

IV. CONCLUSION

Dynamic incorporation offers courts a new model for the Fourth Amendment. It combines the normative appeal of *Katz*'s social norms model with the structural values of judicial restraint and rule of law represented by Fourth Amendment originalism. It restores judges to their proper role without ossifying constitutional law or inhibiting its natural, gradual evolution. Instead of tossing history out the window or crowning it king, this model permits the modernization of doctrine while forcing judges to weave their results coherently into an ancient and longstanding legal fabric. Dynamic incorporation enforces the Fourth Amendment's requirement that the government play by the rules without imprudently vesting the power to make those rules in the long-dead judges of the eighteenth century or exclusively in the unelected judges of today. Rather, the method maximizes the institutional strengths of each relevant entity — federal courts, state courts, and state legislatures — without disrupting the balance among them implicitly required by the very nature of constitutional rights.

¹⁰³ See ELY, *supra* note 16, at 77–79.

¹⁰⁴ See *id.* at 182–83 (denying that a law “that does something frightful to all of us and thus does not single out a powerless minority for victimization” would be unconstitutional).