

# Letting the *Katz* out of the Bag: Recent Developments in Iowa Trash-rip Jurisprudence

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*ABSTRACT: Trash-rip searches are common in police investigations because, under most state constitutions and the Federal Constitution, garbage is not protected against searches and seizures, allowing police to search waste without a warrant. Recently the Iowa Supreme Court cast doubt on the permissibility of these warrantless searches, disturbing years of state and federal precedent. The court applied an originalist analysis, reviving a property-centered search and seizure line of jurisprudence. By changing its course, the court parted ways with federal search and seizure jurisprudence, rendering uncertain the future of trash-rips and other common investigative tactics. Given the recency of the decision, the breadth of the court's holding is still unclear. In light of this uncertainty, the court should clarify its holding and adopt a two-step analysis: first, treating common law property doctrines as a constitutional floor upon which local legislatures may build, and second, assessing additional privacy protections created by local ordinances. Clarifying the framework in this manner empowers localities to craft custom legal regimes preferred by most citizens while maintaining a necessary baseline of protection for criminal defendants.*

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## INTRODUCTION

In 2021, the Iowa Supreme Court split from federal search and seizure jurisprudence on the issue of trash-rip searches.<sup>1</sup> The case, *State v. Wright*, disturbed years of precedent and augurs a new era of criminal law in Iowa.<sup>2</sup> For background, this Note recites the facts and procedural history of *Wright*, describes the outcome at the Iowa Supreme Court, continues with an overview of the relevant search and seizure precedents at both the state and federal level, and then finally explores the rifts between the justices' legal reasonings.<sup>3</sup> Then, this Note explains the advantages of the *Wright* decision before describing potential problems with the court's analysis.<sup>4</sup> Finally, to propose a solution, this Note argues that the Iowa Supreme Court was right to apply originalist principles to Iowa search and seizure jurisprudence but that the court should clarify its approach by applying a two-step analysis to future cases.<sup>5</sup> Using the proposed two-step approach, the court would first analyze the property doctrines applicable to a given search and then examine local statutes to determine whether local ordinances are more protective against searches than the Iowa Constitution.<sup>6</sup>

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1. *State v. Wright*, 961 N.W.2d 396, 400, 420 (Iowa 2021).

2. *See id.*

3. *See infra* Part I.

4. *See infra* Part II.

5. *See infra* Part III.

6. *See infra* Part III.

## I. BACKGROUND

This Part begins with an examination of the relevant history of search and seizure jurisprudence, dividing the precedents into three periods: (1) the Framing Era, (2) the Era of Incorporation, and (3) the Modern Era. Because federal jurisprudence influences state jurisprudence, both are described when relevant. Subsequently, this Part reviews the facts of *State v. Wright*, proceeds to discuss the procedural history, and briefly recapitulates the result at the Iowa Supreme Court. Finally, to explain the dissension caused by the *Wright* decision, this Part describes the opinions written by the Iowa Supreme Court Justices, explaining the nuances of the plurality, concurring, and dissenting opinions.

### A. THE HISTORY OF THE FOURTH AMENDMENT

The Fourth Amendment to the U.S. Constitution provides:

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.<sup>7</sup>

In almost identical language, Article I, Section 8 of the Iowa Constitution states:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized.<sup>8</sup>

The history of the Fourth Amendment to the U.S. Constitution can be broken into three discrete blocks: the Framing Era (from the Framing to about 1925), the Incorporation Era (roughly 1925–1980), and the Modern Era (about 1980–present). The history of Iowa’s search and seizure law can be similarly delineated. Although somewhat arbitrary, these subdivisions highlight major shifts in constitutional interpretation and search and seizure doctrine.

#### 1. The Framing/Early Era

There were few Fourth Amendment cases during the years following the framing and ratification of the U.S. Constitution. Early Fourth Amendment cases are rare for several reasons. Foremost, the Bill of Rights did not apply

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7. U.S. CONST. amend. IV.

8. IOWA CONST. art. I, § 8.

against state governments, where most criminal investigations occurred.<sup>9</sup> Additionally, at the time of the framing—and long after—there were few federal crimes<sup>10</sup>; so, courts had few occasions to consider and define the scope of the Fourth Amendment.

Nevertheless, the fears that drove the Framers to draft and ratify the Fourth Amendment are well-documented. Primary in the Framers' minds was the abuse of "general warrants"—documents allowing government agents to enter a person's home and search for criminal activity without specifying the scope or target of the search.<sup>11</sup> The Framers found these general searches intolerable, a violation of the common law, and an affront to their rights as Englishmen.<sup>12</sup> Consequently, when framing their own government, the Framers enshrined the protections of the common law in the Constitution as prophylaxis against statutes permitting general warrants.<sup>13</sup> This adoption of common law principles illuminates the meaning of the word "unreasonable" as used in the Fourth Amendment. In the Framers' minds, "unreasonable" meant "against the common law."<sup>14</sup> As famed U.S. Supreme Court Justice and constitutional commentator Joseph Story noted, the proscription against unreasonable searches and seizures "is little more than the affirmance of a great constitutional doctrine of the common law."<sup>15</sup>

This background raises the question: What constituted an unreasonable search or seizure at common law? While a full canvass of the common law rules governing searches and seizures is beyond the scope of this Note,

9. *Barron v. City of Balt.*, 32 U.S. (7 Pet.) 243, 247–48 (1833) (indicating that the Bill of Rights did not apply to the states, allowing states to develop their own rules of criminal procedure without concern for the Federal Constitution).

10. See TASK FORCE ON THE FEDERALIZATION OF CRIM. L., AM. BAR ASS'N, *THE FEDERALIZATION OF CRIMINAL LAW* 5–7 (1998) (describing the recent rapid growth in federal criminal law and other federal statutes). See generally John S. Baker, Jr., *Measuring the Explosive Growth of Federal Crime Legislation*, 5 ENGAGE 23 (2004), <https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/BNvfVKmeVXxguulnQbIvKotdpzytrAliLKLilhaX.pdf> [<https://perma.cc/H6JR-4XCX>] (describing the rate of growth in federal criminal provisions).

11. Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1194 (2016).

12. See Letter from John Adams to William Tudor (Mar. 29, 1817), in 10 *THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES* 244, 247–48 (Charles Francis Adams ed., Bos., Little Brown & Co. 1856), [https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/2127/Adams\\_1431-10\\_Bk.pdf](https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/2127/Adams_1431-10_Bk.pdf) [<https://perma.cc/2D7G-28B2>] (describing the furor engendered by a trial over a writ of assistance as the birth of the fight for independence); see also Donohue, *supra* note 11, at 1194, 1238–41 (explaining the colonialists' outrage at the Crown's increasing use of writs of assistance—a type of general warrant that did not specify the location to be searched or the objects to be seized).

13. See Donohue, *supra* note 11, at 1193–94.

14. See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 687–93 (1999) (explaining that because the provenance of the phrase "against reason" was tantamount to "gross illegality or unconstitutionality, 'unreasonable searches and seizures' simply meant searches and seizures that were inherently illegal at common law").

15. 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* §§ 1894–1895, at 748 (Bos., Hilliard, Gray & Co. 1833).

modern trends in constitutional interpretation rely heavily on historical evidence; therefore, a brief overview of the most relevant cases behind the drafting of the Fourth Amendment will help to explain modern search and seizure law.

The historical record indicates that State agents in both England and colonial America conducted warrantless searches at their own physical or economic peril.<sup>16</sup> Attempted warrantless entry could be dangerous, because—under the Castle Doctrine—a homeowner was privileged to defend his dwelling with force against unwanted incursion.<sup>17</sup> If state agents found illicit goods or other incriminating evidence, their search would be justified.<sup>18</sup> However, if they failed to discover evidence of malfeasance, then the officer could be sued in a private trespass action.<sup>19</sup> Between trespass actions for chattels and the Castle Doctrine for real property, the Framers were used to significant protection from government intrusion upon their property.<sup>20</sup> Because the Fourth Amendment “is little more than the affirmance of a great constitutional doctrine of the common law,”<sup>21</sup> it is clear that the original understanding of “unreasonableness” was deeply intertwined with common law trespass.

Trespass, under both English and American common law at the time of the Framing was—and remains today—a broad, multifaceted doctrine.<sup>22</sup> However, the essential elements are fulfilled when a person intentionally

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16. *Bostock v. Saunders* (1773) 95 Eng. Rep. 1141, 1145 (KB) (awarding damages to a plaintiff after a customs officer illegally searched his property for contraband tea); *Wilkes v. Wood* (1763) 98 Eng. Rep. 489, 498–99 (KB) (awarding damages for a trespassory search and seizure of Wilkes’s property).

17. The Castle Doctrine held a man’s home to be his inviolable refuge. *Semayne’s Case* (1604) 77 Eng. Rep. 194, 195 (KB). Thus, unprivileged interference with his use and enjoyment of the property was illegal and could be rebuffed with force and arms. *Id.*; see *Donohue*, *supra* note 11, at 1193.

18. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 767 (1994).

19. See *Entick v. Carrington* (1765) 95 Eng. Rep. 807, 807–08 (KB); *Wilkes*, 98 Eng. Rep. at 489–90; *Leach v. Money* (1765), 97 Eng. Rep. 1075, 1075–76 (KB) (recording instances in which a king’s officer was sued for trespass against a citizen’s property). The common law trespassory standard offered two-pronged protection. The Castle Doctrine applied to real property, defending the home and its curtilage, i.e., the house and the area immediately surrounding it. *Castle Doctrine*, BLACK’S LAW DICTIONARY (11th ed. 2019); *Curtilage*, BLACK’S LAW DICTIONARY (11th ed. 2019). These protections did not extend to so-called “open fields,” or the area outside the home and its curtilage. See *Hester v. United States*, 265 U.S. 57, 59 (1924). As Oliver Wendell Holmes wrote, “[T]he special protection accorded by the Fourth Amendment to the people in their ‘persons, houses, papers and effects,’ is not extended to the open fields. The distinction between the latter and the house is as old as the common law.” *Id.* Chattels received similar protections, but the applicable doctrine was “trespass to chattels” rather than the Castle Doctrine. RESTATEMENT (FIRST) OF TORTS § 217 (AM. L. INST. 1934); see *Donahue*, *supra* note 11, at 1198.

20. See *Donohue*, *supra* note 11, at 1240–43.

21. 3 STORY, *supra* note 15, §§ 1894–1895, at 748.

22. See *Trespass*, BLACK’S LAW DICTIONARY (11th ed. 2019).

dispossesses another of a chattel<sup>23</sup> or uses or meddles with another's chattel without permission.<sup>24</sup> For an action of trespass, the plaintiff must have an ownership interest in the chattel with which the trespasser interfered.<sup>25</sup> A person could easily lose their property interest in a chattel if they abandoned the item.<sup>26</sup> Legal abandonment required the owner to voluntarily forsake his property without expectation or intent to take it up again.<sup>27</sup>

From the foregoing propositions, it appears that the classification of garbage as chattel or abandoned property is essential when determining whether it may be searched under the Fourth Amendment. If trash is classified as abandoned property, then no trespass action can lie, and police may search the discarded items without a warrant. However, if the discarder maintained a legal interest in the property, any warrantless search would likely run afoul of the Fourth Amendment. The common law view of the Fourth Amendment, where real property was insulated from government intrusion by the Castle Doctrine, and chattels were protected by the threat of trespass actions, lasted until the Era of Incorporation.

## 2. The Era of Incorporation

The Era of Incorporation saw massive expansion of Fourth Amendment jurisprudence. During this era, changes in the interpretation of the Fourth Amendment gave rise to a legal regime different from the Framing Era. Among the most influential changes were the incorporation of the Fourth Amendment against state governments, the adoption of the “exclusionary rule,” the advent of the *Katz* test for searches, the development of the “warrant preference,” and the redefinition of the word “reasonable” in the Fourth Amendment context.

After the Civil War and the ratification of the Reconstruction Amendments,<sup>28</sup> the U.S. Supreme Court used the Due Process Clause of the Fourteenth Amendment to incorporate most provisions of the Bill of Rights,<sup>29</sup>

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23. A chattel is defined as “[m]ovable or transferable property; personal property; esp., a physical object capable of manual delivery and not the subject matter of real property.” *Chattel*, BLACK’S LAW DICTIONARY (11th ed. 2019).

24. RESTATEMENT (SECOND) OF TORTS § 217 (AM. L. INST. 1965).

25. *See id.* §§ 216–17.

26. *See, e.g., Eads v. Brazelton*, 22 Ark. 499, 509–10 (1861); *Haslem v. Lockwood*, 37 Conn. 500, 506 (1871).

27. *Eads*, 22 Ark. at 509.

28. *The Reconstruction Amendments*, NAT’L CONST. CTR., <https://constitutioncenter.org/education/classroom-resource-library/classroom/the-reconstruction-amendments> [<https://perma.cc/4XWP-JC3T>] (categorizing the Thirteenth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution as the Reconstruction Amendments).

29. *See, e.g., Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating the protections of the First Amendment to the states); *Gideon v. Wainwright*, 372 U.S. 335, 339–40 (1963) (incorporating right to counsel); *Mapp v. Ohio*, 367 U.S. 643, 655–57 (1961) (incorporating the Fourth Amendment right against unreasonable searches and seizures as well as the exclusionary rule). Most of the provisions of the Bill of Rights have been incorporated against the states, a

rendering the amendments' protections binding against state governments.<sup>30</sup> Since states are the locus of most criminal prosecutions,<sup>31</sup> the Fourth Amendment's incorporation caused a glut of cases defining and redefining its protections.<sup>32</sup> The incorporation of the Fourth Amendment in *Mapp v. Ohio* imposed federal search and seizure doctrines on the states, most notably the so-called exclusionary rule.<sup>33</sup>

The adoption of the exclusionary rule is perhaps the most important change in the history of the Fourth Amendment.<sup>34</sup> In *Weeks v. United States*, the U.S. Supreme Court considered a petition from a man, Weeks, whose possessions were searched without a warrant.<sup>35</sup> Weeks petitioned the lower court for the return of his papers, arguing the authorities had no right to hold his documents because the papers were taken in violation of his constitutional rights.<sup>36</sup> The officials refused to return the papers, and Weeks was convicted of sending gambling tickets through the U.S. mail.<sup>37</sup> The Supreme Court, reviewing Weeks's conviction, determined he was a victim of a malicious seizure, and the district attorney's refusal to return the seized items left Weeks without Constitutional recourse.<sup>38</sup> Therefore, to protect the rights of citizens against the predations of recalcitrant officials, the Court adopted a rule barring from admission, in a federal criminal prosecution, any evidence

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notable exception being the right to a grand jury. *Incorporation Doctrine*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/incorporation\\_doctrine](https://www.law.cornell.edu/wex/incorporation_doctrine) [<https://perma.cc/B92X-BPDM>].

30. Kenneth Katkin, "*Incorporation*" of the Criminal Procedure Amendments: *The View from the States*, 84 NEB. L. REV. 397, 397-98 (2005).

31. See generally *The Justice System*, BUREAU OF JUST. STAT., <https://bjs.ojp.gov/justice-system/#the-structure-of-the-justice-system> [<https://perma.cc/AU3F-QMBT>] (identifying the states as the locus of most criminal law interactions).

32. See, e.g., *California v. Acevedo*, 500 U.S. 565, 579-80 (1991) (holding that police may search a container in a vehicle, even though they do not have a warrant or probable cause to search the entirety of the vehicle); *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968) (holding that, under the Fourth Amendment, a police officer may pat down a suspect's "outer clothing" for weapons if the officer believes based on experience that crime might "be afoot" and that the suspect might be armed and dangerous); *California v. Ciraolo*, 476 U.S. 207, 213-15 (1986) (holding that observation of a home's curtilage from public airways does not require a warrant); *United States v. Place*, 462 U.S. 696, 707 (1983) (holding that a dog sniff of luggage in a public setting is not a Fourth Amendment search).

33. See *Mapp*, 367 U.S. at 655-57.

34. At common law, evidence obtained by an illegal search was admissible against a criminal defendant. See *The King v. Warickshall* (1783) 168 Eng. Rep. 234, 235 (KB) ("This principle [that illegal confessions are inadmissible as evidence] has no application whatever as to the admission or rejection of facts, whether the knowledge of them be obtained in consequence of an extorted confession, or whether it arises from any other source; for a fact, if it exist at all, must exist invariably in the same manner, whether the confession from which it is derived be in other respects true or false.").

35. *Weeks v. United States*, 232 U.S. 383, 386 (1914).

36. *Id.* at 387-88.

37. *Id.* at 386-87.

38. *Id.* at 393.

obtained from an illegal search or seizure.<sup>39</sup> This rule came to be known as the exclusionary rule.<sup>40</sup> The *Weeks* ruling radically changed Fourth Amendment analysis: During the Framing Era, the potential punishment for illegal searches was monetary damages<sup>41</sup>; after *Weeks*, the exclusionary rule imperiled entire convictions if evidence was illegally obtained.

The Court later adopted a new test for determining what constitutes a search under the Fourth Amendment. During the Framing Era, searches were closely tied to property rights and trespass—physical intrusion by a government official upon private property.<sup>42</sup> During the Incorporation Era, the Court developed a new test that extended the sphere of protection beyond property interests.<sup>43</sup> In *Katz v. United States*, a man, Katz, was convicted on evidence obtained from a wiretap of a public phone booth.<sup>44</sup> Katz objected to the admission of the wiretap evidence, and the Supreme Court reviewed his case.<sup>45</sup> The Court reversed Katz's conviction and Justice Harlan's concurring opinion was subsequently adopted as the standard for determining whether a search has taken place.<sup>46</sup> Under Justice Harlan's concurrence, courts employ a two-step analysis: first, asking whether a person has a subjective expectation of privacy in the area searched; and second, evaluating whether that expectation of privacy is one society recognizes as reasonable.<sup>47</sup> By changing from a fixed property-rights-based rule to a flexible societal-expectations standard, the Court disturbed years of precedent and restructured the Fourth Amendment framework.

*Katz* marked a major change in the Court's attitude toward warrantless searches. Where, in the past, a warrantless search exposing criminal malfeasance would likely survive judicial scrutiny,<sup>48</sup> the Court now required a warrant for

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39. See *id.* at 398–99.

40. See *Exclusionary Rule*, BLACK'S LAW DICTIONARY (11th ed. 2019).

41. Davies, *supra* note 14, at 625–27.

42. See CYNTHIA LEE, L. SONG RICHARDSON & TAMARA LAWSON, CRIMINAL PROCEDURE: CASES AND MATERIALS 9 (2d ed. 2018).

43. See *id.*

44. *Katz v. United States*, 389 U.S. 347, 348 (1967).

45. *Id.* at 348–49.

46. *Id.* at 359; *id.* at 360–62 (Harlan, J., concurring); Peter Winn, *Katz and the Origins of the "Reasonable Expectation of Privacy" Test*, 40 MCGEORGE L. REV. 1, 7 (2009); see *Smith v. Maryland*, 442 U.S. 735, 740–42 (1979) (adopting implicitly Justice Harlan's concurrence as the standard for determining when a Fourth Amendment search has occurred).

47. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

48. See *Carpenter v. United States*, 138 S. Ct. 2206, 2244 (2018) (Thomas, J., dissenting) (“The common law required warrants for some types of searches and seizures, but not for many others. The relevant rule depended on context.”); David E. Steinberg, *An Original Misunderstanding: Akhil Amar and Fourth Amendment History*, 42 SAN DIEGO L. REV. 227, 229 (2005) (“In early America, most searches and seizures took place without a warrant.”).



a valid search.<sup>49</sup> This requirement is known as the warrant preference.<sup>50</sup> The warrant preference view differs from that of the Framing Era. During the Framing Era, the Court's primary concern was the common law standard of reasonableness.<sup>51</sup> Contrarily, the Incorporation Era focused on the search warrant.<sup>52</sup> This tension exists in the text of the Fourth Amendment, which is divided into two grammatically distinct clauses conjoined by the word "and."<sup>53</sup> First, the reasonableness clause: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." <sup>54</sup> Second, the warrant clause: "[N]o 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."<sup>55</sup> The juxtaposition between these clauses, combined with the Justices' divergent interpretations of the word "reasonable," has driven many shifts in Fourth Amendment jurisprudence.<sup>56</sup>

Another radical change during the Incorporation Era involved the Court's redefinition of the word "reasonable."<sup>57</sup> As explained above, historical sources indicate that the original understanding of reasonableness was

49. See *Katz*, 389 U.S. at 357 ("Searches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause,' for the Constitution requires 'that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . .'" (alterations in original) (citation omitted) (first quoting *Agnello v. United States*, 269 U.S. 20, 33 (1925); and then quoting *Wong Sun v. United States*, 371 U.S. 471, 481–82 (1963)); *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973) ("It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is '*per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions.'" (alteration in original) (quoting *Katz*, 389 U.S. at 357)).

50. See, e.g., *Jones v. United States*, 362 U.S. 257, 270–71 (1960) (indicating a disinterested adjudication of probable cause by a magistrate is preferred to the judgment of the individual constable); *United States v. Ventresca*, 380 U.S. 102, 105–08 (1965) (describing the Court's preference for a warrant as a bulwark against motivated reasoning on the part of zealous law enforcement officers).

51. Donohue, *supra* note 11, at 1270–71.

52. *California v. Acevedo*, 500 U.S. 565, 581–82 (1991) (Scalia, J., concurring) ("By the late 1960's, the preference for a warrant had won out, at least rhetorically.").

53. See Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977, 992–95.

54. U.S. CONST. amend. IV.

55. *Id.*

56. See, e.g., *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) ("[B]ecause the ultimate touchstone of the Fourth Amendment is '*reasonableness*,' the warrant requirement is subject to certain exceptions." (emphasis added)); cf. *California v. Ciraolo*, 476 U.S. 207, 211 (1986) ("The touchstone of Fourth Amendment analysis is whether a person has a '*constitutionally protected reasonable expectation of privacy*.'" (emphasis added) (quoting *Katz*, 389 U.S. at 360 (Harlan, J., concurring))).

57. In *State v. Wright*, the Iowa Supreme Court identified the reinterpretation of reasonableness as a sea change in Fourth Amendment doctrine. See *State v. Wright*, 961 N.W.2d 396, 407 (Iowa 2021).

inextricably linked to the “reason” of the common law.<sup>58</sup> Hence, the Framing Era reasonableness test was an objective inquiry into which searches were allowed under English common law.<sup>59</sup> During the Incorporation Era, the Court strayed from this objective historical analysis, developing a standard of reasonableness centered on societal expectations. Perhaps the earliest case illustrating this interpretive shift is *Carroll v. United States*.<sup>60</sup> Writing for the Court, Chief Justice Taft proclaimed, “[o]n reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, . . . the search and seizure are valid.”<sup>61</sup> Taft relied not on the formal “reason” of the common law, but rather on the subjective understanding of an individual officer.<sup>62</sup> Taft’s formulation carried on throughout the era; subsequent courts applied and reapplied the same or similar subjective reasonableness tests.<sup>63</sup> These precedents etiolated the original understanding of the Fourth Amendment.

The Incorporation Era was marked by sudden shifts in the nature of search and seizure jurisprudence. Changing from property-based doctrines to the *Katz* test, the adoption of the exclusionary rule, the explosion in Fourth Amendment cases caused by incorporation, and the Court’s shift to a subjective reasonableness standard each shoveled earth over the shallow grave of common law search and seizure. However, the moldering corpse would soon revive, finding new life in the Modern Era of Fourth Amendment jurisprudence.

### 3. The Modern Era

By the end of the Incorporation Era, the Fourth Amendment standard was, in the words of Justice Stewart, “that a search conducted without a warrant issued upon probable cause is ‘*per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions.’”<sup>64</sup> As personnel

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58. Donohue, *supra* note 11, at 1192.

59. *Id.* (noting that in the seventeenth century, “unreasonable” meant “against reason,” or in other words, “against the reason of the common law”).

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

61. *Id.*

62. *See id.*

63. *See, e.g.,* *California v. Carney*, 471 U.S. 386, 395 (1985) (holding that a reasonable magistrate could have issued a warrant on the evidence present to the DEA officers prior to the search); *Chimel v. California*, 395 U.S. 752, 762–64 (1969) (explaining the situations in which police may “reasonably” conduct a warrantless search based on probable cause); *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968) (finding that an officer had reasonable grounds to stop a suspicious looking person and “conduct a carefully limited search of the outer clothing” despite not procuring a warrant); *see also* Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1470 (1985) (describing the Court’s approach to reasonableness as providing *ex post facto* rationalizations for apparently reasonable actions that did not comply with precedential rules).

64. *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (alteration in original) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

and judicial philosophies changed, the Court's focus turned from the warrant requirement to the exceptions. By the early 1990s, the Court had developed no fewer than twenty exceptions to the warrant requirement,<sup>65</sup> and by the mid-2000s, the "touchstone" of the Fourth Amendment was the "reasonableness" of the search rather than the presence of a warrant.<sup>66</sup> Moreover, the long-forsaken trespassory standard for searches made a triumphal return.<sup>67</sup> Although it is beyond the scope of this Note to explore all the changes in Fourth Amendment jurisprudence during the Modern Era, some salient trends are indispensable for understanding the law surrounding trash-rip searches. The most important are the garbage search exception to the warrant requirement and the rebirth of the trespassory standard.<sup>68</sup> Because Iowa's search and seizure jurisprudence generally tracks with federal precedent,<sup>69</sup> these trends provide useful background into the Iowa Supreme Court's decision in *State v. Wright*.

Among the numerous exceptions to the warrant requirement created during the Modern Era was the garbage search exception recognized in *California v. Greenwood* in 1988.<sup>70</sup> In *Greenwood*, a suspected drug trafficker's garbage was intercepted by the police and found to contain illicit paraphernalia.<sup>71</sup> Greenwood, the defendant, was arrested, but because the garbage search was warrantless, lower courts dismissed the charges.<sup>72</sup> The case made its way to the U.S. Supreme Court.<sup>73</sup> The Court applied the *Katz* test,<sup>74</sup> finding no reasonable expectation of privacy in the content of refuse.<sup>75</sup> As the Court noted:

Here, we conclude that respondents exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection. It is common knowledge that plastic garbage bags left on

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65. See Bradley, *supra* note 63, at 1473–74 (cataloging the voluminous exceptions to the warrant requirement).

66. See *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

67. See generally *United States v. Jones*, 565 U.S. 400 (2012) (situationally reviving the trespassory test for search and seizure).

68. See *The Supreme Court, 1987 Term — Leading Cases*, 102 HARV. L. REV. 143, 191 (1988).

69. *State v. Brown*, 930 N.W.2d 840, 847 (Iowa 2019) ("We generally 'interpret the scope and purpose of the Iowa Constitution's search and seizure provisions to track with federal interpretations of the Fourth Amendment' because of their nearly identical language." (quoting *State v. Christopher*, 757 N.W.2d 247, 249 (Iowa 2008))).

70. See generally *California v. Greenwood*, 486 U.S. 35 (1988) (recognizing a garbage-rip exception to the warrant requirement).

71. *Id.* at 37–38.

72. *Id.* at 38–39.

73. *Id.* at 39.

74. First, did the defendant have a reasonable expectation of privacy in the items searched? *Katz v. United States*, 389 U.S. 347, 361–62 (1967) (Harlan, J., concurring). Second, is that expectation one that society is willing "to recognize as 'reasonable'"? *Id.*

75. *Greenwood*, 486 U.S. at 39–41.

or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public.<sup>76</sup>

With this case, the Court determined a warrant is unnecessary to validate a garbage search under the Federal Constitution. Although the Court adhered to the *Katz* standard in *Greenwood*, it would soon restore the trespassory standard.

As discussed above, the trespassory standard for searches, regnant during the Framing Era, fell out of favor during the Era of Incorporation.<sup>77</sup> However, in 2012, the Court revived the trespassory standard as a method for determining when a search has occurred.<sup>78</sup> In *United States v. Jones*, government agents received a warrant to attach a global positioning system (“GPS”) to the undercarriage of a car used by a suspected drug dealer, Jones.<sup>79</sup> A few days after the agents’ warrant expired, they attached a GPS tracker to Jones’s car, surveilling the vehicle for almost a month thereafter.<sup>80</sup> The government indicted Jones for conspiracy to distribute drugs; Jones filed a motion to suppress the GPS evidence, claiming a violation of his Fourth Amendment rights.<sup>81</sup> Justice Scalia, writing for the Court, found the *Katz* test did not erase the older trespassory test; rather, it supplemented the original test while preserving the property-centric core of the Fourth Amendment.<sup>82</sup> From this premise, Justice Scalia reasoned that the government violated Jones’s freedom from unreasonable government intrusion.<sup>83</sup> The *Jones* decision opened the door on Fourth Amendment law, allowing the original property-based tests for search to once again sway Fourth Amendment analysis.

The Court has not, since *Jones*, made significant changes in its Fourth Amendment analysis; however, justices have intimated their willingness to diverge from certain trends in Fourth Amendment jurisprudence. For instance, Justice Thomas has expressed displeasure with the *Katz* standard and seems willing to dispense with the reasonable expectation of privacy test

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76. *Id.* at 40 (footnotes omitted).

77. *See supra* Section I.A.2.

78. *See United States v. Jones*, 565 U.S. 400, 405–06 (2012).

79. *Id.* at 402–03.

80. *Id.* at 403.

81. *Id.*

82. *Id.* at 406–08 (explaining the nexus between the *Katz* reasonable expectation of privacy test and the older property-based test for search and seizure).

83. *Id.* at 408–11.

altogether.<sup>84</sup> Likewise, Justices Alito<sup>85</sup> and Gorsuch<sup>86</sup> have shown themselves willing to overturn, or at the very least modify, the *Katz* test, developing in its stead a bright-line, property-focused standard for deciding Fourth Amendment issues.

The history of Fourth Amendment jurisprudence is long and varied. Its tenets weigh heavily on state courts deciding similar search and seizure questions. Iowa is no exception; its constitutional precepts are closely bound to the decisions of federal courts. Because Iowa law has historically tracked Fourth Amendment law, an overview of the parallels between state and federal law is essential for understanding the state of Iowa's modern search and seizure decisions.

### B. IOWA ARTICLE ONE SECTION EIGHT JURISPRUDENCE

The current Iowa Constitution was adopted in 1857.<sup>87</sup> It protects and codifies many of the same rights protected by the Federal Constitution.<sup>88</sup> Like the Federal Constitution, the Iowa Constitution's history of search and seizure jurisprudence can be broken into three discrete periods: the (1) Framing, (2) Incorporation, and (3) Modern Eras. The Iowa Constitution has been interpreted in parallel with the Federal Constitution, so the protections afforded by the state constitution have been almost identical to those provided at the federal level.<sup>89</sup> Indeed, the Iowa Supreme Court's decisions have "quite consistently tracked with prevailing federal interpretations."<sup>90</sup>

Hence, during Iowa's Framing Era, the Iowa Supreme Court interpreted article I, section 8 of the Iowa Constitution—the Iowa equivalent of the Fourth

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84. See *Carpenter v. United States*, 138 S. Ct. 2206, 2235–46 (2018) (Thomas, J., dissenting) (explaining the provenance of the reasonable expectation of privacy test and its lack of any grounding in the Fourth Amendment's text or history and proposing a return to a strict textual approach to the interpretation of the Fourth Amendment).

85. See *id.* at 2246–61 (Alito, J., dissenting) (expressing displeasure with the current state of Fourth Amendment law and extolling the virtues of the property standards of the Framing Era).

86. See *id.* at 2261–72 (Gorsuch, J. dissenting) (describing the *Katz* test as complex, ahistorical, amorphous, and overly malleable).

87. *Constitution*, THE IOWA LEGISLATURE, <https://www.legis.iowa.gov/law/statutory/constitution> [<https://perma.cc/HYZ6-JT6S>] ("The document drafted and amended by the 1857 convention is the current, original Constitution of the State of Iowa.")

88. Compare IOWA CONST., with U.S. CONST. (revealing the overlapping protections of the constitutions).

89. *State v. Ochoa*, 792 N.W.2d 260, 265–66 (Iowa 2010). A notable exception to this rule is Iowa's early adoption of an exclusionary rule in criminal cases. See *State v. Height*, 91 N.W. 935, 940 (Iowa 1902) ("Without further elaboration or the multiplication of authorities, it is enough to say that the officers acted unlawfully in compelling defendant to submit to this examination, and all evidence with reference to information secured thereby should have been excluded on defendant's objection.")

90. *Ochoa*, 792 N.W.2d at 266 (quoting *Kain v. State*, 378 N.W.2d 900, 902 (Iowa 1985)).

Amendment—along common law property rights lines.<sup>91</sup> For example, in the early case of *McClurg v. Brenton*, the Iowa Supreme Court found a jury could impose exemplary damages against trespassers committing an unlawful search.<sup>92</sup> The court provided:

The mere fact that a man is an officer, whether of high or low degree, gives him no more right than is possessed by the ordinary private citizen to break in upon the privacy of a home and subject its occupants to the indignity of a search for the evidences of crime, without a legal warrant procured for that purpose.<sup>93</sup>

Just as the Federal Constitution affords a greater degree of protection to those objects enumerated in its text,<sup>94</sup> so does the Iowa Constitution's most strongly protect articles listed in the text of article I, section 8.<sup>95</sup> As the U.S. Supreme Court began to alter its interpretation of the Fourth Amendment, Iowa courts altered their methods for interpreting the state constitution.

Again, hewing closely to federal trends, the Iowa Supreme Court adopted the warrant preference<sup>96</sup> and *Katz* test during the Incorporation Era.<sup>97</sup> In adopting the federal warrant-preference regime, Iowa courts imported many of the existing exceptions to the warrant preference. Among these exceptions are the community caretaking exception,<sup>98</sup> the automobile search exception,<sup>99</sup> and the exigent circumstances exception.<sup>100</sup> As with federal jurisprudence, many of the doctrines regnant during the Incorporation Era influence Iowa's recent search and seizure law.

91. See *McClurg v. Brenton*, 98 N.W. 881, 882 (Iowa 1904) (holding that a police officer has “no more right” than a citizen to break into the privacy of a home). See generally *Pomroy & Co. v. Parmlee*, 9 Iowa 140 (1859) (applying common law in the case of a police officer search and seizure); *State v. Ward*, 36 N.W. 765 (Iowa 1888) (applying the common law property analysis to Iowa search and seizure cases).

92. *McClurg*, 98 N.W. at 882–83.

93. *Id.* at 882

94. See *United States v. Jones*, 565 U.S. 400, 411 (2012).

95. See *State v. Wright*, 961 N.W.2d 396, 405 (Iowa 2021).

96. See, e.g., *State v. Spier*, 173 N.W.2d 854, 857 (Iowa 1970) (indicating the court prefers the deliberate process of acquiring a warrant to the ad hoc actions of police officers).

97. See, e.g., *State v. Dickerson*, 313 N.W.2d 526, 531–32 (Iowa 1981) (applying the *Katz* reasonable expectation of privacy standard to a search of the defendant's vacant house); *State v. Bakker*, 262 N.W.2d 538, 546–47 (Iowa 1978) (describing the succession to the throne of the *Katz* standard over the common law standard for search and seizure); *State v. Hansen*, 286 N.W.2d 163, 166 (Iowa 1979) (referencing the *Katz* reasonable expectation of privacy standard).

98. E.g., *State v. Crawford*, 659 N.W.2d 537, 543–44 (Iowa 2003) (holding a search of defendant's vehicle was permissible under the “community caretaking” exception to the warrant requirement).

99. E.g., *State v. Storm*, 898 N.W.2d 140, 142 (Iowa 2017) (“retain[ing] the automobile exception” to the warrant preference).

100. E.g., *State v. Simmons*, 714 N.W.2d 264, 273–74 (Iowa 2006) (explaining the scope and import of the exigent circumstances exception).

In the Modern Era, the Iowa Supreme Court has changed its approach when interpreting article I, section 8 of the Iowa Constitution. In previous eras, Iowa courts tracked close to the federal interpretation of search law. This method makes sense because the Federal Constitution sets a floor beneath which state constitutions may not descend, but recently Iowa courts have begun interpreting the Iowa Constitution as more protective against searches than the Federal Constitution.<sup>101</sup> In other words, the Iowa Supreme Court has built upon the floor provided by the Federal Constitution—offering more protection under the Iowa Constitution than the Federal Constitution. A few examples of this tendency are worth mentioning.

In *State v. Ochoa*, the Iowa Supreme Court departed from federal precedent, finding the Iowa Constitution protects a parolee’s rights against suspicionless searches.<sup>102</sup> Similarly, the Iowa Supreme Court determined, in *State v. Coleman*, that a law enforcement officer is proscribed from extending a traffic stop once the undergirding purpose of the stop is no longer present,<sup>103</sup> parting ways with federal precedent.<sup>104</sup> Again, the Iowa Supreme Court went its own way interpreting search and seizure law when it determined the good-faith exception to the exclusionary rule recognized under the Fourth Amendment<sup>105</sup> does not apply under article I, section 8 of the Iowa Constitution.<sup>106</sup>

Changes in Iowa’s interpretation of its constitution and trends in the interpretation of the Federal Constitution set the stage for the tectonic shift in search and seizure jurisprudence worked by *State v. Wright*. How this shift ought to be viewed and its potential ramifications on Iowa law enforcement and jurisprudence will be addressed later in this Note.

### C. UNDERLYING FACTS OF STATE V. WRIGHT

Sheriff’s Deputy Tami Cavett suspected Nicholas Wright, a citizen of Clear Lake, Iowa, of selling illegal drugs.<sup>107</sup> Deputy Cavett disclosed her

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101. See *State v. Ochoa*, 792 N.W.2d 260, 292 (Iowa 2010); *State v. Coleman*, 890 N.W.2d 284, 285 (Iowa 2017); *State v. Cline*, 617 N.W.2d 277, 292–93 (Iowa 2000). These cases represent departures from the Federal Constitution, allowing greater protections under the Iowa Constitution. The cases are further described in the following paragraphs.

102. *Ochoa*, 792 N.W.2d at 292. The precedent from which Iowa departed was *Samson v. California*, in which the Supreme Court determined the Fourth Amendment allows a police officer to conduct “a suspicionless search of a parolee.” *Samson v. California*, 547 U.S. 843, 857 (2006).

103. *Coleman*, 890 N.W.2d at 285.

104. See *Rodriguez v. United States*, 575 U.S. 348, 354–55 (2015) (explaining a traffic stop may be extended so long as the extension does not carry past “the time reasonably required to” issue a ticket (quoting *Illinois v. Caballes*, 543 U.S. 405, 407 (2005))).

105. See *United States v. Leon*, 468 U.S. 897, 920–23 (1984) (recognizing a good-faith exception to the exclusionary rule).

106. *State v. Cline*, 617 N.W.2d 277, 292–93 (Iowa 2000) (denying the existence of a good-faith exception to the exclusionary rule under the Iowa Constitution).

107. *State v. Wright*, 961 N.W.2d 396, 400 (Iowa 2021).

information to Officer Brandon Heinz, who began investigating Mr. Wright—also known as “Beef.”<sup>108</sup> Later, investigators shifted their focus to Wright’s residence.<sup>109</sup> Heinz surveilled Wright’s home and, on three occasions, removed garbage from the cans in the alley behind the dwelling.<sup>110</sup>

The town of Clear Lake protects the health of its residents by restricting the disposal of garbage.<sup>111</sup> To that end, the city regulates open burning,<sup>112</sup> littering,<sup>113</sup> open dumping,<sup>114</sup> and the storage of toxic or otherwise hazardous waste.<sup>115</sup> Most importantly, the city prohibits anyone, except authorized “solid waste collector[s],” from “[t]ak[ing] or collect[ing] any solid waste which has been placed out for collection on any premises.”<sup>116</sup> A collector is defined as “any person authorized to gather solid waste from public and private places.”<sup>117</sup>

During his searches, Officer Heinz, without a search warrant, entered a public alley, peered into Wright’s open trashcans, and removed opaque garbage bags.<sup>118</sup> Heinz could not discern the contents of the sacks, and he took them to the police station where he looked through their contents.<sup>119</sup> As expected, Heinz discovered evidence of morphine manufacture, including small fabric remnants with poppy seeds clinging to them, empty poppy seed containers, and pieces of mail identifying Wright as the homeowner.<sup>120</sup> Heinz submitted the scraps of fabric to the Division of Criminal Investigation, which identified a cocktail of morphine and cocaine residue on the discarded items.<sup>121</sup> With these incriminating items in his possession, Heinz easily obtained a search warrant for Wright’s residence, predicating the warrant “on the evidence obtained from . . . Wright’s” garbage.<sup>122</sup> Warrant in hand, police searched Wright’s house, finding “two grams of marijuana and several . . . Vyvanse [pills], a . . . drug for which Wright had no prescription.”<sup>123</sup> “The State charged Wright with three counts of unlawful [drug] possession . . . .”<sup>124</sup>

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108. *Id.* at 400.

109. *Id.* at 400–01.

110. *Id.*

111. CLEAR LAKE, IOWA, CODE OF ORDINANCES §105.01 (2003).

112. *Id.* §105.05.

113. *Id.* §105.07.

114. *Id.* §105.08.

115. *Id.* §105.09.

116. *Id.* §105.11(4).

117. *Id.* § 105.02(1).

118. *State v. Wright*, 961 N.W.2d 396, 400–01 (Iowa 2021).

119. *Id.* at 401.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*



*D. PROCEDURAL HISTORY OF STATE V. WRIGHT*

After being charged, “Wright . . . filed a motion to suppress [the] evidence” obtained from the officer’s garbage search, arguing that the warrantless search violated his right against unreasonable searches and seizures under the Federal and Iowa Constitutions.<sup>125</sup> “The district court denied [Wright’s] motion.”<sup>126</sup> After plea negotiations and trial, Wright was found guilty on two of the three counts and sentenced to “two days in jail.”<sup>127</sup> Wright appealed, and his appeal was transferred to the Iowa Court of Appeals, which “affirmed the district court’s denial of Wright’s [suppression] motion.”<sup>128</sup> The court of appeals held, first, that Wright, in placing his garbage cans in the public alley, erased any reasonable expectation of privacy in the receptacle’s content, and second, that Officer Heinz had not trespassed against Wright’s property.<sup>129</sup> Undeterred, Wright requested further review from the Iowa Supreme Court, which granted his application on the state constitutional claim.<sup>130</sup>

*E. AT THE IOWA SUPREME COURT*

Wright’s case exposed a rift in the Iowa Supreme Court, spawning a three-justice plurality, a fractious concurrence, and three acrimonious dissents.<sup>131</sup> The conflict arose from differences in judicial philosophy and views on the permissibility of trash-rip searches under the Iowa Constitution. Although Wright’s conviction was conditionally affirmed,<sup>132</sup> the court’s opinions promise a reimagining of search and seizure law, the repercussions of which may be felt for years.

To understand the dissension among the justices, the holding of the court, and potential problems arising therefrom, it is essential to adumbrate the history of search and seizure jurisprudence in the United States broadly, and Iowa specifically. Although this Note’s principal concern is with the Iowa Constitution, it is impossible to extricate Iowa’s search and seizure rules from the context of federal law; therefore, this Note will describe the relevant federal search jurisprudence.

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125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *State v. Wright*, No. 19-0180, 2020 WL 564938, at \*5 (Iowa Ct. App. Feb. 5, 2020).

130. *Wright*, 961 N.W.2d at 402.

131. *See generally id.* (featuring a plurality opinion from Justice McDonald, a concurrence from Justice Appel, and dissents from Justices Christensen, Waterman, and Mansfield). I call the majority opinion a plurality because, while Justices McDonald, Oxley, and McDermott are in concert, Justice Appel’s concurrence is barely reconcilable with the court’s main opinion.

132. *Wright*, 961 N.W.2d at 420.

*F. THE OPINIONS*

*State v. Wright* revealed serious philosophical differences between the Iowa Supreme Court justices. The case resulted in five opinions: a three-justice plurality, a concurrence, and three dissents. To illuminate the fractures between the justices and canvass the jurisprudence undergirding the disagreements, this Note reviews the opinions and highlights the interpretive method preferred by each justice.

*1. The Plurality Opinion*

Writing for the court, Justice Christopher McDonald explored the history, text, and context of the Iowa Constitution,<sup>133</sup> concluding that a state constitution may provide more, less, or the same amount of protection as the Federal Constitution.<sup>134</sup> That decided, the plurality split from federal search and seizure jurisprudence, adopting a trespassory standard. The court determined garbage is an “effect” or contains “effects” for article I, section 8 purposes<sup>135</sup>; therefore, Officer Heinz trespassed against Wright’s chattels, rendering the search illegitimate.<sup>136</sup> Rather than stopping at a trespassory analysis, the court took two more steps: first, excoriating the *Katz* reasonable-expectation-of-privacy test,<sup>137</sup> then applying the disfavored *Katz* standard when evaluating whether Wright’s garbage was to receive protection from search.<sup>138</sup> By applying both the common law standard and the modern, privacy-focused approach, the court seemed prepared to overturn the *Katz* standard under the Iowa Constitution but did not explicitly abandon the *Katz* test.<sup>139</sup> Speculation on underlying motives may be ill-advised, but it may be that the court’s unwillingness to fully repudiate *Katz* was a function of its desire to form a majority consensus in Wright’s case. This supposition is bolstered by the content of the concurring opinion.

*2. The Concurring Opinion*

Iowa Supreme Court Justice Brent Appel concurred in the judgement of the court; however, his agreement with the plurality was limited to certain

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133. *Id.* at 402.

134. *Id.* at 403 (citing Neil McCabe, *The State and Federal Religion Clauses: Differences of Degree and Kind*, 5 ST. THOMAS L. REV. 49, 50 (1992)). McCabe indicates that, in cases where a state constitution affords less protection than the Federal Constitution, the Federal Constitution’s protections kick in and the decision will be made under existing federal law. *McCabe, supra*, at 50.

135. *See Wright*, 961 N.W.2d at 414.

136. *Id.* at 417, 420.

137. *Id.* at 411.

138. *Id.* at 417–20 (applying a *Katz* analysis, finding Wright still had a reasonable expectation of privacy in his discarded items).

139. *See id.* at 410–11, 417–20 (declining to abandon the *Katz* standard, despite the harsh criticism leveled thereat).

portions of its analysis.<sup>140</sup> In Justice Appel's view, the protections afforded by the search and seizure clauses are an indispensable bulwark against authoritarianism; a bulwark that, he contends, has been perniciously eroded by recent U.S. Supreme Court decisions.<sup>141</sup> Justice Appel would prefer that Iowa depart from the line of federal search and seizure cases and instead adopt a jurisprudence based on "the libertarian principles behind search and seizure law."<sup>142</sup> He argues that the facts of Wright's case lead inexorably to suppression of the evidence obtained by the search.<sup>143</sup> In other words, as he sees it, regardless of whether the court applies the *Katz* test or the trespassory test, the same result follows: The evidence was unreasonably obtained and must be excluded.<sup>144</sup> Triangulating between the originalist approach taken by the plurality and the "libertarian" or "anti-authoritarian" approach preferred by the concurrence, it is reasonable to conclude the court did not abandon *Katz*, lest the decision be fragmented beyond reconciliation.<sup>145</sup> Yet, the compromise reached by the plurality and concurrence could not command the support of the full court; three justices dissented.

### 3. The Dissenting Opinions

Justices Waterman and Mansfield and Chief Justice Christensen dissented from the court's judgment. Each justice raised their own concerns about the scope, import, and reliability of the court's holding. Since many of the issues noted by the justices will be addressed in a later Section of this Note, a brief overview of their preferred reasoning and outcomes will suffice.

Chief Justice Christensen would have affirmed the lower court's ruling and analyzed the case under the federal framework provided in *California v. Greenwood*.<sup>146</sup> Moreover, the Chief Justice expressed concern at the plurality's willingness to overlook procedural minutiae like error preservation.<sup>147</sup> Finally, Chief Justice Christensen would have taken a more restrained approach,

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140. *Id.* at 420–21 (Appel, J., concurring) (describing the agreement between the concurrence and the plurality and highlighting the difference in judicial philosophy between the plurality and the concurrence).

141. *Id.* at 420–22 (expounding the anti-authoritarian purpose of the search and seizure clauses and the danger posed by recent "rights-restricting" decisions in the federal courts).

142. *See id.* at 423–25 (propounding Justice Appel's preferred legal regime and attacking cases that whittled away search and seizure protections).

143. *Id.* at 428–29.

144. *Id.* (describing the case as "a belt-and-suspenders case" because whichever framework is employed the result is suppression of the evidence).

145. Given the plurality's animosity toward the *Katz* standard, it seems the impetus to retain the reasonable-expectation-of-privacy test must have come from the maximalist approach taken by Justice Appel. This conjecture is reinforced by the difference in judicial philosophies on the court: The plurality takes an originalist approach to analyzing search and seizure but refrains from eliminating the *Katz* test. *See id.* at 412–14, 417–20 (plurality opinion). A strange result, because the *Katz* test is not even suggested in cases before the Incorporation Era.

146. *Id.* at 432 (Christensen, C.J., dissenting).

147. *Id.* at 430–32.

coordinating Iowa's search and seizure law with federal precedent to promote clarity and public safety.<sup>148</sup>

In his dissent, Justice Waterman attacked the court's opinion, objugating the plurality's "faux originalism, 'living' constitutionalism, and ahistorical analysis."<sup>149</sup> Trash-rip searches and their historical counterparts, Justice Waterman argued, have always been a tool in the investigator's kit; depriving law enforcement of this invaluable technique would have unwholesome consequences for public safety.<sup>150</sup> These practical points in view, Justice Waterman would have stayed the course, adhering to federal precedent by applying the *California v. Greenwood* framework to Wright's case.<sup>151</sup>

In a colorful dissent, Justice Mansfield argued vehemently against the conclusions of both the plurality and the concurrence.<sup>152</sup> In Justice Mansfield's opinion, the court reasoned poorly, waffling between the dipoles of the common law trespass test and *Katz*'s reasonable-expectation-of-privacy test and, in the end, failing to achieve a satisfactory rapprochement between the two.<sup>153</sup> Finally, Justice Mansfield prophesied the demise of *State v. Wright* as an applicable precedent, writing, "I respectfully predict [the plurality's approach] will have a short life as a precedent."<sup>154</sup>

As evidenced by the numerous, sharply worded opinions, Wright's case created a great deal of friction between the justices. Despite the disagreements on the court, the framework developed by the plurality has much to recommend it.

## II. ANALYSIS

To explain what transpired at the Iowa Supreme Court and its potential repercussions, this Note employs a dual analysis: first, exploring the advantages of the *Wright* framework, then considering the problems likely to flow from the court's decision.

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148. *Id.* at 452 (explaining the problems with the plurality's approach, opining against the uncertainty created by the plurality opinion and expounding the value of a clear legal standard in criminal law contexts).

149. *Id.* at 453 (Waterman, J., dissenting).

150. *Id.* at 455 ("Trash rips are an important investigatory tool for law enforcement; they gather evidence leading to search warrants that shut down meth labs and other societal scourges.").

151. *Id.* at 456 ("I would follow *California v. Greenwood*, and our state's published appellate decisions holding that police do not need a warrant to search garbage placed out for collection." (citation omitted)).

152. *See id.* at 458-65 (Mansfield, J., dissenting) (criticizing the reasoning, holding, and repercussions of the plurality and concurring opinions).

153. *See id.* at 462-63 (pointing out the plurality's inconsistency in analyzing the trash pull). Justice Mansfield explains that the plurality first relies on notions of property law then suddenly shifts, applying the *Katz* construction. *Id.*

154. *Id.* at 464.

A. THE ADVANTAGES OF THE WRIGHT FRAMEWORK

The advantages of the holding in *Wright* stem from its judicial philosophy. The Iowa Supreme Court interpreted the text of the Iowa Constitution through the lens of history,<sup>155</sup> an approach commonly called originalism.<sup>156</sup> Originalism is advantageous because it leads to predictable outcomes; constrains and legitimates judicial power; and promotes civic engagement. These advantages will be addressed in turn.

Complex systems advantage those with resources to navigate them.<sup>157</sup> Unpredictability is a form of complexity.<sup>158</sup> Courts are unpredictable when they rely on tests that vary widely in application and outcome.<sup>159</sup> The more unpredictable and complex the legal system becomes, the more inequality creeps in.<sup>160</sup> Personal prejudice may be obscured by impenetrable legalisms, but it is clearly seen when transgressing a bright line.

Originalism is by no means a panacea to the problem of unpredictability; its own adherents frequently disagree on core tenets of the philosophy.<sup>161</sup> However, originalism acts as an anchor, mooring judges' decisions in a transparent worldview. By focusing on historical analysis, judges constrain

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155. *Id.* at 402 (plurality opinion) (“In determining the minimum degree of protection the constitution afforded when adopted, we generally look to the text of the constitution as illuminated by the lamp of precedent, history, custom, and practice.”).

156. Originalism is defined as “[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted; specif., the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect.” *Originalism*, BLACK’S LAW DICTIONARY (11th ed. 2019).

157. A good example of this phenomenon is the U.S. tax code. See Deborah H. Schenk, *Simplification for Individual Taxpayers: Problems and Proposals*, 45 TAX L. REV. 121, 127–29 (1989). People with expansive economic resources can lobby Congress, hire top-of-the-line tax personnel, and more easily navigate the vagaries of the tax code. Contrarily, in a simplified system with a flat tax rate of fifteen percent, all taxpayers face the same burden, and the apparatus necessary to use obscure provisions of the tax code evaporates.

158. Again, an example is illustrative. Consider two traffic laws: (1) All red cars shall be ticketed; and (2) at the discretion of the enforcing officer, cars of an offending color shall be ticketed. While both laws are hopelessly arbitrary, the first provides a predictable system within which a person might adjust his behavior to get a uniform result. The owner of the red car would be put on notice, and if he is a prudent person, he will sell his car to avoid the law’s sanction. Contrarily, the second law introduces an inescapable element of chaos. No car owner can predict when his paintjob will be deemed “offensive,” and, although he may try to sell his car in favor of a scooter or other inoffensive transport, some nontrivial number of commuters will be forced to work within the protean system. The mutability of the legal system described above is a form of complexity.

159. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) (describing the advantages of a predictable system of law and explaining the disadvantages of nebulous tests, like for example, the “‘totality of the circumstances’ test”).

160. *Id.* at 1179–80 (describing the binding force clear rules have on judges).

161. See generally *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (demonstrating the philosophical disagreements between Justices Kavanaugh, Gorsuch, Thomas, and Alito).

themselves and open their decisions to public censure.<sup>162</sup> Historical facts can be controverted with evidence; it is far harder to critique a “totality of the circumstances” finding that “on balance” one case came out one way while “on balance” a similar case came out differently.

Originalism constrains judicial power. When legislatures pass laws, they do so at the behest of their constituents. When they act in accord with the popular will, they may be rewarded with reelection; when they act contrary to the popular will, they risk defeat. Laws that survive bicameralism—the two houses of Congress—and presentment—presidential signature or veto—are products of popular sovereignty. In the United States, laws are written; the words take their meaning not merely from syntax but also from the time in which they are used—their context.<sup>163</sup> When judges focus their inquiry on the text and context of a given law, they effectuate the will of the people as expressed in the people’s laws and avoid the pitfalls of unfettered judicial power. When citizens understand a court’s reasoning, they will feel they have a stake in the government, increasing institutional legitimacy. As Justice Antonin Scalia wrote, “[r]udimentary justice requires that those subject to the law must have the means of knowing what it prescribes.”<sup>164</sup> Judges who take the opposite approach, expanding their own discretion by employing complex “balancing tests” or “totality of the circumstances” review arrogate to themselves a form of ill-defined power that corrodes the legitimacy of the courts.<sup>165</sup>

Again, originalism is not a cure-all. There will be cases where the historical context is so sparse or the phraseology so obscure that the only remedy is to balance factors or consider the totality of the circumstances. Moreover, there are times when originalism will not only fail to effectuate the popular will but will actively stymie popular preference. The U.S. Constitution, for all its deference to popular sovereignty, contains provisions that are fundamentally anti-majoritarian.<sup>166</sup> Where the popular will and the text of the

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162. Scalia, *supra* note 159, at 1176–79 (propounding the theory that judges bind themselves when they adopt clear rules); see, e.g., *The Supreme Court Redefines Sex*, NAT’L REV. (June 15, 2020, 9:08 PM), <https://www.nationalreview.com/2020/06/Supreme-Court-Redefines-Sex-Bostock-v-Clayton-County-Case> [<https://perma.cc/6SYG-8X5R>] (criticizing the Supreme Court for its holding in *Bostock v. Clayton County*).

163. Take for example the word “cheater.” At one time, a cheater was an agent of the king who oversaw the transfer of land from intestate decedents to the crown. See Judith Herman, *11 Words with Meanings that Have Changed Drastically over Time*, MENTAL FLOSS (Dec. 22, 2015), <https://www.mentalfloss.com/article/61876/11-words-meanings-have-changed-drastically-over-time> [<https://perma.cc/EK7L-LBW6>]. Now, of course, a “cheater” is a person who acts dishonestly in violation of the rules. *Id.*; *Cheater*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/cheater> [<https://perma.cc/97XJ-PK2S>]. Suppose a statute provides that “every cheater shall be compensated twenty dollars for his work.” Without considering the historical context of the words it is impossible to tell whether the law governs the reward owing to king’s agents, or windfall for cardsharps.

164. Scalia, *supra* note 159, at 1179.

165. See *id.* at 1178 (describing the problems of poorly defined judicial power).

166. See, e.g., U.S. CONST. art. I, § 3.

Constitution are at odds, the originalist judge will side with the text over the majority. Still, should the popular outcry grow to the point of supermajority, the amendment process remains.<sup>167</sup>

Finally, originalism promotes engagement with the constitutional process. Laws are born to address societal problems. When a problem becomes irritating enough, the legislature attempts to solve it by passing a law. This first attempt to address the problem will frequently be incomplete, so the legislature returns to the drawing board until a satisfactory solution is created. Judges may hinder this development by interposing themselves between the people and a developing law. There are times when courts can and should interrupt the legislative process; for example, if a law is baldly unconstitutional. However, enforcement of a law as written helps to develop better laws by highlighting areas ripe for change. Courts could step in and soften the hard edges of legislation but doing so slows the development of lasting compromise by easing the sting that motivates legislatures. Because legislatures are the branch of government most sensitive to the needs of the people, they are the best place to forge lasting change. So, by refraining from short-circuiting the legislative process, judges empower citizens to influence their government.

Like the previously enumerated advantages of originalism, the promotion of civic engagement is imperfect. Judges will disagree and outcomes will vary among jurisdictions. Nevertheless, the originalist framework offers numerous advantages,<sup>168</sup> recommending itself to judges of all ideological stripes.

Although the Iowa Supreme Court adopted the proper frame of review for Wright's case, its application of the originalist framework was flawed, creating serious problems for courts, law enforcement, and others.

### B. THE PROBLEMS WITH *STATE V. WRIGHT*

Most of the disadvantages of the *State v. Wright* framework spring from ambiguity about the case's holding. The holding of the case can be summarized as follows:

1. Officer Heinz searched Wright's garbage.<sup>169</sup>
2. Trash bags were, or contained, "papers" and "effects" protected by Iowa's constitution against unreasonable searches and seizures.<sup>170</sup>

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167. See U.S. CONST. art. V.

168. For a deeper discussion of originalist philosophy, see generally KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999).

169. *State v. Wright*, 961 N.W.2d 396, 413 (Iowa 2021) ("It is equally apparent Heinz engaged in a search when he opened the garbage bags and rummaged through them.").

170. *Id.* at 413–14. ("Heinz meaningfully interfered with and 'seized' the garbage bags and papers and effects contained therein when he removed the garbage bags from Wright's trash bins, took possession of them, and transported them to the police station for further inspection.").

3. Wright did not abandon the property he put in the garbage bags.<sup>171</sup>
4. Officer Heinz's warrantless investigation of Wright's trash violated the Iowa Constitution.<sup>172</sup>

The court undermines the apparent simplicity of these premises through its reasoning with regard to *Katz*. As previously detailed, the court's opinion execrates the *Katz* standard.<sup>173</sup> But, the court later seems to employ the *Katz* reasonable expectation of privacy test, saying:

Here, Wright had an expectation based on positive law that his privacy, as a factual matter, would be lost, if at all, only in a certain, limited way. Specifically, Wright had an expectation based on positive law that his garbage bags would be accessed only by a licensed collector under contract with the city.<sup>174</sup>

Thus, the court seems to predicate Wright's reasonable expectation of privacy on the city ordinances limiting garbage disposal to licensed collectors. Even this statutorily focused approach could work when determining whether a person's reasonable expectation of privacy protects his chattels from search. For example, if a city restricts garbage collection by unlicensed personnel, then its citizens can expect evidence obtained through a warrantless search of their garbage to be inadmissible. But the court undermines this possibility writing, "[o]f course, this is not to say article I, section 8 rises and falls based on a particular municipal law. Municipal laws, like all positive laws, are merely one form of evidence of the limits of a peace officer's authority to act without a warrant."<sup>175</sup> So, it would seem, the court adopts a novel, fact-based hybrid of *Katz*, which takes property and common law history into account, but is not anchored to any of the existing Fourth Amendment tests. Indeed, the scope of the holding is the source of much contention. The dissenting justices argue that the holding is so broad that law enforcement officials will be relegated to acting only to the extent a private citizen might.<sup>176</sup> If the dissenters are right,

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171. *Id.* at 415 ("Here, Wright did not abandon all right, title, and interest in the property.").

172. *Id.* at 420 ("We hold Officer Heinz conducted an unreasonable search and seizure in violation of article I, section 8 of the Iowa Constitution when he acted without a search warrant and removed opaque trash bags from waste bins set out for collection behind a residence, took possession of the trash bags, transported them to a different location, opened the bags, and searched through the contents.").

173. *See, e.g., id.* at 410–11 (describing the uncertainty engendered by *Katz*).

174. *Id.* at 419.

175. *Id.* at 417.

176. *See id.* at 458 (Mansfield, J., dissenting). The dissent's fears find potential support in the text of the plurality opinion, which opens with a quote from *Olmstead v. United States*: "Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen." *Id.* at 400 (plurality opinion) (quoting *Olmstead v. United States*, 277 U.S. 438, 485 (1928)).



traditional law enforcement tools like *Terry* stops,<sup>177</sup> wiretaps, car stops, and other methods of surveillance<sup>178</sup> could be endangered because private citizens are not allowed to perform these actions.

The dissenting justices are not alone in their suspicion that the holding is broader than the above summary suggests. The law firm that represented Wright presents the Iowa Supreme Court's holding as a monumental shift in Iowa's search and seizure law; the firm writes, "[t]his ruling also has enormous search and seizure implications moving forward under the Iowa Constitution. Conceivably, it may be extended to other law enforcement tactics during traffic stops, K9 sniffs, knock and talk encounters, drone flights, etc., that have previously been countenanced as lawful police conduct."<sup>179</sup> On the whole, the Iowa Supreme Court's decision in *State v. Wright* raises more questions than it answers. Does the Iowa Constitution demand a trespassory test or one based on a reasonable expectation of privacy? The Iowa Supreme Court seems to adopt a hybrid, totality-of-the-circumstances review in which both standards play a role, but neither is dispositive.<sup>180</sup> Is the holding limited to cases in which a city ordinance creates an expectation of privacy in garbage? The opinion puts great weight on the ordinance in one paragraph, while discounting it in another.<sup>181</sup> Is the decision limited to its facts or should police be wary of other commonly employed search techniques? The opinion does not tell.<sup>182</sup>

These questions and the ambiguity they represent create three major difficulties for Iowa courts and law enforcement, namely, administrability problems, adverse effects on criminal defendants, and impeding the legislative process.

### 1. Administrability Problems

In terms of administering the new legal rules laid out in *State v. Wright*, the immediate problem is novelty. Whenever courts change or abrogate a

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177. *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968) (allowing an officer to stop and frisk a citizen for weapons and readily identifiable contraband as long as the officer has reasonable suspicion that illegal activity is occurring).

178. *See, e.g., Florida v. Riley*, 488 U.S. 445, 451–52 (1989) (holding that a helicopter search of a marijuana greenhouse was permissible under the Fourth Amendment).

179. Colin Murphy, *GRL Law Wins Landmark Search and Seizure Case Before Iowa Supreme Court*, GOURLEY, REHKEMPER & LINDHOLM, PLC (June 24, 2021), <https://www.grllaw.com/blog/grl-law-wins-landmark-search-and-seizure-case-before-iowa-supreme-court> [<https://perma.cc/2KXR-VFL5>].

180. *See Wright*, 961 N.W.2d at 416–19 (waver between the trespassory standard and the *Katz* test). It is unfortunate that the court did not provide clearer guidance on which test controls under the Iowa Constitution. The benefit of the originalist approach to legal questions is its mooring in the text and history of the document being interpreted. Originalism provides, if imperfectly, consistency in rulemaking. The Iowa Supreme Court negated that advantage by waffling between the extant Fourth Amendment tests.

181. *See id.* at 417 (indicating the importance of local positive law and then discounting the focus on a single ordinance).

182. *See generally id.* (failing to clarify the scope and application of its holding).

longstanding rule, the void must be filled by new case law. In this case, the problem is compounded by the aforementioned ambiguity. Police throughout Iowa will need to interpret the decision and develop new investigatory tactics. Likewise, judges overseeing motions to suppress at the district level will have to determine which elements of the *State v. Wright* decision are the most crucial. Local legislative bodies will have to review their code and guess what the potential side effects of their ordinances may be. At the appellate level, the problem becomes even more concerning. The judges on the court of appeals will spend far more time reviewing questions raised by the *State v. Wright* opinion than the Iowa Supreme Court,<sup>183</sup> placing a significant time and resource burden on an already busy court.<sup>184</sup> Again, the lack of clarity in the decision is a major stumbling block; had the Iowa Supreme Court clearly defined its holding, lower courts would have less trouble going forward.

## 2. Adverse Effects on Criminal Defendants

Surprisingly, the holding in *Wright*—apparently an unvarnished win for the accused—may have adverse effects on some criminal defendants. Although Iowa courts can no longer consider evidence obtained from warrantless garbage-tear searches, the federal courts suffer no such malady. In all likelihood, instead of risking a lost conviction in state court, prosecutors will turn over the evidence obtained from illegal searches to federal prosecutors, exchanging a state crime for a federal crime.<sup>185</sup> Switching criminal convictions from state to

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183. As Justice Waterman notes in his dissent:

Presumably, we will soon see a wave of postconviction-relief (PCR) actions seeking to overturn convictions in cases where a trash rip led to inculpatory evidence and a larger wave of PCRs alleging defense counsel provided constitutionally-deficient representation for failing to anticipate our court would adopt the new test limiting police investigations to what private citizens can do.

*Id.* at 456 n.25 (Waterman, J., dissenting).

184. About two thousand cases are filed with the Iowa Supreme Court every year. GUIDE TO IOWA'S COURT SYSTEM 16 (2022), [https://www.iowacourts.gov/static/media/cms/GuidetoIowasCourtSystem\\_464EFAC4887E4.pdf](https://www.iowacourts.gov/static/media/cms/GuidetoIowasCourtSystem_464EFAC4887E4.pdf) [<https://perma.cc/P636-YCDR>]. Of those appeals, ninety percent will be handled by the court of appeals, while the remaining cases will be reviewed by the Iowa Supreme Court. IOWA JUD. BRANCH, COURTS AT A GLANCE: FOR EVERYONE FROM STUDENTS TO SENIORS 11, [http://publications.iowa.gov/6848/1/Courts\\_at\\_a\\_Glance.pdf](http://publications.iowa.gov/6848/1/Courts_at_a_Glance.pdf) [<https://perma.cc/4U8X-M67E>].

185. Consider this illustrative hypothetical. Johnson is a felon who has turned his life around since his original conviction; however, he possesses a firearm. Radditz, a police officer in Johnson's town, searches Johnson's garbage, and finds a discarded pack of gmm shells and a piece of mail identifying Johnson as the homeowner. Before *State v. Wright*, Radditz would probably turn over the evidence to the district attorney, and Johnson would be prosecuted under Iowa Code § 724.26(1), which classifies possession of a firearm by a felon as a class "D" felony and sentenced under Iowa Code § 902.9(1)(e), which sets the statutory maximum for nonhabitual offenders found guilty of a class "D" felony at five years' incarceration and a minimum fine of \$1,025.00. See IOWA CODE §§ 724.26(1), 902.9(1)(e) (2022). After the *Wright* decision, Johnson's case would likely be decided in federal court under 18 U.S. Code § 922(g)(1), which carries a statutory maximum of fifteen years in federal prison. See 18 U.S.C. §§ 922(g)(1), 924(a)(8) (2018).

federal court is costly,<sup>186</sup> and the potential penalties may be far more than those allowed in state court.<sup>187</sup> Moreover, there are good philosophical reasons to keep cases in the state court systems.<sup>188</sup> On the whole, criminal defendants may be ill served if their cases are prosecuted in federal court; an apparent victory may cause some defendants greater pain.

### 3. Short-Circuiting the Political Process

Another infirmity of the *Wright* holding is its removal of questions about criminal enforcement from the political branches. To preface the discussion of political influence in criminal cases, it is important to note that some aspects of criminal procedure are rightly withheld from the vicissitudes of public opinion.<sup>189</sup> Anti-majoritarian strictures prevent tyrannical legislatures from vindictively destroying the liberty of parties with whom they disagree. Nevertheless, principles of federalism dictate that states and localities should have broad power to legislate within the confines of their constitutions. When local governments are beholden to the principles of supply and demand, they eventually reach an equilibrium in which the greatest number of their citizens can live as they see fit. Therefore, judges should enforce anti-majoritarian rules to protect minority rights, while avoiding taking political questions from the hands of representative bodies.

The problem with *State v. Wright* is that, after the decision, it is not clear what the Iowa Constitution requires. Had the court predicated its holding on the City of Clear Lake's anti-scavenging statute, then the decision to pass such statutes would clearly remain with local governments. Unfortunately, the court seems to view the presence of such a statute as immaterial, indicating that *Wright* stands for a *per se* ban on trash searches under the Iowa Constitution.<sup>190</sup> If the court's decision is construed as a proscription against trash searches if, and only if, the locality has an anti-scavenging ordinance,

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186. See generally *Defender Services*, U.S. CTS., <https://www.uscourts.gov/services-forms/defender-services> [<https://perma.cc/QU68-CQHZ>] (describing only those fees related to public defenders in federal court). Given the costs associated just with defense services, it is fair to call federal trials expensive.

187. See *supra* note 185 and accompanying text.

188. See, e.g., Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 101–05, 146–47 (2001) (explaining that the Commerce Clause has been expanded beyond the scope of its original public meaning). The federal government draws most of its power to prosecute criminal offenses from the Commerce Clause. See Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life after Lopez*, 46 CASE W. RES. L. REV. 801, 802–03 (1996). Although this Note is not the piece, nor is its author up to the task, there is an argument to be made for a wholistic originalism in which concerns about originalism at the federal level (for example, distortions of the Commerce Clause) inform the decisions of judges at the state level.

189. For example, the Fifth Amendment to the U.S. Constitution prevents the legislature (without a majority sufficient to amend the Constitution) from passing a law requiring self-incrimination. See U.S. CONST. amend. V.

190. See *State v. Wright*, 961 N.W.2d 396, 417 (Iowa 2021) (“Of course, this is not to say article I, section 8 rises and falls based on a particular municipal law.”).

then the Iowa Supreme Court empowered local legislative bodies to afford their citizens a greater or lesser degree of protection depending on community mores. However, if the court's decision is read as a *per se* proscription against trash searches, then the court withdrew from public debate a policy question about which reasonable minds might differ.<sup>191</sup> It may be that the court was right to withhold these matters from the public; but, if that was its goal, then it should have clearly announced its purpose.

The problems with the *Wright* holding are serious. The case has the potential to harm the efficiency of the courts, create serious administrative problems for law enforcement, and in certain cases menace defendants with punishment exceeding desert. The Iowa Supreme Court should clarify its meaning and tweak its analytical framework to help ameliorate the problems caused by the holding in *Wright*.

### III. SOLUTION

This Note proposes a two-part solution to the problems inherent in the *Wright* framework. The court was correct in adopting an originalist approach to search and seizure questions, but its application of property doctrines to the facts of *Wright* was imperfect. Therefore, the court should clarify its approach by treating property doctrines as a constitutional floor upon which a locality may build and then analyzing local ordinances to ascertain any additional protections created by local laws. This Note also addresses and answers potential criticisms and counterarguments against the suggested framework.

#### A. *SKINNING KATZ OR HOW TO FIX THE WRIGHT DECISION*

Despite the problems with the holding in *State v. Wright*, the decision is salvageable. The Iowa Supreme Court should tweak its analysis of trash-rip searches to better capture the original public meaning of the Iowa Constitution, empower local legislative bodies, and simplify the work of lower courts.

The Iowa Supreme Court was right to consider the original public meaning of the Iowa Constitution. As noted above, originalism anchors judicial decisions in the text and history of the document being interpreted, thereby curtailing the power of judges, and sending signals to representative bodies.<sup>192</sup>

However, the court erred when analyzing the facts of *State v. Wright*. Specifically, the court misapplied its trespassory analysis, wrongly concluding *Wright* had a legally protected interest in his refuse. Several premises from the common law compel this interpretation. First, the common law protections

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191. The supremacy clause of the Iowa Constitution voids any law contrary to the constitution's provisions. IOWA CONST. art. XII, § 1 ("This constitution shall be the supreme law of the state, and any law inconsistent therewith, shall be void."). Thus, any local law that runs afoul of the *Wright* framework would be struck down. So, if the court's holding in *Wright* is a *per se* constitutional holding against trash-rip searches, then localities cannot authorize their police officers to use such searches in the future.

192. See *supra* Section II.A.

of the Castle Doctrine extend only to the home and its curtilage.<sup>193</sup> Curtilage is that portion of a person's property that (1) he attempts to conceal from prying eyes; (2) he demarcates as part and parcel of the home; (3) is close in proximity to the home; and (4) is marked by a use "for intimate activities of the home."<sup>194</sup> Therefore, Wright's garbage cans—sitting in a public alley outside his home<sup>195</sup>—were not protected by the Castle Doctrine. Hence, if Mr. Wright was to claim any protected interest in his trash, he had to rely on the doctrine of trespass against chattels. Undoubtedly, the trash cans were Wright's chattel. He set them out in a public alley fully intending to bring them inside once their contents were removed. But Wright had no discernible interest in the garbage within the cans. At common law, the owner of a chattel lost their right to a piece of property when they discarded it without intent to reclaim.<sup>196</sup> Thus, one could not trespass against abandoned (i.e., ownerless) property because there was no interference with an ownership interest—the essence of trespass.<sup>197</sup> There is no evidence Wright intended to retain any interest in the property he discarded. In fact, had the search never occurred, the trash would have been taken to a landfill and unceremoniously dumped. The Iowa Supreme Court should have stopped its common law analysis there, holding that Wright had no property interest in the garbage.

Instead, the court attempted to force Wright's waste into the category of "papers and effects" protected by article I, section 8 of the Iowa Constitution.<sup>198</sup> This attempt is fruitless and unnecessary. It is fruitless because there is no

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193. See *Florida v. Jardines*, 569 U.S. 1, 6 (2013) ("We therefore regard the area 'immediately surrounding and associated with the home'—what our cases call the curtilage—as 'part of the home itself for Fourth Amendment purposes.'" (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984))); *Hester v. United States*, 265 U.S. 57, 59 (1924) ("As to that, it is enough to say that, apart from the justification, the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law." (citing 4 WILLIAM BLACKSTONE, COMMENTARIES 223, 225–26)).

194. See *United States v. Dunn*, 480 U.S. 294, 301–03 (1987).

195. *Wright*, 961 N.W.2d at 400–01 (describing the location of Wright's garbage cans). Even if a public alleyway were part of curtilage, the U.S. Supreme Court wrote in *California v. Ciarolo* that "an area being within curtilage does not itself bar all police observation. The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." *California v. Ciarolo*, 476 U.S. 207, 213 (1986).

196. See *Eads v. Brazelton*, 22 Ark. 499, 509 (1861) (defining abandonment); *Benjamin v. Lindner Aviation, Inc.*, 534 N.W.2d 400, 406 (Iowa 1995) (defining abandonment under Iowa law as being "shown by proof that the owner intends to abandon the property and has voluntarily relinquished all right, title and interest in the property"); *Haslem v. Lockwood*, 37 Conn. 500, 506–07 (1871) (stating that a party abandons property when they leave it "at the place where it was discovered" and do nothing to "enhance its value or change its nature"). Such discarded property is called *bona vacantia* or ownerless goods. See *bona vacantia*, BLACK'S LAW DICTIONARY (11th ed. 2019).

197. See *trespass to chattels*, BLACK'S LAW DICTIONARY (11th ed. 2019).

198. IOWA CONST. art. I, § 8; *Wright*, 961 N.W.2d at 414.

evidence for<sup>199</sup>—and some evidence against<sup>200</sup>—the proposition that garbage is a constitutionally protected “paper or effect.” The attempt is unnecessary because Wright’s garbage was protected from searches under existing statutory text. The Clear Lake anti-scavenging ordinance states that “[i]t is unlawful for any person to . . . [t]ake or collect any solid waste which has been placed out for collection on any premises, unless such person is an authorized solid waste collector.”<sup>201</sup> Neither the State nor Wright contended that Officer Heinz was an authorized waste collector under the statute; therefore, under the plain text of the law, Officer Heinz’s search was unlawful. The analysis should be a straightforward textualist statutory interpretation.<sup>202</sup>

Going forward, the Iowa Supreme Court should approach search and seizure questions by applying the bifurcated analysis described above. First, the court should look to the historical law of property to determine whether an officer has committed impermissible trespass against the home or chattels. By treating the common law trespassory doctrine as a floor upon which localities may build greater statutory protections, the court can provide the minimum level of protection afforded by the Iowa Constitution at the time of

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199. The court argues the term “effects” comprises movable property. *Wright*, 961 N.W.2d at 414. However, this definition is essentially synonymous with personal property, and as this Note has explained, property demands an owner, or else it is not property. In this case, Wright discarded his movable items with no intent to reassert his ownership thereover. Moreover, the court’s assertion that “[t]here is no ‘constitutional distinction between “worthy” and “unworthy” containers” is unavailing. *Id.* (quoting *United States v. Ross*, 456 U.S. 798, 822 (1982)). For while it is true that there ought not be a difference between fancy luggage and garbage sacks, this lack of distinction applies with equal force to the doctrine of abandonment. That is to say, a Gucci handbag may be abandoned just as readily as the meanest lunch pail. Indeed, *Haslem* and *Brazelton* demonstrate this principle perfectly. In *Haslem*, the abandoned property was horse manure left in the streets, while in *Brazelton*, the dispute arose over an abandoned river steamer filled with highly valuable property; despite the “worthiness” of the property in *Brazelton* and the “unworthiness” of the property in *Haslem*, the courts applied identical abandonment analyses. See *Haslem*, 37 Conn. at 506–07; *Eads*, 22 Ark. at 507–09.

200. As Justice Waterman notes in his dissent, scavenging has existed for thousands of years. *Wright*, 961 N.W.2d at 453–54 (Waterman, J., dissenting). If the Framers sought to specially protect discarded goods, then they could have explicitly listed them in the Constitution, or at least made mention of discarded property in the constitutional debates. See generally Mary Downs & Martin Medina, *A Short History of Scavenging*, 42 COMPAR. CIVILIZATIONS REV. 23 (2000), <https://scholarsarchive.byu.edu/cgi/viewcontent.cgi?article=1476&context=ccr> [<https://perm.a.cc/2AGS-4CSS>] (cataloguing the history of scavenging).

201. CLEAR LAKE, IOWA, CODE OF ORDINANCES § 105.11(4) (2003).

202. In dissent, Chief Justice Christensen argues against this interpretation of the statute, pointing specifically to the purpose section of the Clear Lake ordinance as a bulwark of “health, safety and welfare.” *Wright*, 961 N.W.2d at 435 (Christensen, C.J., dissenting) (quoting CLEAR LAKE, IOWA, CODE OF ORDINANCES § 105.01 (2003)). Chief Justice Christensen’s dissent points out that the ordinance does not purport to change any interest in private property. *Wright*, 961 N.W.2d at 435 (Christensen, C.J., dissenting). The dissent is likely right about the purpose of the statute; however, only the actual text of the law is dispositive. In this case, the language is sufficiently broad that, unless Officer Heinz was a licensed garbage collector under Clear Lake law, his search was impermissible.

its ratification.<sup>203</sup> The second step in the court's analysis should be to determine which statutory provisions govern the individual search and whether the statutory text provides a greater deal of protection than the common law trespassory protections offered by the Iowa Constitution. If the search is non-trespassory and comports with all relevant local statutes, then it passes muster and the evidence obtained thereby should be admitted. This two-step analysis provides several advantages over the current framework, including getting away from the *Katz* test, clarifying the rules regarding searches and seizures for lower courts, and empowering local legislative bodies.<sup>204</sup>

The *Katz* test is an ahistorical chimera,<sup>205</sup> giving judges carte blanche to impose their personal preferences from the bench.<sup>206</sup> Indeed, cases with shockingly similar facts have been decided differently under *Katz* based on

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203. See *id.* at 402 (plurality opinion).

204. One objection to the proposed framework is that it is novel in the realm of constitutional interpretation and therefore untested. However, the test combines many well-worn elements of existing law. For example, the test uses the principles of subsidiarity to empower local legislative bodies in much the same way that the Iowa Constitution grants "Home Rule" to counties and municipalities. See IOWA CONST. art. III, §§ 38A, 39A. Likewise, the concept of constitutional floors, upon which further protections can be built, is commonly applied by state courts and legislatures. See, e.g., *Nguyen v. State*, 878 N.W.2d 744, 755 (Iowa 2016) ("We are free to interpret our constitution more stringently than its federal counterpart, providing greater protection for our citizens' constitutional rights."). In truth, the whole test is built on a foundation of what might be called intrastate federalism; the state constitution builds upon the protections afforded by the Federal Constitution, and local governments can provide yet more protection if they so choose. The apparent novelty of the test dissolves, upon inspection, into the well-heeled principles of republican federalism.

205. The brilliant professor, Orin Kerr, argues that the *Katz* test is consistent with the text and history of the Fourth Amendment and should be adopted by originalist judges and scholars. See Orin S. Kerr, *Katz as Originalism*, 71 DUKE L.J. 1047, 1103–04 (2022). Loath as this Note's author is to disagree with so eminent a legal mind, Professor Kerr's analysis is unconvincing. Professor Kerr focuses heavily on the problems raised by technological progression and the dangers of unbound searching power in the hands of the state. See *id.* at 1079–83. *Katz*, he avers, contains the solution to these problems. *Katz* is fluid, able to meet the demands of modern life and the rising tide of police technology. See *id.* at 1081–82. The flaw in Professor Kerr's analysis is that there already exists a text-based method for dealing with the vicissitudes of time, namely the legislative and amendment processes. While Kerr's article provides an interesting perspective on the Fourth Amendment, its solution leaves with judges what ought to be the province of legislative bodies. The hurly-burly give-and-take of politics is obtuse and frequently results in sub-optimal or wrong-headed solutions to complex problems, but its compromises have a flavor of popular legitimacy that judicial ukase does not.

206. See generally Orin S. Kerr, *Katz Has Only One Step: The Irrelevance of Subjective Expectations*, 82 U. CHI. L. REV. 113 (2015) (explaining that the *Katz* analysis is fundamentally a single-step process rather than the putative two-step of Justice Harlan's concurrence). The problem of course is that if the only prong of the test is the reasonable expectation of privacy test, then the analysis depends entirely on the U.S. Supreme Court's interpretation of what constitutes reasonableness. This calculus changes with Court personnel, and so the outcomes of almost identical cases are different. Such complex balancing determinations should be left to the people and their representatives rather than judges. Congressmen have constituencies, judges do not.

the personnel of the court.<sup>207</sup> These confusing outcomes create serious problems for law enforcement and leave criminal defendants with the sense that the system designed to give them a fair shake is, in fact, manipulated against them. To solve this problem, the Iowa courts should relegate the *Katz* test, as applied under the Iowa Constitution, to the dustbin of history.

It may be objected that the *Katz* test is a requirement under the Fourth Amendment, and so the Iowa courts would act contrary to current U.S. Supreme Court precedent if they deviated from the *Katz* test. This concern applies in cases where a criminal defendant makes a Federal Fourth Amendment claim. But it does not apply to the article I, section 8 analysis under the Iowa Constitution. The Iowa Supreme Court has repeatedly asserted its right to interpret the Iowa Constitution independently of the Federal Constitution,<sup>208</sup> and it should do so in the Fourth Amendment context. The decision in *State v. Wright* is a step toward that goal, but the court's hedging on the *Katz* test confuses the state of the law in Iowa. In a future case, the court should expressly abandon *Katz*—under the Iowa Constitution—and adopt the two-part historical and statutory test described above.

Besides the advantages to be gleaned by abandoning the overelaborate *Katz* test, the Iowa courts, by adopting the proposed historic and statutory approach, could clarify the rules applicable in district and appellate courts.<sup>209</sup> The current synthesis between *Katz* and the trespassory standard is difficult to apply, having neither the flexibility of *Katz* nor the bright-line clarity of the property law approach. This flux between the two tests complicates the analysis of lawyers and judges, likely increasing the volume of appeals and damaging judicial efficiency. The proposed approach, i.e., the common law property and statutory approach, offers a familiar body of property law from which judges may draw their analyses. Moreover, property doctrines are

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207. Compare *Illinois v. Caballes*, 543 U.S. 405, 409–10 (2005) (finding a drug-dog sniff of the exterior of a car was not a violation of the Fourth Amendment), with *United States v. Whitaker*, 820 F.3d 849, 852–53 (7th Cir. 2016) (determining that a defendant had a reasonable expectation of privacy in the hallway outside his apartment, so a drug-dog sniff was impermissible under the Fourth Amendment).

208. See *Wright*, 961 N.W.2d at 402–04.

209. Some might object to this characterization, especially because of the numerous exceptions to the warrant preference that have been carved out since its inception. See Bradley, *supra* note 63, at 1473–74. This critique has merit, but it is worth noting that at least some of the exceptions to the warrant preference could be subsumed into existing property analysis. For example, the community caretaking exception allows an officer to enter a person's residence when: (1) The officer's initial contact or investigation is reasonable; (2) the intrusion is limited; and (3) the officer is not using the entry as a pretext to investigate criminal activity. See *Brigham City v. Stuart*, 547 U.S. 398, 406–07 (2006). This exception is certainly a desirable addition to American law—society wants its police officers to render assistance to hurt or otherwise needy citizens. Would not such a desirable exception be lost under a pure property analysis? Not necessarily. First, the legislature is not precluded from passing a law codifying the community caretaking exception. Second, it is possible that the exception could be found under the property law doctrines of public necessity. See *Public Necessity*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/public\\_necessity](https://www.law.cornell.edu/wex/public_necessity) [<https://perma.cc/DJ65-777N>].



clearer cut—after centuries of development—than their relatively novel reasonable expectation of privacy counterparts. The advantages of clear rules have been sufficiently discussed earlier in this Note.<sup>210</sup> By adopting the two-step analysis described above, Iowa courts could reap the benefits of a concise rule while allowing local governments to craft policy appropriate to the individual community.

A third advantage—among many others not covered by this Note<sup>211</sup>—of the proposed analytical framework is that it devises power to local governments. Under the proposed framework, once the constitutionally required common law property analysis is complete, the court turns to the statutory provisions of the locality in which the search took place. If the ordinances on the books offer stiffer protections than the floor provided by the Iowa Constitution, then the court evaluates whether the search was statutorily permissible. Analyzing cases in this way is analogous to federalism in the federal context. By returning power to the lowest level of government—with the caveat that some essential constitutional protections are off limits—the courts allow people to pass laws that comport with their interpretation of ordered liberty.<sup>212</sup> A city with less crime may find its citizens prefer to curtail certain law enforcement activities, allowing individuals a greater level of privacy. Contrarily, a city afflicted by crime may afford its police greater latitude—within constitutional boundaries—to investigate crime. One-size-

210. See *supra* Section II.A.

211. One practical advantage that is not described at length is the potential for a lasting majority on the Iowa Supreme Court. As it stands, only three justices are fully on board with the *State v. Wright* framework. See generally *State v. Wright*, 961 N.W.2d 396 (Iowa 2021) (featuring a concurrence that is barely reconcilable to the plurality opinion and dissents that are downright hostile to the plurality as currently constructed). Still, it is possible that Justice Mansfield could join a future opinion that adopts the framework proposed by this Note. See *id.* at 464 (Mansfield, J., dissenting) (“Here lies my one point of agreement with the majority. In analyzing article I, section 8, it might be better if we focused more on traditional property law than on reasonable expectations of privacy (although both sources support the lawfulness of the trash pull in this case.”); *id.* at 463 (“One possible saving grace with the majority’s decision is that municipalities can avoid its effects *simply by changing their ordinances*. Repeal the ordinance forbidding private citizens from “scavenging” trash, and trash pulls by law enforcement will become lawful once again.”).

212. It is worth addressing a concern raised by Justice Mansfield’s dissent in *State v. Wright*. He questioned:

Does the majority believe that in performing their investigative duties, the Clear Lake police cannot enter a city park between 11 p.m. and 5 a.m.? [CLEAR LAKE, IOWA, CODE OF ORDINANCES] § 47.05(1) (prohibiting private citizens from doing this). That they can’t park their patrol car in any spot where private citizens are not allowed to park? See *id.* § 69.06 (same). That they can’t park for more than two hours? See *id.* § 69.13 (same). That they can’t drive on a barricaded street? See *id.* § 135.05 (same).

*Id.* at 461–62. Although Justice Mansfield is targeting a different argument made in the plurality opinion, the proposed framework would allow localities to add provisos for law enforcement to their local ordinances if they so desire, eliminating the fear that every local ordinance may be used as a cudgel against police investigations.

fits-all policy often means one-size-fits-*none*; the courts should step back as much as is constitutionally permissible and allow local ordinances to build atop the constitutional floor.

The manifest advantages of the proposed framework and the disadvantages of the *Wright* decision militate in favor of modifying *State v. Wright* to command a wider consensus on the court, ease the work of district and appellate courts, and empower localities to pass laws in accordance with their political values. The proposed framework helps implement these advantages while withstanding criticisms levied against it. Some of the more salient criticisms of the proposed test will be discussed in the following Section.

### B. ADDRESSING CRITICISM

Although the trespassory framework for which this Note advocates provides substantial legal and political advantages, it is not beyond criticism. This Section lays out a few of the most pressing critiques and assures critics that the trespassory framework provides an answer to their concerns.

The first criticism of the trespassory standard is that, unlike *Katz*, the common law property doctrines lack the flexibility needed to address advances in surveillance technology.<sup>213</sup> Modern police forces are equipped with gadgets that far exceed the wildest suppositions of the Framers. Infrared imaging systems allow police to see inside houses from outside,<sup>214</sup> drug sniffing dogs constructively search homes without intrusion,<sup>215</sup> and helicopters allow police to surveil homes with impunity.<sup>216</sup> According to the critic, a flexible privacy-rights centered approach better addresses technological advancement than an antiquated property-rights focused approach.

The problem with this argument is that it misapprehends the nature of judicial power. Courts are well equipped to apply tests to varied fact patterns, but court rulings are brittle and inflexible. They are not quickly modified, so bad rules often last far longer than they should. Technological change is rapid, so a rule that was workable one minute may be outdated the next. A better place to address sudden changes in technology is the legislative

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213. See Orrin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 827–30 (2004) (describing the struggle inherent in adapting property rights to meet the scope of new technologies); *Kyllo v. United States*, 533 U.S. 27, 33–34 (2001) (“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.”).

214. See *Kyllo*, 533 U.S. at 29–31. Police, from their car in a nearby street, used infrared imaging to discover marijuana growing within a person’s home. *Id.*

215. See *Florida v. Jardines*, 569 U.S. 1, 3–6 (2013). A drug-sniffing dog discovered marijuana by sniffing outside the door of a residence. *Id.*

216. See *Florida v. Riley*, 488 U.S. 445, 447–50 (1989). Police helicopters observed marijuana grow inside a greenhouse. *Id.*

branch.<sup>217</sup> In the legislature, rules may pass, be repealed, or be amended within a single legislative session. Moreover, legislators are more responsive to popular will. Judges are, for good reason, more insulated from public pressure; consequently, their decisions may not face public scrutiny at all. So, while advances in technology certainly implicate the protections of the Fourth Amendment, the best method for addressing privacy concerns is legislative.

Another objection to the trespassory framework is based on the concept of *stare decisis*. *Stare decisis* is the principle that past judgments of a court should carry substantial weight in deciding future cases.<sup>218</sup> The argument from *stare decisis* runs like this: The Iowa Supreme Court has used the *Katz* test for many years, so completely abandoning the test now would work a fundamental injustice against criminal defendants and law enforcement by holding them to an all but forgotten trespassory standard. Moreover, the court damages its reputation and legitimacy when it hems and haws over which tests apply to a given fact pattern. The argument makes a strong case; certainty and predictability are indispensable in the law. Basic fairness requires that individuals not be subjected to arbitrary power. That said, the argument fails for several reasons.

First, the *Wright* decision already unsettled Iowa's search and seizure jurisprudence. The question, therefore, is not whether a disturbance of precedent is warranted but rather how to address the already disturbed regime. Given the disturbance, it is desirable for Iowa courts to adopt clear rules, and the property-centric view offers just that. Second, the argument fails because the property view of search and seizure has a longer precedential pedigree than the relatively recent *Katz* standard. *Katz* was decided in 1967.<sup>219</sup> Prior to that decision, property rights were the primary engine of the Fourth Amendment.<sup>220</sup> Therefore, if *stare decisis* is to be fully vindicated, a return to the original understanding of the Iowa Constitution forwards that goal. Finally, the argument fails because adherence to wrongly decided precedent is not an admirable commitment to *stare decisis* but rather a foolish perseverance in error. *Katz* was wrongly decided. Neither the text, nor the structure, nor the history of the Constitution support a nebula of judicially determined privacy rights. Reading such an amalgam into the Fourth Amendment was improper at the time and has become untenable since. Since *Katz*, so many judicial exceptions have been created that the potency of the original test is all but depleted. It is better for the courts to return to constitutional first principles than to continue limping a beleaguered test into the future.

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217. Kerr, *supra* note 213, at 840 (“Fourth Amendment decisions have affected the shape of legislation in important ways, but legislation rather than the Fourth Amendment has provided the primary protection against invasions of privacy from wiretapping.”).

218. See *stare decisis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

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

220. See *supra* Section I.A.1.

The third objection to an originalist view of the Fourth Amendment is that it does not adequately address the problems caused by a departure from federal jurisprudence. The objection posits that the problems articulated above<sup>221</sup> are concomitant with a split from federal search and seizure jurisprudence; therefore, it is undesirable to depart from federal precedent and invite the problems into Iowa law. As previously explained, consistency is indispensable to the rule of law and uncertainty should be injected only where unavoidable. Undoubtedly, the *Wright* decision injected a level of disorder into Iowa criminal law; however, it is too late to put the genie back into the lamp. The Iowa Supreme Court emphatically departed from federal precedent, and so the task is to determine what Iowa law will look like going forward.<sup>222</sup>

The proposed solution is not a panacea to the problems created by *Wright*; for instance, there is a strong likelihood that drug or weapons cases predicated on trash-rip searches will be driven into federal court. Still, the proposed framework could mitigate this problem by shifting the focus to local ordinances. Hence, if a trash-rip search is permissible under local ordinance, the evidence would be admissible, and the case would likely be tried in state court. An additional point is that federal search and seizure jurisprudence seems poised to change.<sup>223</sup> If the U.S. Supreme Court reevaluates *Katz*, then the damage wrought by a state level change in search and seizure jurisprudence may be ameliorated. Finally, it is not clear that a state constitution must join an error in federal constitutional interpretation. *Katz* provides an amorphous, antitextual framework for search and seizure. There is no good reason why the Iowa Constitution should persevere in error merely because the federal courts do so.

Although there are other objections to be made against the proposed framework, the last one this Note addresses is the problem posed by limiting judicial discretion. The argument runs: Judicial discretion—the leeway afforded judges and officers of the court to make decisions—plays an essential role in the criminal justice system. Discretion allows agents of the State to determine how many and what sort of charges to bring, how trials will be executed, and what evidence may be presented. Judges, by and large, make good use of this discretion. Why then would a system limiting judicial discretion, like the proposed framework, be preferable to a system that, like *Katz*, allows courts to dispense individual justice?

While the argument has a certain allure, it fails because discretion is a two-edged sword. It is pleasant to believe every judge will act with Solomonic

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221. See *supra* notes 213–19 and accompanying text.

222. There is an argument to be made that the Iowa Supreme Court could return to its pre-*Wright* jurisprudence; however, given the make-up of the court and the recency of the decision, it seems unlikely that such a change will come to fruition anytime soon.

223. See generally *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (mulling possible replacements for the *Katz* test in dissents).

wisdom and integrity;<sup>224</sup> however, it is equally possible that a judge may act foolishly, deceitfully, and capriciously. It is only by cabining discretion that a society can insure against the vice of the powerful. Limiting judicial discretion over what evidence may be suppressed under the Fourth Amendment is better than allowing wishy-washy, judicially imposed judgments. There are times when the outcome under *Katz* would better comport with society's notions of justice, but the advantage of consistent and limited judicial discretion outweighs these exceptions.

Although there are imperfections in the proposed common law framework, they are surmountable, and the advantages to be gained are sufficient to justify its adoption.

#### CONCLUSION

In *State v. Wright*, the Iowa Supreme Court made a commendable effort to adopt a philosophically sound interpretive framework for article I, section 8 of the Iowa Constitution.<sup>225</sup> Unfortunately, the court retained the complex and extratextual *Katz* test, thereby confusing the search and seizure analysis under the Iowa Constitution. The court should take the opportunity to clarify *State v. Wright*, dropping the *Katz* test and replacing it with a two-part analysis: (1) Look first to the common law doctrine of trespass as a constitutional floor, then (2) evaluate the text of any local statutes providing additional protections against searches. This proposed framework would have yielded almost identical results to the framework applied by the *Wright* court, but the decision's reasoning would have been clearer, providing lower courts with guidance for future decisions.

A court-created solution to the problem is preferable in this instance because the scope of the decision is unclear. If the *Wright* court announced a *per se* ban on garbage searches, then no legislative solution short of constitutional amendment is available. If, on the other hand, the court merely indicated that the search in *Wright* was impermissible, then it should clarify its holding before the legislature attempts to craft a statutory solution. In sum, an originalist approach to the question of search and seizure law combined with bright-line rules for lower courts would best forward the cause of just decisions, judicial efficiency, and popular sovereignty.

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224. See generally 1 *Kings* 3:1–28 (describing the exploits and judgements of Solomon).

225. It is quite likely that the U.S. Supreme Court may soon alter Fourth Amendment analysis. See generally *Carpenter*, 138 S.Ct. 2206 (dissents expressing displeasure with the extant *Katz* analysis and its willingness to replace it with something more closely resembling the common law). If it does, the Court would do well to reinvigorate federalism by pushing more discretion over the contours of Fourth Amendment law to the states. That is not to say that there should be a free-for-all, but if the Court specified a clear constitutional floor upon which state actors could build—within constitutional limits—the cause of federalism would be greatly advanced.