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How the Fourth Amendment and the Separation of Powers Rise (and Fall) Together

Aziz Z. Huq[†]

This Essay explores the purposive and functionalist parallelisms between the Fourth Amendment and the separation of powers. Not only do those two elements of the Constitution share a common ambition, they are also entangled in practical operation. The vindication of Fourth Amendment interests, however defined, depends on institutional differentiation between branches of government. That institutional predicate, however, has eroded over time. In its absence, new questions arise about how Fourth Amendment values are best implemented and whether the their realization is better attained by private rather than state action.

INTRODUCTION

This Essay tenders two claims about how the Fourth Amendment and the separation of powers interact. First, the Fourth Amendment echoes in purpose, and relies on in practice, the division of authority between the three branches of the federal government government. Second, the institutional predicates of the Fourth Amendment's operation with respect to the federal government are incentive-incompatible and therefore unreliable. The ensuing erosion of the amendment's underlying institutional predicates has implications, I suggest, for the viability of efforts to promote pro-privacy regulatory agendas under a constitutional aegis, and, as a correlate, the need to find possible alternative regulatory paths to privacy in new regulatory spaces such as emerging digital and telecommunications domains.

My focus departs from mainstream Fourth Amendment scholarship's current preoccupations. Since the 1960s, the latter

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has focused on the scope of police authority, especially regarding the power to conduct vehicular stops and street stop-and-frisks, the measure of deference to officer safety in traffic stops, the need for an exclusionary rule, and the boundary between a diffuse reasonableness trigger for search authority and a more procedurally onerous warrant requirement. The Supreme Court's Fourth Amendment docket in the 2015 term is exemplary in turning on vehicular stops¹ and municipal investigations.²

This focus obscures the relationship of the Fourth Amendment to the structure of the federal government. It also means that the Court typically considers Fourth Amendment questions concerning novel technologies in litigation about ordinary policing. The consideration of geolocational technologies and cell-phone data in United States v Jones³ and Riley v California,⁴ for instance, emerged respectively from narcotics⁵ and antigang investigations.⁶ But Fourth Amendment rules tend not to be tailored to specific institutional contexts. They spill over to the federal government's rather different search capacities.⁷ Judicial preoccupations peculiar to the policing and crime-control contexts nevertheless infuse (or distort) conduct rules and remedies that extend undifferentiated across distinct institutional contexts.

To be sure, the Fourth Amendment and the separation of powers have been recoupled in the public eye by the sheer force of recent events. Disclosures of warrantless surveillance by the NSA⁸ and telephony-metadata collection⁹ have catalyzed wide-ranging[RT: MW] debate on data-collection and surveillance authorities. The separation of powers figured into this debate because initial administration defenses of surveillance programs

¹ See generally Rodriguez v United States, 135 S Ct 1609 (2015); Heien v North Carolina, 135 S Ct 530 (2014).

² See generally City of Los Angeles, California v Patel, 135 S Ct 2443 (2015).

³ 132 S Ct 945 (2012).

⁴ 134 S Ct 2473 (2014).

⁵ Jones, 132 S Ct at 948.

⁶ Riley, 134 S Ct at 2480–81. [FC note 4] Riley also concerned a drug-related arrest. Id at 2481–82.

⁷ See William J. Stuntz, O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment, 114 Harv L Rev 842, 847 (2001) (describing Fourth Amendment law as “transsubstantive” because it “applies the same standard” to vastly different types of crimes)[SP].

⁸ See James Risén and Eric Lichtblau, Bush Lets U.S. Spy on Callers without Courts (NY Times, Dec 16, 2005), archived at <http://perma.cc/3JAC-VMML>.

⁹ See Glenn Greenwald, NSA Collecting Phone Records of Millions of Verizon Customers Daily (The Guardian, June 6, 2013), archived at <http://perma.cc/M37P-NYPL>.

rested on an assertion of plenary Article II authority.¹⁰ Such claims prompted predictable objections¹¹ and defenses based on constitutional text¹² and practice.¹³ This literature, while informative on its own terms, trains narrowly on the distribution of power between Article I and Article II. It does not consider what the Fourth Amendment implies about the distribution of interbranch authority. Nor does it reflect on the fit between the institutional assumptions underwriting the Fourth Amendment and observed institutional behavior.

To be clear, my aim here is not to ascertain whether specific collection or surveillance programs are lawful or constitutional. The evaluandum in this Article is rather the separation of powers as a device for promoting rights. There is a largely optimistic body of literature that considers causal links between constitutional structure and individual liberties. Hence, Professors Nathan Chapman and Michael McConnell elaborate an account of the Due Process Clause pursuant to which the “government may not interfere with established rights without legal authorization and according to law, with ‘law’ meaning the common law as customarily applied by courts and retrospectively declared by Parliament.”¹⁴ In similar terms, Professor Heather Gerken posits that “the ends of equality and liberty are served by both rights and structure.”¹⁵ I am less certain.¹⁶ My aim is to define

¹⁰ See William E. Moschella, Assistant Attorney General, Letter to the Honorable Pat Roberts, Chairman of the Senate Select Committee on Intelligence, et al *2–3 (Dec 22, 2005), archived at <http://perma.cc/B3ZV-YUW2>.

¹¹ See, for example, Heidi Kitrosser, It Came from beneath the Twilight Zone: Wiretapping and Article II Imperialism, 88 *Tex L Rev* 1401, 1404 (2010) (arguing that defenders of warrantless surveillance are incorrect because “the President’s capacities are constitutionally subject to statutory restraint outside of extraordinary and temporally limited cases”)[SP].

¹² See, for example, Gary Lawson, What Lurks Beneath: NSA Surveillance and Executive Power, 88 *BU L Rev* 375, 383–91 (2008) (arguing that the “Vesting Clause thesis is . . . obviously true” and that “[i]f the Vesting Clause thesis is correct, the Bush Administration’s NSA program as it has been described by the Administration appears to be lawful”)[SP].

¹³ See generally, for example, Neal Katyal and Richard Caplan, The Surprisingly Stronger Case for the Legality of the NSA Surveillance Program: The FDR Precedent, 60 *Stan L Rev* 1023 (2008) (examining the surveillance activities undertaken by President Franklin D. Roosevelt and their similarities to modern practices).

¹⁴ Nathan S. Chapman and Michael W. McConnell, Due Process as Separation of Powers, 121 *Yale L J* 1672, 1679 (2012).

¹⁵ Heather K. Gerken, Windsor’s Mad Genius: The Interlocking Gears of Rights and Structure, 95 *BU L Rev* 587, 594 (2015).

¹⁶ See Aziz Z. Huq, Libertarian Separation of Powers, 8 *NYU J L & Liberty* 1006, 1012 (2014) (“[T]he analysis of structural constitutional design proves only ambiguous and fragile guidance [as to how to promote normative interests.]”)[SP].

here how constitutional structure, viewed ab initio, was intended to promote a specific right, and to analyze the extent to which this structure-rights causal nexus remains robust today. By testing whether constitutional structure does promote Fourth Amendment rights as originally intended, I move beyond the relatively abstract causal claims aired in this literature and provide a more grounded case study in constitutional design.

The argument has three steps. Part I maps three pathways between the Fourth Amendment and the division of interbranch authority—a common purpose and two common assumptions about institutional differentiation. Part II considers whether these linkages have withstood the test of time. It finds a lag between the Fourth Amendment’s aspirational political economy and observed institutional behavior. Part III then draws inferences for future doctrinal development and privacy-seeking strategies, with particular attention to how Fourth Amendment values can be vindicated given aggressive federal collection, analysis, and surveillance efforts regarding electronic communications.

I. THE FOURTH AMENDMENT’S IMPLICATIONS FOR THE SEPARATION OF POWERS

This Part identifies three pathways between the Fourth Amendment and the separation of powers. Its aim is to loosely sketch how rights against unreasonable searches and seizures might have fit into the larger constitutional architecture and to articulate a structural account of the Fourth Amendment.¹⁷ I contend first that a common purpose animates both elements of the Constitution. Further, I suggest that the practical operation of Fourth Amendment values assumes two forms of institutional differentiation embedded in the separation of powers. For each argument, I use text and history as departure points. I recognize that the Fourth Amendment’s text and history remain sharply contested.¹⁹ Still, I hope my argument rest on tolerably uncontroversial, shared grounds.

¹⁷ For one explanation of structural arguments, as opposed to other types of constitutional arguments, see Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* 74–92 (Oxford 1982). Professor Philip Bobbitt describes “structural arguments” as “largely factless” and as relying on “inferences from the existence of constitutional structures and the relationships which the Constitution ordains among these structures.” *Id.* at 74.

¹⁹ For example, compare Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich L Rev 547, 724 (1999) (arguing that the Fourth Amendment was

The basic premise of all three points advanced here is commonplace: the Fourth Amendment initially applied to the federal government alone.²⁰ The Court incorporated protections against unreasonable searches and seizures against the several states only in 1949.²¹ Further, police forces (as the term is employed today) did not exist in 1791.²² They would not come into existence for another half century.²³ As a result, “the *ex officio* authority of the peace officer was still meager in 1789.”²⁴ The class of federal officials of the early republic most often invoked as potential violators of the Fourth Amendment comprised naval inspectors exercising statutory authority to search, either with or without a warrant, for customs violations.²⁵ At the moment of its entry into legal force, therefore, the Fourth Amendment reached governmental behavior distinct in scale and topography from its contemporary analog. Connections to the separation of powers must be glossed in light of that gap.

aimed “at banning Congress from authorizing use of general warrants”), and Telford Taylor, Two Studies in Constitutional Interpretation: Search, Seizure and Surveillance and Fair Trial and Free Press 19–416 (Ohio State 1969) (“concluding that “our constitutional fathers were not concerned about warrantless searches, but about overreaching warrants”)[SP], with Akhil Reed Amar, Fourth Amendment First Principles, 107 Harv L Rev 757, 758 (1994) (arguing that the Amendment “require[s] that all searches and seizures be reasonable”); Silas J. Wasserstrom, The Incredible Shrinking Fourth Amendment, 21 Am Crim L Rev 257, 258 (1984) (describing the “conventional interpretation” of the Fourth Amendment as including a “warrant requirement” for nearly all searches and seizures).

²⁰ See, for example, Akhil Reed Amar, The Bill of Rights as a Constitution, 100 Yale L J 1131, 1136 (1991) (describing the Bill of Rights as “[o]riginally a set of largely structural guarantees applying only against the federal government”)[SP].

²¹ See Wolf v Colorado, 338 US 25, 27–28 (1949). The Court did not extend the exclusionary rule to the states until 1961. See Mapp v Ohio, 367 US 643, 655 (1961).

²² See David A. Sklansky, The Private Police, 46 UCLA L Rev 1165, 1200–07 (1999).

²³ See id at 1204. See also Stephanos Bibas, The Machinery of Criminal Justice 15–16 (Oxford 2012).

²⁴ Davies, 98 Mich L Rev at 552 (cited in note 18).

²⁵ See, for example, Act of Mar 3, 1791, § 32, 1 Stat 199, 207 (authorizing issuance of warrants to customs enforcement officials to find “fraudulently deposited” spirits); Akhil Reed Amar, Fourth Amendment First Principles, 107 Harv L Rev 757, 766 (1994) (collecting early statutes that allowed customs searches without warrants). See also Boyd v United States, 116 US 616, 623 (1886) (noting that an exemption for customs inspectors was granted “by the same Congress which proposed for adoption the original amendments to the Constitution,” indicating that “the members of that body did not regard searches and seizures of this kind as ‘unreasonable’”)[SP].

A. Common Purpose

Constitutions—including the US iteration of 1787—strive to achieve many ends, from the creation of new state infrastructure to the settlement of regional divides to the fostering of public goods such as a robust internal economy or national defense.²⁶ Not all unfold in the same time frame. Some may be long-term; others have close temporal horizons.²⁷ In consequence, it cannot be assumed that distinct constitutional provisions, introduced at different moments in historical time for different reasons by heterogeneous constituencies, will have the same or congruent ends.

Nevertheless, the Fourth Amendment and the 1787 separation of powers pursue a common end. Trivially, both are concerned with constraining, not empowering, the state.²⁸ More interestingly, though, they converge on a quite distinct problem of liberal state building: the avoidance of what Montesquieu called “despoti[sm]”²⁹ and James Madison labeled “tyranny.”³⁰ Both endeavored to raise the costs of attempts by those with political authority to consolidate state power absolutely against contemporaneous or prospective opponents. The separation of powers achieves this end by preserving the platforms from which opponents and newcomers can sustain their positions in political competition. The Fourth Amendment, in contrast, focuses on the potential for incumbents to deploy state power to undermine the persons and reputations of those same opponents. By providing a positive entitlement to platforms for political opposition and a negative entitlement against ill-motivated efforts to undermine those platforms, these two elements of the Constitution work in complementary motion.

²⁶ See Tom Ginsburg and Aziz Huq, *What Can Constitutions Do? The Afghan Case*, 25 *J Dem* 116, 120, 127–28 (2014).

²⁷ I have identified elsewhere an intertemporal tension between different ends sought by the 1787 Constitution. See Aziz Z. Huq, *The Function of Article V*, 162 *U Pa L Rev* 1165, 1229 (2014) (identifying elements of a constitution as “temporally sensitive” due to “exogenous pressures on the nation-state”)[SP].

²⁸ See Raymond Shih Ray Ku, *The Founders’ Privacy: The Fourth Amendment and the Power of Technological Surveillance*, 86 *Minn L Rev* 1325, 1342–43 (2002) (describing the intent of both the Fourth Amendment and the separation of powers as “limit[ing] executive power and discretion”).

²⁹ Montesquieu, *The Spirit of the Laws* Book 3, ch 9 at 28–29 (Cambridge 1989) (Anne M. Cohler, Basia Carolyn Miller, and Harold Samuel Stone, eds).

³⁰ *Federalist* 47 (Madison), in *The Federalist* 323, 324 (Wesleyan 1961) (Jacob E. Cooke, ed).

To Montesquieu and Madison, a central task of constitutional design was aversive in character: avoiding concentrations of power that might conduce to arbitrary rule. Montesquieu identified despotism with regimes in which “the law must be in a single person[,] and it must change constantly,”³¹ and he condemned them as “corrupt by nature.”³² In response, he pressed the utility of intermediating entities—in particular the judiciary.³³ His cure for despotism thus adhered to institutional heterogeneity. Elaborating on Montesquieu’s argument, Madison rejected a complete separation between the branches. Rather, he underscored the French nobleman’s dictum that “where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted.”³⁴ Institutional monopolization of state power, in Madison’s account of the Constitution, was resisted not only by a constitutional design in which “each department [had] the necessary constitutional means, and personal motives, to resist encroachments of the others”³⁵ but also by the installation of a “double security” of vertical separation between the national and state governments.³⁶ Absent the differentiation of interests across institutions, of course, neither separation of powers nor federalism would have an inhibitory effect on despotism. But consistent with his insistence in Federalist 10 on the inevitability of manifold factional differences across the population,³⁸ Madison’s vision of the separation of powers can be understood as a subsidy to the inevitable political opposition that arises in an extended, heterogeneous republic. This subsidy is a hedge against despotism and tyranny.

The Fourth Amendment advances the same end via different means. To see this, start with the two English cases that provided focal points as negative precedent in the ratification

³¹ Montesquieu, *The Spirit of the Laws* Book 8, ch 19 at 126 (cited in note 29).

³² *Id.* at 119.

³³ See Roger Boesche, *Fearing Monarchs and Merchants: Montesquieu’s Two Theories of Despotism*, 43 *W Polit Q* 741, 747 (1990).

³⁴ Federalist 47 (Madison) at 325–26 (cited in note 30).

³⁵ Federalist 51 (Madison), in *The Federalist* 347, 349 (cited in note 30).

³⁶ *Id.* at 351.

³⁸ Federalist 10 (Madison), in *The Federalist* 56, 58 (cited in note 30) (“The latent causes of faction are thus sown in the nature of man; and we see them every where brought into different degrees of activity, according to the different circumstances of civil society.”).[SP]

debates:³⁹ civil actions by John Entick and John Wilkes, both opposition English politicians, against agents of Lord Halifax, the secretary of state.⁴⁰

Both Entick and Wilkes were targeted due to their political activities against those in power, and in particular due to publications that were critical of the Earl of Bute's regime.⁴¹ Explaining the legal questions in Entick's suit, the presiding judge Lord Camden focused not on a flaw in the warrant but rather on the impermissibility of "paper search[es]."⁴² Papers, he explained, were a person's "dearest property[,] and are so far from enduring a seizure, that they will hardly bear an inspection."⁴³

As Professor William Stuntz has elegantly argued, the rule of *Entick v Carrington*⁴⁴ and *Wilkes v Wood*⁴⁵—a rule against paper searches—had almost no bearing on the investigation of ordinary crimes in an era wanting for organized police, when citizens would make accusations and often effect arrests; it rather imposed a constraint on "political crime[s]."⁴⁶ In the eighteenth century, only senior government officials would have men at their disposal to search homes. A number of these searches would likely target papers implicating some kind of opposition to regnant powers.⁴⁷ Seditious libel prosecutions of this sort, with attendant investigations involving "general searches for documentary evidence," had been common under King Charles I.⁴⁸ The Fourth Amendment, to the extent it drew inspiration and purpose from these cases, was thus "really about the protection of political dissent."⁴⁹ In other words, it was about maintaining space for individuals to compete for offices created by the sepa-

³⁹ See William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 *Yale L J* 393, 396–404 (1995); Amar, 107 *Harv L Rev* at 772 (cited in note 25); Davies, 98 *Mich L Rev* at 563 n 21, 657–59 (cited in note 18).

⁴⁰ See Stuntz, 105 *Yale L J* at 397 (cited in note 39).

⁴¹ See *id.* at 397–99. See also Donald A. Dripps, "Dearest Property": Digital Evidence and the History of Private "Papers" as Special Objects of Search and Seizure, 103 *J Crim L & Crimin* 49, 61–62 (2013) (describing how Wilkes's publications specifically targeted Bute and King George III)[SP].

⁴² *Entick v Carrington*, 19 *Howell's St Trials* 1029, 1073 (CP 1765).

⁴³ *Id.* at 1066.

⁴⁴ 19 *Howell's St Trials* 1029 (CP 1765).

⁴⁵ 19 *Howell's St Trials* 1153 (CP 1763).

⁴⁶ Stuntz, 105 *Yale L J* at 402 (cited in note 39).

⁴⁷ See *id.* at 402–04.

⁴⁸ Andrew E. Taslitz, *Reconstructing the Fourth Amendment: A History of Search and Seizure, 1789–1868* 18 (NYU 2006).

⁴⁹ Stuntz, 105 *Yale L J* at 447 (cited in note 39).

ration of powers system—individuals who might play vital roles in resisting incipient despotism.

B. Two Forms of Institutional Differentiation

There is no such thing as a purely private paper or thing. Nothing, as a matter of law, lies categorically beyond the panoptic gaze of government. But it was not always so. In its “first significant case involving the fourth amendment,”⁵⁰ the Court held in *Boyd v United States*⁵¹ that any “seizure of a man’s private books and papers” would violate the Fourth (and Fifth) Amendment.⁵² *Boyd* rooted this absolute protection of private papers in a law office history of *Wilkes*.⁵³ The ensuing class of “private” papers that could be neither seized by government agents nor secured by subpoena endured, at least in theory, until *Boyd*’s repudiation in 1976.⁵⁴ Periodic calls for the revival of the *Boyd* rule aside,⁵⁵ the Court itself currently evinces no appetite for trying to circumscribe some domain of absolutely private papers or things that under no circumstances can be elicited by the state.

But if the Fourth Amendment does not create a zone of unbreachable privacy, what does it do? ⁵⁶ The amendment does not entirely prohibit the government from engaging in searches or seizures—this much is evident from the adjective “unreasonable.” Rather, the amendment has generally been read as circumscribing the conditions under which such actions are lawful.⁵⁷ In textual terms, the reasonableness of a search does not depend on its object or what it happens to discover but rather on the manner in which the government behaves. The Fourth Amendment

⁵⁰ Samuel A. Alito Jr, *Documents and the Privilege against Self-Incrimination*, 48 U Pitt L Rev 27, 39 (1986).

⁵¹ 116 US 616 (1886).

⁵² *Id* at 633.

⁵³ See *id* at 625–26.

⁵⁴ See *Fisher v United States*, 425 US 391, 407–09 (1976). *Fisher* reserved the question whether a personal diary might receive different treatment. *Id* at 401 n 7.

⁵⁵ See, for example, Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 Va L Rev 869, 873–74 (1985) (describing the *Boyd* Court’s interpretation of *Entick* as “more accurate” than later interpretations)[SP].

⁵⁶ See Andrei Marmor, *What Is the Right to Privacy?*, 43 Phil & Pub Aff 3, 7 (2015) (identifying the primary interest at stake in the privacy debate as “the interest in having a reasonable measure of control over ways in which we present ourselves to others”).

⁵⁷ See, for example, *Boyd*, 116 US at 622 (noting that “long usage, acquiesced in by the courts,” might legitimize a given search or seizure by suggesting that there must be “plausible ground or reason for it in the law, or in the historical facts”)[SP].

here diverges from other parts of the Bill of Rights, such as the Free Speech and Establishment Clauses of the First Amendment, which seem to be absolute prohibitions.⁵⁸ It rather tracks the Takings Clause. This does not on its face reject all government confiscations but rather requires compensation and imposes limitations on the subsequent use of property.⁵⁹ Like the Takings Clause, the Fourth Amendment assigns a price to the (coercive) work of statecraft.

The Fourth Amendment's labor, though, operates along a subtly different margin from the Takings Clause's. The former entails a careful division of institutional labor among all three branches, whereas the latter imposes a liability rule of just compensation without specifying its institutional underpinnings.⁶⁰ The executive, of course, is implicated because it is the object of Fourth Amendment regulation. Treating that as a given, I examine here first its implicit allocation to legislators and then its mandate for judicial action to show the Fourth Amendment's double functional dependence on the separation of powers.

1. Congress and the Fourth Amendment.

A world apart from the First Amendment's gimlet-eyed stance toward legislators, the Fourth Amendment deploys Congress as a means to further individual interests. Consider the Warrant Clause, which imposes "probable cause, supported by Oath or affirmation" as a condition antecedent to the issuance of a warrant.⁶¹ The text supplies no referent for probable cause. But it is tolerably clear that a certainty that agents "will find something in a house—walls, for example— . . . cannot suffice to support an *ex parte* warrant."⁶² As a post-*Wilkes* pamphleteer explained, an officer must possess probable cause respecting the presence of "stolen goods, or such a particular thing that is crim-

⁵⁸ US Const Amend I ("Congress shall make no law . . .") (emphasis added).[SP]

⁵⁹ US Const Amend V ("[N]or shall private property be taken for public use, without just compensation.") [SP].

⁶⁰ It is natural, but erroneous, to assume that it is the courts' role to assess and order just compensation; legislatures are capable of issuing compensation without judges' prompting. And the judiciary, as much as the legislature and the executive, is capable of Takings Clause violations. See, for example, *Stop the Beach Renourishment, Inc v Florida Department of Environmental Protection*, 560 US 702, 714 (2010) ("Our precedents provide no support for the proposition that takings effected by the judicial branch are entitled to special treatment, and in fact suggest the contrary.") [SP]. For these reasons, the Takings Clause lacks the Fourth Amendment's distinctive institutional logic.

⁶¹ US Const Amend IV.

⁶² Amar, 107 Harv L Rev at 766 (cited in note 25).

inal in itself . . . before any magistrate is authorized to grant a warrant to any man to enter [a] house and seize it.”⁶³ The reference to probable cause, in short, is an incorporation by reference of substantive criminal law.

Congress accordingly enters the Fourth Amendment equation as a source of rules that calibrate search authority under warrants.⁶⁴ A legislature concerned about executive abuse of search authority can narrow criminal liability to rein in the executive. A legislature lacking this concern, but worried about fiscal goals, can alternatively recruit inspectors and vest them with authority to engage in searches of vessels and homes for illegally imported goods.⁶⁵ Of course, not all search authority turns on warrants. But, at least until recently, the Court has construed the authority to search or seize without a warrant in the case of felony arrests,⁶⁶ vehicular searches,⁶⁷ or street-level stops⁶⁸ as keyed to the scope of substantive criminal law.

The Fourth Amendment’s allocation to Congress of the power to calibrate search authority has two advantages. It first diffuses control over a key element of government power between two branches. Second, it amplifies democratic control over such authority. From this perspective, Stuntz’s near-canonical objection to constitutional criminal procedure—that Congress can take away whatever the Court gives in the form of procedural rights by ratcheting up the severity and scope of substantive criminal law⁶⁹—inverts the anticipated constitutional design. The Fourth Amendment’s democratic pedigree is more consistent with the provision’s central antityranny purpose than Stuntz’s analysis might imply.

⁶³ Schnapper, 71 Va L Rev at 903 (cited in note 55), quoting *Father of Candor, A Letter concerning Libels, Warrants and the Seizure of Papers* 58 (London 5th ed 1765).

⁶⁴ See Ku, 86 Minn L Rev at 1326 (cited in note 28).

⁶⁵ See note 25 and accompanying text.

⁶⁶ See, for example, *United States v Watson*, 423 US 411, 423–24 (1976) (declining to adopt a constitutional rule requiring warrants when it is not “practicable” to procure one during an arrest)[SP].

⁶⁷ See, for example, *Carroll v United States*, 267 US 132, 155 (1925) (“[I]f an officer seizes an automobile . . . without a warrant . . . the officer may escape costs or a suit for damages by a showing that he had reasonable or probable cause for the seizure.”)[SP].

⁶⁸ See, for example, *Terry v Ohio*, 392 US 1, 30 (1968) (permitting a police officer to conduct “a carefully limited search of the outer clothing” of a person if the officer “observes unusual conduct” indicating that “criminal activity may be afoot”)[SP].

⁶⁹ See William J. Stuntz, *The Uneasy Relationship between Criminal Procedure and Criminal Justice*, 107 Yale L J 1, 56 (1997).

There are two important caveats to this point. First, during the first decade of the republic, there was a “muddled”⁷⁰ and highly politicized⁷¹ debate about whether a federal common law of crime existed. Riding circuit in 1798, Justice Samuel Chase rejected nonlegislative crime.⁷² Fourteen years later, the whole Supreme Court in United States v Hudson and Goodwin⁷³ followed suit, holding that the “legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.”⁷⁴

To rely solely on Hudson and Goodwin to show that criminal prohibitions required legislative action would, I think, be evasive. After all, prior to 1812, eight circuit courts had upheld convictions secured through common-law federal crimes.⁷⁵ These judges may have been operating according to presumptions that had been ousted by the 1787 Constitution. But the logic of constitutional architecture is not so airtight or inexorable that elements of a repudiated ancient regime cannot survive, or even fester, as purported constitutional backdrops.

A more modest defense of my argument avoids prochronic feints. It holds that even assuming a federal common law of crime existed in 1791, Congress was hardly shut out of the picture. It surely remained to Congress to abrogate common-law crimes. Even absent a role in fashioning common-law crimes, Congress still held the whip hand over state search authority between 1791 and 1812.

The second caveat operates not as a limitation on my observation about the structural predicates of the Fourth Amendment but instead as an indictment of recent doctrinal developments. Since 1967, the Court has recognized a gamut of exceptions to both the warrant rule and any individuated-suspicion require-

⁷⁰ Kathryn Preyer, Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic, 4 L & Hist Rev 223, 263 (1986).

⁷¹ See Stephen B. Presser, A Tale of Two Judges: Richard Peters, Samuel Chase, and the Broken Promise of Federalist Jurisprudence, 73 Nw U L Rev 26, 68 (1978) (“Other commentators on the political dispute which was soon to develop over the existence of a federal common law of crimes attribute the division of opinion to the broader Federalist/Republican split over the extent of powers that the Constitution granted to the central government.”)[SP].

⁷² See United States v Worrall, 2 US (2 Dall) 384, 388 (1798).

⁷³ 11 US (7 Cranch) 32 (1812).

⁷⁴ *Id.* at 34.

⁷⁵ Gary D. Rowe, The Sound of Silence: United States v. Hudson & Goodwin, the Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes, 101 Yale L J 919, 920 n 8 (1992) (collecting cases in which common-law crimes were upheld).

ment in a series of cases now denominated administrative search jurisprudence.⁷⁶ So, for example, police can establish witness checkpoints without a scintilla of legislative authorization.⁷⁷ Foreign-intelligence investigations are another exception.⁷⁸ Abandonment of individuated suspicion corresponds to a derogation of any necessary legislative role of the kind that the Framers anticipated. The administrative search doctrine has been comprehensively critiqued on other grounds, but it surely counts as a strike against that jurisprudence that it disregards what has long been a keystone element in the amendment's institutional logic—a tight nexus to legislative authorization.⁷⁹

2. Courts and the Fourth Amendment.

To contemporary ears, an inquiry into the judicial function in Fourth Amendment law is no less than an inquiry into the much-maligned exclusionary rule of *Mapp v Ohio*⁸⁰ (imposed, albeit in federal prosecutions, forty-seven years beforehand⁸¹). But even in the absence of an exclusionary rule, the Fourth Amendment in practical operation necessitates institutional differentiation between the executive and judiciary. Before exclusion's advent, therefore, courts were already necessary institutional channels of Fourth Amendment values.

The judicial role emerges in the Warrant Clause. To be sure, just as the text is silent as to the object of probable cause, so too it is silent on the identity of the constitutionally proper person to issue a warrant. But as glossed by the Court, the clause implies institutional differentiation between “the officer engaged in the often competitive enterprise of ferreting out crime” and “a neu-

⁷⁶ See, for example, *Camara v Municipal Court of the City and County of San Francisco*, 387 US 523, 538 (1967) (concluding that area inspections for the purpose of enforcing municipal programs satisfy the criminal law standard of “probable cause” and do not violate the Fourth Amendment as long as “reasonable legislative or administrative standards for conducting an area inspection are satisfied”).

⁷⁷ See *Illinois v Lidster*, 540 US 419, 427 (2004) (deeming a checkpoint stop constitutional because it “interfered only minimally with liberty of the sort the Fourth Amendment seeks to protect”).

⁷⁸ See, for example, 50 USC § 1805(a)(2)(A) (providing special exceptions for electronic surveillance if “the target . . . is a foreign power or an agent of a foreign power”)[SP].

⁷⁹ Narcotics and alcohol checkpoints are loosely justified by legislative action in the sense that laws exist regulating controlled substances. But this is not the kind of tight nexus required by the probable cause requirement.

⁸⁰ 367 US 643, 651 (1961).

⁸¹ See *Weeks v United States*, 232 US 383, 398 (1914).

tral and detached magistrate.”⁸² Article III courts have the authority to issue warrants notwithstanding the ex parte character of those proceedings.⁸³ But not all warrants need to be issued by Article III judges, provided that the magistrate possesses the “neutrality and detachment demanded of a judicial officer.”⁸⁴ In practice, this entails institutional separation.⁸⁵

This illuminates the otherwise rather puzzling result in *Shadwick v City of Tampa*,⁸⁶ in which the Court upheld an ordinance authorizing arrest warrants issued by nonlawyer court clerks for breaches of municipal ordinances.⁸⁷ *Shadwick* explained that the Fourth Amendment insists that “someone independent of the police and prosecution must determine probable cause”⁸⁸ and looked to the institutional locus of the clerks rather than their training or tenure.⁸⁹ For this reason, a non–Article III magistrate judge can issue a warrant,⁹⁰ whereas an FBI special agent in charge, however competent, legalistic, and dispassionate, is disqualified by her presumptive “partiality, or affiliation,”⁹¹ with the investigating officers.

The Warrant Clause, in short, rejects a purely endogenous solution to the problem of ensuring regularity and legality within investigative agencies. It repudiates what administrative law scholars call “internal separation of powers” solutions for checking and diffusing government power.⁹² Such solutions involve intermural “administrative structures and other mechanisms” to promote due process, “regularity[,] and the rule of law”⁹³ in a “fractal”⁹⁴ effort to recreate within a branch structures that might otherwise operate between the branches.

⁸² *Johnson v United States*, 333 US 10, 14 (1948).

⁸³ See *Morrison v Olson*, 487 US 654, 681 n 20 (1988).

⁸⁴ *Lo-Ji Sales, Inc v New York*, 442 US 319, 326 (1979).

⁸⁵ See *id.* at 327 (determining that there was no “neutral and detached posture” when the town justice that issued the search warrant constructively became a member of the police operation)[SP].

⁸⁶ 407 US 345 (1972).

⁸⁷ *Id.* at 352–54.

⁸⁸ *Id.* at 348.

⁸⁹ *Id.* at 349–50.

⁹⁰ FRCrP 41(b).

⁹¹ *Shadwick*, 407 US at 350. [FC n 86]

⁹² See, for example, Gillian E. Metzger, *The Interdependent Relationship between Internal and External Separation of Powers*, 59 *Emory L J* 423, 427–28 (2009).

⁹³ *Id.* at 429.

⁹⁴ Eric A. Posner and Adrian Vermeule, *The Credible Executive*, 74 *U Chi L Rev* 865, 898 (2007).

The second judicial function within the institutional architecture of the Fourth Amendment cannot be drawn directly from the amendment's text. Instead, it must be derived from the assumptions and beliefs that animated its incorporation into the Constitution. On Professor Akhil Amar's account, the anticipated remedial mechanism for Fourth Amendment violations was a civil tort action for damages, in which an officer's liability would be ascertained by a jury.⁹⁵ To substantiate this claim, Amar identifies "strong linkages between the Fourth and Seventh Amendments,"⁹⁶ with *Entick* and *Wilkes* as key exhibits.⁹⁷ Indeed, seizures by federal revenue officials in the early republic were challenged in common-law forms of action such as trover, detinue, and assumpsit.⁹⁸ Such suits were brought in either state or federal courts.⁹⁹ But given that the Seventh Amendment's right to a jury trial in civil cases had been motivated in part by Anti-Federalist concerns about unchecked federal official action,¹⁰⁰ it seems plausible to think that some measure of institutional differentiation within the federal government was inferred from the expected operation of the Fourth Amendment.

C. Structural Implications of the Fourth Amendment

Constitutional rights have different shapes: in Hohfeldian terms,¹⁰¹ the Fourth Amendment is an individual right with a correlative duty on the state regarding the forms of permissible searches and seizures. The duty, rather than being substantive, has a structural, procedural declension. The Fourth Amendment is vindicated not by governmental disavowal of search authority but instead by assiduous observance of interbranch protocols. As befits a constitutional protection aligned in purpose with the separation of powers' antityrannical ambition, the Amendment is cashed out by the involvement of multiple, clearly differentiated branches as conditions precedent to invasions on a person's

⁹⁵ Amar, 107 Harv L Rev at 758 (cited in note 25).

⁹⁶ Id at 775.

⁹⁷ Id at 775–77.

⁹⁸ Jerry L. Mashaw, Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law 66 (Yale 2012).

⁹⁹ Id at 73.

¹⁰⁰ See id at 67–68.

¹⁰¹ See Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L J 16, 30 (1913) (setting forth an influential taxonomy of eight correlatives and opposites that structure legal relationships).

sphere of protected interests. The Fourth Amendment as originally conceived rested on structural armatures.

II. TESTING THE FOURTH AMENDMENT'S STRUCTURAL IMPLICATIONS

But how have those foundations held up over time? This Part uses contemporary examples to illuminate interactions between the Fourth Amendment and the separation of powers. These examples are drawn from the domain of federal national-security-related surveillance, collection, and regulatory activities. The underlying hypothesis to be tested turns on whether fidelity to the separation of powers can indeed promote valued constitutional rights and individual liberties.

I offer a caveat first: The analysis presented here might be taken as endorsing a standard ambition in constitutional theory to “translate”¹⁰² the Fourth Amendment into contemporary contexts or to maintain an original “equilibrium.”¹⁰³ But I am uncertain whether these metaphors enable perspicacious judgment—here, or ever. The sheer number of variables that have changed between 1791 and today means that it is hard to discern what a sound translation or equilibrium would be or how successful translations or equilibriums can be distinguished from failures. The sheer scale and expected social benefit of local and state government, and of the federal government, have changed dramatically but at different rates. How can an invariant Fourth Amendment rule covering all of them possibly embody and preserve a singular 1791 equilibrium? The range of human interests covered by the Fourth Amendment has also proliferated. Changes to domestic architecture and familial domiciliary arrangements, for example, have altered both the expectations and the possibilities of intimacy. Novel diversity in the permitted forms of sociability engender new interests. The advent of electronic surveillance, algorithmic data mining, and geolocational technology merely accentuates the wide variance in privacy interests. Hence, Professor Judith Jarvis Thomson’s famous complaint about the miscellaneous character of privacy¹⁰⁴ resonates

¹⁰² Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 *Stan L Rev* 395, 443 (1995).

¹⁰³ Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 *Harv L Rev* 476, 487 (2011).

¹⁰⁴ Judith Jarvis Thomson, *The Right to Privacy*, 4 *Phil & Pub Aff* 295, 312–13 (1975).

as a critique of the Fourth Amendment's scope and as a reprimand to mechanical notions of translation or equilibrium.

My goal here, instead, is more narrow than translation. It is to ask whether the anticipated causal mechanisms and effects associated with the Fourth Amendment continue to be observed today. The examples considered below document different elements of the contemporary interbranch division of labor as a way of testing the durability of the Founding-era assumptions. They are not fabular exercises in the academy's just-so stories of translation or equilibrium.

A. A Domesticated Fourth Amendment?

The antityranny purpose of the Fourth Amendment finds exiguous echo in contemporary practice and doctrine. Viewed in the round, Fourth Amendment speak no longer treats dissenters (however defined) as the cynosure of constitutional protection. Rather, the overall structure of Fourth Amendment doctrine prioritizes a very different species of privacy.

To see this, consider who might be the closest contemporary analog to Wilkes. It is plausible (if not inevitable) to posit leakers such as Edward Snowden and their abettors at The Guardian and The New York Times as the closest parallels today: political insiders who rebelled in ways that other political insiders find morally and legally repugnant.¹⁰⁶ Recent practice, though, suggests that the federal government is aggressive in investigating leakers and their abetting correspondents, and that the Fourth Amendment would provide very little shelter for either. This is in part because the instruments used to conduct such investigations, such as requests for call records and subpoenas,¹⁰⁷ are weakly regulated under the Constitution. The attorney general's guidelines titrating the use of subpoenas against news organizations stipulate that an order to produce information must be "essential" to a criminal investigation or prosecution.¹⁰⁸ Given

¹⁰⁶ At one presentation of this paper, an academic formerly employed by the federal government expressed sour disdain at this arguing, noting that Snowden, unlike Wilkes, was a government insider who betrayed a trust. Wilkes, of course, was also an insider (a member of parliament when *North Britain* No. 45 was published), protesting what he saw as the most iniquitous policies of the day. Contemporary contempt of Snowden, therefore, seems more probative of the historical parallel than disqualifying. The failure to see the parallelism—a failure that is, I think, quite widespread—is rather telling.

¹⁰⁷ See, for example, Charlie Savage and Leslie Kaufman, Phone Records of Journalists Seized by U.S. (NY Times, May 13, 2013), archived at <http://perma.cc/EJG8-E9A2>.

¹⁰⁸ 28 CFR § 50.10(c)(4)(ii)(A).

that in many cases a journalist's records may be the sole place in which information about a leaker can be found, it is not clear how demanding this standard will prove.¹⁰⁹

As a matter of Fourth Amendment doctrine, political dissenters also receive less protection than that afforded to suspects in more-routine investigations. The 1972 case United States v United States District Court for the Eastern District of Michigan¹¹⁰ (“Keith”) rejected warrantless searches that were directed at a group of domestic political dissenters.¹¹¹ But the Court invoked difficulties faced by investigators in domestic-security investigations to hold that the constitutionally adequate warrant procedure “may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection.”¹¹² Domestic-security cases could be channeled to specially constituted courts and regulated by less onerous timing and reporting rules. This “warrant lite” regime is potentially less protective than the post–World War II executive branch practice of permitting warrantless searches provided that their yield was not used in criminal prosecutions.¹¹³ Congress has never taken up Keith’s invitation. The Keith opinion’s separate exception for foreign-power-related investigations,¹¹⁴ it turns out, has generated quite enough leeway.

If there is a bias in Fourth Amendment law, it runs in quite a different direction. In Keith itself, Justice Lewis Powell adverted to “physical entry of the home [as] the chief evil against which the wording of the Fourth Amendment is directed.”¹¹⁵ More generally, “the home [is] a sacred site at the ‘core of the Fourth Amendment’” across an array of situations.¹¹⁶ In spite of

¹⁰⁹ Efforts to subpoena former *New York Times* report James Risen persisted for several months before Attorney General Eric Holder terminated them. Matt Apuzzo, *Holder Fortifies Protection of News Media’s Phone Records, Notes or Emails*, NY Times, Jan 14, 2015, at A18. Given the seeming centrality of Holder’s views on journalistic freedom to the decision here, it is not clear any general trend can be inferred from this decision.

¹¹⁰ 407 US 297 (1972).

¹¹¹ Id at 321.

¹¹² Id at 323.

¹¹³ See L. Rush Atkinson, The Fourth Amendment’s National Security Exception: Its History and Limits, 66 Vand L Rev 1343, 1392–95 (2013).

¹¹⁴ Keith, 407 US at 321–22 (“We have not addressed, and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents.”)[SP]. [FC n 110]

¹¹⁵ Id at 313.

¹¹⁶ Stephanie M. Stern, The Inviolable Home: Housing Exceptionalism in the Fourth Amendment, 95 Cornell L Rev 905, 913 (2010), quoting Wilson v Layne, 526 US 603, 612 (1999).

its political, structural roots, the Fourth Amendment has transformed into a nostalgia subsidy for home ownership.¹¹⁷

This transmigration of a public-regarding concept into a vindication of the cozily private is not unique. There is a little-noticed parallel between the Fourth Amendment's domestication and the subsequent taming of the Second Amendment in District of Columbia v Heller.¹¹⁸ The Second Amendment emerged from "conceptions of republican political order" that conduced to "ordinary citizens participat[ing] in the process of law enforcement and defense of liberty."¹¹⁹ Heller, however, reworked that right into one that is narrowly framed around self-defense.¹²⁰ There is no small irony in the fact that perhaps the two most antitaxist, centrifugal constitutional elements of the Bill of Rights have been rendered nullities on their original terms by domestication.

B. Congress as the Ally of Fourth Amendment Interests?

Well-trodden examples illustrate how legislators are only weakly incentivized to vindicate Fourth Amendment values. The recent legislative response to Snowden's disclosures, for example, was "hardly resist[ed]" by the NSA because it would entail merely "modest" **[RT: direct quote]** changes to ongoing collection efforts.¹²¹ Similarly, the disclosures of warrantless bulk collection of domestic-to-foreign calls in 2005 resulted in new authorizations for bulk collection and retroactive immunity for telecommunications providers.¹²² Even the much-hymned Foreign Intelligence Surveillance Act of 1978¹²³ (FISA) has glaring lacunae.¹²⁴

¹¹⁷ See Stern, 95 Cornell L Rev at 919–20 (cited in note 116).

¹¹⁸ 554 US 570 (2008).

¹¹⁹ Sanford Levinson, The Embarrassing Second Amendment, 99 Yale L J 637, 650 (1989).

¹²⁰ Heller, 554 US at 599–600.

¹²¹ Peter Baker and David E. Sanger, Why the N.S.A. Isn't Howling over Restrictions (NY Times, May 1, 2015), archived at <http://perma.cc/4S6R-J8S5>.

¹²² See Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub L No 110-261, 122 Stat 2436, codified as amended at 50 USC § 1801 et seq. This Act did extend a warrant rule to acquisitions targeting US persons overseas for the first time. FISA Amendments Act § 101(a)(2), 122 Stat at 2448–53, codified at 50 USC § 1881b.

¹²³ Pub L No 95-511, 92 Stat 1783, codified as amended at 50 USC § 1801 et seq.

¹²⁴ For example, FISA has an "exclusive means" provision, 50 USC § 1812b, but this extends to only "electronic surveillance." The latter's statutory definition, however, trains largely on wire communications inside the US, leaving satellite and other forms of transmission unregulated. §1801(f). The Wiretap Act also contains a savings clause that

The threadbare quality of legislative incentives cannot be explained merely by Congress's prioritization of security over privacy interests. Consider a less well-trodden example. Today, the usage of digital devices and services generates large volumes of by-product transactional, locational, and interactional data.¹²⁵ These data can be used to generate novel and surprising inferences about individual traits, behaviors, and affiliations.¹²⁶ While the epistemic utility of aggregated data amenable to algorithmic analysis has stimulated considerable debate about the third-party doctrine of *Smith v Maryland*,¹²⁷ few have noticed that data-rich intermediaries already have powerful incentives to share data with the government voluntarily, not least due to cyberattacks by other sovereign actors.¹²⁸ Bills proposed in recent sessions of Congress and supported by major telecommunications carriers would deregulate information sharing between companies and the federal government, substantially lowering the cost of mass disclosures to the government.¹²⁹ Recent iterations of these bills not only permit but affirmatively require real-time sharing of data received by the Department of Homeland Security with the NSA.¹³⁰ The bills place no constraints on how data may be used. If the expansive and creative gloss placed on FISA's "tangible things" provision¹³¹ or the deep cooperation between the Drug Enforcement Administration and AT&T in the

permits certain non-statutory collection of non-domestic communications. 18 USC § 2511(2)(f).

¹²⁵ See Bruce Schneier, *Data and Goliath: The Hidden Battles to Collect Your Data and Control Your World* 13–19 (Norton 2015).

¹²⁶ See, for example, *Jones*, 132 S Ct at 956 (Sotomayor concurring) (describing GPS monitoring as "making available at a relatively low cost [] a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track")**[SP]**.

¹²⁷ 442 US 735 (1979). See also, for example, *Jones*, 132 S Ct at 957 (Sotomayor concurring) ("[I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties.").

¹²⁸ See generally Shane Harris, *@War: The Rise of the Military-Internet Complex* (Houghton Mifflin Harcourt 2014).

¹²⁹ See, for example, Cybersecurity Act of 2012, S 2105, 112th Cong, 2d Sess (Feb 14, 2012).

¹³⁰ See, for example, Cyber Intelligence Sharing and Protection Act, HR 234, 114th Cong, 1st Sess (Jan 8, 2015); Cybersecurity Information Sharing Act of 2014, S 2588, 113th Cong, 2d Sess (July 10, 2014). See also Kurt Opsahl, *The CISPA Government Access Loophole* (Electronic Frontier Foundation, Mar 1, 2013), archived at <http://perma.cc/N8JH-V6PM>.

¹³¹ 50 USC § 1861.

Hemisphere Project¹³² is any guide, such provisions will function as cheaper access channels for large data flows that otherwise would be regulated by warrants or administrative subpoenas.

The strong legislative support for such measures suggests that Congress cannot be assumed to act as a friction on executive ambition even absent direct national-security concerns. Indeed, in contrast to legislative attitudes, the White House has promulgated an executive order with relatively robust privacy protections.¹³³ This is not the sole pro-privacy posture struck by unexpected elements of the executive: In the early 2000s, the NSA endorsed robust cryptography and network-security algorithms, thereby ensuring their “wider availability in non-classified settings.”¹³⁴ When the NSA was revealed to have corrupted commercial cryptography standards, another agency of the federal government, the National Institute of Standards and Technology, issued an advisory against the flawed algorithms.¹³⁵ And one of the leading antisurveillance tools available today, the Tor network, was originally developed with the support of the US Naval Research Laboratory.¹³⁶ Hence, even if Congress is routinely (if not inevitably¹³⁷) privacy blind, security-focused elements of the executive can be quite solicitous of the same value.

Elementary public-choice analysis suggests that these anecdotes will not be outliers but rather that congressional production of privacy protections will generally be weak, especially in the national-security domain.¹³⁸ Many forms of surveillance have small effects that are diffused across the population. Consequently, they are unlikely to generate effective interest group formation. Even when government exploitation of vulnerabilities

¹³² See Scott Shane and Colin Moynihan, Drug Agents Use Vast Phone Trove, Eclipsing N.S.A.'s (NY Times, Sept 1, 2013), archived at <http://perma.cc/4QYD-QZZR>.

¹³³ See Executive Order 13691, 80 Fed Reg 9349, 9350–51 [RT2: CQ CFR info] (Feb 15, 2015) (“Agencies shall coordinate their activities under this order with their senior agency officials for privacy and civil liberties and ensure that appropriate protections for privacy and civil liberties are incorporated into such activities.”) [SP].

¹³⁴ Susan Landau, Under the Radar: NSA's Efforts to Secure Private-Sector Telecommunications Infrastructure, 7 J Natl Sec L & Pol 411, 428–29 (2014).

¹³⁵ See id at 430–31.

¹³⁶ See Prying Eyes: Inside the NSA's War on Internet Security (Spiegel Online International, Dec 28, 2014), archived at <http://perma.cc/YGC4-X8ER>.

¹³⁷ See, for example, Charlie Savage, U.S. Weighs Wide Overhaul of Wiretap Laws (NY Times, May 7, 2013), archived at <http://perma.cc/U9TH-2A9Y> (describing some lawmakers as “express[ing] skepticism” about expanding wiretap laws to make it easier to conduct surveillance on Internet users) [SP].

¹³⁸ See Aziz Z. Huq, Standing for the Structural Constitution, 99 Va L Rev 1435, 1502–03 (2013) (summarizing public-choice theory).

engenders possible criminal exploitation of the same weaknesses,¹³⁹ the risk of economic loss is generally in the future, uncertain in distribution and magnitude, and highly discounted. To be sure, there is a minority (roughly one-quarter) of the population that highly values privacy,¹⁴⁰ but (as I explain below) this minority may find the purchase of private substitutes easier than public collective action.

On the other hand, even though the harms combatted by national-security institutions are uncertain and distant, they are vividly pressed by a powerful and prestigious legislative lobby—our law-enforcement and national-security agencies. The latter are especially influential among legislators because they influence the factual agenda for debate by determining how much information to share with Congress. The law-enforcement lobby, as the cybersecurity-information-sharing debate suggests, will also often align with influential telecommunications lobbies, whose financial interests are conducive to the maximizing of individuals' disclosures and tight cooperation with the government on both cybersecurity and regulation.¹⁴¹

Privacy legislation—on the sporadic occasions that it is enacted—already reflects this asymmetrical political economy through the “universal[]” inclusion of “law enforcement access to covered material, relying chiefly on more complex devices than a warrant and probable cause.”¹⁴² More generally, Congress's modal solution to the challenges of political disagreement and technical deficiencies involves delegation under broad standards, which—perhaps uniquely in this domain—re-creates the perceived problems of open-ended discretion rather than re-

¹³⁹ Susan Landau, *Surveillance or Security? The Risks Posed by New Wiretapping Technologies* 182–88 (MIT 2010).

¹⁴⁰ Lior Jacob Strahilevitz, *Toward a Positive Theory of Privacy Law*, 126 *Harv L Rev* 2010, 2026 (2013).

¹⁴¹ See Landau, 7 *J Natl Sec L & Pol* at 423–25 (cited in note 134) (describing congressional support for the industry position of weaker export controls on cryptography against the FBI's campaign for stronger controls). After Snowden's revelations, Apple and Google introduced default Secure Sockets Layer encryption to their mobile operating systems, and WhatsApp integrated TextSecure into the app. But these developments would impose no friction if those companies were to disclose information directly to the state. See Sean Gallagher, *Web Giants Encrypt Their Services—but Leaks Remain* (*Ars Technica*, June 10, 2014), archived at <http://perma.cc/QH72-DC95>; Lily Hay Newman, *WhatsApp Is the First Major Messaging Service to Add Strong End-to-End Encryption* (*Slate*, Nov 18, 2014), archived at <http://perma.cc/LBZ9-YVV3>.

¹⁴² Erin Murphy, *The Politics of Privacy in the Criminal Justice System: Information Disclosure, the Fourth Amendment, and Statutory Law Enforcement Exemptions*, 111 *Mich L Rev* 485, 491 (2013).

solving them. No less than in the criminal law domain, in which legislators have spent most of the past decade bidding up penal sentences,¹⁴³ Congress is unlikely to be a constant Fourth Amendment ally in new technological fields.

C. The Fragile Judicial Role

Over the past thirty years, the Supreme Court has evinced an increasing unwillingness to enforce the Fourth Amendment at the cost of forgoing criminal convictions. Instead, it has required rights holders to show not merely that an act was unlawful but also that it was especially egregious.¹⁴⁴ I have argued elsewhere that this lack of concern flows not just from judges' ideological preferences but also from a sense of the institutional interests of the Article III judiciary.¹⁴⁵ This is a threshold reason to have tempered hope for the judiciary.

It would be surprising indeed if the judicial attitude became more latitudinarian when national-security concerns were in play.¹⁴⁶ Experience with the Foreign Intelligence Surveillance Court (FISC) supports this inference.¹⁴⁷ Since 2003, the FISC, which is tasked with approving foreign-intelligence wiretaps, has approved more than 97 percent of requests without modifi-

¹⁴³ See, for example, Wayne R. LaFave, The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment, 102 Mich L Rev 1843, 1844 (2004) (describing "the renewed interest of the police in traffic enforcement [as] attributable to a federally sponsored initiative related to the war on drugs") (quotation marks omitted).

¹⁴⁴ See Aziz Z. Huq, Judicial Independence and the Rationing of Constitutional Remedies, 65 Duke L J 1, 20 (2015) ("Since the mid-1970s, the Court has rationed the availability of [damages, suppression, and habeas relief] by installing a threshold requirement that individual rights claimants must typically demonstrate that an offending state official not only violated the Constitution, but did so in an especially flagrant and obvious way.").

¹⁴⁵ See *id.* at 55 ("This historical evidence is complemented by a growing body of evidence that judges act upon the basis of institutional interests determined by their position within Article III.").

¹⁴⁶ In fact, courts' approaches to remedies for constitutional violations do not change significantly between national-security and nonsecurity contexts. See Aziz Z. Huq, Against National Security Exceptionalism, 2009 S Ct Rev 225, 257.

¹⁴⁷ I am skeptical that the concerns expressed in the Jones concurrences and in the Riley majority opinion about third-party collection will yield a meaningful friction on state collection efforts. I do not think the Court is well positioned to craft a rule of general application for (1) the many different kinds of governmental entities that collect and hold third-party data; and (2) the many different ways in which different kinds of third-party data can be used, especially given the endless ways in which different databases can be aggregated to de-anonymize and describe individuals. The Court lacks the political will to engage in a sustained campaign of regulation. In my view, it is likely to install a reasonableness rule rather than a warrant requirement.

cation.¹⁴⁸ Of course, high grant rates alone might be explained by the presence of administrative systems that are capable of crafting lawful warrants, anticipating problems, and negotiating solutions. But the FISC has also promulgated relatively broad glosses on collection authority¹⁴⁹ while weakening constraints on interagency dissemination¹⁵⁰ and resisting proposals to introduce adversarial elements into the warrant process.¹⁵¹

Further, even if the anticipatory effect of judicial oversight explains grant rates in the FISC, this may be due less to judicial action than to a sort of quasi-internal separation of powers, including a large, lawyer-staffed compliance apparatus in the DOJ and a pool of former government lawyers operating as “long-term lawyer assistants” to FISC judges.¹⁵² In effect, the government has developed an “iterative”¹⁵³ process of processing and controlling that is more characteristic of bureaucratic rationality than of judicial oversight. To the extent that programs like the NSA’s bulk metadata collection have not generated abusive practices, this may be evidence that internal separation of powers of the sort that the Fourth Amendment’s drafters rejected in fact have some traction. On the other hand, it may also be that such internal controls are only as reliable as the political leadership of a given administration wishes them to be, such that they are effective only when they are the least needful.

* * *

There is a telling response offered to critics of the NSA’s bulk metadata collection that characterizes the program as no executive frolic but rather as an effort vetted by all three

¹⁴⁸ See Laura K. Donohue, Bulk Metadata Collection: Statutory and Constitutional Considerations, 37 Harv J L & Pub Pol 757, 831 (2014).

¹⁴⁹ See generally In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [Redacted], 2014 WL 5463290 (FISC).

¹⁵⁰ See Charlie Savage and Laura Poitras, How a Court Secretly Evolved, Extending U.S. Spies’ Reach (NY Times, Mar 11, 2014), archived at <http://perma.cc/KBA9-QCYS> (noting that the FISC order “significantly changed” prior procedures by allowing agencies “to share unfiltered personal information”).

¹⁵¹ See Honorable John D. Bates, Director of the Administrative Office of the United States Courts, Letter to Honorable Patrick J. Leahy, Chairman of the Senate Committee on the Judiciary *2–5 (Aug 5, 2014), archived at <http://perma.cc/478U-RP37> (opposing the creation of a special advocate position in the FISC).

¹⁵² Margo Schlanger, Intelligence Legalism and the National Security Agency’s Civil Liberties Gap, 6 Harv Natl Sec J 112, 152–53, 165 (2015).

¹⁵³ *Id.* at 164.

branches.¹⁵⁴ Regardless of what one thinks of bulk collection, the response is suggestive of a wider institutional condition. To the extent that the Framers anticipated that either Congress or the federal judiciary would be vigilant guardians of Fourth Amendment values, their expectations about institutional incentives have not been met. Neither of the Fourth Amendment's intended institutional mechanisms works as intended, largely due to institutional officeholders' weak incentives regarding rights-related ends. This erosion in the institutional predicates of Fourth Amendment enforcement is certainly not the sole reason for the observed fragility of constitutional privacy today, but it is likely one explanation for its current limited reach.

III. THE FOURTH AMENDMENT REDIVIVUS?

Given the erosion of the Fourth Amendment's institutional infrastructure, debates about whether Congress or courts are better at vindicating privacy might be better abandoned in favor of alternative, more-profitable inquiries. The institutional-allocation question, pursued lately by Professors Orin Kerr¹⁵⁵ and Erin Murphy,¹⁵⁶ has yielded no obvious clear answers—only stalemate. Rather, a new Fourth Amendment jurisprudence (if such a thing were even feasible) would, in my view, begin by drawing new distinctions and attending to alternatives to hallowed institutional pathways. In what follows, I sketch a possible doctrinal approach—albeit in skeletal and suggestive form—paying particular attention to problems related to electronic communications and large aggregates of third-party data. At bottom, however, I am skeptical that these reforms will see the light of day. Ultimately, it is more likely that privacy allocations will reflect underlying distributions in socioeconomic (and hence political) power.

Consider first some possible reforms. Here, it is useful to start from the observation that the acquisition and use of infor-

¹⁵⁴ See David S. Kris, *On the Bulk Collection of Tangible Things*, 7 J Natl Sec L & Pol 209, 213–23 (2014) (outlining the process of the bulk telephony-metadata collection program)[SP].

¹⁵⁵ See generally Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 Mich L Rev 801 (2004) (calling for legislative, rather than judicial, regulation of criminal investigations in a quickly changing technological context)[SP].

¹⁵⁶ See Murphy, 111 Mich L Rev at 537–38 (cited in note 142) (suggesting interbranch cooperation by “draw[ing] on the relative strengths” of the judiciary and Congress to better regulate policing).[SP]

mation by the federal government looks starkly different from states' and localities' parallel activities. States and localities are (all else being equal) more focused on ordinary crime control. Predictive algorithmic instruments are already deployed by urban police to identify crime hot spots and to make deployment decisions within regularized and bureaucratic "strategic control systems" (or CompStat).¹⁵⁷ Given the efficacy of CompStat and hot spot[RT: MW] policing,¹⁵⁸ expansions of local police departments' authority to exploit pools of electronic data (for example, telecommunications data and social media) might decrease the need for more intrusive and violent measures such as stings, undercover officers, and informants. If such gains come tethered to other costs,¹⁵⁹ both the magnitude and the distribution of such costs as well as associated benefits at this local level will be distinct and different from the costs that are associated with the federal government's exploitation of similar data. To analyze both local and national actors through the same lens—as the Court is wont to do¹⁶⁰—therefore seems to me to be unwise and distorting. The Fourth Amendment, in short, would benefit from a healthy dose of federalism.

Regarding the federal government, I reject as implausible the aspiration that aggregate data collection and analysis be terminated. So long as private companies engage in such activities (and can profitably vend their output to the state) and foreign-state competitors race to secure both defensive and offensive tools,¹⁶¹ the federal government will not stop its data aggregation and analysis business. Moreover, that business will evolve in accord with the dictates of strategic, geopolitical forces—not endogenous legal concerns. To the extent that Fourth Amendment law trains exclusively on the act of acquiring information or penetrating a private space, it is merely gestural.

Instead, it is worth considering whether the harms identified with data-driven surveillance necessarily arise from "puta-

¹⁵⁷ David Weisburd, et al, Reforming to Preserve: Compstat and Strategic Problem Solving in American Policing, 2 *Crimin & Pub Pol* 421, 426 (2003).

¹⁵⁸ See Anthony A. Braga, The Effects of Hot Spots Policing on Crime, 578 *Annals Am Acad Polit & Soc Sci* 104, 113–19 (2001) (observing crime reductions in seven of nine hot spot–policing studies)[SP].

¹⁵⁹ See Andrew Guthrie Ferguson, Big Data and Predictive Reasonable Suspicion, 163 *U Pa L Rev* 327, 398–404 (2015).

¹⁶⁰ See Stuntz, 114 *Harv L Rev* at 847 (cited in note 7).

¹⁶¹ See, for example, Bill Marczak, et al, China's Great Cannon (Citizen Lab, Apr 10, 2015), archived at <http://perma.cc/5HZL-36V2>.

tive violations of privacy” or rather from “an additional concern about the possibility of abuse of the information obtained.”¹⁶² Leading clarion calls against electronic surveillance prominently adumbrate the former concern, not the latter.¹⁶³ Intuitively, this resonates: When a person is seized by police in the course of a street or vehicular encounter, triggering the Fourth Amendment, dignitary and emotional harms can accrue immediately, even absent violence. But there is no parallel to such contact harms in the use of electronic data. This may counsel for more-expansive and more-careful minimization and use procedures, matters that are now allocated to the reticulated backwaters of FISA warrant design.¹⁶⁴ Whether such dissemination and use restrictions are ranked as a Fourth Amendment rule or are merely good practice seems to me to be distinctly less important than the considerable difficulties of implementation.

For the political economy analysis of Part II suggests that reforms of this kind are unlikely to emerge from our current democratic or judicial arrangements. Instead, those still fervently concerned about privacy per se will likely be forced to seek solutions outside the state. Like the residents of Baltimore’s Mondawmin neighborhood,¹⁶⁵ citizens can resort to self-help to restore the balance of power between themselves and the state. At least in the communications domain, this means deploying universal encryption and anonymizing technologies such as Secure Sockets Layer (SSL), a protocol for securing bidirectional data tunnels; Pretty Good Privacy (PGP), a program for encrypting and signing messages; Domain Name System Security Extensions (DNSSEC), a set of specifications for authenticating domain names; Tor, a program for anonymity; and full-disk encryption (FDE), an approach to protecting hardware.¹⁶⁶ Although SSL and PGP are free (and based on robust open-source code), in practice operationalizing universal encryption is “difficult and

¹⁶² Marmor, 43 Phil & Pub Aff at 15–16 (cited in note 56).

¹⁶³ See, for example, Neil M. Richards, *The Dangers of Surveillance*, 126 Harv L Rev 1934, 1935 (2013) (describing surveillance as harmful because it “chill[s] the exercise of our civil liberties” and alters “the power dynamic between the watcher and the watched”)[SP].

¹⁶⁴ See 50 USC § 1861(g)(1) (requiring the attorney general to “adopt specific minimization procedures” for the acquisition of “tangible things”). See also Kris, 7 J Natl Sec L & Pol at 237–41 (cited in note 154).

¹⁶⁵ See Scott Shane, *Baltimore Riots Are Another Scar on a City Long Battered by Neglect* (NY Times, Apr 28, 2015), archived at <http://perma.cc/278Y-UP7G>.

¹⁶⁶ See Nicholas Weaver, *Our Government Has Weaponized the Internet. Here’s How They Did It* (Wired, Nov 13, 2013), archived at <http://perma.cc/GF6V-8AFZ>.

expensive.”¹⁶⁷ Self-help in the electronic-communication-privacy domain thus selects for those with adequate technical skills or resources to purchase access to those skills. Similarly, privacy against algorithmic exploitation of bulk noncontent data (for example, telecommunications metadata and financial records) is best secured by bespoke, and hence expensive, arrangements in which secrecy from both the provider and the government is assured.¹⁶⁸ Privacy, in short, is on the road to becoming “a [p]remium [s]ervice,”¹⁶⁹ acquired only by those with technical knowledge or economic resources.¹⁷⁰

This suggests that the last redoubt of privacy, self-help against state exploitation of electronic data, will likely have sharp regressive effects. Whether this is desirable depends on your views of distributive justice. If privacy in the electronic data domain does trend in this direction, however, it will at least yield a sort of consistency. For, as Professor Stuntz acutely observed more than a decade and a half ago, the distribution of privacy in our domesticated Fourth Amendment already “makes wealthier suspects better off than they otherwise would be, and may make poorer suspects worse off.”¹⁷¹

It is for this reason that I conclude that the Internet, big data, and new forms of communicative technology are unlikely to generate new liberties. They likely will instead reproduce and entrench extant hierarchies. And as Fourth Amendment jurisprudence shifts from the streets to the cloud, it too will again reflect with some fidelity our divided, unequal, and irremediably unjust social order.¹⁷² Whether our constitutional law can do otherwise is a question that remains to be answered.

¹⁶⁷ Id.

¹⁶⁸ It is possible that Hillary Clinton’s use of a private server during her tenure as secretary of state may have been intended as such an arrangement. See Michael S. Schmidt, [No Copies of Clinton Emails on Server, Lawyer Says](http://perma.cc/339G-3J4P) (NY Times, Mar 27, 2015), archived at <http://perma.cc/339G-3J4P>. Of course, I mean to take no position on the various controversies raging around her practice, and I merely use the example as one that involves an expensive bespoke security arrangement.

¹⁶⁹ David Auerbach, [Privacy Is Becoming a Premium Service](http://perma.cc/S99U-JT8L) (Slate, Mar 31, 2015), archived at <http://perma.cc/S99U-JT8L>.

¹⁷⁰ At the same time, the privatization of privacy is likely to peel away critical elements of potentially effective interest groups, raising the cost of legislative mobilization. See Part II.B.

¹⁷¹ William J. Stuntz, [The Distribution of Fourth Amendment Privacy](#), 67 *Geo Wash L Rev* 1265, 1266 (1999).

¹⁷² Louis Michael Seidman, [Making the Best of Fourth Amendment Law: A Comment on The Distribution of Fourth Amendment Privacy](#), 67 *Geo Wash L Rev* 1296, 1296

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(1999) (“Our mainstream constitutional tradition has a deep bias toward status quo distributions of wealth and power.”).