The Fourth Amendment at Home

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THOMAS P. CROCKER*

A refuge, a domain of personal privacy, and the seat of familial life, the home holds a special place in Fourth Amendment jurisprudence. Supreme Court opinions are replete with statements affirming the special status of the home. Fourth Amendment text places special emphasis on securing protections for the home—in addition to persons, papers, and effects—against unwarranted government intrusion. Beyond the Fourth Amendment, the home has a unique place within constitutional structure. The home receives privacy protections in addition to sheltering other constitutional values protected by the Due Process Clause and the First Amendment. For example, under the Due Process Clause, the Constitution protects the intimate relationships and family life that constitute a home. As a physical structure, the home harbors private, domestic life. Constitutional protections of the household, however, extend beyond the enclosing walls of a physical structure. These intimate features of household privacy are necessary conditions for the fulfillment of what Justice Kennedy calls “dimensions of freedom” that extend outward into public life.

This Article demonstrates that because the home’s playing this role is a necessary condition for the possibility of republican self-government, the Fourth Amendment’s protection for household privacy is therefore also a structural check on federal and state power. With rapidly changing technology that can alter the balance between the government and its citizens, the home’s structural role within the Constitution’s system of separated powers is an overlooked feature of the Fourth Amendment. And as home personal assistant devices, doorbell security systems, and “smart” appliances all proliferate, so too do police requests to access stored digital information about the most intimate confines of interpersonal life. Once courts better recognize the home’s structural role, analysis of law enforcement access to such stored data will extend beyond questions of knowing exposure or third-party sharing to encompass questions about the systemic effects of pervasive police access to such data upon republican self-government. Conventional judicial doctrines that apply constitutional rights unmoored from their broader structural roles risk undervaluing privacy while upsetting the balance of constitutional structure. To avoid this overlooked consequence, courts need conceptual clarity about the role the home plays in both the Fourth Amendment and within constitutional structure. Rather than abandoning the idea of privacy in the face of overwhelming informational exposure and advancing technology, we can strengthen it by seeing how it protects broader claims to liberty while preserving an overlooked feature of constitutional structure resident in the home. This Article argues that the home provides a way of organizing a paradigm for privacy protections that extends not only to the confines of a physical home, but also to the person in the public sphere. By linking the liberties of the people with privacy of the home, the Fourth Amendment plays an essential structural role in protecting the household from domination by government institutions and officials. In this way, Fourth Amendment protections for the home function as much to promote political values as personal ones, thereby providing a structural check on executive power.

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INTRODUCTION

A refuge, a domain of personal privacy, and the seat of familial life, the home holds a special place in Fourth Amendment jurisprudence. Supreme Court opinions are replete with statements affirming the special status of the home, for “physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.”

Other opinions affirm “the ancient adage that a man’s house is his castle,” and that “[t]he poorest man may in his cottage bid defiance to all the forces of the Crown.”

Still others speak of the Fourth Amendment by affirming the proposition that “[a]t the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”

Many more expressions of like kind populate the pages of the U.S. Reports.

Fourth Amendment text places special emphasis on securing protections for the home—in addition to persons, papers, and effects—against unwarranted government intrusion. Among these listed sites of protection, Justice Scalia explained that “when it comes to the Fourth Amendment, the home is first among equals.”

But in the wake of the 1967 decision by the Warren Court in Katz v. United States, judicial doctrine emphasized a more portable and evanescent “expectation of privacy”—not location—as the core meaning of the Fourth Amendment’s protections against searches and seizures.

As the Court explained in Katz, the Fourth Amendment

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4. See, e.g., Payton v. New York, 445 U.S. 573, 601 (1980) (stressing “the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic”). But see Stephanie M. Stern, The Inviolable Home: Housing Exceptionalism in the Fourth Amendment, 95 CORNELL L. REV. 905, 912–13 (2010) (arguing that the special status of the home has been used to lower expectations of privacy outside the home).
5. U.S. CONST. amend. IV.
protects "people, not places." Nonetheless, the special role of the home and its relation to a "right of the people" have not been displaced. In a 2013 decision focused on a warrantless search of a home, Justice Scalia wrote for the Court that "[t]he Katz reasonable-expectations test 'has been added to, not substituted for,' the traditional property-based understanding of the Fourth Amendment." This "property-based understanding" places the home at the center of the Fourth Amendment.

Beyond the Fourth Amendment, the home has a unique place within constitutional structure. The home receives privacy protections in addition to sheltering other constitutional values protected by the Due Process Clause and the First Amendment. For example, under the Due Process Clause, the Constitution protects the intimate relationships and family life that constitute a home. As a physical structure, the home harbors private, domestic life. Constitutional protections of the household extend beyond the enclosing walls of a physical structure. These intimate features of household privacy are necessary conditions for the fulfillment of what Justice Kennedy calls "dimensions of freedom" in public life. As a political structure, the home organizes the necessary conditions for political self-determination. In this way, Americans carry their homes with them into the public. Participation in public discourse, a central value protected by the First Amendment, likewise begins with the assimilation and production of ideas contained in "private papers" that the Fourth Amendment protects against unwarranted government search and seizure. Constitutional structure is built upon the specific role of the home, explicitly protected against government occupation, and functionally placed as the reserve for

8. Id.
10. For example, the Court concluded that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977); see also Meyer v. Nebraska, 262 U.S. 390, 399–401 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); Griswold v. Connecticut, 381 U.S. 479, 484–86 (1965); Stanley v. Illinois, 405 U.S. 645, 651 (1972).
11. Obergefell v. Hodges, 576 U.S. 644, 664 (2015) ("The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.").
“domestic Tranquility.”13 This Article demonstrates that because playing this role is a necessary condition for the possibility of republican self-government, the Fourth Amendment’s protection for household privacy is therefore also a structural check on federal and state power. With rapidly changing technology that can alter the balance between the government and its citizens, the home’s structural role within the Constitution’s system of separated powers is an overlooked feature of the Fourth Amendment. And as home personal assistant devices, doorbell security systems, and “smart” appliances all proliferate, so too do police requests to access stored digital information about the most intimate confines of interpersonal life.14 Once courts better recognize the home’s structural role, analysis of law enforcement access to such stored data will extend beyond questions of knowing exposure to encompass questions about the systemic effects of pervasive police access to such data upon republican self-government. This Article argues that the home provides a way of organizing a paradigm for privacy protections that extends not only to the confines of a physical home, but also to the person in the public sphere.15

As others have argued, however, placing the home at the center of our understanding of privacy risks devaluing privacy in other places and contexts.16 If the home is the paradigm of privacy, then in important respects all things that are not the home—persons in public, personal relationships, communications, cars, bags, electronic equipment, stored data, and so much more—must receive a lessened measure of privacy. When people step into public spaces, they are subject to different Fourth Amendment protections and rules, shedding the privacy household intimacies afford. For example, under the Supreme Court’s public observation and third-party doctrines, neither surveillance of one’s movements on public streets nor acquisition of data one has shared with others implicates Fourth Amendment protections.17 As the facts of United States v. Karo illustrate, monitoring the public movements on roadways of persons and objects under investigation by radio beacon does not

15. On the link between persons and property, see Margaret Jane Radin, Property and Personhood, 34 STAN. L. REV. 957 (1982).
implicate protections against unreasonable searches until the signaling device enters the home.\(^\text{18}\)

Such constitutional divergence creates a dilemma. By negative implication, to emphasize household privacy is to invite an overall loss of privacy in all other aspects of Americans’ lives.\(^\text{19}\) But to abandon the home as a privacy paradigm would seem to leave privacy unmoored from any place in which it can be most clearly manifested. Moreover, when Americans invite technology into their homes, they may set in motion a conflict between an absence of privacy protection under the third-party doctrine and the paradigm of privacy under the household-privacy doctrine.\(^\text{20}\) After all, they are sharing household intimacies with a third party, which, according to the Supreme Court, can defeat any further expectation of privacy.\(^\text{21}\) Mechanical application of existing doctrine could yield such aberrant results.\(^\text{22}\) But when considering how Americans carry aspects of their household privacy into public by way of the technology they use, the Supreme Court hesitated to conclude that they shed their Fourth Amendment protections. In \textit{Riley v. California}, the Court reasoned that although persons are subject to searches of their physical person incident to arrest in public, a warrant is necessary to search the contents of their smartphones on which police might find many of the features of household privacy.\(^\text{23}\) This privacy-protective rule comes amidst a number of additional cases that consider the special status of the home in opposition to policing pressure to have unfettered access to interiors, porches, and driveways.\(^\text{24}\) As a result, the home is on the frontlines of the


\(^{19}\) See, e.g., Stern, \textit{supra} note 4, at 909.

\(^{20}\) See, e.g., United States v. White, 401 U.S. 745 (1971) (establishing that individuals “assume the risk” when sharing information with third parties that will convey information to the police); Mary I. Coombs, \textit{Shared Privacy and the Fourth Amendment, or the Rights of Relationships}, 75 \textit{CALIF. L. REV.} 1593, 1635 (1987) (“A view of the world that recognizes the essential interconnectedness of people and the importance of intimacy and sharing is foreign to the atomistic social theory underlying the Court’s present doctrine.”); Daniel J. Solove, \textit{Fourth Amendment Codification and Professor Kerr’s Misguided Call for Judicial Deference}, 74 \textit{FORDHAM L. REV.} 747, 753 (2005) (“The third party doctrine presents one of the most serious threats to privacy in the digital age.”); see also Stephen E. Henderson, \textit{Beyond the (Current) Fourth Amendment: Protecting Third-Party Information, Third Parties, and the Rest of Us Too}, 34 \textit{PEPP. L. REV.} 975 (2007).

\(^{21}\) See, e.g., United States v. Miller, 425 U.S. 435, 442–43 (1976); United States v. Jacobsen, 466 U.S. 109, 117 (1984) (“It is well settled that when an individual reveals private information to another, he assumes the risk that . . . the Fourth Amendment does not prohibit governmental use of the now non-private information.”).

\(^{22}\) Jed Rubenfeld, \textit{The End of Privacy}, 61 \textit{STAN. L. REV.} 101, 113 (2008) (“[T]he Stranger Principle is completely untenable. It implies that, once an individual has exposed information to a third party, the government may seize that information—with or without that third party’s assistance. And that implication would spell the end of the Fourth Amendment almost altogether.”).

\(^{23}\) 573 U.S. 373 (2014).

constitutional tension that exists among preventative policing, new technologies, and privacy.25

This Article argues that the model of household privacy carried into public in Riley provides a basis for applying the principle of household primacy to protect greater privacy in public. This claim is further bolstered by linking the liberty protected in personal relationships by due process to the locus of personal life in the home.26 By linking the liberties of the people with privacy of the home, the Fourth Amendment plays an essential structural role in protecting the household from domination by government institutions and officials.

In this way, Fourth Amendment protections for the home function as much to promote political values as personal ones, thereby providing a structural check on executive power. Household privacy is not merely a personal right against a police officer’s intrusion. Rather, the home shelters a space in which the freedom “to think as you will”27 under the First Amendment is interconnected to “the right to be let alone”28 under the Fourth, supporting the distinctive structural role that “the People” play in self-government.29 Such a role is an often overlooked purpose of the Fourth Amendment—to provide a structural check on executive power through a rights limitation. This structural check, I argue, is located in the home as an institution. In this way, the Fourth Amendment’s protection for the home serves an overall Madisonian anti-tyranny purpose.30

By emphasizing the home, I aim to show how and why the Fourth Amendment might better protect privacy by recognizing the institutional role the home plays within constitutional structure. When persons cross the threshold of their homes, they need not enter a radically altered Fourth Amendment world—one in which unfettered surveillance can follow them without limit until they reenter their household sanctuary. As the Supreme Court explained in a case holding that access to historical cell-cite information constitutes a search requiring a warrant, “[a] person does not surrender all Fourth Amendment protection by venturing into the public sphere.”31 Rather, the protection afforded smartphones against rules otherwise permitting searches incident to arrest in Riley v. California suggests a model for how to think about household privacy in public.32 Similarly, the presence of technology that

25. See, e.g., Carpenter v. United States, 138 S. Ct. 2206, 2218 (2018) (citing Riley, 573 U.S. at 395) (“A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor’s offices, political headquarters, and other potentially revealing locales.”); United States v. Lambis, 197 F. Supp. 3d 606, 610 (S.D.N.Y. 2016) (quoting Kyllo, 533 U.S. at 40) (“[T]he DEA’s use of the cell-site simulator revealed ‘details of the home that would previously have been unknowable without physical intrusion.’”).
29. This role has a modern history in which the citizen’s relation to privacy has shifted. See SARAH E. IGO, THE KNOWN CITIZEN: A HISTORY OF PRIVACY IN MODERN AMERICA (2018).
interacts with third-party providers capable of having a “presence” within the home does not convert the home into a public place. Conventional judicial doctrines that apply constitutional rights unmoored from their broader structural roles risk undervaluing privacy, while upsetting the balance of constitutional structure. It is more typical to emphasize the institutional separation of Congress, courts, and the executive and thereby ignore the further institutional balance “the People” provide, in part, by retaining the right to household privacy. Because the “people themselves” constitute the foundation of republican government, this household privacy is a necessary condition for exercising their public role and creates a separate institutional structure in which the executive cannot become a dominant presence.

To avoid this overlooked consequence, we need conceptual clarity about the role the home plays in both the Fourth Amendment and within constitutional structure. Rather than abandoning the idea of privacy in the face of overwhelming informational exposure, we can strengthen it by seeing how it advances broader claims to liberty while preserving an overlooked feature of constitutional structure resident in the home. How we imagine the structure of Fourth Amendment rights in light of the social, cultural, and political role the home plays forms the unavoidable background to any doctrinal developments. Seeing how concepts of the home and its institutional role within judicial opinions connect to political practice and technological change make possible further normative claims about what shape constitutional doctrine should take.

Fourth Amendment theory determines governing practice. A Fourth Amendment analysis focused on reforming and applying the third-party doctrine or the public observation and exposure doctrines as issues of individual rights is too narrow a reform project to meet the substantial challenges to privacy that technology presents. Any reform project must also engage both the purposes of constitutional protections and the ways these purposes converge across doctrines to provide more substantial conceptual and theoretical grounding. Fourth Amendment scholarship is all too often focused on a dichotomy between facilitating and regulating policing practices and protecting privacy. A doctrinal debate between police and privacy often fails to ask the further question of “why privacy?” By contrast, for example, First Amendment scholarship and jurisprudence asks “why speech?” when looking for a theory to guide

33. See, e.g., 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 165 (1991) (“[D]efining a higher lawmaking process through which future generations might concentrate their political energies to make fundamental law in the name of We the People of the United States.”).
34. See CHARLES TAYLOR, MODERN SOCIAL IMAGINARIES 24 (2004).
35. See, e.g., Orin S. Kerr, Four Models of Fourth Amendment Protection, 60 STAN. L. REV. 503 (2007). This dichotomy also reflects ambivalence about the relationship between police and democracy. See David Alan Sklansky, Police and Democracy, 103 MICH. L. REV. 1699 (2005) (examining the changing relationship between democratic practices and police practices).
free speech doctrine.\footnote{See, e.g., Leslie Kendrick, Use Your Words: On the “Speech” in “Freedom of Speech,” 116 Mich. L. Rev. 667 (2018); Robert Post, Recuperating First Amendment Doctrine, 47 Stan. L. Rev. 1249, 1253 (1995); Frederick Schauer, Must Speech Be Special?, 78 NW. U. L. Rev. 1284 (1983); see also Owen M. Fiss, The Irony of Free Speech (1996); Seana Valentine Shiffrin, Speech Matters: On Lying, Morality, and the Law (2014).} Theory becomes all the more important in light of the increased surveillance we all confront. Emerging technologies and changing social media practices combine to expose us all to both private and public surveillance, implicating the scope and structure of state power that the Fourth Amendment addresses.\footnote{As Bernard Harcourt argues, these changes produce a new “expository power”: “We live today in a new political and social condition that is radically transforming our relations to each other, our political community, and ourselves: a new virtual transparency that is dramatically reconfiguring relations of power throughout society, that is redrawing our social landscape and political possibilities, that is producing a dramatically new circulation of power in society.” Bernard E. Harcourt, Exposed: Desire and Disobedience in the Digital Age 15 (2015).}

Pervasive police surveillance creates the prospect of dystopian constitutional consequences that the Fourth Amendment seeks to forestall.\footnote{See, e.g., United States v. White, 401 U.S. 745, 762 (1971) (Douglas, J., dissenting) (“Monitoring, if prevalent, certainly kills free discourse and spontaneous utterances.”); see also Neil M. Richards, The Dangers of Surveillance, 126 Harv. L. Rev. 1934, 1935 (2013) (“[O]ur society lacks an understanding of why (and when) government surveillance is harmful.”); Christopher Slobogin, Panvasive Surveillance, Political Process Theory, and the Nondelegation Doctrine, 102 Geo. L.J. 1721, 1723 (2014) ("[P]anasive [surveillance] . . . capture[s] the idea that modern government’s efforts at keeping tabs on the citizenry routinely and randomly reach across huge numbers of people, most of whom are innocent of any wrongdoing.").} It might not be hyperbolic for a federal judge to admonish regarding public location tracking that “[s]ome day, soon, we may wake up and find we’re living in Oceania.”\footnote{United States v. Pineda-Moreno, 617 F.3d 1120, 1126 (9th Cir. 2010) (Kozinski, C.J., dissenting).} To so awaken, however, much in the structure of government will have changed through the adaptation of Fourth Amendment jurisprudence to pervasive police surveillance. Technology and social practice create adaptive pressure. Exposure occurs through the extensive data trails we leave through our transactions, communications, and social media practices.\footnote{See Harcourt, supra note 38, at 13–15; Daniel J. Solove, The Digital Person: Technology and Privacy in the Information Age (2004).} We become our own digital selves whom others can know better than ourselves. Technology is rapidly producing an “Internet of Things” that will further monitor our daily lives in the guise of improving our well-being.\footnote{See, e.g., Andrew Guthrie Ferguson, The “Smart” Fourth Amendment, 102 Cornell L. Rev. 547 (2017); Woodrow Hartzog & Evan Selinger, The Internet of Heirlooms and Disposable Things, 17 N.C. J.L. & Tech. 581, 582–83 (2016); Scott R. Peppet, Regulating the Internet of Things: First Steps Toward Managing Discrimination, Privacy, Security, and Consent, 93 Tex. L. Rev. 85 (2014); see also Ian Bogost, Home Monitoring Will Soon Monitor You, ATLANTIC (Nov. 11, 2016), https://www.theatlantic.com/technology/archive/2016/11/home-monitoring-will-soon-monitor-you/507263/ [https://perma.cc/HBR5-MVEL]; Arielle Pardes, The Wired Guide to
technology-enhanced social practices provide new ways of living and interacting, and thus new occasions for us to choose such exposure. Even if for convenience we choose to participate in practices that create and expose our digital selves, we do not at the same time choose a radically different constitutional regime—at least not directly and knowingly.

A problem arises when judicial doctrines lead us to think that by adopting new technologies and social practices that we thereby have also chosen a different structural relation to state power—that we have acceded to an expository power that changes constitutional limits and structures. We make possible a new “national surveillance state.” 43 The possibility of such change is reflected in the National Security Agency’s endeavor to “collect it all” as an approach to surveillance in the name of making us more secure. 44 In collecting all telephone metadata on all Americans—such as the time, duration, location, and number dialed—the NSA justified its actions under a 1970s Supreme Court opinion that held there is no expectation of privacy in the numbers persons dial because they knowingly expose such information to third parties in order to complete the call. 45 In reviewing the program, District Judge Leon rejected this application of the third-party doctrine, reasoning that “the almost-Orwellian technology that enables the Government to store and analyze the phone metadata of every telephone user in the United States is unlike anything that could have been conceived in 1979.” 46 To contemplate such dystopian Orwellian consequences is not to become a “Henny Penny,” decrying dire


consequences from limited evidence, but to reason within a tradition of American constitutionalism aimed at avoiding tyranny.\footnote{7}

Rather than focusing on how the Fourth Amendment regulates police practice, this Article’s inquiry focuses on how household privacy structures federal power. By shifting the focus, we can learn a lot about the constitutional scope of policing practices through the lens of structure and design, while avoiding a conventional error of thinking that the Fourth Amendment—anachronistically, for an institution that did not exist at ratification—does nothing more than provide rules to govern policing practice.\footnote{8}

This Article focuses on how the home provides a way of organizing a conception of privacy that sorts power between executive officers and the sovereign people. In so doing, the Fourth Amendment’s structural role is bolstered by similar protections for household intimacy under the Due Process Clause and freedom of thought and speech under the First Amendment.\footnote{9} By acknowledging these convergent constitutional values, the institutional household provides an analytic approach that is both holistic and systemic in considering the effects of government access and power over the ways Americans are informationally exposed. Moreover, in a doctrinal balance that weighs the state’s claimed necessity to exploit informational exposure against the individual’s claim to privacy, the individual is too easily overcome. Recognition of this power asymmetry—and constitutional imbalance—is evident in Justice Sotomayor’s concurrence in the GPS tracking case, \textit{United States v. Jones}, where she reasoned:

\begin{quote}
The net result is that GPS monitoring—by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the government, in its unfettered discretion, chooses to track—may “alter the relationship between citizen and government in a way that is inimical to democratic society.”\footnote{10}
\end{quote}


\footnote{9. Although lacking a developed jurisprudence, and seemingly anachronistic itself, the Third Amendment similarly focuses on protecting the home against the state becoming a dominant presence. U.S. Const. amend. III (prohibiting the quartering of troops in homes).}

\footnote{10. 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring) (quoting United States v. Cuevas-Perez, 640 F. 3d 272, 285 (7th Cir. 2011) (Flaum, J., concurring)).}
The home as institution plays this structural role of maintaining the separation between citizens and government, necessary for democratic self-determination. Recognizing the home’s role within constitutional structure also helps make sense of the analytic tension within the Fourth Amendment between property-based protections and privacy-centric rationales. This tension is one source of the claim that in choosing new social practices through which we expose ourselves to others we also choose to forego constitutional protection. Prior to Katz, the Court employed the law of trespass as a guide to the Fourth Amendment’s scope. But Katz made clear that the Fourth Amendment protected “people not places,” shifting analytic focus to the expectations of privacy persons might have. But as the Court emphasized in cases like Florida v. Jardines and United States v. Jones, the privacy approach added to the property approach, suggesting an analysis that begins with the physical structure of the home and extends outwards to personal interactions in public space. Scholars and courts alike have largely overlooked the implications of this dynamic. Rather than drawing a firm and bright line at the threshold of the home between the private inside and the public outside, the Court’s dual approach—protecting both property and expectations—opens up the possibility of protecting household privacy outside the home, particularly when doing so promotes a structural end. The latter implication is not one the Court emphasizes but is inherent in the place the home occupies within constitutional structure, giving greater analytic coherence to Fourth Amendment protections. The state’s emerging expository power can be checked by the institutional home’s role in constitutional structure.

In what follows, Part I examines how the Supreme Court repeatedly emphasizes the special sanctity of the home under the Fourth Amendment. Such reasoning takes the home to constitute a privacy paradigm even beyond the threshold. As paradigm, however, there is a risk of being analytically trapped in a “privacy prison,” for everything not the home, not secret, and therefore shared in public becomes exposed. The way out of this “privacy prison” is to recognize the institutional role the home plays beyond providing private shelter. Part II analyzes the Supreme Court’s opinion in Riley v. California to see how the home paradigm extends to public activities. This reasoning survives countervailing exigency doctrines to solidify a Fourth Amendment purpose of protecting the home because of its distinctive institutional role within constitutional structure. Part III demonstrates how due process liberty and First Amendment free speech converge with the Fourth Amendment to establish the home’s distinctive constitutional role. And Part IV argues in conclusion that the home’s structural role can aid in reimagining Fourth Amendment protections against structural aggrandizement by executive officials, aided by new in-home technologies, into zones of democratic self-determination.

I. THE HOME AS PRIVACY PARADIGM

The home occupies a central place within Fourth Amendment jurisprudence. “Physical entry of the home is the chief evil against which the wording of the Fourth Amendment was directed.”

52. See Jones, 565 U.S. at 409 (“[T]he Katz reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test.” (emphasis in original)).
Amendment is directed,” the Court explained in response to warrantless domestic surveillance conducted by government officials under the guise of national security. As the Court also made clear, “when it comes to the Fourth Amendment, the home is first among equals.” Indeed, “[a]t the Amendment’s ‘very core’ stands ‘the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.’” When compared to other physical places, the Court emphasized that “[i]n none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual’s home.” Such attention to the physical dimensions of the home might seem to stand in some contrast to the Court’s claim in *Katz* that the Fourth Amendment protects people, not places: “What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.” The Court clarified in *Jardines* that the *Katz* expectations of privacy analysis does not alter the longstanding understanding that the home is special under the Fourth Amendment.

The home’s place of constitutional protection is also reflected in the Court’s citation to eighteenth-century English cases, such as *Entick v. Carrington* and *Wilkes v. Wood,* which provide an English jurisprudential foundation for the Fourth Amendment. In these seditious libel cases, king’s officials entered homes looking for paper evidence without a warrant. John Wilkes was a member of parliament who published tracts critical of the Crown under the name *The North Briton.* The Secretary of State, Lord Halifax, issued a general warrant which was used to search Wilkes’s home, as well as the homes of a number of his associates, looking for papers to incriminate them in the crime of seditious libel. When Wilkes sued for trespass, Judge Pratt, who later became Lord Camden, wrote: “If such a power is truly invested in a Secretary of State, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject.” Taken as a claim about liberty, this opinion’s reasoning and consequences (checking the power of the Crown) have been widely recognized as forming the background against which the Fourth Amendment was written, as the Supreme Court noted in its 1886 case *Boyd v. United States.* Implicit in this

55. Id. (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)).
62. 116 U.S. 616, 625 (1886) (“[E]vents which took place in England immediately following the argument about writs of assistance in Boston, were fresh in the memories of those who achieved our independence and established our form of government.”).
limitation on the Crown’s power to ransack a home is also recognition that not only is individual liberty at stake but that liberty serves a structural purpose. If government action subverts liberty, then it subverts its own legitimacy, since protecting persons and property is a primary justification for government.63 The Court in Boyd further elaborated the point with regard to Lord Camden’s opinion in Entick, explaining:

The principles laid down in this opinion affect the very essence of constitutional liberty and security. . . . They apply to all invasions on the part of the government and its employés of the sanctity of a man’s home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property . . . .

A government that invades the home crosses a boundary from the profane to the sacred. As an institution the home has a status on a higher level than ordinary property or social arrangements. This ordering between the sacred and profane is further reflected in the Court’s repeated assertions concerning “the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.”65 In this way, protecting the institution of the home is not only a constitutional purpose but is also a constitutive feature of the constitutional order “embedded in our traditions.”66

The home’s status within constitutional structure is further evident in how the Court recognizes “the ancient adage that a man’s house is his castle” and that “[t]he poorest man may in his cottage bid defiance to all the forces of the Crown.”67 The Court similarly reasoned regarding the Fourth Amendment that “[a]t the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”68 Even when executive officials claimed that national security necessity could justify warrantless domestic surveillance, the Court recognized the special protections for the home, holding inviolate the warrant

64. Boyd, 116 U.S. at 630.
66. Id.
67. Miller v. United States, 357 U.S. 301, 307 (1958) (citation omitted). Although sometimes attributed to English common law, the Fourth Amendment expands the scope of this right. William Cuddihy & B. Carmon Hardy, A Man’s House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution, 37 WM. & MARY Q. 371, 400 (1980) (“The Fourth Amendment represented an American extension of the English tradition that a man’s house was his castle.”).
requirement against domestic intrusions. There are other places that are special too, but only the home organizes both personal and social worlds in a way that creates and preserves a separable sphere of governing power. The implication from this special constitutional status the Court protects is that the home is the preserve of “the People,” who have a political function within constitutional structure, not only to check government power through their rights-based limitations but also to legitimate the political structure the Constitution creates. The Fourth Amendment’s functional core is to preserve this constitutional role.

Although the Court explained how “the Fourth Amendment draws `a firm line at the entrance to the house,”’ which is also a “bright” line, household protections do not end when one crosses the threshold. Such protections for intimate household activities extend to what the Court calls “curtilage.” This area includes places around the home “intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened.” Where there is a social practice and a physical link to the home, household privacy extends outside the strict structural confines enclosed by walls and doors. For example, in *Jardines*, the Court made clear that a front porch “is the classic exemplar of an area adjacent to the home and ‘to which the activity of home life extends.’” Through the concept of curtilage, the Court recognizes that the Fourth Amendment protects household activities, not merely enclosed physical spaces. The household functions as a social and political institution through activities that extend beyond its physical structure.

**A. Beyond the Home’s Threshold**

But this extension of household activities beyond the home’s threshold rapidly comes into conflict with the Court’s public observation doctrine whereby police are not required to avert their eyes, as the Court explained, from activity readily apparent. The “open fields” doctrine distinguishes curtilage from other household property located at further remove from where personal activities can be seen by any passerby, including government officials. Once household activities become observable by the public, they shed their distinctive sanctity and partake of the profane. They become undifferentiated from other public activities through which we all become vulnerable to the gaze of other persons. “[O]pen fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance.” Such logic now turns on the accessibility of the household activity to a public vantage point. As the Court emphasized, at common

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74. See id. at 6–7.
75. Oliver, 466 U.S. at 179.
law “open fields” constituted private property open to view by anyone, and the conversely, what is open to view from a public vantage point—even if that vantage requires a plane or helicopter—is no longer private and thereby unprotected by the Fourth Amendment. 76

Creating a separate doctrine for activities and objects publicly accessible and thereby “knowingly exposed” to the public, the Court makes a distinction not only in the scope of Fourth Amendment coverage but in its conception about what it protects. If something is “knowingly exposed,” the Court reasons that no search occurs when government officials access what is exposed. 77 An analysis of accessibility displaces consideration of the institutional or personal status of the place or thing. No matter how personal the contents of one’s garbage, for example, and no matter how much waste reveals about intimate household activities otherwise protected within the confines of four walls, accessibility to others alters its status. 78 Exposure supplants household protections. Such logic expands the toolkit of unregulated activities, which police investigations may pursue. But it does so only by building doctrines shorn from their underlying rationales. Under this logic, an expectation of privacy is defeated by its knowing exposure, with little need to examine the social and political implications of expanding the investigatory power and reach of government officials. Nor is there any serious attempt—as the dissent in the garbage case, California v. Greenwood, urges—to examine social practices and their connections to the reach of government power. 79 In foregoing consideration of such broader issues of government overreach in relation to household privacy, the Court shifts its doctrinal focus toward facilitating policing practices, in part to avoid the costs of inhibiting them. 80 A cluster of law-and-order considerations assist this shift, including the rise of order-maintenance policing, which needs greater constitutional flexibility to facilitate a more visible and proactive policing presence within communities. 81 Exposure and public accessibility become the principal analytic concepts that enable expanded police practices.

76. See Ciraolo, 476 U.S. 207 (no search when plane observed residential backyard activities); Florida v. Riley, 488 U.S. 445 (1989) (no search when helicopter hovered over a home’s backyard and greenhouse).

77. Katz v. United States, 389 U.S. 347, 351 (1967) (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”); Riley, 488 U.S. at 449 (“As a general proposition, the police may see what may be seen ‘from a public vantage point where [they] have a right to be.’” (quoting Ciraolo, 476 U.S. at 213)); see Smith v. Maryland, 442 U.S. 735, 743–44 (1979).

78. See California v. Greenwood, 486 U.S. 35, 40 (1988) (“[W]e conclude that respondents exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection.”).

79. Id. at 51–53 (Brennan, J., dissenting).

80. See, e.g., Herring v. United States, 555 U.S. 135, 144 (2009) (“[P]olice conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.”).

Similarly, an object withheld from public view in the home becomes fully trackable once placed in a vehicle.\footnote{See United States v. Karo, 468 U.S. 705, 716 (1984) ("Indiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight.").} "Public exposure" on streets, where any passerby can observe one’s activities, means that police officers, too, may observe and track a person’s movements.\footnote{See United States v. Knotts, 460 U.S. 276, 276 (1983).} When one leaves a home to drive a car, a person’s Fourth Amendment status changes from being an inviolate king or queen of a castle to becoming an acceptable object of government surveillance. Because any person who chooses to take note can observe an individual’s movements, thereby making them public, not private, matters, Fourth Amendment protections no longer attach. As the Court admonishes, the police are not required to avert their eyes from readily observable phenomenon, such as an individual’s public movements on sidewalks and streets. Constitutional protections do reattach if public tracking occurs by physical placement of a GPS device on the car, or if tracking occurs later through historical analysis of one’s cell phone GPS coordinates.

In the cases confronting these two police practices, the quantity of data available to law enforcement crosses a qualitative line, rendering too much information too easily accessible without constitutional protection.\footnote{See David Gray & Danielle Citron, The Right to Quantitative Privacy, 98 MINN. L. REV. 62 (2013).} It is one thing for law enforcement to follow a car or to walk behind a suspect on a city street in a time-limited manner. It is an entirely different matter to obtain nearly effortlessly the comprehensive data for a car’s movements over an extended period of time through GPS location tracking. In \textit{United States v. Jones}, the Court rejected a government claim that technologically enhanced surveillance of a car’s public movements did not constitute a search for purposes of the Fourth Amendment.\footnote{565 U.S. 400 (2012).} Citing prior precedents, the government argued that GPS tracking was nothing different from the electronic-tracking “beeper” technology at stake in \textit{United States v. Karo}, which fell under the public observation doctrine.\footnote{Id. at 409–10 (citing United States v. Karo, 468 U.S. 705 (1984)).} A majority of the Court reasoned that the physical occupation wrought by placement of the GPS device on the automobile violated a fundamental constitutional protection against physical trespass, quite apart from any expectations of privacy that might be involved.\footnote{Id. at 404.} Justice Scalia’s majority opinion is rooted in the history Lord Camden’s opinion in \textit{Entick} represents, citing favorably the idea that “[o]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour’s close without his leave . . . .”\footnote{Id. at 405 (quoting Entick v. Carrington (1765) 95 Eng. Rep. 807; 19 Howell’s State Trials 1029 (C. P.)).} \textit{Entick} is not about just any sacred property but is particularly about the home, protecting it as a realm apart from the profane world of executive officials who would seek to trammel upon personal privacies. As Justice Sotomayor explained when concurring in \textit{United States v. Jones}, “GPS monitoring generates a precise, comprehensive record of a person’s public movements that reflects a wealth of detail about her familial,
political, professional, religious, and sexual associations.”

Because rote reliance on public exposure or the third-party doctrine renders such information readily accessible to government inquiry, constitutional protections are therefore necessary “to curb arbitrary exercises of police power and prevent ‘a too permeating police surveillance.’”

When considering whether police may obtain the historical location data from a person’s cellphone—which in effect operates like a personal tracking device since it constantly conveys location information to a cell phone service provider—the Court backed away from a mechanical application of its third-party and public-observation doctrines in Carpenter v. United States. Each of these doctrines, if thoughtlessly applied, would suggest that the data obtained merely charts a person’s public movements at lower cost than physical surveillance. After all, as the dissent in Carpenter notes, individuals readily share their movements with any observer who cares to pay attention, and share their location data with a commercial entity who is free to pass that information along to law enforcement. Despite the surface simplicity of these doctrines, a majority of the Court recognized that the net effect of accessing cell phone location data “achieves near perfect surveillance.” The quantity of information available about a person’s past movements is qualitatively different than any other source of information previously available, and vastly outstrips the kind of information available in prior third-party cases, which involved more discrete information, such as the telephone numbers a person dials.

Even more than a GPS device attached to an automobile, a cell phone is in social practice effectively attached to its user, with the consequence that “[a] cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor’s offices, political headquarters, and other potentially revealing locales.” Such comprehensive tracking is unlike anything previously possible.

Moreover, such tracking flattens out the distinction between home and street, making information about one’s movements in each equally possible. But in doing so, the home’s constitutive role provides a reason to extend privacy protection to all of the information obtained as a way to check government access “that implicates basic Fourth Amendment concerns about arbitrary government power.” As an institution, the home and the privacies it contains stands apart from the public power of government—a separation of the people’s power and the government’s the Fourth Amendment seeks to balance. That separation does not depend upon switching the constitution on and off when crossing the home’s threshold. In this way, treating the home as a privacy paradigm is not about creating a threshold bright line or demarcating place as such as significant, but of organizing priorities and separated powers. Arbitrary government power, when exercised by the executive, is capable of invading the prerogatives of Congress and the prerogatives of citizens organized by their attachment to a household.

89.  Id. at 415 (Sotomayor, J., concurring).
90.  Id. at 416–17 (quoting United States v. Di Re, 332 U.S. 581, 595 (1948)).
94.  Carpenter, 138 S. Ct. at 2218.
95.  Id. at 2222.
Despite the existence of doctrines based on exposure and accessibility, the Court avoided mechanical application of public observation and third-party doctrines, focusing on the dangers inherent in expanded government surveillance power. The roots of this concern, however, are grounded in the privacy protections afforded to the home, as the Jones opinion’s use of Entick demonstrates. By appealing to founding-era concerns, the Court links privacy protections to antecedent conditions for republican self-government. No doubt, the People's ability to conduct their affairs in public is essential to republican government, but so too is the ability to be free of comprehensive monitoring of all their movements—both at home and in public. Such power would level the distinction between the home and public in a way that upsets the balance between the government and the governed, where the sovereign power of the latter reigns supreme. As the Carpenter Court warned regarding access to historical cell-site data, “this tool risks Government encroachment of the sort the Framers, ‘after consulting the lessons of history,’ drafted the Fourth Amendment to prevent.” These lessons teach against the tyranny of unchecked government power to invade not simply the privacies of household life but the separate institutional sphere of the home.

This anti-tyranny reasoning, while central to the Fourth Amendment both at the Amendment’s drafting and in more recent opinions, does not always take priority. As the next section explores, there is a risk that the home becomes a paradigm of privacy disconnected from its foundational purpose.

B. Avoiding the Privacy Prison

As a foundational premise, no one doubts that the Fourth Amendment provides baseline protections for home and person. But why? What do these protections achieve? The argument here is that Supreme Court opinions—and their foundations—provide grounds for seeing the importance of the home as more than a place of privacy but also as a separate institution with a distinctive role to play within constitutional structure. But without broader theoretical guidance concerning the Fourth Amendment’s central values, there is a risk that episodic doctrinal decisions fail to consider the implications for constitutional structure that protection of the home provides. In this way, tension exists between claims that surveillance techniques might provide too much data and the Court’s treatment of intimacy in the home. Even though some technologies produce too much data, the Court has not jettisoned its analytic reliance upon accessibility and exposure. A tension exists between intimacy and institution as two related, but potentially inconsistent, analytic foci of the Fourth Amendment.

96. Id. at 2223 (declining to extend the third-party doctrine because of “the deeply revealing nature of CSLI [(cell-site location information)], its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection”); see Stephen E. Henderson, After United States v. Jones, After the Fourth Amendment Third Party Doctrine, 14 N.C. J.L. & TECH. 431 (2013).


By emphasizing the implications of exposure and accessibility to places and things, the Court’s reasoning risks treating the home as the sum of intimate activities withheld from public exposure. In *Kyllo v. United States*, a case examining whether police can use a thermal imaging device to obtain information about the relative heat escaping from the home, the Court emphasized how the Fourth Amendment protects the privacies of the home against the claimed needs of police.  

This technology allowed police to obtain information readily accessible “off the wall” of the home’s exterior from which they could use to make inferences about the activities inside. Such information, the Court reasoned, is about the most intimate activities of the home, such as “at what hour each night the lady of the house takes her daily sauna and bath.”

Seeming to utilize “separate spheres” logic, whereby femininity is associated with household intimacy, and by implication masculinity is about public affairs, the Court does not explain why such intimacies must be protected. They are withhold from view, no doubt. “In the home, our cases show all details are intimate details, because the entire area is held safe from prying government eyes.” But why protect all “intimate details”? What purpose do such intimate details play in individual lives, and what harm occurs from “prying government eyes”? In *Kyllo*, the Court made an inside-outside distinction that reiterated the Fourth Amendment’s bright line protections for the home without connecting the distinction to a governing purpose evident in other considerations of the home. Intimacy disconnected from institution risks making all interactions that occur outside the home less or unprotected.

If shorn of any other consideration about content, social role, or attachment to the home, then analysis of Fourth Amendment household protections can lead to the kind of distortions against which scholars, such as Professor Sklansky, warn. Namely, making the home the paradigm of privacy implies that stepping outside the home inevitably leads to a loss of privacy. By focusing on an analysis of accessibility and exposure, one implication is that privacy becomes more like secrecy. Indeed, the Supreme Court’s “third-party doctrine” follows this implication. If individuals wish to have constitutional protections, then they must not share their homes, activities, or information with others. By sharing an internal space with another person who might incidentally be a government agent, one “assumes the risk,” the Court explains, that one’s activities and information are no longer protected. A person’s assumed risk spreads to follow her every transaction with others, whether through banks, communications providers, or social media, to name only a few.

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100. Id. at 38.
101. Id. at 37.
103. Sklansky, supra note 16 (“If privacy receives more protection in the home than elsewhere, it necessarily follows that leaving one’s home means losing some privacy—that the price of full privacy is not going out.”).
104. See, e.g., Lewis v. United States, 385 U.S. 206, 211 (1966) (“But when . . . the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if carried on [in public].”); see also United States v. Miller, 425 U.S. 435, 443 (1976) (regarding bank records,
rationale, because a person knowingly shares information with these third parties, and because those with whom one shares are free to further share this information with government officials, one assumes the risk associated with losing Fourth Amendment protections by these acts of sharing. Sharing makes information and activities accessible to others. By sharing, one exposes oneself. In this way, the home as privacy paradigm becomes its own privacy prison, for to cross the threshold or to share one’s space, one sheds key Fourth Amendment protections.

One need not even cross the threshold, however, in order to assume the risk of police intrusion into the home. One need only invite others inside to share occupancy of a home, thereby assuming a risk that co-occupants will yield to police inquiries, and thus allow unwarranted searches of co-habitational spaces. Given the potential complexity of household sharing, this risk can spread to any person whom police have a good-faith belief shares authority over the space they wish to search. And depending on the overall purpose and duration of social guests’ visit, they may not receive the protective shield the household provides, making the threshold bright only for some occupants.

Physical presence at the threshold can also be a necessary factor to make the Fourth Amendment’s protections bright for a shared occupancy. The Court held in Georgia v. Randolph that at the threshold of a home, an objecting co-occupant’s refusal of consent renders unreasonable any attempt by the police to effectuate another co-occupant’s consent. In Randolph, a spousal dispute led to one marital partner offering the police consent to search when the other partner denied it. In this situation, the Court concluded that it would be unreasonable for police to enter, in part because background social norms would make it unlikely that any person would believe they were welcome to enter. Chief Justice Roberts argued in dissent that the assumption of risk that accompanies shared household occupancy means that an individual who shares a household is vulnerable to the consent cohabitants might

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105. See United States v. Matlock, 415 U.S. 164, 171 n.7 (1974) (“[I]t is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.”).


109. Id. at 113–14.
grant police. In a subsequent case, Fernandez v. California, police removed the non-consenting household occupant from the home only to return to the scene to act on the consenting occupant’s permission. In a majority opinion written by Chief Justice Roberts, the Court held that such action was reasonable. Having crossed the threshold, the non-consenting citizen’s privacy protections no longer applied against a cohabitant’s waiver. Because physical “presence of the objecting occupant” is necessary, the Court reasoned, “the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared.”

Households are complex living arrangements in which the ability to host invitees extends the social and political organization of society. The precise constitution of the household is highly variable as well. Households can consist of a small nuclear family, but may also include extended family members, non-family members, or be organized in entirely other ways. No matter the composition, a household provides both formal and informal order for intimate and social relations. Nonetheless, in this distinctive role, the Court reasons that members of a household are made vulnerable to the risks that guests present. They might wear a wire, be informants, or otherwise diminish privacy protections within the home. Guests, too, bear risks, for those present in a home with insufficient temporal or intimate attachments may not receive privacy protections from government intrusion into the host’s home. Because “[s]taying overnight in another’s home is a longstanding social custom that serves functions recognized as valuable by society,” the Court recognized that we all share expectations of privacy in a host’s home. But when a household occupant entertains a social visitor “who is merely present with the consent of the householder,” the visitor may not claim Fourth Amendment protections. In this way, the Court’s treatment of the home as a sacred site “at the core of the Fourth Amendment” proves highly malleable in light of the profane needs of law enforcement. Given the implications of the third-party doctrine and the assumption of risks that sharing one’s home creates, keeping to oneself and minimizing social interaction by implication seem to be the only ways to preserve the constitutional

110. Id. at 128 (Roberts, C.J., dissenting) (“If an individual shares information, papers, or places with another, he assumes the risk that the other person will in turn share access to that information or those papers or places with the government.” (emphasis in original)).
112. Id. at 302.
113. Id. at 299–300 (quoting United States v. Matlock, 415 U.S. 164, 170 (1974)).
115. Id. at 1.
118. Minnesota v. Carter, 525 U.S. 83, 90 (1998). Concurring in Carter, Justice Scalia cites to a 1604 English case for the idea that a visitor does not receive protection in another’s “castle,” for “the house of any one is not a castle or privilege but for himself, and shall not extend to protect any person who flies to his house.” Id. at 94 (Scalia, J., concurring) (quoting Semayne’s Case (1604) 77 Eng. Rep. 194, 198 (K.B.)).
sanctity of the home. This can have the consequence of making the home a privacy prison.

If exercising freedom with others in fulfilling the home’s organizational role in social life undermines privacy, then privacy’s purpose is thwarted even upon the domain in which it is meant to be inviolable. When added to the scholarly criticism that household exceptionalism leads to a loss of privacy elsewhere, these doctrines imply that constitutionally protected privacy exists only for those who keep to themselves. But keeping to oneself is inconsistent with the constitutional role the household plays in organizing social and political life—forms of life that are unavoidably shared with others. In the context of the workplace, Justice Scalia recognized this problem, reasoning that

[i]t is privacy that is protected by the Fourth Amendment, not solitude. A man enjoys Fourth Amendment protection in his home, for example, though his wife and children have the run of the place—and indeed, even though his landlord has the right to conduct unannounced inspections at any time. Similarly, in my view, one’s personal office is constitutionally protected against warrantless intrusions by the police, even though employer and co-workers are not excluded.120

By extending household privacy into other shared domains, Justice Scalia provided a reason for thinking that the home need not be the paradigm of privacy as secrecy, even if in Kyllo his focus on intimate details implied otherwise.

Importantly, these assumption of risk doctrines implicate the role of the home without reconciling their effects upon the home. Moreover, these doctrines do not always point in the same direction. Intimacy is a central building block for household privacy. But intimacy is a form of sharing among two or more persons. If sharing were to inexorably lead to a loss of constitutionally protected privacy, the home would become a constitutional paradox. As a paradigm of privacy, the home would also be a paradigm of diminished privacy. But if intimacy risks a loss of constitutional rights, then government intrusion risks undermining constitutional structure. Because the home is an institutional foundation for ordering social and political life, “assumption of risk” reasoning itself erodes an important feature of constitutional structure. Because law enforcement may seek to exploit a person’s intimate connections, judicial doctrine risks creating an intimacy trap. Intimacy is an important feature of human and social life, but it is also a source of vulnerability to state power. The way out of the paradox is to appeal to the constitutional purposes of protecting the home for both its intimate and institutional roles.

The Fourth Amendment protects the home not merely because intimate details are private, but because their privacy is a necessary condition for the possibility of public life. Persons need the organization and protection a household provides, whether living alone or in the company of others. In this way, household intimacy is inseparable from the home’s institutional role.121 If, as Justice Kennedy warned in

121. For example, the Court recognized the fundamental importance of a household’s familial constitution under the liberty protected by the Due Process Clause, concluding that
Lawrence v. Texas, government could become a dominant presence in the home, it is difficult to see how this not only impacts individual liberty but the institutional role the home plays in organizing everyday collective life—a necessary condition for self-government, which, as we will see in Part III below, is a purpose that converges with First Amendment and due process protections. Justice Sotomayor’s concurrence in Jones recognizes this connection between pervasive government surveillance, intimacy, and democracy when it comes to GPS surveillance by police: “[B]y making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track—may ‘alter the relationship between citizen and government in a way that is inimical to democratic society.”’

If all details of the home are intimate details, and if government access to intimate details requires heightened constitutional protections, then despite the vulnerabilities shared access creates under Supreme Court doctrine, the home’s institutional role in sheltering these details can provide a basis for extending privacy protections. This possibility is realized when technology extends the possession of personal information—intimate details—on devices that can be carried into public. When this happens, a conflict between public accessibility and intimate details arises, as the next section examines. When this conflict arises, if we see the home’s institutional role extends beyond protecting “intimate details” merely in virtue of their inaccessibility to the public, then the home can serve as a model for extending privacy in public. If the Constitution protects intimate details as a way of preserving a separate zone of governing power—the ability of the people to play their role as in participatory self-determining democracy—then, contrary to the objection that the home as a privacy paradigm is paradoxically harmful for privacy, the home becomes a way of extending privacy protections in public in virtue of preserving this separate institutional role.

II. At Home in Public: On Balancing and What to Consider

The Fourth Amendment’s privacy protections are subject to an inquiry whereby “the Court must balance the privacy-related and law enforcement-related concerns to determine if the intrusion here was reasonable.” Even in the home, under a doctrine that authorizes search incident to arrest, the Court balances privacy interests against the particular needs of the police. Once police assert a claimed need to access a person or place, judicial reliance on reasonableness as the Fourth Amendment’s “touchstone” leads inexorably to questions about whether and when privacy protections may be invaded to accommodate police needs. This privacy versus police dichotomy is deeply entrenched in both judicial and scholarly

“the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.” Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977).
thinking. At the same time, however, judicial reasoning regarding the home also contains an alternate way of imagining the reach of privacy protections to new technologies even in public spaces. This section explores this alternate constitutional imaginary.

A. Technology and Household Privacy in Public

In Riley v. California, the Court explained that

"absent more precise guidance from the founding era, we generally determine whether to exempt a given type of search from the warrant requirement “by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.”"

When Riley was arrested, he possessed a smartphone. Under the search incident to arrest doctrine, police are entitled to search persons subject to arrest, including bags and other containers found in their possession. The question presented was whether police are entitled to search the contents of a person’s smartphone as if it were no different than searching any other personal possession. Arguing that the doctrine should mechanically apply, California asserted that there was no relevant difference between the crumpled cigarette pack at issue in United States v. Robinson and the contents of a cell phone. And because the search incident doctrine was established by balancing the relevant interests of the person to be free from physical intrusion and the police needs for safety and evidence, the government argued that no further interests needed to be balanced. In response, the Court acknowledged that balancing of interests supports the search incident to arrest doctrine established by Robinson, but that further mechanical application of the doctrine focused on examination of physical objects would not strike the right balance when it comes to the digital content found on cell phones. Balancing done in the case of physical

127. See Charles Taylor, Modern Social Imaginaries 24 (2004) (“[A] social imaginary . . . incorporates a sense of the normal expectations we have of each other, the kind of common understanding that enables us to carry out the collective practices that make up our social life. This incorporates some sense of how we all fit together in carrying out the common practice.”).
129. Riley, 573 U.S. at 379.
132. Id. at 386.
133. Id. at 386–91.
134. Id. at 393 (rejecting the claim that searching incident to arrest a cigarette pack is no different than a smartphone, “[t]hat is like saying a ride on horseback is materially
searches of a person can legitimate a categorical search incident to arrest rule, but cannot justify a similar result when it comes to digital content on a cell phone.\textsuperscript{135} Because a cell phone contains “vast quantities of personal information,” the balance of privacy looks very different than in the context of physical objects. Indeed, “[m]odern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse.”\textsuperscript{136} The physical equivalent of the digital data a “smart” phone contains would include lugging around “every piece of mail they have received . . . every picture they have taken, or every book or article they have read.”\textsuperscript{137}

This vast quantity of data also has a qualitative dimension, for it can expose a far greater amount of information about a person’s life, including historical location data and internet search histories that extends beyond physical analogues.\textsuperscript{138} Pervasive social practices integrate this information into daily activities, including use of platforms that share selected information with others.\textsuperscript{139} As the Court observed, “it is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate.”\textsuperscript{140} Using smartphones integrates other social practices in new ways, whether through maintaining connections, collating memories, tracking steps taken, or any number of other activities. Such technological integration of information with daily activities would make available not only a vast quantity of information to a searching police officer, but also could quickly paint a narrative picture of a person’s life. Given the nature of this information and the pervasive social practices that integrate use of smartphone technology, the Court further distinguished physical searches in a way that forestalled mechanical application of the search incident to arrest doctrine to new technological circumstances.\textsuperscript{141} There is no social practice in which Americans carry around that much stuff—file cabinets full of paper, libraries of books, overflowing photo albums, call records and address books, for example—that could be available to a search incident to arrest, for “[i]n Riley’s case . . . it is implausible that he would have strolled around with video tapes, photo albums, and an address book all crammed into his pockets.”\textsuperscript{142} Access to all of this content would constitute “a significant

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\item \textsuperscript{135} Id. at 386 ("A search of the information on a cell phone bears little resemblance to the type of brief physical search considered in Robinson.").
\item \textsuperscript{136} Id. at 386, 393.
\item \textsuperscript{137} Id. at 393–94.
\item \textsuperscript{138} See Gray & Citron, supra note 84, at 73.
\item \textsuperscript{139} See Katherine J. Strandburg, Home, Home on the Web and Other Fourth Amendment Implications of Technosocial Change, 70 Md. L. Rev. 614 (2011); see also Frank Pasquale, The Black Box Society: The Secret Algorithms That Control Money and Information 19–58 (2015).
\item \textsuperscript{140} Riley, 573 U.S. at 395.
\item \textsuperscript{141} Id. at 397–98.
\item \textsuperscript{142} Id. at 400.
\end{enumerate}
\end{footnotesize}
 diminution of privacy.” 143 Access to this content would also be equivalent to searching the confines of a home.

In a pre-digital world, a person might carry around a single bank transaction receipt, a few wallet photos, and the like, which are samples of the kinds of records often kept at home. But a doctrine that justifies searching the very limited quantities of such physical material a person might carry, the Court reasoned, does not justify searching much greater quantities of household material simply because it can now be transported in digital form. 144 Smartphone technology makes voluminous quantities of household material portable. But that fact does not suddenly turn household privacy into public exposure. Government officials argued that because under Robinson they could search physical examples of such material, they therefore could access the digital equivalent of all such household contents. 145 For the government, household privacy no longer applied because such contents were now accessible in public. 146 In rejecting this argument, the Riley Court reasoned in the opposite direction. Household privacy extends into public. 147

If public exposure could make so much information accessible to law enforcement inspection through a search incident to arrest doctrine, then we would expect an increase in arrests for minor offenses. In Atwater v. City of Lago Vista, the Court held that arrests for minor offenses did not violate the Fourth Amendment, even when the penalty for conviction entailed only a fine. 148 Even though the Court acknowledged the “gratuitous humiliations” 149 that such arrests may impose, the Court nonetheless refused to limit police behavior. Ms. Atwater had been arrested in her neighborhood in front of her children for a seatbelt violation that carried no more than a nominal fine. 150 Despite recognizing the “pointless indignity” she suffered, the Court reasoned that it must “strike a reasonable Fourth Amendment balance” that “credit[s] the government’s side with an essential interest in readily administrable rules.” 151 Were the Court to extend search incident to arrest to cover smartphones, such “readily administrable rules” would provide a powerful incentive for law enforcement to use its arrest power over minor offenses to gain access to the effective contents of a person’s home. When prioritizing police need, doctrines can in this way work together to diminish the separation of powers between law enforcement and the home institution.

Acknowledging the Court’s typical role in providing police with “workable rules” under the Fourth Amendment, 152 Chief Justice Roberts’s opinion in Riley did not

143. Id.
144. Id. at 393–97.
145. Id. at 392–93.
146. Id.
147. Id. at 396–97.
149. Id. at 346.
150. Id. at 323–24.
151. Id. at 347; see Josh Bowers, Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a “Pointless Indignity,” 66 Stan. L. Rev. 987, 1002 (2014) (“[T]he Atwater Court refused even to ask whether an objectively reasonable officer would have acted likewise.”).
prioritize the needs of police. As a result, police work will cost a bit more. But, "privacy comes at a cost," the Court admonished. In conducting this balancing, the Court analyzed two interests: individual privacy against law enforcement need. Absent from the analysis is any explanation for the structural role such balancing fulfills. It is as if the balance floats free of the constitutional structure from which it arises. The self-evident nature of the terms of balance—the privacy to be protected and the invasions the police require—lack any reference to an overriding value or goal by which to judge the propriety of any given balance. Instead, the balance is a tug-of-war between police and privacy in which the Court often sees its role as providing police with "workable rules" that do not unduly hamper legitimate law enforcement interests. The explanandum—the scope of the Fourth Amendment—is thus analyzed in terms of a balance that is itself unmoored from any broader constitutional connection.

If a person is in public, why worry about the private content she carries on her person? To answer that question, the Court avers to the incidents of household privacy people transport into public, providing a key takeaway from Riley. But if in public, why should incidents of household privacy matter? To conclude that extension of the search incident doctrine to smartphone contents would be an invasion of privacy revealing a large quantity of data does not yet explain why exposure of this information in this setting matters, especially since no physical invasion of the home is required. No doubt, such a search can reveal lots of private information, but so too does searching a bag or purse a person happens to tote. Linking the quantity of data to the home provides a threshold explanation but needs to be supplemented by a missing inquiry into why the home matters, especially when paradoxically household privacies are found in public. Balancing privacy with police need in order to protect privacy is an analytic circle that leaves unexplained why privacy matters and must be subject to balance.

One explanation that makes sense of both Riley and the special status the Court grants the home is that by extending the privacy protections afforded the home to searches conducted in public, the structural goal of the Fourth Amendment grounds the privacy-police balance. This goal provides a check on discretionary executive power in order to avoid the arbitrary rule of officials over a coordinate political institution—the home. Through protecting privacy, the Court limits discretionary executive action and promotes the vertical separation of powers, which in the context of federalism, as the Court explained, protects liberty. The home is a separate sphere in which the people possess power in their privacy. It functions as a horizontal institution by analogy to other federal powers, thereby retaining its own structural role and privileges under the Constitution. As the principal place providing order to the privacies of life, the home functions both as an institutional repository for the people’s political and social organization and as an institutional limit on executive power. The home is also a paradigm for privacy protection providing a basis for

153. Id. at 401.
154. Id. at 385–86.
155. Id. at 398.
156. See id. at 396–97.
limiting the expository power of the state to exploit superior access to information under a claim that it has been publicly exposed.\textsuperscript{158}

\textit{Riley} does not explain this institutional role, but the Court does place protection of the home at the center of its reasons for protecting smartphones from unwarranted searches.\textsuperscript{159} Indeed, the Court cites to Judge Learned Hand, writing for the Second Circuit in 1926, to argue that it is “a totally different thing to search a man’s pockets and use against him what they contain, from ransacking his house for everything which may incriminate him.”\textsuperscript{160} Such reasoning not only spans the relation between a person and a house as two “sites” of government intrusion but also marks a difference in degree that gives rise to a difference in kind. A little bit of evidence found on the person is nothing like either the amount or kind of information that can be found by searching a house. But this difference collapses, the Court observes, if the pocket contains a smartphone, for

a cell phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form . . . .\textsuperscript{161}

In one device, government officials can unlock household secrets as well as a vast amount of information about one’s relationships and movements, all connected to household intimacies and privacies, but now compiled in one handy source. In this way, the relation between person and home—pockets and rooms—forms a conceptual unity. This is a unity Justice Brandeis presciently—and more than a little eerily—foresaw in his 1928 dissent in \textit{Olmstead v. United States}: “Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home.”\textsuperscript{162} Unfettered access to a smartphone would constitute such a way to remotely unlock household secrets.

The home’s institutional role within constitutional structure helps explain Chief Justice Roberts’s \textit{Riley} opinion. \textit{Riley} makes an important case for household privacy as a limit on executive authority, even when in public and even though armed with a

\begin{footnotesize}
158. As the Court reasoned: “For just as the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion, so also may a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attache case.” United States v. Ross, 456 U.S. 798, 822 (1982) (citations omitted).
159. See Riley, 573 U.S. at 393–94, 397 (“Most people cannot lug around every piece of mail they have received for the past several months, every picture they have taken, or every book or article they have read—nor would they have any reason to attempt to do so. And if they did, they would have to drag behind them a trunk . . . .”).
160. \textit{Id.} at 396 (quoting United States v. Kirschenblatt, 16 F.2d 202, 203 (2d Cir. 1926)).
161. \textit{Id.} at 396–97 (emphasis in original).
162. 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting).
\end{footnotesize}
judicial doctrine that permits physical intrusions of the person incident to arrest. 163 Avoiding arbitrary government discretion to intrude upon household privacies, even for a person in public, serves the purpose of maintaining separation of powers between the people upon whose liberty and consent government legitimacy rests and the government actors through whom the people maintain ordered liberty. 164 As the following sections will also explore, the multifaceted protections the home receives under the Constitution bolster the conclusion that the home has institutional standing within the American constitutional system. But this conclusion is in tension with the availability of necessity exceptions, even in the home. In the balance of interests, if the government need is sufficiently pressing in terms of time or harm, the Fourth Amendment makes available exigency exceptions, even in the home. The availability of such claims to necessity risks undermining the coherence of the view this Article takes. For if the home plays a structural role, then intruding upon it on a claim of episodic exigency should provide insufficient reasons for risking harms to its institutional life. In order to make the case for the home’s constitutional role, exigency should be contained the way the aggrandizement of a coordinate branch of government might be. 165

B. Exigency Exceptions

Commitment to constitutional rule is always bounded by the availability of exits. Americans pre-commit to govern within certain constitutional limits but remain open to practical deviations so that not only the Constitution can be “adapted to the various crises of human affairs” 166 but also existing rules can be applied flexibly in light of the emerging situations law enforcement may face. 167 Rights limitations are often subject to balancing tests that weigh the degree of necessity imposed by a government interest against the constitutional value that would limit government choice of action. 168 Exigency doctrines within the Fourth Amendment instantiate this dynamic, freeing law enforcement from the straightjacket of normal legal rules when extraordinary situations arise. In this way, the more Fourth Amendment protections for the home are viewed as solely rights based, the more salient exigency exceptions will seem. And in contraposition, the more salient the institutional role the home plays within constitutional structure, the less attractive such exigency exceptions will become.


In establishing the modern exigency exception to the Fourth Amendment, the Court was tasked with setting limits on access to a home. In Mincey v. Arizona, the Court confronted an emergency situation involving the homicide of a police officer in a home, which clearly justified immediate entry, control of the crime scene, and preliminary investigation. But police relied on the temporally bounded emergency to occupy the home for investigatory purposes for an extended time that exceeded “the exigencies of the situation” without gaining the requisite judicial warrant. Even though there was no doubt that probable cause would have existed to obtain the needed warrant, the Court reasoned that “the privacy of a person’s home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law.” When “the exigencies of the situation” are so compelling, law enforcement can forego the warrant requirement, bending constitutional constraints to conform to law enforcement needs. In this way, the Fourth Amendment internalizes a structure of balance allowing the government to claim that deviation from constitutional protections are necessary in light of the exigent circumstances.

A recent case considering police access to the home in exigent situations highlights the principles and perils of the doctrine. In Kentucky v. King, the Court considered whether Fourth Amendment constraints would allow police to enter a home without knocking and without a warrant out of fear that evidence might be imminently destroyed. In writing the majority opinion, Justice Alito acknowledged the traditional view regarding the home, quoting from a recent case whose holding found reason to extend police authority into the interior of the home: “It is a basic principle of Fourth Amendment law,” we have often said, “that searches and seizures inside a home without a warrant are presumptively unreasonable.” By using the expression, “we have often said,” Justice Alito’s opinion distances itself from the proposition that the Fourth Amendment provides special protections for the home, emphasizing instead the fact that “this presumption may be overcome in some circumstances” because the “ultimate touchstone of the Fourth Amendment is ‘reasonableness.’” Although the home is said to have a special place in the life of criminal procedure, the opinion notes that “the warrant requirement is subject to certain reasonable exceptions.” These reasonable exceptions provide police authority to enter a home without a warrant in order to render emergency aid.

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170. Id. at 394.
171. Id. at 393.
174. Id. at 459 (citation omitted). The opinion also recognizes that “[i]n no quarter does the Fourth Amendment apply with greater force than in our homes, our most private space which, for centuries, has been regarded as ‘entitled to special protection.’” Id. at 474 (citation omitted).
175. Id. at 459 (quoting Brigham City, 547 U.S. at 403).
176. Id. (citing Brigham City, 547 U.S. at 403).
177. Brigham City, 547 U.S. at 403.
pursue a fleeing suspect, and to prevent the pending destruction of evidence, among other possible exceptions. It is the latter exception that matters in *King*.

Justice Alito’s opinion reasons that “[w]here, as here, the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed.” The underlying facts occur at the home’s threshold. After a controlled-narcotics buy went sideways, police officers lost sight of the suspect as he entered a nearby apartment complex and then came to a door where they smelled marijuana burning. Officers claimed that they banged loudly on the door, yelled “[p]olice, police, police,” “could hear people inside moving,” and then kicked in the door and entered the home. Despite the nature of this home intrusion—where police kick in a door and enter unceremoniously into the sacred confines of a home—the Court reasoned that “a rule that precludes the police from making a warrantless entry to prevent the destruction of evidence whenever their conduct causes the exigency would unreasonably shrink the reach of this well-established exception to the warrant requirement.” Under this logic, the exception becomes the rule, and the home has no special role to play. Even though residents of a home are purported to have the constitutional right not to answer the door, since lacking a warrant law enforcement officers are like any other member of the public, Justice Alito reasoned that the subjective fears of police justified the home invasion.

Glossing over what residents who wish to avoid the police encounter are supposed to do to ensure that their ordinary household activities are not misconstrued as attempts to destroy evidence, the Court admonishes: “Occupants who choose not to stand on their constitutional rights but instead elect to attempt to destroy evidence have only themselves to blame for the warrantless exigent-circumstances search that may ensue.” Rather than the sacred precinct of ordinary household activity said to be beyond the reach of government surveillance and intrusion, the home becomes an accessible opportunity for police to create encounters with residents that might open the door to further investigation. The Fourth Amendment basis for this intrusion is reasonableness.

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180. *King*, 563 U.S. at 462.
181. *Id.*
182. *Id.* at 456.
183. *Id.*
184. *Id.* at 461–62.
185. See Crocker, *supra* note 81, at 717 (discussing how “the Court protects the exception against ‘unreasonable’ applications of the rule”).
186. *King*, 563 U.S. at 469–70 (“[W]hether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak.”).
187. *Id.* at 470.
188. Indeed, creating such encounters is precisely the point of police “knock and talk” procedures, the validity of which the Court here affirms. In a “knock and talk,” police knock on a door and use the open door as an occasion to peer into the household beyond in hopes of seeing something illegal, thereby justifying an entry and seizure under the Court’s “plain
Emphasizing exigency’s roots in a general “reasonableness” inquiry is of more recent vintage, carving out a presence in two recent Roberts Court opinions from the general proposition announced in Minckey that a warrant is required unless “the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable.” One such exigency is to protect life and avoid serious physical injury. In Brigham City v. Stuart, on which King relies, when officers arrive at a loud party, walk to the back of the house, observe punches being thrown by two persons inside, the Court concluded that they act reasonably in entering without a warrant to quell the violence and render assistance to those injured. Likewise, in another case when police officers arrived at a home to find disorder in the yard, drops of blood on the hood of a disheveled parked pickup, and an occupant in the home “screaming and throwing things,” the Court concluded that they acted reasonably when entering the home without a warrant. In still another case, police entered a home without a warrant after initially confronting a juvenile and his mother on their home’s front steps. Inquiring about a social media post and the student’s absence from school, the police, fearing possible violence and believing the mother’s behavior “odd,” entered to investigate further. Relying on exigent circumstances, the Court explained that “reasonableness must be judged from the perspective of a reasonable officer on the scene,” who is “often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.”

The factual circumstances of these and similar exigencies hinge on an examination of the seriousness of the threat or the likelihood of serious injury that might follow under a standard of reasonableness. This free-floating inquiry begins with claims, like those in Brigham City, that an exigency exception to the warrant requirement occurs with “the need to assist persons who are seriously injured or threatened with such injury.” But, the Court retreated from imposing a rigorous standard, claiming instead that “[t]he role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties.” In this manner, the peace officer serves an order-maintenance function that extends into the

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189. See Brigham City v. Stuart, 547 U.S. 398, 403 (2006); King, 563 U.S. at 467.
191. Id. at 392 (“The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.” (quoting Wayne v. United States 318 F.2d 205, 212 (1963))); see also Michigan v. Tyler, 456 U.S. 499, 509 (1978) (holding warrantless entry to fight and investigate fire permitted).
192. 547 U.S. at 406–07.
193. King, 563 U.S. at 459.
196. Brigham City, 547 U.S. at 406–07.
198. Id. at 471.
199. Id. at 477 (quoting Graham v. Conner, 490 U.S. 386, 396–97 (1989)).
200. Brigham City, 547 U.S. at 403.
201. Id. at 406.
disorderly interior of the home. Even everyday, non-exigent facts can be colored by police fear and “common sense” to conclude that “a combination of events each of which is mundane when viewed in isolation may paint an alarming picture.”

Although the painting’s artistry depends on police perceptions, the Court uses “reasonableness” to avoid a more exacting scrutiny of the effects on household privacy. Indeed, the Court provides no separate analysis of the home’s structural role under the Fourth Amendment in light of law enforcement actions in these “emergency assistance” cases.

Hovering just out of view of the particular circumstances of these cases are similar facts with more pressing social meaning. Indeed, for all the rhetoric conferring special status on it, the home can also be a source of violence and harmful disorder. What if residents subject to domestic violence are in need, or other forms of danger lurk within the confines of the home? Observable disorder within the home might indicate the possibility that other occupants might be endangered. Such questions inform the test the reviewing court should apply: “whether there was ‘an objectively reasonable basis for believing’ that medical assistance was needed, or persons were in danger.” An affirmative answer to this inquiry removes Fourth Amendment restrictions from the threshold of the home. Moreover, because the Court does not consider the seriousness of the crime under investigation as part of the reasonableness inquiry, it does not matter why the police are at the door when the circumstances become exigent. What matters is the perceived presence of danger. In this regard, the home is little different than the public street where peace officers have unquestioned duties of “preventing violence and restoring order” when confronting disorderly or threatening persons. When police proffer consensual

205. These considerations lurk in the background to Georgia v. Randolph, and they are made explicit in Justice Breyer’s separate concurrence. 547 U.S. 103, 125 (2006) (Breyer, J., concurring).
207. Id. (quoting Brigham City v. Stuart, 547 U.S. 398, 406 (2006)).
209. Brigham City, 547 U.S. at 406.
conversation with citizens, Fourth Amendment rights depend on citizen responses and police perceptions, even in the home. Indeed, one goal of the Court’s opinion in King is to facilitate consensual police encounters, even at the threshold of the home, for a person “may appreciate the opportunity to make an informed decision about whether to answer the door to the police.”211 By bringing order-maintenance considerations into the household interior, the distinction between street and home erodes—a possibility only when inquiry into police “reasonableness” becomes disconnected from consideration of privacy and its institutional role.

Order maintenance requires circumstantial flexibility guided by “reasonableness” because the situations of disorder and danger are unforeseeable and variable. Naturally, the police would like to search wherever they want and to seize whatever they find, but the point of the Fourth Amendment is to guide and constrain zealous law enforcement. The greater the zeal and the stronger the desire for police to utilize particular investigatory techniques, the more the Fourth Amendment serves to restrict unfettered police practice. Justice Jackson’s opinion in Johnson v. United States, which Kentucky v. King at least in part silently overrules,212 articulates well why warrants are required.

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.213

Against this idea, the point of recognizing an exception to the warrant requirement when police fear evidence will be destroyed is to affirm the inferences they may draw from circumstances construed as exigent. Why these inferences receive special status remains opaque, especially when one recalls that exigent circumstances alter the protection afforded the home. In contrast to the more recent judicial approach, Justice Jackson warned in 1948: “The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance.”214 This structural contrast between the security of dwelling at home in freedom and the power of law enforcement to invade the home at their discretion marks a key boundary the Fourth Amendment’s structural purpose is meant to fortify.

For police to have the authority to prevent citizens from destroying particular items in their possession under an exigent-circumstances rationale means that police must have a quasi-property interest in finding the items they seek. The magic moment for transferring rights apparently occurs when police arrive at the door. Moments before, evidence flushed would be like so much other waste—not a matter to which

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212. See id. at 469–70; see also Crocker, supra note 81, at 716–19.
214. Id. at 14.
the investigatory power of the police applies. But a simple knock on the door establishes a new order of things the citizen is not free to alter. In this way, a property interest in the item the police seek becomes shared, as the state now has a property interest in preserving an item housed in the Fourth Amendment space of the home.215 This situation is an extraordinary transformation of the home’s constitutional status. This situation is also a puzzle. What is unexplained is how the basic property right to exclude others,216 both from the home and from personal property, fails to apply when police officers wish to conduct an unauthorized search they fear may be thwarted. Once officers are lawfully in a place, they may seize property to be used as evidence, transferring property rights from the occupant to the state.217 But to transform property rights—including the right of occupants to exclude the police from forcible entry—on the subjective desire of police, on their own authority, to look for something they may not find is a conceptual leap left unjustified. Nonetheless, the exigency has its roots in common law justifications for possible forcible entry, warrantless arrest, and searches incident to arrest.218 Authorizing a warrantless home entry, the Supreme Court first used the exception while observing that “[s]uspects have no constitutional right to destroy or dispose of evidence, and no basic constitutional guarantees are violated because an officer succeeds in getting to a place where he is entitled to be more quickly than he would”219 after obtaining a warrant. No doubt a common law property right is not the same as a constitutional right.220 What is more, at least since Katz v. United States,221 property interests have not always determined the scope of privacy rights under the Fourth Amendment, though the home has always received special constitutional consideration. Moreover, the Court revived property-based analysis in United States v. Jones.222 Even when the Supreme Court has focused instead on constitutional protections for


216. See Kaiser Aetna v. United States, 444 U.S. 164, 179–80 (1979) (holding that “the ‘right to exclude’” is “universally held to be a fundamental element of the property right”); Thomas W. Merrill, Property and the Right to Exclude, 77 Neb. L. Rev. 730, 730 (1998) (“[T]he right to exclude others is more than just ‘one of the most essential’ constituents of property—it is the sine qua non.”) (emphasis in original); Carol M. Rose, Canons of Property Talk, or, Blackstone’s Anxiety, 108 Yale L.J. 601, 632 (1998) (“In its own way, the trope of exclusive dominion can encourage respect for the claims of others.”).


220. The exception to the warrant requirement entered constitutional doctrine almost in passing, often referenced in contrast to the nonexigent circumstances under review. See Wong Sun v. United States, 371 U.S. 471, 483–84 (1963) (“[T]he Government claims no extraordinary circumstances—such as the imminent destruction of vital evidence, or the need to rescue a victim in peril . . . .”); Miller v. United States, 357 U.S. 301, 309 (1958) (finding that in this case no claim was being made “that the person to be arrested is fleeing or attempting to destroy evidence”); United States v. Jeffers, 342 U.S. 48, 52 (1951) (finding “no question of . . . imminent destruction, removal, or concealment of the property intended to be seized”).


"expectations of privacy," rather than protecting physical places, in actual practice, privacy often exists only where a property right can be found. The home has retained its status as "first among equals," within constitutional protections that recognize its special sanctity. Yet, even if suspects have no constitutional right to destroy what they have a property right to discard, it does not follow that police should have the authority to prevent affrontation of either the property or privacy right.

With the background principle of the home’s sanctity combined with the institutional role the home plays, a seeming paradox emerges from the Court’s exigency doctrine, particularly as it is manifest in King. Prior to the search—a search police are not legally authorized to conduct absent a warrant or exigency—the issue is whether a police interest extends into the interior of the home, limiting the actions occupants may take regarding their property. When police arrive at a door to engage in a consensual citizen encounter, they have neither a warrant nor exigency. In this situation, privacy has not been breached, yet a government property interest takes priority within the home. Privacy interests only arise in relation to a search. Because the police seek to converse at the door of the home, not to execute an authorized search, then, as the Court made clear in King, no Fourth Amendment privacy interest is implicated. Nonetheless, actions police might “objectively” perceive as an attempt to destroy items for which they would like consent to search become the trigger justifying the search in circumstances they interpret as exigent. The knock on the door announcing a desire for consensual conversation may not implicate individual privacy under the Court’s approach in King, but it does implicate both the liberty and property rights of those inside. It also implicates the structural role of the home.

Such an exigent-circumstance exception, elevated to a rule that police may enter without a warrant when they fear evidence may be destroyed, changes constitutional meaning, creating a police entitlement out of a prior limitation. Such a rule also dispenses with the need to balance the privacy interests of residential occupants against the particular circumstances the police face, incorporating without further analysis supposed “ample protection for the privacy rights that the Amendment protects” by allowing police to conduct searches of a home on their own authority. Despite the special sanctity said to inhabit the home, perceived need to render

223. See Katz, 389 U.S. at 351–52 (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”) (citations omitted).
225. Florida v. Jardines, 569 U.S. 1, 6 (2013) (“[W]hen it comes to the Fourth Amendment, the home is first among equals.”).
226. Payton v. New York, 445 U.S. 573, 601 (1980) (acknowledging “the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic”).
227. The severity of the crime can no longer matter either, overruling sub silentio the Court’s holding in Welsh v. Wisconsin, 466 U.S. 740, 754 (1984) (holding warrantless entry to preserve evidence of minor offense does not fall within exigent circumstance exception), to which the majority opinion in King does not cite.
emergency assistance or fear of imminent destruction of evidence extend policing practice into the home's interior.

What makes the growth of this exigency exception authorizing unwarranted home intrusions possible is the absence of any consideration of the institutional role of the home. This altered relationship of the citizen and the police with regard to property rights within the home occurs only because of discretionary decisions law enforcement officers make. In this way, a separation of powers tension arises between the home's structural role as a check on government power and law enforcement claims that necessity requires access to the household interior. A doctrine without grounding, this exigency exception spins free from any consideration of the underlying Fourth Amendment values and purposes that animate the home's constitutional status. In King, individuals must confront police at the home’s threshold free from any further institutional weight that would counterbalance the hollow claim that an officer's knock at the door is no different than any other. Lacking heft, the individual’s circumstance is too easily outweighed in balance to the seeming reasonableness of the officer’s action. But if this Article’s thesis holds, then the analysis in King must remain an outlier, for it fails to accord appropriate weight to the institutional role household privacies play in creating the space from which communities of democratic participants reside and in which government officials may not become a dominant presence. To make this case, it is important to see how the institutional home does not rely upon the Fourth Amendment alone—subject to its exigency exceptions—but is a place in which other constitutional provisions converge. Most notably, First Amendment free speech protections and the liberty protected by the Due Process Clause each bolster the structural distinction of the home as the next section explains.

III. CONSTITUTIONAL CONVERGENCE

Fourth Amendment beginnings, grounded in Lord Camden’s protection of the home, tethered concern with tyranny to invasions of the home’s sanctity. Separation of powers concerns that a central government might have too much power were to be checked at the door of the people’s houses. This separation of power recognizes that the household plays a pre-existing political role within constitutional structure, one that organizes and secures the liberties of personal and social life free from government control. In this way, the Fourth Amendment sounds in individual liberties—freedom from unwarranted search and seizure of the person and home, for example—but functions as a structural check. This structure is physically and organizationally located in the home.

A. Household Liberties under Due Process

Justice Kennedy’s opinion in Lawrence v. Texas begins with a convergence of constitutional arguments, making novel structural claims about the relationship between the home, liberty, and the State:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant
presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.229

This close connection between liberty and privacy provides constitutional grounds for viewing liberty—not simply privacy—as a central Fourth Amendment value.230 As important as this shift towards analyzing the effects on liberty more broadly can be for Fourth Amendment jurisprudence, Justice Kennedy’s Lawrence opinion makes both rights-based and structural claims. While liberty protects against intrusions into a “dwelling,” a structural limit provides an established “tradition” that “the State is not omnipresent in the home.”231 This latter observation about tradition and the home in addition to the reference of “spatial bounds” suggests that what is at stake under the Due Process Clause converges with what is at stake under the Fourth Amendment: a structural concern for separating the power of government into its proper sphere by recognizing the institutional role of the home as the repository of interpersonal freedom.

Whether by being “omnipresent” or a “dominant presence” in the home, the State’s role is circumscribed by an anti-tyranny purpose manifest in this constitutional convergence of due process and Fourth Amendment protections. This anti-tyranny purpose provides a separation of powers check against state action taken on the household’s distinct institutional sphere and limits discretionary despotic power wielded against “unpopular” groups based upon their status. Justice Kennedy’s introduction to the Lawrence opinion reads like a search and seizure case even though it holds that laws seeking to criminalize the status of intimate relations because they are comprised of same-sex couples violate the liberty protected by due process.232 By placing protection for the dignity and status of intimate relations that persons are free to choose at the center of this convergence,233 Justice Kennedy’s opinion aligns the institutional role of the home as repository of privacy and liberty with its role at the center of family life. Arguing that the State lacks the power to define the meaning of personal relationships, the Court protects the right of persons to choose their intimate relationships within the “confines of their homes and their own private lives and still retain their dignity as free persons.”234

The Due Process Clause has consistently provided protection for the dignity and autonomy of family and household life. With early twentieth-century cases such as

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230. Thomas P. Crocker, The Political Fourth Amendment, 88 WASH. U. L. REV. 303, 371–78 (2010); see, e.g., Crocker, supra note 26, at 32–48. Government dominance in the home implicates other values include dignity. See, e.g., Robert C. Post, Three Concepts of Privacy, 89 Geo. L.J. 2087, 2092 (2001) (“To equate privacy with dignity is to ground privacy in social forms of respect that we owe each other as members of a common community.”).
231. Lawrence, 539 U.S. at 562.
232. Id. at 567 (“The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.”).
233. Id.; see also Crocker, supra note 26, at 32–48.
234. Lawrence, 539 U.S. at 567.
Meyer v. Nebraska forming the background, the Court maintains a tradition of treating the home as a special place where liberty of choice in household matters, including the education of children, prevents government from imposing “restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.” Although these early cases fall within a now-discredited Lochner-era conception of substantive due process, they form a still-valid tradition recognizing the special constitutional role that household life plays. Beyond rights to control child-rearing and education, the Court also recognized constitutional rights to custody and childbearing, each central features of family life that the home shelters. In the wake of Griswold v. Connecticut, this tradition is grounded in the Due Process Clause, while recognizing the convergence of other constitutional provisions that protect the privacy of intimate relations and choices within the home.

Griswold, notoriously perhaps, situated the privacy right of married couples to choose whether to bear children in the convergence of constitutional provisions protecting the home and private life, including the First, Third, Fourth, and Ninth Amendments in addition to the liberty protected by the Due Process Clause. This due process jurisprudence protects “choices central to personal dignity and autonomy,” not simply as matters of personal autonomy, but also within social structures of shared interpersonal relations. Justice Kennedy’s focus in Lawrence on how adults are free to choose their “relationship[s] in the confines of their homes and their own private lives and still retain their dignity as free persons” makes the status of relationships a central feature of due process privacy protections.

Neither the due process conception of liberty nor the privacy right Griswold and its progeny protect focus on a right held in individual isolation from shared relationships. Liberty in particular provides protections for the relationships

235. 262 U.S. 390, 401 (1923) (holding that a state restriction against instruction in the German language violated due process); see also Pierce v. Soc’y of Sisters, 268 U.S. 510, 534–35 (1925) (holding state law forbidding parochial education “unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control”).


237. See Lochner v. New York, 198 U.S. 45 (1905) (holding that the liberty protected by due process limits state police power to regulate economic matters); W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (overturning Lochner and subjecting economic substantive due process claims to minimum rational review); see also BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 255–382 (1998).

238. 381 U.S. 479 (1965).

239. Id. at 484–85; see Reva B. Siegel, How Conflict Entrenched the Right to Privacy, 124 YALE L.J.F. 316, 316 (2015) (“Griswold’s story demonstrates how conflict over the right to privacy—one of the most fiercely contested rights in the modern constitutional canon—has helped to entrench the right to privacy, to make it endure, and to imbue it with evolving meaning.”).


242. See Post, supra note 230, at 2092 (“To equate privacy with dignity is to ground privacy in social forms of respect that we owe each other as members of a common community.”); James Q. Whitman, The Two Western Cultures of Privacy: Dignity Versus Liberty, 113 YALE L.J. 1151, 1214 (2004).
constituting a household, or other forms of social organization, as the Court explained: “[Although] the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State.”243 Regarding a household comprised of members extending beyond the nuclear family, the Court reasoned that “the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition,” and the family “draw[s] together and participate[s] in the duties and the satisfactions of a common home.”244 The Constitution thereby protects the sanctity of this common home as well as the choice of family structure it shelters.245

Other forms of interpersonal relationships outside the home have similar constitutional status, and the dignity exemplified by those relationships further bolsters the status of the home. When it comes to associations protected through both First Amendment freedoms of association and due process in Roberts v. United States Jaycees, the Court explained that “certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation” and that they “act as critical buffers between the individual and the power of the State.”246 The Court further explained that although “the Bill of Rights is designed to secure individual liberty,” it nonetheless also provides “sanctuary” to the formation of personal relationships essential to self-determining individuals with public lives rooted in shared relations.247 In so doing, the Constitution provides sanctuary for relationships outside the confines of household intimacy for reasons coextensive with those for protecting the separate institutional life of the home. Indeed, a protected household need not shelter a family, as the forms of household composition include the kinds of interpersonal relations at stake under freedom of association.248 And although one relationship—marriage—has been understood to have institutional status as “a great public institution, giving character to our whole civil polity,”249 the home gives substance to this structural role, no matter the precise constitution of the household.

By protecting the sanctity of the family under the Due Process Clause and the sanctity of the home under the Fourth Amendment, the Constitution establishes the home and its inhabitants as a separate institution organizing personal, social, and political life. This protection extends to the liberty persons have to choose their

245. Indeed, citing to an earlier dissent by Justice Harlan in Poe v. Ullman, which later framed the reasoning in Griswold, the Court in Moore reasoned: “[H]ere we have not an intrusion into the home so much as on the life which characteristically has its place in the home . . . . The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right.” Moore, 431 U.S. at 503, n.12 (alteration in original) (quoting Poe v. Ullman, 367 U.S. 497, 551–52 (1961) (Harlan, J., dissenting)).
246. 468 U.S. at 618–19.
247. Id. at 618.
248. On the diversity of household composition, see Ellickson, supra note 114.
marital partner in establishing the marital household. When states seek to deprive same-sex couples of the ability to marry, they “disrespect and subordinate them” in ways that “burden the liberty of same-sex couples, and . . . abridge central precepts of equality.”

Similarly, as the Court explained in United States v. Windsor, when the federal government refused to recognize same-sex marriages some states deemed “worthy of dignity in the community equal with all other marriages,” it exercised its power “to degrade or demean” and “to disparage and to injure” marriages a State “sought to protect in personhood and dignity.” In so doing, Congress deprived persons of both liberty and equality. Similarly, in protecting marital choice in Obergefell v. Hodges, the Court explained that “marriage is ‘the foundation of the family and of society,’” making any attempt to deny the liberty and equality to some all the more inimical to an institution that serves as “a building block of our national community.” This “building block” organizes social life through choices individuals make about their intimate relations, with implications for child-rearing and other social functions. In addition, this “building block” provides institutional structure for the life of a sovereign people.

These dual purposes—rights and structure—enhance the constitutional role of the home as institution. When it comes to dual constitutional roles, Heather Gerken argues that “[t]he key to understanding Windsor is to recognize that the ends of equality and liberty are served by both rights and structure.” Congress’s Defense of Marriage Act withheld federal recognition from same-sex marriages authorized by state law, creating a federalism conflict. Although the structural issue in Windsor was federalism, the effect of a conflict between federal and state law regarding the status of same-sex marriage was to enhance “the ways in which federalism and rights work together to promote change.” What Gerken calls the “interlocking gears” of rights and structure allow for different ways that dissent and discursive dialogue can lead to legal change, both by making available local avenues for legal contestation and by providing rights protections for transformative advocacy. The First Amendment alone, for example, only guarantees an absence of legal impediments to speaking, not that one have a venue for making one’s speech effective in the world. In order to have practical effect, advocates often find local

252. Id. at 774–75.
253. 576 U.S. at 669 (quoting Maynard v. Hill, 125 U.S. 190, 211 (1888)).
254. Id.
256. Windsor, 570 U.S. at 752.
257. Gerken, supra note 255, at 594.
258. Id. at 594–600.
259. Id. at 595 (“The most difficult problem for political outliers these days isn’t getting their message out; it’s getting their message across. The marriage equality movement needed what all dissenters need to get their ideas into the national mix—a chance to push its issue on the agenda and force the majority to engage.”); see also Heather K. Gerken, Dissenting by
political avenues more fruitful, which in turn can prod the national agenda. What is achieved locally can be constitutionally significant nationally. In addition, the relationships the institutional household shelters make possible public political participation having both local and national effects. Equality and liberty not only protect same-sex couples in the dignity and respect for their choice of intimate relations but also the distinctive institutional role of the home that shelters them. Protection for the intimate relationships constituting a home also provides the basic structural “building blocks” for the national community.

Rights against the State being a dominant presence in the home also facilitate the institutional building blocks through which the sovereign people organize their lives. If the State becomes a dominant presence in the home, and within the relationships it shelters, then the State can control the forms of life from which the people organize their political lives and thereby play their separate constitutional role as sovereigns and voters. Due process protections for intimate relationships serve this broader, and yet subtler, purpose of separating the representative governors from the people themselves. In this way, protection for individual liberties locks gears, as Gerken suggests, with protections for structural separation.260 In both cases an anti-tyranny goal is served through the dual function of rights and structure.261

Recognizing these interlocking roles of rights and structure highlights the dual function of the home’s constitutional role—as the institutional home for “We the People”262 and as a sphere of privacy. Within these interlocking roles, as we have seen, there is an overlap between the protections afforded by the Fourth Amendment and the Due Process Clause, each of which contests any government effort to become a “dominant presence” in the home. Such contestation does not merely seek to preserve a zone of liberty but also to facilitate the home’s structural role. Other provisions of the Constitution converge upon this interlocking role as well. In particular, the First Amendment, often thought to facilitate deliberative democracy in the public sphere, also protects the distinctive role of the home.

B. First Amendment Speech Indoors and Out

Free speech receives constitutional protection in part because of its interpersonal role as a necessary condition for deliberative democracy. Without deliberation on matters of public concern and without protection for “uninhibited, robust, and wide-open”263 public debate, which at times can become raucous and cacophonous,264 the American experiment in self-government would not be possible. In this respect, deliberation can encompass both the orderly debate of the public assembly depicted

Deciding, 57 Stan. L. Rev. 1745 (2005) (exploring ways that disaggregated decision making can also provide avenues for dissent).

262. U.S. Const. pmbl.
264. Cohen v. California, 403 U.S. 15, 25 (1971) (“That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength.”).
by Norman Rockwell’s painting of free speech as well as the less temperate public protest. Dissent and discussion are central values the First Amendment protects—the more inclusive and robust, the better.265

These interactive values exist alongside another strand of First Amendment jurisprudence that focuses on the autonomy of the individual speaker.266 When focusing on speech and speaker, the value of free speech becomes a matter of the individual’s capacity for self-expression and for the expression of a person’s ideas free from any regulation of their content.267 Under this rendering, the key feature of free speech is its protection of individual liberty to speak, no matter the content. A person’s liberty to speak need not be connected to audience or place since the protection falls upon the speech as such rather than on the interactive speech-act. When combined with the imagery of a “marketplace of ideas,” the focus is upon every individual’s ideas being afforded the opportunity to gain acceptance in the marketplace, analogous with the buying and selling of any other ware in public.268

These dual free speech values reproduce a similar structure of values operative under due process and the Fourth Amendment, particularly in their protections for the home.269 In both cases, we examined how privacy and liberty are simultaneously individual and interpersonal.270 Constitutional protections at times extend only to the isolated individual and at other times apply to shared relationships within social structures. Replicating this structural division, at times First Amendment protections

265. See, e.g., STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA 91 (1999) (“Free Speech theory should be taken beyond protecting or tolerating dissent: the First Amendment should be taken to reflect a constitutional commitment to promoting dissent.”) (emphasis in original); see also GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME (2004).

266. See, e.g., Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 573 (1995) (noting “the fundamental rule of protection under the First Amendment [is] that a speaker has the autonomy to choose the content of his own message”); C. Edwin Baker, Harm, Liberty, and Free Speech, 70 S. CAL. L. REV. 979, 998 (1997) (“[L]iberty is a (legal) capacity to make choices about behavior.”); David A. Strauss, Persuasion, Autonomy, and Freedom of Expression, 91 COLUM. L. REV. 334, 335 (1991) (arguing that freedom of speech is designed to protect autonomy and that “the government may not suppress speech on the ground that the speech is likely to persuade people to do something that the government considers harmful”).

267. See, e.g., Baker, supra note 266, at 990 (“The speaker typically views her own expression as a manifestation of autonomy; the speech presents or embodies her values.”); Robert Post, Managing Deliberation: The Quadrant of Democratic Dialogue, 103 ETHICS 654, 672 (1993) (“Citizenship thus presupposes the attribution of freedom. The ascription of autonomy is in this sense the transcendental precondition for the possibility of democratic self-determination.”); Martin H. Redish, The Value of Free Speech, 130 U. PA. L. REV. 591, 593 (1982) (arguing that the central First Amendment value is “individual self-realization”).


270. See supra Section III.A.
exist for the individual speaker and speech and at other times for the success of interpersonal debate within democratic structures. The one protection is for the isolated individual and the other is for shared interpersonal and social relations. Within this dual role, the home is a place of special First Amendment protection—from the airwaves that enter the home, to the privacy it protects, to the structural limits of law enforcement reach—the home has a distinctive First Amendment role.

In order to engage in public debate, persons must be able to receive ideas and have a space for considering whether to adopt or reject them. In this respect, the Court’s opinion in *Stanley v. Georgia* explains how the home and speech are connected, for a person has “the right to satisfy his intellectual and emotional needs in the privacy of his own home,” which includes “the right to be free from state inquiry into the contents of his library.” A right to access information serves the dual purpose of facilitating an individual’s development as an autonomous person and enabling a person to become informed about issues and ideas to better participate in deliberative self-government. In this way, a “right to receive information and ideas . . . is fundamental to our free society.” Such reception needs a protected place, which in the case of *Stanley*, is a home, “[f]or also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s privacy.” The home provides an “added dimension” to the right to receive information, because it shelters not only rights to speak and to privacy but also it serves an essential structural role in facilitating shared self-governance.

When law enforcement rummages through the contents of a person’s library in order to discover grounds for an obscenity prosecution, as occurred in *Stanley*, there is a notable similarity to foundational Fourth Amendment English cases when crown officials searched personal papers looking to find evidence for seditious libel prosecutions. These searches tread upon constitutional protections for freedom of speech, which includes the freedom to possess and consume the reading and viewing materials used to spread ideas. Making this connection between constitutional protections against searches and for speech clear, the Court in *Stanley* cites to Justice Brandeis’s important dissent in *Olmstead v. United States*. Justice Brandeis dissented in an early wiretapping case, reasoning from the values of both privacy and intellectual freedom.

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against

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272. Id. at 564.
273. Id.
274. Id.
276. 277 U.S. 438, 471–78 (1928) (Brandeis, J., dissenting); *Stanley*, 394 U.S. at 564.
the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.\textsuperscript{277}

Justice Brandeis’s connection between the First Amendment value of free thought and the Fourth Amendment protection for the comprehensive right to be let alone establishes a convergent purpose behind these related constitutional values.\textsuperscript{278} Moreover, in \textit{Mapp v. Ohio}, which began as a First Amendment case, the Court established the exclusionary rule as a remedy applicable to states for violations of the Fourth Amendment under facts similar to \textit{Stanley}.\textsuperscript{279} Police broke into a home and “searched a dresser, a chest of drawers, a closet and some suitcases . . . [and] looked into a photo album and through personal papers belonging to the appellant,”\textsuperscript{280} as well as a trunk in the basement, until they discovered items they sought to use in an obscenity prosecution. In excluding the evidence, the Court averred to the systemic effects of doing otherwise, reasoning that “[t]he ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest.”\textsuperscript{281} This convergence of privacy and speech functions not merely to protect the individual but to uphold institutional separation of powers.

Avoiding clause-bound analysis in \textit{Olmstead},\textsuperscript{282} Justice Brandeis, as Justice Kennedy later did in \textit{Lawrence},\textsuperscript{283} connected the rights-protective provisions of speech, thought, and privacy to the special status afforded the home as an institutional check against government officials by a self-governing people.\textsuperscript{284} A “most comprehensive” and “most valued” right, being let alone respects the separate institutional spheres of home and public life in which respect for the former, under the First Amendment, becomes a necessary (“favorable”) condition for the proper functioning of the latter.\textsuperscript{285}

This power to exclude intrusions upon one’s right to be let alone extends to unwanted speech in the First Amendment context. A line of cases affirms that

\begin{itemize}
\item \textsuperscript{277} \textit{Olmstead}, 277 U.S. at 478 (Brandeis, J., dissenting).
\item \textsuperscript{278} Seana Shiffrin argues that the value of thinking itself is a core First Amendment value. Seana Valentine Shiffrin, \textit{A Thinker-Based Approach to Freedom of Speech}, 27 CONST. COMMENT. 283 (2011).
\item \textsuperscript{279} 367 U.S. 643, 655 (1961); see \textit{Stanley}, 394 U.S. at 565.
\item \textsuperscript{280} \textit{Mapp}, 367 U.S. at 645.
\item \textsuperscript{281} \textit{Id.} at 660.
\item \textsuperscript{282} See \textit{John Hart Ely, Democracy and Distrust: A Theory of Judicial Review} 12 (1980) (noting the problem of “clause-bound” interpretation); see also \textit{Akhil Reed Amar, The Constitution and Criminal Procedure: First Principles} 13 (1997) (“History also reveals strong linkages between the Fourth and Seventh Amendments that previous clause-bound scholarship about each amendment in isolation has overlooked.”).
\item \textsuperscript{283} \textit{Lawrence} v. Texas, 539 U.S. 558, 562 (2003).
\item \textsuperscript{284} \textit{Olmstead v. United States}, 277 U.S. 438, 478–79 (1928) (Brandeis, J., dissenting); \textit{Lawrence}, 539 U.S. at 562.
\item \textsuperscript{285} \textit{Olmstead}, 277 U.S. at 478–79 (Brandeis, J., dissenting); see also \textit{Whitney v. California}, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (“Those who won our independence believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary.”); \textit{Crocker}, \textit{supra} note 60, at 344–45; \textit{Solove, supra} note 12, at 132–38.
\end{itemize}
although a speaker might have a right to express ideas, an audience—particularly one located at home—has no reciprocal obligation to receive them.\textsuperscript{286} Indeed, the Court has upheld the institutional authority of the householder to bar unwanted speakers and speech from the home.\textsuperscript{287} This power exists in recognition of the “ancient concept that ‘a man’s home is his castle’ into which ‘not even the king may enter’ has lost none of its vitality.”\textsuperscript{288} when it comes to the First Amendment. This adage reflects the institutional separation between the household and seat of government. When in the public sphere, a person subject to unwanted speech can “effectively avoid further bombardment of their sensibilities simply by averting their eyes”\textsuperscript{289} or stopping their ears, because in the marketplace one expects the hurly-burly of a vigorous free-speech culture.\textsuperscript{290} Even then, however, if “the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure,”\textsuperscript{291} as the Court explained, then government may move to protect the “captive audience” against unwanted speech.\textsuperscript{292} By harnessing the power of government to preserve the home from unwanted intrusion against other speakers, the Court conjoins Justice Brandeis’s “right to be let alone” with the idea that the home has a distinctive place in our constitutional system.\textsuperscript{293}

Self-government is only possible through the preservation of a robust public sphere, where citizens can come together to engage in what Justice Holmes termed the “free trade in ideas.”\textsuperscript{294} Indeed, the Court has repeatedly explained the principle that “[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.”\textsuperscript{295} To do this, public debate must occur in a public place, for “[p]ublic places are of necessity the locus for discussion of public issues . . . . At the heart of our jurisprudence lies the principle that in a free nation citizens must have the right to gather and speak with other

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\textsuperscript{286} See, e.g., Frisby v. Schultz, 487 U.S. 474, 485 (1988) (“[W]e have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.”); Kovacs v. Cooper, 336 U.S. 77, 86–87 (1949) (protecting households from sound trucks).

\textsuperscript{287} See, e.g., Martin v. City of Struthers, 319 U.S. 141, 148 (1943) (noting “the homeowner himself” has power to determine “whether distributors of literature may lawfully call at a home”); Rowan v. U.S. Post Office Dep’t, 397 U.S. 728, 736–39 (1970) (upholding homeowner’s authority to block receipt of unwanted mail).

\textsuperscript{288} Rowan, 397 U.S. at 737.

\textsuperscript{289} Cohen v. California, 403 U.S. 15, 21 (1971).

\textsuperscript{290} See Hill v. Colorado, 530 U.S. 703, 716 (2000) (“The right to free speech, of course, includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker’s message may be offensive to his audience.”).

\textsuperscript{291} Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975).


\textsuperscript{293} See FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (protecting “the privacy of the home, where the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder”).

\textsuperscript{294} Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

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persons in public places." This public forum principle supports practices of
democratic self-governance that preserve the value of political dissent, as Justice
Brandeis also explained in his concurrence in Whitney v. California: "[D]is-
cussion affords ordinarily adequate protection against the dissemination of noxious
doctrine; that the greatest menace to freedom is an inert people; that public
discussion is a political duty; and that this should be a fundamental principle of the American
government." Yet, dissent also requires the development of ideas through the kind
of thought and reflection that the home shelters and makes possible. Without a
public forum, dissent would have no place to realize its role in deliberative self-
government. But without the home, it would have no place to shelter. In this way,
and through the two opinions of Justice Brandeis covering both the First and Fourth
Amendments, we can trace the causal connection between the institutional role of
the home and the public role "We the People" play in directing the machinery of self-
government.

This dual role—domestic and public—is on display in the 1972 case United States
v. U.S. District Court (Keith) involving systemic domestic surveillance of anti-war
groups. Federal officials claimed that because the surveillance was conducted for
national security purposes, the usual Fourth Amendment procedures did not apply.
Because the surveillance targets were dissenters suspected of engaging in subversive
activities threatening to national security, the government claimed that no warrant
was required. In rejecting these claims, the Court connected the home with the
public sphere, announcing first that protection from such surveillance of the home is
"chief evil against which the wording of the Fourth Amendment is directed." But
the Court further explained that this protection is not limited to a narrow domestic
privacy right, however, for

[the price of lawful public dissent must not be a dread of subjection to
an unchecked surveillance power. Nor must the fear of unauthorized
official eavesdropping deter vigorous citizen dissent and discussion of

(O'Connor, J., concurring); see also Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.,
412 U.S. 94, 193 (1973) (Brennan, J., dissenting) ("The right to speak can flourish only if it is
allowed to operate in an effective forum—whether it be a public park, a schoolroom, a town
meeting hall, a soapbox, or a radio and television frequency.").
297. 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).
298. See Shiffrin, supra note 265, at 91–93.
fora "have immemorially been held in trust for the use of the public and, time out of mind,
have been used for purposes of assembly, communicating thoughts between citizens, and
discussing public questions"); Thomas P. Crocker, Displacing Dissent: The Role of "Place"
in First Amendment Jurisprudence, 75 Fordham L. Rev. 2587, 2622–31 (2007); Robert C.
Post, Between Governance and Management: The History and Theory of the Public Forum,
301. Id. at 320–21.
302. Id. at 313–14.
303. Id. at 313.
government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society.\textsuperscript{304}

In this way, the Court linked household privacy to public debate in a case involving warrantless wiretapping and surveillance of dissenters’ homes, creating what the Court described as “a convergence of First and Fourth Amendment values.”\textsuperscript{305}

This convergence, like the convergence of Fourth Amendment and due process considerations, has both structural anti-tyranny and individual liberty purposes. In the wake of the disclosures provided by Edward Snowden regarding the National Security Agency’s surveillance programs that included bulk collection of all Americans’ telephone metadata and the content collection of Americans’ voice, email, internet search histories, and video communications with persons abroad, including some purely domestic communications, Americans faced a similar situation to those reflected in the Keith case.\textsuperscript{306} They learned through this leak that much of domestic life reflected in activities conducted within the home, or from home to home, were subject to widespread surveillance under the guise of national security necessity, and either outside the bounds of existing statutory authorization or the product of strained and tendentious statutory readings.\textsuperscript{307} And though no Supreme Court cases follow Keith in clarifying further the scope of Fourth Amendment privacy against such activity,\textsuperscript{308} President Obama did acknowledge the convergence of constitutional issues of domestic and public life, admonishing in a speech:

[I]n the 1960s, government spied on civil rights leaders and critics of the Vietnam War. And partly in response to these revelations, additional laws were established in the 1970s to ensure that our intelligence capabilities could not be misused against our citizens. In the long, twilight struggle against Communism, we had been reminded that the very liberties that we sought to preserve could not be sacrificed at the altar of national security.\textsuperscript{309}

\textsuperscript{304} Id. at 314.
\textsuperscript{305} Id. at 313.
\textsuperscript{306} See Glenn Greenwald, No Place to H ide: Edward Snowden, the NSA, and the U.S. Surveillance State 90–95 (2014); Harcourt, supra note 38, at 54–79; see also Crocker, supra note 167, at 107–22.
\textsuperscript{308} See Clapper v. Amnesty Int’l, 568 U.S. 398 (2013) (holding plaintiffs lacked standing because they could not show that they were targets of a surveillance program because factual details remained secret); see also ACLU v. Clapper, 785 F.3d 787 (2d Cir. 2015) (holding bulk metadata collection program exceeded statutory authorization and raising Fourth Amendment concerns).
\textsuperscript{309} Press Release, President Barack Obama, Remarks by the President on Review of Signals Intelligence (Jan. 17, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence [https://perma.cc/6ARH-8KBE]. President Obama also connected surveillance to activities protected by a convergence of constitutional protections, observing, “Having faced down the dangers of totalitarianism
Privacy is not a protected value in the home because of the isolation from public affairs it affords. Too often, privacy is treated as a value equivalent to secrecy.\textsuperscript{310} If information is shared, as the Supreme Court reasons under its third-party doctrine, then its accessibility to others renders it no longer private and protected.\textsuperscript{311} Such a view is a mistake, particularly in a modern age of social sharing.\textsuperscript{312} Instead, privacy in the home is protected in part because it is a necessary condition for public life, giving it a distinctive constitutional role. As we saw in the case of \textit{Riley}, extension of household privacy into public realms does not alter the nature of the information protected by the Fourth Amendment.\textsuperscript{313} Similarly, even though the First Amendment’s protections for free speech may be principally aimed at “uninhibited, robust, and wide-open” public debate,\textsuperscript{314} the right to receive ideas at home is nonetheless an essential part of that debate. What matters is not the descriptive features of the location—whether at a public place or at home—but the institutional role activities within it play. When we clarify the home’s equal role in facilitating consideration of ideas, fostering public debate, and protecting intimate relations, it becomes possible to protect the home’s broader role within a constitutional system. In this way, privacy protections support the institutional powers of the sovereign people separate from the formal institutions of representative government.

\textbf{IV. WHY THE HOME MATTERS TO CONSTITUTIONAL STRUCTURE}

Why does focus on the home matter to the Constitution? For one, despite what might have been widespread criticism of the Court’s use of “core” and “penumbral” meanings of a right in \textit{Griswold},\textsuperscript{315} constitutional law does implement both paradigm and marginal cases. Finding in the home a paradigm—and explaining why—can be useful for proper understanding of the scope of the Fourth Amendment. But as a paradigm of privacy, there is reason to be cautious, because it might undermine many features of interpersonal life lived outside of the home as deserving less protection because they are less private. The way out of this difficulty, as I have argued, is to recognize that the home is not merely a protected place but a separate institution. As an organizing institution, the home is a paradigm not of withdrawn privacy but of public purpose. Protecting it is a right of “the people”—a term the Constitution uses to designate a political body, not atomistic individuals.\textsuperscript{316} It organizes and shelters

\textsuperscript{311} \textit{Maryland}, 442 U.S. at 744; \textit{Miller}, 425 U.S. at 443.
\textsuperscript{312} \textit{See} \textit{Crocker}, \textit{supra} note 26, at 48–56.
\textsuperscript{315} 381 U.S. 479, 484 (1965).
\textsuperscript{316} \textit{See} \textit{AMAR}, \textit{supra} note 282, at 1–45.
the intimate relations, reflective consideration, and idea formation necessary for the robust deliberative democracy upon which the American republic depends. The Fourth Amendment makes the home a paradigm because of these institutional roles, not merely because it is also a place of physical shelter.

The home matters for another reason, as this Article argues, because it is a place where intimate relations converge with public purposes to form a structural institution of constitutional governance. Preserving this function is a principal purpose of the convergence of First and Fourth Amendment protections. It is also a reason to view both rights and structure at work. Protecting the people against encroachments by executive officials serves a separation of powers purpose. It ensures a space wherein the people may form and share ideas that will then constitute the governing priorities of legislative and executive departments. As the Court has recognized, when government becomes a dominant presence in the home, this proper direction of authority from the people to other institutions of government is reversed, a condition indicative of tyranny. In this way, anti-tyranny is a structural issue as much as one of individual rights.

In light of this structural purpose, questions about access to the home by government officials must go beyond questions about “reasonable expectations of privacy” to encompass questions about how such access might impact the structural integrity of this separate institution. Because home life shelters the sovereign people in their political role, not merely their private capacity, narrow consideration of what society might “expect” regarding the privacy of a particular social practice is too narrow a question. What is shared can be exposed for some purposes and not for others. The taxonomy and texture of privacy need not lead to an all-or-nothing set of expectations focused on questions of exposure and accessibility. A constitutional inquiry that does not ask more about social practices that make information accessible to some others for limited purposes will fail to account for the broader institutional questions. Yet, at times the Supreme Court has wielded its third-party doctrine to suggest that limited sharing leads to complete constitutional exposure. Instead, a more refined understanding of privacy would

317. See supra Section II.A; Johnson v. United States, 333 U.S. 10, 17 (1948) (explaining need for a warrant to search a home that “[a]ny other rule . . . would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law”); Wolf v. Colorado, 338 U.S. 25, 28 (1949) (“The security of one’s privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society . . . . The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned . . . .”); United States v. Jones, 565 U.S. 400, 416–17 (2012) (Sotomayor, J., concurring) (“[T]he Fourth Amendment’s goal to curb arbitrary exercises of police power to and prevent ‘a too permeating police surveillance . . . .’” (quoting United States v. Di Re, 332 U.S. 581, 595 (1948))). On the anti-tyrannical focus of the Court’s reasoning in these and related cases, see Crocker, supra note 47, at 593–603, 624–34.


320. See, e.g., Smith v. Maryland, 442 U.S. 735, 743–44 (1979) (“This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.”); Georgia v. Randolph, 547 U.S. 103, 128 (2006) (Roberts, C.J.,
ask what social role do both controlling and sharing of information, relations, and spaces play within both the personal and the public roles of those that the government seeks to surveil. 321 Because Justice Sotomayor has called for a reconsideration of the third-party doctrine, such an expanded conception of privacy that does more than protect "expectations" will be necessary not only to satisfy the Fourth Amendment's foundational concerns but also to remain relevant in new technological settings. 322 Moreover, by asking how a pervasive practice of surveillance impacts institutional roles, we can better explain why the greater quantity of information at issue in Riley requires protection. In Riley, as we saw, the Court recognized that the amount of information available on a smartphone was equivalent to or exceeded what would otherwise only be available with access to the home. 323 In so doing, Riley thereby provided a reason why the quantity of information available on a smartphone required a Fourth Amendment analysis different than what was provided for other physical items subject to searches incident to arrest. 324 We can make sense of why this difference matters only by considering the broader institutional roles the home plays.

Without recognition of the extent of the home's constitutional role—providing a structural purpose to rights protections—then it may be too easy to erode the status of the home by being too quick to apply existing doctrine to new technological settings. Constitutional imagination about how the parts fit together to interlock rights and structure is an essential feature of constitutional law. Without it, implementing the Constitution in new technological settings risks profound error. As the internet of things and the pervasive "smartification" of home technologies produces more and more data about intimate household activities, 325 there is an increasing need to have some conceptual clarity about the constitutional status of the home and household activities—within or beyond its threshold. This conceptual clarity (or its absence) will be a decisive feature of future Fourth Amendment cases as law enforcement pressure to gain access to this data builds. Already we see examples, such as a murder case in Bentonville, Arkansas, in which police sought data from an Amazon Echo home device. 326 Police have sought and continue to seek dissenting) (“If an individual shares information, papers, or places with another, he assumes the risk that the other person will in turn share access to that information or those papers or places with the government.” (emphasis omitted)).

321. See Thomas P. Crocker, Ubiquitous Privacy, 66 OKLA. L. REV. 791, 792 (2014) (“Questions about how to conceptualize, and thus whether to protect, privacy in the information persons share with third parties produce different answers if approached from the perspective of personal identity, rather than from the perspective of law enforcement practice.”); Richards, supra note 39, at 1935.

322. United States v. Jones, 565 U.S. 400, 417 (2012) (Sotomayor, J., concurring) (“More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties.”).


324. See supra Section II.A.


326. See Christopher Mele, Bid for Access to Amazon Echo Audio in Murder Case Raises Privacy Concerns, N.Y. TIMES (Dec. 28, 2016),
access to recorded information from Amazon and Google's home devices, including a case in New Hampshire involving a murder. Moreover, the proliferation of apps that track their users and collect their data across portable devices such as phones and tablets provides ever more data that companies collect, store, and sell, thereby also making vast quantities of data potentially available to law enforcement inquiry. If the third-party doctrine were mechanically applied, the exposure to a third party holding the records of any transactions that occurred within the home during a particular time period would render all such material accessible to law enforcement without Fourth Amendment protection.

Such cases—real and anticipated—highlight the need to have conceptual clarity about the constitutional issues at stake. If Fourth Amendment privacy is considered without reference to the values and structures it protects, or the convergences with due process and free speech it forms, narrow case-specific doctrinal applications risk under-protecting constitutional values in a pernicious way. If courts mechanically apply the third-party doctrine to new technologies like smart televisions and in-home cloud devices such as Amazon Alexa or Google Home, then the Constitution could be read to permit widespread government surveillance of household activities because they are shared with third-party providers. Not only would such pervasive home access be inconsistent with Fourth Amendment foundations and purposes, but it would be inconsistent with separation of powers structures that limit executive authority to access the internal deliberations of household participants. The need to reconsider the third-party doctrine should not arise, however, as a matter of "protecting information," which is often the conceptual framing. Rather, questions about access to information fail to consider the constitutional role of the home that forestalls governing officials' access because it risks making the government a


330. See, e.g., Ferguson, supra note 42, at 609–10; Sklansky, supra note 36, at 1091.
dominant presence in the home. Household information matters because household activities matter to constitutional structure.

One alternative approach to the third-party doctrine would be to follow Riley in conducting a balancing test that weighs the quantity of information available against claimed government need. What it means for information to be private, under the Court’s balancing approach, is that personal control over its access overrides an asserted government need. In this way, balancing always makes government necessity integral to a legal conception of Fourth Amendment privacy. A place—or information—is considered private only when government need does not outweigh its heightened protection. In order for this heightened protection to have greater weight, the Court has to consider the qualitative roles that retaining control over this information plays in a person’s life, as we saw the Court do in Riley. But this dynamic, which renders all sharing vulnerable to claims of overriding executive necessity, becomes more complicated when we add consideration of institutional role to the analysis. Under my approach, privacy also includes a conception of institutional role serving a structural purpose under the Constitution. To include this conception requires an analysis of how government access—no matter the degree of necessity and no matter the outcome of a simple balance—might upset the balance of powers between the governing officials and the governed sovereigns. Privacy would limit government access to information when doing so furthers separate institutional structure in light of the political purposes that convergent rights protect.

The institutional home is more than four walls and a roof. The Constitution does not speak of protecting shelters or buildings, but of houses. Because the home is not simply a physical place, the Constitution does not protect it in virtue of its physical attributes such as its ability to enclose a space. If not physical attributes, then what must make the home constitutionally salient is its social and political roles—the way that it fulfills constitutional purposes. Privacy, and its expectations, can tempt lawyers to focus on the home’s physical attributes and the actions occupants have taken in light of those attributes, such as whether they have closed window blinds. Such inquiries, however, are grounded in a logic of exposure and accessibility divorced from any consideration of Fourth Amendment purposes. Window blinds do not merely control the flow of light through a translucent material but provide a way of occupying a space in which complex social practices exist incompletely protected by an analysis of expectations. To focus on exposure as a physical feature of homes misses how household privacy is a matter of the social and political practices that occur within a space.

Moreover, focusing on the physical attributes of a home has distributional effects, implying that the Constitution protects some homes more than others. The home within an apartment building that police approached in Kentucky v. King has less privacy than the single-family home police investigated with a canine in Jardines

332. Id. at 393–97.
merely because of the nature of the physical space. A household within an apartment building is more easily accessible, sharing common spaces with other households. But from the perspective of the institutional role and purpose of household privacy, such a distributional inequality makes no sense. If we turn our attention away from the physical attributes of the home to the social and political roles of the home, then the poorest multi-family dwelling warrants the same constitutional protection as the richest single-family manse. Both organize the institutional life of the sovereign people through their household arrangements and practices. In these ways, household dwellings are more than the sum of their physical attributes.

CONCLUSION

Focusing on the home is a way of providing analytic purpose to the privacy the Fourth Amendment protects. In parallel to First Amendment inquiries that ask, “why speech?” we can similarly ask, “why privacy?” To ask this question goes beyond the accessibility and exposure inquiry about whether something is private to ask what value exists in protecting something as private. The home as an institution provides an organizing principle to say that privacy matters because of the role it plays in self-governance. The Fourth Amendment has a personal rights-based role as well as a structural political role. If police access to the home risks undermining the separate institutional integrity of the household, whether within the confines of the home’s four walls or in public, then courts should strictly scrutinize the government’s reasons for claiming such access outside of the ordinary probable cause standard. The same concerns should govern any claimed national security needs to monitor or access the home through third-party technology providers. Moreover, this approach is all the more important when it is foreseeable that law enforcement access can be scaled to become a systematic practice, as occurred with the lowered reasonable suspicion standard for stops and frisks. In such a case, the inquiry must go beyond the claimed effects on an individual taken in isolation and must consider the holistic effects on the social and political experiences of communities subjected to a pervasive police practice and presence. Thus, when we confront emerging technologies that involve sharing with third parties, the rules the Court applies do not affect merely the individual subject to an investigation but also affect the people in their political capacity, for what is done to an individual will be done to communities of individuals. Although the judiciary provides grounds for making the constitutional meaning of the home an effective check against erosion of Fourth Amendment values and purposes, it also uses exigency doctrines in a way that erodes such protections. Constitutional vigilance will require imagining new ways of making Fourth Amendment values relevant to new technology and changing social practices that the institutional role of the home makes possible.

The meanings of American constitutionalism reside in the ways we understand and practice constitutional governance through both its empowerments and limitations. The home matters to the Fourth Amendment because it organizes institutional structure and constitutional meanings. Because technological and social

practices render Americans ever more exposed, how we conceptualize the constitutional convergence of privacy protections will shape the relationship between the people and their governing representatives. By placing the home’s structural role at the center of the Fourth Amendment’s meaning, privacy becomes more than a matter of personal exposure and government access. Household privacy empowers a structure of deliberative self-determination, applicable to all, limiting the ability of executive officials to aggrandize institutional power at the expense of the resident citizen.