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The Fourth Amendment's Constitutional Home

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ABSTRACT

The home enjoys omnipresent status in American constitutional law. The Bill of Rights, peculiarly, has served as the central refuge for special protections to the home. This constitutional sanctuary has elicited an intriguing textual and doctrinal puzzle. A distinct thread has emerged that runs through the first five amendments delineating the home as a zone where rights emanating from speech, smut, gods, guns, soldiers, searches, sex, and self-incrimination enjoy special protections. However, the thread inexplicably unravels upon arriving at takings. There, the constitutional text omits and the Supreme Court's doctrine excludes a special zone of safeguards to the home. This revelation raises unsettled questions as to why takings is the disjointed outlier. Prior scholarship has addressed this constitutional schism by observing that judicial deference to economic legislation, as opposed to exacting scrutiny to fundamental rights, has constrained the Court from extending the thread to takings. However, there are more unexplained scattered pieces to this constitutional puzzle that deserve further scholarly attention.

This Article unearths another obscure schism in the thread of special protections to the home in the Fourth Amendment. While the Court's solicitude of home protections remain unassailable in rights involving speech, smut, gods, guns, soldiers, sex and self-incrimination, notwithstanding takings, there has been an inconspicuous rollback—a doctrinal regression—of the home's zone of special protections under the Court's search and seizure doctrines. There, the Court has developed a patchwork of exceptions sanctioning greater government intrusions in the home. These exceptions that weaken home protections in the Fourth Amendment stand in stark contrast to the Court's ironclad consistent homebound doctrines that shield the home in the rest of the Bill of Rights. Why, then, has the Court partially retreated from this special zone of rights and interests under its search and seizure doctrine, but nowhere else in the Bill of Rights?

This Article is the first scholarly project to comprehensively catalogue and systematically survey the entire homebound Bill of Rights to reveal this doctrinal

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and textual discord presented by the Court's partial backsliding from home protections in its searches and seizures jurisprudence. The Article excavates a variety of reasons and explanations for the notable discord and concludes by raising some theoretical and conceptual considerations for the doctrinal retrenchment.

INTRODUCTION

The home enjoys omnipresent status in American constitutional law.[1] The Bill of Rights, peculiarly, has served as the central refuge for special protections to the "sanctity of the home."[2] This constitutional safe haven and sanctuary has elicited an intriguing textual and doctrinal puzzle.[3] A thread has emerged that runs through the first five amendments delineating the home as a zone where constitutional rights involving speech, smut, gods, guns, soldiers, searches, sex, and self-incrimination enjoy special protections, but the thread inexplicably unravels upon arriving at takings. There, the text omits, and the doctrine excludes, special takings protections to the home. This "stark dichotomy" produces a deep puzzle.[4] Indeed, the Supreme Court textually "finds reason to grant special solicitude" to the home and doctrinally maneuvers its precedent to comport with the "distinctive nature of the home."[5] But then, the Court abruptly (and mysteriously) declines to adhere to and respect the solicitude to the home upon arriving at the Takings Clause. The logic—and abrupt illogic—of the discord is striking. Prior scholarship has sought to address this constitutional puzzle by observing that judicial deference to economic legislation, as opposed to exacting scrutiny to fundamental rights, has constrained the Court—or simply made it reluctant—to extend the homebound thread to takings, even though very little, if anything, prevents the Court from doing so. But that is not the end of the story. Piecing together one component of the puzzle reveals yet another.

This Article unearths another obscure schism in special protections to the home that's been overlooked by scholars. That is, while the Constitution's solicitude and the Court's respect for home protections remains relatively unassailable throughout most of the Bill of Rights, there exists a peculiar doctrinal retrenchment or regression of protections to the home under the Court's Fourth Amendment search and seizure doctrines.[6] This rift of weakened home protections in the Fourth Amendment

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[1] D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 297 (2006); AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 267 (1998); JEANIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY 3, 133 (2009); United States v. Craighead, 539 F.3d 1073, 1077 (9th Cir. 2008); Gerald S. Dickinson, *The Puzzle of the Constitutional Home*, 80 OHIO STATE. L.J. 1099, 1100 (2019) [hereinafter Dickinson, *Puzzle of the Constitutional Home*]; *see also* Gerald S. Dickinson, *Intratextual and Intradoctrinal Dimensions of the Constitutional Home*, 15 DUKE J. CONST. L. & PUB. POL'Y 292, 293 (2020).

[2] Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 991 (1982).

[3] *See* Dickinson, *Puzzle of the Constitutional Home*, *supra* note 1, at 1100 (noting that "This engagement has produced a stark dichotomy and a deep puzzle. In most contexts, the Court finds reason to grant special solicitude to a zone of constitutional protection emanating from the distinctive nature of the home. The Court has, in other words, extended itself to textually adhere or doctrinally shape its jurisprudence to protect the home, as opposed to other places and spaces. That solicitude is entirely absent when it comes to the Takings Clause.").

[4] *Id.*

[5] *Id.*

[6] Mapp v. Ohio, 367 U.S. 643, 646–47 (1961).

stands in stark contrast to the Court's consistent doctrines that safeguard the solicitude to the home throughout the rest of the Bill of Rights, notwithstanding takings. This Article is the first scholarly project to systematically survey and comprehensively catalogue the entire homebound Bill of Rights to reveal the doctrinal and textual discord presented by the Court's retreat from home protections afforded by its searches and seizures jurisprudence. To illustrate the striking discordance, let us first examine the homebound harmony and coherence that emanates from the Court's speech, smut, gods, guns, soldiers, sex, and self-incrimination jurisprudence.

The Court's First Amendment free speech jurisprudence reflects a strong "solicitude for the right of an individual to be let alone in the privacy of the home."[7] The doctrine's privacy protection of the home "is certainly of the highest order . . . ."[8] Further, the Court protects the possession and enjoyment of smut, noting that "[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."[9] The Court later elaborated on these home protections by acknowledging that "privacy and freedom of association," along with general principles of free speech, are protections that flow from the Court's First Amendment jurisprudence.[10] Religion, likewise, occupies an "exalted" place in society,[11] and the Court has paid homage to the location of the home as a special space to protect religious activity by recognizing a constitutional right to privately worship in the home.[12] Similarly, the neighboring Second Amendment joins the First Amendment in embracing the fundamental concept of the sanctity of the home.[13]

There, guns share a special enumerated space in the Bill of Rights where the right to bear arms in the "hearth and home" is elevated above all other interests under the Second Amendment.[14] While the Second Amendment's zone protecting gun possession and activity inside the "hearth and home" is atextual, the neighboring Third Amendment grants home dwellers special textual protections from soldiers being quartered in a house during times of peace without consent.[15] The textual protections from quartering soldiers in the home are followed immediately by the Fourth Amendment's textual protections from warrantless unreasonable searches

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[7] Carey v. Brown, 447 U.S. 455, 471 (1980).

[8] Frisby v. Schultz, 487 U.S. 474, 484 (1988) (quoting *Carey*, 447 U.S. at 471).

[9] Stanley v. Georgia, 394 U.S. 557, 565 (1969) (emphasis added).

[10] United States v. Orito, 413 U.S. 139, 142 (1973); Moreno v. U.S. Dep't of Agric., 345 F. Supp. 310, 314 (D.D.C. 1972), *aff'd*, 413 U.S. 528 (1973).

[11] Abington Sch. Dist. v. Schempp, 374 U.S. 203, 226 (1963).

[12] Tandon v. Newsom, 141 S. Ct. 1294, 1297 (2021); Josh Blackman, *The "Essential" Free Exercise Clause*, 44 HARV. J. L. & PUB. POL'Y 637, 638 (2021) (noting the Court "recognized the right of people to worship privately in their home").

[13] District of Columbia v. Heller, 554 U.S. 570, 628–29 (2008).

[14] *Id.* at 615–16, 635 (noting that "every man bearing his arms about him and keeping them in his house, his castle, for his own defense").

[15] U.S. CONST. amend. III.

and seizures by law enforcement in the people's "houses."[16] The Court elevated this protection to special status, stating "the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."[17]

The constitutional homebound thread then extends to sex. The Fourth Amendment's conception of privacy, which is doctrinally embedded within the Court's search and seizure protections,[18] serves as a textual anchor that tethers the homebound sex protections falling outside the scope of the Bill of Rights.[19] There, privacy principles in the Fourth Amendment extend into the Fourteenth Amendment due process principles protecting sex, family rights, and integrity.[20] The thread finally attaches the Fourth Amendment to the Fifth Amendment, where the amendments have been, doctrinally, described as running "almost into each other" due to the provisions that safeguards against all governmental invasions "of the sanctity of a man's home and the privacies of life."[21] But, the thread inexplicably stops there. An abrupt departure of home protections immediately succeeds self-incrimination upon arriving at takings.[22]

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[16] U.S. CONST. amend. IV.

[17] Payton v. New York, 445 U.S. 573, 573 (1980).

[18] Mapp v. Ohio, 367 U.S. 643, 656 (1961) (stating that the Fourth Amendment creates a "right to privacy, no less important than any other right carefully and particularly reserved to the people."). The Court further explained that,

> as to the Federal Government, the Fourth and Fifth Amendments and, as to the States, the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an "intimate relation" in their perpetuation of "principles of humanity and civil liberty (secured) . . . only after years of struggle."

Id. at 657. The Court, in *Griswold*, likewise drew upon *Meyer v. Nebraska*, recognizing the "right 'to . . . establish a home and bring up children' was an essential part of the liberty guaranteed by the Fourteenth Amendment." Griswold v. Connecticut, 381 U.S. 479, 495 (1965). The origins of the Fourth Amendment's privacy protections extending to the Fourteenth Amendment come from *Wolf v. Colorado*, 338 U.S. 25 (1949). There, the Court stated, "we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment." *Id.* at 28. In other words, the Court announced the idea that security of privacy against arbitrary intrusion by the police is implicitly found in the concept of ordered liberty, and as a result enforceable against the States through the Fourteenth Amendment's Due Process Clause. *Id.*

[19] *Griswold*, 381 U.S. at 484–85.

[20] Eisenstadt v. Baird, 405 U.S. 438, 453–54 (1972). And it is arguably the case that the Fourth Amendment's homebound privacy protections similarly tethers the Fourteenth Amendment's protections to sodomy inside the home. *See* Lawrence v. Texas, 539 U.S. 558 (2003).

[21] Boyd v. United States, 116 U.S. 616, 630 (1886). Although, it is noteworthy that *Boyd* established a protection from self-incrimination in the home, and remained good precedent for decades, later Courts limited or negated its reach. *See* Hale v. Henkel, 201 U.S. 43 (1906); Katz v. United States, 389 U.S. 347 (1976); Osborn v. United States, 385 U.S. 323 (1966); Berger v. New York, 388 U.S. 41 (1967); Marron v. United States, 275 U.S. 192 (1927).

[22] *See* Dickinson, *Puzzle of the Constitutional Home*, *supra* note 1, at 1101. The Constitution's Takings Clause and the Court's takings jurisprudence are "devoid of special

Notwithstanding the outlier status of takings, the Court's homebound Bill of Rights has a lot in common. Perhaps most striking is that the Court's jurisprudence in the first five amendments has consistently maintained a zone of protections emanating from the home. The jurisprudence has rarely, if ever, retreated from those well-established protections in the text or within its precedent.[23] And where there has been some retrenchment, it is relatively confined to a few exceptions. That the Framers and subsequent Supreme Courts managed to harmonize a substantial portion of the Constitution's text and its judicial doctrine, at least within the first five amendments, is worthy of praise.

Amid this remarkable harmony exists doctrinal episodes of discord that has been overlooked by scholars when examined alongside the rest of the homebound Bill of Rights. A variety of exceptions to warrantless searches and seizures in the home have developed within the Court's Fourth Amendment jurisprudence, including plain view doctrine, protective sweeps, open fields, third-party consent, no-knock warrants, administrative searches, probation searches, welfare searches, and mobile home searches.[24] These modifications of the search and seizure doctrine have created a stark schism where the Fourth Amendment, unlike the rest of the Bill of Rights, is a constitutional space where the Court has limited special protections to the home. Why, then, has the Court, at times, contradicted its rhetorical and substantive respect for the sanctity of the home by engaging in concerted efforts to retreat from those special protections with a litany of exceptions? It is an example of retrenchment unrivaled in other areas of the Bill of Rights. What gives? This Article proceeds to unpack and answer these questions and more in five Parts.

Part I briefly lays out the textual and doctrinal methodological tools used to explore instances of consistency and coherence of home protections across the Bill of Rights, and to identify the areas of disharmony and dissonance. Indeed, the Supreme Court has expounded upon the textual homebound protections in the Bill of Rights as a guide to elaborate and develop doctrine and precedent that maintains the principle of the sanctity of the home across the Bill of Rights.[25]

Part II excavates the Constitution's text and the Court's jurisprudence protecting the home across the first five amendments. The Court has doctrinally established (and textually reaffirmed) special protections involving speech, smut, gods, guns,

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protections to homes and is equally wanting of any special protections to the home." *Id.* at 1102. Indeed, neither the constitutional text nor the judicial doctrine precludes or grants "special compensation formulas or heightened scrutiny when homes are subject to physical or regulatory takings." *Id.* at 1101. Prior scholarship has attempted to unlock the mystery to this puzzle noting that the answer, arguably, is that judicial deference to economic legislation, as opposed to exacting scrutiny to fundamental privacy rights, has constrained the Court from extending the thread, even though the Court could, and arguably should.

[23] *Id.* at 1100–01.

[24] *See* Payton v. New York, 445 U.S. 573, 577 nn.6–7 (1980).

[25] *See* Akhil Reed Amar, *Document and Doctrine*, 114 HARV. L. REV. 26, 79 (2000) [hereinafter Amar, *Document and Doctrine*].

soldiers, searches, sex, and self-incrimination, but failed to provide equivalent safeguards to the home in its takings jurisprudence. However, upon further inspection lies a stark dichotomy where the Court has also regressed in home protections under its search and seizure doctrine while maintaining strong protections or granting greater protections to homes in the rest of the Bill of Rights.

Part III explores the mystery of the Court's persistent maintenance and occasional expansion of homebound protections involving speech, smut, gods, guns, soldiers, sex, and self-incrimination, but its puzzling retreat in search and seizure doctrines. The Court has engaged, instead, in a concerted and systematic effort to rollback protections to the home under the Fourth Amendment by crafting a patchwork of exceptions that, taken together, limit special protections to the home. This Part surveys those exceptions, including plain view, protective sweeps, open fields, third-party consent, knock and talk, knock and announce, no-knock warrants, administrative searches, welfare searches, probation searches, and mobile homes. These doctrinal exceptions have shrunk the scope of the safeguards inside and around the home to a shadow of its former self, unlike anywhere else in the Bill of Rights.[26] But why? What gives?

Part IV makes theoretical and conceptual observations of the discord and offers some reasons for why the Supreme Court's Fourth Amendment search and seizure doctrines have been modified with exceptions that limit the scope of protections to people and things in the home. There are several theories that help explain why the search and seizure doctrine suffers from homebound regression. This Part sets forth a few of those theories, including property principles, security concepts, the judicial politics of crime, the racialization of criminal procedure, and poverty exceptions. Part V concludes by surveying some doctrinal implications for the dissonance.

Before proceeding, a cautionary tale is in order. Constitutional puzzles are just that: puzzling, complex, incoherent, obtuse, and inconsistent. The exercise of making sense of these perplexing questions is challenging. The result sometimes reveals nothing more than scattered pieces of the puzzle that were missed amid the

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[26] It is important to recognize that these exceptions are not exclusively targeted at or intended to solely limit protections to residential property, such as homes. Some of the exceptions apply to non-residential and nonhome situations. For example, the plain view doctrine is applied more frequently outside the home than inside the home. The open fields doctrine is also an exception focused on activity outside of the home. Administrative inspections may apply, in some circumstances, to business and commercial buildings, and probation search exceptions are applicable to persons on probation, regardless of whether they are in the home or not. It just so happens that the exceptions tend to implicate lesser privacy and property protections to the home compared to other homebound protections in other amendments. This Article does not compare the degrees of home versus nonhome protections under each exception within the Fourth Amendment, but instead illustrates how those exceptions, in and of themselves, have had the cumulative effect of weakening home (and other spaces and places) protections under the Fourth Amendment in ways that the Court's other homebound doctrines in the Bill of Rights have not.

scholarly (re)search mission. As Orin Kerr heeds, attempts "to understand the Fourth Amendment is a bit like trying to put together a jigsaw puzzle with several incorrect pieces: no matter which way you try to assemble it, a few pieces won't fit."[27] Scholars who dare embark on this endeavor are aware of the difficulties and risks. This Article is no exception. It acknowledges the perils presented by exploring a large, complicated puzzle suffering from a few scattered or lost pieces.[28] Many scholars have exercised restraint in their own pursuit of piecing together some of these unanswered questions about the Bill of Rights.[29] Other scholarly efforts have

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[27] Orin Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 809 (2004).

[28] *See* Dickinson, *Puzzle of the Constitutional Home*, *supra* note 1, at 1104 nn.26–27 (explaining "Few scholars have recognized this constitutional puzzle, and only a handful have explored the fundamental question of why this schism exists across the first five amendments . . . . Constitutional law scholars have only partially pieced together the amendment puzzle presented in this Article, and none are fixated on the Court's home-centric void under its takings jurisprudence or attempted to offer explanations for the departure.").

[29] There are no extensive and comprehensive scholarly works accounting for the home protections across the entire Bill of Rights. The research and study, thus far, has been piecemeal. Margaret Radin noted the "anomalous" nature of the absence of Takings Clause special protections to the home, but does not engage in an exhaustive study of the homebound dimensions across the entire Bill of Rights. *See* Radin, *supra* note 2, at 1006. Benjamin Barros covered the Court's First and Fourth Amendment doctrines to account for the special home protections emanating from those amendments and makes specific reference to the Court's failure to "address the unique nature of the home" because there is a "litany of areas in which homes are given special legal treatment." Barros, *supra* note 1, at 297. Akhil Reed Amar engages in some thoughts about homebound protections, making brief reference to some home protections across the Bill of Rights and pondering their significance, but he doesn't go any further in a comprehensive study of the entire homebound Bill of Rights. *See* Akhil Reed Amar, *America's Lived Constitution*, 120 YALE L.J. 1734, 1776 (2011) [hereinafter Amar, *America's Lived Constitution*]. Darrell Miller pieced together the First and Second Amendments protections of the home, but goes no further. *See* Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1278 (2009). Stephanie Stern's research fits some of the First Amendment homebound jurisprudence into the Fourth Amendment search and seizure jurisprudence, arguing for less focus on the physical home under Fourth Amendment and instead an emphasis on residential privacy interests. *See* Stephanie M. Stern, *The Inviolate Home: Housing Exceptionalism in the Fourth Amendment*, 95 CORNELL L. REV. 905, 905 (2010). While John Fee identifies that "constitutional law recognizes the unique status of the home in several ways" under the First, Third, and Fourth Amendments, he does not stitch the entire homebound thread across the Bill of Rights. *See* John Fee, *Eminent Domain and the Sanctity of Home*, 81 NOTRE DAME L. REV. 783, 786 (2006). Arianna Kennedy ties the Fourth and Fifth Amendments together, arguing that "home searches" under the Fourth Amendment "should be viewed as takings" under the Fifth Amendment. Arianna Kennedy Kelly, *The Costs of the Fourth Amendment: Home Searches and Takings Law*, 28 MISS. COLL. L. REV. 1, 4, 18–28 (2009). Thomas Sprankling covers the Third and Fifth Amendment's protections of the home. *See* Thomas G. Sprankling, *Does Five Equal Three? Reading the Takings Clause in Light of the Third Amendment's Protection of Houses*, 112 COLUM. L. REV. 112, 112 (2012); *see also* Michael A. Cottone, *The Textualist Third Amendment*, 82 TENN. L. REV. 537, 540–41 (2015).

pushed the envelope by exploring the "deep" and "fundamental" puzzle of the Bill of Rights "distinctive textual and doctrinal protections to the home."[30] The next frontier of solving constitutional puzzles, nevertheless, lies at the heart of the Fourth Amendment's doctrinal home. The chasm created by the patchwork of lesser protections to the home in the Fourth Amendment is at a scale and level unrivaled by other homebound Bill of Rights. Indeed, the discovery of this discord is quite striking, and deserves scholarly observation and explanation, as well as a thorough examination of its implications.

I. TEXT, DOCTRINE, AND HOUSES

Part I briefly lays out textual and doctrinal interpretive tools used to explore instances of consistency and coherence of home protections across the Bill of Rights and identify areas of disharmony and dissonance. This Article's primary contribution—that the Fourth Amendment's search and seizure doctrine stands as an outlier in the Bill of Rights by increasingly weakening special protections to the home in comparison to its other homebound counterparts—is built on the conceptual and interpretive foundations of textualism and doctrinalism. It is, therefore, important to establish the methodological approach taken to arrive at the discovery.

The Supreme Court's methodological approach is one of "interpretive pluralism."[31] The Justices, past and present, have created a "methodological free-for-all" in which individual Justices use different interpretive methods for different cases.[32] This has created an institution lacking an official, uniform, and standardized "authoritative methodology."[33] The study of the Bill of Rights, for example, has long followed an approach of text, where Justices segment blocks of constitutional text and interpret those provisions in isolation from other amendments.[34] Textualism, for example, identifies patterns across and within constitutional provisions[35] by comparing "various words and phrases" that are repeated throughout the text.[36] With some creative flair, some scholars and jurists have placed "non-adjoining clauses side by side for careful analysis"[37] with an eye towards finding "deeper thematic connection[s]."[38] I say some, because those who engage in this practice have a healthy trove

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[30] Dickinson, *Puzzle of the Constitutional Home*, *supra* note 1, at 1100, 1148.

[31] Glen Staszewski, *Settled Versus Right: A Theory of Precedent and Disagreement*, 116 MICH. L. REV. 1019, 1039 (2018).

[32] *Id.* at 1019.

[33] *Id.*

[34] *See* AMAR, *supra* note 1, at 78.

[35] Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 792–93 (1999) [hereinafter Amar, *Intratextualism*].

[36] *Id.* at 748.

[37] *Id.* at 788.

[38] *Id.* at 793.

of critical dissenters.[39] But this meticulous method of dissecting the "text of a given clause," can reveal a lot about the meaning underlying the document.[40] The practice takes "specific words and word patterns" and gleans into the "historical experiences that birthed and rebirthed the text."[41] The idea is to find "consistency rather than inconsistency."[42] Textualists "seek to braid arguments from text, history, and structure into an interpretive rope whose strands mutually reinforce."[43] Textual interpretations also help to identify amendments that expressly command certain protections. But textualism risks creating instability.[44] Textualists are also susceptible to yielding to "earlier judicial and political deviations."[45] There is some debate among scholars that the study of the Constitution has overemphasized textual interpretive practices of breaking up discrete blocks of text to examine each segment in isolation.[46]

The dominant methodological approach by the Supreme Court, however, has been to apply doctrinal, atextual, precedent-based interpretive methodologies.[47] Doctrinalists, like textualists, seek to "weave together a coherent account from tangled data."[48] The use of doctrine, as opposed to textualism, seeks "to synthesize what the Supreme Court has said and done, sometimes rather loosely, in the name of the Constitution."[49] There are some jurists, however, who "privilege precedent [but] concede that the text does sometimes matter."[50] Doctrinalists, however, have also been known to surrender to the written text.[51] Doctrine also risks "regular sterility" and "recurrent perversity."[52]

This is not to say that textualism is better than precedent-based interpretive methods steeped in creating new and following old doctrine. They both bring equally positive upshots and negative downfalls. Both methods—textualism and doctrinalism—nonetheless, prove crucial to uncovering and exploring coherence and instances of disharmony across the homebound Bill of Rights. Let us start with how "houses" are presented under the Constitution.

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[39] *See* Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730, 730 (2000) (criticizing Amar's interpretive "intratextualism" and arguing skepticism about the general project and specific claims).

[40] *See* Amar, *Intratextualism*, *supra* note 35, at 748.

[41] *See* Amar, *Document and Doctrine*, *supra* note 25, at 26.

[42] *See* Amar, *Intratextualism*, *supra* note 35, at 794.

[43] *See* Amar, *Document and Doctrine*, *supra* note 25, at 31, 53.

[44] *Id.* at 28.

[45] *Id.*

[46] AMAR, *supra* note 1, at xii.

[47] *See* Jonathan F. Mitchell, *Textualism and the Fourteenth Amendment*, 69 STAN. L. REV. 1237, 1237 (2017).

[48] *See* Amar, *Document and Doctrine*, *supra* note 25, at 31, 53.

[49] *See id.* at 27.

[50] *Id.*

[51] *See id.*

[52] *Id.* at 27.

A. The Textual House

The Court has "intuitively" connected modern unenumerated privacy rights with the concept of the "house" in a manner that combines the "best of property and equality."[53] The word "house" was separated and considered "above and beyond all buildings" due to its "special place of privacy"[54] and "egalitarian . . . ideal."[55] Privacy is an unenumerated right that is not mentioned once in the document, yet privacy still enjoys special protections rooted in the "house" in the Bill of Rights.[56] Notwithstanding the words "house" found in the Third and Fourth Amendments, the Constitution's text does not, on its face, necessitate a unique treatment of or protection to the home.[57]

The Third Amendment, for example, grants home dwellers textual protections from soldiers being quartered in the home during times of peace without homeowners' consent.[58] The Third Amendment, in other words, "explicitly protect[s] 'houses' from needless and dangerous intrusions by governmental officials."[59] There was very little debate or dispute over whether to include an anti-quartering clause at the founding.[60] The Third Amendment's purpose was all the more relevant in the post–Revolutionary War era and needed very little justification. But the text and history suggest an understanding of *special* protections to the owner because it "gives the owner of *any* 'house' (and presumably not nonresidential property) the right to refuse to quarter soldiers during peacetime."[61]

The Fourth Amendment's search and seizure clause is, like the Third Amendment, a location where the text establishes a zone of protection to the home.[62] However, unlike the Third, the Fourth has enjoyed significant doctrinal developments since its ratification, including borrowing doctrines, concepts, and analytical frameworks from the First and Second Amendments. The text arguably suggests there is a "right of a [person] to retreat into [the] home and there be free from

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[53] *See* Amar, *America's Lived Constitution*, *supra* note 29, at 1770.

[54] *Id.* at 1772.

[55] *Id.* at 1773.

[56] *Id.* at 1772.

[57] *Id.* This may seem counter-intuitive at first blush, since the very mention of the word "house" in and of itself is arguably special in that it appears only twice in the document. But the Constitution does not say, for example, the right of the people to be secure and have "special protections" in their "houses." Without a specific special command, the Constitution may not provide any forms of special home protections until the Court reads such protections into its doctrine.

[58] U.S. CONST. amend. III.

[59] *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1175 (1991) [hereinafter Amar, *The Bill of Rights*].

[60] *See* Sprankling, *supra* note 29, at 122.

[61] *Id.* (emphasis added).

[62] *Id.* at 149.

unreasonable governmental intrusions," which includes seizing property and seizing people.[63] The combination of the use of the collective "people" and individualistic "persons" in tandem with the "houses" suggests a strong adherence to private domain.[64] While the Constitution has few express "house" words, the decision whether to invoke special house protections has been left to the courts to establish doctrines that "recognizes the special significance of houses and what happens inside them."[65]

B. The Doctrinal Home

Jurists that lean into and rely upon doctrine "strive to synthesize what the Supreme Court has said and done, sometimes rather loosely, in the name of the Constitution."[66] Such reliance is not necessarily focused on the Constitution's text but instead the Court's "elaborate precedent."[67] Doctrine may not completely supplant text, but the method and practice "properly fill[s] in the document's outline, making broad principles workably specific in a court and in the world."[68] For example, the Supreme Court suggested the Third Amendment creates a zone of privacy by prohibiting quartering soldiers "in any house" during times of peace.[69] Similarly, the Court read privacy principles into the Fourth Amendment because the core of the amendment is to draw legal boundaries around the home where police cannot invade without a warrant.[70] Hence why the Court finds that a "zone of privacy is nowhere more clearly defined" when the "physical dimensions" of the home are at issue.[71]

The Constitution arguably invites and encourages judges to attend to the house and home as "explicit words and implicit concepts."[72] Not surprisingly, the Court has done just that.[73] The Justices have intently created a special protection doctrine to homes and recognized the "special significance of houses and what happens inside of them"[74] far beyond what the textual "house" language commands in the Third and Fourth Amendments. As textualists "seek to braid arguments from text, history, and structure into an interpretive rope whose strands mutually reinforce," doctrinalists, similarly, seek to "weave together a coherent account from tangled data."[75] There are, however, wrinkles in those strands that must inevitably be addressed. The

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[63] *Id.*
[64] *See* Amar, *America's Lived Constitution*, *supra* note 29, at 1772.
[65] *Id.* at 1773.
[66] *See* Amar, *Document and Doctrine*, *supra* note 25, at 27.
[67] *Id.*
[68] *Id.* at 80.
[69] Griswold v. Connecticut, 381 U.S. 479, 484 (1965).
[70] *Id.* at 484–86.
[71] Payton v. New York, 445 U.S. 573, 589 (1980).
[72] *See* Amar, *America's Lived Constitution*, *supra* note 29, at 1773–74.
[73] *Id.*
[74] *Id.* at 1773.
[75] *See id.*; Amar, *Document and Doctrine*, *supra* note 25, at 53.

use of these interpretive methods in this Article shows that there are threads, strands, and braids that have been weaved together to create a safe haven for home protections in the Bill of Rights. But the Fourth Amendment's search and seizure doctrine elicits a wrinkle in those protections that has been overlooked by scholars and deserves further scholarly exploration.[76]

II. THE CONSTITUTIONAL SANCTUARY OF THE HOME

Part II excavates the Constitution's text and the Court's jurisprudence protecting the home across the first five amendments. While constitutional text provides some express protections, the Court has doctrinally substantiated those protections across the Bill of Rights where the text is silent.[77]

It is well-established that "every man's house is looked upon by the law to be his castle."[78] This sentiment is likened to the proverbial "castle doctrine" that marks a person's home as equivalent to his castle, a space of security, defense, and asylum.[79] Indeed, American law treats the home as omnipresent; a special place that has been granted a safe haven within the Bill of Rights.[80] The Court has also "singled out [the home] above and beyond all buildings" as "a special place for privacy"[81] that the law has determined "worth preserving."[82] The home is "treated more favorably"[83] because it is "inextricably part of" our society.[84] Like a king, the "ordinary man" enjoys a real and rhetorical power in the home as a castle.[85] Within the home, the individual exercises a "sole and despotic dominion" over the space.[86] In some respects, the image of the castle and sanctuary "are not mutually exclusive."[87] Those images invoke a "notion of refuge and [safe] haven."[88] The American judiciary, especially the U.S. Supreme Court, has likened the "cluster of spatial images" of the home to a "sanctuary," "sacred retreat," and "enclave."[89] The "sanctity of the home" is like

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[76] *See infra* Part III.

[77] *See* Amar, *America's Lived Constitution*, *supra* note 29, at 1773.

[78] 3 WILLIAM BLACKSTONE, COMMENTARIES *288.

[79] Minnesota v. Carter, 525 U.S. 83, 94 (1998) (Scalia, J., concurring); Wilson v. Arkansas, 514 U.S. 927, 931 (1995).

[80] *See* Radin, *supra* note 2, at 992, 996, 997, 999, 1001.

[81] *See* Amar, *America's Lived Constitution*, *supra* note 29, at 1772.

[82] *See* Fee, *supra* note 29, at 787.

[83] *See* Barros, *supra* note 1, at 255.

[84] *See* Radin, *supra* note 2, at 1013.

[85] *See* Jeannie Suk, *Is Privacy a Woman?*, 97 GEO. L.J. 485, 491 (2009).

[86] 2 WILLIAM BLACKSTONE, COMMENTARIES *2–3 (internal quotation marks omitted) (quoting *Genesis* 1:28).

[87] *See* Linda C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 YALE J.L. & HUMAN. 195, 203 (1995).

[88] *Id.*

[89] *Id.*; *id.* at 204 (quoting Dow Chem. Co. v. United States, 749 F.2d 307, 314 (6th Cir.

a "moral nexus between liberty, privacy, and freedom of association."[90] The "uniquely personal" nature of the space makes "it different and in a sense of higher value than other forms of real property."[91]

This constitutional sanctuary is the central refuge for articulating homebound constitutional rights, such as the "right against unreasonable search and seizure, the right to due process, the right of privacy, and . . . the right to bear arms."[92] The home, then, serves as the unique refuge where liberty and property concepts protect both the person and places.[93] Indeed, the constitutional safe haven of the home in the Bill of Rights singles out the home for "special constitutional treatment" because the space is deemed a "consecrated constitutional location" immune from intrusion.[94]

While there is no written express command to treat "houses" specially, the Constitution implicitly "invites judges . . . to attend to this explicit word and this implicit concept."[95] And so they have. In some respects, the Court has intentionally created a special protection doctrine to homes, while others have intuitively recognized the "special significance of houses and what happens inside of them."[96] The Bill of Rights, then, has become the "zone of [homebound] privacy"[97] that occupies a special place in the "pantheon of constitutional rights."[98] Privacy considerations "manifest[] a special concern with the protection of the home."[99]

The Court's speech, smut, and gods line of jurisprudence under the First Amendment illustrates the beginning of the Constitution's thread of home protections in the Bill of Rights.

1984), *aff'd*, 476 U.S. 227 (1986)); *id.* (quoting Gregory v. Chicago, 394 U.S. 111, 125 (1969) (Black, J., concurring)); *id.* (quoting United States v. On Lee, 193 F.2d 306, 216 & n.19 (2d Cir. 1951) (Frank, J., dissenting), *aff'd*, 343 U.S. 747 (1952)).

[90] Radin, *supra* note 2, at 991.

[91] *See* Fee, *supra* note 29, at 793.

[92] SUK, *supra* note 1, at 3.

[93] *See* Timothy Zick, *Constitutional Displacement*, 86 WASH. U. L. REV. 515, 539 (2009).

[94] *Id.*

[95] *See* Amar, *America's Lived Constitution*, *supra* note 29, at 1773.

[96] *Id.*

[97] *See* Ravin v. State, 537 P.2d 494, 498–502 (Alaska 1975).

[98] United States v. Craighead, 539 F.3d 1073, 1077 (9th Cir. 2008) (describing the home's role in constitutional rights: "Under the First Amendment, the 'State has no business telling a man, sitting alone in his house, what books he may read or what films he may watch.' . . . The Second Amendment prohibits a federal 'ban on handgun possession in the home.' . . . The Third Amendment forbids quartering soldiers 'in any house' in time of peace 'without the consent of the Owner.' . . . The Fourth Amendment protects us against unreasonable searches and seizures in our 'persons, houses, papers, and effects.'").

[99] *See* Michael C. Dorf, *Does* Heller *Protect a Right to Carry Guns Outside the Home?*, 59 SYRACUSE L. REV. 225, 232 (2008); *see also* Miller, *supra* note 29, at 1305 (arguing that guns outside the home should be treated the same way as obscene materials are treated under the First Amendment).

A. Speech

The Court's First Amendment jurisprudence reflects a strong "solicitude for the right of an individual 'to be let alone' in the privacy of the home, 'sometimes the last citadel of the tired, the weary, and the sick.'"[100] The home is a space of "retreat" where persons can "repair to escape the tribulations of their daily pursuits."[101] The Court has noted that protecting privacy of the home "is . . . of the highest order"[102] In *City of Ladue v. Gilleo*, the Court explained:

> A special respect for individual liberty in the home has long been part of our culture and our law [and] that principle has special resonance when the government seeks to constrain a person's ability to speak there . . . the government's need to . . . regulate temperate speech from the home is surely much less pressing.[103]

The physical home does "not limit, but instead enhance[s] First Amendment rights" such as speech that are exercised inside the home including, but not limited to, religious gatherings, political speeches and gatherings, and protests or educational activities.[104] As some scholars have recognized, where central to First Amendment activity, "the home serves [simultaneously] as a connection to a person's development and autonomy, providing it with a unique status for expression and privacy."[105] As Benjamin Barros explains, "the psychology of home reveals that the privacy and freedom created by the home allows for feelings of self-expression and self-actualization."[106] The Court balanced the privacy interests of the homeowner with principles that encourage and facilitate the exercise of speech, such as disseminating information at house doors or by mail.[107] The right of every person "to be let alone" must be counterbalanced, the Court announced, with the right of others to communicate.[108]

Speech protections to the home are sometimes referred to as residential privacy protections of the "unwilling . . . listener."[109] The law traditionally expects individuals to voluntarily avoid things they do not want to hear, especially in public, but "the home is different."[110] Protecting homes is "of the highest order"[111] and "an important

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[100] Carey v. Brown, 447 U.S. 455, 471 (1980) (quoting Gregory v. Chicago, 394 U.S. 111, 118 (1969) (Stewart, J., concurring)).

[101] Frisby v. Schultz, 487 U.S. 474, 484 (1988) (quoting *Carey*, 447 U.S. at 471).

[102] *Id.*

[103] City of Ladue v. Gilleo, 512 U.S. 43, 58 (1994).

[104] Mark Cordes, *Property and the First Amendment*, 31 U. RICH. L. REV. 1, 5 (1997).

[105] *Id.* at 65.

[106] *See* Barros, *supra* note 1, at 275 n.88.

[107] *See* Martin v. City of Struthers, 318 U.S. 141, 143 (1943).

[108] Rowan v. U.S. Post Off. Dep't, 397 U.S. 728, 736 (1970).

[109] Frisby v. Schultz, 487 U.S. 474, 488 (1988).

[110] *Id.* at 484.

[111] Carey v. Brown, 447 U.S. 455, 471 (1980).

value"[112] that recognizes different safeguards from that of other spaces and places, especially commercial spaces or public property. It is common practice for the public to communicate ideas to homeowners and their guests by visiting homes, knocking on doors, and ringing doorbells in residential environments to exercise freedom of speech.[113] The law has traditionally left the homeowner, and not the government or community, to decide whether such invited visits are permissible.[114] Indeed, "individual master[s] of each household" exercised dominion over visitors at the doorstep.[115] The law, at the same time, balanced the speech rights of the communicator.[116] They, too, are afforded reasonable latitude to exercise speech rights in residential areas and outside homes.

Communicating house-to-house is a widespread and popular tradition with a long history.[117] For example, distributing pamphlets was one of the most useful, and arguably affordable, methods to disseminate and deliver information "at the homes of the people."[118] The law sought to prohibit "naked restriction[s] of the dissemination of ideas" at or near homes.[119] To balance the protective interests of the homeowner with the speech rights of the communicator, the Court carved out categories or classes of persons whose constitutional rights may be unduly burdened or affected by such dissemination of information.[120] Distributors, receivers, and homeowners were placed into independent classes to protect their ability to distribute or exclude the dissemination of material from the home.[121] The Court has, as a result, invalidated complete bans on expressive activity in residential areas.[122]

Such laws must allow disseminating literature at homes to persons "willing to receive it."[123] However, homeowners may also prohibit unwanted visitors, such as solicitors and peddlers by way of signage providing advanced notice.[124] The distributor

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[112] *Id.*

[113] *See* Martin v. City of Struthers, 318 U.S. 141, 143 (1943).

[114] *Id.* at 141.

[115] *Id.*

[116] *See id.* at 143.

[117] *Id.* at 141, 145.

[118] Schneider v. State, 308 U.S. 147, 164 (1939); *see also Martin*, 319 U.S. at 146 ("The federal government, in its current war bond selling campaign, encourages groups of citizens to distribute advertisements and circulars from house to house.").

[119] *Martin*, 319 U.S. at 147.

[120] *Id.* at 149.

[121] *Id.*; *see also id.* at 153 (Frankfurter, J., dissenting) ("Concededly, the Due Process Clause of the Fourteenth Amendment did not abrogate the power of the states to recognize that homes are sanctuaries from intrusions upon privacy and of opportunities for leading lives in health and safety.").

[122] *Schneider*, 308 U.S. at 162–63 (handbilling); *Martin*, 319 U.S. at 149 (1943) (door-to-door solicitation).

[123] *Schneider*, 308 U.S. at 162.

[124] Rowan v. U.S. Post Off. Dep't, 397 U.S. 728, 736–37 (1970); *see also Martin*, 319 U.S. at 147.

of the ideas cannot force those ideas into the home of the unwilling homeowner, especially when the owner has signaled disapproval.[125] Indeed, the right to communicate to strangers, such as by mailers, is curbed when the homeowner gives advance notice to cease the receipt of further mailings.[126] As Justice Warren Burger explained, the sender's right to communicate by mail, for example, must end "at the mailbox" once a homeowner demands the mail to be discontinued.[127] In other words, the homeowner exercises free speech rights by erecting a wall "that no advertiser may penetrate without his acquiescence."[128] As the Court elaborated, "[t]hat we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere"—including inside the home.[129] The Court evaluated these competing free speech principles, concluding that sufficient measures of "individual autonomy must survive to permit every householder to exercise control over unwanted mail."[130]

The Court also placed special solicitude in the home when expression is targeted at a specific person's home for a specific purpose.[131] The disseminated information, in these instances, is not intended for the general public but targeted at a person occupying their home.[132] Even if there is a broader message for the public behind the expression, such targeted picketing may affect a person's quiet enjoyment of the home.[133] As Justice John Paul Stevens explained, the Court attempted to find the "appropriate balance between the advocate's right to convey a message and the recipient's interest in the quality of his [home]."[134] While in other contexts, a person can avoid the unwelcome visitor if approached at public forums or commercial properties; but, the "unique and subtle impact of [home] picketing" is difficult to escape.[135] Indeed, "picketing for the sole purpose of imposing psychological harm on a family in the shelter of their home is constitutionally protected."[136] A balancing of interests still leaves picketers to "have a right to communicate . . . but after they have had a fair opportunity to communicate that message," picketers cannot continue

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[125] *See* Frisby v. Schultz, 487 U.S. 474, 488 (1988).

[126] *Rowan*, 397 U.S. at 737.

[127] *Id.* at 736–37.

[128] *Id.* at 738.

[129] *Id.* at 738; *cf.* Pub. Utils. Comm. v. Pollak, 343 U.S. 451, 464 (1952) (rejecting "that the 5th Amendment secures to each passenger on a public vehicle regulated by the Federal Government a right of privacy substantially equal to the privacy to which he is entitled in his own home").

[130] *Rowan*, 397 U.S. at 736.

[131] *See* Frisby v. Schultz, 487 U.S. 474, 488 (1988).

[132] *Id.* at 482, 488.

[133] *Id.* at 486, 488.

[134] *Id.* at 487 (Stevens, J., dissenting) (quoting Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 83–84 (1983) (Stevens, J., concurring)).

[135] *Frisby*, 487 U.S. at 487.

[136] *Id.* at 498.

to repeatedly force their message in a manner which only serves to psychologically harm a person or family at their residence.[137] The "homes of men [and women]" must be protected "from noisy, marching, tramping, threatening picketers and demonstrators bent on filling the minds of men, women, and children with fears of the unknown."[138] The Court, as a result, has carved out a "right of homeowners to be free from unwanted communication."[139]

As others have argued, there is a difference between exercising rights in the marketplace of ideas and "physically and psychologically intimidat[ing] someone [to acquiesce to] . . . beliefs under the guise of exercising free speech rights."[140] Indeed, courts may limit speech activity engaged in a manner "proven to harm the targeted resident's privacy interests."[141] As Justice Hugo Black explained, "Speech and press are . . . to be free so that public matters can be discussed with impunity [b]ut picketing and demonstrating can be regulated," otherwise, "homes . . . would have to have their doors thrown open to all who desired to convert the occupants to new views, new morals, and a new way of life."[142]

The Court's speech doctrine has also extended to protecting speech and expression emanating from activity or speech inside and the outside of the home.[143] For example, the Court has invalidated laws that prohibit the "improper use" of flags, such as placement or attachment of designs affixed to the flag on the outside of a home or affixed to the inside of a window.[144] Where the speech at issue is a privately owned item displayed on or within a privately occupied residence, the Court has sought to enhance First Amendment protections.[145] Likewise, the Court invalidated laws that outright ban all residential signs with limited exceptions.[146] Home signage, for example, has a special place under the First Amendment because it serves as a distinct space for communication. Indeed, the First Amendment imparts "[a] special respect for individual liberty in the home [that] has long been part of our culture and our law," deserving of heightened resonance.[147] The "functional concerns" associated with costs, convenience, and speaker identity are prominent themes under the Court's

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[137] *Id.*

[138] Gregory v. City of Chicago, 394 U.S. 111, 125, 126 (1969) (Black, J., concurring).

[139] *See* Cordes, *supra* note 104, at 44.

[140] Hazel A. Landwehr, *Unfriendly Persuasion: Enjoining Residential Picketing*, 43 DUKE L.J. 148, 151 (1993).

[141] *Id.*

[142] *Gregory*, 394 U.S. at 125–26 (Black, J., concurring) (noting privacy in the home is important where political speech is at issue).

[143] *See, e.g.*, Spence v. Washington, 418 U.S. 405, 405–06 (1974).

[144] *Id.* at 407.

[145] Note, however, that the Court might have concluded the same result if the law similarly imposed flag regulations on public property.

[146] City of Ladue v. Gilleo, 512 U.S. 43, 58–59 (1994).

[147] *Id.* at 58.

speech-home protections.[148] Indeed, the "self-regulating nature of homeownership" elevates speech protections above other spaces and places.[149]

B. Smut

The Court has been equally assertive in its protection of freedom of thought and speech inside the home. The seminal case, *Stanley v. Georgia*, was "firmly grounded in the First Amendment."[150] The Court found regulations targeting obscenity cannot "reach into the privacy of one's own home."[151] The special case for protection in the home was established when Justice Thurgood Marshall wrote, "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."[152] The Court has a deep concern for preserving a person's right to possess and view obscene material as a matter of privacy in the home.[153] This "right to satisfy his intellectual and emotional needs in the privacy of his own home" cannot constitutionally be made a crime.[154]

The Court's obscenity doctrine also recognizes the "desirability of controlling a person's private thoughts" in the safety and security of the home, and enhances speech rather than diminishes it.[155] These protections "[take] on an added dimension"[156] when the government regulates persons for possession of printed or filmed obscene material in his home.[157] Here, "[t]he right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."[158] The state cannot, then, regulate a person's private thoughts and deny a person the ability to indulge and enjoy, by way of reading or thinking, about smut in his home.[159] These protections are the result of a confluence of safeguards emanating from the speech and freedom of association principles of the First Amendment. The Court, however, did not advance an absolute right to smut in the home.[160]

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[148] *See* Cordes, *supra* note 104, at 59.
[149] *Id.*
[150] Osborne v. Ohio, 495 U.S. 103, 108 n.3 (1990) (quoting Bowers v. Hardwick, 478 U.S. 186, 195 (1986)).
[151] Stanley v. Georgia, 394 U.S. 557, 565 (1969).
[152] *Id.*
[153] *See, e.g.*, *id.* at 565–66.
[154] *Id.* at 565.
[155] *Id.* at 566.
[156] *Id.* at 564.
[157] *Id.*
[158] Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002).
[159] *Stanley*, 394 U.S. 566–67.
[160] *Id.* at 568.

Like the Court's speech jurisprudence, which defines zones of appropriate expression and communication inside and outside the home, the Court's obscenity doctrine prohibits the receipt, transport, or distribution of lewd material outside the home or the overt solicitation of such material inside the home, especially material with children.[161] In other words, the indulgence of obscene material "ends at the doorstep."[162] People distributing material door to door or by mail are free to do so, but they cannot disseminate harmful information to the home (including forcing the dissemination into the home).[163] Similarly, there is no right to distribute obscene material through the mail.[164]

In *United States v. Reidel*, the Court wrote that "freedom of mind and thought and . . . the privacy of one's home" did not reach to other rights, such as a right to sell or distribute obscene material from within the home, but instead only to "possess and read obscenity in their homes . . . ."[165] Similarly, the Court has upheld regulations that limit or ban obscenity in public.[166] Legal culture and norms seem to embrace these odd contradictions,[167] leading some scholars to question the arguably absurd results where a person can have a right to possess obscenity in the home while at the same time be prosecuted for obtaining it outside the home.[168] The

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[161] United States v. Orito, 413 U.S. 139, 141 (1973) (explaining that the right to view obscenity in the home is not the same as "a correlative right to receive it, transport it, or distribute it").

[162] Miller, *supra* note 29, at 1299.

[163] *Id.* at 1300 n.159.

[164] United States v. Reidel, 402 U.S. 351, 356 (1971).

[165] *Id.*

[166] *See, e.g.*, Paris Adult Theater v. Slaton 413 U.S. 49 (1973).

[167] Some commentators viewed the Court's smut doctrine as an outdated artifact, limited and ineffective under the First Amendment, and that it ought to be supplanted by Fourteenth Amendment substantive due process doctrines. *See* Claudia Tuchman, *Does Privacy Have Four Walls? Salvaging* Stanley v. Georgia, 94 COLUM. L. REV. 2267, 2279 (1994). There, a person would have a "right to obtain obscene material for personal, private use" as a protection of integrity of thought and sexual liberty. *Id.* at 2304. This reshaped interpretation of smut doctrine would move the jurisprudence from one fixated on physical space of privacy to a decisional concept of privacy that enhances sexual autonomy to obtain smut for personal use. *Id.* at 2279. This reimagined doctrine ties in substantive due process to establish a more robust and expansive privacy doctrine "protecting personal decisional freedom." *Id.* These conceptions, although not expressly endorsed by the Court in *Stanley*, were implicitly endorsed when the Court stated that a person as a "right to be free . . . from unwanted governmental intrusions into one's privacy." *Id.* at 2272. Lawrence Tribe arguably endorses this conception of the Court's smut doctrine, noting that the doctrinal line drawn at the entrance of the home, originating from the Fourth Amendment, is the baseline of homebound protections, but that when an individual "retreat[s] across that threshold, the government must provide escalating justification if it wishes to follow, monitor, or control us there." LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1322, 1412 (2d ed. 1988).

[168] Jed Rubenfeld, *The Right of Privacy and the Right to Be Treated as an Object*, 89 GEO. L.J. 2099, 2100 (2001).

unintended consequence might be that police have every reason to "pry into . . . homes . . . to see how [individuals] obtained [smut]" at the same time individuals "exercise their supposed right to look at obscenity in their homes."[169] If distribution and receipt of smut can be regulated or banned, then the protection of the mere possession of it inside the home raises puzzling logical problems.

C. Gods

The right to worship gods, both inside and outside the home, enjoys a variety of protections under the First Amendment.[170] The Free Exercise Clause states that the government "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[171] The text connotes a constitutional right to hold religious beliefs and engage in religious activities and rituals. Implicit is the right to exercise these beliefs and rituals within the safety and security of one's home without government intrusion or regulation. The religious "home" has generated many metaphors conveying its importance.

The image of the home as a temple has a "religious root" that elicits a special space for refuge.[172] This historical emphasis of religious undertones creates the impression that the home is an "inviolable citadel."[173] Some scholars have likened the home as "the most sacred part of a religious space . . . of the presence of God."[174] Because religion and the home "occup[y] exalted place[s] in society,"[175] there exists a realm of protections around or near the home where the free exercise of religion is at its height.[176] Some Justices have also elevated the freedom of religion and free exercise clauses to a "higher estate [and dignity] in our society" worthy of protections inside and outside "a man's . . . castle."[177]

Recently, the Court expressed constitutional solicitude to the idea that the home is an inviolable citadel. In *Tandon v. Newson*, the Court found a right to worship privately in the home.[178] In *Tandon*, the Court faced freedom of religion questions in the context of COVID-19 policies.[179] California's policy, implemented by the Governor's office, treated, according to the Court, secular activities more favorably

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[169] *Id.*
[170] *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).
[171] U.S. CONST. amend. I.
[172] *See* McClain, *supra* note 87, at 195.
[173] *Id.* at 204.
[174] *Id.* at 203.
[175] Abington Sch. Dist. v. Schempp, 374 U.S. 203, 226 (1963).
[176] *Id.*
[177] Martin v. City of Struthers, 319 U.S. 141, 149 (1943) (Murphy, J., concurring); *see also* Jones v. Opelika, 316 U.S. 583, 621 (1942).
[178] Tandon v. Newsom, 141 S. Ct. 1294, 1295 (2021).
[179] *Id.* at 1295–96.

than similar exercises of religious activity in private homes.[180] The policy specifically restricted indoor gathering and limited outdoor gathering to three households.[181] A pastor challenged the policy, arguing that the restrictions on in-home worship were unconstitutional under the Free Exercise Clause because "Bible studies, theological discussions, collective prayer, and musical prayer at their homes" were restricted while other comparable secular work-related activities were not."[182] The Court explained that such "government regulations are not neutral and generally applicable . . . whenever they treat any comparable secular activity more favorably than religious exercise" and that California's policy treats comparable secular activity more favorably than at-home religious exercise.[183] The Court's *Tandon* decision had the tone of its previous 1943 ruling in *Martin v. City of Struthers*, where the Court explained "there should be an accommodation, if at all possible, which gives appropriate recognition . . . to protect the safety and privacy of the home [and] preserve the substance of religious freedom."[184]

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[180] *Id.*

[181] *Id.* at 1295.

[182] Tandon v. Newsom, 517 F. Supp. 3d 922, 945 (N.D. Cal. 2021).

[183] *Tandon*, 141 S. Ct. at 1296.

[184] Martin v. City of Struthers, 319 U.S. 141, 150 (1943). The Court recognizes that regulations must also be drawn to safeguard homes and their occupants against the evils of overzealous and abusive religious canvassers. *See* Cantwell v. Connecticut, 310 U.S. 296, 310 (1940). The spread of the Bible and other religious beliefs have been central to the First Amendment's core features of the freedom of religion. There is a long history of religious groups espousing and worshipping god door-to-door of homes. It is an age-old method of freedom that the Court has protected in residential areas. *See* Schneider v. State, 308 U.S. 147, 163 (1939). Some religious groups, for example, followed the example of Paul from Biblical scriptures, where he taught the public scripture from "house to house." Murdock v. Com. of Pennsylvania, 319 U.S. 105, 108 (1943). Other groups, such as the Jehovah's Witnesses, have exercised their freedom of religion and press by knocking on the doors of strangers with the intent to disseminate religious ideas and advertise meetings with paper handouts. *Martin*, 319 U.S. at 142. The door-to-door and house-to-house solicitation of religious beliefs each "occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits." *Murdock*, 319 U.S. at 109. The Court has effectively equated both the preaching and worshipping of gods at the doorsteps of homes to have the "same claim as the [other worshipping practices in churches]." *Id.* The state cannot decide that some religious ideas may be carried out and distributed to the "homes of [some] citizens," while other ideas cannot be disseminated from "house to house." *Schneider*, 308 U.S. at 164. The Court has ruled that the "house to house" leafleting of books and pamphlets on religious subjects are activities emanating from the "[f]reedom of conscience and freedom to adhere to . . . religious organization or . . . worship" that cannot be banned. *Cantwell*, 310 U.S. at 303. As Justice Reed explains, "It is more than preaching; it is more than distribution of religious literature. It is a combination of both." *Id.* at 109. The Court also found that regulations requiring prior permits to disseminate information door to door at homes violates the First Amendment by abridging freedom of speech and press. *Schneider*, 308 U.S. at 165. Likewise, the Court adopted an approach to prohibit arbitrary

D. Guns

It is well-established that total bans on handguns in the "home" are an unconstitutional violation of the Second Amendment.[185] The Court observed that the "need for defense of self, family, and property is most acute" inside the home, served by the safety and security feature of the handgun.[186] The protective nature of gun rights is intended to preserve and defend the family in the homestead.[187] There is some historical evidence from the revolutionary era that arguably buttresses this protection. During the colonial and Revolutionary War era, "[small-arms] weapons used by militiamen and weapons used in defense of person and home were one and the same."[188]

Another angle to special protections for guns inside the home relates to a spatial dimension. Some argue handgun possession in the home offers a unique space for self-defense because firearms are "easier to store" and "accessible" during exigent circumstances when an intruder enters the home.[189] This spatial advantage of protection allows the homeowner to "lift and aim" a gun in the home.[190] As Justice Antonin Scalia explains, "whatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[191]

That said, there is arguably an equally persuasive interpretation of the Second Amendment's special homebound protections that have nothing to do with the ordinary homeowner. Instead, as Justice Stevens explains, militiamen, not ordinary

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fees imposed on religious solicitors seeking to espouse their views at the residential doorsteps of neighbors, finding that such conditions violate freedom of religion. *Murdock*, 319 U.S. at 105. The Court also struck down laws that limit or ban noncommercial door-to-door leafleting. Breard v. City of Alexandria, 341 U.S. 622, 624 (1951). The Court has noted that, where regulation of such activity is required, it still must be limited to the time, number, and identification of visitors. *Martin*, 319 U.S. at 151. The reasoning, it goes, is that this "accommodation" of religious activity "will protect the privacy and safety of the home and yet preserve the substance of the religious freedom" to minimize the abrogation of freedom of religion. *Id.*

[185] District of Columbia v. Heller, 554 U.S. 570, 628–29 (2008).

[186] *Id.* at 628.

[187] *See id.* at 616 (quoting CONG. GLOBE, 39th Cong., 1st Sess., 1182 (1866) (statement of Sen. Pomeroy)).

[188] *Id.* at 624–25 (quoting State v. Kessler, 614 P.2d 94, 98 (1980) (alteration in original)). I do not attempt to relitigate the *Heller* decision or debate the merits of the individual, as opposed to collective, right to bear arms in this Article.

[189] *Id.* at 629.

[190] *Id.* Admittedly, it's somewhat odd why Justice Scalia used the conjunction "and" to connect the "hearth" with the "home" as especially protective of firearm possession. It is unclear why the brick or concrete slab, or general area in front of the fireplace, serves as a special spatial dimension under the Second Amendment. It does, however, conjure an historical conception of homes that is arguably outdated for the contemporary homeowner.

[191] *Id.* at 635 (alteration added).

household occupants, could "keep" and "store" firearms in their "homes" to be used in service.[192] This interpretation, less focused on the individual writ large, but on a special class of individuals such as militiamen, "surely would have been used to protect" possession of arms in the home.[193] But this did not mean, according to Justice Stevens, bearing arms to protect the hearth and home is guaranteed for all law-abiding citizens—only the citizens voluntarily committed to law enforcement.[194]

There is an intriguing intra-doctrinal connection across the Court's First and Second Amendment protections of the home. The *District of Columbia v. Heller* ruling found that the right to bear arms is not restricted to historic weapons any more than the freedom of speech is restricted to historic forms of communication.[195] Scholars point to parallels between how the Court interpreted the Second Amendment gun rights with its First Amendment "right to own and view adult obscenity [in the home]."[196] As Michael Dorf notes, the First Amendment, like the Second's "hearth and home" principle, "manifests a special concern with the protection of the home."[197] Darrell Miller, likewise, notes, "*Heller* signaled that the First and Second Amendments are cousins, and may be subject to similar limitations."[198] And as other scholars argue, the reach of the Second Amendment right to keep and bear arms for self-defense, similar to the reach of the First Amendment right to possess and enjoy smut, "should be limited to the home."[199] Both are rights that should arguably "end at the doorstep."[200] The core of this parallel is the Court's interpretation of the "right of the people" to mean an individual and personal right to assemble and petition.[201] That same clause was viewed similarly under the Second Amendment's "right of the people."[202] As Justice Scalia explained, "[t]he First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets . . . . The Second Amendment is no different."[203]

Some scholars, like Elaine Scarry, note that the Second Amendment is a "very great amendment, and coming to know it through criminals . . . seems the equivalent of knowing the First Amendment through pornography."[204] Others, such as Joseph Blocher, argue that the First and Second Amendments are doctrinally analogous and

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[192] *Id.* at 650.
[193] *Id.* at 651.
[194] *Id.* at 652.
[195] *Id.* at 582.
[196] *See* Miller, *supra* note 29, at 1278.
[197] *See* Dorf, *supra* note 99, at 232.
[198] *See* Miller, *supra* note 29, at 1281.
[199] *Id.* at 1296.
[200] *Id.* at 1299.
[201] District of Columbia v. Heller, 554 U.S. 570, 579–81 (2008).
[202] *Id.*
[203] *Id.* at 624–25.
[204] Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms*, 139 U. PA. L. REV. 1257, 1268 (1991).

can serve as interpretive resources for the Court.[205] These comparisons allude to Justice Scalia's interpretive link between the First and Second Amendment in *Heller*, explaining that modern forms of communications and modern forms of firearms are both protected by the amendments.[206]

The Court has heard few Second Amendment cases since its landmark *Heller* decision. The Court incorporated the Second Amendment under the Fourteenth Amendment in its *McDonald v. Chicago* decision several years after *Heller*.[207] The Court's recent decision in *New York State Rifle & Pistol Association, Inc. v. Bruen* affirmed *Heller* and expanded the reach of the individual right to bear arms by reading the text, history, and tradition to protect the right to carry for self-defense outside the home.[208] However, the Court has not set forth exceptions or alternative doctrines that minimize or weaken the protections to the home.

E. Soldiers

While the Second Amendment creates an atextual zone protecting gun possession and activity inside the "hearth and home," the Third Amendment grants homeowners special textual protections from soldiers being quartered in the home during times of peace without homeowners consent.[209] The Third Amendment states that "[n]o Soldier shall, in time of peace be quartered in any house, without the consent of the Owner."[210] The Amendment "explicitly protect[s] 'houses' from needless and dangerous intrusions by governmental officials."[211] The early debates at the founding had little, if any, reason to dispute the addition of an anti-quartering clause,[212] which was supported by the States.[213] The Court, likewise, has said very little about the Amendment as well. In fact, the Court has addressed the Third Amendment only a few times. In *Youngstown Sheet & Steel Co. v. Sawyer*, the Court explained that the "Third Amendment [mandates] . . . in war time [any] seizure of needed military housing . . . be authorized by Congress."[214] In *Griswold v. Connecticut*, Justice Douglas's opinion noted that the prohibition of quartering soldiers "in any house" during times of peace is "another facet of that privacy."[215]

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[205] Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 375–76 (2009).

[206] *Heller*, 554 U.S. at 624–25.

[207] McDonald v. Chicago, 561 U.S. 742, 742 (2010).

[208] N.Y. Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2111 (2022).

[209] U.S. CONST. amend. III.

[210] U.S. CONST. amend. III.

[211] *See* Amar, *The Bill of Rights*, *supra* note 59, at 1175.

[212] *See* Sprankling, *supra* note 29, at 128.

[213] *Id.*

[214] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 644 (1952) (Jackson, J., concurring).

[215] 381 U.S. 479, 484 (1965).

Some scholars argue that the home-centric protections were imposed in the Amendment in response to the post–Revolutionary War era, when it was understood that the Third Amendment served as a homebound bridge between the "home-centric Second Amendment and a Fourth Amendment that was from the beginning protective of the private domain."[216] It is unclear, however, from history, text, or doctrine whether the Third Amendment's home protections are meant to cover property, people, or both.[217] One interpretation points to a property protection, because a basic textual reading shows the text expressly stating soldiers may not be "quartered in any house."[218] Further, the underlying concern of the Amendment was to minimize military oppression.[219] If so, it is reasonable to interpret that the "home deserved special protection from government intrusion."[220] Some scholars argue that the Third Amendment "provides [the] benchmark for regulatory takings."[221] The homeowner's property becomes temporarily occupied, and, arguably, its value reduced.[222] Likewise, the Third Amendment's text and history arguably suggests a strong preference for and special protection to the homeowner because it gives the owner of any "house" (and presumably not non-residential property) the right to refuse to "quarter[]" soldiers during "peace[time]."[223]

F. Searches & Seizures

The Fourth Amendment's search and seizure clause is, like the Third Amendment, a space within the Constitution where the text and doctrine establish a special protection to the home. However, unlike the Third, the Fourth has enjoyed significant doctrinal developments since its ratification. The text states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ."[224] The Supreme Court has exercised great liberty in reading this language. It has filled in procedural and substantive gaps not readily identifiable in the text and has set forth a doctrine of special protections to the home like its Bill of Rights counterparts. But, as discussed at length in Part III, the Amendment, unlike other special home protection doctrines in the Bill of Rights, has

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[216] AMAR, *supra* note 1, at 267.

[217] Geoffrey M. Wyatt, *The Third Amendment in the Twenty-First Century: Military Recruiting on Private Campuses*, 40 NEW ENG. L. REV. 113, 132–33 (2005).

[218] *Id.* at 132.

[219] *Id.* at 132 n.94.

[220] *See* Sprankling, *supra* note 29, at 131.

[221] *See* Eugene Kontorovich, *The Constitution in Two Dimensions: A Transaction Cost Analysis of Constitutional Remedies*, 91 VA. L. REV. 1135, 1168 (2005).

[222] *Id.*

[223] U.S. CONST. amend. III.

[224] U.S. CONST. amend. IV.

one of the most robust patchworks of doctrinal exceptions that severely exclude home protections from searches and seizures.[225]

The Court's ruling in *Payton v. New York* laid the modern day doctrinal foundation for a homebound Fourth Amendment.[226] There, the Court found that warrantless arrests in the home are unconstitutional.[227] It was the nature of the "physical entry of the home" that made the encroachment a "chief evil against which the wording of the Fourth Amendment is directed" and presumptively unreasonable.[228] The Court leaned into its privacy principles in carving out the legal boundaries of the home to which police could not broach without a warrant.[229] Like the Court's great care for the home as a place for private retreat, the Court found the "zone of privacy [is nowhere] more clearly defined" when the "physical dimensions" of the home are at issue.[230] A nonconsensual invasion of the home without a warrant is, as Justice Stevens wrote, per se unconstitutional.[231] The Court's use of "invasion" invokes a hypersensitivity to the act of entering the home.[232] It also evokes a sense of attack and fear.[233] Indeed, "the right of a [person] to retreat into [the] home and thereby be free from unreasonable governmental intrusions" includes protecting seizing property and seizing people.[234]

The academic and judicial debate surrounding the history and function of the search and seizure clause is still alive and well. The Court has approached the textual interpretations of the Fourth Amendment similarly to how it does in the First and Second Amendments. The First Amendment protects modern forms of communication.[235] The Second Amendment, likewise, protects and extends to modern forms of bearable arms.[236] As a result, the Court has tied the three together, explaining that the Fourth Amendment also applies to modern forms of search.[237] And, like the First and Second Amendments, there continues to be a great debate as to the function and purpose of the Fourth Amendment's protections as between privacy and property.[238]

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[225] *See infra* Part III.

[226] Payton v. New York, 445 U.S. 573, 590 (1980) ("In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house.").

[227] *Id.*

[228] *Id.* at 585 (citation omitted).

[229] *Id.*

[230] *Id.* at 589.

[231] *Id.* at 586.

[232] *Id.* at 581.

[233] *Id.*

[234] *Id.* at 590.

[235] *See, e.g.*, Reno v. ACLU, 521 U.S. 844 (1997).

[236] District of Columbia v. Heller, 554 U.S. 570, 582 (2008).

[237] Kyllo v. United States, 533 U.S. 27, 35–36 (2001).

[238] *See, e.g.*, Nirej Sekhon, *Purpose, Policing, and the Fourth Amendment*, 107 J. CRIM. L. & CRIMINOLOGY 65 (2017); Ricardo J. Bascuas, *Property and Probable Cause: The Fourth Amendment's Principles Protection of Privacy*, 60 RUTGERS L. REV. 575 (2008).

The proverbial "right to be let alone" underlies the Fourth Amendment's protection of a right to privacy.[239] Those privacy concepts and norms were built into the doctrine to protect activity within the home "precisely because it provides . . . [and delivers] privacy"[240] that is expected and established by "general social norms"[241] and "custom."[242] The "privatization" of the doctrine seeks to value "an individual's comfort, dignity, tranquility, respectability, and fear of embarrassment."[243] Here, "widely shared social expectations" and "customary social understanding" have traditionally shaped the Court's determination in a variety of Fourth Amendment cases, including those involving invasion into the home.[244] But those expectations and understandings employed by the Court were influenced by outside sources, such as concepts of real or personal property.[245] As I will discuss at length in Part III, real and personal property concepts have played an important role in developing exceptions that diminish home protections from searches and seizures.[246]

Some scholars argue that the search and seizure doctrine reflects a long-standing approach that "residential privacy rights are both psychologically and politically vital."[247] Stephanie Stern has posited that there exists an over-emphasis on the property-related features of the Fourth Amendment jurisprudence at the expense of the traditional notions of privacy, and as a result, has produced protections far "too strong" and "too blunt" for residential spaces, including the home.[248] In other words, an imbalance appears in Fourth Amendment jurisprudence that weakens privacy rights while strengthening property rights due to an overwhelming focus on "privileging the physical home" to attend to personal and political interests.[249] In fact, Stern argues that an over-emphasis on the physical home as property undervalues and under-protects Fourth Amendment protections of "people," rather than "places."[250] The reasonable expectation of privacy may turn on whether the source of the reasonable expectation is "outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."[251] Such a conception has extended to viewing

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[239] Samuel D. Warren & Louis D. Brandeis, *Right to Privacy*, 4 HARV. L. REV. 193, 194 (1890).

[240] Minnesota v. Olson, 495 U.S. 91, 99 (1990).

[241] Robbins v. California, 453 U.S. 420, 428 (1981) (plurality opinion).

[242] James A. Bush & Rece Bly, *Expectation of Privacy Analysis and Warrantless Trash Reconnaissance After* Katz v. United States, 23 ARIZ. L. REV. 283, 293 (1981).

[243] Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 117 (2008).

[244] *Id.* at 107.

[245] Rakas v. Illinois, 439 U.S. 128, 143–44 n.12 (1978).

[246] *See infra* Part IV.

[247] *See* Stern, *supra* note 29, at 906.

[248] *Id.* at 908.

[249] *Id.*

[250] *Id.* at 911.

[251] Rakas v. Illinois, 439 U.S. 128, 143–44 n.12 (1978).

"open areas" as not analogous to the "curtilage" for purposes of aerial surveillance as residences have heightened expectations of privacy.[252] Such distinctions, some argue, "illustrate[ ] how home-search cases provide additional justification for limiting protection outside of the home."[253]

G. Sex

The constitutional thread of homebound protections located within the Bill of Rights extends from searches and seizures to sex-based doctrines that fall outside the scope of the Bill of Rights. While most of the Court's sex-related protections emanate from outside the scope of the Bill of Rights in the Fourteenth Amendment's Substantive Due Process and Liberty Clause, the protections are pulled into and moored by the Court's privacy principles within its Fourth Amendment doctrine. The origins of the Fourth Amendment's privacy protections extending to the Fourteenth Amendment derive from *Wolf v. People of the State of Colorado*.[254]

There, the Court stated, "[W]e have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment."[255] In other words, the Court announced the idea that security of privacy against arbitrary intrusion by the police is implicitly found in the concept of ordered liberty, and as a result, enforceable against the States through the Fourteenth Amendment's Due Process Clause.[256] Justice Black, in his concurring opinion, elaborated on the dynamic nature of the Fourth Amendment's protections that go beyond privacy.[257] He explained that "[S]pecific constitutional provisions [ ] are designed in part to protect privacy at certain times and places with respect to certain activities."[258]

The Court has expressly used the Fourth Amendment privacy principles to hook the protections of Fourteenth Amendment due process principles to a variety of other sex-based rights.[259] For example, concepts of liberty protect the right of married couples to buy and use contraceptives within the privacy of their home without government restriction.[260] The Court, as in other areas of the Bill of Rights, later granted further protections in the home by expanding these sexual privacy

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[252] Dow Chem. Co. v. United States, 476 U.S. 227, 239 (1986) (holding that open areas in an industrial plant spread over a large geographic area are not akin to the "curtilage" of a dwelling).

[253] *See* Stern, *supra* note 29, at 922.

[254] Wolf v. Colorado, 338 U.S. 25, 25 (1949).

[255] *Id.* at 28.

[256] *Id.*

[257] *Id.* at 39–40 (Black, J., concurring).

[258] Griswold v. Connecticut, 381 U.S. 479, 508 (1965).

[259] *See, e.g.*, *id.* at 479; Eisenstadt v. Baird, 405 U.S. 438 (1972).

[260] *Griswold*, 381 U.S. at 495.

rights to unmarried persons as well as married persons.[261] Similarly, the Fourth Amendment's privacy protections may tether Fourteenth Amendment protections to sodomy inside the home.[262]

In *Mapp v. Ohio*, the Court noted that the Fourth Amendment creates a "right to privacy, no less important than any other right carefully and particularly reserved to the people."[263] The Court further explained that "as to the . . . Fourth . . . the freedom from unconscionable invasions of privacy . . . do enjoy an 'intimate relation' in their perpetuation of 'principles of humanity and civil liberty (secured) . . . only after years of struggle.'"[264] The Court in *Griswold* likewise recognized prior case law that found the right to establish a home and raise children was an essential part of the liberty guaranteed by the Fourteenth Amendment.[265] There, Justice Douglas pushed the Court in the homebound direction by implicitly commingling the Third, Fourth, and Fourteenth Amendments, consecutively, to establish an overarching privacy interest in the home, quoting the "house" language in both the Third and Fourth Amendments.[266]

It was only a few years earlier, in *Poe v. Ullman*, that Justice John Marshall Harlan began to clarify and develop, in greater detail, the protection of privacy in the home.[267] He explained that the "concept of the privacy of the home receives explicit Constitutional protection at two places" in the Third and Fourth Amendments, and that the "crime [prohibition against possession and use of contraception] . . . is grossly offensive to this privacy . . . of the home."[268] Harlan cautiously drew a distinction between the physical invasion of the home and the regulatory invasion of the home.[269] He noted that "we have not an intrusion into the home so much as on the life which characteristically has its place in the home."[270] He extends the doctrinal hook of the Fourth to the Fourteenth Amendment, explaining that "if the physical curtilage of the home is protected, it is surely as a result of solicitude to protect the privacies of the life within" and that the "safeguarding of the home does not follow merely from the sanctity of property rights."[271] The home, Justice Harlan explained, "derives its pre-eminence as the seat of family life."[272] From there, the Court linked this special conception of the home to privacy, noting that:

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[261] *Eisenstadt*, 405 U.S. at 438.
[262] *See generally* Lawrence v. Texas, 539 U.S. 558 (2003).
[263] Mapp v. Ohio, 367 U.S. 643, 656 (1961).
[264] *Id.* at 657.
[265] *Griswold*, 381 U.S. at 495.
[266] *Id.* at 484.
[267] 367 U.S. 497, 549 (1960) (Harlan, J., dissenting).
[268] *Id.*
[269] *Id.* at 553.
[270] *Id.* at 551.
[271] *Id.*
[272] *Id.* at 551.

> [T]he 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. . . . Of this whole 'private realm of family life' it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations.[273]

The invitation of privacy concepts to protect activity in the home did not go unnoticed and without criticism, however. In *Griswold*, Justice Black's dissent argued that "it belittles [the Fourteenth] Amendment to talk about it as though it protects nothing but 'privacy.'"[274] To treat privacy in that manner would give it a "niggardly interpretation," instead of a liberal intervention for which Black believed the "Bill of Rights provision should be given."[275] The same conception of protections to sex within the privacy of the home born from the Fourth and linked to the Fourteenth was also built upon and extended to sodomy.[276] With language reminiscent of Justices Douglas and Harlan, Justice Kennedy attacked the criminalization of sodomy, noting that such laws would have "far-reaching consequences, touching upon the most private human contact, sexual behavior, and in the most private of places, the home."[277] Justice Kennedy then brought sodomy under the sex protections afforded between the Fourth and Fourteenth Amendments, noting that "[t]he liberty protected by the Constitution allows homosexual persons the right to choose to enter upon relationships in the confines of their homes and their own private lives and still retain their dignity as free persons."[278]

Justice Kennedy further honed in on the privacy dimensions of the home by implying privacy principles under the Fourth Amendment.[279] He also implicitly recognized the First Amendment's privacy protections in the home.[280] He explained, "[l]iberty 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."[281] With a nod to the First Amendment protections inside the home, he noted that, "[f]reedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of

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[273] *Id.* at 551–52.
[274] Griswold v. Connecticut, 381 U.S. 479, 509 (1965).
[275] *Id.*
[276] Lawrence v. Texas, 539 U.S. 558, 558 (2003).
[277] *Id.*
[278] *Id.*
[279] *Id.*
[280] *Id.* at 562.
[281] *Id.*

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."[282]

Kennedy also introduced the concept of "dignity" in establishing the right, noting that, "[i]t suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons."[283] Importantly, while *Lawrence* is framed to protect liberty, Kennedy's analysis of the constitutional right to sodomy in the privacy of the home has its origins in *Griswold* and is the "most pertinent beginning point" in the rights embodied in *Lawrence*.[284] Thus, it is arguably the case that *Lawrence*'s right to privacy in the bedroom of the house is based in *Griswold*'s protections to private decisions to choose and use contraception in the bedroom derived from the Fourth Amendment; then, it is reasonable to conclude that the Fourth Amendment tethers both *Griswold*'s and *Lawrence*'s pronouncements about homebound privacy protections to the Bill of Rights.

The privacy principles embedded in the Fourteenth Amendment, derived arguably from the Fourth Amendment, also create constitutional rights to "establish a home" and those that affect family.[285] In *Meyer v. Nebraska*, the Court recognized a constitutional protection to the right to "establish a home and bring up children."[286] Similarly, the Court in *Pierce v. Society of Sisters* struck down compulsory public education, thus laying the foundation for the establishment of a right of parents to educate their children through home-schooling. The Court in *Pierce* drew upon *Meyer*, explaining that "under the doctrine of *Meyer v. Nebraska*, [there is] liberty of parents and guardians to direct the upbringing and education of children under their control . . . ."[287] Likewise, in *Moore v. City of East Cleveland*, the Court invoked unenumerated rights and protections for extended family members to live together under a single household.[288] There, the need to protect the "sanctity of the family" was paramount, and thus government couldn't regulate the make-up of the family in a household.[289]

H. Self-Incrimination

The Fifth Amendment's self-incrimination clause provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ."[290] The

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[282] *Id.*
[283] *Id.* at 567.
[284] *Id.* at 564.
[285] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
[286] *Id.*
[287] Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925).
[288] Moore v. City of East Cleveland, 431 U.S. 494–95 (1977).
[289] *Id.* at 494.
[290] *See* U.S. CONST. amend. V.

Court's ruling in *Boyd v. United States* laid the homebound foundation by juxtaposing the Fourth and Fifth Amendments.[291] There, the Court explained that the amendments, along with their history and the Court's doctrine "almost [run] into each other."[292] The Fourth's search and seizures and the Fifth's self-incrimination clauses "apply to all invasions . . . of the sanctity of a man's home and the privacies of life."[293] The Court further elaborated, noting that "[i]t is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense—it is the invasion of his indefeasible right of personal security, personal liberty, and private property . . . ."[294] The Court converged several principles drawn upon throughout the Bill of Rights homebound protections, such as privacy, security, and property.

The Court, as with the First and Second Amendments, invoked spatial concepts of property by drawing a line at the doorstep, explaining that the "[b]reaking into a house and opening boxes and drawers are circumstances of aggravation."[295] However, the Court then turned to property, privacy, and security concepts when law enforcement enters the home.[296] There, the Court noted that "but any forcible and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of a crime, or to forfeit his goods" runs afoul to the Fourth and Fifth Amendments.[297] The aggravating nature of the search and seizure upon "forcible entry into a [person's] house and searching among his papers . . . accomplishes the substantial object . . . in forcing from a party evidence against himself."[298] While such a result would be lawful if executed with a warrant, the Court notes that warrantless searches and seizures that lead to evidence being taken and a person forced to testify against himself would be unconstitutional.[299] *Boyd*'s pronouncements protecting the home have been weakened over the years due to the Court's rollback of home protections under its search and seizure doctrine.[300] While *Boyd* established protection from self-incrimination in the home, and remained good precedent for decades, later Courts limited or negated its reach.[301]

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[291] Boyd v. United States, 116 U.S. 616, 630 (1886).
[292] *Id.*
[293] *Id.*
[294] *Id.*
[295] *Id.*
[296] *Id.*
[297] *Id.*
[298] *Id.* at 622.
[299] *Id.* at 630.
[300] *See* Katz v. United States, 389 U.S. 347, 357 n.19 (1967) (noting exceptions to requirement for a warrant).
[301] *See* Hale v. Henkel, 201 U.S. 43 (1906); *Katz*, 389 U.S. 347; Osborn v. United States, 385 U.S. 323 (1966); Berger v. New York, 388 U.S. 41 (1967); Marron v. United States, 275 U.S. 192 (1927).

I. Takings

The forgoing examination of the Bill of Rights has elicited an intriguing textual and doctrinal puzzle where a distinct thread has emerged that runs through the first five amendments, delineating the home as a zone in which rights emanating from speech, smut, gods, guns, soldiers, searches, sex, and self-incrimination enjoy special protections. However, the thread inexplicably unravels upon arriving at takings. The Fifth Amendment's text omits, and the Supreme Court doctrine excludes, a special zone of protections for the home.[302] Here, we find a rare and under-addressed schism between the first five amendments.

There are several ways to interpret and read the takings schism in the Bill of Rights. A textualist reading of coherence would arguably result in recognizing home protections only where the document expressly provides. That leaves the Third and Fourth Amendments as the textual safeguards of the home. Taken to its entire logic, a textual reading of a homebound Bill of Rights would not acknowledge or recognize special home protections emanating from rights involving speech, smut, gods, guns, soldiers, sex or self-incrimination and takings, because those rights do not expressly provide for heightened "house" safeguards. As I have explained in prior scholarship:

> [I]t is difficult to escape the predominantly "atextual nature of the Court's opinions" involving the home in the other amendments, and this suggests that the Court's lack of homebound limitations in its takings jurisprudence is evidence that it has failed to engage in the same atextual home-centric method of interpretation as its other home-centric doctrines in the Bill of Rights.[303]

The textual absence of a home protection in the Fifth Amendment is no less striking than the omission of special home protections in the Court's takings jurisprudence. It is noteworthy that the chasm is not one of degree, but kind. There are some differences in degree for how the Court interprets home protections from one amendment to the other. Privacy principles strongly shape the First Amendment's speech and smut doctrines, while privacy, property, and security principles influence the Court's guns doctrine.[304] The Third Amendment's protections from quartering soldiers arguably rests on property liability and property rule concepts as opposed to privacy, while the Fourth Amendment's doctrine purportedly focuses on people (privacy), as opposed to places (property).[305] Those differences in degree shape what is a robust set of home protections throughout the Bill of Rights. With takings, it is

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[302] *See* Dickinson, *Puzzle of the Constitutional Home*, *supra* note 1, at 1116.
[303] *Id.* at 1136.
[304] *Id.* at 1109–11.
[305] *Id.* at 1112–13.

the opposite. It is a distinction in kind. Neither the text nor the doctrine provides for any special protections to homes.[306] There is nothing to compare or contrast with the other amendments other than the sheer absence.

As I have pondered elsewhere, "[i]t would seem that even if the Fifth Amendment textually lacks the word 'home' or 'house,' unlike the Third and Fourth Amendments, protections to the house could still be read into the Court's takings doctrine."[307] But that has not been the case. A "general limitation [on taking homes] has not developed" under modern takings jurisprudence.[308] Some scholars argue that it is "anomalous" that "some explicit protection to family homes from government taking[s]" has not been crafted by the Court.[309] Others note that the absence of an "implied limitation on the eminent domain power" to take a "special class of property like a family home . . . unless the government shows a 'compelling state interest'" and can show that the taking is the "least intrusive alternative."[310] When viewed in light of the other protections to homes in the rest of the Bill of Rights, the absence in takings is quite odd.

It is a similar interpretive method that allowed Justice Scalia, in part, to read a right to bear arms in the hearth and home into the Court's Second Amendment jurisprudence. Other Justices have copied a similar argument from the Scalia playbook to make the case for a special homebound protection under the Takings Clause.[311] In his *Kelo v. New London* dissent, Justice Thomas, like Scalia, pointed to the Fourth Amendment as evidence of a link to home protections under its Fifth Amendment neighbor.[312] He explained that "elsewhere [in the Fourth Amendment we] recognized 'the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic,'" and that "[t]hough citizens are safe from the government in their homes, the homes themselves are not."[313] I will return to this point, showing that the Court has, contrary to Justice Thomas's belief, quietly rolled back home protections under its search and seizure doctrine. But for now, Justice Thomas further noted that the government physically taking and tearing down a home is an "infinitely more intrusive step [than unlawfully searching a home]."[314] He then equates the overriding sanctity of the home and prohibitions against warrantless home searches and seizures with the specter of the government physically seizing and expropriating the home.[315] Justice Thomas concludes by

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306 *Id.* at 1102, 1104.
307 *Id.* at 1118.
308 Radin, *supra* note 2, at 1006.
309 *Id.*
310 *Id.* at 1005–06.
311 *See* Kelo v. City of New London, 545 U.S. 469, 518 (2005) (Thomas, J., dissenting).
312 *See id.*
313 *Id.*
314 *Id.*
315 *Id.*

reminding the majority that the Court has long recognized "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic,"[316] and that the Court's zone of home protections is inconsistent when "citizens are safe from [police searches] in their homes, [but] the homes themselves are not."[317]

Part of the reason for the discord between takings and the rest of the Bill of Rights home-centric text and doctrines is that the Court has recognized eminent domain takings as economic legislation and regulation subject to rational basis review, as opposed to fundamental rights-based protections to privacy that receive heightened scrutiny, most commonly strict scrutiny.[318] Because the Takings Clause has been interpreted as both a property liability (just compensation) and property rule (public use), the privacy, security, and personhood dimensions realized throughout the rest of the Bill of Rights puts the Takings Clause as an unlikely option for special protections.[319] Further, in the post-*Lochner* era, the Court's deference to government takings under its public use test effectively made the Takings Clause homeless.[320] The Court, in effect, "failed to engage in the same atextual home-centric method of interpretation as its other home-centric doctrines in the Bill of Rights."[321] But, as I have argued elsewhere, the privacy and property dichotomy does not foreclose the Court from creating some special analytical protection to takings of home, whether under the public use rubrics, just compensation requirements, or some other blend of takings and equal protection doctrine to elevate the home.[322] For example, the Court could impose different just compensation requirements where the litigant is a homeowner.[323]

III. DOCTRINAL REGRESSION

Part III explores the Court's regression and retreat from home protections under its homebound search and seizure doctrine. This retrenchment stands in stark contrast to the harmony of home protections throughout the rest of the Bill of Rights. Indeed, American constitutional law has long suffered from criticisms of inconsistency and incoherence, including the methodological and interpretive pluralism present within the Supreme Court and its impact on the institution's application of stare decisis. While the modalities of constitutional interpretation have attempted to

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316 *Id.*

317 *Id.*

318 *See* Dickinson, *Puzzle of the Constitutional Home*, *supra* note 1, at 1123–29.

319 *Id.*

320 *Id.*

321 *Id.* at 1136.

322 Gerald S. Dickinson, *State Constitutional General Welfare Doctrine*, 40 CARDOZO L. REV. 2941, 2963 (2019) [hereinafter Dickinson, *State Constitutional General Welfare Doctrine*]. *See also* Dickinson, *Puzzle of the Constitutional Home*, *supra* note 1, at 1140, 1146.

323 *See* Dickinson, *State Constitutional General Welfare Doctrine*, *supra* note 322, at 2961.

cabin Justices' policy, political, and personal inhibitions, those same methodologies have created patchworks of rulings, doctrines, and precedents that are often obtuse, disorienting, and, sometimes, contradictory. That the Court has managed to harmonize a sliver of the text and doctrine, at least within the first five amendments, is worthy of praise, even if one disagrees with the substantive nature of special home protections or opposes the methodological and analytical approaches that guided the Court towards constitutional consonance. But good things—like constitutional harmony, coherence, and symmetry—do not last forever. There are, inevitably, instances of disharmony once we take a closer look at the remaining pieces to the puzzle.

The Court's search and seizure doctrine, like the others, has established a baseline protection to "houses" from the constitutional text, but has further developed such protections starting with its ruling in *Payton*.[324] However, the Fourth Amendment's "home protection is not absolute" and does not "presume total protection."[325] The same can be said for home-centric protections in the other amendments in the Bill of Rights.[326] The Court, however, has engaged in a concerted and systematic effort to roll back protections to the home under the Fourth Amendment by crafting a patchwork of exceptions that, taken together, limit special protections to the home in a variety of contexts.[327] This Part surveys those exceptions, including plain view, protective sweeps, open fields, third-party consent, administrative searches, welfare searches, probation searches, and mobile homes. These doctrinal exceptions and jurisprudential deviations have shrunk the safeguards outside and inside the home, both privately and physically, under the Fourth Amendment to a shadow of its former textual self.[328] But why has the Court's home protections under its search and seizure doctrine "buckled under the force of its rhetoric"[329] in the Fourth Amendment, but nowhere else in the Bill of Rights? What gives?

It is noteworthy that the chasm between takings and the rest of the Bill of Rights is not one of degree, but instead, kind. Takings has no textual and doctrinal home protections.[330] The other amendments do.[331] There are, however, some differences

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[324] The Court did recognize special home protections prior to the *Payton* ruling, but *Payton* was the most explicit ruling setting forth boundaries and limitations on warrantless searches and seizures in the home. *See* Dickinson, *Puzzle of the Constitutional Home*, *supra* note 1, at 1138–39.

[325] Stern, *supra* note 29, at 917.

[326] *See generally* Dickinson, *Puzzle of the Constitutional Home*, *supra* note 1 (discussing home-centric protections under the Bill of Rights).

[327] *See generally id.*

[328] *See generally id.*

[329] Stern, *supra* note 29, at 918. As Stephanie Stern writes, "It may be the case that residential search doctrine has buckled under the force of its rhetoric and the steep costs to law enforcement of takings precedents strictly at their word." *Id.*

[330] *See* Dickinson, *Puzzle of the Constitutional Home*, *supra* note 1, at 1116.

[331] *Id.* at 1116–17 ("[T]he Court's takings doctrine is devoid, unlike its homebound counterparts, of any special interest in or unique protection to the home.").

in degree in how the Court interprets and applies home protections from one amendment to the other. While the Supreme Court has maintained and, on occasion, expanded special protections to the home in its speech, smut, gods, guns, soldiers, sex, and self-incrimination thread of Bill of Rights jurisprudence, it has, on the other hand, regressed in its special protections to the home under its searches and seizures doctrine, or at the very least, included a litany of exceptions that have, unlike the other amendments, weakened protections to the home.[332]

The subtle trend of retrenchment masks the underlying stripping of home protections, because where the Court inches backwards on home protections in one case, it may rhetorically reaffirm the basic tenets of special home protections in a different context in a different case. This gives the illusion—a doctrinal disguise—that the Court has remained wed to its long-standing doctrinal baseline protections to the home that emanate from the text of the Fourth Amendment. But the Court's rulings and precedent are anything but.

It is unclear why the Court has slowly embarked on this subtle doctrinal regression.[333] The break in the trend towards harmony and coherence elicits intriguing questions about why the Court has done this in the Fourth Amendment, but nowhere else in the Bill of Rights. A secondary, but equally important question, is why the Court actively rolls back home protections in the Fourth, but nowhere else? How does the Court justify its Fourth Amendment legal cacophony with the other Bill of Rights? What impact does the retreat have on interpretive methodologies, followed by many current Justices, that espouse consistency? What effect does this have on theoretical applications that value coherence? And to what extent does the roll back in homebound protections in the search and seizure jurisprudence contribute to or directly cause law enforcement policies and practices to undermine privacy, security, and freedom of disadvantaged communities? These questions are addressed in Parts IV and V.

A. The Development of the Fourth Amendment's Home Protections

The advent of the Fourth Amendment jurisprudence witnessed the Supreme Court embrace property concepts as the basis for protection from unreasonable searches and seizures.[334] The "search" and "seizure" rules also constitute liabilities.[335] The two are conceptually distinguishable, but the practical exercise of both by government, especially law enforcement, serves as the basis for "endless

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[332] *See id.* at 1107–16 (reviewing the protections and expansion of protections to rights within the home).

[333] *See infra* Part IV (discussing observations and explanations for the discord).

[334] *See* Boyd v. United States, 116 U.S. 616, 622; Adams v. New York, 192 U.S. 585, 598 (1904).

[335] *See* Horton v. California, 496 U.S. 128, 133 (1990).

litigation."[336] The Court's search and seizure doctrine is the "prototypical and . . . most commonly litigated area of protected privacy [that enjoys] . . . a ready criterion . . . of the minimal expectation of privacy . . . ."[337] The arrest warrant and search warrant traditionally produce the probable cause requirement necessary for judicial review.[338] However, there is a difference in the interests protected by each warrant.[339] The arrest warrant targets a person who committed a crime, but its purpose is to protect that person from unreasonable seizures.[340] The search warrant, on the other hand, is available to law enforcement to find and search a person who is spatially located in a specific place.[341] But the search warrant also protects the person's privacy interests and possessions inside his home.[342] Those protections, under the Court's case law, also extend to home arrests, home surveillance, and the curtilage around or near the home.[343]

The Court established a doctrinal baseline proposition, derived from the text of the Fourth Amendment, that individuals have a right "to be secure in their . . . houses . . . against [warrantless and] unreasonable searches and seizures" unless law enforcement have probable cause.[344] The home, the Court stated, is the "apex" of protection, in part, because of the rights associated with and linked to ownership of property includes the right to exclude.[345] This baseline rule has been interpreted countless times by the Supreme Court in its voluminous search and seizure precedent. A significant portion of the Court's doctrine has sought to delineate the boundaries of privacy and property principles. As Justice Harlan's dissent in *Poe v. Ullman* explained, "the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life."[346] And as Justice Kennedy wrote, it is "beyond dispute that the home is entitled to special protection as the center of the private lives of our people."[347] Indeed, many cases address the "centuries-old principle"[348] of respect for the privacy of the home and the "ancient adage that a man's house is his castle."[349] The person and property

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[336] Payton v. New York, 445 U.S. 573, 620 (1980) (White, J., dissenting).

[337] Kyllo v. United States, 533 U.S. 27, 28 (2000).

[338] Steagald v. United States, 451 U.S. 204, 212 (1981).

[339] *Id.* at 212–13.

[340] *Id.* at 213.

[341] *Id.*

[342] *Id.*

[343] Payton v. New York, 445 U.S. 573, 576 (1980) (requiring warrants for home arrests but not for arrests outside the home).

[344] *Id.* (quoting the Fourth Amendment).

[345] *See* Alderman v. United States, 394 U.S. 165, 171 (1969); Mincey v. Arizona, 437 U.S. 385, 390, 393–94 (1978); *Payton*, 445 U.S. at 591–92 (1980).

[346] 367 U.S. 497, 551 (Harlan, J., dissenting).

[347] Minnesota v. Carter, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring).

[348] Wilson v. Layne, 526 U.S. 603, 610 (1999).

[349] Miller v. United States, 357 U.S. 301, 307 (1958).

concepts underlying the search and seizure doctrine have been vexing issues for the Supreme Court.

In *Katz v. United States*, the Court wrote that the amendment "protects people, not places"[350] to distance its analytical approach from the traditional property-centered conception to one that focused on reasonable expectations of privacy. *Katz* rhetorically discarded the physical trespass requirements previously followed by the Court, thereby permitting electronic surveillance of homes, but subjecting the practice to the Fourth's protections.[351] The Court's later cases, such as *Kyllo v. United States*, reaffirmed this proposition, finding that the use of thermal imagers by law enforcement to scan the inside of a home was a search for purposes of the Fourth Amendment, and that a person still enjoys a minimal expectation of privacy against such practices, especially when the device is not in general public use.[352] The Court in *Kyllo* also stressed how highly technological searches could allow law enforcement to decide "at what hour each night the lady of the house takes her daily sauna and bath—a detail that many would consider 'intimate.'"[353] The Court's doctrine has gradually peered into the nature and context of the interests intruded upon by the government to determine whether a warrant was necessary to justify an invasion.[354] Orin Kerr elaborated on the property-privacy paradigm, noting that there has been a long persistence of the Court's search and seizure jurisprudence to lean on property concepts to shape the doctrine, even if the Court's rhetoric says otherwise.[355] Some Justices, at other times, have drifted away from privacy and property conceptions and into the realm of rights to security.[356] Justice Kennedy in *Minnesota v. Carter*, for example, wrote a concurring opinion reasoning that the homebound protections under the Court's search and seizure jurisprudence have "acquired over time a power and an independent significance justifying a more general assurance of personal security in one's home, an assurance which has become part of our constitutional tradition."[357]

The Court, however, has bifurcated privacy and property in other contexts. For example, in *Horton v. California*, the Court said a "search" entails a person's interest in privacy, while a "seizure" strips a person of dominion over property.[358] In *United States v. Dunn*, the Court reaffirmed a special protection for the curtilage around home.[359] Likewise, in *Florida v. Jardines*, Justice Scalia explained the right

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[350] Katz v. United States, 389 U.S. 347, 351 (1967).
[351] *Id.* at 350–51.
[352] 533 U.S. 27, 40 (2000).
[353] *Id.* at 38.
[354] *See* Kerr, *supra* note 27, at 813.
[355] *See id.* at 809–27.
[356] *See* Minnesota v. Carter, 525 U.S. 83, 99–100 (1998) (Kennedy, J., concurring).
[357] *Id.* at 100.
[358] Horton v. California, 496 U.S. 128, 133 (1990).
[359] 480 U.S. 294, 296 (1987).

to retreat into the home for protection from unreasonable intrusion is the core of the Fourth Amendment, and thus a porch constitutes curtilage as "part of the home itself" deserving of protections.[360] The porch, Scalia argued, is intimately connected to the home physically and psychologically, where "privacy expectations are most heightened."[361] Following *Jardines*, the Court found enclosed portions of driveways tantamount to curtilage and ruled that the automobile exception did not justify law enforcement's invasion of such an intimate space adjacent to the home.[362]

As for intrusions into the home, Justice Stevens wrote in *Payton v. New York*, "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."[363] In *Silverman v. United States*, the Court reiterated the sanctity of the home concept, explaining that "[a]t the very core [of search and seizure doctrine] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."[364] Even tenants, under the Court's homebound sensitivities, enjoy "special" protections.[365] In *Chapman v. United States*, the Court announced that tenants have Fourth Amendment protections from law enforcement searches consented by the landowner.[366] Likewise, a hotel manager cannot consent to a search of the temporary "home" of a guest's hotel room.[367] Overnight house guests, too, have expectations of privacy and thus Fourth Amendment protections in the temporary nature of their stay.[368]

The Court has also embraced textual and doctrinal home protections in *Steagald v. United States*.[369] There, a Fourth Amendment violation occurred when police entered the home with an arrest warrant for a guest, but no search warrant for the premise.[370] The Court expounded that while the arrest warrant protected the homeowner from "an unreasonable seizure, it did absolutely nothing to protect [the owner's] privacy interest in being free from an unreasonable invasion and search of his home."[371] Without exigent circumstances, Justice Marshall wrote, there was no justification to enter "a person's home to arrest him without a warrant, or a search of a home . . . ."[372] Perhaps most importantly, Justice Marshall ended this inquiry

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360 569 U.S. 1, 6 (2013).
361 *Id.* at 7.
362 Collins v. Virginia, 138 S. Ct. 1663, 1671 (2018).
363 445 U.S. 573, 590 (1980).
364 365 U.S. 505, 511 (1961).
365 Chapman v. United States, 365 U.S. 610, 616–17 (1961).
366 *Id.*
367 Stoner v. California, 376 U.S. 483, 490 (1964).
368 Minnesota v. Olson, 495 U.S. 91, 96–97.
369 451 U.S. 204, 211–13 (1981).
370 *Id.* at 215–16.
371 *Id.* at 213.
372 *Id.*

with the following: "We see no reason to depart from this settled course when the search of a home is for a person rather than an object."[373] Marshall elaborated on this point. He reiterated the "plain wording" of the Fourth Amendment before clarifying that the text does not permit a warrant exemption when the "search of a home is for a person rather than for a thing."[374] Indeed, it didn't matter if the entry was for a search or arrest; law enforcement must have a warrant, absent exigent circumstances.[375] It was clear to Justice Marshall and the Court that third parties, absent a reasonable expectation of privacy inside another person's home, cannot borrow the Fourth Amendment's protections from searches and seizures from the homeowner as a shield against law enforcement,[376] even though the home still served as a "castle or privilege" for the residents.[377]

The Court's decision in *Hayes v. Florida* is equally telling of the Court's initial adherence to home protections.[378] There, a constitutional violation arose when police arrived at and entered a suspect's home to remove and take him to a police station for fingerprinting.[379] The Court was adamant about resting its decision on the foundation laid out in prior decisions.[380] The "line is crossed when the police forcibly [and involuntarily] remove a person from his home . . . and transport him to the police station."[381] Justice Byron White was careful to closely track the Court's precedent in *Payton*, writing that not even reasonable suspicion or probable cause would permit police to enter a home with the intent to obtain fingerprints without a warrant.[382]

The privacy and property distinction in search and seizure cases has been the focal point of the Court's efforts to grapple with the rights of persons involved and the extent of the police power.[383] In *Warden v. Hayden*, the Court reiterated its stance that "[t]he premise that property interests control the right of the Government to search and seize has been discredited."[384] The Court sought to quell debate on the property-related conceptions of the Fourth's home protections, writing that "[w]e have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts."[385] But, as this Article reveals, the

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[373] *Id.* at 214.
[374] *Id.* at 214 n.7.
[375] *Id.* at 216.
[376] *See* Rakas v. Illinois, 439 U.S. 128, 156–57 (1978) (White, J., dissenting) (Marshall, J., joining in dissent).
[377] *Steagald*, 451 U.S. at 219.
[378] 470 U.S. 811, 816 (1985).
[379] *Id.* at 813.
[380] *Id.* at 815–16.
[381] *Id.* at 816.
[382] *Id.* at 817.
[383] Stern, *supra* note 29, at 915–16.
[384] Warden v. Hayden, 387 U.S. 294, 304 (1967).
[385] *Id.*

Court has leaned on property concepts that run afoul to the proverbial "practice what you preach" idiom in its search and seizure doctrine.

For all the "sanctity of the home" rhetoric practiced by the Supreme Court in its search and seizure doctrine, there is evidence of a subtle rollback of home protections unlike anywhere else in the Bill of Rights.[386] An examination of the Court's jurisprudence reveals a Court that has rhetorically and doctrinally committed to strong protections of expectations of privacy inside the home and at times affirmed that rhetoric with forceful rulings validating the textual protections to the "house."[387] However, there is a curious line of rulings and exceptions within the Court's search and seizure doctrine that illustrates an eagerness amongst members of the Court to flout a significant portion of the Constitution's textual protections to the home in ways that run contrary to the principle of the "sanctity of the home."[388] The retrenchment is quite noticeable when the Fourth Amendment exceptions to home protections are observed in relation to other home protections afforded across the Bill of Rights.

B. Regression and Exceptions

It is well-established that the Supreme Court's search and seizure jurisprudence protects, at a minimum, the home as commanded by the text under the Fourth Amendment.[389] Those protections, however, are not absolute.[390] As some scholars argue, "[c]ontrary to constitutional intuition, residential search protection does not provide citizens an effective haven from the reach of government."[391] Indeed, "there are chinks in the [Court's] doctrinal armor . . . [because the Fourth Amendment] does not presume total protection."[392] But the homebound protections in the First, Second, Third, or Fifth Amendments also do not presume total protection.[393] An individual cannot possess and enjoy child pornography in the home.[394] A person with a felony record or a person suffering from severe mental illness may have federal limitations placed on their right to possess firearms in the home.[395] But these are just a few examples within the Bill of Rights where there are exceptions to the general constitutional rules. In contrast to the Court's treatment of other amendments, the Court has significantly retrenched from the textual baseline of the Fourth Amendment and established a "variety of exceptions in tension with the Court's

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[386] Stern, *supra* note 29, at 915–17 (describing the evolution of Fourth Amendment precedents).

[387] *Id.* at 913–14.

[388] *Id.* at 917.

[389] *Id.* at 907.

[390] *Id.* at 907–08.

[391] *Id.* at 910.

[392] *Id.* at 917.

[393] *See supra* note 29 and accompanying text.

[394] New York v. Ferber, 458 U.S. 747, 764 (1982).

[395] District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008).

protectionist rhetoric" in the areas of plain view doctrine, protective sweeps, third-party consent, open fields, no-knock warrants, administrative searches, probation searches, welfare searches, and mobile home searches.[396]

1. Plain View

The plain view doctrine has become arguably one of the Court's exceptions that most threatens the stability and harmony of the homebound Fourth Amendment, and the harmony enjoyed across the rest of the Bill of Rights.[397] The doctrine allows law enforcement to search and seize items in the home, and elsewhere outside the home, incident to intentional or inadvertent observations of the home from the outside.[398] The practice still requires probable cause, but the justification for concluding probable cause is eased as police can position themselves in a manner that would make the "plain view" of potential criminal activity and items inside the home readily accessible.[399]

The underlying principle of the exception is that when law enforcement "has observed an object in 'plain view' the owner's remaining interests in the object are merely those of possession and ownership."[400] Here, property concepts underlie the exception.[401] The question whether "property in plain view . . . may be seized . . . must turn on the legality of the intrusion that enables them to perceive and physically seize the property in question."[402] The seizing of property in plain view does not violate the Fourth Amendment if there is "probable cause to associate the property with criminal activity."[403] The logic is that, once the officer has observed items involved in criminal activity in plain view, the requirement to obtain a warrant at that moment becomes "needless[ly] inconvenien[t]" because the criminal activity may pose a threat or danger to the general public, or the evidence may be destroyed.[404] However, at its inception, the plain view doctrine did not address how the practice would work in cases involving the home.

The Court did not elaborate on "what the Fourth Amendment demands before an officer may seize a visible item that he could not reach without . . . entering a private home . . . ."[405] Subsequent rulings, however, based in plain view principles have, nevertheless, weakened traditional notions of the sanctity of the home, because

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396 Stern, *supra* note 29, at 917.

397 *See, e.g.*, Texas v. Brown, 460 U.S. 730, 738–40 (1983) (creating the plain view doctrine in automobile contexts).

398 *Id.*

399 *Id.* at 739–40.

400 *Id.* at 739.

401 *Id.*

402 *Id.* at 737.

403 *Id.* at 738 n.4 (Stevens, J., concurring).

404 *Id.* at 739 (Stevens, J., concurring).

405 *Id.* at 747 n.4 (Stevens, J., concurring).

law enforcement can seize evidence in plain view if the officers are lawfully searching the area in and around the home with probable cause.[406] The Court has also determined that warrantless seizures of evidence found in the home incident to plain view observation by police is permissible even if not inadvertent.[407] The problem for occupants of homes and residences is that, once a search is initiated, almost everything comes into "plain view," and thus, the Fourth Amendment home protections are diminished.

2. Protective Sweeps

Some of the justifications for the Court's retreat from special home protections derives from general concepts of safety. Safety following an arrest inside the home underlies the Court's "protective sweep" exception.[408] In *Maryland v. Buie*, the Court held that limited protective sweeps following a lawful arrest inside the home is permitted if law enforcement have reason to believe that there is a person who threatens the safety of the area or poses a danger.[409] These searches are incident to an arrest, and thus presumably makes the after-the-fact search more justifiable.[410] But protective sweep exceptions arguably weaken the special home protections beyond what the constitutional text contemplated. The sweep could, if law enforcement wanted, extend to "unseen third parties in the house."[411] One could understand this logic to mean that the "house" in and of itself may hypothetically pose a security threat because the premise may harbor a third-party individual who was partaking in the illegal activity and therefore must be searched. This tweak in the doctrine opens the possibility that police could search, under the veneer of the protective sweep exception, the entire home of the arrestee with little to no probable cause, thus encroaching on the owner's privacy and private property rights.

The Court, in an effort to save face, cautioned that sweeps should not be full-fledged "top-to-bottom" search excursions into the home, but rather "a cursory inspection of those spaces where a person may be found" and no longer than necessary to deal with the lurking danger in the home.[412] In other words, the traditional high standard of probable cause was discarded for the "reasonable belief" test in circumstances where an officer has already made an in-home arrest of the owner-occupant.[413] As Justice William Brennan explained, "the special sanctity of a private residence [coupled with the] highly intrusive nature of a protective sweep" should

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406 Horton v. California, 496 U.S. 128, 142 (1990).
407 *Id.*
408 Maryland v. Buie, 494 U.S. 325, 334 (1990).
409 *Id.* at 327.
410 *Id.* at 333–34.
411 *Id.* at 336.
412 *Id.* at 335–36.
413 *Id.* at 336–37.

counsel the Court against abandoning the probable cause requirement ordinarily mandated for such searches.[414]

Like the protective sweep exception, the Court has endorsed the warrantless search of a home as an "incident to arrest" exception.[415] In *Harris v. United States*,[416] the Court sustained such practices, allowing an officer to make an in-home-arrest-turned-search of the occupant's home without a lawful warrant.[417] The Court, however, limited the practice in its *Chimel v. California* ruling, agreeing that "one result of [cases not limiting searches to the 'grabbing area'] is to give law enforcement officials the opportunity to engage in searches not justified by probable cause, by the simple expedient of arranging to arrest suspects at home rather than elsewhere."[418] The Court, modifying *Harris*, explained that searches of the suspect's "grabbing area" is permitted for fear of the destruction of evidence, but searches elsewhere in the home are unjustifiable.[419] Nevertheless, the search-incident to arrest exception makes it far easier for law enforcement to encroach into homes, a stark departure from the baseline home protections set forth in prior rulings.[420]

3. Open Fields

The open fields doctrine, although originally established as part of the long arch of special home protections, has an array of exceptions that arguably compromise home protections under the Fourth Amendment. The Court established a four-factor framework to ascertain whether an area is within the Fourth Amendment's home protections.[421] Intimate activities are those including "domestic life" and thus the curtilage surrounding the house is protected from warrantless searches and seizures if the area "harbors the intimate activity associated with the sanctity of a man's home and the privacies of life."[422] Likewise, the Court focuses on whether the area subject to inquiry is reasonably treated as a home.[423] However, there exists yet another exception to this rule.

In *California v. Ciraolo*, the Court laid out a curtilage exception by permitting aerial surveillance of backyards if the airspace is accessible to the public.[424] In fact, there is evidence that the Court and law enforcement often deem an "area an open field rather than curtilage" which has the effect of limiting privacy interests inside

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414 *Id.* at 343 (Brennan, J., dissenting).
415 Harris v. United States, 331 U.S. 145, 151 (1947).
416 *Id.*
417 *Id.*
418 395 U.S. 752, 767 (1969).
419 *Id.* at 762–63.
420 *See supra* Section III.A.
421 United States v. Dunn, 480 U.S. 294, 301 (1987).
422 *Id.* at 300 (internal quotations omitted).
423 *Id.*
424 California v. Ciraolo, 476 U.S. 207, 213–15 (1986).

and outside the home, making it easier for law enforcement to search and seize areas near or in close proximity to the home.[425] The result is lesser home protections due to discretion used by police to identify an area as an open field rather than curtilage.

4. Third-Party Consent

The Court has embraced a third-party consent exception to searches in the home. The pivot away from homebound protections permitted law enforcement to gather evidence from conversations or other activities in a person's home and allow co-habitants to consent to a search.[426] In *Illinois v. Rodriguez*, the Court held that a warrantless entry to search for drug evidence did not run afoul of the Fourth Amendment protections, even considering evidence that law enforcement reasonably—albeit erroneously—believed a cohabitant had authority to consent to the search.[427]

The Court announced this new exception in *Rodriguez* by declaring that the textual prohibition against warrantless unreasonable searches and seizures did not apply to voluntary consents from third party individuals who possess "common authority over the premises."[428] Justice Scalia explained the reason for the exception, writing that "common authority" means a "mutual use of the property" and "joint access or control" by two or more persons.[429] Thus, if police reasonably believed that one of the individuals is someone of common authority and receives consent to search by that individual, then the officer is permitted to enter, even if the individual turns out not to be a person of "common authority."[430] The problem with such an exception, beyond departing significantly from the baseline home protections, is that typically exceptions to the warrant requirement are granted if law enforcement has a "compelling" reason to do so.[431] However, in most circumstances, the reason for exercising the third-party consent is to circumvent the burden of the warrant requirement.[432] This exception, some argue, therefore gives law enforcement more power to abuse the baseline protections to the home by raising the third-party exception rule where an officer believes an occupant has "common authority."[433]

This exception has been modified over the years,[434] culminating in the addition of the "social expectation" principle rendered in *Georgia v. Randolph*.[435] The Court,

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[425] *See* Stern, *supra* note 29, at 914 n.35.

[426] *See* Kerr, *supra* note 27, at 828–31.

[427] Illinois v. Rodriguez, 497 U.S. 177, 186 (1990).

[428] *Id.* at 181.

[429] *Id.*

[430] *Id.* at 186.

[431] *Id.* at 190 (Marshall, J., dissenting).

[432] *Id.*

[433] Rodriguez, 497 U.S. at 190–91 (Marshall, J., dissenting).

[434] *See* Stoner v. California, 376 U.S. 483, 489–90 (1969); Frazier v. Cupp, 394 U.S. 731, 740 (1969); United States v. Matlock, 415 U.S. 164, 169–71 (1974); Schneckloth v. Bustamonte, 412 U.S. 218, 232–33 (1973).

[435] Georgia v. Randolph, 547 U.S. 103, 111 (2006).

while finding a warrantless search and arrest unreasonable, established a new standard within its third-party consent precedent by giving "great significance [] to widely shared social expectations, which are . . . influenced by the law of property, but not controlled by its rules."[436] Here, the extent to which an officer may engage in a warrantless arrest with probable cause is dependent upon "a function of commonly held understanding[s] about the authority that co-inhabitants may exercise in ways that affect each other's interests."[437] The problem with this line of reasoning, of course, is that what passes for "widely shared social expectations" is subject to differing social situations and environments that are influenced by race, religion, gender, social, and economic circumstances.[438] This is also apparent when analyzing activity traditionally exercised in the privacy of a residence or home. Indeed, the home engenders a zone of safety and security for individuals and families to exercise their culture, social status, and other markers of individualism and collective expression.[439] If anything, the social expectation exception derives from nothing more than the personal viewpoints of several Justices of the Supreme Court.[440] Further, it is disputable whether the social expectations inquiry is appropriate when the Court had previously settled on whether the individual had a "legitimate expectation of privacy."[441] But the Court went further with its social expectation inquiry in *Fernandez v. California* almost a decade after *Randolph*.[442] The rulings further minimized protections to the home by requiring an occupant of a house who seeks to object to a third-party consent search to be standing at the front door at the same time when the third-party guest is consenting to a search.[443]

5. Knock and Talk, Knock and Announce, and No-Knock Warrant

The Court has approved the police tactics called "knock and talk," "knock and announce," and the no-knock warrant. These practices, over time, have rendered yet another exception to the homebound protections under the Fourth Amendment.[444] For example, knock and talk involves police officers approaching the home and knocking on the door, without probable cause, to investigate a situation.[445] The situation is usually a consensual entry by police into the home. However, the practice sometimes morphs into a situation where an officer, upon entering the home, begins looking around inside and may see unlawful items or criminal activity, thus turning

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436 *Id.*
437 *Id.*
438 *Id.*
439 Stern, *supra* note 29, at 910.
440 *Randolph*, 547 U.S. at 115.
441 Rakas v. Illinois, 439 U.S. 128, 141–43 (1978).
442 Fernandez v. California, 571 U.S. 292, 303–06 (2014).
443 *Id.* at 306–07.
444 *See, e.g.*, Kentucky v. King, 563 U.S. 451 (2011).
445 *Id.* at 469–70.

into a plain view search.[446] Some scenarios involve officers seeing a handgun or illegal paraphernalia from the outside and then probing further by knocking on the door, luring an individual out of the house, arresting the person, entering, searching, and subsequently finding evidence deemed part of illegal activity.[447]

Knock and announce involves officers serving a search warrant. Here, officers are supposed to knock, announce, and wait a "reasonable" time for persons inside the home to answer the door before taking further steps towards forced entry. In these situations, officers may see items or activity that risks immediate danger or destruction of evidence, which then permits the officers to forgo the knock and announce or waiting period.[448] In *Wilson v. Arkansas*, the Court recognized the traditional importance of the announcement requirement.[449] But there were other redeeming law enforcement reasons to abandon the requirement, in part, because the practice presented dangers to officers or caused the destruction of evidence.[450]

The Court has endorsed the no-knock entry practice by law enforcement and approved its legitimacy under the Fourth Amendment.[451] In *Richards v. Wisconsin*, the Court explained that a justifiable no-knock entry into the home requires reasonable suspicion that "knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime . . . ."[452] The rule, which deviates from the probable cause requirement, arguably struck the correct balance between the privacy interests of the occupant of the home and the legitimate police concerns regarding criminal activity.[453] The Court, however, opened the door to potential abuse of the tactic, noting that while "showing [reasonable suspicion] is not high, [] the police should be required to make it whenever the reasonableness of a no-knock entry is challenged."[454] The problem with this loose standard is that, for the ordinary occupant of the home, the rule invites entry with less than reasonable suspicion if an officer is clever enough to articulate the dangers posed.[455]

Nonetheless, the practice is now universal at all levels of government. The no-knock warrant is also implicated in the knock and announce practices. There, when seeking a warrant, law enforcement must articulate special circumstances illustrating the dangers posed to knocking and announcing. A court may grant the warrant considering those special circumstances. The issue is that such warrants have enabled

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[446] *Id.* at 460 (citing United States v. Santana, 427 U.S. 38 (1976)).
[447] *Id.* at 460–63.
[448] Wilson v. Arkansas, 514 U.S. 927 (1995).
[449] *Id.* at 934.
[450] *Id.* at 934–35.
[451] *See* Richards v. Wisconsin, 520 U.S. 385, 394 (1997).
[452] *Id.* at 394.
[453] *Id.*
[454] *Id.* at 394–95.
[455] *Id.* at 395.

forced entries into homes that result in violence or the death of the occupants.[456] There have been countless instances of Black and Brown lives subjected to no-knock warrants that have garnered significant attention nationwide in the post–George Floyd era.[457] The practices are often targeted at marginalized communities with the effect of diminishing Fourth Amendment home protections based on class and race.[458] Likewise, the no-knock exception arguably runs afoul in many regards to the castle doctrine of home protections, where homeowners are at liberty to use force in self-defense without the need to retreat.[459] Homeowners enjoy a level of presumption in the use of force against invaders.[460] But if the invaders are law enforcement officers, then the castle and no-knock doctrines contravene each other in dangerous ways. Indeed, the increased militarization of American police forces gives rise to higher levels of community violence incident to no-knock warrants and poses dangerous threats to guests and third-party occupants of homes.[461]

6. Administrative Inspections

Administrative home inspections are another Fourth Amendment exception that scales back special protections to the home. In *Camara v. Municipal Court*, the Court announced that the government did not have to follow traditional probable cause to satisfy the "warrant" requirement, but instead, a warrant could be satisfied based on "reasonable legislative or administrative standards . . . ."[462] In other words, the Court presumed that probable cause "must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied . . . ."[463] And

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[456] Dara Lind, *Cops Do 20,000 No-Knock Raids a Year. Civilians Often Pay the Price When They Go Wrong*, VOX (May 15, 2015, 12:12 PM), https://www.vox.com/2014/10/29/7083371/swat-no-knock-raids-police-killed-civilians-dangerous-work-drugs [https://perma.cc/PFP8-8XYZ]; Candice Norwood, *The War on Drugs Gave Rise to 'No-Knock' Warrants. Breonna Taylor's Death Could End Them*, PBS (June 12, 2020), https://www.pbs.org/newshour/politics/the-war-on-drugs-gave-rise-to-no-knock-warrants-breonna-taylors-death-could-end-them [https://perma.cc/NMA9-LQX2].

[457] *See, e.g.*, Norwood, *supra* note 456; *Police Killing of Amir Locke Spurs More Protests in Minneapolis Amid Calls to End No-Knock Warrants*, CBS NEWS (Feb. 7, 2022, 10:58 AM), https://www.cbsnews.com/news/amir-locke-minneapolis-police-killing-protests-no-knock-warrant/ [https://perma.cc/5TKD-LULD].

[458] *See* Norwood, *supra* note 456.

[459] *See* Wex Definitions Team, *Castle Doctrine*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/castle_doctrine [https://perma.cc/9JXJ-6DZD] (last visited May 8, 2023).

[460] *Id.*

[461] *See* Norwood, *supra* note 456; Tonya Mosley & Serena McMahon, *Militarization of Police 'Ramped Up' After 9/11, 'Rise of the Warrior Cop' Author Says*, WBUR (Sept. 9, 2021), https://www.wbur.org/hereandnow/2021/09/09/post-9-11-policing [https://perma.cc/NX42-3Q3B].

[462] 387 U.S. 523, 538 (1967).

[463] *Id.*

in most cases, the Court assumes, there will be reasonableness, because the searches are not criminal in nature, but are for the public welfare.[464] This doctrinal move arguably weakens ordinary protections to residential spaces and occupants including those subject to state administrative building inspections and searches. At its height, the ruling effectively greenlights warrantless residential area inspections by government agencies with little, if any, forewarning. Similarly, the Court has found that apartments that adjoin each other are searchable within the meaning of the Fourth Amendment, notwithstanding the fact that only one of the premises is subject to the search warrant.[465]

7. Probation Searches

The Court has additionally carved out a "probation search" exception to its "house" protections, where state officials, including probation officers, are not required to retrieve a warrant nor do they need probable cause to conduct an administrative search of a probationer's home.[466] For example, law enforcement is not required to have a warrant or probable cause before entering a probationer's apartment. Reasonable belief of the presence of contraband, for example, is sufficient.[467] And so long as the search is incident to specific administrative responsibilities, the search satisfies the reasonable grounds requirement.[468] The Court, in *Griffin v. Wisconsin*, drew parallels between the operation of schools and prisons.[469] There, the Court concluded that probation, as a government institution and service, is considered a "special needs" industry that requires a departure from the traditional warrant and probable cause mandates.[470]

The Court explained that "[p]robation, like incarceration, is 'a form of criminal sanction . . . .'"[471] The warrant, the Court wrote, would interfere with "ongoing [non-adversarial] supervisory relationship[s]."[472] In other words, while the Court acknowledged probationers' home protections under the Fourth Amendment, the Court carved out a "special needs" class of property and privacy interests, explaining that certain persons occupying certain homes make certain warrant and probable cause requirements impracticable.[473] The distinction is not without blind spots. For example, plenty of probationers, like any other occupier of a house, live with nuclear or extended

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464 *Id.* at 538–39.
465 Maryland v. Garrison, 480 U.S. 79, 88 (1987).
466 *See infra* notes 467–74 and accompanying text.
467 *See generally* Griffin v. Wisconsin, 483 U.S. 868 (1987).
468 *Id.* at 868.
469 *Id.* at 873–74.
470 *Id.*
471 *Id.* at 874.
472 *Id.* at 879.
473 *Griffin*, 483 U.S. at 873.

family, including spouses, children, and grandparents, who all may also hold the same views of safety, security, and protection in the home as other members of society—"as the center of a person's private life, the bastion in which one has a legitimate expectation of privacy . . . ."[474]

8. Welfare Visits

The Court's welfare visit exception is similar in nature to the administrative and probation search exceptions. Welfare "home visits" are typically conducted by caseworkers to gather information regarding a welfare recipients file, or to inspect compliance with familial and guest rules or to supervise other administrative tasks related to the work of welfare agencies.[475] However, if the occupant refuses entry of the caseworker, then they are liable to lose their welfare eligibility.[476] In *Wyman v. James*, the Court[477] recognized cases involving "a home and some type of official intrusion into the home [that invokes] an immediate and natural reaction . . . of concern about" search and seizure protections afforded under the Fourth Amendment.[478] The state law at issue allowed for regular home visits by caseworkers for investigative and resource purposes at the beginning and throughout the duration of the welfare assistance.[479] But, these administrative "visits" did not, according to the Court, "descend to the level of unreasonableness" prohibited by the Fourth Amendment.[480] The Court went on to explain that home visits for purposes of welfare administrative duties by caseworkers was not a traditional Fourth Amendment search enjoying protections where the nature of the relationship is one prescribed by regulation for state assistance.[481] Instead, the visits were reasonable products of and administrative tools for dispensing the responsibilities of welfare programs.[482]

The Court's ruling seems to rest on the premise that welfare recipients have less protection from search and seizures by state caseworkers simply because they receive government benefits.[483] On the other hand, homeowners, who do not receive traditional welfare assistance at issue in *Wyman*, but who receive government tax rebates, subsidies, and other state-based property abatements, are afforded greater protections under the Fourth Amendment.[484] Likewise, homeowners who happen to

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474 *Id.* at 883 (Blackmun, J., dissenting).
475 *See* Wyman v. James, 400 U.S. 309, 309 (1971).
476 *See id.* at 312 nn.3–4.
477 *Id.* at 309.
478 *Id.* at 316.
479 *Id.* at 312 nn.3–4.
480 *Id.* at 318.
481 *Id.* at 317–18.
482 *Id.* at 322–23.
483 *See infra* Part IV.
484 *See infra* Part IV.

be employees of the federal government or who contract with the federal government for services, enjoy traditional search and seizure protections, while other welfare recipients who also contract with the federal government do not.[485] It is unclear why the distinction turns on the kind of government benefit being conferred to a specific class of persons. Nevertheless, the exception diminishes expectations of home protections under the Fourth Amendment.

9. Mobile Home Searches

The Supreme Court has weakened protections to homes when the abode does not conform with societal expectations of a traditional home or general notions of privacy.[486] The issue arises where the "hybrid character of the motor home"[487] poses difficulty related to the level of privacy interests secured by the owner inside the vehicle. For example, the Court, in *California v. Carney*, denied Fourth Amendment protections to occupants of mobile homes because the Court found that occupants had lesser expectations of privacy.[488] Even though many motor homes serve the same function and purpose as a typical immobile house, especially for the poor, the Court explained that there cannot be the same level of privacy expectations in a mobile home licensed for travel and parked in a lot.[489] The Court asserted that even though the mobile home "possessed some, if not many of the attributes of a home, it is equally clear that the vehicle falls" into the mobile home exception category.[490] The basis of this conclusion is that the occupant of the mobile home could have "moved" the vehicle if law enforcement failed to respond promptly with a search, and that the vehicle was authorized to travel on public roads.[491]

But, as Justice Stevens argued in dissent, "[m]otor homes, by their common use and construction, afford their owners a substantial and legitimate expectation of privacy when they dwell within."[492] Indeed, even though the home may not be considered a "castle" based on societal standards, it still enjoys an expectation of use that equates with a hotel room, vacation or retirement home, or simply a cabin.[493] Further, the problem with associating mobile homes with lesser protection than traditional

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[485] *See infra* Part IV.

[486] *See infra* notes 487–94 and accompanying text.

[487] California v. Carney, 471 U.S. 386, 395 (1985) (Stevens, J. dissenting).

[488] United States v. Chadwick, 433 U.S. 1, 12 (1977) (quoting Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (plurality opinion)); *see also* United States v. Ortiz, 422 U.S. 891, 896 (1975); United States v. Martinez-Fuerte, 428 U.S. 543, 560–62 (1976); South Dakota v. Opperman, 428 U.S. 364, 367–68 (1976); Robbins v. California, 453 U.S. 420, 423–25 (1981); United States v. Ross, 456 U.S. 798, 807 n.9 (1982).

[489] *Carney*, 471 U.S. at 392–93 (1985).

[490] *Id.* at 393.

[491] *Id.*

[492] *Id.* at 402 (Stevens, J., dissenting).

[493] *Id.*

domiciles, like fee simple ownership in homes or leasehold tenancies in apartments, is that the exception risks driving a legal wedge between the haves and the have nots. Many who dwell in mobile homes are of lesser means and resources, oftentimes the poor or working class with little access to other forms of shelter.[494] If the exception is followed strictly, it could disproportionately impact low-income individuals.[495]

IV. OBSERVATIONS AND EXPLANATIONS

Part IV considers various reasons for the discord between the instability of home protections under the Fourth Amendment as opposed to the rest of the Bill of Rights. These observations and explanations focus on some theories underlying the regression and retreat by the Court. There are, indeed, a variety of plausible reasons for this discord, all of which have varying degrees of persuasive authority. For those seeking harmony, the Court's regression in home protections under the Fourth Amendment is perplexing. Perhaps an over-emphasis on property concepts led the Court astray from its homebound origins. Perhaps it is simply that the Fourth Amendment is not an absolute bar from searches and seizures in the home and that the Court is responding to defensible government intrusions necessary for the proper functioning of law enforcement. It is also quite possible that the disharmony involves the rights versus protections dichotomy, in that the Fourth Amendment is heavily grounded in security and protection as opposed to granting specific rights that engender specific activity, such as possession of firearms or smut, or the freedom to speak, express, and associate. This Part explores various explanations to make a better sense of the constitutional puzzle of the Fourth Amendment's retreat from its doctrinal protections to the home.

A. Property, Not People

Perhaps the discord has more to do with the Court's emphasis on property and places, rather than people, in many of the exceptions discussed in Part III. The "property, not people" phrase is the opposite of what the Court stated in its seminal case *Katz v. United States*.[496] Recall *Katz* where the Court explained that "the Fourth Amendment protects people, not places."[497] The rhetoric presumably removed and

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[494] *See* Tanya Zahalak, *Manufactured Housing Landscape 2020*, FANNIE MAE (May 21, 2020), https://multifamily.fanniemae.com/news-insights/multifamily-market-commentary/manufactured-housing-landscape-2020 [https://perma.cc/EPT6-SBB3]. *See generally* MANUFACTURED HOUS. INST., 2021 Manufactured Housing Facts: Industry Overview (May 2021), https://www.manufacturedhousing.org/wp-content/uploads/2021/05/2021-MHI-Quick-Facts-updated-05-2021.pdf [https://perma.cc/FM3U-HWTG].

[495] *See infra* Part IV.

[496] *See generally* 389 U.S. 347 (1967).

[497] *Id.* at 351.

distanced the Court from its previous analytical approach that weighed traditional property-centered concepts in deciding the reasonable expectations of privacy.[498] But the constitutional text also tells us something. The inclusion of "houses" in the amendment arguably did two things. First, the founding generation "singled out [houses] above and beyond all buildings" as a space for special privacy protection.[499] Second, they included "houses" because such residential space was a "broadly distributed type of property."[500] A closer look at the post-*Katz* cases, including many of the exceptions that limit special protections to the home explored in Part III, "derive from property law . . . ."[501] Perhaps this is the key to the dissonance.

Prior to *Katz*, the Court emphasized property concepts, especially trespass, even though privacy enjoyed a strong basis in many of the Court's search and seizure cases.[502] The *Katz* decision suggested that the Fourth Amendment was applicable even when there was an absence of property violations.[503] Wiretaps, thermal invasions, and aerial surveillance from above would not, in some circumstances, implicate the Fourth Amendment protections, where there was no physical intrusions on the property.[504]

The persistence in property concepts post-*Katz*, then, may explain why the Court's search and seizure doctrine limits home protections in some circumstances. Orin Kerr argues that the reasonable expectation of privacy test set forth in *Katz* "has more bark than bite and has not substantially changed the basic property-based contours of Fourth Amendment law."[505] Instead, Kerr argues that *Katz* merely "reemphasized the loose property-based approach announced" in prior decisions and that the reasonable expectation of privacy test was merely an articulation of the legal standard loosely employed in past cases.[506] Others argue that the shift from property to privacy is "flawed in the area of residential search rights."[507] Some scholars argue that a reasonable expectation of privacy does not become reasonable unless, and until, that expectation is supported by the property concept of the right to exclude.[508] Many of the basic home protections under the Fourth Amendment derive from the owner's right to exclude, including visitors or guests.[509] These concepts pervade in

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[498] *See id.* at 352–53.
[499] *See* Amar, *Document and Doctrine*, *supra* note 25, at 1772.
[500] *Id.*
[501] *See* Stern, *supra* note 29, at 917.
[502] *See Katz*, 389 U.S. at 352–53.
[503] *See* Amar, *Document and Doctrine*, *supra* note 25, at 1771.
[504] *Id.*
[505] *See* Kerr, *supra* note 27, at 816.
[506] *Id.* at 820.
[507] *See* Stern, *supra* note 29, at 907–08.
[508] *See* Kerr, *supra* note 27, at 809–27.
[509] *See* Maureen E. Brady, *The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection*, 125 YALE L.J. 946, 952–53 n.16 (2016).

the litany of exceptions limiting protections to the home.[510] If police activity does not invade an owner's right to exclude, then the surveillance typically will not run afoul of reasonable expectations of privacy.[511] Indeed, the "lawfulness of warrantless visual surveillance of a home has still been preserved"[512] because property concepts, like trespass, are central to the determination of legality. The open fields exception is one example.[513]

In *California v. Ciraolo*, the Court laid out a curtilage exception by permitting aerial surveillance of backyards if the airspace is accessible to the public.[514] As the Court noted, however, "Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home . . . ."[515] Thus, officers can invade the privacy of a homeowner by simply looking inside the home through a window, and even irradiate with a flashlight to see better inside,[516] so long as they have not physically intruded into the home.

Take, as another example, the plain view exception. In developing the doctrine, the Court bifurcated certain protections between privacy and property.[517] Both could be intruded upon, but in different ways. Justice Stevens wrote that "[a] search compromises the individual interest in privacy" whereas a "seizure deprives the individual of dominion over his or her person or property."[518] The right to exclude is still paramount to the home protections, the Court said, but law enforcement may still peer through a window of a home without implicating search and seizure protections because they have not trespassed or physically invaded the home.[519] Again, property law played a central role in the creation of the exception.

Likewise, the concept of trespass and other property concepts underlies the Court's third-party consent exceptions. There, law enforcement can persuade third-party persons who have common authority over the home to consent to search.[520] So long as the officer remains standing at the doorstep and does not "trespass," "invade,"

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[510] *See* MICHAEL J. GARCIA ET AL., CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 112-9, at 1228–48 (2d Sess. 2016), https://www.govinfo.gov/content/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-10-5.pdf [https://perma.cc/BK3U-927U].

[511] *See id.*

[512] Kyllo v. United States, 533 U.S. 27, 35–36 (2000).

[513] *See generally* Hester v. United States, 265 U.S. 57 (1924).

[514] 476 U.S. 207, 213–15 (1986).

[515] *Id.* at 213.

[516] United States v. Dunn, 480 U.S. 294, 305 (1986) (holding use of flashlight to illuminate the inside of barn did "not transform their observations into an unreasonable search within the meaning of [the] Fourth Amendment.").

[517] *See infra* note 519.

[518] Horton v. California, 496 U.S. 128, 133 (1990) (citing United States v. Jacobsen, 466 U.S. 109, 113 (1984)).

[519] *Cf.* Brown v. Texas, 460 U.S. 730, 740 (1983).

[520] Stoner v. California, 376 U.S. 483, 489 (1964). *See generally* Frazier v. Cupp, 394 U.S. 731 (1969); United States v. Matlock, 415 U.S. 164 (1974).

or "intrude" into the home, they are free to cajole another occupant into consenting to a search.[521] Further, if the right to exclude was not conveyed effectively by the primary owner, then law enforcement is free to seek consent from a third-party.[522] In *Illinois v. Rodriguez*, the Court declared that prohibitions against warrantless unreasonable searches and seizures did not apply to voluntary consents from third party individuals who possess "common authority over the premises."[523] This weakened home protection for occupants, especially the owner, and allows police to convince cohabitants with "common authority" to consent to a search without the owner's permission.[524] In other words, if the owner has not explicitly exercised his right to exclude, and officers can acquire consent from someone else, then the subsequent search would be permitted. And as the Court explained in *United States v. Jacobsen*, reasonable expectations of privacy are only diminished when law enforcement meaningfully interferes with a person's "possessory interests in [ ] property."[525] Again, concepts of property prove pivotal to the adoption of the exception.

In effect, "[m]any of these exceptions derive from property law and reveal the double-edged sword of housing exceptionalism's property orientation."[526] Indeed, plain view, open fields, protective sweeps, third-party consent, and other exceptions "illustrate how the Court's property focus and absolutist rhetoric creates . . . decisional variance,"[527] thus providing the Court with greater latitude to impose new rules which have the effect of weakening protections to the home. Normatively, there are plausible proposals to discontinue the application of exceptions "that apply to physical searches of home interiors" to preserve the sanctity of the home, such as eliminating or restricting the third-party consent exceptions based primarily in property concepts of trespass instead of privacy.[528]

These examples of exceptions, driven by property concepts, are not readily discernible in other amendments. Although academics seek to draw out property distinctions and show the influence of property concepts in other homebound Bill of Rights, the Court has not. Instead, under the Court's speech, smut, gods, guns, soldiers, sex, and self-incrimination doctrines, the right to privacy and other related concepts are central to the Court's development of home protections.[529] The lack of

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[521] *See Stoner*, 376 U.S. at 489. *See generally* Frazier, 394 U.S. at 731; *Matlock*, 415 U.S. at 164.

[522] *See Stoner*, 376 U.S. at 489. *See generally* Frazier, 394 U.S. at 731; *Matlock*, 415 U.S. at 164.

[523] 497 U.S. 177, 181 (1990).

[524] *See id.*

[525] 466 U.S. 109, 113 (1984).

[526] *See* Stern, *supra* note 29, at 917.

[527] *Id.* at 918.

[528] *See infra* Part V.

[529] *See* Radin, *supra* note 2, at 991–92. The constitutional dichotomy of privacy and speech raises significant scholarly questions about the proper role of the First Amendment protections. The ability to engage in speech, receive, absorb, and learn from information disseminated to the doorstep is important for personal development. There are other property-based

exceptions in the other homebound Bill of Rights suggests, perhaps, that where property concepts are employed as an analytical lens, home protections may be vulnerable.

The Second Amendment, for example, has been universally understood to protect privacy and security interests inside the home, not property interests per

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theories that situate the First Amendment protections as a "property right of people," but none of which have ever been adopted by the Supreme Court. *See* John McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. RICH. L. REV. 49, 56–57 (1996). John McGinnis argues that, instead of focusing solely on the privacy nature of speech in, say, the home, the proper interpretation, consistent with the First Amendment's original intent, is that there is a constitutional protection to a property right of the individual. Although McGinnis does not explicitly tie this theory of property to speech, it does raise interesting questions as to how property concepts would affect rights warranted under freedom of speech principles. His aim is to establish a "model for an emerging laissez-faire [First Amendment] jurisprudence" by situating property rights of individuals at the center of the analysis of governmental regulation of speech. The purpose of First Amendment protections under a property-based theory, he contends, is to "protect the individual's right to transmit his information." Similarly, Norman Dorsen and Joel Gora have urged a reemergence of property rights analysis into First Amendment principles. This scholarly cohort acknowledge that the "dominion" as opposed to "collective" concept of property has played a significant role in First Amendment doctrine, because the law pays homage to "economic autonomy and entrepreneurial freedom" with greater focus and emphasis versus public regulation and equality. Here, scholars argue that free speech is protected when it corresponds with property interests, free expression is not. Indeed, the Court's property-based approach to First Amendment rights arguably signals that "homeowners' rights would prevail over speakers" even though the Court expressed a strong desire to balance the interests of the owner and the speaker. Norman Dorsen & Joel M. Gora, *Free Speech, Property, and the Court: Old Values, New Balances*, 1982 SUP. CT. REV. 195, 196, 231 (1982) (noting that the Burger Court evidenced the impact of property rights on First Amendment analysis). But, as Mark Cordes observes, the invocation of property values in the analytical framework of speech rights is "not necessarily inconsistent with traditional perceptions of personal liberty." Cordes explains that reliance on property values, in part, will focus "judicial attention to such relationships." One could argue that, indeed, a property-based conception of speech rights led the court to appropriately place the sanctity of the home at the core of some of its decisions, thus continuing to keep special protections to homes well-established within its First Amendment jurisprudence. As Cordes explains, the Court's speech-home doctrine has shifted its focus from "residential privacy" to balancing between speech and "residential property interests," and as a result, "privacy concerns associated with [residential property] become an even more dominant factor when weighed against speech interests." Further, the Court has accorded strong protections to expression exercised within the home. The property value of the home drives much of the Court's elevation of the rights at stake in cases like *Spence* and *Ladue*. There, in essence, protection of the intangible property interest is not only a flag or private residence, but the integrity of a trademark. The ancillary nature of the activity within such a private, autonomous, and tranquil space is what drives the Court to extend speech and expression protections above and beyond other property-types. However, Cordes explains that while there exists an appreciation of and focus towards deciding speech-home disputes with an eye towards property interests, "attention to property related values is by no means dispositive in all instances." Mark Cordes, *Property and the First Amendment*, 31 U. RICH. L. REV. 1, 3 (1997).

se.[530] Although the "hearth and home" symbolism does create a physical conception of space, the possession of a firearm, in and of itself, is dependent upon concepts of privacy and security. The Court observed that the "need for defense of self, family, and property is most acute" inside the home because of the safety and security feature of the handgun to protect one's home.[531] As for the Third Amendment, it has been interpreted by some federal courts as a "property-based privacy interest" that subsequently protects "a fundamental right to privacy."[532] But the Supreme Court has never adopted a property-centric conception of the Third Amendment. In the few times that it has spoken directly about the Third Amendment, it explained that the provisions must be "authorized by Congress"[533] by statute and some Justices have noted that the Amendment is a guarantee that creates a zone of privacy, as the prohibition of quartering soldiers "in any house" during times of peace is "another facet of that privacy."[534] Indeed, the Court has "privatized and domesticated the Third Amendment in a way rather precisely analogous to the way that Reconstruction Republicans privatized and domesticated the Second."[535] Some scholars argue that the "Founding linkage between Second and Third is rather neatly preserved by treating both as centrally protecting the privacy 'privilege' in one's homestead."[536] Likewise, Akhil Amar notes that the "Third Amendment, on this reconstructed account, now bridges together a home-centric Second Amendment and a Fourth Amendment that was from the beginning protective of the private domain—of private 'persons' and their private 'papers' in their private 'houses.'"[537] The point, however, is that where the Court's search and seizure jurisprudence weakens protections of the home, those exceptions are greatly influenced by concepts of property even though the Court in *Katz* rhetorically declared the Fourth Amendment is about people, not places.

B. Security and Protection

Another explanation of the discord is the Fourth Amendment's emphasis on security as opposed to the overwhelming and singular emphasis on privacy found in the other Bill of Rights. This may seem, understandably, redundant at first glance.

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[530] *See* Ilya Somin, *Gun Rights, Property Rights, and Takings*, DUKE CTR. FOR FIREARMS & L. (Apr. 5, 2022), https://firearmslaw.duke.edu/2022/04/gun-rights-property-rights-and-takings/ [https://perma.cc/W53D-QU96].

[531] District of Columbia v. Heller, 544 U.S. 570, 628 (2008).

[532] Engblom v. Carey, 677 F.2d 957, 962 (2d Cir. 1982).

[533] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 644 (1952) (Jackson, J., concurring) (alterations added).

[534] Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

[535] AMAR, *supra* note 1, at 267.

[536] *Id.*

[537] *Id.*

Does the right to privacy not require a guarantee of security? It seems that the text of the Fourth Amendment offers the most persuasive clues to these questions. The amendment states, "The right of the people to be *secure* in their persons, *houses*, papers, and effects, against *unreasonable searches and seizures*, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ."[538] A plain reading of the text suggests that a "right to security" is paramount. But that's not all. "People" have a "right" to be "secure" in "houses." While privacy may be implicit in the text, the text means that a "person" has a right to security in the property interests of their "houses." The specter of physical invasion by the government into the home threatens the "security" of the person which is protected by the home.

Several Justices have dabbled with the "right to security" concept in several cases, including those establishing exceptions to general search and seizure rules.[539] In *Horton*, Justice Stevens explained that the "right to security" in person and property is subject to invasion of individual interests in privacy and deprivations of dominion over property.[540] The standard-bearer of the "right of security" and advancement of security concepts under the Fourth Amendment was Justice Kennedy.[541] In *Minnesota v. Carter*, Kennedy charted a course to refine and clarify the role that the right to security plays in the Court's doctrine.[542] He fixated those concepts on special protections to the home.[543] There, Kennedy explained that "[s]ecurity of the home must be guarded by the law in a world where privacy is diminished . . . ."[544] He elaborated: "The axiom that a man's home is his castle . . . has acquired over time a power and an independent significance justifying a more general assurance of personal security in one's home, an assurance which has become part of our constitutional tradition."[545] But, as Justice Ruth Bader Ginsburg argued, the third-party consent exception had the effect of undermining Justice Kennedy's pleas for greater safeguards to the right to security, including undermining the "security of the home resident herself."[546]

The "right to security" concept may provide a clue as to why the Fourth Amendment searches and seizures doctrine is susceptible to homebound exceptions, even though the amendment "explicitly protect[s] 'houses' from needless and dangerous intrusions by governmental officials."[547] In other words, the concept of security cuts both ways. Individuals' safety and security are protected inside the home, but it is

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538 U.S. CONST. amend. IV.
539 *See* Horton v. California, 496 U.S. 128, 142 (1990).
540 *Id.* at 128.
541 Minnesota v. Carter, 525 U.S. 83, 99 (1998).
542 *Id.*
543 *Id.*
544 *Id.*
545 *Id.* at 100.
546 *Id.* at 106 (Ginsburg, J., dissenting).
547 Amar, *The Bill of Rights*, *supra* note 59, at 1175.

not absolute. It is subject to public welfare concerns as well. Hence why the Court has been amenable to carving out exceptions that limit protections to the home, such as plain view or protective sweeps, because there is a reasonable expectation that the government may secure and protect the public welfare from imminent threats.

In establishing its "protective sweep" exception, which arguably lessens an owner's personal security and privacy inside his home, the Court explained that "as a precautionary matter" officers could sweep the home to protect against an immediate attack from another "individual posing a danger to those on the arrest scene."[548] Under the plain view exception, an underlying consideration in permitting an officer to seize illegal items observed in plain view is to avoid the "inconvenience and danger to evidence" if law enforcement had to depart the scene to acquire a warrant.[549] Likewise, the Court is cognizant that exigent circumstances that threaten the safety of the officers, persons located in the home, or the general public, justify the warrantless intrusion into the home under the plain view exception.[550] In *Coolidge v. New Hampshire*, Justice Potter Stewart explained that warrantless seizures were reasonable when an officer inadvertently observes evidence of a crime and that the requirement of obtaining a warrant would be inconvenient, because of the prospect of the evidence being destroyed.[551] The same concern for safety and security underlies the Court's adherence to the no-knock warrant exception.[552] In *Richards v. Wisconsin*, Justice Stevens explained that the no-knock entry is acceptable when law enforcement has reasonable suspicion that announcing their presence at the door of the home "would be dangerous," give rise to violence, or that it would compromise the investigation, including the potential for destruction of evidence.[553]

Because the Fourth Amendment, like the Third Amendment, involves the threat of the government activity invading the physical home, the Court has opted to balance the right of security with a variety of exceptions that allow the government to similarly protect the security and safety of the public.[554] Indeed, since no other amendment, other than the Third Amendment—which has not developed an elaborate jurisprudence—entails the prospect of such intrusive activity by the government, it is plausible that this fact, in and of itself, explains some of the reasons for the Court's retreat from home protections.

The specter of the government physically invading a person's home has always been at the core of the Bill of Rights. But its operation and function under the Fourth Amendment differs substantially from that of the other homebound amendments.

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[548] Maryland v. Buie, 494 U.S. 325, 334 (1990).

[549] Horton v. California, 496 U.S. 128, 138 (1990) (quoting Coolidge v. New Hampshire, 403 U.S. 443, 516 (1971)).

[550] *Coolidge*, 403 U.S. at 467–68.

[551] *Id.*

[552] Richards v. Wisconsin, 520 U.S. 385, 385 (1997).

[553] *Id.*

[554] *Id.* at 386.

The First Amendment's speech, smut, and gods doctrines all seek to afford greater protections to specific activities in the sanctity of the home or for those engaging in activity outside and near residential homes.[555] But the threat of government intrusion is not necessarily one focused on physical penetration of the home. In most circumstances, regulations or restrictions on the free exercise, freedom of thought, and freedom of speech engender a non-physical intrusion by the government.[556] The Second Amendment protections also are not primarily established to thwart government physical intrusion into the home, although the historical data suggests that tyrannical governments were of great concern. The Second Amendment protections have evolved from protections against tyranny to providing self-defense tools for the unauthorized entrance of burglars, for example.[557] *Heller* dealt with the government refusing to approve the registration of a handgun intended to keep at home, not necessarily the direct physical intrusion of law enforcement into the home to search or seize a firearm.[558] Indeed, the prospect of physical invasion of the home, delineated by the text of the Fourth Amendment, may have a lot to do with why the Court has cultivated a patchwork of exceptions that ease law enforcement's entry into the home in comparison with the other homebound amendments.

C. The Judicial Politics of Crime

The Rehnquist and Roberts Courts, compared to the Warren and Burger Courts before, have exhibited methodologically moderate and conservative tendencies. And "[o]ne of the surprising things about the Republican Supreme Court's criminal procedure jurisprudence is its [steadfast] concern for the privacy of the home"[559] while at the same time exhibiting a "generally pro-police" jurisprudence.[560] Indeed, the Court has, at the same time, acquiesced to a "large swath of police activity that

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[555] *See infra* Sections II.A–C.

[556] Of course, there are some exceptions. *See, e.g.*, Stanley v. Georgia 394 U.S. 557 (1969) (investigation "led to the issuance of a search warrant" where "federal and state agents secured entrance"). However, the warrant for entrance was not predicated on an investigation of possession of obscene material, but instead on suspicion of alleged bookmaking. Thus, the specter of the government physically invading homes to find obscene material was not central to the dispute. *See* Lawrence v. Texas, 539 U.S. 558 (2003) (police responded to a report of weapons disturbance in a private residence and entered the apartment to find two men engaged in consensual sexual acts). Again, the fear of government intrusion into homes searching for evidence of sodomy was not central to the case, nor did the statute encourage such intrusive prosecution in most contexts.

[557] *See* District of Columbia v. Heller, 554 U.S. 570, 720 (2007); Amar, *Document and Doctrine*, *supra* note 25, at 127.

[558] *Heller*, 554 U.S. at 575–76.

[559] *Id.*

[560] Craig M. Bradley, *Knock and Talk and the Fourth Amendment*, 84 IND. L.J. 1099 (2009).

intrudes into dwellings" in a way that arguably renders the "search and arrest warrant requirements nugatory."[561]

The dissonance between lesser home protections in the Fourth Amendment and greater protections in the rest of the Bill of Rights may be best explained by what I call the "judicial politics of crime." In other words, the Court may exhibit a built-in aversion to and implicit bias against defendants and the criminal activities that come before it in search and seizure cases. The Court may be less inclined to maintain strong protections for the home when the defendant at issue is a person potentially subject to criminal prosecution, especially for violent crime or drug-related offenses. This bias against criminal defendants has the potential to influence how the Court approaches the reasonable expectation of privacy standard and law enforcement's police power. Indeed, "many of the exceptions to the traditional warrant and probable cause requirements have come from cases involving drug dealers and users and possessors of drugs."[562]

The Court's doctrinal foundation for warrantless searches and seizures is arguably predicated on the need for "law and order," to root out crime and ensure the public welfare and safety, as opposed to protecting individuals from overzealous government investigations or, worse, tyranny.[563] The Court's "proactive policing doctrine" was developed, in large part, under the Fourth Amendment to limit government intrusions into the privacy of the home and at the same time promote effective policing.[564] But the exceptions may play into stereotypes of criminals that lead the Court to strengthen law enforcement's investigative capabilities, while limiting home protections of innocent occupants. Pro-policing doctrines under the Fourth Amendment, including the seminal case, *Terry v. Ohio*,[565] tend to favor easing police practices by loosening probable cause requirements and promoting reasonable suspicion.[566] So long as law enforcement's suspicions of criminal activity are reasonable, the Court has approved aggressive conduct to stamp out "crime."[567] David Harris, a leading scholar in policing, notes that, as a result, reasonable suspicion is manipulated based on where law enforcement identify crime, often in disproportionately urban, nonwhite neighborhoods.[568] Indeed, in many of the exceptions created by the Court, probable cause requirements have been either supplemented or completely supplanted by reasonable suspicion standards due to implicit biases that pervade the

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[561] *Id.*

[562] Stephen A. Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (as Demonstrated by the Open Fields Doctrine)*, 48 U. PITT. L. REV. 1, 3 (1986).

[563] *Id.*

[564] Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 267, 277 (2012).

[565] Terry v. Ohio, 392 U.S. 1, 2–3 (1968).

[566] *Id.*

[567] *Id.*

[568] David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 677–78 (1994).

Court's perception of persons involved in alleged criminal activity in many of the cases before it.[569] This doctrinal tweak allows law enforcement to abrogate its baseline constraints on home intrusions under the Fourth Amendment in pursuit of "law and order" policies at the federal, state, and local levels. But the Court has, at the same time, given lip service to the implicit biases that might pervade some of its doctrines.[570]

In *Brown v. Texas*, the Court acknowledged that "[t]he fact that appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct."[571] However, the Court also noted that the assumption does not apply when the activity is accompanied by flight at the sight of law enforcement.[572] Further, there is ample evidence to suggest that a bias against criminals or criminal activity developed a feedback loop of influence between the Court's search and seizure doctrines, including its exceptions, and the War on Drugs.[573] This implicit, or perhaps arguably explicit, bias may have influenced the Court's search and seizure doctrines in ways that implicate not only vast law enforcement practices outside the home, but also such practices and policies inside homes. The doctrinal exceptions of third-party consent, plain view, protective sweep, and no-knock have arguably been formulated with a repulsion towards crime and criminals, and perpetuation of the War on Drugs and War on Crime.

One can see how the Court's implicit bias against criminals and its loosening of standards help contribute to weakening home protections. Take the no-knock practices. The Court has permitted no-knock practices by the police.[574] The practice is justifiable, according to the Court, when officers have reasonable suspicion that "knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of crime. . . ."[575] But the rule diverges from the probable cause requirement. The Court effectively allows

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[569] *Id.* at 660.

[570] *Id.* at 668.

[571] Brown v. Texas, 443 U.S. 47, 52 (1979).

[572] *Id.* at 52.

[573] *See, e.g.*, Susan F. Mandiberg, *Marijuana Prohibition and the Shrinking of the Fourth Amendment*, 43 MCGEORGE L. REV. 23, 23–24 (2012); *see also* Thomas Regnier, *The "Loyal Foot Soldier": Can the Fourth Amendment Survive the Supreme Court's War on Drugs?*, 72 UMKC L. REV. 631, 649–64 (2004); David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL F. 237, 240; Diane-Michele Krasnow, *To Stop the Scourge: The Supreme Court's Approach to the War on Drugs*, 19 AM. J. CRIM. L. 219, 221 (1992); Christian J. Rowley, Note, Florida v. Bostick*: The Fourth Amendment—Another Casualty of the War on Drugs*, 1992 UTAH L. REV. 601, 603; Steven K. Bernstein, Note, *Fourth Amendment Using the Drug Courier Profile to Fight to War on Drugs*, 80 J. CRIM. L. & CRIMINOLOGY 996, 1017 (1990); Steven Wisotsky, *Crackdown: The Emerging 'Drug Exception' to the Bill of Rights*, 38 HASTINGS L.J. 889, 890 (1987); *see* Saltzburg, *supra* note 562, at 2–3.

[574] Richards v. Wisconsin, 520 U.S. 385, 386 (1997).

[575] *Id.*

police to subjectively determine when they have reasonable suspicion to act, often laced with assumptions and preconceived notions of criminality in particular places and spaces, such as poor or Black and Brown neighborhoods.[576]

Similarly, the open fields doctrine is arguably premised on judicial biases—or flawed assumptions—against criminals and criminal activity. In *California v. Ciraolo*, the Court approved of "fly over" tactics of suspected owner's property, even when doing so allows law enforcement to peer into areas of the home's curtilage typically understood as off-limits to public viewing.[577] Take, for example, the Court's protective sweep exception. There, the Court permits officers to "sweep" the home upon entrance incident to a search or arrest.[578] The reasoning is that the home may harbor additional third-party criminals or suspects who may be at large.[579] Indeed, the impacts of this implicit bias against criminals and the judicial politics supporting the War on Drugs have had lasting impacts on doctrine, including coherence in the Bill of Rights. As some commentators have noted, "[w]hen the war [on drugs] is over, we find that departures from constitutional norms, legitimized by the courts, have lasting and wide-ranging effects. Constitutional principles, once abandoned, are not easily reclaimed."[580]

Nowhere else in the Bill of Rights has the text and doctrine of a homebound amendment sustained such intense influence from political forces that, inadvertently or intentionally, targeted homes in a manner that limited the safeguards to entry. The Second Amendment's jurisprudence has only increased the protective shield of the home from regulations that implicate the right to bear arms. The First Amendment, likewise, has not experienced an overt bias against litigants or groups affected by freedom of speech or free exercise rights to diminish home protections.

D. Poverty Exceptions

Like the biases that arguably pervade the Court's perception of criminal defendants and the influence of the War on Drugs in its rulings that have rolled back home protections, perhaps the same problem persists with its rulings related to the poor and marginalized. The administrative, mobile home, welfare, and probation exceptions involve defendants or classes of people, who are marginalized. The exceptions may give rise to the bias in decisions, which compromise Fourth Amendment protections for homes or even for the homeless.

People living in public spaces, such as the homeless, are subject to arguably unrestricted government invasive searches that do not carry Fourth Amendment

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[576] *See id.* at 389–90.
[577] 476 U.S. 207, 215 (1986).
[578] Maryland v. Buie, 494 U.S. 325, 325 (1990).
[579] *Id.*
[580] Hartness v. Bush, 919 F.2d 170, 175 (D.C. Cir. 1990) (Edwards, J., dissenting).

protections.[581] This includes seizures.[582] The homeless, with little privacy, are subject to warrantless arrests since the Court does not require exigent circumstances to seize a person in public.[583] However, even inside a more traditional "house" or "home" the poor and marginalized may not fare any better. The government does not have to follow traditional probable cause to satisfy the "warrant" requirements for local inspections, including public housing and other forms of subsidized housing.[584] Former inmates and prisoners, who are low-income and typically in need of government assistance, under the "probation search" exception, are subject to probation officers conducting warrantless administrative searches of a probationer's home.[585] The same goes for welfare caseworkers who can enter the homes of welfare recipients without a warrant, reasonable suspicion, or probable cause.[586] Mobile home residents, many of whom are low-income, are granted lesser protections in the home due to the perceived nature of the living arrangement.[587] As some scholars argue, it is "hard to reconcile [these cases] except on the ground that the homes of people on welfare get less Fourth Amendment protection."[588] It is evident that the "poor person's Fourth Amendment rights pale against the wealthier person's."[589] This built-in disadvantage makes it far easier for the government to intrude into the home of the unassuming tenant, mobile home resident, parolee, or welfare recipient.

Further, it is not clear that there are comparable doctrinal examples in the other homebound amendments that have given rise to lesser protections for the home based on poverty. The basis of many civil liberties and civil rights under the Bill of Rights is to protect minorities against majority rule. Whether in the First Amendment's protections of Jehovah's Witnesses' rights to distribute material or door-knock in residential areas, or the ability to worship God in the confines of one's home, there is little evidence of "poverty exceptions" to the home protections elsewhere in the Bill of Rights.[590] Second Amendment gun possessors, whether poor or rich, have the right to bear arms in the "hearth and home" without distinction in class.[591] Likewise, there is an absence of any doctrinal evidence in the Third Amendment showing a proclivity on the part of the Court to rollback protections from quartering soldiers during times of peace in a manner that implicates the poor and marginalized.

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[581] United States v. Watson, 423 U.S. 411, 427 (1976).
[582] *Id.*
[583] *Id.*
[584] *See* Camara v. Mun. Ct. of the City and Cnty. of S.F., 387 U.S. 523, 538 (1967).
[585] United States v. Knights, 534 U.S. 112, 112 (2001).
[586] *See generally* Dubbs v. Head Start, Inc., 336 F.3d 1194 (10th Cir. 2003).
[587] California v. Carney, 471 U.S. 386, 387 (1985).
[588] Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391, 403 (2003).
[589] *Id.*
[590] U.S. CONST. amend. I.
[591] U.S. CONST. amend. II.

Although one could imagine how the government might achieve that goal if it were to execute such military activity during times of war. Perhaps, then, the dissonance in home protections between the Fourth Amendment and the rest of the Bill of Rights is due, in part, to the Court's "poverty exceptions."

V. IMPLICATIONS

Part V surveys some constitutional, interpretive, political, policy, and social implications for the Fourth Amendment's doctrinal regression of protections to the home. Several distinct themes emerge worthy of consideration.

A. Interpretive

As both Akhil Amar and Lawrence Lessig—a textualist and doctrinalist, respectively—explain, scholars and jurists "seek to braid arguments from text, history, and structure into an interpretive rope whose strands mutually reinforce," while doctrinalists, similarly, seek to "weave together a coherent account from tangled data."[592] Indeed, there are inevitable wrinkles in those strands. The weaving and braiding in this Article show that there are threads and strands that were woven together to create a safe haven for home protections in the Bill of Rights; but the Fourth Amendment elicits a doctrinal wrinkle that has been overlooked by scholars and that has spawned curiosity as to why the discord exists.

The Court, over the span of the Warren, Burger, Rehnquist, and Roberts Courts, has filled in the gaps and ambiguities of the Fourth Amendment by crafting new doctrinal principles, frameworks, and reasoning to make work what the text does not.[593] The homebound clause in the Fourth Amendment suggests that a "special sensitivity to values" can be read out of the "houses" text, specifically special safeguards to privacy in the home.[594] And only "reasonable" searches and seizures are permitted, and warrants are required, but subject to the reasonableness of the situation presented to the government.[595]

This Article constructed a thread that runs across the first half of the Bill of Rights where special protections to the home emanate from rights involving speech, smut, gods, guns, soldiers, searches and seizures, and self-incrimination. First, the first five amendments of the Bill of Rights, as a constitutional baseline, provide for special protections for the home.[596] Those safeguards emanate from the written text or the Court's doctrine. Second, the thread of special protections, however, is completely

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[592] Amar, *Document and Doctrine*, *supra* note 25, at 31, 53.
[593] *See supra* Section III.A.
[594] *See* Amar, *Document and Doctrine*, *supra* note 25, at 79–80.
[595] *Id.*
[596] *See supra* Sections II.A–H.

absent in both text and doctrine in the Fifth Amendment's Takings Clause.[597] Third, while the Fourth Amendment's text and the doctrine subscribe to special protections, the Court has regressed from the baseline home protections in both its text and the doctrine, thus placing it as an outlier compared to the other Amendments in the Bill of Rights.[598]

If, as Akhil Amar argues, the Constitution hands the discretion to jurists to determine whether to apply special protections to the home, then the result of discord is nothing more than an expected and arguably welcome feature, not a bug, of constitutional ruling and interpretation; in other words, we can expect that some Bill of Rights doctrines will evolve with varying degrees of protections for the home, and that an exact symmetrical application of home protections is more an aspirational than practical outcome.[599]

Two politically charged institutions and class of persons—law enforcement and criminals—are implicated in most of the search and seizure cases in a way that makes the Court exceptionally vulnerable to being influenced by value judgments and thus may cause its baseline special home protections to vary in degree over time. While the baseline protections to "houses" were meant to cabin overzealous modern police officers and tyrannical governments, the Court has, over time, come to carve out special principles and frameworks, such as protective sweeps and plain view doctrines, to address a devalued group: criminals.[600]

There are those who view and base arguments on the Constitution's "chronological trend and the tug of later amendments on earlier clauses."[601] If continuity in interpretive application is the name of the game, then the Court should be inclined to move beyond the text and history and lean into doctrine.[602] The arguments for continuity of home protections across the Bill of Rights value consistency and predictability.[603] Continuity harmonizes the home. Some call this constructivist coherence.[604] Whether a textualist or doctrinalist, the practice of interpretation is to search for and find coherence, and to modify approaches to avoid dissonance.[605] If one agrees that the Court has veered off track from its baseline protections in its search and seizure doctrine, then perhaps the Court ought to revisit all its home-bound doctrines across the Bill of Rights. Special protections for the home would either only be appropriate under the Third and Fourth Amendments or there should

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[597] *See supra* Section II.I.

[598] *See supra* Section II.F.

[599] Amar, *America's Lived Constitution*, *supra* note 29, at 1773.

[600] *See supra* Sections III.B.1–2.

[601] Amar, *Document and Doctrine*, *supra* note 25, at 52.

[602] *Id.* at 54.

[603] *See supra* notes 31–50 and accompanying text.

[604] *See* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1240 (1987).

[605] *Id.* at 1240 n.230.

be no recognition of unique safeguards to the home at all. The text of the document does not command "special" protection of the home, but simply refers to the house as a place worthy of such treatment.[606] The special nature of the home has instead been delineated by significant alterations to doctrine by the Court.[607]

At the same time, the weakened protections of the home under the Fourth may be the consequence of the "atextual nature of the Court's opinions" involving the home in the other amendments.[608] Asymmetry will naturally develop because the protections are dependent upon judicial precedent, thus vulnerable to the generational trends, political waves, ideological shifts on the Court, and other institutional and personnel changes to the Court.[609] In other words, the discord of home protections created by the Fourth Amendment's exceptions may simply be a welcomed and predictable outcome of the evolving Court and its Fourth Amendment jurisprudence. The dissonance, in other words, in the Fourth Amendment is an evolution of the doctrine, which, as in any other generation or moment in history, could happen to the other homebound amendments.

B. Implicit Racial Bias

Some scholars argue the Court suffers from implicit racial bias, and that its "decisions [] are written primarily through the lens of [a] white privilege [that] carr[ies] [its] own implicit biases."[610] This may lead to a disproportionate impact on Black and Brown individuals and communities. The Court's search and seizure exceptions, which contribute to the weakening of home protections, may exhibit a level of racial bias that compounds the problems associated with expectations of privacy.[611] Furthermore, the racial bias element may be uniquely prevalent in the Fourth Amendment more so than the other Bill of Rights amendments, thus making the doctrine more prone to outcomes suffering from implicit bias.[612]

Even though the Court traditionally views its decisions and its presence as an institution as "color-blind" and immune to racial biases, there is evidence excavated by scholars which suggests that the theory and practice of color-blindness has led the Court to endorse search and seizure doctrines and exceptions that have the indirect effect of negatively impacting Black and Brown communities in a way that no other amendments within the Bill of Rights do.[613] A closer look at the third-party consent exception offers a window into implicit racial bias.

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[606] *See* U.S. CONST. amends. III–IV.

[607] *See supra* Section III.A.

[608] Dickinson, *Puzzle of the Constitutional Home*, *supra* note 1, at 1136.

[609] *See* RANDY KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT 2–5 (2018).

[610] Diana R. Donahoe, *Not-So-Great Expectations: Implicit Racial Bias in the Supreme Court's Consent to Search Doctrine*, 55 AM. CRIM. L. REV. 619, 619 (2018).

[611] *Id.* at 620–21.

[612] *Id.* at 619.

[613] *Id.* at 619–21.

The Court's "social expectation" doctrine, later imputed into the consent exception, likens law enforcements request to enter the home to that of a neighborly guest or friendly visitor requesting to enter.[614] The assumption is that officers and house occupants have the same level of social expectations across various neighborhoods and communities and that guests and visitors alike with "apparent authority" or "actual authority" could and should be capable of consenting to searches.[615] Indeed, a nationwide uniform perspective on American societal expectations underlies the doctrine, allowing officers to enter and search homes far more easily without a warrant.[616] But the social expectations set forth by the Court are arguably driven by and viewed from a vantage point of white privilege given the make-up of the Court, and "do[ ] not take into account the expectations of racial minorities . . . ."[617] The reality, as Diana Donahoe explains, is that such a "view stands in stark contrast to the current realities facing predominantly minority neighborhoods where police officers are often seen as intimidating and militarized government intruders."[618]

Based on studies of implicit bias, Black and Brown communities' social expectations of visitors and law enforcement differ greatly from that of white Americans.[619] Fear of law enforcement may cause Black and Brown individuals, including children, to be more apt to consent to entrance and searches of the home.[620] Likewise, law enforcement may take advantage of this bias by intentionally abusing the third-party consent exception to enter and search homes where they may not have any probable cause or reasonable suspicion.[621] Coupled with a history of the War on Drugs targeting minority communities, the third-party consent exception has arguably become a tool that disproportionately affects racial minorities.[622] Further, white individuals may feel greater security in their rights and be willing to exercise them, say, by asserting privileges or simply refusing when officers request consent, whereas Black and Brown persons may feel unable to decline consent for risk of physical harm or death at the hands of police.

A similar dynamic plays out in no-knock warrant arrests and searches. Breonna Taylor's death at the hands of police was due, in part, to the no-knock warrant.[623] Officers there used the tactic to enter the home where there were no drugs found in the apartment, killing her with gunshot wounds. Law enforcement that exhibits racial biases may be more prone to exercise the no-knock warrant against Black and

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614 *Id.* at 619.
615 *Id.* at 619–20.
616 *Id.* at 621.
617 *Id.* at 620.
618 *Id.* at 619.
619 *Id.* at 636–37.
620 *Id.* at 643.
621 *Id.* at 651.
622 *Id.* at 633, 636.
623 Richard A. Oppel, Jr. et al., *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Dec. 12, 2022), https://www.nytimes.com/article/breonna-taylor-police.html.

Brown individuals as a tool to root out perceived crime, which has the inadvertent consequence of harming racial minorities, including striking fear into residents.[624]

The Fourth Amendment's search and seizure exception exhibits racial consequences of home protections not readily found in the other amendments.

C. Poverty Consequences

The "poverty exceptions" discussed in Part IV also have doctrinal implications for poor defendants. The Court's willingness to discard some search and seizure protections affects safeguards for the poor in the curtilage or the home, and may limit Fourth Amendment protections for the poor and vulnerable.[625] Residents of mobile homes, who are often poor, will enjoy fewer protections.[626] Even the poor who rent from single-family structures may also be subject to lesser protections.[627] If reasonable expectations of privacy turn on societal norms, then the rundown apartments with doors left unlocked, unlatched fence gates, unkempt porches or broken windows would risk search and seizures more readily than wealthier homeowners whose properties are better kept as a result of more resources and money. This may only further "aggravate [] the other areas in which the poor already receive less Fourth Amendment protection."[628] Single mothers on welfare may continue to be subject to unannounced state agency caseworkers who search their homes.[629] Inmates who were recently released from prison and mandated to parole or probation may continue to be subject to unconsented searches and seizures in their apartments at the whim of state-authorized probation officers.[630] These are consequences of a search and seizure doctrine riddled with exceptions that, unlike other homebound amendments in the Bill of Rights, directly implicate the poor.

CONCLUSION

This Article explored some constitutional terrain that Fourth Amendment scholars have not identified. The purpose is to provoke discussion and scholarly debate and to shed light on the Fourth Amendment's constitutional home as it relates to and compares with home protections in its sister amendments across the Bill of

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[624] T. Andrew Brown, *No-Knock Raids: Political Inaction Has Deadly Consequences*, BLOOMBERG L. (Mar. 28, 2022), https://news.bloomberglaw.com/us-law-week/no-knock-raids-political-inaction-has-deadly-consequences [https://perma.cc/NH76-G725].

[625] Slobogin, *supra* note 588, at 392.

[626] *See id.* at 403–04, n.81.

[627] Slobogin, *supra* note 588, at 402.

[628] Amelia L. Deidrich, *Secure in Their Yards—Curtilage, Technology, and the Aggravation of the Poverty Exception to the Fourth Amendment*, 39 HASTINGS CONST. L.Q. 297, 318 (2011).

[629] Slobogin, *supra* note 588, at 402.

[630] Griffin v. Wisconsin, 483 U.S. 868, 873–75 (1987).

Rights. In doing so, we learn that the Court's Fourth Amendment doctrine stands as an outlier compared to the other amendments in adopting a variety of exceptions that limit home protections in numerous contexts, thus making the Fourth Amendment a less welcoming constitutional venue for home protections. This raises intriguing questions as to why the home enjoys lesser protections under the Fourth Amendment as opposed to other amendments.

Indeed, property concepts pervade many of the exceptions in a way that may offer a clue as to why the Court has been less stringent in its application of search and seizure protections in circumstances involving activity inside the home. It may also be the case that the Court's Fourth Amendment doctrine has acquired a special meaning and importance that justifies a guarantee of security in one's home, but that security in the home must yield to police intrusion when the health, safety, and security of the public welfare is at grave risk, as is often the case in the Court's search and seizure cases. This also lends to the explanation that judicial politics of crime is a significant reason for the decline in home protections because the Court has exhibited a genuine bias against criminal defendants, and as a result, has been willing to establish doctrinal exceptions that grant more discretion to law enforcement's entry into the home. This, then, may also help explain why so many of the Court's exceptions implicate the poor and the marginalized, thus offering yet another reason why the Fourth Amendment's home protections have regressed where the homestead is occupied by welfare recipients, probationers, motor home dwellers, or subsidized tenants. There is still much more to explore and discover about the Fourth Amendment's constitutional home compared to the constitutional homes in the other amendments. This Article initiates a conversation and invites further research to continue to develop a greater appreciation of the homebound Bill of Rights.