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## The Forgotten Right to Be Secure

Luke M. Milligan

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# The Forgotten Right to Be Secure

LUKE M. MILLIGAN\*

*Surveillance methods in the United States operate under the general principle that “use precedes regulation.” While the general principle of “use precedes regulation” is widely understood, its societal costs have yet to be fully realized. In the period between “initial use” and “regulation,” government actors can utilize harmful investigative techniques with relative impunity. Assuming a given technique is ultimately subjected to regulation, its preregulation uses are practically exempted from any such regulation due to qualified immunity (for the actor) and the exclusionary rule’s good faith exception (for any resulting evidence). This expectation of impunity invites strategic government actors to make frequent and arbitrary uses of harmful investigative techniques during preregulation periods. Regulatory delays tend to run long (often a decade or more) and are attributable in no small part to the stalling methods of law enforcement (through assertions of privilege, deceptive funding requests, and strategic sequencing of criminal investigations). While the societal costs of regulatory delay are high, rising, and difficult to control, the conventional efforts to shorten regulatory delays (through expedited legislation and broader rules of Article III standing) have proved ineffective.*

*This Article introduces an alternative method to control the costs of regulatory delay: locating rights to be “protected” and “free from fear” in the “to be secure” text of the Fourth Amendment. Courts and most commentators interpret the Fourth Amendment to safeguard a mere right to be “spared” unreasonable searches and seizures. A study of the “to be secure” text, however, suggests that the Amendment can be read more broadly: to guarantee a right to be “protected” against unreasonable searches and seizures, and possibly a right to be “free from fear” against such government action. Support for these broad readings of “to be secure” is found in the original meaning of “secure,” the Amendment’s structure, and founding-era discourse regarding searches and seizures. The rights to be “protected” and “free from fear” can be adequately safeguarded by a judicially-created rule against government “adoption” of an investigative method that constitutes an unregulated and unreasonable search or seizure. The upshot of this Fourth Amendment rule against “adoption” is earlier standing to challenge the constitutionality of concealed investigative techniques. Earlier access to courts invites earlier judicial regulation, which, in turn, helps curb the rising costs of regulatory delay.*

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## INTRODUCTION

Surveillance methods in the United States operate under the general principle that “use precedes regulation.”<sup>1</sup> This principle comes as no surprise to the lawyer or policymaker who has sought the regulation of a new investigative technique. While the general principle of “use precedes regulation” is widely understood, its implications have yet to be fully realized. To date, few scholars have addressed the costs incurred by society during “regulatory delays.”<sup>2</sup> This Article seeks to fill this void.

1. Neil Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1942 (2013) (“[T]he general principle under which American law operates is that surveillance is legal unless forbidden.”).

2. The costs of regulatory delay are not adequately captured by conventional discussions of “failure costs.” “Failure costs” are typically analyzed within a slice of time. If the technique at issue is sufficiently regulated at the time of analysis then it will likely elude identification as a “failure cost.” See ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 153–55 (1974) (discussing time-slice principles). This Article’s discussion of “delay costs,” however, is historical. It identifies costs even when the technique at issue is sufficiently regulated at the time of analysis. To illustrate the difference, assume that Technique X is unregulated from 2002 to 2006, Technique Y from 2006 to 2010, and Technique Z from 2010 to the present. An analysis of “failure costs” would typically be limited to the harm caused by

In the period between “initial use” and “regulation,” government actors can utilize harmful investigative techniques with relative impunity. Assuming that a given technique is ultimately subjected to regulation, its preregulation uses are practically exempted from any such regulation due to qualified immunity (for the actor) and the exclusionary rule’s good faith exception (for any resulting evidence).<sup>3</sup> This expectation of impunity invites strategic government actors to make frequent and arbitrary uses of harmful investigative techniques during preregulation periods.<sup>4</sup>

The societal costs of regulatory delay are a function of *delay lengths*.<sup>5</sup> For example, a five-year delay in regulation invites more preregulation uses than a one-year delay. In the United States, regulatory delays tend to be long—often running a decade or more.<sup>6</sup> Long delays are attributable in

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Technique Z. An analysis of “delay costs,” on the other hand, would focus on the twelve years of harm caused by Techniques X, Y, and Z.

3. See *Davis v. United States*, 131 S. Ct. 2419, 2431 (2011) (recognizing an exception to the exclusionary rule for good faith reliance on a binding appellate decision); see also Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137, 1180–82 (2012) (discussing the possibility of extending the good faith exception to situations in which there is no settled law within the circuit); *Pearson v. Callahan*, 55 U.S. 223 (2009) (stating rules on qualified immunity).

4. For example, police in one Virginia municipality secretly used Global Positioning System (“GPS”) devices to further investigations in nearly 160 cases from 2005 to 2007. See ALISON M. SMITH, CONG. RESEARCH SERV., R4I663, LAW ENFORCEMENT USE OF GLOBAL POSITIONING (GPS) DEVICES TO MONITOR MOTOR VEHICLES: FOURTH AMENDMENT CONSIDERATIONS 2 n.11 (2011); see also Eric Lichtblau, *Police Are Using Phone Tracking as a Routine Tool*, N.Y. TIMES, Mar. 31, 2012, at A1. The decision to regulate an investigative technique generally implies that preregulation uses of that technique caused undue harm (although such harm is rarely found to constitute “legal harm”). See, e.g., *Williams v. United States*, 401 U.S. 646, 656 (1971); *Desist v. United States*, 394 U.S. 244, 246 (1969). For example, consider the Supreme Court’s recent holding that the government’s warrantless attachment of a GPS device to a vehicle, and its use to monitor the vehicle’s movements, constitutes an unreasonable search. *United States v. Jones*, 132 S. Ct. 945, 949 (2012). The Court’s finding that the technique at issue in *Jones* is an unreasonable search implied that the technique caused undue harm, which, in turn, implied that earlier, preregulation uses of the technique caused undue harm. *Id.* at 952 (“By attaching the device to the Jeep, officers encroached on a protected area.”). There are admittedly situations in which a regulated investigative technique might not have caused undue harm in its preregulation period (due to the existence of special factors unique to the preregulation period). These situations are rare enough that I will assume, for the purposes of this Article, that regulation of an investigative technique implies that preregulation uses of that investigative technique caused undue harm.

5. I do not mean to suggest that regulatory delays provide no benefits. Delay can, of course, afford regulators the necessary time to accurately assess the privacy and security implications of a given technique. See generally *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010). With that said, most assessments of new investigative techniques do not benefit from regulatory delay. The typical assessment will not present difficult questions. In the atypical assessment, where difficult issues arise, the difficulties are rarely likely to be allayed with time. And in that narrow category of assessments in which difficult questions are likely to be allayed with time, the costs associated with expedited decisionmaking are mitigated by the fact that judges and legislators are able to amend their conclusions at later points. *Id.* at 2629 (Scalia, J., concurring). As a result, the costs of regulatory delay seem to outweigh the benefits.

6. See *infra* Part I.B. Regulation of investigative techniques by law enforcement can come in the form of legislation, judicial decisions, or administrative actions. The period of preregulation runs from the time a given technique is first used by law enforcement in the jurisdiction until the time the jurisdiction

no small part to the stalling methods of law enforcement (through assertions of privilege, deceptive funding requests, and strategic sequencing of criminal investigations).<sup>7</sup> The costs of regulatory delay are also a function of *technique depth*. A deep pool of unregulated investigative techniques permits law enforcement to stack regulatory delays upon one another: when a preferred technique is exposed and regulated, resourceful investigators can simply dip into their pool of unregulated techniques to continue surveillance.<sup>8</sup> The current pool of unregulated techniques is deep, including satellite surveillance, facial-scanning surveillance, radio-wave hacking, cyborg surveillance insects, nano sensors, iris scanners, bomb-sniffing plants, “Smart Dust” motes, and nano-based radio-frequency identification barcodes.<sup>9</sup> Tomorrow’s pool is anyone’s guess. The depth of available techniques, coupled with the length of regulatory delays, leaves law enforcement under-deterred in their use of harmful investigative methods.

While the societal costs of regulatory delay in the United States are high (and likely rising), conventional proposals to control these costs have enjoyed little success. Calls for more proactive legislative regulation of investigative techniques have gone largely unheeded.<sup>10</sup> And in 2013, the Supreme Court flatly rejected an argument to loosen Article III standing limits for the purpose of inviting earlier judicial review of investigative techniques.<sup>11</sup> It seems time to explore alternative reforms.<sup>12</sup>

This Article locates a solution to the problem of regulatory delay in the text of the Constitution.<sup>13</sup> The Fourth Amendment has traditionally

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regulates law enforcement’s use of that technique. This can last for a decade or more. *See Quon*, 130 S. Ct. at 2630–33 (leaving unregulated the technique of subpoenaing records providing content of text messages sent on work-issued devices). For example, eight years after *Police Chief Magazine* described the technique as a “particularly helpful tool,” the Supreme Court reviewed warrantless GPS tracking. *Jones*, 132 S. Ct. at 949.

7. *See infra* Part I.B. This Article uses the term “law enforcement” as a proxy for “government actors who use investigative techniques” in order to avoid the terminological confusion that comes from distinguishing government actors who *use* the techniques from those who *regulate* the techniques.

8. *See infra* Part I.B. You could even imagine a contractor leasing surveillance tools during the period of impunity with guarantees to substitute new devices once the older ones are regulated.

9. *See infra* Part I.B. Joby Warrick, *Domestic Use of Spy Satellites to Widen*, WASH. POST, Aug. 16, 2007, at A1.

10. The flurry of congressional activity regarding NSA surveillance in the wake of the revelations by Edward Snowden does not necessarily reflect a new legislative attitude toward the regulation of general investigative techniques. For discussion of the unique nature of the recent legislative calls for NSA reform, see discussion *infra* notes 104–106.

11. *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1150 (2013).

12. *See* Jack M. Balkin, *The Constitution in the National Security State*, 93 MINN. L. REV. 1, 23–24 (2008) (“Unless legislatures and courts can devise effective procedures for inspecting and evaluating secret programs, the Presidency will be a law unto itself.”).

13. Every judge attributes at least some weight to the original meaning of the Constitution. *See, e.g.*, *Dist. of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (Stevens, J., dissenting); *Wilson v. Arkansas*, 514 U.S. 927 (1995).

been interpreted by courts to safeguard a mere right to not be subjected to unreasonable searches or seizures.<sup>14</sup> In other words, the Amendment is read to guarantee nothing beyond the right to be “spared” an unreasonable search or seizure.<sup>15</sup> In 2013, the Supreme Court reaffirmed the conventional “spared” reading of the Fourth Amendment in *Clapper v. Amnesty International*.<sup>16</sup> In *Clapper*, all nine Justices agreed that communications surveillance programs do not violate an individual’s Fourth Amendment rights before the government succeeds in “intercepting” or “acquiring” that individual’s communications.<sup>17</sup> The Court made clear, once again, that the Fourth Amendment is not violated by attempts or threats to conduct an unreasonable search or seizure.<sup>18</sup> Nor are an individual’s Fourth Amendment rights violated by the existence of a vast surveillance program that happens to spare the individual claimant.<sup>19</sup>

The Fourth Amendment can be read, however, to safeguard more than a right to be “spared” an unreasonable search or seizure.<sup>20</sup> The Amendment provides for “[t]he right of the people *to be secure* in their persons, houses, papers, and effects, against unreasonable searches and seizures.”<sup>21</sup> Unlike its textual counterparts (such as “search,” “seizure,” and “unreasonable”), the “to be secure” phraseology remains largely forgotten: it is treated on mere occasion by commentators;<sup>22</sup> and it has

14. See discussion *infra* note 118.

15. See discussion *infra* note 119.

16. *Clapper*, 133 S. Ct. at 1150.

17. *Id.* at 1147 (explaining that the Fourth Amendment is violated if communications are “intercepted” or “acquired”); *id.* at 1155 (Breyer, J., dissenting) (stating that harm occurs only if the government “intercept[s] at least some of their private, foreign, telephone, or e-mail conversations”); see *ACLU v. NSA*, 493 F.3d 644, 688 (6th Cir. 2007) (Gibbons, J., concurring) (“The disposition of all of the plaintiffs’ claims depends upon the single fact that the plaintiffs have failed to provide evidence that they are personally subject to the [challenged program].”).

18. *Clapper*, 133 S. Ct. at 1152.

19. *Id.* at 1148–50.

20. This alternative reading of “secure” was recently referenced by the Presidential Advisory Commission on the National Security Agency (“NSA”). PRESIDENT’S REVIEW GRP. ON INTELLIGENCE & COMM’NS TECHS., LIBERTY AND SECURITY IN A CHANGING WORLD: REPORT AND RECOMMENDATIONS 45 (2013) [hereinafter LIBERTY AND SECURITY IN A CHANGING WORLD] (“In Latin, the word ‘securus’ offers the core meanings, which include ‘free from care, quiet, easy,’ and also ‘tranquil; free from danger, safe.’”).

21. U.S. CONST. amend. IV (emphasis added). With the Court’s extensive emphases on the original text in recent cases such as *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008), and *Nat’l Fed’n of Bus. v. Sebelius*, 132 S. Ct. 2566 (2012), it seems reasonable to press the Court on why it has ignored the “to be secure” text.

22. See Lawrence Rosenthal, *Seven Theses in Grudging Defense of the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L. 523, 538 (2013) (“The term ‘secure’ is often ignored in discussions of the Fourth Amendment.”). The leading commentator on the constitutional meaning of “secure” is Thomas Clancy. In a series of articles Clancy has claimed that the right “to be secure” promises nothing more than a right to exclude the government from actual intrusions. See, e.g., Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307

been left undefined in the case law.<sup>23</sup> Historical and textual analyses of “to be secure,” however, suggest the existence of a Fourth Amendment right to “protection” against unreasonable searches and seizures, and perhaps a right to be “free from fear” against such government action. Support for these interpretations of “to be secure” rest in the dictionary definitions of “secure,”<sup>24</sup> the structure of the Fourth Amendment,<sup>25</sup> and founding-era discourse concerning searches and seizures, which regularly emphasized the harms attributable to the *potentiality* of unreasonable searches and seizures.<sup>26</sup>

Judicial recognition of Fourth Amendment rights to be “protected” and “free from fear” will almost certainly reduce the costs of regulatory delay. The prevailing interpretation of the Fourth Amendment (limited to a right to be “spared”), taken in conjunction with the rules on pleading and Article III standing,<sup>27</sup> leaves society with a regulatory matrix that can be easily exploited by self-interested law enforcement actors. To initiate judicial review, claimants must plead facts to demonstrate that a challenged technique was actually used on them or that such use was certainly impending.<sup>28</sup> Law enforcement can delay judicial regulation of a new investigative technique by simply concealing information about the particular targets of its new technique. Concealment assures far less delay, however, when the Fourth Amendment is interpreted to safeguard

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(1998) [hereinafter Clancy, *Property, Privacy, or Security*]; Thomas K. Clancy, *The Fourth Amendment as a Collective Right*, 43 TEXAS TECH L. REV. 255 (2010) [hereinafter Clancy, *Collective Right*]; Thomas K. Clancy, *The Importance of James Otis*, 82 MISS. L.J. 487 (2012) [hereinafter Clancy, *James Otis*]. Several commentators have suggested that “to be secure” could be read more broadly to include rights to be “protected” or “free from fear.” Unfortunately, none of the proponents of the broad reading of “to be secure” has offered extensive historical and textual support for the claim. Richard H. McAdams, Note, *Tying Privacy in Knotts: Beeper Monitoring and Collective Fourth Amendment Rights*, 71 VA. L. REV. 297, 318–19 (1985); Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 122 (2008). For analysis of the contending interpretations of “to be secure,” see *infra* Part II.A.

23. See Rubenfeld, *supra* note 22, at 119 (observing that the “right to be secure” text “play[s] little role in current doctrine”). Interestingly, the Presidential Commission on NSA surveillance devoted several pages to the contending meanings of “secure.” See LIBERTY AND SECURITY IN A CHANGING WORLD, *supra* note 20, at 43–46.

24. OXFORD ENGLISH DICTIONARY 851 (2d. ed., 1989) (defining “secure” as: “safe, free from danger”; “protected from or not exposed to danger”; or “being free from fear or anxiety”); SAMUEL JOHNSON, 1 A DICTIONARY OF THE ENGLISH LANGUAGE 1777 (1755) [hereinafter JOHNSON DICTIONARY] (defining “secure” as: “free from danger, that is safe”; “to protect”; “to insure”; “free from fear”; or “sure, not doubting”).

25. See discussion *infra* Part II.C.2.

26. See discussion *infra* Part II.C.3.

27. See generally *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138 (2013); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

28. *Clapper*, 133 S. Ct. at 1149; Richards, *supra* note 1, at 1944 (“Plaintiffs can only challenge secret government surveillance they can prove, but the government isn’t telling.”).

rights to be “protected” or “free from fear.”<sup>29</sup> Both rights are, in important ways, broader than the right to be “spared”: the term “protected” implies some degree of immunity, while “free from fear” turns not on actualities but perceptions.<sup>30</sup> Thus, an individual “spared” an investigative technique can nonetheless suffer a violation of her rights to be “protected” or “free from fear.”<sup>31</sup> This is an important point. It means that Fourth Amendment claimants can establish standing to challenge the constitutionality of a new investigative technique even if law enforcement has successfully concealed information about the objects of its surveillance.<sup>32</sup> Expedited standing invites earlier judicial regulation, which, in turn, provides a substantial check on the rising costs of regulatory delay.<sup>33</sup>

Judicial recognition of individual rights to be “protected” and “free from fear” will have significant implications for current Fourth Amendment rules and procedures. Thankfully, these rights can be adequately guarded by a simple rule against government adoption of an investigative method that constitutes an unregulated and unreasonable search or seizure.<sup>34</sup> This suggested rule (one of several viable alternatives) provides society with the benefit of expedited judicial regulation of new investigative techniques without inviting burdensome litigation, disruptions to ongoing lawful investigations, or discontinuity of precedent.<sup>35</sup>

This Article proceeds in three parts. Part I identifies the rising costs of regulatory delay, examines its causes, and surveys the conventional

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29. Any number of rules could be enacted to safeguard the rights to be “protected” and “free from fear.” In Part III, *infra*, this Article proposes that courts create a rule against adoption of unregulated and unreasonable investigative techniques.

30. See OXFORD ENGLISH DICTIONARY, *supra* note 24, at 1499 (defining “protect” as “to guard from injury” or “afford immunity to”); Rosenthal, *supra* note 22, at 538 (“Security may not require perfect deterrence, but surely demands at least reasonable deterrent efficacy.”).

31. Aggregated costs associated with “regulatory delay” would have been de minimis at the time of the framing when government actors employed a narrow and fixed set of investigative techniques—all of which had been subjected to regulatory review. See generally WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANINGS: 602–1791 (2009).

32. A plaintiff need only plead facts to show that, in regards to a particular investigative technique, she is not “protected” or “free from fear” (instead of facts demonstrating that she was not “spared” the challenged technique). Part III, *infra*, discusses standing implications in greater detail and proposes important doctrinal limits on the rights to be “protected” and “free from fear.”

33. Judicial regulation does not, of course, *prevent* government use of regulated techniques. It merely *deters* government use of techniques by denying users the benefits of qualified immunity and the good faith exception to the exclusionary rule. See *infra* discussion Part I.A.; see also Mary D. Fan, *The Police Gamesmanship Dilemma*, 44 U.C. DAVIS L. REV. 1407, 1414–17 (2011) (discussing ways to further counter police gamesmanship, including default penalties for failure to produce data on unconstitutional conduct).

34. See discussion *infra* Part III.B.

35. See discussion *infra* Part IV. Unlike the plaintiffs’ Article III standing argument in *Clapper*, the impact of the “protected” and “free from fear” interpretation of the “to be secure” text is limited to Fourth Amendment cases.

proposals to expedite the regulatory processes for new investigative techniques. Part II suggests a new, alternative method to reduce regulatory delay: interpreting the “to be secure” text of the Fourth Amendment to safeguard the right to be “protected” against unreasonable searches and seizures, and perhaps the right to be “free from fear” against such government action. Part II then examines the broad reading of “to be secure” against the historical record, studying the definitions of “secure,” the Amendment’s structure, and founding-era discourse concerning search and seizure. Part III addresses the practical implications of a broad reading of “to be secure” and proposes a tailored Fourth Amendment rule against “adoption” that facilitates expedited regulation of new investigative techniques while avoiding high collateral costs.

## I. THE PROBLEM OF REGULATORY DELAY

Many have written about the costs of failing to regulate investigative techniques.<sup>36</sup> Overlooked in these discussions are the special costs of *delayed* regulation.<sup>37</sup> The following Subparts describe the phenomenon of regulatory delay and survey conventional efforts to manage its costs.<sup>38</sup>

### A. REGULATORY DELAY

The regulation of investigative techniques can take a variety of forms: legislative, administrative, or judicial.<sup>39</sup> Of these forms, judicial regulation is probably the least straightforward. Judicial regulation of a new investigative technique occurs, generally speaking, when an appeals

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36. See generally Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904 (2013); Richard A. Posner, *Privacy, Surveillance, and Law*, 75 U. CHI. L. REV. 245 (2008); Richards, *supra* note 1.

37. There are exceptions. For helpful discussions of the problem of regulatory delay, see M. Ryan Calo, *The Drone as Privacy Catalyst*, 64 STAN. L. REV. ONLINE 29, 32–33 (2011) (“I . . . believe that the lack of a coherent mental model of privacy harm helps account for the lag between the advancement of technology and privacy law.”); Logan, *supra* note 3, at 1143–47 (identifying rules of appeal as a cause of regulatory delay). See generally Scott Michelman, *Who Can Sue Over Government Surveillance?*, 57 UCLA L. REV. 71 (2009) (focusing on the regulatory delay caused by Article III standing rules).

38. This is not a claim about the specific types and degrees of costs attributable to the use of investigative techniques. Cf. Cohen, *supra* note 36; Richards, *supra* note 1. Those who deliberate regarding regulation make cost assessments about a technique. The costs of regulatory delay are simply a function of whatever costs the deliberator attributes to the given technique in its unregulated state. While society will generally not agree on the types and degrees of harm attributable to a given technique, it will be able to agree that such harms (whatever their type and degree) are compounded by regulatory delays. For discussions of the costs of regulatory delay in other contexts, see generally Ronald R. Braeutigam, *The Effect of Uncertainty in Regulatory Delay on the Rate of Innovation*, 43 LAW & CONTEMP. PROBS. 98 (1979); James E. Prieger, *Product Innovation, Signaling, and Endogenous Regulatory Delay*, 34 J. REG. ECON. 95 (2008).

39. Richards, *supra* note 1, at 1942 (“American law governing surveillance is piecemeal, spanning constitutional protections such as the Fourth Amendment, statutes like the Electronic Communications Privacy Act of 1986 (ECPA), and private law rules such as the intrusion-into-seclusion tort.”).

court of the relevant jurisdiction establishes constitutional rules for the technique's uses.<sup>40</sup> This judicial action constitutes "regulation" as it limits the scope of qualified immunity for future users of the technique.<sup>41</sup> It also deprives future users of any potential availability of the "good faith" exception to the exclusionary rule.<sup>42</sup> The judiciary's identification of the standard of constitutionality creates rules of liability and exclusion, which, in turn, regulate (albeit imperfectly) future government uses of the technique.

Analyses of regulatory delay should begin with the components of the regulatory processes.<sup>43</sup> Some parts of the regulatory processes are *structural*. By "structural," this Article means rules and procedures that impact laws and policies beyond the Fourth Amendment and new investigative techniques.<sup>44</sup> In the legislative context, structural parts include, among other things, committee bottlenecks, the bicameral process, and the deliberative process.<sup>45</sup> When it comes to adjudication,

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40. For a more detailed explanation of "judicial regulation," see *infra* note 232. See Logan, *supra* note 3, at 1177 ("Application of the 'clearly established' standard is unremarkable when the constitutionality of the government behavior in question has been resolved by the Supreme Court or the forum circuit.").

41. See Pearson v. Callahan, 555 U.S. 223, 239–43 (2009); Saucier v. Katz, 533 U.S. 194, 201–02 (2000); see also Logan, *supra* note 3, at 1177–79.

42. Davis v. United States, 131 S. Ct. 2419, 2432 (2011). While the majority held that the exception applies when police follow binding appellate precedent, it is at least arguable that the good-faith exception also exists when the law is unsettled within a circuit. See *id.* at 2439 (Breyer, J., dissenting) (explaining that if police culpability is a prerequisite for exclusion, then the good faith exception will apply when clear circuit precedent "just does not exist"); see also Logan, *supra* note 3, at 1180–82 (discussing the likelihood of a "new 'good faith' exception" for police reliance on unsettled case law). Establishment of a constitutional standard for a given technique can moreover result in an injunction. See City of Indianapolis v. Edmond, 531 U.S. 32, 36 (2000); see also Orin S. Kerr, *The Limits of Fourth Amendment Injunctions*, 7 J. TELECOMM. & HIGH TECH L. 127, 128–29 (2009) (stating that "as a matter of history and practice, injunctive relief has been quite rare in Fourth Amendment cases" and arguing that judges are ill-equipped to issue broad injunctions in this area of law).

43. The period of preregulation runs from the time a given technique is first used by law enforcement in the jurisdiction until the time the jurisdiction regulates law enforcement's use of that technique. Regulatory delay can last for a decade or more. See generally City of Ontario v. Quon, 130 S. Ct. 2619 (2010) (leaving unregulated the technique of subpoenaing records providing content of text messages sent on work-issued devices); United States v. Jones, 132 S. Ct. 945 (2012) (regulating warrantless GPS tracking eight years after "Police Chief Magazine" described the technique as a "particularly helpful tool").

44. See Antonin Scalia, *Foreword: The Importance of Structure in Constitutional Interpretation*, 83 NOTRE DAME L. REV. 1417, 1418 (2008) ("The constitutional structure of the United States has two main features: (1) separation and equilibration of powers and (2) federalism.").

45. This Article focuses on regulatory delays attributable to law enforcement stalling and, as a result, is generally not concerned with delays in regulation attributable solely to evolving understandings of morality, efficiency, or constitutional meaning. Compare *Olmstead v. United States*, 277 U.S. 438, 467 (1928), *overruled by Jones*, 132 S. Ct. at 963 (holding that the Court will not regulate), with *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013) (holding that the Court is *unable* to regulate); see also Calo, *supra* note 37, at 32–33 ("I . . . believe that the lack of a coherent mental model of privacy harm helps account for the lag between the advancement of technology and privacy law.").

structural parts include pleading requirements,<sup>46</sup> standing rules,<sup>47</sup> qualified immunity,<sup>48</sup> and the rules of appeal.<sup>49</sup> Interacting with structural parts in the regulatory processes are *doctrinal* parts. By “doctrinal,” this Article means rules and procedures specific to the Fourth Amendment, including the standards for “search,” “seizure,” “reasonableness,” and the scope of exclusionary rule exceptions.<sup>50</sup>

While structural and doctrinal parts bring a “natural” delay to regulatory processes, much of the actual delay in the regulation of new investigative techniques is attributable to law enforcement’s exploitation of these structural and doctrinal parts. Law enforcement’s primary method of exploitation is concealment of information regarding the existence and objects of new investigative techniques.<sup>51</sup> The following Subpart briefly surveys law enforcement efforts to conceal information about new investigative techniques. Such concealment leaves law enforcement undeterred for long periods of time in their uses of harmful investigative techniques.

#### B. DELAY BY CONCEALMENT

Law enforcement agencies utilize several methods to conceal information about the existence and objects of new investigative techniques from regulatory processes.<sup>52</sup> One method relies on government claims of privilege.<sup>53</sup> Assertions of privilege deprive individuals of

46. See *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009). For excellent commentary on *Iqbal*, see generally Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53 (2010).

47. See *Clapper*, 133 S. Ct. at 1146–47; *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972) (“Allegations of a subjective ‘chill’ are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.”). See generally Michelman, *supra* note 37.

48. See *Pearson v. Callahan*, 555 U.S. 223, 231–33 (2009); *Saucier v. Katz*, 533 U.S. 194, 200–01 (2000); see also Logan, *supra* note 3, at 1177–79.

49. See Logan, *supra* note 3, at 1139.

50. *Davis v. United States*, 131 S. Ct. 2419, 2435–36 (2011) (identifying “good faith exception” to the exclusionary rule in regards to reliance on appellate decisions); *California v. Hodari D.*, 499 U.S. 621, 624 (1991) (defining “seizure” of a person); *United States v. Jacobson*, 466 U.S. 109, 114 (1984) (defining “seizure” of property); *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (defining “search”).

51. It should come as no surprise that law enforcement oftentimes conceals new investigative techniques at the point of their use. After all, the practice of concealing surveillance from targets goes back millennia. But it is less obvious that law enforcement often seeks general and complete concealment—not just from the particular target at the point of its specific uses but also from the legislatures, courts, and general public during the periods before and after such uses.

52. See Catherine Crump & Jay Stanley, *Why Americans Are Saying No to Domestic Drones*, SLATE (Feb. 11, 2013), [http://www.slate.com/articles/technology/future\\_tense/2013/02/domestic\\_surveillance\\_drone\\_bans\\_are\\_sweeping\\_the\\_nation.html](http://www.slate.com/articles/technology/future_tense/2013/02/domestic_surveillance_drone_bans_are_sweeping_the_nation.html) (“What we usually see happen with new law enforcement technologies is that agencies quickly and quietly snap them up, making their deployment a fait accompli before the public even learns of their existence.”).

53. See, e.g., Editorial Board, *GPS Tracking and Secret Policies*, N.Y. TIMES, Aug. 17, 2013, at A18 (documenting claims of privilege to avoid disclosure of memos describing uses of GPS tracking); see also Freedom of Information Act (“FOIA”), 5 U.S.C. § 552(b)(3) (2014) (providing exemptions

information practically necessary for legislative and administrative regulation of new investigative techniques.<sup>54</sup> Claims of privilege also create a “brutal paradox” for individuals seeking to initiate judicial regulation.<sup>55</sup> This paradox manifested recently in the Sixth Circuit case of *ACLU v. NSA*.<sup>56</sup> Because information regarding the challenged surveillance had been withheld under the State Secrets Doctrine, the plaintiffs were unable to meet the Article III standing requirement that their own communications had been intercepted by the National Security Agency (“NSA”).<sup>57</sup>

A second method of concealment concerns funding requests. Law enforcement has proved adept at securing funds (such as for training or purchases of equipment) while concealing the specific purpose of the request from the public.<sup>58</sup> It does so by developing pools of discretionary

for “inter-agency or intra-agency memorandums or letters,” materials relating to deliberative process, attorney-client communications, and “investigative techniques and procedures”). Under the state secrets privilege, the government may “bar the disclosure of information if there is a reasonable danger that disclosure will expose military matters which, in the interest of national security, should not be divulged.” See *Al-Haramain Islamic Found., Inc.*, 507 F.3d 1190, 1196 (9th Cir. 2007) (citations omitted); see also *El-Masri v. United States*, 479 F.3d 296, 302–307, 312 (4th Cir. 2007); *ACLU v. NSA*, 493 F.3d 644, 650 n.2 (6th Cir. 2007); *Halkin v. Helms*, 690 F.2d 977, 990 (D.C. Cir. 1982); *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899, 908 (N.D. Ill. 2006).

54. If the use is not revealed the government is not likely to draw the ire of the legislatures and is able to evade any litigation due to case and controversy requirements. Balkin, *supra* note 12, at 23 (discussing “the executive’s increasing use of secrecy . . . to avoid accountability for its actions”); Richards, *supra* note 1, at 1934 (“Although we have laws that protect us against government surveillance, secret government programs cannot be challenged until they are discovered.”); Ginger McCall, *The Face Scan Arrives*, N.Y. TIMES, Aug. 30, 2013, at A19 (discussing documents regarding the Biometric Optical Surveillance System acquired through FOIA requests).

55. Richards, *supra* note 1, at 1944 (stating that this “create[s] a brutal paradox for the plaintiffs: they could not prove whether their telephone calls had been listened to, and thus they could not establish standing to sue for the violation of their civil liberties”).

56. *ACLU*, 493 F.3d at 650–52.

57. *Id.* at 655; see Balkin, *supra* note 12, at 23 (“[W]e exclude more and more executive action from judicial review on the twin grounds of secrecy and efficiency. . . . Judges must also counter the executive’s increasing use of secrecy and the State Secrets privilege to avoid accountability for its actions.”); Richards, note 1, at 1960 (explaining that the NSA wiretapping program was “shrouded in secrecy, denials, and unassessable invocations of national security interests”).

58. See, e.g., Kate Zernike, *New Jersey Supreme Court Restricts Police Searches of Phone Data*, N.Y. TIMES, July 19, 2013, at A1 (“Some departments had manuals advising officers not to reveal the practice to the public.”); Brian Bennett, *Police Employ Predator Drone Spy Planes on Home Front*, L.A. TIMES, Dec. 11, 2011, at A1; Joe Arnold, *LMPD Reveals Use of GPS Tracking*, WHAS11 (Nov. 24, 2009, 4:37 PM), <http://www.whas11.com/news/local/LMPD-reveals-use-of-GPS-tracking-sometimes-without-a-warrant-72633812.html> (“Police acknowledged the use of the tracking devices after WHAS11 News brought a U.S. Attorney’s Office news release that cited Metro Police’s use of them to LMPD’s attention. The Justice Department apparently did not know that the use of such devices in Louisville had never been revealed.”); Stephen Dean, *Police Line Up to Use Drones on Patrol after Houston Secret Test*, EXAMINER.COM (Jan. 11, 2010), <http://www.examiner.com/article/police-line-up-to-use-drones-on-patrol-after-houston-secret-test> (describing a secret drone test in Houston).

funds to finance techniques free of regulatory oversight,<sup>59</sup> “burying” funding requests in vague or unrelated budgetary lines,<sup>60</sup> classifying budgets as confidential,<sup>61</sup> and—when all else fails—explicitly misrepresenting the purpose of the funding.<sup>62</sup>

A third form of concealment involves the sequencing of criminal investigations.<sup>63</sup> The general rule (subject to many exceptions) is that the fruits of an unreasonable search or seizure are not admissible in a criminal trial.<sup>64</sup> Strategic law enforcement actors have learned, however, to further prosecutions through the use of undisclosed investigative techniques.<sup>65</sup> They do so by carefully sequencing the steps of

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59. See generally CITIZENS UNION OF THE CITY OF NEW YORK, SPENDING IN THE SHADOWS: DISCRETIONARY FUNDING IN THE NYS BUDGET (Sept. 2013), available at [http://www.citizensunion.org/www/cu/site/hosting/Reports/CU\\_SpendingintheShadows\\_DiscretionaryFundsInNYS\\_September\\_2013.pdf](http://www.citizensunion.org/www/cu/site/hosting/Reports/CU_SpendingintheShadows_DiscretionaryFundsInNYS_September_2013.pdf) (documenting the discretionary funds flowing to law enforcement).

60. See, e.g., Scott Shane, *New Leaked Documents Outline U.S. Spending on Intelligence Agencies*, N.Y. TIMES, Aug. 30, 2013, at A13 (“For decades, administrations from both parties have hidden spy spending in what is popularly known as the ‘black budget.’”).

61. See, e.g., *id.* (describing budgetary line of “corporate partner access” as a reference to programs collecting information from Internet companies like Google and Microsoft).

62. See Scott Shane & David E. Sanger, *Job Title Key to Inner Access Held by Leaker*, N.Y. TIMES, July 1, 2013, at A1 (describing the false congressional testimony by Director of National Intelligence, James R. Clapper, Jr., and inaccuracies of the “fact sheet” posted by NSA on its website before the leaks by Edward Snowden); see also Peter Baker & Ellen Barry, *Leaker’s Flight Raises Tension for 3 Nations*, N.Y. TIMES, June 25, 2013, at A1 (describing letter from Senators Wyden and Udall to NSA Director General Keith Alexander inquiring about an “inaccurate statement” regarding the uses of surveillance). In Alameda County, California, the police department went so far as to misrepresent its intentions to the Board of Supervisors to conceal the fact that it wanted drones for “activities like spying on ‘suspicious persons’ and ‘large crowd control disturbances’ and not just for ‘emergency purposes.’” The County Board of Supervisors realized that the agency had misrepresented its intentions and moved to postpone plans to buy surveillance drones. Trevor Timm, *EFF to Argue Against Surveillance Drone Use at Alameda County, California Public Hearing*, ELEC. FRONTIER FOUND. (Feb. 13, 2013), <https://www.eff.org/deeplinks/2013/02/eff-and-aclu-testify-against-drone-use-alameda-county>.

63. See Fan, *supra* note 33, at 1419 (stating that police “are capable of very smart, strategic ploys and plays with the law” and “are sensitive to shifts in the law—even subtle and less publicized decision rule shifts that limit remedies for constitutional violations—and can adjust behavior accordingly.”); see also Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 600–18 (2012) (discussing aggressive policing). Non-disclosure is not overly burdensome in the context of overt uses (such as when the undisclosed technique was used in a manner in which the target, or at least some member of the public will be able to provide information about the government action). See generally *Kyllo v. United States*, 533 U.S. 27 (2001); *United States v. Place*, 462 U.S. 696 (1983). But problems arise when the undisclosed technique is used covertly. See generally *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138 (2013). Surveillance pursuant to the 2008 Foreign Intelligence Surveillance Act Amendment is unique from other techniques in that the legislation itself provides that the government shall disclose in criminal cases evidence derived from such surveillance. 50 U.S.C. § 1881e(a) (2012).

64. See, e.g., *Herring v. United States*, 555 U.S. 136 (2009).

65. See Benjamin Weiser, *Judge Says Police and U.S. Agents Misled Court in Manhattan Gun Possession Case*, N.Y. TIMES, July 1, 2013, at A18 (documenting police decision to omit source of information in warrant application to protect a confidential informant). When asked whether sources of information are omitted as a matter of practice, a special agent with ATF responded that “if there was other evidence that established probable cause for an arrest, and you do not have to risk the safety

investigations. Strategic sequencing works as follows: the police will conduct a preliminary investigation with a new, unreviewed technique to generate “shadow leads” for a formal, above-board investigation.<sup>66</sup> In response to any ensuing motions to suppress, the government will cite the formal investigation as the source of the challenged evidence.<sup>67</sup> This shifts the burden to the criminal defendant to establish that the new technique was in fact the original source of the challenged evidence.

As a practical matter, law enforcement’s ability to shift burdens in this context allows it to secure convictions based on evidence gained from new, unregulated techniques without being compelled to disclose the use or existence of such techniques.<sup>68</sup> Let me briefly explain. Evidence obtained by new investigative techniques is not subject to the exclusionary rule if the government can show that it relied in good faith on binding appellate precedent.<sup>69</sup> As a result, defendants will be reluctant to expend their limited investigative resources to discover information about the uses of new techniques when any such discovery is unlikely to increase the chances of an acquittal or favorable plea deal. Moreover, judges will be reluctant to hold extensive hearings based on a claim that is likely to be perceived as desperate speculation on the part of a criminal defendant—particularly when the facts disclosed by the government already established the requisite cause.<sup>70</sup> Lastly, even if extensive hearings are

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of an informant by exposing them, then you try to do that if possible.” *Id.* See also *Rhode Island v. Patino*, No. P1-10-1155A, at \*65 (R.I. Super. Ct. Sept. 4, 2012), available at <http://www.courts.ri.gov/Courts/SuperiorCourt/DecisionsOrders/decisions/10-1155.pdf> (finding that by “revealing only evidence of the text messages in which the State claims the Defendant lacks standing—namely, the text messages on the LG cell phone—while depriving the Defendant of the very evidence that the State claims he needs to prove standing—namely, proof that the corresponding text messages are on his cell phone and could have been viewed and, in fact, were viewed by the police at the time of their search. This prospect turns the law of standing on its head.”).

66. For example, think of illegal GPS surveillance that discloses the residence of a suspect, which prompts the officers to go to the residence, stake it out, and observe criminal behavior. Strategic officers would seek a search warrant based on the physical observations of the stakeout (rather than the information collected through the use of the GPS device).

67. Police have no legal duty to affirmatively reveal all government actions (lawful or otherwise) that lead to evidence. In other words, it is up to the criminal defendant to identify the illegal source of the evidence. Surveillance pursuant to the 2008 FISA Amendment is unique from surveillance based on other techniques in that the legislation itself provides that the government shall disclose in criminal cases evidence derived from such surveillance. 50 U.S.C. § 1881.

68. See *Patino*, No. P1-10-11551, at \*43 (failing to establish the source of the information regarding the incriminating evidence after a three week hearing on a motion to suppress).

69. See *Davis v. United States*, 131 S. Ct. 2419, 2431–32 (2011); see also *Logan*, *supra* note 3, at 1180–82 (discussing the possibility of extending the good faith exception to situations in which there is no settled law within the circuit).

70. There are exceptions. See *Patino*, No. P1-10-11551 (holding a three-week suppression hearing); *Fan*, *supra* note 33, at 1425 (“One of the most prominent of such decision-framing doctrines is the general rule of judicial noninquiry into the reasons behind and prevalence of a practice so long as an officer can point to an ‘objective’ basis at the time for an exertion of power against an individual—even if offered as a post hoc rationalization.”).

actually held, a strategic police department will have likely “decentralized” the investigation in order to reduce the odds that the new investigative technique would be disclosed during a hearing.<sup>71</sup> Decentralization occurs when one officer generates a lead with a new investigative technique and a second officer, without knowing the source of the lead, initiates a formal investigation based on lawful uses of regulated techniques.<sup>72</sup> Decentralization allows the second officer to truthfully testify that her investigation was based on a tip from a fellow officer.<sup>73</sup> If the first officer—who conducted the preliminary investigation with the new technique—is identifiable and called to testify (which is not likely), she could state vaguely that the tip reflected “general information gathered from sources.”<sup>74</sup> If pressed further, the officer may refuse to elaborate. Should the judge threaten the first officer with contempt or conclude that the source of the evidence was indeed a new investigative technique, the government can still evade judicial regulation of the new technique by simply pleading out the case—or, if necessary, moving to dismiss the information or indictment.<sup>75</sup>

The recent case of *Raees Alam Qazi* provides a good example of strategic investigative sequencing.<sup>76</sup> Qazi and his brother were indicted for planning to bomb targets in New York City.<sup>77</sup> His lawyers sought notice whether the government intended to use evidence derived from surveillance authorized by section 1881a of the Foreign Intelligence Surveillance Act (“FISA”) Amendments Act of 2008.<sup>78</sup> Prosecutors responded that it was the defendant’s burden to show that he had actually been subjected to the programmatic surveillance authorized by

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71. See generally Fan, *supra* note 33; Jacobi, *supra* note 63.

72. See SMITH, *supra* note 4, at 2 n.11 (documenting that police in one Virginia municipality secretly used GPS devices to further investigations in nearly 160 cases from 2005 to 2007).

73. Usage will be concealed from many members of the department whom are tasked with simply responding to leads generated by the new technique.

74. See, e.g., *Patino*, No. P1-10-11551, at \*64 (“In addition, the State did not fill this evidentiary void with any testimony at the suppression hearing. While the testimony was often quite evasive, if not wholly lacking in credibility, no officer admitted that he had ever seen the text messages.”).

75. See Eric Schmitt et al., *Mining of Data is Called Crucial to Fight Terror*, N.Y. TIMES, June 8, 2013, at A1 (“While most of those accused in those cases pleaded guilty—and therefore much of the evidence against them was not publicly disclosed.”). If courts require prosecutors to reveal the use of section 1881a-derived evidence to criminal defendants pursuant to the explicit language of section 1881, then the government will have increased incentives to plead cases out.

76. *United States v. Qazi*, No. 12-60298, 2012 WL 7050588 (S.D. Fla. Dec. 19, 2012).

77. *Id.* at \*1–2.

78. See Order of Magistrate Judge John J. O’Sullivan, No. 12-60298 (S.D. Fla. May 6, 2013), available at [http://www.wired.com/images\\_blogs/threatlevel/2013/05/ORDER-granting-FAA-1806-motion-1.pdf](http://www.wired.com/images_blogs/threatlevel/2013/05/ORDER-granting-FAA-1806-motion-1.pdf); see also Adam Liptak, *A Secret Surveillance Program Proves Challengeable in Theory Only*, N.Y. TIMES, July 16, 2013, at A11. Unlike traditional FISA surveillance, section 1881a does not require the government to establish probable cause that the target of the surveillance is a foreign power or agent of a foreign power. 50 U.S.C. § 1881e(a) (2012); *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1144 (2013).

section 1881a.<sup>79</sup> Alexander Abdo of the American Civil Liberties Union (“ACLU”) explained that this shift of burden is “a strategy meant to insulate the 2008 law from judicial review, and thus far the strategy has succeeded.”<sup>80</sup>

### C. EXPLOITATION AND COSTS

Law enforcement’s exploitation of the regulatory scheme (through concealment of the existence and objects of new investigative techniques) impacts the societal costs of regulatory delay in various ways. Most directly, exploitation lengthens the periods of delay that, in turn, facilitate more preregulation uses of investigative techniques. Perhaps less intuitive are the selection biases that inevitably emerge: the more harmful the technique, the more likely that disclosure will lead to regulation, and the harder law enforcement will work to conceal the technique’s adoption and uses.<sup>81</sup>

Law enforcement’s ability to exploit the regulatory scheme makes it almost certain that the costs of regulatory delay will increase in the coming decades. With each year, law enforcement becomes, on balance, more strategic in concealing new investigative techniques.<sup>82</sup> Moreover, the pool of new, unregulated techniques available at a given time only deepens.<sup>83</sup> Today the pool of unregulated techniques includes satellite surveillance,<sup>84</sup>

79. Liptak, *supra* note 78. Following an adverse ruling from the magistrate, the government has moved to reconsider. Schmitt et al., *supra* note 75 (“But prosecutors in the Florida case have told a judge that they are not required to say whether the evidence came from an order under the 2008 law.”). Surveillance pursuant to the 2008 FISA Amendment is unique from other techniques in that the legislation itself provides that the government shall disclose in criminal cases evidence derived from such surveillance. 50 U.S.C. § 1881e(a).

80. Schmitt et al., *supra* note 75. Federal prosecutors have engaged in similar tactics in a Chicago case of a man accused of attempting to blow up a bar. “They told the Supreme Court not to worry about reviewing the FISA Amendments Act because it would get reviewed in a criminal case. They said if they used the evidence in a criminal case, they’d give notice. Now they’re telling criminal defendants they don’t have to tell them. It’s a game of three-card monte with the privacy rights of millions of Americans.” Ellen Nakashima, *Chicago Federal Court Case Raises Questions About NSA Surveillance*, WASH. POST (June 21, 2013, 11:25 PM), [http://www.washingtonpost.com/world/national-security/chicago-federal-court-case-raises-questions-about-nsa-surveillance/2013/06/21/7e2dc8-daa4-11e2-9df4-895344c13c30\\_story.html](http://www.washingtonpost.com/world/national-security/chicago-federal-court-case-raises-questions-about-nsa-surveillance/2013/06/21/7e2dc8-daa4-11e2-9df4-895344c13c30_story.html). To defend the successes of section 1881a surveillance, Senator Dianne Feinstein listed *Qazi* and *Dauod* as among the cases strengthened from surveillance pursuant to section 1881a. See Liptak, *supra* note 78.

81. This is a theoretical point. For example, law enforcement has a stronger incentive, *ceteris paribus*, to delay regulation of a technique with a ninety-five percent likelihood of regulation than one with a five percent chance.

82. Balkin, *supra* note 12, at 21 (“They will increase secrecy, avoid accountability, cover up mistakes, and confuse their interests with the public interest.”).

83. See discussion *infra* Part I.B.

84. Ima Ituen & Gunho Sohn, *The Environmental Applications of Wireless Sensor Networks*, INT’L J. CONTENTS, Dec. 2007, at 1. In 2007, the Department of Homeland Security approved a plan to allow U.S. law enforcement to turn the nation’s spy satellites inward for use domestically. Joby Warrick, *Domestic Use of Spy Satellites To Widen*, WASH. POST, Aug. 16, 2007, at A1; Siobhan

facial-scanning surveillance,<sup>85</sup> cyborg surveillance insects,<sup>86</sup> nano sensors,<sup>87</sup> iris scanners,<sup>88</sup> bomb-sniffing plants,<sup>89</sup> “Smart Dust” motes,<sup>90</sup> radio wave hacking,<sup>91</sup> and nano-based radio-frequency identification barcodes.<sup>92</sup> Tomorrow’s pool is anybody’s guess. Increases in available, unregulated investigative techniques pose a uniquely modern problem: law enforcement can begin to stack regulatory delays upon one another. When a new technique finally becomes exposed and regulated, law enforcement can simply turn to its “bullpen” of unregulated techniques and carry on in its usual, unregulated manner.<sup>93</sup> To put it differently: while specific investigative techniques may be unregulated only *temporarily*, the deep pool of new surveillance alternatives, available at any given time, leaves police unregulated *continuously*.

#### D. EFFORTS TO EXPEDITE REGULATORY PROCESSES

Several reforms have been proposed to manage the rising costs of regulatory delay.<sup>94</sup> The solution, for some, lies in more proactive legislative regulation.<sup>95</sup> Orin Kerr writes that the recent history of criminal procedure regulation shows “that legislatures usually act at a surprisingly early stage.”<sup>96</sup> He explains that legislatures are “[u]nburdened by the procedural barriers that limit and delay judicial power” and can therefore

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Gorman, *Satellite-Surveillance Program to Begin Despite Privacy Concerns*, WALL ST. J., Oct. 1, 2008, at A10.

85. Charlie Savage, *Facial Scanning is Making Gains in Surveillance*, N.Y. TIMES, Aug. 21, 2013, at A1 (describing the progress of the Biometric Optical Surveillance System).

86. See M. Ryan Calo, *Robots and Privacy*, in ROBOT ETHICS: THE ETHICAL AND SOCIAL IMPLICATIONS OF ROBOTICS 187, 189–92 (Patrick Lin et al. eds., 2012).

87. Ituen & Sohn, *supra* note 84, at 1.

88. See Christopher R. Jones, “EyePhones”: *A Fourth Amendment Inquiry into Mobile Iris Scanning*, 63 S.C. L. REV. 925, 927 (2012).

89. See John Roach, *Bomb-Sniffing Plants to the Rescue*, NBC NEWS (Jan. 27, 2011, 5:14 PM), [http://cosmiclog.nbcnews.com/\\_news/2011/01/27/5936102-bomb-sniffing-plants-to-the-rescue](http://cosmiclog.nbcnews.com/_news/2011/01/27/5936102-bomb-sniffing-plants-to-the-rescue).

90. See Ituen & Sohn, *supra* note 84, at 4.

91. See David E. Sanger & Thom Shanker, *NSA Devises Radio Pathways Into Computers*, N.Y. TIMES, Jan. 15, 2014, at A1.

92. See Warrick, *supra* note 84.

93. One might even imagine a contractor leasing surveillance instruments during the prereregulation period with a guarantee to replace such instruments with new devices once the old ones are subjected to regulation.

94. For proposals seeking to improve the regulatory processes of investigative techniques, see Logan, *supra* note 3, at 1186–92 (proposing a certificate of appealability to resolve circuit splits in an expedited manner); Kenneth A. Bamberger & Deirdre K. Mulligan, *Privacy Decisionmaking in Administrative Agencies*, 75 U. CHI. L. REV. 75, 96–100 (2008) (discussing the use of “embedded privacy experts” in the Department of Homeland Security).

95. See Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 806 (2004) (“Judicial deference has often invited Congressional regulation.”); see also *id.* at 868 (“Fourth Amendment rules . . . lag behind parallel statutory rules and current technologies by at least a decade.”).

96. *Id.* at 870.

“enact comprehensive rules far ahead of current practice rather than decades behind it.”<sup>97</sup> These expectations of prompt legislation rest, however, on a historical account that is, according to Daniel Solove, “haphazard at best.”<sup>98</sup> Solove cites Congress’s “hopelessly out of date” rules regulating electronic surveillance:<sup>99</sup> “Throughout the entire twentieth century and continuing on through the present, there have been only a few times Congress has made major changes in electronic surveillance law: in 1934, 1968, 1978, 1986, and 2001.”<sup>100</sup>

More recently, Jack Balkin observed that, when it comes to surveillance, “legislative oversight increasingly plays only a limited role in checking the executive.”<sup>101</sup> The emergence of video surveillance offers a good example. In *United States v. Torres*, Judge Richard Posner wrote that “it is anomalous to have detailed statutory regulation of bugging and wiretapping but not of television surveillance[] in Title III . . . [A]nd we would think it a very good thing if Congress responded to the issues discussed in this opinion by amending Title III to bring television surveillance within its scope.”<sup>102</sup> It speaks volumes that twenty-nine years later, Congress has yet to regulate video surveillance.<sup>103</sup>

The recent congressional activity regarding NSA surveillance seems unique to the NSA and unlikely to signal a new era of expedited legislative regulation of investigative techniques. First of all, the public’s sustained focus on the NSA has been due, in large part, to the sensational circumstances surrounding Edward Snowden and his globe-trotting pursuit of asylum.<sup>104</sup> Second, the NSA surveillance at issue, unlike most

97. *Id.*

98. See Daniel J. Solove, *Panel VI: The Coexistence of Privacy and Security: Fourth Amendment Codification and Professor Kerr’s Misguided Call for Judicial Deference*, 74 *FORDHAM L. REV.* 747, 769 (2005); see also *id.* at 748 (finding that Kerr’s “contentions are based on faulty assumptions that are not well grounded in either theory or practice”). There is little reason to hope that legislators of the future will be more proactive than those of the past. *Id.* at 771 (“[I]t usually takes a dramatic event to spark interest in creating or updating a law. Congress often only gets involved when there is a major uproar or problem, and unless there is a strong impetus, little new lawmaking occurs.”).

99. *Id.* at 769 (“[T]here are numerous forms of technology legislatures have not acted on.”).

100. *Id.* at 769–70 (“Congress has done little to modernize the ECPA in the nearly two decades since its passage.”).

101. Balkin, *supra* note 12, at 21.

102. *United States v. Torres*, 751 F.2d 875, 885 (1984).

103. Bills have been introduced. The Surreptitious Video Surveillance Act of 2010, however, did not make it out of committee. See Jennifer Stisa Granick & Christopher Jon Sprigman, Op-Ed., *The Criminal N.S.A.*, N.Y. TIMES (June 27, 2013), <http://www.nytimes.com/2013/06/28/opinion/the-criminal-nsa.html> (stating that revelations of NSA surveillance “have not enraged most Americans”).

104. Jonathan Weisman, *Momentum Builds Against N.S.A. Surveillance*, N.Y. TIMES, July 29, 2013, at A9. Similarly, the current Congress has contemplated measures to restrict the domestic use of drones. See generally, Preserving Freedom from Unwanted Surveillance Act, H.R. 972, 100th Cong. (2013); Preserving American Privacy Act, H.R. 637, 100th Cong. (2013); Drone Aircraft Privacy and Transparency Act, H.R. 1262, 100th Cong. (2013). One explanation for legislative activity in this area is “that there’s something uniquely ominous about a robotic ‘eye in the sky.’” Crump & Stanley, *supra* note 52; Calo, *supra* note 37, at 33 (stating that drones pose a “vivid and specific instance of a

investigative techniques, affects practically every person in the United States—including, not unimportantly, members of Congress.<sup>105</sup> Third, Congress has remained focused on this issue, at least in part, because NSA officials repeatedly lied to its members about the scope of the program.<sup>106</sup> Fourth, few of the proposed NSA reforms promise to enhance the regulation of novel investigative techniques.<sup>107</sup> As a result, any legislative regulation of the NSA in particular is not likely to reduce the general costs of regulatory delay.

Looking beyond legislative solutions, some have argued for more liberal rules of Article III standing.<sup>108</sup> Broader standing rules invite earlier judicial review, which, in turn, invites earlier regulation of new investigative techniques.<sup>109</sup> Plaintiffs attempting to liberalize standing rules in order to pursue Fourth Amendment claims have enjoyed only fleeting successes.<sup>110</sup> The Ninth Circuit, for example, broadened the standard for “injury-in-fact” to include “a sufficient likelihood” of

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paradigmatic privacy violation in a digital universe, upon which citizens and lawmakers can premise their concern”).

105. *Id.*

106. *Id.* (quoting Representative Zoe Lofgren’s claim that Congress feels a “grave sense of betrayal”); Shane & Sanger, *supra* note 62 (describing the false congressional testimony by Director of National Intelligence, James R. Clapper, Jr., and inaccuracies of the “fact sheet” posted by NSA on its website to counter the leaks by Edward Snowden).

107. The President’s Review Group on Intelligence and Communications Technologies recommended the appointment of a privacy advocate in FISA Hearings. *See* LIBERTY AND SECURITY IN A CHANGING WORLD, *supra* note 20, at 21. President Barack Obama has endorsed the idea of a privacy panel to offer counsel to the FISA Court about “novel” search methods. *See* Josh Keller et al., *Obama’s Changes to Government Surveillance*, N.Y. TIMES, Jan. 17, 2014, at A1. Even if adopted, most “novel” investigative techniques will not be addressed by the court. First, there are many techniques that are used for purposes other than foreign intelligence. Second, a confidential FISA Court ruling will not constitute regulation of parties who are not privileged to access the FISA rulings. Third, there is reasonable concern that the NSA will not seek a FISA Court order *sua sponte* before it utilizes a new investigative technique.

108. Michelman, *supra* note 37, at 113–14 (“By bringing the treatment of probabilistic injuries in the surveillance context into line with the rest of standing law, and by recognizing objectively reasonable chilling-effect injuries, courts can create a body of standing jurisprudence that maintains the integrity of justiciability doctrine while enabling courts to decide some of our generation’s most pressing questions about civil liberties, the separation of powers, and the rule of law.”).

109. A judicial finding of unconstitutionality regulates the use of a new surveillance technique by sapping qualified immunity from actors who use that technique and by foreclosing reliance on the exclusionary rule’s “good faith” exception. The preferred litigation form is a declaratory judgment. Motions to suppress, *Bivens* lawsuits, and § 1983 actions require actual violations. Declaratory judgments, to the contrary, require either actual or threatened injury. *See* Clapper v. Amnesty Int’l USA, 133 S. Ct. 1138, 1163 (2013).

110. The FISA Court has ruled on the constitutionality of at least some new techniques. Eric Lichtblau, *In Secret, Court Vastly Broadens Powers of N.S.A.*, N.Y. TIMES, July 7, 2013, at A1. These reviews are insufficient to check the costs of regulatory delay for numerous reasons. Most importantly, the FISA opinions are not public, and as a result, they cannot provide law enforcement (at least outside of the relatively narrow context of FISA surveillance) with sufficient notice to erode the qualified immunity to civil suits or the good-faith exception to the exclusionary rule.

injury.<sup>111</sup> But in *City of Los Angeles v. Lyons*, the Supreme Court reversed, outlining what is needed to satisfy the Article III case and controversy requirement: “The plaintiff must show that he ‘has sustained or is immediately in danger of sustaining some direct injury’ as the result of the challenged official conduct and the threat of injury must be ‘real and immediate,’ not ‘conjectural’ or ‘hypothetical.’”<sup>112</sup> More recently, the Second Circuit interpreted “injury-in-fact” to encompass acts causing an “objectively reasonable likelihood” of injury.<sup>113</sup> The Supreme Court, once again, reversed.<sup>114</sup> The majority in *Clapper v. Amnesty International* was strident: “Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending.”<sup>115</sup> The Supreme Court has made clear its unwillingness to modify Article III standing rules to invite earlier judicial review of investigative techniques.<sup>116</sup>

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111. *City of Los Angeles v. Lyons*, 461 U.S. 95, 99 (1983); see *Lyons v. City of Los Angeles*, 656 F.2d 417, 418 (9th Cir. 1981).

112. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983); see *Laird v. Tatum*, 408 U.S. 1, 14 (1972) (requiring either a “specific present objective harm or a threat of specific future harm”); *ACLU v. NSA*, 493 F.3d 644, 656 (6th Cir. 2007) (“Because there is no evidence that any plaintiff’s communications have ever been intercepted, and the state secrets privilege prevents discovery of such evidence . . . the anticipated harm is neither imminent nor concrete—it is hypothetical, conjectural, or speculative. Therefore, this harm cannot satisfy the ‘injury in fact’ requirement of standing.”).

113. *Amnesty Int’l USA v. Clapper*, 638 F.3d 118, 134 (2d Cir. 2011).

114. *Clapper*, 133 S. Ct. at 1155; see *ACLU*, 493 F.3d at 662 (holding that plaintiffs lacked standing because they alleged “only a subjective apprehension” of alleged NSA surveillance and “a personal (self-imposed) unwillingness to communicate”); *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1380 (D.C. Cir. 1984) (holding that plaintiffs lacked standing to challenge the legality of an Executive Order relating to surveillance because “the ‘chilling effect’ which is produced by their fear of being subjected to illegal surveillance and which deters them from conducting constitutionally protected activities, is foreclosed as a basis for standing”).

115. *Clapper*, 133 S. Ct. at 1147 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565 n.2 (1991)). The Court concluded that the plaintiffs’ alleged Fourth Amendment violation was not “certainly impending.” *Id.* at 1148. Moreover the Court concluded that “respondents cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending.” *Id.* at 1143.

116. Litigants have also sought to broaden the limits on vicarious standing. See, e.g., *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 15–16 (D.D.C. 2010) (seeking to litigate a violation of plaintiff’s son’s Fourth Amendment rights). Litigants have had little success. See, e.g., *ACLU*, 493 F.3d at 673–74 (“[I]t would be unprecedented for this court to find standing for plaintiffs to litigate a Fourth Amendment cause of action without any evidence that the plaintiffs themselves have been subjected to an illegal search or seizure.”). Even if the standards for vicarious standing were broadened, there are few instances in which expanded vicarious liability would actually expedite the regulation of new investigative techniques. Vicarious standing invites earlier constitutional challenges in those situations where identifiable victims are not willing or able to pursue litigation. But delays in the regulation of new investigative techniques are based, at least in part, on the fact that the targets are not identifiable in the first place. See discussion *supra* Part I.B.

Like the calls for more proactive legislation, efforts to liberalize the rules of Article III standing are unlikely to curb the rising societal costs of regulatory delay of new investigative techniques. It seems time to explore alternatives.

## II. THE RIGHT TO BE SECURE

One solution to the problem of regulatory delay can be found in the text of the Fourth Amendment.<sup>117</sup> This Part describes the prevailing right to be “spared,” surveys the contending interpretations of the “to be secure” text of the Fourth Amendment, and offers a historical and textual defense of the broad reading of “to be secure.”

### A. THE PREVAILING RIGHT TO BE “SPARED”

Traditionally the Fourth Amendment has been interpreted to safeguard a mere right to not be subjected to unreasonable searches or seizures.<sup>118</sup> This right can be rephrased as one to be “spared” an unreasonable search or seizure.<sup>119</sup> In 2013, the Court reaffirmed the

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117. See discussion *supra* note 13.

118. See, e.g., *Clapper*, 133 S. Ct. at 1154 (holding that section 1881a surveillance does not violate an individual’s Fourth Amendment rights before the government “acquires” or “intercepts” the individual’s communications); *California v. Hodari D.*, 499 U.S. 621, 627–29 (1991) (limiting Fourth Amendment analysis to the moment at which the suspect was actually seized); *United States v. Leon*, 468 U.S. 897, 906 (1984) (“The wrong condemned by the [Fourth] Amendment is fully accomplished by the unlawful search or seizure itself.”) (internal quotations omitted); *id.* at 931–32 (Brennan, J., dissenting) (characterizing the majority’s view as implying that the Fourth Amendment’s “proscriptions are directed solely at those government agents who may *actually invade* an individual’s constitutionally protected privacy”) (emphasis added); *United States v. Jacobsen*, 466 U.S. 109, 114–18 (1984) (limiting Fourth Amendment analysis to the moment at which the property was actually seized); *Chambers v. Maroney*, 399 U.S. 42, 47–52 (1970) (confining Fourth Amendment “search” analysis to the conditions of the actual search commenced several days after vehicle was seized); *Sibron v. New York*, 392 U.S. 40, 62 (1968) (rejecting the claim that entire statute was unconstitutional and limiting Fourth Amendment review “to the reasonableness of the searches and seizures which underlie these two convictions”); *Elkins v. United States*, 364 U.S. 206, 223–24 (1960) (holding that evidence in a federal trial should be suppressed only if it was gained as a result of “an unreasonable search and seizure by state officers”); *Oklahoma Press Publ’g Co. v. Walling*, 327 U.S. 186, 195 (1946) (“The short answer to the Fourth Amendment objections is that the records in these cases present no question of actual search and seizure.”); *San Jacinto Sav. & Loan v. Kacal*, 928 F.2d 697, 704 (5th Cir. 1991) (“Because the record in this case is devoid of any evidence that [the plaintiff] was personally subjected to an illegal search or seizure, [the plaintiff] has no standing to assert the rights of third parties who may have been subjected to such searches or seizures while at [the plaintiff’s store].”).

119. The prevailing narrative is that the Fourth Amendment right to be “spared” has been safeguarded by certain judicially-created rules. The leading example is the exclusionary rule. See, e.g., *Herring v. United States*, 555 U.S. 135, 141 (2009) (“[T]he exclusionary rule is not an individual right and applies only where it results in appreciable deterrence.”) (internal quotations omitted); *Leon*, 468 U.S. at 906 (“[T]he exclusionary rule is neither intended nor able to cure the invasion of the defendant’s rights which he has already suffered.”) (internal quotations omitted). Another example is a rule permitting facial invalidation of legislation endorsing procedures to violate the right to be “spared.” See *Berger v. New York*, 388 U.S. 41, 90 (1967) (Harlan, J., dissenting) (“The Court declares, without further explanation, that since petitioner was ‘affected’ by § 813-a, he may challenge

conventional “spared” reading of the Fourth Amendment in *Clapper v. Amnesty International*.<sup>120</sup> All nine justices agreed that a communications surveillance program does not violate an individual’s Fourth Amendment rights before the government succeeds in “intercepting” or “acquiring” the individual’s communications.<sup>121</sup> The Court made clear, once again, that the Fourth Amendment is not violated by threats or attempts to conduct an unreasonable search or seizure.<sup>122</sup> Nor are an individual’s Fourth Amendment rights violated by the adoption and use of a vast surveillance program that happens to spare the individual claimant.<sup>123</sup>

The Fourth Amendment can be read, however, to safeguard more than a right to be “spared.”<sup>124</sup> The Amendment provides that the “right of the people *to be secure* in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”<sup>125</sup> In the “to be secure” language, one might look for a right to be “protected” against unreasonable searches and seizures, and perhaps even a right to be “free from fear” against such searches and seizures.<sup>126</sup>

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its validity on its face.”); *Warshak v. United States*, 490 F.3d 455, 477 (6th Cir. 2007) (“Under *Berger*, facial invalidation is justified where the statute, on its face, endorses procedures to authorize a search that clearly do not comport with the Fourth Amendment.”). *But see Sibron*, 392 U.S. at 59–62 (1968) (stating the Court’s preference for as-applied challenges).

120. *Clapper*, 133 S. Ct. at 1154–55.

121. *Id.* (explaining that the Fourth Amendment cannot be violated by a communications surveillance program before communications are “intercepted” or “acquired”); *id.* at 1155 (Breyer, J., dissenting) (stating that the plaintiff’s Fourth Amendment rights are only violated if the government “intercept[s] at least some of their private, foreign, telephone, or e-mail conversations”); see *ACLU*, 493 F.3d at 688 (Gibbons, J., concurring) (“The disposition of all of the plaintiffs’ claims depends upon the single fact that the plaintiffs have failed to provide evidence that they are personally subject to the [challenged program].”).

122. *Hodari D.*, 499 U.S. at 625–26; *Maroney*, 399 U.S. at 46–53 (1970). The constitutional requirements for valid warrants inform the standard for a “reasonable” search or seizure. Thus, a search or seizure pursuant to a defective warrant violates the right to be “spared” an unreasonable search or seizure. See *Groh v. Ramirez*, 540 U.S. 551, 563 (2004) (“Because petitioner did not have in his possession a warrant particularly describing the things he intended to seize, proceeding with the search was clearly ‘unreasonable’ under the Fourth Amendment.”).

123. *Clapper*, 133 S. Ct. at 1143.

124. There is a large literature on the values animating the Fourth Amendment. See Luke M. Milligan, *The Real Rules of “Search” Interpretations*, 21 WM. & MARY BILL RTS. J. 1, 3 n.3 (2012) (documenting the various Fourth Amendment values identified by scholars). Framing the right as one to be “spared” does not resolve the question of the values protected by the right. Neither does framing the right more broadly as one to be “protected” or “free from fear.” The interpretive shift advocated in this paper sheds little to no light on the question of whether the Amendment prioritizes property, privacy, or power.

125. U.S. CONST. amend. IV (emphasis added).

126. Unlike “spared,” the term “protected” implies a degree of immunity. See OXFORD ENGLISH DICTIONARY, *supra* note 24, at 677 (defining “protect” as “to guard from injury” or “afford immunity to”). Unlike both “spared” and “protected,” the term “free from fear” turns on perceptions rather than actualities.

Judicial recognition of a right to be “protected” or “free from fear” would almost certainly reduce the costs of regulatory delay. Both rights are, in important ways, broader than the right to be “spared”: the term “protected” implies some degree of immunity, while “free from fear” turns not on actualities but perceptions.<sup>127</sup> As a result, an individual “spared” an investigative technique can nonetheless suffer a violation of her right to be “protected” or “free from fear.”<sup>128</sup> This is a critical point. It means that Fourth Amendment claimants can establish standing to challenge the constitutionality of a given investigative technique even when information about the objects of the technique has been successfully concealed by law enforcement.<sup>129</sup> Expedited standing invites earlier judicial regulation of new investigative techniques, which, in turn, helps to curb the rising costs of regulatory delay.<sup>130</sup>

#### B. CONTENDING INTERPRETATIONS OF “TO BE SECURE”

In contrast to its textual counterparts (such as “search,” “seizure,” and “unreasonable”), the Fourth Amendment’s “to be secure” phraseology has been largely ignored.<sup>131</sup> The courts have never explicitly defined “to be secure,”<sup>132</sup> and commentators (absent a few exceptions) have shown little interest in these three words.<sup>133</sup>

127. *See id.* (defining “protect” as “to guard from injury” or “afford immunity to”); Rosenthal, *supra* note 22, at 538 (“Security may not require perfect deterrence, but surely demands at least reasonable deterrent efficacy.”). Jed Rubenfeld has equated being “protected against” and being “spared.” Rubenfeld, *supra* note 22, at 120 (“If ‘secure’ is read essentially to mean ‘protected,’ the ‘right to be secure’ becomes a kind of grammatical excess in the Fourth Amendment’s text, playing no operative or independent role of its own.”). I disagree with Rubenfeld on this point. *See* discussion *infra* Part II.B.

128. The term “protected” implies some degree of immunity, while “free from fear” turns on perceptions rather than actualities. *See* OXFORD ENGLISH DICTIONARY, *supra* note 24, at 677 (defining “protect” as “to guard from injury” or “afford immunity to”). *See* discussion *infra* Part II.B.

129. Numerous rules could safeguard the rights to be “protected” and “free from fear.” Part III.B, *infra*, proposes a rule against adoption of unregulated and unreasonable investigative techniques.

130. Judicial review is no panacea. The protections of the Fourth Amendment have been narrowed in the name of collective security. *See* DANIEL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE* 202 (2004); Balkin, *supra* note 12, at 19 n.71. With that said, many new surveillance techniques are close analogues to regulated techniques and therefore seem, once under review, likely candidates for judicial regulation. *See* Richards, *supra* note 1, at 1952 (“Constitutional law and standing doctrine alone will not solve the threat of surveillance to intellectual freedom and privacy, but they are a good place to start.”).

131. A recent exception can be found in the Executive Summary of the President’s Review Group on Intelligence and Communications Technology. *See* LIBERTY AND SECURITY IN A CHANGING WORLD, *supra* note 20, at 76 (“In Latin, the word ‘securus’ offers the core meanings, which include ‘free from care, quiet, easy,’ and also ‘tranquil; free from danger; safe.’”); *id.* at 75 (“In a free society, one that is genuinely committed to self-government, people are secure in the sense that they need not *fear* that their conversations and activities are being watched, monitored, questioned, interrogated, or scrutinized. Citizens are free from this kind of *fear*.”) (emphases added).

132. Rubenfeld, *supra* note 22, at 119 (observing that the “right to be secure” text “play[s] little role in current doctrine”). While the Court has not interpreted “to be secure,” it has on occasion made reference to the value of “security.” In *Hoffa v. United States*, the Court wrote that “the Fourth

One of the notable exceptions is Thomas Clancy. Clancy has written extensively on the meaning of “to be secure.” Based on historical analyses, Clancy has repeatedly concluded that the “right to be secure” is equivalent to the “right to exclude.”<sup>134</sup> The “ability to exclude,” writes Clancy, “is so essential to the exercise of the right to be secure that it is proper to say that it is the equivalent to the right—the right to be secure is the right to exclude.”<sup>135</sup> Importantly, Clancy has clarified that the “right to exclude” is only violated by *actual* intrusions.<sup>136</sup> He explained that: “With the ability to exclude, a person has all that the Fourth Amendment promises: no unjustified intrusions by the government. In other words, the Fourth Amendment gives the right to say, ‘No,’ to the government’s attempts to search and seize.”<sup>137</sup> In this way, Clancy’s conclusions about the meaning of “to be secure” trace the Supreme Court’s view that the Fourth Amendment safeguards a mere right to be “spared” unreasonable searches and seizures.<sup>138</sup>

Clancy’s analysis of “to be secure” is historical, resting primarily on the events that formed colonial views on general warrants.<sup>139</sup> The first of

Amendment protects . . . the security a man relies upon when he places himself or his property within a constitutionally protected area.” 385 U.S. 293, 301 (1966). See *Soldal v. Cook Cnty., Ill.*, 506 U.S. 56, 69 (1992) (“What matters is the intrusion on the people’s security from governmental interference.”); *Camara v. Mun. Court*, 387 U.S. 523, 529 (1967) (“The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.”) (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)).

133. See Rosenthal, *supra* note 22, at 538 (“The term ‘secure’ is often ignored in discussions of the Fourth Amendment.”). Thomas Davies has written extensively on the original meaning of the Fourth Amendment. See, e.g., Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999). Yet Davies’s treatment of “to be secure” has been relegated to a footnote. *Id.* at 685 n.385 (writing that the “right to be secure” is “a label that anchored the ban against general warrants in the larger set of common-law protections of person and house”).

134. Clancy, *Property, Privacy, or Security*, *supra* note 22, at 353 (“The Framers valued security and intimately associated it with the ability to exclude the government.”). See Clancy, *Collective Right*, *supra* note 22, at 262 n.57 (describing the “right to be secure” as the “right to exclude”); Clancy, *James Otis*, *supra* note 22, at 504 (“To look beyond the right to exclude and seek positive attributes to the right to be secure, whether those attributes be called privacy or something else, serves to limit—and ultimately defeat—that right.”).

135. Clancy, *Property, Privacy, or Security*, *supra* note 22, at 308.

136. *Id.* at 347 n.272.

137. Clancy, *James Otis*, *supra* note 22, at 504–05.

138. Clancy’s view of “to be secure” is aligned with the Court’s jurisprudence inasmuch as he views Fourth Amendment rights as limited to “actual” encroachments. See Clancy, *Property, Privacy, or Security*, *supra* note 22, at 374 n.272. Yet Clancy breaks from Court precedent when he claims that the Fourth Amendment only prohibits encroachments of persons, houses, papers, and effects. See Clancy, *James Otis*, *supra* note 22, at 506. *But cf.* *Smith v. Maryland*, 442 U.S. 735, 744–45 (1979) (holding that the Fourth Amendment protects “expectations of privacy”); *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (arguing that the Fourth Amendment protects “expectations of privacy”).

139. See Clancy, *Collective Right*, *supra* note 22, at 257 (“[T]he period immediately preceding the American Revolution directly served as a catalyst for the Amendment’s adoption; it is also the portion

these events was James Otis's protest against the writs of assistance.<sup>140</sup> Clancy points to Otis's argument that "a man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle."<sup>141</sup> Clancy moreover explains that Otis's "main focus was on the dangers to the security of each individual from the uncontrolled authority to search."<sup>142</sup> The second colonial influence emphasized by Clancy is Lord Camden's opinion in *Entick v. Carrington*.<sup>143</sup> To show that "to be secure" protects persons against no more than actual intrusions violating the "right to exclude," Clancy couples the language in *Entick* that the "great end, for which men entered into society, was to secure their property"<sup>144</sup> with Camden's maxim that "[n]o man can set his foot upon my ground without my [license]."<sup>145</sup>

Clancy's historical research is detailed, and his argument that "the right to exclude" (i.e., a right to be spared an actual intrusion) was central to the framers' understanding of the right "to be secure" is persuasive. But Clancy stands on softer ground when he infers that "to be secure" meant nothing more than the right to be spared an actual intrusion. After all, none of the historical sources cited by Clancy necessarily forecloses broader readings of the "to be secure" text.<sup>146</sup> Moreover, Clancy's narrow interpretation of "to be secure" conflicts with

of the historical record that is most often recalled in Supreme Court opinions and by leading commentators.").

140. *Id.* at 257–58; see Clancy, *Property, Privacy, or Security*, *supra* note 22, at 352–53.

141. Clancy, *Collective Right*, *supra* note 22, at 258. Clancy also relies on a *Boston Gazette* article from 1762 (likely penned by Otis) which argued that if the writs were to be granted "every householder [sic] in this province, will necessarily become less secure than he was before this writ." Clancy, *Property, Privacy, or Security*, *supra* note 22, at 352 (citing JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY BETWEEN 1791 AND 1772 471 (1865) (quoting BOSTON GAZETTE, Jan. 4, 1762)).

142. Clancy, *James Otis*, *supra* note 22, at 495.

143. Clancy, *Collective Right*, *supra* note 22, at 259 (citing *Entick v. Carrington*, (1765) 95 Eng. Rep. 807 (K.B.)).

144. *Id.* at 259 (quoting *Entick*, 95 Eng. Rep. at 807).

145. See Clancy, *Property, Privacy, or Security*, *supra* note 22, at 351 (quoting *Entick*, 95 Eng. Rep. at 807). Clancy finds evidence for his interpretation of the right "to be secure" in other sources as well. He cites William Pitt's declaration that "[i]t may be frail; its roof may shake; the wind may blow through it; the storm may enter; but the King of England cannot enter; all his force dares not cross the threshold of the ruined tenement." *Id.* at 351–52 (citing NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 49–50 (1937)). He moreover cites John Dickinson's "Farmer's Letters," which criticize the writs of assistance as "dangerous to freedom, and expressly contrary to the common law, which ever regarded a man's house as his castle, or a place of perfect security." *Id.* at 352 (emphasis omitted) (citing M.H. SMITH, THE WRITS OF ASSISTANCE CASE 493 (1978)). Clancy also relies on a committee in Boston appointed "to state the Rights of the Colonists," which provided that "[w]henever they are pleased to say they suspect there are in the House, Wares, [etc.] for which the Duties have not been paid. Flagrant instances of the wanton exercise of this Power, have frequently happened in this and other seaport Towns. By this we are cut off from that domestic security which renders the Lives of the most unhappy in some measure agreeable." *Id.* at 352–53 (quoting QUINCY, *supra* note 141, at 466, 471).

146. See discussion *infra* Part II.B.

alternative readings found in the literature. Thirty years ago, for example, Richard McAdams argued that:

[T]he amendment guarantees the people a right to be “secure,” a word that means “free from fear, care, or anxiety: easy in mind . . . having no doubt.” Manifestly concerned with the repose of the people, the framers of the fourth amendment did not merely create a right of individuals to be free from unreasonable searches or seizures, but a societal right to be free from the fear such practices create.<sup>147</sup>

More recently, Jed Rubenfeld wrote:

Grant, then, if only provisionally and for the sake of argument, that we ought to read the Fourth Amendment as written. Stipulate that the people’s right “to be *secure* in their persons, houses, papers, and effects” is a thing of independent meaning and value, and that guaranteeing it was and is the amendment’s whole point. A different command then emerges from the Fourth Amendment’s text.

. . . The meaning of “unreasonable” would instead depend on the meaning of “the people’s right to be secure.”

What is this insecurity?

It is the stifling apprehension and oppression that people would justifiably experience if forced to live their personal lives in fear of appearing “suspicious” in the eyes of the governmental authorities.<sup>148</sup>

Generally speaking, the “protected” and “free from fear” readings of “to be secure” have been offered equivocally and in contexts peripheral to their authors’ central theses. As a result, the broad interpretations of “to be secure” have not been subjected to extensive textual and historical analyses.<sup>149</sup>

147. McAdams, *supra* note 22, at 318–19 (“A close reading of the fourth amendment supports the notion that people *as a group* have a right to be confident that the government will not make unreasonable intrusions into their ‘persons, houses, papers and effects.’”) (emphasis in original).

148. Rubenfeld, *supra* note 22, at 122, 127.

149. See Timothy Casey, *Electronic Surveillance and the Right To Be Secure*, 41 U.C. DAVIS L. REV. 977, 1030–31 (2008) (omitting historical and textual analysis of “to be secure”); McAdams, *supra* note 22, at 318–19 (limiting discussion to a paragraph of analysis and a citation to *Webster’s Dictionary*); Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1241 n.112 (2010) (limiting comment to a footnote and omitting textual and historical analysis); Rosenthal, *supra* note 22, at 536 (limiting discussion to one page and omitting substantial historical and textual analysis). Jed Rubenfeld offers the most developed argument for a broad reading of “to be secure.” Rubenfeld, *supra* note 22, at 122. Yet Rubenfeld’s analysis is limited in certain ways. First, his interpretation is confined to the “free from fear” reading—as he equates being “protected” with being “spared.” *Id.* at 120 (“If ‘secure’ is read essentially to mean ‘protected,’ the ‘right to be secure’ becomes a kind of grammatical excess in the Fourth Amendment’s text, playing no operative or independent role of its own.”). Second, his analysis includes only a limited discussion of the original meaning of the “to be secure” text. *Id.* at 127–29 (discussing views of “security” held by John Stuart Mill and Francis Lieber). Lastly, he emphasizes that his broad interpretation is offered “only provisionally and for the sake of argument.” *Id.* at 122.

### C. ANALYZING THE BROAD INTERPRETATION OF “TO BE SECURE”

Clancy’s conclusion about the meaning of “to be secure” sits at odds with the broader (but less developed) interpretations in the search-and-seizure literature.<sup>150</sup> This Subpart seeks a more complete description of the original meaning of “to be secure.” It does so by assessing the merits of the broad readings in the light provided by definitions and usages, constitutional structure, and pre-ratification discourse concerning searches and seizures.<sup>151</sup>

#### 1. *Definitions and Usages of “Secure”*

The dictionary definitions of “secure” establish that the core meanings of “secure” are separate and distinct from “spared.” Samuel Johnson’s *Dictionary of the English Language* and the *Oxford English Dictionary* give “secure” two unique definitions. They define “secure” as “protected from . . . danger,” and alternatively, “free from fear.”<sup>152</sup> Importantly, neither definition of “secure” can fairly be used to convey the meaning of “spared.”

It is improper to read the meaning of “spared” into the “free from fear” definition of “secure.” Unlike “spared,” the expression “free from fear” contains necessary “perspective” elements. Preratification writings confirm the distinction between “spared” and the “free from fear” usage of “secure.” For example, Henry More, in *An Antidote Against Atheism*, wrote that “Caesar taking the Omen . . . enters Italy, secure of success from so manifest tokens of the favour of the Gods.”<sup>153</sup> In *Paradise Lost*,

150. See *supra* discussion Part II.A.

151. See Thomas K. Clancy, *The Framers’ Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 983 (2011) [hereinafter Clancy, *John Adams*] (“Historical analysis remains a fundamentally important tool to interpret the words of the Fourth Amendment.”); David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1772 (2000) (“[W]hatever its limitations as theory, the new Fourth Amendment originalism has distinct strengths as rhetoric.”) (emphasis omitted); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 878 (1996) (“An air of illegitimacy surrounds any alleged departure from the text or the original understandings.”). *But see* Davies, *supra* note 133, at 740–41 (“Applying the original meaning of the language of the Fourth Amendment in a completely changed social and institutional context would subvert the purpose the Framers had in mind when they adopted the text.” (emphasis omitted)).

152. OXFORD ENGLISH DICTIONARY, *supra* note 24, at 851 (defining “secure” as: “free from . . . danger, safe”; “protected from or not exposed to danger”; or being “free from fear or anxiety”); JOHNSON DICTIONARY, *supra* note 24, at 1777 (defining “secure” as: “free from danger, that is safe”; “to protect”; “to insure”; “free from fear”; or “sure, not doubting”). “Free from . . . danger” is elsewhere explained to mean “protected from or not exposed to danger.” Moreover, the term “safe” is defined as “protected.” OXFORD ENGLISH DICTIONARY, *supra* note 24, at 851. While one might object that “safe” can be alternatively defined as “unaffected” (which is akin to “spared.”), “safe”—as used in the definition of “secure”—is paired with “free from danger.” In order for these paired terms to share a meaning, “safe” can only be understood by its “protected” meaning. *Id.* at 355.

153. HENRY MORE, *AN ANTIDOTE AGAINST ATHEISM: OR, AN APPEAL TO THE NATURAL FACULTIES OF THE MIND OF MAN* 186 (1653) (emphasis omitted). In other words, Caesar was largely free from fear

published in 1667, John Milton wrote that “[b]ut confidence then bore thee on, secure Either to meet no danger, or find Matter of glorious trial.”<sup>154</sup> Both Milton and More used the word “secure” to describe not an objective circumstance but rather a perspective. Because “spared” lacks these “perspective” elements, it simply cannot be read into the “free from fear” definition of “secure.”

It would be similarly odd to read the meaning of “spared” into the “protected” definition of “secure.” Unlike “spared,” the term “protected” implies a valued degree of immunity.<sup>155</sup> The difference between “spared” and “protected” is illustrated by a 1746 passage from William Warburton: “For by the Equity of our Civil Constitution the Consciences of Men are not only left in Freedom, but protected in their liberty.”<sup>156</sup> Warburton makes clear the state of being “left” alone (i.e., spared) is distinct from (and generally less valued than) being “protected.”

Pre-ratification writings further demonstrate that the “protected” usage of “secure” conveyed a meaning separate and distinct from that of “spared.” The *Oxford English Dictionary* gives us the following example: “A very safe road, *secured* from all winds.”<sup>157</sup> The road at issue was “secure” from the winds not simply because the air was still but because the road enjoyed some degree of immunity from potential winds. If the road had instead been exposed to winds that, due to chance, never came, then it would have been improper to claim the road “secure.” William Shakespeare’s *Titus Andronicus* is also instructive on this point: “Repose you here in rest, *Secure* from worldly chaunces and mishaps.”<sup>158</sup> Rome’s “readiest champions” were “secure” not simply because they would not

regarding his chances of success. See G.J. BARKER-BENFIELD, ABIGAIL AND JOHN ADAMS: THE AMERICANIZATION OF SENSIBILITY 115 (2010) (“At Harvard, John [Adams] may as well have read the Cambridge Platonist Henry More’s definition of humanity.” (emphasis omitted)).

154. JOHN MILTON, *PARADISE LOST*, ix: 1175 (1667). *Paradise Lost* was read by many of the founders. See, e.g., JOHN ADAMS, *Diary*, in 2 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR, NOTES AND ILLUSTRATIONS, BY HIS GRANDSON CHARLES FRANCIS ADAMS 3, 14 (BOSTON 1850–1856) (documenting that Adams wrote in his diary at age twenty that “Reading Milton. . . I can only gaze at him with astonishment, without comprehending the vast compass of his capacity.”); Henry Wasser, *John Quincy Adams on the Opening Lines of Milton’s Paradise Lost*, 42 AM. LITERATURE 373, 373 (1970) (“If the Adamses had a cultural hero, it was surely John Milton.”); JOHN CHESTER MILLER, *ALEXANDER HAMILTON AND THE GROWTH OF A NEW NATION* 28 (2003) (stating that Hamilton had read *Paradise Lost*).

155. See OXFORD ENGLISH DICTIONARY, *supra* note 24, at 677 (defining “protect” as “to guard from injury” or “afford immunity to”); Rosenthal, *supra* note 22, at 538 (“Security may not require perfect deterrence, but surely demands at least reasonable deterrent efficacy.”). Take, for example, the statement: “I was protected against a mugging when my bodyguard was near.” It is clear that the speaker is not simply saying: “I was not mugged when my bodyguard was near.” But see Rubinfeld, *supra* note 22, at 120 (equating “protect” and “spared”).

156. WILLIAM WARBURTON, *A SERMON OCCASIONED BY THE PRESENT UNNATURAL REBELLION* 6 (2d ed. 1746).

157. See OXFORD ENGLISH DICTIONARY, *supra* note 24, at 852 (emphasis added).

158. WILLIAM SHAKESPEARE, *TITUS ANDRONICUS* act I, sc. I (1594) (emphasis added).

be subjected to worldly mishap, but rather because they were dead and, as a result, enjoyed immunity from such mishap. If instead the soldiers had been merely wounded but, due to chance, never subjected to “worldly mishap,” it would have been wrong for Titus to have deemed them “secure.”<sup>159</sup>

Dictionaries aside, the claim that “secure” means “protected” or “free from fear” (but not “spared”) can be substantiated by influential pre-ratification discourse concerning searches and seizures.<sup>160</sup> Following James Otis’s landmark criticism of the writs of assistance in *Paxton’s Case*,<sup>161</sup> it was written anonymously (most likely by Otis himself)<sup>162</sup> that:

[E]very hous[e]holder in this province, will necessarily become less *secure* than he was before this writ had any existence among us; for by it, a custom house officer or any other person has a power given him, with the assistance of a peace officer, to enter forcibly into a dwelling house, and rifle any part of it where he shall please to suspect uncustomed goods are lodg[e]d!—Will any man put so great a value on his freehold, after such a power commences as he did before? . . . Will any one then under such circumstances, ever again boast of british honor or british privilege?<sup>163</sup>

The emphasis here on “less secure” and “every householder” is telling. When the author wrote that “every householder . . . will necessarily become less secure,” he surely did not mean to say that every householder will necessarily be subjected to more actual searches than before the writ was allowed. To the contrary, by “less secure” the author probably meant that every householder will necessarily be less protected, or perhaps alternatively, more fearful.<sup>164</sup> The “protected” and “free from fear”

159. The *Oxford English Dictionary* also quotes a 1756 usage of “secure”: “Is the Watch doubled? Are the Gates *secur’d* Against Surprize?” OXFORD ENGLISH DICTIONARY, *supra* note 24, at 852. The speaker would not be satisfied with the answer: Yes, Your Heiness, the enemy is still 300 yards away. Obviously the speaker wants to know if the gates will hold up *if an attack comes*. In other words, the Gates could still be “insecur’d Against Surprize” even if no attack came.

160. *But see* Clancy, *Property, Privacy, or Security*, *supra* note 22, at 350 (stating that the “term ‘secure’ in a *non*-Fourth Amendment context has been associated with being safe or free from danger”) (emphasis added).

161. There is no report of the case. The Supreme Court has described Otis’s argument in *Paxton’s Case* as “perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country.” *Boyd v. United States*, 116 U.S. 616, 625 (1886) (“‘Then and there,’ said John Adams, ‘was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.’”); CUDDIHY, *SUPRA* note 31, at 382 (“His proclamation that only specific writs were legal was the first recorded declaration of the central idea to the specific warrant clause.”).

162. *See* M.H. SMITH, THE WRITS OF ASSISTANCE CASE 562–66 (1978) (designating a *Boston Gazette* article as an “Article, probably by James Otis, in the Boston Gazette for 4 January 1762”); Davies, *supra* note 133, at 562 n.20 (claiming that the article was “probably authored by James Otis”); Rubinfeld, *supra* note 22, at 121 n.90 (stating that the article was “probably written by Otis himself”).

163. QUINCY, *supra* note 141, at 489 (emphasis added).

164. The word “secure” is also attributed to Otis in additional contexts. Otis stated that a “man is accountable to no person for his doings. Every man may reign *secure* in his petty tyranny, and spread

readings of “secure” in this instance are further supported by the author’s subsequent statement that the cost of being “less secure” is incurred at the moment the “writ had any existence among us.”<sup>165</sup> Had the author intended “less secure” to mean “subject to more searches,” he would have designated the *execution* of the writ—not the moment of its existence—as the point at which costs were incurred.<sup>166</sup> Similarly, the author makes clear that it is the writ’s “power” (rather than its execution) that devalues “freeholds” and quiets “boasts of British honor.”<sup>167</sup>

If this were not enough, it also seems that the original author of the “to be secure” phraseology, John Adams, actually understood “secure” to have a meaning separate and distinct from “spared.” In his original notes in *Paxton’s Case*, Adams transcribed Otis as stating that a “Man, who is quiet, is as *secure* in his House, as a Prince in his Castle.”<sup>168</sup> Fifty years later, when he converted his notes into an abstract, Adams made clear that he had interpreted Otis’s use of “secure” to mean “protected” rather than simply “spared.”<sup>169</sup> In that later version, Adams used “well-guarded” as a substitute for “secure,” quoting Otis as saying that a “man’s house is his castle; and whilst he is quiet, he is as *well-guarded* as a prince in his castle.”<sup>170</sup>

## 2. Structure of the Fourth Amendment

Founding-era definitions and writings suggest that the term “secure” meant not “spared” but either “protected” or “free from fear.” The following paragraphs examine the framers’ use of “secure” within the context of the Fourth Amendment.

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terror and desolation around him, until the trump of the Archangel shall excite different emotions in his soul.” *Id.* at 488 (quoting JAMES OTIS, ON THE WRITS OF ASSISTANCE—BEFORE THE SUPERIOR COURT OF MASSACHUSETTS (1761)) (emphasis added). If a man is not accountable then he is “protected” (and likely confident) in his “tyranny.” It would be odd for one to be “reigning” in “tyranny” if he had simply been “spared” accountability. It is therefore highly likely that Otis was using “secure” in this context to mean “protected” or “free from fear.”

165. *See id.*

166. Along these lines, Otis argued that the writs were “most destructive of English liberty” not because of the frequency of their use but rather because they could be used at the whim of government officials: the “liberty of every man [is placed] in the hands of every petty officer.” *Id.*; see discussion *infra* Part II.C.

167. *See* QUINCY, *supra* note 141, at 489.

168. JOHN ADAMS, *Petition of Lechmere (Argument on Writs of Assistance) 1761*, in 2 LEGAL PAPERS OF JOHN ADAMS 106, 125 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965) (emphasis added).

169. Clancy, *Property, Privacy, or Security*, *supra* note 22, at 351–53 (explaining the discrepancy).

170. John Adams, Appendix A, in 2 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH THE LIFE OF THE AUTHOR, NOTES AND ILLUSTRATIONS, BY HIS GRANDSON CHARLES FRANCIS ADAMS 3, 14 (1856) (emphasis added). The discrepancy, according to Clancy, “results from the two sources of the speech.” Clancy, *Property, Privacy, or Security*, *supra* note 22, at 352 n.316 (“[T]he first is from Adams’ original notes [while] the second is from Adams’ abstract made 50 years after the argument.”).

At the time of ratification, seven states had adopted Fourth Amendment analogues.<sup>171</sup> Of these, only three (Massachusetts, New Hampshire, and Pennsylvania) used the language “be secure.”<sup>172</sup> The Massachusetts clause, authored by John Adams, emerged as the model for the federal Amendment on searches and seizures.<sup>173</sup> Article XIV of the Massachusetts Constitution provided, in pertinent part, that “[e]very subject has a right *to be secure* from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions.”<sup>174</sup> The Fourth Amendment, in its final, ratified form, states that:

The right of the people *to be secure* in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>175</sup>

Unfortunately, the Amendment’s drafting history provides no real guidance on the meaning of “to be secure.”<sup>176</sup>

The Fourth Amendment is naturally divided into two parts: the Reasonableness Clause and the Warrant Clause. Both parts inform structural analyses of the meaning of “to be secure.” The first salient feature of the Reasonableness Clause is that it safeguards the “right of *the people* to be secure.”<sup>177</sup> The reference to “the people” is difficult to

171. See George C. Thomas III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451, 1465 n.63 (2005).

172. *Id.* at 1465.

173. See Clancy, *John Adams*, *supra* note 151, at 1029; ALEXANDER H. BULLOCK, *THE CENTENNIAL OF THE MASSACHUSETTS CONSTITUTION 18 (1881)* (quoting Adams as saying, “I made a constitution for Massachusetts, which finally made the constitution of the United States”).

174. MASS. CONST. art. XIV (emphasis added). The text was drafted in 1779 by John Adams and adopted in 1780. See Clancy, *John Adams*, *supra* note 151, at 1027–29; see also N.H. CONST. OF 1784, art. XIX (“Every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions.”). Like Massachusetts and New Hampshire, Pennsylvania had an “unreasonableness clause.” PA. CONST. OF 1776, DECLARATION OF THE RIGHTS, art. I § 8. Pennsylvania’s second Constitution, ratified in 1790, provided that the people “shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures.” PA. CONST. OF 1790, art. IX § 8.

175. U.S. CONST. amend. IV (emphasis added).

176. CUDDIHY, *supra* note 31, at 730–34; Clancy, *John Adams*, *supra* note 151, at 1047 (“The congressional history concerning the evolution of the final form of the amendment’s language is sparse and somewhat disputed. The provision generated very little recorded debate.”); see *id.* at 1028 (stating that John Adams, the author of the Massachusetts template, “never seems to have commented on the Massachusetts search and seizure provision”).

177. U.S. CONST. amend. IV (emphasis added). Courts and most commentators today treat the Fourth Amendment as safeguarding an individual right. See *Dist. of Columbia v. Heller*, 554 U.S. 570, 579 (2008) (stating that the Fourth Amendment “unambiguously refer[s] to individual rights, not ‘collective’ rights, or rights that may be exercised only through participation in some corporate body”); Donald L. Doernberg, “*The Right of the People*”: *Reconciling Collective and Individual Interests under the Fourth Amendment*, 58 N.Y.U. L. REV. 259, 270 (1983) (“These cases clearly contemplate that the rights secured by the fourth amendment are individual rather than a ‘right of the people’ collectively held.”); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L.

assimilate into the “spared” interpretation.<sup>178</sup> One wonders when “the people” are no longer “spared” unreasonable searches and seizures. If the government’s first illegal search or seizure constitutes a violation of the collective right to be spared, then the Amendment is irrational: one search or seizure does not cause the people *as a whole* to be searched or seized. If, on the other hand, a critical mass of the population must be illegally searched or seized to trigger protection, then the Amendment serves no real purpose, for it would not be violated under any plausible scenario.<sup>179</sup> One avoids such interpretive challenges, however, if “secure” is understood to mean “protected” or “free from fear.” It is easy to conceive of government activity leaving “the people” “unprotected” against (or “fearful” of) unreasonable searches and seizures. As a result, the framers’ decision to employ collective language seems to substantiate the broader interpretations of “to be secure.”<sup>180</sup>

The rest of the Reasonableness Clause also favors the broad readings of “to be secure.” The Amendment provides for “the right of the people to be secure *in their persons, houses, papers, and effects*, against unreasonable searches and seizures.”<sup>181</sup> In the decades leading up to ratification, it was common to find written accounts of societies “protected in” certain, enumerated objects (such as persons or property) or ideas (such as freedom or liberty). For example, Roger Coke referenced a society “where Men are protected in their Lives and Fortunes.”<sup>182</sup> Joseph Townsend wrote of a people “equally protected in their property, their

REV. 349, 367 (1974) (“Plainly, the Supreme Court is operating on the atomistic view.”). *But see* Johnson v. United States, 333 U.S. 10, 14 (1948) (“The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance.”).

178. This Article does not argue that the Amendment should be interpreted as a collective right. Rather, it argues that the framers’ decision to draft the Fourth Amendment as a collective right suggests that the term “secure” was intended to mean either “protected” or “free from fear.”

179. Due to natural limits on government resources, it is difficult to imagine the situation where a substantial percentage of the population would be subjected to actual unreasonable searches and seizures.

180. The verb “to be” does not materially change the meaning of “secure.” Depending on the meaning of “secure,” one can simply translate “to be secure” to “to be spared,” “to be protected,” or “to be free from fear.” Moreover, the framers’ decision to replace “secured” from Madison’s draft with “secure” seems to be of no importance to the analysis of the meaning of “to be secure.” See Clancy, *John Adams*, *supra* note 151, at 1048 (explaining that the record is silent as to why “secured” was inserted into and then later removed from the working draft); see *Heller*, 554 U.S. at 590 (2008) (“It is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process.”).

181. U.S. CONST. amend. IV (emphasis added).

182. ROGER COKE, A DETECTION OF THE COURT AND STATE OF ENGLAND DURING THE REIGN OF K. JAMES THE I. CHARLES THE I. CHARLES THE II. AND JAMES THE II. AS ALFO THE INTER-REGNUM 6–7 (1719) (“So all Christian Countries and Kingdoms are as well obliged to join together in honouring and praising God for the publick [sic] Benefits they receive, in being protected in every Government in their Lives and Fortunes in this world.”).

lives, their liberty, and their possessions.”<sup>183</sup> To the contrary, it would have been highly irregular to link the concept of “spared” (or, for that matter, “free from fear”) to a list of enumerated objects or ideas.<sup>184</sup> Further support for the broad reading lies in the framers’ use of the preposition “against” to modify “secure.”<sup>185</sup> Writers of the founding era regularly employed the phrase “protected *against*,”<sup>186</sup> and occasionally used “fear

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183. JOSEPH TOWNSEND, *FREE THOUGHTS ON DESPOTIC AND FREE GOVERNMENTS; AS CONNECTED WITH THE HAPPINESS OF THE GOVERNOR AND THE GOVERNED* 25 (1781). Further examples are numerous. *See, e.g.*, JOHN PETER ZENGER, *THE TRIAL OF JOHN PETER ZENGER, OF NEW YORK PRINTER: WHO WAS CHARGED WITH HAVING PRINTED AND PUBLISHED A LIBEL AGAINST THE GOVERNMENT AND ACQUITTED WITH A NARRATIVE OF HIS CASE* 15 (1765) (“[W]e were protected in our lives, religion, and properties.”); JOSIAH WEDGWOOD, *AN ADDRESS TO THE YOUNG INHABITANTS OF THE POTTERY* 7 (1783) (“[A]nd being protected in his property.”); JOHN HAMILTON BELHAVEN, *THE LORD BELHAVEN’S SPEECH IN THE SCOTCH PARLIAMENT, SATURDAY THE SECOND OF NOVEMBER ON THE SUBJECT-MATTER OF AN UNION BETWIXT THE TWO KINGDOMS OF SCOTLAND AND ENGLAND* 4 (1706) (“[P]rotected in his benefices, Titles, and Dignities.”); CHARLES STURGES, *RELIGION AND LOYALTY: A SERMON* 6 (1793) (“[Y]e are happily protected in your properties, in your liberties, and in your lives.”); T. BECKET, *AUTHENTIC PAPERS FROM AMERICA: SUBMITTED TO THE DISPASSIONATE CONSIDERATION OF THE PUBLIC* 4 (1775) (“Protected in these liberties, the emoluments.”); ALEXANDER CRUDEN, *THE HISTORY OF RICHARD POTTER, A SAILOR, AND PRISONER IN NEWGATE, WHO WAS TRIED AT THE OLD-BAILEY IN JULY 1763, AND RECEIVED SENTENCE OF DEATH FOR ATTEMPTING, AT THE INSTIGATION OF ANOTHER SAILOR, TO RECEIVE THIRTY-FIVE SHILLINGS OF PRIZE-MONEY DUE TO THIRD SAILOR* 10 (1763) (“[F]or the agent only is protected in his property.”); EDWARD FARLEY, *IMPRISONMENT FOR DEBT, UNCONSTITUTIONAL* 16 (2d ed. 1795) (“. . . is protected in his liberty, and property, unless he has committed a felony.”); LEWIS ATTERBURY, *AN ANSWER [BY L. ATTERBURY] TO A POPISH BOOK; ENTITLED A TRUE AND MODEST ACCOUNT OF THE CHIEF POINTS IN CONTROVERSIE, BETWEEN THE ROMAN CATHOLICKS AND THE PROTESTANTS* 8 (1706) (discussing persons “who live securely and peaceably, and are protected in their Persons and Liberties”); MARTIN MADAN, *THOUGHTS ON EXECUTIVE JUSTICE, WITH RESPECT TO OUR CRIMINAL LAWS, PARTICULARLY ON THE CIRCUITS* 8 (1785) (advocating for the right “to be protected in their persons and properties”).

184. A search of Google Scholar for pre-19th Century publications linking “spared” (and related terms such as “unharmd” and “unaffected”) to objects or ideas identified zero publications. A similar search for publications linking “free from fear” (and similar terms such as “confident” and its derivatives) to objects or ideas identified zero publications.

185. One might argue that “against” does not modify “secure” but rather “right” or “right of the people.” Such an interpretation seems unreasonable. Take, for example, the hypothetical “right of the people to be secure in their houses against crime.” This articulation could not be fairly interpreted to provide the people with a “right against crime.” Similarly, a right “to be secure in your person, houses, papers, and effects against unreasonable searches and seizures” should not be read to create a “right against unreasonable searches and seizures.” *See Weeks v. United States*, 232 U.S. 383, 393 (1914) (referencing the “right to be secure *against* such searches and seizures” (emphasis added)); *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting) (“But the right to be secure *against* searches and seizures is one of the most difficult to protect.” (emphasis added)).

186. *See OXFORD ENGLISH DICTIONARY*, *SUPRA* note 24, at 852 (stating that “against” is one of the prepositions used with the “protected” usage of “secure”). A Google Scholar search of pre-19th Century publications identified 293 publications using “protection against” and ninety publications using “protected against.” Moreover, at the time of the founding it was not unusual to pair “secure” (and its derivatives) with “against.” A Google Scholar search of pre-19th Century publications identified 238 publications with “secure against” and 250 publications with “secured against.”

*against.*”<sup>187</sup> The preposition “against,” however, almost never modified “spared” or similar terms such as “unaffected” or “unharm[ed].”<sup>188</sup>

The second part of the Fourth Amendment—the Warrant Clause—similarly favors the “protected” and “free from fear” interpretations.<sup>189</sup> The text and drafting history of the Fourth Amendment suggest that the framers understood the *issuance* of a general warrant to constitute a violation of the “right to be secure.”<sup>190</sup> Yet the mere issuance of a general warrant does not always result in an actual search or seizure.<sup>191</sup> Because the issuance of a general warrant necessarily violates the right to be secure, and because such warrants do not always subject persons to unreasonable searches or seizures, logic demands that the right to be secure was meant to safeguard something beyond the mere right to be “spared” an unreasonable search or seizure.<sup>192</sup> It is far more logical to read “secure” to mean “protected” or “free from fear.” The very issuance of a general warrant, after all, can be understood to necessarily make persons less “protected” against, and more “fearful” of, unreasonable searches and seizures.

Interpreting “secure” to mean “spared” raises a final structural issue: it seems to render the “to be secure” text a linguistic excess. Had the framers sought only to safeguard a right to be “spared,” they could have omitted the phrase “to be secure” and drafted the Amendment to provide

187. A Google Scholar search of pre-19th Century publications identified eleven publications with “fear against,” and 9060 publications with “fear of.” One could alternatively reframe the “right to be free from fear” as a “right to confidence.” As it turns out, the language “confidence against” is far less orthodox than, say, “confidence in.” A Google Scholar search of pre-19th Century publications identified 3770 publications with “confidence in” and seven with “confidence against.”

188. A Google Scholar search of pre-19th Century publications identified 3920 publications using the term “spared.” Of these, only one publication used the language “spared against.” Similarly, a search for “unaffected” identified 1610 publications but zero publications for “unaffected against”; a search for “unharm[ed]” identified thirteen publications but zero for “unharm[ed] against.”

189. There is a robust debate in the literature about how to read the Reasonableness Clause in light of the Warrant Clause. Compare LASSON, *supra* note 145, at 103 (1937) (concluding that the Fourth Amendment was meant to prohibit warrantless searches), with Davies, *supra* note 133, at 724 (finding that the Fourth Amendment did not seek to prohibit warrantless searches).

190. U.S. CONST. amend. IV (stating that “no Warrants shall *issue*, but upon probable cause”) (emphasis added); LASSON, *supra* note 145, at 103 (“The general principle of freedom from unreasonable search and seizure seems to have been stated only by way of premise, and the positive inhibition upon action by the Federal Government limited consequently to issuance of warrants without probable cause.”). For a history of the writs of assistance, see Clancy, *James Otis*, *supra* note 22, at 492–93.

191. A general warrant could, of course, issue but not be exercised.

192. SEE LASSON, *supra* note 145, at 103 (“The general right of security from unreasonable search and seizure was given a sanction of its own and the amendment thus intentionally given a broader scope.”); Davies, *supra* note 133, at 590 (stating that the framers ensured “the *protection* of the person and house by prohibiting legislative approval of general warrants” (emphasis added)); Rubinfeld, *supra* note 22, at 126 (stating that a right to not be subjected to unreasonable searches and seizures “doesn’t grasp the harm that general warrants actually inflict”).

for a “right against unreasonable searches and seizures.”<sup>193</sup> If, on the other hand, “secure” meant “protected” or “free from fear,” then the inclusion of “to be secure” would have been necessary to give the Amendment its intended meaning. Customary rules of interpretation thereby suggest that “secure” be read to mean “protected” or “free from fear.”<sup>194</sup>

### 3. *Discourse on Harms of Potentiality*

The structure of the Fourth Amendment, and the meaning of “secure” at the time of the founding, strongly indicate that the “to be secure” text conferred a right to be “protected” from unreasonable searches and seizures—and possibly a right to be “free from fear” from such government actions. This conclusion is further substantiated by a review of founding-era discourse concerning the harms caused by the *potentiality* of unreasonable searches and seizures.<sup>195</sup>

Preratification arguments regarding “potentiality” focused on “risks of exposure,” and in turn, criticized the “power,” “existence,” and “issuance” (rather than “execution”) of general warrants. In 1582, for example, an anonymous Catholic wrote of the anxiety that comes with arbitrary searches: “[F]ellow believers could not enjoy so much as an hour’s assurance against sudden, forcible invasion, even in their own dwellings.”<sup>196</sup> William Cuddihy found that after the 1640s, general warrants began to attract criticism because “they furnished an infinite *power of surveillance*” that “*exposed every Englishman’s dwelling to perpetual, capricious intrusion.*”<sup>197</sup> Examples are numerous. In 1688, Parliament criticized an act that taxed stone fireplaces as “a badge of slavery upon the whole people” for it “*expos[ed] every man’s house*” to search.<sup>198</sup> In the 1763 decision, *Huckle v. Money*, Judge Pratt concluded

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193. If the framers were seeking to safeguard a right to be “spared,” they could have drafted the amendment to provide that the “the right of the people against unreasonable searches and seizures of their persons, houses, papers, and effects, shall not be violated.” See Rosenthal, *supra* note 22, at 538 (“If the word ‘secure’ were simply understood as a synonym for a ‘right’ to be free from unreasonable search and seizure, it would be redundant of the ‘right’ found earlier in the same clause.”).

194. See *Marbury v. Madison*, 1 Cranch 137, 174 (1803) (“It cannot be presumed that any clause in the constitution is intended to be without effect.”).

195. Justice Jackson summarized the costs of the *potential* of unreasonable searches and seizures in *Brinegar v. United States*, 338 U.S. 160, 180–81 (1949) (Jackson, J., dissenting) (“Among deprivations of rights, none is so effective in cowering a population, crushing the spirit of the individual and putting terror in every heart. . . . And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are *subject at any hour* to unheralded search and seizure by the police.” (emphasis added)); see *Camara v. Mun. Court*, 387 U.S. 523, 531 (1967) (stating that “*possibility* of criminal entry under the guise of official sanction is a serious threat to personal and family security” (emphasis added)).

196. CUDDIHY, *supra* note 31, at 7.

197. *Id.* at 122 (emphases added).

198. *Id.* (emphasis added).

that general warrants reflect a “law under which no Englishman would wish to live an hour.”<sup>199</sup> The “Inhabitants of Boston” issued a report condemning general warrants in part because “our Houses, even our Bed-Chambers, are *exposed* to be ransacked.”<sup>200</sup> James Otis argued that the writs placed the “liberty of *every* man in the hands of every petty officer.”<sup>201</sup> And John Wilkes claimed to assert “the security” of his own house “for the sake of *every* one of my English fellow subjects.”<sup>202</sup> Because neither Wilkes nor Otis believed that *every* individual would actually be subjected to more searches pursuant to general warrants, it seems reasonable to infer that both were highlighting the harms incurred by every individual due to the potential for unreasonable searches and seizures.

Of course references to potentiality do not always reflect a genuine concern for the *harms of potentiality*.<sup>203</sup> Appeals to potentiality are sometimes a rhetorical means to mitigate the harms of actuality.<sup>204</sup> But such appeals, when situated in the larger context of the era’s discourse on search-and-seizure jurisprudence, strongly indicate an acute sensitivity to the harms of potentiality. The following paragraphs discuss two relevant features of preratification discourse: the castle metaphor and allied First Amendment rights.

Founding-era discourse regarding general warrants centered on a preferred metaphor: the inhabitant of his home is the king of his castle.<sup>205</sup> “The house of every one is his castle,” wrote Chief Justice Coke in the landmark *Semayne’s Case*.<sup>206</sup> Coke continued:

[T]he house of every one is to him as his . . . castle and fortress, as well for his defence against injury and violence, as for his repose; and although the life of man is a thing precious and favoured in law . . . if thieves come to a man’s . . . house to rob him, or murder, and the owner [or] his servants kill any of the thieves in defence of himself and his house, it is not a felony, and he shall lose nothing . . . [E]very one may assemble his friends and neighbours . . . to defend his house against violence.<sup>207</sup>

The castle metaphor was also central to William Pitt’s famous address to Parliament:

199. See *id.* at 445; SEE ALSO Huckle v. Money, (1763) 95 Eng. Rep. 768 (C.P.).

200. *Id.* (emphasis added). The “Inhabitants of Boston” was a committee appointed in 1772 to “state the Rights of the Colonists.” *Id.* It counted James Otis as a member. *Id.*

201. See *supra* note 164 (emphasis added).

202. PETER D.G. THOMAS, JOHN WILKES: A FRIEND TO LIBERTY 32 (1996) (emphasis added).

203. For a discussion of how the rule against unreasonable searches and seizures can but need not adequately protect persons from the harms of potentiality, see *infra* discussion notes 251–253.

204. This rhetorical device is used regularly to get an audience “to relate.”

205. See Clancy, *John Adams*, *supra* note 151, at 1021; Clancy, *James Otis*, *supra* note 22, at 497 n.51.

206. *Semayne’s Case*, (1604) 77 Eng. Rep. 194, 194 (K.B.); 5 Coke’s Rep. 91 a.

207. *Id.* at 195.

The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain may enter—but the King of England cannot enter!—all his force dares not cross the threshold of the ruined tenement!<sup>208</sup>

Moreover, James Otis profiled the metaphor in his 1761 critique of the writs of assistance: “A man’s house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle.”<sup>209</sup>

The prevalence of the castle metaphor in preratification discourse offers us some insights into the meaning of “to be secure.”<sup>210</sup> For Clancy, the comparison between the home and the castle suggests that the Fourth Amendment was meant to prohibit only actual intrusions.<sup>211</sup> Yet preratification allusions to “castles” almost certainly evoked images grander than dwellings that just happen, as a matter of fact, to not suffer actual intrusions. Rather, a “castle” was understood to be a place where inhabitants enjoyed a degree of protection, and perhaps, as a result, a degree of freedom from fear. “Castle” is defined as a building “fortified for defense against an enemy.”<sup>212</sup> John Adams understood the importance of “fortification” to the castle metaphor when he wrote that the home provides “as compleat a security, safety and Peace and Tranquility as if it was surrounded with Walls of Brass, with Ramparts and Palisadoes and defended with a Garrison and Artillery.”<sup>213</sup> It should also be noted that the

208. 1 HENRY PETER BROUGHAM, *HISTORICAL SKETCHES OF STATESMEN WHO FLOURISHED IN THE TIME OF GEORGE III* 52 (1839).

209. Clancy, *Collective Right*, *supra* note 22, at 258. Otis went on to explain: “[o]ne of the most essential branches of English liberty is the freedom of one’s house.” CUDDIHY, *supra* note 31, at lxiii.

210. *See generally* HAROLD J. BERMAN, *LAW & REVOLUTION, THE FORMATION OF THE WESTERN LEGAL TRADITION 165–74* (1983) (discussing the power of metaphors to Christian precepts on the development of Western law).

211. *See* Clancy, *Property, Privacy, or Security*, *supra* note 22, at 353–54. The “spared” interpretation of “to be secure” finds support in some of the earlier postratification treatises. *See, e.g.*, THOMAS M. COOLEY, *A TREATISE ON CONSTITUTIONAL LIMITATIONS* 425–26 (1896) (“The maxim that ‘every man’s house is his castle’ is made a part of our constitutional law in the clauses *prohibiting* unreasonable searches and seizures, and has always been looked upon as of high value to the citizen.” (emphasis added)); FRANCIS LIEBER, *CIVIL LIBERTY AND SELF-GOVERNMENT* 62 (1859) (“[N]o man’s house can be forcibly opened, or he or his goods be carried away after it has thus been forced, except in cases of felony, and then the sheriff must be furnished with a warrant, and take great care lest he commit a trespass. This principle is jealously insisted upon.”).

212. OXFORD ENGLISH DICTIONARY 956 (1970).

213. 1 LEGAL PAPERS OF JOHN ADAMS, *supra* note 168, at 137; *see* 1 JOHN DICKINSON, *THE POLITICAL WRITINGS OF JOHN DICKINSON* 230 (Bonsai & Niles, 1801) (describing the castle as “a place of perfect security”); *Weeks v. United States*, 232 U.S. 383, 390 (1914) (“Resistance to these practices had established the principle which was enacted into the fundamental law in the Fourth Amendment, that a man’s house was his castle and not to be invaded by any general authority to search and seize his goods and papers.”).

castle's archetypical inhabitant (the monarch) enjoyed unique protections from *potential* harms under the common law.<sup>214</sup>

Sensitivity to the harms attributable to the mere potential for unreasonable searches and seizures is moreover reflected in preratification discourse emphasizing the connection between general warrants and the exercise of speech and religious rights. General warrants had been used to stifle religious and political dissent in England dating back to at least the Seventeenth Century.<sup>215</sup> For example, the papers of Sir Edward Coke were seized during his 1621 imprisonment.<sup>216</sup> *Entick v. Carrington*, central to the colonial narrative of search and seizure,<sup>217</sup> involved a warrant ordering the King's messengers "to make strict and diligent search for . . . the author, or one concerned in the writing of several weekly very seditious papers."<sup>218</sup> James Otis's criticism of the writs of assistance explicitly referenced searches relating to "breach of the Sabbath-day acts."<sup>219</sup> This historical connection between search regulations and First Amendment rights has not been lost on the Supreme Court. In *Marcus v. Search Warrant*, the Court observed that "[t]he Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression."<sup>220</sup>

Individual decisions to speak or exercise religious rights are based on some assessment of the expected costs and benefits of such actions. Here is the critical point: it is the *potential* for an unreasonable search or

214. For a discussion of the protections of the Crown and the development of attempt law, see Jerome Hall, *Criminal Attempt—A Study of Foundations of Criminal Liability*, 49 YALE L.J. 789 (1940). Since the 14th century, "compassing" the death of the Crown constituted treason even without an overt act. *Id.* at 795 (stating that treason required "[f]ailure to reveal knowledge about a plot against the king") (citing 21 Richard 2 (1397)). This is not to say that the Crown was afforded extra protection for the purpose of making him less anxious; but it is to say that "freedom from fear" was a common byproduct of heightened protection and that "freedom from fear" would have been attractive to anyone seeking a similar degree of protection.

215. CUDDIHY, *supra* note 31, at 8. Numerous examples exist. William Prynne recounted the plunder of an entire cartload of his library's contents in 1634 after a search. *Id.* at 9. Burton and Bastwick were subject to searches for critical sermons. *Id.* "Marprelate" denounced the bishops for terrorizing his printer. *Id.* at 8.

216. *Id.* at 140–42.

217. See *Boyd v. United States*, 116 U.S. 616, 626–27 (1886) ("[E]very American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom . . . [I]t may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the Constitution.").

218. See *Entick v. Carrington*, (1765) 95 Eng. Rep. 807 (K.B.); see also *Wilkes v. Wood*, (1763) 19 Howell St. Trials 1153 (K.B.).

219. SEE Clancy, *James Otis*, *supra* note 22, at 511.

220. 367 U.S. 717, 729 (1961); see *Frank v. Maryland*, 359 U.S. 360, 376 (1959) (Douglas, J., dissenting) ("The commands of our First Amendment (as well as the prohibitions of the Fourth and the Fifth) reflect the teachings of *Entick v. Carrington*. These three amendments are indeed closely related, safeguarding not only privacy and protection against self-incrimination but 'conscience and human dignity and freedom of expression as well.'" (citation omitted)).

seizure—not simply its actuality—that impacts deliberations regarding the exercise of speech or religious rights. As such, the founding-era discourse on the potentiality of unreasonable searches and seizures was not simply a rhetorical device to generate support for policies to mitigate the harms of actual unreasonable searches and seizures. Rather, it reflected an awareness of the harms attributable to the potential for unreasonable searches and seizures.<sup>221</sup> In other words, founding-era discourse strongly suggests that, in the context of unreasonable searches and seizures, the framers realized the value of “protection” and “freedom from fear.”

### III. IMPLICATIONS

On the basis of both text and history, the Fourth Amendment right “to be secure” can be fairly read to encompass the right to be “protected” from unreasonable searches and seizures, and quite possibly the right to be “free from fear” of such government actions. This broader interpretation of “to be secure” has important implications for prevailing Fourth Amendment rules and procedure.

#### A. EXPEDITED REGULATION

Judicial recognition of rights to be “protected” and “free from fear” will almost certainly facilitate earlier judicial review of new investigative techniques, which will serve to curb the rising costs of regulatory delay. Consider the example of drone surveillance by law enforcement.<sup>222</sup> Under current Fourth Amendment law—limited to the right to be “spared” an unreasonable search or seizure—plaintiffs lack standing to challenge drone surveillance unless they can plead facts to demonstrate that they have actually been surveilled by a drone, or that such surveillance is “certainly impending.”<sup>223</sup> Because the government

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221. By the time of ratification the law had been used in various contexts to mitigate “harms of potentiality.” Individuals who feared attack by another could seek protection by presenting an “Article of the Peace” to the King’s Bench. ARTICLES OF THE PEACE, ENTERCOURSE, AND COMMERCE (1605). The tort of assault, from at least the 17th Century, was based on an imminent threat of harm. See *Tuberville v. Savage*, (1669) 86 Eng. Rep. 684 (K.B.). The crime of robbery, beginning in 1735, included the element of “putting another in fear.” *Rex v. Francis*, 8 Geo. 2 B.R. (1735) (“To make a complete robbery there must be a taking from the person, and putting in fear; but it is not necessary that the fear should be previous to the taking; for if it accompanies it, it is sufficient.”). The recognition of attempt crimes—though not requiring the victim be fearful—nonetheless punished individuals who had not completed offenses but simply made people fearful. See *Rex v. Scofield*, Caldecott 397 (1784). The absence of the tort of intentional infliction of emotional distress does not suggest that the legal system of the founding era did not understand the need to deter such inflictions. More likely, the common law judges simply realized that the benefits of such causes of action were outweighed by their costs (such as error rates).

222. See *supra* discussion Part I.B.

223. *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1143 (2013).

regularly conceals information about the objects of drone surveillance,<sup>224</sup> individuals will find it difficult to initiate judicial review (and thus judicial regulation) of drone programs. But an individual who is “spared” drone surveillance can nonetheless experience a violation of his right to be “protected” or “free from fear.” This means that Fourth Amendment claimants can establish standing to challenge the constitutionality of drone surveillance even if law enforcement has successfully concealed information about the objects of such surveillance.<sup>225</sup> As a result, the “protected” and “free from fear” interpretations would, in most cases involving concealed investigative techniques, expedite standing—and hence judicial regulation—without upsetting the prevailing Article III rules regarding “injury-in-fact.”<sup>226</sup>

#### B. RULE AGAINST ADOPTION

Rules giving effect to Fourth Amendment rights to be “protected” and “free from fear” must be drawn carefully.<sup>227</sup> Otherwise they will invite burdensome litigation, disruptions to ongoing lawful investigations, and discontinuity of precedent. Thankfully the rights to be “protected” and “free from fear” can be adequately guarded by a simple rule against government adoption of unregulated investigative techniques:

The Fourth Amendment prohibits government adoption of a method that constitutes an unregulated and unreasonable search or seizure.<sup>228</sup>

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224. See *supra* discussion Part I.B; Brian Bennett, *Police Employ Predator Drone Spy Planes on Home Front*, L.A. TIMES (Dec. 10, 2011), <http://articles.latimes.com/2011/dec/10/nation/la-na-drone-arrest-20111211/2>; Stephen Dean, *Police Line Up to Use Drones on Patrol after Houston Secret Test*, HOUSTON EXAMINER, Jan. 11, 2010, at 1.

225. Moreover, the pleading requirements enunciated in *Iqbal* will not present added difficulties. Plaintiffs must merely plead plausible factual allegations that their rights to be “protected” or “free from fear” were violated. *Ashcroft v. Iqbal*, 556 U.S. 662, 670 (2009).

226. See *Clapper*, 133 S. Ct. at 1140–41. This is perfectly consistent with *Laird v. Tatum*, where the Court held that respondents lacked standing to pursue a First Amendment claim based on the mere adoption of a government surveillance program. 408 U.S. 1, 10 (1972). In that case the Court found it unclear whether respondents experienced an actual violation of their First Amendment rights. *Id.* at 15. But if the Fourth Amendment were read broadly to encompass a right to be “protected” or “free from fear,” then a surveillance program (similar to that at issue in *Laird*) could very well violate the Fourth Amendment rights of individuals (similar to the respondents in *Laird*) so long as the individuals were left not “protected” or “free from fear.”

227. *Soldal v. Cook County*, 506 U.S. 56, 71 (1992) (referencing concern over Fourth Amendment interpretations “carry[ing] it into territory unknown and unforeseen”).

228. For the sake of simplicity, the rule is based on three broad assumptions: (1) protection exists, and fear is not objective, before a method has been adopted by the jurisdiction; (2) protection exists, and fear is not objective, once a method has been regulated; and (3) protection exists, and fear is not objective, once a method has been found to not be an unreasonable search or seizure. See Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 MISS. L.J. 213, 312 (2002) (“Knowledge that government has enacted rules limiting its surveillance powers . . . is the surest way to enhance a sense of security in an age when technology threatens our

The violation of this rule against “adoption”—one of several viable alternatives to guard the rights to be “protected” and “free from fear”—could serve as the basis for a declaratory judgment or civil action.<sup>229</sup> It would serve to supplement, rather than replace, the right to be “spared.”<sup>230</sup>

### C. CURBING NEW LITIGATION

The rule against “adoption” will not invite burdensome litigation. This is attributable, in large part, to the limiting nature of its elements. The “adoption” element, for example, discourages litigation concerning fanciful or incredible surveillance.<sup>231</sup> It also helps to confine litigation to circumstances in which law enforcement can be thought to have assumed litigation risks. The rule’s “unregulated” and “unreasonable” elements are likely to further restrict litigation to *new* investigative methods.<sup>232</sup>

anonymity.”); Rosenthal, *supra* note 22, at 538 (“Security may not require perfect deterrence, but surely demands at least reasonable deterrent efficacy.”).

229. Declaratory judgments are likely the preferred form of action. Qualified immunity doctrine makes it unlikely that government violations of the rule against “adoption” will result in civil liability. In those cases where the adopted method is clearly unregulated and unreasonable, but where the government did not willfully conceal its adoption, courts should be careful to only impose nominal damages—otherwise the rule against “adoption” would unduly punish law enforcement for the ex post nature of judicial regulation. Moreover, mere violations of the rule against “adoption” should not result in the suppression of evidence. Because there is no requirement under the rule against “adoption” to show that the claimant was actually subjected to the technique, there are no fruits of the technique to suppress. (Of course, violations of the rule to be “spared” can still trigger an exclusionary sanction.) Lastly, injunctions are not practically available under this proposed rule. Once the Court sets the constitutional standards for the use of the method, the rule against “adoption” can no longer be violated (as any future government uses of that method will not constitute use of an “unregulated” method). As a result, there is no risk of a future violation of the rule against “adoption” (in regard to the challenged technique) to justify an injunction.

230. In other words, the right to be “spared” is subsumed by the right to be “protected.” This is based on the reasonable view that a person is not protected against unreasonable searches and seizures when they are being subjected to unreasonable searches and seizures. *Dist. of Columbia v. Heller*, 554 U.S. 570, 591 (2008) (“State constitutions of the founding period routinely grouped multiple (related) guarantees under a singular ‘right.’”).

231. Whether a method has been “adopted” is a question of fact. The element of “adoption” might rest, for example, on a news report, FOIA production, government leak, citizen observation, or legislative finding regarding the secret program’s existence. Randy E. Barnett, Opinion, *The NSA’s Surveillance is Unconstitutional*, WALL ST. J. (July 11, 2013, 6:44 PM), <http://online.wsj.com/news/articles/SB10001424127887323823004578593591276402574> (“Due largely to unauthorized leaks, we now know that the National Security Agency has seized from private companies voluminous data on the phone and Internet usage of all U.S. citizens.”). That said, it also seems reasonable to find “adoption” based on legislation empowering law enforcement to act. *See Berger v. New York*, 388 U.S. 41, 90 (1967) (reviewing N.Y. CODE CRIM. PROC. § 813-a (1967)); FISA Amendments Act, Pub. L. No. 110-261, 122 Stat. 2435 (2008) (codified at 50 U.S.C. §§ 1801–12).

232. To avoid difficult questions of what constitutes “legislative regulation,” I suggest that “regulation,” pursuant to the rule against “adoption,” be limited to “judicial regulation.” Moreover, I suggest that “judicial regulation” exists once an appeals court of the relevant jurisdiction has established rules for the method’s “reasonable” use. Trial court rulings would not likely trigger the deterrents of exclusion and civil sanctions necessary for a judicial ruling to constitute “regulation.” *See* discussion *supra* Part I.A. Limiting “regulation” to appeals court rulings raises the possibility of

The limiting nature of “unregulated” and “unreasonable” can be illustrated by a series of hypotheticals. Imagine the announcement of a new departmental policy to stop and search vehicles without particularized suspicion. Because the adopted government method (the suspicionless stop and search of a vehicle) has been “regulated” with constitutional standards (maintained, to some degree, by the threat of exclusion and civil sanctions), the department’s policy does not implicate the rule against “adoption.”<sup>233</sup> Next assume that an officer following the new policy actually stops and searches a vehicle without cause. At this point, the officer has violated the rule to be “spared,” but because the challenged method has been “regulated,” the officer’s use of the method does not violate the rule against “adoption.”<sup>234</sup> Finally, imagine an officer following a vehicle for an entire shift. Because the challenged government method—following a vehicle without suspicion—does not constitute an “unreasonable search or seizure,” the rule against “adoption” is, once again, not implicated.<sup>235</sup>

Baseless claims concerning the rule against “adoption” can be exposed through de minimus allocations of government resources. Plaintiffs will be required to allege facts to establish it plausible that (1) the jurisdiction has “adopted” the method (or that such adoption is “certainly impending”);<sup>236</sup> (2) the method is “unregulated”; and (3) the

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parallel litigation within a given jurisdiction. Yet much of Fourth Amendment litigation regarding new technologies is coordinated by a select number of public interest groups. As a result, the risk of burdensome parallel litigation is small. Another potential concern is defining the relevant appellate jurisdiction. This can be based, easily enough, on the appeals courts relevant to the “clearly established law” requirement for qualified immunity. So in the context of uses of a new method by federal agents, the method is not “regulated” until a panel of the governing circuit court of appeals has established standards for its “reasonable” use. When it comes to uses by state agents, the method is not “regulated” until a panel of the governing federal circuit court or state court of appeals has set standards for its reasonable use.

233. It would make no difference if the officer actually threatened the unreasonable search: the threatened action—stop and search of a vehicle—has been regulated and the passenger therefore remains, as a matter of law, “protected” and “free from fear.”

234. When I write that the right to be “protected” is not violated, I mean that the part of the right to be “protected” that goes beyond the right to be “spared” has not been violated. One might ask whether section 1881a of the FISA Amendments of 2008 could be challenged by this rule. This section is a “new and independent source of intelligence collection authority, beyond that granted in traditional FISA.” *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1144 (2013) (internal citations and quotations omitted). It does not require the Government to demonstrate probable cause that the target of electronic surveillance is a foreign power or agent of a foreign power. Because this method has been neither “regulated” nor found “reasonable” by the judiciary, its adoption could likely be challenged pursuant to the rule.

235. A government’s adoption of “sneak and peak” searches of residences would not violate this rule. Because the feared government technique (search of a dwelling based on a warrant but without notice) has been regulated (with standards for reasonableness that are maintained by the threat of exclusion and civil sanctions), the residents remain, as a matter of law, “protected” and “free from fear.”

236. *Clapper*, 133 S. Ct. at 1147 (defining “injury-in-fact” requirement of Article III standing as harm that is either “actual” or “certainly impending”).

method constitutes an “unreasonable search or seizure.”<sup>237</sup> The government can sufficiently rebut a claim of “adoption” with nothing more than a signed affidavit from the chief law enforcement officer. And it can support a judicial finding of “regulation” with a mere copy of a prior judicial order.<sup>238</sup> Only when a court finds that the government has *adopted* an *unregulated* method will the government be asked to brief the issue of whether the challenged method constitutes an “unreasonable search or seizure.” At this point the government can claim that (1) the adopted method does not constitute a “search” or “seizure,” or (2) the adopted method is “reasonable.” When a court holds that the challenged method does not constitute a “search” or “seizure,” its work is finished and, if affirmed on appeal, similarly-situated future litigants will not have an actionable claim pursuant to the rule against “adoption.”<sup>239</sup> Only when a court finds that the method is a “search” or “seizure” will it ever be expected to go on to describe the requirements for constitutional “reasonableness.”<sup>240</sup>

#### D. PRESERVING ONGOING SURVEILLANCE

A further concern is that the proposed rule against “adoption” will disrupt ongoing, lawful surveillance programs.<sup>241</sup> The *Clapper* majority, for

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237. See *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (“When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.”).

238. See *supra* note 232 (discussing jurisdictional questions regarding “judicial regulation”).

239. Judicial elaboration on “reasonableness” should occur only if it is necessary to resolve the case. Most litigation under this rule will involve warrantless, suspicionless uses of an investigative technique. In such cases, specification of any standard of reasonableness will be appropriate. But if the challenged technique was used, say, pursuant to a warrant based on probable cause, then it may violate the “case and controversy” requirement for the court to elaborate on the specific requirements of “reasonableness.” Should the judge forego elaboration, then further litigation (based on claims that the technique is used by the government without a warrant based on probable cause) would be likely.

240. The typical assessment will not present difficult questions about “reasonableness.” In the atypical assessment, where difficult issues arise, the difficulties are rarely likely to be allayed with time. And in that narrow category of assessments in which difficult questions are likely to be allayed with time, the costs associated with expedited decisionmaking are mitigated by the fact that judges and legislators are able to amend their conclusions at later points. See *generally* *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010). In a recent article, Orin Kerr has criticized ex ante review of Fourth Amendment claims as being error prone. Orin S. Kerr, *Ex Ante Regulation of Computer Search and Seizure*, 96 VA. L. REV. 1241, 1281 (2010) (stating that “[t]he major difficulty with ex ante restrictions is that the reasonableness of executing a warrant is highly factbound, and judges trying to impose ex ante restrictions generally will not know the facts needed to make an accurate judgment of reasonableness”). Unlike the magistrate rules discussed in Kerr’s article, a court’s establishment of constitutional standards to regulate an investigative technique does not require the court to apply rules to facts. In this way the litigation surrounding the rule against “adoption” avoids the “factbound morass of reasonableness” emphasized by Kerr. *Id.* (quoting *Scott v. Harris*, 550 U.S. 372, 383 (2007)).

241. A related concern is that the rule will give the judicial branch undue influence over the pace of investigations. The worst-case scenario for the government, however, is not the termination of the related investigation but rather compliance with the warrant requirement.

example, expressed alarm that “a terrorist (or his attorney) [could] determine whether he is currently under U.S. surveillance simply by filing a lawsuit challenging the Government’s surveillance program.”<sup>242</sup> Such risks will not arise in litigation pursuant to the rule against “adoption.” The identity of particular targets (or, for that matter, the existence of any targets) is not relevant to a claim under the proposed rule.<sup>243</sup>

Yet one might be alternatively concerned that “a terrorist (or his attorney)” would exploit litigation under this new rule to learn about the *existence* of a type of surveillance program. Any such fear is unfounded. Plaintiffs must plead facts to show “adoption” has occurred or is certainly impending. In cases in which a plaintiff fails to plead such facts (even when the allegation is true) the government need not address the issue of “adoption.” It can simply move to dismiss for failure to state a claim. But even in cases in which a plaintiff successfully states a claim, relatively little information about the existence of a program will be revealed *as a result* of litigation. This deserves a brief explanation. First, successful claims of “adoption” are likely to have drawn from facts already in the public domain. Second, the government can seek to have a complaint dismissed on the ground that the challenged technique has already been “regulated.” Third, the government can mitigate the harms of disclosure by simply conceding the issue of “adoption” for the purposes of litigation.<sup>244</sup> As a result, litigation over the proposed rule against “adoption” will never force the disclosure of information about particular targets of surveillance, and it will only occasionally (and imperfectly) reveal information about the existence of particular surveillance methods.<sup>245</sup>

#### E. RESPECTING PRECEDENT

Judicial recognition of the rule against “adoption” will not contravene principles of *stare decisis*. The rule leaves undisturbed the

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242. *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1149 n.4 (2013).

243. Richards, *supra* note 1, at 1960 (explaining that a “prohibition on secret surveillance *systems* does not require the government to notify *individual targets* of surveillance”) (emphases in original).

244. Admittedly, the government’s decision to not address the “adoption” issue would likely signal that the program existed. But the costs incurred by the government from such a signal are relatively low, as the plaintiff has already identified facts about the existence of the program sufficient to meet the pleading requirement.

245. Moreover, if a terrorist (or his attorney) happens to be the first person to challenge a technique (and he makes it to the judicial review phase), he will still not be able to discern whether the government used (or uses) the technique to surveil him. The judge’s consideration of reasonableness, after all, is purely legal. There is no application of the reasonableness standard to the individual. Because it does not matter whether the government met the threshold of requisite cause, neither the litigants (nor the judges themselves) will gain information through this litigation about the particular targets of investigative techniques.

Court's line of standing and pleading cases.<sup>246</sup> A plaintiff must still assert facts showing it plausible that her rights were violated or that a violation is certainly impending.<sup>247</sup> Moreover, the proposed rule does not upset the prohibition on advisory opinions. Advisory opinions resolve cases and controversies that are merely hypothetical.<sup>248</sup> A court's establishment of the constitutional standard for a given investigative technique could be perceived as "hypothetical" inasmuch as the case is disconnected from an actual search or seizure. Yet establishment of the standard is appropriate because it is necessary to resolve an actual (rather than hypothetical) case: whether an individual's Fourth Amendment rights to be "protected" and "free from fear" have been violated.<sup>249</sup> As a result, judicial conclusions of law necessary to adjudicate alleged violations of the rule against "adoption" cannot be fairly characterized as "advisory."<sup>250</sup>

The rule against "adoption" can also be viewed as part of a larger pattern of Fourth Amendment rulemaking. To make this point, this Article offers a brief counter-narrative of Fourth Amendment decisionmaking.<sup>251</sup> Early in the Court's history, a simple rule against

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246. See *Clapper*, 133 S. Ct. 1138; *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Again, the "injury-in-fact" is the violation of the right to be "protected" or "free from fear."

247. See *Clapper*, 133 S. Ct. at 1147; *Iqbal*, 556 U.S. at 678. In *Clapper*, the harm at issue was derived from a violation of the rule to be "spared." *Clapper*, 133 S. Ct. at 1143 (referencing risk of "acquired" communications); *id.* at 1156 (discussing risk of "interception" of communications). Under the proposed rule, the alleged harm would stem from the "adoption" of an unregulated and unreasonable method of search or seizure.

248. See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 325 (1936) (explaining that "a controversy of a justiciable nature" excludes "advisory decrees upon hypothetical state of facts"); *Muskrat v. United States*, 219 U.S. 346, 361 (1911) ("That judicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. The right to declare a law unconstitutional arises because an act of Congress relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law.").

249. The consideration of an adopted technique is similar to the consideration of a subpoena at least inasmuch as neither invasion will occur with certainty. See *Boyd v. United States*, 116 U.S. 616, 631-35 (1886) (holding that scope of subpoenas can be reviewed on Fourth Amendment grounds before compliance). Cf. *Muskrat*, 219 U.S. at 361 ("The object is not to assert a property right as against the Government, or to demand compensation for alleged wrongs because of action upon its part. The whole purpose of the law is to determine the constitutional validity of this class of legislation.").

250. Elaboration about the standard for "reasonableness" may, however, be "advisory" if the technique was used pursuant to a warrant with probable cause. In such a case a court should find the adopted method to be "reasonable" but not clarify the standard for reasonableness. In most cases, however, this problem will not arise as the challenged method will involve uses that are warrantless and without suspicion.

251. The master narrative, endorsed by today's Supreme Court, is that supplementary Fourth Amendment rules serve only the constitutional right to not be unreasonably searched or seized (i.e., the right to be "spared"). See, e.g., *Herring v. United States*, 555 U.S. 135, 141 (2009) ("[T]he exclusionary rule is not an individual right and applies only where it 'results in appreciable deterrence.'" (quoting *United States v. Leon*, 468 U.S. 897, 909 (1984))); *Leon*, 468 U.S. at 906 ("[T]he

unreasonable searches and seizures was believed to deter unreasonable searches and seizures to such a degree that it provided “protection” and left persons “free from fear.”<sup>252</sup> Yet ensuing shifts in law and society eroded the deterrence generated by the rule against unreasonable searches and seizures.<sup>253</sup> Eventually the deterrence generated by the rule dipped to the point where individuals were unprotected against (and fearful of) unreasonable searches and seizures. The Court responded to the weakened deterrence of the rule by creating supplementary Fourth Amendment rules. The *Boyd* Court, for example, supplemented the rule against unreasonable searches and seizures with a Fourth Amendment rule prohibiting “allegations . . . taken as confessed” following the refusal of an unreasonable search or seizure.<sup>254</sup> Justice Bradley located this supplemental rule in the constitutional guarantee of “security.”<sup>255</sup> Several decades later, the Court surveyed prevailing doctrine and again found that insufficient deterrence existed to safeguard the rights to be “protected” and “free from fear.”<sup>256</sup> In *United States v. Weeks*, the

exclusionary rule is neither intended nor able to ‘cure the invasion of the defendant’s rights which he has already suffered.’” (quoting *Stone v. Powell*, 428 U.S. 465, 540 (1976) (White, J., dissenting)).

252. *See Soldal v. Cook County*, 506 U.S. 56, 72 (1992) (“[W]e doubt that the police will often choose to further an enterprise knowing that it is contrary to the law.”). At the time of the founding, prohibitions on actual unreasonable searches and seizures would have likely provided sufficient deterrence to safeguard the rights to be “protected” and “free from fear.” *See, e.g., Entick v. Carrington*, (1765) 95 Eng. Rep. 807 (K.B.) (“By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action.”); AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 69 (1998) (“A warrant issued by a judge or magistrate . . . had the effect of taking a later trespass action away from a jury of ordinary citizens.”). *See* Donald A. Dripps, *Responding to the Challenges of Contextual Change and Legal Dynamism in Interpreting the Fourth Amendment*, 81 Miss. L.J. 1085, 1102–1117 (2012) (discussing risks of warrantless searches and seizures for government agents at time of the founding). Moreover, the rights to be “protected” and “free from fear” can be understood to be individual rights. Just because the rights to be “protected” and “free from fear” can be violated by general law enforcement activity (not directed at the individual) does not necessarily render such rights “collective.” To illustrate: if an individual was assured that he was not subject to surveillance, then his *individual* right to be “protected” and “free from fear” would not be violated even if the rest of the population was unprotected and fearful. To the contrary, he would likely have a claim if such rights were understood to be “collective.”

253. *See People v. Cahan*, 282 P.2d. 905, 911 (Cal. 1955) (“We have been compelled to reach th[e] conclusion [that the exclusionary rule is necessary] because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers.”); *see also United States v. Jones*, 132 S. Ct. 945, 963 (2012) (Alito, J., concurring) (“In the pre-computer age, the greatest protections of privacy were neither constitutional nor statutory, but practical.”).

254. *Boyd v. United States*, 116 U.S. 616, 620 (1886). In *Boyd*, the “search and seizure” came in the form of a subpoena. *Id.* at 636.

255. *Id.* at 635 (stating that the “constitutional provisions for the security of person and property should be liberally construed”).

256. *Weeks v. United States*, 232 U.S. 383, 392 (1914) (referencing the “tendency” of police to obtain convictions by means of unlawful seizures). For arguments that the exclusionary rule is mandated by the Constitution, *see Amsterdam, supra* note 177, at 367 (stating that the Fourth Amendment is a “regulatory canon requiring government to order its law enforcement procedures in a fashion that keeps us collectively secure in our persons, houses, papers and effects”); Doernberg, *supra*

Court drew from the “right to be secure” to supplement Fourth Amendment doctrine with a rule prohibiting the use of ill-gotten evidence in criminal prosecutions.<sup>257</sup> Writing for the majority, Justice Day explained that if the Fourth Amendment consisted of a mere rule against unreasonable searches and seizures, then, as a practical matter, “letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense,” and “the protection of the Fourth Amendment, declaring his right to be *secure* against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.”<sup>258</sup> In sum, the creation of supplemental Fourth Amendment rules in *Boyd* and *Weeks* can be fairly understood as judicial efforts to generate deterrence sufficient to safeguard individual Fourth Amendment rights to be “protected” and “free from fear.”<sup>259</sup>

This counter-narrative of Fourth Amendment rulemaking admits the proposed new rule against government “adoption” of unregulated and unreasonable investigative techniques. The forces of law and society have again shifted such that the current body of Fourth Amendment

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note 177, at 294 (concluding that “the Court should explicitly recognize the societal interest [motivating the exclusionary rule] for what it is—a collective constitutional right”).

257. *Weeks*, 232 U.S. at 393–94; see *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 391 (1920) (recognizing the “fruit of the poisonous tree” rule). For those who view “to be secure” to safeguard a mere right to be “spared,” the exclusionary rule is difficult to justify as a matter of constitutional law. Thomas K. Clancy, *The Fourth Amendment’s Exclusionary Rule as a Constitutional Right*, 10 OHIO ST. J. CRIM. L. 357, 389–91 (2013) (explaining that the exclusionary rule is constitutional because “there can be no right without a remedy” but failing to address why exclusion is the proper remedy for a violation of the right to be “spared”). Another example is the rule permitting facial invalidation of legislation endorsing procedures to violate the right to be “spared.” *Berger v. New York*, 388 U.S. 41, 90 (1967) (Harlan, J., dissenting) (“The Court declares, without further explanation, that, since petitioner was ‘affected’ by § 813-a, he may challenge its validity on its face.”); *Warshak v. United States*, 490 F.3d 455, 477 (6th Cir. 2007) (“Under *Berger*, facial invalidation is justified where the statute, on its face, endorses procedures to authorize a search that clearly do not comport with the Fourth Amendment.”) *But see Sibron v. New York*, 392 U.S. 40, 59–62 (1968) (stating the Court’s preference for as-applied challenges).

258. *Weeks*, 232 U.S. at 393 (emphasis added); Furthermore, “[t]he effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects, against all unreasonable searches and seizures under the guise of law.” *Id.* at 391–92.

259. See Rosenthal, *supra* note 22, at 538 (“Absent a remedial scheme that offers reasonably effective deterrence, the right to be “secure” against unreasonable search and seizure is breached.”). Some scholars have pointed out that the atomistic approach to standing is in tension with the collective remedy of the exclusionary rule. See Doernberg, *supra* note 177, at 284–85 (observing that by identifying an “individual right” with respect to questions of standing and a “collective remedy” designed to protect society by deterring unlawful police conduct, the Court is “using two analytically distinct approaches to analyze fourth amendment cases” which are “fundamentally at war with each other”); Amsterdam, *supra* note 177, at 369 (stating that the deterrence rationale for the exclusionary rule treats the Fourth Amendment “as a general regulation of police behavior” and that courts are acting dishonestly by maintaining the view that Fourth Amendment rights are atomistic).

doctrine no longer generates the deterrence needed to safeguard the rights to be “protected” and “free from fear.”<sup>260</sup> Today’s regulatory matrix—a combination of pleading rules, standing rules, the rule to be “spared,” qualified immunity, and the good-faith exception to the exclusionary rule—is systematically exploited by law enforcement’s concealment of the existence and objects of new investigative techniques.<sup>261</sup> Such concealment leaves law enforcement undeterred for long periods of time in their uses of harmful investigative techniques. The gap in deterrence leaves us, in turn, unprotected against—and, perhaps, objectively fearful of—unreasonable searches and seizures.<sup>262</sup> In a manner consistent with past judicial efforts to safeguard the rights to be “protected” and “free from fear,” the courts should strongly consider supplementing Fourth Amendment doctrine with a rule against “adoption” of unregulated and unreasonable methods of search or seizure.<sup>263</sup>

### CONCLUSION

Delays in the regulation of new investigative techniques impose high costs on society. These costs are heightened by law enforcement efforts to conceal the adoption and uses of new techniques. Unfortunately, the

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260. Importantly, the rule against actual intrusions can be sufficient to safeguard the rights to be “protected” and “free from fear.” Whether such rights are protected by a prohibition on intrusions is a function of the deterrence created by the rule against intrusion. For example, it seems reasonable to conclude that, at the time of the framing, rules against actual unreasonable searches and seizures provided sufficient deterrence to safeguard the rights to be “protected” and “free from fear.” See, e.g., *Entick v. Carrington*, (1765) 95 Eng. Rep. 807 (K.B.) (“By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action.”); Dripps, *supra* note 252, at 1124–25 (discussing risks to government agents at time of ratification who searched or seized without a warrant).

261. See *supra* Part I.B.

262. As Jerome Hall explained, in the context of criminal law, “legal principles arise not from whim or playful imagination but from need; we may assume at certain crucial points in the administration of the criminal law, available sanctions were deemed inadequate. Tension sets in, which makes for legal change.” Hall, *supra* note 214, at 811; see John Dewey, *Logical Method and Law*, 10 *CORNELL L.Q.* 17, 25 (1924) (“There is of course every reason why rules of law should be as regular and as definite as possible. But the amount and kind of antecedent assurance which is actually attainable is a matter of fact, not of form. It is large whenever social conditions are pretty uniform, and when industry, commerce, transportation, etc., move in the channels of old customs. It is much less whenever invention is active and when new devices in business and communication bring about new forms of human relationship.”); JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 1–2 (1980) (“The Constitution proceeds by briefly indicating certain fundamental principles whose specific implications for each age must be determined in contemporary context. . . . That the complete inference will not be found there—because the situation is not likely to have been foreseen—is generally common ground.”).

263. In this way the constitutional rule against “adoption” can be viewed as similar to the exclusionary rule. Both are efforts by courts to generate the deterrence necessary to safeguard the individual rights to be “protected” and “free from fear.” In both situations the deterrence is generated through judicially-created, bright-line rules that can be efficiently implemented by courts.

rising costs of regulatory delay cannot be sufficiently checked by conventional reform proposals. Calls for earlier legislation and broader rules of Article III standing have proved ineffective. Society must therefore work to identify and develop alternative methods to expedite the regulation of new investigative techniques. This Article proposed that the solution can be found in the text of the Fourth Amendment. The Fourth Amendment has been interpreted by courts and commentators to guarantee a mere right to be “spared” unreasonable searches and seizures. A study of the original meaning of the “to be secure” phraseology, however, suggests that the Amendment can be read more broadly: to safeguard a right to be “protected” against unreasonable searches and seizures, and quite possibly a right to be “free from fear” against such government action. Fourth Amendment rights to be “protected” and “free from fear” can be adequately guarded by a simple rule against government “adoption” of an investigative method that constitutes an unregulated and unreasonable search or seizure. This rule against “adoption” will curb the costs of regulatory delay and, at the same time, keep the promise of those who drafted and ratified the Fourth Amendment.