ARTICLE

The Reconciliation Roots of Fourth Amendment Privacy

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The Roberts Court has made protecting "the privacies of life" a catchphrase of Fourth Amendment law in the digital era. The time is thus ripe for revisiting the doctrinal and political roots of this newly influential quote from the Court's 1886 decision Boyd v. United States. *Existing scholarship views* Boyd *and its paean to privacy as an opening salvo in the Supreme Court's turn-of-the-twentieth-century deregulatory jurisprudence (often associated with the Court's most famous substantive due process decision,* Lochner v. New York*). Scholars also assume* Boyd*'s emphasis on privacy was in keeping with the Founders' view of the Fourth Amendment.*

This Article makes a novel argument that Boyd *and its elevation of protecting the "privacies of life" to an animating principle of the Fourth Amendment was instead a product of Reconstruction and its dismantlement. Doctrinally, the Article argues that legal actors did not commonly associate the Fourth Amendment with something they called "privacy" until after the Civil War. This association, along with* Boyd*'s other core doctrinal elements, was instead established during Reconstruction. Further, these Fourth Amendment innovations were pioneered in Congress, not the federal courts. Politically, the Article argues that* Boyd*'s innovations did not arise in response to growing federal economic regulation. Instead, the idea that the Fourth Amendment protected the privacies of life was fed by white Americans' commitment to preserving racial hierarchy after the Civil War. Shared by moderate Republicans and Democrats, this embrace of Fourth Amendment privacy built an anodyne bridge between otherwise fierce political foes. In other words, Fourth Amendment privacy was produced by and helped secure Reconciliation—the process through which white Americans North and South, Democrat and Republican came together to limit Reconstruction, preserve white supremacy, and pave the way for the violent disenfranchisement of newly freed Black men.*

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The Article is primarily a work of legal history; it concludes, however, by considering the divergent doctrinal implications of resituating Boyd *and Fourth Amendment privacy in the politics of Reconciliation. Doing so supports the Roberts Court's recent Fourth Amendment decisions without undermining scholars who contend that the Fourth Amendment protected what we today call privacy from the start. At the same time, this history poses a problem for Justice Neil Gorsuch and other libertarians who use the modern administrative state's connections to Jim Crow-era white supremacy to undermine its legitimacy. This Article shows that the very libertarian tradition championed by these skeptics of the administrative state suffers the same tainted roots. Critical scholars, for their part, document how constitutional privacy doctrines provide limited protection to marginalized communities. This Article's history could support their reparative case for more robust Fourth Amendment protections.*

INTRODUCTION

The Roberts Court has made protecting "the privacies of life" a catchphrase of Fourth Amendment law in the digital era. The Court's 2014 decision *Riley v. California*[1] found that cellphones did not generally qualify for the warrantless searches allowed under that Amendment if they were incident to lawful arrests.[2] Chief Justice John Roberts, writing for a unanimous court, explained that cellphones merited the Fourth Amendment's warrant protection because they uniquely contain in one place all "the privacies of life."[3] Four years later, in *Carpenter v. United States*,[4] the Supreme Court extended Fourth Amendment protection to cell-site location information.[5] In reaching that decision, the Chief Justice deemed protecting "the privacies of life" one of two "basic guideposts" to the Fourth Amendment's scope.[6] The quote originated in the Court's first Fourth Amendment opinion, *Boyd v. United States*,[7] decided in 1886.[8] But before *Riley*, the Court had not used the phrase in a majority opinion in almost thirty years[9] and had not used it to justify a Fourth Amendment remedy since 1980.[10]

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1 573 U.S. 373 (2014).

2 *Id.* at 401–02.

3 *Id.* at 403 (quotation marks omitted) (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).; *accord id.* at 404–07 (Alito, J., concurring in part on other grounds).

4 138 S. Ct. 2206 (2018).

5 *Id.* at 2220.

6 *Id.* at 2214 (quotation marks omitted) (quoting *Boyd*, 116 U.S. at 630).

7 116 U.S. 616 (1886).

8 *Id.* at 630; *cf. Ex parte* Jackson, 96 U.S. 727, 733 (1877) (stating in dicta that sealed letters sent through the mail are subject to the same Fourth Amendment protections "as if they were retained by the parties forwarding them in their own domiciles"). Petitioner A. Orlando Jackson did not argue the Fourth Amendment issue to the Court; instead, the Justices reached for it *sua sponte*. *See* Argument for the Petitioner, *Ex parte* Jackson, 96 U.S. 727 (1877) (No. 6).

9 According to a Westlaw search for the term, the immediately prior use was in *United States v. Dunn*, 480 U.S. 294, 300 (1987) (holding that a field on the defendant's ranch was not within the curtilage of his home).

10 *See* Payton v. New York, 445 U.S. 573, 585 (1980). According to the Westlaw search described above, the Supreme Court had previously used the phrase a dozen times in the 1960s and '70s, including in its sexual privacy decisions. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (holding that a state ban on contraceptives violated the right to marital privacy). And prior to 1960, the Court had used the quote only a handful of times since its first appearance in 1886. The Court also abandoned *Boyd*'s doctrinal holdings

Chief Justice Roberts's turn to *Boyd*'s catchphrase is likely not coincidental. Until recently, the Court's 1967 decision in *Katz v. United States*[11] was the touchstone for asserting that protecting privacy is among the Fourth Amendment's animating principles.[12] Further, under *Katz*, Fourth Amendment analysis turns on determining "reasonable expectation[s] of privacy," drawing the analyst's attention to the present, not the past.[13] Indeed, Professor David Sklansky has described the Court after *Katz* as treating *Boyd* like a "vaguely embarrassing older relative[ ] at a holiday dinner" and the Fourth Amendment's Founding Era history as "increasingly beside the point."[14] But originalists on the Court and in the academy have challenged *Katz*, its emphasis on Fourth Amendment privacy protections, and its "reasonable expectations" test.[15] These critics argue that the Court took a wrong late

during the late twentieth century, though Justice Samuel Alito accused the Court of reviving them in *Carpenter*. 585 U.S. at 372–75 (Alito, J., dissenting).

[11] 389 U.S. 347 (1967).

[12] *Id.* at 351; *id.* at 361 (Harlan, J., concurring); *see, e.g.*, United States v. Jones, 565 U.S. 400, 405–06 (2012) (describing *Katz* and subsequent cases as "deviat[ing] from that [prior] exclusively property-based approach" by also considering reasonable expectations of privacy); *see also* SARAH A. SEO, POLICING THE OPEN ROAD: HOW CARS TRANSFORMED AMERICAN FREEDOM 230 (2019) (noting that "*Katz* presented an important move from a property analysis to a privacy analysis"); Maureen E. Brady, *The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection*, 125 YALE L.J. 946, 949–50 (2016) (observing that the Court in *Katz* replaced property-based Fourth Amendment standards with a "reasonable expectation of privacy" approach); Daniel J. Solove, *Fourth Amendment Pragmatism*, 51 B.C. L. REV. 1511, 1518–19 (2010) (describing *Katz* as having "gave birth to the Court's current approach to determining whether the Fourth Amendment applies"); David Alan Sklansky, *"One Train May Hide Another":* Katz*, Stonewall, and the Secret Subtext of Criminal Procedure*, 41 U.C. DAVIS L. REV. 875, 877 (2008) (calling *Katz* "the source for the modern understanding of the scope of the Fourth Amendment"); William Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 441 (1995) (describing *Katz* as "decoupl[ing] privacy protection from property rights" so as to apply Fourth Amendment limits even if a search "involved no trespass"); *cf.* Orin Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 67–68 (recognizing a "standard account in Fourth Amendment scholarship" that the Court "equated searches with trespasses" until it replaced that approach with the expectations of privacy test in *Katz* but disputing the accuracy of these scholars' account of pre-*Katz* Fourth Amendment doctrine).

[13] *Katz*, 389 U.S. at 360 (Harlan, J., concurring).

[14] David Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1741 (2000).

[15] *Carpenter*, 138 S. Ct. at 2236, 2239 (Thomas, J., dissenting) (arguing that the Court should abandon *Katz*'s reasonable expectations of privacy test for lacking a "basis in the text or history of the Fourth Amendment" and arguing that those sources favor limiting the Fourth Amendment to protecting "security in property"); *id.* at 2264 (Gorsuch, J., dissenting) (agreeing with Justice Clarence Thomas that *Katz*'s test does not comport with "the text and original understanding of the Fourth Amendment," which protected a

twentieth-century turn toward privacy in *Katz* and should return Fourth Amendment doctrine to its property-protecting original purpose.[16]

For Chief Justice Roberts, *Boyd* provides an important antidote to this critique. *Boyd* roots the Fourth Amendment's privacy-protecting purpose in the nineteenth, rather than the twentieth, century. The *Boyd* opinion also derives that link from colonial and Founding Era Anglo-American legal sources.[17] *Boyd*'s catchphrase thus also imports an originalist gloss to its privacy-centric approach to the Fourth Amendment.

With *Boyd*'s Fourth Amendment catchphrase newly influential, the time is ripe for revisiting its doctrinal and political roots.[18] This Article makes a novel argument that *Boyd* and its elevation of the "privacies of life" to an animating principle of the Fourth Amendment was a product of Reconstruction and its dismantlement. During this period, known as Reconciliation, white Republicans and Democrats reached a détente, according to which Republicans abandoned Reconstruction and its racial equality project and ignored white Democrats' violent retaking of political power in the South. Under Reconciliation, fiscal policy—not the future of racial hierarchy—came to serve as the core political fault line between the parties.[19] But before explaining the Article's historical argument further, it would help to introduce

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person's "things . . . . Period"); *Jones*, 565 U.S. at 404–06 (arguing that the text and history of the Fourth Amendment establish its "close connection to property," one *Katz* and its progeny departed from); *see also* Orin S. Kerr, Katz *as Originalism*, 71 DUKE L.J. 1047, 1049 (2022) [hereinafter Kerr, Katz *as Originalism*] (rounding up and contesting originalist critiques of *Katz*).

16 *See supra* note 15; BRUCE A. NEWMAN, AGAINST THAT "POWERFUL ENGINE OF DESPOTISM": THE FOURTH AMENDMENT AND GENERAL WARRANTS AT THE FOUNDING AND TODAY, at xvii, 10 (2007); *cf.* Morgan Cloud, *Property Is Privacy: Locke and Brandeis in the Twenty-First Century*, 55 AM. CRIM. L. REV. 37, 37–38 (2018) (arguing that the Fourth Amendment at the Founding protected property not privacy, but that the conception of property was broad enough to protect intangibles we associate with privacy today).

17 116 U.S. at 624–30 (quoting and discussing at length Anglo-American influences on the Fourth Amendment).

18 There is some question whether a majority remains for the Chief Justice's approach to the Fourth Amendment after the appointments of Justices Brett Kavanaugh and Amy Coney Barrett. Initial indications, however, are that it does. *See* Torres v. Madrid, 141 S. Ct. 989, 1002 (2021) (citing, in an opinion written by the Chief Justice and joined by Justice Kavanaugh, *Boyd*'s "privacies of life" passage to support recognizing "privacy as the 'essence' of the [Fourth] Amendment"). This assumes that Justice Ketanji Brown Jackson will follow the track record of other Democrat-appointed justices in upholding *Riley*.

19 *See infra* Part IV.D.

Boyd and the reigning scholarly consensus that the decision was part of the Court's turn-of-the-century deregulatory jurisprudence.

Boyd arose from a merchant's challenge to a forfeiture judgment against window glass he imported without paying the required customs duties.[20] The jury's verdict against him had been based in part on an invoice that the court ordered him to produce.[21] *Boyd* struck down the customs law provision that authorized federal courts to compel those charged with fraud to produce such books and papers.[22] The opinion relied on a syncretic reading of the Fourth and Fifth Amendments and extended their protection to business records such as Mr. Boyd's invoice.[23] In the Court's judgment, compelled production of the invoice was as violative of the Fourth and Fifth Amendments as "the rummaging of [a man's] drawers" or "extortion of [his] own testimony."[24] The "essence of the offense" those amendments were designed to prevent, the Court explained, was not limited to literal searches and compelled incriminating testimony.[25] Instead, they "appl[ied] to all invasions on the part of the government . . . of the sanctity of a man's home and *the privacies of life*."[26]

Existing scholarship views *Boyd* and its paean to privacy as an opening salvo in the deregulatory jurisprudence often associated with the Court's most famous substantive due process decision, *Lochner v. New York*.[27] Thanks to *Boyd*, Professor William Stuntz contended, "privacy protection cast a large shadow on the regulation of business."[28] The decision thus "fit the larger pattern of [laissez-faire] constitutional law in the late nineteenth and

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20 *Boyd*, 116 U.S. at 617–18.

21 *Id.* at 618.

22 *Id.* at 638.

23 *Id.* at 630 (describing compelled production of papers in the forfeiture action as an instance where "the fourth and fifth amendments run almost into each other").

24 *Id.*

25 *Boyd*, 116 U.S. at 630.

26 *Id.* (emphasis added).

27 198 U.S. 45 (1905). Historians dispute whether the Court actually forged the Constitution into a powerful weapon against newly expansive government regulation and whether *Lochner* epitomized this project. *See, e.g.*, WILLIAM NOVAK, NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE 103 (2022); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 10 (1993).

28 Stuntz, *supra* note 12, at 421.

early twentieth centuries."[29] Other work echoes Stuntz's assessment.[30] Scholars have also linked the current Court's revival of *Boyd* to what some have called its neo-*Lochnerian* jurisprudence.[31]

This Article argues that *Boyd* and its elevation of protecting the "privacies of life" to an animating principle of the Fourth Amendment was instead a product of Reconstruction and Reconciliation. Doctrinally, it argues that many of the decision's core elements were first worked out not in the courts but in the Reconstruction Era Congress. Those include the opinion's extension of Fourth Amendment protections to noncriminal matters and commercial papers, its synthesis of the Fourth with the Fifth Amendment, and its distillation of the Fourth Amendment to protecting an abstract concept labeled "privacy."[32] *Boyd* was also emblematic of a broader reconceptualization of constitutional rights as an external check on legislative power.[33] But even here, the Court was building on Congress's prior shift in *its* view of constitutional rights—a shift that occurred during and was animated by Reconstruction.[34]

Politically, the case's doctrinal and jurisprudential innovations arose as an antidote not to growing federal economic regulation, but to the racial egalitarianism of Reconstruction. They emerged first during the 1860s and '70s in the lead up to the postwar period's first bipartisan civil service reform.[35] That legislative

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[29] *Id.*

[30] KEN I. KERSCH, CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW 46–48 (2004) (describing *Boyd* as among the civil liberties cases businessmen brought to hold off a newly regulatory state); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 726 (1999) (attributing *Boyd* to concerns about "the emergence of the regulatory state"); Katharine B. Hazlett, *The Nineteenth Century Origins of the Fifth Amendment Privilege Against Self-Incrimination*, 42 AM. J. LEGAL HIST. 235, 258–59 (1998) (focusing on *Boyd*'s Fifth Amendment analysis and describing the decision as influenced both by judicial concerns about burgeoning federal laws and a desire to return to an antebellum political status quo); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 788 (1994) (describing the "spirit inspiring *Boyd*" as "akin to *Lochner*'s spirit"); *cf.* ADAM WINKLER, WE THE CORPORATIONS, at xiii–xxiv (2018) (arguing that corporations successfully deployed constitutional claims since the nation's early years but began to pursue constitutional rights claims in the late nineteenth century).

[31] *See* Miriam H. Baer, *Law Enforcement's* Lochner, 105 MINN. L. REV. 1667, 1724–27 (2021). It is unclear if the judges and Justices relying on *Boyd* today are aware of this historical account, but there are some signals they might be. *See, e.g.*, *Carpenter*, 138 S. Ct. at 2264 (Gorsuch, J., dissenting) (citing Stuntz, *supra* note 12).

[32] *See infra* Parts II, IV.

[33] *See infra* Parts I.A, I.C, III.A.

[34] *See infra* Parts II, IV.

[35] *See infra* Parts II.A, IV.A.

effort, in turn, was a proxy for—and precursor to—Congress's abandonment of Reconstruction and the Civil War's promise of full citizenship for Black Americans.[36] In other words, the idea that the Fourth Amendment protected "the privacies of life" was first a tool of Reconciliation—the process through which white Americans North and South, Democrat and Republican came together to limit Reconstruction, preserve racial hierarchy, and pave the way for the violent disenfranchisement of newly freed Black men.[37]

This Article contributes to debates about Fourth Amendment privacy, the turn-of-the-century politics of regulation, and historical work on the post–Civil War period. Most centrally, the Article bolsters the arguments of scholars and jurists who insist that the Fourth Amendment protects privacy. Resituating *Boyd* in the politics of Reconstruction and Reconciliation strengthens the case that the Fourth Amendment was understood to protect privacy long before *Katz*. *Boyd*'s emphasis on the "privacies of life," the Article demonstrates, was not idiosyncratic or happenstance. Instead, it was grounded in a broader legal culture that had come during the 1860s and '70s to associate the Fourth Amendment with protecting an abstract concept of "privacy."[38] The Article thus supports and helps justify Chief Justice Roberts's recent reliance on *Boyd*'s catchphrase.

This Article should also be helpful to scholars arguing that the Fourth Amendment was originally intended to protect privacy. As this Article shows, while few used the term "privacy" in relation to the Fourth Amendment before the Civil War,[39] they nonetheless described that Amendment as protecting many of the things people associated with privacy when that term was later attached consistently to the Fourth Amendment.[40] The Article cautions those writing about the Fourth Amendment to be more

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36 *See infra* Parts II.A, IV.A.

37 *See infra* Part IV.D.

38 *See infra* Parts II, IV, V. This history is arguably inapposite to the Court's decision in *Dobbs v. Jackson Women's Health Organization*, since the Court dismissed the relevance of informational privacy categorically. 142 S. Ct. 2228, 2267 (2022). Provocatively, though, this history shows that the period following the Fourteenth Amendment's adoption, which is critical to the Court's analysis, was one during which legal actors expressed a newfound solicitude for privacy and embedded it in the Constitution in novel ways. *See infra* Parts II, IV, V.

39 *See infra* Part I.C.1.

40 *See infra* Part I.C.

precise when using the term privacy anachronistically. Yet, it ultimately may offer useful history to scholars who argue that the Fourth Amendment was originally intended to protect what our late nineteenth-century forebears and we today consider elements of "privacy."[41]

This Article contributes as well to important critical scholarship documenting how constitutional privacy doctrines provide limited protection to marginalized communities, and especially to those living at those communities' intersections.[42] If we ever take seriously a reparative approach to constitutional law, Fourth Amendment privacy's roots in Reconciliation and its preservation of racial hierarchy could instead amplify the case for more robust Fourth Amendment protections in an era of racially charged mass incarceration.

This history also provides fodder for pressing debates about the legality of the modern administrative state. A growing critical chorus uses connections between its architects and white supremacist views to undermine the administrative state's legitimacy.[43] They call for a return to a libertarian tradition they argue preceded the administrative state's construction. But as this Article shows, the very tradition these critics champion suffers the same tainted roots. The battle over the administrative state must therefore be resolved on other grounds.[44]

Lastly, the Article offers several contributions to legal histories of Reconstruction and Reconciliation. The Article argues that Congress as well as the courts remained significant constitutional actors into the late nineteenth century.[45] Further, it uses the Fourth Amendment to chart how, after the Civil War, legal actors reconceived the Constitution's rights-bearing amendments as an external limit on Congress and the executive branch.[46] This Article also invites legal historians to better integrate accounts of economic regulation and racial justice in the late nineteenth century.[47]

The bulk of this Article focuses on the history of *Boyd*, then turns to its contemporary implications in the conclusion. Part I of the Article argues that before the Civil War's end, neither Congress

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41 *See infra* notes 455–60 and accompanying text.
42 *See infra* notes 467–69 and accompanying text.
43 *See infra* notes 462–63 and accompanying text.
44 Resolution on other grounds is discussed in this Article's conclusion.
45 *See infra* Parts II, IV.
46 *See infra* Parts II.B, IV.D, V.
47 *See infra* Parts IV, V.

nor the Court interpreted the Fourth Amendment as protecting an abstract concept that they termed privacy or as providing a substantive limit on the federal government's tax-surveillance powers. This is not to say that the Founding generation did not view the Fourth Amendment as protecting things we associate with privacy today. This Article does contend, however, that describing the Founders as adopting the Fourth Amendment to protect privacy is anachronistic. Part II demonstrates that it was moderate Republicans in Congress who, in 1867, first collectively interpreted the Fourth Amendment as protecting "privacy" and as providing a substantive limit on the government's powers to search and seize merchants' books and papers. They acted in response to claims that these tax-surveillance powers fed government corruption and that reforming the laws governing the civil service would prevent such corruption. Those arguments about civil service reform, in turn, echoed and played into Democratic claims about corrupt Republican-led governments in the South and moderate Republicans' claims about political corruption in the North's newly working-class cities. As Part III shows, those moderate Republicans' Fourth Amendment theories and privacy gloss were innovative. Indeed, when litigants tested them in the federal courts, including before contemporary and future Supreme Court Justices, they lost.

Part IV explains that Congress ignored the federal courts. Instead, in 1874, it adopted into the customs laws the privacy-centric, tax-surveillance-limiting interpretation of the Fourth Amendment first forged by its members immediately after the Civil War. By the time those Fourth Amendment theories affected the law on the books, their political connections to Reconciliation were not only clearer but also integral to the law's passage. By the 1870s, proposed federal legislation barring racial discrimination in public accommodations fed debates about the private versus public status of business and divided the Republican Party. Asserting the "privacy" of merchants' books resonated with arguments made by opponents to those public accommodation measures. During this period, Democrats and moderate Republicans also used charges of patronage and corruption as a racially coded critique of Reconstruction governments, and of the citizenly capacity of the Black men who helped form and constitute them. Fourth Amendment privacy lay another anodyne bridge between these erstwhile enemies. The reforms to the custom service's search and seizure powers helped fracture the Republican party

and build a new bipartisan alliance that foreshadowed the end of Radical Republicans' Reconstruction agenda. The forging of Fourth Amendment privacy was thus bound up with Reconciliation and its preservation of white supremacy.

As demonstrated in Part V, *Boyd* largely judicialized at the highest level the approach to the Fourth Amendment worked out in Congress in the preceding decades. Further, it was decided before the expansion of federal regulation and authored by a Justice responsible for the Court's most regulation-friendly decision. That Justice was, however, aligned with his fellow Republicans' repudiation of Reconstruction and their reconciliation with white Southerners. *Boyd* is thus best understood as a product of Reconciliation rather than as a forerunner of *Lochner*. Nonetheless, it did important work in codifying an emergent view of business as strictly private that would have implications for the government's power to regulate racial subordination and economic activity. The Article concludes by briefly examining its contributions to history as well as its implications for Fourth Amendment privacy and critiques of administration today.

I. THE LONG HISTORY OF ROBUST TAX SURVEILLANCE AND WEAK PRIVACY PROTECTION BEFORE RECONSTRUCTION

The same Congress that adopted the Fourth Amendment also enacted robust tax-surveillance laws. From the Founding through the Civil War, Congress expanded tax officials' search authority. Despite Congress being a primary site for constitutional interpretation, the Fourth Amendment was not asserted as a limit on those powers. Nor, during that period, did people generally conceive of the Fourth Amendment as protecting an abstract concept they called "privacy." Part I.A. provides a basic background on how constitutional rights protection worked before the adoption of the Reconstruction Amendments. Part I.B. describes the extensive tax-surveillance powers Congress enacted during that same period. Part I.C. explains the evidence that legal actors during this time did not associate the Fourth Amendment with the protection of something they termed privacy or see even Congress's most expansive tax-surveillance laws as raising Fourth Amendment concerns.

A. Legislatures and the *Civil* Liberty Approach to Constitutional Rights Protection

Today, we are used to thinking of the Supreme Court as the primary and final arbiter of the U.S. Constitution's meaning. We are also used to courts at all levels interpreting constitutional rights as an external limit on legislatures' lawmaking powers. The law worked very differently during the United States' first decades, however. At the national level, the Court was not the center of constitutional interpretation. Instead, the executive branch and Congress decided many, and some of the most important, constitutional questions. More generally, courts protected rights not by asserting them as an outside check on government, but by ensuring government acted toward legitimate ends. Rights, in this model, were defined by the space that remained, leading one scholar to term this a "residual freedoms" approach.[48]

1. The Supreme Court's role in the early United States.

Unlike today, when the Supreme Court's decisions command national attention, during the nation's first decades, the courts were not the primary or final arbiter of constitutional questions.[49] The Supreme Court began reviewing the constitutionality of federal laws in the mid-1790s and the federal courts slowly expanded their scope of review over the nineteenth century.[50] Even so, the

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[48] Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 POL. R.Q. 623, 624–25 (1994) [hereinafter Gillman, *Preferred Freedoms*].

[49] *See* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 11 (2007) (arguing that judicial supremacy was a product of the twentieth century); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 221 (2004) (arguing the same); *see also* Farah Peterson, *Interpretation as Statecraft: Chancellor Kent and the Collaborative Era of American Statutory Interpretation*, 77 MD. L. REV. 712, 716 (2018) ("In a sense, federal courts [of the 1790s–1820s] were not even 'courts' . . . . Their jurisdiction was tiny, and what jurisdiction they had was so freighted with non-legal pressure that their decisions provide little helpful data for understanding the development of statutory interpretation as a legal, rather than diplomatic, activity."); Christopher Beauchamp, *Repealing Patents*, 72 VAND. L. REV. 647, 666 (2019) (explaining that the line between judicial and executive functions was blurry at the Founding, with federal courts serving administrative functions).

[50] Keith E. Whittington, *Judicial Review of Congress Before the Civil War*, 97 GEO. L.J. 1257, 1266–67 (2009) (documenting the scope and frequency of judicial review of federal legislation); Alison LaCroix, *Federalists, Federalism, and Federal Jurisdiction*, 30 L. & HIST. REV. 205, 236–40 (2012) (recounting the gradual expansion of federal courts' jurisdiction during the nation's first decades).

Court decided only sixty-two such cases before the Civil War, more than half of which it decided after 1830.[51] Few of those cases involved review of a federal law's impact on individuals' constitutional rights.[52] Instead, most regarded Congress's ability to regulate "the institution of the Judiciary itself or the boundary between the state and federal governments."[53] Further, the Court upheld Congress's laws in most cases.[54] The lower federal courts were only modestly more active.[55] Nor did courts have much to say about the constitutionality of agency officials' actions.[56] Instead, before the Civil War, Congress and the executive branch were important, and in many instances the primary, interpreters of the federal Constitution.[57]

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51 Whittington, *supra* note 50, at 1266–67, app.

52 *See, e.g.*, *id.* at 1289 (finding that the Court "considered only a handful of constitutional challenges to the application of federal laws on due process grounds prior to the Civil War"). For an oft-cited (if rare exception), see *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 280 (1856) (finding a statute authorizing the Secretary of Treasury to issue a distress warrant against the property of a customs collector, and thereby subjecting it to sale by a marshal, did not violate due process).

53 Whittington, *supra* note 50, at 1267 (describing the early nineteenth century as a period in which "[j]udicial review did not occupy the same place in the constitutional system . . . as it does now" but that the Court's decisions "lay[ ] the foundations for that practice"). The pace of review did not reach one case per year until the 1820s or exceed that until after the 1840s. *Id.* at 1268. Scholars debate when and how the Supreme Court came to exercise the power of what we today call "judicial review," or the power to declare acts of Congress unconstitutional. *See generally* KRAMER, *supra* note 49; WILLIAM E. NELSON, *MARBURY V. MADISON*: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW (2000); Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE. L.J. 502 (2006); Daniel J. Hulsebosch, *A Discrete and Cosmopolitan Minority: The Loyalists, the Atlantic World, and the Origins of Judicial Review*, 81 CHI.-KENT L. REV. 825 (2006); William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455 (2005); Whittington, *supra* note 50.

54 Whittington, *supra* note 50, at 1267, 1325 (finding that the Court upheld statutes in 68% of cases and either struck down or imposed constitutional limitations in the remaining 32%, but that the cases in which it did so were neither controversial nor important and were more common right after the Founding and immediately before the Civil War).

55 In the lower courts, there were few cases in the first two decades of the nation's history and at most on average one every other year until the 1830s when the frequency climbed, reaching a peak average of two a year in the 1840s. *Id.* at 1268–69. As Professor Keith Whittington noted, this probably undercounts the number of actual cases due to spotty reporting of decisions. *Id.* at 1268.

56 Sophia Z. Lee, *Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present*, 167 U. PA. L. REV. 1669, 1711–14 (2019).

57 *Id.* at 1714. As an illustration, the chapters in Professor H. Jefferson Powell's history of the Constitution do not focus exclusively or even predominantly on the Supreme Court until after the Civil War. H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS, at vii–viii (2002); *accord* JONATHAN GEINAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 13 (2018) (describing Congress as the "principal site of constitutional development and transformation" in the 1790s). For Congress's constitutionalism during the antebellum period, see generally DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS (1997).

2. The *civil* liberty approach to constitutional rights.

Despite robust regulation, constitutional rights did not generally serve as an external check on government legislation and administration before Reconstruction.

Americans were accustomed to extensive and intrusive government regulation from the Founding through the Civil War. Local governments structured, regulated, and surveilled commercial activity, private property, and even households.[58] Over the course of the nineteenth century, state governments joined them.[59] As Professor William Novak explained, "the fundamental social and economic relations of the nineteenth century . . . were . . . constant objects of governance and regulation."[60] From limiting trade to licensed sellers and public markets; to seizing, condemning, and destroying property; to surveilling residents' health, morals, and drink, state and local government was omnipresent.[61] The federal government also undertook immense developmental projects, dramatically and violently expanding the country's borders to incorporate ever-more Native lands while knitting its internal components into a national market.[62] Many experienced the federal government less directly than their local and state governments. Its actions were often tucked away at its borders, in its western territories, or overseas, while much of its internal work was submerged in co-ventures with state and local governments.[63] But its influence was nonetheless pervasive.

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58 WILLIAM NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 1–15 (1996) [hereinafter NOVAK, THE PEOPLE'S WELFARE].

59 LAURA F. EDWARDS, THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH 4 (2009).

60 NOVAK, THE PEOPLE'S WELFARE, *supra* note 58, at 236.

61 *Id.* at 90–95 (discussing commerce); *id.* at 60–71 (discussing property); *id.* at 149–52 (discussing morals).

62 In the last two decades, historians have debunked earlier assumptions about the weakness of the early American state. *See generally* William Novak, *The Myth of the 'Weak' American State*, 113 AM. HIST. REV. 752 (2008). For recent examples of works recovering how pervasive and effective the early American state was, see BRIAN BALOGH, GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA (2009); MAX M. EDLING, A HERCULES IN THE CRADLE: WAR, MONEY, AND THE AMERICAN STATE, 1783–1867 (2014); GAUTHAM RAO, NATIONAL DUTIES: CUSTOM HOUSES AND THE MAKING OF THE AMERICAN STATE (2016); and RICHARD JOHN, SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE (1995). For an argument that the U.S. state was far less different from its European counterparts than commonly asserted, see Nicolas Barreyre & Claire Lemercier, *The Unexceptional State: Rethinking the State in the Nineteenth Century (France, United States)*, 126 AM. HIST. REV. 481, 483 (2021).

63 BALOGH, *supra* note 62, at 3, 6, 11–13, 58–75.

Courts reviewing legislatures for conformance with state and federal constitutions focused on the scope of legislatures' affirmative lawmaking powers; individual rights were the incidental by-product of that review.[64] Today we conceive of individual constitutional rights as an external check on government regulation, both the laws a legislature enacts and how the executive branch implements them. Disputes about the appropriate scope of government unfolded within a very different and unfamiliar set of assumptions before the Civil War. At the state and local levels, where regulation was felt most directly, the law subordinated individual rights to the public good, the advancement of which was understood as government's purpose and affirmative duty.[65] "[E]very holder of property, however absolute and unqualified may be his title," leading Massachusetts jurist Lemuel Shaw illustrated in 1851, "holds it under the implied liability that his use of it may be so regulated" so as not to injure others' enjoyment of their property or "the rights of the community."[66] Conflicts between residents were treated as breaches of the public's peace more so than anyone's private rights.[67] Arrests and fines for those breaches could lie within executives' police power and not require any judicial process.[68] Judges construed constitutions narrowly, giving wide berth to legislators to make, quoting Shaw again, "orders, laws, statutes and ordinances . . . as they shall judge to be for the good and welfare" of the community.[69] Constitutional decisions about exercises of federal authority were based primarily on structural claims or the scope of Congress's enumerated

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64 NOVAK, THE PEOPLE'S WELFARE, *supra* note 58, at 180.

65 *Id.* at 6, 9–10, 46. On the priority of local law in the early United States and its organization around collective well-being rather than individual rights, see EDWARDS, *supra* note 59, at 4, 7–8.

66 Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 84–85 (1851). Novak has challenged earlier accounts of *Alger*'s novelty, contending it upheld long-standing doctrine. *See* NOVAK, THE PEOPLE'S WELFARE, *supra* note 58, at 20–21.

67 EDWARDS, *supra* note 59, at 11. This changed over the course of the nineteenth century such that by the mid-nineteenth century, the local law of breaches of the peace was largely supplanted by state courts' administration of criminal and other laws, which were reconceived themselves as offenses against the victim's person, not the public's peace. *Id.* at 229–33; Ruth H. Bloch, *The American Revolution, Wife Beating, and the Emergent Value of Privacy*, 5 EARLY AM. STUD. 223, 243–44 (2007).

68 Shafer v. Mumma, 17 Md. 331, 336 (1861).

69 Commonwealth v. Blackington, 41 Mass. (24 Pick.) 352, 357 (1837).

powers, not individual rights.[70] In this context, the term civil liberty referred to the ways in which the exercise of individual liberties was harmonized with, even derivative of, laws serving the common good. As Chief Justice Shaw put it, they were not absolute but contextual, "secured and regulated by mild, equal and efficient laws"; they were *civil* liberties.[71]

Thus, from the Founding until Reconstruction, Congress was an important expositor of the Constitution. Courts upheld legislation if it advanced the general welfare and exercised a recognized legislative power. That left Congress to decide for itself how the Constitution's rights-bearing provisions should shape the laws it passed.

B. Tax Surveillance from the Founding Through the Civil War

While the revolution that created the United States was sparked in part by opposition to British tax surveillance, the new nation wasted no time establishing its own surveillance regime. The first Congress through the Civil War Congress passed statutes giving federal tax officials robust powers to police fraud by searching for and seizing goods, as well as inspecting taxpayers' books and papers. Further, even where not expressly authorized by statute, tax officials were granted warrants to search and seize merchants' records. Congress vastly expanded these well-established powers during the Civil War, exposing most people to the taxman's gaze.

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70 Gillman, *Preferred Freedoms*, *supra* note 48, at 627–28 (arguing that the "principal limit on the powers of the government" during this period was found in Congress's enumerated powers "rather than [ ] the enumeration of specific exceptions to these powers . . . found in . . . the Bill of Rights"). This was also reflected in the advocacy of African Americans and white abolitionists in the decades before the Civil War. As a rich historiography increasingly captures, they agitated against not only slavery but also racist laws in the North and for full citizenship in what Professor Kate Masur has termed the first civil rights movement. But their advocacy was largely pursued outside the courts, and to the extent that claims were brought in courts, they were generally not constitutional in nature. *See, e.g.*, KATE MASUR, UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION (2021) [hereinafter MASUR, UNTIL JUSTICE BE DONE]; STEPHEN KANTROWITZ, MORE THAN FREEDOM: FIGHTING FOR BLACK CITIZENSHIP IN A WHITE REPUBLIC, 1829–1899 (2012). On Black Americans' private law claims in the South during this period, see generally MARTHA S. JONES, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA (2018); KIMBERLY M. WELCH, BLACK LITIGANTS IN THE ANTEBELLUM AMERICAN SOUTH (2018); and KELLY M. KENNINGTON, IN THE SHADOW OF DREDD SCOTT: ST. LOUIS FREEDOM SUITS AND THE LEGAL CULTURE OF SLAVERY IN ANTEBELLUM AMERICA (2017).

71 NOVAK, THE PEOPLE'S WELFARE, *supra* note 58, at 11; *Blackington*, 41 Mass. at 356.

As early as the Founding, taxes served mixed purposes. There were two types of federal taxes: customs (also known as duties or tariffs), which were levied on imports, and internal taxes, which were imposed on income, products, or property within the United States. Even as the Constitution was ratified, the United States faced enormous debts. Taxes, and especially the customs duties that brought in the lion's share of revenue, were essential to standing up the government.[72] In addition, Congress increasingly used customs duties to protect domestic industries (high duties made competing imported goods more expensive) while its internal taxes on alcohol served moral as well as fiscal goals.[73]

Finding effective means of detecting, deterring, and punishing revenue fraud was a challenge. There were two types of fraud, each posing its own detection problem. The first involved hiding goods from tax officials. For imported goods, that meant smuggling items into the country. For internal taxes, that could be accomplished by hiding products or property from tax officials, for instance by failing to disclose them or mislabeling them. The second type of fraud was known as undervaluation. This was a problem whenever people had to pay a specified tax rate on a good's declared value. People could evade those taxes by declaring that goods had an inaccurately low value.[74]

Tax fraud produced no victim to complain, so detection relied on government snooping. Uncovering smuggling required searching ships, crates, luggage, and even people's pockets for secreted goods. Proving undervaluation, in contrast, required documents. For instance, an invoice could prove that the price paid for a good was higher than that declared by its importer. Policing fraud in internal taxes also required inspection of books and papers. With no custom house through which all manufactured goods had to pass, federal revenue agents relied on businessmen's records of their inventories and dealings to ensure that they paid their taxes in full.

As a result, Congress passed laws that gave federal revenue officers the powers to search, seize, and have documents produced to them. From the first Congress on, customs officers could conduct warrantless searches for smuggled goods on ships and seek

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72 Rao, *supra* note 62, at 1–3.

73 W. ELLIOT BROWNLEE, FEDERAL TAXATION IN AMERICA: A HISTORY 36–39 (2016).

74 Rao, *supra* note 62, at 62–63, 183–190.

warrants for such searches on land, including in people's homes.[75] When liquor was involved, customs and internal revenue agents could even search homes and commercial premises on land without a warrant.[76] But agents' search and seizure powers were not limited to goods. In 1791, Congress enacted the first internal tax, on whiskey (reviled, it soon led to the Whiskey Rebellion).[77] The law required distillers to keep books on the spirits they made and sold, to produce those books periodically to revenue officers, and to make them available at their place of business to revenue officers' warrantless inspection.[78]

In pursuit of undervaluation frauds, Congress also gave customs officials the power to inspect merchants' books and papers without a warrant. Congress struggled to design an effective system for detecting undervaluation frauds. At first, it relied on local merchants to determine undervalued goods,[79] before handing the task to professional appraisers at the busiest ports.[80] But expertise alone proved inadequate, so Congress empowered those appraisers to order the production of any "letters, accounts, or invoices" they deemed material.[81] Further, while not expressly authorized by

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75 A 1789 law, passed during Congress's very first session, authorized customs officers to conduct warrantless searches of packages and ships they suspected contained evidence of fraud and to secure warrants from a justice of the peace to search any "dwelling-house, store, building, or other place" suspected to conceal fraudulent goods. Act of July 31, 1789, ch. 5, §§ 23–24, 1 Stat. 29, 43; *accord* Act of Aug. 4, 1790, ch. 35, §§ 47–48, 1 Stat. 145, 169–70; Act of Mar. 2, 1799, ch. 22, §§ 67–68, 1 Stat. 627, 677–78.

76 In 1791, Congress authorized officers to inspect on request, but without a warrant, places where domestic liquor was distilled and any "houses, store-houses, ware-houses, buildings and places" where imported liquor was kept. Act of Mar. 3, ch. 15, §§ 26, 29, 1 Stat. 199, 205–206. They could also seek warrants to search for smuggled liquor and spirits for which there was "reasonable cause of suspicion" that a distiller was trying to avoid taxes. Act of Mar. 3, 1791 ch. 15, § 32, 1 Stat. 207.

77 *See* THOMAS P. SLAUGHTER, THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION 27 (1986).

78 Act of Mar. 3, 1791, ch. 15, § 35, 1 Stat. 199, 207–08.

79 Act of Mar. 2, 1799, ch. 22, § 66, 1 Stat. 627, 677 (empowering collectors to appoint two reputable merchants to determine the value of any goods for which a customs collector suspected the invoice understated their actual cost).

80 Act of Apr. 20, 1818, ch. 79, § 9, 3 Stat. 433, 435–36.

81 Act of July 14, 1832, ch. 227, § 8, 22 Stat. 583, 592 [hereinafter 1832 Act]. Any person revealed by those documents to have lied during the examination was deemed guilty of perjury and if the perjurer was the owner, importer, or consignee of the subject goods, those would be forfeited. *Id.* Professor Nicholas Parrillo has speculated that because the penalty for noncompliance was only $50, few businesses likely complied. NICHOLAS PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940, at 236 (2013). Because the appraisers' valuation would be conclusive if an owner, importer, or consignee refused to comply, however, appraisers had other tools to incentivize compliance. 1832 Act, 22 Stat. at 592.

statute, customs collectors and their agents reportedly were able to, and regularly did, secure warrants for and conduct searches of merchants' books and papers.[82]

The Civil War put extreme pressure on the federal fisc, causing Congress to greatly expand not only its tax laws but also fraud surveillance. Congress passed multiple wartime revenue acts, which, in addition to increasing tariffs, introduced a novel income tax and taxes on land, goods, and services not seen since the War of 1812.[83] Even so, the national debt ballooned.[84] Congress expanded revenue officers' inspection powers in the hopes of stopping much-needed revenue dollars from leaking through the gaping cracks of fraud and corruption.

Because wartime internal taxes were designed to spread the pain across the economy, most, if not all, businesses were now subject to government inspection of their books without any judicial process.[85] The wartime revenue laws authorized warrantless

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[82] *See, e.g.*, H.R. REP. NO. 38-111, at 72–74 (1864) (describing the antebellum process of seeking warrants from a magistrate to search for and seize merchant papers); *id.* at 241–43 (describing an 1862 search for and seizure of a merchant's books and papers and a practice dating back to the 1850s of referring merchants whose books and papers were seized to particular lawyers); H.R. MISC. DOC. NO. 43-264, at 7–8 (1874) (asserting that before 1863, the collector of customs issued his own warrant or secured one from a justice of the peace to seize an importer's books and papers and providing an example of pre-1863 seizure of books); Brief for the United States at 8–12, Stockwell v. United States, 80 U.S. 531 (1871) (No. 77) (suggesting that searches and seizures of papers had been permitted prior to 1863 with warrants provided by justices of the peace). An early history of U.S. customs policy likewise asserted that the Founding Era law providing for searching buildings such as dwelling-houses authorized searches for books and papers, as well as for fraudulent goods. JOHN DEAN GOSS, THE HISTORY OF TARIFF ADMINISTRATION IN THE UNITED STATES 60 (1891). The power to search merchants' books and papers would have been critical not only to establishing fraud but also could have exposed U.S. merchants' participation in the international slave trade long after its formal abolishment. *See* JOHN HARRIS, THE LAST OF THE SLAVE SHIPS: NEW YORK AND THE END OF THE MIDDLE PASSAGE 57–58 (2020).

[83] Act of Aug. 5, 1861, ch. 45, 12 Stat. 292; Act of July 1, 1862, ch. 119, 12 Stat. 432; *see also* BROWNLEE, *supra* note 73, at 40–45; HEATHER COX RICHARDSON, THE GREATEST NATION OF THE EARTH: REPUBLICAN ECONOMIC POLICIES DURING THE CIVIL WAR 110–26 (1997) [hereinafter RICHARDSON, THE GREATEST NATION OF THE EARTH].

[84] RICHARDSON, THE GREATEST NATION OF THE EARTH, *supra* note 83, at 126. The government made up the tax shortfall by printing money not backed by precious metal for the first time (known as "greenbacks") and issuing bonds. JAMES MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 443–47 (1988).

[85] For a sense of the breadth of these taxes, see the lengthy table in the 1866 report of the United States Revenue Commission, which only listed the "principal" sources of internal tax revenue. H.R. EXEC. DOC. NO. 39-34, at 20–23 (1866).

inspections of distillers and brewers, at pain of fines and forfeiture.[86] These laws also gave revenue officers the power to conduct warrantless inspections of brewers' and distillers' *personal* books to determine if the books they kept pursuant to the act were accurate.[87] Further, it was no longer just alcohol manufacturers who were subject to these inspections. Railroad, steamboat, and ferryboat companies were required to report their receipts monthly and make their books available for warrantless inspection.[88] And any person or entity subject to an internal tax could also be required to produce their account books to revenue agents if they failed to annually report their taxable income, products, and transactions.[89]

Congress also formalized customs officers' powers to search and seize importers' books and papers. By the Civil War, most of the country's tariffs were levied by the New York Custom House, making it ground zero for the policing of customs fraud.[90] According to an 1862 investigation by the Treasury Department, the problem was rampant. "[F]rauds in the importation of foreign merchandise," the Department's Solicitor concluded, "are extensively, constantly, and systematically carried on."[91] He further opined that, while smuggling occurred, the most common were undervaluation frauds committed by presenting customs officials with "false or fraudulent invoices."[92] These types of frauds, he warned, were very difficult to detect, let alone prove.[93]

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86 Act of July 1, 1862, ch. 119, §§ 27–28, 12 Stat. 432, 443–44; *see also id.* at §§ 39, 45, 51, 12 Stat. 432, 446, 448–49, 450–51.

87 *Id.* at § 56, 12 Stat. 432, 453.

88 *Id.* at § 80, 12 Stat. 432, 468–69.

89 Act of June 30, 1864, ch. 173, § 14, 13 Stat. 223, 226. Officers could apply to a judge for a contempt order against anyone who failed to comply. *Id.* at § 14, 13 Stat. 223, 226. This act also expanded the times at which a revenue officer could inspect stills, breweries, and distilleries. *Id.* at §§ 37, 57, 13 Stat. 223, 238, 243–44. The Confederacy also imposed intrusive surveillance policies, requiring bankers and businesses to open their books to identify property held by Northern business partners and clients for confiscation. BALOGH, *supra* note 62, at 286.

90 H.R. REP. NO. 38-25 (1865) (stating that "six-sevenths of all the customs revenues of the United States are paid at the port of New York"). New York's dominance declined but remained after the war. H.R. EXEC. DOC. NO. 39-34, at 44 (1866) (asserting that "about two-thirds of the custom receipts of the whole country" were received through the New York Custom House).

91 H.R. DOC. NO. 37-18, at 5.

92 *Id.*

93 *Id.*

The Treasury's investigation led Congress to quickly adopt legislation designed to address the problems it revealed.[94] Congress debated certain of its features, particularly those that seemed to bestow money or power on the Treasury Secretary and his solicitor.[95] One provision, however, received no dispute: it empowered federal judges to issue search warrants to customs collectors "whenever it shall be made to appear, by affidavit, . . . that any fraud on the revenue has been" committed or attempted.[96] The warrants should direct the collector or his officers to "enter any place or premises where any invoices, books, or papers relating to such merchandise or fraud are deposited" and take them away for as long as necessary.[97]

By the Civil War's end, Congress had newly expanded an array of robust tax-surveillance powers that dated to the nation's Founding. Federal agents could inspect the books and papers of those suspected of fraud in the payment of customs duties or internal taxes, in some instances without a warrant, on no more than reasonable suspicion, and without detailing the records to be searched.

C. Privacy and the Fourth Amendment Before Reconstruction

Despite Congress empowering tax officers to search and seize the books and papers of taxpayers, including some of its most powerful citizens, no Fourth Amendment privacy limits were placed on those powers. This was partly because the abstract concept termed privacy emerged only gradually over the nation's first decades and had not yet become a key way of conceptualizing the Fourth Amendment's protections. But it was also because, while the kind of rights as checks we are familiar with today were emerging, the *civil* liberty tradition remained robust on the eve of Reconstruction. Even in Congress, where aspects of its wartime tax-surveillance provisions were controversial, those objections were not made in a constitutional, and especially not a Fourth Amendment or privacy, register.

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94 *Id.* at 1; Act of Mar. 3, 1863, ch. 76, 12 Stat. 737 [hereinafter 1863 Act].

95 CONG. GLOBE, 37th Cong., 3d Sess. 903–04, 906–07 (1863) (Senate); CONG. GLOBE, 37th Cong., 3d Sess. 1499 (1863) (House).

96 1863 Act, 12 Stat. at 740.

97 *Id.*

1. The gradual emergence of privacy as a concept.

The word privacy existed at the Founding, but it was seldom used and did not carry the freight it would gain over the next century. During the 1800s, the concept gained greater cultural meaning and rhetorical heft. Nonetheless, even by the Civil War, it was not used to capture the essence of what the Fourth Amendment protected.

At the Founding, the term privacy existed but had not yet gained the prominence or meaning we associate with it today. Dictionaries from the period used it as a synonym for secrets or secrecy,[98] or to describe a physical place or state. Such privacy could mean lack of light,[99] or it could refer to a place that was closed, either actually[100] or metaphorically.[101] But privacy was not primarily associated with individuals or with the Fourth Amendment. In the late colonial period, Anglo-American culture was just beginning to delineate the notion of an individuated self that was connected to household members within a distinctly intimate space. Even then, this domestic zone was depicted as connected to, rather than distinct—let alone protected—from, the state.[102] The term privacy was rarely used.[103]

In the revolutionary and early American period, something like a common law right to privacy began to emerge, but it applied to collectives not individuals, and none more so than the family. The term "privacy" rarely appeared in published judicial opinions.[104] When it did, it was most often in the interrelated contexts

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98 *See, e.g.*, JOHN ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1775) (using privacy to define concealedness, concealment, covertness, secrecy, and secret and defining privacy to mean privity, which is defined in turn as "[p]rivate communication, conscientiousness, joint knowledge, private concurrence").

99 *See, e.g.*, *id.* (using privacy to define obscurity and obscureness).

100 *See, e.g.*, *id.* (using privacy to define closet, retreat, sequester, and slunk).

101 *See, e.g.*, *id.* (using privacy to describe a "cabinetcouncil" that was held "with unusual privacy and confidence" and to define "petto," which could also mean "breast," and provided taciturnity as one of its definitions, which was in turn defined as "habitual silence").

102 Bloch, *supra* note 67, at 223–24.

103 *Id.* at 225.

104 A search in Westlaw of all state and federal cases before the Civil War for the term "privacy" produced ninety-two cases; in a dozen or so of those, the term was used only by Westlaw in its curatorial categorization of the case or by the attorneys in their arguments to the court. In another dozen or so, the term was used in a factual sense, for instance to describe the conditions under which a conversation occurred. Of course, courts may have referred to something substantively akin to privacy without using that term, but it seems unlikely that they would have done so as to some important category of legal privacy without *ever* using the term. *See, e.g.*, Peppinger v. Low, 6 N.J.L. 384, 385 (N.J. 1797) (noting

of family privacy—which courts deemed to include enslaved household members—and the privacy of the domestic spaces families occupied.[105] Courts never used the term privacy to describe an attribute of a business entity in their published opinions.[106] The privacy of places where business was conducted was unsettled at best. One early nineteenth-century case described a right of privacy associated with family homes as attaching to some places of business, but a later case used the privacy of family

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the difficulty of producing direct evidence of promises to marry given "[t]he privacy with which these arrangements are almost universally made"); People v. Abbot, 19 Wend. 192, 194 (N.Y. Sup. Ct. 1838) (noting that rape and attempted rape are "in their very nature committed under circumstances of the utmost privacy"); State v. Williams, 31 N.C. (9 Ired.) 140, 149 (1848) (noting the difficulty of securing direct evidence that someone stole a runaway enslaved person because he would likely accomplish it "with such privacy").

[105] The most frequent use of the term was in cases *denying* claims to privacy by property owners whose neighbors opened windows or built verandahs looking into the plaintiff's home or yard. *See, e.g.*, Mahan v. Brown, 13 Wend. 261, 264 (N.Y. Sup. Ct. 1835); Durant v. Riddell, 12 La. Ann. 746, 747 (1857); Hubbard v. Town, 33 Vt. 295, 299–300 (1860); Klein v. Gehrung, 25 Tex. Supp. 232, 239 (1860). Privacy was more protective in the family context. Marital privacy prevented spouses from testifying against each other. *See, e.g.*, Robin v. King, 29 Va. (2 Leigh) 140, 143 (1830); McGuire v. Maloney, 40 Ky. (1 B. Mon.) 224, 225 (1841); Jack v. Russey, 8 Ind. 180, 182 n.1 (1856); Dexter v. Parkins, 22 Ill. 143, 146 (1859). "Domestic privacy" was grounds to limit legal regulation of the relationships within the home. Courts' elevation of it increased patriarchs' impunity for their violence against wives, children, and the enslaved. *Lander v. Seaver*, 32 Vt. 114 (1859), used it to protect the parent-child relationship against charges of child abuse. *Id.* at 122. In *State v. Mann*, 13 N.C. (2 Dev.) 263 (1829), the court used the privacy of the relationship between a legal owner and an enslaved woman to explain why it would not entertain charges of battery against the owner for beating her. *Id.* at 267. For more about the case, see Anita Allen, *Natural Law, Slavery, and the Right to Privacy Tort*, 81 FORDHAM L. REV. 1187, 1204 (2012). The judge in *Threewits v. Threewits*, 4 S.C. Eq. (4 Des. Eq.) 560 (S.C. App. Eq. 1815), found a husband's physical abuse of his wife "one of those unhappy cases in which courts of justice are obliged unwillingly to enter into the privacy of domestic life." *Id.* at 561. Over the course of the nineteenth century, notions of familial privacy made courts increasingly unwilling to intrude in cases of domestic violence. Bloch, *supra* note 67, at 226–27. In one or two cases, assumptions about the privacy of domestic spaces informed the construction of constitutional provisions, see *Philleo v. Smalley*, 23 Tex. 498, 502–03 (1859); statutory terms, see *Coleman v. State*, 20 Ala. 51, 53 (1852); the law of trespass, see *Ward v. Bartlett*, 1 N.H. 14, 15 (1816); and the severity of wrongs committed, see *Mask v. State*, 36 Miss. 77, 95 (1858) and *Merrill v. Downs*, 41 N.H. 72, 80 (1860).

[106] Historians describe courts as increasingly according corporations a degree of what we would today describe as privacy during this period. *See, e.g.*, WINKLER, *supra* note 30, at 85–86. But that does not seem to be the way contemporaries understood their status, at least as reflected in reported cases. *See* Ruth H. Bloch & Naomi R. Lamoreaux, The Private Rights of Organizations: The Tangled Roots of the Family, the Corporation, and the Right to Privacy 24–28 (May 19, 2008) (unpublished manuscript) (available at https://perma.cc/K9XD-TJQ8).

homes to distinguish them from commercial houses.[107] Family homes, that court reasoned, were places "withdrawn from the active bustle of business . . . where the curtains of privacy and retirement are drawn around its inmates."[108] Familial privacy also did not serve its typical protective role when the family blended commerce and domesticity.[109] The term privacy came up in the context of search and seizure, but only rarely and not to justify constitutional protection.[110]

Thus, by the time of the Civil War, the concept of privacy seems to have evolved. But the dominant innovation was expanding the term to describe a domestic and familial zone increasingly distinct from the surrounding society, economy, and government.

2. The weakening of the *civil* liberty tradition.

As the concept of privacy broadened and grew more prominent, the early U.S. system of law and regulation weakened and rights consciousness emerged. During the 1820s through 1850s, local law administered by lay justices of the peace was steadily supplanted by state laws administered by hierarchical courts. Those courts were staffed by legally trained jurists who favored legal formalism over the older system's messy determinations of the public good.[111] Regulation also gravitated upward to states from municipalities.[112]

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[107] *Compare* Jones v. Gibson, 1 N.H. 266, 272 (1818) (finding that a stagecoach was not the kind of place in which "the occupant has th[e] exclusive right of possession and privacy" associated with ships, vessels, dwelling houses, and store buildings so as to be protected by the custom statute's warrant requirement), *with Ex parte* Vincent, 26 Ala. 145, 149 (1855) (constructing the term "dwelling-house" in a criminal statute to refer to a family home only and not the store-house where the alleged robbery occurred or other commercial premises in which people also slept). The Delaware Supreme Court also likened an innkeeper who sold a glass of brandy on a Sunday to "a person in the privacy and retirement of his own house," though it found that the innkeeper had not violated a sabbath law on different grounds. Hall v. State, 4 Del. (4 Harr.) 132, 140 (1844).

[108] *Ex parte Vincent*, 26 Ala. at 149. This case involved an enslaved man being held for burglary.

[109] In *City Council v. Ahrens*, 35 S.C.L. (4 Strob.) 241, 252 (S.C. Ct. App. 1850), the South Carolina Court of Appeals rejected the argument that an ordinance prohibiting sellers of meats, fruits, and groceries from keeping liquor "restrain[ed] private liberty" and was a way in which "the privacy of families is invaded."

[110] *See Jones*, 1 N.H. at 272. The New Hampshire Supreme Court also described officers as "intrud[ing] upon a man's privacy without any legal warrant" but found that any evidence so acquired did not constitute, if admitted at trial, compelled evidence against oneself. State v. Flynn, 36 N.H. 64, 71 (1858).

[111] Edwards, *supra* note 59, at 29–34, 58–63.

[112] NOVAK, THE PEOPLE'S WELFARE, *supra* note 58, at 188.

By the mid-nineteenth century, a few judges broke with the *civil* liberty tradition,[113] reconstituting individual rights into hard checks on government regulation.[114] In 1856, the New York Court of Appeals used the Due Process Clause, and the property rights it protected, as a substantive limit on state regulation.[115] Massachusetts's Justice Lemuel Shaw, who had long expounded the classic tenets of the *civil* liberty regime, found a prohibition statute unconstitutional, including on the grounds that it violated that state constitution's search and seizure protections.[116] But these changes remained mainly at the state and local level. Judicial review of Congress's statutes picked up pace but still rarely considered individual rights violations, while constitutional challenges to the actions of federal agents remained all but unheard of.[117] Instead, the federal Constitution's rights-bearing provisions were respected mainly to the extent that Congress and the executive branch factored them into the making and enforcement of laws.[118] As the next Section demonstrates, such limits to tax-surveillance powers were rare.

3. The lack of Fourth Amendment privacy objections to tax surveillance.

Tax-surveillance laws were both intrusive and controversial—indeed, they had been one of the key triggers of the Revolutionary War. One would thus expect them to be a prime site for asserting Fourth Amendment privacy claims. Yet, from the Founding through the Civil War, Fourth Amendment objections to proposed federal tax laws were rare in Congress, and when they occurred, they were not made in the register of privacy.

One might expect to find privacy asserted as a limit on the government's search and seizure powers in the lead up to the

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[113] *See supra* notes 59–71 and accompanying text. Under this tradition, rights were subordinated to and derivative of government pursuit of the general welfare.

[114] NOVAK, THE PEOPLE'S WELFARE, *supra* note 58, at 185–86.

[115] Wynehamer v. People, 13 N.Y. 378, 385 (1856).

[116] Fisher v. McGirr, 67 Mass. (1 Gray) 1, 31–32, 39–40, 43 (1854) (relying on procedural rather than substantive limits on the legislature's authority and finding, among other things, that the inspection powers in a temperance law were akin to a general warrant).

[117] Whittington, *supra* note 50, at 1267. A notable exception that reflected the new turn to individual rights claims was *Murray's Lessee*, 59 U.S. (18 How.) at 280, which rejected a due process challenge to a federal statute. On courts' constitutional review of federal agents, see Lee, *supra* note 56, at 1711–14.

[118] On Congress's constitutional deliberations, see CURRIE, THE CONSTITUTION IN CONGRESS, *supra* note 57. For a synthesis of work on the executive branch's implementation of the Constitution, see Lee, *supra* note 56, at 1714–19.

Fourth Amendment's ratification, yet that does not appear to be the case.[119] During the late colonial era, customs officers' searches of merchants' homes helped spur the American Revolution. They also informed the drafting and ratification of the Fourth Amendment, which barred unreasonable searches and seizures and required warrants to identify the specific place and things to be searched.[120] Debates surrounding the Fourth Amendment featured the English common law principle that a man's home was his castle, protected from warrantless searches and searches under what were known as "general warrants" or "writs of assistance" (essentially, warrants without specific conditions as to the what and where of the search).[121] Some even described papers as "private" or parts of the home as "secret."[122] Such assertions carried over into debates over the early tariff and internal revenue acts.[123] As a result, in the early American period, the common law and Constitution created what we would now describe as a zone

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[119] I am relying here almost exclusively on a broad review of the secondary literature, including its quotes of primary sources. While scholars frequently use the term privacy to describe the type of concerns that gave rise to the Fourth Amendment, the sources they cite almost never use that term. I would welcome another scholar to take the dive into primary sources this Article foregoes to test if the quotes that litter the secondary scholarship are representative of the record as a whole.

[120] *See* U.S. CONST., amend. IV. For the roots of the Fourth Amendment, see generally Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181 (2016); Davies, *supra* note 30; and Amar, *supra* note 30. *See also* TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION pt. I (1969); NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1937). Scholars disagree whether, at the Founding, the Amendment was meant to exclusively bar general warrants (those lacking the required specifics) or whether it was also authorizing "reasonable" warrantless searches. *Compare, e.g.*, Donohue, *supra*, at 1193, *and* Davies, *supra* note 30, at 668, *with* Amar, *supra* note 30, at 785.

[121] Davies, *supra* note 30, at 602–03, 642–46, 649–50, 711–13; Donohue, *supra* note 120, at 1251, 1261, 1291, 1315–17; *see, e.g.*, James Otis, Speech in the Writs of Assistance Case, *reprinted in* M.H. SMITH, THE WRITS OF ASSISTANCE CASE 344 (1978) ("Now one of the most essential branches of English liberty, is the freedom of one's house. A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle."); Semayne's Case (1604) 77 Eng. Rep. 194, 195; 5 Co. Rep. 91 a, 93 b.

[122] Donahue, *supra* note 120 at 1285, 1288; *see also* WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 602–1791, 766 (2009) (explaining how during the debates over the Fourth Amendment, citizens expressed concern about their "private papers," and "private concerns"). For Anglo precedents, see, for example, JOHN ALMON, A LETTER CONCERNING LIBELS, WARRANTS AND THE SEIZURE OF PAPERS 43–44 (1764) ("Every body has some private papers, that he would not on any account have revealed"); Money v. Leach (1765) 97 Eng. Rep. 1075, 1086; 3 Burr. 1742, 1762–63 (describing the "ransack [of] private studies" and searches of "private papers"); Beardmore v. Carrington (1764) 95 Eng. Rep. 790, 794; 2 Wils. K. B. 244, 250 (increasing damages where search was of "secret and private affairs").

[123] Davies, *supra* note 30, at 603, 712 n.471.

of privacy for the home. Speakers even referenced how "private" a "man's house or store" were.[124] But when early Americans talked about the harms the Fourth Amendment protected against, they did not discuss violations of something they called "privacy."[125] Instead, speakers complained about the low class of the officers sent to search the houses of respectable citizens, those officers' arbitrary exercise of power, or their ability to embarrass those whose

[124] *Id.* at 712 n.471 (quoting a defender of the internal revenue laws who reassured that they would not allow officers to "to enter at their pleasure into the most private recesses of a man's house or store" because they only authorized warrantless inspections of registered distilleries and storerooms).

[125] Professors William Cuddihy, Thomas Davies, and Laura Donohue exhaustively canvassed the English, colonial, drafting, and ratification debates regarding general warrants, writs of assistance, and the Fourth Amendment. Despite their extensive quotations of the primary sources, including a number of references to things that are "private" or "secret," they collectively included only a single source that contains the word "privacies" or "privacy." *See* Donohue, *supra* note 120, at 1238 n.331, 1262 n.474. Further, those terms are used only three times in the source from which the quotes are taken, an over three-hundred-page pamphlet decrying general warrants published in 1764 by British polemicist John Almon. *See* ALMON, *supra* note 122, at 46–48. There are no uses of the term in U.S. sources. Davies, who also surveyed early discussions in the United States of warrants, included no quotes containing "privacy." Davies, *supra* note 30; *accord* LEONARD LEVY, ORIGINS OF THE BILL OF RIGHTS 166 (2013) (observing that colonial "Americans never spoke of a right to privacy as such, although they understood the concept and, like their British counterparts, expressed outrage over the possibility that customs agents might . . . 'ransack houses,' and 'enter private cabinets' or 'secret repositories.'"); Cloud, *supra* note 16, at 42 (contending that the "word privacy . . . was not part of the political vocabulary" at the Founding).

homes they searched.[126] Others emphasized that the searches infringed on property rights.[127]

By the mid-nineteenth century, references to privacy grew more frequent in Congress, and the term was even used occasionally in connection with the Fourth Amendment. During the nation's first decades, the several times the term appeared, it was used derogatorily, often as a negative characteristic that could shelter bad actors.[128] These derogatory uses continued until the 1850s.[129] But around the 1820s and '30s, privacy was also invoked

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[126] Davies, *supra* note 30, at 580–81, 602–03. Donohue made the strongest case that privacy was an animating concern for the Fourth Amendment's adoption, but even her comprehensive account documented speakers expressing concern not about violation of an abstract concept of privacy, but about the class of searching officers and their ability to use information to cause reputational harm. Donohue, *supra* note 120, at 1315–20. Such class-based concerns can be found in oft-cited English common law precedents for the Fourth Amendment. *See, e.g.*, Wilkes v. Wood (1763) 98 Eng. Rep. 489, 498; Lofft 1, 17 (seeking greater damages because of the "very improper persons" who "examine[d] his private concerns"); CUDDIHY, *supra* note 122, at 585 (citing Brief of Burland, Bostock v. Saunders (1773), 95 Eng. Rep. 1141, 1143; 3 Wils. K. B. 434, 436–37) (plaintiff's counsel complaining about having his client's "private affairs pr[i]ed into by any little excise-officer"); *see also* ALMON, *supra* note 122, at 59. Revolutionary-era U.S. sources raised the same concern. *See* WILLIAM HENRY DRAYTON, A LETTER FROM FREEMAN OF SOUTH-CAROLINA TO THE DEPUTIES OF NORTH-AMERICA ASSEMBLED IN THE HIGH COURT OF CONGRESS AT PHILADELPHIA 10 (Charleston, Peter Timothy 1774) (expressing concern that "a petty officer has power to cause . . . [the] locks of any [m]an to be broke[n] open, to enter his most private cabinet") (emphasis omitted); James Otis, *Speech Against Writs of Assistance*, TEACHING AM. HIST. (Feb. 24, 1761), https://perma.cc/82LC-MKZU (charging that the power to search expanded so far that "menial servants[ ] are allowed to lord [ ] over us"); *The "Boston Pamphlet",* NAT'L HUMANITIES CTR. (2010) https://perma.cc/3QS6-JFEX (describing the officers with the power to search homes as "Wretches, whom no prudent Man would venture to employ even as menial Servants"); *see also* ANDREW TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789–1868, at 5 (2006).

[127] *See* Davies, *supra* note 30, at 602–03, 713; CUDDIHY, *supra* note 122, at 465–66 (explaining that the home as castle was the most prevalent metaphor in early commentaries on the Fourth Amendment but that, in context, the metaphor conveyed more than privacy, taking on a sacred, quasi-spiritual status and evoking patriarchal control of the household).

[128] *See* 1 ANNALS OF CONG. 195–96 (1789) (Joseph Gales, ed. 1790) (describing "privacy" of landings as protecting "illicit trade" from detection); 6 ANNALS OF CONG. 1787 (1797) (criticizing the "unfairness and privacy" of a settlement regarding states' debts to the federal government); 17 ANNALS OF CONG. 224 (1808) (describing as suspicious the appearance that a defendant in a trial for treason "wished to make or receive some communications which required privacy"); 19 ANNALS OF CONG. 1556 (1809) (explaining that the "privacy under which" ships' licenses were obtained would make it difficult to enforce the embargo on British ships).

[129] *See* 12 REG. DEB. 3255–56, 3264 (1836) (complaining about the Treasury department and the private bank in which it deposited public funds using "secrecy and privacy" and "the pretext of privacy" to "screen [their dealings] from investigation" and "perpetrate

several times as a positive limit on government intrusion.[130] It was even used a few times, albeit unsuccessfully, to critique the exercise of search-and-seizure-like[131] and tax-surveillance powers.[132] In the 1850s, its use picked up, but the term was mostly used as a neutral descriptor, whether of the domestic sphere,[133] communications,[134] or a place.[135] Once, a Congressman opposed to investigating a Cabinet member for corruption used privacy as a noun, itself worthy of protection, and linked it to the Fourth

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their deeds of darkness"); CONG. GLOBE APP., 25th Cong., 2d Sess. 575 (1837) (critiquing the privacy of the President's deliberations by contrasting them with the public nature of House deliberations); CONG. GLOBE APP., 26th Cong., 1st Sess. 566 (1840) (remarking that the privacy of House committees facilitated misleading statements by members); *cf.* CONG. GLOBE APP., 25th Cong., 2d Sess. 334 (1838) (describing those who opposed sending supplies during the war as having "[s]unk forever into privacy, suspicion, and contempt!"); CONG. GLOBE APP., 30th Cong., 1st Sess. 663 (1848) (predicting that voters would, in the next election, "consign the standard-bearers of Whiggery to privacy and retirement").

130 2 REG. DEB. 1563 (1826) (referring to colonial period as one when the "privacy of [citizens'] dwellings [had] been invaded"); 8 REG. DEB. 2282 (1832) (describing a process for determining means-tested eligibility for pensions as one in which "the very recesses of domestic privacy are to be invaded"); 13 REG. DEB. APP. 157 (1837) (recognizing that committee investigating deposit banks had to be careful not to cross "the line of privacy and confidence beyond which [it] could not pass without violating private rights and private confidence"); 14 REG. DEB. 1151 (1837) (explaining that when the "correspondence of private gentlemen . . . had relation to matters of a public character . . . it lost its character of privacy, and became . . . public in its nature"); *cf.* 37 ANNALS OF CONG. 1295 (1821) (likening the "delicate subjects, exclusively appertaining to the [ ] States, which cannot be touched but by them" to those "secluded apartments . . . dedicated to family privacy, into which our nearest and best neighbors should not enter").

131 31 ANNALS OF CONG. 734 (1818) (during debate of a resolution to bring someone suspected of trying to bribe a member of Congress before the House for examination describing "the power of sending . . . for persons and papers" as a "bold[ ] intrusion upon his person and privacy"). The resolution passed over these objections. *Id.* at 790.

132 40 ANNALS OF CONG. 754 (1823) (opposing what became the Tariff Act of 1824 in part by objecting that it will require "a tax-gatherer daily spying upon the privacy of our dwellings"); 42 ANNALS OF CONG. 2364 (1824) (opposing a precursor of the Tariff Act of 1824 by arguing that "[t]he exciseman comes into my house . . . [and] respects not even the privacy of female apartments").

133 *See, e.g.*, CONG. GLOBE APP., 31st Cong., 2d Sess. 204 (1851) (describing visitors to Mt. Vernon as disturbing its current residents' "enjoyment of . . . domestic privacy"); CONG. GLOBE, 34th Cong., 3d Sess. 500 (1857) (describing the "sacred privacy of domestic grief").

134 *See, e.g.*, CONG. GLOBE APP., 32d Cong., 3d Sess. 319 (1853) (describing the subjects the Senate and Executive can "discuss in privacy"); CONG. GLOBE APP., 36th Cong., 1st Sess. 616 (1860) ("the answers were communicated to me in no sort of confidence or privacy").

135 *See, e.g.*, CONG. GLOBE APP., 32d Cong., 1st Sess. 213 (1852) (describing President George Washington experiencing the "privacy of [Mt. Vernon's] consecrated spot"); CONG. GLOBE, 33d Cong., 2d Sess. 654 (1855) (describing a House committee "transact[ing] business in the privacy of its own committee room").

Amendment.[136] But when Congress debated a new immunity statute in 1857—a debate in which the Fifth, and to a lesser extent the Fourth Amendment, were raised—there was no mention of privacy.[137]

During the Civil War, privacy was connected to the Fourth Amendment on several occasions, but not in the context of the tariff and internal revenue laws and not to any legal effect. President Abraham Lincoln's opponents accused his administration several times of unconstitutional searches of the "privacy of home" as part of larger critiques of the war effort.[138] But despite hotly debating the wartime tax laws, no one raised Fourth Amendment, let alone privacy-based, objections to their surveillance provisions.[139] Some surveillance provisions were uncontroversial. For instance, unlike at the Founding, there was no objection to the warrantless inspections authorized for the books of distilling, brewing, railroad, steamboat, and ferry-boat companies.[140] And when a House Committee investigated allegations of official misconduct at the New York Custom House in 1864, it was unconcerned by the many examples it unearthed of customs officers searching for and

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136 CONG. GLOBE, 31st Cong, 1st Sess. 785 (1850) (describing Representative Robert Augustus Toombs as "read[ing] a clause from the Constitution, which secures an individual from having his privacy invaded, and all his papers ransacked and searched, because vague and unauthorized charges are made against him"). Another Representative described privacy as a precondition for exercising the freedom of expression. CONG. GLOBE APP., 33d Cong., 2d Sess. 49 (1854).

137 *See, e.g.*, CONG. GLOBE, 34th Cong., 3d Sess, 427–28 (1857). Similarly, Professor Andrew Taslitz's account of antebellum debates over search and seizure in the enforcement of the Fugitive Slave Acts and repression of abolitionist literature does not identify uses of "privacy." TASLITZ, *supra* note 126, at 12, 126, 128, 164–65, 167–68, 202, 207, 227, 257.

138 *See, e.g.*, CONG. GLOBE 37th Cong., 1st Sess. 59, 417 (1861); *id.*, 3d Sess. 1061, 1072 (1863).

139 The tax laws were hotly debated but mostly on partisan and regional grounds. In particular, the whiskey tax was argued to be laden with class, region, and religious discrimination. For more on these issues and for a detailed account of the congressional debates over wartime revenue laws, see RICHARDSON, THE GREATEST NATION OF THE EARTH, *supra* note 83, at ch. 4.

140 Using ProQuest's Congressional Universe, legislative histories were assembled for all the major revenue and tariff acts from 1860–1868 and each document was searched for the following terms: "libert," "suspicion," "fourth," "4th," "5th," "fifth, "warrant," "seiz," "book," "paper," "inspect," "criminat," "priva," and "inquisit." The optical character recognition translation of these documents is not perfect, so it is possible that some uses of these terms were missed. To compensate, text was scanned before and after any hits, in the hopes that this method would capture any instances when there was substantial discussion of terms likely to be related to a discussion of constitutional privacy. Hearty thanks are due to Alana Bevan for outstanding assistance with this research.

seizing merchants' books.[141] Other surveillance provisions were criticized, but not as violations of constitutionally protected privacy rights. Congressmen referred to some of the tax laws' surveillance powers as "inquisitorial" and creating a "system of espionage."[142] But they did not assert that this overstepped any constitutional boundaries. Instead, they argued that such powers were a problem because they were disliked widely by the public or depressed production.[143] Reflective of the growing rights consciousness, there was at least one critique that may have alluded to the Constitution, but it did not amount to a coherent assertion of Fourth Amendment privacy rights.[144] This lack of constitutional complaints is particularly striking given that plenty of explicitly

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141 H.R. REP. NO. 38-111, at 72–75, 82, 86, 184–85, 240–41, 243, 264–65. In contrast, the report did single out seizure of goods, noting it fielded complaints that those seizures were made by customs officers in order to blackmail or extort merchants. The Committee nonetheless concluded that while they encountered evidence of "seemingly severe and disproportionate" seizures and penalties for fraud, they were all "clearly within the provision of laws made to protect the revenue." *Id.* at 8.

142 These arguments were made by Senators in 1862 regarding provisions empowering revenue officers to enter homes to ascertain taxable luxury goods and incomes. CONG. GLOBE, 37th Cong., 2d Sess. 2330, 2473 (1862). *But see id.* at 2330 (arguing that luxury taxes did not "create[ ] any espionage"); Act of July 1, 1862, ch. 119, §§ 77, 93, 12 Stat. 432, 467, 475. A report by the U.S. Revenue Commission made similar arguments in 1866 regarding taxes on domestic industry. U.S. REVENUE COMMISSION, 39TH CONG., REP. ON REVISION OF THE REVENUE SYSTEM OF THE UNITED STATES 36 (1866) [hereinafter REVENUE COMMISSION REPORT]. For the way late eighteenth- and nineteenth-century thinkers distilled a long and diverse history of inquisitions into a singular "Spanish Inquisition," and recast that religious undertaking as a metaphor for "the oppression of the intellect or the stifling of political liberty," see EDWARD PETERS, INQUISITION 237 (1988).

143 CONG. GLOBE, 37th Cong., 2d Sess. 2330 (1862); REVENUE COMMISSION REPORT, *supra* note 142, at 36. Further, the complainers lost the argument, with the complained-of provisions remaining in place even in the postwar Revenue Act of 1866. Act of July 12, 1866, ch. 184, 14 Stat. 98. Similarly in 1866, Congressmen objected to the practice of publishing incomes because it let the public know businessmen's "private affairs." This was decried not because it was unconstitutional, however, but because, in a lean year, it could "bring [a businessman's creditors] all down upon him when otherwise he would come out safely." CONG. GLOBE, 39th Cong., 1st Sess. 2789 (1866); *see also id.* at 2437.

144 In 1864, a member of the House complained that allowing revenue officers to order the production of books and papers infringed on taxpayers' "liberty" by allowing access to their "private accounts" and books on mere suspicion of fraud. CONG. GLOBE, 38th Cong., 1st Sess. 2997 (1864). Rather than reference the Fourth Amendment, however, he cited the common law and unspecified "private rights," which may have been natural or constitutional and whose importance he subordinated to the common law violation. *Id.* (arguing that "these amendments . . . violate every idea of individual right and liberty which belongs to the common law and to our people" and they would accelerate a "state of things when we not only disregard private rights, but everything which is considered sacred under the common law"). In response, another Representative argued "there is nothing harsh in the measure" that "let him take the oath and produce his books—nothing else." *Id.*

constitutional charges were raised in the voluminous debates over the revenue laws.[145]

Industry associations lobbying Congress also complained of the surveillance provisions and raised constitutional objections to the wartime revenue laws, but did not assert a violation of the Fourth Amendment or privacy. For instance, brewers objected to the 1862 Revenue Act's requirement that their books be kept open to inspection on the grounds that it "does away with our constitutional rights and privileges."[146] They explained these more like due process concerns, however.[147] They also worried about revenue officers "pry[ing] into business matters and relations of a very delicate nature."[148] But they connected these charges to a practical—not constitutional—problem: officers using the information "for purposes of their own" in ways that hurt the brewers' business.[149] The New York Chamber of Commerce, sited in the busiest customs port in the country and the epicenter of the nation's merchant community, objected to the 1863 customs law's provisions for the search and seizure of books and papers. The Chamber's concerns were practical, however: a merchant might "be ruined under such a law, by having his books and papers taken away, and his whole business arrested," it warned, possibly on no more grounds than the word of a disgruntled former employee.[150] The Chamber also cautioned that "in the hands of unscrupulous persons," this power could be made the "engine of extortion."[151] When Congress in 1866 expanded the 1863 warrant power by authorizing judges to issue warrants to customs collectors anywhere in the United States, the Chamber did not object.[152]

Thus, by the Civil War, there were scattered mentions in Congress of privacy in the context of the Fourth Amendment, but

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145 *See, e.g.*, CONG. GLOBE, 37th Cong., 2d Sess. 1273 (1862) (debating whether a provision as drafted exceeded Congress's taxing powers under the U.S. Constitution); *id.* at 1322 (debating whether a statute of limitations provision did away with the presumption of innocence); *see also* RICHARDSON, THE GREATEST NATION OF THE EARTH, *supra* note 83, at 112–13 (noting federalism complaints about the creation of national tax collectors).

146 U.S. LAGERBEER BREWERS' ASSOCIATION, PETITION TO CONGRESS 1 (1863).

147 *Id.* (charging that the requirement compelled them to "keep our doors unlocked and our houses open to the public" when away on business, unlike other manufacturers).

148 *Id.*

149 *Id.*

150 CHAMBER OF COMMERCE OF THE STATE OF N.Y., SIXTH ANNUAL REPORT OF THE CHAMBER OF COMMERCE OF THE STATE OF NEW YORK FOR THE YEAR 1863–'64 (New York, John W. Amerman 1864). As explained above, these were concerns born of experience with preexisting search and seizure practices.

151 *Id.*

152 Act of 1866, ch. 201, § 39, 14 Stat. 178, 187.

such claims did not gain traction. If one expected to find evidence of Fourth Amendment privacy, nowhere would seem more likely than the debates over the most intrusive and extensive tax-surveillance laws the nation had ever witnessed. Yet no one objected to them on Fourth Amendment grounds—neither in Congress nor among even the most organized and well-resourced taxpayers. That changed with Reconstruction, the process through which the federal government rebuilt a country torn apart by war and determined the terms of the freedom that war secured.

II. RECONSTRUCTION AND THE DEVELOPMENT OF FOURTH AMENDMENT PRIVACY IN CONGRESS

Reconstruction generated a political storm over what was required to secure freedom for the formerly enslaved, knit the country back together, and build a flourishing peacetime economy. Debates among Republicans about the scope of Reconstruction were papered over in the face of the hostile Democratic presidency of Andrew Johnson. But those growing disagreements did not disappear. Instead, they were channeled into inseparable concerns about government bloat and corruption. Those concerns echoed and played into Democratic claims about corrupt Republican-led governments in the South. The Reconstruction-related concerns about government bloat and corruption in turn generated efforts to reform the nation's civil service. Republican reformers made the nation's tax laws an early target, sublimating their stifled debates over Reconstruction into Congress's efforts to constrain civil servants' enforcement of the tax laws. It was in this context that a House Committee staffed by moderate Republicans first formally interpreted the Fourth Amendment as protecting "privacy" and as a substantive limit on the government's powers to search and seize taxpayers' books and papers. The connection to debates over Reconstruction was not merely a matter of atmospherics. Instead, the Committee turned to Fourth Amendment privacy in response to claims that those tax-surveillance powers fed government corruption and that reforming the laws governing civil service would prevent such corruption. While their target was the Custom House in New York, their investigation was embedded in the broader debate about civil service reform, itself caught up in inter- and intra-party disputes about the proper scope of Reconstruction.

A. Civil Service Reform as a Proxy for Debates About Reconstruction

After the Civil War, fissures grew in the Republican Party. On the one side were those termed "Radicals" who fought for policies that would make free Black men and women full citizens. This included not only adopting the Thirteenth and Fourteenth Amendments, but also granting rights to vote and to access public accommodations, as well as providing military protection from white violence. Moderates argued that freedom from slavery was all that was required, a promise that they thought could be fulfilled by far less. These debates about the proper scope of Reconstruction played out in many domains, including whether to reform the civil service.

Republicans had stood united during the Civil War but were rending over the federal government's growth and the scope of Reconstruction. A movement of moderate Republicans committed to reforming that government gathered among Northeastern elites.[153] Most of these reformers had roots in the prewar antislavery movement but now expressed concern about the centralizing forces of the war. Federal authority had unquestionably expanded in novel and dramatic ways during the Civil War. Out West, the military pursued a series of wars with Native peoples while the Homestead Act of 1862 drew settlers and facilitated the expropriation of Native lands.[154] That same year, Congress gave the first of many land grants to a railroad, expanding its footprint with each tie laid.[155] Reformers' ire was more selective, however. They were particularly concerned about the union activity and class strife

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[153] For portraits of reformers, see ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 488–99 (1988), and see generally ANDREW L. SLAP, THE DOOM OF RECONSTRUCTION: THE LIBERAL REPUBLICANS IN THE CIVIL WAR ERA (2006) and ARI HOOGENBOOM, OUTLAWING THE SPOILS: A HISTORY OF THE CIVIL SERVICE REFORM MOVEMENT, 1865–1883 (1961).

[154] *See* HEATHER COX RICHARDSON, HOW THE SOUTH WON THE CIVIL WAR: OLIGARCHY, DEMOCRACY, AND THE CONTINUING FIGHT FOR THE SOUL OF AMERICA 69–74 (2020) [hereinafter RICHARDSON, HOW THE SOUTH WON THE CIVIL WAR] (putting western wars with Native nations in context of Civil War). *See generally* MANU KARUKA, EMPIRE'S TRACKS: INDIGENOUS NATIONS, CHINESE WORKERS, AND THE TRANSCONTINENTAL RAILROAD (2019); Steven Hahn, *Slave Emancipation, Indian Peoples, and the Projects of a New American Nation-State*, 3 J. CIVIL WAR ERA 307 (2013); Erik Kades, *The Dark Side of Efficiency:* Johnson v. M'Intosh *and the Expropriation of Amerindian Lands*, 148 U. PA. L. REV. 1065, 1072 (2000).

[155] BALOGH, *supra* note 62, at 287; KARUKA, *supra* note 154, at 67–68; RICHARD W. WHITE, RAILROADED: THE TRANSCONTINENTALS AND THE MAKING OF MODERN AMERICA 16 (2011).

that exploded in the Northeast during and after the war, a trend they attributed to the growth not only of government, but also of companies as a result of their protection by the government's wartime tariffs.[156] They criticized the federal government's growth and centralization of power on its own terms and because, they argued, it facilitated corruption and stifled republican institutions.[157]

Republican reformers argued that overhauling the civil service laws would help cure the growth of federal power. The federal civil service was a tangible manifestation of this growth, its ranks expanded by the wartime tax laws and the army of federal revenue agents they created.[158] Reformers spoke in technocratic terms of the need to "retrench" the federal government by trimming its vastly expanded ranks, while making those who remained more "efficient" and "economical."[159]

Introducing a merit-based system for government workers, reformers argued, was key to securing a smaller, more efficient civil service. For decades, those positions had been staffed by patronage, in which politicians exchanged government offices for partisan support during elections. In this system, key job qualifications included party loyalty and the ability to mobilize voters. Reformers sought to replace patronage with merit-based hiring and promotion. A merit basis would undercut the patronage incentives for government bloat and ensure government workers had the requisite skills for efficient service. Beginning during the war, they introduced a steady stream of civil service reform bills.[160]

The reformist movement was fed by the same class anxieties that spurred criticism of the federal government's growth and centralization. Patronage, according to Republican reformers, fed

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156 SLAP, *supra* note 153, at 91; FONER, *supra* note 153, at 492. They were less concerned about the centralizing effects of using military forces to quell labor unrest in the Northeast. FONER, *supra* note 153, at 31.

157 SLAP, *supra* note 153, at 71.

158 RICHARD FRANKLIN BENSEL, YANKEE LEVIATHAN: THE ORIGINS OF CENTRAL STATE AUTHORITY IN THE UNITED STATES, 1859–1877, at 169 (1991); RICHARDSON, THE GREATEST NATION OF THE EARTH, *supra* note 83, at 117–18. The seceded Southern states were hardly spared this wartime statism: the Confederacy's heavy taxes and agricultural appropriations sparked armed resistance by the farm wives left behind by its drafted soldiers. STEPHANIE MCCURRY, CONFEDERATE RECKONING: POWER AND POLITICS IN THE CIVIL WAR SOUTH 177 (2010).

159 *See, e.g.*, *The Week*, 5 THE NATION, no. 128, 1867, at 469, 470 (praising a recommendation that Congress appoint a nonpartisan commission of experts to "deal with all the questions of currency, revenue, retrenchment, and what not").

160 SLAP, *supra* note 153, at 41.

"the success of demagogues and spoilsmen who rose to power by playing upon the prejudices of working-class voters."[161] This was especially true in Northeastern cities, with their increasingly plebeian electorate. The wartime growth in the civil service, they argued, made patronage even more dangerous.[162] Reformers' solution was laws that would exclude all but their fellow educated, propertied elites from government service. Reforming the civil service laws, they believed, would "break[ ] the power of party machines and open[ ] positions of responsibility to men like themselves."[163]

Republican calls for reform were inseparable not only from the class politics roiling the Northeast's urban centers but also from Reconstruction. After the war, the federal government's footprint expanded, especially across the South, as the government sought to reconstruct and reunite with its former states. No sooner was Lincoln assassinated than Andrew Johnson, the Democrat who replaced him, formed—and sought to quickly return to the Union—Southern governments staffed by former Confederates.[164] His unreconstructed states were permeated by white violence and governed by so-called Black Codes that returned freedmen and freedwomen to a state akin to slavery.[165] The Republican Party, which controlled Congress, pushed back, using federal power to protect and empower the formerly enslaved.[166] By 1867, Republicans in Congress had created the Freedmen's Bureau, enacted civil rights laws, and secured the Thirteenth and

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161 FONER, *supra* note 153, at 490.

162 SLAP, *supra* note 153, at 41.

163 FONER, *supra* note 153, at 493.

164 HEATHER COX RICHARDSON, WEST FROM APPOMATTOX: THE RECONSTRUCTION OF AMERICA AFTER THE CIVIL WAR 42 (2007) [hereinafter RICHARDSON, WEST FROM APPOMATTOX].

165 *Id.*

166 One footnote cannot do justice to the complicated history of what is known as Radical Reconstruction (so-called for the leading role Radical Republicans played). Suffice it to say that I have stated the Radicals' intentions in the most favorable manner. As historians have shown, their motivations were more complex, their means subject to critique by the freedmen and women they ostensibly intended to assist, and their commitment to translating their laws' words into action often subject to question. For a sampling of works that emphasize the limits of Radical Reconstruction, especially from the perspective of the formerly enslaved, see generally AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION (1998); LAURA F. EDWARDS, GENDERED STRIFE AND CONFUSION: THE POLITICAL CULTURE OF RECONSTRUCTION (1997); JULIE SAVILLE, THE WORK OF RECONSTRUCTION: FROM SLAVE TO WAGE LABORER IN SOUTH CAROLINA, 1860–1870 (1994); and Hahn, *supra* note 154. Note also that as Radical Reconstruction progressed, moderate Republicans peeled off. The Military Reconstruction Act, for instance, passed only because Democrats voted for it in the hopes of causing a schism in the Republican Party.

Fourteenth Amendments. That spring they also passed, over President Johnson's veto, legislation that set terms for the defeated states to rejoin the Union, gave Black men a vote in that process but denied it to many ex-Confederates, and quartered the military in the South to quell white violence and register Black voters.[167]

Republican reformers were growing leery of Reconstruction, however. Emancipation, the Thirteenth Amendment, and the Civil Rights Act of 1866,[168] which protected rights of property and contract, had satisfied their limited goals for the war.[169] As Reconstruction sped on and grew more sweeping, Republican reformers turned increasingly against it. Circa 1867, their critiques were tempered and deflected. They viewed Reconstruction as exacerbating the war's centralizing effect,[170] and saw in Southern freedmen's labor agitation alarming echoes of the class strife they so feared in the North.[171] They channeled their criticism of Reconstruction through civil service reform, deeming Reconstruction "an annoying distraction that enabled party spoilsmen" to avoid civil service reform and other more pressing problems plaguing the postwar United States.[172]

Reformers' critiques of patronage were also bound up in Reconstruction politics because they echoed anti-Reconstruction claims made by northern Democrats. Democrats used accusations of patronage and corruption to critique Black office holders in the South.[173] As Professor Heather Cox Richardson has recounted, Northern Democrats linked the growth of patronage, taxes, and the federal government under Republican rule with "racism to construct a powerful opposition to black voting on the basis of political corruption."[174] The Democratic press warned that African Americans sought political office in the South to access what they

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167 RICHARDSON, WEST FROM APPOMATTOX, *supra* note 164, at 19, 45, 54–56. On the federal government's related reconstruction of the West, see *id.* This was hardly a foolproof process: after Congress readmitted Georgia, Black men were ousted from office, leading Congress to put the state back under military rule. HEATHER COX RICHARDSON, THE DEATH OF RECONSTRUCTION: RACE, LABOR, AND POLITICS IN THE POST-CIVIL WAR NORTH 74–80 (2004) [hereinafter RICHARDSON, THE DEATH OF RECONSTRUCTION].

168 Ch. 31, 14 Stat. 27–30 (1866).

169 SLAP, *supra* note 153, at 223; FONER, *supra* note 153, at 497–99.

170 FONER, *supra* note 153, at 489–90, 492; RICHARDSON, THE DEATH OF RECONSTRUCTION, supra note 167, at 59.

171 RICHARDSON, THE DEATH OF RECONSTRUCTION, *supra* note 167, at 55–56.

172 FONER, *supra* note 153, at 497; SLAP, *supra* note 153, at 90, 107.

173 RICHARDSON, THE DEATH OF RECONSTRUCTION, *supra* note 167, at 57–59.

174 *Id.* at 59.

saw as the federal government's profligate Reconstruction spending.[175] Meanwhile, Black voters would "corrupt government by enslaving it to the poor," reproducing at the state level the heavy taxes, patronage, and corruption Democrats criticized Reconstruction for feeding nationally.[176] This political critique, Richardson observed, was "not completely unattractive to conservative and moderate Republicans."[177] When Republican reformers decried patronage and corruption, their words at least resonated with—and arguably took part in—this emerging anti-Reconstruction politics.

Moderate Republicans linked their growing concerns about Reconstruction to their calls for civil service reform and employed rhetoric that resonated with Democrats' critiques of Reconstruction. Fourth Amendment privacy emerged out of this nexus between anti-Reconstruction politics and civil service reform.

Soon after the Civil War, familiar accusations of corrupt civil servants spurred the House of Representatives to investigate the New York Custom House. The investigating Committee formulated the first official Fourth Amendment case against custom agents' search and seizure powers. In doing so, the Committee gave its imprimatur to the previously ad hoc articulations of Fourth Amendment privacy in Congress and applied them for the first time to the government's tax-surveillance powers. In so doing, they linked Fourth Amendment privacy to moderate Republicans' and Democrats' critiques of Reconstruction.

B. Fourth Amendment Privacy and the Problem of Corruption

During the war, Congress's ire at merchants' frauds on the revenue had drawn its members' attention to the New York Custom House.[178] The House Committee charged with investigating these frauds heard claims that customs officers were seizing merchants'

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175 *Id.*

176 *Id.*

177 *Id.* at 57.

178 H.R. REP. NO. 38-111, at 1; H.R. REP. NO. 38-25, at 4–5, 8–9; REVENUE COMMISSION REPORT, *supra* note 142, at 44–45. One report even noted complaints that seizure of goods (rather than papers) were made by customs officers in order to blackmail or extort merchants. The Committee on Public Expenditures nonetheless concluded that, while they encountered evidence of "seemingly severe and disproportionate" seizures and penalties for fraud, they were all "clearly within the provision of laws made to protect the revenue." H.R. REP. NO. 38-111, at 8.

books and papers to extort settlements and "fill their own pockets."[179] They disregarded them, and focused instead on the problem of merchants' undervaluation frauds and on how to secure the invoices necessary to prove them.[180] But as moderate Republicans' calls for civil service reform gathered steam after the war, the House Committee's focus shifted to outrage at the corrupt and extortionist enforcement actions of customs agents. Their final report embraced Fourth Amendment privacy, giving it newfound prominence, while nesting it within civil service reform and the gathering anti-Reconstruction politics with which that issue was entangled.

In 1867, the House Public Expenditures Committee issued a scathing report about the customs law's search and seizure provision that newly connected Founding Era concerns about reputational harm and abusive officers to a newly abstracted concept of privacy. The 1863 provision, the report charged, had made the Solicitor of Treasury "the controlling arbiter of the fortunes, and the *privacies*, and the rights of the commercial citizens of the importing cities of this country."[181] Under that law, the Solicitor, one of "the myrmidons of government itself," took custody of merchants' seized books and papers.[182] Meanwhile, the merchant "cannot arrange his balances or make his collections."[183] Worse, he risked damage to his reputation, and thus his credit, if word of the seizure got out.[184] Were he to appeal the seizure, the Secretary of the Treasury would forward his plea right back to the Solicitor.[185] Clasped in this "garroting grip," even honest merchants would allow "the[ir] flesh pounds, blood and all, to be taken" by paying to settle the matter.[186] The report's Republican authors had been un-

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179 H.R. REP. NO. 38-111, at 74, 241.

180 *See, e.g.*, *id.* at 258–59 (eliciting testimony about custom house workers who were paid to prevent prosecution of merchants for undervaluation frauds by returning invoices held by the custom house to merchants).

181 H.R. REP. NO. 39-30, at 11 (1867) (emphasis added). In the years preceding and immediately following the Fourth Amendment's ratification, speakers used terms such as "private" or its synonym "secret" as an adjective. *See supra* notes 98–110 and accompanying text. By 1867, however, use of the noun "privacy" was threaded into discussions of search and seizure powers, becoming a thing in itself that the Constitution protected.

182 H.R. REP. NO. 39-30, at 15.

183 *Id.*

184 *Id.*

185 *Id.* at 12.

186 *Id.* at 15.

concerned with customs officials' searching for and seizing merchants' books previously.[187] Now they insisted that the 1863 provision was not just bad policy but "in direct conflict with the spirit and words of our Constitution."[188]

The Committee's analysis mapped out most of the doctrinal innovations attributed today to *Boyd*—nearly twenty years before that case was decided. The 1867 Committee's novel claim that the customs law's search and seizure provision was an unconstitutional violation of merchants' "privacies, and [ ] rights" turned not only on the Fourth but also the Fifth Amendment.[189] In fact, to explain why the 1863 provision amounted to an "overthrowing and overleaping of constitutional barriers," the Committee first invoked the Fifth Amendment.[190] This inaugurated an intermixing of Fourth and Fifth Amendment privacy that would persist through *Boyd*; resultingly, one cannot understand the emergence of Fourth Amendment privacy without tracing the changing interpretations of the Fifth Amendment.

Circa 1867, the federal courts had yet to say much about the Fifth Amendment's protection against a witness being "compelled in any criminal case to be a witness against himself."[191] The common law had long provided its own protections against compelled testimony. For decades after the Founding, the robustness of that common law rule had obviated any need to test the scope of the Fifth Amendment's self-incrimination provision, or of similar ones found in state constitutions.[192] But courts had greatly eroded the common law principle's vitality by 1867.[193] As those robust common law protections disappeared, legislatures and courts, for the first time, had to grapple with the extent to which

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187 H.R. REP. NO. 38-111, at 72–75, 82, 86, 184–85, 240–41, 243, 264–65.

188 H.R. REP. NO. 39-30, at 18.

189 *Id.* at 11.

190 *Id.* at 16.

191 *In re* Meador, 16 F. Cas. 1294, 1299 (N.D. Ga. 1869); U.S. CONST. amend. V. No federal court adjudicated the Fifth Amendment until 1854, and there was not another reported decision until 1869. *See* John Fabian Witt, *Making the Fifth: The Constitutionalization of American Self-Incrimination Doctrine, 1791–1903*, 77 TEX. L. REV. 825, 894 n.294 (1999) (collecting cases); Katherine B. Hazlett, *The Nineteenth Century Origins of the Fifth Amendment Privilege against Self-Incrimination*, 42 AM. J. LEGAL HIST. 235, 240–41 (1998). Of course, unreported cases, not as yet unearthed by historians, may require revising this history of the Fifth Amendment. For an argument that *United States v. Burr (In re Willie)*, 25 F. Cas. 38, 39 (C.C.D. Va. 1807), is an exception to this rule, see Orin S. Kerr, *Decryption Originalism: The Lessons of* Burr, 134 HARV. L. REV. 905, 925, 948–50 (2021).

192 Witt, *supra* note 191, at 836.

193 *Id.* at 866–75.

constitutional protections against self-incrimination would pick up the slack.[194]

The Committee interpreted the Fifth Amendment to mirror the common law privilege by protecting against the production of books and papers, not only against self-incriminating testimony.[195] If "no man is compelled to accuse himself," the Committee argued, he could not be "compelled by indirection to furnish that proof against himself."[196] In support, it quoted Chief Justice John Marshall, opining that the privilege protected every factual link in the "chain of testimony which is necessary to convict an individual of a crime."[197] The Committee suggested that there was thus no "legal distinction . . . between compelling an accused party . . . to express verbally his own condemnation," and compelling him "to produce a paper or a book in which he has written that which, if made public, would produce the same result."[198] In doing so, the Committee departed from antebellum constitutional treatises, which tied the Amendment to testimony alone.[199]

The Committee interpreted the Fifth Amendment to track the common law, even where state courts had interpreted their state constitutional analogues more narrowly. The common law rule had previously protected against testimony that could lead

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194 *Id.* at 875–76.

195 The common law rule protected against production of books and papers, not only oral testimony. LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 390 (1968). *See e.g.*, Byass v. Sullivan, 21 How. Pr. 50, 52–53 (N.Y. Sup. Ct. 1860); *see also* Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 883 n.111 (1995) (citing cases that involved books recording the election of corporate officers, custom-house books, and a company's sales agreement). Whether the Fifth Amendment had the same reach was unclear.

196 H.R. REP. NO. 39-30, at 16.

197 *Id.* (citing *Burr*, 25 F. Cas. 38).

198 *Id.* at 17 (quotation marks omitted).

199 Treatises on the U.S. Constitution described the Amendment as only pertaining to self-incriminating verbal testimony. *See* HENRY FLANDERS, AN EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES: DESIGNED AS A MANUAL OF INSTRUCTION 223 (1st ed. 1860) (describing the Fifth Amendment as intended to prevent "cruel and unjust means which have been employed in other countries to extort a confession of guilt"); FURMAN SHEPPARD, THE CONSTITUTIONAL TEXT-BOOK 249 (1855) (describing the Fifth Amendment as applying to "confessions or admissions" and protecting against compelled testimony as well as questioning "as to his guilt or innocence"); BENJAMIN L. OLIVER, RIGHTS OF AN AMERICAN CITIZEN: WITH COMMENTARY ON STATE RIGHTS, AND ON THE CONSTITUTION AND POLICY OF THE UNITED STATES 181 (1832) (describing the Fifth Amendment as forbidding laws that "authorize . . . means of coercion, in order to compel an accused person to confess his guilt"); *cf.* JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 470 (3d ed. 1836) (reporting, in a criminal law treatise informed primarily by state law, that courts would not compel production of papers that would expose a witness or, if the witness was an attorney, his client, "to any criminal prosecution").

to fines, penalties, and forfeiture, as well as that which could lead to criminal prosecution. As common law protections fell away in those noncriminal cases, would they be replaced by constitutional guarantees? By 1861, state courts had settled on an answer: no. Constitutional provisions, they concluded, protected only against criminal exposure, not exposure to property loss.[200] The House Committee disagreed.[201] It pointed to an 1833 district court decision finding that the Judiciary Act of 1789, which gave the federal courts the power to compel production of books and papers in civil actions at law, did not apply to a forfeiture action under the revenue laws.[202] This case, the Committee argued, supported a conclusion that the 1863 search and seizure provision was "in opposition to, and in violation of, the whole current of English and American law, and of the spirit and words of our own Constitution."[203]

The customs law violated the Fourth Amendment as well, the Committee insisted. That Amendment's protections against unreasonable searches and seizures had lain in desuetude since the Founding.[204] The Committee constructed its interpretation from first principles. The Fourth Amendment, the Committee observed, distilled English precedents ranging from England's Glorious Revolution to Lord Camden's ruling against general

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[200] Witt, *supra* note 191, at 889–94.

[201] Prior to this, Congress had enacted a statute that immunized witnesses appearing before it against not only criminal proceedings, but also fines and forfeitures. *See* Act of Jan. 24, 1857, ch. 19, § 2, 11 Stat. 155, 156. Congress amended the Act in 1862 to, among other things, limit the scope of immunity to criminal prosecutions only. Act of Jan. 24, 1862, ch. 11, 12 Stat. 333. The Fifth Amendment was a subject of discussion in both. *See* Witt, *supra* note 191, at 886–87, 895–97; *see also* H.R. REP. NO. 39-30, at 16–17.

[202] H.R. REP. NO. 39-30, at 16 (citing United States v. Twenty-Eight Packages of Pins, 28 F. Cas. 244 (E.D. Pa. 1832)). That the Committee considered this decision relevant to the Fifth Amendment bespeaks how legal thinkers at this time blurred the line between Fourth and Fifth Amendments.

[203] H.R. REP. NO. 39-30, at 17.

[204] *See* Davies, *supra* note 30, at 613 n.174 (finding no Supreme Court cases addressing the Fourth Amendment's search and seizure provisions before *Boyd* and listing an 1869 opinion as the exceptional lower federal court decision that did); Stuntz, *supra* note 12, at 420 (finding state and federal caselaw "governing search and seizure . . . basically dormant" until *Boyd*). The Committee noted that "[i]n the hasty preparation of this report," it had not "noticed any judicial deliverance as to what will be held 'unreasonable.'" H.R. REP. NO. 39-30, at 18. This absence was reflected in early U.S. treatises. *See, e.g.*, JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 709 (1833) (discussing briefly the Fourth Amendment's history and stating only that it "seems indispensable to the full enjoyment of the rights of personal security, personal liberty, and private property"). *See generally* JOSEPH STORY, FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES (1840) (including no mention of the Fourth Amendment).

warrants on the eve of the American Revolution.[205] Under the customs law, the Committee charged, "the staff of the surveyor of the port may with impunity [ ] cross and re-cross . . . the threshold of an American citizen."[206] According to the English precedents, it urged, this was an intrusion that "the sovereign of England [ ] dare not do to the poorest man's cottage."[207] Treatise writers had thus far assumed the Fourth Amendment applied only in criminal cases.[208] The Committee instead applied it to the property losses resulting from fines and forfeiture. Having done so, it next surmounted the Fourth Amendment's protection against only unreasonable or unwarranted searches.[209] The Committee concluded that warrants under the 1863 Act were "unreasonable" because they were often issued in what we might today call rubber-stamp fashion.[210] Warranting searches of books and papers without more "judicial inquiry" than the formalities of an affidavit, the Committee urged, "ought to be deemed 'unreasonable,' and unjustifiable and unlawful, in any civilized country professing the semblance of a constitution."[211]

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[205] H.R. REP. NO. 39-30, at 17–18.

[206] *Id.* at 17.

[207] *Id.*

[208] *See* THE CONSTITUTIONAL GUIDE; COMPRISING THE CONSTITUTION OF THE UNITED STATES; WITH NOTES AND COMMENTARIES FROM THE WRITINGS OF JUDGE STORY, CHANCELLOR KENT, JAMES MADISON, AND OTHER DISTINGUISHED AMERICAN CITIZENS 133 (R.K. Moulton ed., 1834) (noting that the Constitution only "protects the rights of persons suspected of having committed an offence" but recommending that the same protections should be "given to a person, as to his papers, when required in an investigation of a civil nature"); *cf.* ARTHUR J. STANSBURY, ELEMENTARY CATECHISM ON THE CONSTITUTION OF THE UNITED STATES 71 (1828) (stating that searches pursuant to warrants are only permissible when someone's "fellow citizens charge him with some offence which would require this to be done, make it appear probable that he is guilty, and swear to what they declare against him").

[209] For scholars' debates about whether the Founders intended for the Fourth Amendment to authorize reasonable warrantless searches, see *supra* note 120.

[210] H.R. REP. NO. 39-30, at 18. There was no such evidence in the testimony published with the 1867 report. Testimony that magistrates rarely inquired about the allegations in the affidavits on which their warrants were based had accompanied the Committee's 1864 report on the New York Custom House, however. H.R. REP. NO. 38-111, at 74–75 (testimony of DeWitt C. Graham, Inspector of Customs). Graham's testimony was given less than a year after the 1863 provision was enacted and seems to have drawn on his years of pre-Act service, so its relevance to assessing the workings of the 1863 Act is unclear.

[211] H.R. REP. NO. 39-30, at 18. Thomas Davies argued that at the Founding "unreasonable" searches and seizures referred only to those conducted under general warrants. Davies, *supra* note 30, at 668. The report's authors said they had not had time to look for any caselaw on the meaning of "unreasonable" but had they looked, they would not likely have found any. Stuntz, *supra* note 12, at 420.

The Committee leveraged privacy to construct this newfound constitutional protection for merchants' books and papers. While there were common law foundations for extending the Fifth Amendment to commercial books and papers,[212] those documents' protection under the Fourth Amendment was unclear.[213] The Committee glossed over this question by anchoring business records to personal ones, yoking commercial to domestic privacy, and blurring the lines between the Fourth and Fifth Amendments. In explaining why the law had made the Solicitor of Treasury "the controlling arbiter of . . . the privacies, and the rights of the commercial citizens of the importing cities," the report's authors noted that customs officers had allegedly seized a merchant's personal "will, letters between husband and wife, [etc.]."[214] Violating the "sanctities of the household" while searching for commercial invoices, the authors argued, demonstrated why the 1863 provision amounted to a "virtual overthrowing or overleaping of constitutional barriers."[215] The Committee also likened the act of searching to the outcome of a compelled confession (as well as again likening personal to business papers) to harmonize the Fourth and the Fifth Amendments' reach. "Has Congress any more constitutional power," the Committee asked, "by ransacking private drawers and forcing a banker's safe, to secure admissions from a citizen which condemn his property, than it has to obtain

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212 CHITTY, *supra* note 199, at 470 (noting that if producing papers ordered by subpoena *deuces tecum* would expose a witness or, in the case of an attorney, his client, "to any criminal prosecution, the court will not compel him to produce it").

213 *See* Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 VA. L. REV. 869, 923 (1985) (observing that during the eighteenth century events that informed the adoption of the Fourth Amendment, "[b]usiness or financial documents were occasionally mentioned" by courts and commentators "but were clearly of far less concern" than personal papers). One 1860 treatise contended that thanks to the English general warrant cases "the lawful secrets of *business* and friendship were rendered inviolable." FLANDERS, *supra* note 199, at 260. A couple criminal law treatises (which addressed state law) also derived from those cases a rule that warrants could not issue for papers *at all*, even if those warrants were specific rather than general. *See, e.g.*, JOHN ANTHONY GARDNER DAVIS, A TREATISE ON CRIMINAL LAW 408 (1st ed. 1838) (stating that search warrants "can only be granted for stolen goods, and not for libels, or other papers belonging to an accused or suspected party") (citing Entick v. Carrington (1765) 95 Eng. Rep. 807; 19 How. St. Tri. 1030 (KB)); CHITTY, *supra* note 199, at 52 (stating based on *Entick v. Carrington* that "a search warrant for libels and other papers of a suspected party is illegal"). But mostly, neither constitutional nor criminal law treatises address the question. *Cf.* CUDDIHY, *supra* note 122, at 746, 770 (concluding that the framers of the Fourth Amendment accorded places of business lesser or, in some cases, no protection against warrantless searches and seizures as compared to castle-like dwelling houses).

214 H.R. REP. NO. 39-30, at 11, 16.

215 *Id.* at 16.

evidence by extorting confessions from an individual by the rack and thumb-screw?"[216]

Civil service reform, retrenchment, and Reconstruction swirled through, not only around, the House Committee's 1867 charges; its turn to Fourth Amendment privacy must be understood in that context. Just months before, the 1867 report's authors had voted unsuccessfully to keep a civil service reform bill alive in the House.[217] At a time of peak partisanship due to the Civil War and Reconstruction battles against President Johnson, the vote nonetheless pit Republican against Republican.[218] In their 1867 report, they now critiqued the New York Collector of Customs in terms that echoed debates over that civil service bill. For instance, they complained of his "uncalled-for additions to the pay-roll of the custom-house" (read bloat) and hiring of men beset by "incapacity, ignorance, [and] vice" (read corruption).[219] Fellow Republican reformer and editor E.L. Godkin then trumpeted the House Committee's findings in the pages of *The Nation* as evidence of the need to make the civil service "a career to which men devote their lives."[220] Circa 1867, Republicans were still managing a fairly united public front in favor of Reconstruction and against President Johnson. Internally, however, Radicals and moderates were divided over Reconstruction's scope.[221] Critiquing patronage and corruption at the New York Custom House thus partook in a coded debate about limiting Reconstruction in ways that would preserve white dominance.

Congress amended the search and seizure provision, making refinements that were responsive to the Committee's critique. While Congress stopped short of the Committee's recommendation that the provision "should at once be repealed or greatly modified," it changed the law to address at least some of the Committee's concerns.[222] Now, in order to secure a warrant, a complaint that spelled out the particulars of the alleged fraud and the papers to be seized would have to be filed with the district court

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216 *Id.* at 17.

217 *Id.* at 23 (listing authors); CONG. GLOBE, 39th Cong., 2d Sess. 1036 (1867) (reporting roll call vote tabling civil service bill).

218 HOOGENBOOM, *supra* note 153, at 30.

219 H.R. REP. NO. 39-30, at 9.

220 *The Week*, 4 THE NATION, no. 88, 1867, at 181, 182.

221 FONER, *supra* note 153, at 271–76.

222 H.R. REP. NO. 39-30, at 13.

(previously only an affidavit had been needed and it was not required to include those particulars).[223] The law did not prevent merchants' books and papers being used against them, the heart of the Committee's Fifth Amendment concerns. By making it harder to secure warrants, however, the 1867 amendments took aim at the Committee's Fourth Amendment critique. They also greatly weakened customs officials' control over the merchants' "privacies" by transferring the authority to search for, seize, and hold books and papers pursuant to these warrants from customs officials to the federal courts.[224]

For a cadre of lawyers and the taxpayers they represented, however, the 1867 amendments did not go far enough. Channeling the postwar period's greater rights consciousness, they joined the attack on the traditional *civil* liberty tradition, asserting that the Fourth Amendment limited Congress's tax-surveillance powers. Rather than petition Congress, they made their claims in the courts. True to the judicial deference toward legislative decisions at the core of the *civil* liberty tradition, however, the courts proved far less interested in using the Fourth Amendment to check the government's tax-surveillance powers than were moderate Republicans in Congress.

III. JUDICIAL RESISTANCE TO FOURTH AMENDMENT LIMITS ON TAX SURVEILLANCE

The new rights consciousness and Reconstruction politics that spurred the House Committee's report reigned outside Congress as well, generating litigation claiming similar constitutional limits on the government's tax-surveillance powers. The novelty of the Committee's view of taxpayers' privacy and Fourth Amendment rights is demonstrated, however, by the federal courts' rejection of those claims, including by contemporary and future Supreme Court justices.

A. Civil *Liberties* from Below

After the Civil War, challenges proliferated to the *civil* liberty approach of subordinating constitutional rights to the general welfare. Coming after a war fought over fundamental rights and

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[223] Act of Mar. 2, 1867, ch. 188, § 2, 14 Stat. 546, 547.

[224] *Id.* (transferring authority to conduct searches under the warrants from customs collectors to federal marshals and giving the court, rather than the collector, custody of the seized records).

that produced a flurry of constitution-making, it is perhaps unsurprising that rights consciousness took off after the war.[225] This was especially true at the federal level, where rights-based litigation exploded. The Reconstruction Amendments along with the Civil Rights Act of 1866 created new rights and jurisdictional pathways to their vindication.[226] Republicans retook the White House with President Ulysses S. Grant's election in 1869. Under Grant, enforcement of the revenue laws spiked, as did legal challenges to them.[227]

In the same period, Fourth Amendment privacy arguments akin to those made by the House Committee made their way into the treatise literature for the first time. Thomas M. Cooley, a justice on the Michigan Supreme Court, went from being a rising star on a regional legal stage to an oft-cited national expert on constitutional law following the 1868 publication of his *Treatise on Constitutional Limitations*.[228] Cooley paid more attention to the Fourth Amendment than prior treatises, possibly because his was as much an exposition of state constitutions, whose search and seizure provisions were far more developed.[229] Much of what Cooley had to say echoed the arguments of the Founding Era.[230] Notably, however, Cooley was the first treatise writer to give the Fourth Amendment a privacy gloss. He announced that, with few

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[225] *See, e.g.*, LAURA F. EDWARDS, A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION: A NATION OF RIGHTS 131–37 (2015).

[226] ROBERT J. KACZOROWSKI, POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866–1876, at 38–39, 42, 49 (1985); FONER, *supra* note 153, at 277.

[227] President Johnson had let the revenue laws lay fallow just as he had the federal government's enforcement powers under the Civil Rights Act. KACZOROWSKI, *supra* note 226, at 203 n.5.

[228] For Cooley's life and jurisprudence, see generally Alan Jones, *Thomas M. Cooley and the Michigan Supreme Court: 1865–1885*, 10 AM. J. LEGAL HIST. 97 (1966).

[229] For the lack of development of Fourth Amendment law, see *supra* note 204. Scholars have argued that state constitutions' search and seizure provisions were more developed because the employment of police to enforce criminal laws already existed there. *See, e.g.*, Stuntz, *supra* note 12, at 419. This assumption overlooks federal agents' enforcement of the revenue laws as well as their policing of Native peoples, territorial residents, and Black Americans alleged to be fugitive slaves. As a result, the lack of Fourth Amendment doctrine before the Civil War speaks more to who, where, and what it was understood to protect. *See, e.g.*, TASLITZ, *supra* note 126, at 126, 164–65, 167–68 (providing examples of antebellum courts ignoring Fourth Amendment arguments in Fugitive Slave Act cases).

[230] Cooley referred, for instance, to the common law principle of a man's home being his castle, the class-inflected horrors of letting "ignorant and suspicious persons" and "mere ministerial officer[s]" into that castle, and the general warrants and writs of assistance that led to the amendment's adoption. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 299–301, 306 (1868).

exceptions, it would violate the Fourth Amendment to allow the government "to invade one's privacy for the purpose of obtaining evidence against him."[231] His treatment echoed that of the House Committee in other ways as well. Like the Committee, he linked the Fourth and Fifth Amendments, stating that such privacy invasions would also violate the "spirit of the fifth amendment."[232] According to Cooley, the Fourth Amendment's privacy protections did not distinguish between home and business. "[T]he law requires the utmost particularity" of warrants, he explained, "before the privacy of a man's premises is allowed to be invaded by the minister of the law."[233]

As the 1860s ended, the groundwork was thus laid for federal litigation claiming that the Fourth Amendment protected an abstract concept of privacy that limited the government's tax-surveillance powers. Lawyers across the country obliged. Between 1869 and 1874, lawyers brought cases in Maine, Georgia, New York, Nevada, Mississippi, Ohio, and Virginia.[234] Like the House Committee, they raised Fourth and Fifth Amendment claims against the revenue laws' search and seizure provisions, including those Amendments' privacy protecting dimension. Lawyers for the prominent New York mercantile firm Platt & Boyd put privacy at the heart of the constitutional wrongs committed when customs agents searched for and seized their client's papers. "[A]ny act which authorizes an officer to invade the privacy of a man's house and take from him such property" violated the Fourth and Fifth Amendments, they argued to future Supreme Court Justice and then-district court judge Samuel Blatchford.[235] Attorney Lucius Jeremiah Gartrell likewise argued that it was unconstitutional for revenue officers to demand the production of

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[231] *Id.* at 305.

[232] *Id.* at 305 n.5. This is the only mention of the Fifth Amendment in Cooley's treatise, though he did discuss the witness privilege in terms that blended its common law and state constitutional dimensions. *Id.* at 317.

[233] *Id.* at 304.

[234] *See, e.g.*, Stockwell v. United States, 23 F. Cas. 116, 120–21 (C.C.D. Me. 1870), *aff'd*, 80 U.S. 531 (1871); *In re* Meador, 16 F. Cas. 1294, 1294–95 (N.D. Ga. 1869); *In re* Platt, 19 F. Cas. 815, 819 (S.D.N.Y. 1874); *In re* Strouse, 23 F. Cas. 261, 261–62 (D. Nev. 1871); Stanwood v. Green, 22 F. Cas. 1077, 1079 (S.D. Miss. 1870); State v. Williams, 31 N.C. 140, 149 (1848); *In re* Phillips 19 F. Cas. 506, 506–07 (D. Va. 1869).

[235] *The Courts: The Law of Seizure*, N.Y. TRIB., Mar. 30, 1874, at 5. The attorney made this statement in arguing that the act violated the Fifth Amendment's due process provision, and then proceeded to argue that this privacy invasion also violated the Fifth Amendment's protection against self-incrimination and the Fourth Amendment.

taxpayers' books and papers.[236] A revenue official had summoned Gartrell's tobacco-dealer clients to produce their books and papers, then asked a federal judge for a contempt order when they refused.[237] Gartrell argued that the Fourth Amendment protected against not only actual searches but also such compelled production. Gartrell did not invoke privacy. But like the House Committee, he insisted that business records were "private" and thus deserved to be shielded by the Fourth Amendment.[238] If the revenue laws gave officials the power they asserted, Gartrell contended, "then that portion of the act of Congress conferring it is in conflict with the 4th article of the amendments to the Constitution of the U.S. and void."[239]

Lawyers for these alleged revenue cheats were at the front end of the postwar rights consciousness curve. Focused on courts rather than Congress, they sought to add to the scattered prewar decisions holding that constitutional rights bounded, rather than were bounded by, government power. For them, constitutional rights restrained, and therefore legitimized, the government: they were civil *liberties*.

B. Taxes and Reconstruction Politics Beyond the New York Custom House

Reconstruction, not only rights consciousness, fed the constitutional challenges to the revenue laws. Gartrell's suit was a case in point. Gartrell was a prominent defender of slavery in the U.S. Congress before the Civil War and a former leader of the Confederacy, making it hard to separate his courtroom battle from the Civil War's recently ended field battles or the political battles that had followed in their wake.[240] But the ties between

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[236] *In re Meador*, 16 F. Cas. at 1294–95.

[237] *Id.* at 1294.

[238] Application for Writ of Error in Meador Case at 1, *In re* Meador, 16 F. Cas. 1294 (N.D. Ga. 1869) (No. 865) (objecting that his clients would not "have their private books, papers searched or seized for examination in this arbitrary + unprecedented manner"). Note, this argument was made after the court issued its decision on the application for attachment, but because the Fourth Amendment arguments seem to have first been made explicit orally at the hearing on the application, this is the only extensive written record of the arguments. Based on the court's decision, this quote seems to reflect arguments made at the hearing. *In re Meador*, 16 F. Cas. at 1298–99. Gartrell's cocounsel in the case was O.A. Lochrane. *Id.* at 1294.

[239] Brief Case U.S. Supervisor v. Meador & Bros. at 2, *In re* Meador, 16 F. Cas. 1294 (N.D. Ga. 1869) (No. 865).

[240] EZRA J. WARNER, JR. & W. BUCK YEARNS, BIOGRAPHICAL REGISTER OF THE CONFEDERATE CONGRESS 98–99 (1975).

Reconstruction and the federal revenue laws Gartrell challenged stretched beyond the biography, however notorious, of this single lawyer. After the war, hostility to the tax regime it had generated grew across political parties and regions. While these disparate groups' opposition took distinct forms, their antitax positions were tied to their critiques of Reconstruction.

Democrats' opposition to the wartime taxes had the most direct links to Reconstruction politics. Even before the war, Democrats had been the antitax party, having long fought protective tariffs. Such taxes constricted trade, Democrats charged, let elites protect coveted industries, and burdened the stretched-thin consumer to whom the cost of duties was inevitably passed.[241] The wartime internal taxes further fueled their antitax politics, as their opposition to the war became enmeshed with resistance to the taxes by which it was funded.[242] After the war, their hostility to the Reconstruction policies for which the internal taxes paid and the freedwomen and freedmen whose empowerment they supported further stoked Democrats' antitax stance.[243] Between 1868 and 1872, Congress reduced, and in some cases retired, many of the internal taxes.[244] But those it kept included taxes on tobacco and whiskey, which hit hardest in the South, tapping directly into the anti-Reconstruction vein. Ending Reconstruction and preserving white supremacy was thus inseparable from Democrats' tax critiques even when they were cast in the more race-neutral terms of opposing federal power to preserve states' rights and individual liberty.[245]

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[241] *See* RICHARDSON, THE GREATEST NATION OF THE EARTH, *supra* note 83, at 104–09, 127, 129; *see also* BROWNLEE, *supra* note 73, at 56. For Southern slaveholders' antitariff politics, see WALTER JOHNSON, RIVER OF DARK DREAMS: SLAVERY AND EMPIRE IN THE COTTON KINGDOM 11 (2017).

[242] *See* RICHARDSON, THE GREATEST NATION OF THE EARTH, *supra* note 83, at 111, 114, 124.

[243] For white Southerners' resistance to taxes on the grounds that their wealth was being used to support services for Black Southerners, see RICHARDSON, THE DEATH OF RECONSTRUCTION, *supra* note 167 at 105; NICOLAS BARREYRE, GOLD AND FREEDOM: THE POLITICAL ECONOMY OF RECONSTRUCTION 199–200 (2015); and FONER, *supra* note 153, at 415. This was not the only issue that drove the politics of taxes after the Civil War. *See, e.g.*, THEDA SKOCPOL, PROTECTING SOLDIERS AND WOMEN: THE POLITICAL ORIGINS OF SOCIAL WELFARE IN THE UNITED STATES ch. 3 (1992); Andrew Wenders Cohen, *Smuggling, Globalization, and America's Outward State, 1870–1909*, 97 J. AM. HIST. 371, 372 (2010).

[244] RICHARDSON, THE GREATEST NATION OF THE EARTH, *supra* note 83, at 137.

[245] For examples of Democrats using criticism of "centralization" (as expansion of federal authority was termed) to preserve white supremacy in the South, see FONER, *supra* note 153, at 243, 250, 452, 455. A federal district court judge in Tennessee who opposed

Republican reformers developed their own antitax politics after the war, one intertwined with their growing unease with Reconstruction and the newly expanded federal government of which it was a part. Republicans had long been known as the party of tariffs, which they embraced as an essential (and, since the Founding, the primary) source of revenue for the federal government. Many also favored using tariffs to protect U.S. industries—and the jobs they created—from foreign competition.[246] After the war, Republican reformers like those constituting the House Committee broke with this tradition. They instead called for eliminating most internal taxes and ridding the customs laws of protectionist tariffs. These reformers were at best indifferent to Reconstruction, at least saw it as impeding their efforts to shrink the federal government, and at worst used such "retrenchment" as coded language for ending Reconstruction and preserving white dominance.[247]

Out West, internal taxes created reasons to favor winding down Reconstruction where none might have existed. The internal taxes on alcohol were felt acutely in the West, where taxes on breweries fell heavily on politically influential immigrant communities and where whiskey producers had clout. The government's need for tax revenue was inseparable from the Reconstruction projects it funded. The internal taxes thus gave Westerners a reason they might not have otherwise had to favor winding it down.[248]

As taxpayers and their lawyers from across the country challenged the federal government's tax-surveillance powers, their claims were fed by a potent mix of postwar rights consciousness and resistance to Reconstruction. The federal courts, however, were impervious to this trend.

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the government for whom he worked refused to enforce the revenue laws on states' rights grounds. KACZOROWSKI, *supra* note 226, at 59. For the long history of tax policy's entwinement with slavery, see generally ROBIN EINHORN, AMERICAN TAXATION, AMERICAN SLAVERY (2008).

246 On Republican Party support for protective tariffs, see BROWNLEE, *supra* note 73, at 60–61, 65. Thank you to Professor Ajay Mehrotra for pointing out the tension between relying on tariffs for revenue, which turned on robust imports, and employing them protectively to deter imports.

247 *See, e.g.*, RICHARDSON, THE DEATH OF RECONSTRUCTION, *supra* note 167, at 59, 82; SVEN BECKERT, THE MONIED METROPOLIS: NEW YORK CITY AND THE CONSOLIDATION OF THE AMERICAN BOURGEOISIE, 1850–1896, at 159–67 (2001).

248 *Cf.* BARREYRE, *supra* note 243, at 85, 97–98, 104, 121 (describing how protective tariffs also deeply divided Republicans on sectional lines after the Civil War, with proponents casting Midwesterners' opposition as anti-Reconstruction).

C. Fourth Amendment Privacy Fails Before the Federal Courts

Demonstrating the continued vitality of the *civil* liberty tradition in the courts, Fourth Amendment challenges to the tax laws lost every time. Some courts followed the judge in Gartrell's suit, finding that the contempt hearings in which these claims were raised were civil proceedings to which the Fourth and Fifth Amendments did not apply.[249] In finding those Amendments "applicable to criminal cases only," the federal courts interpreted them more narrowly than had the 1867 House Committee.[250] The federal courts also departed from that Committee in finding longstanding historical precedent for the government's tax-surveillance powers. This was the judge's conclusion in Gartrell's case involving the internal revenue laws.[251] A particularly significant case held similarly regarding the customs law's 1867 search and seizure provision. The first issued by a court of appeals, the decision was also authored by Supreme Court Justice Nathan Clifford. Statutes had authorized warrants in customs enforcement since the first Congress, Justice Clifford observed, and the government's power to do so "was never questioned."[252] While he acknowledged that those laws addressed searches for goods, he did not "perceive[ ] that any greater objection can be taken to a warrant to search for books, invoices, and other papers appertaining to an illegal importation than to one authorizing such a search for the imported goods."[253] Judge Blatchford came to the same conclusion, reasoning that the Fourth Amendment did not protect papers any differently than effects.[254]

Also, unlike the 1867 House Committee, the courts drew a strict line between business and personal papers, limiting Fourth Amendment protections to the latter. The U.S. Attorney in Gartrell's case opposed the tobacco dealers' claim that their business records were protected by the Fourth Amendment. The tax laws, he insisted, allowed revenue officers to search not private

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249 *See, e.g.*, *In re Meador*, 16 F. Cas. at 1299; *In re Strouse*, 23 F. Cas. at 261–62.

250 *In re Meador*, 16 F. Cas. at 1299.

251 *Id.* at 1298 (concluding that such powers to enforce excise taxes had been "the law of England and of the colonies prior to the war of Independence, and so it has continued to this day under the national government, and in nearly every State of the Union").

252 *Stockwell*, 23 F. Cas. at 120–21.

253 *Id.* at 121. Justice Clifford's reasoning would have applied equally to the customs law's 1863 search and seizure provision.

254 *In re Platt*, 19 F. Cas. at 819. He found that it was reasonable to treat merchandise and papers similarly under the Fifth Amendment as "books and papers are no more fully 'property' than merchandise is." *Id.*

realms but "the books and papers of firms . . . in certain businesses."[255] His phrasing echoed the way antebellum courts distinguished spaces infected with the "bustle of business" from those granted the privacy of the domestic realm.[256] The judge in Gartrell's case did not directly address this question. He hinted at the public status of the tobacco dealers' papers in dicta, however, observing that when they "sought and accepted the privilege" of their federal license to conduct their business, "the [tax] law was before them."[257] They were therefore "precluded from assailing the constitutionality of this law."[258] The judge in a contempt action involving two Mississippi bankers drew the same distinction between private and business affairs as had the government in Gartrell's case.[259] The bankers were "doing business with the public as bankers," the court reasoned, and "no injury can result to them from an inspection of their books and papers connected with this public business."[260] Because there was "no attempt to investigate any of the [bankers'] private affairs," there was also "not an invasion of any of the rights secured under the constitution."[261] Far from private, these judges reasoned, business records were inherently public and thus fell outside the Fourth Amendment's protection.

The courts declined the invitation to innovate Fourth Amendment law or recognize constitutional privacy as a check on the federal government, as proponents of the civil *liberty* approach hoped. They rejected the claims Gartrell and his fellow attorneys brought and ignored Cooley's privacy gloss and expansive take

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255 Brief of Points on the Part of Gov't in the Matter of Supervisor of Int. Rev. v. Meador & Bros. at 1, *In re* Meador, 16 F. Cas. 1294 (N.D. Ga. 1869) (No. 865).

256 *Ex parte* Vincent, 26 Ala. 145, 149 (1855). The U.S. Attorney's wording also evoked a distinction the colonial-era common law and then Fourth Amendment had drawn between commercial premises, which were searchable even without warrants, and private homes, which should be protected by a specific warrant requirement. Davies, *supra* note 30, at 608, 707–14; *see also supra* note 213. In the U.S. Attorney's view, the same distinction applied to papers as to places. Unfortunately, Davies did not explain how colonial courts or those involved in the Fourth Amendment's adoption treated premises that blended commercial and domestic activities.

257 *In re Meador*, 16 F. Cas. at 1299.

258 *Id.*

259 *Stanwood*, 22 F. Cas. at 1079.

260 *Id.* Notably, the court found the bank and its records essentially public rather than private despite the fact that it was not a chartered corporation, and thus not in that respect a creature of the state. *Id.* On public corporations in the late nineteenth century, see generally NOVAK, THE PEOPLE'S WARFARE, *supra* note 58.

261 *Stanwood*, 22 F. Cas. at 1079.

on Fourth Amendment rights.[262] The Supreme Court also proved uninterested in constitutional critiques of the government's tax-surveillance powers, declining to review these cases or engage the Fourth Amendment arguments they involved.[263] Instead, in the courts, the *civil* liberty tradition remained potent. As the judge in Gartrell's suit opined, the tobacco dealers' case was but one of many "in which the right of property must be made subservient to the public welfare."[264]

Congress was not deterred, however. Instead, it turned the Fourth Amendment privacy theories of the 1867 House Committee into binding law.

IV. CONGRESS IMPLEMENTS FOURTH AMENDMENT PRIVACY

In 1874, Judge Blatchford rejected Platt & Boyd's argument that the customs law's search and seizure provision violated the Fourth and Fifth Amendments by allowing federal officers to "invade the privacy of a man's house."[265] The next month, a coalition of Republican reformers and Southern Democrats in Congress came to the opposite conclusion. Their deliberations over the customs law's search and seizure provision demonstrated how customs reform had become ground zero in debates about civil service reform. Those debates, in turn, glued together a bipartisan political coalition that spelled doom for Reconstruction. The Fourth and Fifth Amendments, as well as the privacy Congress

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[262] In searches of all state and federal cases in the Westlaw database between 1868 and 1874, the only case that cited Cooley's treatise regarding the Fourth or Fifth Amendment was *Stockwell*, 23 F. Cas. at 122. *Stockwell* cited the treatise for the colonial era history of general warrants and writs of assistance from which the customs warrant at issue there was distinguished. *Cf.* State v. Ober, 52 N.H. 459, 465–66 (1873) (discussing Cooley's treatise in regard to a state constitution's compelled testimony provision). Cooley's expansive gloss on the Fourth and Fifth Amendments, combined with Novak's argument that he retained many tenets of the *civil* liberty tradition in his treatise, makes him a liminal figure in the shift in emphasis from "civil" to "liberty" in the conception of civil liberty. NOVAK, THE PEOPLE'S WELFARE, *supra* note 58, at 16, 47, 80, 110.

[263] Gartrell petitioned the Court for review of the judge's decision to no avail. *See generally* L.O. Gartrell and O.A. Lochrane, Writ of Error, *In re* Meador, 16 F. Cas. 1294 (N.D. Ga. 1869) (No. 865). The Court accepted review of the customs decision by Justice Clifford, but its opinion late in 1871 ignored the government's arguments about the decision's Fourth Amendment holding. *See generally Stockwell*, 80 U.S. 531; Brief for the United States, Transcript of Record, Stockwell v. United States, 80 U.S. 531 (1871) (No. 77). These arguments, which borrowed heavily from Justice Clifford's opinion, constituted the bulk of the government's brief. The Court may have ignored the warrant issue because it was not raised by the petitioners. *See generally* Brief of Plaintiffs in Error, Transcript of Record, Stockwell v. United States, 80 U.S. 531 (1871) (No. 77).

[264] *In re Meador*, 16 F. Cas. at 1300.

[265] *The Courts: The Law of Seizure*, *supra* note 235, at 5.

deemed them to protect, provided an anodyne bridge between these erstwhile political opponents. In the process of amending the customs laws, Congress interpreted the Fourth Amendment expansively to reach business records, protect against merely pecuniary consequences, and encompass compelled production.

A. Civil Service Reform as Glue for an Anti-Reconstruction Coalition

After 1870, the interests loosely allied against the tax laws took firmer institutional form. Retrenchment and reform of the civil service continued to provide a policy and rhetorical glue to this gathering coalition. Now, however, key players made patent the often previously submerged racial politics attending those issues.

In 1870, reformers began organizing themselves into a breakaway Liberal Republican Party that made ending Reconstruction as central to its agenda as civil service reform. In the South, reformers turned on their fellow Republican-led Reconstruction governments, calling for civil service reform (which Black Southerners understood was intended to keep them from office), an end to Reconstruction, and the re-enfranchisement of all former Confederates.[266] Northern reformers had already adopted Southern Democrats' racist critiques of Reconstruction, making them a case in point for their reform agenda.[267] They complained that, just as with patronage in the North, Reconstruction sidelined the (ex-Confederate) "best-men" from government in the South.[268] They also argued that Radical Republicans' push for universal suffrage in the South would bring to the region the patronage and corruption that they wanted to clean out of Northern cities.[269] These Northern reformers endorsed the Southern Liberal Republicans' platform as a template for what became a national Liberal Republican Party in 1872.[270]

Republicans' 1872 divide over a federal law barring discrimination in public accommodations tightened the ties between civil

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[266] HOOGENBOOM, *supra* note 153, at 83; *see also* SLAP, *supra* note 153, at 1; RICHARDSON, THE DEATH OF RECONSTRUCTION, *supra* note 167, at 90–91. For Southern Black voters' view of civil service reform, see FONER, *supra* note 153, at 507.

[267] FONER, *supra* note 153, at 497–99. *See* BARREYRE, *supra* note 243, at 230.

[268] FONER, *supra* note 153, at 499.

[269] *Id.* at 497–98; RICHARDSON, THE DEATH OF RECONSTRUCTION, *supra* note 167, at 82, 104; HOOGENBOOM, *supra* note 153, at 100.

[270] SLAP, *supra* note 153, at 18, 23–24; FONER, *supra* note 153, at 500; HOOGENBOOM, *supra* note 153, at 100.

service reform, amendment of the customs laws, and the Republican Party's fracturing over Reconstruction. After the Civil War, issues from granting Black male suffrage to outlawing discrimination in public accommodations in D.C. heightened attention in Congress to the public-private divide and business's place across it.[271] Opponents of these measures cast the private sphere broadly, arguing that these rights sought "social equality" and would threaten white citizens in the intimate spheres of business, home, and family life.[272] Proponents endorsed the public-private divide but insisted that the commercial sphere fell squarely on the public side of the line.[273]

Over the postwar years, Republican reformers increasingly marshalled a private conception of business to oppose Radical Republicans' more capacious conception of Black citizens' rights. In 1867, Republicans ultimately united in support of enfranchisement, overcoming a veto by President Johnson.[274] But in 1869, when the D.C. City Council enacted a public accommodations law, some Republicans joined Democrats in critiquing the law.[275] That year, Radical Republican Senators also failed to strip the D.C. Medical Society of its congressional charter for refusing to admit Black members. Debate again turned on whether the Society, which regulated its doctor-members' work relationships, was private or public, with those seeking to strip its charter insisting the

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271 KATE MASUR, AN EXAMPLE FOR ALL THE LAND: EMANCIPATION AND THE STRUGGLE OVER EQUALITY IN WASHINGTON, D.C. 130 (2010) [hereinafter MASUR, AN EXAMPLE FOR ALL THE LAND]. These fissures opened even as the Civil War raged. In 1864, when Congress considered a proposal to bar segregation in Washington, D.C.'s transit system, moderate Republicans balked initially, coming around only after the issue was reframed as a means to eliminate slavery. *Id.* at 102, 106.

272 *Id.* at 127, 136–37, 161. For similar arguments against adding "public rights" to Louisiana's Constitution, see Rebecca J. Scott, *Discerning a Dignitary Offense: The Concept of Equal 'Public Rights' During Reconstruction*, 38 L. & HIST. REV. 519, 538 (2020) [hereinafter Scott, *Discerning a Dignitary Offense*]; and Rebecca J. Scott, *Public Rights, Social Equality, and the Conceptual Roots of the* Plessy *Challenge*, 106 MICH. L. REV. 777, 788 (2008). On the ways opponents used the charge of "social equality" to link these rights to a threat of interracial rape and sexual contact, see Scott, *Discerning a Dignitary Offense*, *supra*, at 524; and Kenneth W. Mack, *Law, Society, Identity, and the Making of the Jim Crow South: Travel and Segregation on Tennessee Railroads, 1875–1905*, 24 L. & SOC. INQ. 377, 395 (1999).

273 MASUR, AN EXAMPLE FOR ALL THE LAND, *supra* note 271, at 130; *see also* Scott, *Discerning a Dignitary Offense*, *supra* note 271, at 524.

274 *See* RICHARDSON, WEST FROM APPOMATTOX, *supra* note 167, at 49–56.

275 MASUR, AN EXAMPLE FOR ALL THE LAND, *supra* note 271, at 161–62 (quoting a critical article from the Republican *Chicago Tribune*).

Society was public and those opposing the move that it was private.[276] By 1872, when Radical Republicans pushed a federal public accommodations bill, Liberal Republicans critiqued it for trenching on the same "man's home is his castle" principle that had informed the Fourth Amendment's adoption. They were "not well satisfied with the idea that a man's house ceases to be his castle whenever" he takes a license and opens it to the public for entertainment, boarding, or inn-keeping.[277] Instead, they urged, he remained "entitled to all the discrimination in regard to his guests that other men have in admitting them into their homes."[278] Radicals conceded that "a man's private domicile is his own castle."[279] But businesses that were creatures of law and "for the benefit of the public good, have no such exclusive right as the citizen may rightfully claim within his home."[280] Republicans' divide over a federal law barring discrimination in public accommodations echoed the debates about the commercial sphere's status as public or private that coursed through customs reform.

While Republican reformers increasingly adopted Democrats' anti-Reconstruction rhetoric, Democrats embraced civil service reform. In some Southern states, Democrats joined forces—and agendas—with Liberal Republicans.[281] Others had simply appropriated the party's reform platform as a seemingly race-neutral way to package their efforts to undo Reconstruction, if not the Civil War itself.[282] Northern Democrats too had traded their overtly racist rhetoric for a more coded one in which the problem with Black officeholders was not their race per se but the fact that they were corrupt.[283]

Rapprochement between Northern Republicans and Southern Democrats had an economic underpinning as well. The Northeast's merchants had profited handsomely from the Southern plantation

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[276] *Id.* at 164–65.

[277] CONG. GLOBE, 42d Cong., 2d Sess. 492 (1872). For the speaker's alliance with Liberal Republicans, see *Senator Hill, of Georgia, Declares for Grant*, N.Y. TIMES, Sept. 16, 1872, at 1.

[278] CONG. GLOBE, 42d Cong., 2d Sess., at 492.

[279] *Id.* at 729.

[280] *Id.*

[281] FONER, *supra* note 153, at 414.

[282] *See id.* at 415; SLAP, *supra* note 153, at 19; BARREYRE, *supra* note 243, at 197, 199–200; RICHARDSON, THE DEATH OF RECONSTRUCTION, *supra* note 167, at 102.

[283] RICHARDSON, THE DEATH OF RECONSTRUCTION, *supra* note 167, at 57–58; FONER, *supra* note 153, at 505–06. Note that in fact, Southern Republicans' state and federal patronage appointments went predominantly to whites and the scant Black-held patronage positions tended to be low-level offices. FONER, *supra* note 153, at 347–49, 357.

economy, making them some of the last in the Republican Party to come around to civil war.[284] After the war, railroads newly knitted the nation's markets together, decentering merchants and the foreign trade from which they profited. With the South's plantation economy in tatters and ever-more Western lands violently cleared of Native peoples, internal markets expanded and industrialization got underway. A new class of Northeastern manufacturers, financiers, and railroad men (including some nimble erstwhile merchants) turned the South's defeat into an engine of extraordinary wealth.[285] In border states that had stayed loyal to the Union, they built ties with the Democrats in charge.[286] Elsewhere, they came to see restoring power to their fellow white elites as the best politics for their economic endeavors.

As a result, by the mid-1870s, civil service reform had become ever more entwined in the politics of reconciliation with the former rebel South. In 1872, the Liberal Republican and Democratic parties selected newspaper editor Horace Greeley as their presidential candidate. Greeley lost miserably to Grant, yet his nomination exemplified the ties not only between reformers and Democrats but also between civil service reform and Reconciliation.[287] Greeley supported amnesty for all former Confederates, described the freedmen as "an easy, worthless race," and painted Reconstruction governments as horribly corrupt.[288] Even after Greeley's trouncing, the Northern reformer press continued to peddle an overtly racist account of South Carolina's government as a hotbed of corrupt Black officeholders who confiscated the property of white elites for their own gain.[289] White reform-

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[284] BECKERT, *supra* note 247, at 111–13 (2001) (describing how most of New York's merchants had favored accommodation and compromise with Southern slaveholders before the Civil War).

[285] *See generally* BARREYRE, *supra* note 243; EDWARD L. AYERS, THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION (1992); Emma Teitelman, *The Properties of Capitalism: Industrial Enclosures in the South and the West after the American Civil War*, 108 J. AM. HIST. 879 (2020).

[286] When customs officials in 1873 accused a leading Northern merchant-turned-investor in the New South's extractive industries of fraud, his strongest defender in Congress was a Kentucky Democrat. *See* 2 CONG. REC. H4033 (daily ed. May 19, 1874).

[287] FONER, *supra* note 153, at 509 (describing the Greeley campaign as "culminat[ing] the process by which opposition to Reconstruction became inextricably linked with the broader crusade for reform and good government").

[288] *Id.* at 503; RICHARDSON, THE DEATH OF RECONSTRUCTION, *supra* note 167, at 95–96; SLAP, *supra* note 153, at 200–01, 220.

[289] FONER, *supra* note 153, at 525–26; RICHARDSON, THE DEATH OF RECONSTRUCTION, *supra* note 167, at 105.

minded Republicans in the South allied with Democrats and alienated Black Republicans as they embraced this politics of retrenchment and civil service reform in state government.[290] Northern Republicans' support for these efforts provided "inconvertible evidence that blacks remained junior partners at the highest echelons of Southern politics, and that Northern support for Reconstruction was on the wane."[291]

Civil service reform fed the fractures in the Republican Party and created new bipartisan coalitions in Congress. Since the Civil War, the Republican Party had internally divided over the scope of Reconstruction between Radicals and moderates but had managed to maintain a united front against Democrats.[292] Civil service reform newly divided the party, with reformers squaring off against what were known as Stalwarts: icy to reformers' proposed changes to the civil service, they vigorously defended patronage.[293] While reformers drew from the party's moderate wing, given their coolness toward Reconstruction, Stalwarts drew in a mix of Radical and moderate Republicans. As a matter of voting record, Republican unity on Reconstruction largely held during the first half of the 1870s. As reformers' increasingly vocal critiques of Reconstruction and the Liberal Republican Party's breakaway demonstrate, however, that unity was imperiled. With Democrats embracing civil service reform to justify ex-Confederates' return to power in the South, civil service reform became a proving ground for a new electoral coalition between Democrats and reformer Republicans.[294] Indeed, the bipartisan embrace of civil service reform was not merely rhetorical. In Congress, civil service reform bills, which had in the past attracted votes almost exclusively from reform Republicans, began drawing substantial Democratic support.[295] In 1872, a Republican not allied with reformers called civil service reform "a trap set by Democrats to wreck the Republican party."[296]

Civil service reform became a proving ground for new types of national political alignments driven by moderating or ending

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290 FONER, *supra* note 153, at 541–44.

291 *Id.* at 544.

292 For the many ways Republicans divided also over fiscal policy after the war, in ways that were wrapped up with their differences about Reconstruction but not wholly reducible to them, see generally BARREYRE, *supra* note 243.

293 HOOGENBOOM, *supra* note 153, at 111–34.

294 *See* BARREYRE, *supra* note 243, at 185, 221.

295 HOOGENBOOM, *supra* note 153, at 107, 109–10.

296 *Id.* at 105.

Reconstruction. Those alliances were not strong enough to translate into policy wins in Congress, however. With a federal civil service law stymied, the Northeast's custom houses became a proxy for those battles and a forge for the nascent bipartisanship buoying them along.

B. The Custom House as Proxy for Civil Service Reform

The New York and Boston Custom Houses might seem a strange place to locate political fights over Reconstruction's fate: they were situated firmly in the Northeast, in states with strong abolitionist traditions, and are viewed if anything as sites for internot intra-national relations. But that is precisely what this Article contends. In part, that is because the parochial and global images of the nation's busiest custom houses elide the economic and political—not to mention communications and transportation—ties ever-more tightly binding the postwar North, South, and West together. But it is also because just as Reconstruction's fate was increasingly debated in the idiom of government reform, debates over retrenching government and reforming the civil service came to focus on the custom house.

By the 1870s, reformers had notched some victories, but their broadest agenda was still out of reach. Their most sweeping wins were limited to cities—New York, Chicago, Philadelphia—where reformers ousted Democratic and Republican political machines.[297] At the federal level, their push for broad civil service reform struggled. They tried repeatedly to get civil service reform through Congress, from comprehensive bills requiring merit-based hiring to bars on the involvement of congressmen in presidential nominations of officers.[298] As of 1874, all they had secured was the 1867 Tenure of Office Act,[299] which restricted President Johnson's ability to remove officers and thus attracted even

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[297] *Id.* at 97; FONER, *supra* note 153, at 490–91, 493. For reformers' prewar civil service reform efforts, see SLAP, *supra* note 153, at 31, 37. For how the reformers who brought down Mayor William "Boss" Tweed and Tammany Hall fit into New York City's politics, see BECKERT, *supra* note 247, at 182–89.

[298] *See* HOOGENBOOM, *supra* note 153, at 31–32, 57. Although the only formal role Congress played in appointments was through the Senate's confirmation of presidential nominees, by the Civil War, members of Congress had gained great influence over presidential nominations, with nominations for some offices turned entirely over to them. *Id.* at 5.

[299] Ch. 154, 14 Stat. 430 (1867).

Radical Republican support.[300] Efforts to reform bits and pieces of the federal civil service had been more successful, however. For instance, in 1870, reformers created the Justice Department to trim and professionalize the federal government's legal corps.[301]

Investigating the New York Custom House (NYCH) was a product of—and would thus serve as a proxy for—the larger battles over civil service reform. After reformers' Justice Department success, they turned their attention to the NYCH. In 1870, a joint House and Senate Committee that had long agitated for civil service reform was charged with investigating the NYCH.[302] The Committee produced a report in 1871 decrying a new warehousing policy it said facilitated fraud and corruption.[303] The Committee used its charges to promote civil service reform. These "chronic evils," the report concluded, "cannot be wholly eradicated until public offices shall cease to be administered in the interests of politics, and men shall be appointed to office on account of their integrity and capacity."[304] That fall, reformist Republicans called for a Senate Committee to continue the work of this recently lapsed joint Committee. Stalwarts thwarted them while feigning support. Instead of the new Committee considering civil service reform as reformers hoped, Stalwarts called for further investigation of the NYCH.[305] Then they stocked the Committee with allies.[306] They hoped that this would be enough of a gesture to keep the

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300 In the Reconstruction period, outside a small cadre of reformers, Republican support for civil service reform grew and shrank depending on how senators and congressmen felt about the man in the White House and the vigor of his pursuit of Reconstruction. *See id.* at 57, 72; SLAP, *supra* note 153, at 42, 92. Reformers had also used an 1871 appropriations rider to secure a presidential commission to promulgate rules for examining civil service applicants, but it had since been killed by the party's Stalwart wing. *See* HOOGENBOOM, *supra* note 153, at 31–32, 86–87.

301 Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121, 123–26 (2014) (arguing that the Department of Justice was created to retrench, not grow, government and to reform the civil service, not enforce Reconstruction laws).

302 The investigation was the result of the Fenton resolution discussed below.

303 S. REP. NO. 41-380, at 5 (1871).

304 *Id.* at 6.

305 CONG. GLOBE, 42d Cong., 2d Sess. 124, 132, 160–61, 172–73, 182–83, 190, 193–94 (1871). One argument made against the resolution was that it would give the Committee permanent powers to require witnesses to produce papers to the Committee in violation of the Fourth Amendment. CONG. GLOBE, 42d Cong., 2d Sess. 167 (1871).

306 CONG. GLOBE, 42d Cong., 2d Sess. 207–09 (1871).

Republican Party from splitting up over reform, yet still block any real change.[307]

The connection between civil service reform and the NYCH had already been primed by Reuben Fenton, New York's reformer Senator and a key player in the breakaway Liberal Republican Party. Fenton had called for investigations of the NYCH during the war years.[308] When he returned to Congress in 1869 after a stint as governor, Fenton again called for investigations of corruption among the NYCH's ranks.[309] He also introduced multiple bills to transform customs agents' pay, appointment, and tenure that echoed civil service reform's provisions and justifications.[310] "[A] genuine and thorough reform in our civil service, and especially in the customs department," Fenton urged, "has become indispensable."[311] It was time for a "purer and nobler system," he argued, under which government workers would "be faithful servants of the Republic and her laws, not suppliant tools of the appointing power."[312]

Reformers, aided by their Democrat allies, capitalized on the investigative committee to tighten the bonds between customs and civil service reform. The Stalwarts had put two Democrats on the committee investigating the NYCH.[313] Intended to be bipartisan and reform-minded window dressing for the Stalwart-dominated committee, the Democrats instead hijacked the NYCH investigation. Indeed, they elicited such damning testimony that the committee's Stalwart majority cut the investigation off

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307 SLAP, *supra* note 153, at 183 (quoting a Republican Senator stating that the Committee saved his Party "from being destroyed"). These efforts were led by the New York senator who controlled patronage at the NYCH.

308 H.R. REP. NO. 38-111, at 11 (referencing a motion by Senator Fenton that led to the Committee's investigation of NYCH).

309 CONG. GLOBE, 41st Cong., 3d Sess. 91 (1870).

310 *See, e.g.*, CONG. GLOBE, 42d Cong., 1st Sess. 71 (1871). His bill replaced "moieties" (that is, giving customs officers a share of the fines and penalties collected in enforcement actions they undertook) in all but limited circumstances in favor of set salaries, put the Secretary of Treasury in charge of most appointments, and protected employees with cause-only removal during fixed terms of service. *Id.* at 70. On the transition from moieties to salaries in the compensation of government service in the second half of the nineteenth century, see generally PARRILLO, *supra* note 81. On terms of service as a method of insulating officials from politics, see generally Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1 (2021).

311 CONG. GLOBE, 42d Cong., 1st Sess. 71 (1871).

312 *Id.*

313 S. REP. NO. 42-227 (1872).

early.[314] The Senate Committee's Democratic members got the last word, however, filing a lengthy minority report cataloguing problems at the NYCH and demanding reform.[315] Meanwhile, leading businessmen rumored to be affiliated with the Liberal Republican Party submitted petitions to Congress from twenty-five states arguing that the customs law's search and seizure provisions were "subversive of private rights, and unworthy of a free country."[316] The reformer press amplified the minority report's findings, decrying what one paper called the NYCH's "Seizure Business."[317]

In 1873, reformers found the scandal that would launch their crusade against the NYCH into the next piecemeal civil service reform, demonstrating along the way the ties between customs law reform and Reconciliation. That January, New York customs officers began an undervaluation fraud action against Phelps, Dodge & Co., a prominent mercantile firm.[318] The firm's leading partner, William E. Dodge, was president of the New York Chamber of Commerce and among the city's "best men," as white elites North and South were known. He personified the shifts that had yoked Reconciliation to reform of the civil and customs service.[319] A merchant turned mercenary of the postwar economy, Dodge profited handsomely from investments in a range of southern extractive industries.[320] Dodge's politics matched his economic interests. He pursued the rapprochement of white elites North and South over their shared interest in retrenchment, reform, and limiting the franchise for Northern working-class and Southern Black voters alike.[321] As a Republican in the House after the Civil War, he broke with his party's plans for Reconstruction. "I hold," he urged his colleagues, "that at the earliest possible day

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314 EDWARD SPENCER, AN OUTLINE OF THE PUBLIC LIFE AND SERVICES OF THOMAS F. BAYARD 151 (1880); *The Seizure Business*, FINANCIER, Feb. 24, 1872, at 155 [hereinafter *Seizure Business*].

315 S. REP. NO. 42-227.

316 CONG. GLOBE, 42d Cong., 2d Sess. 837–38 (1872). The petitions' uniform yellow covers led Stalwarts to insinuate that they were the product of a coordinated national campaign by the Liberal Republican Party.

317 *See, e.g.*, *The Week*, 14 THE NATION, no. 343, 1872, at 50–51; *The Custom House Inquisition*, FINANCIER, Feb. 10, 1872, at 103; *Seizure Business*, *supra* note 314; *The Plunder of Phelps-Dodge & Co.*, 16 THE NATION, no. 416, 1873, at 416 [hereinafter *The Plunder*].

318 *The Alleged Custom-House Fraud of Phelps, Dodge & Co.*, BALT. SUN, Jan. 20, 1873, at 3 [hereinafter *Phelps, Dodge & Co.*].

319 *See generally* Teitelman, *supra* note 285.

320 *See generally id.*

321 BECKERT, *supra* note 247, at 224–28.

there should be a reconciliation . . . between the North and South."[322] Political uncertainty was stymieing investment and commerce, he argued, while business opposed continued federal presence in the South as a "continuation of [wartime] taxation."[323] He had since backed reform in New York, helping to clear out Mayor William M. ("Boss") Tweed's political machine from city hall and supporting a plan to disenfranchise the working class.[324]

Reformers made Dodge's fraud case into a catalyst for the next piecemeal civil service reform. At first, what little press attention Dodge's case drew mildly chastised this well-heeled revenue cheat.[325] Then *The Nation*, whose editor, E.L. Godkin, was a vocal proponent of civil service reform, got its hands on the case, publishing a series of articles over the summer.[326] Each was more indignant than the last, culminating in the melodramatic title "The Plunder of Phelps-Dodge & Co."[327] Next, the government seized the papers of Platt & Boyd, leading to the litigation discussed in Part III and attracting further attention from the reformist press.[328] The Chamber mobilized in response, charging a committee to consider reforms that "will protect the honest importer from the forfeitures and fines which should fall only upon those who are dishonest and unscrupulous."[329] In January 1874, the committee sent resolutions to Congress calling for reform of the customs law's search and seizure provisions as well as revenue reform and an end to moieties (the shares customs officers received from their enforcement actions). The Chamber also tasked a special committee with securing those changes.[330] A

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322 CONG. GLOBE, 39th Cong., 2d Sess. 601, 628 (1867).

323 *Id.* at 628–29.

324 BECKERT, *supra* note 247, at 218–22.

325 *See, e.g.*, *Phelps, Dodge & Co.*, *supra* note 318, at 3.

326 *See, e.g.*, *The Extraordinary Element in the Case of Phelps, Dodge & Co.*, 16 THE NATION, no. 409, 1873, at 297; *The Contributions of the Government to Public Morals*, 16 THE NATION, no. 410, 1873, at 312. On *The Nation* as the "organ" of the reform movement, see MICHAEL LES BENEDICT, PRESERVING THE CONSTITUTION: ESSAYS ON POLITICS AND THE CONSTITUTION IN THE ERA OF RECONSTRUCTION 180 (2006).

327 *The Plunder*, *supra* note 317, at 416. Among other things, the magazine charged that the customs law's search and seizure provisions violated the Fourth Amendment because they amounted to general warrants. *Id.*

328 *Jayne's Last Raid*, N.Y. TRIB., Aug. 16, 1873, at 1. Platt & Boyd also challenged the seizure on Fourth Amendment grounds. *Id.*

329 CHAMBER OF COMMERCE OF THE STATE OF N.Y., SIXTEENTH ANNUAL REPORT OF THE CHAMBER OF COMMERCE OF THE STATE OF NEW YORK FOR THE YEAR 1873–'74, at 10 (New York, John W. Amerman 1874) [hereinafter CHAMBER OF COM., SIXTEENTH ANNUAL REPORT].

330 *Id.* at 106–07.

fraud action against a leading Boston firm sparked similar action from the Boston Board of Trade.[331] The New York Chamber and Boston Board, whose cities' merchants paid the lion's share of customs tariffs, gathered a coalition of merchant organizations from across the country to press Congress to act.[332]

Throughout, customs law reform was entangled with civil service reform and the politics of Reconciliation. Those ties were most obvious for the Democrats supporting custom house reform. The Democrats who hijacked the NYCH investigation and authored the 1872 minority report exemplified these ties. One was a border-state Democrat who supported civil service reform and opposed the Reconstruction Amendments.[333] The other had urged his home state of California to reject the Fifteenth Amendment lest it "elevate the Chinese and negro races, and amalgamate them with the white race."[334]

Republican reformers, however, also critiqued the customs service and Reconstruction governments in the same terms. For instance, the same papers that decried the 1873 customs enforcement actions against New York City merchants as corrupt and tyrannical were simultaneously peddling an overtly racist account of South Carolina's government. Echoing the accusations against customs officials, a sensational series painted the state as a hotbed of corrupt Black officeholders who confiscated the property of white elites for their own gain.[335] They also backed the most draconian efforts to retrench and reform local governments in the North, which they depicted as corrupted by the working-class vote.[336] Indeed, in 1873 and '74, fed in part by an economic

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331 *The Boston Frauds*, N.Y. HERALD, Jan. 6, 1874, at 3.

332 About three-fourths of the nation's customs revenue was collected in New York in this period, and about seven-eighths of it came from the New York and Boston custom houses. 2 CONG. REC. 4049–50 (May 19, 1874) (statement of Rep. Henry Dawes) [hereinafter Statement of Rep. Dawes].

333 42 CONG. GLOBE 159–60 (1871) (statement of Sen. Charles Sumner) (describing Delaware Sen. Thomas F. Bayard as a supporter of civil service reform); *The National Democratic Convention*, BALT. SUN, July 11, 1872, at 1 (reproducing Bayard's speech opposing the Democratic Party's adoption of the Liberal Republican Party's platform because it endorsed the Reconstruction Amendments whose adoption the Democratic Party opposed).

334 *The Week*, 8 THE NATION, no. 208, 1869, at 486. Notably, *The Nation*, itself a mouthpiece for reformers, challenged the Senator's depiction of Chinese workers (whose exclusion from the U.S. Republicans opposed) but not his use of Black and white racial mixing to oppose the Fifteenth Amendment. *Id.*

335 FONER, *supra* note 153, at 526–27; RICHARDSON, THE DEATH OF RECONSTRUCTION, *supra* note 167, at 105.

336 BECKERT, *supra* note 247, at 218–19.

depression, white voters called ever-more urgently for retrenchment and an end to corruption.[337] Their cries were also coincident with an increase in Black officeholding in the South and linked to complaints that those officials adopted government programs that "primarily benefited corporations and [B]lack[ ]" Southerners.[338] The New York Chamber of Commerce, like Dodge, had worked to secure a quick détente with the South and end to Reconstruction after the Civil War.[339] The Chamber's elite members, also like Dodge, linked "the problems of political rule in the North" with Reconstruction, as they "worked feverishly for a reorientation of the [Republican] party away from radicalism."[340]

By 1874, the customs house had become a proxy for battles over civil service reform, which were, in turn, embedded in the increasingly bipartisan push to end Reconstruction, restore Southern white elites to power, and reconcile North and South. When this Reconciliationist political stew caused Congress to at last target the customs house for the next piecemeal civil service reform, privacy and the Fourth Amendment justified its actions.

C. Customs Reform and the Recognition of Fourth Amendment Privacy

In the proxy battle over the custom house, reformers increasingly insisted that customs agents' search and seizure powers violated the Fourth and Fifth Amendment. In doing so, they pushed the doctrinal innovations made by the 1867 House Committee but rejected by the federal courts and emphasized the privacy of business as well as home. In Congress, their arguments finally prevailed, leading to major reform—and nearly the elimination—of the customs law's search and seizure provisions. Throughout, the bipartisan push for Fourth Amendment privacy was an early testing ground for the political settlement that would come to be known as Reconciliation.

Following the House Committee's 1867 report, reformers broadened and sharpened their claim that the federal government posed a threat to businessmen's privacy and to the Constitution's Fourth Amendment, but they did not directly link the two. Cries echoed from the reformer press to Congress that

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337 FONER, *supra* note 153, at 539, 548.

338 *Id.* at 548.

339 BECKERT, *supra* note 247, at 159–60.

340 *Id.* at 224–25.

the revenue laws were eroding the "privacy of every home and counting-room."[341] Businessmen and reformers in Congress also insisted that not only the 1863 search and seizure provision, but also its 1867 replacement, were "in plain violation of the letter and spirit of" the Fourth Amendment.[342] Senate Democrats' minority report on the NYCH inadvertently emphasized the novelty of this claim. Misquoting the Fourth Amendment, the report stated that it protected "person, houses, *business*, and effects."[343] The press then amplified these claims, insisting that "the framers of the constitution intended no such seizures as these."[344] These Fourth Amendment and privacy arguments were replete with references to "rack and thumbscrew" methods, "private" affairs, "confidential" records, business "secrets," and "espionage."[345] In the years following the 1867 House report, the Fourth Amendment, the Founding Era concerns that animated it, and an abstract concept of privacy thus hovered close together conceptually.

A bipartisan coalition of reformers in Congress were the ones to again conjoin the concept of privacy and the Fourth (and Fifth) Amendment in 1874, this time to law-changing effect. The reformer-dominated House Ways and Means Committee outmaneuvered Stalwarts to gain control of reforming the customs law's 1867 search and seizure provision that spring. The Republican reformer who introduced the resulting bill opened debate by

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341 *A Tax on Corporation Dividends*, PHIL. INQ., Mar. 3, 1870, at 4 (arguing that the federal income tax relied on "a system of espionage upon the privacy of every home and counting-room" for enforcement); *see also The Press and the Rich Men*, 6 THE NATION, no. 149, 1868, at 367 (arguing that the revenue laws had diminished "the old respect for privacy . . . by making the exposure of [private affairs] seem a kind of patriotic duty"); *Our Method of Collecting Taxes*, MERCHANTS' MAG. & COMM. REV., Mar. 1, 1868, at 181 (contending that the U.S. public submitted to tax gatherers' "seizures, confiscations and exactions as passively as if we had no rights of property and of privacy which even the law is bound to respect"). Other issues that drew cries of privacy invasion during this period included the compelled production of telegrams to the House committee conducting the impeachment investigation of President Johnson and the press's inquiries into businessmen's books and papers after the financial crisis of 1873. *The Press and the Present Crisis*, 17 THE NATION, no. 436, 1873, at 300; *The Recent Seizure of Telegrams at Washington*, 4 THE TELEGRAPHER, no. 99, June 6, 1868, at 336.

342 S. REP. NO. 42-227, at C (minority report); *see also* CHAMBER OF COM., SIXTEENTH ANNUAL REPORT, *supra* note 325, at 115–16; H.R. MISC. DOC. NO. 43-264, at 15–16 (statement of Henry D. Hyde).

343 S. REP. NO. 42-227, at C (emphasis added).

344 *Seizure Business*, *supra* note 314, at 155. *Accord The Week*, 14 THE NATION, no. 343, 1872, at 50; *The Plunder*, *supra* note 317, at 417; *see also The Custom House Inquisition*, *supra* note 314, at 103 (arguing the customs law violated the Fifth Amendment).

345 *See supra* notes 341–44.

charging that the 1867 law unconstitutionally gave federal officers "free range in all the privacy of home or business."[346] His charge set off days of debate in the House and Senate over whether to keep the 1867 provision (pursued by only the most Stalwart), replace it with judicial authority to compel production of documents (what a majority of the Ways and Means Committee preferred), or eliminate the government's access to books and papers entirely (sought by the reformer who introduced the bill). The Fourth and Fifth Amendment, as well as concerns about private affairs, secrets, ransacked drawers, confidences, espionage, and the like, played a decisive role, leading to repeal of the 1867 provision and moderating its replacement.[347] For the first time, then, those Amendments and the array of Founding Era concerns we today associate with privacy (referred to below as "Founding Era concerns" for brevity's sake) were linked up by historical actors to the abstract concept of privacy, and with legal consequence.

In repealing and replacing the 1867 provision, Congress acted on interpretations of the Fourth and Fifth Amendments that courts had thus far rejected—and did so in ways that linked them and a litany of Founding Era concerns to an abstract concept of privacy. Arguments that those Amendments applied to commercial, not merely domestic, realms and to business, not only personal, papers flushed out the Republican reformers' opening concern about "the privacy of home or business."[348] Some members of Congress followed the 1867 House report in eliding the difference between office and home and between business and personal records. They relied on claims about personal papers and

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346 2 CONG. REC. 4001, 4028–29 (1874) (statement of Rep. Ellis H. Roberts) [hereinafter Rep. Roberts Statement]. Roberts was also leading retrenchment efforts that spring. *See, e.g.*, 2 CONG. REC. 1911–18 (1874) [hereinafter Rep. Roberts Speech]. Roberts's constitutional argument was a bit cryptic. On the one hand, he said that the Committee did "not approach the question of the constitutionality of the statutes." Rep. Roberts Statement, *supra*, at 4029. On the other hand, he proceeded to explain why the statute exceeded whatever "right of seizure of books and papers exists" and warn that the "liberties of every citizen" were "potentially invaded" by the law. *Id.* at 4029–30.

347 In the House, the reformers who called for full repeal won out. 2 CONG. REC. 4001, 4028–52 (1874). The Senate initially rejected proposals to add the replacement back. *See, e.g.*, 2 CONG. REC. 4685 (1874). In the last minutes of debate, the replacement was amended to address some of the full-repeal contingent's concerns, creating a sufficient consensus to replace the 1867 provision with a modified compelled production replacement. 2 CONG. REC. 4828 (1874). The House conceded disgruntledly, and the replacement became law. 2 CONG. REC. 5132–38, 5167–68 (1874); Act of June 22, 1874, ch. 391, 18 Stat. 186.

348 Rep. Roberts Statement, *supra* note 346, at 4029; *see also supra* note 346 and accompanying text.

domestic spaces to argue against the government's power to search for *any* books and papers *anywhere*. One Northeastern Republican reformer insisted that the 1860s customs provisions were unconstitutional and violated "the sense of every man in the community of personal right, of his secrets, [and] of his home."[349] Another noted merchants' views that the 1867 provision exposed them "in their private and confidential papers and in the sacredness of their own homes to invasion by Government officers."[350] In these arguments, the "privacy of home" was used to damn all search powers.[351]

Others in Congress followed the lead of the 1872 minority report and treated searches of homes or businesses and commercial or personal papers as equally violating the privacy protected by the Fourth Amendment. In doing so, speakers echoed Founding Era concerns to describe those privacy violations. The Republican reformer's opening charge in the House, for instance, did precisely that. He damned the 1867 provision as violating the "privacy of home or business" because it allowed government officers to "strip naked all the confidences of commerce and of life," and to "access the inmost recesses of safe and ledger."[352] A border-state House Democrat urging repeal likewise spread a privacy cloak over a merchant's business records, regardless of where they were found. In doing so, he used the language of Founding Era concerns. Customs searches, he charged, resulted in "dragging [merchants'] most sacred and confidential papers into court."[353] He also insisted that the Founders added the Fourth Amendment to ensure, without distinction as to subject or location, that their "private books and papers, which of right belonged to them, and were

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[349] 2 CONG. REC. 4042 (1874) (statement of Rep. Fernando Wood).

[350] Statement of Rep. Dawes, *supra* note 332, at 4049–51.

[351] For contemporaneous arguments that the inevitable intermixing of business and private papers, wherever located, made the 1860s provisions violate the Fourth Amendment, see H.R. MISC. DOC. NO. 43-264, at 69 (statement of S.B. Eaton) (arguing that the provisions were unconstitutional because they "subject houses and stores to search, and books and papers, with every vestige of correspondence, whether it may be of a business or a private nature, to seizure and removal"); *Illustrations of the Seizure Business*, FINANCIER, Feb. 28, 1874, at 129 (arguing that the 1867 provision violated the Fourth Amendment because detectives "make a clean sweep of everything they choose, not sparing even private letter-books and papers").

[352] Rep. Roberts Statement, *supra* note 346, at 4029.

[353] 2 CONG. REC. 4033 (1874) (statement of Rep. James Beck) [hereinafter Rep. Beck Statement]. Note, however, that customs agents never executed their search warrant in the Phelps-Dodge case because the firm voluntarily opened its books to the government.

used only to perpetuate their own thoughts and protect their private interest, could [not] be taken on any pretext whatever."[354] "Better burn your custom-houses," he concluded dramatically, "than violate the time-honored inalienable rights of the citizens of the Republic."[355]

Conversely, Stalwart supporters of the 1867 law rejected the privacy cloak being thrown around merchants' books and papers. "[T]he distinction between the private books and papers, and the books and papers of the merchant referring to his transactions with the United States Government," a Treasury agent told the House Ways and Means Committee, "is as distinct as daylight and darkness."[356] He explained that "books and papers relating to importations, to which the Government is a party, are not private" and collectors had, "from time immemorial," the right to issue warrants for them.[357] The Republican Senator who controlled patronage at the NYCH also insisted that it was concerns about the government's surveillance powers that were new, not the powers themselves.[358] "I am too old-fashioned to go into . . . the hysterics of virtuous indignation by which I see other people moved," he explained, "by the idea that a man whose person is liable to arrest . . . is liable for the same crime to have a court or an officer look at his business books."[359] Indeed, he "doubt[ed] neither the power nor the propriety" of Congress authorizing such investigations.[360]

The border-state Democrat in the House also extended the Fourth Amendment to compelled production, using Founding Era concerns and thus the "privacy of home or business" with which they were now linked.[361] The 1867 provision had allowed search warrants in cases of suspected fraud.[362] The replacement applied

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354 *Id.* at 4036.

355 *Id.*

356 H.R. MISC. DOC. NO. 43-264, at 7 (statement of B.G. Jayne).

357 *Id.*

358 2 CONG. REC. 4817 (1874) (statement of Sen. Roscoe Conkling).

359 *Id.*

360 *Id.*

361 Since 1867, some members of Congress had argued that compelled production violated the Fourth Amendment, but those arguments were never adopted into law. *See* CONG. GLOBE, 40th Cong., 2d Sess. 2753 (1868) (rejecting a resolution stating that the Fourth Amendment prohibited Congress from compelling witnesses to produce "their personal and private papers," including telegrams); CONG. GLOBE, 42d Cong., 2d Sess. 167 (1871) (statement of Sen. Frederick Frelinghuysen) (opposing a resolution charging a committee with investigating the need for civil service reform on grounds that it would empower the committee to compel witnesses to produce papers in violation of the Fourth Amendment).

362 Act of Mar. 2, 1867, ch. 188, § 2, 14 Stat. 546, 547.

only to already filed fraud proceedings and suits. In those cases, it authorized district attorneys to move for, and a federal judge to order, that a merchant produce to the judge his books and papers related to the alleged fraud. If a merchant refused, the allegations in the district attorney's motion could be "taken as confessed."[363] Having declared that he saw "no difference in principle" between the 1867 provision and its replacement, the Representative from Kentucky extended his Fourth Amendment critique from the former to the latter.[364] In explaining his objection to the replacement provision, he contended that producing books to the court would not stop them from being "ransacked by all the spies, informers, and retainers of the court or the Government."[365]

Arguments that the proposed replacement violated the Fifth Amendment also invoked Founding Era concerns, bundling them within the "privacy of home and business."[366] The 1867 House Committee had broken this path when it argued that the Fifth Amendment protected people against searches of their books and papers and decried those searches as intruding on merchants' "privacies."[367] In 1874, proponents of repeal also invoked the Fifth Amendment.[368] But it came especially to the fore in debates over the 1867 provision's proposed replacement. Reformist Republicans and Democrats argued that the Fifth Amendment privilege covered the replacement's compelled production of books and papers, not only verbal testimony.[369] In doing so, they linked the Fifth Amendment with Founding Era concerns associated with the Fourth Amendment—and now privacy. A border-state Democratic Senator argued that the replacement provision violated the "sacred" principle "that a man shall not be compelled to bear testimony against himself, and that . . . his private writings[ ] shall not be turned into engines for his spoliation and

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363 Rep. Beck Statement, *supra* note 353, at 4026.

364 *Id.* at 4033, 4035 (stating that the "amendments to the Federal Constitution were plainly aimed against" the 1860s provisions and that the replacement provision is "open to all the objections which I have to the present law authorizing seizures").

365 *Id.* at 4035.

366 Rep. Roberts Statement, *supra* note 346, at 4029.

367 H.R. REP. NO. 39-30, at 17. Witt, *supra* note 191, at 898.

368 *See, e.g.*, 2 CONG. REC. 4047 (1874) (statement of Rep. William Niblack) (arguing that the 1867 provision was unconstitutional because it compelled merchants "to provide testimony for their own conviction"). Read in context, this also seems to have been Representative Beck's meaning when he referred to the 1860s provisions violating plural amendments to the Constitution. *See supra* note 353.

369 Rep. Beck Statement, *supra* note 353, at 4035; Statement of Rep. Dawes, *supra* note 332, at 4051; 2 CONG. REC. 4681 (1874) (statement of Sen. Thomas Bayard).

destruction."[370] But he was willing to accept the replacement if it was amended to ensure that "the books of a merchant which are to be ordered into court are not to be opened and ransacked, and examined as to all other items."[371]

Other arguments indirectly related to repeal proponents' overarching concern with "the privacy of home or business."[372] For instance, those making the constitutional case for repeal in the House and Senate insisted that the 1860s search and seizure provisions were unprecedented.[373] Members of Congress also asserted or assumed both amendments applied when mere property loss (as opposed to criminal exposure) was involved.[374] Neither claim directly involved privacy; specific types of private, secret, or confidential items; or surveillance practices that illegitimately intruded upon them. But they were made by speakers who also argued that the Fourth and Fifth Amendments guarded these items against such practices. Their claims about precedent and noncriminal reach thus became part of the legal architecture defining the "privacy of home or business."

The ties between customs law reform and Reconciliation politics peeked out from what would otherwise seem to be a debate far removed from Reconstruction and its demise. Two border-state Democrats made the strongest constitutional case against the 1867 provision and its replacement. One gave a sectional twist to his constitutional argument. He insisted that search and seizure powers were only ever added to the customs laws due to the

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370 *Id.* at 4680. While he did not cite Thomas Cooley, this argument was similar to one Cooley made in a footnote of his treatise. *See supra* note 230.

371 2 CONG. REC. 4828 (1874) (statement of Sen. Thomas Bayard). Elsewhere he described his desired amendments as preventing "a fishing excursion into the books generally" and protecting from hostile parties "rummag[ing] through" a merchant's books and papers. *Id.* at 4848; *see also* Rep. Beck Statement, *supra* note 353, at 4035 (arguing that books produced under compulsion could still be "ransacked by all the spies, informers, and retainers of the court or the Government, and the discoveries . . . made the basis for other suits and proceedings").

372 Rep. Roberts Statement, *supra* note 346, at 4029.

373 2 CONG. REC. 4033, 4047, 4936 (1874) (statements of Reps. James Beck and William Niblack); 2 CONG. REC. 4679, 4683 (1874) (statement of Sen. Thomas Bayard).

374 *See, e.g.*, Rep. Beck Statement, *supra* note 353, at 4035; Rep. Dawes Statement, *supra* note 332, at 4051. Interestingly, the congressmen made this claim despite otherwise relying on the testimony of the New York Chamber's lawyer. That lawyer had instead testified that only the common law version of the privilege, but not the state constitutional one, reached beyond criminal exposure to protect a witness from testimony that would expose him to fines, forfeitures, and penalties. H.R. MISC. DOC. NO. 43-264, at 71 (statement of S.B. Eaton) (citing Livingston v. Harris, 3 Paige Ch. 528, 534 (N.Y. Ch. 1831)).

heat of war, "when constitutional rights and congressional limitations were too often disregarded" and the "eleven [seceded] States were unrepresented."[375] The other was the coauthor of the 1872 minority report on the NYCH and a strident opponent of Reconstruction.[376]

While it is harder to pin a constitutional reason on congressional, as opposed to judicial, decisions, the links members of Congress drew between the Fourth Amendment, Founding Era concerns, and an abstract concept of privacy were consequential. Most concretely, in the House, the entire debate was framed by the argument that the 1867 provision and its replacement violated a constitutionally protected "privacy of home or business," raising a host of Founding Era concerns.[377] Those concerns were also evoked by the Representatives who spoke with greatest force and at greatest length on the House floor in favor of repealing the 1867 provision and against its replacement.[378] Further, that was the position the House ultimately took.[379] On the first day of debate in the Senate, the most extensive case against adding the replacement section back was made by an author of the 1872 minority report. He contended there that the 1867 provision violated the Fourth Amendment; referencing that report, he now invoked similar Founding Era concerns to argue that the replacement provision violated a fused version of the Fourth and Fifth Amendments.[380] The replacement was then rejected in a close vote.[381] And when the replacement provision was ultimately adopted on the last day of debate, it was after it was amended to address that critic's privacy-tinged Fourth and Fifth Amendment grounds for concern.[382]

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375 Rep. Beck Statement, *supra* note 353, at 4033, 4035.

376 *See supra* note 333.

377 *See supra* note 346 and accompanying text.

378 2 CONG. REC. 4034, 4048–51 (May 19, 1874) (statements of Reps. James Beck and Henry Dawes).

379 2 CONG. REC. 4052 (1874) (voting to cut the replacement provision from the bill). Before cutting the replacement provision, the House amended it in a way that responded to the bill's sharpest constitutional critic's strongest concern about the replacement's constitutionality. 2 CONG. REC. 4035, 4048, 4051–52 (1874) (statements of Reps. James Beck, Luke Poland, and Henry Dawes).

380 2 CONG. REC. 4679–80 (1874) (statement of Sen. Thomas Bayard).

381 2 CONG. REC. 4685 (1874) (voting twenty-one to twenty-six to reject an amendment that would have added a replacement provision back to the bill).

382 2 CONG. REC. 4828–29 (1874) (statement of Sen. Thomas Bayard).

More abstractly, Fourth Amendment privacy provided a new plastic legal and political idiom that helped pave the road to Reconciliation.

D. Fourth Amendment Privacy and the Politics of Reconciliation

Fourth Amendment privacy, and the customs reform of which it was a part, participated in and was born of a rising politics of Reconciliation. During the three years following the customs battle, partisan politics realigned. Republicans backed steadily away from Reconstruction even as Democrats violently retook Southern state governments and made inroads in Congress. By 1877, both parties had reoriented around Reconciliation and reform, in a political settlement that mirrored the settlement reached over customs reform a few years earlier.

Fourth Amendment privacy and the search and seizure amendment it shaped helped usher in a new bipartisan politics. In the Senate, after the Fourth- and Fifth-Amendment-sculpted replacement provision was added back by voice vote, the customs reform bill passed by an overwhelming and bipartisan thirty-nine to three.[383] In the House, Fourth Amendment privacy proved a helpful bridge between reformist Republicans and Democrats working to liberate the South from Reconstruction. Drawing from a wellspring of colonial and Founding history allowed representatives to skip over their more recent bloody divide, much the way decrying corruption and patronage had bound their movements together. By running that history through a new-fangled understanding of the commercial sphere as unqualifiedly private rather than fundamentally public, both houses also codified what was becoming a central economic precept: a sharpened distinction between public and private spheres. And when Congress interpreted the Constitution as an external limit on its authority to regulate that private realm, it adopted the civil *liberty* approach thus far rejected by the courts.[384] Congress's efforts therefore not only produced a victory for civil service reformers who were striking out otherwise but also helped forge the political economy of Reconciliation.[385]

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383 2 CONG. REC. 4829 (1874).

384 *See supra* Part III.A (describing the dueling approaches to civil liberties).

385 HOOGENBOOM, *supra* note 153, at 130–31; PARRILLO, *supra* note 81, at 252.

As bipartisan support for reform waxed, Republicans' commitment to Reconstruction waned dramatically. A Northern press that had previously depicted freedmen as "upstanding citizens harassed by violent opponents" now circulated "vicious caricatures presenting them as little more than unbridled animals."[386] Aging abolitionists and the Radical Republicanism they fed exited the scene.[387] In 1874, President Grant supported a former slaveholding Republican in Arkansas who helped deliver the state to Democrats.[388] Conversely, when he sent federal troops to protect the Republican government in Louisiana, white Northerners protested even in the former abolitionist stronghold of Boston.[389] Likening the violent White Leaguers threatening the Louisiana Republicans to the Founding Fathers, white Northerners "convinced Grant of the political dangers posed by a close identification with Reconstruction."[390] Even Southern white Republicans abandoned Reconstruction, instead taking up "their opponents' cry of retrenchment and reform" in a bid to attract waning white support for the party.[391]

The Civil Rights Act of 1875[392] exemplified Republicans' retreat from Reconstruction. The Act was the dying wish of Charles Sumner, the leader of the Republican Party's Radical wing.[393] For years, he had tried unsuccessfully to enact a law to prohibit discrimination in public accommodations. His Senate colleagues passed a pared down version after his death in the spring of 1874, but the measure was so divisive within the Party that the House postponed a vote until after the 1874 elections.[394] The Democrats, who ran against the civil rights bill, won control of the House and several Southern state governments while diminishing the Republican majority in the Senate, further cooling Republican appetite for Reconstruction.[395] House Republicans took up a further trimmed-back version of the bill in the lame-duck session as part of a last-gasp package to shore up federal enforcement of

386 FONER, *supra* note 153, at 527.
387 *Id.* at 527–28.
388 *Id.* at 528.
389 *Id.* at 554.
390 *Id.* at 555.
391 FONER, *supra* note 153, at 541–44.
392 Ch. 114, 18 Stat. 335 (1875).
393 FONER, *supra* note 153, at 533.
394 *Id.* at 533–34.
395 Democrats used the pending civil rights bill to retake Alabama's state government, their first success in a state with a sizable Black electorate. *Id.* at 552–53.

Reconstruction.[396] Opposition by Democrats and moderate reformer Republicans killed the military enforcement efforts and ensured that the Civil Rights Act, though it made it through, had a limited scope and little practical effect.[397] Notably, eleven Republicans in the House and seven in the Senate voted against the bill, including representatives of Northern states and leaders of the breakaway Liberal Republican Party.[398] By narrowing the subset of businesses deemed "public," moderate Republicans ensured that the Act bolstered the private status of the remaining commercial realm. The lame-duck session also demonstrated that "Congressional Republicans had little stomach for further intervention in Southern affairs."[399]

As Republicans retreated from Reconstruction, they built a new politics around the reconciliation of white people across the North and South. In the South, white voters united to deliver one state after another to Democrats, often through the violent suppression of Black voters.[400] This time around, President Grant did nothing, observing that the (white) public was tired of Black voters' calls for protection.[401] In the North, Republican Rutherford Hayes personified his party's new politics, winning the Ohio governorship by combining a reformist fiscal agenda with a "let alone policy" for the South.[402] Meanwhile, the former Radical strongholds of New York and Boston welcomed a Confederate military unit and memorialized the Civil War's fallen as equal in valor and righteousness.[403]

By 1876, both parties' presidential candidates personified Reconciliation politics: they were reformers who promised an end

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396 *Id.* at 555.

397 *Id.* at 555–56. Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1385 (1996) (explaining that lower federal courts interpreted the federal public accommodations law to allow segregation).

398 *See* Alfred Avins, *The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations*, 66 COLUM. L. REV. 873, 911–12 (1966). A Representative from New Jersey and Senators from Connecticut, Missouri, Rhode Island, Wisconsin, and Nebraska voted against the bill. *Id.* Of them, Senators Sprague (Rhode Island), Schurz (Missouri), and Tipton (Nebraska) had joined the Liberal Republican Party. *Id.* at 912 n.219. The New Jersey representative was William Walter Phelps, scion of William Dodge's Phelps-Dodge Co. *Id.* at 910.

399 FONER, *supra* note 153, at 556.

400 *Id.* at 548–53, 558–59, 561–62.

401 *Id.* at 560.

402 *Id.* at 557–58.

403 *Id.* at 525; DAVID BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY 86 (2001).

to Reconstruction.[404] The 1876 election produced no clear winner, but Black Southerners were the unquestionable losers—all the more so when Congress averted a crisis by giving Hayes the presidency in exchange for an end to federal Reconstruction.[405] The following Memorial Day, fifty thousand New Yorkers celebrated the Civil War's Union *and* Confederate soldiers.[406] A more select crowd then gathered to hear a former Confederate Congressman turned New York lawyer lay a new plank in the Reconciliation project. White Northerners should not only mourn the war's Confederate fallen, he argued, but also repudiate Reconstruction as a period of "alien rule and federal domination" that was, at last, "fallen like Lucifer . . . by the thunderbolt of the people's wrath."[407]

The bipartisan embrace of Fourth Amendment privacy that buoyed customs reform partook in and was produced by a new politics of Reconciliation. Sharp inter- and intra-party disagreements over Reconstruction were replaced by increasingly consensual support for a reformist agenda itself linked to an ever-more bipartisan critique of Reconstruction. That same politics tamed the dying gasp of Republican Reconstruction—the Civil Rights Act of 1875. It also ushered in a new political order in which white voters would fight their partisan battles over fiscal policy, leaving Southern Black voters to battle violent disenfranchisement on their own.

V. *BOYD*'S RECONCILIATION ROOTS

The Supreme Court's landmark 1886 decision in *Boyd v. United States* codified the doctrinal innovations first adopted by Congress in its 1874 customs reform. The decision adopted constitutional interpretations and a Fourth Amendment privacy that were products of white Americans' turn away from Reconstruction and toward Reconciliation. Indeed, the decision and its author are themselves best understood as products of that political turn.

With the nation set on the course of Reconciliation, civil service reform was delinked from Reconstruction, becoming the subject of ordinary partisan horse trading. In 1883, Congress enacted

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404 FONER, *supra* note 153, at 566–69.

405 *Id.* at 580–81. For the argument that Reconstruction's promise survived another fifteen years in some Southern states, see generally GLENDA GILMORE, GENDER AND JIM CROW: WOMEN AND THE POLITICS OF WHITE SUPREMACY IN NORTH CAROLINA, 1896–1920 (1996).

406 BLIGHT, *supra* note 403, at 87–88.

407 *Id.* at 91.

a comprehensive reform that created a merit-based, competitive federal civil service.[408] While the final law was only "weak[ly] bipartisan," carried mostly by Republican votes, it resulted from efforts by both parties.[409] This time, however, the bipartisan support and ultimate compromise was born of pure partisan interests, not an alliance that stood in for resistance to Reconstruction.[410]

The dominance of Reconciliation politics also meant that when the pendulum of accusation at the New York Custom House swung back toward fraudulent merchants, it did not stir the high politics of the Reconstruction Era debates. In December 1883, the Treasury Secretary reported widespread undervaluation frauds occurring primarily at NYCH. The *New York Herald*, erstwhile defender of New York's merchants against the moiety-grubbing customs officers, reported that the Secretary had "sustain[ed] every allegation made in the" report.[411] In spring 1884, the same House Committee that introduced the customs reform bill ten years earlier considered a bill that would reintroduce moieties, expand the range of undervaluations subject to fraud enforcement, and make fraud easier to prove. The New York Chamber of Commerce responded indignantly that most of the allegedly widespread fraud was unintentional and resulted from the tariff laws keying duties to market valuations in the first place.[412] The emerging politics of Reconciliation that helped the Chamber win the 1874 amendments were now secure, however, and their call for ditching valuations altogether went nowhere.

E.A. Boyd & Sons, the successor firm to Platt & Boyd, found itself caught up in this undervaluation fraud crackdown. Between December 1883 and the summer of 1885, the government filed over a dozen actions against the company's partners in the New York federal court. Most were for small amounts of unpaid duties,

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408 STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 47 (1982).

409 *Id.* at 67.

410 *See id.* at 66–67.

411 L.G. Martin, *Undervaluations: Frauds That Make Terribly Against the Honest Importer*, N.Y. HERALD, Dec. 22, 1883.

412 Interestingly, after some internal dispute, the Chamber chose not to oppose the bill's reintroduction of moieties. CHAMBER OF COMMERCE OF THE STATE OF N.Y., TWENTY-SEVENTH ANNUAL REPORT OF THE CORPORATION OF THE CHAMBER OF COMMERCE OF THE STATE OF NEW YORK FOR THE YEAR 1884–'85, at xviii–xix (New York, 1885).

but some were for more substantial funds.[413] One, filed in the summer of 1884 over the allegedly fraudulent unpaid duties on $25,000 worth of plate glass, would be the basis of the Supreme Court's 1886 decision in *Boyd v. United States*.[414]

In an opinion penned by Justice Joseph P. Bradley, the Court relied on the very Fourth and Fifth Amendment arguments Southern Democrats and Republican reformers used to sculpt the 1874 replacement provision, albeit now to strike it down. Like Congress in 1874, Justice Bradley put privacy at the heart of the Fourth Amendment. Also like Congress, he elided the difference between business and personal papers, promising that his decision protected against "all invasions on the part of the government . . . of the sanctity of a man's home and the privacies of life."[415] As contended in those debates, he found that the "compulsory production of a man's private papers" (here a business invoice) was an unreasonable search and seizure, as unprecedented in the Anglo-American legal tradition as the 1860s provisions it replaced.[416] Echoing congressional critics of the replacement provision in 1874, Justice Bradley found no meaningful difference between it and the general warrants and writs of assistance the Fourth Amendment was meant to bar.[417] Like Senators before him, Justice Bradley relied on a syncretic and privacy-laden reading of the Fourth and Fifth Amendments.[418] He also followed their approach of finding that the Fourth and Fifth Amendments applied not only to criminal actions, but also to those that would result in fines, penalties, and forfeitures.[419] It took nearly twenty years, but the Supreme Court finally adopted a conception of Fourth Amendment privacy that the civil service reformers and

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413 *Compare* U.S. DIST. CT. LAW VOL. III DOCKET BOOK, 1883–86, 1891, at 325 (1894) (available at Law Dockets, Box 661, RG 21, Records of the District Courts of the United States, U.S. District Court for the Southern District of New York, NARA, NYC) (filing action, *United States v. E.A. Boyd & Sons* on December 7, 1883, worth under twenty dollars), *with id.* at 333 (filing a different action, *United States v. E.A. Boyd & Sons* on April 2, 1884, worth about three hundred dollars).

414 *Id.* at 335 (noting *United States v. Edward A. Boyd* from July 26, 1884); *id.* at 343 (noting *United States v. Edward A. Boyd* from December 11, 1884).

415 *Boyd*, 116 U.S. at 630.

416 *Id.* at 622.

417 *Id.* at 624–30.

418 *Id.* at 633–34.

419 *Id.* at 634–35.

Reconstruction skeptics had developed in Congress during the 1860s and '70s.[420]

Justice Bradley's opinion not only mirrored the constitutional doctrine and echoed the solicitousness for privacy first forged by Congress, but also served the same project of Reconciliation.[421] The political milieu that gave rise to *Boyd*'s emphasis on privacy was that of Reconciliation, not of Lochnerian opposition to economic regulation. Indeed, the opinion makes more sense viewed within the unwinding of Reconstruction than the rise of constitutional limits on government regulation. In the first place, Justice Bradley was not generally on the leading edge of the Court's antiregulation jurisprudence.[422] Justice Bradley joined the dissenters in the *Slaughterhouse Cases*,[423] the 1873 decision that upheld Louisiana butchers' monopoly against a Fourteenth Amendment challenge.[424] But he still adhered to the antebellum rule that government regulation was permissible as long as it served the general welfare. Fittingly for a moderate Northeastern Republican of the time, he simply found the butchers' monopoly an instance of class legislation.[425] Over subsequent years, he

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[420] Justice Bradley's only difference with Congress was that he did not find the last-minute amendment the Democratic Senator had won sufficient to cure the 1874 replacement provision's constitutional defects. *See supra* note 382. Thanks to the Senator, merchants retained custody of their books except for when the government examined them under court supervision. 2 CONG. REC. 4828 (1874). In his view, it was enough that the government would not be able to "make a fishing excursion into the books generally." *Id.* For Justice Bradley, even examination of the compelled documents was unconstitutional.

[421] To be clear, the Article is not arguing that but for the 1874 customs law amendment, *Boyd* would not have been decided, or Fourth Amendment privacy recognized, as they were. Nor is it arguing that *Boyd* would not have come out as it did without Reconciliation. Instead, the claim is that as U.S. history actually unfolded, Congress, which was still the paramount site for constitutional interpretation, and customs reform, which was deeply bound up with Reconstruction and Reconciliation, were where the ties between privacy and the Fourth Amendment first proved durable, consistent, and had legal impact. The critical shift in the post–Civil War era toward conceptualizing intrusions long linked to the Fourth Amendment as protecting something contemporaries called privacy and toward thinking of that privacy as the essence of what the Fourth Amendment protected—as an end in itself—occurred not in the courts during the 1880s but in Congress during the 1860s and '70s. Further, while the customs law that resulted, rather than the constitutional reasoning that led Congress to adopt it, may have been the only legal connection between customs reform and *Boyd*, the politics of Reconciliation fed them all.

[422] For the argument that historians have mistakenly deemed the turn-of-the-century Court as laissez-faire, see *supra* note 62.

[423] 83 U.S. 36 (1872).

[424] *Id.* at 60.

[425] JONATHAN LURIE, MR. JUSTICE BRADLEY: A REASSESSMENT 357–60 (1986). *See generally* WILLIAM NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988).

helped forge the Court's jurisprudence allowing rate regulation.[426] Four years after *Boyd* was decided, when a majority of the Court adopted a newly robust view of substantive due process as a check on government regulation, Justice Bradley objected.[427]

Justice Bradley did, however, share the views on race, Reconstruction, and Reconciliation that typified the Republican reformers of the 1860s and '70s, making that the more likely political context for the decision. Admittedly, the connections are more atmospheric and contextual than explicit.[428] There is nothing in Justice Bradley's notes about *Boyd* to indicate that he saw the case as related to the politics of Reconciliation.[429] Instead, Justice Bradley copiously quoted colonial-era legal sources to depict his interpretations of the Fourth and Fifth Amendments as longstanding and traditional. But Justice Bradley was known to cite historical sources to counter claims of legal innovation, and there are reasons to suspect he did the same in *Boyd*.[430]

Justice Bradley's early legal career suggests that the view of the Fourth Amendment he espoused in *Boyd* was a product of the postbellum era. As a young man, Justice Bradley worked for and

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[426] *See* Charles Fairman, *The So-Called Granger Cases, Lord Hale, and Justice Bradley*, 5 STAN. L. REV. 587, 587–88, 652 (1953) [hereinafter Fairman, *Granger Cases*] (documenting Justice Bradley's influence on Chief Justice Morrison R. Waite's opinion in *Munn v. Illinois*, 94 U.S. 113 (1877)).

[427] *See* LURIE, *supra* note 425, at 363; Chicago, M. & St. P. Ry. v. Minnesota, 134 U.S. 418, 466 (1890) (Bradley, J., dissenting) ("It may be that our legislatures are invested with too much power . . . [b]ut such is the Constitution of our republican form of government, and we are bound to abide by it till it can be corrected in a legitimate way."). On Justice Bradley's jurisprudence on government authority to shape the economy, see generally LURIE, *supra* note 425, and Fairman, *Granger Cases*, *supra* note 426.

[428] The biographic approach to determining the political and doctrinal context for *Boyd* is apt given that the Court was notoriously overburdened during this period such that opinions were often the sole work of their author. Ruth Bader Ginsberg, *Informing the Public About the U.S. Supreme Court's Work*, 29 LOY. U. CHI. L.J. 275, 283 (1998) (collecting scholarship arguing that "the opinion author in those days had a freer hand to compose and publish an opinion untouched by all his colleagues' minds"). The Court had a backlog of nearly a thousand cases when *Boyd* was decided. Supreme Court Statistics: October Term 1885, Docket Book, at 323, Box 34, Morrison R. Waite Papers, Library of Congress, Washington, D.C. [hereinafter Waite Papers]. There are no records of circulated drafts in Justice Bradley's file for the case. Box 16, Folder 7, Joseph P. Bradley Papers, New Jersey Historical Society, Newark, New Jersey [hereinafter Bradley Papers]. Several of the Justices, including Justice Bradley, were also out sick during the two-and-a-half weeks between when the Justices cast their votes in conference and when the decision was handed down, further increasing the chances that Justice Bradley alone authored the decision. Letter from J. Bradley to C.J. Waite, Jan. 9, 1886, Box 24, Folder 10, Waite Papers; Letter from J. Miller to C.J. Waite, Jan. 11, 1886, Box 40, Folder 9, Waite Papers; Letter from J. Gray to C.J. Waite, Jan. 24, 1886, Box 24, Folder 11, Waite Papers.

[429] Box 16, Folder 7, Bradley Papers.

[430] *See, e.g.*, Fairman, *Granger Cases*, *supra* note 426, at 656–57.

studied law under the Port of New Jersey customs collector.[431] His tutoring had centered on just the sort of English law that laced his *Boyd* opinion.[432] If his teacher interpreted those sources to mean that the Fourth Amendment barred the government from securing warrants to search for and seize merchants' papers, let alone compelling their production, Justice Bradley would likely have learned of it. Yet, as a new lawyer, Justice Bradley represented a notorious New Jersey transportation monopoly subject to a highly politicized fraud investigation by the state legislature.[433] Justice Bradley's defense of the monopoly's interests was so vigorous as to win him its ongoing business.[434] When the commissioners charged with the investigation sought access to the company's books and papers, however, Justice Bradley did not object under a state constitution provision that was identical to the Fourth Amendment.[435] Instead, his client shared its records with the commissioners, cautioning only that this was "the farthest they are bound . . . to go."[436] Before the Civil War, people were more likely to claim that the Fourth Amendment barred *Congress's* access to books and papers than that of customs officers.[437] This suggests that the view Justice Bradley expressed in *Boyd* was neither as well-established as he claimed nor one even he had held consistently.

Justice Bradley's emphasis on protecting the "privacies of life" in *Boyd* also resonated with the politics of Reconciliation in ways that fit with his views on those subjects. Justice Bradley had supported President Lincoln and defended the Civil War, but like other moderate Republicans, he did so not because he opposed slavery in the South or rejected white superiority (he did not) but

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[431] Charles Fairman, *Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases*, 54 HARV. L. REV. 977, 981 (1941) [hereinafter Fairman, *Justice Bradley's Appointment*].

[432] Ruth Anne Whiteside, Justice Joseph Bradley and the Reconstruction Amendments 21–22 (Apr. 1981) (Ph.D. thesis, Rice University).

[433] *Id.* at 57–59.

[434] *Id.* at 59–60.

[435] *Compare* N.J. CONST. art. I, § 6 (amended 1947), *with* U.S. CONST. amend. IV.

[436] JOHN R. THOMSON, COMMUNICATION OF THE BOARD OF DIRECTORS OF THE JOINT COMPANIES TO THE STATE COMMISSIONERS, IN REFERENCE TO MR. CAREY'S DEMAND FOR THEIR BOOKS AND PAPERS 8 (Oct. 29, 1849), *reprinted in* REVIEW OF THE REPORT OF THE LATE COMMISSIONERS FOR INVESTIGATING THE AFFAIRS OF THE JOINT COMPANIES: AND OF THE OPERATIONS OF THE MANAGERS OF THOSE COMPANIES (Philadelphia, L.R. Bailey 1850).

[437] *See supra* Part I.C.3.

because he opposed disunion.[438] Like the Republicans who gravitated to the reformist cause after the war, Justice Bradley came to support the Thirteenth and Fourteenth Amendments but thought Reconstruction should end there.[439] Like some of them, his support for at least limited Reconstruction came not from a commitment to abolition but a conviction that the Amendments were necessary to restore the Union.[440] Indeed, Justice Bradley cast the tie-breaking vote on the commission Congress tasked with resolving the electoral crisis of 1877, giving him a personal role in securing the political infrastructure of Reconciliation.[441]

By the 1880s, when *Boyd* was decided, Justice Bradley's views on Reconstruction and Reconciliation had evolved, but in ways that made him only more committed to the public-private divide he relied on in *Boyd*. For instance, Justice Bradley came to accept the need for the federal government to protect Southern Black men's franchise (a franchise he had initially opposed). But he helped build a doctrinal architecture that greatly limited the government's ability to prosecute the violent disenfranchisement of Black voters by white "redeemers" in the South.[442] The narrow path he built carefully preserved a public-private divide, assuring that whatever use the Reconstruction Era Civil Rights Acts could have for charging white Southerners who massacred their Black neighbors, they would not "punish *private action*."[443] Justice

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438 PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION 90–91 (2011); LURIE, *supra* note 425, at 349.

439 LURIE, *supra* note 425, at 349–50; BRANDWEIN, *supra* note 438, at 91.

440 LURIE, *supra* note 425, at 349–50.

441 Fairman, *Justice Bradley's Appointment*, *supra* note 431, at 977.

442 Professor Pamela Brandwein argued against a generation of historians who contended that Bradley and his brethren abandoned Reconstruction after 1877. She showed how the Court's jurisprudence, in ways profoundly shaped by Justice Bradley, left open a narrow path for the federal government to reach private acts of racial violence in the South through a neglect theory of state action. *See* BRANDWEIN, *supra* note 438, at 12–13; *see also* MASUR, UNTIL JUSTICE BE DONE, *supra* note 70, at 338–39 (arguing that the Fourteenth Amendment's state action requirement "looks different . . . if we think our way forward from the antebellum period, rather than backward from later moments": coming after decades of African Americans' agitation against Black Codes in the North and South, "a constitutional ban on racially discriminatory state laws was both extraordinarily novel and critically important").

443 BRANDWEIN, *supra* note 438, at 13 (emphasis in original) (discussing *United States v. Cruikshank*, 25 F. Cas. 707 (C.C.D. La. 1874), *aff'd*, 92 U.S. 542 (1875), which overturned convictions resulting from white supremacists' massacre of Black men guarding a courthouse in Colfax, Louisiana amidst violent battles over racial and partisan control of the parish's government). Leading historian of Reconstruction Eric Foner termed the Colfax massacre "the bloodiest single instance of racial carnage in the Reconstruction era." FONER, *supra* note 153, at 437.

Bradley's 1883 opinion in *The Civil Rights Cases*[444] struck down the 1875 Civil Rights Act on the grounds that Congress could not prohibit private discrimination under the Fourteenth Amendment. A pioneering historian of the South described the decision as the Court, like the liberal Republicans in Congress, "engag[ing] in a bit of reconciliation . . . between North and South."[445] More recent scholarship convincingly argues that neither Republicans in Congress nor those on the Court fully abandoned Reconstruction until the 1890s.[446] Whether one reads *The Civil Rights Cases* as indicating a partial or total ceding of federal intervention on behalf of Black Southerners, however, Justice Bradley's opinion unquestionably limited Reconstruction's reach by erecting a strict wall of privacy around commercial activity. Indeed, as Justice John Marshall Harlan pointed out in dissent, Justice Bradley seemed to retreat in *The Civil Rights Cases* from his position in regulatory cases: there, he had upheld the public obligations of what he now deemed constitutionally protected private businesses.[447]

Justice Harlan's critique points to another reason *Boyd* is best understood as rooted in the politics of Reconciliation, not those of regulation. The alignment of the Justices in *Boyd* suggests that that they did not see it as an antiregulation decision. As the above description of Justice Bradley's jurisprudence on economic regulation demonstrates, the Court in this period was divided in its regulation cases, yet *Boyd* was unanimous.[448] Conversely, Justice Harlan's lone dissent in *The Civil Rights Cases* indicates how uniformly the Justices had made the Court an engine of Reconciliation by the time *Boyd* was decided, an alignment that mirrors that of the Justices in *Boyd*.[449]

The point is not that Justice Bradley did not care about the public-private divide as regards to the constitutional boundaries

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444 109 U.S. 3 (1883).

445 C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 53–54 (1974).

446 BRANDWEIN, *supra* note 438, at 7.

447 *See* 109 U.S. at 37–42 (Harlan, J., dissenting) (arguing that Justice Bradley's treatment of conveyances and amusements as private businesses free from the Fourteenth Amendment's reach conflicted with the Court's decision in the rate-regulation case *Munn*, Justice Bradley's role in the shaping of which is discussed above).

448 Justice Samuel Miller, joined by Chief Justice Morrison Waite, dissented from Justice Bradley's Fourth Amendment holding but concurred in the judgment, finding that the customs law violated the Fifth Amendment. *Boyd*, 116 U.S. at 638–41.

449 *See* WOODWARD, *supra* note 445, at 53–54. Of course, many decisions in multiple areas were unanimous during this period, so the unanimity of *Boyd* more strongly indicates that the Justices did not see it as a regulation decision than it indicates that they saw it as enmeshed in Reconciliation. *See id.*

of government regulation of business. Indeed, at the same time he penned *Boyd*, he also published an encyclopedia entry on the subject "Government." There, Justice Bradley concluded that "the government of the country . . . will best . . . subserve the public good if, after sufficiently protecting its citizens against the withering influence of foreign competition, it leaves them at liberty to pursue their private fortunes in their own way."[450] His and his fellow liberal Republicans' newfound investment in shoring up the public-private distinction and expanding the scope of the private sphere when it came to regulation cannot be disentangled, however, from the post–Civil War context in which those doctrinal innovations arose and from the racial politics they also served.

CONCLUSION

This Article argues that the conceptualization of the Fourth Amendment as protecting an abstract concept termed "privacy" congealed after the Civil War. Fourth Amendment privacy helped produce and was produced by the politics of Reconciliation between white Americans across the North and South, a settlement that led to the abandonment of Reconstruction and the establishment of Jim Crow.

To view *Boyd* as only about how the Constitution would mediate the relationship between a rapidly industrializing economy and increasingly regulatory state is deeply incomplete. That approach mistakenly assumes that what *Boyd* became explains how it came to be, missing the racial and sectional politics that gave rise to the decision and the constitutional interpretations on which it relied. Further, it misses how inseparable those politics are from the rise of industrial capitalism and the regulatory state thought to have spurred *Boyd*. Instead, *Boyd*, like Congress's debates over customs reforms and public accommodations during the 1860s and 1870s, helped produce a newly private view of business. That refined public-private divide served the economy and politics of a nation reconciled to the preservation of racial hierarchy.

This account of Fourth Amendment privacy contributes to legal history and historically informed legal scholarship. The Article makes several interventions in the legal history of the period. The

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[450] JOSEPH P. BRADLEY, GOVERNMENT, ENCYCLOPEDIA BRITANNICA 247 (J.M. Stoddart ed., 9th ed. 1886). Interestingly, given his position on the Civil Rights Act of 1875 in *The Civil Rights Cases*, he also argued that determining when governing in the public interest is too "injurious to individuals" was a problem "peculiarly within the province of the legislative department to solve." *Id.*

first is to histories of the landmark Supreme Court decision of *Boyd v. United States*. Scholars have previously viewed *Boyd* as part of the Court's end-of-the-century deregulatory turn.[451] This Article instead grounds the formulation of Fourth Amendment privacy in Reconciliation and its preservation of white supremacy.

The Article also provides methodological insights about writing constitutional history. Its history reminds scholars that, while the Supreme Court turned toward civil *liberties*—the idea that rights limit the state—during the late nineteenth century, Congress remained an important constitutional actor. Overlooking its role in shaping constitutional interpretation risks misattributing and misunderstanding constitutional change in the wake of Reconstruction. Turning to the Court, legal historians still tend to separate its jurisprudence on economic regulation and racial justice during this period. The history of Fourth Amendment privacy invites legal historians to follow political historians in exploring the interconnections between—even inseparability of—these branches of the Court's jurisprudence.[452] Lastly, this history reminds legal scholars to be alert to anachronism. As this Article highlights, there is a difference between historical actors connecting the Fourth Amendment to something they called privacy and their connecting it to things we consider part of what we call privacy today. Ignoring that difference elides a significant post–Civil War shift in how legal actors came to conceive of privacy, the public-private divide, and the Fourth Amendment. For some projects, historical actors' view of things we associate with a term today is what matters, justifying that term's anachronistic use. But the history above cautions scholars to be self-aware and explicit about such choices, lest they hide as much as they reveal.

What of this history's implications for Chief Justice Roberts's recent revival of *Boyd*'s catchphrase as the fount of Fourth Amendment privacy? The account above strengthens Chief Justice Roberts's likely goal of dislodging *Katz* from this honor. As the Article demonstrates, Justice Bradley's emphasis on what he

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451 *See supra* notes 28–31.

452 *See generally, e.g.*, RICHARDSON, THE DEATH OF RECONSTRUCTION, *supra* note 167; BARREYRE, *supra* note 243; BECKERT, *supra* note 247; FONER, *supra* note 153; WOODWARD, *supra* note 445. For an excellent example of legal historical work at this intersection, see generally Evelyn Atkinson, *Frankenstein's Baby: The Forgotten History of Corporations, Race, and Equal Protection*, 108 VA. L. REV. 581 (2022). The history above also underscores the racial politics attending civil service reform, a topic of growing interest to legal historians. *See, e.g.*, PARRILLO, *supra* note 81; Shugerman, *supra* note 301.

termed the privacies of life was not idiosyncratic or happenstance; instead, it tapped into a broader legal culture that had come to associate the Fourth Amendment with a concept called privacy. The fact that this association did not emerge until after the Civil War is not a problem as Chief Justice Roberts's opinions in this line of cases are decidedly non-originalist.[453] A majority of the Justices appear willing to uphold *Riley* and its progeny despite subsequent changes in the Court's personnel.[454] This Article's history supports and should help preserve the Court's renewed solicitousness to Fourth Amendment privacy.

The Article should also not be read to undermine those scholars making originalist arguments for Fourth Amendment privacy. *Katz* and its privacy-centric approach to the Fourth Amendment has come under increasing attack.[455] Justices Clarence Thomas and Neil Gorsuch concede that the founding generation understood the Fourth Amendment to protect privacy. They insist, however, that those protections were incidental to its main purpose of protecting property and cannot justify the Court's later "elevation of privacy as the *sine qua non* of the Amendment."[456] Other scholars counter that originalist methods support *Katz* and its "expectation of privacy" approach,[457] or contend that "[p]rivacy was the bedrock concern of the [Fourth A]mendment."[458] Both sides of this debate rely on the anachronistic use of privacy warned about above. This Article urges them to be more explicit about their anachronism. Their debate, however, is focused on whether the Founding generation meant to protect the things Americans came to include in an abstract concept they called privacy, and on weighing the significance of those concerns to interpreting the Fourth Amendment. That dispute does not turn on the Founders

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453 *See, e.g.*, Torres v. Madrid, 141 S. Ct. 989, 998 (2021) ("[T]he Fourth Amendment preserves personal security with respect to methods of apprehension old and new.").

454 *See supra* note 18.

455 *See supra* notes 12–16 and accompanying text.

456 *Carpenter*, 138 S. Ct. at 2240 (Thomas, J., dissenting); *id.* at 2264, 2268 (Gorsuch, J., dissenting).

457 Kerr, Katz *as Originalism*, *supra* note 15, at 1050; *cf.* Brady, *supra* note 12, at 981, 995, 1012–13 (emphasizing personal property law as the key to understanding the meaning of "effects" in the Fourth Amendment but positing this as a source for the modern expectation of privacy doctrine, not its substitute).

458 CUDDIHY, *supra* note 122, at 766; *see also* T.T. Arvind & Christian Burset, *A New Report of* Entick v. Carrington *(1765)*, 110 KY. L.J. 265 (2022) (arguing that in a newly discovered report of *Entick*, concern over privacy, not property, led Lord Camden to protect private papers); *id.* at 287 ("The law protects private papers not merely because they are chattels but more fundamentally because of the secrets they contain. Privacy is the end; property is merely the means.").

themselves using the term privacy, nor is it decided by the fact that they generally did not do so.[459]

This history poses a problem, however, for originalist critics of *Katz*. They contend that privacy only became an organizing principle of Fourth Amendment law in the 1960s.[460] This history demonstrates that by the time the Court began enforcing Fourth Amendment limits on its coordinate branches, privacy—historically and anachronistically—was not merely an incidental by-product. Instead, privacy, not mere ownership, sculpted the boundary between papers that were and were not protected by the Amendment.[461] Privacy was thus a limit on, not derivative of, the pre-*Katz* property-centric Fourth Amendment they would restore.

More broadly, this history poses a dilemma for critics of the modern administrative state who marshal its historical connections to white supremacy and antidemocracy. Justice Gorsuch recently connected President Woodrow Wilson's disdain for the masses, immigrants, and the very Black voters and Reconstruction governments that helped give rise to Fourth Amendment privacy to President Wilson's support for administrative agencies and governance by experts.[462] Judge Andrew Oldham of the Fifth

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459 Justices Thomas and Gorsuch might, however, employ Fourth Amendment privacy's roots in Reconciliation to further critique the current Court's elevation of *Boyd*'s privacies-of-life phrase, as both have cited social context to undermine precedents they disfavor. *Cf.* Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2027–28 (2021) (discussing Justice Thomas's concurrence in *Box v. Planned Parenthood*, 139 S. Ct. 1780, 1783 (2019) (Thomas, J., concurring), in which he "misleading[ly] . . . associated abortion with eugenics and the rise of the modern birth control movement"); West Virginia v. EPA, 142 S. Ct. 2587, 2617 n.1 (2022) (Gorsuch, J., concurring) (linking President Woodrow Wilson's racism, xenophobia, and elitism to his faith in expert government and antipathy to the popular sovereignty Justice Gorsuch contends the founders intended).

460 *Carpenter*, 138 S. Ct. at 2240 (Thomas, J., dissenting); *id.* at 2267–68 (Gorsuch, J., dissenting) ("From the founding until the 1960s, the right to assert a Fourth Amendment claim didn't depend on your ability to appeal to a judge's personal sensibilities about the 'reasonableness' of your expectations of privacy . . . [T]he traditional approach asked if a house, paper or effect was *yours* under law.").

461 *See supra* notes 212–16 and accompanying text. Justice Gorsuch would replace *Boyd* with *Ex Parte* Jackson, 96 U.S. 727 (1878), as a guide for contemporary Fourth Amendment law. *Carpenter*, 138 S. Ct. at 2269–71 (Gorsuch, J., dissenting). As explained above, however, whatever problems courts have come to have with *Boyd*'s Fourth Amendment doctrine, the decision codified widely aired interpretations previously implemented by Congress. The Fourth Amendment dicta in *Ex Parte Jackson*, in contrast, was passing and introduced *sua sponte* by the Court. *See supra* note 8.

462 *West Virginia*, 142 S. Ct. at 2617 n.1 (Gorsuch, J., concurring).

Circuit Court of Appeals made a similar argument linking Wilson's views to New Dealers' embrace of administration.[463] These jurists, in turn, build on the work of scholars such as Philip Hamburger and Ronald Pestritto who have connected Wilson's racial views—including his critiques of Reconstruction—to his embrace of administration.[464] These jurists and scholars mobilize Wilson's racism in debates about separation of powers and the structural constitutionality of the modern administrative state. But many of these administrative critics are also libertarians who champion more robust Fourth Amendment protections.[465] If they want the Fourth Amendment to protect businesses as robustly as homes or restrain regulatory searches as stringently as criminal ones, they will have to reckon with *Boyd*'s roots in a similarly white supremacist, Reconciliation Era past.[466]

Taken in a different direction, this history could support a reparative approach to Fourth Amendment privacy. Legal scholars have argued that contemporary Fourth Amendment privacy doctrine not only fails to protect Black Americans but contributes to their overpolicing, mass incarceration, and exposure to police violence.[467] There is a growing literature on the deep historical roots of the disproportionate surveillance of Black Americans but no comparable attention to the racial roots of Fourth Amendment

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463 Cochran v. SEC, 20 F.4th 194, 214 (5th Cir. 2021) (Oldham, J., concurring) (arguing that President Wilson "wanted administrative agencies to operate in a separate, anti-constitutional, and anti-democratic space—free from pesky things like law and an increasingly diverse electorate").

464 *See, e.g.*, PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL 370–72 (2014); RONALD J. PESTRITTO, WOODROW WILSON AND THE ROOTS OF MODERN LIBERALISM 43–45, 61, 127 (2005).

465 *See, e.g.*, Bovat v. Vermont, 141 S. Ct. 22, 24 (2020) (Gorsuch, J., issuing statement regarding denial of certiorari) ("The Constitution's historic protections for the sanctity of the home and its surroundings demand more respect from us all than was displayed here."); Amy Howe, *Gorsuch and the Fourth Amendment*, SCOTUSBLOG (Mar. 17, 2017), https://perma.cc/4SUJ-HVPW; Max Hymans, *Administrative Surveillance Violates the Fourth Amendment*, NEW C.L. ALL. (Aug. 19, 2021), https://perma.cc/8ERS-A59H.

466 For an effort to delineate when and how past "discriminatory taint" should matter for present day analysis, see generally W. Kerrel Murray, *Discriminatory Taint*, 135 HARV. L. REV. 1190 (2020).

467 *See, e.g.*, SCOTT SKINNER-THOMPSON, PRIVACY AT THE MARGINS (2021); Osagie K. Obasogie & Zachary Newman, *The Endogenous Fourth Amendment: An Empirical Assessment of How Police Understandings of Excessive Force Became Constitutional Law*, 104 CORNELL L. REV. 1281 (2019); Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125 (2017); William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265 (1999); *cf.* KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS (2017) (arguing that constitutional protections for privacy are denied to poor, disproportionately Black, women).

privacy.[468] As this Article demonstrates, Fourth Amendment privacy likewise is rooted in the white supremacy-preserving politics of Reconciliation.[469] This history thus adds historical force to recent calls for a reconstruction of privacy law to serve antiracist and antisubordination goals.[470]

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[468] *See generally* SIMONE BROWNE, DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS (2015); VIRGINIA EUBANKS, AUTOMATING INEQUALITY (2017). Andrew Taslitz came closest to this work in arguing that the Fourteenth Amendment was adopted in part to incorporate the Fourth Amendment against the states in light of the surveillance and seizures of Black Americans during slavery and under the post–Civil War Black Codes. TASLITZ, *supra* note 126, at 13, 251–59.

[469] For other work excavating contemporary doctrine's roots in the preservation of white supremacy, see generally Helen Hershkoff & Fred Smith, Jr., *Reconstructing* Klein, 90 U. CHI. L. REV. 2101 (2023).

[470] *See, e.g.*, SCOTT SKINNER-THOMPSON, *supra* note 467; Anita Allen, *Dismantling the "Black Opticon": Privacy, Race Equity, and Online Data-Protection Reform*, 131 YALE L.J.F. 907 (2022). For an example of work seeking to recover the liberatory potential of common law privacy rights, see generally Anita Allen, *Natural Law, Slavery, and the Right to Privacy Tort*, 81 FORDHAM L. REV. 1187 (2012).