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In August 2006, a federal district court held that the Terrorist Surveillance Program violates the Fourth Amendment. Scholars have debated the legality and constitutionality of the program extensively since the New York Times *first publicized its existence in December 2005. In this Article, I look beneath the surface of that raging debate to one of the premises underlying the court's conclusion, that the Fourth Amendment protects the confidentiality of communications. I explore the origins of the notion that the Fourth Amendment protects communications privacy. Most scholars and commentators look to Justice Brandeis's famous dissent in the 1928 case* Olmstead v. United States*. In this Article, I contend that we must go further back, back to surveillance of the first communications network in the United States, the post office. I explain the history of postal surveillance and show that the principle of communications*

* Assistant Professor of Law, University of Wisconsin Law School. Many people read all or large parts of this Article and provided helpful suggestions. Fabio Arcila, N.D. Chang, Orin Kerr, Victoria Nourse, Neil Richards, Linda Smith, and Dan Solove all read and helped the piece with everything from structure to syntax. I am particularly indebted to Dan who suggested a structural change that has made the piece far clearer than it was in its original form. Historians Greg Downey, Richard R. John, Richard Kielbowicz, and Bill Merkel were all indispensable in ensuring historical accuracy (though I should emphasize that I take responsibility for any errors on that count). This Article is part of a larger project which I presented at the 2006 Stanford-Yale Junior Faculty Forum, and I am grateful for comments I received from Jack Balkin and others there. Conversations with Rich Leffler at the Ratification of the Constitution Project also shaped my thinking about some of the historical background. Jennifer Hartung, Sarah Maguire, and Keli Rylance provided superb research assistance, and the helpful staff at the University of Wisconsin Law Library, including Bill Ebbott, Mike Morgalla, and student intern Tara Boyer, helped track down a multitude of sources. Theresa Dougherty, Mike Dudchek, Melissa Leets, Melissa Melshenker, Sue Sawatske, and Elise Volkmann all helped with word processing and editing, and, with apologies to Francis Fukuyama, I thank the many computer programmers and technologists who developed the technology needed to word process, copy, and distribute this Article to the reader. *See* FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY xv (1995). Finally, I am grateful for funding from the University of Wisconsin Law School and the Graduate School at the University of Wisconsin-Madison.

> *privacy derives not from the Fourth Amendment or even from the Constitution at all. Rather, it comes from early postal policymakers who put that principle into postal ordinances and statutes in the late eighteenth century. Over time, the principle of communications privacy became embedded into the postal network by both law and custom. It was only then that the Court incorporated it into the Fourth Amendment in the 1878 case* Ex parte Jackson*, which in turn served as one of the bases of Justice Brandeis's* Olmstead *dissent. So, if today we see the principle of communications privacy as fundamental to the Fourth Amendment, we have postal policymakers to thank, for it was through the post office, not the Constitution or the Bill of Rights, that early Americans first established that principle.*

INTRODUCTION

In December 2005, the *New York Times* reported that the National Security Agency (NSA) had been engaged in warrantless surveillance of international communications—telephone calls, e-mails, etc.—made from within the United States.[1] The ensuing outrage included several lawsuits claiming that the government and various telecommunications companies had violated a host of statutes, particularly the Foreign Intelligence Surveillance Act (FISA), which establishes specific procedures for the government to follow prior to engaging in domestic surveillance for intelligence purposes.[2] At the same time, a few of the lawsuits and some commentators went even further, alleging that the NSA surveillance program violated the Fourth Amendment, in essence arguing that even Congress could not authorize such surveillance.[3] In August 2006, a

1. *See* James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

2. Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified as amended at 50 U.S.C. §§ 1801-1811, 1821-1829, 1841-1846, 1861-1862 (2000)). For most recent amendments, see Protect America Act of 2007, Pub. L. 110-55, 121 Stat. 552 (2007), although most of the changes are due to expire on February 1, 2008. *See id.* § 6(c), 121 Stat. at 557.

3. *See, e.g.*, Complaint at ¶ 193, Am. Civil Liberties Union v. Nat'l Sec. Agency, 438 F. Supp. 2d 754 (E.D. Mich. 2006), *available at* http://www.aclu.org/images/nsaspying/asset_upload_file137_23491.pdf; Robert Bloom & William J. Dunn, *The Constitutional Infirmity of Warrantless NSA Surveillance: The Abuse of Presidential Power and the Injury*

federal district judge in Detroit agreed.[4] One of the unstated premises of the court's holding was that the Fourth Amendment protects the privacy of long-distance communications transmitted through a communications network, a premise that was unequivocally correct as a matter of current Fourth Amendment doctrine.[5]

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to the Fourth Amendment, 15 WM. & MARY BILL RTS. J. 147, 152 (2006) (arguing that the warrantless surveillance program violates the Fourth Amendment); Lawrence Friedman & Renée M. Landers, *Domestic Electronic Surveillance and the Constitution*, 24 J. MARSHALL J. COMPUTER & INFO. L. 177, 185-94 (2006) (same); Wilson R. Huhn, *Congress Has the Power to Enforce the Bill of Rights Against the Federal Government; Therefore FISA Is Constitutional and the President's Terrorist Surveillance Program Is Illegal,* 16 WM. & MARY BILL RTS. J. (forthcoming 2007) (same); John Cary Sims, *What the NSA Is Doing . . . and Why It's Illegal*, 33 HASTINGS CONST. L.Q. 105, 138 n.100 (2006) (suggesting that the mere fact that it is the executive branch rather than a neutral judge that is evaluating the need for the surveillance means that even if the NSA uses a "probable cause" standard, "the core concerns of the Fourth Amendment would remain a serious obstacle to upholding the legality of the program"); *American Bar Association: President Bush Is "Undermining Rule of Law" by Ignoring Laws Passed by Congress* (Democracy Now! radio broadcast July 26, 2006), *transcript available at* http://www.democracynow.org/article.pl?sid=06/07/26/147209#transcript; *cf.* Brian R. Decker, Comment, *"The War of Information": The Foreign Intelligence Surveillance Act,* Hamdan v. Rumsfeld*, and the President's Warrantless Wiretapping Program*, 9 U. PA. J. CONST. L. 291, 307-14 (2006) (arguing that it remains an open question whether the warrantless surveillance program is constitutional under the Fourth Amendment); Richard Henry Seamon, Domestic Spying: Presidential Power and Fourth Amendment Limits 1 (unpublished manuscript), *available at* http://ssrn.com/abstract=911287 (last visited Oct. 22, 2007) (arguing that a "genuine national security emergency" would justify the President conducting surveillance "outside FISA" and that such surveillance would satisfy the Fourth Amendment, but that the current program's status as an ongoing broad "program" prevents it from falling within that narrow exception). Others have written about the separation-of-powers implications of the NSA program. *Compare, e.g.*, John Yoo, *The Terrorist Surveillance Program and the Constitution*, 14 GEO. MASON L. REV. 565, 566 (2007) (arguing that the Terrorist Surveillance Program "represents a valid exercise of the President's Commander-in-Chief authority to gather intelligence during wartime"), John C. Eastman, *Listening to the Enemy: The President's Power to Conduct Surveillance of Enemy Communications During Time of War*, 13 ILSA J. INT'L & COMP. L. 1, 9 (2006) (arguing that the President's Article II powers confer upon him the authority to conduct warrantless "surveillance of enemy communications in time of war and of the communications to and from those he reasonably believes are affiliated with our enemies"), *and* Letter from John C. Eastman, Prof. of Law, Chapman Univ., to James Sensenbrenner, Jr., Chairman, U.S. House of Representatives 6 (Jan. 27, 2006), *available at* http://ssrn.com/abstract=926000 (same), *with* Heidi Kitrosser, *"Macro-Transparency" as Structural Directive: A Look at the NSA Surveillance Controversy*, 91 MINN. L. REV. 1163, 1164-65 (2007) (arguing that defenders of the NSA surveillance program "overlook[] . . . the Constitution's careful balance of powers between the legislative and executive branches"), *and* Huhn, *supra* (arguing that FISA is constitutional under separation-of-powers principles).

4. Am. Civil Liberties Union v. Nat'l Sec. Agency, 438 F. Supp. 2d 754, 773-75 (E.D. Mich. 2006), *vacated*, 493 F.3d 644 (6th Cir. 2007), *petition for cert. filed*, Oct. 3, 2007 (No. 07-468). With respect to the district court's Fourth Amendment holding, the Court of Appeals ruled that the plaintiffs did not have standing. *See* Am. Civil Liberties Union v. Nat'l Sec. Agency, 493 F.3d at 657.

5. *See* Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967); Silverman v. United States, 365 U.S. 505 (1961). *See generally* DANIEL J. SOLOVE,

How is it, though, that the Fourth Amendment came to protect communications privacy?[6] On its face, the language of the amendment makes no reference to the notion of communications privacy. The textual argument on which the principle is based is the notion that surveillance of communications constitutes a "search" and that the communications themselves—the telephone conversations, e-mails, etc.—constitute "persons, houses, papers, [or] effects" within the meaning of the Fourth Amendment.[7] Plausible, but not exactly compelling.[8] As I will describe in greater detail below, the history of the drafting and ratification of the Constitution likewise provides little in the way of support for the notion of communications privacy. Instead, to find the origins of the constitutional principle of communications privacy, we must tap a different historical source, the history of a communications network. That network, maligned today as a relic from another era, is the post office, the most prominent federal administrative agency in the early American republic.

The modern notion that the Fourth Amendment proscribes warrantless "wiretapping"—intercepting a communication while the communication is taking place—stems from the Court's seminal 1967 decisions *Berger v. New York*[9] and *Katz v. United States*.[10] Most commentators view the intellectual underpinnings of *Berger* and *Katz* as being found in Justice Brandeis's dissent forty years earlier in *Olmstead v. United States*.[11] But Justice Brandeis's famous dissent in *Olmstead* had its precursors too, and it is to them that we must look in search of the origins of the constitutional principle of communications privacy. Crucial among the precedents on which Brandeis relied was the 1878 case *Ex parte Jackson*, the first case in which the Court ruled that the Fourth Amendment preserved a realm of communications privacy from government intrusion. *Ex parte Jackson* upheld a law that prohibited sending lottery advertisements through the mail, and in dicta, the Supreme

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MARC ROTENBERG, & PAUL M. SCHWARTZ, INFORMATION PRIVACY LAW 207-63 (2d ed. 2006). Although the premise that the Fourth Amendment protects communications privacy is unequivocally correct, this does not necessarily mean that the NSA program violates the Fourth Amendment. There are numerous exceptions to the general rule.

6. Dan Solove and Neil Richards have used the term "confidentiality" to describe a "conception of privacy . . . based on the protection of relationships." Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO L.J. 123, 127 (2007). Using their taxonomy, I could use the term "confidentiality" rather than "privacy." Still, I use the phrase "communications privacy" here and throughout because it is familiar and more commonly used.

7. In relevant part, the Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV.

8. *See, e.g.*, *Katz*, 389 U.S. at 365-66 (Black, J., dissenting).

9. 388 U.S. 41 (1967).

10. 389 U.S. 347 (1967). Ironically enough, *Katz* did not actually involve wiretapping, though it did involve the use of an electronic device to record a telephone conversation.

11. 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).

Court ruled that the Fourth Amendment precluded the government from opening sealed letters without a warrant.

In this Article, I will explain how *Ex parte Jackson* resulted not from principles embedded in the Fourth Amendment or from an originalist interpretation of the Fourth Amendment or even from existing judicial precedents, but rather from policy choices about the post office a century earlier. Though we often view constitutional law as the application of abstract principles to specific facts, the constitutional principle of communications privacy initially grew out of a particular institutional context; the constitutional principle was simply the affirmation of long-standing law and custom in the post office. Thus, as a historical matter, it was the post office—not the Fourth Amendment of its own independent force—that originally gave us the notion of communications privacy that we now view as an abstract constitutional principle applicable to telephone conversations, e-mails, and the like.[12]

Ex parte Jackson remains important to us today not simply because it established the principle of communications privacy, but also because it shows us two crucial facts about the formation of constitutional law. First, it gives an example of an important constitutional law doctrine that was built around the post office.[13] Second, and perhaps more intriguingly, it demonstrates that constitutional law can follow, rather than undermine, legislative choices. What *Ex parte Jackson* effectively did was to constitutionalize legislation; it took an earlier policy choice and embedded it into the Constitution. But this was not an ordinary policy choice; rather, it was one about the character of a government institution.

The general process, of which *Ex parte Jackson* is an example, can be described briefly in four steps: (1) Congress passes a statute; (2) the statutory provision gives an institution certain attributes; (3) over time, social practice embeds those attributes into the institution; and (4) the courts then take those attributes and write them into constitutional law. The key point is that the Court's interpretation of the Constitution was simply the confirmation of choices made by an earlier legislature, with the institution—and the passage of time—serving as a mediating force between the legislature and the courts. In short, by establishing an institution and giving it particular attributes, the drafters of postal statutes helped shape constitutional law long after the promulgation of their statutes. Let me emphasize that my point is descriptive,

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12. Elsewhere, I examine two First Amendment principles: First Amendment restrictions on government spending—the First Amendment subset of the so-called "unconstitutional conditions" doctrine—and the "right to receive ideas." The Court's first articulation of both of these principles also occurred in the context of constitutional challenges to postal regulations, and both were tethered to the institutional context of the post office. *See* Anuj C. Desai, *The Transformation of Statutes into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine*, 58 HASTINGS L.J. 671 (2007).

13. I supply more examples in Desai, *supra* note 12.

not normative. I am making a claim about the historical origins of a doctrine, not about the appropriate role of courts in establishing that doctrine.

To explain this process in more detail, I will proceed in three parts. In Part I, I will describe the way in which communications privacy was intertwined with the early history of the post office and how the Second Congress eventually came to write the principle of communications privacy into legislation in the 1792 Post Office Act. Key to this Part is the fact that Congress put this principle into a statute, *not* into the Constitution.

In Part II, I will describe the 1878 case *Ex parte Jackson* and then explain how it effectively constitutionalized that principle. I will then compare postal privacy with the contemporaneous history of privacy in telegrams. Looking at this comparison will be the easiest way to see how the process of constitutionalization was limited solely to the particular context of the unique communications medium that was the post office. The constitutional principle was not rooted in the Fourth Amendment in abstract, textual, or even historical terms; rather, it was a principle deeply embedded in the history of the post office.

Finally, in Part III, I briefly sketch some theoretical implications this example has for constitutional law scholarship. My principal point—which is purely descriptive—is that courts draw upon constitutional values that reside within institutions, and that it can be legislatures, not courts, that put those values there in the first place.

I. EMBEDDING COMMUNICATIONS PRIVACY INTO THE AMERICAN POST OFFICE

Current Fourth Amendment doctrine regulates the surveillance and interception of all forms of electronic communications. That doctrine is commonly viewed as deriving from Justice Brandeis's seminal dissent in the 1928 case *Olmstead v. United States*.[14] But the origins of Fourth Amendment

14. 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting). Many scholars see Brandeis's dissent not only as the origin of *communications* privacy, but also as the foundation of the entire edifice of modern Fourth Amendment privacy law. *See, e.g.*, William C. Heffernan, *Privacy Rights*, 29 SUFFOLK U. L. REV. 737, 772 (1995) ("[T]he origin of modern privacy law is to be found in a passage Justice Louis Brandeis included in his 1928 dissent in *Olmstead v. United States*."); Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 817 n.86 (2004) (listing other sources for similar point); Michael S. Leib, *E-mail and the Wiretap Laws: Why Congress Should Add Electronic Communication to Title III's Statutory Exclusionary Rule and Expressly Reject a "Good Faith" Exception*, 34 HARV. J. ON LEGIS. 393, 399 (1997) (reading *Katz* as overruling *Olmstead* based on an "incorporat[ion of] Brandeis's reasoning"); Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1101 (2002) (stating that "Brandeis's . . . dissent in *Olmstead* [has] had a profound impact on the law of privacy and on subsequent theories of privacy" and reading *Katz v. United States*, 389 U.S. 347 (1967), as overruling *Olmstead* based on *Katz*'s "adopt[ion of] Brandeis's view"); *cf.* Kerr, *supra*, at 804 (noting that Brandeis's dissent "provides the guiding light" for proponents of the view that the Fourth Amendment should be interpreted broadly as

protection for communications privacy began long before 1928; they began with the development of a communications network, the post office. By looking closely at the history of the American post office and the ways in which privacy of correspondence was intertwined with the post office's development, we can see the important role postal policy played in modern Fourth Amendment law.

Privacy of correspondence became a central feature of the legal regime that defined the American post office from its beginnings in the late eighteenth century. To understand how that happened requires a look at the transformation of the post office from a British to an American institution. In this Part, I will explain that transformation. In Subpart A, I describe the status of privacy of correspondence in Britain. In Subpart B, I turn to the way in which notions of communications privacy became embedded, both legally and in practice, into the American post office. The change was gradual and rooted in historical notions of liberty that had manifested themselves in England from the early days of the English postal service, but those who established the separate American post office during the Revolutionary period recognized the importance of postal privacy—for reasons intimately connected to the Revolutionary War itself—and gave it a strong foundation in the new nation's legal regime.

For my purposes, however, what is most important about the way in which this happened is that the principle of communications privacy was not part of the Fourth Amendment or even the Constitution at all. Rather, the early American policymakers simply placed that important principle into the laws regulating the postal service. It was only a century later, as I explain in Part II, that the Fourth Amendment was interpreted in such a way as to include that principle.

A. *Communications Privacy in the British Post Office*

During the eighteenth century, the British post office was very much an arm of the Crown. The king controlled all departments of the British government, "either through the ministers in charge or the secretaries of state who transmitted his formal commands."[15] The post office was managed by the Treasury Board; despite this connection to the Treasury, however, the post office was not simply a revenue-raising department. It was also an "intelligence organ, serving as the government's . . . eyes[] and ears."[16] In this sense, it was very much the locus of the activities we in the United States now associate with the Central Intelligence Agency and National Security Agency.

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communications technology advances).

15. KENNETH ELLIS, THE POST OFFICE IN THE EIGHTEENTH CENTURY: A STUDY IN ADMINISTRATIVE HISTORY vii (1958).

16. *Id.* at viii.

The role of the British post office as an "intelligence organ," as the government's "eyes and ears," remained crucial to the British government throughout the eighteenth century and well into the nineteenth. Post office staff collected and reported "all material transactions and remarkable occurrences" to their superiors, and post office officials were thus government intelligence agents.[17]

More important for my present purposes, the post office maintained a "Secret Office" until 1845.[18] Through the "Secret Office," the British post office "created intelligence by opening, detaining, or copying correspondence, and sending 'interceptions' to the Secretaries of State."[19] The practice of surveillance dated back to the sixteenth century and was premised on royal prerogative. Though legally a warrant was required after the Restoration,[20] as a practical matter, the number of officials who actually exercised surveillance powers increased through the eighteenth century. Starting in 1714, the Hanoverian Secretaries of State would simply issue long lists of individuals whose mail was to be inspected, and "[i]n 1765, the lists of foreign diplomats were replaced by a new general warrant . . . ordering the copying of all diplomatic correspondence through London."[21] As a matter of custom, the Under Secretaries of State would regularly give informal orders to open and read the correspondence of opposition leaders.[22] Perhaps more importantly, "[a] single warrant might list more than a hundred names, or it might direct the post office clerks to open the letters not only of a named individual but also of his or her associates."[23] Because the warrants themselves were secret, and because those with the power to issue the warrants likely did not want the public to know the extent of the practice, the relevant documents were often destroyed.[24] As one of the leading historians of the British post office has put

17. *Id.* at 61 (internal citation omitted).

18. In 1844, the British public learned about the existence of the "Secret or Inner Office." The ensuing uproar led to a drastic reduction of the use of warrants to open mail, as the "Secret Office" was officially abolished the following year. *Compare, e.g.*, ELLIS, *supra* note 15, at 138-42, *with* HOWARD ROBINSON, THE BRITISH POST OFFICE: A HISTORY 337-52 (1948).

19. ELLIS, *supra* note 15, at 62.

20. A 1663 statute imposed the warrant requirement. *See id.*; J.C. HEMMEON, THE HISTORY OF THE BRITISH POST OFFICE 26 (1912); *see also* Post Office Act, 1711, 9 Ann., c. 10, § 40 (prohibiting the "open[ing], detain[ing], or delay[ing]" of letters).

21. ELLIS, *supra* note 15, at 63.

22. *Id.* at 64.

23. Julie M. Flavell, *Government Interception of Letters From America and the Quest for Colonial Opinion in 1775*, 58 WM. & MARY Q. 403, 406 (2001), *available at* http://www.historycooperative.org/journals/wm/58.2/flavell.html; *see also* ROBINSON, *supra* note 18, at 121 (discussing a 1730 warrant that listed 112 names and noting that "[s]imilar orders are not infrequent"); Edward Raymond Turner, *The Secrecy of the Post*, 33 ENG. HIST. REV. 320, 323 (1918) (same).

24. Flavell, *supra* note 23, at 406.

it, "secrecy made legality unimportant."[25] Or, as another British historian has written, because so much has likely been destroyed, the post office's "role in generating intelligence [must be] illustrated rather than assessed."[26]

One thing that does appear to be clear is that the "typical government use of post office surveillance was in order to gain intelligence of conspiracies."[27] The term "conspiracies" was broad, however, as it even included a warrant granted to a father permitting his eldest son to open letters from his youngest son so that the father could foil a plan the younger son may have had to marry a woman against the father's wishes.[28]

Interestingly, one exception to this general rule that gathering intelligence of "conspiracies" motivated government surveillance occurred in the context of the American Revolution. After news of the Battle of Lexington and Concord reached London in June 1775, Lord Dartmouth, then the American Secretary, ordered the opening of *all* mail from America to England with the purpose of gauging public opinion. Somewhat sympathetic to some of the American demands and wanting to avoid an all-out war, Lord Dartmouth wanted to open the mail for the purpose of determining how widespread support for the American cause was.[29] As I will explain in the next subsection, Lord Dartmouth's surveillance was just a tiny part of a far deeper connection between postal privacy and the American Revolution.

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25. ELLIS, *supra* note 15, at 63; *see also* DAVID J. SEIPP, THE RIGHT TO PRIVACY IN AMERICAN HISTORY 10 (1978).

26. Flavell, *supra* note 23, at 407 (quoting ROGER WELLS, INSURRECTION: THE BRITISH EXPERIENCE, 1795-1803, at 33 (1983)); *see also* ROBINSON, *supra* note 18, at 122 ("[I]t is impossible to determine how much misuse of the privilege took place."). *See generally id.* at 119-25 (describing the practice and giving numerous examples of both the opening of mail and the perception on the part of letter-writers that their letters were being read); HERBERT JOYCE, THE HISTORY OF THE POST OFFICE FROM ITS ESTABLISHMENT DOWN TO 1836, at 170-72 (London, Richard Bentley & Son 1893) (describing the establishment of a private office around 1718 "which was expressly maintained for the purpose of opening and inspecting letters" and the meager expectations of sanctity of letters during the 18th century). *But cf.* HEMMEON, *supra* note 20, at 47 ("It is difficult to determine how great an extent this practice was prevalent as there seems little doubt that the complainants may occasionally have been prompted by their own vanity to believe that their correspondence had been tampered with.").

27. Flavell, *supra* note 23, at 407. *See generally* Turner, *supra* note 23, at 325-26.

28. *See* ROBINSON, *supra* note 18, at 122; Turner, *supra* note 23, at 325.

29. *See generally* Flavell, *supra* note 23. The British postal operations in the American colonies had ceased by December 1775, and thus so too did this unusual public-opinion surveillance. *See* WARD L. MINER, WILLIAM GODDARD, NEWSPAPERMAN 136 (1962); WILLIAM SMITH, THE HISTORY OF THE POST OFFICE IN BRITISH NORTH AMERICA, 1639-1870, at 65 (1920); Notice from the New York General Post Office (Dec. 25, 1775), *reprinted in* 4 AMERICAN ARCHIVES 453 (Peter Force ed., 4th ser., 1837), *available at* http://colet.uchicago.edu/cgi-bin/amarch/getdoc.pl?/projects/artflb/databases/efts/AmArch/IMAGE/.10444.

B. *Communications Privacy in the American Post Office*

The colonial post office in America was part of the same administrative structure as the English post office; postal communications were thus theoretically subject to the same legal rules. In the early seventeenth century, conveyance of letters in America was largely a private affair, and "[w]hen friends carried the mail the privacy of the contents was normally assured."[30] But "friends" rarely made the trip back to England and so things were quite different for overseas mail when the first mailmen began providing delivery services later in the seventeenth century. For overseas delivery, the only "mailbox" was usually a mailbag hung in a tavern, where anyone could rifle through the outgoing mail. Similarly, when mail arrived from abroad, it would simply be "dumped upon a table in a tavern house and thumbed through by the inhabitants."[31] This was in an era long before the envelope, and though many letter writers did use wax to seal their letters, the seals often fell apart during transit and in any case could easily be broken. Other techniques for preserving the privacy of a letter's contents were used, including the wrapping of an extra blank sheet around the letter to prevent reading through the paper and the use of secret code (including, for example, writing in Latin).[32] In modern parlance, we might refer to these as technological protection measures[33]—hardly quantum cryptography but certainly technological means for achieving the same end.

Though government surveillance certainly occurred during the seventeenth century, it is probably the case that people had some expectations that letters would be kept private.[34] Historian David Flaherty gives the example of Plymouth Colony Governor Bradford's opening of the mail of the colony's first minister, Reverend Mr. Lyford, because of suspicion that Lyford was planning a plot against the Pilgrim church. After doing so, Bradford explained to the colonists why he did what he did. Though Bradford did obviously believe that "security outranked privacy as a value under such circumstances," Flaherty argues that the fact that Bradford felt the need to explain his actions "suggests an obvious assumption by the populace that the mails should [ordinarily] be private."[35]

By early in the eighteenth century, merchants and traders increasingly needed greater security for their "'[c]orrespondencies [sic] and secrets'" from those who would "board[] newly arrived ships and claim[] letters that were not

30. DAVID H. FLAHERTY, PRIVACY IN COLONIAL NEW ENGLAND 116 (1972).

31. *Id.* at 116-17.

32. *Id.* at 118.

33. *Cf.* 17 U.S.C.A. § 1201 (West 2007) (defining "technological protection measure" for the purposes of the Digital Millennium Copyright Act).

34. *See* FLAHERTY, *supra* note 30, at 125.

35. *Id.* at 124-25 (citing WILLIAM BRADFORD, OF PLYMOUTH PLANTATION 149-53 (Boston, Little, Brown 1856)).

addressed to them."[36] This need was part of what spurred the establishment of the more formal post offices in America. By 1715, when a regular service had been established, with weekly service for most major towns,[37] most letter writers had abandoned the private carriers.[38] As I noted earlier, British law formally prohibited the "open[ing], detain[ing], or delay[ing]" of the mail in the absence of a warrant, and this applied to the colonial post as well.[39] There are, however, no reports of anyone actually being fined under this provision.

When William Hunter and Benjamin Franklin became deputy postmasters general for the colonies in the 1750s, among the regulations they promulgated was a requirement that all postmasters and associates had to subscribe to an oath that they would not tamper with the mail.[40] They were also required to establish an "Office" at "a Place to be set apart for that Purpose . . . and not to suffer the Letters to lie open in any Place."[41] The oath included the following: "I A. B. do swear, That I will not wittingly, willingly, or knowingly open . . . or cause, procure, permit, or suffer to be opened . . . any Letter or Letters . . . which shall come into my Hands, Power, or Custody, by Reason of my Employment in or relating to the Post Office; except . . . by an express Warrant in Writing under the Hand of one of the principal Secretaries of State for that purpose."[42] Yet, this was the same oath required by postal clerks in Britain under the Post Office Act of 1711, and there is little evidence that the security of the mail was any better in the colonies than it was in Britain.[43]

Indeed, by the early 1770s, when revolutionary tensions had increased, those opposed to the British Post Office recognized that the ability to intercept and open correspondence brought with it the concomitant power to determine who was a "traitor" to the British. This was of particular concern for sealed correspondence, which was the principal means by which the rebels communicated with those from other colonies. Loyalist postmasters would intercept and destroy materials they viewed as seditious.

When establishing the American post office, known in its early days as the "constitutional post," the rebels recognized the need for a conduit for both public (newspapers) and private (letters) correspondence and the need for both types of communication to be free from British control. William Goddard, a

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36. FLAHERTY, *supra* note 30, at 118-19 (quoting 1699 Mass. Acts 281).

37. Since postal service was provided by postriders on horseback, service was far less reliable during winter.

38. FLAHERTY, *supra* note 30, at 119.

39. *See* Post Office Act, 1711, 9 Ann., c. 10, § 40; *see also* sources cited *supra* note 20.

40. *See* FLAHERTY, *supra* note 30, at 121; *see also* 5 THE PAPERS OF BENJAMIN FRANKLIN 162, 164 (Leonard W. Labaree et al. eds., 1962).

41. *See* 5 THE PAPERS OF BENJAMIN FRANKLIN 162, *supra* note 40; *see also* FLAHERTY, *supra* note 30, at 121.

42. FLAHERTY, *supra* note 30, at 121.

43. *See* ROBINSON, *supra* note 18, at 120 (quoting the oath required under the Act of 1711).

newspaperman whose independent, private postal network became the backbone of the American post office,[44] gave the insecurity of correspondence as one of his principal attacks on the British post office, the so-called "parliamentary post."[45] Indeed, Goddard saw the postal network as a conduit for both one-to-many communication (i.e. newspapers) and one-to-one communication (i.e. letters), and saw British control over the network as a threat to both. In his proposal to establish the "constitutional post," he wrote, "It is not only our letters that are liable to be stopped and opened by a ministerial mandate, and their contents construed into treasonable conspiracies, but our newspapers, those necessary and important alarms in time of publick danger, may be rendered of little consequence for want of circulation."[46] Both types of communication were necessary for liberty; secrecy of private correspondence and widespread distribution of public newspapers both contributed to the goals of the rebels.[47]

In short, by 1773, the Americans clearly worried, and had good reason to worry, that loyalist postmasters would intercept and read their letters, a frightening prospect when much of what they were doing likely constituted treason.[48] Confidentiality of correspondence was thus a significant factor motivating the establishment of the separate "constitutional post."[49]

Goddard established the parallel "constitutional post" during 1774, and in July 1775, the Second Continental Congress adopted Goddard's post. Thus, it is Goddard's post that, strictly speaking, is the predecessor to the U.S. post office. Included among the eight "Model Rules" that Goddard set forth when

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44. MINER, *supra* note 29, at 135; *see also* 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 208-09 (July 26, 1775) (Worthington C. Ford et al. eds., 1936), *available at* http://memory.loc.gov/ammem/amlaw/lawhome.html. For more details of Goddard's connection with the establishment of the American post office, see Desai, *supra* note 12, at 681-83.

45. WESLEY EVERETT RICH, THE HISTORY OF THE UNITED STATES POST OFFICE TO THE YEAR 1829, at 44 (1924); *accord* SEIPP, *supra* note 25, at 10. As a side note, Goddard also viewed "Secrecy" as one of the important "Principles" on which he established his newspaper. *See* MINER, *supra* note 29, at 75. "Secrecy" in this context might be analogized to what today we would call the "journalist's privilege," since what it meant was the willingness to print pseudonymous articles without disclosing the author's identity.

46. William Goddard, Proposal for Establishing an American Post Office (1774), *reprinted in* 1 AMERICAN ARCHIVES 500 (Peter Force ed., 4th ser., 1837), *available at* http://colet.uchicago.edu/cgi-bin/amarch/getdoc.pl?/projects/artflb/databases/efts/AmArch/IMAGE/.562.

47. Elsewhere, I explain in greater detail the importance of the connection between the post office and the press for understanding the First Amendment. *See* Desai, *supra* note 12.

48. *Cf., e.g.*, MINER, *supra* note 29, at 123 (noting that Goddard's creation of a parallel post was illegal).

49. *See also* Goddard, *supra* note 46, at 501 (noting that the parliamentary post maintained "a Set of Officers, Ministerial indeed, in their creation, direction and dependence . . . into whose hands all the social, commercial and political intelligence of the Continent is necessarily committed; which, at this time, every one must consider as dangerous in the extreme").

proposing his postal network was "[t]hat the several mails shall be under lock and key, and liable to the inspection of no person but the respective Postmasters to whom directed, who shall be under oath for the faithful discharge of the trust reposed in them."[50] Though Goddard's principle clearly had its antecedents in Hunter and Franklin's 1753 regulations, which in turn found their basis in the 1711 Post Office Act, it is clear that the very specific concern of those who sought independence motivated their desire for a channel of information that would be both independent of the British "parliamentary post" and would preserve the inviolability of the contents of private communications. In short, the principle of confidentiality of the mail in the American postal network dates back to, and is intimately intertwined with, the revolutionary goals of those who sought independence.

This is not to say that the American practice differed so drastically from the earlier colonial post. Certainly during the Revolutionary War and, indeed, for years afterwards, letters were not always secure. Both Washington and Jefferson, for example, complained bitterly about their mail being opened and read in the post-war era.[51] Moreover, having control of the network during wartime, the Continental Congress certainly wanted access to any military secrets passing through that network. So, for example, in 1777 when Congress appointed an inspector of "dead letters" (those that were undeliverable for some reason), his job included "examin[ing] all dead letters at the expiration of each quarter" and "communicat[ing] to Congress such letters as contain inimical schemes or intelligence."[52] Even so, this provision was clearly aimed at what the Continental Congress viewed as military necessity, as the dead-letter inspector was simultaneously prohibited from making any copies of "any letter whatever" or divulging "their contents to any but Congress, or those whom they may appoint for the purpose."[53] Both the fact that this provision was limited to dead letters and the fact that it was aimed solely at "inimical schemes or intelligence" impliedly support the idea that opening the mail was generally prohibited. In short, the ideological premise that government control over the network did not automatically give it the right to use that control for surveillance purposes was part of the American postal system from the beginning, even if only in a limited form.

In October 1782, towards the end of the Revolutionary War, the Continental Congress passed a comprehensive postal ordinance. That law explicitly prohibited postal officials from opening the mail without "an express warrant under the hand of the President of the Congress of these United States or in time of war, of the Commander in Chief of the armies of these United

50. Goddard, *supra* note 46, at 503.

51. *See* SEIPP, *supra* note 25, at 1, 11; SMITH, *supra* note 29, at 50; LEONARD D. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY 191 (1956).

52. 9 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, *supra* note 44, at 817 (Oct. 17, 1777).

53. *Id.*

States, or of the commanding officer of a seperate [sic] army in these United States, or of the chief executive officer of one of the said states."[54]

One early twentieth-century historian referred to the prohibition of opening the mail in the 1782 Ordinance as "[a] reminiscence of the troubled times at the outbreak of the Revolution," implying the very fear of British control over the communications network that I described earlier.[55] Yet, somewhat paradoxically, he also described the prohibition as simply an adoption of "the practice of the British Post Office."[56] As more recent historical scholarship has argued, however, this second claim is probably an overstatement.[57] But, even if not, the Revolutionary experience and the incorporation of the prohibition into the 1782 Ordinance were part of an attitudinal shift that was taking place, a shift that was solidified after the ratification of the Constitution later that decade.

When Congress passed its first comprehensive postal statute in 1792, the confidentiality of the contents of sealed correspondence was again written into law. Most important, the relevant provision, which was similar to that found in the 1782 Ordinance,[58] was uncontroversial. There was virtually no discussion

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54. *See* An Ordinance for Regulating the Post Office of the United States of America, 23 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 44, at 670-71 (Oct. 18, 1782). The full text of the relevant provision reads as follows:

> And be it further ordained by the authority aforesaid, that the Postmaster General, his clerk or assistant, his deputies, and post and express-riders, and messengers, or either of them, shall not knowingly or willingly open, detain, delay, secrete, embezzle or destroy, or cause, procure, permit or suffer to be opened, detained, delayed, secreted, embezzled or destroyed any letter or letters, packet or packets, or other despatch or despatches, which shall come into his power, hands or custody by reason of his employment in or relating to the Post Office, except by the consent of the person or persons by or to whom the same shall be delivered or directed, or by an express warrant under the hand of the President of the Congress of these United States, or in time of war, of the Commander in Chief of the armies of these United States, or of the commanding officer of a separate army in these United States, or of the chief executive officer of one of the said states, for that purpose, or except in such other cases wherein he shall be authorized so to do by this ordinance: (provided always, that no letter, franked by any person authorized by this ordinance to frank the same, shall be opened by order of any military officer, or chief executive officer of either of the states.)

Id. at 671. In 1786, Congress proposed a new post office ordinance, which included similar language. *See* An Ordinance for Regulating the Post Office of the United States of America, proposed June 15, 1786, 32 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 44, at 46, 48 (Feb. 14, 1787). The Ordinance was never passed. *See* Richard P. McCormick, *Ambiguous Authority: The Ordinances of the Confederation Congress, 1781-1789*, 41 AM. J. LEGAL HIST. 411, 438-39 (1997) (listing all Ordinances with no mention of any postal Ordinances after 1782); *see also* REGISTER OF ORDINANCES, *in* PAPERS OF THE CONTINENTAL CONGRESS, *microformed on* M247, reel 194, item 175 (Nat'l Archives Micoform Publications) (listing all Continental Congress Ordinances and similarly making no mention of any post-1782 postal Ordinances).

55. RICH, *supra* note 45, at 57.

56. *Id.*

57. *See, e.g.*, RICHARD R. JOHN, SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE 30-31 (1995) (disagreeing with Rich's broader assessment that the U.S. Post Office policies were simply extensions of the policies of the British).

58. The relevant provision of the 1792 Act reads as follows:

of the confidentiality issue in Congress. The only brief mention of the principle occurred during a debate on whether the power to designate post roads should be delegated to the executive: one Representative expressed the fear that a future President could use the power to designate post roads as a means to "check the regular channel of information throughout the country" by making use of the power to intercept letters.[59] It was, in short, well assumed by everyone that giving the government the power to intercept, open, and read correspondence was incompatible with the basic principles of a public communications network.

One possible ambiguity is whether the prohibition was intended to control *official* surveillance. One of the leading historians of privacy in the United States, Professor David Seipp, has concluded that the question whether any legal provision "prevented the federal government, acting officially, from opening sealed letters in the custody of its post office was unsettled" until *Ex parte Jackson* in 1878. While he cites the 1792 Act and the 1782 Ordinance, as well as a similar 1825 law,[60] he does not explain how these provisions would permit official prying into letters. He notes that the 1792 Act penalizes postal *employees* and it only prohibits opening mail if done "unlawfully." One could thus see this as an implicit acknowledgement that "lawful" opening of letters was permitted and opening by government officials other than postal employees was similarly permitted. This may be correct, particularly given the statute's limited application to postal employees.

> [I]f any person, employed in any of the departments of the general post-office, shall unlawfully detain, delay, or open, any letter, packet, bag or mail of letters, with which he shall be entrusted, or which shall have come to his possession, and which are intended to be conveyed by post: Or if any such person shall secrete, embezzle or destroy any letter or packet, entrusted to him, as aforesaid, and which shall not contain any security for, or assurance relating to money, as herein after described, every such offender, being thereof duly convicted, shall, for every such offence, be fined not exceeding three hundred dollars, or imprisoned not exceeding six months, or both, according to the circumstances and aggravations of the offence.

Act of Feb. 20, 1792, § 16, 1 STAT. 232, 236. Current law has a similar provision, *see* 18 U.S.C. § 1703 (2000), as well as other provisions regulating postal privacy, *see id.* § 1702; 39 U.S.C § 404(c) (2000). *See generally* Anuj C. Desai, *Can the President Read Your Mail? A Legal Analysis* 1 (Univ. Wis. Law Sch. Legal Studies Research Paper Series, Paper No. 1035, 2007), *available at* http://ssrn.com/abstract=962453 (concluding "that the statutory prohibition on mail opening only applies to mail matter that falls into the category of 'letter'").

59. *See* 2 ANNALS OF CONG. 233 (Joseph Gales ed., 1834). Of course, the connection between giving the President or the Postmaster General the power to designate postal routes and giving either of them the power to intercept letters is not apparent on its face. More likely, the argument was a rhetorical method for tying proponents of the delegation of power to the broader notion of stronger executive powers, which sullied them with making "advances towards Monarchy." *See id*.

60. Note, *The Right to Privacy in Nineteenth Century America*, 94 HARV. L. REV. 1892, 1899 & n.51 (1981); *see* David J. Seipp, Curriculum Vitae, *available at* http://www.bu.edu/law/faculty/profiles/fullcvs/full-time/seipp_d.html (attributing the unsigned Note to Seipp).

Still, if one sees the 1792 Act in light of the language from the 1782 Ordinance, the word "unlawfully" may be less ambiguous than Professor Seipp believed. The 1782 Ordinance prohibited opening mail if done "knowingly" or "willingly,"[61] understandable limitations in a criminal prohibition. In contrast to the 1792 Act, the 1782 Ordinance also includes exceptions for when the addressee consents and when a few, specified officials issue an "express warrant." Given the 1792 Act's origins in the 1782 Ordinance and the lack of any debate about the relevant language in the 1792 Act, the word "unlawfully" in the 1792 Act could have been a shorthand way of saying that there were certain limited circumstances (addressee consent or an express warrant) in which the opening of letters would be "lawful." As I argue in Part II, even if *Ex parte Jackson* can be viewed as explicitly eliminating any ambiguity about the sanctity of the mail with respect to official mail opening, we can still see the case as the constitutionalization of a general principle that was well accepted as a matter of statutory law.

My central point is quite straightforward. By the time the American post office was firmly established in the 1792 Post Office Act, privacy of correspondence was legally mandated. Through Goddard's "Model Rules," the 1782 Ordinance, and eventually the 1792 Act, this legal mandate shaped the post office as an institution. It is worth emphasizing that this legal shaping of postal policy was completely independent of the Bill of Rights, including the First and Fourth Amendments. Certainly many of the same people were involved in both postal policy and the shaping of the Bill of Rights. Nonetheless, the principle of privacy of correspondence effectively preceded the Bill of Rights. While everyone at the time saw that principle as embedded in postal law, no one saw it as a matter of constitutional law. As the United States developed further through the nineteenth century, this *statutory* principle became a feature of the institutional structure of the post office. Eventually, as I explain in Part II, this attribute became a matter of constitutional law.

II. THE CONSTITUTIONALIZATION OF COMMUNICATIONS PRIVACY: *EX PARTE JACKSON* AND THE POSTAL NETWORK

The 1792 Post Office Act firmly embedded the concept of communications privacy into law and postal policy. Through the nineteenth century, the law remained in place, and expectations about the role of the post office and the importance of postal privacy developed. It was only after many decades that the Supreme Court eventually addressed the question of whether Congress could undo that long-standing principle of communications privacy, and it did so in a

61. 23 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 44, at 670-71 (Oct. 18, 1782).

case that on first blush had nothing to do with the confidentiality of communications, *Ex parte Jackson*.[62]

Ex parte Jackson was a constitutional challenge to one of the first postal statutes to prohibit the mailing of disfavored content—in this case, "letter[s] or circular[s] concerning lotteries."[63] Although many modern scholars have seen the case's holding primarily in First Amendment terms[64]—and it certainly does implicate First Amendment values—the case cannot be divorced from, and must be viewed through the lens of, Congress's postal power.[65] More important than its actual holding, however, is the Court's dictum about the Fourth Amendment. That dictum has given us *Ex parte Jackson*'s most illustrious progeny, and it is in that dictum that we see the roots of the Fourth Amendment principle of communications privacy.

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62. 96 U.S. 727 (1878).

63. *Id.* at 730.

64. DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888, at 442-44 (1985) (putting the case into the category of freedom of expression); DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS, 1870-1920, at 137-38 (1997); David M. Rabban, *The Free Speech League, the ACLU, and Changing Conceptions of Free Speech in American History*, 45 STAN. L. REV. 47, 64 (1992) (referring to the case as a "First Amendment challenge"); David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1720 (1991) (referring to the Court's holding as a rejection of "the First Amendment claims"). Professor Reuel Schiller similarly characterizes *Ex parte Jackson* as a First Amendment case and rightly refers to the Court's understanding of Congress's postal power as a type of "police power." Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1, 38-39 (2000). Where I believe Professor Schiller errs is in characterizing *Ex parte Jackson* as a case in which "the constitutional law issue became an administrative matter, judged under the deferential rules of the expertise-driven, prescriptive administrative state." *Id.* at 40. It may be that the standard the Court used to consider the constitutionality of the statute in *Ex parte Jackson* was deferential and thus comparable, at some level of abstraction, to the sort of review that courts use in reviewing administrative agency actions. However, as will become clear from my description of the case, the case was clearly reviewing a federal statute, not an agency action, and there is nothing in the case that suggests deference to the agency, i.e., the post office. Rather, the Court is deferring to Congress's policy choice, not to anything done by the Postmaster General or postal employees. I do agree with the thrust of Professor Schiller's claim that courts treated the post office as an administrative agency to which deference was appropriate in cases involving sensitive free speech issues before the New Deal. As I explain elsewhere, *see* Desai, *supra* note 12, at 711, the *Milwaukee Leader* case, *United States ex rel. Milwaukee Soc. Democrat Publ'g Co. v. Burleson*, 255 U.S. 407 (1921), is a perfect example of the phenomenon Schiller describes, and I agree with his characterization of that case. Schiller, *supra*, at 41-42. However, because *Ex parte Jackson* involved the constitutionality of an actual statute, rather than the act of any postal employee, it is far too much of a stretch to characterize *Ex parte Jackson* as a case with administrative law implications.

65. U.S. CONST. art. I, § 8, cl. 7; *see* CHARLES FAIRMAN, 7 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864-88, pt. 2, at 735 (1987) (referring to *Ex parte Jackson* as "an opinion on the postal power of Congress"); Howard Owen Hunter, *Problems in Search of Principles: The First Amendment in the Supreme Court, 1791-1930*, 35 EMORY L.J. 59, 76 (1986) (characterizing the case as one in which the "Court upheld the prohibition as a proper exercise of the postal power").

A. *Ex parte* Jackson*'s First Amendment Holding*

Orlando Jackson, the petitioner, had been convicted for mailing information about a lottery, and he challenged the statute's constitutionality on habeas. The thrust of his argument was that Congress lacked the power to exclude from the mail those types of "letters and packets which were considered legitimate mail matter at the time of the adoption of the Constitution."[66] In other words, the adoption of the Constitution required Congress to provide a post office that would deliver what was viewed as "mailable" at that time. By doing so, Jackson's argument went, the Constitution effectively created a set of mailable materials, and Congress could not stop delivery of any materials in that set.[67]

But Jackson's appeal to history didn't stop with the Constitution's adoption. For precedent, he relied principally on the congressional debates in 1835 and 1836 about a proposal to bar the use of the mail for antislavery pamphlets; at that time, most members of Congress who considered the matter believed the proposal to be unconstitutional.[68] The petitioner argued that the proposal to bar antislavery pamphlets was more relevant than any case law because it was the only time prior to the law prohibiting lottery circulars that Congress had even considered imposing restrictions on "legitimate mail matter."

If we look to the specifics of the debate surrounding the proposals to bar the use of the mail for antislavery publications, we can see that the debate was intimately tied to unique attributes of the post office. One key attribute was the *federal* nature of the institution.[69] In late 1835, President Andrew Jackson, who supported slavery and opposed the use of the mail for disseminating antislavery tracts, proposed a law that would have prohibited the mailing of "incendiary

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66. *Ex parte* Jackson, 96 U.S. at 729.

67. *See also id.* at 731 (reciting petitioner's argument that "[w]hatever else has been declared to be mailable matter . . . [since] the convention concluded its labors in 1787, may in the discretion of Congress be abolished").

68. *Id.* at 730, 733-35 ("Great reliance is placed by petitioner upon these views, coming, as they did in many instances, from men alike distinguished as jurists and statesmen."). For a discussion of the broader controversy, see DOROTHY GANFIELD FOWLER, UNMAILABLE: CONGRESS AND THE POST OFFICE 26-33 (1977); JOHN, *supra* note 57, at 257-80; Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-37*, 89 NW. U. L. REV. 785, 817-36 (1995); Eberhard P. Deutsch, *Freedom of the Press and of the Mails*, 36 MICH. L. REV. 703, 717-23 (1938). On the events that prompted the controversy, see Susan Wyly-Jones, *The 1835 Anti-Abolition Meetings in the South: A New Look at the Controversy over the Abolition Postal Campaign*, 47 CIV. WAR HIST. 289 (2001). One scholar has argued that the abolitionists' postal campaign was an important catalyst in raising awareness in the North—indeed that it was intended effectively as an advertising campaign, not a conversion campaign—that was crucial in convincing many of the need for emancipation. *See* Bertram Wyatt-Brown, *The Abolitionists' Postal Campaign of 1835*, 50 J. NEGRO HIST. 227, 229, 238 (1965).

69. *See* Curtis, *supra* note 68, at 823-36.

publications intended to instigate the slaves to insurrection."[70] The objection to the President's proposal was based on two separate arguments: first, that the federal government lacked power to regulate, what we might today refer to as an enumerated powers issue; and, second, that the law would abridge freedom of the press, what we might today call an external (individual rights) limitation on federal power. The enumerated powers argument was just as important as the freedom of the press argument.[71] Textually, one argument in favor of the enumerated powers limitation is that Article I provides Congress with the power "to *Establish* Post Offices and Post Roads,"[72] and no more. As one Senator stated when making a related point during the debates, "the words 'to establish' were used to denote that the Congress had the power to fix, unalterably and immovably, . . . the entire operations of the Post Office."[73]

Even Senator John C. Calhoun, a known proponent of Southern slavery, concluded that the federal government lacked the power to bar abolitionist publications. His solution, however, was to have his states' rights cake and eat it too: his alternative proposal was a federal law that would criminalize the delivery of mail that violated state law.[74] In other words, he argued that a general federal law defining what materials could be carried through the mail was unconstitutional but one that simply assisted the states in the enforcement of their laws was not. To many, however, Calhoun's proposed law failed to follow his own logic that the federal government lacked the requisite power to regulate. Representative Hiland Hall of Vermont, for example, concluded that the federal government did not even have the power to do what Senator Calhoun had proposed, which was in effect to enforce state law, because doing so amounted to a violation of freedom of the press.[75]

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70. Andrew Jackson, Seventh Annual Message to Congress (Dec. 7, 1835), *in* 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 176 (James D. Richardson ed., Washington, Gov't Printing Office, 1896); *see also* Curtis, *supra* note 68, at 824.

71. Curtis, *supra* note 68, at 824 ("[T]he problem was not whether legislation to suppress abolitionist publications would violate the right of Americans to free speech or free press. The problem was whether the federal government had any power at all to deal with the subject.").

72. U.S. CONST. art. I, § 8, cl. 7 (emphasis added).

73. CONG. GLOBE, 24th Cong., 1st Sess. app. 282 (1836) (statement of Sen. Morris). Though the argument has a superficial appeal, it makes no sense as a historical matter, and indeed didn't make sense even in 1836. As I explain elsewhere, the post office expanded profoundly in the years following Congress's initial "establish[ment]" of it, at the behest of those early Congresses, many of whose members were involved in the drafting and ratification of the Constitution. *See* Desai, *supra* note 12, at 702-03.

74. CONG. GLOBE, 24th Cong., 1st Sess. 165 (1836).

75. Curtis, *supra* note 68, at 825-26; Richard R. John, *Hiland Hall's "Report on Incendiary Publications": A Forgotten Nineteenth Century Defense of the Constitutional Guarantee of the Freedom of the Press*, 41 AM. J. LEGAL HIST. 94, 99-101 (1997) ("[F]rom Hall's standpoint, Calhoun's proposal differed little from Jackson's."); *see also* FOWLER, *supra* note 68, at 31-33 (quoting Senator John Milton Niles as saying that "[t]he public mail, like the press, should be free, free as the air we breathe" and noting that Senator Daniel

Proponents of the law made the opposite argument, essentially a "greater includes the lesser" form of argument, concluding that because Congress had the power not to establish the post office in the first place, it had the power to decide the uses to which it was to be put and could thus prevent its use for antislavery publications. Under this argument, the federal government was simply refusing to "assist" in circulation rather than prohibiting circulation.[76] Although this argument did not prevail at the time of the debate about antislavery tracts in the mail,[77] it was successful for much of American history. As we will see, the Court in *Ex parte Jackson* ultimately used this form of argument to uphold the law prohibiting the mailing of lottery circulars.[78]

As did opponents of the proposals to bar abolitionist mail, the petitioner in *Ex parte Jackson* also tied his argument to unique attributes of the post office. In *Ex parte Jackson*, however, the focus was not on the federal nature of the post office but instead on the fact that the post office was a monopoly. The petitioner argued that, if Congress could prevent the mailing of letters concerning lotteries, it could effectively "cut off *all* means of epistolary communication":[79] Congress's postal monopoly meant that it could prevent—and, in fact, had prevented—the conveyance of mail by anyone other than the postal service.[80] In short, the petitioner's argument was that prohibiting the circulation of any specific content via the post office amounted to absolute censorship in fact because of the unique institutional attributes of the post office—namely, that it held a monopoly on the conveyance of letters.

Webster made a speech analogizing circulation through the mail to a form of publishing).

76. Curtis, *supra* note 68, at 827-28.

77. Neither President Jackson's nor Senator Calhoun's proposal ever became law. In fact, in July 1836, Congress passed a comprehensive postal reorganization statute that included a provision specifically barring postmasters from interfering with the flow of mail in any way, either by refusing to deliver certain mail or by "giv[ing] a preference to [one piece of mail] over another." Act of July 2, 1836, § 32, 5 Stat. 80, 87 (1836). It seems unlikely that there was complete compliance with the law in the years immediately after its passage, but the law ended the controversy as a legal and constitutional matter. *See* W. Sherman Savage, *Abolitionist Literature in the Mails 1835-1836*, 13 J. NEGRO HIST. 150, 183-84 (1965).

78. So too did the World War I Court use this form of argument when upholding a denial of subsidized postal rates to publications that the postmaster deemed subversive. *See* Desai, *supra* note 12, at 711.

79. *Ex parte* Jackson, 96 U.S. 727, 730-31 (1878) (emphasis added); *see also id.* at 734 (citing Senator Calhoun's report on the antislavery pamphlets for conclusion "that Congress . . . may declare any road or navigable water to be a post road," which combined with the law preventing use of post-roads or "road[s] parallel to" post-roads to convey letters effectively amounted to a monopoly power).

80. I discuss the origins of the American postal monopoly in detail elsewhere. *See* Desai, *supra* note 12, at 696-99. The law at the time of *Ex parte Jackson* was, for all relevant purposes, unchanged from the 1792 Act. *See* Act of March 3, 1825, ch. 64, § 19, 4 Stat. 102, 107 (1825); *see also* RICHARD B. KIELBOWICZ, NEWS IN THE MAIL 34 (1989); George L. Priest, *The History of the Postal Monopoly in the United States*, 18 J.L. & ECON. 33, 55 (1975).

The petitioner then combined that argument with a classic slippery slope argument that such a power would allow Congress to cut off all epistolary communication "upon any subject which is objectionable to a majority of its members."[81] The lower court that heard the case explicitly held that Congress could do such a thing:

> To argue against the existence of such discretion because it is possible for congress to abuse its exercise, by excluding from the mail letters containing matter of a given character, through caprice or from partisan prejudice, is to argue against the existence of all discretion in congress in the exercise of any of the powers conferred on it. All such discretion may be abused, but the correction of the abuse must be left, under our form of government, to the expression of the will of the people by means of the elective franchise. The existence of the abuse is no argument against the existence of the power.[82]

When the case reached the Supreme Court, the Court never addressed this absolute-censorship argument explicitly. Instead, the Court took a slightly different tack. The Court began with eloquent musings about the connection between freedom of the press and access to the mail,[83] but then accepted the government's statement that Congress could not prohibit the transportation of nonmailable matter by means other than the mail.[84] By doing so, the Court was effectively able to characterize the case not as one about absolute censorship but instead simply as one about Congress's power over the mail.

Whether one characterizes the government's statement as a concession or a claim depends on which of two things one views as more important, this particular statute or the broader federal monopoly power over the mail. However, given how little of a concession it was at the time to allow the private delivery of materials that could not be sent through the mail, it probably falls more into the category of "claim" than "concession." Given the post office's practical monopoly at the time of the decision, the government's willingness to give up its legal monopoly for the limited purposes of materials it was unwilling to transport through the post office was not much of a concession. Indeed, one commentator compared the Court's claim that there were other modes of circulation to Marie Antoinette's (probably apocryphal) "Let them eat cake!" suggestion to the breadless peasants during the French Revolution.[85] In characterizing the case as simply one about Congress's power over the mail, the Court was ever so slightly undermining Congress's legal monopoly power, but this shift from, on the one hand, an absolute monopoly power over long-

81. *Ex parte* Jackson, 96 U.S. at 731.

82. *In re* Jackson, 13 F. Cas. 194, 196 (S.D.N.Y. 1877) (No. 7124).

83. Probably the decision's most memorable line was on this point: "Liberty of circulating is as essential to [the freedom of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value." 96 U.S. at 733. The line has been quoted numerous times, most famously by Chief Justice Hughes for the Court in *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938).

84. *Ex parte* Jackson, 96 U.S. at 732.

85. *See* Deutsch, *supra* note 68, at 732.

distance communication without power to exclude on the basis of content to, on the other hand, a more limited monopoly power, one limited to mailable materials only, was certainly a small price for the government to pay in order to gain control over content through what was then the principal means of long-distance communication.[86]

Professor Ithiel de Sola Pool has nicely summarized the tension between the government's postal monopoly and its control over the content of communications through the postal network.[87] Pool notes that taking the postal monopoly and content control as two different factors to consider, there are four different possible ways in which Congress can be allowed to exercise power: (1) a postal monopoly and control over the content (most restrictive); (2) a postal monopoly without control over the content (intermediate); (3) no monopoly, but control over the content (intermediate); and (4) no monopoly and no control over the content (most libertarian). The courts have never permitted Congress the first option and have never imposed the fourth. The move from the antebellum era of a complete postal monopoly to *Ex parte Jackson* can be seen as a move between the two intermediate options, from the second to the third. The courts continued to straddle the second and third categories long after *Ex parte Jackson*. As Justice Holmes put it in 1922, "The decisions thus far have gone largely if not wholly on the ground that if the Government chose to offer a means of transportation which it was not bound to offer it could choose what it would transport."[88]

B. *Ex parte* Jackson *and the Fourth Amendment*

But even seeing the case in these terms, the government did not get complete content control over the mail, and it is this aspect of the Court's decision on which I want to focus. The Court stated explicitly that the government could not enforce the statute by opening sealed letters: "[A] distinction is to be made," the Court stated, "between what is intended to be kept free from inspection, such as letters, and sealed packages subject to letter

86. The only other medium for long-distance communication at the time was the telegraph, which I discuss below.

87. *See generally* ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 80-84 (1983).

88. Leach v. Carlile, 258 U.S. 138, 141 (1922) (Holmes, J., dissenting). By the time of the *Leach* case in 1922, Justice Holmes had of course become a hero to speech libertarians. *See* G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 436-37 (1993) ("In his post-*Abrams* free speech opinions Holmes regularly adopted speech-protective positions and thereby cemented his reputation among commentators as a libertarian on free speech issues."). More important, he had abandoned his views on what we today call "unconstitutional conditions" questions, declaring in effect that he viewed category three as unconstitutional as well because the theoretical availability of other means of circulation did not eliminate "the practical dependence of the public upon the post office." *Leach*, 258 U.S. at 141; *see* WHITE, *supra*, at 437-38; G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CAL. L. REV. 391, 443-44 (1992). *See generally* Desai, *supra* note 12, at 713-14.

postage; and what is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, purposely left in a condition to be examined."[89] According to the Court, the government had no power to open sealed letters without a warrant: "The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be."[90] This conclusion was dicta since it was, strictly speaking, unnecessary to the Court's holding: the government never opened a sealed letter sent by Jackson,[91] and the Court upheld the statute and Jackson's conviction. Nonetheless, the Court discusses this issue for a good part of the case and may well have understood this as part of the quid pro quo that the government had to give up in order to have the power to exclude material from the mail based on its content.

Though the petitioner's argument relied on originalism, the Court's decision did not. Justice Field effectively characterized a letter passing through the mail system as the sender's "papers" for Fourth Amendment purposes,[92] but scholars of the history of the adoption of the Fourth Amendment have never even mentioned protection for letters sent through the post office, let alone concluded that the drafters believed letters were to be protected from warrantless searches while in transit. As Professor Telford Taylor has succinctly put it, "It is quite impossible to spell out an original understanding that the mail, or any future means of general communication, were to fall within the 'persons, houses, papers, and effects' protected by the fourth amendment."[93]

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89. *Ex parte* Jackson, 96 U.S. at 733.

90. *Id.*

91. *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 613 n.174 (1999) (referring to this aspect of the case as dicta); Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down That Wrong Road Again,"* 74 N.C. L. REV. 1559, 1600 (1996) (same); Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 240 n.153 (1993) (same).

92. *See Ex parte* Jackson, 96 U.S. at 733 ("Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection . . . as if they were retained *by the parties forwarding them* in their own domiciles." (emphasis added)). Interestingly, forty years earlier, during the congressional debates surrounding the antislavery pamphlet prohibition proposal, letters in transit were characterized as the property of the *recipient*, not the sender. *See* CONG. GLOBE, 24th Cong., 1st Sess., App. 282 (1836) (statement of Sen. Morris) (saying that when a letter is put in the mail, it is not the "property of him who deposited it," but is rather the "property of the person to whom it is directed"); *see also* JOHN, *supra* note 57, at 262 (noting that "preaddressed periodicals . . . were technically the property of the recipient").

93. TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 76 (1969). To be fair, Professor Taylor was not purporting to have done an exhaustive survey of the question. Earlier in his discussion, he notes simply that "I have seen nothing to indicate that the matter of opening letters was adverted to at the time [that the Constitution vested plenary power over the post in the federal government]." *Id.* at 75. As I explained above, the "matter of opening letters" was definitely "adverted to at the time," but all such references were

In modern scholarship, the principal debate about Fourth Amendment history focuses on whether the framers wanted the amendment to mandate warrants in most government searches and seizures, the so-called "warrant-preference" theory, or instead were primarily concerned with ensuring that searches and seizures were not "unreasonable," the so-called "generalized-reasonableness" approach.[94] None of the events that the most prominent scholars have relied upon as the proximate motivation for the amendment concern the post office in any way.[95] Perhaps of just as much relevance is the fact that when the Second Congress adopted this principle as *legislation* in the

made in the context of legislative debates about postal policy, not in the context of the drafting and ratification of the Fourth Amendment.

94. *Compare, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 762-68, 772-81, 797-98 (1994) (setting forth the historical case that the core of the Fourth Amendment is a "reasonableness" requirement, not a warrant or probable cause requirement, and that the Fourth Amendment properly provides civil remedies sounding in "constitutional torts," not exclusion of evidence from criminal trials), *with* Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925 (1997) (rejecting Amar's view and asserting that the "warrant-preference" view is more consonant with the historical record).

95. *See, e.g.*, Davies, *supra* note 91 (discussing NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1937) and William John Cuddihy, The Fourth Amendment: Origins and Original Meaning, 602-1791 (1990) (unpublished Ph.D. dissertation, Claremont Graduate University) (on file with Robert Crown Law Library, Stanford University). Lasson's book is seminal, and Cuddihy's three-volume, 1560-page doctoral dissertation is comprehensive. In the main text, I use the phrase "the most prominent scholars" because the scholarship on the origins of the Fourth Amendment is so vast that I cannot possibly make a claim about *all* scholars. For a sampling of the literature, see, for example, Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1712-21 (1996) (reviewing and summarizing the most exhaustive history of the origins of the Fourth Amendment ever written, Cuddihy, *supra*); Davies, *supra* note 91 (arguing that framers were only concerned about prohibiting "general warrants"—those that failed to state with particularity the place to be searched or person to be seized and those that were unsupported by sufficient evidence—and had no concern with warrantless searches because officers' powers to search and arrest without a warrant were so limited compared with their powers today); Maclin, *supra* note 91, at 201 (arguing that the framers' central concern was "distrust of police power and discretion"); David E. Steinberg, *The Original Understanding of Unreasonable Searches and Seizures*, 56 FLA. L. REV. 1051, 1053, 1061-82 (2004) (arguing "that the Fourth Amendment was intended to proscribe only a single, discrete activity—physical searches of houses pursuant to a general warrant, or no warrant at all"). Of course, letters *in one's home* were almost definitely viewed as "papers" for Fourth Amendment purposes and could thus have been within the original meaning of the Fourth Amendment. *Cf.* Weeks v. United States, 232 U.S. 383 (1914) (holding that Fourth Amendment was violated when letters were among "papers" seized). In the text, I am referring solely to letters at the time that they are in transit through the postal system. The easiest way to see the importance of the distinction between the home and in transit through the post office is to compare a newspaper in one's home with a newspaper in the postal system. The former would have been protected by the Fourth Amendment, while the latter obviously would not have been because it was sent without any cover and was thus completely open to be read.

1792 Act a mere two months after ratification of the Bill of Rights,[96] it made no reference to the Constitution or the Fourth Amendment.[97]

From this last fact comes my central point about *Ex parte Jackson*: When the Second Congress, following the Continental Congress before it, imposed criminal liability on postal workers who violated the privacy of correspondence, it set the post office on a course as a medium through which the confidentiality of sealed letters would be preserved. It was this congressional action, not the nation's adoption of the Fourth Amendment, that eventually led to the Fourth Amendment principle in *Ex parte Jackson*. Justice Field saw in the Fourth Amendment not what the constitutional drafters had put there, but instead what postal policymakers had incorporated into the structure of the post office.[98]

C. *Telegraph Privacy in the Ex parte* Jackson *Era*

One good way to see the institutional specificity of the rule set down by *Ex parte Jackson* is to see it through the lens of other communication media.[99] These media had different technological and institutional characteristics, and the courts treated them differently. So, for example, consider the telegraph. In the early days, telegrams needed to be transcribed numerous times by telegraph

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96. The first ten amendments to the Constitution were ratified in December 1791, and the 1792 Post Office Act was passed in February 1792. In some ways, the timing is even closer than the two-month period would suggest: the principal debates surrounding the 1792 Act took place in late December 1791.

97. *See supra* text accompanying note 61. Indeed, when Congress passed the first federal law prohibiting use of the mail for sending obscenity in 1865, Congress likely understood that the prohibition could not be enforced by opening sealed letters. *See* CONG. GLOBE, 38th Cong., 2d Sess. 661 (1865). In 1888 (after *Ex parte Jackson*), when the statute was amended, Congress made this point explicit. *See* 25 Stat. 496, 497 (1888); *see also* 19 CONG. REC. 8189 (1888). This is more suggestive evidence that the *Ex parte Jackson* Court was simply transforming a statutory principle into constitutional law.

98. Two of today's leading scholars of privacy and new technologies, Professors Daniel Solove and Orin Kerr, have argued at great length about the relative roles of the legislature and the judiciary in protecting privacy. *See, e.g.*, Orin S. Kerr, *Congress, the Courts, and New Technologies: A Response to Professor Solove*, 74 FORDHAM L. REV. 779 (2005); Kerr, *supra* note 14, at 888 (arguing "that the judiciary-focused view overlooks the critical role that statutory privacy protections have played in protecting privacy in developing technologies"); Daniel J. Solove, *Fourth Amendment Codification and Professor Kerr's Misguided Call for Judicial Deference*, 74 FORDHAM L. REV. 747 (2005). However, seeing certain principles through an institutional lens allows one to view the role that the judiciary plays in light of decisions about institutions that the legislature makes. Doing so does not of course obviate the importance of that question, but it does allow for a role for courts to incorporate long-standing institutional policies about privacy into judicially created constitutional law.

99. *Cf.* Susan Freiwald, *Uncertain Privacy: Communication Attributes After the Digital Telephony Act*, 69 S. CAL. L. REV. 949, 953 n.12 (1996) (referring to postal communications as being "subject to their own unique set of constitutional and statutory provisions").

clerks along the route between sender and recipient. The nature of telegraphic technology thus necessitated that many people other than the intended addressee actually view a telegram's contents. It is not hard to see, then, why a concern about the confidentiality of telegrams could be even greater than that for sealed letters. Yet the telegraph never received the full extent of protection that the mail received, either statutorily or through judicial interpretation of the Constitution.[100] A brief look at the history of confidentiality of the telegraph during the late nineteenth century makes this clear.

Early in the telegraph's commercial history, the American telegraph industry became a very different medium from the post office, including with respect to confidentiality of communication. During the Civil War, telegraph companies affirmatively cooperated with the government, turning over messages to the War Department to help uncover treasonous plots.[101] Indeed, on the other side of the battlefield, Confederate General Jeb Stuart even had his own wiretapper with him in the field.[102] By the time the Court decided *Ex parte Jackson* in 1878, the question of the confidentiality of telegraphic communications was a major public issue about which the Justices would have been well aware. Amid the contested Hayes-Tilden election of 1876 (about a year and a half before the Court's decision in *Ex parte Jackson*), committees in both houses of Congress had subpoenaed Western Union, the country's dominant telegraph company, for records of telegraphic correspondence to search for any information that could help resolve the disputed election.[103] Western Union resisted, and Congress debated the propriety of the subpoenas during December 1876 and January 1877. The debate about the confidentiality of telegrams—including comparisons with the mail—made front page news

100. *See* DAVID J. SEIPP, THE RIGHT TO PRIVACY IN AMERICAN HISTORY 42 (1978) ("Telegraphic messages were not . . . placed on the same legal footing with the mails.").

101. *Id.* at 30. The War Department's regulation of the telegraph also included substantial censorship of news reporting. *See* JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 482-83 (1926). To support my point about the differences between the post office and telegraph even further, it is worth noting that the way in which news correspondents and others circumvented the telegraph censorship was to send unauthorized news via the mail. *See id.* at 483-84. Surprisingly, the two most recent books on constitutional and civil rights issues during Lincoln's presidency do not appear to address these issues, which we would today view as blatant censorship. *See* DANIEL FARBER, LINCOLN'S CONSTITUTION (2003); MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES (1991).

102. SAMUEL DASH, THE INTRUDERS: UNREASONABLE SEARCHES AND SEIZURES FROM KING JOHN TO JOHN ASHCROFT 79 (2004).

103. *See* SEIPP, *supra* note 100, at 31. This was by no means the only time Congress used its subpoena power to do broad dragnet searches. *See* DASH, *supra* note 102, at 79 (discussing an 1876 congressional inquiry into Washington, D.C. real estate dealings that resulted in Congress subpoenaing three quarters of a ton of telegrams).

throughout the country.[104] Western Union eventually delivered nearly 30,000 political telegrams to a Senate committee.[105]

After *Ex parte Jackson* (decided in May 1878),[106] questions about the confidentiality of telegrams—and, in particular, the appropriateness of treating telegrams as legally equivalent to letters for purposes of confidentiality—were debated again. The debates revolved specifically around distinctions with the mail.[107] First, and perhaps foremost, was the fact that when government officials sought to "open" telegrams, they were seeking the contents of what we would today call "stored communications,"[108] rather than—as in the case of the mail—intercepting a communication in transit, what we would today view as analogous to "wire-tapping."[109] Because of this difference, it was much easier for those seeking evidence from telegrams to do "drag-net" searches of the type the Senate authorized during the Tilden-Hayes election controversy. One other distinction was the fact that the telegraphic companies were private, while the post office was of course a governmental institution. It is thus of significant relevance for this difference in treatment that, in contrast to most countries in the world, the telegraph in the United States was not folded into the government post office. In some ways, this was the beginning of the broad policy of "intermodal" competition—allowing the existence of a monopoly in one medium, but restricting cross-ownership across medium-lines—that was unique to American communications policy.[110] This distinction, which mattered for legal purposes,[111] was not as important in the public debate. In response to these arguments, those who saw the analogy between the telegraph and the post office as appropriate focused on the social meaning of the

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104. *See* SEIPP, *supra* note 100, at 35.

105. *Id.* at 37.

106. Although *Ex parte Jackson* has often been cited as an 1877 case, even by some very fine scholars, *see, e.g.*, DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS: 1870-1920, at 137 (1997), the Court in fact heard argument and issued its opinion in 1878.

107. SEIPP, *supra* note 100, at 37 ("One principle of central importance to the continuing debate was an analogy between telegraphic dispatches and letters in the post office.").

108. *See, e.g.*, 18 U.S.C. § 2701 (2000).

109. SEIPP, *supra* note 100, at 41; *see also* Daniel J. Solove, *Reconstructing Electronic Surveillance Law*, 72 GEO. WASH. L. REV. 1264, 1270-71 (2004).

110. *See* PAUL STARR, THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS 394 (2004).

111. *See, e.g.*, *Ex parte* Brown, 72 Mo. 83 (1880), 1880 WL 4234, at *3 (Mo.), 1880 Mo. LEXIS 159, at **7 ("It would be an anomaly, indeed," argued a state attorney general who sought to force the disclosure of telegrams, "if a private corporation could make a rule which, in terms, nullifies process issued by a court of justice; and when the law demands and calls for certain evidence, a telegraph company can defeat that demand by a rule enacted by itself."); *Ex parte* Brown, 7 Mo. App. 484, 490 (Ct. App. 1879) ("By what authority can it be assumed that a private person or company, engaged in the business of telegraphy, stands in relation to the State governments as does the Federal government when acting under express laws?").

telegraph, particularly on the fact that the telegraph was fast becoming an important medium for long-distance communication.[112]

Two years after *Ex parte Jackson*, Western Union proposed, and Congress considered, a bill to treat "all telegraphic messages" as "protected from unreasonable search and seizure . . . to the same extent as letters sent by the United States mail."[113] The bill was defeated, but Congress resolved that, when it issued subpoenas, it would henceforth limit its demands to specific and pertinent messages rather than issue broad subpoenas aimed at wholesale disclosure of telegraphic communications. As I explain below, this approach comported with that taken by most courts that addressed the question in the course of challenges brought by telegraph companies or their employees.

Though the United States Supreme Court never addressed the issue, every court that faced the question of the confidentiality of telegraphic messages rejected the analogy to the mail.[114] One good example is *Merchants National Bank of Wheeling v. First National Bank of Wheeling*.[115] In that case, involving enforcement of a payment on a check, the defendant argued that its telegraphic communications were privileged from disclosure. The West Virginia Supreme Court specifically rejected the analogy to the mail, distinguishing letters as being "protected by act of Congress from being seized and opened . . . for reason of high public policy."[116] Notice this reference to Congress, which turns out to be crucial to the court's understanding of the mail. We can see this because the court made no mention of what the "high public policy" might be, or of whether that "high public policy" might apply with equal measure to telegrams. Instead, the court held that telegraphic messages were different from letters for what today would be a standard argument for judicial deference: "[N]o such legislative enactment, state or national, shields the communications by the telegraph. . . . When the legislative power can be so easily invoked . . . it may be wiser and better for the courts to refrain from such a line of decision."[117]

Merchants National Bank precedes *Ex parte Jackson* by nearly four years and so there was no discussion of the soon-to-be-created Fourth Amendment right to confidentiality of the contents of one's letters. Moreover, the evidence sought in *Merchants National Bank* consisted of specific telegrams, not—as in

112. To the extent that a textualist might note that a letter was tangible and thus could be characterized as a "paper[]" within the meaning of the Fourth Amendment, it is worth noting that telegrams were "papers" as well, since they were transcribed on paper at each node along the route and—most importantly—consisted of paper at the recipient's end as well. *See also infra* note 119.

113. Quoted in SEIPP, *supra* note 100, at 40.

114. *See also infra* note 130.

115. 7 W.Va. 544 (1874).

116. *Id.* at 546-47.

117. *Id.* at 547.

the Congressional subpoenas in the Hayes-Tilden controversy—every message in the Western Union offices.

But *Ex parte Jackson* changed nothing. Soon after the decision, the Missouri courts were specifically asked to extend *Ex parte Jackson*'s Fourth Amendment principle to the telegraph, and they refused. In *Ex parte Brown*, a Western Union employee was held in contempt for refusing to comb through the company's files in response to a subpoena ordering all dispatches involving certain named individuals. In the employee's subsequent habeas petition, the Missouri Court of Appeals rejected the analogy with the mail.[118] Starting with the "physical analogy," the court determined that "original telegrams are not 'papers,'" and there was thus "little foundation for comparison with the post."[119]

Then, turning to the "legal basis for comparison with the post," the court noted that specific laws protected the confidentiality of the mail.[120] The Western Union employee had noted that there was "no statute *expressly* forbid[ding] the production before the grand jury of letters from the government mails,"[121] in essence trying to argue that, with respect to the specific issue—the production of letters before a grand jury—both the post and the telegraph were unprotected by positive statutory law, and thus the constitutional rule from *Ex parte Jackson* should apply equally to telegrams. The point was of course to put telegrams on the same legal footing as letters by untying the statutory protection for letters from the recently created Fourth Amendment principle of confidentiality of sealed correspondence. The court rejected that argument, however, finding the laws protecting the confidentiality of the contents of letters to be highly relevant to distinguishing between the two methods of communicating for Fourth Amendment purposes.[122]

Finally, the court put the post office into its social and historical context: "It is not merely," the court noted, "that a law exists punishing an offender who breaks the seal of a letter in the mail,—it is that the seal itself is a recognized type of inviolable secrecy, and that *by a custom well established*. . . . But no such type of secrecy, and no such trust or custom exists in the case of the telegram."[123] As I explained in Part I, the establishment of this "custom" of

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118. 7 Mo. App. 484, 489-93 (Ct. App. 1879).

119. *Id.* at 489-90 (emphasis added). This is of course exactly what the United States Supreme Court held with respect to telephone conversations nearly fifty years later. *See* Olmstead v. United States, 277 U.S. 438, 464 (1928); *cf.* Katz v. United States, 389 U.S. 347, 364-67 (1967) (Black, J., dissenting). With a telegram, it should have been much easier to refute this textual argument, since what the subpoenas sought were of course not abstract "original telegrams," but instead pieces of *paper* that recorded the telegraphic messages. *See supra* note 112.

120. *Ex parte* Brown, 7 Mo. App. at 490.

121. *Id.*

122. *Id.* at 490-91.

123. *Id.* at 491 (emphasis added). Further support for the court's conclusion that telegrams were not consistently viewed as inviolable was the fact that the use of code in

inviolable secrecy of the mail came originally from English law in the seventeenth century and was then incorporated into the American post office in part as a direct response to fears during the American Revolution; the first postal law following the Constitution then explicitly incorporated postal secrecy into federal law. The law became custom, which in turn became a constitutional principle, and that principle specifically excluded the telegram on the grounds that there was no established custom for that medium.

In today's terms, we might see the Missouri court's reliance on "custom" as an early articulation of the modern notion of "reasonable 'expectation of privacy,'"[124] which is considered the "linchpin of fourth amendment privacy analysis"[125] in current doctrine. Indeed, Justice Harlan himself, from whose concurrence in *Katz*[126] the notion comes, saw it explicitly in these terms; in his dissent in *United States v. White* in his final year on the Court, he spoke of our privacy "expectations" as "reflections of laws that translate into rules the customs and values of the past and present."[127] Of course, many modern commentators now view society's "customs" as an important component of what constitutes the "reasonable expectation of privacy" analysis,[128] but the long-forgotten origins of communications privacy as a constitutional notion show us that courts were able to do this a century earlier.

On appeal, the Missouri Supreme Court reversed *Ex parte Brown* on the grounds that the subpoenas failed to describe with specificity the date and subject of the particular telegrams sought; however, the court explicitly agreed with the lower court's reasoning that the telegraph could not properly be analogized to the post office for purposes of assessing the confidentiality of communications.[129]

Other cases generally followed along the same lines, although after *Ex parte Brown* there was little explicit discussion of the analogy with the mail.[130]

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telegrams was widespread. *See* TOM STANDAGE, THE VICTORIAN INTERNET: THE REMARKABLE STORY OF THE TELEGRAPH AND THE NINETEENTH CENTURY'S ON-LINE PIONEERS 111-18 (1998).

124. Terry v. Ohio, 392 U.S. 1, 9 (1968) (quoting *Katz*, 398 U.S. at 361 (Harlan, J., concurring)). *See generally* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.1 (4th ed. 2004).

125. Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 249 (1993); *cf.* Orin S. Kerr, *Four Models of Fourth Amendment Protection,* 60 STAN. L. REV. 503 (2007) (arguing that the "reasonable expectation of privacy" test is in fact an amalgam of four different coexisting approaches to defining the contours of the Fourth Amendment).

126. 398 U.S. at 361.

127. 401 U.S. 745, 786 (1971) (Harlan, J., dissenting).

128. *See, e.g.*, LAFAVE, *supra* note 124, § 2.1(d), at 441 (quoting Steven C. Douse, Note, *The Concept of Privacy and the Fourth Amendment*, 6 U. MICH. J.L. REFORM 154, 179-80 (1972)).

129. *See Ex parte* Brown, 72 Mo. 83, 91-92 (1880).

130. *See, e.g.*, *In re* Storror, 63 F. 564, 565-67 (N.D. Cal. 1894); Woods v. Frank Miller & Co. 7 N.W. 484, 484-85 (Iowa 1880).

While cases occasionally referred to telegraphic messages as "confidential" because a number of state laws made it unlawful for telegraph companies to disclose telegrams to anyone other than the addressee, the law was equally clear that such messages were not "privileged" and thus were subject to ordinary legal process. A warrant was unnecessary and a subpoena was sufficient. More important, there was never any *constitutional* protection for the confidentiality of telegrams.[131] Indeed, at the federal level, no law protected telegraph privacy until the temporary World War I measure placing all telegraph lines under government control.[132] The law expired when the war ended,[133] and the contents of telegrams were not protected by federal law again until 1934 when Congress responded to the Court's decision in *Olmstead v. United States* with the passage of a provision in the Federal Communications Act that forbade wiretapping.[134]

In short, at the very time at which the Court determined that the Fourth Amendment prevented the government from opening sealed letters in *Ex parte Jackson*, other courts were explicitly rejecting challenges to subpoenas for telegrams, challenges that were based on analogizing the two communications media. *Ex parte Jackson* can thus best be seen as implicitly recognizing specific institutional attributes of the post office. The case's conclusion was ultimately one about the government's relationship to the unique communications institution of the post office, not one about the Fourth Amendment in abstract terms. This is not to say that the telegraph cases could not properly have been analogized to *Ex parte Jackson* or that they were correctly decided, but simply to say that, as a descriptive matter, *Ex parte Jackson* was not decided solely on the abstract principle that courts should guard communications privacy. The *Ex parte Jackson* Court applied that principle to a unique medium to which Congress itself had long since applied the very same principle. Thus, the Court's first[135] articulation of what one

131. *See Storror*, 63 F. at 567 (citing JOHN ORDRONAUX, CONSTITUTIONAL LEGISLATION IN THE UNITED STATES 246-49 (Philadelphia, T. & J.W. Johnson, 1891)).

132. *See* Act of Oct. 29, 1918, § 1, 40 Stat. 1017, 1017-18; *see also* SEIPP, *supra* note 100, at 65.

133. *See* SEIPP, *supra* note 100, at 65; Margaret Lybolt Rosenzweig, *The Law of Wire Tapping*, 32 CORNELL L.Q. 514, 527 n.111 (1947).

134. *See* Communications Act of 1934, Pub. L. No. 416, § 605, 48 Stat. 1064, 1103. *See generally* Rosenzweig, *supra* note 133, at 532-55.

135. Although I have not canvassed all of nineteenth-century Fourth Amendment jurisprudence, Fourth Amendment scholars who have done so invariably list *Ex parte Jackson* as among the first significant Fourth Amendment cases in the United States Supreme Court—if not *the* first. *See, e.g.*, Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 952 n.42 (1977) (referring to *Ex parte Jackson* as the first case "to comment at any length on the fourth amendment"); *cf.* Kerr, *supra* note 14, at 842 & n.234 (citing *Ex parte Jackson* as among the Court's first Fourth Amendment cases). But many scholars ignore *Ex parte Jackson* altogether, concluding that the Court's decision in *Boyd v. United States*, 116 U.S. 616 (1886), nine years later was the first Fourth Amendment case. *See, e.g.*,

might view as a bold Fourth Amendment principle was actually tethered to a very specific institutional context.

III. INSTITUTIONAL EMBEDDEDNESS AND CONSTITUTIONAL THEORY

In an earlier article, I explained how attributes of the post office shaped certain First Amendment doctrines,[136] and here, I hope to have shown that the constitutional principle of communications privacy also derived originally from the post office. The common thread of course is that the institution of the post office shaped the Court's articulations of constitutional law.

In this Part, I want to elaborate further on the relationship between the Constitution and an institution such as the post office. In particular, I will argue that constitutional principles can be embedded in institutions.[137] Moreover, as I touched on briefly in the Introduction, the embedding process can involve the legislature, as it did here, because legislatures are invariably involved in the creation and shaping of institutions. This is even more obviously the case in the establishment and shaping of *government* institutions. Through this embedding process, then, legislatures can indirectly shape the Court's interpretation of the Constitution.

To understand the complex interconnections among the legislature, institutions, and the Court requires that we seriously consider the role of nonjudicial actors in the shaping of constitutional law. The broader notion that the Constitution exists outside of the Court has been a staple of much recent constitutional law scholarship. The "jurocentric" approach to understanding and analyzing constitutional law is slowly ceding to arguments that nonjudicial actors—including legislatures—make constitutional law too. To give just a few examples, Professor Keith Whittington has posited a distinction between constitutional interpretation—what the courts do when enforcing the Constitution against other government actors—and what he calls constitutional "construction"—the ways in which nonjudicial actors shape and determine the meaning of the constitutional text.[138] Most recently, Professor Ernest Young has written about the "Constitution Outside the Constitution," using a

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Steinberg, *supra* note 95, at 1071 ("The United States Supreme Court did not issue its first Fourth Amendment opinion until 1886, with its decision in *Boyd v. United States*."). The fact that Justice Field did not cite to a single authority lends some mild support to this view.

136. *See* Desai, *supra* note 12.

137. In the First Amendment context, there is a rich literature about the relationship between institutions and constitutional law. *See* Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1503 n.26 (2007) (listing some citations). However, that literature—spawned by a 1998 piece written by Professor Frederick Schauer, *see* Frederick Schauer, *The Supreme Court, 1997 Term—Comment: Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84 (1998)—has largely been normative.

138. KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999).

functional approach to "constitutionalism" and arguing that any legal norm that "constitutes" the government or identifies rights of individuals against the government ought to be viewed as "constitutional."[139] And, Professor David Currie is in the midst of a series of books entitled *The Constitution in Congress*, exploring the ways in which Congress has interpreted and shaped the Constitution throughout American history.[140] These scholars all have as a fundamental precept of their work that our conception of what constitutes "constitutional law" ought to be broader than simply the pronouncements of the courts.

While the idea of broadening our conception of what constitutes constitutional law may be one whose time has come, that is not exactly my project here. Rather, my claim is one about the Court's Constitution. In that sense, I am playing the role of the typical jurocentric law professor,[141] seeking to probe the courts and the courts alone. But, by drawing upon work that demands that we take nonjudicial actors seriously in understanding what constitutional law is, I hope to incorporate the role of institutions—and, in turn, the legislatures that create and shape them—into the traditional constitutional law scholarship that focuses on judicial interpretation. In short, although I am looking outside of the courts for illumination, my focus is entirely on *judicial* doctrine.[142]

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139. Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. (forthcoming 2007), *available at* http://www.ssrn.com/abstract=965865.

140. *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829-1861 (2005); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: DESCENT INTO THE MAELSTROM, 1829-1861 (2006); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801 (1997); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1829 (2001); *see also* Kent Greenfield, *Original Penumbras: Constitutional Interpretation in the First Year of Congress*, 26 CONN. L. REV. 79 (1993). The mere fact of this series of books evidences a broader interest in and awareness of the role of Congress in shaping the Constitution. The urge to shake the legal academy from its jurocentric perch is, however, nothing new. Karl Llewellyn famously mocked constitutional law scholars for ignoring the "extra-documentary" aspects of the Constitution during Franklin Roosevelt's first term. K.N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 15 (1934). And Llewellyn saw himself as simply repackaging for his 1930s audience what Arthur Bentley, a prominent journalist and political theorist, had said twenty-five years earlier. *See id.* at 1 n.1. A historian might well find the same lament about law professors even further back.

141. *Cf.* Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489, 489-97 (2006) (noting that their theory of "partisan entrenchment is primarily a theory about how change occurs in constitutional doctrine," but recognizing "that such changes can and do occur throughout a variety of government institutions").

142. Jack Balkin and Sanford Levinson have argued that constitutional doctrine cannot be understood without an understanding of the ways in which political parties use judicial appointments to further political goals—"partisan entrenchment," they call it. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066-83 (2001); *see also* Balkin & Levinson, *supra* note 141. One might think of my goal here as similar in type, if not ambition: an attempt to probe a particular aspect of the actions

As I described in the Introduction, I view the way in which communications privacy became a constitutional principle to be a four-part process.[143] Let me turn to the first step in that process, which involves the legislature promulgating a statute. My claim is that when Congress passed postal privacy legislation, this shaped constitutional law, and I am thus making a claim about the relationship between legislative lawmaking and constitutional interpretation. I thus wish to situate that claim in scholarship that explores the broader relationship between legislatures and constitutional law.

The role of the legislature in shaping constitutional law has increasingly been the subject of legal scholarship. Much of that scholarship appears to be part of a larger normative project in the wake of a perception that the courts were increasingly becoming hostile to rights.[144] Much of it may also stem in part from a sense about the institutional competence of the judiciary to deal with some of the structural problems commonly associated with the enforcement of constitutional rights.[145]

Whatever one might think of the larger normative thrust of this scholarship, it has changed the lens through which we view the relationship between the legislature and the Constitution. Where the legislature was once viewed largely as the font of "majoritarian bias" as we grappled with the so-called "countermajoritarian difficulty,"[146] it is now seen as at least a potential partner

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of extrajudicial actors in order better to understand constitutional doctrine.

143. *See supra* text accompanying note 12.

144. LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001); *see also* Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155 (2002) ("Fed up with the activism of the Rehnquist Court, academics are coming to see the central obsession of constitutional theory in an entirely new light. Before, the central obsession was the inconsistency between judicial review and democracy. Now, it is the inconsistency between judicial review and democracy."); *cf.* Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 406 (2007) ("No doubt this [shift towards constitutional scholarship that cautions judges to interpret the Constitution so as to avoid controversy] reflects a fear of right-wing activism by new conservative appointees to the federal judiciary.").

145. *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

146. The phrase is of course Alexander Bickel's. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1986); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); Friedman, *supra* note 144, at 156 (attempting to historicize the problem of judicial review itself "so that we can see that the countermajoritarian difficulty that obsesses the legal academy is not some timeless problem grounded in immutable truths"); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971 (2000); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334 n.1 (1998) [hereinafter Friedman, *Part One*]; Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383 (2001); Barry Friedman, *The*

in the broader process of constitutional interpretation, even with respect to the articulation of rights.

Yet, scholars have spent decades grappling with reconciling judicial review with "democracy"—defined simply as legislative supremacy—and the problem never seems to die.[147] Indeed, in the specific context of privacy and the Fourth Amendment, some of our leading contemporary scholars have intensely debated the merits of legislatures versus courts in articulating the appropriate standards in the face of technological change.[148] The debates have naturally become more sophisticated, no longer turning simply on issues such as the "legitimacy" of judicial review in a "democracy," but instead on detailed analyses of the nature of the legislature and courts and their respective institutional competences.[149] Still, judicial review is largely viewed through the lens of an inherent conflict between legislature and Court.[150]

History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court, 91 GEO. L.J. 1 (2002). *See generally* Symposium, The Counter-Majoritarian Difficulty, 95 NW. U. L. REV 843 (2001).

147. *See* Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 163 & n.27 (2002) (noting that constitutional law theorists "cannot stop talking about the countermajoritarian difficulty" and collecting citations to this effect); *see also* Barry Friedman, *The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship*, 95 NW. U. L. REV. 933, 933 (2001) ("It seems that among some legal academics the counter-majoritarian problem simply will not go away."); Friedman, *Part One*, *supra* note 146, at 334 n.1 (1998) (noting that the fixation with the countermajoritarian difficulty among constitutional law scholars "is so great the proposition hardly requires citation").

148. *Compare* Kerr, *supra* note 14, at 806 (arguing for "legislative predominance" with respect to the drafting of rules related to privacy in the face of technological change), *with* Daniel J. Solove, *Fourth Amendment Codification and Professor Kerr's Misguided Call for Judicial Deference*, 74 FORDHAM L. REV. 747 (2005).

149. The seminal work in legal scholarship analyzing the institutional competences of the courts and legislature was in part a response to work that attempted to justify searching judicial review of legislation based on the insights of "public choice" theory. *See* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994) (articulating a participation-centered approach to analyzing the legislature, courts, and the market comparatively to understand which institution should decide a particular policy question); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31 (1991) (arguing that courts suffer from some of the same interest group defects as legislatures); *see also* Thomas W. Merrill, *Does Public Choice Theory Justify Judicial Activism After All?*, 21 HARV. J.L. & PUB. POL'Y 219 (1997) (noting that the costs to participate in the courts are far lower than the costs to participate in the U.S. Congress, thereby permitting "poorer" interest groups to participate, and arguing that there may thus be a narrow range of controversies where the dynamics of interest group influence may be neutralized in the courts but not in Congress).

150. This sense of conflict is rife in constitutional law scholarship. Indeed, even as sophisticated a theorist as Professor Adrian Vermeule will assume a vision of constitutional law as one in which a court that invalidates a piece of legislation does so *in opposition to* the legislature. *See* Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482, 1484 (2007) (explaining why constitutional law adjudication differs from common law adjudication and asserting that "[t]he alternative to relying on precedent or tradition, in constitutional law, is never reliance on the unaided reason of the

At this point, it would probably be foolhardy to attempt to reconceptualize this problem on a grand scale; however, part of what I hope the modest example in this Article has shown is that, at times, the Court's actions—even when viewed as an act of judicial review—incorporate values premised on legislative action.

One way to conceive of the legislature's actions in the case of postal privacy, then, is as a form of "entrenchment" vis-à-vis future lawmakers.[151] The legislature embeds certain principles *into an institution*, here the

single judge; the alternative is reliance on the latent wisdom of collective legislatures, or of the executive branch, or of a group of constitutional framers").

151. I want to be clear that, by "entrenchment," I simply mean a process of binding subsequent legislatures by effectively making certain lawmaking choices more difficult in the future. I do not mean to imply what is often presumed when using the term, that such entrenchment constitutes the means by which the polity "precommits" itself to certain constraints, a form of self-binding analogous to Ulysses tying himself to the mast. *See generally* JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY 94 (1979); JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS 167 (2000) [hereinafter ELSTER, ULYSSES UNBOUND] ("In *Ulysses and the Sirens* I came close to claiming . . . that constitutions *are* precommitment devices (in the intentional sense) . . . ."); Samuel Freeman, *Constitutional Democracy and the Legitimacy of Judicial Review*, 9 LAW & PHIL. 327, 327 (1990) (defending judicial review based on the premise that sovereign citizens choose judicial review when "exercising their constituent power at the level of constitutional choice," thereby engaging in a "shared precommitment . . . to maintaining their equal status in the exercise of their political rights in ordinary legislative procedures"). Thinking of constitutional entrenchment as a sovereign precommitting itself dates far back. *See* BARUCH SPINOZA, TRACTATUS THEOLOGICO-POLITICUS VII.1, *quoted in* ELSTER, ULYSSES UNBOUND, *supra*, at 88-89 (noting that kings who instruct their judges to treat all persons, even the king, as equals under the law "have followed the example of Ulysses"). Serious criticisms have been leveled at this conception of constitutional entrenchment. *See* ELSTER, ULYSSES UNBOUND, *supra*, at 88-174 (criticizing his own former view that constitutions serve as precommitment devices); JEREMY WALDRON, LAW AND DISAGREEMENT 255-81 (1999) [hereinafter WALDRON, LAW AND DISAGREEMENT]; Jeremy Waldron, *Precommitment and Disagreement*, *in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 271 (Larry Alexander ed., 1998). Those criticisms have been at times biting. *See* WALDRON, LAW AND DISAGREEMENT, *supra*, at 268 ("My theme in all this is reasonable disagreement, but I cannot restrain myself from saying that anyone who thinks [the process of judicial review in the United States] is appropriately modeled by the story of Ulysses and the sirens is an idiot.").

Nor do I use the term "entrenchment" to imply absolute entrenchment. *See, e.g.*, Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law] May 23, 1949, art. 79 (3) (preventing amendment of the "basic principles of state order" as well as the basic premise that the purpose of the state is to protect human dignity). Professor Julian Eule classified three different types of entrenchment: (1) "procedural entrenchment," which "prescribe[s] the 'manner and form' by which the promulgated directives can be changed"; (2) "transitory entrenchment," which "seeks to prevent alteration for a specified period of time only"; and (3) "preconditional entrenchment," which "purports to permit change only on the occurrence of a preordained event." Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 12 AM. B. FOUND. RES. J. 379, 384-85 (1987). Using Eule's taxonomy, my example would be closest to what he calls "procedural entrenchment." The key is that because the institutional embeddedness shapes judicial doctrine, the entrenchment is comparable to the entrenchment of a Supreme Court decision.

government institution of the post office. This institutionally embedded principle then later binds future legislatures in a way that is effectively the same as a Supreme Court case interpreting the Constitution. One might even see this embedding process as comparable to creating a form of "super-precedent," which because of its embeddedness is more difficult to undo than an ordinary judicial decision.[152] Yet, this embedded constitutionalism can remain unknown at the time. In the late eighteenth century, no one connected postal privacy with the Fourth Amendment, and yet by 1878, postal privacy became the basis of one of the Court's first—and, now, most foundational—Fourth Amendment decisions.

Let me emphasize here that this is a purely descriptive claim. I am simply saying that courts do in fact incorporate institutional characteristics into their constitutional principles: constitutional doctrine does not simply consist of abstract principles applied in deductive fashion to a set of concrete facts. Rather, courts are shaped by institutional context, and that institutional context is created and shaped by legislatures. By embedding principles into institutions, legislatures can effectively entrench their decisions. I take no position on this approach as a normative matter, and there may be good reasons to reject it.[153]

Still, in the specific context of communications privacy, it is clear that modern American society has so incorporated communications privacy *as an abstract principle* that we can have debates about the constitutionality of the NSA surveillance program or e-mail privacy without anyone questioning the idea that the *Constitution* contains that abstract principle.[154] Thus, it is probably

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152. *Cf.* Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1213-14 (2006) (describing *Legal Tender Cases* as an example of a foundational doctrine that becomes entrenched and thereby becomes a super precedent).

153. Effectively, what this amounts to is a form of legislative entrenchment, and the prohibition on legislative entrenchment is of course longstanding. Indeed, that prohibition has been hotly debated by constitutional theorists in recent years. *Compare* Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665 (2002), *with* John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CAL. L. REV. 1773 (2003), *and* Stewart E. Sterk, *Retrenchment on Entrenchment*, 71 GEO. WASH. L. REV. 231 (2003). Charles Black once referred to the principle that one legislature cannot bind a future one as being both "familiar and fundamental" and "so obvious as rarely to be stated." Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 191 (1972); *cf.* THOMAS HOBBES, LEVIATHAN 184 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651) ("For having power to make, and repeale Lawes, [the Sovereign] may when he pleaseth, free himselfe from that subjection, by repealing those Lawes that trouble him, and making of new."). My claim is simply that incorporating principles into an institution can in effect entrench those principles. Moreover, not only did the Court not stop this legislative entrenchment, but its incorporation of the concept of postal privacy into the fabric of constitutional doctrine effectively abetted the entrenchment. Professor Eule implicitly recognized this notion of legislative entrenchment twenty years ago when he noted that "all legislation has some entrenching impact." *See* Eule, *supra* note 151, at 387 n.26.

154. Indeed, we still have debates about the meaning of *Berger* and *Katz* and, for example, the appropriateness of the "reasonable expectation of privacy" test in the context of communications privacy. *See* Susan Freiwald, *First Principles of Communications Privacy*,

an overstatement to claim that the institution of the post office alone is responsible for the enduring nature of the principle. Indeed, it is no doubt the normative attractiveness of the principle, as a principle, that ultimately embedded it into constitutional law. Still, we must recognize the importance of the institution—and the legislature's role in creating and shaping that institution—as instrumental in defining that principle in the first place as a matter of constitutional doctrine.[155]

One way to view this notion of embedded constitutionalism is as an instantiation of what Professor Robert Post has called the "dialectical relationship" between judicial constitutional lawmaking and "constitutional culture," which he defines as that "specific subset of culture that encompasses extrajudicial beliefs about the substance of the Constitution."[156] Professor Post argues that constitutional doctrine is never autonomous from constitutional culture. Rather, the two interact with each other in complex ways.[157]

We can see *Ex parte Jackson* and the principle of communications privacy as one example of the "exceedingly complex" relationship between constitutional doctrine and constitutional culture. Seen through the lens of Professor Post's paradigm, we can view the early postal policymakers as relevant "nonjudicial actors" in understanding the meaning of the Constitution. Perhaps even more generally, we can think of the post office itself—and the public consciousness about the sanctity of the mail that developed over time—as shaping the meaning of the Constitution as interpreted by the Court, by shaping the Court's view of the normative questions it was asked to adjudicate. Thought of in these terms, the relevant "nonjudicial actors" are not simply the shapers of postal policy in 1792 or 1782 (or 1775 or 1753 or 1711), but in addition, the huge numbers of Americans who viewed postal privacy as inviolable by the time the Court articulated that principle as a matter of Fourth Amendment law in 1878. Constitutional culture was thus embedded into the institution over time, not simply in a single moment of policymaking.

2007 STAN. TECH. L. REV. 3. To my knowledge, however, no one has argued that *Ex parte Jackson* and the entire edifice of constitutional doctrine built upon it should be undone.

155. *Cf.* Balkin & Levinson, *supra* note 141, at 501 ("[N]ew constitutional developments often do not begin with the courts—rather, Congress and the presidency build new constitutional institutions, and the courts eventually rationalize them.").

156. Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003); *see also id.* at 41 ("Constitutional culture comes in many forms, ranging from the convictions of ordinary citizens about the meaning of their Constitution to the considered constitutional interpretations of those authorized to make law based upon these interpretations.").

157. *Id.* at 56; *see also id.* at 80 (describing *United States v. American Library Ass'n*, 539 U.S. 194 (2003), and noting that "the fulfillment of the constitutional value of freedom of speech does not turn on legal material alone, but also on cultural meanings that the Court can discern only by drawing upon its knowledge as a literate participant in American culture").

On the other hand, if we focus on the role of the legislature here, a different way of viewing this embedded constitutionalism is to see statutes that embed principles into institutions as "super-statutes," to use a term introduced by William Eskridge and John Ferejohn.[158] Eskridge and Ferejohn argue that certain statutes fall into an "intermediate category of *fundamental* or *quasi-constitutional* law."[159] They call such a statute a "super-statute," which they define as follows:

> [A] law or series of laws that (1) seek to introduce or consolidate a norm or principle as fundamental in our polity, (2) over time do "stick" in the public culture even as the norm evolves through a series of debates and even conflicts about its elaboration or specification, (3) such that the super-statute and its normative principle have a broad effect on the law—including effects beyond the four corners of the statute.[160]

Eskridge and Ferejohn go on to provide three examples, the Sherman Act (1890), the Civil Rights Act of 1964, and the Endangered Species Act (1973), and note that in each case, the statute created norms that transcended the statute by articulating and elaborating "fundamental commitments" that "ultimately drive" the Constitution.[161]

Viewed through the lens of this definition, it is not immediately clear whether the early postal prohibition on mail opening would be a "super-statute," since the statute was really just a small part of the broader principle of postal privacy. There were thus no "debates" or "conflicts about [the principle's] elaboration or specification."[162] Of particular interest to me, though, is the third part of the definition, and in particular, Eskridge and Ferejohn's claim that a super-statute can be what they call "imperial," a term they use to mean that the statute "affect[s] other statutory schemes and even constitutional doctrine."[163]

That of course is precisely what I am arguing here: the criminal prohibition on postal officials' opening or tampering with the mail was "imperial" in that sense. Now, to be frank, it is difficult to read the actual statute[164] and see this lowly provision as the origin of a principle that underpins the constitutional

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158. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes: The New American Constitutionalism*, *in* THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 320 (Richard W. Bauman & Tsvi Kahana eds., 2006). *See generally* Eskridge & Ferejohn, *supra* note 144.

159. Eskridge & Ferejohn, *supra* note 144, at 1275.

160. Eskridge & Ferejohn, *supra* note 158, at 321.

161. *Id.* at 333.

162. *Id.* at 321.

163. *Id.* at 338.

164. The original provision remains largely intact in federal law today. *See* 18 U.S.C. § 1702 (2000); *see also* 18 U.S.C. § 1703(a) (2000). Since *Ex parte Jackson*, Congress has codified the principle that a warrant is required for mail opening. *See* 39 U.S.C. § 404(c) (2000). I say "codified the *principle*" because the statutory restriction is not identical to the Fourth Amendment. *See* Desai, *supra* note 58.

challenge to the National Security Agency's attempts to uncover the communications of alleged terrorists. But that, in short, is my claim.

In keeping with the notion of the "imperial" super-statute, another way to see the embeddedness of the constitutional principle might be to view it as a species of "path dependency."[165] The creation of an institutional attribute and its subsequent entrenchment in the institution can shape the Court's later interpretations of the Constitution. It is worth noting, however, how this approach to "path dependency" differs from the typical discussion of path dependency and its ilk in constitutional law. Here, it is the institution itself—including the legislature's initial shaping of it—that is creating the path dependency, not the Court's prior precedents and not the political forces that inevitably envelop the Court at any given time.[166] This is important because the entrenchment of embedded constitutionalism is independent of arguments about "th' supreme coort follow[ing] th' iliction returns," as Mr. Dooley famously put it more than a century ago.[167] This should be obvious given the

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165. Just to be clear, I am not making a strong claim about "path dependency," nor am I using the term to connect my argument with those scholars associated with the school of "historical institutionalism." *See, e.g.*, Paul Pierson & Theda Skocpol, *Historical Institutionalism in Contemporary Political Science*, *in* POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE 693-721 (Ira Katznelson & Helen V. Milner eds., 2002); Theda Skocpol, *Why I Am an Historical Institutionalist*, 28 POLITY 103 (1995); *see also* Oona Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 604 (2001); *cf.* Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903, 989-95 (2005) (discussing the application of theories of "historical institutionalism" to understanding the Court's use of precedent). If anything, I am making a variation of the weak—and often maligned by social scientists as inconsequential—claim that "history matters." *See, e.g.*, PAUL PIERSON, POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS 2 (2004); Balkin & Levinson, *supra* note 141, at 531 (equating "path dependency" with the idea that "[c]ertain choices once made, change political realities in ways that are often difficult to undo without enormous cost"); Adrian Vermeule, *Constitutional Amendments and the Constitutional Common Law*, *in* THE LEAST EXAMINED BRANCH, *supra* note 158, at 229, 264 (describing "path dependency" as the notion "that the order in which decisions arise is an important constraint on the decisions that may be made"). I premise my argument here on the very basic claim that, as Professor Robert Post has put it, "[a]n account of constitutional law that must suppress the historical processes by which constitutional law comes into being cannot be adequate." Post, *supra* note 156, at 109.

166. Of course, by "political forces," I mean only "the climate of the era," not the "temperature of the day." *See* Ruth Bader Ginsburg, *Constitutional Adjudication in the United States as a Means of Advancing the Equal Stature of Men and Women Under the Law*, 26 HOFSTRA L. REV. 263, 268 (1997) ("Judges . . . are affected, not by the weather of the day, as distinguished Constitutional Law Professor Paul Freund once said, but by the climate of the era.").

167. FINLEY PETER DUNNE, MR. DOOLEY'S OPINIONS 26 (1901), *quoted in* Steven G. Calabresi, *The President, the Supreme Court, and the Founding Fathers: A Reply to Professor Ackerman*, 73 U. CHI. L. REV. 469, 478 n.42 (2006); Finley Peter Dunne, *The Supreme Court's Decisions*, *in* MR. DOOLEY ON THE CHOICE OF LAW 47, 52 (Edward J. Bander ed., 1963); *see also* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957) ("[T]he policy views dominant on the Court are never for long out of line with the policy views dominant among

eighty-five-year time lag between passage of the federal law prohibiting postal employees from opening the mail and the Court's creation of the Fourth Amendment right to postal privacy. The Supreme Court is "following" the majoritarian lawmaking branch of government, but one that was constituted far in the past. "Th' iliction returns" have long since lost their salience.

It would of course be ludicrous to view a single dictum in a single 1878 case as indicative of a grand theory of constitutional law. Indeed, one might even view this example as simply an illustration of the uniqueness of the early Congresses in understanding our constitutional structure. Nonetheless, as the genesis of the constitutional principle underpinning some of today's most pressing constitutional controversies, the story of *Ex parte Jackson* and the birth of communications privacy tells us something about the relationship between legislatures, courts, and the multitude of societal institutions that mediate between the two.

In short, if we think of a constitution—in broad strokes—as a past legal constraint on the current sovereign, then an institution such as the post office can serve, as we see here, precisely that purpose. Karl Llewellyn once referred to the Constitution as an institution,[168] but we could just as well think of the institution and its institutional attributes—here, the post office and its embedded principle of postal privacy—as the Constitution, or perhaps more

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the lawmaking majorities of the United States."). *But see* Jonathan D. Caspar, *The Supreme Court and National Policy Making*, 70 AM. POL. SCI. REV. 50, 50 (1976) (arguing that "Court participates more significantly in national policy making than Dahl's argument suggests"). Richard Funston once referred to this thesis as the "Dahl-Dooley" thesis. *See* Richard Funston, *The Supreme Court and Critical Elections*, 69 AM. POL. SCI. REV. 795, 795 (1975). For attempts at an empirical assessment of the basic thesis, see THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 68-103 (1989) (concluding based on an empirical study that the Supreme Court is largely a majoritarian institution, i.e., that "[m]ost modern Court decisions reflect public opinion"); Thomas R. Marshall, *American Public Opinion and the Rehnquist Court*, 89 JUDICATURE 177 (2005) (reporting an empirical study and concluding that the Rehnquist Court's decisions track public opinion, except in First Amendment cases); Thomas Marshall, *Public Opinion and the Supreme Court: The Insulated Court?*, *in* UNDERSTANDING PUBLIC OPINION 269 (Barbara Norrander & Clyde Wilcox eds., 1997) (conducting a similar empirical analysis covering the first six Terms of the Rehnquist Court and reaching substantially the same conclusions); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87 (1993); *cf.* Michael W. Link, *Tracking Public Mood in the Supreme Court: Cross-Time Analysis of Criminal Procedure and Civil Rights Cases,* 48 POL. RES. Q. 61, 61 (1995) (analyzing impact of both elite opinion and public opinion on the Court's decisions and concluding that the Court "follow[s] changes in the dominant political alliance more readily in some issue areas than it does in others").

168. Llewellyn's point—reiterated most recently by Professor Young, *see supra* text accompanying note 139—is that the Constitution is not simply the "Document," but rather includes "the working Constitution[, which] embraces the interlocking ways and attitudes of different groups and classes in the community—*different* ways and attitudes of *different* groups and classes, but all cogging together into a fairly well organized whole." Llewellyn, *supra* note 140, at 18. I am thus obviously playing fast and loose with Llewellyn's use of the term "institution" since I am using it in a somewhat different sense.

precisely, as one small part of the jurocentric piece of it we call "constitutional law."

CONCLUSION

Constitutional law and the scholarship it spawns often inhabit the world of principle, abstract concepts that are meant to shape notions of government and its relations with the populace.[169] But it is just as often real-world institutions that give us those principles. Communications privacy, the basic idea now embedded in the Fourth Amendment that the government should not be permitted to intercept individuals' communications, began in the United States not as an abstract principle at all, but rather as a response by American rebels during the revolutionary period to the fear of abuses in a particular institution, the post office. When those rebels set out to establish a post office of their own, they embedded communications privacy into it and did so completely independently of the process that we familiarly associate with Constitution-making. Yet, when the Supreme Court dealt with the question of communications privacy as a matter of constitutional law nearly a hundred years later, the institution of the post office had so shaped the Court's thinking that it saw constitutional principle where only postal policy had been before.

So, if today we see the principle of communications privacy as fundamental to the Fourth Amendment, we have William Goddard and the drafters of both the 1782 Post Office Ordinance and the 1792 Post Office Act to thank, for it was through the post office, not the Constitution or the Bill of Rights, that the early Americans first established that principle.

169. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE (1986).