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## Justice Alito Would Be Just Fine if Congress Undid Yesterday's Landmark Privacy Decision

The twisted logic of his concurring opinion

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Photo: SAUL LOEB/AFP/Getty Images

Yesterday, in [Riley v. United States](http://www.supremecourt.gov/opinions/13pdf/13-132_8l9c.pdf) [http://www.supremecourt.gov/opinions/13pdf/13-132\_8l9c.pdf], the Supreme Court held that the Fourth Amendment requires police making an arrest to get a warrant if they want to search the cell phone (or, presumably, the tablet or laptop) of the person they are arresting. As Yishai Schwartz put it in his post [here](http://www.newrepublic.com/article/118388/supreme-court-rules-searching-cell-phone-requires-warrant) [http://www.newrepublic.com/article/118388/supreme-court-rules-searching-cell-phone-requires-warrant] about the opinion, “privacy activists urged the Court to treat cellphone content like any private location outside an arrestee’s immediate vicinity. In essence, they asked the Court to treat a cellphone like a bedroom. And that is precisely what the Court did.”

The case has gotten lots of commentary already—there’s a roundup [here](http://www.scotusblog.com/2014/06/evening-round-up-cellphone-privacy-and-internet-tv/) [http://www.scotusblog.com/2014/06/evening-round-up-cellphone-privacy-and-internet-tv/]. The opinion is very consequential in its immediate holding, which governs the

millions of arrests that take place each year. It may prove to cast a significant shadow, too. The most interesting implication of the lead opinion, by Chief Justice John Roberts, is that (as Orin Kerr has [noted](#)

[<http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/25/the-significance-of-riley/>]), it suggests that the Court finds computer searches different in kind from other physical searches. That could have lots of ramifications in lots of situations. Just for example, Chief Justice Roberts's logic could easily lead the Court to find searches of the laptop computers of border-crossers sufficiently invasive as to require individualized justification, unlike most other border searches.

The Court's judgment was unanimous—all nine Justices agreed that the searches under review were improper without warrants. Justice Alito, alone, did not join all of the Chief Justice's opinion. He wrote separately to express his discomfort with the key precedent governing searches incident to arrest, explaining that in his view, officer safety and the preservation of evidence should not be the only justifications for warrantless searches incident to arrest. So far, Alito was simply repeating an argument he staked out in 2009. But then Alito made an additional point. The Court, he said, should in the future defer to the Congress about how much privacy protection cell phones should receive:

While I agree with the holding of the Court, I would reconsider the question presented here if either Congress or state legislatures, after assessing the legitimate needs of law enforcement and the privacy interests of cell phone owners, enact legislation that draws reasonable distinctions based on categories of information or perhaps other variables. . . .

[B]ecause of the role that these devices [cell phones] have come to play in contemporary life, searching their contents implicates very sensitive privacy interests that this Court is poorly positioned to understand and evaluate. Many forms of modern technology are making it easier and easier for both government and private entities to amass a wealth of information about the lives of ordinary Americans, and at the same time, many ordinary Americans

are choosing to make public much information that was seldom revealed to outsiders just a few decades ago.

In light of these developments, it would be very unfortunate if privacy protection in the 21st century were left primarily to the federal courts using the blunt instrument of the Fourth Amendment. Legislatures, elected by the people, are in a better position than we are to assess and respond to the changes that have already occurred and those that almost certainly will take place in the future.

This is a remarkable passage. Recall that the Fourth Amendment's ban on unreasonable searches and seizures, as part of the Bill of Rights, was directed against the federal government. Yet Justice Alito is prepared to give the Congress an authoritative role in crafting privacy protections. And he's clear that he is not talking about only protections that exceed some Fourth Amendment floor; he would "reconsider the question presented here" if Congress developed an administrable privacy framework.

Compare this bow to congressional expertise, capacity, and control to Justice Alito's apparent disinterest in congressional ideas about implementing equality. He showed no hesitation in joining, for example, *Shelby County v. Holder* [[http://www.oyez.org/cases/2010-2019/2012/2012\\_12\\_96](http://www.oyez.org/cases/2010-2019/2012/2012_12_96)] and *Coleman v. Court of Appeals of Maryland* [[http://www.oyez.org/cases/2010-2019/2011/2011\\_10\\_1016](http://www.oyez.org/cases/2010-2019/2011/2011_10_1016)]. In the former, the Court struck down the Voting Rights Act's rule requiring some states and local governments to seek federal preclearance of changes to voting laws or practices. Chief Justice Roberts wrote for the Court; Justice Alito joined him. And in the second, the Court struck down the self-care provision of the Family and Medical Leave Act, which entitled employees to take up to 12 weeks of unpaid leave if they were facing a serious health condition that interfered with their work performance. Justice Kennedy wrote the plurality opinion; Justice Alito joined him. In both of these cases, Congress tried to implement its own independent vision of what the Fourteenth Amendment's guarantee of "equal protection of the laws" means—and in both the Court slapped the Congress down.

And yet there's a much more compelling argument in favor of congressional influence in Fourteenth Amendment cases than in the Fourth Amendment setting of yesterday's *Riley* decision. Conceptually, the point of the Fourteenth Amendment was to impose new national norms on the former rebel states. Unlike in the Bill of Rights, Congress is for these purposes a regulator, not the regulated entity. And textually, the Fourteenth Amendment expressly grants Congress enforcement authority; Section 5 states "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." And historically, the Reconstruction Congress that drafted the Fourteenth Amendment was uniquely distrustful of courts—a distrust well-earned by the pre-Civil War Taney Court.

Alito's *Riley* concurrence undermines a claim that it's somehow inappropriate to allow Congress space to implement the Constitution. So it's fair to ask him in the future: Shouldn't Congress's views about equality matter, too?