

Search and Seizure History as Conversation: A Reply to Bruce P. Smith

Andrew E. Taslitz*

I. INTRODUCTION

In a recent review of my book, *Reconstructing the Fourth Amendment: A History of Search and Seizure, 1789–1868*,¹ in the pages of this journal, Professor Bruce P. Smith said, “This is an ambitious, provocative, empathetic, and prodigiously researched book.”² He also described it as “strange” in a good way, drawing a parallel between the history recounted by C. Van Woodward in his seminal book, *The Strange Career of Jim Crow*, in which Woodward recounted obscure historical events leading to the reign of Jim Crow, while I addressed “themes in the history of criminal procedure that have long escaped attention.”³

I thank Professor Smith for these words because, as an author, I was pleased to read them and hope that they might convince potential readers of my book to see it as a worthwhile project, whatever its flaws. The bulk of Professor Smith’s review was, however, far more critical of my effort. I have no interest in writing a detailed, heavily-footnoted response to those criticisms (though I will not footnote every proposition, I will offer some meaty footnotes for controversial points or where I believe it enhances the argument). In any event, several other reviewers of my book have a very different take on it than does Professor Smith, and I do not want to re-plough the ground that they have worked—though I hope interested readers of this essay will take a look at their reviews for some startlingly different perspectives from Smith’s.⁴ Instead, I want to concisely clarify a small number of

* Welsh S. White Distinguished Visiting Professor of Law, University of Pittsburgh School of Law; Professor, Howard University School of Law; former Assistant District Attorney, Philadelphia, PA.; B.A., Queens College, 1978; J.D., University of Pennsylvania Law School, 1981. The author thanks his research assistant, Natasha Williams, for her able assistance in completing this essay, and the Howard University School of Law for its financial support of this project.

¹ ANDREW E. TASLITZ, *RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789–1868* (2006).

² Bruce P. Smith, *The Fourth Amendment, 1789–1868: A Strange History*, 5 OHIO ST. J. CRIM. L. 663, 678 (2008).

³ *Id.* at 678 (citing C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1955)).

⁴ See, e.g., Deborah Dennison, *Reconstructing the Fourth Amendment*, 99 LAW LIBR. J. 647, 658 (2007) (book review) (“*Reconstructing the Fourth Amendment* is well researched, lucid, articulate, and also a novel approach to the subject. While both parts of the book might exist independently, Taslitz expertly ties them together and in so doing conveys the brilliance and importance of this fundamental constitutional right.”); Daniel W. Hamilton, *Reconstructing the Fourth Amendment: A History of Search and Seizure, 1789–1868*, 94 J. AM. HIST. 1236 (2008) (book review) (“Andrew E. Taslitz . . . has written a careful and nuanced account,” a “bracing contribution

matters that I see as underlying my dispute with Professor Smith. Furthermore, I bother writing at all primarily in the hope of advancing dialogue on the subject.

For those readers who have not read my book, I first offer a micro-synopsis. The bulk of the book is devoted to detailing the too oft-ignored history of search-and-seizure practices during the nineteenth century struggle over slavery. These practices were aimed not only at subordinating slaves themselves, but also at silencing and intimidating their white supporters. At various times, this struggle over search-and-seizure practices was waged in such elite fora as judicial opinions and congressional and political debates. But the struggle was also embodied in the day-to-day lives of the slaves, abolitionists, anti-tyrannical Northern whites, whites unfriendly to nationwide emancipation, and the slave masters themselves. The struggle came to be understood as one about the very meaning of the American republic, and this tug-of-war continued through Reconstruction, altering understandings of constitutional search-and-seizure principles in important ways.

My principal *legal* argument (as opposed to historical argument) is that the Fourteenth Amendment is best read as applying these revised understandings of search-and-seizure to the states as a matter of *constitutional* law. One way (but not the only way⁵) to capture this application is to view the Fourteenth Amendment as incorporating the Fourth Amendment against the states, in effect creating a "Reconstructed Fourth Amendment." To better envision the historical continuities and discontinuities involved in this act of reconstruction, my book begins with a brief chapter on the events leading up to the "Original Fourth Amendment,"

to the somewhat dormant field of constitutional history . . . that will be of interest to any historian of the Constitution. The book's main accomplishment is that it combines contemporary and historical arguments without slighting either, while providing important new evidence and insight into each."); Krystal E. Noga, *Reconstructing the Fourth Amendment: A History of Search and Seizure, 1789–1868*, 33 CRIM. JUST. REV. 421 (2008) (book review).

Taslitz takes his reader on an extremely well written and brilliantly thorough trip back in time to revisit some of the most stimulating, yet disturbing, times in American history. No history of the Fourth Amendment, and therefore search and seizure, would be complete without reliving the struggles of the early Americans against the tyranny of the British Crown, the horrors of slavery, and the great effort of the Reconstruction. What unfolds is a highly intellectual discussion that reminds us that the Fourth Amendment is one of the few constitutional provisions enacted to protect the political rights of "the People," read to mean one cohesive and integrated group.

Id. at 422. See also Priscilla H. M. Zotti, *Reconstructing the Fourth Amendment: A History of Search and Seizure, 1789–1868* (2007), 17 LAW & POL. BOOK REV. 282, 282, 285 (2007) ("Taslitz's contribution is to make the history of the Fourth Amendment even richer by meticulously accounting the use of search and seizure practices to support slavery and racial discrimination"; "I found *Reconstructing the Fourth Amendment* insightful in its approach to the Fourth Amendment, not only in terms of the law itself, but what is searched and seized, who particularly is subject to search and seizure, and what abuses led to broadening, thus capturing the full rich detail of the Fourth Amendment.").

⁵ See TASLITZ, *supra* note 1, at 284 n.40 (exploring an alternative understanding, and explaining the book's relevance even to those thinkers who reject the idea of the incorporation of most of the Bill of Rights against the states in favor of a more expansive freestanding Fourteenth Amendment due process approach to constitutional search-and-seizure issues).

ratified in 1791. In doing so, I tell a familiar story but emphasize under-weighted aspects of that history, such as concerns about freedom of movement rather than only privacy, the role of Lockean thought in search-and-seizure principles, the fear of humiliation at the hands of the state, and the link between theories of political representation and search-and-seizure practices. In particular, I emphasize the *communicative function* of those practices, the ways in which they send messages about, and thereby affect, the distribution of power in society.

Here, as in later chapters, I view the relevance of history to law as a conversation—sometimes in deed, other times in word—between elites and ordinary people. Although the work is primarily one of history, I briefly draw admittedly contestable “lessons” from that history to illustrate how it potentially plays a role in altering a variety of modern Fourth Amendment rules, principles, and constitutional methodologies. But the lessons are drawn not to articulate a thorough set of Fourth Amendment rules for modern times, nor to craft yet another comprehensive “foundational” theory of constitutional interpretation in this area.⁶ Rather, the lessons seek to spark debate about the modern *legal* relevance of devoting greater attention to nineteenth century history in crafting modern constitutional search-and-seizure doctrine.

Along the way, the book seeks to savage the view of the Fourth Amendment as a mere technicality, suggesting instead that it is as important to individual and collective freedom and to the American identity as provisions more widely recognized as doing so, such as First Amendment protections of speech, press, assembly, and religion. Indeed, I argue, the First and Fourth Amendments are best understood as closely linked.

Professor Smith’s critiques come down to a few major points: first, that my purported policy prescriptions in my ten “lessons” are not dictated by the history that I recount and are, in any event, vague and impractical; second, that the first part of my book, which covers what I describe as the “original Fourth Amendment,” is itself unoriginal; and third, that I have not addressed the rise of professional policing during the eighteenth century nor addressed the judiciary’s doctrinal treatment of the Fourth Amendment post-1868. I see much (though not all) of the substance of Professor Smith’s criticisms as turning on disagreements between us on the role of history in constitutional interpretation. Some aspects of Smith’s critique also respond to claims that he insists that I made that I, at least, never intended to, so I will try to clarify my position on those points further in the pages to come.

Following this Introduction, Part II of this essay examines the role of history in the constitutional law of search-and-seizure. Specifically, Part IIA begins by defining what I mean by historical “lessons” and correcting Smith’s too facile

⁶ See DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* (2002) (debunking the value of foundational theories seeking to use a single overriding principle to explain all constitutional interpretation, and instead favoring the multi-faceted, flexible approach of common law evolution).

attacks on the usefulness to legal decisionmakers of any one lesson. I explain that the right lesson or *combination* of lessons can be chosen effectively in commonsense fashion in a way that amplifies their usefulness well beyond what Smith's approach of isolating one-lesson-at-a-time would suggest. Part IIA next explains why lessons are not rules (and why it's a good thing too); do not suffer from ad hoc reasoning; speak to legislatures as well as courts; and contain a "romantic" element infusing concerns about human emotion, motivations, and aspirations that are both practically useful and more likely to inspire political action than the dry, technical images of a mechanistic constitutional law. A consistent theme of Part IIA is that constitutional interpretation must be understood in part as a conversation among the living and with the dead about how we should best constitute ourselves as a People today.

Part IIB defends the idea that history's lessons for modern¹¹ law can best be learned through the prism of history *itself* as a past conversation between legal elites and ordinary Americans. Listening to that conversation requires heeding the words and deeds of both groups and of relevant sub-groups and seeing how they interact. To seek less of history is to leave it interesting but of little practical value to the modern lawyer or lay citizen. To seek more of history is to give it a clarity that contradicts its complexity, exceeds human abilities, and gives to history a controlling force that it cannot and should not hold.⁷ Any legal history, my own included, ultimately serves modest goals, being but a single brick in a constitutional wall.⁸

While Part IIA therefore focuses on modern conversations—which are partly about the past—Part IIB focuses on ancient conversations *as the usable past*. Part IIB next explains how such an understanding of history can improve constitutional talk today, thus returning to and elaborating upon Part IIA's model of modern constitutional conversation. Part II in its entirety, therefore, articulates a conversational approach to constitutional interpretation generally and to Fourth Amendment interpretation specifically.

Part IIC offers brief musings on the best "tone" for engaging in academic debate, with Part III offering some concluding thoughts.

⁷ See *id.* at 152–68 (summarizing dangers of any foundationalist theory); ALAN M. DERSHOWITZ, *IS THERE A RIGHT TO REMAIN SILENT?: COERCIVE INTERROGATION AND THE FIFTH AMENDMENT AFTER 9/11*, at 55–65, 86, 101–02 (2008) (focusing on critiquing originalism and other formalist uses of history in constitutional interpretation).

⁸ See DERSHOWITZ, *supra* note 7, at 55 ("The object of any historical inquiry must therefore be modest: to convey a sense of how the relevant issues were understood, considered, addressed, and rationalized during the [relevant] period of time . . .").

II. THE ROLE OF HISTORY IN INTERPRETING THE CONSTITUTIONAL LAW OF SEARCH AND SEIZURE

A. What Does It Mean to Say That the Law Can Learn “Lessons” From History?

1. Defining Historical “Lessons”

I start with a preliminary observation. Counting endnotes, approximately forty-five pages of my 342-page text concern potential modern implications or “lessons” of the history that constitutes the bulk of the book. Yet a critique of several of those lessons seems to be the primary thrust of Professor Smith’s review. As I explained in the introduction to my book’s final chapter, however, “[m]y main task in this book has been to tell a story, a historical narrative that helps us to ask new questions about the Fourth Amendment’s meaning or to see old questions in a new light.”⁹ My lessons were meant “to start a new way of thinking, not to end it, to prompt future conversations rather than to halt past ones.”¹⁰ In short, the lessons were meant to be illustrations, subject to debate, to show why paying attention to the nineteenth century’s history of disputes over search-and-seizure issues can matter today. Yes, I have tried to defend some of these lessons in greater detail elsewhere but based primarily on grounds *other than history*, for I do not and did not claim that history offers the sole support for these lessons (converging evidence from many sources, including social science and philosophy, offer additional support),¹¹ nor do I claim that these lessons necessarily alone dictate any specific modern policy prescriptions. But they can, I maintain, lead us to see modern issues in a way we may not before have adequately considered. Explaining and illustrating why this can be so is the task to which I now turn.

⁹ TASLITZ, *supra* note 1, at 258.

¹⁰ *Id.*; see also Zotti, *supra* note 4, at 285 (recognizing the role of my lessons as prompting “ongoing conversation,” an approach that political scientist Zotti concluded had “left [her] thinking about the book long after . . . complet[ing] it.”).

¹¹ See, e.g., Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15 (2003) (explaining what I see as among the most important functions of history in constitutional reasoning); Andrew E. Taslitz, *Racial Auditors and the Fourth Amendment: Data with the Power to Inspire Political Action*, 66 LAW & CONTEMP. PROBS. 221 (2003) [hereinafter Taslitz, *Racial Auditors*] (illustrating the role of social science in constitutional argumentation); Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 FORDHAM L. REV. 2257, 2281 (2002) (explaining the importance of converging sources of data in Fourth Amendment analysis). Smith notes that my book “echo[es] themes advanced in a series of earlier scholarly articles . . .” Smith, *supra* note 2, at 664. He is right. I want to be clear, however, first, that I defended those themes in articles relying primarily on data sources other than history and, second, that, although I draw on the earlier pieces for small portions of the book, the vast bulk of the book’s material—especially the history I recount—is entirely new and not derivative of earlier works.

2. The Usefulness of Even “Vague” Historical Lessons

i. Even Broad Lessons Can Help to Resolve Some Difficult Problems

Professor Smith is right to describe many of my lessons as vague, at least if that term is taken to mean that they are recited at a high level of generality. I do not see doing so as either illegitimate or unhelpful. In the vast majority of modern cases, history simply does not, and it certainly should not, alone determine the meaning of the Constitution for reasons well-explored by other scholars.¹² “Originalists” of some stripes, whether focusing on original “intent” or original “meaning,” would sharply disagree with this last statement, but it is the starting point for my analysis.¹³ Some originalists, on the other hand, take an approach somewhat similar to my own, choosing to describe “intentions” or “meaning” at a higher level of generality.¹⁴ But that approach, too, makes assumptions about the controlling hand of the past that I reject.

I see studying the past as an important tool for understanding human nature and for making sense of the American experience. It is a way, as constitutional scholar Robin West puts it, of helping us to decide today how we, as a people, *should* “constitute” ourselves.¹⁵ History matters, therefore, in important part, in crafting a modern narrative, and all narratives proceed over time, linking the living to the dead.¹⁶ Professor Jed Rubenfeld has been among the ablest defenders of this narrative function of history in constitutional interpretation, taking seriously the idea that only crafting such a narrative can make sense of the idea of there being an American “people.”¹⁷ Professor David A. Richards makes a somewhat similar point, explaining the relevance of history to the constitutional enterprise this way:

¹² See, e.g., FARBER & SHERRY, *supra* note 6, at 10–28 (summarizing the critique of originalism by numerous scholars and including their own critique); David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1739 (2000) (critiquing the Court’s “new” originalism as applied in the Fourth Amendment context).

¹³ See FARBER & SHERRY, *supra* note 6, at 10–28 (summarizing the arguments originalists raise in their own defense).

¹⁴ See ROBERT BENSON, *THE INTERPRETATION GAME: HOW JUDGES AND LAWYERS MAKE THE LAW* 46–77 (2008) (debunking reliance on framers’ intent by noting the various levels of generality at which such intent can be described).

¹⁵ See ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 1–40, 192–98* (1994) (arguing that history matters to help inform us of how we shall constitute ourselves as a people today).

¹⁶ See Taslitz, *Respect and the Fourth Amendment*, *supra* note 11, at 70–72.

¹⁷ See JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* 148–59 (2001). For Rubenfeld, constitutionalism in a democracy consists of a people’s struggle over time to craft and live out its most fundamental, enduring commitments, even if they are contrary to the popular will at a given moment in time. See *id.* at 183–84.

American constitutionalism should be understood in terms of historically evolving interpretive practices that aspire to narrative integrity in telling the constitutional story of a people's self-consciously historical struggle to achieve a politically legitimate government that would guarantee persons their equal human rights. Constitutional interpretation must make use of historical argument constructively to articulate the thread of legal texts, principles, and institutions that constitute over time the struggle for a political community in the genre of American revolutionary constitutionalism. Such interpretation must use the best available political theory of human rights to make contextual sense of the ultimate rights-based normative ends of the constitutional project.¹⁸

I do not claim that this is the only way to use history in constitutional reasoning, but I do claim that it is most often necessary to resolve the truly difficult modern disputes about constitutional meaning and, in any event, it is the way I meant to use history to craft the lessons recited in my book. Does this mean that these lessons, if accepted, can provide a comprehensive framework for resolving all modern Fourth Amendment doctrinal questions? Of course not, and I would be skeptical of any effort by anyone to do so.¹⁹

¹⁸ DAVID A. J. RICHARDS, *CONSCIENCE AND THE CONSTITUTION: HISTORY, THEORY, AND LAW OF THE RECONSTRUCTION AMENDMENTS* 17 (1993). Accuracy in the recounting of history should, of course, to the extent that is humanly possible, be an essential part of this project, however difficult a goal it may be to achieve. Certain events either happened or they did not, and their meaning to actors at the time must be based upon a careful evaluation of the evidence. See Taslitz, *Respect and the Fourth Amendment*, *supra* note 11, at 71 n.326. But the lessons that we draw from that history for modern constitutional law are unavoidably normative ones, and the most important of such lessons must proceed at a high level of generality precisely because they aim to articulate the fundamental principles that should constitute the American people as who they are. It is arguably for this reason that the constitutional text itself is so often abstract, speaking of "equal protection" or "unreasonable search and seizure" without more precise definition. For similar reasons, constitutional scholars so often speak in terms of "community," "justice," "inclusion," "tyranny," and other broad, emotionally-charged, contestable, yet essential terms. The judiciary also struggles to give meaning to such terms, turning partly to history to do so, but rarely relying solely on history, and facing the interpretative task of giving that history meaning for us today, no matter what some judges or justices may claim to be doing. See *supra* Part II.B.; ERWIN CHEMERINSKY, *INTERPRETING THE CONSTITUTION* x, xii (1987) ("[T]he U.S. Constitution serves the dual function of protecting deeply embedded values . . . from the political process, and of serving as a powerful symbol unifying the country."). Chemerinsky continues: "[I]t is desirable to have a constitution written in fairly abstract language enshrining . . . fundamental values about the proper structure of government and the rights of individuals. It is left for each generation to impart specific meaning to these deeply embedded abstract values."

¹⁹ See FARBER & SHERRY, *supra* note 6, at 8, 141, 150–52, 161–62 (challenging the wisdom of any "grand theory" that purports to reduce our messy, conflicting, ambiguous constitutional history, text, politics, and policies to a fundamental maxim mechanically resolving all questions and effectively restraining judicial discretion; but, Farber and Sherry argue, case-by-case adjudication struggling to craft evolving principles to guide, but not determine, future cases, and relying upon varied methods and data sources, is both normatively superior and a better description of what American judges in fact do and will continue to do). Professors Farber and Sherry summarize their argument in one pithy paragraph worth quoting at length:

One of my lessons is about the importance of “respect,” which I define as treating individuals and salient social groups “fittingly” in accordance with some shared core human attribute (whether it be labeled rationality, autonomy, the capacity to achieve moral goodness, or being made in God’s image);²⁰ any lesser treatment is insulting, and I craft an argument for history’s role in helping us to gauge what state action is insulting or humiliating. That argument, however, cannot resolve the contours of the modern “automobile exception” to the Fourth Amendment’s “warrant requirement” or even whether we should recognize such an exception.

Respect has far more relevance to other, quite specific, questions addressed by the Court and by constitutional scholars, notably including whether it is “reasonable” for a police officer to terrify, harangue, and arrest a woman committing a motor vehicle violation that is punishable only by a fine (the Court says yes, while I say no); whether race discrimination should matter to the reasonableness inquiry (the Court apparently says no, while I say yes); and whether the *Terry* Court was right to recognize that stops-and-frisks of minority group members have the effect of humiliating those members and provoking community resentment, while insisting that there is little the Court can do to minimize that ill effect (I think there is much it could have done).²¹

Moreover, as I explain in my book, whether done under the rubric of respect or not, many judges and United States Supreme Court justices have found similar arguments about the importance of avoiding humiliation convincing.²² That reasonable people may disagree with these justices, and that a focus on “respect” does not mechanically resolve all modern interpretive Fourth Amendment issues,

The key problem is that each foundationalist is engaged in an ultimately futile search for certainty, purity, and consistency: a sort of “unified field” theory of the Constitution. They all have what one academic has wittily called “the endemic disease” of academics—“a hardening of categories that transforms a lower-case theory into an upper-case Grand Theory.” But constitutional law is a complex human creation, not an elegant intellectual puzzle. Each theorist, by focusing on only a single aspect of the multi-faceted Constitution, reduces its complexity by sacrificing accuracy. The . . . scholars are much like the blind men and the elephant. Each man feels only a part of the elephant, and thus describes very different things: the trunk feels like a snake, the tusk like a horn, the legs like a tree, and the tail like a broom. But the whole elephant is none of these things—or, rather, is all of them at once—and each man misses the mark in his description. So it is with . . . foundationalists, who each ignore all but a favored aspect of the Constitution.

Id. at 8. See also RICHARD A. POSNER, *HOW JUDGES THINK* 13 (2008) (“[J]udicial philosophies (such as ‘formalism,’ ‘originalism,’ ‘textualism,’ ‘representation-reinforcement,’ ‘civic republicanism,’ or, the newest contenders, ‘active liberty’ and ‘judicial cosmopolitanism,’) are either rationalizations or decisions based on other grounds or rhetorical weapons. None is a politically neutral lodestar guiding judges’ decisions.”).

²⁰ See TASLITZ, *supra* note 1, at 262.

²¹ See *id.* at 2, 76–89, 259–60.

²² See *id.* at 81–83, 263–74.

does not thereby render a jurisprudence of respect “either hopelessly vague, ad hoc, or toothless.”²³

ii. You Have to Choose the Right Lesson or the Right Combination of Lessons for the Right Problem

The importance of respect is only one of ten lessons that I suggest can be drawn from the history recounted in my book. While some lessons may be inapplicable to some situations, others might still be relevant. Moreover, several lessons might interact. Furthermore, because the lessons are not exhaustive, none might apply to a particular circumstance, requiring a re-examination of history to address the new problem.

Smith thus argues, for example, that “respect” is useless in deciding the constitutionality of operating biometric surveillance systems at the Super Bowl, which occur without probable cause or even reasonable suspicion that any individual being surveilled has done anything wrong. I am not sure I even agree with this point: how the searches are conducted; how the procedures for doing so were created; and whether there are adequate limits on police discretion or existing guidelines to handle disagreements over the accuracy of biometric results may affect whether an individual or group has a justifiable reason to feel insulted by the process.²⁴ Granted, actual insult can occur only if those observed know they are being watched. But, the right question is whether they *should be* insulted were they so aware.

Just as a person who is unaware that the reason that he did not get a job was his potential employer’s racism has nevertheless been disrespectfully treated *in*

²³ Smith, *supra* note 2, at 671 (characterizing my approach to constitutional interpretation). Concerning the unavoidability and wisdom of interpretive disagreement over the meaning of constitutional text, see H. JEFFERSON POWELL, *CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION* 92 (2008) [hereinafter *CONSTITUTIONAL CONSCIENCE*] (“The Constitution of the United States starts from exactly [this] . . . presupposition: disagreement on matters of great importance is ineradicable, and it is a tragic mistake to attempt to eliminate it.”). Law professor Steven J. Heyman makes a similar point in the First Amendment context that could apply just as easily to the Fourth Amendment context on which I write:

I do not mean to say that this theory is capable of generating easy answers to free speech problems. As I have stressed, these problems typically involve important values on both sides. Individuals and groups will often disagree about the relative importance of these values and about how conflicts between them should be resolved. It follows that there will always be ideological disagreement over the scope of free speech. The goal of First Amendment theory should be not to eradicate such disagreement, but to develop a common language or framework within which we can engage in reasoned debate about controversial issues.

STEVEN J. HEYMAN, *FREE SPEECH AND HUMAN DIGNITY* 3 (2008).

²⁴ Cf. Martin Marcus & Christopher Slobogin, *ABA Sets Standards for Electronic and Physical Surveillance*, 18 *CRIM. JUST.* 5, 13–19 (2003) (summarizing the American Bar Association Standards on Technologically-Assisted Physical Surveillance, which include limitations of these sorts on the collection and use of, for example, video-camera surveillance information).

fact, so a person whose *privacy* has unjustifiably been invaded, albeit unbeknownst to him, has likewise been objectively treated with disrespect. Furthermore, if some people are ultimately singled out for further investigation based upon biometric surveillance, they at least (and perhaps the press) will then know it has occurred. Persons who are confident that police act pursuant to relatively objective guidelines, administered in a neutral fashion and subject to some oversight, have less reason to feel that they are being treated more as things than as persons. It does not take much to encourage a sense of “thing-hood,” an experience I myself have had on the small number of occasions when police stopped me for no apparent reason, offering no comprehensible explanation, and treating me rudely in the process. Such concerns should, it seems to me, be relevant to the reasonableness of the police conduct even if not necessarily determinative.

Even conceding that respect is not relevant to the biometric testing question, my “lesson” that “privacy in public is not an oxymoron,” that is, that the Court is wrong to have held that we “assume the risk” of full observation by the state any time we expose ourselves to a public place²⁵—a position defended in various ways by a growing number of well-respected scholars²⁶—is indeed relevant to whether the Fourth Amendment even applies in the first place to biometric Super Bowl surveillance. People do and should care about who is watching them, for what purposes, by what means, and for what length of time *even when they are in “public” places*. Under current doctrine, the Fourth Amendment would not even apply to such surveillance because, in a public place, there simply is no privacy to protect, while my position is quite the opposite. Likewise, my emphasis on the lesson that “individualized justice” really should matter—in more familiar language, that we should not too easily jettison the purported commitment to individualized suspicion involved in probable cause and reasonable suspicion determinations²⁷—is of obvious relevance to the Super Bowl situation in which no such suspicion is required. Again, to say that the privacy and suspicion lessons are relevant and merit weight does not mean that no other considerations matter. However, to isolate each lesson to test its relevance to a particular legal problem without exploring whether other lessons or a combination of them might do a better job in that instance—in short, to follow Smith’s approach—is to caricature the meaning of the lessons I advanced.

²⁵ See TASLITZ, *supra* note 1, at 59–60, 273.

²⁶ See, e.g., Aya Gruber, *Garbage Pails and Puppy Dog Tails: Is That What Katz Is Made Of?*, 41 U.C. DAVIS L. REV. 781, 796–804 (2008) (arguing that the third-party doctrine defeated the liberal promise of *Katz v. United States*, 389 U.S. 347, 361 (1967), the seminal case creating the “reasonable expectation of privacy” test for when the Fourth Amendment applies); Daniel J. Solove, *Data Mining and the Security-Liberty Debate*, 75 U. CHI. L. REV. 343, 356–57 (2008) (complaining that the third-party doctrine leaves data-mining unprotected by the Fourth Amendment). *But see* Orin Kerr, *The Case for the Third Party Doctrine*, 107 MICH. L. REV. 561 (2009) (standing as the lone recent effort by a leading scholar in the field to defend the third party doctrine).

²⁷ See TASLITZ, *supra* note 1, at 83–89. To say that a commitment to individualized justice should not be too easily-jettisoned is *not* to say, however, that that commitment must never bend to competing concerns. See *supra* text accompanying notes 34–39.

iii. A Lesson is Not a Rule

Smith also treats my lessons as if they were “rules” rather than reminders of questions to be asked, factors to be weighed, and guidelines for what weight to give them. Thus, he ridicules my “commitment” to individualized suspicion as one that would flatly ban all “group searches,” such as roadblocks, drug testing, police camera surveillance, and data mining.²⁸ The problem is that I never suggested any such outcome.

A rhetorical commitment to individualized justice, as Smith notes, is of course already part of Fourth Amendment jurisprudence. My complaint, like that of several other scholars,²⁹ is that the Court and other governmental entities have steadily eroded that commitment, while often not candidly admitting, much less justifying, that they are doing so. Notably, “probable cause” and “reasonable suspicion” are increasingly found on highly general and questionable evidence.³⁰ Furthermore, even when the courts jettison the individualized suspicion requirement openly, they sometimes do so too easily, with too little thought given to the costs of doing so and how to compensate for them.³¹ That does not mean that individualized suspicion should be required in every case. My own contribution is merely to emphasize that history highlights the requirement’s importance and that sacrificing, diluting, altering, or replacing it needs to be considered more carefully.

I do not think such reminders to take care are meaningless as recent psychological research suggests that reminders and re-emphases of various sorts can often alter, dare I say improve, decision making.³² Furthermore, so long as the Court relies on a balancing of law-enforcement-versus-individual-interests

²⁸ See Smith, *supra* note 2, at 672.

²⁹ In particular, see David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under Terry v. Ohio*, 72 ST. JOHN’S L. REV. 975 (1998).

³⁰ See *id.* at 987–1012 (analyzing a number of cases supporting this proposition).

³¹ See *id.* at 1017–22 (offering a number of examples); Andrew E. Taslitz, *Fortune-Telling and the Fourth Amendment: Of Terrorism, Slippery Slopes, and Predicting the Future*, 58 RUTGERS L. REV. 195 (2005) (exploring the dangers of sliding down a slippery slope toward further unwarranted loss of Fourth Amendment freedoms by continuing to embrace the logic of current individualized suspicion doctrine—doctrine that reflects a blinkered vision of the social costs of too-quickly abandoning the suspicion requirement).

³² See, e.g., DAN ARIELY, *PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS* 206–15 (2008) (describing a series of experiments in which asking participants to recall the Ten Commandments or to take an honor code oath shortly before performing a competitive task for a reward completely eliminated cheating, apparently because it reminded the participants of the importance of honesty); *id.* at 208–09 (“[I]t was not the Commandments themselves that encouraged honesty, but the mere contemplation of a moral benchmark . . .”).

approach to determine the reasonableness of searches,³³ I do not see an alternative to trying to articulate guidelines to aid in evaluating the weight of those interests. Never once did I suggest that such guidelines, however, tip the scale in favor of requiring individualized suspicion in every case.

Smith thus cites Christopher Slobogin for the proposition that an undue obsession with individualized suspicion—with which Smith charges me—can sometimes be too socially costly.³⁴ I agree with Slobogin, however, on this point. Indeed, I discuss with approval in my book the American Bar Association's recent adoption of Standards on Technologically-Assisted Surveillance.³⁵ Those standards seek to correct for the Supreme Court's refusal to find the Fourth Amendment applicable to observation of public activities, thereby presumably permitting unregulated public video surveillance.³⁶ The ABA accordingly proposes filling this regulatory gap by articulating potential legislative standards for the states to enact. Those standards, of which Slobogin was the primary architect, do not adopt an individualized suspicion requirement. They recognize, however, the risks of abuse thereby involved, compensating for them by permitting such surveillance "only when a fairly stringent series of conditions are met, including the opportunity of the public likely to be affected by the surveillance to express its views on the wisdom of the effort and to propose changes in its execution, that public being heard repeatedly on these matters, both before and during the surveillance."³⁷

The ABA and Slobogin thus seem to embrace in this context yet another of the lessons that I have articulated—the importance of community voice—while recognizing that, where public safety requires the sacrifice of individualized suspicion, alternative but nevertheless muscular safeguards are required. If Slobogin is thus also guilty of the "populism" with which Smith rightly but derisively charges me,³⁸ I am proud to be in such company. Similarly, both Slobogin and I serve on an ABA Committee on Transactional Surveillance Standards, part of whose function is to suggest rules governing state access to a wide range of electronic data held by third party institutions—rules that, at a minimum, can be workable only with at least some modification of traditional notions of individualized suspicion.³⁹ I do not expect to be a dissenter from that Committee's evolving standards on this point.

³³ See ANDREW E. TASLITZ, MARGARET L. PARIS & LENESE C. HERBERT, *CONSTITUTIONAL CRIMINAL PROCEDURE* 175–76 (3d ed. 2007) (explaining the Court's categorical "reasonableness balancing approach").

³⁴ See Smith, *supra* note 2, at 671–72.

³⁵ See TASLITZ, *supra* note 1, at 59–60.

³⁶ See Marcus & Slobogin, *supra* note 24, at 14–18.

³⁷ See TASLITZ, *supra* note 1, at 59–60.

³⁸ See Smith, *supra* note 2, at 673.

³⁹ Cf. Christopher Slobogin, *Government Data Mining and the Fourth Amendment*, 75 U. CHI. L. REV. 317, 336–41 (2008) (recognizing the need for reducing, modifying, and even eliminating the

iv. Judicial Minimalism, Code-like Rules, and the Role of the Legislature

a. Broad Lessons, When Applied to Specific Cases, Are Not “Ad-Hoc-ery”

My use of history to inform doctrine in this fashion is sympathetic with a commitment to judicial minimalism of which Professor Cass Sunstein so convincingly writes.⁴⁰ “Judicial minimalism” is the case-by-case accretion of doctrinal change that relies on “incompletely theorized agreements,” that is, on concepts and their justifications recited at a sufficiently high level of generality so as to permit broad agreement on their terms, without straight-jacketing future doctrine in service of some totalizing, comprehensive model that may ignore experience in the service of narrow notions of consistency and logic.⁴¹ That is not to say that my lessons, if accepted and read as I suggest, would not substantially alter current doctrine, but they would do so incrementally, open to the need for course corrections, and with acceptance that they rely on incomplete theories. These lessons are thus merely guidelines meant to assist in analyzing problems raised by specific cases. They are not a code-book of narrowly specific rules pre-judging the wisest resolution of every Fourth Amendment problem.

My approach is also reminiscent of feminist theories that emphasize particularity and uniqueness, and with modes of judicial reasoning that applaud the common law method.⁴² Any interpretive approach partly relies on some sort of theory, but the common law method, as I understand it, accepts Sunstein’s idea that application of general concepts to particular cases can lead to strongly justifiable results even if we cannot all agree on a single, comprehensive explanation for how we got there or should have gotten there.⁴³ Additionally, the common law method accepts that “truth” of some sort can be achieved in an individual case that is

individualized suspicion requirement for at least certain types of government data-mining). The ABA Committee is still in the early stages of its work, so I cannot now know what the final product will say. However, our internal discussions and drafts suggest that it is highly likely that we will recommend modification, alteration, or elimination of the individualized suspicion requirement for certain types of transactional surveillance, including certain types of data-mining.

⁴⁰ See generally CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 11 (1999) (crafting an extended defense of “incompletely theorized agreements” and the wisdom of gradual, case-by-case evolution of constitutional law).

⁴¹ FARBER & SHERRY, *supra* note 6, at 161 (arguing that grand theory in constitutional interpretation impairs judges’ ability to learn from experience).

⁴² See Andrew E. Taslitz, *What Feminism Has to Offer Evidence Law*, 28 SW. U. L. REV. 171, 196–209 (1999) [hereinafter Taslitz, *What Feminism Offers*] (summarizing such feminist theories); see also *infra* text accompanying notes 43–45 (discussing some virtues of the common law method).

⁴³ See SUNSTEIN, *supra* note 40, at 1–40; FARBER & SHERRY, *supra* note 6, at 152 (“Applying large scale theories is clearly not the primary way judges make decisions. Instead, they tend to proceed incrementally, moving case by case. Rather than attempting to articulate a general theory from the start, they try to develop and elaborate principles as they go along.”).

recognized as unique.⁴⁴ Of course, the accretion of reasoning explaining such cases leads to principles meant to guide future cases too (serving as precedent), and there is always a tension between the needs of the individual case and the precedent set for future ones.⁴⁵ Nevertheless, precedent is ultimately guidance rather than the statement of a simple mechanically-applied rule; it is one set of weighty reasons to be considered in making future decisions but can often be distinguished from a particular new case.⁴⁶ Case-specific reasoning is thus always part of the common law method.

Such an approach of course allows for the interplay of at least subconscious judicial biases and political preconceptions. While the law should do what it can to minimize such influences where they are pernicious, I do not think that they can ever be eliminated.⁴⁷ Moreover, for the important questions of constitutional law, good arguments have been made that it is self-delusion to believe that these forces are not at work and that it is even desirable that they play a role, as long as the underlying political and ideological arguments are brought into the open, thereby subjecting them to efforts at defense and critique.⁴⁸ Such arguments accept that the

⁴⁴ Richard Posner makes the point this way:

So pervasive is pragmatic thinking in the American political culture that legalists are [unconvincingly] driven to defend the blinkered results to which their methodology of strict rules and literal interpretations tends as yielding better consequences [that is, as being more pragmatically useful] *than a fuller engagement with the facts of a case, a greater willingness to knead rules into standards, and a looser interpretation of rules that were created without reference to the situation presented by the new case would do.*

POSNER, *supra* note 19, at 239–40 (emphasis added).

⁴⁵ *See id.* at 238–39 (arguing that sensible pragmatic judges consider the social consequences of a rule crafted in a specific case and not only the consequences for the parties in the case before it).

⁴⁶ *See id.* at 39–51, 54–56, 144–45, 184 (analyzing the roles of precedent and the doctrine of stare decisis in legal theory and practice); *see generally* MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* (2008) (articulating a comprehensive theory of the role of precedent in constitutional decisionmaking).

⁴⁷ *See* POSNER, *supra* note 19, at 19–56, 107–21 (surveying nine theories of judicial behavior, most of which recognize a prominent role for the subconscious in judicial reasoning, and arguing that, via intuition and good judgment, subconscious reasoning is often, though not always or entirely, a good thing).

⁴⁸ Judge Posner explains:

If the Justices acknowledged to themselves the essentially personal, subjective, political, and, from a legalist standpoint, arbitrary character of most of their constitutional decisions, then—deprived of “the law made me do it” rationalization for their exercise of power—they might be less aggressive upsetters of political applecarts than they are. But that is probably too much to expect, because the “if” condition cannot be satisfied. For judges to acknowledge even just to themselves the political dimension of their role would open a psychologically unsettling gap between their official job description and their actual job. Acknowledging that they were making political choices would also undermine their confidence in the soundness of their decisions, since judges’ political choices cannot be justified by reference to their professional background or training.

Id. at 289. *Cf.* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 3 (2007) (articulating empiricists’ argument emphasizing the powerful subconscious forces at work in judging, observing their benign and

Court is a political institution, though not operating in the same way as a legislature or the executive.⁴⁹ The Court itself thus contributes to an ongoing conversation with the other branches and the people about what aspects of political morality do and should constitute the basic law of the American people.⁵⁰ Effective conversations require give-and-take as well as constant adjustment and flexibility. Rigid, narrow rules designed to cover a vast swath of legal disputes are not conducive to such conversation. To Smith this is “ad-hoc-ery”; to me it is principled realism.⁵¹

b. Clearer Rules and the Legislature

The criticism that ad hoc reasoning often gives police officers and private citizens too little guidance to assist them adequately in their daily tasks is, nevertheless, sometimes a valid one. The Court’s current approach to the Fourth Amendment has widely been critiqued as being a confusing, complex, inconsistent

pernicious effects, and recommending a variety of reforms for compensating for the ill effects, a model they call the “intuitive-override” mode of judging).

⁴⁹ See POSNER, *supra* note 19, at 157, 204, 264–65, 369–77 (summarizing the institutional and internal constraints on judging that leave the judiciary a wide berth for exercising discretion in creating and applying law, but a discretion different from that exercised by legislatures and far from unlimited). Posner sees the discretionary, quasi-legislative role of the judiciary as unavoidable in our legal culture and often desirable:

[T]he reasons for the legislative character of much American judging lie so deep in our political and legal systems and our culture that no feasible reforms could alter it, and furthermore that [this is] the character of our legal system is not such a terrible thing. The falsest of false dawns is the belief that our system can be placed on the path to reform by a judicial commitment to legalism—to conceiving the judicial role as exhausted in applying rules laid down by statutes and constitutions or in using analytic methods that enable judges to confine their attention to orthodox legal materials and have no truck with politics.

Id. at 15.

⁵⁰ See ROBERT W. BENNETT, *TALKING IT THROUGH: PUZZLES OF AMERICAN DEMOCRACY* 1–8, 85–105 (2003) (arguing that our governmental institutions are designed to promote widespread conversation among the branches and between them and the American people, a model in which the courts play an important role). H. Jefferson Powell, relying on his understanding of Justice Oliver Wendell Holmes’s work, likewise stresses the importance of conversation:

Holmes’s point is that the unavoidably coercive aspect of political community is, in the American system, dependent on conversation, on the ability of those subject to its coercions to participate in the community’s choices. The constitutional virtues collectively inculcate a predisposition to understand American constitutionalism in this manner, as a privileging of talk over command, inclusive conversation over divisive exercises of power.

POWELL, *CONSTITUTIONAL CONSCIENCE*, *supra* note 23, at 102.

⁵¹ See Smith, *supra* note 2, at 671 (decrying what he sees as my ad hoc constitutional reasoning); *but cf.* POSNER, *supra* note 19, at 238–39 (denying that case-specific evolution of legal rules is a “synonym for ad hoc adjudication” because judges consider both the consequences to the parties in the immediate case and the wider systemic consequences of decisions).

mess, and it seems that every theorist thinks that he or she can do better.⁵² Crafting highly specific rules, however, seems to be generally a legislative task.⁵³ That is not to say that the legislature can do it alone. It must act in conversation with the judiciary, which can ensure enforcement of some minimal standards of constitutional protection. The judiciary can also offer incentives for legislatures to take the time to craft specific rules and to do so in accordance with broad constitutional guidelines—an incentives-creating technique that Erik Luna has dubbed using “constitutional roadmaps.”⁵⁴

The judiciary is thus at its best when it draws on history, precedent, and a wide array of other sources to resolve individual disputes. Though the rules it crafts certainly impact future cases too—the latter being the major point of *stare decisis*.⁵⁵ The articulation of highly specific rules meant to govern a broad run of cases, however, is generally a better job for the legislature. The legislature, like the judiciary and the executive, is bound by the Constitution, and so it should feel obliged to act as informed by the same historical, empirical, and moral concerns that worry courts wrestling with constitutional questions.⁵⁶ But precisely because the crafting of specific, trans-case rules can be so controversial, that job is often best left to the legislature. Accordingly, I devoted some significant effort in my book to argue that the lessons I articulated should guide legislative thinking, as well as that of the executive and the judiciary.⁵⁷ In doing so, I embrace a variant of a growing school of thought that sees a major role for legislatures in *constitutional reasoning*.⁵⁸

Any legislative code will suffer from inconsistencies, and it will still require the courts to apply that code to specific cases, but an enhanced legislative role in consultation with the courts helps to address concerns about ad-hoc thinking. That principles, passions, and history have, do, and should guide Congress in playing

⁵² See, e.g., AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 1* (1997) (“The Fourth Amendment today is an embarrassment. . . . All searches and seizures must be grounded in probable cause—but not on Tuesdays. . . . The result is a vast jumble of judicial pronouncements that is not merely complex and contradictory, but often perverse.”); CRAIG M. BRADLEY, *THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION* (1993) (critiquing the Court’s messy doctrine).

⁵³ Cf. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) (crafting an extended defense of the argument that legislatures, rather than courts, should play the primary role in constitutional interpretation).

⁵⁴ See Erik Luna, *Constitutional Road Maps*, 90 J. CRIM. L. & CRIMINOLOGY 1125 (2000).

⁵⁵ See *supra* text accompanying notes 41–45.

⁵⁶ See POWELL, *CONSTITUTIONAL CONSCIENCE*, *supra* note 23, at 12 (“[T]he distinction between adjudication and constitutional decision by political actors is less dramatic than is often assumed”); *id.* at 74–75 (arguing, however, that it is also not entirely meaningless); ANDREW E. TASLITZ, *RAPE AND THE CULTURE OF THE COURTROOM* 148–51 (1999) (discussing the “legislative constitution”).

⁵⁷ See TASLITZ, *supra* note 1, at 58–60.

⁵⁸ See TUSHNET, *supra* note 53.

this role I take as a given.⁵⁹ I thus reject the hyper-skepticism that declares legislatures unable to serve or craft any “common good” as an overstatement, and one that fails, and fails badly, to consider adequately the institutional alternatives.⁶⁰ All decisionmaking processes are flawed and all require means of accountability and self-correction; therefore, all we can hope to accomplish is to choose the least bad option for the tasks that we set.⁶¹

Constitutional scholar Jefferson Powell concedes the unavoidable imperfections that characterize our, or any, constitutional system, and the indeterminacy of finding answers to our difficult constitutional questions.⁶² Yet Powell finds solace in the obligations of all constitutional interpreters—regardless of the branch and thus pointedly including the legislative and executive branches—to act with a “constitutional conscience,” guided by constitutional “virtues.”⁶³ These virtues include: faith, in the sense of a belief that the Constitution is

⁵⁹ Jefferson Powell put the point this way:

The problem with this dichotomy—judges good, politicians and their legal eagles bad—is that it combines an extreme cynicism about the political branches of government (and often all branches of state government) with an extreme credulity, in practice if not always in theory, about the federal judiciary. Both sides of this coin are gross exaggerations of whatever truth they may contain. The history of the Republic is replete with examples of government lawyers working in the political branches who took positions which were not mere translations of their superiors’ wishes into legalese, and to say [even] this is to [wrongly] risk ignoring the possibility and the historical reality of principled obedience to the law on the part of those superiors.

POWELL, CONSTITUTIONAL CONSCIENCE, *supra* note 23, at 67. Powell is obviously here addressing both the role of the legislature and the executive branch, though the quoted comment is in a chapter devoted to illustrating how one executive branch figure fused principles, passions, and history to demonstrate a “conscience” about how wisely to interpret the constitution. See *id.* at 74–79 (developing that illustration); *id.* at 110–11 (noting the “priority of the political,” in which legislative and electoral politics are assumed in the Constitution to play critical roles).

⁶⁰ See Andrew E. Taslitz, *Interpretive Method and the Federal Rules of Evidence: A Call for a Politically Realistic Hermeneutics*, 32 HARV. J. ON LEGIS. 329, 353–94 (1995) (analyzing and responding to public choice and other theorists’ critique of legislation as not having any discernible purpose or serving any coherent notion of the public good); Andrew E. Taslitz, *The Jury and the Common Good: Synthesizing the Insights of Modern and Postmodern Legal Theories*, in FOR THE COMMON GOOD: A CRITICAL EXAMINATION OF LAW AND SOCIAL CONTROL 312 (R. Robin Miller & Sandra Lee Browning eds., 2004) [hereinafter Taslitz, *The Common Good*] (crafting an extended argument that the “common good” is no fiction and comes into being as a result of deliberative dialogue and heated political conversation).

⁶¹ Cf. NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 5 (1994) (“Institutional choice is difficult as well as essential. The choice is always a choice among highly imperfect alternatives.”).

⁶² See POWELL, CONSTITUTIONAL CONSCIENCE, *supra* note 23, at 87 (“Founding-era constitutionalists understood, correctly I think, that no legal instrument complex in its provisions or in its goals can eliminate ambiguity. This must be true a fortiori for an instrument that . . . is the constituent act of a nation. The founders therefore accepted quite consciously the corollary that interpreting the Constitution is an intellectually creative activity, not a mechanical process of unveiling outcomes already fixed in the text.”).

⁶³ *Id.* at 11.

intelligible, and in a commitment to using its language fairly;⁶⁴ candor about its ambiguity;⁶⁵ and integrity in “seeking in any given situation that interpretation of the Constitution that honestly seems to the interpreter the most plausible resolution of the issues in the light of the text and constitutional tradition.”⁶⁶ The virtues also include: “humility,” the recognition that “the Constitution is primarily a framework for political argument and decision and not a tool for the elimination of debate”;⁶⁷ and “acquiescence,”⁶⁸ when one’s efforts to persuade others have failed. Powell further argues that three substantive constitutional commitments are necessary for these virtues to thrive: first, that political struggle is generally a good; second, that orthodox understandings must be resisted and dissenters given free reign to do so; and third, that all Americans are to be included in the ensuing debate.⁶⁹

Powell understands that appeals to virtue may sound to some readers like hopeless naïveté, but he goes on to illustrate how, over the course of American history, all the branches have often lived up to these ideals, while also often falling short of them.⁷⁰ Moreover, he insists that logic and experience show that the exercise of these virtues are thoroughly consistent with the clash of self-interested

⁶⁴ *Id.* at 11, 85.

⁶⁵ *Id.* at 87–89.

⁶⁶ *Id.* at 90.

⁶⁷ *Id.* at 94, 99–101; *see also* HEYMAN, *supra* note 23, at 3 (making similar point).

⁶⁸ The virtue of “acquiescence,” Powell notes, is not an invariant rule of decision—exceptions may be necessary in individual cases—but is nevertheless an obligation of political morality:

In habitually beginning from a presumption of respect for past decisions, the conscientious interpreter acknowledges the possibility not only of error on his or her part, but even more fundamentally the existence of principled disagreement within the American community over the Constitution’s purposes. The virtue of acquiescence locates the constitutional decision maker within the broader American community, which encompasses the past, with its controversies, conclusions, and errors, as well as his or her contemporaries, who share that past, as well as the obligation to treat constitutional decision as the search to implement not a partisan or parochial perspective but what Madison called “the national judgment and intention.”

POWELL, CONSTITUTIONAL CONSCIENCE, *supra* note 23, at 99–100. “Acquiescence” is, therefore, a mark of belongingness to the American political community but not an entreaty to silence. The discussion can continue in the loser’s hope of one day persuading the winners of their error, and the loser can do so in the expectation that, when that day arrives, those still dissenting from his position will nevertheless acquiesce in it until such time, if ever, when they shall again win the debate.

⁶⁹ *See id.* at 110–13.

⁷⁰ Powell discussed only one major historical example in this work. *See id.* at 56–79. But, in light of his current theory of constitutional virtues, many of his other historical works can be understood as extended examples of these virtues at work or analyses of their reasons for failing. *See, e.g.*, H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS (2002); H. JEFFERSON POWELL, THE CONSTITUTION AND THE PRESIDENT’S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION (2002); H. JEFFERSON POWELL, THE CONSTITUTION AND THE ATTORNEYS GENERAL (1999); H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION (1993).

groups and with “passionate commitment to one’s views on contested matters of constitutional interpretation.”⁷¹

If history proves that the constitutional virtues can mean something real, then every constitutional actor must strive to develop them because, in a world of unavoidable legal indeterminacy, acting in good faith is all we have. Powell pulls no punches about the consequences if the exercise of such virtues proves, contrary to his view, unattainable:

I have identified what I believe are certain constitutional virtues, dispositions of mind and will that are necessary if men and women are to interpret and apply the Constitution as that instrument and the history of our dealings with it demand. Without those virtues as ideals, and as realities, to the extent that [it] is possible for fallible human beings [to make these ideals real], American constitutionalism is a fraud.⁷²

But, Powell further adds, these virtues not only set the rules of the game but have moral significance beyond those rules, for “they draw the outline of a particular attitude toward political community.”⁷³ In short, “they describe the characteristics of men and women who recognize the incorrigible otherness of those with whom they must live and yet who decline the old, sour, ultimately violent solution of denying the equal humanity of the other.”⁷⁴

My point in reviewing Powell’s articulation of the constitutional virtues is that legislatures, simply because they are political creatures, are not by that reason alone rendered incapable of protecting fundamental rights, including those embodied in the Fourth Amendment.⁷⁵ Correspondingly, just because hard constitutional questions are indeterminate does not mean that legislatures, the executive, or the judiciary are incapable of addressing such questions in a fair, reasoned manner. But their choices are limited by moral, institutional, and cultural constraints on the options available to them.⁷⁶ History provides fodder for the

⁷¹ POWELL, CONSTITUTIONAL CONSCIENCE, *supra* note 23, at 94. Indeed, one of the essential premises of Powell’s argument is that “constitutional law’s central function is to provide a means of resolving political conflict that accepts the inevitability and persistence of such conflict rather than the possibility of consensus or even broad agreement on many issues.” *Id.* at 7; *see generally* STUART HAMPSHIRE, JUSTICE IS CONFLICT (2000).

⁷² POWELL, CONSTITUTIONAL CONSCIENCE, *supra* note 23, at 100.

⁷³ *Id.* at 101.

⁷⁴ *Id.*

⁷⁵ *See* TASLITZ, *supra* note 1, at 58–59 (summarizing instances in which legislatures did a better job than the courts in enhancing protections against unreasonable searches and seizures).

⁷⁶ Erwin Chemerinsky summarizes a number of the constraints operating, for example, on the courts, including the need to elaborate reasons for decision, the regard of the relevant interpretive communities, the likelihood that judges themselves embrace values broadly reflective of large segments of the broader political community, the community’s commitment to the separation of powers, judicial norms governing decisionmaking methods and outcomes, the appointments process,

exercise of the constitutional virtues by all the branches of government but does not alone dictate outcomes.

If the courts act with these virtues while focusing on case-by-case decisionmaking (yet with an eye toward their future implications), *and* if they prod legislatures to craft more specific rules within broad guidelines, *and* if all institutions act within a political culture of broad-ranging, inclusive conversation, *then* the “lessons” drawn from constitutional history and other sources will be worthy of respect and will be the best that fallible humans are likely to achieve. That Powell and I both believe that this happens, at least sometimes, makes us constitutional optimists in an otherwise often cynical legal and political culture.

c. The Romanticism of Constitutional Lessons

Finally, I plead guilty not only to the charge of being an optimist but also to being a romantic.⁷⁷ History in the context of law can, among other functions, serve to caution us against human foibles and yet still call us to noble aspirations. To articulate a motivating vision of such aspirations and to seek to live them are themselves, I believe, inherently worthwhile tasks.

These aspirations are not merely “academic.” They also inspire reform movements, spark individual creativity, and encourage coalition-building. They

the at-least conscience-pulling tug of *stare decisis*, and, in rare cases, the fear of the Article V amendment process. See CHEMERINSKY, *supra* note 18, at 119–28.

⁷⁷ One way—a way that I reject—to define a romantic is someone who is “[i]dealistic, characterized by or arising from idealistic or impractical attitudes and expectations.” MICROSOFT ENCARTA COLLEGE DICTIONARY 1258 (2001). I chose the word carefully because I know that some readers might suffer from a cynicism that would equate idealism with impracticality, the pejorative notion embodied in the above definition. But the same dictionary from which I drew that definition also notes that one definition of an idealist is “*somebody with high ideals*[,] somebody who aspires to or abides by high standards or principles.” *Id.* at 715. Likewise, that dictionary offers an alternative definition of being romantic as “*involving adventure*[,] relating to or characterized by adventure, excitement, the potential for heroic achievement, or the exotic.” *Id.* at 1258. I use the term “romantic” here, therefore, to fuse aspects of these definitions, to mean someone who aspires to high ideals, sees them as a means for motivating others to heroic achievement, and understands the practical obstacles to changing visions or actions yet goes forward anyway, knowing that some observers will see foolishness where the romantic sees opportunity. *But see* POWELL, CONSTITUTIONAL CONSCIENCE, *supra* note 23, at 110 (rejecting a description of himself as “romantic” if that means ignoring the virtues and hard realities of practical politics). Explains Powell:

In the American Republic the political process is not some means of channeling the choices (which [means] if they existed would be authoritarian and frightening) of a mythical people: it is instead the form of political struggle by which individuals and groups seek to pursue their own goals within a shared political framework. . . . At our best, as individuals and groups we take into account the existence of fellow Americans with (sometimes) very different visions of the world, but the Constitution does not assume that we are always at our best, nor does it demand that we be so.

Id. at 110–11.

are part of the stuff of politics and of law's role in any political system.⁷⁸ Greed, irrationality, foolishness, confusion, chaos, randomness, and downright evil are also part of the stuff of politics and law. I prefer to be open-eyed about the latter without rejecting the relevance of the former. Part of my worry about the law of search-and-seizure is that it has come to be seen as a hyper-technical set of questions to be resolved mechanically by legal elites, of relatively little importance in the hierarchy of liberties and of little relevance to the common man or to the future of the republic. Examining history, particularly the too-oft ignored aspects of that history, belies those claims, and that alone is a very worthwhile effort.

A little romanticism of this sort in thinking about constitutional law, politics, and passions is thus as hard-headed as it is idealistic, an answer to the passivity and despair that cynicism or pessimism can breed.

B. *History as a Conversation Between Elites and the Hoi-Poloi*

Having argued in Part IIA that current constitutional interpretation is best understood as a conversation among modern political actors, including their understanding of the past, I turn now to defending the idea that legal history is best envisioned as a *past* conversation about the kind of people we then thought we should be. I discuss how that past conversation can further enrich the current one, and I elaborate on some of the points made more glancingly in Part IIA about history's role in constitutional interpretation. Part IIB thereby closes the circle of a conversational theory of constitutional interpretation.

1. Legal History as Conversation

Several decades ago, historian Howard Zinn published his now-famous *A People's History of the United States*.⁷⁹ Zinn's goal was to tell the nation's story from the bottom-up, focusing on the experiences of racial and ethnic minorities, workingmen, recent immigrants, the poor, and the despised. Other book authors have followed Zinn's example, examining narrower slices of the American experience than did Zinn in his sweeping chronicle.⁸⁰ My approach has an affinity for Zinn's, and particularly for the "narrower slice" variant followed by his intellectual descendants. One of the major goals of my book was to examine one such narrow slice: how search-and-seizure practices during slavery and Reconstruction affected African-Americans and the White defenders of the anti-

⁷⁸ See LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (1996); Taslitz, *Racial Auditors*, *supra* note 11, at 264–65 (arguing that the "political emotions" can be used to motivate social change that at first blush seems unattainable).

⁷⁹ HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES: 1492–PRESENT* (HarperCollins Pub. 2003) (1980).

⁸⁰ See, e.g., DAVID WILLIAMS, *A PEOPLE'S HISTORY OF THE CIVIL WAR: STRUGGLES FOR THE MEANING OF FREEDOM* (2005); RAY RAPHAEL, *A PEOPLE'S HISTORY OF THE AMERICAN REVOLUTION: HOW COMMON PEOPLE SHAPED THE FIGHT FOR INDEPENDENCE* (2002).

slavery cause. But a *legal* history cannot entirely jettison concern with elites, for it is the elites who ultimately enact and interpret the laws.⁸¹

The elites do not always act as gods imposing their sacred law on their worshippers, however much the contrary may seem to be the case. Elites respond to events on the ground, sometimes having sympathy for, or a political need for the support of, those who daily struggle for and against the law as it is practiced, other times acting against the dissenters and protestors whom some elites find repellent. Moreover, the meaning of the law, especially of constitutional law, is daily disputed by the American public, if not necessarily directly so.⁸² Modernly,

⁸¹ In this respect, my approach differs from Zinn's. Zinn and his progeny look at history from the bottom-up. More traditional histories look at history from the top-down. I look at both perspectives (for example, I have chapters on the masters' viewpoint and others on the slaves' viewpoint) and try to explore the interconnections among them—the ways that the actions and, sometimes the perspectives, of each group influenced the actions and understandings of the other. There are, however, also differences, for example among elites, so I have chapters on Northern versus Southern perspectives. Obviously, not all, or even many, perspectives can be offered in a book of workable length when trying to tell an understandable story, and there is choice involved in what groups to select and what perspectives to seek. This observation is true of all histories. I have tried to select those groups and perspectives that I thought most relevant to my task. The key point here, however, is that history can be seen as an interaction among many contending viewpoints, all of which are changing, multiple, and complex. Furthermore, most human action has some communicative element, conveying some message to someone, whether intended or not, and evoking some responsive meaning-filled action by recipients. In this sense, therefore, history is itself a conversation among participants, albeit one on which any historian can eavesdrop only selectively without each portion being drowned out by the cacophony. See JOYCE APPLEBY, LYNN HUNT & MARGARET JACOB, *TELLING THE TRUTH ABOUT HISTORY* 256, 262–67 (1994) (noting that there are always multiple simultaneously true *perspectives* among the various actors involved in historical events; that there are many messages packed into each past event, not all of which were consciously intended; and that every history involves telling a story by some degree of selection, arrangement of events, and interpretation).

⁸² Constitutional historian Jack Rakove thus cautions us to distinguish between “intention” and “understanding.” See JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 8 (1996). “Intention” refers to an actor’s purpose, while “understanding” refers to the impressions of the actor’s words or actions that are formed in the minds of his audience. See *id.* When speaking of the “original meaning” given words or actions by historical participants, therefore, we must distinguish between the intentions of the framers and the understandings of the ratifiers. See *id.* at 8–10. But, emphasizes Rakove, there is always a range of intentions and understandings in any collective enterprise. See *id.* at 6–10. Furthermore, because historical participants never act in isolation, the “ratifiers” of the constitution must at least include not only the elected representatives to the state constitutional conventions, but also the electorate whom they represent. See *id.* at 6. (I would go further and consider as well even the influence of those Americans excluded from the vote.) Additionally, says Rakove, intentions and understandings are dynamic and creative, making them uncertain and problematic. See *id.* at 10. As Rakove and other historians note, however, this does not mean that history can be no more than a collection of acts, for history is comprehensible only as a narrative. See *id.* at xiv, 6. See also MICHAEL STANFORD, *AN INTRODUCTION TO THE PHILOSOPHY OF HISTORY* 17, 216–17 (1998). While different narratives may be told, some are more plausible, some not, and some are better reasoned and more carefully supported by evidence than others. See APPLEBY ET AL., *supra* note 81, at 259, 261–63. (“The fact that there can be a multiplicity of accurate histories does not turn accuracy into a fugitive from a more confident age . . .”). *Id.* at 262. But any sound *legal* conclusions to be drawn from past

internet chat room debates, television news stories, high-profile lawsuits, family dinner conversations, and church sermons concerning everything from abortion to police use of force to affirmative action, demonstrate this reality.

The creation, meaning, and application of constitutional law thus, I believe, turn partly on, and arise partly from, a conversation between historical elites and everyday people. This is a conversation that can be had both in words and in deeds, and it is an often unpleasant conversation that is part of a struggle over status, power, material resources, and deeply-held moral, religious, and political values.⁸³ This historical conversation is not the sole source of constitutional law,⁸⁴ but it is an important one, and it is the one that I sought to emphasize.

Historians who argue, for example, that slaves themselves (by thousands of small acts of defiance during the antebellum period and by fleeing in huge numbers from their masters during the Civil War) played an important role in their own freedom, held views of that freedom's meaning, and contributed to its embodiment in the Thirteenth Amendment, are recognizing that history (including legal history) cannot be understood solely via the words or actions of the elites.⁸⁵ Correspondingly, anyone reading widely in the history leading up to the three Reconstruction Amendments sees the critical role of elites—whether via congressional debates, political speeches, or judicial opinions.⁸⁶ All that is said by elites, however, cannot be taken simply at face value, because their words and actions reflect their awareness of players in the historical drama whom they do not mention, agendas that they sometimes seek to camouflage, and forces that influence them but which they do not wholly understand.⁸⁷

intentions and understandings must not rely upon univocal stories of the past that exclude voices that have something to teach us today. Cf. RAKOVE at 10 n.10 (“What historians do best is to make connections with the past to illuminate problems of the present.”).

⁸³ Cf. RAKOVE, *supra* note 82, at 11 (noting history always involves power and exclusion).

⁸⁴ Rakove thus distinguishes between using historical intentions, understandings, and interpretations as “an informed point of departure,” which makes sense to both him and me, or letting past meanings control present law, which, even if possible, makes no sense to either of us. *See id.* at 9.

⁸⁵ *See, e.g.,* TASLITZ, *supra* note 1, at 236–39 (summarizing much of the historical work on the slaves' role in attaining their freedom); ALEXANDER TESIS, *THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY* 4 (2004) (“[A] key to understanding the Abolition Amendment is first to comprehend the workings of the institution that it ended.”).

⁸⁶ *See, e.g.,* EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869* (1990).

⁸⁷ This last observation is one of many reasons why history necessitates interpretation. As Joyce Appleby and her colleagues have noted: “Historians . . . seek to understand the internal dispositions of historical actors: what motivated them, how they responded to events, which ideas shaped their social world.” APPLEBY ET AL., *supra* note 81, at 259. Such understandings must be divined from evidence—evidence that can support or help to falsify a particular account. *See id.* at 261–62. Different interpretations from the same evidence can result by assigning different weights to the various kinds of evidence, and as a result of the author's perception of the participants' relative influence on events, as well as from different sets of assumptions about human nature or other factors. *See id.* at 256. Furthermore, the meaning of events is not inherent in them but lies in their

A conversational approach to law—and thus to legal history—recognizes as well that law and culture continually interact, shaping one another. In particular, law serves an expressive function, sending messages about the kind of people we are and the things we value.⁸⁸ Such messages affect the status, power, and self-conception of individuals and groups, matters having both instrumental and inherent value.⁸⁹ Those messages will, therefore, always be contested. The law thus helps to constitute our nature as individuals, members of salient social groups, and as Americans. Political scientist John Brigham explained the matter thus:

We call practices operating on ways of thinking and acting . . . *constitutive*. Legal practices in this sense are a part of the culture, part of our nature: our basic outlook on life is stamped by the compacts drawn up by the colonists; by the decision that all laborers, black or white, should be free; by the agreements concerning due process for the accused and the convicted and the proper roles of the police and the judiciary. The constitutive is a level in the analysis of legal practices; it comes from *constitute*, meaning to form or establish. When we say of a former slave after the Civil War that laws constitute his identity we do not mean to say that being free is his whole being, but rather that laws operate at the level where his being is determined, and that they operated, along with social position and physical characteristics (such as being black), to make him what was called at the time a “freedman.”⁹⁰

inter-connection, so a historian’s narrative is necessarily a partial explanation of what ties certain events into a story. See STANFORD, *supra* note 82, at 217. This observation does not mean, however, that a historian can explore only the evidence supporting the story he tells and not contradictory evidence, for that would be a sin akin to that of “law office history”—history that is unduly selective or merely justificatory rhetoric to achieve an advocate’s goal. See RAKOVE, *supra* note 82, at 11. (Trying to avoid this sin is one of the reasons for some of the lengthy footnotes in my text, which seek to account for and weigh or explain away evidence arguably contrary to my thesis). Yet complete balance on all details is unworkable given the “drama, significance, irony, pathos” of a good narrative. See STANFORD, *supra* note 82, at 217. Thus historian Michael Stanford asks this rhetorical question about scrupulous balance: “Is not this the death of a good story?” *Id.*

⁸⁸ See Taslitz, *What Feminism Offers*, *supra* note 42, at 180.

⁸⁹ See *id.* at 180–81. Stanford notes that interpretation in one sense turns on actors’ intentions, in another sense on their significance, and in a third sense on their meaning. See STANFORD, *supra* note 8, at 16. But, determining significance always requires asking: “Significant to whom and in what ways?” See *id.* Similarly, giving meaning means “making sense,” which also requires us to ask: “Making sense of what, why, and how?” See *id.* The questions we ask, therefore, affect what particular struggles over the meaning of their answers best aid our understanding of the earlier period. My interest in my book concerned questions arising from messages reflecting and affecting the distribution of power that were embodied in nineteenth century struggles over governmental search-and-seizure activities relating to the position of African-American slaves, then newly-freed men, in the American polity. My answers, therefore, focused on the significance and meaning of those events to those constitutional actors, matters necessarily affecting the distribution of social power then and, more indirectly, now.

⁹⁰ JOHN BRIGHAM, *THE CONSTITUTION OF INTERESTS: BEYOND THE POLITICS OF RIGHTS* 2–3 (1996).

Law can impose degrading meanings as well as uplifting ones, and law does so by the daily practices of legal actors and ordinary civilians acting in the shadow of the law. Thus, the segregated beaches, buses, and water fountains of the Jim Crow era are described by one leading constitutional scholar as subjecting African-Americans to thousands of daily “degradation ceremon[ies]” shaping the “life of every black person within the system’s reach.”⁹¹ Critical legal scholars make a similar point when they seek to challenge the reigning legal “narratives,” drawing on the experiences of the subordinated to challenge, modify, or reject the stories that both the law on the books and the law as it is practiced tell about the nature of our social world.⁹²

Here is where an important distinction must be made. In Part IIA of this article, I explained how modernly crafting “lessons” from history presupposes a conversational politics today. Up until now, in Part IIB, however, I have written about a conversational approach to *history*, particularly *legal* history. This latter approach explores the meanings of past events, including degrading meanings, to the participants. But when we return to the task of determining what the past has to say about how the law should help to constitute ourselves in the present, we are leaving the historians’ realm.⁹³ This latter task changes the conversation to one among the living and between the living and the dead. *That* conversation and its legal consequences will also send messages about the kind of people we are today and whom we respect or degrade.⁹⁴

A conversational approach to legal history has several consequences for my dialogue with Professor Smith: first, it explains what I saw as evidence for my claims; second, it helps in understanding the scope of my project.

2. What Counts as Evidence for Legal Claims

Here, too, a background point is necessary. As already noted above, I see my book’s most important contribution as shedding light on search-and-seizure

⁹¹ See KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 4 (1989).

⁹² See Taslitz, *What Feminism Offers*, *supra* note 42, at 181.

⁹³ Perhaps this is not entirely so. Joyce Appleby and her colleagues note that the telling of history is central to a people’s identity, so passionate modern conflicts can erupt over the quantity, nature, and meaning of evidence supporting one reading of our history over another. See APPLEBY ET AL., *supra* note 81, at 5. Historian Gordon Wood, while urging his audience to resist bending historical truths to correspond to modern agendas, goes even further, arguing that history’s greatest relevance for the present is how it links us to the past, helping us to understand who we truly are. See GORDON S. WOOD, *THE PURPOSE OF THE PAST* 10–13 (2008).

⁹⁴ See RUBENFELD, *supra* note 17, at 54–58, 91–92, 95–100, 131–42, 153, 156–58 (defining a “people” as those living out a set of commitments embodied in law over time, linking past, present, and future into one people).

practices during slavery and Reconstruction. Indeed, 199 pages of my text are devoted to this subject. Smith himself finds the book at its “most compelling in describing the extent to which southern slave owners used their extensive powers of search and seizure to regulate slaves, free persons of color, and abolitionists.”⁹⁵ Nonetheless, he devotes but a handful of paragraphs in his review to this subject. Smith likewise spends only two paragraphs of his review analyzing my discussion of Reconstruction, centering those two paragraphs on his claim that I do little more than quote John Bingham for an argument that the “framers and ratifiers” of the Fourteenth Amendment meant to apply a re-invigorated version of the Fourth Amendment to the states.⁹⁶ Apart from challenging my “lessons” learned from history, Smith thus focuses his critique on Part I of my book, which briefly explored the “original Fourth Amendment” of 1791 as background for understanding the “Reconstructed” Fourth Amendment of Part II.

Professor Smith’s critique of Part I challenges my originality, not my history, and his critique of Part II challenges the strength of the evidence supporting my argument that the Fourteenth Amendment rendered regulation of the states’ search-and-seizure practices (as opposed to just the federal government’s similar practices) a matter of federal constitutional law. Smith does not otherwise critique my history in Part II.

I want to begin with Smith’s accusation that John Bingham’s words are the sole evidence I offer for applying the Fourth Amendment to the states, then turn to his critique of the book’s Part I.

i. Implicit “Conversations” as Evidence of “Incorporation”

Smith’s focus on Bingham’s words assumes that by “framers and ratifiers” I meant the traditional notion of the members of Congress and of the state ratifying conventions. Here I must accept some blame for lack of clarity of expression. I used the term “framers and ratifiers” only rarely, but in the context of the entire thrust of my book I thought it would be clear that by this term I meant the framers and ratifiers *in conversation with the American people*, for it is ultimately the

⁹⁵ Smith, *supra* note 2, at 667. Smith also describes my history as a “pioneering effort to situate the law of search-and-seizure within the context of antebellum slavery,” while, however, deriding the lessons I draw therefrom as “ignor[ing] the workings of day-to-day criminal justice administration.” *Id.* at 664. Smith’s latter criticism is correct, if my “lessons” were rigid and isolated rules rather than, as I have said, meant to be illustrations of some ways in which history might be *one factor* in helping us to re-envision what Fourth Amendment law should be like today. Therefore, I did not in this book spend much time addressing other factors, such as the practicalities of modern criminal justice administration. That is a task that I have undertaken elsewhere in much of the body of my writing on criminal procedure, along with countless other academics whose insights I draw upon, a task that I hope to continue in the years ahead.

⁹⁶ See *id.* at 669. Smith does concede that my evidence on this point is “suggestive of the importance of search-and-seizure law” to the Fourteenth Amendment’s drafters, though he considers it “hardly compelling,” a conclusion that, I will shortly argue, ignores what should count as evidence for the claim and misunderstands what I was claiming in the first place.

People's authority that vests the Reconstruction Amendments, like the rest of the Constitution, with its status as our basic law.

This vision of the American people is reflected in the conversation of word and deed between the elites (including members of Congress and the like) and the everyday people who make history, including the newly-freed slaves, the Union soldiers, the seemingly triumphant abolitionists, and others.

There are indeed relatively few statements in congressional or ratifying convention debates that unequivocally and, to modern ears, clearly support the idea of incorporation of any amendments at all.⁹⁷ Yet incorporation of most of the Bill of Rights has become the status quo understanding of the law on the Court and among most, though not all, leading constitutional scholars.⁹⁸ Part of the reason

⁹⁷ Professor George Thomas makes this point most thoroughly and eloquently in his article challenging the "incorporation" of the Bill of Rights against the states via the Fourteenth Amendment. See George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145 (2001). But even Thomas reads the Fourteenth Amendment as constitutionalizing regulation of state search and seizure practices as a stand-alone amendment, though he argues that it operates in a different way from how the Fourth Amendment regulates the federal government. See *id.* at 222–26. Whether Thomas would agree with my lessons I do not know, but I explain in my book why I could reach the same conclusions that I do under his anti-incorporationist mantle. See TASLITZ, *supra* note 1, at 284 n.40. Given that both paths would lead me to the same place, emphasizing the more familiar language of incorporation seemed the clearest way to convey my arguments to most of my audience, who are familiar with the idea of incorporation.

I note briefly as well that Smith criticizes my use of certain of John Bingham's words during the debates because Bingham could have had other things in mind than search and seizure. But those other things are not inconsistent with an embrace of search and seizure's importance to Bingham, especially read in context. See, e.g., TASLITZ, *supra* note 1, at 128, 242–57 (summarizing references by other Republicans to search and seizure concepts and to the Fourth Amendment in public debate as well as in congressional debates leading up to, and immediately following, ratification of the Fourteenth Amendment, including over the Civil Rights Act of 1866, an important Fourteenth Amendment precursor, and in light of developing Republican theories of the nature of the American polity).

More importantly, Bingham's intentions were never my primary concern, nor were his words the primary evidence on which I meant to rely for my claim that Fourth Amendment concerns should best be understood as among the "core" concerns embodied in the Fourteenth Amendment. Social context and the "conversation" of which I write over time are what make this history useful for present-day lawyers. See *supra* text accompanying notes 82–86. Moreover, even taking the past on its own terms requires far more inquiry than into the words appearing in isolated debates or into the intentions of their speakers to understand just what was afoot. Explains leading historian Gordon Wood:

The past in the hands of expert historians becomes a different world, a complicated world that requires considerable historical imagination to recover with any degree of accuracy. The complexity that we find in that different world comes with the realization that the participants were limited by forces that they did not understand or were even aware of—forces such as demographic movements, economic developments, or large-scale cultural patterns. The drama, indeed the tragedy, of history comes from our understanding of the tension that existed between the conscious wills and intentions of the participants in the past and the underlying conditions that constrained their actions and shaped their future.

WOOD, *supra* note 93, at 10–11.

⁹⁸ See TASLITZ, *supra* note 1, at 284 n.40.

for this is that some leading historians have made convincing arguments that those statements that *were* made in Congress, when put in the context of events and in light of the political background of the speakers, are best understood as representative of a broader congressional intention that the Fourteenth Amendment apply the Bill of Rights to the states (or at least recognize that that application already existed).⁹⁹

Still, I can understand why some thinkers would find the incorporation argument as to the entire Bill of Rights hard to swallow based upon congressional debates alone. Furthermore, express reference to the Fourth Amendment specifically in those debates, though not non-existent, is relatively sparse.¹⁰⁰ My goal, as I expressly stated in my book, however, was not to re-create the wheel by recounting and critiquing yet again the debate over incorporation.¹⁰¹ Instead, on the one hand, I *assumed* the correctness of the incorporationist position, focusing more on its consequences for the incorporated Fourth Amendment's meaning than on whether it was incorporated at all. On the other hand, I recounted those aspects of history that I thought best supported the incorporationist position as to the Fourth Amendment given my conversationalist approach to legal history, gauging its relevance for modern law. However, I did not limit my examination of the relevant history to the congressional debates. Were that so, Smith's critique of my position would have more force. Instead, I relied on far more wide-ranging evidence.

I have always thought that the most viable arguments for incorporation instead arise from the conversational perspective. Search-and-seizure issues were at the heart of the American Revolution and of the great contest over slavery and Reconstruction. Reading that history reveals stories of the colonists being seized from the streets to be impressed into the royal Navy, the slaves required to produce passes or face whippings when leaving plantations, and the abolitionists being banished from Southern states while their letters and publications to Southern brethren were seized by postal authorities and burned. That revelation makes evident the centrality of search-and-seizure to the American story, and to the path to the Fourteenth Amendment.

Judicial decisions, political speeches, newspapers, public protests, sermons, and street violence similarly reflected these concerns. If much of the Bill of Rights, and particularly the Fourth Amendment, was made applicable to the states by the Fourteenth Amendment, it is because that is the best way to make sense of this relevant portion of the American story. It is not because legislative debates come close to conclusively resolving this matter. Although it was not my goal, one way to read the bulk of my book, therefore is as, in part, an extended argument in support of incorporation, at least as to the Fourth Amendment.

⁹⁹ See MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 110–30, 218–20 (1986).

¹⁰⁰ See TASILTZ, *supra* note 1, at 242–57.

¹⁰¹ See *id.* at 284 n.40.

Yet that reading would itself be slightly misleading because of the awkward nature of the word “incorporation.” The word “incorporation” conjures up images of Congresspersons’ and ratifying convention members’ intent. My point instead is that the Fourteenth Amendment is best understood as imposing on the states restrictions on their search-and-seizure practices informed by the nation’s experiences with such practices during slavery and Reconstruction. I think that the best and most convenient way to understand and express this idea is to see the Fourth Amendment as being applied to the states by the Fourteenth Amendment, the latter mutating the meaning of the former to embody the people’s lived conversational experience with political elites. But, as I explain in a lengthy footnote,¹⁰² the same result could be reached on a theory that the freestanding Fourteenth Amendment imposes, in its own right, independently of the Fourth Amendment, restrictions on modern search-and-seizure practices. I thus saw the everyday Americans’ struggles—their implicit and explicit conversations with their ruling elites—as making incorporation a sensible idea, while acknowledging that, even jettisoning the assumption of incorporation’s wisdom, similar results can be achieved through alternative constitutional paths.

ii. Post-1868 Case Law as Irrelevant to My Project

Similar reasons explain why I did not address case law development or indeed any other search-and-seizure history post-1868. Whether based upon the theory of incorporation, free-standing due process, or the privileges and immunities of American citizens, it is the ratification of the Fourteenth Amendment in 1868 that is best understood as imposing, for the first time, serious constitutional limitations on the search-and-seizure practices *of the states*. That the courts did not figure this out until the mid-twentieth century is quite irrelevant to a people-focused, conversational narrative approach to constitutional interpretation. Bruce Ackerman, in his *We the People*¹⁰³ series of books makes a similar point when he argues that judges often have a certain myopia that blinds them from fully comprehending the implications of the People’s verdict in making major changes in our constitutional order.

Ackerman’s pathbreaking work has faced other criticisms,¹⁰⁴ but I think that his argument that judges can at least temporarily be blinded to constitutional change embodied in the ongoing struggles of the American People—and that judges therefore often give outdated or cramped interpretations to constitutional text—is consistent with the teachings of an array of modern sociological, political science, and psychological studies of “how judges think” and with a clear-eyed

¹⁰² See *id.*

¹⁰³ See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1993); BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (2000).

¹⁰⁴ See FARBER & SHERRY, *supra* note 6, at 97–121 (summarizing such critiques).

understanding of the political functions of the courts.¹⁰⁵ In any event, whether Ackerman is right or not, because a conversational approach to legal history is a theory about how to interpret that history, I simply note here that I think that the interpretive premises that led courts for too long to abdicate their responsibility to craft a jurisprudence of constitutional regulation of state search-and-seizure practices were wrong.

iii. The Relevance of Great Political Events as Evidence to Resolve Concrete Modern Controversies

A similar line of reasoning explains why I do not accept Smith's assertion that great political events have little relevance for crafting law governing the common fare of ordinary criminal cases.¹⁰⁶ Again, if by this he means, for example, that understanding how Southern slave masters used the equivalent of general warrants to limit slaves' free movement and ability to invade their white masters' property does not dictate what the rule should be when modern police engage in inventory searches, he is right. In one sense, a narrower use of history, perhaps searching for nineteenth century practices akin to inventory searches, would arguably provide more specific guidance. But, as Thomas Davies, in his powerful studies of the original Fourth Amendment's history concludes, there are strong normative reasons for not giving such narrow, specific histories a decisive or even especially important role in resolving modern day Fourth Amendment controversies.¹⁰⁷

¹⁰⁵ See, e.g., POSNER, *supra* note 19, at 97, 103–05. Posner declares it “implausible that people are libertarians, or socialists, or originalists because libertarianism, or socialism, or originalism is ‘correct.’” *Id.* at 97. Rather, he considers these “isms” “hypothesis-driven rather than fact-driven,” because “[n]othing is more common than for different people of equal competence in reasoning to form different beliefs from the same information,” “seeing the same thing but interpreting it in opposite ways.” *Id.* This observation, argues Posner, applies to how originalists use history, *id.* at 103, because interpreting history, tradition, and what counts as settled precedent are “tasks so fraught with uncertainty that the judge’s preferences as to outcome will not only shape his theory but also determine its application to specific cases.” *Id.* at 105. A judge blinded by the ideology with which he has been raised, I therefore argue, is often blind to seeing that events may have rendered that ideology obsolete.

¹⁰⁶ See Smith, *supra* note 2, at 676 (asserting that the history of criminal procedure in prosecuting political offenses and slavery has nothing to offer in understanding procedure in ordinary criminal cases).

¹⁰⁷ See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 740–50 (1999) (arguing for applying history’s lessons to modern Fourth Amendment law only when stated at a high level of generality); Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239, 437–38 (2002) (“An accurate understanding of how constitutional criminal procedure came to take the shape that it has provides valuable and liberating perspectives on current issues. However, in the end, it teaches that . . . [d]ecision making regarding criminal procedure will be more likely to produce sound policy—and less likely to succumb to undiluted statism—if it proceeds without the distorting influence of fictional law-and-order originalism.”). Another way to use history in Fourth Amendment analysis is to ask what the common law permitted or prohibited at the time of the original Fourth Amendment’s ratification. I

Furthermore, even if such more specific histories are given such a role, that does not render the history of broader political struggles any less important. Indeed, the centrality of the colonists' search-and-seizure disputes with the British to the American Revolution¹⁰⁸ is now widely recognized by most thinkers who pay attention to such things; and the colonists' complaints about general warrants and an array of other British practices, and the meaning that those complaints hold for us today, have repeatedly informed the Court's crafting of more specific Fourth Amendment rules.¹⁰⁹

If, as I have sought to suggest, a general framework is needed for debating constitutional questions in any particular area (such as search-and-seizure); if certain values or lessons should guide how much weight the Court gives to various

will not dwell on this approach here but note that it has been soundly debunked by others and, in any event, misunderstands the common law as a fixed set of doctrines when it is really an approach to careful, flexible, and reasoned evolution of the law to meet changing circumstances. *See generally* Sklansky, *supra* note 12; *see also infra* note 109 (expanding upon the flaws in an overly-specific common law originalism).

¹⁰⁸ *See* SAMUEL DASH, *THE INTRUDERS: UNREASONABLE SEARCHES AND SEIZURES FROM KING JOHN TO JOHN ASHCROFT* 2–31, 37, 41 (2004) (noting that the “writs of assistance . . . were the yoke the colonists would not bear” and that “unreasonable searches and seizures were partly responsible for igniting the Revolution . . .”).

¹⁰⁹ *See* Sklansky, *supra* note 12, at 1739 (praising an “older tradition” on the Court of “using the background of the Fourth Amendment to illuminate not its precise demands but its general aims”); *id.* at 1739–43 nn.2–22 (summarizing some leading illustrative cases and scholarship in this vein). Sklansky notes that this older tradition was largely, though not entirely, displaced by an “ahistoric” approach, followed more recently by a new originalism that Sklansky properly derides. *See id.* at 1742–44. Sklansky begins by summarizing the older tradition that he reveres:

Justices Bradley, Brandeis, and Frankfurter all focused on particular forms of search and seizure condemned in the years preceding the American Revolution: the general warrants struck down by English Courts in the 1760s, and the writs of assistance that provoked widespread opposition in the colonies. They sought to generalize from those controversies to the underlying evils against which the Fourth Amendment took aim. Both the Court and its commentators have favorably contrasted this strategy with approaches that would limit a constitutional prohibition to the “mischief which gave it birth.” So it would be odd if the Court now read the Fourth Amendment to prohibit only general warrants and writs of assistance.

Id. at 1743. Sklansky contrasts this approach with the Court's new originalism that does seem to use history in the blinkered way that he and others have condemned. While the Court has not gone so far as to limit the Fourth Amendment to prohibiting general warrants and writs of assistance only, its approach, argues Sklansky, moves it in that direction, asking what government action was considered unlawful under the common law at the time the amendment was framed. *See id.* “Novelty aside” says Sklansky:

[T]his is a curious reading in at least two respects. First, the Fourth Amendment on its face says nothing about common law, but bans all unreasonable searches and seizures, whether or not they were legal before the Amendment was adopted. Second, the chief proponent of the Court's new understanding of the Fourth Amendment has been Justice Scalia, who is also its most vocal advocate of giving constitutional and statutory provisions their “plain meaning.”

Id. at 1743.

interests in crafting constitutional rules; and if a constitutional provision is not to be viewed as a mere technicality but rather as an expression of a broad, symbolic vision of who we are as a people and how we should live our lives, *then* the political struggles that define and redefine the social compact that we call the “Constitution” *must* play a role in crafting a constitutional search-and-seizure jurisprudence. That role can and should inform holdings in specific cases, and aid in crafting rules to guide future cases, *even those governing routine police conduct*. The Court and other scholars do this routinely, and I think wisely so.¹¹⁰

In my view, those who embrace a narrower view of history condemn the Bill of Rights to slow, subtle erosion—to becoming a withering constitutional flower. If my specific efforts to show how the lessons of our second American Revolution can translate into modern doctrine do not persuade Professor Smith, that is fine, but I do not see the wisdom of the argument that the task should not be attempted.

Additionally, the task I set for myself was to emphasize too-long ignored aspects of search-and-seizure history, specifically those involved in slavery and Reconstruction, that shed light on the importance of expressive violence, race, dissent, and protection of society’s weakest. Smith is therefore right when he says that I wrote “a” but not “the” definitive history of the Fourth Amendment. I did not try to do the latter and do not believe that it can effectively be achieved in a single volume of manageable length. William Cuddihy’s magisterial dissertation on the original Fourth Amendment is three thick volumes long,¹¹¹ and his newly-published book—an updated and streamlined version of his dissertation is just under one thousand pages.¹¹² Thus, I did not address the rise of police forces in the nineteenth century because that history was beyond the scope of my project. I leave that history for another day.¹¹³

¹¹⁰ See DASH, *supra* note 108, at 2–10 (arguing that remembering history, particularly the history of the American Revolution, is essential to preventing the many seemingly minor, routine intrusions on Fourth Amendment rights that are too often sanctioned by the courts from cumulating to blow a hole in that Amendment); *id.* at 120–31 (offering the Court’s approach to standing and its creation of a good faith exception to the exclusionary rule as examples of what the author saw as misguided Fourth Amendment doctrines because they ignored the broad teachings of history).

¹¹¹ See William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning*, 602–1791, at 1–3 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (on file with UMI Dissertation Services).

¹¹² See WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 602–1791 (2009).

¹¹³ Important work on nineteenth-century search-and-seizure history and its link to the rise of modern police forces has recently been done by Wesley Oliver. See Wesley MacNeil Oliver, *The Rise and Fall of Material Witness Detention in Nineteenth Century New York*, 1 N.Y.U. J. L. & LIBERTY 727 (2005).

3. On Originality

This discussion of the conversational approach to legal history leads me back to Smith's claim that chapter two of my book, covering the "Original Fourth Amendment," says little that is new. Part of his complaint is that others have written about the Fourth Amendment's role in taming political violence, and he is right. But Smith cites scholars who have largely relied on arguments other than history to do so.¹¹⁴ The one work of history he does cite for this point is William Cuddihy,¹¹⁵ and here he is absolutely right, and I am pleased to be placed in such company, but, as Smith concedes, "no scholar has stressed the ubiquity of 'political violence' to the same degree as [Taslitz]"¹¹⁶ Smith also says that others have made the point that constitutional law is forged not only in the courts but by people on the street, and here too he is right, but he cites a superb book by Larry Kramer that is not focused on how this happens in the area of search-and-seizure.¹¹⁷ Smith also notes that Akhil Amar has stressed the public, political functions of the Fourth Amendment,¹¹⁸ and here too Smith is correct, but Amar did not explore much of the history that I do, did not portray that eighteenth-century history as laying the groundwork for the nineteenth-century history (which Amar does not examine), and reaches very different conclusions from mine.¹¹⁹

More importantly, Smith ignores my use of "political violence" as a shorthand term for "*expressive* political violence"—the idea that violence by and against the state always carries with it messages about status, power, equality, and the inherent worth of persons as fundamentally political beings.¹²⁰ Without addressing this aspect of my definition, and without explaining how he reaches his conclusion, Smith says my definition is "so vague and so expansive that those eschewing [t]his path have seemingly taken the more defensible approach."¹²¹

My definition is indeed expansive, but that was exactly its point: to demonstrate that expressive violence is ubiquitous when the state engages in searches and seizures and that even the daily, little occurrences of stopping individuals on the street can, properly understood, have political consequences. These consequences underscore the Fourth Amendment's importance. Seeing much human behavior as expressive, and seeing most state action as political (in the sense that it affects power and cultural understandings relevant to power), are

¹¹⁴ See Smith, *supra* note 2, at 665–66.

¹¹⁵ See *id.* at 666 n.14.

¹¹⁶ See *id.* at 666.

¹¹⁷ See *id.* at 666 n.17 (citing LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004)).

¹¹⁸ See *id.*, at 666 n.16.

¹¹⁹ See AMAR, *supra* note 52, at 1–45 (offering a concise and updated presentation of Amar's work on the Fourth Amendment).

¹²⁰ See TASLITZ, *supra* note 1, at 2–5, 14, 17, 71, 261, 279 n.4.

¹²¹ Smith, *supra* note 2, at 666.

insights consistent with the work of critical, feminist, and critical race scholars, of “bottom-up” historians like Zinn, and of a wide array of less left-leaning legal, linguistic, political, and legal scholars who emphasize the expressive function of the law.¹²² Those whose works lean more to the hard-right or who simply reject the expressive vision of the law will find my definition of expressive political violence unhelpful, but it is within a stream of thought that many scholars have found enlightening, and I do not think that it necessarily only supports conclusions consistent with progressive political policies.¹²³

Part I of my book indeed tries to argue that the idea of expressive political violence is implicit in the Lockean social contract theory that was so important in the framers’ era—a theory that also stresses the oft-legitimate role of such violence in maintaining the public peace¹²⁴—and tells the story of the original Fourth Amendment in a way that emphasizes struggles over expression, voice, and meaning.¹²⁵ My tale of the original Fourth Amendment thus emphasizes such matters as: seditious libel disputes; the colonists’ righteous anger at having an unrepresentative Parliament dictating search-and-seizure policy; their correspondingly seeing a close connection between British policies in this area and the tyranny that justified revolution; the insult experienced by colonial leaders and businessmen facing searches pursuant to general warrants; the sense of degradation experienced by ordinary colonists forcefully impressed into the British navy; the anger generated by the unjustified seizures of sloops involved in smuggling that was seen as a protest against British policies; the symbolic importance of the home and the diminishment experienced by its denizens upon its violation; and the perception that British search-and-seizure practices lowered colonists to the dishonorable status of the slave.¹²⁶

The messages sent by British searches and seizures and received by the colonists fed fuel to the fire of revolution and sent us on a path to the Fourth Amendment. These were pieces of a great political struggle, but the pieces and their meaning happened one-at-a-time, often to individuals. The citizen impressed

¹²² See Taslitz, *What Feminism Offers*, *supra* note 42, at 179–87 (summarizing the work of feminist legal scholars writing about the expressive function); *supra* notes 63–65 (discussing the relevance of Zinn’s work and that of his successors).

¹²³ For example, my reading of the literature on the Second Amendment right to bear arms has led me to believe that it embraces both collective and individual rights components, but that if the Fourteenth Amendment incorporated the Second Amendment against the states, it revised the latter amendment to far more heavily stress the individual rights component—a conclusion generally associated with the political Right. (I have not written about this specific matter and thus merely state my conclusion to make the noted point). See also *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (interpreting the Second Amendment to create an individual right to bear arms but without deciding the incorporation question); *cf.* TASLITZ, *supra* note 1 at 147, 248–52 (discussing the historical connections among thinking about the Second, Fourth, and Fourteenth Amendments during the period of Reconstruction).

¹²⁴ See TASLITZ, *supra* note 1, at 3–4.

¹²⁵ See *id.* at 17–44.

¹²⁶ See *id.*

on the street, the warehouseman whose goods were seized, and the mother who faced armed men of the king rifling through intimate items in her home were perhaps then concerned with their own fate, but their plight helped shape the fate of the nation.

I take no credit for originality in the approach to constitutional interpretation that I assumed and briefly recounted but did not fully defend in my book—and that I elaborate on a bit more here—but I *do* claim originality in using that approach as a lens for understanding the original Fourth Amendment and its 1868-reconstructed child, and I *do* claim originality for telling in particular the tale of search-and-seizure practices under slavery and during Reconstruction. I do not claim that my perspective is the only legitimate one, nor is it the only one that guides my own work, but I do claim that it is *one* legitimate perspective worth debating.

III. A COMMENT ON TONE

Professor Smith also faults me for what he sees as my oddly combative tone.¹²⁷ I must say that this is a criticism I have never heard about my work from anyone, and I am not sure what he means by it or what evidence he cites for it. It particularly troubled me because I tried, I thought, to go out of my way to demonstrate that, in most respects, my work was consistent with that of other scholars of search-and-seizure history, though I sought to build on their work and to cast some of their evidence in a different light. The critique also troubled me because I so object to the common academic style of not simply disagreeing with someone but of trashing their work, as if someone who disagrees with you has thereby produced trash.¹²⁸ I expressed disagreement with other scholars (what Smith calls “quibbles”) only where I thought it unavoidable, in order to defend my own perspective.

For example, I accepted and relied upon much of the excellent work of Tom Davies, but I disagreed with Davies’s writing off the Fourth Amendment’s reference to a right “of the people” as a mere rhetorical flourish; I instead see it as central to understanding the Amendment’s meaning, and I see nothing combative about trying to explain why this is so. I did not insult or diminish Davies’s work but indeed complimented him along the way.

Smith strangely tries to argue that I am too combative and not combative enough simultaneously. Thus, he faults me for devoting an extended footnote to arguing that Davies was wrong to conclude that ships and commercial premises were excluded from the scope of the original Fourth Amendment. Then, however, he suggests I have wasted my time “belabor[ing]” the point because I end my note

¹²⁷ See Smith, *supra* note 2, at 678.

¹²⁸ See ROBERT J. SPITZER, SAVING THE CONSTITUTION FROM LAWYERS: HOW LEGAL TRAINING AND LAW REVIEWS DISTORT CONSTITUTIONAL MEANING 5, 23 (2008) (bemoaning the stridency, one-sidedness, and harsh tone of much legal scholarship as aimed more at advocacy than truth).

by “admit[ting]” that the difference between Davies and me is that “Davies relies more heavily . . . on official and elite statements about the law” than do I.¹²⁹ But I saw no flaw in acknowledging that reasonable people might differ on a point and explaining candidly why and how I reached a different conclusion than Davies. Smith seems to suggest that my candor undermines the strength of my argument, while I find the hyperbole and lack of candor in so much legal writing both unfair and unconvincing.¹³⁰

Simultaneously, Smith seems to think that I meant my statement about Davies’s and others’ reliance on elite sources as a criticism, thus presenting himself as their defender by noting that “it is to their credit, not their detriment” that they do so.¹³¹ *But, I agree.* My position is simply that elite sources are not the only ones that matter in understanding history on its own terms or the lessons that it teaches the law; a greater emphasis on non-elite sources is crucial to the conversational approach to legal history. If the “people” in conversation with their rulers—most often via expressive action—are considered to be important constitutional actors, maybe the most important ones, then greater weight should be given to their actions, and I argued only that doing so led me to a different view than Davies on a fairly specific question. I meant no slight to others writing about the Fourth Amendment’s history, and several of them—William Cuddihy and Tracey Maclin, joined also by leading constitutional scholar H. Jefferson Powell—graciously offered effusive praise for my book that adorns the hard cover version of the book’s jacket.¹³²

I do not claim to be holier than thou. Too many qualified statements and too much tentativeness in expression *can* be boring, sometimes meandering, and even create the impression of lack of confidence in one’s work. The line between a strongly-held position fairly defended and a combative stance can sometimes be a thin one, and I am sure I must have crossed it at times. Indeed, I worry that this

¹²⁹ Smith, *supra* note 2, at 666–67.

¹³⁰ Cf. SPITZER, *supra* note 128 (analyzing in extended fashion some major examples).

¹³¹ See Smith, *supra* note 2, at 667.

¹³² Tracey Maclin praised the book’s “unique vision,” particularly its emphasis on “tam[ing] political violence” and on “respect for the individual,” finding the “research on search and seizure practices of Southern states during Reconstruction” “illuminating.” TASLITZ, *supra* note 1 (reviews on back cover of dust jacket), available at http://www.nyupress.org/product_info.php?products_id=4825&reviews=1. William Cuddihy lauded the book for removing a “critical gap” in the historical literature and “break[ing] new ground by exploring the Fourth Amendment’s connections with political violence and slavery.” *Id.* Finally, H. Jefferson Powell described the book thus:

Reconstructing the Fourth Amendment is a remarkable scholarly accomplishment. It presents one of the most radical challenges to standard constitutional thinking—not just about searches and seizures but also about the interpretation of the Fourteenth Amendment as a protection of individual rights—in recent literature. Taslitz stakes out a radical and compelling position on a pressing contemporary issue—the protection of individual privacy against government invasion—and does so on impeccably researched and intellectually conservative grounds. It is a must read.

essay may read a bit combatively because I thought that Smith often took my words out of context or used the *reductio ad absurdum* argument style openly to ridicule my work.¹³³ I admit that this irked me. As does any scholar, I have faced criticism before, sometimes even heated or sarcastic criticism, but I rarely viewed it as unfair, and sometimes I benefited from it enormously. Smith's analysis of my work is probably the only one that has irked me so. But I felt nothing but pleasure in wrestling with other scholars in my book and struggled to avoid some sort of academic showdown with them, so I was, to say the least, surprised by Smith's characterization.

IV. CONCLUSION

My displeasure with Smith's review arose primarily from what I saw as its lack of balance and its harsh tone. But Smith's underlying objections raise fair points about the role of history in constitutional interpretation. I thank him for presenting the opportunity for me to at least try to clarify the assumptions about the interpretation that, as I briefly explained in my book, underlay both the history presented there and the illustrative, admittedly debatable lessons that I drew from it. I also said in that book that I wrote it to prompt debate, not to end it, and this too Smith has done, for which I again express my appreciation. I find no contradiction in saying that I can find disagreement with another scholar's work, even find fault in it, and even take away hurt feelings from it, yet still find it to have merit as well and to serve the laudable goal of continuing the conversation.

¹³³ Smith also describes my book as "irritating," dropping a footnote bemoaning what he describes as "stock[ing]" my footnotes with citations to popular culture, like *The Sopranos* and *The Rolling Stones*. Smith, *supra* note 2, at 678 n.66. I cannot recall references to popular culture elsewhere in the book, except for my discussion of *The Matrix*; this is hardly a "stocking" of the text with such references which were used where I thought they expressed or illustrated a theoretical point nicely, never as a substitute for historical analysis. See *id.* (agreeing that I cite "extensively from both primary documents and respected secondary sources"). He further bemoans my voice as "unpredictable" for including some normative theory (my "lessons") and, again, for *briefly* (in an introduction and scattered in a few footnotes) discussing popular culture, and for drawing on my "personal experiences with race relations" (the latter being something I did only in my book's Preface, to explain what prompted my interest in the book's subject area). *Id.* He also argues that my coverage is "extremely selective," which I take as meaning that he objects to the fact that I did not address the nineteenth-century rise of police forces—a task that, as I have explained, was outside my focus on the culture of the Slave Power and that would, in itself, deserve a separate text in order to be treated fairly. *Id.* This collection of vituperative comments ends his review, leaving a harsh impression and, as is true of his entire review, rejecting any serious attention to the history that occupies the bulk of the text. Spirited, even passionate, pull-no-punches debate and criticism are essential to scholarly progress. But I have always failed to understand how lack of balance, selective isolation of pieces from the puzzle as a whole, and language dripping with contempt help to achieve that goal.

