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Recovering the Original Fourth Amendment

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RECOVERING THE ORIGINAL FOURTH AMENDMENT

Thomas Y. Davies*

“The past is a foreign country: they do things differently there.”**

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** L.P. HARTLEY, *THE GO-BETWEEN* 1 (1953).

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I. INTRODUCTION AND OVERVIEW

Claims regarding the original or intended meaning of constitutional texts are commonplace in constitutional argument and analysis. All such claims are subject to an implicit validity criterion — only historically authentic assertions should matter. The rub is that the original meaning commonly attributed to a constitutional text may not be authentic. The historical Fourth Amendment is a case in point.

If American judges, lawyers, or law teachers were asked what the Framers intended when they adopted the Fourth Amendment, they would likely answer that the Framers intended that all searches and seizures conducted by government officers must be reasonable given the circumstances. That answer may seem obvious — the Amendment begins with a clause that states that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”¹ Indeed, this language has been identified as a prime example of how the original understanding can be gleaned directly from constitutional text — what could “unreasonable” mean if not inappropriate in the circumstances?²

1. U.S. CONST. amend. IV. The full text reads:

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

2. For example, Justice Antonin Scalia has asserted that “reasonableness” is the “first principle” of the Fourth Amendment, and has interpreted “reasonableness” to create a balancing standard based on the totality of the circumstances. *See California v. Acevedo*, 500 U.S. 565, 583 (1991) (Scalia, J., concurring) (asserting “the first principle that the ‘reasonableness’ requirement of the Fourth Amendment affords the protection that the common law afforded”); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995) (majority opinion by Scalia, J.) (“As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a government search is ‘reasonableness.’”); *Whren v. United States*, 517 U.S. 806, 817 (1996) (majority opinion by Scalia, J.) (“It is of course true that in principle every Fourth Amendment case, since it turns upon a ‘reasonableness’ determination, involves a balancing of all relevant factors.”); *see also Antonin Scalia, The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1186 (1989) [hereinafter Scalia, *The Rule of Law*] (claiming that assessments of reasonableness are factual, and thus the law of searches and seizures should be an exception to the usual principle that the law should be stated as rules). Justice Scalia is a leading proponent of “originalism.” *See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997) [hereinafter SCALIA, *A MATTER OF INTERPRETATION*]; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

See also Edwin Meese III, Address to the D.C. Chapter of the Federalist Society Lawyers Division (Nov. 15, 1985), in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 33 (Federalist Society ed., 1986); Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 825, 826 (1986) (referring to “unreasonable searches and seizures” in a discussion of the “core values” evident from the Constitution’s text, structure, and history).

Of course, the reference to “unreasonable searches and seizures” does not exhaust the intended meaning of the text — the standards for valid arrest or search warrants that are set out in the second clause also show that the Framers intended to ban the use of too-loose, or “general,” warrants. Thus the Framers intended to require that all searches and seizures be reasonable and also to forbid use of general warrants.

There is a difficulty embedded in the apparently obvious meanings of the two clauses, however — the text does not indicate how they fit together. It does not say whether a valid warrant should be the usual criterion for a “reasonable” police intrusion, or whether “Fourth Amendment reasonableness” should be assessed independently of use of a warrant. Put more concretely, it does not indicate whether or in what circumstances arrests or searches must be made pursuant to a warrant. Thus, it does not say when an officer should be allowed to intrude on the basis of his own judgment, or when he should be required to obtain prior approval from a judge. Largely because of this silence in the text, the need for warrants has been the central issue in the modern debate regarding search and seizure authority.

A number of the historical commentaries on the Fourth Amendment have either favored or rejected a warrant requirement. However, none have supported their answer with persuasive historical evidence. If one turns to the historical sources themselves, the mystery initially deepens: the participants in the historical controversies that stimulated the framing of the Fourth Amendment simply did not discuss when a warrant was required. Odd as it may seem, the Framers simply were not troubled by the most salient issue in the modern debate.

However, upon closer examination, the historical sources do provide a solution to the silence. They show that the Framers did not perceive the problem of search and seizure authority in the same way we now do. In fact, they reveal that the Framers did not even use the term “unreasonable searches and seizures” the way we do.

The historical statements about search and seizure focused on condemning general warrants. In fact, the historical concerns were almost exclusively about the need to ban house searches under general warrants. Thus, the Framers clearly understood the warrant standards to be the operative content of the Fourth Amendment, as well as the earlier state search and seizure provisions. Moreover, the evidence indicates that the Framers understood “unreasonable searches and seizures” simply as a pejorative label for the inherent illegality of any searches or seizures that might be made under general warrants. In other words, the Framers did not address warrantless intrusions at all in the Fourth Amendment or in the earlier state provisions; thus, they never anticipated that “unreasonable” might be read as a standard for warrantless intrusions.

Perplexing as that omission may appear from a modern perspective, it made sense in the context of the Framers' understanding of the problem of search and seizure. They saw no need for a constitutional standard to regulate the warrantless officer because they did not perceive the warrantless officer as being capable of posing a significant threat to the security of person or house. That was so because the *ex officio* authority of the peace officer was still meager in 1789. Warrant authority was the potent source of arrest and search authority. As a result, the Framers expected that warrants would be used. Thus, they believed that the only threat to the right to be secure came from the possibility that too-loose warrants might be used.

The modern interpretation of "unreasonable searches and seizures" is the product of *post-framing* developments that the Framers did not anticipate. During the nineteenth century, courts and legislatures responded to heightened concerns about crime and disorder by expanding peace officers' *ex officio* authority to arrest and search. That expansion marginalized warrant authority and thus undercut the premises that had led the Framers to believe that they could control the officer by controlling the warrant. As a result, the new discretionary arrest and search authority of the officer posed a novel threat to the security of person and house.

In the early twentieth century, the Supreme Court belatedly responded to the new threat to the right to be secure by extending constitutional search and seizure doctrine to the warrantless officer. It was at that time that the "warrant requirement" emerged as a salient issue. And it was at that time that the reference to "unreasonable searches and seizures" in the constitutional text was reinterpreted as though it articulated the relativistic concept of reasonableness-in-the-circumstances. In sum, the authentic history of constitutional search and seizure doctrine is not a simple story of continuity; rather, it is a story that includes drastic change.

Overview of the Argument in this Article

This Article begins the presentation of the authentic history of the Fourth Amendment by recovering the original understanding from the historical sources.³ The experience of working out the authentic history has convinced me that one cannot grasp the original meaning un-

3. I previously presented some aspects of my historical research in Congressional testimony. See *The Jury and the Search for the Truth: Hearing on S. 3 Before the Senate Comm. on the Judiciary*, 104th Cong. 121, 123-33 (1995) [hereinafter *Hearings*]. My discussion of Fourth Amendment history appears in *id.* [hereinafter *Davies's Testimony*]. My historical research was still incomplete on that occasion; for example, I was still unaware of how the Framers understood "unreasonable," a crucial aspect of the authentic history. See also *infra* notes 62, 308.

til one first accepts the invalidity of the usual modern assumptions about the concerns the Framers “must have” experienced. For that reason, this Article makes two passes through the historical evidence. Parts II through IV refute the now commonplace assumption that the Framers must have meant to create a broad reasonableness standard for warrantless intrusions.

Part II briefly reviews the two currently competing constructions of Fourth Amendment reasonableness: the more conventional warrant-preference construction, which treats the warrant process as the central protection called for by the Amendment, and the generalized-reasonableness construction, which rejects the need for, or value of, warrants. Part III next reviews the existing historical accounts associated with the two constructions and shows that each account is significantly flawed. The conventional accounts, which are linked to the warrant-preference construction, posit both a historical reasonableness standard, as well as the importance of warrants, but fail to clarify the Framers’ understanding of when a warrant need be used. In contrast, the generalized-reasonableness accounts claim that the Framers meant for “unreasonable” to constitute the essence of the Amendment, while the warrant clause was meant only to discourage use of warrants. However, they are based in large measure on erroneous historical premises. Moreover, all of the previous accounts suffer from having made prochronistic *assumptions* of one sort or another; that is, at critical points they have each imposed *contemporary* concepts, definitions, or concerns on the historical sources and thus have misperceived the actual content of those sources.

Part IV completes the historical critique of Fourth Amendment reasonableness by exposing the inauthenticity of the shared but prochronistic assumptions that have misdirected prior commentaries. It first exposes the lack of any actual evidence of a broad reasonableness-in-the-circumstances standard in framing-era arrest and search law. It next shows that the Framers’ complaints were not about warrantless intrusions but were almost exclusively about revenue searches of houses under general warrants. Additionally, it shows that early interpretations of the Fourth Amendment and of the related state provisions did not include the regulation of warrantless intrusions; rather, post-framing court decisions interpreted the constitutional provisions banning “unreasonable searches and seizures” as regulating only the issuance of warrants.

After exposing the defects in current treatments of the original meaning, Parts V through VII make a second pass through the historical sources to recover the Framers’ understanding of the constitutional provisions. Part V consults common-law sources to reconstruct how the Framers perceived the problem of search and seizure authority and to explain why the Framers thought that control of warrant authority — and, more precisely, the prohibition of *general* warrant

authority — would *suffice* to preserve the right to be secure in person and house. The explanation consists of two strands. First, common-law sources indicate that it made sense for the Framers to focus only on clarifying warrant standards because the *ex officio* authority of the framing-era officer was still rather meager. For example, the framing-era constable's arrest authority was much narrower than is generally supposed, and nowhere near that of a modern police officer.⁴ Likewise, the justifications available for a warrantless entry of a house were especially limited. At common law, controlling the warrant *did* control the officer for all practical purposes.

The second reason the Framers did not address warrantless intrusions was that they did not anticipate that a wrongful act by an officer might constitute a form of government illegality — rather, they viewed such misconduct as only a *personal* trespass by the person who held the office. Thus, there was neither a need nor a basis for addressing the conduct of a warrantless officer in a constitutional provision regulating government authority. (Likewise, because unlawful acts by officers were only personal, it never occurred to the Framers to apply an exclusionary principle to such misconduct.) The modern notion that an officer's misconduct constitutes government illegality appears to reflect a redefinition of the boundary of government action articulated during the late nineteenth-century formulation of "state action" doctrine under the Fourteenth Amendment. However, that constituted a low-visibility revolution in constitutional thought; the Framers had no such concept.

Part VI traces the initial textual development of search and seizure language in the state constitutional provisions adopted prior to the Fourth Amendment. It demonstrates that each of those provisions dealt only with the banning of general warrants, and that the addition of a rhetorical invocation of a "right" regarding searches and seizures in several of those provisions was not meant to introduce a new search standard. Rather, a variety of evidence shows that the statement of the "right" may have been introduced to insert a listing of the interests to be protected and thus define the scope of the protection against general search and seizure authority — "persons, houses, papers, and possessions." (The last term was altered to "effects" in the Fourth Amendment.)

Part VI also discusses the significant fact that *John Adams* personally introduced the phrase "unreasonable searches and seizures" when he wrote the 1780 Massachusetts provision — the state provision that most closely anticipated the Fourth Amendment. Adams's authorship

4. The framing-era constable could not justify a felony arrest by showing "probable cause," but could usually justify an arrest only if there was "felony in fact" (a point that has been widely misstated in court opinions and commentaries). See *infra* notes 227-228.

reveals that “unreasonable” was derived from Sir Edward Coke’s earlier use of “against reason” as a synonym for inherent illegality or unconstitutionality.⁵ Thus, “unreasonable searches and seizures” was a label that denoted the *inherent illegality* of intrusions made under general warrants.

Part VII traces the actual framing of the Fourth Amendment. It shows that James Madison, who proposed the draft that ultimately became the Fourth Amendment, viewed his proposal only as a ban against “general warrants”; hence, he also understood “unreasonable searches and seizures” as a label for intrusions under general warrants. Although Madison’s draft was modified by the House of Representatives to produce the final two-clause text of the Fourth Amendment, this Part demonstrates that there is no historical support for the conventional claim that this change was made to provide a reasonableness standard to regulate warrantless intrusions. Rather, the evident purpose for the change — which inserted the words “and no warrants shall issue but . . .” — was simply to make the ban against any authorization of general warrants more explicitly imperative than Madison’s language had made it. Thus, like the earlier state provisions, the language of the Fourth Amendment was simply aimed at banning legislative authorization of general warrants for searches of houses or arrests of persons.

The post-framing transformation of the original meaning into modern search and seizure doctrine is a complex story in its own right; thus, a full account is beyond the scope of this initial Article. However, Part VIII briefly identifies the key events. The conferral of discretionary authority on the warrantless officer during the nineteenth century was the catalyst for the transformation. The expansion of *ex officio* authority marginalized the warrant process as a means of controlling police intrusions. As a result, police began to assert broader authority to make searches “incident to arrest,” including warrantless searches of houses and offices. The Supreme Court responded to that novel threat to the right to be secure by creating the basic elements of

5. In 1610, Coke had asserted in *Dr. Bonham’s Case*, 8 Coke Rep. 113, 77 Eng. Rep. 646 (C.P. 1610), that a statute was unconstitutional and void if it was “against common right and reason” — that is, if it violated basic principles of the common law. 8 Coke Rep. at 118a, 77 Eng. Rep. at 652-53. Adams’s mentor, James Otis, invoked Coke’s dictum when he condemned British legislative authority for general writs of assistance as being “against reason” in the 1761 *Writs of Assistance Case* — the initial American controversy over general warrants. Adams took notes of Otis’s argument. (There is no case report; the sources on the case are discussed *infra* note 20.) Adams would also have been aware of similar invocations of Coke’s “against reason” — often converted to “unreasonable” — in other legal and political writings of the time. Thus, Adams understood “unreasonable” to mean inherently illegal or unconstitutional, and he used “unreasonable searches and seizures” as the perfect pejorative label for a search or seizure under a general warrant — a search or seizure that would have been so violative of the law of the land that it could not have been authorized even by legislation. This argument is presented in detail *infra* notes 382-421 and accompanying text.

modern search and seizure doctrine. The 1914 decision *Weeks v. United States* extended the Fourth Amendment to a federal officer's warrantless search of a house and papers, constitutionalized the common-law warrant requirement for such searches, and adopted exclusion as the means for enforcing the right to be secure.⁶ Next, the 1925 decision in *Carroll v. United States* assumed that the Fourth Amendment broadly protected all privately owned property but adopted a relativistic reasonableness standard to assess the constitutionality of warrantless police intrusions.⁷ Notably, Chief Justice Taft's *Carroll* opinion was grounded on a historically false description of the original meaning of "unreasonable searches and seizures." The two currently competing constructions of the Fourth Amendment have emerged from the tensions arising between the doctrinal elements announced in *Weeks* and *Carroll*.

Finally, Part IX considers the normative implications of the authentic original meaning — and of the deep differences between the original meaning and modern doctrine. I argue that neither of the currently competing constructions of the Fourth Amendment adheres to the historical meaning, though the warrant-preference construction is more faithful to the Framers' concerns than the generalized-reasonableness construction. In fact, the latter is nearly the antithesis of the Framers' understanding. However, I also express doubts that the original meaning can be directly applied to address modern issues. In particular, I argue that any attempt to return to the literal original meaning — that is, to an understanding that the text only banned general warrants but did not address warrantless intrusions — would subvert the larger purpose for which the Framers adopted the text; namely to curb the exercise of discretionary authority by officers. I also argue that it would be inappropriate to employ framing-era doctrines selectively to answer specific modern issues because historic doctrines often do not accomplish the same ends in the modern context as they did during the framing era. Instead, I conclude that the authentic history is useful primarily for providing a larger perspective of the overall trajectory of the evolution of search and seizure doctrine: we now accord officers far more discretionary authority than the Framers ever intended or expected.

6. 232 U.S. 383 (1914).

7. 267 U.S. 132 (1925).

II. THE MODERN NOTION OF "FOURTH AMENDMENT REASONABLENESS"

The Fourth Amendment was adopted by Congress in 1789 and ratified by the states in 1791 as one of the provisions of the Bill of Rights. It reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁸

There has been a widespread consensus during the twentieth century about the basic meaning to be attributed to each of the two clauses of the text. The first clause has been understood to state a comprehensive principle — that the government shall not violate the "right to be secure" by conducting "unreasonable searches and seizures."⁹ The Supreme Court has endorsed this understanding in numerous modern opinions, asserting, for example, that "[t]he essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials . . ."¹⁰ In fact, Justices from across the ideological

8. U.S. CONST. amend. IV.

9. The basic meanings assigned to the two clauses of the text and the difficulties that arise when one tries to mesh the two clauses have been discussed in numerous commentaries. See, e.g., Roger B. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329 (1973); Luis G. Stelzner, *The Fourth Amendment: The Reasonableness and Warrant Clauses*, 10 N.M. L. REV. 33 (1979-80); Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 72; Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468 (1985); Ronald Bacigal, *Dodging a Bullet, but Opening Old Wounds in Fourth Amendment Jurisprudence*, 16 SETON HALL L. REV. 597 (1986); Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19 (1988); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383 (1988); Jacob W. Landynski, *Comments on H. Richard Uviller's Reasonability and the Fourth Amendment*, 25 CRIM. L. BULL. 51 (1989); H. Richard Uviller, *Reasonability and the Fourth Amendment: A (Belated) Farewell to Justice Potter Stewart*, 25 CRIM. L. BULL. 29, 33 (1989); Silas J. Wasserstrom, *The Fourth Amendment's Two Clauses*, 26 AM. CRIM. L. REV. 1389 (1989) [hereinafter Wasserstrom, *Two Clauses*]; Lloyd L. Weinreb, *The Fourth Amendment Today*, in *THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING* 184 (Eugene W. Hickok, Jr. ed., 1990); Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 207-28 (1993) [hereinafter Maclin, *Central Meaning*]; 1 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* 5-7 (3d ed. 1996).

I previously discussed the two clauses of the text in Thomas Y. Davies, *Denying a Right by Disregarding Doctrine: How Illinois v. Rodriguez Cortors Consent, Trivializes Fourth Amendment Reasonableness, and Exaggerates the Excusability of Police Error*, 59 TENN. L. REV. 1, 45-59 (1991). My discontent regarding the uncertain relationship between the two clauses was one reason I undertook this historical research.

10. *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979).

spectrum have treated the first clause as the essence of the Fourth Amendment — even quoting it by itself as though it were the Fourth Amendment.¹¹

The second clause of the text — which starts “and no Warrants” and is commonly called “the Warrant Clause” — has been understood to serve the more specific purpose of regulating warrant authority. Its effect is to ban the use of a “general warrant” — a framing-era term for an unparticularized warrant (for example, ordering a search of “suspected places”), which was also commonly applied to a warrant lacking a complaint under oath or an adequate showing of cause.¹²

It is not difficult to understand why the Fourth Amendment is widely thought to contain an overarching reasonableness-in-the-circumstances standard. To begin with, modern readers have approached the text with the assumption that the Framers must have intended it to serve as a comprehensive regulation of all government searches or seizures — an assumption that derives, in turn, from the

11. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 8 (1968) (opinion of the Court by Warren, C.J.); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971) (opinion of the Court by Brennan, J.); *United States v. Mendenhall*, 446 U.S. 544, 550 (1980) (opinion of the Court by Stewart, J.); *Skinner v. Railway Labor Executives Ass’n*, 489 U.S. 602, 613 (1989) (opinion of the Court by Kennedy, J.); *Wyoming v. Houghton*, 119 S. Ct. 1297, 1300 (1999) (opinion of the Court by Scalia, J.). Other opinions simply assert “the constitutional guarantee against ‘unreasonable searches and seizures’ ” without quoting the text of the amendment at all. E.g., *Illinois v. Rodriguez*, 497 U.S. 177, 183 (1990) (opinion of the Court by Scalia, J.); *California v. Acevedo*, 500 U.S. 565, 583 (1991) (Scalia, J., concurring).

12. The most common meaning of “general warrant” was a warrant that lacked specificity as to whom to arrest or where to search; for example, a warrant directing arrests of “suspected persons” or a search of “suspicious places.” In addition, because the lack of specificity often reflected a lack of information, “general warrant” was also often used to denote a warrant that lacked an adequate showing of justification for a search or arrest. See the contrasting uses of “general warrant” in the 1776 Virginia provision set out *infra* text accompanying note 347 (using “general warrants” in the wider sense), and in the 1776 Maryland provision set out *infra* note 351 (using “general warrants” only in the more specific sense of unparticularized warrants).

“General warrant” could also carry an entirely innocent meaning — a warrant that was directed to and executable by any of the constables in a county and/or was made returnable to any justice of the peace in the county. See, for example, the form for a particularized arrest warrant for assault denoted “a general warrant” in CONDUCTOR GENERALIS 445 (James Parker ed., New York 1788) (This was a justice of the peace manual composed by a former Justice of the Peace of Middlesex County, New Jersey, which was published in numerous versions. The version cited here was “Printed by John Patterson, for Robert Hodge, No. 237 *Queen-Street*” in New York). Warrants of this latter type were not meant to be prohibited by the Fourth Amendment. This innocent usage of “general warrant” persisted into the early nineteenth century. See *United States v. Bollman*, 24 Fed. Cas. 1189, 1196 (C.C.D.C. 1807) (No. 14,622) (“In all general warrants for arresting a supposed offender, the direction to the officer is, to bring the party before the person issuing the warrant, or some other justice of peace, &c.”). Note that this innocent usage of “general warrants” may explain why that term was not used in several of the state provisions and not included in the language of the Fourth Amendment. This Article uses “general warrant” only to refer to illegal warrants that lack adequate cause or particularity.

broader assumption that the Bill of Rights was intended to be a comprehensive catalog of rights. If one assumes the Fourth Amendment must reach all intrusions by officers, the word “unreasonable” in the first clause is the only term that could serve as a comprehensive standard.¹³ Moreover, the reasonableness reading resonates with modern lawyers who are comfortable with the idea that constitutional provisions often, even usually, contain relativistic balancing notions like “reasonableness.”

Because the first clause has been assumed to set out a broad reasonableness principle, modern debate over search and seizure doctrine has focused not on whether reasonableness should be the central concept in search and seizure doctrine, but instead on competing constructions of “Fourth Amendment reasonableness.” For most of this century, the Supreme Court has endorsed what is now called the “warrant-preference” construction of Fourth Amendment reasonableness, in which the use of a valid warrant — or at least compliance with the warrant standard of probable cause — is the salient factor in assessing the reasonableness of a search or seizure.¹⁴ The warrant-preference construction is favored by advocates of civil liberties because it enhances the potential for judicial supervision of police conduct. Supporters of the warrant-preference construction also tend to endorse the exclusion of illegally obtained items or information from use as evidence as the proper means for enforcing government compliance with the Fourth Amendment.

For several decades, the Supreme Court has been shifting away from the warrant-preference construction and toward what is now called the “generalized-reasonableness” construction, in which the value of the warrant is discounted and the constitutionality of a search or seizure is determined simply by making a relativistic assessment of the appropriateness of police conduct in light of the totality of the circumstances.¹⁵ The generalized-reasonableness construction is favored

13. As then Justice Rehnquist once observed, “The Framers of the Fourth Amendment have given us only the general standard of ‘unreasonableness’ as a guide in determining whether searches and seizures meet the standard of that Amendment in those cases where a warrant is not required.” *Cady v. Dombrowski*, 413 U.S. 433, 448 (1973).

14. See, e.g., *Trupiano v. United States*, 334 U.S. 699 (1948); *United States v. Rabinowitz*, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting); *Katz v. United States*, 389 U.S. 347 (1967). In the *Katz* formulation, any warrantless arrest or search is presumptively “unreasonable” unless it falls within one of the recognized and well delineated “exceptions” to the warrant process.

15. The first full statement of the generalized-reasonableness approach appeared in Justice Minton’s majority opinion in *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950) (“The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.”). More recently, a generalized-reasonableness approach was reasserted in Justice Rehnquist’s majority opinions in *Cady v. Dombrowski*, 413 U.S. at 448, see quotation *supra* note 13, and *United States v. Robinson*, 414 U.S. 218 (1973) (treating the common-law rule authorizing search incident to arrest as deriving from a “reasonableness”

by law and order advocates because it tends to allow greater leeway for police aggressively to enforce the law. Supporters of the generalized-reasonableness construction also tend to disapprove of the exclusionary rule.

The running debate over the proper construction of the reasonableness standard should not be allowed to obscure the fact that the competing constructions share common assumptions regarding the Fourth Amendment's intended meaning. Both assume the text was meant to regulate all government searches and seizures comprehensively, and both accept the centrality of a sweeping reasonableness standard or concept of some sort. They disagree only about the content of that concept.

III. PREVIOUS TREATMENTS OF THE HISTORICAL FOURTH AMENDMENT — AND THEIR SHORTCOMINGS

The literature on the history of search and seizure doctrine has also almost uniformly accepted the interconnected assumptions that the text was meant to regulate government intrusions comprehensively and that it was meant to articulate a broad reasonableness standard. As in the normative commentary, the principal divide in the historical literature relates to the content of "reasonableness."

A. *The Conventional Historical Accounts by Lasson and Cuddihy*

The conventional account of Fourth Amendment history (which tends to parallel the warrant-preference construction) has been shaped primarily by the first serious historical treatment, a monograph by Nelson B. Lasson published in 1937.¹⁶ Lasson appears to have defined the goal of his project largely as connecting modern search and seizure doctrine to the historical Fourth Amendment; as a result, he

principle). In recent terms, the Justices of the Rehnquist Court have broadly assessed compliance with the Fourth Amendment according to "objective reasonableness." See, e.g., *Illinois v. Rodriguez*, 497 U.S. 177 (1990) (concluding that it was "reasonable" for police to enter an apartment on the basis of a nonresident's apparent consent to their entry); *Wilson v. Arkansas*, 514 U.S. 927 (1995) (replacing the common-law knock-and-announce rule for executing warrants with a "reasonableness" standard).

16. See NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* (1937). Of course, Lasson was not the first to write about the Fourth Amendment. One earlier commentary that probably influenced his analysis was Osmond K. Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361 (1921). Other constitutional commentators had also referred to the history of the Fourth Amendment within broader discussions of constitutional history. See, e.g., CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 508-09 (1928).

assumed away the fundamental question of whether there really was a high degree of continuity in Fourth Amendment jurisprudence.¹⁷

Lasson rooted the Framers' motivation for constitutional search and seizure provisions in three episodes of controversy regarding search and arrest authority that preceded the American Revolution. The first arose in Boston where customs officials had used general writs of assistance¹⁸ (which Americans perceived as a form of general warrant¹⁹) as authority to search for untaxed imported goods. In the 1761 *Writs of Assistance Case*, James Otis argued that the general writ violated common-law principles and the statutory authority for the writ was therefore unconstitutional. Nevertheless, the colonial court upheld the legality of the general writ.²⁰

17. Lasson's orientation may reflect the period during which he wrote — that is, after the Court had already asserted in *Carroll* that "reasonableness" was the essence of the historical Fourth Amendment, see *infra* notes 525-530 and accompanying text, but prior to the emergence of the skeptical academic attitude toward judicial pronouncements associated with legal realism.

18. The writ of assistance attested to the authority of the bearer to search places in which the bearer suspected uncustomed goods were hidden. It took its name from its command that all peace officers and any other persons who were present "be assisting" in the performance of the search. It was initially issued only to commissioned customs officials (though it was used by their subordinates as well) but was later issued to naval officers as well. The statutory authority for the writ made it applicable to searches of "houses" as well as of ships, warehouses, and shops. See generally Joseph Raphael Frese, *Early Parliamentary Legislation on Writs of Assistance*, 38 PUBLICATIONS COLONIAL SOC'Y MASS. 318 (1959) [hereinafter Frese, *Article*].

19. See, e.g., William Henry Drayton's complaint quoted *infra* note 83; Mercy Otis Warren's statement quoted *infra* text accompanying note 496. See generally JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 194-98* (1986) (discussing the general warrant and general writ of assistance grievance).

Unfortunately, Professor Akhil Amar has recently muddied this point by asserting that the Framers sought to ban only general warrants but not general writs of assistance. See Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53, 77-80 (1996) [hereinafter Amar, *Boston*]. Amar relied primarily on a statement by Lord Mansfield in a 1785 English case. *Id.* at 79-80 (discussing *Cooper v. Boot*, 4 Doug. 339, 99 Eng. Rep. 911 (K.B. 1785)). Americans would not have paid *Cooper* much heed, however, because it construed an English excise statute never in effect in the American colonies. Moreover, it is unlikely they ever heard of *Cooper* prior to 1789 because the earliest published report was *Cooper v. Booth*, 3 Esp. 135, 170 Eng. Rep. 564 (K.B. 1785). Publication of Espinasse's reports began with the first volume in 1796. See 1 A LEGAL BIBLIOGRAPHY OF THE BRITISH COMMONWEALTH OF NATIONS 335, entry 5 (W. Harold Maxwell & Leslie F. Maxwell eds., 2d ed. 1955) [hereinafter LEGAL BIBLIOGRAPHY] (showing the volumes of the first edition were published "1796-1811"). Although I cannot determine the precise year in which the third volume was published, it reported cases tried in 1799 through 1801, see 170 Eng. Rep. 517 (1927) (reprinting title of 3 Esp. (1819 ed.)); thus, the third volume was published *no earlier than 1801*. The reason the 1785 decision in *Cooper* was included among the later cases was that an 1800 case included in the reports referred to *Cooper*, but *Cooper* had not previously been published. See 3 Esp. 127, 170 Eng. Rep. 562 (note on inclusion of cases). The report that Amar cites, 4 Doug. 339, 99 Eng. Rep. 911, was not published until 1831. See 1 LEGAL BIBLIOGRAPHY, *supra*, at 299, entry 44.

20. There is no case report. I style the case the *Writs of Assistance Case* because it is the most descriptive title, although it is sometimes called "Paxton's Case" or "Petition of Lech-

The second episode occurred in England when the Tory government employed general warrants to initiate seditious libel prosecutions against John Wilkes — an opposition politician — and his supporters. Those warrants directed officers to determine who was responsible for several allegedly seditious publications, to arrest those persons, and to seize their papers. Officers used the general warrants to arrest Wilkes and numerous other men and often searched houses and seized papers. Wilkes and his supporters then brought trespass actions against the officers. In several high-visibility Wilkesite cases decided between 1763 and 1765, English courts ruled that such general warrants violated common law, and juries ordered the executing officers to pay trespass damages to Wilkes and other victims. In 1769,

mere" (after the names of customs officials). The record consists of notes taken at the two hearings. John Adams took notes at the first hearing. See *Petition of Lechmere*, in 2 LEGAL PAPERS OF JOHN ADAMS 123-34 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965). Josiah Quincy took notes at the second hearing. See *Paxton's Case, Mass. (Quincy)* 51 (1761). The most important aspect of the case is James Otis's argument, during the first hearing, that such writs were illegal. See discussion *infra* notes 405-412 and accompanying text. The Massachusetts court was presided over by Lieutenant Governor Thomas Hutchinson, however, and it ultimately upheld the writs. For a brief treatment of the case, see LASSON, *supra* note 16, at 55-63. For more detailed treatments, see MAURICE H. SMITH, THE WRITS OF ASSISTANCE CASE (1978); 2 William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning 757-825* (1990) (unpublished Ph.D. dissertation, Claremont Graduate School).

It is difficult to assess how widely news of Otis's argument may have spread within the colonies, or exactly when it might have spread. It is evident that Otis's argument was widely known in Boston because many members of the bar and merchant community actually heard the argument and also because Otis published part of it in a newspaper column in 1762. See *BOSTON GAZETTE & COUNTRY JOURNAL*, Jan. 4, 1762 (article) [hereinafter *Otis's 1762 Article*] (probably authored by James Otis), reprinted in SMITH, *supra*, at 563-66. Moreover, general warrants once again became an issue in Massachusetts in 1762 when the colonial legislature, in which Otis was a leader, passed a statute banning the use of general warrants; however, it was vetoed by the governor. See *Mass. Writs of Assistance Bill (1762)*, reprinted in SMITH, *supra*, at 567-68. In addition, Adams's abstract of Otis's argument was circulated to some degree and was published in a Boston paper in 1773. See John Adams, *Abstract, MASS. SPY*, Apr. 29, 1773, reprinted in SMITH, *supra*, at 548, 551-55. We do not know whether news of the case reached other colonies because there are substantial gaps in the surviving copies of important colonial papers. It seems likely, however, that some information about Otis's argument spread during the latter 1760s because Otis was a delegate to the Stamp Act Congress in 1765, see *infra* note 400, and became acquainted with other colonial leaders at that time. For example, he met John Dickinson of Pennsylvania, with whom he later corresponded regarding the general writ of assistance. See *infra* note 138.

Amar has asserted that Otis's argument exerted less influence than the Wilkesite cases on the framing of the Fourth Amendment because Otis's argument was invoked only once during the debates over a federal Bill of Rights in 1787-88. See Amar, *Boston*, *supra* note 19, at 53, 66, 76. The absence of specific references in 1787-88 is not significant, however, because the illegality of general warrants was so settled at that time that writers rarely cited any authorities for that point. It is noteworthy that Amar has not provided any evidence that the Wilkesite cases were widely discussed in 1787-88.

Wilkes also won a verdict against the Secretary of State who had issued the general warrant.²¹

Americans learned of the arrests and searches of Wilkesites under the general warrant and of the subsequent trespass cases through brief accounts that appeared in London and colonial newspapers. The accounts of the trials exclaimed the importance of the issue for English liberty and the sanctity of the house while condemning general warrants as "illegal," "unconstitutional," "void," "oppressive," and "unwarrantable."²² Similar accounts also appeared in pamphlets that cir-

21. I use "Wilkesite cases" as a collective label for the English trespass cases brought by Wilkes and his supporters. The first set of cases were brought by victims of a "nameless" general warrant (issued by the Secretary of State, Lord Halifax) that had directed king's messengers to identify the persons responsible for publishing *The North Briton No. 45*, which had carried a satirical account of a speech by the King. See GEORGE NOBBE, *THE NORTH BRITON: A STUDY IN POLITICAL PROPAGANDA* (reissued 1966) (1939). The messengers arrested upwards of forty men and also searched houses and seized private papers. The victims then brought trespass cases in the Court of Common Pleas presided over by Charles Pratt (later Lord Camden), Chief Justice of that court. Pratt instructed the London juries that the general warrant was illegal, and the juries awarded trespass damages to the plaintiff victims. The more prominent cases in this first set were *Huckle v. Money* (C.P. 1763), *Lindsay v. Money* (C.P. 1763), *Wilkes v. Wood* (C.P. 1763), and *Leach v. Money* (C.P. 1763). The Court of King's Bench reviewed and upheld the judgment in *Leach* in 1765. Thereafter, a number of other cases were settled.

A second set of cases related to an earlier round of arrests and searches involving publication of *The Monitor*. Those warrants named the persons to be arrested, but were general as to the papers to be seized. These later trespass cases followed the same scenario as the earlier cases. The main case was *Entick v. Carrington* (C.P. 1765), in which Lord Camden (Pratt) ruled that the papers search warrant was illegal because there was no existing authority in common law or statute for any magistrate to issue a search warrant to seize papers for use as evidence.

Following these cases, Parliament in 1766 passed resolutions condemning general warrants as illegal, at least for certain uses, unless Parliament itself authorized them.

The final development came in the 1769 trial of *Wilkes v. Halifax*, in which John Wilkes won a judgment of 4000 pounds against Halifax for having issued the "nameless" general warrant. See *infra* note 222.

Citations to the case reports for the Wilkesite cases are provided *infra* note 25. For a brief account of the Wilkesite cases, see LASSON, *supra* note 16, at 42-50. For more detailed accounts, see 2 Cuddihy, *supra* note 20, at 884-927, and NOBBE, *supra*.

22. The following examples typify the press reports that shaped American perceptions of the Wilkesite cases. A Boston newspaper account of the initial Wilkesite trials in *Huckle* and *Lindsay* reported the 200 pound verdicts against the officers, noted that the verdicts condemned "the dangerous practice of issuing general and unconstitutional warrants," and exclaimed that "no age has produced a determination of more general and extensive consequence to every free born ENGLISHMAN." BOSTON GAZETTE & COUNTRY JOURNAL, Sept. 19, 1763 (no. 441), at 2, cols. 2-3.

A London press report of the December 1763 trial of *Wilkes v. Wood* listed all of the attorneys and jurors involved and declared that the case involved "a Cause, that, in the highest degree, affected the most sacred and inviolate Rights and Liberties of Englishmen." It also exclaimed:

By this important decision, every Englishman has the satisfaction of seeing, that his house is his castle, and is not liable to be searched, nor his papers pried into, by the malignant curiosity of King's Messengers, and an utter end is put to this unconstitutional practice; and it may

be truly said, that no question was ever agitated in a Court of Judicature of more interesting consequences to Society.

LONDON CHRON., Dec. 6-8, 1763 (No. 1082), at 550, cols. 1-2. This entire report was reprinted virtually verbatim in some colonial papers. See, e.g., BOSTON GAZETTE & COUNTRY JOURNAL, Feb. 20, 1764 (no. 464), at 4, col. 1.

A London press report of the trial of *Leach*, held a week after that in *Wood*, carried a quotation of Chief Justice Pratt's speech from the case:

This warrant is unconstitutional, illegal, and absolutely void: It is a general warrant, directed to four Messengers, to take up any persons, without naming or describing them with any certainty, and to bring them together with their papers. If it be good, a Secretary of State can delegate and depute any one of the Messengers, or any even from the lowest of the people, to take examinations, to commit or release, and in fine to do every act which the highest judicial officers the law knows can do or order. There is no authority in our law books that mention these kinds of warrants, but in express terms condemn them.

I do venture to pronounce this warrant *illegal*

LONDON CHRON., Dec. 10-13, 1763 (no. 1084), at 562, col. 2. (This account does not identify Pratt as the speaker, but his identity was evident from the context.) This account was also reprinted verbatim in some colonial papers. See, e.g., BOSTON GAZETTE & COUNTRY JOURNAL, Mar. 26, 1764 (no. 469), at 2, cols. 2-3; see also the report discussed *infra* note 24 (attributing this statement to Pratt).

The 1765 Court of King's Bench review of the verdict against the messengers in *Leach* prompted only a brief report in the London press that the verdict "was affirmed by the unanimous opinion of the Court of King's Bench." LONDON CHRON., Nov. 7-9, 1765 (no. 1387), at 452, col. 3. Nothing was reported regarding the content of the legal arguments. I have not located any account of this ruling in an American paper — possibly colonial attention was fixated on the Stamp Act crisis at that date.

London press coverage of *Entick* was also more limited than that of the earlier cases. Beyond the personages and verdict, the report simply noted that

Lord Camden, in a very learned and eloquent speech, which lasted two hours and a half, declared it was the unanimous opinion of the whole court, that Secretaries of State had no manner of right to grant warrants to enter any persons houses, in order to seize their papers, &c. By this noble determination, Englishmens houses may be now again considered as their castles, and not so liable to be exposed to the wanton sport or resentment of the iron hand of arbitrary power.

LONDON CHRON., Nov. 26-28, 1765 (no. 1395), at 516, col. 2.

I have not located any report of *Entick* in a Boston paper. However, a very brief report appeared in the Williamsburg paper:

Lord Camden gave his opinion upon the granting of warrants by Secretaries of State. After enlarging on and explaining numbers of cases, which lasted two hours and twenty minutes, his Lordship declared such warrants (except in cases of high treason) to be illegal, oppressive, and unwarrantable.

VA. GAZETTE (Purdie), Mar. 7, 1766 (no. 772), at 2, col. 1. (This is virtually the entire report and does not refer to *Entick* by name; however, the date implied for Camden's speech, Nov. 27, 1765, matches the decision in *Entick*.)

Finally, the facts of the 1769 verdict of 4,000 pounds (against the Secretary of State who issued the general warrant) in *Wilkes v. Halifax* was widely reported (along with the disappointment of Wilkes's supporters at the amount of the damages). Those accounts were devoid of the rhetorical flourishes of the earlier accounts, however, probably because the illegality of the general warrant was by then old news. See, e.g., LONDON CHRON., Nov. 9-11, 1769 (no. 2014), at 450, cols. 2-3; BOSTON GAZETTE & COUNTRY JOURNAL, Feb. 5, 1770 (no. 774), at 1, col. 1.

culated on both sides of the Atlantic,²³ as well as in other periodicals that probably reached the colonies.²⁴ (The case reports that are commonly cited in modern commentary, however, were not published contemporaneously with the cases but mostly appeared a decade or more later — *after* American hostility toward general warrants had already hardened.²⁵)

The colonial press accounts discussed in this note are among those identified in 3 Cuddihy, *supra* note 20, at 1631-34.

23. The most important pamphlet was probably FATHER OF CANDOR, AN ENQUIRY INTO THE DOCTRINE LATELY PROPAGATED CONCERNING LIBELS, WARRANTS, AND THE SEIZURE OF PAPERS (1764, reprinted 1970) (criticizing Parliament for not condemning general warrants and paper searches in stronger terms). See also *infra* note 78. "Father of Candor" may have been a pseudonym of Pratt's. See LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 391 (1968).

24. For example, a London publication, the *Annual Register*, provided a yearly survey of important events. The survey of 1763, first published in 1764, carried an account of the general warrant issued for the *North Briton* No. 45, Wilkes's arrest and the search of his papers, his release under a writ of habeas corpus, and the proceedings in *Wilkes v. Wood*. THE ANNUAL REGISTER FOR 1763, APPENDIX TO CHRONICLE 135-47. The account of *Wood* reports a portion of Chief Justice Pratt's charge to the jury in which he declared that "[t]his warrant is unconstitutional, illegal, and absolutely void . . ." *Id.* at 145. (However, the quoted passage appears to be a somewhat more elaborate version of the statement reported in the press accounts of *Leach*. See *supra* note 22. No similar statement appears in Lofft's later report of *Wood*. See *infra* note 25.)

25. The case reports of the Wilksite cases were not published contemporaneously with the trials. In fact, the report of *Wilkes v. Wood* and the longer report of *Entick v. Carrington* — the two case reports that are most heavily cited and quoted by modern commentators — did not appear until *after* the American controversies over general writs of assistance had largely run their course. (As I explain in the text *infra*, the widespread colonial controversies over the general writ ran from the enactment of the Townshend Duties Act in 1767 to about 1774, at which time they were displaced by more dire developments such as the military occupation of Boston.) Only three case reports from the Wilksite cases reached the colonies during the period of legal controversies over general writs.

The first two Wilksite case reports were published in London in 1770 in Wilson's Reports: *Huckle v. Money*, 2 Wils. 205, 95 Eng. Rep. 807 (C.P. 1763) (denying the messengers' motion for a reduction of damages); *Entick v. Carrington*, 2 Wils. 275, 95 Eng. Rep. 807 (C.P. 1765) (a short report of Lord Camden's ruling that a search warrant could not be legally issued for a search of papers because no such warrant was authorized by common law or statute). Although the conventional citations for these cases are to the second volume of Wilson's Reports, that citation is actually to the three-volume format of the third London edition published in 1799 and subsequently reprinted in 95 English Reports. Wilson's Reports were originally published in "3 [par]ts in 2 vol[ume]s" — volume one in 1770 and volume two in 1775. See 1 LEGAL BIBLIOGRAPHY, *supra* note 19, at 310, entry 131. A second edition was also printed in that format. See *id.* I have been unable to locate a surviving copy of either of those three-parts-in-two-volumes editions, but it is reasonably certain that parts one and two comprised volume one of the first edition, while part three comprised volume two of the first edition. Thus, notwithstanding the conventional citations to the second volume, the *Huckle* and *Entick* reports were originally published in volume one of the first edition in 1770.

The only other case report published during the period of intense colonial controversy over general writs was a report of the King's Bench proceeding in *Leach* published in 1771: *Leach v. Money*, 3 Burr. 1692, 1742, 11 St. Tr. 307 (Francis Hargrave's 4th ed.), 19 Howell St. Tr. 1001, 97 Eng. Rep. 1050, 1075 (K.B. 1765). See 1 LEGAL BIBLIOGRAPHY, *supra* note 19, at 294, entry 20 (showing that 3 Burr. was published in 1771).

The third episode of controversy over search authority broke out when Parliament reauthorized the use of the general writ for customs searches in the American colonies in the Townshend Act of 1767. That round of controversy produced legal disputes over general writs throughout the American colonies and persisted until nearly the eve of the Revolution. During that period, customs officials petitioned for the issuance of general writs, but colonial judges usually ignored or denied the petitions and often described the requested general writs as "illegal" notwithstanding the specific statutory authority.²⁶ The colo-

The report of the 1763 trial in *Wilkes v. Wood* appeared in 1776. Lofft 1, 19 Howell St. Tr. 1153, 98 Eng. Rep. 489 (C.P. 1763). See 1 LEGAL BIBLIOGRAPHY, *supra* note 19, at 304, entry 83 (showing that Lofft Rep. was published in 1776).

The more elaborate version of Camden's statements in *Entick*, which is virtually always quoted in modern judicial opinions and commentaries, was not published until 1781: *Entick v. Carrington*, 11 St. Tr. 313 (Francis Hargrave's 4th ed.), reprinted in 19 Howell St. Tr. 1029 (C.P. 1765) (not reprinted in Eng. Rep.). See 1 LEGAL BIBLIOGRAPHY, *supra* note 19, at 369, entry 8 (showing that the final, eleventh, volume was published in 1781). It does not seem likely that Hargrave's edition of *State Trials*, an eleven-volume set of reports of treason, sedition, and prominent criminal cases from the time of Henry IV through the 1760s, would have been widely obtained by American lawyers during the 1780s. References to this reporter in American sources are rare; the earliest I have found is in the 1794 justice manual by William Waller Hening. See WILLIAM WALLER HENING, NEW VIRGINIA JUSTICE 415 (entered for publication 1794; the version cited was printed in Richmond by "Aug: Davis" in 1799) (citing "11 State Trials 321"). Moreover, as I describe below, virtually all of the language in the Fourth Amendment, including "unreasonable searches and seizures," had appeared as of the 1780 Massachusetts provision; hence, it is unlikely that Camden's statements in the longer version of *Entick* influenced the Framers' views. See also *infra* notes 212, 508.

No formal case report was ever published of the 1769 trial in *Wilkes v. Halifax*, but it was described in newspapers and magazine articles. See *infra* note 222.

26. In 1766, the authorities in London concluded that the statutory authority for the use of the writ in the American colonies was inadequate, so Parliament reauthorized use of the writ in the Townshend Act of 1767, 7 Geo. III, ch. 46, § 10 (Eng.). Other sections of the act imposed increased customs taxes on a wide range of imported products. Thereafter, legal controversies erupted in most of the colonies when customs officers petitioned the colonial courts to issue general writs. After some initial uncertainty, the colonial courts refused to issue the writs in a general (unparticularized) form. See *infra* note 82. Both Virginia and Pennsylvania witnessed several rounds of controversy in which customs officers repeteritioned for a general writ after the judges of those courts had refused to issue it. In fact, the judges persisted in their refusal even after the English Attorney General weighed in with an opinion that the general writ was legal. In Connecticut, the judges simply refused to rule on the customs officers' petitions. In South Carolina, the judges initially refused to issue the writ until the judges were replaced by Tory appointees. See *infra* note 83. There was no legal controversy over the Townshend writ in Massachusetts and New Hampshire, however, because the 1761 ruling in the *Writs of Assistance Case* was taken to have settled the legality of the writ in those colonies. Even so, public opposition in Boston to the use of the writ was intense during this period. See *infra* note 139.

The first substantial historical account of the Townshend Act writ controversies was Oliver M. Dickerson, *Writs of Assistance as a Cause of the Revolution, in THE ERA OF THE AMERICAN REVOLUTION 40* (Richard B. Morris ed., 1939) [hereinafter Dickerson, *Writs of Assistance*]. That account is still the most useful for an overview, although it has been superseded on some details. See also Joseph R. Frese, S.J., *Writs of Assistance in the American*

nial judges were undoubtedly influenced not only by the earlier press accounts of the Wilkesite cases, but also by Blackstone's summary of the condemnation of general warrants in those cases and, perhaps, by the appearance of the first formal reports from Wilkesite cases.²⁷ In 1774, the First Continental Congress also included general writs among the colonial grievances against Parliament.²⁸

Lasson's account clearly established that the memory of these three episodes provided the stimulus for the Framers' subsequent adoption of constitutional search and seizure provisions. The only disagreements among later commentators concern the relative importance of these episodes. (I think that the widespread and protracted controversies over the reauthorization of the general writ in the Townshend Act exerted the most direct influence on the American Framers.²⁹)

Colonies: 1660-1776, at 225-300 (1951) (unpublished Ph.D. dissertation, Harvard University) [hereinafter, Frese, Dissertation]; 2 Cuddihy, *supra* note 20, at 1017-84.

27. A series of developments probably reignited American interest in the condemnation of general warrants in the Wilkesite cases concurrently with the colonial legal controversies over the Townshend Act writ. One was that John Wilkes became embroiled in a second controversy when he was denied a seat in the House of Commons despite his electoral victory in 1768. Because that controversy dovetailed with American complaints about lack of representation in Parliament, "Wilkes and Liberty" became a Whig slogan on both sides of the Atlantic, and a number of American Whigs endorsed and corresponded with Wilkes at that time. That controversy renewed American interest in Wilkes's earlier legal battle against general warrants. See PETER D.G. THOMAS, JOHN WILKES: A FRIEND TO LIBERTY 159-75 (1996). Moreover, in early 1770, colonial papers carried reports of the verdict for Wilkes in *Wilkes v. Halifax*. See *supra* note 22; *infra* note 222. In addition, Americans undoubtedly heeded Blackstone's 1769 condemnation of general warrants, which was based on the Court of King's Bench proceedings in *Leach*. See 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 288 n.1 (1769, reprinted facsimile The University of Chicago Press, 1979), quoted *infra* note 78. The case reports of three Wilkesite cases — *Huckle*, *Entick* (the shorter version), and *Leach* — also became available during the early 1770s. See *supra* note 25.

28. See *infra* notes 139, 142.

29. Lasson did not emphasize the Townshend Act writ controversies, but he wrote before Dickerson's seminal account of those legal controversies was available. See *supra* note 26. I think the memory of Parliament's 1767 reauthorization of general warrants for customs searches of houses was the principal stimulus for the adoption of bans against general warrants in the state declarations of rights adopted between 1776 and 1784, and for the anti-Federalist calls for a federal ban against general warrants during the constitutional ratification debates of 1787-88. As I explain below, the concerns about search authority raised by anti-Federalists during the ratification debates of 1787-88 were primarily about revenue searches of houses. See *infra* notes 164-166; cf. Dickerson, *Writs of Assistance*, *supra* note 26, at 48 (asserting that the controversy over the Townshend Act writ "became an issue throughout the colonies, involving nearly every judge and prominent lawyer in America outside of Massachusetts and New Hampshire"); Frese, Dissertation, *supra* note 26, at 300 (concluding that "with such a widespread legal discussion [regarding the reauthorization of the writ of assistance in the Townshend Act] it is hardly to be wondered if a fourth amendment was proposed for the American Constitution").

Commentators who have relied primarily on case reports have tended to omit or understate the significance of the Townshend Act writ controversies, probably because those controversies were never formally reported. See *infra* note 62.

As to the actual drafting of the state and federal search and seizure provisions, Lasson asserted that the Framers meant to ban general warrants but that their concerns over searches and seizures broadened into a comprehensive “principle [of] freedom from unreasonable search and seizure.”³⁰ Although he conceded that Madison had addressed only general warrants in the draft for a federal provision, Lasson asserted that a subsequent language change made in the House of Representatives injected the broader reasonableness principle. Thus, he asserted that the first clause of the Fourth Amendment was meant to state a broad reasonableness standard for government intrusions, while the second was specifically meant to ban general warrants.³¹

Lasson also described the subsequent historical development of Fourth Amendment law as though modern doctrine reflected a continuous development from the original meaning of the text. Although he noted that the federal courts had little to say about the Fourth Amendment during the early 1800s,³² he treated the Supreme Court’s 1886 ruling in *Boyd v. United States*³³ — that a statute was unconstitutional because it authorized an unreasonable seizure of a commercial invoice — as though it were an application of the original meaning of the text.³⁴ He also treated the Court’s subsequent recognition of a broad exclusionary rule in the 1914 decision *Weeks v. United States*³⁵ as a more or less continuous development from *Boyd*.³⁶ Thus Lasson claimed that a broad reasonableness standard was always central to the Fourth Amendment’s meaning.³⁷

Numerous commentators have relied upon and repeated Lasson’s historical treatment, often claiming it supports the warrant-preference

30. LASSON, *supra* note 16, at 81.

31. *See id.* at 100-03. Lasson was not the first commentator to assert this construction. See the earlier statement by Fraenkel discussed *infra* note 527. Madison’s focus on banning general warrants is discussed *infra* notes 430-439 and accompanying text. The subsequent language change is discussed *infra* notes 477-499 and accompanying text.

32. *See id.* at 106-07.

33. 116 U.S. 616 (1886).

34. *See* LASSON, *supra* note 16, at 107-10. Lasson accepted at face value the originalist claims Justice Bradley made about the original meaning of the Fourth Amendment in *Boyd*, but those claims were actually groundless. *See infra* notes 512-513.

35. 232 U.S. 383 (1914).

36. *See* LASSON, *supra* note 16, at 111-12.

37. Because Lasson assumed the presence of a broad reasonableness standard, he did not identify *Carroll*’s use of a reasonableness-in-the-circumstances standard as a significant development. *See id.* at 125-26, 130 n.84, 131 n.90. However, *Carroll*, which approved of a warrantless search of an automobile for illegal liquor, in part because of the exigency presented by the mobility of the vehicle, was the first Supreme Court case to treat “unreasonable” in the Fourth Amendment as a relativistic reasonableness-in-the-circumstances standard. *See infra* notes 523-529 and accompanying text.

interpretation.³⁸ Likewise, a number of Supreme Court opinions have cited Lasson's as the authoritative historical account.³⁹

In addition, William J. Cuddihy essentially replicated Lasson's analysis in a massive 1990 Ph.D. dissertation that added considerably to the historical documentation of the origins of the Fourth Amendment.⁴⁰ Like Lasson, Cuddihy treated the first clause as stating a

38. Numerous commentaries draw on Lasson's commentary to describe Fourth Amendment history; those that address the subject in some detail include (in chronological order): JACOB W. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION* (1966); Joseph J. Stengel, *Background of the Fourth Amendment to the Constitution of the United States* (pts. 1 & 2), 3 U. RICH. L. REV. 278 (1969), 4 U. RICH. L. REV. 60 (1969); Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 395-99 (1974); Luis G. Stelzner, *The Fourth Amendment: The Reasonableness and Warrant Clauses*, 10 N.M. L. REV. 33, 35-41 (1979-80); POLYVIOS G. POLYVIOS, *SEARCH & SEIZURE: CONSTITUTIONAL AND COMMON LAW 1-19* (1982); Joseph D. Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 AM. CRIM. L. REV. 603 (1982); Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a 'Principled Basis' Rather than an 'Empirical Proposition'?*, 16 CREIGHTON L. REV. 565, 571-79 (1983); Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development, and Future of the Exclusionary Rule in Search and Seizure Cases*, 83 COLUM. L. REV. 1365, 1372-80 (1983); Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 281-95 (1984); Martin Grayson, *The Warrant Clause in Historical Context*, 14 AM. J. CRIM. L. 107 (1987); John M.A. DiPippa, *Is the Fourth Amendment Obsolete? — Restating the Fourth Amendment in Functional Terms*, 22 GONZ. L. REV. 483, 503-14 (1987-88); and Clark D. Cunningham, *A Linguistic Analysis of the Meanings of 'Search' in the Fourth Amendment: A Search for Common Sense*, 73 IOWA L. REV. 541, 550-59 (1988). See also 1 LAFAVE, *supra* note 9, at 3-11.

39. Supreme Court opinions have frequently cited Lasson's commentary (as well as that by LANDYNSKI, *supra* note 38) as a general authority on Fourth Amendment history. Citations to Lasson that relate to key aspects of the history addressed in this Article include (in chronological order): *Lopez v. United States*, 373 U.S. 427, 454-55 (1963) (Brennan, J., dissenting) (citing Lasson for the proposition that the first clause sets out a "more encompassing principle" than the warrant standards); *Warden v. Hayden*, 387 U.S. 294, 303, 317 (1967) (Douglas, J., dissenting) (citing Lasson regarding the enlargement of the text to include a broad reasonableness principle); *United States v. United States Dist. Court*, 407 U.S. 297, 328-29 (1972) (Douglas, J., concurring) (citing Lasson for the proposition that the Amendment was aimed at curbing abusive warrants); *United States v. Matlock*, 415 U.S. 164, 183 (1974) (Douglas, J., dissenting) (citing Lasson regarding the enlargement of the text to include a broad reasonableness principle); *United States v. Watson*, 423 U.S. 411, 429 (1976) (Powell, J., concurring) (citing Lasson for the proposition that the Framers were unconcerned with warrantless intrusions); *Arkansas v. Sanders*, 442 U.S. 753, 759 (1979) (opinion of the Court by Powell, J.) (citing Lasson for the proposition that the Framers believed a specific warrant was needed for a search of premises); *Payton v. New York*, 445 U.S. 573, 585 (1980) (opinion of the Court by Stevens, J.) (citing Lasson regarding the enlargement of the text to include a broad reasonableness principle); *id.* at 611 (White, J., dissenting) (same); *Oliver v. United States*, 466 U.S. 170, 177 (1984) (opinion of the Court by Powell, J.) (same); and *United States v. Leon*, 468 U.S. 897, 971 (1984) (Stevens, J., concurring in part, dissenting in part) (citing Lasson for the proposition that the Amendment was aimed at curbing abusive warrants).

40. See Cuddihy, *supra* note 20. Cuddihy's study examines search and seizure from the midst of time to 1791 but does not address the understanding of the Fourth Amendment during the nineteenth century. See also William J. Cuddihy & B. Carmon Hardy, *A Man's House Was Not His Castle: Origins of the Fourth Amendment*, 37 WM. & MARY Q. 371 (1980).

broad reasonableness principle. In fact, he described the Fourth Amendment as the culmination of a long development of a “concept” of unreasonable searches and seizures that ultimately took the form of a strong preference that searches be based on specific warrants.⁴¹ Although Cuddihy’s work is not yet as widely known as Lasson’s,⁴² one Supreme Court opinion has cited it,⁴³ and Professor Tracey Maclin has summarized Cuddihy’s analysis and offered it as support for the warrant-preference interpretation of the Fourth Amendment.⁴⁴ Professor Leonard W. Levy, Cuddihy’s dissertation adviser, has also endorsed a similar view of the original meaning of the Fourth Amendment, although he placed greater stress on the vagueness of the reasonableness concept.⁴⁵

I have found Cuddihy’s thorough research to be of immense value in identifying relevant historical sources; the citations in this Article do not adequately reflect how much I have learned from his work. However, I disagree with a number of Cuddihy’s interpretations of the historical sources. See *infra* notes 107, 145, 163-166, 206, 297, 299, 349, 350, 377, 434, 473.

41. Cuddihy described the reference to “unreasonable searches and seizures” in the first clause of the Fourth Amendment as a general principle in the same way Lasson did:

The most significant element of the amendment was . . . the generic concept of [unreasonable search and seizure]. The amendment’s first clause, which explicitly renounces all unreasonable searches and seizures, overshadows the second clause, which implicitly renounced only a single category, the general warrant. The Framers of the amendment were less concerned with a right against general warrants than with the broader rights those warrants infringed.

2 Cuddihy, *supra* note 20, at 1545. Similarly,

[t]he history that preceded the Fourth Amendment . . . reveals a depth and complexity that transcends language. To think of the amendment as a right against general warrants disparages its intricacy. The amendment expressed not a single idea but a family of ideas whose identity and dimensions developed in historical context.

Id. at 1555.

42. *But see* the favorable review of Cuddihy’s dissertation in Morgan Cloud, *Searching Through History: Searching for History*, 63 U. CHI. L. REV. 1707 (1996) (book review).

43. See *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 669 (1995) (O’Connor, J., dissenting) (citing 3 Cuddihy, *supra* note 20, at 1402, 1499, 1555, for the proposition that the Framers intended that searches be based on individualized suspicion). I agree with Cuddihy’s conclusions in that regard.

44. See Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925 (1997) [hereinafter Maclin, *Complexity*]; Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse than the Disease*, 68 S. CAL. L. REV. 1 (1994) [hereinafter Maclin, *Cure*].

45. See LEONARD W. LEVY, ORIGINAL MEANING AND THE FRAMERS’ CONSTITUTION, ch. 11 (1988) [hereinafter LEVY, ORIGINAL MEANING]. That chapter has been twice reproduced. See Leonard W. Levy, *Origins of the Fourth Amendment*, 114 POL. SCI. Q. 79 (1999) (reprinting the 1988 chapter but deleting a number of footnotes showing reliance on Cuddihy’s dissertation); LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS, ch. 7 (1999) (reprinting the text of the 1988 chapter but deleting all footnotes). I do not cite either of the redundant publications.

Although Levy’s account largely tracks that of Lasson and Cuddihy, he has stressed the supposedly open-ended and undefined character of the supposed “reasonableness” principle. For example, he has asserted that “[the Fourth Amendment] contained principles that

B. *The Shortcomings of the Conventional Accounts*

The historical accounts given by Lasson and Cuddihy suffer from a serious shortcoming; neither clarifies the basic mystery that resides in the Fourth Amendment's two-clause text. As noted above, the text appears incomplete or incoherent insofar as it fails to state whether or in what circumstances a warrant is required; thus, it does not say when the warrant standards, or when only the "reasonableness" standard, apply. Given Lasson's and Cuddihy's interpretation, the silence is mysterious, even perverse, because the question of whether or when a warrant is required would seem central to any practical application of the text.⁴⁶

It is clear that the Framers did not intend that warrants be required for all searches and seizures conducted by officers. For example, the common law permitted a constable to make a warrantless arrest for a felony in some circumstances.⁴⁷ Likewise, framing-era customs statutes permitted officers to search ships without a warrant.⁴⁸ Yet the use and regulation of warrant authority was obviously important to the Framers — the inclusion of the warrant standards in the second clause of the Fourth Amendment demonstrates that. So what did the Framers intend regarding warrant use? When were each of the two clauses meant to apply? Both Lasson and Cuddihy failed to answer these questions.

C. *The Generalized-Reasonableness Accounts by Taylor and Amar*

The absence of any clear warrant requirement in the text, and the absence of any solution to that mysterious omission in the conventional historical accounts, left an opening for competing interpretations of the historical Fourth Amendment. Professor Telford Taylor leveled the seminal challenge in a 1967 lecture.⁴⁹ He noted that the earliest state search and seizure provisions had addressed only warrant standards, but had been silent as to warrantless intrusions.⁵⁰ Largely on that basis, he asserted that the Framers viewed "the warrant" as

were as vague as they might be comprehensive," referring to the open-endedness of the "reasonableness" standard. LEVY, ORIGINAL MEANING, *supra*, at 245.

46. See commentaries cited *supra* note 9.

47. See, e.g., Grano, *supra* note 38, at 621 ("[H]istory indicates that warrantless felony arrests did not cause consternation [among the Framers]."). See also the discussion of the common-law of arrest authority *infra* notes 217-230 and accompanying text.

48. See *infra* notes 146-159 and accompanying text.

49. See TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION: SEARCH, SEIZURE AND SURVEILLANCE AND FAIR TRIAL AND FREE PRESS 19-46 (1969) (printing 1967 lecture).

50. See *id.* at 41-42.

“an enemy.”⁵¹ Thus, he concluded that the Framers had feared rather than preferred warrants, and that the modern notion of a warrant requirement “stood the Fourth Amendment on its head.”⁵² Because he interpreted historical sources as showing that warrantless arrests and warrantless searches incident to arrest had long been approved in English common law, he also asserted that the Framers were “[not] at all concerned” with controlling warrantless intrusions by officers, and that they viewed warrantless searches made incident to arrest as “quite normal and, in the language of the fourth amendment, ‘reasonable.’”⁵³

Proponents of the generalized-reasonableness construction gave Taylor’s reading a warm welcome. Perhaps because of his personal prominence, several Supreme Court opinions uncritically recited his claims,⁵⁴ and Judge Richard Posner also gave them increased visibility through his own commentary.⁵⁵ In addition, Taylor’s treatment also

51. *Id.* at 41 (asserting also that the Framers did not see “the warrant as a protection against unreasonable searches” but “as an authority for unreasonable and oppressive searches, and sought to confine its issuance and execution . . .”).

52. *Id.* at 23-24.

53. *Id.* at 39. Note, however, that Taylor expressed some agnosticism regarding the intended meaning of “unreasonable.” See *id.* at 43 (“Nothing in the legislative or other history of the fourth amendment sheds much light on the purpose of the first clause. Quite possibly it was to cover shortcomings in warrants other than those specified in the second clause; quite possibly it was to cover other unforeseeable contingencies.”).

54. Supreme Court opinions have cited Taylor’s commentary as authority for a variety of historical points; those that relate to the historical meaning of the Fourth Amendment include (in chronological order): *Coolidge v. New Hampshire*, 403 U.S. 443, 492 (1971) (Harlan, J., concurring) (citing Taylor’s claim that a warrant requirement “st[ands] the amendment on its head”); *United States v. Robinson*, 414 U.S. 218, 233 (1973) (opinion of the Court by Rehnquist, J.) (citing Taylor’s treatment of the historical basis for warrantless searches incident to arrest); *Gerstein v. Pugh*, 420 U.S. 103, 116 (1975) (opinion of the Court by Powell, J.) (citing Taylor for proposition that the stolen goods search warrant was the Framers’ model for a “reasonable” search); *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 327-28 (1978) (Stevens, J., dissenting) (citing Taylor as authority that the Framers were concerned with “circumscrib[ing] the warrant power” rather than controlling warrantless searches); *Payton v. New York*, 445 U.S. 573, 621 (1980) (Rehnquist, J., dissenting) (citing Taylor’s claim that the Framers did not intend to require or encourage use of warrants); *Steagald v. United States*, 451 U.S. 204, 228 (1981) (Rehnquist, J., dissenting) (citing Taylor’s claim that warrantless searches of houses could be made incident to arrest at time of framing); *Robbins v. California*, 453 U.S. 420, 438 (1981) (Rehnquist, J., dissenting) (citing Taylor’s claim that a warrant requirement “st[ands] the amendment on its head”); *United States v. Leon*, 468 U.S. 897, 972 (1984) (Stevens, J., concurring in part, dissenting in part) (citing Taylor’s claim that the Framers were more concerned with controlling warrants than with controlling the warrantless officer); and *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring) (citing Taylor as supporting the view that the Fourth Amendment was meant to restrict the issuance of warrants so as to preserve the jury’s role in regulating searches and seizures). See also *United States v. Brown*, 64 F.3d 1083, 1085 (7th Cir. 1995) (opinion by Easterbrook, J., joined by Posner, J.) (reciting Taylor’s claim that the warrant requirement “st[ands] the amendment on its head”).

55. See, e.g., Posner, *supra* note 9, at 52 n.9, 72 n.56. Although this commentary was primarily an economic argument for replacing the exclusionary rule with a tort remedy, Pos-

provided a jumping-off point for several further lines of commentary that rejected the conventional history, including commentaries by Professor Gerard Bradley⁵⁶ and Professor William Stuntz.⁵⁷

Professor Akhil Amar has produced a series of articles constituting the most ambitious attempt to craft a textual and historical case for the generalized-reasonableness construction.⁵⁸ Amar has followed

ner did follow Taylor in asserting that the Fourth Amendment was inspired by "English cases." *Id.* at 52 & n.9. He also followed Taylor in asserting that the Framers did not want to encourage use of warrants but "to discourage their use by imposing stringent requirements on their issuance," and that the Fourth Amendment was not aimed at warrantless searches, but at the possibility "that magistrates might issue unreasonably broad warrants." *Id.* at 72 n.56. Finally, Posner followed Taylor in expressing skepticism as to "what exactly [the Framers] meant by the term 'unreasonable' in the first clause of the Fourth Amendment." *Id.* at 74; *see also* Taylor's statement *supra* note 53.

56. Professor Gerald Bradley has argued that the Framers only meant to ban general warrants and that the reference to "unreasonable searches and seizures" was mere rhetoric. On that basis, he has asserted that the Fourth Amendment should not be understood to imply any limit on the conduct of officers who do not use a warrant. *See* Gerard V. Bradley, *The Constitutional Theory of the Fourth Amendment*, 38 DEPAUL L. REV. 817, 833-55 (1989). In a narrow sense, Bradley's conclusion that the text addressed only warrant standards is correct. He arrived at that conclusion, however, only on the basis of a mistaken understanding of the drafting of the Fourth Amendment. *See infra* note 485. Moreover, his claim that the Framers did not mean to restrict warrantless officers ignores the reason that the Framers banned the general warrant — they opposed giving discretionary authority to officers, as discussed below.

57. Professor William Stuntz has argued that the Framers sought to ban general warrants only to protect against persecution of political dissidents, as in the English *Wilkes* cases, but that they did not mean for the Fourth Amendment to reach criminal justice. *See* William Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 396-403 (1995). That treatment of the Framers' concerns, however, is based largely on the usual "three cases." *Id.* at 396-97; *see also infra* note 62. In addition, Stuntz's analysis rests on a number of faulty premises.

For example, Stuntz stated that "[s]earch warrants in ordinary criminal cases were apparently unknown [at the time of the framing]." Stuntz, *supra*, at 411 n.66 (citing JULIUS GOEBEL, JR. & T. RAYMOND NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE, 1664-1776*, at 428-29 (1944)). Goebel and Naughton actually concluded, however, that arrests and searches for stolen property were *usually* made by warrant. On the pages cited by Stuntz, Goebel and Naughton wrote that "[p]recepts ordering an officer to search must certainly have been in general use considering the great number of larcenies, robberies, and burglaries . . ." GOEBEL & NAUGHTON, *supra*, at 428. ("Precept" was one of several generic terms used to refer to warrants. *See infra* note 201.) Likewise, they identified several references to search warrants for stolen goods that had been preserved in the colonial records. They also concluded that "the normal rule of no search [of a house] without a warrant was settled law." GOEBEL & NAUGHTON, *supra*, at 394.

Stuntz also uncritically accepted Taylor's incorrect claim that warrantless searches could be made of houses. *See* Stuntz, *supra*, at 401 n.35; *see also infra* note 276. He likewise uncritically repeated Amar's incorrect claim that the Framers were motivated by opposition to the "immunizing" effect of a warrant. Stuntz, *supra*, at 409-411; *see also infra* notes 95-98 and accompanying text; *infra* note 222.

58. Professor Amar initially addressed the Fourth Amendment in Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1175-81 (1991) [hereinafter Amar, *Bill of Rights*]. He addressed the text and history at more length in Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) [hereinafter Amar,

Taylor's lead in attacking the conventional understanding that the Framers valued the warrant as a protection against arbitrary intrusions, and in insisting that any warrant requirement is contrary to the Framers' intention. However, he has departed from Taylor's position that the Framers were simply unconcerned with warrantless intrusions and instead has asserted that the Framers intended for a reasonableness standard to be the *essence* of the Fourth Amendment. Thus, Amar has asserted that the first clause of the text should be understood as a "Reasonableness Clause" that articulates a freestanding reasonableness standard. He has also insisted that the Framers intended for reasonableness to be the "global" standard by which all government searches or seizures should be judged. In his reading, the warrant standards in the second clause were meant only to discourage the use of warrants.⁵⁹

Amar's attack is novel because, in addition to repeating Taylor's claim that the Framers viewed the warrant as "an enemy," he has attempted to provide a historical explanation for that hostility. Specifically, he has asserted that the Framers were hostile toward the use of warrants because a warrant provided an officer with an "absolute defense" against trespass liability. Thus, if an officer used a warrant to make an arrest or search, the victim was prevented from obtaining a jury's assessment, in a subsequent trespass suit, of whether the search or seizure was actually reasonable (and thus lawful). In contrast, Amar suggests that the Framers approved of warrantless searches and arrests because no legal bar prevented a jury from subsequently assessing the reasonableness of those intrusions.⁶⁰ Not surprisingly, a Supreme Court opinion has cited Amar's key historical assertion.⁶¹

Fourth Amendment]. Amar cited these articles in his testimony, *see Hearings, supra* note 3, at 12-15, and the latter has also been reprinted without significant changes as Chapter One of AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997). However, I cite only the article. Amar has also reiterated his claims about the Fourth Amendment in three additional publications: Amar, *Boston, supra* note 19 (1996); AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 64-77 (1998) [hereinafter, AMAR, *BILL OF RIGHTS BOOK*] (this discussion appears to be a brief overview of some of the arguments Amar made in prior commentaries; it does not set out new claims to any significant degree); and Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097 (1998) [hereinafter Amar, *Terry*].

59. *See, e.g.*, Amar, *Bill of Rights, supra* note 58, at 1178-80 (asserting that the ban against "unreasonable searches and seizures" was meant to be distinct from the warrant standards); Amar, *Fourth Amendment, supra* note 58, at 758 (commenting on the Amendment's "global command that all government searches and seizures be reasonable"); *id.* at 759 (claiming that the Amendment does not require warrants but does require that all searches and seizures be reasonable); *id.* at 801 ("The core of the Fourth Amendment . . . is neither a warrant nor probable cause, but reasonableness."); *id.* at 807 (referring to the first clause of the Amendment as "the Reasonableness Clause").

60. *See* Amar, *BILL OF RIGHTS BOOK, supra* note 58, at 69-71; Amar, *Boston, supra* note 19, at 60; Amar, *Bill of Rights, supra* note 58, at 1178-80; Amar, *Fourth Amendment, supra* note 58, at 771-74; Amar, *Terry, supra* note 58, at 1111. Amar also claims that the

D. *The Flaws in the Generalized-Reasonableness Accounts*

Neither Taylor nor Amar undertook to present the sort of systematic account of the original meaning that Lasson or Cuddihy offered. Taylor addressed the history to set the stage for arguing that the Supreme Court should not curb warrantless searches made "incident to arrest."⁶² Likewise, Amar has addressed only selective aspects of the history to muster support for his normative proposals for revising search and seizure doctrine.⁶³ Thus, if one examines Taylor's and

Framers' concern for jury assessments of searches was shaped largely by the case reports of *Wood* and, to a lesser extent, *Entick*. See, e.g., Amar, *Bill of Rights*, *supra* note 58, at 1176 n.208. (Like Taylor's earlier account, Amar's account of the origins of the amendment places heavy emphasis on the Wilkesite case reports. See *infra* note 62.)

The specific claim that the Framers feared the immunizing effect of "warrants" may have been suggested by a previous comment by Posner, *supra* note 9, at 72 n.56 (stating that police might seek a warrant, even if they had grounds for warrantless intrusion, "in order to have a more secure defense of legal process if sued for torts committed in the course of the search").

Amar's assertions on this point are discussed in more detail and criticized *infra* notes 63-104 and accompanying text.

61. See *California v. Acevedo*, 500 U.S. 565, 581-82 (Scalia, J., concurring) (stating that "[b]y restricting the issuance of warrants, the Framers endeavored to preserve the jury's role in regulating searches and seizures," and citing Amar, *Bill of Rights*, *supra* note 58, at 1178-90, and Posner, *supra* note 9, at 72-73); see also *infra* note 62.

62. Taylor's discussion of the general warrant controversies was superficial insofar as it was based almost entirely on the case reports of two Wilkesite cases, *Wood* and *Entick* (without noting the late publication dates of those reports, see *supra* note 25), and on Otis's speech in the 1761 *Writs of Assistance Case*, but virtually ignored the important colonial controversies over the Townshend Act writ. See TAYLOR, *supra* note 49, at 29-38; cf. Grano, *supra* note 38, at 616 (describing Taylor's historical account as "cursory" and noting that it failed to support the broad claim that the Framers were hostile to warrants).

The reduction of the historical search controversies to reported "cases," without attention to publication dates, is a common failing. See, for example, the commentaries by Amar discussed *supra* note 58, and by Stuntz discussed *supra* note 57. See also Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 VA. L. REV. 869 (1985). This oversimplification also appears in judicial opinions. See, e.g., *City of West Covina v. Perkins*, 119 S. Ct. 678, 684 n.2 (1999) (opinion of the Court by Thomas, J.) (citing commentaries by Taylor, Amar, and Stuntz as authority for the proposition that the case reports in *Wood* and *Entick* "profoundly influenced the Founders' view of what a 'reasonable' search entailed"). I was previously guilty of the same oversimplification. See *Davies's Testimony*, *supra* note 3, at 127.

63. Amar is an engaging writer, but his treatment of text and history is often loose and uninformed. Criticisms of his claims appear throughout the text and footnotes to this Article. See *supra* notes 19-20; *infra* note 62; *infra* notes 65-104, 109-115 and accompanying text; *infra* notes 117, 119, 129, 132, 143, 153, 171, 187, 252, 273, 276, 278, 318, 320, 322, 363, 382, 450, 467, 470, 489, 533. But see note 485.

For other criticisms of Amar's Fourth Amendment claims, see, for example, Susan Bandes, *We the People and Our Enduring Values*, 96 MICH. L. REV. 1376 (1998) (book review); Cloud, *supra* note 42; Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down that Wrong Road Again,"* 74 N.C. L. REV. 1559 (1996); Susan R. Klein, *Enduring Principles and Current Crises in Constitutional Criminal Procedure*, 24 LAW & SOC. INQUIRY 533 (1999) (book review); Maclin, *Complexity*, *supra* note 44; Maclin, *Cure*, *supra* note 44; Carol S. Steiker, "First Principles" of Constitutional Criminal

Amar's accounts closely, one finds that each offered little evidence for their central historical claims — that the Framers broadly approved of warrantless intrusions and that the Framers viewed “the warrant” as “an enemy.” Moreover, both ignored salient features of the history that are not easily reconciled with their claims.

1. *The Framers' Attitude Toward Warrantless Intrusions*

There is no question that common law sometimes permitted warrantless arrests or searches. The significant question is *how broadly* they were permitted. Neither Taylor nor Amar presented significant evidence on that point. Taylor merely recited a historical description of arrest law circa the thirteenth century and a single endorsement of broad warrantless search authority from a mid-seventeenth-century pamphlet of dubious authority.⁶⁴ Likewise, Amar observed only that common law permitted warrantless arrests “in a variety of circumstances” and quoted Taylor's summary — but never identified the common-law rules that actually defined warrantless arrest authority.⁶⁵ Neither demonstrated that the Framers broadly approved of warrantless intrusions.

In addition, neither Taylor nor Amar confronted significant features of historical doctrine that collide with any claim that the Framers would have broadly approved of warrantless intrusions. The modern warrant-preference construction favors prior judicial approval of searches as a means of *preventing* unjustified intrusions. The preference for warrants is premised on the expectation that magistrates will be more likely than officers to perceive when justification for a proposed search is inadequate. The historical evidence indicates that the Framers preferred use of specific warrants rather than warrantless intrusions for essentially the same reason. The Framers sought to *prevent* unjustified searches and arrests from occurring, not merely to provide an after-the-fact remedy for unjustified intrusions. For example, the complaints they voiced about searches concerned the breach of the security of the house.⁶⁶ Likewise, the constitutional texts they

Procedure: A Mistake?, 112 HARV. L. REV. 680 (1999) [hereinafter Steiker, *Mistake*] (book review); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820 (1994) [hereinafter Steiker, *Second Thoughts*]; George C. Thomas III, *Remapping the Criminal Procedure Universe*, 83 VA. L. REV. 1819 (1997) (book review). *But see* Michael Stokes Paulsen, *Dirty Harry and the Real Constitution*, 64 U. CHI. L. REV. 1457 (1997) (book review) (giving a positive review of Amar's criminal procedure book).

64. See TAYLOR, *supra* note 49, at 27-30. The deficiencies in those sources are discussed in some detail *infra* notes 276-277.

65. See Amar, *Fourth Amendment*, *supra* note 58, at 764, n.13 (citing generally to common-law treatises).

66. See *infra* notes 104, 136-142 and accompanying text.

wrote did not simply seek to provide a post-intrusion remedy or condemn only the actual use of a general warrant; rather, the constitutional texts adopted a preventive strategy by consistently prohibiting even the *issuance* of a too-loose warrant.⁶⁷

The historical evidence also demonstrates that the Framers believed that the orderly and formal processes associated with specific warrants, including the judicial assessment of whether there was adequate cause for the intrusion, provided the best means of preventing violations of the security of person or house. In particular, the Framers thought that magistrates were more capable than ordinary officers of making sound decisions as to whether a search was justified.⁶⁸

The principal difference between framing-era statements and the modern warrant-preference construction is that the former sometimes expressed outright disdain for the character and judgment of ordinary officers.⁶⁹ Indeed, the Framers' perception of the untrustworthiness of the ordinary officer was reinforced by class-consciousness and status concerns. It was disagreeable enough for an elite or middle-class householder to have to open his house to a search in response to a command from a high status magistrate acting under a judicial commission; it was a gross insult to the householder's status as a "free-

67. The Framers' concern with preventing breaches of the privacy of the house is evident from their determination to prevent *issuance* of general warrants. As I explain below, all of the state constitutional provisions and anti-Federalist proposals for a federal provision stated that too-loose warrants "ought not be granted" or "shall not be issued." See *infra* note 494 and accompanying text. Indeed, the final motion to amend Madison's draft language for the Fourth Amendment was aimed precisely at inserting this imperative language to make it clear that non-specific warrants "shall [not be] issue[d]." See *infra* notes 478-497 and accompanying text.

68. There is a discrepancy between Amar's historical and policy arguments on this point. In his historical discussion, Amar wrote as though the Framers sought only to preserve the availability of suits for trespass for "unreasonable" searches that could be brought *after* such searches had been made. However, when he discussed current policy, he endorsed the value of having a judge assess the grounds for a search *before* privacy is violated in what he calls "judicial preclearance" of searches. See Amar, *Fourth Amendment*, *supra* note 58, at 810. The value of "judicial preclearance" (that is, a specific warrant process) as a means of *preventing* violations of house and person was as evident to the Framers as it now is to Amar.

69. For example, Blackstone commented, while discussing the office of constable, that "considering what manner of men are for the most part put upon these offices, it is perhaps very well that they are generally kept in ignorance [of the full extent of the authority of their office]." 1 BLACKSTONE, *supra* note 27, at 344. Likewise, the press accounts of chief justice Pratt's jury instruction in *Leach* indicated that he complained that a general warrant allowed the decision to search, properly left to the judges, to be delegated to king's messengers or "even . . . the lowest of the people." Cuddihy has observed that complaints about delegation of authority to lower class officers, coupled with derogatory descriptions of such officers, was a consistent theme in the prerevolutionary grievance against the general writ of assistance. See 2 Cuddihy, *supra* note 20, at 1126-27 (noting descriptions of officers employing writs as "odious harpies," "servants," "villains," "dreggs," "most despicable wretches," and "ruffians"). Similar expressions of contempt for ordinary officers are commonplace in the fears anti-Federalists expressed regarding customs searches by federal revenue officers.

man” to be bossed about by an ordinary officer who was likely drawn from an inferior class.

For example, during the 1761 *Writs of Assistance Case*, James Otis complained that the delegation of authority to a petty officer by a general writ of assistance reduced a householder to being “the servant of servants.”⁷⁰ Thus, the Framers were not unconcerned about warrantless intrusions because they had any confidence in officers’ judgment — rather, they were unconcerned with warrantless intrusions because they did not perceive ordinary officers as possessing any significant discretionary authority at common law to initiate arrests or searches.⁷¹

The common-law tradition viewed any form of discretionary authority with unease — but delegation of discretionary authority to ordinary, “petty,” or “subordinate” officers was anathema to framing-era lawyers. Contrary to Amar’s claims, framing-era common law never permitted a warrantless officer to justify an arrest or search according to any standard as loose or flexible as “reasonableness.”⁷² Instead, as I explain in detail below, the common law imposed rigid limits on the *ex officio* authority of ordinary officers. For example, under framing-era common law, an officer could *not* even justify a warrantless arrest by showing “probable cause” to believe an offense had been committed (let alone by a loose “reasonableness” standard); rather, a framing-era peace officer (like a private person) could justify a warrantless arrest only by proving “felony in fact” (that is, that a felony had *actually* been committed).⁷³

Common-law authorities repeatedly gave a consistent reason for condemning general warrants: if such warrants had been permitted, they would have conferred on ordinary officers *discretionary authority* to arrest or even to search houses. In the early seventeenth century, Sir Edward Coke had labeled unspecific arrest warrants “against reason.”⁷⁴ In the late seventeenth century, Sir Matthew Hale condemned

70. 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 20, at 142 (reprinting John Adams’s abstract of Otis’s argument in the *Writs of Assistance Case* that shows Otis complaining that the use of a general writ of assistance was not even limited to commissioned customs collectors but could also be used by “not only deputies, &c. but even THEIR MENIAL SERVANTS ARE ALLOWED TO LORD IT OVER US — What is this but to have the curse of Canaan with a witness on us, to be the servant of servants, the most despicable of God’s creation”).

71. See *infra* notes 217-230, 260-275 and accompanying text.

72. Although Amar’s writings convey the impression that “reasonableness” was a common-law standard, he has not identified a single framing-era legal authority that actually employed “reasonableness” as a standard for assessing the lawfulness of a warrantless intrusion. See *infra* notes 109-115 and accompanying text.

73. See *infra* notes 227-228 and accompanying text.

74. See *infra* note 397. Coke had such a constrained view of arrest authority that he even disputed the authority of justices of the peace to issue arrest warrants before an indict-

general warrants in his treatise on criminal law because they allowed the party executing the warrant to act as his own judge.⁷⁵ Later, Serjeant William Hawkins (the leading eighteenth-century authority on criminal procedure) converted these abstract rejections of general warrants into a more concrete expression of distrust of the common officer when he condemned general warrants because "it would be extremely hard to leave it to the discretion of a common Officer to arrest what Persons, and search what Houses he thinks fit."⁷⁶

The same theme runs throughout the condemnation of general warrants in the Wilkesite cases. In the 1765 proceedings in *Leach v. Money*, even the Tory Lord Mansfield condemned the unparticularized general warrant as illegal at common law because it was "not fit" for an officer to exercise any judgment as to whom to arrest or where to search.⁷⁷ Mansfield's statement was made especially visible when

ment. See SIR EDWARD COKE, *FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 176-77* (1817, reprinted by Professional Books Ltd. 1986) (originally published in 1644, see 1 LEGAL BIBLIOGRAPHY, *supra* note 19, at 258, entry 6).

75. See 2 SIR MATTHEW HALE, *HISTORY OF THE PLEAS OF THE CROWN* 150 (Solemn Emlyn ed., 1736). Hale wrote his two-volume treatise prior to 1676 (the year of his death), but it was not published until 1736 (after the appearance of the treatise by Hawkins, discussed in the following note). See 1 LEGAL BIBLIOGRAPHY, *supra* note 19, at 362, entry 36.

76. 2 SERJEANT WILLIAM HAWKINS, *PLEAS OF THE CROWN* 82 (1721). Hawkins's treatise was the most complete and "current" treatment of criminal procedure available to the Framers. Volume one, published in 1716, dealt largely with crimes; volume two, which dealt largely with procedure, was published in 1721. See 1 LEGAL BIBLIOGRAPHY, *supra* note 19, at 362, entry 37. The importance of Hawkins's treatise is discussed in 12 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 361-62 (1938). Further editions of Hawkins's treatise were published throughout the eighteenth century. The sixth edition, edited by Thomas Leach [hereinafter LEACH'S HAWKINS] is especially useful as evidence of English common-law procedure at the time of the framing as Leach had updated the text and notes to reflect current rulings. The sixth edition of the second volume was published in London in 1787. See 1 LEGAL BIBLIOGRAPHY, *supra* note 19, at 362-63, entry 37. However, the copy I have used is a 1788 Dublin printing which may be the version most commonly purchased by Americans.

77. Mansfield said:

It is not fit, that the receiving or judging of the information [regarding cause to arrest or search] should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer. This is so, upon reason and convenience.

... [T]he [common law] authorities — Hale and all others hold such an uncertain warrant void: and there is no case or book to the contrary.

Leach v. Money, 3 Burr. 1742, 1766, 19 Howell St. Tr. 1001, 1027, 97 Eng. Rep. 1075, 1088 (K.B. 1765). The other judges of the King's Bench also condemned the general warrant in the same way. See 3 Burr. at 1767, 19 Howell St. Tr. at 1027, 97 Eng. Rep. at 1088. This case report was published in 1771. See *supra* note 25.

The Supreme Court has recognized the relevance of Mansfield's statement for the meaning of the Fourth Amendment. See *United States v. United States District Court*, 497 U.S. 297 (1972). Justice Powell's opinion for the Court noted that "[o]ver two centuries ago, Lord Mansfield held that common-law principles prohibited warrants that ordered the arrest of unnamed individuals who the officer might conclude were guilty of seditious libel" and then quoted the passage from *Leach* quoted immediately above. *Id.* at 316 (emphasis in original).

Blackstone paraphrased it to condemn general warrants because officers ought not be left to judge whom to arrest (as well as reiterating Coke's assertion that unspecific criminal warrants were "unreasonable").⁷⁸ Judge Pratt (Lord Camden) also condemned the discretionary character of the authority conferred by a general warrant in a number of statements made during other of the Wilkesite cases.⁷⁹ Likewise, the English pamphleteer "Father of Candor" complained that general warrants permitted arrests or searches to be "made at discretion [by] any common fellows . . . upon their own imaginations, or the surmises of their acquaintances, or upon other worse and more dangerous intimations."⁸⁰

Hostility to conferring discretionary search authority on common officers is also the theme of American complaints about the general writ of assistance. In addition to complaining that householders were reduced to the status of a servant, Otis repeatedly condemned the discretionary authority conferred on "petty" officers by the writ of assistance when he argued the 1761 *Writs of Assistance Case*. He com-

78. Blackstone wrote:

A general warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for its uncertainty [citing Hale and Hawkins]; for it is the duty of the magistrate, and ought not be left to the officer, to judge of the grounds of suspicion.

4 BLACKSTONE, *supra* note 27, at 288 (note that I have not followed the common practice of citing to the "star" page numbering of Blackstone, because those numbers are not to the first edition). As authority for the illegality of a general warrant, Blackstone cited "Money v. Leach, *Trin. 5 Geo III B.R.* . . . (Com. Journ. 22 Apr 1766)." *Id.* at n.i. He did not cite any formal case report because none had been published in 1769. *See supra* note 77.

Blackstone's reiteration of Coke's condemnation of unspecific criminal warrants appeared in the first volume of his commentaries. *See* 1 BLACKSTONE, *supra* note 27, at 133. For a discussion, see *infra* note 418 and accompanying text.

Blackstone's *Commentaries* became very popular in the American colonies on the eve of the Revolutionary War. Volume one, which addressed the inherent rights of English subjects, was published in 1765; however, volume four, which dealt with criminal law and procedure, was not published until 1769. *See* LEGAL BIBLIOGRAPHY, *supra* note 19, at 27, entry 8 (showing "1st ed., vol. 1" published 1765; "1st ed., vol. 4" published 1769). Because Blackstone aimed at providing a broad overview of English law, his treatment of criminal procedure topics was considerably less detailed than that in the treatises by Hawkins and Hale. For example, Blackstone discussed only arrest warrants, not search warrants.

79. In *Huckle*, Pratt assailed the use of a "nameless" general warrant as a violation of Magna Carta and "worse than the Spanish Inquisition." *Huckle v. Money*, 2 Wils. 206, 207, 95 Eng. Rep. 768, 769 (C.P. 1763). (This case report was published in 1770. *See supra* note 25.) In *Wood*, Pratt condemned the general warrant because "a discretionary power given to [officers] to search wherever their suspicions may chance to fall . . . is totally subversive to the liberty of the subject." *Wilkes v. Wood*, Lofft 18, 18, 19 Howell St. Tr. 1153, 1167, 98 Eng. Rep. 489, 498 (C.P. 1763). (This case report was published in 1776. *See supra* note 25.) In *Leach*, Pratt condemned the general warrant because it delegated decisions that were properly reserved to judicial authority to mere messengers. *See* the press accounts of *Leach*, set out *supra* note 22.

80. FATHER OF CANDOR, *supra* note 23, at 57.

plained that the general writ was “a power that places the liberty of every man in the hands of every petty officer,” that it allowed officers “to enter our houses when they please,” that it was an instrument of “arbitrary power,” that it transformed officers into “tyrant[s],” that it “[delegated] vast powers,” and that it failed even to impose the usual safeguard of requiring the officer to file a “return” with the issuing court.⁸¹

Likewise, the Pennsylvania judges who later refused to issue general writs authorized by the Townshend Act of 1767 did so because they felt “that arming officers of the Customs with so extensive a power, to be exercised totally at their own discretion would be of dangerous consequences and was not warranted by Law”; the Virginia judges asserted that it was “unconstitutional to lodge such a Writ in the hands of the officer which gave him unlimited power to act under it according to his own arbitrary Discretion”; and William Drayton, chief justice of the colonial court for East Florida, declined to issue a general writ that might “be used discretionally, (perhaps without proper Foundation) at the will of subordinate officers”⁸² Likewise, in 1774 William Henry Drayton, a judge in Charleston, complained of the discretionary authority delegated to “a petty officer” by a writ of assistance when he called on the First Continental Congress to include a ban against general writs and warrants in a declaration of

81. 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 20, at 140-43. John Dickinson later echoed Otis’s complaint that no return was required with a general writ. See discussion *infra* note 94.

82. Dickerson, *Writs of Assistance*, *supra* note 26, at 60-61 (Pennsylvania judges), 69 (Virginia judges), 64 (East Florida judge). Similarly, the Connecticut judges unofficially indicated they would issue particular writs but not “a general writ to be used at . . . discretion.” 2 Cuddihy, *supra* note 20, at 1082.

American rights.⁸³ And Patrick Henry later voiced the same concern in the Virginia ratification convention in 1788.⁸⁴

The repeated objections to allowing “subordinate” officers to exercise discretionary search or arrest authority cannot be explained away simply as a concern with the “immunizing” effect that a general warrant might have had if allowed. Rather, the nature of the complaints that were actually made about general warrants — that it would be “extremely hard” to leave the decision to intrude to an ordinary officer, that it would not be “fit” to have ordinary officers decide whom to arrest or where to search — demonstrate a deep-rooted distrust and even disdain for the judgment of ordinary officers. Given that distrust, it is wholly implausible that the Framers would have approved of broad use of warrantless intrusions, because such intrusions would necessarily have rested solely on the officers’ own judgment.⁸⁵

83. Drayton complained that American rights were injured

[b]y Judges now-a-days granting to the Customs to lie dormant in their possession, writs of assistance in the nature of general warrants, by which, without any crime charged and without any suspicion, a petty officer has power to cause the doors and locks of any man to be broke open, to enter his most private cabinet, and thence to take and carry away, whatever he shall in his pleasure deem uncustomed goods.

William Henry Drayton, *A Letter from Freeman*, Aug. 10, 1774, reprinted in I DOCUMENTARY HISTORY OF THE AMERICAN REVOLUTION 11, 15 (R.W. Gibbes ed., 1855, reprinted 1972). Although Drayton at one point called the general writ “of a more pernicious nature than general warrants,” he also condemned “the general writ, or rather the general warrant.” *Id.* at 21. (The reference to “Judges now-days” refers to the fact that the court in Charleston had refused to issue general writs until the judges were removed and replaced by more compliant judges. See *id.* at 21-22.) Drayton also proposed that the Congress declare that only warrants “in the nature of . . . warrants to search for stolen goods” — that is, specific warrants — be allowed. See quotation *infra* note 94.

84. See 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 587-88 (Jonathan Elliot ed., 2d ed. 1838, reprinted in facsimile 1937) [hereinafter ELLIOT’S DEBATES]. Henry stated that:

general warrants, by which an officer may search suspected places, without evidence of the commission of a fact, or seize any person, without evidence of his crime, ought to be prohibited. As these are admitted, any man may be seized, any property may be taken, in the most arbitrary manner, without any evidence or reason. Every thing the most sacred may be searched and ransacked by the strong hand of power.

Id. at 588.

85. This is hardly a novel insight on my part. See, e.g., Kamisar, *supra* note 38, at 575 (asking, in connection with the colonial protests against the Townshend Act writ, “[c]an there be any doubt that the colonists would have vigorously opposed warrantless searches exhibiting the same characteristics as general warrants and writs and thus impairing privacy and freedom to the same degree?”); Maclin, *Complexity*, *supra* note 44, at 970-71 (“The purpose of [the condemnation of overbroad warrants in a constitutional search and seizure provision] was to restrain the discretion of officers and executive officials. With this in mind, one can read [the warrant standards in the text of a constitutional search and seizure provision] and properly conclude that promiscuous warrantless intrusions exhibiting the same traits as general warrants also violate the principle embodied in [the constitutional text].”).

However, neither Taylor nor Amar confronted any of the historical condemnations of officers exercising discretionary authority.⁸⁶

2. The Framers' Attitude Toward Specific Warrants

No one questions that the Framers despised and sought to ban general warrants. The modern doctrinal debate has been about whether use of *specific warrants* — warrants that comply with the constitutional standards — should be required or at least preferred over warrantless intrusions. Thus the significant historical inquiry is about the Framers' view of specific warrants. Taylor did not claim in so many words that the Framers were hostile to specific warrants, but he made statements criticizing the warrant requirement that implied as much. For example, Taylor's complaint that the modern warrant requirement "st[ands] the Fourth Amendment on its head" and his related generic-sounding assertion that the Framers viewed "the warrant" as "an enemy" both connote that the Framers held a negative view of *specific* warrants as well as general warrants.

Likewise, Amar has repeatedly made the generic-sounding claim that the Framers viewed "judges and warrants" as "heavies,"⁸⁷ and has also asserted that their disapproval was "not merely of general warrants, but of . . . *all* search warrants."⁸⁸ Thus, his statements also connote that historical hostility toward use of "warrants" had been diffuse, and had reached specific as well as general warrants.⁸⁹ However,

86. Taylor and Amar each discussed other aspects of Mansfield's statements in *Leach*, but neither mentioned his statement that it was "not fit" for the officer to exercise discretionary authority. See TAYLOR, *supra* note 49, at 31-32; Amar, *Fourth Amendment*, *supra* note 58, at 776. Likewise, Amar selectively recited from Blackstone's condemnation of general warrants (quoted *supra* note 78) without noting that Blackstone also wrote that it ought not be left to the officer to decide whom to arrest. See *id.* at 779 (quoting 4 BLACKSTONE, *supra* note 27, at *286-90). And Amar referred to *Wood* at numerous points without mentioning Pratt's salient condemnation of discretionary authority (quoted *supra* note 79). See, e.g., *id.* at 775-76.

87. See, e.g., AMAR, BILL OF RIGHTS BOOK, *supra* note 58, at 70; Amar, *Bill of Rights*, *supra* note 58, at 1179; see also Amar, *Fourth Amendment*, *supra* note 58, at 714 ("Warrants then, were friends of the searcher, not the searched."); *id.* (quoting TAYLOR, *supra* note 49, at 41, in claiming that the Framers viewed "a warrant" as an "enemy"); Amar, *Bill of Rights*, *supra* note 58, at 1178-80 ("A warrant issued by a *judge* or *magistrate* . . . had the effect of taking a later trespass action away from a *jury* of ordinary citizens."); Amar, *Boston*, *supra* note 19, at 60 ("Warrants . . . were the friends of the officer, not the citizen; and so warrants had to be strictly limited.").

88. Amar, *Fourth Amendment*, *supra* note 58, at 778 (emphasis in original). Amar made this assertion with regard to several post-framing statements, see *infra* note 92, but his text does not lead the reader to understand that its import should be limited to that setting. Moreover, the cited sources do not actually show hostility to specific search warrants. See *infra* note 92.

89. Some readers of drafts of this Article indicated they interpreted Amar as claiming only that the purpose of the second clause of the Fourth Amendment consisted solely of banning general warrants, and that the Framers were indifferent to whether specific warrants should be used. In that regard, it may also be relevant that when I previously criticized

neither Taylor nor Amar has made out a persuasive historical case that the Framers felt any generic hostility toward all “warrants”; likewise, neither has provided evidence that the Framers preferred a post-intrusion remedy over pre-intrusion protection of the right to be secure.

Taylor’s assertion that the early constitutional provisions treated “the warrant” as “an enemy” was overgeneralized. The texts clearly treated the *general warrant* as “an enemy,” but there is nothing in the texts to suggest any hostility toward the use of *specific warrants*. The constitutional texts do not say “no Warrants shall issue.” Rather, they set out standards to distinguish legal, specific warrants from too-loose, general warrants. Neither the Fourth Amendment nor any of the earlier state search and seizure provisions ever undertook to limit the use of specific warrants⁹⁰ — except for requiring that the purpose for which a search is made pursuant to a warrant must be authorized by law.⁹¹

Likewise, Taylor did not identify any historical expressions of hostility toward the use of specific warrants. Amar has held out some post-framing statements as evidence of hostility toward “all search warrants” — however, the complaints he cited were actually about house searches which could be made only under warrant authority, not complaints about specific warrants as such.⁹² None of the complaints

Amar for making generic-sounding claims that the Framers were opposed to “warrants,” he responded that I had misstated his position (but did not explain the nature of my error). See *Davies’s Testimony*, *supra* note 3, at 135 n. 31; Amar, *Boston*, *supra* note 19, at 80 n. 122. I readily concede that Amar’s commentary need not be read to claim that the Framers were as opposed to specific as they were to general warrants. Nevertheless, I think that Amar’s generic-sounding claim that the Framers viewed “judges and warrants” as “heavies” will often be understood as a claim that the Framers disliked specific as well as general warrants. In addition, I do not see how his claim that historical statements show disapproval of “all search warrants,” *see text supra*, can be read as anything other than a claim of broad hostility toward specific as well as general warrants. Moreover, only that reading of his generic-sounding claims lends much support to the generalized-reasonableness construction that he favors. Amar’s commentary does not make much of an attack on the warrant preference unless it is read as a claim that the Framers disapproved of specific warrants to some degree.

90. This point has also been noted by Maclin, *Complexity*, *supra* note 44, at 967-70.

91. See the third statement of the 1780 Massachusetts provision, discussed *infra* notes 379-381 and accompanying text.

92. See Amar, *Fourth Amendment*, *supra* note 58, at 778 (citing *Reed v. Rice*, 25 Ky. (2 J.J. Marsh) 44, 46 (1829), and *Robinson v. Richardson*, 79 Mass. (13 Gray) 454, 457 (1859)); *see also* THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 303 (1st ed. 1868). None of those sources indicated a preference for warrantless searches over searches by warrant; all they showed was hesitation to allow certain searches even with the protections associated with a specific warrant. *Reed* complained that “the execution” of a search warrant for a house search was distressing; the warrant was drawn into that complaint only because it was understood that a house search could be justified only by a search warrant. See 25 Ky. (2 J.J. Marsh) at 46.

he cited indicated a preference that house searches be made without warrant, or even that house searches be allowed without warrants.⁹³ In addition, Taylor and Amar overlooked direct evidence that the Framers approved of specific warrants. For example, during the *Writs of Assistance Case*, Otis endorsed the legality of the “special” (that is, specific) warrant and used it as the model for contrasting and condemning the general warrant.⁹⁴

Similarly, Cooley argued that, because a search warrant could authorize a search of a house, legislators should resist recognizing new purposes for which search warrants could be issued; however, he said nothing that would imply that warrantless searches should be permitted as an alternative to searches under search warrants. See COOLEY, *supra*, at 303-07. (Cooley’s understanding of the Fourth Amendment and the need for a warrant for a house search is discussed *infra* note 191.)

Robinson involved a different context: it refused to allow a search warrant to be used to authorize private persons to search for concealed property in a civil proceeding to settle an estate; it did not express hostility to the traditional uses of search warrants by the government in criminal or revenue matters; and it did not suggest allowing a warrantless search instead of use of a search warrant. See 79 Mass. (13 Gray) at 457.

93. Some commentators have interpreted the fact that the common law recognized a search warrant only for stolen property as though it placed a limit only on the use of warrants for searches but not on warrantless searches. See, e.g., Amar, *Fourth Amendment*, *supra* note 58, at 765-66 & n.26. That treatment overlooks the fact that a warrant was usually the only justification for a house search; warrantless searches of houses were *not* available as an alternative. See *infra* notes 271-274 and accompanying text. When the common law limited the purposes for which search warrants could be issued, it limited the purposes for which houses could be searched. See *infra* notes 203, 273.

94. See, e.g., 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 20, at 141 (quoting Adams’s abstract of Otis’s argument: “special [that is, specific] warrants only are legal”); see also SMITH, *supra* note 20, at 334-36. There is other evidence of the approval of specific warrants. The colonial judges who refused to issue general writs of assistance under the Townshend Act were willing to issue *specific* writs based on specific sworn allegations of customs violations. See, e.g., Dickerson, *Writs of Assistance*, *supra* note 26, at 60-61 (Pennsylvania), 68-72 (Virginia). Likewise, John Dickinson echoed Otis’s contrasting of the general writ to the specific warrant when he attacked the Townshend Act writ for lacking a requirement of a “return” to the issuing court. See JOHN DICKINSON, LETTERS FROM A FARMER IN PENNSYLVANIA TO THE INHABITANTS OF THE BRITISH COLONIES (1768), reprinted in TRACTS OF THE AMERICAN REVOLUTION: 1763-1776, at 127, 150-151 (Merrill Jensen ed., 1967) [hereinafter Jensen]. William Henry Drayton also explicitly approved of specific writs of assistance. See Drayton, *supra* note 83, at 17 (proposing that the Continental Congress should declare “[t]hat no writs of assistance ought to be issued to the customs but in the nature of writs or warrants to search for stolen goods — general writs or warrants being illegal”). The approval of specific warrants was implicit throughout the condemnations of general warrants.

Oddly, Taylor recognized that Camden and Otis “contrasted [the general writ] with the common-law warrant for stolen goods” but seems to have overlooked the implications of that contrasting treatment when he announced the overbroad conclusion that the Framers viewed “a warrant” as “an enemy.” See TAYLOR, *supra* note 49, at 36-37, 41.

Levy has also muddied this point by asserting that “[i]n all the American rhetoric [against general warrants, William Henry Drayton was the only writer who] seems to have urged special warrants in place of warrantless searches and general warrants.” LEVY, ORIGINAL MEANING, *supra* note 45, at 235 n.54 (citing the statement by Drayton quoted *supra*). Levy has even asserted that “[John] Dickinson did not recommend specific warrants in [place of general writs] or condemn any warrantless searches.” *Id.* at 234. Levy’s is a rather crabbed reading of the colonial attitudes regarding search authority. The colonists

Amar's claim that the Framers viewed "judges and warrants" as "heavies" because they feared the "immunizing" effect of a "warrant" also lacks historical support.⁹⁵ The Framers did not express any general antagonism toward judges regarding search matters. In fact, Lord Camden, a judge, emerged as the hero of the Wilkesite cases, and the colonial judges who refused to issue general writs under the Townshend Act provided an example that may well have stimulated the developing American conception of judicial review.⁹⁶

In addition, the "immunizing" claim that Amar makes so much of is more in the nature of a hypothesis than a historical observation: it is *not* evident in historical statements.⁹⁷ For example, Amar cited ten sources to document a supposed "linkage" between the Framers' concerns about "warrants" and about preserving jury trials in civil tres-

complained only about general writs because they understood specific warrants were appropriate and legal at common law; and they did not explicitly condemn warrantless customs searches of houses because it was generally understood that only a valid warrant could justify a search of a house.

95. See Amar, *Boston*, *supra* note 19, at 63 (referring to "the guarantee of immunity provided by a warrant"); see also *supra* note 87; *infra* note 97.

96. The Framers certainly did perceive some judges as heavies; for example, they vilified Thomas Hutchinson, who presided over the *Writs of Assistance Case* while he also was lieutenant governor of the colony of Massachusetts. That and similar experiences no doubt contributed to the Framers' views on the importance of an independent judiciary. However, judges generally emerged as the heroes of the struggle against general writs and warrants.

For example, Charles Pratt (Lord Camden), the *judge* in the Wilkesite cases that Amar relies upon so heavily, *instructed* the juries that general warrants were illegal and void and could not provide justification for the searches and arrests. See statements by Pratt quoted *supra* notes 22, 79. (As Amar has often noted, Lord Camden was such a hero to Americans that they named towns and counties after him. See, e.g., Amar, *Boston*, *supra* note 19, at 65-66. It should be clarified, however, that Camden's fame probably was based at least as much on his championing of the colonial position in the House of Lords as on his judicial rulings; for example, Camden was instrumental in the repeal of the hated Stamp Act.)

Likewise, the colonial *judges* blocked the use of general writs for customs searches of houses when they almost uniformly refused to issue general writs under the Townshend Act. See *supra* note 26. If anything, the judges who refused to issue statutorily authorized general writs because such writs were contrary to basic principles of common law provided an example that contributed to the American tradition of judicial review. Cf. Cloud, *supra* note 42, at 1732-37; Maclin, *Cure*, *supra* note 44, at 22 (quoting Frese, *supra* note 26, at 300, and Dickerson, *Writs of Assistance*, *supra* note 26, at 74).

97. The principal historical support Amar offers for the emphasis he places on the immunizing effect of a legal warrant is a statement by Lord Mansfield. In Amar's words: "Indeed, the immunity conferred [by a warrant] was part of its very purpose, its definition; as Lord Mansfield put it in 1785, it would be a 'solecism' if 'the regular execution of a legal warrant shall be a trespass.'" Amar, *Fourth Amendment*, *supra* note 58, at 778 (quoting "Cooperv. Boot, 99 Eng. Rep. 911, 916 (K.B. 1785)").

However, this statement by Mansfield was unknown to the Framers, because the earliest case report of *Cooper* was published in the third volume of Espinasse's Reports sometime after 1801. See the discussion of the publication history of *Cooper*, *supra* note 19. In addition, this statement was made in support of a *departure* from the common-law rule that an officer was liable for a fruitless search made under even a legal warrant if the officer had initiated the warrant. See *infra* note 294.

pass cases. However, those sources expressed concern only that “*general warrants*” might be made legal — not concern regarding the “immunizing” effect of specific warrants.⁹⁸ Amar has never identified a

98. Amar claimed that there was a “Fourth-Seventh Amendment linkage.” Amar, *Fourth Amendment*, *supra* note 58, at 777-78. As evidence of that purported linkage, Amar discussed ten historical sources that mentioned both search and seizure and jury trial concerns, along with other concerns. (I pass over the question of whether that constitutes a “linkage.”) The significant point is that none of them expressed any concern about the immunizing effect of a specific warrant; rather, they usually condemned only “general warrants.”

Amar discussed four sources in his text: (1) *Essay by a Farmer (I)*, MD. GAZETTE, Feb. 15, 1788, *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST 5, 14-15 (5.1.13) (Herbert J. Storing ed., 1981) (expressing fear of loss of jury trial and specifically posing the question “are general warrants illegal by the constitution of the United States?” but not expressing any complaint about specific warrants); (2) *Mr. Martin’s Information to the General Assembly of the State of Maryland*, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra*, at 27, 70-71 (expressing dismay at the failure of the constitution to protect jury trials in civil and criminal actions involving the government and government officers, but not expressing any specific concern about search and seizure authority); (3) *Samuel Chase Notes of Speeches Delivered to the Maryland Ratifying Convention (IIA)*, *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST, *supra*, at 81, 82 (miscited by Amar as IIB) (quoting section 3 of the Maryland declaration of rights, a broad provision endorsing trial by jury, and quoting section 23 of that declaration which condemned too-loose and “general” warrants, but saying nothing against specific warrants); and (4) *Address of a Minority of the Maryland Ratifying Convention*, *reprinted in* 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 733-34 (1971) (also *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra*, at 92, 95 (5.4.6)) (calling for jury trial in “all cases of trespasses” and for prohibiting magistrates to issue “general warrants,” but saying nothing about the immunizing effects of specific warrants).

In footnote 79 to his discussion, Amar identified six additional sources that supposedly provided “further, more subtle, linkages between what would become the Fourth and Seventh Amendments.” Amar, *Fourth Amendment*, *supra* note 58, at 778 n.79. These six sources again complain about “general warrants” but are devoid of concern regarding the immunizing effect of a specific warrant: (1) Letter from James Madison to George Eve (Jan. 2, 1789), *reprinted in* 2 SCHWARTZ, *supra*, at 997 (also *reprinted in* 11 THE PAPERS OF JAMES MADISON 404, 405 (Robert A. Rutland et al. eds., 1977)) (explicitly referring to the need to ban “general warrants” and to preserve jury trial, but not mentioning the immunizing effect of specific warrants); (2) LETTERS OF CENTINEL, No. 1, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra*, at 136 (expressing fear of the loss of protections against “general warrants” and of the right to jury trial, but saying nothing about the immunizing effect of a specific warrant); (3) *Letter from the Federal Farmer (IV)*, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra*, at 245, 249 (expressing fear of “hasty and unreasonable search warrants, warrants not founded on oath, and not issued with due caution” (that is, general warrants) and fear of loss of jury trial, but saying nothing about the immunizing effect of a specific warrant); (4) Brutus, *To the Citizens of the State of New York*, No. II, N.Y.J., Nov. 1, 1787, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra*, at 372, 375 (quoting the provisions of the Maryland declaration of rights forbidding too-loose and “general” warrants and preserving the right of trial by juries, but saying nothing about the immunizing effect of a specific warrant); (5) *An Old Whig (V)*, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST, *supra*, at 34, 37 (expressing the need for jury trials and for protections against searches and arrests “upon general suspicion or general warrants,” but saying nothing about the immunizing effect of specific warrants); and (6) *Objections by a Son of Liberty*, *reprinted in* 6 THE COMPLETE ANTI-FEDERALIST, *supra*, at 34, 34-35 (discussing the loss of jury trials, searches of papers under “*general warrants*,” and revenue searches of houses under pretense as “curses” of the new Constitution, but saying nothing about the immunizing effect of specific warrants (emphasis in the original)).

single historical complaint about the “immunizing” effect of a specific warrant. In addition, Amar’s renditions of the effect a “warrant” had on trespass liability have been oversimplified and incomplete. Because a general warrant was clearly deemed illegal by the framing era, it did not protect either the issuing magistrate or the executing officer against trespass liability.⁹⁹ Only a legal (that is, specific) warrant indemnified the officer against trespass liability.

Amar’s “immunizing” argument would be valid if it were construed to mean only that, as a logical matter, there was a *potential* that a general warrant might confer immunity on an executing officer *if* general warrants were somehow made legal in the future. That potential could have added to the Framers’ motivation for barring future authorization of general warrants (although no explicit statement by a Framers to that effect has been identified). However, even that concern indicates a basis for hostility only toward *general* warrants; it does not provide any ground to infer that the Framers feared or objected to the indemnifying effect of a specific warrant. Indeed, what possible reason could the Framers have had to object to the indemnification of an officer who simply executed a valid, specific warrant, within the terms of the judicial command to search or arrest?¹⁰⁰

Although Amar invoked ten sources, *none* of them expressed any complaint about the indemnifying effect of a *specific* warrant. That simply was not a concern that troubled the Framers.

99. The trespass liability that attached to an officer’s execution of a general warrant was evident in the press accounts of the early Wilkesite cases, *Huckle*, *Leach*, and *Wood*. (Each imposed trespass liability on officers for arresting and searching under a general warrant. See *supra* note 21.) Likewise, the press accounts of *Halifax* showed a magistrate’s liability for issuing a general warrant. See *supra* note 21. These doctrines were understood by early American judges. See, e.g., *Grumon v. Raymond*, 1 Conn. 39, 47 (1814) (holding magistrate liable for issuing irregular search warrant and officer liable for searching house under an unparticularized warrant); *Sanford v. Nichols*, 13 Mass. (1 Tyng) 287, 288-89 (1816) (same); see also HENING, *supra* note 25, at 415-16 (recounting the trespass liability of officers who executed illegal warrants in *Wood* and *Entick*), 462 (observing that “false imprisonment lies against him that issues [a general arrest] warrant”).

Unfortunately, Amar has recently muddied this point by asserting that “an overbroad warrant lacking probable cause or specificity — in other words, a general warrant — was *per se* unreasonable, in part because it unjustifiably displaced the proper role of the jury.” AMAR, BILL OF RIGHTS BOOK, *supra* note 58, at 71. The claim that a general warrant “displaced” the jury implies that the general warrant immunized the officer — but that was not the understanding at the time of framing. A general warrant was a legal nullity that had no effect on trespass liability — that is the basic rule that was consistently affirmed in the Wilkesite cases.

100. See BLACKSTONE, *supra* note 27, at 288 (stating that a valid warrant will “indemnify the officer who executes the same ministerially”). However, it is unlikely that the Framers thought that a valid specific warrant provided the officer with an absolute defense against trespass liability if the officer acted maliciously. Amar quoted part of a statement from a 1787 essay by a Pennsylvania anti-Federalist to demonstrate how “Americans enthusiastically embraced” trespass actions as remedies for excessive searches. As Amar related it, the essay stated that “[if a federal constable searching] for stolen goods, pulled down the clothes of a bed in which there was a woman” during the search, he would face trespass

Moreover, a valid warrant's indemnification of the executing officer did not "preclud[e]" the victim of an unjustified intrusion from obtaining legal recourse, as Amar has asserted.¹⁰¹ Rather, Amar overlooked an aspect of common law that has disappeared from modern doctrine but was well known at the time of the framing: the *complainant* who swore out a valid search warrant was subject to trespass liability if the search proved fruitless (and that rule also applied to officers who acted as complainants). Common law assigned trespass liability for inappropriate searches under warrants where it belonged — on the complainant who initiated the search rather than on the executing officer who only did his duty.¹⁰²

Most importantly, Amar's insistence on the "immunizing" effect of a valid warrant has deflected attention away from the more salient concern noted above: like modern courts, the Framers understood that the magistrate's review of the factual allegations offered as cause for a search could *prevent* an unjustified invasion of a house.¹⁰³ Like modern judges, the Framers understood that no post-search remedy could adequately restore the breached security of the house. They valued the specific warrant, in large part, because the magistrate's judgment offered the best available protection against too-hasty invasions of houses. They did not perceive any post-intrusion remedy as an adequate substitute for *preventing* unjustified intrusions.¹⁰⁴

damages. Amar, *Fourth Amendment*, *supra* note 58, at 776 (quoting *Essay of a Democratic Federalist*, 3 *THE COMPLETE ANTI-FEDERALIST*, *supra* note 98, at 58, 61); AMAR, *BILL OF RIGHTS BOOK*, *supra* note 58, at 74 (same). The bracketed language was provided by Amar. The quoted passage actually began: "Suppose . . . that a constable, *having a warrant to search for stolen goods*, pulled down the clothes . . ." *Id.* (emphasis added). Thus, the actual passage indicated that even an officer searching under a specific warrant (the warrant to search for stolen goods was the model for the specific warrant) was subject to suit for outrageous conduct during a search. Amar's alteration of the context addressed in the passage obscured the implication that even a valid warrant would not provide absolute protection to an officer.

101. See, e.g., Amar, *Fourth Amendment*, *supra* note 58, at 771-72 ("The Framers did not exalt warrants[,] for a warrant . . . had the purpose and effect of precluding any common law trespass suit the aggrieved target might try to bring before a local jury.").

102. I discuss this aspect of framing-era law *infra* notes 293-295 and accompanying text. In his search and seizure writings, Amar has never mentioned the common-law accountability of complainants who swore out warrants.

103. Some commentators have asserted that framing-era magistrates could not refuse to issue warrants. However, that is not what the common-law authorities say. See *infra* notes 296-297 and accompanying text.

104. Otis addressed the inadequacy of a post-search damage remedy in the 1762 Boston newspaper column in which he repeated his arguments from the *Writs of Assistance Case*:

[If a search of a house has occurred under a writ without genuine information of a specific customs violation,] is it enough to say, that damages may be recover'd against [the searching officer] in the law? I hope indeed this will always be the case; — but are we *perpetually* to be expos'd to outrages of this kind, & to be told for our *only* consolation, that we must be *perpetually* seeking to the courts of law for redress? Is not this vexation *itself* to a man of a well disposed mind?

At bottom, Taylor's and Amar's claims that the Framers feared "the warrant" only blurred the Framers' focused fear of general warrants into a diffuse-sounding disapproval of all warrants. But the history, like the texts, contradicts that overgeneralized disapproval of "warrants."

E. Summary

To sum up, the conventional historical accounts of Lasson and Cuddihy and the generalized-reasonableness accounts of Taylor and Amar have all failed to solve the puzzle of the two-clause Fourth Amendment. All of the existing treatments are seriously flawed in some substantial way. Those flaws, in turn, are rooted in these commentators' acceptance of a set of false assumptions that obstruct recovery of the Framers' thought.

Each of the historical commentaries have taken for granted that the Framers must have intended to create a *comprehensive* constitutional standard or principle that would reach all searches or seizures conducted by officers, with or without warrant. Likewise, each of these commentaries has assumed the Framers must have intended for "unreasonable" to serve, in some fashion, as that broadly applicable constitutional standard or principle. But these assumptions are only prochronisms derived from *modern* doctrine.

The historical record indicates that the Framers perceived the threat to the right to be secure more precisely than we do today. They did not have a diffuse concern about the security of person and house — the common-law rules regarding search and arrest authority provided sufficient protection against unjustified intrusions. Instead, they were concerned about a specific vulnerability in the protections provided by the common law; they were concerned that legislation might make general warrants legal in the future, and thus undermine the right of security in person and house. Thus, the Framers adopted constitutional search and seizure provisions with the precise aim of ensuring the protection of person and house by prohibiting legislative approval of general warrants.

In the next Part, I demonstrate that the Framers did not conceive of the problem of search and seizure as diffusely as we do. Then, in subsequent Parts, I explain why the Framers' concern was focused on general warrants, and how they expressed that focused concern in the constitutional provisions they adopted.

Otis's 1762 Article, *supra* note 20, at 562, 563-64 (emphases in original). (Otis's reference to an action for damages may refer to the liability of an officer who conducted a fruitless revenue search, based only on his personal suspicion, pursuant to a writ of assistance. See *infra* note 294.)

IV. THE PROCHRONISTIC ASSUMPTIONS THAT HAVE OBSCURED THE AUTHENTIC MEANING OF THE TEXT

If one examines the historical statements, and also listens for unexpected silences of the dog-that-did-not-bark-in-the-night variety,¹⁰⁵ there is abundant evidence that the Framers did not mean for the first clause of the Fourth Amendment to create a broad “reasonableness” standard at all. For one thing, the historical sources show that framing-era law did not recognize any “reasonableness” standard for arrests and searches. For another, they also show that the Framers focused their complaints about search and seizure authority on searches of houses under general warrants.

A. *There Was No Historical “Reasonableness” Standard*

The near-universal assumption that the first clause of the Fourth Amendment was meant to articulate a broad reasonableness-in-the-circumstances standard runs afoul of two historical facts. The first is the widespread opposition to allowing officers to exercise discretionary search authority, as described above. That opposition is inconsistent with the use of a relativistic reasonableness standard, which would have facilitated officers’ discretion to initiate intrusions. The second fact is a silence: reasonableness was not used as a standard for assessing searches or arrests in framing-era legal sources, and there is also no persuasive evidence of the use of any such standard during the framing of the state or federal constitutional provisions.

1. *The Absence of a Broad Reasonableness Standard in Framing-Era Law*

Unfortunately, the absence of a historical reasonableness standard is not as obvious as it should be in the existing literature. One reason for the oversight is that previous commentaries did not undertake to recover a systematic understanding of the common law of arrest and search as a necessary first step toward understanding the Framers’ thinking. As I explain in the next Part, common-law arrest and search authority consisted of a set of rules that were often more stringent

105. People rarely write down what they do *not* think; hence, unexpected silences in historical statements indicate aspects of contemporary thought without analogs in historical thought. One can learn a good deal about what the Framers did not think about search and seizure by tracing modern concepts backwards in time — and finding they sometimes disappear from the historical record. Of course, the classic statement on significant silences comes from Sherlock Holmes, who perceived that the theft of a horse must have been an “inside job” because the stable watchdog had not barked the night the horse was taken. See ARTHUR CONAN DOYLE, *Silver Blaze*, in MEMOIRS OF SHERLOCK HOLMES 1, 27 (1930). Dogs that do not bark in the night are essential guides to the past.

than modern search and seizure law. Thus, had the prior commentaries confronted the actual rules used to assess arrests and searches at the time of the framing, they would have discovered the incongruity of a broad reasonableness standard. They did not, however, confront the actual content of the common law.

Another reason that the absence of a broad reasonableness standard has gone unnoticed is that previous commentators have not treated a reasonableness standard as an inquiry, but rather as an assumption; thus they have tended to impose a modern reasonableness standard on the historical sources. For example, Lasson failed to directly ask and answer the question “Where did ‘unreasonable’ in ‘unreasonable searches and seizures’ come from, and what did it mean?” Instead, he referred uncritically to several historical circumstances as though they involved the use of a “reasonableness” standard — even though the historical sources regarding those situations did *not* use that term. For example, he referred to “[t]he principle that search and seizure must be reasonable” in a discussion of English law following the Restoration of 1660, without citing any historical source that mentioned such a principle.¹⁰⁶ There was none. Cuddihy has done the same.¹⁰⁷

Taylor and Amar have also tended to assume the existence of a historical reasonableness standard. When discussing historical doctrine, Taylor used the terms “reasonable” and “unreasonable” as they are used in modern doctrine, but never actually claimed to find evidence of a historical reasonableness standard.¹⁰⁸ In contrast, Amar has conveyed the impression that evidence of a historical reasonableness-in-the-circumstances standard is abundant — for example, he has recently claimed that, “[a]t the Founding, civil juries often played a role in helping to define the idea of Fourth Amendment reasonable-

106. LASSON, *supra* note 16, at 34; *see also id.* at 42-43 (describing the Wilkesite cases as “the final establishment of the principle of reasonable search and seizure”).

107. Cuddihy also finessed the absence of evidence of a historical reasonableness standard by describing the entire development of Anglo-American search and seizure law leading up to the framing as though it constituted a development of an overarching “concept” of unreasonable searches and seizures. Thus, he repeatedly referred to a concept of “unreasonable search and seizure,” even though he sometimes acknowledged that historical sources did not use that terminology. *See, e.g.*, 1 Cuddihy, *supra* note 20, at 3 (stating that Englishmen by 1642 had come to believe earlier methods of search “were fundamentally unreasonable and illegal”); *id.* at 48 (referring to “the concept of unreasonable search and seizure” in England circa 1600). There are numerous similar examples. Notwithstanding Cuddihy’s occasional acknowledgments that the historical sources do not actually employ the concept of “unreasonable search and seizure,” the constant use of that terminology hulls the reader into thinking that it must reflect historical thought, even though no direct evidence of any such concept is ever offered.

108. *See* TAYLOR, *supra* note 49, at 43.

ness.”¹⁰⁹ However, there is a large gap between his assertions and his evidence.

The only mention of a supposed reasonableness standard that Amar has identified in the framing-era legal sources was a statement Lord Mansfield made during the 1765 proceedings in *Leach v. Money*, one of the Wilkesite cases. In Amar’s words:

[Mansfield’s statement in *Leach*] featured the following noteworthy passage: “ ‘Whether there was a probable cause or ground of suspicion’ was a matter for the jury to determine: that is not now before the Court. So [too with the issue] ‘whether the defendants detained the plaintiff an *unreasonable* time.’ ” Here we have clear evidence of the role of the civil jury in deciding the reasonableness of government searches and seizures¹¹⁰

Amar’s quotation ends too abruptly. Although Mansfield did repeat a lawyer’s argument that the king’s messengers should not be liable for false imprisonment if they detained the plaintiff only a reasonable time (note the internal quotation marks in Mansfield’s statement), Mansfield went on to say, in the lines that immediately follow those quoted, “[b]ut if it had been found to have been a reasonable time; yet it would be no justification to the [officers]”¹¹¹ Thus, Mansfield

109. Amar, *Terry*, *supra* note 58, at 1125; *see also* Amar, *Fourth Amendment*, *supra* note 58, at 774 (noting that illegality depended on “[i]f the jury deemed the search or seizure unreasonable — and reasonableness was a classic jury question”); statements cited *supra* note 63.

110. Amar, *Fourth Amendment*, *supra* note 58, at 776 (quoting *Leach v. Money*, 3 Burr. 1742, 1765, 19 Howell St. Tr. 1001, 1026, 97 Eng. Rep. 1075, 1087 (K.B. 1765) (emphasis and second bracketing by Amar)). This passage is the only framing-era legal source Amar has ever identified as evidence of a historical reasonableness standard. For his most recent treatment, *see* Amar, *Terry*, *supra* note 58, at 1126.

111. Here is a fuller quotation of Mansfield’s language in *Leach*; the asterisk indicates the start of Amar’s quotation, the double asterisk indicates the end:

[Lord Mansfield:] A bill of exceptions [filed by the messengers] supposes the evidence true; and questions the competency or propriety of it.

***Whether there was a probable cause or ground of suspicion,” was a matter for the jury to determine: that is not now before the Court. So — “whether the defendants detained the plaintiff an unreasonable time.”**

But if it had been found to have been a reasonable time; yet it would be no justification to the defendants; because it is stated “that this man was neither author, printer, or publisher:” and if he was not, then they have taken up a man who was not the subject of the warrant.

Money v. Leach, 3 Burr. 1742, 1765, 19 Howell St. Tr. 1001, 1026, 97 Eng. Rep. 1075, 1087 (K.B. 1765).

To put this statement in context, it is apparent from the report of the case that the Messengers did *not* attempt to justify the arrest on their own authority. (Note that the offense of seditious libel was a misdemeanor, so even Leach’s actual guilt would *not* have provided a justification for the arrest. *See infra* note 222.) Rather, they pleaded “the general issue, ‘not guilty’ ” (meaning they had not done what was alleged) and, alternatively, a “special justification” (that is, a legal defense). The special justification asserted was that the Messengers had acted pursuant to the warrant issued by Halifax and thus were within the terms of a statute (24 Geo. II, ch. 44) that protected an officer who acted in obedience to the terms of a

actually stated that the reasonableness of the duration of the detention was irrelevant to the lawfulness of the officers' conduct. And almost immediately thereafter, Mansfield condemned the discretionary authority claimed by the officers under the general warrant because it was "not fit" to allow officers to make a judgment as to whom to arrest.¹¹² Mansfield did not endorse a relativistic reasonableness standard for assessing the lawfulness of arrests or searches; rather, he condemned the attempt to confer discretionary authority on an officer.¹¹³

If Amar's evidence is examined closely, it turns out that he has never identified a single framing-era source that endorsed a warrantless arrest or search on the ground that it was reasonable in the circumstances.¹¹⁴ That is because none did.¹¹⁵

warrant. See *Leach*, 3 Burr. at 1742, 1745, 1749, 19 Howell St. Tr. at 1003, 1006, 1010, 97 Eng. Rep. at 1075, 1077, 1079.

When understood in the context of the actual legal issues, the phrase "whether the defendants detained the plaintiff an unreasonable time" was not part of an argument that there were legal grounds to arrest Leach other than the general warrant (as Amar implies). Rather, it appears that the Messengers' not-unreasonable-time claim was part of the "not guilty" argument; namely, that there had not really been an actionable arrest or that Leach had not suffered any actionable harm upon which damages could be predicated. In that context, Mansfield responded to the not-unreasonable-time argument by declaring that, if any such factual evaluations had been relevant, they would have been for the jury, but that they were not germane to the review by the King's Bench of the legal issues of the applicability of the statutory protection or, potentially, of the validity of the general warrant. Because the King's Bench judges concluded that Leach was not within the description of the persons to be arrested in the general warrant, they concluded that the Messengers' conduct could not come within the terms of the statute (thus, the King's Bench ruling did not formally reach the lurking constitutional question of whether the statute could protect officers who acted within the terms of a general warrant illegal at common law).

112. See statement quoted *supra* note 77.

113. I previously noted that Amar's treatment of Mansfield's statement did not show a historical reasonableness standard for arrests or searches. See *Davies's Testimony*, *supra* note 3, at 119, 129 n.17. Amar has responded that Blackstone's later report of *Leach* and an 1827 English case "confirm [his] initial reading [of *Leach*]." Amar, *Boston*, *supra* note 19, at 61 n.36 (citing *Money v. Leach*, 1 Black. W. 555, 560, 96 Eng. Rep. 320, 323 (K.B. 1765), and *Beckwith v. Philby*, 6 B. & C. 635, 638, 108 Eng. Rep. 585, 586 (K.B. 1827)). Blackstone's report only confirms that Mansfield repeated but rejected the Messengers' counsel's "reasonable time" argument. Amar is correct that the 1827 *Beckwith* opinion did construe the passage in *Leach* in the same way he treated it. However, *Beckwith* must be read in context; it initiated a radical relaxation of the common-law standard for justifying a warrantless arrest and cited *Leach* as part of an exercise of pretending that the novel rule it announced (the modern probable cause standard for warrantless arrests) was consistent with earlier common law. It was not a sound exposition of *Leach*. I discuss *Beckwith* *infra* notes 241-242, 248-251 and accompanying text.

114. The purported evidence Amar has offered of a historical reasonableness standard consists of the *Leach* passage, see *supra* notes 110-113 and accompanying text, and three calls for a federal protection from "unreasonable searches and seizures" made during the ratification debates of 1787 and 1788, see discussion *infra* notes 120-132 and accompanying text. The only other evidence Amar has offered is what he terms "a smattering" of mid- to late nineteenth-century legal statements that used the word "reasonable." Amar, *Fourth Amendment*, *supra* note 58, at 818 n.228. This "smattering" is far too little and a hundred years too late to constitute evidence of the intended meaning of the search and seizure texts.

2. *The Absence of a Broad Reasonableness Standard in the Records of the Framing*

There is also a dearth of evidence of a broad reasonableness standard in the records of the framing of the American search and seizure provisions. Indeed, the phrase “unreasonable searches and seizures” did not appear until relatively late in the formulation of American constitutional search and seizure language. In all, nine states or proto-states adopted search and seizure provisions prior to the Fourth Amendment.¹¹⁶ No one disputes that “unreasonable” was not introduced until the 1780 Massachusetts provision, the seventh of the nine provisions, began with the declaration that “[e]very subject has a right to be secure from all unreasonable searches and seizures of his person, his house, his papers, and all his possessions.”¹¹⁷ Why, if reasonableness

115. It is difficult to document a negative, but Professor Taylor illuminated the sort of searches that were actually conducted and litigated when he noted that “[m]ost of the court decisions [assessing the lawfulness of searches] during the nineteenth century relate to stolen goods warrants, and the requirements for their valid issuance and execution.” TAYLOR, *supra* note 49, at 44 & n.71 (citing the following eight cases [brackets show corrected citations]: Sandford v. Nichols, 13 Mass. 286 (1816); Gardner v. Neil, 4 N. Car. 104 (1814); Beaty v. Perkins, 6 Wend. 382 (N.Y. Sup. Ct. 1831); Reed v. Rice, 2 J.J. Marsh 4[4] (Ky. 1829); Halsted v. Brice, 13 Mo. [171] (1850); Larthet v. Forgay, 2 La. Ann. 524 (18[4]7); Chipman v. Bates, 15 Vt. 51 (1843); and Humes v. Taber, 1 R.I. 464 (1850)).

Oddly, Amar cited the cases collected by Taylor as evidence that “the civil trespass action tried to a jury flourished as the obvious remedy against haughty customs officers, tax collectors, constables, marshals, and the like.” Amar, *Fourth Amendment*, *supra* note 58, at 786 & n.105. Putting aside the question of whether eight appellate cases can show a “flourishing” remedy (especially when the defendant searchers won several of them), Amar’s characterization of these cases omitted the salient fact that each arose from a warrant search and involved issues regarding the validity and scope of the warrant. Taylor’s cases undercut Amar’s claims regarding use of a reasonableness standard because they show (1) that officers who attempted to search houses used warrants, and (2) the principal issues that arose with regard to the legality of searches concerned whether the search warrant was valid and whether the officer’s search conformed to the command of the search warrant. None of these cases employed a broad “reasonableness” standard.

116. See *infra* note 326.

117. The full text of the 1780 Massachusetts provision is set out *infra* text accompanying note 379, and is discussed in detail *infra* notes 379-387 and accompanying text. For commentary recognizing that this was the first appearance of “unreasonable,” see, for example, LASSON, *supra* note 16, at 82; LEVY, ORIGINAL MEANING, *supra* note 45, at 239; and 3 Cud-dihy, *supra* note 20, at 1240-41. Cf. TAYLOR, *supra* note 49, at 42 (noting that the Massachusetts provision was the clearest ancestor of Fourth Amendment).

Unlike the other commentators, Amar has omitted any direct discussion of the initial appearance of “unreasonable searches and seizures” — even when he discussed the Massachusetts provision. See, e.g., Amar, *Boston*, *supra* note 19, at 66-68 (discussing the Massachusetts provision without mentioning it was the first to use “unreasonable searches and seizures”). In fact, Amar has obscured the initial appearance of “unreasonable” by including the earlier Pennsylvania provision along with the Massachusetts provision among the state provisions that “most closely anticipated the eventual language of the federal Fourth Amendment” — without noting the absence of “unreasonable” in the former. Amar, *Fourth Amendment*, *supra* note 58, at 763 n.10; see also *infra* note 119.

was the "first principle" of search law, did the phrase appear so late in the evolution of American search and seizure texts?

Previous commentators have finessed the late appearance of "unreasonable" by directing attention to the earlier 1776 Pennsylvania provision, which began by declaring that "the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure"¹¹⁸ Lasson asserted that a broad reasonableness principle was "imputed" in that language, and Cuddihy, Levy, and Amar have all followed that example.¹¹⁹ However, there is no factual or textual basis for Lasson's claim: the Pennsylvania language clearly asserted a "right," but it said nothing to suggest defining that right in terms of reasonableness-in-the-circumstances.

There is also a dearth of evidence of a broad reasonableness standard in the discussions of the need for a federal search provision during the ratification debates of 1787-88. Even recognizing that the surviving record of those debates is incomplete, it remains striking that the prior commentaries have identified only three statements from that period as evidence of a broad reasonableness principle. In September 1787, Richard Henry Lee called for a federal bill of rights including a protection "[t]hat the citizens shall not be exposed to unreasonable searches, seizures of their persons, houses, papers or property";¹²⁰ in December 1787, the sixth installment of the widely

118. PA. CONST. art. X (1776) (Decl. of Rights). The Pennsylvania provision is discussed *infra* notes 352-378 and accompanying text.

119. See LASSON, *supra* note 16, at 81-82 n.11 (stating that "[t]he word 'unreasonable' is imputed" in the Pennsylvania provision). Cuddihy repeated that finesse. See Cuddihy, *supra* note 20, at 1244 ("Although the Pennsylvania constitution renounced all searches and seizures, it assumed that only unreasonable ones were prohibited."); see also *id.* at 1239-40, 1251-52. Levy initially described the Pennsylvania provision without imputing "unreasonable," but later wrote as though both the Pennsylvania and Massachusetts provisions had employed a reasonableness standard. See LEVY, ORIGINAL MEANING, *supra* note 45, at 237-38, 243. Amar has also adopted a low-key version of Lasson's finesse by treating the Pennsylvania provision as one of the state provisions that "most closely anticipated the eventual language of the Fourth Amendment." See Amar, *Fourth Amendment*, *supra* note 58, at 763 n. 10; discussion *supra* note 117.

In contrast, Taylor recognized that the Pennsylvania provision did not include a broad reasonableness standard. See TAYLOR, *supra* note 49, at 41 (describing the initial state provisions except for Massachusetts and New Hampshire as being aimed only at warrant authority).

120. Letter from Richard Henry Lee to Edmund Randolph, Governor of Virginia, (Oct. 16, 1787) (postscript), in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 98, at 117 (5.6.5). Immediately after the Constitutional Convention ended in 1787 without adopting a bill of rights, Lee called on the Continental Congress (which was still sitting under the Articles of Confederation) to adopt a bill of rights to be submitted to the states along with the proposed Constitution. His proposal was defeated. Lee then included this call for a federal bill of rights in correspondence:

That the new constitution proposed for the government of the United States be bottomed upon a declaration or bill of rights, clearly and precisely stating the principles upon which this social compact is founded, to wit: That the rights of conscience in matters of religion

disseminated anti-Federalist pamphlet *Letters of a Federal Farmer* (which may or may not have been authored by Lee¹²¹) called for a federal protection that “[n]o man [should be] subject to . . . unreasonable searches or seizures of his person, papers, or effects . . .”;¹²² and in 1788, during the Massachusetts ratification convention, Samuel Adams made (and then backed away from) a motion that called for amendments including a protection of “the people [against] unreasonable searches and seizures of their persons, papers, or possessions.”¹²³

ought not to be violated . . . — That the right of the people to assemble peaceably for the purpose of petitioning the legislature shall not be prevented — That the citizens shall not be exposed to unreasonable searches, seizures of their persons, houses, papers or property; and it is necessary for the good of society, that the administration of government be conducted with all possible maturity of judgment, for which reason it hath been the practice of civilized nations and so determined by every state in the Union. — That a council of state or privy council should be appointed to advise and assist in the arduous business assigned to the executive power.

Id. at 116-17 (5.6.5). Note that it appears that Lee meant only to list subjects to be addressed in a bill of rights, not to propose constitutional language. Contrast the more fully developed anti-Federalist proposals for a federal search and seizure provision set out *infra* notes 128, 426, 429.

121. The authorship of the *Letters* was earlier attributed to Lee, but that attribution is now uncertain. See 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 98, at 214-16.

122. THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 240-41 (6.2.4.7) (Neil H. Cogan ed., 1997) [hereinafter COGAN] (excerpting *Letters from the Federal Farmer (VI)* (Dec. 25, 1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 98, at 262 (2.8.86)). This reference to “unreasonable searches and seizures” appears in a listing of topics to be included in a bill of rights:

The following, I think, will be allowed to be unalienable or fundamental rights in the United States: —

No man, demeaning himself peaceably, shall be molested on account of his religion or mode of worship — The people have a right to hold and enjoy their property according to known standing laws, and which cannot be taken from them without their consent, or the consent of their representatives; and whenever taken in the pressing urgencies of government, they are to receive a reasonable compensation for it — Individual security consists in having free recourse to the laws . . . — They have a right, when charged, to a speedy trial in the vicinage; to be heard by themselves or counsel, not to be compelled to furnish evidence against themselves, to have witnesses face to face, and to confront their adversaries before the judge — No man is held to answer a crime charged upon him till it be substantially described to him; and he is subject to no unreasonable searches or seizures of his person, papers, or effects — The people have a right to assemble in an orderly manner, and petition the government for a redress of wrongs — The freedom of the press ought not to be restrained — No emoluments, except for actual service . . .

Id. Note that this brief reference to a protection against “unreasonable searches and seizures” appears simply to identify a subject to be addressed in a bill of rights, rather than to propose constitutional language. Contrast the more fully developed proposal set out *infra* note 128; see also the anti-Federalist proposals set out *infra* notes 426, 429.

123. DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS HELD IN THE YEAR 1788, at 86-87 (Boston, William White, Printer to the Commonwealth 1856). The motion is also quoted in COGAN, *supra* note 122, at 232-33 (6.1.2.2). This motion appears to have been a listing of subjects to be addressed in amendments rather than a proposal for actual language for such amendments:

Previous commentaries have treated the appearance of “unreasonable searches and seizures” in these three statements as evidence of a broad reasonableness standard because the statements failed also to refer explicitly to general warrants.¹²⁴ But that interpretation outruns the statements. To begin with, none of the three statements appears to have been meant as proposed language for a constitutional provision; instead, they each appear merely to identify topics that should be addressed in a federal bill of rights.¹²⁵ It appears that each of the statements simply borrowed the reference to “unreasonable searches and seizures” from the beginning of the Massachusetts provision as a short-hand label for the topic to be addressed.¹²⁶ While it is true that these three statements refer to “unreasonable searches and seizures” without mentioning general warrants, it is also true that they do not explicitly mention warrantless searches or arrests — their common feature is brevity.

[T]hat the said Constitution be never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience; or to prevent the people of the United States, who are peaceable citizens, from keeping their own arms; or to raise standing armies, unless when necessary for the defence of the United States, or of some one or more of them; or to prevent the people from petitioning, in a peaceable and orderly manner, the federal legislature, for a redress of grievances; or to subject the people to unreasonable searches and seizures of their persons, papers or possessions.

Id. The motion was voted down. For a discussion of the politics involved, see 3 Cuddihy, *supra* note 20, at 1421-23.

124. Lasson described Lee’s call for a federal search protection as an endorsement of the “general principle” of freedom from unreasonable searches and seizures. See LASSON, *supra* note 16, at 87 n.82.

Cuddihy also asserted that Lee’s language did “more than abrogate general warrants, for it took in the full range of searches and seizures that had become unreasonable . . .” 3 Cuddihy, *supra* note 20, at 1365. Cuddihy also characterized the sixth of the *Letters from the Federal Farmer* (which he described as probably being written by Lee) as “defining unreasonable searches to include more than general warrants.” *Id.* at 1373. He also described Samuel Adams’s motion as “a modification of Lee’s [proposal].” *Id.* at 1384. And he concluded that “Lee and Samuel Adams desired a right against unreasonable search and seizure but did not say that general warrants were unreasonable or ask their abolition.” *Id.* at 1471.

Levy has invoked Lee’s call and the sixth of the *Letters* as evidence of a broad reasonableness standard. See LEVY, ORIGINAL MEANING, *supra* note 45, at 241.

Amar did not mention any of these three statements in his principal discussion of Fourth Amendment history, see Amar, *Fourth Amendment*, *supra* note 58, but he invoked the three statements described in the text as “vivid evidence” of a “standalone reasonableness requirement” in Amar, *Boston*, *supra* note 19, at 67 n.54. See also Amar, *Terry*, *supra* note 58, at 1108.

125. See the fuller texts quoted *supra* notes 120, 122, 123.

126. The link between Samuel Adams and the Massachusetts provision is obvious. It is also evident that the author of the *Letters from the Federal Farmer* borrowed from the Massachusetts text. See *infra* note 128. Finally, Lee was well acquainted with both John Adams and Samuel Adams and corresponded often with the latter during the ratification debates.

In addition, other statements in the *Letters of a Federal Farmer* suggest that “unreasonable searches and seizures” was understood to refer to the complaint against general warrants. The reference to “unreasonable searches and seizures” quoted above, which appeared in the sixth installment, was actually the second of three discussions of a federal search protection in the *Letters*. The earlier fourth installment called for protection against “hasty and *unreasonable search warrants*” — it did not use “unreasonable searches and seizures.”¹²⁷ In addition, the later sixteenth installment, which made the most detailed call for a federal protection, proposed language for a federal provision that tracked but condensed the Massachusetts state provision, including the reference to a “right to be secure” against “unreasonable searches and seizures”; but it then referred to that proposal as a protection against “*unreasonable search warrants*.”¹²⁸ The interchange of “unreasonable search warrants” and “unreasonable searches and seizures” undercuts the claim that the *Letters* intended to call for a free-standing reasonableness standard distinct from the ban against too-loose warrants. Previous commentators, however, have either omitted or downplayed the references to “unreasonable search warrants” in the *Letters*.¹²⁹

127. *Letters from the Federal Farmer (IV)* (Oct. 12, 1787) (emphasis added), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 98, at 249 (2.8.53) (calling for “freedom from hasty and unreasonable search warrants, warrants not founded on oath, and not issued with due caution, for searching and seizing men’s papers, property, and persons”).

128. *Letters from the Federal Farmer (XVI)* (Jan. 20, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 98, at 328 (2.8.200) (emphasis added). The proposed provision read:

[T]hat all persons shall have a right to be secure from all unreasonable searches and seizures of their persons, houses, papers, or possessions; and that all warrants shall be deemed contrary to this right, if the cause or foundation of them be not previously supported by oath, and there be not in them a special designation of persons or objects of search, arrest, or seizure

Id. A few lines later, the letter repeated the call for a federal protection but phrased it as a protection “to be secure against unreasonable search warrants.” *Id.*

Note that the language of the proposed provision is composed from the italicized parts of the 1780 Massachusetts provision:

Art. XIV. Every *subject has a right to be secure from all unreasonable searches and seizures of his person, his house, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation, and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the person or objects of search, arrest, or seizure; and no warrant ought to be issued, but in cases, and with the formalities prescribed by the laws.*

See MASS. CONST. of 1780, pt. 1, art. XIV, reprinted in COGAN, *supra* note 122, at 234 (6.1.3.3) (emphasis added). The Massachusetts provision is discussed in detail *infra*, beginning with text accompanying note 379.

129. Lasson wrote at a time when it was believed that Lee was the author of the *Letters*; even so, he separated the presentation of Lee’s initial call for a ban against “unreasonable” searches and seizures, see LASSON, *supra* note 16, at 87 n.32 (referring to the statement discussed *supra* note 120 and accompanying text), from the later call for a protection from

The three statements offered as evidence of a broad reasonable-standard are also atypical; complaints about search authority made during the ratification debates were far more likely to refer explicitly to “general warrants” than to call for a ban against “unreasonable searches and seizures.”¹³⁰ In fact, as I describe below, the first two anti-Federalist proposals for a federal protection actually introduced in state ratification conventions simply called for a ban on too-loose warrants without mentioning “unreasonable searches and seizures.”¹³¹ Previous commentaries have not confronted the implications of those focused calls for banning general warrants.¹³²

In sum, the few isolated references to “unreasonable searches and seizures” do not provide persuasive evidence that the Framers sought a constitutional protection beyond prohibiting too-loose warrants. Although the prior commentaries have asserted that the historical sources employed a broad reasonableness standard, they simply have not identified persuasive evidence of a sweeping reasonableness-in-the-circumstances standard in the pre-framing- or framing-era sources.

B. *The Framers’ Complaints Did Not Involve Warrantless Intrusions*

The historical evidence poses an even deeper problem for prior interpretations. The assumption that the Fourth Amendment contains a broad reasonableness standard rests on the more fundamental as-

“hasty and unreasonable search warrants” in the fourth *Letter*, see *id.* at 88 n.37 (referring to the statement discussed *supra* note 127 and accompanying text). Lasson did not refer to the sixteenth *Letter*.

Cuddihy reported the references to “unreasonable search warrants” in the fourth and sixteenth *Letters*, but did not call attention to the interchangeable use of that term and “unreasonable searches and seizures.” See 3 Cuddihy, *supra* note 20, at 1373.

Levy referred to all three of the *Letters*: he noted that the fourth letter mentioned a right against unreasonable warrants (but did not quote that language); he mentioned another aspect of the sixth letter; and he quoted the fuller proposal for a protection in the sixteenth letter but did not mention that it also characterized that protection as one against “unreasonable search warrants.” See LEVY, ORIGINAL MEANING, *supra* note 45, at 241.

Amar mentioned the fourth letter as evidence of a “Fourth-Seventh Amendment linkage,” see *supra* note 98; however, he did not mention that it referred to the protection as one against “unreasonable search warrants.” He did not mention the sixteenth letter.

130. See *supra* note 98; *infra* notes 164-166.

131. See the anti-Federalist proposals advanced in the Pennsylvania and Maryland ratification conventions, discussed *infra* note 426.

132. Lasson omitted the Pennsylvania and Maryland anti-Federalist proposals; so did Levy. Cuddihy did discuss the Pennsylvania and Maryland anti-Federalist proposals, but did not quote them and did not draw attention to the fact that they omitted any use of “unreasonable searches and seizures.” See 3 Cuddihy, *supra* note 20, at 1382-85. Amar lumped all of the ratification convention proposals together as “proto Fourth Amendments” — without quoting them or noting that two of those proposals did not include “unreasonable.” See Amar, *Fourth Amendment*, *supra* note 58, at 775 n.65.

sumption that the Framers sought to craft a comprehensive regulation of all government search and seizure authority, including warrantless searches and arrests. Viewed from a modern perspective, the assumption appears to make sense. Modern search and seizure law has become preoccupied with warrantless arrests and searches because the overwhelming bulk of today's arrests and searches are made without warrants.¹³³ Thus, modern readers have trouble understanding how the Framers could have been satisfied with a text banning only the use of general warrants.

The historical record, however, reveals that the Framers focused their concerns and complaints rather precisely on searches of houses under general warrants. Moreover, the early interpretations of the Fourth Amendment and of the related state provisions understood the texts to pertain only to warrant standards.

1. *The Concerns Expressed During the Prerevolutionary Controversies*

The American Whigs consistently aimed their complaints about search and seizure at general warrants. Controversies about general warrants are evident in colonial legislation even prior to the beginning of the colonists' political struggle with Parliament.¹³⁴ Moreover, the actual complaints and concerns about search and seizure expressed during the historical controversies that preceded the Revolution were focused on *searches of houses under general warrants*. Except for the vicarious concerns over the use of general warrants for arrests in connection with the English Wilkesite cases, which involved both arrests and searches of houses and papers, the prerevolutionary controversies were devoid of any consideration of arrest authority.¹³⁵

James Otis framed the initial American attack on searches made under the general writ of assistance by describing how use of an illegal general warrant violated "[t]he Privilege of [the] House." However,

133. See, e.g., Thomas Y. Davies, *A Hard Look at What We Know (And Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. (now L. & SOC. INQUIRY) 611, 665.

134. For example, in 1626 the Virginia Council and General Court forbade use of "general warrants" because of "divers inconveniencies w^{ch} appeare to have happened." See 27 VA. MAG. HIST. & BIOG. 142, 145 (1919, reprinted 1968). Virginia also enacted a ban against "blank warrants" in 1643. See 1 HENING, STATUTES AT LARGE 257-58, cited in LASSON, *supra* note 16, at 33 n.73. Likewise, the Massachusetts colonial legislature (the General Court) enacted bans against certain uses of general warrants in 1756, apparently in response to fears of searches (or at least entries of houses) created by the Massachusetts excise act of 1754. See Maclin, *Complexity*, *supra* note 44, at 943-44.

135. Cf. 3 Cuddihy, *supra* note 20, at 1514 (noting that there is little mention of arrest authority in the Framers' discussions of search and seizure issues, and that arrest authority was not addressed in American legislation prior to 1791); see also *supra* note 47.

he did not complain of searches of ships or warehouses. His focus on house searches was especially noteworthy because his clients were merchants who also owned ships and warehouses.¹³⁶ Likewise, colonial press accounts of the Wilkesite cases typically stressed the violation of the house in the searches made under general warrants, and the “papers” involved in those cases were the kind generally kept in the house.¹³⁷ John Dickinson also criticized the general writ reauthorized by the Townshend Act as a violation of the house.¹³⁸ Samuel Adams complained that customs searches of houses under general warrants left citizens “cut off from that domestick security which renders [life agreeable].”¹³⁹ And William Henry Drayton attacked the general writ

136. John Adams’s notes from the *Writs of Assistance Case* of Otis’s opening statement regarding the “Privilege of House” are quoted *infra* text accompanying note 262. Otis’s stress on the violation of the house is also evident in the newspaper column he published in Boston in 1762, in which he complained of the violation of “a DWELLING HOUSE,” of a “freeholder’s house,” and of a “freeman’s house” — but again did not complain of searches of ships, shops, or warehouses. See *Otis’s 1762 Article*, *supra* note 20, at 562-66 (capitalization in original).

137. For example, both London and colonial press accounts of the trial and verdict in *Wilkes v. Wood* summed up the significance of the case by stating that “every Englishman has the satisfaction of seeing that his house is his castle, and is not liable to be searched, nor his papers pried into by the malignant curiosity of King’s Messengers.” THE LONDON CHRON., Dec. 6-8, 1763 (No. 1082), at 550, cols. 1-2; see also the London and Boston press accounts of the Wilkesite cases set out *supra* note 22.

138. When Dickinson criticized the general writ of assistance authorized in the Townshend Act, he initially recited the scope of the authority granted by the writ but emphasized that the writ authorized entry into the house: “the officers of the customs are ‘im-pow-ered to enter any HOUSE, warehouse, shop, cellar, or other place’” John Dickinson, *Letters from a Farmer in Pennsylvania*, in JENSEN, *supra* note 94, at 150-51 (capitalization in original). Dickinson then went on to complain specifically of the violation of a man’s “castle.” *Id.* Dickinson corresponded with Otis about the general writ. See 2 Cuddihy, *supra* note 20, at 1123-24.

139. A STATE OF THE RIGHTS OF THE COLONISTS (likely authored by Samuel Adams), in JENSEN, *supra* note 94, at 243. This report to a Boston town meeting in November 1772, which is usually attributed to Samuel Adams, contains a complaint about searches under writs of assistance. After reciting the language of the writ of assistance authorizing searches of ships and warehouses as well as houses, the report expressed emphatic complaints regarding the violation of the house:

[O]ur homes and even our bedchambers, are exposed to be ransacked, our boxes chests & trunks broke open ravaged and plundered by wretches, whom no prudent man would venture to employ even as menial servants; whenever they are pleased to say they *suspect* there are in the house wares etc. for which the dutys have not been paid. Flagrant instances of the wanton exercise of this power, have frequently happened in this and other sea port Towns. By this we are cut off from that domestick security which renders the lives of the most unhappy in some measure agreeable. Those Officers may under colour of law and the cloak of a general warrant, break thro’ the sacred rights of the *Domicil*, ransack mens houses, destroy their securities, carry off their property, and with little danger to themselves commit the most horred murders.

Id. at 243-44 (emphasis in original).

for its violation of “private cabinets” and “houses, the castles of English subjects.”¹⁴⁰

Focusing criticism of the general writ on the violation of the house made sense as a strategy for attacking the legality of the writ. As I explain below, because the house enjoyed special status at common law — expressed in the motto “a man’s house is his castle” — a valid warrant was usually required to justify “breaking” a house.¹⁴¹ Thus, legal criticism of the general warrant was especially strong when the security of a house was at issue.¹⁴²

Of equal importance is the fact that the historical record of prerevolutionary grievance reveals no legal complaints about other kinds of searches and seizures. Some previous commentators have adverted to complaints about warrantless searches of houses, but close examination of the particular complaints undercuts those interpretations.¹⁴³ For example, the Continental Congress complained in 1774

140. See Drayton, *supra* note 83, at 15, 21.

141. The castle doctrine and the common-law justifications for breaking a house are discussed *infra* notes 259-274 and accompanying text.

142. As previous commentators have noted, there is abundant evidence that the prerevolutionary grievance was directed at the use of general writs of assistance for house searches. Cuddihy has collected American complaints about writs of assistance; many were specifically addressed to violations of the house. See 2 Cuddihy, *supra* note 20, at 1026-27 (reporting that Daniel Malcolm justified his defiance of a writ of assistance as a defense of his house); *id.* at 1095-96 (quoting William S. Johnson that the writ permitted officers “at their own discretion to enter Houses”); *id.* at 1113-14 (reciting complaints by a meeting of Delawarians and by a committee of Virginians that writs of assistance violated houses); *id.* at 1125-27 (quoting Arthur Lee that the writ “laid open every man’s house”; quoting Hyperion that the writ destroyed the house’s status as a “castle”; quoting Reverend Sherwood that the writ exposed “private apartments”; quoting Americanus that the writ destroyed the privacy of houses; quoting Freeman that the writ destroyed “domestic enjoyment”; quoting Regulus that the writ empowered “wretches” to “break up our houses”).

Although Cuddihy sometimes writes as though the Fourth Amendment was meant to apply to all government searches and seizures, he notes at other points that the Framers were primarily concerned with searches of houses. See, e.g., 1 Cuddihy, *supra* note 20, at six (the Framers “focused their attention on searches of their houses”); 3 *id.* at 1545 (Framers denounced general warrants because they “abridged the security that houses afforded”); 3 *id.* at 1556 (“[T]he framers fixated on the single technique that most affected personal dwellings, the search warrant.”). Unfortunately, he did not consistently recognize the full import of that focus, and paid no attention to the meaning of “houses, papers, and effects” in the language of the Fourth Amendment. Cf. LEVY, ORIGINAL MEANING, *supra* note 45, at 222 (“The Fourth Amendment . . . was a constitutional embodiment of the extraordinary coupling of Magna Carta to the appealing fiction that a man’s home is his castle.”).

143. In the 1750s, customs officers in Boston had asserted that they possessed *ex officio* authority to search for uncustomed goods. However, that claim was questioned, and the customs officers then obtained warrants from the governor. That appears to have been the end of any custom officer claims of *ex officio* search authority. Likewise, when the validity of the governor’s warrant was questioned in 1755, the customs officers began to obtain writs of assistance from the Massachusetts courts. That appears to have ended any claim by customs officers that an executive “warrant” was sufficient. Thus, by the time of the 1761 *Writs of Assistance Case*, the issue was framed solely in terms of the validity of judicially issued general writs of assistance.

that “[t]he Commissioners of the Customs are empowered to break open and enter houses without the authority of any Civil Magistrate, founded on legal information.”¹⁴⁴ Although the statement may initially appear to be a complaint about warrantless searches of houses, the concern with the lack of “legal information” suggests that it was most likely an artfully worded attack on customs searches under illegal general writs of assistance.¹⁴⁵

Similarly, Lasson and later commentators have treated prerevolutionary controversies over warrantless seizures of ships as evidence that the Framers were concerned with warrantless intrusions, as well as general warrants, when they wrote the constitutional search and seizure provisions. For example, they have conflated the colonial grievance over ship seizures with the grievance over general search authority.¹⁴⁶ However, the colonial complaint about ship seizures did not arise from ships being exposed to general search authority, but from “customs racketeering” in the form of hypertechnical applications of customs rules or forfeiture proceedings based on perjured testimony from informers.¹⁴⁷

Professor Amar has written as though the Framers feared issuance of “executive” warrants. See Amar, *Fourth Amendment*, *supra* note 58, at 773, 780. However, he offers no specific evidence beyond alluding to the issuance of the Wilkes general warrant by the English Secretary of State, Lord Halifax. Because executive warrants were rejected in Massachusetts in 1755, and because Halifax’s authority to issue warrants was rejected in the 1765 *Entick* ruling, see *supra* notes 21-25, I do not think that the Framers perceived any threat from “executive” warrants.

144. *Memorial to the Inhabitants of the British Colonies*, Oct. 21, 1774, reprinted in 1 AM. ARCHIVES 921, 925 (series 4, 1837). The same complaint was repeated in *The Address to the King*, Oct. 26, 1774, reprinted in 1 AM. ARCHIVES, *supra*, at 934-35.

145. Cuddihy has interpreted this complaint to be about warrantless “promiscuous” searches — and it is virtually the only evidence he offers of a legal grievance about warrantless searches during the prerevolutionary controversies. See 3 Cuddihy, *supra* note 20, at 1499-1501. However, it does not seem likely that a complaint about warrantless searches would refer to a lack of “legal information” — that is, a complaint under oath before a judicial magistrate.

Compare William Henry Drayton’s call for the Continental Congress to declare the illegality of general warrants and his complaint, shortly before the resolutions, that general writs were not based on “any crime charged” — that is, not on a legal complaint. See *supra* note 83. The absence of any direct mention of the writ in the language of the congressional resolutions probably reflects the view, widespread among American Whigs by 1774, that Parliament had no authority to legislate for the colonies. It would have been inconsistent to complain about use of writs authorized only by statute at the same time Congress denied the jurisdiction of Parliament to legislate for the colonies. Hence, the authors of the 1774 complaint showed their disdain for Parliament’s pretended legislative authority by declining to refer directly to the writs authorized by the Townshend Act.

146. See, e.g., LASSON, *supra* note 16, at 72 (including ship seizure controversies with the general search warrant controversy); 2 Cuddihy, *supra* note 20, at 1200-19 (same).

147. The two most visible ship seizure controversies involved Henry Laurens’s legal battles with customs officers in Charleston and the seizure of John Hancock’s sloop *Liberty* in Boston. The former involved hypertechnical interpretations of customs rules regarding bonding and clearance. See DAVID D. WALLACE, *THE LIFE OF HENRY LAURENS* 137-49

The absence of legal complaints about general search authority regarding ships is not mysterious. Even during the prerevolutionary struggle with Parliament, American Whigs accepted the legitimacy of extensive government regulation and inspection of shipping.¹⁴⁸ Moreover, no late eighteenth-century lawyer would have imagined that ships were entitled to the same common-law protection due “houses, papers, and effects.” Ships were not ordinary property at common law, but personalities subject to admiralty law — a branch of civil law.¹⁴⁹ Indeed, the First Congress recognized as much when it explicitly included revenue seizures involving ships in the exclusive admiralty (that is, civil law) jurisdiction of the federal courts.¹⁵⁰ In late

(Russell & Russell 1967) (1915). The latter involved perjured testimony by an informer which, taken at face value, provided *specific* cause for the seizure. See 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 20, at 173-210. The most comprehensive treatment of customs racketeering is OLIVER M. DICKERSON, *THE NAVIGATION ACTS AND THE AMERICAN REVOLUTION* 208-66 (1951). Although Dickerson had previously authored an account of the controversies over the Townshend Act writ of assistance, see Dickerson, *Writs of Assistance*, *supra* note 26, he made only a passing reference to the writs of assistance in his treatment of ship controversies, see DICKERSON, *supra*, at 250-51, and did not include general search authority as a significant feature of the controversies over ship seizures.

148. See DICKERSON, *supra* note 147, at 296-97 (arguing that colonial resistance was to excessive taxation of trade, not to the regulation of trade itself).

149. See, e.g., 4 COKE, *supra* note 74, at 134-47 (discussing jurisdiction and law applied by Court of Admiralty); 1 MATTHEW BACON, *NEW ABRIDGMENT OF THE LAW* 629 (T. Cunningham ed., 6th ed. 1793) (“All Maritime Affairs are regulated chiefly by the Civil Law . . .”); Address and Reasons of Dissent of the Minority of the Pennsylvania Convention (Dec. 12, 1787), *reprinted in* COGAN, *supra* note 122, at 430-31 (12.2.2.4.d) (recognizing that proceedings against ships under revenue laws “will be at the civil law”); see also OLIVER WENDELL HOLMES, *THE COMMON LAW* 25-26 (1881) (“A ship is the most living of inanimate things It is only by supposing the ship to have been treated as if endowed with personality, that the arbitrary seeming peculiarities of the maritime law can be made intelligible.”); *Moragne v. States Marine Lines*, 398 U.S. 375, 386-87 (1970) (recognizing that “[m]aritime law had always, in this country as in England, been a thing apart from the common law”).

Although Cuddihy conflated ship seizures with the general search warrant grievance, he noted that ships were entitled to less protection than houses in framing-era law. See 3 Cuddihy, *supra* note 20, at 1508, 1548-50.

150. Shortly after adopting the Bill of Rights and the 1789 Collections Act, the First Congress included a provision in the 1789 Judiciary Act that treated seizures of ships under “laws of impost” (customs) as matters within federal admiralty jurisdiction:

[T]he District courts . . . shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it

Act of Sep. 24, 1789, ch. 20, § 9, 1 Stat. 73, 76-77 (emphasis added). Note that the “savings clause” at the end of the quoted passage also demonstrates that the members of the First Congress understood that admiralty law matters were distinct from common law.

The history of federal admiralty jurisdiction is discussed in detail in DAVID W. ROBERTSON, *ADMIRALTY AND FEDERALISM* (1970). Although Robertson did not discuss directly the Framers’ understanding of a ship, his analysis indicates that there was no signifi-

eighteenth-century thought, ships were neither “houses, papers, and effects [or possessions]” nor “places.” They were ships.¹⁵¹

The current notion that the Framers intended the Fourth Amendment to address ships likely derives from Chief Justice Taft’s claim in *Carroll* that the Framers would have viewed warrantless searches of “vehicles” as “reasonable” searches under the Fourth Amendment because the First Congress had authorized customs officers to make warrantless searches of ships in the 1789 Collections Act.¹⁵² Numerous commentators have accepted uncritically Taft’s assumption that the 1789 statute reflected the Framers’ understanding of the Fourth Amendment.¹⁵³ Likewise, a number of judicial opinions have since assumed that the Fourth Amendment applied to admiralty matters (and that the treatment of ship searches reflected the understanding of the Fourth Amendment).¹⁵⁴ In fact, Taft’s assertion regarding the 1789

cant controversy over the treatment of *in rem* actions involving ships (such as seizures of ships) as admiralty matters; rather, the controversial aspects of admiralty jurisdiction involved the extent to which it reached *in personam* actions connected to ships, which might alternatively be viewed as common-law matters (for example, contracts, insurance, seamen’s wages, torts, etc.).

151. Several readers of the manuscript for this Article asked if the seizure of a ship would not have constituted a “seizure” of the people on it, or if a search of a ship would not have constituted a “search” of the possessions or effects of the people on it. The answer seems to be that the people and possessions on ships were usually viewed as being subject to maritime rather than common law, so that the issue was only whether there were grounds for seizing the ship. See 5 NATHANIEL DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW 587, ch. 172, art. 9, § 9 (1824) (“Trespass for false imprisonment will not lie at common law, where the imprisonment is merely in consequence of taking a ship as prize, though the ship has been acquitted.”).

152. *Carroll v. United States*, 267 U.S. 132, 150-51 (1924). Taft also cited later customs statutes providing for warrantless customs searches of “any vehicle, beast, or person” suspected of transporting goods. *Id.* at 151-52. These provisions are discussed *infra* note 470. (*Carroll* is discussed in more detail *infra* notes 523-531 and accompanying text.)

153. See, e.g., LASSON, *supra* note 16, at 125; LEVY, ORIGINAL MEANING, *supra* note 45, at 245; Amar, *Fourth Amendment*, *supra* note 58, at 766-67; Cloud, *supra* note 42, at 1740; 3 Cuddihy, *supra* note 20, at 1487-94. Commentators have also assumed, presumably because of *Carroll*, that other statements in ship seizure cases can be taken to reflect the meaning of the Fourth Amendment. See, e.g., Amar, *Terry*, *supra* note 58, at 1104 (asserting that a 1790 statutory provision permitting warrantless searches of ships lying within four leagues of the coast shows that the Framers intended for Fourth Amendment “reasonableness” to permit suspicionless searches); Daniel M. Harris, *Back to Basics: An Examination of the Exclusionary Rule in Light of Common Sense and the Supreme Court’s Original Search and Seizure Jurisprudence*, 37 ARK. L. REV. 646, 656-65 (1983). See also the commentaries misinterpreting an 1821 opinion by Justice Story in a ship seizure case as though it addressed exclusion under the Fourth Amendment discussed *infra* note 320.

The persistent misunderstanding of the Framers’ attitude toward ship searches may well result, at least in part, from an unfortunate gap in the historical record regarding the debates over the 1789 Collection Act. See *infra* note 470.

154. Post-*Carroll* judicial opinions have made the prochronistic error of assuming that the Fourth Amendment was always understood to apply to ships, and thus have erroneously cited ship seizure cases as though such cases shed light on the Fourth Amendment — even though the cited cases never mentioned it. See, e.g., *California v. Acevedo*, 500 U.S. 561,

Collections Act has become a prominent historical premise for the modern generalized-reasonableness construction.¹⁵⁵ (It probably has also contributed to the modern notion, which would amaze the Framers, that a house can be declared forfeit under admiralty prize court procedures.¹⁵⁶)

However, Taft's assertion was ahistorical. He ignored the explicit reference to "houses, papers, and effects" in the Fourth Amendment. Likewise, he ignored the civil-law character of admiralty law as well as the First Congress's explicit treatment of revenue seizures of ships as admiralty matters. Instead, he merely *assumed* that the authorization of warrantless ship searches in the customs statutes must have reflected the original understanding of the Fourth Amendment.

The numerous ship seizure cases decided by the Supreme Court between 1789 and 1925 provide powerful evidence of the invalidity of Taft's assumption. Notwithstanding that many of those cases involved seizures by federal officers in American ports or territorial waters, *none* of them so much as mentioned the Fourth Amendment, let alone applied it.¹⁵⁷ Indeed, several of those cases upheld ship seizures under

583-84 (1991) (Scalia, J., concurring) (citing *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), and *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 246 (1818)); *United States v. Verdugo-Urguidex*, 494 U.S. 259, 267, 289 n.10 (1990) (citing *Little*).

155. For example, in the seminal statement of the generalized-reasonableness construction in *Rabinowitz*, Justice Minton invoked Taft's claim regarding warrantless ship seizures as historical support for the claim that the Framers only meant to require that government intrusions be reasonable in the circumstances. See *United States v. Rabinowitz*, 339 U.S. 56, 60 (1949). Justice Scalia has recently repeated Taft's claim that the provision for warrantless ship searches in early customs statutes demonstrates that the Framers intended to allow broad warrantless search authority "where probable cause exists." *Wyoming v. Houghton*, 119 S. Ct. 1297, 1300 (1999). Justice Thomas has done likewise in *Florida v. White*, 119 S. Ct. 1555, 1558-59 (1999).

156. Under admiralty prize court procedure, the seizing party did not have to prove the ship committed a violation; rather the owners of a ship had the burden of proving it had *not* violated the law. A few years before *Carroll*, the Court applied the forfeiture procedures applicable to ships to automobiles that had been used to transport illegal liquor. See *Goldsmith-Grant Co. v. United States*, 254 U.S. 505 (1921). In the decades since Prohibition, legislation has greatly expanded the grounds for forfeiture. Under a 1984 statute, all real property, including a house, which has been used to facilitate a violation of federal drug laws is subject to forfeiture. See Comprehensive Crime Control Act of 1984, 21 U.S.C. § 881(a)(7) (1988). The court proceeding to determine the validity of a seizure of a house follows admiralty prize court forfeiture procedures. See 18 U.S.C. § 981(b) (1988 & Supp. IV 1992) (providing that "Supplemental Federal Rules for Certain Admiralty and Maritime Claims" shall govern procedures regarding forfeiture of assets in federal district courts).

The notion that an interest as important as a house could be subjected to the slanted procedures employed by prize courts would have amazed a framing-era lawyer. Indeed, chapter 29 of Magna Carta had explicitly decreed that no freeman would "be disseised of his freehold" except in accordance with "the law of the land" — that is, in accordance with *common-law* procedure. See *infra* note 332. The constitutional amnesia evident in the modern forfeiture statutory provisions appears to stem from *Carroll's* conflation of personal possessions, and even houses, with ships.

157. See, e.g., *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804); *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 246 (1818); *The Appollon*, 22 U.S. (9 Wheat.) 362 (1824). See also Justice Story's

statutory standards that would not be reconcilable with even the weakest possible construction of the Fourth Amendment.¹⁵⁸ The Supreme Court had never suggested that the Fourth Amendment applied to vessels prior to its decision in *Carroll*.¹⁵⁹

In a similar vein, there is little in the historical record to support the current assumption that the Framers intended the Fourth Amendment to protect commercial premises in addition to houses. Although Americans did express anger over customs officers using general writs to search warehouses, the record does not indicate that those complaints ever became part of the *legal* grievance over general warrants. As noted above, the absence of complaints about warehouse searches is a pregnant silence in Otis's 1761 argument on behalf of the merchants of Boston; a similar silence exists in Dickinson's 1768 complaint and in Samuel Adams's 1772 complaint.¹⁶⁰

The most likely explanation for the repeated emphasis on house searches, and the virtual silence regarding searches of commercial premises, is that the Framers understood that legislative authority for official inspection of commercial premises did not violate any common-law principle comparable to the castle doctrine applicable to houses. In contrast to the free market ideology the Supreme Court imposed on the Constitution in late nineteenth- and early twentieth-century rulings, the Framers were apparently comfortable with a regime in which the colonies and then the states closely regulated commercial interests.¹⁶¹

opinion in the Circuit Court decision in *United States v. La Jeune Eugenie*, 26 F. Cas. 832 (C.C.D. Mass. 1822) (No. 15,551), discussed *infra* note 320. The early federal ship seizure cases are summarized in 7 DANE, *supra* note 151, at 463-97.

158. In *Crowell v. McFadon*, 12 U.S. (8 Cranch) 94, 98 (1814), the Justices unanimously upheld a federal collector's seizure of a ship and cargo under the Embargo Act of 1808 on the ground that all that was required by the Act was the collector's honest opinion that the ship intended to violate the embargo. A year later, in *Otis v. Watkins*, 13 U.S. (9 Cranch) 339, 355-56 (1815), the Justices ruled that a jury instruction that "it was the collector's duty to have used reasonable care in ascertaining the facts on which to form an opinion" as to the ship's intention was an incorrect statement of the authority created by the Embargo Act, because the Act required only that the officer "honestly entertained the opinion under which he acted." None of the Justices or lawyers suggested that the Fourth Amendment was involved in any way.

159. The Court began to apply the Fourth Amendment to ships shortly after *Carroll*. See *Maul v. United States*, 274 U.S. 501 (1927); *United States v. Lee*, 274 U.S. 559 (1927).

160. See *supra* notes 136-139 and accompanying text.

161. See, e.g., JAMES W. ELY, *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 19-20 (1992). For examples of early statutory authority for searches and inspections regarding ships and commerce, see the statutes collected in Gerard V. Bradley, *Present at the Creation? A Critical Guide to Weeks v. United States and Its Progeny*, 30 ST. LOUIS U. L.J. 1031, 1041 n. 64 (1986). Bradley assumed that the Fourth Amendment and the state provisions were meant to apply to ships and commerce, and presented these statutes as proof there was no historical warrant requirement. I think they actually show that "houses, papers, and effects [or possessions]" was

2. *The Concerns Expressed During the Ratification Debates*

The concerns and complaints about search and seizure voiced by anti-Federalists during the ratification debates of 1787-88 were similar to those voiced during the prerevolutionary grievance. Once again, little concern was expressed regarding arrest authority; on the few occasions when it was mentioned, the concern focused on the potential use of general arrest warrants.¹⁶² The primary concern during 1787-88 was the potential for general search authority regarding houses.

Cuddihy has noted that the anti-Federalists expressed concerns with revenue searches of houses both under general warrants and without any warrants.¹⁶³ However, a clearer picture emerges if one sorts out the statements made by anti-Federalists who actually called for a federal search and seizure provision, from the more demagogic statements made by anti-Federalists who simply sought to whip up opposition to the proposed constitution. The latter professed rather fanciful fears that federal officers would search and seize everything in sight to enforce a federal "excise."¹⁶⁴ However, these dire predictions

not understood to mean ships or commerce. None of the statutes Bradley cited provided for a warrantless search of a house.

162. For example, when Patrick Henry addressed the possibility of abusive arrests during the Virginia ratification convention in 1788, he referred only to the possibility of the use of a general arrest warrant, not to a warrantless arrest. See 3 ELLIOT'S DEBATES, *supra* note 84, at 588, *quoted in part in* COGAN, *supra* note 122, at 238 (6.2.2.3). A similar focus on general arrest warrants, but not warrantless arrests, appeared in the statement by Abraham Holmes during the 1788 Massachusetts ratification convention. See *infra* note 302.

163. See 3 Cuddihy, *supra* note 20, at 1375-79.

164. These fears were based on the provision in the Constitution allowing Congress to levy "Taxes, Duties, Imposts and Excises . . ." U.S. CONST. art I, § 8. Excise taxes were aimed at the sale of internally produced merchandise, usually liquor, rather than at imports. Fears that excise taxes might lead to house searches were based partly on earlier colonial controversies, such as that over the Massachusetts excise of 1754, see *supra* note 134, and partly on reports of oppressive enforcement of excises in England, including a tax on domestic production of cider for household consumption. Those excises were enforced by requiring oaths regarding the amount that had been produced. The English cider tax became a political issue contemporaneously with the Wilkesite cases. See 2 Cuddihy, *supra* note 20, at 943-50. Even the Toryish Blackstone decried excises as oppressive and voiced concern regarding the potential for excise searches. See 1 BLACKSTONE, *supra* note 27, at 308-10.

However, notwithstanding the fulsome terms in which excise searches were predicted, it appears that there existed a broadly shared understanding that an excise search of a house would have to be authorized by a warrant or writ. For example, the anti-Federalist minority at the Maryland ratification convention expressed fears of excise searches but then proposed a federal search protection that only banned too-loose warrants as a remedy for those fears. See *Address of a Minority of the Maryland Ratifying Convention, reprinted in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 98, at 92, 96 (reciting a proposed federal provision banning too-loose warrants and then explaining that "[t]his amendment" was thought necessary to deal with "excises, the horror of a free people, by which our dwelling-houses . . . will be laid open"). Thus, it appears that the concern with excise searches of houses collapsed into the concern with searches of houses under general warrants.

were not usually connected to a call for a federal constitutional protection; instead, they were aimed at convincing readers that the proposed federal government would simply be impossible to control.¹⁶⁵ More salient for understanding the content of the Fourth Amendment are those anti-Federalist complaints raised in connection with calls for a federal bill of rights. Those anti-Federalists expressed the more focused concern that a future federal government might employ general warrants.¹⁶⁶

In sum, the complaints expressed during the prerevolutionary controversies and during the ratification debates reveal that the Framers simply did not harbor diffuse fears regarding search and seizure

165. See, e.g., *Address of Cato Uticensis*, reprinted in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 98, at 123-24 (5.7.9) (warning the reader that if you approve of the new Constitution "you subject yourselves to see the doors of your houses, them impenetrable Castles of freemen, fly open before the magic wand of the exciseman"); *Essay by a Farmer and Planter*, reprinted in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 98, at 75 (5.2.2), excerpted in COGAN, *supra* note 122, at 241-42 (6.2.4.9) (expressing fears of excise searches); *Objections by a Son of Liberty*, reprinted in 6 THE COMPLETE ANTI-FEDERALIST, *supra* note 98, at 35 (6.2.2), excerpted in COGAN, *supra* note 122, at 240 (6.2.4.6) (expressing fears of house searches under general warrants and of excise searches of bed chambers); Luther Martin, *The Genuine Information Delivered to the Legislature of the State of Maryland Relative to the Proceedings of the General Convention Lately Held in Philadelphia*, reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 98, at 54-55 (2.4.55-56) (expressing fears of excise searches).

166. See, e.g., Brutus, *supra* note 98, at 375 (2.9.28) (calling for a federal protection against general warrants); LETTERS OF CENTINEL, NO. 1, *supra* note 98, at 136 (2.7.1) (expressing fear of loss of the Pennsylvania state protection against general warrants); OBSERVATIONS ON THE NEW CONSTITUTION, AND ON THE FEDERAL AND STATE CONVENTIONS, BY A COLUMBIAN PATRIOT, reprinted in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 98, at 270 [hereinafter COLUMBIAN PATRIOT] (relevant portions quoted *infra* text accompanying note 496). See also the calls for a protection against general warrants in the *Letters from the Federal Farmer*, discussed *supra* notes 127-128; in the statements by Patrick Henry during the Virginia ratification convention, discussed *supra* note 162, *infra* note 439; in the statement by Abraham Holmes during the Massachusetts convention, quoted *infra* note 302; and in the statement by Robert Whitehill during the Pennsylvania convention, PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787-1788, at 781-82 (John Bach McMaster & Frederick D. Stone eds., 1888), discussed in 3 Cuddihy, *supra* note 20, at 1382 (expressing concern that federal officers could enter houses under general warrants).

Some anti-Federalists who did not explicitly propose a constitutional protection nevertheless expressed fears about federal searches only in terms of general warrants. See, e.g., *Essay by a [Maryland] Farmer*, MD. GAZETTE, Feb. 15, 1788 (likely authored by John F. Mercer), reprinted in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 98, at 14 (5.1.13) (expressing doubts that federal courts would treat searches of houses under general warrants as illegal); John Dewitt, *To the Free Citizens of the Commonwealth of Massachusetts*, No. IV, (BOSTON) AM. HERALD, Oct.-Dec. 1787, reprinted in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 98, at 33-34 (4.3.21-22) (expressing fears of federal searches and contrasting the Massachusetts protection against general warrants). See also the address of the Maryland anti-Federalists, discussed *supra* note 164.

Calls for a constitutional protection broader than a prohibition of general warrants were infrequent. *But see Old Whig*, No. 5, (PHIL.) INDEP. GAZETTEER, Nov. 1, 1787, excerpted in COGAN, *supra* note 122, at 240 (6.2.4.5) (calling for a protection of persons, houses, and papers "from seizure and search upon general suspicion or general warrants").

authority. Rather, they were concerned specifically with the threat posed by general warrants, especially in the context of revenue searches of houses.

3. *The Post-Framing Understanding of the Constitutional Search and Seizure Provisions*

Previous commentaries have tended to jump from the framing of the Fourth Amendment to the 1886 *Boyd* decision,¹⁶⁷ which is widely viewed as the Supreme Court's first substantial construction of the Fourth (and Fifth) Amendment.¹⁶⁸ However, a variety of aspects of early nineteenth-century legal pronouncements (or silences) cast light on the original meaning of the Fourth Amendment — and reveal that the original meaning differed from modern constructions.

To begin with, the First Congress did not address the warrantless arrest authority of federal officers. The 1789 Judiciary Act, enacted contemporaneously with Congressional approval of the Fourth Amendment, created authority for magistrates to issue arrest warrants for federal offenses.¹⁶⁹ It also created federal marshals and gave them the duty of executing writs and warrants issuing from federal courts — but was silent as to their authority to make warrantless arrests.¹⁷⁰ In 1792, Congress conferred on marshals authority equivalent to that of a state sheriff to call out a posse comitatus of citizens (that is, the local militia) to suppress riots or insurrections.¹⁷¹ However, Congress never

167. *Boyd* declared that a federal statute that authorized court orders requiring the production of invoices in customs disputes was unconstitutional as a violation of both the Fifth Amendment's self-incrimination clause and the Fourth Amendment. On the way to that ruling it articulated the basis for what became known as the "mere evidence doctrine." It also anticipated the modern exclusionary rule by ordering that the information obtained from the unconstitutionally seized invoice could not be used in any further proceeding. I discuss *Boyd* and criticize its historical claims regarding the Fourth Amendment *infra* notes 511-515 and accompanying text.

168. See, e.g., LANDYNSKI, *supra* note 38, at 49; LASSON, *supra* note 16, at 106-07 (covering the period from the framing to *Boyd* in a page and a half). Cuddihy's account essentially stopped with the framing; so did Levy's.

169. Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91 (providing authority for any judge or justice of the peace to order arrest of violators of federal law "agreeably to the usual mode of process").

170. See *id.* § 27, 1 Stat. at 87 (creating the office of federal marshal and charging that officer with the duty of executing writs and warrants issued by federal judges). The marshal's duty to execute writs and warrants has been continuously in effect with only minor changes in phrasing; it now appears in 28 U.S.C. § 566(c) (1994). The likely explanation for the First Congress's failure to enact legislative warrantless arrest authority is that the general understanding in 1789 was that any officer possessed the same common-law arrest authority as that inherently possessed by any person — but no more. See *infra* note 218.

171. A 1792 statute titled "An Act to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections, and repel invasions" conferred additional authority on the federal marshal:

explicitly authorized marshals to make warrantless arrests until 1935.¹⁷² Thus, it does not appear that early Congresses were much concerned with warrantless arrests by federal officers.

That the marshals of the several districts, and their deputies, shall have the same powers in executing the laws of the United States, as sheriffs and their deputies, in the several states, have by law, in executing the laws of the respective states.

Act of May 2, 1792, ch. 18, § 9, 1 Stat. 265. This provision was reenacted several times: Act of Feb. 28, 1795, ch. 36, § 9, 1 Stat. 424, 425 (act with similar title); Act of July 29, 1861, ch. 25, § 7, 12 Stat. 281, 282 (act with similar title); Rev. Stat. § 788 (1874); and Judicial Code of 1948, ch. 646, § 549, 62 Stat. 910, 912. This provision is currently 28 U.S.C. § 564 (1994).

Judicial opinions and commentaries have asserted that the 1792 provision was intended to confer broad warrantless arrest authority on federal marshals and thus demonstrates the early Congress's approval of wide use of warrantless arrest authority. See, e.g., *United States v. Watson*, 423 U.S. 411, 418, 420 n.2 (1976); Amar, *Fourth Amendment*, *supra* note 58, at 764. However, the title of the statute — referring to the calling out of the militia to suppress insurrections — indicates that Congress had in mind the sheriff's common-law "power of the county" to call out the posse comitatus to suppress riots or civil disorders. See, e.g., 1 BLACKSTONE, *supra* note 27, at 343; Note, *Baltimore City's Liability for Riot Damage: The Mayor as Conservator of the Peace*, 33 MD. L. REV. 73, 76-79, 84-91 (1973) (discussing sheriff's authority to call out posse comitatus to suppress riots). The federal legislation may have been prompted by the agitation against the 1791 federal excise on liquor that ultimately erupted in the 1794 Whiskey Rebellion.

Unfortunately, there is no record of any debate in the Senate regarding this Act. The record of the debate on this statute in the House of Representatives is limited but nevertheless supports the interpretation offered. The bill was treated as part of the "Militia Bill" and the debate was mostly about what sort of federal authority should exist to call out a state militia to respond to an insurrection. See 3 ANNALS OF CONG. 557, 574-80 (Gales & Seaton, 1849) (page numbers cited are to the edition with the running head "History of Congress," see *infra* note 475). However, the record indicates that there was some discussion of the potential for popular resistance to the excise and of marshals' authority to call out the posse comitatus. Representative Clark referred to "call[ing] forth the military in case of any opposition to the excise law." 3 ANNALS OF CONG., *supra*, at 575. Representative Mercer observed that "the marshals of the several states have a power to call forth the *posse comitatus*; and additional marshals should be appointed, and only in the last extremity they may call forth the military power." *Id.* (Because states did not use the office of "marshal," the reference to "the marshals of the several states" must be to the federal marshals serving in the various states.) In contrast, the record does not disclose any discussion of marshals' warrantless arrest authority as such.

172. In 1935, Congress added to the authority of federal marshals the power to "make arrests without warrant" for any federal offenses "committed in their presence" or "in cases where such felony has in fact been or is being committed and they have reasonable grounds to believe that the person to be arrested has committed or is committing it." Act of June 15, 1935, ch. 259, § 2, 49 Stat. 377, 378. The language of this provision did not authorize arrests on probable cause of felony, but only when there was an actual felony.

In 1948, Congress expanded the marshal's warrantless arrest authority by providing for warrantless arrests based on "reasonable grounds to believe that the person to be arrested has committed or is committing" a federal felony. At that time, Congress also moved this provision from the duties of judicial officers to the criminal title of the federal code. See Act of June 25, 1948, ch. 203, § 3053, 62 Stat. 817 (codified at 18 U.S.C. § 3053 (1994)) (providing authority for warrantless arrests based on "reasonable grounds"). In 1988, Congress reinserted a similar (and apparently redundant) statement of warrantless arrest authority in the judiciary provisions regarding the authority of the marshal. See Pub. L. No. 100-690, § 7608(a), 102 Stat. 4181, 4514 (codified at 28 U.S.C. § 566(d) (1994)).

Early nineteenth-century judicial interpretations of the Fourth Amendment and of the state search and seizure provisions also provide important evidence as to how the Framers understood these texts. (At the least, they are better guides to the original understanding than are judicial interpretations offered a century or more after the framing.) Post-framing interpretations indicate that judges understood the provisions banning “unreasonable searches and seizures” as bans against too-loose warrants, but not as standards for warrantless intrusions.

Federal courts rarely addressed the Fourth Amendment during the nineteenth century. That in itself is strong evidence that the amendment was not understood to be a comprehensive regulation of searches and arrests in that period — federal officers certainly made arrests and searches.¹⁷³ Moreover, the early federal cases which did mention the Fourth Amendment almost always addressed warrant authority in some respect, and often involved a challenge to legislation that allowed a novel use of warrants.¹⁷⁴ For example, even the 1886

173. This is not to say that search issues could be raised as readily then as now; for example, federal appellate review of criminal convictions was very limited until the late nineteenth century. See LESTER BERNHARDT ORFIELD, *CRIMINAL APPEALS IN AMERICA* 244-45 (1939).

174. For Supreme Court decisions that referred to the Fourth Amendment, see: *Ex parte Burford*, 7 U.S. (3 Cranch) 447, 450-51 (1806), in which the Marshall Court ordered the release of a man in a habeas corpus proceeding who had been imprisoned by the justices of the peace of the District of Columbia for being “an evil doer and disturber of the peace” (the Court quoted the warrant clause of the sixth Article to the Constitution (the Fourth Amendment) while reminding the justices of the peace that a warrant of commitment to prison could be issued only upon a conviction for a recognized crime); *Ex parte Bollman and Swartwout*, 8 U.S. (4 Cranch) 75, 110 (1807), in which the Marshall Court in a habeas corpus proceeding, during which counsel for a petitioner recited the Fourth Amendment and emphasized the warrant clause, ruled that an arrest warrant issued to commit two men to trial for treason was invalid because it lacked an adequate showing of probable cause as to the offense (In an earlier proceeding of the Circuit Court for the District of Columbia in the latter case, Chief Judge Cranch had opined that the issuance of an arrest warrant against the men was inconsistent with the Fourth Amendment (denoted “sixth article of the amendments”). See *United States v. Bollman*, 24 F. Cas. 1189, 1190, 1192-93 (C.C.D.C. 1807) (No. 14,622)); *Smith v. Maryland*, 59 U.S. (18 How.) 71, 76 (1855), in which the Justices turned away a challenge brought by Maryland oystermen against a Maryland state statute that authorized search warrants for the regulation of oystering on the grounds that the Fourth Amendment “restrains the issue of warrants only under the law of the United States, and has no application to state process”; *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855), in which the Court rejected a challenge to a “warrant” used for execution of a civil judgment because the Fourth Amendment did not apply to writs or process issued in a private civil action, but only to warrants issued in causes to which the United States is a party; *Ex parte Jackson*, 96 U.S. 727, 733 (1877), in which the Court, while discussing statutory postal authority, noted in dicta that letters and packages in the mail could not be opened without a search warrant; *Boyd v. United States*, 116 U.S. 616 (1886); and *West v. Cabell*, 153 U.S. 78, 86-87 (1894), in which the Court held that an arrest warrant that was mistakenly made out in a name other than that of the intended person contravened constitutional standards.

Reported decisions by lower federal courts rarely referred to the Fourth Amendment. One did manifest an understanding that the provision addressed warrant standards. See *In*

Boyd decision, which involved a challenge to the constitutionality of statutory authority by which the government had obtained an invoice in a customs dispute, implicitly dealt with search warrant authority.¹⁷⁵ Conversely, although federal courts discussed the validity of warrantless arrests on a number of occasions, they rarely mentioned the Fourth Amendment when they did so — and the few arrest cases that did mention the Fourth Amendment were of the exception-that-proves-the-rule variety.¹⁷⁶

State constitutional pronouncements and judicial decisions regarding search and seizure also focused on warrant authority, rather than treating reasonableness as a standard for warrantless intrusions. When Ohio adopted a declaration of rights in 1802, it changed “unreasonable searches and seizures” to “unwarrantable searches and seizures” — hardly a change the drafters would have made if reasonableness had been the accepted constitutional standard for assessing warrantless intrusions.¹⁷⁷

re Meador, 16 F. Cas. 1294, 1298 (D.C.N.D. Ga. 1869) (No. 9375) (discussing the history of the Fourth Amendment and asserting that the Fourth Amendment is a “provision[] in regard to search warrants” and that it applies only to criminal proceedings because search warrants were never recognized at common law for use in civil proceedings).

175. The statute at issue in *Boyd* provided for a court order to compel production of invoices in customs disputes. That statute replaced an earlier Civil War-era statute that had provided for use of search warrants to obtain such documents. See 116 U.S. at 620-21. By ruling that the statutory authority for the court-ordered production of an invoice was an unconstitutional “seizure,” *Boyd* effectively precluded reauthorization of search warrants to obtain such documents. Cf. *Carroll v. United States*, 267 U.S. 132, 147 (1925) (observing that *Boyd’s* ruling prohibited “unreasonable search even where made upon a search warrant”). *Boyd* is discussed in more detail *infra* notes 511-515 and accompanying text.

176. The Supreme Court discussed the standards for a federal warrantless arrest in some detail *without mentioning* the Fourth Amendment in its 1900 decision *Bad Elk v. United States*, 177 U.S. 529 (1900). Several lower federal court opinions also assessed warrantless arrests made by federal officers without mentioning the Fourth Amendment. See, e.g., *In re Engle*, 8 F. Cas. 716 (C.C.D. Md. 1877) (No. 4488); *Ex parte Geissler*, 4 F. 188 (C.C.N.D. Ill. 1880); *In re Deputy Marshals*, 22 F. 153 (C.C.E.D. Mo. 1884).

The exception-that-proves-the-rule cases include: *Johnson v. Tompkins*, 13 F. Cas. 840, 849 (C.C.E.D. Pa. 1833) (No. 7416) (discussing the Fourth Amendment only in connection with a judge’s oral order to arrest, but not when assessing a constable’s warrantless actions; discussed *infra* note 184); and *United States v. Tureaud*, 20 F. 621, 622-23 (C.C.E.D. La. 1884) (condemning a barebones misdemeanor charge as failing the Fourth Amendment’s probable cause standard, but applying the Fourth Amendment by declaring that all misdemeanor prosecutions necessarily involved the use of “warrants” in the form of sworn complaints). A more ambiguous treatment appears in *Ex parte Morrill*, 35 F. 261, 266-67 (C.C.D. Or. 1888) (stating that the Fourth Amendment was never understood to prohibit an officer from making warrantless arrest for offense committed in his presence, and an officer’s observations are analogous to sworn-to allegation of probable cause).

177. See OHIO CONST. of 1802, art. VIII, § 5, *reprinted in* 7 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 547, 554 (William F. Swindler ed., 1973) [hereinafter SWINDLER].

That the people shall be secure in their persons, houses, papers, and possessions from all unwarrantable searches and seizures; and that general warrants, whereby an officer may be

State court interpretations of state search and seizure provisions banning “unreasonable searches and seizures” also focused on warrant authority. Some state court decisions assessed the constitutionality of statutes that authorized new uses of search warrants.¹⁷⁸ The state courts, however, rarely addressed the constitutional provisions when they assessed the lawfulness of warrantless arrests. The few state court opinions regarding warrantless arrests to address constitutional provisions banning “unreasonable searches and seizures” concluded that such provisions *were not intended to apply* to warrantless arrests.¹⁷⁹

The 1814 Pennsylvania case *Wakely v. Hart* was probably the most widely cited early American case on the law of arrest.¹⁸⁰ Wakely sued a high constable of Philadelphia for false imprisonment, alleging that the officer had violated the state constitutional prohibition against “unreasonable searches and seizures” simply because he had arrested Wakely without a warrant.¹⁸¹ Unsurprisingly, the Pennsylvania

commanded to search suspected places, without probable evidence of a fact committed, or to seize any person or persons not named, whose offences are not particularly described, and without oath or affirmation, are dangerous to liberty, and shall not be granted.

Id. “Unwarrantable” meant “[n]ot defensible; not to be justified; not allowed.” See SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755) (unpaginated) [hereinafter JOHNSON’S DICTIONARY]. Note that “unwarrantable” is nearly a synonym for the Cokean meaning of “unreasonable,” discussed *infra* notes 391-397 and accompanying text. See also *infra* note 417 and accompanying text.

178. See, e.g., *Commonwealth v. Dana*, 43 Mass. (2 Met.) 329 (1841) (upholding the constitutionality of a state statute authorizing search warrants for unlawful lottery materials as complying with the state search and seizure provision); *Fisher v. McGirr*, 67 Mass. (1 Gray) 1 (1854) (holding that a statutory provision authorizing search warrants for liquor did not satisfy the requirements of the state search and seizure provision). For a more detailed discussion of *Dana*, see discussion *infra* note 318.

179. In addition to the state arrest cases discussed in the text, there is another set of exception-that-proves-the-rule cases. During the late nineteenth century, several state courts invoked the constitutional search and seizure provisions in striking down state statutes that purported to authorize warrantless arrests for misdemeanors based on probable cause, even though, at common law, an arrest for a misdemeanor could have been justified only by an arrest warrant if the arresting person had not actually witnessed the commission of the offense. (This common-law rule is discussed *infra* notes 216, 220-222 and accompanying text.) Some state courts reasoned that statutes authorizing officers to make misdemeanor arrests were the functional equivalent of “general warrants” for misdemeanor arrests, and ruled the statutes unconstitutional. See, e.g., *In re Kellam*, 55 Kan. 700, 41 P. 960, 961 (1895) (statute permitting arrests for unwitnessed misdemeanor is “in effect, a revival of the odious general warrants”).

180. 6 Binn. 315 (Pa. 1814).

181. Although Pennsylvania had not used “unreasonable” in its 1776 state constitutional search and seizure provision, see discussion *infra* notes 353-366 and accompanying text, it later added the term in 1790 when the provision was amended to read:

Sect. VIII. That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures: And that no warrant to search any place, or to seize any person or things, shall issue, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.

Supreme Court rejected Wakely's strained argument.¹⁸² However, the Pennsylvania judges did not conclude that the warrantless arrest conformed to a constitutional reasonableness standard. Rather, Chief Justice Tilghman wrote that the state search and seizure provision had nothing to do with warrantless arrests:

The whole [search and seizure provision] was nothing more than an affirmation of the common law, for general warrants have been decided to be illegal; but as the practice of issuing them had been ancient, the abuses great, and the decisions *against them* only of modern date, the agitation occasioned by the discussion of this important question had scarcely subsided, and it was thought prudent to enter a *solemn veto* against this powerful engine of despotism.¹⁸³

Thus, *Wakely* construed the provision banning "unreasonable searches and seizures" as simply prohibiting any authorization of general warrants.¹⁸⁴

The Massachusetts Supreme Judicial Court gave a similar description of its state provision (the provision in which "unreasonable searches and seizures" had been introduced) in its 1850 decision *Rohan v. Sawin*:

It has been sometimes contended, that [a warrantless arrest] was a violation of the great fundamental principles of our national and state consti-

PA. CONST. of 1790, art. IX, § 8, reprinted in COGAN, *supra* note 122, at 235 (6.1.3.6.b).

182. Wakely's argument was strained because common law allowed for warrantless arrests for felony "on suspicion" if there had been "felony in fact." (The common-law "on suspicion" standard is discussed *infra* notes 226-228 and accompanying text.) I speculate that Wakely's claim was prompted by an out-of-context reading of a statement the Pennsylvania court had earlier made in *Conner v. Commonwealth*, 3 Binn. 38, 44 (1810), to the effect that "a man . . . should not be arrested, unless [on the basis of a sworn complaint]." Because the only issue in *Conner* was whether a constable was obligated to execute a warrant that lacked a sworn allegation of cause, that statement was undoubtedly meant to relate to arrests that were made by warrant. However, if taken out of context, the statement may have appeared to make warrantless arrests impermissible.

183. 6 Binn. at 318 (emphasis in original).

184. The treatment of the Pennsylvania provision in *Wakely* was followed in *Johnson v. Tompkins*, 13 F. Cas. 840 (C.C.E.D. Pa. 1833) (No. 7416). The plaintiff, a slave owner who was hit and injured in an attempt to recapture a fugitive slave, brought a successful trespass action in federal court against Tompkins (a justice of the peace) and others (including a constable) who had resisted his efforts. In the course of a lengthy opinion, Judge Baldwin described the law of warrantless arrest, citing *Wakely* ("6 Binn. 318, 319") without any reference to either the Pennsylvania search and seizure provision or the Fourth Amendment. *See id.* at 844-45. However, when Judge Baldwin later addressed an oral arrest order that had been given, during the events at issue, by a state judge named M'Neil, he quoted both the 1790 Pennsylvania provision and the Fourth Amendment and declared that the oral arrest order by a state judge was "in direct violation of both constitutions" and "void" because it was "utterly wanting every requisite prescribed." *Id.* at 849. Thus, he concluded that the oral judicial order to arrest could not justify any act by the defendants. The specific application of constitutional provisions in this case also reflects a view that the constitutional search and seizure provisions reached judicial acts, but not the conduct of constables acting without warrant.

tutions, forbidding unreasonable searches and seizures and arrests, except by warrant founded upon a complaint made under oath. Those provisions doubtless had *another and different purpose*, being in restraint of general warrants to make searches, and requiring warrants to issue only upon a complaint made under oath. They do not conflict with the authority of constables or other peace-officers, or private persons under proper limitations, to arrest without warrant those who have committed felonies.¹⁸⁵

Thus, both *Wakely* and *Rohan* construed the ban against “unreasonable searches and seizures” to be aimed at searches and seizures made under general warrants rather than warrantless arrests.¹⁸⁶ (Unfortunately, some recent discussions of these cases may have conveyed the misimpression that they applied constitutional search and seizure provisions to warrantless arrests.¹⁸⁷)

In addition, the Massachusetts Supreme Judicial Court had earlier discussed the meaning of “unreasonable searches and seizures” in its

185. 59 Mass. (5 Cush.) 281, 284-85 (1850) (emphasis added). Defendant constable had made a warrantless arrest of plaintiff for theft, but no charge was prosecuted. Plaintiff brought a trespass action for false arrest. The trial judge gave the unusual instruction that “reasonable and probable ground to suspect” theft was not a justification for a warrantless arrest unless there was a danger the suspected person would flee. The jury returned a verdict for the plaintiff. The Massachusetts Supreme Court reversed, and declared that “[p]eace officers without warrant may arrest suspected felons.” *Id.* at 284. Although this ruling dropped the framing-era “felony in fact” requirement for a warrantless arrest, Justice Dewey’s opinion did not acknowledge the change. See *infra* note 244. In the course of justifying conferral of broad arrest authority on officers, Dewey asserted that constitutional search and seizure provisions did not limit warrantless arrest authority, as quoted in the text.

186. See also *Mayo v. Wilson*, 1 N.H. 53, 59-60 (1817). The New Hampshire Supreme Court upheld a warrantless arrest under a state statute making Sabbath-breaking an offense. The court concluded that the statutory authorization for a warrantless arrest did not violate the state “law of the land” provision. The court also briefly noted, with regard to the state search and seizure provision (which was identical to the Massachusetts provision, see *infra* note 380), that a warrantless arrest on “open and manifest guilt” was “no more unreasonable” than an arrest by valid warrant, and that the search and seizure provision “does not seem intended to restrain the legislature from authorizing arrests without warrant, but to guard against abuse of warrants issued by magistrates.” *Id.* The latter part of that statement reflects the usual understanding that the constitutional provisions only regulated warrant authority. The earlier statement that a warrantless arrest was not “more unreasonable” than an arrest under a valid warrant may appear to be an early treatment of “unreasonable searches and seizures” as a relativistic standard, but can also be understood simply as saying that a warrantless arrest on “strong evidence” was no more inherently illegal than an arrest under a valid warrant would have been — that is, that a warrantless arrest on strong evidence was perfectly lawful.

187. See *California v. Acevedo*, 500 U.S. 561, 581 (1991) (Scalia, J., concurring) (citing *Wakely* shortly after referring to “unreasonable” in the Fourth Amendment without mentioning that *Wakely* stated that the constitutional ban against “unreasonable searches and seizures” did not apply to warrantless arrests); see also Amar, *Fourth Amendment*, *supra* note 58, at 763 (describing *Wakely*, *Rohan*, and *Mayo*, see preceding note, as “briskly dismissing” a warrant requirement for arrests, without mentioning that those courts treated warrantless arrests as falling outside of the constitutional protection against “unreasonable searches and seizures”).

1838 decision *Banks v. Farwell*.¹⁸⁸ An officer had arrested Banks pursuant to a warrant and then, after Banks confessed to a theft, went to Banks's shop and entered without a warrant to retrieve property Banks had just admitted was there. The court concluded that neither the Fourth Amendment nor the Massachusetts provision prohibited the intrusion because "[w]hat is meant by 'unreasonable searches and seizures,' is clearly explained by the subsequent words in both constitutions."¹⁸⁹ Of course, the "subsequent words" only set out standards for valid warrants.

These judicial statements that search and seizure provisions against "unreasonable searches and seizures" did not apply to warrantless intrusions were consistent with early constitutional commentaries. St. George Tucker, William Rawle, and Justice Joseph Story each described the Fourth Amendment and state search and seizure provisions exclusively in terms of the warrant standards that banned the use of general warrants. None discussed standards for warrantless intrusions in that context, and none identified a reasonableness standard distinct from the standards for a valid warrant.¹⁹⁰ As late as 1868, Thomas Cooley used "Unreasonable Searches and Seizures" as the heading for his discussion of the Fourth Amendment, but discussed only warrant standards, not warrantless intrusions, under that heading.¹⁹¹

188. 38 Mass. (21 Pick.) 156 (1838); *see also infra* note 284.

189. *Banks*, 38 Mass. at 159.

190. St. George Tucker described the Fourth Amendment as affording a test "for trying the legality of any warrant." ST. GEORGE TUCKER, ANNOTATIONS TO BLACKSTONE'S COMMENTARIES app. at 301 (1803). He included annotations to the Fourth Amendment and the Virginia search and seizure provision at Blackstone's condemnation of general warrants, *see id.* at 291 n.4 (annotating the Blackstone passage discussed *supra* note 78), and at Blackstone's statement that imprisonment under an unspecific warrant was "unreasonable," *see id.* at 137 n.22 (annotating the Blackstone passage discussed *infra* note 418). However, he did not mention either provision in connection with Blackstone's discussion of the standard for a warrantless arrest.

Similarly, William Rawle discussed the Fourth Amendment as pertaining only to warrant authority. *See* WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 127 (Philip Nicklin Law Bookstore 2d ed. 1829).

Justice Joseph Story treated the Fourth Amendment similarly, writing that it was "little more than the affirmance of a great constitutional doctrine of the common law" and that its inclusion in the Bill of Rights reflected the controversies "upon the subject of general warrants almost upon the eve of the American revolution." He did not discuss standards for warrantless intrusions but only the ban against general warrants — hence, it is clear that the "great constitutional doctrine" he referred to was the illegality of general warrants. *See* 3 JOSEPH STORY, COMMENTARIES § 1895, 748 (1st ed. 1833).

191. *See* COOLEY, *supra* note 92, at 299-308. Cooley still stressed the protection of the house as the focus of the Amendment — the second sentence in his commentary on the Fourth Amendment invoked the doctrine that a man's house is his castle. *See id.* at 299-300. He then discussed the condemnation of general warrants in the Wilkesite cases and in the American colonial opposition to general writs of assistance, and commented that, although those matters were in the past, "it has not been deemed unwise to repeat in the State consti-

In sum, the historical record does not support the common assumptions that the Framers must have intended the Fourth Amendment to be a comprehensive regulation of search and arrest authority and to articulate a standard for warrantless intrusions. An authentic historical account of the original meaning of the Fourth Amendment must account for both the focused nature of the complaints that appeared prior to the framing and the focused character of the post-framing judicial interpretations of the search and seizure provisions.

V. WHY IT MADE SENSE FOR THE FRAMERS TO FOCUS ON PROHIBITING LEGISLATIVE APPROVAL OF GENERAL WARRANTS

The preceding Parts have argued that existing accounts of the original meaning of the Fourth Amendment rest on misinterpretations of the historical evidence. This Part begins the task of piecing together an authentic account of the original meaning. Specifically, it offers two somewhat overlapping explanations for the Framers' focus on banning general warrants. It first draws on common-law doctrine regarding arrest and search authority to show that the Framers understood warrant authority as the most relevant and potent mode of arrest and search authority, especially when intrusions of houses were involved; thus, the Framers perceived that control of warrant authority would control the officer. It next argues that common-law doctrine did not include the notion that an officer's misconduct might consti-

tutions, as well as in the national, the principles already settled in the common law upon this vital point in civil liberty." *Id.* at 301-03. In the remainder of his discussion, he described the requisites for valid issuance and execution of "criminal process" and "search-warrants" and discussed constitutional limits on legislative power to authorize novel uses of search warrants. *Id.* at 303-07. In particular, he opined that legislative power to authorize "process" for entering houses to search books and papers "can properly be exercised only in extreme cases." *Id.* at 306. In the context of that discussion of legislative authorization of warrants, he also asserted that "it would generally be safe for the legislature to regard all those searches and seizures 'unreasonable' which have hitherto been unknown to the law, and on that account abstain from authorizing them." *Id.* at 307. The implicit premise underlying Cooley's discussion of warrant authority is that the use of warrants should be carefully regulated because warrants could provide authority for intrusions, including even searches of houses, that would not otherwise exist. Thus, he concluded by noting that except for instances in which search warrants may be legal, "the law favors the complete and undisturbed dominion of every man in his own premises, and [jealously] protects him in it . . ." *Id.* at 308.

Cooley also addressed the meaning of "unreasonable searches and seizures" as a Justice of the Michigan Supreme Court in *Weimer v. Bunbury*, 30 Mich. 200, 208 (1874), a challenge to the constitutionality of a state statute authorizing a "warrant" to levy against the property of a delinquent tax collector for undelivered tax receipts. The Michigan search and seizure provision declared that "[t]he person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures" and forbade issuance of too-loose warrants. MICH. CONST. of 1850, art. VI, § 26. Upholding the statute, Cooley observed that the "main purpose [of the constitutional provision] was to make sacred the privacy of the citizen's dwelling and person against everything but *process* issued upon a showing of legal cause for invading it." 30 Mich. at 208 (emphasis added).

tute a government illegality; thus, the Framers would not have perceived any basis for addressing the conduct of warrantless officers in a constitutional text.

A. *Why the Framers Were Concerned Only with Prohibiting General Warrants*

Framing-era arrest and search authority was both more complex and more restrictive than modern commentaries have suggested. In particular, the common law did not provide officers with discretionary search and seizure authority. Although use of warrants was not “required” in quite the same way as it is today, the warrant was far more salient in common-law authority than it is in modern doctrine. Indeed, the historical sources show that the Framers worded the search and seizure provisions as they did to counter the possibility that legislators might authorize use of general warrants for customs searches of houses, and thereby open a unique breach in the common law’s prohibition of discretionary house searches.

1. *The Salient Characteristics of Framing-Era Criminal Law Enforcement Authority*

Proactive criminal law enforcement had not yet developed by the framing of the Bill of Rights; in fact, even post-crime investigation by officers was minimal.¹⁹² Criminal law was still conceived largely in terms of disputes between man and man. Although the law recognized a number of complainantless crimes (such as public drunkenness and violation of Sabbath laws), they appear not to have been viewed as seriously as modern complaintless crimes such as drug offenses. In addition, the institutions of criminal justice were still rudimentary. There were no police departments in the colonies or early states. In fact, there were no professional law enforcement officers.

The peace officer, most commonly a constable,¹⁹³ was usually a low status “freeman” pressed into a tour of duty for a year.¹⁹⁴ He was not

192. See, for example, the following description of criminal justice in Boston:

Through the eighteenth century the use of legal force was ordinarily a direct response to the demands of private citizens for help. The victim of robbery or assault called a watchman, if available, and afterward applied to a justice for a warrant and a constable to make or aid in the arrest. The business of detection was largely a private matter, with initiative encouraged through a system of rewards and fines paid to informers. Neither state nor town made any provision for the identification or pursuit of the unknown offender, except through the coroner’s inquest.

ROGER LANE, *POLICING THE CITY: BOSTON 1822-1885*, at 7 (1967).

193. Although there were some local variations, the sheriff and his deputies were primarily concerned with the service and execution of writs regarding civil litigation and made arrests primarily in connection with bringing defendants in *civil* litigation before the courts.

paid a salary; rather, he was a part-time officer who received small fees for performing various services, probably while attempting to maintain his usual occupation. Although constables in some cities might have been loosely organized under a “high constable,” and might have been augmented by a nightwatch, peace officers were not numerous; the usual pattern was one constable for each parish, ward, or similar local jurisdiction. Thus, the constable often depended on the assistance of bystanders to execute an arrest — in fact, the constable’s authority to command the assistance of others may have been the most distinctive attribute of his office.¹⁹⁵

Constables were expected to preserve order by keeping an eye on taverns, controlling drunks, apprehending vagrants, and responding to “affrays” (fights) and other disturbances¹⁹⁶ — but they were not oth-

The sheriff also had the “power of the county” to quell riots and civil disturbances, but he and his deputies were otherwise uninvolved in criminal law enforcement. See HENING, *supra* note 25, at 153 (stating that arrest warrants were most commonly issued to constables rather than to sheriffs). Hening was a compiler of Virginia statutes. His justice of the peace manual is especially useful as a source on the content of American law at the date of the framing of the Fourth Amendment, especially because it is one of the few such publications that sometimes commented on actual practices as well as doctrines.

194. Cf. DOUGLAS GREENBERG, *CRIME AND LAW ENFORCEMENT IN THE COLONY OF NEW YORK, 1691-1776*, at 156-58 (1974) (describing the nightwatch and constables in New York City). Greenberg notes that “there appears to have been great difficulty in keeping a sufficient number of constables in office,” that “[m]en of questionable integrity and scruples were sometimes the only people willing to serve” as constables, and that “there can be no doubt that the first link in the chain of criminal justice in colonial New York — the exercise of police powers by constables and sheriffs — was a very weak one indeed.” *Id.* at 163, 165, 167; see also LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY 27-30, 67-68* (1993).

195. See 1 HALE, *supra* note 75, at 588. Blackstone’s successor in the Vinerian chair of law at Oxford commented that:

The right of quelling an affray or apprehending a felon upon view every other man partakes with the constable, but the constable as a public person has what others have not, the right of requiring any of the king’s subjects to assist him in executing the king’s laws; and he that refuses to obey him becomes liable to fine and imprisonment.

1 ROBERT CHAMBERS, *A COURSE OF LECTURES ON THE ENGLISH LAW: 1767-1773*, at 245 (Thomas M. Curley ed., 1986). Note, however, that Chambers’s lectures were not published at the time of the framing. See *id.* at xi; see also HENING, *supra* note 25, at 20, 37 (stating that a private person is bound to assist an officer if asked and risks punishment if he refuses); *id.* at 39 (stating that a private person could not command assistance to arrest); WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW 34* (1975) (“In [the Anglo-American] tradition, government did not have vast bureaucratic armies of officials to enforce its laws, but instead relied on its subjects to aid the few officials who did exist in their task of law enforcement.”). Nelson also notes that this meant that community sentiment could blunt law enforcement efforts. See *id.* at 34-35.

196. The constable had a variety of order maintenance roles. For example, he policed taverns. In England, statutes that created misdemeanor offences (for example, vagrancy) sometimes also provided authority for constables to arrest on view of a violation. A number of colonies and states also enacted a variety of misdemeanor-level offenses for which only constables, but not private persons, could make arrests. In addition to vagrancy laws, Sabbath violation offenses were often enforceable only by constables or similar officers. See, e.g., *Mayo v. Wilson*, 1 N.H. 53, 59-60 (1817) (concerning the New Hampshire statute pro-

erwise expected to investigate crime.¹⁹⁷ Instead, the mobilization of criminal justice depended almost entirely on private initiation of criminal prosecutions. Except for homicides, which might be inquired into by a coroner's inquest or grand jury, the initiation of arrests and searches commenced when a crime victim either raised the "hue and cry" or made a sworn complaint. How and how often (if at all) the hue and cry was used in late eighteenth-century America is not well understood, but it appears to have been reserved primarily as a response to "fresh" crimes, especially robbery and escapes.¹⁹⁸

viding authority for "selectmen" and "tythingmen" (local officers) to arrest persons traveling on Sunday that was the basis for the arrest); see also discussion *supra* note 186. Hale and Blackstone based much of their descriptions of the power of constables on these statutes. See 2 HALE, *supra* note 75, at 88-89; 1 BLACKSTONE, *supra* note 27, at 344-45. Some American states adopted similar statutes. See THE WORKS OF JAMES WILSON 568-69 (Robert G. McCloskey ed., 1967) (reprinting the 1790-91 law lectures given by Wilson, one of the American Framers). Note, however, that Hening remarked in 1794 that there had been "few instances" in Virginia where a constable had attempted to exercise "the same latitude of power as exercised in England." HENING, *supra* note 25, at 20.

See also Bradley, *supra* note 161, at 1041-45 n.64 (setting forth examples of such statutes). A few early American statutes describe the duties and authority of constables. See THE LAWS AND LIBERTIES OF MASSACHUSETTS 13 (1929, reprinting the 1648 edition); THE FIRST LAWS OF THE STATE OF CONNECTICUT 23-24 (1984, reprinting the 1784 edition); see also BRADLEY CHAPIN, CRIMINAL JUSTICE IN COLONIAL AMERICA: 1606-1660, at 96-97 (1983).

197. A number of common-law statements reflect an expectation that warrantless arrests would be resorted to primarily when an offense was *observed* and there was pursuit of fresh crime. For example, Hening's 1794 discussion observed that arrests may "frequently" be made without warrant as well as by warrant, but then mentioned only instances in which the commission of a crime was directly observed — by any person who viewed the commission of a felony, dangerous wounding, or breach of the peace, and by watchmen who came across "night-walkers." He then concluded "[s]o much concerning an arrest *without* a warrant," and moved on to arrest by warrant. HENING, *supra* note 25, at 37-38 (emphasis in original). Similarly, the Pennsylvania court emphasized "pursued" when it remarked in 1814 that, "[t]he felon who is seen to commit murder or robbery, must be arrested on the spot or suffered to escape. So although not seen, yet if known to have committed a felony, and *pursued* with or without warrant, he may be arrested by any person." *Wakely v. Hart*, 6 Binn. 315, 318-19 (Pa. 1814) (emphasis in original); cf. Grano, *supra* note 38, at 639 ("The common law, which was preoccupied with the danger of escape, contemplated that [a warrantless] arrest would be made shortly after the felony occurred.").

198. The hue and cry emerged during an early period in which a village or hundred could be "amerced" (fined) if a felony occurred within it and the felon was not caught. For descriptions of the legal authority for arrests on hue and cry, see 2 HALE, *supra* note 75, at 104; 2 HAWKINS, *supra* note 76, at 75-77; and 4 BLACKSTONE, *supra* note 27, at 290-91. Blackstone described an arrest under a hue and cry as carrying equivalent protections as an arrest under warrant, but noted that a person who "wantonly or maliciously" raised a cry would be guilty of disturbing the peace. *Id.* at 291; see also 3 BACON, *supra* note 149, at 62-65.

Early American statutes provided that constables could "put forth Pursuits or Hue-and-cries after Murderers, Peacebreakers, Thieves, Robbers, Burglarians and other Capital Offenders where no Magistrate or Justice of the Peace is near at hand." FIRST LAWS OF THE STATE OF CONNECTICUT, *supra* note 196, at 23-24. A similar provision appears in the 1648 Massachusetts statute. See THE LAWS AND LIBERTIES OF MASSACHUSETTS, *supra* note 196, at 13.

Because only a commissioned judicial officer possessed authority to administer an oath and act on the basis of another person's suspicion, crime victims had to make complaints to a local justice of the peace, the lowest ranking official possessing a judicial commission. The constable, who had no judicial commission, could neither administer an oath nor receive a complaint. Thus, the justice of the peace served as the gatekeeper who decided whether to activate the criminal justice apparatus for making arrests and searches.¹⁹⁹

Unlike the constable, the justice of the peace was a man of wealth and high status in the local community. He did not personally make arrests or searches; rather, he directed his constable (who was regarded as an officer of the judicial branch²⁰⁰) to perform those tasks. A judicial warrant (sometimes referred to by the more generic terms "mandate," "precept," "writ," or "process"²⁰¹) was central to law en-

The traditional hue and cry appears to have fallen into disuse in late eighteenth-century America. In his 1794 manual, Hening stated that the hue and cry was "seldom used" in Virginia. See HENING, *supra* note 25, at 247. He also concluded his discussion of hue and cry arrest authority by noting that the "safest" way to use it was to procure a hue and cry warrant from a magistrate. *Id.* at 251. To the extent that the hue and cry persisted in framing-era America, it may have been used primarily to convey information about wanted felons to adjoining counties, thus avoiding the cumbersome procedure of "backing" warrants (i.e., having an arrest warrant issued in another county endorsed by a justice of the peace of the local county before it could be executed). Thus, the hue and cry may have been transformed into the nineteenth-century "wanted" poster.

199. See, e.g., CONDUCTOR GENERALIS, *supra* note 12, at 109, 117 (reprinting essay by Saunders Welch, former high constable of Middlesex, England) (noting "that the suspicion of one man cannot properly be transferred to another without the circumstance of an oath, which the constable has no power to administer"); 1 ROBERT BURN, *THE JUSTICE OF THE PEACE AND PARISH OFFICER* 393 (15th ed. 1785) (noting that a constable "cannot take any man's oath . . . because he is not a judge of record").

200. James Wilson, one of the Framers and an early law teacher, described the constable, in his law lectures of 1790-91, as the lowest officer of the "judicial department," not of the executive branch. See 2 *THE WORKS OF JAMES WILSON*, *supra* note 196, at 568-69; see also HENING, *supra* note 25, at 142 ("[T]he constable is the proper officer to a justice of the peace, and bound to execute his warrants.").

201. Warrants were a specific form of the larger category of written judicial orders. For example, 2 GILES JACOB, *THE LAW-DICTIONARY: EXPLAINING THE RISE, PROGRESS, AND PRESENT STATE, OF THE ENGLISH LAW* (T.E. Tomlins ed., London, Andrew Strahan 1797) [hereinafter *JACOB'S LAW DICTIONARY*] (pages unnumbered), defined "WARRANT" as "[a] precept under hand and seal of some Officer, to take up any offender, to be dealt with according to due course of Law." One of the definitions the source gives for "PRECEPT" is "a command in writing, by a Justice of the Peace, or other officer, for bringing a person or records before him." 2 *id.* "MANDATE" is similarly defined as "[a] commandment judicial of the King or his Justices to have any thing done for dispatch of justice." 2 *id.* (These definitions remained unchanged in the first American edition of Jacob's Law Dictionary published in 1811. See *JACOB'S LAW-DICTIONARY* (T.E. Tomlins ed., 1st American ed., Philadelphia, P. Byrne 1811).) The use of the terms "process" or "writ" to refer broadly to written orders issued by a judicial officer was a looser usage, but was quite common in common-law writings. Hence, the appearance of any of these terms in common-law writings on search and arrest should be understood as a reference to warrant authority. See, e.g., *An Act for apprehending and securing for Trial Persons charged with having committed Crimes in some States; and to authorize the Officers of Justice of the other States to continue the Execution of their Precepts within this State, when Necessary* (Mass. 1782), reprinted in *THE*

forcement authority because it was usually the only means for a justice of the peace to give binding instructions to the constable as well as to indemnify the constable against trespass claims.²⁰²

2. "Justification" for Arrests and Searches at Common Law

A few words are in order regarding "legal authority." Official authority can be thought of either in normative terms as positive statements of what an officer is entitled to do, or in more prudential terms as descriptive statements of the potential adverse consequences if an officer oversteps his bounds. Because we cannot recover the actual attitudes and behaviors of framing-era peace officers, assessing the latter provides the more useful means of understanding past criminal law enforcement authority.

Today, the exclusionary rule articulates the legal consequence that may follow an "illegal" arrest or search. Although there was no exclusionary rule in the late eighteenth century, "unlawful" arrests or searches still carried potential adverse consequences. At common law, a search or arrest was presumed an unlawful trespass unless "justified."²⁰³ Thus, law enforcement authority as such consisted simply of

FIRST LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 131-32 (John D. Cushing ed., 1981) ("Precepts" in the title refers to provisions in the act dealing with "writs, warrants, or other process."); the quotation from *Bacon's Abridgment* set out *infra* note 209 (referring to a "Warrant" as a "Writ").

202. See, e.g., 2 HALE, *supra* note 75, at 86 ("[I]f the felony or other breach of the peace be done in [the justice's] absence, then he must issue his warrant in writing under his seal to apprehend the malefactor."). The only exception to the requirement that a justice's command to a peace officer be in a written warrant was that a justice could orally ("parol") command an officer to make an arrest if the justice was at the scene and witnessed the commission of the offense. See *id.*; see also 2 HAWKINS, *supra* note 76, at 83; HENING, *supra* note 25, at 21. Massachusetts and Connecticut both adopted statutory provisions requiring that any warrant be in writing. See the statutes regarding constables cited *supra* note 196. A constable who refused to execute a lawful warrant was subject to prosecution. See *Conner v. Commonwealth* 3 Binn. 38, 44 (Pa. 1810).

203. Lord Camden stressed the rigid requirement of positive legal authority to justify intrusions by officers — the mirror image of the complaint against discretionary authority — in the short report of *Entick*:

In the case of *Wilkes*, a member of the Commons House, all his books and papers were seized and taken away; we were told by one of these messengers that he was obliged by his oath to sweep away all papers whatsoever; if this was law it would be found in our books, but no such law ever existed in this country; our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbor's ground, he must justify it by law.

Entick v. Carrington, 2 Wils. 275, 291, 95 Eng. Rep. 807, 817 (C.P. 1765) (case report published in 1770, see *supra* note 25).

Blackstone also stressed the requirement of positive legal justification "either by common law or act of parliament," in his discussion of false imprisonment:

those justifications for arrests or searches recognized by the common-law treatises and cases.

“Unlawful” (unjustified) arrests or searches exposed the officer to lawful resistance by bystanders or the target of his intrusion. Unlike modern statutes, the common law did not make it an offense to resist an officer who attempted to make an unjustified arrest or search. Thus, there was a relatively robust understanding of a citizen’s right to resist an officer who exceeded his authority.²⁰⁴

Furthermore, the victim of an unlawful arrest or search could sue the offending officer for trespass damages. The common law recognized no broad doctrine of official immunity.²⁰⁵ There is a dearth of

Every confinement of the person is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets. Unlawful, or false, imprisonment consists in such confinement or detention without sufficient authority: which authority may arise either from some process from the courts of justice; or from some warrant from a legal officer having power to commit, under his hand and seal, and expressing the cause of such commitment; or from some other special cause warranted, for the necessity of the thing, either by common law, or act of parliament; such as the arresting of a felon by a private person without warrant, the impressing of mariners for the public service, or the apprehending of waggons for misbehavior in the public highways.

3 BLACKSTONE, *supra* note 27, at 127 (citations to Coke and to a statute omitted).

204. Use of force necessary to prevent an officer from making an unlawful arrest was not a crime unless the officer was killed or seriously injured. *See, e.g., Commonwealth v. Kennard*, 25 Mass. (8 Pick.) 133, 134, 135-36 (1829); *Commonwealth v. Crotty*, 92 Mass (10 Allen) 403 (1865) (reversing a conviction for assaulting and battering a deputy sheriff, described as a “ministerial officer,” who had attempted to arrest pursuant to an unparticularized illegal “John Doe” warrant because the officer was a “trespasser” who stood “on the same footing” as a person doing the same act who was not an officer). Forcible resistance to constables was not uncommon. *See GREENBERG, supra* note 194, at 158-62.

However, some common-law authorities gave a more restrictive description of the right to resist an unlawful arrest. *See, e.g., HENING, supra* note 25, at 42-43 (stating that the target of an arrest might lawfully resist an attempted arrest by a private person because “an innocent person is not bound to take notice of a private persons suspicions,” but that a person should submit to an arrest by a “commonly known” officer or pursuant to a warrant).

Killing a constable who attempted an unlawful arrest was an offense at common law, but it was manslaughter, not murder. *See, e.g., 1 LEGAL PAPERS OF JOHN ADAMS, supra* note 20, at 102 n.75 (quoting LAW OF ARRESTS 71-72, § 9, that it was “[n]ot Murder to slay an officer executing bad Warrant” (stating the holding of *Rex v. Cook*, Cro. Car. 537, 79 Eng. Rep. 1063 (K.B. 1640))). This was still the law at the end of the nineteenth century. *See, e.g., Bad Elk v. United States*, 177 U.S. 529, 534 (1900).

The right to resist forcibly unlawful arrests has effectively been revoked by modern arrest statutes, which limit resistance to police officers making arrests to self-defense against excessive force. *See generally* Paul G. Chevigny, *The Right to Resist an Unlawful Arrest*, 78 YALE L.J. 1128 (1969).

205. Judicially defined official immunity has only recently been extended to ordinary law enforcement officers. During the framing era, there were some English statutes that provided various protections for magistrates and peace officers against trespass liability. *See, for example,* the statute protecting officers who executed a warrant that was at issue in the Wilkesite cases, 24 Geo. II, ch. 44, discussed *supra* note 111. Except for customs statutes, however, English statutes protecting officers did not apply in the American colonies. The American states began to adopt such statutes in the early nineteenth century. *See NELSON, supra* note 195, at 92-93 (describing statutes protecting officers that were enacted in the early nineteenth century).

information, however, as to how often victims actually brought trespass suits as remedies for unlawful arrests or searches.²⁰⁶ (The common-law sources also referred to the potential for criminal prosecution of officers for unlawful intrusions; however, instances of criminal prosecution would likely have been as rare then as they are today.²⁰⁷)

The most salient feature of common-law authority for present purposes is that a valid (specific) arrest or search warrant provided the officer with the clearest and strongest source of justification for an intrusion. The constable executing a valid warrant acted as the agent of the justice of the peace and, indirectly, of the sovereign political power. He was not to be trifled with. As long as he acted “ministerially” — that is, within the directions of the warrant²⁰⁸ — it was an offense to

206. Famous trespass cases such as the Wilkesite cases demonstrate that some trespass actions were based on unlawful searches or arrests, but they shed little light on the frequency of such cases in the civil trial courts. Likewise, the few early American reported appellate decisions, *see supra* note 115, do not provide a basis for assessing the incidence of trespass claims in the trial courts. A comment by Chief Justice Wilmot in an English case suggests that there may have been a fair number of such cases in the trial courts. *See Bruce v. Rawlins*, 3 Wils. 63, 95 Eng. Rep. 934 (K.B. 1770) (commenting that he could not conceive what customs officers meant by searching a house unlawfully because “this matter has been so often tried in Westminster Hall”).

A caveat is in order on this point — there were numerous actions brought against sheriffs and their deputies for misfeasance or nonfeasance as well as malfeasance in the execution of writs in *civil* cases, often by the plaintiff creditors in civil actions, sometimes by debtors who were wrongfully arrested or whose goods were wrongfully seized. Indeed, the Chief Justice of Massachusetts remarked that such claims against officers “are among the most common actions in our courts.” *Commonwealth v. Kennard*, 25 Mass. (8 Pick.) 133, 135 (1829). Although the trespass actions relating to misconduct by officers in civil matters sometimes reflected similar issues and standards to those arising from criminal arrests or searches, the two sets of cases should be distinguished when one attempts to assess the frequency with which successful trespass actions were brought. For example, civil cases in which plaintiff-creditors complained that an officer allowed a debtor to escape are quite unlike cases alleging wrongful searches or arrests. In addition, it seems that the parties to civil actions would have been more likely to have sufficient funds to pursue such actions, and juries may have responded differently to trespass actions involving civil rather than criminal matters. Thus, it is likely that successful trespass actions against officers regarding civil matters would have been more frequent than such actions involving criminal matters. However, some commentaries regarding the frequency of trespass actions against officers have mixed the two categories of cases. *See, e.g.*, 3 Cuddihy, *supra* note 20, at 1535-39.

207. Alexander Hamilton implied that criminal sanctions would keep officers in check when he asserted that trial by jury in criminal cases would provide security against abuses by federal revenue officers. *See THE FEDERALIST NO. 83* (1788) (Alexander Hamilton).

208. The term “ministerial” was commonly used to describe the character of the peace officer’s authority. For example, Hawkins referred to “a Constable, or other such like ministerial Officer.” 2 HAWKINS, *supra* note 76, at 82. JOHNSON’S DICTIONARY, *supra* note 177, gave three potentially relevant definitions of “Ministerial,” including: “Attendant; acting at command”; “Acting under superior authority”; and “Pertaining to . . . persons in subordinate authority.” *See also* *South v. State of Maryland, Use of Pottle*, 59 U.S. (18 How.) 396, 402 (1855) (describing the “ministerial” aspects of the office of sheriff as a duty “to execute all processes issuing from the courts of justice”). Constables, sheriffs, and related officers were routinely described as “ministerial” officers well into the nineteenth century. *See generally* WILLIAM L. MURFREE SR., A TREATISE ON THE LAW OF SHERIFFS AND OTHER MINISTERIAL OFFICERS (1884).

resist him, or even to refuse to assist him. Likewise, because he acted as the justice's agent, he was "indemnified" against trespass liability.²⁰⁹ In contrast, an officer found it much harder to justify his actions when he attempted an arrest or search without a warrant.²¹⁰ Indeed, common-law sources often described warrantless arrests or searches as acts that an officer undertook "at his own risk" or "at his peril."²¹¹

3. *The Meager Authority of the Warrantless Officer*

In the late eighteenth century, searches were still of limited utility to criminal law enforcement. The principal possessory offense was possession of stolen property. In the absence of forensic science, items other than stolen property would usually have been of limited evidentiary value.²¹² Thus, as I describe below, the common law recognized a search warrant for stolen goods, and also recognized the lawfulness of taking weapons or stolen property from the "possession" of an arrestee as an "incident" of a lawful arrest made with or without a warrant. However, those appear to have been the only forms of search authority recognized in framing-era common law.²¹³

The limited character of common-law authority for warrantless arrests is apparent if one contrasts the framing-era rules to the *ex officio* authority of a modern police officer. Today, a police officer's felony arrest is generally considered legal if she had "probable cause" to believe the arrestee might be involved in crime. Likewise, an arrest

209. See 4 BLACKSTONE, *supra* note 27, at 288 (commenting that a constable was indemnified so long as he executed a warrant "ministerially"). However, the officer was not allowed any leeway for mistakes in the execution of a warrant; for example, if he arrested the wrong person under an arrest warrant, the arrest was unjustified. See, e.g. 5 BACON, *supra* note 149, at 170 ("34. . . if A. tell an Officer, who has a Warrant to arrest B. that his Name is B. and thereupon the Officer arrest A. this is a false Imprisonment; for that the Officer is at his Peril to take Care, that he do not arrest any other Person than him against whom the Writ issued.").

210. The lawfulness of the use of force to make an arrest was also clearest when the arrest was by warrant. See, e.g., HENING, *supra* note 25, at 42.

211. See, e.g., *Wakely v. Hart*, 6 Binn. 315, 317-18 (Pa. 1814).

212. Discussions of evidence in common-law sources usually dealt with sworn testimony by witnesses and certain types of formal documents, but not with physical items. See, for example, the discussion of "Evidence" in 1 JACOB'S LAW DICTIONARY, *supra* note 201; HENING, *supra* note 25, at 175-88.

213. See, e.g., CONDUCTOR GENERALIS, *supra* note 12, at 109, 117 (reprinting essay by Saunders Welch, former high constable of Middlesex, England, advising constables that "a thorough search of the [arrested] felon is of the utmost consequence to your own safety, and . . . by this means he will be deprived of instruments of mischief, and evidence may probably be found on him sufficient to convict him"). However, the doctrine of search incident to arrest is not uniformly accorded importance in the framing-era materials; for example, there is no mention of that doctrine in HENING, *supra* note 25.

based on probable cause will justify a search incident to arrest. That simple picture, however, is a recent development.²¹⁴

In the late nineteenth century, statutory provisions and judicial opinions usually identified four or five different (though somewhat overlapping) justifications for warrantless arrests by officers. For example, the 1887 South Dakota arrest statute, which the Supreme Court discussed in the 1900 decision *Bad Elk v. United States*, set out five possible justifications for a warrantless arrest by an officer, and the Court characterized them as codifying the “common law”:

(1) For a public offence committed or attempted in [the officer’s] presence. [This was often referred to as an arrest “on view.”]

(2) When the person arrested has committed a felony, although not in [the officer’s] presence. [This was sometimes referred to as the actual guilt justification.]

(3) When a felony has in fact been committed and [the officer] has reasonable cause for believing the person arrested to have committed it. [This was often referred to as an arrest “on suspicion.”]

(4) On a charge made [by another person] upon reasonable cause of the commission of a felony by the party arrested. [This was sometimes called an arrest “on charge.”]

[(5) The officer] may also . . . arrest any person whom he has reasonable cause for believing to have committed a felony, and is justified in making the arrest, though it afterward appear that the felony had not been committed. [This is the modern “probable cause” standard.]²¹⁵

The listing is a virtual fossil record of the gradual expansion of arrest authority. As I discuss below, the “on charge” justification (the fourth in the list) was added in the early nineteenth century to allow the officer more leeway to assist a citizen who was making a felony arrest, and the “probable cause” justification (the fifth in the list) then evolved from the “on charge” justification and eventually displaced the earlier justifications for warrantless felony arrests by officers. However, *only the first three justifications* for warrantless arrests were recognized in

214. After reconstructing the post-framing expansion of the peace officer’s warrantless arrest authority, as described in the text and notes that follow, I discovered that Professor Jerome Hall had previously described the expansion of the officer’s warrantless arrest authority in English law in even more detail. See Jerome Hall, *Legal and Social Aspects of Arrest Without a Warrant*, 49 HARV. L. REV. 566 (1936). Unfortunately, Hall’s account has rarely been cited (never by the Supreme Court). One reason may be that its title does not convey that it is a historical account.

215. 177 U.S. 529, 535-36 n.1 (1900). The five arrest standards are from THE COMPILED LAWS OF THE TERRITORY OF DAKOTA (E.W. Caldwell & Charles H. Price eds., 1887). The first four justifications appear in § 7148; the fifth justification (the probable cause justification, which the South Dakota statute limited to arrests at night) was set out in § 7150.

American law as of 1789 (and they were not augmented by any broad authority to temporarily detain persons short of arrest²¹⁶).

a. *The Three Framing-Era Justifications for Warrantless Arrest.* One notable feature of the three framing-era justifications for warrantless arrests is that they were equally available to peace officers and private persons; thus, they also defined the justifications for what we now call a "citizen's arrest."²¹⁷ In fact, the leading treatise by Serjeant William Hawkins first described the arrest authority possessed by "any person" and then opened the discussion of an officer's warrantless arrest authority by saying that "[a]s to the justifying of . . . arrests by the Constable's own authority; it seems difficult to find any Case, wherein a Constable is impowered to arrest a Man for a Felony committed or attempted, in which a private Person might not as well be justified in doing it" ²¹⁸ Put another way, the idea that a peace officer pos-

216. Framing-era common law did not recognize any broad power of peace officers to detain short of arrest. See *supra* note 203. There were, however, three specific circumstances in which officers could temporarily detain persons. First, some common-law sources indicate that an officer could detain a person to prevent an incipient "affray" (for example, when he observed an argument becoming violent). See, e.g., 2 THE WORKS OF JAMES WILSON, *supra* note 196, at 468 (discussing the authority of a "conservator of the peace" — a term sometimes used to describe peace officers generally). Second, an officer could detain a person who had inflicted a grave wound to determine whether the victim would live or die because, although homicide was a felony and thus subject to warrantless arrest, an attack short of homicide was usually only a misdemeanor, and thus limited to arrests on view. See *infra* note 220. Third, common-law sources recite that constables and nightwatchmen were empowered to detain any "nightwalkers" for examination by a justice of the peace the next morning — an authority that reflected the special fear of nighttime crime. See 4 BLACKSTONE, *supra* note 27, at 289; see also THE LAWS AND LIBERTIES OF MASSACHUSETTS, *supra* note 196, at 13 (Massachusetts statute regarding constables); THE FIRST LAWS OF THE STATE OF CONNECTICUT, *supra* note 196, at 23-24 (Connecticut statute). It appears that there were so few legitimate reasons to be out and about at night that nightwalking was viewed almost as an offense in its own right. Except for these specific situations, however, the common-law sources did not recognize any broad authority for officers to detain "suspicious" persons; thus, there is no historical precedent for the general authority of police officers to detain persons based on "reasonable suspicion" as authorized by *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

217. For example, the justifications for arrest by a private person in the South Dakota statutes match the first three justifications for arrests by an officer. (Compare the three subsections of § 7154 to the first three subsections of § 7148 quoted in *Bad Elk*, 177 U.S. at 536 n.1.)

218. 2 HAWKINS, *supra* note 76, at 80-81. This statement was unchanged as late as 1788. See 2 LEACH'S HAWKINS, *supra* note 76, at 130. The 1814 Pennsylvania decision in *Wakely* discussed the warrantless arrest authority of the high constable of Philadelphia in terms of the justifications available to any person, not in terms of any distinctive authority derived from the constable's office. See *Wakely v. Hart*, 6 Binn. 315, 318 (Pa. 1814); see also Hall, *supra* note 214, at 567-70 (discussing the equivalent warrantless arrest authority possessed by private persons and officers in late eighteenth-century common law).

Acceptance of the equivalence between an officer's warrantless arrest authority and the warrantless arrest authority inherently possessed by any person probably explains why the First Congress did not confer any warrantless arrest authority on federal marshals in the 1789 Judiciary Act, see *supra* note 170; there was no need explicitly to confer that level of warrantless arrest authority on a marshal.

essed a distinctive level of *ex officio* arrest authority had not yet emerged.

The narrowness of the three framing-era justifications for warrantless arrests becomes apparent when one works through them. The “on view” justification (the first in the list) was the *only* justification for a warrantless misdemeanor arrest. Common law did not provide any justification for making a warrantless misdemeanor arrest after-the-fact; in that case, only a judicial arrest warrant could justify the arrest.²¹⁹ This limitation was significant because many serious crimes (that are now felonies) were misdemeanors at common law.²²⁰

The restriction against making warrantless misdemeanor arrests after-the-fact meant that even a person guilty of a completed misdemeanor could lawfully resist a constable’s attempt to make a warrantless arrest for that offense.²²¹ Likewise, even a convicted misdemeanant could bring a trespass action against an officer who had arrested him after-the-fact without a valid arrest warrant.²²²

219. See, e.g., HENING, *supra* note 25, at 21 (“[A] constable hath no power to arrest a man for an affray done out of his own view, without a warrant from a justice, unless a felony were done or likely to be done.”).

220. For example, all attempt crimes were only misdemeanors at common law, as were assaults, batteries, woundings, and even kidnappings. See 4 BLACKSTONE, *supra* note 27, at 216. The treatment of what we now call “aggravated assault” or “assault with a deadly weapon” as a misdemeanor at common law created a procedural difficulty when a person was found holding a knife over a stabbing victim who was not yet dead. Homicide was a felony and thus subject to a warrantless arrest; but if the victim did not die, there was only a misdemeanor, so an arrest had to be by warrant (unless the arresting person had actually observed the stabbing). The common-law sources permitted a sort of conditional warrantless arrest of the attacker until it became clear whether the victim would live or die. See, e.g., *Mayo v. Wilson*, 1 N.H. 53, 56 (1817) (“If one man dangerously wound another, any person may arrest him, that he be safely kept, till it be known whether the person shall die or not.”); 4 BLACKSTONE, *supra* note 27, at 289.

221. See, e.g., *Commonwealth v. Crotty*, 92 Mass. (10 Allen) 403, 405 (1865).

222. *Wilkes v. Halifax* demonstrates the point. Wilkes’s 1769 trespass verdict against Lord Halifax for issuing the general warrant under which Wilkes had been arrested in 1763 was obtained while Wilkes was *in prison* serving consecutive misdemeanor sentences for publication of a seditious libel and for publication of an obscene poem. The complex events that preceded the verdict in *Wilkes v. Halifax* were as follows. In late 1763, Wilkes won a verdict in *Wilkes v. Wood*, a trespass action against Halifax’s subordinate who had directed the Messengers who arrested Wilkes, searched his house, and seized his papers under the general warrant. See *supra* notes 21-25. *Wood* was unusual because Wilkes managed to bring that trespass action to trial before there had been a trial on the misdemeanor charges he faced for seditious libel for publishing *The North Briton*, No. 45 (the publication named in the general warrant). Shortly after he won the trespass verdict against Wood, Wilkes went (or fled) to France. In 1764, during his absence, Wilkes was tried and convicted of publishing a seditious libel for *The North Briton*, No. 45, as well as of publishing an obscene poem. When he returned to England in 1768, his convictions were affirmed by the Court of King’s Bench and the House of Lords, he was denied the seat in the House of Commons to which he was elected, and he began serving 10 months for publishing *The North Briton*, No. 45, and an additional 14 months for publishing the obscene poem. See *Rex v. Wilkes*, 4 Burr. 2527, 2574, 98 Eng. Rep. 327, 353-54 (K.B. 1770) (reporting proceedings in the criminal case in the Court of King’s Bench from the filing of charges and trial in 1764, through the sentencing in

Because it was more important to apprehend felons than misdemeanants, the common law provided somewhat broader justifications for felony arrests. Thus, an officer could justify a felony arrest if the arrestee was actually guilty of the felony for which the arrest was made — that is, if the arrestee was subsequently convicted of the felony.²²³ The actual guilt justification depended entirely on the subse-

1768, to his release from custody in 1770); see also *Wilkes v. The King*, Wilm. 322, 340, 97 Eng. Rep. 123, 130 (H.L. 1768) (affirming the sentencing in 1768). A useful summary of the sequence of the civil and criminal proceedings involving Wilkes appears in NOBBE, *supra* note 21, at 225-65.

There is no case report of *Wilkes v. Halifax*. However, a brief account of the judge's instructions to the jury in an "Addenda" to the Wilkesite cases, 19 Howell St. Tr. 1381, 1408-15 (some pages misnumbered) (reprinting a magazine account of the trial), indicates that the trial was little more than an exercise in assessing damages: the judge instructed the jury that "this proceeding [i.e., the arrest and search pursuant to the general warrant] . . . was certainly illegal; you must therefore find a verdict for [Wilkes]." *Id.* at 1415. Thus, *Halifax* confirms that even a convicted misdemeanant could bring a trespass action for an arrest not meeting the "on view" justification. (Both Wilkes's 1768 sentencing proceeding as well as his successful trespass suit against Halifax were covered by the American colonial press. See 3 Cuddihy, *supra* note 20, at 1632-33 (identifying 1770 colonial press reports about the trial and verdict in *Halifax*.)

There is a puzzling statement in the case report of the 1763 trial in *Wood* that may seem inconsistent. During that trial, Chief Justice Pratt instructed the jury that "[i]f upon the whole, they should esteem Mr. Wilkes to be the author and publisher [of *The North Briton*, No. 45], [then Wood's] justification would be fully proved." *Wilkes v. Wood*, Lofft 1, 18, 19 Howell St. Tr. 1153, 1166, 98 Eng. Rep. 489, 498 (C.P. 1763). Pratt's statement may appear to be an application of the "actual guilt" justification for an arrest, discussed *infra* note 223 and accompanying text. (Professor Stuntz has read it that way. See Stuntz, *supra* note 57, at 400 n.33.) The actual guilt justification did not apply to a misdemeanor arrest, however, and seditious libel was a misdemeanor. Moreover, the presentation of the legal arguments in Lofft's case report of *Wood* was grossly incomplete — the legal arguments made by the Solicitor General on Wood's behalf are virtually omitted. All one learns is that Wood "maintained a plea of not guilty" (that is, he contested his role as a factual matter), and he "secondly, relied on the special justification." *Wood*, Lofft at 8, 98 Eng. Rep. at 493.

The reports of the other Wilkesite cases reveal that "the special justification" would have been the protection of "the statute of 24 G[eorge] 2, c. 44." See, e.g., *Leach v. Money*, 3 Burr. 1742, 1742, 1745, 19 Howell St. Tr. 1001, 1003, 1006, 97 Eng. Rep. 1075, 1075, 1077 (K.B. 1765). That statute gave protection to an officer who acted "in obedience to" a warrant. 3 Burr. at 1767, 19 Howell St. Tr. at 1026, 97 Eng. Rep. at 1088. In *Leach* the King's Bench ruled that the Messengers could not raise the statute as a defense because the general warrant directed the arrest of the author, publisher, or printer of No. 45, but Leach did not fit any of those descriptions. See *supra* note 111. It seems likely that Wood also raised this statutory defense, and that Pratt's reference to whether "[Wood's] justification would be fully proved" meant that if the jury found that Wilkes was the author of No. 45, then Wood's conduct would be within the terms of the warrant and the "special justification" provided by 24 Geo. 2, c. 44. Interestingly, because none of the juries ever found the "special justification" applicable, the English courts never reached the question of whether conduct in obedience to an illegal general warrant fell within the statutory protection.

223. See, e.g., 2 HAWKINS, *supra* note 76, at 77 ("And where a man arrests another, who is actually guilty of the Crime for which he was arrested, it seems, That he needs not in justifying it, set forth any special Cause of his Suspicion, but may say, in general, that the Party feloniously did such a Fact, for which he arrested him."). The felony conviction would bar trespass liability for the arrest and would also justify any force used to accomplish the arrest. Likewise, a conviction meant that any forcible resistance by the arrestee, or by anyone attempting to rescue the arrestee, would be unlawful and constitute an offense.

quent conviction of the arrestee²²⁴ — it did not matter what information the arresting person had about the crime at the time of the arrest.²²⁵ The practical limitation was that the actual guilt justification involved a gamble — the officer had to predict *whether* a felony conviction would result (and the outcome of a trial obviously could turn on factors other than the testimony provided by the arresting person).

Because the actual guilt justification was so uncertain, it appears likely that the “on suspicion” standard, the third in the list, would have been the operative common-law justification for a warrantless felony arrest. Although the “on suspicion” justification was less demanding than actual guilt, it was more demanding than the label might suggest. An officer could meet it only upon proof that “felony in fact” had actually been committed by someone and that there was “probable cause of suspicion” to think the arrestee was that person. The “probable cause of suspicion” prong does not appear to have been particularly stringent; it departed from the notion of certain truth by allowing suspicion as to *who* committed the offense to be merely “probable.” Moreover, it seems likely that an officer could have met this prong by testifying as to unsworn information reported by other persons.²²⁶

The requirement that the officer prove a felony had been committed by someone “in fact,” however, was met only if the officer proved that the felony for which the arrest was made had *actually* (not just probably) been committed (and proof that a misdemeanor had been committed would not suffice).²²⁷ (The principal difference between

224. The common-law actual guilt justification appears to have been a holdover of the religious epistemology of certain truth that prevailed during the Middle Ages; notions of “probable” truth and *ex ante* assessments of legality emerged later, but still had not been fully absorbed by the late eighteenth century. See generally BARBARA J. SHAPIRO, BEYOND REASONABLE DOUBT AND PROBABLE CAUSE: HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE (1991).

225. Cf. Amar, *Fourth Amendment*, *supra* note 58, at 767 (“[If the constable] merely played a hunch and proved right — if the suspect *was* a felon, or the goods *were* stolen or contraband — this *ex post* success apparently was a complete defense.”). Amar’s statement is true as to felony arrests, but not as to searches for stolen goods or contraband. See *infra* notes 278-285.

226. Hawkins asserted that “sufficient causes of suspicion” could be based on “[t]he common Fame of the Country” provided such fame was based on probable ground, as well as on a variety of observations suggesting guilt. 2 HAWKINS, *supra* note 76, at 76; see also HENING, *supra* note 25, at 35. Professor Alschuler has noted that this prong may trace back as far as Bracton’s writing in the mid-thirteenth century. See Albert W. Alshuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 253 (1984). Alschuler also noted that the prerevolutionary legal literature indicated that “so long as an offense had been committed, the common opinion of the public that a particular person had committed it would justify his arrest.” *Id.* at 254.

227. The framing-era sources make it clear that a warrantless felony arrest could not be justified unless there was proof of felony-in-fact. See, for example, James Wilson’s statement in his law lectures of 1790-91:

the “on suspicion” justification and the modern “probable cause” standard is that the latter can be satisfied by showing a probability that a felony had been committed, but the former could not.²²⁸) Thus, the constable had to be sure of his facts about the felony before he attempted a warrantless arrest.

In addition, the framing-era officer could not avoid justifying the arrest by claiming to act at another person’s request. The person who initiated an arrest had to be able to justify it,²²⁹ and anyone who as-

It is a general rule, that, at any time, and in any place, every private person is justified in arresting a traitor or a felon [this is the ex post guilt-in-fact justification]; and, *if a treason or felony has been committed*, he is justified in arresting even an innocent person, upon his reasonable suspicion that by such person it has been committed.

2 THE WORKS OF JAMES WILSON, *supra* note 196, at 685 (emphasis added); *see also* CONDUCTOR GENERALIS, *supra* note 12, at 109, 116-17 (reprinting essay by Saunders Welch, a former English high constable in Middlesex, England) (advising constables that it is “absolutely necessary” to justify an arrest that a felony has been really committed; that a mistake on that point is “fatal”); 2 HALE, *supra* note 75, at 92 (stating that for justification of a felony arrest made “on suspicion,” “there must be a felony in fact and the constable must be ascertained of that, and aver it in his plea and it is issuable” (emphasis in original)); HENING, *supra* note 25, at 36 (“But generally, no . . . cause of suspicion . . . will justify an arrest, where in truth no such crime hath been committed; unless it be in the case of hue and cry.”).

A crime “in fact” was still a requirement for an arrest in early nineteenth-century American law. *See* Wakely v. Hart, 6 Binn. 315, 318 (Pa. 1814) (“And even when there is only probable cause of suspicion, a *private person may* without warrant *at his peril* make an arrest. I say at his peril, for nothing short of proving the felony will justify the arrest.”); 2 DANE, *supra* note 151, at 224, ch. 217, art. 2. (volume 2 published 1823) (“But ‘without a fact suspicion is no cause of arrest’; that is, there must be a felony or offence, in fact, committed, and suspicion is only to the person.”); *see also* Hall, *supra* note 214, at 567-70.

228. For example, assume that a modern police officer has discovered that a person is in possession of a white powder, and the officer has substantial reason from the context to think that the powder may well be heroin. Today, that would be enough for “probable cause” to arrest for possession of heroin, and that arrest would be valid, even if subsequent testing showed that the white powder was not a drug at all. However, under the framing-era “on suspicion” standard, the arrest would be unlawful because, if there were no heroin, there would be no felony-in-fact.

229. For example, Hawkins wrote:

As to . . . [b]y whom the [arrested] Person must be suspected, upon such an Arrest for Suspicion; it seems to be agreed, That the Law hath so tender a Regard to the Liberty and Reputation of every Person, that no Causes of Suspicion whatsoever, let the Number and Probability of them be never so great, will justify the Arrest of an innocent Man, by one who is not himself induced by them to suspect him to be guilty

2 HAWKINS, *supra* note 76, at 76, sec. 15. Hawkins then went on to state that the same rules applied to warrantless arrests by an officer. *See id.* at 80-81, sec. 7. Likewise, Hawkins wrote that the rule that “no one can justify an Arrest upon a Suspicion of Felony, unless he himself suspect the Party” applied except in the case of an officer executing an arrest warrant. *Id.* at 82, sec. 11; *see also* 5 BACON, *supra* note 149, at 171 (“50. But if A. arrest B. without an express Warrant, because C. has just Cause to suspect that B. has committed a Felony, A. is guilty of a false Imprisonment; for the Power of arresting without an express Warrant is confined to the Party suspecting.”).

sisted in making an arrest, including an officer, was justified only if the initiating person could do so.²³⁰

b. *The Expansion of the Officer's Warrantless Arrest Authority After the Framing.* One indication that framing-era law actually inhibited officers from making warrantless arrests is that later — when crime and urban disorder emerged as concerns during the nineteenth century — courts and legislatures substantially relaxed the justifications for warrantless arrests by officers. The expansion of the officer's *ex officio* authority, which opened the way for the development of modern policing, was largely imported from developments in English law.

The initial expansion of the peace officer's warrantless arrest authority occurred in the 1780 King's Bench decision, *Samuel v. Payne*.²³¹ Indeed, the change made is evident in the difference between Lord Mansfield's charge to the jury at the trial and the subsequent granting of a new trial by the Court of King's Bench.

Hall, a private person, suspected that Samuel had stolen some laces, and procured a warrant to search for stolen goods (but not to arrest). Payne, a constable, assisted in executing the search. Although no stolen laces were found, Hall accused Samuel of theft, and Payne assisted Hall in arresting Samuel. After a magistrate released Samuel, Samuel sued both Hall and Constable Payne for trespass. At the trial, Mansfield instructed the jury that a constable could not justify a warrantless arrest on the basis of an unsworn charge by another person; thereupon the jury found both Hall and constable Payne liable for trespass.²³²

When Constable Payne moved for a new trial in the Court of King's Bench, the judges, including Mansfield, recognized a "charge" of felony as a justification for a warrantless arrest by an officer, even if

230. The risk an officer took if he made a felony arrest on the basis of information provided by another was illustrated by the initial trial verdict in the English case *Samuel v. Payne*, 1 Doug. 359, 360, 99 Eng. Rep. 230, 231 (K.B. 1780). See also CONDUCTOR GENERALIS, *supra* note 12, at 109, 116-17 (reprinting essay by Saunders Welch, a former English high constable in Middlesex, England) (advising constables that if they arrest on the report of a felony by another person, based on the other person's own knowledge, they should require the other person to attend the arrest; and that "in all cases of [arrest on] suspicion, not from your own knowledge [that is, not 'on view'], the safest way is to refer the parties to a justice of the peace, and act on his warrant").

There were two exceptions. A constable did not incur risk simply by receiving custody of a person already arrested by someone else; a private person who made an arrest was supposed to turn the arrestee over to a constable for presentation to a justice of the peace. In that instance, the constable did not arrest but simply provided safekeeping following the arrest made by the other person. The other exception was that the constable could — like anyone else — arrest without personal liability under the hue and cry. See *supra* note 198.

231. 1 Doug. 359, 99 Eng. Rep. 230 (K.B. 1780).

232. See *Samuel*, 1 Doug. at 359-60, 99 Eng. Rep. at 230-31.

there was no felony in fact. They described the earlier rule as “inconvenient.”²³³ However, they did not relax the rule that a private person could not justify an arrest unless there was an actual felony.²³⁴ The distinction drawn in *Samuel* between the warrantless arrest authority of a peace officer and that of a private person was the seed from which the discretionary arrest authority of the modern police officer developed.²³⁵

Although *Samuel* was decided in 1780, it could not have influenced the framing of the American search and seizure provisions; the case report was not published until 1782,²³⁶ after the “right to be secure” against “unreasonable searches and seizures” had already been introduced in the 1780 Massachusetts provision. It is possible that some of the federal Framers may have heard of *Samuel* by 1789, but if so they would have understood it to be a novel English ruling.²³⁷ In fact, American courts appear to have been slow to adopt *Samuel*’s innovation. The 1814 Pennsylvania decision in *Wakely* does not even hint of

233. 1 Doug. at 359-60, 99 Eng. Rep. at 230-31. Five years later, Mansfield summed up the post-*Samuel* law of warrantless felony arrest as follows: “When a felony has been committed, any person may arrest on reasonable suspicion. When no felony has been committed, an officer may arrest on a charge.” *Cooper v. Boot*, 4 Douglas 339, 342, 99 Eng. Rep. 911, 913 (K.B. 1785). Note, however, that this statement was not available to the Framers. See *supra* note 19.

234. Despite its novelty, *Samuel* preserved trespass accountability by confining the justification to the officer, while still holding the person who made the unproven charge of felony (or any other private person who assisted) accountable for damages for false arrest. See 1 Doug. at 360, 99 Eng. Rep. at 231 (“He that makes the charge should alone be answerable.”). On retrial, constable Payne was found not liable, but Hall, the accuser, was again found liable for trespass. See 1 Doug. at 360 n.8, 99 Eng. Rep. at 231 n.8.

235. As Professor Hall previously observed: “We are able to trace definitely in the cases the origin of the rule which augmented [the officer’s warrantless arrest authority]. *Samuel v. Payne* is the pivot upon which the legal cycle turns.” Hall, *supra* note 214, at 570 (citation omitted).

236. See 1 LEGAL BIBLIOGRAPHY, *supra* note 19, at 299, entry 44 (1 Douglas published 1782).

237. The descriptions of *Samuel* that were available by 1789 explicitly portrayed the King’s Bench ruling as novel. The initial report of *Samuel* in Douglas’s Reports described it as “the first determination of the point.” 1 Doug. at 360 n.7, 99 Eng. Rep. at 231 n.7. A note on *Samuel* in Leach’s 1787 edition of Hawkins’s widely used treatise also made it clear that the ruling was novel. See LEACH’S HAWKINS, *supra* note 76, 120 n.(a) (describing *Samuel* as “the first determination of the point” that a constable could arrest “on charge” even in the absence of an actual felony). Likewise, descriptions of *Samuel* in justice of the peace manuals also demonstrated its novelty. For example, a discussion in a 1785 edition of Burn’s manual described both the initial imposition of liability on the constable at the trial presided over by Mansfield and the new rule adopted by the Court of King’s Bench. See 1 BURN, *supra* note 199, at 102-03 (noting the different rules applied by Mansfield at trial and by the King’s Bench on motion for new trial). Descriptions of *Samuel* during the 1790s still noted the novelty of the ruling. The difference between the trial and appellate rulings was still recognized in a 1793 edition of Burn. See ROBERT BURN, THE JUSTICE OF THE PEACE AND PARISH OFFICER *403 (London, 1793) (title page reciting published in London in 1793 and sold in shops in America). For a virtually identical description of the two proceedings in *Samuel*, see also HENING, *supra* note 25, at 36-37.

the “on charge” standard or of the idea that an officer might possess distinctive *ex officio* (as opposed to personal) warrantless arrest authority.²³⁸ The 1829 New York decision *Holley v. Mix* appears to have been the earliest American case to adopt the “on charge” justification.²³⁹ However, during the remainder of the nineteenth century virtually all American jurisdictions adopted the “on charge” justification for arrests by officers.²⁴⁰

The “probable cause” justification for warrantless arrests was also an English import. In 1827 the judges of the King’s Bench used *Samuel* as a springboard for a further expansion of *ex officio* arrest authority in *Beckwith v. Philby*, which permitted an officer (but not a private person) to justify a warrantless arrest if he could show “reasonable ground to suspect that a felony ha[d] been committed,” even if none had been²⁴¹ — that is, on probable cause.²⁴² American lawyers and judges likely became familiar with the *Beckwith* probable cause standard by the early 1830s. Even so, it appears that the first American reported decisions to endorse the probable cause standard for warrantless arrests by officers were the 1844 Pennsylvania decision *Russell v.*

238. *Wakely* still analyzed the arrest authority of a high constable of Philadelphia in terms of the inherent arrest authority possessed by any person rather than in terms of *ex officio* arrest authority, see *supra* note 218; it also still emphasized the traditional requirement of felony-in-fact for a warrantless arrest, see *supra* note 227.

239. 3 Wend. 350, 353 (N.Y. 1829) (citing *Samuel*). The slowness of the American adoption of *Samuel* is also evident in the fact that Nathaniel Dane still described it as an innovative case in 1824: “[i]f this case be law, it settles the long agitated point, and proves a peace officer may arrest on reasonable suspicion of felony without warrant, though no felony has been committed.” 3 DANE, *supra* note 151, at 72, ch. 75, art. 6, § 4 (volume published 1824).

240. See, for example, the inclusion of the “on charge” justification in the 1887 South Dakota arrest statute quoted *supra* text accompanying note 215.

241. 6 B. & C. 635, 638-39, 108 Eng. Rep. 585, 586 (1827). *Philby*, a high constable, had been told that *Beckwith* was acting suspiciously and suspected, from various circumstances, that *Beckwith* had stolen a horse. *Philby* arrested *Beckwith* on that basis. However, no horse had been stolen. *Beckwith* sued for trespass, but Lord Tenterden, C.J., ruled that an officer could arrest upon reasonable ground to suspect a felony. A similar ruling was announced in *Davis v. Russell*, 5 Bing. 354, 130 Eng. Rep. 1098 (C.C. 1829).

The timing of the *Beckwith* decision is notable because it came just two years prior to the creation of the London Metropolitan Police in 1829. The expansion of a peace officer’s discretionary arrest authority in *Beckwith* may well have been a crucial step in making a police force feasible.

242. *Samuel* destabilized the law regarding warrantless arrests by officers, and a number of English decisions issued after *Samuel* contained language that anticipated the even broader reasonable (or probable) ground to suspect commission of a felony standard announced in *Beckwith*. See Hall, *supra* note 214, at 571-75. Nevertheless, *Beckwith* appears to be the first case that actually upheld the lawfulness of an officer’s warrantless arrest in circumstances in which no felony had been committed. See *id.* at 575 (assessing that *Beckwith* was the first case “closely representing the ultimate doctrine” that an officer can arrest on reasonable (that is, probable) grounds to suspect a felony has been committed).

*Shuster*²⁴³ and the 1850 Massachusetts decision *Rohan v. Sawin*.²⁴⁴ During the remainder of the century, a majority of American jurisdictions adopted the probable-cause-to-suspect-felony standard.²⁴⁵ Unlike the “on charge” standard, however, the probable cause standard sparked some controversy, and it was not uniformly adopted.²⁴⁶ Nevertheless, by the early twentieth century the probable cause standard had become the predominant American standard for warrantless felony arrests by officers.²⁴⁷

243. 8 Watts & Serg. 308, 309 (Pa. 1844). Defendants Russell and Downer (apparently constables, though the report does not say so explicitly) had arrested Shuster, on the ground that Shuster’s trunk, which he permitted to be examined, contained burglar’s tools and thus showed that he “was addicted to burglary.” *Id.* at 308. When no charges were brought, Shuster sued for trespass. At trial, the defendants were not permitted to admit evidence regarding Shuster’s trunk, and the verdict was for Shuster. The Supreme Court reversed and ruled that the evidence regarding the trunk should have been permitted because the issue was “probable cause.” *Id.* at 310. Chief Justice Gibson recited that “[a] constable may justify an arrest for reasonable cause of suspicion alone; and in this respect he stands on more favourable ground than a private person, who must show, in addition to such cause, that a felony was actually committed.” *Id.* at 309. Gibson cited no authorities. However, counsel for the defendant officers cited *Wakely* (“6 Binn. 316”), *Samuel* (“Dougl. 359”), and *Beckwith* (“6 Barn. & Cres. 635”). *Id.* Nothing in the opinion acknowledges the departure from the explicit requirement of felony-in-fact in the Pennsylvania court’s earlier ruling in *Wakely* (discussed *supra* note 227).

244. 59 Mass. (5 Cush.) 281, 284 (1850) (reciting that “[p]eace-officers may arrest suspected felons,” citing *Samuel* and *Beckwith*, and incorrectly asserting that the 1814 Pennsylvania ruling in *Wakely* “is to the same effect”). The facts in *Rohan* are described *supra* note 185.

245. In some instances state legislatures endorsed the reasonable cause standard for warrantless felony arrests by officers. In other cases, state courts read that standard into statutes that did not include it. *See, e.g.,* State v. Hum Quock, 300 P. 220, 221 (Mont. 1931) (upholding an arrest by a prosecutor’s special investigator as being justified by probable cause, even though the state arrest statute provided equal authority to officers and private persons and still required observation of the offense, actual guilt of a felony, or reasonable cause “when a felony has in fact been committed”).

246. For example, a North Carolina judge dissented from an 1856 decision adopting *Samuel* and *Beckwith* because those cases “go very far in the justification of officers, who apprehend suspected persons without warrants . . . farther than is compatible with that personal liberty, of which English jurists are so fond of boasting.” Brockway v. Crawford, 48 N.C. (3 Jones) 433, 439-40 (1856) (Battle, J., dissenting). The less-than-uniform adoption of the probable cause standard is also evident in legislative arrest standards. The 1887 South Dakota statute discussed in *Bad Elk* allowed the probable cause justification to be used only for arrests made at night. *See supra* note 215. Indeed, Congress still employed the felony-in-fact standard, not the probable cause of felony standard, when it initially addressed the warrantless arrest authority of federal marshals in 1935. *See supra* note 172. Likewise, a New York decision rejected probable cause of felony as a justification for a warrantless arrest by an officer as late as 1939. *See* Morgan v. New York Cent. R. Co., 9 N.Y.S. 2d 339, 341 (N.Y. App. Div. 1939) (interpreting state statute to permit felony arrest by officer without warrant only when a felony has in fact been committed). The Tennessee arrest statute has never been amended to recognize the probable cause standard; it ends with the “on charge” justification. *See* TENN. CODE ANN. § 40-7-103 (1997) (grounds for arrest by officer without warrant).

247. The notion that probable cause was uniformly accepted as the American standard for warrantless felony arrests may stem from Chief Justice Taft’s assertion to that effect in his 1925 opinion in *Carroll*. *See* Carroll v. United States, 267 U.S. 132, 156 (1925) (“The

The purely *ex ante* probable cause justification for warrantless felony arrests was a more radical enlargement of the officer's arrest authority than was the "on charge" justification. By replacing the felony "in fact" requirement with a probable felony, while at the same time not requiring any explicit charge of a felony, *Beckwith* provided the officer with a substantial degree of discretion to judge the appropriateness of an arrest. As a result, an officer enjoyed a much broader latitude for erroneously arresting innocent persons or for making warrantless arrests of persons who were actually guilty only of a misdemeanor.²⁴⁸

The expansion of the *ex officio* arrest authority of state officers (which also affected federal officers²⁴⁹) constituted a revolution in criminal justice authority and resulted in warrantless felony arrests displacing the previous reliance on arrest warrants. Additionally, the expansion of *ex officio* felony arrest authority expanded the opportunities for officers to make warrantless searches incident to arrest, making that power far more significant than it had been at the framing.²⁵⁰

The adoption of the probable cause justification also undercut the adverse consequences that had previously policed the limits on warrantless arrest and search authority. *Beckwith* undercut the threat of trespass liability by allowing the officer to rely on *unsworn* information provided to him by other persons even when no one else actually made a felony "charge." Thus, no particular person took on the responsibility for being the complainant for the arrest: the officer was not accountable for actually "charging" the commission of a crime. Thus, the probable cause standard blurred accountability for a mistaken arrest and severely undercut the viability of the trespass remedy

usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony . . ."). Taft also cited *Rohan* as reflecting "the common law." *Id.* at 157.

248. A large proportion of "felony arrests" made today are disposed of without any felony complaint being filed. *See, e.g., Davies, supra* note 133, at 643 n.172.

249. Because the federal marshal statute in effect during the nineteenth century linked the authority of federal officers to that of a state sheriff in the state in which the federal marshal served, these changes in state law were probably understood to automatically expand the arrest authority of many federal officers without any federal legislation or federal court decisions. *See supra* note 171.

250. Reported decisions regarding the allowable scope of searches incident to arrest first became evident in court records during the late nineteenth century. Taylor reported that he found only three cases raising issues as to the lawfulness of searches incident to arrest "prior to 1920" and cited state cases from 1866, 1887, and 1897. *See TAYLOR, supra* note 49, at 188 n.77. Taylor interpreted that fact to mean that courts were beginning to question the authority for warrantless searches made incident to arrest at that time. *See id.* at 45. It seems more likely that the issue appeared in reported cases at that time because officers were increasingly testing the limits of their expanded authority to make warrantless arrests and warrantless searches incident to them.

as a means of regulating warrantless arrests. In addition, because an innocent person could not readily appraise whether an officer who attempted an arrest was justified by “probable cause,” the right to resist unlawful arrests became unworkable and gradually collapsed.²⁵¹

In sum, the recognition of probable cause alone as a justification for a warrantless arrest marked a drastic departure from the common-law regime familiar to the Framers. The enlarged *ex officio* authority of the officer, coupled with the organizational might of the new police departments, fundamentally changed arrest and search doctrine and practice. The modern police officer and aggressive policing had become realities by the end of the nineteenth century; the warrant ceased to be the usual mode of arrest, and the “ministerial” label disappeared from the literature on law enforcement officers.

Unfortunately, modern Supreme Court opinions and commentaries have obscured the post-framing expansion of the officer’s *ex officio* authority by incorrectly asserting that probable cause was the American “common-law” standard for arrest at the time of the framing.²⁵² Indeed, that error is responsible for much of the confusion at-

251. The common-law right to resist an unlawful arrest or search was fairly robust (though not without ambiguity) at the time of the framing. See *supra* note 204. However, that right was undercut when the officer was given greater leeway for error; a person who was the target of an attempted arrest could usually apprise whether he was guilty of a crime, but he could not readily assess whether the officer had information that made it reasonable to suspect he might be guilty of a crime. Thus, the shift to probable cause made it riskier to resist arrest. Moreover, the appearance of police departments, the presence of multiple officers, and eventually of armed officers also made resistance less feasible. It is difficult to pinpoint exactly when the right to resist unlawful arrest collapsed — but it clearly did.

252. The virtual erasure of memory of the historical “felony in fact” requirement and the substitution of a mythical long-standing or even “ancient” probable cause standard presents a case study in how legal institutions reconstruct historical doctrine to legitimate current rulings. Although the King’s Bench ruling in *Samuel* clearly changed the trial court ruling, the judges who later decided *Beckwith* simply cited *Samuel* without noting that it was novel in itself and without noting that their announcement of the probable cause of felony standard actually went well beyond the innovation made in *Samuel*. Nineteenth-century English commentaries subsequently reinforced the false notion that the new probable cause standard was long-standing. See, e.g., 1 JAMES FITZJAMES STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 193 (1883) (attributing the reasonable cause standard to Hale, but not giving any page citation for that claim). But see Hall, *supra* note 214, at 567 (criticizing Stephen).

The false notion of a historical probable cause standard was implanted in American law by the judicial opinions that imported the *Samuel* and *Beckwith* innovations. Neither *Holly*, *Russell*, nor *Rohan* acknowledged that they were adopting a change from earlier American law. Thereafter, these cases — which departed from the framing-era standards — were cited as if they articulated historical common-law standards. This presentation was facilitated by the dual meanings of “common law” — sometimes referring to the content of the law inherited from England in 1776, but sometimes referring simply to judge-made law. In the 1900 *Bad Elk* decision, Justice Peckham described the 1887 South Dakota statute that included the “on charge” and “probable cause” justifications as a codification of “common law.” *Bad Elk v. United States*, 177 U.S. 529, 535-36 (1900).

A widely cited 1924 article, Horace L. Wilgus, *Arrest Without A Warrant*, 22 MICH. L. REV. 541 (1924), further reinforced the notion that the common law of arrest had not

tending Fourth Amendment history. We cannot appreciate the Framers' understanding of the problem of search and seizure unless we remove the probable cause justification for arrests and related post-framing developments from the picture. The Framers understood that justifications for warrantless arrests and accompanying searches were quite limited. Thus, they did *not* perceive the peace officer as possessing any significant *ex officio* discretionary arrest or search authority.

Likewise, the Framers did not share the modern expectation that police officers will tend to be overzealous in "the often competitive

changed greatly; Wilgus commingled sources ranging from Coke and Hale to early twentieth-century American decisions and presented the whole as though there was an analytically coherent treatment of "common law" arrest authority. (Wilgus did not omit the cases that made important historical changes, but he did not say they changed the law; for example, he wrote as though *Beckwith* "settled" an uncertainty — a treatment that did not adequately recognize the earlier stability of the felony-in-fact requirement. See, e.g., *id.* at 689.) In the 1925 *Carroll* decision, Chief Justice Taft (who could have read Wilgus) cited *Rohan* for a seemingly historical assertion (in the context of discussing the original meaning of the Fourth Amendment) that "at common law" a warrantless arrest could be made "on a reliable report of a felony," 267 U.S. at 157, 161, and also asserted that "[t]he usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony" — but did not mention the felony-in-fact requirement, *id.* at 156.

Recent decisions have reinforced the myth of a long-standing probable cause standard. In *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975), Justice Powell blurred together historical and modern citations and erroneously implied that the "probable cause" standard for warrantless arrests was in keeping with "the common-law antecedents" of the Fourth Amendment. A year later, Justice White asserted in *Watson v. United States*, 423 U.S. 411, 418 (1976) — the leading contemporary decision regarding warrantless arrest authority — that the "ancient common law rule" permitted an officer to make a warrantless arrest "if there was reasonable ground for making the arrest." As authority for that claim, he cited Hale and Blackstone (statements which, if examined, clearly stated the felony-in-fact requirement) and then *Samuel*, *Beckwith*, and *Rohan* — as though the sources endorsed a consistent standard. See *id.* at 418-19. White concluded that "[t]he balance struck by the common law in generally authorizing felony arrests on probable cause, but without a warrant, has survived substantially intact." *Id.* at 421.

Decisions since *Watson* have reiterated the claim that probable cause was the framing-era standard for warrantless arrests. See, e.g., *Payton v. New York*, 445 U.S. 573, 607, 609 (1980) (White, J., dissenting) (citing *Samuel* and *Rohan* as reflecting the standard for warrantless arrests in framing-era common law); *California v. Acevedo*, 500 U.S. 565, 584 (1991) (Scalia, J., concurring) (citing *Watson* and *Rohan* in stating "[u]nder our precedents (as at common law), a person may be arrested . . . on the basis of probable cause, without an arrest warrant").

Likewise, modern commentary has almost uniformly succumbed to the myth of a historical probable cause arrest standard. Lasson did not discuss the historical standard for warrantless arrests; however, Landynski asserted that at common law "[a] felon could be apprehended on probable cause alone," but gave no authority for that statement. LANDYNSKI, *supra* note 38, at 45; see also Amar, *Boston*, *supra* note 19, at 61, 70 (describing *Samuel* and *Beckwith* as though they reflect framing-era common law and the Framers' expectations); Jack K. Weber, *The Birth of Probable Cause*, 11 *ANGLO-AM. L. REV.* 155, (1982) (treating the probable cause of suspicion prong of the "on suspicion" standard as though it were the same as the modern probable cause standard, without addressing the historical felony-in-fact requirement).

enterprise of ferreting out crime.”²⁵³ The aggressive police officer is an outgrowth of an occupational subculture created by the development of police departments and full-time, career police officers.²⁵⁴ The amateur constable of the framing-era would not have had any similar notion of “real police work”; rather, he had little motive to act “at his own risk.” The principal historical complaint regarding constables was not their overzealousness so much as their inaction.²⁵⁵

The bottom line is that the Framers perceived warrant authority as the salient mode of arrest and search authority. As James Wilson put it when opening his 1790-91 lecture on arrest authority, “A warrant is the first step usually taken for [the apprehension of a criminal].”²⁵⁶ In that institutional context, the Framers perceived no reason to fear the

253. *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

254. The classic description of the occupational subculture of modern policing is JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN A DEMOCRATIC SOCIETY* (1966).

The historical development of the police department is well documented. *See, e.g.*, DAVID R. JOHNSON, *POLICING THE URBAN UNDERWORLD: THE IMPACT OF CRIME ON THE DEVELOPMENT OF THE AMERICAN POLICE, 1800-1887* (1979); LANE, *supra* note 192; WILBUR R. MILLER, *COPS AND BOOBIES: POLICE AUTHORITY IN NEW YORK AND LONDON, 1830-1870* (1973); ERIC MONKKONEN, *POLICE IN URBAN AMERICA, 1860-1920* (1981); JAMES F. RICHARDSON, *THE NEW YORK POLICE: COLONIAL TIMES TO 1901* (1970); ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE, PHILADELPHIA, 1800-1880* (1989); *see also* Steiker, *Second Thoughts*, *supra* note 63, at 832-39.

255. *See, e.g.*, FRIEDMAN, *supra* note 194, at 68. The common-law sources sometimes provided forms for indictments for refusing to serve as constable. *See, e.g.*, 1 BURN, *supra* note 199, at 391-92, 397-98.

256. 2 THE WORKS OF JAMES WILSON, *supra* note 196, at 684; *see also* 1 BURN, *supra* note 199, at 390 (stating that constables are chosen by justices of the peace because their office consists largely of executing the justices' precepts); 5 BACON, *supra* note 149, at 171, §§ 46-49 (“It is in the general true, that an Arrest for a criminal Cause, without an express Warrant, is a false Imprisonment. . . . And wherever an express Warrant is necessary to authorise an Arrest for a criminal Cause, an Arrest without an express Warrant can never be justified under one granted after the Arrest. . . . But in some Cases an Arrest may be made for a criminal Cause without an express Warrant. If a Felony have been committed, and A. have just Cause to suspect it was committed by B. A. may arrest B. without an express Warrant.”).

Modern historians have also emphasized the importance of warrant authority. *See, e.g.*, CHAPIN, *supra* note 196, at 31, 96-97 (“The larger part of [the constables'] duty consisted of executing the orders of the justices of the peace.”); GOEBEL & NAUGHTON, *supra* note 57, at 337-38 (warrants usually used for arrest in colonial New York); NELSON, *supra* note 195, at 17 (stating, somewhat overbroadly, “[a] fundamental rule was that an arrest, a search, or a seizure of goods following a search was an actionable wrong unless made pursuant to a lawful warrant”); ARTHUR P. SCOTT, *CRIMINAL LAW IN COLONIAL VIRGINIA 52-53* (1930) (stating that warrants were usually used for arrest in colonial Virginia).

There is also indirect evidence of the expectation that arrest warrants were the usual basis for arrest; when arrest powers were discussed during the ratification debates of 1787-88 it was in the context of arrest warrants. *See, for example*, the remarks of Holmes in the Massachusetts convention, quoted *infra* note 302, and the remarks of Patrick Henry in the Virginia convention discussed *supra* note 162. It is also significant that the First Congress did not create any *ex officio* arrest authority when it created the office of federal marshal shortly after adopting the Fourth Amendment. *See supra* note 170.

“ministerial” officer — especially when house searches were involved.²⁵⁷

4. *The Heightened Importance of Warrant Authority for Intrusions into Houses*

Although modern courts apply the Fourth Amendment to all privately owned property (except open fields), contemporary cases still acknowledge that the house was meant to receive special protection.²⁵⁸ Even so, the rhetoric of modern doctrine falls short of recognizing the unique status accorded the house at common law. The domicile was a sacrosanct interest in late eighteenth-century common law, as evidenced by the doctrine that “a man’s house is his castle.”²⁵⁹

The castle doctrine announced the householder’s entitlement to be left alone in his house — what John Adams called “that strong Protection, that sweet Security, that delightful Tranquillity which the Laws have thus secured to [an Englishman] in his own House”²⁶⁰ Thus,

257. Unfortunately, historical records cannot be used to quantify how often warrants were used during the framing era because executed warrants were not filed, but retained by the constables who executed them. See HENING, *supra* note 25, at 44. Thus, issued warrants have not been preserved even in surviving court records. Contemporary empirical researchers still report severe difficulties working with records of search warrants, because they are usually not filed with case files. See RICHARD VAN DUIZEND ET AL., *THE WARRANT PROCESS* 2, 8 (1985).

258. The most quoted passage to this effect is in *United States v. United States Dist. Court*, 407 U.S. 297, 316 (1972) (“[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed . . .”).

259. The most famous statement of this doctrine is a 1763 speech by William Pitt. See LASSON, *supra* note 16, at 49-50. However, the doctrine was recognized a century and half earlier by Coke in *Semayne’s Case*, 5 Coke Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K.B. 1604) (“[T]he house of every one is to him as his castle . . .”), and traces back at least to the early sixteenth century. See LEVY, *ORIGINAL MEANING*, *supra* note 45, at 222, 441 n.2; 1 Cuddihy, *supra* note 20, at xciv-xcvii.

The importance attached to the house is evident in numerous ways. For example, being a “freeholder” — that is, owning a house — was the general standard for membership in the English political community. Similarly, the Third Amendment to the Federal Constitution, which was based directly on a provision in the English Bill of Rights, and reflects a pre-revolutionary grievance as well, forbade quartering soldiers in “a house.” U.S. CONST. amend. III.

The common-law felony of burglary also demonstrated the unique status of the house. As a general rule, attempt offenses (conduct committed “with intent” to inflict a harm) were only misdemeanors at common law; however, breaking into a house at night with intent to commit a felony was a felony. See 4 BLACKSTONE, *supra* note 27, at 223-26 (stating the castle doctrine and noting that outbuildings within the curtilage are within the meaning of a house but not a “distant barn, warehouse, or the like”).

However, there was a limitation: a householder could not give sanctuary to a person who was not a resident of the household and was pursued by officers who had grounds to arrest him. See, e.g., HENING, *supra* note 25, at 41.

260. Adams described the status of the house:

except for extraordinary circumstances, an officer could not justify “breaking” (that is, opening²⁶¹) the outer door of a house unless he acted pursuant to a judicial warrant. Adams’s cryptic notes of Otis’s 1761 argument bear witness to this understanding:

This [general writ of assistance] is against the fundamental Principles of Law. The Priviledge of House. A Man, who is quiet, is as secure in his House, as a Prince in his Castle, not with standing all his Debts, and civil Processes of any kind. — But

For flagrant Crimes, and in Cases of great public Necessity, the Priviledge may be [encroached]. For Felonies an officer may break upon Prossess, and oath — i.e. by a Special Warrant to search such an House, sworn to be suspected, and good Grounds of suspicion appearing.²⁶²

Otis’s claim that a house was immune to entry except upon a “special warrant” echoed earlier common-law statements. Coke had asserted a broad right to forcibly defend one’s house,²⁶³ and had described arrest warrants largely in terms of the authority they provided officers to enter a house to make a felony arrest.²⁶⁴ Although Hale

An Englishmans dwelling House is his Castle. The Law has erected a Fortification round it — and as every Man is Party to the Law, i.e. the Law is a Covenant of every Member of society with every other Member, therefore every Member of Society has entered into a solemn Covenant with every other that he shall enjoy in his own dwelling House as compleat a security, safety and Peace and Tranquility as if it was surrounded with Walls of Brass, with Ramparts and Palisadoes and defended with a Garrison and Artillery. . . .

Every English[man] values himself exceedingly, he takes a Pride and he glories justly in that strong Protection, that sweet Security, that delightfull Tranquillity which the Laws have thus secured to him in his own House, especially in the Night. Now to deprive a Man of this Protection, this quiet and Security in the dead of Night, when himself and Family confiding in it are asleep, is treat[ing] him not like an Englishman not like a Freeman but like a Slave

1 LEGAL PAPERS OF JOHN ADAMS, *supra* note 20, at 137 (quoting Adams’s notes of his argument in the 1774 case *King v. Stewart*).

261. See 4 BLACKSTONE, *supra* note 27, at 226 (discussing burglary, Blackstone wrote that “lifting up the latch” of an outer door would constitute “breaking” a house).

262. 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 20, at 125-26. (Note that, because “Prossess” was a generic term for writs and warrants, the statement that “an officer may break [a house] upon Prossesses” reflects an understanding that a valid warrant was usually needed to justify breaking a house.) Otis also referred to the need to “get a special [i.e., specific] Warrant . . . to infringe the Priviledge of House,” complained that the general writ was a “Commission to break Houses,” and specifically noted an instance in which “Justice Walley searched House” under a writ. 2 *id.* at 126-29; see also 2 *id.* at 142-43 (discussing the portion of Adams’s abstract of Otis’s argument dealing with “the freedom of one’s house,” described as “one of the most essential branches of English liberty”).

263. *Semayne’s Case*, 5 Coke Rep. at 91b, 77 Eng. Rep. at 195 (stating that, although a homicide committed in self-defense or by accident was still a felony, a killing in defense of one’s house was not).

264. See 4 COKE, *supra* note 74, at 176-77. Coke had earlier made a statement that “the K[ing]’s officer” could break into a house to arrest for felony or suspicion of felony in his ruling in *Semayne’s Case*, 5 Coke Rep. at 92a-92b, 77 Eng. Rep. at 196-97 (K.B. 1604). This is sometimes read as though Coke meant that an officer had broad authority to break into a house to make a felony arrest. See, e.g., LEVY, ORIGINAL MEANING, *supra* note 45, at 223. However, the only justification for a warrantless breaking recognized in that case report is

later gave a somewhat more expansive interpretation of an officer's authority to break into a house to make a warrantless arrest for felony, he generally cautioned that the felon must actually be present in the house²⁶⁵ and advised that "to avoid question in these cases, it is best to obtain the warrant of a justice, if the time and necessity will permit."²⁶⁶

Hawkins adopted a more restrictive view in his chapter on "Where Doors may be broken open in Order to make an Arrest." He noted that an officer could break into a house to execute an arrest warrant from a justice of the peace,²⁶⁷ but recognized only two situations in which an officer could do so without a warrant: if he perceived that violence was then occurring inside the house,²⁶⁸ or if he was in pursuit of a person who either had just been witnessed committing an affray or was actually guilty of a felony. However, Hawkins asserted that an officer could not break into a house to make an arrest on suspicion of

for an arrest made upon "hue and cry" where the criminal "retreats into the house" and is "pursue[d]." *Semayne's Case*, 5 Coke Rep. at 91b-92a, 77 Eng. Rep. at 196. The seemingly broad statement regarding the authority of the King's officer actually referred to the execution of a "writ" — that is, a warrant:

[Y]et forasmuch as the K[ing] is a party, the writ of itself is *non omittas propt' aliquam libertat'*. . . for felony or suspicion of felony, the K[ing]'s officer may break the house to apprehend the felon, and that for two reasons: 1. For the commonwealth, for it is for the commonwealth to apprehend felons. 2. In every felony the King has interest, and where the King has interest the writ is *non omittas propter aliquam libertatem*; and so the liberty or privilege of the house doth not hold against the King.

5 Coke Rep. at 92 a, 77 Eng. Rep. at 196-97 (emphasis added). ("[N]on omittas propter aliquam libertatem" directed the officer not to omit to execute the writ because of any "liberty" — that is, any special district or jurisdiction. See BLACK'S LAW DICTIONARY 917, 1056, 1220 (6th ed. 1990).) Thus, the only justification for a warrantless breaking of a house Coke recognized was on fresh pursuit under the hue and cry.

The crucial distinction drawn in *Semayne's Case* was that a house could never be forcibly entered, even on the basis of a writ or other process, in a civil matter to which the King was not a party, but could be forcibly entered to execute judicial process (writs or warrants) in a matter in which the King was a party. See, e.g., HENING, *supra* note 25, at 41.

265. Hale twice discussed breaking doors to arrest. In his first volume, he discussed breaking doors to execute an arrest warrant at 1 HALE, *supra* note 75, at 582-83; he discussed breaking doors for warrantless arrests at 1 *id.* at 588-89. Note that his statements regarding breaking to make a warrantless arrest are usually qualified by something like "and the offender is in the house." Hale also discussed arrest authority in his second volume where he stated that a private person could not justify breaking a house to arrest on suspicion, but only to arrest on actual guilt, see 2 *id.* at 82; that an officer could justify breaking a house for a warrantless arrest on suspicion "if the supposed offender fly and take house," 2 *id.* at 92; that a constable can break into a house to suppress an affray "whereby there is likely to be manslaughter or bloodshed committed" or to suppress disorder, 2 *id.* at 95; that an arrest by hue and cry will justify the breaking of doors only if the person sought is present, 2 *id.* at 103; and that an arrest warrant will justify the breaking of doors, 2 *id.* at 116-17.

266. 1 *id.* at 589.

267. 2 HAWKINS, *supra* note 76, at 86-87; see also 2 LEACH'S HAWKINS, *supra* note 76, at 138-39.

268. See 2 LEACH'S HAWKINS, *supra* note 76, at 139, § 8 (stating one limitation as "[w]here an affray is made in a house in the view or hearing of a constable").

felony.²⁶⁹ Other eighteenth-century authorities maintained that, while an arrest warrant for a felony could justify breaking a house, an arrest warrant for a misdemeanor would not suffice.²⁷⁰

The warrant was even more critical for justifying searches of houses than for entering the house to make an arrest. Common-law authorities recognized a search warrant for stolen goods,²⁷¹ which was also a justification for forcibly entering a house if necessary.²⁷² The

269. Hawkins recognized two situations in which a warrantless breaking of a house was permitted in a pursuit. "Sect. 8. [The breaking of doors of a house may be justified w]here those who have made an Affray in [the arresting person's] Presence fly to a House, and are immediately pursued by him, and he is not suffered to enter . . . to apprehend the Affrayers . . ." 2 HAWKINS, *supra* note 76, at 87; see also 2 LEACH'S HAWKINS, *supra* note 76, at 139.

Sect. 7.[The breaking of doors of a house may be justified w]here one known to have committed a Treason or Felony, or to have given another a dangerous Wound, is pursued either with or without a Warrant, by a Constable or private Person: But where one lies under a probable Suspicion only, and is not indicted, it seems the better Opinion at this Day, That no one can justify the breaking open Doors in Order to apprehend him

2 HAWKINS, *supra* note 76, at 86-87; 2 LEACH'S HAWKINS, *supra* note 76, at 139. Hawkins's reference to a "known" felon is to one actually guilty, rather than only suspected of being guilty. Note that Hawkins's view that even an officer could not break into a house to arrest on suspicion without a warrant was contrary to Hale's earlier view. See *supra* note 265. This difference was noted in a number of framing-era sources. See, e.g., 1 BURN, *supra* note 199, at 106-07.

270. See John Adams, Minutes of the Referee's Hearing, reprinted in 1 LEGAL PAPERS OF JOHN ADAMS, *supra* note 20, at 87, 99 n.59 (quoting 1 JOSEPH SHAW, THE PRACTICAL JUSTICE OF PEACE 85 (6th ed. 1756)) (" [A] Justice of Peace his Warrant will not justify a Constable in breaking into a House to apprehend any Person for a less Crime than Felony or Misprision of Felony. ").

271. The common-law search warrant for stolen goods seems to have been created as a response to the special protection of the house recognized in *Semayne's Case*, 5 Coke Rep. 91a, 77 Eng. Rep. 194 (K.B. 1604), see discussion *supra* note 264, which held that a house could not be broken to serve a civil writ unless the King was a party to the suit. The search warrant for stolen goods provided a means for recovering property while avoiding that limit because the allegation that goods had been stolen gave the King an interest in the proceeding. Lord Camden described search warrants for stolen goods as having "crept into the law by imperceptible practice" in the longer report of *Entick v. Carrington*, 11 St. Tr. 313, 321 (Francis Hargrave's 4th ed.), 19 Howell St. Tr. 1029, 1067 (C.P. 1765) (first published 1781, see *supra* note 25). This passage was paraphrased in 2 LEACH'S HAWKINS, *supra* note 76, at 135 n.6 (1788 edition).

272. The strong protection afforded the house is evident in the fact that Hale was apparently uncertain whether a search warrant for stolen goods could justify breaking the door of a house, or merely allowed entry through an already open door. In Hale's first discussion, he wrote that "[t]here can be no breaking open of doors to make the search, but [the searchers] must enter *per ostia aperta* [by an open outer door] or upon voluntary opening of the door by the house-keeper or his servants," 2 HALE, *supra* note 75, at 114, and also that "[u]pon a warrant to search for stolen goods the doors cannot be broken open," *id.* at 116. In his second discussion of the execution of a warrant to search for stolen goods, however, Hale states that

[i]f the door be shut, and upon demand it be refused to be opened by them within, *if the stolen goods be in the house*, the officer may break open the door, and neither the officer nor the [complainant] are punishable for it, but may justify it upon the general issue . . . so that *in eventu* it is justifiable by both

common-law sources, however, did not identify *any* positive justification for a warrantless search of a house — a silence that meant there was no such justification.²⁷³ Indeed, the absence of common-law justifications for warrantless house searches, or of common-law authority for search warrants other than for stolen property, explains why Parliament had to enact statutory search authority for customs officers.²⁷⁴ As the Massachusetts Supreme Judicial Court stated in 1816, “every one is presumed to know that the dwelling house of another cannot be lawfully forced, unless for purposes especially provided for by law.”²⁷⁵

Modern commentators have sometimes understated the strong protection afforded the house against warrantless intrusions. For example, Professor Taylor claimed that the common law permitted a warrantless search of a house for evidence or stolen goods as an “incident” of a lawful arrest made in the house — but did not support that historical claim.²⁷⁶ Although that issue apparently arose infrequently,

Id. at 151 (emphasis added). Note that the breaking of the door pursuant to a legal search warrant was justifiable only if the stolen goods were actually found in the house — otherwise it was a trespass. See also the discussion of the liability of the complainant for an unsuccessful search pursuant to a warrant *infra* notes 293-294.

273. As noted above, common-law sources tended to define lawful authority positively and to catalog the forms of authority that existed; as a general matter, the absence of an affirmative statement of authority was understood to mean there was no authority. See, for example, Lord Camden’s statement in *Entick v. Carrington*, 2 Wils. 275, 291, 95 Eng. Rep. 807, 817 (C.P. 1765) (“[I]f this is law, it would be found in our books . . .”). For the full quotation, see *supra* note 203.

Professor Amar has implied that warrantless searches of houses were permitted because scholars have yet to identify framing-era statements that warrants were required for *all* searches. See, e.g., Amar, *Fourth Amendment*, *supra* note 58, at 763. That argument is a strawman. Not all interests were as protected as houses; thus, specific warrants were not needed to justify ship searches. See *supra* notes 149-159 and accompanying text. Moreover, Amar posed the question backwards — a framing-era lawyer would have assumed there was no justification for a search of a house unless such authority was positively recognized. The important fact is the *absence* of statements approving of warrantless house searches. See *also supra* notes 93, 203; *infra* note 543.

274. Parliament conferred customs revenues on Charles II at the Restoration in 1660; shortly thereafter, Parliament created a customs search warrant. See An Act to Prevent Frauds, 12 Car. 2, ch. 19 (1660) (Eng.). That legislation was prompted by a situation in which a merchant had barred the door to his house to block officers attempting to search for uncustomed goods; the officers did not make the search because they dared not break into the house on their own *ex officio* authority. See Frese, *Article*, *supra* note 18, at 321-22. Smith described the same incident but failed to mention the important fact that the door barred was to the merchant’s house. See SMITH, *supra* note 20, at 41. In 1662, when customs collections were “farmed” to commissioned collectors, the customs search warrant was replaced by the writ of assistance. See *infra* note 306.

275. *Sanford v. Nichols*, 13 Mass. (1 Tyng) 286, 289 (1816). The statement was made in the context of a ruling recognizing the trespass liability of revenue officers who searched a house without a valid warrant.

276. Taylor offered only three pieces of historical evidence on that point, and none of them lends any support to his claim. He first quoted a description of the early law of arrests as “rude.” TAYLOR, *supra* note 49, at 28 (quoting 1 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*

the framing-era statements that do address the point take the opposite view.²⁷⁷

Similarly, Professor Amar has asserted the existence of a broad “ex post success justification” for searching for and discovering stolen goods or contraband — but has not identified any supporting authority.²⁷⁸ Actually, the record indicates the opposite — that the success of

582-83 (2d ed. 1903)). That, however, was a description of the English law of arrest circa the thirteenth century. See 1 POLLOCK & MAITLAND, *supra*, at 579. Second, Taylor cited a single mid-seventeenth-century pamphlet on the constable for the proposition that a constable could make a warrantless search of a house incident to making an arrest there. TAYLOR, *supra* note 49, at 28-29 (quoting WILLIAM SHEPPARD, THE OFFICES OF THE CONSTABLES, CHURCH-WARDENS, OVERSEERS OF THE POOR, SUPRAVISORS OF THE HIGH-WAYES, TREASURERS OF THE COUNTY STOCK; AND SOME OTHER LESSER COUNTRY OFFICERS, PLAINLY AND LIVELY SET FORTH ch. 8, § 2, no. 4 (London, c. 1650)). The pamphlet was of dubious authority, however; at a number of points it appears to be more an assertion of what the law should be than a description of what the courts had declared the law was. Moreover, it predated the full development of the liberty of the house that attended the Restoration of 1660 and the Glorious Revolution of 1688. Taylor’s third citation was a “see also” cite to a 1754 work, but it does not contain any statement on the subject. See TAYLOR, *supra* note 49, at 183 n.27 (citing SAUNDERS WELCH, OBSERVATIONS ON THE OFFICE OF CONSTABLE 12, 14 (1754)). On the basis of that scanty, parochronistic evidence, Taylor asserted that searches of houses incident to arrest “had the full approval of bench and bar, in the time of George III . . .” TAYLOR, *supra* note 49, at 29.

Notwithstanding Taylor’s minimal documentation, a number of commentators have uncritically accepted his assertion on this point. See, e.g., Amar, *Fourth Amendment*, *supra* note 58, at 764; Stuntz, *supra* note 57, at 401 n.35.

277. Cuddihy has summarized the common-law literature on this point: “[t]he legal authors of 1761-1776 agreed that houses could be broken into to consummate the arrest process,” but “they did not also say that houses could be searched during that process.” 2 Cuddihy, *supra* note 20, at 1183. Cuddihy also reports a memorandum Charles Pratt (the judge in the Wilkesite cases) sent to William Pitt in 1763, just prior to the Wilkes trials, which stated that, even though the law allowed an officer to break into a house to arrest “in Felony & the flagrant Cases,” the arresting officer could “apprehend nothing but the Person.” *Id.* at 989, 1184 n.3 (quoting memorandum from Pratt to Pitt).

The most likely reason that little was said in the common-law sources about the scope of searches incident to arrest is that such searches were conducted primarily in connection with arrests made in fresh pursuit. Except in that setting, officers would not usually have made arrests for theft until after the property was discovered with a search warrant for stolen goods; without the recovered property, it would usually have been difficult to justify the arrest. See *supra* note 227 (discussing the requirement of “felony in fact” for a warrantless arrests “on suspicion”); see also discussion *supra* notes 231-235 and accompanying text (noting that the victim-complainant in *Samuel* obtained a search warrant for stolen goods, but not an arrest warrant); *supra* note 115 (discussing Taylor’s own observation that trespass cases involving searches for stolen property arose from warrant searches).

278. In addition to correctly noting that there was an “ex post success defense” to trespass for felony arrests, Amar asserted that discovery and seizure of “stolen goods” or “contraband” would also be self-justifying, citing as authority a statement by Justice Story in *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 246, 310 (1818). See Amar, *Fourth Amendment*, *supra* note 58, at 767 n.30; quotation of Amar’s statement *supra* note 225. (Stuntz has uncritically repeated Amar’s assertion on this point. See Stuntz, *supra* note 57, at 400 n.32.) However, *Gelston* involved an *in rem* seizure of a ship based on information that it was about to violate the 1794 Neutrality Act; it did not involve any search, let alone a warrantless entry and search of a house. Hence, *Gelston* does not provide authority for justifying a search of a house; it merely illustrates that ships did not enjoy the same protection as houses.

a search was not sufficient justification for a violation of a house.²⁷⁹ The importance of a valid warrant for justifying a house search is exemplified by the 1813 New York decision *Bell v. Clapp*, in which a search warrant was the only justification offered for the lawfulness of a successful search.²⁸⁰ Likewise, in the 1816 trespass case *Sanford v. Nichols*, the Massachusetts Supreme Judicial Court faced a situation in which customs officers had made a successful search of a house for uncustomed goods, but had acted under a too-loose and therefore illegal search warrant.²⁸¹ The court noted that the plaintiff was entitled to a trespass verdict against customs officers, thereby showing that a successful search did not justify the violation of a house (however, the court suggested that damages might be small because only forfeit goods were actually taken).²⁸² Similar implications are apparent in both the 1814 New York decision *Sally v. Smith*²⁸³ and the 1838 Mas-

279. An English judge described a verdict of trespass against revenue officers who had found uncustomed goods during a search of a house under a writ of assistance but who had failed to comply with the terms of the writ, because they had searched without bringing the local constable with them, as called for in the writ. Thus, the successful seizure of uncustomed goods was not enough to justify the house search; the justification for the house search depended on compliance with the writ of assistance. See the statement by Justice Gould in *Bruce v. Rawlins*, 3 Wils. 61, 62, 95 Eng. Rep. 934, 935 (C.P. 1770). (Although *Bruce* is conventionally cited to the third volume of Wilson's Reports, it was initially published in 1775 in the third "part" which comprised the second volume of the first edition. In later editions, the volume numbers were changed when the three parts were published as three volumes. See the discussion of publication dates of Wilson's Reports, *supra* note 25.)

280. 10 Johns. Cas. 263 (N.Y. Sup. Ct. 1813). Officers had searched a house and found and removed barrels of stolen flour under the authority of a search warrant for stolen property; the owner of the premises sued for trespass, but the court held that the warrant provided justification for the search. The significant point, for present purposes, is that the officers do not seem to have attempted to justify the successful search other than by the warrant. Why would the arguments have been entirely about the validity of the search warrant if the success of the search could constitute a justification?

Although barrels of stolen flour were recovered, there is no mention of any criminal prosecution. A search warrant for stolen property did not rest on an allegation that the theft was committed by anyone in particular, only that there had been a theft and that there was probable cause as to where the property was located. The warrant commanded the constable to bring anyone who was found to have control of the premises to the justice of the peace for examination if the allegedly stolen property was found during the search. It does not appear, however, that a successful search for stolen property necessarily led to a criminal prosecution. At least when there was no subsequent prosecution, the search warrant for stolen property was the only justification for a search of a house.

281. 13 Mass. (1 Tyng) 256, 289-90 (1816).

282. The defendant officers had won at a trial, in which the too-loose search warrant had been admitted into evidence as their justification. On appeal, the court ruled that the warrant should not have been admitted, and ordered a retrial. In that context, the court noted that the plaintiff might wish to consider whether a retrial would be worthwhile because, since only forfeit goods had actually been seized, damages might not be large (apparently there was no damage to the house itself). The court's comment on the amount of damages shows that the defendant officers could not justify the house search simply by showing that forfeit items had been found. See generally *id.*

sachusetts decision *Banks v. Farwell*.²⁸⁴ Thus, the common law apparently provided no justification for a search of a house beyond the ministerial execution of a valid search warrant.²⁸⁵

The absence of justifications for house searches other than a valid search warrant explains why prerevolutionary controversies over search authority consistently focused on whether general warrants could constitute a legal justification for a house search. It also explains why no one seems to have claimed that customs officers (or King's Messengers) could conduct lawful warrantless searches of houses.

Thus, there is a historical explanation for the silence of the Fourth Amendment (and of the state provisions) as to whether or when a warrant is to be used. The Framers of the Fourth Amendment understood that the common law already specified that many sorts of arrests or searches could only be justified by a valid warrant — especially when “houses, papers, and effects” were involved. Because they took the importance of warrant authority for granted, they perceived the task for the

283. 11 Johns Cas. 500 (N.Y. Sup. Ct. 1814). The decision upheld a state customs officer's warrantless search and seizure of a commercial sled that was located in a shed open to the public. The seizure was made under a state “trading with the enemy” statute enacted during the War of 1812. The court's opinion noted that the statute also purported to authorize warrantless searches of dwelling-houses, and commented that authority for a warrantless search of a house would be “an extensive and highly important authority . . . if it does exist,” and that the “more correct course” for searching a house would be for the officer to obtain a search warrant. *Id.* at 502-03. This opinion has to be read in light of the fact that New York had not adopted any constitutional search and seizure provision; thus, the judges could not invoke a constitutional provision to invalidate the statute. In that light, the reluctance they expressed regarding warrantless house searches reflected a strong sense that the statute conflicted with the common-law protection usually accorded the house. The discussion also refutes any notion that warrantless house searches were permissible in the absence of specific statutory authority.

284. 38 Mass. (21 Pick.) 156 (1838). Farwell had sworn out a complaint and arrest warrant for Banks for theft of a pump-nose. A constable arrested Banks pursuant to the warrant, and during a justice of the peace's examination Banks said that the pump-nose was in his shop. Over Banks's objections, the justice told the constable and Farwell to get it. To do so, they broke into Banks's shop and seized the pump-nose. Banks subsequently sued Farwell and the constable for trespass. The trial judge instructed the jury that the facts did *not* constitute a justification for the breaking and search of the shop, and the jury returned a verdict for Banks. On the officer's appeal, the Massachusetts Supreme Court reversed the trespass verdict. Although the result in the case weakened the need for a search warrant (and is best understood as reflecting the nineteenth-century expansion of the officer's *ex officio* authority), the court based its ruling on the premise that the retrieval of the stolen item from the shop had not constituted a “search.” In that regard, the judges recited that “[h]ad [the constable and the complainant] attempted to break into the plaintiff's house or shop for the purpose of searching for stolen property, they would have gone aside from their authority and would have acted at their peril.” *Id.* at 159. Thus, the court seems to have upheld the warrantless entry on the narrow ground that because the arrestee had confessed the location of the pump-nose, its location was known with certainty — not because a successful search was self-justifying.

285. See also GOEBEL & NAUGHTON, *supra* note 57, at 428, quoted *supra* note 57; NELSON, *supra* note 195, at 34, quoted *supra* note 195.

constitutional text solely as banning the legalization of general warrants — and the warrant standards of sworn-to probable cause and particularity sufficed to accomplish that.

Justices Jackson and Frankfurter, as well as a number of commentators, were therefore correct when they asserted that the Framers of the Fourth Amendment must have believed they could control intrusions by peace officers simply by controlling the issuance of warrants.²⁸⁶ The Justices provided no supporting evidence for their conclusion, however, because they likely did not fully grasp (or were constrained from reporting) how much modern search and seizure doctrine had diverged from the common-law rules that had shaped the Framers' expectations.

5. *The Framers' Acceptance of Specific Warrants*

The common-law sources also shed considerable light on why the Framers objected only to general warrants, but not to specific warrants. At common law, specific warrants provided several layers of protection against arbitrary searches. First, and perhaps foremost, the specific warrant gave a particularized command to the officer, thereby circumscribing the officer's exercise of his own judgment as to whom to arrest, what place to search, or what items to seize. The specific warrant controlled the officer.

The second layer of protection derived from the common law's distribution of accountability for searches made under warrant. In the modern warrant process, an officer can recite hearsay information from an unidentified informant to establish probable cause for a warrant²⁸⁷ (or, as a practical matter, can even invent such information or

286. Justice Jackson correctly perceived the Framers' sense of the centrality of warrant authority. After quoting the Fourth Amendment, he wrote "[h]ere endeth the command of the forefathers, apparently because they believed that by thus controlling search warrants they had controlled searches." *Harris v. United States*, 331 U.S. 145, 196 (1946) (Jackson, J., dissenting).

Justice Frankfurter put it this way:

When the Fourth Amendment outlawed "unreasonable searches" and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is "unreasonable" unless a warrant authorizes it, barring only exceptions justified by absolute necessity.

United States v. Rabinowitz, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting).

See also Kamisar, *supra* note 38, at 571-79 (discussing "why the Framers probably believed that by controlling search warrants they had controlled searches"); Wasserstrom & Seidman, *supra* note 9, at 83 ("[A]t the time the amendment was adopted, it was assumed that the common law would effectively protect the citizenry from warrantless searches and seizures, and therefore the framers primarily feared search[es] and seizures under warrants.").

287. The Supreme Court still expressed skepticism regarding the use of hearsay information to establish probable cause for a search warrant as late as *Grau v. United States*, 287

informants with minimal likelihood of discovery²⁸⁸). In framing-era law, however, only a person who had personal knowledge of an offense could swear out a complaint and warrant; thus, there were no “confidential” informants, only *named* complainants.²⁸⁹ An officer could act as the complainant only by swearing to his *own* information and suspicion.

In addition, a complainant had to make strong allegations: for an arrest warrant, he had to swear to knowledge of a crime *in fact* and that he possessed probable cause of suspicion regarding the perpetra-

U.S. 124, 128 (1932) (“A search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury.”). However, the restrictive use of hearsay to establish probable cause for warrants was in tension with the permissive allowance of the use of hearsay information to provide probable cause for warrantless arrests, as permitted in *Beckwith* and its progeny. The Supreme Court resolved that tension by rejecting the general proposition that probable cause for a warrantless arrest must be based on evidence that would be admissible at trial in *Draper v. United States*, 358 U.S. 307, 311-12 & n.4 (1959) (disapproving the standard stated in *Grau* and asserting that allowance of hearsay evidence to establish probable cause is consistent with the treatment of probable cause in *Brinegar v. United States*, 338 U.S. 160, 172-74 (1949)). The Court also ruled that an affidavit for a search warrant is not to be deemed invalid because “it sets out not the affiant’s observations but those of another” because it would be “incongruous” to apply different standards for probable cause for warrantless arrests and search warrants. *Jones v. United States*, 362 U.S. 257, 269, 270 (1960). The Supreme Court’s allowance of hearsay to show probable cause was anticipated in earlier lower federal court and state court rulings. However, the earlier cases that permitted probable cause for an arrest or search to be based on hearsay information from an informant tended to require that the informant be identified, notwithstanding the general “informant’s privilege” recognized in the law of evidence. See 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 769 n. 9 (John T. McNaughton rev. 1961) (citing cases). However, the Supreme Court also effectively rejected a rule of disclosure of the identity of an informant who provided the information constituting probable cause for an arrest or search warrant in 1960 in *Jones*, 362 U.S. at 272 (although defendant objected that warrant affidavit did not name informants, the Court ruled that informants need not be produced before commissioner authorized to issue search warrant).

The Court subsequently directly rejected a claim that a defendant was entitled to know, for purposes of challenging the validity of an arrest and search, the identity of the person who allegedly provided the information that constituted probable cause. See *McCray v. Illinois*, 386 U.S. 300 (1967). Although *McCray* involved a warrantless arrest, it has been understood — in light of the Court’s earlier statement in *Jones* that it would be “incongruous” if the standard for probable cause for a warrant were higher than for a warrantless intrusion — to also mean that the identity of an informant need not be disclosed in a warrant application based on hearsay information, or in subsequent suppression proceedings.

288. See, e.g., Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 102-07 (1992). The Burger Court made it virtually impossible for defendants to attack perjurious allegations in warrant affidavits. See *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978) (requiring defendant to make a prima facie showing that police deliberately or recklessly made a false allegation regarding information provided by informant). The affidavit in *Franks* was aberrant insofar as it named the supposed informants; however, when the informants are not identified, as is the typical practice, there is no possible way for a defendant to challenge the veracity of the claims police officers swear to in affidavits.

289. See, e.g., 2 HALE, *supra* note 75, at 150 (stating that a search warrant for stolen property is not to be granted without oath of a felony (that is, a theft) committed and “that the party complaining hath probable cause to suspect” that the stolen property is in a particular place).

tor's identity;²⁹⁰ for a search warrant for stolen goods, he had to swear that goods were stolen *in fact* and that he possessed probable cause of suspicion as to the location of the stolen property.²⁹¹ (Note that the Fourth Amendment probable cause standard for warrants, which does not require an allegation of an offense "in fact," is actually *less* demanding than the common-law standards for criminal warrants.²⁹²)

Swearing out a search warrant was a serious undertaking because the complainant was accountable for the outcome of the search; if it did not produce the stolen property or contraband as alleged, the complainant was liable for trespass.²⁹³ Moreover, an officer who initiated a revenue search was as accountable as a private complainant. An officer was indemnified for *executing* a valid search warrant because that was a "ministerial" act he was duty-bound to perform, but swearing out a warrant was a personal act. Thus, an officer who initiated an unsuccessful revenue search of a house by swearing out a search warrant for untaxed goods was likewise liable for trespass if the search proved fruitless.²⁹⁴ (Customs officers did, however, sometimes enjoy a degree

290. Hale wrote: "it is fit in all cases of warrants for arresting for felony, much more for suspicion of felony, [for the justice of the peace] to examine upon oath the party requiring the warrant, as well whether a felony were done, as also the causes of his suspicion . . ." 2 HALE, *supra* note 75, at 110. See also the passage from Blackstone quoted *infra* note 297. The elements for an arrest were still stated the same way in early nineteenth-century works. See, e.g., 7 DANE, *supra* note 151, at 244, 248.

291. See citation to Hale *supra* note 289. Lord Camden described the elements for a search warrant the same way: "the justice and the informer must proceed with great caution; there must be an oath that the party has had his goods stolen, and a strong reason to believe they are concealed in such a place . . ." Entick v. Carrington, 2 Wils. 275, 291-92, 95 Eng. Rep. 807, 818 (C.P. 1765) (version published 1770, see *supra* note 25). The same description of the elements needed for a search warrant still appeared in post-framing American works. See, e.g., 7 DANE, *supra* note 151, at 244-45 & n.*; HENING, *supra* note 25, at 413-15.

292. See *infra* notes 445-447 and accompanying text.

293. See, e.g., 2 HALE, *supra* note 75, at 151 (stating that an officer executing a warrant was not liable for a fruitless search of a house "but it seems the party that made the suggestion [to search] is punishable in such case, for as to him the breaking of the door is *in eventu* lawful or unlawful, *viz.* lawful if the goods are there; unlawful, if not there"). Lord Camden also asserted that the complainant was liable for a fruitless search for stolen goods: "if the goods are not found there [as the complainant swore], he is a trespasser; the officer in that case is a witness." Entick, 2 Wils. at 291-92, 95 Eng. Rep. at 818; see also 2 Wils. at 283, 95 Eng. Rep. at 812 (case report published in 1770, see *supra* note 25). In addition, the original statutory authority for a customs search warrant explicitly provided for liability of the complainant for a fruitless search under such a warrant. See 12 Car. 2, ch. 19 (1660) (Eng.) ("[I]f the Information whereupon any House shall come to be searched shall prove to be false, that then and in such case the party injured shall recover his full damages and costs against the Informer by Action of Trespass to be therefore brought against such Informer.").

In American law, the rule of complainant liability for a fruitless search made pursuant to a warrant persisted into the nineteenth century. See, e.g., DANIEL DAVIS, A PRACTICAL TREATISE UPON THE AUTHORITY AND DUTY OF JUSTICES OF THE PEACE 75-76 (1824); HENING, *supra* note 25, at 40, 414, 415.

294. At common law, the general rule, that the person who initiated a fruitless search by procuring a search warrant was liable for trespass, applied to officers who initiated

of statutory protection for wrongful seizures when they seized goods that had initially appeared to be untaxed but later were ruled not forfeit.²⁹⁵) Although the complainant's trespass liability has disappeared from modern doctrine, it was an important feature of framing-era law.

searches. For example, an officer who made a fruitless search under a writ of assistance was liable for trespass if he initiated the search on the basis of his own suspicion; however, he was not liable for trespass if he acted on the basis of information provided by another person. See *Bruce v. Rawlins*, 3 Wils. 61, 95 Eng. Rep. 934 (C.P. 1770) (imposing trespass liability on a customs officer for a fruitless search under a writ of assistance initiated on the basis of the officer's own suspicion rather than on information provided by another person). Framing-era American lawyers were probably familiar with *Bruce*, because the case reports conventionally cited to the third volume of Wilson's Reports were published in the second volume of the first edition in 1775. See *supra* notes 25, 279. (However, it is unclear how the potential liability of an officer who searched under a writ of assistance was understood by Massachusetts lawyers at the time of the 1761 *Writs of Assistance Case*. See SMITH, *supra* note 20, at 511-15.)

Similarly, at common law, an officer who acted as complainant and procured a revenue search warrant was liable for trespass if the search proved fruitless. See *Bostock v. Saunders*, 3 Wils. 434, 95 Eng. Rep. 1141 (K.B. 1773) (distinguishing between the protection afforded an officer who only executed a fruitless search under a lawful search warrant and the liability of an officer who also initiated a fruitless search by acting as complainant and obtaining an excise search warrant); also reported as 2 Black. W. 912, 96 Eng. Rep. 539 (first published 1781, see 1 LEGAL BIBLIOGRAPHY, *supra* note 19, at 239, entry 11). Framing-era American lawyers were probably familiar with *Bostock* because it was published in 1775 in the same volume of Wilson's Reports as *Bruce*.

Bostock was reversed in English law when Lord Mansfield and the other judges of the Court of King's Bench ruled in 1785 that an officer should not be liable for a fruitless search conducted under an excise search warrant even if he had procured the warrant (though acknowledging that this treatment contrasted with the well established liability of an officer who initiated a fruitless search under a writ of assistance on the basis of his own suspicion). *Cooper v. Booth*, 3 Esp. 138, 170 Eng. Rep. 564 (K.B. 1785), also reported as *Cooper v. Boot*, 4 Doug. 339, 99 Eng. Rep. 911. However, it is highly unlikely that framing-era American lawyers were familiar with this change in English law because the case report by Espinasse was published no earlier than 1801 while that by Douglas was not published until 1831. See *supra* note 19.

Indeed, Nathaniel Dane treated *Bostock* as the American doctrine in his 1824 commentary (without mentioning *Cooper*) and suggested that, under *Bostock*, a federal customs officer who procured a search warrant under the 1789 Collections Act should be liable if the revenue search made pursuant to it was unsuccessful. See 7 DANE, *supra* note 151, at 244-46 (volume published 1824). The 1789 Collections Act anticipated suits against officers in connection with searches and seizures but did not state any standards as to when liability would be incurred regarding search warrants. See 1789 Collections Act, Act of July 21, 1789, ch. 5, § 27, 1 Stat. 29, 43-44.

295. English statutes in effect during the late colonial period provided that customs officers were immune against trespass suits if they seized goods or ships that were subsequently ruled not forfeit or "acquitted" provided that the judge who heard the forfeiture proceeding determined that the officer had acted with "probable cause" when he made the seizure. See, e.g., The Sugar Act, 4 Geo. 3, ch. 15, § 46 (1764) (Eng.). American legislators also provided customs officers with a comparable protection in the event a ship or goods seized by customs officers was ruled not forfeit. The 1789 Collections Act enacted by the First Congress provided that the court that decided a revenue seizure was invalid could issue a certificate that would bar any legal action against the customs officer who made the seizure, provided the court found "there was a reasonable cause of seizure." See Act of July 31, 1789, ch. 5, § 36, 1 Stat. 29, 47-48.

Indeed, the complainant's oath may have been important, in part, because it clarified who was ultimately accountable for the search.

A magistrate's assessment of the adequacy of a complaint added a third layer of protection to the specific warrant process. Unlike a constable, a magistrate (usually the justice of the peace) was expected to be a man of stature and sound judgment.²⁹⁶ In addition to assuring that a complaint alleged, under oath, an offense "in fact," the magistrate was expected to assess the grounds for probable cause of suspicion respecting the person to be arrested or the place to be searched.²⁹⁷ In sum, the specific warrant provided substantial protections against arbitrary intrusions.

296. In colonial America, the office of justice of the peace was reserved for "men of means and standing." David F. Forte, *Marbury's Travail: Federalist Politics and William Marbury's Appointment as Justice of the Peace*, 45 CATH. U. L. REV. 349, 354 (1996). Forte notes that in Maryland, "appointment as justice of the peace was an essential emblem of a man's membership in the political and financial elite." *Id.* at 351.

297. *See, e.g.*, 4 BLACKSTONE, *supra* note 27, at 287 (emphasis in original):

[I]t is fitting [for the magistrate who hears a warrant application] to examine upon oath the party requiring a warrant [i.e., the complainant], as well to ascertain that there *is* a felony or other crime actually committed, without which no warrant should be granted; as also to *prove* the cause and probability of suspecting the party, against whom the warrant is prayed.

This statement comports with other descriptions of the magistrate's role. *See, e.g.*, 1 HALE, *supra* note 75, at 582; 2 *id.* at 110-11 (stating that a justice of the peace is "a competent judge of those circumstances that may induce the granting of a warrant" and "[t]he party that demands it ought to be examined upon his oath touching the whole matter, whereupon the warrant is demanded, and that examination put into writing"); 2 HAWKINS, *supra* note 76, at 84-85 (advising that "a Justice of Peace cannot well be too tender in [issuing arrest warrants prior to indictment], and seems to be punishable not only at the Suit of the King, but also of the Party grieved; if he grant any such Warrant groundlessly and maliciously, without such probable Cause, as might induce a candid and impartial Man to suspect the Party to be guilty"); 2 LEACH'S HAWKINS, *supra* note 76, at 135 (repeating previous passage). *See also* Mansfield's statement in *Leach* quoted *supra* note 77 (recognizing that it is for a magistrate to assess cause for arrest), and Camden's statement from *Entick* (case report published in 1770) quoted *supra* note 291 (reflecting need for magistrate to exercise care in granting warrant). This view of the magistrate's role also appears in early American sources. *See, e.g.*, 7 DANE, *supra* note 151, at 243 (volume published 1824).

Some commentaries have asserted that magistrates did not, indeed could not, assess the grounds for a warrant. Levy has written, without offering any documentation, that magistrates "made no independent determination" whether there was a basis for a warrant. LEVY, ORIGINAL MEANING, *supra* note 45, at 224-25. His statement is presumably based on Cuddihy's similar statements. *See, e.g.*, 2 Cuddihy, *supra* note 20, at 687 (stating that a magistrate had no discretion as to the issuance of a warrant under certain Massachusetts laws circa 1756-64) (This was also relied upon by Maclin, *Complexity*, *supra* note 44, at 944 n.112.) I do not think these claims reflect the general understanding of the magistrate's role in the warrant process at the time of the framing.

6. *The Illegality of General Warrants*

Although there had been a long period in which general warrants had been allowed at common law,²⁹⁸ common-law treatises clearly disapproved of such warrants as a doctrinal matter (even if such warrants had not been entirely eliminated in practice) by the mid-eighteenth century — and any lingering doubt was removed by the Wilkesite cases in the 1760s.²⁹⁹ Courts and commentators condemned general warrants

298. See MICHAEL DALTON, *THE COUNTRY JUSTICE* 462-64, 469 (1690 ed.) (first published in London, 1618 with seventeen subsequent editions to 1742, see 1 LEGAL BIBLIOGRAPHY, *supra* note 19, at 227, entry 24), *discussed in* 1 Cuddihy, *supra* note 20, at 95-96.

299. When exactly the condemnation of general warrants occurred is a contested subject. I think American lawyers understood general warrants to be condemned *as a matter of doctrine* by the late 1760s. That is not to say that some ignorant justices of the peace did not continue to issue general warrants for arrests or searches of houses after that date (there are still some ignorant magistrates who do so); however, the cumulative effect of the condemnations of general warrants by Hale, *see supra* note 75, and Hawkins, *see supra* note 76 and accompanying text, the press reports of the Wilkesite cases, *see supra* note 137, the politicization of the complaint against the general warrant during the Townshend Act controversies, *see supra* note 26, and Blackstone's 1769 condemnation of general warrants, *see supra* note 78, would have dispelled any lingering approval of general warrants for arrests of person or searches of houses.

In contrast, Cuddihy has argued that the general warrant was common in colonial practice and was still widely used and approved of in some states until the mid-1780s — virtually the eve of the Fourth Amendment's adoption. (Cuddihy's argument on this point is set out primarily in his Chapter 23, 3 Cuddihy, *supra* note 20, at 1231-1358; it has also been summarized in Cloud, *supra* note 42, at 1725-31, and Maclin, *Complexity*, *supra* note 44, at 939-50. See also LEVY, *ORIGINAL MEANING*, *supra* note 45, at 240, 242; Cuddihy & Hardy, *supra* note 40, at 398.) However, Cuddihy is not entirely consistent in his own treatment of the subject. Compare 2 Cuddihy, *supra* note 20, at 1229 (stating that the specific warrant triumphed over the general warrant by 1776), with 3 *id.* at 1277 (stating that general warrants were still common in the states in the 1780s).

Cuddihy offered four sorts of evidence to support his claim that Americans did not fully reject the general warrant until the eve of the framing of the Fourth Amendment; however, I do not think that they support his conclusion. First, he argued that some state governments used general warrants *during the Revolution* to authorize searches to apprehend deserters or escaped enemy soldiers, to seize weapons, supplies, or the papers and possessions of Tories, to enforce bans against trading with the enemy, or to discover hoarding of vital supplies. See 3 Cuddihy, *supra* note 20, at 1256-76. In addition, he noted that a form of general warrant was used in 1777 to round up and detain prominent Quakers in Philadelphia, who were feared to be loyalists, shortly before the British army occupied that city. See 3 *id.* at 1267-70, 1283-84, 1297-98, 1313-16. (This episode was also discussed in LASSON, *supra* note 16, at 76-78.)

However, at least some of the "general warrants" to arrest persons that Cuddihy refers to were of the innocent variety discussed *supra* note 12 — warrants to arrest particular persons that were designated "general" only in the sense that they were returnable before any magistrate in the county. Moreover, the use of general warrants during the military emergency of the Revolutionary War — which amounted to a civil war — is not valid evidence of the Framers' view of the legality of such warrants in normal times. There is considerable evidence that the Framers concluded that legal rights could be suspended in the face of military emergency. For example, Cuddihy notes that Henry Laurens observed in 1777 that the mass arrest of Quakers, while absolutely necessary in the circumstances, would be "danger-

ous" in peacetime. 3 *id.* at 1297-98; *cf.*, Blackstone's statement regarding "first principles," quoted *infra* note 568; LASSON, *supra* note 16, at 77-78. Likewise, the Framers' outlook is evident in the provision of the Constitution that provides for the suspension of the writ of habeas corpus "when in Cases of Rebellion or Invasion the public Safety may require it," U.S. CONST. art. I, § 9, and also in the Third Amendment which qualifies the protection of the house by permitting the billeting of troops "in time of war." Moreover, Cuddihy also reports that even *during* the revolutionary war "[o]n land . . . general warrants of all descriptions were far less common than specific search warrants and warrants to apprehend particular persons." 3 *id.* at 1261-62. Thus, even during the period of military action, the Founders usually used specific warrants.

The second sort of evidence Cuddihy pointed to as showing the persistence of general warrants consisted of search warrant provisions in a number of early state statutes, especially state impost (customs) statutes. Cuddihy asserted that many of these statutes provided for "general warrants." Specifically, he asserted that "general warrants" were provided for in the 1781 Virginia impost statute, *see* 3 *id.* at 1284; in the 1784 New York impost statute, *see* 3 *id.* at 1325-26; in the 1783 Maryland impost statute, *see* 3 *id.* at 1332-33; in the 1786 Georgia impost statute, *see* 3 *id.* at 1332 n.195; in the 1784 North Carolina impost statute, *see* 3 *id.* at 1333; and in the 1783 South Carolina impost statute, *see* 3 *id.* at 1334-35. He also asserted that the 1780 Pennsylvania impost statute permitted warrantless searches of houses as well as ships, but required the officer to obtain a writ of assistance to justify forcible entry if entry was resisted. *See* 3 *id.* at 1284.

I do not read these statutes the way Cuddihy did. Some of his statements are plainly erroneous. For example, his initial statements about the 1780 Pennsylvania statute are inconsistent with a later passage in which he correctly noted that that statute actually contained a provision that required use of a *specific warrant* for a search of a house. *See* 3 *id.* at 1314-15. (I discuss this statute *infra* note 370 and accompanying text.) In addition, Cuddihy never explained the basis for his conclusion that the other state impost statutes provided for general warrants except for noting, at the beginning of that discussion, that the 1781 Virginia statute employed "general warrants" that "allowed searching 'any house.'" Because similar "any house" language appeared in the other state customs acts cited by Cuddihy (except for the Pennsylvania statute), I presume that this language is what led Cuddihy to describe the statutes as providing for "general warrants."

However, I think Cuddihy miscomprehended the point of the "any house" language. That phrase appeared in the following search warrant provision of the Virginia statute (and in comparable provisions in the other statutes cited):

[I]t shall be lawful to and for all and every [customs] Collector and Collectors . . . , by warrant under the hand of a Justice of the Peace (which warrant shall not be granted but upon an information made to him upon oath, and accompanied with a Constable) to break open, in the day time, any house, warehouse, or storehouse, to search for, seize, and carry away any [uncustomed goods].

An Act for ascertaining certain Taxes and Duties, and for establishing a permanent Revenue, Va. Acts, ch. 90, §§ 10-11 (1782), *reprinted in* VIRGINIA: THE STATUTES AT LARGE 501 (William Waller Hening ed., 1822). Cuddihy apparently read the statute as permitting issuance of a warrant that recited authority to search "any house." I think that is a misreading: the reference to "information made to him upon oath" indicated that the warrant had to be based on specific information. In that context, the "any house" language only indicated that there was no limitation on the kind of building that the specific warrant could be issued for — that it could be issued for a dwelling house just as validly as for a warehouse or storehouse. This is evident if one examines the style of the provision. Note the reference to "all and every Collector and Collectors" at the outset of the provision; that language indicated that the authority to obtain a warrant was not limited to a particular collector, but was shared by all collectors. Note, too, the clearly plural meaning of "all and every" collectors and the contrasting singular implication of "any" building — not "all and every" buildings — in this context. And note that the statute used the singular "any house," not the plural "any houses." Although the statute could have been more precisely drafted (for example, by saying "any particular house"), Cuddihy's reading reflects a hypercritical attitude toward the

precisely because they lacked each of the protections afforded by specific warrants: a complainant's swearing out of specific allegations, the complainant's accountability for fruitless searches, a judge's assessment of the grounds for the warrant, and — perhaps most importantly — clear directions to the officer as to whom to arrest or where to search.³⁰⁰ The general warrant was reviled as a source of arbitrary power.

7. *Why the Framers Feared Legislative Approval of General Warrants for Customs Searches*

One question remains: why did the Framers bother to adopt constitutional bans against general warrants in light of the apparent consensus that the general warrant was illegal at common law? Their motivation may have been partly symbolic — they responded to Parliament's earlier insult to their right to be secure by declaring that the government should never ignore that right again. But they may also have felt a genuine concern that Congress might endanger the right in the future.

They had little reason to fear that judges might approve of general warrants on their own initiative — the highly visible rulings in the

Framers' draftsmanship rather than an effort to recover the meaning they expected their language would convey. See also *infra* note 349. (The Virginia, Maryland, and North Carolina impost statutes are also discussed *infra* note 374.)

The third sort of evidence Cuddihy pointed to as showing the persistence of general warrants consisted of the fact that forms for "hue and cry" warrants continued to be set out in several American practice manuals published between 1776 and 1788, and that those warrant forms commanded that "diligent search" be made for known felons. There were also some proclamations issued by governors of a similar import. See 3 *id.* at 1279-82. These "warrants," however, were derived from the common-law institution of the "hue and cry" and were issued only for pursuit of fresh crime or escape, sometimes by constables when no justice of the peace was available, and without the usual requirements of a sworn complaint. It is unlikely the Framers would have perceived hue and cry warrants as being in the same category as judicially issued arrest or search warrants. Moreover, it is not clear whether hue and cry was much used by the framing era. (See the discussion of hue and cry arrests, *supra* note 198.)

Finally, Cuddihy pointed to the use of slave patrol statutes in several Southern states (mostly carried over from the colonial period). See 3 *id.* at 1280-82, 1327, 1340-41. Those statutes certainly demonstrate the inherent incompatibility between the institution of slavery and enforceable legal rights (it is no coincidence that Georgia and South Carolina, which had slave patrol statutes, did not adopt declarations of rights). However, those statutes do not shed much light on the Framers' general understanding of the common-law status of a freeman's house.

In sum, I do not think the evidence supports Cuddihy's claim that Americans did not generally perceive general warrants as inherently illegal until the eve of the framing of the Fourth Amendment. Rather, the illegality of general warrants was well settled prior to the first round of state search and seizure provisions adopted in 1776 and 1777.

300. See the condemnations of the discretionary character of general warrant authority discussed *supra* notes 74-84 and accompanying text.

Wilkesite cases had removed any possibility of upholding general warrants at common law. Thus, *legislation* posed the only plausible threat that general warrants might be made legal in the future. The Wilkesite cases, which declared general warrants illegal under common law, explicitly left open that possibility;³⁰¹ indeed, Parliament had reauthorized the general writ of assistance in the Townshend Act of 1767, *after* the Wilkesite cases. Thus, the Framers' constitutional concern was preventing the *legislature* from authorizing use of general warrants.³⁰²

Of course, the Framers would not have anticipated that future legislators might seek to authorize general warrants in a campaign against crime. Indeed, crime was apparently not perceived as a pressing social problem in late eighteenth-century America. Nor were the Framers likely worried that a future legislature might be tempted to authorize general warrants to identify and persecute political opponents (as the

301. See Lord Camden's 1765 remarks in *Entick v. Carrington*, 2 Wils. 275, 292, 95 Eng. Rep. 807, 818 (C.P. 1765) (version first published 1770, *see supra* note 25) (stating that "if the Legislature be of that opinion they will make [warrants to search for papers] lawful"). Camden seems to have earlier made a contrary assertion, however, during the 1763 trial in *Wilkes v. Wood*, Lofft 1, 3, 19 Howell St. Tr. 1153, 1155, 98 Eng. Rep. 489, 490 (C.P. 1763) (first published in 1776, *see supra* note 25) ("No legal authority, in the present case, to justify the action. No precedents, no legal determinations, not an Act of Parliament itself, is sufficient to warrant any proceeding contrary to the spirit of the constitution.").

302. When the American Framers described the reason for declarations of rights, they typically stated that the declarations were meant to curb *legislative* power. For example, during the 1788 Virginia ratifying convention, George Mason described the Virginia declaration, which he had primarily authored, as declaring rights "to be paramount to the power of the legislature." 3 ELLIOT'S DEBATES, *supra* note 84, at 444. The same is true of statements regarding the need for a federal Bill of Rights. For example, during the 1788 Massachusetts ratification convention, Abraham Holmes said the following about the need for a protection against general arrest warrants:

The framers of our state constitutions took particular care to prevent the General Court [the Massachusetts state legislature] from authorizing the judicial authority to issue a[n arrest] warrant against a man for a crime, unless his being guilty of the crime was supported by oath or affirmation, prior to the warrant being granted; why it should be esteemed so much more safe to intrust Congress with the power of enacting laws, which it was deemed unsafe to intrust our state legislature with, I am unable to conceive.

Abraham Holmes, Statement at the Massachusetts State Convention (Jan. 30, 1788), *quoted in* COGAN, *supra* note 122, at 284, 285-86 (7.2.2.1.a). Madison also presented his proposals for rights amendments as a check on Congress. *See infra* notes 435-439 and accompanying text.

The focus on legislation explains historical silences that would otherwise be inexplicable. Henning's 1794 justice manual discussed the standards for warrants and the illegality of general warrants (briefly mentioning the Wilkesite cases), yet *never* mentioned the ban against general warrants in the Virginia Declaration of Rights. *See* HENNING, *supra* note 25, at 413-16, 459-64. Likewise, he presented the provisions of the federal customs and excise statutes relating to search warrants, but never mentioned the Fourth Amendment. *See id.* app. II, at 4, 30. These silences would be inexplicable if he had understood constitutional search and search provisions to apply to the day-to-day operation of criminal justice. However, his omission of the constitutional provisions from a justice of the peace manual would make sense if the provisions were understood primarily as checks on legislative authority.

Tory government in England had persecuted Wilkes and his supporters). Instead, they were most likely concerned about general warrants because of their experience with the use, or at least threatened use, of general warrants for customs searches of houses.³⁰³

Customs was a peculiar arena in several ways. First, customs enforcement was more aggressive than law enforcement generally. Customs officers had a unique motive for initiating searches and seizures that constables and other peace officers did not share: customs officers were entitled to keep a significant portion of the value of any uncustomed goods they seized.³⁰⁴ Second, legislatures had a particular reason to allow unusually aggressive enforcement in customs collections: customs (“imposts”) were to be a primary source of revenues, initially for the new state governments, and then for the new national government. Thus, flagging revenue collections might prompt a legislature to approve general warrants.³⁰⁵

In addition, because customs search law was understood to be the product of statutes,³⁰⁶ common law was less effective as a restraint on customs collections than on criminal law enforcement. Hence, customs law was peculiarly susceptible to novel standards and modes of procedure. Parliament had crafted the writ of assistance to facilitate a

303. Cf. Kamisar, *supra* note 38, at 571 (arguing that the Framers were preoccupied with general warrants and “seem to have had tax collectors and customs officials more in mind than the police”). See also discussion of Madison’s concern with customs searches *infra* notes 443-450 and accompanying text.

304. In colonial America, a customs position was denoted an “office of profit.” It was called that because the value of ships or goods seized and condemned as forfeit under customs statutes was divided into three moieties: one-third went to the crown, one-third to the provincial governor, and one-third to the customs official who made the seizure. See SMITH, *supra* note 20, at 13. This same approach was continued by the First Congress in the 1789 Collections Act. See Act of July 31, 1789, ch. 5, 1 Stat. 29, § 38 (providing that the value of ships or goods seized and ruled forfeit under the act should be divided into two “moieties,” one-half going to the United States and the other half to be divided among the various customs officials (and informers) responsible for the seizure).

305. See, e.g., *Essay by a Farmer (I)*, *supra* note 98, at 14 (referring to the threat of revenue searches of houses under general warrants and noting that “general warrants have been used” only in “those cases which may strongly interest the passions of government”).

306. Parliament provided that the crown would have revenue from customs collections at the Restoration in 1660. In that same year, Parliament enacted statutory authority for a customs search warrant. See An Act to Prevent Frauds, 12 Car. 2, ch. 19 (1660) (Eng.). (For a discussion of the incident that motivated that measure, see *supra* note 274.) In 1662, when customs collections were “farmed” to commissioned collectors, Parliament created a writ of assistance to facilitate customs searches. See An Act to Prevent Frauds, 14 Car. 2, ch. 11, § 5 (1662) (Eng.). By another statute adopted in 1696, the provisions for customs collections in England were extended to the North American colonies. See An Act for Preventing Frauds, 7 & 8 Will. 3, ch. 22, § 6 (Eng.). The 1696 act was the only authority for use of the customs writ of assistance in the American colonies until the writ was reauthorized in the Townshend Act of 1767, 7 Geo. III, ch. 46, § 10 (Eng.). See discussion *supra* note 26. For a fuller treatment of the English statutory provisions regarding customs searches, see SMITH, *supra* note 20, at 41-50, and Frese, *Article*, *supra* note 18. Customs search authority was also defined by statute in the American states. See *infra* notes 370-374 and accompanying text.

customs collector's ability to initiate searches and seizures, giving him greater room to exercise initiative than an ordinary peace officer enjoyed.

Thus, the Framers likely perceived the threat to the right to be secure in house and person in very specific terms — they feared the possibility that future legislatures might authorize use of general warrants for revenue searches of houses. As a result, they wrote constitutional search and seizure provisions to address what they perceived to be the *singular* threat to the right to be secure in person and house — they wrote them to bar legislative authorization of general warrants.³⁰⁷

B. *Why the Framers Did Not Perceive Misconduct by Officers as a Form of Government Action*

There is a second reason that the Framers addressed only warrant standards — they did not equate an officer's misconduct with government illegality; rather they perceived only *personal* misconduct when an officer exceeded his official authority. Hence, misconduct by an ordinary officer could not constitute an “unconstitutional” government act. This is a large topic, and I will only sketch the argument here.³⁰⁸

In the late eighteenth century, constitutions were understood to address acts of sovereign power. In that vein, the Framers understood that a statute, which always carried the imprimatur of sovereign governmental authority, could be “unconstitutional.”³⁰⁹ They also understood that a general warrant could be “illegal” and “unconstitutional” because a judicially issued warrant always carried the imprimatur of sovereign governmental authority, even if the warrant was ultimately found invalid.³¹⁰ Thus, the Framers realized that a constitutional pro-

307. This is hardly the first commentary to recognize that the Framers' concern was aimed at general warrants. See, e.g., Amsterdam, *supra* note 38, at 397-98; Grano, *supra* note 38, at 617; Kamisar, *supra* note 38, at 571; Wasserstrom, *Two Clauses, supra* note 9, at 1393. However, because those previous commentaries continued to assume that the first clause created a broad reasonableness standard for warrantless intrusions, they did not recognize that the constitutional texts were focused *solely* on banning general warrants.

308. I still misunderstood the status of the warrantless officer when I gave my 1995 testimony. At that time, I thought that the warrantless officer was always viewed as being a private actor. See *Davies's Testimony, supra* note 3, at 127. In fact, only *unlawful* conduct by an officer was perceived as merely personal.

309. See discussion of Coke's opinion in *Dr. Bonham's Case, infra* notes 391-399 and accompanying text; see also discussion of the Framers' views of judicial review of statutes *infra* notes 440-441.

310. For example, colonial press accounts of the Wilkesite cases condemned the general warrant as “unconstitutional, illegal, and absolutely void.” See press accounts *supra* note 22. See also *infra* note 313.

vision was an appropriate means of prohibiting future legislative authorization of general warrants.

The Framers' understanding of the conduct of the ordinary officer, however, was more complex, almost paradoxical. An ordinary officer's act remained official as long as it fell *within* the lawful authority of his office. Thus, the officer exercised sovereign power when he executed a legal warrant, and he also exercised official authority deriving from his own office when acting without a warrant but within the lawful bounds of that office (limited as it was). However (and this is the twist), an officer's conduct *ceased to be official* if he exceeded his lawful authority; then he committed only an "unlawful" *personal* wrong for which he was subject to forcible resistance and trespass liability just as if he held no office at all.³¹¹ Although an officer's misconduct was sometimes labeled misconduct "under color of" law, authority, or office, that meant only that there had been a *pretense* of official action, not that it was a form of government illegality.³¹² Miscon-

311. Because writers rarely explicitly disavow notions they do not conceive of, this is a point on which silences of the dog-that-did-not-bark-in-the-night variety provide salient evidence. The framing-era sources simply do not treat wrongful intrusions by warrantless officers as "unconstitutional" in the way they treat general warrants.

However, the understanding that an officer's misconduct was not viewed as official action is reflected in a number of framing-era statements. For example, during the 1765 arguments in *Leach*, the plaintiff's attorney described the Messengers who had executed the illegal general warrant as having acted "of their own wrong." *Money v. Leach*, 3 Burr. 1741, 1745, 19 Howell St. Tr. 1001, 1006, 97 Eng. Rep. 1075, 1077 (K.B. 1765). Similarly, Chief Justice Marshall wrote the following, quoting Blackstone:

After stating that personal injury from the king to a subject is presumed to be impossible, Blackstone, vol. 3, p. 255, says, "but injuries to the rights of property can scarcely be committed by the crown without the intervention of its officers; for whom, the law, in matters of right, entertains no respect or delicacy; but furnishes various methods of detecting the errors and misconduct of those agents, by whom the king has been deceived and induced to do a temporary injustice."

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165 (1803). This notion that misconduct by an officer amounts to "deception" of the King (who can do no wrong) contrasts with the usual rule of respondeat superior applicable to master and servant. See 1 BLACKSTONE, *supra* note 27, at 417-20.

312. The understanding that unlawful acts by an ordinary officer were not official persisted well into the nineteenth century. See, e.g., *Johnson v. Tompkins*, 13 F. Cas. 840, 854 (C.C.E.D. Pa. 1833) (No. 7416) (employing the traditional distinction between actions by an official "merely under the colour or pretense of his office, and not by virtue of it," and addressing constitutional search and seizure provisions only when discussing the validity of a state judge's orders, but not when discussing a state constable's conduct (see discussion *supra* note 184)); *Commonwealth v. Crotty*, 92 Mass (10 Allen) 403 (1865) (holding that officer attempting an unlawful arrest is as susceptible to lawful resistance as any private person attempting the same act); *Ex parte Young*, 209 U.S. 123, 160 (1908) (state attorney general attempting to enforce invalid state statute is "stripped of his official or representative character"); *Merrick v. Lewis*, 22 Penn. Dist. Rep. 55, 56 (1913) (ruling that a jailer who compelled an inmate to attend religious service did not violate the inmate's state constitutional right to freedom of conscience because the constitutional provision was "directed to legislative action or its results [and] does not apply to compulsion exercised by one person over another, except so far as that compulsion may claim to be authorized by law").

duct by an officer was usually denoted a wrong, a trespass, or “unlawful” — the language of private wrongdoing which indicated that the officer was personally liable for it — but it was rarely labeled “illegal.”³¹³

This narrow understanding of misconduct by officers was becoming unstable by the time of the framing. For example, English legislation had afforded officers some protection from trespass liability for errors made in connection with their office,³¹⁴ and the First Congress extended comparable protections to federal revenue officers.³¹⁵

Woodrow Wilson summed up the historical understanding of officer misconduct as follows in 1908 (about the time when this understanding was collapsing): “The theory of our law . . . is that an officer is an officer only as long as he acts within his powers; that when he transcends his authority he ceases to be an officer and is only a private individual, subject to be sued and punished for his offense.” WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 19 (1908), quoted in LANDYNSKI, *supra* note 38, at 184.

313. Although valid warrants were often denoted “lawful,” see, e.g., 3 BLACKSTONE, *supra* note 27, at 127 (“a lawful warrant”); 4 *id.* at 288 (“a lawful warrant”), general warrants were almost uniformly condemned as “illegal.” See, for example, Chief Justice Pratt’s speech from *Leach*, quoted *supra* note 22 (“This [general] warrant is . . . illegal.”); 4 BLACKSTONE, *supra* note 27, at 288 (general warrant “illegal and void” (for fuller quotation of passage, see *supra* note 78)); *Frisbie v. Butler*, Kirby 213, 214, 215 (Conn. 1787) (asserting search warrant was general and thus was “illegal and void” and “clearly illegal”); *Ex Parte Burford*, 7 U.S. (3 Cranch) 448, 453 (1806) (unspecific warrant of commitment “was illegal”); and 1 NOAH WEBSTER, FIRST EDITION OF AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828, reprinted in facsimile 1967) (pages unnumbered) [hereinafter WEBSTER’S DICTIONARY] (entry for “WARRANT”) (“A general warrant to seize suspected persons, is illegal.”). *But see infra* note 417 and accompanying text (quoting Serjeant Glynn’s reference to an “unreasonable or unlawful warrant”).

In contrast, invalid warrantless intrusions were usually denoted “unlawful.” See, e.g., 3 BLACKSTONE, *supra* note 27, at 127 (referring to “[t]he unlawfulness of a detention” and to “[u]nlawful, or false, imprisonment”). For an exception, see *Ex Parte Bollman & Swartwout*, 8 U.S. (4 Cranch) 75, 111 (1807) (argument of counsel referring to an invalid warrantless arrest under military authority as an “illegal seizure”).

My impression is that this specific difference may reflect a broader pattern of framing-era usage in which “unlawful” was used to refer to private wrongdoing while “illegal” tended to be reserved as a label for official or institutional wrongdoing and often was linked to “void.” I do not mean to suggest that there was a clear difference in the definitions of the terms; there was not. Rather, I suggest there was a perceptible difference in usages. *Cf.* 7 THE OXFORD ENGLISH DICTIONARY 652 (2d ed. 1989) (pre-1800 usages of “illegal,” “illegality,” and “illegally” refer to elections, acts of Princes of England, official judgments, and a warrant obtained without oath); 14 *id.* at 98 (pre-1800 usages of “unlawful,” “unlawfully,” and “unlawfulness” tend to refer to personal wrongdoing).

314. Eighteenth-century English statutes had begun to provide officers and magistrates with a degree of protection from trespass actions for unjustified acts committed in connection with their office. For example, magistrates who issued warrants and officers who made arrests in obedience to warrants were generally protected against trespass liability by statute. See discussion of the protections afforded by 24 Geo. 2, ch. 44, *supra* note 111. (Some states began to adopt similar protections in the early nineteenth century. See *supra* note 205.) English statutes also permitted courts that ruled that seized goods were not forfeit under revenue statutes to issue certificates of probable cause which protected the revenue officer who made the invalid seizure from trespass liability. See *supra* note 295.

315. The 1789 Collections Act enacted immediately before the adoption of the Fourth Amendment provided that federal courts could protect federal revenue officers against tres-

Even so, there is no reason to think the Framers perceived an ordinary officer's misconduct to be a form of governmental action. Thus, they had neither a motive nor a basis for addressing the conduct of ordinary officers in constitutional provisions.

The absence of a concept that officer misconduct was attributable to the government is also evident in the fact that the Framers did not address any "remedies" for officers' violations when they wrote the Fourth Amendment (or the other provisions in the Bill of Rights). Indeed, the narrow view of officer misconduct as only personal misconduct explains why the Framers never considered an exclusionary principle. The exclusionary rule is premised on the notion that an unconstitutional *government* act is void — but exclusion has never been seriously proposed as a consequence of private wrongdoing.³¹⁶ Because the only constitutional violation the Framers could have anticipated would have taken the form of a statute purporting to authorize general warrants, the primary "remedy" would have been for the judiciary to refuse to issue warrants under the void statute.³¹⁷

pass suits by issuing certificates of reasonable cause in cases in which seized ships or goods were ruled not forfeit. See discussion *supra* note 295; Act of July 31, 1789, ch. 5, § 27, 1 Stat. 29, 43-44.

In addition, Congress later provided for removal of suits against federal revenue officers from state to federal court as a response to New England opposition to shipping restrictions imposed during the War of 1812. See Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 195, 198. That statute was extended briefly, see Act of Mar. 3, 1815, ch. 94, §§ 6, 8, 3 Stat. 231, 233-34, 235; Act of April 27, 1816, ch. 110, § 3, 3 Stat. 315, but went out of effect in 1822, see Act of March 3, 1817, ch. 109, §§ 2, 6, 3 Stat. 396, 397. The relevant provision read as follows:

That if any suit or prosecution be commenced in any state court, against any collector, naval officer, surveyor, inspector, or any other officer, civil or military . . . for any thing done, or omitted to be done, as an officer of the customs, or for anything done by virtue of this act or under color thereof, [the defendant may remove to federal court].

Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. at 198-99. The reference to conduct "as an officer of the customs" may appear to reach unlawful acts committed in connection with customs enforcement, and there was a clear attempt to extend the removal power to some wrongful conduct in the language "anything done . . . under color [of this act]."

A subsequent removal provision was included in the "Force Bill" of 1833 as a response to South Carolina's espousal of the nullification doctrine. See Act of March 2, 1833, ch. 57, § 3, 4 Stat. 632, 633. That act defined removal as applying to

any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, or under colour thereof, or for or on account of any right, authority, or title, set up or claimed by such officer, or other person under any such law of the United States.

Id. Note that this statute tied removability closely to conduct that was at least colorably within statutory authority, rather than to any broad notion of conduct in connection with an office.

The broad term "under color of his office" was not used in any federal removal statutes until 1866. See Act of July 13, 1866, ch. 184, § 67, 14 Stat. 98, 171.

316. See *Burdeau v. McDowell*, 256 U.S. 465 (1921) (holding that items or information obtained by private wrongs are not subject to exclusion under the Fourth Amendment).

317. For further discussion of this point, see *infra* notes 440-442 and accompanying text.

The historical appearance of the argument for exclusion supports this analysis; the exclusionary principle was first articulated in nineteenth-century cases that challenged the constitutionality of *statutes* that authorized *court orders* for searches and seizures. Exclusion was first proposed as a constitutional remedy for illegally seized evidence in the 1841 case *Commonwealth v. Dana*, which involved a challenge to the constitutionality of a state statute that authorized courts to issue search warrants to seize lottery tickets.³¹⁸ Likewise, exclusion was first employed as a remedy for a violation of the Fourth Amendment in the 1886 Supreme Court decision in *Boyd v. United States*, which ruled unconstitutional a statute that authorized courts to issue orders to compel production of invoices in customs disputes.³¹⁹ In contrast, the argument for exclusion was not raised in cases that simply alleged unlawful searches by officers,³²⁰ because personal

318. The constitutional argument for exclusion was first made (unsuccessfully) in *Commonwealth v. Dana*, 43 Mass. (2 Met.) 329 (1841). That case involved a challenge to the constitutionality of a state statute that authorized a novel use of a search warrant to obtain evidence of a lottery violation. Of course, the statute clearly involved a government action; that is why the argument for exclusion as a necessary consequence of an unconstitutional and therefore void government act could be made in that context. The court initially upheld the statute, but then added dicta to the effect that the means by which evidence was acquired could not be challenged during a criminal trial. *See id.* at 337.

The fact that the argument for exclusion was first made in *Dana* is confirmed by the appearance of the discussion of that issue in Greenleaf's *Evidence Treatise*. Amar has noted that "as late as 1883" that treatise recited *Dana's* dicta prohibiting litigation during a criminal trial of the means by which evidence was obtained. *See Amar, Fourth Amendment, supra* note 58, at 787 n.108 (citing 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 254a (14th ed. 1883)). The more significant fact is that there is no mention of that topic in the 1842 *first edition* — § 254a was inserted into the 1844 second edition on the basis of *Dana*. Compare 1 GREENLEAF, *supra*, §§ 254-255 (1st ed. 1842) (lacking § 254a), with 1 *id.* at 302 (2d ed. 1844) (inserting § 254a).

Dana and Greenleaf cited two English cases as earlier authority for this point: *Legatt v. Tollervey*, 14 East 302, 104 Eng. Rep. 617 (K.B. 1811), and *Jordan v. Lewis*, 14 East 306 n.a., 104 Eng. Rep. 618 (K.B. 1740). However, neither of the English cases were germane to an alleged violation of a constitutional standard; they each involved an attempt by a defendant officer to prevent a plaintiff-victim in a false prosecution case from admitting unofficially obtained court records as evidence of the false prosecution — the reverse of the setting involved in the constitutional argument for exclusion.

319. 116 U.S. 616, 638 (1886). In *Boyd*, the first Supreme Court case to recognize exclusion under the Fourth Amendment, the Court ruled that the statute that authorized a court order to compel production of an invoice in a customs proceeding was unconstitutional and the order to produce therefore "void." On that basis, the Court ruled that admission into evidence of the invoice obtained under the order was "erroneous." For a more complete discussion of *Boyd*, see *infra* notes 512-515.

320. There is a widespread misperception that Justice Story addressed and rejected exclusion under the Fourth Amendment in dicta in his 1822 circuit court opinion in *United States v. La Jeune Eugenie*, 26 F. Cas. 832 (C.C.D. Mass.). *See, e.g., Hearings, supra* note 3, at 17 (statement of William Gangi); BRADFORD P. WILSON, ENFORCING THE FOURTH AMENDMENT 45-47 (1986); Amar, *Fourth Amendment, supra* note 58, at 786-87. The facts are otherwise.

wrongdoing, even by a person holding an office, could not violate a constitutional standard or right.³²¹ For the same reason, the Framers

To begin with, *La Jeune Eugenie* arose when an American naval ship captured a French ship for violating international law by preparing to engage in slave-trading off the West coast of Africa. (The reference to “United States” in the case caption is somewhat misleading; the value of the seized ship was to go entirely to the captain and crew of the naval ship, not to the government.) In a trial conducted under admiralty prize court procedure, Story decided the seizure was valid under the law of nations. There is no mention of the Fourth Amendment anywhere in his opinion or in the record of the case (available through the National Archives).

The only argument touching on any notion of exclusion was made by the French ship owners, who claimed, under admiralty law, that there could be no right to seize if there was no “right of search” (an admiralty term referring to a warship’s authority to search ships entering its national waters or during wartime, neither of which was involved). After rejecting that claim as incorrect under English admiralty cases, Story added, in dictum, that incriminating items might be used as evidence “in the ordinary administration of municipal law” even if the items had been obtained from a suspect during a dubious arrest. *La Jeune Eugenie*, 26 F. Cas. at 843-44.

Story did not refer to a *government* arrest, however — in fact, he did not even place any officer in the hypothetical arrest and search scenario. Moreover, it is not likely he would have prefaced his dictum as pertaining to “the ordinary administration of municipal law” if he had a constitutional issue in mind. (Indeed, Story viewed the Fourth Amendment as only addressing warrant standards. See *supra* note 190.) All Story’s dictum stands for is the unexceptional proposition that exclusion is not appropriate when evidence has been obtained through an unlawful *private* arrest and search — a view which has never been seriously challenged. See *supra* note 316. *La Jeune Eugenie* did not address exclusion based on a violation of the Fourth Amendment.

Amar has also claimed that exclusion was rejected in *King v. Warickshall*, 1 Leach 263, 264-65, 168 Eng. Rep. 234, 235 (1783), which permitted the admission of testimony regarding recovery of stolen property even when the property was located through an improperly “induced” confession that was itself inadmissible. See Amar, *Fourth Amendment*, *supra* note 58, at 789 n.123. (Amar has also claimed that *Warickshall* sheds light on the intended meaning of the Fifth Amendment right against compelled self-incrimination. See Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 916-17 (1995) (describing *Warickshall* as “apparently the leading English case on [the admissibility of confessions and fruits of confessions] when the U.S. Bill of Rights was adopted in 1791”). The short answer is that *Warickshall* has nothing to do with the Fourth Amendment because it is highly unlikely the Framers were familiar with it; although the doctrines regarding induced confessions and recovered property that were discussed in *Warickshall* were briefly noted in the 1787 edition of Hawkins’s treatise, see LEACH’S HAWKINS, *supra* note 76, at 604 n. 2, the case report itself was not published until 1789. See 1 LEGAL BIBLIOGRAPHY, *supra* note 19, at 303, entry 78 (1 Leach published 1789). In addition, *Warickshall* dealt with the discovery of evidence through a confession induced by threats or promises made by “the prosecutor” — in all likelihood by the private person whose property was allegedly stolen. It does not appear that *Warickshall* addressed any misconduct during an official judicial examination of the defendant. For example, Henning’s 1794 discussion of the inadmissibility of an induced confession describes it as applying to “the case of a *private* confession” — presumably in distinction to a judicially received confession. HENNING, *supra* note 25, at 138 (emphasis added). Private misconduct could not have been understood to implicate a constitutional right.

321. The necessity of characterizing an officer’s wrongful search as government misconduct as a predicate for a constitutional remedy of exclusion is reflected in the fact that some of the state courts that declined to adopt a state exclusionary rule during the early twentieth century based that refusal on their insistence that the wayward officer had acted only personally, not as the government. See, e.g., *Hall v. Commonwealth*, 121 S.E. 154, 155 (Va. 1924) (holding that exclusion was not required because “[a] police officer, when acting with-

would not have believed that the government could be liable for a "constitutional tort" committed by an officer — a term that would have been a virtual oxymoron in 1789.³²²

The modern notion that officer misconduct constitutes government illegality traces its origin to the development, during the late nineteenth and early twentieth centuries, of "state action" doctrine under the Fourteenth Amendment. In that context, courts came to view misconduct by officers acting "under color of" law as a form of government misconduct.³²³ That development, however, which came

out a warrant, or under a void warrant, acts without authority or color of authority from the state, and ceases to be its agent and he alone is responsible for his illegal acts").

322. The notion of a "constitutional tort" developed only after the Supreme Court began to treat unlawful misconduct by an officer as a governmental deprivation of rights. The Supreme Court first recognized the possibility of a constitutional tort action against a federal officer in *Bell v. Hood*, 327 U.S. 678 (1946), and subsequently endorsed such an action in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Both of those cases employed the modern notion of officer conduct "under color of office" as a form of government misconduct. See *infra* note 323. The flaw in Professor Amar's claim that the Fourth Amendment "sounds . . . in constitutional tort law," Amar, *Fourth Amendment*, *supra* note 58, at 758, is that there was no such doctrine until the twentieth century.

323. The redefinition of "under color of law" from a term for a pretense of official action to one connoting a form of government illegality is a complex story. The highlights are as follows. When the Reconstruction Congress undertook to protect former slaves from abuse in the Southern states, it encountered a constitutional difficulty — there was no consensus, even after the Civil War, that the federal government should have plenary power over the conduct of individuals. However, a legislative majority sought to prevent Southern states from enforcing discriminatory state laws, such as the notorious "Black Codes." In section one of the Civil Rights Act of 1866, Congress first recited that all citizens were to enjoy equal benefit of the laws, "any [state] law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27. In section two, it created criminal liability for "any person who, under color of any [state] law, statute, ordinance, regulation, or custom" deprived any inhabitant of the equal benefit of the laws. *Id.* § 2. Thus, as written, the statutory language appears to have been aimed at prohibiting state officers from enforcing discriminatory state legislation. The statute did not use the potentially broader term "under color of office," even though the term "under color of his office" had appeared in an 1866 removal act, see *supra* note 315.

The Fourteenth Amendment, adopted in 1868, prohibited deprivations of rights by a "State." U.S. CONST. amend. XIV (1868). The Congress then reenacted the substance of the 1866 Act in the Enforcement Act of 1870, see Act of May 31, 1870, ch. 114, §§ 16-18, 16 Stat. 140, 144, and added a civil remedy for discrimination committed "under color of" state law in the Ku Klux Klan Act of 1871, see Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13. These provisions again addressed conduct "under color of any [state] law, statute, ordinance, regulation, or custom." The 1871 statute added the word "usage" after "custom" in the listing of forms of state law. The important point for present purposes is that these statutes did not attempt to treat all forms of misconduct by officers in connection with their office as "state" conduct. Rather, they treated only those sorts of discriminatory misconduct by officers that were *within the terms of a discriminatory state statute or some other form of positive state law* as government misconduct. See also Eric H. Zagrans, "Under Color of" What Law: A Reconstructed Model of Section 1983 Liability, 71 VA. L. REV. 499, 540-60 (1985) (arguing that discrimination "under color of" state law was understood during Congressional debates to refer to conduct within the terms of a discriminatory state statute). But see *infra* note 324.

more than a century after the framing, constituted nothing less than a revolutionary expansion of the bounds of government action and the reach of constitutional standards.³²⁴ The modern reading of the Bill of Rights as a comprehensive regulation of the conduct of government officers is possible only because of the Court's expansive redefinition of officer misconduct as a form of government action. Officer misconduct was not viewed as government illegality at the time of the framing.³²⁵

The Supreme Court later incrementally expanded the boundary of "state action" (that is, state government misconduct) by enlarging the understanding of "under color of [state] law." The justices initially upheld federal civil rights prosecutions against state officials who discriminated in the exercise of authority created by state statutes that were nondiscriminatory on their face. *See, e.g., Ex parte Virginia*, 100 U.S. 339 (1879) (upholding indictment of state judge for engaging in racial discrimination in the seating of a jury). Subsequently, during the period of economic "substantive due process," the justices began to treat even conduct by state officials that was allegedly *contrary to state law* as conduct "under color of" state law and "state action" for purposes of applying the Fourteenth Amendment. *See, e.g., Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 287 (1913) (holding that action by city utility regulators that allegedly violated state law constitutes "state action" and is subject to Due Process Clause of Fourteenth Amendment). Under that formulation, any misconduct by an officer that was connected to the exercise of an office came to constitute *government misconduct*.

The Supreme Court then transferred this broadened understanding of government illegality to misconduct by federal officers. It was in the 1914 decision in *Weeks*, a year after *Home Telephone & Telegraph*, that the Court first extended the Fourth Amendment to a federal marshal's unlawful warrantless search of a house by deeming that his "unlawful" misconduct was "under color of" office and thus a government violation of the Constitution. *See Weeks v. United States* 232 U.S. 383 (1914); discussion *infra* notes 519-523 and accompanying text.

324. Professor Steven L. Winter has argued that conduct "under color of law" always constituted a third category between private and official conduct which referred specifically to the unlawful but nevertheless official actions of public officers, and that the Reconstruction Congress understood the term this way when it enacted the federal civil rights acts. *See Steven L. Winter, The Meaning of "Under Color of" Law*, 91 MICH. L. REV. 323 (1992).

I do not think Winter's analytic notion that conduct "under color of law" was a "third category" addresses the crucial question, which is whether officer misconduct was understood to be a form of *government* conduct or illegality. I agree that early efforts to protect officers from trespass liability (for example, in the federal removal statutes discussed *supra* note 315) show that the traditional notion that officer misconduct was purely private was becoming unstable. However, in framing-era doctrine, misconduct by an ordinary law enforcement officer was not understood to carry any consequence for the government, or to be capable of qualifying as a constitutional violation.

Likewise, although Winter's critique of Zagrans's analysis of the legislative history of the federal civil rights acts, *see Zagrans, supra* note 323, may suffice to show that the understanding of "under color of" law was contested and in transition, I do not think that it shows any consensus that "under color of" state law extended to any abuse committed in connection with a state office, regardless of explicit state statutory authority. The significant point, for present purposes, is that the idea of attributing misconduct by an officer to the government that made him an officer was still a relatively novel notion in the latter half of the nineteenth century.

325. My argument on this point is historical, not normative. The modern understanding that misconduct by an officer in connection with an office is a form of government illegality makes eminent sense given the expansive discretionary authority that modern officers now exercise. That, however, is not the sort of officer the Framers anticipated.

C. *Summary: The Framers' Concern with Banning Legislative Approval of General Warrants*

In sum, the Framers did not harbor diffuse concerns about search and seizure. They did not fear warrantless intrusions because they perceived the officer's *ex officio* authority to be meager. Moreover, they did not have a conceptual basis for addressing misconduct by ordinary officers in a constitutional text. They also did not fear, but preferred use of, specific warrants because the warrant process carried significant protections. Thus, they thought the important issue, and the only potential threat to the right to be secure, was whether *general* warrants could be authorized by *legislation*. Hence, they were content to ban legislative approval of too-loose warrants.

VI. THE ACTUAL FRAMING-ERA MEANING OF "UNREASONABLE SEARCHES AND SEIZURES"

Of course, there is still an important question to answer — if the Framers meant only to constitutionalize the standards for valid warrants, why did they include the language of the first clause of the Fourth Amendment? Where did “unreasonable” in “unreasonable searches and seizures” come from, and how was it understood? In this Part, I trace the appearance of “unreasonable searches and seizures” in the textual evolution of the state search and seizure provisions. In the next Part, I trace the framing of the Fourth Amendment itself.

A. *How the Framers Approached Declarations of Rights*

Eleven of the initial thirteen states (thirteen of the initial fifteen counting Vermont and Franklin, the protostate of Tennessee) adopted state constitutions prior to the adoption of the federal Constitution; of those, seven (nine counting Vermont and Franklin) adopted declarations of rights. Several of the states not adopting declarations included some provisions regarding rights within the constitutional texts themselves.³²⁶ Although the grievance over Parliament's authorization

326. In chronological order, the states and proto-states that adopted declarations of rights as well as constitutions were Virginia, Pennsylvania, Delaware, Maryland, North Carolina (all in 1776), Vermont (which adopted a constitution and declaration of rights in 1777 but was not admitted to the Union until 1791), Massachusetts (in 1780), New Hampshire (in 1783), and Franklin (the proto-state of Tennessee, Franklin adopted a constitution and declaration of rights in 1784, but Tennessee was not admitted to the Union until 1796). New York, New Jersey, South Carolina, and Georgia adopted state constitutions without adopting declarations of rights, but did protect some rights within the body of the constitutional statements. Connecticut adopted a brief constitutional statement requiring the government to comply with the laws, and continuing its charter government (in 1776). Rhode Island did not adopt any constitutional statement but continued its charter government. (The state declarations of rights and constitutions, as well as the statehood statutes for

of the general writ had yielded to more severe complaints after 1774,³²⁷ each of the state declarations of rights included a search and seizure provision that banned general warrants (though none of the states that omitted a declaration adopted such a ban). The state search and seizure provisions provide important evidence regarding the original meaning of the Fourth Amendment, because virtually all of the language of the Fourth Amendment found its genesis in the earlier state texts.

The state declarations typically included two different sets of statements.³²⁸ One articulated the political rights of the community and reflected the political theory of social contract evident in the Declaration of Independence. The other articulated individual rights, and included a number of procedural and substantive provisions relating to criminal justice, broadly defined. Although few records of the deliberations that preceded the framing of the state declarations have survived (beyond the declarations themselves), it is apparent that the state framers did not undertake to draft comprehensive catalogs of individual rights.

For one thing, the framers would not have thought it feasible to capture all of the rights of citizens in a single document. For another,

Vermont and Tennessee, may be located in SWINDLER, *supra* note 177. Earlier collections include THE FEDERAL AND STATE CONSTITUTIONS (Francis Newton Thorpe ed., 1909), and an earlier edition of the same work edited by Benjamin P. Poore, THE FEDERAL AND STATE CONSTITUTIONS (Benjamin Perley Poore ed., 2d ed. 1878). Note, however, that the Thorpe and Poore collections omitted the Delaware declaration of rights.)

327. It has been noted that the Declaration of Independence does not specifically mention the general writ as one of the colonial grievances, though it does refer to harassment by tax collectors. Part of the explanation is that the general writ ceased to be a major issue after the colonial courts refused to issue them. See *supra* note 26. The other part of the explanation is that the declaration was aimed at George III, not at Parliament. See, e.g., Edwin S. Corwin, *The "Higher Law" Background of American Constitutional Law* (pt.2), 42 HARV. L. REV. 365, 402 (1928) (noting that the Declaration of Independence was "addressed not to Parliament but to the king"). The general writ grievance was against Parliament's reauthorization of the writ in the Townshend Act rather than against the crown as such. In contrast, the king had issued the commissions of the tax collectors, so their appointment was a grievance against the crown.

328. For commentary on the state declarations, see, for example, WILLI PAUL ADAMS, THE FIRST CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA (1980); THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES (Patrick T. Conley & John P. Kaminski eds., 1992); MARK W. KRUMAN, BETWEEN AUTHORITY AND LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA 35-59 (1997); DONALD S. LUTZ, POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS (1980); G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 75-81 (1998); and Jeremy Elkins, *Declarations of Rights*, 3 U. CHI. L. SCH. ROUNDTABLE 243 (1996). A table that identifies the provisions in some of the state declarations that anticipated provisions of the federal Bill of Rights (but that does not report other provisions in the state declarations that were not included in the federal Bill of Rights) appears in EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY app. at 160-65 (1957).

they would not have thought it necessary to do so because rights were already captured by another source — the common law.³²⁹ Indeed, the ideological justification for the American Revolution consisted largely of complaints that Parliament's enactments had encroached upon the "immemorial" common-law rights, privileges, and immunities that colonists claimed as English "freemen."³³⁰ Given that background, the state framers did not approach the task of articulating individual rights as an exercise in abstract theorizing. They were not engaged in deducing rights, but in declaring and thus preserving rights already embedded in the larger structure of common law.³³¹

The degree to which the common law shaped the state framers' approach is evident in the widespread adoption of provisions guaranteeing that government would not act against citizens except according to "the law of the land" — a provision that was adopted in some form by nearly all of the initial state constitutions, including those that

329. The political rights identified in the declarations were clearly based on social contract notions of natural law. However, the specific protections of individual rights were drawn from common law, which was thought to create a structure of legal rights consistent with the demands of natural law. As Professor Wood observed:

[W]hat is truly extraordinary about the Revolution is that few Americans ever felt the need to repudiate their English heritage for the sake of nature or of what ought to be. In their minds natural law and English history were allied. Whatever the universality with which they clothed their rights, those rights remained the common-law rights embedded in the English past, justified not simply by their having existed from time immemorial but by their being as well "the acknowledged rights of human nature."

GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 10 (1969) (quoting a speech by John Dickinson).

330. Professor John Phillip Reid has noted that Americans did not establish new constitutional rights; instead, they drew upon "old law, the not yet quite *passé* law of Magna Carta, the Petition of Right, and the English Bill of Rights." JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY TO LEGISLATE* 6 (1991). See generally BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); REID, *supra* note 19, at 190-202; WOOD, *supra* note 329.

331. For example, Richard Henry Lee summed up the contents of the rights that had been omitted from the federal Constitution as "[a] reservation in favor of the Press, Rights of Conscience, Trial by Jury in Criminal cases, or *Common Law securities*." Letter from Richard Henry Lee to Samuel Adams (October 27, 1787), reprinted in 2 *THE LETTERS OF RICHARD HENRY LEE* 456, 457 (James Curtis Ballagh ed., 1914) (emphasis added).

Modern arguments over the content of the provisions of the Bill of Rights tend to address those rights as though they are freestanding. Thus, liberals tend to assert that the provisions should be understood expansively as sweeping generalities written in vague language, while conservatives tend to assert that the content of a right should be strictly limited to the actual language of the provision. I think both of these treatments are historically inaccurate because neither takes account of the larger structure of common-law rights that the Framers understood to exist beneath and around the enumerated rights. Similarly, although I would agree with Professor Amar that some of the provisions of the Bill of Rights should be understood to carry implications for one another, the provisions of the Bill of Rights and of the Constitution should not be regarded as the exclusive or even predominant source of such implications. The historical Bill of Rights cannot be understood except in the context of the common law.

lacked a declaration of rights as such. Such provisions echoed the most famous chapter in Magna Carta, that which declared that no man could be taken or punished by the sovereign except according to “the law of the land”³³² (or, in later iterations, except according to “due process of law”³³³).

Sir Edward Coke’s writings shaped the framers’ understanding of the “law of the land” chapter. Coke was not only a central figure in the Whig tradition of English liberty,³³⁴ he was also the author of the works which the framers read to learn law.³³⁵ The important point, for present purposes, is that Coke had presented the common-law rules of criminal procedure, including arrest authority and warrants, as being subsumed under the law of the land chapter of Magna Carta.³³⁶ Moreover, Coke had insisted that the sovereign was obligated to com-

332. In the original 1215 version of Magna Carta, this chapter read:

No free man shall be taken or imprisoned or disseised of his freehold or outlawed or exiled or in any way ruined, nor will we go or send against him; except by lawful judgment of his peers or by the law of the land. . . .

J.C. HOLT, *MAGNA CARTA* 460-61 (2d ed. 1992) (translated from the Latin). (Although the chapters of the original text were unnumbered, this chapter is conventionally numbered 39 in modern discussions of the original text).

Magna Carta was reconfirmed on several later occasions. Sir Edward Coke discussed the 9 H. III (1225) version in which this chapter was numbered 29 and read:

No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.

SIR EDWARD COKE, *SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 45 (1817 edition, reprinted 1986 by Professional Books Ltd.) (originally published 1642, see 1 LEGAL BIBLIOGRAPHY, *supra* note 19, at 546, entry 4). Because the American Framers learned law largely from Coke, they also knew the provision as chapter 29. See, e.g., Paxton’s Case, Mass. (Quincy) 51, 56 n.22 (1761) (quoting James Otis referring to this chapter as “29”); Mass. (Quincy) app. 1 at 483-85 (1762) (editor’s collection of quotes) (same).

333. The phrase “due process of law” was substituted for “law of the land” in a 1354 statutory iteration of Magna Carta. See A.E. DICK HOWARD, *MAGNA CARTA: TEXT AND COMMENTARY* 15 (1964) (“The Fifth Amendment to the Constitution of the United States is talking about ‘law of the land’ when it says that no person shall be deprived of ‘life, liberty, or property, without due process of law.’”).

334. For an introduction to Coke’s place in Anglo-American law, see NORMAN F. CANTOR, *IMAGINING THE LAW: COMMON LAW AND THE FOUNDATIONS OF THE AMERICAN LEGAL SYSTEM* 301-22 (1997).

335. Although Coke wrote in the early seventeenth century, his *Institutes* and *Reports* were still the primary sources from which the American framers learned law. See, e.g., A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEADE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* 117-25 (1968).

336. See 2 COKE, *supra* note 332, at 45-56 (discussing the law of arrests under chapter 29 of Magna Carta).

ply with criminal procedure rules that constituted the law of the land.³³⁷

Thus, the phrase “law of the land” connoted that the basic features of common-law criminal procedure were essentially *fixed*.³³⁸ Likewise, the fact that the framers of some state constitutions were content to simply adopt the law of the land protection, rather than a catalog of

337. The Petition of Right of 1628, which Coke authored, condemned the king’s orders for arrests without cause as a violation of the law of the land clause of Magna Carta and of the fundamental principles of common-law procedure. See COGAN, *supra* note 122, at 355 (10.1.4.2); see also *infra* note 397. This is the basis for the common-law rule that the king could not order an arrest except by procuring a judicial arrest warrant. See 2 COKE, *supra* note 332, at 186; 1 JACOB’S LAW DICTIONARY, *supra* note 201 (explanation of the term “arrest”).

338. For an example of this understanding of “fixed” law, see FATHER OF CANDOR, *supra* note 23, at 64, 90. The celebratory view of the common law as a permanent and perfected law of the land is also evident in statements by American legal writers. For example:

Common law is the perfection of reason, arising from the nature of God, of man, and of things, and from their relations, dependencies, and connections: It is universal and extends to all men, and to all combinations of men, in every possible situation; and embraces all cases and questions that can possibly arise; it is in itself perfect, clear and certain; it is immutable, and cannot be changed or altered, without altering the nature and relation of things; it is superior to all other laws and regulations, by it they are corrected and controlled; all positive laws are to be construed by it, and wherein they are opposed to it, they are void. It is immemorial, no memory runneth to the contrary of it; it is coexistent with the nature of man, and commensurate with his being; it is most energetic and coercive; for every one who violates its maxims and precepts are sure of feeling the weight of its sanctions.

Jesse Root, *Introduction to 1 Root i*, ix (Conn. 1798). (Root was a judge of the superior court and a compiler of Connecticut decisions.) (Professor David Langum brought this quote to my attention.)

Of course, the great unsettled point was the degree to which legislation could alter long-settled procedural law. On the one hand, there is no doubt that the American Framers viewed the legislature as the preeminent branch of government, and no doubt that they thought legislation could alter procedure to some degree. Indeed, they probably regarded some statutes, such as the English Habeas Corpus Act, as being so settled that they had become part of the law of the land. On the other hand, the American Revolution was a rejection of the British notion of parliamentary sovereignty insofar as Americans asserted the existence of fundamental legal rights that could not be altered even by Parliament; thus, the guarantee of “the law of the land” or of “due process of law” carried substance beyond mere compliance with whatever legislative standard was then in effect.

My sense is that the Framers did not think it necessary to define the boundary of what aspects of common-law procedure could or could not be changed by legislation in any definite way. They had no reason to think that a government would be likely to ignore the entire body of common-law procedure. (Recall that the dispute over general writs of assistance had been argued within the shared understanding that houses could not be searched without some form of warrant authority.) Likewise, they had no experience with broad codification of criminal procedure; in their experience, legislation regulated commerce and trade, set taxes, defined new crimes, and created public and commercial institutions — thus, they could not have anticipated the broad shift from common-law procedure to legislation that occurred in the nineteenth century. Instead, they simply expected that common-law procedure would persist. The phrase “due process of law” now seems imprecise because we have lost the common-law tradition the Framers took for granted, and because we address contexts and issues that the common law never anticipated.

more specific rights, reveals their understanding of its breadth.³³⁹ The state framers understood the “law of the land” protection to encompass the more specific procedural requirements eventually included in American declarations of rights, including the ban against general warrants.³⁴⁰

That the framers sometimes articulated more specific procedural protections likely reflects their desire to repudiate particular past violations of the law of the land and thus preclude any repetition of those deviations. Indeed, the historical models of declarations of rights available to the state framers took the form of statements of grievances.³⁴¹ Thus, the specific provisions in the state declarations tend to address either specific grievances from English constitutional history or colonial grievances from the controversies that preceded the American Revolution. They thus reinforced what Madison would call “those essential rights, which have been thought to be in danger.”³⁴² The bans against general warrants were spun out from the broader “law of the land” protection because Parliament had purported to

339. Cf. *Letters from the Federal Farmer (XVI)*, *supra* note 128, at 328 (2.8.200) (stating that the law of the land provision “may be said to comprehend the whole end of political society”). (The *Letters* may have been authored by Richard Henry Lee. See *supra* note 121.)

340. For example, Chief Justice Pratt (Lord Camden) had referred to the general warrant as a violation of Magna Carta in *Huckle*. See *supra* note 79. Father of Candor had proposed a parliamentary resolution recognizing that general warrants were “contrary to Magna Carta.” See FATHER OF CANDOR, *supra* note 23, at 105. Likewise, William Henry Drayton had referred to the general writ as “trench[ing] too severely and unnecessarily on the safety of the subject, secured by Magna Carta.” Drayton, *supra* note 83, at 21. All of these references to Magna Carta would have been understood to be to the “law of the land” chapter.

The Supreme Court adopted a narrow understanding of “due process of law” in *Hurtado v. California*, 110 U.S. 516 (1884), when it ruled that the Due Process Clause of the Fourteenth Amendment did not include the other rights specifically enumerated in the Bill of Rights (in particular, the right not to be prosecuted except upon indictment by a grand jury). Justice Matthews argued that the specific articulation of a right to grand jury indictment in the Fifth Amendment would be redundant if it were also included in the protection of the Due Process Clause of that Amendment. See *id.* at 534-35. However, that construction did not give adequate attention to the way “law of the land” and “due process of law” were understood in the framing era. Moreover, although constitutional provisions should not be inconsistent, there is no reason they should not overlap. Justice Harlan’s dissenting opinion in *Hurtado* was much closer to the Framers’ broad understanding of the content of the due process of law protection. See *id.* at 539-46.

341. Magna Carta had set out the Crown’s assurances to the barons that their grievances against the Crown would not be repeated. See SOURCES OF OUR LIBERTIES 1-22 (Richard L. Perry & John C. Cooper eds., 1959). The Petition of Right of 1628 identified certain acts of the Crown as “illegal” and forbade their repetition. See *id.* at 62-75. The English Bill of Rights of 1689 listed the abuses of James II to assure they would not be repeated. See *id.* at 222. In short, the enumerated rights were identified by the experience of prior government abuses. See also 1 BLACKSTONE, *supra* note 27, at 123-25 (describing these constitutional statements).

342. See *infra* note 435.

authorize use of general warrants in derogation of the common-law liberty of the house.³⁴³

B. *The Textual Evolution of Search and Seizure Provisions*

As noted above, the phrase “unreasonable searches and seizures” first appeared in the 1780 Massachusetts search and seizure provision, the seventh of the nine state and proto-state provisions.³⁴⁴ Why and how it appeared there are crucial to an authentic understanding of the original Fourth Amendment.

1. *The Straightforward State Bans Against General Warrants*

The story of the state declarations began when George Mason authored the first draft of the Virginia declaration of rights in the late spring of 1776, prior to the Declaration of Independence. Mason omitted a prohibition against general warrants because he did not think it sufficiently fundamental for a declaration of rights.³⁴⁵ Other members of the legislative committee that reviewed Mason’s draft disagreed, however, and inserted a search and seizure provision.³⁴⁶ After making further changes, the legislature adopted the following:

X. That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.³⁴⁷

343. Cf. *Wakely v. Hart*, 6 Binn. 316 (Pa. 1814) (describing the origin of the Pennsylvania search and seizure provision); see also *supra* note 183 and accompanying text (quoting *Wakely*).

344. See *supra* note 326.

345. See HELEN HILL MILLER, *GEORGE MASON: GENTLEMAN REVOLUTIONARY 148* (1975).

346. The committee of the legislature proposed the following provision:

12. That warrants unsupported by evidence, whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are grievous and oppressive, and ought not to be granted.

1 THE PAPERS OF GEORGE MASON 284 (Robert A. Rutland ed., 1970). The legislature modified this draft further and adopted the provision quoted in the text *infra*.

347. VA. CONST. of 1776, art. X (Decl. of Rights), quoted in COGAN, *supra* note 122, at 235 (6.1.3.8). The state provisions and the various drafts and proposals for a federal provision are quoted in numerous works; to simplify the citations, I have referred, whenever possible, to Cogan’s reference work. The citations in Cogan will lead the reader to earlier sources. Note, however, that Cogan presents the state provisions broken up according to each of the ten amendments in the federal Bill of Rights. For sources containing the full state declarations of rights, see *supra* note 326.

Like the earlier committee draft, the final version focused on banning general warrants; nothing in its language could be viewed as addressing warrantless intrusions or creating a broad reasonableness standard.³⁴⁸ The Virginia drafters clearly banned general warrants.³⁴⁹ However, they did not attempt to spell out when warrants were to be used, because the common-law justifications for arrest and search were not controversial. Rather, because the drafters took it as a given that a warrant provided the most potent form of arrest authority, and virtually the only authority for searching a house or papers, they were content to simply ban the use of too-loose warrants by commanding that such warrants “ought not be granted.”³⁵⁰ Maryland, Delaware, and North

348. The legislature added the term “general warrants” and then made the standards for warrants more precise by banning search warrants for “suspected places without evidence of a fact committed.” “[F]act committed” meant that a search warrant had to be based on specific information that an offense actually had been committed (a “fact”), and thus was more rigorous than the committee’s language which simply prohibited warrants “unsupported by evidence.” See, e.g., 4 BLACKSTONE, *supra* note 27, at 301 (noting that the date and township “in which the fact was committed” must be named in an indictment). The legislature dropped the explicit prohibition against warrants that did not particularly describe the property to be seized, but that was probably thought redundant in view of the “fact committed” requirement (for example, if the “fact” was smuggling, then the property to be seized was any uncustomed goods).

Similarly, the legislature banned arrest warrants that did not name the person to be arrested, did not particularly describe the offense he had committed, and were not “supported by evidence.” The requirement in arrest warrants that the offense be particularly described and supported by evidence would seem to accomplish the same point as the “fact committed” language used for search warrants.

349. Unfortunately, modern readers sometimes approach historical texts with more hubris than sensitivity; as a result, they sometimes fail to perceive how much the language of those texts actually conveyed. For example, Levy has described the 1776 Virginia provision as exhibiting “egregious deficiencies” because it lacked a requirement of an oath, contained only a “stunted” probable cause standard, merely labeled general warrants as “grievous” rather than “illegal,” and only advised that general warrants “ought” not be issued rather than commanded that they shall not be issued. LEVY, ORIGINAL MEANING, *supra* note 45, at 236-37; see also 3 Cuddihy, *supra* note 20, at 1233-55.

These criticisms are invalid. Use of the term “evidence” in the provision would have implied a complaint under oath because statements not under oath could not be “evidence”; the requirement of “evidence of a fact committed” — that is, of a sworn complaint of a crime committed in fact — is actually a *stronger* standard than probable cause, see *infra* notes 445-447 and accompanying text; omission of the term “illegal” in a constitutional provision condemning too-loose warrants hardly alters its significance; and “ought” was as imperative as “shall,” see *infra* note 350.

350. I think that the provisions in the state declarations that used “ought” were understood to limit the legislative power. However, a number of commentators have asserted that the rather consistent use of “ought” rather than “shall” in the state declarations of rights made the declarations merely prescriptive or hortatory rather than legally binding on state legislatures. For example, Levy has asserted that Madison’s later use of “shall” in his proposals for federal rights amendments made them more imperative than the statements in the earlier state declarations that had used “ought.” See, e.g., LEVY, ORIGINAL MEANING, *supra* note 45, at 243. A number of other commentators have repeated that assertion. See, e.g., TARR, *supra* note 328, at 76; 3 Cuddihy, *supra* note 20, at 1472. In particular, LUTZ, *supra* note 328, at 65-68, has noted that the state framers usually used “shall” in the body of

Carolina soon adopted similar provisions that also simply stated the standards for valid warrants. (The protostate of Franklin did likewise in 1784.³⁵¹)

state constitutions, but usually used "ought" in the state declarations of rights; he concluded that the difference shows that the declarations were understood to be not legally binding.

I think the asserted difference is illusory and the different usages were only stylistic, rather than substantive. Many of the statements in the body of the constitutions were descriptive of processes, and, in that context, "shall" fit better than "ought." Conversely, "ought" was probably thought to convey a more solemn, traditional tone, befitting a statement of fundamental rights. (For example, the English Bill of Rights had used "ought" rather than "shall." See SOURCES OF OUR LIBERTIES, *supra* note 341, at 245, 246-47 (for example: "10. That excessive bail ought not to be required . . .").)

In addition, several uses of "ought" in the state constitutions are inconsistent with the notion that "ought" was not imperative. For example, the Delaware constitution ended by stating that "No article of the declaration of rights . . . nor the first, second, . . . twenty-ninth articles of this constitution, ought ever to be violated on any pretence whatever . . ." DEL. CONST. of 1776, art. 30. The inclusion of the words "ever" and "any pretense whatsoever" remove any doubt that the prohibition against future amendment was meant to be "legally binding" — however, it uses "ought" rather than "shall." Similar provisions, also using "ought," appeared in several of the other early state constitutions.

Moreover, framing-era usages do not bear out the notion that "shall" was more imperative than "ought." Instead the historical dictionary definitions indicate that "ought" was understood to be imperative. JOHNSON'S DICTIONARY, *supra* note 177 (pages unnumbered), defined "Ought" as "[t]o be obliged by duty" and also defined "Oblige" as "[t]o bind; to impose obligation; to compel something" — thus it treated "ought" as binding or compelling, which sounds rather imperative. Noah Webster still gave essentially the same definition of "ought" when he published his American dictionary in 1828. See 1 WEBSTER'S DICTIONARY, *supra* note 313 (defining "Ought" as "[t]o be held or bound in duty or moral obligation").

The dictionaries gave alternative definitions for "shall." Johnson commented that "Shall" was "originally I owe, or I ought," but that it subsequently "became a sign of the future tense"; he then gave alternative definitions in which "shall" was defined as command, as permission, and as a description of what will happen in the future. See JOHNSON'S DICTIONARY, *supra* note 177 (emphasis in original). Webster commented regarding "Shall" that "it coincides in signification nearly with *ought*, it is a duty, it is necessary; . . . [t]he literal sense is to hold or be held, hence to owe, and hence the sense of guilt, a being held, bound or liable to justice and punishment." WEBSTER'S DICTIONARY, *supra* note 313 (emphasis in original). Like Johnson, Webster emphasized the alternative meanings that "Shall" could carry.

It is important to recognize substantive distinctions in the framers' language, but it is equally important not to impose distinctions that the framers did not intend. The evidence does not support the assertion that the framers understood "ought" to be less binding or imperative than "shall."

351. North Carolina copied the final Virginia provision in 1776. See N.C. CONST. of 1776, art. XI (Decl. of Rights), *quoted in* COGAN, *supra* note 122, at 234-35 (6.1.3.5).

Maryland adopted a similar provision in 1776:

That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons without naming or describing the place, or the person in special, are illegal, and ought not to be granted.

MD. CONST. of 1776, § 23 (Decl. of Rights), *quoted in* COGAN, *supra* note 122, at 234 (6.1.3.2). Delaware adopted a provision nearly identical to Maryland's in 1776. See DEL. CONST. of 1776, § 17 (Decl. of Rights), *quoted in* COGAN, *supra* note 122, at 234 (6.1.3.1).

2. *Pennsylvania's Addition of an Introductory Right Statement*

Shortly after the Declaration of Independence was signed, Pennsylvania became the second state formally to adopt a declaration of rights. The Pennsylvania framers borrowed heavily from the committee draft of the Virginia declaration, then being circulated within the Continental Congress meeting in Philadelphia.³⁵² Pennsylvania adopted the following search and seizure provision:

That the people have a right to hold themselves, their houses, papers, and possessions free from search or seizure; and therefore warrants without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are contrary to that right, and ought not to be granted.³⁵³

The language banning general warrants (everything after “therefore”) was clearly based on the Virginia committee draft. Like the Virginia draft, the Pennsylvania provision did not use the term “general warrant” (as the final Virginia text did) but instead prohibited unparticularized warrants for “suspected places” or an undescribed person — the hallmarks of general warrants.³⁵⁴ It appears that the initial draft for this provision consisted only of the ban against too-loose warrants (like the provisions being drafted in the neighboring states of Maryland and Delaware at roughly the same time). However, at some point in the drafting process, possibly quite late, the Pennsylvania framers innovated by inserting the statement declaring the “right” at issue ahead of the ban against general warrants.³⁵⁵ (I refer to clauses of the type preceding “and therefore” in the Pennsylvania text as an

The proto-state of Franklin, which became Tennessee, copied the 1776 Virginia search and seizure provision when it adopted a declaration of rights in 1784. See 9 SWINDLER, *supra* note 177, at 125, 128.

352. See 1 THE PAPERS OF JAMES MADISON, *supra* note 98, at 171 (showing the Virginia committee draft of declaration of rights was carried to the Second Continental Congress and printed in a Philadelphia paper).

353. PA. CONST. of 1776, art. X (Decl. of Rights), *quoted in* COGAN, *supra* note 122, at 235 (6.3.1.6.a).

354. The Pennsylvania text spelled out the cause standard in the Virginia committee draft (“unsupported by evidence”) in somewhat more detail, but otherwise tracked the language of the Virginia committee draft, the text of which is *quoted supra* note 346.

355. Benjamin Franklin presided over the adoption of the Pennsylvania constitution and declaration. A copy of a printed draft of the declaration with his editing appears in 22 THE PAPERS OF BENJAMIN FRANKLIN 528, 532 (William B. Willcox ed., 1982). It shows that the printer had erroneously added the statement of a right against search and seizure to the end of section 9, the “law of the land” provision, rather than at the beginning of section 10, the search and seizure provision. See 22 *id.* The misplacement of the right statement suggests the possibility that it had been inserted into an earlier draft or even that the printer received it separately from the rest of the text and was left to guess (wrongly) where to insert it.

“introductory right statement” in order to reserve the “first clause” label for the opening clause of the Fourth Amendment itself.)

As shown below, the Pennsylvania introductory right statement would serve as the prototype for similar language in the 1780 Massachusetts provision, and that provision, in turn, would provide the model for the language of the first clause of the Fourth Amendment. The Pennsylvania introductory right statement, however, does not contain the term “unreasonable.” In fact, it is oddly drafted: a “right to hold themselves, their houses, papers, and possessions free from search or seizure” sounds absolute.³⁵⁶ Yet the provision clearly was not intended to create a complete ban against searches and seizures of the listed interests because it used “therefore” to connect the introductory right statement to the warrant standards, thus showing that the statement of the right was meant to serve as the premise for the constitutionalization of the warrant standards.³⁵⁷ Why did the Pennsylvania framers add this introductory right statement?

Prior commentators have assumed the statement was added to broaden the protection to regulate warrantless intrusions and have even “imputed” a broad reasonableness standard for warrantless intrusions to its language.³⁵⁸ However, they have not identified a colonial grievance broader than customs searches of houses under general warrants.³⁵⁹ Likewise, they have not explained why the framers would have thought an unlawful warrantless arrest or search by an officer could carry any constitutional implications.³⁶⁰ (An unjustified arrest ordered by a governor might have carried constitutional implications; however, that specific abuse would have been understood to violate the “law of the land” provision that was also included in the Pennsylvania declaration, as well as other state declarations. Hence, even that concern would not have led the drafters to expand the search and seizure provision beyond banning general warrants.³⁶¹)

356. The absolutist tone was corrected when Pennsylvania added “unreasonable” in a 1790 amendment. *See supra* note 181.

357. *Cf. LASSON, supra* note 16, at 81 n.11; Kamisar, *supra* note 38, at 573.

358. *See supra* note 119 and accompanying text.

359. *See supra* notes 136-142 and accompanying text.

360. *See supra* notes 313-314 and accompanying text.

361. The Pennsylvania law of the land clause read “nor can any man be justly deprived of his liberty except by the law of the land, or the judgment of his peers.” PA. CONST. of 1776, ch. 1, § 9, reprinted in COGAN, *supra* note 122, at 353-54 (10.1.3.8.a). This was a virtual copy of the 1776 Virginia law of the land clause. *See id.* at 355 (10.1.3.12). The 1776 Maryland provision included a bit more of the language of Magna Carta by stating that no man could be “taken” except according to the law of the land. *See id.* at 350 (10.1.3.2.b). The 1780 Massachusetts provision was even more explicit by prohibiting the government from “*arrest[ing]*” any person except according to the law of the land. *See id.* at 350 (10.1.3.3.c) (emphasis added). Compare these to the language of the chapter of Magna Carta quoted *supra* note 332.

Prior commentators have also overlooked a noteworthy textual feature — neither the Pennsylvania provision nor any of the other state search and seizure provisions used the term “arrests”; rather, they each referred to “seizures” of persons. The terms “arrest” or “apprehension” were widely used in the framing-era common-law literature when referring to warrantless arrests; the most likely explanation for the use of “seizure” in the constitutional provisions is that it had been used in the Wilkes general warrant.³⁶²

That the Pennsylvania introductory right statement was not meant to address warrantless intrusions brings us back to the question: why did the Pennsylvania framers add the introductory right statement? One explanation is that the statement provided a rhetorical justification for including the ban against general warrants in the declaration. Prefacing the warrant standards with an invocation of a “right” of “the people”³⁶³ served to show that the warrant standards were not mere

Attacks on the illegality of government-ordered arrests were historically connected to the law of the land provision because Coke had explicitly claimed in the Petition of Right that the King had violated the law of the land chapter of Magna Carta when he had ordered arrests without cause. See *supra* note 337. The Framers’ understanding of the connection between the law of the land and arrest authority is also evident in the 1817 New Hampshire decision in *Mayo v. Wilson*, 1 N.H. 53 (1817), in which the court assessed the constitutionality of an arrest statute primarily in terms of the state due process provision rather than the search and seizure provision. See *supra* note 186.

362. The Wilkes general warrant commanded the Messengers to identify the culprits responsible for the publication of *The North Briton*, No. 45, “and them or any of them having been found, to apprehend and seize, together with their papers, and to bring in safe custody . . .” *Money v. Leach*, 3 Burr. 1742, 1743, 19 Howell St. Tr. 1001, 1004, 97 Eng. Rep. 1075, 1076 (K.B. 1765) (emphasis added). This warrant was reprinted in colonial newspapers. See 2 Cuddihy, *supra* note 20, at 1105-10; 3 *id.* at 1631-33. It also appeared in FATHER OF CANDOR, *supra* note 23, at 38.

Other linguistic evidence also suggests that “seizure” of a person often connoted an arrest under warrant. Johnson’s Dictionary defined “seize” as “To take forcible possession of by law.” JOHNSON’S DICTIONARY, *supra* note 177. The first definition it offered for the verb “arrest,” and the only one that used any form of “seize,” was “[t]o seize by a mandate from a court or officer of justice.” *Id.* The term “mandate” indicates either a writ or a warrant. See *supra* note 201. Likewise, “officer of justice” refers to a justice of the peace or judge, because only they could issue a “mandate.” See also the definition of “justice” in JOHNSON’S DICTIONARY, *supra* note 177. However, there are some instances in which “seize” was used in framing-era sources in the context of warrantless arrests. See, e.g., 1 CHAMBERS, *supra* note 195, at 245 (stating that if an offense is committed in the constable’s view, he “may by virtue of his office seize the offender”).

Thus, it appears that the historical relation of seizure and arrest was different from the current usage. Today, “seizure” is treated as a broader category that includes temporary detentions as well as arrests. At the time of the framing, “arrest” was at least as broad a term and included both warrantless arrests and “seizures” (warrant arrests). Of course, the current broad usage of “seizure” dates back only to *Terry v. Ohio*, 392 U.S. 1 (1968), the first case to apply the Fourth Amendment to a detention less than an arrest.

363. It may initially seem odd that a right regarding search and seizure would be phrased as a right of “the people,” because that connotes a collective right. This phrasing may simply reflect the rhetorical bent of the Pennsylvania framers, who were fond of describing constitutional rights in terms of “the people.” Nine of the sixteen provisions in the Pennsylvania declaration of rights refer to a right or authority of “the People.” See PA.

legal niceties but were sufficiently fundamental to merit inclusion in a declaration of rights.³⁶⁴ Indeed, the reference to persons, houses, papers, and possessions served to link the warrant standards to interests that were paramount under the common law.³⁶⁵ The rhetorical explanation is especially compelling because the Pennsylvania framers were quite fond of prefacing constitutional rules with statements of rights.³⁶⁶

The persons-houses-papers-possession formula also suggests another possible explanation for the introductory right statement: the Pennsylvania framers may have added it to define the scope of the ban against use of general search authority.³⁶⁷ As noted above, the colonists had aimed the legal grievance against general writs specifically at customs searches of houses, not at searches of ships or warehouses.

CONST. of 1776 (Decl. of Rights), reprinted in 8 SWINDLER, *supra* note 177, at 277-79. This may reflect the fact that the Pennsylvania constitution was the most radically democratic of the initial state constitutions. See generally J. PAUL SELSAM, *THE PENNSYLVANIA CONSTITUTION OF 1776: A STUDY IN REVOLUTIONARY DEMOCRACY* (1971). Moreover, this usage was not unprecedented; Blackstone had described the right of personal security as one of "the rights of the people of England." 1 BLACKSTONE, *supra* note 27, at 125. In addition, the collective tone of "the people" is appropriate to a provision banning general warrants because such warrants, if allowed, would imperil the security of the entire community.

Amar has asserted a different explanation of "the people" — that the use of the term shows that the Framers were primarily concerned with preventing the use of search and arrest authority to suppress free speech, and that the Fourth Amendment really reflects First Amendment concerns. See AMAR, *BILL OF RIGHTS BOOK*, *supra* note 58, at 65-68; Amar, *Bill of Rights*, *supra* note 58, at 1175-77; see also Stuntz, *supra* note 57, at 403. That interpretation is strained at the least; Amar has not identified any historical evidence for it beyond a general assertion that the Wilkesite cases, which involved political dissidents, were the real catalyst for the Fourth Amendment. See *supra* note 60. The inclusion of "papers" in the Pennsylvania introductory right statement no doubt does reflect the memory of the Wilkesite cases. However, the predominant concern during the colonial grievances and during the ratification debates of 1787-88 was the use of general warrants or writs for customs searches of houses. See *supra* notes 136-142 and accompanying text. Commentators should certainly be sensitive to the possibility that there are interrelationships between rights provisions — but they should not pretend relationships which are not supported by evidence.

364. Note that there had been some disagreement on this point in Virginia. See *supra* notes 345-349 and accompanying text. The Pennsylvania drafters could easily have learned of that disagreement because Virginia delegates were then in Philadelphia for the Continental Congress.

365. See, e.g., 1 BLACKSTONE, *supra* note 27, at 125 (discussing the "three principal or primary articles [of the rights of the people of England]; the right of personal security, the right of personal liberty; and the right of private property").

366. The Pennsylvania framers inserted a statement of a right that "therefore" required a constitutional rule in five of the fifteen provisions in their declaration of rights: IV, VIII, X (the search and seizure provision), XII, and XIV. See PA. CONST. of 1776, reprinted in 8 SWINDLER, *supra* note 177, at 277, 278-79.

367. As a drafting matter, if one wanted to add a definition of the scope of the ban against general search warrants to the already complex language stating the standards for valid warrants, the easiest way would be to add it in an introductory statement.

The text itself is not entirely clear on this point. For example, it still condemns warrants to search "suspected places," which sounds broader than houses. As described above, however, that language simply repeated a phrase that commonly appeared in general warrants.

Likewise, the Wilkesite cases had been primarily concerned with searches of, and seizures of papers from, houses, as well as arrests under general warrants. Thus, the persons-houses-papers-possession formula captured the interests involved in both the colonial grievance and the Wilkesite cases.³⁶⁸ Conversely, the listing would also have served to indicate that the provision did not bar general search authority of warehouses. A motive for limiting the ban against general search authority is also evident; the Pennsylvania framers would have anticipated that customs, enforced by searches, would be the primary source of revenue for the new state government. Indeed, because Philadelphia was the busiest port in America at that time, Pennsylvania would have had an unusually strong interest in efficient customs enforcement.³⁶⁹

The strongest evidence that the introductory right statement was meant to delimit the provision's scope is found in the Pennsylvania legislature's subsequent treatments of search authority. In 1780, it enacted a state customs statute that required customs officers to obtain a specific warrant to search a "dwelling house," but permitted them to make warrantless searches of other premises, and even to obtain a writ of assistance if they met with a lack of cooperation.³⁷⁰

368. It is noteworthy that, beginning with the 1776 Pennsylvania provision, "papers" were consistently included in all of the various scope formulas employed in introductory right statements. See the 1780 Massachusetts provision, quoted *infra* text accompanying note 379; the 1788 Virginia ratification convention proposal, quoted *infra* note 429; Madison's proposal, quoted *infra* text accompanying note 432; the various anti-Federalist proposals discussed *infra* notes 453-459. That treatment attests to the importance that the Framers attached to papers. However, it is also significant that none of the various search and seizure provisions ever indicated that searches and seizures of "papers" were subject to any distinct limitations beyond the standards for valid warrants — a treatment which tends to undercut the historical case for the "mere evidence" doctrine. See *infra* note 513.

369. The importance of customs collections varied among the states because of the pattern of foreign commerce. Ships from foreign ports tended to enter, and pay customs, at Philadelphia or Boston, or perhaps Charleston. Trade to the other American ports tended to be by smaller coastal vessels that distributed goods from the larger ports. This coastal trade, however, was not subject to further customs collections. Thus, customs was far more important as a source of revenue to Pennsylvania or Massachusetts than to Virginia. This pattern was a source of regional conflict when the Framers debated the early federal customs and excise laws. For example, during the contentious debate over the 1791 Excise Act, Madison disputed another representative's claim that the Southern States did not pay their proportion of the impost by noting that "the trade of the Southern States was carried on by the Eastern and Northern States" — that is, they indirectly paid their share of customs in the prices of the merchandise they purchased through the coastal trade. See 3 ANNALS OF CONG. 1861 (1834) (citing version with running head "History of Congress," see *infra* note 475).

370. Section 10 of the Pennsylvania customs act of 1780 gave the customs officers authority to conduct warrantless searches of ships and all other premises "where he shall have reason to suspect" uncustomed goods are concealed; in instances where entry was refused or resisted, the officer was authorized to obtain a writ of assistance from the supreme court or two justices of the peace. See Act of Dec. 21, 1780, ch. 190, § 10 (placing an impost on goods, wares, and merchandise imported into the state), reprinted in THE FIRST LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 422, 424-25 (John D. Cushing ed., 1984). Section

Moreover, Pennsylvania's distinction between searches of houses and other premises appears to be part of a broader pattern. Massachusetts, which also had a major port in Boston and which adopted a search and seizure provision also containing the persons-houses-papers-possession formula,³⁷¹ enacted a customs act in 1783 that required specific search warrants to search houses but allowed somewhat broader customs search authority for other premises.³⁷² In contrast, Virginia, Maryland, and North Carolina — none of which had ports comparable to Philadelphia or Boston and none of which had included any listing of protected interests in their search and seizure provisions³⁷³ — each adopted customs statutes that required specific search warrants for any search of premises on land.³⁷⁴ (There are also indications that the scope of the ban against general search

11, however, added the proviso that "no search of any dwelling shall be made in manner aforesaid, until due cause of suspicion hath been shewn to the satisfaction of a [judge or justice of the peace], as in the case of stolen goods." *Id.* at 425. The reference to "the case of stolen goods" refers to the common-law specific search warrant for stolen goods.

371. *See infra* text accompanying note 379.

372. In 1783, Massachusetts adopted revenue search provisions similar to that adopted by Pennsylvania; a specific search warrant was required to search a house, but ships and commercial premises could be searched on a more routine basis. One statute, Excise Act of March 10, 1783 "An Act in Addition to an Act passed the Eighth Day of November [1782], laying an Excise on certain Articles therein mentioned," required a specific search warrant for a search of a "Dwelling-House," but provided that customs officials could search ships or commercial premises without a warrant provided they had sworn information in writing constituting "just cause to suspect" that uncustomed goods were hidden on the premises. These provisions were essentially reenacted in Excise Act of July 10, 1783, "An Act laying Dutes of Impost and Excise on certain Goods, Wares and Merchandize therein described, and for repealing the several Laws heretofore made for that Purpose."

373. *See supra* text accompanying notes 347, 351.

374. Virginia adopted a state customs statute that required a specific warrant for any search of a premises on land (but still allowed warrantless searches of ships). *See* An Act for ascertaining certain Taxes and Duties, and for establishing a permanent Revenue, Va. Acts, ch. 40, §§ 10-11 (1782), *reprinted in* VIRGINIA: THE STATUTES AT LARGE 501 (William Waller Hening ed., 1822). Chapter 10 provided that the state collectors "shall have full power and authority to go and enter on board any ship or other vessel, and [to seize any articles liable to a duty]." *Id.* ch. 10. Chapter 11 provided:

That it shall be lawful to and for all and every collector . . . by warrant under the hand of a justice of peace (which warrant shall not be granted but upon an information made to him upon oath, and accompanied with a constable) to break open, in the day time, any house, warehouse or storehouse, to search for, seize and carry away [any customed goods].

Id. ch. 11. The Maryland customs act treated search authority the same way. *See* An Act to impose duties on certain enumerated articles imported into and exported out of this state, and on all other goods, wares and merchandise, imported into this state . . . , ch. 84, §§ 6 & 7 (1784), *reprinted in* FIRST LAWS OF THE STATE OF MARYLAND (John D. Cushing ed., 1981) (unpaginated). The North Carolina customs statute also provided the same search authority as that of Virginia. *See* An act for laying certain duties therein mentioned on all foreign merchandize imported into this State, in aid of the public finances, and directing the mode of collecting the same, [ch. 4], §§ 5, 7 (1784).

authority was still controversial during the framing of the Fourth Amendment, as I describe below.³⁷⁵)

In addition, the Pennsylvania legislature passed a 1785 statute that repealed various earlier statutes that had permitted revenue officers “to break open dwelling houses” without specific warrants. The repeal was enacted because those earlier statutes were “in direct violation of the [search and seizure provision of the state] Bill of Rights.” Like the 1780 customs act, the 1785 statute required the use of specific warrants only to break open dwelling houses; it did not mention other premises.³⁷⁶ Thus, the listing of interests in the Pennsylvania introductory right statement was understood to define the scope of the constitutional ban against general search authority.³⁷⁷

Whatever the actual motive(s) behind the adoption of the Pennsylvania introductory right statement, there is neither need nor grounds to “impute” a broad reasonableness standard for warrantless intrusions. Like the other state provisions adopted in 1776, the Pennsylvania provision focused precisely on the right not to have one’s person or house subjected to general warrant authority. That was also true of the 1777 Vermont provision, which copied Pennsylvania’s.³⁷⁸ Combining Pennsylvania and Vermont with the four states that adopted provisions that set out only warrant standards without any form of introductory right statement (Virginia, Maryland, Delaware, and North

375. Disagreement regarding the scope of the ban against general warrants appears to have persisted until the framing of the Fourth Amendment, and may have led to the adoption of “effects” as a final compromise term in the scope formula. See *infra* notes 465-472 and accompanying text.

376. See Act of Apr. 5, 1785, ch. 208 (An Act to repeal and alter such parts of the Excise Laws and other Tax Laws of this Commonwealth as empower the Collectors of these taxes to break open dwelling houses, in order to make seizures . . .), reprinted in 2 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA, 1781-1790, at 306 (Alexander James Dallas ed., 1793). The statute does not specifically identify the earlier provisions; however, it appears that when the state of Pennsylvania was initially formed in 1776, the state legislature had continued a variety of the existing colonial statutes on such topics. It seems likely that some of those earlier colonial statutes contained the provisions referred to.

377. Although Cuddihy passed over the possible significance of the persons-houses-papers-possession language in the Pennsylvania provision, he described one event that may appear inconsistent with the interpretation I have given. Specifically, he asserted that the Pennsylvania court in 1780 “struck down general warrants to search ships.” 3 Cuddihy, *supra* note 20, at 1507 (citing Letter from McKean to Reed (July 10, 1780), reprinted in 8 PENNSYLVANIA ARCHIVES 403-04 (Series 1 1853)). If that were all that were involved, it would call my interpretation into question. However, the rejected general warrant, which had been requested by the French consul, was not simply to search all ships, but to search ships for the purpose of seizing “any person” suspected of being a deserter from French ships. In short, the request was for a general arrest warrant, which is probably why the Pennsylvania judges said the illegality of such a warrant “would have been pretty clear” under the common law even if Pennsylvania had not adopted a constitutional provision.

378. See VT. CONST. of 1777, ch. 1 (Right XI), reprinted in COGAN, *supra* note 122, at 235 (6.1.3.7).

Carolina), none of the initial six state provisions addressed warrantless intrusions, and none created any reasonableness standard.

3. *The Introduction of "Unreasonable" in the 1780 Massachusetts Provision*

Massachusetts was the first state to add "unreasonable" before "searches and seizures" when it adopted its search and seizure provision in 1780:

Art. XIV. Every subject has a right to be secure from all *unreasonable* searches and seizures of his person, his house, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the person or objects of search, arrest, or seizure: And no warrant ought to be issued, but in cases, and with the formalities, prescribed by the laws.³⁷⁹

This provision (which was copied by New Hampshire in 1783³⁸⁰) is the longest and most systematic of the state search and seizure protections; it is also the most detailed provision in the Massachusetts declaration. Unlike the Pennsylvania provision, it makes three statements rather than two. It begins with an introductory right statement; it then "therefore" forbids the use of general warrants (like the Pennsylvania provision, it does not use that term but rather forbids unparticularized warrants to search "suspected places" or arrest "suspected persons"); finally, it commands that "and no warrant ought to be issued but in cases . . . prescribed by the laws." This third statement, which had not appeared in any prior provision, almost certainly reflects the basic principle articulated in Lord Camden's 1765 ruling in *Entick v. Carrington* (one of the Wilkesite cases): that no magistrate had authority to issue a search by warrant except for purposes authorized by common law or statute.³⁸¹ The addition of the third statement probably explains why the introductory right statement was made a separate sentence; otherwise, the provision would have become a very lengthy run-on sentence.

379. MASS. CONST. of 1780, pt. 1, art. XIV, reprinted in COGAN, *supra* note 122, at 234 (6.1.3.3) (emphasis added).

380. See N.H. CONST. of 1783, pt. 1, art. XIX, reprinted in COGAN, *supra* note 122, at 234 (6.1.3.4).

381. 2 Wils. 275, 291, 95 Eng. Rep. 807, 817 (C.P. 1765) (This is the shorter report of *Entick* published in 1770. See *supra* note 25.) Lord Camden had stated that warrants could be issued only for purposes recognized in the "law books" (i.e., common law or statute) in *Entick*. *Id.*; see also quotation *supra* note 203. Maclin has offered a different explanation for the third statement, that it reflected the earlier Massachusetts legislation prohibiting certain types of general warrants. See Maclin, *Complexity*, *supra* note 44, at 968.

A crucial fact about the Massachusetts provision, which Lasson was unaware of when he wrote the first history of the Fourth Amendment in 1937, is now well established. *John Adams* personally drafted the provision along with rest of the 1780 Massachusetts constitution and declaration of rights.³⁸² Adams used the Pennsylvania provision as a starting point,³⁸³ borrowing “search[es] and seizure[s]” and the persons-houses-papers-posessions formula from the Pennsylvania introductory right statement.³⁸⁴ He made two changes in that statement, however. First, he called the right at issue the “right to be secure,” a label that anchored the ban against general warrants in the larger set of common-law protections of person and house.³⁸⁵ Adams’s second, more important change was the addition of “unreasonable” before searches and seizures. Previous commentators did not examine why Adams added that term because they assumed that the Massachusetts provision simply made explicit the broad “reasonableness” standard they had already “imputed” to the Pennsylvania introductory right statement.³⁸⁶ However, his motives can be discerned.

The immediate reason Adams added “unreasonable” is patent; it cured the defective drafting of the Pennsylvania introductory right statement. The Pennsylvania language — a right to “hold [one’s per-

382. See 8 PAPERS OF JOHN ADAMS 228-71 (Gregg L. Lint et al. eds., 1989). The final text was virtually unchanged from Adams’s draft except for altering Adams’s “man” to “subject.” See *id.* at 240. Adams’s involvement in drafting the Massachusetts constitution and declaration of rights was still unsettled as late as the 1950s. See, e.g., ROBERT ALLEN RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS, 1776-1791*, at 68-70 (1955). Some recent commentary has still not noted Adams’s authorship. See, e.g., Amar, *Boston, supra* note 19, at 66 (stating that the 1780 Massachusetts search and seizure provision was written by “a convention”). Other commentators have recognized Adams’s authorship, and even the significance of Adams’s connection to James Otis. See, e.g., LEVY, *ORIGINAL MEANING, supra* note 45, at 238; Maclin, *Complexity, supra* note 44, at 968; 3 Cuddihy, *supra* note 20, at 1247-48, 1296-97. Even these commentators have not made the connection, however, between Otis’s use of “against reason” and Adams’s “unreasonable.”

383. This is apparent from the texts. See also 8 PAPERS OF JOHN ADAMS, *supra* note 382, at 231, 263 n.24.

384. It is not surprising that Adams included an introductory right statement. For one thing, he would have appreciated the rhetorical invocation of a “right” because he was inclined to state the premises for constitutional provisions. See RONALD M. PETERS, *THE MASSACHUSETTS CONSTITUTION OF 1780: A SOCIAL COMPACT* 14 (1974). For another, he would have approved of the persons-houses-papers-posessions formula because he was well versed in the special protection afforded the house at common law. See *supra* note 260.

385. The label “right to be secure” was not innovative. In the common-law tradition, the notion of a right to “security” was as closely connected to the status of a “freeman” as the right to “liberty”; it was often linked to the house. For example, Otis had also asserted that the general writ made householders “less secure.” See *Otis’s 1762 Article, supra* note 20, at 562.

386. Just as there is no basis for imputing a broad “reasonableness” standard into the Pennsylvania provision, there is also no basis for assuming that Adams meant to employ “unreasonable” as a global standard for all government searches or arrests. Adams had already included another provision that prohibited government “arrest[s]” except according to the “law of the land.” See *supra* note 361.

son and house] free from search and seizure” — was susceptible to the misunderstanding that it barred *any* arrest or *any* search of a house, even by an officer with a valid specific warrant.³⁸⁷ A careful drafter, which Adams undoubtedly was, would have perceived the need to qualify the right by adding some descriptive adjective before “searches and seizures.” The crucial question is why Adams chose “unreasonable” for the adjective, and how he and others of his generation would have understood the meaning of that term.

C. What “Unreasonable” Meant, and Why John Adams Chose It

A word rarely carries only a single meaning. Thus, the precise meaning a word was meant to carry in a text can be identified only by examining the customary usage of a term *in the specific context* addressed by the text.³⁸⁸ Moreover, because usages can shift over time, the meaning a word carried in a historical text can be evaluated only by considering the usage of the term *in the specific historical context*.³⁸⁹

In current Fourth Amendment doctrine, “unreasonable” is used as a relativistic term connoting inappropriateness in the circumstances. Although the relativistic usage of “reasonableness” does appear in framing-era discourse, and even in framing-era legal discourse,³⁹⁰ it was not the only meaning the term carried. The modern relativistic meaning of “reasonableness” is pragmatic, but late eighteenth-century

387. See *supra* note 356 and accompanying text.

388. See, e.g., Lawrence M. Solan, *Learning Our Limits: The Decline of Textualism in Statutory Cases*, 1997 WIS. L. REV. 235 (criticizing acontextual interpretation of statutes based on the “ordinary” meaning of words).

389. The famous example is that in 1675, Charles II described St. Paul’s Cathedral as “awful” and “artificial” — by which he meant “awe-inspiring” and “artistic.” See Thomas Gibbs Gee, *Original Intent: “With Friends Like These . . .”*, 88 MICH. L. REV. 1335, 1337 (1990) (book review); see also JOHNSON’S DICTIONARY, *supra* note 177 (definitions of “awful” and “artificial”).

390. “Unreasonable” was sometimes used in framing-era legal sources to denote an excessive quantity, as in a complaint regarding an act taking “an unreasonable time.” See, for example, the discussion of *Leach supra* text accompanying note 110. Similarly, HENING, *supra* note 25, at 421-22, observed that Virginia sheriffs were not to take “unreasonable distresses” for unpaid taxes — i.e., they were not to seize an amount of property that substantially exceeded the value of the tax owed. Likewise, “reasonable cause to suspect” was often used as a synonym for the “probable cause to suspect” prong of the “on suspicion” arrest standard. See, e.g., HENING, *supra* note 25, at 251. Even so, “reasonable” — and especially “unreasonable” — were not used as frequently in framing-era writing as they are today.

My impression is that Blackstone used “reasonable” and even “unreasonable” far more frequently than any of the preceding common-law treatises on criminal law and procedure. Blackstone often wrote of the “reason” for a rule, and described the effects of a rule as “reasonable.” However, he seems to have been more restrained in using “unreasonable” in discussing criminal procedure. There, he used “unreasonable” to condemn violations of basic rules such as use of an unspecific warrant of commitment to prison, see *infra* note 418, or ex post facto laws, see 1 BLACKSTONE, *supra* note 27, at 46.

legal discourse was usually of a more formal character. In the latter context, “reasonable” usually connoted logic or consistency, and “unreasonable” connoted illogic or inconsistency in the form of a violation of a rule or principle.³⁹¹ Moreover, “unreasonable” had become an extremely potent pejorative *in constitutional discourse* because “unreasonable” — in the form of “against reason” — had been used in famous episodes in English constitutional history to denounce violations of fundamental legal principle.

1. *Coke’s Use of “Against Reason” as a Label for Unconstitutionality*

Coke had championed the idea that the basic principles of the common law constituted the fundamental and immemorial law of the land. Like other early common-law writers, he described the common law as an embodiment of “natural equity.”³⁹² He also insisted that common law had a constitutional status, asserting that common-law principles sometimes restrained otherwise sovereign political power. In particular, he declared that common-law principles could limit the power of Parliament in his 1610 opinion in *Dr. Bonham’s Case*.³⁹³

There, Coke ruled that a statute that permitted the college of physicians to impose fines for unlawful practice of medicine was “void” because it violated the common-law principle that no man could sit in judgment of a case in which he had a direct interest. In the course of that ruling, Coke insisted that “the Common Law will controul Acts of Parliament” and then condemned the statute as being “*against* Common Right and Reason” — a phrase of art denoting unconstitutionality.³⁹⁴

391. This formal usage of “unreasonable” is evident in JOHNSON’S DICTIONARY, *supra* note 177 (the principal dictionary available during the framing era) (pages unnumbered). It offered three definitions of “unreasonable”: “exorbitant”; “[n]ot agreeable to reason”; and “[g]reater than is fit; immoderate.” Three definitions were given for “Exorbitant”: “[g]oing out of the prescribed track” (the literal translation of the Latin root); “deviating from the course appointed or the rule established”; and “[a]nomalous; not comprehended in a settled rule or method.” Thus, both “unreasonable” and “exorbitant” could connote a violation of a settled rule.

392. Common-law writers were too sophisticated to claim that common law was solely the product of natural law; rather, they argued that the common law was a refined and perfected system of rationalized custom that was consistent with natural law. See generally GLENN BURGESS, *THE POLITICS OF THE ANCIENT CONSTITUTION 19-78* (1992).

393. 8 Coke Rep. 113b, 77 Eng. Rep. 646 (C.P. 1610).

394. *Dr. Bonham’s Case*, 8 Coke Rep. at 118a, 77 Eng. Rep. at 652 (emphasis added). This phrase appears in the following passage:

And it appears in our Books, that in many Cases, the Common Law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: For when an Act of Parliament is against Common Right and Reason, or repugnant, or impossible to be performed, the Common Law will controul it, and adjudge such Act to be void . . .

Id. The stylized character of “against common right and reason” is evident in the fact that Coke repeated it two more times in the lines immediately following the passage.

To understand what Coke meant by “against . . . reason,” one must understand that “reason” carried several different meanings in seventeenth-century common-law discourse. “Natural reason” referred to logic. However, Coke and other legal writers insisted that the common law had its own “artificial reason,”³⁹⁵ and sometimes used “reason” in legal contexts as a label for the basic principles of the common law.³⁹⁶ Thus, “the reason” of the common law became a label for principles such as, for example, the maxim that no man could be a judge in his own cause. To say that a statute was “against reason” was to say that it violated basic principles of legality.³⁹⁷

There is a debate among modern scholars as to what Coke actually meant regarding the power of judicial review in *Dr. Bonham's Case* — especially whether he meant that courts could negate legislation or only that courts could construe legislation to avoid palpably absurd implications. See JAMES R. STONER, JR., COMMON LAW AND LIBERAL THEORY: COKE, HOBBS, AND THE ORIGINS OF AMERICAN CONSTITUTIONALISM, 48-62 (1992). What matters for present purposes, however, is that American Whigs understood Coke to endorse some degree of judicial review of statutes by recourse to common-law principles.

395. [F]or reason is the life of the law, nay the common law itself is nothing else but reason; which is to be understood of an artificial perfection of reason, gotten by long study, observation, and experience, and not of every man's naturall reason; for, *Nemo nascitur artifex*. This legal reason *est summa ratio*. And therefore if all the reason that is dispersed into so many severall heads, were united into one, yet could he not make such a law as the law in England is; because by many successions of ages it hath beene fined and refined by an infinite number of grave and learned men, and by long experience growne to such a perfection, for the government of this realme . . . : no man out of his own private reason ought to be wiser than the law, which is the perfection of reason.

SIR EDWARD COKE, 1 THE INSTITUTES OF THE LAWS OF ENGLAND; OR A COMMENTARY UPON LITTLETON 97b (19th ed. 1832) (commonly called *Coke on Littleton*) [hereinafter COKE ON LITTLETON] (originally published 1628, see 1 LEGAL BIBLIOGRAPHY, *supra* note 19, at 449, entry 7). Coke also based his famous rebuke of James I's claim to be entitled to judge legal cases himself on the King's ignorance of the “artificial reason” of the common law. See Prohibitions del Roy, 12 Coke Rep. 63, 77 Eng. Rep. 1342 (1610). Blackstone also reiterated Coke's discussion:

Customs must be *reasonable*; or rather, taken negatively, they must not be unreasonable. Which is not always, as Sir Edward Coke says, to be understood of every unlearned man's reason, but of artificial and legal reason, warranted by authority of law.

1 BLACKSTONE, *supra* note 27, at 77 (citations to Coke omitted).

396. For example, Coke wrote “that the surest construction of a statute is by the rule and reason of the common law.” COKE ON LITTLETON, *supra* note 395, at 272b.

397. *Dr. Bonham's Case* was not the only occasion on which Coke used “against reason” to denote unconstitutionality. Although James I removed Coke from the bench for “errors” in his reports, possibly including his dictum in *Dr. Bonham's Case* (the statute voided in that case rested on a royal charter), the elderly Coke returned to the political fray as a member of the House of Commons in 1628 and participated in the parliamentary debates that culminated in the Petition of Right. See *supra* note 337. Controversy had arisen when Charles I had levied a tax in the form of a “loan” on landholders and merchants without Parliament's approval. Whigs viewed it as an illegal tax. Subsequently, the King's ministers ordered the arrest of persons who refused to pay it. The courts upheld the arrests. See Darnell's Case (also called *The Five Knights Case*), 3 Howell St. Tr. 1 (1627) (never reprinted in the English Reporter).

During the subsequent debate in the House of Commons, Coke denounced the illegality of the royal order for arrest that lacked a statement of cause (virtually a general, nonjudicial

Coke's "against reason" dictum was well known and often repeated by political and legal writers in the seventeenth and eighteenth centuries. For example, John Locke invoked the principle that it would be "unreasonable" for any man to be judge in his own case (an obvious reference to Coke's "against reason" in *Dr. Bonham's Case*) as one of his basic arguments for a social contract of government.³⁹⁸ Likewise, Blackstone discussed Coke's dictum early in the first volume of his *Commentaries*, and, like Locke, he converted Coke's "against reason" to "unreasonable."³⁹⁹

Coke's dictum in *Dr. Bonham's Case* also became the model for the initial constitutional argument that American Whigs made against Parliament's imposition of taxes on the colonies — that such taxes violated the colonists' rights under common law.⁴⁰⁰ James Otis anticipated that use of "against reason" when he argued that the statutory authority for general writs of assistance was unconstitutional.⁴⁰¹

2. *Otis's Claim that the Statute Creating the General Writ of Assistance Was "Against Reason"*

Coke's "against reason" dictum was the fulcrum for James Otis's 1761 argument during the *Writs of Assistance Case*. Of course, Otis denounced the general writ of assistance as a violation of American

warrant) by declaring that "[i]t is against reason to send a man to prison and not show the cause." STEPHEN D. WHITE, SIR EDWARD COKE AND "THE GRIEVANCES OF THE COMMONWEALTH," 1621-1628, at 231, 240 (1979) (citing 2 Commons Debates, 1628, at 100-14 (Robert C. Johnson et al. eds., 1977)). (Blackstone later paraphrased Coke's statement on that occasion. See *infra* note 418.) For a fuller treatment of Coke's use of "reason" and "against reason," see STONER, *supra* note 394 (especially pp. 13-26).

398. JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT §§ 12, 13 (Peter Laslett ed., Oxford Univ. Press 1988) (stating "[t]hat it is unreasonable for Men to be Judges in their own Cases, that Self-love will make Men partial to themselves and their Friends"), quoted in STONER, *supra* note 394, at 139. Thomas Hobbes also discussed the principle that "no man can be Judge in his own cause." THOMAS HOBBS, LEVIATHAN ch. 23, 292 (C.B. McPherson ed., Penguin Books 1984), quoted in STONER, *supra* note 394, at 110.

399. See 1 BLACKSTONE, *supra* note 27, at 91.

400. The American cry of "no taxation without representation" was not a novel political claim, or a "natural law" claim, but constituted a *legal* claim based on American colonists' perception of their common-law right against being taxed without "consent," that is, without the approval of their legislature. See *supra* note 397. Thus, one of the resolutions adopted by the Stamp Act Congress of 1766 (to which James Otis was a delegate) resonated with Coke's "against reason" dictum by declaring that "it is unreasonable, and inconsistent with the principles and Spirit of the British Constitution, for the People of Great Britain, to Grant to his Majesty, the property of the Colonists." C.A. WESLAGER, THE STAMP ACT CONGRESS: WITH AN EXACT COPY OF THE COMPLETE JOURNAL 201 (1976).

401. This is not a novel observation. See, e.g., I JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 89-95 (1971); BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 3-6 (1993).

liberties. But the crucial point is that he leveled a *constitutional* attack against the *legislation* authorizing the writ.⁴⁰²

Otis opened by developing and emphasizing the high level of protection the common law afforded the house under the "castle" doctrine.⁴⁰³ He then established that the common-law authorities had already condemned general warrants as illegal.⁴⁰⁴ From those premises, he concluded that any statute that authorized use of a general writ would be so contrary to the principles of common law as to be "void."

John Adams not only heard Otis's argument, but took notes and subsequently wrote up an "abstract" of it.⁴⁰⁵ His notes of Otis's argument on this point are as follows:

As to Acts of Parliament. An Act against the Constitution is void: an Act against natural Equity is void: and if an Act of Parliament should be made, in the very Words of this Petition, it would be void. The executive Courts must pass such Acts into disuse. 8 Rep. 118. from Viner. Reason of the Common Law to control an Act of Parliament.⁴⁰⁶

Previous commentators have recognized that Adams's notation to "8 Rep 118" is a citation to Coke's opinion in *Dr. Bonham's Case* and that "Viner" refers to Charles Viner's discussion of Coke's dictum,⁴⁰⁷ but they have not called attention to the fact that "8 [Coke] Rep 118" cites the page on which Coke stated that an act of Parliament is "void" if it is "against common right and reason,"⁴⁰⁸ perhaps because the phrase "against . . . reason" does not actually appear in Adams's notes. Although Adams recorded only the page citation, Otis, who spoke for four or five hours, would have read Coke's language.⁴⁰⁹ Moreover,

402. The customs writ of assistance was entirely a creation of statutory law. See *supra* note 306.

403. See *supra* text accompanying note 262.

404. Adams's notes show that Otis cited Hawkins's condemnation of general warrants. See 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 20, at 140; discussion *supra* note 76. Smith has asserted that Otis relied on Hale's condemnation of general warrants, but his claim appears to be entirely speculative. See SMITH, *supra* note 20, at 334-36.

405. See 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 20, at 123-34 (Adams's notes), 134-44 (Adams's "Abstract").

406. 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 20, at 127-28. The "executive courts" were the law courts.

407. See CHARLES VINER, A GENERAL ABRIDGEMENT OF LAW AND EQUITY (23 volumes, 1741-53). It appears that Otis referred to the extract from *Dr. Bonham's Case* in 19 VINER, *supra*, at 512-13. See 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 20, at 128 n.73.

408. Lasson and Cuddihy both recognized that Otis invoked *Dr. Bonham's Case* but did not note the connection between Coke's "against reason" and Adams's "unreasonable." See LASSON, *supra* note 16, at 59; see also 2 Cuddihy, *supra* note 20, at 783-84. Smith quoted the "common right and reason" passage from *Dr. Bonham's Case*, but passed over it, probably because he was not particularly interested in discussing the Fourth Amendment itself. See SMITH, *supra* note 20, at 358-64.

409. See SMITH, *supra* note 20, at 257-61 (estimating Otis spoke for four or five hours).

Otis's invocation of Coke's "against reason" is evident in Adams's notation that Otis asserted "[the r]eason of the Common Law [is] to control an Act of Parliament."⁴¹⁰ That Adams recorded only the page citation may indicate (beyond the limitations of recording with a quill pen) that he was already familiar with Coke's "against reason" dictum.

"Against reason" also appears in the "abstract" of Otis's argument that Adams wrote shortly after the argument (possibly with Otis's assistance). The abstract, which was probably intended for a wider lay audience, alters the order of Otis's argument from Adams's notes. There is no quotation of Coke's "against common right and reason" at the point where Adams describes Otis's argument that the statute was "void."⁴¹¹ However, Adams's abstract describes Otis asserting, at a slightly earlier point, that "Reason and the constitution are both against this writ."⁴¹²

It is unlikely that Adams forgot Otis's claim.⁴¹³ In fact, there is direct evidence of Adams's familiarity with Coke's "against reason." In 1765, Adams argued, as co-counsel with Otis, that the Stamp Act was unconstitutional. He declared it to be "against Reason."⁴¹⁴

3. *Other Common-law Authorities' Use of "Unreasonable" to Condemn General Warrants*

The scholarly Adams undoubtedly also would have been exposed to Coke's dictum through other common-law sources that had condemned general warrants as "unreasonable." Although Hale had not used the term "unreasonable" when he condemned general warrants, he had written that a general warrant was illegal because it allowed

410. 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 20, at 128 (emphasis added). During the second hearing, Otis also quoted Coke to the effect that "[t]he surest construction of a statute is by the rule and reason of the common law." *Paxton's Case*, Mass. (Quincy) 51, 56 n.21 (1761).

411. *See* 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 20, at 144.

412. *Id.* at 143. When Otis wrote a 1762 newspaper column that repeated his legal arguments for a lay audience, he referred to searches under writs of assistance as "unreasonable." *See Otis's 1762 Article*, *supra* note 20, at 562, 563 (describing an officer's assertion of authority to search a house under a writ of assistance as "his unreasonable . . . demands").

413. Otis had been Adams's mentor, and Adams often recalled Otis's role in the formative period of the American revolution. Contemporaneously with the Declaration of Independence in 1776, Adams described "the argument concerning the writs of assistance" as the beginning of the struggle with Britain, *see* LASSON, *supra* note 16, at 61, and he gave much the same account at the end of his career, *see id.* at 59, 60 n.39. Writers who dismiss the elderly Adams's statements about Otis overlook the statement he made in 1776. *See, e.g.,* Amar, *Fourth Amendment*, *supra* note 58, at 772.

414. "Notes on the Opening of the Courts," *reprinted in* 1 PAPERS OF JOHN ADAMS, *supra* note 382, at 150, 151 ("Acts of Parliament that are against Reason, or impossible to be performed shall be judged void. 8 Rep. 118. 128. 129. . ."). Note that Adams omitted Coke's "common right" and simply wrote that the statute was "against reason."

the executing officer to act as judge in his own case⁴¹⁵ — the same principle Coke had earlier invoked in *Dr. Bonham's Case*. Thereafter, it was a short step for other writers to condemn general warrants as “against reason” or “unreasonable.”

A 1742 treatise on the law of arrest used in colonial Boston (probably by Otis and Adams) condemned “the Unreasonableness, and the seeming Unwarrantableness of [general warrants].”⁴¹⁶ In addition, during the 1765 argument in *Entick*, Serjeant John Glynn, the well-known London lawyer who represented Entick (and who had previously represented John Wilkes and his supporters), belittled a warrant authorizing a search of papers as an “unreasonable or unlawful warrant.”⁴¹⁷ Similarly, when Blackstone discussed the inherent rights of Englishmen in 1765, he invoked Coke’s earlier assertion that an imprisonment under an unspecific warrant would be “against reason” — and converted “against reason” to “unreasonable.”⁴¹⁸

Thus, the powerful “unreasonable” had already emerged as the pejorative of choice for condemning the inherent illegality of general warrants well before Adams penned the 1780 Massachusetts provision. It is worth noting, however, that framing-era common-law sources did not apply “unreasonable” to mere “unlawful” intrusions by warrantless officers — it was too grand a pejorative for mere personal trespasses committed by ordinary officers.⁴¹⁹

415. See *supra* note 75 and accompanying text.

416. 1 LEGAL PAPERS OF JOHN ADAMS, *supra* note 20, at 102 n.74 (quoting THE LAW OF ARRESTS § 8, at 173-74 (London 1742)) (“And yet there is a Precedent of such general Warrant in *Dalton's Justice*, notwithstanding the Unreasonableness, and seeming Unwarrantableness of such practice.”). Adams apparently referred to this passage in his legal notes for a 1765 case. See *id.* at 102 n.74.

417. Glynn’s labeling the papers search warrant “unreasonable” as well as his statement that office practices that are “unreasonable, contrary to common right, or purely against law” are “void,” appeared in 2 Wils. at 283, 95 Eng. Rep. at 812 (the shorter version of *Entick* published in 1770, see *supra* note 25). Glynn’s reference to a warrant as “unlawful,” rather than “illegal,” is unusual; I speculate he may have used “unlawful,” the language of personal misconduct, to underscore the complete lack of legal authority for the Secretary of State to issue any such warrant. Glynn was well known to the Framers because of his representation of Wilkes. For example, Georgia included “Glynn” along with “Wilkes” and “Camden” among the names it adopted for counties.

418. After stating that a warrant of commitment to prison must “express the causes of the commitment,” Blackstone cited Coke for the principle “that it is *unreasonable* to send a prisoner, and not to signify withal the crimes alleged against him.” 1 BLACKSTONE, *supra* note 27, at 133 (emphasis added). The reference to Coke appears to be to Coke’s argument during the debate over the Petition of Right. See *supra* note 397. This statement by Blackstone appears in a discussion of the inherent rights of Englishmen at common law in the first volume of his Commentaries — a part that would have been widely read.

419. See *supra* note 313.

Thus, John Adams likely had a ready-made qualifier for “searches and seizures” when he wrote the Massachusetts provision.⁴²⁰ Because “unreasonable” was a pejorative synonym for gross illegality or unconstitutionality, “unreasonable searches and seizures” simply meant searches and seizures that were inherently illegal at common law.⁴²¹ As a result, the Framers would have understood “unreasonable searches and seizures” as the pejorative label for searches or arrests made under that most illegal pretense of authority — general warrants.⁴²²

VII. THE ORIGINAL MEANING OF THE FOURTH AMENDMENT

The historical record of the framing of the Fourth Amendment shows that it was essentially a replay of the framing of the state provisions. The anti-Federalists who called for a federal search and seizure protection focused on the threat that general warrants might be used for federal revenue searches of houses. Madison proposed a federal provision which only forbade general warrants and which he consistently described as a ban on general warrants. Although Madison’s text was al-

420. There are several reasons why it would not have suited Adams to simply write that there was a right not to have one’s person, house, papers or possessions violated by a general warrant. For one thing, the term “general warrant” was not a precise term of art. See *supra* note 12. For another, that formulation lacked rhetorical punch; use of the term “unreasonable” connoted that the ban against general warrants was of a fundamental character.

“Illegal” is another term that may seem to have fit Adams’s need; why did he not simply write that there was a right against “illegal” searches and seizures of persons, houses, papers, and possessions? I think the problem with that formulation was that it did not adequately address the issue of legislation. A statute could usually prescribe what was legal (as Adams’s third statement implicitly recognized). The main point of the constitutional provision banning general warrants was to prohibit the legislature from enacting a statute that would make loose warrants legal. Thus, simply articulating a right against “illegal” searches and seizures would not have accomplished anything.

421. The label “unreasonable searches and seizures” also captured the second sort of inherently illegal warrant — one issued for a purpose not authorized by positive law and thus violative of the third statement in Adams’s text. See Adam’s inclusion of the *Entick* principle in the final statement of the Massachusetts provision discussed *supra* text accompanying note 381.

422. There is no reason to doubt that the other Framers understood “unreasonable searches and seizures” the same way Adams did. See, for example, discussion of the resolution of the Stamp Act Congress *supra* note 400. In 1774, Roger Sherman stated in the Continental Congress that “[t]he Colonies adopt the common Law, not as the common Law, but as the highest Reason.” WOOD, *supra* note 329, at 9 (quoting Roger Sherman). In 1784, Alexander Hamilton cited Coke’s opinion in *Dr. Bonham’s Case* as authority when he argued that a New York statute was unconstitutional and void. See Alexander Hamilton, Brief No. 4 from *Rutgers v. Waddington* (undated), reprinted in I LAW PRACTICE OF ALEXANDER HAMILTON 282, 357 (Julius Goebel, Jr. ed., 1964) (stating that “[a] statute against law and reason especially if a private statute is void,” and citing “8 [Coke Rep.] 118 a & b”). In 1789, a South Carolina court ruled that “[i]t is clear, that statutes passed against the plain and obvious principles of common right, and common reason, are absolutely null and void, as far as they are calculated to operate against those principles.” *Ham v. M’Claws*, 1 S.C.L. (1 Bay) 38, 40 (1789).

tered to the final two-clause format during debate in the House of Representatives, the historical record is devoid of any indication that the change was meant to create a standard for warrantless intrusions by federal officers; rather, it simply gave a more imperative tone to Madison's proposal. Like the state framers, the federal Framers believed that a ban against general warrants would suffice to protect the security of person and house.

A. *Anti-Federalist Proposals for a Federal Protection Against General Warrants*

Any lingering question as to the illegality of general warrants had disappeared by the time of the ratification debates in 1787-88.⁴²³ In fact, the various state legislatures had earlier banned the use of general warrants by national customs officers during a failed attempt to create a national customs revenue during the mid-1780s.⁴²⁴ The only unsettled question at that time was whether the ban against general warrants also applied to premises other than houses.

When anti-Federalists made the absence of a federal Bill of Rights the centerpiece of their opposition to ratification of the Constitution (at least without amendments), they expressed concern over the lack of a protection against general warrants.⁴²⁵ Thus, those among the anti-Federalists calling for a federal bill of rights usually included a ban against general warrants among the needed protections. Interestingly, however, the anti-Federalist pamphleteers did not usually

423. The acceptance of the illegality of general warrants is demonstrated by the earliest reported state search and seizure decision, *Frisbie v. Butler*, 1 Kirby 213 (Conn. 1785) (recognizing that a warrant to search an entire village for a stolen pig was invalid). The fact that this decision was by a Connecticut court — a state that had not adopted a search and seizure provision as such — demonstrates the acceptance of the illegality of general warrants at common law. Kirby's reports were the first set of state court reports published in any American state.

424. These statutes are cited and discussed in 3 Cuddihy, *supra* note 20, at 1347-51. I disagree with Cuddihy's suggestion, however, that some of these statutes permitted general search warrants; rather, they consistently required specific warrants for house searches. See *supra* note 299.

425. See *supra* notes 98, 164, 166.

Chief Justice Rehnquist has written that "[t]he Framers originally decided not to include a provision like the Fourth Amendment, because they believed the National Government lacked power to conduct searches and seizures." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 266 (1990) (citing WARREN, *supra* note 16, at 508-09). I do not find any comparable statement in Warren. In any event, the statement is historically incorrect. Although Federalists made a general argument that a Bill of Rights was unnecessary in view of the limited powers of the proposed government, it was widely assumed that customs would be the chief revenue source for the new national government and that federal customs collectors would be empowered to make searches and seizures to enforce it; that is evident in the provisions for search authority for federal officers in the state statutes discussed in the preceding note.

adopt John Adams's reference to "unreasonable searches and seizures." In fact, the anti-Federalist factions in the Pennsylvania and Maryland ratification conventions (the first two state conventions that witnessed substantial opposition to ratification) both proposed federal search and seizure provisions that simply banned general warrants without including any statement of the "right" at issue. The Pennsylvania anti-Federalists actually dropped the introductory right statement that had been included in their own state provision.⁴²⁶

Use of the phrase "unreasonable searches and seizures" as part of an introductory right statement likely became popular among the anti-Federalists because it was used in the *Letters of a Federal Farmer* — the most influential of the anti-Federalist pamphlets. The author of the *Letters* most likely used John Adams's Massachusetts text as a template for his proposed federal protection against what he called "unreasonable searches and seizures," or, alternatively, "hasty and unreasonable search warrants."⁴²⁷ The influence of the *Letters*, or of Richard Henry Lee (who may have been their author),⁴²⁸ probably accounts for the inclusion of an introductory right statement regarding "unreasonable searches and seizures" in the influential proposal for a federal ban against general warrants that was adopted by the Virginia

426. The Pennsylvania anti-Federalists proposed:

5. That warrants unsupported by evidence, whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are grievous and oppressive, and shall not be granted either by the magistrates of the federal government or others.

COGAN, *supra* note 122, at 233 (6.1.2.5). Note that this is basically the 1776 Pennsylvania provision, *see* quotation *supra* text accompanying note 353, with the *deletion* of the introductory right statement and the addition of the final reference to federal magistrates. Because the anti-Federalists tended to take libertarian positions, I speculate that the Pennsylvania anti-Federalists dropped the right statement to enlarge the protection beyond the limited scope of the ban implied by the persons-houses-papers-possession formula of the state provision. *See supra* note 370 and accompanying text.

The Maryland anti-Federalists advanced a similar proposal for a straightforward ban against too-loose warrants:

8. That all warrants without oath, or affirmation of a person conscientiously scrupulous of taking an oath, to search suspected places, or seize any person or his property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend any person suspected, without naming or describing the place or person in special, are dangerous, and ought not to be granted.

COGAN, *supra* note 122, at 232 (6.1.2.1). This proposal, however, tracked the 1776 Maryland provision, which also had not included an introductory right statement. *See supra* note 351; *see also supra* note 164.

427. See description of the calls for a federal protection in the fourth, sixth, and sixteenth letters discussed *supra* notes 122, 127, 128 and accompanying text.

428. See Richard Henry Lee's call for a federal protection discussed *supra* note 120 and accompanying text; authorship of the *Letters* discussed *supra* note 121.

ratification convention (and that was also subsequently adopted by the ratification conventions in New York and North Carolina).⁴²⁹

B. *Madison's Proposal for a Federal Ban Against
"General Warrants"*

James Madison took up the task of drafting a proposal for federal rights amendments. He had the experience for it, having served on the committee that had drafted the Virginia declaration of rights and constitution in 1776,⁴³⁰ and on the committee of the Virginia ratification convention that had proposed federal rights amendments in 1788.⁴³¹

Madison did not, however, simply reiterate the search and seizure proposal advanced by the Virginia ratification convention. Instead, he borrowed from a number of previous provisions to fashion a novel proposal. Rather than adopting the usual two-clause format of an introductory right statement that "therefore" required the banning of

429. The Virginia ratification convention proposed:

Fourteenth, That every freeman has a right to be secure from all unreasonable searches and siezures of his person, his papers and his property; all warrants, therefore, to search suspected places, or sieze any freeman, his papers or property, without information upon Oath (or affirmation of a person religiously scrupulous of taking an oath) of legal and sufficient cause, are grievous and oppressive; and all general Warrants to search suspected places, or to apprehend any suspected person, without specially naming or describing the place or person, are dangerous and ought not to be granted.

COGAN, *supra* note 122, at 233 (6.1.2.6).

Lasson asserted that the language of the Virginia ratification convention resolution "was broader than the analogous clause in the [1776] Virginia Bill of Rights which had only concerned itself with general warrants" and that this language "added the principle of security from unreasonable search and seizure." LASSON, *supra* note 16, at 95-96. That assertion, however, rests on the unsupported assumption that "unreasonable" was intended to be a standard distinct from the standards for valid warrants.

George Wythe moved this proposal in the Virginia convention on behalf of a bipartisan committee that included James Madison. See Proposed Amendments Agreed upon by the Anti-federal Committee of Richmond and Dispatched to New York, June 11, 1788, reprinted in 3 PAPERS OF GEORGE MASON, *supra* note 346, at 1071. The introductory right statement tracks that found in the sixteenth of the *Letters from the Federal Farmer* and the 1780 Massachusetts provision. See *supra* note 128; text accompanying note 379. The language banning too-loose warrants appears to be a slightly expanded version of the Maryland anti-Federalist proposal. See *supra* note 426.

For the New York version of the proposal, see COGAN, *supra* note 122, at 233 (6.1.2.3); for the North Carolina version, see *id.* (6.1.2.4). Samuel Adams also made a motion that called for a federal protection against "unreasonable searches and seizures" during the Massachusetts convention, which was withdrawn during political maneuvering. See *supra* note 123 and accompanying text.

430. See 1 THE PAPERS OF JAMES MADISON, *supra* note 98, at 170-71. This suggests that Madison participated in the decision to add a ban against general warrants to Mason's initial draft of the Virginia declaration. See *supra* note 346.

431. See *supra* note 429.

general warrants, Madison collapsed the substance of the two statements into a single-clause provision:

The rights of the people to be secured in their persons, their houses, their papers, and their other property from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.⁴³²

Several features of Madison's proposal are noteworthy.

1. *Madison's Single-Clause Format*

Madison's use of a *single-clause* format is significant. Madison's motive for collapsing the right statement and the warrant standards into a single clause was likely stylistic — he appears to have disliked the “therefore” constructions that were common in earlier declarations of rights and proposals for a federal declaration.⁴³³ As a result,

432. James Madison, Speech to the House of Representatives (June 8, 1789) [hereinafter Speech of James Madison], in 12 THE PAPERS OF JAMES MADISON, *supra* note 98, at 197, 201; see also COGAN, *supra* note 122, at 223 (6.1.1.1.a-c). Madison's proposal obviously included borrowings from the language of the Pennsylvania provision (for example, “the people,” see *supra* note 363), and from the Massachusetts provision and Virginia ratification convention resolutions (“right to be secured” and “unreasonable searches and seizures,” see *supra* text accompanying notes 379, 429). Madison also followed the Virginia convention's preference for defining the scope of the protection more broadly to reach persons, houses, papers, and “other property” rather than “possessions,” as discussed in the text *infra*.

433. Previous commentaries have not ventured any explanation for Madison's adoption of a single-clause provision. I think the significant clue is that Madison did not use a single “therefore” format in any of the federal rights amendments he proposed. See Speech of James Madison, *supra* note 432, at 200-02. The complete absence of that format suggests a stylistic aversion, because it had been used in all of the prior state search and seizure provisions, and proposals for a federal search and seizure protection that included an introductory right statement. Likewise, it had been frequently used in provisions dealing with other rights in the state declarations of rights and in proposals for a federal bill of rights.

Madison's proclivity to adopt different language to articulate rights previously identified in the various state declarations or state ratification convention proposals is also evident in his treatment of the common-law protection against compelled self-accusation. Madison proposed “No person . . . shall be compelled to be a witness against himself.” See Speech of James Madison, *supra* note 432, at 201; see also COGAN, *supra* note 122, at 315 (9.1.1.1.a). However, the initial provision adopted by Virginia in 1776 had stated that no man “can be compelled to give evidence against himself.” VA. DECL. OF RIGHTS OF 1776, § VIII, reprinted in COGAN, *supra* note 122, at 330 (9.1.3.8). Pennsylvania, Delaware, Maryland, North Carolina, and Vermont had repeated that formulation. See COGAN, *supra* note 122, at 328-30 (9.1.3.6.a, 9.1.3.1, 9.1.3.2, 9.1.3.5, 9.1.3.7). In keeping with John Adams's more detailed drafting style, the 1780 Massachusetts declaration had adopted a somewhat fuller statement that “No subject shall . . . be compelled to accuse, or furnish evidence against himself.” MASS. CONST. of 1780, part I, art. XII, reprinted in COGAN, *supra* note 122, at 328 (9.1.3.3.b.). New Hampshire had also adopted that formulation. See COGAN, *supra* note 122, at 329 (9.1.3.4). The Virginia, New York, and North Carolina ratification conventions all had proposed that no person should “be compelled to give evidence against himself.” See COGAN, *supra* note 122, at 326-28 (9.1.2.1-9.1.2.5).

Some prior commentators have asserted that these minor language variations are significant, and that Madison's “compelled to be a witness” formulation was narrower than earlier

formulations. See, e.g., Amar & Lettow, *supra* note 320, at 919 & n.274. However, the historical record shows that was not the case.

The record of the House debate over the language that became the Fifth Amendment provides direct evidence that Madison's "compelled to be a witness against himself" was understood to be synonymous with the earlier usage of "compelled to give evidence against himself." Representative Lawrance voiced the only objection to Madison's proposal when he complained that Madison's language was a "general declaration" that was too broad unless it was explicitly limited to criminal cases. See discussion *infra* note 450. The record states that Lawrance "alluded to that part where a person shall not be compelled to give evidence against himself." See COGAN, *supra* note 122, at 330 (9.2.1.2.a) (recording House debate, August 17, 1789) (emphasis added). Thus, Madison's "be a witness" language was understood to be interchangeable with the earlier "give evidence" language during the House debate.

Moreover, had Madison's language been perceived as narrower than earlier constitutional statements, zealous advocates of a strong bill of rights undoubtedly would have criticized it during that debate. (Elbridge Gerry did criticize several of Madison's other proposals, including his search and seizure proposal, for being too weakly stated. See *infra* notes 482, 493-497 and accompanying text). However, the Committee of Eleven accepted Madison's language without alteration, see COGAN, *supra* note 122, at 316 (9.1.1.2), and there is no indication anyone criticized Madison's language as being too narrow during the House debate.

Indeed, the precise phrasing of the protection against self-accusation was inconsequential in any event. When the Framers drafted bills of rights, they undertook to preserve existing doctrines, not formulate new ones. They usually did not attempt to define the rights in detail; rather, they simply invoked the then-shared understanding of well-settled common-law rights. See *supra* notes 329-331 and accompanying text. (The state search and seizure provisions and the Fourth Amendment were unusually detailed because the legal requisites of search and arrest warrants had been the subject of controversy only a decade or two prior to the framings.)

The most significant feature of the common-law statements of the right against compelled self-accusation was the breadth with which they were stated. For example, Blackstone, in the 1765 first volume of his commentaries, gave two examples of "established rules and maxims" of the common law — one was that "no 'man shall be bound to accuse himself.'" 1 BLACKSTONE, *supra* note 27, at 68. In his 1769 fourth volume he stated that "at the common law, *nemo tenebatur prodere seipsum* [no one is bound to betray himself]; and his fault was not to be wrung out of himself, but rather to be discovered by other means and other men." 4 *id.* at 293 (bracketed translation of the Latin from Black's Law Dictionary); see also *infra* note 574. Likewise, Chief Justice Pratt (Lord Camden) stated in his jury instructions during the 1763 trial in *Wood* that one reason the seizure of papers under a general warrant was illegal, see *supra* note 21, was that "nothing can be more unjust in itself, than that proof of a man's guilt shall be extracted from his own bosom." *Wilkes v. Wood*, Lofft 1, 3, 19 Howell St. Tr. 1153, 1155, 98 Eng. Rep. 489, 490 (C.P. 1763) (case report published in 1776, see *supra* note 25); see also cases discussed *infra* note 511.

The most significant innovation in Madison's presentation of the right against compelled self-accusation was not his wording but rather where he placed it in the Bill of Rights. Whereas some earlier state provisions or state ratification proposals might have appeared to have bundled the right with trial rights, Madison did not include it in the provision he proposed for rights "[i]n all criminal prosecutions" (namely, the language that became the Sixth Amendment). Rather, he set it out in an earlier provision in combination with the ban against double jeopardy, the broad "due process of law" protection, and a "takings" clause. See Speech of James Madison, *supra* note 432, at 201. That placement makes it clear that he understood the right to apply to any aspect or stage of a criminal matter. See also *infra* note 450. Although the Committee of Eleven and the House did move some provisions around in framing the final Bill of Rights (for example, the grand jury provision), there is no indication anyone objected to Madison's placement of the right against being "compelled to be a wit-

his text defined the violation of the “right” to be secure solely in terms of “warrants issued without probable cause [or particularity].” Thus, as previous commentators have almost uniformly conceded, Madison’s text only banned general warrants but did not reach warrantless intrusions.⁴³⁴

Because Madison’s text reached only warrant authority, he must have used “unreasonable” to describe only those searches and seizures made under general warrants. In fact, Madison referred to this provision as a protection from “general warrants” at least once (possibly twice) in his speech introducing proposed rights amendments in the House of Representatives, as well as in three letters.⁴³⁵ There is no re-

ness.” Thus, the language and placement of the right in the Fifth Amendment invoked the full breadth of the common-law right.

Another example of Madison’s innovative drafting was his use of the term “due process of law” instead of “law of the land” in the what became the Fifth Amendment. The preceding state constitutions and declarations of rights had almost uniformly used “law of the land,” see COGAN, *supra* note 122, at 349-53 (10.1.3.1.b - 10.1.3.1.2), as had most of the state ratification convention proposals for federal rights amendments, see *id.* at 348-49 (10.1.2.2-10.1.2.4). The only prior use of “due process of law” had appeared in the 1787 New York statutory bill of rights and the New York ratification convention proposal for federal amendments. See *id.* at 353 (10.1.3.6.c), 348 (10.1.2.1). Nevertheless, Madison chose the less used formulation. See *supra* notes 332-333 and accompanying text.

434. See, e.g., LANDYNSKI, *supra* note 38, at 41-42; LASSON, *supra* note 16, at 100; TAYLOR, *supra* note 49, at 42-43; Amsterdam, *supra* note 38, at 468 n.465; Kamisar, *supra* note 38, at 573-74. This also appears to be Amar’s understanding; he asserted that “in early drafts of the federal Fourth, it is the loose warrant, not the warrantless intrusion, that is explicitly labeled ‘unreasonable.’” See Amar, *Fourth Amendment*, *supra* note 58, at 775. Levy also has viewed Madison’s text as being narrower than the final text, but for peculiar reasons. See *infra* note 474.

Cuddihy, however, asserted that “Madison’s original proposal . . . embraced the full breadth of the final version [of the Fourth Amendment] simply by acknowledging the multiple categories of unreasonable searches and seizures against which rights existed.”³ Cuddihy, *supra* note 20, at 1410; see also *id.* at 1476-77 (suggesting that Madison only altered the “phraseology” of the earlier proposals). It appears that Cuddihy concluded that Madison was addressing “multiple categories of unreasonable searches and seizures” because Madison used the plural “rights” when he referred to “the rights of the people.” (No historical source ever referred to “multiple categories of unreasonable searches and seizures” — that is only the conceptual framework that Cuddihy himself employed.) Madison’s use of the plural “rights” may have simply reflected his use of the collective terms “the people” and “their” persons, houses, papers, and property.

435. Madison referred to his proposed protection as a prohibition against Congress approving “general warrants” in his June 8, 1789, speech to the House on rights amendments. Speech of James Madison, *supra* note 432, at 205; see also COGAN, *supra* note 122, at 53, 55 (1.2.1.1.a) (excerpting from Madison’s statement). (One observer of Madison’s speech also described his search and seizure proposal as “exemption from general warrants.” Letter from Fisher Ames to Thomas Dwight (June 11, 1789), reprinted in COGAN, *supra* note 122, at 242 (6.2.5.2).) Madison’s notes for his speech to the House show he also planned to refer to “G1. Warrants” a second time during the speech in a passage describing several desirable rights not included in the English Declaration of Rights. James Madison, Notes for Speech in Congress (June 8, 1789) [hereinafter Madison’s Notes], reprinted in 12 THE PAPERS OF JAMES MADISON, *supra* note 98, at 193. No such reference, however, appears in the corresponding part of the report of his speech.

cord, however, of his expressing concern about warrantless intrusions nor even of his referring generically to the provision as a protection against “unreasonable searches and seizures.”⁴³⁶

2. *Madison’s Focus on Banning Legislative Approval of General Warrants*

Madison also proposed that most of the rights amendments, including the ban against general warrants, be added to Article I’s limitations on Congressional power rather than be stated in a supplemental bill of rights.⁴³⁷ The proposed placement strongly suggests that Madison conceived his proposal as a deprivation of Congress’s power to authorize use of general warrants⁴³⁸ — not as a constraint on the

The three letters were: Letter from James Madison to George Eve (Jan. 2, 1789), *reprinted in* 11 THE PAPERS OF JAMES MADISON, *supra* note 98, at 404, 405 (endorsing “provisions for all essential rights, particularly the rights of Conscience in the fullest latitude, the freedom of the press, trials by jury, security against general warrants &c.”); and Letter from James Madison to Thomas Mann Randolph (Jan. 13, 1789), *reprinted in* 11 THE PAPERS OF JAMES MADISON, *supra* note 98, at 415, 416 (endorsing “the clearest, and strongest provision . . . for all those essential rights, which have been thought in danger, such as the rights of conscience, the freedom of the press, trials by jury, exemption from general warrants, &c.”); Letter from James Madison to a Resident of Spotsylvania County (Jan. 27, 1789), *reprinted in* 11 THE PAPERS OF JAMES MADISON, *supra* note 98, at 428 (endorsing “specific provision[s] made on the subject of the *Rights of Conscience, The Freedom of the Press, Trials by Jury, Exemption from General Warrants, &c.*”). These three letters are identified in 3 Cuddihy, *supra* note 20, at 1405 n.79.

436. Madison’s arguments regarding the need for a federal search and seizure provision have sometimes been misstated as though he had expressed a fear about customs searches being made without warrant. Writing in 1928, Charles Warren asserted, in an apparent reference to Madison’s speech to the House regarding the need for rights amendments, that Madison feared that customs officers would make searches “without warrants.” See WARREN, *supra* note 16, at 508-09. Warren’s statement is an example of prochronistic historiography; he treated the dominant issue of search law at the time he wrote (after *Weeks* and *Carroll*) as though it were the historical issue — even though Madison had not expressed any doubt that revenue searches would employ some sort of warrant. See the text of Madison’s statement, quoted *infra* note 438.

437. Madison proposed putting the provisions that became the first, second, third, fifth (except the grand jury clause), eighth, fourth, sixth (except the trial by local jury clause) and ninth amendments “in article 1st, section 9, between clauses 3 and 4.” See Speech of James Madison, *supra* note 432, at 201-02. He proposed putting the local jury trial clause, the grand jury clause, and the provision that became the seventh amendment (jury trials in civil cases) in “article 3d, section 2 . . .” *Id.* at 202; see also Edward Hartnett, *A ‘Uniform and Entire’ Constitution; Or, What if Madison Had Won?*, 15 CONST. COMMENTARY 251 (1998).

438. Madison’s reason for inserting most of the rights amendments into the limits on Congressional power in Article I is evident in the explanation that he gave during his speech to the House:

In our government it is [necessary to guard against abuse by] the legislative, for it is the most powerful [branch], and most likely to be abused, because it is under the least controul; hence, so far as a declaration of rights can tend to prevent the exercise of undue power, it cannot be doubted but such declaration is proper.

Speech of James Madison, *supra* note 432, at 204. He also referred to the need to check the legislature indirectly when he stated that “the prescriptions in favor of liberty ought to be

conduct of ordinary officers. Likewise, when Madison introduced his proposals for rights amendments in the House, he specifically mentioned the need to include a provision banning “general warrants” to make clear that the Necessary and Proper Clause did not empower Congress to authorize general warrants for revenue collections (though he did not limit the threat posed by general warrants to that setting).⁴³⁹

Madison’s treatment of the search and seizure provision as a limit on legislative power also explains why he omitted any statement of a remedy for a violation of the right to be secure. To begin with, an explicit constitutional prohibition would inhibit Congress from authorizing general warrants. In addition, although the Framers may have held a variety of views regarding the appropriate scope of judicial review, the evidence suggests that they would have expected, at a minimum, that courts would decline to enforce legislation that conflicted with the essential rights announced in the Constitution.⁴⁴⁰ Indeed, be-

levelled against . . . the body of the people, operating by the majority against the minority.” *Id.* These concerns are consistent with Madison’s previously expressed concern that the legislative branch would tend to “draw [] all power into its impetuous vortex.” THE FEDERALIST NO. 48 (James Madison).

439. Madison said the following:

It is true that the powers of the general government are circumscribed, they are directed to particular objects; but even if government keeps with those limits, it has certain discretionary powers with respect to the means, which may admit of abuse to a certain extent, in the same manner as the powers of the state governments under their constitutions may to an indefinite extent Now, may not laws be considered necessary and proper by Congress, for it is them who are to judge of the necessity and propriety to accomplish those special purposes which they may have in contemplation, which laws in themselves are neither necessary or proper; as well as improper laws could be enacted by the state legislatures, for fulfilling the more extended objects of those governments. I will state an instance which I think in point, and proves that this might be the case. The general government has a right to pass all laws which shall be necessary to collect its revenue; the means for enforcing the collection are within the direction of the legislature: may not general warrants be considered necessary for this purpose, as well as for some purposes which it was supposed at the framing of their constitutions the state governments had in view. If there was reason for restraining the state governments from exercising this power, there is like reason for restraining the federal government.

Speech of James Madison, *supra* note 432, at 205-06; *see also* COGAN, *supra* note 122, at 55 (1.2.1.1.a) (excerpting Madison’s speech). Madison may have borrowed this point from Patrick Henry’s expression of concern, during the Virginia ratification convention, that the “necessary and proper clause” would permit general warrants. *See* Patrick Henry, Statements Before the Virginia Ratification Convention (June 14, 1788), reprinted in 3 ELLIOT’S DEBATES, *supra* note 84, at 439, 442, 448. Elbridge Gerry had also singled out the Necessary and Proper Clause as a power that “rendered insecure” the rights of citizens. *See* GEORGE ATHAN BILIAS, ELBRIDGE GERRY, FOUNDING FATHER AND REPUBLICAN STATESMAN 199 (1976).

440. Although there may not have been a clear consensus as to the appropriate scope for judicial review among the Framers, there is little doubt that they at least intended that the federal courts would exercise review over the constitutionality of legislation that impinged on traditional judicial functions and subject matter. For example, during the Constitutional Convention of 1787, Madison expressed doubts “whether it was not going too far to extend the jurisdiction of the Court generally to cases arising Under the Constitution, &

cause general warrants would have to be issued by a judge, the judiciary could enforce the ban against general warrants simply by refusing to act — the remedy Otis had sought in 1761 and that the colonial courts had provided when they refused to issue “illegal” general writs under the Townshend Act.⁴⁴¹ Additionally, even if Congress were to pass such a statute and a wayward judge were to issue a general warrant, another court could still treat the warrant as a nullity in a subsequent trespass action or prosecution for resisting execution of the warrant.⁴⁴² Given these layers of protection against the use of general warrants, it should not be surprising that neither Madison nor the other Framers made any explicit provision for a “remedy.”

whether it ought not to be limited to cases of a Judiciary Nature.” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Max Ferrand ed., 1911, *reprinted* 1966) [hereinafter RECORDS OF THE FEDERAL CONVENTION]. His notes show that the response to his query was that it was “generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature.” *Id.* The significant point, for present purposes, is that legislation dealing with the issuance of warrants, or with other aspects of criminal procedure, would have been understood to be “of a Judiciary nature.”

Madison’s expectation that there would be judicial review regarding legislation affecting procedural rights is also evident in his speech to the House on June 8, 1789, when he argued:

[If provisions regarding rights] are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.

Speech of James Madison, *supra* note 432, at 206-07.

There are a variety of other endorsements of the principle of judicial review in the records of the Constitutional Convention, the debates over ratification, and the state ratifying conventions. The best known endorsement was by Alexander Hamilton in THE FEDERALIST NO. 78. *See also* Eldridge Gerry, Statements Before the Federal Convention (July 21, 1787), *reprinted in* 1 RECORDS OF THE FEDERAL CONVENTION, *supra*, at 97-98; Patrick Henry, Statement Before the Virginia Ratification Convention (June 12, 1788), *reprinted in* 3 ELLIOT’S DEBATES, *supra* note 84, at 313, 325; Patrick Henry, Statement Before the Virginia Ratification Convention (June 15, 1788), *reprinted in* 3 ELLIOT’S DEBATES, *supra* note 84, at 460, 462; John Marshall, Statement Before the Virginia Ratification Convention (June 20, 1788), *reprinted in* 3 ELLIOT’S DEBATES, *supra* note 84, at 551, 553-54.

441. Otis called on the Massachusetts Court to “pass into disuse” the statute that purported to authorize issuance of general warrants. *See supra* text accompanying note 406. Likewise, the colonial courts had generally refused to issue general writs despite the statutory authority provided by the Townshend Act. *See supra* note 26.

Unfortunately, works on the historical origins of American judicial review have sometimes focused on judicial review of Congressional powers granted in Article I, without adequately addressing the implications of the adoption of the Bill of Rights as a limit on congressional power. *See, e.g.,* LEVY, ORIGINAL MEANING, *supra* note 45, at 89-123 (1988); J.M. SOSIN, THE ARISTOCRACY OF THE LONG ROBE: THE ORIGINS OF JUDICIAL REVIEW IN AMERICA (1989).

442. *See supra* note 99 and accompanying text.

3. Madison's Use of "Probable Cause"

Madison's draft also adopted "probable cause" as the standard of cause for a valid warrant, a standard that had *not* been used in any of the previous state provisions or anti-Federalist proposals. Instead, Madison (who had expertise in customs legislation⁴⁴³) may have borrowed "probable cause" from a 1786 Pennsylvania statute allowing for a national customs collection.⁴⁴⁴

Significantly, "probable cause" *alone* was not the common-law standard for criminal warrants; as described above, common law required that arrest or search warrants had to be based on an allegation of an offense or theft "in fact" as well as "probable cause of suspicion" as to a particular person to be arrested or place to be searched.⁴⁴⁵ An English excise statute, however, had authorized revenue officers to obtain search warrants on probable cause standing alone, without any allegation of a "fact" of a violation⁴⁴⁶ — a *lower* threshold of cause than that required for criminal warrants.⁴⁴⁷ Madison's adoption of a

443. Madison had authored a Virginia customs statute in 1787; hence, it is likely that he was familiar with the various state customs statutes as well as the state statutes enacted in the unsuccessful attempt to authorize a national impost. See James Madison, Bill concerning the Collection of Duties (Jan. 8, 1787), reprinted in 9 THE PAPERS OF JAMES MADISON, *supra* note 98, at 232-42.

444. The Pennsylvania statute required a sworn-to showing of "probable cause" as a condition for the granting of a search warrant for a house to a national customs collector. Act of April 8, 1786, ch. 30, § 3. So far as I can determine, this statute is the only American source, predating Madison's draft, that used "probable cause," standing alone, as a standard for a warrant. The Pennsylvania statute may have borrowed the probable cause standard from the English excise or customs statutes discussed *infra* note 446.

445. The allegations of an offense "in fact" required for a complaint to support a criminal arrest or search warrant are discussed *supra* notes 290-292 and accompanying text.

446. English revenue statutes used the "probable cause" standard in two ways. One was as a protection for the officer in a case in which seized goods or ships were acquitted in forfeiture proceedings; in that circumstance, the court that adjudged the seized goods not forfeit could nevertheless protect the officer from a trespass action by certifying that the officer had possessed "probable cause" for the seizure. English customs statutes that applied in the American colonies offered this protection. See *supra* note 295.

English revenue statutes also had employed probable cause as grounds for the issuance of an excise search warrant. See, e.g., 10 Geo. 1, ch. 10, § 13 (English excise statute that was never in effect in the American colonies, but that the Framers probably became familiar with when they began to formulate revenue statutes in the 1780s). Lord Mansfield suggested the reason for allowing revenue warrants to be issued on the lower threshold of probable cause: namely, that a revenue search warrant should be more available to a revenue officer than a search warrant for stolen goods should be to a private complainant, because the former was "for the benefit of the public, and it is for their benefit that the parties may proceed safely on reasonable grounds." See *Cooper v. Boot*, 4 Doug. 339, 349, 99 Eng. Rep. 911, 916 (K.B. 1785). The implication seems to be that the search for stolen property was only a private benefit to the victim. Note, however, that the Framers were unfamiliar with *Cooper* because it was not published as of 1789. See *supra* note 19.

447. Prior commentators have either understated or misunderstood this point. Lasson noted that Hale had written that the examination of a complainant seeking an arrest warrant

probable cause standard for warrants, without any reference to an allegation of an offense “in fact,” seems geared specifically to customs searches and indicates the federal Framers’ specific concern with regulating revenue searches⁴⁴⁸ (which may explain why “probable cause” met a mixed reception among subsequent state drafters).⁴⁴⁹ Although Madison’s formulation assured that the wording of the federal

should included “whether a crime had actually been committed and the reasons for his suspicions.” LASSON, *supra* note 16, at 35 (citing 2 HALE, *supra* note 75, at 110). However, when Lasson described the requirements for a *search warrant* for stolen property, he described Hale as stating that such a search warrant could be issued “after a showing, upon oath, of the suspicion and the ‘probable cause’ thereof, to the satisfaction of the magistrate.” LASSON, *supra* note 16, at 35-36 (citing 2 HALE, *supra* note 75, at 150). Actually, Hale had stated that search warrants “are not to be granted without oath made before the justice of a felony committed, and that the party complaining hath probable cause to suspect [the stolen goods] are in such a house or place, and do shew his reasons of such suspicion.” 2 HALE, *supra* note 75, at 149-50 (emphasis added). Thus, because Lasson’s treatment of search warrants understated Hale’s insistence on an allegation of felony-in-fact, it allowed readers to erroneously believe that common law permitted a search warrant to be issued on “probable cause” alone.

Subsequent commentators have written as though the cause standard for a warrant had evolved from weaker statements up to the probable cause threshold. See, e.g., LEVY, ORIGINAL MEANING, *supra* note 45; Cuddihy, *supra* note 20. Actually, the evolution was the reverse.

448. Madison’s concern with customs searches was evident in his speech to the house. See *supra* note 439 and accompanying text.

449. “Probable cause” met with a mixed reception after the adoption of the Fourth Amendment. In 1790, when Pennsylvania revised its search and seizure provision, it adopted “probable cause” as the cause standard for warrants rather than the “supported by evidence” standard in the 1776 Pennsylvania provision. Compare the 1790 provision, *supra* note 181, with the 1776 provision, *supra* text accompanying note 353. Pennsylvania had earlier adopted “probable cause” as the standard for national customs search warrants. See *supra* note 444. In 1792, Kentucky adopted a provision based on the 1790 Pennsylvania provision and also used “probable cause.” See KY. CONST. of 1792, art. XII, reprinted in 4 SWINDLER, *supra* note 177, at 142, 150. Indiana followed suit in 1816. See IND. CONST. of 1816, art. I, § 8, reprinted in 3 SWINDLER, *supra* note 177, at 364, 365. Mississippi did likewise in 1817. See MISS. CONST. of 1817, art. I, § 9, reprinted in, 5 SWINDLER, *supra* note 177, at 347, 348.

When Tennessee adopted a declaration of rights in 1796, however, it appears to have borrowed only the introductory right statement language from the 1790 Pennsylvania revision but then condemned “general warrants” not based on “evidence of a fact committed.” See TENN. CONST. of 1796, art. XI, § 7, reprinted in 9 SWINDLER, *supra* note 177, at 141, 148. The “evidence of a fact committed” standard was probably borrowed, via North Carolina, from the Virginia provision. See *supra* text accompanying notes 347, 351. Tennessee may have used that language because it had been previously used in the 1784 declaration of rights by the proto-state of Franklin. See *supra* note 351. In 1802, Ohio apparently copied the 1796 Tennessee provision but tried to blend it with the federal probable cause standard by calling for “probable evidence of the fact committed” (which appears to be an oxymoron). See OHIO CONST. of 1802, art. VIII, § 5, reprinted in 7 SWINDLER, *supra* note 177, at 547, 554 (quoted *supra* note 177). Illinois, however, reverted to the earlier “evidence of a fact committed” standard without “probable” in 1818. See 3 ILL. CONST. of 1818, art. VIII, § 7, reprinted in 3 SWINDLER, *supra* note 177, at 237, 244. Virginia and North Carolina still retain their “evidence of a fact committed” standard. See *supra* text accompanying note 347 and note 351.

ban against general warrants would not impede customs collections,⁴⁵⁰ there is no evidence to suggest that he actually intended to reduce the

450. Concern for the efficient collection of customs affected another aspect of the House deliberations over the proposed Bill of Rights; specifically, the historical record indicates that "in any criminal case" was added to the Fifth Amendment's language protecting the right against self-incrimination to make it clear that that provision did not extend to civil customs collection matters. Representative John Lawrance moved to add that language because otherwise "this clause contained a general declaration, in some degree contrary to laws passed . . ." John Lawrance [sometimes spelled Laurence], Statement Before First Congress (Aug. 17, 1789), *reprinted in* COGAN, *supra* note 122, at 330 (9.2.1.2.a). The 1789 Collections Act, enacted July 31, 1789, was one of the few "laws passed" prior to the House debate over the Bill of Rights in August 1789, and it contained a variety of provisions requiring oaths and production of invoices. *See* Act of July 31, 1789, ch. 5, § 13, 1 Stat. 29, 39-40. Significantly, Lawrance was the principal author of the Collections Act. *See* 3 Cuddihy, *supra* note 20, at 1487-88.

Lawrance's insertion of "in any criminal case" was not a novel limit on the right against compelled self-accusation — at common law the right applied to criminal matters, but not to civil matters. *See, e.g.,* *Roe v. Harvey*, 4 Burr. 2484, 2489, 98 Eng. Rep. 302, 305 (K.B. 1769) ("Lord Mansfield observed that in civil causes, the Court will force parties to produce evidence which may prove against themselves; or leave the refusal to do it (after proper notice) as a strong presumption, to the jury But in a criminal or penal cause, the defendant is never forced to produce evidence; though he should hold it in his hands, in Court."). (Burrrows' case report of *Roe* was published 1776. *See* 1 LEGAL BIBLIOGRAPHY, *supra* note 19, 294, entry 20 ("Vol 4, 1776").)

The need to explicitly define the scope of the right against compelled self-accusation in the federal Bill of Rights arose because Madison had not followed the earlier practice of bundling that right only with other rights that also pertained to criminal matters. For example, the 1776 Virginia declaration had combined the right against compelled self-accusation with other rights pertinent to "capital or criminal prosecutions." *See* VA. DECL. OF RIGHTS OF 1776, § VIII, *reprinted in* COGAN, *supra* note 122, at 330 (9.1.3.8). The same was true of the Virginia ratification convention proposal. *See* COGAN, *supra* note 122, at 328 (9.1.2.5). However, Madison also had included the *civil* "takings" provision in the same provision as the right against compelled self-accusation, and that injected some ambiguity into the scope of the latter. *See* Speech of James Madison, *supra* note 432, at 201; *see also* COGAN, *supra* note 122, at 315 (9.1.1.1.a).

Unfortunately, the rather straightforward explanation why the Framers inserted "in any criminal case" has been lost sight of. The reason is probably Justice Bradley's erroneous claim in the 1886 *Boyd* decision that the Fifth Amendment right was intended to prohibit compelled production of invoices for imported goods in civil customs forfeiture proceedings (which *Boyd* was) because "though [such proceedings] may be civil in form, [they] are in their nature criminal." *See Boyd v. United States*, 116 U.S. 616, 633-34 (1886). The most significant feature of Bradley's claim is that he did not discuss the actual legislative history of the addition of "in any criminal case." Instead, he directed attention to a provision of the Judiciary Act that permitted federal courts to require production of books or writings in civil suits according to the ordinary rules of proceeding in chancery, and asserted that a cardinal rule of chancery was that production was never to be compelled if it would result in forfeiture. *See id.* at 630-32. Thus, he justified prohibiting compelled production of invoices notwithstanding that the Framers intended to permit compelled production in customs matters.

Modern commentary on the Fifth Amendment has uncritically followed Bradley's explanation. *See* LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION* 424-27 (1968). So far as I can determine, no commentary has previously noted the rather obvious connections between "in any criminal case," the preservation of settled customs enforcement procedures, and the common-law boundary on the privilege.

Indeed, Professor Amar has recently given "in any criminal case" in the Fifth Amendment a novel twist by asserting that the phrase should be understood to mean that the pro-

common-law cause standards for criminal warrants⁴⁵¹ (though that is what subsequently occurred).

4. Madison's Substitution of "Other Property" for "Possessions"

A final noteworthy aspect of Madison's proposal is his use of "other property" as the final term in the listing of interests protected by the right to be secure. As noted above, the only controversial aspect of the ban against general warrants was the scope of the protection. The states apparently held different views as to whether the protections associated with specific warrants should apply to searches of all premises on land or only to houses.⁴⁵² Thus, the appropriate scope for the protection was still unsettled during the ratification debates.

tection only prohibits compelling a defendant to give testimony *during his own criminal trial*, but allows compelling him to make incriminating statements or produce incriminating evidence prior to his trial or in connection with prosecution or trial of another person. See Amar & Lettow, *supra* note 320, 898-901. Amar's argument is grounded on the assertion that "in a criminal case" can mean only during a person's own criminal trial. See, e.g., *id.* at 858-59 ("[T]he [defendant's] compelled words will never be introduced over the defendant's objection in a criminal trial [so] the defendant will never be an involuntary 'witness' against himself 'in' a 'criminal case.'" (emphasis in original)); *id.* at 900 ("Unless these words [from a defendant's compelled pretrial statements] are introduced at trial, a suspect is not a 'witness' against himself 'in' a criminal 'case.'" (emphasis in original)); *id.* at 909-910 ("Textually, the Fifth Amendment speaks to witnessing *within* the criminal case, not beyond. Therefore, the key question is what 'witnessing' is excludable 'in' a 'criminal case' — that is, at trial." (emphasis in original)).

The significant feature of Amar's and Lettow's assertion, for present purposes, is that they offered no evidence that "case" was understood to mean only the defendant's own trial at the time of the framing. That clearly was not the historical understanding. For example, Chief Justice Pratt ruled during *Wilkes v. Wood* that a potential witness against Wilkes could not be required to answer questions regarding "any matter which may tend to accuse himself." Lofft 1, 13, 19 How. St. Tr. 1154, 1162, 98 Eng. Rep. 489, 495 (C.P. 1763). (The case report was published 1776. See *supra* note 25.) Oddly, although Amar treated the civil trespass ruling in *Wood* as central to the meaning of the Fourth Amendment, see *supra* note 60, he does not mention it in his discussion of the breadth of the right against self-accusation. See also *supra* note 433.

451. Early interpretations of the probable cause standard seem to have varied depending on the context. The Supreme Court gave a rather rigorous interpretation of "probable cause" in the context of assessing an arrest warrant for treason in *Ex parte Bollman and Swartwout*, 8 U.S. (7 Cranch) 75 (1807). In that case, the Court ruled that the absence of an allegation that there had been an actual taking up of arms against the United States defeated probable cause for an arrest warrant for treason. In contrast, the Court later gave a looser interpretation of "probable cause" in the context of assessing the validity of a revenue seizure made under the 1799 Collections Act:

[T]he term "probable cause," according to its usual acceptation, means less than evidence which would justify condemnation; and, in all cases of seizure, has a fixed and well known meaning. It imports a seizure made under circumstances which warrant suspicion. In this, its legal sense, the Court must understand the term to have been used by Congress.

Locke v. United States, 11 U.S. (7 Cranch) 339, 348 (1813) (construing Act of March 2, 1799, ch. 22, § 71, 1 Stat. 627, 678). Note that the "in all cases of seizure" language leaves open the possibility that the term could carry a different meaning in the criminal context.

452. See *supra* notes 370-377 and accompanying text.

The lack of consensus regarding the scope of the protection is suggested by the variation in the listing of protected interests in anti-Federalist proposals. Richard Henry Lee's initial proposal for a federal search and seizure protection approximated the Pennsylvania and Massachusetts state provisions by recognizing a right regarding persons, houses, papers — but substituted “property” for “possessions.”⁴⁵³ The most complete and polished proposal for a federal protection that appeared in the sixteenth of the *Letters from the Federal Farmer* used the persons, houses, papers, and possessions formula.⁴⁵⁴ However, other anti-Federalists seem to have endorsed a broader scope of protection.

As noted above, the anti-Federalist factions in the Pennsylvania and Maryland ratification conventions followed the earlier Virginia state provision by omitting any right statement, and thus any listing of protected rights — an omission that implied a broad ban against general search authority.⁴⁵⁵ Other anti-Federalists endorsed a listing of protected interests but did so in a way that seemed to reach a search of any privately owned premises; specifically, they omitted any specific mention of “houses.” For example, the initial discussion of a federal search protection in the *Letters* called for a protection against “searching and seizing men’s papers, property, and persons.”⁴⁵⁶ The proposals for a federal search protection adopted in the Virginia, New York, and North Carolina ratification conventions also referred to the right of a freeman regarding “his person, his papers and his property” — without mentioning the house.⁴⁵⁷ Similarly, another of the *Letters* referred to a right regarding a citizen’s “person, papers, or effects,”⁴⁵⁸ and Samuel Adam’s motion during the Massachusetts convention used “persons, papers, or possessions.”⁴⁵⁹ The absence of any reference to “houses” in these formulations of a federal protection is remarkable given the prominence attached to violations of the house in the complaints about general warrants. For that reason, I speculate that the term “houses” was omitted in order to extend the protection to all privately owned property regardless of the premises on which it was located.

On a related point, it is also noteworthy that the anti-Federalist proposals tended to substitute the broader-sounding terms “property”

453. Letter from Richard Henry Lee to Edmund Randolph (postscript), *supra* note 120, at 117.

454. See *Letters from the Federal Farmer (XVI)*, *supra* note 128, at 328.

455. See *supra* note 426 and accompanying text.

456. See *Letters from the Federal Farmer (IV)*, *supra* note 127.

457. See *supra* note 429.

458. See *Letters from the Federal Farmer (VI)*, *supra* note 122.

459. See *supra* note 123.

or “effects,” for “possessions.” “Possessions” connoted items of tangible personal property that might be seized.⁴⁶⁰ The term “effects” may have carried a broader connotation insofar as it was commonly used to denote commercial goods.⁴⁶¹ (At the time of the framing, “effects” was most commonly used in bankruptcy law,⁴⁶² though it may have

460. One commentator has argued that “possessions” could have been understood to include real property at the time of the framing. See Neil C. McCabe, *State Constitutions and the “Open Fields” Doctrine: A Historical-Definitional Analysis of the Scope of Protection Against Warrantless Searches of “Possessions,”* 13 VT. L. REV. 179 (1988). McCabe did show that “possessions” sometimes referred to land in framing-era usage. *Id.* at 193-210. However, he does not show that it was ever used that way in the context of complaints about searches and seizures. As described above, the American search controversies were about the threatened seizure of goods from houses. Moreover, McCabe did not offer any explanation for the substitution of “effects” for “possessions” in the Fourth Amendment (discussed in the text *infra*), and offered no evidence that “effects” was used to refer to land. To the contrary, the evidence is clear that “effects” referred to moveable goods. See *infra* note 461. Thus, it is implausible that the term “possessions” in search and seizure provisions was understood to apply the right to be secure to land.

461. “Effects” does not seem to have been defined in framing-era legal dictionaries, but it was defined in general purpose dictionaries. A 1730 dictionary defined “effects” as “the goods of a merchant, tradesman, &c.” DICTIONARIUM BRITANNICUM (Nathan Bailey ed., 1730, reprinted 1969). JOHNSON’S DICTIONARY, *supra* note 177 (published in 1755), defined the plural of “effect” simply as “Goods; moveables.”

In addition, some framing-era usages of “effects” clearly used the term to refer only to moveable property. For example, during the debates over boycotting British imports in 1769, the imports were usually referred to as “goods,” “wares,” “manufactures,” “merchandizes,” or “commodities,” but were occasionally referred to as “effects.” See THE LETTERS OF FREEMAN, ETC: ESSAYS ON THE NONIMPORTATION MOVEMENT IN SOUTH CAROLINA 105, 107 (William Henry Drayton ed., 1771; reprinted, Robert M. Weir ed., 1977). Similarly, in 1775 the Continental Congress complained that British authorities in Boston “detained the greatest part of the inhabitants of the town, and compelled the few who were permitted to retire, to leave their most valuable effects behind” — a complaint that would not make sense unless it meant that the departing inhabitants were not permitted to take everything of a moveable nature with them. See A DECLARATION BY REPRESENTATIVES OF THE UNITED COLONIES OF NORTH-AMERICA, NOW MET IN CONGRESS AT PHILADELPHIA, SETTING FORTH THE CAUSES AND NECESSITY OF THEIR TAKING UP ARMS (July 6, 1775), quoted in SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS 295, 298 (Richard L. Perry ed., 1959). Similarly, a 1782 wartime Pennsylvania statute authorized seizures of “Goods, Wares, and Merchandize” or “Goods and Property” imported from Britain; one provision excepted “all Goods and Effects” which were the property of any of the States, and another referred to “the Goods or Effects seized” under authority of the act. See An Act for the more effectual Suppression of all Intercourse and Commerce with the Enemies of the United States of America, ch. 31, § 3 (“all Goods and Effects”), § 13 (“the Goods and Effects seized”) (1782).

The same understanding is still evident in the 1828 first edition of WEBSTER’S DICTIONARY, *supra* note 313 (pages unnumbered) (defining “EFFECT” as “[i]n the plural, effects are goods; moveables; personal estate. The people escaped from the town with their effects”) (emphasis in original).

462. Bankruptcy appears to be the only area of framing-era law where the term “effects” was frequently used. References to the bankrupt’s “estate and effects” were common in framing-era bankruptcy law because the principal English bankruptcy statute applied to the bankrupt’s “goods, wares, merchandizes, money, estate and effects.” An Act to prevent the committing of Frauds by Bankrupts, 5 Geo. 2, ch 30, § 1 (1732) (Eng.). As a result, the term “estate and effects” was often used as an inclusive formula for everything the bankrupt had that was of value. See, e.g., 2 BLACKSTONE, *supra* note 27, at ch. 31. The term “effects”

later acquired broader usage and connotations during the nineteenth century.⁴⁶³) However, “effects” appears to have been similar to “possessions” insofar as it also connoted goods or items that might be seized, rather than premises.

In contrast, the term “property” was potentially broader than “possessions” or “effects” insofar as it could have included real property as well as personal items or commercial goods; thus, “property” could have been understood to denote premises such as houses, shops, or warehouses that might be searched, as well as items or goods that might be seized. As a result, the statement of a right to be secure in one’s “property” (without mentioning “houses” specifically) may have been intended to serve as a rhetorical endorsement of the importance of the protection against general warrants that did not limit the scope of the premises that enjoyed the protection.

Madison proposed that the right be stated as a protection of “their persons, their houses, their papers, and their other property.” Thus, he specifically included “houses” but coupled it with the broader term “other property” rather than the narrower term “possessions” — a formulation that only Lee had previously proposed. It is possible that Madison sought to broaden the scope of the protection by using “property” rather than “possessions.” (Madison’s reference to “the place to be searched” may also appear to anticipate that the provision

— often coupled with “estate” — also appears in the 1785 Pennsylvania bankruptcy Act, An Act for the Regulation of Bankruptcy, ch. 230, (1785), and in the 1800 federal bankruptcy Act, Act of Apr. 4, 1800, ch. 19, 2 Stat. 19.

The use of “effects” in bankruptcy law probably reflects the fact that, during the framing era, bankruptcy still applied only to “merchants.” See Thomas Plank, *The Constitutional Limits of Bankruptcy*, 63 TENN. L. REV. 487, 507-09 (1996). A bankrupt merchant’s remaining wealth might well be largely in the form of unsold goods (though all of his interests, including land, were subject to bankruptcy). In that context, it made sense that bankruptcy law would often refer to the combination of a bankrupt’s “effects” (goods and personal items, see the previous note) and “estate” (a term that referred broadly to interests in land or other property). Thus, “estate and effects” of the bankrupt served as an inclusive formula for anything of value that the bankrupt owned or was owed. The early bankruptcy acts, however, used a plethora of terms to denote anything of value that commissioners of bankruptcy could claim and sell for the benefit of the bankrupt’s creditors, and it does not appear that there was any particular effort to differentiate among the various terms for forms of property or interests in those statutes.

463. Lord Mansfield gave an expansive construction to the phrase “real and personal effects” in the context of interpreting a will in the 1775 English decision *Hogan v. Jackson*, 1 Cowp. 299, 98 Eng. Rep. 1096, 1099 (K.B. 1775). The case report of that decision, however, was not published until 1783, see 1 LEGAL BIBLIOGRAPHY, *supra* note 19, at 298, entry 36; hence, it seems unlikely that Mansfield’s interpretation influenced the American Framers. One of the attorneys in *Hogan* had argued that the word “effects” was properly applicable only to “personal estate,” and that “[a]ll the dictionaries explain it by the words ‘goods and moveables.’ ” 1 Cowp. at 302, 98 Eng. Rep. at 1098. Lord Mansfield chose to interpret “effects” to be “synonymous to worldly substance . . . whatever can be turned to value” so that “real and personal effects” would mean “all a man’s property.” 1 Cowp. at 304, 98 Eng. Rep. at 1099. Mansfield’s treatment may have led to a broader understanding of “effects” during the nineteenth century — at least or especially when it was linked to the term “real.”

would protect premises other than houses, but it may simply be a carryover from the disapproval of the earlier language of general warrants directing search of “suspected places.”⁴⁶⁴) Alternatively, he may have cobbled together an ambiguous listing in the hope of avoiding or downplaying conflict on that point.

C. *The Committee of Eleven’s Review of Madison’s Proposal*

The “Committee of Eleven” of the House of Representatives initially reviewed Madison’s proposals for rights amendments, and made significant changes to a number of the proposals; however, they did little to the language of his search and seizure proposal.⁴⁶⁵ In fact, the Committee made only one deliberate change of any potential significance — it altered Madison’s listing of protected interests from persons, houses, papers, and “other property” to persons, houses, papers, and “effects.”

1. *The Committee’s Substitution of “Effects”*

Because there are no records of the Committee’s deliberations, one can only speculate as to why the committee substituted “effects” for Madison’s “property.” It seems unlikely (though not impossible) that the Committee made the substitution only as a matter of stylistic preference. The Committee certainly did not have any general aversion to the term “property,” as it had already twice accepted Madison’s use of the term in what later became the Fifth Amendment.⁴⁶⁶ Moreover, because it seems likely that the Committee would have perceived the listing of protected interests as a controversial subject, it is unlikely that the committee would have made any casual stylistic changes in that regard. Because “effects” was usually understood to designate moveable goods or property (but not real property or premises), the most likely explana-

464. See *supra* text accompanying notes 351-378.

465. The committee reported the provision as follows:

The right of the people to be secure in their person, houses, papers, and effects, shall not be violated by warrants issuing, without probable cause supported by oath or affirmation, and not particularly describing the places to be searched, and the person or things to be seized.

HOUSE COMMITTEE OF ELEVEN REPORT (July 28, 1789), reprinted in COGAN, *supra* note 122, at 223-24 (6.1.1.2).

For the appointment of the Committee, see 3 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1789-91: HOUSE OF REPRESENTATIVES JOURNAL 117 (Linda Grant DePauw ed., 1977). Madison and Egbert Benson were members, but Elbridge Gerry was not.

466. See James Madison, Proposal in the House of Representatives (June 8, 1789), reprinted in COGAN, *supra* note 122, at 337 (10.1.1.1.a-c); HOUSE COMMITTEE OF ELEVEN REPORT (July 28, 1789), reprinted in COGAN, *supra* note 122, at 338 (10.1.1.2).

tion for the substitution is that the Committee intended to narrow the scope of interests protected by Madison's proposal.⁴⁶⁷

Thus, the Committee's formulation implied that "houses" were the only type of premises protected by the right to be secure, although "effects" denoted that any type of items or goods that might be located within a house, including commercial goods, were also protected. A plausible motive for adopting a narrower expression regarding the scope of protection is patent: customs collections would be the primary source of revenue for the new government, and the Committee may have been reluctant to adopt an inflexible *constitutional* protection that would limit legislative authority to provide for searches of commercial premises⁴⁶⁸ — especially given that the popular concern regarding searches focused on violations of houses.⁴⁶⁹

At first blush, this interpretation may appear to be inconsistent with the statutory protection of commercial premises enacted by the First Congress. For example, the provisions regarding customs search authority included in the 1789 Collections Act (adopted virtually contemporaneously with the Fourth Amendment's language) did require specific warrants for searches of all buildings, rather than just houses.⁴⁷⁰ However, Congress's decision to require use of specific

467. The Supreme Court concluded that "[t]he Framers would have understood the term 'effects' to be limited to personal, rather than real, property" in *Oliver v. United States*, 466 U.S. 170, 177 n.7 (1984) (opinion of the Court by Powell, J.). Note, however, that the citations to Blackstone in the discussion in *Oliver* are mere decorations rather than historical evidence on this point; they refer to Blackstone's discussion of personal property, but he did not use the term "effects" in that discussion.

In contrast, Amar has asserted that the Framers intended for "effects" to be a catchall including all buildings and even ships. See AMAR, BILL OF RIGHTS BOOK, *supra* note 58, at 67 (asserting that "other buildings" than houses were "subsumed within the catchall word effects"); Amar, *Boston*, *supra* note 19, at 68-69 (criticizing my suggestion that the Fourth Amendment did not reach ships or commercial premises as "Davies's gambit"); Amar, *Terry*, *supra* note 58, at 1104-05, 1108-09 (criticizing my argument that ships were not "effects" and asserting that "property," "effects," and "possessions" each constituted "broad residual language" meant "to sweep in all important stuff, not to keep out ships, etc." (emphasis in original)). Amar, however, has not offered any historical evidence to support these assertions.

468. See *supra* note 369 and accompanying text.

469. One sort of evidence suggests the absence of any popular demand for protection of commercial premises: the state search and seizure provisions that were revised or adopted after the Fourth Amendment was adopted all explicitly referred to "houses" and often used the more traditional, but narrower-sounding "possessions" rather than "effects." Pennsylvania retained "possessions" rather than change to "effects" when it revised its search and seizure provision in 1790. See *supra* note 181. Thereafter "possessions" was used by Kentucky (1792), Tennessee (1796), Ohio (1802), Mississippi (1817), Illinois (1818), Maine (1819), and Alabama (1819). The term "effects" was not used in a state provision until Indiana used it (1816), and Missouri followed suit (1820). See the respective state declarations of rights in SWINDLER, *supra* note 177.

470. The First Congress adopted customs search authority provisions in the 1789 Collections Act only a few weeks before the House debate on the Bill of Rights. Act of July 31, 1789, ch. 5, 1 Stat. 29. Section 24 initially empowered customs officers to make warrantless

search warrants for commercial premises as a matter of policy does not show that Congress understood that the constitutional right to be secure *required* that treatment.

Moreover, in later statutes Congress sometimes provided for warrantless search authority of commercial premises, but not dwellings. The excise search provisions adopted in 1791 and following years generally required specific warrants for searches of houses or other buildings, but provided revenue officers with warrantless search authority for buildings or rooms that had been registered as distilleries or liquor storerooms as part of the liquor licensing process. The exception suggests that Congress understood that it had leeway to confer general search authority on revenue officers regarding commercial premises — though not for places actually used as dwellings.⁴⁷¹ (In

searches of ships when they had “reason to suspect” customs fraud. *Id.* at 43. (However, the Framers would not have thought ships came within protection of the common law “right to be secure” protected in the Fourth Amendment. *See supra* notes 143-151 and accompanying text.) Section 24 also provided:

if [the officer] shall have cause to suspect a concealment [of uncustomed goods], in any particular dwelling-house, store, building, or other place, [he] shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the day time only) and there to search for such goods . . .

1 Stat. at 43. Because this authority for issuance of a search warrant was the only form of authority for a search of a house or other building that was created by the statute, this section effectively required use of a particularized warrant for any search of a building.

Unfortunately, this section has been misconstrued in various ways in prior commentary. Amar, *Fourth Amendment, supra* note 58, at 766, asserted that the statute “authorized, but did not require” use of warrants to search houses and building. That interpretation, however, ignores the absence of any other grant of legal authority by which a federal officer could justify a search of a house. *See supra* notes 92, 240. It also flies in the face of the explicit grant of warrantless search authority *only* as to ship searches at the beginning of the same section, as described above. *See Maclin, Complexity, supra* note 44, at 952.

LEVY, ORIGINAL MEANING, *supra* note 45, at 245, asserted that this section prevented the magistrate from assessing whether there was probable cause for the search before issuing a warrant. However, that reading placed too much weight on “entitled to a warrant” and too little on the earlier “if” in “if [the officer] shall have cause . . .”

The confusion over the meaning of the search provisions in the 1789 Collections Act no doubt flows in part from a serious gap in the historical record. Although the House debates over the duties and tonnage aspects of the act were reported by Lloyd in volumes one and two of the Congressional Register, *see* CONG. REGISTER, *infra* note 475, the entries for the dates on which the procedural aspects of customs collections would have been debated consist only of brief notations that the House resolved itself into a committee of the whole and continued debate on the collections bill. *See 2 id.* at 54-56 (reporting proceedings on July 2-3, 6-11, 1789). Thus, there is no record of the content of the House debate on the subjects that would have most directly illuminated the Framers’ views of the relative protections to be afforded houses, commercial buildings, and ships. Likewise, this gap probably also at least partly explains the failure of prior Fourth Amendment commentaries to recognize how focused the federal Framers were on customs searches when they framed the Fourth Amendment.

471. Congress modeled the 1791 federal excise on distilled spirits on earlier English excise collection schemes. Distillers were required to register and designate any buildings or rooms in houses that were used for distilling or for storing liquor and those premises were

made subject to discretionary inspection by excise officers at any time during daytime. See Act of Mar. 3, 1791, ch. 15, §§ 25, 26, 29, 1 Stat. 199, 205-07. However, the Act provided for specific search warrants for searches of any premises other than registered distilleries or storerooms:

It shall be lawful for any [federal judge or justice of the peace], upon reasonable cause of suspicion, to be made out to the satisfaction of such judge or justice, by the oath or affirmation of any person or persons, by special warrant or warrants . . . to authorize any of the officers of inspection, by day, in the presence of a constable or other officer of the peace, to enter into all and every such place or places in which any of the said spirits shall be suspected to be [concealed].

Id. § 32, 1 Stat. at 207. This authority for issuance of “special warrant[s]” effectively required use of specific search warrants because it was the only form of search authority for non-registered premises provided for. Thus, an excise search of a house could be justified only by a specific warrant.

The exposure of registered rooms to discretionary (general) search authority would appear to mean either that the constitutional “right to be secure” in the Fourth Amendment did not prohibit legislative approval of general search authority as to commercial premises, or that the registration was understood to constitute a waiver of the usual protection. Of course, from the standpoint of modern doctrine, it may seem that the exception for registered buildings or rooms could be explained as a form of waiver of the usual right to security as a condition for being permitted to engage in distilling. I have not found any framing-era discussions that actually discussed a waiver, however.

Unfortunately, there is no record of any debate in the Senate regarding the 1791 Excise Act, and the record of the debate in the House of Representatives regarding the procedural aspects of the Act is quite limited. Even so, the House record indicates that the representatives were especially opposed to authorizing excise officers to make discretionary searches of houses but were not necessarily opposed to allowing discretionary search authority regarding commercial premises. Opponents of the excise asserted it would provoke public resistance because it would make houses vulnerable to searches. For example, Representative Jackson asserted that Americans would “not subject themselves to a host of excise officers, who would be warranted by law to penetrate into the inmost recesses of houses.” 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS: DEBATES IN THE HOUSE OF REPRESENTATIVES, THIRD SESSION: DEC. 1790 – MAR. 1791, at 213-14 (William Charles DiGiacomantonio et al. eds., 1995) [hereinafter 14 DEBATES IN THE HOUSE]. Likewise, Representative Parker questioned whether the government could protect revenue officers “in their searchings of the houses of your citizens.” 14 *id.* at 221-23.

In response, proponents of the excise bill called attention to the fact that it did not authorize discretionary searches of houses, but conferred such search authority only over certain commercial premises. In his report to the House, Treasury Secretary Alexander Hamilton noted that the proposed bill did not give officers “the general power . . . of VISITING AND SEARCHING INDISCRIMATELY the houses, stores and other buildings of the dealers in excised articles,” but that the officers’ “discretionary power of visiting and searching is to be restricted to those places, which the Dealers themselves shall designate . . .” 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS: LEGISLATIVE HISTORIES, AMENDMENTS TO THE CONSTITUTION THROUGH FOREIGN OFFICERS BILL 582, 585 (Charlene Bangs Bickford & Helen E. Veit eds., 1986) [hereinafter 4 LEGISLATIVE HISTORIES] (capitalization in original). (Note that “discretionary power of visiting” appears to refer to *ex officio* or warrantless search authority.) Similarly, Representative Sherman asserted that the excise was not odious because it exposed only “distillers and importers” to “the visits of excise officers.” 14 DEBATES IN THE HOUSE, *supra*, at 247.

Other defenders of the bill also stressed that it did not expose citizen’s houses or personal property to searches. Representative Livermore asserted that the proposed legislation did not allow excise officers “to enter at their pleasure into the most private recesses of a man’s house or store . . .” 14 *id.* at 247-49. Representative Lawrance insisted that the proposed legislation did not “subject every individual to be searched, and to have his dwelling inspected by excise officers.” 14 *id.* at 303-04. Representative Smith also observed that one

addition, a short-lived wartime statute adopted in 1815 authorized customs officers to make warrantless searches of vehicles, pack animals, or even packages carried by a person. Although that provision was something of an aberration, it appears to have been aimed at the transport of commercial goods.⁴⁷²) In sum, although the evidence on this point is less than definitive, the available linguistic and statutory evidence suggests that “persons, houses, papers, and effects” was understood to provide clear protection for houses, personal papers, the sorts of domestic and personal items associated with houses, and even commercial products or goods that might be stored in houses — while leaving commercial premises and interests otherwise subject to congressional discretion.

of the “principal objections to the excise in England” was that “it throws open the houses (or as they are emphatically stiled, the castles) of British subjects to the inspection of excise officers”; however, he insisted that objection did not apply to the proposed legislation because “an excise officer cannot enter a dwelling-house; he has access to those places only, which the proprietors set a-part for the storage of spirituous liquors. How is domestic tranquility violated?” 14 *id.* at 257-59. Indeed, Smith asserted that “the regard shewn in this bill for the protection of the citizens, exceeds what was provided in the 47th section of the collection laws of the last session [namely, the search warrant provision of the 1789 Collections Act]; yet, we did not then hear of the dangers of violating either public rights or private property.” 14 *id.* at 259. (The record does not identify the difference Smith perceived between the search warrant provisions of the two revenue acts; however, the only protection provided in section 34 of the 1791 Excise Act, but not in section 47 of the 1789 Collections Act, was a requirement that an excise search warrant be executed only “in the presence of a Constable or other officer of the peace” — that is, a local officer. This was apparently viewed as a significant provision; although the Senate sought to strike it out, the House refused to acquiesce in that amendment and it was retained. 4 LEGISLATIVE HISTORIES, *supra*, at 609, 625 n. 53.)

There do not appear to have been any legal challenges to the general search authority for registered premises in the federal excise acts. That silence suggests that it was widely understood that the right to be secure did not protect commercial premises. *See also* Maclin, *Complexity*, *supra* note 44, at 953-54 (discussing the excise search provisions).

472. The federal collections acts were silent as to searches of wagons until 1815, when Congress enacted a provision empowering a customs officer “to stop, search and examine any carriage or vehicle, of any kind whatsoever, and to stop any person travelling on foot, or beast of burden, on which he shall suspect there are [uncustomed] goods, wares or merchandise . . .” Act of March 3, 1815, ch. 94, § 2, 3 Stat. 231, 232. The statute also provided that “[t]he necessity for a search warrant arising under this act, shall in no case be considered as applicable to any carriage, wagon, cart sleigh, vessel, boat, or other vehicle, of whatever form or construction, employed as a medium of transportation, or to any packages on any animal or animals, or carried by man on foot.” *Id.* This provision was short-lived, however; its repeal in 1816, *see* Act of April 27, 1816, ch. 110, § 3, 3 Stat. 315, suggests that it was viewed as an extreme wartime measure. There was no further provision of search authority regarding vehicles until this section of the 1815 act was revived in the closing months of the Civil War, and then continued. *See* Act of Feb. 28, 1865, ch. 67, § 1, 13 Stat. 441, 441-42, reenacted in slightly different language in Act of July 18, 1866, ch. 201, § 2, 14 Stat. 178, and then incorporated into Revised Statutes, ch. 10, § 3061, 18 Stat. 588. So far as I can determine, the constitutionality of this search authority regarding vehicles was never challenged in court.

It may be relevant that customs searches would have looked for items of some bulk; hence, it is unlikely that the search authority would have been understood to allow highly intrusive searches. It is also possible that the 1815 legislation was related to the New York *Sally* decision, discussed *supra* note 283.

2. *The Committee's Acceptance of the Substance and Format of Madison's Proposal*

The Committee's report of the search and seizure provision differed from Madison's proposal in one other significant respect — it omitted Madison's "against all unreasonable searches and seizures." That omission was described as a "mistake," however, when the language was reinserted by motion during the House debate. Hence, it appears to be only a transcription error that does not reflect any substantive consideration (but "all" was lost in the process).⁴⁷³ The only other changes the Committee made to Madison's proposal were small stylistic alterations.⁴⁷⁴

The most significant feature of the Committee's report is what it did not change. It endorsed Madison's one-clause format as well as his proposal to insert the search and seizure provision into the description of legislative power in Article I. (The decision to use a supplementary Bill of Rights was not made until shortly after the final floor debate in the House regarding the content of the search and seizure provision.

473. See HOUSE COMMITTEE OF ELEVEN REPORT, *supra* note 465; see also COGAN, *supra* note 122, at 224-25 (6.1.1.4.a, b, c, d) (excerpting various reported versions of the motion to reinsert "against unreasonable searches and seizures" and the description of the omission as a "mistake"). The motion to reinsert the language appears to have been made by Egbert Benson, see *infra* note 480, a member of the Committee of Eleven, see *supra* note 465.

Cuddihy states that the Committee "excised" the phrase "against unreasonable searches and seizures" but omits to mention the reference to the omission being a "mistake." 3 Cuddihy, *supra* note 20, at 1408-09. Levy follows Cuddihy by stating that "unreasonable searches and seizures" was "deleted." LEVY, ORIGINAL MEANING, *supra* note 45, at 243. I do not think those treatments are supported by the record.

474. Madison's plural "rights" was altered to the singular "right," his "secured" was changed to "secure," and his "by warrants issued" was changed to "by warrants issuing." In addition, his repetitive use of "their" was eliminated. See COGAN, *supra* note 122, at 223-24 (6.1.1.2, 6.1.1.3.a, b, c, d) (excerpting both the House Committee of Eleven Report and various reports of the House's consideration of the provision). It is not entirely clear whether these changes were made by the committee report or on the House floor in connection with the motion to reinsert "against unreasonable searches and seizures," described in the preceding note.

I do not think these small language changes carried any substantive import. Levy, however, has treated these small changes and the reinsertion of "against unreasonable searches and seizures" as though they somehow transformed Madison's ban against general warrants into a broad principle against unreasonable searches and seizures:

[A motion was made for] the restoration of "unreasonable searches and seizures." Oddly, [the movant] said he did so on a presumption that a "mistake" had been made in the wording of the clause, which he corrected by changing "rights" to "right" and "secured" to "secure." The effect was to provide security or, as we might say, privacy to the people; [this] motion changed the meaning from a protection of the right to a protection of the individuals in their persons homes, papers, and effects.

LEVY, ORIGINAL MEANING, *supra* note 45, at 244 (references to Gerry as the movant removed because it is unlikely he made the motion in question, see *infra* note 482). I find Levy's explanation mystifying.

Moreover, it does not appear to have reflected any disagreement as to the content of the rights amendments.⁴⁷⁵) Thus, the Committee members must have also understood the proposed search and seizure language as a ban solely against legislative approval of general warrants.⁴⁷⁶

D. *Gerry's Motion to Make Madison's Text More Imperative*

Unfortunately, previous commentaries have rushed past the particulars of Madison's proposal and the Committee's approval. Instead, they have focused on the subsequent change that produced the final

475. The Select Committee that initially reviewed Madison's proposed rights amendments endorsed his proposal to insert the amendments into the text of the Constitution. However, when the full House took up the subject of rights amendments on August 13, 1789, Roger Sherman moved that the amendments be reformatted into a "supplementary" document. 2 CONG. REGISTER 161, 167 (Thomas Lloyd reporter, 1789). See the explanation of the various records of the House debate *infra*. After debate as to the form of the amendments, see 2 *id.* at 167-79, that motion was defeated on the same day, see 2 *id.* at 179. The content of the provision that would become the Fourth Amendment (denoted as the "seventh clause of the fourth proposition") was debated on August 17th. 2 *Id.* at 219, 226 (discussed *infra* notes 478-493 and accompanying text). On August 19, after the debate on the search and seizure provision, but before the conclusion of the debate on the rights amendments, Sherman renewed his motion to put the amendments in a supplementary document. After further debate, his motion passed. See 2 *id.* at 237, 241. Thereafter, on August 20th, the House formally adopted the search and seizure amendment along with several other amendments. See 2 *id.* at 241, 243.

It does not appear that there was any disagreement that the amendments should be aimed at Congress. Rather, Sherman seems to have sought the supplementary format in the hope of downgrading the importance of the amendments, and possibly of warding off additional amendments to the Constitution. Sherman's ultimate victory probably reflected the desire of the members of the House to finish work on the amendments and move on to other pressing matters. See 2 *id.* at 167-79, 241.

Lloyd's Congressional Register account of the debate was published in New York in 1789. However, because copies were limited, that account was subsequently republished, apparently verbatim but without acknowledgment of the Lloyd's edition, in two different sets of *Annals of Congress*, both in 1834 (one bearing the running page head "History of Congress" and the other bearing the running page head "Gale's and Seaton's History of Debates in Congress"). The paginations of the three versions of the debates each differ from the others. See BENNETT B. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT* 98-99 (1955) (distinguishing in an explanatory note the two versions of *Annals of Congress*). The relevant portions of Gale and Seaton's version of the *Annals* are also republished in *id.* at 93-217 (but with different pagination). The earlier commentaries on the Fourth Amendment often cited to one of the versions of the *Annals* because they were more available. However, I have usually cited only Lloyd's original *Congressional Register*. The corresponding material can be located in the various versions of the *Annals* by reference to the date of the debate.

476. It is also significant that the Committee did not drop this provision. After Madison had submitted his proposals, Roger Sherman submitted a shorter alternative proposal for a bill of rights to the Committee which did not include a protection against general warrants. See ROGER SHERMAN'S DRAFT OF THE BILL OF RIGHTS (1789), *reprinted in* THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT app. at 351-52 (Randy E. Barnett ed., 1989). However, Sherman does not seem to have voiced any opposition to the search and seizure proposal made by the Committee.

two-clause format. Specifically, a motion was made during the House debate to alter the Committee's statement that "[the right shall not be violated] by warrants issuing without [probable cause or particularity]" to "[the right shall not be violated], *and no warrants shall issue but upon* [probable cause and particularity]."⁴⁷⁷ The most complete record of the motion is as follows:

Mr. BENSON Objected to the words "by warrants issuing." This declaratory provision was good as far as it went, but he thought it was not sufficient; he therefore proposed to alter it so as to read "and no warrant shall issue."

The question was put on this motion, and lost by a considerable majority.⁴⁷⁸

Regrettably, the record is not entirely accurate.⁴⁷⁹

The available evidence indicates that it was most likely Elbridge Gerry of Massachusetts, not Egbert Benson of New York, who made this motion. The record of the House debate quoted above had attributed the earlier motion to correct a "mistake" and reinsert "against unreasonable searches and seizures" to Gerry, while it attributed the motion to substitute "and no Warrants shall issue" to Egbert Benson. However, other records show the opposite.⁴⁸⁰ Moreover, the latter attributions make more sense in the context. To begin with, Benson was a member of the Committee of Eleven, but Gerry was

477. See the Committee's proposed text, *supra* note 465 ("[the right shall not be violated] by warrants issuing [without probable cause or particularity]"); the motion quoted in the text immediately *infra*.

478. 2 CONG. REGISTER, *supra* note 475, at 236 (Aug. 17, 1789), *quoted in* COGAN, *supra* note 122, at 236 (6.2.1.2.a). Lasson quoted this passage from the Gale and Seaton's version of the *Annals of Congress*. See LASSON, *supra* note 16, at 101 (quoting Gale and Seaton's *Annals*, discussed *supra* note 475). For several shorter renditions of the motion, see COGAN, *supra* note 122, at 225, (6.1.1.5.a, b), 236-37 (6.2.1.2.b, c, d).

479. The House reporter, Thomas Lloyd, made numerous errors. See DAUMBAULD, *supra* note 328, at 35 n.6, 41 n.28, 42 n.32, as cited in Amar, *Fourth Amendment*, *supra* note 58, at 775 n.66.

480. The documentary evidence is inconsistent as to whether Benson or Gerry made this motion. There had been an earlier motion to correct the "mistake" of the omission of "against unreasonable searches and seizures" from the report of the Committee of Eleven. See discussion *supra* note 465. The Congressional Register account shows Gerry making the earlier motion to reinsert "against unreasonable searches and seizures" and shows Benson making the later motion to substitute "and no warrant shall issue." See 2 CONG. REGISTER, *supra* note 478; COGAN, *supra* note 122, at 224-25 (6.1.1.4.a, 6.1.1.5.a). *Gazette of the United States* shows the reverse, however, with Benson reinserting "against unreasonable searches and seizures" and Gerry substituting "and no Warrants shall issue." GAZETTE OF THE U.S., Aug. 22, 1789, at 249, col. 3, *quoted in* COGAN, *supra* note 122, at 237 (6.2.1.2.d); see also *id.* at 225 (6.1.1.4.d, 6.1.1.5.b). A contemporaneous press report that appeared in several New York newspapers also showed Benson moving to reinsert "against unreasonable searches and seizures," but did not mention the second motion to substitute "and no warrants shall issue." For two of these identical newspaper accounts, see DAILY ADVERTISER, Aug. 18, 1789, at 2, col. 4, *quoted in* COGAN, *supra* note 122, at 236 (6.1.1.4.b); NEW-YORK DAILY GAZETTE, Aug. 19, 1789, at 802, col. 4, *quoted in* COGAN, *supra* note 122, at 224 (6.1.1.4.c).

not; hence, Benson was in the better position to describe the omission of “against unreasonable searches and seizures” as a transcription “mistake.”⁴⁸¹ In addition, the motion to substitute “and no Warrants shall issue” sounds like Gerry; he was a frequent and combative participant in the House debate and offered several motions to make the language of proposed rights amendments more explicit or precise.⁴⁸² In contrast, because Benson did not dissent from his Committee’s proposal, it seems unlikely he would have moved to alter it on the House floor. Thus, the evidence strongly suggests that Gerry made the crucial motion.⁴⁸³

The record showing that this motion “failed” has provoked some consternation. In fact, the combination of this report and the fact that the substitute language nevertheless appeared in later versions of the amendment led prior commentators to formulate a conspiracy theory in which a committee of style surreptitiously inserted the voted-down language in the proposals the House sent to the Senate.⁴⁸⁴ However,

481. The Committee membership is discussed *supra* note 465.

482. Gerry’s biographer has observed that, except for Madison, Gerry was probably the most active participant in the debate regarding the rights amendments; that Gerry and Madison were often at odds; and that Gerry resented Madison’s having assumed the role of sponsor of the rights amendments. See BILLIAS, *supra* note 439, at 230-35, 398 n.53. Moreover, the content of the motion to substitute fits Gerry’s ideological outlook, because he tended to insist on the most explicit statements of rights. See *infra* note 495 and accompanying text.

Gerry’s concern with precise language was evident in other aspects of the House debate over the rights amendments. For example, he complained that the word “disparage” in the language that became the Ninth Amendment should have been “impair” because “‘disparage’ was not of plain import.” See 2 CONG. REGISTER, *supra* note 478, at 226, reprinted in COGAN, *supra* note 122, at 628 (15.1.1.4). Likewise, when the language that became the Second Amendment was debated, Gerry wanted to expand “a well regulated militia” to “a well regulated militia trained to arms.” *Id.* at 171 (4.1.1.8). He also wanted to change the phrase “public danger” at the end of the proposed grand jury provision to “foreign invasion.” *Id.* at 268 (7.1.1.7.a, b). And during the debate over the Tenth Amendment, he may have sought to add “expressly” between “powers” and “delegated to the United States.” *Id.* at 665 (16.1.1.8) (note, however, that this last motion may have been by Tucker, see *id.* (16.1.1.6.a)).

483. Cuddihy has also concluded, based on the newspaper reports (cited *supra* note 480), that Benson made the first motion to reinsert “against unreasonable searches and seizures,” thus Gerry must have made the motion to substitute “and no Warrants shall issue.” 3 Cuddihy, *supra* note 20, at 1409-10 & n.89.

484. The fact that the proposed change nevertheless appeared in the Amendment has led prior commentators to fashion a conspiracy theory in which a three-member Style Committee subsequently appointed by the House, which Benson chaired, sneaked in the language change despite the House vote. This scenario, which was probably prompted by the incorrect notion that Benson was the proponent of the substitute language, was first proposed in a 1921 article by Osmond K. Fraenkel, *supra* note 16, at 366 n.30. It has been nearly universally repeated by later commentators. See, e.g., LANDYNSKI, *supra* note 38, at 41-42; LASSON, *supra* note 16, at 101-03; LEVY, ORIGINAL MEANING, *supra* note 45, at 244; Maclin, *Central Meaning*, *supra* note 9, at 208-09 & n.35; 3 Cuddihy, *supra* note 20, at 1411, 1412-13. Bradley rested his interpretation of the intended meaning of the text on the supposed failure of this motion. See Bradley, *supra* note 56, at 827-28. The conspiracy theory

the documentary evidence on this point also is inconsistent; Amar has noted that other House records show the change having been made prior to the appointment of the Style Committee.⁴⁸⁵ In addition, a third motion made immediately after the vote on the motion to substitute “and no Warrants shall issue” strongly suggests that the motion must have passed.⁴⁸⁶ Thus, in all likelihood the report is also erroneous on this point — the motion passed.

Of course, the crucial question is *why* the substitution of “and no warrant shall issue” was made. Lasson paraphrased the record quoted above by stating that “although [the proposed language] was good as far as it went, *it was not sufficient*.”⁴⁸⁷ Thus, he interpreted the change to add a broad reasonableness principle distinct from the warrant standards themselves.⁴⁸⁸ Later commentators almost uniformly have accepted Lasson’s assertion that the change was intended to create a reasonableness standard for warrantless intrusions,⁴⁸⁹ and several Supreme Court opinions have endorsed it.⁴⁹⁰

has also been repeated in *Payton v. New York*, 445 U.S. 573, 611. (1980) (White, J., dissenting). Amar has been the only prior skeptic. See *infra* note 485.

485. Two documentary accounts show that the motion “lost” or “was negated.” See 2 CONG. REGISTER, *supra* note 478, at 226 (Aug. 17, 1789), quoted in COGAN, *supra* note 122, at 236 (6.2.1.2a); GAZETTE OF THE U.S., AUG. 22, 1789, at 249, col. 3, quoted in COGAN, *supra* note 122, at 236 (6.1.1.5.b). However, other evidence shows the outcome of the vote was probably misreported. Amar has noted documentary evidence that indicates that the altered language appeared in House records *prior* to the appointment of the three-person style committee. See Amar, *Boston*, *supra* note 19, at 67 n.54 (citing 3 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1789-91, *supra* note 465, at 159), for the text of the search and seizure provision appearing as of August 21, 1789, and *id.* at 165 for the appointment of the Committee of Three on August 22, 1789.

486. A third motion made by Representative Livermore in the House debate immediately after the motion to substitute “and no warrant shall issue . . .” shows that the motion must have passed. He moved to drop the “not” that appeared between the probable cause and particularity standards in the Committee’s proposal. See 2 CONG. REGISTER, *supra* note 475, at 236 (Aug. 17, 1789), quoted in COGAN, *supra* note 122, at 225 (6.1.1.6). Dropping the “not” makes sense only if the substitution of “and no Warrants shall issue, but upon . . .” had *already* been made. That substitution changed the statement of the warrant standards from a negative statement of what could not be omitted (hence the original “and not” between probable cause and particularity), to an affirmative statement of conditions that had to be met, in which the “not” was out of place. Hence, the substitution of “and no Warrants shall issue” must have already been made by the House. (Interestingly, the record shows Livermore’s motion also “failed,” though that change was also made in the version that appears in the House records identified by Amar. See *supra* note 485.)

487. LASSON, *supra* note 16, at 103 (emphasis in original).

488. See *id.*

489. See, e.g., LANDYNSKI, *supra* note 38, at 41-43; TAYLOR, *supra* note 49, at 42-43; Amsterdam, *supra* note 38, at 468 n.465; Cunningham, *supra* note 38, at 552; Kamisar, *supra* note 38, at 573-74; Maclin, *Cure*, *supra* note 44, at 19 n.84. Amar did not discuss the significance of this change beyond asserting that the motion passed, see *supra* note 485, but his statement that “early drafts” of the Fourth Amendment targeted the too-loose warrant as the enemy, see Amar, *Fourth Amendment*, *supra* note 58, at 774-75, implies that he also thought the content was later broadened by the substitution of “and no warrant shall issue . . .”

Although the conventional interpretation makes the text seem to fit *modern* doctrine, it does not rest on any *historical* evidence. As noted above, the historical records of the framing era show a dearth of concern about warrantless intrusions,⁴⁹¹ nor was any expressed during the House debate.⁴⁹² Moreover, Lasson's paraphrase of the record was incomplete.

The movant did not make a diffuse complaint that the content of the provision was substantively inadequate. Rather, the record quoted above shows that he objected to "*the words 'by warrants issuing,'*" that he complained that the Committee's "*declaratory provision . . . was not sufficient,*" and that he proposed substituting *imperative* language, "*and no warrant shall issue but . . .*" In other words, the proposed language was not sufficiently imperative.⁴⁹³

The source of the movant's complaint is obvious if one compares the Committee's proposed text to the earlier state provisions and anti-Federalist proposals for a federal protection. *Each and every one* of those earlier search and seizure texts had contained an *explicit* command that noncomplying warrants "ought [or shall] not be granted."⁴⁹⁴

Cuddihy did not follow Lasson's treatment, however, because he did not view Madison's text as focusing on warrant standards but as asserting "multiple categories of unreasonable searches and seizures," *see supra* note 265; thus, he described Gerry's motion as only "polish[ing] the language of the right without enlarging its scope," 3 Cuddihy, *supra* note 20, at 1410. Because Levy interpreted the earlier motion to reinsert "against unreasonable searches and seizures" as the crucial change, *see supra* note 474, he did not discuss the significance of this motion beyond noting that it "split" the provision into two parts. LEVY, ORIGINAL MEANING, *supra* note 45, at 244.

490. *See Lopez v. United States*, 373 U.S. 427, 454-55 (1963) (Brennan, J., dissenting) (citing Lasson for the proposition that the first clause sets out a "more encompassing principle" than the warrant standards); *Warden v. Hayden*, 387 U.S. 294, 303, 317 (1967) (Douglas, J., dissenting) (citing Lasson regarding the enlargement of the text to include a broad reasonableness principle); *United States v. Matlock*, 415 U.S. 164, 183 (1974) (Douglas, J., dissenting) (citing Lasson regarding the enlargement of the text to include a broad reasonableness principle); *Payton v. New York*, 445 U.S. 573, 585 (1980) (opinion of the Court by Stevens, J.) (citing Lasson regarding the enlargement of the text to include a broad reasonableness principle); *id.* at 611 (White, J., dissenting) (same); *Oliver v. United States*, 466 U.S. 170, 177 (1984) (opinion of the Court by Powell, J.) (same).

491. As described above, there is no persuasive historical evidence of a grievance regarding warrantless intrusions in the prerevolutionary controversies, *see supra* notes 135-161 and accompanying text, and no persuasive historical evidence of concern about warrantless searches during the debates over the need for a federal bill of rights in 1787 and 1788, *see supra* notes 162-166 and accompanying text.

492. The First Congress did not enact any warrantless arrest authority when it created the office of federal marshal in the Judiciary Act of 1789, as discussed *supra* notes 169-172 and accompanying text.

493. Madison's use of "shall" rather than "ought" appears to have been simply a stylistic preference, like his avoidance of "therefore." *See supra* note 350.

494. For the provisions and proposals commanding that loose warrants not be issued, see the 1776 Virginia provision, VA. CONST. of 1776, art. X (Decl. of Rights), *quoted supra* text accompanying note 347, which was copied by North Carolina, N.C. CONST. of 1776, art. XI (Decl. of Rights), *reprinted in* COGAN, *supra* note 122, at 234-35 (6.1.3.5); the 1776 Penn-

In contrast, although the Committee's language implied that general warrants should not be issued, it did not explicitly command that no unspecified warrant be issued; in fact, it referred to general warrants "*issuing*." All the motion did was to clearly forbid *even the issuance* of a general warrant, and it did so simply by injecting language that had been uniformly used for that prohibition in prior constitutional bans against general warrants.

The likelihood that Gerry made the motion reinforces this interpretation because historical evidence suggests he would have found the "declaratory" tone of the Committee's provision inadequate. Gerry was a zealous advocate for a federal bill of rights: he had made the unsuccessful motion to add a bill of rights to the Constitution at the end of the 1787 Constitutional Convention; he had been one of three delegates who had refused to sign the Constitution, in part because it lacked a bill of rights; and he "remained suspicious lest the central government trespass on the liberties of citizens" during the First Congress.⁴⁹⁵

Most significantly, Gerry represented a Massachusetts anti-Federalist circle that held a near-paranoid fear that general warrants would be used to enforce federal tax collections. His close friend Mercy Otis Warren (James Otis's sister) had written the following in 1788 shortly after discussing with him the shortcomings of the proposed constitution:

There is no provision by a bill of rights to guard against the dangerous encroachments of power in too many instances to be named: but I cannot pass over in silence the insecurity in which we are left with regard to warrants unsupported by evidence — the daring experiment of granting *writs of assistance* in a former arbitrary administration is not yet forgotten in the Massachusetts; nor can we be so ungrateful to the memory of the patriots who counteracted their operation, as so soon after their many exertions to save us from such a detestable instrument of arbitrary power, to subject ourselves to the insolence of any petty revenue officer to enter our houses, search, insult, and seize at pleasure. . . . The rights of individuals ought to be the primary object of all government, and cannot

sylvania Provision, PA. CONST. of 1776, art. X (Decl. of Rights), *quoted supra* text accompanying note 353, which was copied by Vermont, VT. CONST. of 1777, ch. 1 (Right XI), *reprinted in* COGAN, *supra* note 122, at 235 (6.1.3.7); the 1776 Maryland provision, MD. CONST. of 1776, § 23 (Decl. of Rights), *quoted supra* note 351, virtually copied by Delaware, DEL. CONST. of 1776, § 17 (Decl. of Rights), *reprinted in* COGAN, *supra* note 122, at 234 (6.1.3.1); the 1780 Massachusetts provision, MASS. CONST. of 1780, pt. 1, art. XIV, *quoted supra* text accompanying note 379, copied by New Hampshire, N.H. CONST. of 1783, pt. 1, art. XIX, *reprinted in* COGAN, *supra* note 122, at 234 (6.1.3.4); the Pennsylvania and Maryland anti-Federalist proposals *quoted supra* note 426; the Virginia ratification convention resolution, copied by the New York and North Carolina conventions, *quoted supra* note 429.

495. See BILLIAS, *supra* note 439, at 197, 200, 225.

be too securely guarded by the most explicit declarations in their favor. . . .⁴⁹⁶

Gerry undoubtedly shared Warren's view that the rights of citizens "cannot be too securely guarded by the most explicit declarations in their favor." Thus, he would have insisted on a prohibition against general warrants that left no need for implication nor room for interpretation.⁴⁹⁷

Gerry's being from Massachusetts also reveals the likely source of the substitute language he proposed — and why he did not connect the two clauses with the usual "therefore." He probably borrowed "and no warrant ought to be issued, but . . ." from the beginning of the unique third statement in John Adams's Massachusetts provision,⁴⁹⁸ changed Adams's more traditional "ought" to Madison's "shall," and moved to substitute "and no warrant shall issue but . . ." for the middle phrase of the Committee's text.

The final two-clause format of the Fourth Amendment, and the fact that the resulting first clause ended by stating that the right "shall not be violated," are mere by-products of a change that was only intended to make the ban against *issuance* of general warrants explicit. There is no reason to think that the insertion of "and no warrant shall issue but . . ." was meant to broaden or alter the content of the provision.⁴⁹⁹

E. *Adoption and Ratification of the Text*

Madison's draft for a search and seizure amendment banned general warrants by setting out standards for arrest or search warrants. The report of the Committee of Eleven did not alter that content. Neither did the modification on the House floor that produced the fi-

496. COLUMBIAN PATRIOT, *supra* note 166, at 270, 278-79 (4.28.4) (emphasis in original); see also *id.* at 270-71 (attributing pamphlet to Warren, and correcting earlier attribution to Gerry (for example, in PAMPHLETS ON THE CONSTITUTION 2, 12-13 (Paul Leicester Ford ed., 1888, republished 1968))). Warren was prominent among the Massachusetts anti-Federalists, and Gerry was undoubtedly familiar with this passage. In fact, Warren had visited Gerry to discuss the shortcomings of the proposed constitution a month prior to writing this pamphlet. See BILLIAS, *supra* note 439, at 214.

497. Examples of Gerry's concern with the precise language of the various rights amendments are set out *supra* note 482.

498. The Massachusetts provision is quoted *supra* text accompanying note 379. Note that John Adams had used "therefore" at the beginning of the second statement in the Massachusetts provision, but had not repeated it at the beginning of the third statement.

499. The fact that the first clause of the Fourth Amendment was left to end with "shall not be violated" appears to be incidental; that was simply the easiest place for Gerry to interrupt Madison's text and insert "and no warrant shall issue but." Moreover, a statement that a "right . . . shall not be violated" is tautological; hence, there was nothing in the resulting first clause that should have caused the Framers to think that any significant change in its content had occurred.

nal two-clause format.⁵⁰⁰ The proposed amendment still had the same content when it emerged from the Senate, without any apparent controversy;⁵⁰¹ and it still had the same content when it was ratified by the state legislatures, again without any apparent controversy.⁵⁰² When the first two of the twelve amendments Congress submitted to the states were not ratified (they did not deal with rights), the federal search and seizure provision that had been submitted to the states as the Sixth Article of Amendment became known as the Fourth Article of Amendment, or simply as the Fourth Amendment.⁵⁰³

F. *Summary: The Original Meaning of the Fourth Amendment*

The evidence set out in this Article shows that the Fourth Amendment had a specific historical meaning. As understood by its Framers, the two-clause text was neither mysterious nor incomplete. Likewise, there is no historical basis to think that its Framers understood it to be “vague” or “comprehensive.”⁵⁰⁴ To the contrary, they adopted the text as a specific response to a specific grievance that had arisen in a specific historical context and had been shaped by a specific vulnerability in the protections afforded by common-law arrest and search authority.⁵⁰⁵

500. The punctuation between the two clauses of the Fourth Amendment varied after passage of the motion. A semicolon initially appeared after “shall not be violated” in a statement of the provision on August 21, 1787, *see* COGAN, *supra* note 122, at 225 (6.1.1.7) (quoting records of the consideration in the House, August 24, 1789), but it had become a comma by the time the House sent the proposed amendments to the Senate a few days later, *see id.* at 226 (6.1.1.9.a-c) (quoting records of the consideration in the Senate, August 25, 1789). It remained a comma in the enrolled resolution of Congress, *see id.* at 232 (6.1.1.22), but was sometimes incorrectly printed with a semi-colon in early collections of statutes, *see* 1 STATUTES AT LARGE 21, 97-98, *reprinted in* COGAN, *supra* note 122, at 232 (6.1.1.23.a, b).

501. There is no record of any debate regarding the Bill of Rights in the Senate. Although the Senate made some substantial changes in some of the House rights proposals, it made no change in the language that became the Fourth Amendment. *See* COGAN, *supra* note 122, at 226-27 (6.1.1.9-6.1.1.12) (quoting records of the consideration in the Senate, August 25, 1789, and September 4, 1789).

502. There was some controversy over some of the other eleven proposed amendments that were submitted for ratification to the state legislatures, but there is no record of any controversy in the state legislatures regarding the search and seizure provision. *See* 3 Cuddihy, *supra* note 20, at 1443-65.

503. *See* COGAN, *supra* note 122, at 231-32 (6.1.1.21.a-b, 6.1.1.22) (setting out the “Sixth Article of Amendment” submitted to the states).

504. Quoting LEVY, ORIGINAL MEANING, *see supra* note 45, at 246.

505. One objection that is sometimes raised regarding attribution of the original meaning or purpose of a constitutional text is that such statements ignore the likely variation of attitudes and understandings that may have existed among the various groups of persons (drafters, federal legislators, state legislators, commentators) who might be lumped together under the label of “Framers.” I have no doubt that is a genuine difficulty for assessing the historical meaning of certain aspects of the Constitution or especially of the Fourteenth Amendment. It is possible to speak of “the” original meaning of the Fourth Amendment, however, because there simply is no indication in the historical sources of any controversy or

The Framers aimed the Fourth Amendment precisely at banning Congress from authorizing use of general warrants; they did not mean to create any broad reasonableness standard for assessing warrantless searches and arrests. Likewise, they did not intend it to guide officers in the exercise of discretionary arrest or search authority; instead, the Amendment's ban on too-loose warrants served to reaffirm the common law's general resistance to conferring discretionary authority on ordinary officers. The silences of the text regarding warrantless intrusions and when warrants were required or excused were not oversights or defects of drafting. Rather, in the common-law context the Framers had no reason to expect that those topics could become unsettled or controversial. The Framers were content to state the standards for valid warrant authority because they believed that would *suffice* to curb discretionary search and seizure. They wrote what they meant and meant what they wrote; they simply did not perceive the problem of search and seizure the same way that we do.

VIII. THE TRANSFORMATION TO MODERN DOCTRINE

That the original meaning of the Fourth Amendment sounds so strange to modern ears demonstrates the degree and depth of change that has occurred in constitutional search and seizure doctrine since the framing. The story of the post-framing changes is complex and can be understood only in the context of larger institutional and doctrinal developments that have shaped American constitutional law. This Part briefly sketches those changes to show how the original meaning was lost in the transformation to modern doctrine.

Commentators have usually described the post-framing course of the Fourth Amendment as a smooth and continuous development from the original meaning. For example, they have described the 1886 decision in *Boyd* as though it connects modern doctrine to the original meaning, and likewise have described current doctrine as though it evolved from *Boyd*.⁵⁰⁶ The conventional account is inaccurate, however, because it fails to confront the discontinuities evident in the post-framing development of search and seizure doctrine.

A. *The Loss of Common-Law Restraints Against Discretionary Authority*

As argued above, the Framers adopted the Fourth Amendment and the other criminal procedure provisions of the Bill of Rights to

disagreement as to its meaning (with the exception of the mysterious choice of "effects") among any of the persons who could be considered "Framers."

506. See, e.g., LANDYNSKI, *supra* note 38, at 49-61; LASSON, *supra* note 16, at 107-11.

reinforce those aspects of common-law criminal procedure that they perceived to be (or that have been) threatened. They did not attempt to adopt a full statement of common-law rights because they assumed that the common law would continue as it had in the past, particularly if they addressed certain vulnerable points such as the threat of legislatively authorized general warrants. Their assumption was not borne out by actual developments.

During the early nineteenth century, the turn to legislative codes undermined the notion of a permanent common law,⁵⁰⁷ thereby blurring the common-law foundation for the Bill of Rights. In addition, the transformation of criminal justice institutions further destabilized the original understanding of search and seizure doctrine. New concerns about crime and social disorder during the nineteenth century gave rise to a perception that the common-law structure of law enforcement was inadequate to meet the needs of an increasingly complex and urban society. Contemporaneously with the advent of police departments and career officers, courts and legislatures drastically expanded the *ex officio* authority of the warrantless officer.⁵⁰⁸

These developments pushed warrant authority toward the margins of law enforcement procedure and thus destroyed the common-law premises that had grounded the Framers' belief that a ban against general warrants would suffice to ensure the right to be secure in person and house. Likewise, these developments undermined trespass actions against individual officers as a means of enforcing legal limits on search and arrest authority.⁵⁰⁹ By the end of the nineteenth century, the warrantless officer posed a far more potent threat to the security of person and house than the Framers had ever anticipated.⁵¹⁰

507. For a discussion of the codification movement circa 1820-40, see KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 126-27 (1989).

508. See *supra* notes 231-251, 254 and accompanying text.

509. There is a large literature assessing a trespass remedy as an alternative to exclusion. Nonetheless, the commentators who advocate trespass actions as the historical remedy for illegal arrests and searches have never accounted for the fact that modern standards for assessing arrests and searches are looser than historical standards and do not emphasize the role of a specific complainant as did the common law. See *supra* text accompanying note 251. For a review and critique of the commentary supporting "tort" remedies, see Yale Kamisar, *Remembering the "Old World" of Criminal Procedure: A Reply to Professor Grano*, 23 U. MICH. J.L. REFORM 537, 562-69 (1990).

510. Cf. Wasserstrom, *Two Clauses, supra* note 9, at 1394-95 (noting that the Framers were primarily concerned with general warrants and expected common law to protect citizens from unwarranted search and seizure). The irony, of course, is that the incremental changes that undermined the common law right to be secure went virtually unchallenged during the nineteenth century precisely because federal and state courts took the view that the constitutional prohibitions against "unreasonable searches and seizures" only banned legislative approval of general warrants but did not address conduct by warrantless officers. See *supra* notes 179-189 and accompanying text.

During most of the nineteenth century, the courts worried little over the creation of discretionary police authority. The late nineteenth century, however, witnessed a turn toward due process concerns. Although that turn likely was stimulated by a number of factors, it was at least in part an elite reaction to the emergence of the regulatory state.

B. *The Supreme Court's Stretching of the Original Understanding in Boyd*

The 1886 decision in *Boyd* is a clear example of judicial resistance to the emergence of heightened government regulation. Indeed, the Justices adopted a novel and sweeping protection of even ordinary business records in that case that surpassed anything anticipated by the Framers.⁵¹¹ In the course of striking down the statutory authority

511. *Boyd v. United States*, 116 U.S. 616 (1886), declared unconstitutional a statute that had provided authority for a court order to an importer to produce an invoice regarding the value of imported glass. The Court held that the statute violated both the Fourth and Fifth Amendments. Justice Bradley's majority opinion made four interrelated claims: first, that the Fifth Amendment right against self-incrimination prohibited compelling any person to produce potentially incriminating documents, *see id.* at 637; second, that the Fifth Amendment protection against self-accusation applied to customs forfeiture proceedings because such proceedings were essentially criminal, *see id.* at 633-34; third, that a compelled production of documents amounted to a "seizure" within the meaning of the Fourth Amendment, at least by analogy, *see id.* at 635; and fourth, that a compelled production of a document that violated the Fifth Amendment right would also be "unreasonable" under the Fourth Amendment, *see id.* at 634.

The first of these claims is supported by the historical evidence regarding the Framers' understanding. *See* the discussion of *Roe*, *supra* note 450; *see also* *Rex v. Worsenham*, 1 Ld. Raym. 705, 91 Eng. Rep. 1370 (K.B. 1701) (declining to order customs officers being prosecuted for fraud to produce their custom-house books because it would be, in effect "to compel the defendants to produce evidence against themselves"); *Regina v. Mead*, 2 Ld. Raym. 927, 92 Eng. Rep. 119 (K.B. 1703) (declining to order trustees of a charity to produce books because "it would be to make a man produce evidence against himself in a criminal prosecution"); *Rex v. Purnell*, 1 Black. W. 37, 96 Eng. Rep. 20 (K.B. 1748) (denying inspection of a college's books in connection with a criminal prosecution). For modern sources recognizing a common-law right against compelled production of incriminating documents at the time of the Fifth Amendment's framing, *see* Richard A. Nagareda, *Compulsion "To Be a Witness" and the Resurrection of Boyd*, 74 N.Y.U. L. REV. 1575, 1619 & n.172 (1999).

However, the other three claims Bradley made in *Boyd* are another matter. The Framers added "in any criminal case" to the Fifth Amendment compelled self-accusation clause to make it clear that the clause did *not* apply to customs enforcement proceedings. *See supra* note 450. Thus, Bradley's conclusion that the Fifth Amendment applied to customs forfeiture proceedings was contrary to the Framers' intent.

Bradley's claims that compelled production constituted a "seizure" and violated the Fourth Amendment lack historical support. Both claims were founded only on Bradley's assertion that "the Fourth and Fifth Amendments run almost into each other," 116 U.S. at 630, and stand in "intimate relation" to one another, *id.* at 633. However, those claims rest, in turn, on Bradley's claim that the Framers were influenced by Lord Camden's remarks as reported in the longer version of *Entick* — which is unlikely. *See infra* note 512. Moreover, Camden's treatment in *Entick* of a search of papers as a form of self-incrimination appears to have been novel claim. *See infra* note 513.

for a court order compelling production of an invoice, Justice Bradley erroneously invoked Lord Camden's statements from the later version of *Entick*, the version of which the Framers were probably unaware, as though they demonstrated that the Framers would have equated a search or seizure of papers for use as evidence with a violation of the right against compelled self-accusation⁵¹² (thus inventing what became known as the "mere evidence" doctrine).⁵¹³ He also declared that any

Professor Nagareda has also recently concluded that *Boyd* went astray by intermixing Fourth and Fifth Amendment analysis. See Nagareda, *supra*, at 1585-90.

512. Bradley's claim that the Framers would have viewed any seizure of papers as compelled self-incrimination relied upon Lord Camden's remarks as recorded in the longer case report of the 1765 proceedings in *Entick*. See 116 U.S. at 626-30 (quoting *Entick v. Carrington*, 19 Howell St. Tr. 1029, 1066-74 (C.P. 1765)). However, it is unlikely the Framers were familiar with that version, which was not published until 1781. The analysis that Bradley quoted is not evident in the earlier, shorter case report of *Entick* in Wilson's Reports that the Framers were familiar with. See *supra* note 25. Thus, Bradley's claim that his ruling accorded with what was in the "memory" and "minds" of the Framers was fanciful at best.

513. The so-called "mere evidence" rule was an aspect of Fourth Amendment doctrine from its articulation in *Boyd* until its rejection in *Warden v. Hayden*, 387 U.S. 294 (1967). Under that doctrine, searches and seizures were permissible only for fruits or instrumentalities of crime, but not for papers or other items that were only evidentiary in nature. Justice Bradley's opinion in *Boyd* based that doctrine partly on a distinction between items which the government was entitled to possess (for example, contraband) versus legitimate private property, see 116 U.S. at 623-24, and partly on language from the longer version of Lord Camden's observations in *Entick*, discussed *supra* note 512, which analogized a search of papers to self-incrimination.

The analogy between a search of papers and compelled self-incrimination does not appear to have been developed in common law sources. I have not located any framing-era source that treated compelled production as a "seizure." Likewise, I have located only two pre-*Entick* claims that a search of papers constituted compelled self-incrimination: one appears in a cryptic report of Pratt's (Camden's) remarks during the 1763 trial in *Wilkes v. Wood*, Lofft 3, 19 Howell St. Tr. 1153, 1155, 98 Eng. Rep. 489, 490 (C.P. 1763) (case report first published 1776, see *supra* note 25) ("Nothing can be more unjust in itself, than that the proof of a man's guilt shall be extracted from his own bosom."); the other appears in a single passage in the 1764 pamphlet *FATHER OF CANDOR*, *supra* note 23, at 56-59 (Father of Candor may have been Pratt, see *supra* note 23). Likewise, I have not located any analogy of a search of papers under a warrant to self-incrimination in the American complaints made during the prerevolutionary general writ of assistance grievance or in any of the statements made regarding search authority during the ratification debates of 1787-88. See also *supra* note 368. Early American discussions of *Entick* simply described it as standing for the proposition that common law did not provide authority for the issuance of a search warrant other than for stolen property. See, e.g., HENING, *supra* note 25, at 415.

Cogan has cited a case refusing a court order to inspect a college's books for evidence pertinent to a criminal prosecution as though it were a precedent for the Fourth Amendment and, presumably, the mere evidence doctrine. See COGAN, *supra* note 122, at 245 (6.3.2.1) (reprinting the report of *The King v. Dr. Purnell*, 1 Black. W. at 37, 96 Eng. Rep. at 20). However, that case report was not published until 1781, see 1 LEGAL BIBLIOGRAPHY, *supra* note 19, at 293, entry 11; a somewhat different report was published in 1770 in 1 Wils. 239, 95 Eng. Rep. 595, see 1 LEGAL BIBLIOGRAPHY, *supra* note 19, at 310, entry 131. Although the motion to review the books was apparently resisted in part because the request was too broad, I do not think it is likely that the Framers would have understood either report of *Purnell* to address a search or seizure.

Although the Framers did understand that warrants could be issued only for purposes recognized at common law or by statute, see *supra* note 381, it does not appear that they

compelled production of documents that constituted self-incrimination also constituted a “seizure” that was “unreasonable” under the Fourth Amendment. That use of “unreasonable” as a constitutional search standard distinct from the warrant standards was novel, though Bradley still used it in a Cokean rather than relativistic sense.⁵¹⁴ After concluding the statute was unconstitutional, Bradley employed exclusion to remedy the production of the invoice under the unconstitutional statutory authority.⁵¹⁵

Notwithstanding the novelty of Bradley’s specific claims, he articulated the rationale for the expanded protection of papers within the analytic framework of the original understanding of the Fourth Amendment — as a limitation on congressional power to create search authority. He said nothing about extending the Fourth Amendment to regulate searches by warrantless officers. Thus, *Boyd*

were familiar with any “mere evidence” doctrine of the sort Justice Bradley articulated in *Boyd*. Thus, I agree with Professor Taylor’s previous conclusion that the “mere evidence” rule lacked a historical basis, though I do not agree with all of the details of his argument. See TAYLOR, *supra* note 49, at 50-71.

514. See 116 U.S. at 622, 630, 631-32, 633. Bradley’s use of “unreasonable” as a constitutional standard in its own right was novel and probably was a response to the awkward problem he faced in crafting the rationale for declaring the court order compelling production of an invoice to be a violation of the Fourth Amendment (even putting aside the awkwardness of describing an order to produce as a “seizure”). The order at issue was not merely a subpoena (as it is sometimes described), because it could only be issued by a judge on the government’s showing of a particularized need for a specific invoice. See 116 U.S. at 619-20 (quoting Act of June 22, 1874, 18 Stat. 187). Thus, it would have been difficult for Bradley to assert that the order to produce violated the probable cause and particularity standards set out in the second clause of the Fourth Amendment. Instead, he simply asserted that the order’s violation of the right against compelled self-accusation also made the “seizure” of the invoice “unreasonable.” 116 U.S. at 633-35.

In condemning the compelled production of the invoice as “unreasonable,” Bradley treated “unreasonable” as though it constituted a constitutional standard above and beyond compliance with the warrant standards. However, there were limits to Bradley’s innovation. He did *not* treat “unreasonable” as a relativistic standard — he claimed that compelled seizures of papers were *categorically* illegal, not that the seizure was inappropriate in particular circumstances. Thus, his usage of “unreasonable” was still Cokean in character. Although *Boyd* focused new attention on “unreasonable,” and opened the way for “unreasonable” to be viewed as a constitutional standard in its own right, it did not adopt the modern meaning assigned to that term.

515. After describing the court order as unconstitutional and “void,” Bradley stated that admission of the invoice was erroneous and that any information obtained from the invoice could not be used in future proceedings. 116 U.S. at 638. He did not explain that aspect of the ruling; however, it probably seemed like an obvious result of the nullity of the order. In fact, exclusion of evidence obtained under a “void” statute would seem to flow directly from the holding of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) (holding that federal courts lack jurisdiction to apply an unconstitutional statute because “a law repugnant to the constitution is void; and . . . courts, as well as other departments, are bound by that instrument” (emphasis in original)). The recognition of exclusion in *Boyd*, however, extended only to the effect of an unconstitutional statute; it did not identify any basis for excluding items seized unlawfully by officers not acting under specific statutory authority. Thus, *Boyd* stopped short of articulating the modern exclusionary rule.

should probably be understood as a late expression of the original understanding — albeit with novel twists — rather than as the beginning of modern doctrine. *Boyd* opened the way for later court decisions to create modern doctrine, but it did not actually do so itself.

C. *The Supreme Court's Extension of the Fourth Amendment to Warrantless Intrusions in Weeks*

The genesis of modern doctrine appears rooted in the awakening of judicial concern over the newly powerful warrantless officer. By the early twentieth century, it had become clear that *Boyd* had not solved the problem of protecting business records because it failed to address the seizure of such records by officers acting on their own initiative.⁵¹⁶ In addition, at roughly the same time, the Court's redefinition of misconduct by officers acting "under color of law" provided a new doctrinal basis for applying constitutional standards directly to officers' warrantless intrusions.⁵¹⁷ The Justices responded to the confluence of those developments by adjusting constitutional search and seizure doctrine to modern realities in the 1914 decision *Weeks v. United States*.⁵¹⁸

The *Weeks* opinion made several innovations: it used the new understanding that officer misconduct "under color of" office was a form

516. A 1911 incident demonstrated the potential for warrantless seizures of business records "incident to" arrest. Federal marshals in New York had arrested the principals of an import business for alleged customs fraud and then, without obtaining any search warrant, had seized the records of the import business. The business principals challenged the seizure by filing a motion for the return of the papers prior to their trial. The federal court ruled the seizure illegal and ordered the government to return the seized papers, but did not explain the basis for that order beyond citing *Boyd*. See *United States v. Mills*, 185 F. 318, 318-20 (C.C.S.D.N.Y. 1911). The United States Attorney, Henry A. Wise, refused to comply with the order. The federal court held Wise in contempt, and he filed an appeal and habeas corpus petition with the Supreme Court. See *Wise v. Mills*, 220 U.S. 549 (1911); *Wise v. Henkel*, 220 U.S. 556 (1911). The Justices dismissed Wise's papers on procedural grounds, while avoiding the merits of the controversy. See *Wise v. Mills*, 220 U.S. at 555 (holding that the lower court's order to return the papers was not "so *dehors* the authority of the court as to cause it to be void, and to justify an officer of the court in refusing to respect and obey it"); *Wise v. Henkel*, 220 U.S. at 558 (stating that the lower court had authority to decide the petition for return of papers "irrespective of whether there was a constitutional right to exact the return of the books and papers"). The *Wise* litigation must have alerted the Justices that there was a significant gap in the protection of business records.

517. See *supra* note 323.

518. 232 U.S. 383 (1914). In addition to the *Wise* litigation, discussed *supra* note 516, several other developments may have sensitized the Justices to search authority contemporaneously with *Weeks's* appeal. The income tax applicable to corporations and wealthy individuals, with associated enforcement powers, had been enacted in 1913. See *Tariff of 1913* (Revenue Act of 1913), Pub. L. No. 16, 38 Stat. 114, 166. (A corporate excise tax on net profits had commenced a few years earlier. See *Tariff of 1909* (Corporate Excise Tax of 1909), ch. 6, § 38, 36 Stat. 11, 112-17.) It may also be significant that the Federal Trade Commission Act, which would create additional federal investigatory powers, was pending in Congress in 1914.

of government illegality, to extend the Fourth Amendment to the conduct of a warrantless officer;⁵¹⁹ it explicitly constitutionalized the common-law requirement of a warrant for a house search;⁵²⁰ and it then used those innovations as premises for announcing a broad exclusionary rule as the legal consequence of an unconstitutional government search.⁵²¹ Put simply, *Weeks* initiated the development of modern doctrine by reading the Fourth Amendment as a broad protection of a right to be secure in one's house and papers rather than as a sim-

519. Early in his opinion, Day declared the Fourth Amendment limited "the courts of the United States and Federal officials, in the exercise of their power and authority . . ." 232 U.S. at 391-92. Farther along, he stated that the Amendment's protection of the citizen's person and property "is equally extended to the action of the Government *and officers of the law acting under it.*" 232 U.S. at 394 (emphasis added). Day also noted that there were precedents for applying the Fourth Amendment to invasions under "judicial sanction" (that is, warrants) and to invasions under "legislative sanction" (that is, seizures made in the exercise of statutory authority as in *Boyd*) — but he finessed the fact that there were no precedents for applying the Fourth Amendment directly to the conduct of an officer except in those settings. *Id.* He then concluded by characterizing the unlawful search by the marshal as misconduct "under color of his office in direct violation of the constitutional rights of the defendant . . ." 232 U.S. at 398 (emphasis added). Note that *Weeks* was decided only a year after the Court had clearly held, in *Home Telephone and Telegraph*, that conduct by a state regulator alleged to violate state law constituted misconduct "under color of" state law and thus constituted "state action." *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 287 (1913); see also discussion *supra* note 323.

520. The common-law rule that a search of houses could not be justified except by a valid search warrant, see *supra* notes 259-285 and accompanying text, had not been disturbed as doctrine prior to *Weeks*, even though it sometimes may have been ignored in practice, as it was in the search at issue in *Weeks* itself. The treatment of the seizure of papers and property during the warrantless house search in *Weeks* as an act "in direct violation of the constitutional rights of the [resident]," 232 U.S. at 398, had the effect of constitutionalizing what had previously been a common-law warrant requirement for house searches. The Court had previously implied a warrant requirement under the Fourth Amendment in 1877 in dicta in *Ex parte Jackson*, but had not articulated any rationale for it. 96 U.S. 727 (1877); see also discussion *supra* note 174.

521. Day's characterization of the marshal's invalid warrantless search as a "direct violation of the constitutional rights of the defendant" put it in the same category as the "void" court order in *Boyd* and also brought it within the basic constitutional principle that a court could not give any recognition to an unconstitutional government act. See *supra* note 515 (discussing the relationship between *Boyd's* conclusion that the court order was "void" and the ruling in *Marbury* that a court has no authority to recognize a "void" government act). Under that logic, exclusion is a necessary consequence of a government search that violates constitutional authority.

Indeed, the formal logic of voidness is so strong that it cannot be escaped unless one adopts the view that the constitutional violation involved in the illegal seizure was completed and thus distinct from the subsequent use of the unconstitutionally seized information or items as evidence in court. Thus, when the Burger Court redefined the rationale for exclusion as being solely to deter future police misconduct, rather than to enforce a constitutional imperative, the crucial step in the rationale was the assertion that the constitutional violation was "accomplished" when the seizure occurred so that the later use of the evidence worked no "new" constitutional wrong. *United States v. Calandra*, 414 U.S. 338, 354 (1974). That analysis was borrowed (without attribution) from an earlier California decision in *People v. Mayen*, 205 P. 435, 440 (1922) — an analysis that the California court subsequently rejected as artificial in *People v. Cahen*, 282 P.2d 905, 911-12 (1955).

ple ban against general warrants. The warrant requirement articulated in *Weeks* restored a strong content to the right to be secure with regard to houses and papers. In addition, the adoption of the exclusionary rule enforced the requirement by making compliance with that standard a matter of consequence.⁵²²

D. *The Supreme Court's Articulation of a Relativistic "Reasonableness" Standard in Carroll*

A decade after *Weeks*, however, the Supreme Court in its 1925 decision in *Carroll v. United States* relaxed the new constitutional warrant requirement in order to facilitate the enforcement of Prohibition.⁵²³ Chief Justice Taft's majority opinion upheld a warrantless police search of an automobile because the officers had probable cause to believe it was transporting contraband (albeit employing a loose notion of "probable cause"⁵²⁴) and the mobility of the automobile created an exigency. The Court's holding was novel because probable cause would not have sufficed to justify a warrantless arrest and search incident to arrest for the misdemeanor offense involved.⁵²⁵ To justify the warrantless search, Taft declared that the Fourth Amendment prohibited *only* those searches that were "unreasonable," and that it was "not unreasonable" for the police to conduct a warrantless search of a car for contraband in the circumstances.⁵²⁶ Thus,

522. The remedy of exclusion was especially appropriate where the police had evaded the prior judicial assessment of the cause for the search of a house in a warrant application, as had happened in the warrantless search in *Weeks*. See Kamisar, *supra* note 38, at 592-93.

523. 267 U.S. 132 (1925).

524. Taft referred to probable cause as the standard for a lawful seizure of contraband. See e.g., *Carroll*, 267 U.S. at 155-56, 159-62. In contrast, Justice McReynolds's dissenting opinion disputed both the applicable standard for the search, see *id.* at 163-69, and the significance of the information possessed by the officers, see *id.* at 174 ("Has it come about that merely because a man once agreed to deliver whiskey, but did not, he may be arrested whenever he ventures to drive an automobile on the road to Detroit!").

525. Probable cause was insufficient to justify an arrest of the persons in the car because the Prohibition Act classified a first offense as a misdemeanor. A warrantless arrest for a misdemeanor could not be lawful unless the arresting officer had actually witnessed the commission of the crime. See *Carroll*, 267 U.S. at 156-58; see also *supra* notes 219-222 and accompanying text. As a result, Taft analyzed the warrantless search of the automobile for contraband by analogy to an *in rem* seizure of a ship or vehicle under the customs laws, while asserting that the arrest of the occupants was only incidental to the seizure of contraband. See 267 U.S. at 157-61.

526. 267 U.S. at 147-50. Taft actually employed "reasonableness" only to excuse the lack of a search warrant when there was probable cause to believe an automobile contained contraband; he did not employ "reasonableness" as a substitute for the probable cause standard itself. Thus, Taft stopped short of the current generalized-reasonableness construction. Cf. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 667-68 (1995) (O'Connor, J., dissenting). However, the rhetoric of Taft's opinion outran that specific application.

Taft effectively rewrote the Fourth Amendment in *Carroll* by imposing a modern, relativistic meaning on the word “unreasonable.”⁵²⁷

Of course, it is not surprising to find a twentieth-century Court opinion assessing the constitutionality of a policy according to its “reasonableness.” During the course of the late nineteenth and early twentieth centuries, the Supreme Court had made the flexible notion of “reasonableness” the central criterion of constitutional law (and thereby vastly increased the importance of judicial review of legislation).⁵²⁸ Thus, it was a short step to announce that the scope of the warrant requirement would be determined according to “reasonableness.”

However, Taft’s *Carroll* opinion did not simply invoke reasonableness as the criterion for arriving at appropriate specific standards for regulating police conduct. Rather, when Taft suggested that the Fourth Amendment only forbade those police intrusions that were “unreasonable,” he opened the way for *replacing* specific standards of police conduct with the open-ended notion of “reasonableness” itself. Thus, *Carroll* set search and seizure doctrine on a course away from the rules model and toward the generalized-reasonableness construc-

527. Taft may have drawn the idea — of treating “unreasonable” as a standard that was distinct from the warrant standards — from *Boyd*, although that decision had still used “unreasonable” only in a categorical, Cokean fashion. See *supra* note 514. Taft may also have been influenced by a 1921 commentary. See Fraenkel, *supra* note 16, at 366 (asserting, apparently based on *Boyd*, that “[i]t is significant that the Amendment itself is in two parts — one which forbids ‘unreasonable searches,’ and the other which requires certain specific particulars to be observed before warrants may be issued”).

528. The Supreme Court had repeatedly invoked “reasonableness” as a broad constitutional standard during the period in which it had asserted a judicial veto over legislation in connection with economic regulation and substantive due process. See, e.g., *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 109 (1873); *id.* at 112, 119 (Bradley, J., dissenting) (stating that all ordinances and regulations must be “reasonable”); *Mugler v. Kansas*, 123 U.S. 623, 663 (1887) (stating exercise of police power is valid if “reasonable grounds”); *Plessy v. Ferguson*, 163 U.S. 537, 550-51 (1896) (explaining that because “every exercise of the police power [of a state] must be reasonable,” the question is “whether the statute of Louisiana is a reasonable regulation,” and concluding that the statute at issue was not “unreasonable”); *Lochner v. New York*, 198 U.S. 45, 56-57 (1905) (stating the issue as whether the regulation was “a fair, reasonable and appropriate exercise of the police power of the State, or . . . an unreasonable, unnecessary and arbitrary interference with the right of the individual” and concluding that there was “no reasonable ground” for the regulation).

The acceptance of this relativistic notion of “reasonableness” as a constitutional standard was so pronounced by the early twentieth century that even Edwin S. Corwin made a prochronistic statement, in his 1928 article, by treating Coke’s “against common right and reason” in *Dr. Bonham’s Case* as not only foreshadowing judicial review but as also expressing “that very test of ‘reasonableness’ which is the ultimate flowering of this power.” Corwin, *supra* note 327, at 368. In fact, Coke was referring to a violation of a settled principle of the law of the land (as Corwin certainly understood based on other statements in his writing), not to the sort of relativistic balancing standard that became commonplace in American law in the nineteenth century. See *supra* notes 392-397 and accompanying text.

tion Justice Minton would later announce in his 1950 opinion in *Rabinowitz*.⁵²⁹

Carroll also blurred the intended scope of the Fourth Amendment's protections. As noted above, Taft rationalized his conclusion that warrantless searches of automobiles were "reasonable" under the Fourth Amendment by pointing to the fact that the Framers had approved of warrantless ship searches in the 1789 Collections Act⁵³⁰ — even though there is no historical evidence that the Framers would have viewed ships as enjoying the common-law right to be secure afforded "persons, houses, papers, and effects." That rationalization has contributed to doctrinal developments that broadened the scope of the Fourth Amendment's protection to commercial as well as personal and domestic interests.⁵³¹

Current search and seizure doctrine reflects the working out of the doctrinal elements announced in *Weeks* and *Carroll*. It lacks coherence because the elements announced in those decisions do not mesh very well. Indeed, *Weeks* and *Carroll* moved in opposite directions; the former sought to revive personal and domestic privacy by revitalizing the warrant, while the latter undertook to expand the *ex officio* authority of the police to facilitate social control, and thus marginalized the warrant process. The lack of theoretical coherence, however, has not prevented a clear trend from emerging. Despite the interlude of the Warren Court, search and seizure doctrine since *Carroll* has evolved increasingly to favor police power over the security of the citizen. Indeed, the Burger and Rehnquist Courts have rather consis-

529. See *supra* notes 15, 155 and accompanying text.

530. 267 U.S. at 150-53. The early "vehicle" searches Taft referred to involved ships and commercial vehicles.

531. The historical distinction between ships and the personal and domestic interests protected at common law is discussed *supra* notes 146-151 and accompanying text. Taft's erroneous treatment of warrantless ship searches as intrusions subject to the Fourth Amendment was a major step in the obliteration of the intended meaning of the words "houses, papers, and effects." Following *Carroll*, the Court has construed the Fourth Amendment as though it had been intended to serve as a global protection of all manner of privately owned property, including commercial property (though not open fields). Indeed, later cases mixed this understanding of the broad scope of the protection together with the notion of a relativistic reasonableness standard and redefined the scope of the Amendment's protections according to whether there was a "reasonable" expectation of privacy. *Katz v. United States*, 389 U.S. 347, 361 (1967). Although that formula was initially used to modernize the protection of the Fourth Amendment (by applying it to seizures of telephone conversations), it has since been employed to limit the protection of the house, see, e.g., *Florida v. Riley*, 488 U.S. 445 (1989), and of papers, see, e.g., *United States v. Miller*, 425 U.S. 435 (1976). It has also been used to limit "standing" to challenge the legality of searches, see, e.g., *Rakas v. Illinois*, 439 U.S. 128 (1978) — including searches of houses, see, e.g., *Minnesota v. Carter*, 525 U.S. 83 (1998).

tently expanded discretionary police authority under the modern rubric of “reasonableness.”⁵³²

IX. THE IMPLICATIONS OF THE AUTHENTIC ORIGINAL MEANING

The idea of a constitution implies permanence and continuity. Even though there is little consensus as to precisely how or how much the intended meaning of a constitutional text should matter in contemporary constitutional analysis, there is a widely shared sense that the Framers’ meaning should carry some weight, or matter in some way. Thus, discussion of the historical meaning of a constitutional provision almost inevitably leads to consideration of its implications for modern doctrinal issues.

A general caveat should be borne in mind in any such discussion: inaccurate statements of historical doctrine pose a serious threat to constitutional interpretation because there is no conceivable basis for giving normative weight to false statements about the original meaning of a constitutional text. Thus, it is crucial to complete the historical inquiry before seeking any implications. The normative importance attached to the original meaning has had both an upside and downside for constitutional history. It has assured that scholars and the Court would examine the historical meaning to some extent; but the historical accounts have sometimes been conducted with one eye on the implications, rather than both eyes on the evidence. In particular, the concern with fitting the historical meaning to modern doctrine has tainted prior accounts with prochronistic concerns and ideological slants that were foreign to the authentic history.⁵³³ The

532. This point has been made in numerous commentaries. My own views are set out in *Davies’s Testimony*, *supra* note 3, at 141-43.

533. Professor Amar’s commentary would appear to be an example of the desired implications leading the historiography. In his initial discussion of the historical Fourth Amendment in 1991, Amar asserted that “a jury could subsequently assess [the] reasonableness [of a search]” and that “[r]easonableness vel non was a classic question of fact for the jury.” Amar, *Bill of Rights*, *supra* note 58, at 1179. However, the only support he offered for the historical-sounding claim that reasonableness “was” the Fourth Amendment legal standard for assessing the lawfulness of a search was a citation to a purely normative statement in an article by Justice Scalia to the effect that searches *should* be assessed according to reasonableness. *See id.* at 214 (citing only Scalia, *The Rule of Law*, *supra* note 2, at 1180-86).

Thereafter, Justice Scalia cited Amar’s article as support for Justice Scalia’s claim in a 1991 opinion that “colonial juries” could assess damages against an officer for a search “unless the jury found that his action was ‘reasonable.’” *California v. Acevedo*, 500 U.S. 565, 581 (1991) (Scalia, J., concurring) (citing Amar, *Bill of Rights*, *supra* note 58, at 1178-80, and *Huckle v. Money*, 2 Wils. 205, 95 Eng. Rep. 768 (K.B. 1763)). Like the other Wilkesite cases, *see supra* notes 21-25, *Huckle* does show that damages could be awarded for unlawful intrusions, but it says nothing about a “reasonableness” standard. Thus, the only authority Justice Scalia actually cited regarding a historical reasonableness standard was Amar’s citation of Scalia’s own earlier normative claim.

authentic history can be recovered only by respecting the foreignness of the past and by immersing oneself in its records.⁵³⁴

The primary purpose of this Article has been to lay out the historical evidence, make sense of it, and correct prior misinterpretations. The evidence reveals a striking coherence, so much so that it leaves little room for doubt as to the original meaning. Because the history is rather clear, it provides a fairly firm platform for exploring the implications of the original meaning of the Fourth Amendment.⁵³⁵

That said, it is likely that the normative implications of the historical original meaning will be seen differently by different readers. Unlike the historical meaning, which is ultimately a matter of evidence, the normative implications one draws depend on the approach to constitutional analysis that one adopts. There is such wide variation in the approaches taken by commentators, and even by Supreme Court Justices, that it will not be surprising if different readers, with different understandings of constitutional methodology and different ideological agendas, express contrasting views regarding the implications of the authentic original meaning.

This final Part initiates discussion of the implications by offering some thoughts about various ways that the historical meaning might be brought to bear on modern doctrine. The recovery of the authentic history exposes the falsehood of originalist claims that are currently espoused. It also provides a broad perspective for assessing where

Three years after Justice Scalia had cited Amar, Amar published his fuller exposition of claims regarding the historical Fourth Amendment in his 1994 article, *Fourth Amendment First Principles*. Amar, *Fourth Amendment*, *supra* note 58. There Amar wrote as though there were evidence of a historical reasonableness standard — even though he did not identify any. See *supra* notes 109-115 and accompanying text.

534. Immersion in the materials regarding the entire history of a constitutional provision is the only method that can produce an authentic understanding of the intended meaning. It cannot be gleaned by making assumptions about what the Framers “must have” thought. Neither can it be gleaned by ruminating on the “ordinary meaning” of the words of the text; indeed the important meanings — as in the connotation that “unreasonable” carried in framing-era constitutional discourse — are not necessarily what modern readers would think “ordinary.” Likewise, the historical meaning cannot be gleaned by relying on the historical claims that have appeared in *United States Reports* or in prior commentaries. It cannot even be gleaned by studying only the historical sources regarding the “origins” of a provision — one cannot adequately detect the dogs-that-did-not-bark-in-the-night that expose unexpected differences between contemporary and historical doctrine unless one also examines the post-framing interpretations.

535. There is no reason to presume that all constitutional statements will be equally susceptible to historical analysis of original meaning, or that they will all reflect an equal degree of settled meaning. The criminal procedure-related provisions of the Bill of Rights were largely based on common law and were largely intended to preserve what were understood to be existing rights; hence, it is highly likely that the Framers of those provisions shared settled understandings of their meanings. In contrast, because the structure of government in the Constitution was in some ways an experiment, it seems unlikely that the Framers shared any settled meaning of provisions such as the Necessary and Proper Clause. Likewise, because it was passed at a time of pronounced political controversy, it seems unlikely that the Framers of the Fourteenth Amendment shared any settled understanding of its meaning.

search and seizure doctrine currently is, and how it got there. I am skeptical, however, whether even clear history can provide much positive guidance for shaping specific responses to modern search and seizure issues.

A. *The Inauthenticity of the Generalized-Reasonableness Construction*

The original meaning does not fully endorse either the warrant-preference or generalized-reasonableness construction; in fact, it shows that neither is really equivalent to the Framers' understanding. The generalized-reasonableness construction, however, is especially distant from the Framers' meaning.

Adherents of the generalized-reasonableness construction, including a number of Justices, have insisted that the Fourth Amendment should not be understood to reflect any preference for the use of warrants, but rather to posit a global requirement that government officers act "reasonably" when making searches or seizures. The authentic history reveals that the historical assertions this construction rests on are plainly false.

The Framers never meant to create a relativistic notion of "reasonableness" as a global standard for assessing warrantless intrusions by officers.⁵³⁶ Rather, they banned general warrants in order to prevent the officer from exercising discretionary authority. In the context of banning general warrants, they used "unreasonable" as a formal Cokean synonym for inherent illegality. There is no reason to think they meant for "reasonableness" to be understood as a flexible, relativistic standard for the exercise of discretionary authority.

Along the same vein, it is decidedly not true that the Framers preferred warrantless searches made under a reasonableness standard to searches made under specific warrants, or that they thought warrantless searches provided as much protection from abuse as specific warrants.⁵³⁷ Rather, they believed that specific warrants provided significant protections against arbitrary intrusions.⁵³⁸ Thus, it is decidedly not true that the modern notion of a "reasonableness" standard "affords the protection that the common law afforded."⁵³⁹ Rather, framing-era common law resisted the sort of discretionary authority

536. *See supra* note 13.

537. *See supra* notes 51-53, 60-61 and accompanying text.

538. *See supra* notes 287-297 and accompanying text.

539. *California v. Acevedo*, 500 U.S. 565, 583 (1991) (Scalia, J., concurring); *see also supra* note 2.

that “reasonableness” analysis confers on modern officers.⁵⁴⁰ The modern notion of “reasonableness” would have been distinctly ill suited to the Framers’ concerns; it is such a soft, subjective, contentless notion that it fosters and enhances, rather than curbs, discretionary authority.⁵⁴¹

The mantra of generalized-reasonableness advocates — that “the Fourth Amendment prohibits only those searches and seizures that are unreasonable”⁵⁴² — accords the modern police officer far greater authority to arrest or search than the Framers ever intended or anticipated. It also inclines decisions toward a constant expansion of discretionary authority.⁵⁴³ The generalized-reasonableness construction reflects an endorsement of government power over citizens that is

540. See the framing-era condemnations of discretionary authority quoted *supra* notes 74-84 and accompanying text.

541. See, e.g., *United States v. Rabinowitz*, 339 U.S. 56, 83 (Frankfurter, J., dissenting) (“To say that the search must be reasonable is to require some criterion of reason. It is no guide at all either for a jury or for district judges or the police to say that an ‘unreasonable search’ is forbidden — that the search must be reasonable. What is the test of reason which makes a search reasonable?”); RICHARD A. POSNER, *OVERCOMING LAW* 250-51 (1995) (commenting on the “imagined” objectivity of a standard of reasonableness).

542. See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 668 (1995); *Maryland v. Buie*, 494 U.S. 325, 331 (1990); *Skinner v. Railway Labor Executives Ass’n*, 489 U.S. 602, 619 (1989); *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985); *United States v. Sharpe*, 470 U.S. 675, 682 (1985); *Segura v. United States*, 468 U.S. 796, 806 (1984); *Bell v. Wolfish*, 441 U.S. 520, 558 (1978); *Scott v. United States*, 436 U.S. 128, 137 (1978); *United States v. Ramsey*, 431 U.S. 606, 617 (1977); *South Dakota v. Opperman*, 428 U.S. 364, 371-72 (1976); *Desist v. United States*, 394 U.S. 244, 254 n.23 (1969); *Schmerber v. California*, 384 U.S. 757, 768 (1966); *Harris v. United States*, 331 U.S. 145, 150 (1947); *Carroll v. United States*, 267 U.S. 132, 147 (1925).

543. The direction from which principles are stated matters because it tends to define the default rule for close cases. At common law, intrusions were judged unlawful unless they were positively justified. See, e.g., *supra* note 203; *infra* note 544. The credo of modern reasonableness doctrine, however — that the Fourth Amendment forbids *only* those intrusions that are unreasonable — reverses the common-law default rule. Indeed, advocates of generalized-reasonableness tend to treat the asserted reasonableness of police conduct as though reasonableness itself constitutes a *source* of police authority. See, for example, discussion of Amar’s claims to that effect *supra* notes 93, 273.

The notion that “reasonableness” presumptively permits the exercise of government authority over individuals is also evident in Judge Richard Posner’s opinion in *United States v. Torres*, 751 F.2d 875 (7th Cir. 1984). The issue was whether wiretaps were legal. Judge Posner concluded they were because statutory authority for wiretaps should not be construed according to “[t]he motto of the Prussian state — that everything which is not permitted is forbidden.” *Id.* at 880. However, that conclusion inverted the understanding of government authority embraced by the Framers; the principle that “everything that is not permitted is forbidden” is how the common law treated the authority of officers — any intrusion not authorized by positive law was a trespass. See *Entick v. Carrington*, 2 Wils. 291, 291, 95 Eng. Rep. 807, 807 (C.P. 1765). The Framers understood that restraint of official authority provides freedom for citizens, but that a permissive treatment of the authority of officials detracts from citizens’ liberty and security. Likewise, Judge Posner’s assertion that a judge has inherent authority to issue search warrants, see 751 F.2d at 880, conflicts with the basic principle announced in *Entick*, that no warrant can be issued unless positively provided for in law. See also *supra* text accompanying notes 379-381.

fundamentally at odds with the Framers' more libertarian view of the inherent rights of "freemen."⁵⁴⁴

B. *The Limited Authenticity of the Warrant-Preference Construction*

The warrant-preference construction comes closer to the original meaning insofar as it values the specific warrant. The Framers did view the specific warrant as the most appropriate means for providing the arrest and search authority necessary for law enforcement. In particular, they valued the specific warrant because it did not confer discretionary search authority on officers. But the current warrant-preference construction differs from the original meaning in significant ways.

As summarized in *Katz v. United States*, the central tenet of the warrant-preference construction is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions."⁵⁴⁵ (Of course, the *Katz* across-the-board warrant "requirement" is not as strong in practice as in theory. As a number of commentators have noted, the Court has recognized more than a "few" exceptions to the warrant requirement, and those exceptions often apply to the settings in which police searches are most common.⁵⁴⁶)

A number of features of the *Katz* statement depart from the original meaning. To begin with, the warrant-preference construction also reflects a false understanding of the historic meaning of "unreasonable" as an overarching standard in the Fourth Amendment. Indeed, any construction of "Fourth Amendment reasonableness" is only modern. In addition, the *Katz* formulation that warrantless searches are "*per se* unreasonable" posits a theoretical across-the-board warrant requirement that ignores the differentiation among interests that was prominent in framing-era common law. The Framers anticipated that warrants would be the principal (though not exclusive) mode for

544. See, for example, James Wilson's discussion of a "great and important political maxim" in his law lectures of 1790-91:

Every wanton, or causeless, or unnecessary act of authority, exerted, or authorized, or encouraged by the legislature over the citizens, is wrong, and unjustifiable, and tyrannical: for every citizen is, of right, entitled to liberty, personal as well as mental, in the highest possible degree, which can consist with the safety and welfare of the state. [We are servants of the law so that we can be free.]

2 THE WORKS OF JAMES WILSON, *supra* note 196, at 649 (last sentence in brackets translated from the Latin).

545. 389 U.S. 347, 357 (1967).

546. See, e.g., Craig Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473-74 (1988).

arrests and that specific warrant authority would virtually always be necessary to justify searches of houses and their personal and domestic contents.⁵⁴⁷ Their concern, however, was primarily with that sphere of personal and domestic security. They viewed general search authority as appropriate for ships, and it appears unlikely that they meant to prohibit legislators from conferring general search authority on officers regarding commercial premises.⁵⁴⁸ The current view that the right to be secure extends to commercial interests reflects the pro-business activism of the late nineteenth- and early twentieth-century Supreme Court — not the original understanding of the Amendment.⁵⁴⁹

At first blush, the broadening of the scope of interests protected by the Fourth Amendment may appear to strengthen the right to be secure; however, it has had the opposite effect. It is difficult to insist on rigorous standards for house searches if ships, commercial vehicles, and warehouses are entitled to an equal measure of protection. In particular, the blurring of the distinction between personal and commercial interests has warped the treatment of automobile searches, starting with *Carroll*.⁵⁵⁰ Thus, the exaggerated scope of the theoretical warrant requirement has actually tended to undermine the protection of personal and domestic security.⁵⁵¹

547. See *supra* notes 136-142 and accompanying text.

548. See *supra* notes 143-161 and accompanying text.

549. It is curious that proponents of originalism seldom question the validity of the Court's 1886 announcement, in *Santa Clara Co. v. Southern Pac. R.R. Co.*, 118 U.S. 394 (1886), that business corporations are "persons" for purposes of constitutional law.

550. The automobile was obviously a form of property that was beyond the Framers' anticipation. However, given that the Framers endorsed a right to be secure for "persons, houses, papers, and effects" but not for commercial interests, one might have thought that the appropriate point to begin the analysis in *Carroll* would have been to ask whether the auto should be viewed as a protected personal "effect" or should be viewed as comparable to commercial vehicles. I think the answer should have been that the automobile was within the sphere of personal and domestic interests that the Fourth Amendment was intended to protect. Chief Justice Taft, however, never asked that question. Instead, he simply asserted that automobiles carrying contraband were subject to *in rem* forfeiture because ships and commercial vehicles were. See *Carroll v. United States*, 267 U.S. 132, 153 (1925). In effect, he decreed that the efficient application of statutory forfeiture authority took precedence over the citizens' constitutional right to be secure in personal automobiles. *Id.* at 153-56.

551. Modern rulings have even undercut the protection of the house from a variety of angles. *United States v. Leon*, 468 U.S. 897 (1984), effectively held that the exclusionary rule usually will not apply (which is to say that there will be no legal consequence at all) if police enter and search a house pursuant to an unconstitutional warrant. In addition, *Anderson v. Creighton*, 483 U.S. 635 (1987), protects officers from civil liability even when they illegally enter a house without a warrant. The "standing" doctrines that limit a person's ability to challenge the legality of a search or seizure have also exposed houses by virtually inviting police agencies to illegally enter and search the residences of third parties who are not the primary targets of prosecution themselves. See, e.g., *Payner v. United States*, 447 U.S. 727 (1980). Were it not for the rulings in *Payton v. New York*, 445 U.S. 573 (1980), and *Welsh v. Wisconsin*, 466 U.S. 740 (1984), prohibiting warrantless entries of houses to make arrests, the notion of the special protection of the house would be only a historical relic.

The modern warrant-preference construction also endorses a warrant process that is different from, and weaker than, its framing-era counterpart. For example, the modern practice of allowing probable cause for warrants to be established by an officer's account of hearsay information supposedly provided by a confidential informant gives the officer far more control over the process than the Framers expected.⁵⁵² Thus, while the theoretical warrant "requirement" posits a broader scope for use of specific warrants than the Framers expected, the looser process for issuing warrants has weakened the protection that the specific warrant actually provides.

In sum, neither of the usual modern constructions is equivalent to the original meaning. Is there any other approach that would be truer to the historical Fourth Amendment?

C. *The Undesirability of "Returning" to the Literal Original Meaning*

It might seem that we could decide to return to the literal original meaning of the Fourth Amendment, reading it merely as a ban on too-loose general warrants, while leaving the regulation of warrantless intrusions to legislation or judicial decisionmaking. This position is not without adherents. Professor Taylor hinted at it when he previously asserted that the Framers were "unconcerned with" warrantless intrusions.⁵⁵³ More recently Professor Gerard Bradley explicitly called for such an interpretation.⁵⁵⁴ Indeed, this approach might even be seen as the logical destination of Justice Scalia's insistence, in recent commentary, that only the original meaning of the language of a constitutional text, but not the Framers' intention, should matter in constitutional analysis.⁵⁵⁵

The difficulty is obvious. Applying the original meaning of the language of the Fourth Amendment in a completely changed social

552. See *supra* notes 287-295 and accompanying text.

553. See *supra* notes 49-53 and accompanying text.

554. See *supra* note 56.

555. See, e.g., SCALIA, A MATTER OF INTERPRETATION, *supra* note 2, at 38 ("What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsman intended.").

The purported distinction between meaning and intention is artificial. One can rarely if ever arrive at an authentic understanding or application of the "meaning" of a text without considering its authors' purpose within the context in which it was written. See *supra* note 388. The fact that a reading based on the "ordinary meaning" of the words of the Fourth Amendment has fostered a historically false treatment of that provision by misconstruing the intended meaning of "unreasonable" is an eloquent demonstration of the fallibility of acontextual textualism. Indeed, why should anyone assume that the Framers intended to use an "ordinary meaning" when they adopted "unreasonable" in the Fourth Amendment? They used the peculiar language of constitutional discourse because they were writing a constitution.

and institutional context would subvert the *purpose* the Framers had in mind when they adopted the text. They focused on banning general warrants because they perceived the general warrant as the only means by which discretionary search authority might be conferred.⁵⁵⁶ They did not mean to approve of, nor facilitate the development of, warrantless discretionary authority; rather, they did not conceive of the possibility that future generations would confer discretionary authority on ordinary officers by means other than general warrants.

In a very real sense, the modern mystery associated with the two-clause text of the Fourth Amendment is the product of the Framers' inability to gauge how criminal justice institutions would actually evolve. Modern statutes and court rulings that confer substantial *ex officio* authority on police officers (for example, by permitting arrests on mere probable cause of felony⁵⁵⁷) provide a level of discretionary authority that the Framers would not have expected a warrantless officer could exercise unless general warrants had been made legal. Choosing to read the text to forbid only the use of general warrants while ignoring the unanticipated post-framing conferral of discretionary authority on officers would effectively evade the Framers' concern. Returning to the literal original meaning in the face of the deeply changed context would reduce the constitutional text to a Catch-22.

The text of the Fourth Amendment clearly anticipated that there would be a "right to be secure" in one's person, house, papers, and effects. If there is any term in the text that might be described as the core or essence of the provision, "right to be secure" is the leading candidate. Thus, one should not advocate a modern meaning for the Fourth Amendment that would render the right to be secure a practical nullity. Hence, I think that the Court's extension of the amendment to warrantless intrusions in *Weeks* was appropriate because it was necessary to preserve a meaningful "right to be secure" in the modern context.⁵⁵⁸

556. See *supra* notes 192-286 and accompanying text.

557. As described above, the Framers would have thought that an *ex officio* arrest based on mere probable cause alone (without proof of the fact of felony) would be obviously "unlawful." See *supra* notes 226-227 and accompanying text. The modern probable cause standard for arrests was adopted after the framing. See *supra* notes 241-251.

558. Cf. Kamisar, *supra* note 38, at 574 (arguing that even if the Fourth Amendment had been literally aimed exclusively against general warrants, courts would still have properly interpreted the amendment to prohibit indiscriminate, arbitrary, and unjustified warrantless searches as well).

D. *The Nonoriginalism of Selective Originalism*

It might seem that there is an alternative to a complete return to the original meaning — we could select specific aspects of historical doctrine as guides to decisions. Indeed, in a series of recent cases, Justices Scalia and Thomas have asserted that framing-era common-law doctrine should be consulted as the starting point for analyzing constitutional search and seizure issues. For example, Justice Scalia recently began a Fourth Amendment analysis by first quoting the first clause of the text and then writing:

In determining whether a particular government action violates this provision, we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed. Where that inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness⁵⁵⁹

This approach is not helpful for two reasons. One problem is that modern judges have not been particularly successful in recounting the content of framing-era law. In fact, immediately after the passage cited above, Justice Scalia repeated Chief Justice Taft's historically false claim that the allowance of warrantless ship searches in the 1789 Collections Act revealed the Framers' understanding of the Fourth Amendment's "reasonableness" standard.⁵⁶⁰ Likewise, Justice Thomas has recently mischaracterized a statement by Blackstone as though it were relevant to the knock-and-announce rule for serving warrants.⁵⁶¹ Similar examples of erroneous claims regarding historical standards in Supreme Court opinions are numerous.⁵⁶²

559. *Wyoming v. Houghton*, 119 S. Ct. 1297, 1300 (1999) (omitting citations to *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995), and *California v. Hodari D.*, 499 U.S. 621, 624 (1991)).

560. See *supra* notes 152-155 and accompanying text.

561. Justice Thomas wrote the unanimous decision in *Wilson v. Arkansas*, 514 U.S. 927 (1995), which ruled that officers must "knock and announce" before breaking a house to execute a warrant if, but only if, it is "reasonable" to so require in the circumstances. Justice Thomas's opinion correctly recited several framing-era common-law sources that articulated a *rigid* knock-and-announce rule for serving warrants. See *id.* at 932. He ended the discussion of framing-era law, however, by stating that "Sir William Blackstone stated simply that the sheriff may 'justify breaking open doors, if the possession be not quietly delivered.' 3 Blackstone [Commentaries] *412." *Id.* at 932-33.

The Blackstone passage Thomas quoted has nothing to do with execution of a search warrant. It refers to a sheriff ejecting squatters *after* a civil judicial ruling that they have no claim to the property — a situation that obviously does not pose the usual concern for the security of a house and its residents. See 3 BLACKSTONE, *supra* note 27, at 412-13.

In addition, Thomas's historical summary papers over the large gap between early American cases that "embraced the common-law knock-and-announce principle" and "[o]ur own cases . . ." 514 U.S. at 933-34. The simple fact is that the *modern* flexible reasonableness standard applied in *Wilson* was unknown to the common law. The Justices' decision to relax the requirements for the execution of a search warrant was not based in history; rather

Getting the common-law doctrine wrong is not the only problem with this approach. No Justice or commentator is likely to endorse a wholesale return to common-law doctrine. For example, the common law did not authorize warrantless arrests for felony on probable cause, but insisted on proof of “felony in fact.” I doubt that anyone will advocate returning to a common-law doctrine that was later judged inadequate for effective policing. Yet, if common law is not embraced entirely, the choice of which pieces to embrace may come down to little more than personal preference.

Singling out and applying a specific common-law doctrine in a modern — that is, changed and foreign — context will often produce results that are different from, or even inconsistent with, the purpose the rule served in its historical milieu. For example, consider the common-law doctrine that a warrantless constable could break into a house to arrest a felon, perhaps even to arrest “on suspicion.”⁵⁶³ Should that doctrine be viewed as a basis for giving a modern police officer broad authority to make a warrantless entry of a house to make a felony arrest? The situations are not nearly as comparable as they may initially appear to be. The modern police officer is far more protected from forcible resistance or trespass liability than was a framing-era constable, so he is much more likely to exploit such authority than a constable would have been. Likewise, the modern officer can justify a felony arrest by a probable cause standard that is looser than the common law “on suspicion” standard (which required “felony in fact”). And the modern category of “felonies” encompasses a much wider array of offenses than did common-law felonies (the common law did not permit breaking into a house for a misdemeanor arrest, even with a warrant). Allowing a modern officer to make a warrantless entry of a house to effect a felony arrest would leave houses far more vulnerable to invasion than the superficially comparable common-law rule did at the time of the framing.⁵⁶⁴

it was a departure from historical doctrine. The suggestion that the decision was in any way supported by historical doctrine was only pretense.

562. See examples cited *supra* notes 152-159 and accompanying text; *supra* notes 171, 187, 247, 252, 340, 425, 450, 467, 484, 490, 511-513, 533; *supra* notes 559-561 and accompanying text. Precisely because judges may feel obliged to concoct historical pedigrees to justify novel rulings, legal historians should never take judicial descriptions of legal history at face value.

563. I have simplified the historical doctrine for the purposes of this discussion. As discussed above, Hawkins actually asserted a more restrictive doctrine under which only an arrest of an actually guilty felon could justify the breaking of a house. See *supra* notes 265-269 and accompanying text. This discussion follows Hale’s broader statement regarding the authority of officers to break into houses to arrest. However, I am also omitting Hale’s general caveat that the breaking could be justified only if the suspected felon was actually present in the house at the time.

564. These comments are directed to Justice White’s historical arguments in his dissenting opinion in *Payton v. New York*, 445 U.S. 573, 604-12 (1980). He asserted that there

In a changed context, specific common-law statements will rarely produce the same effect they were meant to produce. Hence, piecemeal originalism usually produces only an illusion of continuity. It fails to come to grips with, or even acknowledge, the full range and depth of post-framing changes. Piecemeal originalism is not originalism at all.

E. *The Infeasibility of "Translating" the Original Meaning for the Modern Context*

Another approach frequently advocated as a viable form of originalism, even by some commentators loosely or popularly identified as "strict constructionists," is to retreat to a "higher level of abstraction." Some commentators describe this as extracting the "first principle(s)" of the constitutional provision.⁵⁶⁵ Others describe it as "translating" the text to apply to the modern context.⁵⁶⁶ Whatever the label, I doubt this approach can provide valid answers to specific modern questions.

I do not deny that the Fourth Amendment can be restated at higher levels of abstraction. For example, it is certainly the case that the Framers intended to preserve a personal and domestic sphere that

was no basis for requiring a warrant for making an arrest in the wanted person's residence because common law had allowed warrantless entries of houses to make arrests. White's claim, however, wrenched the common-law statements regarding the justification for breaking into a house out of the cluster of related historical doctrines.

Common-law doctrine was also taken out of historical context in Justice Scalia's concurring opinion in *Minnesota v. Carter*, 525 U.S. 83, 91 (1998), in which a five-justice majority held that nonsocial visitors could not challenge the legality of a search of a house. Justice Scalia asserted that this conclusion was mandated by the Fourth Amendment itself, in part because "it would have been clear to anyone who knew the English and early American law of arrest and trespass that underlay the Fourth Amendment" that a nonresident could not claim the right to be secure in a house that a resident could claim. *Id.* at 94 (quoting statements by Coke, a comment by Cooley regarding a statement by Blackstone, and an 1815 English decision). The cited statements, however, pertain to situations where a nonresident who was either already lawfully pursued by officers and subject to arrest or already subject to execution of a civil court judgment was attempting to use the house of another as a refuge. In contrast, there was no basis for arresting the nonresidents in *Carter* except for evidence obtained during a search of the house the nonresidents had visited. That scenario does not seem to have come up during the framing era, probably because the householder still had a viable trespass remedy for an unlawful entry of his house, as well as a right to use force to defend his house, and officers were reluctant to expose themselves to those risks. *See supra* notes 263-275 and accompanying text. The scenario in *Carter* arises today because the post-framing development of "qualified immunity" doctrine has vitiated even the householder's trespass remedy that earlier gave substance to the castle doctrine. *See, e.g., Anderson v. Creighton*, 483 U.S. 635 (1987) (opinion of the Court by Scalia, J.). Historical authorities never foresaw the incentives for unlawful police searches of houses that the current combination of "immunity" and "standing" doctrines create.

565. *See, e.g., supra* notes 2, 58.

566. *See, e.g., Lawrence Lessig, Fidelity and Constraint*, 65 *FORDHAM L. REV.* 1365 (1997).

would be meaningfully protected against undue intrusions by government officers. Likewise, it is even possible to draw some more specific insights from the text and its history. For example, as Justice O'Connor has observed, the Framers would not have approved of searches that were not based on individualized assessments of cause.⁵⁶⁷ Nevertheless, the retreat to a higher level of abstraction also encounters several obstinate difficulties.

Reading the provisions of the Bill of Rights as statements of broad principles is itself dubious as a historical matter. The historical record of the framing indicates that the Framers saw the Fourth Amendment as a specific constitutional barricade against the unique threat which legislative approval of general warrants posed for the structure of common-law authority — not as a general statement of an abstract principle. Indeed, because they perceived that the common law — “the law of the land” — provided the structure of liberty and security, they saw no need to formulate a comprehensive statement of constitutional rights. Likewise, they saw no need to spell out the principles and values that underlay the common law. Thus, except for the cryptic invocation of a “right” to be secure in person and house, the text of the Fourth Amendment does not explicate the principles and values that it serves. Those principles and values can be located only by going outside the text and examining the larger historical context.

The fact that we now face issues the Framers never anticipated may leave us little choice but to treat the constitutional texts as expressions of broad principles, rather than as specific solutions to specific historical threats. Indeed, the expansive treatment now accorded the Bill of Rights can be justified as a replacement for the Framers' unfulfilled expectation of a permanent structure of common-law rights. However, we should not confuse our predicament with the historical character of the texts. At least as far as the procedural protections of the Bill of Rights are concerned, the retreat to principles is only a *modern* response to changed circumstances; it is not the Framers' understanding of the text.

Furthermore, extracting any “principle” from a text that was written within the larger structure of common-law concepts and doctrines is inherently reductionist — and the act of reduction introduces room for the interpreter to define the “essence” of the text in a way that furthers his or her own ideological agenda. “Translation” sounds objec-

567. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 669 (1995) (O'Connor, J., dissenting). Similarly, Justice Stevens has noted that the Framers would have been less concerned to prevent the issuance of too-loose warrants than improper warrantless intrusions. See *United States v. Leon*, 468 U.S. 897, 971 (1984) (Stevens, J., dissenting). Justice O'Connor has also noted that the Framers would have been especially concerned about legislation that purported to authorize arrests without a showing of cause. See *Illinois v. Krull*, 480 U.S. 340, 362 (1987) (O'Connor, J., dissenting).

tive because, in other contexts, it connotes a fairly rigorous notion of equivalence. Unlike translating a passage from English to French, however, there are no dictionaries or grammars available to structure the translation of a constitutional text from one historical context to another.

Likewise, the language of “first principles” implies a clear hierarchy of values or principles, with some being more foundational than others. But the texts of the Amendments do not identify any such hierarchy — the interpreter does.⁵⁶⁸ The distorting potential of “first principle(s)” reductionism is demonstrated by the way the supposed “first principle” of “reasonableness” has been employed to downgrade the warrant standards in the second clause of the Fourth Amendment. Yet, the historical sources show that those warrant standards were central to the Framers’ understanding of the text and its purpose.

Indeed, the distorting potential of “translation” and “first principle(s)” is magnified in constitutional discourse because asserted principles are likely to have been drawn from historical descriptions that were themselves inauthentic. The very fact that law draws upon precedent and continuity as sources of legitimation for rulings means that lawyers and judges will attempt to couch even novel arguments or rulings as though they are continuous with the original meanings of constitutional provisions. The result is that commonly accepted understandings of constitutional history are likely to include more than a few mythical elements. Indeed, the now commonly accepted understanding of the historical Fourth Amendment is composed largely of an accretion of false historical claims.

In the final analysis, moving to a higher level of abstraction does not solve the difficulties that inhere in any attempt to apply a text written for one historical context to another, different context. Abstractions that are valid are usually too general to answer specific issues, while the “principles” that seem to provide answers to specific issues are usually reductionist. In the end, the move to higher levels of ab-

568. There is no historical basis for treating the constitutional statements of rights as though they were formulated deductively, as the “first principle” language implies. The Framers undoubtedly thought that there were identifiable principles embedded in the common law (for example, that no man could be judge in his own case), but they also understood that the common law was the product of accretion. Although the phrase “first principles” does appear in Blackstone’s writing, he used that term to refer virtually to the principles that inhere in the social contract itself. See 1 BLACKSTONE, *supra* note 27, at 243 (“I say in the *ordinary* course of law, for I do not now speak of those *extraordinary* recourses to first principles which are necessary when the contracts of society are in danger of dissolution, and the law proves too weak a defense against the violence of fraud or oppression.” (emphasis in the original)).

straction only papers over the range and depth of contextual and doctrinal changes that have occurred since the framing.⁵⁶⁹

F. *Confronting the Inescapability of Doctrinal Change*

The recovery of the authentic original meaning of the Fourth Amendment and the explication of the post-framing transformation of the meaning assigned to that text demonstrate that even constitutional standards cannot remain static when everything to which they relate undergoes change. Even constitutional law is not autonomous from larger social, institutional, and political changes. The reality of deep change since the framing means that the original meaning generally cannot directly speak to modern issues.

At one level, the discontinuity between the original meaning and modern doctrine creates an intellectual crisis for constitutional law — at least for any positive notion of constitutional law. If one thinks that constitutional law should represent something more than the personal judgment of the fifth Justice, the usual bromides about the “living constitution” are not particularly soothing. The current quest in constitutional commentary is to locate some criterion of validity, and the recent “turn to history” is at least partly a response to that quest.⁵⁷⁰ However, the mere desire to have a firm criterion does not assure that there is one to be found.

Viewed pragmatically, the central issue in modern Fourth Amendment doctrine is the degree to which it is possible and/or desirable to constrain discretionary police authority by a regime of rules, or at least partial rules. That issue must be addressed with a realistic understanding that the law enforcement institutions of the framing era were not adequate to meet the needs of a more populous, heterogeneous, and urbanized society. Although the expansion of modern law enforcement authority undoubtedly reflects a degree of institutional self-aggrandizement, it also reflects a sustained judgment that some degree of discretionary authority is necessary for effective policing. The issue is not whether we will allow any discretionary police authority, but

569. Cf. POSNER, *supra* note 541, at 251 (“Originalism is not an analytic method; it is a rhetoric that can be used to support any result a judge wants to reach. . . . Some of the most activist judges, whether of the right or the left . . . have been most drawn to the rhetoric of originalism. For it is a magnificent disguise. The judge can do the wildest things, all the while presenting himself as the passive agent of the sainted Founders — don’t argue with me, argue with Them.”).

570. For a discussion of the quest for “usable” legal history, see generally Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 *FORDHAM L. REV.* 87 (1997).

how much discretionary authority will be conferred and in what circumstances.⁵⁷¹

In that regard, the history most relevant to modern issues is not the history of the framing, but the history of the changes made to the original meaning — for example, by *Weeks* and *Carroll*. A critical examination of the *entire course* of the evolution of constitutional search and seizure doctrine, viewed in the context of changing social needs and of the evolution of related institutions and doctrines, would give us a better understanding of how search and seizure doctrine has come to take its present shape. A complete history, starting from the authentic original meaning, would reveal what choices were made, and might even shed light on whether those choices were appropriate.⁵⁷²

In the final analysis, however, the value of recovering the authentic history of search and seizure doctrine lies largely in the broader perspective it provides. Commentators who have made recent claims that the generalized-reasonableness construction affords the protection intended by the Framers have often also suggested that constitutional doctrine had integrity and continuity until the Warren Court departed from the true path by imposing unprecedented constraints on police authority.⁵⁷³ That combination of claims smoothes the way for further

571. To my mind, the crux of the problem of modern search and seizure law is posed by the somewhat contrasting views offered by Professors Wayne LaFave and Albert Alschuler as to the degree to which rules of search and arrest authority are desirable and/or feasible. See Albert W. Alschuler, *Bright-Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227 (1984); Wayne R. LaFave, "Case-by-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma, 1974 SUP. CT. REV. 127; Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307 (1982).

My own sense is that a regime of rules would be desirable, but I confess some skepticism as to how broadly rules can be feasibly formulated. The shortcoming of the Court's recent embrace of generalized-reasonableness is that it has short-circuited any attempt to formulate a law of rules for search and seizure.

572. As noted above, I think the adjustments made in *Weeks* were appropriate and necessary, and I hope to explain that view in more detail in a future publication. I do not think the same can be said of the imposition of the flexible reasonableness-in-the-circumstances standard in *Carroll*, because the broad endorsement of discretionary authority implied in that standard was inconsistent with the Framers' larger purpose of foreclosing officers from exercising discretionary authority. Of course, I recognize that it was inevitable that some degree of discretionary authority would be recognized in the twentieth century. However *Carroll's* false claim that the Framers had envisioned a reasonableness-in-the-circumstances standard blunted a thorough examination of just how much discretionary authority was necessary in modern criminal justice, and in precisely what circumstances. It effectively converted the Fourth Amendment from a bar against discretionary police authority to a *source* of such authority. I think a thorough examination of *Carroll* reveals it to be an expression of statist-inclined judicial activism that runs contrary to the larger purposes of the Fourth Amendment.

573. See, e.g., *County of Riverside v. McLaughlin*, 500 U.S. 44, 71 (1991) (Scalia, J., dissenting) (complaining that the Court "in recent years [has] invented novel applications of the Fourth Amendment to free the guilty"); cf. SCALIA, A MATTER OF INTERPRETATION, *supra* note 2, at 41 (stating that "[h]istorically, and particularly in the past thirty-five years, the 'evolving' Constitution has imposed a vast array of new constraints — new inflexibilities

expansions of police power. However, the authentic history prompts a different outlook.

The authentic history shows that framing-era doctrine provided a much stronger notion of a “right to be secure” in person and house than does modern doctrine. The trajectory of doctrinal evolution has been away from a sense of the individual’s right to be secure from government intrusions and toward an ever-enlarging notion of government authority to intrude.⁵⁷⁴ (In the larger picture, the Warren Court was just a brief, moderately libertarian interlude in the longer-range statist trend.) The larger story suggests that we should not have any particular confidence that current doctrine has reached the right balance (especially because reasonableness rulings have often been

— upon administrative, judicial, and legislative action,” and mentioning, first, the extension of the exclusionary rule to the states in *Mapp v. Ohio*, 367 U.S. 643 (1961)).

574. The implications of the post-framing expansion of the peace officer’s authority for constitutional standards and rights are not limited to search and arrest authority. The post-framing creation of police interrogation of suspects is equally prominent in the historical evolution of constitutional doctrine regarding the Fifth Amendment right against compelled self-accusation.

Framing-era common law did not permit officers to interrogate or take statements or confessions from suspects. See, for example, Chief Justice Pratt’s (Lord Camden’s) remark in the press accounts of *Leach* to the effect that officers could not be permitted to arrest or search at their discretion any more than they could be permitted “to take examinations,” quoted *supra* note 22. In fact, although English statutory law created authority for justices of the peace to “examine” arrestees (though not under oath) and record their answers for evidence in a subsequent trial, there is evidence that at least some American jurisdictions viewed that practice as violative of the common-law right against compelled self-accusation. Hening’s 1794 Virginia justice of the peace manual had this to say:

The justice, before whom the prisoner is brought, is bound immediately to examine the circumstances of the crime alleged. But the power of examining the prisoner himself and committing his examination to writing seems not to be recognized by our laws. This authority was granted by statute of England of *Phillip & Mary*, which not having been adopted by our legislature, is consequently not in force. And that these proceedings are repugnant to the common law, will appear . . . from judge *Blackstone*, who says, that at the common law, *no man was bound to betray himself*: and his fault was not to be wrung out of himself, but rather to be discovered by other means and other men.

HENING, *supra* note 25, at 153 (citations to statutes and other authorities and footnote omitted); the *Blackstone* citation was to 4 BLACKSTONE, *supra* note 27, at 293).

The Framers never anticipated that ordinary peace officers would be authorized to interrogate arrestees or take admissible statements from them. Thus, the emergence of police interrogation during the nineteenth century threatened to bypass and nullify the historical understanding of the right against compelled self-accusation in much the same way that the expansion of police warrantless arrest authority threatened to bypass and nullify the historical understanding of the right to be secure. Likewise, the initial application of the Fifth Amendment right to the police interrogation setting in *Bram v. United States*, 168 U.S. 532, 542 (1897), is best understood as a parallel to the Court’s extension of the Fourth Amendment to warrantless searches in *Weeks* — as an effort by the Court to adjust the constitutional right to a drastically different threat than the Framers had any reason to anticipate. As in search and seizure doctrine and practice, the post-framing expansion of police authority is the salient feature of the historical evolution of interrogation doctrine and practice. For other discussions of the historical Fifth Amendment right against compelled self-incrimination, see *supra* notes 320, 433, 450, 511.

justified by false history). The authentic history suggests that the burden of justification for further expansions of police power — or even for maintaining recent expansions — should fall squarely on the proponents of police power.

The recognition that we accord far greater authority to the officer than the Framers intended or anticipated will not provide answers to specific issues. There is no panacea for that. But the authentic history of Fourth Amendment doctrine can at least displace fictional originalist distractions and allow us to refocus attention on the critical question of what a “right to be secure” should mean. That is the idea that animated the Framers. That, and not question-evading platitudes about “reasonableness,” is the proper concern of modern search and seizure doctrine.