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# THE CONSTITUTIONAL THEORY OF THE FOURTH AMENDMENT

Gerard V. Bradley\*

## INTRODUCTION

We presently inhabit a "judicialized" regime of search and seizure. The "reasonableness clause" of the fourth amendment is universally understood to require a "common law of search and seizure,"<sup>1</sup> yet one of constitutional stature. That is, it binds the states and cannot be undone by ordinary legislation. The purpose of this Article is to demonstrate that this near universal interpretation of the fourth amendment is unfounded. Indeed, it will be argued that the current view is contrary to the plain meaning of the fourth amendment, as historically recovered, and is inconsistent with the basic constitutional structure. Instead, the reasonableness clause, properly understood, does not authorize courts to do anything, but exists to affirm legislative supremacy over the law of search and seizure. Accordingly, the only judicially operative portion of the amendment is the "warrant clause." This interpretation can and should be installed as the operative premise of the fourth amendment.

This Article will, in large part, present its thesis regarding fourth amendment doctrine by employing as an illustration a recent application of the current approach by the Seventh Circuit Court of Appeals. In *United States v. Torres*,<sup>2</sup> the Seventh Circuit held video surveillance constitutional and further found that the judiciary had the authority to issue warrants for such a technique. Although welcomed by prosecutors and law enforcement officials, this decision highlights the absurdity of the current interpretation of the reasonableness clause. Moreover, *Torres* provides a vehicle through which this Article's historical interpretation can be brought into focus under the cold light of modern reality.

Prosecutors, especially those with weak cases born of unsavory witnesses, have their own version of the "necessity" defense and valid reasons for applauding the decision in *Torres*. This "necessity" defense is just that: the

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1. That is, the governing rules and their application are a uniquely judicial enterprise, and their scope is as broad as the problem. Moreover, this corpus is drawn from the "policy" preference of judges. For one prominent use of the precise term, see Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982).

2. 751 F.2d 875 (7th Cir. 1984).

argument of last resort. Having deployed it to no avail on many occasions myself,<sup>3</sup> the holding in *Torres* was initially welcome news.<sup>4</sup> "Sure, it would be nice if we could choose our witnesses," prosecutors tell jurors in summation. "And if we *could* choose, we would not have chosen poor (read: that drunken sleazeball) Mr. Muscatel, today's victim." The argument continues: "But we didn't get to choose our witness; the defendant did, by stabbing Mr. Muscatel. It would be even nicer if we could videotape crimes. Then we would not have to rely on fragile human memory. But the defendant didn't send us a note saying where and when to set up our cameras to catch his act. Ladies and gentlemen of the jury, we had no choice but to present the case that we did. So, even if Mr. Muscatel hasn't been sober since his First Holy Communion, even if he cannot tell you where, or if, he's presently living, the evidence compels a guilty verdict."

In *Torres*, deadly serious Puerto Rican terrorists, the Fuerzas Armadas de Liberacion Nacional Pertorriquena ("F.A.L.N."), with, as the court put it, "the plans, the materials, and the know-how to kill in gross"<sup>5</sup> were surreptitiously filmed assembling bombs. The F.A.L.N., however, had not sent the government notice of their plans; the government got their break by turning a co-conspirator. The "turncoat" described both a seditious conspiracy and weapons violations, and fingered two F.A.L.N. "safe houses," one of which was a virtual munitions factory. He also disclosed that the F.A.L.N. was prepared for snoops. The F.A.L.N. members evidently said little while working and loudly played the radio to drown out the little they said.

The investigators could not just break in because the turncoat's word would not be enough to convict. A search might produce some bombs, but not evidence linking the conspirators to them. Investigators then concluded that if they were unable to listen to the F.A.L.N., perhaps they could,

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3. From 1980 to 1983, I served in the Trial Division of the New York County District Attorney's Office. In one particular assault trial, my only witness was the victim. Not only was he a street preacher of dubious repute, but he was also the only person to my knowledge ever convicted of conspiracy to hijack an ocean liner, the Queen Elizabeth. On another occasion, my two victim witnesses were knock-around guys literally "caught with their pants down." Enticed to a hotel room by a prostitute (whom they mistakenly believed was female), they were robbed by the prostitute's male confederates as they (the victims) assumed their "enjoying" position. Although I must report that academic life has proved much more relaxing than trying such cases, it has also been much less colorful.

4. *Torres*, however, was not the first case to grapple with the constitutionality of video surveillance. See *In re Application of Order Authorizing Interception*, 513 F. Supp. 421 (D. Mass. 1980) (limited video surveillance allowed following a determination of illegalities based on audio surveillance, provided that substantive safeguards of oral communications interception were observed); *People v. Dezek*, 107 Mich. App. 78, 308 N.W.2d 652 (1981) (police video surveillance suppressed where monitoring was pursuant to invalid search warrant); *People v. Teicher*, 52 N.Y.2d 638, 422 N.E.2d 506, 439 N.Y.S.2d 846 (1981) (video surveillance permitted since authorized by state statute sufficiently broad to allow seizure of intangible visual image secured by a video recording).

5. *Torres*, 751 F.2d at 883.

instead, watch them on television. More exactly, they opted for surreptitious video surveillance, made feasible for close observation by the advent of silent cameras. There was no emergency for what promised to be and ultimately was lengthy surveillance, so bedrock fourth amendment case law interpreting the reasonableness clause required prior judicial authorization, i.e., a warrant.<sup>6</sup> This situation produced the dilemma that was eventually presented to the Seventh Circuit: *did* the federal district judge have the authority to warrant video, as opposed to audio, surveillance? Hence the anomaly: if the federal courts were found to lack the authority to issue this admittedly new type of warrant, then, although video surveillance might be theoretically constitutional, no court would possess the power to issue the necessary warrant.

Judge Posner wrote for a divided Seventh Circuit panel and, finding the requisite power to issue warrants for video surveillance, reversed the trial court's suppression order. In the short run, there is no doubt that society is better off because of this decision. Mr. Torres and his friends belong in jail; videotape evidence is exceedingly probative; and, anything that reduces reliance on the memories of people like Mr. Muscatel contributes to the common good and preserves prosecutors' sanity. Nor do I quarrel with Judge Posner over the constitutionality of video surveillance. If authorized by Congress, investigators may do what they did in the *Torres* case. However, Congress has not yet authorized video surveillance.

So much for the welcome news. This Article, however, is not about the welcome news of the advent of video surveillance. It is about the rationale proffered by Judge Posner, one which illustrates an unattended deformity in our current constitutional order of search and seizure. Judge Posner's rationale comprised two alternative grounds. First, that in Federal Rule of Criminal Procedure 41 ("Rule 41") Congress authorized courts to issue a video surveillance warrant.<sup>7</sup> Second, that courts possess "inherent" power to issue *any* warrant required by the fourth amendment, regardless of congressional authorization.<sup>8</sup> Because neither ground withstands even casual scrutiny, I suggest that Judge Posner created these alternative grounds precisely to avoid the anomaly of approving video surveillance but at the same time requiring a warrant for it that no court would ever have the authority to issue. Under the existing fourth amendment scheme, compliance with the reasonableness clause requires courts to examine particular search and seizure activity and issue a warrant authorizing the conduct. Save the few "emergency" exceptions courts have recognized, warrants will almost always be required if a particular activity is to be considered reasonable. Because there will be very few "emergency" exceptions for video surveil-

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6. See *United States v. Ventresca*, 380 U.S. 102 (1965) (exceptions to requirement that search and seizure be conducted pursuant to warrant are limited, thereby underscoring preference for action taken pursuant to warrant).

7. *Torres*, 751 F.2d at 877-78.

8. *Id.* at 878.

lance,<sup>9</sup> warrants will be a necessary condition to such activity. The anomaly of approving a search technique for which courts could not issue a warrant practically declares the technique constitutionally forbidden, precisely the outcome sought to be avoided. Pulling at this anomalous thread unravels the fourth amendment corpus to uncover a theoretical deformity of the first magnitude.

This Article is divided into six parts. Part I further defines the defect in the current fourth amendment regime and, using the Seventh Circuit's decision in *Torres* as a guide, places it in context. Part II discusses the historical origins of the fourth amendment and concludes that the guiding factor in the amendment's interpretation should be what the ratifiers of that amendment viewed as the effect of its adoption. Part III examines the historical data surrounding the ratification of the Bill of Rights and concludes that the fourth amendment ratifiers could only have understood its effect as a ban on general warrants. Part IV then examines the legitimacy of the historical approach as compared with the modern policy justifications for an operative reasonableness clause. Parts V and VI conclude this Article by responding to some of the remaining criticisms against restoring a historically recovered fourth amendment to our constitutional jurisprudence at this point in our history.

### I. THE PROBLEM EXPLORED: *TORRES*

If the Supreme Court had never activated the reasonableness clause of the fourth amendment,<sup>10</sup> the *Torres* anomaly would not have arisen. The reasoning behind this statement is that if the judicial rule that warrantless searches are presumptively "unreasonable" did not exist, the fourth amendment would leave entirely open the question of *when* a warrant need be secured. The *Torres* court applied the constitutional common law of reasonableness and predictably concluded that while video surveillance could be "constitutionally"—i.e. "reasonably" within the meaning of the fourth amendment—conducted, "constitutionality" nonetheless required a warrant, absent an emergency. Only a "detached neutral magistrate" may issue that warrant.<sup>11</sup> However, if no magistrate has the legal power to do so, incongruous possibilities suggest themselves. Judge Posner described one: if courts are not authorized to issue the warrant, police officers then may use video

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9. The time it takes to install the equipment virtually precludes a claim that warrantless surveillance was necessary due to insufficient time to get a warrant.

10. 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.

U.S. CONST. amend. IV.

11. See *Connally v. Georgia*, 429 U.S. 245, 246 (1977); *Coolidge v. New Hampshire*, 403 U.S. 443, 449 (1971).

surveillance *only* in emergencies.<sup>12</sup> As applied to video surveillance, this makes no practical sense for law enforcement, and effectively deprives police of the tool that the *Torres* opinion strives to make available. It also contradicts the entrenched rule that prior judicial authorization is the normal index of constitutionality. But the question remains: *do* courts have the power to issue this unprecedented type of warrant?

The *Torres* court's application of the reasonableness clause forced it to answer this question affirmatively if video surveillance was to remain a practical possibility. Accordingly, the court struggled to find some kind of authority, either statutory or common law, from which to derive the power to issue such a warrant. Judge Cudahy's concurrence<sup>13</sup> located judicial authority to issue the warrant in Title III of the Omnibus Crime Control and Safe Streets Act ("Title III")<sup>14</sup> and the Foreign Intelligence Surveillance Act ("F.I.S.A.")<sup>15</sup> Judge Posner eschewed that escape route, contending that video surveillance and its warrants are neither prohibited nor authorized by those statutes. F.A.L.N. members were not "foreign agents"<sup>16</sup> as required for F.I.S.A. coverage and "aural acquisition,"<sup>17</sup> the key to Title III coverage, does not include *video* surveillance. Judge Posner instead read Rule 41<sup>18</sup> effectively to say: "Congress hereby authorizes courts to issue *any* warrant courts deem required by the Constitution." The basic problem is that Rule 41 authorizes warrants to search for certain kinds of "property,"<sup>19</sup> and the rule defines property as "tangible objects."<sup>20</sup> While film may be "tangible," the "seizure" accomplished by video surveillance is *not* that of the film, which was always in the government's possession. Instead it is the scenes captured on the film which are "seized."

Aside from the formidable statutory obstacle, it is hard to reconcile a warrant like that issued in *Torres* with the United States Constitution. The "particularity"<sup>21</sup> requirement cannot be satisfied, and the shotgun approach required to collect electronic data defeats those "minimization" concerns which attempt to effect "particularity" retroactively. Title III now appears more of a necessary legislative response to aspects of techniques *not* readily compatible with the constitutional warrant framework. Indeed, the advent of nomenclature like "judicial order" and "administrative compliance or-

12. *Torres*, 751 F.2d at 880.

13. *Id.* at 886 (Cudahy, J., concurring).

14. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1982).

15. Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1801 (1982).

16. *Torres*, 751 F.2d at 881.

17. *Id.* at 880.

18. FED. R. CRIM. P. 41.

19. FED. R. CRIM. P. 41(b).

20. FED. R. CRIM. P. 41(h).

21. "[N]o Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and *particularly* describing the place to be searched, and the person or things to be seized." U.S. CONST. amend. IV, cl. 2 (emphasis added).

der,"<sup>22</sup> by departing from the norm, are signals of the same theoretical deformity in the judicial regime. An activated reasonableness clause begot a preference for "warrants" without probable cause,<sup>23</sup> which are conceptually indistinguishable from general warrants. In other words, the fourth amendment requires warrants whose issuance the fourth amendment forbids. This much alone suggests an error somewhere along the way. Harmonizing all this dissonance by recourse to legislative authorization—an expansive Rule 41 interpretation and special provisions for problem areas like wiretapping—implies the following illogic. Courts are constitutionally authorized to prescribe the grounds, including the need for warrants, upon which the state may invade citizens' privacy, yet, courts must be empowered by Congress to do so. It seems we have made the fourth amendment the governor of all search and seizure while increasingly recognizing it to be ill-suited to the task.

In any event, the practical problem will not disappear with the *Torres* decision. A breathtaking reading of Rule 41 may harmonize the issue in the federal system, but does not solve the problem in state courts. Under the present judicial dispensation, constitutional rules apply equally to federal and state officers. Is Congress supposed to have authorized *state* judges to issue a warrant *not* authorized by the state legislature? If not, the practical dissonance resurfaces: state police can conduct video surveillance *only* without prior judicialization. Further, video surveillance is merely one example of recent technical innovations that produce the difficulty. Pen registers,<sup>24</sup> cordless<sup>25</sup> and mobile microwave<sup>26</sup> telephones, electronic mail,<sup>27</sup> and computer "conversation"<sup>28</sup> are other techniques that leave courts facing loopholes in the legal framework. Is electronic surveillance of these means of communication constitutionally available to police? If so, may courts issue warrants for their use?

A closer look at Judge Posner's analysis in *Torres* is warranted. He proclaims that "[t]here is another basis, besides Rule 41, for the issuance of warrants for television surveillance: . . . inherent . . . judicial power."<sup>29</sup> Now, there are two relevant senses of "inherent." It may mean "nonstatutory," more accurately characterized as "common law" and presumably subordinate to the desires of the legislature. The other, "constitutional"

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22. See *Camara v. Municipal Court*, 387 U.S. 523, 531-33 (1967); see also *See v. City of Seattle*, 387 U.S. 541, 545 (1967) (administrative subpoena and demand for entry).

23. *Camara*, 387 U.S. at 533-39.

24. See *Smith v. Maryland*, 442 U.S. 735 (1979); *United States v. New York Tel. Co.*, 434 U.S. 159 (1977).

25. See *State v. Howard*, 235 Kan. 236, 679 P.2d 197 (1984); *State v. Delaurier*, 488 A.2d 688 (R.I. 1985); *State v. Smith*, 142 Wis. 2d 562, 419 N.W.2d 259, *rev. granted*, 143 Wis. 2d 907, 420 N.W.2d 57 (1988).

26. See *Edwards v. State Farm Ins. Co.*, 833 F.2d 535 (5th Cir. 1987).

27. See *N.Y. Times*, June 1, 1988, § 1, at 1, col. 3.

28. See *id.*, Dec. 19, 1983, § 1, at 1, col. 1.

29. *Torres*, 751 F.2d at 878.

sense is more theoretical and is grounded in that power which “*must* inhere in courts in order for them to function as courts.” One instance of the latter sense is judicial power to punish direct contempt:<sup>30</sup> this power cannot, consistent with the constitutional separation of the branches, fail to attach to a court. This second sense is obviously more powerful than the first. Not only is statutory authorization unnecessary to its existence, no statute can take it away. Judge Posner ostensibly inquires after the first sense, and concludes, in what he concedes is a close case, that courts possess it.<sup>31</sup> As the argument below delineates, Judge Posner was incorrect.

Curiously, no one has argued forthrightly for the second sense, yet *that* is the position implied by our current constitutional regime of search and seizure. This regime is irrevocably committed to both of the following propositions: 1) fourth amendment activity occurs wherever courts decide it has occurred; and, 2) wherever the activity has occurred, courts must authorize it by prior warrant in order for it to be reasonable, save for the few exceptions that courts have recognized. Thus, the current regime is virtually paralyzed if courts are unable to issue warrants. A successful defense of the first variation of “inherent” hardly reduces this dissonance. If Congress strips the courts’ “inherent”—i.e., non-statutory or common law—judicial authority to issue a video surveillance warrant, it effectively forbids the technique’s use, except for the rare emergency. The warrant preference thus remains in force and one suspects that Congress, by regulating the issuance of warrants, possesses more decisive authority in the search and seizure regime than it realizes.

As stated above, Judge Posner himself seems to define “inherent” in the “nonstatutory” sense, adding that “Congress can limit the procedural authority of the federal courts.”<sup>32</sup> However, whether Congress can deny the power to issue a warrant altogether is not an issue Judge Posner explicitly addresses. Indeed, he seems to introduce the second sense of “inherent” in discussing the power to punish contempt and to issue writs in aid of jurisdiction.<sup>33</sup> He confuses the two senses by calling the search warrant “a form of (or at least an analogue to) pretrial discovery.”<sup>34</sup> He adds, in an apparent attempt to find ground in tradition, that “much of federal criminal procedure, especially in the early days of federal courts, was judge-made.”<sup>35</sup> That may be true, but the issue remains whether it was authorized by the Constitution, Congress, or the common law. Judge Posner responds only with the feeble concession that search warrants were not among this early “judge-made” criminal procedure.<sup>36</sup>

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30. See *Young v. United States ex. rel. Vuitton Et Fils S.A.*, 481 U.S. 787 (1987).

31. *Torres*, 751 F.2d at 878.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*



Among this bewildering and largely inconclusive assembly of points one might find sufficient support to argue that the courts' authority to issue search warrants is "inherent" in the second and more powerful sense. If the argument that this power is necessary to a properly functioning judiciary was successful, it would certainly make the current deformity in fourth amendment law less significant if not more doctrinally sound. The argument, however, cannot possibly succeed. For example, search warrants cannot be compared to pretrial discovery for the simple reason that they have no necessary relation whatsoever to any ongoing case. A similar conclusion is drawn from the attempted analogy to "writs in aid of jurisdiction." Search warrants typically issue before *any* court has taken jurisdiction of *any* Article III controversy, much less in aid of one. There is no requirement, even after proceedings commence, that search warrant applications be made to the judge handling the case to which the evidence is relevant. Judicial authorization for searches has nothing to do with trial "housekeeping," but instead focuses on the privacy of persons who may not even be before the court. Most critically, and in light of the recent Supreme Court discussion of the contempt power as obviously "inherent,"<sup>37</sup> there simply is no basis for concluding that courts could not function as courts without authority to issue warrants. There is no necessary practical effect at all. Denying inherent authority to issue warrants results only in *precisely* the same evidence being produced, without prior judicial authorization. Courts are not incapacitated by this situation. The only "incapacity" implied is that of inherent authority to issue warrants and this becomes an obviously circular argument.

In order to defend his position, Judge Posner leans heavily on pre-Constitution English practice,<sup>38</sup> hardly the usual bulwark of fourth amendment analysis. Yet, he dismisses as dictum<sup>39</sup> the authority contrary to his position, authority which is contained in the case most relevant to this question, *Entick v. Carrington*.<sup>40</sup> He cites various secondary works<sup>41</sup> in which the inherent judicial power to issue warrants is determined to have existed as far back as the twelfth century, but these pertain only "implicitly" to search warrants.<sup>42</sup> And if Judge Posner's reliance on Nelson Lasson's *History*<sup>43</sup> of the fourth amendment is typical of his use of the sources he has cited, it

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37. See *supra* note 30.

38. *Torres*, 751 F.2d at 878.

39. *Id.*

40. 95 Eng. Rep. 807 (K.B. 1765).

41. See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 15 (2d ed. 1979); CROWN PLEAS OF THE WILSHIRE EYRE 1249 75, 92, 98, 100 (Meekings ed. 1961); M. DALTON, THE COUNTRY JUSTICE 1619 300-06 (1972 reprint ed.) (1622); N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 36 n.86 (1937); J. SCARBORO & J. WHITE, CONSTITUTIONAL CRIMINAL PROCEDURE 21 (1977).

42. *Torres*, 751 F.2d at 878. In fact, the only search warrant of the kind was one for stolen goods; otherwise express statutory authority was essential. See *infra* note 56 and accompanying text.

43. N. LASSON, *supra* note 41.

is easy to determine how he was wrong: Lasson is simply misused.<sup>44</sup> In an apparent attempt to bridge the relevance gap between early English and modern American practice, Judge Posner incorrectly attributes what Lasson refers to as Justice of the Peace powers.<sup>45</sup> The powers were attributed to the royal courts because they were staffed by abler persons, even if royal courts "had little or no occasion to exercise it."<sup>46</sup> Our federal courts, we are told, borrow many features from these royal courts.<sup>47</sup> "A modern American parallel"<sup>48</sup> of what seems to be Judge Posner's principal of attribution—a power lodged in persons with lesser training is assumed to reside in those with greater training—is Rule 41(a), which speaks of magistrates and state court judges issuing warrants, but has been assumed to include district judges as well.<sup>49</sup> I leave to the reader whether *Torres* has, thus far, advanced the inquiry into contemporary judicial authority to issue a search warrant in a new situation absent statutory sanction.

The balance of Judge Posner's argument actually consists of evidence contrary to his position,<sup>50</sup> which he attempts to dispel by citation to other courts that have, like Judge Posner, invented inherent authority simply because they found it necessary to their analyses.<sup>51</sup> At this point, we have passed from argument to assertion to simple profession of faith. Remove Judge Posner's determination, grounded in the necessities of the judicial regime, to sustain that inherent authority and there is little of substance left. That is, the case for inherent judicial authority to issue warrants is ultimately no more than taking the steps necessary to make our judicial regime constitutionally logical. Inherent authority is necessary to justify the manner in which the regime functions; therefore, inherent authority exists.

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44. Judge Posner cites N. LASSON, *supra* note 41, at 36 n.86, in support of inherent judicial authority to issue warrants, even though the actual text of Lasson refutes that claim. First, Lasson's text is quite consistent with the view that statutory authority *was* necessary to so empower the justice of the peace. Second, the text makes clear that an inherent judicial authority to issue warrants is, in any event, inapposite to our constitutional system of separate powers.

45. Judge Posner offers his view that "justices of the peace could issue search warrants, provided they were not general warrants," as proof of *inherent* judicial power, where the observation implies only that, aside from the search for stolen goods, statutory authorization was a condition precedent to issuance of other warrants. *Torres*, 751 F.2d at 878.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* Even that assumption is not right. Federal Rule of Criminal Procedure 54(c), not "assumption," defines "magistrate" to include district, appellate, and Supreme Court judges. FED. R. CRIM. P. 54(c).

50. Judge Posner argues that the power to issue a search warrant is a common law power in America, yet admits that, in the federal system as well as in state systems, criminal jurisdiction is derived from statutes. *Torres*, 751 F.2d at 879.

51. Judge Posner admits that criminal jurisdiction is derived from statute, yet argues that, before 1917, there was no general statutory authorization to issue federal search warrants and states that "it is hard to believe that before federal search warrants and states that "it is hard to believe that before then [1917] no warrants were issued outside of the few specific areas in which Congress had explicitly authorized their issuance." *Torres*, 751 F.2d at 879.

It is no wonder that Judge Posner ends the discussion with an act of contrition. "We shall not pretend greater certainty than we feel that federal courts can authorize new types of search without statutory authorization, though *United States v. New York Tel.* is powerful authority."<sup>52</sup> For what authority *New York Tel.* stands Judge Posner does not say, but it certainly does not stand for the proposition he is defending. As Judge Posner himself confessed: "The historical evidence we have marshaled is, as so commonly is the case, incomplete and enigmatic . . . ."<sup>53</sup> This statement surely overstates the case in Judge Posner's favor and ignores all the straightforward evidence against his case that he fails to marshal. The historical evidence is clear, not enigmatic: courts do not have inherent authority to issue search warrants.

Judge Posner himself relates, as he depreciates, evidence for that conclusion. He concedes the absence of solid historical evidence for inherent authority—literally in his account of early criminal procedure,<sup>54</sup> and implicitly when he merely presumes such authority in the historical corpus.<sup>55</sup> In fact, the historical evidence shows that, save for the warrant to search for stolen goods, courts issued warrants only where they were authorized by statutes.<sup>56</sup>

It helps at this juncture to recall the traditional view of warrants. According to one commentator, Thomas Cooley, they are "a species of process exceedingly arbitrary in character, and which ought not be resorted to except for very urgent and satisfactory reasons . . . [and] they are only to be granted in the cases expressly authorized by law."<sup>57</sup> This merely reflected the principle expressed in *Entick*<sup>58</sup> and, with deference to Judge Posner, received into federal constitutional law in *Boyd v. United States*.<sup>59</sup> Available evidence indicates that state and federal practice required an enabling act to issue a warrant, save for the search for stolen goods.<sup>60</sup> Until 1917, when Congress

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52. *Id.* at 879-80.

53. *Id.* at 880.

54. Judge Posner concedes that *Entick v. Carrington*, 95 Eng. Rep. 807 (K.B. 1765), has stood as precedent for the proposition that statutory authority was required in England for issuing all search warrants except those for stolen goods. *Torres*, 751 F.2d at 878.

55. See *supra* note 51 and accompanying text.

56. *Entick*, 95 Eng. Rep. 807. See also *United States v. Finazzo*, 583 F.2d 837, 842-44 (6th Cir. 1978) (stating that, in absence of statutory authority, judge did not have power under the fourth amendment to authorize a break-in to install listening device). See generally *United States v. New York Tel. Co.*, 434 U.S. 159 (1978) (Court ruled that 1968 electronic surveillance statute did not implicitly provide federal judges with power to issue search warrants authorizing federal agents to install pen registers on telephone lines, but held that Fed. R. Crim. P. 41 *did* authorize courts to issue such warrants). The stolen goods exception goes back to Roman law and seems to have crept into the common law tradition without solid justification. N. LASSON, *supra* note 41, at 17-18.

57. T. COOLEY, 1 A TREATISE ON CONSTITUTIONAL LIMITATIONS 303-04 (De Capo reprint ed. 1972) (1868).

58. 95 Eng. Rep. 807 (K.B. 1765).

59. 116 U.S. 616 (1886).

60. T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 56-57 (1969). Accord T. COOLEY, *supra* note 57 and accompanying text.

passed the first general enabling act, search warrants were restricted to revenue, counterfeiting, and a few other cases.<sup>61</sup> Judge Posner noted, but discounted, the beliefs of congressmen and the attorney general that, without the new statute, federal courts were confined to specific statutory grants.<sup>62</sup> Congress similarly authorized search warrants for "mere evidence" after the Supreme Court, in 1967,<sup>63</sup> overturned ancient precedent and squared such searches with the fourth amendment. Most fatefully, Judge Posner ignored two recent judicial expositions of the subject.<sup>64</sup> Justice Stewart, for example, in his concurrence in *New York Tel.*,<sup>65</sup> affirmed the traditional view of limited inherent authority.<sup>66</sup> We are thus left with the warranted suspicion that even Judge Posner knows that some sleight of hand is necessary to keep our fourth amendment organizing principles intact. This strongly suggests that something is awry in our organizing principles.

## II. THE RATIFIERS' VIEW OF THE FOURTH AMENDMENT AS A GUIDING INTERPRETIVE PRINCIPLE

The fourth amendment as ratified reads as follows:

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.<sup>67</sup>

However, the "fourth amendment" approved by the House Committee of the Whole ("the Whole") read this way:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized.<sup>68</sup>

61. See Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 380 (1920).

62. *Torres*, 751 F.2d at 879.

63. *Warden v. Hayden*, 387 U.S. 294, 300-01 (1967) (rejecting distinction between searching for "mere evidence" and searching for instrumentalities, fruits of crime, or contraband).

64. See the extraordinarily able opinion by Judge Merritt in *United States v. Finazzo*, 583 F.2d 837 (6th Cir. 1978); see also *United States v. New York Tel. Co.*, 434 U.S. 159 (1977).

65. 434 U.S. 159 (1977).

66. *Id.* at 178 (Stewart, J., concurring).

67. U.S. CONST. amend. IV.

68. 1 ANNALS OF CONG. 783 (Gales and Seaton ed. 1834) (emphasis added). This draft was indistinguishable from that submitted originally by Madison:

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.

*Id.* at 452.

If the fourth amendment actually read as does the version originally approved by the Whole, my argument could rest comfortably upon the undeniable meaning of the text. Even some distinguished commentators sympathetic to the modern judicial corpus<sup>69</sup> concede that there is but one clause above the warrant clause introduced by an enveloping desideratum with no operative significance. However, not all distinguished commentators are this sympathetic. Yale Kamisar, for example, says that even if the warrant clause alone were ratified, a judge would properly add to it an operative reasonableness clause.<sup>70</sup> But whatever may explain such a move, it is not any theory of constitutional interpretation. Professor Kamisar's view is an example not of interpreting this Constitution, but of writing a different one. If *any* distinction between judicial interpretation of *this* Constitution—what most people mean by “constitutional law”—and simply creating another Constitution is retained, then Professor Kamisar's suggestion cannot be considered a proposal about constitutional law. It is instead an exercise in political theorizing, perhaps a prolegomenon to drafting a new Constitution. Of course, that does not prevent otherwise rational people from clinging to it—in a regime of substantive due process even the oxymoronic is common fare. But I, for one, cannot accept whimsical constitutional law, at least not on this side of Wonderland.

Nonetheless, a sound, but simple, proposal about interpreting the fourth amendment as ratified is this: the fourth amendment should be interpreted as if it read precisely like its cognate as quoted above. The cognate accurately captures the “plain meaning” of the fourth amendment, “historically recovered,”<sup>71</sup> which I shortly defend as the appropriate test of constitutional interpretation. The cognate has other virtues. One is that it is the only version consciously agreed to by the House of Representatives in 1789.<sup>72</sup> In fact, the House, sitting as a Committee of the Whole, rejected, “by a considerable majority,” Representative Egbert Benson's suggestion to change the wording from the above to that eventually ratified.<sup>73</sup> Representative Benson then chaired a Committee of Three charged only with arranging the many amendments approved by the Whole for final House passage.<sup>74</sup> Benson's group reported the amendment as it now appears,<sup>75</sup> in the form which

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69. N. LASSON, *supra* note 41, at 100.

70. Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a 'Principled Basis' Rather Than an 'Empirical Proposition'?*, 16 CREIGHTON L. REV. 565, 574 (1983) (stating that even if fourth amendment had been literally aimed exclusively against general warrants, courts would still have interpreted the amendment to “prohibit indiscriminate, arbitrary and unjustified warrantless searches as well”) (emphasis in original).

71. For a fuller exposition of that methodological proposal, see G. Bradley, *Plain Meaning, Historically Recovered: Restoring the Constitution to Constitutional Law* (1988) (unpublished manuscript).

72. 1 ANNALS OF CONG. 783 (Gales and Seaton ed. 1834).

73. *Id.*

74. *Id.*

75. 1 HOUSE JOURNAL 89 (Aug. 24, 1789).

the House had previously rejected. The House apparently never noticed the substitution.

Benson's error or subterfuge, however, admittedly is not a reason to whittle a clause from the fourth amendment. Nor is the amendment's validity dubious: the Senate accepted Benson's substitute<sup>76</sup> and later both the House and Senate formally, if indifferently, enacted it.<sup>77</sup> The states eventually ratified Benson's version and it remains the one that appears in all our textbooks. The significance of Benson's error lay elsewhere. That the House agreed to a one clause amendment, and never attentively to anything else, is suggestive of the manner in which to interpret the amendment as ratified. It suggests that the amendment as ratified differs only stylistically, and not substantively, from the cognate. If Benson's switch indicated more, even someone in a concededly inattentive House would have noticed.<sup>78</sup> Why then did the Committee of the Whole originally care enough to exhibit a strong preference<sup>79</sup> for the cognate? This was most likely because it reflected the intended meaning a little better than Benson's version. Thus, the meaning of the fourth amendment apprehended by both Congress and subsequently by state ratifiers remains that which was more clearly conveyed by the cognate.

Why do we care about the text and its "apprehended meaning" at all? Because ratification is the key event. Congress proposes amendments, the state legislatures enact them. The fourth amendment had no legal significance until ratified by three-quarters of the states.<sup>80</sup> Madison was only one of the first to recognize the implications for constitutional law. Speaking of this "proposal-ratification" relationship between the Philadelphia Framers and the ratifying conventions he remarked:

As a guide in expounding and applying the provisions of the Constitution, the debates and incidental decisions of the Convention can have no authoritative character . . . . The legitimate meaning of the Instrument must be derived from the text itself; or if a key is to be sought elsewhere, it must not be in the opinions or intentions of the Body which planned and proposed the Constitution, but in the sense attached to it by the people in their respective State Conventions where it recd. all the Authority which it possesses.<sup>81</sup>

John Hart Ely rightly amplified Madison's observation: only the language is ratified,<sup>82</sup> not the opinions of even the most prominent proponents of the

76. 1 SENATE JOURNAL 103 (Aug. 25, 1789).

77. See 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1787-1870 321-23 (U.S. Bureau of Rolls and Library microfiche 1894) [hereinafter DOCUMENTARY HISTORY].

78. This "inattentiveness" is further described and explained in *infra* Part III.

79. The term "strong preference" is intended to denote only the decisive defeat of Benson's substitute, by a large number of votes. I do not mean to suggest a deep hostility to Benson's provision; in fact, I believe the opposite was more the case.

80. See U.S. CONST. art. V.

81. C. WOLFE, THE RISE OF MODERN JUDICIAL REVIEW 34 (1986) (quoting James Madison).

82. Only the language of the federal Bill of Rights was submitted to the states for ratification,

amendments, nor predecessor proposals in Congress even if preferred by the House to the language actually ratified. The lesson is one consistently confirmed by the Supreme Court: the search for constitutional meaning is for the meaning apprehended by the ratifiers.<sup>83</sup> Thus, theoretical considerations force us toward the accessible public meaning of constitutional terms and away from exotic definitions or private renditions. "Theoretical considerations" are the conditions or attributes which lend political legitimacy and constitutional authority to a text—in this case, the fourth amendment.

Madison appreciated a lesson apparently lost on us: constitutional meaning is inseparably tied to the ratification process which transforms a proposal into a fundamental principle denying ordinary majorities a legislative option they otherwise would possess. The ratifiers, not privy to congressional intrigue, look squarely at language, and only the language, and make a deliberate decision to submit to it. The process *presupposes* that ratifiers can translate the proposals into some identifiable class of state actions whose outlawing is the question. Henry Monaghan writes: "a constitutional amendment is a *conscious* alteration of the frame of government whose major import should be reasonably apparent to those who gave it life."<sup>84</sup> One must presume that ratifiers have some understanding of the provisions they ratify, especially where, as was the case with the Bill of Rights, ratification was so extraordinarily casual.<sup>85</sup> One must suppose, at least as a working principle, that when the ratifiers looked at the proposed sixth amendment, which became fourth when the first two proposals failed to secure ratification, they recognized in it an agreeable limit on possible outcomes of the legislative process.

One objection to this reading of the fourth amendment is probably apparent. If the text is actually so decisive, how can the two clauses ratified be trimmed through the use of interpretation of the one clause originally approved by the House, at least without resort to Posnerian sleight of hand? A clever, although inadequate, response would turn the argument against its makers because these same commentators are almost certainly on record as critical of any historically-grounded interpretive method which focuses on text; they therefore cannot in good conscience rely on it for critique. There is doubtlessly a great affinity between suspicion of a "plain meaning" approach to constitutional law and a contrasting technique which blithely ignores, bludgeons, or rewrites constitutional language as the occasion demands. The "due substance" clause is one example, and there are many

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with no accompanying explanation, elaboration, or report. See J. Ely, *DEMOCRACY AND DISTRUST* 27 (1980).

83. See, e.g., *Maxwell v. Dow*, 176 U.S. 581, 601-02 (1900).

84. Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L. L. REV. 117, 127 (1978).

85. For a discussion of that casualness, see G. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* 111-18 (1987) (reporting that ratification of the Bill of Rights was apparently anticlimactic, with newspaper editors and men in the nation's capital paying little attention to event).

examples closer to the point. Anyone, for example, who believes "administrative warrants"<sup>86</sup> are consistent with the fourth amendment, much less required by it, has long since ceased to take constitutional language and its originating context seriously.

The more adequate response, however, is that the objection implicitly but necessarily equates "textualism" with an undifferentiated "literalism," commonly called, in another context, "fundamentalism." The equation of these two approaches is always incorrect and the objection as proposed is steeped in literalism, rather than based on a principled textualism, as is the interpretation proposed in this Article. The claim here is *not* that the fourth amendment contains "one" rather than "two" clauses. The claim is that the enumerated requisites of a valid warrant form the only operative portion of the amendment. The "reasonableness clause" is a second clause, but one which has no *operative* significance. This claim implies not that the reasonableness clause is non-existent or meaningless, but rather that its purpose is simply not the same as that of the warrant clause. Nelson Lasson's interpretation typifies the unjustified assumption animating the objection to this claim: from Benson's substitution of "and" for "by," Lasson concludes that the two clauses have identical purposes.<sup>87</sup> Nowhere, however, does he justify this leap in reasoning.

The nature of the leap can be profitably compared to a standard critique of biblical "fundamentalism." Fundamentalists are not distinguishable from other believers for their belief that the Bible is true. Fundamentalists are distinguishable because they take nearly all of the Bible as *literally* true; a truth rising to the level of scientific or historical accuracy. The Book of Genesis, for example, is said to depict historical events; scientific or historical doubts amount to assertions that Genesis is false. Non-fundamentalists who believe the Bible to be true distinguish passages which are intended to convey historical or scientific "truths" from other passages possessing, and usually intended to convey, literary or poetic truth, and from still others exclusively concerned with spiritual truths.

Applying this comparison to law, the Supreme Court's decision in *United States v. Nixon*<sup>88</sup> yields the high watermark of judicial fundamentalism. In *Nixon*, the President's lawyer urged that "executive privilege" was a constitutionally sound principle *and* that its scope, for various reasons, was a matter for presidential determination.<sup>89</sup> A unanimous Court accepted the first claim but scoffed at the second. The *Nixon* Court relied on *Marbury v. Madison*,<sup>90</sup> which had stated in another context that "[i]t is emphatically the province and duty of the judicial department to say what the law is."<sup>91</sup>

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86. See *supra* note 22 and accompanying text.

87. N. LASSON, *supra* note 41, at 103.

88. 418 U.S. 683 (1974).

89. *Id.* at 703.

90. 5 U.S. (1 Cranch) 137 (1803).

91. *Id.* at 177.



In other words, *all* constitutional provisions are addressed to the judiciary, *all* charge the judiciary with final interpretive authority, and *no* constitutional provision may finally be interpreted by another branch of government.<sup>92</sup>

The *Nixon* Court evidently forgot that not all constitutional provisions have the same purpose, function, or partake of the same "truth." Some, like the provision for federal assumption of state debts incurred under the Articles of Confederation,<sup>93</sup> had practical significance but no longer do. Some provisions are addressed exclusively to the political branches. The Senate's role in impeachment trials,<sup>94</sup> and the House's power to expel members,<sup>95</sup> are two examples; the "General Welfare" modifier of the Spending Power<sup>96</sup> is another. The preamble<sup>97</sup> has never been understood to state legally operative rules of law at all. For a hundred and more years, the extradition clause<sup>98</sup> contained a judicially unenforceable exhortation to state governors.<sup>99</sup> The ninth<sup>100</sup> and tenth amendments<sup>101</sup> present another kind of "truth." But, at least for the bulk of constitutional history,<sup>102</sup> they have been understood

92. See G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 25-29, 377-98 (11th ed. 1985).

93. "All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation." U.S. CONST. art. VI, cl. 1.

94. "The Senate shall have the sole Power to try all Impeachments." U.S. CONST. art. I, § 3, cl. 6.

95. "Each House may . . . with the Concurrence of two thirds, expel a Member." U.S. CONST. art. I, § 5, cl. 2.

96. "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . ." U.S. CONST. art. I, § 8, cl. 1. See also *Buckley v. Valeo*, 424 U.S. 1, 90-91 (1976) (holding that general welfare clause is a liberal grant of spending power rather than a limitation on spending power).

97. U.S. CONST. preamble.

98. "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up to be removed to the State having Jurisdiction of the Crime." U.S. CONST. art. IV, § 2, cl. 2.

99. *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 108-10 (1861) (articulating federal inability to "enforce" extradition clause), *abandoned by*, *Puerto Rico v. Branstad*, 483 U.S. 219 (1987).

100. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

101. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend X.

102. There are tantalizing references to the ninth amendment in cases such as *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965) (Justice Douglas used ninth amendment, as well as first, third, fourth and fifth amendments to strengthen his plurality decision that specific guarantees in the Bill of Rights have penumbras surrounding them which give expanded rights to individuals and collectively introduce inherent constitutional right to privacy). As far as I can tell, however, the ninth amendment has never been the basis for a Supreme Court holding. For the present status of the tenth amendment as a "truism," see *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). The *Garcia* Court stated: "[T]he Commerce Clause

to express something otherwise implicit in the Constitution. They say something, but not something new or independently operative.

The second amendment<sup>103</sup> presents an example of still another type of provision, one most akin to the fourth. Its first clause, “[a] well regulated militia, being necessary to the security of a free state,” states a principal which justifies or explains a rule of law. The rule of law is in the succeeding clause: “the right of the people to keep and bear arms, shall not be infringed.” An additional twist: even this rule of law probably does not state an individual but instead a collective right “of the people.” No individual right over or against the wishes of the people is implied.<sup>104</sup> Nor does it provide a judicially available, substantive principle of limitation upon legislative action. These final three types of provisions: 1) making express something otherwise inferable; 2) creating prefatory or explanatory language rather than operative language; and, 3) providing a collective right rather than individual right, are all intuitively plausible accounts of the meaning of the reasonableness clause. None authorizes courts to do anything.

This intuitively plausible reconciliation of “plain meaning, historically recovered” and an “invisible” reasonableness clause is enough to warrant further investigation of the historical sources. Do the sources show one or more of the above interpretive possibilities to be the “meaning apprehended by the ratifiers?” What unobjectionable, comprehensible limit on federal power did they “see” in the text submitted to them?

### III. THE MEANING OF THE FOURTH AMENDMENT APPREHENDED BY THE RATIFIERS

“Mr. Madison has introduced his long expected amendments,”<sup>105</sup> Massachusetts’ Fisher Ames wrote during the early stages of the First Congress. Ames probably knew that Madison had previously announced his intention to seek citizen protection from “general warrants.”<sup>106</sup> Madison carried out his intention by submitting the “single clause” cognate quoted earlier. Ames related his apprehension of its meaning: “It contains [an] . . . exemption from general warrants.”<sup>107</sup> This constitutes the *prima facie* case supporting a disappointed Nelson Lasson’s confession.<sup>108</sup> The meaning of the cognate

by its specific language does not provide any special limitation on Congress’ actions with respect to the States . . . [but] [b]ehind the words of the constitutional provisions are postulates which limit and control.” *Id.* at 547 (quoting *Monaco v. Mississippi*, 292 U.S. 313, 322 (1934)).

103. “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II.

104. See discussion in J. NOWAK, R. ROTUNDA, & N. YOUNG, *CONSTITUTIONAL LAW* 316 n.4 (3d ed. 1986).

105. 1 *WORKS OF FISHER AMES* 52-53 (S. Ames ed. 1854).

106. See *Boston Independent Chronicle*, Feb. 26, 1789 (quoting Madison’s wish “to see the fullest provision on . . . general warrants”).

107. 1 *WORKS OF FISHER AMES*, *supra* note 105, at 52-53.

108. See *supra* note 69 and accompanying text for a discussion of Lasson’s admission that the original version of the fourth amendment did not contain a judicially operative reasonableness clause.

form apprehended by informed observers like Ames and Madison was that no general warrants should issue.

The remaining analytical agenda may be organized around two questions. First, was Ames' apprehension of the cognate that of his ratifying contemporaries? Second, did Benson's later switch affect that apprehension? The answers to these questions are, respectively, yes and no. Ames' view was representative of his cohorts' views in that Madison's version banned only general warrants, and to those who ratified the amendment the language as altered meant the same thing.

Ames remarked that Madison "hunted up all the grievances and complaints of newspapers, all the articles of conventions, and the small talk of their debates."<sup>109</sup> Independent examination of all Madison's congressional proposals verifies this claim. Madison indeed drew his formulation from the demands of the 1788 state conventions which recommended or demanded amendments as the price of ratification.<sup>110</sup> This action made perfect political sense. President Washington also appealed in his greeting to Congress for ratification of those amendments "rendered expedient" by the "nature of objections which have been urged against the system, or by the degree of unrest which has given birth to them."<sup>111</sup> Madison admitted to Jefferson on another occasion that he never viewed a bill of rights "in an important light" but might favor one amendment for no other reason than that "it is anxiously desired by others."<sup>112</sup> The political dynamic which produced the Bill of Rights, including the fourth amendment, was therefore one of "demand-response." Ames was hardly alone in viewing the entire exercise as little more than political posturing, bordering on demagoguery. "On the whole, it may do some good toward quieting men who attend to sounds only, and may get the movers some popularity, which he wishes," he confided to his correspondent, Timothy Dwight.<sup>113</sup>

Representative George Clymer, among others, sarcastically observed that Madison was merely throwing a "tub or a number of tubs" to the whale, a metaphor derived generally from seafaring lore, and from Jonathan Swift in particular.<sup>114</sup> It meant a diversion to avoid real danger. By this statement, Clymer was noting that Madison's personal liberty amendments would short-circuit demands for the structural alterations which were the real objectives of the Constitution's anti-federalist adversaries.

In such instances, the intentions of the whale (the anti-federalists) are more important than those of the ship's crew (the First Congress, especially

109. 1 WORKS OF FISHER AMES, *supra* note 105, at 52-53.

110. I. BRANT, *THE FOURTH PRESIDENT, A LIFE OF JAMES MADISON* 264 (1954).

111. See 1 ANNALS OF CONG. 29 (Gales and Seaton ed. 1834).

112. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 423 (1865).

113. 1 WORKS OF FISHER AMES, *supra* note 105, at 52-53.

114. See Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 497 n.251 (1983).

Madison). What does the whale demand? What will satisfy him and make him go away? The hermeneutical implication is *not* substitution of such evidence for the plain meaning of the text. Rather it is to "historically recover" that meaning by locating it in the rush of events and decisions which begot the words themselves.

Contemporary Supreme Court practice is in accordance with this approach. The Justices regularly seek interpretive assistance in fourth amendment cases by identifying the "evils" which the constitutional principle was designed to eradicate. In *United States v. Chadwick*,<sup>115</sup> for example, the Court stated that "the Fourth Amendment's commands grew in large measure out of the colonists' experience with writs of assistance and their memories of general warrants formerly in use in England."<sup>116</sup> When this judicial observation is joined with those regarding Madison's proposal, a fourth amendment pedigree emerges. Historical experience with identifiable government enforcement practices forged a consensus among the founding generation that those practices were oppressive, unjust, and unreasonable. That consensus percolated through the legal corpus of the era<sup>117</sup> and provided fertile ground for anti-federalist rhetoricians. Stated differently, the fourth amendment ameliorated a popular objection sufficiently widespread to make favoring it a safe platform for the Constitution's critics and indifference to it a serious liability for its defenders.

Given the above consensus, discussion of these enforcement practices is warranted. Colonial resistance to oppressive customs duties, known as smuggling from the Tory point of view, was the pragmatic incubator which spawned the fourth amendment.<sup>118</sup> Because the patriots responded unsympathetically to various imperial revenue-raising measures in the 1760's and 1770's, crown authorities resorted to extraordinary enforcement means, including "writs of assistance" to search for smuggled goods. In his seminal 1920 article,<sup>119</sup> Osmond Fraenkel stated that these writs "much resembled" general warrants.<sup>120</sup> The relationship between the two forms is actually that of species to genus: writs of assistance were a type of general warrant. This infamous writ, apparently the only regularly used general warrant in the colonies,<sup>121</sup> partook of "generality" by its failure to specify the place to be searched or the items to be seized.<sup>122</sup> A difference in duration distinguished

115. 433 U.S. 1 (1977).

116. *Id.* at 7-8.

117. See notes 120-32 and accompanying text.

118. See N. LASSON, *supra* note 41, at 50-53; Fraenkel, *supra* note 61, at 364.

119. See Fraenkel, *supra* note 61.

120. *Id.* at 364.

121. At least the narratives supplied by Lasson and Fraenkel, *supra* note 118, plus the material developed *infra* in part III of this article, reveal complaints only about writs of assistance.

122. General warrants were used in Britain to ferret out seditious publications, including those at issue in *Entick v. Carrington*, 95 Eng. Rep. 807 (K.B. 1765). See Fraenkel, *supra* note 61, at 362-63.

writs of assistance from other general writs, and increased their oppressiveness: they were good for the lifetime of the reigning sovereign plus six months, the duration being unaffected by the death of any Commissioner named therein.<sup>123</sup> Thus there could be no return on the writ as we now understand that term: when was execution complete? Writs of assistance, however, although exempting land structures from night-time invasion, did not authorize arrests.<sup>124</sup>

Originally authorized by a Statute of Charles II,<sup>125</sup> the writ is most easily understood as one authorizing the use of "assistants." Its primary function was to order local officials, the sheriff, for example, to assist the crown's agent in the latter's search for smuggled goods.<sup>126</sup> An implicit effect was thus to clarify the agent's authority to search houses and vessels in the first place. Agents enjoyed authority to search wherever they suspected concealed goods to exist. "Suspicion" was practically no restraint upon official discretion, but the scant cause required to search is not, the sources suggest, the distinguishing feature of general warrants.<sup>127</sup> General warrants were *not* "general" because of their failure to state adequate cause for suspicion, as celebrated British examples of general warrants in seditious libel cases illustrate.<sup>128</sup>

As a purely descriptive matter, it is easy to agree with the colonists that writs of assistance were "oppressive"; that is, they legitimated highly intrusive law enforcement techniques. That they were an ideal vehicle for harassment by petty officials, and fundamentally hostile to the substantive scheme being enforced, easily persuaded the revolutionists that such "general" writs should not be allowed. A famous, fiery denunciation of them by Massachusetts' James Otis<sup>129</sup> made clear that all three aspects rankled sufficiently, in John Adams' opinion, to touch off the War of Independence.<sup>130</sup> In any event, these objections hardened into a consensus, literally finding their way into various Revolutionary-era state constitutions, themselves the breeding ground of the federal Bill of Rights.

The Declaration of Independence provoked a flurry of state constitution drafting around 1776. Almost all the colonies *qua* states enacted fundamental charters, and most included a bill of rights.<sup>131</sup> Every bill of rights contained an unmistakable relative of the fourth amendment.<sup>132</sup> Given the common

123. J. QUINCY, QUINCY'S MASS. REPORTS 1761-72 397 (App. 1).

124. N. LASSON, *supra* note 41, at 54.

125. J. QUINCY, *supra* note 123, at 397.

126. *Id.* at 399 (complete specimen of such a writ).

127. *See* N. LASSON, *supra* note 41, at 95 n.61, 96 n.62.

128. *Entick v. Carrington*, 95 Eng. Rep. 807 (K.B. 1765).

129. N. LASSON, *supra* note 41, at 58-59.

130. *Id.*

131. Rhode Island and Connecticut were the exceptions.

132. Connecticut, for example, provided as follows: "No man's person shall be arrested—no man's goods shall be taken away from him, unless clearly warranted by the laws of this state." CONN. CONST. of 1776, *cited in* N. LASSON, *supra* note 41, at 82 n.17. Similarly,

American experience with writs of assistance and its resulting consensus, it is no surprise that all these provisions assuaged the three objections to British enforcement methods: 1) probable cause was the threshold to issuance instead of "suspicion"; 2) the application had to be given under oath prior to issuance; and, 3) particularity as to persons, places and things was required. These requirements, moreover, were constitutionally mandated and thus could not be changed by the legislature.

More instructively, the state declarations all had language above and beyond these three prerequisites to issuing warrants. Four formulations existed in the early national era, and all grew out of and responded to experience with general warrants. The variations, however, were limited by copy-cat drafting: Vermont<sup>133</sup> copied verbatim from Pennsylvania,<sup>134</sup> New Hampshire<sup>135</sup> from Massachusetts,<sup>136</sup> and North Carolina<sup>137</sup> from Virginia.<sup>138</sup>

Delaware provided:

Commissions shall run in the name of "The Delaware State," and bear test by the president. Writs shall run in the same manner, and bear test in the name of the chief-justice or justice first named in the commissions for the several courts, and be sealed with the public seals of such courts.

DEL. CONST. of 1776, art. 20, *cited in* 1 F. THORPE, THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES 566 (1901). *See infra* notes 133-39 for other examples.

133. Vermont, although not one of the thirteen original states, copied article 10 of the Pennsylvania declaration in its 1777 constitution and later repeated it in its declaration of 1786. N. LASSON, *supra* note 41, at 82.

134. That the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure, and therefore warrants without oaths or affirmations first made, affording a sufficient foundation for them, and whereby an 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.

PA. CONST. of 1776, art. X, *cited in* 5 F. THORPE, *supra* note 132, at 3083.

135. Compare N.H. CONST. of 1784, Bill of Rights Art. XIX, *cited in* 4 F. THORPE, *supra* note 132, at 2456 with *infra* note 136. The New Hampshire and Massachusetts constitutional provisions are almost identical.

136. Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, 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 persons 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.

MASS. CONST. of 1780, art. XIV, *cited in* 3 F. THORPE, *supra* note 132, at 1891.

137. That general warrants whereby an officer or messenger may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons, not named, whose offences are not particularly described, and supported by evidence are dangerous to liberty, and ought not to be granted.

N.C. CONST. of 1776, art. XI, *cited in* 5 F. THORPE, *supra* note 132, at 2788.

138. "[G]eneral warrants . . . not . . . supported by evidence, are grievous and oppressive, and ought not to be granted." VA. CONST. of 1776, Bill of Rights § 10, *cited in* 7 F. THORPE, *supra* note 132, at 3814.

Maryland had no emulators.<sup>139</sup> The last three mentioned, North Carolina, Virginia, and Maryland, expressly condemned general warrants. The other states also did so effectively, but with different expressions. Notwithstanding these differences, each of the four, Vermont, Pennsylvania, New Hampshire, and Massachusetts, contained *two* clauses. Moreover, they all shared the same basic structure which is similar to that of the fourth amendment: a general declaration, connected by "therefore" to a condemnation of specific practices constitutive of general warrants. Indeed, the Massachusetts and New Hampshire provisions were *virtually* identical to what was to become the fourth amendment. That none of these state provisions went further, as an operative matter, than outlawing general warrants is highly suggestive of the federal provision's meaning. That is, the founding generation was accustomed to looking at search and seizure constitutional provisions virtually indistinguishable from the fourth amendment, and those state provisions demonstrably did no more than ban general warrants.

Lasson reluctantly admits to this interpretation of the state regimes even as he strives to avoid the implication with respect to the fourth amendment. He states that the introductory clauses in the state provisions were "stated merely as a basis for the minor premise condemning general warrants and that the abuse attempted to be prevented was that of general warrants only."<sup>140</sup> The initial clauses were indeed "prefatory," but a look at the language itself makes it clear that they could not have been intended or understood to state an operative principle. The Pennsylvania and Vermont provisions, for example, began with "[t]hat the people have a right to hold themselves, their houses, papers, and possessions *free from search and seizure*, and therefore warrants without . . . ought not to be granted."<sup>141</sup> Lasson did not, and could not, suppose that "search and seizure" itself was unconstitutional in Pennsylvania and Vermont. Lasson adds: "By freedom 'from search and seizure' is obviously not meant all search and seizure, as the next clause attests. The word unreasonable is imputed."<sup>142</sup> The word unreasonable "must be" imputed *if* one is to read the introductory clause as a practical principle. But one need not, and should not, do that.

The Massachusetts provision offered an alternative, enunciating a "right to be secure from all unreasonable searches, and seizures . . ."<sup>143</sup> and possessed not only two clauses but two complete sentences. These two clauses,

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139. 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, art. XXIII, cited in 3 F. THORPE, *supra* note 132, at 1688.

140. N. LASSON, *supra* note 41, at 81 n.10.

141. See *supra* notes 133-34 for the text of these provisions (emphasis added).

142. N. LASSON, *supra* note 41, at 81 n.11.

143. See *supra* note 136 for full text.

however, did not signal any more practical or operative import than Pennsylvania's more compact form. That the Massachusetts provision functionally condemned only general warrants is apparent from its wording, which is virtually indistinguishable from our fourth amendment. It should also be noted that it is placed with the procedural, and not the substantive, guarantees of the Declaration of Rights, which is where the requirements of a valid warrant, but not an overreaching protection against invasions of privacy, belonged. What then *was* the purpose of the Massachusetts reasonableness clause? Ronald Peters' careful study of the 1780 Constitution<sup>144</sup> identifies in the Declaration of Rights at least three types of clauses.<sup>145</sup> Peters shows that the principle drafter, John Adams, was wont to introduce or explain, as if to justify, constitutional provisions by way of prefatory phrases.<sup>146</sup> Thus, the purpose of the Massachusetts reasonableness clause, as Lasson suspected, was a mini-preamble, tailored for the occasion.

Other state cognates, including "one-clause" versions, contained equivalent prefaces. Recall that the Massachusetts Constitution stated that general warrants were "contrary" to the right to be free from unreasonable search and seizure. Logically, that clause is commodious enough to house a range of unspecified privileges and the federal provision is now read in this manner. However, nothing more than the specifically condemned warrant practices need be meant. And, if the reasonableness clause is just as "operative" as the warrant clause, the warrant clause is redundant. If all "unreasonable" practices are generically foreclosed, surely any interpretation of "reasonable" sufficed to outlaw general warrants. Further, *if* the Massachusetts clause is read as we read the fourth amendment, a comprehensive guarantee followed by a mini-list of particularly infamous practices, it follows that Pennsylvania<sup>147</sup> and Vermont<sup>148</sup> must be presumed to render unconstitutional "search and seizure"; Virginia all "grievous and oppressive" practices;<sup>149</sup> North Carolina all government action "dangerous to liberty";<sup>150</sup> and Maryland all "illegal" practices.<sup>151</sup> These are the comparable "rhetorical"—i.e., non-operative—passages of the search and seizure amendments in those states that simply do not provide the same "truth" as the warrant clauses. They are obviously not pragmatic statements. "Dangerous to liberty" suffices to describe the purpose of written constitutions.<sup>152</sup> If "oppressive" practices could somehow be vanquished by declaring them outlawed, why proceed further with Constitution drafting? Compared with its sister states' provisions, the Massa-

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144. R. PETERS, *THE MASSACHUSETTS CONSTITUTION OF 1780, A SOCIAL COMPACT* (1978).

145. *Id.* at 46.

146. *Id.* at 14.

147. *See supra* note 134.

148. *See supra* note 133.

149. *See supra* note 138.

150. *See supra* note 137.

151. *See supra* note 139.

152. *See supra* note 137.



chusetts "reasonableness clause" is but a variation on their common theme. The theme is the flip-side of saying general warrants are iniquitous and "ought not to be granted." General warrants are bad because they are "oppressive," "dangerous," "illegal," and "unreasonable."

There are additional ways in which to show that by the time the fourth amendment was drafted and ratified, its reasonableness clause, like that of Massachusetts, was apprehended by its ratifiers to convey no operative content. One way is to explore just what Americans thought their various state constitutions meant by examining state judicial search and seizure regimes crafted in their light. No state court during the Confederation era, for example, ever ground a decision in the "rhetorical" portions of the amendments. The only surviving reported decision from the era was a Connecticut opinion condemning a "general" warrant.<sup>153</sup> This scant indication can be amplified by a detailed examination of legislative activity under the constraints of the search and seizure amendments just described. State legislatures in *all* national jurisdictions, from the Revolution through the enactment of the fourth amendment, statutorily empowered enforcement officials to engage in warrantless stops, searches, and seizures of persons as well as goods upon mere suspicion.<sup>154</sup> That is, the states regularly authorized

153. *Frisbie v. Butler*, Kirby 213 (Conn. 1787).

154. *See, e.g., Connecticut—THE FIRST LAWS OF THE STATE OF CONNECTICUT* 214-15 (Cushing ed. 1982) (1751 Act) (authorizing sheriffs, constables, grand jurors, and tithing men to arrest without a warrant, upon sight or knowledge, persons traveling unnecessarily on the Sabbath); *id.* at 224 (1784 Act) (authorizing sheriffs to arrest without a warrant those disturbing the peace); *id.* at 80-81 (1750 Act) (authorizing justices, upon complaint of forcible entry into any house, to go to house and arrest such offenders without a warrant); *id.* at 258-59 (1750 Act) (permitting constables and grand jurors, on public days of religious solemnity, to search all places suspected of harboring any persons assembled contrary to law); *id.* at 23 (1750 Act) (authorizing constables to arrest without a warrant, upon sight or present information of others, persons guilty of drunkenness, profane swearing, Sabbath breaking, vagrants, and unseasonable nightwalkers); *CONN. LAWS*, tit. 87, An Act to Prevent Horse-Racing, and to Repeal the Existing Statute on that subject (Passed Oct. 1803) (authorizing constables and grand jurors to seize without a warrant any horse used in a race upon which a bet was laid within six months of placing of bet); *ACTS AND LAWS OF THE COLONY OF CONNECTICUT 1716-1749* 293 (Bates ed. 1919) (1723 Act) (authorizing constables to enter and search any tavern, to break open any lock or door if necessary, and to arrest offenders of the Act who refuse to depart when commanded);

Delaware—2 *THE FIRST LAWS OF THE STATE OF DELAWARE*, pt. 2, ch. 134, § 2, at 1355 (Cushing ed. 1981) (1797 Act) (authorizing state-appointed physician to board ships carrying passengers); *id.* at pt. 2, ch. 97, § 18, at 1246 (1796 Act) (authorizing inspectors and their deputies to board vessels docked in the ports of New Castle and Port-Penn that store at least 50 casks of flour and to inspect the flour); *id.* at pt. 2, ch. 97, § 5, at 1241 (1796 Act) (authorizing inspectors and their deputies, upon suspicion or request of the buyer, to inspect casks of flour for sale in the state);

Georgia—*DIGEST OF THE LAWS OF THE STATE OF GEORGIA 1755-1800* 411 (Marbury & Crawford eds. 1802) (Act Passed Mar. 4, 1762) (authorizing church wardens and constables to walk through their towns twice on Sunday, to arrest any offenders of Sabbath laws, and to enter any public house to search for offenders); *id.* at 252 (authorizing justices of the peace and

“general” warrantless searches. The only thing legislators did *not* authorize

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constables, upon information from any credible person or upon personal knowledge or having reasonable or just cause to suspect that persons are gaming in any licensed public house, to go to such house with two credible persons, demand admittance, and upon refusal, to break open the doors, and to arrest any persons gaming);

Maryland—THE FIRST LAWS OF THE STATE OF MARYLAND, ch. 2 (Cushing ed. 1981) (1777) (permitting any person to arrest without a warrant persons suspected of being deserters and to carry them before a justice of the peace for examination); *id.* ch. 20 (1777) (authorizing governor, council, and magistrates, on their own knowledge or on information that any male 18 years or older who is a fugitive from another state has taken shelter in this state, to arrest such persons); *id.* ch. 23 (1778) (permitting warrantless arrest, during an invasion of the state or adjoining state, of any person whose going at large there are good grounds to believe will be dangerous to the state); *id.* ch. 17 (1782) (authorizing special commissioners to enter upon lots, grounds, and possessions of any person, through which common sewers run or ought to run);

Massachusetts—MASS. LAWS, ch. 45, § 2, at 812-13 (T.B. Wait & Co. ed. 1814) (1777 Act) (authorizing sheriff, under an arrest warrant issued against persons who pose a threat to the safety of the commonwealth, to break and enter any dwelling that he suspects is harboring such persons); *id.* ch. 51, § 1, at 828-29 (1779 Act) (authorizing selectmen and committees of correspondence members to stop and search any team of horses or boat suspected of violating the Act by transporting certain articles out of the state); MASS. GEN. LAWS 1780-1798, ch. 67, § 6, at 520, col. 1, (Boston ed. 1823) (Act passed Mar. 7, 1797) (authorizing inspector to seize without a warrant any baskets used for measuring coal that fails to conform to Act standards); *id.* ch. 30, § 2, at 170 (1784 Act) (authorizing state-council-appointed surveyors to board vessels and conduct warrantless searches of casks of flax seed to inspect for compliance with the Act); *id.* ch. 25, § 2, at 201 (Act passed Nov. 8, 1785) (authorizing inspectors to board vessels and conduct warrantless searches of tobacco intended for exportation); MASS. GEN. LAWS, ch. 43, § 6 (Boston ed. 1814) (Act passed May 1776) (permitting selectmen of each town to seize citizens' guns for the army's use if receipt for reimbursement is given); MASS. LAWS 1780-1798, ch. 8, § 4, at 391 (Wells, Lilly, Cummings & Hilliard ed. 1823) (authorizing inspectors to board vessels and to conduct warrantless inspections of pot and pearl ashes shipped for exportation and to seize casks of pot and pearl ashes that are not branded according to the Act's requirements); *id.* ch. 71, § 3, at 497 (authorizing citizens who find shellfish that have been taken from their town and placed on board a noncitizen's boat to seize such shellfish and keep it for up to 48 hours, at which time it must be attached by due process);

New Hampshire—THE FIRST LAWS OF THE STATE OF NEW HAMPSHIRE, ch. 1, at 85 (Cushing ed. 1981) (1777 Act) (authorizing sheriff, after demanding admittance, to break open any dwelling house or other building or apartment between sunrise and sunset in which he suspects any person required to be arrested by an arrest warrant under the Act is concealed); *id.* at 132-34 (1778 Act) (authorizing naval officers to go or send searches on board any ship at any time without a warrant to investigate compliance with the Act); 6 LAWS OF NEW HAMPSHIRE SECOND CONSTITUTIONAL PERIOD 1792-1801, ch. 10, at 593-94 (New Hampshire Secretary of State 1917) (1799 Act) (authorizing town and district officers to stop and forcibly detain persons they suspect of traveling unnecessarily on the Lord's Day, to investigate as to reasons for traveling, and if responses to such inquiries are insufficient, to detain persons until a regular trial can be held); 5 LAWS OF NEW HAMPSHIRE, FIRST CONSTITUTIONAL PERIOD 1784-1792, ch. 40, at 825 (New Hampshire Secretary of State 1917) (1791 Act) (authorizing inspectors to make warrantless searches of any ships in their jurisdiction to search for casks of pot or pearl ashes improperly branded, to seize any improperly branded casks, and to keep them until trial); *id.* ch. 14, at 263 (1787 Act) (authorizing impost officers or their deputies, without a warrant, to board any vessel coming into port in the state, to examine cargo and compare it with the duty report);

New Jersey—DIGEST OF THE LAWS OF NEW JERSEY 1789-1838, at 471 (Lucius Q.C. Elmer

were general warrants. We may presume courts issued no warrants because

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ed. 1838) (Act passed Feb. 24, 1797) (authorizing justices, sheriffs or constables, and other citizens commanded to give assistance to arrest without a warrant any rioters who fail to disperse after a verbal warning and one hour time period, and forthwith to bring those arrested before a justice); *id.* at 586 (Act passed June 10, 1799) (requiring constables and authorizing any other person to apprehend, without warrant or process, any disorderly person and to take him or her before the justice of the peace); *id.* at 414 (Act passed Mar. 11, 1774) (authorizing constables or any inhabitants of the colony to apprehend any idle vagrants or beggars wandering about the county and to bring them before justice of the peace); *id.* at 236 (Act passed Feb. 18, 1813) (permitting flour inspector to board any vessel between sunrise and sunset to search for flour or meal that he may have reason to suspect was shipped in violation of the Act); *id.* at 207 (Act passed Nov. 27, 1821) (authorizing inspectors to enter on board any ship without a warrant to search for herring shipped for exportation); *id.* at 587 (Act passed Mar. 16, 1798) (authorizing constable or other citizen to stop offenders of the Sabbath laws and to detain them until the next day, when they would be dealt with according to the law);

New York—1 N.Y. LAWS 1777-1784 629 (Weed, Parsons & Co. ed. 1886) (authorizing any person to seize unlawfully kept gunpowder found during any fire or alarm of fire and to keep it for his own use); *id.* at 601 (Act passed Mar. 22, 1784) (authorizing collectors, upon suspicion that a report from a vessel does not accurately reflect goods therein, to enter vessel and search for such goods and to seize any good not accounted for in the report); *id.* at 509 (Act passed July 22, 1782) (authorizing any person to seize all goods that are moving through the state and are thought to be from Great Britain); *id.* at 424 (Act passed Nov. 22, 1781) (authorizing state agent to seize without a warrant, for army use, all hogs fit for pork, grain, and forage, except what was required for the subsistence of families); *id.* at 359 (Act passed Mar. 26, 1781) (authorizing any person to arrest without a warrant hawkers or peddlers); *id.* at 114 (Act passed Mar. 5, 1779) (authorizing administrator of the government, by and with advice and consent of six legislature members, whenever he shall conceive emergency to require it, to authorize seizure of any flour, wheat, or meal in the state for use of the army, and to break and enter into any house, barn, or other place of storage if necessary); *id.* at 122 (Act passed Mar. 8, 1779) (authorizing warrantless seizure by any person of any goods within the power of the enemy brought into the state without permission from state administrator); *id.* at 19 (Act passed Mar. 14, 1778) (authorizing any district, precinct, or county committee or peace officer to seize and detain until trial any flour, meal, or grain suspected of being exported without special license and to seize and detain vessel, slaves, cattle, and carriages attempting to export such items); *id.* at 68 (Act passed Mar. 16, 1785) (authorizing inspectors to board any vessel in harbors of New York to search for flour shipped for exportation and seize any casks of flour not branded); *id.* at 666 (Act passed Apr. 23, 1784) (authorizing inspectors to board any vessel in their districts' harbors to search for and impost pot or pearl ashes); *id.* at 10 (Act passed Nov. 18, 1784) (authorizing appointed surveyor and searchers to go on board every ship coming into their port and to direct a land and tide waiter to remain until the duty is paid and longer if thought necessary); *id.* at 490 (Act passed Mar. 24, 1787) (authorizing sheriffs, deputy sheriffs, constable marshals, and watchman to arrest anyone seen breaking or carrying away glass lamps hung in front houses); 4 N.Y. LAWS 1797-1800, ch. 65, at 230 (Weed, Parsons & Co. ed. 1887) (Act passed Mar. 30, 1798) (requiring health officer to enter on board every vessel coming into port of New York and to make strict search, examination, and inquiry about health of those on board and into the state and condition of vessel and her cargo); *id.* ch. 70, at 395 (Act passed Mar. 30, 1799) (authorizing appointed inspectors, between sunrise and sunset, to enter into any building of any kind to examine state thereof, whenever they judge that the health of the city may require any regulations or alterations in that building); *id.* ch. 97, at 551 (Act passed Apr. 4, 1800) (authorizing inspector of flour and meal to enter on board any vessel between sunrise and sunset to search for flour or meal that he may have reason to suspect

they possessed no inherent warrant-issuing authority. In summary, there is

has been shipped contrary to the Act and to seize any so found);

North Carolina—2 THE FIRST LAWS OF THE STATE OF NORTH CAROLINA, ch. 4, § 2, at 405 (J. Cushing ed. 1984) (1780 Act) (authorizing commissioners to seize property of British sympathizers); *id.* ch. 4, § 6, at 406 (1780 Act) (authorizing sheriffs to seize plundered property brought in from South Carolina); *id.* ch. 4, § 7, at 413 (1781 Act) (authorizing commissioners, sheriffs, coroners, and justices, when confiscated property has been conveyed out of county, to find and seize such property); *id.* ch. 27, § 21, at 503 (1784 Act) (authorizing collectors of the duty on tonnage to go on board any vessel in order to examine and determine tonnage); *id.*, ch. 12, at 337 (1777 Act) (authorizing inspectors of tobacco to examine any tobacco brought to a public warehouse and authorizes any person to seize tobacco exported in violation of the Act);

Pennsylvania—THE FIRST LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 456 (J. Cushing ed. 1984) (1781 Act) (authorizing Inspector of Bread and Flour and his deputies to enter any ship to search for flour intended to be transported out of state); 3 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 1790-1802, at 177-83 (J. Bioren ed. 1810) ("An Act for the Prevention of Vice and Immorality, and of Unlawful Gaming and to Restrain Disorderly Sports and Dissipation") (1794) (authorizing justices and magistrates to cause to have arrested without a warrant offenders of the Act);

Rhode Island—RHODE ISLAND ACTS AND RESOLVES 1779 JAN. TO 1780 NOV. 6 (J. Carter printer) ("An Act To Prevent Desertion," passed Dec. 1779) (authorizing any male inhabitants of the state who detect deserters to arrest them); *id.* 1771 May (2d) to 1778 Dec., at 8 (Act of June 1778) (authorizing Intendants of Trade to search every vessel within their districts and to seize any quantity of provisions above that allowed); *id.* 1771 May(2d) to 1778 Dec., at 10 (Act of May 1778) (authorizing Major-General to arrest all persons who are suspected or known to be unfriendly to this state or to the United States); *id.* 1784 Feb. to 1785 Oct., at 27 (Act of May 1785) (authorizing Collector of Impost or Intendant of Trade, upon suspicion of any vessel failing to report contents of its hold, to board such vessel and examine the hold); *id.* 1784 Feb. to 1785 Oct., at 42 (Act of Oct. 1785) (authorizing Collectors of Impost to seize imported goods that are not weighed and marked as required under the Act and to seize vehicles carrying such goods); *id.* 1784 Fed. to 1785 Oct., at 16 (Act of Aug. 1784) (authorizing sworn packer of the state to inspect all casks of beef, pork, or fish before their sale and to mark them if merchantable); *id.* 1779 Jan. to 1780 Nov., at 15 (Act of July 1780) (authorizing any person to arrest without a warrant those persons who are furthering any unofficial correspondence with enemy);

South Carolina—5 THE STATUTES AT LARGE OF SOUTH CAROLINA 1786-1814 113-14 (Cooper ed. 1839) (1789 Act) (permitting state-appointed commissioners to erect warehouses where all tobacco being exported shall first be subject to inspection); 4 THE STATUTES AT LARGE OF SOUTH CAROLINA 1752-1786 550-52 (1783 Act) (authorizing justice of the peace to seize goods unlawfully taken away, or reasonably suspected to have been taken away, from stranded ships when unauthorized person attempts to sell goods);

Virginia—1 LAWS OF VIRGINIA, ch. 62, at 32 (S. Pleasants printer 1814) (Act of Nov. 16, 1792) (authorizing governor, with the advice of the state council, to cause to have arrested any suspicious persons who are subjects of lands that are at war with the United States); *id.* ch. 221, at 525 ("An Act to Amend the Act Entitled 'An Act to Prevent Unlawful Gaming'") (authorizing magistrates to seize all monies exhibited for purpose of betting); 12 STATUTES AT LARGE OF VIRGINIA 1785-1788 331-33 (W. Henning ed. 1823) (authorizing two or more justices of the peace and sheriff to arrest any rioters without a warrant).

It is also important to note that many statutes requiring the issuance of a warrant before certain searches and seizures do not require a probable cause determination and are in many cases "shorn" warrants. *See, e.g.*, 1 N.Y. LAWS 1777-1784, ch. 29, at 55 (Weed, Parsons & Co. ed. 1886) (Act passed Apr. 2, 1778) (authorizing commander of the army, during incursion

abundant evidence from the legislative behavior of the same political elites which produced the state constitutions that plenary legislative authority over search and seizure was constitutionally modified *only* by outlawing general warrants. There is certainly no record, and no reason to suspect unrecorded instances, of judicial enforcement of *any* norm stemming from a reasonableness clause.

Legislative practice is a measure, albeit approximate, of constitutional meaning. The Supreme Court has declared that the statutory record is powerful evidence of constitutional meaning.<sup>155</sup> This is especially true when the legislators whose practices are inspected were substantially the same men who drafted and ratified the constitutional provision. This is not to say that "governmental practice" should be substituted for the constitutional text, but it can be employed to provide some indication of the meaning of the text, in part by recourse to the "testimony" of conduct. One can say with some confidence, therefore, that the widespread understanding of politically informed Americans of their state search and seizure provisions was that they were nothing more than a prohibition of general warrants. It makes a good deal of historical sense that not even statutory "general" warrantless searches were prohibited. First, general searches with warrants were worse, from the citizen's point of view, than without them. That is because the warrant emboldened its executing officer as a statute did not. Part of the explanation resides in the familiar bromide, "a man's home is his castle." Historically, warrants functioned precisely to defeat that otherwise honored expectation of privacy.<sup>156</sup> Specific differences between a warrantless search and one sanctioned by a general warrant included the greater authority of the individual to physically resist the warrantless search,<sup>157</sup> and the effective defense to remedial lawsuits the warrant provided.<sup>158</sup> Second, legislative prerogative over search and seizure may seem contrary to our constitutional assumptions but was not so viewed by the Founders. The primary distinction has to do without our almost exclusive association of terms like "freedom," "liberty," and "rights" with the "autonomy" of individuals.<sup>159</sup>

It should be noted that the warrant clause operated as an initial practical matter solely upon the judiciary and curbed courts' common law authority to issue search warrants for stolen goods. The warrant clause, more importantly, operated derivatively upon the legislature: a ban on general warrants

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of the enemy, to issue a warrant at his discretion to take forage from any inhabitant of the state); MASS. LAWS, ch. 45, § 2, at 812 (T.B. Wait & Co. ed. 1814) (1777) (authorizing council to issue arrest warrants for any person whom council deems a threat to safety of the commonwealth); *id.* ch. 46, § 1, at 814 (requiring justices to issue arrest warrants against persons found to be traitors by a majority vote of the townspeople).

155. See, e.g., *Hampton & Co. v. United States*, 276 U.S. 394, 412 (1928).

156. See Fraenkel, *supra* note 61, at 361.

157. See N. LASSON, *supra* note 41, at 55.

158. See W. NELSON, *THE AMERICANIZATION OF THE COMMON LAW* 17 (1975).

159. See *infra* part V for a complete discussion and critique of this view.

was indirectly but necessarily a constraint upon legislative power. Until recently, statutory authorization was traditionally required before courts could issue any warrant, general or otherwise. There *was*, therefore, a substantial triumph of an evolving constitutionalism in the ban on general warrants, a limitation effectively upon all governmental power in favor of personal liberty.

Given the Framers' debt to British history and tradition and their commitment to popular sovereignty, it should perhaps be more surprising that they curbed the legislature at all, rather than that they did not do it in the extravagant manner we wish they had. For example, the teaching of British episodes like *Entick v. Carrington*,<sup>160</sup> so relied upon by the United States Supreme Court for its fourth amendment exegesis, is *not* that general warrants are "unconstitutional." Nor is it that freedom from them is a "constitutional right"; citizen immunity from *all* governmental practices of the kind, however authorized. Rather, the teaching is that they are evil and ordinarily illegal. From this, however, the conclusion was not that Parliament could never authorize general warrants, but that it should do so sparingly and for very serious reasons.<sup>161</sup> This was the tradition, and the Founders surpassed it by banning general warrants altogether. The fourth amendment surpassed its state forbearers in this regard: it states unqualifiedly that "no [general] warrant shall issue."<sup>162</sup> Its predecessors opined that general warrants "ought not be granted."<sup>163</sup>

It is quite true that the traditional import of search warrants has changed. For example, officers are now better able to defend false imprisonment suits arising from warrantless arrests: they are immunized by their "good faith" belief in the lawfulness of their actions, as opposed to traditional strict liability.<sup>164</sup> Nevertheless, after *Illinois v. Gates*<sup>165</sup> and *United States v. Leon*,<sup>166</sup> the issuance of a search warrant is still virtually determinative of fourth amendment rights. The combined effect of those cases renders evidence secured via warrants conclusively admissible, save for perjured police

160. 95 Eng. Rep. 807 (K.B. 1765).

161. See N. LASSON, *supra* note 41, at 47-49.

162. U.S. CONST. amend. IV.

163. See *supra* note 134 and accompanying text.

164. *Pierson v. Ray*, 386 U.S. 547 (1967).

165. 462 U.S. 213 (1983). In *Gates*, respondents were arrested after a search of their home, pursuant to a warrant, produced drugs and other contraband. *Id.* at 216. The Supreme Court considered the propriety of the magistrate's issuance of the warrant based only on a "partially corroborated anonymous tip." *Id.* at 217. The Court determined that issuance of the warrant was proper because the magistrate had a "substantial basis for . . . conclud[ing]" that there was probable cause to search respondent's home and, therefore, there was no fourth amendment violation.

166. 468 U.S. 897 (1984). In *Leon*, the Court held that the fourth amendment exclusionary rule should not bar the use of evidence in the prosecution's case in chief if it was "obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." *Id.* at 900.

affidavits<sup>167</sup> or egregious, and exceptionally rare, judicial error.<sup>168</sup> In other words, recent developments place a high premium on, and fourth amendment protection effectively rides on, judicial power to issue warrants.

Recall that the immediate reason for amending the federal Constitution was the content of the "unamended" document which emerged from Philadelphia and which was circulated for state approval. The Framers quite unreflectively denounced late-summer suggestions that liberties,<sup>169</sup> other than those already guaranteed in the Constitution, be explicitly protected.<sup>170</sup> The federalist defenders of the Constitution produced a formulaic response to these suggestions: due to the enumerated powers nature of the national government, a "bill of rights" was unnecessary.<sup>171</sup> They believed that because the Constitution gave the national government no power over the press or religious belief, for example, it posed no threat to those liberties. Indeed, the argument continued, explicit declarations in favor of these liberties, such as that which would be included in a federal bill of rights, implied that perhaps a power over them *was* given. To the federalists, a bill of rights dangerously suggested that not only were powers pertaining to those rights granted, but that any right not reserved might not be retained.<sup>172</sup> This latter concern bore fruit in the ninth and tenth amendments.

Whatever soundness the argument possessed for religion and the press, the Constitution's anti-federalist critics proved it unsound on search and seizure, and did so precisely by raising the specter of general warrants, especially writs of assistance. Records of the Virginia ratifying convention,<sup>173</sup> for example, reveal quite clearly that the evil that was to be condemned by the fourth amendment was the general warrant.<sup>174</sup> Madison, who was present in the Virginia conclave, repeated the standard counter-argument on the House floor while offering his corrective, a ban on general warrants:

It is true, the powers of the General Government are circumscribed, they are directed to particular objects; but even if [the] Government keeps within 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

167. *Id.* at 914.

168. *Id.* at 923.

169. See J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 630 (Norton ed. 1966) (civil jury trial); *id.* at 639 (standing armies); *id.* at 640 (liberty of the press).

170. These liberties include criminal jury trials, "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . .," U.S. CONST. art. III, § 2, cl. 3; and the ban on religious tests, "but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." U.S. CONST. art. VI, cl. 3.

171. N. LASSON, *supra* note 41, at 90 (summary of classic expression of Federalist argument by probably its most forceful proponent—Pennsylvanian James Wilson).

172. *Id.*

173. N. LASSON, *supra* note 41, at 92-94 (adequately summarizes relevant portions of Virginia debate).

174. See generally 3 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787 *passim* (2d. ed. 1888).

as the powers of the State Governments under their constitutions may to an indefinite extent; because in the constitution of the United States, there is a clause granting to Congress the power to make all laws which shall be necessary and proper for carrying into execution all the powers vested in the Government of the United States, or in any department or officer thereof; this enables them to fulfill every purpose for which the Government was established. Now, may not laws be considered necessary and proper by Congress, for it is for them 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 nor 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 discretion 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.<sup>175</sup>

Madison thus threw a connecting circle around the episodic components of the fourth amendment story. State governments, via their declarations of rights, prohibited general warrants, and there was reason to do so—the abusive British revenue collection practices. Critics of the federal Constitution rightly saw that Congress would provide for efficient collection of its revenue, and that a ban on that time-dishonored British tool was appropriate. Throughout the entire controversy, no one denied that “general warrants” were grievous and oppressive and should not be granted. Instead, dispute centered on the necessity and wisdom of their explicit prohibition.

Every state ratifying convention which condemned general warrants spoke of a “right to be secure from all unreasonable search and seizure,”<sup>176</sup> in the

175. 1 ANNALS OF CONG. 455-56 (Gales & Seaton ed. 1834).

176. See, e.g., North Carolina:

That every freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers and property; all warrants, therefore, to search suspected places, or to apprehend any suspected person, without specially naming or describing the place or person, are dangerous; and ought not be granted.

4 J. ELLIOT, *supra* note 174, at 244;

New York:

That every freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers or his property, and therefore, that all Warrants to search suspected places or seize any Freeman his papers or property, without information upon Oath or Affirmation of sufficient cause, are grievous and oppressive; and that all general Warrants (or such in which the place or person suspected are not particularly designated) are dangerous and ought not to be granted.

2 DOCUMENTARY HISTORY, *supra* note 77, at 193;

Rhode Island:

That every person has a right to be secure from all unreasonable searches and



manner of Madison's proposal and the ratified form of the fourth amendment.<sup>177</sup> The entire pre-congressional history of constitutional regulation of search and seizure thus suggests that Congress was merely expected to outlaw general warrants. There is good reason, based on that same history, to read the fourth amendment as doing precisely that.

It is still logically possible that an operative reasonableness guarantee arose in a fast-developing congressional or ratifying consensus where ascertainable practices, other than abusive warrants, were to be constitutionally condemned. However, there is no concrete evidence of any such development; the evidence, in fact, weighs entirely against it. A speculative breakthrough to any specific norm of "reasonableness" is completely inconsistent with the origins of our Bill of Rights. Stated simply, libertarian innovation was the furthest thing from the Framers' minds.

The above may sound heretical, but only because we are buried in constitutional apostasy. Because constitutional questions like due process, free speech, and unreasonable search and seizure have *become*, as judges have made them, vessels for our most expansive, forward-looking philosophical discourse about the substance of American society, the tendency is to conscript the Framers into this army of theoretical speculators. This phenomenon can be most aptly deemed the "Bill of Rights Synthesis,"<sup>178</sup> a reading back into the origins what we have recently put there. It is, however, merely historical wishful thinking. In actuality, the Bill of Rights as a whole contained only affirmations of what was already taken for granted by the vast majority of Americans.<sup>179</sup> Process forced the meaning of proposed

seizures of his person, his papers or his property, and therefore that all warrants to search suspected places or seize any person, his papers or his property, without information upon oath, or affirmation, of sufficient cause, are grievous and oppressive, and that all general warrants (or such in which the place or person suspected, are not particularly designated) are dangerous, and ought not to be granted.

*Id.* at 313-14;

Virginia:

That every freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers, and property; all warrants, therefore, to search suspected places, or seize 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 be granted.

3 J. ELLIOT, *supra* note 174, at 658.

177. A minority in Maryland simply banned general warrants, *see* 2 J. ELLIOT, *supra* note 174, at 551, and the dissenters in Pennsylvania referred to their constitution for the substance of their recommendation, *see* PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788 421 (B. McMaster & F. Stone ed. 1888).

178. The discussion in the text from notes 178-87 is taken largely from G. BRADLEY, *supra* note 85, at 69-73 (1987).

179. One glance at the Revolutionary-era state constitutions shows enormous dependence by the federal Bill of Rights upon its state predecessors.

amendments to the political center or, more exactly, to convergence upon a common denominator of popular sentiment. Put differently, the process itself was inconsistent with both extant fringe or wholly novel interpretations of settled norms. The political structure and strategies that resulted in adoption of the Bill of Rights could result only in standard, commonly entertained definitions of, for example, prohibited search and seizure practices.

One structural limit on innovation through subsequent amendment came about because the new Constitution required "super-majorities" in Congress and among the states in order for ratification of amendments to succeed.<sup>180</sup> Because most states recommended amendments along with, not instead of, their ratification of the Constitution,<sup>181</sup> the anti-federalists faced that document's strenuous formula for fruitful alteration. Less obvious but just as important is what the advocates of the amendments initially were trying to do—defeat the proposed Constitution. Because defeat required rejection by a sufficient number of popularly elected state ratifying conventions, the anti-federalist's actions were essentially an effort in popular political coalition building. There is, in historical fact, ample evidence of a nationwide anti-federal network of activists, borrowing ideas and stratagems from neighboring as well as distant conferees.<sup>182</sup> The personal liberty amendments proposed by the state conventions were remarkably similar and frequently identical.<sup>183</sup> The effect was to tame the whale's demands by homogenizing them through politically dictated interstate, even intersectional, cooperation. Given this original purpose, formulations for these proposed amendments were necessarily midwived by historical memory, not speculative fancy. Large numbers of people otherwise friendly to the Constitution would not be likely to do a sudden "about-face" because it lacked a guarantee of which they had never heard.

Compelling evidence indicates that anti-federalist leaders actually desired either the wholesale defeat of the Constitution or such far reaching structural amendments as to make it what they originally expected of the Philadelphia

180. See U.S. CONST. art. V.

181. North Carolina neither approved nor rejected the Constitution prior to the new government's inauguration in 1789. The convention which met at Hillsborough in July 1788 did, however, forward recommendations for amendment to the Constitution.

182. See, e.g., letter from Richard Henry Lee to George Mason (Oct. 1, 1787), reprinted in 2 J. BALLAGH, *THE LETTERS OF RICHARD HENRY LEE* 438 (1914); to Samuel Adams (October 5, 1787) reprinted in J. BALLAGH, *supra*, at 444; to George Mason (May 7, 1788) reprinted in J. BALLAGH, *supra*, at 468-69; 2 J. ELLIOTT, *supra* note 174, at 325 (statement by Willie Jones); *Unpublished Letters from North Carolinians to James Madison and James Monroe*, 14 N.C. HIST. REV. 156, 166 (McPherson ed. 1937) (letter from William H. Davie, a member of the North Carolina legislature from 1786 to 1799).

183. A glance at the amendments proposed by the following states indicates the similarity. See, e.g., Virginia: 3 J. ELLIOTT, *supra* note 174 at 659-61; New York: 2 DOCUMENTARY HISTORY, *supra* note 77, at 191; North Carolina: 4 J. ELLIOTT, *supra* note 174, at 244-46; Massachusetts: 2 J. ELLIOTT, *supra* note 174, at 177.

convention: Articles of Confederation with a little more bite.<sup>184</sup> A bill of rights was secondary to them, but it served, in Leonard Levy's words, to "dramatize" opposition to the Constitution among those unable to appreciate the subtle but more dangerous threats posed by the new order.<sup>185</sup> The rights trumpeted by anti-federalist elitists were intended primarily for popular consumption. Those norms *had* to appeal to, and be understood by, large numbers of relatively unsophisticated people from all parts of the country.

This process of bland homogenization continued in the state ratifying conventions. In some of them, federalists actually drafted proposed amendments.<sup>186</sup> Madison, one of the leading federalists, adopted the same tactic in Congress: better that friends of the new government suggest alterations which stopped short of endangering its essential features. The drafters of the amendments walked a political tightrope; they had to do enough to satisfy amenable opponents of the Constitution without alienating supporters. Thus, the formulations proposed by Madison to the initial Congress were truly the product of centrist, bipartisan sentiment.

Madison made one further connection between a bill of rights and the sense of the community that helps explain his proposal to the First Congress. Well before committing himself to amendments, he told Jefferson that the rights protected must closely track the sense of the public. Otherwise they would lose, because of repeated violations, "even their ordinary efficacy."<sup>187</sup> It seems then that to our possible dismay, the campaign for a bill of rights was much more like a modern electoral contest than a festival of progressive brainstorming. "Leadership" is hardly the first word that comes to mind to define the federalists' actions. In the specific sense of educating voters to favor "good ideas," which they presently neither understand nor favor, Madison's predicament was much like that of many political candidates: we can lead later but first we must find the popular pulse and place ourselves squarely on it.

In spite of this formidable cadre of evidence against an operative reasonableness clause, a final desperate effort to salvage an expansive reasonableness clause within a "plain meaning" hermeneutical model might run as follows. Sounding in John Hart Ely's account of the privileges and immunities clause,<sup>188</sup> one might concede that the reasonableness clause had no ascertainable content to the founding generation but was nevertheless in-

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184. See generally J. MAIN, *THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION, 1781-1788* 119-67 (1961) (discussing antifederal objections to the Constitution and proffered alternatives to delegation of powers granted therein).

185. L. LEVY, *LEGACY OF SUPPRESSION* 217, 227 (1960).

186. Massachusetts and Virginia, for example. See 3 J. ELLIOT, *supra* note 174, at 191 (speech of Edward Randolph).

187. 1 *LETTERS AND OTHER WRITINGS OF JAMES MADISON* 427 (letter of October 17, 1788).

188. "[T]he most plausible interpretation . . . is the one suggested by its language—that it was a delegation to future constitutional decision-makers to protect certain rights that the document neither lists, at least not exhaustively, nor even in any specific way gives directions for finding." J. Ely, *supra* note 82, at 28.

tended to be what, in fact, it has become—a commission to the judiciary to develop a common law of search and seizure as time goes by and as circumstances demand.

The above assertion, however, is clearly wrong. First, there is no historical evidence to support it; instead, it has been at some point since the founding that courts have seized the clause as a charter for judicial lawmaking. Second, the suggestion *cannot* be sustained as a historical matter. Even a passing acquaintance with anti-federalist rhetoric shows that the independent federal judiciary was regarded as a profound threat to popular liberty,<sup>189</sup> and not the bulwark we have made it today. Third, the argument is contrary to the tenor of the Bill of Rights, which is to limit power, not to transfer the locus of its exercise. The short conclusion is that a transfer of such power to the judiciary could not have assuaged objections to the Constitution. Contrary to our impulses, people at that time really believed that responsive electoral government, not Delphic Oracles, insured liberty. As has been shown, no brainstorming occurred in Congress. Eventual approval in the House and Senate was perfunctory. This suggests continuity with the undeniable message of the process to that point: general warrants, and nothing more, were prohibited by the fourth amendment. But ratification was the decisive act, and in theory could have been a possible turning point.

The evidence, however, demonstrates that it was not. The amendments proposed to the states were those asked for by the state ratifying conventions, thus closing the circle around the whale and his tub. The initial newspaper reaction to the congressional proposals was one of relief, portending an anti-climactic ratification by the states.<sup>190</sup> Echoed in the private correspondence of Madison<sup>191</sup> and Washington,<sup>192</sup> the general perception was that Congress had accurately and adequately quieted popular fears insofar as those fears were for personal liberty of the type encompassed by a bill of rights.

The legislative journals of each state reveal various details of ratification,<sup>193</sup> and we even know about the inaction of states, such as Massachusetts,

189. See, e.g., J. CONLEY, *DEMOCRACY IN DECLINE* 117 (1977) (discussing James Madison); *DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS* 406 (1788); L. PENSULLI, *MARYLAND THE FEDERAL YEARS* 66 (1972); *8 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS* 581 (E. Burnett ed. 1936) (statement of William Grayson); see also the recommendations of Pennsylvania's disappointed anti-federalist majority, which called upon Congress to not create any inferior federal courts. 2 J. ELLIOT, *supra* note 174, at 546 (2d ed. 1937).

190. See, e.g., *PENNSYLVANIA JOURNAL*, October 14, & December 30, 1789; *MASSACHUSETTS CENTINAL*, July 4, 1789.

191. Letter from Edward Carrington to James Madison (December 20, 1789), *reprinted in 5 DOCUMENTARY HISTORY*, *supra* note 77, at 227; letter from James Madison to George Washington (November 20, 1789), *reprinted in id.* at 213.

192. Letter from Dr. Stuart to George Washington (September 12, 1789), *reprinted in 5 DOCUMENTARY HISTORY*, *supra* note 77, at 205; letter from George Washington to Governor Morris (October 13, 1789), *reprinted in id.* at 212; letter from D. Humphreys to George Washington (October 29, 1789), *reprinted in id.* at 213.

193. See G. BRADLEY, *supra* note 85, at 114-20.

Connecticut, and Georgia, that did not ratify until the sesquicentennial year of 1939.<sup>194</sup> The journals show that ratification was perfunctory, without significant debate or opposition, through a process which treated all ten amendments as an undifferentiated mass. It was accomplished with almost unseemly haste.

This routine approval implies that the amendments were not seriously considered as substantially expanding personal liberties. As long ago as 1807, Chief Justice Marshall, presiding over the trial of Aaron Burr, remarked that a "grand departure" from established practice would be clearly demarcated.<sup>195</sup> Raoul Berger made important use of the point in his study *Executive Privilege*,<sup>196</sup> but Leonard Levy's expression of it in another context is closer to home and still classic:

If definition were unnecessary [i.e., if no one in the state legislatures had to bother to explain the norms that they were ratifying] because of the existence of a tacit and widespread understanding of "liberty of the press," only the received or traditional understanding could have been possible. To assume the existence of a general, latitudinarian understanding that veered substantially from the common-law definition is incredible, given the total absence of argumentative analysis of the meaning of the clause on speech and press. Any novel definition expanding the scope of free expressions of repudiating, even altering, the concept of seditious libel would have been the subject of public debate or comment.<sup>197</sup>

The proffered formulation of the fourth amendment did not occasion significantly more discussion in the states than did liberty of the press. The silent state legislators thus spoke in loud, unmistakably clear voices in ratifying it. This provides the operative meaning of the amendment and it harmonizes with the views actually expressed during 1788 and in the First Congress.

A final piece of evidence of what the ratifiers must have, could only have, and did apprehend the fourth amendment to mean is Congress' actions. "This [Supreme] Court," wrote Chief Justice Taft for a unanimous bench in *Hampton & Co. v. United States*,<sup>198</sup> "has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, long acquiesced in, fixes the construction to be given its provision."<sup>199</sup> This rule of construction is most often articulated, as in *Hampton*, where the First Congress implemented the 1787 Constitution. Because of the substantial overlap in membership, the 1789 legislative meeting is frequently treated as if it were a rump session of the Philadelphia con-

194. J. NOWAK, R. ROTUNDA, & N. YOUNG, *supra* note 104, at 1117.

195. *United States v. Burr*, 25 F. Cas. 55 (C.C.D. Va. 1807) (No. 14,693).

196. R. BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* 35 (1976).

197. L. LEVY, *supra* note 185, at 224-25, *reprinted in* L. LEVY, *THE EMERGENCE OF A FREE PRESS* 267 (1985) (author's revision of his earlier work, *LEGACY*).

198. *See supra* note 155 and accompanying text.

199. *Hampton & Co. v. United States*, 276 U.S. 394, 412 (1928).

vention.<sup>200</sup> This rule of construction is even more persuasive where the overlap is total, as it is with the First Congress and the fourth amendment. At the very least, the legislative behavior of the First Congress should help locate their understanding of what they wrought.

Suppose that, somehow, the reasonableness clause was vivified during congressional proposal or state ratification, or both. Then both state and federal legislators would possess some new consciousness of the constitutional constraints upon search and seizure beyond the extant consensus against general warrants. Surely *these* hypothetical congressmen would not simultaneously betray that consciousness, nor would state legislators ratify words whose meaning was muddled by such contradictory behavior. Put differently, to the extent one posits a "grand departure" at the congressional or ratifying stage, the *more* decisive evidence of legislative practice becomes for constitutional meaning. A person, with no apparent political advantage, would not go out on a limb of speculative rights creation and then saw off the limb in practice.

The conduct evidence shows that the very same Congress which proposed the fourth amendment on several occasions authorized warrantless general searches. Customs officers,<sup>201</sup> excise men,<sup>202</sup> and other revenue collectors<sup>203</sup> were variously authorized to search and seize "on suspicion" of fraud or concealment. Passage of these acts occasioned no constitutional deliberation, and must therefore have been seen by congressmen as consistent with the fourth amendment. Similarly, specific legislatively authorized general searches were also compatible with state search and seizure guarantees.<sup>204</sup> At the same session it proposed the fourth amendment, the First Congress enacted two residual process acts<sup>205</sup> to govern "ordinary" search and seizure, which is

200. Sixteen members of the First Congress were signers of the 1787 Constitution: John Langdon, Nicholas Gilman, Rufus King, William Samuel Johnson, Roger Sherman, William Paterson, Robert Morris, George Clymer, Thomas Fitzsimmons, George Read, Richard Bassett, Daniel Carroll, James Madison, Pierce Butler, William Few, and Abraham Baldwin.

201. See 1 Stat. 29, 43, Sess. 1, ch. 5, § 23 (1789). An identical statute was passed in the next session. See 1 Stat. 145, 169-70, Sess. 2, ch. 35, § 47 (1790). Bradley, *Present at the Creation? A Critical Guide to Weeks v. United States and Its Progeny*, 30 ST. LOUIS U.L.J. 1031, 1045 n.65 (1986) (citing text of statute). The statute authorizes customs officers, on suspicion of fraud, to open and examine, in the presence of two or more reputable merchants, any packages of goods to check that accurate entries of the contents were made and to seize any packages found which differ in their contents from the entry.

202. See 1 Stat. 199, 205-06, Sess. 3, ch. 15, § 26 (1791). This statute authorized supervisors of the revenue for the districts in which there are distilleries of any kind to conduct warrantless inspections of such distilling operations and to take an exact count of the spirits therein to enter into their books.

203. See 1 Stat. 29, 43, Sess. 1, ch. 5, § 24 (1789). An identical statute was passed in the next session. See 1 Stat. 145, 170, Sess. 2, ch. 35, § 48 (1790). This statute authorized collectors, naval officers, surveyors, and appointed persons to enter any vessel in which they had reason to suspect that goods subject to a duty were concealed and search for and seize such goods.

204. See *supra* note 154 and accompanying text.

205. See 1 Stat. 93, Sess. 1, ch. 21, § 2 (1789) (stating that forms of writs and executions

not tied to enforcement of a particular regulatory scheme. In these two instances, various accoutrement of federal search and seizure, including arrest, forms of writs, their execution, and modes of process, were subjected to prevailing rules of the state in which the federal court was located. Congress evidently felt that no federal constitutional constraint existed beyond that of cognate state constitutions. In other words, contemporaneous legislative activity reveals that Congress thought the fourth amendment meant the same as similar state provisions—no general warrants.

A final cache of evidence supporting this historical interpretation of the fourth amendment consists of nineteenth century judicial precedents. Lasson correctly writes that the first fourth amendment case of "real importance"<sup>206</sup> in the Supreme Court was *Boyd v. United States*,<sup>207</sup> decided in 1886. It is true, as Lasson also notes,<sup>208</sup> that the paucity of judicial opinions before *Boyd* owes to the absence of general criminal appellate jurisdiction. But this lack of jurisdiction was not a complete bar to these cases. First, habeas corpus<sup>209</sup> provided some access to appellate review of criminal convictions. Second, and as the federal statutes previously noted suggest, search and seizure questions were likely to arise in civil collection proceedings and forfeitures. The targets of these searches had the incentive and wherewithal to litigate constitutional issues fully. The sparse precedents, therefore, reflect factors beyond the limited appellate jurisdiction. This probability is further attested by a survey of the lower, usually trial, court cases for the first century after ratification. The opinions collected in *Federal Cases* contain no higher proportion of fourth amendment issues than the *United States Reports*;<sup>210</sup> the absolute numbers are quite small. The pre-*Boyd* scarcity is due to what must have been a widespread understanding that, aside from those aggrieved by general warrants, few litigants indeed thought they could successfully avail themselves of the fourth amendment's protections.

The few extant opinions generally confirm that suggestion. As late as 1869, for example, a federal judge held that the fourth amendment was simply inapposite to civil proceedings. The federal district court, in *United States v. Meador*,<sup>211</sup> explained this conclusion in a case involving a statutorily authorized warrantless search by excise officers for uncustomed goods. The unsuccessful claimants quite reasonably pointed out that even if a "distinction in principle between general search warrants and writs of assistance and

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and modes of process in federal court shall be the same in each state respectively as are now used or allowed in Supreme Court of the same); 1 Stat. 73, 91, Sess. 1, ch. 20, § 33 (1789) (authorizing arrest of criminals against the United States by any justice of the peace or other magistrate of any of the States where criminal may be found, using usual mode of process against offenders in that state).

206. N. LASSON, *supra* note 41, at 107.

207. 116 U.S. 616 (1886). See *infra* notes 247-58.

208. N. LASSON, *supra* note 41, at 106.

209. U.S. CONST. art. I, § 9, cl. 2.

210. In an unscientific survey by the author.

211. 16 F. Cas. 1297 (C.C.N.D. Ga. 1869) (No. 9,375).

the power claimed by the supervisor [in this case pursuant to statute] to enter and examine premises" could be drawn, there "was no difference in their practical effect each being repugnant to the Constitution and all equally illegal."<sup>212</sup>

Whether there *was* a practical difference did not matter to the court, for a gigantic constitutional distinction remained. Reciting various historical proofs that the fourth amendment had to do solely with search warrants,<sup>213</sup> the court concluded that there could be no fourth amendment violation. The judge coupled this quite expected observation with the actually irrelevant rule that private parties in civil suits could not get search warrants<sup>214</sup> to arrive at the conclusion that the amendment had no application in civil proceedings.

At least two other federal courts upheld similar general warrantless searches, on equivalent grounds, reasoning that they were matters of efficient enforcement and thus legislative prerogative.<sup>215</sup> No court before *Boyd* invalidated an act of Congress regarding search and seizure, nor even equivocally signalled that the reasonableness clause could ever check legislatively authorized search and seizure.

#### IV. THE HISTORICAL VIEW VERSUS THE MODERN RATIONALE

In *Hudson v. Palmer*, Justice Stevens stated: "The Fourth Amendment is of 'general application,' and its text requires that every search or seizure . . . be evaluated for its reasonableness."<sup>216</sup> Madison and Justice Stevens cannot both be right. Justice Stevens asserts that search and seizure is a generic type of governmental activity cutting across particular theatres of operation—police, schools, prisons, workplace, immigration—superintended by a judiciary commissioned by the "reasonableness" clause. Because reasonableness is hardly a term loaded with ascertainable content, Justice Stevens effectively claims thorough judicial management which, because it is constitutional law, is unalterable by ordinary political processes.

Madison's view could not contrast more starkly. His view was that search and seizure might, as a matter of observation, be an identifiable generic

212. *Id.* at 1298.

213. *Id.*

214. *Id.* at 1299.

215. *See, e.g.,* *United States v. Distillery No. 28*, 25 F. Cas. 868 (C.C.D. Ind. 1875) (No. 14,966); *Stanwood v. Green*, 22 F. Cas. 1077 (C.C.S.D. Miss. 1870) (No. 13,301). *Cf.* *United States v. Stockwell*, 23 F. Cas. 116 (C.C.D. Me. 1870) (No. 13,466) (Congress may authorize issuance of search warrants as it sees fit to enforce its regulatory scheme). Several federal courts during the 19th century upheld congressional power to authorize warrantless arrest. *See, e.g.,* *West v. Cabell*, 153 U.S. 78 (1894); *Ex parte Morrill*, 35 F. 261 (C.C.D. Or. 1888); *In re Deputy Marshals*, 202 F. 153 (C.C.E.D. Mo. 1884); *Ex parte Geissler*, F. 188 (C.C.N.D. Ill. 1880); *In re Engle*, 8 F. Cas. 716 (C.C.D. Md. 1877) (No. 4,488).

216. *Hudson v. Palmer*, 468 U.S. 517, 555-56 (1984) (Stevens, J., concurring in part & dissenting in part).



government activity. However, all that was "generically" treatable normatively were the prerequisites of a valid warrant. Aside from the warrant requirements, search and seizure was for Madison a context-bound feature of the regulatory scheme it serviced: immigration, customs, and revenue collection. Like other features of that regulatory scheme, it was governed through ordinary political processes. The issue is thus joined at the crossroads of fundamental and ordinary law: Justice Stevens, who accurately describes what courts of recent memory have wrought, would take search and seizure out of the ordinary processes of democratic self-governance; Madison, with the exception of the warrant clause, would not.

The argument so far has been that Madison at least spoke for the founding generation which drafted, debated, and ratified the fourth amendment, and aptly described its plain meaning, historically recovered. As such, it has at least a warranted, if not a decisive, claim to be constitutional law until subsequent amendment. The support for Justice Stevens' position is less clear save for that attaching to recent judicial practice or precedent. He tells us what courts have recently claimed in the Constitution's name. As a matter of constitutional history, however, the transition from "plain meaning/self-governance" to "fundamental law/judicial governance" has never been explicitly justified.

The shift from "plain meaning/self-governance" to "fundamental law/judicial governance" was announced in *Boyd v. United States*,<sup>217</sup> and has been assumed since. Its hardiness indicates that the shift occurred in a hospitable historical environment; otherwise it would have been more openly challenged and, in turn, more subtly justified. It will not do, however, simply to trot out tired plabum like the need for a "living" Constitution, which is obviously preferred to one with rigor mortis. Likewise, no one will argue with the statement "that times and conditions have changed dramatically since the Founders' time." None of that will do precisely because no variation of this approach provides a reason for choosing between the two alternatives presented. The alternatives are not between "old" and "new" law, "antiquated" and "modern" search and seizure rules. The issue put forth by both Justice Stevens and Madison is *who* in our political system shall shape our "living" law of search and seizure: courts or legislatures?

Before one must decide, that choice may be further clarified by eliminating an unfounded argument which might provide a reason for preferring judicial management. The unfounded argument, if accepted, would present us with a choice different from the one presented here. The argument is that but for judicial management and capture of search and seizure by fundamental law, the police would run wild. They would break into our bedrooms at midnight, ransack our homes, engage in "dragnet" searches and, all in all, provide us with the trappings of a police state.

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217. 116 U.S. 616 (1886).

There are a host of counter-arguments dispositive of such judicial self-flattery.<sup>218</sup> The most pertinent one surfaces when this strawman is plugged into this author's formulation of the debate between Madison and Justice Stevens. The rhetorical fireworks effectively substitute "untethered, arbitrary, faceless, unaccountable executive discretion" for "self-governance through the ordinary political procedure." If *that* were the choice, and it is not, it would be difficult to welcome a police state. This, however, is not the choice. Madison quite clearly and correctly tied search and seizure to congressional power over the substantive area of regulation of customs and revenue. Further, he could easily have added the postal system, currency management, and immigration. Executive officers, in some sense of that term, will perform the search and seizures as they must in either framework. Judges have not yet suggested that they will actually execute search warrants, for example. Neither framework suggests that all executive discretion can be eliminated, nor that the judiciary is cut off from review of the executive discretion. That is, judicial review of police compliance with statutory norms should be expected. The choice remains, therefore, one in which a regime of search and seizure whose governance through basic rules and principles by the people is via either the legislature or the judiciary.

Still, there is no gainsaying that the Gestapo bogeyman plays the part assigned him quite well. Constitutional law, however, is not<sup>219</sup> popular theatre or low culture, and there is too much of an undeniable aura of plausibility to the Gestapo talk. When scrutinized, however, that aura can be shown to subsist on a fundamental misperception of the basic constitutional scheme. Perhaps ironically, that basic error is the darling of "conservatives"; those Federalist Society-types propound it with gleeful enthusiasm. It is nonetheless mistaken, even if it fuels the fantasies more of "liberals" who simply cannot, or will not, imagine a constitutional order without a hyperactive judiciary. This misperception substitutes "executive" for "legislative" in the Madison side of the colloquy. It manifests itself theoretically in constitutional law as a "separation of powers" problem. The Reagan Administration consistently advanced a constitutional theory of "law enforcement," which former Attorney General Edwin Meese regarded as an indivisibly "executive function."<sup>220</sup> With specific reference to independent agencies, Meese proclaimed that "[i]n the tripartite scheme of government, a body with enforcement powers is part of the executive branch of government."<sup>221</sup> Meese further warned that we cannot keep the constitutional tigers on their chairs with weasel-words any longer. "Federal agencies performing executive functions

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218. Not the least of which is that many regimes, such as Great Britain, avoid "police state" status without judicial review.

219. After the Bork confirmation hearings, one should instead say: "should not be."

220. See *A Question of Power, A Powerful Questioner*, N.Y. Times, Nov. 6, 1985, at B8, col. 3, quoted in *Ameron v. United States Army Corps of Eng.*, 787 F.2d 875, 887 n.6 (3rd Cir. 1986).

221. *Id.*

are themselves properly agents of the executive. They are not 'quasi' this or 'independent' that."<sup>222</sup>

This argument presents "law enforcement" as an "executive" activity in a sense which delegitimizes governance of it by anyone—including the legislature—outside the "executive," which can now be appropriately called the "enforcement" branch. If this interpretation is followed, the strawman will never be incinerated. Search and seizure *are*, prosaically, "enforcement" actions preformed by "executive" officials. Madison, however, knew a lot more about the Constitution he expounded than those propounding this fallacy, and "search and seizure" *is* constitutionally to be governed by Congress.<sup>223</sup>

#### V. A RESPONSE TO SOME EXTRA-CONSTITUTIONAL OBJECTIONS

There are those who may find the fourth amendment, as historically recovered, unacceptable due to extra-constitutional objections. "Extra-constitutional" critique is the process of subjecting constitutional exegesis to a philosophical critique which finds no persuasive root in the Constitution or any set of acceptable aids to its interpretation. For example, it is apparent that the Constitution itself does not oblige government to significantly redistribute income. Nevertheless, respectable notions of "justice" require precisely such wealth transfers and one may conclude that our government, as a matter of fundamental principle and not political wont, ought to do so. None of this, however, changes the original observation that this is not provided in the Constitution and one is left with the belief that the Constitution does not adequately embody a first principle of justice.

The fundamental misstep of constitutional law in the past few decades has been the propensity of both bench and bar to insist on "reinterpreting" the Constitution to alleviate such criticisms by incorporating into it such extra-constitutional objections. Indeed, society is at a point where it has robbed itself of the privilege of saying that, in some instances, the Constitution was and may be just plain wrong. As Professor Roche has recently observed, the Framers lost little sleep over the compromise over slavery, though it was an issue over which many of their grandsons lost their lives.<sup>224</sup> Slavery, plus the Constitution's failure to grapple effectively with the problem of federalism, surely had much to do with the Civil War.<sup>225</sup>

A refined version of the philosophical critique runs something like this: congressional primacy may indeed be the historically recovered plain meaning of the text, but that leads to unacceptable results. "Individual rights," uniquely the subject of judicial protection, are pitted against the "collective

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222. *Id.*

223. See Bradley, *Law Enforcement and The Separation of Powers*, 30 ARIZ L. REV. 901-88 (1988) (showing fallacy of the bogeyman).

224. *Constitutional Scholarship: What Next?*, 5 CONSTITUTIONAL COMMENTARY 22 (1988).

225. See *id.*

interests" which dominate the legislature. Thus, "liberty" will be sacrificed to "security," and unacceptably so. Instead, the just society, and good Constitution, though perhaps not the one bequeathed us by the Framers, will seek institutional assurances that precious individual rights of privacy reign superior over collective interests. Because the legislature embodies "collective interests" and is inattentive to "rights," making it the final arbiter is like drawing sports referees from one of the teams contesting the game.

Some readers may recognize in this critique themes from the works of Ronald Dworkin.<sup>226</sup> But the critique is hardly limited to prominent academicians. There should be little doubt that the objection is firmly within the analytical matrix used by the judiciary, everyday of the year, in addressing fourth amendment questions. The criticism is that of persons usually considered "liberal," meaning those within this framework who push individual protection against state intrusion to the limit of collective security, and perhaps beyond. In Professor Robert George's succinct expression, "[t]he liberal position is depicted as one favoring individual rights; the conservative position as the one favoring collective interests. American conservatism has [thus] by and large left the liberal understanding of individual rights and collective interests unchallenged."<sup>227</sup> Thus, the practical calculus evident in the search and seizure corpus is to decide how much individual liberty is compatible with the social interest in security. All of this is a rather long-winded warm-up for the main pitch, which is *not* to rebut liberal criticism with conservative affirmations. Both are rooted in exactly the theoretical situation which must be overcome if the Constitution is ever to be restored to constitutional law. The entire philosophical matrix, and not just the liberal emphasis on one half of it, must be seen as essentially extra-constitutional, at least in the issue of the fourth amendment. This necessitates recovery of the constitutional theory of the fourth amendment, which is *not* that of contemporary liberal individualism.

The constitutional text supplies us with sufficient clues to its theoretical lineage. The reasonableness clause states no operative principle of limitation upon government action. There were suggested, earlier, a number of alternative renderings of its purpose.<sup>228</sup> These "alternatives" may be integrated to reveal a unifying theoretical account. The clause *is* prefatory or explanatory in that it justifies or provides a reason for the subsequent prohibition of general warrants. That, we noted, was a common drafting technique in state bills of rights,<sup>229</sup> and the second amendment bears a similar structure.<sup>230</sup>

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226. Dworkin states this position most forcefully. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

227. R. GEORGE, *Natural Law, the Common Good, and American Politics*, in *PROCEEDINGS OF FELLOWSHIP OF CATHOLIC SCHOLARS ANNUAL MEETING 1987* 9, 14 (G. Kelly ed. 1988).

228. See *supra* notes 93-104 and accompanying text.

229. See *supra* notes 133-52 and accompanying text.

230. U.S. CONST. amend II. See *supra* note 103 for the full text of the amendment.

But the precise formulation of the fourth amendment makes clear that the clause, while prefatory, was not inconsequential or meaningless. Rather it contains a positive theoretical statement of the nature of "liberty" and "rights" in the Constitution.

"The *right* of the *people* to be secure . . . against unreasonable search and seizure."<sup>231</sup> The emphasis is added to signal the introduction of a concept *not* found in dominant contemporary theorizing. The conjunction of "right" and "people" is neither haphazard nor a synonym for the aggregated rights of individuals. It is not haphazard because, by the time of the Constitution's drafting and ratification, the collective phrase "the people" was a familiar, settled formulation.<sup>232</sup> Further, the federal Bill of Rights itself distinguishes rights of the people from other rights, like those of the fifth<sup>233</sup> and sixth<sup>234</sup> amendments, that attach to individuals. It is not "synonymous," for as Ronald Peters argues in specific reference to the Massachusetts Constitution of 1780, "the people" is used consciously and denotes an entity distinct from any individual, group of individuals, or even all individuals.<sup>235</sup> Peters asserts that this conception was central to the thinking of Massachusetts residents and that their political thinking cannot be understood apart from it.<sup>236</sup> Our Bill of Rights, especially the fourth amendment, is similarly incomprehensible without this concept. We have seen no evidence of what the reasonableness clause might mean if pressed into an operational mode. Viewing it as a blank check to judges to go and do "justice" is hopelessly ahistorical.

This concept of popular rights stems from the theoretical situation in which the Founders found themselves after the Revolution. The Revolution was basically fought over the principle of self-rule, the right of the people to make the laws by which they were to be governed.<sup>237</sup> "Popular sover-

231. U.S. CONST. amend. IV.

232. R. PETERS, *supra* note 144, at 44 n.2.

233. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

234. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

235. See R. PETERS, *supra* note 144, at 44 n.2.

236. *Id.*

237. *Id.*

eignty" was the predominant connotation of "freedom" or "liberty."<sup>238</sup> At a minimum, one can say that the Constitution, established to secure the blessings of liberty, tackled that task mainly via construction of an ascendant legislative branch accountable to the people.

That motif is hardly limited to the unamended 1787 Constitution. The Bill of Rights is surprisingly little more devoted to the "individualistic" connotation of liberty. The only explicit mentions of individual guarantees are in the fifth and sixth amendments, and these guarantees are largely procedural. Even so, those guarantees of grand jury indictment and jury trial in the vicinage partake more of the dominant conception of liberty. They protect individuals by placing persons at the mercy of the people, or at least a cross section of them. The seventh amendment guarantee of civil jury trial shares this complexion.<sup>239</sup> All presuppose that government can, and is likely to be prone to, abridge citizen's freedom, and that the counter to that tendency is placement of the "people" between citizen and government.

Almost the entire balance of the Bill of Rights specifies "rights of the people." The third amendment reveals the theoretical dynamic.<sup>240</sup> Protecting against nonconsensual quartering of soldiers during peacetime resonates a bit with modern notions of individual privacy. Even so, this "substantive" guarantee of privacy is balanced by quartering during war "in a manner prescribed by law." In other words, as long as it is expressed regularly through the lawmaking process, the "right" of the people to make laws overrides, here, another "right" of individuals to be governed in accord with certain norms. Even the first amendment<sup>241</sup> is, itself, only a bit different. It speaks explicitly of the people's right to assemble and petition; this is clearly an adjunct of self-government. Freedom of speech and of the press were also then, if not now, understood more as instruments of popular sovereignty, more as attributes of effective self government than of individual expression,<sup>242</sup> thus leaving only the religion guarantees for further examina-

238. Gordon Wood may go too far in suggesting that a second connotation—the right of individuals to be governed by certain laws—hardly surfaced at all in the Revolutionary era. See G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* 61-62 (1967). Wood implies that "self-rule" so dominated conceptualization of liberty that tension between liberty and individual freedom was practically inconceivable. *Id.* Wood's point is nevertheless well taken, and supports Peter's conclusion that the predominant conception of liberty was the collective one. See R. PETERS, *supra* note 144, *passim*.

239. "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

240. "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III.

241. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

242. See, e.g., A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

tion. Notwithstanding these constitutional guarantees, the chief constitutional protection was intended to be, and has been, the interplay of a "multiplicity of sects" in the political process.<sup>243</sup> And, notwithstanding the admitted individualistic spin of free exercise, the more obviously distinctive "freedom of conscience" formulation proposed by Madison was rejected by Congress.<sup>244</sup>

This recitation should suffice to underscore the central point: "the right of the people," specified by the fourth amendment, was not apprehended by its ratifiers to refer to an individual's "right" to be governed by laws other than those favored by the community's desire and political authority to enact them. This is simply what society has come to believe. But the plain meaning, historically recovered, is this: the people are affirmed in their right to govern the search and seizure activity of its government through laws of their choosing. The reasonableness clause is prefatory, for it precedes and explains the warrant clause. It places the government on notice that the measure of appropriate search and seizure is that with which the people would burden themselves if delegation of lawmaking authority to Congress was not obliged by the extended sphere of the republic. That is the "right of the people." Individuals have no claim to be governed by particular search and seizure laws other than the ban on general warrants.

By conceiving "collective interests" in this way, we are clearly outside the liberal constructions typified by Dworkin. In so doing, the "neat contrasts between matters of principle and policy and individual rights and collective interests blur."<sup>245</sup> Preservation of "rights" is no longer the peculiar province of courts just as it is no longer the exclusive property of individuals. The dilemma of "security versus rights" is overcome and with the passing of that contrived dichotomy enters a notion sorely lacking in the current lexicon: the "common good." The good of the community results from the right or liberty of the people to shape the regime they inhabit. For the founding generation, the problem of government was not that it might be subservient to the collective will of the people but that it might be insufficiently accountable to it. "Tyranny" was a term for arbitrary government, untethered to the people's will. The solution was to reconnect the governed to their government so that the latter might operate for the common good and not for parochial interests.

This restoration may be better effected by tracing the liberal deformity in the modern fourth amendment corpus to its roots. Heralded only by fleeting

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243. Bradley, *The No-Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 CASE W. RES. 674-747 (1987).

244. "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." 1 ANNALS OF CONG. 451 (Gales and Seaton ed. 1834).

245. R. GEORGE, *supra* note 227, at 12.

dictum to similar effect nine years earlier,<sup>246</sup> *Boyd v. United States*<sup>247</sup> marked the dawn of our era by vivifying the reasonableness clause in 1886. It was, in Lasson's words, the first major case.<sup>248</sup> It was also the last, because it christened the judiciary as managers of search and seizure. Our countless volumes of fourth amendment law are but increasingly belabored footnotes to *Boyd*. The case involved Madison's paradigmatic search and seizure scenario: congressionally authorized measures to enforce the customs laws in order to prevent smuggling effectively.<sup>249</sup> The statute at issue in *Boyd* authorized courts to issue, upon government motion, a subpoena to suspected smugglers to produce in court private papers, chiefly invoices.<sup>250</sup> The statute further provided that failure to comply was to be taken as confession of the government's allegations.<sup>251</sup> The irony is heightened then by seeing this scheme for what it was: an attempt to enforce the revenue laws effectively *without* intrusive rummaging about warehouses and other private property. In other words, *Boyd* did not even involve a search and seizure.

The Court had little difficulty in concluding that a fifth amendment violation occurred. The Justices unanimously convinced themselves that civil forfeiture was effectively a "criminal case," and that compulsory production of one's private papers for admission in court amounted to "compelling" one "to be a witness against himself."<sup>252</sup> Given the Court's primary reliance on the fifth amendment, one would have thought that the *Boyd* Court's fourth amendment discussion was dicta; but that conclusion would also be wrong. *Boyd* initiated a period, lasting until 1966, in which the Court could not differentiate the two constitutional guarantees.<sup>253</sup> Typical of these frequently mushy analyses is the *Boyd* Court's observation of an "intimate relation" between them, "throw[ing] great light on each other"; indeed, they "run almost into each other."<sup>254</sup>

This near-collision was certainly an engineered one. The Court introduced the fourth amendment by the following curious logic:

[i]t is true that certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching amongst his papers, are wanting, . . . but it [the statute] accomplishes the substantial object of those [prior] acts [which had authorized search and seizure] in forcing from a party evidence against himself. It is our opinion, therefore,

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246. *In re Jackson*, 96 U.S. 727 (1877).

247. 116 U.S. 616 (1886).

248. N. LASSON, *supra* note 41, at 107.

249. *Boyd*, 116 U.S. at 617.

250. Act to amend the customs revenue laws and to repeal moiety laws, ch. 391, § 5, 18 Stat. 186, *cited in Boyd*, 116 U.S. at 617.

251. "[I]f the defendant or claimant shall fail or refuse to produce such book, invoice, or paper in obedience to such notice, the allegations stated in the said motion shall be taken as confessed." Ch. 391, § 5, 18 Stat. 186.

252. *Boyd*, 116 U.S. at 633-34.

253. *Schmerber v. California*, 384 U.S. 757 (1966).

254. *Boyd*, 116 U.S. at 630, 633.



that a compulsory production of a man's private papers to establish a criminal charge against him . . . is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient, and effects the sole object and purpose of search and seizure.<sup>255</sup>

Which is, *Boyd* seems to say, that while there may not be a search and seizure at issue, there is nonetheless a fourth amendment problem. This conclusion derives from the principle that "[b]reaking into a house and opening boxes and drawers"—that is, search and seizure—were only "circumstances of aggravation."<sup>256</sup> The true evil meant to be rooted out by the fourth amendment was government invasion of the sacred right to "personal security, personal liberty and private property."<sup>257</sup> That transcendent, if a bit amorphous, *summum bonum* was to have produced both the fourth and the fifth amendments. And, as the Court soon thereafter made clear, the due process clause as well.

A final excerpt from *Boyd* should thoroughly dispel the mists of constitutional history and clarify the convoluted course of that opinion:

[t]hough the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*. We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law.<sup>258</sup>

This is familiar methodological turf. Identify the overreaching objectives of the Constitution, at least of a host of its clauses or perhaps the whole Bill of Rights, distrust the legislature, and identify courts with enforcement not of the Constitution, but of its transcendent objectives. Those objectives are personal rights of liberty and privacy against the legislatively expressed prerogatives of the people. The turf is familiar because we have seen it so often in Supreme Court opinions such as *Griswold v. Connecticut*<sup>259</sup> and

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255. *Id.* at 622.

256. *Id.* at 630.

257. *Id.*

258. *Id.* at 635.

259. 381 U.S. 479 (1965).

*Roe v. Wade*.<sup>260</sup> It is judicial enforcement of modern liberal individualism via the convenient offices of constitutional law. It first breathed life into the reasonableness clause and sustains it to this day. It has given us the general right of privacy upon which United States Supreme Court nominee Robert Bork was crucified. Of course it also gave us *New York v. Lochner*.<sup>261</sup> *Boyd* is *Lochnerizing* before *Lochner*.

With the perspective so gained, it remains to say that there has never been a serious attempt to justify vivification of the reasonableness clause, because it has never been necessary. It has never been necessary because there is, despite appearances to the contrary and apart from elaborations of the warrant clause, no fourth amendment jurisprudence as such. It is now possible to see the vivification of the reasonableness clause as it was and is—an aspect of the now century-old effort to enforce liberal individualism, generally denoted as the “right of privacy.” The reasonableness clause is a convenient home for this slice of the judicial opus. Moreover, respectable opinion has never called the *Boyd* Court’s bluff and demanded a particular, plausible textual basis for the judicial enforcement of its preferred norms. Thus, what we call fourth amendment law for a long time was joined to the fifth amendment’s protection against self-incrimination. It could just as easily have been located in the due process guarantee of liberty. For that matter, an animated due process guarantee clause<sup>262</sup> could, according to prevailing canons of interpretation, house *all* of our constitutional law. Following the current rationale to its logical conclusion, the entire set of *United States Reports* may simply expound the requisites of a “Republican Form of Government.” If all this suggests that present canons of interpretation are cockeyed, the reader will find no quarrel here.

#### VI. WHETHER A BREAK WITH STARE DECISIS IS EITHER LIKELY OR JUSTIFIED

At this juncture, one may reasonably ask whether this is merely a matter of tilting at windmills. After all, how much chance is there that the judiciary, even presuming the intellectual validity of the argument here, will de-activate the reasonableness clause? Granted, not very much, but the argument is still not done. The suggestion to de-activate is seriously intended as a genuine option for constitutional law. Nonetheless, it is sometimes better that the law be settled rather than right, and any seriously intended proposal for significant change must address the countervailing force of *stare decisis*.

The fact that it is better that the law *sometimes* be settled rather than right, is to concede that it is important, but perhaps not always decisive,

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260. 410 U.S. 113 (1973).

261. 198 U.S. 45 (1905).

262. “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence. U.S. CONST. art. IV, § 4.

that the law be right. And it is best if the law is both settled and right. The issue preliminary to any of this, however, is to what extent would this proposal change the law and thus introduce the instability that *stare decisis* alleviates? To answer this question, it must also be understood that stability is made up of the reasonable reliance upon the extant corpus by actors governed by the law.

The short answer is that the argument proposed here is for a major theoretical shift, but a shift which would not have a large practical effect on fourth amendment actors. And "practicality" is all that precedent really cares about. Settled law is valuable only when it is the law upon which actors rely and pattern their expectations. This is especially true in the fourth amendment area where the most relevant actors are police officers and, consequently, the law must be very clear for it to engender any expectations. It is obvious that fourth amendment law is not clear in this sense.

There are good and bad reasons for the lack of clarity. The bad ones result from judicial confusion, obtuseness, and the back and forth of ideological posturing between liberals and conservatives precisely where a disciplined approach to constitutional lawmaking has been foregone. The good reason is that *the* central legal issues around which present expectations are focused—when, under what circumstances, and how may police intrude on citizen privacy—are so fact intensive that little worthwhile precedent actually exists. For example, the terms probable cause, reasonable suspicion, and exigent circumstances do not, and cannot, lend themselves to settled expectations. Indeed, the Supreme Court explicitly integrated that insight in *Illinois v. Gates*,<sup>263</sup> concluding that determinations of probable cause in one case will rarely shed light on the next case. Consequently, neither the state's agents nor individual citizens can reliably know in advance of the search or seizure whether appropriate grounds exist.

Notwithstanding, it may be objected that, somehow, de-activation of the reasonableness clause means the replacement of standards altogether, thus making fourth amendment law even more unclear. For one example, while "exigent circumstances" currently justify departure from the judicially implied necessity for a warrant, if the approach proposed here were followed, the warrant requirement as such would no longer apply. This, however, should not be a concern because the law would be much clearer—even if flawed according to some criteria—if a requirement to which there has developed an exception were jettisoned. In any event, the warrant clause and its accumulated jurisprudence is left undisturbed by this proposal and there cannot be many fewer warrants secured in any projected future than the few that are procured under the current regime.<sup>264</sup> Therefore, *any* modification of the present so-called "warrant requirement" cannot to any extent disturb settled expectations.

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263. 462 U.S. 213, 238 n.11 (1983).

264. From my own several years experience as a New York City prosecutor, I would estimate that far less than one in a hundred searches and seizures are conducted pursuant to a warrant.

The virtue of clarity, however, has been unevenly embraced by the Supreme Court. Cases involving "bright line"<sup>265</sup> rules aspire to a clarity commensurate with practical expectation, and generally those Justices committed to the most intensive judicialization of search and seizure evince the least sympathy for such rules.<sup>266</sup> Instead, they savor the quest for the exactly correct "search incident to arrest" of an automobile's recent occupant. Notwithstanding this avoidance of clear rules in the fourth amendment area, any Supreme Court Justice who continues to act upon a personal view of the Constitution which is quite clearly not the current law<sup>267</sup> at least ought to seriously consider "righting" the law in the fourth amendment area, despite precedent to the contrary.

Some may argue that deactivation will have an adverse effect. The response is that no judgment can be ventured until a projection of probable changes is made. To do that, we need to ask first who will make those decisions. There are many institutional and individual actors whose judgments presently make up the regime of search and seizure. Individual officers, their supervisors and commanders, city and state officials, state legislatures, state judges interpreting state constitutions as well as state and federal statutes, and Congress *all* survive deactivation, and cannot be assumed to act much differently than under the present scheme. Ultimately, of course, it is the people, exercising power through their representatives, who acquire the final supervisory control now held by federal judges. Whether the "people" will craft a more "conservative" regime than our courts have is just as disputable as whether it would be better if they did. Moreover, for reasons more fully explored below, there would probably not be much difference at all. It may help to recall that most arguments of this kind are really arguments against the entire Constitution, for it is the earmark of a republican system that a very persistent populace will eventually have its way. The idea behind such systems is to diffuse power sufficiently to stymie hasty actions by fleeting majorities, not to take away popular power completely. No doubt the outright, if unadmitted, judicial rejection of our Constitution explains much of the judicial activity since *Boyd*. But, at *this* most basic level, it is better to correct the situation than to allow it to persist in error. Judges, or Justices, who simply are unwilling to interpret *this* Constitution ought at least recognize the incompatibility of continuing to exercise Article III judicial power.

Another justification for rendering the reasonableness clause inoperative is to demonstrate how democratization actually fulfills or consummates the

265. See, e.g., *United States v. Ross*, 456 U.S. 798 (1982); *New York v. Belton*, 453 U.S. 454 (1981).

266. For instance, Justices Brennan and Marshall dissented in both *Ross* and *Belton*, and would require a case-by-case determination *ad hoc* of the exigencies of a particular automobile stop, *Ross*, 456 U.S. at 827, and of the permissible scope of a search incident to arrest. *Belton*, 453 U.S. at 463.

267. I am thinking of Justices Brennan and Marshall's dissents in capital punishment cases. A very recent example is *Franklin v. Lynaugh*, 109 S. Ct. 332 (1988) (Brennan & Marshall, JJ., dissenting from denial of certiorari).

present judicial regime. That is, deactivating the reasonableness clause will, in very significant ways, achieve the objectives sought by the judiciary all along. In this light, an operative reasonableness clause is more an unwelcome yoke, an inescapable obstacle, to that regime which courts think best and which they have incompletely brought to maturity.

This examination of the cases' "democratic" core starts at the beginning with *Katz v. United States*.<sup>268</sup> *Katz* was a watershed in that it posted democratic acolytes at the portal to judicialization of the fourth amendment. According to the Supreme Courts' recent garbage search decision in *California v. Greenwood*,<sup>269</sup> *Katz* established that the fourth amendment is implicated only where the state intrudes upon "a subjective expectation of privacy . . . that society accepts as objectively reasonable."<sup>270</sup> This societal standard, presently beyond dispute as the organizing introductory issue in fourth amendment, succeeded a formula which actually provided less popular input. Before *Katz*, local property concepts, largely developed through common law judicial reasoning, were the chief indicia of fourth amendment activity.<sup>271</sup> Now, it takes first year law students little time to appreciate that there is less of the plebiscitary here than the Court's assertions suggest. Still, the garbage search case is typical of the corpus, and in it the Justices steadfastly assert the democratic nature of the question, and strenuously attempt to link their conclusions to popular sentiment. The majority insists: "Fourth Amendment analysis must turn on such factors as 'our societal understanding that certain areas deserve the most scrupulous protection from government invasion.'"<sup>272</sup> The dissenters disagree only on the pace of the popular pulse: "Most of us," they say, would legitimate an expectation of privacy in trash.<sup>273</sup>

The question is not how much are the Court's own norms attributed to society and how much is honest perception of what "most of us" want. I assume it is a quite eclectic mix, varying from case to case. The question instead is a normative one: is the Court correct in saying that "societal expectations" ground the fourth amendment? If so, and there is little judicial or academic dissent, we may plausibly suggest that the plain meaning, historically recovered, actually points present law more clearly in the direction it has pursued since *Katz*.

The same democratic fever pervades the subsidiary portal issue of fourth amendment standing:<sup>274</sup> assuming fourth amendment activity, have *this* de-

268. 389 U.S. 347 (1967).

269. 108 S. Ct. 1625 (1988).

270. *Id.* at 1628.

271. 389 U.S. at 352-53.

272. *Greenwood*, 108 S. Ct. at 1630 (quoting *Oliver v. United States*, 466 U.S. 128, 143-44 n.12 (1978)) (emphasis in original).

273. *Id.* at 1635 (Brennan, J., dissenting).

274. Y. KAMISAR, W. LAFAVE, AND J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 777-96 (6th ed. 1986) [hereinafter Y. KAMISAR] (crucial issue with regard to fourth amendment standing is

defendant's rights been impaired? After entrance has been gained, the democratic flavor remains. Title III<sup>275</sup> presents one exemplary type which will most likely be imitated in the near future as high-tech threats to privacy multiply. Having decided that society deems electronic surveillance to be fourth amendment activity, the Court in effect said to Congress: put together a regulatory scheme along the lines which we have sketched here. That is precisely what Congress did in enacting Title III. The "democratic" content here is indeed subordinate, but then the Supreme Court has never actually pronounced Title III, as such, valid.<sup>276</sup> Similarly, democratic content is another set of examples in which the legislature, for all practical purposes, does away with the warrant requirement, the probable cause standard, or both. Typified by *Colonade Catering Corp. v. United States*,<sup>277</sup> *United States v. Biswell*,<sup>278</sup> *United States v. Watson*,<sup>279</sup> and to a lesser extent, the *Carroll v. United States*<sup>280</sup> and *United States v. Ross*<sup>281</sup> automobile exception cases, legislative tradition all but determines fourth amendment meaning in these areas. A third set of examples, such as border searches,<sup>282</sup> airport inspections,<sup>283</sup> and various administrative searches,<sup>284</sup> reveal similar judicial deference to other government officials. The touchstone of fourth amendment reasonableness in these instances is the absence of discretion in individual officers to "pick and choose" occasions and suspects. The upshot is that as long as field operatives cannot readily harass people, superior executive officers may determine the nature, timing and the scope of search and seizure activity.

Thus, the overreaching paradigm in the current judicial *modus operandi* is, after all, not very much different from that suggested by plain meaning, historically recovered: the people's right to be free from unreasonable search

whether the area searched is one in which there is a reasonable expectation of freedom from government intrusion; where business premises searched standing will be found if sufficient nexus exists between area searched and work space of defendant; in search of vehicle, non-owner passenger had no legitimate expectation of privacy in vehicle and therefore no standing to challenge search).

275. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20 (1982).

276. Y. KAMISAR, *supra* note 274, at 434-35.

277. 397 U.S. 72 (1970).

278. 406 U.S. 311 (1972).

279. 423 U.S. 411 (1976).

280. 267 U.S. 132 (1925).

281. 456 U.S. 798 (1982).

282. *See United States v. Montaya de Hernandez*, 473 U.S. 531 (1985).

283. *See United States v. Davis*, 482 F.2d 893 (9th Cir. 1973).

284. *See generally* Y. KAMISAR, *supra* note 274, at 399-408 (warrant for area code enforcement inspections can be had by introducing evidence regarding age of particular building or condition of entire area, specific knowledge of condition of particular building unnecessary; warrantless inspections required by Mine Safety and Health Act do not offend fourth amendment; warrantless inspection of envelope from Thailand by postal service held constitutional as analogous to border search).

and seizure means that the people themselves must decide just what is reasonable search and seizure. A host of *Katz* "portal" questions best flesh this out. Consider the questions presented by, for examples, pen registers,<sup>285</sup> bank records,<sup>286</sup> mail cover,<sup>287</sup> airport searches,<sup>288</sup> and fixed roadside stops.<sup>289</sup> The first question in the present order is what society wants to do with these, subject them to judicial regulation by calling them fourth amendment activity or leave them to political governance. Plain meaning, historically recovered, asks the same question. The people may still subject police behavior to judicial control, simply by passing a governing statute. Title III<sup>290</sup> is a good example of intense judicial control of a dangerous police technique under statutory auspices. The difference is simply that courts will not initially decide for society what society wants to do. Instead, society will decide what society wants to do.

This easy formulation does not, although some may argue otherwise, assume a naive view of political actions. Consider the pool of persons affected by bank records, airport travel, mail, and telephones. *Everyone* in society has a stake in those private areas; if any social or economic group is over represented, it is the middle and upper classes. The destitute rarely fly and conduct few of their affairs via banks. Is there any reason to suspect that, roughly and in anything other than the very short run, the balance between privacy and law enforcement worked out through political processes will be other than what society wants? I think it will be and one may subsume under this conclusion newer problem areas: trash inspection,<sup>291</sup> aerial surveillance,<sup>292</sup> government monitoring of computer mail,<sup>293</sup> and the increasingly problematic area of employee drug testing.

It seems that the single greatest concern of the Supreme Court in the last twenty or so years, which largely explains modern criminal procedure, has been precisely, and only, in an area where the political process will not work. This is where police officers, usually white, non-residents of the areas they patrol, with insufficient, if any, cause, stop, search and seize—that is, hassle—members of discrete groups, chiefly young black and hispanic men.<sup>294</sup>

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285. See *Smith v. Maryland*, 442 U.S. 735 (1979); *United States v. New York Tel. Co.*, 434 U.S. 159 (1977).

286. See *United States v. Miller*, 425 U.S. 435 (1976).

287. See *United States v. Choate*, 576 F.2d 165 (9th Cir. 1978), *cert. denied*, 449 U.S. 951 (1980).

288. See *supra* note 283.

289. See *Delaware v. Prouse*, 440 U.S. 648 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

290. 18 U.S.C. §§ 2510-2520 (1982).

291. See *California v. Greenwood*, 108 S. Ct. 1625 (1988).

292. See *Dow Chem. Co. v. United States*, 476 U.S. 227 (1986); *California v. Ciraolo*, 476 U.S. 207 (1986).

293. See *supra* notes 27 & 28.

294. The Court's analysis of the issues presented in *Terry v. Ohio*, 392 U.S. 1 (1968), is the best example of this concern at work.

It is quite true that this type of police conduct has been, and continues to be, problematic and that political correctives cannot, at least ordinarily, be counted on. Many would say "judicialization" should follow. But courts have not successfully combatted this problem by declaring these actions illegal as a matter of fourth amendment constitutional law. Unconstitutionality was never the problem. Harassment of this sort *already* violates the constitution without resorting to the fourth amendment. The problem is how to eliminate police illegality. How to make officers observe the law is a challenge courts have found themselves ill-equipped to handle. In any event, enforcement would remain the only problem even if plain meaning, historically recovered, were accepted. This is because while racially authorized search and seizure activity would no longer violate the fourth amendment, it would still be unconstitutional. No statute that authorizes, for example, stopping only males, blacks, or hispanics could pass equal protection muster. If officers are authorized to stop anyone at all they will be, as they presently are, equally authorized to arrest on probable cause, or stop on reasonable suspicion without limitation or exclusion. How to prevent officers from disregarding these limits, or from exercising their authority in a racially discriminatory manner, will remain the challenge it presently is.

The reader may of course question what ground has then been gained by deactivating the reasonableness clause. After all, the result will be approximately the same. Chiefly, the gain is that fourth amendment law will be right, even "righter" in that its purported popular fidelity will be more fully realized. That is a large accomplishment for search and seizure. But the gains are greatest in constitutional law. For one thing it further evidences that historical recovery *is* attainable. For too long judges and commentators, both politically left and right, have admitted the centrality of recovery even while denying its possibility. This effort should force at least some to fish or cut bait: either embrace the recovered meaning or reject it. At least candor, never the judiciary's strong suit, will be served.

More than the fourth amendment is at stake. At the root of constitutional lawmaking today is the presumption that the Constitution, particularly the Bill of Rights, is meaningful, if at all, only at a very high level of abstraction, and that the real task of "interpretation" is in application. Thus Justice Brennan, seconding Robert Jackson, stated: "[T]he burden of judicial interpretation is to translate the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century."<sup>295</sup>

Within that one observation resides the source of the current malaise in constitutional law, a predicament in which academics pursue the novel and the fanciful, and write rhapsodically about crudely reductionist approaches

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295. W. Brennan, Speech at Georgetown University (Oct. 12, 1985) (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943)).



to constitutional law. Judicial opinions not coincidentally partake the features, especially the colorless prolixity, of law review articles while striking increasingly tedious ideological pastures.

Of course, the Bill of Rights *is* largely a list of majestic generalities if it is shorn of all concrete historical context; if provisions, like the reasonableness clause, never intended as operative limits, and containing none, are activated; if, finally, the *premise* of reasoning about the Constitution is that provisions need be interpreted in a way which yields judicial control of the more democratic branches. Which is to say, if the end result is predetermined to be a highly active judiciary reading liberal individualism into the Constitution, then the text must be made a collection of majestic generalities. Even then we will have to make a few delicate course adjustments to smooth the way. Bludgeoning Rule 41 and inventing inherent judicial authority to issue warrants are but two examples.

Herewith lies an argument for subtracting one such "majestic generality." Elsewhere I have argued for further reductions.<sup>296</sup> The list of remaining majesties may turn out to be a short one indeed. But even no list at all may fail to eradicate the commitment to substantial government by judiciary, which is more likely rooted in ground other than an intellectually honest, politically-detached approach to the Constitution. Still there is reason for cautious optimism. Historical recovery of some kind is the key to restoring integrity to constitutional law. Fortunately, that recovery yields a much richer, more diverse constitutional tradition than liberals bequeath us. It promises a breakthrough in the methodological impasse at the same time it yields a "communitarian" corrective to liberal discourse. The signs of the times suggest that we are ready for such a possibility.

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296. See Bradley, *supra* note 71.