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The Original Fourth Amendment


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83 U. Chi. L. Rev. 1181 (2016)

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The Original Fourth Amendment

Laura K. Donohue†

The meaning of the rights enshrined in the Constitution provides a critical baseline for understanding the limits of government action—perhaps nowhere more so than in regard to the Fourth Amendment. At the time it was adopted, the Fourth Amendment prohibited the government from entering into any home, warehouse, or place of business against the owner’s wishes to search for or to seize persons, papers, or effects, absent a specific warrant. Consistent with English common law, the notable exception was when law enforcement or citizens were pursuing a known felon. Outside of such circumstances, search and seizure required government officials to approach a magistrate and, under oath, to provide evidence of the suspected offense and to particularly describe the place to be searched and persons or things to be seized. Scholars’ insistence that the Fourth Amendment does not entail a general protection against government entry into the home without a warrant does more than just fail to appreciate the context. It contradicts the meaning of the text itself, which carefully lays out the conditions that must be met before the government may intrude. Reclaiming this meaning is essential for understanding the scope of the original Fourth Amendment and for ensuring a doctrine that reflects fidelity to the founding principles.

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† Professor of Law, Georgetown University Law Center. Special thanks to Randy Barnett, Morgan Cloud, Julie Cohen, William Cuddihy, Jennifer Daskal, Thomas Davies, Daniel Ernst, Erin Kidwell, Martin Lederman, John Mikhail, Paul Ohm, James Oldham, Julie O’Sullivan, Michel Paradis, Brad Snyder, Geoff Stone, William Treanor, and Peter Winn, who provided thoughtful comments on earlier versions of the Article. Ladislav Orsy kindly helped to verify the meaning of the original Latin texts. My appreciation extends to participants at the Georgetown Law faculty workshop, Georgetown Law’s Constitutional Law Seminar, the 2015 Berkeley-GW 8th Annual Privacy Law Scholars Conference, the Washington, DC National Security Law Roundtable, and the Retired Partners Group at Arnold & Porter LLP for their critiques. Jeremy McCabe, Thanh Nguyen, Ellen Noble, and Morgan Stoddard kindly assisted in helping to obtain many materials. Betsy Kuhn copyedited the penultimate text, which is reflected in part in chapters four and five of my recently published book, *The Future of Foreign Intelligence: Security and Privacy in a Digital Age* (Oxford 2016). The editors at *The University of Chicago Law Review* dedicated time and effort to ensuring the quality of the final Article. It is much appreciated.

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INTRODUCTION

As a term of art, "originalism" is a relative newcomer to constitutional debate. It emerged in the conservative backlash to the Warren Court and the dialectic that ensued over the appropriate role of the judiciary in interpreting and applying the Constitution.¹ Nevertheless, the basic concept—understanding the text according to its original meaning or the intent of those who introduced the provisions—is not a new idea. For centuries, lawyers, judges, and scholars have recognized the importance of discerning

¹ See, for example, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind L J* 1, 5–6, 8 (1971) (critiquing the Warren Court on the grounds that "[i]f we have constitutional rights and liberties already, rights and liberties specified by the Constitution, the Court need make no fundamental value choices," and stating that "[t]he judge must stick close to the text and the history, and their fair implications, and not construct new rights," as an attack on *Griswold v Connecticut*, 381 US 479 (1965)) (citation omitted). See also generally William H. Rehnquist, *The Notion of a Living Constitution*, 54 *Tex L Rev* 693 (1976) (criticizing living constitutionalism). In 1980, Professor Paul Brest responded with an article credited with coining the term "originalism." See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 *BU L Rev* 204, 204 (1980). Academic debate followed. See generally, for example, Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 *Nw U L Rev* 226 (1988); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 *Harv L Rev* 885 (1985).

the meaning of the law at its inception.² In 1988, the Department of Justice (DOJ) made its adherence to this approach explicit, arguing that fidelity to the original meaning of the Constitution was neither conservative nor liberal. It embodied “a jurisprudence faithful to our Constitution.”³ The DOJ’s Office of Legal Policy directed officials, when text may be ambiguous or vague, to look to sources that indicated “the intent of those who drafted, proposed, and ratified that provision (*i.e.*, the Founders).”⁴ Accordingly, all briefs were to “clearly set out the text and original understanding of the relevant constitutional provisions, along with an analysis of how the case would be resolved consistent with that understanding.”⁵

In the ensuing decades, originalism has become an important mode of constitutional interpretation.⁶ It has been the deciding

² See, for example, *Gibbons v Ogden*, 22 US (9 Wheat) 1, 188 (1824) (“[T]he enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.”); *Reynolds v United States*, 98 US 145, 162 (1879) (“The word ‘religion’ is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted.”); *Ex parte Bain*, 121 US 1, 12 (1887) (“It is never to be forgotten that, in the construction of the language of the Constitution here relied on, as indeed in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument.”); *United States v Lovett*, 328 US 303, 321 (1946) (drawing an interpretive distinction between “the broad standards of fairness written into the Constitution (*e.g.* ‘due process,’ ‘equal protection of the laws,’ [and] ‘just compensation’),” and “very specific provisions of the Constitution,” which “had their source in definite grievances and led the Fathers to proscribe against recurrence of their experience”). See also Joseph Story, 1 *Commentaries on the Constitution of the United States* § 400 at 383–84 (Hilliard, Gray 1833).

³ Office of Legal Policy, *Guidelines on Constitutional Litigation* 1 (DOJ 1988).

⁴ *Id.* at 3.

⁵ *Id.* at 10.

⁶ During the Reagan administration’s second term, Edwin Meese was appointed attorney general. He gave a series of speeches in which he stated that originalism would guide the DOJ. One of the speeches, given at the American Bar Association’s annual meeting in July 1985, became widely reported and provided political salience to what had been largely insulated within the realm of legal scholarship. See generally Edwin Meese III, *Speech before the American Bar Association*, in Steven G. Calabresi, ed., *Originalism: A Quarter-Century of Debate* 47 (Regnery 2007). Justice William J. Brennan Jr responded, spurring further public debate that included additional public remarks by Meese. See generally William J. Brennan Jr, *Speech to the Text and Teaching Symposium*, in Calabresi, ed., *Originalism* 55 (cited in note 6); Edwin Meese III, *Speech before the D.C. Chapter of the Federalist Society Lawyers Division*, in Calabresi, ed., *Originalism* 71 (cited in note 6). See also Steven G. Calabresi, *A Critical Introduction to the Originalism Debate*, 31 Harv J L & Pub Pol 875, 875–85 (2008) (discussing all three speeches). The movement gained momentum as Meese brought young attorneys to the Office of Legal Counsel. Justice Antonin Scalia advocated a move away from original intentions and toward public meaning. See generally *Address by Justice Antonin Scalia before the Attorney General’s Conference on Economic Liberties in Washington, D.C. (June 14, 1986)*, in *Original Meaning Jurisprudence: A Sourcebook* 101 (Office of Legal Policy 1987). In the 1990s, these ideas began

factor in Supreme Court decisions.⁷ It elucidates the meaning of the Constitution, and, like the Founding, reflects all sides of the political spectrum. Originalism has been embraced by conservative justices, such as William Rehnquist, Antonin Scalia, and Clarence Thomas.⁸ And it has been applied to a range of traditionally liberal causes, with civil rights,⁹ as well as the Court's decisions in *Roe v Wade*¹⁰ and *Brown v Board of Education of Topeka*,¹¹ defended on originalist grounds.

taking root in academia. See, for example, Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 Nw U L Rev 819, 823 (1999); Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L Rev 1487, 1493 (2005) ("The modern interpreter should read the language in accord with the meaning it would have had in the late 1780s."). Around the turn of the century, "new originalism" emerged, centered on two tenets: the original meaning of the constitutional text equates to its public meaning (reflecting Scalia's approach), and a distinction can be drawn between interpretation and construction. See, for example, Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* 1–7 (Harvard 1999); Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* 1–16 (Kansas 1999); Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* 92–93, 121–25 (Princeton 2004) (describing the public-meaning understanding of originalism and distinguishing between interpretation and construction); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 Loyola L Rev 611, 620, 645 (1999); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 Fordham L Rev 453, 457 (2013) (distinguishing between constitutional interpretation and constitutional construction and advancing two claims about the latter); Lawrence B. Solum and Robert W. Bennett, *Constitutional Originalism: A Debate* 1–4 (Cornell 2011).

⁷ See, for example, *District of Columbia v Heller*, 554 US 570, 576–77 (2008) (interpreting the Second Amendment by employing the principle that "meaning . . . excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation"). For a discussion of why *Heller* was a particularly strong vehicle for originalism, see Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 Nw U L Rev 923, 925–26 (2009).

⁸ See Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 38 (Princeton 1997) ("What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended."). See also generally Antonin Scalia, *Originalism: The Lesser Evil*, 57 U Cin L Rev 849 (1989); Rehnquist, 54 Tex L Rev 693 (cited in note 1). See also Nancie G. Marzulla, *The Textualism of Clarence Thomas: Anchoring the Supreme Court's Property Rights Jurisprudence to the Constitution*, 10 Am U J Gender Soc Pol & L 351, 379 (2002) (describing Thomas as "an individualist . . . dedicated to an interpretative philosophy based on the text of the Constitution and its context").

⁹ See generally, for example, Steven G. Calabresi and Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 U Fla L Rev 909 (2013) (arguing that the Equal Protection Clause should be applied to religious discrimination based on the Clause's original understanding).

¹⁰ 410 US 113 (1973). For an originalist defense of *Roe*, see Akhil Reed Amar's fictional "opinion" in Jack M. Balkin, ed, *What Roe v. Wade Should Have Said: The Nation's Top Legal Experts Rewrite America's Most Controversial Decision* 152, 152–69 (NYU 2005).

¹¹ 347 US 483 (1954). See also Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va L Rev 947, 1131–40 (1995).

The meaning of the rights enshrined in the Constitution provides a critical baseline for understanding the limits of government action—perhaps nowhere more so than in regard to the Fourth Amendment. The Amendment prohibited the government from entering into any home, warehouse, or place of business against the owner’s wishes to search for or to seize persons, papers, and effects, absent a specific warrant. The only exception was when law enforcement or citizens were in active pursuit of a known felon.¹² Outside of that narrow circumstance, the government was prohibited from search and seizure absent appearing before a magistrate and, under oath, providing evidence of the suspected offense and particularly describing the place to be searched and persons or things to be seized.

Over time, the essence of the Amendment has at times become lost, risking diminution of the rights that existed at the Founding. In 1994, for instance, Professor Akhil Reed Amar argued in the *Harvard Law Review* that “[t]he core of the Fourth Amendment . . . is neither a warrant nor probable cause, but reasonableness.”¹³ Amar grounded his argument in the text: “We

¹² There was no exception for customs officers to search for contraband. See, for example, *Bostock v Saunders*, 95 Eng Rep 1141, 1145 (KB 1773) (de Grey) (recognizing an action in trespass against a customs inspector looking for contraband tea because the oath provided was not supported by probable cause, “as no evidence was given at the trial of any probable cause or ground of suspicion that tea was fraudulently concealed by the plaintiff, the jury found a verdict for him, and gave the whole damages in the declaration”). Warrants were presumptively required. Much later, the Supreme Court articulated the contours of hot pursuit in *Warden v Hayden*, 387 US 294, 298–300 (1967).

¹³ Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv L Rev 757, 801 (1994). See also Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 Suffolk U L Rev 53, 55 (1996) (“[T]he [Fourth] Amendment does not require a warrant for each and every search or seizure. It simply requires that each and every search or seizure be reasonable.”); Akhil Reed Amar, Terry and *Fourth Amendment First Principles*, 72 St John’s L Rev 1097, 1106 (1998):

[T]here are several problems with [the] “warrantist” reading of the [Fourth] Amendment. First, it is not what the words of the Amendment say. Second, no Framers ever said that this is what the Amendment did or should mean. Third, no early treatise said that all warrantless searches and seizures were (even presumptively) illegitimate.

See also Akhil Reed Amar, *America’s Unwritten Constitution: The Precedents and Principles We Live By* 129, 178 (Basic Books 2012) (“The Fourth Amendment does not bar all intrusions upon privacy—only unreasonable ones.”); Akhil Reed Amar, *The Law of the Land: A Grand Tour of Our Constitutional Republic* 232 (Basic Books 2015):

[T]he [Fourth] [A]mendment does not require a warrant for each and every search or seizure. It simply requires that each and every search or seizure be *reasonable*. . . . Reading into [the wording of the first clause] . . . an implicit warrant requirement for all searches and seizures runs counter to text, Founding-era history, and common sense. Textually, as we have seen, the amendment contains no third

need to read the Amendment's words and take them seriously: they do not require warrants, [or] probable cause, . . . but they do require that all searches and seizures be reasonable."¹⁴ Amar suggested that the modern Supreme Court had erred in assuming a link between the right of the people to be secure against unreasonable search and seizure and the requirement that no warrant issue but upon probable cause, particularity, and oath.¹⁵ The assumption that search and seizure could take place only pursuant to a warrant was "only one of several possible ways of understanding the relationship between the" two demands.¹⁶ Amar advocated reading the clauses separately, looking to exceptions to the warrant requirement as evidence that the Founders did not contemplate that warrants should always issue, before asserting that "[t]he common law search warrants referred to in the Warrant Clause were solely for stolen goods."¹⁷

clause explicitly stating that "warrantless searches and seizures are inherently unreasonable," or explicitly barring all "warrantless searches and seizures."

¹⁴ Amar, 107 Harv L Rev at 759 (cited in note 13).

¹⁵ See id at 762.

¹⁶ Id.

¹⁷ Id at 765–66. Amar elucidates his theory of why the Fourth Amendment took aim at stolen goods: "[O]nce extended beyond the limited context of the common law warrant for stolen goods, warrants had the potential for great evil." Amar, 30 Suffolk U L Rev at 63 (cited in note 13). Because the warrant insulated officers of the Crown from tort claims, the purpose of prohibiting general warrants focused on stolen goods and related areas. In all other circumstances, judicial review would provide an effective check on whether a search comported with what he calls "common-sense reasonableness." Id. See also Amar, 107 Harv L Rev at 777 (cited in note 13) (emphasizing the importance of juries in cases involving the Fourth Amendment). Amar's interpretation is intriguing but problematic. It does not, for instance, explain why juries should not also provide an effective check for searches premised on stolen goods. Why have a warrant requirement at all if civil suits were such an effective way of protecting the right against promiscuous search and seizure? What protection could juries realistically perform in civil cases if the right to jury trial could be waived? See, for example, *Patton v United States*, 281 US 276, 301 (1930) (holding that "notwithstanding the imperative language of the statute, it was competent for the parties to waive a trial by jury" in civil cases). Warrants were used in a range of cases, from libel to pressing people into military service. What evidence is there that only the stolen goods warrants were the object of the second clause of the Fourth Amendment? If Amar is targeting stolen goods warrants because of the common-law understanding, then the prohibition on entry into the home must, by the same token, be read into the first clause. Amar's argument also does not explain why a warrant would immunize or insulate an officer from civil suit. Juries could still consider malfeasance or ill motive, whether sufficient grounds to grant the warrant were present, and whether law enforcement stepped outside the contours of the warrant. In some sense this moves the inquiry to the judicial determination and the representation made by the law enforcement officer in question, but a check on government activity remains. This shift helps to explain the great debate over, and embrace of, judicial independence that marked the exchange between Brutus, Alexander Hamilton, and others. See text accompanying notes 657–65. If judges were to prove the gatekeeper, their independence would have to be guaranteed.

Amar's argument raised important questions about the relationship of the clauses within the text of the Fourth Amendment. It also became influential, with about a dozen lower federal and state court opinions later citing his reasonableness proposition.¹⁸ Some scholars (including Professor Michael Stokes Paulsen and Professor William J. Stuntz) endorsed his position.¹⁹ But many more criticized the article, suggesting that it was not sufficiently grounded in historical sources and therefore had failed to take account of contrary evidence.²⁰

¹⁸ See *State v Hemenway*, 295 P3d 617, 635 n 12 (Or 2013); *State v Ochoa*, 792 NW2d 260, 272 (Iowa 2010); *United States v Hernandez-Lopez*, 761 F Supp 2d 1172, 1198 n 8 (D NM 2010); *United States v Askew*, 529 F3d 1119, 1151 n 1, 1158 n 6 (DC Cir 2008); *In re Tiffany O.*, 174 P3d 282, 291 n 4 (Ariz App 2007); *Christopher v Nestlerode*, 373 F Supp 2d 503, 512 n 10 (MD Pa 2005); *Weber v Oakridge School District 76*, 56 P3d 504, 513 n 3 (Or App 2002); *People v McKay*, 41 P3d 59, 80 (Cal 2002); *Tenenbaum v Williams*, 193 F3d 581, 602–03 (2d Cir 1999); *Buritica v United States*, 8 F Supp 2d 1188, 1194 (ND Cal 1998); *United States v Warren*, 997 F Supp 1188, 1194 (ED Wis 1998); *United States v Brown*, 64 F3d 1083, 1085 (7th Cir 1995); *Brown v State*, 653 NE2d 77, 82 n 2 (Ind 1995); *United States v Johnson*, 22 F3d 674, 684 (6th Cir 1994). Although the Supreme Court has never directly cited Amar's proposition, as late as 2004, Thomas, joined by Scalia, suggested that "the text of the Fourth Amendment [] does not mandate" a warrant requirement as part of the reasonableness requirement, "[n]or does the Amendment's history, which is clear as to the Amendment's principal target (general warrants), but not as clear with respect to when warrants were required, if ever." *Groh v Ramirez*, 540 US 551, 572 (2004) (Thomas dissenting).

¹⁹ Michael Stokes Paulsen, Book Review, *Dirty Harry and the Real Constitution*, 64 U Chi L Rev 1457, 1491 (1997) (calling Amar's work "an argument that needs, and deserves, to be taken seriously"); William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 Yale L J 393, 409–10 (1995). See also Jeb Rubinfeld, *Revolution by Judiciary: The Structure of American Constitutional Law* 32–33 (Harvard 2005); Corey M. Then, Note, *Searches and Seizures of Americans Abroad: Re-examining the Fourth Amendment's Warrant Clause and the Foreign Intelligence Exception Five Years after United States v. Bin Laden*, 55 Duke L J 1059, 1071 (2006).

²⁰ See, for example, David E. Steinberg, *The Uses and Misuses of Fourth Amendment History*, 10 U Pa J Const L 581, 590–95 (2008); Roger Roots, *Are Cops Constitutional?*, 11 Seton Hall Const L J 685, 729–34 (2001); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich L Rev 547, 571–90 (1999); Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 Wake Forest L Rev 239, 263 & n 64, 417 n 593 (2002); Susan R. Klein, Book Review, *Enduring Principles and Current Crises in Constitutional Criminal Procedure*, 24 L & Soc Inquiry 533, 538–50 (1999); Louis Michael Seidman, Book Review, *Akhil Amar and the (Premature?) Demise of Criminal Procedure Liberalism*, 107 Yale L J 2281, 2294–2303 (1998); Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 BU L Rev 925, 929 (1997); Morgan Cloud, Book Review, *Searching through History; Searching for History*, 63 U Chi L Rev 1707, 1732–43 (1996); Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go down That Wrong Road Again"*, 74 NC L Rev 1559, 1594–1623 (1996). See also generally David E. Steinberg, *An Original Misunderstanding: Akhil Amar and Fourth Amendment History*, 42 San Diego L Rev 227 (2005); David A. Sklansky, *The Fourth Amendment and Common Law*, 100 Colum L Rev 1739 (2000); Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse Than the Disease*, 68 S Cal L Rev 1 (1994).

As a matter of originalist scholarship, the critiques rest on strong ground. At the time of the Founding, prominent scholars and public opinion embraced the position that—outside of active pursuit of a known felon—the Crown could not forcibly enter a subject’s domicile for purposes of search and seizure without a specific warrant. The only way that officers could legally demand access to the home was with a particularized showing under oath. The clauses that cemented this understanding into the US Constitution were deeply contextual: “[t]he right of the people to be secure . . . against unreasonable searches and seizures”²¹ meant that the government could not enter at will, and that general warrants—under which the government could gain entry—would be prohibited. For a specific warrant to be valid, in turn, it had to meet the requirements of the second part of the Fourth Amendment.

Part of the problem with Amar’s argument appears to be that it relied in significant measure on a lecture presented in April 1967 by Professor Telford Taylor at the Ohio State University College of Law, which he published two years later as part of a book.²² Based on minimal historical documentation, Taylor argued that the Framers were not concerned about warrantless searches—and that the Fourth Amendment required only a reasonableness standard.²³

²¹ US Const Amend IV.

²² See generally Telford Taylor, *Two Studies in Constitutional Interpretation* (Ohio State 1969). See also, for example, Amar, 107 Harv L Rev at 764–66, 789, 803 (cited in note 13).

²³ Taylor, *Two Studies in Constitutional Interpretation* at 23–44 (cited in note 22). In support of his claim, for instance, that warrants were not historically required, Taylor noted that it would be “quite impracticable unless there are a reasonable number of officials who can read and write.” Id at 27. He continued: “Accordingly, it is hardly surprising [] that the earliest statutes authorizing searches say nothing of warrants.” Id. He did not, however, cite any laws—nor was the assumed connection between illiteracy and a lack of warrants anything more than mere conjecture. Taylor continued, suggesting that the arrest and search of suspected felons without a warrant was a frequent occurrence and that “it is from this natural if often oppressive practice that much of the modern law of search and seizure has sprung.” Id at 28. Yet he provided no evidence of this assertion—to the contrary, he went on to quote Sir Frederick Pollock and Frederick William Maitland on the *infrequency* of arrest (not even addressing search) outside of hot pursuit. Id, citing Frederick Pollock and Frederic William Maitland, 2 *The History of English Law before the Time of Edward I* 582–83 (Cambridge 2d ed 1898). Taylor further contended that search incident to arrest suggests that warrants were not required, without realizing that this amounted to an exception. Taylor, *Two Studies in Constitutional Interpretation* at 28–29 (cited in note 22), citing William Sheppard, *The Offices of Constables*, ch 8, § 2, no 4 (Hondgkinsonne 2d ed c 1675), and Saunders Welch, *Observations on the Office of Constable* 12, 14 (printed for A. Millar 1754).

In addition to Taylor, in support of the claim that the common-law search referred to in the Warrant Clause related solely to stolen goods, Amar referenced a 1765 pamphlet written by John Almon, the “Father of Candor,” stating that to retrieve stolen goods, a sworn statement must be provided to a magistrate and a warrant must be obtained.²⁴ This, Amar suggested, demonstrated that the Warrant Clause was limited to stolen items.²⁵

The errors in the argument are clear. First, simply because a sworn statement must be made to retrieve *stolen goods* does not mean that the same is *not* required for searches related to other matters. Some of the most well-known search cases at the time, for instance, centered on seditious libel, not stolen goods—even as other statutes provided for searches for such disparate objects as counterfeit coins and indigents wanted for service on the high seas.²⁶ Second, the fact that a warrant was required under certain conditions (that is, those outlined in the pamphlet) does not imply that in all other circumstances a warrant would *not* be required.

Using a similarly faulty ratiocination, Amar cited a statute passed in 1789, which allowed naval inspectors to enter ships without warrants to search for and to seize goods violating customs.²⁷ He noted that “[o]ther provisions of the 1789 Act authorized, but did not require, warrants to search houses, stores, and buildings.”²⁸ Since the statute did not explicitly prohibit warrantless entry, he reasoned, warrants were not necessary. The absence of a prohibition, however, does not imply the presence of permission—particularly when provision is made for the conditions under which a home could be searched. Parallel cases in English law, moreover, underscored the necessity of customs officers and others first obtaining a warrant, supported by probable cause and particularly describing the place to be searched, before the Crown could enter into any private residence.²⁹ In the absence

²⁴ Amar, 107 Harv L Rev at 765 n 21 (cited in note 13).

²⁵ Id at 765.

²⁶ See Part I.

²⁷ Amar, 107 Harv L Rev at 766–67 (cited in note 13), citing Act of July 31, 1789, ch 5, § 24, 1 Stat 29, 43 (repealed 1790).

²⁸ Amar, 107 Harv L Rev at 766 (cited in note 13). Amar similarly relies on this argument in his rebuttal to Professor Thomas Davies. Amar, 30 Suffolk U L Rev at 59 (cited in note 13).

²⁹ See, for example, *Bostock*, 95 Eng Rep at 1146 (Nares) (distinguishing protections of personal homes from protections of businesses and finding that the absence of probable cause resulted in a judgment for the plaintiff of trespass). See also *Cooper v Boot*, 99 Eng Rep 911, 916 (KB 1785) (finding that the statute of 10 Geo 1, ch 10 imposed a duty on

of a warrant, the actions of the government official amounted to a trespass.

Despite the shortcomings of Amar's argument, some of its most effective critics have also made assumptions about the original meaning of the Fourth Amendment that fail inspection. Five years after Amar published his piece, Professor Thomas Davies offered one of the most sustained critiques, pointing out that the Framers never contemplated that the government would attempt to conduct warrantless intrusions.³⁰ They could not have anticipated that the word "unreasonable" would be transformed in future centuries into a meter for the validity of something that would not have been permitted in the first place.³¹

Davies's account differed in subtle but important ways from two prior histories of the Fourth Amendment that embraced a warrant preference. In 1937, Professor Nelson Lasson published a manuscript in which he detailed the role of James Otis's oration in *Paxton's Case*,³² the controversy surrounding John Wilkes in England, and the Townshend Acts as precursors to the Fourth Amendment.³³ Lasson suggested that the Founders' concerns about general warrants, illustrated in each of these cases, had broadened by 1789 into a more comprehensive principle³⁴ of freedom from unreasonable search and seizure.³⁵ He concluded that the first clause of the Amendment encompassed an ideal, while the second clause banned general warrants.³⁶

In 1990, Professor William Cuddihy supplanted Lasson's work with a meticulous history of the Fourth Amendment.³⁷ Like

excise officers having grounds of suspicion to lay them before a justice of peace, or commissioner of excise, upon oath, and that the judgment of the magistrate upon ex parte examination, certified by oath, served as a legal warrant); *Samuel v Payne*, 99 Eng Rep 230, 230–31 (KB 1780) (noting that a justice of the peace issued a search warrant based on a charge that the individual possessed stolen goods).

³⁰ Davies, 98 Mich L Rev at 551 (cited in note 20).

³¹ Id.

³² 1 Quincy 51 (Mass 1761).

³³ See generally Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* (Johns Hopkins 1937).

³⁴ See id at 101–03.

³⁵ Davies, 98 Mich L Rev at 568 (cited in note 20), citing Lasson, *The History and Development of the Fourth Amendment* at 81 (cited in note 33).

³⁶ Lasson, *The History and Development of the Fourth Amendment* at 103 (cited in note 33). See also Davies, 98 Mich L Rev at 568 (cited in note 20) (summarizing Lasson's analysis).

³⁷ See generally William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* (unpublished PhD dissertation, Claremont Graduate School, 1990) ("Cuddihy Dissertation"). He subsequently published his dissertation as a book. See generally

Lasson, Cuddihy emphasized the initial phrase as the more profound statement: “The amendment’s first clause, which explicitly renounces all unreasonable searches and seizures, overshadows the second clause, which implicitly renounced only a single category, the general warrant.”³⁸ He concluded, “The framers of the amendment were less concerned with a right against general warrants than with the broader rights those warrants infringed.”³⁹ To consider the Fourth Amendment as a prohibition on general warrants “disparages its intricacy. The amendment expressed not a single idea,” Cuddihy wrote, “but a family of ideas whose identity and dimensions developed in historical context.”⁴⁰

Davies faulted Lasson and Cuddihy for neglecting to clarify the basic question: whether or in what circumstances a warrant is required.⁴¹ According to Davies, this failure had given Amar an opening to suggest the absence of a relationship between the clauses.⁴² Davies went on to respond to Taylor and Amar in two ways: first, by noting the dearth of historical support for their claims; and second, by offering evidence that what the Framers objected to was not general warrants per se, but the allocation of the discretionary exercise of power to petty officers.⁴³ Providing such officers with search and seizure powers outside of any warrant would have been abhorrent—thus, warrantless authorities were never on the table.⁴⁴ Davies noted that the Founding generation “did not have a diffuse concern about the security of person and house.”⁴⁵ Why? Because “the common-law rules regarding search and arrest authority provided sufficient protection against unjustified intrusions.”⁴⁶ The real concern, Davies argued, was a common-law vulnerability: the potential for future legislation to make general warrants legal, thus undermining security against government intrusion.⁴⁷ This, he reasoned, is why the Fourth

William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning: 602–1791* (Oxford 2009).

³⁸ Cuddihy, *The Fourth Amendment* at 765 (cited in note 37).

³⁹ *Id.* at 765–66.

⁴⁰ *Id.* at 770.

⁴¹ See Davies, 98 Mich L Rev at 571 (cited in note 20).

⁴² See *id.* at 571–74.

⁴³ See *id.* at 575–83.

⁴⁴ *Id.* at 581–82.

⁴⁵ Davies, 98 Mich L Rev at 590 (cited in note 20).

⁴⁶ *Id.*

⁴⁷ *Id.* at 600–10.

Amendment was initially inserted into Article I, § 9 as a limitation on the legislature.⁴⁸

Davies is correct that, at the Founding, there was no such thing as a “standard of reasonableness,” such as has marked the Fourth Amendment discourse since the 1967 case of *Katz v United States*.⁴⁹ Careful historians could hardly conclude otherwise. As this Article demonstrates, Amar and Taylor are simply wrong on this point. Taylor’s further claim, echoed by Amar, that the Framers were unconcerned about warrantless intrusion is also unsupported by history. The Founders were worried about all intrusions—and no warrant lacking the appropriate particularity could overcome the presumption against invasion of the home. Amar is similarly incorrect that, as a result, reasonableness—and not a warrant requirement—lies at the heart of the Fourth Amendment. Reasonableness does lay at the heart of the Fourth Amendment, but what it meant was that, outside of apprehending a known felon, a warrant would be required.

Where Davies (and, indeed, Lasson and Cuddihy) errs is in failing to understand the first clause as itself restricting government entry in order to prevent promiscuous search and seizure.⁵⁰ As the Supreme Court noted in 2001, “[t]he touchstone of the Fourth Amendment is reasonableness.”⁵¹ What “unreasonable” meant in the seventeenth century was “against reason,” which translated into “against the reason of the common law.” Warrantless entry, as well as general warrants (warrants that failed to specify the person, crime, or place to be searched), violated the reason of the common law and were therefore unreasonable. Davies is correct that the clause did not mean what it has come to be understood as meaning in a relativistic sense: an evaluation of

⁴⁸ Id at 700 & n 437.

⁴⁹ 389 US 347 (1967).

⁵⁰ Cuddihy rightly critiqued Davies for narrowing the category of “unreasonable searches and seizures” to include only general warrants. William Cuddihy, *Warrantless House-to-House Searches and Fourth Amendment Originalism: A Reply to Professor Davies*, 44 Tex Tech L Rev 997, 998 (2012) (“Davies’s identification of the general warrant as the Amendment’s only ‘unreasonable’ category in 1791 massively contradicts a pre-revolutionary consensus on search and seizure that anathematized all legal entities that incubated general house searches.”). It is therefore puzzling why Cuddihy would see the first clause as a general statement of principle requiring a warrant for entry and not also a prohibition on general warrants, a concept that he instead applies to the specifics required in the second clause of the Fourth Amendment. See text accompanying notes 37–40.

⁵¹ *United States v Knights*, 534 US 112, 118 (2001).

what could be considered more or less reasonable. This interpretation untethers the Fourth Amendment from its original meaning, undermining rights that the Framers sought to protect.

This Article sets the historical record straight. The proper way to understand the Fourth Amendment is as a prohibition on general search and seizure authorities *and* a requirement for specific warrants. The first clause outlaws promiscuous search and seizure, even as the second clarifies *precisely* what will be required for a particularized warrant to be valid. The government could not violate the right against search and seizure of one's person, house, papers, or effects absent either a felony arrest or a warrant meeting the requirements detailed in the second clause. In making this argument, the Article provides a detailed narrative of the broader context of the meaning of the Fourth Amendment, examining the writings, laws, and legal opinions that laid the groundwork for its inclusion in the Constitution.

Part I begins with the English experience, which embraced the premise that an Englishman's dwelling was his castle. The common law recognized only a few, limited conditions under which the Crown could enter the home absent a warrant. Efforts to get around common-law prohibitions by passing statutory measures that allowed for the issuance of general warrants created increasing friction between English subjects and the Crown, leading scholars and jurists to reject indiscriminate search and seizure. A notable exception was in the context of felony arrest (during apprehension of a known felon, or in the course of the hue and cry).⁵²

Part II of this Article turns to the colonial experience, which reinforced the inherited discourse. Reflecting the sanctity of the home, outside of limited circumstances, warrants were required for the government to enter. To obtain greater access, officers of the Crown increasingly turned to general warrants. As in England,

⁵² In a later response to Davies, Amar refers to Sir William Blackstone's writing to support the assertion that there is no warrant requirement in the Fourth Amendment. See Amar, 30 *Suffolk U L Rev* at 56–59 (cited in note 13). He misses in this analysis that public safety—which included apprehending a fleeing felon immediately following the felonious act—presented an exception to the general requirement. He also focuses on the citizen's arrest aspect of felony pursuit, contradicting Davies's assertion that such arrests do not represent state action. The analysis rather misses the point that breaches of the peace and the fleeing felon exception were just that: exceptions and not the general rule. The fact that constables, by nature of their office, held similar powers also misses the point. Sir Matthew Hale, Sergeant William Hawkins, Blackstone, and others have spilled a considerable amount of ink discussing the level of assuredness needed during the commission of a felony, or immediately afterward, for the *exception* to hold. See Part I.C.

it was not that such instruments did not exist—it was that the government’s expanding use of them spurred the colonists to resist British rule.

The War of Independence was fought in part because of the Crown’s effort to exercise writs of assistance, a form of general warrant wherein government officials failed to specify the precise place or person to be searched, or to provide evidence under oath to a third-party magistrate of a particular crime suspected. In the shadow of the French and Indian War, Britain had begun to make ever-greater use of the writs, sowing the seeds of revolution. Otis’s argument in *Paxton’s Case* set the stage.⁵³ President John Adams later reported, “Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.”⁵⁴ The nascent states went on to prohibit general warrants in their state constitutions.⁵⁵ Outside of active pursuit of a known felon, no forcible entry into the home would be countenanced absent a specific warrant.

Part III details how a number of the states ratified the US Constitution only on the condition that the document would be amended. A prohibition on indiscriminate search and seizure figured largely in the debate. The object was to prevent government officials from intruding upon the sanctity of the home unless officials could present evidence, under oath to a magistrate, of a crime committed. The court would then have to issue a warrant under its own seal, particularly describing the place to be searched and the individual on whom the warrant would be served. The Founders’ primary concern was that the government not be allowed free rein to search for potential evidence of criminal wrongdoing. This concern reflected a close relationship between the interests encapsulated in the Fourth and Fifth Amendments. The Supreme Court subsequently tried to capture this relationship in the mere-evidence rule. Although later set aside as unworkable, the rule was consistent with parallel English cases and the animating ideas behind the Fourth Amendment.

As Part IV recognizes, the debates and discussions surrounding the right to be secure against unreasonable search and seizure

⁵³ Lasson, *The History and Development of the Fourth Amendment* at 58–59 (cited in note 33).

⁵⁴ Letter from John Adams to William Tudor (Mar 29, 1817), in 10 *The Works of John Adams, Second President of the United States* 244, 248 (Little, Brown 1856). See also Laura K. Donohue, *The Future of Foreign Intelligence: Privacy and Surveillance in a Digital Age* 75 (Oxford 2016).

⁵⁵ See Donohue, *The Future of Foreign Intelligence* at 84–94 (cited in note 54).

are notable for what they did not include. They did not include exceptions for treason or threats to the government. They did not allow for suspensions or violations of the general rule to collect intelligence, to enforce customs laws, or to collect revenues. It was any intrusion in one's private sphere that the Framers sought to confine within narrow bounds.

It would be difficult to do justice to the full range of arguments that animated the rejection of warrantless search and seizure, general warrants, and specific warrants lacking the requisite particularity. Yet similar themes reverberate in English and American treatises, legal opinions, pamphlets, and orations. The right to be secure in one's home was one of the principal concerns, accompanied by the right to a private sphere within which thoughts, beliefs, writings, and intimate relations were protected from outside inspection. The Founding generation voiced concerns about the harms that could ensue from giving the government access to information and thus providing officials with the power to head off political or religious opposition. Information obtained could be used to embarrass citizens or to harm their relationships with others. Even when innocent in itself, information could be combined to make it look as though an individual were engaged in illegal activity. Structural harms could also follow, with the targeting of the other branches' personnel, or of state and local leaders, undermining separation of powers and federalism.

This Article concludes by suggesting that, while living constitutionalism may embrace a meaning of "unreasonable" beyond that adopted at the Founding, it is on shakier ground when it may look to read the rights that existed at the time the Constitution was drafted out of existence. At a minimum, then, this means that outside of active pursuit of a known felon, the Fourth Amendment prohibits the government from violating the sanctity of the home to conduct searches or seizures absent a warrant, under a general warrant, or under a specific warrant lacking the requisite particularity.

I. INHERITED DISCOURSE

Seventeenth- and eighteenth-century legal treatises embraced the position that, outside of certain circumstances, the Crown could not intrude on the sanctity of the home without a

warrant.⁵⁶ Efforts to get around the rule by drafting warrants broadly to allow for indiscriminate search and seizure were met with objection. It was not that the Crown never tried to evade the warrant requirement—it was that common-law principles did not allow it.⁵⁷

A. English Cases Prohibiting General Warrants

Three influential cases laid the groundwork for the Founders' rejection of general warrants: *Entick v Carrington*⁵⁸ in 1765, *Wilkes v Wood*⁵⁹ in 1763, and *Leach v Money*⁶⁰ in 1765. The stories behind the cases illustrate why English jurists and scholars rejected such instruments.

1. *Entick v Carrington* (1765).

In 1755, the seeds of the first controversy were sown. John Entick, self-styled reverend and sometime English schoolmaster, met political satirist John Shebbeare and publisher Jonathan Scott in The Horn Tavern at the junction of Little Knightbridge and Sermon Lane, London.⁶¹ In the presence of their solicitor, Arthur Beardmore, the men launched a weekly essay paper, *The Monitor*, “to commend good men and good measures, and to censure bad

⁵⁶ For discussion of the fleeing felon exception and its relationship to the hue and cry, see Part I.C.

⁵⁷ See, for example, James Oldham, 1 *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* 204 (UNC 1992) (quoting the manuscript report of *Leach v Money*, 19 How St Tr 1001 (KB 1765)). In the words of Chief Justice Mansfield: “Usage, no doubt, has great Weight; but Usage against clear principles and authorities of Law never weighs. Where the inconvenience of Setting the Error right would be greater, than in letting it continue in the way it was; that would be a reason for Establishing the Usage.” And as Justice Yates added: “[A]n Usage from the 1st year of Rome would not give them any Sanction at all; for no Usage or Custom whatever, can ever establish anything that is in its first Principles illegal.” Oldham, 1 *The Mansfield Manuscripts* at 204 (cited in note 57). Based on this commentary, Professor James Oldham concludes, “Usage, therefore, did not control.” Id. Oldham goes on to ask how, then, jurists identified first principles and suggests that they looked to statute, reason, and authorities, writing that “principles fixed by common law cases were not to be overcome by contrary usage.” Id. at 205. See also id. (“[W]here a question had not been settled by judicial determination, custom and usage remained relevant.”).

⁵⁸ 19 How St Tr 1029 (CP 1765).

⁵⁹ 19 How St Tr 1153 (CP 1763).

⁶⁰ 19 How St Tr 1001 (KB 1765).

⁶¹ *Entick*, 19 How St Tr at 1033. See also David Feldman, *The Politics and People of Entick v. Carrington*, in Adam Tomkins and Paul Scott, eds, *Entick v Carrington: 250 Years of the Rule of Law* 5, 25 (Hart 2015).

ones.”⁶² The rebellious nature of the enterprise could hardly be ignored. The founders’ aim was nothing less than to arouse “that spirit of LIBERTY and LOYALTY, for which the *British* nation was *anciently* distinguished, but which was in a manner lulled asleep by that golden opiate, which weak and wicked Ministers for many years, had too successfully tendered to persons of all ranks, as a *necessary* engine of government.”⁶³

Such was the derision with which the paper treated the political elite that on November 6, 1762, the second Earl of Halifax, George Montagu Dunk, member of the King’s Privy Council and newly appointed secretary of state for the Northern Department, launched a campaign against it. The warrant that Halifax signed on that day decried *The Monitor’s* “gross and scandalous reflections and invectives upon his majesty’s government, and upon both houses of parliament,” naming Entick as the individual responsible.⁶⁴ Halifax directed King George III’s messengers to obtain and deliver Entick’s person and papers to him.⁶⁵

Five days later, the King’s chief messenger, Nathan Carrington, and three “messengers in ordinary” executed the warrant.⁶⁶ At eleven o’clock in the morning, the King’s messengers opened Entick’s front door and entered his home.⁶⁷ For the next four hours they used “force and arms” to accomplish their purpose.⁶⁸ Outraged at the intrusion, Entick brought a trespass suit on grounds of the most ancient of English rights: that of an Englishman to be secure in his own home against unreasonable government intrusion.⁶⁹

Charles Pratt, chief justice of the Common Pleas, presided over the trial.⁷⁰ In ruling against Halifax and for Entick, Pratt observed that “[t]he great end, for which men entered into society,

⁶² 1 *The Monitor: or, British Freeholder, The Dedication* *1 (printed for J. Scott 3d ed 1760).

⁶³ *Id.* at *1–2.

⁶⁴ *Entick*, 19 How St Tr at 1034. Seditious libel was a misdemeanor. It was customarily tried in the Court of King’s Bench. See, for example, Robert Scott, 1 *The History of England; during the Reign of George III* 390 (J. Robins and Co 1824) (noting that the attorney general filed a bill for seditious libel in the Court of King’s Bench). The action for trespass came through the Court of Common Pleas. *Entick*, 19 How St Tr at 1030.

⁶⁵ *Entick*, 19 How St Tr at 1033–34.

⁶⁶ *Id.* at 1034.

⁶⁷ *Id.* at 1034–35.

⁶⁸ *Id.* at 1030.

⁶⁹ *Entick*, 19 How St Tr at 1032.

⁷⁰ *Pratt, Charles*, in H.C.G. Matthew and Brian Harrison, eds, 45 *Oxford Dictionary of National Biography* 211, 211–12 (Oxford 2004). He became Lord Camden in 1765. *Id.*

was to secure their property.”⁷¹ The common law rejected the proposition that the Crown could enter its subjects’ domiciles at will: “[E]very invasion of private property, be it ever so minute, is a trespass.”⁷² The protection of private property extended to letters, papers, and documents. “Papers are the owner’s goods and chattels,” Pratt explained, “they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection.”⁷³

For Pratt, it was not the physical break-in or the rummaging in drawers that constituted the essence of the Crown’s misconduct, but rather the invasion of the indefeasible rights of personal security, liberty, and private property.⁷⁴ Every man in his home was entitled to live free from the gaze of the Crown. The right to privacy ought not to be infringed. The wrong occurred not just when property was confiscated or incriminating evidence obtained, but at the moment the King’s messengers entered.⁷⁵

Pratt took pains to distinguish what had happened in the case of the general warrant for seditious libel from the standards adopted for a specific warrant in criminal law. In the latter instance, “[t]here must be a full charge upon oath of a theft committed.”⁷⁶ A warrant must be executed in the presence of an officer of the law. When a private person suspected criminal activity, evidence had to be provided under oath to a constable, who then determined the reasonableness of the grounds for the suspicion.

In this case, nothing had been described, nor the target of the search distinguished. Pratt explained, “no charge is requisite to prove, that the party has any criminal papers in his custody[;] no person present to separate or select[;] no person to prove in the owner’s behalf the officer’s misbehaviour.”⁷⁷ General searches, such as that to which Entick had been subject, raised the specter of the Star Chamber.⁷⁸ They had been rejected in its aftermath.

⁷¹ *Entick*, 19 How St Tr at 1066. The sufficiency of the warrant was a matter of law and thus within the judge’s domain and not the jury’s.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See *Boyd v United States*, 116 US 616, 630 (1886) (noting that Pratt laid down the basic principles of the Fourth Amendment).

⁷⁵ See John E.F. Wood, *The Scope of the Constitutional Immunity against Searches and Seizures*, 34 W Va L Q 1, 14 (1927).

⁷⁶ *Entick*, 19 How St Tr at 1067.

⁷⁷ *Id.*

⁷⁸ The Star Chamber was an English court named after the building in which the court sat in the palace of Edward the Confessor at Westminster. It operated in the sixteenth and early seventeenth centuries until Parliament abolished it in 1641. The court became a political tool, notorious for secret proceedings that violated the rule of law and

Even to prevent the most serious crimes, such searches were not allowed. Pratt suggested that “such a power would be more pernicious to the innocent than useful to the public.”⁷⁹

2. *Wilkes v Wood* (1763).

Entick was not the first time that Pratt had confronted—and condemned—a general warrant. Two years earlier, he had found himself embroiled in a case involving John Wilkes (one of Entick’s close associates and a darling of the American Revolution), as well as a parallel case involving efforts to fine the printer of Wilkes’s writing. Together with a prominent case from the American colonies, these judicial challenges—and the legal treatises on which they were based—were to profoundly shape the Founding Fathers’ introduction and understanding of the Fourth Amendment.

Wilkes, an English politician raised by commoners, found expression in his pen.⁸⁰ In 1762, after placing a handful of essays in *The Monitor*, Wilkes helped to start a political weekly to counter *The Briton*, a progovernment publication, naming its counterpoise the *North Briton*.⁸¹ The paper dedicated much of its space to lampooning George III’s Scottish favorite, John Stuart, third Earl of Bute.⁸² As Bute was the beloved tutor to the Prince of Wales, George III’s accession to the throne in 1760 immediately improved Bute’s circumstances.⁸³ In May 1762, Bute became first lord of the treasury and leader of the House of Lords.⁸⁴ He entered into complex negotiations with the French, bringing the Seven

seen as representing the worst exercise of arbitrary power. Edward P. Cheyney, *The Court of Star Chamber*, 18 *Am Hist Rev* 727, 727 (1913).

⁷⁹ *Entick*, 19 *How St Tr* at 1073.

⁸⁰ See *Wilkes, John*, in H.C.G. Matthew and Brian Harrison, eds, 58 *Oxford Dictionary of National Biography* 953, 954 (Oxford 2004).

⁸¹ See *id.*; Arthur H. Cash, *John Wilkes: The Scandalous Father of Civil Liberty* 68–69 (Yale 2006).

⁸² See, for example, John Wilkes, *North Briton No 2*, in 1 *The North Briton* 6, 6–7 (printed for John Mitchell and James Williams 1764) (“My joy and exultation are now complete, for I have lived to see my countryman, the Earl of Bute . . . presiding over the finances of this kingdom.”). The first volume of the *North Briton* appeared June 5, 1762, and continued weekly thereafter until April 2, 1763, which is the date of *North Briton No 44*. *North Briton No 45* was published on April 23, 1763, and *North Briton No 46* on November 12, 1763. Wilkes printed the first collected edition in his own home in 1763. *Bibliography of the ‘North Briton.’*, in 9 *Notes and Queries: A Medium of Intercommunication for Literary Men, General Readers, Etc.* 104, 104–06 (John C. Francis 7th series Jan–June 1890).

⁸³ See *Stuart, John*, in H.C.G. Matthew and Brian Harrison, eds, 53 *Oxford Dictionary of National Biography* 173, 174–75 (Oxford 2004).

⁸⁴ *Id.* at 176.

Years' War to conclusion.⁸⁵ November of that year saw the preliminaries signed in Fontainebleau, France.⁸⁶

The *North Briton* and others vehemently attacked the terms of peace. Upon first hearing of the agreement, the journal inveighed:

Almost every thing won from the *French* by the wisdom or valour of a *Whig* administration, these vipers, bred and nourished in the bosom of our country, sacrificed to *France* from a lust of power, and the interested views of their faction, ever propitious and favourable to the designs of the *ancient enemy of this kingdom*.⁸⁷

Formal publication of the terms of agreement between England and France fared little better. "It is with the deepest concern, astonishment, and indignation," Wilkes wrote, "that the *Preliminary articles of Peace* have been received by the public."⁸⁸ He decried their substance: "They are of such a nature, that they more resemble the ancient treaties of friendship and alliance between *France* and her *old firm, ally Scotland*, than any which have ever subsisted between that power, and her *natural enemy, England*."⁸⁹ Wilkes continued, "Almost all the glorious advantages we had gained over our most restless and perfidious foe, our ministers have given away."⁹⁰ Wilkes worried that French commerce would benefit to the detriment of England.⁹¹ More lamentably,

[t]he *French king*, by a stroke of his pen, has regained what all the power of that nation, and her allies, could never have recovered; and *England*, once more the dupe of a subtle negotiation [sic], has consented to give up very nearly all her conquests, the purchase of such immense public treasure, and the blood of so many noble and brave families.⁹²

⁸⁵ *Wilkes, John* at 954 (cited in note 80); *Stuart, John* at 175–76 (cited in note 83).

⁸⁶ See *Stuart, John* at 176 (cited in note 83).

⁸⁷ John Wilkes, *North Briton No 25*, in 2 *The North Briton* 136, 136–37 (printed for John Mitchell and James Williams 1764).

⁸⁸ John Wilkes, *North Briton No 28*, in 2 *The North Briton* 154, 154 (cited in note 87).

⁸⁹ *Id.*

⁹⁰ *Id.* at 156.

⁹¹ *Id.*

⁹² Wilkes, *North Briton No 28* at 156 (cited in note 88).

Despite political opposition, the Treaty of Paris passed the House of Lords and the House of Commons by decisive majorities.⁹³ But hostility against Bute continued, forcing his resignation as prime minister in April 1763.⁹⁴

George Grenville took Bute's place—both in government and as an object of Wilkes's derision. "The NORTH BRITON," Wilkes wrote, "has been steady in his opposition to a *single*, insolent, incapable, despotic minister; and is equally ready, in the service of his country, to combat the *triple-headed, Cerberean* administration, if the SCOT is to assume that motley form."⁹⁵ Wilkes pilloried Grenville for sanctioning the treaty, which had "saved *England* from the certain ruin of success."⁹⁶ According to Wilkes, the agreement had sacrificed any immediate advantages of trade or territory to England's "inveterate enemies."⁹⁷ He lamented seeing the Crown "sunk even to prostitution."⁹⁸

This time, Wilkes had gone too far. Three days after *North Briton No 45* was issued, Halifax signed a general warrant, directing the same Carrington who would later execute the warrant against Entick, and three messengers, "to make strict and diligent search for the authors, printers and publishers of a seditious and treasonable paper, intitled, The North Briton," and "to apprehend and seize [them], together with their papers, and to bring in safe custody before me, to be examined."⁹⁹

With the warrant in hand, on the morning of April 30, 1762, the four messengers and Constable Robert Chisholm arrived at Wilkes's home.¹⁰⁰ It took more than two hours for Wilkes to agree to leave the premises.¹⁰¹ He insisted that his status as a member of Parliament protected him.¹⁰² Eventually, he agreed to go to Halifax's home—just a few doors down Great George Street.¹⁰³ Thereafter, Robert Wood, secretary to Lord Egremont, secretary

⁹³ *Stuart, John* at 176 (cited in note 83).

⁹⁴ *Id.*

⁹⁵ John Wilkes, *North Briton No 45*, in 2 *The North Briton* 261, 261 (cited in note 87).

⁹⁶ John Wilkes, *North Briton No 31*, in 2 *The North Briton* 173, 175 (cited in note 87).

⁹⁷ Wilkes, *North Briton No 45* at 264–65 (cited in note 95).

⁹⁸ *Id.* at 267.

⁹⁹ *The General Warrant on Which John Wilkes Was Arrested, 30 April 1763*, in D.B. Horn, ed, *English Historical Documents 1714–1815* 61, 61–62 (Methuen 1967).

¹⁰⁰ *Wilkes*, 19 *How St Tr* at 1155.

¹⁰¹ *See id.*

¹⁰² Cash, *John Wilkes* at 106 (cited in note 81).

¹⁰³ *Id.* at 107.

of state for the Southern Department, oversaw the search and seizure of Wilkes's possessions.¹⁰⁴

Wilkes's butler, present at the time, recounted the events that transpired:

[T]hey rummaged all the papers together they could find, in and about the room; [] they (the messengers) fetched a sack, and filled it with papers. [] Blackmore then went down stairs, and fetched a smith to open the locks. . . . [A] messenger, then came, and would whisper Mr. Wood, who bade him speak out; he then said he brought orders from lord Halifax to seize all manuscripts.¹⁰⁵

When the locksmith arrived, the men took all of the papers out of Wilkes's drawers and put them, along with his pocketbook, into the sack.¹⁰⁶ Wilkes challenged his imprisonment and the legality of the warrant, bringing a claim of trespass and false imprisonment against Wood.¹⁰⁷

Wilkes's status in the minds of many parliamentarians was that of a boil on the backside of a pig. As William Barrington, second Viscount Barrington, wrote to the British envoy in Berlin in May 1763, "Nothing is at present talk'd of here but the Affair of a very impudent worthless man named Wilks, a Member of Parliament, who was lately taken up by the Secretaries of State for writing a most seditious Libel personally attacking the King."¹⁰⁸ But the "mob," as Barrington despaired, and not a few others—who sought no favor from the monarch—supported Wilkes, if not for

¹⁰⁴ *Wilkes*, 19 How St Tr at 1156.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1153, 1179. The Kingdom of Great Britain at that time had two secretaries of state, with Halifax placed in the more junior position of secretary of state of the Northern Department, responsible for northern England, Scotland, and relations with the Protestant countries in northern Europe, and Charles Wyndham, second Earl of Egremont, serving in the more senior role of secretary of state of the Southern Department, which focused on southern England, Wales, and Ireland, as well as Roman Catholic and Muslim countries abroad. Halifax explained during the trial that although the two offices were carried on in separate departments, together they formed one complete secretary's office. See *id.* at 1161. Thus, as Egremont's secretary, Wood was heavily involved in Wilkes's prosecution. Wood also had been involved in the preliminaries of the Treaty of Paris.

¹⁰⁸ Letter from Lord Barrington to Mr. Mitchell (May 13, 1763), in Henry Ellis, ed., *4 Original Letters, Illustrative of English History* 464, 464 (printed for Harding and Leopard 1827).

the substance of what he had written, then for the reason that the Crown had gone too far.¹⁰⁹

Pratt ruled that Wilkes's arrest and detention infringed parliamentary privilege.¹¹⁰ Libel being no breach of the peace, the Crown must release Wilkes.¹¹¹ The decision floored the ministry. Wilkes spun the verdict as a defense of liberty, giving a rousing speech to a crowd of thousands, which accompanied him from Westminster Hall back to his home on Great George Street.¹¹² Forced to release Wilkes from prison on Friday, May 6, 1763, by Monday, May 9, Halifax had ordered Attorney General Charles Yorke to prosecute Wilkes for seditious libel. That same day Yorke filed charges in the Court of King's Bench. Wilkes brought suit.¹¹³

The trial began at nine o'clock in the morning on December 6, 1763, at the Court of Common Pleas at Westminster.¹¹⁴ Wilkes's lawyer, John Glynn, argued that more was at stake than the simple execution of a warrant against one man. The case "touched the liberty of every subject of this country, and, if found to be legal, would shake that most precious inheritance of Englishmen."¹¹⁵ Glynn explained, "In vain has our house been declared, by the law, our asylum and defence, if it is capable of being entered, upon any frivolous or no pretence at all, by a secretary of state."¹¹⁶

The seizing of Wilkes's papers stood as the most serious of the charges at hand: "for other offences, an acknowledgement might make amends; but [] for the promulgation of our most private concerns, affairs of the most secret personal nature, no reparation whatsoever could be made."¹¹⁷ English law, counsel argued, "never admits of a general search-warrant."¹¹⁸ Beyond the privacy invasion, significant risk accompanied the proposition "[t]hat some papers, quite innocent in themselves, might, by the slightest alteration, be converted to criminal action."¹¹⁹ The warrant, signed

¹⁰⁹ Id at 464–65.

¹¹⁰ See *The Case of John Wilkes, Esq on a Habeas Corpus*, 19 How St Tr 981, 993 (CP 1763).

¹¹¹ Id.

¹¹² Cash, *John Wilkes* at 115–16 (cited in note 81).

¹¹³ Id at 122.

¹¹⁴ *Wilkes*, 19 How St Tr at 1153, 1168.

¹¹⁵ Id at 1153.

¹¹⁶ Id at 1153–54.

¹¹⁷ Id at 1154.

¹¹⁸ *Wilkes*, 19 How St Tr at 1154.

¹¹⁹ Id.

three days before Halifax actually received information supporting its execution, failed to name Wilkes.¹²⁰ It did not include specific items to be seized, nor particular places to be searched.¹²¹ For Glynn, it was “an outrage to the constitution.”¹²²

After more than twelve hours of witnesses and argument, Pratt summarized the evidence that had been presented, noting that the action in question was one of trespass, to which Wood had initially pleaded not guilty but later shifted to defend based on a special justification.¹²³ Pratt inveighed the jury to consider extraordinary damages to make the point that such behavior would not be tolerated in the future.¹²⁴ After a mere half hour of deliberation, the jury returned a verdict for Wilkes, awarding a stunning £1,000 in damages.¹²⁵ Two days later, *The London Chronicle* reflected, “By this important decision, every Englishman has the satisfaction of seeing, that his house is his castle.”¹²⁶

3. *Leach v Money* (1765).

Pratt’s view of general warrants was hardly unique. His chief constitutional rival was William Murray, first Earl of Mansfield. Lord chief justice of the Court of King’s Bench, Mansfield was Pratt’s senior in age (and according to Jeremy Bentham, dignity), and his equal in argument.¹²⁷ He was also a Tory, which meant that his political perspective differed from that of his junior, Whig colleague.¹²⁸ Despite their political differences, the men agreed on the illegality of indiscriminate search and seizure.

In 1765, Mansfield, like Pratt, found himself confronted with the execution of a general warrant in response to the publication

¹²⁰ See *id.* at 1161, 1169.

¹²¹ See *The General Warrant on Which John Wilkes Was Arrested* at 61–62 (cited in note 99).

¹²² *Wilkes*, 19 *How St Tr* at 1154.

¹²³ *Id.* at 1166, 1168.

¹²⁴ See *id.* at 1167.

¹²⁵ *Id.* at 1168.

¹²⁶ 14 *The London Chronicle* 550 (Dec 8, 1763).

¹²⁷ John Bowring, 19 *The Works of Jeremy Bentham* 119–21 (Tait 1842). See also generally *Murray, William*, in Matthew and Harrison, eds, 45 *Oxford Dictionary of National Biography* 992 (cited in note 70); *Pratt, Charles* (cited in note 70). For discussion of Mansfield’s central role in cases involving seditious libel, see James Oldham, 2 *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* 775–860 (UNC 1992); James Oldham, *English Common Law in the Age of Mansfield* 209–35 (UNC 2004).

¹²⁸ See *Murray, William* at 996 (cited in note 127); *Pratt, Charles* at 212 (cited in note 70).

of *North Briton No 45*—in this case, as it was served on the alleged printer of the publication, Dryden Leach.¹²⁹ And Mansfield, like Pratt, found the execution of the general warrant to be a violation of the common law.¹³⁰

The facts mirrored those of *Wilkes*. On April 29, 1763, a constable and four King's messengers entered Leach's open front door and found both him and freshly printed copies of the first two issues of the *North Briton*.¹³¹ They arrested Leach.¹³² For the next six hours, the same Carrington that executed the general warrants against Entick and Wilkes, in this instance assisted by John Money, James Watson, and Robert Blackmore, searched Leach's home.¹³³ Halifax, being "employed in other business belonging to his said office of secretary of state," was unable to meet with the prisoner for four days, during which time Leach was detained.¹³⁴ When he finally met with Leach, Halifax concluded that Leach had not printed the pamphlet and ordered his release.¹³⁵ Leach brought suit against the King's messengers for breaking and entering into his home, for seizing his person and papers, and for imprisoning him for four days.¹³⁶

Leach first came before Pratt at the Court of Common Pleas on December 10, 1763.¹³⁷ The defendants argued that they should be exempt from the suit, as they were protected by a statute introduced under George II entitled, "An act for the rendering justices of the peace more safe in the execution of their office; and for indemnifying constables and others acting in obedience to their warrants."¹³⁸ Leach argued in response that they were covered neither by that statute nor by the statute of James I, "An Act for ease in pleading against troublesome and contencious Suites, psecuted against Justices of the Peace Maiors Constables and ctaine other his Majesties Officers, for the lawfull execucion of their Office,"¹³⁹ nor the subsequent act to enlarge and make perpetual the

¹²⁹ *Leach*, 19 How St Tr at 1003–04.

¹³⁰ *Id* at 1027–28.

¹³¹ *Id* at 1007, 1009.

¹³² *Id* at 1009.

¹³³ *Leach*, 19 How St Tr at 1005.

¹³⁴ *Id*.

¹³⁵ *Id* at 1009.

¹³⁶ *Id* at 1005–06.

¹³⁷ *Leach*, 19 How St Tr at 1006.

¹³⁸ 24 Geo II, ch 44 (1751), in 20 Statutes of the Realm 279, 279. See also *Leach*, 19 How St Tr at 1010.

¹³⁹ 7 James I, ch 5 (1609), in 4 Statutes at Large 1161, 1161. See also *Leach*, 19 How St Tr at 1010.

same.¹⁴⁰ The jury found for the plaintiff and awarded him £400.¹⁴¹ The defendants filed a bill of exceptions in the Court of King's Bench, seeking relief.¹⁴²

Mansfield presided over the case. The solicitor general began by attempting to establish the status of the King's messengers as emissaries—the long arm—of the justices of the peace.¹⁴³ Seditious libel represented “an offence against government and the public peace; [] effectually undermin[ing] government.”¹⁴⁴ The secretary of state “is a centinel for the public peace: it is his duty to prevent the violation of it, and to bring the offenders to justice; and it is necessary that he should be invested with this power, in order to enable him to execute this his duty.”¹⁴⁵ As for the vagueness of the warrant, such power, he argued, “is not illegal: and the abuse of it is no objection to the warrant itself. Such warrants are agreeable to long practise and usage.”¹⁴⁶

Leach's counsel, John Dunning—an effective barrister in his own right—responded that the secretary of state was not a justice, conservator, or constable—nor were the King's messengers in ordinary immune by nature of their office.¹⁴⁷ The generality of the warrant made it invalid.¹⁴⁸ The document described the offense but not the individual responsible:

Here is no probable cause, nor any reason for justifying the officer under a probable cause. It is not like the cases of apprehending traitors or felons. Here is only information from one of their own body, “that the author of the paper had been seen going into Leach's house; and that Leach was the printer of the composition in general;” not of this particular paper.¹⁴⁹

Hearsay, even if true, was insufficient evidence of the crime alleged.¹⁵⁰ Yet, on the basis of the same, they had imprisoned Leach for four days and thoroughly searched his home. The warrant itself was thus illegal.

¹⁴⁰ 21 James I, ch 12 (1623), in 4 Statutes at Large 1220, 1220. See also *Leach*, 19 How St Tr at 1010.

¹⁴¹ *Leach*, 19 How St Tr at 1006.

¹⁴² *Id* at 1011.

¹⁴³ *Id* at 1015–18.

¹⁴⁴ *Id* at 1013.

¹⁴⁵ *Leach*, 19 How St Tr at 1013.

¹⁴⁶ *Id* at 1018.

¹⁴⁷ *Id* at 1020–22.

¹⁴⁸ See *id* at 1022–24.

¹⁴⁹ *Leach*, 19 How St Tr at 1022.

¹⁵⁰ *Id* at 1022–23.

If a warrant could be issued, counsel argued, directing those executing it to find the person responsible for a particular murder, without naming the target of the warrant, “[s]uch a power would be extremely mischievous, and might be productive of great oppression.”¹⁵¹ He continued, “To ransack private studies in order to search for evidence, and even without a previous charge on oath, is contrary to natural justice, as well as to the liberty of the subject.”¹⁵² Dunning concluded, “To search a man’s private papers *ad libitum*, and even without accusation, is an infringement of the natural rights of mankind.”¹⁵³

Mansfield agreed. Under common law, in certain cases, constables could exercise arrest without an accompanying warrant.¹⁵⁴ As a statutory matter, the authority to arrest under general warrant had been extended to certain contexts, such as writs of assistance and warrants to take up disorderly people.¹⁵⁵ Here, however, no common-law authority provided the power to apprehend, nor had Parliament created an explicit exception. “Therefore,” Mansfield concluded, the authority had to “stand upon principles of common law.”¹⁵⁶ A critical misstep was the absence of a third party, standing in discernment of the evidence, to authorize arrest, search, and seizure: “The magistrate ought to judge; and should give certain directions to the officer.”¹⁵⁷ Mansfield noted, “[Sir Matthew] Hale and all others hold such an uncertain warrant void: and there is no case or book to the contrary.”¹⁵⁸ The judgment in favor of Leach stood.

B. English Legal Treatises’ Condemnation of General Warrants

The law lords’ rejection of general warrants in *Entick, Wilkes*, and *Leach* traced its origin, at least as argued in the seventeenth century, to the 1215 Magna Carta.¹⁵⁹ General warrants lacked specificity: the person to be arrested, the place to be searched, or evidence of the crime for which the individual or information was

¹⁵¹ *Id.* at 1024.

¹⁵² *Id.*

¹⁵³ *Leach*, 19 How St Tr at 1024.

¹⁵⁴ *Id.* at 1026.

¹⁵⁵ *Id.* at 1026–27.

¹⁵⁶ *Id.* at 1027.

¹⁵⁷ *Leach*, 19 How St Tr at 1027.

¹⁵⁸ *Id.* For further discussion of Hale’s treatise condemning general warrants, see Part I.B.

¹⁵⁹ See Donohue, *The Future of Foreign Intelligence* at 76 (cited in note 54).

being sought. General warrants for arrest, as well as for search and seizure, implicated liberty and property rights and earned the enmity of those subject to their execution. It made little sense to talk about liberty rights if the King's subjects could be imprisoned without cause; nor could the right to property be secure if the King could subject property to search on any occasion, and subsequently construct charges against the owner.

To protect these rights, the line was drawn at the walls of the home. The most famous articulation of this principle came in 1604 in *Semayne's Case*,¹⁶⁰ when Sir Edward Coke wrote, "[T]he house of every one is to him as his [] castle and fortress."¹⁶¹ Coke returned to the principle in his *Institutes*: "[F]or a mans house is his castle, & *domus sua cuique est tutissimum refugium* [and each man's home is his safest refuge]."¹⁶² The Crown might well overcome certain restrictions as applied to ordinary subjects, but the principle—the right of a man to be secure in his own home—spanned the centuries.

Although Coke articulated a strong right against Crown interference in the domestic affairs of the King's subjects, the monarchy did not always toe the line. While entry without a warrant was generally prohibited, with a warrant the walls could be breached. And so pressure was placed on general warrants, which gave the Crown's officers the greatest latitude.

The Tudors and the Stuarts relied on the general warrant to head off political opposition.¹⁶³ Henry VIII's daughter, Mary I, made broad use of search powers to try to reestablish the Catholic Church.¹⁶⁴ In 1559, Mary I's successor, Elizabeth I, formed a High Commission to counter "seditious and slanderous persons" setting "forth false rumours, tales, and seditious slanders" against the Queen "and the said good laws and statutes."¹⁶⁵ Citing the laws reestablishing the Church of England,¹⁶⁶ Elizabeth I directed the

¹⁶⁰ 77 Eng Rep 194 (KB 1604).

¹⁶¹ *Id.* at 195.

¹⁶² Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes* 162 (Fletcher 1644) (translation for this Article).

¹⁶³ See Donohue, *The Future of Foreign Intelligence* at 76–77 (cited in note 54).

¹⁶⁴ See Cuddihy, *The Fourth Amendment* at 56–57 (cited in note 37) (discussing the proclamations of 1555).

¹⁶⁵ *Establishment of the Court of High Commission*, in George Burton Adams and H. Morse Stephens, eds., *Select Documents of English Constitutional History* 310, 310 (Macmillan 1916).

¹⁶⁶ An Acte for the Uniformitie of Common Prayoure and Dyvnye Service in the Churche, and the Administration of the Sacramentes, 1 Eliz, ch 2 (1559), in 4 Statutes of

Commission to prosecute “all and singular heretical opinions, seditious books, contempts, conspiracies, false rumours, tales, seditions, misbehaviours, slanderous words or shewings, published, invented or set forth.”¹⁶⁷ She gave the Commission “full power and authority” to address “all such errors, heresies, crimes, abuses, offences, contempts and enormities spiritual and ecclesiastical wheresoever, which by any spiritual or ecclesiastical power, authority or jurisdiction can or may lawfully be reformed, ordered, redressed, corrected, restrained or amended, to the pleasure of Almighty God.”¹⁶⁸ To root out all “fornications and ecclesiastical crimes,” the Commission was empowered “to use and devise all such politic ways and means for the trial and searching out of all the premises, as . . . shall be thought most expedient and necessary.”¹⁶⁹

Instead of eliminating the High Commission, James I expanded its reach, collapsing the distinction between religious matters and those overseen by the Privy Council. He gave the Commission the authority to find heretical materials, as well as documents “offensive to the state,” and to go after not just the authors of such works but also the publishers and printers and those involved in their dissemination.¹⁷⁰ To carry out general searches, both the Commission and the Privy Council relied on the associated writs.¹⁷¹

As successive monarchs expanded the use of general warrants, Englishmen increasingly found themselves at the receiving end of their execution.¹⁷² General warrants became seen as the epitome of unreasonableness and foremost among the egregious

the Realm 355, 355 (setting the order for the prayers included in the Book of Common Prayer); An Acte Restoring to the Crowne Thaucyent Jurisdiction over the State Ecclesiasticall and Spuall, and Abolyshing All Forreine Power Repugnaunt to the Same, 1 Eliz, ch 1 (1559), in 4 Statutes of the Realm 350, 351–52 (reviving the acts withdrawn by Mary I and reinstalling the monarch as the Supreme Governor of the Church of England). Note that both acts were passed in 1559, but under the parliamentary date system, they are attributed to 1558.

¹⁶⁷ *Establishment of the Court of High Commission* at 311 (cited in note 165).

¹⁶⁸ *Id* at 311–12.

¹⁶⁹ *Id* at 312. See also Donohue, *The Future of Foreign Intelligence* at 76–77 (cited in note 54).

¹⁷⁰ Cuddihy, *The Fourth Amendment* at 58 (cited in note 37) (quotation marks omitted) (quoting a Commission report from June 21, 1614). James I initially had the Commission address ecclesiastical matters. See *id* (quoting a Commission report from August 29, 1611). See also Donohue, *The Future of Foreign Intelligence* at 77 (cited in note 54).

¹⁷¹ Cuddihy, *The Fourth Amendment* at 58, 61 (cited in note 37).

¹⁷² See *id* at 69–101. See also *id* at 70 (“The crux of the matter was that general searches had been enforced sporadically before 1485 but afterwards became both routine and increasingly violent.”).

powers exercised by the Crown.¹⁷³ Coke took the lead in attacking their legitimacy—a move not without irony, as he had previously, as attorney general, exercised them.¹⁷⁴

The context was one of heightened religious tension. Elizabeth I had followed the acts of 1559 with further steps “[t]o accelerate acceptance and flush out dissenters.”¹⁷⁵ A series of statutes expanded her power.¹⁷⁶ James I held the course as opposition mounted. In November 1605, the Crown discovered a scheme to blow up the Houses of Parliament—and, with them, the King—on the first day of the new session.¹⁷⁷ The ultimate purpose of the so-called Gunpowder Plot was to trigger a series of events that would lead to the installation of the King’s nine-year-old daughter as a Catholic monarch.¹⁷⁸ James I signed two general warrants to find those responsible.¹⁷⁹ Coke helped to execute the writs, breaking into a Catholic residence in the Inner Temple and confiscating books.¹⁸⁰

¹⁷³ Id at 105.

¹⁷⁴ See id at 106. See also Donohue, *The Future of Foreign Intelligence* at 77 (cited in note 54).

¹⁷⁵ Alan Haynes, *The Gunpowder Plot: Faith in Rebellion* 4 (Grange 1994).

¹⁷⁶ See An Acte for Thassurance of the Quenes Ma[jesty’s] Royall Power over All Estates and Subjectes within Her Highnes Dominions, 5 Eliz, ch 1 (1563), in 4 Statutes of the Realm 402, 402 (making illegal “yf any pson or psons dwelling . . . within this Realme . . . shall by writing . . . preaching or teaching dede or acte . . . maintayne or defende thauthoritee jurisdiction or power of the Bushoppe of Rome or of his See”); William Edward Collins, *The Northern Rebellion of 1569*, in *Queen Elizabeth’s Defence of Her Proceedings in Church and State* 5, 19 (Society for Promoting Christian Knowledge 1899) (quoting an Elizabethan proclamation protecting “the religion, which in dede is stablished both by God’s Word, and by the laws of the Realme”); An Acte Whereby Certayne Offences Bee Made Treason, 13 Eliz, ch 1 (1571), in 4 Statutes of the Realm 526, 526 (making referring to Queen Elizabeth as “an Heretyke Schesmatyke Tyraunt Infidell or an Usurper” treason); An Acte agaynste the Bringing In and Putting In Execution of Bulls and Other Instruments from the Sea of Rome, 13 Eliz, ch 2 (1571), in 4 Statutes of the Realm 529, 529–30 (making it treasonous to obtain a papal bull to be absolved of obedience to the Crown). See also John Bellamy, *The Tudor Law of Treason: An Introduction* 61–82 (Toronto 1979).

¹⁷⁷ See John Gerard, *What Was the Gunpowder Plot? The Traditional Story Tested by Original Evidence* 1 (Osgood 1897).

¹⁷⁸ See generally id.

¹⁷⁹ *By the King. A Proclamation for the Search and Apprehension of Thomas Percy*, in James F. Larkin and Paul L. Hughes, eds, 1 *Stuart Royal Proclamations: Royal Proclamations of King James I 1603–1625* 123, 123 (Clarendon 1973); *By the King. A Proclamation for the Searching for, and Apprehending of Robert Winter, and Stephen Littleton.*, in Larkin and Hughes, eds, 1 *Stuart Royal Proclamations* 128, 128–29 (cited in note 179). See also Cuddihy, *The Fourth Amendment* at 140 & n 49 (cited in note 37); Donohue, *The Future of Foreign Intelligence* at 77 (cited in note 54).

¹⁸⁰ See Cuddihy, *The Fourth Amendment* at 140 (cited in note 37), citing Hugh Ross Williamson, *The Gunpowder Plot* 196–97 (Faber 1951) (noting Coke’s removal of two manuscript copies of *A Treatise of Equivocation* from the home of the Tresham family and the suspicious death of Francis Tresham, possibly due to poison, shortly thereafter). See also Donohue, *The Future of Foreign Intelligence* at 77 (cited in note 54).

Coke, however, was not solely to be an instrument of state power. In 1621, the same king that had instructed him to search for those responsible for the Gunpowder Plot issued a general warrant to detain Coke while his home was searched “for all such papers and writings as doe anie way concerne his Majestie’s service.”¹⁸¹ The warrant directed the King’s officers “to open all such studies, clossetts, chests, trunckes, deskes or boxes, where you shall understaund or probably conceave anie such papers.”¹⁸²

The incident proved formative for Coke’s understanding of the legality of general warrants. He later hearkened back to the position in which he had been placed during the search to argue in Westminster that the 1628 Petition of Right include a clause prohibiting imprisonment without cause: “But for that that no cause should be shown upon the commitment, the honest man and the honest judge shall be most miserable,” he stated.¹⁸³ “I was committed to the Tower and all my books and study searched, and 37 manuscripts were taken away. . . . I was inquired after what I had done all my life before. So then there may be cause found out after the commitment.”¹⁸⁴

It was not the first occasion on which Coke had objected in Parliament to general warrants. In March 1628, he protested, “No free man ought to be committed but the cause must be showed in particular. If it be for treason or murder the particular must not be showed, but the general must. . . . It is against reason to send a man to prison and not to show the cause.”¹⁸⁵ Royal prerogative, or reason of state, would not suffice to exempt the Crown:

[I]f [imprisonment] be *per mandatum domini regis*, or “for matter of state”; and then we are gone, and we are in a worse case than ever. If we agree to this imprisonment “for matters of state” and “a convenient time,” we shall leave Magna Carta

¹⁸¹ *Warrant Dec 30, 1621*, in Steve Sheppard, ed, 3 *The Selected Writings of Sir Edward Coke* 1330, 1330 (Liberty 2003). See also Donohue, *The Future of Foreign Intelligence* at 78 (cited in note 54).

¹⁸² *Warrant Dec 30, 1621* at 1330 (cited in note 181). See also Cuddihy, *The Fourth Amendment* at 141 (cited in note 37).

¹⁸³ *Coke to Parliament, Committee of the Whole House, Proceedings and Debates*, ff. 100–100v, in *CD, III, 149–51 (Apr. 29, 1628)*, in Sheppard, ed, 3 *The Selected Writings of Edward Coke* 1270, 1271 (cited in note 181).

¹⁸⁴ *Id.* See also Donohue, *The Future of Foreign Intelligence* at 78 (cited in note 54).

¹⁸⁵ *Coke to Parliament, Committee of the Whole House, Proceedings and Debates*, ff. 21–21v, in *CD, II, 100–101 (March 25, 1628)*, in Sheppard, ed, 3 *The Selected Writings of Edward Coke* 1232, 1234 (cited in note 181).

and the other statutes and make them fruitless, and do what our ancestors would never do.¹⁸⁶

Coke more fully articulated his understanding of the illegality of general warrants in his *Institutes*.¹⁸⁷ “One or more Justice or Justices of Peace cannot make a warrant upon a bare surmise to break any mans house to search for a Felon, or for stoln goods, for they being created by Act of Parliament have no such authority granted unto them by any Act of Parliament.”¹⁸⁸ Common law demanded that the Crown first produce evidence that the individual had committed a crime:

[I]t should be full of inconvenience, that it should be in the power of any Justice of Peace being a Judge of Record upon a bare suggestion to break the house of any person of what state, quality, or degree soever, and at what time soever, either in the day or night upon such surmises.¹⁸⁹

Coke reiterated the origins of the prohibition of general warrants, citing the Great Charter, stating that to issue such writs “is against Magna Carta, [Neither will we pass upon him, nor condemn him, but by the lawful judgment of his peers, or by the law of the land]: and against the statute of 42 E. 3. cap. 3. &c.”¹⁹⁰

What made the use of general warrants particularly odious was that they retained for the Crown the particulars of suspicion, making them vulnerable to abuse. In contrast, by requiring a specific warrant, the Crown would be forced to produce evidence in open court. Requiring this went to the heart of the rule of law, “because Justices of Peace are Judges of Record, and ought to proceed upon Record, and not upon surmises.”¹⁹¹ General warrants

¹⁸⁶ *Coke to Parliament, Committee of the Whole House, Proceedings and Debates, f. 99, in CD, III, 94–96 (Apr. 26, 1628)*, in Sheppard, ed, 3 *The Selected Writings of Edward Coke* 1266, 1268 (cited in note 181).

¹⁸⁷ See Cuddihy, *The Fourth Amendment* at 106 (cited in note 37) (crediting Coke with isolating general warrants as the device that made it possible to indiscriminately search individuals’ papers).

¹⁸⁸ Edward Coke, *The Fourth Part of the Institutes of the Laws of England: Concerning the Jurisdiction of Courts* 176 (Flesher 1644). See also Donohue, *The Future of Foreign Intelligence* at 78 (cited in note 54).

¹⁸⁹ Coke, *The Fourth Part of the Institutes* at 176–77 (cited in note 188).

¹⁹⁰ *Id.* at 177 (translation for this Article from the original Latin: “*Nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium Parium suorum, vel per legem Terræ*”). But see Lysander Spooner, *An Essay on the Trial by Jury* 26–28 (Jewett 1852) (critiquing Coke’s understanding of Magna Carta).

¹⁹¹ Coke, *The Fourth Part of the Institutes* at 177 (cited in note 188). See also Donohue, *The Future of Foreign Intelligence* at 78 (cited in note 54). The history of Magna Carta is convoluted, at best. By way of summary, the original document, signed in 1215 between

thus violated not just a statute dating back to 1368, but Magna Carta itself: “[E]rrones ad sua principia referre, est refellere, To bring errors to their first, is to see their last.”¹⁹²

In the years that have elapsed since Coke wrote his treatise, scholars have excavated the context of Magna Carta to point out that the text Coke cited—the clause that has come to be known as Article 39—meant something very different in the thirteenth century.¹⁹³ Coke’s understanding of the right against general searches as stemming from Magna Carta, however, was hardly novel. In 1589, Privy Council clerk Robert Beale bemoaned the death of Magna Carta, if every agent of the High Commission “by

King John and his barons, was known as the Articles of the Barons. See J.C. Holt, *Magna Carta* 245 (Cambridge 2d ed 1992). In 1225, the Charter of the Forest was divided from the rest of the document, at which point the title “Magna Carta” was used to refer to the remaining text. See Anthony Arlidge and Igor Judge, *Magna Carta Uncovered* 21–22 (Hart 2014). Because the document was reissued by Henry III and Edward I, they were generally given credit for the introduction of Magna Carta as the first statute, until eighteenth-century legal scholars drew attention to John’s role in the Baron’s Charter. See Michael Dillon, *Magna Carta and the United States Constitution: An Exercise in Building Fences*, in Daniel Barstow Magraw, Andrea Martinez, and Roy E. Brownell II, eds, *Magna Carta and the Rule of Law* 81, 84 (ABA 2015). See also Nicholas A. Robinson, *The Charter of the Forest: Evolving Human Rights in Nature*, in Magraw, Martinez, and Brownell, eds, *Magna Carta* 311, 318–21 (cited in note 191). As the document evolved, some clauses previously included were altered. See Daniel B. Magraw, Andrea Martinez, and Roy E. Brownell II, *Introduction: Magna Carta and the Rule of Law*, in Magraw, Martinez, and Brownell, eds, *Magna Carta* 1, 7–8 (cited in note 191). What began as clauses 39 and 40 in the year 1215 became clauses 32 and 33 in the year 1216, clauses 35 and 36 in 1217, and clause 29 from 1225 onward. See generally Appendices C, F, G, and I, in Magraw, Martinez, and Brownell, eds, *Magna Carta* 389, 405, 413, 425 (cited in note 191) (reprinting the versions of Magna Carta from the years 1215, 1216, 1217, and 1225, respectively). Coke, writing in the seventeenth century, referred back to clause 29 as the statutorily enforceable clause (not the original clauses 39 and 40). The current trend in American scholarship, however, is to refer to the Baron’s Charter numbering, in which clauses 39 and 40 incorporated what Coke later cited in support of the proposition that general warrants violated the Charter. See generally Magraw, Martinez, and Brownell, eds, *Magna Carta* (cited in note 191). See also generally Arlidge and Judge, *Magna Carta Uncovered* (cited in note 191); Claire Breay, *Magna Carta: Manuscripts and Myths* (British Library 2002); Holt, *Magna Carta* (cited in note 191).

¹⁹² Coke, *The Fourth Part of the Institutes* at 98 (cited in note 188).

¹⁹³ See, for example, Edward Jenks, *The Myth of Magna Carta*, 4 *Indep Rev* 260, 269–73 (1904) (arguing that the notion of “due process” is absent in the Magna Carta, attributing the symbolic ascension of the document to Coke’s work, and arguing that the document reflected aristocratic privilege, not the rights of men and citizens or the foundation of liberty); Max Radin, *The Myth of Magna Carta*, 60 *Harv L Rev* 1060, 1061–62, 1071 (1947) (agreeing with Jenks on the due process point and noting that most scholarship on the charter begins with nineteenth-century sources, but arguing that the Charter is best “regarded as a clarified statement of what most persons regarded as fundamental feudal law”). See also Cuddihy, *The Fourth Amendment* at 110 (cited in note 37) (“As framed at Runnymede, Article Thirty-Nine bore little resemblance to Coke’s description of it.”); Holt, *Magna Carta* at 2–9 (cited in note 191).

a warrant under the handes of the Comissioners, shall enter into mens howses, break vpp their chestes and chambers, . . . carry away what they list, and afterward pick matter to arrest and committ them.”¹⁹⁴ Other critics of general warrants followed suit.¹⁹⁵ Coke’s analysis, moreover, was not the first reconstruction of Magna Carta. Rights related to taxation by consent and parliamentary approval, indictment by grand jury, and the importance of due process of law were all similarly, *ex post facto*, read into the language and meaning of the Charter.¹⁹⁶

Coke persuaded Parliament to include a prohibition on the use of general warrants in the Petition of Right.¹⁹⁷ The document was ratified by the House of Commons and the House of Lords on May 26 and 27, 1628, and accepted by King Charles I on June 2. Parliament objected that merely receiving the petition was insufficient, demanding that the King give royal assent. This he did on June 7, 1628, admitting “the illegality of warrants by the king’s special command, not assigning grounds of arrest or detainer” and making effectual the remedy by habeas corpus.¹⁹⁸

Coke’s work reflected a growing concern about the Crown’s use of general warrants. His writing clarified why such power sat uneasily in the English constitutional tradition.¹⁹⁹ By rooting his objection in Magna Carta, he recalled ancient rights. Coke did not claim that the Crown never made use of the instruments—this

¹⁹⁴ Cuddihy, *The Fourth Amendment* at 114 & n 39 (cited in note 37) (quotation marks omitted).

¹⁹⁵ *Id.* at 114 (noting that “at least four critics” invoked Magna Carta).

¹⁹⁶ *Id.* at 113.

¹⁹⁷ See Arlidge and Judge, *Magna Carta Uncovered* at 134–35 (cited in note 191). The Petition of Right is considered to have been passed in 1627, although it did not receive royal assent until June 1628 owing to the practice at the time of giving statutes the year in which the session of Parliament convened. The third Parliament of Charles I convened on March 17, which was considered 1627 in the Old Style calendar.

¹⁹⁸ *General Warrant*, in A. Wood Renton, ed, 6 *Encyclopaedia of the Laws of England, Being a New Abridgment by the Most Eminent Legal Authorities* 63, 63 (Sweet & Maxwell 1898). *The Law Lexicon, or Dictionary of Jurisprudence* defines “general warrant” narrowly as

a process which used to issue from the state secretary’s office, to take up (without naming any persons in particular) the author, printer, and publisher of such obscene and seditious libels as were particularly specified in it. It was declared illegal and void for uncertainty by a vote of the House of Commons. *Com. Jour.* 22nd April, 1766.

J.J.S. Wharton, *The Law Lexicon, or Dictionary of Jurisprudence* 275 (Spettigue and Farrance 1848).

¹⁹⁹ See Donohue, *The Future of Foreign Intelligence* at 78–79 (cited in note 54).

plainly was not accurate.²⁰⁰ Rather, he objected that they had become routine instruments of political power. The impact could be felt throughout society, “[f]or though commonly the Houses or Cottages of poore and base people be by such Warrants searched &c. yet if it be lawfull, the houses of any subject, be he never so great, may be searched, &c. by such Warrant upon bare surmises.”²⁰¹

With his opposition to those in power increasingly clear, Coke earned the enmity of the Crown. As Coke lay on his deathbed, Charles I issued a general warrant to search his home and to seize “all such papers and manuscripts” considered appropriate for confiscation.²⁰² Similar orders accompanied a search of Coke’s papers at the Inner Temple, as they were considered “disadvantageous” to the Crown.²⁰³ The action was intensely personal: Charles I himself opened the trunks and made note of what they contained.²⁰⁴

While the manuscripts of the *Institutes* were among those items confiscated, the Crown’s effort to silence Coke came too late. Legal scholars went on to take Coke at face value, cementing his critique into English thought.²⁰⁵ In 1678, Sir Matthew Hale, an intellectual giant most famous for his 1739 *History of the Common Law of England*, wrote in the first volume of his *Pleas of the Crown: Or, a Methodical Summary*, “A general Warrant to search for Felons or stoln Goods, not good.”²⁰⁶ Two years later, Parliament directed publication of Hale’s manuscript.

²⁰⁰ Id.

²⁰¹ Coke, *The Fourth Part of the Institutes* at 177–78 (cited in note 188).

²⁰² Cuddihy, *The Fourth Amendment* at 145 (cited in note 37).

²⁰³ Id. See also Donohue, *The Future of Foreign Intelligence* at 79 (cited in note 54).

²⁰⁴ See Cuddihy, *The Fourth Amendment* at 145 (cited in note 37). Among the items seized were Coke’s original manuscripts for the *Commentary on Littleton*, his second, third, and fourth *Institutes*, his will, and other documents. The will was never returned. John Lord Campbell, 1 *The Lives of the Chief Justices of England: From the Norman Conquest till the Death of Lord Mansfield* 336 (Murray 1849).

²⁰⁵ Cuddihy, *The Fourth Amendment* at 120–21 (cited in note 37). For this proposition, Professor Cuddihy cites William Sheppard’s *A Sure Guide for His Majesties Justices of the Peace* and John Bond’s *A Complete Guide for Justices of Peace, According to the Best Approved Authors*. See id. See also Donohue, *The Future of Foreign Intelligence* at 79 (cited in note 54).

²⁰⁶ Matthew Hale, *Pleas of the Crown: Or, a Methodical Summary of the Principal Matters Relating to That Subject* 93 (Atkyns 1682) (citing “C. Jur. Courts, 177”). Hale wrote his magnum opus roughly a decade after Coke’s *Institutes*, but he hid the manuscript during the interregnum period and directed that it not be published even posthumously. Parliament later directed publication of the volume in 1680, but the first edition was not released until 1736 as *History of the Pleas of the Crown*. See Cuddihy, *The Fourth Amendment* at 270 (cited in note 37); Donohue, *The Future of Foreign Intelligence* at 79 (cited in note 54).

When *Historia Placitorum Coronae* (“History of the Pleas of the Crown”) finally appeared in 1736, it became enormously influential.²⁰⁷ In it, Hale stated, “[A] general warrant to search in all suspected places is not good, but only to search in such particular places, where the party assigns before the justice his suspicion and the probable cause thereof, for these warrants are judicial acts, and must be granted upon examination of the fact.”²⁰⁸ He continued:

[T]herefore I take those general warrants dormant, which are made many times before any felony committed, are not justifiable, for it makes the party to be in effect the judge; and therefore searches made by pretense of such general warrants give no more power to the officer or party, than what they may do by law without them.²⁰⁹

As with search provisions, a general warrant for arrest was equally void. “[A] general warrant upon a complaint of a robbery to apprehend all persons suspected, and to bring them before” the law, Hale wrote, “was ruled void, and false imprisonment lies against him that takes a man upon such a warrant.”²¹⁰

It was to this publication that Mansfield appealed in *Leach*,²¹¹ even as Sergeant William Hawkins cited Coke and Hale in his *Pleas of the Crown*: “I do not find any good Authority, That a Justice can justify sending a general Warrant to search all suspected

²⁰⁷ Cuddihy, *The Fourth Amendment* at 269 (cited in note 37).

²⁰⁸ Matthew Hale, 2 *Historia Placitorum Coronae* 150 (Rider 1800). Hale elaborated:

The party that demands it ought to be examined upon his oath touching the whole matter. . . . The warrant ought to be under the hand and seal of the justice. . . . It must have a certain date, but the place, tho it must be alledged in pleading, need not be expressed in the warrant. . . . [T]he warrant ought to contain the cause specially, and should not be generally *to answer such matters as shall be objected against him*, because it cannot appear. . . . [I]n warrants of the peace and good behaviour the cause must be shewn, that the party may come provided with his sureties.

Id at 110–11.

²⁰⁹ Id at 150.

²¹⁰ Matthew Hale, 1 *Historia Placitorum Coronae* 580 (Rider 1736).

²¹¹ *Leach*, 19 How St Tr at 1027. Coke and Hale were hardly the only legal scholars to reject general warrants. By 1680, political writer Henry Care moved the discussion further in *English Liberties*, arguing for a requirement of specificity in warrants. See William Hawkins, 2 *A Treatise of the Pleas of the Crown* 81–82 (Professional Books 1973) (P.R. Glazebrook, ed); Thomas Wood, *An Institute of the Laws of England: Or, the Laws of England in Their Natural Order, According to Common Use* 91 (Lintot 1754); Hale, 2 *Historia Placitorum Coronae* at 107, 113–14 (cited in note 208).

Houses in general for stolen Goods.”²¹² Hawkins added, “inasmuch as Justices of Peace claim this Power rather by Connivance, than any express Warrant of Law, and since the undue Execution of it may prove so highly prejudicial to the Reputation as well as the Liberty of the Party,” general writes—particularly for arrest—were void.²¹³ Hawkins looked to Coke and Hale’s disapproval, stating that first probable cause must be demonstrated, particularity attached, and a warrant issued prior to arrest.²¹⁴ A number of influential English legal treatises and abridgements followed Hawkins’s *Pleas*, condemning general warrants.²¹⁵

Parliament built upon the foundation constructed by English legal scholars. Initially, concern stemmed from parliamentarians’ objection to the exercise of powers that they had not created, and the use of general warrants against members, making legislative privilege and self-interest—and not individual rights—central to their concerns.²¹⁶ Parliament sent agents of the Crown to the Tower of London for conducting searches against its members and considered certain “general warrant[s] dormant,” as they acted “against law and the liberties of the subject.”²¹⁷ In 1681, nearly four decades after Coke’s *Institutes*, the House of Commons listed as a reason for the impeachment of Chief Justice Sir William Scroggs that he had “granted divers general warrants for attaching the persons and seizing the goods of his majesty’s subjects, not named or described particularly in the said warrants, by means whereof many have been vexed, their houses entered into, and

²¹² Hawkins, 2 *A Treatise of the Pleas of the Crown* at 84 (cited in note 211). See also Donohue, *The Future of Foreign Intelligence* at 79 (cited in note 54).

²¹³ Hawkins, 2 *A Treatise of the Pleas of the Crown* at 84 (cited in note 211).

²¹⁴ *Id.* at 85.

²¹⁵ See, for example, *The Law of Arrests in Both Civil and Criminal Cases* 173–74, 186 (Lintot 1742):

A Justice of the Peace (it is said) cannot justify the Granting a general Warrant, to search all suspected Houses in general for stolen Goods; for such a Warrant seems in the very Face of it to be illegal, because it would be very hard to leave it to the Discretion of a common Officer to arrest what Persons, and search what Houses he should think fit.

See also Matthew Bacon, 7 *A New Abridgment of the Law* 190 (Strahan 7th ed 1832) (“[T]he sheriff ought not to make a blank warrant.”); Charles Viner, 15 *A General Abridgement of Law and Equity* 13–14 (Robinson 2d ed 1793). See also Cuddihy, *The Fourth Amendment* at 120–21 (cited in note 37); Donohue, *The Future of Foreign Intelligence* at 78 (cited in note 54).

²¹⁶ Cuddihy, *The Fourth Amendment* at 12–14, 124 (cited in note 37).

²¹⁷ *Id.* at 125–26 (quotation marks omitted) (quoting a Committee report of March 1–2, 1640–41).

they themselves generally oppressed contrary to law.”²¹⁸ By “contrary to law,” what Parliament meant was that it had not passed any statute laying out an exception to the general rule—not, as Coke had stated, that the instruments themselves were contrary to law.²¹⁹

Like Coke’s treatise, Parliament’s actions reflected growing public resistance—and opposition—to the use of general warrants. Soon after Pratt’s judgment in *Entick*, the House of Commons passed a resolution condemning the use of general warrants for libels.²²⁰ During debate, Parliament underscored its rather personal concern at the exercise of such warrants, altering “not warranted by law” to “illegal” and adding, “and, if executed on the person of a member of this House, is also a breach of the privilege of this House.”²²¹ Three days later, Parliament amended the resolution to make general warrants universally illegal, outside of specific cases provided via statute.²²²

The issue of general warrants had been the subject of parliamentary debate even before *Entick* and the resolution discussed above. The House of Commons had considered the issue in January 1765. Members of the House of Commons recognized that while the use of general warrants to detain people, or to recover seditious or libelous materials, was objectionable, it was even worse to allow the Crown to trawl through an individual’s private

²¹⁸ *Id.* at 126.

²¹⁹ See *id.* at 13–14.

²²⁰ *Proceedings Related to General Warrants and the Seizure of Papers*, in William Cobbett, ed., 16 *The Parliamentary History of England, from the Earliest Period to the Year 1803* 207, 208 (Hansard 1813) (detailing the April 22, 1766, proceedings of the House of Commons). The proposed resolution read: “That a General Warrant to apprehend the author, printer, or publisher, of a libel, is illegal.” See *id.*

²²¹ *Id.* But note that Parliament still reserved to itself the right to authorize general warrants, which it did the following year in the 1767 Townshend Revenue Act. An Act for Granting Certain Duties in the British Colonies and Plantations in America, Revenue Act, 7 Geo III, ch 46 (1766), in 27 Statutes at Large 505.

²²² *Proceedings Related to General Warrants and the Seizure of Papers* at 209 (cited in note 220) (“That a General Warrant for seizing and apprehending any person or persons being illegal, except in cases provided for by act of parliament, is, if executed upon a member of this House, a breach of the privilege of this House.”). An effort on April 29, 1766, to introduce a statute solidifying the change, allowing general warrants only in cases of treason or felony without benefit of clergy, under certain regulations, failed. *Id.* at 209–10. Nevertheless, on May 2, 1766, a bill was presented to the House of Commons to limit government exercise of search and seizure. Its title was amended to “A Bill to prevent the inconveniencies and dangers to the subject from searching for and seizing papers, by establishing proper regulations, in such cases where searching for and seizing papers is justifiable by law.” The bill passed the Commons on May 14, 1766, but failed to muster the necessary votes to pass the House of Lords. *Id.* at 210.

papers.²²³ The reasoning? “[P]apers, though often dearer to a man than his heart’s blood, and equally close, have neither eyes nor ears to perceive the injury done to them, nor tongue to complain of it, and of course, may be treated in a degree highly injurious to the owners.”²²⁴ Documents could be broken into parts and rejoined “so as to make of them engines capable of working the destruction of the most innocent persons.”²²⁵ The same was true even of specific warrants, which failed to first specify what documents were to be seized, because “in that case, all a man’s papers must be indiscriminately examined, and such examination may bring things to light which it may not concern the public to know, and which yet it may prove highly detrimental to the owner to have made public.”²²⁶ The issue was more than mere embarrassment—it was concern that individuals had a right to a private sphere beyond the gaze of others.

Government supporters countered that

to question the legality of general warrants, would be impeaching the character of the highest and most respectable tribunal, next to the House of Lords, in the whole realm; a tribunal, whose judges for many years past, that general warrants have been in use, have been allowed to be men of the soundest capacity and most unbiassed integrity.²²⁷

They argued that since the men exercising the warrants were lawyers, and therefore respectful of liberty, their integrity should not be impugned.²²⁸ But reliance on the respect owed to those exercising the powers did not win the day.

As the Crown’s use of executive writs continued, Parliament became increasingly concerned, leading one member, in 1766, to declare that “a general warrant is such a piece of nonsense as deserves not to be spoken of, being no warrant at all, and incapable of answering any one purpose, in any case whatever, that a legal warrant would not better attain.”²²⁹

²²³ *Debate in the Commons on General Warrants*, in Cobbett, ed, 16 *The Parliamentary History of England* 6, 10 (cited in note 220).

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* at 10–11.

²²⁷ *Debate in the Commons on General Warrants* at 12–13 (cited in note 223).

²²⁸ *Id.* at 13.

²²⁹ *A Speech in Behalf of the Constitution against the Suspending and Dispensing Prerogative, &c.*, in Cobbett, ed, 16 *The Parliamentary History of England* 251, 287 (cited in note 220). See also Donohue, *The Future of Foreign Intelligence* at 80 (cited in note 54).

In 1768, William Blackstone announced in his *Commentaries on the Laws of England* that the question of the legality of general warrants under the common law, had it ever existed, had since been well settled:

Sir Edward Coke indeed hath laid it down, that a justice of the peace cannot issue a warrant to apprehend a felon upon bare suspicion; no, not even till an indictment be actually found: and the contrary practice is by others held to be grounded rather upon connivance, than the express rule of law; though now by long custom established.²³⁰

There was a distinction to be drawn between specific warrants for arrest and those that lacked the necessary particularization.²³¹ The former, discussed at length by Hale, required that evidence be submitted, under oath, to a competent judge, who would then issue a warrant for arrest. Such warrants, issued in open court, bore the seal of a justice of the peace.²³²

However, “[a] *general* warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for [its] uncertainty; for it is the duty of the magistrate, and ought not to be left to the officer, to judge of the ground of suspicion.”²³³ Blackstone continued:

[A] warrant to apprehend all persons guilty of a crime therein specified, is no legal warrant: for the point, upon which [its] authority rests, is a fact to be decided on a subsequent trial; namely, whether the person apprehended thereupon be really guilty or not. It is therefore in fact no warrant at all: for it will not justify the officer who acts under it.²³⁴

²³⁰ William Blackstone, 4 *Commentaries on the Laws of England* 287 (Clarendon 1769) (citations omitted). See also Donohue, *The Future of Foreign Intelligence* at 80 (cited in note 54).

²³¹ See Donohue, *The Future of Foreign Intelligence* at 80–81 (cited in note 54).

²³² Blackstone, 4 *Commentaries* at 287–88 (cited in note 230). See also Donohue, *The Future of Foreign Intelligence* at 80–81 (cited in note 54).

²³³ Blackstone, 4 *Commentaries* at 288 (cited in note 230) (citation omitted). See also Donohue, *The Future of Foreign Intelligence* at 81 (cited in note 54).

²³⁴ Blackstone, 4 *Commentaries* at 288 (cited in note 230). Blackstone went on to recognize the exception to the warrant requirement for the arrest of felons, discussed in Part I.C. Professor Amar looks to this exception as stating a rule, in the process getting the common-law understanding backward. See Amar, *The Law of the Land* at 232–33 (cited in note 13) (citing constables’ felony-arrest powers as evidence that the Fourth Amendment does not include a warrant requirement).

Even as they rejected general warrants, English legal treatises acknowledged an exception wherein entry to the home, absent a warrant, satisfied common-law principles. In order to ensure the King's peace, special rules accompanied the capture and search of felons.

C. Keeping the King's Peace: The Known-Felon Exception

For eighteenth-century English subjects, the walls of the home served as a barrier to government intrusion. An ancient exception to this rule stemmed from the importance of maintaining the King's peace. Following the Norman invasions, the concept had evolved into a general safeguard of public order.²³⁵ Anyone committing a criminal offense could be sued by the King "as for a Thing committed against his Commandment, and against his Peace."²³⁶ The notion stemmed, in part, from the sanctity of the King's home, as extended to the land he controlled.²³⁷ Violating the King's peace was an act of personal disobedience, making the wrongdoer the King's enemy.²³⁸ With the matter so close to the monarch's interests, it was his justices who tried breaches of the peace, even as the King formally was entered as a party to the plea.²³⁹

Initially, only felonies counted as *contra pacem domini regis* ("against the King's peace").²⁴⁰ They included the most serious offenses, not least because, when coupled with the actual murder of another individual, neither the breach of the peace nor the commission of the crime could be amended.²⁴¹ As a result, severe penalties followed: execution, forfeiture of land or goods, or both.²⁴²

²³⁵ See Frederick Pollock and Frederick William Maitland, 1 *The History of English Law before the Time of Edward I* 44–45 (Cambridge 2d ed 1898). See also James Fitzjames Stephen, 2 *A History of the Criminal Law of England* 203 (Macmillan 1883).

²³⁶ Statute of Westminster I, 3 Edw I, ch 1 (1275), in 1 *Statutes of the Realm* 26, 27.

²³⁷ Pollock and Maitland, 1 *The History of English Law* at 45 (cited in note 235).

²³⁸ *Id.*

²³⁹ A.H.F. Lefroy, *Anglo-Saxon Period of English Law: II*, 26 *Yale L J* 388, 389 (1917). See also Pollock and Maitland, 1 *The History of English Law* at 44 (cited in note 235) ("All criminal offences have long been said to be committed against the king's peace.").

²⁴⁰ Alternatively, it is possible that only crimes *contra pacem* constituted felonies. Lefroy, 26 *Yale L J* at 389 (cited in note 239). As a historical matter, it is difficult to give priority to one or the other. Suffice it to say that the two were interchangeable. Over time, it became standard to claim any criminal wrong as *contra pacem*. *Id.*

²⁴¹ Pollock and Maitland, 2 *The History of English Law* at 461–63 (cited in note 23); Lefroy, 26 *Yale L J* at 391 (cited in note 239).

²⁴² Emlin McClain, 1 *A Treatise on the Criminal Law as Now Administered in the United States* § 18 at 21 (Callaghan 1897). McClain goes on to note that the meaning of

Over time, breaches of the King's peace broadened to include lesser offenses—a phenomenon that nineteenth-century English legal scholars Sir Frederick Pollock and Frederick William Maitland attributed to the ease with which peace spread. But “[i]t was otherwise with felony.”²⁴³ That became, and remained, the name “for the worst, the bootless crimes.”²⁴⁴

The rejection of felonious acts was reflected in the etymology of the word, which Coke traced to “fell,” “fel,” or “gall”—the original meaning being an individual full of bitterness, as “gall” and “venom” were closely associated.²⁴⁵ Thomas Blount's 1670 lexicon, which cited Coke, listed murder, theft, suicide, rape, and the willful burning of houses as examples, distinguishing them “from lighter offences, in that the punishment thereof is death.”²⁴⁶ The term carried moral approbation and social condemnation. Accordingly, *Johnson's Dictionary* in 1768 defined a “felon” as not just “[o]ne who has committed a capital crime,” but as “[c]ruel; traitorous; [and] inhuman,” while “felonious” meant “[w]icked; traitorous; villainous; [and] malignant.”²⁴⁷

Under English law, certain officers of the Crown served as conservators of the King's peace.²⁴⁸ It fell to them to apprehend felons. There was no preliminary investigation before a magistrate. Instead, agents of the Crown had the authority to arrest individuals caught in the act.²⁴⁹ Certain conditions therefore had

the word “felony” was not entirely settled, “and by some authorities the test was the liability to forfeiture rather than the liability to capital punishment.” *Id.* But “[a]s used in the American colonies, the popular distinction seems to have been [] between offenses punishable with death and those not so punishable.” *Id.*

²⁴³ Pollock and Maitland, 2 *The History of English Law* at 464 (cited in note 23) (emphasis omitted).

²⁴⁴ *Id.*

²⁴⁵ Blackstone dismissed Coke's attribution, preferring Sir Henry Spelman's “fee-lon” (or “pretium feudi”). Blackstone, 4 *Commentaries* at 95 (cited in note 230). But Pollock and Maitland sided with Coke in the etymology of the word. Pollock and Maitland, 2 *The History of English Law* at 464–65 (cited in note 23).

²⁴⁶ Thomas Blount, *Nomo-Lexikon: A Law-Dictionary* at “felony” (Newcomb 1670) (adding “yet not always” and citing petit larceny as an example).

²⁴⁷ Samuel Johnson, *A Dictionary of the English Language* at “felon,” “felonious” (Jones 3d ed revised 1768).

²⁴⁸ The officers included “the king, treasurer, steward, high chancellor, constable, marshal, [] the judges of the king's bench, master of the rolls, . . . the sheriff, coroner, justices of the peace, the constable, bailiffs, [and] watchmen.” Horace L. Wilgus, *Arrest without a Warrant*, 22 *Mich L Rev* 541, 547 (1924). Magna Carta removed the right to hold pleas of the Crown from the sheriff, constable, coroner, and bailiffs. *Id.* at 547 & n 38.

²⁴⁹ See, for example, *id.* at 547 (discussing the Assize of Clarendon (1166), as well as the Ordinance of 1195, which “command[ed] all men to arrest outlaws, robbers, thieves and the harborers of such,” and the Ordinance of 1252, which “mention[ed] ‘disturbers of our peace’”). Pollock and Maitland later stated that the rule at the time was “that felons

to be met for felony arrests to occur. The arrests had to be directed toward: (a) a specific individual, (b) for a particular crime, (c) that was serious in nature (that is, a felony); and (d) the agent needed a high level of confidence that the individual had actually engaged in the illegal activity—specifically, that the officer, or the person approaching the officer to demand the arrest, had witnessed the person commit the crime. In this way, individuality, particularity, severity, and certainty proved essential. When these requirements were met, the law allowed the officers, witnesses, or persons responding to the hue and cry to chase and apprehend the felon, to break down the doors of any homes in which the felon had sought refuge, and to seize any items found in the individual's possession.²⁵⁰

Persons effecting arrest in this manner still risked legal penalties for trespass, assault, or murder, in the event that they were wrong in their knowledge that the target had committed the felony.²⁵¹ For the hue and cry, though, only those who raised the alarm, and not those responding to it, were held responsible for the outcome. Thus, the legitimacy of the seizure of the person, or the search that accompanied the seizure, turned in some measure on the suspect's actual guilt, as demonstrated *ex post facto*, in a court of law. A brief discussion of the public safety powers of arrest and search, and the hue and cry, helps to underscore the specificity of the known-felon exception.

1. Public safety: powers of arrest and search.²⁵²

Seventeenth- and eighteenth-century English legal scholars agreed that in the case of a felony, when an individual was known to have committed the crime, a warrant was not required for arrest. Nor was a warrant required for a search incident to the arrest, which sought to secure the safety of those effecting the arrest and to preserve evidence for trial. These were exceptions to the

ought to be summarily arrested and put in gaol." Pollock and Maitland, 2 *The History of English Law* at 582 (cited in note 23).

²⁵⁰ Blackstone, 4 *Commentaries* at 289–91 (cited in note 230).

²⁵¹ Wilgus, 22 *Mich L Rev* at 563 (cited in note 248); Pollock and Maitland, 2 *The History of English Law* at 582–83 (cited in note 23).

²⁵² Note the distinction between powers of arrest and powers of imprisonment. As Professor Horace Wilgus explained in the early twentieth century, "An arrest is the beginning of an imprisonment. It is . . . [t]he taking of one under a real or assumed authority, into custody to answer some legal charge, civil or criminal." Wilgus, 22 *Mich L Rev* at 543 (cited in note 248) (citation omitted).

general rule that required officers of the Crown to first obtain a warrant before forcible entry into a dwelling.

Hale explained in 1736 in his *History of the Pleas of the Crown* that certain ministers—justices of the peace, sheriffs, coroners, constables, and watchmen—were empowered to “arrest felons, and those that are probably suspected of felony,” prior to indictment or conviction.²⁵³ The qualifications required for those in office, as well as the potential for officials to be held in violation of the law for abusing their authority, acted as restraints on the power.²⁵⁴ The officers had unique and carefully circumscribed authorities, underscoring the carefulness accorded to the exception.

Justices of the peace could arrest only individuals whom they actually witnessed commit a felony or breach of the peace, or whom others witnessed commit the same.²⁵⁵ They could not proceed against lesser offenses, nor could they proceed absent a high

²⁵³ Hale, 2 *Historia Placitorum Coronae* at 85 (cited in note 208).

²⁵⁴ Id. It appears that the offices of judge and sheriff derive from King Alfred's reign in 886, from which Saunders Welch conjectured in 1754 that the office of constable grew. As Welch wrote: “But whether *Alfred* introduced this office into *England* from the *Saxon* Constitution, or whether the *Saxons* incorporated this office, on account of its utility, into the civil polity of their own country, history is silent. However the former is most probable.” Saunders Welch, *An Essay on the Office of Constable* v–vi (printed for C. Henderson 1758). These offices proved insufficient to prevent attacks upon the highways. See id. at viii:

But the Constables, it seems, though aided by the military power, are not even then capable of protecting us from the violence of a few paultry villains, who turn public robbers: for a third institution has been not many years invented to supply the pretended defects of our wretched constitution.

Following the restoration of the Stuarts, crime in London began to spiral out of control. Parliament responded with two statutes, passed during the fourth year of the reign of William and Mary, providing for a reward of £40 to the apprehender of any highwayman, extended during the sixth year of the reign of George I to any street robber via language naming the streets of London, Westminster, and other cities, towns, and places for purposes of robberies to be deemed highways. Id. at ix. Robberies continued, with a reward increased to £100 promised by proclamation “to the apprehender and prosecutor to conviction.” Id. at x. Thieves began using the system to collect the rewards, with innocent people punished. The records of Tyburn, England, showed that at one point nineteen or twenty people were sometimes convicted at once, “[a]nd it became no uncommon thing for a charge of one thousand pounds to accrue to the government at a single sessions; the far greater part of which became the plunder of the society.” Id. Civil officers were designed, then, to prevent reliance on thieves and the public for apprehension of individuals engaged in felonies. Id. at xii–xiii.

²⁵⁵ Hale, 2 *Historia Placitorum Coronae* at 86 (cited in note 208).

level of assuredness that a crime had been, or was being, committed.²⁵⁶ In the event that the arrest would be based on another person's witnessing of the event, then the justice of the peace was required to issue a warrant in writing under his seal before the individual could be arrested.²⁵⁷ By statute, and consistent with the common law, sheriffs were similarly empowered to arrest felons.²⁵⁸

Coroners, finding that the body under their inspection had been murdered and the party responsible for the assault was clear, had the power to order the arrest of the party responsible for having committed the felony.²⁵⁹ Their power was strictly limited to ordering the arrest of individuals suspected of killing others; they had no further powers of questioning or arrest.²⁶⁰

Constables acted as conservators of the peace at common law.²⁶¹ They therefore had the power "to quell all affrays, riots, routs, and actual assaults, by commanding the parties, in the king's name to keep the peace . . . and to apprehend all persons

²⁵⁶ *Id.* (quoting a fourteenth-century statute as saying, "[I]f the justice of peace hath either from himself or by a credible information from others knowledge of a felony done, and just cause of suspicion of any person, he may himself arrest and commit that person").

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 86–87.

²⁵⁹ Statute of Westminster I, 3 Edw I, ch 9 (1275), in 1 *Statutes of the Realm* 26, 29. See also Hale, 2 *Historia Placitorum Coronae* at 88 (cited in note 208).

²⁶⁰ Hale, 2 *Historia Placitorum Coronae* at 87 (cited in note 208). Coroners' authority appears to have narrowed over time. See, for example, 4 Edw I, ch 1 (1275), in 1 *Statutes of the Realm* 40, 40:

A coroner of our Lord the King ought to inquire of these Things. [First] to the Places where any be slain, or suddenly dead, or wounded, or where Houses are broken . . . and shall forthwith command four of the next Towns, or five or six, to appear before [him] in such a place: and when they are come thither the Coroner upon the Oath of them shall inquire in this manner, that is to wit; [If they know where the Person was slain, whether it were in any house, field, bed, tavern, or company,] and who were there: Likewise it is to be inquired, who were culpable either of the Act, or of the Force, and who were present, either Men or Women, and of what age soever they be, if they can speak, or have any Discretion: and how many soever be found culpable by Inquisition in any of the manners aforesaid, they shall be taken and delivered to the Sheriff, and shall be committed to the Gaol.

²⁶¹ Hale, 2 *Historia Placitorum Coronae* at 88 (cited in note 208). See also William Sheppard, *The Offices and Duties of Constables* 34 (Hodgkinsonne 1641) (stating the authority and duty of constables as "foreseeing, that nothing be done that tendeth either directly, or by any meanes to the breach of the Peace . . . in quieting or pacifying those that are occupied in breach of the Peace . . . [and] in punishing such as have already broken the Peace").

who,” within their eyesight, broke the peace “by assaulting, striking, or by fighting.”²⁶²

Even here, Saunders Welch, an eighteenth-century justice of the peace, as well as a high constable, warned against intermeddling in the affray or assault.²⁶³ As a routine matter, the injured person “ought to apply to a magistrate for his warrant.”²⁶⁴ Welch advised that the only time a constable should intervene under his own authority was when any person appeared “to be dangerously wounded, and the party wounded” charged another person present.²⁶⁵ In such circumstances, constables were to detain the person accused, “as the delay of a warrant may be the escape of a murderer.”²⁶⁶

The law obliged constables to follow the directions of justices of the peace, sheriffs, and coroners to apprehend felons. They risked indictment and a fine for failing to do so.²⁶⁷ Once a constable apprehended a suspect, the law required the constable immediately to bring the prisoner before a justice of the peace.²⁶⁸ The rationale was that, as conservators of the peace, constables had the power to apprehend without legal process, but they could not discharge prisoners upon their own authority, “the intention of such arrest being the delivery of the Party to the magistrates, to

²⁶² Welch, *Observations on the Office of Constable* at 6 (cited in note 23). See also Sheppard, *The Offices and Duties of Constables* at 34 (cited in note 261) (noting that a breach of the peace was understood as “not onely that fighting, which wee commonly call the Breach of the Peace, but also that every Murder, Rape, Manslaughter, and felonie whatsoever, and every Affraying, or putting in feare of the Kings people”).

²⁶³ Welch, a wholesale grocer, was appointed high constable of Holborn for a three-year term in 1746, renewed thereafter in 1749 and 1752. In 1749, Welch was appointed as one of the vestrymen to present a memorial drafted on behalf of the Bloomsbury vestry “to prevent and suppress the frequent robberies and other outrages committed in this parish” to John Russell, fourth Duke of Bedford. He was also appointed by one of the barons of the exchequer to be the receiver of the moneys to be raised to recruit men to assist the constables and watchmen of the parish. In 1753, Welch became a magistrate in the Middlesex Commission of the Peace. Welch wrote a pamphlet, *Observations on the Office of Constable*, in 1754, revised in a second edition in 1758. Ruth Paley, *Welch, Saunders (1711–1784)*, in *Oxford Dictionary of National Biography* (Oxford online ed 2015) (visited Apr 8, 2016).

²⁶⁴ Welch, *Observations on the Office of Constable* at 7 (cited in note 23).

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 7–8. Amar adopts an expansive understanding of constables’ authority to arrest felons, without understanding the limits on them, as outlined by Hale, Welch, and others, in their exercise of such powers. See, for example, Amar, 30 *Suffolk U L Rev* at 58 (cited in note 13).

²⁶⁷ See, for example, Sheppard, *The Offices of Constables* at ch 8, § 2, no 4 (cited in note 23); Welch, *Observations on the Office of Constable* at 23–28, 34–35 (cited in note 23).

²⁶⁸ Hale, 2 *Historia Placitorum Coronae* at 89 (cited in note 208).

be dealt with according to law.”²⁶⁹ Penalties applied for unlawful discharge.²⁷⁰

The emphasis was always on public safety.²⁷¹ Thus, as Hale wrote, constables were empowered to arrest “suspicious night walkers . . . and men that ride armed in fair or markets or elsewhere.”²⁷² They also could arrest individuals in the middle of a public fight, but, “if the affray be past, and no danger of death, the constable cannot arrest the parties without a warrant from a justice of the peace.”²⁷³

Hale was careful to distinguish between the powers of arrest (a) when a felony was “*certainly* committed,” (b) in cases of “*suspicion* of felony,” and (c) when there was a “*danger* of felony, tho none be committed, as in case of affrays or dangerous wounding.”²⁷⁴

In the first instance, “it is of all hands agreed,” Hale noted, that the constable could “arrest and imprison the felon,” including breaking “open doors to take the felon, if the felon be in the house, and his entry denied after demand and notice that he is constable.”²⁷⁵ Hale explained *why* such powers had been granted: because a constable is “a conservator of the peace, and is not only permitted but by law enjoined to take a felon, and if he omits his duty herein, he is indictable and subject to a fine and imprisonment.”²⁷⁶

In the second case, when a felony has been committed and there is a suspect—such as a robbery upon person A, and “A. suspects B. upon probable grounds to be the felon, and acquaints the constable with it”—then the constable could apprehend B upon the suspicion.²⁷⁷ Under these circumstances, the constable had a responsibility first to “inquire and examine the circumstances

²⁶⁹ Welch, *Observations on the Office of Constable* at 7 (cited in note 23).

²⁷⁰ Id (“If at any time you should forget this caution, you will be subject to an indictment, or action of false imprisonment: for your discharge amounts to a confession that you had no lawful power to arrest.”).

²⁷¹ In his rebuttal to Davies, Amar looks at the powers granted to constables “by virtue of their office” as proof that they had special powers, without appreciating that the reason they did was to allow them to respond to the most serious transgressions—namely, breaches of the peace—and to apprehend fleeing felons before they could endanger people further. This was a notable exception to the warrant requirement. See Amar, 30 *Suffolk U L Rev* at 57 & n 15, 59 (cited in note 13).

²⁷² Hale, 2 *Historia Placitorum Coronae* at 89 (cited in note 208). See also Sheppard, *The Offices of Constables* at ch 8, § 2, no 4 (cited in note 23).

²⁷³ Hale, 2 *Historia Placitorum Coronae* at 90 (cited in note 208).

²⁷⁴ Id (emphasis omitted).

²⁷⁵ Id.

²⁷⁶ Id at 90–91.

²⁷⁷ Hale, 2 *Historia Placitorum Coronae* at 91 (cited in note 208).

and causes of the suspicion of A.”²⁷⁸ If satisfied, the constable and the accuser had to proceed together to effect the arrest.²⁷⁹ Thus, when an *actual* felony had been committed *in fact* and a constable established *probable cause* that a particular individual was responsible, then arrest powers, absent a warrant, followed.

Hale laid out the danger of not allowing such powers: “[I]f the constable should not be allowed this latitude in cases of this nature, many felons would escape.”²⁸⁰ There were, nevertheless, checks on the power. The innocence of the party arrested should still be assumed, before being brought before a justice of the peace, who then was required to “consider the circumstances, and possibly in some cases discharge or bail him, and upon his trial, if innocent, he will be discharged.”²⁸¹ But the seriousness of the crime was of the utmost importance. At a minimum, Hale explained, “there must be a felony in fact done, and the constable must be ascertained of *that*, and aver it in his plea.”²⁸²

Regarding entry into homes, as in the first case, should “the supposed offender fly and take house, and the door will not be opened upon demand of the constable and notification of his business, the constable may break open the door, tho he have no warrant.”²⁸³ The norm, therefore, was clear: in order to enter into a

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ Hale, 2 *Historia Placitorum Coronae* at 91 (cited in note 208).

²⁸² *Id.* at 91–92.

²⁸³ *Id.* at 92. But note that there is disagreement among seventeenth- and eighteenth-century legal scholars as to this point. Coke considered such arrest to be illegal: “[N]either the Constable, nor any other can break open any house for the apprehension of the party suspected or charged with the felony.” Coke, *The Fourth Part of the Institutes* at 177 (cited in note 188). For Coke, only a King’s indictment could justify breaking down doors to effect arrest based on suspicion. A warrant issued by a justice of the peace was insufficient. Richard Burn agreed with Coke, as did Michael Foster and Hawkins. Richard Burn, 1 *The Justice of the Peace, and Parish Officer* 99 (Strahan 12th ed 1772) (“[W]here one lies under a probable suspicion only, and is not indicted, it seems the better opinion at this day (Mr. Hawkins says) that no one can justify the breaking open doors in order to apprehend him.”) (emphasis omitted); Michael Foster, *A Report of Some Proceedings on the Commission of Oyer and Terminer and Goal Delivery for the Trial of the Rebels in the Year 1746 in the County of Surry, and of Other Crown Cases* 321 (Clarendon 1762) (agreeing with Coke that an officer may not enter a private home to arrest someone without a warrant); William Hawkins, 2 *A Treatise of the Pleas of the Crown* 139 (6th ed 1787) (citing Hale in support of the claim that “where one lies under a probable suspicion only, and is not indicted, it seems the better [] opinion at this day, That no one can justify the breaking open doors in order to apprehend him”). Sir Edward Hyde East and Sir William Oldnall Russell also agreed, although they suggested that actual guilt or innocence, as demonstrated in court, determined whether the officer effecting arrest would be liable for trespass. Edward Hyde East, 1 *A Treatise of the Pleas of the Crown* 322 (Strahan 1803):

home, the constable was required to first have a warrant—unless he was in pursuit of a felon. Under such circumstances, the warrant requirement could be waived.

There were other limits on the powers. Unlike the first instance (in which the constable knew to a certainty that the individual had engaged in a felony), it was much more questionable in the second instance (in which there was only a strong suspicion, based on a witness who had been examined by the constable) whether the constable could actually use lethal force against the suspected felon.²⁸⁴

As for the third case, Hale provided an example in which an individual had wounded, but not killed, another person:

If *A.* hath wounded *B.* so that he is in danger of death, and *A.* flies and takes his house, and shuts the doors, and will not open them, the constable of the vill where it is done, or upon

[Y]et a bare suspicion of guilt against the party will not warrant a proceeding to this extremity [the breaking of doors], unless the officer be armed with a magistrate's warrant grounded on such suspicion. It will at least be at the peril of proving that the party so taken on suspicion was guilty.

See also William Oldnall Russell, 1 *A Treatise on Crimes and Misdemeanors* 745 (Butterworth 1819). Blackstone, Joseph Chitty (who relied on Hale), and Henry John Stephen took a different view. Blackstone, 4 *Commentaries* at 289 (cited in note 230); Joseph Chitty, 1 *A Practical Treatise on the Criminal Law* 23 (Butterworth 1816); Henry John Stephen, 4 *New Commentaries on the Laws of England* 359 (Voorhies 1846). Hale, however, is not as clearly opposed to Coke as Blackstone and Chitty might lead one to believe. As noted in the text above, Hale states that when a constable suspects an individual of having committed a felony, “if the supposed offender fly and take house, and the door will not be opened upon demand of the constable and notification of his business, the constable may break the door, tho he have no warrant.” Hale, 2 *Historia Placitorum Coronae* at 92 (cited in note 208). See also *id.* at 90–95. On the face of it, this appears to limit the warrantless exception for home arrests to cases of hot pursuit in which a felon is known. In another part of his work, citing a statement in an early Year Book, later quoted in *Burdett v Abbott*, 104 Eng Rep 501 (KB 1811), Hale suggests that entry to arrest without a warrant under suspicion of a felony committed was legal. Hale, 2 *Historia Placitorum Coronae* at 93–94 (cited in note 208). See also *Burdett*, 104 Eng Rep at 560. Although *Semayne's Case* is at times credited as describing entry without a warrant, the scenario it details closely aligns with descriptions of how a warrant was served. Compare, for example, *Semayne's Case*, 77 Eng Rep at 195–96, with Chitty, 1 *A Practical Treatise on the Criminal Law* at 50 (cited in note 283).

²⁸⁴ Hale, 2 *Historia Placitorum Coronae* at 92 (cited in note 208) (“[I]t may be more questionable, whether if he fly and cannot be apprehended, the officer may kill him, where he is suspected and innocent, if he cannot be otherwise taken, as he may a felon, as before is shewn.”). Hale notes that the law is unclear on this point, although it may, under some circumstances, be allowed, on the grounds that the constable is bound to the duties of his office “in case of a probable suspicion, as well as in case of an actual felony,” because the constable could not judge the actual guilt until trial, and because the effort of the individual to escape suggests potential guilt. *Id.*

hue and cry, may break the doors of the house to take him, if upon demand he will not yield himself to the constable.²⁸⁵

Should there be further disorder in the house, the constable was empowered to enter the home “to keep the peace and prevent the danger.”²⁸⁶

English law allowed for two kinds of search related to the arrest of a felon: first, of the person arrested, and second, of the area where the felon was located. The primary purposes of these searches were to ensure public safety at the time of the arrest and to seize evidence of the crime itself.

William Sheppard, writing in the seventeenth century, explained that after a felony occurred, constables were required to

make diligent search for him that did it, in all such places within their Liberty as they shall understand to be likely to finde him in . . . and albeit it be a mans house he doth dwell in, which they doe suspect the Fellon to be in, yet they may enter in there to search; and if the owner of the house, upon request, will not open his dores, it seems the Officer may break open the dores upon him to come in to search.²⁸⁷

He added, “And so also it seems the Officer may search for goods stoln, as he may for the Fellon himself that doth steal them.”²⁸⁸

Seventy-five years later, Welch directed constables, “If the watch or yourself apprehend any suspicious persons, let them be carefully search’d.”²⁸⁹ He further advised: “[I]f any thing uncommon, as fire-arms, or other offensive weapons, be found upon them be sure to secure them, and take in writing with great exactness, the first account they give of themselves.”²⁹⁰

²⁸⁵ *Id.* at 94.

²⁸⁶ *Id.* at 95.

²⁸⁷ Sheppard, *The Offices of Constables* at ch 8, § 2, no 10 (cited in note 23).

²⁸⁸ *Id.* See also Sheppard, *The Offices and Duties of Constables* at 65–66 (cited in note 261):

[In the event that another person brings claims of felony against an individual,] the Constable in this case of his owne authoritie, without warrant from a Justice of Peace, may search for the goods, and the Felon; and if he find the goods, seise them, and if he finde the felon, apprehend him; yet for the most part, the Constable not knowing his Authoritie, or the danger, is so fearfull and remisse herein, that he doth nothing untill he hath the warrant of a Justice of Peace, to provoke and enable him so to doe.

²⁸⁹ Welch, *Observations on the Office of Constable* at 12 (cited in note 23).

²⁹⁰ *Id.*

Jurists echoed Welch's understanding. Even as late as 1887, in *Dillon v O'Brien*,²⁹¹ the Court of the Exchequer noted that "in cases of treason and felony, constables (and probably also private persons) are entitled, upon a lawful arrest . . . to take and detain property found in his possession which will form material evidence in his prosecution for that crime."²⁹²

The importance of protecting the public by keeping the King's peace animated the known-felon exception.²⁹³ As such, the exception bore a close relationship to the hue and cry, which extended the authority to apprehend known felons beyond officers of the Crown.

2. The hue and cry.

The hue and cry was an ancient tradition reserved for the most serious of crimes. Alfred the Great's institution of "hundreds," a type of regional administrative division, during his ninth-century reign as King of the Anglo-Saxons appears to have originated the practice.²⁹⁴ In the thirteenth century, Henrici de Bracton wrote in *De Legibus et Consuetudinibus Angliæ* ("On the Laws and Customs of England"): "[I]f one has committed a felony and, after the hue has been raised, is arrested at once, pursuit shall end."²⁹⁵ All persons between the ages of fifteen and sixty who heard the hue and cry were obliged to assist.²⁹⁶ Those who did so were protected from legal penalties—although the person who first raised the hue and cry, should it turn out to be false, was not. During the reign of Edward I, the hue and cry was incorporated into the Statute of Westminster.²⁹⁷ The Statute of Winchester also

²⁹¹ 16 Cox Crim Cas 245 (Ex 1887).

²⁹² *Id* at 249.

²⁹³ For this reason, constables similarly had the power to arrest rogues and vagrants. Sheppard, *The Offices and Duties of Constables* at 95 (cited in note 261). As with constables, the powers of arrest and search for those breaking the law granted to watchmen were the same—namely, to prevent breaches of public order. *Id* at 96–98.

²⁹⁴ Chitty, 1 *A Practical Treatise on Criminal Law* at 26 (cited in note 283). See also Statute of Winchester, 13 Edw I, ch 4–6 (1285), in 1 *Statutes of the Realm* 96, 97; *De Officio Coronatoris*, 4 Edw I (1275–76), in 1 *Statutes of the Realm* 40, 40–41. See also generally Henrici de Bracton, 2 *On the Laws and Customs of England* (Hein 1997) (Samuel E. Thorne, trans).

²⁹⁵ Bracton, 2 *On the Laws and Customs of England* at 328 (cited in note 294). This is a translation from Bracton's Latin: "[S]i quis feloniam fecerit et statim captus fuerit, levato huthesio, cessabit secta." *Id* (citations omitted).

²⁹⁶ *Id*. See also Statute of Winchester, 13 Edw I, ch 6 (1685), in 1 *Statutes of the Realm* 96, 97–98.

²⁹⁷ Statute of Westminster I, 3 Edw I, ch 9 (1275), in 1 *Statutes of the Realm* 26, 28–29.

included it, requiring that people in neighboring towns and counties pursue the felon in response to the hue and cry.²⁹⁸ Later statutes expanded it to require pursuit by horse, as well as by foot.²⁹⁹

In the early seventeenth century, Coke noted that when a hue and cry had been raised against a felon, and the felon took refuge in a home “and defended with force,” Crown agents had the authority to “lawfully break the house” to effect arrest.³⁰⁰ Coke returned to the subject in the third part of his *Institutes*, in which he distinguished between two kinds of hue and cry: that derived from common law and that conducted consistent with statutory authority.³⁰¹

“Hue and Cry by the Common law, or for the King,” Coke explained, “is, when any felony is committed, or any person grievously & dangerously wounded, or any person assaulted and offered to be robbed either in the day or night.”³⁰² In such circumstances, the party aggrieved could approach a constable “and acquaint him with the causes, describing the party, and telling which way the offender is gone, and require him to raise Hue and Cry.”³⁰³ The idea behind the doctrine was that the felon be caught before he had a chance to escape. Accordingly, it was the constable’s duty to then “raise the power of the towne, as well in

²⁹⁸ Statute of Winchester, 13 Edw I, ch 1 (1285), in 1 Statutes of the Realm 96, 96:

Our Lord the King, for to abate the power of Felons . . . doth command, That [Cries] shall be solemnly made in all Counties, Hundreds, Markets, Fairs, and all other Places where great Resort of People is, so that none shall excuse himself by Ignorance, that from henceforth every Country be so well kept, that immediately upon such Robberies and Felonies committed, fresh Suit shall be made from Town to Town and from Country to Country.

(brackets in original). The Statute of Winchester additionally required night watchmen to raise a hue and cry in the event that strangers should resist arrest, stating:

And if they will not obey the Arrest, they shall levy Hue and Cry upon them, and [such as keep the Town shall follow with Hue and Cry with all the Town, and the Towns near, and so Hue and Cry shall be made from Town to Town,] until that they be taken and delivered to the Sheriff.

Statute of Winchester, 13 Edw I, ch 4 (1285), in 1 Statutes of the Realm 96, 97 (brackets in original). See also Statute of Winchester, 13 Edw I, ch 6 (1685), in 1 Statutes of the Realm 96, 97–98 (requiring all persons ages fifteen to sixty to “follow the Cry with the Country” and “to keep Horses and Armor” for the purpose).

²⁹⁹ Chitty, 1 *A Practical Treatise on Criminal Law* at 27 (cited in note 283), citing 27 Eliz, ch 13, § 8 (1584–85), in 4 Statutes of the Realm 720, 722.

³⁰⁰ *Semayne’s Case*, 77 Eng Rep at 196.

³⁰¹ Coke, *The Third Part of the Institutes* at 116–18 (cited in note 162).

³⁰² *Id.* at 116.

³⁰³ *Id.*

the night as in the day,” to find the offender.³⁰⁴ Public safety demanded it.³⁰⁵

Under statutory provisions, the situations in which the hue and cry could be raised were limited to five: (a) when a watchman attempted to detain a suspicious nightwalker and he attempted escape; (b) when outlaws trespassed in forests, chases, parks, or warrens, with the intent to rob or murder travelers; (c) when Welsh outlaws or men indicted for treason or felony attempted to escape into Herefordshire; (d) when individuals stole horses or carriages and attempted to escape; and (e) when a man, during the daytime, had been robbed and the perpetrator attempted to escape.³⁰⁶

A century later, Hale explained, “Hue and cry is the old common law process after felons and such as have dangerously wounded any person.”³⁰⁷ By then, several statutes recognized it.³⁰⁸

³⁰⁴ Id (citation omitted). See also Sheppard, *The Offices of Constables* at ch 8, § 2, no 13 (cited in note 23):

The Constable is to levy *Hue* and *Cry* when there is cause, and to send it East, West, North, and South; and it is best to express in the *Hue* and *Cry*, the nature of the thing stoln, colour, and marks, and to describe the number of Fellons, their Horse, Apparel, &c. And this Officer receiving a *Hue and Cry* after a Fellon, must, with all speed, make diligent pursuit, with Horse and Foot, after the offenders from Town to Town the way it is sent, and make diligent search in his own Town: And the Constable and Hundred both may be punished for neglect herein.

³⁰⁵ See, for example, Welch, *Observations on the Office of Constable* at 17 (cited in note 23) (writing with regard to the hue and cry that “[t]he wisdom of the law has rendered warrants in apprehending felons unnecessary, as such a delay might be the escape of the offenders”).

³⁰⁶ See id at 16–17. See also, for example, Statute of Trespassers in Parks, 21 Edw I (1293), in 1 Statutes of the Realm 111, 111–12:

[I]f any Forester, Parker, or Warrener shall find any Trespassers wandering within his Liberty, intending to do Damage therein, and that will not yield themselves to the Foresters, Warreners, or Parkers, after Hue and Cry made to stand unto the Peace, but do continue their malice, and disobeying the King’s Peace, do flee, or defend themselves with Force and Arms,

and the officials respond by killing them, they shall not be accused of murder. However, when the foresters, parkers, warreners, or others “maliciously pretend against any Person passing through their Liberties, that they came thither for to trespass or misdo, when of truth they did nothing . . . and so kill them [they shall be executed].” Id at 112.

³⁰⁷ Hale, 2 *Historia Placitorum Coronae* at 97 (cited in note 208) (emphasis omitted).

³⁰⁸ See, for example, id at 98, quoting Statute of Westminster I, 3 Edw I, ch 9 (1275), in 1 Statutes of the Realm 26, 29:

That all be ready and appavelled at the summons of the sheriff & a cry de pays to pursue and arrest felons as well within franchises as without; and if they do it not and be thereof attaint, *le roy prendra a eux grevement*, they are to be indicted and fined for the neglect.

Constables had the authority to raise a hue and cry to apprehend a felon.³⁰⁹ Their decision to do so extended “only to two things, first that a felony has been really committed, and the second, that the person [arrested] is properly suspected.”³¹⁰ The first was “absolutely necessary to justify an arrest; a mistake here [was] fatal.”³¹¹ A mistake in the second condition, however, could be excused if appropriate efforts had first been taken to ascertain that the individual being sought was the right person.

By the eighteenth century, Welch thus advised constables that when they did not themselves witness the felony, and, instead, the information had been brought to them of both the crime and the person responsible, they were to

examine well if it be upon his own knowledge, or the report of another; if upon his own, charge him in the king’s name to aid and assist you; if upon the report of another, extend your enquiry to him, and act in the same manner: by this means you produce to the magistrate your prisoner and his accuser at the same time.³¹²

See also Hale, 2 *Historia Placitorum Coronae* at 98 (cited in note 208), citing De Officio Coronatoris, 4 Edw I (1275–76), in 1 Statutes of the Realm 40, 41:

Hue and cry shall be levied for all murders, burglaries, men-slain, or in peril to be slain, as other-where is used in *England*, and all shall follow the *hue* and steps as near as they can; and he that doth not, and is convict thereof, shall be attached to be before the justices in *eyre*.

See also Hale, 2 *Historia Placitorum Coronae* at 98 (cited in note 208), citing Statute of Winchester, 13 Edw I, ch 1 (1285), in 1 Statutes of the Realm 96, 96 (“From henceforth every country shall be so well kept, that immediately upon robberies and felonies committed fresh suit shall be made from town to town, and from country to country.”), and Statute of Winchester, 13 Edw I, ch 4 (1285), in 1 Statutes of the Realm 96, 97:

If any will not obey the arrest of the town, where night-walkers pass, they shall levy *hue* and *cry* upon them; and such as keep the town, (*viz.* the baliff or constable), shall follow with *hue* and *cry* with all the town and the towns near; and so *hue* and *cry* shall be made from town to town, until they are taken and delivered to the sheriff; and for arrestments of such strangers none shall be punished.

³⁰⁹ See Hale, 2 *Historia Placitorum Coronae* at 91 (cited in note 208). See also Welch, *Observations on the Office of Constable* at 16 (cited in note 23) (informing constables that they had “power to raise hue and cry, with horse and foot, to search all suspected places, and break open doors in the pursuit of felons; and to extend this pursuit to every parish round [them], by giving notice to their respective constables”).

³¹⁰ Welch, *Observations on the Office of Constable* at 17 (cited in note 23).

³¹¹ *Id.* at 17–18.

³¹² *Id.* at 18.

When such conditions were not met, the constable was “to refer the parties to a justice of the peace, and act upon his warrant.”³¹³ The hue and cry persisted until 1827.³¹⁴

D. Summary

For centuries, English legal scholars read the common law as prohibiting the Crown from forcibly entering a domicile to conduct search and seizure, outside of narrow constraints. In the event of a public felony, officers could arrest the perpetrator and search him on the spot. Alternatively, should the felon flee, then officers, or individuals responding to the hue and cry, could breach the walls of a house where the felon was present and seize him. They could simultaneously search for and seize any instruments used in the commission of the crime. The items taken had to be material to the felony charged, such as poison, firearms, stolen goods, or treasonous materials,³¹⁵ or they had to be weapons that could be used against those performing the arrest, making their confiscation essential for public safety.

By the early nineteenth century, outside of the known-felon exception, a warrant, supported by reasonable suspicion and evidence presented under oath, was required to search for or to seize persons or items—and only certain types of items, at that.³¹⁶ Magistrates were required “to examine upon oath the party requiring a warrant, as well to ascertain that a felony or other crime [had]

³¹³ *Id.* (referencing Hale in support of this instruction). Like constables, coroners had the authority to give effect to the hue and cry, demanding that men seek out individuals suspected of felonies. Hale, 2 *Historia Placitorum Coronae* at 88 (cited in note 208). This power reached back to the thirteenth century, with a statute passed during the time of Edward I outlining the authorities of coroners reading, “Huy shall be levied for all Murthers, Burglaries, and for Men slain, or in Peril to be slain, as otherwise is used in England, and all shall follow the Huy and Steps, as near as can be.” *De Officio Coronatoris*, 4 Edw I (1275–76), in 1 *Statutes of the Realm* 40, 41 (citations and brackets omitted).

³¹⁴ 7 & 8 Geo IV, ch 27 (1827), in 67 *Statutes of the United Kingdom of Great Britain and Ireland* 152, 154.

³¹⁵ *Dillon*, 16 Cox Crim Cas at 249. See also *Crozier v Cundey*, 108 Eng Rep 439, 439 (KB 1827) (finding trespass for seizing goods not named in the warrant and not “likely to furnish evidence of the identity of the articles stolen and mentioned in the warrant”); *Rex v Barnett*, 172 Eng Rep 563, 564 (CP 1829) (finding that the money seized was “not in any way material as evidence on the charge made against the prisoner,” and ordering its return); *Regina v Frost*, 173 Eng Rep 771, 771 (CP 1839) (noting that “[t]he Court will not order that money taken from a prisoner charged with high treason be restored to him, unless it be made appear to the Court that the money forms no part of the proof against him”).

³¹⁶ See, for example, *Bostock v Saunders*, 95 Eng Rep 1141, 1144–45 (KB 1773); *Cooper v Boot*, 99 Eng Rep 911, 916–17 (KB 1785). Some commentators went so far as to suggest that at no time could the Crown seize a person’s private papers as evidence of libel, treason, or other high crimes. See notes 220–26 and accompanying text.

actually been committed, as also to prove the cause and probability of suspecting the party against whom the warrant [was] prayed.”³¹⁷ The circumstances sworn to had to meet a standard of “probable cause as might induce a discreet and impartial man to suspect the party to be guilty.”³¹⁸ The warrant had to include the name of the party to be apprehended and the cause.³¹⁹ Absent these requirements, the person who entered on a deficient warrant could be held liable to an action of trespass, upon suit by the individual aggrieved.³²⁰

Search warrants, in turn (as opposed to arrest warrants), had to specify the precise place to be searched.³²¹ Their object could be stolen goods,³²² coins,³²³ naval and military stores,³²⁴ goods from

³¹⁷ Chitty, 1 *A Practical Treatise on the Criminal Law* at 33–34 (cited in note 283).

³¹⁸ *Id.* at 34. Coke had argued that only the individual with knowledge or “suspicion of the felony” could make an arrest. For him, justices of the peace had no authority to issue warrants for arrest. But Hale took a different approach, saying that a justice of the peace could “issue a warrant to apprehend a person suspected of felony, tho the original suspicion be not in himself, but in the party that prays his warrant; and the reason is, because he is a competent judge of the probabilities offered to him of such suspicion.” Edward L. Barrett Jr, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 S Ct Rev 46, 50 n 12 (analyzing materials from Coke’s *Institutes* and Hale’s *Historiam Placitorum Coronae*). This appears to be the source of the “probable cause” standard subsequently embraced by Chitty.

³¹⁹ Chitty, 1 *A Practical Treatise on the Criminal Law* at 39–41 (cited in note 283). If the person’s name was not known, the person had to be described with specificity, such as “the body of a man whose name is unknown, but whose person is well known, and who is employed as the driver of cattle, and wears a badge, No. 573.” *Id.* (quotation marks omitted).

³²⁰ *Entick*, 19 How St Tr at 1073. Most commonly, warrants were issued by a justice of the peace for all treasons, felonies, and breaches of the peace or offenses for which the party was punishable with corporal punishment. Chitty, 1 *A Practical Treatise on the Criminal Law* at 35 (cited in note 283). But note that in extraordinary cases, the secretaries of state, speaker of the House of Commons or Lords, justices of Gaol Delivery or Oyer and Terminer, justices at sessions, or a judge of the Court of the King’s Bench could issue a warrant. *Id.* at 34–35.

³²¹ Chitty, 1 *A Practical Treatise on the Criminal Law* at 57 (cited in note 283).

³²² *Id.* at 64, citing 22 Geo III, ch 58, § 2 (1782), in 9 Statutes at Large 242, 242 (describing the statute as making it “lawful for any one justice of the peace, upon complaint made before him, upon oath, that there is reason to suspect that stolen goods are knowingly concealed in any dwellinghouse . . . by warrant under his hand and seal, to cause every such place to be searched in the day-time”) (emphasis omitted).

³²³ 11 Geo III, ch 40, § 3 (1771), in 8 Statutes at Large 156, 156 (providing justices of the peace “on Complaint made” before them “upon the Oath of one credible Person, . . . to cause the Dwelling-house, Room, Workshop, Outhouse, Yard, Garden, or other Place belonging to such suspected Person or Persons, to be searched for Tools and Implements for coining such Copper Monies”).

³²⁴ 39 & 40 Geo III, ch 89, § 11 (1800), in 14 Statutes at Large 431, 434 (giving commissioners of the navy, upon the oath of one or more credible persons, the authority to search any “Dwelling House, Warehouse, Workshop, Outhouse, Yard, Garden or other Place, or on board any Ship, Vessel, Barge, Boat, or other Craft,” and to issue a warrant

onboard ships,³²⁵ or idle and disorderly persons needed to serve in the army or navy.³²⁶ A warrant to search for and to seize private papers, however, was considered illegal. The reason, according to one English legal scholar, was “apparent”:

In the one, I am permitted to seize my own goods which are placed in the hands of a public officer, till the felon’s conviction shall entitle me to restitution. In the other, the party’s own property would be seized before, and without conviction, and he have no power to reclaim the goods, even after his innocence is cleared by acquittal.³²⁷

Search warrants had to include particulars similar to those required for warrants for arrest: an oath, before a justice, of a felony committed, with the party complaining having probable cause to suspect that the object being sought was in a particular place and demonstrating his reasons for such suspicion.³²⁸ The warrant had to specify that the search would be undertaken during daylight hours and directed by a constable or other public officer, with the complaining party present (to identify property that has been stolen).³²⁹ The “goods found, together with the person in whose custody they [were] taken,” were then to be brought before a justice of the peace.³³⁰

Underlying these rules was the importance of the sanctity of the home. As Almon, writing as the Father of Candor, eloquently explained in 1765:

Nothing, as I apprehend, can be forcibly taken from any man, or his house entered, without some specific charge upon oath.

to search such places during the daytime); 39 & 40 Geo III, ch 89, § 12 (1800), in 14 Statutes at Large 431, 434 (giving the principal officers or commissioners of the navy the authority to search and detain any barge, boat, or other craft to which there was reason to suspect that naval stores had been diverted); 39 & 40 Geo III, ch 89, § 13 (1800), in 14 Statutes at Large 431, 436 (extending the same power to constables, peace officers, and watchmen).

³²⁵ 2 Geo III, ch 28, § 7 (1761), in 25 Statutes at Large 164, 167 (making it lawful for a justice of the peace upon “Information made to him on Oath” to cause to search for items onboard vessels).

³²⁶ 26 Geo II, ch 4, § 6 (1765), in 21 Statutes at Large 318, 320 (empowering commissioners “to make, or cause to be made a general Search within their respective parishes [and] townships . . . for all such persons as they can find, who are or shall appear to them to be within the description of this act.”). See also Chitty, 1 *A Practical Treatise on the Criminal Law* at 64–65 (cited in note 283).

³²⁷ Chitty, 1 *A Practical Treatise on the Criminal Law* at 65 (cited in note 283).

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.*

The mansion of every man being his castle, no general search-warrant is good. It must either be sworn that I have certain stolen goods, or such a particular thing that is criminal in itself, in my custody, before any magistrate is authorized to grant a warrant to any man to enter my house and seize it. Nay further, if a positive oath be made, and such a particular warrant be issued, it can only be executed upon the paper or thing sworn to and specified, and in the presence of the owner, or of somebody intrusted by him, with the custody of it. Without these limitations, there is no liberty or free enjoyment of person or property, but every part of a man's most valuable possessions and privacies, is liable to the ravage, inroad and inspection of suspicious ministers, who may at any time harass, insult and expose, and perhaps, undo him.³³¹

The following year, William Pitt, first Earl of Chatham, elaborated in Parliament on the underlying rationale for limiting the state's ability to search. He emphasized that outside of narrow circumstances, the Crown and its officers could not enter the home:

The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.³³²

Chatham's words, like those of Coke, Hale, Hawkins, Blackstone, and Almon, reflected growing indignation at the Crown's flagrant disregard for the sanctity of the home.

Thus it was that, by the time of the US Founding, English legal treatises, prominent law lords, the Court of Common Pleas, the Court of King's Bench, Parliament, and the general public had

³³¹ The Father of Candor, *A Letter Concerning Libels, Warrants, Seizure of Papers, and Security for the Peace, &c.* 58 (printed for Almon 3d ed 1765) ("Father of Candor"). In 1819, Chitty reiterated that

a man's own house is regarded as his castle, which is only to be violated when absolute necessity compels the disregard of smaller rights, in order to secure public benefit; and, therefore, in all cases where the law is silent and express principles do not apply, this extreme violence [entering another's home without permission] is illegal.

Chitty, 1 *A Practical Treatise on the Criminal Law* at 52 (cited in note 283).

³³² See Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 320 n 2 (Little, Brown 2d ed 1871) (quoting Chatham).

come to embrace the broad understanding that, outside of pursuit of a known felon, a warrant must issue prior to search or seizure within the home.³³³ They rejected general warrants and required

³³³ This understanding persisted in English law. In 1816, Chitty explained that when a suspected felon is at large, “he may in some cases, before an indictment has been found, be apprehended, either without warrant, by a private individual, or by a constable or other officer ex officio; or, under a warrant granted by a Justice of the Peace or a Judge.” Chitty, 1 *A Practical Treatise on the Criminal Law* at 11 (cited in note 283). A constable could “break open doors to take a felon, if he be in the house, and entry denied after demand, and notice given that he is a constable.” *Id.* at 23. Constables could not, however, arrest individuals for mere breaches of the peace if they did not personally witness the affray. *Id.* Justices of the peace, sheriffs, and coroners had similar powers of arrest. *Id.* at 24–26. Felons could also be pursued “with horn and voice” under the common-law process of hue and cry. *Id.* at 26–28. The reason for the fleeing felon exception to the warrant requirement was to prevent escape. *Id.* at 31. Even then, it might be more prudent to obtain the authority of a magistrate through a warrant. *Id.* General warrants were not allowed:

[A] general warrant to seize and apprehend all persons suspected, without naming or describing any person in particular, is illegal and void for its uncertainty; for it is the duty of the magistrate, and not to be left to the officer, to judge of the ground of suspicion. . . . [A] warrant to apprehend all persons guilty of a crime therein specified, is not a legal warrant.

Id. at 41–42. But note that in the midst of public disorder, a warrant could be issued to arrest those engaged in the affray. *Id.* at 42. Subsequent cases reflected this understanding. See, for example, *Beckwith v Philby*, 108 Eng Rep 585, 585–86 (KB 1827) (finding a felony arrest by a constable based on probable cause without a warrant to be reasonable when the individual arrested was believed to be in the midst of stealing a horse). This general approach continued into the early twentieth century. See, for example, Earl of Halsbury, et al, eds, 9 *The Laws of England, Being a Complete Statement of the Whole Law of England* § 523 at 246 n (c) (Butterworth 1909):

If a treason or a felony has been committed, anyone may without a warrant arrest a person against whom there is reasonable ground of suspicion; a constable may arrest anyone whom he has reasonable ground to suspect of having committed, or being about to commit, a felony. In cases of misdemeanour, with some exceptions, there is no power to arrest without a warrant.

(citations omitted). See also *id.* § 601 at 292 (“A warrant cannot issue unless there is an information in writing and on oath.”); *id.* § 609 at 296 (“Anyone may without a warrant arrest a person whom he sees on the point of committing or attempting to commit treason or felony, but there is no power of arrest if the attempt has ceased.”) (citations omitted); *id.* § 610 at 297 n (q) (“[E]xcept where there is a breach of the peace, there is no power at common law to arrest without a warrant for a mere disturbance.”). A warrant had to include

the offence on which it is founded and that an information has been sworn, or facts on which it is based proved on oath, and names or otherwise describes the offender; and it orders the person or persons to whom it is directed to apprehend the offender and bring him before the justice issuing the warrant.

Id. § 618 at 307–08. For search warrants,

[a] justice of the peace has at common law the power, on an information being sworn before him alleging a suspicion that larceny has been committed, to issue a search warrant authorising a search in any house etc. in the day time for stolen goods and the arrest of any person found in possession of such goods. *Except in*

certain particulars even for specific warrants to be valid.³³⁴ The Crown nevertheless persisted in attempting to enter homes without a warrant and to execute general warrants under statutory provisions. But the practice was controversial, particularly in colonial America, where special rules under English law explicitly allowed for general searches in relation to customs.³³⁵ As the Crown sought to make greater use of the associated instrument (the writ of assistance), tension increased, mirroring the frictions that followed the English Civil War.

II. COLONIAL EXPERIENCE

At the most general level, early American colonists reviled search and seizure on the grounds that they unduly interfered with private life. Colonial enmity extended beyond general warrants to any government entry into the home. Response to such searches tended to be immediate and visceral—not part of an intellectualized objection to promiscuous search.³³⁶ Thus it was that impost officers in Massachusetts Bay found themselves unable to search for illegally imported spirits—despite having the legal authority to do so.³³⁷ The question was not whether a warrant was

the case of stolen goods there is no power at common law to issue a warrant authorising the search of a house. But provision is made by statute for the issue of a search warrant in certain specified cases.

Id § 625 at 310 (citations omitted and emphasis added).

³³⁴ To some extent, the persistence of general warrants in relation to customs and excise may have been a product of the prevalence of smuggling and the seriousness with which the Crown treated matters related to the treasury. See generally, for example, Geoffrey Morley, *The Smuggling War: The Government's Fight against Smuggling in the 18th and 19th Centuries* (Sutton 1994).

³³⁵ In 1662, for instance, the Earl of Southampton lamented that even as he granted general warrants at the request of the customs officers, he was assaulted and vexed by those upon whom the warrants were being served. Cuddihy, *The Fourth Amendment* at 127 (cited in note 37). Within a short time, however, the Earl changed his stance and refused to serve them. Within two decades, customs officials had imposed their own restrictions, bringing even customs in alignment with the other areas by requiring that officers first demonstrate to a magistrate, under oath, the facts on which search and seizure rested. Id at 127 n 109 (citing the *Dictionary of Rates and Laws Relating to Customs, 1682*, available at the British Library).

For twentieth- and twenty-first-century US cases recognizing this history, see *Thornton v United States*, 541 US 615, 629–31 (2004) (Scalia concurring); *Miller v United States*, 357 US 301, 306–09 (1958); *Accarino v United States*, 179 F2d 456, 460–62 (DC Cir 1949); *People v Chiagles*, 142 NE 583, 583–84 (NY 1923).

³³⁶ Cuddihy, *The Fourth Amendment* at 185–86 (cited in note 37).

³³⁷ See id.

general or specific; efforts to serve either kind of instrument resulted in hostility.³³⁸

It was not just the upper class that objected. In 1734, for instance, after a sea captain was slain when he used a cannon to prevent a marshal of the Vice Admiralty Court from boarding his vessel, the public spontaneously assembled and objected that the ship was the captain's home.³³⁹ According to a local newspaper, "[a] greasy Fellow with a leather apron" declared:

[M]y house is my castle, and so is my ship, and therefore . . . I lay it down as a fundamental Law of Nations, that if the greatest Officer of the King has, was to come with a thousand Warrants against me for any crime whatsoever, if he offers to take me out of my castle, I can kill him, and the law will bear me out.³⁴⁰

The debate was not under what conditions the Crown could enter dwellings—the conversation that marked the legal discourse across the ocean—but whether homes could be entered at all.

Reflecting this attitude, from the earliest colonial times, there were fewer conditions under which officials in the Americas could enter homes to search or to seize items. Entire tracts of British search and seizure law, such as those relating to religious and political conformity, never made their way across the Atlantic.

The reason why is a matter of some speculation. To some extent, the use of general warrants for this purpose had been an invention of the Tudors, meant to consolidate power in England. Individuals seeking to flee from political or religious persecution might understandably choose not to import general warrants, a tool related to efforts to control dissent, into the New World.

But political and religious matters were not the sole areas in which more limited powers traversed the Atlantic. General warrants related to the guilds or to recreation by the working classes also remained uniquely English.³⁴¹ And while promiscuous search and seizure related to bankruptcy, vagrancy, and game poaching continued to mark English law, only a few colonies adopted similar instruments.³⁴² Nor did the use of general warrants for military service cross the water. Fewer situations in which general

³³⁸ Id at 185.

³³⁹ Id at 188.

³⁴⁰ Cuddihy, *The Fourth Amendment* at 188 (cited in note 37) (ellipsis in original), quoting *The South-Carolina Gazette* (Oct 26–Nov 2, 1734).

³⁴¹ Cuddihy, *The Fourth Amendment* at 227 (cited in note 37).

³⁴² Id.

searches could be executed (such as hue and cry or collection of revenues) marked colonial times.³⁴³

Regardless of why this was the case, as a practical matter, by the end of the seventeenth century, England had approximately twice as many subject matter areas in which the Crown indulged in promiscuous search and seizure.³⁴⁴ And unlike in England, where such searches became the norm, in the American colonies they did not—except with regard to customs and writs of assistance, in which cases general searches, effected by officers of the Crown, became more common, increasing tension and providing a focal point for colonial discontent.

A writ of assistance served as a particular form of general warrant, providing customs agents (and later, naval officers) with the authority to search places ranging from ships and warehouses to private dwellings in order to look for goods that failed to meet the customs requirements. The name derived from the language of the writs themselves: all individuals present were required to “assist” the official engaged in the search.³⁴⁵

Seeds of conflict between colonists and the Crown with regard to these writs were laid in 1678, when Edward Randolph became the chief agent of the commissioners of customs in New England.³⁴⁶ A meticulous, if partisan, administrator, Randolph was highly critical of the colonial government. His appointment followed a visit he had made to Boston in the summer of 1676, after which he had reported to the Crown that the Massachusetts Bay Company was abusing its charter, tolerating illegal trade, and exerting tyrannical power over its citizens and neighbors.³⁴⁷ Returning to the colonies, Randolph became appalled at the colonists’ disdain for the Crown. He identified a small group of Loyalists and began planning a new form of government, which he referred to as the “Dominion of New England.” The aim was to replace Massachusetts Bay and other nearby colonies, including what eventually became New York. Randolph’s reports led to the annulment of the Massachusetts Bay Company’s charter.³⁴⁸

During the 1689 colonial uprising, Randolph—unpopular with the local population—found himself imprisoned before being

³⁴³ *Id.* at 227–28.

³⁴⁴ *Id.* at 228.

³⁴⁵ Amar, 30 *Suffolk U L Rev* at 77–78 (cited in note 13).

³⁴⁶ Cuddihy, *The Fourth Amendment* at 254 (cited in note 37).

³⁴⁷ *Randolph, Edward*, in H.C.G. Matthew and Brian Harrison, eds, 46 *Oxford Dictionary of National Biography* 5, 5–6 (Oxford 2004).

³⁴⁸ *Id.* at 5.

repatriated to England.³⁴⁹ In April 1692, Randolph returned to the colonies and launched a three-year examination of nearly every port on the Eastern Seaboard, along the way strongly endorsing the use of general warrants.³⁵⁰ He documented inadequate record keeping, illegal trade, and corruption, with his final report leading to the introduction in Westminster of a new statute to cut off illegal colonial trade.³⁵¹ The legislation created a system of admiralty courts to enforce regulations and to punish smugglers. Juries were to be constituted by Englishmen.³⁵² The law required officers to take oaths to uphold their legal obligations, under threat of removal and penalty.³⁵³ The lord treasurer, commissioners of the treasury, and commissioners of customs would, “for the tyme being,” appoint customs officers in any city, town, river, port, harbor, or creek in the colonies.³⁵⁴ The statute gave the officials broad powers of search and seizure. It allowed officers of the Crown to issue writs of assistance to search ships, warehouses, or homes to find smuggled goods.³⁵⁵

³⁴⁹ Id. For an example of the colonial uprising in 1689, see Cotton Mather and Others, *The Declaration of the Gentlemen, Merchants, and Inhabitants of Boston, and the Country Adjacent* (Green 1689), excerpted at <http://perma.cc/2KMW-MN7X>. Mathers’s declaration was served, following the overthrow of James II, on the recently appointed Boston governor, Sir Edmund Andros, objecting to his levying of new taxes, suspension of assemblies, and curtailment of citizens’ rights.

³⁵⁰ *Randolph, Edward* at 6 (cited in note 347). See also Cuddihy, *The Fourth Amendment* at 255–56 (cited in note 37).

³⁵¹ *Randolph, Edward* at 6 (cited in note 347). See also An Act for Preventing Frauds and Regulating Abuses in the Plantation Trade, 7 & 8 Wm III, ch 22 (1695–96), in 7 Statutes of the Realm 103. The statute specified illegal trade to, from, or within the Asian, African, or American colonies or plantations.

³⁵² Jurors had to be either natives of England or Ireland or born in the plantations. Note that the allowance of juries for admiralty matters related to customs departed from the practice in England at the time, where juries did not sit in courts of admiralty. See 7 & 8 Wm III, ch 22, § 10 (1695–96), in 7 Statutes of the Realm 103, 105.

³⁵³ 7 & 8 Wm III, ch 22, § 3 (1695–96), in 7 Statutes of the Realm 103, 103.

³⁵⁴ 7 & 8 Wm III, ch 22, § 10 (1695–96), in 7 Statutes of the Realm 103, 105.

³⁵⁵ 7 & 8 Wm III, ch 22, § 5 (1695–96), in 7 Statutes of the Realm 103, 104. Randolph also repeatedly proposed that the American colonies be consolidated under direct authority from the Crown. Although he managed to convince the Board of Trade of the plan, he died before it was enacted. See *Randolph, Edward* at 5–6 (cited in note 347). Colonial law paralleled that of England. In 1695, the province of Maryland passed a law authorizing officers

to Enter into any Ship or Vessell Tradeing to and from this Province or into any house Warehouse or other building and open any Trunk Chest Cask or fardle and Search to make in any part of place of such Ship or Vessell houses or buildings as af where such Navall Officer shall suspect any such fursrs or Skinns to be.

An Act for Laying an Imposition on Severall Commoditys Exported out of This Province (Oct 1695), reprinted in William Hand Browne, ed, 19 *Proceedings and Acts of the General Assembly of Maryland: September 1693–June 1697* 276, 277 (Maryland Historical Society

Formal instructions to colonial officers following passage of the statute directed them to take special steps to enforce it using writs of assistance.³⁵⁶ Further incentive was provided by the statute itself: a third of the contraband seized would be awarded to the governor of the colony, with another third supplied to the person providing information leading to the seizure of the goods, and the remaining third being retained for the Crown.³⁵⁷

Increasing use of promiscuous searches and seizures followed, with violence frequently accompanying exercise of the powers.³⁵⁸ Colonists became ever more concerned by intrusions into their homes and businesses.³⁵⁹ Because the writs of assistance acted as a legal instrument, there was no judicial recourse.³⁶⁰ The documents gave officials carte blanche to access ships, warehouses, and homes, and all persons, papers, and effects contained therein, violating the oldest of English rights: that of a person to be secure in his home.³⁶¹ By the mid-eighteenth century, tension simmered. As the geopolitics shifted, a renewed effort to employ writs of assistance brought it to a roiling boil.

A. *Paxton's Case*: The Child Independence

In the mid-eighteenth century, Great Britain controlled the thirteen colonies. Its lands reached from the Atlantic Ocean to the Appalachian Mountains. Beyond the frontier, from La Nouvelle-Orléans in the south, through Fort Détroit on the Great Lakes,

1899). Virginia and other colonies similarly introduced legislation requiring general warrants for the execution of customs laws. Over time, these powers steadily expanded, as did the objects of their affection (extending, for example, to contraband, tobacco, and other items). See Cuddihy, *The Fourth Amendment* at 213–15 (cited in note 37).

³⁵⁶ Cuddihy, *The Fourth Amendment* at 258 & n 30 (cited in note 37), citing *Instructions Nos 1035 and 1039*, in Leonard Woods Labaree, ed, 2 *Royal Instructions to British Governors, 1670–1776* 752, 752, 762 (Appleton 1935).

³⁵⁷ 7 & 8 Wm III, ch 22, § 1 (1695–96), in 7 *Statutes of the Realm* 103, 103.

³⁵⁸ See Cuddihy, *The Fourth Amendment* at 259–62 (cited in note 37).

³⁵⁹ See id at 185–88.

³⁶⁰ See M.H. Smith, *The Writs of Assistance Case* 39 (California 1978).

³⁶¹ See generally id (tracing the history of writs of assistance); E.R. Adair and F.M. Greir Evans, *Writs of Assistance, 1558–1700*, 36 *Eng Hist Rev* 356 (1921). See also Gordon S. Wood, *The Creation of the American Republic* 3–45 (UNC 1998) (discussing the colonists' conceptions of the British constitution). M.H. Smith recognizes, "Juridically, the search warrant and the writ of assistance were poles apart," noting that the former were judicial instruments and the latter legal instruments granted under a parliamentary act, requiring citizens to assist under threat of being held in violation of the law. Smith, *The Writs of Assistance Case* at 39 (cited in note 360). Smith nevertheless concedes that both at the time and in the intervening years the writs were treated and considered as general search warrants. Id.

and up to Québec in the north, lay New France. Although more than three times as large as New England, it had just 70,000 settlers, in contrast to 1.5 million colonists to the east.³⁶² The European countries' expansionist tendencies, coupled with a lack of clarity as to territorial borders, contributed to frequent skirmishes for more land. War followed.

In 1752, angered by the Virginia governor's continued grants of land to parts of the Ohio River Basin, the French and their allied Native American tribes in the region (the Seneca, the Lenape in Delaware, and the Shawnee) seized or evicted all English-speaking traders from the region.³⁶³ Virginia responded by sending a delegation of four military officers, plus an interpreter and a guide, to inform the French that the colony would not stand for such actions. Chosen to lead the parley was twenty-one-year-old George Washington, then a major in the British colonial forces.

The French met Washington with a polite but firm refusal to recognize Virginia's claim. "As to the Summons you send me to retire," Commandant Jacques Legardeur de St. Pierre, the elderly French officer to whom Washington delivered the Virginia governor's demands, wrote in reply, "I do not think myself obliged to obey it."³⁶⁴ The governor responded by promoting Washington to lieutenant colonel and directing him to return to Ohio to prevent the French from claiming the territory.³⁶⁵

Washington did return with a force of 160 men, only to find himself outnumbered.³⁶⁶ Upon hearing of Washington's defeat, British Prime Minister Thomas Pelham-Holles decided to push for a swift, undeclared retaliation. Members of his cabinet disagreed.³⁶⁷ His opponents leaked the plans, giving notice to the French and catapulting what would have been a minor altercation on the edges of the empire into a full-blown military conflict. The French and Indian War, in turn, became the opening salvo in the Europeans' Seven Years' War.

³⁶² Linda Kealey, *North America from North of the 49th Parallel*, in Teresa A. Meade and Merry E. Wiesner-Hanks, eds, *A Companion to Gender History* 492, 493 (Blackwell 2006).

³⁶³ See Spencer C. Tucker, 1 *Almanac of American Military History* 145–46 (ABC-CLIO 2013).

³⁶⁴ Letter from Jacques Legardeur de Saint-Pierre to Robert Dinwiddie (Dec 15, 1753), in *The Journal of Major George Washington* 31 (printed for Jefferys 1754).

³⁶⁵ Tucker, 1 *Almanac of American Military History* at 145–46 (cited in note 363).

³⁶⁶ Scott Weidensaul, *The First Frontier* 319 (Houghton Mifflin 2012).

³⁶⁷ See *French and Indian War / Seven Years' War, 1754–63* (US Department of State, Office of the Historian), archived at <http://perma.cc/BYH7-C93D>.

It was in the context of the French and Indian War that Governor William Shirley, sensing the coming conflict, returned to the Province of Massachusetts Bay.³⁶⁸ He took decisive steps to assist in the war effort, turning to writs of assistance to prevent French Canada from benefiting from illegal commerce.³⁶⁹ Instead of relying on legislation for legal authority, however, Shirley drew on his executive powers as governor—a rationale widely regarded as illegitimate for such purposes, not least because legislation passed by England in 1660 and 1662 required a warrant for searching buildings.³⁷⁰ The colony's impost laws and corresponding local measures allowed homes to be entered only via specific, not general, warrants.³⁷¹ Nevertheless, Shirley directed his newly appointed customs officers, among them Charles Paxton and Thomas Lechmere, to use the writs to prevent illegal trade.³⁷²

³⁶⁸ See Donohue, *The Future of Foreign Intelligence* at 81 (cited in note 54).

³⁶⁹ *Id.*

³⁷⁰ An Act to Prevent Frauds and Concealments of His Majesty's Customs and Subsidies, 12 Car II, ch 19, § 1 (1660), in 5 Statutes of the Realm 250, 250. The Act authorized, upon an oath made to the lord treasurer, any barons of the exchequer, or the chief magistrate of the place of the offense or nearby region, the same persons

to issue out a Warrant to any person or persons thereby enableing him or them with the assistance of a Sheriffe Justice of Peace or Constable to enter into any House in the day time where such Goods are suspected to be concealed, and in case of resistance to breake open such Houses, and to seize and secure the same goods soe concealed, And all Officers and Ministers of Justice are hereby required to be aiding and assisting thereunto.

12 Car II, ch 19, § 1 (1660), in 5 Statutes of the Realm 250, 250. See also An Act for Preventing Frauds and Regulating Abuses in His Majesties Customes, 14 Car II, ch 11, § 44 (1662), in 5 Statutes of the Realm 393, 394:

And it shall be lawfull to or for any person or persons, authorized by Writt of Assistance under the Seale of his Majestyes Court of Exchequer to take a Constable Headborough or other Publique Officer inhabiting neare unto the place and in the day time to enter and go into any House Shop Cellar Ware-house or Room or other place and in case of resistance to breake open Doores Chests Trunks and other Package there to seize and from thence to bring any kind of Goods & Merchandize whatsoever prohibited or uncustomed and to put and secure the same in His Majesties Store house in the Port next to the place where such seizure shall be made.

³⁷¹ See, for example, Nathaniel B. Shurtleff, ed, 3 *Records of the Governor and Company of the Massachusetts Bay in New England, Printed by Order of the Legislature* 372 (White 1854) (including language of the impost law of September 20, 1654, requiring impost officers to sue in a court of law to recover monies due).

³⁷² Paxton was assigned "Surveyor of all Rates, Duties, and Impositions arising and growing [] within" the Port of Boston on January 8, 1752. Josiah Quincy Jr and Horace Gray, *Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay, between 1761 and 1772* 403–04, 406 (Little, Brown 1865).

Paxton, responsible for the Port of Boston, soon came into the possession of information indicating that the brother of Thomas Hutchinson, himself a well-known Loyalist to the Crown, had illegal goods stored in his warehouse.³⁷³ When Paxton arrived to conduct a search, Hutchinson challenged him, arguing that the writ was invalid, making Paxton vulnerable to charges of breaking and entering.³⁷⁴ He nevertheless gave him access to the storehouse.

Shirley, informed of Hutchinson's objection, directed his customs officers to obtain a writ from the colony's Superior Court of Judicature that would serve in place of his executive order.³⁷⁵ In June 1755, Paxton did so.³⁷⁶ Two months later, the Massachusetts Bay Superior Court issued the requested writ, directing that justices of the peace allow Paxton and his deputies "from Time to time at his or their Will as well in the day as in the Night to enter and go on board" any vessel, "to View & Search" and to carry out the duties of customs officers. During the daytime, the writ empowered Paxton "to enter and go into any Vaults, Cellars, Warehouses, Shops or other Places to search and see whether any Goods, Wares or Merchandises, in [the] same Ships, Boats or Vessells, Vaults, Cellars, Warehouses, Shops or other Places are or shall be there hid or concealed," and, further, "to open any Trunks, Chests, Boxes, fardells or Packs made up or in Bulk, whatever in [which] any Goods, Wares, or Merchandises are suspected to be packed or concealed."³⁷⁷ Within the next five years, all seven of Paxton's fellow commissioners of customs in Boston had obtained similar writs.³⁷⁸

³⁷³ Hutchinson, Thomas, in H.C.G. Matthew and Brian Harrison, eds, 29 *Oxford Dictionary of National Biography* 33, 33–34 (Oxford 2004). See also Donohue, *The Future of Foreign Intelligence* at 81 (cited in note 54).

³⁷⁴ Cuddihy, *The Fourth Amendment* at 379 (cited in note 37). See also Donohue, *The Future of Foreign Intelligence* at 81–82 (cited in note 54).

³⁷⁵ Cuddihy, *The Fourth Amendment* at 379 (cited in note 37). See also Donohue, *The Future of Foreign Intelligence* at 82 (cited in note 54).

³⁷⁶ Cuddihy, *The Fourth Amendment* at 379 (cited in note 37). See also Donohue, *The Future of Foreign Intelligence* at 82 (cited in note 54).

³⁷⁷ Quincy and Gray, *Reports of Cases Argued* at 404–05 (cited in note 372). The case itself is unreported in formal volumes. Instead, the record is based on notes taken during two hearings. President Adams recorded the first proceeding, and Josiah Quincy Jr made notations on the second one. See John Adams, *Minutes of the Argument*, in L. Kinvin Wroth and Hiller B. Zobel, eds, 2 *Legal Papers of John Adams* 106, 123–34 (Belknap 1965). Adams's abstract of the argument was printed in 1773 in a paper in Boston. See Smith, *The Writs of Assistance Case* at 548 (cited in note 360). See also Donohue, *The Future of Foreign Intelligence* at 82 (cited in note 54).

³⁷⁸ Cuddihy, *The Fourth Amendment* at 379 (cited in note 37).

The language of these writs drew from the legislation passed by Westminster in 1660 and 1662. As previously discussed, the statutes allowed for house-to-house searches, without any demonstration of illegal acts by those subject to search. There was no further involvement of the judiciary. Anyone served with such a writ, moreover, was forced to comply.

In 1760, Lord Chatham, secretary of state for the Southern Department, upped the ante. He directed Sir Francis Bernard, who had become governor of the Province of Massachusetts Bay, to use writs of assistance to stop trade not only with French Canada, but also with the French Indies.³⁷⁹ The governor and royal customs officers were to “make the strictest, & most diligent Enquiry into the State of this dangerous and ignominious Trade.”³⁸⁰ Every step authorized by law was to be taken “to bring all such heinous Offenders to the most exemplary, and condign Punishment.”³⁸¹

When King George II died, the writs entered a twilight: within six months of the death of the reigning monarch, all writs of assistance expired.³⁸² Colonial officials therefore had only until April 1761 to obtain a renewal—creating a window for those who opposed the instruments to challenge them. The Society for Promoting Trade and Commerce within the Province stepped forward, petitioning the Massachusetts Bay Superior Court to hear its case.³⁸³

Like other colonial mercantile organizations, the Society had a strong influence on government policies and frequently found its position reflected in council and parliamentary decisions.³⁸⁴ In the period leading up to the Revolution, the Society took on increasing political importance—not least by openly challenging the customs officers.

³⁷⁹ *Id.* at 380 n 19 (citing historical newspapers and other documents). See also Donohue, *The Future of Foreign Intelligence* at 82–83 (cited in note 54).

³⁸⁰ Quincy and Gray, *Reports of Cases Argued* at 407 (cited in note 372).

³⁸¹ *Id.* at 408.

³⁸² 1 Anne, ch 2, § 5 (1701), in 8 Statutes of the Realm 5, 6:

[N]o . . . Writ of Assistance . . . shall be determined abated or discontinued by the Demise of the said late King but all and every such Writ Commission Process and Proceedings shall be and are hereby revived and continued and shall be in full Force and Vertue[.] . . . But every such Commission and Writ shall be and continue in full Force and Vertue for the Space of Six Months next ensuing notwithstanding any such Demise[,] unless superseded and determined by Her Majesty Her Heirs or Successors.

³⁸³ Cuddihy, *The Fourth Amendment* at 381 (cited in note 37).

³⁸⁴ See Charles M. Andrews, *The Boston Merchants and the Non-importation Movement* 160–80 (Wilson 1917).

Lechmere, by then surveyor general of the customs, lodged a petition in opposition to the Society, defending the extension of the writs.³⁸⁵ The same person who had challenged Paxton's use of the executive writ, Hutchinson, had by then become chief justice of the Superior Court.³⁸⁶

James Otis Jr argued the case on behalf of the Society. Born in West Barnstable, Massachusetts, Otis had graduated from Harvard and subsequently entered into legal practice.³⁸⁷ His father later used his friendship with Shirley to secure a position for Otis as, first, justice of the peace and, then, deputy advocate-general of the Massachusetts Vice-Admiralty Court.³⁸⁸ When the Crown approached Otis to argue the case on its behalf, Otis resigned.³⁸⁹ The Boston merchants took this as an opportunity, securing his representation.³⁹⁰ He agreed to do it pro bono, later explaining in court, "The only principles of public conduct that are worthy [of] a gentleman, or a man are, to sacrifice estate, ease, health and applause, and even life itself to the sacred calls of his country."³⁹¹

Otis's declamation against general warrants is one of the most celebrated orations in US history.³⁹² President Adams, who witnessed the moment, later recalled, "Otis was a flame of Fire!"³⁹³ Otis had "breathed into this nation the breath of life."³⁹⁴ He kindled the Revolution: "Every man of an crowded Audience appeared to me to go away, as I did, ready to take up Arms against Writs of Assistants."³⁹⁵

³⁸⁵ Cuddihy, *The Fourth Amendment* at 381 n 22 (cited in note 37) (citing Lechmere's petition).

³⁸⁶ For further discussion of Hutchinson and his rather tense relationship with the Otis family, see Malcolm Freiberg, *Prelude to Purgatory: Thomas Hutchinson in Provincial Massachusetts Politics, 1760-1770* *8-9 (unpublished PhD thesis, Brown University, 1950).

³⁸⁷ *Otis, James, Junior*, in H.C.G. Matthew and Brian Harrison, eds, 42 *Oxford Dictionary of National Biography* 99, 99-100 (Oxford 2004).

³⁸⁸ *Id* at 99.

³⁸⁹ J.A. Spencer, 1 *History of the United States from the Earliest Period to the Administration of James Buchanan* 249 (Johnson, Fry 1858).

³⁹⁰ See Donohue, *The Future of Foreign Intelligence* at 83 (cited in note 54).

³⁹¹ The Massachusetts Spy *3 (Apr 29, 1773) ("Brief of James Otis") (reporting Otis's speech before the Superior Court in *Paxton's Case*). See also Donohue, *The Future of Foreign Intelligence* at 83 (cited in note 54).

³⁹² See Donohue, *The Future of Foreign Intelligence* at 83 (cited in note 54).

³⁹³ Smith, *The Writs of Assistance Case* at 253 (cited in note 360).

³⁹⁴ *Id* at 252.

³⁹⁵ *Id* at 253.

Legal tracts on both sides of the Atlantic later credited Otis's argument with being a central moment in the shift to independence. In the nineteenth century, one law dictionary explained, "The issuing of [writs of assistance] was one of the causes of the American republic. They were a species of general warrant, being directed to 'all and singular justices, sheriffs, constables and all other officers and subjects,' empowering them to enter and search any house."³⁹⁶ They had been put into disuse "owing to the eloquent argument of Otis before the supreme court of Massachusetts against their legality."³⁹⁷ Another dictionary noted, "The use of the writ of assistance was one of the causes of the revolt of the American colonies."³⁹⁸ Modern scholars similarly hail Otis's argument as laying "the foundation for the breach between Great Britain and her continental colonies."³⁹⁹

Otis denounced general warrants as a tyrannical exercise of power. "I will to my dying day oppose," he stated, "with all the powers and faculties God has given me, all such instruments of slavery on the one hand, and villainy on the other, as this writ of assistance is."⁴⁰⁰ For Otis, the writ was "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of the constitution, that ever was found in an English law-book."⁴⁰¹ For him, the threat was real. Otis used prose that bordered on sedition, warning that it was precisely this kind of power that had "cost one King of England his head and another his throne."⁴⁰²

Just as Coke had disdained the actual practice of the Crown, it mattered naught to Otis that British legislation appeared to allow such instruments. "Your Honours will find in the old book, concerning the office of a justice of peace, precedents of general warrants to search suspected houses," he noted.⁴⁰³ "But in more modern books you will find only special warrants to search such and such houses specially named, in which the complainant has

³⁹⁶ John Bouvier, 1 *A Law Dictionary, Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union* 708 (Lippincott 15th ed 1892).

³⁹⁷ *Id.*

³⁹⁸ Renton, ed, 6 *Encyclopaedia of the Laws of England* at 63 (cited in note 198).

³⁹⁹ Lawrence Henry Gipson, *The Coming of the Revolution, 1763-1775* 39 (Harper & Row 1962).

⁴⁰⁰ Smith, *The Writs of Assistance Case* at 552 (cited in note 360) (reproducing the speech of Otis). See also Donohue, *The Future of Foreign Intelligence* at 84 (cited in note 54).

⁴⁰¹ Smith, *The Writs of Assistance Case* at 552 (cited in note 360).

⁴⁰² *Id.*

⁴⁰³ *Id.* at 553.

before sworn that he suspects his goods are concealed.”⁴⁰⁴ Only specific warrants—even under the 1662 Act,⁴⁰⁵ which empowered a justice of the peace to search for stolen goods—were legal. As a result, “the writ prayed for in this petition being general is illegal.”⁴⁰⁶

Otis went on to highlight the problems with general warrants. Directed against all persons, “every one with this writ may be a tyrant.”⁴⁰⁷ Worse, the instrument gave the person wielding it the imprimatur of law.⁴⁰⁸ The writ had no expiration, nor was any return required.⁴⁰⁹ No one, therefore, ever could be held accountable in court for use of the power.⁴¹⁰ It was not just the target of the search, moreover, whose freedom was thereby limited. Anyone carrying such a document could direct others to assist him, thus impacting their liberty as well.⁴¹¹

At stake were the same rights that Coke had extolled in *Semayne’s Case* and traced to Magna Carta: “[O]ne of the most essential branches of English liberty,” Otis noted, “is the freedom of one’s house. A man’s house is his castle; and while he is quiet, he is as well guarded as a prince in his castle.”⁴¹² The writ in question, “if it should be declared legal, would totally annihilate this privilege.”⁴¹³

One of the greatest dangers of allowing promiscuous search was that the powers of the state could become an instrument of personal power. Otis referenced a recent case, recognizable to those present. As an act of personal retribution, a customs officer had used a writ of assistance to harass a constable (the constable had called the official before him to answer charges related to a breach of the Sabbath, or for swearing).⁴¹⁴ Otis underscored his concern: “Every man prompted by revenge, ill humour or wantonness to inspect the inside of his neighbour’s house, may get a writ

⁴⁰⁴ Id.

⁴⁰⁵ See Smith, *The Writs of Assistance Case* at 334–35 (cited in note 360).

⁴⁰⁶ Id at 533.

⁴⁰⁷ Id.

⁴⁰⁸ Id. See also Donohue, *The Future of Foreign Intelligence* at 84 (cited in note 54).

⁴⁰⁹ Smith, *The Writs of Assistance Case* at 553 (cited in note 360). See also Donohue, *The Future of Foreign Intelligence* at 84 (cited in note 54).

⁴¹⁰ Smith, *The Writs of Assistance Case* at 553 (cited in note 360). See also Donohue, *The Future of Foreign Intelligence* at 84 (cited in note 54).

⁴¹¹ Smith, *The Writs of Assistance Case* at 553 (cited in note 360). See also Donohue, *The Future of Foreign Intelligence* at 84 (cited in note 54).

⁴¹² Smith, *The Writs of Assistance Case* at 553–54 (cited in note 360).

⁴¹³ Id at 554.

⁴¹⁴ Id.

of assistance; others will ask it from self defence; one arbitrary exertion will provoke another, until society will be involved in tumult and in blood.”⁴¹⁵ Reason, and the British constitution, demanded that the court find such instruments illegal. For Otis, the common law served as the ultimate protector of individual rights. Precedent fell subject to the principles of the law. “Though it should be made in the very words of the petition it would be void, [as] ‘AN ACT AGAINST THE CONSTITUTION IS VOID.’”⁴¹⁶

B. Influence of English Law

Paxton’s Case served as a stark colonial example of the rejection of general warrants. It underscored how overreaching by the government undermined individual rights. In the course of his argument, Otis referenced Coke, Hale, and Magna Carta,⁴¹⁷ even as he noted that the Crown’s failure to stay within the prescribed limits of government had led to the execution of Charles I and to the overthrow of James II—the first shot of the American Revolution, indeed. Otis’s argument underscores the fact that the Founding generation was intimately familiar with the arguments of the great English legal theorists and their denunciation of general warrants.

Coke’s *Institutes*, Hale’s *History of the Pleas of the Crown*, and Blackstone’s *Commentaries* had a profound influence on the

⁴¹⁵ Id. See also Donohue, *The Future of Foreign Intelligence* at 84 (cited in note 54).

⁴¹⁶ Smith, *The Writs of Assistance Case* at 364 (cited in note 360).

⁴¹⁷ See id at 544–45.

American Founders.⁴¹⁸ Thomas Jefferson considered these treatises central to understanding American law.⁴¹⁹ In his later years, Jefferson wrote that the *Institutes* and *Commentaries* “are possessed & understood by every one.”⁴²⁰ The former, in particular, “[are] executed with so much learning and judgment that I do not recollect that a single position in it has ever been judicially denied.”⁴²¹ Seven months later he again noted, “Coke has given us the first view of the whole body of law worthy now of being studied. . . . Coke’s *Institutes* are a perfect Digest of the law as it stood in his day.”⁴²²

To be fair, Jefferson did not always perceive Coke with a spirit of good will. As a nineteen-year-old law student, Jefferson had lamented:

I am sure to get through old Cooke [Coke] this winter: for God knows I have not seen him since I packed him up in my trunk in Williamsburgh. . . . I do wish the Devil had old Cooke, for I am sure I never was so tired of an old dull scoundrel in my life.⁴²³

⁴¹⁸ See A.E. Dick Howard, 1 *The Road from Runnymede: Magna Carta and Constitutionalism in America* 119 (Virginia 1968):

The popularity of Coke in the colonies is of no small significance. Coke himself had been at the eye of the storm in the clashes between King and Parliament in the early seventeenth century which did so much to shape the English Constitution. He rose to high office at the instance of the Crown—he was Speaker of the House of Commons and Attorney General under Queen Elizabeth, and James I made Coke first his Chief Justice of Common Pleas and then his Chief Justice of King’s Bench. During this time Coke gained an unchallenged position as the greatest authority of his time on the laws of England. . . . Having been a champion of the Crown’s interests, Coke . . . became instead the defender of the common law.

See also Brian J. Moline, *Early American Legal Education*, 42 *Washburn L J* 775, 786 (2002) (“[B]y far the most studied text in colonial America was the first volume of Coke’s *Institutes*.”); *Payton v New York*, 445 US 573, 594 n 36 (1979), quoting Howard, *The Road from Runnymede* at 118–19 (cited in note 418) (“Foremost among the titles to be found in private libraries of the time were the works of Coke, the great expounder of Magna Carta, and similar books on English liberties.”).

⁴¹⁹ See Letter from Thomas Jefferson to John Minor (Aug 30, 1814), in Morris L. Cohen, *Thomas Jefferson Recommends a Course of Law Study*, in Steve Sheppard, ed, 1 *The History of Legal Education in the United States: Commentaries and Primary Sources* 169, 175–76 (Salem 1999) (recommending Blackstone and Coke).

⁴²⁰ Letter from Thomas Jefferson to Thomas Cooper (Jan 16, 1814), in J. Jefferson Looney, ed, 7 *The Papers of Thomas Jefferson Retirement Series* 124, 127 (Princeton 2010).

⁴²¹ *Id* at 126.

⁴²² Letter from Thomas Jefferson to John Minor (Aug 30, 1814), in Looney, ed, 7 *The Papers of Thomas Jefferson Retirement Series* 625, 627 (cited in note 420).

⁴²³ Letter from Thomas Jefferson to John Page (Dec 25, 1762), in Julian P. Boyd, ed, 1 *The Papers of Thomas Jefferson* 3, 5 (Princeton 1950) (brackets in original).

Age, though, seems rather to have improved his opinion. Asked for advice in 1821 on the best way to approach learning the law, Jefferson replied, “1. Begin with Coke’s 4. institutes. [T]hese give a compleat body of the law as it stood in the reign of the 1st James, an epoch the more interesting to us, as we separated at that point from English legislation, and acknowledge no subsequent statutory alterations.”⁴²⁴ He later commented on Coke, “a sounder Whig never wrote nor profounder learning in the orthodox doctrines of British liberties.”⁴²⁵ Jefferson assisted others by providing copies of the mainstays in English legal thought, for example, in 1806 presenting a 1736 edition of Hale’s *History of the Pleas of the Crown* to his nephew, Dabney Carr—a lawyer, writer, and future justice of the Virginia Supreme Court.⁴²⁶

Jefferson’s library contained all of the volumes heretofore discussed.⁴²⁷ In addition to Coke’s *Institutes*, he had two copies of Hale’s *History of the Pleas of the Crown* (as well as a copy of Hale’s *History of the Common Law of England*). The library boasted a first edition of Richard Crompton’s *L’Autoritie et Jurisdiction des Courts de la Majestie de la Roygne*,⁴²⁸ cited by Hale in support of the proposition that general warrants were unlawful. His shelves housed all four volumes of Blackstone’s *Commentaries*, as well as his reports. Indeed, Jefferson appeared to be almost in dialogue with Blackstone, frequently opining on Blackstone’s writings in his correspondence.⁴²⁹ Blackstone was of such pervasive

⁴²⁴ Letter from Thomas Jefferson to Dabney Terrell (Feb 26, 1821). A transcription is archived at <http://perma.cc/Z9VD-43S8>.

⁴²⁵ Kevin Ryan, *Lex et Ratio: Coke, the Rule of Law and Executive Power*, 31 Vt Bar J 9, 9 (2005).

⁴²⁶ The University of Virginia has a copy that has his bookplate and an inscription inside the front board: “Given by Thos. Jefferson to D. Carr, 1806.”

⁴²⁷ In 1815, the Library of Congress purchased Jefferson’s private library. *Thomas Jefferson’s Library* (Library of Congress), archived at <http://perma.cc/B49Y-XJZW>. The books that survived the fire of 1851 are currently on display in Washington, DC, while a digital catalogue of the original holdings, prepared by Nicholas Trist, can be found at <http://perma.cc/Y9ZT-TLRH> (“Trist’s Catalog”).

⁴²⁸ See *Trist’s Catalog* at *47–49, 52 (cited in note 427).

⁴²⁹ See, for example, Letter from Thomas Jefferson to John Tyler (May 26, 1810), in J. Jefferson Looney, ed, 2 *The Papers of Thomas Jefferson Retirement Series* 420, 420 (Princeton 2005):

I have long lamented with you the depreciation of law science. [T]he opinion seems to be that Blackstone is to us what the Alcoran is to the Mahometans, that every thing which is necessary is in him, & what is not in him is not necessary. I still lend my counsel & books to such young students as will fix themselves in the neighborhood. Coke’s institutes, all, & reports are their first, & Blackstone their last book, after an intermediate course of 2. or 3. Years. [I]t is

influence that Jefferson worried that his work would become a source of litigation should the Committee of the Revised Code adopt it in 1776.⁴³⁰

Jefferson's reliance on scholars who rejected general warrants is notable, not least because his grounding in English treatises and case law became cemented into American law. Between 1776 and 1778, Jefferson, George Wythe, and Edmund Pendleton rewrote the laws of Virginia. To Jefferson fell the responsibility of incorporating English common law into the statutory regime.⁴³¹

The same legal tracts central to Jefferson's training and approach were foundational to many of the Founders' educations and common discourse. Adams's study of the law included reading Coke's *Institutes*, as well as Sergeant Hawkins's *Pleas of the Crown*.⁴³² He referred to Coke as "the oracle of law," stating that whoever could master Coke could become "master of the laws of England."⁴³³ John Jay and Theophilus Parsons similarly relied on

nothing more than an elegant digest of what they will then have acquired from the real fountains of the law.

⁴³⁰ Jefferson's library also held a copy of St. George Tucker's commentary on Blackstone, which contained notes of reference between the *Commentaries* and the laws of the federal government of the United States. See *Trist's Catalog* at *48 (cited in note 427). See also St. George Tucker, 1 *Blackstone's Commentaries: with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and the Commonwealth of Virginia* 301 (Birch and Small 1803):

The case of general warrants, under which term all warrants not comprehended within the description of the preceding article may be included, was warmly contested in England about thirty or thirty-five years ago, and after much altercation they were finally pronounced to be illegal by the common law. The constitutional sanction here given to the same doctrine, and the test which it affords for trying the legality of any warrant by which a man may be deprived of his liberty, or disturbed in the enjoyment of his property, can not be too highly valued by a free people.

(citation omitted).

⁴³¹ Jefferson focused on the common law and statutes beginning with the Reformation, or the end of the reign of Elizabeth I. Wythe did the subsequent statutes. Pendleton focused on Virginia laws. When the men gathered to go over the result, they found that Pendleton had not simplified the laws, merely copying them out verbatim and omitting certain laws. So Wythe and Jefferson did Pendleton's part, "as well as the shortness of the time would admit, and we brought the whole body of British statutes, & laws of Virginia into 127 acts, most of them short." The aim was to eliminate redundancies. Letter from Thomas Jefferson to Skelton Jones (July 28, 1809), in J. Jefferson Looney, ed, 1 *The Papers of Thomas Jefferson Retirement Series* 381, 382 (Princeton 2004).

⁴³² Diary Entry of Nov 26, 1760, in 2 *The Works of John Adams, Second President of the United States* 45, 47 (Little, Brown 1865).

⁴³³ Charles R. McKirdy, *The Lawyer as Apprentice: Legal Education in Eighteenth Century Massachusetts*, 28 *J Legal Educ* 124, 131 (1976).

Coke.⁴³⁴ Blackstone's *Commentaries* were extremely well received in the New World, with some 2,500 copies purchased along the Eastern Seaboard prior to the Revolution.⁴³⁵

The number of prominent colonists and early American leaders who read or had copies of English legal treatises is too extensive to list. Even a few examples will suffice: Adams, Samuel Sewall, Francis Dana, and Robert Treat Paine from Massachusetts Bay Colony; St. George Tucker, Wythe, William Byrd, and Robert Carter in the Colony of Virginia; Jay, James Alexander, James Montgomery, and Cadwalader Colden in New York; and Gouverneur Morris, Benjamin Chew, and James Wilson in Pennsylvania.⁴³⁶ In addition to residing in private collections, the monographs were widely available in college libraries and, as soon as public libraries came into being, to the public. By 1723, Harvard College had copies of Coke's *Institutes*. Eventually, versions of the original texts, with notations making them relevant to the American context, were published.⁴³⁷

⁴³⁴ Catherine Drinker Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke* 514 (Little, Brown 1957).

⁴³⁵ Moline, 42 Washburn L J at 790 (cited in note 418). See also id at 791 ("Many nineteenth-century lawyers relied exclusively on the Commentaries to the exclusion of any other authorities.").

⁴³⁶ Library catalogs from the late 1600s through the early 1800s, and listings of the books held by the private libraries of the Founders, offer a glimpse into the ubiquitous nature of English legal scholars in the New World. A national bibliography of books imported in the eighteenth century, for instance, found dozens of copies of Blackstone's *Commentaries*, Coke's *First Institute*, Hale's *History of the Pleas of the Crown* and *Pleas of the Crown*, and Hawkins's *Treatise of the Pleas of the Crown* in North America during the late colonial period. Herbert A. Johnson, *Imported Eighteenth Century Law Treatises in American Libraries, 1700-1799* 13-14, 28-30 (Tennessee 1978). Another bibliography similarly lists dozens of copies of the same volumes in the colonies. William Hamilton Bryson, *A Census of Law Books in Colonial Virginia* 34, 41-42, 53 (Virginia 1978).

For further discussion of the influence of English legal scholars on the Founding generation, see Cuddihy, *The Fourth Amendment* at 188-89 (cited in note 37); Moline, 42 Washburn L J at 790 (cited in note 418) (reporting which law books—including Blackstone and Coke—were commonly used by early American lawyers); Charles Warren, *A History of the American Bar* 181-90 (Little, Brown 1911) (noting that colonial lawyers routinely consulted Coke and Blackstone); Paul M. Hamlin, *Legal Education in Colonial New York* 64-65 (NYU 1939) (examining colonial collections and noting the number of orders for copies of Blackstone); McKirdy, 28 J Legal Educ at 128-33 (cited in note 433) (highlighting the law books available to early American lawyers and readings that would be assigned to apprentices); Clement Eaton, *A Mirror of the Southern Colonial Lawyer: The Fee Books of Patrick Henry, Thomas Jefferson, and Waightstill Avery*, 8 Wm & Mary Q 520, 521-22 (1951) (addressing which law books were used by early American lawyers and noting that Jefferson routinely recommended Coke's *Institutes* and Blackstone's *Commentaries*).

⁴³⁷ See generally, for example, Matthew Hale, 1 *Historia Placitorum Coronae. The History of the Pleas of the Crown* (Small 1847) (W.A. Stokes and E. Ingersoll, eds).

The Founders' reliance on English law and legal tracts provided a baseline for their expectations. As Englishmen, they came to expect that certain norms would be observed in relation to the rights that they held under the British constitution. Simultaneously, the Founders closely followed the evolution of the common law and contemporary legal developments in England. In both regards, general warrants lay beyond the pale.

Colonial newspapers covered the sagas of Entick and Wilkes with an enthusiasm paralleling that of modern *Downton Abbey* fans. Papers in Connecticut,⁴³⁸ Georgia,⁴³⁹ Massachusetts,⁴⁴⁰ New

⁴³⁸ See, for example, New-London Summary 1 (July 1, 1763):

[Wilkes was discharged from the Tower and] was followed to his own House amidst the loud Acclamations of above 10,000 People, who cry'd out, Wilkes and Liberty! he was immediately waited on by Lord Temple, and many other Noblemen and Gentlemen, and great Rejoicings were made in many Parts of the Town. Mr. Wilkes immediately wrote several Letters to the Earls of Egremont and Halifax, charging them with having robb'd his House, and insisting upon their returning the stolen Goods; Mr. Wilkes was going to Prosecute the two Secretaries of State for false Imprisonment, and has laid his Damages against each at fifty Thousand Pounds.

⁴³⁹ See, for example, The Georgia Gazette 3 (July 21, 1763); The Georgia Gazette 2 (July 28, 1763).

⁴⁴⁰ See, for example, Boston Post-Boy 4 (June 20, 1763):

[John Wilkes, MP for Aylesbury,] was taken into Custody by four of his Majesty's Messengers, & conducted to his Lordship's House, from thence was committed Prisoner to the Tower, being charged with writing a Piece in the North Briton of Saturday the 23d of April last; all his Papers were seized, and afterwards deposited in Lord Halifax's Office: And we hear that the Papers are under the Examination of Philip Carteret Webb, Esq; Solicitor of the Treasury, and Lovel Stanhope, Esq; Law-Clerk of the Secretary of State's Office. Mr. W. it is said, disputed the Authority of the Messengers the first Time of their coming to his House.

See also Boston Evening-Post 2 (June 27, 1763) ("Though John Wilkes, Esq; is discharged from his imprisonment, on account of his being a member of parliament, yet he is not freed from the accusations against him."); Boston News-Letter 3 (June 30, 1763):

An authentick Account of the Proceedings against JOHN WILKES, Esq. . . . Containing all the Papers relative to this interesting Affair, from that Gentleman's being taken into Custody by his Majesty's Messengers, to his Discharge to the Court of Common Pleas. With an Abstract of that precious Jewel of an *Englishman*, The *Habeas Corpus* Act. Addressed to all Lovers of Liberty.

Hampshire,⁴⁴¹ New York,⁴⁴² North Carolina,⁴⁴³ and Rhode Island⁴⁴⁴ provided play-by-play accounts of Wilkes's arrest, the search of his home, and his subsequent imprisonment in the Tower of London. *The Boston Post-Boy* reported that upon Wilkes's release, "the bells of [Guilford], famous for its loyal and constitutional principles, rang a peal to liberty."⁴⁴⁵ Papers recounted how the crowds cheered as they walked with Wilkes from the Tower of London to his home.⁴⁴⁶ Colonial periodicals printed, verbatim, the letters that Wilkes subsequently sent to the British secretaries of state, demanding the return of his stolen papers.⁴⁴⁷ Others covered Wilkes's effort to secure "a warrant to search the houses of the Earls of Egremont and Halifax, his majesty's principal Secretaries of State, for goods stolen from the house of said Wilkes. . . . [B]ut the sitting justice refused to issue the said warrant."⁴⁴⁸ Throughout the summer and autumn of 1763 and into the winter and spring of 1764, papers continued to cover the case in great detail.⁴⁴⁹ Songs were written in his honor. Wilkes was a celebrity.⁴⁵⁰

⁴⁴¹ See, for example, *New-Hampshire Gazette and Historical Chronicle* 3 (July 1, 1763) (noting Wilkes's arrest by four of his Majesty's messengers and his conduct to Lord Halifax's house and from there to commitment as a prisoner in the Tower of London, as well as the subsequent examination of Wilkes's papers by the solicitor of the treasury and the secretary of the treasury); *New-Hampshire Gazette and Historical Chronicle* 2 (Sept 2, 1763).

⁴⁴² See, for example, *New-York Gazette* 2 (June 20, 1763) (noting that on May 3, John Wilkes "was taken into Custody by four of his Majesty's Messengers, and committed Prisoner to the Tower by the Secretaries of State, being charged with writing a Paper published in the *North Briton*").

⁴⁴³ See, for example, *The North-Carolina Magazine* 188 (Nov 9, 1764).

⁴⁴⁴ See, for example, *Providence Gazette and Country Journal* 1–2 (July 2, 1763) (carrying an article on Wilkes's arrest as well as the text of his letters to the secretaries of state).

⁴⁴⁵ *Boston Post-Boy* 3 (June 27, 1763).

⁴⁴⁶ See, for example, *New-York Gazette* 2 (July 4, 1763); *Newport Mercury* 2 (July 4, 1763).

⁴⁴⁷ See, for example, *Boston Evening-Post* 2 (June 27, 1763):

On my return here from Westminster-hall, where I have been discharged from my commitment to the Tower under your Lordships warrant, I find that my house has been robbed, and am informed that the stolen goods are in the possession of one or both of your Lordships, I therefore insist that you do forthwith return them.

See also *Providence Gazette and Country Journal* 1–2 (July 2, 1763) (reprinting, in addition, another letter by Wilkes). See also *Newport Mercury* 2 (July 4, 1763).

⁴⁴⁸ *Boston Post-Boy* 1 (July 4, 1763). See also *The Massachusetts Gazette* 2 (June 30, 1763).

⁴⁴⁹ See, for example, *Boston Gazette* 2 (Apr 2, 1764); *Boston News-Letter* 2 (Apr 26, 1764); *Boston Post-Boy & Advertiser* 2 (Apr 30, 1764); *New-York Mercury* 1 (Sept 24, 1764).

⁴⁵⁰ See, for example, *New-York Gazette* 2 (Feb 6, 1764).

Colonial media embraced Wilkes's fight, and that of Entick, in the cause of freedom. Boston newspapers reported that the verdict in *Wilkes* condemned "the dangerous practice of issuing general and unconstitutional warrants," stating that "no age has produced a determination of more general and extensive consequence to every free born ENGLISHMAN."⁴⁵¹ In North Carolina, a local paper praised the *Entick* trial: "The great candour and impartiality shewn in the trial of Mr. Entick last Friday, gave the highest pleasure and satisfaction to all present; and in no part more than the ardent desire which was expressed that the Jury would consider the cause simply, as it stood before them."⁴⁵² The paper lauded, "[T]he whole matter was argued and considered fairly by itself, with a strictness of justice that was thought deserving of the highest commendation."⁴⁵³ Bequests to Wilkes were seen "as an acknowledgment to him who bravely defended the constitutional liberties of his country, and checked the dangerous progress of arbitrary power."⁴⁵⁴

Wilkes was hardly the only person affected by the general warrant issued in response to *North Briton No 45*. The incidents of arrest, search, and seizure related to the warrant gave rise to dozens of trials, which were costly to the Crown and further polarized British public opinion.⁴⁵⁵ Adulation may have centered more on concerns related to freedom of the press and the way in which seditious libel was used than on general warrants per se, but the exercise of promiscuous search and seizure was an important element in the equation. The court invoked English subjects' ancient rights, drawing a direct link between general warrants and a violation of Magna Carta.⁴⁵⁶

News reached the colonists by media and post. While in London, Benjamin Franklin, writing to his son, described the crowd that gathered for Wilkes's reelection. The crowd sang and filled the

⁴⁵¹ Boston Gazette 2 (Sept 19, 1763).

⁴⁵² The North-Carolina Magazine 189 (Nov 9, 1764) (mentioning the case of Wilkes as well).

⁴⁵³ *Id.*

⁴⁵⁴ The North-Carolina Magazine 164 (Oct 19, 1764).

⁴⁵⁵ For the costs of the trials, see Thomas Erskine May, 2 *Constitutional History of England since the Accession of George the Third* 247 (A.C. Armonstrong and Son 1895). For the cases arising out of the incident, in addition to the previously cited cases, see generally *Huckle v Money*, 95 Eng Rep 768 (CP 1763); *Rex v Wilkes*, 95 Eng Rep 737 (CP 1763). See also Cuddihy, *The Fourth Amendment* at 444–45 (cited in note 37); Davies, 98 Mich L Rev at 563–65 nn 21–25 (cited in note 20); Oldham, 2 *The Mansfield Manuscripts* at 790, 826–28 (cited in note 127).

⁴⁵⁶ See *Huckle*, 95 Eng Rep at 769.

streets of London, “requiring gentlemen and ladies of all ranks as they passed in their carriages to shout for Wilkes and liberty, marking the same words on all their coaches with chalk, and No. 45 on every door.”⁴⁵⁷ Franklin continued, “[F]or fifteen miles out of town, there was scarce a door or window shutter next the road unmarked; and this continued, here and there,” some sixty-four miles from London.⁴⁵⁸

Deeply cognizant of the rejection of general warrants in Great Britain, and having a salient example of the same in *Paxton’s Case*, the colonists viewed promiscuous search and seizure with ever-deeper antagonism. A determination by the British Attorney General William DeGrey that the authority for writs of assistance had not been extended to New England via the 1696 Navigation Act,⁴⁵⁹ and Parliament’s effort to address this deficiency by the introduction of a new statutory provision, did little to stem the tide.

The vehicle chosen by Westminster was none other than the Townshend Revenue Act of 1767. Infamous for its effort to extort money from the colonists to pay for the French and Indian War (following repeal of the Stamp Act in 1766), the first Townshend Act included a provision that gave customs officers the authority “to enter houses or warehouses, to search for and seize goods prohibited to be imported or exported . . . or for which any duties are payable, or ought to have been paid.”⁴⁶⁰ The legislation provided the highest court in each colony with the authority to issue writs of assistance to customs officers.⁴⁶¹ The statute did not require that the writs incorporate general terms of search and seizure. As a matter of practice, colonial courts tended, when they did grant writs, to make them specific, as they rejected general warrants as illegitimate.⁴⁶² Practice thus embraced Otis’s position.⁴⁶³

⁴⁵⁷ Letter from Benjamin Franklin to Governor Franklin (Apr 16, 1768), in William Temple Franklin, ed, 1 *Memoirs of the Life and Writings of Benjamin Franklin*, LL.D. 161, 161–62 (printed for H. Colburn 1818).

⁴⁵⁸ *Id.*

⁴⁵⁹ William de Grey, *Opinion of Attorney General De Grey upon Writs of Assistance* (Aug 20, 1768), archived at <http://perma.cc/W3R9-G8KB>.

⁴⁶⁰ An Act for Granting Certain Duties in the British Colonies and Plantations in America, 7 Geo III, ch 46, § 10 (1766), in 27 Statutes at Large 505, 511–12.

⁴⁶¹ 7 Geo III, ch 46, § 10 (1766), in 27 Statutes at Large 505, 511–12.

⁴⁶² See, for example, *Frisbie v Butler*, 1 Kirby 213, 215 (Conn Super 1787) (“[T]he warrant in the present case, being general, to search all places, and arrest all persons, the complainant should suspect, is clearly illegal.”).

⁴⁶³ For thoughtful discussion of how this transpired in each of the colonies, and the evolution of judicial consensus against general warrants, see Cuddihy, *The Fourth Amendment* at 506–36 (cited in note 37).

Along with practice, American legal treatises written between 1765 and 1776 adopted the perspective of English legal scholars, as well as that articulated by Otis in *Paxton's Case*. In 1767–68, John Dickinson wrote *Letters from a Pennsylvania Farmer*, a series of essays decrying the Townshend Acts. “By the late act,” he wrote,

the officers of the customs [were] impowered to enter into any HOUSE, warehouse, shop, cellar, or other place, in the British colonies or plantations in America to search for or seize prohibited or unaccustomed goods, etc. on writs granted by the superior or supreme court of justice, having jurisdiction within such colony or plantation respectively.⁴⁶⁴

Dickinson labeled such authority an “engine of oppression.”⁴⁶⁵ Whether or not such powers existed in Great Britain did not matter. “[T]he greatest asserters of the rights of Englishmen,” he inveighed, “have always strenuously contended, that such a power was dangerous to freedom, and expressly contrary to the common law, which ever regarded a man’s house as his castle, or a place of perfect security.”⁴⁶⁶ If this power could destroy liberty in England, “it must be utterly destructive to liberty” in the New World—where trials for violations would be held before judges who were wholly dependent upon the Crown for their positions and who were responsible for issuing the writs in the first place.⁴⁶⁷ That such writs were open to arbitrary exercise, and that property rights were not well protected, added fuel to the fire.

In 1764, English journalist and political writer Almon similarly condemned general warrants, noting that their rejection was not limited to people with doors on their homes.⁴⁶⁸ He wrote:

[I]t would be (as Hawkins says) extremely hard, to leave it to the discretion of a common officer to arrest what persons, and search what houses he thinks fit: and if a Justice cannot legally grant a blank warrant for the arrest of a single person, leaving it to the party to fill it up, surely he cannot grant such

⁴⁶⁴ John Dickinson, *Letters from a Farmer in Pennsylvania: Letter IX*, in William E. Leuchtenberg and Bernard Wishy, eds, *Empire and Nation* 50, 53 (Prentice-Hall 1962) (quotation marks and emphasis omitted).

⁴⁶⁵ Id.

⁴⁶⁶ Id at 53–54.

⁴⁶⁷ Id at 54.

⁴⁶⁸ *Father of Candor* at 47 (cited in note 331).

a general warrant, which might have the effect of a hundred blank warrants.⁴⁶⁹

That the secretary of state engaged in this practice did not make it legal—numerous examples in which officials had ensured the sufficiency of warrants likewise existed. “In truth,” he wrote,

there has been no uniform practice in the office, as may be seen by the variant and multiform warrants printed from thence in *Quarto*, and privately distributed to trusty friends . . . with the inscription of *most secret*. Much less would precedents only from the time of the Revolution be sufficient to *justify* such an illegal practice.⁴⁷⁰

Being a secretary of state—or even a member of the Privy Council—did not transform a person into a justice of the peace, who alone held the authority to issue a warrant.⁴⁷¹ Thus it was “that the two grounds suggested as an authority for the issuing of these General Warrants, namely, the constant exercise and usage of them, and the antiquity of the Secretary of State as a Privy Counsellor,” failed.⁴⁷²

As with the jurists’ conclusion that the principles of the law could not be overcome by efforts by the Crown to levy such powers, Almon noted:

[E]ven if the usage [of general warrants] had been both immemorial and uniform, and ten thousand similar warrants could have been produced, it would not have been sufficient; because, the practice must likewise be agreeable to the principles of law, in order to be good, whereas, this is a practice inconsistent with, and in direct opposition to, the first and clearest principles of law.⁴⁷³

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.* at 47–48.

⁴⁷¹ *Id.* at 48–49.

⁴⁷² *Father of Candor* at 49 (cited in note 331). The author also notes that a warrant can never itself be considered precedent, it being not an argument or deliberation, but rather an act of the court:

[W]hat is done without debate, or any argument or consideration had of it, makes the authority of a precedent to be of no force in point of law: for, judgments and awards, given upon deliberation and debate, only are proofs and arguments of weight; and not any sudden act of the court without debate or deliberation.

Id. at 53.

⁴⁷³ *Id.* at 49.

He added, “[i]n one word, no warrant whatever, in any case or crime whatever, that names or describes nobody in certain, is good, or can be justified in law, in any circumstances whatever.”⁴⁷⁴

Colonists continued to raise their objections to the Crown being allowed access to their homes. In 1773, the Boston Committee of Correspondence issued its first communication to the towns of Massachusetts, including among its grievances that the Crown had assumed for itself “power too absolute and arbitrary,” as “[p]rivate premises are exposed to search.”⁴⁷⁵ Bolton’s committee of twenty-one lamented that the Crown could subject their homes to unlimited inspection.⁴⁷⁶ Towns in Massachusetts quickly formed their own committees of correspondence, prompting similar entities to be constituted in Connecticut, New Hampshire, Rhode Island, and South Carolina. By early 1774, the committees had superseded the colonial legislatures and Crown officials in all thirteen colonies, giving individuals an opportunity to voice their grievances, including opposition to promiscuous search and seizure.⁴⁷⁷

The First Continental Congress picked up the baton, remonstrating against the Townshend Acts and other revenue statutes as accruing immense power and using the law to subjugate the colonies.⁴⁷⁸ The Continental Congress averred that their rights and liberties were being infringed, citing the multiplication of “[e]xpensive and oppressive offices.”⁴⁷⁹ Among their chief concerns was that “[t]he Commissioners of the Customs are empowered to break open and enter houses without the authority of any Civil Magistrate, founded on legal information.”⁴⁸⁰

⁴⁷⁴ Id. Almon also stated that general warrants could not be used for libel, forgery, high treason, or other felonies, and suggested that

where there is even a charge against one particular paper, to seize *all*, of every kind, is extravagant, unreasonable and inquisitorial. It is infamous in theory, and downright tyranny and despotism in practice. We can have no positive liberty or privacy, but must enjoy our correspondencies, friendships, papers and studies at discretion, that is, at the will and pleasure of the ministers for the time being, and of their inferior agents!

Id at 59.

⁴⁷⁵ *The Committees of Correspondence: The Voice of the Patriots* (Boston Tea Party Ships & Museum), archived at <http://perma.cc/4FKV-B88V> (quoting the Boston Committee of Correspondence’s first list of grievances).

⁴⁷⁶ Quincy and Gray, *Reports of Cases Argued* at 467 (cited in note 372).

⁴⁷⁷ See *Committees of Correspondence* (cited in note 475).

⁴⁷⁸ *Memorial to the Inhabitants of the British Colonies*, First Continental Congress (Oct 21, 1774), reprinted in 1 *American Archives: Fourth Series* 921, 925 (Clark and Force 1837).

⁴⁷⁹ Id.

⁴⁸⁰ Id.

Far from the more modern claim made by some scholars—that the Crown could enter at will and that it was only once a warrant issued that particularity was required—the colonial understanding was that, outside of narrow conditions, the Crown could not enter at all, without a specific warrant issued by a judge.

C. State Prohibitions

Like their English predecessors, the newly formed American states objected to the use of promiscuous search and seizure. But they went beyond English legal theorists' rejection of the instruments in three important ways.⁴⁸¹

First, the early state constitutions created a positive right—namely, to be secure in one's person, house, papers, and effects against unreasonable search and seizure. Although, at least since 1967, the concept of "unreasonable" has become untethered from the original meaning,⁴⁸² the word itself implied something different in the eighteenth century. "Unreasonable" translated into "against reason," or against "the Reason of the Common Law."⁴⁸³ Because general warrants violated the common law (and were thus unreasonable), they were not legal. The right to be secure in one's person, house, papers, and effects thus meant a prohibition on promiscuous search or seizure.

Second, the Founders embraced particularized warrants as the only way in which the government could breach the walls of the home, outside of active pursuit of felons.

Third, merely the fact that a warrant was specific was not enough. States went to great pains to outline precisely what information would have to be presented, by whom, which procedures would have to be followed, and who could issue warrants for them to be considered valid. These elements provided a baseline for evaluating the strength of the government's case for violating the sanctity of the person, interfering with private property, or breaching the walls of the home.

The nascent state declarations of rights and constitutions incorporated these changes before the Fourth Amendment cemented them into federal law. Virginia led the charge.⁴⁸⁴

⁴⁸¹ See Donohue, *The Future of Foreign Intelligence* at 84–85 (cited in note 54).

⁴⁸² See generally *Katz v United States*, 389 US 347 (1967).

⁴⁸³ See Part II.C.2.

⁴⁸⁴ New Jersey, New York, Georgia, and South Carolina were the only states not to issue or include a declaration of rights in their new constitutions. The New Jersey Constitution of July 2, 1776, written in the shadow of Washington's loss in New York, which put

1. General warrants rejected.

The fifth Virginia Convention met in May 1776. Jefferson, Washington, Patrick Henry, Richard Henry Lee, George Mason, Pendleton, Wythe, and other prominent Virginians gathered in the House of Burgesses.⁴⁸⁵ A portrait of George III hung on the wall, staring down at those gathered.⁴⁸⁶ Despite such an immediate and visceral reminder of the power of the English Crown, the delegates voted to adopt a declaration of rights, to adopt a constitution, and to forge alliances with the colonies to make a new country.⁴⁸⁷ Mason became responsible for drafting the Virginia Declaration of Rights and, together with James Madison, the state constitution.⁴⁸⁸ The documents became central to the formation of the new republic. Other states looked to them for guidance, even as the US Constitution, and, later, the Bill of Rights, echoed their substance.

The natural rights of man figured largely in the declaration. Mason drew from John Locke's *Second Treatise of Government*, as

the security of territory at risk, was a hastily conceived document, written in five days and adopted in two. There was no statement of rights in the preface. Instead, it laid out the structure of the government, included provisions meant to protect freedom of religion, and stated that the common law of England and colonial statutory provisions would remain in force until altered by future acts of the state legislature. See generally NJ Const of 1776 (superseded 1844). New York's Constitution similarly lacked any prefatory statement of rights. See generally NY Const of 1777 (superseded 1821). Georgia adopted a temporary constitution for the revolutionary government, with the first state constitution issued on February 5, 1777. Walter McElreath, *A Treatise on the Constitution of Georgia* 60–62 (Harrison 1912). South Carolina similarly introduced a temporary constitution in 1776 and amended it in 1778. Francis Newton Thorpe, 6 *Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* 3241 (Government Printing Office 1909). Neither Georgia nor South Carolina included either a declaration of rights in the prefatory material or provisions related to search or seizure, although they did address other rights, such as the right to a jury trial, in the text. McElreath, *Treatise on the Constitution of Georgia* at 60–62 (cited in note 484); Thorpe, 6 *Federal and State Constitutions* at 3241 (cited in note 484). Two states (Connecticut and Rhode Island) did not adopt a new constitution prior to the 1787 Constitutional Convention, instead operating under their previous charters and colonial statutes. See Thorpe, 6 *Federal and State Constitutions* at 3222 (cited in note 484); Francis Newton Thorpe, 1 *Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* 536 (Government Printing Office 1909).

⁴⁸⁵ See Donohue, *The Future of Foreign Intelligence* at 85 (cited in note 54).

⁴⁸⁶ The portrait still hangs in the chamber in historic Williamsburg. In the course of research for this Article, an archivist verified its presence in 1776 by citing the purchase of the portrait by the House of Burgesses and the subsequent restoration of the chamber to its state at the time of the Founding.

⁴⁸⁷ See Donohue, *The Future of Foreign Intelligence* at 85 (cited in note 54).

⁴⁸⁸ *Id.*

well as Baron de Montesquieu's *The Spirit of Laws*.⁴⁸⁹ He looked to English history and the British constitution, which had wrestled with the extent of rights and the duties owed to the Crown. From the Grand Remonstrance and beheading of Charles I; through the Glorious Revolution, the 1689 English Bill of Rights, and the succession of William III and Mary II to the throne; and continuing through the restoration of Charles II, the experience of Englishmen was one of the gradual institution of rights as held against the government.

Accordingly, Mason highlighted the importance of consent.⁴⁹⁰ He asserted the principle of taxation only with representation.⁴⁹¹ He acknowledged the danger of military power, prohibiting the presence of a standing army.⁴⁹² He recognized the prohibition on excessive bail and fines.⁴⁹³ The declaration outlawed cruel or unusual punishment.⁴⁹⁴ It established free elections.⁴⁹⁵ It prohibited forfeiture without conviction.⁴⁹⁶ And it underscored the importance of jury trial.⁴⁹⁷

To these rights, Mason added the right, long recognized by English legal theorists,⁴⁹⁸ against "grievous and oppressive" search and seizure. To accomplish the last, Mason made general

⁴⁸⁹ See *id.*

⁴⁹⁰ Compare Va Decl of Rights § 7 (1776) with English Bill of Rights, 1 Wm & Mary, sess 2, ch 2, cl 3 (1689), in 6 Statutes of the Realm 142, 142.

⁴⁹¹ Compare Va Decl of Rights § 6 (1776) with English Bill of Rights, 1 Wm & Mary, sess 2, ch 2, cl 6 (1689), in 6 Statutes of the Realm 142, 142.

⁴⁹² Compare Va Decl of Rights § 13 (1776) with English Bill of Rights, 1 Wm & Mary, sess 2, ch 2, cl 7, 24 (1689), in 6 Statutes of the Realm 142, 142–43.

⁴⁹³ Compare Va Decl of Rights § 9 (1776) with English Bill of Rights, 1 Wm & Mary, sess 2, ch 2, cl 12, 13, 28 (1689), in 6 Statutes of the Realm 142, 143.

⁴⁹⁴ Compare Va Decl of Rights § 9 (1776) with English Bill of Rights, 1 Wm & Mary, sess 2, ch 2, cl 14 (1689), in 6 Statutes of the Realm 142, 143.

⁴⁹⁵ Compare Va Decl of Rights § 6 (1776) with English Bill of Rights, 1 Wm & Mary, sess 2, ch 2, cl 9, 26 (1689), in 6 Statutes of the Realm 142, 142–43.

⁴⁹⁶ Compare Va Decl of Rights §§ 6, 8 (1776) with English Bill of Rights, 1 Wm & Mary, sess 2, ch 2, cl 15, 30 (1689), in 6 Statutes of the Realm 142, 143.

⁴⁹⁷ Compare Va Decl of Rights § 8 (1776) with English Bill of Rights, 1 Wm & Mary, sess 2, ch 2, cl 11, 29 (1689), in 6 Statutes of the Realm 142, 142–43.

⁴⁹⁸ See, for example, Petition of Right, 3 Car I, ch 1, § 3 (1628), in 5 Statutes of the Realm 23, 23 (hearkening back to the "great Charter" as the source of the right that "no Freeman may be taken or imprisoned or be disseised of his Freehold or Liberties or his free Customes or be outlawed or exiled or in any manner destroyed, but by the lawfull Judgment of his Peeres or by the Law of the Land"); 3 Car I, ch 1, § 4 (1628), in 5 Statutes of the Realm 23, 24 (stating that "no man . . . should be . . . taken nor imprisoned . . . without being brought to aunswere by due pcesse of Lawe"); 3 Car I, ch 1, § 5 (1628), in 5 Statutes of the Realm 23, 24 (noting the exercise of general warrants of arrest as a cause of grievance).

warrants illegal and specified what particulars would be necessary for a valid warrant.⁴⁹⁹ To some extent, this was an American innovation. Coke, as previously mentioned, had included a clause in the 1628 Petition of Right arguing that general warrants for arrest violated Magna Carta.⁵⁰⁰ Despite James II's later use of general warrants, and English legal treatises' consistent rejection of the same, the 1689 English Bill of Rights had not incorporated an equivalent clause.

Mason's decision to include a prohibition on promiscuous search and seizure took an aspect of the common law and turned it into a written, guaranteed right, as held against the government. It could not be abridged by mere statute. And Mason went further. He did not simply prohibit general warrants. He was careful to spell out what would have to be done for a specific warrant to be valid.

The Virginia Declaration of Rights stated:

[G]eneral warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive and ought not to be granted.⁵⁰¹

To obtain a warrant, officials would have to present evidence of criminal activity to a court. The name of the person on whom the warrant would be served would have to be included, as well as the illegal activity in question. On June 12, 1776—just one month after entrusting Mason with the drafting of the declaration—the convention adopted it.⁵⁰²

Pennsylvania followed Virginia's lead. Some of the foremost political figures of the time—George Bryan, James Cannon, Franklin, and Jefferson—helped to draft the state constitution. Its first article focused on rights. Like the Virginia Declaration,

⁴⁹⁹ See Donohue, *The Future of Foreign Intelligence* at 86 (cited in note 54).

⁵⁰⁰ See Part II.B.

⁵⁰¹ Va Decl of Rights § 10 (1776). See also Donohue, *The Future of Foreign Intelligence* at 85 (cited in note 54).

⁵⁰² Throughout US history, scholars have noted the relationship between this clause and the Fourth Amendment of the US Constitution. See, for example, Leonard C. Helderan, *The Virginia Bill of Rights*, 3 Wash & Lee L Rev 225, 231 n 21 (1942) (“Though this section does not contain the ‘unreasonable searches and seizures’ terminology of the Fourth Amendment to the Federal Constitution, the same field is in all probability covered by the two provisions.”). See also Donohue, *The Future of Foreign Intelligence* at 85 (cited in note 54).

the Pennsylvania Constitution established the right of “the people” to “hold themselves, their houses, papers, and possession free from search and seizure.”⁵⁰³ To this, the document added, “warrants without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are contrary to that right, and ought not to be granted.”⁵⁰⁴ The first statement thus established a right—the right against entry into the home absent a warrant. Pennsylvania made general warrants void, even as it established, in the second clause, additional requirements for a valid warrant.

Delaware followed a similar approach. In September 1776, it adopted a Declaration of Rights, stating that the absence of an oath would render specific warrants “grievous and oppressive,” even as it condemned all general warrants as “illegal.”⁵⁰⁵ The state constitution went on to refer to the Declaration of Rights, stating that “[n]o article of the declaration of rights and fundamental rules of this State, agreed to by this convention . . . ought ever to be violated on any presence [sic] whatever.”⁵⁰⁶

Overlapping with deliberations in Pennsylvania and Delaware, Maryland delegates met between August and November 1776, at which time they drafted and approved their state’s first constitution. A Declaration of Rights constituted the first section.⁵⁰⁷ It, too, emphasized search and seizure. The corresponding clauses took several phrases from the Virginia document, further shaping it to fit Blackstone’s rejection of general warrants. Article XXIII read:

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

⁵⁰³ Pa Const of 1776, Decl of Rights Art X (superseded 1790).

⁵⁰⁴ Pa Const of 1776, Decl of Rights Art X (superseded 1790).

⁵⁰⁵ Del Decl of Rights § 17 (1776):

That all warrants without oath to search suspected places, or to seize any person or his property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend all persons suspected, without naming or describing the place or any person in special, are illegal and ought not to be granted.

⁵⁰⁶ Del Const of 1776 Art XXX (superseded 1792).

⁵⁰⁷ See Md Const of 1776, Decl of Rights (superseded 1851).

naming or describing the place, or the person in special—are illegal, and ought not to be granted.⁵⁰⁸

This language went beyond Virginia's declaration by requiring that the evidence provided for a search be upon oath. It reflected Virginia's use of "grievous and oppressive," and, like Delaware, it used Blackstone's condemnation of the instruments as "illegal." By doing so, Maryland ensured that, even upon evidence of a crime sworn under oath, general warrants would not be allowed.

North Carolina, which in December 1776 inserted a Declaration of Rights as the first section of its constitution, eliminated promiscuous search and seizure across the board. It included a section on "general warrants," in which it made their use for arrest, search, or seizure illegal on the grounds that the instruments were "dangerous to liberty."⁵⁰⁹

The Massachusetts Constitution similarly objected to the use of general warrants.⁵¹⁰ The language it adopted, like that of New Hampshire, was similar to the language that Madison used in what became the Fourth Amendment. Authored by Adams, the document generates insight into the original meaning of the text.⁵¹¹ Adams's choice of language reflected the legal legacy that he inherited, as well as contemporary understandings of the illegality of general warrants and the requirements of specificity.

2. "Unreasonable" as violating the reason of the common law.

Like his colleagues in Virginia and Pennsylvania, Adams began by articulating the underlying right: "Every man has a right to be secure from all *unreasonable* searches and seizures of his

⁵⁰⁸ Md Const of 1776, Decl of Rights Art XXIII (superseded 1851).

⁵⁰⁹ NC Const of 1776, Decl of Rights Art XI (superseded 1868) ("[G]eneral warrants—whereby an officer or messenger may [be] commanded to search suspected places, without evidence of the act [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.").

⁵¹⁰ See Donohue, *The Future of Foreign Intelligence* at 87 (cited in note 54).

⁵¹¹ Gregg L. Lint, et al, eds, 8 *Papers of John Adams* 240 & n 24 (Belknap 1989) (showing that the final text was consistent with Adams's draft, with the exception of a change from "man" to "subject"). Although Professor Lasson was not aware of the authorship of the Massachusetts provision when he published his work on the Fourth Amendment in 1937, scholarship has since definitively established Adams's role. See, for example, Leonard W. Levy, *Original Intent and the Framers' Constitution* 238 (MacMillan 1988); Davies, 98 Mich L Rev at 658 (cited in note 20); Cuddihy, *The Fourth Amendment* at 605 (cited in note 37).

person, his houses, his papers, and all his possessions.”⁵¹² As elsewhere, the choice of the word “unreasonable” conveyed a particular meaning: namely, against reason, or against the reason of the common law. The concept stemmed from the contemporary understanding at the time of the relationship between “reason” and the common law. Although disagreement marks the precise source of such reason (for example, custom, natural law, or Continental precepts),⁵¹³ the basic idea was that the principles inherent in common law had legal force. That which was consistent

⁵¹² Lint, et al, eds, 8 *Papers of John Adams* at 240 (cited in note 511) (emphasis added). See also Donohue, *The Future of Foreign Intelligence* at 87 (cited in note 54).

⁵¹³ There is disagreement in the modern literature over the precise contours, and source, of the reason of the common law. One of the most interesting articles considers late medieval Year Book cases and English jurisprudential works, emphasizing the incorporation of St. Thomas Aquinas’s equation of reason with natural law into jurisprudists’ theoretical schemes, noting at the same time that such reasoning never entered into judicial opinions. Barbara A. Singer, *The Reason of the Common Law*, 37 U Miami L Rev 797, 799–802 (1983). Instead, the courts invoked reason independently to protect the right to life, liberty, and property, as well as the due process right to a fair trial and all that it entailed. Id at 811–14. If no precedent existed, courts would judge “according to law and reason,” making their own precedent. Id at 814. When precedent existed, judges felt compelled, as early as the fifteenth century, to follow it, unless the judge determined that precedent ran counter to reason, in which case he would set a new precedent or modify the common law. Id at 814–15. Judges similarly hearkened to reason when precedent conflicted. Id at 816. Custom could become part of the common law only when it, too, comported with reason. Id at 818–19. The courts then looked to reason to interpret statutes. Id at 820–22. Professor Barbara Singer concludes, “Reason truly was the very soul of the common law.” Id at 823.

Other commentaries offer a similar understanding of the reason of the common law as reflecting a morality manifest in natural law, divine law, justice, or conscience. See, for example, Norman Doe, *Fundamental Authority in Late Medieval English Law* 120, 177 (Cambridge 1990). In arguing that common-law lawyers equated reason with natural law, making their thinking congruent with Roman law and canon law, another scholar suggests that English law is more influenced by the *ius commune* (Continental jurisprudence) than has been admitted by some English legal historians. J.W. Tubbs, *The Common Law Mind: Medieval and Early Modern Conceptions* 173–78 (Johns Hopkins 2000). Professor H. Jefferson Powell, in contrast, argues that the notion of “resound” derived from French sources, equating with that which was reasonable. H. Jefferson Powell, *The Moral Tradition of American Constitutionalism: A Theological Interpretation* 77–78 (Duke 1993). Professor James Stoner compares “Hale’s idea of common law reason with Hobbes’s concept of an absolute sovereign.” See Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 Emory L J 585, 611 n 137 (2009), citing James Stoner Jr, *Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism* 131–33 (Kansas 1992). He suggests a distinction between reason in an Aristotelian sense and an Enlightenment ideal:

[T]he common law proceeds by reason, but by reason that collects and judges particulars—by a sort of Aristotelian practical reason—rather than by reason in the modern, Enlightenment, analytical sense—the reason that breaks apart and reassembles. It stresses continuity rather than novelty, though it demands some

with the common law was reasonable and, therefore, legal. That which was inconsistent was unreasonable and illegal. General warrants, being against the reason of the common law, were thus unlawful, or void.

This interpretation, adopted by the Founders, reflected the common-law approach embraced by English scholars. Adams had read Coke, Hawkins's *Pleas of the Crown*, and other English legal treatises.⁵¹⁴ In 1610, Coke had asserted in dicta in *Dr. Bonham's Case*⁵¹⁵ that a statute was void if it was "against common right and reason," that is, if it violated the basic principles of common law.⁵¹⁶ Similarly, in 1628, Coke spoke in Parliament of general warrants as being "against reason."⁵¹⁷ The use of "unreasonable" as meaning "against reason" reflected a common philosophical and legal practice. Locke, in a statement referring back to *Dr. Bonham's Case*, converted "against reason" to "unreasonable."⁵¹⁸

reason greater than custom alone, for by common law, unreasonable customs have no legal force.

Stoner, *Common Law and Liberal Theory* at 177 (cited in note 513). But see J.H. Hexter, *Thomas Hobbes and the Law*, 65 Cornell L Rev 471, 479–82 (1980) (describing Hobbes's reference to "the artificial reason of the common law," and the concept of natural law, as being in direct opposition to the ideal of the "reason of the common law"). In his study of Bentham and the common-law tradition, Professor Gerald Postema postulates that two concepts of reason were embedded in the common law: a "particularist" concept, focused on specific cases and contexts, within which "reasoning is analogical, arguing from particular case to particular case," discussing similarities and differences; and a broader understanding of reason, which emphasizes "general justifying principles . . . instanced in, and illustrated by, particular decisions and settled rules," in which reason is "reflective," capable of turning common law into a "rational science based on first principles." Gerald J. Postema, *Bentham and the Common Law Tradition* 30–38 (Clarendon 1986) (emphasis omitted). In another work, Postema suggests that the "artificial reason" of the common law "was seen largely as the most reliable procedure for approximating" natural justice, bringing him closer to Norman Doe's position. Gerald J. Postema, *Classical Common Law Jurisprudence (Part II)*, 3 Oxford U Commonwealth L J 1, 21 (2003). See also generally Gerald J. Postema, *Classical Common Law Jurisprudence (Part I)*, 2 Oxford U Commonwealth L J 155 (2002). An article published by Professor James Whitman in 1991 points out the "mingling" of reason, custom, and constitution, noting how customary rights became intertwined with the concept of deductive natural law. He refers to "[t]he eighteenth-century constitutionalist habit of identifying custom with reason." James Q. Whitman, *Why Did the Revolutionary Lawyers Confuse Custom and Reason?*, 58 U Chi L Rev 1321, 1322 (1991).

⁵¹⁴ Moline, 42 Washburn L J at 783 (cited in note 418).

⁵¹⁵ 77 Eng Rep 646 (CP 1610).

⁵¹⁶ *Id* at 652–53.

⁵¹⁷ Davies, 98 Mich L Rev at 688 n 397 (cited in note 20).

⁵¹⁸ *Id* at 689 & n 398, quoting John Locke, *The Second Treatise of Government* § 13 at 275 (Cambridge 1988) (Peter Laslett, ed) ("[I]t is unreasonable for Men to be Judges in their own Cases.").

Blackstone, too, altered Coke's phrase of "against reason" to "unreasonable."⁵¹⁹

It was not just Coke and Blackstone to whom Adams hearkened for the understanding of general warrants as "against reason" and thus "unreasonable." Adams's abstract of Otis's argument notes that Otis referred to writs of assistance as being "against reason"—a phrase that he converted in the Massachusetts Constitution to "unreasonable."⁵²⁰

Adams's more lengthy notes on Otis's argument draw the point even more forcefully. In them, he wrote, "An Act against the Constitution is void: . . . and if an Act of Parliament should be made, in the very Words of this Petition, it would be void."⁵²¹ He went on to cite the specific page in Coke's opinion in *Dr. Bonham's Case* on which Coke stated that an act is "void" when it is "against common right and reason."⁵²² Adams then noted Otis's statement that the "[r]eason of the Common Law [is] to control an Act of Parliament."⁵²³

Legal tracts of the day made a similar link between unreasonableness (as against the reason of the common law) and illegality. In 1751, *A New Law-Dictionary* explained that common law "[i]s founded upon *Reason*; and is said to be the Perfection of *Reason*, acquired by long Study, Observation and Experience, and refined by Learned Men in all Ages."⁵²⁴ It explained, "It has been observed [that Reason] is the very Life of the Law; and that what is contrary to it, is unlawful: When the *Reason* of the Law once ceases, the Law itself generally ceases; because *Reason* is the Foundation of all our Laws."⁵²⁵ In other words, reason was considered to be the life of the law, and whatever was contrary to it was therefore unlawful.⁵²⁶ As an early nineteenth-century dictionary

⁵¹⁹ Davies, 98 Mich L Rev at 689 (cited in note 20), quoting William Blackstone, 1 *Commentaries on the Laws of England* 91 (Chicago 1979).

⁵²⁰ See Davies, 98 Mich L Rev at 689–90 (cited in note 20). See also generally John Adams, *Abstract of the Argument*, in Wroth and Zobel, eds, 2 *Legal Papers of John Adams* 134 (cited in note 377).

⁵²¹ Davies, 98 Mich L Rev at 690 (cited in note 20), quoting Adams, *Minutes of the Argument* at 127–28 (cited in note 377).

⁵²² Davies, 98 Mich L Rev at 690 (cited in note 20), quoting Adams, *Abstract of the Argument* at 144 (cited in note 520).

⁵²³ Davies, 98 Mich L Rev at 690 (cited in note 20), quoting Adams, *Minutes of the Argument* at 127–28 (cited in note 377).

⁵²⁴ Giles Jacob, *A New Law-Dictionary* at "Common Law" (printed for Lintot 7th ed 1751) (first emphasis added).

⁵²⁵ *Id.* at "Reason."

⁵²⁶ Giles Jacob and T.E. Tomlins, 5 *The Law-Dictionary* 386 (P. Byrne 1811).

noted, “Reason is called the soul of the law; for when the reason ceases, the law itself ceases.”⁵²⁷

Just as legal tracts recognized that which was contrary to reason as unreasonable, or illegal, so too did tracts highlight general warrants as being unreasonable and thus a violation of the common law. *The Law of Arrests*, published in London in 1742, for instance, noted “the Unreasonableness, and seeming Unwarrantableness of [general warrants].”⁵²⁸ This language was consistent with *Johnson’s Dictionary*, the principal English lexicon of the time, which defined “unreasonable” as “[n]ot agreeable to reason.”⁵²⁹

So strong was the pull of the reason of the common law that statutes at the time of the Founding had to be read in a manner consistent with it. Contemporary legal tracts underscored the rule.⁵³⁰ Courts similarly embraced it. Thus, in a dispute in 1774 over access to a navigable river, a provincial court in Baltimore County, Maryland, cited Coke, asserting: “The surest construction of a statute is by the rule and reason of the common law.”⁵³¹ In 1797, the Supreme Court of Appeals of Virginia recognized the rule that statutes were to be interpreted as closely as possible to “the reason of the common law.”⁵³² In 1804, the Superior Courts of Law and Equity of North Carolina similarly cited Coke’s rule of interpreting statutes “as near to the rule and reason of the common law as may be.”⁵³³ It limited how far afield legislatures could go.⁵³⁴ The reason of the common law permeated judicial opinions over the first decades of the country’s existence.⁵³⁵

⁵²⁷ John Bouvier, 2 *A Law Dictionary, Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union* 325 (T. & J.W. Johnson 1839) (emphasis omitted).

⁵²⁸ *The Law of Arrests* at 174 (cited in note 215).

⁵²⁹ Johnson, *A Dictionary of the English Language* at “unreasonable” (cited in note 247).

⁵³⁰ See, for example, Giles Jacob and T.E. Tomlins, 6 *The Law-Dictionary* 118–27 (P. Byrne 1811) (focusing on constructing statutes consistent with the “reason of the common law”).

⁵³¹ *Harrison v Sterett*, 4 H & McH 540, 545 (Md Prov 1774).

⁵³² *Chichester v Vass*, 5 Va (1 Call) 83, 102 (1797).

⁵³³ *Pender v Jones*, 3 NC (2 Hayw) 294, 295 (Super L & Eq 1804).

⁵³⁴ See, for example, *Weatherhead v Lessee of Bledsoes’ Heirs*, 2 Tenn (2 Overt) 352, 354 (1815) (insisting that the reason of the common law trumped alternative readings of a statute passed by the legislature); *Given v Blann*, 3 Blackford 64, 65–66 (Ind 1832) (responding to the argument before the court that the statute in question had “taken away the reason of the common law, and therefore” made the law void not by disputing the general rule, but by suggesting that in this case “the reason of the common law” had not been impaired).

⁵³⁵ See, for example, *Wallace v Taliaferro*, 6 Va (2 Call) 447, 467 (1800) (arguing “that the best construction of a statute, in a doubtful case, is to construe it, as near to the rule and reason of the common law as may be”); *State v Cheatwood*, 20 SCL (2 Hill) 459, 462

The eighteenth-century meaning of “unreasonable” thus carried a different meaning than that which currently marks our modern, relativistic understanding of the word.⁵³⁶ We now see “unreasonable” as suggesting that the behavior in question is inappropriate under the circumstances, while “reasonable” tends to be understood as appropriate. In the *Oxford English Dictionary*, for instance, “reasonable” means “[n]ot going beyond the limit assigned by reason; not extravagant or excessive; moderate.”⁵³⁷ “Unreasonable,” in turn, suggests something beyond the appropriate limits, or “excessive in amount or degree.”⁵³⁸

The eighteenth-century construction is a much more formalistic framing. According to Samuel Johnson’s *A Dictionary of the English Language*, “reasonable” was understood at the time as “agreeable to reason,”⁵³⁹ a formulation that reflected the meaning *consistent with the reason of the common law*. It carried a sense

(SC App L & Eq 1834) (quoting Hawkins for the proposition that “in doubtful cases, the reason of the common law ought to govern the construction of a statute”); *Hillhouse v Chester*, 3 Day 166, 178 (Conn 1808) (quoting Coke as writing that “[t]he best construction of a statute is to construe it as near the rule and reason of the common law as may be”); *Middletown Bank v Magill*, 5 Conn 28, 31 (1823) (“When a statute directs any thing to be done *generally*, and does not appoint any special manner, it shall be done according to the course of the common law. Acts of parliament, in what they are silent, are best expounded according to the use and reason of the common law.”) (quotation marks omitted); *Cochran’s Executors v Davis*, 15 Ky (5 Litt) 118, 125 (1824) (quoting Coke as saying that “it is a good exposition of a statute, when the reason of the common law is pursued”); *Guion’s Lessee v Bradley Academy*, 12 Tenn (4 Yer) 232, 239 (1833) (“The best construction of a statute is to construe it as near to the rule and reason of the common law as may be.”); *Smith v Mitchell*, 24 SCL (Rice) 316, 320 (SC App 1839) (“We must [] construe the literal enactments of our limitation act, so as to preserve the principles and reasons of the common law, as far as they are left unaltered by the act.”); *Taul v Campbell*, 15 Tenn (7 Yer) 319, 328 (1835) (stating that the best construction of a statute is to read it consistent with the reason of the common law); *McKinney v Reader*, 7 Watts 123, 124 (Pa 1838) (“[I]t is wholesome, in the exposition of a statute, to approach, as near as may be, to the reason of the common law. . . . The fathers of the law insisted on this with peculiar emphasis.”); *Grand Gulf Bank v Barnes*, 10 Miss (2 Smedes & M) 165, 170 (1844) (“[T]he best construction of a statute is to construe it as near to the rule and reason of the common law as may be.”) (citation omitted); *Leavenworth v Marshall*, 19 Conn 1, 4 (1848) (“[T]he best interpretation of a statute, is, to construe it as near to the rule and reason of the common law as may be.”).

⁵³⁶ See Donohue, *The Future of Foreign Intelligence* at 87 (cited in note 54).

⁵³⁷ J.A. Simpson and E.S.C. Weiner, eds, 13 *Oxford English Dictionary* 291 (Clarendon 2d ed 1989).

⁵³⁸ J.A. Simpson and E.S.C. Weiner, eds, 19 *Oxford English Dictionary* 160 (Clarendon 2d ed 1989). See also Donohue, *The Future of Foreign Intelligence* at 87 (cited in note 54).

⁵³⁹ Johnson, *A Dictionary of the English Language* at “reasonable” (cited in note 247). All of the entries under “reasonable” in the 1768 and 1792 editions are identical to those in the 1765 edition. Compare id with Samuel Johnson, *A Dictionary of the English Language* at “reasonable” (printed for J.F. & C. Rivington, et al, 10th ed 1792).

of being logical and consistent, while “unreasonable” meant “illogical,” or “inconsistent with the common law”—making the action illegal.⁵⁴⁰ In juxtaposition, Johnson’s *Dictionary* defined “unreasonable” to mean “exorbitant,” or “claiming, or insisting on more than is fit.”⁵⁴¹ It understood “exorbitant,” in turn, to mean “[d]eviating from the . . . rule established.”⁵⁴² “Unreasonable” thus carried a quality that meant actually *going outside the boundaries of a settled rule*—in this case, the common-law tenet making general warrants void.⁵⁴³ It was not a matter of degree. It was a matter of whether it met the standards or not.

The state constitution went on to describe what would fall outside acceptable bounds:

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

⁵⁴⁰ Davies, 98 Mich L Rev at 687 (cited in note 20) (observing that “‘reasonable’ usually connoted logic or consistency, and ‘unreasonable’ connoted illogic or inconsistency”). Davies goes on to cite different passages from Johnson’s *Dictionary* in support of his argument. Id at 687 n 391.

⁵⁴¹ Johnson, *A Dictionary of the English Language* at “unreasonable” (cited in note 247). This entry differs in subtle but inconsequential ways from the 1765 and 1792 versions. See Samuel Johnson, *A Dictionary of the English Language* at “unreasonable” (Strahan 3d ed 1765) (“exorbitant; claiming, or insisting upon more than is fit”); Johnson, *A Dictionary of the English Language* at “unreasonable” (cited in note 539).

⁵⁴² Johnson, *A Dictionary of the English Language* at “exorbitant” (cited in note 247). The language is repeated verbatim in the definition from the 1792 dictionary. See Johnson, *A Dictionary of the English Language* at “exorbitant” (cited in note 539). The definition provided in 1765 varies a bit more, as it included an additional clause, saying “[g]oing out of the prescribed tract.” Johnson, *A Dictionary of the English Language* at “exorbitant” (cited in note 541). By eliminating “[g]oing out of the prescribed tract” in the later definitions, there is a slight retreat from the potential of a more rigid understanding, although the word “deviate” still encompasses such transgression.

⁵⁴³ Davies, 98 Mich L Rev at 686–87 nn 390–91 (cited in note 20). There is a second reading of “unreasonable” from the eighteenth century that underscores this meaning. It was also used to suggest an excessive quantity, such as an unreasonable amount of time or unreasonable distress. Id at 686 n 390. It was thus an issue of degree. See, for example, *Leach*, 19 How St Tr at 1026 (describing one issue in the case as being “whether the defendants detained the plaintiff an unreasonable time”). Johnson’s *A Dictionary of the English Language* offered one further definition of unreasonable that captured this quality: “[g]reater than is fit; immoderate.” Davies, 98 Mich L Rev at 687 n 391 (cited in note 20), citing Johnson, *A Dictionary of the English Language* at “unreasonable” (cited in note 247). In the meaning of the times, therefore, Adams’s use of “unreasonable” suggested a quality of being against reason and therefore violative of the basic principles of the law (precisely the manner in which general warrants had been described), as well as excessive, a meaning that was consistent with the contemporary manner in which general warrants were viewed. Davies, 98 Mich L Rev at 686–93 (cited in note 20).

suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure.⁵⁴⁴

Warrants lacking the appropriate specificity fell outside common-law limits. By placing the rule into the written constitution, Adams secured the right against not just warrantless search and seizure, but execution of the same with a warrant lacking the requisite particularity.

In the context of the times, warrantless entry, and entry under general warrants, defined unreasonable search and seizure. The right to be protected within one's home included the right not to be subject to promiscuous search and seizure. The government thus could not, at will, search an individual's "person, his houses, his papers, and all his possessions."⁵⁴⁵ Further criteria were required for a specific warrant to be valid.

By using "therefore," Adams thus tied the requirements of a specific warrant to the general protection against government interference.⁵⁴⁶ The clause continued, "[A]nd no warrant ought to be issued but in cases, and with the formalities, prescribed by the laws."⁵⁴⁷ The supplemental language cemented process into a constitutional requirement. Not only would a warrant with appropriate specificity be required for entry, but it had to be issued consistent with the rule of law.

Massachusetts, prior to the Founding, had come the furthest with regard to instituting specific warrants in place of general warrants, paving the way for the subsequent language that Madison adopted in the Fourth Amendment.⁵⁴⁸ It also went the furthest in spelling out the criteria that would have to be met for the government to conduct lawful search and seizure.

3. The warrant requirement.

Yet more states took steps to restrict government powers of search and seizure. The parallel clause in the New Hampshire Constitution of 1783 replicated the one adopted by Massachusetts

⁵⁴⁴ Mass Const Pt 1, Art XIV. See also Davies, 98 Mich L Rev at 684 (cited in note 20); Cuddihy, *The Fourth Amendment* at 605–06 (cited in note 37); Donohue, *The Future of Foreign Intelligence* at 87 (cited in note 54).

⁵⁴⁵ Mass Const Pt 1, Art XIV.

⁵⁴⁶ See Donohue, *The Future of Foreign Intelligence* at 87 (cited in note 54).

⁵⁴⁷ Mass Const Pt 1, Art XIV. See also Donohue, *The Future of Foreign Intelligence* at 87–88 (cited in note 54).

⁵⁴⁸ Cuddihy, *The Fourth Amendment* at 527–30, 550–52, 561–69 (cited in note 37).

nearly word for word.⁵⁴⁹ Vermont's approach mirrored that adopted by Pennsylvania, in which the first chapter of its constitution entrenched certain rights.⁵⁵⁰ As in the Massachusetts and New Hampshire constitutions, the relevant clause began with a statement: "[T]he people have a right to hold themselves, their houses, papers and possessions free from search or seizure."⁵⁵¹ The sanctity of the home lay at the heart of the protection. In order to be secure, the government's access to one's house, papers, and possessions must be constrained. Echoing Adams's structure in the Massachusetts document, the Vermont Constitution followed with the word "therefore" before detailing the conditions required prior to issuance of a warrant: it had to be specific and limited, supported by oath or affirmation, and backed by sufficient evidence of criminal activity. Other states followed suit.

Far from supporting Professor Amar's 1994 thesis that the walls of one's home *could* be entered without a warrant—wherein the Fourth Amendment requires only that, when a warrant *does* issue, it must be specific—the right established by the Vermont Constitution, as well as by the other state constitutions, was that the home could not be entered at all, outside of what is now understood as exigent circumstances, without a warrant meeting the specifics listed. The question was not, then, one of more or less

⁵⁴⁹ NH Const of 1783, Bill of Rights Art XIX:

Every subject hath 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.

See also Davies, 98 Mich L Rev at 684 (cited in note 20); Donohue, *The Future of Foreign Intelligence* at 88 (cited in note 54).

⁵⁵⁰ Compare Vt Const of 1777, Decl of Rights Art XI (superseded 1793), with Pa Const of 1776, Decl of Rights § 10 (superseded 1790).

⁵⁵¹ Vt Const of 1777, Decl of Rights Art XI (superseded 1793):

That the people have a right to hold themselves, their houses, papers and possessions free from search or seizure; and therefore warrants without oath or affirmation first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his, her or their property, not particularly described, are contrary to that right, and ought not to be granted.

See also Donohue, *The Future of Foreign Intelligence* at 88 (cited in note 54).

reasonableness, as Amar asks,⁵⁵² but what the law allowed. By 1787, Delaware, Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, Vermont, and Virginia all explicitly prohibited general warrants.⁵⁵³

The state declarations and constitutions played a critical role in the early Republic.⁵⁵⁴ They made it clear that the use of general warrants, in particular, ran contrary to the reason of the common law. They simultaneously turned the generalized grievance about the amassing of too much power by the Crown into a written guarantee against promiscuous search and seizure.⁵⁵⁵ They elevated the status of general warrants as contrary to common law to a constitutional tenet, ensuring that any subsequent adaptation of the common law to the American context would refrain from infringing the right. They also reflected the Founding generation's concern about individual security, as a concomitant of limited government power. If the state governments were to be allowed to conduct search or seizure, it could be only under severely constrained conditions.

With this history in mind, Amar's textual critique of the early state constitutions falls short. "If a warrant requirement was intended but not spelled out," he suggests, "if it simply went without saying—we might expect to find at least some early state constitutions making clear what the federal Fourth Amendment left to inference. Yet although many states featured language akin to the Fourth Amendment, none had a textual warrant requirement."⁵⁵⁶ What Amar fails to recognize is that each of the state provisions was itself part of a broader context that forbade search without a warrant. Each provision prohibited warrantless entry, as well as general warrants, and laid out further elements that would have to be met for a specific warrant to issue.

⁵⁵² See, for example, Amar, 107 Harv L Rev at 780 (cited in note 13) ("But who should decide what is unreasonable, or for that matter, whether probable cause is truly met? In the first instance, of course, the issuing magistrate. But what if the citizen target disagrees, and tries to (re)litigate the matter by bringing it before a jury?"); id at 784–85 ("Is it not easier to read the words as written, and say that warrantless searches must simply be 'reasonable'? For unlike the seemingly fixed and high standard of 'probable cause,' reasonableness obviously does require different levels of cause in different contexts, and not always a high probability of success.")

⁵⁵³ See Cuddihy, *The Fourth Amendment* at 608–09 (cited in note 37).

⁵⁵⁴ See Emily Zackin, *Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights* 197 (Princeton 2013) (arguing that the state constitutions served as the original repositories for the protection of individual rights).

⁵⁵⁵ See Donohue, *The Future of Foreign Intelligence* at 88 (cited in note 54).

⁵⁵⁶ Amar, 107 Harv L Rev at 763 (cited in note 13).

Amar cites four early state cases in support of his assertion,⁵⁵⁷ each of which fails inspection. He characterizes the first case as “upholding a warrantless seizure of liquors,”⁵⁵⁸ without noting that it dealt with the arrest of an individual in the midst of committing a felony—in this case, transporting liquor by horse and wagon.⁵⁵⁹ Such seizure had long been recognized as an exception to the warrant requirement.

Amar considers another case, *Mayo v Wilson*,⁵⁶⁰ to stand for the proposition that New Hampshire’s equivalent Fourth Amendment clauses merely “guard against abuse of warrants issued by Magistrates,” without limiting arrest without a warrant.⁵⁶¹ But that case similarly centered on the arrest of an individual in the midst of publicly breaking the law. The court itself recognized the exception as applying narrowly to situations in which (a) “a man is present when another commits treason, felony or notorious breach of the peace”; (b) a breach of the peace has occurred, such that “any present may during the continuance of the affray . . . restrain any of the offenders, but if the affray be over there must be an express warrant”; or (c) “one man dangerously wound[ed] another, [such that] any person may arrest him, that he be safely kept, till it be known whether the person shall die or not.”⁵⁶² Arrest absent a warrant could also be made under strong suspicion of illegal activities or, for a watchman, when a nightwalker may be present at “unreasonable hours” by the common law.⁵⁶³ In other words, if done in the course of illegal activity, then arrest without a warrant might be valid—although, for private citizens, as for public officers, an action in trespass could still be brought, so as to limit even these situations.

The final two cases cited by Amar explicitly refer to the Fourth Amendment’s prohibition on general warrants—rather cutting against Amar’s thesis that a warrant is not required. In *Wakely v Hart*,⁵⁶⁴ the court wrote, “[I]f known to have committed

⁵⁵⁷ Id at 763 n 11.

⁵⁵⁸ Id.

⁵⁵⁹ *Jones v Root*, 72 Mass (6 Gray) 435, 436 (1856) (“[W]hen [the officer] stopped the wagon, there were several barrels of intoxicating liquor in it, which Harvey Jones was illegally engaged in transporting from Thompsonville, Connecticut, to Holyoke.”).

⁵⁶⁰ 1 NH 53 (1817).

⁵⁶¹ Amar, 107 Harv L Rev at 763 n 11 (cited in note 13), quoting *Mayo*, 1 NH at 60.

⁵⁶² *Mayo*, 1 NH at 56.

⁵⁶³ Id.

⁵⁶⁴ 6 Binn 314 (Pa 1814).

a felony, and pursued with or without warrant, he may be arrested by any person. . . . These are principles of the common law, essential to the welfare of society, and not intended to be altered or impaired by the [C]onstitution.”⁵⁶⁵ Similarly, in *Rohan v Sawin*,⁵⁶⁶ the Massachusetts state court noted that “[t]he probability of an escape . . . if the party is not forthwith arrested” proved central to the determination of whether an arrest without a warrant would be considered valid.⁵⁶⁷ “The question of reasonable necessity for an immediate arrest, in order to prevent the escape of the party charged with the felony, is one that the officer must act upon.”⁵⁶⁸ The court noted the prohibition of promiscuous search and seizure in the Fourth Amendment:

It has been sometimes contended, that an arrest of this character, without a warrant, was a violation of the great fundamental principles of our national and state constitutions, forbidding unreasonable searches and arrests, except by warrant founded upon a complaint made under oath. Those provisions doubtless had another and different purpose, being in restraint of general warrants to make searches, and requiring warrants to issue solely upon a complaint made under oath. They do not conflict with the authority of constables or other peace-officers, or private persons under proper limitations, to arrest without warrant those who have committed felonies. The public safety [requires it].⁵⁶⁹

While arrest in the course of illegal activity might be valid without a warrant, a search of one’s domicile, absent the same, failed constitutional muster.

III. CONSTITUTIONAL DIALOGUE

The Articles of Confederation, a triumph for those who feared the tyranny of George III, proved inadequate to sustain the country’s economic needs. The national government had no power to protect trade among the new states. Without a uniform system of currency, saddled by debt, and lacking the ability to raise revenue, the government could neither pay its accounts nor counteract inflation. Violence and civil unrest threatened. The country

⁵⁶⁵ *Id.* at 318.

⁵⁶⁶ 59 Mass (5 Cush) 281 (1850).

⁵⁶⁷ *Id.* at 286.

⁵⁶⁸ *Id.*

⁵⁶⁹ *Id.* at 284–85.

had no national independent judiciary, no head of government to handle foreign affairs, and no locus for addressing internal and external conflict. Further beset by legislative inefficiencies that stemmed from the ability of five states to block any law, as well as from a cumbersome amendment process (requiring unanimity), Congress floundered.⁵⁷⁰ In 1787, state delegates gathered in Philadelphia to reevaluate the structure.

The first aim of the Framers was to augment the power of the national government.⁵⁷¹ But more power meant an increased risk that the authority would be abused. It also raised the question whether the rights previously secured by the state constitutions for the people would be sufficient to guard against overreach by the national government.⁵⁷² The Framers designed the framework to protect rights by adopting a principle of enumerated powers, creating a delicate balance between the different functions of the government, incorporating federalism, carefully delineating broad representation, and ensuring a republican form of government. But concern percolated as to whether the structural protections would be sufficient to restrain a stronger national government.⁵⁷³

Mason, who had written the Virginia Declaration of Rights, raised his concern five days before the convention adjourned that they had failed to address individual rights.⁵⁷⁴ Almost all of the state constitutions had incorporated rights—generally as the first clause or article in the text. Mason lamented that the Constitution had not “been prefaced with a Bill of Rights.”⁵⁷⁵ He volunteered to second a motion to insert a statement of rights at the beginning, on the grounds that “[i]t would give great quiet to the people.”⁵⁷⁶ He did not think that it would take more than a few hours to draft. Elbridge Gerry agreed and promptly moved for a

⁵⁷⁰ For prominent histories of the Articles of Confederation and the problems that the country faced, see generally Robert W. Hoffert, *A Politics of Tensions: The Articles of Confederation and American Political Ideas* (Colorado 1992); Merrill Jensen, *The New Nation: A History of the United States during the Confederation, 1781–1789* (Knopf 1950); Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (UNC 1969).

⁵⁷¹ See Donohue, *The Future of Foreign Intelligence* at 88–89 (cited in note 54).

⁵⁷² *Id.* at 89.

⁵⁷³ See Francis Newton Thorpe, 2 *The Constitutional History of the United States 1765–1895* 8 (Da Capo 1970).

⁵⁷⁴ See Donohue, *The Future of Foreign Intelligence* at 89 (cited in note 54).

⁵⁷⁵ Max Farrand, ed, 2 *The Records of the Federal Convention of 1787* 587 (Yale 1911).

⁵⁷⁶ *Id.* On August 31, 1787, Mason had told the convention that he would “sooner chop off his right hand than put it to the Constitution as it now stands.” *Id.* at 479. He scribbled a list of “objections” on the back of a report prepared by the Committee of Style, which included the absence of a bill of rights. Pauline Maier, *Ratification: The People Debate the Constitution, 1787–1788* 43–46 (Simon & Schuster 2010).

committee to prepare the document.⁵⁷⁷ Mason seconded the motion.⁵⁷⁸ But Roger Sherman objected, noting that the state declarations of rights were not repealed by the Constitution. Untouched, they would prove sufficient for the protection.⁵⁷⁹ Mason's response to Sherman, that the Supremacy Clause rendered the state documents impotent, failed to sway the delegates. Ten states voted no, with one (Gerry's home state of Massachusetts) abstaining.⁵⁸⁰

Gerry and Mason remained steadfast in their concern. Gerry later explained to the Massachusetts state legislature, "My principal objections to the [Constitution include] . . . that the system is without the security of a bill of rights."⁵⁸¹ Mason similarly complained to his home state, "There is no declaration of rights; and, the laws of the general government being paramount to the laws and constitutions of the several states, the declarations of rights in the separate states are no security."⁵⁸²

The decision not to include a bill of rights contributed to growing unease about the new powers afforded the federal government. In September 1787, Lee, from Virginia, and Melancton Smith, from New York, attempted to induce Congress to attach a bill of rights to the Constitution prior its circulation to the states.⁵⁸³ Lee explained that "[u]niversal experience" had shown

⁵⁷⁷ Farrand, ed, 2 *The Records of the Federal Convention of 1787* at 588 (cited in note 575). See also Donohue, *The Future of Foreign Intelligence* at 89 (cited in note 54).

⁵⁷⁸ Farrand, ed, 2 *The Records of the Federal Convention of 1787* at 588 (cited in note 575).

⁵⁷⁹ *Id.*

⁵⁸⁰ *Id.*

⁵⁸¹ Letter from Elbridge Gerry to Samuel Adams, President of the Senate of Massachusetts, and James Warren, Speaker of the House of Representatives of Massachusetts (Oct 18, 1787), in James T. Austen, 2 *The Life of Elbridge Gerry* 42, 42–43 (Wells & Lilly 1829).

⁵⁸² Jonathan Elliot, ed, 1 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 494 (printed for Elliot 2d ed 1836) (reproducing the objections of Mason). Asking why a motion for a bill of rights appeared so late in the day, Professor Jack Rakove offers an important historical insight. See Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 317 & n 77 (Vintage 1996). Seven weeks prior to the discussion, the Committee of Detail had considered whether a preamble would be necessary "for the purpose of designating the ends of government and human polities." Farrand, ed, 2 *The Records of the Federal Convention of 1787* at 137 (cited in note 575). The Committee answered in the negative, as the Constitution was not meant to work upon the natural rights of men not yet in political union, "but upon those rights, modified by society, and [] interwoven with what we call [] the rights of states." *Id.* (emphasis omitted). The document is in Mason's papers at the Library of Congress. Rakove explains, "If these documents were regarded less as compilations of legally enforceable civil rights than as general reservations of natural rights," then it made no sense to rewrite the 1776 Declaration of Independence. Rakove, *Original Meanings* at 317 (cited in note 582).

⁵⁸³ See Donohue, *The Future of Foreign Intelligence* at 89 (cited in note 54).

the need to insert “the most express declarations and reservations . . . to protect the just rights and liberty of Mankind from the Silent, powerful, and ever active conspiracy of those who govern.”⁵⁸⁴ Resultantly, the Constitution ought to “be bottomed upon a declaration, or Bill of Rights, clearly and precisely stating the principles upon which the Social Compact is founded.”⁵⁸⁵ Lee included in this concern the right to be secure against “unreasonable searches [and] seizures” of one’s “papers, houses, persons, or property.”⁵⁸⁶

In the end, Congress did not agree to Lee’s proposal. Instead, by unanimous vote, it forwarded the new Constitution to the states for ratification.⁵⁸⁷

A. Ratification and Reservation

Scholars have written extensively and well on the state conventions and public debates that accompanied ratification of the US Constitution.⁵⁸⁸ For now, it is sufficient to note that foremost among a number of states’ concerns was the importance of amending the document to include a bill of rights. The question was whether one would be required prior to ratification, possibly as the result of a second constitutional convention or in the context of the state deliberations, in the course of which the Constitution might be further amended, or whether it could be addressed after ratification. Whether one reads the machinations as a political calculation, a battle over the role of popular sovereignty, or a fundamental commitment to rights, the issue assumed center stage,

⁵⁸⁴ Maier, *Ratification* at 56 (cited in note 576). See also Donohue, *The Future of Foreign Intelligence* at 89 (cited in note 54).

⁵⁸⁵ Maier, *Ratification* at 56 (cited in note 576). See also Donohue, *The Future of Foreign Intelligence* at 89 (cited in note 54).

⁵⁸⁶ John P. Kaminski, et al, eds, *Richard Henry Lee’s Proposed Amendments, 27 September 1787* (Virginia, 2009), archived at <http://perma.cc/D4UB-9AJE>. See also Donohue, *The Future of Foreign Intelligence* at 89 (cited in note 54).

⁵⁸⁷ Roscoe R. Hill, ed, 33 *Journals of the Continental Congress 1786–1787* 548–49 (GPO 1936) (entry of Sept 28, 1787). See also Donohue, *The Future of Foreign Intelligence* at 89 (cited in note 54).

⁵⁸⁸ See generally, for example, Rakove, *Original Meanings* (cited in note 582); Maier, *Ratification* (cited in note 576); John P. Kaminski, et al, eds, *The Documentary History of the Ratification of the Constitution* (Wisconsin Historical Society); Philip P. Kurland and Ralph Lerner, *The Founders’ Constitution* (Chicago 1989); Jürgen Heideking, *The Constitution before the Judgment Seat: The Prehistory and Ratification of the American Constitution, 1787–1791* (Virginia 2012) (John P. Kaminski and Richard Leffler, eds). *The Documentary History of the Ratification of the Constitution*, published since 1976 by the Wisconsin Historical Society, is a terrific resource. A digital edition, hosted by the University of Virginia, is archived at <http://perma.cc/P699-ZZ5E>.

particularly in the battleground states.⁵⁸⁹ Concerns about general warrants, and about ensuring that specific warrants contained sufficient particularity, figured largely in the conversation, which centered on ensuring that the rights of the people would be secure against government overreach.⁵⁹⁰

Virginia, again, led the way. The depth and breadth of the debate that followed was perhaps unsurprising: Virginia was the first part of the country that had been permanently settled (Jamestown, in 1607),⁵⁹¹ the state with the oldest lawmaking body (the House of Burgesses),⁵⁹² and the first entity to issue a declaration of rights.

The outcome of the debate mattered. Virginia was enormously important and influential, owing in part to its size. As of 1780, the United States had approximately 2.8 million people. More than half a million people lived in Virginia—whose population nearly totaled those of the next two most populous states combined.⁵⁹³ Virginia played a prominent role in the American Revolution and, thereafter, on the national stage. Four of the first five presidents (Washington, Jefferson, Madison, and James Monroe) were Virginians. Although Virginia had sent seven delegates to the Constitutional Convention, four—Mason, James McClurg, Edmund J. Randolph, and Wythe, all prominent figures—had not signed it.⁵⁹⁴ The battle lines were drawn, and the drama played out at the state convention.

⁵⁸⁹ The seven most important states in this regard were Massachusetts, New Hampshire, New York, North Carolina, Pennsylvania, Rhode Island, and Virginia. See Rakove, *Original Meanings* at 116–28 (cited in note 582).

⁵⁹⁰ Anti-Federalists immediately focused in on the absence of protection against general warrants as one of the most significant gaps in the new Constitution. For scathing satires, see One of the Nobility, *Political Creed of Every Federalist*, *New-York Journal* 2 (Dec 12, 1787) (“I believe that it is totally unnecessary to secure the rights of mankind in the formation of a constitution.”); *The Independent Gazetteer* *2 (Oct 6, 1787) (including “[g]eneral search warrants” as “[a]mong the blessings of the new-proposed government”).

⁵⁹¹ Brendan Wolfe, *Early Jamestown Settlement* (Virginia Foundation for the Humanities, May 30, 2014), archived at <http://perma.cc/X7T4-HSRR>.

⁵⁹² Matthew S. Gottlieb, *House of Burgesses* (Virginia Foundation for the Humanities, Mar 24, 2016), archived at <http://perma.cc/MC66-SZ2K>.

⁵⁹³ Pennsylvania had a population of approximately 327,000, and North Carolina had a population of approximately 270,000. Bureau of the Census, *Historical Statistics of the United States: Colonial Times to 1970* 1168 (Bureau of the Census 1975).

⁵⁹⁴ Virginia had the second-highest number of representatives at the convention; the only state to send more delegates than Virginia was Pennsylvania, with eight delegates. See generally Letter from Edmund Randolph to Joseph Prentis, Speaker of the Virginia House of Delegates (Oct 16, 1787), in Paul Leicester Ford, ed., *Pamphlets on the Constitution of the United States, Published during Its Discussion by the People 1787–1788* 261 (1888) (discussing the prominence of the Virginia delegation). John Blair, James Madison

Virginia's charismatic former governor, Patrick Henry, let loose—and what a tour de force it was. Even Jefferson, who deplored Henry's legal acumen and held a long-lasting grudge against the man, acknowledged that he was “the greatest orator that ever lived.”⁵⁹⁵ Henry began, “[O]ur rights and privileges are endangered, and the sovereignty of the states will be relinquished. . . . [A]ll your immunities and franchises, all pretensions to human rights and privileges, are rendered insecure, if not lost” by the new Constitution.⁵⁹⁶ Such “tame relinquishment of rights” was not “worthy of freemen.”⁵⁹⁷ Henry asked:

When these harpies are aided by excisemen, who may search, at any time, your houses, and most secret recesses, will the people hear it? If you think so, you differ from me. Where I thought there was a possibility of such mischiefs, I would grant power with a niggardly hand.⁵⁹⁸

What was needed was a bill of rights to secure the people against the federal government.⁵⁹⁹

Henry pointed out that Virginia had not been content with a structure that divided power among the legislative, executive, and judicial branches. Nor had Virginia relied on direct representation. To the contrary, the state had introduced a declaration of rights as an added protection. What was good for the goose was good for the gander. Henry continued:

If you give up [state power], without a bill of rights, you will exhibit the most absurd thing to mankind that ever the world saw—a government that has abandoned all its powers . . . without check, limitation, or control. . . . You have a bill of rights to defend you against the state government, which is

Jr. and Washington were the Virginians who signed the document. McClurg and Wythe left the convention early. Mason and Randolph refused to sign the final document. *Id.* at 271.

⁵⁹⁵ Maier, *Ratification* at 230 n 47 (cited in note 576), citing Stan V. Henkels, *Jefferson's Recollections of Patrick Henry*, 34 *Pa Magazine Hist & Biography* 385, 387 (1910) (reproducing a letter from Jefferson to William Wirt that was written at Monticello on August 4, 1805).

⁵⁹⁶ Jonathan Elliot, ed, 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 44 (printed for Elliot 2d ed 1836). See also Donohue, *The Future of Foreign Intelligence* at 89 (cited in note 54).

⁵⁹⁷ Elliot, ed, 3 *The Debates in the Several State Conventions* at 44 (cited in note 596).

⁵⁹⁸ *Id.* at 58. See also Donohue, *The Future of Foreign Intelligence* at 89 (cited in note 54).

⁵⁹⁹ Elliot, ed, 3 *The Debates in the Several State Conventions* at 445 (cited in note 596) (“Mr. Chairman, the necessity of a bill of rights appears to me to be greater in this government than ever it was in any government before.”).

bereaved of all power, and yet you have none against Congress, though in full and exclusive possession of all power!⁶⁰⁰

Why, indeed, had the Convention not included a bill of rights? “Is it because it will consume too much paper?” Henry asked, tongue in cheek.⁶⁰¹ Under the Virginia Constitution, the government was “restrained from issuing general warrants to search suspected places, or seize persons not named, without evidence of the commission of a fact, &c.”⁶⁰² But under the federal Constitution being contemplated,

[t]he officers of congress may come upon you now, fortified with all the terrors of paramount federal authority. Excisemen may come in multitudes; for the limitation of their numbers no man knows. They may, unless the general government be restrained by a bill of rights, or some similar restriction, go into your cellars and rooms, and search, ransack, and measure, every thing you eat, drink, and wear. They ought to be restrained within proper bounds.⁶⁰³

General warrants, for Henry, earned a special place of shame. He stated:

I feel myself distressed because the necessity of securing our *personal rights* seems not to have pervaded the minds of men; for many other valuable things are omitted:—for instance, general warrants, by which an officer may search suspected places, without evidence of the commission of a fact, or seize any person without evidence of his crime, ought to be prohibited.⁶⁰⁴

The problem was that citizens’ property could be seized “in the most arbitrary manner, without any evidence or reason.”⁶⁰⁵ Everything sacred could “be searched and ransacked by the strong hand of power.”⁶⁰⁶

⁶⁰⁰ Id at 446.

⁶⁰¹ Id at 448.

⁶⁰² Id.

⁶⁰³ Elliot, ed, 3 *The Debates in the Several State Conventions* at 448–49 (cited in note 596). See also Donohue, *The Future of Foreign Intelligence* at 90 (cited in note 54).

⁶⁰⁴ Elliot, ed, 3 *The Debates in the Several State Conventions* at 588 (cited in note 596).

⁶⁰⁵ Id.

⁶⁰⁶ Id.

Others in Virginia shared Henry's concerns.⁶⁰⁷ Accordingly, the state convention appointed the Wythe Committee.⁶⁰⁸ It proposed adoption of a new bill of rights—essentially, a revised list of the entitlements detailed in the Virginia Declaration of Rights. Unanimously approved, the draft bill of rights was forwarded, along with the ratification of the US Constitution, to the federal legislature.⁶⁰⁹ The ratification document recommended that “there be a declaration or bill of rights asserting, and securing from encroachment, the essential and unalienable rights of the people.”⁶¹⁰

In the proposed text, Virginia established a right against unreasonable search and seizure. To ensure this right, the document prohibited not just general warrants, but specific warrants lacking the requisite particularity. Proposed Article XIV read:

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 on oath (or affirmation of a person religiously scrupulous of taking an oath) of legal and sufficient cause, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend any suspected person, without specially naming or describing the place or person, are dangerous, and ought not to be granted.⁶¹¹

Without the guarantee of a bill of rights, it is highly questionable whether the Virginia delegates would have ratified the US Constitution.⁶¹² The state convention resolved to enjoin Virginia's representatives in Congress “to exert all their influence, and use all reasonable and legal methods, to obtain a ratification of” the clause.⁶¹³ Even once the draft bill of rights had been passed and attached to the ratification document, the vote was narrow: delegates approved it 89–79, providing those in support of the new Constitution only a five-vote margin.⁶¹⁴

⁶⁰⁷ Donohue, *The Future of Foreign Intelligence* at 90 (cited in note 54).

⁶⁰⁸ *Id.*

⁶⁰⁹ Elliot, ed, 3 *The Debates in the Several State Conventions* at 662–63 (cited in note 596).

⁶¹⁰ *Id.* at 657.

⁶¹¹ *Id.* at 658 (emphasis added).

⁶¹² See Donohue, *The Future of Foreign Intelligence* at 90 (cited in note 54).

⁶¹³ Elliot, ed, 3 *The Debates in the Several State Conventions* at 661 (cited in note 596).

⁶¹⁴ *Id.* at 654. See also Donohue, *The Future of Foreign Intelligence* at 90 (cited in note 54).

New York passed the Constitution by an even narrower margin: 30–27.⁶¹⁵ Heated public debate over the failure of the Constitution to prohibit general warrants surrounded the convention. Writing in the *New-York Journal* in November 1787, a “Son of Liberty” outlined “a *few* of the *curses* which will be entailed on the people of America, by this preposterous and newfangled system, if they are ever so infatuated as to receive it.”⁶¹⁶ The fourth item in the list read:

Men of all ranks and conditions, subject to have their houses searched by officers, acting under the sanction of *general warrants*, their private papers seized, and themselves dragged to prison, under various pretences, whenever the fear of their lordly masters shall suggest, that they are plotting mischief against their arbitrary conduct.⁶¹⁷

Promiscuous search and seizure gave the government the ability to target political opponents. And by silencing criticism, the instruments freed the government to act badly.

The convention took the critique to heart. As part of their formal ratification—and not just as an accompanying document—New York entered the statement:

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.⁶¹⁸

The language tracked that of the earlier state constitutions. The right against unreasonable search and seizure meant that the government could not enter the home without a warrant meeting the particulars laid out in the text.

⁶¹⁵ Jonathan Elliot, ed, 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 413 (printed for Elliot 2d ed 1836). See also Donohue, *The Future of Foreign Intelligence* at 91 (cited in note 54).

⁶¹⁶ A Son of Liberty, *New-York Journal* *2 (Nov 8, 1787). See also Donohue, *The Future of Foreign Intelligence* at 91 (cited in note 54).

⁶¹⁷ A Son of Liberty, *New-York Journal* at *2 (cited in note 616). See also Donohue, *The Future of Foreign Intelligence* at 91 (cited in note 54).

⁶¹⁸ Elliot, ed, 1 *The Debates in the Several State Conventions* at 328 (cited in note 582) (emphasis added).

Not only did New York incorporate a prohibition on general warrants in its actual ratification document, but the state declared that it was only with the understanding that new language would be added to take account of the right against promiscuous search and seizure, as well as others outlined in the ratification instrument, that it agreed to the new Constitution.⁶¹⁹

Further underscoring its commitment to protecting individual liberty, New York included a clause that, with certain exceptions, required its military to remain within state borders until the matter had been settled.⁶²⁰ The threat was clear.⁶²¹

Virginia and New York were battleground states. Had they not ratified the Constitution, the experiment would have failed.⁶²² Approximately 3.9 million people lived in the country at the time. About one quarter of the population lived in the two states.⁶²³ A lack of their presence would have threatened geographic continuity. Both states evinced serious concerns about the new agreement. For Virginia, the hot button was individual rights. In New York, antifederalism dominated. In both discussions, the lack of protections against promiscuous search and seizure loomed large. The failure of the drafters to include a statement outlawing general warrants and laying out the particulars that would have to be met for the government to have access to citizens' homes was an important issue.

⁶¹⁹ Id at 329. See also Donohue, *The Future of Foreign Intelligence* at 91 (cited in note 54). The document read:

Under [this] impression[], and declaring that the rights aforesaid cannot be abridged or violated, and that the explanations aforesaid are consistent with the said Constitution, and in confidence that the amendments which shall have been proposed to the said Constitution will receive an early and mature consideration, — We, the said delegates, in the name and in the behalf of the people of the state of New York, do, by these presents, assent to and ratify the said Constitution.

Elliot, ed, 1 *The Debates in the Several State Conventions* at 329 (cited in note 582).

⁶²⁰ Elliot, ed, 1 *The Debates in the Several State Conventions* at 329 (cited in note 582) (“In full confidence, nevertheless, that, until a convention shall be called and convened for proposing amendments to the said Constitution, the militia of this state will not be continued in service out of this state for a longer term than six weeks, without the consent of the legislature thereof.”). See also Donohue, *The Future of Foreign Intelligence* at 92 (cited in note 54).

⁶²¹ See Donohue, *The Future of Foreign Intelligence* at 92 (cited in note 54).

⁶²² Id.

⁶²³ According to the 1790 Census, Virginia was the most populous state, with 747,610 people, while New York had 340,120 people. *Return of the Whole Number of Persons within the Several Districts of the United States, according to “An Act Providing for the Enumeration of the Inhabitants of the United States”* 3 (Childs & Swaine 1791).

Other states also insisted on the inclusion of a bill of rights within which general warrants played a role. In declaring the right against unreasonable search and seizure, Rhode Island adopted language in the body of its ratification document that was identical to that used by New York, substituting only the word “person” for “freeman.”⁶²⁴ Like New York, Rhode Island ratified the document on the condition that the Constitution would later be amended to take account of its concerns. Like New York, Rhode Island indicated that it would largely retain its militia within state borders until a federal declaration of rights had been enacted.⁶²⁵ Rhode Island’s ratification vote was the slimmest of any state. It passed 34–32.⁶²⁶

Maryland delegates were required to report the proceedings of the Constitutional Convention to the state legislature. State Attorney General Luther Martin, a graduate of the College of New Jersey (later Princeton) and a delegate to the Constitutional Convention, walked out two weeks before the Philadelphia meeting adjourned. He explained his decision to leave the Constitutional Convention to the Maryland House of Assembly: the new federal government would prove too powerful.⁶²⁷ He objected to the ability of federal officers, through excise, to have access to citizens’ private lives.⁶²⁸

Martin’s concerns were picked up in the public discussion by “A Farmer and Planter,” an Anti-Federalist writing under a pen name, who published his objections in the *Maryland Journal*. “The excise-officers have power to enter your houses at all times, by night or day, and if you refuse them entrance, they can, under pretence of searching for exciseable goods, . . . break open your doors, chests, trunks, desks, boxes, and rummage your houses

⁶²⁴ See 2 *Documentary History of the Constitution of the States of America, 1786–1870* 313–14 (US Department of State 1894).

⁶²⁵ *Id.*

⁶²⁶ See Ronald L. Watts, Darrel R. Reid, and Dwight Herperger, *Parallel Accords: The American Precedent* 46 (Queen’s 1990).

⁶²⁷ See Luther Martin, *The Genuine Information Delivered to the Legislature of the State of Maryland Relative to the Proceedings of the General Convention Lately Held at Philadelphia*, in Herbert J. Storing, ed., 2 *The Complete Anti-Federalist* 19, 78 (Chicago 1981).

⁶²⁸ See *id.* at 27, 54–55. Martin first gave a speech to the Maryland legislature in autumn 1787. He then expanded his remarks, which the *Maryland Gazette* began printing toward the end of the year. The final installment was released in February. In April 1788, Eleazar Oswald printed the entire series as the pamphlet *The Genuine Information, Delivered to the Legislature of Maryland*. See Maier, *Ratification* at 90 (cited in note 576).

from bottom to top.”⁶²⁹ The Anti-Federalist made an impassioned plea, “What do you think of a law to let loose such a set of vile officers among you!”⁶³⁰ He asked:

Do you expect the Congress excise-officers will be any better, if God, in his anger, should think it proper to punish us for our ignorance, and sins of ingratitude to him, after carrying us through the late war, and giving us liberty, and now so tamely to give it up by adopting this aristocratical government?⁶³¹

These arguments did not prevent Maryland from ratifying the Constitution, but they did lead to the state convention considering a series of amendments. Delegates supported the additional clauses. Although the Constitution passed, unamended, by a nearly six-to-one ratio, the convention voted to remand the amendments to Congress for inclusion in the Constitution.⁶³² One of the relevant clauses read:

That all warrants without oath, or affirmation of a person conscientiously scrupulous of taking an oath, to search suspected places, or seize any person or his property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend any person suspected, without naming or describing the place or person in special, are dangerous, and ought not to be granted.⁶³³

The notes of Maryland’s state convention underscored the importance of this provision:

This amendment was considered indispensable by many of the committee; for, Congress having the power of laying excises, (the horror of a free people,) by which our dwelling-houses, those castles considered so sacred by the English law, will be laid open to the insolence and oppression of office, there could be no constitutional check provided that would prove so effectual a safeguard to our citizens.⁶³⁴

⁶²⁹ *Essay by a Farmer and Planter*, in Herbert J. Storing, ed, 5 *The Complete Anti-Federalist* 74, 75 (Chicago 1981).

⁶³⁰ *Id* at 76.

⁶³¹ *Id*.

⁶³² See Elliot, ed, 2 *The Debates in the Several State Conventions* at 549 (cited in note 615) (“Sentiments highly favorable to amendments were expressed, and a general murmur of approbation seemed to arise from all parts of the house, expressive of a desire to consider amendments.”).

⁶³³ *Id* at 551.

⁶³⁴ *Id*.

The convention went on to recognize, “General warrants, too, the great engine by which power may destroy those individuals who resist usurpation, are also hereby forbidden to those magistrates who are to administer the general government.”⁶³⁵ Without amendments to the federal Constitution, the liberty and happiness of the people stood endangered.⁶³⁶

The subject was broached in other state conventions as well. In Massachusetts, Abraham Holmes, from Plymouth County, noted that the framers of the state constitution had taken “particular care to prevent” general warrants from being issued. He could not conceive “why it should be esteemed so much more safe to intrust Congress with the power of enacting laws, which it was deemed so unsafe to intrust our state legislature with.”⁶³⁷ Holmes voted against ratification.

North Carolina delegates similarly raised concerns about the absence of explicit protections for rights in the Constitution, stating that “a declaration of rights, asserting and securing from encroachments the great principles of civil and religious liberty, and the unalienable rights of the people . . . ought to be laid before Congress.”⁶³⁸ The state convention included in its proposed declaration of rights, “That every freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers and property.”⁶³⁹ Like the other states, North Carolina tied protection of this right to outlawing general warrants and adding the particular requirements for specific warrants that would make them valid. The text continued, “[A]ll 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 to be granted.”⁶⁴⁰

One of the liveliest public discussions of general warrants and the failure of the Constitution to prohibit them occurred in Pennsylvania. The Anti-Federalist Samuel Bryan repeatedly made this point, drawing a contrast between the rights secured to the citizens through Pennsylvania’s own constitution and the lack of any protections in the proposed document. In October

⁶³⁵ *Id.* at 551–52.

⁶³⁶ Elliot, ed, 2 *The Debates in the Several State Conventions* at 555 (cited in note 615).

⁶³⁷ *Id.* at 111–12.

⁶³⁸ Elliot, ed, 1 *The Debates in the Several State Conventions* at 331–32 (cited in note 582).

⁶³⁹ Jonathan Elliot, ed, 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 244 (Franklin 2d ed 1888).

⁶⁴⁰ *Id.*

1787, he began his letter to “the Freemen of Pennsylvania,” “Permit one of yourselves to put you in mind of certain *liberties* and *privileges* secured to you by the constitution of this commonwealth, and to beg your serious attention to . . . the plan of the federal government submitted to your consideration.”⁶⁴¹ First among his concerns was the lack of a protection against government interference: “Your present frame of government secures you a right to hold yourselves, houses, papers and possessions free from search and seizure.”⁶⁴² He continued, “[*T*]herefore warrants granted without oaths or affirmations first made, affording sufficient foundation for them, whereby any officer or messenger may be commanded or required to search your houses or seize your persons or property, not particularly described in such warrant, shall not be granted.”⁶⁴³

It was not, as Professor Amar has much more recently argued, that the government could enter, search, and seize at will. It was that the government *could not do so at all* without a sufficiently particularized warrant. Bryan went on to critique the separation and balance of powers, suggesting that the problem with relying on structure alone was that there was “no declaration of personal rights, premised in most free constitutions.”⁶⁴⁴

Not everyone at the Founding wanted to include a bill of rights. Federalists, led by Alexander Hamilton (the only New Yorker to sign the Constitution), Wilson (a Scottish Pennsylvanian who had studied law under Dickinson), and James Iredell (from North Carolina), argued against the explicit inclusion of rights.⁶⁴⁵ These men were no less influenced by English experience.⁶⁴⁶ They simply took a different lesson from it. It was not that powers such as those encapsulated in general warrants ought to be allowed—it was that the structure had been designed to prevent the government from having the authority to issue such instruments in the first place.

⁶⁴¹ Centinel, *Independent Gazetteer* (Oct 5, 1787) (“Centinel I”), in John P. Kaminski, et al, eds, 2 *The Documentary History of the Ratification of the Constitution Digital Edition* *158, 158 (Virginia 2009).

⁶⁴² *Id.*

⁶⁴³ *Id.* (emphasis added).

⁶⁴⁴ *Id.* at *166.

⁶⁴⁵ See Joseph Postell, *Securing Liberty: The Purpose and Importance of the Bill of Rights* (Heritage Foundation, Dec 14, 2007), archived at <http://perma.cc/F4QJ-MS55>.

⁶⁴⁶ Hamilton’s writing in *The Federalist* demonstrates a prior knowledge of Coke and Blackstone, as well as Montesquieu and others. See Moline, 42 *Washburn L J* at 785 (cited in note 418).

In trying to convince his fellow New Yorkers to vote for the Constitution, Hamilton noted in Federalist 84 that the purpose of a bill of rights in English history was to form an agreement between the Crown and its subjects, abridging royal prerogative.⁶⁴⁷ Magna Carta, the Petition of Right crafted by Coke and assented to by Charles I, the Declaration of Right presented in 1688 to William of Orange—all of these had recognized the rights held by individuals as against the King. In America, however, there would be no monarch. Sovereignty resided in the people. It was therefore unnecessary to enact a bill of rights.

Iredell further explained during the North Carolina ratifying convention that unlike England, where no instrument could abridge the authority of Parliament, the United States had a written constitution which would act to constrain the federal government.⁶⁴⁸ “Of what use,” he asked, “can a bill of rights be in [the US] Constitution, where the people expressly declare how much power they do give, and consequently retain all they do not?”⁶⁴⁹ And he went further, suggesting that a bill of rights would be not only unnecessary but also “absurd and dangerous.”⁶⁵⁰

Hamilton agreed. His rationale in Federalist 84 was that a bill of rights “would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted.”⁶⁵¹ The national government was to be one of limited, enumerated authorities. By asserting a specific right, such as the right against unreasonable search and seizure, the assumption would shift to suggest that anything not listed as a right was not protected. Hamilton explained, “[W]hy declare that things shall not be done which there is no power to do?”⁶⁵² For Hamilton, an enumeration of specific rights was meaningless. Rights must be understood in context, subject to popular demands. There was no point in establishing a right without a corresponding power. It was to the Constitution

⁶⁴⁷ Federalist 84 (Hamilton), in *The Federalist* 575, 578 (Wesleyan 1961) (Jacob E. Cooke, ed) (“It has been several times truly remarked, that bills of rights are in their origin, stipulations between kings and their subjects, abridgements of prerogative in favor of privilege, reservations of rights not surrendered to the prince.”).

⁶⁴⁸ Elliot, ed, 4 *The Debates in the Several State Conventions* at 148–49 (cited in note 639).

⁶⁴⁹ *Id.* at 148.

⁶⁵⁰ *Id.* at 149.

⁶⁵¹ Federalist 84 at 579 (cited in note 647).

⁶⁵² *Id.*

itself one should look for a bill of rights. The structure would protect rights.⁶⁵³

One of the most persuasive arguments against a bill of rights was that of a shifting burden of proof. At the heart of the concern was the fear that the introduction of such clauses would flip the presumption of the Constitution. As initially written, the Constitution placed the burden of demonstrating federal power to act on Congress and the president. In October 1787, Wilson argued during the first state ratification debate in Pennsylvania—a discourse that brought him to national prominence as a spokesman for the Federalist cause—that “it would have been superfluous and absurd to have stipulated with a foederal body of our own creation, that we should enjoy those privileges of which we are not divested.”⁶⁵⁴ By calling out specific rights, there would be a narrowing of rights to reflect only those listed. Federal powers would be conceived broadly, with those defending the rights bearing the burden of showing that the written provision had been invaded.⁶⁵⁵

Wilson’s remarks proved prescient. It would be difficult to look at the doctrine that has since ensued without observing the tendency of courts to limit rights to those expressly declared or implied in the Bill of Rights. Nevertheless, the Federalist arguments did not override Anti-Federalist concerns about the growing power of the federal government.

Bryan, writing as Centinel, argued in response to Wilson’s speech that the Constitution had failed to recognize “that the people have a right to hold themselves, their houses, papers and possessions free from search or seizure.”⁶⁵⁶ Centinel continued:

therefore warrants without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or his property, not

⁶⁵³ Id at 581.

⁶⁵⁴ Speech of James Wilson (Oct 6, 1787), in John P. Kaminski, et al, eds, 13 *The Documentary History of the Ratification of the Constitution Digital Edition* *337, 339–40 (Virginia 2009).

⁶⁵⁵ See Federalist 84 at 579–80 (cited in note 647).

⁶⁵⁶ Centinel, Philadelphia Freeman’s Journal (Oct 24, 1787) (“Centinel II”), in Kaminski, et al, eds, 13 *The Documentary History of the Ratification of the Constitution Digital Edition* *457, 466–67 (cited in note 654).

particularly described, are contrary to that right and ought not to be granted.⁶⁵⁷

To protect the right, a warrant would require particularity.

As explained by another Anti-Federalist writing as Brutus (likely Robert Yates),⁶⁵⁸ the issue was one of personal liberty. The purpose of entering into a political union was to protect individuals. In doing so, it was not necessary “that individuals should relinquish all their natural rights.”⁶⁵⁹ Of some of these, individuals could not be divested. Other rights were not necessary to give up to attain the object of government. They should be retained, for surrendering them “would counteract the very end of government, to wit, the common good.”⁶⁶⁰ The “Federal Farmer,” whose identity has not been established (although scholars point to Lee or Melancton Smith as the likely author),⁶⁶¹ wrote two pamphlets analyzing and arguing against the Constitution. He shared Brutus’s concept of the rights at stake, noting, “There are other essential rights, which we have justly understood to be the rights of freemen; as freedom from hasty and unreasonable search warrants, warrants not founded on oath, and not issued with due caution, for searching and seizing men’s papers, property, and persons.”⁶⁶²

⁶⁵⁷ *Id.* at *467 (emphasis added). The day before Wilson’s speech, Bryan had argued that the proposed Constitution divested Pennsylvanians of their existing liberties and privileges:

Your present frame of government, secures you a right to hold yourselves, houses, papers and possessions free from search and seizure, and therefore warrants granted without oaths or affirmations first made, affording sufficient foundation for them, whereby any officer or messenger may be commanded or required to search your houses or seize your persons or property, not particularly described in such warrant.

Centinel I at *258 (cited in note 641). The right to be free from “general warrant” was now imperiled.

⁶⁵⁸ Jackson Turner Main, *The Antifederalists, Critics of the Constitution 1781-1788* 287 (Quadrangle 1961).

⁶⁵⁹ Brutus, *New-York Journal* (Nov 1, 1787) (“Brutus II”), in John P. Kaminski, et al, eds, 19 *The Documentary History of the Ratification of the Constitution Digital Edition* *154, 155 (Virginia 2009).

⁶⁶⁰ *Id.*

⁶⁶¹ See Saul Cornell, *The Other Founders: Anti-Federalism & the Dissenting Tradition in America, 1788-1829* 88 (UNC 1999).

⁶⁶² *Observations Leading to a Fair Examination of the System of Government Proposed by the Late Convention; and to Several Essential and Necessary Alternations in It. In a Number of Letters from the Federal Farmer to the Republican*, in Storing, ed, 2 *The Complete Anti-Federalist* 214, 249 (cited in note 627). See also *id.* at 262:

The following, I think, will be allowed to be unalienable or fundamental rights in the United States: . . . No man is held to answer a crime charged upon him

Brutus recognized that governments tend to expand their powers to invade the rights of the people. This, indeed, had been the salient lesson from English experience. England's "[M]agna [C]harta and bill of rights have long been the boast, as well as the security of that nation."⁶⁶³ The Founders had taken this so seriously to heart that with regard to the state constitutions, "there is not one of them but what is either founded on a declaration or bill of rights, or has certain express reservation of rights interwoven in the body of them."⁶⁶⁴ It was thus "astonishing" that the security of the rights of the people could be found nowhere in the Constitution.⁶⁶⁵

General warrants stood as the foremost example of the abridgement of individual liberty rights. Brutus explained, "For the security of liberty, it has been declared [t]hat all warrants, without oath or affirmation, to search suspected places, or seize any person, his papers or property, are grievous and oppressive."⁶⁶⁶ This provision, he argued, was "as necessary under the general government as under that of the individual states; for the power" of the federal government "is as complete to the purpose of . . . granting search warrants, and seizing persons, papers, or property, in certain cases" as the authority of the states to do so.⁶⁶⁷

Although the Federalists had a strong argument—one that has, as an empirical matter, largely played out in the intervening centuries—it was the protection of the liberty interests at stake that ultimately won the day. There was little question following the state conventions that Congress would have to incorporate a bill of rights into the Constitution for the United States to survive. Six of the original thirteen states had recommended changes to the Constitution. Several had stated outright that this meant that the document would have to be amended to include a declaration of rights. Even in states that did not include an overt demand for a bill of rights in their final ratification decision, a vigorous debate about whether to institute one marked the public discourse.⁶⁶⁸ Of

till it be substantially described to him; and he is subject to no unreasonable searches or seizures of his person, papers or effects.

⁶⁶³ *Brutus II* at *156 (cited in note 659).

⁶⁶⁴ *Id.*

⁶⁶⁵ *Id.*

⁶⁶⁶ *Id.*

⁶⁶⁷ *Brutus II* at *157 (cited in note 659).

⁶⁶⁸ See Cuddihy, *The Fourth Amendment* at 680–82 (cited in note 37). In Pennsylvania, for instance, during the state convention, Robert Whitehill introduced a bill of rights that would have outlawed general warrants. His proposal built on the Virginia Declaration of

the rights articulated, one of the most important and consistent objections was the failure of the original Constitution to outlaw promiscuous search and seizure.

B. Adopting the Fourth Amendment

On September 28, 1789, the first session of the First Congress passed a resolution reflecting state concerns over the lack of a bill of rights:

The conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best insure the beneficent ends of its institution. Resolved . . . that the following Articles be proposed to the Legislatures of the several States, as amendments to the Constitution of the United States.⁶⁶⁹

The task of drafting the bill of rights fell to Madison, one of the principal architects of the Constitution.

1. Drafting the text.

Although Madison had objected to any constitutional amendments prior to ratification on the grounds that they would cause friction between the states and potentially contribute to a dissolution of the Union, by the time of the congressional resolution, he believed that amendments would “serve the double purpose of satisfying the minds of well meaning opponents, and of providing additional guards in favour of liberty.”⁶⁷⁰ In particular, he supported adding new measures to protect “the rights of conscience, the freedom of the press, trials by jury, [and] exemption from general warrants.”⁶⁷¹

Rights, going further to state that not only “ought not” such warrants be granted, but that they “shall not” be approved. *Id.* at 682. Although the convention voted two to one against including a bill of rights, the Anti-Federalists went on to publish the proposed document as a pamphlet. Similar initiatives failed in Massachusetts. *Id.*

⁶⁶⁹ Helen E. Veit, Kenneth R. Bowling, and Charlene Bangs Bickford, eds, *Creating the Bill of Rights* 3 (Johns Hopkins 1991).

⁶⁷⁰ Robert Allen Rutland, *James Madison: The Founding Father* 47 (MacMillan 1987).

⁶⁷¹ *Id.* at 48. See also Veit, Bowling, and Bickford, eds, *Creating the Bill of Rights* at 85 (cited in note 669).

On May 4, 1789, Madison informed the House of Representatives that he intended to introduce amendments.⁶⁷² Just over a month later, he made good on his promise, citing the debt owed to those who ratified the Constitution to secure “the liberty for which they valiantly fought and honorably bled.”⁶⁷³ He enjoined his colleagues to “expressly declare the great rights of mankind secured under [the] Constitution.”⁶⁷⁴ Madison presented a draft of what is now the Fourth Amendment:

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.⁶⁷⁵

A few observations about this initial language can be made.

First, the comma after “persons” separated the individual from objects related to them. There were thus dual rights at stake: security of the person and security of personal property. Supporting this interpretation is the establishment of “rights” in the plural. It was not just one right at stake, but two. In adopting this approach, Madison tracked the approach taken by Vermont, which had similarly separated out “themselves” from “their houses, papers, and possessions.”⁶⁷⁶

Second, the language generally followed the contours of the Massachusetts Constitution, which also began by establishing a right (albeit in the singular).⁶⁷⁷ In both, the clause protected

⁶⁷² 1 *Annals of Cong* 247 (May 4, 1789).

⁶⁷³ *Id* at 432 (June 8, 1789).

⁶⁷⁴ *Id*. Madison noted, “I believe that the great mass of the people who opposed [the Constitution] disliked it because it did not contain effectual provisions against encroachments on particular rights, and those safeguards which they have been long accustomed to have interposed between them and the magistrate who exercises the sovereign power.” *Id* at 433.

⁶⁷⁵ *Id* at 434–35; 1 *Congressional Register* 428 (June 8, 1789). See also *The Daily Advertiser* 2 (June 12, 1789); *New-York Daily Gazette* 574 (June 13, 1789).

⁶⁷⁶ *Vt Const of 1777, Decl of Rights Art XI* (superseded 1793).

⁶⁷⁷ *Mass Const Pt 1, Art XIV*:

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

against “all unreasonable searches and seizures” of one’s person, house, papers, and things (“property” for Madison, “possessions” for Adams).⁶⁷⁸ And both clauses required an oath or affirmation, as well as particularization regarding the place to be searched or persons or property to be seized.

Third, some scholars insist that Madison’s initial draft demonstrates that he was primarily concerned with prohibiting general warrants, and not necessarily with requiring warrants under all circumstances.⁶⁷⁹ The text does dwell on the particulars that would be required, rejecting warrants that failed to reflect “probable cause,” were not “supported by oath or affirmation,” or did not particularly describe “the places to be searched, or the persons or things to be seized.”⁶⁸⁰ This reading also is consistent with Madison’s concern, which he had previously voiced, that the Constitution had not included a ban against general warrants. He again raised this point when he introduced the amendments, citing the risk that the “General Government” might abuse its authority to collect revenue by issuing general warrants in support of the necessity of the new measures.⁶⁸¹

Cutting against this interpretation, though, is the formulation itself: unlike Virginia’s statement in its Declaration of Rights, for instance, which clearly established that general warrants were “grievous and oppressive,” Madison’s draft of the Fourth Amendment started from the right itself.⁶⁸² By leading with “unreasonable,” the clause invoked a broader prohibition against warrantless entry, as recognized in the common law.

For Madison, “the great object” common to the states “in making declarations in favor of particular rights” had been

to limit and qualify the powers of Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode. They point these exceptions sometimes against the abuse of the executive power, sometimes against the legislative, and,

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.

⁶⁷⁸ Compare Mass Const Pt 1, Art XIV, with 1 Annals of Cong 434–35 (June 8, 1789).

⁶⁷⁹ See, for example, Robert M. Bloom, *Warrant Requirement – The Burger Court Approach*, 53 U Colo L Rev 691, 696 (1982); Lasson, *The History and Development of the Fourth Amendment* at 103 (cited in note 33).

⁶⁸⁰ 1 Annals of Cong 434–35 (June 8, 1789).

⁶⁸¹ *Id* at 437–38.

⁶⁸² See text accompanying notes 501 and 512.

in some cases, against the community itself; or, in other words, against the majority in favor of the minority.⁶⁸³

The legislature—not the executive branch—posed the greatest danger to personal liberty. Accordingly, Madison proposed that the rights be added to Article I, § 9, a section of the Constitution that, unlike Article I, § 8 (which enumerates Congress’s powers), places limits on the legislative power.⁶⁸⁴ As federal powers were to stem from the legislature, with the executive merely carrying them into execution, Madison’s understanding was that the protection against overreach ought to be located in Article I.

The House of Representatives did not immediately take Madison’s amendments on board. A number of members considered it to be an untimely interruption of more important questions.⁶⁸⁵ But on July 21, 1789, Madison reintroduced the measures.⁶⁸⁶ He requested that the House reconvene as a Committee of the Whole House to debate the provisions.⁶⁸⁷ Instead, the House decided to direct the amendments to the Committee of Eleven, chaired by Delaware’s John Vining.⁶⁸⁸

The Committee changed Madison’s language that protected “persons, houses, papers, and *other property*,” to “persons, houses, papers, and *effects*.”⁶⁸⁹ In making this alteration, the Committee extended the meaning beyond personal property or possessions (as implied in “other property”) to include commercial items and goods.⁶⁹⁰

In addition to this alteration, the Committee removed the words “all unreasonable searches and seizures” apparently by mistake—or so Egbert Benson later claimed during the House debate, when the clauses were simply reinstated as “the right of the

⁶⁸³ 1 Annals of Cong 454 (June 13, 1789).

⁶⁸⁴ 1 Congressional Register 427 (June 8, 1789).

⁶⁸⁵ See *id.* at 437, 440.

⁶⁸⁶ 1 Annals of Cong 660 (July 21, 1789).

⁶⁸⁷ *Id.*

⁶⁸⁸ *Id.* at 665. The House was divided, with thirty-four in favor of removing discussion of the amendments from the Committee of the Whole and fifteen against it. *Id.* at 664.

⁶⁸⁹ US Const Amend IX (emphasis added). See also Donohue, *The Future of Foreign Intelligence* at 93 (cited in note 54).

⁶⁹⁰ See Davies, 98 Mich L Rev at 708 n 461 (cited in note 20). Johnson’s *A Dictionary of the English Language* defined “effects” as “[g]oods; moveables.” Johnson, *A Dictionary of the English Language* at “effects” (cited in note 247). A general dictionary from 1730 defined it as “the goods of a merchant, tradesman, &c.” N. Bailey, *Dictionarium Britannicum* at “effects” (printed for T. Cox 1736). See also Donohue, *The Future of Foreign Intelligence* at 93 (cited in note 54).

people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches.”⁶⁹¹

The Committee also put “secured” into the present tense (“secure”).⁶⁹² It went on to agree to the balance of the clause, as well as Madison’s intent to insert the clause into Article I, § 9, as a limit on the legislature.⁶⁹³

It took nearly a month of steady pressure from Madison for Congress to consider the amendments as unanimously agreed to by the Committee.⁶⁹⁴ The House then met for two weeks to debate the report as a Committee of the Whole, and then to discuss the report of the Committee of the Whole as the House of Representatives.⁶⁹⁵

⁶⁹¹ See 1 Annals of Cong 753 (Aug 17, 1789) (reintroducing the text as “The right of the people to be secured in their persons, houses, papers, and effects, 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”). Professor Davies also states that it was simply a “mistake.” Davies, 98 Mich L Rev at 715 (cited in note 20), citing Neil H. Cogan, ed, *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* § 6.1.1.4.a at 334 (Oxford 2d ed 1997). Professor Cuddihy takes a slightly stronger position, hinting at the intentional omission of the clause by noting that the Vining Committee “excised the phrase” before it was reinserted by Benson of New York on August 13. Cuddihy, *The Fourth Amendment* at 694 (cited in note 37). Professor Leonard Levy echoes Cuddihy’s position, writing that the clause was “deleted.” Levy, *Original Intent* at 243 (cited in note 511). Davies takes particular care to separate his position from those of Cuddihy and Levy. Davies, 98 Mich L Rev at 715 (cited in note 20). From the text of the congressional debate alone, there is little to go on to determine which party has the stronger argument, although Benson “presumed there was a mistake in the wording of [the] clause,” quickly moving that it be amended, and the vote carried. 1 Annals of Cong 753 (Aug 17, 1789). Although the Annals of Congress attributes reinsertion of the clause to Gerry, numerous other sources attribute it to Benson. See, for example, Cogan, ed, *The Complete Bill of Rights* § 6.2.1.2.b at 347 (cited in note 691) (quoting the August 18, 1789 edition of the *Daily Advertiser* as saying that Benson moved to insert “against unreasonable searches and seizures” and noting, “This was carried. The question was then put on the amendment and carried”); id § 6.2.1.2.c at 347 (quoting the August 19, 1789 edition of the *New-York Daily Gazette* as saying that Benson moved to insert “against unreasonable searches and seizures” and noting that “[t]his was carried”); id § 6.2.1.2.d at 347 (quoting the August 22, 1789 edition of the *Gazette of the United States* as stating that Benson added “against unreasonable seizures, and searches” and noting that “[t]his was carried”). See also Davies, 98 Mich L Rev at 717–18 (cited in note 20) (arguing that the clause was added by Benson).

⁶⁹² Cogan, ed, *The Complete Bill of Rights* § 6.1.1.2 at 334 (cited in note 691) (quoting the House Committee of Eleven Report from July 28, 1789, as providing, in the text of the amendment, “the rights of the people to be secure in their person, houses, papers and effects”).

⁶⁹³ Id.

⁶⁹⁴ 2 Congressional Register 226 (Aug 17, 1789).

⁶⁹⁵ See 1 Annals of Cong 703–80 (Aug 13–24, 1789) (presenting a discussion that began August 13, 1789, and concluded August 24, 1789).

The House made four revisions to what would become the Fourth Amendment. In addition to Benson's reinsertion of "unreasonable searches and seizures," Gerry seemingly altered "by warrants issuing" to "no warrant shall issue."⁶⁹⁶ This change largely clarified the language without broadening or narrowing the specified rights. Samuel Livermore continued Gerry's addition, adding "and not" between "affirmation" and "particularly," thus making the clause an independent declaration.⁶⁹⁷ The progressive nature of this change calls into question subsequent interpretations of the Fourth Amendment that suggest a disconnect between the warrant requirement and the prohibition against general warrants.

Finally, although Madison objected, Sherman moved to relocate the Bill of Rights to a separate appendix.⁶⁹⁸ He voiced concern that changes to the body of the Constitution could impact the state ratification agreements, which had been premised on the then-existing text.⁶⁹⁹ Sherman further suggested that by placing the material in the middle of the document and leaving the signatures from the Philadelphia Convention at the end, it implied that they had agreed to the amendments, which they had not.⁷⁰⁰

The House of Representatives thereafter completed its consideration of the other clauses and directed a Committee of Three (Benson, Sherman, and Theodore Sedgwick) to determine the order of the amendments.⁷⁰¹ The Committee reported back to the

⁶⁹⁶ See Davies, 98 Mich L Rev at 717–18 (cited in note 20). This alteration is attributed to Benson in the *Congressional Register*. See 2 Congressional Register 226 (Aug 17, 1789). Robert Bloom also attributes it to Benson. Bloom, 53 U Colo L Rev at 696 (cited in note 679). However, other sources, which carry slightly more sway, place authorship with Gerry. See, for example, Cogan, ed, *The Complete Bill of Rights* § 6.2.1.2.d at 347 (cited in note 691) (quoting the August 22, 1789 edition of the *Gazette of the United States* as attributing the proposed amendment altering "by warrants issuing" to "and no warrant shall issue" to Gerry and noting, "This was negatived"); 1 Journal of the House of Representatives of the United States 108 (Aug 21, 1789) ("[R]ead and debated . . . agreed to by the House, two-thirds of the members present concurring").

⁶⁹⁷ 2 Congressional Register 226 (Aug 17, 1789). Although the changes recommended by Benson and Livermore were removed by the House from the draft bill of rights, they were subsequently reinstated by the Committee of Three. The Senate retained the clauses. Thorpe, 2 *The Constitutional History of the United States* at 257 (cited in note 573).

⁶⁹⁸ 1 Annals of Cong 707–08 (Aug 13, 1789) (recording Sherman's argument and Madison's objections). See also Donohue, *The Future of Foreign Intelligence* at 93 (cited in note 54).

⁶⁹⁹ 1 Annals of Cong 707–08 (Aug 13, 1789).

⁷⁰⁰ *Id.*

⁷⁰¹ 1 Journal of the House of Representatives of the United States 112 (Aug 22, 1789).

House on August 24 with a seventeen-point document, which was then sent to the Senate.⁷⁰²

Although the Senate made changes to other amendments, the only alteration it made to the clause on search and seizure related to punctuation.⁷⁰³ The text returned to the House as the sixth amendment. The House apparently rejected the Benson Committee paragraph, but following a conference committee, the House withdrew its objections.⁷⁰⁴ Accordingly, on September 25, 1789, via a joint resolution of Congress, the federal government sent twelve amendments to the state legislatures.⁷⁰⁵ The sixth clause declared:

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.⁷⁰⁶

Notably, by retaining the word “place” in the singular and the clause “persons or things” in the plural, the drafters reflected a contemporary understanding of the illegitimacy of “multiple-specific search warrants.”⁷⁰⁷ Such instruments may meet the requirements that a particular person be named and that the charge be made under oath or affirmation and supported by probable cause, but numerous places could then be searched. Such instruments were considered invalid. They had been used by the Crown prior to the Revolution, but legal treatises developed at the time the Fourth Amendment was adopted repudiated the idea that multiple locations could be searched, impliedly restricting search to a specific location.⁷⁰⁸ Warrants allowing multiple houses to be searched were unreasonable, even if the multiple houses were

⁷⁰² Journal of the First Session of the Senate of the United States of America 104–05 (Aug 24, 1789) (Greenleaf 1789).

⁷⁰³ See Cogan, ed, *The Complete Bill of Rights* § 6.1.1.12 at 337 (cited in note 691) (quoting a Senate resolution included in a Senate pamphlet from September 9, 1789).

⁷⁰⁴ 1 Journal of the House of Representatives of the United States 115–16 (Sept 21, 1789); id at 121 (Sept 24, 1789); Journal of the First Session of the Senate of the United States of America 86 (Sept 24, 1789) (Greenleaf 1789).

⁷⁰⁵ Journal of the First Session of the Senate of the United States of America 88 (Sept 25, 1789) (Greenleaf 1789); Cogan, ed, *The Complete Bill of Rights* § 6.1.1.22 at 337 (cited in note 691) (quoting an enrolled resolution from September 28, 1789).

⁷⁰⁶ 1 Stat 21, 97–98 (1789).

⁷⁰⁷ See Donohue, *The Future of Foreign Intelligence* at 94 (cited in note 54).

⁷⁰⁸ See Cuddihy, *The Fourth Amendment* at 740 n 260 (cited in note 37).

specified. State legislation followed suit: by 1789, most states had adopted statutes that required specific warrants, limiting search to single locations.⁷⁰⁹

Madison's wording is particular in another regard: although the right extends, in the first part of the Fourth Amendment, to the people to be secure in their (plural) "houses," the warrant is limited to "particularly describing the place" to be searched.⁷¹⁰ Unlike contemporary understandings, in which "place" can be understood in broad terms—at times synonymous with "space"⁷¹¹—in 1789, it was understood as a "particular portion of space."⁷¹² By adopting language that required a warrant "particularly describing" a "place," Congress restricted such searches not just to a single home or warehouse but, potentially, to a smaller subsection of such a structure.⁷¹³

The first two clauses never garnered sufficient votes from the states to become law.⁷¹⁴ As a result, what had been the sixth amendment became the Fourth Amendment. On December 15, 1791, Virginia became the eleventh state to ratify the first ten amendments to the Constitution, making their addition official.⁷¹⁵

2. Judicial affirmation.

Not long after the Fourth Amendment entered into law, a number of cases reiterated that the purpose of the Amendment was to protect individuals against general warrants, as well as warrants lacking sufficient particularity.⁷¹⁶

The first such case was *Conner v Commonwealth*.⁷¹⁷ In Pennsylvania, Article IX, § 8 of the state constitution stated that no warrant shall be issued "to seize any person . . . without

⁷⁰⁹ See *id.* at 631 (noting that even as early as 1777 to 1779, specific warrants had become "the standard method of search and seizure" in Massachusetts, Rhode Island, New Jersey, and Delaware); *id.* at 637–58 (discussing the broader political and intellectual context for the gradual entrenchment of specific warrants). See also Donohue, *The Future of Foreign Intelligence* at 94 (cited in note 54).

⁷¹⁰ US Const Amend IV.

⁷¹¹ Cuddihy, *The Fourth Amendment* at 742 (cited in note 37).

⁷¹² *Id.*, quoting Johnson, *A Dictionary of the English Language* at "place" (cited in note 247).

⁷¹³ For further support of this point, see Cuddihy, *The Fourth Amendment* at 739–42 (cited in note 37).

⁷¹⁴ See Thorpe, 2 *The Constitutional History of the United States* at 260 (cited in note 573).

⁷¹⁵ *Id.* at 261.

⁷¹⁶ See Donohue, *The Future of Foreign Intelligence* at 94 (cited in note 54).

⁷¹⁷ 3 Binney 38 (Pa 1810).

probable cause supported by oath or affirmation.”⁷¹⁸ The president judge of the Court of Common Pleas of Northumberland County nevertheless issued a general warrant for the arrest of an individual whom it was rumored had forged bank notes.⁷¹⁹ The judge confronted the claim that “public safety” required a waiver of the specificity otherwise required by the law, leaving it to the magistrate to determine when such an exception would apply.⁷²⁰

“It appears to me,” Chief Justice William Tilghman stated, “that if this be the true construction, the provision in the constitution is a dead letter.”⁷²¹ His rationale was straightforward: “[I]n every instance, the magistrate who issued the warrant, would say that he thought it a case of necessity.”⁷²² The judge noted that by insisting on the particulars, felons may on occasion escape. “This must have been very well known to the framers of our constitution,” he surmised, “but they thought it better that the guilty should sometimes escape, than that every individual should be subject to vexation and oppression.”⁷²³

In 1825, William Rawle, the US district attorney for Pennsylvania, explained in his treatise on US constitutional law that “[t]he term *unreasonable* is used to indicate that the sanction of a legal warrant is to be obtained, before searches or seizures are made.”⁷²⁴

Courts in Connecticut took a similar stance. In *Grumon v Raymond*,⁷²⁵ a case involving a warrant that empowered the authorities to search every suspected house within the town of Wilton, the court said, “This is a general search-warrant, which has always been determined to be illegal, not only in cases of searching for stolen goods, but in all other cases.”⁷²⁶ In parallel, a case in New York affirmed that only particularity in a warrant would justify the breaking open of a suspect’s home.⁷²⁷

⁷¹⁸ Pa Const of 1790 Art IX, § 8 (superseded 1838).

⁷¹⁹ *Conner*, 3 Binney at 43.

⁷²⁰ See *id.*

⁷²¹ *Id.*

⁷²² *Id.*

⁷²³ *Conner*, 3 Binney at 43–44.

⁷²⁴ William Rawle, *A View of the Constitution of the United States of America* 127 (Philip Nicklin 2d ed 1829). The clause continues: “[B]ut when upon probable cause, supported by oath or affirmation, such a warrant is issued, not only may other effects, but the papers of the accused be taken into the custody of the law.” *Id.*

⁷²⁵ 1 Conn 39 (1814).

⁷²⁶ *Id.* at 42.

⁷²⁷ See *Bell v Clapp*, 10 Johns 263, 265–66 (NY 1813).

In 1868, Thomas Cooley, chief justice of the Michigan Supreme Court, reiterated the importance of the Fourth Amendment's prohibition on using a warrant to obtain evidence of guilt.⁷²⁸ Further, he noted:

[F]ound also in many State constitutions, [the Fourth Amendment] would clearly preclude the seizure of one's papers in order to obtain evidence against him; and the spirit of the fifth amendment—that no person shall be compelled in a criminal case to give evidence against himself—would also forbid such seizure.⁷²⁹

While it was true that, with a warrant, an officer following the writ's command was protected from legal penalties, any deviation from the warrant itself—such as searching in places not named or seizing persons or articles not specified—placed the officer outside the protection of the law. In all other cases “the law favors the complete and undisturbed dominion of every man over his own premises, and protects him therein with such jealousy that he may defend his possession against intruders, in person or by his servants or guests, even to the extent of taking the life of the intruder.”⁷³⁰

⁷²⁸ Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 431–32 (Little, Brown 7th ed 1903):

The warrant is not allowed for the purpose of obtaining evidence of an intended crime; but only after lawful evidence of an offence actually committed. Nor even then is it allowable to invade one's privacy for the sole purpose of obtaining evidence against him, except in a few special cases where that which is the subject of the crime is supposed to be concealed, and the public or the complainant has an interest in it or in its destruction.

(citations omitted). Cooley specified the particular circumstances under which search warrants could issue, including for stolen goods, items smuggled into the country in violation of revenue laws, gaming or counterfeiting materials, lottery tickets, prohibited liquors, obscene books and papers held in preparation for sale, and explosive and dangerous material proving a threat to public safety. *Id.* at 432. Cooley explained:

[I]t is better oftentimes that crime should go unpunished than that the citizen should be liable to have his premises invaded, his desks broken open, his private books, letters, and papers exposed to prying curiosity, and to the misconstructions of ignorant and suspicious persons, — and all this under the direction of a mere ministerial officer.

Id. He added later, “Letters and sealed packages subject to letter postage in the mail can be opened and examined only under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household.” *Id.* at 432 n 2.

⁷²⁹ *Id.* at 431 n 4, citing *State v Slamon*, 73 Vt 212 (1901) (holding that the seizure of a letter in the course of searching for stolen goods under a warrant violated the Constitution).

⁷³⁰ Cooley, *A Treatise on the Constitutional Limitations* at 434 (cited in note 728).

Congress similarly recognized the role of the Fourth Amendment, not once legislating against it. In 1789, for instance, it passed an act *requiring* customs officers to first approach a justice of the peace to obtain a warrant, demonstrate evidence under oath, and particularly describe the dwelling-house, store, building, or other place they would like to enter prior to conducting a search for goods subject to duty.⁷³¹

C. The Rise and Fall of the “Mere Evidence” Rule

The Supreme Court later articulated a broad understanding of the scope of the Fourth Amendment, extending its protection of “papers” to include not just private documents and correspondence but also one’s business records.⁷³² While the 1886 case of *Boyd v United States*⁷³³ is commonly credited with being the first articulation of what became the “mere evidence” rule—and, at times, discounted as part of *Lochner*-era thinking⁷³⁴—it was far from the first articulation of a canon that found its roots, like the prohibition against general warrants, in English law. Even a few

⁷³¹ Act of July 31, 1789, 1 Stat 29, 43 (repealed 1790):

And be it further enacted, That every collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority, to enter any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed; and therein to search for, seize, and secure any such goods, wares or merchandise; and if they shall have cause to suspect a concealment thereof, in any particular dwelling-house, store, building, or other place, they or either of them shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the day time only) and there to search for such goods, and if any shall be found, to seize and secure the same for trial.

(emphasis omitted). Amar points to this law in support of the opposite proposition—that is, the proposition that the First Congress passed laws that did not require warrants—despite the text’s clear meaning to the contrary. See, for example, Amar, *The Law of the Land* at 234 n 12 (cited in note 13); Amar, 107 Harv L Rev at 766 (cited in note 13). For this reason, I include the text in full.

⁷³² See *Boyd v United States*, 116 US 616, 617, 638 (1886).

⁷³³ 116 US 616 (1886).

⁷³⁴ See, for example, Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles* 22 (Yale 1997) (stating that *Boyd* “took root in a judicial era that we now know by the name *Lochner*, and the spirit inspiring *Boyd* and its progeny was indeed akin to *Lochner*’s spirit: a person has a right to his property, and it is unreasonable to use his property against him in a criminal proceeding”) (citations omitted); Amar, 107 Harv L Rev at 787–88 (cited in note 13) (writing about *Boyd* as a product of *Lochner*); Davies, 98 Mich L Rev at 726 (cited in note 20) (classifying *Boyd* as “a clear example of judicial resistance to the emergence of heightened government regulation”).

cases help to illustrate the limits articulated by English courts on how far the Crown could go in obtaining private papers.

Perhaps the most famous example stems from what has come to be known as *Purnell's Case*.⁷³⁵ During the reign of George II, two young Oxford students, Whitmore and Dawes, spoke “treasonable words in the street.”⁷³⁶ For this, they were sentenced to pay a fine, to undergo two years’ imprisonment, to provide security for their future behavior, “and to go round immediately to all the Courts in Westminster Hall, with a paper on their foreheads denoting their crime.”⁷³⁷ In addition, the government directed John Purnell, the vice-chancellor of Oxford, to impose academic punishment on the students.⁷³⁸ He appears not to have done so. As a consequence, the attorney general ex officio issued an information against him for failing to carry out his responsibilities.⁷³⁹ As part of the misdemeanor prosecution, at 9:00 p.m. on the final day of the term, the attorney general, without an affidavit, moved the court for a rule to require the university to open its records to the Crown, in order to furnish evidence against the vice-chancellor.⁷⁴⁰

The court, uneasy with the request, demanded that the attorney general show cause.⁷⁴¹ Purnell, in turn, refused to supply the documents—a decision that the university supported on the grounds of “[n]emo tenetur seipsum accusare”: “The law will not tempt a man to make shipwreck of his conscience, in order to disculpate himself.”⁷⁴² Further, “in no case has the Court ever interposed in a criminal prosecution to . . . force such inspection.”⁷⁴³ Chief Justice William Lee delivered the opinion of the King’s Bench, citing precedent in support of the proposition that the Crown could not compel an individual to incriminate himself.⁷⁴⁴

As part of his critique of general warrants, Almon too referenced the prohibition on obtaining individuals’ papers in order to develop evidence against an individual prior to any charge. How could the law of England countenance that, upon a general warrant,

⁷³⁵ *The King v Dr. Purnell*, 96 Eng Rep 20 (KB 1748).

⁷³⁶ *The King v Whitmore*, 96 Eng Rep 20, 20 (KB 1748).

⁷³⁷ *Id.*

⁷³⁸ *Id.*

⁷³⁹ *Purnell's Case*, 96 Eng Rep at 20. See also *Previous Vice-Chancellors* (Oxford), archived at <http://perma.cc/HW8W-Q8JL> (listing John Purnell as vice-chancellor of Oxford University from 1747 to 1750).

⁷⁴⁰ *Purnell's Case*, 96 Eng Rep at 20.

⁷⁴¹ *Id.*

⁷⁴² *Id.*

⁷⁴³ *Id.* at 21.

⁷⁴⁴ *Purnell's Case*, 96 Eng Rep at 23.

any common fellows . . . upon their own imaginations, or the surmises of their acquaintance, or upon other worse and more dangerous intimations, may, with a strong hand, seize and carry off all his papers; and then at his trial produce these papers, thus taken by force from him, in evidence against himself[?]⁷⁴⁵

The problem, as in *Purnell's Case*, was one of self-incrimination: “This would be making a man give evidence against and accuse himself, with a vengeance.”⁷⁴⁶ It was against the “ancient common law of the Land” to allow the government such access to one’s papers.⁷⁴⁷

The Supreme Court’s decision in *Boyd* hearkened back to the reasoning of the English cases, to colonial concerns regarding general warrants, and to Cooley’s comments noting the close relationship between the Fourth and Fifth Amendments. In *Boyd*, the Court struck down a statute that allowed for a court order compelling the production of a business invoice.⁷⁴⁸ Citing Chief Justice Pratt’s remarks in *Entick*, Justice Joseph Bradley, on behalf of seven justices, reasoned that the seizure of the papers in question amounted to a violation of the right against self-incrimination.⁷⁴⁹ Any such Fifth Amendment violation, in turn, could be understood as an “unreasonable search” under the Fourth Amendment.⁷⁵⁰ Whenever the claim to papers was *based solely on their potential utility as evidence* in a criminal proceeding, the search—and seizure—were presumptively unreasonable.⁷⁵¹

The ruling—that the Fourth Amendment permitted searches and seizures only when the government had a superior claim of title to the items seized—became known as the “mere evidence rule.”⁷⁵² The Court drew the line at the point at which a search for

⁷⁴⁵ *Father of Candor* at 55 (cited in note 331).

⁷⁴⁶ *Id.* at 55–56.

⁷⁴⁷ *Id.* at 56. See also *id.* at 77–78:

I take it to be most clear, as the law now stands, a General Warrant is good in no case whatever, for the apprehension of persons or papers, or both; and that a Particular, or any Warrant, for seizing the papers, is likewise, as the law now stands, good in no case whatever: and consequently, that none of all his ingenious contrivances before stated, for eluding the law, would be, if attempted, worth one single straw.

⁷⁴⁸ *Boyd*, 116 US at 638.

⁷⁴⁹ *Id.* at 630.

⁷⁵⁰ *Id.* at 633.

⁷⁵¹ *Id.* at 629–30.

⁷⁵² See *Warden v Hayden*, 387 US 294, 308 (1967).

specific items became an effort to access or to generate information that could *then* be used to convict individuals of wrongdoing:

The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo*. In the one case, the government is entitled to the possession of the property; in the other it is not.⁷⁵³

The rule mirrored the prohibition on general warrants: the government could neither rummage around in one's personal documents nor comb through one's business records to uncover evidence of criminal behavior. The principles laid out in *Entick* affected "the very essence of constitutional liberty and security," Bradley wrote.⁷⁵⁴ "[T]hey apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life."⁷⁵⁵ The Court continued:

It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense.⁷⁵⁶

The first clause of the Fourth Amendment did not narrowly serve as a prelude to the Warrant Clause. It carried its own weight, underscoring that individuals' persons, papers, and effects were immune from government examination and interference.⁷⁵⁷

Thirty-five years later, the Supreme Court solidified the mere-evidence rule in *Gouled v United States*.⁷⁵⁸ The case challenged two types of searches. In the first, an Army intelligence

⁷⁵³ *Boyd*, 116 US at 623.

⁷⁵⁴ *Id.* at 630.

⁷⁵⁵ *Id.*

⁷⁵⁶ *Id.*

⁷⁵⁷ See Lasson, *The History and Development of the Fourth Amendment* at 103 (cited in note 33); Note, *The Life and Times of Boyd v. United States (1886-1976)*, 76 Mich L Rev 184, 185–88 (1977).

⁷⁵⁸ 255 US 298 (1921). See also *United States v Lefkowitz*, 285 US 452, 464–65 (1932) ("Respondents' papers were wanted by the officers solely for use as evidence of crime. . . . They could not lawfully be searched for and taken even under a search warrant issued upon ample evidence and precisely describing such things and disclosing exactly where they were."). But see *Burdeau v McDowell*, 256 US 465, 470–72, 475–76 (1921) (holding

officer, pretending to call on a government contractor, Felix Gouled, for social purposes, surreptitiously removed documents from Gouled's office that were later used as evidence of conspiracy to defraud the government.⁷⁵⁹ In the second search, a US commissioner, based on the affidavit of an agent of the DOJ, approved a warrant stating that Gouled's office contained property that had been used "as a means of committing a felony, to wit: . . . as a means for the bribery" of a government employee.⁷⁶⁰ The Court found each instrument to be a violation of the defendant's Fourth Amendment right against unreasonable search and seizure, as well as his Fifth Amendment right against self-incrimination.⁷⁶¹

In the first search,

if for a Government officer to obtain entrance to a man's house or office by force or by an illegal threat or show of force, amounting to coercion . . . would be an unreasonable and therefore a prohibited search and seizure . . . it is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth, instead of by force or coercion.⁷⁶²

In either instance, the security and privacy of the home or office, and of the papers of the owner, would be equally invaded.⁷⁶³ With regard to self-incrimination, the Court noted that whether an individual "be obliged to supply evidence against himself or whether such evidence be obtained by an illegal search of his premises and seizure of his private papers" mattered naught.⁷⁶⁴ "In either case," the Court explained, "he is the unwilling source of the evidence," which the Fifth Amendment forbids.⁷⁶⁵

In regard to the second search, since the time of the Founding, specific warrants could be used to obtain "stolen or forfeited property, . . . counterfeit coin, burglars' tools and weapons, implements of gambling," and the like.⁷⁶⁶ But they could *not* be used as

admissible papers obtained when company officials and a private detective entered a private office and opened the target's safes and desk drawers because the company later provided the documents to federal authorities).

⁷⁵⁹ *Gouled*, 255 US at 304–05.

⁷⁶⁰ *Id.* at 307 (ellipsis in original). The warrant was issued under the Act of June 15, 1917, 40 Stat 217, 228. See *Gouled*, 255 US at 303.

⁷⁶¹ *Gouled*, 255 US at 305–06.

⁷⁶² *Id.* at 305.

⁷⁶³ *Id.* at 305–06.

⁷⁶⁴ *Id.* at 306.

⁷⁶⁵ *Gouled*, 255 US at 306.

⁷⁶⁶ *Id.* at 308.

a means of gaining access to the home “solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding.”⁷⁶⁷ The Court was at pains here to recognize the prohibition on general warrants that had marked the Founding. A general warrant, allowing the government to snoop around inside a home or office to potentially find evidence of wrongdoing, would not be allowed.

The mere-evidence rule proved unworkable in practice, not least because the distinction between evidence and the instrumentality of a crime was hard to maintain. The Supreme Court gradually chipped away at the edges. It excluded corporations.⁷⁶⁸ It expanded the definition of “instrumentalities” to include any property used in the course of criminal activity.⁷⁶⁹ And it determined that if individuals were legally required to maintain records, the government could search, seize, and admit the records as evidence during trial.⁷⁷⁰ In 1966, it sidestepped the rule altogether to find that a forced blood test did not run afoul of the Fifth Amendment, distinguishing between testimonial and physical evidence in the course of the opinion.⁷⁷¹

The following year the Court explicitly repudiated the mere-evidence rule in *Warden v Hayden*,⁷⁷² a case that centered on the search of a suspected bank robber’s home in the course of a hot pursuit.⁷⁷³ The Court found that neither the entry without a warrant to search for the suspect nor the immediate search of his person was invalid.⁷⁷⁴ “The permissible scope of the search,” the Court wrote, “must, [] at the least, be as broad as may reasonably be necessary to prevent the dangers that the suspect at large in

⁷⁶⁷ *Id.* at 309. See also *Boyd*, 116 US at 623–24.

⁷⁶⁸ See *Hale v Henkel*, 201 US 43, 74–75 (1906). See also *United States v White*, 322 US 694, 703–04 (1944) (holding that the Fifth Amendment does not shield collective entities from subpoenas, as long as the existence of the organization is independent from that of its individual members).

⁷⁶⁹ *Marron v United States*, 275 US 192, 198–99 (1927) (holding that a ledger involved in the sale of illegal alcohol could be seized, just as the alcohol could be, because “it was none the less a part of the outfit or equipment actually used to commit the offense”).

⁷⁷⁰ *Shapiro v United States*, 335 US 1, 18–20 (1948).

⁷⁷¹ *Schmerber v California*, 384 US 757, 761 (1966):

We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends.

(citation omitted).

⁷⁷² 387 US 294 (1967).

⁷⁷³ *Id.* at 294–95.

⁷⁷⁴ *Id.* at 296–97.

the house may resist or escape.”⁷⁷⁵ It relied on the *Schmerber v California*⁷⁷⁶ test, eschewing the property-based approach of the Founders in favor of a regime centered on privacy.⁷⁷⁷ The Court noted that the Fourth Amendment “was a reaction to the evils of the use of the general warrant in England and the writs of assistance in the Colonies.”⁷⁷⁸ The aim, the Court recognized, was to protect the sanctity of the home.⁷⁷⁹ The way the Fourth Amendment did this was by prohibiting all “unreasonable” searches and seizures, as well as by requiring particularity.⁷⁸⁰

Even as it reversed the mere-evidence articulation of *Boyd*, the Court recognized the underlying protections that the Court had been trying preserve in *Boyd*: the prohibition on general warrants at the heart of the Fourth Amendment.⁷⁸¹

The understanding of the Fourth Amendment articulated by Amar and Taylor, which suggests that the home can be breached to search for evidence absent a warrant, fails to appreciate the context of the times. It was because of the sanctity of the home that warrantless entry, as well as the use of general warrants, was prohibited. The only time that the government could trespass on the privacies of life to conduct a search or seizure was either in the context of the arrest of a known felon or when a warrant with sufficient particularity issued. To the extent that this history has hitherto been lost, it is a loss, indeed, for our understanding of the original meaning of the Constitution.

IV. ANIMATING ARGUMENTS

Why, precisely, did the Founding generation reject general warrants? Are there common concerns among the arguments that Coke, Hale, and Blackstone articulated; that Otis raised in *Paxton's Case*; and that animated the state prohibitions on general warrants, later coming to fruition in the Fourth Amendment? These are difficult questions. Even legislative histories of narrow

⁷⁷⁵ Id at 299.

⁷⁷⁶ 384 US 757 (1966).

⁷⁷⁷ *Hayden*, 387 US at 306–07.

⁷⁷⁸ Id at 301. For an interesting discussion of the transformation of Fourth and Fifth Amendment jurisprudence in the early to mid-twentieth century, see generally Note, 76 Mich L Rev 184 (cited in note 757).

⁷⁷⁹ *Hayden*, 387 US at 301.

⁷⁸⁰ Id.

⁷⁸¹ See Note, 76 Mich L Rev at 186–87 (cited in note 757) (emphasizing that the *Boyd* Court saw itself as implementing the rule laid out by Pratt in *Entick*).

clauses within statutes may prove impossible to reconstruct accurately. Like the Founding generation, those enacting such provisions may evince numerous concerns. Nevertheless, there are some concerns that recurred—across time and the Atlantic, throughout the colonies and the Founding of the country—that are worth noting.

Perhaps most importantly, that an Englishman’s home was his castle figured largely in English law and early American documents.⁷⁸² The guarantee against general warrants and warrantless entry thus found root in the right of an individual to be secure against unwelcome intrusion.⁷⁸³

This Article has already quoted phrases citing this principle in the English treatises, cases, and parliamentary debates.⁷⁸⁴ In America, “Cato Uticensis” argued that ratification of the Constitution would force the country “to see the doors of [their] houses, the impenetrable castles . . . fly open.”⁷⁸⁵ Anti-Federalists worried that federal excise powers would result in exposing “houses, those castles considered sacred by the English law . . . to . . . insolence and oppression.”⁷⁸⁶ “A Farmer” considered the home to be a man’s “sanctuary.”⁷⁸⁷

Outside of active pursuit of a felon, or a sufficiently high standard of suspicion of involvement in illegal activity supported by a warrant, individuals had the right to be secure within their own homes against government intrusion.

This approach encapsulated two deeper concerns. The first centered on what one should be forced to reveal to the government or to others.⁷⁸⁸ The home encircled family and friends. Within it, one built intimate relations, contemplated spiritual matters, and found solace.⁷⁸⁹ The ability to be unguarded created an opportunity for honesty, reflection, and growth. Almon addressed the “absolute illegality of the seizure of papers” on grounds of privacy.⁷⁹⁰ No gentleman in England would rest easy “in his bed, if he

⁷⁸² See Donohue, *The Future of Foreign Intelligence* at 99 (cited in note 54).

⁷⁸³ See *Brutus II* at *157 (cited in note 659).

⁷⁸⁴ See, for example, *Father of Candor* at 58 (cited in note 331).

⁷⁸⁵ Cato Uticensis, Virginia Independent Chronicle (Oct 10, 1787), in John P. Kaminski, et al, eds, 8 *The Documentary History of the Ratification of the Constitution Digital Edition* *70, 75 (Virginia 2009).

⁷⁸⁶ Cuddihy, *The Fourth Amendment* at 687–88 (cited in note 37).

⁷⁸⁷ *Essays by a Farmer (I)*, in Storing, ed, 5 *The Complete Anti-Federalist* 5, 14 (cited in note 629).

⁷⁸⁸ See Donohue, *The Future of Foreign Intelligence* at 99 (cited in note 54).

⁷⁸⁹ *Id.*

⁷⁹⁰ *Father of Candor* at 54 (cited in note 331).

thought, that for every loose and unguarded, or supposed libelous expression . . . he was liable not only to be taken up himself, but every secret of his family made subject to the inspection of a whole Secretary of State's Office."⁷⁹¹ Almon's concerns included giving the Crown access to private affairs. "Many gentlemen have secret correspondences, which they keep from their wives, their relations, and their bosom friends," he explained.⁷⁹² "Every body has some private papers, that he would not on any account have revealed."⁷⁹³

Business records did not remove the privacy implications of the government gaining access to individuals' private lives:

A lawyer hath frequently the papers and securities of his clients; a merchant or agent, of his correspondents. What then, can be more excruciating torture, than to have the lowest of mankind, such fellows as Mooney, Watson, and the rest of them, enter suddenly into his house, and forcibly carry away his scrutores, with all of his papers of every kind, under a pretence of law, *because* the Attorney general had, *ex officio*, filed an information against the author, printer and publisher of some pamphlet or weekly paper, and somebody had told one of these greyhounds that this gentleman was thought by some people to be the author!⁷⁹⁴

An Englishman's castle, therefore, could be breached only with due process of the law. Absent legal constraints, it made no sense to speak of individual liberty. One was inherently *not* free if the government could, at any time without specific cause, enter into one's home, seize one's person, examine one's papers, or take one's property away. "Such a vexatious authority in the crown, is inconsistent with every idea of liberty."⁷⁹⁵

Nor was society free if all of one's associates could thereby be implicated. Accordingly, Almon argued that papers seized by the government "are immediately to be thrown into the hands of some clerks, of much curiosity . . . who will . . . naturally amuse themselves with the perusal of all private letters, memorandums, secrets and intrigues, of the gentleman himself, and of all his friends and acquaintances of both sexes."⁷⁹⁶ Wilkes's patron, Lord Grenville-Temple, similarly expressed alarm that the momentum

⁷⁹¹ *Id.* at 55.

⁷⁹² *Id.* at 54.

⁷⁹³ *Id.*

⁷⁹⁴ *Father of Candor* at 54 (cited in note 331).

⁷⁹⁵ *Id.* at 55.

⁷⁹⁶ *Id.* at 54–55.

of the disclosure went beyond the individual whose papers were seized, to all those with whom the person was in correspondence.⁷⁹⁷

The second concern underlying the assertion that a man's home was his castle was the potential harm that could result—as a personal matter and as a broader structural point—from giving the government untrammelled access.⁷⁹⁸

Rather than having information indicating that the individual to be searched or seized was engaged in illegal activity, evidence of which justified breaching the right to be secure in one's home, general warrants violated the right in order to uncover evidence.⁷⁹⁹ In doing so, the instrument turned the concept of innocent until proven guilty on its head.⁸⁰⁰ Guilt was presumed, with innocence established only after a search.⁸⁰¹

The central point made by eighteenth-century contemporaries was that by inverting the principle, the government could target people without any evidence of criminal activity. Such power was vulnerable to abuse.⁸⁰² The government could use the instrument against citizens to prevent political opposition, to consolidate economic or political control, or to stifle ideas contrary to those held by government officials.⁸⁰³

That some of the information obtained might, in itself, be innocent mattered naught. Eighteenth-century arguments recognized the potential for broad powers of search to combine information from different sources to build a case against individuals the government did not like.⁸⁰⁴ The risk was that otherwise-innocent activity, combined with other information, might look very different. This information then could be used to cast aspersions, potentially to the point of persons being found guilty of criminal acts in which they did not engage. In Britain, parliamentarians considered powers of search in this way to be even more concerning than powers of arrest:

⁷⁹⁷ Cuddihy, *The Fourth Amendment* at 460 (cited in note 37), citing *A Letter to the Right Honourable the Earls of Engremont and Halifax, His Majesty's Principal Secretaries of State, on the Seizure of Papers*. 6–7, 10–11 (printed for J. Williams 1763), and 25 *The Scots Magazine* 396 (July 1763). See also Donohue, *The Future of Foreign Intelligence* at 103 (cited in note 54).

⁷⁹⁸ See Donohue, *The Future of Foreign Intelligence* at 103 (cited in note 54).

⁷⁹⁹ See, for example, *Brief of James Otis* at *3 (cited in note 391). See also Donohue, *The Future of Foreign Intelligence* at 105 (cited in note 54).

⁸⁰⁰ Donohue, *The Future of Foreign Intelligence* at 105 (cited in note 54).

⁸⁰¹ *Id.*

⁸⁰² *Id.*

⁸⁰³ *Id.*

⁸⁰⁴ See, for example, *Wilkes*, 19 How St Tr at 1166.

[I]f a general warrant for seizing the authors, printers, and publishers of a libel, seditious and treasonable in the eye of a minister, be liable to objection, one for seizing their papers is still more so, since papers may be treated in a manner highly injurious to their owners before they can get into the hands of a minister, who, to glut his revenge, may combine or disjoin them, so as to make of them engines capable of working the destruction of the most innocent persons.⁸⁰⁵

Other information obtained in the course of executing a general warrant had the potential to embarrass the person to whom the information pertained. In 1721, Sergeant Hawkins explained that general warrants may prove “highly prejudicial to the Reputation as well as the Liberty of the Party.”⁸⁰⁶ This concern again arose in Parliament in 1765, when one member noted that

even a particular warrant to seize seditious papers alone, without mentioning the titles of them, may prove highly detrimental, since in that case all a man’s papers must be indiscriminately examined, and such examination may bring things to light which it may not concern the public to know, and which yet it may prove highly detrimental to the owners to have made public.⁸⁰⁷

American legal scholars later agreed with Parliament that “even when conducted in the discreetest [sic] manner,” the execution of a general warrant “might injure the most virtuous in their reputation and fortune.”⁸⁰⁸ While, alone, it may not suffice to create a right to seize innocent people, such an instrument could nevertheless “throw in the way of messengers a temptation to inquire into the life and character of persons.”⁸⁰⁹

Beyond the collection of private or embarrassing information, giving the government insight into one’s private affairs raised the potential that information obtained could be used as leverage. It

⁸⁰⁵ Herbert Broom and George L. Denman, *Constitutional Law Viewed in Relation to Common Law, and Exemplified by Cases* 608 (Maxwell & Son 2d ed 1885).

⁸⁰⁶ Hawkins, *2 A Treatise of the Pleas of the Crown* at 84 (cited in note 211).

⁸⁰⁷ Broom and Denman, *Constitutional Law Viewed in Relation to Common Law* at 608 (cited in note 805) (discussing a debate in Parliament). Even particular warrants were of concern, because the examination of papers could bring matters to light that the public had no right to know, and yet which could prove “highly detrimental to the owner to have made public.” *Id.* See also Donohue, *The Future of Foreign Intelligence* at 106 (cited in note 54).

⁸⁰⁸ Broom and Denman, *Constitutional Law Viewed in Relation to Common Law* at 608 (cited in note 805).

⁸⁰⁹ *Id.*

could be made public to defame political adversaries. Even without criminal penalties, it could harm an individual's reputation and standing in the community. The Founders sought to protect against information being misused in this way.

As a structural matter, the consolidation of such power in one place caused even greater alarm. The Founders embraced the concern expressed in *Leach* that the ability to use general warrants as a way around the restrictions on search and seizure could "be productive of great oppression."⁸¹⁰ Chief Justice Pratt similarly stated in *Wilkes* that "a discretionary power given to [officers] to search wherever their suspicions may chance to fall . . . is totally subversive to the liberty of the subject."⁸¹¹

The Father of Candor, in turn, warned that to allow general warrants in any case might "amuse the public with the sound of liberty," while in reality allowing them to enjoy none.⁸¹² "If such warrants were to be allowed legally justifiable in any instances, it would be exceedingly difficult, nay, impossible, to restrain Ministers from grievously oppressing any man they did not like, under many pretences, from time to time . . . without any motive of public good."⁸¹³ The liberty of the subject was at stake.⁸¹⁴ Each step, however small, mattered. He explained, "Tyranny grows by degrees."⁸¹⁵

Otis used the case of the customs officer attempting to exact revenge as an illustration of the potential for such powers to be misused.⁸¹⁶ Dickinson's *Letters of a Pennsylvania Farmer* similarly denounced the writs as being vulnerable to arbitrary use.⁸¹⁷

Following the Founding, the state constitutional conventions, as well as the ratification debates, similarly recognized the danger posed by promiscuous search and seizure. Henry railed against the arbitrary way in which the government could search and seize an individual's private papers.⁸¹⁸ One of the first state

⁸¹⁰ *Leach*, 19 How St Tr at 1024.

⁸¹¹ *Wilkes*, 19 How St Tr at 1167.

⁸¹² *Father of Candor* at 50 (cited in note 331).

⁸¹³ *Id.*

⁸¹⁴ *Id.* at 50–51.

⁸¹⁵ *Id.* at 51.

⁸¹⁶ *Brief of James Otis* at *3 (cited in note 391).

⁸¹⁷ Dickinson, *Letters from a Farmer in Pennsylvania: Letter IX* at 50 (cited in note 464).

See also Donohue, *The Future of Foreign Intelligence* at 110 (cited in note 54).

⁸¹⁸ Elliot, ed, 3 *The Debates in the Several State Conventions* at 588 (cited in note 596):

[G]eneral warrants, by which an officer may search suspected places, without evidence of the commission of a fact, or seize any person without evidence of his

courts to confront general warrants following the adoption of the Bill of Rights stated that general warrants “would open a door for the gratification of the most malignant passions, if such process issued by a magistrate should screen him from damages.”⁸¹⁹ Others echoed Parliament’s concern that general warrants “throw in the way of messengers a temptation to inquire into the life and character of persons.”⁸²⁰

It was not that the country did not face great dangers from within and without: in 1787, the future of the country hung in the balance. During the Constitutional Convention, Oliver Ellsworth insisted that creation of a new federal structure was essential to national security.⁸²¹ Soon afterward, Hamilton explained:

The principal purposes to be answered by Union are these—The common defence of the members—the preservation of the public peace as well against internal convulsions as external attacks—the regulation of commerce with other nations and between the States—the superintendence of our intercourse, political and commercial, with foreign countries.⁸²²

To address these needs, Hamilton wrote, military capabilities must be made available to the national government: “The authorities essential to the common defence are these—to raise armies—to build and equip fleets—to prescribe rules for the government of both—to direct their operations—to provide for their support.”⁸²³ He advocated these powers, “[b]ecause it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent & variety of the means which may be necessary to satisfy them.”⁸²⁴

Yet even with this understanding—that the country was under threat, and that to face these threats, the national government must be given broad military powers—the Founding generation

crime, ought to be prohibited. As these are admitted, any man may be seized, any property may be taken, in the most arbitrary manner.

See also text accompanying notes 595–606.

⁸¹⁹ *Grumon*, 1 Conn at 44.

⁸²⁰ Broom and Denman, *Constitutional Law Viewed in Relation to Common Law* at 608 (cited in note 805).

⁸²¹ *Debates in the Federal Convention of 1787: Saturday, June 30* (TeachingAmericanHistory.org), archived at <http://perma.cc/UV7V-BQM4> (transcribing the remarks of Ellsworth).

⁸²² Federalist 23 (Hamilton), in *The Federalist* 146, 146–47 (cited in note 647).

⁸²³ *Id.* at 147.

⁸²⁴ *Id.* (emphasis omitted).

did *not* provide the legislature with the authority to use general warrants for national security or the common defense.⁸²⁵

Part of the reason for this stemmed, perhaps, from history. The English Crown had appealed to necessity in justification of expanding its use of general warrants. Almon explained,

The greatest part [] of the warrants offered in proof of [promiscuous search and seizure] were issued in the times of rebellion; when men are not likely to call in question such a proceeding, the extremity of the case making them wink at all irregularities, for the sake of supporting the protestant establishment itself. And yet, bad men, as one may easily figure to one self, will be apt to lay stress upon such acts of necessity, as precedents for their doing the like in ordinary cases, and to gratify personal pique, and therefore such excesses of power are dangerous in example, and should never be excused.⁸²⁶

Accordingly, the Founders did not allow the government to intrude upon the sanctity of the home without sufficient cause. They did not create special exceptions for libel, treason, or either specific or general threats to the state. Nor did they endorse any exceptions for customs.⁸²⁷ To the contrary, state after state refused to ratify the Constitution until extracting a guarantee that further provisions would be added, including those prohibiting general warrants and requiring certain particulars before any specific warrant could issue.⁸²⁸

That initially the Fourth Amendment was to be placed in Article I, § 9 underscores the Founders' intent to restrict Congress from being able to abridge the people's right to be secure in their homes from unwanted government intrusion. When the First Congress moved the clause that now forms the Fourth Amendment to an appendix, it was because it did not make sense to insert it into the main body, to which the members of the Convention had previously affixed their signatures. As a substantive matter, all agreed that what is now the Fourth Amendment would

⁸²⁵ For a history of the term "national security" and the evolution of the concept in US history, see generally Laura K. Donohue, *The Limits of National Security*, 48 Am Crim L Rev 1573 (2011).

⁸²⁶ *Father of Candor* at 49 (cited in note 331).

⁸²⁷ See *Bostock v Saunders*, 95 Eng Rep 1141, 1145 (KB 1773).

⁸²⁸ See Part III.A.

limit the legislature, as well as be an additional protection to ensure that the executive would not—because it could not—interfere with individuals’ private homes and lives.⁸²⁹

The Founders’ concern went beyond the amassing of tyrannical power in one place to the impact such an accumulation of power would have on the separation of powers. General warrants gave power to the executive branch, without constraint on how the power could be used. General warrants amounted to the proverbial fox guarding the hen house.⁸³⁰

Legal doctrine had long recognized the inherent conflict of interest. *Nemo iudex in causa sua*: no one ought to be a judge in his own cause.⁸³¹ In the interests of fairness and justice, one of the central principles of common law was to minimize the risk of partiality: anyone with a stake in the outcome risked making a decision in their own favor. Thus it was in *Dr. Bonham’s Case* that Coke stated that a college of physicians given the authority, under statute, to punish those who practiced medicine without a license could not simultaneously act as “judges, ministers, and parties.”⁸³² Hawkins also highlighted the danger of general warrants, in that they provided the officer with the full authority to determine whom and where to search and what to seize.⁸³³ For the same reason, Hale condemned any information filed by the attorney general ex officio, without even an oath, allegedly stating of the legal sufficiency of such instruments that “[i]f ever they came in dispute, they could not stand, but must necessarily fall to the ground.”⁸³⁴ Lord Mansfield underscored the point in *Leach*, recognizing that general warrants violated the common law, not least because officers should not have the discretion to set the boundaries of their own authority.⁸³⁵

The Founding generation agreed with their brethren’s concerns. The Father of Candor condemned Henry VII as “one of the

⁸²⁹ See Part III.B.

⁸³⁰ Donohue, *The Future of Foreign Intelligence* at 111 (cited in note 54).

⁸³¹ See *id.*

⁸³² *Dr. Bonham’s Case*, 77 Eng Rep at 652. The Supreme Court frequently cites this case in support of the proposition. Adrian Vermeule, *Contra Nemo Iudex in Sua Causa: The Limits of Impartiality*, 122 Yale L J 384, 386 n 6 (2012). But see generally *id.* (arguing for limits on the principle). See also Donohue, *The Future of Foreign Intelligence* at 111 (cited in note 54).

⁸³³ See Hawkins, 2 *A Treatise of the Pleas of the Crown* at 81–82 (cited in note 211). See also Donohue, *The Future of Foreign Intelligence* at 111 (cited in note 54).

⁸³⁴ *Father of Candor* at 8 (cited in note 331) (quoting Hale).

⁸³⁵ *Leach*, 19 How St Tr at 1027. See also Donohue, *The Future of Foreign Intelligence* at 111 (cited in note 54).

worst Princes” England ever knew, not least for giving officers of the state the authority “to summon, try and punish, of their own mere discretion and authority, any persons who shall be accused of the offences therein very generally named and described.”⁸³⁶ He decried the potential for the attorney general to issue an information upon his own authority, underscoring the potential costs borne by individuals who should fall under his gaze:

It is a power that is, in my apprehension, very alarming; and a thinking man cannot refrain from surprise, that a free people should suffer so odious a prerogative to exist. It has been, and may most certainly be again, the means of great persecution. In truth, it seems to be a power necessary for no good purpose, and capable of being put to a very bad one.⁸³⁷

Judges in Pennsylvania and Virginia attacked the writs issued under the Townshend Act of 1767 on the same grounds, stating that officers should not be given the authority to exercise their own discretion.⁸³⁸ Justice William Henry Drayton, a Charleston judge, and Henry, from Virginia, both repeatedly opposed allowing officers to exercise discretion in search and arrest decisions.⁸³⁹

The principle became intimately connected with the Fourth Amendment. It provided context for the text. As one mid-twentieth-century scholar explained after reading the text of the Fourth Amendment to the Massachusetts Historical Society, “No public officer, therefore, in this country, can be supplied with a general warrant for use on occasion, *he to be the judge of the occasion*. About that there can hardly be a question.”⁸⁴⁰

The Founders’ fundamental insight was that the executive branch could not be impartial when its interests were involved.⁸⁴¹

⁸³⁶ *Father of Candor* at 7 (cited in note 331).

⁸³⁷ *Id.* at 8–9.

⁸³⁸ O.M. Dickerson, *Writs of Assistance as a Cause of the American Revolution*, in Richard Morris, ed., *The Era of the American Revolution* 40, 60–61, 69 (Columbia 1939).

⁸³⁹ See William Henry Drayton, *A Letter from “Freeman” of South Carolina to the Deputies of North America, Assembled in the High Court of Congress at Philadelphia*, in R.W. Gibbes, ed., *Documentary History of the American Revolution* 11, 15 (D. Appleton & Co 1855); Elliot, ed., 3 *The Debates in the Several State Conventions* at 578–88 (cited in note 596); Davies, 98 *Mich L Rev* at 581–82 (cited in note 20). But see Gibbes, ed., *Documentary History of the American Revolution* at 11 (cited in note 839) (questioning the attribution of the “Freeman” letter to Drayton). See also Donohue, *The Future of Foreign Intelligence* at 111 (cited in note 54).

⁸⁴⁰ George G. Wolkins, *Writs of Assistance in England*, in 66 *Proceedings of the Massachusetts Historical Society* 357, 358 (Massachusetts Historical Society 1942) (emphasis added). See also Donohue, *The Future of Foreign Intelligence* at 111 (cited in note 54).

⁸⁴¹ See Donohue, *The Future of Foreign Intelligence* at 111 (cited in note 54).

Therefore, it was restrained from entering the home at will, absent emergency circumstances surrounding the commission of a felony. The only way it could enter was under a warrant issued by the judiciary. If citizens were to give the executive branch the freedom to set the limits of its own authority, the risk that it would claim ever more power for itself was significant. A warrant lacking specificity gave the government the ability to determine whom to target, where to look, and what to seize.⁸⁴² The implication reached beyond the relationship between the federal government and individual citizens: it threatened the relationship between the branches as well, with structural implications.⁸⁴³ The executive could use the power to overcome carefully thought-out checks and balances.⁸⁴⁴

There was another way in which general warrants altered the powers of the judiciary: it was not just the potential use or misuse of the information vis-à-vis the legislature or the courts, but the fact that the judiciary had been cleaved away from the process. It was the duty of magistrates and judges to determine whether sufficient cause had been demonstrated to waive rights otherwise held by the citizens. In his *Commentaries on the Laws of England*, Blackstone raised this point: “[I]t is the duty of the magistrate, and ought not be left to the officer, to judge of the ground of suspicion.”⁸⁴⁵ Henry similarly inveighed that by inserting the judiciary into the process, evidence and reason could play a role in mitigating the “strong hand of power.”⁸⁴⁶ By removing judges from these determinations, their power, their authority, was reduced.

A parallel concern centered on the impact of general warrants on federalism. State and local governments, no less than individual citizens or the other branches of government, could find their role—and their ability to provide a check on the executive—undermined by the accumulation of information. Henry and others raised this concern, as federal power expanded in the new Constitution. The Founders were further concerned about turning law enforcement into spies, and about the impact that this would have on the social and cultural structures of the representative regime.

⁸⁴² *Id.*

⁸⁴³ *Id.* at 111–12.

⁸⁴⁴ See *id.*

⁸⁴⁵ Blackstone, 4 *Commentaries* at 288 (cited in note 230).

⁸⁴⁶ Elliot, ed, 3 *The Debates in the Several State Conventions* at 174 (cited in note 596).

CONCLUSION

Members of the Founding generation saw themselves as entitled to their rights as Englishmen. Among these was the right to be secure in one's home. To protect this right, outside of limited conditions, the Crown was prevented from entering without a warrant. Efforts to grant the King's officers broader access generated friction between English subjects and the Crown. Treatises, such as Coke's *Institutes*, Hale's *History of the Pleas of the Crown*, and Sergeant Hawkins's *Pleas of the Crown*, condemned the practice and laid the groundwork for jurists' condemnation of general warrants. By 1768, the Court of Common Pleas, the Court of the King's Bench, members of Parliament, and the public had come to reject the granting of general warrants as an exercise of tyrannical power. As Chief Justice Pratt explained, "To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition, a law under which no Englishman would wish to live an hour."⁸⁴⁷

The Framers studied English legal thought and shared jurists' rejection of general warrants. If anything, they were even more hostile to government interference than their countrymen overseas. During the French and Indian War, the Crown's use of writs of assistance contributed to growing tension between the colonies and Great Britain.⁸⁴⁸ *Paxton's Case* became an exercise in line drawing, as Otis roundly rejected the use of the instruments.⁸⁴⁹

Upon independence, many of the new states included a constitutional prohibition on promiscuous search and seizure.⁸⁵⁰ The purpose was to codify the common-law understanding of the conditions under which the government could enter the home.⁸⁵¹ That it had been the common law that had limited the ability of the Crown to intrude without a specific warrant mattered. Since the early seventeenth century, jurists had recognized that the monarch lacked the authority to alter common law or statutory provisions.⁸⁵² Precisely how far Parliament could go in authorizing

⁸⁴⁷ Cuddihy, *The Fourth Amendment* at 447 (cited in note 37), quoting *Huckle v Money*, 95 Eng Rep 768, 769 (CP 1763).

⁸⁴⁸ See Part II.A.

⁸⁴⁹ See Part II.B.

⁸⁵⁰ See Part II.C.

⁸⁵¹ Cooley, *A Treatise on the Constitutional Limitations* at 424 (cited in note 728).

⁸⁵² *Case of Proclamations*, 12 Coke Rep 74 (1610), reprinted in George Brodie, 1 *A Constitutional History of the British Empire* 532, 533 (Longmans 1866) ("[T]he king, by his proclamation or other ways, cannot change any part of the common law, or statute law, or the customs of the realm.").

broader search authorities, however, was less certain. The Framers sought to ensure that the common-law understanding did not become subsumed by the American adaptation.

In his formidable recitation of the history of the Fourth Amendment, Professor Cuddihy emphasizes the importance of the Founders' actions in adopting the Fourth Amendment.⁸⁵³ He considers the decision to be a significant departure from English experience.⁸⁵⁴ The intended placement of the clause in Article I, § 9 reflects this claim. The challenge to the prohibition on promiscuous search and seizure would come not from the executive, which had no independent authority to breach the walls of the home, but from the legislature, which might seek to do so in carrying into effect its other powers. The Fourth Amendment cemented a particularized warrant requirement into the law.

Some scholars may not feel that fidelity to the original meaning of the Constitution, or to the text introduced by the Founders, matters.⁸⁵⁵ The initial meaning, it could be argued, is no longer relevant. More persuasive and important are the ways in which Supreme Court doctrine has adapted the application of the Fourth Amendment to a changing context. There are a number of difficulties with this approach, each deserving of a fuller discussion than can be done in a conclusion. For now, a brief discussion will suffice.

First, living constitutionalism allows for the application of new rules of construction. But however incremental such changes might be, surely they cannot mean that the protections created at the Founding cease to exist or—even more unlikely—that the language of the Fourth Amendment means the *opposite* of what it meant when it was enacted.

Second, a living constitutionalist approach to the Fourth Amendment that allows for general search and seizure absent a warrant fails to appreciate the strength of the arguments on

⁸⁵³ See Cuddihy, *The Fourth Amendment* at 599–723 (cited in note 37). See also Cloud, Book Review, 63 U Chi L Rev at 1714–15 (cited in note 20) (noting this aspect of Cuddihy's work).

⁸⁵⁴ See Cuddihy, *The Fourth Amendment* at 437–576 (cited in note 37).

⁸⁵⁵ See, for example, Sklansky, 100 Colum L Rev at 1809–13 (cited in note 20) (arguing that instead of understanding “unreasonable searches and seizures” in light of eighteenth-century common law, emphasis should be placed on the Supreme Court's traditional Fourth Amendment doctrine and stare decisis); *Missouri v Holland*, 252 US 416, 433 (1920) (“[Constitutional questions] must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.”); Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 Harv L Rev 673, 735 (1963) (“There is no such thing as a constitutional provision with a static meaning.”).

which the Founders relied. The rationale for rejecting general warrants related to the individual right in question, as well as to potential harms to the constitutional structure. The reasons for the Founders' concerns have not dissipated. They remain as relevant, if not more so, today.

Third, and relatedly, as illustrated in the Federalist–Anti-Federalist debate over the insertion of the Bill of Rights, one of the Founders' principal concerns was that by naming specific rights, other rights would not be guaranteed going forward. Wherever one stood on the question, the understanding was that, at a minimum, the rights articulated in the amendments would be protected. They thus represent a baseline, a *de minimis* level, for rights moving forward.⁸⁵⁶

Fourth, the prohibition on promiscuous search and seizure derived from common law. At least some common-law rules could be altered by statute—certainly, the history of general warrants demonstrates that the Crown attempted to do this with some regularity, starting with the Tudors. By inserting a prohibition on the same into the Constitution—particularly in Article I, § 9, as a limit on the legislature—the Founders sought to ensure that no further encroachments could occur.

The Court, over time, has struggled with how to understand the Fourth Amendment and the relationship between its two clauses.⁸⁵⁷ Nevertheless, it appears to be moving away from the proposition that the Fourth Amendment does not embody a warrant requirement, and to be recognizing that the presence or absence of a warrant is central to understanding whether a search

⁸⁵⁶ This is the position recently adopted by Justice Scalia in *United States v Jones*, 132 S Ct 945 (2012), in which he postulated that constitutional interpretation cannot be used to read rights that existed at the Founding out of existence. *Id.* at 950–51. At most, the rules of construction must be understood to apply the original principles to the contemporary context—not to contravene the basic meaning of the clause. Scalia cited *Entick*, noting that the Court had described it as a “monument of English freedom undoubtedly familiar to every American statesman at the time the Constitution was adopted, and considered to be the true and ultimate expression of constitutional law with regard to search and seizure.” *Id.* at 949 (quotation marks omitted). Scalia explained, “At bottom, we must ‘assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.’” *Id.* at 950 (brackets in original).

⁸⁵⁷ See, for example, Bloom, 53 U Colo L Rev at 692 (cited in note 679):

The Supreme Court has at times interpreted the first clause, the reasonableness clause, as distinct from the second clause, the warrant clause, so that in determining whether a search was reasonable a warrant would be but one of the many factors to consider. . . . At other times the Court has interpreted the reasonableness clause in conjunction with the warrant clause and has held that generally a warrant is necessary for a search to be reasonable.

is reasonable. In the 2013 case *Florida v Jardines*,⁸⁵⁸ Justice Scalia, writing for the Court, concluded that whether or not the police first obtained a warrant before taking a police dog trained to identify narcotics inside the curtilage of the home went directly to the question *whether the search in question was reasonable*.⁸⁵⁹ That same year, in *Missouri v McNeely*,⁸⁶⁰ Justice Sonia Sotomayor, joined by a number of her colleagues, considered the absence of a warrant to obtain a blood test to be essential to answering whether a search was reasonable.⁸⁶¹ Similarly, in 2014 in *Riley v California*,⁸⁶² the Court considered the absence of a warrant to be relevant in ascertaining the reasonableness of the search.⁸⁶³ The Court did note that “the exigencies of” a situation may bring a warrantless search within constitutional bounds, but this exception was no different than that which the Founding generation recognized as part of their common-law legacy.⁸⁶⁴

Scholars’ contrary insistence that the Fourth Amendment does not entail a general protection against government entry into the home does more than just fail to appreciate the context. It contradicts the meaning of the text itself, which carefully lays out the conditions that must be met by the government before it may intrude on one’s person, home, papers, and effects. Reclaiming this meaning is essential for understanding the scope of the original Fourth Amendment.

⁸⁵⁸ 133 S Ct 1409 (2013).

⁸⁵⁹ *Id.* at 1411–12.

⁸⁶⁰ 133 S Ct 1552 (2013).

⁸⁶¹ *Id.* at 1558.

⁸⁶² 134 S Ct 2473 (2014).

⁸⁶³ *Id.* at 2482. See also *Vernonia School District 47J v Acton*, 515 US 646, 653 (1995) (“Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing . . . reasonableness generally requires the obtaining of a judicial warrant.”); *Silverman v United States*, 365 US 505, 511 (1961) (stating that the Fourth Amendment “stands [for] the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion”).

⁸⁶⁴ *Riley*, 134 S Ct at 2494, citing *Kentucky v King*, 131 S Ct 1839, 1856 (2011), quoting *Mincey v Arizona*, 437 US 385, 394 (1978).