

## THE USES AND MISUSES OF FOURTH AMENDMENT HISTORY

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### I. INTRODUCTION

The Fourth Amendment has become a very important constitutional provision.<sup>1</sup> In the past two years, the Amendment has been applied in situations ranging from a deputy's use of force to run an automobile driver off the road,<sup>2</sup> to the use of a drug-detecting dog at a traffic stop,<sup>3</sup> and to the use of a computer software program to track a suspect's internet use.<sup>4</sup>

The doctrinal incoherence of Fourth Amendment law disturbs many judges and scholars. For example, law enforcement officers need a warrant to search a locked footlocker in a train terminal,<sup>5</sup> but the officers do not need a warrant to search the same container in a car.<sup>6</sup> Law enforcement officers do not need a warrant to monitor a beeper traveling in the public streets, but the officers must obtain a

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1 See U.S. CONST. amend. IV (guaranteeing "[t]he right of the people to be secure in their persons, houses, papers, and effects").

2 See *Scott v. Harris*, 127 S. Ct. 1769, 1779 (2007) (holding that a deputy did not violate the Fourth Amendment when he forced a fleeing motorist off of the road, resulting in a crash that rendered the motorist a quadriplegic).

3 See *Illinois v. Caballes*, 543 U.S. 405, 410 (2005) ("A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.").

4 See *United States v. Forrester*, 495 F.3d 1041, 1049 (9th Cir. 2007) (authorizing warrantless use of software to monitor websites visited by a suspect, as well as e-mail addresses with which he communicated, because "e-mail and Internet users have no expectation of privacy in the to/from addresses of their messages or the IP addresses of the websites they visit").

5 See *United States v. Chadwick*, 433 U.S. 1, 11 (1977) (comparing an individual's expectation of privacy for a locked footlocker to "one who locks the doors of his home against intruders").

6 See *California v. Acevedo*, 500 U.S. 565, 569–81 (1991) (allowing the warrantless search of a container in the trunk of a vehicle where police officers had probable cause to believe that only the container, not the rest of the car, contained marijuana); *United States v. Ross*, 456 U.S. 798, 817–24 (1982) (allowing police officers to search containers within a car when they have probable cause to believe that the vehicle contains narcotics).

warrant if the same beeper enters into a residence.<sup>7</sup> Before using a thermal imaging unit to measure the heat radiating from a house, law enforcement officers must obtain a warrant.<sup>8</sup> But before inspecting the same house from an airplane, law enforcement officers do not need a warrant—or probable cause.<sup>9</sup>

Given the unsatisfactory quality of Fourth Amendment doctrine, attorneys and scholars have demonstrated a renewed interest in the original understanding and historical origins of the Fourth Amendment.<sup>10</sup> The following discussion reviews three common interpretations of Fourth Amendment history. Mainstream analysis asserts that the Framers of the Fourth Amendment intended to impose both a warrant preference rule and a general reasonableness requirement on all searches and seizures. However, little historical evidence supports either a warrant preference rule or a general reasonableness requirement.

Akhil Reed Amar has developed one of the primary alternative readings of Fourth Amendment history. According to Professor Amar, the Framers of the Fourth Amendment viewed warrants as dangerous and enacted the Fourth Amendment to limit the use of warrants.<sup>11</sup> Again, little historical evidence supports this alternative interpretation.

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7 *Compare* United States v. Karo, 468 U.S. 705, 714 (1984) (tracking a beeper that entered a residence without first obtaining a warrant violated the Fourth Amendment), *with* United States v. Knotts, 460 U.S. 276, 284–85 (1983) (tracking a beeper that only traveled through public areas without first obtaining a warrant did not violate the Fourth Amendment).

8 *See* *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (holding that the warrantless use of a thermal imaging unit to determine the amount of heat emanating from the suspect's home violated the Fourth Amendment).

9 *See, e.g.*, Florida v. Riley, 488 U.S. 445, 449 (1989) (allowing warrantless surveillance from a helicopter because “the home and its curtilage are not necessarily protected from inspection that involves no physical invasion”); Dow Chemical Co. v. United States, 476 U.S. 227, 234–39 (1986) (upholding a warrantless search where federal agents used an airplane to examine an industrial compound); California v. Ciraolo, 476 U.S. 207, 212–15 (1986) (holding that where police officers used an airplane to engage in warrantless surveillance of a suspect's backyard, the officers' conduct did not violate the suspect's reasonable expectation of privacy).

10 *See, e.g.*, Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707 (1996) (reviewing William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (on file with Biddle Law Library, University of Pennsylvania Law School)); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999) (commenting on the historical origins and development of the Fourth Amendment); Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925 (1997) (same).

11 *See infra* Part III.A.

Other scholars argue that courts should not consider Fourth Amendment history, either because the original understanding of the Amendment is impossible to determine, or because changed circumstances make this history of little relevance to current controversies. However, scholars have not demonstrated that the original understanding of the Fourth Amendment is shrouded in uncertainty. In addition, scholars have offered few coherent analytical alternatives that could replace historical analysis.

An objective review of historical sources yields an original understanding of the Fourth Amendment that is both surprisingly clear, and surprisingly different from most contemporary readings. Historical sources indicate that the Framers were focused on a single, narrow problem: physical trespasses into houses by government agents. The Fourth Amendment was enacted to address this problem through a precise, bright-line rule. Before entering a house, law enforcement officers typically would need to obtain a specific warrant.<sup>12</sup> But what about searches or seizures that did not involve physical entry into a house? Outside of house searches, the Fourth Amendment was simply inapplicable.<sup>13</sup>

## II. THE WARRANT PREFERENCE RULE AND THE REASONABLENESS REQUIREMENT

Mainstream Fourth Amendment discourse provides both that the Fourth Amendment prefers searches pursuant to a warrant, and that

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<sup>12</sup> I have developed some of this historical analysis in a series of articles. See David E. Steinberg, *High School Drug Testing and the Original Understanding of the Fourth Amendment*, 30 HASTINGS CONST. L.Q. 263 (2003); David E. Steinberg, *An Original Misunderstanding: Akhil Amar and Fourth Amendment History*, 42 SAN DIEGO L. REV. 227 (2005) [hereinafter Steinberg, *Akhil Amar and Fourth Amendment History*]; David E. Steinberg, *The Original Understanding of Unreasonable Searches and Seizures*, 56 FLA. L. REV. 1051 (2004); David E. Steinberg, *Restoring the Fourth Amendment: The Original Understanding Revisited*, 33 HASTINGS CONST. L.Q. 47 (2005).

<sup>13</sup> My view of the Fourth Amendment today is profoundly different from the positions that I expressed in some earlier writings on the Amendment. In those pieces, I argued that the warrant requirement should apply to a variety of searches that did not involve any physical entry into a residence. See David E. Steinberg, Essay, *The Drive Toward Warrantless Auto Searches: Suggestions From a Back Seat Driver*, 80 B.U. L. REV. 545, 546 (2000) (asserting that the Supreme Court's "abandonment of the warrant requirement for automobile searches is ill-advised"); David E. Steinberg, *Making Sense of Sense-Enhanced Searches*, 74 MINN. L. REV. 563, 613–27 (1990) (suggesting a new approach for applying the warrant requirement to sense-enhanced searches, which usually do not involve a physical entry into a residence). My change in thinking has resulted both from my more complete understanding of Fourth Amendment history and my profound doubts about the viability of current Fourth Amendment jurisprudence.

the Amendment imposes a reasonableness requirement on all warrantless searches and seizures. However, neither the warrant preference rule nor the global reasonableness requirement receive support from Fourth Amendment history.

A. *The Warrant Preference Rule*

According to a number of scholars, the Framers enacted the Fourth Amendment to impose a “warrant preference rule” favoring, and sometimes mandating, searches pursuant to a specific warrant. The United States Supreme Court often has stated this warrant preference rule. The Justices have concluded that the Fourth Amendment demonstrates a “strong preference for searches conducted pursuant to a warrant.”<sup>14</sup> At the same time, the Justices have stated that “[w]arrantless searches are presumptively unreasonable” outside of cases involving “a few limited exceptions to this general rule.”<sup>15</sup>

Tracey Maclin has asserted that Fourth Amendment framing-era sources endorse a warrant preference rule.<sup>16</sup> A number of other scholars also assert that Fourth Amendment historical evidence supports a warrant preference rule.<sup>17</sup>

Actually, the balance of evidence is very different. With respect to searches and seizures in early America, Gerard Bradley accurately observes: “Warrantless searches, then as now, were the rule rather than the exception, and each of the thirteen colonies, and then states, as a common statutory practice, authorized them.”<sup>18</sup> As support for this

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14 Illinois v. Gates, 462 U.S. 213, 236 (1983); see also United States v. Leon, 468 U.S. 897, 914 (1984) (noting the Court’s “strong preference for warrants” in the search context).

15 United States v. Karo, 468 U.S. 705, 717 (1984), quoted in California v. Ciraolo, 476 U.S. 207, 225 (1986) (Powell, J., dissenting).

16 See Maclin, *supra* note 10, at 955 (“[T]he decades leading up to the ratification of the Fourth Amendment offer several instances in which colonial and state legislatures announced not only a warrant preference, but a warrant requirement, when enacting search and seizure laws.”).

17 For arguments in support of the warrant preference rule, see Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 852–56 (1994) (enumerating the problems mitigated by the warrant preference rule); Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 295–98 (1984) (supporting the use of a warrant preference rule); Cuddihy, *supra* note 10, at civ (asserting that “specific warrants were mandatory and were intended to be the conventional method of search and seizure”).

18 Gerard V. Bradley, *Present at the Creation? A Critical Guide to Weeks v. United States and Its Progeny*, 30 ST. LOUIS U. L.J. 1031, 1041 (1986).

proposition, Bradley cites a long list of colonial, state, and federal laws that did indeed authorize warrantless searches and seizures.<sup>19</sup>

In those rare situations where early American law enforcement officers needed to obtain a warrant, the warrant requirement appeared in statutes rather than in constitutional interpretations. William Cuddihy notes that in 1783, the Massachusetts legislature required that any law enforcement officer must obtain a specific warrant before searching a house for smuggled goods.<sup>20</sup> However, the officer “could search structures other than dwellings without a warrant, but only if the informant told him, under oath and in writing, both where the taxable goods had been smuggled and where they had been taken.”<sup>21</sup> In 1780 and 1785, the Pennsylvania legislature enacted statutes that required specific warrants for house searches, but not for searches of other premises.<sup>22</sup>

Without question, commentators in the seventeenth and eighteenth centuries emphasized the importance of specific warrants. However, framing-era commentators sought to require specific warrants only prior to physical trespasses into residences. In January 1761, James Otis, a prominent Boston attorney, opposed house searches conducted by British customs officials armed with a writ of assistance—the American version of the general warrant.<sup>23</sup> Specifically, Otis complained that British customs officials “may enter our houses when they please . . . may break locks, bars and every thing in their way—and whether they break through malice or revenge, no man, no court can inquire . . .”<sup>24</sup> In a 1774 letter to the inhabitants of Quebec, the Continental Congress warned that British customs officers who lacked a specific warrant would break into “houses, the scenes of domestic peace and comfort and called the castles of English subjects in the books of their law.”<sup>25</sup> As discussed in the concluding Part of this Article, the Framers intended that the Fourth Amendment would require a specific warrant—but only prior to house searches.

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19 *Id.* at 1041–45 nn.64–65. Bradley’s citations are consistent with my argument in Part V of this Article, where I conclude that the Fourth Amendment was intended only to govern house searches and not other types of government intrusions. *See infra* notes 98–133 and accompanying text.

20 Cuddihy, *supra* note 10, at 1291.

21 *Id.*

22 Davies, *supra* note 10, at 681, 683.

23 M.H. SMITH, *THE WRITS OF ASSISTANCE CASE 344* (1978).

24 *Id.* (quoting the writings of James Otis).

25 Cuddihy, *supra* note 10, at 1117 (quoting Continental Congress, *A Letter to the Inhabitants of the Province of Quebec: Extracts from the Minutes of Congress* 43 (1774)).

### B. A Global Reasonableness Requirement

In addition to imposing a Fourth Amendment “warrant requirement,” the modern Supreme Court has concluded that any search or seizure must be “reasonable.” The Court has applied the Fourth Amendment to such diverse government actions as auto checkpoints,<sup>26</sup> random drug testing,<sup>27</sup> and the use of beepers to follow suspects.<sup>28</sup> But like the warrant preference rule, a Fourth Amendment global reasonableness requirement finds little support in framing-era sources.

If the Fourth Amendment imposed a global reasonableness requirement on all government searches and seizures, one would expect that early Americans frequently would invoke constitutional search-and-seizure provisions. To the contrary, the dearth of published eighteenth-century and early nineteenth-century opinions on constitutional search-and-seizure provisions is remarkable. Prior to the 1886 United States Supreme Court opinion in *Boyd v. United States*,<sup>29</sup> constitutional search-and-seizure provisions probably were mentioned in fewer than fifty cases.<sup>30</sup>

Admittedly, prior to the twentieth century, the Fourth Amendment of the United States Constitution only applied to the federal government.<sup>31</sup> During the eighteenth century and the early nineteenth century, most criminal laws were enacted by the states, not the federal government.<sup>32</sup> In early America, most criminal prosecutions

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26 *Compare* *City of Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000) (holding that random auto stops at a narcotics checkpoint violated the Fourth Amendment), *with* *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (holding that random auto stops at a sobriety checkpoint did not violate the Fourth Amendment).

27 *Compare* *Bd. of Educ. v. Earls*, 536 U.S. 822, 838 (2002) (upholding random drug tests of all students who participated in competitive extracurricular activities), *with* *Chandler v. Miller*, 520 U.S. 305, 322 (1997) (holding that random drug testing of candidates running for state office violated the Fourth Amendment).

28 *Compare* *United States v. Karo*, 468 U.S. 705, 716–18 (1984) (holding that federal agents should have obtained a warrant before tracking a beeper that entered a residence), *with* *United States v. Knotts*, 460 U.S. 276, 284–85 (1983) (holding that federal agents need not obtain a warrant before tracking a beeper that traveled through public streets).

29 116 U.S. 616 (1886).

30 *See* Davies, *supra* note 10, at 613 (discussing the rarity and narrow focus of Fourth Amendment jurisprudence in nineteenth-century federal courts).

31 *See* *Smith v. Maryland*, 59 U.S. (18 How.) 71, 76 (1855) (“[The Fourth Amendment] restrains the issue of warrants only under the laws of the United States, and has no application to state process.”).

32 *See, e.g.*, Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 40 (1996) (discussing the very limited scope of early federal criminal law). In fact, federal criminal law specified only seventeen offenses.

took place in the state courts, where the Fourth Amendment did not apply.

However, during the eighteenth and early nineteenth centuries, most state constitutions contained search-and-seizure provisions, using language that was very similar or identical to the Fourth Amendment.<sup>33</sup> Nonetheless, published state court opinions rarely mentioned these state constitutional search-and-seizure provisions. When attorneys did raise the state provisions, courts quickly dismissed arguments that the government had engaged in an unconstitutional search or seizure.

For example, in the 1814 case of *Wakely v. Hart*,<sup>34</sup> Wakely argued that his warrantless arrest had violated a Pennsylvania constitutional provision, which prohibited unreasonable searches and seizures.<sup>35</sup> The Pennsylvania Supreme Court quickly concluded that the arrest did not violate the state constitutional provision.<sup>36</sup> Similarly, in the 1817 case of *Mayo v. Wilson*,<sup>37</sup> the New Hampshire Supreme Court wrote that a warrantless arrest did not violate the New Hampshire Constitution, which prohibited unreasonable searches and seizures.<sup>38</sup> In the 1838 opinion in *Banks v. Farwell*,<sup>39</sup> the Massachusetts Supreme Judicial Court held that a warrantless search of a shop did not violate a state constitutional search-and-seizure provision.<sup>40</sup> The decisions in *Mayo* and *Banks* are particularly relevant because the Massachusetts and New Hampshire constitutional search-and-seizure provisions used language that largely mirrored the Federal Fourth Amendment.<sup>41</sup>

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Thomas J. Maroney, *Fifty Years of Federalization of Criminal Law: Sounding the Alarm or "Crying Wolf?"*, 50 SYRACUSE L. REV. 1317, 1319 (2000).

<sup>33</sup> Davies, *supra* note 10, at 674–86.

<sup>34</sup> 6 Binn. 315 (Pa. 1814).

<sup>35</sup> Davies describes *Wakely* as “probably the most widely cited American case on the law of arrest.” Davies, *supra* note 10, at 615.

<sup>36</sup> *Wakely*, 6 Binn. at 318.

<sup>37</sup> 1 N.H. 53 (1817).

<sup>38</sup> *Id.* at 59–60.

<sup>39</sup> 38 Mass. (21 Pick.) 156 (1838).

<sup>40</sup> *Id.* at 159–60.

<sup>41</sup> See MASS. CONST. of 1780, pt. 1, art. XIV, *reprinted in* 3 THE 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 1891 (Francis N. Thorpe ed., 1909) [hereinafter THE FEDERAL AND STATE CONSTITUTIONS] (“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.”); N.H. CONST. of 1784, pt. 1, art. XIX, *reprinted in* 4 THE FEDERAL AND STATE CONSTITUTIONS 2456 (employing the same language as the Massachusetts Constitution of 1780).

Early ship seizure cases cast further doubt on the existence of a framing-era reasonableness requirement. Early federal statutes often permitted ship seizures with only minimal evidentiary support. Nonetheless, in the early nineteenth-century cases that reached the United States Supreme Court, the Justices never invalidated a ship seizure on Fourth Amendment grounds. More significantly, *the attorneys representing the shipowners never even argued that the ship seizures had violated the Fourth Amendment.*

In the 1804 case of *Little v. Barreme*,<sup>42</sup> the Supreme Court reviewed a ship seizure resulting from a federal law that prohibited trading with France.<sup>43</sup> In *The Apollon*,<sup>44</sup> an 1824 case, the Supreme Court reviewed a ship seizure that arose out of alleged customs violations.<sup>45</sup> In both of these cases, neither the litigants nor the Justices mentioned the Fourth Amendment.

As was true in other contexts, regulation of ship searches occurred through statutes, rather than through the application of a constitutional search-and-seizure provision. In the Collection Act of 1789, Congress approved the warrantless search of vessels for customs violations.<sup>46</sup> The need for a statute to regulate ship searches strongly suggests that the Fourth Amendment was not intended to regulate such searches.<sup>47</sup>

The writings of early American constitutional scholar Thomas Cooley cast further doubt on whether the Framers of the Fourth Amendment intended to impose a global reasonableness requirement. In his influential treatise on the United States Constitution, Justice Cooley did not discuss any such global reasonableness requirement. Instead, Justice Cooley emphasized that the Framers had enacted the Fourth Amendment to regulate house searches. In a treatise section titled “Unreasonable Searches and Seizures,”<sup>48</sup> Justice Cooley wrote: “The maxim that ‘every man’s house is his castle’ is made a part of our constitutional law in the clause prohibiting unrea-

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42 6 U.S. (2 Cranch) 170 (1804).

43 *Id.* at 176–77.

44 22 U.S. (9 Wheat.) 362 (1824).

45 *Id.* at 363–65, 370–72.

46 Collection Act of 1789, ch. 5, 1 Stat. 29 (1789).

47 *But see* Carroll v. United States, 267 U.S. 132, 150–51 (1925) (asserting that with the passage of the Collections Act of 1789, Congress indicated that the Fourth Amendment applied to ship searches).

48 THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 299 (Boston, Little, Brown, & Co. 1868).

sonable searches and seizures . . . .”<sup>49</sup> Justice Cooley continued, stating that the origins of the Fourth Amendment derived from “the abuse of executive authority, and in the unwarrantable intrusion of executive agents into the houses and among the private papers of individuals.”<sup>50</sup>

As Chief Justice of the Michigan Supreme Court, Thomas Cooley followed a similar approach in the 1874 case of *Weimer v. Bunbury*.<sup>51</sup> Rejecting a challenge under a Michigan state constitutional provision that prohibited unreasonable searches and seizures, Justice Cooley upheld a state statute that authorized a “warrant” for the repossession of property owned by delinquent tax collectors. Justice Cooley did not inquire whether such a seizure of property was “reasonable.” Instead, Justice Cooley wrote that the Michigan constitutional provision outlawing unreasonable searches and seizures was simply inapplicable.<sup>52</sup>

According to Justice Cooley, the Michigan constitutional provision was intended for “something quite different from an open and public levy upon property after the usual method of execution levies.”<sup>53</sup> Justice Cooley continued, writing that the state constitutional search-and-seizure provision “was to make sacred the privacy of the citizen’s dwelling and person against everything but process issued upon a showing of legal cause for invading it.”<sup>54</sup> In short, Justice Cooley’s writings—like other materials from the framing period—are inconsistent with assertions that the Fourth Amendment imposes a global reasonableness requirement on all searches and seizures.

### C. *Summary*

Most modern attorneys and commentators assume that the Framers enacted the Fourth Amendment both to impose a warrant preference rule and to impose a reasonableness requirement on all searches and seizures. However, eighteenth-century and early nineteenth-century sources provide little support either for a warrant preference rule or for a global reasonableness requirement.

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49 *Id.* at 299–300 (citation omitted).

50 *Id.* at 300.

51 30 Mich. 201 (1874).

52 *Id.* at 208.

53 *Id.*

54 *Id.*

### III. AKHIL AMAR: WARRANTS WERE DISFAVORED

Professor Amar offers a second, competing interpretation of Fourth Amendment history.<sup>55</sup> Although Professor Amar makes several observations about the original understanding of the Fourth Amendment,<sup>56</sup> Professor Amar's most original—and controversial—assertions involve the Framers' attitude toward warrants. In brief, Professor Amar argues that the Framers enacted the Fourth Amendment to limit the availability of warrants, rather than to require warrants prior to searches. Unfortunately, Professor Amar's contention—that the Framers rejected warrants—receives little support from historical sources.

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55 See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 64–77 (1998) [hereinafter AMAR, *THE BILL OF RIGHTS*]; AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 1–45 (1997) [hereinafter AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE*]; Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 *YALE L.J.* 1131, 1175–81 (1991) [hereinafter Amar, *The Bill of Rights as a Constitution*]; Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 *SUFFOLK U. L. REV.* 53, 53–54 (1996) [hereinafter Amar, *The Writs of Assistance*]; Akhil Reed Amar, *Fourth Amendment First Principles*, 107 *HARV. L. REV.* 757, 758 (1994) [hereinafter Amar, *Fourth Amendment First Principles*]; Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 72 *ST. JOHN'S L. REV.* 1097, 1097–1098 (1998) [hereinafter Amar, *Terry and Fourth Amendment First Principles*].

56 In addition to his observations about warrants, Professor Amar agrees with the modern Supreme Court that the Fourth Amendment imposes a global reasonable requirement on all searches and seizures. Professor Amar describes arguments suggesting that the Fourth Amendment does not protect office buildings, cars, and computer disks as “an outlandish and crabbed approach.” Amar, *The Writs of Assistance*, *supra* note 55, at 68–69. In fact, given Professor Amar's rejection of warrants, reasonableness forms a central component of his approach. See Amar, *Fourth Amendment First Principles*, *supra* note 55, at 801–11 (using reasonableness as the foundation for determining what rights the Fourth Amendment grants). I already have discussed the lack of historical support for the presence of a global reasonableness requirement under the Fourth Amendment. See *supra* Part II.B.

Professor Amar also disagrees with the exclusionary rule as the appropriate remedy for Fourth Amendment violations. Amar, *Fourth Amendment First Principles*, *supra* note 55, at 785–800. Under this rule, evidence obtained in violation of the Fourth Amendment typically is excluded at a subsequent criminal trial. See, e.g., *Weeks v. United States*, 232 U.S. 383, 393 (1914) (arguing that if illegally obtained items may be “held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value”); see also *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding that the exclusionary rule applies in state court cases).

This Article focuses on the historical understanding of the *rights* that the Framers intended to protect in the Fourth Amendment, and includes minimal discussion of framing-era *remedies* for Fourth Amendment violations. Accordingly, the propriety of the exclusionary rule is beyond the scope of this Article. But in other writings, I have noted the plausibility of Professor Amar's exclusionary rule concerns. Steinberg, *Akhil Amar and Fourth Amendment History*, *supra* note 12, at 238–42.

A. *Professor Amar's Historical Account: The Framers Sought to Limit the Use of Warrants*

Building on the earlier work of Professor Telford Taylor,<sup>57</sup> Professor Amar accurately observes that the text of the Fourth Amendment nowhere requires warrants.<sup>58</sup> But Professor Amar goes beyond arguing that warrants were not required. Professor Amar asserts that the Framers actually viewed warrants as dangerous, and sought to limit their use.<sup>59</sup> Professor Amar cites a number of statements criticizing the warrant requirement<sup>60</sup>—although many of these statements almost certainly were directed at the general warrant and not the specific warrant described in the text of the Fourth Amendment.<sup>61</sup>

According to Professor Amar, the Framers' hostility to warrants is related to the framing-era remedy for Fourth Amendment violations. During the framing era, evidence obtained in violation of the Fourth Amendment was not excluded from a criminal trial.<sup>62</sup> Instead, the victim of an unreasonable search would seek damages "in an ordinary trespass suit—with both parties represented at trial and a jury deciding between the government and the citizen."<sup>63</sup>

Professor Amar continues, further stating that the Framers viewed such suits for damages as the most effective deterrent to unreasonable searches. Professor Amar writes that in the English John Wilkes

57 According to Professor Taylor, the Framers did not view the warrant as providing "protection against unreasonable searches." TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 41 (1969). Instead, the Framers regarded the warrant "as an authority for unreasonable and oppressive searches." *Id.* According to Professor Taylor, with the "[e]xaltation of the warrant as the touchstone of 'reasonableness,'" Supreme Court Justices and commentators "have stood the [F]ourth [A]mendment on its head." *Id.* at 23–24.

58 See Amar, *The Writs of Assistance*, *supra* note 55, at 54 ("If, however, the Amendment simply means what it says, and does not require warrants, what exactly is the purpose of the warrant clause?"); see also Amar, *Fourth Amendment First Principles*, *supra* note 55, at 763 ("[A]lthough many states featured language akin to the Fourth Amendment, none had a textual warrant requirement.").

59 Amar, *The Writs of Assistance*, *supra* note 55, at 60 ("Why did the framers seek to limit warrants? Because a lawful warrant could immunize the officer who carried it out from the trespass suit that the citizen victim might otherwise have been free to bring.").

60 See, e.g., Amar, *Fourth Amendment First Principles*, *supra* note 55, at 778 (citing courts that characterized the effects of warrants as distressing, humiliating, and degrading).

61 See *infra* text accompanying notes 68–81 (discussing the difference between the general warrant and the specific warrant).

62 See Amar, *Fourth Amendment First Principles*, *supra* note 54, at 786 ("Supporters of the exclusionary rule cannot point to a single major statement from the Founding—or even the antebellum or Reconstruction eras—supporting Fourth Amendment exclusion of evidence in a criminal trial.").

63 *Id.* at 774.

cases, the victims of unreasonable searches “had recovered a King’s ransom from civil juries to teach arrogant officialdom a lesson and to deter future abuse.”<sup>64</sup>

However, such trespass suits would not succeed if law enforcement officials had obtained a warrant. Professor Amar writes that “a lawful warrant would provide—indeed, was designed to provide—an absolute defense in any subsequent trespass suit.”<sup>65</sup> The Framers sought to limit the use of warrants, “otherwise, central officers on the government payroll in *ex parte* proceedings would usurp the role of the good old jury in striking the proper balance between government and citizen after hearing lawyers on both sides.”<sup>66</sup> Professor Amar concludes, “Warrants then, were friends of the officer, not the citizen; and so warrants had to be strictly limited . . . .”<sup>67</sup> In other words: “Judges and warrants are the heavies, not the heroes, of our story.”<sup>68</sup>

#### *B. Professor Amar and the Historical Evidence*

In fact, the Framers did oppose house searches pursuant to some search warrants. But the Framers only opposed the use of general warrants, not specific warrants.

The first American state constitutional provision that regulated searches and seizures imposed a straightforward ban against general warrants. In Article X of the Virginia Declaration of Rights of 1776, the Virginia legislature provided that general warrants “are grievous and oppressive, and ought not to be granted.”<sup>69</sup> Further, the Virginia Declaration described the general warrant and its defects. General warrants improperly permitted law enforcement officers to search “places without evidence of a fact committed.”<sup>70</sup> In other words, the general warrant typically lacked sufficient evidentiary support. General warrants also improperly permitted law enforcement officers “to seize any person or persons not named, or whose offence is not particularly described and supported by evidence.”<sup>71</sup> In other words, such warrants did not narrowly specify the places that law enforce-

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64 *Id.* at 797.

65 *Id.* at 774.

66 *Id.*

67 Amar, *The Writs of Assistance*, *supra* note 55, at 60.

68 Amar, *The Bill of Rights as a Constitution*, *supra* note 55, at 1179.

69 VA. CONST. OF 1776, art. X, *reprinted in* 7 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 41, at 3814.

70 *Id.*

71 *Id.*

ment officers could search. General warrants simply provided law enforcement officers with too much discretion.

For early Americans, the cure for this discretion was not warrantless house searches, which would provide law enforcement officers with unlimited discretion, subject only to a possible subsequent trespass suit. Rather, early Americans advocated house searches conducted pursuant to specific warrants. Unlike the minimal evidentiary showings that preceded the issuance of a general warrant, the specific warrant required that law enforcement officers must demonstrate “probable cause” before a court could issue the warrant.<sup>72</sup> And while a general warrant did not limit the scope of government investigations, a specific warrant needed to describe with particularity “the place to be searched, and the persons or things to be seized.”<sup>73</sup>

The most prominent theme in early discussions of unreasonable searches and seizures focused on the illegitimacy of unconstrained house searches conducted pursuant to a general warrant. In his 1721 treatise, Matthew Hale concluded that general warrants were “not justifiable,” because these warrants gave so much discretion to the law enforcement officers that the warrants made the officers “to be in effect the judge.”<sup>74</sup> In the 1763 English case of *Wilkes v. Wood*,<sup>75</sup> Chief Justice Pratt wrote that where the defendants claimed a right “to force persons houses, break open escrutores, seize their papers, &c. upon a general warrant,” these actions violated common law principles and were “totally subversive to the liberty of the subject.”<sup>76</sup> At a Boston town meeting in 1772, Samuel Adams attacked the writs of assistance—the American form of the general warrant. Adams asserted: “[O]ur homes and even our bed chambers, are exposed to be ransacked, our boxes chests & trunks broke open ravaged and plundered by wretches . . . whenever they are pleased to say they *suspect* there are in the house wares etc. for which dutys [sic] have not been paid.”<sup>77</sup>

Contrary to Professor Amar’s suggestion, early Americans did not believe that the cure for these unconstrained house searches was to

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72 See U.S. CONST. amend. IV (providing that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation”).

73 *Id.*; see also Davies, *supra* note 10, at 650–54 (contrasting the specific warrant with the general warrant).

74 2 SIR MATTHEW HALE, *HISTORIA PLACITORUM CORONÆ: HISTORY OF THE PLEAS OF THE CROWN* 150 (Sollom Emlyn ed., London, E. & R. Nutt & R. Gosling 1736).

75 98 Eng. Rep. 489 (K.B. 1763).

76 *Id.* at 498.

77 Samuel Adams, *A State of Rights of the Colonists*, reprinted in *TRACTS OF THE AMERICAN REVOLUTION: 1763–1776*, at 235, 243 (Merrill Jensen ed., 1967).

eliminate all warrants and permit warrantless searches. In fact, early Americans believed that house searches should take place only pursuant to a specific warrant.

Early American statutes contradict Professor Amar's claim that the Framers disfavored *all* warrants—both general warrants and specific warrants. As Tracey Maclin has written, a section of the Federal Collection Act of 1789 required a specific warrant before customs agents could search buildings.<sup>78</sup> A 1786 Rhode Island statute required that federal tax agents must obtain a specific warrant before the agents could search a “Dwelling-House, Store, Ware-house, or other Building.”<sup>79</sup> In a 1786 act, Delaware required that government agents obtain specific warrants before the agents could search buildings for cargo pilfered from shipwrecked vessels.<sup>80</sup> And, as noted previously, during the 1780s both Massachusetts and Pennsylvania enacted statutes that required specific warrants prior to house searches.<sup>81</sup>

Of course, none of these statutory examples conclusively prove that the Fourth Amendment required warrants prior to house searches. However, these examples contradict Professor Amar's assertion that Americans sought to limit the use of all warrants. As Professor Morgan Cloud has written: “If warrants, particularly specific warrants, were seen as the enemies of privacy and liberty, and not as a restriction upon government power,” then statutes that required specific warrants “make little sense.”<sup>82</sup>

To summarize, the Framers viewed only the general warrant as dangerous and subject to abuse. Contrary to Professor Amar's assertion, the Framers did not enact the Fourth Amendment to restrict the use of all warrants.<sup>83</sup> Instead, the Framers sought to prevent unrestrained house searches, by requiring that law enforcement officers obtain a specific warrant before entering a residence. Although Pro-

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78 Collection Act of 1789, ch. 5, § 24, 1 Stat. 29, 43 (1789); Maclin, *supra* note 10, at 963.

79 Cuddihy, *supra* note 10, at 1292.

80 *Id.* at 1293.

81 See *supra* text accompanying notes 20–22.

82 Cloud, *supra* note 10, at 1731; see also *id.* (“To fail to distinguish between specific and general warrants . . . is to simply miss one of the important historical developments in the years preceding the ratification of the Fourth Amendment.”).

83 A number of Fourth Amendment scholars disagree with Professor Amar's reading of Fourth Amendment history. For detailed critiques of Professor Amar's arguments, see *id.* at 1739 (“[Amar] selectively deploys incomplete fragments of the historical record to advance a partisan thesis.”); Davies, *supra* note 10, at 575 n.63 (“Amar is an engaging writer, but his treatment of text and history is often loose and uninformed.”); Maclin, *supra* note 10, at 929 (“Amar provides an incomplete account of the [Fourth] Amendment's history.”).

fessor Amar asserts that the Framers sought to limit the use of all warrants, this assertion is not supported by the historical record.<sup>84</sup>

#### IV. ARGUMENTS THAT COURTS SHOULD NOT CONSIDER FOURTH AMENDMENT HISTORY

The first two Parts of this Article evaluate interpretations of Fourth Amendment history. However, some commentators argue that modern Fourth Amendment analysis should exclude any reference to history. According to some commentators, historical materials on the Fourth Amendment are vague and contradictory, making any attempt to divine the original understanding of the Amendment an exercise in futility. However, such contentions are inaccurate. In fact, the need to regulate house searches appears with unmistakable clarity in the historical record.

Other commentators contend that the original understanding of the Amendment is irrelevant because law enforcement has changed so dramatically since the adoption of the Fourth Amendment. The premise of this argument is accurate—law enforcement today is very different from law enforcement during the framing era. Unfortunately, commentators who argue that history is irrelevant to Fourth Amendment analysis typically offer few analytical alternatives.

##### A. *Does Fourth Amendment History Reveal a Clear Original Understanding?*

Some scholars assert that, given the vagueness and complexity of the historical record on searches and seizures, attempts to divine the original understanding of the Fourth Amendment are largely doomed to failure. For example, Tracey Maclin concludes that Fourth Amendment historical reviews typically “either present a muddled picture of the Framers’ expectations or do not address many of the Fourth Amendment issues currently confronting today’s judges.”<sup>85</sup> In his review of William Cuddihy’s major treatise on Fourth Amendment history, Professor Morgan Cloud writes that “except for a few uncontroversial issues, constitutional decision makers should be skeptical when lawyers claim to have discovered the [Fourth] Amendment’s precise meaning in its complex history.”<sup>86</sup>

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<sup>84</sup> For a more detailed critique of Professor Amar’s Fourth Amendment historical analysis, see generally Steinberg, *Akhil Amar and Fourth Amendment History*, *supra* note 12.

<sup>85</sup> Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 973 (2002).

<sup>86</sup> Cloud, *supra* note 10, 1746–47.

Without question, the development of Fourth Amendment principles was not always consistent. Professor Cloud accurately observes that “victims and critics of general searches and seizures complained bitterly and loudly, only to use the same methods against their adversaries when they had the chance.”<sup>87</sup> For example, in framing-era discussions of unreasonable searches and seizures, scholars and statesmen consistently opposed house searches conducted pursuant to general warrants.<sup>88</sup> But as of 1787, five states continued to authorize the use of general warrants.<sup>89</sup> After the adoption of the Fourth Amendment, some southern states still used general warrants when searching for runaway slaves.<sup>90</sup>

Yet despite the admitted complexity and ambiguity of the historical record, the basic purpose of the Fourth Amendment was surprisingly clear. The Supreme Court has long observed that the Fourth Amendment was intended to protect homes from indiscriminate searches.<sup>91</sup> As discussed in the concluding Part of this Article, Fourth Amendment history emphasizes the importance of protecting houses from unregulated searches, pursuant to a general warrant, or no warrant at all.<sup>92</sup>

Most commentators assume that the Fourth Amendment must have been intended to extend beyond house searches. After finding very limited historical evidence about how the Amendment would govern law enforcement activities other than house searches, commentators often conclude that the original understanding of the Fourth Amendment is shrouded in ambiguity.

However, such arguments proceed from a false premise. As demonstrated in the concluding Part of this Article, the Framers enacted the Fourth Amendment only to govern house searches. The Framers did not intend for the Amendment to apply to other law enforcement activities.

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87 *Id.* at 1717.

88 *See, e.g.*, Davies, *supra* note 10, at 551 (characterizing historical concerns about search and seizures as “almost exclusively about the need to ban house searches under general warrants”).

89 Cuddihy, *supra* note 10, at 1277–82 (describing the use of general warrants in New York, Maryland, North Carolina, South Carolina, and Georgia).

90 *Id.* at 1280–82.

91 *See, e.g.*, *Payton v. New York*, 445 U.S. 573, 586 (1980) (“It is a ‘basic principle of Fourth Amendment law’ that searches and seizures inside a home without a warrant are presumptively unreasonable.”); *United States v. U.S. Dist. Court*, 407 U.S. 297, 313 (1972) (“[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed . . .”).

92 *See infra* notes 100–35.

*B. Times Have Changed*

In addition to concerns about the complexity or vagueness of Fourth Amendment history, commentators cite another reason that lawyers and judges should not consider Fourth Amendment historical sources. These commentators argue that because law enforcement practices and social values have changed dramatically since the framing era, the original understanding of the Fourth Amendment is irrelevant to current controversies.

Professor Thomas Davies presents a clear statement of this argument. After an exceptionally thorough historical analysis, Professor Davies arrives at a Fourth Amendment historical interpretation that is very similar to the interpretation advanced in this Article. Professor Davies determines that the historical concerns resulting in the Fourth Amendment “were almost exclusively about the need to ban house searches under general warrants.”<sup>93</sup>

Nonetheless, Professor Davies does not advocate returning to the relatively narrow original understanding of the Fourth Amendment. According to Professor Davies, a return to the original understanding of the Fourth Amendment “would subvert the *purpose* the Framers had in mind when they adopted the text.”<sup>94</sup> Professor Davies largely accepts the Supreme Court’s rewriting of the Fourth Amendment because today’s law enforcement officers exercise “a level of discretion-

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93 Davies, *supra* note 10, at 551. Professor Davies’ article contains a remarkably thorough and convincing discussion of the original understanding of the Fourth Amendment. However, I disagree with Professor Davies’ conclusion that the Fourth Amendment did not reach warrantless house searches. Professor Davies writes that the sole purpose of the Fourth Amendment was “banning Congress from authorizing use of general warrants.” *Id.* at 724. “In other words, the Framers did not address warrantless intrusions at all in the Fourth Amendment or in the earlier state provisions . . .” *Id.* at 551.

In concluding that the Fourth Amendment did not address warrantless searches, Professor Davies notes the absence of eighteenth-century protests about warrantless house searches. *Id.* at 603. However, the lack of debate about warrantless house searches likely occurred because in early America, “the common law apparently provided no justification for a search of a house beyond the ministerial execution of a valid search warrant.” *Id.* at 649. In other words, everyone agreed that warrantless house searches were impermissible.

According to Professor Davies’ reading of the Framers’ intent, a search of a house pursuant to a general warrant would be an “unreasonable search,” as that term is used in the Fourth Amendment. However, Davies asserts that a warrantless house search would not be an unreasonable search, at least for Fourth Amendment purposes. Given the profound common law tradition that proscribed unauthorized entries into houses, I disagree with Davies’ conclusion that the Fourth Amendment did not prohibit warrantless house searches.

94 *Id.* at 741.

ary authority that the Framers would not have expected a warrantless officer could exercise unless general warrants had been made legal.<sup>95</sup>

Professor Davies is correct that today's sprawling and omnipresent law enforcement departments have little in common with law enforcement during the framing era. In early America, the very limited criminal law enforcement that existed took place almost exclusively under state law, where the Fourth Amendment did not apply.<sup>96</sup> Federal law specified few crimes, and federal criminal law enforcement rarely occurred.<sup>97</sup> Given the vast changes in law and society that have occurred since the framing era, some commentators assert that Fourth Amendment history should be irrelevant to current search-and-seizure controversies.<sup>98</sup>

However, such arguments typically do not offer a coherent Fourth Amendment alternative to historical analysis. As noted at the beginning of this Article, the Supreme Court's historical Fourth Amendment analysis has resulted in a search-and-seizure doctrine that is arbitrary, inconsistent, and ultimately incoherent. Scholars have responded to this doctrine with well-deserved criticism.<sup>99</sup> Given the

<sup>95</sup> *Id.*; see also Cloud, *supra* note 10, at 1719 (suggesting that before applying historical analysis to modern Fourth Amendment problems, "we might at least wonder how much deference we owe to methods designed to preserve social structures and practices that we have rejected").

<sup>96</sup> See *supra* note 31.

<sup>97</sup> See, e.g., NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 106 (1937) ("During [the nineteenth century], the limited criminal jurisdiction of the Federal Government was not exercised by Congress except in minor instances."); Maroney, *supra* note 32, at 1319–20 ("Because the [early] federal government was then small and conducted few programs, the list of [criminal] offenses was short.").

<sup>98</sup> For arguments that modern notions of reasonableness should influence Fourth Amendment doctrine, see Yale Kamisar, *The Writings of John Barker Waite and Thomas Davies on the Search and Seizure Exclusionary Rule*, 100 MICH. L. REV. 1821, 1865 (2002) ("[C]hanging times and changing circumstances seriously undermined the presuppositions and expectations regarding the drafting and adoption of the search and seizure provision."); Streiker, *supra* note 17, at 824 ("[T]he construction of the Fourth Amendment's 'reasonableness' clause should properly change over time to accommodate constitutional purposes more general than the Framers' specific intentions . . .").

<sup>99</sup> For criticisms of current Fourth Amendment doctrine, see Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468 (1985) ("The [F]ourth [A]mendment is the Supreme Court's tarbaby: a mass of contradictions and obscurities that has ensnared the 'Brethren' in such a way that every effort to extract themselves only finds them more profoundly stuck."); Erik G. Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 787–88 (1999) (arguing that each new Fourth Amendment doctrine "is more duct tape on the Amendment's frame and a step closer to the junkyard"); Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 49–50 (1974) (noting that the Court's Fourth Amendment jurisprudence is "a body of doctrine that is unstable and unconvincing").

unsatisfactory nature of modern Fourth Amendment doctrine, the original understanding of the Amendment deserves further attention.

#### V. THE ORIGINAL FOURTH AMENDMENT: AN OBJECTIVE REVIEW OF HISTORY

Reviews of Fourth Amendment history typically are distorted either by partisan objectives or by popular misconceptions that have grown up around the Fourth Amendment. Contrary to the modern warrant preference rule, the overwhelming majority of framing-era searches and seizures took place without a warrant. The occasional framing-era statutes that required a warrant cast considerable doubt on Professor Amar's historical thesis, which asserts that the Framers viewed warrants as dangerous, and sought to limit their use. And when scholars assert that the original understanding of the Fourth Amendment is too vague to be determined, such assertions are just as inaccurate as the incorrect interpretations of Fourth Amendment history.

In fact, framing-era discussions of unreasonable searches and seizures focused almost exclusively on house searches. At the same time, any problems raised by searches and seizures outside of house searches were rarely mentioned. This emphasis on house searches appears in both the English legal developments that predated the Fourth Amendment and in the American developments that occurred before and soon after the adoption of the Amendment.

As demonstrated by historical sources, the Framers who enacted the Fourth Amendment intended to address only a narrow, specific problem. The Framers intended to prohibit any physical trespass into a residence by law enforcement officers—pursuant to either a general warrant, or no warrant at all. In the Fourth Amendment, the Framers sought to require that government agents obtain a specific warrant before entering a house. And that is all the Framers intended to require. Contrary to modern interpretations, the Framers never intended that the Fourth Amendment would govern all of the complex problems raised by government searches and seizures.

##### A. *Early English Thought on Unreasonable Searches and Seizures*

###### 1. *Origins and Commentary*

The doctrine prohibiting unreasonable searches and seizures did not originate as a restraint upon the government. The doctrine be-

gan with English laws that protected homes against breaking and entering by private citizens.

As Professor William Cuddihy observes, as early as the seventh century, English codes “penalized severely those who invaded a neighbor’s premises or provoked a disturbance within it.”<sup>100</sup> Professor Cuddihy writes that the early English housebreaking proscriptions acted exclusively as sanctions against private parties and not as restraints on the government.<sup>101</sup> The early English housebreaking laws “sought to control violence by private persons toward each other, not official searches by the government.”<sup>102</sup>

As house searches by the English government occurred with increasing frequency after 1485, English thought began to postulate that certain types of house searches by government agents were unreasonable and unlawful. Professor Cuddihy summarizes this movement: “Elizabethan Englishmen began to insist that their houses were castles for the paradoxical reason that the castle-like security that those houses had afforded from intrusion was vanishing. As the violence and frequency of searches escalated, the perception that some types of search and seizure were unreasonable appeared.”<sup>103</sup>

Not surprisingly, early English commentaries on searches and seizures focused on house searches. In 1644, Sir Edward Coke described unreasonable searches in the following terms: “One or more justice or justices of peace cannot make a warrant upon a bare surmise to break [open] any man[']s house to search for a felon, or for stol[e]n goods . . . .”<sup>104</sup> Coke continued that “for justices of peace to make warrants upon surmises, for breaking the houses of any subjects to search for felons, or stol[e]n goods, is against [the] Magna Carta.”<sup>105</sup>

In his 1721 treatise, Matthew Hale expanded on Coke’s rejection of general warrants as a justification “to break open any man’s house.”<sup>106</sup> Like other contemporary commentators, Hale focused on house searches. In his chapter “*Concerning* warrants to search for sto-

100 Cuddihy, *supra* note 10, at 32.

101 *Id.* at 36.

102 *Id.*

103 *Id.* at 128.

104 EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING THE JURISDICTION OF COURTS 176 (London, W. Clarke & Sons 1817) (1644).

105 *Id.* William Blackstone also emphasized the illegality of general warrants. Blackstone wrote: “A *general* warrant to apprehend all persons suspected, without naming or describing any person in special, is illegal and void for it’s uncertainty . . . .” WILLIAM BLACKSTONE, 4 COMMENTARIES \*288.

106 *See* 2 HALE, *supra* note 74, at 148 (quoting COKE, *supra* note 104, at 176).

len goods, *and seizing of them*,”<sup>107</sup> Hale wrote exclusively about searches of *houses*, and did not discuss searches of commercial establishments that also might contain stolen goods.<sup>108</sup>

## 2. *The John Wilkes Cases*

In the eighteenth century, the most well-known examples of unreasonable searches arose out of an English seditious libel prosecution brought against opposition politician John Wilkes and his supporters.<sup>109</sup> In April 1763, an anonymous letter printed in an opposition periodical described the British Tory administration as “‘wretched’ puppets, . . . and ‘the tools of corruption and despotism.’”<sup>110</sup> Based on a general warrant issued by the Tory Secretary of State, English officers searched at least five houses and arrested at least forty-nine people pursuant to this single general warrant.<sup>111</sup> Wilkes and his supporters responded with at least thirty different trespass and false imprisonment suits.<sup>112</sup>

In a series of decisions issued between 1763 and 1769, English courts concluded that the house searches in the John Wilkes cases violated English common law principles.<sup>113</sup> The officers who conducted these house searches were liable for trespass and false imprisonment.<sup>114</sup>

Although the John Wilkes cases are discussed routinely in Fourth Amendment works, scholars rarely acknowledge that these decisions focused almost exclusively on the impropriety of house searches conducted pursuant to a general warrant. For example, in *Huckle v. Money*,<sup>115</sup> Chief Justice Pratt refused to set aside a damages verdict won

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<sup>107</sup> *Id.*

<sup>108</sup> For example, Hale concludes that, if an officer possesses a specific warrant, and “if the stolen goods be in the house, the officer may break open the door.” *Id.* at 151. But if an officer lawfully enters a house to search for stolen goods and no stolen goods are in the house, “the party that made the suggestion [about the presence of stolen goods] is punishable in such case.” *Id.*

<sup>109</sup> For a detailed account of the John Wilkes cases, see Cuddihy, *supra* note 10, at 886–927.

<sup>110</sup> *Id.* at 886.

<sup>111</sup> *Id.* at 893.

<sup>112</sup> *Id.* at 894.

<sup>113</sup> The published opinions that arose out of suits initiated by John Wilkes and his followers include *Entick v. Carrington*, 95 Eng. Rep. 807 (K.B. 1765); *Money v. Leach*, 97 Eng. Rep. 1050 (K.B. 1765); *Huckle v. Money*, 95 Eng. Rep. 768 (K.B. 1763); and *Wilkes v. Wood*, 98 Eng. Rep. 489 (K.B. 1763).

<sup>114</sup> See LASSON, *supra* note 97, at 44–45 (describing the verdicts in the John Wilkes cases and noting that the English government’s expenses in these cases “were said to total £100,000”).

<sup>115</sup> 95 Eng. Rep. 768 (K.B. 1763).

by a printer whose house had been searched pursuant to the general warrant. Chief Justice Pratt wrote: “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; it was a most daring public attack made upon the liberty of the subject.”<sup>116</sup> Other opinions issued in the John Wilkes cases included similar condemnations of unlawful house searches.<sup>117</sup>

The John Wilkes cases focused exclusively on the impropriety of *house searches* pursuant to a general warrant. These cases did not suggest that similar searches of shops, warehouses, or vessels would violate common law principles.<sup>118</sup> Nor did these cases announce a global reasonableness requirement for all searches and seizures.

## B. American Framing-Era Thought on Unreasonable Searches and Seizures

### 1. Paxton’s Case

In America, one of the first formal protests against unreasonable searches came in Paxton’s case. Charles Paxton was a customs officer in Boston, Massachusetts. In 1755, Paxton sought to renew a writ of assistance.<sup>119</sup> The writ of assistance was the American equivalent of the English general warrant.<sup>120</sup>

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<sup>116</sup> *Id.* at 769.

<sup>117</sup> See, e.g., *Entick*, 95 Eng. Rep. at 818 (holding that executing a general warrant “to enter a man’s house, search for and take away all his books and papers” violated common law principles); *Wilkes*, 98 Eng. Rep. at 498 (stating that, where the defendants claimed a right “to force persons houses, break open escutores, seize their papers, &c. upon a general warrant,” these actions were “totally subversive to the liberty of the subject”).

<sup>118</sup> Eighteenth-century Americans may have lacked access to the actual opinions issued in the John Wilkes cases. See Davies, *supra* note 10, at 565 n.25 (“The case reports of the [John Wilkes] cases were not published contemporaneously with the trials.”). But during the eighteenth century these opinions were reported on widely in the popular press—both in America and in England. See *id.* at 563 (“The [London and colonial newspaper] accounts of the trials exclaimed . . . the sanctity of the house while condemning general warrants . . . .”); accord Cuddihy, *supra* note 10, at 927–37 (describing British publications that opposed the use of general warrants in the John Wilkes cases); see also JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 29 (1966) (recounting Chief Justice Pratt’s increased popularity in England following his opinions in the John Wilkes cases). Eighteenth-century Americans almost certainly were familiar with the results and reasoning in the John Wilkes cases, even if these early Americans lacked access to the actual court opinions.

<sup>119</sup> Cuddihy, *supra* note 10, at 761.

<sup>120</sup> Colonial authorities used the writs of assistance to search for customs violations. The writ authorized customs officers to search any places where the officers suspected smuggled goods were hidden. In Boston, customs officers believed that these writs empowered them to enter and inspect all houses in Massachusetts. *Id.* at 759.

In January 1761, attorney James Otis challenged Paxton's writ of assistance before the Superior Court in Boston.<sup>121</sup> After asserting that "the freedom of one's house" was among "the most essential branches of English liberty,"<sup>122</sup> Otis argued that the writs of assistance operated as general warrants, in violation of common law principles.<sup>123</sup>

In Paxton's case, Otis argued only against house searches. As Thomas Davies has noted, Otis's clients were "merchants who also owned ships and warehouses."<sup>124</sup> But Otis did not challenge the searches of warehouses or the seizure of ships—only physical intrusions into residences.<sup>125</sup>

The Superior Court in Boston ultimately approved the continued use of the writs of assistance.<sup>126</sup> Nonetheless, Otis's argument was a major event in the American movement for independence from England.<sup>127</sup>

## 2. *American Opposition to the Townshend Act*

American opposition to house searches pursuant to general warrants flared again in 1767, when the British Parliament enacted the Townshend Act. The Act reauthorized the use of writs of assistance by customs officers in America.<sup>128</sup>

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The writ was named a "writ of assistance" because the writ compelled all peace officers and other persons present to assist the customs officers in the performance of a search. Davies, *supra* note 10, at 561 n.18.

<sup>121</sup> Cuddihy, *supra* note 10, at 765.

<sup>122</sup> SMITH, *supra* note 23, at 344.

<sup>123</sup> *Id.*

<sup>124</sup> Davies, *supra* note 10, at 602.

<sup>125</sup> *Id.* at 601–02.

<sup>126</sup> Cuddihy, *supra* note 10, at 798.

<sup>127</sup> John Adams and other important statesmen attended Otis's argument in Boston. According to Adams, during Otis's argument "American independence was then and there born." 10 JOHN ADAMS, *THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR* 247 (Charles Francis Adams ed., Boston, Little, Brown & Co. 1856). Adams also wrote that Otis's attack on the writs of assistance was "the first scene of the first act of opposition to the arbitrary claims of Great Britain." *Id.* at 248. *But cf.* Davies, *supra* note 10, at 561–62 n.20 (concluding that "Otis's argument was widely known in Boston," but expressing uncertainty about whether news of the case reached beyond Massachusetts).

<sup>128</sup> Cuddihy, *supra* note 10, at 1040. Given the profound influence of the John Wilkes cases and Paxton's case, colonial courts rarely issued the writs authorized by the Townshend Act, and customs officers could not execute the writs effectively. William Cuddihy describes the implementation of the Townshend Act: "In only a few colonies did the courts issue the writs as general search warrants, and the massive searches that those writs authorized were never implemented on an effective scale." *Id.* at 1046. Cuddihy identifies

With the passage of the Townshend Act, American opposition to unreasonable search-and-seizures again focused almost exclusively on house searches pursuant to a writ of assistance. The remarks of Judge William Henry Drayton are typical. In a 1774 letter, Judge Drayton complained that “a petty officer has power to cause the doors and locks of any man to be broke open, to enter his most private cabinet, and thence to take and carry away, whatever he shall in his pleasure deem uncustomed goods.”<sup>129</sup> Similarly, in a 1774 address to the American people, the Continental Congress protested against the power of customs officers “to break open and enter houses without the authority of any civil magistrate founded on legal information.”<sup>130</sup>

Admittedly, the Supreme Court’s first case on the Fourth Amendment did not involve house searches. In *Boyd v. United States*, the Court struck down a statute that authorized courts to order the production of business records.<sup>131</sup> The *Boyd* Court held that the statute violated the Fourth Amendment to the United States Constitution.<sup>132</sup>

In his *Boyd* majority opinion, Justice Joseph P. Bradley cited almost no authority for the proposition that the Fourth Amendment protects business records.<sup>133</sup> Cases such as *Boyd* would ultimately culminate in the Court’s use of substantive due process to strike down government regulations of businesses, including the notorious decision in *Lochner v. New York*.<sup>134</sup> *Boyd* is best understood as a decision from the late

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at least three different reactions to the Townshend Act. In Massachusetts, judges actually issued the writs of assistance. However, as a result of popular resistance, customs officers usually were not able to execute effective searches pursuant to the writs. *Id.* at 1046–50. In colonies such as Rhode Island, Maryland, and South Carolina, judges either ignored the writ applications or repeatedly postponed considering these applications. *Id.* at 1056–57. The Supreme Courts of Pennsylvania and Connecticut attempted to transform the writs of assistance into specific search warrants. *Id.* at 1067; see also LASSON, *supra* note 97, at 73 (“Most of the [non-Massachusetts] colonial courts . . . refused to grant general writs of assistance even after the Townshend Act had set at rest all technical objections to their legality.”).

129 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 1 DOCUMENTARY HISTORY OF THE AMERICAN REVOLUTION: CONSISTING OF LETTERS AND PAPERS RELATING TO THE CONTEST FOR LIBERTY, CHIEFLY IN SOUTH CAROLINA, FROM ORIGINALS IN THE POSSESSION OF THE EDITOR, AND OTHER SOURCES 11, 15 (R. W. Gibbes ed., New York, D. Appleton & Co. 1855).

130 Cuddihy, *supra* note 10, at 1116 (internal quotation marks omitted).

131 116 U.S. 616, 638 (1886).

132 *Id.* at 632.

133 See Davies, *supra* note 10, at 728 (describing “the novelty of [Justice] Bradley’s specific claims”); *id.* at 727 n.512 (describing Justice Bradley’s account of the original understanding of the Fourth Amendment as “fanciful at best”).

134 198 U.S. 45 (1905). For discussions of substantive due process in the nineteenth century and early twentieth century, see generally John Harrison, *Substantive Due Process and the*

nineteenth century, when the Supreme Court used the Constitution to shield business owners from government regulations.<sup>135</sup>

Decided almost 100 years after the Framers adopted the Fourth Amendment, *Boyd* offers little insight into the intentions of the Framers. By extending the Fourth Amendment to business records, the *Boyd* decision was inconsistent with the original understanding of the Amendment.

## VI. CONCLUSION

Although Fourth Amendment history has begun to attract considerable attention, many conclusions about the original understanding of the Amendment are simply wrong. The prevalence of warrantless searches in early America is inconsistent with a warrant preference rule. With the very rare invocation of constitutional search-and-seizure provisions, little evidence supports assertions that the Fourth Amendment imposed a global reasonableness requirement on all searches and seizures. Although Professor Amar contends that the Framers enacted the Fourth Amendment to limit the use of warrants, the presence of a warrant requirement in a number of framing-era statutes contradicts Professor Amar's contention.

Although many authors have misinterpreted Fourth Amendment history, this does not mean that the original understanding of the Amendment is shrouded in mystery. In fact, a review of framing-era sources reveals a surprisingly clear depiction of the Framers' intentions. The Fourth Amendment proscribed physical trespasses into houses pursuant to a general warrant, or no warrant at all. The Amendment sought only to regulate house searches. Outside of this realm, the Amendment was simply inapplicable.

If the Supreme Court returned to the original understanding of the Fourth Amendment, the regulation of law enforcement searches and seizures typically would occur through the discretionary decisions of elected officials, rather than through court interpretations of the Fourth Amendment. Before rejecting such a regime, critics should carefully consider the chaotic and inconsistent state of current

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*Constitutional Text*, 83 VA. L. REV. 493 (1997); Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1 (1991); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

<sup>135</sup> See Davies, *supra* note 10, at 739 (supporting the view that Justice Bradley's assumption that the Fourth Amendment extended to commercial interests "reflects the pro-business activism of the late nineteenth- and early twentieth-century Supreme Court—not the original understanding of the Amendment").

Fourth Amendment jurisprudence. Fourth Amendment doctrine is incoherent precisely because courts have invoked the Amendment in situations where it was never intended to apply.