

An Original Misunderstanding: Akhil Amar and Fourth Amendment History

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TABLE OF CONTENTS

I.	INTRODUCTION	228
II.	MAINSTREAM FOURTH AMENDMENT DISCOURSE	230
	A. <i>The Warrant Preference Rule</i>	230
	1. <i>Categorical Exceptions</i>	231
	2. <i>Fact Specific Exceptions</i>	233
	B. <i>The Reasonableness Requirement</i>	234
III.	PROFESSOR AMAR'S ACCOUNT OF FOURTH AMENDMENT HISTORY	235
	A. <i>Warrants</i>	236
	B. <i>Reasonableness</i>	237
	C. <i>The Attractiveness of Professor Amar's Account</i>	238
IV.	ANALYZING PROFESSOR AMAR'S HISTORICAL ASSERTIONS	242
	A. <i>The Framers Were Not Hostile to Specific Warrants</i>	242
	B. <i>The Fourth Amendment Did Not Impose a Global Reasonableness Standard</i>	246

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I have learned a great deal about Fourth Amendment history from the landmark works of William Cuddihy and Thomas Davies. See William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (on file with author); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999). I am indebted to these fine scholars.

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	1. <i>The Dearth of Early Search and Seizure Opinions</i>	246
	2. <i>The Ship Seizure Cases</i>	248
	3. <i>Weimer v. Bunbury</i>	250
	4. <i>Summary</i>	251
	C. <i>The Exclusionary Rule and Fourth Amendment Rights</i>	252
	D. <i>Summary</i>	254
V.	THE REAL FOURTH AMENDMENT	255
	A. <i>The Origins</i>	255
	B. <i>The Commentators</i>	256
	C. <i>The Controversies</i>	258
	1. <i>The John Wilkes Cases</i>	259
	2. <i>Paxton's Case</i>	260
	3. <i>American Opposition to the Townshend Act</i>	261
	4. <i>The Ship Seizure Cases</i>	262
	D. <i>House Searches and the Ambiguity of Fourth Amendment History</i>	263
	E. <i>Summary</i>	265
VI.	CONCLUSION	266

I. INTRODUCTION

If Fourth Amendment scholars agree on anything, they agree that Fourth Amendment doctrine currently is arbitrary, unpredictable, and unsatisfactory.¹ The Supreme Court's Fourth Amendment decisions rely on two central assumptions about the original understanding of the amendment. First, the Court and most modern commentators have presumed that the Fourth Amendment prefers searches and seizures pursuant to a specific warrant. Second, even where law enforcement activities do not require a warrant, the Court has presumed that the Fourth Amendment imposes a global reasonableness requirement on all searches and seizures. This reasonableness requirement may mandate that police officers act with probable cause, reasonable suspicion, or some other form of justification, depending on the circumstances.

In a series of influential books and law review articles, Professor

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

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 fourth amendment 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) (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 (1974) (noting that the Court's Fourth Amendment jurisprudence is "a body of doctrine that is unstable and unconvincing").

Akhil Amar has advocated a restructuring of Fourth Amendment law, based on a very different account of Fourth Amendment history.² Professor Amar's principal disagreement with current doctrine relates to the warrant preference rule. Professor Amar writes that the Fourth Amendment did not prefer warrants. Instead, the amendment was enacted to limit the use of warrants. According to Professor Amar, the framers viewed warrants as dangerous because a warrant would provide a defense to law enforcement officers in a trespass action. Rather than imposing a warrant preference rule, Professor Amar asserts that the Fourth Amendment imposes a global reasonableness requirement on all searches and seizures.

This Article concludes that Professor Amar's account receives little support from historical sources. Contrary to Professor Amar's assertion, the framers did not believe that all warrants were dangerous. The framers actually intended that law enforcement officers must obtain a specific warrant before the officers entered a house. Nor does the historical record support Professor Amar's claim that the Fourth Amendment imposed a global reasonableness requirement on all searches and seizures. For example, the Fourth Amendment was not even mentioned in early federal ship seizure cases.

While the historical record does not support Professor Amar's contentions, the Supreme Court's traditional combination of a warrant preference rule and a reasonableness requirement also receives little support from historical sources. In early America, most searches and seizures took place without a warrant. And the historical record does not suggest that these searches were assessed under a general reasonableness standard.

The real Fourth Amendment envisioned by the framers was actually a narrow document—much less sweeping in scope than either the traditional account or Professor Amar's understanding of history.

2. AKHIL REED AMAR, *THE BILL OF RIGHTS 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, *Terry and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097 (1998) [hereinafter Amar, *Terry and Fourth Amendment First Principles*]; Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53 (1996) [hereinafter Amar, *The Writs of Assistance*]; Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) [hereinafter Amar, *Fourth Amendment First Principles*]; 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*].

Historical sources indicate that the framers were focused on a single, narrow problem—physical invasions of houses by government agents.³ The Fourth Amendment was enacted to address this problem with a precise, bright-line rule. Before entering a house, law enforcement officers typically would need to obtain a specific warrant. But what about searches or seizures that did not involve a physical entry into a house? Outside of house searches, the Fourth Amendment was simply inapplicable.⁴

II. MAINSTREAM FOURTH AMENDMENT DISCOURSE

Mainstream Fourth Amendment discourse provides both that the Fourth Amendment prefers searches pursuant to a warrant, and that the amendment imposes a reasonableness requirement on warrantless searches. Professor Amar agrees with the reasonableness requirement, but disagrees with the warrant preference rule.

A. *The Warrant Preference Rule*

Although there is considerable disagreement about Fourth Amendment law, mainstream discourse views the Fourth Amendment as endorsing a warrant preference rule. According to this interpretation, the Fourth Amendment always prefers searches pursuant to a specific warrant, and sometimes mandates such a warrant.⁵

3. I have developed some of this historical analysis in earlier articles. See David E. Steinberg, *The Original Understanding of Unreasonable Searches and Seizures*, 56 FLA. L. REV. 1051 (2004); David E. Steinberg, *High School Drug Testing and the Original Understanding of the Fourth Amendment*, 30 HASTINGS CONST. L.Q. 263 (2003).

4. 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, *The Drive Toward Warrantless Auto Searches: Suggestions From a Back Seat Driver*, 80 B.U. L. REV. 545, 546 (2000) [hereinafter Steinberg, *The Drive Toward Warrantless Auto Searches*] (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) [hereinafter Steinberg, *Making Sense of Sense-Enhanced Searches*] (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.

5. For arguments in support of the warrant preference rule, see William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning*, at civ (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (on file with author) (asserting that under the Fourth Amendment, "specific warrants were mandatory and were intended to be the conventional method of search and seizure"); Tracey Maclin,

The U.S. 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.”⁶ 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.”⁷

Despite the Court’s formal statement of the warrant preference rule, the Justices have dramatically limited any Fourth Amendment warrant requirement. First, the Justices have endorsed a long list of categorical exceptions where the so-called warrant requirement does not apply. And even in situations where the Court ordinarily would require a warrant, the Justices have recognized fact-specific exceptions to this requirement. As a result of these Fourth Amendment exceptions, the warrant requirement is itself the exception, and not the rule.

1. Categorical Exceptions

A search or seizure requires a warrant only if government activity invades a suspect’s “reasonable expectation of privacy.”⁸ The Court has emphasized that people possess a reasonable expectation of privacy in their residences.⁹ The Court also has held that a person’s reasonable expectation of privacy is violated by the warrantless use of a wiretap,¹⁰

The Complexity of the Fourth Amendment: A Historical Review, 77 B.U. L. REV. 925, 955 (1997); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 852–56 (1994) (defending the warrant preference rule); Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 294–98 (1984) (same).

6. *Illinois v. Gates*, 462 U.S. 213, 236 (1983); *accord* *United States v. Leon*, 468 U.S. 897, 914 (1984) (discussing the Court’s “strong preference for warrants”).

7. *United States v. Karo*, 468 U.S. 705, 717 (1984); *accord* *California v. Ciraolo*, 476 U.S. 207, 225 (1986).

8. *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). Subsequent Fourth Amendment decisions have endorsed the Katz formulation. *See, e.g., Ciraolo*, 476 U.S. at 211; *California v. Greenwood*, 486 U.S. 35, 39 (1988); *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

9. *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. United States 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 . . .”).

10. *See Katz*, 389 U.S. at 357–59 (holding that federal agents violated the Fourth Amendment by not obtaining a warrant, where the agents used a wiretap to eavesdrop on conversations made from a public telephone booth).

and the warrantless search of a container, such as a footlocker.¹¹

But more often than not, the Court has concluded that law enforcement activities do not invade a suspect's reasonable expectation of privacy, and do not require a warrant.¹² In one of the most important Fourth Amendment exceptions, the Court has held that searches of automobiles ordinarily do not require a warrant.¹³ In approving warrantless searches of autos, the Court has emphasized that automobiles are inherently mobile, heavily regulated, and that most people have only a limited expectation of privacy in their cars.¹⁴ Other situations where the Court has held that individuals do not possess a reasonable expectation of privacy include the use of a pen register to record the numbers dialed from a suspect's phone,¹⁵ a search of a suspect's garbage,¹⁶ and warrantless surveillance from an airplane or helicopter.¹⁷ And the Court has held that warrantless searches of open fields do not violate the Fourth Amendment, regardless of a defendant's efforts to keep his or her fields private.¹⁸

11. See *United States v. Chadwick*, 433 U.S. 1, 8–11 (1977) (holding that federal agents violated the Fourth Amendment by engaging in a warrantless search of a footlocker located in a train terminal). However, the Court has upheld the warrantless search of containers found in automobiles. See, e.g., *California v. Acevedo*, 500 U.S. 565, 569–81 (1991) (upholding the warrantless search of a paper bag found in the trunk of a car); *United States v. Ross*, 456 U.S. 798, 804–25 (1982) (same).

12. See, e.g., *Bradley*, *supra* note 1, at 1475 (“As anyone who has worked in the criminal justice system knows, searches conducted pursuant to these exceptions, particularly searches incident to arrest, automobile and ‘stop and frisk’ searches, far exceed searches performed pursuant to warrants.”).

13. See, e.g., *California v. Carney*, 471 U.S. 386, 390–95 (1985) (upholding the warrantless search of a motor home parked in a public parking lot); *Chambers v. Maroney*, 399 U.S. 42, 47–52 (1970) (holding that the warrantless search of an automobile did not violate the Fourth Amendment).

14. See generally *Carney*, 471 U.S. at 390–92 (discussing the rationales that support warrantless searches of automobiles).

15. See, e.g., *Smith v. Maryland*, 442 U.S. 735, 744–46 (1979).

16. See *California v. Greenwood*, 486 U.S. 35, 39–44 (1988) (holding that a warrantless search of the defendant's garbage did not violate the Fourth Amendment).

17. See *Florida v. Riley*, 488 U.S. 445, 449–52 (1989) (holding that warrantless surveillance from a helicopter did not violate the Fourth Amendment); *Dow Chem. Co. v. United States*, 476 U.S. 227, 234–39 (1986) (holding that where federal agents used an airplane to engage in warrantless surveillance of an industrial compound, the agents did not violate the Fourth Amendment); *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).

18. *Oliver v. United States*, 466 U.S. 170, 176–81 (1984). A federal district court had concluded that Ray Oliver possessed a reasonable expectation of privacy in his fields, based on Oliver's locked gate and display of “No Trespassing” signs. *United States v. Oliver*, 686 F.2d 356, 358 (6th Cir. 1982), *aff'd*, 466 U.S. 170 (1984) (summarizing the district court's unpublished opinion). In response, the U.S. Supreme Court held that the Fourth Amendment simply does not apply to the open fields. Therefore, whether Oliver possessed a reasonable expectation of privacy in his fields

The Court's warrant requirement decisions display a disturbing ad hoc quality. If police officers sitting in a car use a thermal imaging unit to measure the heat inside of a residence, the officers must obtain a warrant.¹⁹ But surveillance of a residential backyard from an airplane does not require a warrant.²⁰ The search of a footlocker or luggage found in a train terminal requires a warrant.²¹ But a search of the same footlocker inside of a car does not.²²

2. *Fact Specific Exceptions*

Even in situations where a search or a seizure ordinarily would require a warrant, fact-specific exceptions often will make the warrant requirement inapplicable. For practical purposes, the most important of these exceptions is the consent search. A suspect who consents to a search waives his or her Fourth Amendment rights, including any requirement that police officers must obtain a warrant.²³

Where police officers lawfully arrest a suspect, the search incident to arrest doctrine provides another exception to the warrant requirement. Ordinarily, police officers cannot lawfully open a container without a warrant.²⁴ However, if police officers arrest a suspect, the officers may

was irrelevant. *Oliver*, 466 U.S. at 176–77.

19. See *Kyllo v. United States*, 533 U.S. 27, 33–41 (2001) (where federal agents conducted a search by using a thermal imaging unit to determine the amount of heat emanating from the suspect's home, the search was presumptively unreasonable without a warrant).

20. See *Ciraolo*, 476 U.S. at 212–15 (holding that the warrantless aerial surveillance of a suspect's backyard did not violate the Fourth Amendment).

21. See *United States v. Chadwick*, 433 U.S. 1, 11 (1977) (stating that a person who places items in a locked footlocker receives the same Fourth Amendment protection as "one who locks the doors of his home against intruders").

22. See *California v. Acevedo*, 500 U.S. 565, 569–81 (1991) (holding that where a police officer had probable cause to believe that a paper bag in the trunk of the suspect's auto contained marijuana, the police officer could open the paper bag without first obtaining a warrant); *United States v. Ross*, 456 U.S. 798, 804–25 (1982) (holding that where a police officer had probable cause to believe that an automobile contained narcotics, the officers could open a paper bag in the trunk of the car without first obtaining a warrant).

23. See, e.g., *Illinois v. Rodriguez*, 497 U.S. 177, 181–89 (1990) (holding that if police officers reasonably believed that a crime victim had authority to consent to a search of the defendant's residence, the officers did not violate the Fourth Amendment when they searched the residence without a warrant); *United States v. Matlock*, 415 U.S. 164, 171 (1974) (holding that police officers could search a suspect's residence, where the search was authorized by a third party "who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected").

24. See *Chadwick*, 433 U.S. at 11 (holding that where federal agents opened a

open any containers found in the suspect's outer clothing, without a warrant or probable cause.²⁵

B. The Reasonableness Requirement

Even when the warrant requirement does not apply, the Justices have concluded that any search or seizure must be reasonable. The Supreme Court has applied the Fourth Amendment to such diverse activities as auto checkpoints,²⁶ random drug testing,²⁷ and the use of beepers to follow suspects.²⁸

The justification demanded by the Court depends on the Justices' views with respect to the intrusiveness of government conduct. In some cases, the Court requires that law enforcement officers possess probable cause.²⁹ In other situations, government conduct is lawful if law enforcement officers satisfy a less demanding "reasonable suspicion" standard.³⁰ And the Court has held that some purely random searches do

footlocker without a warrant, the officers violated the Fourth Amendment). *But cf. Acevedo*, 500 U.S. at 569–81 (holding that a police officer could open a paper bag in the suspect's car without a warrant, if the officer had probable cause to believe that the paper bag contained incriminating evidence).

25. *See United States v. Robinson*, 414 U.S. 218, 224–37 (1973) (holding that where a police officer arrested a suspect, the officer could open a cigarette package in the suspect's coat without obtaining a warrant).

26. *Compare City of Indianapolis v. Edmond*, 531 U.S. 32, 37–48 (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, 449–55 (1990) (concluding 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, 828–38 (2002) (upholding random drug tests of all students who participate in competitive extracurricular activities) *with Chandler v. Miller*, 520 U.S. 305, 313–23 (1997) (random drug testing of candidates running for state offices violated the Fourth Amendment).

28. *Compare United States v. Karo*, 468 U.S. 705, 716–18 (1984) (holding that when federal agents tracked a beeper that entered a residence without first obtaining a warrant, the agents violated the Fourth Amendment) *with United States v. Knotts*, 460 U.S. 276, 284–85 (1983) (holding that where federal agents failed to obtain a warrant before tracking a beeper that traveled through the public streets, the agents did not violate the Fourth Amendment).

29. *See, e.g., Chambers v. Maroney*, 399 U.S. 42, 46–52 (1970) (holding that police officers needed probable cause to search an automobile, but the officers did not need a warrant); *Schmerber v. California*, 384 U.S. 757, 769–71 (1966) (holding that in a driving under the influence case, police officers needed probable cause before requiring that a suspect take a blood test, but the officers did not need a warrant).

30. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 30 (1968) (holding that where a police officer has reasonable grounds to believe that any suspect is armed and dangerous, the officer may "conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him"); *New Jersey v. T.L.O.*, 469 U.S. 325, 333–48 (1985) (holding that a high school vice principal could search a student's purse, where the vice principal had "reasonable grounds" to believe that the student had violated a school rule).

not violate the Fourth Amendment.³¹

Like the Court's warrant clause decisions, the Court's review of warrantless government conduct seems arbitrary and ad hoc. The Court has permitted random drug tests of high school students who participate in extracurricular activities.³² However, random drug tests of candidates for public office are unacceptable.³³ The Court has upheld brief auto checkpoints to intercept drunk drivers or illegal immigrants.³⁴ But the Court also has struck down a brief auto checkpoint, where police officers used drug detecting dogs to sniff for narcotics.³⁵

III. PROFESSOR AMAR'S ACCOUNT OF FOURTH AMENDMENT HISTORY

In his interpretation of Fourth Amendment history, Professor Amar emphasizes two assertions. Contrary to the traditional warrant preference rule, Professor Amar contends that the Fourth Amendment actually reflects the framers' view that warrants were dangerous. However, consistent with mainstream doctrine, Professor Amar argues that the Fourth Amendment imposes a general reasonableness requirement on all searches and seizures.³⁶

31. See, e.g., *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 618–34 (1989) (upholding random and warrantless drug tests of railway workers); *Sitz*, 496 U.S. at 449–55 (holding that random and warrantless auto stops at a sobriety checkpoint did not violate the Fourth Amendment).

32. See *Earls*, 536 U.S. at 828–38 (upholding random drug tests of all students who participated in extracurricular activities); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652–64 (1995) (upholding random drug tests of students who participated in interscholastic athletics).

33. See *Chandler v. Miller*, 520 U.S. 305, 313–23 (1997) (holding that random drug testing of candidates for state office violated the Fourth Amendment).

34. *Sitz*, 496 U.S. at 449–55 (holding that random and warrantless auto stops at a sobriety checkpoint did not violate the Fourth Amendment); *United States v. Martinez-Fuerte*, 428 U.S. 543, 554–67 (1976) (concluding that where the Border Patrol stopped cars briefly at a fixed checkpoint to search for illegal aliens, the checkpoint did not violate the Fourth Amendment).

35. See *City of Indianapolis v. Edmond*, 531 U.S. 32, 37–48 (2000) (holding that random auto stops at a narcotics checkpoint violated the Fourth Amendment).

36. Professor Amar also disagrees with the exclusionary rule as the appropriate remedy for Fourth Amendment violations. See Amar, *Fourth Amendment First Principles*, *supra* note 2, 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) (concluding 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).

A. Warrants

Building on the earlier work of Professor Telford Taylor,³⁷ Professor Amar begins with the accurate observation that the text of the Fourth Amendment nowhere requires warrants.³⁸ But for Professor Amar, this does not simply indicate that warrants were not mandated. According to Professor Amar, the framers actually believed that warrants were dangerous, and sought to limit their use.³⁹ Professor Amar cites a number of statements criticizing the warrant requirement⁴⁰—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.⁴¹

Professor Amar writes that the framers' uneasiness about warrants was related to the framing-era remedy for Fourth Amendment violations. In the eighteenth century, 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."⁴²

According to Professor Amar, the framers viewed such damage suits as the most effective deterrent to unreasonable searches. Professor Amar writes that in the English John Wilkes 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."⁴³

However, such trespass suits would not succeed if law enforcement officials had obtained a warrant. Professor Amar writes that "a lawful

The propriety of the exclusionary rule is beyond the scope of this Article. But as indicated in subsection C of this Part, I have some serious reservations about this rule. See *infra* text accompanying notes 58–70.

37. Professor Taylor concluded that 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 fourth amendment on its head." *Id.* at 23–24.

38. Amar, *The Writs of Assistance*, *supra* note 2, at 60; see also Amar, *Fourth Amendment First Principles*, *supra* note 2, at 763 ("[A]lthough many states featured language akin to the Fourth Amendment, none had a textual warrant requirement.").

39. Amar, *The Writs of Assistance*, *supra* note 2, at 60; Amar, *Terry and Fourth Amendment First Principles*, *supra* note 2, at 1099, 1111, 1113; see also, AMAR, *THE BILL OF RIGHTS*, *supra* note 2, at 72–73. Professor Amar compares warrants to the modern-day temporary restraining order. With respect to warrants, Professor Amar concludes that the framers "imposed strict limits on these dangerous devices." AMAR, *THE BILL OF RIGHTS*, *supra* note 2, at 73.

40. See, e.g., Amar, *Fourth Amendment First Principles*, *supra* note 2, at 778.

41. See *infra* text accompanying notes 75–83 (discussing the difference between the general warrant and the specific warrant).

42. Amar, *Fourth Amendment First Principles*, *supra* note 2, at 774.

43. *Id.* at 797.

warrant would provide—indeed, was designed to provide—an absolute defense in any subsequent trespass suit.”⁴⁴ 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.”⁴⁵ Professor Amar concludes that “[w]arrants . . . were friends of the officer, not the citizen; and so warrants had to be strictly limited”⁴⁶ In other words: “Judges and warrants are the heavies, not the heroes, of our story.”⁴⁷

B. Reasonableness

According to Professor Amar, the Fourth Amendment does not require warrants, but instead imposes a global reasonableness requirement on all searches and seizures. Professor Amar describes arguments that the Fourth Amendment does not protect office buildings, cars, and computer disks as “an outlandish and crabbed approach.”⁴⁸ Although Professor Amar clearly is critical of the Supreme Court’s work in Fourth Amendment cases,⁴⁹ Professor Amar does agree with the Court’s premise that the Fourth Amendment applies to all searches and seizures.

Professor Amar is somewhat vague about the meaning of Fourth Amendment reasonableness, given the importance of the reasonableness requirement in Professor Amar’s conception of the Fourth Amendment. Some of the relevant considerations would include “the importance of finding what the government is looking for, the intrusiveness of the search, the identity of the search target, the availability of other means of achieving the purpose of the search, and so on.”⁵⁰

Professor Amar also writes that Fourth Amendment reasonableness

44. *Id.* at 774.

45. *Id.*

46. Amar, *The Writs of Assistance*, *supra* note 2, at 60.

47. Amar, *The Bill of Rights as a Constitution*, *supra* note 2, at 1179; *see also* AMAR, *THE BILL OF RIGHTS*, *supra* note 2, at 69 (“Because juries could often be trusted more than judges to protect against government overreaching . . . warrants were generally disfavored . . .”).

48. Amar, *The Writs of Assistance*, *supra* note 2, at 68–69; *see also*, Amar, Terry and Fourth Amendment First Principles, *supra* note 2, at 1100 (arguing that the Fourth Amendment terms “searches” and “seizures” “should be generously construed”).

49. *See* Amar, *Fourth Amendment First Principles*, *supra* note 2, at 763–71 (criticizing the Supreme Court’s warrant preference rule and the exceptions to the rule).

50. *Id.* at 801.

should be determined “in light of other constitutional provisions.”⁵¹ For example, given the First Amendment protection of freedom of the press, “a search or seizure of newspaper files should cause special alarm and require special safeguards.”⁵² According to Professor Amar, the other constitutional provisions that should inform Fourth Amendment analysis include the First Amendment right to freedom of speech, the Sixth Amendment right to counsel, the Fifth Amendment Self-Incrimination Clause, the Fourteenth Amendment Equal Protection Clause, and the Due Process Clauses of the Fifth and Fourteenth Amendments.⁵³

In another example of Professor Amar’s constitutional reasonableness analysis, he discusses a relationship between the Fifth Amendment Takings Clause and the Fourth Amendment by suggesting the following hypothetical⁵⁴:

The grand jury subpoenas a witness of modest means to appear before it, at her own expense, for weeks upon end. Surely, this is a Fourth Amendment “seizure,” and even if the Takings Clause does not strictly apply—the grand jury is seizing and using a person, not property—could the Clause not inform a ruling that, at some point, minimum compensation would be required to render the Fourth Amendment “seizure” “reasonable”?⁵⁵

Regardless of whether one agrees with Professor Amar’s observations on constitutional reasonableness, this approach is not an originalist interpretation of the Fourth Amendment. Professor Amar cites no historical authority for his argument that the Fourth Amendment requires the government to provide reasonable compensation to grand jury witnesses. Indeed, Professor Amar rarely cites historical sources in his discussion of Fourth Amendment reasonableness.⁵⁶

Professor Amar’s omission of historical sources is not a mere oversight. As discussed below, the framers never endorsed the global reasonableness requirement proposed by Professor Amar.⁵⁷ Instead, the framers enacted the Fourth Amendment to deal with a much more narrow and specific problem—house searches pursuant to a general warrant, or no warrant at all.

C. The Attractiveness of Professor Amar’s Account

The attractiveness of Professor Amar’s account is closely linked to the

51. *Id.* at 805.

52. *Id.*

53. *Id.* at 804–11.

54. *Id.* at 807–08.

55. *Id.* (citations omitted).

56. *But cf. id.* at 805 (citing the John Wilkes cases as an illustration of “the special dangers posed by the government’s searching and seizing documents from the press”).

57. *See infra* text accompanying notes 93–126.

use of the exclusionary rule as a remedy for Fourth Amendment violations. Under the exclusionary rule, evidence obtained in violation of the Fourth Amendment typically must be excluded from a criminal trial.⁵⁸ In cases where law enforcement officers violate the Fourth Amendment, a defendant who committed a crime may be impossible to convict.

Under the traditional warrant preference rule, Fourth Amendment cases often involve a familiar pattern. Law enforcement officers engage in a warrantless search. The search produces incriminating evidence, which would convict the defendant. The defense then argues that the warrantless search violated the Fourth Amendment, and that the court must exclude the incriminating evidence.

The exclusionary rule places considerable pressure on judges to find that law enforcement activities did not violate the Fourth Amendment.⁵⁹ Judges want juries to hear the probative evidence.⁶⁰ But this will occur only if law enforcement agents act lawfully.

For judges seeking a way to conclude that a warrant is not required, Professor Amar's Fourth Amendment account has an obvious appeal. Professor Amar contends that the Fourth Amendment was never intended to require warrants. Instead, the amendment simply requires that searches must be "reasonable." If Professor Amar's interpretation is correct, a court may find that law enforcement agents did not need to obtain a warrant, that their search was reasonable, and that probative evidence is admissible.

58. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding that the exclusionary rule applies in state court cases); *Weeks v. United States*, 232 U.S. 383, 398 (1914) (holding that the exclusionary rule applies in federal court cases).

59. Professor Amar recognizes that the exclusionary rule imposes pressure on judges to conclude that law enforcement officers have not violated the Fourth Amendment. See Amar, *Fourth Amendment First Principles*, *supra* note 2, at 799 ("Judges do not like excluding bloody knives, so they distort doctrine, claiming the Fourth Amendment was not really violated."); see also *United States v. Leon*, 468 U.S. 897, 907 (1984) ("The substantial social costs exacted by the exclusionary rule for the vindication of Fourth Amendment rights have long been a source of concern."); 8 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2184a, at 52 n.44 (John T. McNaughton ed., 1961) (contending that the exclusionary rule creates pressure on judges to reduce Fourth Amendment protections); Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111, 112 (2003) (asserting that the exclusionary rule imposes pressure on judges to conclude that no Fourth Amendment violation has occurred, because judges do not want to exclude probative evidence).

60. See *Illinois v. Gates*, 462 U.S. 213, 254 (1983) (noting that because of "the inherent trustworthiness of seized tangible evidence and the resulting social costs from its loss through suppression," application of the exclusionary rule has been restricted).

In *Illinois v. Rodriguez*,⁶¹ the U.S. Supreme Court issued a Fourth Amendment decision that seemed to be driven by exclusionary rule pressures. Police officers found cocaine in the apartment where Edward Rodriguez lived.⁶² Gail Fischer had consented to a warrantless search of this apartment. Police officers believed that Fischer was the girlfriend of Rodriguez, and that Fischer had common authority to authorize the warrantless search.⁶³ However, the Illinois state courts held: “Fischer did not have common authority over the apartment.”⁶⁴

Based on these facts, Rodriguez seems like an easy case. Police officers had engaged in an unauthorized, warrantless intrusion into a residence. The officers had violated the Fourth Amendment. Therefore, the courts must suppress the cocaine found by the officers.

But that is not what happened. Instead, the *Rodriguez* Court reversed a lower court determination that the police officers had violated the Fourth Amendment.⁶⁵ In a passage that sounds very similar to Professor Amar’s text, Justice Antonin Scalia wrote: “The ordinary requirement of a warrant is sometimes supplanted by other elements that render the unconsented search ‘reasonable.’”⁶⁶ Justice Scalia concluded that if the police officers had reasonably relied on Gail Fischer’s suggestions of common authority, then the warrantless search of the apartment was lawful.⁶⁷

The reasoning that appears in *Rodriguez* borders on incoherent. Consent searches occur where a defendant voluntarily waives his or her Fourth Amendment protections, such as the protection against warrantless searches.⁶⁸ How could someone with no authority over Rodriguez’s apartment waive Rodriguez’s Fourth Amendment rights, and authorize a warrantless search of the apartment?⁶⁹

61. 497 U.S. 177 (1990).

62. *Id.* at 180.

63. *Id.* at 179 (“Fischer several times referred to the apartment on South California as ‘our’ apartment, and said that she had clothes and furniture there.”).

64. *Id.* at 180.

65. *Id.* at 189.

66. *Id.* at 185. *Rodriguez* predates Professor Amar’s Fourth Amendment publications. It seems unlikely that Professor Amar’s theories influenced the results in this case.

67. *Id.* at 184–89. The *Rodriguez* Court remanded the case, allowing the Illinois courts to determine if the police officers reasonably relied on Gail Fischer’s claim of common authority. *Id.* at 189.

68. *But cf.* *Schneekloth v. Bustamonte*, 412 U.S. 218, 246 n.34 (1973) (discussing “the fundamentally different nature of a consent search from the waiver of a trial right”).

69. For another incoherent Fourth Amendment decision that seems driven by exclusionary rule pressures, see *Maryland v. Garrison*, 480 U.S. 79 (1987). Police officers obtained a valid search warrant for a third-floor apartment rented by Lawrence McWebb. When the officers arrived at the Baltimore, Maryland apartment building, they did not realize that the third floor of the building was divided into two apartments.

But while the reasoning of the *Rodriguez* Court may be unsatisfying, it is hard to feel outrage about the result. Edward Rodriguez was a drug dealer, just as culpable as any other drug dealer. Based on common sense principles of equal treatment, Rodriguez should face the same penalty as any other, equally culpable drug dealer. Those same common sense principles are offended by the suggestion that probative, incriminating evidence should be excluded when Rodriguez faces trial, because police officers made a mistake.⁷⁰

The *Rodriguez* decision illustrates how the exclusionary rule drives Fourth Amendment doctrine. If courts must adhere to a bright-line warrant requirement, judges in cases like *Rodriguez* must exclude evidence obtained in warrantless searches. But if the Fourth Amendment requires only that the state must satisfy Professor Amar's fuzzy

Lawrence McWebb lived in one apartment. Harold Garrison lived in the other apartment. *Id.* at 80.

Police officers searched Garrison's apartment, believing that the apartment was part of McWebb's residence. Inside of Garrison's apartment, the officers discovered heroin. *Id.* at 80.

Garrison was charged with possessing heroin with intent to distribute it. After the evidence was admitted at Garrison's criminal trial, Garrison was convicted. *Id.* at 80–81.

Initially, *Garrison* seems like an easy case. The officers did not have a warrant or probable cause to search Garrison's apartment. No exigent circumstances justified the search. Therefore, it would seem that the search violated the Fourth Amendment, and that the evidence found inside of the apartment could not be used against Garrison.

But that is not what the *Garrison* Court held. Instead, the *Garrison* Court upheld the search. Justice John Paul Stevens wrote that "the officers properly responded to the command contained in a valid warrant even if the warrant is interpreted as authorizing a search limited to McWebb's apartment rather than the entire third floor." *Id.* at 88. According to Justice Stevens: "[T]he Court has also recognized the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants." *Id.* at 87. Justice Stevens thus concluded that "the officers' conduct was consistent with a reasonable effort to ascertain and identify the place intended to be searched within the meaning of the Fourth Amendment." *Id.* at 88–89.

As in *Rodriguez*, the reasoning in *Garrison* borders on incoherent. But also like *Rodriguez*, it is difficult to feel real outrage with the outcome. Like Edward Rodriguez, Harold Garrison was a drug dealer. For a jury to reach a just outcome in Garrison's case, the jury should be able to hear about the incriminating evidence that police officers found in Garrison's apartment. If the *Garrison* Court concluded that the Baltimore police officers had violated the Fourth Amendment, the jury probably would not have heard this evidence.

70. See *United States v. Leon*, 468 U.S. 897, 907–08 (1984) (stating that "when law enforcement officers have acted in objective good faith or their transgressions have been minor," application of the exclusionary rule "offends basic concepts of the criminal justice system"); Amar, *Fourth Amendment First Principles*, *supra* note 2, at 799 ("In the popular mind, the [Fourth] Amendment has lost its luster and become associated with grinning criminals getting off on crummy technicalities.").

“reasonableness” standard, then judges will be able to conclude that police conduct was reasonable, and a court may admit the incriminating evidence. Given the pressures imposed by the exclusionary rule, Professor Amar’s reasonableness standard offers an obvious attraction to judges and commentators.

IV. ANALYZING PROFESSOR AMAR’S HISTORICAL ASSERTIONS

In his interpretation of Fourth Amendment history, Professor Amar reaches two central conclusions about the Fourth Amendment. First, the framers believed that warrants were dangerous. The Fourth Amendment did not prefer warrants, but instead sought to limit the use of warrants. Second, the Fourth Amendment imposed a general reasonableness requirement on all government searches and seizures. The historical record does not support either of Professor Amar’s conclusions.

A. The Framers Were Not Hostile to Specific Warrants

Professor Amar’s assertion that the framers viewed all warrants as dangerous is not supported by the historical record. Without question, the framers were hostile to general warrants—warrants that were so broad as to impose no restraints at all. But contrary to Professor Amar’s assertion, the framers did not oppose specific warrants. In fact, the framers accepted house searches only pursuant to specific warrants.

Professor Amar’s discussion of warrants raises a number of valid points. First, the text of the Fourth Amendment does not impose any requirement that government agents obtain a warrant before conducting a search or seizure. The Fourth Amendment prohibits “unreasonable” searches.⁷¹ The amendment then imposes limitations on the issuance of warrants. The amendment provides that warrants cannot be issued “but upon probable cause,” and that warrants must describe with particularity “the place to be searched, and the persons or things to be seized.”⁷²

Second, the Fourth Amendment was not intended to impose a warrant requirement on all government investigations. 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.”⁷³ As support for this proposition, Bradley cites a long list of colonial, state, and federal laws

71. U.S. CONST. amend. IV.

72. *Id.*

73. 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).

that did indeed authorize warrantless searches and seizures.⁷⁴

Third, the framers were strongly opposed to house searches pursuant to a particular type of warrant—the general warrant. In fact, the first state constitutional provision enacted in America 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.”⁷⁵

However, Professor Amar makes a critical error in suggesting that when the framers opposed general warrants, they intended to limit the use of all search warrants. To the contrary, the framers opposed general warrants because such warrants did not effectively restrain law enforcement officers. The Virginia declaration itself explained the deficiencies of the general warrant. First, general warrants were deficient because such warrants permitted law enforcement officers to search “places without evidence of a fact committed”⁷⁶ In other words, the general warrant typically lacked sufficient evidentiary support. General warrants also were deficient because such warrants permitted law enforcement officers “to seize any person or persons not named, or whose offence is not particularly described and supported by evidence”⁷⁷ In other words, such warrants did not narrowly specify the places that law enforcement officers could search. In short, general warrants provided law enforcement officers with too much discretion.

In fact, the most prominent theme in early discussions of unreasonable searches and seizures focused on the unrestrained discretion that law enforcement officers could exercise 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 them “to be in effect the

74. *Id.* at 1041–45 nn.64–65. Bradley’s citations are consistent with my argument in Part V of this Article. I conclude that the Fourth Amendment was intended to apply only to house searches—and not to other types of government intrusions. *See infra* text accompanying notes 141–205.

75. VIRGINIA DECLARATION OF RIGHTS, art. X, reprinted in 7 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 3814, § 10 (Francis Newton Thorpe ed., 1909) [hereinafter THE FEDERAL AND STATE CONSTITUTIONS].

76. *Id.*

77. *Id.*

judge”⁷⁸ In January 1761, James Otis, a prominent Boston attorney, argued against the use of writs of assistance—the American version of the general warrant.⁷⁹ Specifically, Otis complained that with a writ of assistance, 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”⁸⁰ And at a Boston town meeting in 1772, Samuel Adams attacked the writs of assistance. 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 the duties have not been paid.”⁸¹

For early Americans, the cure for the problems raised by the general warrant was not warrantless house searches—but rather house searches conducted pursuant to specific warrants. Unlike the minimal evidentiary showings required for a general warrant, the specific warrant required that law enforcement officers demonstrate “probable cause” before a court could issue the warrant.⁸² And while a general warrant did not limit the scope of government investigations, a specific warrant must describe with particularity “the place to be searched, and the persons or things to be seized.”⁸³

Early American statutes contradict Professor Amar’s claim that the framers sought to limit the use of *all* warrants—both general and specific. Two sections of the 1789 Collections Act authorized the warrantless search of vessels for customs violations.⁸⁴ But as Tracey Maclin has observed, a third section of the act required a specific warrant before customs agents could search buildings.⁸⁵

In fact, several scholars also have noted that a number of early state statutes required specific warrants.⁸⁶ In 1783, the Massachusetts legislature

78. See 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 150 (Sollom Emlyn ed., 1736).

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

80. *Id.*

81. *A State of the Rights of the Colonists*, in TRACTS OF THE AMERICAN REVOLUTION, 1763–1776, at 233, 243 (Merrill Jensen ed., 1967) [hereinafter *A State of the Rights of the Colonists*] (report typically attributed to Samuel Adams).

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

83. *Id.*; see also Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 650–54 (1999) (contrasting the specific warrant with the general warrant).

84. Collections Act of 1789, 1 Stat. 29, 44–45 (1789).

85. Collections Act of 1789, 1 Stat. 29, 43 (1789); see Maclin, *supra* note 5, at 963 (noting that this section of the Collections Act required a specific warrant).

86. See Morgan Cloud, *Searching through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1727 (1996) (book review) (“By 1787, many of the new states

required that any law enforcement officer must obtain a specific warrant before searching a house for smuggled goods.⁸⁷ However, as William Cuddihy observes, 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.”⁸⁸ In 1780 and 1785, the Pennsylvania legislature enacted statutes that required specific warrants for house searches, but not for searches of other premises.⁸⁹

The Massachusetts and Pennsylvania statutory requirements that law enforcement officers must obtain a specific warrant before they engaged in house searches is particularly noteworthy. As discussed in Part V of this Article, the Fourth Amendment was enacted to regulate house searches.⁹⁰ As Thomas Davies has observed, the historical concerns resulting in the Fourth Amendment “were almost exclusively about the need to ban house searches under general warrants.”⁹¹ And when it came to physical intrusions into the most sacred place—the home—the Massachusetts legislature and the Pennsylvania legislature required that government agents must obtain a specific warrant.

Of course, these statutory examples do not conclusively prove that the Fourth Amendment required warrants. However, these examples do demonstrate a critical flaw in Professor Amar’s historical interpretation. Having read the many early American denunciations of the general warrant, Professor Amar concludes that Americans opposed all warrants, except in special circumstances. But 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.”⁹²

In fact, the framers only opposed the use of the general warrant. It was the general warrant that gave law enforcement officers unrestrained

already had gone farther than England in adopting specific warrants as a replacement for general warrants.”); Cuddihy, *supra* note 5, at 1290–96; Maclin, *supra* note 5, at 957.

87. Cuddihy, *supra* note 5, at 1291.

88. *Id.*

89. Davies, *supra* note 83, at 681–83.

90. See *infra* text accompanying notes 141–205.

91. Davies, *supra* note 83, at 551.

92. Cloud, *supra* note 86, at 1731; see also *id.* (failing 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”).

discretion to enter and search houses. The framers did not intend to cure this abuse of authority by profoundly limiting the use of warrants, as Professor Amar contends. Instead, the framers viewed the specific warrant as the cure for unjustified house searches. Professor Amar's faulty premise about the framers' distrust of all warrants raises questions about the rest of his historical account.

B. The Fourth Amendment Did Not Impose a Global Reasonableness Standard

In his interpretation of Fourth Amendment history, Professor Amar's central proposition is that the Fourth Amendment was intended to impose a global "reasonableness" requirement on all government searches and seizures.⁹³ Professor Amar's assumption is shared by the U.S. Supreme Court. The Court has assumed that the Fourth Amendment imposes a reasonableness requirement on all searches and seizures—even where the government activity does not require a warrant, and takes place outside of any residence.⁹⁴

Both Professor Amar and the Supreme Court have cited surprisingly little authority for their conclusion that the Fourth Amendment was intended to impose a reasonableness requirement on all searches and seizures. In fact, a review of the historical record strongly suggests that this conclusion is incorrect. Three historical examples are particularly worth attention. First, eighteenth-century and early nineteenth-century court decisions almost never mentioned constitutional search and seizure provisions. Second, the Fourth Amendment was not raised or discussed in early ship seizure cases. Third, Thomas Cooley's Michigan Supreme Court opinion in *Weimer v. Bunbry*⁹⁵ explicitly rejects the view that constitutional search and seizure provisions imposed a global reasonableness requirement on all searches and seizures.

1. The Dearth of Early Search and Seizure Opinions

The lack of eighteenth-century and early-nineteenth century published opinions on constitutional search and seizure provisions is remarkable.

93. See Amar, *Fourth Amendment First Principles*, *supra* note 2, at 801–11.

94. See, e.g., *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 450 (1990) ("[A] Fourth Amendment 'seizure' occurs when a vehicle is stopped at a checkpoint."); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989) (holding that the Fourth Amendment applies to random drug tests); *Katz v. United States*, 389 U.S. 347, 357–59 (1967) (concluding that the warrantless use of a wiretap to monitor conversations made from a public telephone booth violated the Fourth Amendment).

95. 30 Mich. 200 (1874).

Prior to the U.S. Supreme Court opinion in *Boyd v. United States*,⁹⁶ constitutional search and seizure provisions probably were mentioned in fewer than fifty cases.⁹⁷

Admittedly, prior to the twentieth century, the Fourth Amendment of the U.S. Constitution only applied to the federal government.⁹⁸ During the eighteenth century and the early nineteenth century, most criminal laws were enacted by the states, not the federal government.⁹⁹ In early America, most criminal prosecutions took place in the state courts, where the Fourth Amendment did not apply.

But during the eighteenth century and the early nineteenth century, most state constitutions contained search and seizure provisions, using language that was very similar or identical to the Fourth Amendment.¹⁰⁰ And yet published state court opinions rarely mentioned these state constitutional search and seizure provisions. And when attorneys did raise the state provisions, arguments that the government had engaged in an unreasonable search or seizure were quickly dismissed.

For example, in the 1814 case of *Wakely v. Hart*,¹⁰¹ Wakely argued that his warrantless arrest had violated a Pennsylvania constitutional provision, which prohibited unreasonable searches and seizures.¹⁰² The Pennsylvania Supreme Court quickly concluded that the arrest did not violate the state constitutional provision.¹⁰³ Similarly, in the 1817 case

96. 116 U.S. 616 (1886).

97. See Davies, *supra* note 83, at 611–19.

98. See *Smith v. Maryland*, 59 U.S. (18 How.) 71, 76 (1855) (rejecting a Fourth Amendment challenge to a Maryland state statute, because the Fourth Amendment applied only to the federal government).

99. 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) (noting that the original scope of federal criminal law was very narrow and that “[u]ntil the Civil War, there were only a small number of federal offenses, and they generally dealt with injury to or interference with the federal government itself or its programs”); NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 106 (1937) (observing that in the nineteenth century, “the limited criminal jurisdiction of the Federal Government was not exercised by Congress except in minor instances”); Thomas J. Maroney, *Fifty Years of Federalization of Criminal Law: Sounding the Alarm or “Crying Wolf?”*, 50 SYRACUSE L. REV. 1317, 1319–20 (2000) (noting that because the eighteenth-century federal government was “small and conducted few programs, the list of offenses was short”).

100. See Davies, *supra* note 83, at 674–86.

101. 6 Binn. 315 (Pa. 1814).

102. See Davies, *supra* note 83, at 615 (describing *Wakely v. Hart* as “probably the most widely cited early American case on the law of arrest”).

103. *Wakely*, 6 Binn. at 318.

of *Mayo v. Wilson*,¹⁰⁴ the New Hampshire Supreme Court wrote that a warrantless arrest did not violate the New Hampshire Constitution, which prohibited unreasonable searches and seizures.¹⁰⁵ In the 1838 opinion in *Banks v. Farwell*,¹⁰⁶ the Massachusetts Supreme Judicial Council held that a warrantless search of a shop did not violate a state constitutional search and seizure provision. 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.¹⁰⁷

If early American lawyers and judges understood that the Fourth Amendment imposed a general reasonableness requirement on all searches and seizures, one would expect these lawyers and judges to discuss the constitutional search and seizure provisions frequently in civil and criminal cases. Yet in the court opinions published in early America, the search and seizure provisions were rarely mentioned. And when attorneys did raise constitutional search and seizure arguments, courts typically dismissed those arguments with little discussion. The dearth of early American search and seizure decisions raises considerable doubt about whether the framers intended the Fourth Amendment to impose a general reasonableness requirement on all searches and seizures.

2. *The Ship Seizure Cases*

The regulation of shipping was one area where the early federal government did engage in searches and seizures. Early federal statutes often permitted ship seizures with only minimal evidentiary support. So if the Fourth Amendment did indeed impose a general reasonableness requirement, attorneys representing the shipowners would be expected to argue that these early federal ship seizures were unreasonable, and violated the Fourth Amendment.

But this was not the case. In the early nineteenth-century cases that reached the U.S. 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 federal statutes violated the Fourth Amendment. The failure of shipowners to

104. 1 N.H. 53 (1817).

105. *Id.* at 59–60.

106. 38 Mass. (21 Pick.) 156 (1839).

107. See MASS. CONST. of 1780, pt. 1, art. XIV, reprinted in 3 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 75, at 1891 (providing that 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, *supra* note 75, at 2456 (using the same language as the Massachusetts Constitution of 1780).

raise a Fourth Amendment argument casts considerable doubt on Professor Amar's central contention, that the Fourth Amendment imposed a general reasonableness requirement.

In *Little v. Barreme*,¹⁰⁸ the U.S. Supreme Court reviewed a federal statute, which gave federal officers the right to "stop and examine any ship or vessel of the United States on the high seas," if "there may be reason to suspect" that the vessel was sailing to France.¹⁰⁹ The Supreme Court ultimately struck down the ship seizure in *Little*, but only because the federal statute did not authorize a seizure of this particular type of ship.¹¹⁰ In *Little*, neither the litigants nor the Justices mentioned the Fourth Amendment.

In *The Apollon*,¹¹¹ the Supreme Court dealt with the seizure of a vessel under a 1799 statute, which authorized ship seizures where a vessel arriving from a foreign port failed to report to a U.S. customs collector.¹¹² The *Apollon* Court held that the ship seizure was not authorized by the statute, because the vessel passed through U.S. waters to dock in Florida, at that time a territory of Spain.¹¹³ As in *Little*, the Fourth Amendment was not mentioned by either the litigants or the Justices in *The Apollon*.

The framers apparently believed that federal ship seizures would be regulated by statutes, and not by the Fourth Amendment. For example, in the 1789 Collections Act, Congress approved the warrantless search of vessels for customs violations.¹¹⁴ If the Fourth Amendment already governed ship searches, this statutory regulation would be redundant. Congress needed to enact the Collections Act only if the Fourth Amendment did not apply to searches of ships.¹¹⁵

In the early ship seizure cases, both the attorneys and the Justices seemed to understand that the Fourth Amendment simply did not apply to searches or seizures of ships. Although Professor Amar contends that

108. 6 U.S. (2 Cranch) 170 (1804).

109. *Id.* at 177 (emphasis omitted).

110. *Id.* at 176, 179. Congress only had authorized the seizure of ships sailing from America to France. *Id.* at 177. The vessel in *Little* was sailing from a French port to a Danish port. *Id.* at 176.

111. 22 U.S. (9 Wheat.) 362 (1824).

112. *Id.* at 368.

113. *Id.* at 369–71.

114. Collections Act of 1789, § 24, 1 Stat. 29, 43–44 (1789).

115. *But cf.* *Carroll v. United States*, 267 U.S. 132, 150–51 (1925) (citing the 1789 Collections Act as evidence that the Fourth Amendment was intended to apply to ship seizures).

the Fourth Amendment imposes a general reasonableness standard on all searches and seizures, the ship seizure cases raise serious doubts about this contention.

3. *Weimer v. Bunbury*

In the 1874 case of *Weimer v. Bunbury*,¹¹⁶ the Michigan Supreme Court held that a state repossession statute did not violate a Michigan constitutional provision regulating searches and seizures. In holding that a government seizure outside of the home did not violate this state constitutional provision, *Weimer* is an unremarkable nineteenth-century case. However, *Weimer* is significant because the opinion was written by Justice Thomas Cooley, one of the most prominent early commentators on the U.S. Constitution. Justice Cooley's views, expressed in *Weimer* and elsewhere, strongly suggest that the Fourth Amendment did not impose any general reasonableness standard on government activity outside of residences.

The Michigan legislature had enacted a statute, which allowed the state to issue a "warrant" authorizing the repossession of property owned by delinquent tax collectors. In *Weimer v. Bunbury*,¹¹⁷ the plaintiff alleged that this statute violated a Michigan state constitutional provision, which proscribed unreasonable searches and seizures.¹¹⁸ If Professor Amar's interpretation of the constitutional search and seizure provisions is correct, then the Michigan Court should have determined whether the repossession statute was "reasonable."

But this was not the approach taken by Justice Cooley in *Weimer*. In upholding the repossession statute, Justice Cooley wrote that the Michigan constitutional provision outlawing unreasonable searches and seizures was simply inapplicable. 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"¹¹⁹ Justice Cooley continued 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."¹²⁰

Admittedly, *Weimer* involved the interpretation of a state constitutional search and seizure provision, and not the federal Fourth

116. 30 Mich. 201 (1874).

117. *Id.*

118. MICH. CONST. art. VI, § 26 (providing that the "person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures").

119. *Weimer*, 30 Mich. at 208.

120. *Id.*

Amendment. However, the *Weimer* decision is completely consistent with Justice Cooley's description of the federal Fourth Amendment.¹²¹

In his earlier treatise on the U.S. Constitution, Cooley did not discuss any general reasonableness requirement imposed by the Fourth Amendment. Instead, Cooley emphasized that the Fourth Amendment was designed to regulate house searches. In a treatise section titled "Unreasonable Searches and Seizures,"¹²² Cooley wrote: "The maxim that 'every man's house is his castle' is made a part of our constitutional law in the clause prohibiting unreasonable searches and seizures."¹²³ Cooley continued 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"¹²⁴

Justice Cooley's discussion both in *Weimer* and in his influential treatise are entirely consistent with the prevailing nineteenth-century view of constitutional search and seizure provisions.¹²⁵ In short, such provisions did not impose any global reasonableness requirements. Instead these provisions exclusively regulated house searches.

4. Summary

On the question of whether the Fourth Amendment imposed some global reasonableness requirement on all government searches and seizures, the historical record is remarkably consistent. The dearth of early search and seizure challenges, the ship seizure cases, and Justice

121. See *infra* text accompanying notes 122–25.

122. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 299 (1868).

123. *Id.* at 299–300.

124. *Id.* at 300.

125. Admittedly, in 1878, the Supreme Court's first decision on the Fourth Amendment struck down a statute authorizing courts to order the production of business records. *Boyd v. United States*, 116 U.S. 616 (1886). However, the *Boyd* decision came at the beginning of an era where the court attempted to protect businesses from government regulation.

The *Boyd* decision is consistent with the pro-business doctrine of substantive due process, and is not consistent with framing-era sources on the Fourth Amendment. As Thomas Davies has observed, the 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 [Fourth] Amendment." Davies, *supra* note 83, at 739.

Cooley's analysis in *Weimer v. Bunbury*¹²⁶ all lead to the same conclusion. Contrary to Professor Amar's assertion, the Fourth Amendment did not impose any global reasonableness requirement on all government searches and seizures. Instead, the amendment was designed solely to proscribe improper physical entries into houses.

C. *The Exclusionary Rule and Fourth Amendment Rights*

Professor Amar observes that in early America, evidence obtained in violation of the Fourth Amendment was not excluded at the defendant's subsequent criminal trial. Professor Amar writes: "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."¹²⁷

Professor Amar observes that instead of the exclusion of evidence, tort remedies were "clearly the ones presupposed by the Framers of the Fourth Amendment and counterpart state constitutional provisions."¹²⁸ Warrants would bar these civil damages actions because "a lawful warrant would provide—indeed, was designed to provide—an absolute defense in any subsequent trespass suit."¹²⁹ Professor Amar concludes that the framers viewed warrants "as an enemy, not a friend."¹³⁰

Some of Professor Amar's remedial observations are accurate and enlightening. First, Professor Amar is correct that the exclusion of evidence obtained in violation of the Fourth Amendment was unknown in early America.¹³¹ Instead, the victim of an unlawful search would

126. 30 Mich. 201 (1874).

127. Amar, *Fourth Amendment First Principles*, *supra* note 2, at 786; *see also* Amar, *Terry and Fourth Amendment First Principles*, *supra* note 2, at 1127 (asserting that "no court in America ever excluded evidence on Fourth Amendment-like grounds for the first century after Independence").

128. Amar, *Fourth Amendment First Principles*, *supra* note 2, at 786.

129. *Id.* at 774.

130. *Id.* (quoting TAYLOR, *supra* note 37, at 41).

131. *See, e.g.*, *Weeks v. United States*, 232 U.S. 383, 396 (1914) (stating that the admissibility of unlawfully obtained evidence in a criminal trial "has the sanction of so many state cases that it would be impracticable to cite or refer to them in detail"); *Adams v. New York*, 192 U.S. 585, 595 (1904) (concluding that "though papers and other subjects of evidence may have been illegally taken," such evidence is admissible at a criminal trial); Paul G. Cassell, *The Mysterious Creation Of Search and Seizure Exclusionary Rules Under State Constitutions: The Utah Example*, 1993 UTAH L. REV. 751, 758 ("Throughout most of the nineteenth century, the United States Supreme Court likewise did not consider exclusion of evidence a remedy for unlawful searches."); Daniel M. Harris, *Back to Basics: An Examination of the Exclusionary Rule in Light of Common Sense and the Supreme Court's Original Search and Seizure Jurisprudence*, 37 ARK. L. REV. 646, 658 (1984) (stating that in early America, the "proper and adequate remedy" for an unlawful search or seizure was "a common law action for damages by the aggrieved party against the seizing officer").

seek civil damages in a trespass suit. As discussed in Part V, the eighteenth-century John Wilkes cases in England constituted one of the landmark events leading to the adoption of the Fourth Amendment.¹³² The John Wilkes cases all involved civil damage suits contesting unlawful searches, and not efforts by criminal defendants to exclude evidence.

Second, Professor Amar appropriately emphasizes the connection between the Fourth Amendment and the common law trespass doctrine. As discussed below, the doctrine of unreasonable searches and seizures did not originally operate as a restraint on the government. Instead, the prohibition on unreasonable searches and seizures derived from English laws that prohibited housebreaking by private parties.¹³³

However, the accuracy of Professor Amar's observations about Fourth Amendment *remedies* provides little guidance about the extent of Fourth Amendment *rights*. Civil damages were the remedy for Fourth Amendment violations. However, this observation simply does not establish that the framers sought to limit the use of warrants.¹³⁴ As discussed above, the presence of a warrant requirement in many statutory enactments suggests just the opposite.¹³⁵

Nor does the civil damages remedy demonstrate that the Fourth Amendment imposed some global reasonableness requirement on all searches and seizures. If Professor Amar could cite framing-era Fourth Amendment civil damage suits brought in cases not involving house searches, this certainly would support Professor Amar's global reasonableness requirement. But Professor Amar cannot cite such cases, because they do not exist. In describing unlawful search cases from eighteenth-century England, Professor Amar accurately observes: "John Wilkes and company, after all, had recovered a King's ransom from civil juries to teach arrogant officialdom a lesson and to deter future abuse."¹³⁶ But in the John Wilkes cases, damages were awarded for

132. See *infra* text accompanying notes 159–69.

133. See *infra* text accompanying notes 142–45.

134. See Cloud, *supra* note 86, at 1730 (asserting that although warrants did provide a defense in trespass suits, "to extrapolate from this narrow fact the broad principle that warrants served no protective function is simply to ignore the development of specific warrants").

135. See *supra* text accompanying notes 84–92.

136. Amar, *Fourth Amendment First Principles*, *supra* note 2, at 797. Nelson Lasson observes that in the John Wilkes cases, the English government's expenses "were said to total £100,000." LASSON, *supra* note 99, at 44–45.

unlawful house searches. The John Wilkes cases did not establish that the concept of unreasonable searches and seizures extended beyond house searches.

Ultimately, Professor Amar seems to read the Fourth Amendment as similar to the Fifth Amendment takings clause, which provides that the government cannot take private property “for public use, without just compensation.”¹³⁷ Professor Amar’s approach suggests that the framers were willing to tolerate unreasonable searches and seizures, as long as the search victims ultimately were compensated by civil jury verdicts.

But such an approach is inconsistent with the unconditional denunciations of unreasonable searches that appear during the framing era. In the English case of *Wilkes v. Wood*,¹³⁸ Chief Justice Pratt wrote that the government’s assertion of a right “to force persons houses, break open escrutores, seize their papers, . . . upon a general warrant” would be “totally subversive of the liberty of the subject.”¹³⁹ Similarly, Judge William Henry Drayton of Charleston, South Carolina complained in 1774 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.”¹⁴⁰ Such statements did not simply request compensation for victims of unlawful house searches. These statements indicated that unlawful house searches were categorically unacceptable.

D. Summary

Professor Amar contends that the framers sought to limit the use of warrants, that the Fourth Amendment imposed a global reasonableness requirement on all searches and seizures, and that the framers envisioned a civil damages suit as the appropriate Fourth Amendment remedy. Of these contentions, only Professor Amar’s claim about the civil damages remedy is supported by framing-era sources. Although Professor Amar contends that the framers sought to limit the use of warrants, these same framers enacted statutes that required specific warrants. And Professor Amar cannot point to any direct evidence supporting a global reasonableness requirement. Instead, all of the evidence suggests that the Fourth Amendment did not apply outside of house searches.

137. U.S. CONST. amend. V.

138. 98 Eng. Rep. 489 (K.B. 1763).

139. *Id.* at 498.

140. William Henry Drayton, *A Letter From Freeman*, in DOCUMENTARY HISTORY OF THE AMERICAN REVOLUTION 11, 15 (R.W. Gibbes ed. 1855) [hereinafter DOCUMENTARY HISTORY OF THE AMERICAN REVOLUTION].

V. THE REAL FOURTH AMENDMENT

Professor Amar's reading of the Fourth Amendment receives little support from historical sources. However, the mainstream warrant preference rule also is inconsistent with Fourth Amendment history. During the eighteenth century and the early nineteenth century, warrantless searches and seizures took place far more frequently than searches pursuant to a warrant. These searches or seizures rarely were challenged on constitutional grounds. And court decisions invalidating a warrantless search or seizure were virtually nonexistent.

A review of historical sources clearly indicates that the framers who enacted the Fourth Amendment intended to address only a narrow, specific problem. The framers intended to proscribe only unlawful physical entries into residences—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.

Eighteenth-century and early nineteenth-century discussions of unreasonable searches and seizures focus almost exclusively on house searches.¹⁴¹ At the same time, any problems raised by searches and seizures other than house searches rarely were mentioned.

In the Fourth Amendment proscription against unreasonable searches and seizures of “persons, houses, papers, and effects,” the framers sought to proscribe unreasonable searches and seizures of “persons, papers, and effects” in a house. And that is all the framers intended to proscribe.

A. The Origins

The doctrine prohibiting unreasonable searches and seizures did not originate as a restraint upon the government. The Fourth Amendment proscription against unreasonable searches originated with English laws that protected homes against breaking and entering by private citizens. From the beginning, the doctrine of unreasonable searches and seizures

141. Professor Amar acknowledges that the framers of the Fourth Amendment were particularly concerned with regulating house searches. *See* AMAR, THE BILL OF RIGHTS, *supra* note 2, at 67 (noting that the Fourth Amendment “singles out ‘houses’ for special mention above and beyond other buildings subsumed within the catchall word *effects*”). But unlike this Article, Professor Amar also contends that the Fourth Amendment extends beyond house searches. *See supra* text accompanying notes 48–57, 93–126.

was intimately tied to unlawful entries of residences.

As 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.”¹⁴² Cuddihy writes that the early English housebreaking proscriptions acted exclusively as sanctions against private persons, and not as restraints on the government.¹⁴³ The English housebreaking laws “sought to control violence by private persons toward each other, not official searches by the government”¹⁴⁴

With the increased frequency of government house searches after 1485, English thought began to postulate that certain types of house searches by government agents were unreasonable and unlawful. As 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.”¹⁴⁵ From the beginning, the doctrine of unreasonable searches and seizures focused on house searches, and not other types of government conduct.

B. The Commentators

In their discussion of unreasonable searches and seizures, English and early American commentators focused almost exclusively on unlawful physical entries of houses. 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 stolen goods”¹⁴⁶ Coke continued that “for justices of peace to make warrants upon surmises, for breaking the houses of any subjects to search for felons, or stolen goods, is against the Magna Carta.”¹⁴⁷

In his 1721 treatise, Matthew Hale expanded on Coke’s rejection of

142. Cuddihy, *supra* note 5, at 32.

143. *Id.* at 36.

144. *Id.*

145. *Id.* at 128.

146. EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 176 (1797, reprinted by William S. Hein & Co. 1986). Coke’s treatise originally was published in 1644. See Davies, *supra* note 83, at 578 n.74.

147. COKE, *supra* note 146, at 176. William Blackstone also emphasized the illegality of general warrants. Blackstone wrote: “A *general* warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for it’s [sic] uncertainty” 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: A FACSIMILE OF THE FIRST EDITION OF 1765–1769, at 288 (Univ. of Chi. Press 1769).

general warrants as a justification “to break open any man’s house.”¹⁴⁸ Like other contemporary commentators, Hale focused on house searches. In his chapter *Concerning Warrants to Search for Stolen Goods, and Seizing of Them*,¹⁴⁹ Hale wrote exclusively about searches of houses, and did not discuss searches of commercial establishments that also might contain stolen goods.¹⁵⁰

Early American legal commentators seemed to agree that the Fourth Amendment merely incorporated the English common law prohibition on unlawful physical searches of houses. In his *Commentaries on the Constitution of the United States*, Joseph Story devoted just one page to the Fourth Amendment. With respect to the amendment, Story wrote: “It is little more than the affirmance of a great constitutional doctrine of the common law.”¹⁵¹

In discussing this “common law” doctrine, Story referred to the English prohibition on general warrants. After describing the general warrant, Story wrote: “In the year 1763, the legality of these general warrants was brought before the King’s Bench [in England] for solemn decision; and they were adjudged to be illegal, and void for uncertainty.”¹⁵² Story continued that a legal warrant “must not only state the name of the party, but also the time, and place, and nature of the offence with reasonable certainty.”¹⁵³

Story’s brief treatment of the Fourth Amendment is perfectly consistent with a limited amendment, which only regulated house searches. However, if the Fourth Amendment imposed a global reasonableness requirement on a broad array of government conduct, Story’s brief treatment of the amendment is difficult to explain.

As noted above, Thomas Cooley’s account of the Fourth Amendment is entirely consistent with the views of other early

148. See 2 HALE, *supra* note 78, at 149 (quoting COKE, *supra* note 146, at 176).

149. *Id.*

150. See, e.g., *id.* at 151 (concluding that if an officer possesses a specific warrant and “stolen goods be in the house, the officer may break open the door”); *id.* (observing that where 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 . . .”).

151. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1005, at 709 (Carolina Academic Press 1987) (1833).

152. *Id.* at 710. Story was referring to the John Wilkes cases, which concluded that English house searches conducted pursuant to a general warrant had violated common law principles. See *infra* text accompanying notes 159–69.

153. STORY, *supra* note 151, at 710.

commentators, who explicitly referred to house searches when discussing unreasonable searches and seizures.¹⁵⁴ In describing the Fourth Amendment, Cooley wrote: “The maxim that ‘every man’s house is his castle’ is made a part of our constitutional law in the clause prohibiting unreasonable searches and seizures”¹⁵⁵

The Continental Congress provides one of the best sources of information on the framers’ intent when they proscribed unreasonable searches and seizures in the Fourth Amendment. In their complaint against oppressive British action, the Congress focused on house searches, and not other law enforcement activity. As William Cuddihy reports, 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.”¹⁵⁶ In a 1774 letter to the inhabitants of Quebec, the Congress warned that British customs officers would break into “houses, the scenes of domestic peace and comfort and called the castles of the English subjects in the books of their law.”¹⁵⁷

During the framing era, English and American commentators demonstrated a remarkable uniformity about what constituted unreasonable searches and seizures. Early commentators all focused on the need to proscribe unlawful house searches. Nothing in these early commentaries supports the global reasonableness requirement asserted by Professor Amar.

C. *The Controversies*

Commentators have observed that discussions of unreasonable searches in the late eighteenth century primarily focused on three controversies—the John Wilkes cases in England, Paxton’s case in Boston, and American reactions to the Townshend Act.¹⁵⁸ In all three controversies, criticisms of the English government focused almost exclusively on physical searches of houses pursuant to general warrants.

154. See *supra* text accompanying notes 116–25 (discussing Justice Cooley’s opinion in *Weimer v. Bunbury*).

155. COOLEY, *supra* note 122, at 299–300.

156. Cuddihy, *supra* note 5, at 1116.

157. *Id.* at 1117.

158. See, e.g., LASSON, *supra* note 99, at 43–47 (discussing the John Wilkes cases), 57–63 (discussing Paxton’s case), 69–76 (discussing the Townshend Act); see also Davies, *supra* note 83, at 561–67 (discussing these three controversies, and noting agreement among commentators that these controversies represent the most important events leading to the adoption of the Fourth Amendment).

1. 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.¹⁵⁹ 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.”¹⁶⁰ Based on a single general warrant issued by the Tory Secretary of State, English officers searched at least five houses and arrested at least forty-nine people.¹⁶¹ Wilkes and his supporters responded with at least thirty different trespass and false imprisonment suits.¹⁶²

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.¹⁶³ The officers who conducted these house searches were liable for trespass and false imprisonment.¹⁶⁴

Professor Amar acknowledges the importance of the John Wilkes cases in the development of thought on unreasonable searches and seizures.¹⁶⁵ However, Professor Amar does not recognize the extent to which these decisions focused on the impropriety of house searches.

For example, in *Huckle v. Money*,¹⁶⁶ Chief Justice Pratt refused to set aside a damages verdict won by a printer, whose house had been searched pursuant to the general warrant. Chief Justice Pratt’s opinion harshly criticized house searches pursuant to general warrants. For example, 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

159. For a detailed account of the John Wilkes cases, see Cuddihy, *supra* note 5, at 886–927.

160. *Id.* at 886.

161. *Id.* at 893.

162. *Id.* at 894.

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

164. See LASSON, *supra* note 99, 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”).

165. See, e.g., Amar, *Fourth Amendment First Principles*, *supra* note 2, at 772, 797–98; Amar, *The Writs of Assistance*, *supra* note 2, at 65 (stating that the John Wilkes cases were “the most famous colonial-era cases in all America”).

166. *Huckle*, 95 Eng. Rep. at 768.

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.”¹⁶⁷ Other opinions issued in the John Wilkes cases included similar criticisms of unlawful house searches.¹⁶⁸

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.¹⁶⁹ Nor did these cases announce the global reasonableness requirement that Professor Amar infers from Fourth Amendment history.

2. Paxton’s Case

Charles Paxton was a Boston, Massachusetts customs officer. In 1761, Paxton sought to renew a writ of assistance that he had received from the Superior Court in Boston.¹⁷⁰ The writ of assistance was the American equivalent of the English general warrant.¹⁷¹

In January 1761, an association of Massachusetts merchants challenged Paxton’s writ of assistance before the superior court. James Otis, a prominent Boston attorney, argued the case on behalf of the merchants.¹⁷²

Otis argued that the writs of assistance operated as general warrants, in violation of common law principles. Otis initially asserted that “the freedom of one’s house” was among “the most essential branches of English liberty.”¹⁷³ Otis then complained that with a writ of assistance,

167. *Id.* at 769.

168. *See, e.g., Entick*, 95 Eng. Rep. at 818 (concluding that “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 (asserting that where the defendants claimed a right “to force persons houses, break open escrutores, seize their papers, . . . upon a general warrant,” these actions were “totally subversive of the liberty of the subject”).

169. Eighteenth-century Americans may have lacked access to the actual opinions issued in the John Wilkes cases. *See* Davies, *supra* note 83, at 565 n.25 (noting that the official reports of the John Wilkes cases “were not published contemporaneously with the trials”). But during the eighteenth century, these opinions were reported widely in the popular press—both in America and in England. *See, e.g., Cuddihy, supra* note 5, at 927–37 (describing British publications that opposed the use of general warrants in the John Wilkes cases); Davies, *supra* note 83, at 563 (describing British and colonial newspaper accounts of the John Wilkes cases, which emphasized “the sanctity of the house while condemning general warrants”); *see also* JACOB W. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT* 29 (1966) (noting Chief Justice Pratt’s popularity in England, following his opinions in the John Wilkes cases).

170. Cuddihy, *supra* note 5, at 760–61.

171. Colonial authorities used the writs of assistance to search for customs violations. The writs authorized customs officers to search any places where the officers suspected that smuggled goods were hidden. Customs officers believed that these writs empowered them to enter and inspect all houses in Massachusetts. *Id.* at 759.

172. Cuddihy, *supra* note 5, at 765.

173. SMITH, *supra* note 79, at 344.

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”¹⁷⁴

On November 18, 1761, the Superior Court in Boston ultimately approved the continued use of the writs of assistance.¹⁷⁵ Nonetheless, Otis’s argument was one of the major events that fueled the movement for American independence from England.¹⁷⁶

It is significant that Otis argued only against house searches. As Thomas Davies has noted, Otis’s clients were “merchants who also owned ships and warehouses.”¹⁷⁷ But Otis did not challenge the searches of warehouses or the seizure of ships—only physical intrusions into residences.¹⁷⁸

3. *American Opposition to the Townshend Act*

In 1767, the British Parliament enacted the Townshend Act. The act reauthorized the use of writs of assistance by custom officers in America.¹⁷⁹ But given the profound influence of the John Wilkes cases and Paxton’s case, colonial courts rarely issued the writs, and customs officers could not execute the writs effectively.¹⁸⁰

Like the John Wilkes cases and Paxton’s case, opposition to the

174. *Id.*

175. Cuddihy, *supra* note 5, at 798.

176. For John Adams’s description of the argument made by Otis, see 10 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 247–48 (1856). See also Davies, *supra* note 83, 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).

177. Davies, *supra* note 83, at 602.

178. *Id.* at 601–02.

179. Cuddihy, *supra* note 5, at 1040.

180. As 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 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 1046–49. 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 into specific search warrants. *Id.* at 1067; see also LASSON, *supra* note 99, at 73 (reporting that most colonial courts “refused to grant general writs of assistance even after the Townshend Act had set at rest all technical objections to their legality”).

Townshend Act again focused on the use of general warrants to authorize house searches. When he attacked the writs of assistance in 1772, Samuel 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 the dutys have not been paid.”¹⁸¹ Adams continued that customs officers may “break thro’ the sacred rights of the *Domicil*, [and] ransack mens houses . . .”¹⁸² Similarly, Judge William Henry Drayton of Charleston complained in 1774 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.”¹⁸³

After the Revolutionary War, the reactions of early state legislatures to general warrants also are instructive. As discussed above, in the 1780s, both Massachusetts and Pennsylvania passed laws that mandated specific warrants.¹⁸⁴ However, these statutes required specific warrants only for house searches—not for searches of other places.¹⁸⁵

4. *The Ship Seizure Cases*

The only significant pre-Revolutionary American challenges to nonresidential searches or seizures arose out of the British seizure of American ships, based on allegations of customs violations. In two particularly notorious cases, British agents seized ships owned by prominent merchants Henry Laurens of South Carolina and John Hancock of Massachusetts.¹⁸⁶ Nelson Lasson observes that in Boston during 1768, “a riot resulted when John Hancock’s sloop ‘Liberty’ was seized . . .”¹⁸⁷

181. *A State of the Rights of the Colonists*, *supra* note 81, at 243 (report typically attributed to Samuel Adams).

182. *Id.* at 244. Like James Otis, Adams made his argument in the seaport of Boston. Many members of Adams’s audience undoubtedly were merchants, who owned shops, warehouses, and vessels. Nonetheless, Adams only discussed house searches.

183. DOCUMENTARY HISTORY OF THE AMERICAN REVOLUTION, *supra* note 140, at 15.

184. *See supra* text accompanying notes 86–91.

185. *Id.* Admittedly, some early state statutes required that law enforcement officers obtain specific warrants before undertaking searches outside of the home. For example, 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.” Cuddihy, *supra* note 5, at 1292. In a 1786 act, Delaware required that government agents must obtain specific warrants before the agents could search buildings for cargo pilfered from shipwrecked vessels. *Id.* at 1293.

186. *See Cuddihy*, *supra* note 5, at 1205–14.

187. LASSON, *supra* note 99, at 72. Some authors have cited these ship seizure

However, nineteenth-century cases strongly indicate that the framers did not intend to apply the Fourth Amendment to ship seizures. As discussed above, during the early nineteenth century, federal authorities regularly seized ships, sometimes with minimal evidentiary support.¹⁸⁸ But neither the attorneys arguing these cases nor the Justices who decided the cases even mentioned the Fourth Amendment.

Without question, American colonial merchants deplored British seizures of American ships. However, Americans also apparently did not view the Fourth Amendment as the means for regulating these ship seizures. In the 1789 Collections Act, Congress approved the warrantless search of vessels for customs violations.¹⁸⁹ Americans apparently believed that regulation of ship seizures would occur through federal statutes, and not through application of the Fourth Amendment.

D. House Searches and the Ambiguity of Fourth Amendment History

The house search interpretation presented above is what Professor Morgan Cloud describes as a “lawyer’s history.”¹⁹⁰ When Professor Cloud uses this term, he is referring to the tendency of lawyers writing historical analysis to “condense the complexity and ambiguity of life,” thus “giving form to history’s chaos by selectively omitting details”¹⁹¹ The development of the doctrine of unreasonable searches and seizures was too complicated, and too chaotic, for all of the evidence to fit in a simple, neat package.

In his review of William Cuddihy’s landmark dissertation on the Fourth Amendment, Professor Cloud writes: “With almost humorous regularity, Cuddihy documents how victims and critics of general searches and seizures complained bitterly and loudly, only to use the

cases as indicating that the framers intended to extend the Fourth Amendment beyond house searches. See Maclin, *supra* note 5, at 962 (stating that the ship seizure controversies “helped to focus colonial thinking on the principle of probable cause”). But cf. Davies, *supra* note 83, at 604. Davies contends that the ship seizure controversies did not dispute “general search authority,” but instead involved challenges focused on “‘customs racketeering’ in the form of hypertechnical applications of customs rules or forfeiture proceedings based on perjured testimony from informers.” *Id.*

188. See *supra* text accompanying notes 108–115.

189. Collections Act of 1789, § 24, 1 Stat. 29, 43 (1789). Based on this provision, Chief Justice William Howard Taft concluded that the Fourth Amendment was intended to apply to ship searches. See *Carroll v. United States*, 267 U.S. 132, 150–51 (1925).

190. Cloud, *supra* note 86, at 1707–08.

191. *Id.* at 1709.

same methods against their adversaries when they had the chance.”¹⁹² For example, the invalidity of house searches pursuant to general warrants formed the most persistent theme in early American complaints about unreasonable searches and seizures. But as of 1787, five states still permitted the use of general warrants.¹⁹³ In the framing era, the term “unreasonable search and seizure” sometimes meant different things, to different people in different places.

Given the complexity of the historical record, some historical fragments inevitably will conflict with the house search interpretation of the Fourth Amendment advocated in this essay. For example, some early state statutes required warrants for non-residential searches. For example, one section of the 1789 Collections Act required a specific warrant before federal customs officers could search buildings.¹⁹⁴ A 1786 Rhode Island statute permitted a federal tax agent to search houses, stores, warehouses, or other buildings only after the agent had obtained a specific warrant.¹⁹⁵ A 1786 Delaware statute required that before a law enforcement agent could search any buildings for goods pilfered from shipwrecks, the agent must obtain a warrant.¹⁹⁶

Second, warrantless searches of houses sometimes may have been permitted. As Professor Amar notes, an early federal statute authorized warrantless entries into all “houses, store-houses, ware-houses, buildings and places” that had been registered for storing or distilling liquor.¹⁹⁷ Although this statute explicitly used the word “houses,” the statute probably was intended to cover only commercial premises used to distill and store liquor.¹⁹⁸ Professor Amar acknowledges that the “houses” covered by the statute were “‘houses’” of sorts—though obviously deserving of less privacy than a purely private abode.”¹⁹⁹

Despite these examples, the house search interpretation of the Fourth Amendment remains the most plausible reading of the amendment’s history. According to the mainstream warrant preference rule, the Fourth Amendment always prefers and sometimes mandates warrants.²⁰⁰

192. *Id.* at 1717.

193. *Id.* at 1727–28.

194. Collections Act of 1789, 1 Stat. 29, 43 (1789); *see also* Maclin, *supra* note 5, at 963 (discussing the collections act).

195. Cuddihy, *supra* note 5, at 1292.

196. *Id.* at 1293.

197. Act of March 3, 1791, ch. 15, §§ 25, 29, 1 Stat. 199, 205–06.

198. *See* Davies *supra* note 83, at 712 (asserting that when Congress enacted this statute, the legislators understood that they “had leeway to confer general search authority on revenue officers regarding commercial premises—though not for places actually used as dwellings”).

199. Amar, Terry and Fourth Amendment First Principles, *supra* note 2, at 1105.

200. *See supra* text accompanying notes 5–7 (describing the warrant preference rule).

However, the warrant preference rule receives little support from early American practice, where the government conducted most searches and seizures without a warrant.²⁰¹

Nor does Professor Amar's alternative account receive substantial support from historical sources. According to Professor Amar, the framers believed that warrants were dangerous. However, a number of early federal and state statutes mandated specific warrants, raising severe doubts about the accuracy of Professor Amar's contention.²⁰²

And although Professor Amar asserts that the Fourth Amendment imposed a general reasonableness requirement on searches and seizures, court opinions prior to the 1880s almost never mentioned the amendment.²⁰³ In the rare nineteenth-century cases where attorneys demonstrated the creativity to raise a Fourth Amendment argument, such arguments were quickly dismissed.²⁰⁴ If the Fourth Amendment did impose some general reasonableness requirement, this would have been news to early American judges and attorneys.

The evolution of the doctrine of unreasonable searches and seizures was complex and chaotic. But in the end, the vast weight of the historical evidence indicates that when the framers enacted the Fourth Amendment, they only intended to regulate house searches. While not all of the evidence is consistent with this house search interpretation, this reading is more plausible than the alternative interpretations of Fourth Amendment history.

E. Summary

A review of the historical evidence indicates that when the framers adopted the Fourth Amendment, they intended to implement a provision that was much narrower than modern mainstream conceptions of the amendment, or the historical interpretation advanced by Professor Amar.²⁰⁵ The John Wilkes cases, Paxton's case, and American opposition

201. See Bradley, *supra* note 73, at 1041 (observing that in early America, warrantless searches "were the rule rather than the exception").

202. See *supra* text accompanying notes 84–89.

203. See *supra* text accompanying notes 96–107.

204. See *supra* text accompanying notes 101–07.

205. Thomas Davies has advanced a reading of Fourth Amendment history that is very similar to the interpretation presented in this Article. Davies appropriately emphasizes that the historical concerns resulting in the Fourth Amendment "were almost exclusively about the need to ban house searches under general warrants." Davies, *supra* note 83, at 551; see also *id.* at 642–50 (emphasizing the sanctity of the home in

to the Townshend Act all focused on a single, narrow issue—the need to proscribe house searches pursuant to a general warrant, or no warrant at all.

When they enacted the Fourth Amendment, the framers intended that law enforcement agents typically must obtain a specific warrant before these agents entered a house. And that is all that the framers intended. The historical record does not provide any evidence that the framers intended to impose a global reasonableness requirement on all searches and seizures.

VI. CONCLUSION

According to the traditional understanding of the Fourth Amendment,

eighteenth-century America).

However, I disagree with Davies on at least two points. Davies concludes 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, 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 Davies’s 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 cannot agree with Davies’s conclusion that the Fourth Amendment did not proscribe warrantless house searches.

Davies and I also disagree on the implications of the framers’ original intent for current Fourth Amendment doctrine. Davies believes that a return to the original understanding of the Fourth Amendment “would subvert the *purpose* the Framers had in mind when they adopted the text.” *Id.* at 741. Davies largely accepts the Supreme Court’s rewriting of the Fourth Amendment, because law enforcement officers today exercise “a level of discretionary authority that the Framers would not have expected a warrantless officer could exercise unless general warrants had been made legal.” *Id.*

I agree with Davies that unrestrained police discretion is undesirable. However, judicial activism is not the only potential source for police restraint. Police discretion could be constrained by elected officials who supervise police departments, by statutes, or by amendments to state constitutions or the federal constitution.

In short, having nine appointed Supreme Court Justices re-invent the Fourth Amendment based on their personal views about “unreasonable searches and seizures” is not the most sensible way to regulate police discretion. In my opinion, Fourth Amendment doctrine is such a mess because well-intentioned judges have invoked the amendment in situations where it never was intended to apply. *See supra* text accompanying notes 5–35 (discussing Fourth Amendment decisions that seem arbitrary and incoherent).

the amendment prefers searches pursuant to a warrant. Given the prevalence of warrantless searches and seizures during and after the enactment of the Fourth Amendment, the traditional warrant preference rule seems inconsistent with Fourth Amendment history.

Professor Akhil Amar has developed a very different interpretation of Fourth Amendment history. According to Professor Amar, the Fourth Amendment does not prefer warrants. Instead, the amendment was designed to limit the use of warrants. In addition, Professor Amar asserts that the Fourth Amendment imposed a global reasonableness requirement on all government searches and seizures.

Professor Amar's approach receives even less support from historical sources than the traditional warrant preference rule. Contrary to Professor Amar's claims, the framers did not seek to limit the use of specific warrants. And the historical evidence does not support Professor Amar's contention that the framers intended to impose a global reasonableness requirement on all government searches and seizures.

The historical record actually supports a third interpretation of the Fourth Amendment, different from both the warrant preference rule and Professor Amar's reasonableness approach. Specifically, the framers enacted the amendment solely to regulate house searches. The Fourth Amendment required that law enforcement officers typically must obtain a specific warrant before the officers entered a house. The amendment proscribed house searches pursuant to a general warrant, or no warrant at all. And house searches were the only thing that the amendment was intended to regulate.

With a broad Fourth Amendment, Supreme Court Justices and law professors have become important figures in the regulation of law enforcement. So it is unsurprising that both groups have advocated broad readings of the amendment.

But the incoherence of modern Fourth Amendment doctrine also is unsurprising, given the lack of connection between modern readings of the amendment and the intent of the amendment's framers. Fourth Amendment doctrine is such a mess precisely because lawyers and judges have invoked the amendment in situations where it never was intended to apply.

