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THE CONTINGENT FOURTH AMENDMENT

*Michael J. Zydney Mannheimer**

In the past forty years, the U.S. Supreme Court has increasingly advanced the notion that the Fourth Amendment encompasses the common-law restrictions on searches and seizures that existed in 1791 when the Amendment was adopted. Yet, in case after case, the Court has encountered indeterminacy in the common law circa 1791. At times, the Court confronts this indeterminacy by concluding that, in the absence of a clear common-law rule, the Fourth Amendment does not govern the issue. At other times, in the face of indeterminacy, the Court falls back upon general Fourth Amendment principles. And on occasion the Court pretends that the indeterminacy does not exist.

The reason for the absence of clear common-law search-and-seizure rules in 1791 is that the common law differed in important respects among the new American States. More importantly, the Anti-Federalists, those who demanded that the Bill of Rights be added to the Constitution as the price of ratification, recognized that the common law differed by State. This differentiated common law included the common-law rights of Englishmen secured by state constitutions and bills of rights. The Anti-Federalists saw the common law not as a fixed set of rules they were freezing in time, but as fluid, contingent, and evolving around them. Thus, if the Court is going to continue to interpret the Fourth Amendment as incorporating common-law search-and-seizure rules, it must come to terms with the fact that the common law of 1791 was viewed by a significant part of the population as contingent rather than fixed. And given that we owe the Bill of Rights to the Anti-Federalists, it makes some sense to interpret its commands in light of their view of the common law.

This Article introduces a view of the Fourth Amendment—the contingent Fourth Amendment—that courts and commentators have overlooked. It asserts that we ought to conceive of our rights against unreasonable searches and seizures by federal officials as being largely contingent on state law. The only

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common-law rules that the Fourth Amendment freezes into the Constitution are those explicitly set forth in the Warrant Clause: rules against warrants that are general, issued on less than probable cause, or unsupported by oath or affirmation. The residuum of constitutional search-and-seizure rules are to be dictated by state law, even when it is a federal officer doing the searching or seizing. On this approach, as a matter of federal constitutional law, a federal officer is generally constrained by the search-and-seizure law of the State where a federal search or seizure occurs.

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INTRODUCTION

There have always been two competing views of the common law in this country. One view posits the common law as relatively stable across time and uniform across borders. The second view conceives of the common law as fluid and differentiated, evolving to meet the needs of a growing society and adapting to meet the needs of different polities. Since the rise of legal realism in the early twentieth century, the latter view has generally won out. But its victory is incomplete because the view of the common law as a discoverable, unchanging monolith has prevailed in one significant respect: it is the view that typically drives originalist approaches to the Constitution.¹

The prevailing view of the Fourth Amendment² is a prime example. Over the past forty years, the U.S. Supreme Court has increasingly advanced the notion that the Fourth Amendment tracks the common law of search and seizure as it existed in 1791 when the Amendment was adopted. In other areas, the Court has embraced the Realist view that the common law is nothing more

¹ See Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 553–54 (2006) (“Originalists’ invocations of the common law posit a fixed, stable, and unified eighteenth-century content”); David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1795 (2000) (observing that originalists tend to “treat the common law as a unified, systematic body of rules, constant across space and time”).

² U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

or less than the positive law of each individual jurisdiction, adapted and refined for reasons of public policy distinctive to that jurisdiction.³ Yet the Court typically acts as if the common law of search and seizure as of 1791 was generally a unified corpus of settled doctrine.

As it turns out, there rarely was consensus in the common law of 1791 on the issues that matter to lawyers. Examination of the law of search and seizure during the founding period, as expressed in the justice of the peace manuals used by magistrates and constables, demonstrates important differences across borders and over time. These differences concerned such significant matters as the appropriate grounds for a warrantless arrest, whether one could search incident to arrest, whether and under what circumstances doors could be broken to make an arrest, and when, if ever, nocturnal searches were justified. Indeed, at the time the Fourth Amendment was adopted, the States differed on such a fundamental matter as whether a warrant was necessary to search non-dwelling premises.

Importantly, a significant portion of framers and ratifiers of the Bill of Rights understood that the common law in general, and the law of search and seizure in particular, was thus differentiated. In particular, the Anti-Federalist opponents of the Constitution embraced this proto-Realist, jurisdiction-specific view of the law. Their speeches and essays in opposition to the Constitution suggest that they sought not constraints on federal search-and-seizure authority that would be uniform across the Nation but rather conformity of federal actors with the laws of the respective States. Ultimately, a sufficient number of moderate Anti-Federalists dropped their opposition to the Constitution in return for the promise of a Bill of Rights that would provide such constraints. Because we owe the Bill of Rights and, indeed, the Nation we know today to these moderate Anti-Federalists, we should give their views primacy when interpreting the Fourth Amendment.

Consistent with this view, this Article argues that, at least from an originalist standpoint, the Fourth Amendment is best viewed as being largely contingent on state law. That is to say, if the Court is to continue to attempt to ascribe to the Fourth Amendment the meaning it was understood to have in 1791, the Amendment is best viewed as having incorporated state law search-and-seizure constraints against federal actors, so that federal agents and

³ See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004) (“[W]e now tend to understand common law not as a discoverable reflection of universal reason but, in a positivistic way, as a product of human choice.”).

officers are bound by the search-and-seizure rules in the respective States in which they operate.⁴ The only exceptions are the rules set forth explicitly in the Warrant Clause: bars on general warrants⁵ and those not issued upon probable cause or unsupported by oath or affirmation. By its terms the Amendment fixes these as uniform throughout the Nation. But the rest were likely understood, by a significant number of the framers and ratifiers of the Bill of Rights, as being contingent on state law.

Part I of this Article discusses the Supreme Court's reliance on common law to decide Fourth Amendment cases. It shows that the Court often pretends that the common law of 1791 was settled and uniform when it was neither. On other occasions, the Court confronts the vagueness of the common law of 1791 but does not follow a uniform approach when the common law was hazy. Part II sifts through the justice of the peace manuals used from 1761 to 1795, which are the best evidence we have of search-and-seizure doctrine and practice across North America. This examination shows that the common law of search and seizure, while generally consistent over time and across borders, also encompassed several significant differences in different jurisdictions during different times. This Part also demonstrates that statutory authority to search premises differed by State in the decade before ratification of the Fourth Amendment. Part III demonstrates that those who demanded the Bill of Rights, the Anti-Federalists, understood that the common law varied by State. It also shows that the Anti-Federalists demanded a bill of rights because they viewed the States as the primary guardians of liberty and feared that the centralizing tendencies of the Constitution would allow the federal government to bypass state protections of rights. In this way, they understood individual rights as being calibrated to state norms. Viewed in this light, the Anti-Federalists'

⁴ This is a very different sort of contingency than that addressed by Wayne A. Logan, *Contingent Constitutionalism: State and Local Criminal Laws and the Applicability of Federal Constitutional Rights*, 51 WM. & MARY L. REV. 143 (2009). Professor Logan observes that the Fourth Amendment standards of reasonable suspicion and probable cause operate differently in different States because of differences in underlying substantive criminal law. Because of these differences, probable cause or reasonable suspicion to believe a crime has occurred or is about to occur might exist in one State although the same conduct would not give rise to probable cause or reasonable suspicion in another State. *See id.* at 151–56. This Article asserts that the standards themselves that are applicable to federal officers, and not just how those standards are applied, should be thought to differ by State.

The central thesis of this Article shares some similarities with that of Note, *The Fourth Amendment's Third Way*, 120 HARV. L. REV. 1627 (2007), which also argues that Fourth Amendment reasonableness analysis should use state law as its touchstone. Although that Note is highly persuasive and well written, it does not address the Fourth Amendment from an originalist standpoint.

⁵ General warrants are those “that lack[] specificity as to whom to arrest or where to search.” Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 558 n.12 (1999).

demands for restrictions on federal search-and-seizure authority can be reinterpreted largely as demands that the power of federal agents be subordinated to state search-and-seizure constraints. This Part contends that the Anti-Federalist perspective should be given primacy in any originalist reading of the Bill of Rights because the Bill was the price exacted by the moderate Anti-Federalists in exchange for their reluctant support for the Constitution. Finally, Part IV discusses some of the promises and perils of reinterpreting the Fourth Amendment as subjecting federal agents to state search-and-seizure rules.⁶

I. USE AND MISUSE OF THE COMMON LAW IN FOURTH AMENDMENT CASES

The Fourth Amendment's Warrant Clause is very specific. It sets out three requirements—particularity, oath or affirmation, and probable cause—before a warrant may be issued. By contrast, the Amendment's Reasonableness Clause is “vague [and] unilluminating.”⁷ It provides a benchmark of reasonableness for all those search-and-seizure questions not answered by the Warrant Clause, which is to say, most of them: When are warrants required? How must they be executed? Under what circumstances can warrantless searches and seizures be made? And so on. In the past forty years, the U.S. Supreme Court has increasingly relied on the common law as it existed in 1791 to determine the meaning of the Reasonableness Clause. But in relying on the common law of 1791, the Court all too often either has downplayed the extent to which the common law of 1791 was unclear or nonuniform, or else has failed to come to grips with the consequences of that lack of clarity and uniformity.

⁶ This Article does not attempt to address the important question of whether and to what extent the Fourteenth Amendment incorporates the Fourth. While the Article does look to cases applying the Fourth Amendment to the States in analyzing current Fourth Amendment doctrine, that is the unavoidable consequence of the Court's having treated the Amendment identically when applied to the States as it is applied to the federal government. See *Malloy v. Hogan*, 378 U.S. 1, 10 (1964) (“We have held that . . . the prohibition of unreasonable searches and seizures of the Fourth Amendment . . . are . . . to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.”). If the Fourth Amendment is at least in part a federalism-based constraint, then full incorporation of it into the Fourteenth would be highly problematic. But to the extent that the Due Process Clause of the Fourteenth Amendment, U.S. CONST. amend. XIV (“No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .”), is directed to arbitrary and discriminatory conduct by state officials, it can and should be read to impose some Fourth Amendment-type constraints. Beyond these preliminary thoughts, this Article remains agnostic on the incorporation question.

⁷ Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 353–54 (1974); see George C. Thomas III, *The Eternally Young Fourth Amendment Common Law*, 65 RUTGERS L. REV. 951, 951 (2013) (“[T]he Framers wrote the two clauses of the Fourth Amendment in very different ways.”).

A. *The Court's Reliance on the Common Law in Interpreting the Fourth Amendment*

The Court has increasingly looked to the common law circa 1791 in order to resolve a wide variety of Fourth Amendment issues that come before it. For example, in 1975, in *Gerstein v. Pugh*, the Court looked to the Fourth Amendment's "common-law antecedents" in determining that a person arrested without a warrant could not be detained indefinitely absent a judicial determination of probable cause.⁸ The following year, in *United States v. Watson*, the Court relied in part on an "ancient common-law rule" in determining that an officer could make a public arrest for a felony without a warrant as long as "there was reasonable ground for making the arrest."⁹ The Court again looked to the common law in distinguishing *Watson* four years later in *Payton v. New York*, holding that a warrant was needed to forcibly enter a home to make an arrest.¹⁰

During this period, the Court did not always rely on the common law in interpreting the Fourth Amendment. For example, in *Tennessee v. Garner*, the Court explicitly rejected the common law rule permitting the use of deadly force against a fleeing felon, reasoning that "[b]ecause of sweeping change in the legal and technological context, reliance on the common-law rule in this case would be a mistaken literalism that ignores the purposes of a historical inquiry."¹¹ And even where the Court looked to the common law of 1791, that inquiry was typically informative but not dispositive. For example, in *Gerstein*, the Court's examination of the common law played a supporting role for the Court's balancing of law-enforcement and personal-liberty interests.¹²

As a result of the influence of Justice Scalia after his appointment to the Supreme Court in 1986, however, the common-law antecedents to the Fourth Amendment began to take on added significance. In a trio of cases in 1991, Justice Scalia made clear that the common law of 1791 should be the first place to look in determining the meaning of the Fourth Amendment. Writing for the Court in *California v. Hodari D.*, Justice Scalia relied principally on the common-law understanding of the word "seizure" to clarify that a person has

⁸ 420 U.S. 103, 111, 114–16 (1975).

⁹ 423 U.S. 411, 418 (1976). For a discussion of *Watson*, see *infra* Part I.B.1.

¹⁰ 445 U.S. 573, 591–98 (1980). For a discussion of *Payton*, see *infra* Part I.B.2.b.

¹¹ 471 U.S. 1, 13 (1985); see Sklansky, *supra* note 1, at 1765 (observing that in *Garner*, the Court consciously deviated from common law).

¹² 420 U.S. at 113–14.

not been seized pursuant to the Fourth Amendment merely because he has been the target of an unsuccessful attempt to stop him via a show of authority.¹³ In his separate opinion in *California v. Acevedo*, after surveying the incoherence that Fourth Amendment law has wrought, he suggested that “the path out of this confusion should be sought by returning to the first principle that the ‘reasonableness’ requirement of the Fourth Amendment affords the protection that the common law afforded.”¹⁴

Justice Scalia was careful not to suggest, however, that the Fourth Amendment affords *only* the protections of the common law. He made that point explicit in his dissent in *County of Riverside v. McLaughlin*, in which he clarified that the Fourth Amendment might require balancing public-safety concerns against individual-liberty interests, “[b]ut not . . . in resolving those questions on which a clear answer already existed in 1791, and has been generally adhered to by the traditions of our society ever since.”¹⁵ The Fourth Amendment places such issues “beyond time, place, and judicial predilection, incorporating the traditional common-law guarantees against unlawful arrest.”¹⁶

Within eight years, that two-tiered inquiry became solidified in the law, so that Justice Scalia could write for the Court in *Wyoming v. Houghton*:

In determining whether a particular governmental action violates [the Fourth Amendment], we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed. Where that inquiry yields no answer, we must evaluate the search or seizure under traditional standards of

¹³ 499 U.S. 621, 624–27 (1991); see Sklansky, *supra* note 1, at 1754 (observing significance of *Hodari D.* in the transformation of Justice Scalia’s thinking about common-law background of the Fourth Amendment); accord Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239, 258 & n.44 (2002).

¹⁴ 500 U.S. 565, 583 (1991) (Scalia, J., concurring in the judgment); see Sklansky, *supra* note 1, at 1755–56 (observing that Justice Scalia’s separate opinion in *Acevedo* suggests that the common-law background of Fourth Amendment provides a way to resolve “confusion and inconsistency” in Fourth Amendment jurisprudence); accord Davies, *supra* note 13, at 259.

¹⁵ 500 U.S. 44, 60 (1991) (Scalia, J., dissenting); see also Sklansky, *supra* note 1, at 1755 (noting that Justice Scalia suggested in his *McLaughlin* dissent that “[t]he common law of arrest . . . should operate as a floor on Fourth Amendment protections,” but not a ceiling).

¹⁶ *McLaughlin*, 500 U.S. at 66 (Scalia, J., dissenting); see Sklansky, *supra* note 1, at 1755 (observing that Justice Scalia’s dissent in *McLaughlin* posited the common law of 1791 as “a safe harbor against political winds unfavorable to civil liberties”); see also *Minnesota v. Dickerson*, 508 U.S. 366, 380 (1993) (Scalia, J., concurring) (“The purpose of the [Fourth Amendment] . . . is to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted . . .”).

reasonableness by assessing, on the one hand, the degree to which it intrudes upon the individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.¹⁷

The Court has also interpreted the term “common law” broadly to include not just case law but “an amalgam of cases, statutes, commentary, custom, and fundamental principles.”¹⁸ For example, in *Atwater v. City of Lago Vista*, the Court canvassed case law, statutes, and commentary from England and the United States to determine whether warrantless arrests for misdemeanors other than breach of the peace were permitted at common law.¹⁹ Thus, the Court looks to the entire legal landscape at the time of the framing to determine the common-law rule. If that produces no clear answer, the Court decides the issue based on “traditional standards of reasonableness.”

B. The Court's Treatment of Indeterminacy in the Common Law

The two-step inquiry described above has engendered two distinct problems in Fourth Amendment jurisprudence. First, the common law of search and seizure circa 1791 was virtually never clear nor uniform.²⁰ Indeed, the second step of the Court's two-part inquiry is premised on this reality. Yet, in a number of cases, the Court has papered over this indeterminacy and pretended that it does not exist. Second, the Court has not settled upon the path to take, even on those occasions where it has recognized this indeterminacy.²¹

¹⁷ 526 U.S. 295, 299–300 (1999) (citations omitted); see Davies, *supra* note 13, at 259 (discussing *Houghton*); George C. Thomas III, *Stumbling Toward History: The Framers' Search and Seizure World*, 43 TEX. TECH L. REV. 199, 205 (2010) (same); see also *Florida v. White*, 526 U.S. 559, 563 (1999) (“In deciding whether a challenged governmental action violates the [Fourth] Amendment, we have taken care to inquire whether the action was regarded as an unlawful search and seizure when the Amendment was framed.”).

¹⁸ Sklansky, *supra* note 1, at 1795; see also *Atwater v. City of Lago Vista*, 532 U.S. 318, 327 (2001) (observing that common law could be “understood strictly as law judicially derived or, instead, as the whole body of law extant at the time of the framing”).

¹⁹ 532 U.S. at 327–44.

²⁰ See Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1717 (1996) (reviewing William John Cuddihy, *The Fourth Amendment: Origins and Original Meaning*, 602–1791 (unpublished Ph.D. dissertation, Claremont Graduate School 1990)) (“[L]egal rules [on search and seizure] not only varied over time but also were inconsistent at almost any point in time during the centuries preceding the adoption of the Fourth Amendment . . .”); M. Blane Michael, Madison Lecture, *Reading the Fourth Amendment: Guidance from the Mischief that Gave It Birth*, 85 N.Y.U. L. REV. 905, 915 (2010) (“[T]he common law of 1791, which Justice Scalia casually refers to as though it were a single, clearly defined body of rules, was actually derived from a variety of authorities and differed from jurisdiction to jurisdiction.” (footnote omitted)); Sklansky, *supra* note 1, at 1744 (“Th[e] rules . . . were both hazier and less comprehensive than the Court has suggested . . .”).

²¹ As Professor Tracey Maclin has put it:

1. *Papering Over the Indeterminacy of the Common Law of 1791: The Illusion of Consensus*

In some cases, the Court pretends that there was a clear common-law rule in 1791 that forms a part of the Fourth Amendment's superstructure. Yet, upon closer scrutiny, the supposed consensus turns out to be an illusion. For example, in *United States v. Watson*, the Supreme Court ruled that the Fourth Amendment permits public arrest without a warrant so long as there is probable cause to believe the suspect had committed a felony, in part relying on the pedigree of the common-law rule to that effect in 1791. Yet the rule in 1791 was surprisingly unsettled.

After Henry Watson was arrested without a warrant, but based on probable cause, for possession of a stolen credit card in a Los Angeles restaurant in 1972, he argued that his arrest violated the Fourth Amendment.²² The Court rejected this argument, in part because it found that the Fourth Amendment encompassed "the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a . . . felony not committed in his presence if there was reasonable ground for making the arrest."²³ For this proposition, the Court cited, among other sources, the 1780 English decision in *Samuel v. Payne*.²⁴

Yet, as Professor Thomas Davies points out, Americans of that time period would have viewed *Samuel v. Payne* as setting forth a novel rule of law, not an "ancient" one.²⁵ Indeed, the trial judge in that case had held that a warrantless arrest was lawful only if a felony had in fact been committed by the arrestee, but the judges of the King's Bench collectively disagreed and granted a new trial on the ground that it was sufficient if there were reasonable grounds to

[T]he Supreme Court has not been consistent in juxtaposing the history of the Fourth Amendment with modern law enforcement techniques. In one case, history provides the driving force behind a ruling; in another, it is neglected even though the challenged police conduct is contrary to historical practice. In yet other cases, the meaning and weight of historical precedent sharply divide the Court.

Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 926–27 (1997) (footnotes omitted); see also Davies, *supra* note 13, at 260 ("[T]he Court's recourse to framing-era doctrine to decide search and seizure issues is rather selective . . .").

²² See *United States v. Watson*, 423 U.S. 411, 413–14 (1976); *United States v. Watson*, 504 F.2d 849, 851–52 (9th Cir. 1974), *rev'd*, 423 U.S. 411 (1976).

²³ *Watson*, 423 U.S. at 418.

²⁴ See *id.* at 418–19.

²⁵ See Davies, *supra* note 5, at 635 ("It is possible that some of the federal Framers may have heard of *Samuel* by 1789, but if so they would have understood it to be a novel English ruling.")

believe a felony had been committed even if one had not.²⁶ Unless the trial judge were guilty of the sheerest incompetence—unlikely, given that it was the esteemed Lord Mansfield²⁷—the rule of law described by *Watson* as “ancient” was not even known to the framers and ratifiers of the Fourth Amendment only a few years prior to its ratification.

It was also a rule that Americans were slow to adopt. *Holley v. Mix*,²⁸ an 1829 New York case, appears to have been the first on this side of the Atlantic to decide that a police officer could make a warrantless arrest based only on reasonable grounds, rather than certainty, that a felony had been committed.²⁹ Indeed, an 1814 Pennsylvania case held that a warrantless arrest could take place only if a felony had in fact had been committed, irrespective of the constable’s suspicions.³⁰ The only other contemporaneous sources *Watson* cited for the proposition that public warrantless arrests were lawful if based on reasonable grounds—Blackstone and Hale³¹—“clearly stated the felony-in-fact requirement” instead.³²

²⁶ See *Samuel v. Payne*, (1780) 99 Eng. Rep. 230 (K.B.) 231; 1 Dougl. 359, 360; *Davies*, *supra* note 5, at 634–36 (contrasting trial court ruling adopting “felony in fact” requirement from appellate court’s ruling allowing an arrest “on charge” of felony (internal quotation marks omitted)).

²⁷ See *Davies*, *supra* note 5, at 634.

²⁸ 3 Wend. 350, 353 (N.Y. Sup. Ct. 1829).

²⁹ See *Davies*, *supra* note 5, at 636; accord George C. Thomas III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451, 1472 (2005).

³⁰ *Wakely v. Hart*, 6 Binn. 316, 318 (Pa. 1814); see *Davies*, *supra* note 5, at 633 n.227, 635–36; *Thomas*, *supra* note 29, at 1472–73.

³¹ *United States v. Watson*, 423 U.S. 411, 418 (1976) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *292; 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN *72–74).

³² See *Davies*, *supra* note 5, at 640 n.252; see also Sklansky, *supra* note 1, at 1802 (“[T]he rule regarding arrests in public places was far from clear-cut.”). Professor Thomas Davies has argued that “the ancient common-law rule” was settled at the time of the adoption of the Fourth Amendment, but that it was precisely the opposite of the rule recognized in *Watson*: a warrantless public arrest was justified only if a felony had in fact occurred. See *Davies*, *supra* note 5, at 632 (asserting that official arrest authority at the founding existed only so far as allowing an officer to make an arrest “upon proof that ‘felony in fact’ had actually been committed by someone and that there was ‘probable cause of suspicion’ to think the arrestee was that person”). Yet, the sources he cites are in serious tension with this conclusion. For example, two Justice of the Peace manuals, one from 1793 and one from 1795, discussed both rules. See WILLIAM WALLER HENING, THE NEW VIRGINIA JUSTICE 34 (Richmond, T. Nicolson 1795); *Davies*, *supra* note 5, at 635 n.237 (citing 1 RICHARD BURN, THE JUSTICE OF THE PEACE, AND PARISH OFFICER *403 (Dublin, John Rice, 18th ed. 1793)); see also *infra* notes 83–84 (detailing Hening’s discussion of both rules). Moreover, contemporaneous commentary on the case describes the ruling in *Samuel v. Payne* as “the first determination of the point.” See *Davies*, *supra* note 5, at 635 n.237 (quoting *Samuel v. Payne*, (1780) 99 Eng. Rep. 230 (K.B.) 231 n.7; 1 Dougl. 359, 360 n.7 and 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 120 n.(a) (Thomas Leach ed., London, Eliz. Lynch 6th ed. 1788)) (internal quotation marks omitted); accord Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of “Due Process of Law,”* 77 MISS. L.J. 1, 185 n.585 (2007). This is strange language to use if

The common law on warrantless arrests on suspicion that a felony had been committed appears to have been unsettled as of 1791, but this lack of clarity was papered over by the *Watson* Court's suggestion that its rule was backed by consensus from time immemorial.

2. *Facing the Indeterminacy of the Common Law of 1791*

Even when the Court has acknowledged indeterminacy in the common law of search and seizure of 1791, it has not provided a uniform account of where else it should look to resolve the Fourth Amendment question at issue. Worse, the Court's approaches have been diametrically opposed to one another. In some cases, the Court concludes that the absence of a clear common-law rule in 1791 indicates that the search-and-seizure issue at hand is simply not governed by the Fourth Amendment and must be resolved by the political process. In other cases, in the absence of a clear common-law rule governing the specific issue, the Court falls back upon general Fourth Amendment principles that dictate a countermajoritarian result.

a. *Deference to Legislative Judgments in the Face of Indeterminacy*

In *Atwater v. City of Lago Vista*, the Court confronted the question whether the Fourth Amendment, as incorporated by the Fourteenth, prohibits a full custodial arrest for a crime that was punishable only by a fine.³³ Gail Atwater had been arrested and taken into custody for violation of a Texas statute making it a misdemeanor, punishable by fifty-dollar fine, for the operator of a vehicle to fail to secure with a seatbelt any child riding in the front seat.³⁴ The Court concluded that the Fourth and Fourteenth Amendments had not been violated.

In the course of a lengthy excursion into the common-law antecedents of the Fourth Amendment,³⁵ the Court found that neither the case law nor the commentary provided any clear answer regarding the common-law authority to arrest without a warrant for a misdemeanor committed in the presence of the constable.³⁶ For example, both William Blackstone and Edward East implied

the court had actually reversed course from settled law. And Professor Davies does not dispute that *Samuel* was the first case to definitively address the issue. See Davies, *supra*, at 185 n.585.

³³ 532 U.S. 318 (2001).

³⁴ *Id.* at 323–24 (citing TEX. TRANSP. CODE ANN. § 545.413(b), (d) (West 1999)).

³⁵ *Id.* at 326–40.

³⁶ *Id.* at 328 (“[T]he common-law commentators (as well as the sparsely reported cases) reached divergent conclusions with respect to officers’ warrantless misdemeanor arrest power.”).

that warrantless arrest power for misdemeanors extended only to those involving breach of the peace.³⁷ Yet Matthew Hale wrote that “a constable could arrest without a warrant ‘for breach of the peace and some misdemeanors, less than felony.’”³⁸ Importantly, Hale’s view was reiterated in two of the most influential justice of the peace manuals in America.³⁹ And William Hawkins agreed that a warrantless arrest was justified for a misdemeanor that was “scandalous and prejudicial to the public.”⁴⁰ Nor did nineteenth-century courts adopt any particular “common-law rule with anything approaching unanimity.”⁴¹

Thus, finding “disagreement, not unanimity, among both the common-law jurists and the text writers,” the Court had to decide the case on other grounds.⁴² Ultimately, the Court rejected the distinction between fine-only

³⁷ See *id.* at 329–30 (citing 4 BLACKSTONE, *supra* note 31, at *289; 1 EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN § 71, at 303 (London, A. Strahan 1803)). The Court warned that even Blackstone and East wrote only that breach of the peace was a sufficient, not a necessary, condition to warrantless arrest authority for a misdemeanor. See *id.*

³⁸ *Id.* at 330 (quoting 2 HALE, *supra* note 31, at *88).

³⁹ *Id.* (citing GILES JACOB, THE COMPLEAT PARRISH-OFFICER 11 (London, Henry Lintot 1744); 1 RICHARD BURN, THE JUSTICE OF THE PEACE, AND PARISH OFFICER 271 (London, S. Sweet 28th ed. 1837)).

⁴⁰ *Id.* at 331–32 (quoting 2 HAWKINS, *supra* note 32, § 20, at 122).

⁴¹ *Id.* at 341. Professor Davies disagreed with this conclusion and authored a lengthy article seeking to demonstrate that at the time of the framing, warrantless arrest authority generally extended only to felonies and to misdemeanors involving breach of the peace. See generally Davies, *supra* note 13. However, he allowed that there was some lack of clarity, given that “arrest authority regarding misdemeanors was so marginal that it was sometimes not discussed in legal commentaries at all.” *Id.* at 303 n.201. Moreover, he conceded that the general rule disallowing warrantless arrests for non-breach-of-the-peace misdemeanor offenses was “subject to specific exceptions to deal with situations that evidenced an unusual need for warrantless arrest authority.” *Id.* at 330; see also *id.* at 333. Specifically, his evidence demonstrated that the rule was riddled with exceptions in various jurisdictions. See, e.g., *id.* at 306 n.205 (describing a 1774 North Carolina justice of the peace manual permitting warrantless arrests for loitering, begging, idleness, and “disturbing the Minister in Time of Divine Service”); *id.* at 308–12 & n.220 (noting, among other sources, that a 1768 New York manual permitted warrantless arrests for offenses that were neither felonies nor breaches of the peace); *id.* at 332 n.284 (citing a 1788 manual that included a “discussion of statutory arrest authority regarding unknown persons who profanely swear and persons observed begging”); *id.* at 341 n.319 (citing a Massachusetts statute permitting warrantless arrest of those “overtaken with drink . . . vagrant persons, [and] night-walkers”); *id.* at 343 n.322 (citing a 1799 New Jersey statute permitting warrantless arrest of “vagrants or vagabonds, common drunkards, common night-walkers, and common prostitutes, as well as fortune-tellers and other practitioners of crafty science” (internal quotation marks omitted)). Finally, his evidence demonstrated that there were disagreements across different jurisdictions over warrantless arrest authority. See, e.g., *id.* at 350 (observing that while “New Jersey . . . preserved warrantless arrest authority for all kinds of violations of the Sabbath as late as 1798 . . . other states seem to have been retreating from such authority”); *id.* at 353 (observing that warrantless arrest authority “for the offenses of ‘hawking’ and ‘peddling’” existed in New York and South Carolina but not Massachusetts); *id.* at 329 n.268 (noting conflict over whether “nightwalkers could . . . be arrested unless they were engaged in some specific unlawful act”).

⁴² *Atwater*, 532 U.S. at 332.

offenses and others for two reasons. First, the Court determined that such a distinction would be exceedingly difficult to administer, as the degree of severity of the offense might not be readily apparent to the police officer responsible for making the decision whether to arrest.⁴³ Second, the Court relied on local decisionmaking to address whatever problem was raised by warrantless misdemeanor arrests.⁴⁴ Noting that many States did limit by statute warrantless arrest authority for misdemeanors, the Court observed that the States should be motivated to enact such limits because of the costs associated with arrests for petty offenses.⁴⁵ And, the Court suggested, “the political accountability[] of most local lawmakers and law-enforcement officials” should prevent arrest practices that are onerous to the general public from being enacted and enforced.⁴⁶

The Court admitted that Atwater’s arrest, when viewed in isolation, could be considered to contravene “traditional standards of reasonableness.”⁴⁷ Her “claim to live free of pointless indignity and confinement clearly outweigh[ed]” any governmental interest.⁴⁸ Yet, the Court decided otherwise based on considerations of administrative convenience and on a representation-reinforcing view of the Fourth Amendment.⁴⁹ In other cases, however, “traditional standards of reasonableness” have pointed in the opposite direction, privileging the individual interest to be free from intrusions at the expense of administrative efficiency and democratic rulemaking.

b. Reliance on General Fourth Amendment Values in the Face of Indeterminacy

In *Payton v. New York*, the Court considered whether the Fourth and Fourteenth Amendments require police to obtain a warrant to forcibly enter a home to arrest a suspect absent exigent circumstances.⁵⁰ Looking to the common law circa 1791, the Court found “a surprising lack of judicial

⁴³ See *id.* at 347–51.

⁴⁴ See *id.* at 352–54.

⁴⁵ *Id.* at 352.

⁴⁶ *Id.* at 353.

⁴⁷ *Id.* at 346.

⁴⁸ *Id.* at 347.

⁴⁹ Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in Atwater v. City of Lago Vista*, 71 *FORDHAM L. REV.* 329, 401 (2002) (“[T]he Court’s decision in *Atwater* might be seen as promoting democratic goals . . . by leaving almost all arrest-limiting decisions to the legislative or executive branches.”).

⁵⁰ 445 U.S. 573, 576, 581–82 (1980).

decisions and a deep divergence among scholars” on the legality of forcible, in-home, warrantless arrests.⁵¹ For example, “[t]he most cited evidence” in support of a common-law rule that warrants for in-home arrests of suspected felons were not required “consist[ed] of an equivocal dictum” in *Semayne’s Case*, a case involving a service of civil process, which indicated that in criminal cases, the authorities must knock and demand entry before breaking doors, but did not specifically mention warrants.⁵² Moreover, “[t]he common-law commentators disagreed sharply on the subject.”⁵³ Indeed, at least three distinct approaches appear. Coke, Burn, Foster, and Hawkins took the extreme view that not even a warrant permitted breaking of doors of a dwelling; rather, breaking of doors was permitted only after the arrestee had been indicted.⁵⁴ East and Russell took the more moderate approach that no warrant was necessary if the suspect were actually guilty, but only a warrant could justify breaking doors to arrest someone who turned out to be innocent.⁵⁵ And Blackstone, Chitty, and Stephen were of the view that no warrant was necessary at all to make an in-home arrest for a felony.⁵⁶ This last view was so widely adhered to as late as 1761 that an attorney in the Boston writs of assistance case in that year could state with confidence: “Every Body knows

⁵¹ *Id.* at 592.

⁵² *Id.* at 592–93 (citing *Semayne’s Case*, (1604) 77 Eng. Rep. 194 (K.B.) 195–96; 5 Co. Rep. 91 a, 91 b); see Fabio Arcila, Jr., *The Death of Suspicion*, 51 WM. & MARY L. REV. 1275, 1300 n.69 (2010) (“The popular reading of *Semayne’s Case* [that a warrant is required to break doors] is too broad because the opinion repeatedly took pains to preserve governmental authority to search private homes in cases in which the king was involved.”).

⁵³ *Payton*, 445 U.S. at 593; see also *id.* at 606 (White., J., dissenting) (“[C]ommentators have differed as to the scope of the constable’s inherent authority, when not acting under a warrant, to break doors in order to arrest.”); Sklansky, *supra* note 1, at 1801–02 (“[C]ommon-law commentators differed widely on th[is] question: some, including Coke, disallowed warrantless entries for purpose of arrest, except in case of hot pursuit; others, including Blackstone, allowed such entries; and still others, including Hale, appeared to equivocate.”).

⁵⁴ See *Payton*, 445 U.S. at 593–95 & nn.37–38 (citing EDW. COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 177 (London, M. Flesher 1644); 1 RICHARD BURN, THE JUSTICE OF THE PEACE, AND PARISH OFFICER 87 (London, Henry Lintot 6th ed. 1758); MICHAEL FOSTER, CROWN LAW 321 (Oxford, Clarendon Press 1762); 2 HAWKINS, *supra* note 32, at 139).

⁵⁵ *Id.* at 595 & n.39 (citing 1 EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN 322 (Philadelphia, P. Byrne 1806); 1 WILLIAM RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 745 (London, J. & T. Clarke 1819)). According to Thomas, *supra* note 17, at 233, Foster actually adhered to this view as well.

⁵⁶ *Payton*, 445 U.S. at 595 & n.40 (citing 4 BLACKSTONE, *supra* note 31, at *292; 1 J. CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 23 (London, A.J. Valpy 1816); 4 HENRY JOHN STEPHEN, NEW COMMENTARIES ON THE LAWS OF ENGLAND 359 (London, C. Roworth & Sons 1845)); see also Thomas, *supra* note 17, at 231 (“Though the Court is correct that history does not speak with a single voice on this issue, it preponderates in favor of the view that warrants were not necessary for arrests in the home if the officer had adequate cause to suspect that the arrestee had committed a felony.”).

that the subject has the Privilege of House only against his fellow subjects, not vs. the King either in matters of Crime or fine.”⁵⁷

Given that the question of the legality of warrantless entry into the home was not “definitively settled by the common law at the time the Fourth Amendment was adopted,”⁵⁸ the Court had to rely on other considerations. Unlike the *Atwater* Court, however, which would be willing to leave the question up to the political process, the *Payton* Court concluded that the fact that “[o]nly 24 of the 50 States”—that is, nearly half—permitted “warrantless entries into the home to arrest” was not dispositive.⁵⁹ The Court also did not find it significant that Congress had neither permitted nor forbidden in-home warrantless arrests, interpreting congressional silence as a neutral factor instead.⁶⁰ And in sharp contrast to the way in which the Court would later rule in *Atwater*, in *Payton* it glossed over the serious administrability problems with the rule it propounded. As the dissent charged, a rule requiring a warrant for a forcible in-home arrest unless there are exigent circumstances is far from a bright-line rule. To the contrary, “police officers will often face the difficult task of deciding whether the circumstances are sufficiently exigent to justify their entry to arrest without a warrant.”⁶¹

Instead, the Court relied on the general solicitude for the home represented by the common law and the Fourth Amendment and took the haziness of the common law as militating toward a rule requiring warrants for in-home arrests: “[T]he absence of any 17th- or 18th-century English cases directly in point, together with the unequivocal endorsement of the tenet that ‘a man’s house is his castle,’ strongly suggests that the prevailing practice was not to make such arrests.”⁶² Likewise, the Court wrote that “neither history nor this Nation’s experience requires us to disregard the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.”⁶³ Accordingly, the Court concluded, the presumptive

⁵⁷ John Adams, Minutes of the Argument in Petition of Lechmere (Feb. 24, 1761), in 2 LEGAL PAPERS OF JOHN ADAMS 123, 130 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965); see also Sklansky, *supra* note 1, at 1761 n.143.

⁵⁸ *Payton*, 445 U.S. at 598.

⁵⁹ *Id.* at 600 (emphasis added).

⁶⁰ See *id.* at 601.

⁶¹ *Id.* at 619 (White, J., dissenting).

⁶² *Id.* at 598 (majority opinion).

⁶³ *Id.* at 601.

unconstitutionality of official forcible entry into a home without a warrant applies to seizures of persons as well as of objects.⁶⁴

* * *

The Court's increasing reliance on the common law circa 1791 has led to increasingly unpredictable results. One can never be certain whether the Court will hide the uncertainty of the common law via overly broad pronouncements on the consensus that supposedly existed in 1791, as with the bare-probable-cause-to-arrest standard in *Watson*, or whether it will instead straightforwardly concede that there was no consensus on the particular issue, as in *Atwater* and *Payton*. And if it takes the latter approach, one never can predict what the Supreme Court will consider reasonable.⁶⁵

It may well be that the foregoing suggests that the Court's entire enterprise in attempting to discern the common-law search-and-seizure rules of 1791 should be abandoned. However, to whatever extent the Court is justified in using the common law of 1791 as the benchmark for its Fourth Amendment decisions, a more nuanced approach is called for. Indeed, a closer look at the common law of searches and seizures during the framing period reveals that the Court's cases merely scratch the surface of the indeterminacy of the law at that time.

II. THE CONTINGENCY OF THE LAW OF SEARCH AND SEIZURE DURING THE FRAMING PERIOD

It is unsurprising that the U.S. Supreme Court's struggle to discover the common law of searches and seizures circa 1791 has been largely unsuccessful. While some general principles were universal, the common law was to a large extent indeterminate, and "search-and-seizure rules . . . varied from colony to colony and from decade to decade."⁶⁶ A look at the law of search and seizure, as manifested in both the justice of the peace manuals of the time and statutory authority for customs searches, confirms this basic insight.

⁶⁴ See *id.* at 590 ("In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house.").

⁶⁵ See Sklansky, *supra* note 1, at 1774 ("The Court has left itself more than enough wiggle room to respond however it wants.").

⁶⁶ *Id.* at 1795.

A. *The Justice of the Peace Manuals*

Modern courts and commentators sometimes overlook three truths about search-and-seizure doctrine in the lead-up to ratification of the Bill of Rights. First, the common law of search and seizure in 1791 was underdeveloped, given “the limited range of questions that eighteenth-century judges and commentators asked about searches and seizures.”⁶⁷ Second, while the law was uniform in some respects, there were also significant differences of opinion.⁶⁸ That is because some of the very same principles we take for granted today were in sharp dispute at the time.⁶⁹ Finally, the common law was dynamic, changing over time as new rules were adopted and old ones discarded, both judicially and legislatively.⁷⁰

Examination of the justice of the peace manuals used by the various jurisdictions in the critical three decades prior to the adoption of the Bill of Rights⁷¹ reveals some of the haziness, the contentiousness, and the dynamism that characterized the common law of search and seizure. These manuals were derived from treatises and other earlier works,⁷² and “addressed . . . legal matters relevant to justices of the peace and other parish and county level officers, including constables.”⁷³ They “were often quite substantial,” and most contained different sections dealing with arrests, arrest warrants, constables, and search warrants.⁷⁴ Professor Davies has observed that “[t]hese were probably the sources regarding criminal procedure that were most accessible to

⁶⁷ *Id.* at 1744; see also Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 1014 (2011) (observing that “search and seizure principles were [not] fully formed” during the framing period).

⁶⁸ See Clancy, *supra* note 67, at 1014 (observing that treatises during the framing period demonstrated no “consensus as to proper practices”).

⁶⁹ See *id.* at 1053 (“Many of the principles that remain today as core search and seizure concerns were being litigated at that time.”).

⁷⁰ See Cloud, *supra* note 20, at 1716 (“Search and seizure law was dynamic in that it changed over time.”); Donald A. Dripps, *Responding to the Challenges of Contextual Change and Legal Dynamism in Interpreting the Fourth Amendment*, 81 MISS. L.J. 1085, 1121 (2011) (“The Framers . . . knew that common-law doctrine could change. Rules of the common law could be changed judicially [or] . . . by the legislature . . .”).

⁷¹ I have focused on this time period because even those who assert that search-and-seizure principles were largely settled and uniform as of the framing period acknowledge that there was more diversity prior thereto. See, e.g., Davies, *supra* note 13, at 282 n.123 (“[M]any of the earlier historical controversies and uncertainties were treated as settled by the framing era itself.”).

⁷² See Davies, *supra* note 32, at 72–73 (observing that these manuals were largely derived from the “leading English manual . . . Richard Burn’s *Justice of the Peace and Parish Officer*,” which in turn drew heavily from Hawkins, Hale, and other treatise writers); accord Davies, *supra* note 13, at 276–77, 278 n.121.

⁷³ See Davies, *supra* note 13, at 278 n.121.

⁷⁴ See *id.*

members of the Framers' generation."⁷⁵ And Professor John Conley's research suggests that "the American justices relied on their manual as their primary source of legal reference."⁷⁶

Importantly, different versions of the manuals were used in different colonies and States at different times during the founding period.⁷⁷ That very fact should give us pause before we conclude that the law was uniform. And a comparison of ten of these manuals published between 1761 to 1795⁷⁸ confirms that, during this period, search-and-seizure law was both fairly differentiated rather than uniform across the geographic boundaries of the thirteen colonies and States, and that there was change over time within particular jurisdictions.

It is true that the differences among the justice of the peace manuals are relatively minor. Moreover, many of the differences take the form, not of outright contradiction, but of omission of material in one manual that appears

⁷⁵ *Id.* at 280.

⁷⁶ John A. Conley, *Doing It by the Book: Justice of the Peace Manuals and English Law in Eighteenth Century America*, 6 J. LEGAL HIST. 257, 265 (1985).

⁷⁷ See Davies, *supra* note 13, at 280 n.122 ("Given the locations at which American versions of justice of the peace manuals were printed, as well as statements in the various prefaces, it appears that they were often oriented to particular colonies/states."). For a helpful summary of the American justice of the peace manuals, organized by place of publication, see Conley, *supra* note 76, at 294–95.

⁷⁸ In chronological order, these manuals are as follows: WILLIAM SIMPSON, *THE PRACTICAL JUSTICE OF THE PEACE AND PARISH-OFFICER, OF HIS MAJESTY'S PROVINCE OF SOUTH-CAROLINA* (Charlestown, Robert Wells 1761); JAMES PARKER, *CONDUCTOR GENERALIS: OR, THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE, HIGH-SHERIFFS, UNDER-SHERIFFS, CORONERS, CONSTABLES, GAOLERS, JURY-MEN, AND OVERSEERS OF THE POOR* (Woodbridge, James Parker 1764) (New Jersey); JOSEPH GREENLEAF, *AN ABRIDGEMENT OF BURN'S JUSTICE OF THE PEACE AND PARISH OFFICER* (Boston, Joseph Greenleaf 1773) (Massachusetts); JAMES DAVIS, *THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE* (Newbern, James Davis 1774) (North Carolina); RICHARD STARKE, *THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE EXPLAINED AND DIGESTED, UNDER PROPER TITLES* (Williamsburg, Alexander Purdie & John Dixon 1774) (Virginia); *THE CONDUCTOR GENERALIS: OR, THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE, HIGH-SHERIFFS, UNDER-SHERIFFS, CORONERS, CONSTABLES, GAOLERS, JURY-MEN, AND OVERSEERS OF THE POOR* (New York, Hugh Gainé 1788) [hereinafter 1788 CONDUCTOR GENERALIS] (New York); *THE SOUTH-CAROLINA JUSTICE OF PEACE* (Philadelphia, R. Aitken & Son 1788); *THE CONDUCTOR GENERALIS: OR, THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE, HIGH-SHERIFFS, UNDER-SHERIFFS, CORONERS, CONSTABLES, GAOLERS, JURY-MEN, AND OVERSEERS OF THE POOR* (Philadelphia, Robert Campbell 1792) [hereinafter 1792 CONDUCTOR GENERALIS] (New Jersey, New York, and Pennsylvania); ELIPHALET LADD, *BURN'S ABRIDGEMENT, OR THE AMERICAN JUSTICE; CONTAINING THE WHOLE PRACTICE, AUTHORITY AND DUTY OF JUSTICES OF THE PEACE* (Dover, Eliphalet Ladd 2d ed. 1792) (New Hampshire, Massachusetts, and Vermont); and HENING, *supra* note 32 (Virginia).

Two slightly different versions of the 1788 CONDUCTOR GENERALIS were published. This Article refers to the version printed by Hugh Gainé.

The 1788 South Carolina manual was published anonymously but has been attributed to John F. Grimké. See Conley, *supra* note 76, at 280; Davies, *supra* note 13, at 281 n.122.

in another, or equivocation on a legal point in one that is stated more forthrightly in another. Yet the authors of these manuals were, for the most part, experienced lawyers and judges.⁷⁹ As good lawyers know, omission of terms or conditions from any legal document can be highly significant, and equivocal directives give actors far more discretion than those stated more definitively. The question is how these minor differences in wording, when translated into action by real justices and constables, would have played out in real life, for common law doctrine was inextricably and symbiotically intertwined with custom and usage: legal doctrine guided conduct, and conduct, in turn, determined law.⁸⁰ However minor the differences in the manuals were, they likely resulted in different customs—and therefore different law—when operationalized by legal actors.

1. Differences in the Common Law of Search and Seizure Expressed in the Founding-Era Justice of the Peace Manuals

A careful comparison among the justice of the peace manuals used in North America from 1761 to 1795 reveals at least nine significant differences in the common law of search and seizure based on location and time period.

a. The Felony-in-Fact Requirement for Warrantless Arrests

One point on which the justice of the peace manuals differ is the issue raised by *United States v. Watson*: whether a felony in fact was required for a warrantless arrest or, rather, reasonable grounds for suspicion that a felony had been committed were sufficient.⁸¹ Again, the 1780 English case *Samuel v. Payne* contains the first determination of this question.⁸² Of the justice of the peace manuals that post-date the decision in that case, only the 1795 Virginia manual discusses the possibility that “reasonable probable grounds of suspicion” of a felony is sufficient justification for an arrest, even if no felony had in fact been committed.⁸³ This discussion immediately followed a reiteration of the more conventional rule: “[G]enerally, no . . . cause of suspicion . . . will justify an arrest, where in truth no such crime hath been

⁷⁹ See *infra* notes 143–50 and accompanying text.

⁸⁰ See John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1768 (2008) (observing that for “[t]hose who practiced and wrote about the common law in the seventeenth and eighteenth centuries,” common law meant “the law of ‘long use’ and ‘custom’”).

⁸¹ *United States v. Watson*, 423 U.S. 411, 418 (1976); see *supra* Part I.B.1.

⁸² *Samuel v. Payne*, (1780) 99 Eng. Rep. 230 (K.B.) 231; 1 Dougl. 359, 360.

⁸³ See HENING, *supra* note 32, at 34.

committed.”⁸⁴ Thus, the Virginia manual set forth two inconsistent rules without picking a side. More significantly, the two manuals published in 1792—by which time the decade-old decision in *Samuel v. Payne* might have been known to at least some in America⁸⁵—did not mention that decision at all and set forth only the more conventional rule.⁸⁶

b. Breaking of Doors to Arrest

The manuals also differed over the issue raised in *Payton v. New York*: what circumstances permitted the breaking of doors to make an arrest.⁸⁷ As the *Payton* Court suggested, three distinct positions are evident.⁸⁸ The strictest rule—discussed but not necessarily endorsed by the 1764 New Jersey manual, the 1773 Massachusetts manual, the 1788 New York manual, and the 1792 New England and mid-Atlantic manuals—was the rule advocated by Coke⁸⁹ that “where one lies under a probable suspicion only, and is not indicted, it seems the better opinion at this day (Mr. Hawkins says) that no one can justify the breaking open of doors in order to apprehend him.”⁹⁰ However, these manuals immediately went on to suggest a second, more modern rule: “But lord Hale, in his history of the pleas of the crown, says, that upon a warrant for probable cause of suspicion of felony, the person to whom such warrant is directed, may break open doors to take the person suspected.”⁹¹

By stark contrast, the 1761 and 1788 South Carolina manuals did not even suggest the Cokean limitations on granting warrants or on breaking of doors to cases where the putative arrestee has already been indicted. They stated without reservation that “upon a warrant for probable cause of suspicion of

⁸⁴ *Id.*

⁸⁵ *Cf.* Davies, *supra* note 5, at 635 (“It is possible that some of the federal Framers may have heard of *Samuel* by 1789 . . .”).

⁸⁶ See 1792 CONDUCTOR GENERALIS, *supra* note 78, at 25; LADD, *supra* note 78, at 40.

⁸⁷ 445 U.S. 573, 574, 581–82 (1980); see *supra* Part I.B.2.b.

⁸⁸ See *id.* at 593–95.

⁸⁹ See *supra* text accompanying note 54; see also Davies, *supra* note 32, at 65 (“Coke insisted that only a post-indictment felony arrest warrant, but not a pre-indictment warrant, could justify breaking a house.”).

⁹⁰ See 1788 CONDUCTOR GENERALIS, *supra* note 78, at 27 (emphasis omitted); 1792 CONDUCTOR GENERALIS, *supra* note 78, at 27 (emphasis omitted); GREENLEAF, *supra* note 78, at 24–25 (emphasis omitted); LADD, *supra* note 78, at 42–43 (emphasis omitted); PARKER, *supra* note 78, at 29 (emphasis omitted).

⁹¹ See 1788 CONDUCTOR GENERALIS, *supra* note 78, at 27 (emphasis omitted); 1792 CONDUCTOR GENERALIS, *supra* note 78, at 27 (emphasis omitted); GREENLEAF, *supra* note 78, at 25 (emphasis omitted); LADD, *supra* note 78, at 43 (emphasis omitted); PARKER, *supra* note 78, at 29 (emphasis omitted).

felony, the person to whom such warrant is directed may break open doors to take the person suspected.”⁹²

Finally, the 1774 Virginia and North Carolina manuals provided a middle ground. They did not suggest that an indictment was required for breaking of doors, but neither did they state that doors could be broken with a warrant issued upon mere “probable cause of suspicion of felony.” Instead, both permitted breaking of doors only where one has been indicted or upon a warrant for one “who is known to have committed [t]reason, or [f]elony” (in Virginia),⁹³ or simply “a [f]elon” (in North Carolina).⁹⁴ And, interestingly, the 1795 Virginia manual, without choosing sides, provided both this rule and the more traditional Cokean rule requiring an indictment before doors could be broken.⁹⁵

c. Issuance of Arrest Warrant Prior to Indictment

The manuals also differed over an issue similar to whether an indictment was necessary to breaking of doors to arrest: whether an arrest warrant could be issued at all absent an indictment. The 1764 New Jersey manual, the 1773 Massachusetts manual, the 1788 New York and South Carolina manuals, and the 1792 mid-Atlantic and New England manuals mentioned an extreme limitation advocated by Coke: that an arrest warrant could not be issued prior to indictment.⁹⁶ It is true that the manuals then strongly suggested that Coke ought not be followed, but they again did not explicitly pick a side in this controversy.⁹⁷ By contrast, the 1761 South Carolina and 1774 Virginia

⁹² SIMPSON, *supra* note 78, at 25; accord THE SOUTH-CAROLINA JUSTICE OF PEACE, *supra* note 78, at 20.

⁹³ STARKE, *supra* note 78, at 17.

⁹⁴ DAVIS, *supra* note 78, at 15.

⁹⁵ See HENING, *supra* note 32, at 37 (“[W]here one lies under a probable suspicion only, and is not indicted . . . no one can justify the breaking open doors in order to apprehend him . . .”).

⁹⁶ See 1788 CONDUCTOR GENERALIS, *supra* note 78, at 366–67; 1792 CONDUCTOR GENERALIS, *supra* note 78, at 366–67; GREENLEAF, *supra* note 78, at 372; LADD, *supra* note 78, at 418; PARKER, *supra* note 78, at 457; THE SOUTH-CAROLINA JUSTICE OF THE PEACE, *supra* note 78, at 492–93.

⁹⁷ They stated:

Lord Hale proves at large, contrary to the opinion of lord Coke that a justice hath power to issue a warrant to apprehend a person suspected of felony, before he is indicted

. . . I think, says [Hale], the law is not so, and the constant practice in all cases hath obtained against it, and it would be pernicious to the kingdom if it should be as lord Coke delivers it

Mr. Hawkins likewise seems to be of the same opinion against lord Coke, but delivereth himself with his wonted caution and candour: It seems probable, he says, that the practice of justices of the peace in relation to this matter, is now become a law, and that a justice may justify

manuals stated without hesitation: “A Justice hath power to issue a warrant to apprehend a person suspected of felony, before he is indicted.”⁹⁸

d. Grounds for Warrantless Arrest

The manuals also vary widely with respect to the grounds for making a warrantless arrest. For example, among the traditional causes of suspicion that would justify warrantless arrest was “[t]he common Fame of the Country.”⁹⁹ This was listed as the very first ground for a warrantless arrest in seven of the manuals.¹⁰⁰ Yet it was omitted entirely from the 1761 South Carolina manual and the 1774 North Carolina and Virginia manuals.¹⁰¹ In addition, four of the manuals—the 1773 Massachusetts, 1788 South Carolina, 1792 New England, and 1795 Virginia manuals—permitted the warrantless arrests of night walkers¹⁰² whereas the other six did not.¹⁰³ Finally, nine of the ten manuals

the granting of a warrant for the arrest of any person, upon strong grounds of suspicion, for a felony or other misdemeanor, before any indictment hath been found against him . . .

PARKER, *supra* note 78, at 457 (emphasis omitted) (citation omitted); *accord* 1788 CONDUCTOR GENERALIS, *supra* note 78, at 366–67; 1792 CONDUCTOR GENERALIS, *supra* note 78, at 366–67; GREENLEAF, *supra* note 78, at 372–73; LADD, *supra* note 78, at 418–19; THE SOUTH-CAROLINA JUSTICE OF THE PEACE, *supra* note 78, at 492–93.

⁹⁸ SIMPSON, *supra* note 78, at 258; *accord* STARKE, *supra* note 78, at 351. Professor Davies has claimed that Coke’s position on issuing pre-indictment arrest warrants was discussed in some manuals of the time “only as a point of historical interest” and that the contrary position of Hale “had clearly won out by the eighteenth century.” Davies, *supra* note 13, at 283 n.125. For this proposition, however, he cites nothing but the manuals themselves. *See id.* And he does not explain why some manuals would contain this “point of historical interest” and others would not. *See id.*

⁹⁹ *See* Davies, *supra* note 5, at 632 n.226 (alteration in original) (quoting 2 HAWKINS, *supra* note 32, at 76) (internal quotation marks omitted); *accord* Davies, *supra* note 32, at 74 n.222.

¹⁰⁰ *See* PARKER, *supra* note 78, at 26 (“[T]he causes of suspicion, which are generally agreed to justify the arrest of an innocent person for felony, are . . . [t]he common fame of the country; but it seems, that it ought to appear upon evidence, in an action brought for such arrest, that such fame had some probable ground.”); *accord* 1788 CONDUCTOR GENERALIS, *supra* note 78, at 24; 1792 CONDUCTOR GENERALIS, *supra* note 78, at 24; GREENLEAF, *supra* note 78, at 22; HENING, *supra* note 32, at 33; LADD, *supra* note 78, at 39; THE SOUTH-CAROLINA JUSTICE OF THE PEACE, *supra* note 78, at 17.

¹⁰¹ *See* DAVIS, *supra* note 78, at 14–16; SIMPSON, *supra* note 78, at 23; STARKE, *supra* note 78, at 16.

¹⁰² *See* GREENLEAF, *supra* note 78, at 23 (“[A] watchman may arrest a night walker, without any warrant from a magistrate.”); *accord* HENING, *supra* note 32, at 35; LADD, *supra* note 78, at 40; THE SOUTH-CAROLINA JUSTICE OF THE PEACE, *supra* note 78, at 18.

¹⁰³ *See* 1788 CONDUCTOR GENERALIS, *supra* note 78, at 25–26; 1792 CONDUCTOR GENERALIS, *supra* note 78, at 25–26; DAVIS, *supra* note 78, at 14–16; PARKER, *supra* note 78, at 27–28; SIMPSON, *supra* note 78, at 23–24; STARKE, *supra* note 78, at 16; *see also* Davies, *supra* note 13, at 345 n.333 (noting absence of authority to arrest night walkers in 1761 South Carolina manual). Even where there was agreement that night walkers could be arrested, there was some dispute over who had the power to make such arrests. *See* Thomas, *supra* note 17, at 226 (observing that “Coke said that only watchmen could make night-walker arrests” while Matthew “Bacon claimed . . . that any person could arrest a ‘Night-Walker’”).

permitted warrantless arrest of vagrants,¹⁰⁴ but the 1774 Virginia manual did not.¹⁰⁵

e. Authority to Search Incident to Arrest

Another highly significant difference among the manuals is that only one, the 1764 New Jersey manual, reprinted an instructional essay for constables by English justice of the peace and former high constable Saunders Welch.¹⁰⁶ The 1758 Welch essay has been cited as authority for police “search incident to arrest” power, the notion that the Fourth Amendment permits searches of the person of the arrestee and his immediately surrounding area upon arrest.¹⁰⁷ Welch observed that the law allowed the constable “to disarm and bind his prisoner” upon arrest.¹⁰⁸ He elaborated:

[A] thorough search of a felon is of the utmost consequence to your own safety, and the benefit of the public, as by this means he will be deprived of instruments of mischief, and evidence may probably be found on him sufficient to convict him, of which, if he has either time or opportunity allowed him, he will be sure to find some means to get rid of.¹⁰⁹

By stark contrast, the other manuals, including the 1792 revision of the 1764 manual, do not contain the Welch essay or any other reference to searches incident to arrest,¹¹⁰ suggesting that searches incident to arrest were not universally considered customary. Indeed, the preface to the 1764 New

¹⁰⁴ SIMPSON, *supra* note 78, at 23 (permitting arrest of those “living an idle, vagrant and disorderly life, without having any visible means to support it”); *accord* 1788 CONDUCTOR GENERALIS, *supra* note 78, at 25; 1792 CONDUCTOR GENERALIS, *supra* note 78, at 25; GREENLEAF, *supra* note 78, at 22; HENING, *supra* note 32, at 34; LADD, *supra* note 78, at 40; PARKER, *supra* note 78, at 26; THE SOUTH-CAROLINA JUSTICE OF PEACE, *supra* note 78, at 18; *see also* DAVIS, *supra* note 78, at 120 (observing that the constable “must endeavour to apprehend Rogues, Vagabonds, and idle Persons, wandring, or begging, or found loitering within his Precinct”).

¹⁰⁵ *See* STARKE, *supra* note 78, at 16–17, 103–05 (omitting such grounds); *see also* Davies, *supra* note 13, at 347 (“[R]eferences to warrantless arrest authority for vagrancy were omitted in several late eighteenth-century American justice of the peace manuals.”). As noted above, *statutory* authority for warrantless arrests also differed significantly among jurisdictions. *See supra* note 41.

¹⁰⁶ *See* PARKER, *supra* note 78, at 111–24.

¹⁰⁷ *See* Thornton v. United States, 541 U.S. 615, 630–31 & 631 n.2 (2004) (Scalia, J., concurring in the judgment).

¹⁰⁸ *See* PARKER, *supra* note 78, at 117.

¹⁰⁹ *See id.*

¹¹⁰ *See* 1792 CONDUCTOR GENERALIS, *supra* note 78, at 97–100; DAVIS, *supra* note 78, at 115–23; GREENLEAF, *supra* note 78, at 102 (no entry for “Constable”); HENING, *supra* note 32, at 135–37; LADD, *supra* note 78, at 110 (no entry for “Constable”); SIMPSON, *supra* note 78, at 84–87; STARKE, *supra* note 78, at 103–05; THE SOUTH-CAROLINA JUSTICE OF PEACE, *supra* note 78, at 117–22.

Jersey manual, which includes the essay, characterizes it as “a curious tract.”¹¹¹ It may be that the Welch essay, and search-incident-to-arrest authority, was included tentatively in the 1764 edition as a sort of curiosity and rejected in other manuals as an outdated or foreign oddity. But whatever the reason, the authority of a constable to search incident to arrest is nowhere mentioned in the other manuals.¹¹²

f. Liability for Fruitless Forcible Entries

Another difference among the manuals relates to whether they address liability for two kinds of fruitless forcible entries. Seven of the ten manuals provided that if a prospective arrestee is thought to be in the house of a third party, and one breaks doors to apprehend him, but the prospective arrestee is not there, the one who attempted to make the arrest is liable to the owner in trespass.¹¹³ In a similar vein, these manuals provided that if a private person (but not a constable) broke doors to make an arrest “barely upon suspicion of felony,” and the arrestee turned out to be innocent, the person who made the arrest was liable for damages.¹¹⁴ The 1761 South Carolina manual and the 1774 North Carolina and Virginia manuals contained no such restrictions,¹¹⁵ indicating that the law in these colonies either gave those making arrests more leeway to be in error or was simply unclear. However, by 1788 and 1795, liability in such situations apparently was sufficiently clear in South Carolina

¹¹¹ PARKER, *supra* note 78, at iii.

¹¹² It should be noted that the Welch essay appears in one version of the 1788 New York manual but not another. Compare 1788 CONDUCTOR GENERALIS, *supra* note 78, at 97–100 (omitting the essay), with CONDUCTOR GENERALIS: OR THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE, HIGH-SHERIFFS, UNDER-SHERIFFS, CORONERS, CONSTABLES, GOALERS, JURY-MEN, AND OVERSEERS OF THE POOR 109–24 (New York, John Patterson 1788) (including the essay). Thus, there may have been confusion over search-incident-to-arrest authority even in a single jurisdiction at a single point in time.

¹¹³ See PARKER, *supra* note 78, at 29 (noting that when one to whom a warrant is directed “break[s] open the house of another to take [the felon] . . . he must at his peril see that the felon is there; for if the felon be not there, he is a trespasser to the stranger whose house it is”); accord 1788 CONDUCTOR GENERALIS, *supra* note 78, at 27; 1792 CONDUCTOR GENERALIS, *supra* note 78, at 27; GREENLEAF, *supra* note 78, at 25; HENING, *supra* note 32, at 37; LADD, *supra* note 78, at 43; THE SOUTH-CAROLINA JUSTICE OF PEACE, *supra* note 78, at 20.

¹¹⁴ See PARKER, *supra* note 78, at 29 (“[I]t seems that he that arrests as a private man barely upon suspicion of felony, cannot justify the breaking open of doors to arrest the party suspected, but he doth it at his peril, that is if in truth he be a felon, then it is justifiable, but if he be innocent, but upon a reasonable cause suspected, it is not justifiable.” (emphasis omitted)). The manuals go on to say that “a constable in such [a] case may justify.” *Id.* (emphasis omitted); accord 1788 CONDUCTOR GENERALIS, *supra* note 78, at 27; 1792 CONDUCTOR GENERALIS, *supra* note 78, at 27; GREENLEAF, *supra* note 78, at 25; HENING, *supra* note 32, at 37; LADD, *supra* note 78, at 43; THE SOUTH-CAROLINA JUSTICE OF PEACE, *supra* note 78, at 20.

¹¹⁵ See DAVIS, *supra* note 78, at 15–16; SIMPSON, *supra* note 78, at 25–26; STARKE, *supra* note 78, at 17.

and Virginia, respectively, to call for inclusion of these provisions in the manuals published in those years.¹¹⁶

g. Nocturnal Arrests and Searches

The manuals also differed with respect to how they addressed nocturnal searches and arrests. Most explicitly allowed nocturnal arrests, on the theory that if an arrest were not made immediately when proper grounds appear, the putative arrestee might escape.¹¹⁷ By contrast, the 1761 South Carolina manual did not explicitly mention nocturnal arrests at all.¹¹⁸ However, by 1788, South Carolina had apparently adopted the majority rule on nocturnal arrests.¹¹⁹

As for nocturnal searches, a number of different variations on the same theme are present in the manuals. The 1774 North Carolina manual restated Hale's¹²⁰ condemnation of nocturnal searches as "very inconvenient" if not "unlawful."¹²¹ By contrast, the 1764 New Jersey, 1773 Massachusetts, and 1788 South Carolina and New York manuals generally barred nocturnal searches but permitted such searches when there was "positive proof" that stolen goods were in a premises, based on the same "exigent circumstances" theory set forth for nocturnal arrests.¹²² These provisions were retained in the 1792 New England and mid-Atlantic manuals.¹²³ In yet another variation, the 1774 Virginia manual also cited the same page of Hale's treatise but grafted

¹¹⁶ See HENING, *supra* note 78, at 37; THE SOUTH-CAROLINA JUSTICE OF PEACE, *supra* note 78, at 20.

¹¹⁷ See PARKER, *supra* note 78, at 28 ("An arrest in the night is good . . . else the party may escape."); accord 1788 CONDUCTOR GENERALIS, *supra* note 78, at 26; 1792 CONDUCTOR GENERALIS, *supra* note 78, at 26; DAVIS, *supra* note 78, at 15; GREENLEAF, *supra* note 78, at 24; HENING, *supra* note 32, at 36; LADD, *supra* note 78, at 42; STARKE, *supra* note 78, at 17.

¹¹⁸ See SIMPSON, *supra* note 78, at 25–27.

¹¹⁹ See THE SOUTH-CAROLINA JUSTICE OF PEACE, *supra* note 78, at 19.

¹²⁰ See 2 HALE, *supra* note 31, at *150.

¹²¹ See DAVIS, *supra* note 78, at 308.

¹²² They stated:

[L]ord Hale says, it is convenient, that such warrant do require the search to be made in the day time; and tho' I will not affirm (says he) that they are unlawful without such restriction yet they are very inconvenient without it; for many times under pretence of searches made in the night, robberies and burglaries have been committed, and at best it creates great disturbance.

But in case not of probable suspicion only, but of positive proof, it is right to execute the warrant in the night time, lest the offenders and the goods also be gone before morning.

PARKER, *supra* note 78, at 385–86 (emphasis and citation omitted); accord 1788 CONDUCTOR GENERALIS, *supra* note 78, at 323–24; GREENLEAF, *supra* note 78, at 323; THE SOUTH-CAROLINA JUSTICE OF PEACE, *supra* note 78, at 425.

¹²³ See 1792 CONDUCTOR GENERALIS, *supra* note 78, at 323–24; LADD, *supra* note 78, at 358.

onto Hale’s caution a puzzling addendum, presumably granting authorities more wiggle room: “[I]t is better to require the Search to be made in the Day Time, *unless it be in particular Cases.*”¹²⁴ The 1795 Virginia manual, by contrast, did not contain this proviso and instead, like the 1774 North Carolina manual, recited Hale’s bare admonition against nocturnal searches.¹²⁵ Finally, the 1761 South Carolina manual simply did not mention nocturnal searches.¹²⁶ It is unclear what was meant by “positive proof” or “particular cases.” But these exceptions may have meant that different jurisdictions, at different times, had different degrees of robustness in their bars on nocturnal searches.

h. Guilt of the Arrestee as an Absolute Defense

The manuals also appear to differ over whether the guilt of the arrestee was an absolute defense to a subsequent tort action. That is to say, could a factually guilty arrestee sue in tort based on an improper arrest? Traditionally, the answer was “no,”¹²⁷ and that traditional rule is suggested in most of the manuals: in listing out various grounds for a warrantless arrest, these manuals began by categorizing the grounds as “the causes of suspicion, which are generally agreed to justify the arrest of an innocent person.”¹²⁸ This wording suggests that arrest of a factually guilty person was always justified. However, language in the 1774 Virginia manual implied that even a guilty person could sue for trespass if no grounds for arrest existed: it described the acceptable grounds for arrest as the “Causes of Suspicion to justify an Arrest.”¹²⁹

i. Seizure of Papers via Warrant

Thirty years after *Entick v. Carrington*¹³⁰ was decided, and after it would have been known among Americans,¹³¹ the 1795 Virginia manual became the

¹²⁴ See STARKE, *supra* note 78, at 351 (emphasis added).

¹²⁵ See HENING, *supra* note 32, at 402.

¹²⁶ See SIMPSON, *supra* note 78, at 225–27.

¹²⁷ See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 767 (1994) (asserting that, at common law, arrest of an actually guilty person was always lawful); Davies, *supra* note 5, at 631 (“[A]n officer could justify a felony arrest if the arrestee was actually guilty of the felony for which the arrest was made . . .”).

¹²⁸ PARKER, *supra* note 78, at 26 (emphasis added); accord 1788 CONDUCTOR GENERALIS, *supra* note 78, at 24; 1792 CONDUCTOR GENERALIS, *supra* note 78, at 24; GREENLEAF, *supra* note 78, at 22; HENING, *supra* note 32, at 33; LADD, *supra* note 78, at 39; THE SOUTH-CAROLINA JUSTICE OF PEACE, *supra* note 78, at 17.

¹²⁹ See STARKE, *supra* note 16, at 16 (emphasis added).

¹³⁰ (1765) 95 Eng. Rep. 807 (K.B.); 2 Wils. K.B. 275.

¹³¹ See Donald A. Dripps, “Dearest Property”: Digital Evidence and the History of Private “Papers” as Special Objects of Search and Seizure, 103 J. CRIM. L. & CRIMINOLOGY 49, 65–66 (2013).

first to suggest that seizure of private papers, even via warrant, was illegal. The manual extensively discussed *Entick* for the proposition that “a warrant to seize and carry away papers . . . [is] illegal and void.”¹³² The manual recited the holding of *Entick* with no editorial comment, suggesting, but never saying expressly, that the author agreed with that holding.¹³³ By sharp contrast, even the other manuals published in the 1790s did not cite *Entick* or any other case for the proposition that search warrants for private papers were illegal.¹³⁴ One might argue that, by failing to mention search warrants for anything other than stolen goods, these manuals recognized a common law bar on such warrants. However, *statutory* authority for search warrants for other items, such as uncustomed goods, was well accepted during the framing period¹³⁵ and dates back to at least 1660 under English law.¹³⁶ Rather, it appears, but is by no means certain, that the 1795 Virginia manual barred searches and seizures of private papers, and that the others either permitted them or took no position.

2. *The Significance of Differences Among the Justice of the Peace Manuals*

The differences across geographic boundaries and over time in the common law of search and seizure, as demonstrated by the justice of the peace manuals, are all the more striking given that virtually all of these manuals “drew heavily on [Richard] Burn’s English manual.”¹³⁷ Indeed, the very fact that different manuals were used in different sections of North America and were periodically updated belies any notion that the laws were uniform or static.¹³⁸

¹³² HENING, *supra* note 32, at 404.

¹³³ Thus, Professor Dripps appears to have gone too far when he wrote that Hening “expressly prohibit[ed] warrants for papers.” Dripps, *supra* note 131, at 76.

¹³⁴ See 1792 CONDUCTOR GENERALIS, *supra* note 78, at 324; LADD, *supra* note 78, at 359. Although Ladd does cite *Entick*, he does so only for the proposition that “[g]eneral search warrants are illegal.” *Id.* at 357. Again, Professor Dripps appears to read too much into Ladd’s singular citation of *Entick* in concluding that Ladd meant to forbid searches and seizures of private papers. See Dripps, *supra* note 131, at 76.

¹³⁵ See *infra* Part II.B.

¹³⁶ See An Act to Prevent Fraudes and Concealments of His Majestyes Customes and Subsidyes, 1660, 12 Car. 2, c. 19, § 1.

¹³⁷ Davies, *supra* note 32, at 73 n.220 (observing that CONDUCTOR GENERALIS, the 1773 Massachusetts manual, the 1774 Virginia manual, and the 1788 South Carolina manual all derived from Burn); see also Thomas Y. Davies, *Can You Handle the Truth?: The Framers Preserved Common-Law Criminal Arrest and Search Rules in “Due Process of Law”—“Fourth Amendment Reasonableness” Is Only a Modern, Destructive, Judicial Myth*, 43 TEX. TECH L. REV. 51, 64 n.46 (2010) (observing that CONDUCTOR GENERALIS, the 1773 Massachusetts manual, the 1788 South Carolina manual, the 1792 New England manual, and the 1795 Virginia manual all derived from Burn). The only exception from among the works this Article uses is the 1774 North Carolina manual. See Davies, *supra* note 13, at 281 n.122.

¹³⁸ See Conley, *supra* note 76, at 265 (“[T]he main reason for revised editions rested on an editor’s conscientious attempt to maintain the book’s currency . . .”).

Thus, the differences among them appear to be the result of conscious picking and choosing of the various aspects of Burn to fit the particular jurisdiction at a particular time. One might argue that these manuals cannot show search-and-seizure law as it was actually practiced by colonial and early State constables and justices of the peace. But that proves too much, for no extant source can do this.¹³⁹ Moreover, differences among the manuals probably understate the extent to which practice diverged from policy. For example, although all the manuals provide that “hue and cry”—by which offenders were pursued and arrested immediately after an offense was committed¹⁴⁰—was a sufficient ground for arrest, the use of this procedure appears to have varied by State and was used rarely in Virginia.¹⁴¹ But these manuals remain “the sources regarding criminal procedure that were most accessible to members of the Framers’ generation.”¹⁴²

One might argue that differences among the different manuals is less the result of policy preferences of a particular jurisdiction and more the result of either carelessness or an intent to convey the same exact information in slightly different forms. But the editors of these manuals were, in most cases, experienced lawyers, judges, and justices of the peace.¹⁴³ Davis was “a prominent attorney, member of the council, and a justice of the peace” in North Carolina.¹⁴⁴ “Greenleaf was . . . a justice of the peace for Plymouth County, Massachusetts.”¹⁴⁵ Grimké was not only a Cambridge educated lawyer and a justice of the peace but was also a judge on the South Carolina superior court.¹⁴⁶ Hening was an attorney “who served on the Privy Council and as a clerk of the Chancery Court” in Virginia.¹⁴⁷ Simpson was Chief Justice of South Carolina.¹⁴⁸ Moreover, their intent of keeping their manuals up to date through a process of inclusion and exclusion is manifested, at least in some cases, by their prefatory remarks, such as Ladd’s expression of gratitude to

¹³⁹ See Davies, *supra* note 13, at 282 n.124 (“So far as I know, we have no historical sources that preserve systematic evidence of practice; hence, it is not possible to demonstrate to what extent framing-era practice comported with doctrine.”).

¹⁴⁰ See 2 HALE, *supra* note 31, at *98–104.

¹⁴¹ See Davies, *supra* note 137, at 75 n.105.

¹⁴² See Davies, *supra* note 13, at 280; see also Conley, *supra* note 76, at 265 (suggesting that “the American justices relied on their manual as their primary source of legal reference”).

¹⁴³ See Conley, *supra* note 76, at 263 (“[T]he editors . . . in most instances were justices of the peace . . .”).

¹⁴⁴ *Id.* at 278.

¹⁴⁵ *Id.* at 290 n.94.

¹⁴⁶ See *id.* at 280, 293 n.154.

¹⁴⁷ *Id.* at 276.

¹⁴⁸ See *id.* at 279.

“those gentlemen of the profession, who have . . . furnished him with alterations which have been made in American Jurisprudence.”¹⁴⁹ Thus, it is implausible that these legal experts included or omitted material carelessly or arbitrarily; rather, these editorial decisions appear to have been deliberately made.¹⁵⁰

It could also be argued that simple omissions from one manual should not necessarily be interpreted as disagreements with other manuals that contain the omitted material, absent an express statement of disagreement. Yet, one would naturally expect such disagreements to typically take the form of omissions rather than explicit statements of disagreement. For example, in a section listing the types of authority to make warrantless arrests, one would not expect a manual to expressly state that there is no authority to arrest a night walker or vagrant. Instead, one would expect to see exactly what one sees in some of the manuals: a failure to mention this authority at all. And as legal experts, the editors of these manuals would likely understand the significance of such an omission.

Moreover, the generally light editing that occurred between editions of the justice of the peace manuals makes all the more significant the editorial choices that were made. For example, the 1764 and 1792 versions of *Conductor Generalis* were virtually identical. Not only that, but the later version retained the earlier edition’s references to the king,¹⁵¹ to English statutes,¹⁵² and to other terms peculiar to English legal culture, such as “member[s] of parliament,”¹⁵³ “peers,”¹⁵⁴ and “knights”¹⁵⁵—nearly a decade after the Treaty of Paris guaranteed a separate legal existence for the United States.¹⁵⁶ This is suggestive of a strong resistance to change when updating the

¹⁴⁹ LADD, *supra* note 78, at v–vi.

¹⁵⁰ See Conley, *supra* note 76, at 288 n.61 (“Each editor used his own judgment to delete or add material.”); see also *id.* at 269 (“Each editor . . . emphasized different themes or concerns by his decision to include or exclude certain material.”).

¹⁵¹ 1792 CONDUCTOR GENERALIS, *supra* note 78, at 24–29 (using the terms “the king’s will,” “the king’s peace,” “the suit of the king,” “king’s bench,” “forfeiture to the king,” and “the king’s name”).

¹⁵² *Id.* at 24, 26 (citing, in turn, An Ordinance of the Forest, 1306, 34 Edw. 1, c. 1; Apprehension of Endorsed Warrants Act, 1750, 24 Geo. 2, c. 55; and the Statute of Winchester, 1285, 13 Edw. 1, c. 1–6).

¹⁵³ *Id.* at 24.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 26.

¹⁵⁶ See The Definitive Treaty of Peace and Friendship, Between His Britannick Majesty, and the United States of America, U.S.–Gr. Brit., art. I, Sept. 3, 1783, 2 U.S.T. 151.

manual.¹⁵⁷ Accordingly, the omission in the 1792 version of the Saunders Welch essay justifying search-incident-to-arrest authority¹⁵⁸ is highly significant.

In any event, the *reason* that certain rules were omitted or included in the various manuals is far less important than the *fact* that they were omitted or included. The function of these manuals, after all, was to inform eighteenth-century justices of the peace and constables, who generally lacked any formal legal training, how to do their jobs.¹⁵⁹ Assuming that the manuals performed this function, we also have to assume that the various omissions and inclusions were manifested in the day-to-day practices of justices and constables.¹⁶⁰ Diligent justices of the peace or constables, in consulting a manual to determine whether a vagrant or night walker could be arrested without a warrant, would have come to different conclusions based on where they were. A risk-averse justice consulting a manual to determine whether he could issue a pre-indictment arrest warrant, and a risk-averse constable doing the same to determine whether he could break doors to serve such a warrant, would have come to different conclusions depending on whether they were in Massachusetts in 1773, Virginia in 1774, or South Carolina in 1788. Cautious constables in the 1760s might not search incident to arrest except in New Jersey, where the applicable manual explicitly gave them that authority. We can only assume that the directives of the manuals, or the absence thereof, thus became the common law of the jurisdiction through custom and usage. Whatever the reasons for the differences in search-and-seizure doctrine, search-and-seizure practice, as evidenced by these manuals, differed by colony and State, and over time.

¹⁵⁷ See Conley, *supra* note 76, at 263 (“[E]ven after the Revolution the editors [of CONDUCTOR GENERALIS] refused to Americanize the manual.”).

¹⁵⁸ See *supra* Part II.A.1.e.

¹⁵⁹ See Conley, *supra* note 76, at 265 (observing that the manuals’ editors sought “to provide information on topics of law not readily available to the colonists because of the general lack of law books in the colonies”); see also *id.* at 280 (observing that Grimké’s “reasons for publishing [his] work centered around the need to assist the local justices in the performance of their duties”); *id.* at 283 (characterizing the manuals “an alternative to legal education”).

¹⁶⁰ See *id.* at 263 (“Americans recognized that these justice manuals had a high value, juristic as well as practical.” (endnote omitted)); *id.* at 271 (observing that “the justices of the peace in New Hampshire, Massachusetts, and Vermont” expressed their need for the 1792 Ladd manual “by quickly purchasing” it); *id.* at 283 (“The widespread printing and sale of these manuals throughout the colonies indicated a recognition of their value by the colonists.”).

Concededly, those differences were relatively few and at the margins.¹⁶¹ Yet, likewise, only the tiniest fraction of DNA makes the difference between a human being and a bonobo. Like the building blocks of life, the common law is intricate, and its intricacy is founded upon “its ability to comprehend a variety of exceptions to a general rule.”¹⁶² And as any first-year law student knows, learning the law is all about learning when to apply the rule and when the exception. That one jurisdiction applies the rule when another applies the exception is not a trivial matter.

Thus, some of the issues on which these manuals differed geographically and temporally are closely analogous to Fourth Amendment issues that confound and divide modern courts. For example, the issue of whether night walkers or vagrants could be arrested without warrant is similar to the issue that divided the Court 5–4 in *Atwater v. City of Lago Vista*: whether the Fourth Amendment (as incorporated by the Fourteenth) prohibits a warrantless arrest for an offense that could not be punished by incarceration.¹⁶³ It is also analogous to the still-controversial¹⁶⁴ 1968 decision in *Terry v. Ohio*,¹⁶⁵ permitting temporary detention upon reasonable suspicion of commission of a crime.¹⁶⁶ Whether and to what extent the general bar on nocturnal searches allowed for an exception when there is “positive proof . . . lest the offenders and goods also be gone before morning,”¹⁶⁷ is closely analogous to modern disagreements over whether and to what extent exigent circumstances can justify warrantless intrusions into dwellings¹⁶⁸ or the failure of police to knock

¹⁶¹ See *id.* at 277 (“Th[e] similarity found in the manuals across colonies and regions is very striking.”); Davies, *supra* note 13, at 282 n.125 (“There were some unsettled points at the margin.”).

¹⁶² Meyler, *supra* note 1, at 578.

¹⁶³ 532 U.S. 318, 323 (2001); see *supra* Part I.B.2.a.

¹⁶⁴ See, e.g., Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271 (1998); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383 (1988).

¹⁶⁵ 392 U.S. 1 (1968).

¹⁶⁶ See *Minnesota v. Dickerson*, 508 U.S. 366, 381 (1993) (Scalia, J., concurring) (analogizing rule announced in *Terry* to the common-law power to arrest night walkers). *But see* Sklansky, *supra* note 1, at 1804 (“[T]he treatment of night-walkers is weak precedent for *Terry* stops.”). For an interesting discussion of whether the night walker statutes provide support for *Terry* on originalist grounds, see Lawrence Rosenthal, *Pragmatism, Originalism, Race, and the Case Against Terry v. Ohio*, 43 TEX. TECH L. REV. 299, 330–33 (2010).

¹⁶⁷ GREENLEAF, *supra* note 78, at 323.

¹⁶⁸ See *Kentucky v. King*, 131 S. Ct. 1849, 1862 (2011) (assuming without deciding that sounds of movement in apartment known to contain drugs after knock on door went unanswered gave rise to exigent circumstances).

and announce their presence.¹⁶⁹ Whether and to what extent state officials were liable for trespass when they broke doors of a third party's dwelling to arrest someone who turned out not to be present calls to mind the ongoing debate over what level of suspicion is required on the part of the police regarding the putative arrestee's presence in order to break doors to make an arrest.¹⁷⁰ The omission or inclusion of a "common fame of the country" ground for arrest—that is, permitting arrest on the basis of hearsay and rumor—is redolent of modern-day disputes over whether and to what extent hearsay information is sufficient to justify an arrest.¹⁷¹ It is with these granular details of how search-and-seizure law is operationalized, and not just the sweeping and grandiose language of fundamental rights, that modern police officers, lawyers, and judges are concerned.

B. Excise and Customs Searches of Non-Dwelling Premises

Aside from the differences noted among the various justice of the peace manuals, there was at least one other respect, not covered by these manuals, in which search-and-seizure law differed by jurisdiction during the framing period. At least regarding excise searches, some jurisdictions required warrants to enter any premises on land, while others required warrants only to enter dwellings. Warrants to search for dutiable and taxable items, unlike warrants to search for stolen goods, were a creature of statute, not common law.¹⁷² Accordingly, the former were not mentioned in the common-law-centered justice of the peace manuals. Instead, one must look to statutory authority.¹⁷³

In Massachusetts and Pennsylvania, dwellings were treated separate and apart from all other premises. Those States required that officials obtain

¹⁶⁹ See *Richards v. Wisconsin*, 520 U.S. 385 (1997) (holding that reasonable suspicion of exigency is sufficient for police to dispense with "knock and announce" requirement).

¹⁷⁰ See Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137, 1197 (2012). Compare *United States v. Gorman*, 314 F.3d 1105, 1111–15 (9th Cir. 2002) (requiring probable cause to believe defendant on premises), with *Valdez v. McPheters*, 172 F.3d 1220, 1224–25 (10th Cir. 1999) (permitting such entry on less than probable cause to believe defendant on premises).

¹⁷¹ See, e.g., *Spinelli v. United States*, 393 U.S. 410, 414 (1969) (characterizing the allegation that the suspect was generally known "as a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers" as "but a bald and unilluminating assertion of suspicion that is entitled to no weight").

¹⁷² See *Davies*, *supra* note 5, at 646 ("[T]he absence of . . . common-law authority for search warrants other than for stolen property[] explains why Parliament had to enact statutory search authority for customs officers."); *id.* at 659 n.306 ("Customs search authority was . . . defined by statute in the American states.").

¹⁷³ It bears repeating that, in looking to the "common law" of 1791, the Court has interpreted that term broadly enough to include the statutory landscape as well as case law, commentary, and custom. See *supra* notes 18–19 and accompanying text.

warrants in order to enter dwellings to search for smuggled items but did not require warrants to enter any other premises.¹⁷⁴ A 1780 Pennsylvania statute establishing an impost provided that collectors of the impost could, without a warrant, “enter any ship or vessel, *and into any house or other place* where he shall have reason to suspect that any goods, wares or merchandise, liable to the . . . duty, shall be concealed, and therein to search for the same.”¹⁷⁵ However, the Act made clear that, in order to search a dwelling, a warrant was required.¹⁷⁶ Likewise, Massachusetts enacted an impost in 1783 that allowed collectors of the impost to enter without a warrant “into [a] vessel or float, *store, building or place* (dwelling-houses excepted) and there to search for” any goods taken there in violation of the law.¹⁷⁷ Again, the Act made clear that a warrant was required to search a dwelling.¹⁷⁸

By stark contrast, Maryland, North Carolina, and Virginia treated all premises on land in the same way they treated dwellings: a warrant was required to enter. A 1781 Virginia impost statute required that collectors of the impost obtain a warrant to search “any house, warehouse or storehouse.”¹⁷⁹ A 1784 Maryland impost statute required a warrant for entry into “any house, warehouse, storehouse or cellar.”¹⁸⁰ And a 1784 North Carolina statute was identical to Virginia’s in that respect.¹⁸¹

Although the Warrant Clause of the Fourth Amendment would ultimately dictate a national standard regarding the contents of federal search warrants, it says nothing explicitly about when warrants are required. In the years leading up to the adoption of the Amendment, the States differed starkly over as significant an issue as whether warrants were required to search non-dwelling premises. This issue “was still unsettled during the ratification debates.”¹⁸²

¹⁷⁴ See Davies, *supra* note 5, at 681–83.

¹⁷⁵ Act of Dec. 23, 1780, ch. 925, § 5, 1780 Pa. Laws 252, 253, available at <http://www.palrb.us/statutesatlarge/17001799/1780/0/act/0925.pdf> (emphasis added).

¹⁷⁶ *Id.*; see Davies, *supra* note 5, at 682 n.370.

¹⁷⁷ Act of July 10, 1783, ch. 12, 1783 Mass. Acts 506, 526 available at <http://archives.lib.state.ma.us/actsResolves/1783/1783acts0012.pdf> (emphasis added).

¹⁷⁸ *Id.* at 527.

¹⁷⁹ Act of Nov. 5, 1781, ch. 40, § 11, 1781 Va. Acts 151; see Davies, *supra* note 5, at 682 n.374.

¹⁸⁰ Act of Jan. 22, 1785, ch. 84, § 7, 1784 Md. Laws 438, available at <http://msa.maryland.gov/megafile/msa/speccol/sc4800/sc4872/003180/html/m3180-1403.html>; see Davies, *supra* note 5, at 682 n.374.

¹⁸¹ See Davies, *supra* note 5, at 682 n.374 (observing that the North Carolina statute “provided the same search authority as that of Virginia”).

¹⁸² *Id.* at 706.

III. THE ANTI-FEDERALISTS AND THE CONTINGENCY OF CONSTITUTIONAL SEARCH-AND-SEIZURE RULES

As of 1791, the common law of search and seizure was even more differentiated than the U.S. Supreme Court's cases reveal. The question remains whether and to what extent that differentiation should be imported into our understanding of the Fourth Amendment. On an originalist account, the answer depends upon whether and to what extent the framers and ratifiers of the Fourth Amendment understood the common law of search and seizure to be differentiated rather than uniform, and whether and to what extent they understood the Fourth Amendment as incorporating that differentiated common law. It is clear that a large segment of those who spoke and wrote about the common law, and in particular the Anti-Federalist progenitors of the Bill of Rights, understood its differentiated nature. Within a short time, former Federalist and principal draftsman of the Bill of Rights, James Madison himself, was an adherent of this view. While there is no conclusive evidence that the framers and ratifiers of the Fourth Amendment understood it as incorporating this differentiated nature, several clues point strongly in that direction.

A. The Anti-Federalist Notion of State Sovereignty as a Guarantor of Individual Liberty

The moderate Anti-Federalists initially opposed the Constitution and later demanded that the Bill of Rights be adopted as the price for their reluctant acquiescence to ratification. Thus, Anti-Federalist views on the necessity of a Bill, grounded in the belief that individual liberty was tied to state norms, is critical to a complete understanding of the Bill.

The Anti-Federalists were opposed to the unamended Constitution because the proposed new central government would draw power away from the States, leaving them weak and enervated, and this would lead to infringement of the rights of their citizens. While we tend to view individual rights as being in tension with governmental power, the Anti-Federalists saw things differently. They saw local, responsive government as the guardian of liberty.¹⁸³ The threat to freedom came, not from government in general, but from the proposed new federal government. The Anti-Federalists viewed the States as the protectors of

¹⁸³ See Gerard V. Bradley, *The Constitutional Theory of the Fourth Amendment*, 38 DEPAUL L. REV. 817, 851 (1989) (“Contrary to our impulses, people at that time really believed that responsive electoral governments . . . insured liberty.”).

individual rights,¹⁸⁴ for nearly every State had drafted a constitution since 1776 guaranteeing its citizens a number of individual rights.¹⁸⁵ The greatest fear of the Anti-Federalists, spurring them to demand a federal bill of rights, was that the state constitutions and bills of rights would be ineffectual to protect the citizenry from the new federal government's exercise of broad new powers. Of particular concern were the Necessary and Proper Clause,¹⁸⁶ giving an open-ended means by which to effectuate the enumerated powers, and the Supremacy Clause,¹⁸⁷ which explicitly subordinated state norms to federal power.¹⁸⁸ And because the federal government would be acting directly upon the citizenry, state constitutions and bills of rights were no barrier. Preservation

¹⁸⁴ See Robert C. Palmer, *Liberties as Constitutional Provisions: 1776–1791*, in *LIBERTY AND COMMUNITY: CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC* 55, 115 (William E. Nelson & Robert C. Palmer eds., 1987) (“[The Anti-Federalists] considered the states protectors, not opponents, of rights.”); Harry N. Scheiber, *Federalism and the Constitution: The Original Understanding*, in *AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES* 85, 87 (Lawrence M. Friedman & Harry N. Scheiber eds., 1978) (“The Antifederalists asserted that the splendor of the American nation depended . . . on state sovereignty: . . . on the ability of each distinct people within the union to defend its own liberties through the instrumentality of government close at hand . . .”); George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers’ Bill of Rights and Criminal Procedure*, 100 *MICH. L. REV.* 145, 180 (2001) (“The anti-Federalists . . . saw state legislatures and state courts as the protectors of citizens and not as threats.”); Arthur E. Wilmarth, Jr., *The Original Purpose of the Bill of Rights: James Madison and the Founders’ Search for a Workable Balance Between Federal and State Power*, 26 *AM. CRIM. L. REV.* 1261, 1281 (1989) (observing that, according to the Anti-Federalists, “the states . . . were considered to be the true guardians of the people’s rights”).

¹⁸⁵ Eleven of the thirteen States—all but Connecticut and Rhode Island—had drafted new constitutions following independence. See Steven G. Calabresi, Sarah E. Agudo & Kathryn L. Dore, *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*, 85 *S. CAL. L. REV.* 1451, 1465 tbl.3 (2012). These constitutions guaranteed anywhere from 9 (in South Carolina) to 50 (in New Hampshire) individual rights, with a median of 35 (in Delaware). *Id.*

¹⁸⁶ See U.S. CONST. art. I, § 8, cl. 18 (“The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . .”).

¹⁸⁷ U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

¹⁸⁸ See *THE STATES RIGHTS DEBATE: ANTIFEDERALISM AND THE CONSTITUTION* 81 (Alpheus Thomas Mason ed., 2d ed. 1972) (“The combined effect of the supremacy clause and the necessary-and-proper clause seemed especially dangerous to the rights of the states and their citizens.”); Scheiber, *supra* note 184, at 90 (“The means for . . . oppression were ready at hand in the Constitution: its supremacy clause would support nearly any attack on state sovereignty; [and] the necessary-and-proper and general-welfare clauses comprised practically unlimited writs of authority . . .”); Herbert J. Storing, *What the Anti-Federalists Were For*, in 1 *THE COMPLETE ANTI-FEDERALIST* 3, 28 (Herbert J. Storing ed., 1981) (“The broad grants of power, taken together with the ‘supremacy’ and ‘necessary and proper’ clauses, amounted, the Anti-Federalists contended, to an unlimited grant of power to the general government to do whatever it might choose to do.”).

of individual freedom was thus inextricably linked to the preservation of state power; states' rights and individual rights were intertwined.¹⁸⁹

George Mason summed up these concerns in the very first sentence of his *Objections to the Constitution of Government Formed by the Convention*.¹⁹⁰ Mason, who attended the Constitutional Convention but refused to sign the Constitution,¹⁹¹ published his *Objections* before the ink was dry on the Constitution, and his *Objections* became “the first salvo in the paper war over ratification.”¹⁹² Mason's *Objections* were second only to those of Elbridge Gerry¹⁹³ in their significance and influence among other Anti-Federalists.¹⁹⁴ Mason began his *Objections* this way: “There is no Declaration of Rights; and the Laws of the general Government being paramount to the Laws and Constitutions of the several States, the Declaration of Rights in the separate States are no Security.”¹⁹⁵ Thus, Mason's very first reason for opposing the Constitution was that, because the Supremacy Clause subordinated state bills of rights, these were “no [s]ecurity” against the federal government.

The concern that the Constitution would weaken state governments and emasculate their bills of rights to the detriment of individual liberty was

¹⁸⁹ AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 128 (1998) (“[The] point is not that substantive rights are unimportant, but that these rights were intimately intertwined with structural considerations.”); SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828*, at 6 (1999) (“Cast in modern terms, states' rights and individual rights were not antithetical in Anti-Federalist constitutionalism, but intimately bound together.”); Murray Dry, *The Case Against Ratification: Anti-Federalist Constitutional Thought*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION* 271, 275 (Leonard W. Levy & Dennis J. Mahoney eds., 1987) (“[T]he Anti-Federal interest in rights goes together with an interest in mild, and hence decentralized, government.”); Michael Lienesch, *North Carolina: Preserving Rights*, in *RATIFYING THE CONSTITUTION* 343, 355 (Michael Allen Gillespie & Michael Lienesch eds., 1989) (“For them, the rights of the people were inseparable from the rights of their states.”); Palmer, *supra* note 184, at 108 (“Preservation of state authority and liberty restrictions on the federal government can never be distinct; the individuals who would benefit most from individual rights preserved against the federal government were those who were supporting a state government's policy at odds with federal policy.”); *THE STATES RIGHTS DEBATE*, *supra* note 188, at 98 (“Spurring the Antifederalist campaign was the unshakeable conviction that the proposed Constitution would enthrone a consolidated government, thereby rendering *state* protection of individual rights insecure.”).

¹⁹⁰ George Mason, *Objections to the Constitution of Government Formed by the Convention* (1787), reprinted in 2 *THE COMPLETE ANTI-FEDERALIST*, *supra* note 188, at 11.

¹⁹¹ See Herbert J. Storing, *Commentary to George Mason's Objections to the Constitution of Government Formed by the Convention*, in 2 *THE COMPLETE ANTI-FEDERALIST*, *supra* note 188, at 9.

¹⁹² Robert A. Rutland, *Framing and Ratifying the First Ten Amendments*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION*, *supra* note 189, at 305, 305.

¹⁹³ Letter from Elbridge Gerry to Samuel Adams & James Warren (Oct. 18, 1787), reprinted in 2 *THE COMPLETE ANTI-FEDERALIST*, *supra* note 188, at 6, 6–8.

¹⁹⁴ CORNELL, *supra* note 189, at 29.

¹⁹⁵ Mason, *supra* note 190, at 13.

echoed by Anti-Federalists in state ratifying conventions and political tracts up and down the continent. At the Pennsylvania convention, Robert Whitehill said that the Constitution would be “the means of annihilating the constitutions of the several States, and consequently the liberties of the people” and that “the dissolution of our State constitutions will produce the ruin of civil liberty.”¹⁹⁶ In one widely read tract, Pennsylvania Anti-Federalist Centinel (George or Samuel Bryan)¹⁹⁷ echoed these sentiments, writing that “the general government would necessarily annihilate the particular [i.e., state] governments, and . . . the security of the personal rights of the people by the state constitutions [would be] superseded and destroyed.”¹⁹⁸ Similarly, in the Virginia ratifying convention the following June, Patrick Henry declared that the Constitution would “annihilate[]” the state government, leaving it powerless, and thereby render the state bill of rights a barrier only against a “weakened, prostrated, enervated State Government,” and therefore a nullity.¹⁹⁹ Likewise, at the New York ratifying convention, Thomas Tredwell expressly tied the loss of state power to the loss of individual liberty when he lamented: “Here we find no security for the rights of individuals, no security for the existence of our state governments; here is no bill of rights, no proper restriction of power; our lives, our property, and our consciences, are left wholly at the mercy of the [national] legislature.”²⁰⁰

The Federalist response to this position is telling as well. The Federalists initially opposed adding a bill of rights for two related reasons: first, that it was unnecessary, and second, that it was dangerous. A bill of rights, they maintained, was unnecessary because the powers of the federal government

¹⁹⁶ PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787–1788, at 287 (John Bach McMaster & Frederick D. Stone eds., Lancaster, Inquirer Printing & Publ’g Co. 1888); *see also* Palmer, *supra* note 184, at 109 (recounting fear of a minority of the Pennsylvania ratifying convention “that the federal government would absorb the states, and that the federal Constitution would supersede completely the rights specifications in state constitutions”).

¹⁹⁷ *See* JACKSON TURNER MAIN, THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION 1781–1788, at 287 app. C (3d prt. 1961).

¹⁹⁸ Letter of Centinel (Oct. 24, 1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 188, at 143, 152. This letter was among the most widely circulated Anti-Federalist tracts, having been reprinted eleven times during the ratification period. *See* CORNELL, *supra* note 189, at 46.

¹⁹⁹ Patrick Henry, Speech in the Virginia State Ratifying Convention (June 16, 1788), *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 188, at 246, 247. Henry on several other occasions expressed the intertwined nature of individual liberty and state sovereignty. *See* Palmer, *supra* note 184, at 111–12.

²⁰⁰ 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 401 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott & Co. 1876) [hereinafter ELLIOT’S DEBATES]. Similar comments were made at the New York convention by Melancton Smith and John Lansing. *See* Palmer, *supra* note 184, at 113–14.

were limited and enumerated;²⁰¹ the Constitution would give it no power, for example, to authorize general warrants because that was not one of the powers vested by Article I. They also maintained that listing certain rights would be dangerous to liberty because such an enumeration would imply the nonexistence of any other rights.²⁰²

But embedded in their first argument was a sub-argument regarding the effectiveness of state constitutions and bills of rights. To the extent that the federal government did overextend its powers, they asserted, the state constitutions and bills of rights would act as a buffer between the government and the people, even absent a federal bill. For example, when the issue first arose at the Constitutional Convention on September 12, 1787, Roger Sherman brushed aside the suggestion that a federal bill was needed, arguing: “The State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient.”²⁰³ That is to say, Sherman believed that the state constitutions and bills of rights would operate even against the federal government to preserve individual liberty.

This belief was echoed by Edmund Randolph at the Virginia ratifying convention the following year. Speaking specifically about the supposed necessity of a provision barring general warrants, he stated:

That general warrants are grievous and oppressive, and ought not be granted, I fully admit. . . . But we have sufficient security here Can it be believed that the federal judiciary would not be independent enough to prevent such oppressive practices? If they will not do justice to persons injured, *may they not go to our own state judiciaries, and obtain it?*²⁰⁴

Thus, Randolph believed that the general common-law bar on general warrants would be sufficient, even absent a written bill of rights, to require federal judges to disallow them. And, if that were not enough, state judges, presumably also relying upon general common law, would do so.

²⁰¹ See THE FEDERALIST NO. 84, at 512 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (“[A] minute detail of particular rights is certainly far less applicable to a Constitution like that under consideration, which is merely intended to regulate the general political interests of the nation, than to a constitution which has the regulation of every species of personal and private concerns.”).

²⁰² See *id.* at 513 (“I go further and affirm that bills of rights . . . are not only unnecessary in the proposed Constitution but would even be dangerous. They would . . . afford a colorable pretext to claim more [powers] than were granted. For why declare that things shall not be done which there is no power to do?”); see also THE STATES RIGHTS DEBATE, *supra* note 188, at 83.

²⁰³ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 588 (Max Farrand ed., 1911).

²⁰⁴ 3 ELLIOT’S DEBATES, *supra* note 200, at 468 (emphasis added).

But the Anti-Federalists were not convinced. They wanted to make explicit what Federalists Sherman and Randolph believed was implicit in the Constitution. For example, Anti-Federalist Agrippa (James Winthrop of Massachusetts),²⁰⁵ as part of a proposed set of amendments to the document, suggested that the Constitution expressly say that state bills of rights stand as a barrier between the federal government and the individual:

Nothing in this constitution shall deprive a citizen of any state of the benefit of the bill of rights established by the constitution of the state in which he shall reside, and such bills of rights shall be considered as valid in any court of the United States where they shall be pleaded.²⁰⁶

In a similar vein, an amendment proposed by Melancton Smith at the New York ratifying convention would have required all federal officers “to be bound, by oath or affirmation, not to infringe the constitutions or rights of the respective states.”²⁰⁷ This amendment was adopted by the New York ratifying convention in a set of amendments proposed to Congress as part and parcel of the State’s ratification.²⁰⁸

Ultimately, ratification failed on the initial ballot in Massachusetts, New Hampshire, New York, North Carolina, and Virginia.²⁰⁹ This failure stemmed in large part from the Anti-Federalists’ belief that, without an explicit provision such as Agrippa’s or Smith’s proposed amendment, state constitutions and bills of rights were no protection against the proposed federal government. And the reason for that position has much to do with two very distinct views of the common law entertained respectively by the Federalists and Anti-Federalists.

B. The Anti-Federalist Conception of Common Law

It makes some sense to view the Fourth Amendment as constitutionalizing common-law restrictions on search-and-seizure authority. The founding “generation was steeped in both the rules and the rhetoric of the common

²⁰⁵ See CORNELL, *supra* note 189, at 53, 58.

²⁰⁶ Letter from Agrippa to the Massachusetts Convention (Feb. 5, 1788), *reprinted in* THE ESSENTIAL ANTI-FEDERALIST 54, 57 (W.B. Allen & Gordon Lloyd eds., 2d ed. 2002).

²⁰⁷ 2 ELLIOT’S DEBATES, *supra* note 200, at 409–10.

²⁰⁸ See 1 *id.* at 331.

²⁰⁹ Michael J. Zydney Mannheimer, *Cruel and Unusual Federal Punishments*, 98 IOWA L. REV. 69, 108 (2012).

law.”²¹⁰ To support their arguments against British rule, the colonists turned time and again to the rhetoric of the common-law rights of Englishmen.²¹¹ So, too, did the Anti-Federalists extol the common law as establishing their rights. For example, immediately after asserting that state bills of rights were “no [s]ecurity” against the proposed federal government, George Mason in his *Objections* expressly invoked the common law: “Nor are the people secured even in the Enjoyment of the Benefits of the common-Law.”²¹²

But the “common law” in 1791 was a notoriously slippery notion.²¹³ Conventional wisdom maintains that a pre-Realist view of the common law was dominant in the eighteenth century. For example, Justice Scalia has written that, at the founding,

the prevailing image of the common law was that of a preexisting body of rules, uniform throughout the nation (rather than different from state to state), that judges merely “discovered” rather than created. It is only in th[e] [twentieth] century, with the rise of legal realism, that we came to acknowledge that judges in fact “make” the common law, and that each state has its own.²¹⁴

Yet the conventional wisdom glosses over the existence of a competing view of the common law at the time of the founding, for there was a distinct ideological split in the way the common law was viewed.

The pre-Realist view described by Justice Scalia was, as he put it, “prevailing” only if one looks solely to the Federalists. The Federalists of the 1790s generally viewed common law as deriving from higher law, the law of nature.²¹⁵ As such, they viewed the common law, and common-law rights in particular, not as transient but as fixed, existing “in the air” rather than being

²¹⁰ Sklansky, *supra* note 1, at 1776.

²¹¹ See Davies, *supra* note 5, at 670 (“[T]he ideological justification for the American Revolution consisted largely of complaints that Parliament’s enactments had encroached upon the ‘immemorial’ common-law rights, privileges, and immunities that colonists claimed as English ‘freemen.’”); Sklansky, *supra* note 1, at 1776 (“[T]he colonists regularly used the language of the common law to support their claims against Great Britain.”).

²¹² Mason, *supra* note 188, at 11.

²¹³ See Meyler, *supra* note 1, at 567 (“The very definition and scope of the common law—including its permeability to statutory innovation, its longevity, its potential for local variations, and its relation to the ‘ancient constitution’ securing the rights of the people—were subject to serious contestation.”).

²¹⁴ Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 10 (Amy Gutmann ed., 1997).

²¹⁵ See Andrew Lenner, *A Tale of Two Constitutions: Nationalism in the Federalist Era*, 40 *AM. J. LEGAL HIST.* 72, 77–88 (1996).

tioned to sovereignty.²¹⁶ The remarks of Edmund Randolph regarding the lack of necessity of a federal bill of rights are indicative of the general Federalist position on the common law. The notion that common-law rights simply exist, rather than representing the relationship between an individual and a particular sovereign, explains Randolph's remark that federal and state judges, presumably applying general common law, would disallow general warrants, even without an express prohibition at the federal level.

But imputing this view of the common law to the entire founding generation is a grave error. By the late eighteenth century, there were sharp disputes over the nature of the common law,²¹⁷ and a proto-Realist view of the law had seeped into the American understanding of the nature of law.²¹⁸ Specifically, this proto-Realist view was embraced by the Anti-Federalists. While their mission was to secure as against the federal government the common-law rights of Englishmen, the Anti-Federalists were under no illusion that the common law was the same in the United States as it was in England, or that it was the same in every State.

Once again, George Mason summed up the Anti-Federalists' proto-Realist stance in the first paragraph of his *Objections*. Immediately after invoking the common law rights of Englishmen, he wrote that "the common-Law . . . stands here upon no other Foundation than [its] having been adopted by the respective Acts forming the Constitutions of the several States."²¹⁹ That is to say, even the common law, that great source of English liberty, has no authority unless adopted as the positive law of the polity: it has "no other [f]oundation."²²⁰

²¹⁶ See Michael J. Zydney Mannheimer, Response, *On Proportionality and Federalism: A Response to Professor Stinneford*, 97 VA. L. REV. IN BRIEF 51, 59 (2011) (describing this view as conceiving of the common law as "declaratory rather than instrumental, unitary rather than particularized, free floating rather than tied to sovereignty").

²¹⁷ See Mannheimer, *supra* note 209, at 110–11; see also Meyler, *supra* note 1, at 567 ("[C]ontroversies about the nature of the common law in America undermine any attempt to represent it as a fixed and unified entity . . .").

²¹⁸ See Meyler, *supra* note 1, at 557 ("A certain self-consciousness . . . characterized common law jurisprudence of the seventeenth and eighteenth centuries, a self-consciousness that undermines the view . . . that we became aware only with the legal realists that judges made rather than discovered law."); Sklansky, *supra* note 1, at 1788 (observing that the acknowledgement that common-law judges made law "began in the 1780s and was well underway in the 1790s").

²¹⁹ Mason, *supra* note 188, at 11 (emphasis added).

²²⁰ See THE STATES RIGHTS DEBATE, *supra* note 188, at 89 (observing that Anti-Federalists believed that "common law rights stood on no higher law foundation").

In other Anti-Federalist writings about the need for a bill of rights, the idea that the common law had no effect until adopted was often expressed alongside the cognate idea that there were as many different versions of the common law as there were common-law jurisdictions. For example, “A Maryland Farmer” (believed to have been Maryland delegate John Francis Mercer) explicitly noted that even the common-law rights of Englishmen are inapplicable unless they have been adopted as part of the positive law. And, he recognized, they differed from State to State. He wrote:

If a citizen of Maryland can have no benefit of his own bill of rights in the confederal courts, and there is no bill of rights of the United States . . . [h]ow could he take advantage of any of the common law rights, which have heretofore been considered as the birthright of Englishmen and their descendants, could he plead them and produce the authority of the English judges in his support? Unquestionably not, for *the authority of the common law arises from the express adoption by the several States in their respective constitutions, and that in various degrees and under different modifications.*²²¹

Here we have a frank recognition that common-law rights have no authority whatsoever in the courts aside from their “express adoption by the several States.” This is followed quickly by the observation that the common law exists “in various degrees and under different modifications” in every State. Just as telling was the Federalist response: echoing Sherman and Randolph, Federalist writer Aristides (Alexander Contee Hanson) asserted that “the party injured [by a general warrant] will most clearly have redress in a state court.”²²²

Soon after ratification, this notion of a differentiated rather than uniform common law achieved dominance. Former Anti-Federalist Justice Samuel Chase’s polemic against a federal criminal common law in 1798 in *United States v. Worrall*²²³—a view validated by the full Supreme Court fourteen years later in *United States v. Hudson*²²⁴—set the tone.²²⁵ The banner

²²¹ Essay by A [Maryland] Farmer No. I (Feb. 15, 1788), *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 188, at 13 (emphasis added).

²²² Herbert J. Storing, *Commentary to Essays by A Farmer*, 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 188, at 70 n.8 (internal quotation marks omitted).

²²³ 28 F. Cas. 774, 779 (C.C.D. Pa. 1798) (No. 16,766).

²²⁴ 11 U.S. (7 Cranch) 32, 33 (1812); *see also* TRIAL OF WILLIAM BUTLER FOR PIRACY 25 (Charleston, R. Crush 1813) (observing “[t]he many and radical discrepancies which exist among the States as to the principles of the Common Law”).

²²⁵ *See* Mannheimer, *supra* note 209, at 116–17. Although appointed to the bench by President Washington, Chase had been “a strident Antifederalist who had opposed ratifying the Constitution.” Stewart

of states' rights, and of a differentiated common law, was then picked up by the immediate intellectual descendants of the Anti-Federalists, the Jeffersonian Republicans,²²⁶ in their opposition to the Alien and Sedition Acts.²²⁷

Indeed, none other than former Federalist James Madison eloquently set forth the Republican position on a differentiated common law less than a decade after having successfully secured ratification of the Bill of Rights. In his 1800 follow-up to the Virginia Resolutions on the Alien and Sedition Acts, Madison wrote:

In the state prior to the Revolution, it is certain that the common law, under different limitations, made a part of the colonial codes. But . . . it was the separate law of each colony within its respective limits, and was unknown to them, as a law pervading and operating through the whole, as one society.

It could not possibly be otherwise. The common law was not the same in any two of the colonies; in some the modifications were materially and extensively different.²²⁸

Soon after, in the election of 1800, the Federalists, and their view of common law as natural law, were roundly defeated.²²⁹ The Jeffersonian Republicans, with their proto-Realist view of common law, attained political hegemony for more than a quarter century afterwards.²³⁰

Jay, *Origins of Federal Common Law* (pt. 1), 133 U. PA. L. REV. 1003, 1068 (1985); see Samuel Chase, Notes of Speeches Delivered to the Maryland Ratifying Convention (Apr. 1788), reprinted in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 188, at 79–91 (arguing against ratification of the proposed Constitution); see also Stephen B. Presser, *A Tale of Two Judges: Richard Peters, Samuel Chase, and the Broken Promise of Federalist Jurisprudence*, 73 NW. U. L. REV. 26, 73 (1978) (characterizing Chase as a “vehement opponent of the proposed Federal Constitution on the grounds that it too tightly constricted the sovereignty of the individual states”).

²²⁶ See CORNELL, *supra* note 189, at 147–218; see also Richard E. Ellis, *The Persistence of Federalism After 1789*, in BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 295, 300–14 (Richard Beeman, Stephen Botein & Edward C. Carter II eds., 1987) (observing that “most Antifederalists became Republicans” and recounting how the Anti-Federalist emphasis on states’ rights manifested itself in Republican thought through the 1830s); John H. Aldrich & Ruth W. Grant, *The Antifederalists, the First Congress, and the First Parties*, 55 J. POL. 295, 298 (1993) (“The ideology of the Jeffersonian Republicans . . . bears a striking resemblance to antifederalist thought.”).

²²⁷ See 8 ANNALS OF CONG. 2137 (1798) (statement of Rep. Gallatin) (“The common law of Great Britain received in each colony, had in every one received modifications arising from their situation; those modifications differed in the several States; and now each State had a common law, in its general principles the same, but in many particulars differing from each other.”).

²²⁸ *Mr. Madison’s Report on the Virginia Resolutions*, reprinted in THE VIRGINIA AND KENTUCKY RESOLUTIONS OF 1798 AND ‘99, at 21, 31 (Washington, Jonathan Elliot 1832).

²²⁹ Lenner, *supra* note 215, at 105.

²³⁰ *Id.* at 75.

Implicit in this idea of a differentiated common law is that the common law can change over time as well as across boundaries. Because the Anti-Federalists, and later the Republicans, recognized that the common law of England was adopted in each colony and State only insofar as it cohered with local conditions, they also recognized that the common law is capable of changing with those conditions. “By 1791 . . . ‘a commonly understood concept of common-law had become that of a process characterized by occasional flexibility and capacity for growth in order to respond to changing social pressures, rather than that of a fixed and immutable body of unchanging rules.’”²³¹ Common law, to them, was neither given from on high nor the perfection of pure reason. It was positive law to be adopted, amended, adapted, or abrogated, just like statutory law.²³²

Thus, we see the nub of the Anti-Federalist’s complaint about the unamended Constitution. As Mason argued in his *Objections*, the common-law rights of Englishmen “stand[] . . . upon no other Foundation than [their] having been adopted” as the positive law in “the Constitutions of the several States.”²³³ Common-law rights have no separate existence independent of the body of the rest of the common law, and the body of the common law exists “in various degrees and under different modifications” in the different States.²³⁴ There was no common law of the United States as a whole and thus no common-law rights to restrain the proposed central government. What the Anti-Federalists sought, it appears, was the application of common-law rights, as adopted by the respective States, to that government. Statements made by

²³¹ Sklansky, *supra* note 1, at 1788 (quoting Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 736 (1973) (some internal quotation marks omitted)). Professor Davies accordingly errs in premising his view of the Fourth Amendment on the assertion “that the basic features of common-law criminal procedure were essentially fixed.” Davies, *supra* note 5, at 672 (emphasis omitted). In order to demonstrate the view of the common law taken by the Framers, he quotes a passage by Connecticut jurist Jesse Root, who described the common law as “the perfection of reason,” “universal,” “clear and certain,” and “immutable.” *Id.* at 672 n.338 (quoting Jesse Root, *Introduction* to 1 REPORTS OF CASES ADJUDGED IN THE SUPERIOR COURT AND SUPREME COURT OF ERRORS ix (Hartford, Hudson & Goodwin 1798)). Tellingly, Root was a Federalist. *See* WESLEY W. HORTON, *THE CONNECTICUT STATE CONSTITUTION* 15 (2d ed. 2012). And by 1798, the year of his essay, the battle lines were clearly drawn between Federalists and Republicans over their views of the common law. Indeed, at Connecticut’s constitutional convention in 1818, Root took the position that no bill of rights was necessary, essentially repeating the Federalist party line from thirty years earlier. *See id.* at 16.

²³² TRIAL OF WILLIAM BUTLER FOR PIRACY, *supra* note 224, at 24 (“[T]he adoption of the Common Law, depended upon the voluntary act of the legislative power of the several States, as much as the passage of any positive law.”).

²³³ Mason, *supra* note 190, at 11.

²³⁴ Essay by A [Maryland] Farmer No. I, *supra* note 221, at 13.

the Anti-Federalists regarding federal search-and-seizure authority bear this out.

C. The Anti-Federalist Push for Constraints on Federal Search-and-Seizure Authority

During the ratification period, Anti-Federalists specifically criticized the proposed Constitution both for its lack of a prohibition of warrants that were too general or otherwise promiscuous²³⁵ and for its failure to address searches and seizures more generally.²³⁶ Their objections reveal that what the Anti-Federalists sought were not necessarily uniform and unchanging rules on the extent to which the federal government could search and seize. Rather, their goal appears to have been procedural rather than substantive: to maintain the primacy of state search-and-seizure law vis-à-vis federal officials.

Recall, for example, A Maryland Farmer's observation that "the authority of the common law arises from the express adoption by the several States in their respective constitutions, and that in various degrees and under different modifications."²³⁷ Importantly, he almost immediately gave as an example the absence from the proposed Constitution of a ban on general warrants: "To render this more intelligible—suppose for instance, that an officer of the United States should force the house . . . of a citizen, by virtue of a general warrant, I would ask, are general warrants illegal by the constitution of the United States?"²³⁸ Read in light of Maryland's constitutional prohibition on general warrants, and his "various degrees and . . . different modifications" language, A Maryland Farmer's concern appears to be not so much with

²³⁵ See, e.g., Letter from the Federal Farmer (Oct. 12, 1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 188, at 245, 249 (identifying as among "the rights of freemen . . . freedom from hasty and unreasonable search warrants, warrants not founded on oath, and not issued with due caution, for searching and seizing men's papers, property, and persons"); see also Clancy, *supra* note 67, at 1040 ("[A] significant focus was . . . on general warrants.").

²³⁶ As Professor William Cuddihy put it,

the debate of 1787–88 had a wider focus [than just general warrants]. The general warrant was no longer the only kind of unreasonable search. The ratifying conventions and pamphleteers increasingly spoke in the plural, of unreasonable searches and seizures. General excise searches and search warrants issued groundlessly were condemned almost as much as the general warrant.

WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING, 602–1791, at 690 (2009); see also Clancy, *supra* note 67, at 1032 ("Some have claimed that the commentary addressed solely a concern with general warrants. The historical record, however, does not support that view." (footnote omitted)).

²³⁷ Essay by A [Maryland] Farmer No. I, *supra* note 221, at 13.

²³⁸ *Id.* at 13–14.

imposing a universal ban of general warrants but rather with requiring federal officers to respect Maryland law.²³⁹

Patrick Henry in the Virginia ratifying convention made a similar point about the potential inability of federal judges to rein in federal officers. And he specifically pointed to the fact that state constitutions and bills of rights would be ineffectual in holding federal excisemen to account for their actions in searching for untaxed goods. He warned that if an aggrieved person were to go to the federal courts in “Philadelphia or New York . . . there [he] must appeal to judges sworn to support this Constitution, *in opposition to that of any state.*”²⁴⁰ Thus, Henry argued, consistently with the Anti-Federalist party line, that adoption of the Constitution without a bill of rights would free federal officers from any constitutional constraint on searching and seizing that would otherwise exist under state law. Henry consequently despaired that nothing would “tie [the] hands” of federal agents who came to search and seize.²⁴¹ Henry’s complaint was more procedural than substantive: he sought to control federal officers’ search-and-seizure authority through restrictions based on state constitutional common law, not by any universal rules.

Consider also the warnings that Massachusetts Anti-Federalist John DeWitt issued about the authority that Congress would give to federal tax collectors under the proposed Constitution:

They are to determine, *and you are to make no laws inconsistent with such determination*, whether such Collectors shall carry with them any paper, purporting their commission, or not—whether it shall be a general warrant, or a special one—whether written or printed—whether any of your goods, or your persons shall be exempt from distress, and in what manner either you or your property is to be treated when taken in consequence of such warrants. They will have the liberty of entering your houses by night as well as by day for such purposes.²⁴²

DeWitt’s admonition was aimed not simply at the prospect of Congress’ formulating search-and-seizure policy that would be antithetical to general

²³⁹ Of course, the Fourth Amendment ultimately did ban general warrants across the board. But this does not take away from the fact that the focus of A Maryland Farmer’s pre-ratification concern was not the absence of such a uniform rule but the potential conflict between the Maryland rule forbidding general warrants and a federal rule permitting them.

²⁴⁰ 3 ELLIOT’S DEBATES, *supra* note 200, at 58 (emphasis added).

²⁴¹ *Id.* at 57.

²⁴² John DeWitt, Essay to the Free Citizens of the Commonwealth of Massachusetts No. IV (Dec. 1787), *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 188, at 29, 33 (emphasis added).

common-law principles. Rather, he cautioned his fellow Bay Staters that they would be unable, via the typical routes of judicial and legislative rulemaking, to require federal officials to follow *Massachusetts* law: “you are to make no laws inconsistent with [Congress’s] determination.”

Another variation on this theme is seen in Anti-Federalist Federal Farmer’s explicitly linking a demand for limitations on federal search-and-seizure authority with an invocation of Magna Carta’s “law of the land” provision.²⁴³ In suggesting various amendments to the Constitution, he proposed

that all persons shall have a right to be secure from all unreasonable searches and seizures of their persons, houses, papers, or possessions; and that all warrants shall be deemed contrary to this right, if the foundation of them be not previously supported by oath, and there be not in them a special designation of persons or objects of search, arrest, or seizure: and *that no person shall be exiled or molested in his person or effects, otherwise than by the judgment of his peers, or according to the law of the land.*²⁴⁴

Thus, Federal Farmer specifically conjoined the requirements of a specific warrant, supported by oath, with the common-law constraint, stemming from Chapter 29 of Magna Carta, that no person be deprived of liberty or property other than “according to the law of the land.”

Consistent with the strain of framing-era thought that posited that the common law was jurisdiction specific, there is significant evidence that, by “the law of the land,” Federal Farmer was referring not to general or natural law but to the law of particular States. For one thing, although his identity is

²⁴³ Coke explained this provision as follows:

That no man be taken or imprisoned, . . . be disseised . . . of his freehold (that is) lands, or livelihood, or his liberties, or free customs, . . . be out lawed . . . be exiled . . . be in any [way] destroyed . . . nor condemned . . . but by the judgment of his Peers, that is, equals, or according to the Law of the Land.

EDW. COKE, *THE SECOND PART OF THE INSTITUTES OF THE LAWE OF ENGLAND* 46 (London, M. Fleisher & R. Young 1642). Although the “law of the land” clause is sometimes rendered as chapter 39, Coke numbered it chapter 29, and that is how it was referred to in framing-era sources. See Davies, *supra* note 32, at 45 n.108. This Article follows that convention.

²⁴⁴ Letter from the Federal Farmer (Jan. 20, 1788), *reprinted in* 2 *THE COMPLETE ANTI-FEDERALIST*, *supra* note 188, at 323, 328 (emphasis added); see Davies, *supra* note 32, at 101 (observing that Federal Farmer combined a proposed ban on general warrants and a proposed requirement that arrests follow “the law of the land”). The Federal Farmer’s essays have been described as “[t]he best known of the Antifederalist pamphlets,” “[a]mong the most important writings published by Antifederalists in the contest over ratification,” and “a key resource for the Constitution’s opponents.” Robert H. Webking, *Melancton Smith and the Letters from the Federal Farmer*, 44 *WM. & MARY Q.* 510, 510 (1987).

still unclear, Federal Farmer is now believed to have been Melancton Smith of New York.²⁴⁵ And, as previously noted, Smith proposed an amendment that would have expressly required that federal officers “be bound, by oath or affirmation, not to infringe the constitutions or rights of the *respective* states.”²⁴⁶ Such an amendment would have done expressly what the Fourth Amendment can be read as doing by implication: holding federal officers to the different search-and-seizure standards enshrined in the constitution of each “respective” State.

Additionally, “law of the land” provisions in early colonial and state legislation generally referred to the law of a specific jurisdiction.²⁴⁷ At least seven colonies were home to iterations of Chapter 29 that referred specifically to the laws of those jurisdictions,²⁴⁸ “suggest[ing] that the law-of-the-land formulation from Magna Carta was viewed in the American colonies in the late seventeenth and early eighteenth centuries as equivalent to established law (either statute or customary).”²⁴⁹ Chapter 29 was thus widely viewed in the colonies as requiring only that local positive law be followed in arresting and securing people for trial.²⁵⁰ And references in several post-1776 state constitutions to the “law of the land” “suggest a continued equivalence, at least for some purposes, between the ‘law of the land’ and the positive law of the state.”²⁵¹

²⁴⁵ See Webking, *supra* note 244, at 511; Gordon S. Wood, *The Authorship of the Letters from the Federal Farmer*, 31 WM. & MARY Q. 299 (1974). *But see* David E. Narrett, *A Zeal for Liberty: The Antifederalist Case Against the Constitution in New York*, 69 N.Y. HIST. 285, 291 n.9 (1988) (expressing skepticism that Smith was “Federal Farmer”).

²⁴⁶ 2 ELLIOT’S DEBATES, *supra* note 200, at 409–10 (emphasis added).

²⁴⁷ See Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 435 (2010) (“For the most part, these enactments . . . paraphrased ‘law of the land’ to refer specifically to the duly enacted law of the colony itself.”).

²⁴⁸ See, e.g., THE BODY OF LIBERTIES OF 1641, *reprinted in* THE COLONIAL LAWS OF MASSACHUSETTS 33 (Boston, William H. Whitmore 1889) (“expresse law of the Country”); THE CHARTER OF LIBERTIES AND PRIVILEGES GRANTED BY HIS ROYALL HIGHNESSE TO THE INHABITANTS OF NEW YORKE AND ITS DEPENDENCYES (Oct. 30, 1683), *reprinted in* 1 THE COLONIAL LAWS OF NEW YORK: YEAR 1664 TO THE REVOLUTION 111, 113 (Albany, James B. Lyon 1894) (“the Law of this province”); AN ACT DECLARING WHAT ARE THE RIGHTS AND PRIVILEGES, OF HIS MAJESTY’S SUBJECTS, INHABITING WITHIN THIS PROVINCE OF EAST NEW JERSEY (1698), *reprinted in* AARON LEAMING & JACOB SPICER, THE GRANTS, CONCESSIONS, AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW JERSEY 368, 371 (Philadelphia, W. Bradford, 1881) (same); Act of Nov. 27, 1700, ch. 19, § 1, 1700 Pa. Stat. 18, (“the laws of this province and territories thereof”).

²⁴⁹ Williams, *supra* note 247, at 436.

²⁵⁰ See *id.* at 436–37 (asserting “that law of the land’ was understood under seventeenth- and eighteenth-century English law in a primarily positivist manner”).

²⁵¹ *Id.* at 439.

And Professor Davies has argued persuasively that it was not the Fourth Amendment at all but rather the Fifth Amendment's Due Process Clause²⁵² that was understood as incorporating Chapter 29 of Magna Carta and encompassing restrictions on federal searches and seizures beyond the requirements of the Warrant Clause.²⁵³ Accordingly, Federal Farmer's proposal of a proto-Fourth Amendment, linked to a reiteration of Magna Carta's "law of the land" provision, is highly significant. If a widely understood meaning of "law of the land" was, in effect, the "law of the State," then his proposal effectively meant and would have been understood as meaning that no one could be searched and seized other than by the law of the State where the search or seizure occurred.

D. The Anti-Federalist Origins of the Bill of Rights

It is significant that the battle over ratification resulted in the adoption of some common-law rights as the Bill of Rights. For if, at least for the Anti-Federalists, these common-law rights had no existence separate and apart from their adoption in the States, and if the common law differs in every State and can change over time, then it follows that the common-law rights adopted as the federal Bill of Rights also might vary by State and over time. True, the Anti-Federalists lost the ratification battle. But "we distort history when we ignore the losers in a conflict, because losing movements are forces which at every moment have influenced the final outcome."²⁵⁴ Given the Bill of Rights' status as the product of the bargained-for exchange between the Federalists and the Anti-Federalists, it is appropriate to interpret it as the Anti-Federalist essays and speeches suggest they did.

The Bill of Rights was added to the Constitution as an implicit condition for ratification. Without it, ratification almost surely would have failed.²⁵⁵ The Anti-Federalists initially were in the majority in the key States of Massachusetts, New York, and Virginia, as well as in New Hampshire and

²⁵² U.S. CONST. amend V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . .").

²⁵³ See Davies, *supra* note 32; Davies, *supra* note 137.

²⁵⁴ Robin Brooks, *Alexander Hamilton, Melancton Smith, and the Ratification of the Constitution in New York*, 24 WM. & MARY Q. 339, 339 (1967).

²⁵⁵ See NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 97 (1937) ("The general view . . . is that the Constitution would never have been ratified . . . but for the tacit understanding that it would be amended so as to embody the customary guaranties of personal liberty.").

North Carolina.²⁵⁶ Indeed, in New York, popular sentiment was opposed to ratification by a margin of greater than two to one.²⁵⁷ The Federalists realized that they would need to promise adoption of such a bill shortly after ratification in order to ensure that the Constitution would be ratified.²⁵⁸ In Massachusetts, the first state in which the Constitution met with serious opposition, it first “seemed doubtful that enough votes in favor could be mustered.”²⁵⁹ Ratification would have been impossible there had the Federalists not “siphon[ed] off votes from the Antifederalist majority” by agreeing to propose amendments to Congress.²⁶⁰ Likewise, “the Federalists of Virginia realized that they were not a commanding majority and would have to compromise to avert rejection of the Constitution or irresistible demands for its radical modification.”²⁶¹ That compromise consisted of a proposal for a bill of rights.²⁶²

Although a sufficient number of States had ratified prior to ratification by the New York and Virginia conventions,²⁶³ a Union without these States would

²⁵⁶ See MAIN, *supra* note 197, at 288 app. D (showing that initial votes in Massachusetts, New Hampshire, New York, and North Carolina were against ratification, while Virginia’s convention was tied); Lienesch, *supra* note 189, at 348 (characterizing as an exaggeration, “though probably not by much,” a contemporaneous estimate that 90% of North Carolinians opposed ratification); Cecelia M. Kenyon, *Men of Little Faith: The Anti-Federalists on the Nature of Representative Government*, 12 WM. & MARY Q. 3, 5 (1955) (“A very large proportion of the people in 1787–1788 were Anti-Federalists . . .” (emphasis omitted)); Wilmarth, *supra* note 184, at 1288 (observing that Federalists were in minority in Massachusetts, New Hampshire, New York, and Virginia).

²⁵⁷ See Forrest McDonald, *The Anti-Federalists, 1781–1789*, in THE REINTERPRETATION OF THE AMERICAN REVOLUTION 1763–1789, at 365, 373 (Jack P. Greene ed., 1968); see also CUDDIHY, *supra* note 236, at 702 (“The New York convention commenced with a huge majority of its members opposing the Constitution.”).

²⁵⁸ See LASSON, *supra* note 255, at 94 (“[T]he friends of the Constitution saw that with the parties so nearly equal and with the outcome so doubtful, some concession would have to be made to save the Constitution from defeat . . .”); Michael J. Zydney Mannheimer, *Self-Government, the Federal Death Penalty, and the Unusual Case of Michael Jacques*, 36 VT. L. REV. 131, 146 (2011) (“James Madison himself believed that ratification by Virginia would have been impossible without a pledge to adopt the recommended amendments.”).

²⁵⁹ THE STATES RIGHTS DEBATE, *supra* note 188, at 91.

²⁶⁰ CUDDIHY, *supra* note 236, at 701; accord THE STATES RIGHTS DEBATE, *supra* note 188, at 91 (recounting that opponents of Constitution in Massachusetts, including Samuel Adams and John Hancock, eventually assented on the condition that amendments be recommended).

²⁶¹ CUDDIHY, *supra* note 236, at 702.

²⁶² *Id.*; accord THE STATES RIGHTS DEBATE, *supra* note 188, at 92 (observing that when ratification debate moved to Virginia, the advocates of ratification adopted “[t]he Massachusetts formula” of promising that amendments be recommended in exchange for ratification).

²⁶³ See MAIN, *supra* note 197, at 288 app. D.

have been almost inconceivable.²⁶⁴ Without New York, which separated New England from the rest of the young nation, and Virginia, which stretched from the Atlantic to the Mississippi, the Union would have been left in three noncontiguous pieces, and deprived of almost 30% of its population²⁶⁵ and one of its busiest ports. Only by pledging to advance the adoption of a bill of rights as one of the first orders of business of the new government did the Federalists secure ratification by swaying a sufficient number of moderate Anti-Federalists to their fold.²⁶⁶

In particular, the views of the moderate Anti-Federalists, those who were at first opposed to the Constitution but ultimately voted for it based on the promise of a bill of rights, are absolutely critical. While hard-line Anti-Federalists who voted against the Constitution were not a party to the compromise, the moderates were. At the New York ratifying convention, following ratification by ten other States, these more moderate Anti-Federalists sought not outright rejection of the Constitution but “assurances that the defects of the proposed Constitution could be remedied.”²⁶⁷ Thus, we have to look to men like Melancton Smith, who led the Anti-Federalists at the New York ratifying convention as their “most eloquent and outspoken” member.²⁶⁸ Smith was the leader of the moderate New York Anti-Federalists and voted in favor of ratification, taking eleven other moderate Anti-Federalists with him.²⁶⁹ It was Smith and his followers who provided the “bare margin of victory for

²⁶⁴ See THE STATES RIGHTS DEBATE, *supra* note 188, at 92 (“Even if enough states ratified to put the Constitution into effect, no one entertained the slightest hope for its success without New York and Virginia . . .”).

²⁶⁵ See Mannheim, *supra* note 258, at 146.

²⁶⁶ See CUDDIHY, *supra* note 236, at 706 (asserting that ratification was achieved in Massachusetts, New Hampshire, New York, and Virginia only because it was thought predicated on approval of amendments); THE STATES RIGHTS DEBATE, *supra* note 188, at 92 (recounting Madison’s acquiescence to amendments lest Anti-Federalists succeed in postponing ratification process); see also Mannheim, *supra* note 209, at 108–09.

²⁶⁷ Richard B. Morris, *John Jay and the Adoption of the Federal Constitution in New York: A New Reading of Persons and Events*, 63 N.Y. HIST. 133, 149 (1982); see also Linda Grant De Pauw, *E. Wilder Spaulding and New York History*, 49 N.Y. HIST. 142, 152 (1968) (“[T]he Antifederalist program [in New York] was not to reject the Constitution, but to adopt it with previous amendments”); Narrett, *supra* note 245, at 297 (“[M]ost Antifederalists [at the New York convention] favored the reform rather than the rejection of the Constitution.”).

²⁶⁸ Narrett, *supra* note 245, at 291.

²⁶⁹ See Brooks, *supra* note 254, at 353, 357; Morris, *supra* note 267, at 162; Narrett, *supra* note 245, at 288–89. For the roll call vote, see 2 ELLIOT’S DEBATES, *supra* note 200, at 413.

the Constitution.”²⁷⁰ Thus, it may well be that Smith was “indispensable to successful ratification” in New York.²⁷¹

Alone among the leaders of the Anti-Federalist cause, Smith possessed “a sufficient degree of moderation to recognize the crisis that exclusion from the Union might produce.”²⁷² Aside from the “economic and political chaos” that would result from New York’s being left out of the Union, rejection of the Constitution also risked secession of the southern part of the State, including New York City.²⁷³ Smith and his allies thus favored union but based only on the prospect of amending the Constitution to better reflect the legitimate state sovereignty concerns of the Anti-Federalists.²⁷⁴ Accordingly, the convention reached a compromise that the Constitution would be ratified but would also be accompanied both by proposed amendments and by a letter sent to the other States calling for a second convention at which amendments could be considered.²⁷⁵

Recall that one of these proposed amendments, suggested by Smith himself, would require that federal officials “be bound, by oath or affirmation, not to infringe the constitutions or rights of the respective states.”²⁷⁶ Recall also that it was likely Smith who, as the Federal Farmer, proposed in an essay that federal search-and-seizure authority be constrained by a provision that both foreshadowed the Fourth Amendment and contained an addendum inspired by Chapter 29 of Magna Carta that “the law of the land”—that is, of the State—be adhered to when federal officials interfere with one’s “person or effects.”²⁷⁷ Because that small band of moderate Anti-Federalists led by Smith formed the fulcrum upon which ratification, and a viable Union, turned, Smith’s views should be considered paramount when interpreting the Bill of Rights. His views suggest a constraint on federal search-and-seizure authority that looks to state law as its benchmark.

Even after Virginia and New York became the tenth and eleventh States to ratify, and the First Congress was in session, “[r]atification remained

²⁷⁰ Brooks, *supra* note 254, at 339; *see also* Morris, *supra* note 267, at 162 (observing that final vote for ratification in New York was 30–27); Narrett, *supra* note 245, at 289 (same).

²⁷¹ Brooks, *supra* note 254, at 357.

²⁷² *Id.* at 350.

²⁷³ Narrett, *supra* note 245, at 289; *see also* Brooks, *supra* note 254, at 350.

²⁷⁴ *See* Narrett, *supra* note 245, at 291.

²⁷⁵ *See* Brooks, *supra* note 254, at 354–55; *see also* 2 ELLIOT’S DEBATES, *supra* note 200, at 413–14.

²⁷⁶ 2 ELLIOT’S DEBATES, *supra* note 200, at 409–10.

²⁷⁷ Letter from the Federal Farmer, *supra* note 244, at 328 (emphasis added); *see also supra* notes 243–53 and accompanying text.

incomplete, revocable, and precarious.”²⁷⁸ In addition to New York, three other States had coupled their ratification with a proposal “for a second convention to dilute the powers that the federal government had obtained at Philadelphia.”²⁷⁹ The New York ratifying convention’s letter in particular caused grave concern for the friends of the Constitution.²⁸⁰ Had an adequate bill of rights not been quickly adopted, “a second convention might have . . . gutted the Constitution” via much more radical changes in the constitutional structure.²⁸¹ James Madison viewed the result of the New York ratifying convention—ratification coupled with proposed amendments and a call for a second convention—“to be a complete victory for the Antifederalists.”²⁸² The Bill of Rights was necessary, in Madison’s words, “in order to extinguish opposition” to the new Constitution.²⁸³

On a personal level, Madison saw that he needed to back the proposed amendments following ratification or risk political suicide.²⁸⁴ In his home State of Virginia, the “enemies” of the Constitution “had been winning one victory after another since” ratification.²⁸⁵ The Virginia legislature rejected Madison’s bid for a U.S. Senate seat and instead chose two Anti-Federalists to fill the positions.²⁸⁶ Through what we would today call “gerrymandering,” his political enemies almost succeeded in keeping him out of the U.S. House of Representatives as well.²⁸⁷ Indeed, he won election to the House only because he made a commitment to his constituents to pursue a bill of rights,²⁸⁸ and he

²⁷⁸ CUDDIHY, *supra* note 236, at 705.

²⁷⁹ *Id.* at 704.

²⁸⁰ THE STATES RIGHTS DEBATE, *supra* note 188, at 94–95.

²⁸¹ CUDDIHY, *supra* note 236, at 706; *accord* Ellis, *supra* note 226, at 298 (asserting that Madison “recognized that failure to amend the Constitution would fuel the movement for a second constitutional convention, which was in many ways a more dangerous alternative”); THE STATES RIGHTS DEBATE, *supra* note 188, at 94–95 (discussing Madison’s concern that second convention would lead to crisis).

²⁸² De Pauw, *supra* note 267, at 153.

²⁸³ THE STATES RIGHTS DEBATE, *supra* note 188, at 96 (quoting Letter from James Madison to Thomas Jefferson (Mar. 29, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 6–7 (Julian P. Boyd ed., 1958)) (internal quotation marks omitted).

²⁸⁴ *See* CUDDIHY, *supra* note 236, at 770 (“Madison did not write the [Fourth] [A]mendment because its ideas commanded constitutional expression but because he was under the political gun of Antifederalism.”).

²⁸⁵ *Id.* at 704.

²⁸⁶ *Id.*

²⁸⁷ *See id.*

²⁸⁸ *See id.* at 706–07 (observing that Madison “readily admitted that he would not have been elected without a Federalist commitment to amendments, nor would Virginia have ratified the Constitution in the absence of that commitment”); *see also* STEVEN R. BOYD, THE POLITICS OF OPPOSITION: ANTIFEDERALISTS AND THE ACCEPTANCE OF THE CONSTITUTION 157–58 (1979) (“[D]uring the campaign for a seat in the House of Representatives, Madison pledged to work for prompt congressional amendment of the Constitution.”).

felt duty bound to follow through on this pledge.²⁸⁹ Moreover, at the time he proposed the Bill of Rights in the House, North Carolina and Rhode Island still had not ratified, and “[a] prominent North Carolina Federalist confided to Madison that his state would ‘not confederate’ without amendments.”²⁹⁰ Madison conceded privately that the Bill of Rights was a “direct response[] to these political pressures.”²⁹¹

Significantly, in introducing and advocating for his proposed bill of rights in the House of Representatives, Madison used language that suggests that he understood the differentiated nature of the common law rights encompassed by the Bill. He urged adoption of the Bill on the ground that most of the opponents of the Constitution “disliked it because it did not contain effectual provisions against encroachments on particular rights, and those safeguards which they have been long accustomed to have interposed between them and the magistrate who exercises the sovereign power.”²⁹² By “those safeguards which they have been long accustomed to,” Madison most likely meant the common law rights of Englishmen enshrined in state constitutions and bills of rights. Concededly, he might have had in mind a pre-Realist, undifferentiated view of these common law rights. But when read together with Madison’s full-throated defense of a differentiated common law in his celebrated 1800 *Report on the Virginia Resolutions*,²⁹³ this statement suggests otherwise.

Once the Bill of Rights had been proposed by Congress and sent to the States for ratification, the Anti-Federalists were, for the most part, placated. As Jefferson wrote to Marquis de Lafayette in 1790, “the amendments proposed by Congress, have brought over almost all their followers.”²⁹⁴ It seems almost inconceivable that the Anti-Federalists’ passionate advocacy that the

²⁸⁹ See THE STATES RIGHTS DEBATE, *supra* note 188, at 96 (“As a member of the First Congress, Madison felt ‘bound in honor and duty’ to fulfill this election pledge.”); see also Ellis, *supra* note 226, at 298 (noting that Madison’s “honor was at stake, since he had personally guaranteed the Virginia ratifying convention that he would support the move to amend the Constitution”); Clancy, *supra* note 67, at 1045 (quoting a letter from Madison stating: “As an honest man I feel bound by this consideration.” (emphasis omitted)).

²⁹⁰ See CUDDIHY, *supra* note 236, at 704; see also THE STATES RIGHTS DEBATE, *supra* note 188, at 95 (discussing a letter from Madison to Jefferson “lamenting North Carolina’s failure to ratify the Constitution”). In November 1789, after Madison proposed the Bill of Rights in Congress, a second convention was called in North Carolina, which approved ratification, after an initial convention had voted against ratification less than a year earlier by a vote of 184 to 83. See Lienesch, *supra* note 189, at 363–64.

²⁹¹ CUDDIHY, *supra* note 236, at 706.

²⁹² 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1025 (1971) (statement of Rep. Madison, June 8, 1789).

²⁹³ See *supra* note 228 and accompanying text.

²⁹⁴ Letter from Thomas Jefferson to Marquis de Lafayette (Apr. 2, 1790), reprinted in SCHWARTZ, *supra* note 292, at 1004, 1004.

Constitution be amended to incorporate the common-law rights of Englishmen would have been satisfied had they not believed that those rights would be dictated by state law.

In short, the Bill of Rights was attributable almost entirely to the Federalists' efforts to placate moderate Anti-Federalists. As Murray Dry put it: “[W]hile the Federalists gave us the Constitution, the Anti-Federalists gave us the Bill of Rights.”²⁹⁵ For these reasons, “Anti-Federalist political thought is essential to understanding the meaning of the Bill of Rights.”²⁹⁶ Thus, when interpreting the Bill, we must look to what men like moderate Anti-Federalist leader Melancton Smith sought to accomplish with such a Bill. Incorporation of the Anti-Federalist worldview into our interpretive strategies suggests a new view of the Bill of Rights, one that looks to state law as the benchmark for federal rights, at least where the capacious language of the Bill cries out for a benchmark.

E. Reading Contingency into the Fourth Amendment

While the Warrant Clause of the Fourth Amendment sets forth a few uniform rules for the issuance of warrants, the repository of most constitutional search-and-seizure rules is the Reasonableness Clause. And the standard of “unreasonable searches and seizures” cries out for a benchmark against which federal searches and seizures are to be compared. The Supreme Court has used as its primary benchmark the common law of 1791. Assuming that the Court is correct, it should not continue to ignore that the common law, as A Maryland Farmer put it, and as demonstrated above, existed “in various degrees and under different modifications” in the respective States.²⁹⁷ Rather, on an originalist account, it is more plausible to read the Constitution as providing that federal search-and-seizure authority, other than those rules relating to the content and issuance of warrants, is to be governed by state law.

²⁹⁵ Murray Dry, *The Anti-Federalists and the Constitution*, in PRINCIPLES OF THE CONSTITUTIONAL ORDER: THE RATIFICATION DEBATES 63, 80 (Robert L. Utley, Jr. ed., 1989).

²⁹⁶ Saul A. Cornell, *The Changing Historical Fortunes of the Anti-Federalists*, 84 NW. U. L. REV. 39, 67 (1989); accord Palmer, *supra* note 184, at 105 (“The Antifederalist origin to the demand for a Bill of Rights dictates a state-oriented approach to the Bill of Rights.” (footnote omitted)); see also Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 WM. & MARY BILL RTS. J. 73, 84–88 (2005) (discussing the “Gentlemen’s Agreement” between the Federalists and moderate Anti-Federalists).

²⁹⁷ Essay by A [Maryland] Farmer No. I, *supra* note 221, at 13; see also *supra* notes 219–20 and accompanying text.

Search-and-seizure principles varied across state borders and fluctuated over time during the critical three decades preceding adoption of the Bill of Rights. The moderate Anti-Federalists, who demanded the adoption of a bill of rights as the price for ratification of the Constitution, recognized that those principles were indeterminate. By 1800, former Federalist James Madison himself fully embraced the view that the common law varied from State to State.

The Bill of Rights was designed as a palliative for the anxieties of moderate Anti-Federalists so that the Federalists might win sufficient support for ratification of the Constitution. What the Anti-Federalists sought was the promise that federal officials would adhere to common-law constraints on search and seizure. What the Anti-Federalists received in return was the Fourth Amendment. Based on their preratification calls for protections vis-à-vis federal searches and seizure, as well as their more general objections to the Constitution, the Anti-Federalists likely had as their premise that the benchmark for determining which searches and seizures were “unreasonable” would be state law in each respective State. And even Federalist Roger Sherman, in dismissing the necessity of a federal bill of rights, reasoned that without such a Bill, state constitutions and bills of rights would still operate to constrain the federal government.²⁹⁸ It would be odd to now interpret the Anti-Federalist-driven federal Bill to have actually *removed* these constraints.

To be sure, it would be difficult to conclude that this was a consensus position. Yet the dominant originalist methodologies recognize that not every question of original semantic meaning of the constitutional text was the subject of consensus in 1791. At the point where consensus breaks down, constitutional interpretation must give way to constitutional construction, “and the meaning of the text must be *determined* rather than found.”²⁹⁹ Under these circumstances, the best an originalist approach can hope to do is “to adopt a construction of the text that is consistent with its original meaning” even if “not deducible from it.”³⁰⁰ In order to constrain the act of construction, it is critical “to take into account constitutional principles that underlie the text,” principally “separation of powers and federalism.”³⁰¹ For reasons discussed at length, a proper construction of the provisions of the Bill of Rights must strive to give heavy weight to its origins with the moderate Anti-Federalists as a

²⁹⁸ See *supra* note 203 and accompanying text.

²⁹⁹ RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 120 (2004).

³⁰⁰ *Id.* at 121.

³⁰¹ *Id.* at 125.

reclamation of federalism from the centralizing tendencies of the un-amended Constitution. The Supreme Court's current approach to the Fourth Amendment, which posits a uniform and static common law of search and seizure as of 1791, does not do so.

Only a contingent Fourth Amendment does. That is to say, the Fourth Amendment should be construed as binding federal officers and agents by the state search and seizure rules in each of the respective States. The Warrant Clause, by its terms, dictates the requisite form and contents of search and arrest warrants. But for all the questions covered by the Reasonableness Clause—when warrants are required, how they must be executed, when and how warrantless arrests and searches can be made, and so on—federal officers would be bound by state law when they search and seize.³⁰²

The idea of a contingent Fourth Amendment is entirely consistent with an originalist approach to constitutional interpretation. As Justice Scalia has acknowledged, although the Fourth Amendment was understood in 1791 as incorporating “background sources of law,” changes in those predicate sources of law would result in concomitant changes in how the Fourth Amendment is to be applied.³⁰³ Thus, “changes in the law of property to which the Fourth Amendment referred would not alter the Amendment’s meaning.”³⁰⁴ If the Fourth Amendment meant in 1791 that each respective State’s search-and-seizure law was binding on federal officers, changes in that law would not change that meaning; it would merely change the outcome in particular cases. As Justice Scalia concluded: “There is nothing new or surprising in the proposition that our unchanging Constitution refers to other bodies of law that might themselves change. . . . This reference to changeable law presents no problem for the originalist.”³⁰⁵ And, although Justice Scalia did not make the point explicitly, what goes for changes in the underlying sources of law over time would also go for changes as one crosses state boundaries.

As our Union was made possible only by virtue of the moderate Anti-Federalists’ reluctant accession to the Constitution in exchange for the

³⁰² This would of course be inapplicable to searches and seizures undertaken outside the jurisdiction of any State, such as in the District of Columbia or on the high seas. In such cases, it may well be legitimate for the courts to derive search-and-seizure rules from those adhered to in the States generally. And, again, such a reimagining of the Fourth Amendment would affect only federal, not state, actors. *See supra* note 6.

³⁰³ *Georgia v. Randolph*, 547 U.S. 103, 143 (2006) (Scalia, J., dissenting).

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 144.

promise of a bill of rights, their views should be paramount in interpreting the Bill. If the Court is to continue to use the common law of 1791 as the primary source for the meaning of the Fourth Amendment, the Reasonableness Clause is most plausibly read as demanding that the respective *state* “right[s] . . . to be secure . . . against unreasonable searches and seizures, shall not be violated” by the federal government.³⁰⁶

IV. MODERN IMPLICATIONS OF A CONTINGENT FOURTH AMENDMENT

A rule that strictly calibrates federal search-and-seizure authority to that granted by the respective States would sometimes result in a diminishment and sometimes an enhancement of federal search-and-seizure authority. What is critical is that by yoking federal authority to state norms, the contingent Fourth Amendment reserves to each State the responsibility for establishing the contours of all searches and seizures occurring within its boundaries, by both state and federal officials.

For example, rather than the rule of *Atwater v. City of Lago Vista*³⁰⁷ permitting warrantless arrests for even minor offenses,³⁰⁸ a contingent Fourth Amendment would be read to require that federal officials arrest for minor offenses only to the extent that their state counterparts can do the same. Of course, it is rare for federal officials to make arrests for minor crimes, so such cases would be few and far between.³⁰⁹ But imagine the not unlikely scenario of another Gail Atwater failing to secure her children in seatbelts while driving in one of Virginia’s many national parks.³¹⁰ Such conduct would constitute a misdemeanor subjecting her to a maximum sentence of six months imprisonment, in addition to a possible fine, plus court costs.³¹¹ Consistent

³⁰⁶ U.S. CONST. amend. IV.

³⁰⁷ 532 U.S. 318, 347–51 (2001).

³⁰⁸ See *supra* Part I.B.2.a.

³⁰⁹ It is more common for arrests by state officials for minor offenses to evolve into federal prosecutions when evidence of a federal offense is uncovered as a result of the arrest. See Wayne A. Logan, *Erie and Federal Criminal Courts*, 63 VAND. L. REV. 1243, 1252–53 (2010). Such a scenario brings up the added complication of whether the exclusionary rule should operate to bar from federal court the use of evidence discovered by state officials as a result of a violation of state law. Accordingly, I have set such cases aside.

³¹⁰ See *Virginia*, NAT’L PARK SERVICE, <http://www.nps.gov/state/va/index.htm?program=all> (last visited Apr. 27, 2015).

³¹¹ See 18 U.S.C.A. § 1865(a) (West 2014) (“A person that violates any regulation authorized by section 100751(a) of title 54 shall be imprisoned not more than 6 months, fined under this title, or both, and be adjudged to pay all cost of the proceedings.”); 54 U.S.C.A. § 100751(a) (West 2014) (“The Secretary [of the Interior] shall prescribe such regulations as the Secretary considers necessary or proper for the use and management of System units.”); *id.* § 100751(c) (“Criminal penalties for a violation of a regulation prescribed

with *Atwater*, federal law would permit a full custodial arrest of our hypothetical driver.³¹² But Virginia law generally forbids the full custodial arrest of anyone suspected of a misdemeanor and requires that a summons be issued instead.³¹³ It is hardly a stretch of the English language to say that the fact that our hypothetical driver's arrest would have been illegal if undertaken by Virginia authorities, for the same conduct, would render her arrest by the federal government in Virginia an "unreasonable . . . seizure[]" within the meaning of the Fourth Amendment.

In other cases the federal government would have greater authority than it has under current law. Consider the pre-*Payton* case of *United States v. Reed*, in which federal Drug Enforcement agents forcibly entered the defendant's apartment in New York to arrest her without a warrant for a federal drug offense.³¹⁴ Such a forcible warrantless entry to arrest would have been authorized by a state statute had New York authorities been performing the arrest.³¹⁵ Correctly predicting the outcome of *Payton v. New York*,³¹⁶ the U.S. Court of Appeals for the Second Circuit held that the warrantless entry violated the Fourth Amendment.³¹⁷ Yet, if the Fourth Amendment is best read as a federalism-based constraint on federal action, then the one-size-fits-all rule eventually established by *Payton*, requiring warrants for all in-home arrests, state and federal, is questionable.³¹⁸ And if *Payton* was an unwarranted incursion on state power, then *Reed* was at least as unwarranted an incursion on federal power. Where state law expressly permits warrantless forcible in-home arrests, and assuming the Fourteenth Amendment does not forbid them, federal agents ought to be able to rely on the permissive state statute and conduct such arrests as well.

under this section are provided by section 1865 of title 18."); 36 C.F.R. § 4.15(a) (2015) ("Each operator and passenger occupying any seating position of a motor vehicle in a park area will have the safety belt or child restraint system properly fastened at all times when the vehicle is in motion.").

³¹² See 54 U.S.C.A. § 102701(a)(2)(B) (permitting a park ranger to "make arrests without warrant for any offense against the United States committed in the presence" of the ranger).

³¹³ See VA. CODE ANN. § 18.2-11 (West 2012); *id.* § 19.2-74(A)(1) (West Supp. 2014); see also *Virginia v. Moore*, 553 U.S. 164, 167 (2008).

³¹⁴ 572 F.2d 412, 415-16 (2d Cir. 1978).

³¹⁵ See N.Y. CRIM. PROC. LAW § 140.15(4) (McKinney 2004) ("In order to effect . . . an arrest, a police officer may enter premises in which he reasonably believes [a] person [subject to arrest] to be present . . ."). The context makes clear that no warrant is required. See *Payton v. New York*, 445 U.S. 573, 578 & n.9 (1980).

³¹⁶ 445 U.S. at 590. For a discussion of *Payton*, see *supra* Part I.B.2.b.

³¹⁷ See *Reed*, 572 F.2d at 424.

³¹⁸ *Cf. supra* note 6 (reserving judgment on whether and to what extent the Fourth Amendment should be read to bind the States via the Fourteenth Amendment).

Note that even in areas where the Court has established a liberty-enhancing Fourth Amendment rule, it has, at the same time, allowed the uniform rule to “preempt the field,” subjecting all future refinements of the rule to a stultifying uniformity as well. Accordingly, a subsequent judicial gloss on that rule might result in a net diminishment of liberty across the board. A contingent Fourth Amendment would not only free the federal government from the confines of the rule in jurisdictions that do not recognize it but also more strictly circumscribe federal action in those jurisdictions that do recognize it.

Consider the knock-and-announce rule. The Court held in *Wilson v. Arkansas* that all law enforcement, state and federal, must generally abide by the liberty-enhancing rule that officers serving a warrant must first knock and announce their presence before breaking doors.³¹⁹ However, the Court ominously warned in the same opinion “that under certain circumstances the presumption in favor of announcement necessarily would give way to contrary considerations.”³²⁰ It was not long before the Court cut back on the general rule by announcing—across the board, for state and federal officials alike—that as long as “police . . . have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would . . . allow[] the destruction of evidence,” prior announcement could be dispensed with.³²¹ In a subsequent case involving federal agents, the Court held that it was enough that the agents waited fifteen to twenty seconds for them to assume that destruction of evidence was afoot, justifying their breaking of doors.³²² The Court reasoned that, irrespective of the layout of the particular premises, twenty seconds was generally long enough for a suspect to begin to act on an inclination to begin flushing drugs down the toilet.³²³ Thus, the Court has put its imprimatur on a twenty-second outer bound beyond which federal and state officers need not wait before breaking doors to serve a warrant in the typical drug case.

But reasonable people can come to different conclusions as to how long officers must wait after knocking and announcing before the probability of destruction of evidence becomes too high to tolerate.³²⁴ While this judgment will depend in part on readily ascertainable facts, such as the physical nature of

³¹⁹ 514 U.S. 927, 934 (1995).

³²⁰ *Id.* at 935.

³²¹ *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997).

³²² *See United States v. Banks*, 540 U.S. 31, 38 (2003).

³²³ *See id.* at 39–42.

³²⁴ *See id.* at 38 (observing that “this call is a close one”).

different sorts of contraband, it will also be informed by normative assessments of where liberty must yield to order. These normative assessments will differ not only from person to person but also from State to State. The idea that a wait time of fifteen to twenty seconds is a satisfactory accommodation of these interests for over 315 million people³²⁵ spread across fifty states borders on the absurd. Each State, of course, can impose on its *own* officers a more stringent rule than that set by the Supreme Court in *Banks*. But the Fourth Amendment should be interpreted to mean that the each State is free to set its own policy on this point for *all* searches within the State, both state and federal. That is the promise of a contingent Fourth Amendment.

One might object that a contingent Fourth Amendment would cause an administrative headache for federal law enforcement personnel, who would have to become familiar with the search-and-seizure rules of every jurisdiction in which they operate. This is a real concern. Of course, in an era in which most commentators view the increasing federalization of crime as highly problematic,³²⁶ creating another hoop through which law enforcement officers must jump in order to enforce federal criminal law may not be such a bad idea. Indeed, it appears that that is precisely one object the Anti-Federalists had in mind in demanding a bill of rights.³²⁷

In any event, the concern is somewhat overblown. For one thing, a regime of contingent search-and-seizure authority for federal officials would hardly be revolutionary. At least as a statutory matter, from the earliest days of the Republic, federal agents and officers were bound by state search-and-seizure law unless a specific federal statute provided otherwise.³²⁸ That meant that

³²⁵ The latest estimate available for the population of the United States is 316,128,839 as of July 1, 2013. See AM. FACTFINDER, http://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml (last visited Apr. 27, 2015) (under "Population" select "2013 Population Estimate (as of July 1, 2013)").

³²⁶ Much ink has been spilled on this topic. See TASK FORCE ON FEDERALIZATION OF CRIM. LAW, THE FEDERALIZATION OF CRIMINAL LAW (1998), available at http://www.americanbar.org/content/dam/aba/publications/criminaljustice/Federalization_of_Criminal_Law.authcheckdam.pdf; Symposium, *The Federal Role in Criminal Law*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 9 (1996); Symposium, *Federalism and the Criminal Justice System*, 98 W. VA. L. REV. 757 (1996); Symposium, *Federalization of Crime*, 46 HASTINGS L.J. 965 (1995); *Second Annual Lawyers Convention of the Federalist Society: The Constitution and Federal Criminal Law*, 26 AM. CRIM. L. REV. 1659 (1989). For a contrary view, see Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 EMORY L.J. 1 (2012).

³²⁷ See Thomas, *supra* note 184, at 160 ("The principal concern in the Bill of Rights was . . . to create formidable obstacles to federal investigation and prosecution of crime.").

³²⁸ See Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91 ("[F]or any crime or offence against the United States, the offender may, by any justice or judge of the United States, or by any justice of the peace, or other magistrate of any of the United States where he may be found *agreeably to the usual mode of process against offenders in such state* . . . be arrested . . ." (emphasis added)); Militia Act of 1792, ch. 28, § 9, 1 Stat. 264,

changes in the underlying state law over time would likely also have altered the authority of federal officials.³²⁹ This was so until 1935, when Congress first explicitly granted federal officers general arrest authority that differed from underlying state law.³³⁰ Thus, unless specific authority were given by a particular statute, federal search-and-seizure authority tracked state law, and thus differed by State, for the first 146 years—about the first two-thirds—of this Nation’s existence. And yet the sky did not fall.

Moreover, federal search-and-seizure authority under the Fourth Amendment is, in reality, currently variable, and intractably so. Professor Wayne Logan has identified over twenty-five important search-and-seizure issues over which the United States Courts of Appeals disagree amongst themselves.³³¹ Some of these disagreements are, as of this writing, nearly two decades old.³³² In a very real sense, the search-and-seizure authority of federal officers already varies based on which part of the country they work in. And given that new issues and new disagreements arise all the time, and that the Supreme Court tends to take at most two or three Fourth Amendment cases per Term, that reality is not going away anytime soon. Better that we ground that reality, not in the arbitrarily drawn lines separating the federal circuits, but in the history surrounding the ratification of the Fourth Amendment.

CONCLUSION

Originalist methodology has increasingly influenced Fourth Amendment jurisprudence for about the last forty years and, it is fair to say, has dominated it for about the last twenty. But the originalism that the Supreme Court has advanced is faulty. It conceives of a common law of search and seizure that was largely uniform, static, and generic at the founding. And it imagines that

265 (granting federal “marshals of the several districts and their deputies . . . the same powers in executing the laws of the United States, as sheriffs and their deputies in the several states have by law, in executing the laws of their respective states”); *see also* Davies, *supra* note 32, at 210 (“Prior to the 1930s . . . warrantless arrests by federal officers . . . were subject to the law of the state in which the arrest was made.”).

³²⁹ Davies, *supra* note 32, at 191 n.599 (“[C]hanges in state warrantless arrest law were probably understood to automatically expand the warrantless arrest authority of many federal officers . . .”).

³³⁰ *See* Davies, *supra* note 5, at 611–12 (“Congress never explicitly authorized marshals to make warrantless arrests until 1935.”).

³³¹ *See* Logan, *supra* note 170, at 1195–1200 app. A. I have included in this figure only those disagreements on the substance of the Fourth Amendment, and not those on the scope of the exclusionary rule or appellate review.

³³² *See id.* (identifying five issues over which the courts have been split since at least 1996).

the members of the founding generation conceived of the common law in that way as well.

The real picture is far more complex. At least in marginal cases, the ones that matter most in the incremental shaping of law that is the role of judges, the law of search and seizure during the framing period was hardly uniform or static. Moreover, the insight that the common law was tied to sovereignty and therefore differed by jurisdiction did not suddenly burst forth on the scene in the twentieth century but was alive with the Anti-Federalists and Jeffersonian Republicans at the end of the eighteenth. A more nuanced originalist approach to the Fourth Amendment requires a reassessment both of the reality and perception of the common law of search and seizure during the framing period and of the place of the Bill of Rights uniquely as a constraint on *federal* power. Such a reassessment leads most plausibly to a contingent Fourth Amendment, by which federal authority to search and seize is generally calibrated to state norms.

At the very least, an acknowledgement of the origins of the Fourth Amendment in the differentiated common law of search and seizure present at the founding and the struggle of the Anti-Federalists to cabin federal authority via state law should cause us to rethink Fourth Amendment doctrine. In positing a monolithic Fourth Amendment applicable to state and federal governments alike, the Court has paid inadequate attention to state law as a guidepost for constitutional constraints on the federal government and, at the same time, has disregarded the essential federalism component of the Amendment which makes jot-for-jot incorporation against the States highly problematic. For too long, our view of the Fourth Amendment, and the Bill of Rights more generally, has been driven by the laudable notion that we are a *Union* of states at the expense of the equally laudable notion that we are a union of *States*.