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The Original Understanding of Unreasonable Searches and Seizures

David E. Steinberg

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THE ORIGINAL UNDERSTANDING OF UNREASONABLE SEARCHES AND SEIZURES

*David E. Steinberg**

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* Professor, Thomas Jefferson School of Law. B.A., Northwestern University, 1982; J.D., Stanford Law School, 1986.

I have learned a great deal about Fourth Amendment history from the landmark works of William Cuddihy and Thomas Davies. See William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* (1990) (unpublished Ph.D. dissertation, Claremont Graduate School); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999). My frequent, explicit references in the text to Cuddihy and Davies may not adequately reflect the debt of gratitude that I owe these fine scholars.

And speaking of debts of gratitude—this Article would not have been possible without the absolutely outstanding research assistance of Brooke Fredrickson.

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I. INTRODUCTION

Today, the Fourth Amendment to the United States Constitution covers most government evidence-gathering activities.¹ In search and seizure cases, after determining that the Fourth Amendment applies to an investigation, the Supreme Court then specifies the Fourth Amendment standard that governs the law enforcement activity. In some cases, law enforcement officers must obtain a warrant.² In other cases, officers must possess “probable cause,”³ or a “reasonable suspicion.”⁴

1. See U.S. CONST. amend. IV. (guaranteeing “the right of the people to be secure in their persons, houses, papers, and effects”).

2. See, e.g., *Kyllo v. United States*, 533 U.S. 27, 31-41 (2001) (holding that when federal agents used a thermal imaging unit to record the heat generated inside of a residence without first obtaining a warrant, the agents violated the Fourth Amendment); *Katz v. United States*, 389 U.S. 347, 354-59 (1967) (holding that where federal agents used a wiretap to eavesdrop on conversations made from a public telephone booth without first obtaining a warrant, the agents violated the Fourth Amendment).

3. See, e.g., *Chambers v. Maroney*, 399 U.S. 42, 46-52 (1970) (holding that police officers needed probable cause to search an automobile, but the officers did not need a warrant); *Schmerber v. California*, 384 U.S. 757, 766-71 (1966) (holding that in a driving under the influence case, police officers needed probable cause before requiring that a suspect must take a blood test, but the officers did not need a warrant).

4. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (holding that where a police officer has reasonable grounds to believe that any suspect is armed and dangerous, the officer may “conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons

The Supreme Court's current presumption that the Fourth Amendment typically covers law enforcement investigations is ahistorical. A review of history demonstrates that the Fourth Amendment was intended to proscribe only a single, discrete activity—physical searches of houses pursuant to a general warrant, or no warrant at all.⁵ The framers never intended that the Fourth Amendment would apply to other government evidence-gathering activities.⁶ Accordingly, the Fourth Amendment simply provides no guidelines for random drug tests, sense-enhanced searches, automobile checkpoints, and the many other situations where the Supreme Court has attempted to apply the Amendment.

Part I of this Article examines current doctrine on what constitutes a “search or seizure” for Fourth Amendment purposes. According to current doctrine, the Fourth Amendment applies when government evidence-gathering activities affect a person's reasonable expectation of privacy. Applying this standard, the Supreme Court has determined that the Fourth Amendment covers most government evidence-gathering activities. But the Court has held that the Fourth Amendment does not apply to some types of law enforcement investigations. For example, in *Oliver v. United States*,⁷ the Court relied on historical analysis to conclude that the Fourth Amendment does not apply to police searches in the open fields.⁸

Part II of this Article reviews historical evidence on the original understanding of the Fourth Amendment. The historical record defines precisely what the framers meant when they proscribed “unreasonable searches and seizures.” Specifically, the framers intended that the phrase “unreasonable searches and seizures” would proscribe only physical searches of residences pursuant to a general warrant or no warrant at all.

which might be used to assault him”).

5. For a further discussion of this historical argument, see David E. Steinberg, *High School Drug Testing and the Original Understanding of the Fourth Amendment*, 30 HASTINGS CON. L. Q. 263, 270-88 (2003) [hereinafter Steinberg, *High School Drug Testing*].

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

7. 466 U.S. 170 (1984).

8. See *id.*

Part III examines a few of the Supreme Court's attempts to apply the Fourth Amendment in situations other than residential searches. Part III concludes that if courts continue to apply the Fourth Amendment in cases that do not involve physical intrusions into the home, such attempts will be doomed to incoherence. The Fourth Amendment never was intended to apply beyond house searches. The Amendment simply offers no guidance with respect to other types of government evidence-gathering activities.

II. MODERN DOCTRINE: THE FOURTH AMENDMENT TYPICALLY COVERS EVIDENCE-GATHERING ACTIVITIES

In determining whether government conduct constitutes a Fourth Amendment search or seizure, most Supreme Court opinions employ a test that originated in *Katz v. United States*.⁹ Justice John Marshall Harlan's concurring opinion in *Katz* stated a two-part test: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"¹⁰

After applying the *Katz* test, most Supreme Court decisions have concluded—often with little discussion—that a government evidence-gathering activity is a Fourth Amendment search or seizure. However, some opinions have determined that the Fourth Amendment does not apply to particular government conduct. In *Oliver v. United States*,¹¹ the Court did not employ the *Katz* test. Instead, the *Oliver* Court relied on historical analysis to determine that a search of the open fields was not covered by the Fourth Amendment.¹²

A. *The Katz Test: Opinions Concluding that Government Activity Constitutes a Fourth Amendment Search*

The Supreme Court has concluded that most types of government evidence-gathering activities constitute Fourth Amendment searches. For example, in *Skinner v. Railway Labor Executives Association*,¹³ the Court determined that a random drug test accomplished through urinalysis qualified as a Fourth Amendment "search."¹⁴ In a relatively brief

9. 389 U.S. 347 (1967).

10. *Id.* at 361 (Harlan, J., concurring). For discussions of when a government evidence-gathering activity amounts to a Fourth Amendment search, see Gregory S. Fisher, *Cracking Down on Soccer Moms and Other Urban Legends on the Frontier of the Fourth Amendment: Is it Finally Time to Re-Define Searches and Seizures?*, 38 WILLAMETTE L. REV. 137, 141-65 (2002); Peter Thornton, Note, *Police Use of Sense-Enhancing Devices and the Limits of the Fourth Amendment*, 1977 U. ILL. L. F. 1167, 1172-201 (1977).

11. 466 U.S. 170 (1984).

12. *See id.* at 176-84.

13. 489 U.S. 602 (1989).

14. *Id.* at 616-18.

discussion, Justice Anthony M. Kennedy noted that a chemical analysis of urine may reveal sensitive medical information.¹⁵ Justice Kennedy also observed: “Nor can it be disputed that the process of collecting the sample to be tested, which may in some cases involve visual or aural monitoring of the act of urination, itself implicates privacy interests.”¹⁶

Similarly, in *Kyllo v. United States*,¹⁷ the Court held that a scan of a residence with a thermal imaging unit constituted a Fourth Amendment “search.”¹⁸ In *Kyllo*, federal agents sought to confirm that Danny Kyllo maintained a marijuana greenhouse inside his Oregon residence.¹⁹ While sitting in a vehicle parked across the street from Kyllo’s residence, the agents focused a thermal imaging unit on the residence.²⁰ According to the thermal imaging unit, the temperature inside of Kyllo’s garage was warmer than the rest of Kyllo’s residence, and it was also warmer than the temperatures inside of neighboring homes.²¹ A subsequent search of Kyllo’s residence revealed more than 100 marijuana plants.²²

In concluding that the use of the thermal imaging unit was covered by the Fourth Amendment, the *Kyllo* majority began by noting that in most cases, unaided visual observation “is no ‘search’ at all.”²³ However, writing for the majority, Justice Antonin Scalia then observed that the *Kyllo* case involved “officers on a public street engaged in more than naked-eye surveillance of a home.”²⁴ Justice Scalia emphasized that with respect to the interior of a residence, “there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*.”²⁵ Justice Scalia concluded that the use of sense-enhancing technology to obtain information about the interior of a residence constitutes a Fourth Amendment search, “at least where (as here) the technology in question is not in general public use.”²⁶

In *United States v. Karo*,²⁷ the Court also found that law enforcement officers had engaged in a Fourth Amendment search.²⁸ In *Karo*, federal

15. *Id.* at 617.

16. *Id.* The *Skinner* Court ultimately concluded that random urine testing of railway workers did not violate the Fourth Amendment. *Id.* at 618-34.

17. 533 U.S. 27 (2001).

18. *Id.* at 40.

19. *Id.* at 29.

20. *Id.* at 29-30.

21. *Id.* at 30.

22. *Id.*

23. *Id.* at 32.

24. *Id.* at 33.

25. *Id.* at 34.

26. *Id.*

27. 468 U.S. 705 (1984).

28. *Id.* at 717-18.

agents placed a beeper in a can of ether.²⁹ The agents tracked the beeper to a residence, which James Karo and other defendants were using as a drug lab.³⁰

The *Karo* Court concluded that when the federal agents monitored the beeper inside of the residence, the agents engaged in a Fourth Amendment search.³¹ Justice Byron R. White described residences as places where “the individual normally expects privacy free of governmental intrusion not authorized by a warrant.”³² Accordingly, the federal agents violated the Fourth Amendment when the agents monitored the beeper inside of the residence without first obtaining a warrant.³³ Several other opinions also have concluded, often with minimal analysis, that various government evidence-gathering activities constitute Fourth Amendment “searches.”³⁴

B. *The Katz Test: Opinions Concluding that Government Activity Does Not Constitute a Fourth Amendment Search*

Although most opinions applying the *Katz* test have concluded that government evidence-gathering activities qualify as Fourth Amendment searches,³⁵ the Court occasionally has determined that an evidence-gathering activity is not a search covered by the Fourth Amendment. In *Smith v. Maryland*,³⁶ Maryland police officers used a pen register to record the phone numbers dialed by a suspect.³⁷ A pen register records the numbers dialed from a particular telephone, but not the contents of any telephone communications.³⁸ Prior to installing the pen register, police officers did not obtain a warrant.³⁹

The *Smith* Court upheld the warrantless use of the pen register, concluding that Defendant Michael Lee Smith had no reasonable expectation of privacy in the phone numbers that he had dialed.⁴⁰ Justice Harry A. Blackmun asserted that telephone users “typically know that they

29. *Id.* at 708.

30. *Id.* at 709-10.

31. *Id.* at 716.

32. *Id.* at 714.

33. *Id.* at 718 (“In sum, we discern no reason for deviating from the general rule that a search of a house should be conducted pursuant to a warrant.”).

34. *See, e.g.*, *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 450 (1990) (“[A] Fourth Amendment ‘seizure’ occurs when a vehicle is stopped at a checkpoint.”); *Schmerber v. California*, 384 U.S. 757, 769-70 (1966) (in a driving under the influence case, the process of drawing blood for a blood test was governed by the Fourth Amendment).

35. *See supra* text accompanying notes 14-34.

36. 442 U.S. 735 (1979).

37. *Id.* at 737.

38. *Id.* at 741.

39. *Id.* at 737.

40. *Id.* at 742-43.

must convey numerical information to the phone company; that the phone company has facilities for recording this information; and that the phone company does in fact record this information for a variety of legitimate business purposes.”⁴¹ And even if the defendant somehow subjectively believed that the numbers he dialed were private, such a belief would not be reasonable.⁴² When the defendant used his phone, he “voluntarily conveyed numerical information to the telephone company and ‘exposed’ that information to its equipment in the ordinary course of business.”⁴³ Accordingly, the *Smith* Court concluded that the pen register was not a search and was not covered by the Fourth Amendment.⁴⁴

In *California v. Ciraolo*,⁴⁵ the Court held that aerial surveillance was not a search and was not covered by the Fourth Amendment.⁴⁶ Police officers flew 1,000 feet over Dante Ciraolo’s backyard in a private airplane.⁴⁷ Using unaided visual surveillance, the officers spotted marijuana plants growing in Ciraolo’s backyard.⁴⁸ The officers ultimately seized seventy-three plants from the backyard.⁴⁹ Prior to the flight, the officers did not obtain a warrant.⁵⁰

When police officers looked into Dante Ciraolo’s backyard, the officers were scanning the curtilage of Ciraolo’s home.⁵¹ Court opinions frequently have concluded that police surveillance of a residence constitutes a Fourth Amendment search.⁵² Further, the Supreme Court has held that the Fourth Amendment protections afforded to a residence extend to the curtilage.⁵³ Accordingly, one might have assumed that the aerial surveillance in *Ciraolo* was covered by the Fourth Amendment.⁵⁴

41. *Id.* at 743.

42. *Id.*

43. *Id.* at 744.

44. *Id.* at 745-46.

45. 476 U.S. 207 (1986).

46. *Id.* at 215.

47. *Id.* at 209.

48. *Id.*

49. *Id.* at 209-10.

50. *Id.* at 212.

51. *Id.* at 212-13.

52. See *Kyllo v. United States*, 533 U.S. 27, 33-41 (2001) (holding that the use of a thermal imaging device to measure the heat emanating from a suspect’s residence constitutes a Fourth Amendment search); *United States v. Karo*, 468 U.S. 705, 715-16 (1984) (concluding that when federal agents monitored a beeper that criminal suspects had unknowingly carried inside of a residence, the agents engaged in a Fourth Amendment search).

53. See, e.g., *United States v. Dunn*, 480 U.S. 294, 300 (1987) (recognizing that “the Fourth Amendment protects the curtilage of a house”); *Oliver v. United States*, 466 U.S. 170, 180 (1984) (“only the curtilage, not the neighboring open fields, warrants the Fourth Amendment protections that attach to the home”).

54. See *Ciraolo*, 476 U.S. at 215. In *Ciraolo*, police officers looked into the defendant’s

Nonetheless, the *Ciraolo* Court held that the aerial surveillance did not constitute a Fourth Amendment search.⁵⁵ Chief Justice Warren E. Burger wrote that *Ciraolo* did not have a reasonable expectation of privacy with respect to aerial surveillance, because “[a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed.”⁵⁶ Justice Burger concluded: “The Fourth Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye.”⁵⁷ After applying the *Katz* test, other Fourth Amendment opinions also have concluded that government evidence-gathering activities do not constitute a Fourth Amendment search or seizure.⁵⁸

C. *Oliver v. United States*

In *Oliver v. United States*,⁵⁹ the Supreme Court held that the Fourth Amendment does not apply to police searches in the open fields.⁶⁰ When Kentucky police officers arrived at Ray Oliver’s farm, the officers encountered a locked gate that displayed a “No Trespassing” sign.⁶¹ After the officers walked around the gate on a footpath, the officers eventually discovered a marijuana field, located more than one mile from Oliver’s house.⁶² Because of the locked gate and the “No Trespassing” sign, a federal district court determined that Oliver “had an expectation of privacy and that the expectation was a reasonable one.”⁶³

However, the Supreme Court held that the Fourth Amendment does not apply to open fields, such as Oliver’s farm.⁶⁴ Oliver’s attempts to maintain

backyard from an airplane. *Id.*

55. *Id.*

56. *Id.* at 213-14.

57. *Id.* at 215. See also *Florida v. Riley*, 488 U.S. 445, 447-52 (1989) (holding that surveillance of a backyard greenhouse from a helicopter did not constitute a Fourth Amendment search); *Dow Chem. Co. v. United States*, 476 U.S. 227, 234-39 (1986) (where federal agents in an airplane used a sophisticated camera to photograph an industrial complex, the agents did not engage in a Fourth Amendment search).

58. See, e.g., *California v. Greenwood*, 486 U.S. 35, 39-44 (1988) (a defendant who left garbage bags on the curb in front of his house did not have a reasonable expectation of privacy in the contents of the bags, and a police officer who sifted through the rubbish did not engage in a Fourth Amendment search); *United States v. Knotts*, 460 U.S. 276, 281-85 (1983) (holding that when police officers used a beeper to track an auto traveling in the public streets, the officers did not engage in a Fourth Amendment search).

59. 466 U.S. 170 (1984).

60. *Id.* at 181.

61. *Id.* at 173.

62. *Id.*

63. *United States v. Oliver*, 686 F.2d 356, 358 (6th Cir. 1982), *aff’d*, *Oliver v. United States*, 466 U.S. 170 (1984) (summarizing the district court’s unpublished opinion).

64. *Oliver*, 466 U.S. at 176-81.

privacy on his farm were irrelevant because “the government’s intrusion upon the open fields is not one of those ‘unreasonable searches’ proscribed by the text of the Fourth Amendment.”⁶⁵

The reasoning that appears in *Oliver* is significant. First, the *Oliver* Court relied heavily on Fourth Amendment history. The *Oliver* majority quoted from an opinion by Chief Justice Oliver Wendell Holmes: “[T]he special protection accorded by the Fourth Amendment to the people in their “persons, houses, papers, and effects,” is not extended to the open fields. The distinction between the latter and the house is as old as the common law.”⁶⁶

Further, the *Oliver* decision contains an explicit acknowledgment that the Fourth Amendment simply does not apply to all government evidence-gathering activities. Justice Lewis F. Powell, Jr. noted the difference in the common law treatment of open fields and “land immediately surrounding and associated with the home,”⁶⁷ also referred to as the curtilage. Justice Powell continued: “The distinction implies that only the curtilage, not the neighboring open fields, warrants the Fourth Amendment protections that attach to the home.”⁶⁸ Additionally, Justice Powell stressed “the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.”⁶⁹

D. Summary

The Supreme Court has determined that government evidence-gathering activities implicate the Fourth Amendment in situations where a person has a reasonable expectation of privacy. The Court has applied the Fourth Amendment to exotic investigative techniques, such as random urine

65. *Id.* at 177. In concluding that a government evidence-gathering activity did not qualify as a Fourth Amendment search, the Court also did not apply the *Katz* test in *United States v. Place*, 462 U.S. 696 (1983). In *Place*, the Court held that a canine sniff of luggage “did not constitute a ‘search’ within the meaning of the Fourth Amendment.” *Id.* at 707. Concluding that the canine sniff was not governed by the Fourth Amendment, the *Place* majority emphasized that no other investigative procedure “is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure.” *Id.* The *Place* Court held that the canine sniff did not violate the Fourth Amendment, even though federal agents had used the drug-detecting dog to sniff luggage. *Id.* The Court previously held that people have a reasonable expectation of privacy with respect to the contents of a sealed luggage container. *See, e.g., United States v. Chadwick*, 433 U.S. 1, 11 (1977).

66. *Oliver*, 466 U.S. at 176 (1984) (alteration in original) (quoting *Hester v. United States*, 265 U.S. 57, 59 (1924)); *see also id.* at 180 (describing the common law origins of the open fields doctrine).

67. *Id.* at 180.

68. *Id.*

69. *Id.* at 178 (quoting *Payton v. New York*, 445 U.S. 573, 601 (1980)).

testing,⁷⁰ the use of a thermal imaging device,⁷¹ and police tracking of a beeper that enters a residence.⁷²

But in other cases, the Court has held that government evidence-gathering activities are not covered by the Fourth Amendment because the activities do not infringe on a suspect's privacy. And in *Oliver v. United States*,⁷³ the Court held that a search of the open fields does not implicate the Fourth Amendment, regardless of a defendant's efforts to maintain his or her fields as a private place.⁷⁴

As in many other areas of Fourth Amendment law, the Court's decisions concerning when government evidence-gathering activities amount to a Fourth Amendment "search" seem arbitrary and inconsistent.⁷⁵ In *Kyllo v. United States*,⁷⁶ the Court held that the use of a thermal imaging unit constituted a Fourth Amendment search, in part because the unit intruded on the "sanctity of the home."⁷⁷ However, in *California v. Ciraolo*,⁷⁸ the Court held that aerial surveillance of a suspect's backyard did not interfere with a suspect's reasonable expectation of privacy, and thus, such surveillance did not constitute a Fourth Amendment search.⁷⁹

If anything, the aerial surveillance in *Ciraolo* would seem to involve a greater intrusion on residential privacy than the use of the thermal imaging unit in *Kyllo*. The thermal imaging unit only would inform federal agents about the heat generated inside of a suspect's house, as compared with the temperatures inside of neighboring houses.⁸⁰ Conversely, "[t]he indiscriminate nature of [the] aerial surveillance"⁸¹ in *Ciraolo* would allow law enforcement officers to view a variety of private activities not only in a suspect's backyard, but also in the backyards of the suspect's neighbors.⁸² Nonetheless, the Court held that the Fourth Amendment restricted the

70. See, e.g., *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 618-34 (1989) (holding that random drug tests of railway workers did not violate the Fourth Amendment).

71. See *Kyllo v. United States*, 533 U.S. 27, 33-41 (2001) (holding that the warrantless use of a thermal imaging unit violated the Fourth Amendment).

72. See *United States v. Karo*, 468 U.S. 705, 716-18 (1984) (holding that when federal agents did not obtain a warrant before monitoring a beeper that suspects had brought inside of a residence, the agents violated the Fourth Amendment).

73. 466 U.S. 170 (1984).

74. *Id.* at 182-83.

75. See *infra* text accompanying notes 234-324 (criticizing Supreme Court decisions in three areas of Fourth Amendment law).

76. 533 U.S. 27 (2001).

77. *Id.* at 37.

78. 476 U.S. 207 (1986).

79. *Id.* at 212-15.

80. *Kyllo*, 533 U.S. at 29-30.

81. *Ciraolo*, 476 U.S. at 225 (Powell, J., dissenting).

82. See *id.* In his dissent, Justice Lewis F. Powell, Jr. also observed that Dante Ciraolo's yard "contained a swimming pool and a patio for sunbathing and other private activities." *Id.* at 222 n.7.

government's use of the thermal imaging device,⁸³ but did not restrict the government's use of aerial surveillance.⁸⁴

Given these puzzling results concerning the extent of Fourth Amendment coverage, this Article examines the original understanding of the Fourth Amendment. This discussion demonstrates that the Court today is invoking the Fourth Amendment in situations where the Amendment never was intended to apply. In short, the original understanding of the Fourth Amendment proscribed unlawful physical entries into a residence, pursuant either to a general warrant or no warrant at all. Outside of house searches, the Fourth Amendment simply was inapplicable.

III. THE ORIGINAL UNDERSTANDING OF UNREASONABLE SEARCHES AND SEIZURES

The historical record strongly suggests that the Fourth Amendment was intended only to proscribe physical searches of residences where the search occurred pursuant to a general warrant, or without any warrant at all. My originalist argument is not based on the discovery of some new historical evidence. Rather, the limitation of the Fourth Amendment to house searches is expressed clearly in familiar Fourth Amendment sources. I am particularly indebted to the superb research of William Cuddihy and Thomas Davies.⁸⁵ However, I also have benefitted from the fine historical scholarship of Nelson Lasson,⁸⁶ Tracey Maclin,⁸⁷ and several other authors.⁸⁸

83. In *Kyllo*, the Court attempted to distinguish *Ciraolo* on the grounds that private and commercial flights in the public airways were routine, while the thermal imaging unit "is not in general public use." *Kyllo*, 533 U.S. at 40; see also *id.* at 39-40 & n.6.

84. *Ciraolo*, 476 U.S. at 215.

85. See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999); William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning*, (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (on file with author).

86. See NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* (1937).

87. See Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895 (2002) [hereinafter Maclin, *Let Sleeping Dogs Lie*]; Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925 (1997) [hereinafter Maclin, *The Complexity of the Fourth Amendment*]; Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse Than the Disease*, 68 S. CAL. L. REV. 1 (1994) [hereinafter Maclin, *When the Cure for the Fourth Amendment Is Worse Than the Disease*].

88. See, e.g., Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1175-81 (1991) [hereinafter Amar, *The Bill of Rights as a Constitution*]; Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53 (1996) [hereinafter Amar, *The Writs of Assistance*]; Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) [hereinafter Amar, *Fourth Amendment First Principles*]; Gerard V. Bradley, *The Constitutional Theory of the Fourth Amendment*, 38 DEPAUL L. REV. 817 (1989); Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707 (1996)

A. *English Housebreaking Laws: The Early Origins of the Fourth Amendment*

William Cuddihy has observed that the modern proscription against unreasonable searches originated not with concerns about abuses of government power, but with laws that protected homes against breaking and entering by private citizens.⁸⁹ Cuddihy writes that as early as the seventh century, English codes “penalized severely those who invaded a neighbor’s premises or provoked a disturbance within it.”⁹⁰

By the twelfth century, these codes that prohibited housebreaking had developed into the crime of hamsocn.⁹¹ Cuddihy describes this crime of housebreaking as “among the more serious of crimes in medieval England, one hundred shillings being the usual fine for it.”⁹² By the end of the sixteenth century in England, the crime of hamsocn had been transformed into more modern codes that proscribed burglary, housebreaking, and trespass.⁹³

Cuddihy observes that the early English laws against housebreaking acted exclusively as sanctions against private parties, not as restraints on the government.⁹⁴ Laws such as hamsocn “sought to control violence by private persons toward each other, not official searches by the government.”⁹⁵

Prior to 1485, searches of private houses by English government representatives were quite rare.⁹⁶ But after 1485, England’s Tudor monarchs profoundly expanded the justifications for and frequency of house searches conducted by the government.⁹⁷ According to Cuddihy: “Everything from the food that an Englishman put into his mouth and the cap that he wore on his head to the thoughts circulating in his mind came to furnish legal pretexts for the government to inspect his home.”⁹⁸ Government agents possessed particularly broad powers to search houses

(book review); Joseph D. Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 AM. CRIM. L. REV. 603 (1982); William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393 (1995).

89. Cuddihy, *supra* note 85, at 31-35.

90. *Id.* at 32.

91. *Id.* at 33.

92. *Id.*

93. *Id.* at 33-34.

94. *Id.* at 36.

95. *Id.*

96. *Id.* at 75.

97. *Id.* at 80-82.

98. *Id.* at 81.

for evidence of customs violations,⁹⁹ religious heresy,¹⁰⁰ and political dissent.¹⁰¹

As the English Crown's house searches became more frequent and offensive, English thought began to postulate that certain types of house searches were unreasonable and unlawful.¹⁰² As Cuddihy summarizes this movement: "Elizabethan Englishmen began to insist that their houses were castles for the paradoxical reason that the castle-like security that those houses had afforded from intrusion was vanishing. As the violence and frequency of searches escalated, the perception that some types of search and seizure were unreasonable appeared."¹⁰³

This historical backdrop sheds considerable light on the eighteenth-century American opposition to unreasonable searches and seizures, which culminated in the Fourth Amendment. As the next section illustrates,¹⁰⁴ when eighteenth-century Americans spoke of unreasonable searches or seizures, these Americans were criticizing one specific practice—the unlawful physical entry of houses. Americans did not adopt the Fourth Amendment to impose broad regulations on how law enforcement officers gathered evidence or effected arrests. Instead, Americans adopted the Fourth Amendment exclusively to prohibit housebreaking by government agents, pursuant to a general warrant or no warrant at all.

B. *The Controversies That Resulted in the Fourth Amendment*

When the framers of the Fourth Amendment proscribed unreasonable searches and seizures, they intended to prohibit physical searches of residences pursuant to general warrants.¹⁰⁵ The term "general warrant" referred to warrants that contained either of two deficiencies. First, a

99. *Id.* at 100-02.

100. *Id.* at 105-07.

101. *Id.* at 111-18.

102. *Id.* at 127-28.

103. *Id.* at 128.

104. *See infra* text accompanying notes 105-48.

105. The first American constitutional provision to regulate searches and seizures was Article X of the Virginia Declaration of Rights of 1776. Article X proscribed general warrants with the following language:

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

VA. BILL OF RIGHTS, art. X, *reprinted in* 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 3814 (Francis N. Thorpe ed. 1909) [hereinafter THE FEDERAL AND STATE CONSTITUTIONS].

warrant would be inadequate if the document failed to specify the places to be searched or the persons to be seized.¹⁰⁶ Second, a warrant would be inadequate if the document lacked sufficient evidentiary support for the search or seizure.¹⁰⁷

As noted by Nelson Lasson, Thomas Y. Davies, and others, discussion of unreasonable searches in the late eighteenth century primarily focused on three controversies—the John Wilkes cases in England, Paxton’s case in Boston, and American reactions to the English Townshend Act.¹⁰⁸ All three controversies focused on physical searches of homes pursuant to general warrants.¹⁰⁹

1. The John Wilkes Cases

In the eighteenth century, the most well-known examples of unreasonable searches arose out of an English seditious libel prosecution brought against opposition politician John Wilkes and his supporters.¹¹⁰ In April 1763, an anonymous letter printed in an opposition periodical described the British Tory administration as “‘wretched’ puppets,” and “‘the tools of corruption and despotism.’”¹¹¹ The Tory government suspected that John Wilkes was the author of the statement. The government accused Wilkes and his followers of seditious libel.¹¹²

Pursuant to a general warrant issued by the Tory Secretary of State, English officers were directed to discover who was responsible for the libelous letter and to search any places that might contain evidence.¹¹³ Ultimately, the officers searched at least five houses and arrested at least

106. *See id.* (proscribing warrants that allowed law enforcement officials to “seize any person or persons not named”).

107. *See id.* (proscribing warrants that authorized officers “to search suspected places without evidence of a fact committed, or to seize any person . . . whose offence is not particularly described and supported by evidence”).

108. *See, e.g.,* LASSON, *supra* note 86, at 43-48 (discussing the John Wilkes cases); *id.* at 57-63 (discussing Paxton’s case); *id.* at 69-76 (discussing the Townshend Act); *see also* Davies, *supra* note 85, at 561-67 (discussing these three controversies, and noting agreement among commentators that these controversies represent the most important events leading to the adoption of the Fourth Amendment).

109. Eighteenth-century Americans contrasted the unlawful general warrant with the lawful specific warrant. The specific warrant was sworn out by a named complainant. If the search did not produce evidence of a crime, the complainant was liable for trespass damages. The specific warrant could be issued only by a neutral magistrate—usually a man of stature. Most significantly, the warrant gave a specific command to the officer undertaking the search, thus limiting the officer’s discretion. *See* Davies, *supra* note 85, at 650-54 (contrasting the specific warrant with the general warrant).

110. For a detailed account of the John Wilkes cases, *see* Cuddihy, *supra* note 85, at 886-927.

111. *Id.* at 886.

112. *Id.* at 886-94.

113. *Id.* at 886-87.

forty-nine people pursuant to this single general warrant.¹¹⁴ Wilkes and his supporters responded with at least thirty different trespass and false imprisonment suits.¹¹⁵

In a series of decisions issued between 1763 and 1769, English courts ruled that the house searches conducted pursuant to the general warrant violated English common law.¹¹⁶ The officers who conducted these house searches were liable for trespass and false imprisonment.¹¹⁷

For example, in *Huckle v. Money*, Chief Justice Pratt refused to set aside a damages verdict won by a printer whose house had been searched pursuant to the general warrant.¹¹⁸ In a caustic denunciation of this house search, Chief Justice Pratt wrote: “To enter a man’s house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject.”¹¹⁹ Other opinions issued in the John Wilkes cases included similar criticisms of unlawful house searches.¹²⁰

The John Wilkes cases focused exclusively on the impropriety of *house searches* pursuant to a general warrant. These cases did not suggest that similar searches of shops, warehouses, or vessels would violate common law principles.¹²¹

114. *Id.* at 893.

115. *Id.* at 894.

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

117. See LASSON, *supra* note 86, at 44–45 (describing the verdicts in the John Wilkes cases, and noting that the English government’s expenses in these cases “were said to total £100,000”).

118. 95 Eng. Rep. at 768–69.

119. *Id.* at 769.

120. See, e.g., *Entick*, 95 Eng. Rep. at 818 (holding that “to enter a man’s house, search for and take away all his books and papers” violated common law principles); *Wilkes*, 98 Eng. Rep. at 498 (where “[t]he defendants claimed a right . . . to force persons houses, break open escutores, seize their papers, &c. upon a general warrant,” these actions were “totally subversive of the liberty of the subject”).

121. Eighteenth-century Americans may have lacked access to the actual opinions issued in the John Wilkes cases. See Davies, *supra* note 85, at 565 n.25 (noting that the official reports of the John Wilkes cases “were not published contemporaneously with the trials”). But during the eighteenth century, these opinions were reported widely in the popular press—both in America and in England. See, e.g., Cuddihy, *supra* note 85, at 927–37 (describing British publications that opposed the use of general warrants in the John Wilkes cases); Davies, *supra* note 85, at 563 (describing British and colonial newspaper accounts of the John Wilkes cases which emphasized “the sanctity of the house while condemning general warrants”); see also JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 29 (1966) (noting Chief Justice Pratt’s popularity in England, following his opinions in the John Wilkes cases).

2. Paxton's Case

Charles Paxton was a Boston, Massachusetts customs officer.¹²² In 1755, Paxton received a writ of assistance from the Superior Court in Boston.¹²³ In 1761, the Surveyor General of Customs sought to renew the writ.¹²⁴ The writ of assistance was the American equivalent of the English general warrant.¹²⁵

In January 1761, an association of Massachusetts merchants challenged Paxton's writ of assistance before the Superior Court in Boston.¹²⁶ James Otis, Jr., a prominent Boston attorney, argued the case on behalf of the merchants.¹²⁷

Otis argued that the writs of assistance operated as general warrants, in violation of common law principles.¹²⁸ Otis initially asserted that "the freedom of one's house" was among "the most essential branches of English liberty."¹²⁹ Otis then complained that with a writ of assistance, customs officials "may enter our houses when they please—may break locks, bars and every thing in their way—and whether they break through malice or revenge, no man, no court can inquire."¹³⁰

On November 18, 1761, the Superior Court in Boston approved the continued use of the writs of assistance.¹³¹ Nonetheless, Otis's argument against the writ became a watershed moment in the American drive for independence.¹³² Some have described Otis's argument against the writ of

Eighteenth-century Americans almost certainly were familiar with the results and reasoning in the John Wilkes cases, even if these early Americans lacked access to the actual court opinions.

122. Cuddihy, *supra* note 85, at 760.

123. *Id.* at 760-61.

124. *Id.* at 758-64.

125. *Id.* at 759. Colonial authorities used the writs of assistance to search for customs violations. The writ authorized customs officers to search any places where the officers suspected that smuggled goods were hidden. Customs officers believed that these writs empowered them to enter and inspect all houses in Massachusetts. *Id.* at 758-59.

The writ was named a "writ of assistance" because the writ compelled all peace officers and other persons present to assist the customs officers in the performance of the search. *See* Davies, *supra* note 85, at 561 n.18.

126. Cuddihy, *supra* note 85, at 764.

127. *Id.* at 765.

128. *See id.* at 777-78.

129. M.H. SMITH, THE WRITS OF ASSISTANCE CASE 344 (1978) (quoting *Paxton's Case*, Mass. Reps. 469 (Mass. Sup. Ct. 1761)).

130. *Id.*

131. Cuddihy, *supra* note 85, at 798.

132. For John Adams's description of the argument made by Otis, see 10 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 247-48 (1856) [hereinafter THE WORKS OF JOHN ADAMS]; *see also* Davies, *supra* note 85, at 561-62 n.20 (concluding that "Otis's argument was widely known in Boston," but expressing uncertainty about whether news of the case reached

assistance as the most important single event that led to the Revolutionary War.¹³³

It is significant that Otis argued only against house searches. As Thomas Davies has noted, Otis's clients were "merchants who also owned ships and warehouses."¹³⁴ But Otis did not challenge the searches of warehouses or the seizure of ships—only physical intrusions into residences.¹³⁵

3. American Opposition to the Townshend Act

In 1767, the British Parliament enacted the Townshend Act.¹³⁶ The Act reauthorized the use of writs of assistance by customs officers in America.¹³⁷ But given the profound influence of the John Wilkes cases and Paxton's case, colonial courts issued the writs sporadically, and customs officers never executed the writs effectively.¹³⁸ As William Cuddihy describes the implementation of the Townshend Act: "In only a few colonies did the courts issue the writs as general search warrants, and the massive searches that those writs authorized were never implemented on an effective scale."¹³⁹

Like the John Wilkes cases and Paxton's case, opposition to the Townshend Act again focused on the use of general warrants to authorize physical searches of residences. At a Boston town meeting in 1772, Samuel Adams attacked the writs of assistance.¹⁴⁰ Adams asserted, "[O]ur homes

beyond Massachusetts).

133. In Boston, John Adams and other important statesmen attended Otis's argument. According to Adams, during Otis's argument "American independence was then and there born." THE WORKS OF JOHN ADAMS, *supra* note 132, at 247. Adams also wrote that Otis's attack on the writs of assistance was "the first scene of the first act of opposition to the arbitrary claims of Great Britain." *Id.* at 248.

134. Davies, *supra* note 85, at 602.

135. *Id.* at 601-02.

136. See Cuddihy, *supra* note 85, at 1040.

137. *Id.*

138. See *id.* at 1046.

139. *Id.* Cuddihy identifies at least three different reactions to the Townshend Act. In Massachusetts, judges actually issued the writs of assistance. However, as a result of popular resistance, customs officers usually were not able to execute effective searches pursuant to the writs. *Id.* at 1046-52. In colonies such as Rhode Island, Maryland, and South Carolina, judges either ignored the writ applications or repeatedly postponed considering these applications. *Id.* at 1056-57. The Supreme Courts of Pennsylvania and Connecticut attempted to transform the writs into specific search warrants. *Id.* at 1067; see also LASSON, *supra* note 86, at 73 (noting that most colonial courts "refused to grant general writs of assistance even after the Townshend Act had set at rest all technical objections to their legality").

140. *A State of Rights of the Colonists*, reprinted in TRACTS OF THE AMERICAN REVOLUTION, 1763-1776, at 243-44 (Merrill Jensen ed. 1967) [hereinafter *A State of Rights of the Colonists*] (report typically attributed to Samuel Adams).

and even our bed chambers, are exposed to be ransacked, our boxes[,] chests & trunks broke open ravaged and plundered by wretches . . . whenever they are pleased to say they *suspect* there are in the house wares etc. for which the dutys have not been paid.”¹⁴¹ Adams continued that customs officers “break thro’ the sacred rights of the *Domicil*, [and] ransack mens [sic] houses.”¹⁴² Similarly, Judge William Henry Drayton of Charleston complained in 1774 that “a petty officer has power to cause the doors and locks of any man to be broke open, to enter his most private cabinet, and thence to take and carry away, whatever he shall in his pleasure deem uncustomed goods.”¹⁴³

The Continental Congress also spoke against house searches conducted pursuant to writs of assistance.¹⁴⁴ In a 1774 address to the American people, the Continental Congress protested against the power of customs officers “to break open and enter houses without the authority of any civil magistrate founded on legal information.”¹⁴⁵ In a 1774 letter to the inhabitants of Quebec, the Congress warned that British customs officers would break into “houses, the scenes of domestic peace and comfort and called the castles of English subjects in the books of their law.”¹⁴⁶

4. Summary

More than anything else, three major controversies led to the adoption of the Fourth Amendment. Those three controversies were the John Wilkes cases, Paxton’s case, and American opposition to the Townshend Act.

In each situation, critics focused their opposition on unlawful house searches—not searches of shops, warehouses, or other commercial establishments. Even more specifically, critics repeatedly asserted that unlawful searches involved *breaking into houses*. In 1772, Samuel Adams complained that customs officers may violate “the sacred rights of the *Domicil*” and ransack houses.¹⁴⁷ In 1774, the Continental Congress denounced customs officers, who could “break open and enter houses without the authority of any civil magistrate founded on legal

141. *Id.* at 243-44.

142. *Id.* at 244. Like James Otis, Samuel Adams made his argument in the seaport of Boston. Many members of Adams’s audience undoubtedly were merchants, who owned shops, warehouses, and ships. Nonetheless, the remarks made by Adams do not refer to unreasonable searches of shops, warehouses, and ships. In describing unreasonable searches, Adams only discussed house searches.

143. William Henry Drayton, *A Letter From Freeman*, in 1 DOCUMENTARY HISTORY OF THE AMERICAN REVOLUTION 15 (R.W. Gibbes ed. 1855) [hereinafter cited as DOCUMENTARY HISTORY OF THE AMERICAN REVOLUTION].

144. Cuddihy, *supra* note 85, at 1116-17.

145. *Id.* at 1116 (quoting Continental Congress to the American People (Oct. 26, 1774)).

146. *Id.* at 1117 (quoting Continental Congress to Inhabitants of Quebec (Oct. 26, 1774)).

147. *A State of Rights of the Colonists*, *supra* note 140, at 243-44.

information.”¹⁴⁸ In defining unreasonable searches, the framers focused exclusively on unlawful physical entries into houses. The framers did not criticize surveillance by customs agents unless the agents engaged in breaking and entering a house.

C. Legal Commentary

English and early American treatises defined unreasonable searches in the same terms as early American statesmen and attorneys. In discussing unreasonable searches, legal commentators focused almost exclusively on unlawful physical entries of houses.

In 1644, Sir Edward Coke described unreasonable searches in the following terms: “One or more justice or justices of peace cannot make a warrant upon a bare surmise to break any mans [sic] house to search for a felon, or for stol[e]n goods”¹⁴⁹ Coke continued, “[F]or justices of peace to make warrants upon surmises, for breaking the houses of any subjects to search for felons, or stol[e]n goods, is against [the] Magna Carta. . . .”¹⁵⁰

In his 1721 treatise, Sir Matthew Hale expanded on Coke’s rejection of general warrants as a justification “to break open any man’s house.”¹⁵¹ Like Coke, Hale condemned the use of general warrants. Hale concluded that such warrants were “not justifiable,” because these warrants gave so much discretion to the law enforcement officers that the warrants made them “to be in effect the judge.”¹⁵² Also, like other contemporary commentators, Hale focused exclusively on house searches. In his chapter *Concerning Warrants to Search for Stolen Goods, and Seizing of Them*,¹⁵³ Hale wrote exclusively about searches of *houses* and did not discuss searches of commercial establishments that also might contain stolen goods.¹⁵⁴

148. Cuddihy, *supra* note 85, at 1116 (quoting Continental Congress to the American People (Oct. 26, 1774)).

149. SIR EDWARD COKE, *THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 176 (1817). Coke’s treatise originally was published in 1644; *see* Davies, *supra* note 85, at 578 n.74.

150. COKE, *supra* note 149, at 177. William Blackstone also emphasized the illegality of general warrants. Blackstone wrote: “A *general* warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for it’s [sic] uncertainty” 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 288 (1769).

151. *See* 2 SIR MATTHEW HALE, *HISTORY OF THE PLEAS OF THE CROWN* 149 (Solemn Emlyn ed. 1736) (quoting COKE, *supra* note 149, at 176).

152. *Id.* at 150.

153. *Id.* at 149.

154. *See, e.g., id.* at 150 (concluding that if an officer possesses a specific warrant and “if stolen goods be in the house, the officer may break open the door”); *id.* (noting that if an officer lawfully enters a house to search for stolen goods and no stolen goods are in the house, “the party that made the suggestion [about the presence of stolen goods] is punishable in such case”).

Early American legal commentators seemed to agree that the Fourth Amendment merely incorporated the English common law prohibition on unlawful physical searches of houses, conducted pursuant to general warrants. In his *Commentaries on the Constitution of the United States*, Joseph Story devoted just one page to the Fourth Amendment. With respect to the Amendment, Story wrote: “It is little more than the affirmance of a great constitutional doctrine of the common law.”¹⁵⁵

In discussing this “common law” doctrine, Story referred to the English prohibition on general warrants.¹⁵⁶ After describing the general warrant, Story wrote: “In the year 1763, the legality of these general warrants was brought before the King’s Bench [in England] for solemn decision; and they were adjudged to be illegal, and void for uncertainty.”¹⁵⁷ Story continued that a legal warrant “must not only state the name of the party, but also the time, and place, and nature of the offence with reasonable certainty.”¹⁵⁸

Story’s text is significant not only for its content but also for its brevity. If the framers intended that the Fourth Amendment would regulate a variety of government evidence-gathering activities, then Story presumably would have written an extended discussion on the many search and seizure issues that might arise. No one ever will know with precise certainty why Story wrote so little about the Fourth Amendment. But the most plausible explanation is that the scope of the Amendment was limited and applied only to unlawful house searches.

This assumption is corroborated by Thomas Cooley. In his constitutional treatise, Cooley emphasized that the Fourth Amendment was designed to regulate house searches.¹⁵⁹ In the treatise section, *Unreasonable Searches and Seizures*, Cooley wrote, “The maxim that ‘every man’s house is his castle’ is made a part of our constitutional law in the clause prohibiting unreasonable searches and seizures”¹⁶⁰ Cooley continued that the origins of the Fourth Amendment derived from “the abuse of executive authority, and in the unwarrantable intrusion of executive agents into the houses and among the private papers of individuals.”¹⁶¹

155. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1005, at 709 (Ronald D. Rotunda & John E. Nowak eds. 1987).

156. *Id.* at 709-10.

157. *Id.* at 710.

158. *Id.*

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

160. *Id.* at 299-300.

161. *Id.* at 300.

If there were any doubts about Thomas Cooley's understanding of the phrase "unreasonable searches and seizures," Cooley erased those doubts as a Justice on the Michigan Supreme Court. In the 1874 case of *Weimer v. Bunbury*,¹⁶² the Michigan high court reviewed a state statute. The statute allowed the state to issue a "warrant" authorizing the repossession of property owned by delinquent tax collectors.¹⁶³ The *Weimer* plaintiff alleged that this statute violated a Michigan state constitutional provision, which proscribed unreasonable searches and seizures.¹⁶⁴

Writing for the Michigan Supreme Court, Justice Cooley upheld the Michigan repossession statute.¹⁶⁵ According to Justice Cooley, the Michigan state constitutional provision outlawing unreasonable searches and seizures was intended for "something quite different from an open and public levy upon property after the usual method of execution levies."¹⁶⁶ Justice Cooley continued that the "main purpose" of the state constitutional search and seizure provision "was to make sacred the privacy of the citizen's dwelling and person against everything but process issued upon a showing of legal cause for invading it."¹⁶⁷ Although *Weimer* involved a state constitutional provision, Justice Cooley's earlier treatise also described the Fourth Amendment as exclusively regulating house searches.¹⁶⁸

English and early American legal commentators thus reaffirmed the original understanding of the Fourth Amendment. In short, the Amendment was intended to proscribe unlawful physical entries into residences. Nothing in the early commentaries indicates that the Fourth Amendment was intended to apply in other contexts.

D. *The Dearth of Nineteenth-Century Search and Seizure Cases*

If the framers intended to regulate a broad variety of government evidence-gathering activities in the Fourth Amendment, the paucity of nineteenth-century Fourth Amendment cases is difficult to explain. The United States Supreme Court did not issue its first Fourth Amendment opinion until 1886, with its decision in *Boyd v. United States*.¹⁶⁹

Federalism may in part explain the lack of early decisions interpreting the Fourth Amendment. In the eighteenth century and the nineteenth

162. 30 Mich. 201 (1874).

163. *Id.* at 210.

164. *Id.* at 208; see MICH. CONST. OF 1850, art VI, § 26 (providing that "[t]he person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures").

165. *Weimer*, 30 Mich. at 208, 210.

166. *Id.* at 208.

167. *Id.*

168. See *supra* text accompanying notes 159-61.

169. 116 U.S. 616 (1886).

century, the Bill of Rights—including the Fourth Amendment—only applied to the federal government.¹⁷⁰ During this same time period, most criminal laws were enacted by the states, not the federal government.¹⁷¹ Criminal prosecutions almost always took place in the state courts, where the Fourth Amendment did not apply.

However, during the eighteenth and nineteenth centuries, most state constitutions contained search and seizure provisions. Often these provisions used language that was very similar to the Federal Fourth Amendment.¹⁷² Yet published state court opinions rarely mentioned these state constitutional search and seizure provisions.¹⁷³ Prior to *Boyd v. United States*,¹⁷⁴ constitutional search and seizure provisions probably were discussed in fewer than fifty opinions. In the rare cases where attorneys argued that law enforcement activities ran afoul of a state constitutional provision, state courts typically concluded that the search and seizure provision had not been violated.¹⁷⁵

If the constitutional search and seizure provisions really did impose broad restraints on law enforcement activities, the failure of attorneys and judges to discuss these provisions is impossible to explain. However, if the

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

171. See, e.g., Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 40 (1996) (noting that federal criminal law initially had a very limited scope); Thomas J. Maroney, *Fifty Years of Federalization of Criminal Law: Sounding the Alarm or "Crying Wolf?"*, 50 SYRACUSE L. REV. 1317, 1319-20 (2000). Maroney observes that because the eighteenth-century federal government was "small and conducted few programs, the list of offenses was short." Maroney, *supra* at 1319-20. At this time, federal law specified only seventeen criminal offenses. *Id.*

172. See, e.g., MASS. CONST. OF 1780, pt. 1, art. XIV, reprinted in 3 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 105, at 1891 (guaranteeing that every person had "a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions"); PA. CONST. OF 1776, art. X, reprinted in, 5 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 105, at 3083 (guaranteeing "[t]hat the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure"); see also Davies, *supra* note 85, at 674-86 (summarizing search and seizure provisions that appeared in eighteenth-century state constitutions).

173. See Davies, *supra* note 85, at 611-19 (discussing early search and seizure cases).

174. 116 U.S. 616 (1886).

175. See, e.g., *Banks v. Farwell*, 38 Mass. 156, 158-60 (21 Pick. 1838) (holding that a warrantless search of a shop did not violate the Massachusetts Constitution, which prohibited unreasonable searches and seizures); *Mayo v. Wilson*, 1 N.H. 53, 59-60 (Sup. Ct. N.H. 1817) (holding that a warrantless arrest did not violate the New Hampshire Constitution, which prohibited unreasonable searches and seizures); *Wakely v. Hart*, 6 Binn. 316, 318 (Pa. 1814) (holding that a warrantless arrest did not violate the Pennsylvania Constitution, which regulated searches and seizures). *But cf.* *Sandford v. Nichols*, 13 Mass. (13 Tying) 286, 289-90 (1816) (holding that a house search conducted pursuant to an invalid warrant probably violated a Massachusetts constitutional provision, which prohibited unreasonable searches and seizures).

constitutional search and seizure provisions only applied to unlawful house searches, the lack of eighteenth-century and nineteenth-century search and seizure cases makes sense. In early America, attorneys and judges understood that unless a case involved a physical entry into a house, the state constitutional search and seizure provisions were just as inapplicable as the Federal Fourth Amendment.

IV. HISTORICAL AND TEXTUAL ARGUMENTS OPPOSING THE HOUSE SEARCH LIMITATION

As discussed above, a broad array of historical evidence indicates that when the framers enacted the Fourth Amendment, they intended that this provision would proscribe only unlawful physical entries into residences. Nonetheless, proponents of a broader Fourth Amendment may raise at least two arguments based on the text and the history of the Amendment.

First, eighteenth-century Americans protested British seizures of American ships. The controversy generated by these ship seizures may suggest that Americans were not exclusively concerned with residential searches and seizures.

Second, proponents of a broad Fourth Amendment may point to the language of the Amendment itself. The explicit text of the Fourth Amendment guarantees the right of the people to be secure not just in their “houses,” but also in their “persons, . . . papers, and effects.”¹⁷⁶ Proponents of a broad Fourth Amendment may argue that when the framers added the “persons, . . . papers, and effects” language, they intended that the Fourth Amendment would apply in situations other than house searches.

It is impossible to categorically dismiss these arguments against the house search interpretation of the Fourth Amendment. But on careful examination, neither the ship seizure cases nor the language of the Fourth Amendment convincingly demonstrates that the Amendment extended beyond physical intrusions into houses.

A. *The Ship Seizure Cases*

The *only* significant pre-Revolutionary American challenges to non-residential searches or seizures arose out of the British seizure of American ships, based on allegations of customs violations. The British faced particularly harsh criticism when they seized ships owned by prominent merchants Henry Laurens of South Carolina and John Hancock of Massachusetts.¹⁷⁷ Nelson Lasson observes that in Boston during 1768, “a

176. U.S. CONST. amend. IV.

177. See Cuddihy, *supra* note 85, at 1205-14.

riot resulted when John Hancock's sloop 'Liberty' was seized."¹⁷⁸ Initially, these ship seizure cases seem to suggest that eighteenth-century Americans believed that the phrase "unreasonable searches and seizures" would not apply exclusively to house searches.¹⁷⁹

However, federal ship seizure cases decided in the early nineteenth century strongly suggest that the Fourth Amendment never was intended to apply to vessels. These cases involved federal ship seizure provisions. The federal provisions permitted ship seizures with only minimal evidentiary support. Such provisions seem at odds with the Fourth Amendment prohibition on unreasonable searches and seizures. But in the early nineteenth-century ship seizure cases, *the Fourth Amendment never even was raised as an attack on the provisions authorizing ship seizures*.¹⁸⁰

In *Little v. Barreme*, the Supreme Court reviewed a federal statute that gave federal officers the right "to stop and examine any ship or vessel of the United States on the high sea," if "there may be reason to suspect" that the vessel was sailing to France.¹⁸¹ Under modern readings of the Fourth Amendment, such broad seizure powers would be highly suspect.

Not only did a Fourth Amendment argument not prevail in *Little*, but the Amendment was not even mentioned in the case. The Supreme Court ultimately held that the ship seizure in *Little* was improper, but only because the federal statute did not authorize a seizure of this particular type of ship.¹⁸² *Little* contains no suggestion that this ship seizure statute even raised a Fourth Amendment issue.

In *The Apollon*, the Supreme Court dealt with the seizure of a vessel under a 1799 statute. The statute authorized ship seizures where a vessel arriving from a foreign port failed to report to a United States customs

178. LASSON, *supra* note 86, at 72.

179. See Maclin, *The Complexity of the Fourth Amendment*, *supra* note 87, at 962 (asserting that the ship seizure controversies "helped to focus colonial thinking on the principle of probable cause"). *But cf.* Davies, *supra* note 85, at 604. Davies contends that these ship seizure controversies did not dispute "general search authority," but instead involved challenges focused on "'customs racketeering' in the form of hypertechnical applications of customs rules or forfeiture proceedings based on perjured testimony from informers." *Id.*

180. In the 1789 Collections Act, Congress approved the warrantless search of vessels for customs violations. Collections Act of 1789, ch. 5, 1 Stat. 29, 24-25 (1789). Based on this provision, Chief Justice William Howard Taft concluded that the Fourth Amendment was intended to apply to ship searches. See *Carroll v. United States*, 267 U.S. 132, 150-51 (1925).

However, if the framers intended that the Fourth Amendment would govern ship searches, it is unclear why Congress would pass a statute that simply restated the law imposed by the Amendment. If anything, the Collections Act suggests that Congress needed to enact a law regulating searches of vessels because the Fourth Amendment did not apply to such searches.

181. 6 U.S. 170, 177 (1804) (quoting Law of Feb. 9, 1799, ch. II, § 5, 1 Stat. 613-16).

182. *Id.* at 178-79. Congress only had authorized the seizure of ships sailing from America to France. *Id.* at 177. The vessel in *Little* was sailing from a French port to a Danish port. *Id.* at 176.

collector.¹⁸³ The *Apollon* Court held that the ship seizure was not authorized by the statute because the vessel passed through United States waters to dock in Florida, at that time a territory of Spain.¹⁸⁴ *The Apollon* involved another statute that might seem to run afoul of the Fourth Amendment prohibition on unreasonable searches and seizures. But once again, neither the Court nor the parties ever mentioned the Fourth Amendment.¹⁸⁵

Why is the Fourth Amendment not discussed in these ship seizure cases? The most plausible explanation is that both the attorneys and the Justices understood that the Fourth Amendment simply did not apply to searches or seizures of ships.

Without question, American colonial merchants deplored British seizures of American ships. But even after the adoption of the Fourth Amendment, Americans seemed to believe that regulation of ship seizures would occur through federal statutes, and not through application of the Fourth Amendment.

For example, in the 1789 Collections Act, Congress approved the warrantless search of vessels for customs violations.¹⁸⁶ If the framers had intended that the Fourth Amendment would govern ship searches, it is unclear why Congress would pass a statute that simply restated the law imposed by the Amendment. The Collections Act suggests that Congress needed to enact a law regulating searches of vessels because the Fourth Amendment did not apply to such searches.¹⁸⁷ In short, the colonial ship seizure controversies do not indicate that the Fourth Amendment was intended to apply to searches and seizures of vessels.

B. *The Textualist Counterargument*

The argument that the Fourth Amendment only regulates house searches initially seems inconsistent with the broad, explicit language of the Amendment. The text of the Fourth Amendment does not simply prohibit unreasonable searches of houses. Instead, the Amendment proscribes unreasonable searches or seizures of “persons, houses, papers,

183. 22 U.S. 362, 368 (1824).

184. *Id.* at 364, 370-72.

185. I have focused on the ship seizure cases because these cases involved an exercise of federal power. However, Gerard Bradley has pointed out that both early state and federal laws frequently authorized warrantless searches. Bradley, *supra* note 88, at 840-46. Bradley cites a long list of colonial, state, and federal laws that authorized warrantless searches and/or seizures. *Id.* at 840-44 & n.154.

186. Collections Act of 1789, ch. 5, 1 Stat. 29, 24 (1789).

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

and effects.”¹⁸⁸ This broad language would seem to extend the protections of the Amendment beyond house searches.

The framers nowhere explicitly stated what they meant by “persons, houses, papers, and effects.”¹⁸⁹ So it is impossible to categorically reject the modern interpretation of the Fourth Amendment, which applies the Amendment to most government evidence-gathering activities. The framers might have intended that the Fourth Amendment would apply outside of house searches. And even if the Fourth Amendment only applied to house searches in the eighteenth century, the framers may have intended to adopt a flexible and open-ended amendment, which could expand or contract in the future.¹⁹⁰ Nonetheless, the vast preponderance of the historical evidence suggests that the framers adopted the Fourth Amendment solely to proscribe unlawful physical intrusions into houses.¹⁹¹

1. The Narrowing of the Fourth Amendment Language

Congress actually narrowed the language of the Fourth Amendment from the first draft of the Amendment submitted by James Madison. Of the previously enacted state constitutional search and seizure provisions, Article XIV of the Massachusetts Constitution most closely resembled the Federal Fourth Amendment.¹⁹² This Massachusetts constitutional provision guaranteed that every person had “a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, *and all his possessions*.”¹⁹³ In Madison’s first draft, the Fourth Amendment guaranteed the “rights of the people to be secured in their persons, their

188. U.S. CONST. amend. IV.

189. See, e.g., Davies, *supra* note 85, at 723 n.501 (“There is no record of any debate regarding the Bill of Rights in the Senate.”).

190. For arguments that the Fourth Amendment is a flexible document that should change with the times, see Davies, *supra* note 85, at 740-41 (arguing that a return to the original understanding of the Fourth Amendment “would subvert the *purpose* the Framers had in mind when they adopted the text”); Yale Kamisar, *The Writings of John Barker Waite and Thomas Davies on the Search and Seizure Exclusionary Rule*, 100 MICH. L. REV. 1821, 1865 (2002) (arguing that “changing times and changing circumstances seriously undermined the presuppositions and expectations regarding the drafting and adoption of the search and seizure provision”); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 824 (1994) (asserting that “the construction of the Fourth Amendment’s ‘reasonableness’ clause should properly change over time to accommodate constitutional purposes more general than the Framers’ specific intentions”).

Legal scholars often argue that constitutional provisions such as the Fourth Amendment should evolve or change over time. But with respect to questions about *how* the Fourth Amendment should grow or evolve, commentators often fail to provide specific answers.

191. See *supra* text accompanying notes 85-175.

192. See, e.g., Davies, *supra* note 85, at 554 (describing Article XIV of the Massachusetts Constitution as “the state provision that most closely anticipated the Fourth Amendment”).

193. MASS. CONST. OF 1780, pt. 1, art. XIV, reprinted in 3 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 105, at 1891 (emphasis added).

houses, their papers, *and their other property* from all unreasonable searches and seizures.”¹⁹⁴

Why did Madison substitute the words “their other property” for the Massachusetts phrase “all his possessions”? Madison never explained this change. However, Madison may have sought to protect real property other than residences, such as shops or warehouses. As Thomas Davies writes: “[T]he statement of a right to be secure in one’s ‘property’ (without mentioning ‘houses’ specifically) may have been intended to serve as a rhetorical endorsement of the importance of the protection against general warrants that did not limit the scope of the premises that enjoyed the protection.”¹⁹⁵

Ultimately, Congress did not accept Madison’s broader language. Instead, a House of Representatives Committee changed the phrase “and their other property,” to the narrower language “effects.”¹⁹⁶ The Committee’s language eventually was adopted in the Fourth Amendment.

Madison never explained why he substituted the phrase “their other property” for the Massachusetts phrase “all his possessions.”¹⁹⁷ Nor did the House Committee explain why it ultimately decided to change Madison’s language “their other property” and adopt yet a third version: “effects.”¹⁹⁸ So these relatively small differences in wording may have been purely stylistic and inconsequential.

On the other hand, when Madison used the words “their other property,” Madison may have signaled a willingness to extend the Fourth Amendment beyond house searches. And in modifying Madison’s language, Madison’s colleagues on the House Committee and in Congress ultimately may have rejected any such extension of the Fourth Amendment.¹⁹⁹

2. The Limited Reach of State Constitutional Provisions

Prior to the ratification of the United States Constitution, a majority of the original thirteen states had adopted state constitutional provisions that regulated searches and seizures.²⁰⁰ Like the Federal Fourth Amendment,

194. James Madison, Speech to the House of Representatives (June 8, 1789), in 12 THE PAPERS OF JAMES MADISON 197, 201 (Robert A. Rutland et al. eds., 1977) (emphasis added).

195. Davies, *supra* note 85, at 709.

196. HOUSE COMM. OF ELEVEN REPORT (July 28, 1789), reprinted in THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 223-24 (Neil H. Cogan ed. 1997).

197. See Davies, *supra* note 85, at 709-10 (concluding that it is uncertain why Madison departed from the wording of the Massachusetts search and seizure provision).

198. See *id.* at 710 (noting that “there are no records of the Committee’s deliberations”).

199. *Id.* at 711 (“[T]he Committee’s formulation implied that ‘houses’ were the only type of premises protected by the right to be secure . . .”).

200. *Id.* at 668-69 (noting that seven of the original thirteen states adopted a declaration of

many of these state constitutional provisions used language that appeared to extend beyond house searches. And as is the case for the Federal Fourth Amendment, no historical evidence suggests that the states intended to regulate anything other than physical searches of residences.

As discussed above, Article XIV of the Massachusetts Constitution used wording that was very similar to the language of the Federal Fourth Amendment.²⁰¹ Article XIV guaranteed that every person had “a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions.”²⁰²

Yet in the 1838 case of *Banks v. Farwell*,²⁰³ the Massachusetts Supreme Judicial Court upheld the warrantless search of a shop by law enforcement officers.²⁰⁴ Although the *Banks* Court did not engage in any explicit discussion about the applicability of Article XIV to commercial premises, *Banks* raises doubts about whether the Massachusetts constitutional provision was intended to apply beyond house searches.

The early Pennsylvania constitutional provision on search and seizure law also may have been adopted solely to regulate house searches. Enacted in 1776, Article X of the Pennsylvania Constitution provided: “That the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure”²⁰⁵

Like the Fourth Amendment, the Pennsylvania Constitution used broad language that seemed to extend beyond house searches. But in both 1780 and 1785, the Pennsylvania legislature enacted statutes that required specific warrants for house searches, but not for searches of other premises.²⁰⁶ At a minimum, these statutes indicate that in Pennsylvania, house searches required stricter controls than searches in other places. However, these statutes also may suggest that Article X of the Pennsylvania Constitution applied exclusively to house searches.²⁰⁷

Much later in the nineteenth century, the Michigan Supreme Court largely limited that state’s constitutional search and seizure provision to house searches. The Michigan Constitution provided: “The person, houses, papers and possessions of every person shall be secure from unreasonable

rights, with each declaration of rights including a search and seizure provision).

201. See *supra* text accompanying notes 192-94.

202. MASS. CONST. OF 1780, pt. 1, art. XIV, reprinted in 3 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 105, at 1891.

203. 38 Mass. 156 (21 Pick. 1838).

204. *Id.* at 159-60.

205. PA. CONST. OF 1776, art. X, reprinted in 5 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 105, at 3083.

206. See *Davies*, *supra* note 85, at 681-83.

207. See *id.* at 678 (asserting that prior commentators on the Pennsylvania Constitution “have not identified a colonial grievance broader than customs searches of houses under general warrants”).

searches and seizures”²⁰⁸ But in reviewing a state statute that provided for a “warrant” authorizing the repossession of property owned by delinquent tax collectors, the Michigan Supreme Court held that the constitutional search and seizure provision simply was not applicable.²⁰⁹ Instead, Justice Thomas Cooley wrote that the state constitutional provision was designed “to make sacred the privacy of the citizen’s dwelling and person.”²¹⁰

As was the case with the Fourth Amendment, state constitutional provisions used broad language that would seem to extend search and seizure regulation beyond house searches. And as was the case with the Fourth Amendment, no historical evidence indicates that the state constitutional provisions were intended to regulate anything other than physical searches of residences.

3. The Lack of Discussions Beyond House Searches

If the framers had intended that the Fourth Amendment would apply to “unreasonable searches and seizures” of “persons, papers, and effects” outside of houses,²¹¹ one would expect some discussion about when such non-residential searches would be reasonable. But the historical record is profoundly silent as to the reasonableness of searches and seizures—with the sole exception of house searches.

Fourth Amendment doctrine has consistently recognized that the Amendment simply does not apply to some government investigatory activities. For example, in the 1924 decision in *Hester v. United States*,²¹² the Supreme Court held that the Fourth Amendment does not apply to open fields.²¹³ More specifically, *Hester* held that a bottle of illicit whisky found in the open fields was not an “effect,” as that term is used in the Fourth Amendment.²¹⁴ Sixty years later, in *Oliver v. United States*,²¹⁵ the United States Supreme Court reaffirmed its *Hester* holding.²¹⁶ *Oliver* reiterated that the Fourth Amendment does not govern searches in the open fields.²¹⁷

208. MICH. CONST. OF 1850, art. VI, § 26.

209. *Weimer v. Bunbury*, 30 Mich. 201, 208 (Mich. 1874).

210. *Id.*; see also *supra* text accompanying notes 159-61 (discussing Thomas Cooley’s understanding of the Federal Fourth Amendment).

211. U.S. CONST. amend. IV.

212. 265 U.S. 57 (1924).

213. *Id.* at 59.

214. *Id.* at 58-59 (holding that the Fourth Amendment did not apply when law enforcement officers seized bottles of illicit whisky, discovered in the open fields).

215. 466 U.S. 170 (1984).

216. *Id.* at 176-84.

217. *Id.*; see also *United States v. Dunn*, 480 U.S. 294, 303-04 (1987) (“*Oliver* reaffirmed the precept, established in *Hester*, that an open field is neither a ‘house’ nor an ‘effect,’” and that the Fourth Amendment does not apply to searches in the open fields). For a further discussion of the

Assuming that the Fourth Amendment was not intended to regulate all government evidence-gathering activities, one would expect some guidance from the framers about those situations where “persons . . . papers, and effects”²¹⁸ were protected by the Amendment. And yet, sources from the framing period do not define the places where the Fourth Amendment was intended to apply, with one notable exception—house searches. Thomas Davies thus concludes that the framers intended the Fourth Amendment “to provide clear protection for houses, personal papers, the sorts of domestic and personal items associated with houses, and even commercial products or goods that might be stored in houses—while leaving commercial premises and interests otherwise subject to congressional discretion.”²¹⁹

4. The Implausibility of Fourth Amendment Literalism

The First Congress enacted the Bill of Rights quickly, and largely indifferently. James Madison introduced the Bill of Rights before Congress on June 8, 1789.²²⁰ Congress passed the Amendments on September 25, 1789.²²¹ As Leonard Levy writes, members of the House of Representatives responded to the Bill of Rights largely with apathy, indifference, and a concern that the Amendments would distract the legislators’ attention from more important matters.²²²

Under these circumstances, it seems unlikely that Congress chose the specific words used in the Bill of Rights with careful precision. As a result, an emphasis on the literal language of the Amendments ultimately could contradict the intent of the framers.

For example, the First Amendment provides: “Congress shall make *no law* . . . abridging the freedom of speech.”²²³ And yet governments do make laws abridging freedom of speech all of the time. For example, a government may prohibit anyone from yelling “fire” in a crowded theater where no fire exists, even though yelling fire is a form of speech.²²⁴ And governments also may prohibit obscenity, another form of speech.²²⁵

Oliver decision, see *supra* text accompanying notes 59-69.

218. U.S. CONST. amend. IV.

219. Davies, *supra* note 85, at 714.

220. 1 ANNALS OF CONGR. 448-59 (Joseph Gales ed., 1834).

221. *Id.* at 951.

222. LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 34-37 (1999).

223. U.S. CONST. amend. I (emphasis added).

224. This example typically is credited to Oliver Wendell Holmes. See *Schenck v. United States*, 249 U.S. 47, 52 (1919).

225. See, e.g., *Miller v. California*, 413 U.S. 15, 20 (1973) (“[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. . . .” (quoting *Roth v. United States*, 354 U.S. 476, 484-85 (1957))); see also *New York v. Ferber*, 458

Similarly, the Second Amendment provides that “the right of the people to keep and bear Arms, shall not be infringed.”²²⁶ But the Second Amendment certainly permits gun licensing laws and other restrictions on firearms, even though such laws do affect the right to keep and bear arms.²²⁷

Just as a literal reading of the First Amendment or the Second Amendment would not be consistent with the intent of the framers, a literal interpretation of the Fourth Amendment also is inconsistent with the framers’ intent. The explicit language of the Fourth Amendment prohibits “unreasonable searches and seizures” of “persons, houses, papers, and effects.”²²⁸ And yet all of the historical evidence suggests that the framers meant only to regulate searches and seizures of persons, papers, and effects *inside of houses*. While the language of the Amendment may offer a mirage of expansive protection, the framers intended only to proscribe unlawful physical entries into houses.

C. Summary

Neither the ship seizure cases nor the text of the Fourth Amendment refutes the overwhelming historical evidence that when the framers adopted the Fourth Amendment, they only intended to regulate physical entries into residences. During the eighteenth century, Americans protested against English seizures of American ships. Despite these colonial grievances, early nineteenth-century litigation suggests a clear understanding that the Fourth Amendment simply did not apply to ship seizures.

Initially, the explicit Fourth Amendment guarantee of the right of people to be secure in their “persons, houses, papers, and effects” would seem to offer protection beyond house searches. And yet under both federal and state constitutional provisions, the only examples of unreasonable searches or seizures involved government agents breaking and entering houses. According to the original understanding of the Fourth Amendment, the proscription on unreasonable searches and seizures applied only to physical searches of houses and the seizure of persons, papers, and effects

U.S. 747, 753-64 (1982) (holding that child pornography does not receive any protection under the First Amendment).

226. U.S. CONST. amend II.

227. *See, e.g., United States v. Miller*, 307 U.S. 174, 178 (1939) (holding that the Second Amendment does not guarantee a citizen’s right to possess a sawed-off shotgun).

228. U.S. CONST. amend. IV.

found inside of houses.²²⁹ In other contexts, the Amendment was simply inapplicable.²³⁰

229. Akhil Amar advocates an interpretation of Fourth Amendment history that is quite different from the account presented in this Article. *See, e.g.,* Amar, *Fourth Amendment First Principles*, *supra* note 88; Amar, *The Bill of Rights as a Constitution*, *supra* note 88, at 1175-81; Amar, *The Writs of Assistance*, *supra* note 88. Amar's historical argument rests on two critical propositions. First, like the current Supreme Court, Amar asserts that the framers intended that the Fourth Amendment would impose a global reasonableness requirement on almost all government evidence-gathering activities. Amar, *Fourth Amendment First Principles*, *supra* note 88, at 801-11.

Second, Amar asserts that the framers actually disfavored searches pursuant to any warrant, general or specific. *Id.* at 771-81. According to Amar, the framers did not view the warrant process as protecting against unreasonable searches. *Id.* at 774. Instead, civil trespass suits offered the primary protection from such searches. *Id.* Amar contends that the framers disfavored warrants, because a warrant would provide "an absolute defense in any subsequent trespass suit." *Id.* Amar concludes: "Judges and warrants are the heavies, not the heroes, of our story." Amar, *The Bill of Rights as a Constitution*, *supra* note 88, at 1179; *see also* TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION: SEARCH, SEIZURE, AND SURVEILLANCE AND FAIR TRIAL AND FREE PRESS 41 (1969) (also arguing that the framers viewed all warrants as "an enemy").

Although Amar's account is creative and engaging, his contentions often seem at odds with the historical record. To take just one example, when early American legislatures passed statutes regulating searches and seizures, those statutes sometimes included a warrant requirement. *See, e.g.,* Excise Act of 1791, ch. 15, § 32, 1 Stat. 199, 207 (1791) (requiring that federal customs officers obtain a warrant before the officers search certain types of buildings for spirits that were concealed "with intent to evade the duties thereby imposed upon them"); Davies, *supra* note 85, at 681-83 (noting that in 1780 and 1785, the Pennsylvania Legislature enacted statutes that required specific warrants for house searches). Although Amar contends that the framers disfavored searches pursuant to warrants, these early American statutes requiring warrants contradict Amar's contention.

A number of Fourth Amendment scholars disagree with Amar's reading of Fourth Amendment history. For detailed critiques of Amar's arguments, *see* Cloud, *supra* note 88, at 1739 (arguing that Amar "selectively deploys incomplete fragments of the historical record to advance a partisan thesis"); Davies, *supra* note 85, at 575 n.63 ("Amar is an engaging writer, but his treatment of text and history is often loose and uninformed."); Maclin, *The Complexity of the Fourth Amendment*, *supra* note 87, at 929 ("Amar provides an incomplete account of the [Fourth] Amendment's history.").

230. Thomas Davies has advanced a reading of Fourth Amendment history that is very similar to the interpretation presented in this Article. Davies appropriately emphasizes that the historical concerns resulting in the Fourth Amendment "were almost exclusively about the need to ban house searches under general warrants." Davies, *supra* note 85, at 551; *see also id.* at 642-50 (emphasizing the sanctity of the home in eighteenth-century America).

However, I disagree with Davies on at least two points. Davies concludes that the sole purpose of the Fourth Amendment was "banning Congress from authorizing use of general warrants." *Id.* at 724. "In other words, the Framers did not address warrantless intrusions at all in the Fourth Amendment or in the earlier state provisions. . . ." *Id.* at 551.

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

V. BEYOND HOUSE SEARCHES: THE INCOHERENCE OF MODERN FOURTH AMENDMENT DOCTRINE

The most plausible reading of the historical record leads to the following conclusion: The framers intended that the Fourth Amendment would apply only to physical searches of residences, pursuant to a general warrant or no warrant at all. As discussed in Part I of this Article, modern doctrine has rejected this interpretation.²³¹ Instead, the Supreme Court has sought to apply the Amendment to a wide variety of government evidence-gathering activities.

The concluding section of this Article reviews three types of Fourth Amendment cases that do not involve intrusions into residences—random drug tests, sense-enhanced searches, and auto checkpoints. This review does not yield encouraging results. The decisions in these cases seem arbitrary, unpredictable, and ultimately incoherent.²³²

According to Davies's reading of the framers' intent, a search of a house pursuant to a general warrant would be an "unreasonable search," as that term is used in the Fourth Amendment. *Id.* at 724. However, Davies asserts that a warrantless house search would not be an unreasonable search, at least for Fourth Amendment purposes. *See id.* at 551. Given the profound common law tradition that proscribed unauthorized entries into houses, I disagree with Davies's conclusion that the Fourth Amendment did not proscribe warrantless house searches.

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

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

In short, having nine appointed Supreme Court Justices reinvent the Fourth Amendment based on their personal views about "unreasonable searches and seizures" is not the most sensible way to regulate police discretion. Fourth Amendment doctrine is such a mess because well-intentioned judges have invoked the Amendment in situations where it never was intended to apply. *See infra* text accompanying notes 234-320 (discussing Fourth Amendment decisions that seem arbitrary and incoherent).

231. *See supra* text accompanying notes 9-84.

232. While Fourth Amendment scholars may not agree on much, they almost universally agree on the unsatisfactory state of current Fourth Amendment doctrine. *See, e.g.,* Amar, *Fourth Amendment First Principles*, *supra* note 88, at 757 ("The Fourth Amendment today is an embarrassment."); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468 (1985) ("The fourth amendment is the Supreme Court's tarbaby: a mass of contradictions and obscurities that has ensnared the 'Brethren' in such a way that every effort to extract themselves only finds them more profoundly stuck."); Erik G. Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 787-88 (1999) (suggesting that each new Fourth Amendment doctrine

This incoherence is unlikely to be solved by some minor tweaking of Fourth Amendment doctrine. The chaos in Fourth Amendment doctrine has resulted from attempts to apply the Fourth Amendment in situations where the Amendment never was intended to apply. If one asked the framers of the Fourth Amendment what the Amendment provided for with respect to random drug tests, sense-enhanced searches, or auto checkpoints, the answer would be “Nothing at all.”

Of course, originalism is not the only method of constitutional analysis.²³³ But in Fourth Amendment cases, it seems virtually impossible to define “unreasonable searches and seizures” without reference to history. As the subsequent cases vividly illustrate, no modern consensus exists with respect to the propriety of random drug tests, sense-enhanced searches, auto checkpoints, and a variety of other government evidence-gathering activities.

Indeed, any modern agreement might be limited to the principle that improper physical intrusions into residences violate the Fourth Amendment. A search for some modern Fourth Amendment consensus thus might lead to the same conclusion as a search for the original intent of the framers—the Fourth Amendment prohibits improper physical searches of residences, and that is all.

A. *Random Drug Tests*

Since 1989, the Supreme Court has reviewed six random drug test cases.²³⁴ The Court has upheld four random drug test programs, while concluding that two other programs violated the Fourth Amendment.²³⁵

“is more duct tape on the Amendment’s frame and a step closer to the junkyard”).

233. See, e.g., *Maclin, Let Sleeping Dogs Lie*, *supra* note 87, at 897 (arguing that the Supreme Court no longer should consider historical evidence on the intent of the framers in Fourth Amendment cases, “unless it is able to develop a more effective and consistent method by which to do so”).

234. See, e.g., *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665-79 (1989) (upholding random drug tests for some customs service employees); *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 618-34 (1989) (upholding random drug tests for railway workers).

235. See *Bd. of Educ. v. Earls*, 536 U.S. 822, 828-38 (2002) (upholding random drug tests of all students who participate in competitive extracurricular activities); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-65 (1995) (upholding random drug tests of students who participated in interscholastic athletics); *Nat’l Treasury Employees Union*, 489 U.S. at 665-79 (upholding random drug tests of some customs service employees); *Skinner*, 489 U.S. at 618-34 (upholding random drug tests of railway workers); cf. *Ferguson v. City of Charleston*, 532 U.S. 67, 76-86 (2001) (holding that a random drug testing program for women who received prenatal care violated the Fourth Amendment); *Chandler v. Miller*, 520 U.S. 305, 309-23 (1997) (holding that drug testing of candidates for state office violated the Fourth Amendment).

For discussions of random drug testing cases, see Irene Merker Rosenberg, *Public School Drug Testing: The Impact of Acton*, 33 AM. CRIM. L. REV. 349 (1996); Jennifer Y. Buffalo, Note,

In distinguishing between permissible and impermissible random drug test programs, the Court has emphasized two factors. First, the Justices often have upheld random drug tests only after the government has demonstrated that the tests serve “special needs.”²³⁶ For example, in *Skinner v. Railway Labor Executives’ Ass’n*, the Justices upheld random drug testing of railway workers, based on the “governmental interest in ensuring the safety of the traveling public and of the employees themselves.”²³⁷

Second, the Justices have not permitted the use of random drug test results in criminal prosecutions. In *Ferguson v. City of Charleston*,²³⁸ the Court struck down a random drug testing program for women receiving prenatal care, where law enforcement authorities could receive positive drug test results.²³⁹ Although the Court has emphasized the importance both of special needs and of insulating random drug test results from law enforcement officers, the random drug testing cases sometimes still seem inconsistent and difficult to reconcile.

In *Chandler v. Miller*,²⁴⁰ the Justices struck down a Georgia statute, which required that candidates for designated state offices must take a urinalysis drug test prior to their nomination or election.²⁴¹ In ruling that the Georgia statute violated the Fourth Amendment, the *Chandler* Court held that the state had not shown any “special need” for the drug test policy.²⁴² Justice Ruth Bader Ginsburg concluded: “Georgia asserts no evidence of a drug problem among the State’s elected officials, those officials typically do not perform high-risk, safety-sensitive tasks, and the required certification immediately aids no interdiction effort.”²⁴³

Conversely, the Justices accepted a random drug test policy for high school students in *Board of Education v. Earls*.²⁴⁴ Tecumseh High School mandated urinalysis testing for any student who participated in competitive extracurricular activities.²⁴⁵ The random drug tests applied not only to students who participated in extracurricular athletics, but also to students

“Special Needs” and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule, 32 HARV. C.R. - C.L. L. REV. 529 (1997).

236. *Skinner*, 489 U.S. at 620.

237. *Id.* at 621.

238. 532 U.S. 67 (2001).

239. *Id.* at 80 (holding that the drug testing program violated the Fourth Amendment, because “the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment”).

240. 520 U.S. 305 (1997).

241. *Id.* at 309-10.

242. *Id.* at 318.

243. *Id.* at 321-22.

244. 536 U.S. 822, 836 (2002).

245. *Id.* at 826.

who were involved in activities such as choir, marching band, and the Future Farmers of America.²⁴⁶ The *Earls* majority upheld the random drug testing policy, concluding that “the nationwide drug epidemic makes the war against drugs a pressing concern in every school.”²⁴⁷

The holdings in *Earls* and *Chandler* are difficult to reconcile. In *Chandler*, the Court emphasized that the state had not demonstrated any “concrete danger” of widespread illicit drug use among candidates for public office.²⁴⁸ But in *Earls*, the state school board also failed to demonstrate any “particularized or pervasive drug problem” among Tecumseh High School students involved in extracurricular activities.²⁴⁹ Instead, as Justice Ruth Bader Ginsburg wrote in dissent: “Nationwide, students who participate in extracurricular activities are significantly less likely to develop substance abuse problems than are their less-involved peers.”²⁵⁰

In holding that random drug testing of candidates for public office violated the Fourth Amendment, the *Chandler* Court emphasized that elected state government officials “typically do not perform high-risk, safety-sensitive tasks.”²⁵¹ But like these state officials, many of the students tested in *Earls* would not ordinarily pose any threat to others. Admittedly, high school athletes who were under the influence of illicit drugs could pose a genuine danger to others at sports competitions.²⁵² However, a member of the choir or the debate team who used illicit drugs probably would not pose a danger to anyone but himself or herself.²⁵³ In short, the Court’s random drug test decisions in *Chandler* and *Earls* are difficult to reconcile.

Given the Court’s willingness to uphold a random drug testing program in *Earls*, the lack of deference exhibited by the Justices in *Chandler* is genuinely disturbing. In 1990, the Georgia Legislature approved the drug testing statute that was subsequently invalidated in *Chandler*.²⁵⁴ The legislators undoubtedly were aware of the Fourth Amendment. These

246. *Id.*

247. *Id.* at 834. For a further discussion of the *Earls* decision, see Steinberg, *High School Drug Testing*, *supra* note 5, at 269-70.

248. *Chandler v. Miller*, 520 U.S. 305, 318-19 (1997).

249. *Earls*, 536 U.S. at 835.

250. *Id.* at 853 (Ginsburg, J., dissenting).

251. *Chandler*, 520 U.S. at 321-22.

252. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 662 (1995) (holding that when student athletes use drugs, “the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high”).

253. *See Earls*, 536 U.S. at 852 (Ginsburg, J., dissenting) (asserting that “the great majority of students the School District seeks to test in truth are engaged in activities that are not safety sensitive to an unusual degree”).

254. *Chandler*, 520 U.S. at 309.

lawmakers could make their own determination about whether a drug test for public office candidates amounted to an unreasonable search. But in *Chandler*, the Justices did not hesitate to substitute their own interpretation of Fourth Amendment reasonableness for the approach endorsed by Georgia's elected legislators—even though the *Chandler* decision was not compelled by the text or the history of the Fourth Amendment.²⁵⁵

B. Sense-Enhanced Searches

A sense-enhanced search involves “any police examination of a person or his property through the use of some method that provides information not available to unaided sensory perceptions.”²⁵⁶ Like the drug-testing rulings, the Supreme Court's decisions applying the Fourth Amendment to sense-enhanced searches often seem contradictory and difficult to reconcile.²⁵⁷

A review of sense-enhanced search decisions reveals some themes that appear frequently. For example, where law enforcement officers have used sense-enhancing devices to reveal information about a residence, such searches are particularly suspect.²⁵⁸ Further, the Court is more likely to permit the warrantless use of a device that enhances visual observations, as opposed to a device that enhances hearing.²⁵⁹

255. See *id.* at 328 (Rehnquist, J., dissenting) (“Nothing in the Fourth Amendment or in any other part of the Constitution prevents a State from enacting a statute whose principal vice is that it may seem misguided or even silly to the Members of this Court.”).

256. Steinberg, *Making Sense of Sense-Enhanced Searches*, *supra* note 6, at 563 n.1.

257. For discussions of sense-enhanced search cases, see Melvin Gutterman, *A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance*, 39 SYRACUSE L. REV. 647 (1988); Raymond Shih Ray Ku, *The Founders' Privacy: The Fourth Amendment and the Power of Technological Surveillance*, 86 MINN. L. REV. 1325 (2002); Ric Simmons, *From Katz to Kyllo: A Blueprint for Adapting the Fourth Amendment to Twenty-First Century Technologies*, 53 HASTINGS L.J. 1303 (2002); Steinberg, *Making Sense of Sense-Enhanced Searches*, *supra* note 6.

258. Compare *United States v. Karo*, 468 U.S. 705, 716-18 (1984) (holding that the warrantless monitoring of a beeper inside of a residence violated the Fourth Amendment), and *Kyllo v. United States*, 533 U.S. 27, 33-41 (2001) (holding that when law enforcement officers did not obtain a warrant before using a thermal imaging device to measure the amount of heat emanating from a suspect's home, the officers violated the Fourth Amendment), with *United States v. Knotts*, 460 U.S. 276, 280-85 (1983) (holding that where police officers monitored a beeper that traveled through the public streets, such police conduct was not a search and did not require a warrant).

259. Compare *California v. Ciraolo*, 476 U.S. 207, 211-15 (1986) (holding that where police officers used an airplane to view marijuana plants growing in a fenced backyard, the officers did not engage in a Fourth Amendment search, and the officers did not need to obtain a warrant), with *Katz v. United States*, 389 U.S. 347, 357-59 (1967) (holding that the warrantless use of a wiretap to monitor conversations from a public telephone booth violated the Fourth Amendment). *But cf.* *United States v. White*, 401 U.S. 745, 748-54 (1971) (holding that the warrantless use of a radio

Despite these themes, the Supreme Court's sense-enhanced search decisions often seem unpredictable and contradictory.²⁶⁰ In *Kyllo v. United States*,²⁶¹ the Supreme Court rejected the warrantless use of a thermal imaging device to detect heat emanating from a house.²⁶² The thermal imaging device would inform police officers only about the temperature inside of a residence, and would not reveal any other information.²⁶³ Federal agents used the device to corroborate their suspicions that Danny Kyllo was growing marijuana plants.²⁶⁴

Writing for the majority, Justice Antonin Scalia began by observing that the Fourth Amendment provides a high level of protection to residences.²⁶⁵ Justice Scalia worried that the use of a thermal imaging unit might disclose intimate details, such as "what hour each night the lady of the house takes her daily sauna and bath."²⁶⁶ Justice Scalia also noted that when federal law enforcement agents scanned the defendant's house with the thermal imaging unit, the government was employing "a device that is not in general public use, to explore details of the home."²⁶⁷

The decision in *Kyllo* seems to conflict with an earlier decision in *United States v. Place*.²⁶⁸ In *Place*, Drug Enforcement Agents used a drug-detecting dog to sniff the suspect's two luggage bags at Kennedy Airport.²⁶⁹ The agents did not obtain a warrant before using the dog.²⁷⁰ The drug-detecting dog reacted positively to the smaller bag.²⁷¹ When the agents opened the bag, they found more than 1000 grams of cocaine.²⁷²

transmitter concealed on an informant did not violate the Fourth Amendment); see also Steinberg, *Making Sense of Sense-Enhanced Searches*, *supra* note 6, at 592-96 (discussing the Supreme Court's different treatment of devices that augment a police officer's hearing and devices that enhance an officer's sight).

260. See Steinberg, *Making Sense of Sense-Enhanced Searches*, *supra* note 6, at 564 (describing sense-enhanced search decisions, which seem "chaotic and unpredictable").

261. 533 U.S. 27 (2001).

262. *Id.* at 33-41; see *supra* text accompanying notes 17-26 (discussing the *Kyllo* conclusion that the use of a thermal imaging unit involved a "search," covered by the Fourth Amendment).

263. See *Kyllo*, 533 U.S. at 30 (noting that the thermal imaging unit "operates somewhat like a video camera showing heat images").

264. *Id.* at 29-30. The agents ultimately found more than 100 marijuana plants in *Kyllo's* residence. *Id.* at 30.

265. *Id.* at 31 (asserting that protection of residences lies at "'the very core' of the Fourth Amendment") (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

266. *Id.* at 38.

267. *Id.* at 40; cf. *California v. Ciraolo*, 476 U.S. 207, 211-15 (1986) (holding that where police officers viewed the defendant's backyard from an airplane using only their naked eyes, the surveillance was not a Fourth Amendment "search" and did not require a warrant).

268. 462 U.S. 696 (1983).

269. *Id.* at 699.

270. *Id.*

271. *Id.*

272. *Id.*

In *Place*, the Justices upheld the warrantless use of the drug-detecting dog.²⁷³ In fact, the Court concluded that the canine sniff did not even constitute “a ‘search’ within the meaning of the Fourth Amendment.”²⁷⁴ In reaching this conclusion, Justice Sandra Day O’Connor emphasized that the canine sniff “does not require opening the luggage.”²⁷⁵ Further, the sniff “discloses only the presence or absence of narcotics, a contraband item.”²⁷⁶

The decisions in *Kyllo* and *Place* seem difficult to reconcile. Both cases involved a search technique that disclosed very limited information. In *Kyllo*, the thermal imaging device revealed only the temperature inside of the suspect’s home.²⁷⁷ In *Place*, the canine sniff revealed only the presence of a controlled substance in the suspect’s luggage.²⁷⁸

Both cases also involved a sense-enhancing device that was not frequently used, except by law enforcement officers. The *Kyllo* decision explicitly noted that the thermal imaging device was “not in general public use.”²⁷⁹ Of course, drug-detecting dogs also are not “in general public use.”

Admittedly, federal agents scanned different types of property in *Kyllo* and *Place*. In *Kyllo*, federal agents used the thermal imaging unit to scan the interior of the suspect’s home.²⁸⁰ Conversely, the Drug Enforcement Agents in *Place* used the drug-detecting dog to sniff the suspect’s luggage at a public airport.²⁸¹

However, according to current Fourth Amendment doctrine, this distinction should not lead to the different results in *Kyllo* and *Place*. Admittedly, the *Kyllo* Court described the interior of a residence as “the prototypical and hence most commonly litigated area of protected privacy.”²⁸² However, the Supreme Court also has held that individuals possess a reasonable expectation of privacy in containers such as luggage.²⁸³ In fact, the Court typically requires that law enforcement

273. *Id.* at 706-07.

274. *Id.* at 707.

275. *Id.*

276. *Id.*

277. *Kyllo v. United States*, 533 U.S. 27, 29-30 (2001).

278. *Place*, 462 U.S. at 699, 707. If anything, the canine sniff might be more intrusive than the thermal imaging unit. Individuals ordinarily might regard the presence or absence of a controlled substance as more sensitive and private than the temperature of their residences.

279. *Kyllo*, 533 U.S. at 40.

280. *Id.* at 34.

281. *Place*, 462 U.S. at 707.

282. *Kyllo*, 533 U.S. at 34.

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

officers must obtain a warrant before opening luggage or similar containers.²⁸⁴

In short, the decisions in *Kyllo* and *Place* seem completely inconsistent. Both cases involved the use of a sense-enhancing device that was not in general public use, that did not require a physical trespass into a constitutionally protected area, and that revealed only limited information.

And yet the cases reached opposite results. In *Kyllo*, the Court invalidated the warrantless use of the thermal imaging unit. In *Place*, the Court permitted the warrantless use of the drug-detecting dog. But the *Place* Court went even further, concluding that use of the drug-detecting dog was not even a “search” and was not covered by the Fourth Amendment at all.²⁸⁵ Ultimately, the *Kyllo* and *Place* decisions seem impossible to reconcile.

C. Automobile Checkpoints

In a pair of relatively recent decisions, the Supreme Court has applied the Fourth Amendment to automobile checkpoints, where police officers stop each driver. As is the case in the random drug test cases and the sense-enhanced search cases, these checkpoint decisions seem arbitrary and difficult to reconcile.²⁸⁶

In *Michigan Department of State Police v. Sitz*,²⁸⁷ the Court upheld a Michigan sobriety checkpoint.²⁸⁸ Michigan state law enforcement officers stopped every vehicle that passed through a fixed checkpoint.²⁸⁹ At the checkpoint, the officers checked each driver for obvious signs of

284. See, e.g., *id.* at 7-16 (holding that when federal agents seized a locked footlocker outside of a train station, the agents should have obtained a warrant before they opened the footlocker); cf. *California v. Acevedo*, 500 U.S. 565, 569-81 (1991) (holding that where a police officer had probable cause to believe that a paper bag in the trunk of a suspect’s auto contained marijuana, the police officer could open the paper bag without first obtaining a warrant); *United States v. Ross*, 456 U.S. 798, 804-25 (1982) (holding that where a police officer had probable cause to believe that an automobile contained narcotics, the officer could open a paper bag in the trunk of the car without first obtaining a warrant).

285. *Place*, 462 U.S. at 707.

286. For discussions of the Court’s automobile checkpoint decisions, see generally Suzanne Graves, Note, *Checkpoints and the Fourth Amendment: Saving Grace or Constitutional Martyr?*, 32 CONN. L. REV. 1487 (2000); Doug Reeder, Note, *City of Indianapolis v. Edmond: The Supreme Court Takes a Detour to Avoid Roadblock Precedent*, 40 HOUS. L. REV. 577 (2003); Shannon S. Schultz, Note, *Edmond v. Goldsmith: Are Roadblocks Used to Catch Drug Offenders Constitutional?*, 84 MARQ. L. REV. 571 (2000).

287. 496 U.S. 444 (1990).

288. *Id.* at 447-55.

289. *Id.*

intoxication.²⁹⁰ On average, each checkpoint stop lasted for about twenty-five seconds.²⁹¹

The *Sitz* Court held that the Michigan sobriety checkpoint program did not violate the Fourth Amendment.²⁹² Chief Justice William H. Rehnquist began by noting “the magnitude of the drunken driving problem,” and “the State’s interest in eradicating it.”²⁹³ Balanced against this important state interest, “the intrusion on motorists stopped briefly at sobriety checkpoints—is slight.”²⁹⁴ Because officers at a checkpoint stopped “every approaching vehicle,”²⁹⁵ this policy served to “minimize the discretion of the officers on the scene.”²⁹⁶ Justice Rehnquist also noted that because a motorist at a fixed checkpoint is able to see police officers stopping other vehicles, as well as “visible signs of the officers’ authority,” the motorist is unlikely “to be frightened or annoyed by the intrusion.”²⁹⁷

In *City of Indianapolis v. Edmond*,²⁹⁸ the Court reviewed a narcotics checkpoint program with many similarities to the checkpoint program upheld in *Sitz*. In *Edmond*, police officers stopped a predetermined number of vehicles at each checkpoint location.²⁹⁹ While checking each driver for signs of impairment, an officer also looked for narcotics by conducting “an open-view examination of the vehicle.”³⁰⁰ In addition, police officers led a drug-detecting dog around the outside of each stopped vehicle.³⁰¹ If the officers did not find any evidence of narcotics or other criminal misconduct, these auto stops lasted “two to three minutes or less.”³⁰²

The use of a drug-detecting dog in *Edmond* seemed like the only real difference between the narcotics checkpoint in *Edmond* and the constitutional sobriety checkpoint in *Sitz*. But as discussed above,³⁰³ the United States Supreme Court previously had held that a canine sniff is not

290. *Id.*

291. *Id.* at 448; *see also* *United States v. Martinez-Fuerte*, 428 U.S. 543, 554-67 (1976) (holding that where the Border Patrol stopped cars briefly at a fixed checkpoint to search for illegal aliens, the checkpoint did not violate the Fourth Amendment).

292. *Sitz*, 496 U.S. at 447-55.

293. *Id.* at 451.

294. *Id.*

295. *Id.* at 453.

296. *Id.* at 452.

297. *Id.* at 453 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976)); *cf.* *Delaware v. Prouse*, 440 U.S. 648, 657 (1979) (roving patrols to check for unlicensed and unsafe drivers violated the Fourth Amendment, in part because such patrols “may create substantial anxiety” when the patrols stop motorists).

298. 531 U.S. 32 (2000).

299. *Id.* at 35.

300. *Id.*

301. *Id.*

302. *Id.* at 36.

303. *See supra* text accompanying notes 268-76.

covered by the Fourth Amendment at all.³⁰⁴ This holding was reaffirmed in *Edmond*.³⁰⁵ Seemingly, a valid checkpoint procedure combined with a constitutional canine sniff would result in a constitutional program.

Nonetheless, the *Edmond* Court held that the Indianapolis narcotics checkpoints violated the Fourth Amendment.³⁰⁶ The Court asserted that the Indianapolis checkpoints resulted out of an improper “primary purpose.”³⁰⁷ Justice Sandra Day O’Connor observed that “the Indianapolis checkpoint program unquestionably has the primary purpose of interdicting illegal narcotics.”³⁰⁸ The Court only had approved checkpoints that were designed “primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety.”³⁰⁹ In striking down the Indianapolis narcotics checkpoint program, the *Edmond* majority cautioned against “exceptions to the general rule of individualized suspicion,”³¹⁰ where a government program is designed primarily to serve law enforcement interests.³¹¹

The *Edmond* decision raises a number of problems. First, in focusing on the primary purpose served by the checkpoint program, the decision seems to clash with other Fourth Amendment precedents. In *Whren v. United States*,³¹² the Court held that a police officer’s subjective motivations were irrelevant in a Fourth Amendment challenge, as long as an auto stop was supported by probable cause derived from objective facts.³¹³ Yet the *Edmond* Court rejected the checkpoint program solely because the program resulted from what the Justices perceived to be an improper purpose.³¹⁴

Second, the Court’s distinction between the valid sobriety checkpoint in *Sitz* and the invalid narcotics checkpoint in *Edmond* suggests a highly questionable balancing of private and public interests. In *Sitz*, during a sobriety checkpoint that police officers operated for seventy-five minutes,

304. *United States v. Place*, 462 U.S. 696, 707 (1983).

305. *Edmond*, 531 U.S. at 40 (holding that a dog sniff is not a Fourth Amendment “search”).

306. *Id.* at 40-48.

307. *Id.* at 48.

308. *Id.* at 40.

309. *Id.* at 41.

310. *Id.* at 43.

311. *Id.*

312. 517 U.S. 806 (1996).

313. *See id.* at 813 (holding that “the constitutional reasonableness of traffic stops” does not depend on “the actual motivations of the individual officers involved”); *see also Atwater v. City of Lago Vista*, 532 U.S. 318, 346-47 (2001) (holding that a misdemeanor arrest did not violate the Fourth Amendment, even though the arrest involved “gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor judgment”).

314. *Edmond*, 531 U.S. at 40 (asserting that the Indianapolis narcotics checkpoint program violated the Fourth Amendment, because the program had “the primary purpose of interdicting illegal narcotics”).

the officers arrested about 1.6% of the drivers who passed through the checkpoint.³¹⁵ In *Edmond*, during six narcotics checkpoints, about 9 percent of the auto stops resulted in arrests.³¹⁶

Except for the non-invasive canine sniff, the *Edmond* checkpoint stop was no more intrusive than the checkpoint stop in *Sitz*. But because the *Edmond* narcotics checkpoint resulted in a much higher arrest rate than the sobriety checkpoint in *Sitz*, the *Edmond* checkpoint arguably advanced legitimate public interests to a greater extent than the *Sitz* checkpoint. Although the *Edmond* Court rejected the Indianapolis narcotics checkpoint program, the Indianapolis program would seem to have a better claim to constitutionality than the sobriety checkpoint program upheld in *Sitz*.³¹⁷

315. At the Saginaw County checkpoint, police officers stopped 126 vehicles and arrested two drivers. Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 448 (1990).

316. At the Indianapolis checkpoints, police officers stopped 1161 vehicles and arrested 104 motorists. *Edmond*, 531 U.S. at 34-35.

317. Earlier this year, the United States Supreme Court reviewed another auto checkpoint in *Illinois v. Lidster*, 124 S. Ct. 885 (2004). In *Lidster*, a bicyclist was killed in a hit-and-run accident on an Illinois highway. *Id.* at 888. About one week after the fatal accident, police officers erected a highway checkpoint "at about the same time of night and at about the same place" as the location where the accident had occurred. *Id.* As each vehicle approached the checkpoint, a police officer stopped the car for about ten to fifteen seconds. The officer asked the occupants of each auto if they possessed any information about the fatal hit-and-run accident. Police officers at the checkpoint hoped to obtain "more information about the accident from the motoring public." *Id.*

As Robert Lidster approached the checkpoint, Lidster was driving his minivan erratically. After a police officer smelled alcohol on Lidster's breath, a second officer administered a sobriety test. When Lidster failed the test, the officer arrested Lidster. Lidster eventually was convicted of driving under the influence of alcohol. *Id.*

The *Lidster* Court upheld this crime scene checkpoint. The Court conceded that the crime scene checkpoint promoted the state's "general interest in crime control," like the narcotics checkpoints struck down in *Edmond*. *Id.* at 889. Nonetheless, the Justices held that the *Lidster* crime scene checkpoint did not violate the Fourth Amendment, because the *Lidster* checkpoint involved an "information-seeking kind of stop." *Id.* Writing for the *Lidster* majority, Justice Stephen Breyer observed: "The stop's primary law enforcement purpose was not to determine whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others." *Id.*

The *Lidster* Court's attempt to distinguish *Edmond* is unconvincing. The "primary law enforcement" purpose in *Lidster* was to catch the driver responsible for the hit-and-run accident. Had police officers stopped this driver at the *Lidster* checkpoint, the driver unquestionably would have been detained and probably would have been prosecuted. And police officers did not stop Robert Lidster to solicit his help "in providing information about a crime." The officers stopped Lidster to prosecute Lidster for drunk driving.

The *Lidster* Court also cautioned that courts assessing checkpoints must judge each checkpoint's "reasonableness, hence its constitutionality, on the basis of the individual circumstances." *Id.* at 890. The vagueness of this non-standard provides virtually no guidance to police departments contemplating checkpoints, or to lower courts reviewing police checkpoints. The *Lidster* decision seems certain to generate more checkpoint litigation, with unpredictable and chaotic results.

Finally, the decisions in *Sitz* and *Edmond* suggest that rulings on the constitutionality of auto checkpoints may turn on fine factual distinctions. Assume that the hypothetical municipality of Hulls Cove institutes a fixed sobriety checkpoint designed to identify drunk drivers. Only one fact distinguishes the Hulls Cove sobriety checkpoint from the sobriety checkpoint program upheld in *Sitz*. During brief auto stops at the Hulls Cove checkpoint, police officers lead a drug-detecting dog around each car. Ordinarily, the canine sniff does not extend the length of the detention. But if the dog signals that illicit drugs are present in the auto, police will detain the driver and search the car.³¹⁸

The hypothetical Hulls Cove checkpoint program seems to fall somewhere in between the lawful sobriety checkpoint in *Sitz* and the unlawful narcotics checkpoint in *Edmond*. Would the Hulls Cove checkpoint violate the Fourth Amendment? It is impossible to say.

This uncertainty should be worrisome. Assume that police officers or lawmakers guess wrong and implement a program that violates the Fourth Amendment. Under the exclusionary rule, any evidence obtained through such an unconstitutional program ordinarily will be suppressed.³¹⁹ Highly probative evidence will be excluded from criminal trials, leading to the acquittal of defendants who otherwise would be convicted. In an attempt to prevent such results, the Supreme Court's Fourth Amendment decisions often have emphasized the importance of providing police officers with bright line rules that clearly identify permissible searches and seizures.³²⁰ With respect to roadblocks, the absence of such clear rules inevitably will lead to law enforcement errors, the exclusion of evidence, and the inability to convict obviously guilty defendants.

318. This hypothetical is based on a problem published by James Tomkovicz and Welsh White. See JAMES J. TOMKOVICZ & WELSH S. WHITE, CRIMINAL PROCEDURE: CONSTITUTIONAL CONSTRAINTS UPON INVESTIGATION AND PROOF 411, Note 3 (4th ed. 2001).

319. See, e.g., *Weeks v. United States*, 232 U.S. 383, 393 (1914) (holding that if illegally obtained items may be "held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value"); see also *Mapp v. Ohio*, 367 U.S. 643, 655-57 (1961) (holding that the exclusionary rule applies in state court cases).

320. See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001) (holding that in interpreting the Fourth Amendment, the Supreme Court should "draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made"); *New York v. Belton*, 453 U.S. 454, 458 (1981) (holding that where police officers search an automobile incident to an arrest, the officers must be able to apply "[a] single, familiar standard" (alteration in original) (quoting *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979))).

D. Summary

Attempts to apply the Fourth Amendment to random drug tests, sense-enhanced searches, and roadblocks have resulted in chaotic and unpredictable decisions. In these cases, the Supreme Court has announced arbitrary decisions that rarely refer to Fourth Amendment history and make little sense as a matter of public policy.

After reviewing these seemingly arbitrary and irreconcilable Fourth Amendment cases, the reader must ask how the Supreme Court has performed so poorly in this area.³²¹ In interpreting the United States Constitution, the Court has many advantages over police officers in the field, or even the lower courts. Supreme Court Justices are carefully selected and subjected to a rigorous confirmation process.³²² The Court's jurisdiction is almost entirely discretionary, with the Justices handling a relatively limited docket.³²³ Each Justice has the assistance of several law clerks, whom the Justices choose from the best and the brightest law school graduates.³²⁴ Despite all of these advantages, the Court's Fourth Amendment opinions often border on incoherence.

A review of history provides new insight into the Supreme Court's Fourth Amendment quagmire. When the Court issues a Fourth Amendment ruling on issues such as random drug testing, sense-enhanced searches, or automobile checkpoints, the Justices are invoking the Fourth Amendment in situations where the Amendment never was intended to apply. If one accepts the inapplicability of the Fourth Amendment in these situations, the chaotic nature of the Court's Fourth Amendment interpretations is less difficult to explain.

321. For further criticisms of the Court's Fourth Amendment jurisprudence, see sources cited *supra* note 232.

322. For discussions of the modern Supreme Court confirmation process, see Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1203-12 (1988); Ronald D. Rotunda, *The Confirmation Process for Supreme Court Justices in the Modern Era*, 37 EMORY L.J. 559, 562-86 (1988); David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1494-1520 (1992).

323. See, e.g., LISA A. KLOPPENBERG, *PLAYING IT SAFE: HOW THE SUPREME COURT SIDESTEPS HARD CASES AND STUNTS THE DEVELOPMENT OF LAW* 4 (2001) (reporting that the Supreme Court agrees to review only about one percent of the cases that reach the Court through a petition for certiorari).

324. See, e.g., Mark R. Brown, *Gender Discrimination in the Supreme Court's Clerkship Selection Process*, 75 OR. L. REV. 359, 362 (1996) (noting that former Supreme Court clerks "practice in the nation's best law firms, teach in its best law schools, hold plum public-sector appointments, and on occasion rise again to the Supreme Court").

VI. CONCLUSION

The Supreme Court has read the Fourth Amendment phrase “unreasonable searches and seizures” in a very different way than the framers of the Constitution intended. The Court typically has concluded that any government evidence-gathering activity constitutes a “search or seizure,” where the government activity affects a suspect’s reasonable expectation of privacy. The Court’s distinctions between cases that implicate the Fourth Amendment and cases that do not are chaotic and difficult to reconcile.

When the framers used the phrase “unreasonable searches and seizures,” the framers actually were referring to a narrow, specific problem. In short, the framers intended that the Fourth Amendment would prohibit only unlawful physical searches of houses, pursuant to a general warrant or no warrant at all. The framers never intended that the Amendment would somehow govern the many other complex problems raised by police investigations of criminal misconduct.

The previous section of this Article examines some of the Supreme Court’s relatively recent attempts to address new Fourth Amendment problems. After reviewing the seemingly arbitrary and sometimes incoherent results in these cases, it is difficult to remain optimistic about the current Court’s Fourth Amendment activism.

In the vast majority of cases where the Supreme Court today attempts to apply the Fourth Amendment, the Amendment simply never was intended to apply. A change in the membership of the Court, or a tweaking of Fourth Amendment doctrine, will not repair the Court’s search and seizure jurisprudence. The Justices may restore sensibility to Fourth Amendment analysis only by returning to the original understanding of the Amendment.