

REVIEW

Searching through History; Searching for History

Morgan Cloud†

The Fourth Amendment: Origins and Original Meaning, 602-1791. William John Cuddihy. UMI, 1990. Pp cx, 1696.¹

If history could be told in all its complexity and detail it would provide us with something as chaotic and baffling as life itself; but because it can be condensed there is nothing that cannot be made to seem simple, and the chaos acquires form by virtue of what we choose to omit.²

Lawyers' histories of the Fourth Amendment³ have been partial in two ways: they have been incomplete, reviewing only a

† Professor of Law, Emory University. I thank Harold Berman, Tracey Maclin, Polly Price, and John Witte for their comments, criticisms and suggestions. David Krugler provided valuable research assistance, as did Holliday Osborne of the Emory University Law Library.

¹ Unpublished Ph.D. dissertation. It is available in book form from UMI Dissertation Services, 300 N. Zeeb Road, Ann Arbor, Michigan 48106. UMI is an information resource with which many lawyers may be unfamiliar. UMI reproduces doctoral dissertations and masters theses from the microfilm masters of the original documents. The copies are produced in book form. UMI reports that it holds the full text of all doctoral dissertations accepted in the United States since 1970, and abstracts of all dissertations accepted since 1900. A database of UMI holdings, called *Dissertation Abstracts*, is available on CD-ROM and is held by many university libraries.

² H. Butterfield, *The Whig Interpretation of History* 97 (Bell 1968).

³ For at least a century, lawyers, judges, and legal scholars have employed history to explain the meaning of the Fourth Amendment. See, for example, *Boyd v United States*, 116 US 616 (1886); Joseph Story, 3 *Commentaries on the Constitution of the United States* § 1895 at 748-50 (Da Capo 1970); Andrew Alexander Bruce, *Arbitrary Searches and Seizures As Applied to Modern Industry*, 18 Green Bag 273 (1906).

small fraction of the relevant historical data, and they have been partisan, selectively deploying fragments of the historical record to support their arguments about the Amendment's meaning. Skeptics might argue that these are defects inherent in the enterprise of writing history. No history of a topic as broad as the origins of the constitutional rules governing searches and seizures could ever be factually complete in an absolute sense. And a history written without an interpretive theme or purpose would be unbearably dull.⁴ Nonetheless, by a historian's standards, lawyers' histories of the Fourth Amendment's origins have been partial.⁵

Most obviously, these histories have been incomplete in the scope and depth of their research and analysis. Of course, length is not the measure of a history's quality. But when a history is so brief that it fails to discuss—or apparently even to consider—important sources, brevity is a shortcoming. This has been a common defect in lawyers' histories of the Fourth Amendment's origins. Even those written by scholars trained in other fields often have been notable for their brevity. Nelson Lasson's treatise is a useful example precisely because it has been the pre-eminent history of the Fourth Amendment for more than half a century.⁶ Lasson's first two chapters trace the Amendment's

⁴ See G.R. Elton, *Two Kinds of History*, in Robert William Fogel and G.R. Elton, eds., *Which Road to the Past? Two Views of History* 71, 85 (Yale 1983) ("There is no historical evidence that does not lack perfection—none that is not incomplete, ambiguous, and in some way biased."); Butterfield, *The Whig Interpretation* at 90 (cited in note 2) (describing as "the dullest of all things, history without bias, the history that is partial to nobody").

⁵ See, for example, Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 S Ct Rev 119, 155 (The Supreme Court's "recent historical essays are very poor indeed. . . . [T]hey are essentially pieces of special pleading. Too often they reach conclusions that are plainly erroneous. More often they state as categorical absolutes propositions that the historian would find to be tentative, speculative, interesting, and worthy of further investigation and inquiry, but not at all pedigreed historical truth."). I do not mean to suggest that historians have arrived at some consensus about methodology. I do mean to suggest, however, that lawyers' typical treatment of history in the Fourth Amendment context would fail almost any methodological standards commonly accepted by professional historians. For a discussion of methodological divisions among historians recently published in the legal literature, see Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 Colum L Rev 523, 530-45 (1995). Flaherty asserts that "habits of poorly supported generalization—which at times fall below even the standards of undergraduate history writing—pervade the work of many of the most rigorous [constitutional] theorists." Id at 526. For a congenial debate between two distinguished historians about some methodological disputes among professional historians, see Fogel and Elton, *Which Road to the Past?* (cited in note 4). Although the authors agree that historians legitimately employ diverse techniques, see id at 23-24, 40-41, 74-75, 121, both also appear to measure all methods against rigorous standards of completeness, impartiality, and effort. Id at 67, 100-02.

⁶ Nelson B. Lasson, *The History and Development of the Fourth Amendment to the*

background from Biblical and Roman law through ratification by the states, yet require only ninety-two pages to explain two millennia of legal development. Other important histories have been equally brief and inevitably incomplete.⁷ Each of these histories has its merits. But as we shall soon see, the record of the Amendment's historical origins sprawls far beyond the scope of these concise volumes.

Perhaps the legal world has accepted these incomplete histories because they were sufficient for lawyers' needs and satisfied our expectations about lawyers' work. Lawyers writing briefs, judicial opinions, and scholarly commentaries tend to treat history as but one more source of evidence to be deployed in support of their arguments.⁸ As a matter of course, they condense the complexity and ambiguity of life into something "made to seem simple," giving form to history's chaos by selectively omitting details—particularly those that contradict the lawyers' arguments. Lawyers arguing about the meaning of the Constitution frequently have

manipulated history in the best tradition of American advocacy, carefully marshaling every possible scrap of evidence in favor of the desired interpretation and just as carefully doctoring all the evidence to the contrary, either by suppressing it when that seemed plausible, or by distorting it when suppression was not possible.⁹

United States Constitution 13-105 (Da Capo 1970). Lasson's work originated as a Ph.D. dissertation in political science.

⁷ See, for example, Jacob W. Landynski, *Search and Seizure and the Supreme Court: A Study in Constitutional Interpretation* (Johns Hopkins 1966); Telford Taylor, *Two Studies in Constitutional Interpretation* (Ohio State 1969). Landynski's frequently cited book devotes only thirty pages to the origins of the Amendment. See Landynski, *Search and Seizure* at 19-48. Leonard Levy's well known chapter on the Fourth Amendment's origins is only twenty-six pages in length. Leonard W. Levy, *Original Intent and the Framers' Constitution* 221-46 (MacMillan 1988). The brevity of most Fourth Amendment histories is emphasized by Potter Stewart's description of the short Lasson and Landynski books as "[t]wo of the most extensive discussions of the events leading to the adoption of the fourth amendment." Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum L Rev 1365, 1369 n 15 (1983).

⁸ See, for example, R.H. Helmholz, *Origins of the Privilege Against Self-Incrimination: The Role of the European Ius Commune*, 65 NYU L Rev 962, 989 (1990) ("Lawyers have long chosen good ideas wherever they have found them. They press them into service in the short-term interests of their clients. It may be that the initial battles over the ex officio oath owe much to that longstanding lawyerly habit.").

⁹ Kelly, 1965 S Ct Rev at 144 (cited in note 5) (referring to lawyers presenting arguments in litigated disputes).

Perhaps we accept this behavior because it is congruent with a lawyer's professional training and craft and is consistent with the obvious fact that most lawyers are not trained as professional historians.¹⁰ At the root of it, we do not expect lawyers to be impartial in the pursuit of historical truth. We expect lawyers to assemble the available materials into persuasive arguments. And this expectation apparently extends not just to practicing lawyers, but also to lawyers who happen to be judges and scholars.¹¹

It is a mistake, however, to accept these tendentious lawyers' histories as attempts at researching and writing *history*, for they are something else. They are not the product of work by researchers sensitive to the "admonition that historians should devote themselves to the task of determining what actually happened."¹² They are more akin to the work product of lawyers engaged in litigation.

This Review examines some of the differences between the two genres. Parts I and II review William J. Cuddihy's dissertation, which is the most ambitious history of the Fourth Amendment's origins yet undertaken by a professional historian. These Parts also discuss the work's relevance to some difficult problems in contemporary Fourth Amendment jurisprudence. Part III then explores how lawyers' partial histories can produce conclusions not supported by a more complete study of the historical record. To illustrate this point, the discussion contrasts Cuddihy's exploration of selected historical issues with a prominent legal scholar's recent use of history to support his interpretation of the Amendment's meaning.

Identifying the virtues and limitations of Fourth Amendment histories is important, if only because they have had practical significance in constitutional law: they have been used by judges deciding cases.¹³ We need not revisit the endless and circular

¹⁰ But see *id* at 121 (describing how legal reasoning in a system of precedents shares some attributes with a historian's work and noting the "fairly close relationship between the day-to-day methodology of the judicial process and that of historical scholarship").

¹¹ I use the phrase "lawyers' histories" because it encompasses academic lawyers as well as judges and practitioners. In contrast, Alfred Kelly's well known term, "law office histories," suggests only the latter two groups, although Kelly apparently did not intend such a limitation. See *id* at 122 n 13.

¹² See Robert William Fogel, "Scientific" History and Traditional History, in Robert William Fogel and G.R. Elton, eds, *Which Road to the Past? Two Views of History* 5, 28 (Yale 1983).

¹³ A LEXIS search revealed that Lasson's book has been cited in 75 reported judicial opinions and nearly 150 law review articles. Taylor's book has been cited in 33 cases and

debate about originalism to recognize that history matters to constitutional decision makers.¹⁴ One of the most intriguing recent examples of history's impact upon a judge's interpretation of the Constitution is Justice O'Connor's dissent in *Vernonia School District 47J v Acton*.¹⁵ It is intriguing because Justice O'Connor seems to have changed her position on a fundamental issue in constitutional law, and a scholarly history of the Fourth Amendment appears to have influenced her decision.

In *Vernonia*, the Court approved a public school district's program of mandatory drug tests for students participating in interscholastic athletics. All student-athletes were tested at the beginning of the season. Each succeeding week 10 percent of them were selected randomly for mandatory testing. The program did not require individualized suspicion of drug use by the students subjected to testing.¹⁶

Traditionally, individualized suspicion of wrongdoing has been a prerequisite for lawful searches or seizures.¹⁷ In recent years, however, the Supreme Court has issued a series of decisions holding that some suspicionless searches and seizures, including some mandatory drug-testing programs, do not violate the Fourth Amendment.¹⁸ Before *Vernonia*, Justice O'Connor had regularly joined the Court's majorities approving suspicionless searches and seizures.¹⁹ She also had concurred in

more than 90 law review articles. The problem is not confined to the interpretation of the Fourth Amendment. See, for example, Mark DeWolfe Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* 4 (Chicago 1965) ("The judge as statesman, purporting to be the servant of the judge as historian, often asks us to believe that the choices that he makes—the rules of law that he establishes for the nation—are the dictates of a past which his abundant and uncommitted scholarship has discovered.").

¹⁴ See, for example, Carol S. Steiker, *Second Thoughts About First Principles*, 107 Harv L Rev 820, 826 (1994) (rejecting rigid forms of originalism but asserting that "most scholars stake their position somewhere on the widely-accepted middle ground that cedes *some* authority to the Framers' intentions"); Howe, *The Garden and the Wilderness* at 3 (cited in note 13) (describing the Supreme Court's power to interpret history and its related "power, through the disposition of cases, to make it").

¹⁵ 115 S Ct 2386, 2398-99 (1995) (O'Connor dissenting).

¹⁶ *Vernonia*, 115 S Ct at 2389.

¹⁷ For an extensive recent discussion of the role of individualized suspicion in Fourth Amendment doctrine, see Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U Memphis L Rev 483 (1995).

¹⁸ See, for example, *Michigan Department of State Police v Sitz*, 496 US 444 (1990) (sobriety checkpoints); *Skinner v Railway Labor Executives' Association*, 489 US 602 (1989) (drug testing of railroad employees); *National Treasury Employees Union v Von Raab*, 489 US 656 (1989) (drug testing of Customs Service employees); *New York v Burger*, 482 US 691 (1987) (administrative inspections); *United States v Martinez-Fuerte*, 428 US 543 (1976) (Border Patrol checkpoints).

¹⁹ Two of the cases, *Von Raab* and *Sitz*, were 5-4 decisions. Justice O'Connor usually

an opinion freeing public school officials from the most rigorous Fourth Amendment requirements when conducting some searches of students and their possessions.²⁰

Given the Court's recent decisions, the outcome in *Vernonia* came as little surprise. Given her participation in the Court's earlier decisions, the biggest surprise was that Justice O'Connor dissented, arguing that the drug testing program violated the Fourth Amendment because it authorized searches without requiring the existence of individualized suspicion.²¹ Of particular relevance here, Justice O'Connor's departure from her positions in earlier cases apparently was influenced by constitutional history—in large part as recounted in the previously obscure, unpublished Ph.D. dissertation that is the subject of this review.²²

I. THE CUDDIHY HISTORY OF THE FOURTH AMENDMENT

Unlike previous historians of the Fourth Amendment, William Cuddihy has attempted to tell its history "in all its complexity and detail." Justice O'Connor describes the work as "one of the most exhaustive analyses of the original meaning of the Fourth Amendment ever undertaken."²³ Professor Maclin refers to it as "William Cuddihy's monumental study of the Fourth Amendment's origins."²⁴ Both are correct. The work is exhaustive; it is monumental. It is likely to become essential reading for

has sided with the government in cases involving search and seizure issues. She has done so even in cases in which Justice Scalia—hardly the criminal defendant's friend on the Court—has argued that the government's conduct was unconstitutional. See, for example, *Arizona v Hicks*, 480 US 321 (1987); id at 333 (O'Connor dissenting). In at least one other opinion, however, she relied upon history to argue that a search violated the Fourth Amendment. See *Illinois v Krull*, 480 US 340, 362 (1987) (O'Connor dissenting) (finding a "powerful historical basis for the exclusion of evidence gathered pursuant to a search authorized by an unconstitutional statute").

²⁰ *New Jersey v T.L.O.*, 469 US 325, 348, 350 (1985) (Powell concurring, joined by O'Connor) (joining opinion allowing search where school officials had individualized suspicion that a student was violating school rules and criminal laws, but not requiring a warrant or probable cause).

²¹ *Vernonia*, 115 S Ct at 2397 (O'Connor dissenting).

²² Justice O'Connor cites Cuddihy's dissertation thirteen times in four pages of her dissent, often in support of arguments she presents as dispositive of the constitutional issues. Id at 2398-2401. It appears that prior to Justice O'Connor's dissent in *Vernonia*, only a small number of constitutional historians and scholars of the Fourth Amendment were familiar with Cuddihy's Ph.D. dissertation. No judicial opinions had cited it, and only one scholar had cited it in a published law review article. See Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S Cal L Rev 1, 5 n 21 (1994).

²³ *Vernonia*, 115 S Ct at 2398 (O'Connor dissenting).

²⁴ Maclin, 68 S Cal L Rev at 15 (cited in note 22).

students of the Fourth Amendment. That is both the good news and the bad news, because this treatise not only is exhaustive, it is exhausting.

As "published" by UMI, the work comes in three volumes, with 1,560 pages of text and footnotes, accompanied by 136 pages of appendices and a 21-page introduction. The Table of Sources alone is almost 80 pages. I offer this information solely in the interest of full disclosure. At times the sheer quantity of detail threatens to turn the treatise into "something as chaotic and baffling as life itself." It is for neither the fainthearted nor the casual reader. But it is the work's ambitious scope that ultimately makes it worth the effort for anyone whose research draws him to study the origins of the Fourth Amendment.

Cuddihy explores four principal theses in this work. The first has two related parts. "Many kinds of searches and seizures were unreasonable within the original meaning of the amendment, not just general warrants" (p civ). Therefore, the Fourth Amendment "transcends its specific warrant clause and was designed to do much more than merely abolish general warrants in favor of specific ones" (p civ). Cuddihy's list of examples of unreasonable searches other than those conducted pursuant to general warrants includes warrantless general searches, specific search warrants listing multiple locations, and unannounced nighttime entries into dwellings (p civ).

Of his major theses, the first is the most closely linked to contemporary debates about the meaning of the Fourth Amendment, because it implicitly refers to the relationship between the concept of unreasonableness announced in the first clause and the warrant requirements found in the second clause.²⁵ Cuddihy's research leads him to conclude that in the absence of an emergency, the Amendment's original meaning dictated that "specific warrants were mandatory and were intended to be the conventional method of search and seizure" (p civ). This conclusion comports with the warrant preference rule that lawyers have debated for most of the century,²⁶ but Cuddihy's conclusion is enlightening because it rests upon an exhaustive analysis of

²⁵ The text of the Fourth Amendment is set forth in the text accompanying note 46.

²⁶ See Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 Stan L Rev 555, 581-609 (1996) (discussing the use of the warrant model in the early years of the twentieth century). For recent examples of the debate about the legitimacy of the warrant preference rule, compare Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv L Rev 757 (1994), with Maclin, 68 S Cal L Rev 1 (cited in note 22).

the primary sources, rather than upon a one-sided use of parts of the record to advance a partisan legal argument.

Cuddihy's second thesis involves issues more removed from the contemporary legal debates, and like the first thesis, it has several parts. He identifies the British origins of the idea that there is "a right against unreasonable search and seizure"; of procedures deemed reasonable or unreasonable by the Amendment; and of the "specific warrant clause [which] is a direct out-growth of a multi-staged, centuries-long rebellion against general warrants by British intellectuals that inspired all other facets of the amendment" (p cv). As one would expect, a "centuries-long" process involved ideas, rules, practices, and events that are more notable for their variety than for their consistency.²⁷

The third thesis is the most intriguing because it leads to the conclusion that, in significant ways, the Fourth Amendment represents a break from the past and must be understood not only in the context of the law and practice that preceded it, but in part as a rejection of much of that tradition.²⁸ Cuddihy asserts that "[a]lthough the specific warrant originated in England, most of its development as a replacement for the general warrant occurred in North America between 1755 and 1789" (p cv). And this development was not limited to the adoption of the Fourth Amendment. In the years following the Revolution, general warrants and searches were rejected and specific warrants and searches were adopted in the laws of many of the original states. Cuddihy concludes that "scholars who have viewed the amendment as little more than its specific warrant clause, and that clause as merely British law in American constitutional form, are doubly wrong" (pp cv-cvi). If the Fourth Amendment represents a break from earlier traditions, then the relationship between that

²⁷ Cuddihy observes that because England's traditional limits on search and seizure varied so widely with each category of legislation, "[n]o single limit applied universally or even sufficiently to define an unreasonable class of searches or seizures that could serve as the basis of a future right" (p 863).

²⁸ See, for example, (p 1357) ("Between 1776 and 1787, the American law of search and seizure underwent a transformation that separated it from British law."); (p 1358) ("By 1787, the stage was set for an American right that far exceeded the British anathematization of general warrants."); (p 458) ("The framers of the amendment not only embraced Coke but repudiated the statutory legacy of their forefathers."); (p 459) ("The amendment did more than articulate an exogenous theory against general warrants; it repudiated more than a century of their American usage."); (pp 459-60) ("In the colonies as in the mother country, such warrants were often used to capture fugitives, collect revenues, stop counterfeiting, and seize contraband of various sorts. The Fourth Amendment abrogated a legacy of the general warrant and its affiliates that was at least as much American as English.").

history and the Amendment's meaning obviously differs from the relationship that we would find if the Amendment merely adopted those practices. In particular, the elements of that tradition rejected by the Amendment can hardly serve as literal sources of its meaning.

In his fourth thesis, Cuddihy argues that the eventual "triumph" of the ideas embodied in the Amendment rested not merely upon their "inherent worth," but also upon "[p]olitical forces [that] played a powerful role in the emergence of the amendment" (p cvi). Throughout the work Cuddihy examines how the interaction between libertarian ideals and social and political realities not only generated competing visions of what kinds of intrusions upon privacy and liberty were unreasonable, but also produced different legal rules and practices. "General warrants continued to prevail over specific ones, even in American legislation and practice, until political realities stimulated a reversal, almost at the moment of the amendment's adoption" (p cvi). While his thesis—that politics played an essential role in the adoption of the Bill of Rights—may be conventional, his documentation of the thesis is once again detailed, and he discusses sources not commonly examined in the Fourth Amendment literature.

Lawyers studying the Amendment's origins have tended to emphasize a small portion of the record, including the 1761 writs of assistance case in colonial Massachusetts;²⁹ the English lawsuits decided in the 1760s that were prompted by general searches for publications critical of the government;³⁰ provisions restricting searches and seizures contained in various state constitutions, particularly those enacted before 1791;³¹ and the sparse record of the drafting and ratification of the Fourth Amendment itself.³² Lawyers have concentrated upon this small corpus of

²⁹ Paxton's Case of the Writ of Assistance, in Josiah Quincy, Jr., *Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay, Between 1761 and 1772* 51-57 (Little, Brown 1865).

³⁰ See, for example, *Wilkes v Halifax*, 19 Howell's State Trials 1406, 95 Eng Rep 797 (CP 1769); *Entick v Carrington*, 19 Howell's State Trials 1029, 95 Eng Rep 807 (CP 1765); *Money v Leach*, 19 Howell's State Trials 1001, 97 Eng Rep 1075 (KB 1765); *Beardmore v Carrington*, 19 Howell's State Trials 1405, 95 Eng Rep 790 (KB 1764); *Wilkes v Wood*, 19 Howell's State Trials 1153, 98 Eng Rep 489 (CP 1763); *Huckle v Money*, 19 Howell's State Trials 1404, 95 Eng Rep 768 (KB 1763).

³¹ See (pp 1233-55) (examining the search and seizure provisions contained in the early state constitutions).

³² See (pp 1403-43) (examining the congressional machinations that produced the final language of the Fourth Amendment); (p 1444) ("Because of the condition of the documentary record, the ratification of the Fourth Amendment can be discussed only as

sources for understandable reasons. These events long have been familiar to students of the Amendment, they were close in time to its drafting and ratification, and each was germane to the Amendment's creation. These commonly cited historical sources have had the added virtue of being readily accessible.

But Cuddihy's research demonstrates that these conventional sources constitute only a small part of the history of Anglo-American search and seizure law. He ranges far beyond the commonly cited sources, presenting an overwhelming documentary record supporting his contention that "[t]he Fourth Amendment incorporated a legacy of centuries, not decades, and can only be understood in the fullness of that legacy" (p 1486).³³

The dissertation examines that legacy in twenty-four chapters that reveal the dynamism and complexity of Anglo-American search and seizure law.³⁴ Search and seizure law was dynamic in that it changed over time. In 1600, for example, the adage that a man's home was his castle was applied to limit only intrusions by private citizens, and not those committed by agents of the Crown (pp 36-38). By 1760, however, the concept had come to be applied primarily to official—not private—searches (pp xcix-c). "Between 1700 and 1760, 'A man's house is his castle (except against the government)' yielded to 'A man's house is his castle (especially against the government)' (p c). Search and seizure

part of the ratification of the Bill of Rights as a whole."); Taylor, *Two Studies in Constitutional Interpretation* at 43 (cited in note 7) ("Nothing in the legislative or other history of the fourth amendment sheds much light on the purpose of the first clause."); Lasson, *History and Development of the Fourth Amendment* at 98-109 (cited in note 6) (briefly discussing the Fourth Amendment's legislative history); id at 102 n 86 ("Little information concerning the deliberations of the Senate is available"); Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 Wm & Mary L Rev 197, 207-09 (1993) (briefly reviewing the Fourth Amendment's legislative history).

³³ This claim might appear to contradict Cuddihy's thesis that the Fourth Amendment broke with earlier traditions. No contradiction exists if an understanding of these earlier traditions is necessary for appreciating how the Amendment discarded some and adopted others.

³⁴ The first four chapters examine the emergence of the concept of unreasonable search and seizure in English legal theory, law, and practice from the seventh century to the year 1642. The next twelve chapters examine the development of the critique of general warrants and general searches as "unreasonable," and the emergence of specific warrants and searches as "reasonable," in English and colonial law before 1760. Later chapters are devoted to the Massachusetts writs of assistance case (*Paxton's Case*), the English general warrant cases of the 1760s (*Wilkes* and related cases), and the colonial response to these disputes. Two chapters address issues raised by warrantless searches and seizures before and after 1760. The final two chapters—which total 330 pages—are devoted to the development of search and seizure law in America from 1776 to 1787 and from 1787 to 1791 respectively, and cover the drafting and ratification of the Fourth Amendment.

law was complex because law and practice were not uniform at any point in time, at least after 1600. Inconsistent rules were applied inconsistently in differing circumstances. This was as true in the century preceding the adoption of the Fourth Amendment as it was in earlier centuries.

Of course, no thoughtful reader would expect to find that lawmakers had developed a single set of rules that were applied uniformly to the myriad events that occurred over the course of centuries. Upon reflection, the idea that legal rules not only varied over time but also were inconsistent at almost any point in time during the centuries preceding the adoption of the Fourth Amendment seems intuitively obvious. Cuddihy's contribution is to document in unprecedented detail the nature of those changes and inconsistencies.

For example, it is not news to read that general searches and seizures were devices used by those in power in England to suppress religious heresy (pp 136-62) and political dissent (pp 103-18, 162-65). But it is enlightening to read a detailed account of how seventeenth-century Catholics used these methods to suppress Protestants and how Protestants did the same to Catholics when the opportunity arose (pp 142-62, 165-67). Not only does the account clarify one particularly odious part of the history of general searches and seizures, it supplies provocative evidence of the historical connections between the Fourth Amendment and the First Amendment's Religion Clauses. It also suggests connections between the history of searches and seizures and the privilege against self-incrimination contained in the Fifth Amendment. For example, if searchers could use torture to force a suspected heretic to implicate other members of his group and to identify the location of incriminating evidence, the confession eliminated the need for more time-consuming general searches for the same people and evidence.³⁵

The historical record is inconsistent in part because the response to oppressive methods of search and seizure often depended upon who was the searcher and who was the target. With almost humorous regularity, Cuddihy documents how victims and critics of general searches and seizures complained bitterly and loudly, only to use the same methods against their adversaries when they had the chance. Members of Parliament objected when

³⁵ See, for example, (p 149) ("The agony of the rack extorted from Campion and his associates a list of sympathizers so detailed that it obviated the need for general search warrants of the usual sort.").

the High Commission or the Crown ordered searches of them, their colleagues, or their property, yet passed laws permitting general searches and seizures of others, particularly members of the lower classes (pp 16-24, 40-45). During the Revolutionary War, state governments violated their own constitutions by conducting searches and seizures of those suspected of sympathizing with England. The mistreatment of Philadelphia Quakers is probably the most striking example of the dichotomy between a written constitutional right and government practice during this period (pp 1267-70). Richard Henry Lee was an influential advocate of adding a ban on general searches to the national constitution, yet in 1777 he had helped instigate "the dragnet searches of Philadelphia Quakers," and in 1770 he had issued a general warrant against a "fugitive servant" (p 1467). Lord Camden's 1765 opinion in *Entick v Carrington*³⁶ is still cited as a landmark precedent for the Fourth Amendment's broad vision of liberty, yet years earlier, as attorney general, he had approved the use of general warrants (pp 905-06 & n 53).³⁷

Taken separately, these might seem nothing more than examples of individual hypocrisy. But placed in the context of centuries of similar events in England and America, they suggest that we must be cautious about accepting claims that single events or small groups of examples define the law and practice that predated the Fourth Amendment. Almost invariably, these examples will only be part of the picture.³⁸ Cuddihy's research emphasizes what we should already know. An impartial examination of the historical record frequently undercuts those who

³⁶ 19 Howell's State Trials 1029, 95 Eng Rep 807 (CP 1765).

³⁷ When the Wilkes affair erupted in 1763, Charles Pratt was Lord Chief Justice of the Court of Common Pleas. By 1765 he had "been elevated to the peerage as Lord Camden" (p 919).

³⁸ For much of its early history the hue and cry was commenced by the witnesses to a crime (pp 51-57, 85-89), who "were to chase the perpetrator, blowing horns and shouting for others to join them" (p 52). The hue and cry thus functioned as a hot pursuit initiated by those with the most obvious particularized suspicion: the witnesses to a crime. But beginning in the late thirteenth century, the hue and cry was transformed from a device for the pursuit of felons, and by the end of the Tudor period, it served as a method of general search that even permitted warrantless door-to-door searches. The historical record is replete with similar contradictions. For example, before 1760, executive agencies and prerogative courts could authorize general searches and seizures subject to few restraints, but the statutory and common law "abounded with restrictions on search and seizure" (p 830). In the 1660s Parliament passed one statute imposing procedural limits akin to probable cause and particularity and another not imposing these procedural restrictions on general searches (p 305-06).

claim to have divined the literal meaning of the Amendment from its origins.

Cuddihy's narrative also raises another kind of question about the literal relevance of much of this historical record to our contemporary interpretation of the Amendment. Warrantless general searches were common in England and America during the centuries preceding the adoption of the Fourth Amendment. Yet many of the specific kinds of general searches arose in the context of social and economic class structures peculiar to the time and place. Much of the law and practice that was developed in the fifteenth to eighteenth centuries was designed to control the lower classes.³⁹ Two examples should suffice to make the point. Warrantless general searches to round up vagrants and other social "undesirables" were a common social control device in England.⁴⁰ In America, general searches were used in the South to control slaves (pp 432-54, 1276, 1280-82, 1340-41). One could cite these as examples supporting the claim that the Amendment's history demonstrates that warrantless general searches are reasonable. But both practices would be unconstitutional today,⁴¹ and we might at least wonder how much deference we owe to methods designed to preserve social structures and practices that we have rejected. Alfred Kelly's cautionary

³⁹ Cuddihy observes that "[a]ll search warrants instituted between 1610 and 1626 . . . were intended for purposes of social control. . . . [O]ne of Dalton's warrants for robbery identified the leading suspects as 'all such persons as are masterless, or out of service, as also for all idle, Vagrant, or wandring Rogues, [and] beggars'" (p 97) (alteration in original). Conversely, "[l]ords of the manor, freeholders worth more than £40/year, and those with hunting preserves were exempted from the operation of the search warrants" created by the 1610 game poaching statute (p 98). See also (pp 81-126), where Cuddihy examines the use of general searches as devices for maintaining social, political, economic, and intellectual control during the Tudor and early Stuart periods. This was accomplished by expanding their use from three to fifteen categories, including general searches related to vagrancy, recreation, the apparel worn by the lower classes, the hue and cry, the Crown's pursuit of accused people, recovery of stolen property, game poaching, economic regulation, sumptuary conduct, bankruptcy, weapons, customs, guilds, censorship, and suppression of political and religious dissent (p 81).

⁴⁰ See, for example, (pp 82-84, 127-35) (listing examples); (p 132) (reporting that in 1569 "over thirteen thousand masterless men had been found" after the Crown had ordered a general search throughout England); (p 129) (In 1601, Nottingham officials "wanted cripples and 'impotent persons' run out of town."); (pp 96-97, 290, 319-20, 601-02, 611, 648-49, 689, 973, 981) (listing examples of general searches for poachers and the use of press gangs to impress people into the navy).

⁴¹ The Thirteenth Amendment prohibits slavery, and the Supreme Court's decisions striking down vagrancy statutes make general seizures of vagrants unconstitutional. See *Kolender v Lawson*, 461 US 352 (1983); *Papachristou v City of Jacksonville*, 405 US 156 (1972).

statement about using history to interpret the First Amendment seems particularly relevant:

The present-day debate over the aboriginal meaning of the Establishment and Free Exercise clauses of the First Amendment illustrates very clearly the many dangers involved in attempting to recover a clear and precise judgment on the part of the authors of a text almost two hundred years old, and expecting it to throw a decisive, revelatory light upon twentieth-century problems of church and state. The eighteenth-century proponents of the First Amendment . . . were concerned with the problems of their day and not with those of ours, and to assume that a revelatory reconstruction is possible is to fall into an amateurish historical solecism.⁴²

Cuddihy's ambitious research demonstrates that the Fourth Amendment is no more amenable to simple historical answers than is the First Amendment. Yet for all its richness of detail, or perhaps because of it, the work is difficult to use. While no other Fourth Amendment history is so ambitious in scope, no other important history so needs an editor—and an organizing principle. Cuddihy has divided the work into two geographic loci, England and America, and into seven time periods. Within each geographic setting and time period he repeatedly examines the same topics.⁴³ The complicated structure permits him to examine the history of Anglo-American search and seizure law in minute detail. It also forces him to return to the same topics, themes and issues again and again. As a result, ideas that should be discussed in one place are scattered over hundreds of pages. The reader who starts at the beginning and reads to the end is likely to find himself repeatedly leafing through the three volumes to locate earlier discussions of important topics.

If Cuddihy follows the time-honored tradition of converting a dissertation into books and articles, one can only hope he will

⁴² Kelly, 1965 S Ct Rev at 141 (cited in note 5). See also (p 1557) (The Framers "addressed the problems of 1790 rather than 1990."); Butterfield, *The Whig Interpretation* at 36 (cited in note 2) ("The issue between Protestants and Catholics in the 16th century was an issue of their world and not of our world.").

⁴³ These include the use of searches and seizures to catch criminals, to suppress religious heresy and political dissent, to collect taxes, to control the lower economic classes, and to enforce economic monopolies. Cuddihy also repeatedly examines the gap between intellectual theory rejecting general warrants and searches and actual practice, which commonly employed these devices.

find some more efficient structure for organizing and presenting the fruits of twenty years of labor.⁴⁴ In the meantime, we have his dissertation, and for all its organizational problems, it is still a monumental effort and a valuable resource. As Justice O'Connor's dissent in *Vernonia* demonstrates, because Cuddihy's work is so comprehensive, it is an essential source of historical evidence for future arguments about the Fourth Amendment's past. His work will make it easier for lawyers to be less partial—at least by having a more complete historical record available for them to study in crafting their partisan arguments.⁴⁵

These arguments often arise out of questions about the ambiguous relationship between the Amendment's two clauses. In Part II, I discuss some answers suggested by Cuddihy's research.

II. GENERAL WARRANTS, GENERAL SEARCHES, AND PROBABLE CAUSE

The Fourth Amendment is a compound sentence consisting of two related clauses. Its text commands:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁴⁶

Identifying the relationship between these two clauses has been a fundamental task in Fourth Amendment theory. For most of this century the Supreme Court has employed a "conjunctive" theory that uses the more specific language of the Warrant

⁴⁴ Cuddihy devoted two decades to studying the Fourth Amendment's origins. He completed his master's thesis more than twenty years ago. See William J. Cuddihy, *Search and Seizure in Great Britain and the American Colonies from 1000 to 1791: A Comparative Study of Laws, Legal Opinion and Practice Respecting the Origins of the Fourth Amendment to the United States Constitution* (1974) (unpublished master's thesis on file with CSU-Fullerton). During the 1980s he published at least two articles on the subject. See William Cuddihy and B. Carmon Hardy, *A Man's House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution*, 3d ser, 37 Wm & Mary Q 371 (1980); William J. Cuddihy, *Fourth Amendment (Historical Origins)*, in Leonard W. Levy, Kenneth L. Karst, and Dennis J. Mahoney, eds, 2 *Encyclopedia of the American Constitution* 761 (Macmillan 1986).

⁴⁵ An advocate willing to read the work can rest assured that it will cite some statute, case, pamphlet, or speech that supports almost any argument he wants to make about the Amendment's original meaning.

⁴⁶ US Const, Amend IV.

Clause to define the procedural attributes of reasonable searches and seizures.⁴⁷ A search or seizure is procedurally reasonable if authorized by a valid, properly executed warrant.⁴⁸ But warrants are not required in all circumstances. Warrantless intrusions that satisfy some fundamental requirements embodied in the Warrant Clause also can be constitutional. Probable cause is perhaps the most important of these requirements. It exists when "the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."⁴⁹ By requiring fact-based suspicion, the probable cause standard precludes many kinds of general searches.

This conjunctive theory recognizes that many searches and seizures are justified by the combination of probable cause and an exception to the warrant requirement. Most of these exceptions rest upon some kind of exigency. For instance, warrantless searches and seizures are reasonable when securing a warrant would permit a suspect to escape or dispose of contraband, or would create a threat to public safety.⁵⁰ A classic example is the automobile exception permitting searches of automobiles when officers have probable cause to believe they contain contraband.⁵¹

In recent years, this conjunctive theory linking the two clauses has lost its central role in the Supreme Court's Fourth Amendment jurisprudence. *Vernonia* is only the latest in a series of Supreme Court opinions that have worked radical changes in Fourth Amendment theory, in part by adopting a "disjunctive" theory that cleaves the Amendment's two clauses. Rather than

⁴⁷ Some critics of the warrant model have attempted to diminish its historic significance by asserting that it emerged from a series of dissents written by Justice Frankfurter in the decade following World War II. See, for example, Taylor, *Two Studies in Constitutional Interpretation* at 23-24 (cited in note 7). In fact, the warrant model can be traced back to the Supreme Court's opinions during the Lochner era. See Cloud, 48 Stan L Rev at 623 (cited in note 26).

⁴⁸ *Katz v United States*, 389 US 347, 357 (1967).

⁴⁹ *Brinegar v United States*, 338 US 160, 175-76 (1949), quoting *Carroll v United States*, 267 US 132, 162 (1925).

⁵⁰ These exceptions are consistent with some elements of English search and seizure law and practice in the fourteenth to seventeenth centuries. See, for example, (pp 827-29).

⁵¹ *Carroll*, 267 US 132. Some searches are reasonable despite the absence of probable cause to search, as long as probable cause exists to arrest a suspect. For example, officers can search a suspect incident to a valid arrest based upon probable cause, in part to prevent potential exigencies: arrestees may be carrying dangerous weapons or might hide or destroy evidence. See *United States v Robinson*, 414 US 218, 234-35 (1973).

focus upon the characteristics of reasonable searches and seizures outlined in the Warrant Clause, the Supreme Court has concluded that whether a particular search is unreasonable "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."⁵² The warrant model now is treated merely as an example of balancing, imposed on some, but not all, criminal investigations.⁵³

With increasing frequency, the Court has decided that the rules found in the Warrant Clause, including the fundamental requirement of probable cause, are irrelevant for judging the reasonableness of many government searches and seizures. "[A] warrant is not required to establish the reasonableness of *all* government searches; and when a warrant is not required (and the Warrant Clause therefore not applicable), probable cause is not invariably required either."⁵⁴

This argument rests upon tautological reasoning and the assumption that the Amendment's two clauses apply to discrete categories of searches and seizures. The argument posits that the requirements imposed by the Warrant Clause are relevant only to searches and seizures conducted pursuant to warrants. Searches conducted without a warrant or probable cause are reasonable whenever a decision maker determines that "special needs" make that conduct reasonable.⁵⁵ Freed from the constraints of the Warrant Clause, judges applying the increasingly malleable standard of reasonableness can adopt whatever policies they prefer.

Advocates of both the conjunctive and disjunctive theories of the Amendment have claimed that history supports whichever theory they prefer. Cuddihy's exhaustive research does not resolve all the disputes about the Amendment's origins (nor would we expect it to), but it does provide a wealth of detailed information bearing upon the relationship between the Amendment's two clauses. Most notably, it supports the conclusion embodied in the

⁵² *Vernonia*, 115 S Ct at 2390, quoting *Skinner v Railway Labor Executives' Association*, 489 US 602, 619 (1989).

⁵³ See *Skinner*, 489 US at 619 ("In most criminal cases, we strike this balance in favor of the procedures described by the Warrant Clause of the Fourth Amendment.").

⁵⁴ *Vernonia*, 115 S Ct at 2390-91.

⁵⁵ See *id* at 2391 ("A search unsupported by probable cause can be constitutional, we have said, 'when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'"), quoting *Griffin v Wisconsin*, 483 US 868, 873 (1987).

conjunctive theory that the Fourth Amendment rejects both warrantless general searches and general warrants as unreasonable.

Cuddihy concludes that the Amendment's "[p]rohibition of the general warrant was part of a larger scheme to extinguish general searches categorically" (p 1499). In the 1770s and 1780s, American critics decried general searches and seizures conducted with and without warrants. They labeled both as unreasonable, just as they advocated devices that limited or eliminated these practices (pp 1486, 1499). The record of the years immediately preceding the drafting and ratification of the Fourth Amendment supports his conclusion that a consensus began to emerge rejecting broad categories of searches and seizures as unreasonable, including general searches conducted with or without warrants.⁵⁶ Unreasonable methods included not just general warrants, but any mass suspicionless searches and seizures (p civ), searches of homes conducted at night,⁵⁷ and entries into homes without announcement.⁵⁸ All were included within the meaning of unreasonable searches and seizures in the Amendment, although the text only specified general warrants.

The text articulated ideas that had percolated through Anglo-American law for centuries. "Although the precise contents of what became the amendment emerged only in the decade before its ratification, its rough contours had long been evident" (p 1486). In other words, the Fourth Amendment adopted parts of

⁵⁶ See (pp ciii-civ). Cuddihy notes that:

The implicit unconstitutionality of general searches without warrant predated the amendment. In the most widely publicized protests on the search process prior to the amendment, the Continental Congress, in 1774, had unconditionally condemned promiscuous, warrantless searches by customs and excise officers.

While the Constitution was being ratified, moreover, nearly as many authors had execrated general excise searches without warrant as had [execrated] similar searches by warrant, and the protests came from both Federalists and Antifederalists (pp 1499-1500).

⁵⁷ See (p 1510) (Except for specific warrants, "the hidden unconstitutionality of nocturnal searches was the most certain feature of the amendment's original understanding").

⁵⁸ Only a month before its decision in *Vernonia*, the Supreme Court held for the first time that although it is not mentioned in the Fourth Amendment's text, under the common law of search and seizure, "the reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering." *Wilson v Arkansas*, 115 S Ct 1914, 1916 (1995). Writing for a unanimous Court, Justice Thomas concluded that although the Fourth Amendment's underlying command is that searches and seizures must be reasonable, "our effort to give content to this term may be guided by the meaning ascribed to it by the Framers of the Amendment." Id.

the Anglo-American search and seizure tradition as reasonable and rejected others as unreasonable. The idea that searches and seizures could be unreasonable existed in England centuries before the creation of the Fourth Amendment, as did the idea that particularized suspicion was a requisite element of reasonable intrusions.⁵⁹ But despite these arguments, general searches and seizures survived in Anglo-American law and practice.

Widespread opposition to these methods arose in England and America only when changing methods of search and seizure began to affect larger groups of people. For example, significant discontent began to emerge in England around the year 1580, largely in response to changes in search and seizure law and practice during the previous century (pp 3-4, 127). Before the sixteenth century, general searches had been used only sporadically, but during that century they became both more common and more violent. "In the century after 1485, the typical searches shifted from inspections of ships for contraband and of workmen's shops by brother artisans to door-bursting invasions of entire villages in the depth of night by large bands of intimidating, heavily armed strangers" (p 128). Cuddihy concludes that the "violent, general search, moreover, evolved quickly from an extreme measure for social, religious, and political emergencies into the usual method of search. As the applications for that search multiplied, so also did the population sectors that encountered and deplored it" (p 193). Objections first raised by religious minorities in the 1580s were echoed in the 1640s by merchants protesting customs searches, artisans condemning guild searches, and Parliamentary complaints about searches of its members (p 193).

If the Fourth Amendment's "abolition of the general warrant was part of a larger effort to eliminate all general searches on land" (p 1555), why does it specify only one kind of unreasonable search method in the text? Cuddihy suggests an answer that is consistent with much of the evidence about other stages in the evolution of the theory of unreasonable searches and seizures. Just as the English opposition to general searches responded to changing practices,

⁵⁹ Arguments that cause for suspicion was required for searches and seizures were made as early as the year 1447 (p 835), and examples of searches (and seizures) requiring some type of particularized suspicion can be traced to the Middle Ages (pp 853-54) (citing examples from the thirteenth through seventeenth centuries).

the reason that the framers of the amendment defined search warrants more than other elements of search and seizure was that those elements had excited less of the controversy that bred definition. Despite centuries of development, probable cause, arrest warrants, and warrantless seizures had never occasioned the intensity or depth of thought, adjudication, and legislation that search warrants had (p 1558).⁶⁰

Their decision to identify in the text only the most notorious example of unreasonable searches and seizures in the colonial experience does not mean that the Framers were unconcerned about other methods that shared noxious characteristics with general warrants.⁶¹ Instead, the historical record suggests that objections to general warrants and general searches alike rested upon broad concerns about protecting privacy, property, and liberty from unwarranted and unlimited intrusions.⁶² Warrantless general searches, like general warrants, were unreasonable because they made every person's home vulnerable to forcible intrusion.⁶³ They made everyone's private property, including their

⁶⁰ *Ex officio* searches by customs officers are an important example of warrantless searches that produced opposition in the colonies in the years preceding the Revolution. See, for example, M.H. Smith, *The Writs of Assistance Case* 116-18 (California 1978); Maclin, 35 Wm & Mary L Rev at 219-22 (cited in note 32). Cuddihy's thesis that the pressure of events in the years following 1760 triggered the coalescence of ideas about unreasonable searches and seizures into a new consensus is consistent with the broader theses of some prominent historians of the Revolution. See, for example, Bernard Bailyn, *The Ideological Origins of the American Revolution* 22 (Harvard 1967) (explaining that events during the years 1763-76 produced a "clarification and consolidation . . . of a view . . . [that] had existed in balance . . . with other, conflicting views," and had been "[e]xpressed mainly on occasions of controversy").

⁶¹ See (p 1558) ("Put another way, only after 1782 did most states complete the shift from general to specific warrants as their standard method of search and seizure. Until then, general warrants had been the overriding threat to privacy . . . Why debate probable cause for a specific warrant to search one house when a general warrant laid entire towns open to government purview?").

⁶² See (pp 1547-48) (arguing that "[p]rivity was the bedrock concern of the amendment, not general warrants," and asserting that while in the 1760s the primary objection to general warrants had been that they permitted general searches, a quarter of a century later "opinion on search and seizure had moved beyond those warrants to derivative and deeper issues[,] . . . [holding] that general warrants were wrong not just because they permitted general searches but because searches threatened privacy").

⁶³ See (pp 1546-47) ("The concern with warrants, in short, embraced a concern with houses, which encapsulated still deeper concerns. . . . Open your front door . . . and the extent of federal invasion will be infinite."); (p 1387) (At the Virginia ratifying convention in 1788, Patrick Henry complained that general warrants "exposed any person or property to seizure 'in the most arbitrary manner, without any evidence or reason. Everything the most sacred may be searched and ransacked by the strong arm of arbitrary power.'").

most private papers, subject to inspection and seizure. They put every person in jeopardy of being seized and searched.

One might conclude that the ambiguous history on this point leads us nowhere, and perhaps everywhere. But this is true only if we treat the Fourth Amendment *solely* as part of a web of events stretching back for centuries. In one sense it was—otherwise its history would be irrelevant. But as much as it was tied to its complex history, the Fourth Amendment also represented a break with Anglo-American tradition.

Most obviously, by prohibiting the new national government from using general warrants, the Amendment rejected centuries of practice, including some contemporary practice in England and the United States.⁶⁴ During the final decades of the eighteenth century, English law actually expanded the use of general warrants.⁶⁵ The Framers' decision to reject general warrants categorically thus represented a break not only with the British past but with the British present (pp 1232-34, 1357). They also rejected practices that had been common in America, although general search methods were increasingly disfavored in the years following the end of the Revolution.

By 1787, many of the new states already had gone farther than England in adopting specific warrants as a replacement for general warrants. By 1787, specific warrants had displaced general ones as an accepted method of searching to recover stolen goods throughout the states (p 1294). In four states, Massachusetts, Rhode Island, New Jersey, and Delaware, specific warrants had become the standard method of search and seizure (p 1294). But not all of the new states eliminated the general warrant as an acceptable mode of search and seizure. Five states, including three southern states where general searches were employed as a device for pursuing runaway slaves, preserved general warrants

⁶⁴ See (p 376) (noting that “[t]he amendment abrogated a statutory heritage of the general warrant that was as much American as British. Inheritance of an English ideology condemning that warrant was only one cause of the amendment. Another cause was a memory of general warrant legislation by the colonies.”).

⁶⁵ By the time of the American Revolution, the specific warrant “had made sufficient progress in Britain to identify it as the accepted replacement for the general warrant” (p 984). It had, for example, replaced the general warrant as the device used for the recovery of stolen property and to enforce poaching laws (p 985). Yet in the 1770s and 1780s, England loosened some of the common law constraints on excise searches (p 982). Around the time of the ratification of the Constitution, England also authorized general warrants for new categories of searches. In 1789, English law retained general warrants to enforce treason, felony, vagrancy, customs, and excise tax laws (p 984). Six years later, legislation expanded the list to permit general searches for the impressment of seamen and for economic regulation (p 984).

(pp 1277-82). The general warrant's importance had diminished,⁶⁶ but it had survived in several states (pp 1294-95).

An important mechanism for eliminating general warrants was meaningful judicial review of the reasons for and the scope of intrusions. Yet, prior to adoption of the Fourth Amendment,

[o]nly a few American statutes . . . guarded against caprice as the basis of arrest or search warrants by allowing magistrates to evaluate the requests for these warrants. In most circumstances, judges issued warrants automatically on a person's sworn complaint that he suspected, rather than believed, that a place or person was connected to a crime (p 1351).⁶⁷

By commanding that warrants could issue only upon a showing of *probable* cause, and by requiring particularity in warrants, the Fourth Amendment ensures that judges will issue warrants only upon a showing of *good* cause for the intrusion and that those intrusions upon privacy, property, or liberty will be limited in scope to the places, persons, or things supplying that cause. The probable cause and particularity requirements thus rejected the history of general warrants and general searches by prohibiting both suspicionless searches and the exercise of arbitrary discretion.⁶⁸ By providing the factual basis for meaningful judicial review, the Amendment also abandoned the parts of its history in which there was no independent judicial scrutiny of the factual justifications for searches and seizures.⁶⁹

⁶⁶ See (pp 1302-38) (reviewing actions by different states to retain or replace general warrants).

⁶⁷ See also (p 858) ("For the most part, judges took the word of informants at face value or initiated the warrant themselves on the basis of hear-say.").

⁶⁸ The probable cause and particularity requirements serve overlapping functions. As the Court stated in *Maryland v Garrison*, 480 US 79, 84 (1987), the purpose of the particularity requirement

was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.

See also Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn L Rev 349, 411-12 (1974); Cloud, 48 Stan L Rev at 623-24 (cited in note 26).

⁶⁹ Cuddihy argues that "[t]he belief that arrests, searches, and seizures required adequate cause, which a disinterested magistrate had found to be so, existed long before the revolution" (p 1351), and by the middle of the eighteenth century the idea that particularized suspicion was a prerequisite of reasonable searches appeared frequently in cases and

There is no logical reason to think that the Founders only wanted to eliminate the evils of suspicionless and arbitrary intrusions when searchers used warrants.⁷⁰ And the historical record is replete with examples of complaints about warrantless general searches that intruded upon privacy, property, and liberty rights.⁷¹ History supports the conclusion that “[a]lthough the language of the amendment equates probable cause with warrants, it absorbed practices that required such cause for warrantless procedures. When America and Britain separated, for example, arrests in exigent circumstances were only permitted ‘upon reasonable probable grounds of suspicion’: circumstances, behavior, or evidence imputing guilt to a particular person” (p 1529).

A significant part of the historical record thus is consistent with logic: the Framers acted to eliminate search and seizure methods that permitted the arbitrary exercise of discretion and were conducted without good cause, whether or not warrants were employed.⁷² Yet some critics of the conjunctive theory linking the two clauses have rejected this conclusion. The most important is Telford Taylor, who wrote more than a quarter century ago that the Framers’ “prime purpose” was not to use the Warrant Clause as an identifier of unreasonable methods, but instead “to prohibit the oppressive use of warrants, and they were not at all concerned about searches without warrants.”⁷³ More recently,

commentaries. In the 1730s, an English judge admonished excise officers that “a house could only be searched by a special warrant arising from a sworn complaint ‘which Cause must be thought sufficient by the Justice who grants the Warrant’” (pp 835-36). Later in the century, the writer “Father of Candor” argued that specificity in warrants should be required for places, persons, and objects, and that

[n]othing . . . can be forcibly taken from any man, or his house entered, without some specific charge on oath . . . that I have certain stolen goods or such a particular thing that is criminal in itself, in my custody, before any magistrate is authorized to grant a warrant to any man to enter my house and seize it (p 937).

⁷⁰ See Landynski, *Search and Seizure* at 44 (cited in note 7) (“It would be strange, to say the least, for the amendment to specify stringent warrant requirements, after having in effect negated these by authorizing judicially unsupervised ‘reasonable’ searches without warrant. To detach the first clause from the second is to run the risk of making the second virtually useless.”).

⁷¹ In this essay, I use the term “privacy” in the twentieth-century sense. It encompasses the interest in being free from intrusions into the home, personal papers, and the like. In the eighteenth century, and before, these were interests recognized by opponents of general searches, although they probably would not have used the term “privacy” to describe them as we do in contemporary discourse.

⁷² See Amsterdam, 58 Minn L Rev at 399 (cited in note 68); Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L Rev 199, 295-97 (1993).

⁷³ Taylor, *Two Studies in Constitutional Interpretation* at 43 (cited in note 7). Taylor

Akhil Amar, who has adopted Taylor's general thesis, has argued that warrants—and judges who issued them—were disfavored by the Framers, and that the Amendment's history teaches that "juries, not judges, are the heroes of the Founders' Fourth Amendment story."⁷⁴ In an earlier article, his attack on judges was even harsher: "Judges and warrants [were] the heavies, not the heroes" to the Founders.⁷⁵ Amar asserts that because warrants were issued in *ex parte* proceedings and could serve as a defense to trespass suits against the searchers, warrants were the "friends of the searcher, not the searched. They had to be limited; otherwise, central officers . . . would usurp the role of the good old jury"⁷⁶

Of course, warrants were one of the many sources of defenses available to searchers sued for trespass.⁷⁷ But to extrapolate from this narrow fact the broad principle that warrants served no protective function is simply to ignore the development of specific warrants. General warrants may have been akin to a license to search, but specific warrants came into prominence, particularly in the United States after 1782, precisely because they protected citizens' rights against such unreasonable methods.

Cuddihy documents the rapid acceptance of specific warrants as a replacement for general warrants in the years immediately preceding the drafting and ratification of the Bill of Rights (pp 882-83, 1338-40, 1347-49). He reports, for example, that prior to ratification of the Fourth Amendment various states treated warrants as a restriction upon the power of federal searchers.⁷⁸

rested much of his argument upon the noncontroversial assertion that warrantless searches incident to arrest were common and largely unchallenged in the late eighteenth century. Extrapolating from this limited example, Taylor argued that history establishes that the Framers were unconcerned with warrantless searches and seizure, because "nothing gave them cause for worry about warrantless searches." Id. As Professor Maclin has sensibly observed, it is "a long leap from this narrow proposition" to Taylor's larger claim that the people "who battled British customs officers were unconcerned and untroubled by warrantless searches generally." Maclin, 35 Wm & Mary L Rev at 222 (cited in note 32).

⁷⁴ Amar, 107 Harv L Rev at 771 (cited in note 26).

⁷⁵ Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L J 1131, 1179 (1991).

⁷⁶ Amar, 107 Harv L Rev at 774 (cited in note 26). Amar cites Taylor for the proposition that "[i]n every state constitution prior to the federal Bill, 'the warrant is treated as an enemy, not a friend.'" Id, quoting Taylor, *Two Studies in Constitutional Interpretation* at 41 (cited in note 7).

⁷⁷ For a more detailed examination of the variety of defenses available in trespass actions, see (pp 1530-41).

⁷⁸ Indeed, some of the arguments raised by Antifederalists after 1787 demonstrated not only concern about the use of general warrants, but also fear of warrantless searches by federal officers. For example, according to Cuddihy, in the Virginia Convention in 1788,

Nine states permitted federal searches only by warrant, and some states, including North Carolina and Rhode Island, demanded that they must be specific warrants (pp 1349-50). Cuddihy notes that

[a]lthough general warrants had survived in some states, only New York permitted the national government to use the same general warrants that it employed to collect the state impost. North Carolina enacted companion statutes securing such warrants to itself but denying them to Congress. Pennsylvania relied on both warrants and on warrantless searches to collect its impost but restricted impost searches by the central government to warrants in all circumstances (pp 1348-49).⁷⁹

If warrants, particularly specific warrants, were seen as the enemies of privacy and liberty, and not as a restriction upon government power, these actions by the states make little sense (pp 1390-91). The Fourth Amendment defines general warrants as unreasonable, but it also defines specific warrants as reasonable. This is a distinction that makes a difference. A specific warrant may have provided a defense to a lawsuit, but that was not inconsistent with the Framers' primary concerns. Their primary concerns were to ensure that searches and seizures would be justified by probable cause, to restrict their scope with the requirement of particularity, and to enforce these limits with various mechanisms, including independent judicial review. To fail to distinguish between specific and general warrants, and the corollary differences between general and specific searches without a warrant, is to simply miss one of the important historical developments in the years preceding the ratification of the Fourth Amendment.⁸⁰

Patrick Henry warned that "excisemen . . . might commandeer the militia and enter houses and cellars without warrant" (p 1385).

⁷⁹ This suggests that the incorporation of the Fourth Amendment into the Due Process Clause of the Fourteenth Amendment may present insoluble problems for those who would restrict contemporary theory to the practice in 1791. See *Mapp v Ohio*, 367 US 643 (1961); *Ker v California*, 374 US 23 (1963). Under contemporary incorporation doctrine, citizens hold identical Fourth Amendment rights against the state and federal governments, but in 1791 the Amendment restricted only the national government.

⁸⁰ Professor Amar recognizes the distinction between general and specific warrants. He even mentions it in his Fourth Amendment article. See Amar, 107 Harv L Rev at 771 (cited in note 26) ("Unless warrants meet certain strict standards, they are per se unreasonable."); id at 774 ("[T]he summary warrant procedure was justified only because . . . there was a very good reason—probable cause—to think that an owner . . . was

III. JUDGES, JURIES, AND WARRANTS

The final section of this Review examines specific examples of the ways that lawyers' partial histories can obscure rather than clarify constitutional meanings. Parts A and B address Professor Amar's argument that the Founders considered judges and warrants as the "heavies," not the "heroes," when they adopted the Fourth Amendment.⁸¹ Part C reviews Amar's analysis of search and seizure legislation enacted by Congress in the years 1789 to 1799. I select Professor Amar's work for review because he is a prominent contemporary legal scholar who regularly employs history to support his interpretation of the Constitution, and he claims that history supports his theories about the meaning of the Fourth Amendment. My thesis is simple: If we find that a scholar of Professor Amar's stature employs incomplete histories in ways that advance his arguments but blur historical meanings, the lessons we learn may be applicable to the scholarship of others.⁸² Space limitations permit me to examine only a small sample of his arguments and sources. I begin with Amar's use of parts of the ratification debate to support his claims about the Founders' views on judges and juries in the Fourth Amendment context.

harboring something he had no right to have in the first place."); id at 775 ("And in early drafts of the federal Fourth, it is the loose warrant, not the warrantless intrusion, that is explicitly labeled 'unreasonable.'"). Inexplicably, Professor Amar fails to incorporate this fundamental distinction into his interpretation of the Amendment's history.

⁸¹ See notes 74-76 and accompanying text. Because of space limitations, I do not undertake a more general analysis of Professor Amar's use of history and policy arguments to support his Fourth Amendment theories. Others have already done that. See generally Maclin, 68 S Cal L Rev 1 (cited in note 22); Steiker, 107 Harv L Rev 820 (cited in note 14); Donald A. Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down That Wrong Road Again"*, 74 NC L Rev 1559 (1996). My purpose here is much more limited. I am only attempting to use the work of a prominent scholar to explore the problem of lawyers' partial histories. Amar's coauthored article examining the Fifth Amendment privilege against self-incrimination also has received severe scholarly criticism. Compare Akhil Reed Amar and Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 Mich L Rev 857 (1995), with Yale Kamisar, *Response: On the "Fruits" of Miranda Violations, Coerced Confessions, and Compelled Testimony*, 93 Mich L Rev 929 (1995). One measure of Professor Amar's prominence is that his work provokes so many scholarly responses.

⁸² For a more extensive criticism of the use of history by other leading constitutional scholars, see generally Flaherty, 95 Colum L Rev 523 (cited in note 5).

A. The Ratification Debate

Professor Amar is too subtle an advocate not to qualify his extreme claims about the Founders' views on judges. In his Fourth Amendment article, for example, he comments rather weakly that "at times, the Founders viewed judges and certain judicial proceedings with suspicion."⁸³ His own opinions are harsher. Following this description of the Founders' limited concerns, he asserts that "this unflattering truth may not immediately suggest itself to modern-day judges,"⁸⁴ and in the accompanying footnote cites Telford Taylor for "a more charitable explanation of how judges came to stand the Fourth Amendment on its head."⁸⁵

Amar's explanation of the Founders' foreboding about judges echoes some arguments made by those opposing ratification of the 1787 Constitution. Article III judges were appointed by the President, were officials of the central government that paid their salaries, and so on.⁸⁶ The entire judicial branch was dangerous because "if even one federal judge was a lord or a lackey, executive officials shopping for easy warrants would know where to go."⁸⁷ In contrast, "[f]ar more trustworthy were twelve men, good and true, on a local jury, independent of the government, sympathetic to the legitimate concerns of fellow citizens, too numerous to be corrupted, and whose vigilance could not easily be evaded by governmental judge-shopping."⁸⁸

The evidence Amar offers to support his thesis that the Founders saw judges as "heavies" and civil juries as "heroes" includes numerous quotations from the Antifederalist side of the debate over ratification of the 1787 Constitution. In the text he quotes various Antifederalists, including Luther Martin and the pseudonymous Maryland Farmer.⁸⁹ In footnotes he repeatedly cites Antifederalist sources.⁹⁰ All praise the civil jury. It is hardly surprising to read Antifederalist statements favoring civil

⁸³ Amar, 107 Harv L Rev at 771 (cited in note 26).

⁸⁴ Id.

⁸⁵ Id at 771 n 50, citing Taylor, *Two Studies in Constitutional Interpretation* at 44-46 (cited in note 7).

⁸⁶ Amar, 107 Harv L Rev at 773 (cited in note 26). Interestingly, Amar fails to mention lifetime appointments.

⁸⁷ Id.

⁸⁸ Id.

⁸⁹ Id at 777.

⁹⁰ Id at 776-78 nn 71-79.

juries, particularly in an article advocating an increased role for the civil jury in Fourth Amendment jurisprudence.⁹¹

What is surprising is that these passages leave the impression that the Founders achieved unanimity during the ratification debate.⁹² And not just unanimity about the virtues of the civil jury system, but about the vices of the judiciary, as well. Of course, not all of the Founders agreed with the Antifederalist arguments. One might be tempted to note that the Antifederalists were on the losing side of the political debate over ratification of the Constitution, although the obvious retort is that the Seventh Amendment was quickly adopted.⁹³ Professor Amar is correct in asserting that many Antifederalists argued in favor of constitutionalizing the civil jury right,⁹⁴ and fretted as well about the creation of a federal judiciary.⁹⁵

But there was another side in the ratification debate, and it addressed the question of the roles of judges and juries as protectors of liberty and property rights. This side included some of the leading political voices of the age, who argued that judges would act as protectors of liberty in a variety of contexts.⁹⁶ Among the

⁹¹ Id at 816-19. The importance of the civil jury has been a recurring theme in Amar's scholarship. See, for example, Amar, 100 Yale L J at 1206-10 (cited in note 75).

⁹² Cuddihy's discussion of the ratification process undermines Amar's argument that the Framers were unconcerned with warrantless intrusions (pp 1363-1403). For example, some Antifederalist arguments focused upon general warrants, but many went beyond this and expressed fears of warrantless searches and seizures as well (pp 1375-78). In the ratifying conventions of seven states, some delegates "wanted only to extinguish general warrants. Most of those delegates, however, preferred a comprehensive guarantee against all types of unreasonable search and seizure" (p 1382).

⁹³ US Const, Amend VII. The criminal jury was preserved as well. US Const, Art III, § 2, cl 3; US Const, Amend VI.

⁹⁴ See, for example, *Cincinnatus II to James Wilson, Esquire*, NY Journal (Nov 8, 1787), in John P. Kaminski, et al, eds, 14 *The Documentary History of the Ratification of the Constitution* 12-14 (State Hist Soc'y of Wis 1983); *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents* (Dec 18, 1787), quoted in Ralph Ketcham, ed, *The Anti-Federalist Papers and the Constitutional Convention Debates* 250 (New American Library 1986).

⁹⁵ See *A Democratic Federalist*, Pa Herald (Oct 17, 1787), in John P. Kaminski, et al, eds, 13 *The Documentary History of the Ratification of the Constitution* 388-89 (State Hist Soc'y of Wis 1981); Letter from Timothy Pickering to Charles Tillinghast (Dec 24, 1787), in John P. Kaminski, et al, eds, 14 *The Documentary History of the Ratification of the Constitution* 199 (State Hist Soc'y of Wis 1983); *Richard Henry Lee to Governor Edmund Randolph*, Petersburg Va Gazette (Dec 6, 1787), in John P. Kaminski, et al, eds, 14 *The Documentary History of the Ratification of the Constitution* 364, 369 (State Hist Soc'y of Wis 1983).

⁹⁶ See, for example, James Madison, *Notes of Debates in the Federal Convention of 1787* 336-37 (Ohio 1966) (quoting James Wilson); Governor Randolph of Virginia argued:

most important was Alexander Hamilton, who argued vigorously on behalf of the Constitution's provisions concerning the national judiciary. In Federalist 78 he wrote that the appointment of judges for a term of good behavior is an "excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient . . . to secure a steady, upright, and impartial administration of the laws."⁹⁷ In the same essay he argued in favor of judicial review of the constitutionality of legislative acts,⁹⁸ and described the judiciary's role in preventing "serious oppressions of the minor party in the community."⁹⁹ Judges were essential defenders of liberty and property rights:

But it is not with a view to infractions of the Constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws.¹⁰⁰

And civil juries did not earn universal praise from the participants in the constitutional debate. Noah Webster asked:

But, why this outcry about juries? If the people esteem them so highly, why do they ever neglect them, and suffer the trial by them to go into disuse? . . . In the City-Courts of some States, juries are rarely or never called, altho' the parties may demand them . . . It is found, that the judg-

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

Jonathan Elliot, ed, 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 468 (2d ed 1836).

⁹⁷ Federalist 78 (Hamilton) in Clinton Rossiter, ed, *The Federalist Papers* 465 (Mentor 1961). The important function served by judges as enforcers of rights was at the center of political controversies in several colonies in the decades preceding the Revolution. Colonists complained about the absence of life tenure for colonial judges because they recognized that life tenure was a source of judicial independence from executive and legislative pressures. See Bailyn, *Ideological Origins* at 105-09 (cited in note 60).

⁹⁸ Federalist 78 (Hamilton) in Rossiter, ed, *The Federalist Papers* at 466-69 (cited in note 97).

⁹⁹ Id at 469.

¹⁰⁰ Id at 470.

ment of a Court, gives as much satisfaction, as the verdict of a jury, as the Court are as good judges of fact, as juries, and much better judges of law.¹⁰¹

Professor Amar quotes at length from a statement by the “firebreathing Luther Martin” that refers to government acts to collect various kinds of taxes. Amar concludes that Martin referred to “what we now call ‘Fourth Amendment cases’ in emphasizing the importance of juries.”¹⁰² In a footnote he notes—without discussing Hamilton’s argument—that in Federalist 83 Hamilton “directly responds to this passage.”¹⁰³ Despite Amar’s omission of it, Hamilton’s opinion obviously supplies relevant data for evaluating how members of the founding generation viewed civil juries.

Hamilton responded to Luther Martin and other Antifederalists with the following arguments. He began by acknowledging that during the ratification debates the attack on the Constitution’s “want of a constitutional provision for the trial by jury in civil cases”¹⁰⁴ had been successful in some states. Hamilton conceded that juries were valuable, but he questioned the significance of the *civil* jury as a protector of liberty:

But I must acknowledge that I cannot readily discern the inseparable connection between the existence of liberty and the trial by jury in civil cases. Arbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions have ever appeared to me to be the great engines of judicial despotism; and these have all relation to criminal proceedings. The trial by jury in criminal cases, aided by the *habeas corpus* act, seems therefore to be alone concerned in the question. And both of these are provided for in the most ample manner in the plan of the convention.¹⁰⁵

Government efforts to enforce tax laws have played a significant role in the Anglo-American history of searches and seizures (which Amar may have had in mind when he characterized Lu-

¹⁰¹ Noah Webster, *America*, NY Daily Advertiser (Dec 31, 1787), in John P. Kaminski, et al., eds, 15 *The Documentary History of the Ratification of the Constitution* 194, 197 (State Hist Soc'y of Wis 1984).

¹⁰² Amar, 107 Harv L Rev at 777 (cited in note 26).

¹⁰³ Id at 777 n 76.

¹⁰⁴ Federalist 83 (Hamilton) in Rossiter, ed, *The Federalist Papers* at 495 (cited in note 97).

¹⁰⁵ Id at 499.

ther Martin's statement about taxes as referring to search and seizure issues). Yet Hamilton rejected the argument that civil jury trials were a necessary safeguard in this context. He even rejected concerns about abusive methods of collection and the conduct of revenue officers as justifications for the need for a civil jury.¹⁰⁶ Hamilton did not oppose civil juries.¹⁰⁷ But he claimed that "[t]he excellence of the trial by jury in civil cases appears to depend on circumstances foreign to the preservation of liberty."¹⁰⁸

None of this should suggest that I disagree with Professor Amar's assertion that civil juries were an element of the liberty-protecting arsenal eventually included in the Constitution. What I find troubling is that his presentation of the historical record in support of his argument is so incomplete. His characterization of the Founders' views about judges and juries oversimplifies the more subtle and complex record of the ratification debates. No one could reasonably dispute that many members of the founding generation credited juries with some substantial value, including some role in protecting liberty and property rights. But this historical fact does not mean that the Founders uniformly saw judges as the enemies of liberty. In fact, a more complete review of the historical record seems to suggest just the opposite conclusion.

B. Writs of Assistance

Cuddihy's discussion of the numerous controversies arising out of attempts by colonial customs officers to obtain writs of assistance reveals the inevitable shortcomings in lawyers' histories, and why we should use caution in relying upon them. Once again, Professor Amar's critique of the Founders' views about judges in the context of searches, seizures, and warrants serves as a counterexample. In this discussion, Amar mentions only the

¹⁰⁶ Id at 500. Some participants in the ratification debate did address search and seizure issues, including concerns about general warrants and other forms of unreasonable searches and seizures, and the enforcement of federal excise taxes (pp 1365-1403).

¹⁰⁷ Ultimately he concluded that civil juries were "in most cases, under proper regulations, an excellent method of determining questions of property; and that on this account alone it would be entitled to a constitutional provision in its favor if it were possible to fix the limits within which it ought to be comprehended." Id at 501. Hamilton then surveyed the inconsistent laws and practices among the various states, and concluded that the Constitutional Convention could not have fashioned a workable "general rule" governing civil juries because of the "material diversity" among the states. Id at 503. Subsequent events, of course, disproved this argument.

¹⁰⁸ Id at 500.

most famous of the writs of assistance cases, *Paxton's Case*, which arose in Boston in 1761. He dismisses that case as unimportant to the Framers, claiming that it "went almost unnoticed in debates over the federal Constitution and Bill of Rights."¹⁰⁹ Amar ignores the many other writs of assistance controversies that arose throughout the colonies in the decade preceding the Revolution. In particular, he ignores the disputes triggered by the customs duties and enforcement mechanisms enacted in the 1767 Townshend Revenue Act.¹¹⁰ This is a significant omission, in part because these events confirm that the complex historical record defies simplistic interpretations.

Cuddihy's research reveals that the judicial response to applications for writs of assistance to enforce the Townshend legislation was multifarious (pp 1002-1102). Some colonial judges simply rejected the requests on the grounds that the general writs sought by customs agents were illegal (pp 1054-55, 1060-64, 1083). Others were willing to grant more specifically limited writs, but refused for various reasons to grant the particularly general writs sought by government officials. The government sought writs which were not restricted to searches of specific places or to seizures of specific goods; which did not require either an oath or information supplying cause to believe a violation had occurred; and which survived indefinitely (pp 1067-77, 1081-82, 1472). Still other courts simply employed devious ploys to create delays that allowed them to avoid issuing the writs (pp 1056-57, 1077-80). Some customs officers did not bother to apply for the general writs because they believed the colonial judges would not grant them (pp 1067, 1078). And in a minority of the colonies—with Massachusetts serving as the leading example—courts issued general writs of assistance (pp 1003, 1031, 1046, 1080). In response to repeated applications for writs, some courts reversed their positions, either first granting general writs and later stalling or refusing to issue more (pp 1077-78, 1083), or initially refusing and later granting general writs—after all of the judges on the court had been replaced (pp 1080-81).

Judicial (and political) opposition to the writs was so strong throughout the colonies that during the years 1769-1772, outside

¹⁰⁹ See Amar, 107 Harv L Rev at 772 (cited in note 26). Professor Maclin has examined in detail the defects in Amar's analysis of the historical record of the colonial writs of assistance controversies. See Maclin, 68 S Cal L Rev at 13-17 (cited in note 22). See also (pp 1374 & 1374-75 n 27).

¹¹⁰ 7 Geo 3 ch 46 (1767).

of Massachusetts and New Hampshire, "no colonial court . . . granted the general writ that the customs authorities wanted, and most included constitutional or legal exegeses in their grounds of refusal" (pp 1066-67). Even when colonial judges were willing to grant more specific writs, customs officers concluded that the judges were attempting to obstruct rather than facilitate enforcement of the customs laws (pp 1075-76).

Cuddihy is not the only historian to document this behavior by colonial judges,¹¹¹ and once again the historical record raises doubts about Amar's claim that the Founders saw judges as enemies of liberty in the context of searches and seizures. The history of these controversies permits, and perhaps even compels, the conclusion that in the years preceding the Revolution numerous colonial judges were important impediments to the use of writs of assistance to conduct general searches to enforce the customs laws.¹¹² Had Professor Amar's examination of the Amendment's history considered this data, he might have reconsidered his views about judges. Instead, Amar's treatment of this part of constitutional history is partial in both ways common to lawyers' histories of the Fourth Amendment. He selectively deploys incomplete fragments of the historical record to advance a partisan thesis.

C. Statutes Passed by Early Congresses

Amar's discussion of four statutes passed by the early Congresses is also incomplete and partisan. He begins by noting that the Collection Act of 1789¹¹³ "pointedly authorized federal naval inspectors to enter ships without warrants . . . to search for and to seize any goods that they suspected violated customs laws. Similar provisions were contained in congressional acts passed in 1790, 1793, and 1799."¹¹⁴ Amar offers this as evidence that the Framers approved of some warrantless searches and seizures,

¹¹¹ See, for example, Smith, *Writs of Assistance Case* at 1-7 (cited in note 60); O.M. Dickerson, *Writs of Assistance as a Cause of the Revolution* 40-75, in Richard B. Morris, ed., *The Era of the American Revolution* (Columbia 1939).

¹¹² See, for example, (pp 1065, 1094, 1097-98) (discussing awareness by leading politicians and lawyers of the judicial resistance in the colonies, particularly in the context of political activities); Dickerson, *Writs of Assistance* at 52-54, 62-63 (cited in note 111) (discussing the significance of judicial opposition to the writs); but see id at 74-75 (praising colonial judges for their "unsung" courage in resisting general writs because they were "[a]cting in private" without "public plaudits" or "newspaper publicity").

¹¹³ Collection Act of July 31, 1789, ch 5, 1 Stat 29, repealed by Act of Aug 4, 1790, ch 35, § 74, 1 Stat 145, 178.

¹¹⁴ Amar, 107 Harv L Rev at 766 (cited in note 26).

and he is correct. Yet once again, his use of history is partial. It ignores relevant parts of the statutes, including some provisions that arguably support the disjunctive theory of the Amendment that he advocates. It ignores an important statute passed by the First Congress that undermines his thesis. And rather than grapple with the complexity of the statutory record, it simplifies to make a point.

Amar argues that the 1789 statute is one indication of the views of the members of the First Congress about reasonable searches and seizures. Cuddihy agrees, and concludes that the 1789 Collection Act is the most helpful of the early statutes at identifying the “techniques of search and seizure that the Framers of the amendment believed reasonable while they were framing it” (p 1490-91), because Congress began considering the search warrant section of that act “only twelve days before the amendment originated, and that section became law just three weeks before the amendment assumed definitive form” (p 1491).

If the statute tells us what methods the Amendment’s Framers thought were reasonable, the message is mixed. The statute established three categories of searches and seizures. The first group would be classified today as administrative searches and seizures, and required neither warrants nor particularized suspicion. The limited nature and purpose of these searches is illustrated by § 15 of the statute, which permitted the designated officers “of any port of entry or delivery, at which any ship or vessel may arrive to put on board” inspectors. Particularized suspicion of wrongdoing was irrelevant because the event triggering the entry was simply the arrival of a ship in a port. Once the inspectors were on board the ship, their functions included “specifying the marks and numbers of each package, and a description thereof.” This created an administrative record, so that when the ship was unloaded officials could “compare the account and entries”¹¹⁵ of the unloaded goods with this list and other documents describing the cargo as a means of ensuring that duties were collected on all goods.¹¹⁶

The statute distinguished these administrative acts from searches of ships that were triggered by a belief that dutiable

¹¹⁵ Collection Act of 1789 § 15, 1 Stat at 40.

¹¹⁶ Inexplicably, Amar fails to cite these sections of the 1789 Act. Because they permit limited intrusions without requiring either a warrant or particularized suspicion, they seem to support his broader arguments about the disjunctive relationship between the two clauses of the Fourth Amendment.

goods were being concealed to avoid payment of taxes. It authorized warrantless searches of vessels only when officers had "reason to suspect any goods, wares or merchandise subject to duty shall be concealed."¹¹⁷ As Cuddihy notes, the 1789 Collection Act allowed warrantless searches of ships—where the mobility exigency typically existed—but only when searchers had "reasonable suspicion that it concealed taxable property" (p 1488).

The third category of searches arose when government officers "shall have cause to suspect" that goods were concealed in "any particular dwelling-house, store, building, or other place." For these searches on land, the statute adopted warrant requirements akin to those enacted in the Fourth Amendment. The officers possessing reasonable suspicion "shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the day time only)." Cuddihy concludes that,¹¹⁸ for searches on land the 1789 Collection Act "imposed the highest possible standard of particularity by restricting all federal search warrants to single structures, even if those structures were not houses" (p 1497).¹¹⁹

¹¹⁷ Collection Act of 1789 § 24, 1 Stat at 43.

¹¹⁸ Amar argues that the statute did not require warrants for searches on land, only that "under certain conditions, naval officers and customs collectors would 'be entitled to a warrant.'" Amar, 107 Harv L Rev at 766 (cited in note 26). He apparently offers this argument to support his claim that the warrant's limited function was as a defense to civil damage actions, a thesis not precluded by the text of the Act. But if the statute is a guide to the search and seizure methods considered reasonable by the First Congress, other interpretations of the language seem more plausible. For example, in a single sentence the statute authorized warrantless searches of ships if the officers had reason to suspect a violation of the law, but prescribed warrant procedures for similar searches on land. Collection Act of 1789 § 24, 1 Stat at 43. It is a fair inference from this juxtaposition that warrants were a prerequisite for reasonable searches on land, but not for those on ships. This interpretation is bolstered by other parts of the statute. For example, the 1789 Act enacted defenses for officials sued for some actions taken pursuant to the statute. Judicial warrants supplied defenses, but so did "the powers given by this act." Id § 27, 1 Stat at 43. Thus a warrantless search of a ship based on reasonable suspicion was lawful, and supplied a defense to the civil action. Had the drafters intended to treat intrusions on land in the same way, the warrant language would have been irrelevant in both §§ 24 and 27. In other words, it appears that the statute's drafters used concepts soon to be embodied in the Fourth Amendment to define different categories of reasonable intrusions. Arguably, particularized suspicion was the most important of these concepts. For example, even when a claimant prevailed in a civil suit, recovery of costs was precluded if the trial judge found that the officers possessed "reasonable cause" to seize the property. Id § 36, 1 Stat at 47.

¹¹⁹ Cuddihy acknowledges that "[t]he current understanding of probable cause, however, is broader than that of 1789" (p 1523). But he documents that in the 1780s, "many commentators were advocating those elements" comprising the modern understanding of the meaning of probable cause (pp 1524, 1523-27). He also concludes that the differences in the use of probable cause in the 1789 Impost and 1791 Excise Acts "indicated that

The 1790 Collection Act repealed the 1789 statute, but imposed similar restrictions on suspicion-based searches and seizures on land as well as upon vessels.¹²⁰ The Collection Act of 1799 in turn repealed the 1790 Act. It approved broad powers to search ships in at least two sections¹²¹ but also repeated the limits on suspicion-based intrusions enacted in the 1789 and 1790 statutes.¹²² Thus these statutes did permit warrantless searches, but they also imposed limits on suspicion-based intrusions consistent with the conjunctive theory of the Amendment.

Finally, Amar fails to mention an important statute that undermines his arguments supporting the disjunctive theory of the Amendment. Eight months before the Bill of Rights went into effect, the First Congress passed the Excise Act of 1791,¹²³ a tax-related statute containing search and seizure provisions. The statute was part of Treasury Secretary Alexander Hamilton's financial program (pp 1488-89). It permitted designated officials to conduct warrantless daytime searches of registered buildings where liquor was distilled or stored to determine the quantities, kinds, and proofs of the inventories.¹²⁴ The statute also authorized officials to apply for search warrants to look for "spirits"

Congress . . . was of two minds on the subject" (p 1528).

¹²⁰ Amar cites one section of the 1790 statute, Act of Aug 4, 1790, ch 35, § 48, 1 Stat 145, 170, repealed by Act of Mar 2, 1799, § 112, 1 Stat 627, 704. But once again, he fails to discuss, or even cite, relevant provisions of the statute. For example, the 1790 Act granted greater geographical authority for customs officers to board ships and conduct searches limited to the administrative purpose of identifying and preserving containers whose contents might be dutiable. Ships could be boarded even before they had arrived in port. The officers were entitled to record descriptions of the containers, and to put seals upon them. When the ship was unloaded, a fine of \$200 was imposed for each container missing or on which the seals were broken. Id § 31, 1 Stat at 164-65. Elsewhere, the statute authorized the construction and operation of up to ten boats, or cutters, with small crews, Act of Aug 4, 1790, ch 35, §§ 62-63, 1 Stat at 175, whose captains and crews were granted broad, warrantless search powers of "every ship or vessel which shall arrive within the United States, or within four leagues of the coast thereof, if bound for the United States . . ." Id § 64, 1 Stat at 175. Similarly, he cites the Act of Mar 2, 1799, ch 22, § 68, 1 Stat 627, 677-78, repealed by the Tariff Act of 1922, ch 356, § 644, Pub L No 318, 42 Stat 858, 890, which preserved the earlier restrictions on suspicion-based searches on land and sea, but he again fails to cite the sections permitting suspicionless, warrantless intrusions upon ships. See, for example, Act of Mar 2, 1799, ch 22, §§ 53-54, 1 Stat at 667-68. The 1793 statute also approved broad search powers on vessels for "any officer of the revenue." Act of Feb 18, 1793, ch 8, § 27, 1 Stat 305, 315. For Amar's citations, see Amar, 107 Harv L Rev at 766 nn 27-29 (cited in note 26).

¹²¹ Act of Mar 2, 1799, ch 22, §§ 53-54, 68, 1 Stat at 667-68, 677-78.

¹²² Id § 68, 1 Stat at 677-78. See also id §§ 66-67, 1 Stat at 677.

¹²³ Act of Mar 3, 1791, ch 15, § 1, 1 Stat 199. The first ten amendments went into effect on November 3, 1791. See Henry Steele Commager, ed, *Documents of American History* 146 (Meredith 7th ed 1963).

¹²⁴ Act of Mar 3, 1791, ch 15, §§ 29, 32, 1 Stat at 206-07.

that were hidden to avoid the excise tax. But the warrants were to issue only if "reasonable cause of suspicion [was] . . . made out to the satisfaction of such judge or justice, by the oath or affirmation of any person . . ." ¹²⁵ The statute imposed additional procedural limits on the execution of these specific warrants.¹²⁶ It also placed limits on the scope of warrantless searches. Cuddihy concludes that Hamilton intended to avoid objections to earlier excise taxes by providing "a method of search without warrant as specific and unobjectionable as that which the specific warrant imposed" (p 1506).¹²⁷ But Cuddihy does not make the error of claiming that this statute proves some simplistic argument about the Framers' intent. Instead, he recognizes that the 1791 Statute, like the Fourth Amendment, "mediated between . . . opposing traditions regarding warrants" (p 1502).

My point is not to suggest that Amar is inaccurate when he writes that these early statutes permitted some warrantless searches. They did. His statements are accurate—as far as they go. My concern is simply that his description of their contents is so incomplete and one-sided that it leaves the reader with an inadequate basis for evaluating how the statutes affect our understanding of one of the fundamental questions lurking behind his arguments: What does history tell us about the relationship between the two clauses of the Fourth Amendment?

IV. CONCLUSION: PARTIAL HISTORIES AND LAWYERS' PURPOSES

The omissions in lawyers' histories may simply be the product of life's inherent limitations. Most of us only possess, and therefore act upon, incomplete data all the time. It is unlikely

¹²⁵ Id § 32, 1 Stat at 207.

¹²⁶ Id (Officials executing these warrants had to search during the day, "in the presence of a constable or other officer of the peace."). Despite these limits, the specter of tax officers searching homes for excisable goods triggered protests around the nation (see pp 1502-03).

¹²⁷ For Cuddihy's sources supporting this conclusion, see (pp 1503-07). The states had a long tradition of permitting warrantless inspections of commercial establishments, including searches for violations of the Sabbath and searches of breweries and other kinds of workplaces (pp 1501-02). Yet the excise tax of 1791, which permitted warrantless searches of distilleries, triggered "apocalyptic protests," despite Hamilton's attempts to establish a method of specific warrantless searches (p 1502). The statutory limits were consistent with those enacted in the Fourth Amendment. As one defender of that Act noted, "the discretion [to issue an excise warrant] is not in the officer of the revenue but in a magistrate, and even he cannot grant such a warrant but in consequence of reasonable cause of suspicion" (p 1528), quoting John Neville, *An Address to the Citizens of Westmoreland, Fayette and Alleghany Counties on the Revenue Law*, Gazette of the United States 284 (Dec 31, 1791).

that any other professional historian, let alone any lawyer, has engaged in research of the topic that is as comprehensive as Cuddihy's. Cuddihy devoted two decades to researching and writing about the Fourth Amendment's origins. Even before Cuddihy had completed his dissertation, Leonard Levy wrote that "Cuddihy is the best authority on the origins of the Fourth Amendment."¹²⁸ His authority rests upon more complete historical research than most of us will ever undertake.

But I suspect that the partial selection of historical data in lawyers' histories usually is better explained by the other kind of partiality—the desire to advance a partisan legal argument. Professor Amar, for example, openly described the instrumental goals of his Fourth Amendment analysis.¹²⁹ He intended to correct the fundamental errors in contemporary Fourth Amendment theory, and to demonstrate that there is "a better way to think about the Fourth Amendment."¹³⁰ More specifically, Amar wanted to debunk the exclusionary rule and to demonstrate that the Amendment's warrant and reasonableness clauses are not linked—and therefore the constitutionality of warrantless intrusions need only be judged against some malleable standard of reasonableness. Amar's aversion to the exclusionary rule and the

¹²⁸ Levy, *Original Intent* at 441 n 1 (cited in note 7). Levy was familiar with the work because he was Cuddihy's dissertation adviser. In this same passage Levy explained that he frequently cited other published sources because at the time Cuddihy's dissertation was still in the process of revision and repagination. Levy stressed, however, "[t]his note is by way of acknowledging my debt to him even when I cite others." Id. Despite this caveat, Levy repeatedly cited to chapters in Cuddihy's work in progress. See, for example, id at 224-25, 232, 235-36, 244.

¹²⁹ See Amar, 107 Harv L Rev at 757-61 (cited in note 26). It is interesting that Telford Taylor's book, which Amar praises as brilliant and from which he derives many of his arguments and some of his historical evidence, also used history instrumentally to support arguments urging the Supreme Court to revise Fourth Amendment doctrine. Taylor delivered the text as lectures in 1967, when the Supreme Court was reconsidering the basic premises of its Fourth Amendment theory. Taylor employed history to support his arguments about the contemporary issues facing the Supreme Court, and advocated: (1) abolition of the mere evidence rule, which the Court did in *Warden v Hayden*, 387 US 294 (1967); (2) abandoning the Court's interpretive linkage of the two clauses of the Fourth Amendment, a process the Court began in *Camara v Municipal Court*, 387 US 523 (1967) and *Terry v Ohio*, 392 US 1 (1968); and (3) restricting the use of electronic surveillance, which the Court did in *Berger v New York*, 388 US 41 (1967), and *Katz v United States*, 389 US 347 (1967) (although the Court relied upon the warrant model to do this, and Taylor had advocated other means). See Taylor, *Two Studies in Constitutional Interpretation* at 38-93 (cited in note 7).

¹³⁰ Amar, 107 Harv L Rev at 759 (cited in note 26) (emphasis omitted). This is an admirable goal, and one that many others (including the author of this Review) have attempted. See Cloud, 41 UCLA L Rev 199 (cited in note 72); Cloud, 48 Stan L Rev 555 (cited in note 26).

warrant model may derive in part from his ongoing advocacy of the civil jury as the remedy for many constitutional ills. And this in turn may help explain his attempt to characterize judges as the "heavies" in the history of the creation of the Fourth Amendment. After all, the Fourth Amendment allocates the power to issue warrants to judges, not juries, and the exclusion of evidence is the one Fourth Amendment remedy controlled exclusively by judges.

I do not mean to suggest that there is no historical evidence to support Amar's arguments. There is. I do suspect, however, that like other lawyers who use history to support their arguments about what the law should be today, his advocacy of particular theses inevitably influenced his selection from historical sources. This does not appear to be analysis driven by the historical record. It appears to be a classic example of a lawyer's selective use of the record to advance his theories.

This kind of partiality is not unique; it is characteristic of lawyers' histories. This does not mean that lawyers' histories are invalid; indeed, they serve significant functions in our legal world. But it is important that we recognize lawyers' histories for what they are, and for what they are not. This kind of work is not constitutional *history*, it is not legal *history*; it is not *history*. It is a lawyer's selective use of historical data to advance a legal argument. It is part of a time-honored tradition¹³¹ in which most legal scholars who write about constitutional history participate from time to time. Some readers (and I suspect Professor Amar will be in this group) may conclude that this is precisely what I have done in this Review. But I am not worried about lawyers acting like lawyers. I am not worried about partisan arguments relying upon historical materials as long as we treat them as lawyer's briefs and not as sources of historical truth.

What worries me is that our readers—whether they are judges, lawmakers, or scholars—will mistake lawyers' histories for something else. What worries me is that judges will decide

¹³¹ Cuddihy asserts that Sir Edward Coke's attack upon general warrants in his *Institutes of the Laws of England* (1642-44) transformed the English debate about unreasonable searches and seizures (p 201). He then documents how Coke's thesis rested upon "creative" interpretations of history and legal precedents (pp 200-35). The discussion of Coke's interpretation of the historical meaning of Article 39 of the Magna Carta is a particularly informative example of the selective use of history to reconstruct legal theory (pp 208-21). Cuddihy does not condemn Coke's interpretive behavior. He concludes that "Coke inherited rather than contrived a loose way of construing Magna Carta that was nearly as old as the charter itself and that had allowed it to operate as a principal avenue of constitutional growth" (p 218).

cases based upon some partial history whose author claims to have discovered history's true and literal meaning. What worries me is that we may have become so used to lawyers' histories that we do not recognize them for what they are, and for what they are not.¹³²

If we are aware of the difference, then lawyers' histories will probably cause little harm: "Our assumptions do not matter if we are conscious that they are assumptions, but the most fallacious thing in the world is to organise our historical knowledge upon an assumption without realising what we are doing, and then to make inferences from that organisation and claim that these inferences are the voice of history."¹³³ What worries me is that we are not conscious of these assumptions when we read lawyers' histories—and perhaps not even when we write them.

This is why William Cuddihy's search through and for the history of the origins of the Fourth Amendment is so valuable. Even with its organizational flaws, it serves as a model of the effort and objectivity that are hallmarks of legal history. While Cuddihy's work undoubtedly will serve as a resource for others, his greatest contribution may be that he confirms that the complexity of the Amendment's history defies the simple generalizations—whether glib or thoughtful—that lawyers, judges, and legal scholars have made about the lessons history teaches about the meaning of the Fourth Amendment.¹³⁴

I do not mean to suggest that history teaches us nothing about the meaning of the Fourth Amendment. It teaches us that except for a few uncontroversial issues,¹³⁵ constitutional decision makers should be skeptical when lawyers claim to have discovered the Amendment's precise meaning in its complex his-

¹³² See Kelly, 1965 S Ct Rev at 155 (cited in note 5) (The Supreme Court "has confused the writing of briefs with the writing of history").

¹³³ Butterfield, *The Whig Interpretation* at 23-24 (cited in note 2).

¹³⁴ Cuddihy cautions against the use of history to support partisan lawyers' arguments: "Those who advocate adherence to the amendment's original understanding should consider that its authors expressed conflicting understandings of probable cause and of an enforcement mechanism" (p 1556).

¹³⁵ For example, no one disputes that in eighteenth-century England the primary legal remedy for unreasonable searches and seizures of property was a trespass suit for damages. See, for example, (pp 1531-32). Similarly, the historical record establishes the validity of searches incident to arrest. But even here, history is ambiguous on an important issue, the permissible scope of these searches. "[T]hose who framed and ratified the Fourth Amendment assumed not only that persons could be searched but also that personal searches had limits. The extent of those limits, however, was debatable. That an arrest subjected the person arrested to a search was clear; that his companions, acquaintances [sic], or neighbors were so subject was not clear" (p 1519). See also (pp 842-48).

tory. It also teaches us that the Amendment embodies broad background principles favoring privacy, property, and liberty, and these are principles that can guide us as we attempt to interpret the Amendment two centuries after its creation. Even complex histories can guide us if we are willing to deal with them on an appropriate level of abstraction.

In a recent article, Professor Helmholtz examines the historical origins of the privilege against self-incrimination.¹³⁶ After noting that “[t]he ‘lessons’ of legal history are often ambiguous,” he suggests that

[p]erhaps the lesson to be drawn is that we must make up our own minds. History does not compel modern lawyers to take account of the privilege as it existed in the European *ius commune* in forging a law for today. It does ask that they recognize the complexity of the way in which the privilege evolved.¹³⁷

Cuddihy’s history should help us recognize the complexity of the Fourth Amendment’s origins. Perhaps that is enough. Ultimately, we do have to make up our own minds about what the law will be in this time and in this place.

¹³⁶ Helmholtz, 65 NYU L Rev 962 (cited in note 8).

¹³⁷ Id at 990.

