

THE SUPREME COURT'S AHISTORICAL REASONABLENESS APPROACH TO THE FOURTH AMENDMENT

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In recent years, the Supreme Court has increasingly made “reasonableness” the central inquiry of whether a search or seizure is constitutional under the Fourth Amendment. The rise of the reasonableness approach has coincided with originalist scholarship that claims this interpretation is more consistent with the Amendment’s text and history. This Note looks at Framing-era search-and-seizure practice and argues that the Court’s modern reasonableness interpretation is, in fact, ahistorical and inconsistent with Framing-era practice and the Amendment’s original understanding. Not only is there scant evidence that the legality of searches and seizures turned on their reasonableness during the Framing era, but the arguments made in favor of the Court’s modern reasonableness approach are based on flawed historical assumptions. As a result, the Court’s various applications of its reasonableness interpretation are all inconsistent with Framing-era practice and the Amendment’s original understanding.

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INTRODUCTION

The Fourth Amendment prohibits “unreasonable searches and seizures” but gives little guidance on what “unreasonable” means.¹ In defining this prohibition, the Supreme Court has developed various interpretations of Fourth Amendment reasonableness. The interpretation the Court adopts has significant consequences ranging from the legality of the NSA’s collection of phone record metadata² to whether the police need a warrant to extract and analyze an arrestee’s DNA³ to the scope of evidence admissible in criminal trials under the exclusionary rule.⁴

For much of the twentieth century, the Court embraced a warrant-preference interpretation of the Amendment in which searches and seizures conducted without a warrant were presump-

¹ U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

² See *Klayman v. Obama*, 957 F. Supp. 2d 1, 37–41, 43 (D.D.C. 2013) (ordering a preliminary injunction against the collection of phone record metadata because these searches are likely to be unreasonable).

³ They do not. See *Maryland v. King*, 133 S. Ct. 1958, 1980 (2013) (finding the warrantless collection of an arrestee’s DNA reasonable under the Fourth Amendment).

⁴ See *infra* notes 49–52 and accompanying text (discussing the exclusionary rule).

tively unreasonable.⁵ Increasingly, the Court has abandoned its preference for warrants for what this Note will call the reasonableness interpretation.⁶ Under the reasonableness interpretation, the operative question for determining whether a search or seizure is constitutional is whether it is reasonable. Warrants are not presumptively required, and warrantless searches and seizures are permissible as long as they meet the reasonableness standard.⁷

The rise of the reasonableness interpretation is due in large part to the claim that it is more faithful to the text and history of the Amendment than the warrant-preference interpretation.⁸ This Note challenges that claim, arguing that the reasonableness interpretation is not, in fact, more faithful to history. By looking at Framing-era search-and-seizure practice,⁹ this Note concludes that there is no evidence the Amendment was originally understood as requiring that searches and seizures simply be “reasonable.” In other words, the Court’s reasonableness interpretation is inconsistent with the original understanding of the Amendment.¹⁰

⁵ See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 559 (1999) (noting that the Court “endorsed” the warrant-preference interpretation “[f]or most of this century”); *infra* notes 25–32 and accompanying text (discussing the warrant-preference interpretation).

⁶ See Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 Nw. U. L. REV. 1609, 1612–13 (2012) (noting the “collapse of the warrant requirement” and the rise of the reasonableness interpretation).

⁷ See *infra* notes 33–45 and accompanying text (discussing the reasonableness interpretation).

⁸ See *infra* note 34 (discussing this claim).

⁹ This Note does not adopt any fixed dates for the “Framing era.” However, as the goal of originalist interpretation is to uncover the original public understanding of constitutional text, see *infra* note 17, the further from 1791 (the year the Fourth Amendment was ratified) a given interpretation is, the less likely it will reflect the original understanding.

¹⁰ This Note is not the first work to criticize the historical basis for the Court’s reasonableness approach or argue that its interpretation is inconsistent with original understanding. Other works, however, have treated the issue only relatively briefly, focused on the political events that motivated the Framers rather than specific historical practice, or rejected the historical evidence of a reasonableness interpretation in favor of an alternative interpretation of the Amendment. The most comprehensive and well-researched criticism is Davies, *supra* note 5, at 571–600, 736–38, which attacks the historical basis for the reasonableness interpretation in support of his theory that the Amendment was originally understood as regulating only searches and seizures conducted under general warrants, rather than all searches and seizures. See also WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 602–1791, at 776–77 (2009) (rejecting evidence of a historical reasonableness standard based on evidence of a historical trajectory toward specific warrants); Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: “Here I Go Down That Wrong Road Again,”* 74 N.C. L. REV. 1559, 1601 & n.192 (1996) (criticizing Amar’s evidence of a historical reasonableness standard in a long footnote); Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse than the Disease*, 68 S. CAL. L. REV. 1, 13–24 (1994)

Of course, the importance and validity of historical and originalist evidence in constitutional interpretation is subject to considerable debate.¹¹ Therefore, Part I.A of this Note begins by explaining the role history plays in interpreting the Fourth Amendment and in this Note. Part I.B describes the Court's two modern approaches to the Fourth Amendment: the warrant-preference interpretation and the reasonableness interpretation. Part I.C focuses on the reasonableness approach and describes the two historical arguments often made to support it: (1) that the legality of searches and seizures turned directly on whether they were reasonable during the Framing era, and (2) that the Amendment was intended to limit warrants in order to channel enforcement of searches and seizures away from *ex parte* warrants issued by distrusted judges and toward *ex post* civil suits and civil juries.

Part II argues that neither of these arguments for the reasonableness approach reflect the historical record. Parts II.A and II.B look at Framing-era authority and practice and argue that there is no evidence of a Framing-era reasonableness standard, either before or after the Amendment was enacted. Part II.C turns to the second claim and argues that it is both internally inconsistent and based on historically inaccurate assumptions.

Finally, Part III looks at the varied ways the Court has actually applied its reasonableness interpretation and argues that all are inconsistent with Framing-era practice and the Amendment's original understanding.

I

WARRANTS, REASONABLENESS, AND HISTORY

A. *The Role of History in Fourth Amendment Interpretation*

History has long played an important role in interpreting the Fourth Amendment,¹² perhaps because it is the “one procedural safe-

(recounting contemporary events to criticize Amar's historical account that judges and warrants were disfavored); Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1732–43 (1996) (reviewing CUDDIHY, *supra*) (drawing on the ratification record, colonial writs-of-assistance cases, and early federal statutes to criticize the historical basis of the reasonableness interpretation).

¹¹ See *infra* note 16 and accompanying text (discussing this debate).

¹² The Court's early Fourth Amendment opinions often relied heavily on Framing-era history. See, e.g., *United States v. Rabinowitz*, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting) (“One cannot wrench ‘unreasonable searches’ from the text and context and historic content of the Fourth Amendment.”), *overruled in part* by *Chimel v. California*, 395 U.S. 752 (1969); *Carroll v. United States*, 267 U.S. 132, 149–53 (1925) (relying on eighteenth-century history to inform the Amendment's meaning); *Weeks v. United States*, 232 U.S. 383, 390 (1914) (same), *overruled in part* by *Mapp v. Ohio*, 367 U.S. 643 (1961);

guard in the Constitution that grew directly out of the events which immediately preceded the revolutionary struggle with England.”¹³ The importance of history in interpreting the Fourth Amendment has increased over the last several decades with the rise of originalism,¹⁴ which claims constitutional text should be interpreted according to its original understanding or the Framers’ intent.¹⁵

Of course, the role history should play in constitutional interpretation and the validity of originalism are questions subject to considerable debate.¹⁶ This Note does not take a position on these important questions, but instead takes the role of history and originalism as given and aims to ensure that the historical analysis is correct.¹⁷ Unfortunately, this task is complicated by a Fourth Amendment history that is often frustratingly obscure, contradictory, or—even worse—silent. Moreover, the history is often written by lawyers, and lawyers make bad historians.¹⁸ Nonetheless, the effort to understand the historical record is critical because historical exegesis of the Constitution should only be taken seriously to the extent the history is correct.

B. The Court’s Modern Fourth Amendment Interpretations

This section will briefly lay out the Court’s modern interpretations of the Fourth Amendment. The Fourth Amendment states:

Boyd v. United States, 116 U.S. 616, 623–32 (1886) (same), *abrogation recognized* by Fisher v. United States, 425 U.S. 391 (1976).

¹³ JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 19 (The Johns Hopkins Univ. Studies in Historical & Political Sci. Ser. 84 No. 1, 1966).

¹⁴ See David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1741–43 (2000) (discussing the recent turn toward history in Fourth Amendment scholarship).

¹⁵ Originalism has developed several forms, but its central principle is that it “regards the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present.” Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 599 (2004).

¹⁶ Compare Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854, 862–64 (1989) (arguing for an originalist approach), with Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009) (critiquing originalism), and Carol S. Steiker, Response, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820 (1994) (arguing for a limited historical role in Fourth Amendment interpretation).

¹⁷ I use “originalism” here in the sense that Justice Scalia does, to mean the original public understanding of constitutional text. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) (referring to the “examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification” as “a critical tool of constitutional interpretation”).

¹⁸ See generally Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995) (criticizing lawyers’ renditions of history).

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.¹⁹

The first clause, known as the Reasonableness Clause, prohibits unreasonable searches and seizures. The second clause, the Warrant Clause, prohibits general—as opposed to specific—warrants by providing the requirements for a valid warrant.²⁰

The text, unfortunately, leaves much unanswered. The first clause establishes a standard (reasonableness) but does not explain what it means. The second clause states the requirements for a valid warrant but does not explain when warrants are required.²¹ While most agree the Reasonableness Clause extends to all searches and seizures,²² there is no such agreement on what “unreasonable” means and to what extent the Warrant Clause informs that meaning.²³

¹⁹ U.S. CONST. amend. IV.

²⁰ See Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977, 993 (discussing and explaining the two clauses).

²¹ Cf. Cloud, *supra* note 10, at 1721 (“Identifying the relationship between these two clauses has been a fundamental task in Fourth Amendment theory.”).

²² See generally Clancy, *supra* note 20, at 991–1026 (discussing the various approaches to reasonableness). *But see* Davies, *supra* note 5, at 693, 724 (arguing that “unreasonable” was intended as a synonym for “gross illegality or unconstitutionality” and only applies to searches and seizures conducted under general warrants).

²³ See, e.g., CUDDIHY, *supra* note 10 (documenting extensively the search-and-seizure practice from 602 to 1791 and arguing that history demonstrated a trend away from warrantless searches and seizures); NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* (Leonard W. Levy ed., Da Capo Press 1970) (1937) (describing the history that motivated the Framers’ adoption of the Fourth Amendment); TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 19–93 (1969) (arguing that some warrantless searches were common during the Framing era in support of the reasonableness interpretation of the Fourth Amendment); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) (rejecting the warrant-preference interpretation in favor of the reasonableness interpretation of the Fourth Amendment); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974) (discussing and critiquing the Supreme Court’s Fourth Amendment jurisprudence); Bar-Gill & Friedman, *supra* note 6 (arguing that the Supreme Court should reverse course and make warrants the centerpiece of the Fourth Amendment); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468 (1985) (arguing that the Supreme Court should approach the Fourth Amendment either with no guidelines or with a bright-line rule); Clancy, *supra* note 20 (categorizing the Supreme Court’s various applications of the reasonableness interpretation); Davies, *supra* note 5 (rejecting a broad reasonableness interpretation in favor of an interpretation that the Fourth Amendment was only intended to ban general warrants); Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197 (1993) (questioning the Supreme Court’s reasonableness interpretation of the Fourth Amendment); Sklansky, *supra* note 14 (arguing against anchoring the Fourth Amendment in common law); Steiker, *supra* note 16 (arguing for a pragmatic Fourth Amendment interpretation).

The Supreme Court has developed two primary but competing interpretations of Fourth Amendment reasonableness: the warrant-preference interpretation and the reasonableness interpretation.²⁴ The warrant-preference interpretation reads the Amendment as generally requiring warrants: “[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.”²⁵ Supporters argue this interpretation is based in the text, which must be read under a “conjunctive theory” so that the Warrant Clause informs the meaning of the Reasonableness Clause.²⁶ The theory behind this reading is that judicially issued warrants are needed as a procedural safeguard against overzealous police, who otherwise would be able to unilaterally determine whom, what, and where to search.²⁷ Proponents of the warrant preference also turn to history, claiming the Amendment must be understood in light of specific political events that informed its meaning.²⁸ Under this view, the Amendment (and its warrant preference) were “the answer of the Revolutionary statesmen to the evils of searches without warrants and searches with warrants unrestricted in scope.”²⁹

The warrant-preference interpretation, however, is subject to significant textual,³⁰ historical,³¹ and practical³² critiques. In light of

²⁴ See generally Clancy, *supra* note 20 (providing a more detailed and nuanced account of the Court’s approaches).

²⁵ *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnote omitted).

²⁶ See Cloud, *supra* note 10, at 1721–22 (“For most of this century the Supreme Court has employed a ‘conjunctive’ theory that uses the more specific language of the Warrant Clause to define the procedural attributes of reasonable searches and seizures.”).

²⁷ See *Katz*, 389 U.S. at 357 (“[T]he Constitution requires that the deliberate, impartial judgment of a judicial officer be interposed between the citizen and the police.” (internal quotation marks omitted)).

²⁸ Focus is often on three Framing-era episodes: (1) the famous 1761 *Writs of Assistance Case* in Boston in which James Otis argued that the use of general writs of assistance by British customs officials was illegal; (2) a series of high-profile English cases in the 1760s brought by a publisher, John Wilkes, and his supporters against the English government, in which the English courts declared general warrants illegal under the common law and awarded heavy damages against the government officials; and (3) Parliament’s reauthorization of general writs for custom searches in the American colonies under the Townshend Act of 1767. See Davies, *supra* note 5, at 561–67 (discussing these episodes).

²⁹ *United States v. Rabinowitz*, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting), *overruled in part by Chimel v. California*, 395 U.S. 752 (1969).

³⁰ See, e.g., *id.* at 65 (majority opinion) (noting that “the Constitution does not say that the right of the people to be secure in their persons should not be violated without a search warrant if it is practicable for the officers to procure one,” but instead requires that “the people shall be secure against *unreasonable* searches”).

³¹ Not only are there many instances where warrantless conduct was legal during the Framing era, see *infra* Part II.A–B (examining examples of warrantless arrests and searches), but there are also very few Framing-era statements suggesting a warrant

these shortcomings, a competing interpretation—what this Note calls the reasonableness interpretation—emerged, claiming to be more consistent with the text and original understanding. Under this approach the “relevant test” for whether a search or seizure is constitutional is not the presence of a warrant but the single standard of reasonableness, based on the “facts and circumstances—the total atmosphere of the case.”³³

Supporters of the reasonableness interpretation argue that it is superior to the warrant-preference interpretation because it is more faithful to the Amendment’s text and history.³⁴ Unlike the warrant-preference interpretation, which must be read into the Amendment,³⁵ supporters claim the reasonableness interpretation is apparent on the text’s face.³⁶ Rather than reading the Amendment conjunctively, it

preference was intended, *see* Davies, *supra* note 5, at 571 (noting that the major historical accounts fail to address this issue or provide support). However, even if the historical record falls short of stating a warrant *requirement*, the statement of James Wilson—one of the Framers and first Supreme Court Justices—that “[a] warrant is the first step usually taken for [a criminal’s] apprehension” appears to at least suggest a preference for or a high priority placed on warrants. James Wilson, *Of the Different Steps Prescribed by the Law, for Apprehending, Detaining, Trying, and Punishing Offenders*, in 2 COLLECTED WORKS OF JAMES WILSON 1175, 1175 (Kermit L. Hall & Mark David Hall eds., 2007).

³² From a practical perspective, exceptions to the warrant preference threaten to swallow the rule. *See* Bradley, *supra* note 23, at 1473–74 (noting exceptions for searches incident to arrest, automobile searches, border searches, searches near the border, administrative searches of regulated businesses, stop and frisk, plain view, open field seizures, prison shakedowns, exigent circumstances, custodial searches, searches incident to nonarrest when there is probable cause to arrest, fire investigations, warrantless entry following arrest elsewhere, boat boarding for document checks, consent searches, welfare searches, inventory searches, driver’s license and vehicle registration checks, airport searches, searches at courthouse doors, and some searches in schools). The fact that exceptions are so pervasive further undermines the textual basis for the warrant requirement. *See* Amar, *supra* note 23, at 771 (“To read in a warrant requirement that is not in the text—and then to read in various non-textual exceptions to that so-called requirement—is not to read the Fourth Amendment at all. It is to rewrite it.”).

³³ *Rabinowitz*, 339 U.S. at 66.

³⁴ The important role that text and history have played in supporting the reasonableness interpretation is underscored by the fact that many of its most prominent supporters, such as Justice Scalia and Professor Akhil Reed Amar, are originalists. *See, e.g.,* *California v. Acevedo*, 500 U.S. 565, 581 (1991) (Scalia, J., concurring) (suggesting that the focus on reasonableness is “more faithful to the text and tradition of the Fourth Amendment” than a warrant requirement); Amar, *supra* note 23, at 759 (arguing that a reasonableness interpretation is “more faithful to constitutional text and history”).

³⁵ *See supra* note 30 (discussing the absence of a warrant preference in the constitutional text).

³⁶ *See, e.g.,* *Cady v. Dombrowski*, 413 U.S. 433, 448 (1973) (“The Framers of the Fourth Amendment have given us only the general standard of ‘unreasonableness’ as a guide in determining whether searches and seizures meet the standard of that Amendment in those cases where a warrant is not required.”); *see also* Clancy, *supra* note 20, at 999 (discussing the textual basis for the reasonableness interpretation).

reads the Amendment's clauses as two "distinct" commands.³⁷ Thus, whether searches or seizures are constitutional is governed solely by the Reasonableness Clause. The Warrant Clause, in contrast, is only relevant when warrants are issued and, therefore, does not apply to searches and seizures in general.³⁸

The reasonableness interpretation has been formulated in various ways, perhaps because the term "unreasonable" itself provides little direct guidance.³⁹ In some cases, the Supreme Court has described it as a test to be applied on a case-by-case basis,⁴⁰ or "the totality of the circumstances."⁴¹ Professor Akhil Reed Amar has described it as reflecting "common sense."⁴² In other cases the Court has applied reasonableness on a categorical rather than case-by-case basis, requiring that the *rule* applied in the particular case be reasonable.⁴³ Under yet another approach, the Court has applied a modern balancing test in which the State's interests in the search or seizure are balanced against the individual's privacy interest infringed by application of the rule.⁴⁴ Regardless of the specific approach the Court takes, the central idea behind the reasonableness interpretation is that searches and seizures are governed under a single standard and are not dependent upon warrants or probable cause.⁴⁵ In other words, reasonableness,

³⁷ Clancy, *supra* note 20, at 999.

³⁸ *See id.* ("[T]he second clause addresses only those searches and seizures conducted under warrants, saying nothing about when a warrant is necessary or which factors must be examined to determine reasonableness.").

³⁹ *See United States v. Rabinowitz*, 339 U.S. 56, 83 (1950) (Frankfurter, J., dissenting) ("To say that the search must be reasonable is to require some criterion of reason. It is no guide at all . . . to say that an 'unreasonable search' is forbidden—that the search must be reasonable. What is the test of reason which makes a search reasonable?"), *overruled in part by Chimel v. California*, 395 U.S. 752 (1969).

⁴⁰ *Id.* at 66 (majority opinion) ("[W]hether the search was reasonable . . . depends upon the facts and circumstances—the total atmosphere of the case.").

⁴¹ *United States v. Knights*, 534 U.S. 112, 118 (2001) (quoting *Ohio v. Robinette*, 519 U.S. 33, 39 (1996)).

⁴² Amar, *supra* note 23, at 801; *see also id.* at 818 ("'Reasonableness' is largely a matter of common sense, and the jury represents the common sense of common people.").

⁴³ *See Atwater v. City of Lago Vista*, 532 U.S. 318, 346–47 (2001) ("If we were to derive a rule exclusively to address the uncontested facts of this case, Atwater might well prevail. . . . But we have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need . . ."). The importance of the distinction between the case-by-case and categorical approaches will be discussed in Part III.

⁴⁴ *See Knights*, 534 U.S. at 118–19 ("[T]he reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." (internal quotation marks omitted)); *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 536–37 (1967) (setting forth similar balancing test).

⁴⁵ *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995) ("As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a

and not the warrant requirement, is the “touchstone” of the Fourth Amendment.⁴⁶

C. *Historical Arguments in Support of the Reasonableness Interpretation*

The previous section explained how the traditional warrant-preference interpretation has been increasingly supplanted by the Court’s reasonableness interpretation. As noted above, the Court’s shift is partly attributable to the argument that the reasonableness interpretation more accurately reflects the Amendment’s original understanding.⁴⁷ Supporters of the reasonableness interpretation argue it is superior to the warrant preference for two reasons. The first argument is that searches and seizures were governed by a reasonableness standard during the Framing era, much as they are under the Court’s modern reasonableness interpretation. The second claim is that the Framers distrusted warrants and the judges who issued them *ex parte*, and therefore instead sought to channel regulation of searches and seizures to juries awarding damages in civil *ex post* enforcement suits. This section will explore these claims in detail.

1. *Framing-Era Law Applied a Reasonableness Standard*

The first argument, most associated with several articles written by Professor Amar in the 1990s,⁴⁸ is that the legality of searches and seizures during the Framing era turned directly on whether they were reasonable. To the extent this is true, one could conclude that the Amendment was originally understood as imposing a reasonableness standard on all searches and seizures.

In order to understand Amar’s argument, it is first necessary to understand the enforcement regime that protected citizens against

governmental search is ‘reasonableness.’”); Amar, *supra* note 23, at 801 (“The core of the Fourth Amendment . . . is neither a warrant nor probable cause, but reasonableness.”).

⁴⁶ *Knights*, 534 U.S. at 118.

⁴⁷ See *supra* notes 34–38 and accompanying text.

⁴⁸ Amar most fully developed his argument in his 1994 *Harvard Law Review* article, *Fourth Amendment First Principles*, which he dedicated to Professor Telford Taylor. Amar, *supra* note 23, at 757 n.*. He has expanded on his argument in a number of other works. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 64–118 (1998) (recounting arguments made in Amar, *supra* note 23, and other works); Akhil Reed Amar, Terry and Fourth Amendment First Principles, 72 ST. JOHN’S L. REV. 1097 (1998) (arguing for reasonableness, and not warrants or probable cause, as the touchstone of the Fourth Amendment); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1178–80 (1991) [hereinafter Amar, *Bill of Rights*] (previewing arguments made in Amar, *supra* note 23); Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53 (1996) [hereinafter Amar, *Writs of Assistance*] (developing historical arguments made in Amar, *supra* note 23).

illegal searches and seizures during the Framing era. Today, the constitutionality of searches and seizures is mainly litigated in suppression hearings, in which criminal defendants attempt to exclude evidence allegedly obtained through an unconstitutional search or seizure in violation of the Fourth Amendment (or the Fourteenth Amendment's Due Process Clause, which incorporates a similar right against the states).⁴⁹ Although individuals whose Fourth Amendment rights have been violated theoretically can seek damages against state officials under a § 1983 civil rights action⁵⁰ or against federal officials under a *Bivens* action,⁵¹ in practice these actions are virtually impossible for plaintiffs to win.⁵²

In contrast, illegal searches and seizures during the Framing era were primarily challenged through *ex post* civil actions brought by victims of searches or seizures against the offending officers.⁵³ These actions were grounded in tort law causes of action, such as trespass or false imprisonment.⁵⁴ An officer could defend by arguing her search or seizure was justified by law, but if found liable she could face personal liability and even exemplary damages.⁵⁵ In theory, civil damages actions effectively deterred unlawful conduct.

⁴⁹ Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 527 (2007) (describing the exclusionary rule as “the primary remedy to enforce Fourth Amendment rules”). The Fourth Amendment was originally incorporated against the states in *Wolf v. Colorado*, 338 U.S. 25, 27–28 (1949), although the Court did not incorporate the exclusionary rule against the states until *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

⁵⁰ See 42 U.S.C. § 1983 (2012) (creating a private right of action against state officials who, under color of state law, subject another to the deprivation of any right secured by the Federal Constitution).

⁵¹ See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (holding that an implied cause of action exists for an individual whose Fourth Amendment rights have been violated by federal officials).

⁵² See Bar-Gill & Friedman, *supra* note 6, at 1629–31 (discussing the difficulty of prevailing in such suits and the legal barriers to liability).

⁵³ See, e.g., *Payton v. New York*, 445 U.S. 573, 592 (1980) (“At common law, the question whether an arrest was authorized typically arose in civil damages actions for trespass or false arrest, in which a constable’s authority to make the arrest was a defense.”); Amar, *supra* note 23, at 759 (“[W]e must remember the historic role played by civil juries and civil damage actions in which government officials were held liable for unreasonable intrusions against person, property, and privacy.”). Legality also arose as a defense to charges of murder or assault of an officer: Individuals could lawfully resist an officer who was not justified in executing a search or seizure because such an officer would be considered a trespasser. See Davies, *supra* note 5, at 625 (describing the ability to resist officers).

⁵⁴ See *Payton*, 445 U.S. at 592 (noting that the question of whether an arrest was authorized at common law typically arose in actions for trespass or false arrest).

⁵⁵ See *id.* (discussing officer liability in civil damages actions); Amar, *supra* note 23, at 774 (noting heavy damages in such actions).

Amar argues that Fourth Amendment reasonableness must be understood in light of these civil damages trials.⁵⁶ According to Amar,

If the jury deemed the search or seizure unreasonable—and reasonableness was a classic jury question—the citizen plaintiff would win and the official would be obliged to pay (often heavy) damages. Any federal defense that the official might try to claim would collapse, trumped by the finding that the federal action was unreasonable, and thus unconstitutional under the Fourth Amendment, and thus no defense at all.⁵⁷

In other words, the Fourth Amendment was originally understood as directly imposing a reasonableness standard in these *ex post* civil enforcement suits. Amar's argument has been endorsed by some Supreme Court Justices. For example, Justice Scalia has written that an officer acting without a warrant would be "liable for trespass, including exemplary damages, unless the jury found that his action was 'reasonable.'"⁵⁸ As Part II argues, however, this claim is historically inaccurate. Looking at both pre- and post-Amendment law and practice, there is no evidence that the legality of a search or seizure during the Framing era hinged on whether it was reasonable.⁵⁹

2. *The Framers Intended to Limit Warrants and Privilege Civil Juries*

The second historical argument advanced to support the reasonableness interpretation was first articulated by Professor Telford Taylor in the late 1960s and significantly expanded upon by Professor Amar starting in the 1990s.⁶⁰ They argue that the warrant-preference interpretation turned history and the Amendment "on its head" because the Framers intended to *limit*—not *privilege*—the use of warrants.⁶¹

To understand the Taylor-Amar argument, it is necessary to return to the *ex post* civil regime through which illegal searches and seizures were regulated during the Framing era. Common-law war-

⁵⁶ See Amar, *supra* note 23, at 786 ("Tort law remedies were thus clearly the ones presupposed by the Framers of the Fourth Amendment and counterpart state constitutional provisions.")

⁵⁷ *Id.* at 774.

⁵⁸ *California v. Acevedo*, 500 U.S. 565, 581 (1991) (Scalia, J., concurring) (citing Amar, *Bill of Rights*, *supra* note 48, at 1178–80).

⁵⁹ See *infra* Part II.A (addressing pre-Amendment common law); *infra* Part II.B (addressing post-Amendment law).

⁶⁰ See TAYLOR, *supra* note 23, at 19–49 (developing an originalist theory of the Amendment). For Amar's works, see *supra* note 48.

⁶¹ TAYLOR, *supra* note 23, at 23–24; see also Amar, *supra* note 23, at 782 (echoing Taylor in noting that the probable cause and warrant requirements "stand[] the Fourth Amendment on its head").

rants had two relevant effects. First, they generally immunized the executing officer from personal liability in a subsequent civil suit.⁶² This immunity, in turn, would eliminate much of the deterrent effect of the ex post civil enforcement suits, allowing officers to abuse their authority.⁶³ Second, warrants effectively transferred the question of whether a search or seizure was legal from a citizen jury to a judge.⁶⁴ However, unlike citizen juries, Framing-era judges in the pay of a central executive could not necessarily be trusted to preserve individual rights.⁶⁵ Thus, warrants were doubly problematic: They both immunized officers from liability and circumvented the jury's role as a bulwark against government power.

With this history in mind, supporters of the reasonableness interpretation argue that the Amendment was originally understood as limiting warrants, not encouraging them.⁶⁶ By limiting the issuance of warrants, the Amendment curtailed their immunizing effect and entrenched the role of juries in preventing government overreach.⁶⁷ This, in turn, explains why the Amendment imposes a less stringent standard on warrantless conduct (reasonableness) than on warranted conduct (the Warrant Clause's particularity, oath, and probable cause requirements).⁶⁸

⁶² See Amar, *Bill of Rights*, *supra* note 48, at 1178–79 (“A lawful warrant, in effect, would compel a sort of directed verdict for the defendant government official in any subsequent lawsuit for damages.”).

⁶³ Cf. Amar, *supra* note 23, at 774 (“Warrants . . . were friends of the searcher, not the searched.”).

⁶⁴ See Amar, *Bill of Rights*, *supra* note 48, at 1179 (explaining how a warrant issued by a judge would take the question of liability away from a jury).

⁶⁵ See *id.* (“Because juries could be trusted far more than judges to protect against government overreaching . . . , warrants were generally *disfavored*. Judges and warrants are the heavies, not the heroes, of our story.”).

⁶⁶ See Amar, *supra* note 23, at 774 (“[Warrants] had to be limited; otherwise, central officers on the government payroll in ex parte proceedings would usurp the role of the good old jury in striking the proper balance between government and citizen after hearing lawyers on both sides.”). The textual basis for this argument rests on the Warrant Clause's negative formulation: It starts with the phrase “*no* Warrants shall issue, but . . .” U.S. CONST. amend. IV (emphasis added); see also Amar, *supra* note 23, at 774 (arguing that the text's “reference to warrants is . . . plainly negative”).

⁶⁷ See Amar, *supra* note 23, at 781 (arguing that the Amendment was intended to “privilege the perspective of the civil jury” over the judges who issued ex parte warrants).

⁶⁸ This theory offers an explanation for the apparent inconsistency in allowing a less stringent standard under the Reasonableness Clause than the Warrant Clause, which has been noted by supporters of both the warrant-preference and reasonableness interpretations of the Amendment. See LANDYNSKI, *supra* note 13, at 44 (“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.”); Amar, *Bill of Rights*, *supra* note 48, at 1178–80 (“Why should government officials be allowed greater latitude (general reasonableness rather than the

Both Taylor's and Amar's arguments have been adopted by members of the Court in support of the reasonableness interpretation. Taylor's work has repeatedly been cited for the claims that the Amendment was intended to limit warrants and that the Framers viewed judges with suspicion.⁶⁹ Amar's work has also been cited in support of a reasonableness interpretation.⁷⁰ In particular, Justice Scalia has echoed Amar's argument that "the warrant was a means of insulating officials from personal liability assessed by colonial juries."⁷¹ Justice Scalia has also agreed with Amar that "[b]y restricting the issuance of warrants, the Framers endeavored to preserve the jury's role in regulating searches and seizures."⁷² As Part II.C will argue, however, the assumptions upon which this claim rests are also historically inaccurate.

This Part has provided an overview of the Court's modern interpretation of Fourth Amendment reasonableness, focusing on the reasonableness interpretation that has increasingly supplanted the traditional warrant-preference approach and the originalist arguments made in support of this shift. The validity of these arguments is examined in Part II.

II

THE ABSENCE OF A HISTORICAL REASONABLENESS STANDARD

The previous section summarized the historical claims made in support of the reasonableness interpretation; namely, (1) the legality of searches and seizures turned directly on whether they were reasonable during the Framing era, and (2) the Amendment was intended to limit *ex parte* warrants issued by distrusted judges and instead channel enforcement of searches and seizures to more trustworthy civil juries. This Part argues that these claims are inconsistent with historical practice and original understanding. Parts II.A and II.B address the first claim, and Part II.C addresses the second.

stricter probable cause) when they intentionally avoid the courtroom and intrude on individuals in a judicially unwarranted manner?"

⁶⁹ *E.g.*, *California v. Acevedo*, 500 U.S. 565, 581–82 (1991) (Scalia, J., concurring) (citing TAYLOR, *supra* note 23, at 41); *United States v. Leon*, 468 U.S. 897, 972 (1984) (Stevens, J., concurring in part and dissenting in part) (citing TAYLOR, *supra* note 23, at 41); *Payton v. New York*, 445 U.S. 573, 621 (1980) (Rehnquist, J., dissenting) (citing TAYLOR, *supra* note 23, at 38–50); *Coolidge v. New Hampshire*, 403 U.S. 443, 492 (1971) (Harlan, J., concurring) (citing TAYLOR, *supra* note 23, at 23–24).

⁷⁰ *Acevedo*, 500 U.S. at 581–82 (Scalia, J., concurring) (citing Amar, *Bill of Rights*, *supra* note 48, at 1178–80).

⁷¹ *Id.* at 581 (citing Amar, *Bill of Rights*, *supra* note 48, at 1178–80).

⁷² *Id.* at 581–82 (citing Amar, *Bill of Rights*, *supra* note 48, at 1178–80).

A. *The Absence of a Pre-Amendment Reasonableness Standard*

Supporters of the reasonableness interpretation argue that reasonableness was the standard under which searches and seizures were governed during the Framing era.⁷³ This in turn suggests the Court's modern reasonableness interpretation is consistent with Framing-era practice and the original understanding of the Amendment. In making this claim, supporters argue that reasonableness was not only the standard imposed by the Amendment, but also the standard existing *before* the Amendment was enacted.⁷⁴ However, as this Subpart and the next will argue, neither claim is correct. Neither pre- nor post-Amendment search-and-seizure law turned on a reasonableness standard. In fact, there is no evidence that any Framing-era judge or jury decided the legality of a search or seizure by asking whether it was reasonable, by applying a balancing test, or by invoking any other version of the modern reasonableness interpretation.⁷⁵ Part II.B will examine post-Amendment law. This Subpart focuses on pre-Amendment law. It begins by discussing civil liability for illegal searches and seizures, in general. It then examines specific pre-Amendment arrest and search justifications. Finally, it examines the historical evidence proponents of the reasonableness interpretation have offered in support of a pre-Amendment reasonableness standard and argues that the evidence is insufficient.

1. *Civil Liability for Illegal Searches and Seizures, in General*

During the Framing era, the primary means of adjudicating the illegality of a government search or seizure was a civil suit against the offending officer.⁷⁶ Civil suits could be brought as a number of common-law actions, each with different substantive standards of proof.⁷⁷ For example, illegal arrests might support actions for trespass

⁷³ See *supra* Part I.C.1 (discussing the argument).

⁷⁴ For example, Professor Amar cites a *pre*-Amendment English case as "clear evidence of the role of the civil jury in deciding the reasonableness of government searches and seizures." Amar, *supra* note 23, at 776 & n.69 (citing *Money v. Leach*, (1765) 97 Eng. Rep. 1075 (K.B.) 1087; 3 Burr. 1742, 1765). Justice Scalia similarly cites a pre-Amendment English case for the same point. See *Acevedo*, 500 U.S. at 581–82 (Scalia, J., concurring) ("An officer who searched or seized without a warrant did so at his own risk; he would be liable for trespass, including exemplary damages, unless the jury found that his action was 'reasonable.'" (citing *Huckle v. Money*, (1763) 95 Eng. Rep. 768 (K.B.); 2 Wils. K.B. 205)).

⁷⁵ See *supra* notes 39–45 and accompanying text (discussing versions of the reasonableness interpretation).

⁷⁶ See *supra* notes 49–52 and accompanying text (discussing the Framing-era *ex post* civil enforcement regime).

⁷⁷ Although modern commentators and the Court sometimes speak of enforcing illegal searches and seizures through civil *trespass* actions, the term during the Framing era was understood in its broadest sense as encompassing the law of what would now be known as

vi et armis (“by force of arms”) or false imprisonment,⁷⁸ while illegal searches might support actions for trespass *de bonis asportatis* (“for goods carried away”) or trover.⁷⁹ However, once a plaintiff established her prima facie tort claim, the officer could respond that legal authority justified his conduct.⁸⁰

The remainder of this Subpart discusses common categories of pre-Amendment search-and-seizure authority. Legal authority could come from various sources, including warrants, statutes, and common law. Although the scope of some authority continues to be debated, search or seizure authority simply did not turn on whether the conduct was reasonable. Instead, as the examples below illustrate, Framing-era common law tended to apply categorical rules rather than open-ended standards like reasonableness.

torts. See, e.g., 3 WILLIAM BLACKSTONE, COMMENTARIES *208 (“Trespass, in its largest and most extensive sense, signifies any transgression or offence against the law of nature, of society, or of the country in which we live, whether it relates to a man’s person or his property.”). As with modern torts, there was no single substantive standard applied across trespass actions when used in this broad sense. See, e.g., S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 299 (2d ed. 1981) (noting that “trespass” in its broader sense was simply not “a juridical entity for which a separate or a single rule could have existed” and that it was instead a “collection of separate substantive wrongs [that] had been given a terminological unity for procedural reasons”).

⁷⁸ See, e.g., *Cameron v. Lightfoot*, (1778) 96 Eng. Rep. 701 (C.P.) 702; 2 Black W. 1190, 1192 (“[F]or all arrests made without lawful authority, trespass and false imprisonment will lie.”). An action for trespass *vi et armis* required that the defendant’s conduct was “directly and immediately injurious to the person or property of another, and therefore necessarily accompanied with some force.” 3 BLACKSTONE, *supra* note 77, at *208–09. An action for false imprisonment required: “1. The detention of the person; and, 2. The unlawfulness of such detention.” *Id.* at *127.

⁷⁹ See JAMES OLDHAM, ENGLISH COMMON LAW IN THE AGE OF MANSFIELD 297–98 & n.43 (2004) (noting that where an action for trespass *de bonis asportatis* was viable, plaintiffs could often also bring an action for trover). “The gist of the action of trespass *de bonis asportatis* . . . was a taking from the plaintiff’s possession under a claim of dominion.” J.B. Ames, *The History of Trover* (pt. 2), 11 HARV. L. REV. 374, 374 (1898). The historical elements of an action in trover were that the plaintiff possessed “a certain chattel; that he afterwards casually lost it; that it came to the possession of the defendant by finding; that the defendant refused to deliver it to the plaintiff on request; and that he converted it to his own use, to the plaintiff’s damage”; however, the pleading of “loss and finding are notorious fictions.” J.B. Ames, *The History of Trover* (pt. 1), 11 HARV. L. REV. 277, 277 (1897).

⁸⁰ See, e.g., *Entick v. Carrington*, (1765) 95 Eng. Rep. 807 (K.B.) 817; 2 Wils. K.B. 275, 291 (“[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour’s close without his leave; if he does he is a trespasser, though he does no damage at all; . . . [and] he must justify it by law.”); see also Davies, *supra* note 5, at 624 (“At common law, a search or arrest was presumed an unlawful trespass unless ‘justified.’”).

2. Arrest Justifications

Under pre-Amendment common law, an officer's arrest authority varied with the seriousness of the offense. This section will examine pre-Amendment common-law arrest justifications for a variety of situations: misdemeanors, felonies, arrests in homes, and special circumstances. Although some standards arguably incorporated reasonableness into certain elements of the justification, arrest justifications did not turn on an across-the-board reasonableness standard.

As with all offenses, a misdemeanor arrest could be justified by a warrant.⁸¹ However, if the officer lacked a warrant, her common-law arrest authority was significantly circumscribed. Under pre-Amendment common law, an officer could only arrest for a misdemeanor offense without a warrant if (1) an actual offense was committed, (2) it was committed in the officer's presence, and (3) the arrest was made at the time of the offense, not after the fact.⁸² These

⁸¹ See, e.g., 4 BLACKSTONE, *supra* note 77, at *286 (“[A]n arrest may be made four ways: 1. By warrant . . .”); *id.* at *288 (“[A] lawful warrant will at all events indemnify the officer, who executes the same ministerially.”).

⁸² The Court discussed the scope of this common-law rule at length in *Atwater v. City of Lago Vista*, 532 U.S. 318, 327–46 (2001). The Court's discussion focused on whether the officer's warrantless authority extended to *all* misdemeanors or only those considered breaches of the peace. *Id.* Ultimately, the Court found greater support for the former, more expansive position. *Id.* at 347–54. *But see* Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239, 239–40 (2002) (arguing that the Court's historical conclusions were incorrect).

The modern constitutional rule the Court stated was that “[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.” *Atwater*, 532 U.S. at 354. This formulation, however, departs from the common-law rule in several respects. First, it substitutes probable cause, which is not mentioned in the historical sources, for the requirement that an actual offense was committed. Second, the Court's formulation does not clearly require that the arrest be made at the time and not after the fact. However, these requirements are clearly articulated in the historical sources to which the Court cites. See, e.g., *United States v. Watson*, 423 U.S. 411, 418 (1976) (“The cases construing the Fourth Amendment thus reflect the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence . . .”), *cited in Atwater*, 532 U.S. at 340–41; *The Queen v. Tooley*, (1709) 92 Eng. Rep. 349 (Q.B.) 352; 2 Ld. Raym. 1296, 1301 (“[A] constable cannot arrest, but when he sees an actual breach of the peace; and if the affray be over, he cannot arrest.”), *cited in Atwater*, 532 U.S. at 329; CODE OF CRIMINAL PROCEDURE § 21 cmt. A at 231–33 (1930) (surveying common law and finding peace officer's authority was limited to arrests for misdemeanors made in her presence), *cited in Atwater*, 532 U.S. at 329; 1 RICHARD BURN, *THE JUSTICE OF THE PEACE AND PARISH OFFICER* 271 (London, S. Sweet et al. 28th ed. 1837) (“A constable . . . may at common law, for treason, felony, breach of the peace, and some misdemeanors less than felony, committed in his view, apprehend the supposed offender without any warrant.”), *cited in Atwater*, 532 U.S. at 330; 1 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 193 (London, MacMillan & Co. 1883) (“The common law did not authorise the arrest of persons guilty or suspected of

requirements appear to have been firmly established throughout the Framing era, appearing in both pre- and post-Amendment case law in England and America.⁸³ Thus, whether an officer arrested a suspect with a warrant or under the officer's more limited authority for misdemeanors committed in her presence, the legality of a misdemeanor arrest did not turn on whether it was reasonable.

Pre-Amendment felony arrest authority was broader than for misdemeanor offenses, but still did not depend on the reasonableness of the seizure. As with misdemeanors, an officer could arrest for a felony pursuant to a warrant⁸⁴ or if it was committed in her presence⁸⁵—neither of which involved reasonableness.

Outside of these circumstances, the general rule in America in 1791 was likely that an officer could justify a warrantless arrest for a felony not committed in her presence if (1) the felony had actually been committed and (2) she had sufficient reason to suspect the arrestee had committed it.⁸⁶ Although some formulations of the rule

misdemeanours, except in cases of an actual breach of the peace In such cases . . . the right to arrest was accordingly limited to cases in which the person to be arrested was taken in the fact or immediately after its commission.”), *cited in Atwater*, 532 U.S. at 329.

⁸³ See *supra* note 82 and sources cited; see also *Elk v. United States*, 177 U.S. 529, 534 (1900) (“[A]n officer, at common law, was not authorized to make an arrest without a warrant, for a mere misdemeanor not committed in his presence.”); *Cook v. Nethercote*, (1835) 172 Eng. Rep. 1443 (Exch.) 1445; 6 Car. & P. 741, 744 (“If . . . there had been an affray, and that affray were over, then the constable had not and ought not to have the power of apprehending the persons engaged in it”). The *Cook* court also explained the rationale behind the rule: “[F]or the power is given [to the constable] by law to prevent a breach of the peace; and where a breach of the peace had been committed, and was over, the constable must proceed in the same way as any other person, namely, by obtaining a warrant from a magistrate.” *Id.*; 6 Car. & P. at 744–45.

⁸⁴ See *supra* note 81 (citing warrant arrest authority).

⁸⁵ The in-the-presence rule for felonies was the same as the rule for arresting for misdemeanors. See, e.g., *Watson*, 423 U.S. at 418 (describing “the ancient common-law rule” as allowing “a peace officer . . . to arrest without a warrant for a misdemeanor or felony committed in his presence”); 4 BLACKSTONE, *supra* note 77, at *289 (“Any private person (and *a fortiori* a peace officer) that is present when any felony is committed, is bound by law to arrest the felon”).

⁸⁶ See *Samuel v. Payne*, (1780) 99 Eng. Rep. 230 (K.B.) 231; 1 Dougl. 359, 360 (“[I]f a felony has actually been committed, any man, upon reasonable probable grounds of suspicion, may justify apprehending the suspected person to carry him before a magistrate; but that, if no felony has been committed, the apprehension of a person suspected cannot be justified by any body.”); 4 BLACKSTONE, *supra* note 77, at *289 (“[I]n case of felony actually committed, or a dangerous wounding whereby felony is like to ensue, he may upon probable suspicion arrest the felon”); Jerome Hall, *Legal and Social Aspects of Arrest Without a Warrant*, 49 HARV. L. REV. 566, 569 (1936) (“Thus two definite and equally important elements exist [in eighteenth-century common law]: commission of a felony, and reasonable belief that the arrestee is the guilty person.”).

The first element—the “actually committed” or “felony-in-fact” requirement—meant the officer would have to prove that the felony for which the arrestee had been arrested had actually been committed. See *Davies*, *supra* note 5, at 632 (“The requirement that the

phrased the second element as requiring a “reasonable ground for making the arrest,”⁸⁷ this should not be confused with a general standard of reasonableness. First, historical sources clearly show that the element refers to whether there was sufficient or reasonable *suspicion* to make the arrest,⁸⁸ which is different from whether the arrest was

officer prove a felony had been committed by someone ‘in fact,’ . . . was met only if the officer proved that the felony for which the arrest was made had *actually* (not just probably) been committed . . .”). The effect was that an officer had to be fairly certain that a felony had, in fact, been committed before making the arrest. *See id.* at 633 (“Thus, the constable had to be sure of his facts about the felony before he attempted a warrantless arrest.”). However, the practical effect likely varied depending on the available evidence. For example, the discovery of a dead body plus a bloody knife strongly suggests murder, whereas a dead body with no clear cause of death is not clear evidence a felony has been committed. Although the purpose of the requirement is not clear from the historical authorities, it was perhaps a safeguard against officers abusing their authority by arresting on trumped-up charges.

It is unclear precisely when this “felony-in-fact” requirement was dropped. However, there is compelling evidence it was still the rule in America when the Fourth Amendment was enacted. For example, the requirement was first relaxed in England in 1780, shortly before the Fourth Amendment was enacted, and even then only for officers acting ministerially, i.e., on the “charge” or accusation of another, as opposed to ex officio or on their own authority. *See Samuel v. Payne*, 99 Eng. Rep. at 231; 1 Dougl. at 360 (dropping the requirement for officers acting on another’s charge); *see also Williams v. Dawson* (1788) (N.P.), *quoted in Hobbs v. Brandscomb*, (1813) 170 Eng. Rep. 1431 (K.B.) 1431–32; 3 Camp. 420, 421 (continuing to apply the requirement to officers acting ex officio).

American legal authorities and state courts continued to follow the older rule at the time of the Fourth Amendment’s adoption and for some years after, suggesting that any changes to the rule in England had not been incorporated in America. For example, James Wilson, one of the Framers and first Justices of the Supreme Court, stated in his law lectures delivered in 1790 and 1791: “It is a general rule, that, at any time, and in any place, every private person is justified in arresting . . . a felon; and, if . . . a felony *has been committed*, he is justified in arresting even an innocent person, upon his reasonable suspicion that by such person it has been committed.” Wilson, *supra* note 31, at 1176 (emphasis added); *see also BURN’S ABRIDGMENT, OR THE AMERICAN JUSTICE* 40 (Dover, Eliphalet Ladd 1792) (“But generally, no such case of suspicion, as any of the above mentioned, will justify an arrest, *where in truth no such crime has been committed*; unless it be in the case of hue and cry.” (emphasis added)); 5 NATHAN DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW ch. 172, art. 9, § 18, at 588 (Boston, Cummings, Hilliard & Co. 1824) (citing *Gale v. Hoyt* (Mass. 1796)) (“[T]o justify one man’s arresting another, *without warrant or legal process*, there must be, 1. Proof that a felony *has been committed*: and 2. A reasonable cause to suspect the person arrested, *has committed the felony*.”). There is no evidence the *Samuel v. Payne* rule was relied on in American law until 1829. *See Holley v. Mix*, 3 Wend. 350, 353 (N.Y. Sup. Ct. 1829) (citing *Samuel v. Payne*, 99 Eng. Rep. 230; 1 Dougl. 359).

⁸⁷ *E.g., Watson*, 423 U.S. at 418 (“[T]he ancient common-law rule [was] that a peace officer was permitted to arrest without a warrant for a . . . felony not committed in his presence *if there was reasonable ground for making the arrest*.” (emphasis added)).

⁸⁸ *See Beckwith v. Philby*, (1827) 108 Eng. Rep. 585 (K.B.) 586; 6 B. & C. 635, 638–39 (“[A] constable having *reasonable ground to suspect* that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities.” (emphasis added)), *cited in Watson*, 423 U.S. at 419; *Samuel v. Payne*, 99 Eng. Rep. at 231; 1 Dougl. at 360 (“[I]f a felony has actually been committed, any man, *upon reasonable probable grounds of suspicion*, may justify apprehending the suspected

generally reasonable.⁸⁹ Second, the phrase “reasonable ground” was only one of many formulations used by the sources, with other authorities speaking of “probable suspicion,”⁹⁰ “reasonable ground to suspect,”⁹¹ or the long-winded “reasonable probable grounds of suspicion.”⁹² Thus, even if reasonableness entered the inquiry to some extent through a suspicion element, the legality of a common-law felony arrest still did not turn on whether it was reasonable as a whole.

Other rules justified arrest in a variety of special circumstances. However, as with the misdemeanor and felony arrest authority described above, none of the rules focused on the overall reasonableness of the arrest. For example, in *Payton v. New York*,⁹³ the Court surveyed Framing-era sources to discover the scope of an officer’s authority to enter a house to make an arrest.⁹⁴ The Court found that Framing-era common law justified an officer entering a house to

person” (emphasis added)), cited in *Watson*, 423 U.S. at 419; 4 BLACKSTONE, *supra* note 77, at *289 (“[I]n case of felony actually committed, or a dangerous wounding whereby felony is like to ensue, he may upon *probable suspicion* arrest the felon” (emphasis added)), cited in *Watson*, 423 U.S. at 418; 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 90 (London, E. Rider new ed. 1800) (discussing an officer’s authority to arrest without a warrant “in cases of *suspicion* of felony” and where there was danger a felony was about to occur, as in an affray or breach of the peace), cited in *Watson*, 423 U.S. at 418; 1 STEPHEN, *supra* note 82, at 193 (“Any constable may arrest any person whom he *suspects on reasonable grounds* of having committed any felony, whether in fact any such felony has been committed or not.” (emphasis added)), cited in *Watson*, 423 U.S. at 418; Horace L. Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 673, 687 (1924) (“[I]f a felony has actually been committed, any man, upon *reasonable probable grounds of suspicion* may justify apprehending the suspected person” (emphasis added) (quoting *Samuel v. Payne*, 99 Eng. Rep. at 231; 1 Dougl. at 360)), cited in *Watson*, 423 U.S. at 418.

⁸⁹ Although historical sources do not distinguish between reasonable suspicion and a general reasonableness standard (likely because there was no reasonableness standard and therefore no reason to discuss the distinction), the two are logically different. For example, a search or arrest based on reasonable suspicion is not necessarily “reasonable” if other factors militate against it. Likewise, a suspicionless search could be “reasonable” in certain circumstances. More importantly, conflating “reasonable suspicion” with “reasonable” would drastically transform the Court’s current reasonableness interpretation. The Court has generally rejected the idea that Fourth Amendment reasonableness requires some level of suspicion or probable cause. See, e.g., *Samson v. California*, 547 U.S. 843, 857 (2006) (“[W]e conclude that the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee.”).

⁹⁰ 4 BLACKSTONE, *supra* note 77, at *289, cited in *Watson*, 423 U.S. at 418.

⁹¹ *Beckwith v. Philby*, 108 Eng. Rep. at 586; 6 B. & C. at 638, cited in *Watson*, 423 U.S. at 419.

⁹² *Samuel v. Payne*, 99 Eng. Rep. at 231; 1 Dougl. at 360, cited in *Watson*, 423 U.S. at 419; Wilgus, *supra* note 88, at 687 (quoting *Samuel v. Payne*, 99 Eng. Rep. at 231; 1 Dougl. at 360), cited in *Watson*, 423 U.S. at 418.

⁹³ 445 U.S. 573 (1980).

⁹⁴ *Id.* at 591–98.

arrest someone under a warrant or in “hot pursuit” of a felon,⁹⁵ but noted disagreement on the rule outside these circumstances.⁹⁶ Some authorities said warrantless entry was never lawful; others permitted entry if the felony arrest was otherwise lawful; and some allowed warrantless entry but added the requirement that the arrestee eventually be proven guilty.⁹⁷ Regardless of which position best reflected pre-Amendment common law, none of them turned on reasonableness.⁹⁸

Other types of arrest authority included the ancient practice of the “hue and cry”—rallying bystanders to pursue a suspect who had been seen committing a felony.⁹⁹ However, both the duty to raise the hue and cry and the duty to arrest a suspect under it were absolute rather than a function of reasonableness.¹⁰⁰ Similarly, night watchmen were statutorily authorized to arrest or detain nightwalkers without cause,¹⁰¹ an authority the Court has suggested would clearly have been within “the legal background of any conception of reasonableness the Fourth Amendment’s Framers might have entertained.”¹⁰² But, as with other forms of arrest authority, the authority to arrest nightwalkers did not turn on whether the arrest was reasonable. Instead, it simply required that the nightwalker was a stranger and out at night.¹⁰³

Finally, if reasonableness truly was the pre-Amendment standard for determining the legality of searches and seizures, one would expect to see it applied to reasonable mistakes, perhaps as a residual

⁹⁵ *Id.* at 598.

⁹⁶ *See id.* (“[T]he issue is not one that can be said to have been definitively settled by the common law at the time the Fourth Amendment was adopted.”).

⁹⁷ *See id.* at 593–95 & nn.37–40 (citing various historical authorities).

⁹⁸ The first and second positions either categorically prohibited or extended existing arrest authority to the home. The last simply added a categorical proof-of-guilt element to the justification.

⁹⁹ 4 BLACKSTONE, *supra* note 77, at *290. The practice, however, appears to have fallen largely out of use by the late 1700s. *See* Pauline Maier, *Popular Uprisings and Civil Authority in Eighteenth-Century America*, 27 WM. & MARY Q. (3d ser.) 3, 19 (1970) (noting that by the eighteenth century magistrates had moved away from utilizing the “hue and cry” in favor of relying on either able-bodied men whom a sheriff could call upon or, when necessary, the militia); *see also* Davies, *supra* note 5, at 622–23 n.198 (“The traditional hue and cry appears to have fallen into disuse in late eighteenth-century America.”).

¹⁰⁰ *See* 4 BLACKSTONE, *supra* note 77, at *290–91 (requiring that the hue and cry be raised immediately upon the commission of a felony and that the felon be apprehended, and imposing liability for neglecting this duty).

¹⁰¹ *Id.* at *289.

¹⁰² *Atwater v. City of Lago Vista*, 532 U.S. 318, 333 (2001).

¹⁰³ *See id.* (discussing various historical authorities); *see also* Statute of Winchester, 13 Edw., c. 4 (1285) (“[I]f any Stranger do pass by [the Watch], he shall be arrested until Morning. And if no Suspicion be found, he shall go quit; and if they find Cause of Suspicion, they shall forthwith deliver him to the Sheriff . . .”).

standard to justify otherwise reasonable searches or seizures that did not fall into any of the categories above. However, that was not the case. For example, an officer who mistakenly arrested someone other than the person named in a warrant was not justified, even if the arrestee looked like the person named in the warrant, if a witness identified the arrestee as the wanted person, or if the arrestee said she was the person named in the warrant—all mistakes that would seem reasonable.¹⁰⁴

As these examples have shown, pre-Amendment arrests were not justified by an across-the-board reasonableness rule. Instead, arrests were justified under specific common-law (and sometimes statutory) rules that involved various nonreasonableness elements.

3. *Search Justifications*

As demonstrated above, pre-Amendment arrest authority did not turn on whether the arrest was reasonable. Search authority was no different. This section examines the rules governing two common types of Framing-era searches: searches for stolen goods and customs searches.¹⁰⁵

Search warrants to search for stolen goods were firmly established in pre-Amendment common law.¹⁰⁶ To obtain a warrant, an informant (often the person whose goods had been stolen) would have to swear before a justice of the peace that a felony (the stealing of goods) had been committed, as well as the basis of her “probable cause to suspect” that the goods were in a particular house or place.¹⁰⁷ In a subsequent trespass suit, such warrants generally indemnified the

¹⁰⁴ See George C. Thomas III, *Stumbling Towards History: The Framers’ Search and Seizure World*, 43 *TEX. TECH L. REV.* 199, 225–26 (2010) (citing authority for liability in such cases); see also *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 73 (1804) (noting the common-law rule that “[i]f the sheriff has a writ against A, and B is shewn to him as the person, and he arrests B instead of A, he is liable to an action of trespass at the suit of B”).

¹⁰⁵ Besides searches for stolen goods and customs searches, other Framing-era searches included searches incident to arrest and searches for evidence. The historical basis for searches incident to arrest is subject to debate. Compare *Cuddihy*, *supra* note 10, at 578–79 (“[T]he arrest process permitted searches and seizures of vast scope in 1776.”), and *Taylor*, *supra* note 23, at 28–29, 45 (arguing that searches of an arrestee’s person and premises were unchallenged in the Framing era), with *Davies*, *supra* note 5, at 646–47 & nn.276–77 (criticizing Taylor’s argument as insufficiently supported and citing contrary authority). Searches for mere evidence were traditionally prohibited, a prohibition conventionally traced back to Framing-era English case law. See *Warden v. Hayden*, 387 U.S. 294, 303 (1967) (discussing this history). But see *Davies*, *supra* note 5, at 727 n.513 (rejecting the conventional history of the doctrine).

¹⁰⁶ See *Taylor*, *supra* note 23, at 24–27 (discussing the common-law search warrant for stolen goods).

¹⁰⁷ 2 *HALE*, *supra* note 88, at 150.

executing officer but not the informant.¹⁰⁸ Thus, as with other warranted searches and seizures, the validity of a search for stolen goods under a search warrant did not turn on whether it was reasonable.

Some have argued that pre-Amendment law also recognized a “success” justification, under which an officer was justified in searching if stolen goods were actually found.¹⁰⁹ However, the historical support for this second justification is uncertain.¹¹⁰ Nonetheless, even if this type of “success” search was authorized, it did not turn on

¹⁰⁸ See *Bostock v. Saunders*, (1773) 95 Eng. Rep. 1141 (K.B.) 1145; 3 Wils. K.B. 434, 440 (“In cases of warrants granted to search for stolen goods . . . the search is lawful if the goods are there; unlawful, if not there; and although the justice of peace and the officer may justify in trespass, yet the informer cannot.”); BURN’S ABRIDGMENT, OR THE AMERICAN JUSTICE, *supra* note 86, at 358–59 (“If the goods be not in the house . . . it seems the officer is excused . . . because he searcheth by warrant . . . ; but it seems the party that made suggestion is punishable in such case . . .”). Another source, however, suggests that even the officer would be liable if the stolen goods were not found. See *Entick v. Carrington*, (1765) 95 Eng. Rep. 807 (K.B.) 812; 2 Wils. K.B. 275, 283 (“In the case of a search warrant for stolen goods . . . if stolen goods are not found there, all who entered with the warrant are trespassers.”).

¹⁰⁹ See Amar, *supra* note 23, at 767–68 (describing this as the “ex post success” justification); see also Fabio Arcila, Jr., *The Death of Suspicion*, 51 WM. & MARY L. REV. 1275, 1316–24 (2010) [hereinafter Arcila, *The Death of Suspicion*] (describing how an officer was justified in searching for stolen goods if the goods were actually found); Fabio Arcila, Jr., *The Framers’ Search Power: The Misunderstood Statutory History of Suspicion & Probable Cause*, 50 B.C. L. REV. 363, 373 n.34 (2009) [hereinafter Arcila, *The Framers’ Search Power*] (providing statements of the rule in contemporary American and English treatises, but noting that it was not entirely clear whether the statements refer to warrantless or warranted conduct).

¹¹⁰ In support of the rule, Amar cites to a Supreme Court case, *Gelston v. Hoyt*, in which Justice Story explains: “At common law any person may, at his peril, seize for a forfeiture to the government, and if the government adopt his seizure, and the property is condemned, he is justified.” 16 U.S. (1 Wheat.) 246, 247 (1818). However, as Professor Thomas Davies points out, this case dealt with in rem forfeiture of a ship under an early statute and so does not support the more general rule that success justified warrantless searches for stolen goods. Davies, *supra* note 5, at 647 n.278. Davies generally argues there was no “success” justification for searches for stolen goods, at least with respect to warrantless entry of houses. *Id.* at 647–49.

Professor Fabio Arcila makes a claim similar to Amar’s. Arcila’s claim appears to be based largely on a section from Hale’s *The History of the Pleas of the Crown* and justice-of-the-peace manuals that cite back to Hale. See Arcila, *The Death of Suspicion*, *supra* note 109, at 1316 nn.156–57 (citing 2 HALE, *supra* note 88, at 151); Arcila, *The Framers’ Search Power*, *supra* note 109, at 373 n.34 (citing 2 HALE, *supra* note 88, at 151, and various justice-of-the-peace manuals). The passage in Hale that Arcila and the justice-of-the-peace manuals cite says that “[i]f the door be shut, and upon demand it be refused to be opened by them within, if the stolen goods be in the house, the officer may break open the door, and neither the officer nor the party that comes in his assistance are punishable for it, but may justify it.” 2 HALE, *supra* note 88, at 151. This passage, however, appears to be concerned with *search warrants* rather than warrantless searches. First, it is in a short chapter titled “Concerning warrants to search for stolen goods, and seizing of them.” *Id.* at 149. Second, it is made under the subheading “Touching the execution of this warrant.” *Id.* at 151. Finally, the phrase “justify it” most naturally refers to the breaking of the door to the house after being refused entry and not the search itself.

whether the search was reasonable, but whether stolen goods were actually found. Thus, both types of searches for stolen goods—warranted searches and those based on a success justification—turned on categorical elements—the validity of a search warrant or the existence of stolen goods—rather than a reasonableness standard.

Unlike searches for stolen goods, which were governed by the common law, colonial customs searches were generally authorized by statute and litigated in admiralty court.¹¹¹ By the time of American independence, British statutes authorized searches and seizures of undeclared customs goods if the customs official had probable cause to support the seizure.¹¹² Thus, these statutes provide clear evidence there was no across-the-board reasonableness standard prior to the Fourth Amendment, as the customs statutes applied a probable cause rather than reasonableness standard.

4. *Weakness of Evidence of a Pre-Amendment Reasonableness Standard*

The previous sections have argued that pre-Amendment arrests and searches were not governed by a general or across-the-board reasonableness standard. Perhaps unsurprisingly, then, supporters of the reasonableness interpretation provide little persuasive historical evidence of a reasonableness standard in practice.

Professor Amar’s “clear evidence”¹¹³ of a pre-Amendment reasonableness standard comes from a quote by Lord Mansfield in *Money v. Leach*, a 1765 case celebrated for its holding that general warrants violated the common law.¹¹⁴ *Money v. Leach* was a civil trespass and false imprisonment action brought against the King’s agents for illegally entering the plaintiff’s house and holding him in detention for four days before bringing him before the proper authorities.¹¹⁵

Amar relies on a statement made by Lord Mansfield regarding the issues on appeal: “‘Whether there was a probable cause or ground of suspicion,’ was a matter for the jury to determine: that is not now

¹¹¹ See Arcila, *The Framers’ Search Power*, *supra* note 109, at 379 (describing the statutory regime for customs collections under which customs forfeitures were usually litigated in vice-admiralty courts).

¹¹² See, e.g., Sugar Act, 4 Geo. 3, c. 15, § 46 (1764) (limiting liability against customs collectors in subsequent civil suits if there was “probable cause of seizure”); see also Arcila, *The Framers’ Search Power*, *supra* note 109, at 426 n.93 (noting probable cause standard in the 1764 Sugar Act); Davies, *supra* note 5, at 653 n.295 (same).

¹¹³ Amar, *supra* note 23, at 776 & n.69 (citing *Money v. Leach*, (1765) 97 Eng. Rep. 1075 (K.B.) 1087; 3 Burr. 1742, 1765). A second version of the case was also reported. See *Money v. Leach*, (1765) 96 Eng. Rep. 320 (K.B.); 1 Black W. 555.

¹¹⁴ 97 Eng. Rep. at 1086; 3 Burr. at 1762–63. General warrants are warrants that do not identify a specific person or place to search or seize. In other words, they lack particularity.

¹¹⁵ *Id.* at 1076–77; 3 Burr. at 1744.

before the Court. So [too was the question]—“whether the defendants detained the plaintiff an unreasonable time.”¹¹⁶ While Lord Mansfield’s statement underlines the important role juries played in civil enforcement suits¹¹⁷ and the role of suspicion in justifying some arrests,¹¹⁸ it does not establish that the legality of the search and seizure turned on whether they were reasonable. First, the question of reasonableness does not arise with respect to the initial seizure, but instead goes to the subsequent process—whether the officials kept the plaintiff in custody for too long after the arrest¹¹⁹—which could trigger liability apart from an initial unlawful arrest.¹²⁰ Second, Lord Mansfield later implicitly rejects a reasonableness standard for the legality of an arrest: “The common law gives authority to arrest without a warrant in many cases But it is not contended in the present case, that the common law gives a power to apprehend without a warrant”¹²¹ Under a reasonableness standard, Lord Mansfield could not categorically reject the legality of the arrest and, at a minimum, would need to explain why the arrest was unreasonable as a matter of law or put the issue to the jury.

Justice Scalia also fails to provide compelling evidence of a pre-Amendment reasonableness standard. To support the claim that “[a]n officer who searched or seized without a warrant . . . would be liable

¹¹⁶ *Id.* at 1087; 3 Burr. at 1765.

¹¹⁷ See *infra* notes 172–84 and accompanying text (discussing the jury’s role in civil enforcement suits).

¹¹⁸ See *supra* notes 87–88 and accompanying text (discussing suspicion requirement in some felony arrests).

¹¹⁹ Under Framing-era common law, an arresting officer was required to bring the arrestee to the jail or a magistrate as soon as possible. Although unnecessary delay was a breach of duty for which the officer could be liable, sources often referred to the duty in terms that did not implicate reasonableness. See, e.g., 3 BLACKSTONE, *supra* note 77, at *293 (“When a delinquent is arrested by any of the means mentioned in the preceding chapter, he ought *regularly* to be carried before a justice of the peace.” (emphasis added)); 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 59 (New York, Banks, Gould & Co. 5th American ed. 1847) (“When the officer has made his arrest, he is, *as soon as possible*, to bring the party to the gaol or to the justice, according to the import of the warrant; and if he be guilty of unnecessary delay, it is a breach of duty.” (emphasis added)); see also *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (“At common law it was customary, if not obligatory, for an arrested person to be brought before a justice of the peace *shortly after arrest*.” (emphasis added) (citing 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 77, 81, 95, 121 (1736))).

¹²⁰ That postarrest detention triggered a separate question of liability is clear from Lord Mansfield’s subsequent comments. See *Money v. Leach*, 97 Eng. Rep. at 1087; 3 Burr. at 1765 (“But if it had been found to have been a reasonable time; yet it would be no justification to the defendants . . . if . . . they have taken up a man who was not the subject of the warrant.”); see also *Davies*, *supra* note 5, at 593–94 & nn.111–12 (making a similar argument).

¹²¹ *Money v. Leach*, (1765) 96 Eng. Rep. 320 (K.B.) 323; 1 Black W. 555, 561; *accord Money v. Leach*, 97 Eng. Rep. at 1088; 3 Burr. at 1766.

for trespass, including exemplary damages, unless the jury found that his action was ‘reasonable.’” Justice Scalia cites to Amar’s article, *Bill of Rights as a Constitution*, and an English case, *Huckle v. Money*.¹²² But as just discussed, Amar’s evidence of a reasonableness standard is insufficient,¹²³ and *Huckle v. Money* appears to be cited solely to support the availability of money damages against officers found liable for trespass.¹²⁴

As this section has shown, even if reasonableness crept into the inquiry of whether a search or seizure was legal in certain, limited circumstances, it simply was not the universal standard as claimed by supporters of the modern reasonableness interpretation. Instead, there was a collection of mostly common-law rules that applied in discrete circumstances, many of which did not involve reasonableness at all and none of which turned on a general reasonableness standard. Therefore, it is unlikely that the Fourth Amendment was understood as reflecting or preserving such a preexisting standard.

B. *The Absence of a Post-Amendment Reasonableness Standard*

The previous section has shown there was no general or across-the-board reasonableness standard in pre-Amendment search-and-seizure law. However, even if pre-Amendment search-and-seizure law did not reflect a reasonableness standard, it is still possible that the Amendment was originally understood as imposing a *new* substantive search-and-seizure standard. In other words, the Amendment might have been understood as effectively replacing the preexisting common-law regime with a single standard requiring that all searches and seizures be reasonable. As with pre-Amendment law, the problem with this interpretation is that there is no evidence that a general rea-

¹²² See *California v. Acevedo*, 500 U.S. 565, 581–82 (1991) (Scalia, J., concurring) (citing Amar, *Bill of Rights*, *supra* note 48, at 1178–80; *Huckle v. Money*, (1763) 95 Eng. Rep. 768 (K.B.); 2 Wils. K.B. 205).

¹²³ See *supra* notes 113–21 (discussing Amar’s historical evidence of a pre-Amendment reasonableness standard). Although Justice Scalia cites to Amar’s *Bill of Rights as a Constitution* and the above discussion addresses Amar’s arguments made in *Fourth Amendment First Principles*, Amar’s *Bill of Rights as a Constitution* provides even less historical evidence of a reasonableness standard. In that work, Amar indirectly supports his central statement that “[r]easonableness vel non was a classic question of fact for the jury,” by citing to an article by Justice Scalia that does not address whether or provide evidence that reasonableness was a jury question in 1791. Amar, *Bill of Rights*, *supra* note 48, at 1179 (citing Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180–86 (1989)).

¹²⁴ In *Huckle v. Money*, the only issue was whether to uphold the jury’s damages award in a previous trespass and false imprisonment action, and the opinion does not even mention the term “reasonableness” or the standard on which the earlier suit was decided. See 95 Eng. Rep. at 769; 2 Wils. K.B. at 207 (finding damages were not excessive and refusing to grant a new trial).

sonableness standard was applied in practice. Instead, federal search-and-seizure law—as well as state law in those states that had similar provisions to the Fourth Amendment—appears to have largely followed or adopted the preexisting search-and-seizure justifications discussed above.¹²⁵

1. Federal Law

Unfortunately, there is little evidence of how federal search-and-seizure law was practiced in the years immediately following the enactment of the Fourth Amendment. Indeed, the Supreme Court heard few Fourth Amendment cases in its first hundred and fifty years,¹²⁶ in part because the Amendment was not fully incorporated against the states until 1956.¹²⁷

Nevertheless, statutes passed by the first Congresses suggest the Amendment was not originally understood as imposing a reasonableness standard on federal searches and seizures. With respect to seizures, early federal arrest authority reflected a continuation of the preexisting, common-law justifications rather than a turn toward reasonableness. For example, five months after the Amendment was ratified, the Congress that passed the Fourth Amendment also granted federal marshals the same arrest authority granted to sheriffs in the states where they were located.¹²⁸ Because the states appear to have mostly adopted the preexisting common-law arrest authority,¹²⁹ the congressional grant effectively conferred common-law arrest authority

¹²⁵ See *supra* Part II.A (detailing these pre-Amendment search-and-seizure justifications).

¹²⁶ See Davies, *supra* note 5, at 613 (“Federal courts rarely addressed the Fourth Amendment during the nineteenth century.”). The Court’s modern Fourth Amendment jurisprudence arguably began with *Boyd v. United States*, 116 U.S. 616 (1886), *abrogation recognized* by *Fisher v. United States*, 425 U.S. 391 (1976).

¹²⁷ The prohibition against unreasonable searches and seizures was incorporated against the states in *Wolf v. Colorado*, 338 U.S. 25, 27–28 (1949), but the Court did not apply the exclusionary rule against the states until *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

¹²⁸ Act of May 2, 1792, ch. 28, § 9, 1 Stat. 264, 265 (repealed 1795) (“[T]he marshals of the several districts and their deputies, shall have the same powers in executing the laws of the United States, as sheriffs and their deputies in the several states have by law, in executing the laws of their respective states.”).

¹²⁹ See, e.g., Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791, 798–800 (1951) (discussing states’ adoption of the English common law); see also *infra* note 142 and accompanying text (discussing the reception of common law in states with constitutional provisions similar to the Fourth Amendment).

As further evidence the states adopted common-law arrest authority, the common-law rules continued to be published in American versions of justice-of-the-peace manuals that were a prevalent practice guide on Framing-era law. See, e.g., A GENTLEMAN OF THE LAW, A NEW CONDUCTOR GENERALIS 37–45 (Albany, D. & S. Whiting 1803) (reflecting a substantially similar continuation of pre-Amendment common-law arrest authority); WILLIAM WALLER HENING, THE VIRGINIA JUSTICE 72–78 (Richmond, Shepherd &

on federal marshals.¹³⁰ But since common-law arrest authority did not turn on whether an arrest was reasonable,¹³¹ this suggests Congress did not interpret the Amendment as mandating a reasonableness standard. Even more to the point, Congress directly granted District of Columbia officers common-law arrest authority when it adopted the common law for the District in 1801.¹³² As a result, federal courts in the District of Columbia continued to apply preexisting common-law arrest rules.¹³³ Framing-era commentators also expressed the view that the Amendment did not displace common-law arrest authority.¹³⁴

Apart from federal arrest authority, customs statutes passed by the First Congress and reenacted by subsequent Congresses also belie the notion that the Fourth Amendment was originally understood as imposing a general reasonableness standard. In 1789, Congress authorized warrantless searches of ships if customs collectors had “reason to suspect” dutiable goods were concealed on board, but required warrants for land searches of “dwelling-house[s], building[s], store[s] or other place[s]” where the customs collectors had “cause to suspect” dutiable goods were concealed within.¹³⁵ The same statute

Pollard 4th ed. 1825) (same); *see also supra* Part II.A.2 (discussing common-law arrest rules).

¹³⁰ *See* Amar, *supra* note 23, at 764 (interpreting the statute to confer this power).

¹³¹ *See supra* Part II.A (discussing the absence of a reasonableness standard in pre-Amendment law).

¹³² *See* Act of Feb. 27, 1801, ch. 15, § 1, 2 Stat. 103, 103–05 (incorporating the laws of Virginia and Maryland in the District of Columbia). Although the Act only incorporated the preexisting laws of Virginia and Maryland, both states had incorporated English common law. *See* MD. CONST. of 1776, Declaration of Rights, art. 3 (adopting English common law); Ordinance of May 6, 1776, ch. 5, § 6, 1776 Va. Acts 37, 37 (same).

¹³³ For example, in an 1806 case the court restated the common-law rule regarding warrantless arrest authority for nonfelony offenses. *See* United States v. Pignel, 27 F. Cas. 538, 538 (C.C.D.C. 1806) (No. 16,049) (noting that if the officer “was in the general execution of his office as a conservator of the peace, and as such endeavoring to suppress the affray, then it is not necessary to produce the warrant”). One of the lawyers in the case stated the rule more clearly: “It is not necessary to produce the warrant. [The officer] took the man in an affray, and had a right to do so as a peace-officer.” *Id.*; *see supra* note 82 and accompanying text (discussing this rule).

¹³⁴ St. George Tucker, a noted law professor and judge, stated in his law lectures in the early 1790s: “But this clause does not extend to repeal, or annul the common law principle that offenders may in certain cases be arrested, even without warrant.” St. George Tucker, Lecture Notes, in David T. Hardy, *The Lecture Notes of St. George Tucker*, 103 Nw. U. L. REV. 1527, 1535 (2009).

¹³⁵ Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29, 43 (repealed 1790). Similar acts were passed in 1790, 1793, and 1799. *See* Act of Mar. 2, 1799, ch. 22, § 68, 1 Stat. 627, 677 (repealed 1922); Act of Feb. 18, 1793, ch. 8, § 27, 1 Stat. 305, 315; Act of Aug. 4, 1790, ch. 35, § 48, 1 Stat. 145, 170 (repealed 1799). *But see* Davies, *supra* note 5, at 605 (“[N]o late eighteenth-century lawyer would have imagined that ships were entitled to the same common-law protection due ‘houses, papers, and effects.’”).

Amar claims the provisions “authorized, but did not require,” warrants to search homes, stores, and other buildings. Amar, *supra* note 23, at 766. However, this seems to be

also authorized customs collectors to open containers “on suspicion of [customs] fraud.”¹³⁶ Although these provisions undermine a categorical historical warrant requirement—a point made by supporters of the reasonableness interpretation¹³⁷—they likewise undermine the existence of a general reasonableness standard.

Although evidence of the Amendment’s original understanding is scarce in the years following its enactment, these early statutes provide some indication of how the Amendment was originally understood. None of the statutes suggest that the Amendment was understood as imposing a requirement that all searches and seizures be reasonable.¹³⁸

2. *State Law*

The absence of a reasonableness standard in post-Amendment practice is clearer in state practice, where there is a more extensive historical record. Although the Fourth Amendment did not originally apply to the states,¹³⁹ many state constitutions had provisions similar to the Fourth Amendment.¹⁴⁰ Practice in these states, therefore, provides some suggestion of how the Fourth Amendment’s text would originally have been understood.¹⁴¹

Perhaps most significantly, states that had constitutional search or seizure provisions containing the same prohibition on “unreasonable searches and seizures” as the Federal Fourth Amendment appear to have largely adopted pre-Amendment common-law search-and-

a strained reading of the text. In the first clause, pertaining to ships and vessels, the Act grants “full power and authority” to enter ships and vessels without a warrant. Act of July 31, 1789 § 24, 1 Stat. at 43. However, in the following clause, pertaining to homes and buildings, the Act does *not* grant “full power and authority”; instead, it states, “[I]f [the collector, etc.] shall have cause to suspect a concealment thereof, in any particular dwelling-house, store, building or other place, they . . . shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter . . . and to there search for such goods . . .” *Id.* Therefore, the language of the Act in no way authorizes an official to enter into a home or building without a warrant to search for customs goods, as it clearly does for ships and vessels.

¹³⁶ Act of July 31, 1789 § 23, 1 Stat. at 43.

¹³⁷ See Amar, *supra* note 23, at 766 (“[M]any of the most important searches and seizures can and must take place without warrants.”).

¹³⁸ One counterargument is that the common-law arrest authority and customs search authority conferred by statute were nevertheless considered reasonable in the Framing era, even if they did not impose a case-by-case reasonableness standard. This argument is addressed in Part III.B.

¹³⁹ See *Barron v. Mayor of Baltimore*, 32 U.S. 243, 247 (1833) (discussing the limited application of the Bill of Rights against the states while deciding a Takings Clause case).

¹⁴⁰ See *infra* note 142 (discussing states with similar constitutional provisions).

¹⁴¹ See *Atwater v. City of Lago Vista*, 532 U.S. 318, 339 (2001) (noting that state practice is not “irrelevant in unearthing the Amendment’s original meaning” and surveying state misdemeanor arrest authority).

seizure authority, which was not based on a reasonableness standard.¹⁴² Moreover, courts in these states appear to have continued to determine the legality of searches and seizures under common-law justifications rather than a reasonableness analysis. For example, a 1796 Massachusetts case followed the common-law rule that warrantless arrests for felonies not committed in the officer's presence required proof of felony-in-fact.¹⁴³ An 1804 Delaware court appears to have announced a similar rule.¹⁴⁴ Even more directly, the Pennsylvania Supreme Court stated in an 1814 case that "[t]he whole section [prohibiting unreasonable searches and seizures] indeed was nothing more than an affirmance of the common law."¹⁴⁵

Although the above examples reflect state rather than federal practice, the fact that states with similar constitutional provisions to

¹⁴² For example, Massachusetts, Pennsylvania, New Hampshire, and Delaware had constitutional provisions prohibiting "unreasonable" searches and seizures and also adopted common-law arrest authority. The Massachusetts Constitution, ratified in 1780, stated, "Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions." MASS. CONST. pt. 1, art. XIV. A later provision adopted the "laws which have heretofore been adopted, used and approved in the Province, Colony or State of Massachusetts Bay, and usually practised on in the courts of law." *Id.* pt. 2, ch. VI, art. VI.

The Pennsylvania Constitution of 1790 guaranteed "[t]hat the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures." PA. CONST. of 1790, art. IX, § 8. Pennsylvania adopted the common law of England by statute in 1777. *See* Act of Jan. 28, 1777, ch. 2, § 2, 1777 Pa. Laws 3, 3 (adopting "the common law and such of the statute laws of England as have heretofore been in force in the said province," with certain exceptions).

The New Hampshire Constitution was substantively similar to the Massachusetts search-and-seizure provision. *See* N.H. CONST. pt. 1, art. 19 (amended 1793) ("Every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions."). Another provision incorporated existing law, including common law. *See id.* pt. 2, art. 90 ("All the laws which have heretofore been adopted, used, and approved, in the province, colony, or state of New Hampshire . . . shall remain and be in full force . . .").

The Delaware Constitution of 1792 stated that "[t]he people shall be secure in their persons, houses, papers, and possessions, from unreasonable searches and seizures," and required that warrants must describe what is to be searched "as particularly as may be" and with "probable cause supported by oath or affirmation." DEL. CONST. of 1792, art. I, § 6. Another provision of the constitution incorporated existing law, *id.* art. VIII, § 10, which included "[t]he common law of England, as well as so much of the statute law as have been heretofore adopted in practice in this state," DEL. CONST. of 1776, art. 25.

¹⁴³ *See* 5 DANE, *supra* note 86, ch. 172, art. 9, § 18, at 588 (citing *Gale v. Hoyt* (Mass. 1796)) ("[T]o justify one man's arresting another, *without warrant or legal process*, there must be, 1. Proof that a felony has been committed; and 2. A reasonable cause to suspect the person arrested, has committed the felony."). For a discussion of the common-law rule, see *supra* notes 86–92 and accompanying text.

¹⁴⁴ *See* *State v. Clark*, 2 Del. Cas. 210, 212 (Ct. Quarter Sess. 1804) (per curiam) ("[W]hen a person arrests another without a pass it is at their own peril; [and], if no felony [was] committed before the arrest [it is] no justification that the person is an officer, etc.").

¹⁴⁵ *Wakely v. Hart*, 6 Binn. 316, 319 (Pa. 1814).

the Fourth Amendment did not apply a reasonableness standard further undermines the idea that the original understanding of the Fourth Amendment was rooted in reasonableness.

3. *Weakness of Evidence of a Post-Amendment Reasonableness Standard*

If the reasonableness interpretation were consistent with the original understanding of the Amendment, one would expect to find Framing-era cases in which judges or juries decided the legality of a federal search or seizure based on whether it was reasonable, as the Court does today.¹⁴⁶ However, no such cases exist, and it appears the Supreme Court did not even consider a reasonableness standard until the twentieth century.¹⁴⁷

Professor Amar's evidence of a post-Framing reasonableness standard consists of an 1827 English case¹⁴⁸ and American cases from 1844, 1849, and 1867,¹⁴⁹ too late to be truly indicative of how the Amendment would have been originally understood in 1791.¹⁵⁰ More importantly, none of these cases actually applied a reasonableness standard to determine the legality of the search or seizure.¹⁵¹ For

¹⁴⁶ See *supra* notes 33–45 and accompanying text (exploring the Court's adoption of the reasonableness standard).

¹⁴⁷ Professor Thomas Clancy traces the modern reasonableness interpretation to *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931), *abrogation recognized by Arizona v. Gant*, 556 U.S. 332 (2009). Clancy, *supra* note 20, at 999. In *Go-Bart*, the Court stated, "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances." 282 U.S. at 357.

¹⁴⁸ Amar, *Writs of Assistance*, *supra* note 48, at 61 & nn.34–36 (citing *Beckwith v. Philby*, (1827) 108 Eng. Rep. 585 (K.B.); 6 B. & C. 635).

¹⁴⁹ Amar, *supra* note 23, at 818 n.228 (citing *Simpson v. McCaffrey*, 13 Ohio 508, 517 (1844); *Luther v. Borden*, 48 U.S. (7 How.) 1, 87 (1849) (Woodbury, J., dissenting); *Allen v. Colby*, 47 N.H. 544, 549 (1867)). Amar's other historical evidence largely speaks to the role of juries in civil search-and-seizure suits rather than the standard applied in such suits. Amar, *supra* note 23, at 775–78.

¹⁵⁰ Cases from the 1840s are likely too late to reflect the original public understanding of the Amendment for two reasons. First, the generation that had drafted, debated, and ratified the Amendment would have passed on by that time. Second, the law in general was fundamentally changing through the first part of the nineteenth century as the older, formal, procedurally driven common law gave way to a more flexible, substantive law. See FREDERICK POLLOCK, *THE GENIUS OF THE COMMON LAW* 27–36 (1911) (discussing evolution in the common law).

¹⁵¹ Amar does not directly claim the cases are examples of a reasonableness standard. Instead, he describes them as evidence of the role civil juries played in "deciding the reasonableness of government searches and seizures," Amar, *supra* note 23, at 776, or of the jury's "reasonableness role," *id.* at 818 n.228. See also Amar, *Writs of Assistance*, *supra* note 48, at 61 & n.36 (citing *Beckwith v. Philby*, 108 Eng. Rep. at 586; 6 B. & C. at 638) (describing *Beckwith v. Philby* as illustrating that "key questions about the reasonableness of government conduct might be decided not by a single judge, but by a judge sitting with a local jury").

example, in the 1827 English case, *Beckwith v. Philby*, the court only states that whether there was proof of reasonable cause to arrest and whether the plaintiff was detained for an unreasonable amount of time after the arrest were issues for the jury to decide.¹⁵² But as discussed above this is not the same as asking whether the seizure was reasonable, and it is insufficient to establish that a reasonableness standard applied to all searches and seizures.¹⁵³ The three American cases likewise fail to establish a reasonableness standard in the sense it is applied by today's Court.¹⁵⁴

¹⁵² See *Beckwith v. Philby*, 108 Eng. Rep. at 586; 6 B. & C. at 638 ("Whether there was any reasonable cause for suspecting that the plaintiff had committed a felony, or was about to commit one, or whether he had been detained in custody an unreasonable time, were questions of fact for the jury . . .").

¹⁵³ These are the same two issues Amar claimed established a reasonableness standard in the pre-Amendment case, *Money v. Leach*, (1765) 97 Eng. Rep. 1075 (K.B.); 3 Burr. 1742. See *supra* notes 113–21 (discussing Amar's reliance on this case and the flaws in his conclusions). As in that case, neither establish a reasonableness standard. The question of reasonable cause for suspicion only goes to the sufficiency of suspicion required to make the arrest, not the reasonableness of the arrest. See *supra* notes 87–88 and accompanying text (differentiating between reasonable suspicion and the reasonableness of the arrest in common-law arrest authority). The question of reasonable time of detention goes to liability for postarrest detention and not the legality of the arrest in the first place. See *supra* notes 119–20 and accompanying text (discussing postarrest detention).

¹⁵⁴ The first case, *Simpson v. McCaffrey*, 13 Ohio 508 (1844), involved the warrantless search of a house for counterfeit paper by a private individual, not an officer. The defendants' counsel argued for the admission of evidence that the searched house was a house of ill repute, *id.* at 512, on the grounds that it went to the "reasonableness" of the arrest and that "the circumstances which would render a search reasonable are for the jury to judge," *id.* at 517. However, it is clear from the context that reasonableness here was not applied as a standalone standard because the counsel immediately afterward spoke in terms of "probable cause" and "reasonable grounds of suspicion." *Id.* More importantly, the court rejected the admission of the evidence on the grounds that it "in no sense constituted a justification of the trespass complained of." *Id.* at 522. As the reporter stated, the rule that applied in the case was: "Existence on the premises of guilty implements, or evidences of crime, will warrant a search, *but if not found there, the justification fails.*" *Id.* at 508 (emphasis added). In other words, whether the search was "reasonable" or whether there were "reasonable grounds of suspicion" that the house contained counterfeit paper was irrelevant because the warrantless search was only justified if the counterfeit paper was found. However, the court did admit the evidence with respect to mitigation of damages, where the question was not whether the conduct was lawful, but whether it was done maliciously. *Id.* at 522–23.

In the second case, *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), Amar quotes dissenting Justice Woodbury: "[I]f the sanctity of domestic life has been violated, the castle of the citizen broken into, or property or person injured, without good cause, in either case a jury of the country should give damages, and courts are bound to instruct them to do so, unless a justification is made . . ." *Id.* at 87 (Woodbury, J., dissenting), quoted in Amar, *supra* note 23, at 818 n.228. Again, this does not establish a reasonableness standard; instead, it suggests the uncontroversial positions that officers could not search or seize without justification, and that if they lacked legal justification they were potentially subject to monetary liability.

In the third case, *Allen v. Colby*, 47 N.H. 544 (1867), a sheriff intended to arrest the plaintiff under a presidential order authorizing the arrest of individuals evading the draft.

As this section has shown, even after the Amendment was enacted the legality of searches and seizures did not turn on whether they were reasonable. Even though some cases introduced elements of reasonableness into the inquiry, this falls short of establishing either that reasonableness was the ultimate inquiry or that a reasonableness standard applied to all searches and seizures. Thus, the absence of a post-Amendment general reasonableness standard fundamentally undermines the claim that the Court's modern reasonableness interpretation is consistent with original understanding or historical practice.

C. *The Amendment Was Not Intended to Limit Warrants and Privilege Civil Juries*

The preceding two sections have argued that search-and-seizure law did not turn on a reasonableness standard during the Framing era and that the Amendment was not originally understood as imposing or creating such a standard. Supporters of the reasonableness interpretation, however, also make a second claim: The reasonableness interpretation is appropriate because the Framers intended to channel enforcement of illegal searches and seizures away from judges who issued *ex parte* and *ex ante* warrants and toward civil juries who imposed *ex post* monetary damages.¹⁵⁵ As discussed in Part I.C.2, this argument rests on three propositions: (1) the Framers disfavored warrants because they immunized the executing officer in a subsequent civil suit and therefore transferred the question of liability from jury to judge;¹⁵⁶ (2) the Framers trusted juries more than judges as a bul-

Id. at 544. However, finding the plaintiff not at home, the sheriff seized his luggage instead. *Id.* After the war, the plaintiff brought a trespass action to recover his luggage and, among other claims, argued that the presidential order to arrest draft evaders violated the Fourth Amendment. The court stated that the Fourth Amendment is not "understood to prohibit a search or seizure, made in attempting to execute a military order authorized by the constitution and a law of Congress, when the jury under correct instructions from the court, have found that the seizure was proper and reasonable, as they have in this case." *Id.* at 549. It is not clear how this establishes a reasonableness standard, as "reasonable" here does not appear to refer to the standard applied by the lower court. Indeed, the lower court instructed the jury to find for the sheriff-defendant if it found the sheriff believed the plaintiff was about to leave for Canada to evade the draft and believed seizing the luggage would prevent the plaintiff from fleeing to Canada—a jury instruction that did not turn on reasonableness. *Id.* at 546. On the other hand, it is possible the state appellate court found that the seizure was objectively reasonable as a matter of law and therefore did not violate the Fourth Amendment. However, this reading is not clear from the face of the opinion. Moreover, an ambiguous state opinion from seventy years after the Amendment's enactment is a thin reed on which to base an original understanding of the Amendment's meaning.

¹⁵⁵ See *supra* Part I.C.2 (summarizing this argument).

¹⁵⁶ See *supra* notes 62–64 and accompanying text (explaining these effects of warrants).

wark against government oppression;¹⁵⁷ and (3) therefore, the Amendment imposed a higher standard on warranted conduct (probable cause, particularity, oath, and judicial preclearance) than warrantless conduct (reasonableness) in order to limit warrants and channel enforcement to civil juries.¹⁵⁸

However, as this section will argue, all three propositions are incorrect. First, the Framers were not clearly hostile to warrants; instead, it appears any hostility was primarily directed at a certain type of general or overly broad warrant. Second, in regulating searches and seizures, the Framers did not clearly favor juries over judges; in fact, early federal search-and-seizure statutes did just the opposite, favoring judges over juries. Third, a reasonableness standard would not necessarily have channeled enforcement away from warrants and toward juries. These points are examined in detail below.

The first of the three propositions is that the Framers viewed the warrant as “an enemy, not a friend.”¹⁵⁹ While there is some evidence that the Framers were hostile to warrants,¹⁶⁰ such a strong claim is overly facile. First, when Framing-era commentators expressed hostility to warrants, the hostility was mostly directed at *general* warrants,¹⁶¹ and not the specific warrants that the Amendment permits.¹⁶² This is reflected in the text of the Amendment, which unequivocally prohibits general warrants—“no Warrants shall issue, but” those supported by oath, probable cause, and particularity¹⁶³—while placing no limits on warrants that satisfy the Warrant Clause.¹⁶⁴ Thus, while there is a textual basis for reading the Amendment as hostile to general

¹⁵⁷ See *supra* note 65 and accompanying text (discussing how citizen juries were trusted more than judges on the government payroll).

¹⁵⁸ See *supra* note 68 and accompanying text (reconciling the inconsistency that would seemingly result from imposing more stringent requirements on warranted conduct than warrantless conduct under the Amendment).

¹⁵⁹ TAYLOR, *supra* note 23, at 41.

¹⁶⁰ See Amar, *supra* note 23, at 776–78 (quoting Anti-Federalist writers denouncing the general warrant).

¹⁶¹ General warrants were warrants that did not name a specific person, place, or thing to be searched or seized and therefore did not satisfy the particularity requirement of the Warrant Clause.

¹⁶² For example, the Anti-Federalist Maryland Farmer, quoted by Amar, was referring to general and not specific warrants when he wrote, “[S]uppose for instance, that an officer of the United States should force the house, the asylum of a citizen, by virtue of a general warrant . . . [.] [N]o remedy has been yet found equal to the task of deterring [sic] and curbing the insolence of office, but a jury[.]” A Farmer, Essay, MD. GAZETTE, Feb. 15, 1788, reprinted in 5 THE COMPLETE ANTI-FEDERALIST 9, 14 (Herbert J. Storing ed., 1981), quoted in Amar, *supra* note 23, at 777.

¹⁶³ U.S. CONST. amend. IV.

¹⁶⁴ *Id.* But see *California v. Acevedo*, 500 U.S. 565, 581 (1991) (Scalia, J., concurring) (“What [the Amendment] explicitly states regarding warrants is by way of limitation upon their issuance rather than requirement of their use.”).

warrants, there is no reason to translate this into a hostility to all warrants.¹⁶⁵ Instead, the text of the Amendment is, at most, neutral regarding searches and seizures conducted pursuant to a valid warrant.

Nor does the fact that warrants were not always required translate into a general hostility to warrants. While warrants were not required in some situations,¹⁶⁶ they were in others. For example, the common-law rule, which appears to have generally remained in effect after the Amendment was enacted, required a warrant to arrest for misdemeanors committed outside of the officer's presence.¹⁶⁷ Likewise, there is strong evidence that searches for stolen goods always required search warrants.¹⁶⁸ Perhaps most significantly, customs collections—which were arguably the most important application of the federal government's search-and-seizure power¹⁶⁹—required warrants for customs searches of buildings and homes.¹⁷⁰ Finally, there are compelling statements from Framing-era authority that warrants were, in fact, preferred.¹⁷¹ In light of this evidence, it is simply not accurate to say the Framers viewed all warrants, including specific warrants, as the “enemy.”

¹⁶⁵ In other words, the text “merely restrict[s] *certain types of warrants*, not all warrants.” Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 967 (1997). Others have made similar points. See Davies, *supra* note 5, at 583–90 (rebutting the claim that the Framers took a hostile view toward specific warrants); David E. Steinberg, *An Original Misunderstanding: Akhil Amar and Fourth Amendment History*, 42 SAN DIEGO L. REV. 227, 242–46 (2005) (same).

¹⁶⁶ See, e.g., *supra* note 82 and accompanying text (arrests for misdemeanors committed in the officer's presence); *supra* note 86 and accompanying text (arrests upon suspicion of felony and proof of felony-in-fact); *supra* note 95 and accompanying text (hot pursuit of a felon); *supra* notes 99–100 and accompanying text (hue and cry); *supra* notes 101–03 and accompanying text (night walkers); *supra* notes 109–10 and accompanying text (“success” searches); *supra* notes 111–12 and accompanying text (customs searches).

¹⁶⁷ See *supra* notes 82–83 and accompanying text (discussing the common-law rule); *supra* notes 128–33 and accompanying text (discussing adoption of common-law arrest authority for federal marshals and in the District of Columbia).

¹⁶⁸ See *supra* notes 106–10 and accompanying text (discussing authority to search for stolen goods and noting weak authority for the existence of a “success” justification).

¹⁶⁹ See *infra* notes 178–80 and accompanying text (discussing importance of federal customs searches in the Framing era).

¹⁷⁰ See *supra* note 135 (discussing warrant requirement for customs search of buildings).

¹⁷¹ For example, in his 1791–1792 law lectures, St. George Tucker asked, “What shall be deemed unreasonable searches and seizures[?]” Tucker, *supra* note 134, at 1535. After repeating the requirements of the Warrant Clause, Tucker answered, “All other searches or seizures, except such as are thus authorized, are therefore unreasonable and unconstitutional.” *Id.* The clear implication is that searches and seizures not authorized by specific warrants are unreasonable. However, Tucker hedges somewhat by also saying that the Amendment did not repeal warrantless authority that already existed under the common law. See *supra* note 134.

The second of the three propositions—that the Framers preferred juries over judges, at least with respect to regulating searches and seizures¹⁷²—is also problematic. While the deprivation of jury trials was an important colonial grievance against Great Britain¹⁷³ and there is ample evidence that Framing-era commentators, especially Anti-Federalists, saw civil juries as serving an important check on government abuse,¹⁷⁴ early federal customs statutes largely curtailed the power of the jury in evaluating the legality of federal searches. Under the early federal collections acts, a customs collector could seize goods for which he suspected duties had not been paid, and the goods would then be subject to forfeiture proceedings held exclusively under federal court jurisdiction.¹⁷⁵ If the collector was subsequently sued in a civil action, the collector could request a certificate of “reasonable cause” from the court where the goods were forfeited, which served as a complete defense in any civil case against the collector¹⁷⁶ and effec-

¹⁷² See Amar, *supra* note 23, at 771 (“[J]uries, not judges, are the heroes of the Founders’ Fourth Amendment story.”). A more nuanced statement is that precisely because of the powers judges wielded, the Framers believed that “[a] judge is the blessing, or he is the curse of society.” James Wilson, *Of the Constituent Parts of Courts—Of the Judges*, in 2 COLLECTED WORKS OF JAMES WILSON, *supra* note 31, at 950, 950.

¹⁷³ See THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776) (complaining of the English Crown’s “depriving us in many cases, of the benefits of Trial by Jury”).

¹⁷⁴ A typical example began, “[If a federal constable searching] for stolen goods, pulled down the clothes of a bed in which there was a woman, and searched under her shift, . . . a trial by jury would be our safest resource, heavy damages would at once punish the offender, and deter others from committing the same . . . [.]” A Democratic Federalist, *Essay*, PA. HERALD, Oct. 17, 1787, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 162, at 58, 61, *quoted in* Amar, *supra* note 23, at 776. The writer continued, “[B]ut what satisfaction can we expect from a lordly [judge], always ready to protect the officers of government against the weak and helpless citizens . . . ?” *Id.*

¹⁷⁵ See Arcila, *The Framers’ Search Power*, *supra* note 109, at 394–97 (discussing forfeiture proceedings in early customs seizures); *see also supra* notes 135–36 (discussing statutes authorizing customs seizures). The federal courts had exclusive jurisdiction over all federal forfeitures. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (granting the federal district courts exclusive jurisdiction over “all seizures on land” and “all suits for . . . forfeitures incurred, under the laws of the United States”); *accord* *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 246, 312 (1818) (recognizing this grant).

¹⁷⁶ See Act of July 31, 1789, ch. 5, § 36, 1 Stat. 29, 47–48 (repealed 1790) (establishing that if the court where the forfeiture was prosecuted ascertained that there was a “reasonable cause of seizure, the same court shall cause a proper certificate or entry to be made thereof, and in such case the claimant shall not be entitled to costs, nor shall the person who made the seizure be liable to action, judgment or suit”); *see also* Act of Mar. 2, 1799, ch. 22, § 89, 1 Stat. 627, 696 (enacting similar language); Act of Aug. 4, 1790, ch. 35, § 67, 1 Stat. 145, 176 (repealed 1799) (enacting similar language); *United States v. One Hempen Cable*, 27 F. Cas. 264, 266 (D. Mass. 1831) (No. 15,931a) (issuing a certificate of reasonable cause to immunize the collector from subsequent civil suit); Arcila, *The Framers’ Search Power*, *supra* note 109, at 394–400 (describing reasonable cause justification).

The role of the jury was further reduced when the customs seizure occurred on water as opposed to land because the forfeiture proceeding would then fall under admiralty

tively removed the question of liability from a civil jury.¹⁷⁷ These early federal customs collections statutes are significant because federal customs searches were arguably the most common type of Framing-era search or seizure and therefore likely the conduct the Framers were the most concerned with regulating.¹⁷⁸ Not only were issues with customs collections a source of colonial ire in the lead-up to independence,¹⁷⁹ but import customs also accounted for nearly ninety percent of early federal revenue.¹⁸⁰

In addition, the assumption that the Framers preferred juries to judges in the Fourth Amendment context is complicated by open questions regarding how much discretion juries actually exercised in *ex post* civil enforcement suits. For example, it appears there was no uniformity on whether juries or judges decided crucial elements of a justification, such as the sufficiency of an officer's suspicion in making an arrest.¹⁸¹ More significantly, the jury's role varied considerably in the period following the Amendment's enactment. In federal courts, the jury's ability to decide questions of *law* was the subject of a fierce debate between Federalists and Anti-Federalists,¹⁸² although the Fed-

jurisdiction, where trial was by judge rather than jury. *See* *The Sarah*, 21 U.S. (8 Wheat.) 391, 394 (1823) (noting that “[i]n the trial of all cases of seizure, on land, the Court sits as a Court of common law” and “the trial must be by jury,” but “[i]n cases of seizure made on waters . . . the Court sits as a Court of Admiralty” and “the trial is to be by the Court”); *United States v. The Schooner Betsey & Charlotte*, 8 U.S. (4 Cranch) 443, 452 (1808) (noting admiralty jurisdiction and trial without jury for seizures on water); William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 AM. J. LEGAL HIST. 117, 118, 134 (1993) (describing federal admiralty jurisdiction over revenue laws).

¹⁷⁷ *See* Arcila, *The Framers' Search Power*, *supra* note 109, at 398 (“The jury, at the core of the common law system, had been cast aside when it came to deciding immunity.”).

¹⁷⁸ *See* Davies, *supra* note 82, at 371 (“[The Framers] anticipated that searches under customs warrants would be the primary sort of searches that federal officers might conduct.”).

¹⁷⁹ *See* Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment “Search and Seizure” Doctrine*, 100 J. CRIM. L. & CRIMINOLOGY 933, 949 (2010) (“[T]he general writs for customs searches of houses became an early symbol of Parliament's disregard for colonists' common law rights.”).

¹⁸⁰ *See* Casto, *supra* note 176, at 134 n.92 (“During the first eleven years of the federal government's operation (1789–1801), 87% of its receipts came from customs . . .”). In contrast, federal criminal prosecutions, and therefore presumably federal arrests, were a relative rarity. *See* *History of the Federal Judiciary: Criminal Jurisdiction in the Federal Courts*, FED. JUD. CENTER, http://www.fjc.gov/history/home.nsf/page/jurisdiction_criminal.html (last visited Aug. 16, 2014) (noting only 426 criminal prosecutions between 1789 and 1801, or about 35 per year).

¹⁸¹ *See* Wilgus, *supra* note 88, at 700–01 (noting conflict and describing differing results of American and English cases).

¹⁸² *See generally* John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 566 (1993) (noting a “titanic struggle about the character of American law” between those who “were hostile to lawyers and legal doctrine” and approached it with “common sense notions of right and wrong,” and those who saw human

eralist vision of a strong judge and more limited jury quickly won out.¹⁸³ State practice regarding juries varied considerably, with some states giving juries “final” power to determine questions of law and others strictly limiting juries to deciding questions of fact.¹⁸⁴ Because civil enforcement suits against federal officers were common-law tort claims and could be brought in state court, the officer’s liability might therefore be decided by a judge or jury, depending on state practice.

The third and final proposition in the argument is that a reasonableness standard imposed by the Fourth Amendment would channel search-and-seizure enforcement away from warrants and judges and toward civil juries. However, this proposition is also incorrect.

Under a reasonableness standard, an officer acting without a warrant would theoretically be deterred from abusing her authority because she would face the possibility of significant personal damages if a jury found she acted unreasonably.¹⁸⁵ In contrast, an officer seeking a warrant would need to convince a judge under oath that she had probable cause and particularity, which likewise would prevent her from abusing her authority.

However, given these options, it is unclear how a reasonableness standard would in fact channel enforcement from judges to juries. Given the unpredictability of jury awards and the potential hostility of a state or even federal jury toward a federal official, an officer would presumably only act if she had sufficient probable cause and particularity to get a warrant and its immunizing effect. An officer who lacked probable cause, particularity, or even time to get a warrant *could* act without a warrant and risk civil damages, but the inherent discretion in law enforcement would also allow her to avoid that risk—a much safer course of action.¹⁸⁶ Thus, an officer’s decision

affairs as “beget[ting] unavoidable complexity in legal rules and procedures,” which in turn leads to “legal professionalism”); William E. Nelson, *The Province of the Judiciary*, 37 J. MARSHALL L. REV. 325, 330, 335 (2004) (describing the debate on the jury’s ability to decide questions of law).

¹⁸³ See Nelson, *supra* note 182, at 335 (“[B]y 1804, at the latest, the civil jury had been tamed.”).

¹⁸⁴ See William E. Nelson, *The Lawfinding Power of Colonial American Juries*, 71 OHIO ST. L.J. 1003, 1004, 1007–08, 1023 (2010) (noting broad power of juries in Virginia and New England, especially Massachusetts, and limited power in Pennsylvania and the Carolinas); *cf.* Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 4 (1794) (opinion of Jay, C.J.) (“[O]n questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But . . . you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy.”).

¹⁸⁵ See *supra* note 55 and accompanying text (discussing the deterrent effect of civil liability).

¹⁸⁶ See Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 907 (1962) (noting the “myth” of full enforcement of the law).

whether to seek a warrant or face potential civil jury damages would depend on a number of other factors, such as the amount of damages typically awarded, the typical jury's notion of reasonableness, the ease of getting a warrant from a judge, the cost of not fulfilling her official duty, and the discretion inherent in executing that duty. The point here is simply that a reasonableness standard would not necessarily and automatically channel enforcement of searches and seizures away from warrants and judges and toward civil juries as claimed by supporters of the reasonableness interpretation, and might actually achieve the opposite effect.¹⁸⁷

Thus, the argument that the reasonableness interpretation reflects an original intent to channel regulation of illegal searches and seizures away from distrusted judges and warrants and toward civil juries is based on several flawed historical assumptions.

III

THE INCONSISTENCY OF THE COURT'S REASONABLENESS INTERPRETATION WITH THE FOURTH AMENDMENT'S ORIGINAL UNDERSTANDING

As the previous Part has shown, there are serious flaws with the historical basis of the Court's reasonableness interpretation. The legality of individual searches and seizures did not turn on whether they were reasonable, and the argument that the Amendment was intended to privilege civil juries over warrants and judges is inconsistent with historical evidence. This lack of historical support, therefore, undermines the attractiveness and legitimacy of the reasonableness interpretation.

The Court's modern reasonableness interpretation is, in fact, an amalgamation of several different approaches, which it applies inconsistently. On some occasions, the Court applies a case-by-case approach, under which a search or seizure satisfies the Fourth Amendment if it is reasonable based on the facts of the case or "the totality of the circumstances." In other cases, the Court has taken a categorical approach, permitting a search or seizure as long as the *rule* applied to the particular facts is reasonable. In these cases, the Court has often, but not always, applied a modern balancing test to determine whether

¹⁸⁷ Under the preexisting common-law regime, specific justifications acted as safe harbors, letting an officer know whether she would be liable for her conduct before she acted. For example, an officer knew she was justified arresting a suspect without a warrant for a misdemeanor committed in her presence, but needed a warrant if she was not present when the misdemeanor was committed. *See supra* Part II.A.2 (discussing misdemeanor arrest authority). Either way, she would be justified *ex ante* and therefore would not face liability in a subsequent suit.

a search or seizure is reasonable. Finally, some cases apply a hybrid approach of first looking to the common law to define reasonableness and then applying a balancing test where the common law provides no direction. This Part examines each of these approaches and explains why they are inconsistent with the Amendment's original understanding.

A. Case-by-Case Reasonableness

The first approach—the case-by-case approach to reasonableness—is clearly inconsistent with the original understanding of the Amendment as explained in Part II of this Note. Under this approach, the constitutionality of a search or seizure is determined by whether it is reasonable, based on “the totality of the circumstances”¹⁸⁸ or the “facts and circumstances—the total atmosphere of the case.”¹⁸⁹ This is also the approach Professor Amar advocates when he describes reasonableness as based on “common sense,” which involves “look[ing] beyond probability to the importance of finding what the government is looking for, the intrusiveness of the search, the identity of the search target, the availability of other means of achieving the purpose of the search, and so on.”¹⁹⁰

However, as demonstrated in Parts II.A and II.B, Framing-era searches and seizures did not turn on whether the particular search or seizure was reasonable, undermining the notion that the Amendment was originally understood as imposing a case-by-case reasonableness standard. Moreover, as demonstrated in Part II.C, it is unlikely the Framers intended to impose a case-by-case reasonableness standard in order to channel enforcement away from warrants and judges and toward civil juries. Thus, when the Court applies a case-by-case reasonableness standard, it is significantly departing from the Fourth Amendment's original understanding.

B. Categorical Reasonableness

Besides the case-by-case approach, the Court has also applied a categorical approach to reasonableness. Like the case-by-case approach, the categorical approach is inconsistent with the Amendment's original understanding—although the inconsistency is not as stark.

¹⁸⁸ *United States v. Knights*, 534 U.S. 112, 118 (2001) (quoting *Ohio v. Robinette*, 519 U.S. 33, 39 (1996)).

¹⁸⁹ *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950), *overruled in part by Chimel v. California*, 395 U.S. 752 (1969).

¹⁹⁰ Amar, *supra* note 23, at 801.

Under this approach, a search or seizure is constitutional under the Fourth Amendment as long as the *rule* applied to the particular circumstances is reasonable. Often, but not always, the Court has combined this categorical approach with a balancing test, in which the state's interests in the search or seizure are balanced against the individual's privacy interest affected by application of the rule.¹⁹¹ Indeed, when the Court applies the balancing test, it often stresses the categorical nature of the test.¹⁹²

As with the case-by-case approach, when the Court engages in balancing it is also not acting consistently with the original understanding of the Amendment. As demonstrated in Parts II.A and II.B, the legality of Framing-era searches and seizures was rooted in a body of relatively fixed common-law rules with specific elements. For example, specific common-law rules governed when a misdemeanor arrest was justified: One rule justified arrests made pursuant to a warrant;¹⁹³ a second justified arrests for misdemeanors committed in the officer's presence;¹⁹⁴ and outside these categories, misdemeanor arrests were unjustified.¹⁹⁵

Application of the common-law rules did not involve or require balancing of interests. This should not be surprising, as balancing itself is a modern judicial invention and would have been thoroughly anachronistic to Framing-era judges.¹⁹⁶ Thus, the Court's application of a balancing test in service of a categorical approach is also clearly inconsistent with the Amendment's original understanding.

However, the categorical approach does not necessarily require balancing. The Court can take a categorical approach by asking whether the *rule* itself is reasonable. In other words, this approach applies the reasonableness standard not to the particulars of the search or seizure, but to the rule which governs it.

¹⁹¹ See *Knights*, 534 U.S. at 118–19 (“[T]he reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.” (internal quotation marks omitted)); *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 537 (1967) (setting forth a similar test).

¹⁹² See *Wyoming v. Houghton*, 526 U.S. 295, 305 (1999) (“[T]he balancing of interests must be conducted with an eye to the generality of cases.”); *Michigan v. Summers*, 452 U.S. 692, 705 n.19 (1981) (“[T]he balancing of the competing interests . . . must in large part be done on a categorical basis—not in an ad hoc, case-by-case fashion” (internal quotation marks omitted)).

¹⁹³ See *supra* note 81 (discussing warrant arrest authority).

¹⁹⁴ See *supra* note 82 (discussing in-the-presence misdemeanor arrest authority).

¹⁹⁵ This is the just the corollary of the first two rules.

¹⁹⁶ See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 *YALE L.J.* 943, 948–49 (1987) (noting that balancing tests are a modern development and were first employed by the Court in the late 1930s and early 1940s).

This approach is more difficult to dismiss as inconsistent with the Amendment's original understanding. Although Parts II.A and II.B demonstrate that Framing-era search-and-seizure law did not apply a case-by-case reasonableness standard, it is possible that Congress and Framing-era judges were still looking to the Amendment to determine whether a particular rule or statutory provision was reasonable. For example, Framing-era statutes authorizing warrantless searches of ships on a probable cause standard¹⁹⁷ or common-law rules justifying arrests for misdemeanor offenses committed in an officer's presence¹⁹⁸ might have been understood as reasonable under the terms of the Amendment even though the legality of the individual searches or seizures did not turn on a reasonableness standard.

However, this approach also likely conflicts with the Amendment's original understanding. First, it requires a nontextual reading of the Amendment. The Amendment prohibits "unreasonable searches and seizures," not "unreasonable search-and-seizure rules." While this distinction is subtle, the approaches will yield different results when a rule that is otherwise generally reasonable is nonetheless unreasonable in application. Indeed, the Court has recognized as much.¹⁹⁹ Second, the historical record does not support this approach because Framing-era practice is largely devoid of any mention of reasonableness, whether as a case-by-case or a categorical standard.²⁰⁰ Moreover, if this were the original understanding of the Amendment, one would expect to see many early federal and state cases questioning whether inherited common-law rules were consistent with the Fourth Amendment's notion of reasonableness; but in fact, none exist.²⁰¹ Finally, a categorical reasonableness standard is internally inconsistent with the theory advanced by proponents of the reasonableness interpretation that the Amendment was intended to channel search-and-seizure enforcement away from warrants and judges and

¹⁹⁷ See *supra* note 135 and accompanying text (discussing warrantless customs searches of ships).

¹⁹⁸ See *supra* note 82 and accompanying text (discussing in-the-presence arrest authority).

¹⁹⁹ See *Atwater v. City of Lago Vista*, 532 U.S. 318, 346–47 (2001) ("If we were to derive a rule exclusively to address the uncontested facts of this case, *Atwater* might well prevail. . . . But we have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need").

²⁰⁰ See *supra* Part II.A–B (noting the lack of any reasonableness standard in Framing-era practice).

²⁰¹ Although it is impossible to prove a negative, my research has not produced any such cases within the first several decades after the Amendment's enactment.

toward civil juries,²⁰² since a categorical standard requires that judges, not juries, decide whether a particular rule is reasonable²⁰³ and does not inherently disfavor warrants.²⁰⁴

Even if this approach—applying reasonableness on a categorical basis—were consistent with the original understanding of the Amendment, applying it today would be problematic for several reasons. First, it is troubling from an originalist perspective because it gives little guidance on how the Court should determine whether any particular search or seizure rule is reasonable. To the extent that the “purpose of constitutional guarantees . . . is precisely to prevent the law from reflecting certain changes in original values that the society adopting the Constitution thinks fundamentally undesirable,”²⁰⁵ it is difficult to see how a categorical approach to reasonableness in any way restrains judges.²⁰⁶ Of course, the Court could attempt to fill in the content of reasonableness by means of a judicially developed test, but as discussed above with respect to balancing, such a test itself would not be based on original understanding.²⁰⁷

Second, accepting a categorical approach to reasonableness undermines the Court’s textual and historical rationale for rejecting the warrant preference in favor of the reasonableness interpretation.²⁰⁸ If the warrant preference is recharacterized as a type of default rule—warrants are required unless it is impractical to obtain one—the operative question must be whether the warrant-preference *rule* is itself reasonable. Reliance on the text for the proposition that the Amendment prohibits “unreasonable searches and seizures” rather than “warrantless searches and seizures”²⁰⁹ is a red herring

²⁰² See *supra* Part I.C.2 (discussing this historical theory of the reasonableness interpretation).

²⁰³ It is difficult to see how such an approach would be administrable if juries decided the reasonableness of rules. Indeed, under the Court’s modern approach, this is a question of law. See Scalia, *supra* note 123, at 1182 (noting that what is a “‘reasonable search’ [is] a question of law”).

²⁰⁴ See *supra* notes 166–71 and accompanying text (discussing Framing-era requirements for warrants, which, under this approach, would have been considered reasonable during the Framing era).

²⁰⁵ Scalia, *supra* note 16, at 862.

²⁰⁶ Indeed, one could argue that the categorical approach to reasonableness positively invites judges to substitute their own notions of reasonableness in determining whether any particular rule is reasonable.

²⁰⁷ See *supra* note 196 and accompanying text (discussing the anachronistic nature of modern balancing tests).

²⁰⁸ See *supra* note 34 and accompanying text (discussing the Court’s rationale for rejecting the warrant-preference interpretation).

²⁰⁹ *Cf.* *United States v. Rabinowitz*, 339 U.S. 56, 65 (1950) (“[T]he Constitution does not say that the right of the people to be secure in their persons should not be violated without a search warrant if it is practicable for the officers to procure one. The mandate of the

because the test is not whether the word “reasonable” appears in the rule, but whether the rule itself is reasonable. Likewise, the fact that a warrant-preference default rule may not have existed historically is also irrelevant because the test is whether the Court finds such a rule reasonable today.²¹⁰

Thus, it is far from clear that applying reasonableness on a categorical basis is any more consistent with the original understanding than a case-by-case standard. The Court’s common approach of tying the categorical approach to a modern balancing test is clearly inconsistent with original understandings and judicial methods. A categorical approach that simply asks whether a search or seizure *rule* is reasonable is also likely inconsistent with original understanding or, at the very least, problematic for supporters of the reasonableness interpretation.

C. *Common Law Plus Balancing*

In several recent cases, the Court has articulated a third approach to its reasonableness interpretation that combines balancing with an inquiry into common-law practices.²¹¹ Under this approach, the Court determines whether a particular search or seizure is unreasonable by first asking whether it “was regarded as an unlawful search or seizure under the common law when the Amendment was framed,” i.e., in 1789–1791; if the common law provides no answer, the Court proceeds to the second step, under which it evaluates the search or seizure under its usual balancing test.²¹²

In many respects, this is a novel solution to the problems discussed with the previous methods: By locating reasonableness in Framing-era common law, this approach attempts to avoid the inconsistency of the reasonableness interpretation with the Amendment’s original understanding. However, this approach is also inconsistent

Fourth Amendment is that the people shall be secure against *unreasonable* searches.”), *overruled in part by* *Chimel v. California*, 395 U.S. 752 (1969).

²¹⁰ Arguably, the relevancy of history and original understanding is particularly diminished under a categorical reasonableness approach because of the level of abstraction inherent in the standard. See *Steiker*, *supra* note 16, at 824 (noting that “the Fourth Amendment, more than many other parts of the Constitution, appears to require a fairly high level of abstraction of purpose” and that “formulat[ing] notions of the Framers’ intent at some higher level of abstraction . . . necessarily renders less significant even highly persuasive historical claims about more specific intentions”).

²¹¹ The term “common law plus balancing” is taken from Clancy, *supra* note 20, at 1014–15 (discussing the approach). See also Sklansky, *supra* note 14, at 1744 (describing this approach as “new Fourth Amendment originalism”).

²¹² *Wyoming v. Houghton*, 526 U.S. 295, 299–300 (1999); see also *Arizona v. Gant*, 556 U.S. 332, 351 (2009) (Scalia, J., concurring) (applying the *Houghton* test); *Virginia v. Moore*, 553 U.S. 164, 168, 171 (2008) (same).

with the original understanding. Under the first step, the operative inquiry is not whether a search or seizure is reasonable as the text of the Amendment dictates, but whether it was lawful in 1791. In effect, this redefines reasonableness away from the Court's ordinary reasonableness interpretation and into something like "contrary to Framing-era law," a meaning that is nontextual and raises other issues from an originalist perspective.²¹³

The more significant problem with this approach is in its second step. Where eighteenth-century law provides no relevant rule of decision—as will often happen in a modern context²¹⁴—the Court applies a balancing test.²¹⁵ But as discussed above, a balancing test is anachronistic and would not have been recognized as consistent with the Amendment's original application.²¹⁶ Thus, the common-law-plus-balancing test also fails to reconcile the Court's reasonableness interpretation with the original understanding of the Amendment.

Thus, the Court's three modern approaches to reasonableness are all inconsistent with the Fourth Amendment's original understanding. A case-by-case reasonableness standard is clearly inconsistent, as there is simply no evidence that the Amendment was originally understood as incorporating or imposing such a standard. A categorical approach is also inconsistent with original understanding. In its balancing test form, it is clearly anachronistic. In its nonbalancing form, it is unsupported by historical practice and introduces several conceptual difficulties. Finally, the Court's common-law-plus-balancing approach, while novel, fails for the same reason as the categorical balancing approach.

²¹³ See Sklansky, *supra* note 14, at 1743–44 (critiquing the Court's framing of reasonableness in terms of Framing-era common law); cf. Amar, *supra* note 23, at 818 ("'Reasonableness' is not some set of specific rules, frozen in 1791 or 1868 amber . . .").

²¹⁴ See Donald A. Dripps, *Responding to the Challenges of Contextual Change and Legal Dynamism in Interpreting the Fourth Amendment*, 81 Miss. L.J. 1085, 1131 (2012) ("A search or seizure in 1791 took place in an institutional context so different from ours that it simply is not the same search or seizure it was then."); Sklansky, *supra* note 14, at 1794–814 (criticizing the attempt to understand reasonableness by reference to common-law rules). Justice Alito recently made a similar point in *United States v. Jones*, 132 S. Ct. 945, 958 & n.3 (2012) (Alito, J., concurring) (noting, in the context of deciding whether attaching a GPS device to a car and tracking it constitutes a search, that "it is almost impossible to think of late-18th-century situations that are analogous to what took place in this case," and that to the extent "[t]he Court suggests that something like this might have occurred in 1791, . . . [it] would have required either a gigantic coach, a very tiny constable, or both").

²¹⁵ See *supra* note 212 and accompanying text.

²¹⁶ See *supra* note 196 and accompanying text.

CONCLUSION

This Note has demonstrated that the Court's increasingly preferred interpretation of the Fourth Amendment, the reasonableness interpretation, is inconsistent with the Amendment's original understanding and historical practice. Given the important role history has played in Fourth Amendment interpretation, the lack of historical support for the reasonableness interpretation should give pause to those on the Court and elsewhere who place a high normative value on interpreting the Constitution in accordance with history and its original understanding.

