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## The Local-Control Model of the Fourth Amendment

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## THE LOCAL-CONTROL MODEL OF THE FOURTH AMENDMENT

MICHAEL J. ZYDNEY MANNHEIMER\*

*Fourth Amendment doctrine has been home to two competing models: the Warrant Model and the Reasonableness Model. The Warrant Model, emphasizing the Amendment's Warrant Clause, holds that search and arrest via warrant is the preferred method and the default rule, though allowing for exceptions when obtaining a warrant is impracticable. The Reasonableness Model, which stresses the Amendment's Reasonableness Clause, holds that the Amendment imposes a generalized reasonableness standard on searches and seizures by which the question is not whether dispensing with a warrant is reasonable but whether the search or seizure itself is reasonable. These polar positions have been replicated in the scholarly literature on the history surrounding the adoption of the Fourth Amendment. Some adhere to a reading of the historical record that roughly supports the Warrant Model while others have found that history more strongly supports the Reasonableness Model.*

*This Article interprets the historical record differently than either of the two dominant schools, and introduces a third model of the Fourth Amendment: the Local-Control Model. It situates the Fourth Amendment as the culmination of a decades-long, continent-wide struggle by Americans for local control over search-and-seizure policy as against central authority. And it posits the Fourth Amendment as the result of an effort on the part of the Anti-Federalists, those who demanded a Bill of Rights, to maintain local control over search-and-seizure policy. On this view, the Fourth Amendment has a strong federalism component. It demands neither that federal officers generally use warrants for searching and seizing nor that they act pursuant to a general reasonableness standard. Rather, the Local-Control Model supports the view that federal officers must generally follow state law in*

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*conducting searches and seizures.*

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#### INTRODUCTION

When it comes to the Fourth Amendment,<sup>1</sup> history matters, perhaps now more than ever. The Fourth Amendment decisions of the U.S. Supreme Court in recent years have addressed such modern phenomena as electronic hotel registries, collection of DNA from arrestees, and GPS tracking of suspects. Nevertheless, the Court's opinions in these cases have witnessed such real and imagined framing-era characters as “tithingmen . . . search[ing]

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<sup>1</sup> The Fourth Amendment provides:

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.

U.S. CONST. amend. IV.

public houses of entertainment on [the] Sabbath,”<sup>2</sup> early Americans “open[ing] their mouths for royal inspection,”<sup>3</sup> and, of course, the “very tiny constable.”<sup>4</sup>

If history matters, then we ought to get that history right. There is a plethora of available information regarding our eighteenth-century predecessors’ law, policy, and custom on search and seizure. Nevertheless, there is widespread disagreement over how to interpret those data. Some see the history surrounding the adoption of the Fourth Amendment as pointing to a general requirement that the government be reasonable when it searches and seizes. On this view, reasonableness is determined largely by after-the-fact jury determinations, not a before-the-fact warrant requirement. Others see that history as more strongly supporting a warrant requirement as a mechanism for judges to control the discretion of executive officers.

Neither side is entirely correct. Both types of regulation of government officials’ conduct—a general reasonableness requirement backed by the threat of lawsuit and a requirement that executive discretion be tightly controlled by judicial supervision—appear in colonial America and the early Republic. Yet to say that a system is characterized by a particular type of regulation is far different from saying that such a regulation is either a necessary or a sufficient component of that system. Neither dominant model of Fourth Amendment history has captured the touchstone of the Amendment. That touchstone is neither warrants nor reasonableness, but local control.

This Article contends that the best way to understand the Fourth Amendment, as a historical matter, is as a reservation of local control over federal searches and seizures.<sup>5</sup> While there was a general consensus by 1791 that general warrants were unlawful, search-and-seizure rules were, in other respects, to be controlled by state law. Three episodes during the roughly

<sup>2</sup> *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2459–60 (2015) (Scalia, J., dissenting) (quoting WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 743 (2009) (alteration added)).

<sup>3</sup> *Maryland v. King*, 133 S. Ct. 1958, 1989 (2013) (Scalia, J., dissenting).

<sup>4</sup> *United States v. Jones*, 132 S. Ct. 945, 958 n.3 (2012) (Alito, J., concurring in the judgment).

<sup>5</sup> The word “federal” in this sentence is critical. From 1791 to 1868, the Fourth Amendment regulated only federal searches and seizures. It is only with the adoption in 1868 of the Due Process Clause of the Fourteenth Amendment, U.S. CONST. amend. XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .”), that we can speak of the Fourth Amendment as controlling searches by state officials as well. Given the focus of this Article on the history surrounding the adoption of the Fourth Amendment in 1791, it does not attempt to thoroughly address the critical but separate issue of how the Fourth Amendment should be thought to apply to the States. However, the Article does offer a few brief, preliminary thoughts in that direction. See *infra* Section III.C.

thirty-year period surrounding the adoption of the Fourth Amendment—the writs-of-assistance controversy of the 1760s, the States’ conditional ratifications of a national impost under the Articles of Confederation in the 1780s, and the enactment of two early federal statutes in the 1790s—each evoke the theme of local control over central authority vis-à-vis searches and seizures. This theme of local control dovetails almost perfectly with the motivation of the Anti-Federalists in demanding a Bill of Rights in exchange for their reluctant acquiescence to the Constitution: the reservation of state power regarding the most important spheres of human activity.

Recent scholarship has begun to question the sharp dichotomy in constitutional law between rights and structure, and to rediscover the linkages between them.<sup>6</sup> In isolating a powerful theme of federalism in the Fourth Amendment, this Article is of a piece with that recent scholarship. Neither dominant historical model of the Fourth Amendment adequately accounts for this strong federalism component of the Bill of Rights. Only the Local-Control Model can do so.

Part I examines, and offers a brief critique of, the two dominant models of interpreting the history surrounding the Fourth Amendment: the Reasonableness Model and the Warrant Model. Part II discusses at length three episodes that shed light on the original understanding of the Fourth Amendment. The first, the writs-of-assistance controversy of the 1760s, has been the subject of much commentary. However, few have appreciated this episode for what it was: not a unified colonial revolt against general warrants, but a set of particularized assertions of local control, differing by colony, against Crown authority. The second, the States’ placement of conditions on their ratification of a national impost under the Articles of Confederation, has almost entirely escaped the notice of Fourth Amendment scholars. This episode also involved particularized conditions, varying by State, placed on central search-and-seizure authority. Finally, the enactment of section 33 of the Judiciary Act of 1789 and section nine of the Militia Act of 1792, which explicitly calibrated federal search-and-seizure authority to that of the respective States, suggests an understanding of the Fourth Amendment heavily infused with federalism principles. Part III posits local control of searches and seizures as the touchstone for each of these three episodes in the early American experience. It attempts to demonstrate the superiority of the Local-Control Model as a historical matter by tying these three episodes to the federalism-based motivations of the Anti-Federalists in demanding constraints on federal search-and-seizure authority.

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<sup>6</sup> See generally Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672 (2012); Heather K. Gerken, *Windsor’s Mad Genius: The Interlocking Gears of Rights and Structure*, 95 B.U. L. REV. 587, 587–88 (2015).

## I. THE TWO DOMINANT MODELS OF THE FOURTH AMENDMENT

The central puzzle of the Fourth Amendment has always been what the relationship is between its two clauses. The first, the Reasonableness Clause, demands that all governmental searches and seizures of “persons, houses, papers, and effects” be reasonable.<sup>7</sup> The second, the Warrant Clause, spells out three requirements before a warrant may be issued: probable cause, oath or affirmation, and particularity.<sup>8</sup> But what is the relationship between these two Clauses? Some have asserted that the Amendment means that a warrant must be used to render a search or seizure reasonable, at least presumptively. We can call this the “Warrant Model.” Others have interpreted it to mean that reasonableness of searches and seizures is generally to be measured independently of whether a warrant was used, the Warrant Clause telling us only what requirements must be met if a warrant is used. We can call this the “Reasonableness Model.” The U.S. Supreme Court has never clearly settled upon either view. Instead, it has paid lip service to the Warrant Model while vacillating back and forth between the two. Moreover, adherents of each view can find some support in the historical record surrounding adoption of the Fourth Amendment.

## A. THE WARRANT AND REASONABLENESS MODELS

In Craig Bradley’s helpful taxonomy, “there are two, and only two, ways of looking at the [F]ourth [A]mendment” that will allow for coherence of doctrine and consistency of application.<sup>9</sup> What Bradley calls “the ‘no lines’ and ‘bright line’ approaches”<sup>10</sup> roughly equate to the Reasonableness Model and the Warrant Model. Pursuant to the former, “[a] search and seizure must be reasonable, considering all relevant factors on a case-by-case basis.”<sup>11</sup> Pursuant to the latter, “a warrant is always required for every search and seizure when it is practicable to obtain one.”<sup>12</sup>

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<sup>7</sup> U.S. CONST. amend. IV.

<sup>8</sup> *See id.*

<sup>9</sup> Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1471 (1985).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* These factors would include the level of suspicion by officials, whether they obtained a warrant, any exigency, the nature and level of intrusion, and the gravity of the offense being investigated. *See id.*

<sup>12</sup> *Id.* (emphasis omitted). This is not to say that these are the only two possible models for the Fourth Amendment. For example, Professor Erik Luna has posited an “individual sovereignty” model and an “antidiscrimination” model, favoring the former. *See* Erik G. Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 789 (1999). Professor Scott Sundby has advanced a model based on “reciprocal government-citizen trust.” *See* Scott E. Sundby, *“Everyman”’s Fourth Amendment: Privacy or Mutual Trust Between Government and*

Both models have found expression in the Supreme Court's Fourth Amendment jurisprudence. Each has, on occasion, held dominance. Indeed, to use Justice Scalia's evocative language, the Court has "lurched back and forth between imposing a categorical warrant requirement and looking to reasonableness alone."<sup>13</sup> For example, in *United States v. Lefkowitz*, in 1932, the Court articulated the warrant preference rule: "[T]he informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests."<sup>14</sup> Yet, a mere fifteen years later, in *Harris v. United States*, the Court embraced the Reasonableness Model: "The test of reasonableness cannot be stated in rigid and absolute terms . . . The Fourth Amendment has never been held to require that every valid search and seizure be effected under the authority of a search warrant."<sup>15</sup> Less than a year later, the Court returned to a reading of the Fourth Amendment more consistent with the Warrant Model. It declared that "[w]hen the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent," unless "exceptional circumstances" exist.<sup>16</sup> But barely two years after that, in *United States v. Rabinowitz*, the Court reversed course once more:

[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 Fourth Amendment is that the people shall be secure against *unreasonable* searches.<sup>17</sup>

*Rabinowitz* provided something of a showcase for the battle between the two views. For the majority, espousing the Reasonableness Model, Justice Minton set forth the proposition that the Fourth Amendment requires reasonableness, not warrants: "The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was

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*Citizen?*, 94 COLUM. L. REV. 1751, 1754 (1994). But only the Warrant and Reasonableness Models attempt to solve the textual puzzle at the heart of the Fourth Amendment.

<sup>13</sup> *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring in the judgment).

<sup>14</sup> 285 U.S. 452, 464 (1932).

<sup>15</sup> 331 U.S. 145, 150 (1947).

<sup>16</sup> *Johnson v. United States*, 333 U.S. 10, 14 (1948). See also *McDonald v. United States*, 335 U.S. 451, 454 (1948) ("A search without a warrant demands exceptional circumstances . . ."); *Trupiano v. United States*, 334 U.S. 699, 705 (1948) ("To provide the necessary security against unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial processes wherever possible.").

<sup>17</sup> 339 U.S. 56, 65 (1950).

reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case.”<sup>18</sup> Justice Frankfurter, writing for himself and Justice Jackson in dissent, just as clearly set forth a succinct statement of the Warrant Model:

When the Fourth Amendment outlawed “unreasonable searches” and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is “unreasonable” unless a warrant authorizes it, barring only exceptions justified by absolute necessity.<sup>19</sup>

While the Warrant Model became ascendant in the late 1960s and early 1970s,<sup>20</sup> the debate continues sixty-six years after *Rabinowitz*. Different members of the same Court express the Fourth Amendment’s central requirement in terms of either the Reasonableness Model or the Warrant Model, depending on his or her preferences. Indeed, one can often discern from a Supreme Court opinion whether a Fourth Amendment claimant will win or lose based on whether, at the outset of its Fourth Amendment analysis, the Court describes the Amendment’s requirements in terms of the Reasonableness Model or the Warrant Model. To take just a recent example, here is how the majority opinion in *City of Los Angeles v. Patel*, written by Justice Sotomayor, explained the provision’s requirements: “Based on [this] constitutional text, the Court has repeatedly held that ‘searches conducted outside the judicial process, without prior approval by a judge or a magistrate judge, are *per se* unreasonable subject only to a few specifically established and well-delineated exceptions.’”<sup>21</sup> Predictably, the Court found a Fourth Amendment violation.<sup>22</sup> And here is how Justice Scalia in dissent described the same requirements:

[I]n an effort to guide courts in applying the Search-and-Seizure Clause’s indeterminate reasonableness standard . . . we have used the Warrant Clause as a guidepost for assessing the reasonableness of a search, and have erected a framework of presumptions applicable to broad categories of searches . . . . Our case law has repeatedly recognized, however, that these are mere presumptions, and the only constitutional *requirement* is that a search be reasonable.<sup>23</sup>

The result is an uneasy truce. The Warrant Model has won out but only

<sup>18</sup> *Id.* at 66.

<sup>19</sup> *Id.* at 70 (Frankfurter, J., dissenting).

<sup>20</sup> See Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 204 (1993) (“The warrant preference rule grew in stature during the latter half of the 1960’s and the early 1970’s.”).

<sup>21</sup> 135 S. Ct. 2443, 2452 (2015) (quoting *Arizona v. Gant*, 556 U.S. 332, 338 (2009)) (alterations omitted).

<sup>22</sup> See *id.* at 2456.

<sup>23</sup> *Id.* at 2458 (Scalia, J., dissenting).

“rhetorically,”<sup>24</sup> and the warrant requirement is shot through with so many different amorphous exceptions—more than twenty, according to Bradley writing thirty years ago<sup>25</sup>—that it is the Reasonableness Model that is truly ascendant.<sup>26</sup> No wonder that Fourth Amendment jurisprudence has been the subject of pejoratives by so many who have written about it.<sup>27</sup>

## B. HISTORICAL SUPPORT FOR THE WARRANT AND REASONABLENESS MODELS

The Fourth Amendment cannot “be read as [it] might be read by a man who knows English but who has no knowledge of the history that gave rise to the words.”<sup>28</sup> Some have looked to this history for a way out of the wilderness. All agree that the Warrant Clause clearly forbids general warrants, and history supports the notion that, by 1791, general warrants were almost uniformly seen as unlawful.<sup>29</sup> Beyond that, unfortunately, the historical evidence regarding what else the Fourth Amendment requires is ambiguous. Perhaps unsurprisingly, each camp can claim that the evidence points to its preferred Fourth Amendment model.

### *1. History and the Reasonableness Model*

The idea that history supports a model of the Fourth Amendment that downplays warrants and plays up reasonableness has been most completely and robustly set forth by Professor Akhil Amar. In his seminal piece, *Fourth*

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<sup>24</sup> *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring in the judgment).

<sup>25</sup> Bradley, *supra* note 9, at 1473.

<sup>26</sup> See Maclin, *supra* note 20, at 205 (“[T]he Court . . . formulates Fourth Amendment rules around an ad hoc test, and provides only occasional lip service to the warrant preference rule.”).

<sup>27</sup> See, e.g., Ronald J. Allen & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 ST. JOHN’S L. REV. 1149, 1149 (1998) (“a mess”); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757 (1994) (“an embarrassment”); Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 475 (1991) (“mired in confusion and contradiction”); Bradley, *supra* note 9, at 1468 (a “tarbaby”); David E. Steinberg, *The Uses and Misuses of Fourth Amendment History*, 10 U. PA. J. CONST. L. 581, 598 (2008) (“arbitrary, inconsistent, and ultimately incoherent”); Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 49 (1974) (“unstable and unconvincing”). See also Luna, *supra* note 12, at 787–88 (“[E]ach doctrine is more duct tape on the Amendment’s frame and a step closer to the junkyard.”).

<sup>28</sup> *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

<sup>29</sup> See CUDDIHY, *supra* note 2, at 637–58.

*Amendment First Principles*,<sup>30</sup> and in follow-up pieces,<sup>31</sup> he argued not only that warrants were not generally required for searches and seizures at the time of the adoption of the Fourth Amendment, but also that warrants were actually disfavored, because a warrant immunized the government official from a suit for trespass.

Amar first staked out the textual high ground: “The words of the Fourth Amendment really do mean what they say. They do not require warrants, even presumptively, for searches and seizures.”<sup>32</sup> After all, the negative phrasing of the Warrant Clause (“no warrant[] shall issue”) itself suggests that the Amendment should be read as disfavoring, not favoring, warrants.<sup>33</sup> He also pointed out that a number of different types of warrantless searches and seizures were permissible in 1791: arrests,<sup>34</sup> searches incident thereto,<sup>35</sup> and searches aboard ships.<sup>36</sup> He further asserted that searches performed without warrants could be justified ex post if contraband or stolen items were found.<sup>37</sup>

Amar argued that the language of the Fourth Amendment disfavors warrants for good reason: warrants were issued in ex parte proceedings by a judge “and had the purpose and effect of precluding any common law trespass suit the aggrieved target might try to bring before a local jury.”<sup>38</sup>

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<sup>30</sup> Amar, *supra* note 27.

<sup>31</sup> See generally AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997); see also Akhil Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53, 55–60 (1996) [hereinafter Amar, *Writs of Assistance*]; Akhil Amar, *Terry and Fourth Amendment First Principles*, 72 ST. JOHN’S L. REV. 1097, 1106–11 (1998).

<sup>32</sup> Amar, *supra* note 27, at 761.

<sup>33</sup> See *id.* at 774; see also TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION: SEARCH, SEIZURE, AND SURVEILLANCE AND FAIR TRIAL AND FREE PRESS* 43 (1969) (asserting that the Fourth Amendment was designed “to prohibit the oppressive use of warrants” and leave warrantless searches and seizures unregulated).

<sup>34</sup> See Amar, *supra* note 27, at 764.

<sup>35</sup> See *id.* at 764–66. Search-incident-to-arrest authority surely existed in the eighteenth century but it arguably was not as extensive as is widely thought. See Michael J.Z. Mannheimer, *The Contingent Fourth Amendment*, 64 EMORY L.J. 1229, 1252–53 (2015).

<sup>36</sup> See Amar, *supra* note 27, at 766–67. Amar relies upon the Collection Act of 1789 for the proposition that warrantless searches of ship comported with the Fourth Amendment. *Id.* However, reliance upon an Act of Congress, even one passed by the First Congress, to inform the meaning of the Fourth Amendment is particularly hazardous. See *infra* notes 193–241 and accompanying text.

<sup>37</sup> See Amar, *supra* note 27, at 767. There is a good deal of dispute over this proposition. Compare Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 647–48 (1999) (taking issue with Amar’s account), with Fabio Arcila, Jr., *The Death of Suspicion*, 51 WM. & MARY L. REV. 1275, 1316–24 (2010) (supporting Amar’s account).

<sup>38</sup> Amar, *supra* note 27, at 772; accord Arcila, Jr., *supra* note 37, at 1284 (“[T]he Framers

Regulation of federal searches and seizures, he argued, would come about as a result of after-the-fact remedial action by local juries in tort suits.<sup>39</sup> As such, warrants were a bad thing, not a good thing, given that they immunized officers from suit even where a search or seizure turned out to be flagrantly unreasonable.<sup>40</sup> Amar concluded “that the ultimate touchstone of the Fourth Amendment is not warrants but reasonableness.”<sup>41</sup>

As attractive as Amar’s account seems at first blush, it is flawed when one digs deeper. As will be seen,<sup>42</sup> during the writs-of-assistance controversy in colonial North America in the 1760s, specific warrants were generally held up by the colonists as the *sine qua non* of a lawful search. If Amar’s account were correct, James Otis, the attorney for the Boston merchants who first fought the writs of assistance in 1760, should have argued that British customs agents were entitled to no warrants at all. Instead, he argued that they were entitled to specific warrants.<sup>43</sup> Likewise, colonial courts should not have offered to issue writs of assistance as specific warrants, as several did.<sup>44</sup> Rather, they should have refused to issue writs at all.

Even putting this to one side, Amar’s historical account is implausible. The keystone of his claim that warrants were disfavored is that the bulk of search-and-seizure policy was to be determined *ex post* by juries on a case-by-case basis. But intricate sets of rules—common-law and statutory—regarding when warrants were and were not required were already in place at the time of the adoption of the Fourth Amendment.<sup>45</sup> These rules allowed arrests and searches without warrants in some circumstances and required warrants in others.<sup>46</sup> True, where there was no warrant to immunize the person conducting the search or seizure, the jury determined whether the search or seizure was reasonable. But to say that the common law posited the jury as the principal architect of search-and-seizure policy captures only a piece of the picture, and minimizes the extent to which the common law kept a good many cases from juries by providing for search and seizure via warrant.

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sought to limit access to warrants because they immunized officers from suits challenging the propriety of their searches.”).

<sup>39</sup> See Amar, *supra* note 27, at 774.

<sup>40</sup> See *id.* (“[A] lawful warrant would provide . . . an absolute defense in any subsequent trespass suit.”).

<sup>41</sup> *Id.* at 771.

<sup>42</sup> See *infra* Section II.A.

<sup>43</sup> See *infra* text accompanying notes 92–95.

<sup>44</sup> See *infra* text accompanying notes 112, 114–115.

<sup>45</sup> See Mannheimer, *supra* note 35, at 1246–56, 1261–62.

<sup>46</sup> *Id.*

Moreover, the founding generation understood as well as we do that tort suits are a blunt instrument of regulation and that after-the-fact remedies could offer only imperfect redress.<sup>47</sup> Indeed, this very argument was made amidst the writs-of-assistance controversy, likely by Otis himself, in a column published in the *Boston Gazette* on January 4, 1762.<sup>48</sup> Otis asked what “reparation” a petty officer would make “after he has put a family . . . to the utmost confusion and terror . . . [without] just grounds of suspicion.”<sup>49</sup> He continued,

is it enough to say, that damages may be recover'd against him in the law? I hope indeed this will always be the case; — but are we *perpetually* to be expos'd to outrages of this kind, [and] to be told for our *only* consolation, that we must be *perpetually* seeking to the courts of law for redress? Is not this vexation *itself*?<sup>50</sup>

The risk of under-deterrence is amplified when one considers how unlikely it was that the victim of a purportedly unlawful search would bring a tort action. Amar can point to only a handful of reported cases in British North America in which such an action was brought.<sup>51</sup> The showcase litigation for his theory, instead, is the *Wilkesite* set of cases, a series of litigations brought in Britain against Crown officials.<sup>52</sup> The plaintiffs in those cases, however, were a prominent Member of Parliament and his close associates. Much as those cases might have set a precedent and deterred future Crown officials from violating the rights of all British subjects,<sup>53</sup> it is unlikely that search-and-seizure law can be fine-tuned based solely on tort suits brought by the well-placed few with the resources and wherewithal to bring such actions.

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<sup>47</sup> See Davies, *supra* note 37, at 589 (“Like modern judges, the Framers understood that no post-search remedy could adequately restore the breached security of the house.”).

<sup>48</sup> See JOSIAH QUINCY, JUNIOR, REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPREME COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY BETWEEN 1761 AND 1772 488–94 (1865) (reprinting the column and speculating that Otis had written it); see also Davies, *supra* note 37, at 561 n.20 (surmising that Otis wrote the column).

<sup>49</sup> QUINCY, *supra* note 48, at 490.

<sup>50</sup> *Id.* Otis also pointed out that some intangible harms, such as poor treatment by a petty executive officer during a search, were non-compensable. See *id.* (“[M]ay we not be insolently treated by our *petty tyrants* in *some* ways, for which the law prescribes no redress?”).

<sup>51</sup> See Amar, *supra* note 27, at 786 n.105. If Amar were correct, “there should be thousands of such cases, and evidence of them should be easy to find. The only evidence so far produced is [a] ‘smattering of nineteenth-century cases,’ . . . not the avalanche of cases that a flourishing system would generate.” Allen & Rosenberg, *supra* note 27, at 1176–77.

<sup>52</sup> See Amar, *supra* note 27, at 772, 775–76, 797–98.

<sup>53</sup> See *id.* at 797 (observing that the *Wilkes* plaintiffs “had recovered a King’s ransom from civil juries to teach arrogant officialdom a lesson and to deter future abuse”).

## 2. History and the Warrant Model

Some of those who advocate for the Warrant Model agree that history offers a guide. But they tend to pull the camera back on the specific practices of the framers in order to view the general zeitgeist during the framing period vis-à-vis search-and-seizure policy.<sup>54</sup> As Justice Frankfurter remarked in his famed *Rabinowitz* dissent, the Fourth Amendment “was the answer of the Revolutionary statesmen to the evils of searches without warrants and searches with warrants unrestricted in scope. Both were deemed ‘unreasonable.’”<sup>55</sup> The colonists recoiled at the use of general warrants.<sup>56</sup> But it would make little sense to think that Americans during the framing period reacted so violently to general warrants yet calmly accepted searches and seizures performed with no warrant at all. The chief vice of both general warrants and warrantless searches and seizures is that they afforded unlimited discretion to low-level executive officials: constables and customs collectors. Both general warrants and unwarranted searches and seizures “place[d] the liberty of every man in the hands of every petty officer.”<sup>57</sup> Thus, the argument goes, “[t]he Fourth Amendment was . . . adopted for the purpose of checking discretionary police authority.”<sup>58</sup> The idea was to “place[] the magistrate as a buffer between the police and the citizenry.”<sup>59</sup> Thus, to

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<sup>54</sup> See Maclin, *supra* note 20, at 213 (exhorting the Court not to “be preoccupied with the permissible law enforcement practices of the eighteenth century” but rather to “focus on the ‘underlying vision’ of the amendment” (quoting LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 537 (2d ed. 1988) (emphasis omitted)); Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 958 (1997) (“History is relevant not because it offers irrefutable answers to current constitutional questions, but because it provides guidance on the broad values that underlie the Constitution’s text.”).

<sup>55</sup> *United States v. Rabinowitz*, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting).

<sup>56</sup> Hon. M. Blane Michael, *Reading the Fourth Amendment: Guidance from the Mischief that Gave It Birth*, 85 N.Y.U. L. REV. 905, 921 (2010).

<sup>57</sup> *Olmstead v. United States*, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting) (quoting Otis’s argument against Writs of Assistance).

<sup>58</sup> Michael, *supra* note 56, at 921–22; see also Maclin, *supra* note 20, at 229 (“The framers declared a broad principle about government power in guaranteeing freedom from unreasonable search and seizure. Under that broad principle, government authority and discretion would not go unchecked.”).

<sup>59</sup> Maclin, *supra* note 20, at 213–14 (quoting Jacob W. Landynski, *In Search of Justice Black’s Fourth Amendment*, 45 *FORDHAM L. REV.* 453, 462 (1976)). In a variation on this theme, Professor Thomas Davies has contended that the Reasonableness Clause referred only to the inherent illegality of searches pursuant to general warrants, see Davies, *supra* note 37, at 551, but that warrantless searches and arrests were understood as being regulated by the Due Process Clause of the Fifth Amendment, see Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of “Due Process of Law,”* 77 *MISS. L.J.* 1, 7–8 (2007). In another variation, Professor David Steinberg has asserted that the Fourth Amendment was intended to

Warrant Clause advocates, the Fourth Amendment is largely about the checks and balances that go with separation of powers: controlling executive discretion through judicial superintendence.

But while a preference for judicial oversight of petty executive authority can be gleaned from the colonial opposition to writs of assistance and general search warrants, such a preference cannot be stated as a general rule applicable to all searches and seizures. First, warrantless arrests were common during the framing period. As long as a felony had in fact been committed, and there was reasonable grounds to believe the arrestee had committed it, warrantless arrest was perfectly acceptable.<sup>60</sup> Indeed, even the felony-in-fact requirement was breaking down during the late eighteenth century.<sup>61</sup> Warrantless arrests for felonies could also be made in most jurisdictions based on “[t]he common Fame of the Country,” that is, based on general reputation.<sup>62</sup> Moreover, in most jurisdictions warrantless arrest of a person who was actually guilty of a felony was always justified, even if based upon no suspicion at all.<sup>63</sup> Warrantless arrests could also be made in some jurisdictions for such lesser offenses as vagrancy,<sup>64</sup> “disturbing the Minister in Time of Divine Service,”<sup>65</sup> “profane[] swear[ing],”<sup>66</sup> “begging,”<sup>67</sup> prostitution,<sup>68</sup> fortune-telling and practicing other “crafty science,”<sup>69</sup> “‘hawking’ and ‘peddling,’”<sup>70</sup> and violations of the Sabbath.<sup>71</sup> None of these crime categories requires the kind of swift action that would make obtaining

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require warrants, but only with respect to searches of houses. See David E. Steinberg, *The Original Understanding of Unreasonable Searches and Seizures*, 56 FLA. L. REV. 1051, 1053 (2004) (“[T]he Fourth Amendment was intended to proscribe only a single, discrete activity—physical searches of houses pursuant to a general warrant, or no warrant at all.”).

<sup>60</sup> See Davies, *supra* note 37, at 633–35.

<sup>61</sup> See Mannheimer, *supra* note 35, at 1238–40, 1248–49.

<sup>62</sup> See *id.* at 1251. However, if a subsequent tort action were brought for false arrest, the defendant was required to introduce “evidence . . . that such fame had some probable ground.” See *id.* at 1251 n.100 (quoting JAMES PARKER, CONDUCTOR GENERALIS: OR, THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE, HIGH-SHERIFFS, UNDER-SHERIFFS, CORONERS, CONSTABLES, GAOLERS, JURY-MEN, AND OVERSEERS OF THE POOR 26 (1764)).

<sup>63</sup> See Mannheimer, *supra* note 35, at 1255.

<sup>64</sup> See *id.* at 1251–52.

<sup>65</sup> 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, 305, 306 n.205 (2002).

<sup>66</sup> *Id.* at 332 n.284.

<sup>67</sup> *Id.*

<sup>68</sup> See *id.* at 343 n.322.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 353.

<sup>71</sup> See *id.* at 350.

a warrant impracticable, at least not as a general matter. The law was unclear even as to whether doors could be broken to make a warrantless arrest.<sup>72</sup> Based on this evidence, adherents of the Warrant Model have a tough row to hoe in claiming that the Fourth Amendment was understood in 1791 as generally requiring warrants for seizures.

Warrant Model proponents are on somewhat firmer footing when it comes to searches, but even here, they falter. Even assuming that warrants were consistently thought during the framing period to be required for searches of homes, there was no universal rule beyond that. For example, customs statutes enacted by Maryland, North Carolina, and Virginia during the 1780s required that officials obtain a warrant to enter into “warehouses” and “storehouses” as well as dwellings.<sup>73</sup> But customs statutes in Massachusetts and Pennsylvania during the same period permitted warrantless searches of such premises, requiring warrants only for searches of houses.<sup>74</sup> Fans of the Warrant Model cannot explain why, within a span of ten years, warrants for searches of non-premises dwellings went from being an unnecessary encumbrance on customs officials to being a constitutional necessity.

More broadly, the views of those who advocate a Warrant Model of the Fourth Amendment are in very serious tension with the fact that the Amendment was directed to the federal legislative branch, not the executive or the judicial. When James Madison initially proposed the Bill of Rights in the House of Representatives, he contemplated that its provisions would be interspersed, each tacked onto the provision of the body of the Constitution it was meant to alter, rather than added as a separate set of provisions at the end.<sup>75</sup> The Fourth Amendment was not intended to be added to Article II, which one might expect if it were primarily a check on the executive. Nor was it destined for Article III, which one would imagine it would be if intended as a direction to judges about when to issue warrants. Rather, it was originally contemplated that the Fourth Amendment would find a home in Article I, § 9,<sup>76</sup> along with the other prohibitions on the legislative branch.<sup>77</sup>

That the Fourth Amendment was directed to the national lawmaking body tells us something very significant. For the Amendment is not a

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<sup>72</sup> See Mannheim, *supra* note 35, at 1242–44.

<sup>73</sup> See *id.* at 1262.

<sup>74</sup> See *id.*

<sup>75</sup> See Edward Hartnett, *A “Uniform and Entire” Constitution; Or, What if Madison Had Won?*, 15 CONST. COMMENT. 251, 252–53 (1998).

<sup>76</sup> See, e.g., Hartnett, *supra* note 75, at 258–59; see also THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 223 (Neil H. Cogan ed., 1997).

<sup>77</sup> See U.S. CONST. art. I, § 9.

direction to judges about when to issue warrants or to executive officials about how to search and seize. It is a constraint on Congress's power to make law regarding searches, seizures, and warrants. That power lay with the States. The Fourth Amendment, it turns out, is more about federalism than separation of powers.

## II. LOCAL CONTROL OF SEARCH-AND-SEIZURE LAW: FROM EMPIRE TO CONFEDERATION TO REPUBLIC

History does not neatly dovetail with either the Warrant or the Reasonableness Models. That is to say, history cannot tell us when warrants are required by the Fourth Amendment. Are they required for every search or seizure, except where impracticable? Or are they required only when a search would be unreasonable without one? History cannot provide an answer to this question because it is the wrong question. Both Warrant Model and Reasonableness Model enthusiasts have assumed that the Fourth Amendment provides a single, uniform rule as to when warrants are required. However, history provides a third model of the Fourth Amendment that has been overlooked. Members of the framing generation did not demonstrate an overriding preference for warrants, but neither did they wish to subject federal searches and seizures to a general requirement of reasonableness. Rather, what they contemplated was local control over federal searches and seizures.

The thirty-year period from 1761 to 1791 saw different expressions of the idea that search-and-seizure authority should fall under local, not central, control. This occurred under three different types of central government: imperial, confederal, and federal. First, during the writs-of-assistance controversy after 1761, local judges throughout the continent refused to issue such writs, in defiance of orders from the Crown, and one colonial legislature unsuccessfully tried to statutorily bar the writs.<sup>78</sup> Then, in the brief Articles of Confederation period, much of the state legislation ratifying the 1783 confederal impost explicitly held federal officers to differing search-and-seizure restrictions. Finally, two pieces of early federal legislation explicitly held federal officers to the standards of the States in which they operated, demonstrating that such a patchwork approach was unremarkable in the early Republic and suggesting that adherence to state law was itself considered the

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<sup>78</sup> It appears that the quest for local control over search-and-seizure policy began in some colonies much earlier. See, e.g., CUDDIHY, *supra* note 2, at 194 (“Between 1620 and 1700, New England legislators withheld the power to search or seize for many applications for which Parliament permitted it . . .”). I begin with the writs-of-assistance controversy of the 1760s because the episode was “[t]he driving force behind the adoption of the [Fourth] Amendment.” *United States v. Verdugo-Urquidez*, 494 U.S. 259, 266 (1990).

constitutional floor set by the Bill of Rights.

A. LOCAL CONTROL UNDER THE EMPIRE: THE WRITS-OF-ASSISTANCE CONTROVERSY

It is almost uniformly thought that the writs-of-assistance controversy of the 1760s was the single most important episode in colonial history to shed light on the meaning of the Fourth Amendment.<sup>79</sup> A close examination of this episode shows that the touchstone of the colonists' complaints about the writs was the loss of local control over search-and-seizure policy: that despite their unquestionable legality in England, the writs were illegal in the colonies. Moreover, not every colony agreed that the writs were unlawful, and they were actually issued in Massachusetts, New Hampshire, New York, and South Carolina.

Writs of assistance were akin to general search warrants.<sup>80</sup> However, they were especially pernicious in at least three respects. First, they could be obtained by customs officials as a matter of course, without any allegation of illegal activity.<sup>81</sup> Second, they were issued "without judicial superintendence and without the possibility of refusal."<sup>82</sup> Finally, they did not expire upon seizure and return of stolen or untaxed goods but, instead, were operative until six months after the death of the monarch under which they were issued.<sup>83</sup>

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<sup>79</sup> See, e.g., Thomas Y. Davies, *Can You Handle the Truth?: The Framers Preserved Common-Law Criminal Arrest and Search Rules in "Due Process of Law"—"Fourth Amendment Reasonableness" is Only a Modern, Destructive, Judicial Myth*, 43 TEX. TECH L. REV. 51, 86 (2010) (observing that "[t]he controversy over the use of general writs of assistance for revenue searches of houses was the far more important catalyst" for the Fourth Amendment, as compared to the *Wilkesite* cases). *But see* Amar, *supra* note 27, at 772 (asserting that the series of English *Wilkesite* cases of the 1760s "and not the 1761 Boston writs of assistance controversy . . . was the paradigm search and seizure case for Americans"). However, Amar seems later to have acknowledged, at least in part, the significance of the writs-of-assistance controversy in interpreting the Fourth Amendment. See Amar, *Writs of Assistance*, *supra* note 31, at 76–77 (acknowledging that the "later writs-of-assistance controversies" outside of Massachusetts after 1767 "were . . . more significant at the time than the 1761 Boston cases"). For a succinct description of the *Wilkesite* cases and their impact in the colonies, see Davies, *supra* note 37, at 562–65.

<sup>80</sup> See CUDDIHY, *supra* note 2, at 378 (observing that "[t]he customs service in Massachusetts" had used such "writs as general warrants"); O.M. Dickerson, *Writs of Assistance as a Cause of the Revolution*, in *THE ERA OF THE AMERICAN REVOLUTION* 40, 40 (Richard B. Morris ed., 1939) ("The writs were general in form . . .").

<sup>81</sup> See CUDDIHY, *supra* note 2, at 380.

<sup>82</sup> *Id.*

<sup>83</sup> See *id.* at 380–81; Dickerson, *supra* note 80, at 40; NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 54 (1937) ("The more dangerous element of the writ of assistance . . . was that it was not

Such writs were used in Massachusetts beginning in 1755 by customs officials searching for untaxed goods.<sup>84</sup> However, a controversy arose with the death of King George II in late 1760 and the consequent expiration of all extant writs of assistance in the spring of 1761.<sup>85</sup> When new writs were requested in Massachusetts by English authorities, a group of Boston merchants resisted and hired prominent Boston attorney James Otis to represent them.<sup>86</sup> In the proceeding before the Massachusetts Superior Court that became known as *Paxton's Case*, Otis provided the first full account of the perniciousness of general warrants and offered a persuasive defense of specific warrants as an alternative.<sup>87</sup> He argued: “For Felonies an officer may break, upon Proccess [sic], and oath. — i.e., by a Special Warrant to search such a House, sworn to be suspected, and good Grounds of suspicion appearing.”<sup>88</sup>

*Paxton's Case* is best viewed as the culmination of a century-long push in Massachusetts toward local control of search-and-seizure policy. As Professor William Cuddihy pointed out, Otis's legal arguments in favor of specific warrants were severely flawed. Neither statutory nor English common law demanded that warrants be specific.<sup>89</sup> Rather, general warrants and writs of assistance were the norm in Britain, not an aberration.<sup>90</sup> Moreover, it was unmistakably clear that English law applied to Massachusetts in that respect.<sup>91</sup> Otis's mistake—or, perhaps, his gambit—was to conflate established English law with evolving Massachusetts law. The colony had enacted local legislation that, over the course of the prior

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returnable at all after execution, but was good as a continuous license and authority during the whole lifetime of the reigning sovereign.”); QUINCY, *supra* note 48, at 397 n.5 (“Writs of assistance continue in force until the demise of the Crown, and for six month afterwards.”); *see also* CUDDIHY, *supra* note 2, at 393 (observing that “regular search warrants were of limited duration” under English law).

<sup>84</sup> See CUDDIHY, *supra* note 2, at 378–79; Dickerson, *supra* note 80, at 40.

<sup>85</sup> See CUDDIHY, *supra* note 2, at 380–81; QUINCY, *supra* note 48, at 414 n.2; Dickerson, *supra* note 80, at 40.

<sup>86</sup> See CUDDIHY, *supra* note 2, at 381; Thomas K. Clancy, *The Framers' Intent: John Adams, his Era, and the Fourth Amendment*, 86 IND. L.J. 979, 992 (2011).

<sup>87</sup> See CUDDIHY, *supra* note 2, at 382 (observing that Otis's “proclamation that only specific writs were legal was the first recorded declaration of the central idea to the specific warrant clause”); Clancy, *supra* note 86, at 992 (“[N]o authority preceding Otis had articulated so completely the framework for proper search and seizure practices that was ultimately embodied in the Fourth Amendment's Warrant Clause.”).

<sup>88</sup> QUINCY, *supra* note 48, at 471.

<sup>89</sup> See CUDDIHY, *supra* note 2, at 386–94.

<sup>90</sup> See *id.* at 392 (observing that “writs of assistance typified [British] law”).

<sup>91</sup> See *id.* at 388–89.

century, had become increasingly hostile toward general warrants.<sup>92</sup> Otis's argument elided the growing gulf between Massachusetts law and English law.<sup>93</sup> Only according to the former were specific warrants favored.<sup>94</sup> Perhaps unsurprisingly, Otis lost and the Massachusetts Superior Court ruled that writs of assistance could issue.<sup>95</sup>

In his January 4, 1762 *Boston Gazette* piece, Otis attempted to support his argument that customs officials in Massachusetts should be required to use specific warrants, despite the fact that they were permitted to use general warrants in England. His argument focused on the relative degree of control over customs officials in the respective locales. In England, he pointed out, customs officials were subject to the complete control of the court of exchequer, even extending to physical discipline when necessary: "In England the exchequer has the power of controuling them in every respect; and even of *inflicting corporal punishment upon them for mal-conduct . . .*"<sup>96</sup> As such, they were accountable to the court of exchequer and were called to account on a weekly basis for their conduct.<sup>97</sup> Accordingly, the people had effective control over customs officials in England and had "a short and easy method of redress in case of injury receiv'd from them."<sup>98</sup> But no such "checks and restrictions" existed in Massachusetts, "and therefore the writ of assistance ought to be look'd upon as a *different thing* there, from what it is here."<sup>99</sup> As Otis put it, the writ of assistance gave the customs officer greater power in Massachusetts than in England, "*greater* because UNCONTROUL'D—and can a community be safe with an uncontrold power lodg'd in the hands of *such* officers[?]"<sup>100</sup>

It is in the colonial response to *Paxton's Case* where we see most dramatically a push toward local control of search-and-seizure policy. Not only did the local responses generally frustrate the policy of the central

<sup>92</sup> See *id.* at 392 ("Hostility to general warrants had been increasingly evident in the colony's legislation on search and seizure for more than a century.").

<sup>93</sup> See *id.* ("Otis ignored mounting disparities in the legislation of Massachusetts and Britain toward search and seizure . . .").

<sup>94</sup> See *id.* at 393 ("[T]he specific warrant . . . reigned supreme only in Massachusetts . . ."); see also Maclin, *supra* note 54, at 945–46 (observing that the writs "contradicted local law").

<sup>95</sup> See CUDDIHY, *supra* note 2, at 395; QUINCY, *supra* note 48, at 414 n.2; Dickerson, *supra* note 80, at 40.

<sup>96</sup> QUINCY, *supra* note 48, at 493.

<sup>97</sup> See *id.* ("[T]hey are the proper officers of that court, and are accountable to it as often as it shall call them to account, and they do in fact account to it for money receiv'd, and for their BEHAVIOR, once every week . . .").

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 494.

government, but the responses differed in important respects by colony. In Massachusetts, a legislative response was attempted. The legislature there passed a bill in March 1762 to nullify the decision in *Paxton's Case* by essentially transforming writs of assistance into specific warrants.<sup>101</sup> The bill would have “limited the duration of writs of assistance to seven days, based them on oath, and required that they designate the informer, the accused owner of contraband, and the alleged place of concealment.”<sup>102</sup> That is to say, it would have transformed general writs of assistance by instilling them with the salient characteristics of specific warrants. Although the measure was vetoed by the governor, it stands as an example of “an effort to compel British customs officers to observe the restraints on searches that their local counterparts already accepted.”<sup>103</sup> Thus, the Massachusetts legislature sought to subject British customs officials to the same constraints that bound local officials.

Responses in other colonies were varied. After passage of the Townshend Acts in 1767,<sup>104</sup> aimed in part at endowing colonial courts with jurisdiction to issue writs of assistance,<sup>105</sup> most of the colonial judiciaries were forced to confront the issue, and they did so in diverse ways. In a large number of colonies, judges either refused to grant the writs, ignored requests for them, or engaged in dilatory tactics in the hopes that customs officials would give up. Courts in Maryland chose largely to ignore the requests.<sup>106</sup> The Rhode Island Superior Court used indefinite delay to frustrate customs officials.<sup>107</sup> Like those in its neighbor to the east, judges in Connecticut also “postpone[d] consideration of the writs,” though arguably this was in a good faith effort to determine their legality.<sup>108</sup> Later, judges in Connecticut

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<sup>101</sup> See CUDDIHY, *supra* note 2, at 403; QUINCY, *supra* note 48, at 495–96; Clancy, *supra* note 86, at 1002; Maclin, *supra* note 54, at 947.

<sup>102</sup> CUDDIHY, *supra* note 2, at 403. For the text of the bill, see QUINCY, *supra* note 48, at 495–96.

<sup>103</sup> CUDDIHY, *supra* note 2, at 403–04.

<sup>104</sup> See, e.g., Revenue Act 1767, 7 Geo. 3 c. 46.

<sup>105</sup> See Clancy, *supra* note 86, at 1003.

<sup>106</sup> See CUDDIHY, *supra* note 2, at 513, 526 (“In Maryland . . . the highest court[] had ignored rather than refused requests for the writs.”); accord Joseph R. Frese, *Writs of Assistance in the American Colonies: 1660–1776*, at 246 (1951) (unpublished Ph.D. dissertation, Harvard University) (on file with author); see also Dickerson, *supra* note 80, at 62 (observing that Maryland court expressed willingness to issue writ but not until the need arose in a particular case).

<sup>107</sup> See CUDDIHY, *supra* note 2, at 514, 524, 526 (“Asked repeatedly for the same writs, the Rhode Island Superior Court . . . postponed considering them on grounds that two of its members were absent.”); Dickerson, *supra* note 80, at 50–51; cf. QUINCY, *supra* note 48, at 505–06 (concluding that no writs were issued in Rhode Island).

<sup>108</sup> Accord QUINCY, *supra* note 48, at 501–04; Dickerson, *supra* note 80, at 52–53; see

responded to requests for writs by offering to issue them as specific warrants.<sup>109</sup> And in Pennsylvania, the Supreme Court outright refused to issue the writs, branding them “illegal,” both because they were general<sup>110</sup> and because they were perpetual.<sup>111</sup> As in Connecticut, judges in Pennsylvania offered to grant them as specific warrants,<sup>112</sup> and did in fact do so in particular cases.<sup>113</sup>

By contrast, judges in Virginia, Georgia, New York, and South Carolina were more equivocal. Virginia courts, taking a middle-of-the-road approach, granted writs that were general but that were acceptable to colonial sensibilities in other respects: they were of definite duration rather than perpetual and were issued only when based on sworn allegations.<sup>114</sup> As in Virginia, the judges of Georgia expressed a willingness to issue general writs, but refused to do so unless the need arose in a particular case.<sup>115</sup> In South Carolina, judges initially publicly avoided responding to requests for writs of assistance while privately concluding that they were illegal.<sup>116</sup> However, in 1773, the newly reconstituted high court of South Carolina ruled the writs legal and issued a number of them.<sup>117</sup> In New York, the situation was reversed: judges there initially issued writs<sup>118</sup> but later practiced the same

CUDDIHY, *supra* note 2, at 514–15; Frese, *supra* note 106, at 239–40 (quoting the chief justice as declaring that “they were not clear that the thing itself was constitutional”).

<sup>109</sup> See CUDDIHY, *supra* note 2, at 520–21, 525.

<sup>110</sup> See *id.* at 519; Frese, *supra* note 106, at 264, 286.

<sup>111</sup> *Accord* QUINCY, *supra* note 48, at 509; see CUDDIHY, *supra* note 2, at 515–16; Dickerson, *supra* note 80, at 58–60.

<sup>112</sup> See CUDDIHY, *supra* note 2, at 525; Dickerson, *supra* note 80, at 60; Frese, *supra* note 106, at 264, 277; see also Davies, *supra* note 37, at 566 (“[C]olonial judges usually ignored or denied the petitions [for writs of assistance] and often described the requested general writs as ‘illegal’ notwithstanding specific statutory authority.”).

<sup>113</sup> See CUDDIHY, *supra* note 2, at 519–20; Frese, *supra* note 106, at 264–68.

<sup>114</sup> See CUDDIHY, *supra* note 2, at 521–22, 525–26; Dickerson, *supra* note 80, at 67–72. Both Quincy and Frese mistakenly referred to these as specific writs. QUINCY, *supra* note 48, at 510 n.14; Frese, *supra* note 106, at 270. However, an essential feature of a specific warrant is a “prior designation of a particular person or location to whom or which the warrant [i]s confined.” CUDDIHY, *supra* note 2, at 313. It is this essential feature that was lacking in the writs issued in Virginia pursuant to the Townshend Act. See Frese, *supra* note 106, at 270 (quoting writ as permitting entry “into *any* House, Shop, Cellar, Warehouse or Room or *other place* where the said goods are suspected to be concealed”) (emphasis added).

<sup>115</sup> See Frese, *supra* note 106, at 279; see also CUDDIHY, *supra* note 2, at 523, 525; Dickerson, *supra* note 80, at 65–66.

<sup>116</sup> See CUDDIHY, *supra* note 2, at 518; see also Dickerson, *supra* note 80, at 66 (documenting delay by South Carolina court in issuing writs).

<sup>117</sup> See CUDDIHY, *supra* note 2, at 524–25; Davies, *supra* note 79, at 88; Dickerson, *supra* note 80, at 66–67; Frese, *supra* note 106, at 289.

<sup>118</sup> See CUDDIHY, *supra* note 2, at 513; Dickerson, *supra* note 80, at 54. Quincy first observed that writs were issued in New York, but later asserted that the writs in New York

kind of intransigence seen in Rhode Island<sup>119</sup> and finally outright refused to issue them.<sup>120</sup>

Thus, judicial reaction to requests for writs of assistance differed by colony. Though it is tempting to see the colonial opposition as uniform, unified, and monolithic, the record discloses a more nuanced picture,<sup>121</sup> as demonstrated in Table 1 below. Judges in four colonies—Connecticut, Maryland, Pennsylvania, and Rhode Island—either staunchly refused to issue the writ or frustrated Crown policy through dilatory tactics and subterfuge. In Georgia, too, judges essentially defied the Crown, paying lip service to general warrants by expressing their willingness to approve them but only if particular need arose. In Virginia, judges willingly granted hybrid writs that, while general, were acceptable in other ways to colonial sensibilities, such as being of limited duration and founded upon specific allegations made under oath. Again, this was done in defiance of Crown policy,<sup>122</sup> but with more diplomacy. And in Massachusetts,<sup>123</sup> New Hampshire,<sup>124</sup> New York,<sup>125</sup> and South Carolina<sup>126</sup> judges actually issued the

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were issued as specific warrants. QUINCY, *supra* note 48, at 507–08, 511 n.15. This latter assertion appears to be incorrect. The form of the writ issued in New York is reproduced in full in Dickerson, and it is phrased as a general warrant. Dickerson, *supra* note 80, at 54–55; *see also* CUDDIHY, *supra* note 2, at 513 (showing that the writs issued in New York were “phrased as general search warrants”). Moreover, the court’s order, reproduced in Frese demonstrates the breadth of the authority granted:

[Y]ou are hereby authorized . . . in the Day time to enter . . . any Ship Boat [sic] or other Vessel as also into any House Warehouse Shop Cellar or other place in this Colony . . . and to seize . . . any kind of Goods or Merchandizes whatsoever prohibited to be imported or Exported or whereof the Customs or other Duties have not been and shall not be duly paid.

*Supra* note 106, at 243 (emphasis added).

<sup>119</sup> *Accord* Dickerson, *supra* note 80, at 58; Frese, *supra* note 106, at 263–64, 276; *see* CUDDIHY, *supra* note 2, at 523 (“Judges pleaded illness, age, and inclemency of weather for absences that precluded a necessary quorum.”).

<sup>120</sup> *See* CUDDIHY, *supra* note 2, at 526 (“[T]he New York Superior Court [announced] in 1773 that it had pronounced [the writs] not warranted by law . . . and that it would not comply.”); *see also* Frese, *supra* note 106, at 277, 285–86.

<sup>121</sup> *See* Davies, *supra* note 79, at 88 (observing that “colonial court rulings” were “inconsistent”).

<sup>122</sup> *See* Dickerson, *supra* note 80, at 69 (“Here was apparently a judicial defiance of a direction of the attorney general in England and a departure from the known practice of the Court of Exchequer.”).

<sup>123</sup> *See* Clancy, *supra* note 86, at 1004 (“Massachusetts continued to issue general writs of assistance . . .”); *see also* MAURICE H. SMITH, THE WRITS OF ASSISTANCE CASE 468–72 (1978) (documenting use of writs granted in Massachusetts after 1767).

<sup>124</sup> *See* CUDDIHY, *supra* note 2, at 509.

<sup>125</sup> *See supra* text accompanying notes 116–118.

<sup>126</sup> *See supra* text accompanying notes 118–119.

writs, although those in the last two States changed their position over time.<sup>127</sup>

**Table 1. Colonial Courts' Responses to Crown Officials' Requests for Writs of Assistance After Passage of Townshend Act of 1767**

Refused	Ignored request	Delayed	Offered to issue as specific warrants	Issued as specific warrants	Offered to issue as non-perpetual, oath-based, general warrants	Issued as non-perpetual, oath-based, general warrants	Issued writs	Insufficient data or no request for writ by Crown officials
NY	MD	CT	CT	PA	GA	VA	MA	DE
PA	SC	NY	PA				NH	NJ
		RI					NY	NC
							SC	

Judicial intransigence in some colonies was accompanied by foot-dragging and interference by executive officials. In one instance, faced with indefinite delay by the Rhode Island Superior Court in considering writs, customs officials went to the governor, only to be delayed further by the actions of the governor, the judge advocate, and a deputy sheriff.<sup>128</sup> Ultimately, a writ was issued as a specific warrant, but night fell before it could be executed, allowing locals to remove the sought-after contraband.<sup>129</sup> In Connecticut, the chief justice who had politely declined to issue the writs based on doubts about their legality also served as lieutenant governor of the colony.<sup>130</sup> And when the British attempted “to remove him from his judicial office” based on the notion of separation of powers, the people of the colony

<sup>127</sup> It is unclear whether writs were ever issued in New Jersey, but the preponderance of scholarly weight indicates that they were not. Compare CUDDIHY, *supra* note 2, at 512 (“At least one writ of assistance . . . operated in New Jersey during the post-Townshend period.”), with QUINCY, *supra* note 48, at 508 (“[T]he records of the court [in New Jersey] which are in quite a perfect state, contain no evidence of any writs having been issued . . .”), and Dickerson, *supra* note 80, at 49 (“There is no evidence that writs were ever applied for in New Jersey . . .”), and Frese, *supra* note 106, at 244 (“We have no record of a general writ issued in New Jersey.”). It appears that writs of assistance were not requested in the two remaining colonies, Delaware and North Carolina. See CUDDIHY, *supra* note 2, at 511–12.

<sup>128</sup> Frese, *supra* note 106, at 237–39; see also CUDDIHY, *supra* note 2, at 514.

<sup>129</sup> See Frese, *supra* note 106, at 237–39; CUDDIHY, *supra* note 2, at 514.

<sup>130</sup> Frese, *supra* note 106, at 242.

blocked the attempt.<sup>131</sup> In Pennsylvania, the chief justice sought and obtained the opinion of the colony's attorney general, who agreed with him that the writs were illegal.<sup>132</sup> In Virginia, the governor himself was on the court that permitted general but limited writs.<sup>133</sup>

As had occurred in Massachusetts, the colonial legislatures sometimes became involved. For example, in Connecticut, the chief justice, opining that "the superior court could do nothing contrary to the sense of the people," suggested that the General Assembly of the colony take up the issue of the legality of the writs.<sup>134</sup> The General Assembly took the chief justice up on his proposal, appointed a committee to study the question, and ultimately punted based on the committee's conclusion that the matter "properly belonged to the Superior Court."<sup>135</sup> Privately, however, the General Assembly "advised the judges not to grant the writs."<sup>136</sup>

Accordingly, the writs-of-assistance controversy represents an episode in which local control over search-and-seizure policy was strongly asserted against the central government, in this case the Crown. *Paxton's Case* clearly held the writs to be legal in Massachusetts, and the Townshend Act likewise clearly extended their legality to the rest of the colonies.<sup>137</sup> Yet, centralized search-and-seizure policy was frustrated, and local policy made supreme, by the actions of local officials: legislative, executive, and judicial. It is tempting to look back upon the writs-of-assistance controversy and see a widespread revolt by the colonists against the use of general warrants. With all the benefits of hindsight, we know that general warrants were widely deemed unlawful by 1791,<sup>138</sup> as their prohibition in the Fourth Amendment demonstrates. Yet general warrants were not universally reviled on this side of the Atlantic in the 1760s. Some States continued to use them even after Independence.<sup>139</sup> And, as shown above, general warrants were issued to Crown officials in more than half—six out of ten—colonies for which data are available. A more nuanced view of the writs of assistance controversy shows that it was largely about holding Crown officials to whatever standards local officials preferred. True, the specific issue raised by the writs-of-

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 245.

<sup>133</sup> *Id.* at 269.

<sup>134</sup> *Id.* at 260.

<sup>135</sup> *Id.* (internal quotation marks omitted).

<sup>136</sup> *Id.*

<sup>137</sup> See *supra* text accompanying notes 93, 102–103.

<sup>138</sup> See CUDDIHY, *supra* note 2, at 739–42.

<sup>139</sup> See *id.* at 628 (discussing use of general warrants in early 1780s in Pennsylvania and Virginia).

assistance controversy—the legality of general warrants—was ultimately settled in a uniform way by the Fourth Amendment’s Warrant Clause. However, the controversy stands for the more general proposition that the colonists sought not continent-wide rules, but simply local control of Crown officials.

The colonial response during the writs of assistance episode also refutes Professor Amar’s argument that warrants were seen during the framing period as a bad thing, not a good thing. First, Otis’s central argument in *Paxton’s Case*—the initial colonial response to British assumption of power to obtain writs of assistance—was not that British officers must act without warrants and hold themselves vulnerable to suit. Rather, it was that they must obtain specific warrants.<sup>140</sup> After Otis lost, the attempted legislative response in Massachusetts was in the same vein: to allow only those writs of assistance that met the requirements of limited duration, oath, and specificity.<sup>141</sup> Moreover, of the four colonies with the strongest judicial reaction against issuing writs (Connecticut, Maryland, Pennsylvania, and Rhode Island), judges in two (Connecticut and Pennsylvania) issued them or offered to issue them as specific warrants instead.<sup>142</sup> It is impossible to view their response as anti-warrant.

#### B. LOCAL CONTROL UNDER THE CONFEDERATION: STATE LEGISLATION RATIFYING THE 1783 CONFEDERAL IMPOST RESOLUTION

Americans continued, after the Revolution and before ratification of the Constitution, to assert local control over search-and-seizure policy. Specifically, during the Articles of Confederation period, state legislation ratifying a 1783 confederal impost resolution demonstrates the importance of State control over search-and-seizure rules. On April 18, 1783, the Confederation Congress recommended that it be “vested with the power to levy duties on certain imported goods, such as rum, tea, sugar, coffee, wine, and molasses.”<sup>143</sup> The resolution required ratification by each and every State

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<sup>140</sup> See *supra* notes 85–86 and accompanying text; see also Maclin, *supra* note 20, at 224 (“Otis emphasized that the absence of judicial oversight was one of the prime evils inherent in the writs.”); Maclin, *supra* note 54, at 968 (“In his argument against the writs of assistance, Otis did not condemn all warrants. He stated that special or specific warrants were reasonable.”).

<sup>141</sup> See *supra* notes 99–101 and accompanying text.

<sup>142</sup> See *supra* notes 107–111 and accompanying text.

<sup>143</sup> Michael J.Z. Mannheimer, *Harmelin’s Faulty Originalism*, 14 NEV. L.J. 522, 538 (2014) (citing 24 J. CONT. CONG. 1774–1789, at 256, 256–57 (1783) reprinted in THE RESOLUTION OF CONGRESS OF THE 18TH OF APRIL, 1783: RECOMMENDING THE STATES TO INVEST CONGRESS WITH THE POWER TO LEVY AN IMPOST, FOR THE USE OF THE STATES; AND THE

before it could take effect.<sup>144</sup> The ratifying legislation tells us much about the way the rights ultimately expressed in the Fourth Amendment in 1791 were viewed within the previous decade.

Eight of the States that passed legislation ratifying the confederal impost included therein what can be called “mini-bills of rights” that explicitly required that the confederal government abide by certain search-and-seizure rules in enforcing the impost regulations.<sup>145</sup> Five—Georgia, Massachusetts, New Hampshire, South Carolina, and Virginia—required the confederal government to obtain a search warrant, though not necessarily a specific one, in order “to break open any dwelling house, store or ware-house.”<sup>146</sup> Pennsylvania’s legislation was somewhat less protective than this baseline, requiring a warrant (again, not necessarily a specific one) only for “dwelling house[s].”<sup>147</sup>

The other two States that enacted explicit search-and-seizure constraints on the confederal government—North Carolina and Rhode Island—imposed more stringent requirements. First, they included *all* premises within the prohibition.<sup>148</sup> Additionally, these two States required that such warrants be specific:<sup>149</sup> Rhode Island required that the warrant “particularly discriminat[e] the dwelling-house, store, ware-house, or other building,”<sup>150</sup> and North Carolina provided that a warrant could be granted with regard to “such house” where uncustomed goods were suspected of being.<sup>151</sup>

Finally, of the five States that did not include a “mini-Bill of Rights,” only New York and New Jersey did not place any implicit constraints on the

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LAWS OF THE RESPECTIVE STATES PASSED IN PURSUANCE OF THE SAID RECOMMENDATION, TOGETHER WITH REMARKS ON THE RESOLUTIONS OF CONGRESS, AND LAWS OF THE DIFFERENT STATES 4 (1787) [hereinafter IMPOST LAWS]).

<sup>144</sup> IMPOST LAWS, *supra* note 143, at 6; see Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1104, 1113 (2013) (discussing similar 1781 resolution); see also JACKSON T. MAIN, *THE ANTI-FEDERALISTS: CRITICS OF THE CONSTITUTION 1781–1788*, at 73 (1961). Ultimately, the 1783 Impost Resolution did not take effect because New York refused to ratify it in a form acceptable to the Confederation Congress. See Campbell, *supra* note 144, at 1120–26; *infra* text accompanying notes 163–165.

<sup>145</sup> Mannheim, *supra* note 143, at 538; IMPOST LAWS, *supra* note 143, at 7, 10, 12–13, 30–31, 40, 42, 44–45, 48.

<sup>146</sup> IMPOST LAWS, *supra* note 143, at 7, 10, 40, 44, 48 (emphasis omitted).

<sup>147</sup> *Id.* at 31.

<sup>148</sup> *Id.* at 13, 42 (Rhode Island: “any . . . other building”; North Carolina: “any other place”).

<sup>149</sup> See CUDDIHY, *supra* note 2, at 663 (“Like North Carolina, Rhode Island had not only tied enforcement of the Congressional impost to warrants but also demanded that those warrants be specific.”).

<sup>150</sup> IMPOST LAWS, *supra* note 143, at 13 (Rhode Island) (emphasis omitted).

<sup>151</sup> *Id.* at 42 (emphasis omitted).

confederal government in collecting the impost.<sup>152</sup> The other three required that the confederal government follow the respective state constitutions in collecting the impost. Delaware required that “such rules and ordinances for collecting and levying the . . . duties . . . *be not repugnant to the constitution and laws of this state,*”<sup>153</sup> and Maryland similarly required that “such ordinances, regulations and arrangements . . . for the faithful and punctual payment and collection of the . . . duties . . . *shall not be repugnant to the constitution of this state.*”<sup>154</sup> Connecticut’s legislation set forth this requirement in a more roundabout way by directing its citizens to adhere to confederal impost regulations except to the extent that they were “inconsistent with the constitution and internal police of this state.”<sup>155</sup> Moreover, because the Delaware and Maryland constitutions required the use of specific warrants, their legislation ratifying the confederal impost required the same.<sup>156</sup>

In sum, as illustrated in Table 2 below, ten of the thirteen States in ratifying the 1783 confederal impost regulation required confederal authorities to obtain warrants supported by oath<sup>157</sup> in collecting the impost. But only four of those ten—Delaware, Maryland, North Carolina, and Rhode Island—required, expressly or by necessary implication, that those warrants be

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<sup>152</sup> *Id.* at 17–22.

<sup>153</sup> *Id.* at 32.

<sup>154</sup> *Id.* at 37.

<sup>155</sup> *Id.* at 16 (emphasis omitted). This provision appears incongruous at first blush, for Connecticut had no constitution at the time its impost ratification legislation was adopted in May 1784. See George C. Thomas, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451, 1465 n.63 (2005). Apparently, the provision referred to Connecticut’s unwritten constitution (i.e., its common law on search and seizure). See *Frisbie v. Butler*, 1 Kirby 213 (Conn. 1787), (outlawing general warrants based on state common law).

<sup>156</sup> See CUDDIHY, *supra* note 2, at 663–64 (“The remaining states simply instructed Congress to observe their constitutions in collecting the impost, automatically preventing the federal usage of general warrants in Maryland and Delaware.”). Although general warrants were later deemed illegal in Connecticut, see *Frisbie v. Butler*, 1 Kirby 213 (Conn. 1787), (“[T]he warrant in the present case, being general, to search all places, and arrest all persons, the complainant should suspect, is clearly illegal . . .”), at the time the Connecticut impost ratification legislation was adopted in May 1784, it appears that general warrants may still have been consistent with Connecticut law. See CUDDIHY, *supra* note 2, at 644 (“By 1787, Connecticut was the last significant outpost for promiscuous searches and seizures in [New England].”).

<sup>157</sup> In addition to those whose impost-ratifying legislation expressly required warrants issued only upon oath, both the Maryland and Delaware constitutions, incorporated by reference in those States’ legislation, contained this requirement. See THE COMPLETE BILL OF RIGHTS, *supra* note 76, at 234.

specific,<sup>158</sup> while the other six did not. The States also differed as to what types of premises could be searched only by warrant: Pennsylvania’s warrant requirement applied only to dwellings; Georgia, Massachusetts, New Hampshire, South Carolina, and Virginia applied their requirement to stores and warehouses in addition to dwellings; North Carolina, and Rhode Island applied it to all buildings; and it is unclear how far Delaware’s and Maryland’s respective warrant requirements extended. In addition, while nine of these ten required that searches be conducted in daytime, Delaware did not.<sup>159</sup> Furthermore, although Connecticut did not require that confederal officials obtain warrants before searching, it did require that they adhere to state law generally. Only New Jersey and New York would have left officials to their own devices when searching and seizing pursuant to the confederal impost legislation. And because New York refused to ratify the legislation unless its own officials (who, obviously, would have to abide by state law) would enforce the impost,<sup>160</sup> New Jersey stood alone in declining to constrain the search-and-seizure authority of confederal officials in enforcing the proposed impost legislation.

**Table 2. Search-And-Seizure Constraints Placed by States on Confederal Authorities in Impost Ratification Legislation, 1783–86**

Requirement that confederal authorities obtain <i>specific</i> warrant to search any building	Requirement that confederal authorities obtain <i>specific</i> warrant to search; unclear what premises this applied to	Requirement that confederal authorities obtain warrant to search dwelling, storehouse, or warehouse	Requirement that confederal authorities obtain warrant to search dwelling	Requirement that confederal authorities adhere to state law	Requirement that State authorities enforce impost	No constraints on confederal authorities
NC	DE	GA	PA	CT	NY	NJ
RI	MD	MA				
		NH				
		SC				
		VA				

<sup>158</sup> See Maclin, *supra* note 54, at 949. Professor Maclin incorrectly dates the proposed impost legislation to 1787 instead of 1783.

<sup>159</sup> See CUDDIHY, *supra* note 2, at 747 (“[D]elaware’s legislation after 1776 ignored [nighttime searches], neither allowing nor prohibiting.”).

<sup>160</sup> See *infra* text accompanying notes 164–166.

Two conclusions follow. First, under the Articles, twelve of the thirteen States sought to control the search and seizure authority of the central government. Second, they did so in different ways: some expressly required warrants while some did not; some required that those warrants be specific while some did not; some required warrants for all premises, some for dwellings, warehouses, and storehouses, and some only for dwellings; some forbade nocturnal searches while some did not; and some laid down explicit rules while some required adherence to state law generally. Thus, as late as 1786<sup>161</sup>—five years before the Bill of Rights was adopted—a patchwork of search-and-seizure rules, different in significant respects, was contemplated. This crazy quilt of rules that varied by State meant that *national* officials were to be constrained in different parts of the country in different ways depending upon the State in which they acted.<sup>162</sup> Accordingly, Americans of that period were quite accustomed to the idea that national officials would be subjected to different search-and-seizure rules on a State-by-State basis.

One might argue that this arrangement under the Articles of Confederation is weak evidence of what was contemplated by the Constitution. The Constitution, after all, was developed as an antidote to the anemic government under the Articles, a centralizing force in stark contrast to the decidedly de-centralizing Articles. This assertion, however, misses the entire point of the Bill of Rights. The Bill was a concession to the Anti-Federalist opponents of the Constitution who had feared that it would consolidate too much power in the hands of the federal government at the expense of the several States.<sup>163</sup> While the Constitution represented a move toward centralization, the Bill of Rights represented a countervailing step toward the kind of de-centralization epitomized by the Articles. That is to say, in much the same way that the centripetal forces inherent in the Constitution were a reaction to the de-centralizing tendencies of the Articles, pulling the Nation together, the centrifugal forces embedded in the Bill of Rights were in reaction to the centralizing tendencies of the Constitution,

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<sup>161</sup> The Rhode Island legislation was passed in 1786. *IMPOST LAWS*, *supra* note 143, at 11.

<sup>162</sup> Although the collectors of the impost were initially to be appointed by each respective State, after having been appointed they were “amendable to, and removable by the United States in Congress assembled, alone.” *Id.* at 5 (emphasis omitted). Moreover, if a State failed to make appointments within one month after receiving notice, the appointment was to be “made by the United States in Congress assembled.” *Id.* Because, after appointment, these officials served at the pleasure of Congress, they are properly characterized as national officers. Indeed, that was the main sticking point upon which the impost resolution ultimately failed. *See infra* text accompanying notes 164–166.

<sup>163</sup> *See Mannheimer, supra* note 35, at 1278–84.

allowing for some differentiation by States to be preserved. As the Constitution drew the Nation in and imposed uniformity, the Bill of Rights carved out spheres where variety and diversity could be retained.

Indeed, the proposed impost law of 1783 is a prime example of why the Articles of Confederation failed, but not because of the search-and-seizure constraints placed upon the confederal government by the States. True, the Articles of Confederation failed largely because they required unanimous consent for any significant legislation, such as the proposed impost. But despite the conditions placed by the States upon the confederal collectors of the impost, each State but one was deemed by the Confederation Congress to have ratified the proposal.<sup>164</sup> Only the purported ratification by New York was deemed at such a variance with the impost proposal that it was not accepted as a ratification of it.<sup>165</sup> New York's nominal ratification of the impost was rejected because New York insisted that the collectors of the impost within New York be considered agents of New York, supervised by and answerable only to that State.<sup>166</sup> Congress deemed congressional superintendence over the impost collectors to be "an essential part of the plan."<sup>167</sup> To put it another way, the confederal Congress readily accepted the condition placed upon ratification of the legislation by eleven of the thirteen States that state search-and-seizure policy control collection of the impost. It was only when New York demanded in addition the right to select and superintend the personnel responsible for collecting the impost that the Congress balked.

Accordingly, the impost, and in a larger sense, the Articles, were doomed because one State refused to entrust national actors with a national duty, not because eleven other States required those national actors to play by local rules. To the contrary, the requirement that central officials obey local search-and-seizure rules seems to have been uncontroversial. After all, that is precisely what the colonies had sought in the 1760s.

Finally, observe that the States' conditional ratification of the 1783 confederal impost legislation demonstrates a clear preference for warrants,

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<sup>164</sup> See IMPOST LAWS, *supra* note 143, at 66 ("All the states except New-York hav[e] in pursuance of the recommendation of the 18th [of] April, 1783, granted the impost by acts vesting this power, with certain qualifications, exclusively in the United States in Congress assembled . . .").

<sup>165</sup> See *id.* at 67 (determining that the New York legislation "so essentially varies from the system of impost recommended by the United States in Congress assembled on the 18th day of April, 1783, that the said act is not, and cannot be considered as a compliance with the same, so as to enable Congress, consistently with the acts of the other states to bring the system into operation").

<sup>166</sup> See Campbell, *supra* note 144, at 1124.

<sup>167</sup> IMPOST LAWS, *supra* note 143, at 66; see also Campbell, *supra* note 144, at 1124.

all but eviscerating Professor Amar's claim that warrants were actually disfavored by the framers and ratifiers of the Fourth Amendment. Ten of the thirteen States implicitly or explicitly required that confederal officers obtain warrants prior to searching or seizing.<sup>168</sup> These measures were passed in order to hem in the authority of confederal excise collectors, not to immunize them from suit. If Professor Amar and his adherents were correct, those States would have forbidden the use of warrants, leaving confederal officers open to common-law tort suits for trespass in state courts. Instead, they required warrants. Thus, in the decade before the Fourth Amendment was adopted, the warrant was viewed primarily as a constraint on central authority, not as a get-out-of-jail-free card.

### C. LOCAL CONTROL UNDER THE REPUBLIC: CONTINGENT FEDERAL SEARCH-AND-SEIZURE AUTHORITY IN EARLY LEGISLATION

Two early pieces of federal legislation, the Judiciary Act of 1789 and the Militia Act of 1792, specifically granted federal officers the same search-and-seizure authority that analogous state officers had under the laws of the respective States. That is to say, federal legislation contemplated that federal officers would have different search-and-seizure authority depending upon the State in which they acted. Once again, this time following ratification of the Constitution, we see the assertion of local norms binding actors of the central government vis-à-vis search-and-seizure. While this falls short of definitive proof that the Constitution similarly establishes different limits on search-and-seizure authority by State, the absence of any statutory language setting a constitutional floor strongly implies that Congress meant these statutes to track the constitutional limits on federal search-and-seizure authority.

First, section 33 of the Judiciary Act of 1789, enacted by the First Congress, provided that

for any crime or offence against the United States, the offender may, by any justice or judge of the United States, or by any justice of the peace, or other magistrate of justice of any of the United States where he may be found *agreeably to the usual mode of process against offenders in such state . . .* be arrested.<sup>169</sup>

The act thus empowered federal officers "to accomplish seizures and arrests through the usual legal processes of their resident states."<sup>170</sup> The term

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<sup>168</sup> See *supra* text accompanying note 156.

<sup>169</sup> Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91 (emphasis added).

<sup>170</sup> CUDDIHY, *supra* note 2, at 750; see also Gerald V. Bradley, *The Constitutional Theory of the Fourth Amendment*, 38 DEPAUL L. REV. 817, 854 (1989) ("[V]arious accoutrements of federal search and seizure, including arrest, forms of writs, their execution, and modes of process, were subjected to prevailing rules of the state in which the federal court was

“usual mode of process” was understood by contemporary lawyers as referring to arrest warrants,<sup>171</sup> which explains why the statute is directed to judicial officers. And Congress had within its ranks a sufficient number of lawyers to impute this meaning to them.<sup>172</sup> Accordingly, as the Bill of Rights was being debated, Congress “assumed the applicability of state laws and practices governing” the power of federal officials to make arrests.<sup>173</sup>

Then, in 1792, the Second Congress passed the Militia Act, section nine of which granted federal “marshals of the several districts and [their] deputies . . . the same powers in executing the laws of the United States, as sheriffs and their deputies in the several states have by law, in executing the laws of their respective states.”<sup>174</sup> While the Judiciary Act of 1789 dictated that federal power to issue and execute arrest warrants would track state law, the Militia Act provided that federal power to otherwise search and seize would generally do so as well, except as provided by more specific federal legislation, such as the Collection Act of 1789 and the Excise Act of 1791.<sup>175</sup>

Professor Thomas Davies has set forth the claim that section nine of the 1792 Militia Act did no more than confer upon federal marshals the power that local sheriffs had under common law “to call out a posse comitatus of citizens (that is, the local militia) to suppress riots or insurrections.”<sup>176</sup> However, the plain meaning of section nine could not be clearer: federal marshals and their deputies were granted “the same powers” in enforcing federal law that local law enforcement officers have in enforcing state law. This certainly comprehends the power of raising a posse comitatus, but it

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located.”); Davies, *supra* note 79, at 104 (“[T]he early Congresses . . . did not enact standards for criminal warrants or warrantless arrests; instead, the Judiciary Act of 1789 simply directed federal courts and officers to use the mode of ‘process’ . . . used in the state in which they served.”).

<sup>171</sup> CUDDIHY, *supra* note 2, at 753; *see also* Davies, *supra* note 79, at 104 (observing that the term “mode of ‘process’ . . . would include warrants”).

<sup>172</sup> *See* CUDDIHY, *supra* note 2, at 753 (“The Framers of the Fourth Amendment included so large a cross-section of legal talent that they must have equated ‘mode of process’ with the procedures of arrest and seizure that most contemporary lawyers understood.”).

<sup>173</sup> *See id.* (“Although th[e] statute did not mention arrest warrants, they were the linchpin of the ‘mode of process’ that it acknowledged.”).

<sup>174</sup> Militia Act of 1792, ch. 28, § 9, 1 Stat. 264, 265 (1792).

<sup>175</sup> As discussed more fully *infra* text accompanying notes 193–241, the 1789 Judiciary Act and the 1792 Militia Act are much more reflective of the limits placed on federal search and seizure authority by the Fourth Amendment than are the Collection Act of 1789 and the Excise Act of 1791. The latter two Acts, and particularly the 1791 Act, were highly partisan pieces of legislation representing the political dominance of the Federalists in Congress in the very early days of the Republic. As such, one cannot infer from these statutes any consensus view of the Fourth Amendment.

<sup>176</sup> *See* Davies, *supra* note 37, at 611; *see also* Davies, *supra* note 79, at 157 n.491; Davies, *supra* note 65, at 355–56.

goes well beyond that power. The Supreme Court has consistently interpreted this provision as granting federal officers *all* the law enforcement powers of a local sheriff, not just the posse comitatus power.<sup>177</sup> Scholars generally agree with this interpretation.<sup>178</sup>

Professor Davies argues that since ordinary citizens had the same common-law power to make arrests as did constables and sheriffs, section nine of the Militia Act would have been superfluous had it granted federal marshals warrantless arrest power. After all, federal marshals and their deputies had no less inherent authority than private persons.<sup>179</sup> This argument overlooks two salient points. First, it is true that the common law permitted ordinary citizens to make warrantless arrests. But, as of 1792, there was some dispute over whether and to what extent common-law precepts applied to the new federal government.<sup>180</sup> Accordingly, it was unclear to what extent, if at all, ordinary citizens could make warrantless arrests for *federal* crimes. Given this lack of clarity, Congress would have wanted to give explicit direction to federal officers that their power to arrest for federal crimes matched state officers' power to arrest for state crimes.

Second, the 1792 Act goes beyond granting federal officers warrantless arrest authority and grants them *all* "the same powers in executing the laws" enjoyed by state officers. This includes several powers generally denied to ordinary citizens.<sup>181</sup> Perhaps most importantly, state officers generally enjoyed the power to execute search warrants, whereas private persons did not.<sup>182</sup> It is true, as Professor Davies points out, that section 27 of the

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<sup>177</sup> See *United States v. Watson*, 423 U.S. 411, 420 (1976) (interpreting section nine of the Militia Act as "giving United States marshals the same power as local peace officers to arrest for a felony without a warrant"); accord *Atwater v. City of Lago Vista*, 532 U.S. 318, 339 (2001).

<sup>178</sup> See, e.g., Amar, *supra* note 27, at 764 ("In 1792 . . . the Second Congress explicitly conferred th[e] common law arrest power on federal marshals.").

<sup>179</sup> See Davies, *supra* note 65, at 355 ("[F]ederal marshals inherently possessed the same common-law warrantless arrest authority possessed by any private person, which is pretty much all that state sheriffs possessed."); accord Davies, *supra* note 59, at 157 n.491.

<sup>180</sup> See Mannheimer, *supra* note 35, at 1269–73.

<sup>181</sup> See Amar, *Writs of Assistance*, *supra* note 31, at 57–59.

<sup>182</sup> This appears to have differed by State. Compare WILLIAM W. HENING, *THE NEW VIRGINIA JUSTICE* 403 (1795) (instructing that search warrants "ought to be directed to constable, and other public officers . . . and not to private persons . . ."), and ELIPHALET LADD, *TO THE HONOURABLE THE JUSTICES OF THE PEACE* 358 (1792) (Massachusetts, New Hampshire, and Vermont) (similar), and JAMES PARKER, *THE CONDUCTOR GENERALIS: OR, THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE* 324 (1792) (New Jersey, New York, and Pennsylvania) (similar), and PETER FRENAU, *THE SOUTH CAROLINA JUSTICE OF THE PEACE* 425 (1788) (similar), with FRANCOIS X. MARTIN, *THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE* 280 (1791) (North Carolina) ("A search warrant is a justice's order . . . directed to a lawful officer or any indifferent person, commanding him to search a house, or

Judiciary Act of 1789 had already granted federal marshals and their deputies the authority “to execute throughout the district, all lawful precepts directed to him, and issued under the authority of the United States.”<sup>183</sup> Presumably, this included search warrants. However, section nine of the 1792 Militia Act goes one step further and grants federal officers the equivalent power to execute such warrants as their state counterparts. Moreover, relying upon section 27 of the 1789 Judiciary Act is a double-edged sword for Professor Davies, given that that section already empowered federal marshals “to command all necessary assistance in the execution of his duty.”<sup>184</sup> This encompassed the common-law posse comitatus power,<sup>185</sup> rendering superfluous the single grant of power Professor Davies suggests was given by section nine of the 1792 Militia Act.

In addition, eighteenth-century justice of the peace manuals take pains to differentiate between the arrest powers of government officials and those of private persons. So, for example, one such manual published the same year that the Militia Act took effect states that “all persons” must apprehend a felon if the felony is committed in their presence, but only “a watchman may arrest a night walker” and only “a constable may *ex officio* arrest a breaker of the peace in his view.”<sup>186</sup> While private persons could halt an ongoing affray, they had no power to arrest the affrayers once the tumult had concluded.<sup>187</sup> Nor, according to the 1792 manual, could such a person break doors to a private home to stop an ongoing affray. Those powers lay exclusively with state officers.<sup>188</sup>

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houses, therein particularly named, for stolen goods.”) (emphasis added).

<sup>183</sup> Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87 (1789); see Davies, *supra* note 37, at 611.

<sup>184</sup> Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87.

<sup>185</sup> See John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1979 (1983) (“In the Judiciary Act of 1789, Congress . . . gave each [federal] marshal ‘power to command all necessary assistance in the execution of his duty,’ including the power to call out a posse comitatus.”) (footnote omitted); see also Nathan Canestero, *Homeland Defense: Another Nail in the Coffin for Posse Comitatus*, 12 WASH. U. J.L. & POL’Y 99, 110 (2003); Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 YALE L. & POL’Y REV. 383, 392 (2003); David B. Kopel, *The Posse Comitatus and the Office of Sheriff: Armed Citizens Summoned to the Aid of Law Enforcement*, 104 J. CRIM. L. & CRIMINOLOGY 761, 796 (2015); Jason Mazzone, *The Commandeerer in Chief*, 83 NOTRE DAME L. REV. 265, 315–16 (2007); Gautham Rao, *The Federal Posse Comitatus Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth-Century America*, 26 LAW & HIST. REV. 1, 16 (2008).

<sup>186</sup> LADD, *supra* note 182, at 40–41.

<sup>187</sup> See *id.* at 41; accord Amar, *Writs of Assistance*, *supra* note 31, at 57.

<sup>188</sup> See LADD, *supra* note 182, at 44 (“Where an affray is made in a house, in the view or hearing of a constable, he may break open the doors to take them.”) (emphasis added); accord Amar, *Writs of Assistance*, *supra* note 31, at 57. One might quibble that these provisions

Likewise, although private persons and state officials alike could arrest for felonies, state officials generally had greater power to break doors to arrest for felonies than did private persons. In particular, a private person could not break doors to arrest “barely upon suspicion of felony,” while “a constable in such case may justify.”<sup>189</sup> While an ultimate finding of guilt of the arrestee could retroactively justify the private person’s breaking of doors in such an instance,<sup>190</sup> one could hardly say that the power of the private person and the state official were equivalent: only the latter could, on suspicion of felony, break doors to arrest even an innocent person.

At all events, even pursuant to Professor Davies’s interpretation, federal officers were bound by state law search-and-seizure standards, at least regarding warrantless arrest authority, whether by virtue of the 1792 Act or otherwise.<sup>191</sup> Indeed, Professor Davies goes so far as to observe that changes in the underlying state law of search and seizure over time would necessarily also alter the authority of federal marshals to search and seize.<sup>192</sup>

In sum, while the Fourth Amendment would dictate that a federal warrant must be particularized, founded upon oath, and issued only on probable cause,<sup>193</sup> the Judiciary Act of 1789 and the Militia Act of 1792 together provided that state law would determine the rest: whether the

mention only “constables” while the 1792 Militia Act gives federal marshals the same powers as local “sheriffs.” However, the sheriff was denominated as the “principal conservator of the peace” for the county. LADD, *supra* note 182, at 384. As such, he could “apprehend . . . all persons who break the peace, or attempt to break it.” WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1783). Like all conservators of the peace, part of his duty was “in suppressing . . . affrays.” *Id.* at 354. Accordingly, sheriffs enjoyed the same power of halting affrays and arresting affrayers as did constables.

<sup>189</sup> LADD, *supra* note 182, at 43; *see also* Amar, *Writs of Assistance*, *supra* note 31, at 57. Again, while the manual uses the word “constable,” sheriffs were undoubtedly entitled to the same justification. After all, the rationale behind allowing constables such a justification was that they could be punished if they refused to perform their duties while private persons had the authority to arrest but in most cases were not compelled to. *See* LADD, *supra* note 182, at 43. But sheriffs, in this respect, were in the same position as constables. *See id.* at 41 (“The warrant is ordinarily directed to the *sheriff or constable*, and they are indictable, and subject thereupon to a fine and imprisonment, if they neglect or refuse it.”) (emphasis added).

<sup>190</sup> LADD, *supra* note 182, at 42–43; *see also* Amar, *Writs of Assistance*, *supra* note 31, at 57.

<sup>191</sup> *See* Davies, *supra* note 79, at 104 (“[S]tate common law continued to set the standards for warrantless arrests by federal officers . . .”); Davies, *supra* note 59, at 210 (“Prior to the 1930s . . . warrantless arrests by federal officers . . . were subject to the law of the state in which the arrest was made.”).

<sup>192</sup> Davies, *supra* note 59, at 191 n.599 (“[C]hanges in state warrantless arrest law were probably understood to automatically expand the warrantless arrest authority of many federal officers . . .”).

<sup>193</sup> U.S. CONST. amend. IV.

warrant could be served nocturnally, whether prior announcement was required, whether and to what extent the arrestee's person and effects could be searched, where and under what circumstances a warrant could be dispensed with, and so forth. And this state of affairs existed continuously from the earliest days of the Republic until the mid-1930s, when Congress first explicitly granted federal officers general search-and-seizure authority untethered to underlying state law.<sup>194</sup>

No discussion of early federal search-and-seizure law would be complete without reference to the Collection Act of 1789,<sup>195</sup> the Act of August 4, 1790,<sup>196</sup> or the Excise Act of 1791.<sup>197</sup> The Collection Act permitted customs searches of ships without a warrant based on "reason to suspect" that goods subject to duty were concealed therein.<sup>198</sup> The 1790 Act, which effectively repealed the Collection Act but "imposed similar restrictions" on federal officers,<sup>199</sup> permitted warrantless and suspicionless searches of ships. The 1791 Act permitted searches of "houses, store-houses, ware-houses, buildings and [other] places" without warrant if those premises were registered as places where distilleries were located.<sup>200</sup> Assuming that these Acts shed light on the meaning of the Fourth Amendment,<sup>201</sup> they would cut against the claim that the Amendment ties the search-and-seizure authority of the federal government to that of each respective State. After all, the Acts permit warrantless searches of vessels, commercial buildings, and even homes, without taking account that such searches might be illegal under local law. And, indeed, the Court and a number of scholars have argued that the Acts do tell us how the Fourth Amendment should be interpreted. This

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<sup>194</sup> See, e.g., Act of June 18, 1934, ch. 595, 48 Stat. 1008, 1008; Act of June 15, 1935, ch. 259, § 2, 49 Stat. 377, 378; see also Davies, *supra* note 37, at 611–12 ("Congress never explicitly authorized marshals to make warrantless arrests until 1935."); accord Davies, *supra* note 65, at 356. One might argue that, because the 1789 and 1792 Acts require federal officers to follow state law, the Fourth Amendment cannot impose that requirement, for then the legislation would be superfluous. But the Amendment establishes a rule of limitation, while the legislation is a grant of power. The legislation granted federal executive officers search-and-seizure power up to the limits of the Amendment. Absent the legislation, federal officers would have had no special powers to search or seize beyond that which was provided to ordinary citizens in each State.

<sup>195</sup> Collection Act of 1789, ch. 5, 1 Stat. 29 (1789).

<sup>196</sup> Act of Aug. 4, 1790, ch. 35, § 31, 1 Stat. 145 (1790); see also Act of Feb. 18, 1793, ch. 8, § 27, 1 Stat. 305, 315 (1793).

<sup>197</sup> Act of Mar. 3, 1791, ch. 15, 1 Stat. 199 (1791).

<sup>198</sup> Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29, 43 (1789).

<sup>199</sup> Morgan Cloud, *Searching Through History, Searching for History*, 63 U. CHI. L. REV. 1707, 1742 (1996).

<sup>200</sup> Act of Mar. 3, 1791, ch. 15, §§ 25, 26, 29, 1 Stat. 199, 205–07.

<sup>201</sup> But see *infra* text accompanying notes 193–241.

assertion is based on the following syllogism: the same men who drafted both these statutes also drafted the Fourth Amendment; they would not have drafted statutes that they believed violated the Fourth Amendment; therefore, we must assume that men who drafted the Fourth Amendment believed that it permitted the searches allowed by the statutes.<sup>202</sup>

However, the syllogism is faulty.<sup>203</sup> First, while the federal statutes were enacted by Congress, to say the same of the Fourth Amendment is a great oversimplification of the process by which the Bill of Rights was adopted. While mere legislation has only drafters, a constitutional amendment has both drafters and ratifiers. To ascribe some meaning to the latter, one must consult not just the Members of Congress who voted for it but also the members of the legislatures of the three-fourths of the States that ultimately ratified it.

More importantly, the Federalists, who dominated the First Congress, were opposed to a Bill of Rights.<sup>204</sup> The Bill was adopted only to placate moderate Anti-Federalists, who demanded it as the price for ratification.<sup>205</sup> While Congress was given the task of determining the precise wording of the amendments, the ideas that those words represent were dictated to Congress by the Anti-Federalists. In Professor Gerard Bradley's seafaring analogy: "[T]he intentions of the whale (the anti-federalists) are more important than

<sup>202</sup> As early as *Boyd v. United States*, 116 U.S. 616, 623 (1886), the Court employed this syllogism: "As [the Collection Act] was passed by the same [C]ongress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable' . . ." Typical of the same logic employed by commentators is this passage from Professor Cuddihy regarding the Collection Act:

The Collection Act of 1789 was most significant because it identified the techniques of search and seizure that the framers of the [Fourth] [A]mendment believed reasonable while they were framing it. Congressional consideration of the search warrant section of that act commenced only twelve days before the [A]mendment originated, and that section became law just three weeks before the [A]mendment assumed definitive form. The Collection Act explicated the Fourth Amendment for both documents expressed the thoughts of the same persons upon the same subject at the same time.

CUDDIHY, *supra* note 2, at 737–38; see also Amar, *Writs of Assistance*, *supra* note 31, at 59 ("[H]istorical exceptions to a blanket requirement come from the First Congress—the same body that drafted the Fourth Amendment itself."); Arcila, Jr., *supra* note 37, at 1289–90 ("[N]umerous federal statutes from the Framers' era authoriz[ing] warrantless civil searches . . . evidence that neither the Framers nor other political leaders from their generation believed that a warrant was usually required for a valid search.").

<sup>203</sup> See Davies, *supra* note 37, at 606 ("Numerous commentators have accepted uncritically [the] assumption that the 1789 statute reflected the Framers' understanding of the Fourth Amendment.").

<sup>204</sup> See Mannheimer, *supra* note 35, at 1266–67.

<sup>205</sup> See *id.* at 1278–84; see *infra* text accompanying note 243.

those of the ship's crew (the First Congress, especially Madison). What does the whale demand? What will satisfy him and make him go away?"<sup>206</sup> In order to interpret the Bill of Rights, we cannot look only, or even primarily, to what the First Congress may have believed it was doing.

Given the Federalist/Anti-Federalist split in the First Congress, it is far from clear that there was any kind of consensus over whether these statutes were consistent with the Fourth Amendment. Unfortunately, the records of debates and votes on these items from the First Congress are largely lost to history.<sup>207</sup> Accordingly, it is disingenuous for supporters of the view that these Acts shed light on the meaning of the Fourth Amendment to put the burden of proof on those who disagree.<sup>208</sup> Because the records of the debates are sparse or non-existent, it is impossible to prove one way or the other how much controversy was caused by the search-and-seizure provisions of these early Acts of Congress.

Moreover, all the available evidence suggests that these provisions were viewed by opponents as of dubious constitutional validity. For example, suspicionless searches of ships must have been seen as of questionable constitutionality, given that Americans of the period increasingly viewed their ships as akin to their dwellings in terms of their expectations of privacy.<sup>209</sup> There is a recorded instance of this sentiment as early as 1734.<sup>210</sup> The years of the writs-of-assistance controversy also saw a concomitant "ardent public hostility" toward shipboard searches.<sup>211</sup> In the years just preceding the Revolution, "Americans increasingly regarded not only houses but ships as castles."<sup>212</sup> It is inconceivable that by 1790, the sentiment of a large chunk of the population, identifying ships as areas deserving of a quantum of privacy approaching that of the home, had simply vanished such that the 1790 Act represented a consensus view of the Fourth Amendment.

<sup>206</sup> Bradley, *supra* note 170, at 834–35.

<sup>207</sup> See Davies, *supra* note 37, at 711 n.470 (observing this "serious gap in the historical record" regarding the 1789 Collection Act); *id.* at 713 n.471 ("[T]here is no record of any debate in the Senate regarding the 1791 Excise Act, and the record of the debate in the House of Representatives regarding the procedural aspects of the Act is quite limited."); see also CUDDIHY, *supra* note 2, at 737 n.257 ("The documentation on the Collection Act mentions no debates of its sections concerning search and seizure. [D]ebates of those sections either never occurred or were not recorded.").

<sup>208</sup> See, e.g., Amar, *Writs of Assistance*, *supra* note 31, at 59 ("If any Member of Congress objected to or even questioned these warrantless searches and seizures on Fourth Amendment grounds, supporters of a warrant requirement have yet to identify him.").

<sup>209</sup> See Arcila, Jr., *supra* note 37, at 1299–1303.

<sup>210</sup> See *id.* at 1300 ("In 1734, a South Carolinian contended that 'my house is my castle, and so is my ship.'" (quoting S.C. GAZETTE, Nov. 2–9, 1734, at 2)).

<sup>211</sup> *Id.* at 1302.

<sup>212</sup> CUDDIHY, *supra* note 2, at 591.

The 1791 Act in particular “was widely perceived as overly intrusive of privacy.”<sup>213</sup> According to Francis Wharton, the Act “produced at once great opposition, both in and out of Congress.”<sup>214</sup> “A majority of the southern and western members [of Congress], even before the bill was passed, proclaimed an organized agitation for its repeal . . . .”<sup>215</sup> The few statements we have of House members debating the search provisions of the 1791 Act illustrate this: Virginia Anti-Federalist Representative Josiah Parker<sup>216</sup> objected to the provisions regarding “the mode of collecting the tax” as being “hostile to the liberties of the people.”<sup>217</sup> In vivid terms, he warned that the collections provisions would “let loose a swarm of harpies, who, under the denomination of revenue officers, will range through the country, prying into every man’s house and affairs, and like a Macedonian phalanx bear down all before them.”<sup>218</sup> Representative James Jackson, an anti-administration Federalist from Georgia,<sup>219</sup> also opposed the Act as “unfriendly to the liberties of the people.”<sup>220</sup> Even some generally pro-administration Federalists were against the Act on constitutional grounds. Representative John Steele of North Carolina,<sup>221</sup> for example, complained that the proposed Act would subject citizens “to the most unreasonable, unusual and disgusting situation of having their houses searched at any hour of the day or night.”<sup>222</sup>

After the Act became law, it “triggered apocalyptic protests”<sup>223</sup> and was “assailed violently from the country at large.”<sup>224</sup> Maryland, North Carolina, Pennsylvania, and Virginia “united in solemn declarations of rooted dislike, and of resistance” amounting to, in some cases, “nullification.”<sup>225</sup> Delegates from Pennsylvania’s western counties remonstrated to Congress and the Pennsylvania legislature that “[i]t is insulting to the feelings of the people to

<sup>213</sup> Arcila, Jr., *supra* note 37, at 1308 (emphasis omitted).

<sup>214</sup> FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 102 (1849).

<sup>215</sup> *Id.*

<sup>216</sup> See John H. Aldrich & Ruth W. Grant, *The Antifederalists, the First Congress, and the First Parties*, 55 J. POL. 295, 323 app. 1 (1993).

<sup>217</sup> 1 ANNALS OF CONG. 1844 (1791).

<sup>218</sup> *Id.*; see Arcila, Jr., *supra* note 37, at 1309.

<sup>219</sup> See Aldrich & Grant, *supra* note 216, at 322 app. 1.

<sup>220</sup> 1 ANNALS OF CONG. 1846.

<sup>221</sup> See Aldrich & Grant, *supra* note 216, at 323 app. 1.

<sup>222</sup> DAILY ADVERTISER, June 22, 1790, at 1; see Arcila, Jr., *supra* note 37, at 1308 n.117. These remarks do not appear in 1 ANNALS OF CONG. 1642–43.

<sup>223</sup> CUDDIHY, *supra* note 2, at 743.

<sup>224</sup> WHARTON, *supra* note 214, at 102.

<sup>225</sup> *Id.*

have their . . . houses . . . ransacked.”<sup>226</sup> Subsequently, one essay appearing in a New York newspaper, apparently reprinted from a North Carolina paper, objected that, pursuant to the Act, “every citizen’s house in the United States, is liable to undergo the insult of a search.”<sup>227</sup> The essay continued that the Act “lays open the peaceable dwellings of the inhabitants of a country to the entrance, insults and rudeness of a set of unprincipled excisemen,” and “disturb[s] the peace and happiness of their families by the entering, searching and ransacking their houses and closets, by a set of rude and insulting excisemen.”<sup>228</sup>

The opposition to the 1791 Excise Act soon turned violent. Barely three months after the Act went into effect, Robert Johnson, collector of revenues for Pennsylvania’s western counties, was attacked by a mob of “armed men, who stripped him, cut off his hair, tarred and feathered him,” and stole his money and his horse.<sup>229</sup> After a complaint was filed against members of the mob in federal court, a man attempting to serve the papers relating to the litigation was tarred and feathered, had his horse and watch stolen from him, and was blindfolded and tied up in the woods for five hours.<sup>230</sup> Such acts of terrorism in opposition to the Excise Act continued in Western Pennsylvania for three years until, in 1794, opposition ripened into armed insurrection, put down only when President Washington called in the militia.<sup>231</sup> For this, a number of insurgents were later tried for treason and sentenced to hang.<sup>232</sup> When people burn down federal buildings, and torture and kill federal agents because of the intrusiveness of a federal law, one can reasonably infer that they were upset by the law when it was passed.<sup>233</sup> It is inconceivable that the provisions of the 1791 Excise Act represent anything resembling a national consensus on the meaning of the Fourth Amendment. The point here is not that the Excise Act was unconstitutional because it was controversial. It is rather the more modest proposition that we cannot simply assume that the Excise Act was constitutional simply because it was enacted by the same

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<sup>226</sup> *Pittsburgh, Sept. 10*, INDEP. GAZETEER, Sept. 24, 1791, at 3; see Arcila, Jr., *supra* note 37, at 1308–09.

<sup>227</sup> *Extract from Observations in a North-Carolina Paper “On the Assumption and Excise Law,”* NEW YORK DAILY GAZETTE, Feb. 2, 1793, at 3 [hereinafter *Extract from Observations*]; see Arcila, Jr., *supra* note 37, at 1308.

<sup>228</sup> *Extract from Observations*, *supra* note 227, at 3.

<sup>229</sup> WHARTON, *supra* note 214, at 105.

<sup>230</sup> *See id.*

<sup>231</sup> *See id.* at 110–17; Arcila, Jr., *supra* note 37, at 1309.

<sup>232</sup> *See* WHARTON, *supra* note 214, at 172–83.

<sup>233</sup> *See* LIN-MANUEL MIRANDA, HAMILTON, *Cabinet Battle #1* (Atlantic Records 2015) (“Look, when Britain taxed our tea, we got frisky. Imagine what gon’ happen when you try to tax our whiskey.”).

Congress that proposed the Fourth Amendment.

More broadly, it is sometimes easy to forget that America's first congressmen were *politicians* who belonged to political parties that often disagreed with one another, sometimes vehemently. More particularly, the sentiments of the Anti-Federalists, those who had opposed the Constitution and still favored States' rights vis-à-vis the central government, were alive and well in the First Congress.<sup>234</sup> Pro-administration Federalists, who desired to empower the federal government with robust authority, constituted a majority of the First Congress.<sup>235</sup> But the opposition was strong, and Anti-Federalists constituted a sizeable minority.<sup>236</sup>

Moreover, much of the legislation considered in the First Congress was seen as carrying over the issues from the ratification debates, and particularly the question of federalism.<sup>237</sup> Fundamental questions about the nature of the young Republic were inherent in virtually every issue debated in the First Congress,<sup>238</sup> and debate revolved around a Federalist/Anti-Federalist axis.<sup>239</sup>

Not only was there often a Federalist/Anti-Federalist dividing line on important legislation in the First Congress, but the 1791 Excise Act was the work of none other than high Federalist Alexander Hamilton,<sup>240</sup> whom Anti-Federalists despised.<sup>241</sup> It blinks reality to think that the sizeable minority of Anti-Federalists in Congress blithely accepted as constitutional the intrusive search provisions of an Act whose architect was the hated Secretary of the Treasury. Indeed, opposition to Hamilton was one point around which Anti-Federalists could rally; they generally voted as a united bloc against his

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<sup>234</sup> See Aldrich & Grant, *supra* note 216, at 296 (“Th[e] ‘regime question’ remained open in the 1790s, although its focus shifted from the merits of the Constitution itself to which of the potential tendencies within the Constitution’s framework would prove dominant.”).

<sup>235</sup> See *id.* at 313 (“[P]ro-administration Federalists were a majority in the First Congress . . .”).

<sup>236</sup> See *id.* (observing that opposition to the majority in the First Congress “was typically quite large, and anti-federalists provided much of that opposition”).

<sup>237</sup> See *id.* at 301 (contending that issues addressed in the First Congress “kept alive, and were understood as, issues raised in the ratification debates [including] the distribution of power . . . between the general and state governments”).

<sup>238</sup> See *id.* at 302 (“Almost every issue before the House was debated partially in terms of its effect on the character of the republic.”).

<sup>239</sup> See *id.* at 310 (“All of the major issues facing the First Congress had been anticipated before and during the ratification campaign, and they provoked arguments in the House along Federalist-antifederalist lines.”).

<sup>240</sup> See CUDDIHY, *supra* note 2, at 736 & n.254.

<sup>241</sup> See Jonathan Turley, *Reflections on Murder, Misdemeanors, and Madison*, 28 HOFSTRA L. REV. 439, 442 n.21 (1999) (“[T]he Jeffersonians . . . hated Hamilton as the personification of the Federalist cause.”).

proposals.<sup>242</sup> Together with anti-administration Federalists, they were almost able to defeat those proposals.<sup>243</sup>

In the First Congress, the Bill of Rights, on the one hand, and ordinary legislation, on the other, were simply on two different political trajectories. The former, though necessarily blessed by the Federalist majority, was an Anti-Federalist project.<sup>244</sup> The latter generally subordinated the concerns of the minority Anti-Federalists as part of the Federalist project of building a powerful central government. This gives us a good reason to resist the facile notion that the expansive federal search authority created by the First Congress was necessarily consistent with the limitations on federal search authority embodied by the Fourth Amendment.

Thus, it blinks reality to suggest any type of consensus in the First Congress, much less the Nation as a whole, that the Collection Act, the Act of August 4, 1790, and, in particular, the Excise Act, were consistent with the Fourth Amendment.<sup>245</sup> It is not only that “early Americans did not always practice what they preached”;<sup>246</sup> it is also that they were preaching from two different pulpits.

But one can hardly say the same of the local-control provisions of the 1789 Judiciary Act and the 1792 Militia Act. By declining to establish federal search-and-seizure rules, and instead calibrating federal rules to those of each respective State, Congress avoided the kind of controversy engendered by the Collection and Excise Acts. Unlike the latter, the local-control provisions of the Judiciary and Militia Acts would have naturally enjoyed the support of the minority Anti-Federalists, and obviously enjoyed sufficient support from the majority Federalists to become law.

Of course, this legislation is evidence only of what members of the early Congresses believed the Fourth Amendment *permitted*, not what they thought it *required*. One might argue that compliance with section 33 of the Judiciary Act of 1789 or section 9 of the Militia Act of 1792 might put a federal officer afoul of the Fourth Amendment if a State’s search-and-seizure rules fell

<sup>242</sup> See Aldrich & Grant, *supra* note 216, at 299 (“[A]ntifederalist representatives . . . tended to vote together in opposition to Hamilton’s proposals . . .”).

<sup>243</sup> See *id.* at 300 (observing that Anti-Federalists “formed a significant proportion of the opposition forces that Hamilton’s supporters were barely able to defeat”).

<sup>244</sup> See *infra* Section III.A.

<sup>245</sup> See Maclin, *supra* note 54, at 951 (citing “conflict among the Framers as to the meaning of the Fourth Amendment” as a reason not to take the Collection Act as evidence of the Amendment’s original meaning). A final clue that the Excise Act in particular must have been relatively divisive is the date of its enactment: March 3, 1791, the final day of the final session of the First Congress.

<sup>246</sup> Tracey Maclin, *When the Cure for the Fourth Amendment is Worse Than the Disease*, 68 S. CAL. L. REV. 1, 11 (1994).

below a constitutional minimum set by the Fourth Amendment. Again, the legislative history is sparse, and we must rely to a large extent on informed speculation. But notice that the statutes themselves contain no proviso to address that situation. Instead, the way they are written suggests that state rules of search and seizure are the constitutional floor. At a minimum, these statutes demonstrate that Americans of this time period were quite comfortable with the idea that federal power be constrained by state law, even if only as a matter of statute.

### III. THE SUPERIORITY OF THE LOCAL-CONTROL MODEL

A common thread runs through these three distinct episodes in early American history: local control over search-and-seizure policy. These attempts to reserve local control of search-and-seizure policy during these three periods dovetail almost perfectly with the Anti-Federalist impetus behind the Fourth Amendment. It was these opponents of the Constitution who ultimately compromised, demanding a Bill of Rights with robust protections for state norms as the price for their acquiescence to union. They demanded that certain spheres of human activity be carved out of the centralization agenda of the Federalists and be retained for local control. One of those areas, because of the grave potential for abuse, was search-and-seizure law and policy. In turn, what the Anti-Federalists had to say about searches and seizures refutes both the Reasonableness Model and the Warrant Model.

#### A. THE ANTI-FEDERALISTS AND THE FOURTH AMENDMENT

It is true that, by its terms, the Fourth Amendment does not expressly demand calibration of federal search-and-seizure policy to that of the States. Instead, it prescribes the requirements for issuance of warrants and otherwise demand that searches and seizures be “reasonable” (or, to be precise, not “unreasonable”).<sup>247</sup> But that very term “reasonable” “cries out for a benchmark against which federal searches and seizures are to be compared.”<sup>248</sup> Where to find that benchmark? For the Anti-Federalists who demanded adoption of the Fourth Amendment, the answer was simple: in the search-and-seizure practices of the individual States.

The Anti-Federalists opposed the Constitution because they feared that its concentration of power in the central government would lead to both the annihilation of the state governments and the destruction of individual

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<sup>247</sup> U.S. CONST. amend. IV.

<sup>248</sup> Mannheim, *supra* note 35, at 1284.

liberty.<sup>249</sup> Local government and individual rights were intertwined in their mind: the States were positioned as the guarantors of freedom as against any central government, be it the British Empire, the Confederation Congress, or the proposed federal government.<sup>250</sup> Every State had a Constitution, a Bill of Rights, or at least a strong common-law tradition of protecting individual liberty.<sup>251</sup> A new central government that could act directly upon the citizenry without having to go through the States would be able to bypass these state-level protections of liberty.<sup>252</sup> A Bill of Rights was required to assuage these fears.<sup>253</sup>

Without the promise of a Bill of Rights, our nation might never have been formed. At the outset of the ratification process, Anti-Federalists held majorities in such key States as Massachusetts, New York, and Virginia.<sup>254</sup> The Bill of Rights was the enticement needed to win over moderate Anti-Federalists, who saw the flaws of the Articles of the Confederation but desired to maintain some of its decentralizing attributes.<sup>255</sup> The strategy worked. In the battleground State of New York, for example, moderate Anti-Federalist Melancton Smith and eleven of his followers were sufficiently appeased by the promise of a Bill of Rights to sway them in favor of the Constitution.<sup>256</sup> The margin of victory was three votes.<sup>257</sup> Simply put, without the votes of these moderate Anti-Federalists, the United States might not exist today, at least as we know it. The Bill of Rights thus should be understood as it was contemplated by those who demanded its inclusion in the Constitution in exchange for their votes in favor of ratification: as carving out certain spheres for control by the several States.<sup>258</sup>

One of these spheres was search-and-seizure. Over and over, the Anti-Federalists expressed anxiety at leaving search-and-seizure policy in the hands of a new, powerful central government. First, they demanded a prohibition on general warrants, as a consensus had developed by 1791 that

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<sup>249</sup> See Mannheimer, *supra* note 35, at 1263–64; Michael J.Z. Mannheimer, *Cruel and Unusual Federal Punishments*, 98 IOWA L. REV. 69, 101–03 (2012).

<sup>250</sup> See Mannheimer, *supra* note 35, at 1264–66; Mannheimer, *supra* note 249, at 101–02.

<sup>251</sup> See Mannheimer, *supra* note 35, at 1264.

<sup>252</sup> See *id.* at 1265; Mannheimer, *supra* note 249, at 103.

<sup>253</sup> See Mannheimer, *supra* note 35, at 1268; Mannheimer, *supra* note 249, at 104.

<sup>254</sup> See Mannheimer, *supra* note 35, at 1278; Mannheimer, *supra* note 249, at 108.

<sup>255</sup> See Mannheimer, *supra* note 249, at 100.

<sup>256</sup> See Mannheimer, *supra* note 35, at 1280–81.

<sup>257</sup> See Richard B. Morris, *John Jay and the Adoption of the Federal Constitution in New York: A New Reading of Persons and Events*, 63 N.Y. HIST. 133, 162 (1982); David E. Narrett, *A Zeal for Liberty: The Antifederalist Case Against the Constitution in New York*, 69 N.Y. HIST. 285, 289 (1988).

<sup>258</sup> See Mannheimer, *supra* note 35, at 1284; Mannheimer, *supra* note 249, at 109.

such warrants were unlawful.<sup>259</sup> However, their concern went beyond merely the idea that warrants be specific, and encompassed anxiety over federal executive officers' search-and seizure authority more generally. Consider, for example, Massachusetts Anti-Federalist John DeWitt's warnings concerning potential federal authority to be given to federal tax collectors. He wrote:

They [Congress] are to determine, *and you are to make no laws inconsistent with such determination*, whether such Collectors shall carry with them any paper, purporting their commission, or not—whether it shall be a general warrant, or a special one—whether written or printed—whether any of your goods, or your persons are to be exempt from distress, and in what manner either you or your property is to be treated when taken in consequence of such warrants. They will have the liberty of entering your houses by night as well as by day for such purposes.<sup>260</sup>

That DeWitt was primarily concerned with local control of search-and-seizure policy, and only as an ancillary matter with any particular aspect of that policy, is evident from the way in which he began his discussion: Congress is “to determine” all of the rules attending searches and seizures, “*and you are to make no laws inconsistent with such determination.*” Read this language in the light shone by Massachusetts's unsuccessful attempt to legislatively overturn the result in *Paxton's Case*,<sup>261</sup> and its later reservation of local search-and-seizure law as applied to national officials in its legislation ratifying the 1783 confederal impost.<sup>262</sup> The problem, according to DeWitt, was not simply that federal search-and-seizure policy might contain features disliked by Bay Staters regarding warrantless searches, the extent of seizures, the treatment of persons and property subject to seizure, and nocturnal searches. The real problem was that Massachusetts would be unable—as it had done in 1783 and attempted to do in 1762—to pass legislation to do something about it.

Likewise, Patrick Henry in the Virginia ratifying convention despaired of the loss of local control over searches and seizures. He observed that even local sheriffs, although “under the watchful eye of [the Virginia] legislature,” had “committed the most horrid and barbarous ravages on [the] people.”<sup>263</sup> This had been met, with limited success, by state legislation “to suppress their

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<sup>259</sup> See CUDDIHY, *supra* note 2, at 739–43.

<sup>260</sup> John DeWitt, *To the Free Citizens of the Commonwealth of Massachusetts IV*, reprinted in 4 THE COMPLETE ANTI-FEDERALIST 29, 33 (Herbert J. Storing ed., 1981) (emphasis added).

<sup>261</sup> See *supra* text accompanying notes 99–101.

<sup>262</sup> See *supra* text accompanying note 143.

<sup>263</sup> 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 58 (Jonathan Elliott ed., 2d ed. 1901) [hereinafter ELLIOTT'S DEBATES].

iniquitous speculations and cruel extortions.”<sup>264</sup> He then raised the specter of federal officers searching with impunity through every inch of the people’s dwellings, of “harpies . . . aided by excisemen, who may search, at any time, your houses, and most secret recesses.”<sup>265</sup> Henry contrasted the attempts by the state legislature to keep vigilant watch over wayward local sheriffs with the unlikely prospect that such attempts by a national legislature would be successful: “[I]f sheriffs, thus immediately under the eye of our state legislature . . . have dared to commit these outrages, what would they not have done if their masters had been at Philadelphia or New York?”<sup>266</sup> Thus, Henry argued that the national legislature and federal judges were far less likely to constrain federal officers through legislation and common-law rulemaking than were the state legislature and state judges. The premise of this argument is a common refrain among the Anti-Federalists: that local control enhances the accountability of government actors while centralized power weakens political accountability.<sup>267</sup> Consequently, according to Henry, nothing would “tie [the] hands” of federal tax collectors and excisemen vis-à-vis intrusive searches and seizures.<sup>268</sup>

Henry’s prescription for this problem was that such searches and seizures should be subject to state, not federal, regulation. He made this clear at another point during the Virginia ratifying convention, when he raised the specter of a federal “exciseman . . . demand[ing] leave to enter [one’s] cellar, or house, by virtue of his office.”<sup>269</sup> He explained that he was unwilling to abide such a potentiality “without any reservation of rights or control.”<sup>270</sup> The best reading of Henry’s prescription of a “reservation of rights” and “control,” pursuant to what ultimately became the Fourth Amendment, given his other comments, is that he meant local control—legislative and judicial—of federal officials. Such control, of course, had already taken place in Virginia, in the form of local refusal to issue writs of assistance, perfectly legal under English law, but which conflicted with local sensibilities.<sup>271</sup>

The statements made by the Anti-Federalists regarding their fears over federal search-and-seizure policy, viewed in the light shed by the multiple

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> See Michael J.Z. Mannheimer, *Self-Government, the Federal Death Penalty, and the Unusual Case of Michael Jacques*, 36 VT. L. REV. 131, 148–55 (2011) (exploring Anti-Federalist view of accountability deficits flowing from large-scale Republic).

<sup>268</sup> ELLIOTT’S DEBATES, *supra* note 263, at 57; see Mannheimer, *supra* note 35, at 1275.

<sup>269</sup> *Speech by Patrick Henry (June 14, 1788)*, in 3 ELLIOTT’S DEBATES, *supra* note 263, at 412.

<sup>270</sup> *Id.*

<sup>271</sup> See *supra* text accompanying note 112.

instances of the assertion of local control against central authority in the thirty years straddling the framing period, thus support a local-control model of Fourth Amendment protection. Such a model posits that the central concern of the framers and ratifiers of the Fourth Amendment was placing decisions regarding search-and-seizure policy in the hands of the States rather than the new central government.

#### B. THE ANTI-FEDERALISTS AND THE REASONABLENESS AND WARRANT MODELS

The statements of Anti-Federalists such as John DeWitt and Patrick Henry, and the more general sentiments of the Anti-Federalists, also largely refute both the Reasonableness Model and the Warrant Model. Taking into account the complete historical picture, a local-control model is superior to a historical model that posits warrants as the touchstone of Fourth Amendment protection, on the one hand, and one that holds the federal government only to some nebulous standard of reasonableness, on the other.

One need go no further than the statements of DeWitt and Henry discussed above to refute Professor Amar's claim that the framers and ratifiers of the Fourth Amendment were exclusively concerned with general warrants and were unperturbed by warrantless searches. Notice several things about the enlightening passage from DeWitt. First, he expressed anxiety that federal tax collectors might have a "paper purporting their commission," i.e., a warrant, "*or not.*"<sup>272</sup> That is, he expressed a concern that tax collectors might act without warrant at all, in addition to expressing the concern that such a warrant might be "general" rather than "special."<sup>273</sup> Moreover, he expressed concern about "whether any of [one's] goods, or . . . persons are to be exempt from distress."<sup>274</sup> Again, this goes beyond a concern regarding the specificity of warrants and suggests that there might be limitations on how "goods" and "persons" can be searched or seized even with a warrant. DeWitt probably had in mind the precept, discernible from *Entick v. Carrington*, that seizure of "mere evidence" of a crime, even pursuant to warrant, was unlawful.<sup>275</sup> Furthermore, DeWitt worried about the manner in which persons and property are "to be treated when taken in consequence of such warrants."<sup>276</sup> Again, the concern is not just with general

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<sup>272</sup> See *supra* text accompanying note 258.

<sup>273</sup> See *id.*

<sup>274</sup> See *id.*

<sup>275</sup> 95 Eng. Rep. 807 (K.B. 1765). See also Amar, *supra* note 27, at 782 (asserting that a warrant issued on probable cause "justified searches only for items akin to contraband or stolen goods, not 'mere evidence'").

<sup>276</sup> See *supra* text accompanying note 258.

warrants but also with the way in which they were to be executed.<sup>277</sup> Finally, he expressed a concern about nocturnal searches, which again goes to the execution of search warrants as opposed to their generality or specificity.

Henry, too, was concerned not only with a federal official's using general warrants, but also with his not obtaining a warrant at all and executing a search "by virtue of his office."<sup>278</sup> Indeed, Henry chose his words carefully. By describing a potential warrantless search by a federal excise collector as being "by virtue of his office," he deliberately evoked the *ex officio* (that is, warrantless) searches by British customs officials in the 1740s and 1750s that incensed the people of Massachusetts and were a prelude to the writs of assistance controversy.<sup>279</sup> To those who clamored for a federal constitutional protection against unreasonable searches and seizures, "an *ex officio* search and a writ of assistance search were two different sides of the same coin" because "[b]oth allowed broad, discretionary . . . power without any requirement of specific cause or judicial oversight."<sup>280</sup> Like DeWitt, Henry also stoked fears of nocturnal searches, by conjuring up images of federal "harpies . . . assisted by excisemen[,] 'who may search, *at any time*.'"<sup>281</sup>

On the other hand, the confidence of Warrant Model adherents in judicial control of executive officers is in sharp tension with the deep suspicion that the Anti-Federalists felt toward the prospect of a federal judiciary. It is true, of course, that colonial judges largely (though not uniformly) sided with the colonists during the writs of assistance controversy.<sup>282</sup> However, these were the forerunners of *state* judges; federal judges were another matter. Anti-Federalists continually complained that "[t]he Constitution creates a powerful judicial branch that threatens the integrity of state courts."<sup>283</sup> Indeed, the major conflict during the first twenty

<sup>277</sup> DeWitt may have had in mind warrantless searches incident to arrest. The common law authority to conduct such a search was not nearly as well settled at the time of the framing as modern Supreme Court decisions have made it out to be. *Compare* Mannheim, *supra* note 35, at 1252–53 (observing that search-incident-to-arrest authority was discussed in only two out of eleven justices of the peace manuals printed in North America between 1761 and 1795), *with* *Weeks v. United States*, 232 U.S. 383, 392 (1914) (asserting that search-incident-to-arrest authority has "always [been] recognized under English and American law").

<sup>278</sup> See *supra* text accompanying note 267; CUDDIHY, *supra* note 2, at 683 (explaining that Henry was concerned about federal excisemen searching "without warrant").

<sup>279</sup> See CUDDIHY, *supra* note 2, at 363; Maclin, *supra* note 20, at 219.

<sup>280</sup> See Maclin, *supra* note 20, at 222–23.

<sup>281</sup> See CUDDIHY, *supra* note 2, at 683.

<sup>282</sup> See Maclin, *supra* note 20, at 227 (asserting that "many [colonial] judges . . . strongly opposed practices that granted custom officers the discretion to invade the privacy and personal security of individuals").

<sup>283</sup> See SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828*, at 30–31 (1999).

years of the Republic over the existence of federal common law<sup>284</sup> stemmed at least in part over Anti-Federalist, and then Jeffersonian Republican, distrust of federal judges. As Patrick Henry warned in his speech referenced above, federal judges would be “sworn to support this [federal] Constitution, in opposition to that of any state, and . . . may also be inclined to favor their own officers.”<sup>285</sup> Placing limits on federal executive officers that were to be enforced by federal judges would have been, to the Anti-Federalists, putting the foxes in charge of the henhouse. The notion that this was the central goal of the Fourth Amendment is a creation of the twentieth century, not the eighteenth.

The Fourth Amendment is not primarily about separation of powers. It is mostly about federalism. Recall that Patrick Henry expressed support for the idea that local sheriffs be kept “under the eye of [the] state legislature and judiciary.”<sup>286</sup> But the Anti-Federalists did not trust the federal legislature and judiciary to restrain federal officers. Rather, the idea was to restrain federal executives via the state legislature and judiciary, the former by formulating search-and-seizure policy, and the latter by both controlling the issuance of warrants and providing remedies for trespass (and, in doing so, building upon the common law of search and seizure). This, after all, was exactly how the writs of assistance controversy played out in most of the colonies: local legislatures and judiciaries constraining the executive power of the Crown. It was also at the heart of the state legislation ratifying the federal impost in the 1780s, which forced state search-and-seizure policy, as formulated by local legislatures and judges upon confederal enforcement officers. And it was the strategy of section 33 of the Judiciary Act of 1789 and section 9 of the Militia Act of 1792, which required that federal agents generally abide by state law when they search and seize.

To the Anti-Federalists, the Bill of Rights was largely about self-government and local control of the policies that affected people most directly. As Professor Gerard Bradley cogently observed: “[T]he right of the people, specified by the [F]ourth [A]mendment, was not apprehended by its ratifiers to refer to an individual’s ‘right’ to be governed by laws other than those favored by the community’s desire and political authority to enact them.”<sup>287</sup> Search-and-seizure law is fundamentally about striking an appropriate balance between liberty and security. And the Anti-Federalists saw this as fundamentally a matter for each “community’s desire,” not

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<sup>284</sup> See Mannheimer, *supra* note 249, at 113–20.

<sup>285</sup> 3 ELLIOTT’S DEBATES, *supra* note 263, at 58.

<sup>286</sup> *Id.*

<sup>287</sup> Bradley, *supra* note 170, at 862.

national policy.<sup>288</sup>

By 1791, a consensus had developed throughout the United States that general warrants were unlawful.<sup>289</sup> Thus, the Fourth Amendment specifically bans them. But no similar consensus had developed on many of the other issues of search-and-seizure policy that had arisen, such as when warrants are needed. On issues such as these, the history surrounding the adoption of the Fourth Amendment points most strongly not toward a general warrant requirement nor toward a general reasonableness standard, but to a regime of local control of federal officials. It was a regime that most closely accorded with the demands of the Anti-Federalists, whose support ultimately was necessary to form the Union. And it was a regime that Americans in 1791 would have been used to.

### C. AN ASIDE ABOUT INCORPORATION OF A LOCAL-CONTROL MODEL OF THE FOURTH AMENDMENT

One nettlesome problem is how to translate this local-control model into a useable framework governing searches and seizures by state, rather than federal, officials. If the Fourth Amendment is primarily about federalism and thus preserves local control of search-and-seizure authority, one might conclude that no effective constitutional constraint on state searches and seizures can exist. While a complete response to this potential objection is beyond the scope of this Article, some rough contours can be briefly sketched out.

State searches and seizures are, of course, governed by the Due Process Clause of the Fourteenth Amendment.<sup>290</sup> It is only through the legal fiction of incorporation that we speak of the Fourth Amendment as applying to the States. And, whatever else it might require, the core, irreducible command that “[n]o State shall . . . deprive any person of . . . liberty[] or property, without due process of law” is that state executive officials must follow state law in searching and seizing. Due process, on this view, is largely about separation of powers, preventing the executive from depriving persons of their interests in ways that are authorized by neither the legislative nor the judicial branch.<sup>291</sup>

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<sup>288</sup> See Amar, *supra* note 27, at 818 (observing that local juries are optimally situated “to decide, in any given situation, whom it fears more, the cops or the robbers,” and that “[t]his judgment . . . will vary from place to place and over time”).

<sup>289</sup> See CUDDIHY, *supra* note 2, at 637–58.

<sup>290</sup> U.S. CONST. amend. XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .”).

<sup>291</sup> See Chapman & McConnell, *supra* note 6, at 1782 (“The first, central, and largely uncontroversial meaning of ‘due process of law,’ . . . was that the executive may not seize the

The core meaning of the Due Process Clause is that, before depriving someone of life, liberty, or property, state officials must follow the law. This is very similar to the view of the Fourth Amendment espoused by Warrant Model enthusiasts that the central value of that Amendment is curbing executive discretion. The difference is that those who espouse the Warrant Model envision only a single way of curbing executive discretion, through the judicial superintendence of the warrant process. But due process arguably is more fluid and forgiving, allowing executives to act pursuant either to judicial directives via warrant or to specific legislation permitting them to undertake particular conduct under particular circumstances.<sup>292</sup> And, of course, police must also abide by search-and-seizure provisions of state constitutions, which are often stricter than the Fourth Amendment itself.<sup>293</sup> If due process means at its core that the police must follow state law in conducting searches and seizures,<sup>294</sup> then it means a lot. Indeed, if state authorities violate the U.S. Constitution whenever they violate these constraints—a position the U.S. Supreme Court unfortunately has rejected<sup>295</sup>—the result is a sharp enhancement, not a diminishment, of individual liberty.

One might object that an edict that police obey state law is, at the end of the day, no protection at all. After all, a State that overvalues security and undervalues liberty might decide to implement a totalitarian search-and-seizure regime. But political process theory suggests that this fear is overblown. Here, due process and equal protection constraints work in tandem: not only must police obey the law, but that law must apply equally

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property or restrain the liberty of a person . . . without legal authority arising either from established common law or from statute.”)

<sup>292</sup> See *Terry v. Ohio*, 392 U.S. 1, 31 (1968) (Harlan, J., concurring) (opining that if a State were to specifically authorize police to forcibly stop and disarm a person reasonably suspected of having a concealed weapon, a police officer’s actions pursuant to that authority would be constitutional).

<sup>293</sup> See William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548–49 (1986).

<sup>294</sup> The Court at one time suggested just such an approach to due process. See *Barrington v. Missouri*, 205 U.S. 483, 486–87 (1907) (“[I]f . . . the admission of th[e] testimony did not violate . . . the [C]onstitution and laws of the state of Missouri, the record affords no basis for holding that he was not awarded due process of law.”). Though the *Barrington* Court held only that adherence to state law was sufficient in providing due process of law, this suggests that adherence to state law is also necessary in providing due process of law. *Id.*

<sup>295</sup> See *Virginia v. Moore*, 553 U.S. 164, 176 (2008) (holding that arrest by state police officer based on probable cause but which violated state statute did not violate Fourth Amendment). *Moore* is perhaps justified as a decision about the applicability of the exclusionary rule and not the scope of the Fourth Amendment itself. See *id.* at 180 (Ginsburg, J., concurring in the judgment).

to all, including state legislators and their constituents. If the majority and their political representatives do not wish to be subject to searches and seizures without warrant and without cause, they cannot visit that treatment upon outgroups.<sup>296</sup> Again, the presence of search-and-seizure protections at the state level strongly suggests that, when the law applies equally to all, at least on a formal basis, the States are fully capable of striking an acceptable balance between liberty and order.

The hedge “at least on a formal basis” in the preceding sentence points up the most troublesome potentiality of such a view of how the Fourth Amendment should apply to the States. For a State might implement a set of search and seizure constraints weighed in favor of security at the expense of liberty, formally imposing the associated burdens on everyone, but in fact subjecting minorities and the politically unpopular to searches and seizures at a much higher rate than members of the dominant group. Of course, such a world is not difficult to imagine—in many ways, it is the one we inhabit. To take one obvious example, the standard of reasonable suspicion required for police to forcibly stop and detain citizens is a low one.<sup>297</sup> Yet few white people and people of means have to worry much about the inconvenience and humiliation of being stopped and detained by the police, something that poor people of color contend with on a daily basis.<sup>298</sup>

If the worst that can be said of this approach is that it replicates the status quo, then so be it. But even under this model, a more robust form of protection against arbitrary searches and seizures by the police can be imagined. For example, courts might calibrate their scrutiny of searches and seizures to the amount of discretion given the police, such that where people of particular racial groups are disproportionately subjected to searches and seizures, weightier race-neutral justifications are required when these outcomes are the result of broad grants of law enforcement discretion. By contrast, courts might be more deferential when the same outcomes result

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<sup>296</sup> See William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1855 (2016) (justifying a model that determines whether a Fourth Amendment search has occurred by looking to positive law, in part, on the ground that it is capable of tying “the neglected interests of those who face government investigation to the much broader interests of society at large”); see also *Railway Express Agency, Inc. v. New York* 336 U.S. 106, 112 (1949) (Jackson, J., concurring) (“[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.”).

<sup>297</sup> See, e.g., *United States v. Hensley*, 469 U.S. 221, 229 (1985) (requiring only “reasonable suspicion, grounded in specific and articulable facts, that a person . . . was involved in or is wanted in connection with a completed felony” to forcibly detain someone).

<sup>298</sup> See generally *Floyd v. City of New York*, 959 F. Supp. 2d 668 (S.D.N.Y. 2013).

from tightly constrained discretion. And if broad discretion is inevitable, minimal national standards might be required as a last resort. But this is far different from making uniform national standards the default rule. Beyond these initial thoughts, however, this Article leaves for another day the problem of deriving constraints on the States from a federalism-driven Fourth Amendment.

#### CONCLUSION

Reasonableness Model adherents and Warrant Model advocates are each part right and part wrong. The Fourth Amendment does subject federal officials to a standard of reasonableness, not a regime of warrants. But it is not a freestanding reasonableness standard to be constructed freehand by federal judges. It is a standard of reasonableness tied to and established by local law: statutes enacted by local legislatures, common-law doctrines determined by local judges, and normative judgments made in particular cases by local juries. By the same token, the Fourth Amendment does sometimes require that federal officials use warrants. But they are required to use warrants only when, and only to the extent that, their state counterparts also fall under this obligation.