

High School Drug Testing and the Original Understanding of the Fourth Amendment

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Table of Contents

I. Random Drug Tests and the Fourth Amendment.....	265
A. The Road to <i>Earls</i> : Supreme Court Decisions on Random Drug Tests.....	265
B. Random Drug Tests in High Schools	267
1. <i>Acton</i>	268
2. <i>Earls</i>	269
3. Summary	270
II. The Original Understanding of the Fourth Amendment	270
A. The Controversies That Resulted in the Fourth Amendment	271
1. The John Wilkes Cases	273
2. Paxton's Case	274
3. The Townshend Act	276
4. Summary	277
B. Other Discussions of Unreasonable Searches	277
C. The Ship Seizure Cases	278
D. Nineteenth Century Search and Seizure Cases.....	280
1. <i>Banks</i> and <i>Sanford</i>	282

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More than anything else, my understanding of Fourth Amendment history has been informed by two landmark historical works: William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (on file with author) and Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999). Throughout the text of this essay, the reader will find frequent, explicit references to the works of Cuddihy and Davies. However, neither those references nor this footnote are adequate to indicate just how much I have benefited from the work of these two fine scholars. My debt to these scholars is in no way mitigated by the fact that I do not completely agree with their conclusions.

2. <i>Weimer</i>	283
3. Summary	284
E. The Modern Misreading of the Fourth Amendment: <i>Boyd</i> and <i>Katz</i>	284
F. Summary	287
III. Interpreting the Fourth Amendment Without Reference to the Original Understanding	289
IV. Search and Seizure in a World Without a Fourth Amendment	292
V. Conclusion	294

Introduction

In *Board of Education v. Earls*,¹ the United States Supreme Court recently upheld a random drug testing program for high school students. In rejecting a Fourth Amendment challenge, the *Earls* majority concluded that the important “governmental concern in preventing drug use” among high school students outweighed the “minimally intrusive” impact on the students’ privacy.²

The Court in *Earls* reached the correct result, but for the wrong reason. A review of historical evidence indicates that the framers adopted the Fourth Amendment to deal with a single, specific issue. The framers sought to proscribe physical searches of residences pursuant to a general warrant, or without any warrant at all. The Fourth Amendment simply never was intended to govern the issues raised by random drug tests.³

The *Earls* Court’s conclusion that the Fourth Amendment permits random drug testing of public high school students is not quite correct. Instead, the Fourth Amendment simply should not apply to high school

1. 536 U.S. 822 (2002).

2. *Id.* at 834.

3. The Fourth Amendment interpretation that I advance in this essay is profoundly different from the conclusions that I reached in my previous writings on the Fourth Amendment. In those pieces, I argued for applying the warrant requirement to a variety of searches that did not involve any physical entry into a residence. See David E. Steinberg, *The Drive Toward Warrantless Auto Searches: Suggestions From a Back Seat Driver*, 80 B.U. L. REV. 545, 546 (2000) (asserting that the Supreme Court’s “abandonment of the warrant requirement for automobile searches is ill-advised”); David E. Steinberg, *Making Sense of Sense-Enhanced Searches*, 74 MINN. L. REV. 563, 613-27 (1990) (suggesting a new approach for applying the warrant requirement to sense-enhanced searches, which usually do not involve a physical entry into a residence).

Since I published these earlier pieces, my views on the Fourth Amendment have changed very significantly. I attribute this change to both my more complete understanding of Fourth Amendment history, and my ever-increasing disenchantment with current Fourth Amendment jurisprudence.

drug tests.

Part I of this essay examines Fourth Amendment cases on random drug tests decided prior to the *Earls* decision. Part I then discusses the reasoning of the closely divided *Earls* Court. Part II reviews the original understanding of the Fourth Amendment. Part II concludes that when the framers adopted the Fourth Amendment, they never intended that the amendment would provide a general framework governing all government searches and seizures. Instead, the Framers enacted the Fourth Amendment solely to prohibit a single, specific practice: physical searches of private residences conducted pursuant to a general warrant, or without a warrant at all.

Part III considers the possibility of interpreting the Fourth Amendment without reference to the original understanding. Part III expresses some serious doubts about such an undertaking because there is no modern consensus about whether particular police practices constitute an unreasonable search. Finally, Part IV considers legislative restraints on police behavior in a world where the Fourth Amendment no longer would apply to all government searches and seizures.

I. Random Drug Tests and the Fourth Amendment

A. The Road to *Earls*: Supreme Court Decisions on Random Drug Tests

In several decisions prior to *Earls*, the United States Supreme Court upheld the use of random drug tests to screen for controlled substances. However, the Court has never given unconditional approval to random drug tests. Instead, the Court has focused on two critical factors in random drug test cases. First, random drug testing must be justified by the government's special needs. Second, the state cannot use positive drug test results in criminal prosecutions.

Prior to the *Earls* decision, the Court upheld random drug tests only in special circumstances, where drug impairment would result in a high degree of risk to someone other than the drug user. For example, in *Skinner v. Railway Labor Executives Association*,⁴ the Court upheld federal regulations that mandated blood and urine tests for railway employees following "a major train accident."⁵ In rejecting a Fourth Amendment challenge, the *Skinner* Court emphasized the government's "special needs" in its regulation of the railroads.⁶ These "special needs" resulted from the

4. 489 U.S. 602 (1989).

5. *Id.* at 609.

6. *Id.* at 620 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987)).

“government interest in ensuring the safety of the traveling public and of the employees themselves.”⁷

The Court also upheld random drug tests for certain types of Customs Service employees in *National Treasury Employees Union v. Von Raab*.⁸ The *Von Raab* majority worried that a “drug user’s indifference to the [Customs] Service’s basic mission or, even worse, his active complicity with the malefactors, can facilitate importation of sizable drug shipments or block apprehension of dangerous criminals.”⁹

Where the Court has not found any such special needs, the Justices typically have held that random drug tests violate the Fourth Amendment. In *Chandler v. Miller*,¹⁰ the Court invalidated a Georgia statute, requiring that all candidates for state office must submit to a drug test. In holding that this statute violated the Fourth Amendment, the *Chandler* majority noted the absence of “any fear or suspicion of drug use by state officials.”¹¹

In addition to requiring that random drug tests respond to “special needs,” the Court has upheld random drug testing only where the government does not use positive drug test results in criminal prosecutions. In both *Skinner* and *Von Raab*, the Justices noted that drug test results would not be used in criminal prosecutions.¹²

Conversely, in *Ferguson v. City of Charleston*,¹³ the Court struck down a random drug test program for women receiving prenatal care. Under the program reviewed in *Ferguson*, if a patient tested positive for cocaine abuse and failed to follow through with a treatment program, police officers would arrest the patient.¹⁴ In holding that this drug testing program violated the Fourth Amendment, the Justices concluded that “the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment.”¹⁵

7. *Id.* at 621.

8. 489 U.S. 656 (1989).

9. *Id.* at 670.

10. 520 U.S. 305 (1997).

11. *Id.* at 319.

12. See *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666 (1989) (holding that drug test results obtained by the customs service “may not be used in a criminal prosecution of the employee without the employee’s consent”); *Skinner v. Ry. Labor Executives Ass’n*, 489 U.S. 602, 620-21 (1989) (noting that blood, breath, and urine tests were not used “to assist in the prosecution of employees,” but instead were designed to prevent train accidents caused by substance abuse).

13. 532 U.S. 67 (2001).

14. *Id.* at 72.

15. *Id.* at 80.

The decisions in *Skinner*, *Von Raab*, *Chandler*, and *Ferguson* reveal significant disagreement and uncertainty about the constitutionality of random drug tests. In three of these four cases, the Supreme Court reversed lower courts.¹⁶ In *Skinner*, a federal appeals court concluded that a random drug testing program violated the Fourth Amendment. The United States Supreme Court reversed, holding that the random blood, breath, and urine tests were permissible.¹⁷ In *Chandler* and *Ferguson*, federal appeals courts had upheld random drug testing programs. Again, the Supreme Court disagreed, holding that the drug testing programs violated the Fourth Amendment.¹⁸

Further, these Supreme Court decisions often have been sharply divided. *Von Raab* was decided by a 5-4 vote,¹⁹ with the four dissenters arguing that the random drug test policy violated the Fourth Amendment.²⁰ *Ferguson* was decided by a 6-3 vote,²¹ with the three dissenters voting to uphold the drug testing program.²²

B. Random Drug Tests in High Schools

As discussed below, in *Vernonia School District 47J v. Acton*,²³ the Supreme Court upheld random drug testing of student athletes. With its decision in *Board of Education v. Earls*,²⁴ the Court extended *Acton* and upheld random drug testing of all students who participated in extracurricular activities.²⁵

16. The Supreme Court reached the same conclusion as the federal circuit court only in *Von Raab*. See Nat'l Treasury Employees Union v. Van Raab, 816 F.2d 170 (5th Cir. 1987), *aff'd in part, vacated in part*, 489 U.S. 656, 679 (1989).

17. Ry. Labor Executives Ass'n v. Burnley, 839 F.2d 575 (9th Cir. 1988), *rev'd sub nom. Skinner v. Ry. Labor Executives Ass'n* 489 U.S. 602, 634 (1989).

18. *Ferguson v. City of Charleston*, 186 F.3d 469 (4th Cir. 1999), *rev'd*, 532 U.S. 67, 86 (2001); *Chandler v. Miller*, 73 F.3d 1543 (11th Cir. 1996), *rev'd*, 520 U.S. 305, 323 (1997).

19. *Von Raab*, 489 U.S. at 658.

20. See *id.* at 679 (Marshall, J., dissenting); *id.* at 680 (Scalia, J., dissenting).

21. *Ferguson*, 532 U.S. at 69.

22. See *id.* at 91 (Scalia, J., dissenting).

23. 515 U.S. 646 (1995).

24. 536 U.S. 822 (2002).

25. For other discussions of random drug tests in high schools, see Irene Merker Rosenberg, *Public School Drug Testing: The Impact of Acton*, 33 AM. CRIM. L. REV. 349 (1996); Jennifer Y. Buffaloe, Note, "Special Needs" and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule, 32 HARV. C.R.-C.L. L. REV. 529 (1997); John J. Bursch, Note, *The 4 R's of Drug Testing in Public Schools: Random Is Reasonable and Rights Are Reduced*, 80 MINN. L. REV. 1221 (1996); James M. McCray, Note, *Urine Trouble! Extending Constitutionality to Mandatory Suspicionless Drug Testing of Students in Extracurricular Activities*, 53 VAND. L. REV. 387 (2000); Linda Oshman, Comment, *Public School Lessons: Setting Limits on Suspicionless Drug Testing After Vernonia*, 38 HOUS. L. REV. 1313 (2001).

1. *Vernonia School District 47J v. Acton*

The Supreme Court first considered random high school drug tests in *Vernonia School District 47J v. Acton*.²⁶ During the 1980s, teachers in Vernonia, Oregon witnessed a sharp increase in drug use among high school students — particularly student athletes.²⁷ As a result, the school district adopted a random urine testing program, which applied to students who participated in interscholastic athletics.²⁸

The Ninth Circuit Court of Appeals held that these random drug tests violated the Fourth Amendment to the United States Constitution.²⁹ The Supreme Court reversed the Ninth Circuit and upheld the random drug testing program.³⁰

The *Acton* majority concluded that the random drug tests served special needs. The Court determined that illicit drug use by high school students was an important concern.³¹ The majority asserted: “School years are the time when the physical, psychological, and addictive effects of drugs are most severe.”³² Further, the majority emphasized that when student athletes use illegal drugs, “the risk of immediate physical harm to the drug user or those with whom he [or she] is playing his [or her] sport is particularly high.”³³

The Court held that these government interests outweighed any privacy interests of the student athletes.³⁴ According to the majority, the conditions for collecting urine specimens “are nearly identical to those typically encountered in public restrooms, which men, women, and especially schoolchildren use daily.”³⁵ The *Acton* Court was particularly skeptical about the privacy claims raised by student athletes because student athletes change clothes and shower in communal locker rooms that afford little privacy.³⁶ In addition, the majority noted that the random drug test results were “not turned over to law enforcement authorities or used for

26. 515 U.S. 646 (1995).

27. Students participating in interscholastic athletics were required to sign a form, consenting to random urine testing. Each student athlete took a urine test at the beginning of the season for their sport. In addition, the school tested ten percent of the student athletes each week. The school did not turn over positive test results to law enforcement authorities. *Id.* at 648-51.

28. *Id.* at 650.

29. *Id.* at 652.

30. *Id.* at 665.

31. *Id.* at 660-65.

32. *Id.* at 661.

33. *Id.* at 662.

34. *Id.* at 664-66.

35. *Id.* at 658.

36. *Id.* at 657.

any internal disciplinary function.”³⁷

2. *Board of Education v. Earls*

In its 2002 decision in *Board of Education v. Earls*,³⁸ the Court again upheld a random drug testing program for high school students. The *Earls* decision reviewed a very strange policy. Tecumseh High School mandated random drug tests for any student who participated in competitive extracurricular activities, but not for other students.³⁹ Unlike the drug testing policy in *Acton*, the *Earls* policy went beyond competitive extracurricular athletics. The *Earls* policy applied to activities such as choir, marching band, and the National Honor Society.⁴⁰ In a sense, the *Earls* policy seemed to punish students who voluntarily participated in extracurricular activities, and could discourage other students from participating in these activities.⁴¹

Relying heavily on *Acton*, the United States Supreme Court held that the random drug testing program did not violate the Fourth Amendment. In a 5-4 decision, the Court asserted that the students’ privacy interest was “limited in a public school environment.”⁴² The Court also concluded that “students who participate in competitive extracurricular activities voluntarily subject themselves to many of the same intrusions on their privacy as do athletes.”⁴³ The majority emphasized that the test results were “not turned over to any law enforcement authority.”⁴⁴ Also, a positive drug test only would have one consequence – the test results would bar a student from participating in extracurricular activities.⁴⁵

The *Earls* majority concluded that any privacy interests asserted by the students were outweighed by the state interest in preventing drug abuse among high school students.⁴⁶ After citing statistics that showed illicit drug use had increased in high schools, the Court concluded that “the nationwide drug epidemic makes the war against drugs a pressing concern in every

37. *Id.* at 658.

38. 536 U.S. 822 (2002).

39. *Id.* at 826.

40. *Id.*

41. *Id.* at 853 (Ginsburg, J., dissenting) (the random drug testing program in *Earls* “risks steering students at greatest risk for substance abuse away from extracurricular involvement that potentially may palliate drug problems”).

42. *Id.* at 830.

43. *Id.* at 831.

44. *Id.* at 833.

45. *Id.*

46. *Id.* at 834-38.

school.”⁴⁷

Unlike prior cases that had upheld drug testing, the *Earls* decision did not find any special circumstances that made random drug testing particularly appropriate. While the majority did cite some evidence that suggested occasional illicit drug use among Tecumseh High School students,⁴⁸ the majority admitted that no evidence demonstrated a “particularized or pervasive drug problem” among the students involved in extracurricular activities.⁴⁹ Instead, as Justice Ruth Bader Ginsburg noted in dissent: “Nationwide, students who participate in extracurricular activities are significantly less likely to develop substance abuse problems than are their less-involved peers.”⁵⁰

C. Summary

As in many other areas of Fourth Amendment law, the Supreme Court’s random drug test decisions often appear arbitrary and ad hoc. The Court has upheld some programs, invalidated others. The Court frequently has reversed lower court decisions in these opinions, illustrating the chaotic and unpredictable state of the law. In random drug testing cases, the Supreme Court itself often is closely divided.

In upholding random drug tests, the Court typically has focused on the special need for drug testing in particular contexts, and representations that the drug test results will not be used in criminal prosecutions. Neither of these requirements finds any direct, explicit support in the language of the Fourth Amendment. And the Court upheld the random drug testing program in *Earls*, despite the government’s failure to show any specific evidence of “special needs.”

Given the judicial disagreements about the constitutionality of random drug tests, this area of Fourth Amendment law requires a reevaluation. The subsequent historical review leads to a stark conclusion. The Fourth Amendment should not apply in random drug testing cases at all.

II. The Original Understanding of the Fourth Amendment

The Fourth Amendment was conceived to serve a single, specific purpose — to prevent the physical search of residences without a warrant, or pursuant to a general warrant. Courts may attempt to develop a coherent regulation of random drug tests based on the Fourth Amendment, but such

47. *Id.* at 834.

48. *Id.* at 834-35.

49. *Id.* at 835.

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

attempts are doomed to failure. The Fourth Amendment never was intended to govern such controversies. With respect to the validity of random drug tests in the public schools, the Fourth Amendment says nothing at all.

My originalist argument is not based on the discovery of some new historical evidence. All of the sources cited in this section will be familiar to students of Fourth Amendment history. I am particularly indebted to the research of Thomas Davies.⁵¹ However, I also have relied on the fine historical scholarship of Akhil Reed Amar,⁵² William Cuddihy,⁵³ Nelson Lasson,⁵⁴ Tracey Maclin,⁵⁵ and others.⁵⁶

A. The Controversies That Resulted in the Fourth Amendment

When the framers of the Fourth Amendment proscribed unreasonable searches and seizures, they intended to prohibit searches of residences pursuant to a general warrant. The characteristics of a “general warrant” are illustrated in Article X of the Virginia Declaration of Rights of 1776, the first American law to proscribe these warrants. Article X provided:

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

51. See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999).

52. Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53 (1996) [hereinafter Amar, *The Writs of Assistance*]; Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) [hereinafter Amar, *Fourth Amendment First Principles*]; Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991) [hereinafter Amar, *The Bill of Rights as a Constitution*].

53. See William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (on file with author).

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

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

56. See, e.g., Gerard V. Bradley, *The Constitutional Theory of the Fourth Amendment*, 38 DEPAUL L. REV. 817 (1989); Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707 (1996) (book review); Joseph D. Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 AM. CRIM. L. REV. 603 (1982); William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393 (1995).

grievous and oppressive, and ought not to be granted.⁵⁷

As illustrated by the Virginia declaration, the term “general warrant” referred to warrants that contained either of two deficiencies. A warrant would be inadequate if the document failed to specify the places to be searched or the persons to be seized.⁵⁸ A warrant also would be inadequate if the document lacked adequate evidentiary support for the search or the seizure.

As noted by Nelson Lasson, Thomas Y. Davies, and others, discussions of unreasonable searches in the late eighteenth-century primarily focused on three controversies — the John Wilkes cases in England, Paxton’s case in Boston, and American opposition to the Townshend Act.⁵⁹ All three controversies involved the use of general warrants to search homes.⁶⁰ Outside of these three examples, other American discussions of unreasonable searches in the eighteenth century focused almost exclusively on searches of homes pursuant to general warrants.⁶¹

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

58. The Virginia Declaration proscribed warrants that allowed law enforcement officials to “seize any person or persons not named.” *Id.*

59. See, e.g., LASSON, *supra* note 54, at 43-48 (discussing the John Wilkes cases); *id.* at 56-67 (discussing Paxton’s case); *id.* at 69-76 (discussing the Townshend Act). See also Davies, *supra* note 51, at 561-67 (discussing these three controversies, and noting agreement among subsequent commentators that these controversies represent the most important events leading to the adoption of the Fourth Amendment).

60. General warrants lacked specificity. The warrants did not discuss where the officer could search, what the officer could search for, or whom the officer could seize. Such warrants could be obtained with little evidence of wrongdoing.

Conversely, the specific warrant was sworn out by a named complainant. If the search did not produce evidence of a crime, the complainant was liable for trespass. The warrant could be issued only by a neutral magistrate—usually a man of stature. Most significantly, the warrant gave a specific command to the officer undertaking the search, thus limiting the officer’s discretion. See Davies, *supra* note 51, at 650-54 (contrasting the specific warrant with the general warrant).

61. See, e.g., JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 20 (1966) (describing how the Fourth Amendment was enacted in response to English and American abuses, which had done violence to “the ancient maxim that ‘[a] man’s house is his castle’”).

1. *The John Wilkes cases*

In the eighteenth century, the most well known examples of unreasonable searches arose out of the English seditious libel prosecution of John Wilkes and his supporters.⁶² This controversy began on April 23, 1763, with an anonymous letter printed in *The North Briton*, an opposition periodical. The letter described the British Tory administration as “wretched” puppets, and “the tools of corruption and despotism.”⁶³

The Tory government eventually learned that the author of these statements was John Wilkes, an opposition politician. The Tory government accused Wilkes and his followers of disseminating seditious publications.

Pursuant to a general warrant issued by the Tory Secretary of State, English officers were directed to discover who was responsible for the libel and search any places that might contain evidence. Relying on the general warrant, the officers arrested Wilkes and several of his supporters. Ultimately, the officers searched at least five houses and arrested at least 49 people pursuant to this single general warrant.⁶⁴ Wilkes and his supporters responded with at least thirty different trespass and false imprisonment suits.⁶⁵

In a series of decisions issued between 1763 and 1769, English courts ruled that these searches of homes pursuant to the general warrant violated British common law. Juries ordered that the officers must pay damages to Wilkes and the other search victims.⁶⁶

In the published opinions issued in the John Wilkes cases,⁶⁷ British judges emphasized that the searches pursuant to the general warrant had been illegal because the officers had physically entered the homes of Wilkes and his supporters without an adequate warrant. In *Huckle v. Money*,⁶⁸ Chief Justice Pratt refused to set aside a damages verdict won by a printer, whose house had been searched pursuant to the general warrant. Chief Justice Pratt’s opinion included a scathing denunciation of the law enforcement intrusion into the plaintiff’s home. The Chief Justice wrote:

62. For a detailed account of the John Wilkes cases, see Cuddihy, *supra* note 53, at 886-927.

63. *Id.* at 886.

64. *Id.* at 893.

65. *Id.* at 894.

66. See LASSON, *supra* note 54, at 44-45 (describing the verdicts in the John Wilkes cases, and noting that the English government’s expenses in these cases “were said to total £100,000”).

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

68. 95 Eng. Rep. 768 (C.P. 1763).

“To enter a man’s house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject.”⁶⁹

At the conclusion of the trial in the trespass case of *Wilkes v. Wood*,⁷⁰ Chief Justice Pratt again condemned the physical invasion of homes pursuant to a general warrant. Chief Justice Pratt asserted that the defendants claimed a right “to force persons houses, break open escrutores, seize their papers, etc. upon a general warrant.”⁷¹ The Chief Justice concluded that these actions were “totally subversive of the liberty of the subject.”⁷²

Similarly, in *Entick v. Carrington*,⁷³ Chief Justice Pratt wrote that the use of the general warrant “to enter a man’s house, search for and take away all his books and papers” violated common law principles.⁷⁴ The Chief Justice concluded that such a use of general warrants would “destroy all the comforts of society.”⁷⁵

Considerable doubt exists about the extent to which eighteenth-century Americans had access to the opinions issued in the John Wilkes cases.⁷⁶ However, the judicial condemnation of these home searches received extensive publicity in British and American newspapers and pamphlets.⁷⁷

2. Paxton’s case

The other two familiar examples of unreasonable searches in eighteenth-century America involved writs of assistance — the American equivalent of the English general warrant. Colonial authorities used the writ to search for customs violations. The writ authorized customs officers

69. *Id.* at 769.

70. 98 Eng. Rep. 489 (C.P. 1763).

71. *Id.* at 498.

72. *Id.*

73. 95 Eng. Rep. 807 (C.P. 1765).

74. *Id.* at 818.

75. *Id.* at 817. By the time of the 1765 trial in *Entick v. Carrington*, Chief Justice Pratt was known as Lord Camden. Cuddihy, *supra* note 53, at 919.

76. See Davies, *supra* note 51, at 565 n.25 (noting that the official reports of the John Wilkes cases “were not published contemporaneously with the trials”).

77. See, e.g., Cuddihy, *supra* note 53, at 927-37 (describing British publications that opposed the use of general warrants in the John Wilkes cases); Davies, *supra* note 51, at 563 (describing British and colonial newspaper accounts of the John Wilkes cases, which emphasized “the sanctity of the house while condemning general warrants”). See also LANDYNSKI, *supra* note 61, at 29 (noting Chief Justice Pratt’s popularity in England following his opinions in the John Wilkes cases).

to search any places where they suspected that smuggled goods were hidden. The “writ of assistance” required that peace officers and any other persons who were present must assist the customs officers in the performance of the search.⁷⁸

Charles Paxton was a Boston, Massachusetts customs officer. In 1755, Paxton sought and received a writ of assistance from the Superior Court in Boston. Paxton sought to renew the writ in 1761.⁷⁹ Customs officers believed that these writs empowered them to enter and inspect all houses in Massachusetts.⁸⁰

In January 1761, an association of Massachusetts merchants filed a petition with the Superior Court in Boston. The petition challenged the writs of assistance. James Otis, a prominent Boston attorney, argued the case on behalf of the merchants.⁸¹

Otis argued that the writs of assistance operated as general warrants, in violation of common law principles. Otis initially asserted that “the freedom of one’s house” was among “the most essential branches of English liberty.”⁸² Otis then complained that with a writ of assistance, customs officials “may enter our houses when they please . . .—may break locks, bars and every thing in their way—and whether they break through malice or revenge, no man, no court, can inquire”⁸³

On November 18, 1761, the Superior Court in Boston ultimately approved the continued use of the writs of assistance.⁸⁴ Nonetheless, Otis’s argument against the writ was heralded by Americans increasingly frustrated with British colonial rule. In Boston, John Adams and other important statesmen attended Otis’s argument.⁸⁵ Some have described Otis’s argument against the writ of assistance as the most important single event that led to the Revolutionary War.⁸⁶

78. See Davies, *supra* note 51, at 561 n.18.

79. See Cuddihy, *supra* note 53, at 760-63.

80. *Id.* at 759.

81. *Id.* at 765.

82. M.H. SMITH, THE WRITS OF ASSISTANCE CASE 344 (1978).

83. *Id.* In 1761, the common law argument advanced by Otis against the writs of assistance was quite prescient. As discussed above, the first in a series of English court opinions rejecting house searches pursuant to general warrants did not appear until 1763. See *supra* notes 62-77 and accompanying text.

84. Cuddihy, *supra* note 53, at 798.

85. For John Adams’s description of the argument made by Otis, see 10 THE WORKS OF JOHN ADAMS 247-48 (1856) [hereinafter THE WORKS OF JOHN ADAMS]. See also Davies, *supra* note 51, at 561-62 n.20 (concluding that “Otis’s argument was widely known in Boston,” but expressing uncertainty about whether news of the case reached the other colonies).

86. According to John Adams, during Otis’s argument “American independence was then and there born.” THE WORKS OF JOHN ADAMS, *supra* note 85, at 247-48. Adams also wrote that

It is significant that Otis argued only against house searches. As Thomas Davies has noted, Otis's clients were "merchants who also owned ships and warehouses."⁸⁷ But Otis did not challenge the searches of warehouses or the seizure of ships—only the searches of homes.⁸⁸

3. *The Townshend Act*

In 1767, British Parliament reauthorized the writs of assistance for custom searches through the Townshend Act.⁸⁹ But given the profound influence in America of the John Wilkes cases and Paxton's case, courts issued the writs sporadically, and customs officers never executed the writs effectively.

William Cuddihy describes the Townshend Act as "one of the most arrant failures in American legal history."⁹⁰ Cuddihy continues: "In only a few colonies did the courts issue the writs as general search warrants, and the massive searches that those writs authorized were never implemented on an effective scale."⁹¹

Cuddihy identifies at least three different reactions to the Townshend Act. First, in Massachusetts, judges actually issued the writs of assistance. However, as a result of popular resistance, customs officers usually were not able to execute effective searches pursuant to the writs.⁹² Second, in colonies such as Rhode Island, Maryland, and South Carolina, judges either ignored the writ applications, or repeatedly postponed considering these applications.⁹³ Finally, the Supreme Courts of Pennsylvania and Connecticut attempted to transform the writs into specific search warrants.⁹⁴

Like the John Wilkes cases and Paxton's case, the opposition to the Townshend Act focused on the use of a general warrant to search residences. While the Townshend Act authorized general warrants in the form of writs of assistance, customs agents had little success in obtaining or executing these writs. By the time that England enacted the Townshend

Otis's attack on the writs of assistance was "the first act of opposition to the arbitrary claims of Great Britain." *Id.*

87. Davies, *supra* note 51, at 602.

88. *Id.* at 601-02.

89. Cuddihy, *supra* note 53, at 1040.

90. *Id.* at 1046.

91. *Id.* See also LASSON, *supra* note 54, at 73 (stating that most colonial courts "refused to grant general writs of assistance even after the Townshend Act had set at rest all technical objections to their legality").

92. Cuddihy, *supra* note 53, at 1046-49.

93. *Id.* at 1056-57.

94. *Id.* at 1067.

Act in 1767, Americans profoundly had rejected home searches pursuant to general warrants.

4. Summary

More than anything else, three major controversies led to the adoption of the Fourth Amendment: the John Wilkes cases, Paxton's case, and the Townshend Act.

In each case, the opponents of government action attacked physical searches of homes pursuant to general warrants. The proponents of search and seizure limitations spoke only of protecting houses from physical intrusions. These statesmen simply did not discuss searches of businesses, warehouses, or ships.⁹⁵

B. Other Discussions of Unreasonable Searches

Like James Otis, early American statesmen referred almost exclusively to searches of homes when they discussed unreasonable searches. In 1772, Samuel Adams attacked the writ of assistance at a Boston town meeting. Adams asserted: "Our homes and even our bedchambers are exposed to be ransacked, our boxes chests & trunks broke open ravaged and plundered by wretches . . . whenever they are pleased to say that they suspect there are in the house wares etc. for which dutys have not been paid . . ."⁹⁶ Adams continued that customs officers "may break into the sacred rights of domicil, [and] ransack mens [sic] houses . . ."⁹⁷

95. The only significant pre-Revolutionary American challenges to non-residential searches or seizures arose out of two ship seizure controversies, which involved ships owned by prominent merchants Henry Laurens of South Carolina and John Hancock of Massachusetts. See Cuddihy, *supra* note 53, at 1205-14. See also LASSON, *supra* note 54, at 72 (observing that in Boston during 1768, "a riot resulted when John Hancock's sloop 'Liberty' was seized"). Davies contends that these ship seizure controversies did not dispute "general search authority," but instead involved challenges focused on "'customs racketeering' in the form of hypertechnical applications of customs rules or forfeiture proceedings based on perjured testimony from informers." Davies, *supra* note 51, at 604. Nonetheless, the ship seizure controversies provide some support for arguments that the Fourth Amendment did not apply only to house searches. See Maclin, *The Complexity of the Fourth Amendment*, *supra* note 55, at 962 (the ship seizure controversies "helped to focus colonial thinking on the principle of probable cause").

As discussed below, early statutes passed by Congress permitted federal authorities to seize ships without a warrant, and with minimal evidence of wrongdoing. Early Supreme Court opinions upheld these broad ship seizure statutes. See *infra* text accompanying notes 105-112. In light of these early ship seizure laws, it is hard to imagine that the Fourth Amendment was intended to apply to ships.

96. *A State of Rights of the Colonists*, in TRACTS OF THE AMERICAN REVOLUTION, 1763-1776, 243 (Merrill Jensen ed., 1967) (report typically attributed to Samuel Adams).

97. *Id.* at 244. Like James Otis, Adams made his argument in the seaport of Boston. Many members of Adams's audience undoubtedly were merchants, who owned warehouses and ships. Nonetheless, the remarks made by Adams do not refer to unreasonable searches of warehouses

Similarly, Judge William Henry Drayton of Charleston complained in 1774 that “a petty officer has power to cause the doors and locks of any man to be broke open, to enter his most private cabinet and thence to take and carry away, whatever he shall in his pleasure deem uncustomed goods.”⁹⁸

As William Cuddihy reports, addresses by the Continental Congress in 1774 provide particular insight into what the Framers viewed as unreasonable searches and seizures. In a 1774 address to the American people, the Continental Congress protested against the power of customs officers “to break open and enter houses without the authority of any civil magistrate founded on legal information.”⁹⁹ In a 1774 letter to the inhabitants of Quebec, the Congress warned that British customs officers would break into “houses, the scenes of domestic peace and comfort and called the castles of the English subjects in the books of their law.”¹⁰⁰

C. The Ship Seizure Cases

Both the Wilkes cases and Paxton’s case challenged the searches of residences. As illustrated by these court challenges, the original intent of the Framers of the Fourth Amendment was to proscribe unwarranted house searches.

Conversely, no one in early America disputed the propriety of warrantless searches outside of residences. For example, during the early nineteenth century, federal law enforcement officials regularly searched and seized ships. But no court case considered that the Fourth Amendment might apply to these ship seizures.

A review of colonial ship seizure cases confirms that the Fourth Amendment was limited to searches of residences. Initially, it might appear that the Fourth Amendment *did* apply to searches and seizures of vessels. In the 1789 Collections Act, Congress approved the warrantless search of vessels for customs violations.¹⁰¹ One could argue that Congress passed this statute to explain how the Fourth Amendment applied to ships. Indeed in *Carroll v. United States*,¹⁰² Chief Justice William Howard Taft

and ships. In describing unreasonable searches, Adams only discussed searches of residences.

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

99. Cuddihy, *supra* note 53, at 1116.

100. *Id.* at 1117.

101. Collection Act of 1789, Ch.5, § 27, 1 Stat. 29, 43-44 (1789) (*cited in* *Carroll v. United States*, 267 U.S. 132, 150-51 (1925)). The early American Congress also passed the Excise Act of 1791, which authorized the warrantless entry into and inspection of all buildings that had been registered as liquor storerooms or distilleries. Excise Act of 1791, 1 Stat. 199 (1791).

102. 267 U.S. 132 (1925).

relied on the Collections Act in concluding that the Fourth Amendment was intended to apply to vessels.¹⁰³ *Carroll* held that the Fourth Amendment permitted warrantless searches of automobiles.¹⁰⁴

However, a different interpretation of the 1789 Collections Act is more plausible. The act may have codified what everyone already understood—that the Fourth Amendment simply did not apply to searches of vessels. If the amendment did not apply, then the warrant requirement contained in the amendment also was not applicable.

The accuracy of this second reading is supported by early American cases where federal officers seized ships. Often, the liberal provisions authorizing these ship seizures seemed at odds with the Fourth Amendment prohibition on unreasonable searches and seizures. But not only were the statutes authorizing warrantless ship seizures upheld in these cases, *the Fourth Amendment never even was raised as an attack on these ship seizures.*

In *Little v. Barreme*,¹⁰⁵ the United States Supreme Court considered the seizure of a ship pursuant to a federal statute, which gave federal officers the “right to stop and examine any ship or vessel of the *United States* on the high seas” if “there may be reason to suspect” that the vessel was sailing to France.¹⁰⁶ Under modern readings of the Fourth Amendment, such broad seizure powers would be highly suspect.

But a Fourth Amendment argument did not merely fail in *Little*; the amendment wasn’t even mentioned in the case. The Supreme Court ultimately found the seizure in *Little* improper, but only because the statute passed by Congress did not authorize a seizure of this particular type of ship.¹⁰⁷ *Little* contains no suggestion that the ship seizure statute violated the Fourth Amendment, or any other provision of the Constitution.

In *The Apollon*,¹⁰⁸ the United States Supreme Court dealt with the seizure of a vessel under a 1799 statute. The statute authorized ship seizures where a vessel arriving from a foreign port failed to report to a United States customs collector.¹⁰⁹ The Court held that the 1799 statute did not apply because the vessel passed through United States waters to dock in

103. *Id.* at 150-51.

104. *Id.* at 149-59.

105. 6 U.S. (2 Cranch) 170 (1804).

106. *Id.* at 177.

107. *Id.* at 179. Congress had authorized only the seizure of ships sailing from America to France. *Id.* at 177. The vessel in *Little* was sailing from France to America. *Id.* at 176.

108. 22 U.S. 362 (1824).

109. *Id.* at 368.

Florida, at that time a territory of Spain.¹¹⁰

The Apollon involved another statute that today might seem to run afoul of the Fourth Amendment prohibition on unreasonable searches and seizures. But once again, neither the Court nor the parties even mentioned the Fourth Amendment.¹¹¹

Why isn't the Fourth Amendment mentioned in these ship seizure cases? The most likely explanation is that both the attorneys and the Justices understood that the Fourth Amendment simply did not apply to searches or seizures of ships. The amendment applied to searches of homes - and that was all.¹¹²

D. Nineteenth Century Search and Seizure Cases

A review of nineteenth century search and seizure cases supports the conclusion that the framers intended to limit the Fourth Amendment to physical entries of houses. First, very few nineteenth-century cases involved a constitutional challenge to searches or seizures. In both the federal courts and the state courts, constitutional search and seizure provisions probably were mentioned in fewer than 50 cases.¹¹³ If the Framers intended that the Fourth Amendment would impose a "reasonableness" requirement on all government searches and seizures, the failure of attorneys and courts to discuss the amendment is hard to

110. *Id.* at 371.

111. I have focused on the ship seizure cases, because these cases involved an exercise of federal power. However, Gerard Bradley has noted that both early state and federal laws frequently authorized warrantless searches. Gerald V. Bradley, *Present at the Creation? A Critical Guide to Weeks v. United States and Its Progeny*, 30 ST. LOUIS U.L.J. 1031, 1041-46 (1986). Bradley writes: "Warrantless searches, then as now, were the rule rather than the exception, and each of the thirteen colonies, and then the states, as a common statutory practice, authorized them." *Id.* at 1041. Bradley then cites a litany of colonial, state, and federal laws that did indeed authorize warrantless searches and/or seizures. *Id.* at 1041-45 nn.64-65.

But none of the statutes cited by Bradley authorized warrantless searches of a residence. Bradley's examples thus seem to support my contention that the Fourth Amendment was intended to apply only to physical searches of residences.

112. Tracey Maclin observes that although two sections of the Collections Act authorized warrantless searches of ships, a third section required a specific warrant before customs agents could search buildings. Maclin, *The Complexity of the Fourth Amendment*, *supra* note 55, at 963. However, it is not clear how this statutory scheme supports Maclin's contention that the Fourth Amendment contains a "warrant preference rule," which extends beyond physical searches of houses. *Id.* at 955. If the Fourth Amendment already governed searches and seizures aboard ships and in warehouses, then Congress presumably would not need to pass a statute regulating such searches and seizures. The most plausible inference from the Collections Act is that the Fourth Amendment simply did not govern searches of ships and warehouse. For this reason, Congress enacted legislation that would govern such searches.

113. *See* Davies, *supra* note 51, at 611-19.

understand.¹¹⁴

Admittedly, during the eighteenth and nineteenth centuries, the Fourth Amendment of the United States Constitution only applied to the federal government.¹¹⁵ During the eighteenth century and the early nineteenth century, most criminal laws were enacted by the states, and not by the federal government.¹¹⁶ Initially, one might attribute the dearth of constitutional search and seizure rulings to the fact that most criminal prosecutions took place in the state courts, where the Fourth Amendment did not apply.

However, this explanation is not satisfactory. During the eighteenth and nineteenth centuries, most state constitutions contained search and seizure provisions, using language that was very similar or identical to the Fourth Amendment.¹¹⁷ And yet published state court opinions rarely mentioned these state constitutional search and seizure provisions. And when the state constitutional provisions were mentioned, state courts typically concluded that government action had not violated these search and seizure provisions.

Why weren't attorneys and judges in state courts discussing the state constitutional search and seizure provisions? The most plausible answer is that, like the Fourth Amendment of the United States Constitution, the reach of these state provisions was limited. The state provisions only were intended to proscribe physical entries into homes without a specific warrant. With respect to other government searches and seizures, the state constitutional provisions were just as inapplicable as the Fourth Amendment.

Early challenges to warrantless arrests support this conclusion. In the 1814 case of *Wakely v. Hart*,¹¹⁸ Wakely argued that his warrantless arrest

114. See *id.* at 613 (“Federal courts rarely addressed the Fourth Amendment during the nineteenth century. That in itself is strong evidence that the amendment was not understood to be a comprehensive regulation of searches and arrests in that period. . .”).

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

116. See, e.g., LASSON, *supra* note 54, at 106 (noting that during the nineteenth century, “the limited criminal jurisdiction of the Federal Government was not exercised by Congress except in minor instances”); Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 40 (1996) (noting that federal criminal law initially had a very limited scope, and specified only 17 offenses); Thomas J. Maroney, *Fifty Years of Federalization of Criminal Law: Sounding the Alarm or ‘Crying Wolf?’*, 50 SYRACUSE L. REV. 1317, 1319-20 (2000) (noting that because the eighteenth-century federal government was “small and conducted few programs, the list of offenses was short”).

117. See *Davies*, *supra* note 51, at 674-86.

118. 6 Binn. 316 (Pa. 1814).

had violated a Pennsylvania constitutional provision that prohibited unreasonable searches and seizures.¹¹⁹ The Pennsylvania Supreme Court quickly rejected this argument.¹²⁰ Similarly, in the 1817 case of *Mayo v. Wilson*,¹²¹ the New Hampshire Supreme Court wrote that a warrantless arrest did not violate the New Hampshire Constitution, which prohibited unreasonable searches and seizures.¹²²

In addition, three nineteenth-century cases are particularly relevant to the historical argument advanced in this essay — *Banks v. Farwell*,¹²³ *Sandford v. Nichols*,¹²⁴ and *Weimer v. Bunbury*.¹²⁵

1. *Banks v. Farwell* and *Sandford v. Nichols*

In the 1838 *Banks* case, Banks had confessed to a theft. A police officer subsequently entered Banks's shop without a warrant to retrieve the stolen property.¹²⁶ Although the Massachusetts Constitution prohibited unreasonable searches and seizures, the Massachusetts Supreme Judicial Court concluded that the warrantless search of the shop did not violate this constitutional provision.¹²⁷

Banks contrasts with *Sandford*, another challenge to a police search decided by the Massachusetts Supreme Judicial Court in the early nineteenth century.¹²⁸ In *Sandford*, a law enforcement officer searched Thomas Sandford's house for smuggled goods. The officer had obtained a warrant. But because the warrant did not describe the goods with sufficient particularity, the warrant was defective. Sandford subsequently brought a trespass suit.¹²⁹

In *Sandford*, the Massachusetts Supreme Judicial Court held that the trial court erred in admitting the improper warrant into evidence. The Justices ordered a new trial for Sandford's trespass action.¹³⁰ The Massachusetts Supreme Judicial Court also strongly intimated that Sandford would succeed in a trespass action, but expressed doubt about

119. See Davies, *supra* note 51, at 615 (describing *Wakely v. Hart* as "probably the most widely cited early American case on the law of arrest").

120. *Wakely*, 6 Binn. at 318.

121. 1 N.H. 53 (1817).

122. *Id.* at 59-60.

123. 38 Mass. (21 Pick.) 156 (1838).

124. 13 Mass. (13 Tying) 286 (1816).

125. 30 Mich. 201 (1874).

126. *Banks v. Farwell*, 38 Mass. (21 Pick.) 156, 156-57 (1838).

127. *Id.* at 159-60.

128. *Sandford v. Nichols*, 13 Mass. (13 Tying) 286 (1816).

129. *Id.* at 289.

130. *Id.*

whether Sandford could prove substantial damages.¹³¹

In *Banks*, the Massachusetts Supreme Judicial Court held that a search was lawful, even though the police officer executing the search had not obtained a warrant. In *Sandford*, the same court suggested that a search was probably unlawful, because the law enforcement officer had obtained a *defective* warrant. But unlike the officer in *Banks*, the officer in *Sandford* at least had made the effort to obtain a warrant.

The obvious difference between *Banks* and *Sandford* was the place that the officers were searching. The officers in *Banks* were searching a business, while the officers in *Sandford* were searching a home. The Massachusetts Supreme Judicial Court probably required a warrant only in *Sandford* because *Sandford* involved a physical entry into a house, and *Banks* did not.

2. *Weimer v. Bunbury*

In the 1874 case of *Weimer v. Bunbury*,¹³² the Michigan Supreme Court reviewed a state statute, which allowed the state to issue a “warrant” authorizing the repossession of property owned by delinquent tax collectors. The plaintiff contended that this statute violated a Michigan state constitutional provision, which proscribed unreasonable searches and seizures. The *Weimer* Court rejected the plaintiff’s contention and upheld the statute. The Court wrote that the search and seizure provision in the Michigan state constitution was intended for “something quite different from an open and public levy upon property after the usual method of execution levies.”¹³³

The Court continued that the state constitutional search and seizure provision “was to make sacred the privacy of the citizen’s dwelling and person against everything but process issued upon a showing of legal cause for invading it.”¹³⁴ Notably, the *Weimer* opinion was written by Justice Thomas Cooley, a prominent commentator on the United States Constitution.¹³⁵

131. *Id.* at 289-90.

132. 30 Mich. 201 (1874).

133. *Id.* at 208.

134. *Id.*

135. *See generally* THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (1st ed. 1868).

3. Summary

If the constitutional search and seizure provisions were designed to provide broad regulation of police activity, one would expect nineteenth-century court opinions to discuss these provisions. Instead, nineteenth-century courts rarely mentioned the constitutional search and seizure provisions. Further, the results in the few reported opinions are consistent with the argument advanced in this essay — that the Fourth Amendment was intended only to proscribe physical entries into the home, either pursuant to a general warrant, or without any warrant at all.

E. The Modern Misreading of the Fourth Amendment: *Boyd* and *Katz*

The Supreme Court took a significant step down the wrong path in its first Fourth Amendment decision, *Boyd v. United States*.¹³⁶ The *Boyd* decision struck down a statute, which authorized courts to order the production of business records.¹³⁷ The *Boyd* Court held that the statute violated the Fourth Amendment.¹³⁸

In the majority opinion, Justice Joseph P. Bradley cited almost no authority for the proposition that the Fourth Amendment protected business records.¹³⁹ Justice Bradley made liberal references to the argument of James Otis in *Paxton's* case, and to the John Wilkes cases.¹⁴⁰ Yet as Justice Bradley explicitly recognized in *Boyd*, those controversies involved the warrantless searches of residences.¹⁴¹ In his summary of early American grievances, Justice Bradley wrote in *Boyd*: “Prominent and principle among these was the practice of issuing general warrants by the Secretary of State, for searching *private houses* for the discovery and seizure of books and papers that might be used to convict their owner of the charge of libel.”¹⁴²

The *Boyd* case is best understood as a decision from the late nineteenth century, when the Supreme Court used the Constitution to shield business owners from government regulation.¹⁴³ Cases such as *Boyd*

136. 116 U.S. 616 (1886).

137. *Id.* at 632.

138. *Id.*

139. See Davies, *supra* note 51, at 728 (describing “the novelty of [Justice] Bradley’s specific claims”); *id.* at 727 n.512 (describing Justice Bradley’s account of the original understanding of the Fourth Amendment as “fanciful at best”).

140. *Boyd*, 116 U.S. at 624-26.

141. *Id.*

142. *Id.* at 625-26 (emphasis added).

143. See Davies, *supra* note 51, at 739 (Justice Bradley’s assumption that the Fourth Amendment extended to commercial interests “reflects the pro-business activism of the late nineteenth – and early twentieth-century Supreme Court – not the original understanding of the

ultimately would culminate in the Court's use of substantive due process to strike down government regulations of businesses, including the notorious decision in *Lochner v. New York*.¹⁴⁴

The Court's error in *Boyd* was compounded significantly in *Katz v. United States*.¹⁴⁵ In a decision that serves as the foundation for modern Fourth Amendment doctrine, the Court held that the Fourth Amendment proscribed the use of a warrantless wiretap to monitor a suspect's phone calls made from a public telephone booth.¹⁴⁶ In striking down the warrantless wiretap, the *Katz* Court overruled *Olmstead v. United States*.¹⁴⁷ The *Olmstead* Court had concluded, correctly, that a wiretap typically would not violate the Fourth Amendment because the wiretap did not involve any physical entry into a residence.¹⁴⁸

In overruling *Olmstead*, the *Katz* majority asserted that Fourth Amendment protections "do not vanish when the search in question is transferred from the setting of a home, an office, or a hotel room to that of a telephone booth."¹⁴⁹ The *Katz* majority concluded that "electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment."¹⁵⁰

Justice John Harlan's landmark concurrence in *Katz* ultimately would prove more important than the *Katz* majority opinion.¹⁵¹ Justice Harlan introduced a two-part test that has become the basis for determining whether the Fourth Amendment requires police officers to obtain a warrant. Justice Harlan's test provided that first "a person must have exhibited an actual (subjective) expectation of privacy and, second, that the expectation [must] be one that society is prepared to recognize as 'reasonable.'"¹⁵²

[Fourth] Amendment").

144. 198 U.S. 45 (1905). For discussions of substantive due process in the nineteenth century and early twentieth century, see generally John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493 (1997). See also, Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1 (1991); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

145. 389 U.S. 347 (1967).

146. *Id.* at 349-59.

147. *Id.* at 353.

148. 277 U.S. 438, 464 (1928) (the government's wiretap did not violate the Fourth Amendment, because there was "no entry of the houses or offices of the defendants").

149. *Katz*, 389 U.S. at 359.

150. *Id.* at 353.

151. *Id.* at 360 (Harlan, J., concurring).

152. *Id.* at 361.

Both the *Katz* majority opinion and Justice Harlan's concurrence completely failed to make any reference to the original understanding of the Fourth Amendment. Because the *Katz* decision involved a major revision of Fourth Amendment law, the Court's failure to discuss the Amendment's origins is hard to understand.

However, in his *Katz* dissent,¹⁵³ Justice Hugo Black did demonstrate attention to history. Justice Black wrote that if the Framers "desired to outlaw or restrict the use of evidence obtained by eavesdropping, I believe that they would have used the appropriate language to do so in the Fourth Amendment."¹⁵⁴ Justice Black insisted that the Court should remain faithful to the text and the history of the Fourth Amendment. Justice Black asserted that the Court should not "rewrite the [Fourth] Amendment in order 'to bring it into harmony with the times' and thus reach a result that many people believe to be desirable."¹⁵⁵

The *Katz* decision is not completely ahistorical. The Framers objected to searches of homes pursuant to general warrants because those searches invaded a resident's privacy. When Judge William Henry Drayton of Charleston complained in 1774 that any petty officer could break open a homeowner's doors and "enter his most private cabinet and thence to take and carry away, whatever he shall in his pleasure deem uncustomed goods,"¹⁵⁶ Judge Drayton was complaining about an invasion of privacy.

But *Katz* and subsequent modern cases fail to acknowledge that when the Framers enacted the Fourth Amendment, the Framers sought to proscribe only unreasonable physical intrusions into private residences. The amendment simply was not intended to regulate searches of ships, businesses, warehouses, or any of the other places outside of a residence where a person might have some expectation of privacy. In concluding that the Fourth Amendment governs searches that do not involve a physical intrusion into a residence,¹⁵⁷ the *Katz* opinion reached a result inconsistent with the Framers' original understanding.

153. *Id.* at 364 (Black, J., dissenting).

154. *Id.* at 366.

155. *Id.* at 364.

156. Drayton, *supra* note 98, at 15 and accompanying text.

157. *See Katz v. United States*, 389 U.S. 347, 353 (1967) (the applicability of the Fourth Amendment does not "turn upon the presence or absence of a physical intrusion into any given enclosure").

F. Summary

Today, the Supreme Court presumes that the Fourth Amendment applies to almost every government search and seizure.¹⁵⁸ After asserting that the Fourth Amendment applies to searches and seizures conducted by the government, the Court considers whether a particular search and seizure is reasonable. Sometimes the Court requires a warrant.¹⁵⁹ In other situations, the Justices only require that police officers possess probable cause.¹⁶⁰ And the Court has permitted some searches and seizures — such as random drug tests — where police officers do not possess either a warrant or probable cause.¹⁶¹

As the preceding discussion illustrates, this reading of the Fourth Amendment is completely inconsistent with the original intent of the Framers. No evidence suggests that the Framers intended the Fourth Amendment to impose some sort of general reasonableness requirement on all searches and seizures. In fact, the Framers' intent in enacting the Fourth Amendment is surprisingly clear. The Fourth Amendment was intended solely to regulate physical entries of residences by government agents. The amendment proscribed warrantless searches of residences, and searches of residences pursuant to a general warrant.¹⁶² With respect to government

158. See, e.g., *Skinner v. Ry. Labor Executives Ass'n*, 489 U.S. 602, 614 (1989) (the Fourth Amendment usually applies to government searches and seizures). *But cf.* *Oliver v. United States*, 466 U.S. 170, 177 (1984) (a search of the open fields “is not one of those ‘unreasonable searches’ proscribed by the text of the Fourth Amendment”).

159. *Kyllo v. United States*, 533 U.S. 27, 33-41 (2001) (before police officers use a thermal imaging device to measure the heat radiating from a suspect's residence, the officers first must obtain a warrant); *Katz*, 389 U.S. at 349-59 (before police officers use a wiretap to eavesdrop on a suspect's telephone conversations, the officers first must obtain a warrant).

160. *California v. Carney*, 471 U.S. 386, 387-95 (1985) (police officers need not obtain a warrant prior to searching an automobile, but the officers usually must possess probable cause).

161. See, e.g., *Skinner*, 489 U.S. at 618-33 (upholding random drug tests of railway workers, conducted without a warrant or probable cause); *California v. Ciraolo*, 476 U.S. 207, 211-15 (when police officers view a suspect's backyard from an airplane, the officers need not possess a warrant or probable cause).

162. Thomas Davies also argues that the historical concerns resulting in the Fourth Amendment “were almost exclusively about the need to ban house searches under general warrants.” See Davies, *supra* note 51, at 551, 642-50 (emphasizing the sanctity of the home in eighteenth-century America). However, I disagree with Davies on at least two points.

First, Davies concludes that the sole purpose of the Fourth Amendment was “banning Congress from authorizing use of general warrants.” *Id.* at 724. “In other words, the Framers did not address warrantless intrusions at all in the Fourth Amendment or in the earlier state provisions.” *Id.* at 551.

In concluding that the Fourth Amendment did not address warrantless searches, Davies relies at least in part on his observation that “the historical record of prerevolutionary grievance reveals no legal complaints” about warrantless searches. *Id.* at 603. However, the lack of debate about warrantless searches likely occurred because in early America, “the common law apparently

searches and seizures that did not involve physical intrusions into residences, the Fourth Amendment simply was inapplicable.¹⁶³

provided no justification for a search of a house beyond the ministerial execution of a valid search warrant.” *Id.* at 649. In other words, everyone agreed that warrantless house searches were impermissible. Even when faced with epidemic smuggling in eighteenth-century America, customs officers would not enter a home without a court-authorized writ of assistance.

According to Davies’s reading of the Framers’ intent, a search of a house pursuant to a general warrant would be an “unreasonable search,” as that term is used in the Fourth Amendment. However, Davies asserts that a warrantless house search would not be an unreasonable search, at least for Fourth Amendment purposes. Given the profound common law rejection of warrantless house searches, I cannot agree with Davies’s conclusion that the Fourth Amendment did not proscribe such searches.

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

Of course, unrestrained police discretion is undesirable. However, Davies does not explain why the most appropriate approach to limit police discretion is for nine Supreme Court Justices to rewrite the Fourth Amendment in whatever way seems best at the time. Police discretion could be constrained by the elected officials that supervise police departments, by statutes, or by amendments to state constitutions or the federal constitution.

The current incoherence of Fourth Amendment doctrine raises profound doubts about Fourth Amendment activism, with judges attempting to control police discretion by reinventing the amendment. In my opinion, Fourth Amendment doctrine is such a mess because well-intentioned judges have invoked the amendment in situations where it never was intended to apply.

163. Akhil Amar advocates an interpretation of Fourth Amendment history that is quite different from the account presented in this essay. Amar has advanced his historical account in a series of law review articles. *See, e.g.,* Amar, *The Writs of Assistance*, *supra* note 52; Amar, *Fourth Amendment First Principles*, *supra* note 52; Amar, *The Bill of Rights as a Constitution*, *supra* note 52, at 1775-81.

Amar’s historical argument rests on two critical propositions. First, like the current Supreme Court, Amar asserts that the Framers intended that the Fourth Amendment would impose a global reasonableness requirement on all searches and seizures. Amar, *Fourth Amendment First Principles*, *supra* note 52, at 801-04. Second, Amar asserts that the Framers actually disfavored searches pursuant to any warrant, general or specific. *Id.* at 771-80. According to Amar, the Framers did not view the warrant process as protecting against unreasonable searches. Instead, civil trespass suits offered the primary protection from such searches. *Id.* at 774. Amar contends that the Framers disfavored warrants, because a warrant would provide “an absolute defense in any subsequent trespass suit.” *Id.* Amar concludes: “Judges and warrants are the heavies, not the heroes, of our story.” Amar, *The Bill of Rights as a Constitution*, *supra* note 52, at 1179. *See also* TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION: SEIZURE AND SURVEILLANCE AND FAIR TRIAL AND FREE PRESS* 41 (1967) (also arguing that the Framers viewed all warrants as “an enemy”).

It is not possible to present a comprehensive analysis of Amar’s sophisticated historical argument in a footnote. However, one observation may be worth considering. Amar’s generalized reasonableness account requires two conclusions about the Framers’ views on search and seizure law. First, the Framers concluded that warrantless physical searches of residences

III. Interpreting the Fourth Amendment Without Reference to the Original Understanding

When the Framers adopted the Fourth Amendment, they never could have envisioned random drug tests. Therefore, one might conclude that historical evidence is not helpful with such problems. Instead one should look to some modern notions about reasonableness, and search for some consensus about random drug testing.¹⁶⁴

At least with respect to random drug tests, any attempt to discover some modern consensus is doomed to failure. Currently, no consensus exists as to when, if ever, random drug testing is “reasonable.”

Consider the very different voting patterns of Chief Justice William H. Rehnquist and Justice David H. Souter. At least with respect to Fourth Amendment cases that have come before the Supreme Court, Chief Justice

sometimes could be reasonable. Second, the Framers concluded that warrantless searches outside of residences sometimes could be unreasonable.

However, the historical record offers no support for either of these propositions. There is simply no evidence that the Framers *ever* intended to permit warrantless physical searches of houses. Even when seeking to prosecute the authors of the inflammatory publications in the John Wilkes cases, the Tory administration in England did not dare order law enforcement officers to enter houses without some kind of a warrant. Instead, the Tory Secretary of State obtained a general warrant. *See supra* notes 61-77 and accompanying text. Contrary to Amar’s suggestion, “the common law apparently provided no justification for a search of a house beyond the ministerial execution of a valid search warrant.” Davies, *supra* note 51, at 649.

Amar’s suggestion that some searches outside of a residence could be unreasonable is equally ahistorical. In researching early American court opinions on search and seizure law, I have not found a single case prior to the 1880s holding that a government search or seizure occurring outside of a home was an unreasonable search. The first suggestion that such searches could violate the Fourth Amendment did not appear until *Boyd v. United States*, 116 U.S. 616 (1886).

No one disputes Amar’s abilities or as a writer or an advocate. However, a number of Fourth Amendment scholars profoundly disagree with Amar’s reading of history. *See, e.g.*, Davies, *supra* note 51, at 575 n.63 (“Amar is an engaging writer, but his treatment of text and history is often loose and uninformed.”); Maclin, *The Complexity of the Fourth Amendment*, *supra* note 55, at 929 (“Amar provides an incomplete account of the [Fourth] Amendment’s history.”); Cloud, *supra* note 56, at 1739 (Amar “selectively deploys incomplete fragments of the historical record to advance a partisan thesis”).

164. For arguments that modern notions of reasonableness should influence Fourth Amendment doctrine, see Yale Kamisar, *The Writings of John Barker Waite and Thomas Davies on the Search and Seizure Exclusionary Rule*, 100 MICH. L. REV. 1821, 1865 (2002) (arguing that “changing times and changing circumstances seriously undermined the presuppositions and expectations regarding the drafting and adoption of the search and seizure provision”); Maclin, *Let Sleeping Dogs Lie*, *supra* note 55, at 897 (arguing that the Supreme Court should “stop considering the historical origins of the Fourth Amendment unless it is able to develop a more effective and consistent method by which to do so”); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 824 (1994) (asserting that “the construction of the Fourth Amendment’s ‘reasonableness’ clause should properly change over time to accommodate constitutional purposes more general than the Framers’ specific intentions”).

Rehnquist never has seen a random drug testing program that he didn't like. Chief Justice Rehnquist voted to uphold random drug testing programs in all six of the cases the Court has heard. Chief Justice Rehnquist agreed with a Court majority to uphold the random drug testing programs in *Skinner*, *Van Raab*, *Acton*, and *Earls*.¹⁶⁵ When the majority struck down random drug testing programs in *Chandler* and *Ferguson*, Chief Justice Rehnquist dissented.¹⁶⁶

Conversely, Justice Souter never has voted to uphold a random drug testing program. Justice Souter has participated in four of the Court's six random drug testing cases. In *Chandler* and *Ferguson*, Justice Souter agreed with the majority that random drug testing programs violated the Fourth Amendment.¹⁶⁷ When the majority upheld random drug testing programs in *Acton* and *Earls*, Justice Souter dissented.¹⁶⁸

So which of these two Justices is the "reasonable" person, with respect to random drug tests? Is it Justice Rehnquist, who consistently votes to uphold random drug testing programs? Or is it Justice Souter, who consistently concludes that such programs violate the Fourth Amendment?

The lack of any consensus extends beyond the divergent views of these two Justices. In *Acton*, the Ninth Circuit Court of Appeals held that requiring student athletes to take random drug tests violated the Fourth Amendment. The Supreme Court reversed the Ninth Circuit, and upheld the drug testing program.¹⁶⁹ In *Earls*, the Tenth Circuit Court of Appeals held that requiring students who participate in extracurricular activities to take random drug tests violated the Fourth Amendment.¹⁷⁰ Again, the Supreme Court reversed the appellate court, and held that the drug testing program was constitutional.

The debate about random drug testing almost certainly is not limited to federal judges. Different people will have different perspectives about what constitutes a reasonable search.¹⁷¹ A prosecutor's view of what

165. See *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Ry. Labor Executives Union*, 489 U.S. 602 (1989).

166. See *Ferguson v. City of Charleston*, 532 U.S. 67, 91 (2001) (Scalia, J., dissenting) (joined by Rehnquist, J. and Thomas, J.); *Chandler v. Miller*, 520 U.S. 305, 323 (1997) (Rehnquist, J., dissenting).

167. See *Ferguson*, 532 U.S. at 67; *Chandler*, 520 U.S. at 305.

168. See *Earls*, 536 U.S. at 842 (O'Connor, J., dissenting) (joined by Souter, J.); *id.* (Ginsburg, J., dissenting) (joined by Stevens, J., O'Connor, J., and Souter, J.); *Acton*, 515 U.S. at 666 (O'Connor, J., dissenting) (joined by Stevens, J. and Souter, J.).

169. *Vernonia Sch. Dist. v. Acton*, 66 F.3d 217 (9th Cir. 1995), *rev'd*, 515 U.S. 646 (1995).

170. *Earls v. Bd. of Educ.*, 300 F.3d 1222 (10th Cir. 2002), *rev'd*, 536 U.S. 822 (2002).

171. For arguments that public high schools should be able to conduct random drug tests, see William J. Bennett, *A Victory for 'Ordered Liberty,'* WALL ST. J., July 1, 2002, at A14

constitutes a reasonable search will differ from the views of a public defender. A police officer's view of what is reasonable will differ from the views of a low-income housing resident, who frequently is hassled (or worse) by police officers. And so on.¹⁷²

Consensus on what constitutes an "unreasonable search" for Fourth Amendment purposes may be limited to a fairly narrow fact pattern. There may indeed be a popular consensus that warrantless physical searches of homes are *per se* unconstitutional, absent some emergency or other extraordinary circumstances. But beyond this agreement about the impropriety of warrantless house searches, no current consensus exists with respect to the proper interpretation of the Fourth Amendment.

A search for a modern consensus about the Fourth Amendment thus may reach the same result as a review of the original intentions of the Framers. The Fourth Amendment only proscribes warrantless physical searches of residences, and physical searches of residences pursuant to an invalid warrant.

(permitting high schools to adopt random drug testing programs affirms that "local control is an essential element" of education); *Maybe Tecumseh Was Right*, DAILY OKLAHOMAN, Jan. 4, 2003, at 6A (discussing an Oregon study, which indicated that random drug testing reduces illicit drug use among high school students); Cathi Jeffrey, *Drug Testing in Schools Is a Deterrent*, QUINCY PATRIOT LEDGER, Jan. 29, 2003, at 12 (random drug testing in high schools "has been proven to decrease the likelihood of drug use").

For arguments opposing random drug testing in public schools, see *No Logic in School Drug Test*, NEWARK STAR LEDGER, July 6, 2002, at 6 (random high school drug tests "abuse student privacy rights while doing precious little to fight drugs"); Nolan Finley, *Oklahoma Student Stood Up for Liberty: People Shouldn't Let Her Stand Alone*, DETROIT NEWS, July 7, 2002, at 11 (random high school drug tests violate "protections against privacy intrusions, unreasonable searches and self-incrimination"); *Ruling an Assault on Student Privacy*, S. FLA. SUN-SENTINEL, July 4, 2002, at 14A ("random drug testing of high school students participating in extracurricular activities flunks the test of liberty").

172. See, e.g., Ronald J. Bacigal, *Choosing Perspectives in Criminal Procedure*, 6 WM. & MARY BILL OF RTS. J. 677, 706 (1998) (in Fourth Amendment cases, Supreme Court analysis sometimes focuses on "police, hypothetical reasonable people, or individual citizens, whose perspectives are utilized to resolve Fourth Amendment issues"); Dwight L. Greene, *Justice Scalia and Tonto, Judicial Pluralistic Ignorance, and the Myth of Colorless Individualism in Bostick v. Florida*, 67 TUL. L. REV. 1979, 2029 n.191 (1993) ("Scalia's approach to the Fourth Amendment reflects a majoritarian white police perspective. It does not reflect the justified apprehension black men have of police."); Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1308 (1990) (contending that the Supreme Court follows a "police-oriented, innocent-citizen perspective" in Fourth Amendment cases); Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 FORDHAM L. REV. 2257, 2302 (2002) (discussing "minority community voices suppressed in the judicial determination of Fourth Amendment 'reasonableness'").

IV. Search and Seizure In a World Without a Fourth Amendment

In this essay, I advocate a reading of the Fourth Amendment that is much narrower than the approach adopted by the modern Supreme Court. Under this narrower reading, the Fourth Amendment simply would not apply to controversies such as random drug testing. In the highly unlikely event that the Supreme Court ever adopted such an interpretation, the United States Constitution no longer would regulate most searches and seizures. With few restrictions imposed by the Supreme Court, one might worry that no one would regulate most law enforcement activities.

Actually, legislatures often have proven quite willing to impose restrictions on law enforcement officers, when particular search techniques generated real public concern. In the 1967 *Katz* decision, the Supreme Court concluded that a warrantless wiretap violated the Fourth Amendment to the United States Constitution.¹⁷³ But for practical purposes, the most important restrictions on wiretapping appear in a federal statute enacted by Congress — Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (“Title III”).¹⁷⁴ Title III requires that the government obtain a court order prior to installing a wiretap.¹⁷⁵ Title III specifies the requirements for a wiretap application,¹⁷⁶ and the standards that a judge must use in determining whether to grant the application.¹⁷⁷ Title III makes unauthorized wiretapping a felony.¹⁷⁸

To date, the significant restrictions on the interception of internet communications have derived from federal statutes, rather than from the Fourth Amendment. With respect to Internet transmissions, the most applicable statute probably is the Electronic Communications Privacy Act of 1986 (ECPA).¹⁷⁹ Among other things, the ECPA governs the use of any “trap and trace” device — a device which “captures the incoming electronic or other impulses which identify the originating number,” or other information that is “reasonably likely to identify the source of a wire or electronic communication.”¹⁸⁰ Like the Title III restriction on wiretaps, the ECPA permits the use of a trap and trace device only after the

173. *Katz v. United States*, 389 U.S. 347, 349-59 (1967).

174. 18 U.S.C. §§ 2510-2522 (1994 & Supp. 1998).

175. *Id.* at § 2516(3).

176. *Id.* at § 2518(1).

177. *Id.*

178. *Id.* at § 2511.

179. 18 U.S.C. §§ 3121-3127 (1994 & Supp. 1998).

180. 18 U.S.C.A. § 3127(4) (West Supp. 2003).

government has obtained a court order.¹⁸¹ The ECPA specifies the contents of an application for a trap and trace device,¹⁸² and the circumstances where a court should permit the use of such a device.¹⁸³ In short, in cases where citizens feel the most profound concerns about intrusive searches, Congress has passed statutes that constrain police activity.

Of course, it would be hopelessly naive to suggest that legislatures always impose appropriate limitations on searches, or that police overreaching never occurs. For example, the *Earls* decision arose out of an Oklahoma school district policy that mandated random drug testing only for students involved in extra-curricular activities, and not for other students.¹⁸⁴ As already noted, this seems like a very strange policy.¹⁸⁵ It is hard to understand why a school district would suspect illicit drug use among members of the National Honor Society or the school choir — but not among the general student population.¹⁸⁶

In addition, some recent studies support the conclusion that police officers may abuse their search powers. Specifically, some empirical studies indicate that police officers are far more likely to stop and search African-American drivers than white drivers.¹⁸⁷ Such studies suggest that police officers sometimes act as a result of racial bias. This suggestion of racial bias is deeply disturbing.

But even if one accepts that elected officials or police officers sometimes will authorize intrusive searches, the Fourth Amendment is not necessarily the cure for such problems. When the Framers enacted the Fourth Amendment, they were not thinking of random drug tests, racially biased traffic stops, or many other current law enforcement controversies.

181. *Id.* at § 3121(a).

182. *Id.* at § 3122(b).

183. *Id.* at § 3123(a). *But cf.* Christian David Hammel Schultz, Note, *Unrestricted Federal Agent: "Carnivore" and the Need to Revise the Pen Register Statute*, 76 NOTRE DAME L. REV. 1215, 1242-54 (2001) (asserting that existing federal statutes do not apply to the "Carnivore" program, which tracks a user's internet activity).

184. *Bd. of Educ. v. Earls*, 536 U.S. 822, 826-27 (2002).

185. *See supra* notes 38-41 and accompanying text.

186. *See Earls*, 536 U.S. at 853 (Ginsburg, J., dissenting).

187. *See* David A. Harris, *The Stories, The Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 279 (1999) (describing a study conducted on the New Jersey turnpike, which showed that "73.2 percent of those stopped and arrested were black, while only 13.5 percent of the cars on the road had a black driver or passenger"); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 957-58 (1999) ("Between January 1995 and September 1996, of the 823 citizens detained for drug searches on one stretch of Interstate 95, over seventy percent were African American."). *See also* Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 1030 (2002) (empirical evidence suggests that police officers "are more likely to stop blacks and Latinas/os than whites").

Because the Framers did not adopt the Fourth Amendment to deal with anything remotely similar to random drug tests, it is hard to see how the amendment offers any real guidance in resolving such difficult controversies.

V. Conclusion

Courts often have struggled when applying the Fourth Amendment to random drug test controversies. The Supreme Court has decided random drug testing cases in closely divided opinions, often overruling lower federal courts.

To date, the Supreme Court has upheld random drug testing programs in the public high schools. In *Vernonia School District 47J v. Acton*,¹⁸⁸ the Justices upheld a random drug testing program for high school students participating in interscholastic athletics. In *Board of Education v. Earls*,¹⁸⁹ the Justices extended the *Acton* decision to uphold a random drug testing program for all students who participated in extracurricular activities.

The Justices reached the correct results in these cases, but for the wrong reason. A review of historical evidence demonstrates that the Framers enacted the Fourth Amendment solely to prohibit physical intrusions into residences, pursuant either to a general warrant, or no warrant at all. The Fourth Amendment never was intended to govern many of the other complex issues raised by government searches and seizures, such as random drug tests. In both *Acton* and *Earls*, the Supreme Court should have concluded that the Fourth Amendment simply was inapplicable.

Random drug testing is not the only issue where courts have struggled to apply the current interpretation of the Fourth Amendment. If Fourth Amendment scholars agree on anything, it is that current Fourth Amendment jurisprudence is a mess.¹⁹⁰ One cannot realistically expect any improvement, as long as the Supreme Court continues to invoke the Fourth

188. 515 U.S. 646 (1995).

189. 536 U.S. 822 (2002).

190. See, e.g., Amar, *Fourth Amendment First Principles*, *supra* note 52, at 757 (“The Fourth Amendment today is an embarrassment.”); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468 (1985) (“The fourth amendment is the Supreme Court’s tarbaby: a mass of contradictions and obscurities that has ensnared the ‘Brethren’ in such a way that every effort to extract themselves only finds them more profoundly stuck.”); Erik G. Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 787-88 (1999) (each new Fourth Amendment doctrine “is more duct tape on the Amendment’s frame and a step closer to the junkyard”); See also Kathryn R. Urbonya, *A Fourth Amendment “Search” in the Age of Technology: Postmodern Perspectives*, 72 MISS. L.J. 447, 447 n.2 (2002) (citing frequent complaints from scholars about the Fourth Amendment mess).

Amendment in situations where the amendment never was intended to apply.

* * * *