
MY CAR IS MY CASTLE: THE FAILED HISTORICAL ROOTS OF THE VEHICLE EXCEPTION TO THE FOURTH AMENDMENT

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*This Article focuses on overturning the vehicle exception to the Fourth Amendment using historical analysis to bring together a surprising confluence of law from the Founding Era of the United States. It examines the relationship between admiralty law, federal court jurisdiction, and the Fourth Amendment in the formative years of the American republic. Through this analysis, this Article demonstrates that the 1925 Supreme Court case *Carroll v. United States*, which established the vehicle exception and is still good law, was based upon an improper reading of the historical sources from the time of the Founding onward. As the Article argues, this counsels in favor of overturning the vehicle exception to the Fourth Amendment, because the originalist arguments set forth in *Carroll* were misguided. This Article also addresses why the *Carroll* progeny, especially the 1979 case *California v. Carney*, cannot be justified based on policy grounds. Instead, this Article demonstrates that a textualist reading of the Fourth Amendment requires far stronger protections against warrantless vehicle searches.*

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INTRODUCTION

There is a constitutional conundrum in the continued application of the “automobile exception” or “vehicle exception” to the Fourth Amendment.¹ The 1925 Supreme Court case *Carroll v. United States*, written by Chief Justice William Howard Taft, created the vehicle exception by allowing for warrantless searches of vehicles, abrogating the constitutional warrant requirement for searches under the Fourth Amendment.² However, recent

1. The Fourth Amendment states:

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.

2. See *Carroll v. United States*, 267 U.S. 132, 153 (1925) (“[C]ontraband goods concealed and

Supreme Court decisions have called the vehicle exception into question.³

The 2012 Supreme Court case *United States v. Jones* sought to reinforce the relationship between the term “effects” in Fourth Amendment jurisprudence and the property interest in vehicles.⁴ Though *Jones* did not deal specifically with the vehicle exception, Justice Antonin Scalia declared unequivocally: “It is beyond dispute that a vehicle is an ‘effect’ as that term is used in the [Fourth] Amendment.”⁵ According to *Jones*, the rationale behind the protection of “effects” was the fact that “[t]he text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to ‘the right of the people to be secure against unreasonable searches and seizures’; the phrase ‘in their persons, houses, papers, and effects’ would have been superfluous.”⁶

Herein lies the constitutional conundrum. The Fourth Amendment’s warrant requirement for the search of effects, coupled with Justice Scalia’s finding that a vehicle must be considered an effect for the purposes of the Fourth Amendment, logically leads to the conclusion that a warrant must be required for a vehicle search, calling into question the holding in *Carroll*.

Moreover, in the 2018 case *Collins v. Virginia*, the Supreme Court

illegally transported in an automobile or other vehicle may be searched for without a warrant . . .”). For a fairly comprehensive history of the importance of automobiles in American culture and their relationship with Fourth Amendment law throughout the twentieth and twenty-first centuries, see SARA A. SEO, *POLICING THE OPEN ROAD: HOW CARS TRANSFORMED AMERICAN FREEDOM* (2019).

For a discussion of the Fourth Amendment doctrine developed by the Supreme Court under Chief Justice Taft, see Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 116–72 (2006). While Post is overly laudatory in his assessment of Chief Justice Taft’s *Carroll* decision, he correctly points out that Chief Justice Taft consciously sought a position of equipoise between the enforcement of Prohibition and ensuring Fourth Amendment protections. *See id.* at 130–31. That Chief Justice Taft failed to strike this balance is the argument of this Article. Indeed, Post himself notes that at times, Chief Justice Taft’s arguments were questionable. For example, in *Carroll*, Chief Justice Taft relied on “a very strained reading of the Volstead Act” that was created to enforce Prohibition. *Id.* at 131.

3. This Article does not discuss the application of the plain view exception to the Fourth Amendment in automobile searches. This Article primarily deals with automobile searches of areas that are not visible from plain view, including under seats, in the glove box, in the trunk, and so forth.

4. *See United States v. Jones*, 565 U.S. 400, 404–05 (2012); *see also* Maureen E. Brady, *The Lost “Effects” of the Fourth Amendment: Giving Personal Property Due Protection*, 125 YALE L.J. 946, 955 (2016). The facts of *Jones* are as follows:

The Government obtained a search warrant permitting it to install a Global-Positioning-System (GPS) tracking device on a vehicle registered to respondent Jones’s wife. The warrant authorized installation in the District of Columbia and within 10 days, but agents installed the device on the 11th day and in Maryland. . . . [The Government] subsequently secured an indictment of Jones and others on drug-trafficking-conspiracy charges. The District Court suppressed the GPS data obtained while the vehicle was parked at Jones’s residence, but held the remaining data admissible because Jones had no reasonable expectation of privacy when the vehicle was on public streets. Jones was convicted.

Jones, 565 U.S. at 400.

5. *Jones*, 565 U.S. at 404 (citing *United States v. Chadwick*, 433 U.S. 1, 12 (1977)).

6. *Id.* at 405.

refused to extend the automobile exception to a search that occurred in the curtilage of a home.⁷ What explains the Court's refusal to further expand the vehicle exception? An obvious answer is that the vehicle exception clearly goes against the text of the Fourth Amendment. As Justice Scalia pointed out in *Jones*, a vehicle falls within the protection of the term "effects" in the Fourth Amendment, and the vehicle exception abrogates the Fourth Amendment's warrant requirement.⁸ The vehicle exception does nothing less than read out the term "effects" from Fourth Amendment jurisprudence. Indeed, a few years after the *Carroll* decision was handed down, in a 1929 article in the *Columbia Law Review*, Forrest Black made this same observation:

The majority of the Court [in *Carroll*], in its interpretation of the Prohibition Act . . . , attempting to emphasize the distinction between the right of search and seizure of dwellings and of automobiles with a warrant, has in effect denaturalized the Fourth Amendment as to everything except the word "houses." The eloquent defense by the Court of the "right of castle" is fustian. It affords no comfort to [John] Carroll or to the motoring public.⁹

Indeed, Black's argument was quite prescient, because *Carroll* created an instrument for the Supreme Court to use to read out the term "effects" from Fourth Amendment jurisprudence. For a time, the Court protected "effects" present in vehicles, such as luggage and sealed containers, by refusing to extend the vehicle exception to the search of other effects present in a vehicle.¹⁰ However, in the 1991 case *California v. Acevedo*, the Supreme

7. See *Collins v. Virginia*, 138 S. Ct. 1663, 1671 (2018) ("In physically intruding on the curtilage of Collins' home to search the motorcycle, Officer Rhodes not only invaded Collins' Fourth Amendment interest in the item searched, *i.e.*, the motorcycle, but also invaded Collins' Fourth Amendment interest in the curtilage of his home. The question before the court is whether the automobile exception justifies the invasion of the curtilage. The answer is no.").

8. See *Jones*, 565 U.S. at 404. In *United States v. Chadwick*, 433 U.S. at 3–5, the Court dealt with the warrantless search of a footlocker, taken off an Amtrak train in Boston and transferred into the trunk of a car, which law enforcement officials later opened and found marijuana hidden inside. Chief Justice Warren Burger, writing for the majority in *Chadwick*, stated that "this Court has recognized significant differences between motor vehicles and other property which permit warrantless searches of automobiles in circumstances in which warrantless searches would not be reasonable in other contexts," *id.* at 12, but conceded, "[i]t is true that, like the footlocker at issue here, automobiles are 'effects' under the Fourth Amendment . . .," *id.*

9. Forrest R. Black, *A Critique of the Carroll Case*, 29 COLUM. L. REV. 1068, 1075 (1929). Black's article offers an illuminating critique of the *Carroll* case, largely contemporary to the 1925 decision. Fourth Amendment scholar Jacob Landynski praised Black's article. See JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 90 (1966). However, Landynski wholly ignored Black's argument that the Supreme Court decision in *Carroll* undercuts Fourth Amendment protections outside the home. See *id.* at 91 ("The [Fourth] [A]mendment was intended principally to protect private dwellings; it need not be construed, in the presence of probable cause, to protect against searches of moving vehicles."). Landynski failed to take into account the protections of "effects" set forth by the Fourth Amendment.

10. In *Chadwick*, the Court argued that the warrantless search of the footlocker violated the Fourth

Court chose to extend the *Carroll* automobile exception to the warrantless search of sealed containers present within a vehicle.¹¹ Similar to *Carroll*, the fundamental problem with the extension of the vehicle exception in *Acevedo* is the fact that it completely ignores the term “effects” in the Fourth Amendment.¹² *Carroll* and its progeny, especially *Acevedo*, eviscerate the

Amendment. See *Chadwick*, 433 U.S. at 11 (“In this case, important Fourth Amendment privacy interests were at stake. By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination. No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protections of the Fourth Amendment Warrant Clause. There being no exigency, it was unreasonable for the Government to conduct this search without the safeguards a judicial warrant provides.”). Moreover, despite the fact that the federal government argued in *Chadwick* that the vehicle exception should also apply to the search of luggage within a vehicle, see *id.* at 11–12, the Supreme Court refused to extend the vehicle exception to luggage searches, see *id.* at 13 (“The factors which diminish the privacy aspects of an automobile do not apply to respondents’ footlocker. Luggage contents are not open to public view, except as a condition to a border entry or common carrier travel; nor is luggage subject to regular inspections and official scrutiny on a continuing basis. Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects. In sum, a person’s expectations of privacy in personal luggage are substantially greater than in an automobile.”). Two years after *Chadwick*, in *Arkansas v. Sanders*, 442 U.S. 753, 766 (1979), the Supreme Court specifically held that a warrant was required for the search of luggage in a vehicle:

In sum, we hold that the warrant requirement of the Fourth Amendment applies to personal luggage taken from an automobile to the same degree it applies to such luggage in other locations. Thus, insofar as the police are entitled to search such luggage without a warrant, their actions must be justified under some exception to the warrant requirement other than that applicable to automobiles stopped on the highway. Where—as in the present case—the police, without endangering themselves or risking loss of evidence, lawfully have detained one suspected of criminal activity and secured his suitcase, they should delay the search thereof until after judicial approval has been obtained. In this way, constitutional rights of suspects to prior judicial review of searches will be fully protected.

11. In the leadup to *California v. Acevedo*, 500 U.S. 565 (1991), the Court began to question the holding of *Arkansas v. Sanders* in the 1982 case *United States v. Ross*, 456 U.S. 798, 801 (1982), which dealt with the search of a “closed brown paper bag” present in the trunk of an automobile. A law enforcement official “opened the bag and discovered a number of glassine bags containing a white powder.” *Id.* Justice John Paul Stevens, in his majority opinion, permitted this search by stating:

The exception recognized in *Carroll* is unquestionably one that is “specifically established and well delineated.” We hold that the scope of the warrantless search authorized by that exception is no broader and no narrower than a magistrate could legitimately authorize by warrant. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.

Id. at 825.

In light of the inconsistency between *Sanders* and *Ross*, Justice Harry Blackmun, writing for the majority of the Court, overruled *Sanders* in *Acevedo*. See *Acevedo*, 500 U.S. at 579 (“We conclude that it is better to adopt one clear-cut rule to govern automobile searches and eliminate the warrant requirement for closed containers set forth in *Sanders*.”). At the same time, the Court adopted the *Ross* rule, explicitly extending the vehicle exception to other “effects” present in a vehicle: “The interpretation of the *Carroll* doctrine set forth in *Ross* now applies to all searches of containers found in an automobile. In other words, the police may search without a warrant if their search is supported by probable cause.” *Id.*

12. Criminal procedure scholar Tracey Maclin succinctly describes the weakness of the *Acevedo* decision:

The Court never considers the real question in *Acevedo*: whether the Warrant Clause should apply to personal property? To me, the answer seems obvious. Because the Fourth Amendment protects effects as well as persons, homes, and papers, and because the Warrant Clause does not distinguish “between searches conducted in private homes and other searches,” warrantless

protection of “effects” set forth in the text of the Fourth Amendment and are troubling instances of the Supreme Court’s attempts to run roughshod over constitutional safeguards against government intrusion.

If textualism offers no defense for the vehicle exception, what about another method of interpretation, such as originalism? Indeed, most of Chief Justice Taft’s arguments in *Carroll* relied on originalist arguments.¹³ Chief Justice Taft justified his decision in *Carroll* by stating:

We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, *where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.*¹⁴

This Article will demonstrate that the originalist argument in *Carroll* is based on an incorrect historical interpretation of the history of the Fourth Amendment. As discussed in greater detail below, the *Carroll* argument hinges on the allowance of warrantless ship searches by the First Congress (the same Congress that proposed the Fourth Amendment), coupled with a further analytic step of analogizing ship searches to land vehicle searches. This Article will show that warrantless ship searches were considered permissible under the Fourth Amendment because they were confined to federal admiralty jurisdiction at the time of the Founding. In contrast, land searches were treated differently by the First Congress. Thus, as this Article will demonstrate, the originalist argument in *Carroll* fails.

Finally, this Article will refute the pragmatic policy arguments offered by the Supreme Court to justify the vehicle exception. While policy arguments are not necessarily meritless, they are the weakest justifications in this instance, because the vehicle exception goes against both the text and the original intent of the Fourth Amendment. There are two main arguments in favor of a warrantless search exception: (1) the mobility of vehicles and (2) the substantial government regulation of vehicles. This Article will

searches of closed containers should be *per se* unreasonable, subject to a few carefully drawn exceptions.

Tracey Maclin, *Justice Thurgood Marshall: Taking the Fourth Amendment Seriously*, 77 CORNELL L. REV. 723, 782 (1992) (footnotes omitted) (quoting *Chadwick*, 433 U.S. at 8).

13. See *Carroll v. United States*, 267 U.S. 132, 149 (1925) (“The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.”).

14. *Id.* at 153 (emphasis added).

demonstrate that both rest on faulty premises that do not justify the abrogation of the Fourth Amendment warrant requirement.

Even upon its creation in 1925, the vehicle exception to the Fourth Amendment has always rested on a shaky ground. The time has come for the Supreme Court to overturn this exception and instead apply the text and history of the Fourth Amendment to require warrants for the search of vehicles.

I. THE QUESTIONABLE HISTORICAL INTERPRETATION OF THE VEHICLE EXCEPTION

As noted above, Chief Justice Taft largely justified his finding in *Carroll* on originalist grounds. However, because there were no automobiles in 1791, Chief Justice Taft's arguments were largely confined to the historical treatment of searches of ships around the time of the Framing.¹⁵ Thus, his argument was not wholly originalist, since there was no way he could analyze how the Framers applied Fourth Amendment search requirements to automobile searches. Instead, Chief Justice Taft's argument in *Carroll* required a further (non-originalist) step of analogizing ships to automobiles, which will be discussed in greater detail below.

Much of the historical analysis in *Carroll* relies on quotations from Justice Joseph Bradley's findings in 1886 in *Boyd v. United States*.¹⁶ In his opinion, Justice Bradley's analysis (and, by quoting Justice Bradley in his *Carroll* opinion, Chief Justice Taft's analysis) tends toward dilettante historicism, seeking to make broad claims about historical circumstances that are at best ambiguous.

For example, in *Boyd*, Justice Bradley asserted: "The seizure of stolen goods is authorized by the common law . . ." ¹⁷ This is very questionable. William Cuddihy, a scholar of Fourth Amendment history, has noted: "Between 1776 and 1789, the American law of search and seizures underwent a transformation that separated it from British law."¹⁸ In particular, Cuddihy has noted that scholars of the common law pushed for the use of warrants *for stolen goods*.¹⁹ Moreover, actual legal practice in the late eighteenth century was far more complicated than *Boyd* allows, as

15. *See id.* at 149–52.

16. *See Boyd v. United States*, 116 U.S. 616 (1886).

17. *Id.* at 623; *Carroll*, 267 U.S. at 149–50.

18. WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING*, 602–1791, at 667 (2009).

19. *See id.* at 633 ("Of nine legal publications between 1776 and 1795 that discussed search warrants for recovering stolen goods, all but one displayed only a specific warrant or recommended it as appropriate.").

Cuddihy points out:

By the measurement of American legislation and practice, the specific warrant became increasingly common during and after the revolution. The laws and constitutions of the new states, however, had by no means eradicated the general warrant as an acceptable mode of search and seizure. Taken as a whole, the laws and practices of 1776–87 had entrenched specific warrants as the accepted vehicle of search only *for recovering stolen goods*, and, beyond that narrow usage, only in Massachusetts, Rhode Island, New Jersey, and Delaware. Virginia had adopted the specific warrant as well, but on the doorstep of the Fourth Amendment, after years of maintaining the general warrants that its constitution denounced. Elsewhere, the general warrant either reigned supreme or held its own. During most of the Fourth Amendment’s foundation years, 1776–87, four states had disestablished the warrant that the amendment would forbid. Five states, however, had retained that warrant or something like it as their conventional protocol of search and seizure.²⁰

Thus, it is by no means clear that the common law allowed for the seizure of stolen goods in the late eighteenth century, at least not without first obtaining a search warrant to find the stolen goods.

Justice Bradley also noted in *Boyd* (as did Chief Justice Taft in *Carroll*) that under the common law, “the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government.”²¹ However, this assertion would not have been without controversy in the eighteenth century. For example, in Charleston, South Carolina, in 1734, the captain of a ship shot a cannon at a Vice Admiralty Court’s marshal in an attempt to prevent the marshal from boarding his ship.²² After the ship’s captain was killed, “[t]he incident led to a spontaneous public assembly in which,” according to Cuddihy, “some argued that a man’s ship was no less his castle than was his house.”²³ Among them was “[a] greasy Fellow with a leather apron,”²⁴ who declared: “[M]y house is my castle, *and so is my ship*, and therefore . . . I lay it down as a fundamental Law of Nations, that if the greatest Officer the King has, was to come with a thousand Warrants against me for any crime whatsoever, if he offers to take me out of my castle, I can kill him, and the law will bear me

20. *Id.* (emphasis added).

21. *Boyd*, 116 U.S. at 623; *Carroll*, 267 U.S. at 150.

22. See CUDDIHY, *supra* note 18, at 188.

23. *Id.*

24. *Id.* (citation omitted).

out.”²⁵ Thus, in the eighteenth century, some believed that ships should be considered on par with the home and were also entitled to strong protections against government search and seizure.

A. THE COLLECTION ACT OF 1789 AND THE WARRANTLESS SEARCH EXCEPTION FOR SHIPS

In spite of possible objections by ship owners, *Boyd* and *Carroll* noted that Congress passed a statute “to regulate the collection of duties, the act of July 31, 1789, 1 Stat. 29, 43,”²⁶ which allowed for seizure of goods kept or hidden for the purposes of violating federal revenue laws. This piece of legislation was known as the Collection Act of 1789 (the “Collection Act”), and it was passed under the guidance of John Laurence, a Congressman from New York City.²⁷ In particular, Chief Justice Taft (though not Justice Bradley) quoted from section 24 of the Collection Act, which stated:

That every collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority, to enter any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed; and therein to search for, seize, and secure any such goods, wares or merchandise; and if they shall have cause to suspect a concealment thereof, in any particular dwelling-house, store, building, or other place, they or either of them shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the day time only) and there to search for such goods, and if any shall be found, to seize and secure the same for trial; and all such goods, wares and merchandise, on which the duties shall not have been paid or secured, shall be forfeited.²⁸

What is important to glean from this statute is that it grants authority to revenue collectors and naval officers to search ships and seize any goods they suspect have been hidden within the ship to avoid tax collection, and to do so without a warrant—though it required a warrant for searches of real property on land. Both judicial interpretation and scholarly analysis have placed significant weight on this. In *Boyd*, Justice Bradley asserted (which Chief Justice Taft quoted in *Carroll*): “As this act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches

25. *Id.* (emphasis added) (citation omitted).

26. *Carroll*, 267 U.S. at 150 (quoting *Boyd*, 116 U.S. at 623).

27. See CUDDIHY, *supra* note 18, at 735.

28. Collection Act of 1789, ch. 5, § 24, 1 Stat. 29, 43 (1789); see also *Carroll*, 267 U.S. at 150–51 (there is some alteration of semicolons to commas in *Carroll* compared with the original statute, but this is not of great significance).

and seizures of this kind as ‘unreasonable,’ and they are not embraced within the prohibition of the amendment.”²⁹ Chief Justice Taft reiterated this in his *Carroll* opinion.³⁰ Scholar William Cuddihy was even more effusive in his description of the 1789 legislation, declaring: “The Collection Act of 1789 was nothing less than a statutory exegesis on the Fourth Amendment.”³¹

These search provisions in the Collection Act were further ratified by subsequent legislation in the First Congress in 1790³² and the Second Congress in 1793.³³ This has led other modern legal thinkers, such as Akhil Reed Amar, when discussing the Collection Act and its progeny, to declare: “If any members of the early Congresses objected to or even questioned these warrantless searches and seizures on Fourth Amendment grounds, supporters of the so-called warrant requirement have yet to identify them.”³⁴ Amar’s argument largely mirrors Chief Justice Taft’s opinion in *Carroll*, though Amar’s tone is more forceful.³⁵

However, the argument set forth in *Boyd* and *Carroll* as well as by Cuddihy and Amar clearly creates a conundrum in Fourth Amendment law.

29. *Boyd*, 116 U.S. at 623; *Carroll*, 267 U.S. at 150.

30. *See Carroll*, 267 U.S. at 151 (“Thus contemporaneously with the adoption of the Fourth Amendment we find in the first Congress, and in the following Second and Fourth Congresses, a difference made as to the necessity for a search warrant between goods subject to forfeiture, when concealed in a dwelling house or similar place, and like goods in course of transportation and concealed in a movable vessel where they readily could be put out of reach of a search warrant.”).

31. CUDDIHY, *supra* note 18, at 739.

32. *See Act of Aug. 4, 1790, ch. 35, § 48, 1 Stat. 145, 170 (1790)* (“That every collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority to enter any ship or vessel in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed: and therein to search for, seize and secure any such goods, wares or merchandise. And if they shall have cause to suspect a concealment thereof in any particular dwelling-house, store, building, or other place, they or either of them shall, upon application on oath to any justice of the peace, be entitled to a warrant to enter such house, store or other place (in the daytime only) and there to search for such goods, and if any shall be found, to seize and secure the same for trial: and all such goods, wares and merchandise, on which the duties shall not have been paid or secured, shall be forfeited.”). There are extremely minor punctuation alterations in this Act that differ from the Collection Act, such as elimination of some Oxford commas and one instance in which a semicolon is changed to a period.

33. The Second Congress passed legislation with different wording than the Collection Act that allowed for searches of ships without a warrant by duties collectors. *See Act of Feb. 18, 1793, ch. 8, § 27, 1 Stat. 305, 315 (1793)* (“That it shall be lawful for any officer of the revenue, to go on board of any ship or vessel, whether she shall be within or without his district, and the same to inspect, search and examine, and if it shall appear, that any breach of the laws of the United States has been committed, whereby such ship or vessel, or the goods, wares and merchandise on board, or any part thereof, is, or are liable to forfeiture, to make seizure of the same.”); *Carroll*, 267 U.S. at 151.

34. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 766–67 (1994).

35. *See Carroll*, 267 U.S. at 151 (“Like provisions were contained in the Act of August 4, 1790, c. 35, Sections 48–51, 1 Stat. 145, 170; in Section 27 of the Act of February 18, 1793, c. 8, 1 Stat. 305, 315, and in Sections 68–71 of the Act of March 2, 1799, c. 22, 1 Stat. 627, 677, 678.”); *Collection Act of 1789, ch. 5, § 36, 1 Stat. 29, 47–48 (1789)*.

If the Framers of the Bill of Rights obviously wanted to allow for warrantless searches of ships, what explains the fact that there is no such exception in the text of the Fourth Amendment?

B. DOES THE COLLECTION ACT DEMONSTRATE THE TRUE MEANING OF THE FOURTH AMENDMENT?

The Framers of the Bill of Rights certainly could have included such a ship-search exception in the Fourth Amendment's text, because the ratification of the Fourth Amendment concluded on December 15, 1791,³⁶ long after the Collection Act was passed on July 31, 1789. William Cuddihy attempted to justify his belief that the Collection Act played an important role in explicating the Fourth Amendment by asserting: "Congressional consideration of the search warrant section of [the Collection Act] commenced only twelve days before the amendment originated, and that section became law just three weeks before the amendment assumed definitive form."³⁷ However, this argument further calls into question why an exception for warrantless searches of ships was not included in the Fourth Amendment if the Amendment's drafting was so proximate to the passage of the Collection Act. Indeed, during the drafting of the Collection Act, there does not appear to have been any references on the floor of the House to the words "search," "searched," "seizure," "seize," "seized," "warrant," or "warrants."³⁸ The same appears to be true for the Senate debates.³⁹ While the House records from the *Annals of Congress* reference these words with regard to what would become the Fourth Amendment, they do not appear with regard to the Collection Act.⁴⁰ Once again, the same is true for the Senate.⁴¹

James Madison first brought up the possibility of constitutional amendments on June 8, 1789.⁴² On that day, Madison proposed his Bill of Rights in a speech before the House, which included a provision that would ultimately become the Fourth Amendment: "The rights of the people to be secured in their persons, their houses, their papers, and their other property,

36. See LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 12 (2001).

37. CUDDIHY, *supra* note 18, at 737.

38. See generally 1 ANNALS OF CONG. (1789) (Joseph Gales ed., 1834). The *Annals of Congress* offer a much more comprehensive record of the debates in the House of Representatives than the *Journal of the House of Representatives*. See generally H.R. JOURNAL, 1st Cong., 1st Sess. (1789). Indeed, the *Journal* does not even include James Madison's speech in favor of a Bill of Rights from June 8, 1789 (it does not even mention Madison by name on that day). *Id.* at 46–47.

39. See generally S. JOURNAL, 1st Cong., 1st Sess. (1789).

40. See 1 ANNALS OF CONG. (1789) (Joseph Gales ed., 1834).

41. See S. JOURNAL, 1st Cong., 1st Sess. (1789).

42. See 1 ANNALS OF CONG. 431 (1789) (Joseph Gales ed., 1834). Before discussing the merits of constitutional amendments, the House discussed Western lands and import duties. *Id.* at 410–24.

from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.”⁴³ He did not relate it at all to the drafting of what would become the Collection Act, which was also taking place at the time.

Furthermore, Madison also made a statement that helps to better clarify the relationship between the Collection Act, the general powers of the federal government, and the subsequent adoption of the Fourth Amendment. In his June 8th speech, Madison noted:

The General Government has a right to pass all laws which shall be necessary to collect its revenue; the means for enforcing the collection are within the direction of the Legislature: may not general warrants be considered necessary for this purpose, as well as for some purposes which it was supposed at the framing of their constitutions the State Governments had in view? If there was reason for restraining the State Governments from exercising this power, there is like reason for restraining the Federal Government.⁴⁴

Historian Leonard Levy has described general warrants as “[p]romiscuously broad warrants [that] allowed officers to search wherever they wanted and to seize whatever they wanted, with few exceptions.”⁴⁵

In the eighteenth century, the British Parliament passed legislation allowing for the use of general warrants in the collection of duties, and the practice of issuing general warrants had spread from Britain to the American colonies.⁴⁶ However, Madison’s argument points out that the adoption of a Bill of Rights, through the fledgling version of the Fourth Amendment he had proposed earlier in his speech, would make congressional passage of general warrants illegal. This further complicates the argument made in *Boyd* and *Carroll* as well as by Cuddihy and Amar, because using this logic, passage of the Fourth Amendment would necessarily supersede prior congressional legislation on general warrants, including the Collection Act.

Moreover, when proposing protections against warrantless searches and seizures, Madison’s draft set forth a clear rule, without any textual exceptions to the rule. Madison made a concerted effort to create strong constitutional protections against warrantless searches and seizures, as historian Leonard Levy noted:

43. *Id.* at 434–35.

44. *Id.* at 438.

45. LEVY, *supra* note 36, at 153.

46. *See id.* at 153–54.

Madison could have achieved his goals and redeemed his campaign pledge by taking the least troublesome route. On the issue of search and seizure, for example, he might have shown up the Anti-Federalists by proposing that the United States would not enforce its laws by searches and seizures that violated the laws of the states, most of which still allowed general warrants. That would have put the burden on the states to bring about reforms securing the rights of citizens against unreasonable searches and seizures. Or Madison might have simply proposed that the United States would not employ general warrants. Or he might have recommended the weak formulation of his own state's constitution [in Virginia], with its omission of specificity for the things to be seized, its failure to require a sworn statement, and its flabby assertion that "grievous" warrants "ought" not to be granted. Even Virginia's excellent 1788 recommendation for a search and seizure provision to be added to the federal Constitution employed the same "ought."⁴⁷

Madison chose to include unusually robust legal protections in his proposal for what became the Fourth Amendment. As Levy pointed out: "If Madison had chosen a formulation narrower than the one he offered, only the citizens of Massachusetts could consistently have criticized him."⁴⁸ In particular, Madison's innovations included "the imperative voice, 'shall not be violated,' rather than the wishful 'ought not,' which allowed for exceptions"⁴⁹ as well as the standard of probable cause, which "required more than mere suspicion or even reasonable suspicion, as had its antecedents such as 'just cause' and 'sufficient foundation.'"⁵⁰ Thus, we find ourselves in a historical paradox. It is likely that, according to its original understanding, the Fourth Amendment created a strong warrant requirement with regard to searches,⁵¹ but the First and Second Congresses passed

47. *Id.* at 175.

48. *Id.*

49. *Id.* at 176.

50. *Id.*

51. It should be noted that there is a debate over whether the Fourth Amendment created a warrant requirement. For example, in his concurring opinion in *California v. Acevedo*, 500 U.S. 565, 581 (1991) (Scalia, J., concurring in judgment), Justice Scalia argued that the text of the Fourth Amendment does not require warrants: "The Fourth Amendment does not by its terms require a prior warrant for searches and seizures; it merely prohibits searches and seizures that are 'unreasonable.' What it explicitly states regarding warrants is by way of limitation upon their issuance rather than requirement of their use." Justice Scalia's argument is questionable, however, as legal historian Laura Donohue has noted:

The proper way to understand the Fourth Amendment is as a prohibition on general search and seizure authorities *and* a requirement for specific warrants. The first clause outlaws promiscuous search and seizure, even as the second clarifies *precisely* what will be required for a particularized warrant to be valid. The government could not violate the right against search and seizure of one's person, house, papers, or effects absent either a felony arrest or a warrant meeting the requirements detailed in the second clause.

Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1193 (2016) (emphasis in original).

Chief Justice John Roberts in the 2014 case *Riley v. California*, 573 U.S. 373, 381 (2014),

legislation that clearly went against this general rule, and instead allowed for warrantless searches of ships.⁵² How do we square this circle?

C. THE FOURTH AMENDMENT'S DIVISION BETWEEN ADMIRALTY AND OTHER JURISDICTIONS

As legal historian Thomas Davies has noted, the answer can be found by looking at the establishment of the jurisdiction of federal courts, in particular federal court jurisdiction over admiralty cases.⁵³ The Collection Act established districts for the collection of duties (Samuel Johnson in the 1785 edition of his *Dictionary of the English Language* defined a "Duty" as a "Tax; impost; custom; toll.")⁵⁴ throughout the United States, ranging in number from one district in New Hampshire to twenty districts in

appears to have adopted a rule that "reasonableness" for the purposes of the Fourth Amendment generally requires a warrant, excepting certain carve-outs to Fourth Amendment protections:

As the text makes clear, "the ultimate touchstone of the Fourth Amendment is reasonableness." Our cases have determined that "[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant." Such a warrant ensures that the inferences to support a search are "drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement.

52. Cuddihy argues that three factors may have influenced the decision to allow for the warrantless search of ships at the time of the Founding:

Perhaps, because (1) the mobility of a ship facilitated the removal of evidence or contraband while a warrant was being sought; or (2) like distilleries, ships were less places of habitation than of commerce; or (3) the concentration of numerous crewmen in a confined space eradicated the expectation of privacy.

CUDDIHY, *supra* note 18, at 767–68.

This Article will specifically discuss why points (1) and (2) are poor explanations of the Collection Act's relationship with the Fourth Amendment. Explanation (3) appears to invoke the "reasonable expectation of privacy" test that emerged from Justice Harlan's concurring opinion in 1967 in *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring), discussed in detail *infra* note 185. Of course, the reasonable expectation of privacy test would have been unfamiliar to the Founders.

53. See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 605 (1999) ("Ships were not ordinary property at common law, but personalities subject to admiralty law – a branch of civil law. Indeed, the First Congress recognized as much when it explicitly included revenue seizures involving ships in the exclusive admiralty (that is, civil law) jurisdiction of the federal courts."). While I agree with this general assertion offered by Davies, his article offers rather limited evidence for this argument. My Article will go into greater depth in explaining specifically why admiralty was considered different for Fourth Amendment purposes at the time of the Founding and which specific Framers were most influential in the creation of this constitutional carve-out. Moreover, the rationale that Davies offers for why ships were treated differently is mistaken, as explained *infra* note 92. Furthermore, Davies takes a questionable position on the inapplicability of the Fourth Amendment to commercial property at the time of the Founding, as discussed *infra* note 115.

54. *Duty*, 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 663 (6th ed., 1785). Samuel Johnson's *Dictionary* was first published on April 15, 1755. See W. JACKSON BATE, SAMUEL JOHNSON 258 (1998). This was a major achievement, because, as historian W. Jackson Bate had noted, up until that point "a growing embarrassment to the English intellectual world in particular—was the lack of a major English dictionary." *Id.* at 240. As Bate observed: "There was nothing even remotely to compare with the great national dictionaries of France and Italy, both of them the product of learned academies with many members." *Id.*

Massachusetts.⁵⁵ Interestingly, the Collection Act was rather vague in its description of which courts had the jurisdiction to hear cases for violation of the Act. The Act stated: “That all penalties accruing by any breach of this act, shall be sued for and recovered with costs of suit, in the name of the United States, *in any court proper* to try the same, by the collector of the district where the same accrued, and not otherwise, unless in cases of penalty relating to an officer of the customs”⁵⁶ The reason for the inchoate discussion of jurisdiction when it came to the enforcement of the Collection Act was due to the fact that the lower federal courts had not yet been established by the First Congress. This did not occur until September 24, 1789, with the passage of the Judiciary Act of 1789 (the “Judiciary Act”), which created the federal District Courts and the federal Circuit Courts.⁵⁷

1. Oliver Ellsworth, the Judiciary Act of 1789, and the Bill of Rights

It is unsurprising that admiralty jurisdiction played an important role in the creation of the Judiciary Act, because Senator Oliver Ellsworth of Connecticut was central to its drafting. Senator Ellsworth had been a member of the Continental Congress and during that time had served on three committees that connected admiralty, revenue collection, and the judiciary.⁵⁸ According to historian William Brown, the first committee was “the Marine Committee, which a little later became the Board of Admiralty; by another change, its duties were later devolved upon a sort of department of naval affairs, headed by a secretary or manager whose counterpart under the Constitution is the secretary of the navy.”⁵⁹ The second committee, Brown noted, was “styled [as] the Board of Treasury, [which] attained, through much the same succession of changes, a like ancestral relationship to the present Department of the Treasury.”⁶⁰ And the third and final Continental Congressional Committee, Brown stated, was “the Committee of Appeals; and that, it is now quite clear, was the first forerunner of the present Supreme Court of the United States; its work was the beginning of all our federal

55. See Collection Act of 1789, ch. 5, § 1, 1 Stat. 29, 29–30 (1789). As historian Gordon Wood has noted, the collection of customs duties became the federal government’s primary means of raising revenue in the late eighteenth century:

Financing the funded national debt depended on the customs duties levied on foreign imports, most of which were British. Indeed, it was the extraordinary growth of federal customs revenue in the 1790s that enabled the state governments to lower their taxes, which of course enhanced the reputation of the Washington government.

GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 193 (2009).

56. Collection Act of 1789 § 36, 1 Stat. at 47 (emphasis added).

57. See Judiciary Act of 1789, ch. 20, §§ 1–4, 1 Stat. 73, 73–75 (1789); see also Davies, *supra* note 53, at 605.

58. See William Garrott Brown, *A Continental Congressman: Oliver Ellsworth, 1777–1783*, 10 AM. HIST. REV. 751, 754 (1905).

59. *Id.*

60. *Id.*

jurisprudence.”⁶¹

Moreover, as legal historian William Casto has noted: “When the first Congress was convened, [Senator] Oliver Ellsworth, who had significant experience with the admiralty courts under the Article [sic] of Confederation, played the leading role in the creation of the new federal judicial system.”⁶² According to Casto: “The admiralty provisions of the bill that [Senator Ellsworth] personally penned were enacted by the Congress without objection.”⁶³ As William Brown noted in his biography of Senator Ellsworth, James Madison late in his life, in a letter dated February 27, 1836, declared: “It may be taken for certain that the bill organizing the judicial department originated in his ([Senator] Ellsworth’s) draft, and that it was not materially changed in its passage into law.”⁶⁴ Around the same time that the Judiciary Act was being drafted, Senator Ellsworth also assisted in the passage of the Bill of Rights.

Senator Ellsworth, writing as “The Landholder” in *The Connecticut Courant* on December 10, 1787, in favor of the passage of the Constitution, had argued against the inclusion of a Bill of Rights, declaring:

Bills of Rights were introduced in England when its kings claimed all power and jurisdiction, and were considered by them as grants to the people. They are insignificant since government is considered as originating from the people, and all the power government now has is a grant from the people. The constitution they establish with powers limited and defined, becomes now to the legislator and magistrate, what originally a bill of rights was to the people. To have inserted in this constitution a bill of rights for the states, would suppose them to derive and hold their rights from the federal government, when the reverse is the case.⁶⁵

Yet, after the Constitution had been ratified and he had become a member of Congress, Senator Ellsworth, similar to James Madison, had an about-face and played an important role in creating the Bill of Rights.⁶⁶ On August 25, 1789, the proposed amendments to the Constitution, some of which became the Bill of Rights, were brought from the House of

61. *Id.*

62. William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 AM. J. LEGAL HIST. 117, 139–40 (1993).

63. *Id.* at 140.

64. WILLIAM GARROTT BROWN, *LIFE OF OLIVER ELLSWORTH* 185 (1905).

65. Oliver Ellsworth, Opinion, *The Landowner VI*, CONN. COURANT, Dec. 10, 1787, reprinted in *ESSAYS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE 1787–1788*, at 161, 163 (Paul Leicester Ford ed., 1892).

66. As legal historian Michael Klarman has noted: “Given Madison’s initial resistance to a bill of rights, it is greatly ironic that without his efforts, the Constitution probably would not have been amended to include one.” MICHAEL J. KLARMAN, *THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 547 (2016).

Representatives to the Senate.⁶⁷ On September 4, 1789, some of the proposed amendments were passed by the Senate, including the provision that would become the Fourth Amendment.⁶⁸ To resolve the differences between the two proposals, the House requested “a conference . . . with the Senate on the subject matter of the amendments disagreed to,” whose members from the House would include Madison, Congressman John Vining, and Senator Ellsworth’s good friend Congressman Roger Sherman of Connecticut.⁶⁹ Senators Charles Carroll, William Paterson, and Ellsworth were “managers of the conference on the part of the Senate.”⁷⁰ Indeed, it was Senator Ellsworth himself who introduced on behalf of the Senate-House conference the proposed modifications to the Bill of Rights amendments on September 24, 1789.⁷¹ The Senate approved the amendments the next day, on September 25, 1789.⁷² Thus, rather than opposing the Bill of Rights, Senator Ellsworth helped to guide the amendments through the Senate toward their ultimate ratification, around the same time that the Judiciary Act received final approval in the Senate on September 19, 1789.⁷³

2. The Judiciary Act and the Establishment of Admiralty Jurisdiction for Federal Revenue Collection

Among other things, the Judiciary Act granted the federal District Courts original jurisdiction over admiralty cases (though it limited this jurisdiction to bodies of water navigable by ships of a particular tonnage), stating: “That the district courts . . . shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, *including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as*

67. See S. JOURNAL, 1st Cong., 1st Sess. 62–64 (1789). The provision that would become the Fourth Amendment, Article VII, read as follows:

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.

Id. at 64.

68. See *id.* at 70–71.

69. *Id.* at 84; First Federal Congress Project, *Birth of the Nation: The First Federal Congress 1789–1791*, GEO. WASH. U., <http://www2.gwu.edu/~ffcp/exhibit/p1/members> [https://perma.cc/VA2V-GHBF]. According to historian William Brown, Senator Ellsworth “once declared that he had taken the character of Sherman for his model . . .” Brown, *supra* note 58, at 754.

70. S. JOURNAL, 1st Cong., 1st Sess. 84 (1789); First Federal Congress Project, *supra* note 69; see also RICHARD LABUNSKI, *JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS* 239 (2006).

71. See S. JOURNAL, 1st Cong., 1st Sess. 86 (1789).

72. See *id.* at 88.

73. See *id.* at 82–83.

well as upon the high seas”⁷⁴ An impost was a tax. Indeed, “Impost” was defined in the 1785 edition of Samuel Johnson’s *Dictionary of the English Language* as: “A tax; a toll; a custom paid.”⁷⁵ Thus, the federal District Courts were given original jurisdiction over admiralty cases involving all seizures related to unpaid customs duties and tariffs, such as under the Collection Act.

On December 31, 1790, Attorney General Edmund Randolph issued a report to the House of Representatives on the “Judiciary System.”⁷⁶ Attorney General Randolph discussed “[f]rom which of the judicial powers enumerated in the constitution the State courts may be rightfully excluded,”⁷⁷ which included “cases of admiralty and maritime jurisdiction.”⁷⁸ In his discussion of admiralty, he spoke about “offences on water against the revenue laws,”⁷⁹ as well as “claims for specific satisfaction on the body of a vessel,”⁸⁰ and noted that “neither of these is of necessity appropriated to the admiralty.”⁸¹ In contrast to Attorney General Randolph, others at the time of the Founding believed that breaches of the revenue acts at sea were necessarily confined to admiralty. In a letter dated March 28, 1789, from Judge David Sewell of Massachusetts to Senator Caleb Strong of Massachusetts, who was on the drafting committee for the pending Judiciary Act, Judge Sewell declared:

A maritime or Admiralty Court whose proceedings are according to the Course of the Civil Law, must be erected in some quarter—and suppose the Territory of United States divided into a number of districts in the division of which no regard is had to the boundaries of particular states, *in these several districts suppose Admiralty Judges resident, and in whose Courts all Seizures of property for breach of the acts of Trade and Revenue where the process is in rem may be determined—and from these Admiralty Courts let an appeal lie in causes to a certain limited Value to the S.J. of the U.S.—and as their division may be considerably large Territories let the Admiralty Courts be ambulatory in their respective districts. As the Laws of Trade and Commerce are to be uniform and made by Congress, there can be no need of any State Admiralty, or maritime Courts; let the admiralty courts Jurisdiction be so fully plainly and clearly*

74. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77 (1789) (emphasis added); *see also* Davies, *supra* note 53, at 605.

75. *Impost*, 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 1012 (6th ed., 1785).

76. *See* EDMUND RANDOLPH, JUDICIARY SYSTEM, H.R. DOC. NO. 1-17, at 21 (1790); *see also* Casto, *supra* note 62, at 119.

77. EDMUND RANDOLPH, JUDICIARY SYSTEM, H.R. DOC. NO. 1-17, at 21 (1790).

78. *Id.* at 22.

79. *Id.*

80. *Id.*

81. *Id.*

defined, as to give full speedy and effectual remedy in all matters within their jurisdiction.⁸²

As William Casto observed: “Judge Sewell’s express reference to revenue collection cases and criminal prosecutions is an unexceptional restatement of the eighteenth century public law paradigm of federal admiralty”⁸³ Similarly, while drafting the Judiciary Act, Congressman James Jackson from Georgia stated on August 29, 1789: “An *Admiralty court of jurisdiction* he would grant might be necessary for the trial of maritime affairs, and *matters relative to the revenue*; to which object he would cheerfully enlarge it”⁸⁴

Regardless, Attorney General Randolph followed up his statement in his report to the House by declaring: “It is true that a jurisdiction over [offences on water against the revenue laws] must be deduced from Congress, and that they will doubtless deposit it in their own tribunals, and most probably in the admiralty.”⁸⁵ This is, indeed, what the Judiciary Act had done. According to William Casto, as a result of the Judiciary Act: “A study of the surviving district court files covering the period 1789 to 1797 indicates that more than half of all of the admiralty cases filed throughout the nation were to enforce federal revenue laws.”⁸⁶

3. Federal Admiralty Jurisdiction Differed in Procedural Rules Compared to Common Law and Equity Jurisdictions

Admiralty was treated differently from other jurisdictions. Indeed, the Constitution made this jurisdictional division clear: “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to all Cases of admiralty and maritime Jurisdiction”⁸⁷ Moreover, during the drafting of the Judiciary Act, some in the First Congress treated admiralty as wholly separate from other jurisdictions. Fisher Ames, Congressman from Massachusetts, speaking before the House of Representatives on August 29, 1789, declared: “The branches of the judicial power of the United States are the admiralty jurisdiction, the criminal jurisdiction, cognizance of certain common law

82. Casto, *supra* note 62, at 156 (emphasis in original).

83. *Id.*

84. 1 ANNALS OF CONG. 803 (1789) (Joseph Gales ed., 1834) (emphasis added); First Federal Congress Project, *supra* note 69.

85. H.R. DOC. NO. 1-17, at 22.

86. Casto, *supra* note 62, at 149.

87. U.S. CONST. art. III, § 2, cl. 1; *see also* Lily Kurland, *A Trying Balance: Determining the Trier of Fact in Hybrid Admiralty-Civil Cases*, 90 WASH. U. L. REV. 1293, 1296 (2013).

cases, and of such as may be given by the statutes of Congress.”⁸⁸ Legal historian Alison LaCroix has noted that under the Judiciary Act the federal district courts and federal circuit courts were given different jurisdictions based on subject matter.⁸⁹ According to LaCroix, admiralty jurisdiction was consigned to the federal district courts, among certain other cases.⁹⁰ This was different from the jurisdiction granted to federal circuit courts, which had original jurisdiction over common law and equity cases, with a variety of jurisdictional limits such as a minimum amount of damages in controversy.⁹¹ Thus, admiralty law was treated as separate from other federal court jurisdictions.⁹²

88. 1 ANNALS OF CONG. 807 (1789) (Joseph Gales ed., 1834); see First Federal Congress Project, *supra* note 69.

89. See Alison L. LaCroix, *The New Wheel in the Federal Machine: From Sovereignty to Jurisdiction in the Early Republic*, 2007 SUP. CT. REV. 345, 359–60 (2007).

90. See *id.* at 359 (“The district courts possessed exclusive jurisdiction over admiralty cases and cases involving minor federal crimes, as well as concurrent jurisdiction with the circuit or state courts with respect to certain tort suits by aliens and certain suits by the United States.”).

91. See *id.* at 359–60 (“The circuit courts’ original jurisdiction, meanwhile, extended to ‘all suits of a civil nature at common law or in equity, where the matter in dispute exceeds . . . the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State.’” (quoting Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (1789))).

92. Legal historian Thomas Davies appears to argue that ships were not entitled to Fourth Amendment protections due to their legal “personalities.” Davies, *supra* note 53, at 605. While Davies does not fully explain what he means analytically when he describes “personalities,” it seems that he was largely drawing upon a position taken by Oliver Wendell Holmes, Jr., in his book *The Common Law*, which states: “A ship is the most living of inanimate things . . . It is only by supposing the ship to have been treated as if endowed with personality, that the arbitrary seeming peculiarities of the maritime law can be made intelligible.” O. W. HOLMES, JR., *THE COMMON LAW* 26–27 (1881); see also Davies, *supra* note 53, at 605 n.149. Thus, Davies seems to argue that ships were subject to admiralty because they were endowed with some sort of legal personality different from other forms of property. As a result, Davies argues: “In late eighteenth century thought, ships were neither ‘houses, papers, and effects [or possessions]’ nor ‘places.’ They were ships.” Davies, *supra* note 53, at 605–06.

The argument offered by Holmes, and by extension Davies, appears to assert that admiralty jurisdiction was based on legal personalities of a ship. This is likely referring to the *in rem* cause of action; however, *in rem* was not limited to admiralty, as described by legal historian J. H. Baker:

The kind of property which was the subject of seisin, and was protected by the *praecipe* actions, was known as real property (realty), supposedly because it could be vindicated by a remedy *in rem*: that is, an action to recover the property (or *res*) itself. Other kinds of property, such as leases for years or movable chattels, were distinguished as “personal property” (personalty), because the remedy for infringement lay *in personam*: usually an action for damages.

JOHN BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 317 (5th ed. 2019). Confusion emerged historically due to the blending of these two actions: “[S]ome forms of personalty came eventually to achieve substantial protection *in rem* while retaining some of the characteristics of chattels (such as being uninheritable).” *Id.*

Instead, admiralty jurisdiction was based upon geographic location. As Baker states, “[t]he courts of common law could not properly entertain causes of action arising outside the realm, because of the rule that an issue of fact had to be tried by a jury from the place where it was alleged to have occurred, and a jury could not be summoned from outside an English county,” which created the need for admiralty courts to fill in this jurisdictional limitation. *Id.* at 131. Thus, if a piece of property, including a ship, was on the sea (but not an interior waterway), then it was subject to admiralty jurisdiction. Interestingly, Davies cites to Lord Edward Coke from the seventeenth century and to a 1793 treatise by Matthew Bacon

By virtue of its separate jurisdiction, admiralty tended to have different procedural rules compared to other jurisdictions, such as common law jurisdiction. As Senator Ellsworth, future drafter of the Judiciary Act, pointed out in *The Connecticut Courant* under the pseudonym “The Landowner” on December 10, 1787: “In chancery courts juries are never used, nor are they proper in admiralty courts, which proceed not by municipal laws, which they may be supposed to understand, but by the civil

but does not include extended quotes from either of these works. As Davies notes, publication of Lord Coke’s *Institutes of the Laws of England* began in 1644. See Davies, *supra* note 53, at 578 n.74. Lord Coke noted that presence on the sea was required for admiralty jurisdiction to apply:

[F]or the death of a man, and of mayhem (in those two cases only) done in great ships, being and hovering in the maine streame [sic] only beneath the points of the same Rivers nigh to the sea, and no other place of the same rivers, nor in other causes, but in those two only, the Admirall hath cognisance [sic]. But for all contracts, pleas, and querels [sic] made or done upon a river, Haven, or Creek, within any County of this Realm, the Admirall without question hath not any jurisdiction, for then he should hold plea of things done within the body of the County, which are triable by verdict of twelve men, and meerly [sic] determinable by the Common law, and not within the Court of the Admiralty according to the Civill law.

4 EDW. COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING THE JURISDICTION OF COURTS 135–36 (5th ed. 1671).

Matthew Bacon offers a similar assertion in his treatise on the general rule governing admiralty jurisdiction:

It is laid down as a general Rule in our Common Law Books, That the Admiral’s Jurisdiction is confined to Matters arising on the High Seas only, and that he cannot take Conuzance [sic] of Contracts, &c. made or done in any River, Haven or Creek within any County; and that all Matters arising within these are triable by the Common Law.

1 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW, ALPHABETICALLY DIGESTED UNDER PROPER TITLE 623 (T. Cunningham ed., 6th ed. 1793). There were, of course, certain exceptions, such as instances in which a contract was at issue. See *id.* at 626–28.

Finally, Davies cites an 1824 treatise by Nathan Dane to support his claims: “Trespass for false imprisonment will not lie at common law, where the imprisonment is merely in consequence of taking a ship as a prize, though the ship has been acquitted.” Davies, *supra* note 53, at 606 n.151 (citing 5 NATHAN DANE, A GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW 587, ch. 172, art. 9, § 9 (1824)). This case at issue in Dane’s treatise was *Le Caux v. Eden*, (1781) 99 Eng. Rep. 375 (KB), in the English common law court of King’s Bench. This case focused on jurisdiction, specifically whether trespass could be plead at common law when a ship had been seized as a prize. *Id.* at 385 (“It was still a seizure as a prize; which the common law does not take notice of, as a trespass; and the sentence cannot make that a trespass, which was not so at the time when the fact was committed.”).

Why does this matter? Unlike what Holmes and Davies argue, it appears that ships were not different from other property by nature of being ships *per se* (which seems to be what Holmes and Davies argue when they discuss the “personalities” of ships). The argument about ship “personalities” offered by Holmes and Davies opens up the possibility of providing ships with lesser Fourth Amendment protections under both admiralty and common law jurisdiction compared to other “effects” covered by the Fourth Amendment law. Indeed, Davies himself seems to indicate this when he writes: “In late eighteenth century thought, ships were neither ‘houses, papers, and effects [or possessions]’ nor ‘places.’” Davies, *supra* note 53, at 605–06. This reasoning is misguided. As Lord Coke, Matthew Bacon, and *Le Caux v. Eden* make clear, ships were treated differently because of the jurisdiction that applied. Under English law, a ship was subject to admiralty jurisdiction if it was on the sea, but when it was present on an interior waterway, such as a river, common law jurisdiction would apply. Even if there was a Fourth Amendment carve-out for admiralty law jurisdiction, as discussed in greater detail below, there does not appear to be Fourth Amendment carve-outs for common law jurisdiction. As a result, it appears that the Fourth Amendment’s textual protections of “effects” would extend to federal searches of ships not covered by admiralty jurisdiction.

law and law of nations.”⁹³

Indeed, five years after the passage of the Bill of Rights, the Supreme Court held in *United States v. La Vengeance* that the Sixth Amendment jury trial provision did not apply to certain admiralty cases.⁹⁴ The Sixth Amendment states: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed”⁹⁵ The facts of *La Vengeance* were as follows:

[A] . . . proceeding had been instituted against [a] privateer, in which the District Attorney filed, *ex officio*, an information, stating ‘that *Aquila Giles*, Marshal of the said district, had seized to the use of the *United States*, as forfeited, a certain schooner, or vessel, called *La Vengeance*, with her tackle, apparel, and furniture, the property of some person, or persons, to the said Attorney unknown; for that certain canons, muskets, and gun-powder, to wit, 2 cannon, 20 muskets, and 50 boxes of gun-powder, were between the 22d of May, 1794, and the 22d of May, 1795, exported in the said schooner, or vessel, from the said United States, to wit, from Sandy-Hook, in the state of New Jersey (that is to say, from the city of New York in the New York district) to a foreign country, to wit, to Port-de-Paix, in the island of St. Domingo, in the West-Indies, contrary to the prohibitions of the act, in such case made and provided,’ &c.: And praying judgment of forfeiture accordingly. A claim was filed on behalf of the owners of the privateers, denying the exportation of cannon or muskets; and alledging [sic] that the gun-powder constituted part of the equipment of *Semillante*, a frigate belonging to the republic of *France*, and had been taken from her and put on board the privateer, to be carried to *Port-de-Paix*, by order of the proper officer of the said Republic.⁹⁶

United States Attorney General Charles Lee argued that this was a criminal case:

All causes are either civil or criminal; and this is a criminal cause, as well on account of the manner of prosecution, as on account of the matter charged. Thus, Informations [sic] are a proceeding at common law, and classed with criminal prosecutions; and the act of Congress which was framed to protect the *United States*, at a critical moment, from a serious injury, inflicts for the offence of violating its provisions, a forfeiture of the vessel employed in exporting arms or ammunition, and a fine of 1000

93. Ellsworth, *supra* note 65, at 161, 165.

94. *United States v. La Vengeance*, 3 U.S. (3 Dall.) 297, 301 (1796); see also Chester Kamin, Comment, *The Availability of Criminal Jury Trials Under the Sixth Amendment*, 32 U. CHI. L. REV. 311, 313 (1965).

95. U.S. CONST. amend. VI.

96. *La Vengeance*, 3 U.S. (3 Dall.) at 297–98.

dollars. It is true; that it may be considered, in part, as a proceeding *in rem*; but it is still a criminal proceeding.⁹⁷

Because this was a criminal case, Attorney General Lee argued:

If, therefore, the *United States* do not claim *La Vengeance* for debt, nor as a mere exercise of arbitrary will, but on account of some offence, some crime, that has been committed; it follows, of course, that the process used to enforce the claim, must, under any denomination, be, in fact, a criminal process; and, in all criminal causes, whether the trial is by jury, or otherwise, the judgment of the District Court is final.⁹⁸

The Supreme Court was not convinced by Attorney General Lee's argument. None other than Chief Justice Oliver Ellsworth, author of the Judiciary Act and expert in admiralty law, wrote for the Court, stating: "[W]e are unanimously of [sic] opinion, that it is a civil cause: It is a process of the nature of a libel *in rem*; and does not, in any degree, touch the person of the offender."⁹⁹ The Court did not address what procedure would be required if the proceedings did directly touch upon the liberty of the offender. However, in this case, the Supreme Court found that the Sixth Amendment right to jury trial did not apply: "In this view of the subject, it follows, of course, that no jury was necessary, as it was a civil cause; and that the appeal to the Circuit Court was regular, as it was a cause of Admiralty and Maritime jurisdiction."¹⁰⁰ Thus, certain procedural protections in the Bill of Rights were not guaranteed in admiralty jurisdiction.¹⁰¹

97. *Id.* at 299 (internal citation omitted).

98. *Id.*

99. *Id.* at 301.

100. *Id.* It should be noted that nothing in the text of the Fourth Amendment indicates that it would not apply to civil cases.

101. Thomas Davies has observed: "Numerous commentators have accepted uncritically Taft's assumption that the 1789 statute reflected the Framers' understanding of the Fourth Amendment." Davies, *supra* note 53, at 606. However, Davies points out that

[t]he numerous ship seizure cases decided by the Supreme Court between 1789 and 1925 provide powerful evidence of the invalidity of Taft's assumption. Notwithstanding that many of those cases involved seizures by federal officers in American ports or territorial waters, none of them so much as mentioned the Fourth Amendment, let alone applied it.

Id. at 607. It should be noted, nevertheless, that the earliest case Davies cites is *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804). This case came during the tenure of Chief Justice John Marshall, whose jurisprudence created numerous innovations in constitutional adjudication, so it is difficult to maintain that the cases during this time effectively reflected the original intent of the Fourth Amendment and the Constitution generally. For example, historian Gordon Wood has noted that Chief Justice Marshall invented the methods of constitutional interpretation:

It was one of Marshall's great achievements, says [historian Charles] Hobson, to apply 'the familiar tools and methods of statutory construction . . . [t]o the novel task of expounding the Constitution of the United States.' The result was the beginning of the creation of a special body of textual exegeses and legal expositions and precedents that we have come to call constitutional law.

Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less*, 56 WASH. & LEE L. REV. 787, 801 (1999) (quoting CHARLES F. HOBSON, *THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW* 199 (1996)). Thus, while Davies's arguments are

Another good example of this is the fact that the civil jury trial requirement of the Seventh Amendment did not apply to admiralty cases.¹⁰² The Seventh Amendment states: “In Suits *at common law* . . . the right of trial by jury shall be preserved”¹⁰³ Because admiralty law was a separate jurisdiction from suits at common law, different procedural requirements apply. This was clearly what the First Congress believed, based on the Judiciary Act, which specifically noted that trial by jury was not required in admiralty cases: “And the trial of issues in fact, in the district courts, in all causes *except civil causes of admiralty and maritime jurisdiction*, shall be by jury.”¹⁰⁴ Indeed, the Supreme Court later affirmed this in the 1847 case *Waring v. Clarke*, stating:

[T]here is no provision, as the constitution originally was, from which it can be inferred that civil causes in admiralty were to be tried by a jury, contrary to what the framers of the constitution knew was the mode of trial of issues of fact in the admiralty. We confess, then, we cannot see how they are to be embraced in the seventh amendment of the constitution, providing that in suits at common law the trial by jury should be preserved.¹⁰⁵

Thus, enforcement of the Collection Act would have applied different rules compared to common law and equity cases, because the Collection Act was enforced under admiralty jurisdiction. The Collection Act was also civil in its enforcement, stating: “And all ships or vessels, goods, wares and merchandise, which shall become forfeit by virtue of this act, shall be seized, libeled and prosecuted as aforesaid, in the proper court having cognizance thereof”¹⁰⁶ Since the Collection Act dealt with forfeiture of property, rather than touching the person of the offender, the Collection Act would likely have also been considered a civil case in admiralty. Thus, calling the Collection Act, as Cuddihy does, “nothing less than a statutory exegesis on the Fourth Amendment,”¹⁰⁷ is rather exaggerated.

interesting, there simply may not be enough Supreme Court decisions on point in the years immediately after 1791 to fully illuminate the Court’s jurisprudence on the Fourth Amendment at the time of the Framing of the Bill of Rights. Part of the confusion surrounding Fourth Amendment jurisprudence at the time of the Framing may also be due to the fact that, as Nelson Lasson has found, “in early cases the Fourth Amendment was cited as Amendment 6, because it stood sixth in the list of amendments as they were submitted to the states for ratification. The first two never were ratified.” NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 106 n.1 (1937).

102. See Kurland, *supra* note 87, at 1298.

103. U.S. CONST. amend. VII (emphasis added).

104. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (1789) (emphasis added); see William W. Adams, Note, *Constitutional History—Development of Admiralty Jurisdiction in the United States, 1789-1857*, 8 W. NEW ENG. L. REV. 157, 165 (1986).

105. *Waring v. Clarke*, 46 U.S. 441, 460 (1847).

106. Collection Act of 1789, ch. 5, § 36, 1 Stat. 29, 47 (1789).

107. CUDDIHY, *supra* note 18, at 739.

4. The Collection Act Alone Does Not Effectively Illuminate the Meaning of the Fourth Amendment

As such, and given the above, the reason that Congress passed the Collection Act and its progeny in 1790 and 1793, but did not find the need to include these warrantless search exceptions in the text of the Fourth Amendment, was because these searches were permitted only in a narrow set of cases. Most importantly, the warrantless searches of ships were justified solely based on their admiralty jurisdiction. These were impost searches looking for duties or tariffs owed, so they were confined to federal admiralty jurisdiction established by the Judiciary Act. This meant there was less risk that these warrantless search exceptions would be expanded to other jurisdictions, such as common law jurisdiction that dealt with criminal law.

Moreover, because these were admiralty cases, different procedures applied, which is also demonstrated by the Judiciary Act. Admiralty cases were considered to be in a separate court, so separate procedural rules would have applied compared to cases at common law, where criminal law was enforced. Thus, even if there was a Fourth Amendment exception in admiralty, the jurisdictional separation between admiralty and common law courts would have ensured that this exception was cabined, thereby limiting the dangers of its possible excesses. Finally, particularly after the 1796 Supreme Court decision in *La Vengeance*, because these warrantless ship searches were civil cases rather than criminal cases, there was less danger that these searches would have endangered the personal liberty of those people whose ships were being searched.

5. The Difference Between Admiralty and Other Jurisdictions Explains the Strong Warrant Protections in the Excise Tax of 1791

Indeed, the jurisdictional separation between admiralty, common law, and equity explains why the First Congress passed the Excise Tax of 1791 (the “Excise Tax”), even after it had passed the warrantless ship search exceptions in 1789 and 1790. The Excise Tax was implemented in March 1791, after the Fourth Amendment’s acceptance by nine states but before the Amendment’s official ratification.¹⁰⁸ As Levy notes: “Unlike the collections act of 1789, the act of 1791 explicitly empowered magistrates to decide for themselves whether an officer had probable cause.”¹⁰⁹

The Excise Tax offers a major stumbling block to those who would argue that the Collection Act offers a guiding framework for Fourth Amendment law. For example, William Cuddihy asserts that the First

108. See LEVY, *supra* note 36, at 178.

109. *Id.* at 178–79.

Congress conceived of the Fourth Amendment based on how analogous a particular piece of property was to a house: "Structures afforded the privacy of houses to the extent that they resembled them. Dwelling houses were castles, but ships were not, and places of business affecting the public interest were somewhere in between."¹¹⁰ However, it is difficult to explain how this framing fits within the text of the Fourth Amendment. The Fourth Amendment specifically protects "[t]he right of the people to be secure in their persons, houses, papers, and effects"¹¹¹ Ships should fall under the protection of the term "effects," because as legal scholar David Currie noted, that word "is generally taken to refer to personal rather than real property."¹¹² However, because places of business are real property, not personal property, and because the only real property protected by the text of the Fourth Amendment is "houses," places of business would perhaps be the most susceptible to warrantless searches.

The Excise Tax further complicates this matter. Searches of ships were allowed without a warrant by the First Congress. Yet searches of places of business, despite their lack of protection under the text of the Fourth Amendment, were not allowed without warrants under the Excise Tax. For example, the Excise Tax specifically stated:

That it shall be lawful for the officers of inspection of each survey at all times in the daytime, upon request, to enter into all and every the *houses, store-houses, ware-houses, buildings and places* which shall have been entered in manner aforesaid, and by tasting, gauging or otherwise, to take account of the quantity, kinds and proofs of the said spirits therein contained¹¹³

In cases in which searches were not consented to, the Excise Act required a warrant, not limited to homes but including places of business such as storehouses and warehouses, issued by an independent magistrate:

That in case any of the said spirits shall be fraudulently deposited, hid or concealed *in any place whatsoever*, with intent to evade the duties thereby imposed upon them, they shall be forfeited. And for the better discovery of any such spirits so fraudulently deposited, hid or concealed, it shall be

110. CUDDIHY, *supra* note 18, at 746. One problem with Cuddihy's argument is that there does not appear to be any historical documentation supporting this assertion. Cuddihy himself, in an attempt to support the argument above, does not cite to documents from the First Congress, but instead cites to Joseph D. Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 AM. CRIM. L. REV. 603, 617–20 (1982). See CUDDIHY, *supra* note 18, at 746 n.291. Nowhere in this passage cited by Cuddihy does Grano discuss either the Collection Act or the Excise Tax, nor does he discuss any interpretation by the First Congress of either of these statutes. See Grano, *supra*, at 617–20.

111. U.S. CONST. amend. IV.

112. DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888–1986*, at 164 (1994).

113. Excise Tax of 1791, ch. 15, § 29, 1 Stat. 199, 206 (1791) (emphasis added).

lawful for *any judge of any court of the United States*, or either of them, or for *any justice of the peace, upon reasonable cause of suspicion*, to be made out *to the satisfaction of such judge or justice, by the oath or affirmation* of any person or persons, *by special warrant or warrants* under their respective hands and seals, to authorize any of the officers of inspection, *by day, in the presence of a constable or other officer of the peace*, to enter into all and every *such place or places* in which any of the said spirits *shall be suspected to be* so fraudulently deposited, hid or concealed, and to seize and carry away any of the said spirits which shall be there found so fraudulently deposited, hid or concealed, as forfeited.¹¹⁴

Thus, despite the fact that the First Congress had already allowed for warrantless searches of ships, the Excise Tax set forth a warrant requirement for searches of real property, including places of business, which were not covered by the text of the Fourth Amendment.¹¹⁵ Further, the Excise Tax required an independent judge or justice of the peace to issue a warrant, supported by a standard akin to probable cause, for a search to be considered legally valid.¹¹⁶

Rather than thinking about how analogous ships were to houses, this is best explained by thinking about jurisdiction. Ships were different simply because admiralty jurisdiction applied to searches on board seafaring vessels, and different procedure applied to these searches. It appears that ships, being subject to admiralty jurisdiction, were likely subject to a constitutional carve-out under the Fourth Amendment. Common law jurisdiction governed searches of real property, including both homes and places of business, such as storehouses and warehouses. The First Congress extended procedural protections for searches of these forms of property by setting forth a warrant requirement for searches of all of these forms of real property under the Excise Tax.¹¹⁷

114. *Id.* § 32, 1 Stat. at 207.

115. This statute calls into question Thomas Davies's argument that "there is little in the historical record to support the current assumption that the Framers intended the Fourth Amendment to protect commercial premises in addition to houses." Davies, *supra* note 53, at 608. The text of the Excise Act demonstrates that members of the First Congress sought to create strong protections against warrantless searches of real property, including both homes and commercial premises.

116. According to Leonard Levy, the portion of this text that states, "upon reasonable cause of suspicion," Excise Tax of 1791 § 32, 1 Stat. at 207, would ultimately form "the basis in federal law for the determination of probable cause," LEVY, *supra* note 36, at 179.

117. It should be noted that my analysis is based on indirect evidence. My research has not revealed any direct evidence of congressional intent that explicitly indicates, one way or the other, how the Collection Act related to the Fourth Amendment. Constitutional historian Jack Rakove offers a particularly instructive observation of the difference between direct evidence (which he calls "textual") and indirect evidence (which he calls "contextual"):

An avowedly historical approach to the problem of original meaning involves something more than aggregating all relevant references to a particular provision of the Constitution or an aspect of constitutional thinking. It requires us to assess the probative value of any piece of evidence

D. ADMIRALTY JURISDICTION EXPLAINS WHY SHIPS AND CARS ARE NOT ANALOGOUS

Perhaps it will strike the reader as odd that an article dealing with automobiles and motor vehicles has spent such considerable time on the history of congressional legislation governing the collection of duties on ships. Yet this analysis reveals the deep flaw in the leap that Chief Justice Taft's opinion in *Carroll* requires when it comes to establishing the vehicle exception to the Fourth Amendment. *Carroll* relies on the validity of an analogy between ships and automobiles. The easiest argument *Carroll* could have made would have been to find a Fourth Amendment exception to the search of land-based vehicles, such as wagons or carriages, at the time of the Founding. Yet *Carroll* does not do this. Instead, to make his argument by analogy, Chief Justice Taft's rationale in *Carroll* is based on the fact that both ships and automobiles are mobile:

Thus contemporaneously with the adoption of the Fourth Amendment we find in the first Congress, and in the following Second and Fourth Congresses, a difference made as to the necessity for a search warrant between goods subject to forfeiture, when concealed in a dwelling house or similar place, and like goods in course of transportation and concealed in a *movable vessel* where they readily could be put out of reach of a search warrant.¹¹⁸

One would expect that if *Carroll* were correct that the First Congress did indeed create an exception to the Fourth Amendment based upon the mobility of vehicles, including ships, wagons, and carriages, then this would be borne out in the historical record, with warrant exceptions similar to the Collection Act for vehicles such as wagons. However, this is not the case. Even William Cuddihy, who agrees with Chief Justice Taft in *Carroll* that searches of ships did not require a warrant when the Fourth Amendment was

as well as to think systematically about the different types of evidence with which we work. In practice, there are four sets of sources that can be brought to bear to solve problems or puzzles about the original meaning of the Constitution. Two of these sets of sources can be described as *textual* in the sense that they consist of the explicit discussion of the Constitution found in the records of the debates of the federal and state conventions of 1787 and 1788, as well as the commentaries published during the campaign over its ratification. The other two sets of sources can be characterized as *contextual* in that they may enable us—when explicit commentary on particular points seems inadequate—to reconstruct a body of tacit assumptions and concerns that informed the way in which framers and ratifiers thought about the questions they were resolving.

JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 12–13 (1996). Drawing upon Rakove's definition, there does not appear to be any direct "textual" evidence pointing one way or the other on the question of federal ship searches at the time of the Founding. Thus, all arguments on this issue rely on indirect "contextual" evidence, and I believe my analysis more effectively synthesizes the indirect contextual evidence compared to other, earlier arguments, such as those made by Cuddihy, Amar, and Chief Justice Taft in *Carroll* (which also rely on indirect contextual evidence regarding the Fourth Amendment).

118. *Carroll v. United States*, 267 U.S. 132, 151 (1925) (emphasis added).

adopted, concedes: “The extent to which other vehicles were so subject [to warrantless searches] is unknowable . . . for neither case law nor legislation had significantly illuminated the subject.”¹¹⁹

Moreover, the meaning of the text of the Fourth Amendment at the time of the Founding indicates that this was not the case. The justification in *Carroll* for finding that a ship or wagon would not be covered by the term “effects” in the Fourth Amendment based on the assertion that a “vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought”¹²⁰ is nonsensical if one looks at the historical definition of the term “effects” around the time of the drafting. Historic dictionaries are useful tools for understanding the meaning of constitutional terms, which the Supreme Court has drawn upon in its cases.¹²¹ According to the 1785 edition of Samuel Johnson’s dictionary, the term “Effect” is defined as: “[In the plural.] Goods; moveables.”¹²² In particular, if the term “effects” meant “moveables,” at the time of the Framing, Chief Justice Taft’s assertion in *Carroll* that there must be an exception for ships and wagons because these “vehicle[s] can be quickly moved”¹²³ is illogical, because this would exclude the very “moveables” that the Framers likely sought to protect with the use of the term “effects” in the Fourth Amendment.

In addition, the *Carroll* analogy, based on the argument that ships and land vehicles are both mobile, is untenable for the simple reason that ships and land vehicles were fundamentally different based on jurisdictional considerations. Ships were subject to admiralty jurisdiction, while land vehicles were not. The use of analogy in *Carroll* ignores the fact that the English legal system, and the American legal system by extension, often

119. CUDDIHY, *supra* note 18, at 767.

120. *Carroll*, 267 U.S. at 153.

121. For example, the Supreme Court has consulted the 1773 Samuel Johnson dictionary, the 1771 Timothy Cunningham legal dictionary, and the 1828 Noah Webster dictionary to explain the meaning of the Second Amendment. See *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008). The use of the Noah Webster dictionary is, at best, questionable, though legal scholars have also consulted it. See, e.g., Brady, *supra* note 4, at 985–86. While the Framers of the U.S. Constitution, living in 1789 (and, with regard to the Bill of Rights, 1791) could have made use of a dictionary from 1771 or 1773, it would obviously have been impossible for them to make use of a dictionary published in 1828. Thus, using the 1828 Webster dictionary runs the risk of historical anachronism. For a useful historical analysis of how the meaning of words can change over time, see Melvin Richter, *Begriffsgeschichte and the History of Ideas*, 48 J. HIST. IDEAS 247 (1987).

122. *Effects*, 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 672 (6th ed., 1785). To help further explain the meaning of terms, Johnson offered quotes from literary texts. Here, he drew from William Shakespeare: “What form of prayer / Can serve my turn? Forgive me my foul murder [sic]; / That cannot be, since I am still possess [sic] / Of those *effects* for which I did the murder, / My crown, mine own ambition, and my queen.” *Id.* There is no definition of the term “effects” in Timothy Cunningham’s law dictionary. See *generally* 1 T. CUNNINGHAM, A NEW AND COMPLETE LAW-DICTIONARY, OR, GENERAL ABRIDGEMENT OF THE LAW (1764).

123. *Carroll*, 267 U.S. at 153.

treats some things as categorically different, despite superficial similarities. The First Congress treated searches covered by admiralty jurisdiction as fundamentally different from searches on land, which explains why they permitted warrantless searches of ships for the collection of impost duties, while simultaneously creating strong protections for searches on land, including real property that was not clearly protected by the text of the Fourth Amendment, such as property used for business.

This is supported by another impost statute passed by the Fifth Congress on March 2, 1799¹²⁴ (Chief Justice Taft in *Carroll* appears to erroneously state that this statute was passed by the Fourth Congress).¹²⁵ Section 68 of this statute included a discussion of searches of both ships and property on land:

That every collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority to enter any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise, subject to duty, are concealed, and therein to search for, seize, and secure any such goods, wares or merchandise; and if they shall have cause to suspect a concealment thereof *in any particular dwelling-house, store, building, or other place*, they or either of them *shall upon proper application on oath, to any justice of the peace, be entitled to a warrant* to enter such house, store, or other place (in the daytime only) and there to search for such goods; and if any shall be found, to seize and secure the same for trial¹²⁶

Thus, warrantless searches of ships were permitted for the collection of duties, but as soon as searches occurred on land, a warrant was required. It should be emphasized in particular that this statute included a very broad warrant requirement for searches of “any particular dwelling-house, store, building, or other place.”¹²⁷ As noted above, this warrant requirement covered real property (stores and buildings) that was not clearly covered by the text of the Fourth Amendment. Moreover, the term “other place” was quite broad. Perhaps it included only real property, based on the other words used in the statute (dwelling house, store, building). Or, perhaps, it was more general. The first definition of the word “place” in Samuel Johnson’s dictionary is: “Particular portion of space.”¹²⁸ Clearly, the generality of this

124. See Act of Mar. 2, 1799, ch. 22, 1 Stat. 627 (1799).

125. See *Carroll*, 267 U.S. at 151.

126. Act of Mar. 2, 1799 § 68, 1 Stat. at 677–78.

127. *Id.* at 678.

128. 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 329 (6th ed., 1785). Johnson included several quotes to reflect this meaning. These included, “Search you out a *place* to pitch your tents,” from Deuteronomy; “We accept it always and in all *places*,” from the Acts of the Apostles, “With worship, *place* by *place*, where he vouchsaf’d [sic] / Presence divine,” from John Milton; and “I will teach him the names of the most celebrated persons who frequent that *place*,” from Joseph Addison. *Id.*

definition indicates that the meaning of the word “place” in the statute could include land vehicles, such as wagons and carriages, since these are portions of space. At the very least, the 1799 statute demonstrates that the Fifth Congress treated ship searches as different from land searches, and that land searches had a strong warrant requirement, considerably stronger than even the Fourth Amendment’s text required, thus indicating that this strong warrant requirement could likewise have extended to searches of vehicles on land.

E. WARRANTLESS SEARCHES OF LAND VEHICLES AT THE BORDER AND THE WAR OF 1812

Despite the weakness of the *Carroll* analogy between ships and other vehicles at the Founding, perhaps it could be argued that the *Carroll* discussion did not necessarily require analogizing ships to wagons. As David Currie has noted: “To a substantial degree [Chief Justice Taft’s] conclusion [in *Carroll*] was based upon a long-standing congressional practice that, as a leading student of the amendment observed, had largely been confined to searches at or near international borders—a context in which the Court acknowledged that the ordinary rules did not apply.”¹²⁹ This is the argument Chief Justice Taft made in his *Carroll* opinion by discussing the types of searches permitted under a customs act passed on March 3, 1815, which included permission for the warrantless search of ships and other vehicles, such as carriages.¹³⁰ However, this congressional practice of warrantless

Timothy Cunningham’s law dictionary offers no help here. Cunningham’s definition of place deals with how to properly discuss place in a pleading if it is required. 2 T. CUNNINGHAM, A NEW AND COMPLETE LAW-DICTIONARY OR, GENERAL ABRIDGEMENT OF THE LAW 509 (1764). Cunningham does state: “[W]hen one thing doth come in the place of another, it shall be said to be of the same nature; as in the case of an exchange, &c.” *Id.* at 509–10. This definition is not about statutory construction, it is about pleadings. This is made clear by the citations offered by Cunningham, one to William Sheppard’s *Epitome*, which states:

When one thing doth come in the place of another, it shall be said to be of the same nature, as that it comes in the place of; as in case of Recovery of Recompense in Value, Exchange, and Rent to make Equality of Partition, and the like: For which see the *Titles*.

WILLIAM SHEPPARD, AN EPITOME OF ALL THE COMMON & STATUTE LAWS OF THIS NATION, NOW IN FORCE 700 (1656). Sheppard also discusses the requirements of place in certain pleadings. *Id.* In addition, Cunningham cites to Charles Viner’s law abridgement, which also discusses the term “place” by stating: “In what Cases the Place is material.” 16 CHARLES VINER, A GENERAL ABRIDGEMENT OF LAW AND EQUITY, ALPHABETICALLY DIGESTED UNDER PROPER TITLES WITH NOTES AND REFERENCES TO THE WHOLE 357 (1742).

129. CURRIE, *supra* note 112, at 165.

130. See *Carroll*, 267 U.S. at 151–52 (“Again, by the second section of the Act of March 3, 1815, 3 Stat. 231, 232, it was made lawful for customs officers not only to board and search vessels within their own and adjoining districts, but also to stop, search and examine any vehicle, beast or person on which or whom they should suspect there was merchandise which was subject to duty or had been introduced into the United States in any manner contrary to law, whether by the person in charge of the vehicle or beast or otherwise, and if they should find any goods, wares or merchandise thereon, which they had probable cause to believe had been so unlawfully brought into the country, to seize and secure the same,

searches at the border was a creation of the nineteenth century, not the original intent of the Framers in the late eighteenth century. Indeed, this 1815 statute is the first statute cited by *Carroll* that allowed for warrantless searches of land vehicles, and not just ships. The statute was passed by the Thirteenth Congress, almost twenty-six years after the passage of the Collection Act on July 31, 1789, and nearly twenty-four years after the Fourth Amendment was ratified on December 15, 1791.¹³¹ As a result, it would be a mistake to claim that the 1815 statute reflects the original intent of congressional searches at the border.

Moreover, this broad allowance for searches at the border in 1815 can be explained by the unique circumstances of the War of 1812, which have no bearing on the original meaning of the Fourth Amendment. The costs of increasing the size of the American military meant that Congress had to find ways to raise revenues, but according to Gordon Wood, the Democratic-Republican members of Congress “were not willing to give up, at least not easily, . . . their traditional opposition to any kind of internal taxation.”¹³² Wood points out this meant that “[i]f the Republicans were to avoid imposing internal taxes, they needed the revenue from customs duties on imports, most of which were British goods.”¹³³ Ultimately, Wood notes, “in June 1813 the Republicans [of the Thirteenth Congress] closed their severely divided ranks enough to pass a comprehensive tax bill, which included a direct tax on land, a duty on imported salt, and excise taxes on stills, retailers, auction sales, sugar, carriages, and negotiable paper.”¹³⁴ An increase in import duties, coupled with an allowance for warrantless searches at the border, would obviously allow for greater revenue to be generated.

Furthermore, the 1815 act was part of a delayed response to the illegal border trade that had occurred between the United States and Canada during the War of 1812. According to historian Donald Hickey: “British officials were willing to permit Americans to supply their subjects in Canada as well as their armies and navies in the New World.”¹³⁵ As a result, Hickey states: “Anglo-American commerce was particularly brisk along the Florida and Canadian borders. The British government made no effort to interdict this trade, and American officials were unwilling or unable to stop it either.”¹³⁶

and the vehicle or beast as well, for trial and forfeiture.”); Act of March 3, 1815, ch. 94, § 2, 3 Stat. 231, 232 (1815).

131. See LEVY, *supra* note 36, at 12.

132. WOOD, *supra* note 55, at 684.

133. *Id.*

134. *Id.*

135. Donald R. Hickey, *American Trade Restrictions During the War of 1812*, 68 J. AM. HIST. 517, 533 (1981).

136. *Id.* at 533–34.

Over time this trade reached a crisis level, as Hickey observes:

After Napoleon's defeat in 1814 . . . British veterans began to pour into Canada, and the trade quickly assumed alarming proportions. Customs officials increased their efforts to halt this trade, but their powers were severely limited. They could not legally search every type of vehicle or make preventative seizures, and the enemy trade act did not clearly define those goods that could not be shipped overland to Canada.¹³⁷

As a result, Hickey states, Congress passed a statute that

authorized customs officials to search without warrant any land or water craft or any person suspected of trading with the enemy and to seize any goods suspected of being illegally imported or of being on their way to the enemy. Upon securing a warrant, customs officials could also search any building suspected of containing goods which were likely to be shipped to the enemy or which might have been imported from enemy territory.¹³⁸

Although the law shortly became obsolete due to the end of the War of 1812, Hickey notes that “[m]any provisions of this law were reenacted shortly after the war to prevent smugglers from evading the tariff laws,”¹³⁹ and cites directly to the March 3, 1815, statute.¹⁴⁰

Thus, the March 3, 1815, statute was passed in light of circumstances specific to the War of 1812, and the statute has no bearing on the original meaning of the Fourth Amendment nor on the historical validity of searches of land vehicles under that Amendment. Chief Justice Taft's attempt in *Carroll* to extend the validity of warrantless searches to land vehicles by stating that the 1815 statute harkens back to congressional approval of warrantless ship searches under the Collection Act is an instance of judicial sophistry and relies on an incorrect historical premise.

F. THE BORDER EXCEPTION ONLY APPLIED TO CASES IN ADMIRALTY

Although this Article will not delve into the interstices of Fourth Amendment border searches, it should be noted that the border exception also comes from the Supreme Court's assessment of the Collection Act. In 1977 in *United States v. Ramsey*, the Supreme Court carried along the same historical error as *Carroll*, stating: “The Congress which proposed the Bill of Rights, including the Fourth Amendment, to the state legislatures on September 25, 1789, 1 Stat. 97, had, some two months prior to that proposal, enacted the first customs statute, Act of July 31, 1789, c. 5, 1 Stat. 29.”¹⁴¹

137. *Id.* at 534–35.

138. *Id.* at 535–36.

139. *Id.* at 536 n.102.

140. *See id.*

141. *United States v. Ramsey*, 431 U.S. 606, 616 (1977).

Thus, according to the Supreme Court in *Ramsey*: “The historical importance of the enactment of this customs statute by the same Congress which proposed the Fourth Amendment is, we think, manifest.”¹⁴² *Ramsey* then cited to *Boyd* and *Carroll* to support this proposition.¹⁴³ As demonstrated above in this Article, the Collection Act and its progeny created an exception to the warrant requirement for the searches of ships only because these searches were limited to admiralty jurisdiction, but it by no means created a clear Fourth Amendment exception to all border searches. Warrantless border searches on land appear to have arisen only in 1815 due to the unique circumstances of the War of 1812. Thus, if Chief Justice Taft relied on the border exception to justify his decision in *Carroll*, as David Currie supposes,¹⁴⁴ this exception is equally questionable from the perspective of originalism, because the border exception appears to have applied to cases in admiralty, but not broadly to border searches.

Moreover, border searches of ships were geographically limited by federal court jurisdiction. This is in contrast to Chief Justice Taft’s decision in *Carroll*. In that case, *Carroll* placed no geographic limit on warrantless searches and seizures for automobiles: “[T]hose lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.”¹⁴⁵ Unlike *Carroll*, in the Judiciary Act the First Congress gave the federal district courts jurisdiction over impost seizures, but placed a geographic limit on this jurisdiction:

That the district courts . . . shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost . . . *on waters which are navigable from the sea by vessels of ten or more tons burthen*, within their respective districts as well as upon the high seas . . .¹⁴⁶

Thus, federal court admiralty jurisdiction was given a geographic limit. This jurisdiction only extended to the waters that a ship of ten or more tons could navigate. Interestingly, this placed a practical limit on federal officials, because a federal official who sought to bring suit under the Collection Act beyond this geographic boundary would have to go to state court to enforce the statute. Whether or not state courts would have to enforce a federal impost statute was likely an open question in 1789, and state courts might

142. *Id.* at 616–17.

143. *See id.* at 617–18.

144. *See* CURRIE, *supra* note 112, at 165.

145. *Carroll v. United States*, 267 U.S. 132, 154 (1925).

146. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (1789) (emphasis added).

have refused to do so.¹⁴⁷ Indeed, the question as to whether state courts were required to enforce federal laws was not resolved until nearly 150 years after the Founding in the 1947 case *Testa v. Katt*, which found that state courts must do so.¹⁴⁸ Moreover, it has been Supreme Court practice to place geographic limits on border searches.¹⁴⁹

In summation, if the First Congress placed practical limitations on the enforcement of the Collection Act, and the Supreme Court has placed geographic limits on border searches, the extension of the warrantless search exception in *Carroll* beyond the border to vehicles throughout the entire United States is a clear instance of judicial overreach lacking foundation in historical fact.

II. THE PRAGMATIC POLICY ARGUMENTS IN FAVOR OF THE VEHICLE EXCEPTION FAIL

If the vehicle exception to the Fourth Amendment cannot be justified by either the text of the Fourth Amendment or the history of the Amendment, then the only rationale for the exception would be a pragmatic policy argument. For those Supreme Court Justices who rely on the text and history of the Constitution, these policy arguments are highly questionable, as they seek to go directly against the warrant requirement of the text of the Fourth Amendment itself.¹⁵⁰ Nevertheless, policy arguments play an important role

147. Oliver Ellsworth was skeptical of granting state courts the jurisdiction to hear cases involving federal law. As he stated in a letter dated August 4, 1789, to Judge Richard Law of New York:

To annex to State Courts, jurisdictions which they had not before, as of admiralty cases, and, perhaps, of offences against the United States, would be constituting the judges of them, *pro tanto*, federal judges, and of course they would continue such during good behaviour, and on fixed salaries, which in many cases, would illy comport with their present tenures of office.

FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS WITH REFERENCES, HISTORICAL AND PROFESSIONAL, AND PRELIMINARY NOTES ON THE POLITICS OF THE TIMES 38 (1849); *see also* BROWN, *supra* note 64, at 189–90; Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 66 (1923).

148. *See Testa v. Katt*, 330 U.S. 386 (1947).

149. The Supreme Court has not set a definitive geographic limit for border searches, but in *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), and *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), the Supreme Court largely relied on congressional statute and agency regulations to define the border area, for the purposes of Fourth Amendment jurisprudence, as encompassing the area within one hundred air miles from the U.S. border. *See Brignoni-Ponce*, 422 U.S. at 882–83 (“The only formal limitation on that discretion appears to be the administrative regulation defining the term ‘reasonable distance’ in § 287(a)(3) to mean within 100 air miles from the border. 8 CFR § 287.1(a) (1975).”); *Martinez-Fuerte*, 428 U.S. at 553 n.8 (“All these operations are conducted pursuant to statutory authorizations empowering Border Patrol agents to interrogate those believed to be aliens as to their right to be in the United States and to inspect vehicles for aliens. 8 U.S.C. §§ 1357(a)(1), (a)(3). Under current regulations the authority conferred by § 1357(a)(3) may be exercised anywhere within 100 air miles of the border. 8 CFR § 287.1(a) (1976).”).

150. For example, Justice Clarence Thomas has made this argument in criticizing the exclusionary rule to the Fourth Amendment: “[T]he exclusionary rule is not rooted in the Constitution or a federal statute.” *Collins v. Virginia*, 138 S. Ct. 1663, 1679–80 (2018) (Thomas, J., concurring).

in the Court's Fourth Amendment jurisprudence, and it is likely that they will continue to do so.¹⁵¹ However, as this Article will demonstrate, the policy justifications offered for the vehicle exception to the Fourth Amendment tend to rely on reasoning in which the Justices arrive at their conclusions first, rather than allowing the law to guide them to the correct resolution.

As Justice Sonia Sotomayor noted in *Collins v. Virginia*, the Supreme Court has given two policy rationales for the vehicle exception. First, as Justice Sotomayor stated: "The 'ready mobility' of vehicles served as the core justification for the automobile exception for many years."¹⁵² Second, according to Justice Sotomayor: "Later cases then introduced an additional rationale based on 'the pervasive regulation of vehicles capable of traveling on the public highways.'"¹⁵³ These policy justifications will be addressed in turn.

A. "MOBILITY" AS A JUSTIFICATION FOR THE VEHICLE EXCEPTION

In *Carroll*, Chief Justice Taft sought to use originalism as the foundation for the "mobility" justification of the vehicle exception to the Fourth Amendment. As noted in the beginning of this Article, Chief Justice Taft stated in *Carroll*:

We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, *practically since the beginning of the Government*, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, *where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought*.¹⁵⁴

151. For example, former Justice Potter Stewart justified the exclusionary rule through a policy argument that every constitutional right requires a constitutional remedy:

[I]t may be argued that although the Constitution does not explicitly provide for exclusion, the need to enforce the Constitution's limits on government—to preserve the rule of law—requires an exclusionary rule. Under this . . . "doctrinal" basis for the exclusionary rule, which has been described as "constitutional common law," the exclusion of unconstitutionally obtained evidence is not a constitutional *right* but a constitutional *remedy*. It is a right only in the sense that every remedy vests a right in those who may claim it.

Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1384 (1983) (emphasis in original).

152. *Collins*, 138 S. Ct. at 1669 (citing *California v. Carney*, 471 U.S. 386, 390 (1985)).

153. *Id.* at 1669–70 (citing *Carney*, 471 U.S. at 392).

154. *Carroll v. United States*, 267 U.S. 132, 153 (1925) (emphasis added).

If mobility had been the justification for warrantless searches of vehicles at the time of the Founding, one would expect to find clear evidence across the board that warrants were not required to search ships, wagons, or carriages.¹⁵⁵ However, as this Article has demonstrated, the *Carroll* argument ignores the fact that, while there was a warrant exception for ships at the time of the Founding, there was no clear warrant exception for other vehicles, such as wagons and carriages.¹⁵⁶ Furthermore, the mobility justification is clearly at odds with the plain meaning of the term “effects” at the time of the Founding.

Despite this inability to justify mobility on originalist grounds, the Supreme Court has persisted in asserting that mobility is an important policy concern that justifies the vehicle exception. In *California v. Carney*, drawing upon the Supreme Court decision in *Carroll*, Chief Justice Warren Burger stated: “There, the Court recognized that the privacy interests in an automobile are constitutionally protected; however, it held that the ready mobility of the automobile justifies a lesser degree of protection of those interests.”¹⁵⁷ As a result, Chief Justice Burger said: “The mobility of automobiles, we have observed, ‘creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible.’”¹⁵⁸

Yet it is difficult to see how this is true. In the 1977 case *Pennsylvania v. Mimms*, the Supreme Court held that, even for a traffic stop, police officers can command a vehicle’s driver to exit the vehicle.¹⁵⁹ Similarly, in the 1997 case *Maryland v. Wilson*, the Supreme Court extended the *Mimms* holding by finding that police officers can also command passengers to exit a vehicle.¹⁶⁰ Chief Justice William Rehnquist, writing the majority opinion in *Wilson*, drew a parallel between a traffic stop and the search of a residence with a warrant in *Michigan v. Summers*. Quoting *Summers*, Chief Justice

155. This Article is focused on federal law, in particular what Congress considered in the drafting of the Fourth Amendment and contemporaneous federal legislation. It is not meant to be exhaustive on state law or give an extended discussion on what, if any, state law existed on search and seizure at the time of the Founding.

156. See CUDDIHY, *supra* note 18, at 767.

157. *Carney*, 471 U.S. at 390.

158. *Id.* at 391 (citing *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976)).

159. See *Pennsylvania v. Mimms*, 434 U.S. 106, 111 n.6 (1977) (per curiam) (“We hold only that once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment’s proscription of unreasonable searches and seizures.”).

160. See *Maryland v. Wilson*, 519 U.S. 408, 414–15 (1997) (“[D]anger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car. While there is not the same basis for ordering the passengers out of the car as there is for ordering the driver out, the additional intrusion on the passenger is minimal. We therefore hold that an officer making a traffic stop may order passengers to get out of the car pending completion of the stop.”).

Rehnquist wrote:

Although no special danger to the police is suggested by the evidence in this record, the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence. The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.¹⁶¹

Thus, using Chief Justice Rehnquist's reasoning, a police officer can order the driver and passengers out of a vehicle, thereby allowing the officer to exercise total control of the circumstances.¹⁶²

If Chief Justice Rehnquist is correct, this means no one will be present in the vehicle. The automobile will no longer be mobile—just a static, motionless effect—and thus mobility offers no justification for a warrantless search of the vehicle. Indeed, it was for this reason that the Supreme Court in 1971 in *Coolidge v. New Hampshire* noted that a parked car was not considered mobile:

In this case, it is, of course, true that even though Coolidge was in jail, his wife was miles away in the company of two plainclothesmen, and the Coolidge property was under the guard of two officers, the automobile was in a literal sense 'mobile.' A person who had the keys and could slip by the guard could drive it away. We attach no constitutional significance to this sort of mobility.¹⁶³

Thus, a vehicle's mobility does not justify the abrogation of the Fourth Amendment's warrant requirement for searches of effects, because vehicles will always be immobile once an officer asks the driver and passengers to exit the vehicle. Since the vehicle will be immobile, there is no need to worry that it will disappear before the officer is able to call for a warrant. Indeed, in the age of computers in police vehicles, tablets, and smartphones, obtaining a warrant for a vehicle search, even from the side of the road, is easier than ever before.

161. *Id.* at 414 (quoting *Michigan v. Summers*, 452 U.S. 692, 702–03 (1981) (footnotes omitted)).

162. As Chief Justice Rehnquist noted in *Wilson*, ordering passengers out of a vehicle is justifiable based on the need for officer safety:

Outside the car, the passengers will be denied access to any possible weapon that might be concealed in the interior of the passenger compartment. It would seem that the possibility of a violent encounter stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop. And the motivation of a passenger to employ violence to prevent apprehension of such a crime is every bit as great as that of the driver.

Id. The same justification was offered in *Mimms*: "We think it too plain for argument that the State's proffered justification—the safety of the officer—is both legitimate and weighty." *Mimms*, 434 U.S. at 110. Both *Wilson* and *Mimms* used a balancing test that balanced officer safety against personal privacy interests. See *Wilson*, 519 U.S. at 413; *Mimms*, 434 U.S. at 109–11.

163. *Coolidge v. New Hampshire*, 403 U.S. 443, 461 n.18 (1971) (plurality opinion).

There is an important question remaining: once a vehicle has been seized by law enforcement officials, what will happen to the vehicle? There appear to be two options: keeping the vehicle at the side of the road until a search warrant can be obtained or taking the vehicle to impound and keeping it there under police guard until a search warrant has been obtained.¹⁶⁴ This issue was discussed by Justice Lewis Powell in his concurring opinion in the 1976 case *South Dakota v. Opperman*, though it should be noted that at the core of *Opperman* was the permissibility of police inventory searches of automobiles under the Fourth Amendment.¹⁶⁵ After a vehicle has been seized and its passengers ordered out, leaving the vehicle at the side of the road may be the easiest course of action, similar to parallel parking a vehicle on a street. As Justice Powell noted in *Opperman*: “[L]ocked doors and rolled-up windows afford the same protection that the contents of a parked automobile normally enjoy.”¹⁶⁶ However, according to Justice Powell: “[M]any owners might leave valuables in their automobile temporarily that they would not leave there unattended for the several days that police custody may last.”¹⁶⁷

164. The inventory search exception to the Fourth Amendment, set forth in *South Dakota v. Opperman*, 428 U.S. 364 (1976), would not apply to these automobiles, as discussed in further detail below in this footnote.

Although this Article does not provide an extended critique of the inventory search exception, it is useful to point out the problematic nature of this exception. As John Wray has noted in his discussion of the inventory search exception: “Investigative searches conducted outside the judicial process, without prior approval by a judge or magistrate, are considered to be *per se* unreasonable under the fourth amendment.” John M. Wray, *The Inventory Search and the Arrestee’s Privacy Expectation*, 59 IND. L.J. 321, 323 (1984). Because the inventory search exception directly contravenes the warrant requirement of the Fourth Amendment, the exception only exists because the Supreme Court in *South Dakota v. Opperman* found that the inventory search exception was “[i]n the interests of public safety and as part of what the Court has called ‘community caretaking functions’” *Opperman*, 428 U.S. at 368 (quoting *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973)). According to the Supreme Court in *Opperman*, a warrantless inventory search is reasonable for the purposes of Fourth Amendment law because “in following standard police procedures, prevailing throughout the country and approved by the overwhelming majority of courts, the conduct of the police was not ‘unreasonable’ under the Fourth Amendment.” *Id.* at 376.

The inventory search exception should not apply to instances in which a vehicle has been seized by law enforcement officials for the purposes of an investigatory search, because this would allow police to get around a search warrant requirement for vehicles. The police could stop a vehicle, and instead of waiting on a search warrant, they could simply impound the car and conduct a warrantless inventory search of the vehicle, rendering a warrant requirement for vehicles totally ineffective.

165. See *Opperman*, 428 U.S. at 365.

166. *Id.* at 379 (Powell, J., concurring).

167. *Id.* Justice John Marshall Harlan II raised a similar concern in his concurring and dissenting opinion in the 1970 case *Chambers v. Maroney*, 399 U.S. 42, 64 n.9 (1970) (Harlan, J., concurring in part and dissenting in part), stating:

Circumstances might arise in which it would be impractical to immobilize the car for the time required to obtain a warrant—for example, where a single police officer must take arrested suspects to the station, and has no way of protecting the suspects’ car during his absence. In such situations it might be wholly reasonable to perform an on-the-spot search based on probable cause. However, where nothing in the situation makes impracticable the obtaining of a warrant, I cannot join the Court in shunting aside that vital Fourth Amendment safeguard.

The obvious solution to Justice Harlan’s concern would be taking the vehicle to an impound lot for

Impounding vehicles offers an alternative that provides greater security to the vehicles and the belongings inside. However, Justice Powell was concerned that in order to effectively secure these vehicles and the property inside them, a guard would need to be posted at the impound lot, which might be costly for smaller police forces: “[W]hile the same security could be attained by posting a guard at the storage lot, that alternative may be prohibitively expensive, especially for smaller jurisdictions.”¹⁶⁸ As a result, Justice Powell instead proposed inventory searches as a less expensive alternative to guarded inventory lots.¹⁶⁹

This is not an illegitimate policy concern. Police officers in a small, rural village may not have the money or manpower to watch over an inventory lot while they wait for a warrant that a large, well-funded metropolitan police force would have. However, these resource-constraint concerns are not limited to the Fourth Amendment. For instance, a similar issue would arise in First Amendment “heckler’s veto” cases. According to constitutional law scholar Owen Fiss, the heckler’s veto doctrine “recognizes that when a mob is angered by a speaker and jeopardizes the public order by threatening the speaker, the policeman must act to preserve the opportunity of an individual to speak. The duty of the policeman is to restrain the mob.”¹⁷⁰ Thus, Cheryl Leanza has argued: “In these [heckler’s veto] cases, the First Amendment grants a positive right to the speaker: the local government must take action to protect the speaker against a hostile crowd. The courts do not allow local law enforcement to accede to a heckler’s veto.”¹⁷¹ If the expensive protection of First Amendment free speech against the heckler’s veto of a large crowd does not rise and fall with the budgetary concerns of local police forces, neither should the protections of the Fourth Amendment be limited by funding concerns.

Moreover, there is an important question as to whether the Supreme Court is the proper institution to assess the budgetary constraints of police forces. If having a police officer guard vehicles at an impound lot is prohibitively expensive for a particular jurisdiction, law enforcement officials and local residents in that jurisdiction should lobby their legislature for an increase in law enforcement funding. The legislature will be able to more effectively gather information on the details of law enforcement

safekeeping until a warrant has been obtained, after which a search could properly occur under the Fourth Amendment.

168. *Opperman*, 428 U.S. at 379 (Powell, J., concurring).

169. *See id.* (“There is thus a substantial gain in security if automobiles are inventoried and valuable items removed for storage.”).

170. Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1417 (1986).

171. Cheryl A. Leanza, *Heckler’s Veto Case Law as a Resource for Democratic Discourse*, 35 HOFSTRA L. REV. 1305, 1306 (2007).

funding and to examine how these funding concerns fit into the overall state or federal budget and allocate resources accordingly. While Justice Powell's concerns are important, it is not the institutional role of the Supreme Court to assess the allocation of resources, but rather the role of legislatures.¹⁷²

B. PERVASIVE REGULATION AS A JUSTIFICATION FOR THE VEHICLE EXCEPTION

An important factual circumstance in *Carney* was that the case dealt with a Dodge motor home, rather than a car.¹⁷³ The lower court found that the motor home was closer to a house than to a car: “The California Supreme Court held that the expectations of privacy in a motor home are more like those in a dwelling than in an automobile because the primary function of motor homes is not to provide transportation but to ‘provide the occupant with living quarters.’”¹⁷⁴

Chief Justice Burger disagreed in *Carney*, stating: “[A]lthough ready mobility alone was perhaps the original justification for the vehicle exception, our later cases have made clear that ready mobility is not the only basis for the exception.”¹⁷⁵ Instead, he noted: “Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one’s automobile is significantly less than that relating to one’s home or office.”¹⁷⁶ Chief Justice Burger stated that “[t]he reasons for the vehicle exception . . . are twofold.”¹⁷⁷

First, he explained that “[e]ven in cases where an automobile was not immediately mobile, the lesser expectation of privacy resulting from its use as a readily mobile vehicle justified application of the vehicular exception.”¹⁷⁸ This reduced expectation of privacy in a vehicle was due to the application of the plain view doctrine, Chief Justice Burger explained:

172. In *The Federalist No. 58*, James Madison emphasized the importance of granting the power of the purse to the legislature, particularly to the House of Representatives at the federal level, in order to ensure that budgetary allocations more effectively represented the will of the people:

The House of Representatives . . . alone can propose the supplies requisite for the support of government. They, in a word, hold the purse—that powerful instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.

THE FEDERALIST NO. 58, at 289 (James Madison) (Lawrence Goldman ed., 2008).

173. See *California v. Carney*, 471 U.S. 386, 387–88 (1985).

174. *Id.* at 389 (quoting *People v. Carney*, 668 P.2d 807, 812 (Cal. 1983)).

175. *Id.* at 391.

176. *Id.* (quoting *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976)).

177. *Id.*

178. *Id.*

“In some cases, the configuration of the vehicle contributed to the lower expectations of privacy; for example, we held . . . that, because the passenger compartment of a standard automobile is relatively open to plain view, there are lesser expectations of privacy.”¹⁷⁹ This seems to be fairly uncontroversial—the plain view exception to the Fourth Amendment applies to the visible parts of a vehicle, because the exterior and portions of the interior of an automobile may be visible when the vehicle is being driven or parked.¹⁸⁰ However, Chief Justice Burger’s argument does not explain why the automobile exception is necessary if the plain view exception already applies to these visible areas. Indeed, in *Arizona v. Hicks*, the Supreme Court noted: “[T]o treat searches more liberally would especially erode the plurality’s warning in [the 1971 case] *Coolidge* that ‘the “plain view” doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.’ ”¹⁸¹

Chief Justice Burger was aware that he needed to explain the rationale underlying the warrantless searches of the parts of a vehicle beyond the areas in plain view:

[E]ven when enclosed “repository” areas have been involved, we have concluded that the lesser expectations of privacy warrant application of the exception. We have applied the exception in the context of a locked car trunk, a sealed package in a car trunk, a closed compartment under the dashboard, the interior of a vehicle’s upholstery, or sealed packages inside a covered pickup truck.¹⁸²

To make this justification, the Chief Justice offered his second rationale: “These reduced expectations of privacy derive not from the fact that the area

179. *Id.* (citations omitted).

180. Under the plain view exception to the Fourth Amendment, “the police may seize evidence in plain view without a warrant.” *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971). The plain view exception applies in several instances, including (1) “the situation in which the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character,” *id.*, (2) “[w]here the initial intrusion that brings the police within plain view of such an article is supported, not by a warrant, but by one of the recognized exceptions to the warrant requirement, the seizure is also legitimate,” *id.*, and (3) “[a]n object that comes into view during a search incident to arrest that is appropriately limited in scope under existing law may be seized without a warrant,” *id.* It appears that the plain view exception would apply prong (2) to a vehicle during a traffic stop in which the officer has probable cause or reasonable suspicion of a crime or traffic infraction. *See Delaware v. Prouse*, 440 U.S. 648, 661 (1979) (“When there is not probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations—or other articulable basis amounting to reasonable suspicion that the driver is unlicensed or his vehicle unregistered—we cannot conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver.” (footnotes omitted)).

The Court adopted the *Coolidge* prongs in *Horton v. California*, 496 U.S. 128 (1990), stating that *Coolidge* is “binding precedent,” *id.* at 136, though the Court did not adopt the “inadvertence” requirement of plain view discovery from *Coolidge*, *see id.* at 137.

181. *Arizona v. Hicks*, 480 U.S. 321, 328 (1987) (quoting *Coolidge*, 403 U.S. at 466).

182. *Carney*, 471 U.S. at 391–92 (citations omitted).

to be searched is in plain view, but from the pervasive regulation of vehicles capable of traveling on the public highways.”¹⁸³

As a result of these two arguments, Chief Justice Burger found that the motor home was closer to an automobile than to a house:

When a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used for residential purposes—temporary or otherwise—the two justifications for the vehicle exception come into play. First, the vehicle is obviously readily mobile by the turn of an ignition key, if not actually moving. Second, there is a reduced expectation of privacy stemming from its use as a licensed motor vehicle subject to a range of police regulation inapplicable to a fixed dwelling. At least in these circumstances, the overriding societal interests in effective law enforcement justify an immediate search before the vehicle and its occupants become unavailable.¹⁸⁴

183. *Id.* at 392.

184. *Id.* at 392–93 (footnote omitted). In the 1999 case *Wyoming v. Houghton*, 526 U.S. 295, 298, 302 (1999), Justice Scalia, writing for the majority, extended the scope of automobile searches even further to include searches of personal belongings, such as purses and wallets. In *Houghton*, Justice Scalia stated:

When there is probable cause to search for contraband in a car, it is reasonable for police officers—like customs officials in the founding-era—to examine packages and containers without a showing of individualized probable cause for each one. A passenger’s personal belongings, just like the driver’s belongings or containers attached to the car like a glove compartment, are “in” the car, and the officer has probable cause to search for contraband *in* the car.

Id. at 302. The analysis in *Houghton* is problematic for several reasons.

First, *Houghton* relies on the mistaken historical interpretation of ship searches set forth in *Carroll*, which has been criticized in detail above. *See id.* at 300. Thus, *Houghton* is unsupported on originalist grounds.

Second, *Houghton* attempts to distinguish its facts from those set forth in *United States v. Di Re*, 332 U.S. 581 (1948), and *Ybarra v. Illinois*, 444 U.S. 85 (1979), by stating that “[t]hese cases turned on the unique, significantly heightened protection afforded against searches of one’s person.” *Houghton*, 526 U.S. at 303. It is true that *United States v. Di Re* and *Ybarra v. Illinois* both focused on the search of the person.

In *Di Re*, Justice Robert H. Jackson analyzed whether “officers have the right, without a warrant, to search any car which they have reasonable cause to believe carries contraband, and incidentally may search any occupant of such car when the contraband sought is of a character that might be concealed on the person.” *Di Re*, 332 U.S. at 584. The Supreme Court in *Di Re* refused to extend the automobile exception to searches of persons:

We see no ground for expanding the rule in the *Carroll* case to justify this arrest and search as incident to the search of a car. We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled.

Id. at 587. Thus, even if police officers had probable cause to search a vehicle, this did not allow them to search a person in a vehicle merely because of the person’s presence there.

The facts of *Ybarra v. Illinois* were these:

An Illinois statute authorizes law enforcement officers to detain and search any person found on premises being searched pursuant to a search warrant, to protect themselves from attack or to prevent the disposal or concealment of anything described in the warrant. The question before us is whether the application of this statute to the facts of the present case violated the Fourth and Fourteenth Amendments.

Ybarra, 444 U.S. at 87 (footnote omitted). Writing for the majority in *Ybarra*, Justice Potter Stewart stated:

These two arguments are related because Chief Justice Burger invokes a reasonable expectation of privacy test. Chief Justice Burger argues that there is no reasonable expectation of privacy due to a vehicle's mobility and because vehicles are subject to pervasive regulation. In making this argument, Chief Justice Burger appears to be drawing from Justice John Marshall Harlan II's concurrence in *Katz v. United States*, which set forth a two-prong test assessing whether there was both a subjective expectation of privacy and a societal expectation of privacy.¹⁸⁵

However, Justice Harlan's *Katz* test tends to be inherently problematic because, as Justice Scalia observed in 2001 in *Kyllo v. United States*: "The *Katz* test—whether the individual has an expectation of privacy that society is prepared to recognize as reasonable—has often been criticized as circular, and hence subjective and unpredictable."¹⁸⁶ Moreover, neither of Chief Justice Burger's justifications in *Carney* for warrantless vehicle searches have any limiting principle.

It is true that the police possessed a warrant based on probable cause to search the tavern in which Ybarra happened to be at the time the warrant was executed. But, a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be.

Id. at 91 (footnote omitted) (citations omitted). Once again, if police had probable cause to search a business, and even if they obtained a warrant to search that business, they were not allowed to search a person at the business merely because of that person's presence there.

Turning back to *Houghton*, it is correct to say that both *Di Re* and *Ybarra* focused specifically on the search of persons. See *Houghton*, 526 U.S. at 303. However, based on the text of the Fourth Amendment, this does not matter. The Fourth Amendment applies its protections equally to "persons, houses, papers, and effects, against unreasonable searches and seizures," and does not apply different levels of protections to these four terms. U.S. CONST. amend. IV (emphasis added). Thus, the requirements of searches of "persons" set forth in *Di Re* and *Ybarra* should apply equally to searches of "effects," including the purse and wallet at issue in *Houghton*. Even if the police have probable cause to search a vehicle or a building, the mere presence of "effects" in that vehicle or building, like the mere presence of "persons" in a vehicle or building, should not give the police free reign to conduct a search absent probable cause and a warrant. It is telling that in *Houghton*, Justice Scalia attempted to distinguish the facts of that case from *Di Re* and *Ybarra* not by making a textualist argument, but by making a policy argument. Citing *Carney*, Justice Scalia stated: "As in all car-search cases, the 'ready mobility' of an automobile creates a risk that the evidence or contraband will be permanently lost while a warrant is obtained." *Houghton*, 526 U.S. at 304 (citing *Carney*, 471 U.S. at 390). Justice Scalia also stated: "In addition, a car passenger—unlike the unwitting tavern patron in *Ybarra*—will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or evidence of their wrongdoing." *Id.* at 304–05. Because Justice Scalia's argument in *Houghton* can only be justified by policy arguments, and is unjustified on textualist and originalist grounds, the time is also right for a reappraisal of the *Houghton* decision.

185. See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) ("My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"). The Supreme Court adopted Justice Harlan's test in *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

186. *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

In Chief Justice Burger's initial argument justifying the vehicle exception, he states: "First, the vehicle is obviously readily mobile by the turn of an ignition key, if not actually moving."¹⁸⁷ Chief Justice Burger's argument effectively boils down to this: even if a vehicle is actually immobile, treat it as mobile, and because it can be treated as mobile, there must be a reduced expectation of privacy. This is a strange argument. It would be fairly ridiculous to claim that there is no difference between a child sitting in her parent's stationary car in the family driveway pretending to drive and a child actually taking a joy ride down the streets of her neighborhood at fifty miles an hour simply because there is the *possibility* that the child in the first scenario could go into the house and take the car keys off of the kitchen counter. Yet Chief Justice Burger's argument would treat the *possibility* of driving in the same manner as the *actuality* of driving.

Moreover, Chief Justice Burger's argument offers no logical limit, even when it comes to personal property that is not analogous to a vehicle. Suppose someone drops off a letter in a postal mailbox in New York City and sends it across the country to Los Angeles. The letter gains mobility as it is carried across the country by various postal planes, trucks, and post office employees. Unlike a car, the letter has no internal mechanism for moving from one place to another, but it is still "mobile" because, in the words of the *Merriam-Webster* dictionary, it is "capable of moving or being moved: movable."¹⁸⁸ Despite the obvious difference between letters and motor vehicles, under Chief Justice Burger's framework the letter is readily mobile because there is the possibility that it could be moved by simply picking it up and dropping it into a mailbox. Thus, there would be a reduced expectation of privacy in the letter and under Chief Justice Burger's framework the letter could be searched without a warrant.¹⁸⁹ Chief Justice Burger's assertion that mobility, even possible mobility, justifies a reduced expectation of privacy and therefore warrantless searches has no logical limiting factor, even in factual circumstances far outside the scope of vehicle searches.

187. *Carney*, 471 U.S. at 393.

188. *Mobile*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2019).

189. This has not been the framework adopted by the Supreme Court. *See Ex parte Jackson*, 96 U.S. 727, 733 (1878) ("Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution.").

Chief Justice Burger runs into a similar problem with his second justification for the vehicle exception to the Fourth Amendment: “These reduced expectations of privacy derive not from the fact that the area to be searched is in plain view, but from the pervasive regulation of vehicles capable of traveling on the public highways.”¹⁹⁰ In modern society, it would be difficult to escape pervasive regulations, both from state government and federal government, in any area of life (health, telecommunications, travel, economic markets, and so forth), so once again it is difficult to see where the Fourth Amendment line of protections could be drawn against warrantless government searches. Even in the nineteenth century, when state and federal regulation was far less pervasive, the Supreme Court rejected the argument that congressional legislation could supersede the Fourth Amendment.¹⁹¹ Chief Justice Burger’s argument turns the Constitution on its head by allowing government statutes and regulations to determine the content of constitutional rights, rather than ensuring that constitutional rights dictate the limits placed on the government. Further, Chief Justice Burger’s framework makes the text of the Constitution superfluous and instead gives the federal government and the states the authority to determine the boundaries of their power without any meaningful judicial oversight.

However, in recent Supreme Court jurisprudence, the Court has begun to recognize the problems inherent in removing judicial enforcement of constitutional provisions. To ensure that judicial enforcement of the Fourth Amendment would not fall by the wayside, the Supreme Court in *Jones* returned to and reinforced Fourth Amendment protections of property interests—the common-law-based trespassory test, which continued to exist even after the emergence of the *Katz* paradigm. As Justice Scalia noted in *United States v. Jones*: “[F]or most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas (‘persons, houses, papers, and effects’) it enumerates. *Katz* did not repudiate that understanding.”¹⁹² Justice Scalia then observed: “As

190. *Carney*, 471 U.S. at 392.

191. The Supreme Court in the 1878 case *Ex parte Jackson*, 96 U.S. at 732, addressed this very issue:

The power possessed by Congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded. The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail.

As noted above, the Supreme Court stated specifically that “all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution,” *id.* at 733, specifically the warrant requirement, *see id.*

192. *United States v. Jones*, 565 U.S. 400, 406–07 (2012) (footnote omitted). For example, the decision in 1928 in *Olmstead v. United States*, 277 U.S. 438, 466 (1928) (Taft, C.J.), was based on the argument in part that a trespass upon the real property of a home would constitute a search:

Justice Brennan explained in his concurrence in *Knotts*, *Katz* did not erode the principle ‘that, when the Government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment.’”¹⁹³ As a result, Justice Scalia pointed out in *Jones*:

We have embodied that preservation of past rights in our very definition of “reasonable expectation of privacy” which we have said to be an expectation “that has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.”¹⁹⁴

Thus, *Jones* stated: “*Katz* did not narrow the Fourth Amendment’s scope.”¹⁹⁵ This means that “the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test.”¹⁹⁶

The beginning of this Article noted that the personal property interests protected by the Fourth Amendment include vehicles: “It is beyond dispute

The reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house and messages while passing over them are not within the protection of the Fourth Amendment. Here those who intercepted the projected voices were not in the house of either party to the conversation.

See also Post, *supra* note 2, at 149–50.

Scholars of the Fourth Amendment have noted that aspects of *Olmstead* could also be interpreted as applying an assumption of the risk framework, in which the defendant orally or visually disclosed information to investigating law enforcement officers, even unknowingly. This may be related to what Robert Post has called the notion of “appropriation” in Chief Justice Taft’s *Olmstead* opinion, a framework wherein “[a]ppropriation was constitutionally suspect because it interfered with a person’s control over things that belonged to him.” *Id.* at 150. As Post notes: “In *Olmstead* Taft seemed to argue that the eye does not appropriate what it sees, nor does the ear appropriate what it hears.” *Id.*

The lack of appropriation may create an assumption of the risk on the part of the person speaking. JoAnn Guzik has argued: “The majority opinion [in *Olmstead*], which planted the seed for the development of risk analysis, suggested that persons who were exposed to warrantless electronic interception were volunteering their statements to the government by the very act of speaking to each other.” JoAnn Guzik, *The Assumption of Risk Doctrine: Erosion of Fourth Amendment Protection Through Fictitious Consent to Search and Seizure*, 22 SANTA CLARA L. REV. 1051, 1057 (1982). Orin Kerr has made a similar argument, drawing directly from the text of the *Olmstead* opinion. Quoting Chief Justice Taft in *Olmstead*, Kerr noted: “ ‘There was no entry of the house or offices of the defendants,’ so the wiretapping implicated no right in houses. And conversations over telephone lines, unlike postal letters, were neither papers nor effects.” Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 81 (footnotes omitted) (quoting *Olmstead*, 277 U.S. at 464). Thus, according to Kerr, once again quoting *Olmstead*: “The rule of liberal interpretation could not ‘justify enlargement of the language employed [in the Fourth Amendment] beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight.’ ” *Id.* (quoting *Olmstead*, 277 U.S. at 465). This is a framing similar to the assumption of the risk doctrine, because it states that the Fourth Amendment does not protect the information that a defendant has disclosed to the outside world.

193. *Jones*, 565 U.S. at 407 (quoting *United States v. Knotts*, 460 U.S. 276, 286 (1983) (Brennan, J., concurring in judgment)).

194. *Id.* at 407–08 (quoting *Minnesota v. Carter*, 525 U.S. 83, 88 (1998)).

195. *Id.* at 408.

196. *Id.* at 409.

that a vehicle is an ‘effect’ as that term is used in the [Fourth] Amendment.”¹⁹⁷ Thus, Justice Scalia declared unequivocally in *Jones*: “The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a ‘search’ within the meaning of the Fourth Amendment when it was adopted.”¹⁹⁸

As Justice Scalia stated in *Jones*, *Katz* did not repudiate, but actually served to supplement, the common-law trespassory test. Because a vehicle is considered an “effect” of personal property for the purposes of Fourth Amendment protection, it is protected by both the *Katz* test and the common-law trespassory test. This means that, setting aside the reasonable expectation of privacy test, *Carney* fails to explain why the common-law trespassory test should not apply to vehicle searches. According to Justice Scalia in *Jones*: “What we apply is an 18th-century guarantee against unreasonable searches, which we believe must provide at a *minimum* the degree of protection it afforded when it was adopted.”¹⁹⁹ Since the open-ended analysis in *Carney* fails to provide even that minimum, it should be repudiated. *Carney* does not take into account the fact that the Fourth Amendment places a warrant requirement on the search of personal property, including vehicles, because a warrantless search of a vehicle violates the common-law trespassory test.²⁰⁰

197. *Id.* at 404 (citing *United States v. Chadwick*, 433 U.S. 1, 12 (1977)).

198. *Id.* at 404–05.

199. *Id.* at 411 (emphasis in original).

200. *Jones* also calls into question the validity of *New York v. Class*, 475 U.S. 106 (1986). The facts of *Class* were as follows:

Officer McNamee opened the door of respondent’s car to look for the VIN [Vehicle Identification Number], which is located on the left doorjamb in automobiles manufactured before 1969. When the officer did not find the VIN on the doorjamb, he reached into the interior of respondent’s car to move some papers obscuring the area of the dashboard where the VIN is located in later model automobiles. In doing so, Officer McNamee saw the handle of a gun protruding about one inch from underneath the driver’s seat. The officer seized the gun, and respondent was promptly arrested.”

Id. at 108. In *Class*, Justice O’Connor stated: “[B]ecause of the important role played by the VIN in the pervasive governmental regulation of the automobile and the efforts by the Federal Government to ensure that the VIN is placed in plain view, we hold that there was no reasonable expectation of privacy in the VIN.” *Id.* at 114. According to Justice Scalia in *Jones*: “In *Class* itself . . . we concluded that an officer’s momentary reaching into the interior of a vehicle did constitute a search.” *Jones*, 565 U.S. at 410 (citing *Class*, 475 U.S. at 114–15). If *Jones* is correct and the intrusion in *Class* did constitute a search, the search was a common law trespass in violation of the Fourth Amendment warrant requirement because in the words of *Jones*, “[t]he Government physically occupied private property for the purpose of obtaining information.” *Id.* at 404. Therefore, the search in *Class* should be considered unconstitutional. For a critique of the *Class* decision from the perspective of the *Katz* test, see Tracey Maclin, *New York v. Class: A Little-Noticed Case with Disturbing Implications*, 78 J. CRIM. L. & CRIMINOLOGY 1 (1987).

CONCLUSION

Since its creation in 1925 in the *Carroll* decision, the Supreme Court's vehicle exception, allowing for the warrantless search of automobiles, has rested on precarious ground. The automobile exception is clearly at odds with the text of the Fourth Amendment, specifically the Amendment's warrant requirement for the search of "effects," which includes personal property such as vehicles.

Chief Justice Taft sought to explain the vehicle exception's abrogation of the text of the Fourth Amendment in *Carroll* by couching the exception in an originalist argument. However, as this Article has shown, the warrantless searches of ships for revenue collection at the time of the Founding, permitted under the Collection Act and its progeny, were limited by the Judiciary Act to admiralty jurisdiction. Ships were not analogous to other land vehicles, such as wagons and carriages, because ships fell under federal admiralty jurisdiction, while land vehicles did not. Fourth Amendment historian William Cuddihy has noted: "The extent to which other vehicles were so subject [to warrantless searches] is unknowable . . . for neither case law nor legislation had significantly illuminated the subject."²⁰¹ What is known is that the First Congress placed strong warrant protections on land searches. Land searches were treated fundamentally differently from ship searches—admiralty jurisdiction did not apply to land searches. It is clear that protecting the home against unlawful searches was of great importance at the time of the Founding due to the privacy associated with the home.²⁰² Moreover, other buildings appear to have been protected by the Fourth Amendment at the time of the Founding. For example, in the Excise Tax, the First Congress set forth a requirement for a warrant issued by an independent magistrate for searches of buildings, including houses, as well as buildings not even covered by the text of the Fourth Amendment, such as places of business. The Supreme Court should return to the strong protections of land searches instituted by the early Congresses by overturning the vehicle exception and replacing it with a warrant requirement for the search of vehicles, as required by the text of the Fourth Amendment.

Similarly, policy arguments in favor of the warrantless search of vehicles also fail. Arguments based on the mobility of automobiles are untenable, because police officers can order drivers and passengers out of the vehicle, thereby rendering the automobile immobile and eliminating the danger that the vehicle and the evidence in it will disappear before the officer

201. CUDDIHY, *supra* note 18, at 767.

202. *See id.* at 743.

can obtain a search warrant. Indeed, obtaining a search warrant should be easier than ever, since officers now have access to smart phones, tablets, and computers. Furthermore, arguments that people have a reduced expectation of privacy in their automobile, both due to its mobility and due to the pervasive regulation of vehicles, also fail. Neither of these arguments have effective limiting principles, other than ad hoc judicial judgments, and will swallow the Fourth Amendment rule with their exceptions. Moreover, in the wake of *United States v. Jones*, which noted the importance of both *Katz* protections and personal property protections under the Fourth Amendment, the reasonable expectation arguments have been rendered moot because vehicles should clearly be considered effects under the text of the Fourth Amendment and, as stated above, searches of effects are subject to the Amendment's warrant requirement.

Overturning the vehicle exception is not a judicial innovation, but a return to the true meaning of the Fourth Amendment's text. As Justice Robert H. Jackson declared in his dissenting opinion in the 1949 case *Brinegar v. United States*: "I come to the case of *Brinegar*. His automobile was one of his 'effects' and hence within the express protection of the Fourth Amendment."²⁰³ Justice Jackson noted:

[A]n illegal search and seizure usually is a single incident, perpetrated by surprise, conducted in haste, kept purposely beyond the court's supervision and limited only by the judgment and moderation of officers whose own interests and records are often at stake in the search. There is no opportunity for injunction or appeal to disinterested intervention. The citizen's choice is quietly to submit to whatever the officers undertake or to resist at risk of arrest or immediate violence.²⁰⁴

Eliminating the vehicle exception to the Fourth Amendment would simply place a neutral judicial magistrate between the citizen and law enforcement officials in order to determine the validity of a search through the grant or denial of a search warrant. Law enforcement officials who are "fit and responsible"²⁰⁵ can be confident that their warrant request will be granted, while "the most unfit and ruthless officers"²⁰⁶ will be more effectively kept in check since they will not be the ones determining whether probable cause exists.

The *Carroll* vehicle exception to the Fourth Amendment has been ill-advised since its inception.²⁰⁷ Much like the Prohibition era that gave rise to it,

203. *Brinegar v. United States*, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting).

204. *Id.*

205. *Id.*

206. *Id.*

207. As Forrest Black stated in his 1929 article:

the vehicle exception announced in *Carroll* has also been a failed experiment. The time has come for the Supreme Court to return to the protection of “effects” established by the Fourth Amendment and to overturn the vehicle exception once and for all.

Recent news dispatches convey the startling information that as many as a hundred automobiles have been stopped on a single afternoon on one road and the prohibition officers did not possess even the semblance of a blanket warrant. In Georgia, in order to stop all cars, heavy planks bearing huge spikes were placed across the roads. Funeral processions have been molested and coffins searched without a warrant. The *Carroll* decision has “worked.” Scores of innocent persons have been murdered and no liquor has been found. The inevitable consequence of the *Carroll* case has been to place the innocent motorist, especially in the night time, in an uncomfortable dilemma. The person attempting to stop the car may be either a bandit or an officer. The motorist is running a risk both if he stops or fails to stop.

Black, *supra* note 9, at 1095.

