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A RESPONSE TO PROFESSOR STEINBERG'S FOURTH  
AMENDMENT CHUTZPAH

*Fabio Arcila, Jr.\**

INTRODUCTION

It takes a lot of chutzpah to suggest that the Framers did not intend to ban all general warrants through the Fourth Amendment, given that there exists widespread consensus that general warrants were perhaps *the* problem at which the Framers were aiming when they implemented the Fourth Amendment.<sup>1</sup> But that is what Professor Steinberg would have us believe. It is a position he first advanced in 2003, and he feels strongly enough about it that he has made the same argument four times since then.<sup>2</sup> As he recently reiterated in this Journal, he believes the Fourth Amendment was intended *only* to provide some protection against physical searches of homes through imposition of a specific warrant requirement because the Framers' *only* object in promulgating the Fourth Amendment was to ban physical searches of homes under general warrants or no warrants at all.<sup>3</sup>

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\* © Fabio Arcila, Jr. 2008. Assistant Professor, Touro Law Center. Many thanks to my colleague Rodger Citron for his comments on this manuscript. I also am grateful to my research assistants who aided me on this project: Gregory Coleman, Yun Ni, and Richard Santos.

1 Even scholars having significant disagreements about the Fourth Amendment agree that general warrants were a primary evil against which the Fourth Amendment was aimed. *E.g.*, Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097, 1116 (1998) [hereinafter Amar, *Terry & Fourth Amendment*]; Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 619, 650, 655–60 (1999) [hereinafter Davies, *Original Fourth Amendment*]; Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse Than the Disease*, 68 S. CAL. L. REV. 1, 9–10 (1994).

2 David E. Steinberg, *The Uses and Misuses of Fourth Amendment History*, 10 U. PA. J. CONST. L. 587 (2008) [hereinafter Steinberg, *Uses and Misuses*]; David E. Steinberg, *Sense-Enhanced Searches and the Irrelevance of the Fourth Amendment*, 16 WM. & MARY BILL RTS. J. 465, 466 (2007) [hereinafter Steinberg, *Sense-Enhanced Searches*]; David E. Steinberg, *An Original Misunderstanding: Akhil Amar and Fourth Amendment History*, 42 SAN DIEGO L. REV. 227, 242–46 (2005) [hereinafter Steinberg, *Original Misunderstanding*]; David E. Steinberg, *The Original Understanding of Unreasonable Searches and Seizures*, 56 FLA. L. REV. 1051, 1053 (2004) [hereinafter Steinberg, *Original Understanding*]; David E. Steinberg, *High School Drug Testing and the Original Understanding of the Fourth Amendment*, 30 HASTINGS CONST. L.Q. 263, 265, 270 (2003) [hereinafter Steinberg, *High School Drug Testing*].

3 Steinberg, *Uses and Misuses*, *supra* note 2, at 601–602, 607.

What Professor Steinberg does not say, but is the inescapable implication of his argument, is that the Framers therefore meant to ban general warrants *only* with regard to home searches, and the Fourth Amendment has nothing to say about warrantless searches conducted outside the home. According to Professor Steinberg, general warrants and warrantless searches executed outside the home are beyond the Fourth Amendment's ken. Thus, in his view, search and seizure protections must for the most part come from extra-constitutional sources, such as legislation.<sup>4</sup>

Professor Steinberg's call for an originalist Fourth Amendment faces a daunting challenge. It is particularly difficult to justify a strict originalist approach to the Fourth Amendment given how dramatically circumstances have changed since the Framers' era. One example of such change is the explosion of the regulatory state. Another is the evolving nature of privacy and the government's ever-increasing capacity to intrude upon that privacy through technological advancements. The Supreme Court found itself increasingly grappling with this latter dynamic in the last century, leading to its groundbreaking decision in *Katz v. United States*,<sup>5</sup> in which it made the leap towards a privacy model of the Fourth Amendment.<sup>6</sup> In doing so, the Court not only studiously ignored originalism (which is not particularly notable, since that was par for the course during that era of Supreme Court history<sup>7</sup>), but actually rejected it, albeit implicitly.<sup>8</sup>

Nonetheless, Professor Steinberg's focus upon an originalist Fourth Amendment is important, both practically and doctrinally. In practical terms, the conservative ascendancy has led the Court to repeatedly embrace Fourth Amendment originalism since the 1990s,<sup>9</sup>

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4 See Steinberg, *High School Drug Testing*, *supra* note 2, at 292 (explaining the importance of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 in restricting wiretaps).

5 389 U.S. 347 (1967).

6 See *infra* notes 26–29 and accompanying text.

7 See David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1739–41, 1762–70 (2000) (showing that Fourth Amendment jurisprudence generally, and certainly between the late 1960s through the early 1990s, followed paths other than originalism).

8 See *Katz*, 389 U.S. at 352–53 (rejecting the traditional property model of the Fourth Amendment, which was founded upon common law trespass jurisprudence). For a brief review of the Fourth Amendment's origins in common law trespass jurisprudence, see *infra* notes 76–86 and accompanying text.

9 See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318, 326–27 (2001) (seeking to determine the Framers' understanding of "unreasonable" searches and seizures); *Florida v. White*, 526 U.S. 559, 563 (1999) (noting the importance of determining whether the "challenged governmental action" would have been regarded as unlawful under the Fourth

despite the long-standing trajectory against it. Professor Steinberg is therefore riding a wave that, at least at this point, is more likely to swell and accelerate than to ebb and falter. Doctrinally, Professor Steinberg's thesis provides yet another avenue through which to assess originalism's validity. Given that the majority often will shun those who legitimately seek to vindicate Fourth Amendment interests—such as arrestees or criminal defendants—it is far from clear that originalism's majoritarian appeal should hold sway.

Before wading into the theoretical considerations underlying Professor Steinberg's approach, it is informative to explore the jurisprudential consequences of his thesis. These are dramatic, and so far-reaching that they must inform the validity of his position. After all, one measure of jurisprudential validity is whether a given approach produces acceptable results. Thus, I will start in Part I by discussing the implications of his thesis. Next, I will explain in Part II some of my concerns with his methodology. Then I will return in Part III to Professor Steinberg's thesis, examining its theoretical implication—namely that, except as to homes, we have a majoritarian Fourth Amendment—and whether he adequately defends this position. I will conclude with some thoughts about Professor Steinberg's presumption that originalism should control our Fourth Amendment jurisprudence.

## I. CONSEQUENTIAL IMPLICATIONS OF PROFESSOR STEINBERG'S THESIS

In five publications since 2003, Professor Steinberg has explained his position, as well as why two mainstream Fourth Amendment theories—the reasonableness and warrant preference models—are misguided.<sup>10</sup> Yet, in none of those publications has he developed in any depth the very broad implications that his thesis has for contemporary Fourth Amendment jurisprudence. This is an effort worth pursuing, however, because it can inform our views about whether we think he is correct. As I set forth below, those implications are so profound that they suggest he is taking too narrow a view of the historical record.

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Amendment at the time of the Framing); *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999) (determining if the act was illegal under common law at the time of the Framing); *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995) (looking to “the traditional protections against unreasonable searches and seizures afforded by the common law”).

<sup>10</sup> See *supra* note 2.

### A. *Warrant Implications*

If Professor Steinberg is correct, the vast majority of searches need not comply with either the Reasonableness or Warrant Clauses. This means, for example, that the vast majority of search warrants need not comply with the Warrant Clause. This is such a remarkable claim that it bears repeating: though the Fourth Amendment states as plain as day that “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,”<sup>11</sup> Professor Steinberg believes that we have badly misread this language to mean that 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.<sup>12</sup> Rather, he argues that what the Framers meant was that only warrants directed at home searches need to meet these requirements. His position is based on his reading of the historical record, which he says shows that the Framers were only concerned about abusive home searches when they promulgated the Fourth Amendment. I will critique below the adequacy of his methodology when reading the historical record.<sup>13</sup> But for now it is useful to explore the implications of his thesis.

If Professor Steinberg is correct, the legislature and judiciary are free to approve the following, so long as searches or seizures do not directly involve the home:

- general, unparticularized warrants;
- warrants whose issuance is based upon information to which no one is prepared to testify at trial under penalty of perjury; and
- warrantless searches.

From a basic analytical standpoint, this view has some attraction because it promises to make our constitutional inquiry quite simple in most cases: Is a home search involved? No? Then no constitutional limits apply. Anything is fair game.

11 U.S. CONST. amend. IV (emphasis added) (“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.”).

12 See Steinberg, *Original Understanding*, *supra* note 2, at 1075–76 (acknowledging that his thesis is inconsistent with the Fourth Amendment’s plain text); *id.* at 1080–81 (arguing the implausibility of Fourth Amendment literalism).

13 See *infra* Part II.

It is fair to ask whether this result can possibly be correct. Does it make sense for the Framers to be so concerned about what makes warrants valid in the context of a physical home search, but unconcerned (at least in a constitutional sense) in all other contexts? Despite all of the evidence in the historical record that the Framers were concerned about restraining the searcher's discretion, can it really be that the Framers perceived no constitutional need to constrain such discretion outside of home searches?

In terms of contemporary Warrant Clause jurisprudence, Professor Steinberg's thesis is far-reaching. For example, it would have important implications for a pair of significant and controversial Fourth Amendment decisions, *Camara v. Municipal Court of San Francisco*<sup>14</sup> and *See v. City of Seattle*.<sup>15</sup> These cases are pillars of modern Fourth Amendment jurisprudence because in them the Supreme Court for the first time clearly held that the Fourth Amendment's protections apply to civil searches. They are controversial because the Court, while still trying to adhere to a Warrant Clause preference rule, held that warrants are necessary to conduct municipal code inspections of homes (*Camara*) and businesses (*See*).

These holdings created the potential for a "Catch-22" problem, since the municipalities' regulatory regimes could not be adequately enforced through inspections if traditional Warrant Clause criteria were applied. If traditional probable cause was required, then no warrant could issue for such an inspection until specific facts could be articulated to show probable cause that a code violation existed. But obtaining such facts would be extremely unlikely unless access to the interior was available. Except for voluntarily compliance, access depended upon the warrant, which was unavailable for lack of supporting facts. Thus, application of a traditional probable cause criterion to this inspection context threatened to undermine the entire regulatory regime. After all, the point of the inspections was to identify potential problems before they became manifest, such as before an electrical code violation led to a house or business premises burning down.

To deal with this problem in *Camara* and *See*, the Court essentially adopted a controversial legal fiction by declaring that "administrative" warrants based upon a specialized version of "probable cause" would suffice. "Probable cause," in this context, would not be traditional probable cause, based upon specific and particularized facts

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<sup>14</sup> 387 U.S. 523 (1967).

<sup>15</sup> 387 U.S. 541 (1967).

sufficient to support an adequate level of suspicion.<sup>16</sup> Rather, it would be satisfied based upon application of neutral, discretion-limiting guidelines, such as a requirement that an inspection would be deemed necessary every *x* number of years.

It is not clear to me exactly how Professor Steinberg's thesis would apply to *Camara*. At issue in *Camara* was a physical home search, so under his view, the Fourth Amendment and its Warrant Clause protections apply. The Warrant Clause requires probable cause. But what version of probable cause governs? Would *Camara* be incorrect for sacrificing the level of Fourth Amendment protection (traditional probable cause) that otherwise applies to homes? Or would *Camara* still be correct in allowing use of a less demanding version of probable cause (some, like me, would say a "make-believe" version)? If so, how can that be reconciled with the very special status (according to Professor Steinberg) that the Framers conferred upon homes? A fair response to these questions is that they are beyond Professor Steinberg's thesis. Yet, one manner of measuring its correctness and usefulness is to answer these sorts of questions, to explore what implications his thesis has for a case like *Camara*. Thus, the uncertainty about how his thesis would apply to *Camara* leaves me wanting more.

In any case, clearly his approach would dispense with all constitutional search and seizure protections for the sorts of commercial premises at issue in *See*. (Not a home? Then no Fourth Amendment protection.) The extent to which Professor Steinberg's thesis is fatal to *See* is one example of its very profound implications.

Whether this state of affairs is really what the Framers intended, as Professor Steinberg argues, is obviously an important question and gets us back full circle to *Camara* and the role warrants are supposed to play under the Fourth Amendment. A principle value that warrants play is that they constrain discretion. The regulatory warrants that *Camara* required did not do so through the traditional method—probable cause—but through a requirement that discretion-limiting guidelines be implemented to regulate the inspections.<sup>17</sup> Under Professor Steinberg's approach, constitutionally required warrants often will be unavailable to constrain discretion. Constraining discretion

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16 Traditional probable cause exists "if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged." *Dumbra v. United States*, 268 U.S. 435, 441 (1925).

17 See Stephen J. Schulhofer, *On the Fourth Amendment Rights of the Law-Abiding Public*, 1989 SUP. CT. REV. 87, 91–93, 91 n.17 (explaining the "administrative search" exception to the probable cause requirement).

will still be crucial, but—similar to what *Camara* requires—it will have to occur through some other mechanism, such as a legislatively imposed statute or executive regulation. In judging whether Professor Steinberg is correct, it is fair to ask whether such a dramatic and wholesale reinterpretation of the Fourth Amendment squares not just with originalism and history, but also with our current constitutional order and jurisprudential needs.

The absoluteness of Professor Steinberg's approach does have the appeal of helping us avoid bad decisions. Recently, the Eighth Circuit issued what undoubtedly is one of the worst Fourth Amendment decisions in memory. In *United States v. Kattaria*, the Eighth Circuit ruled that, under the Fourth Amendment, *reasonable suspicion* was an adequate basis upon which to issue a warrant authorizing "aerial use of a thermal imaging device to search for excess heat emanating from a home"<sup>18</sup> for the purpose of conducting a traditional criminal investigation. What part of "*no Warrants shall issue, but upon probable cause*"<sup>19</sup> does the Eighth Circuit not understand?<sup>20</sup> In any event, Professor Steinberg's approach would have short-circuited the adequacy-of-suspicion issue in *Kattaria* because no *physical* home search would mean no Fourth Amendment protection at all.

### B. Personhood Implications: Dignitary Interests

It is widely accepted that the Fourth Amendment protects privacy, and that this privacy protection has, at a minimum, both dignitary and informational components.<sup>21</sup> I will address dignitary interests

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18 503 F.3d 703, 704 (8th Cir. 2007), *vacated, reh'g granted en banc*, No. 06–3903, 2007 WL 5018841 (8th Cir. Dec. 7, 2007).

19 U.S. CONST. amend. IV (emphasis added).

20 The Eighth Circuit reached its result by relying upon (1) administrative arrest warrant and warrantless search cases involving those with decreased expectations of privacy, such as convicted fugitives, probationers, and parolees; (2) civil search cases; and (3) *Terry v. Ohio* and its progeny, which allow warrantless searches based upon reasonable suspicion. *Kattaria*, 503 F.3d at 706–07 (citing, among other authorities, *Terry v. Ohio*, 392 U.S. 1 (1968)). The Eighth Circuit in *Kattaria* ignored, however, that its case involved *neither* someone with a decreased expectation of privacy *nor* a civil search *nor* a warrantless search. It involved a traditional law enforcement investigation designed to uncover evidence of criminal wrongdoing. In these circumstances, the Supreme Court has *never* approved of a search warrant issued upon less than probable cause. Under these circumstances, proper constitutional analysis would apply the Warrant Clause and its traditional probable cause standard.

21 *E.g.*, Schmerber v. California, 384 U.S. 757, 767 (1966); JOHN GILLIOM, SURVEILLANCE, PRIVACY, AND THE LAW: EMPLOYEE DRUG TESTING AND THE POLITICS OF SOCIAL CONTROL 90–93 (1994); Fabio Arcila, Jr., *In the Trenches: Searches and the Misunderstood Common-Law History of Suspicion and Probable Cause*, 10 U. PA. J. CONST. L. 1, 3 n.5 (2007) [hereinafter

stemming from personhood here and leave to the next section the discussion about informational privacy.

Professor Steinberg clearly believes that the home is given pre-eminent status in the Fourth Amendment, to such an extent that it defines the scope of constitutional search and seizure protections. If so, no constitutional protection would extend to searches of persons outside the home.

Thus, under his thesis, significant dignitary interests are sacrificed. Dignitary interests exist in the body and bodily functions.<sup>22</sup> Yet, under his approach, no Fourth Amendment protection of private information connected to the corporeal body exists. Often searches involving the body (such as strip searches) or bodily functions (such as blood or urinalysis drug testing) do not occur in the home, nor are physical records of the search generated or stored there.

According to Professor Steinberg, absent protection from some other legal source, men, women, and children outside the home—such as on public roads or sidewalks or in schools or workplaces—are subject not just to governmental searches absent constitutional restraint, but to searches having no constitutional invasiveness or intrusiveness limits whatsoever.<sup>23</sup> Want to strip search that juvenile female at her high school (or middle or elementary or nursery school)? No Fourth Amendment problem. What if the searcher is an adult male who wants to throw in a body cavity search solely to satisfy his sexual proclivities? Still no such problem. After all, the search did not occur in the home. Did that body cavity search take an awfully long time? Say, twenty minutes? Two hours? Twenty-four hours? No Fourth Amendment problem with that. The Fourth Amendment does not apply, so it imposes no durational limits either, and simply offers no remedy.<sup>24</sup>

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Arcila, *In the Trenches*]; William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1021 (1995).

22 *E.g.*, *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 680 (1989) (Scalia, J., dissenting); *Schmerber*, 384 U.S. at 767; James Felman & Christopher J. Petriani, *Drug Testing and Public Employment: Toward a Rational Application of the Fourth Amendment*, 51 LAW & CONTEMP. PROBS. 253, 270–73 (1988).

23 *See* Steinberg, *High School Drug Testing*, *supra* note 2, at 286 (“[M]odern cases fail to acknowledge that when the Framers enacted the Fourth Amendment, the Framers sought to proscribe only unreasonable physical intrusions into private residences. The amendment simply was not intended to regulate . . . any of the other places outside of a residence where a person might have some expectation of privacy.”).

24 Under Professor Steinberg’s position, whether *any* legal remedy would exist would depend upon legal protections other than the Fourth Amendment. Legal protections might be available under some other constitutional provision, or perhaps under some applicable statutory provision. *See id.* at 292 (recognizing that, under this thesis, “one

It is not difficult to go on and on with such outrageous hypotheticals involving intrusive searches of our corporeal bodies. Does it seem likely the Framers who adopted the Fourth Amendment would have constitutionally tolerated these results? On the face of it, there is reason to be skeptical.

### C. Privacy Implications: Informational Interests

Just as Professor Steinberg's thesis would sacrifice significant dignitary interests, it also would go a long way toward eviscerating constitutional protections of informational privacy.<sup>25</sup> The latter is extremely vulnerable under his approach, in which there exists no Fourth Amendment protection unless both a *physical* search is at issue and it was directly linked to the *home*.

Consider private communications and the seminal decision in *Katz v. United States*.<sup>26</sup> *Katz* was decided in the same year as *Camara* and *See*<sup>27</sup> and is a foundational case for all modern Fourth Amendment law because it switched the locus of constitutional protection from property to privacy.<sup>28</sup> In *Katz*, the Court held unconstitutional warrantless electronic eavesdropping on one side of a telephone conversation occurring in a public telephone booth. *Katz* would be gone under Professor Steinberg's thesis. No physical search connected to the home, but merely surreptitious electronic eavesdropping of a public place? No case.<sup>29</sup>

This example reveals another unspoken implication of Professor Steinberg's views: telephone calls would normally enjoy no Fourth Amendment protection. This is a subject of great present controversy given President George W. Bush's formerly secret domestic wiretapping program, known alternately as the "NSA" or "terrorist" wiretapping program.<sup>30</sup> It is difficult to contend that telephone conversa-

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might worry that no one would regulate most law enforcement activities," but contending that "[a]ctually, legislatures often have proven quite willing to impose restrictions on law enforcement officers, when particular search techniques generated real public concern"). However, Professor Steinberg confesses that his thesis would surely result in dramatically reduced legal limitations on searches. See *infra* note 123.

25 See *supra* note 21 and accompanying text (explaining that the Fourth Amendment's privacy protections cover both dignitary and informational interests).

26 389 U.S. 347 (1967).

27 Regarding *Camara* and *See*, see *supra* notes 14–15 and accompanying text.

28 *Katz*, 389 U.S. at 351, 353.

29 See Steinberg, *High School Drug Testing*, *supra* note 2, at 286 ("[T]he *Katz* opinion reached a result inconsistent with the Framers' original understanding.").

30 See *Bush Ends Warrantless Surveillance Program, FISA Court To Oversee Wiretaps on Terrorists*, 75 U.S.L.W. 2423 (Jan. 23, 2007) (discussing the circumstances surrounding the end of the

tions are subject to physical searches. Moreover, it is increasingly common for such conversations to have no connection to the home due to the prevalence of mobile telephones.

This is just the beginning of the implications that Professor Steinberg's thesis would have for communications. Think about another form of private communication—writings—that is often subject to a physical document search. Private letters would enjoy Fourth Amendment protection while being written at a desk or kitchen table in the home, and also while sitting on the counter at the recipient's home. But it does not seem that the same letter—or any other form of private written communication—would be entitled to any Fourth Amendment protection while in transit, such as in United States postal system, or even during the course of being hand-delivered outside a home by the writer. I suspect that Professor Steinberg worries little about this prospect, as he can take comfort in this country's long history of extending statutory privacy protections to the United States mail.<sup>31</sup> Frankly, however, I worry about the tenuousness of such statutory protection in light of emotionally powerful claims that could be premised, for instance, upon national security concerns, which could argue that such protections ensnare us in a "suicide pact."<sup>32</sup>

Other aspects of informational privacy also are at substantial risk under Professor Steinberg's approach. Another example that comes

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warrantless surveillance program); *Class Action Complaint Filed Against Verizon for Alleged Release of Phone Records to NSA*, 74 U.S.L.W. 2502 (Feb. 28, 2006) (discussing six lawsuits arising from the NSA wiretapping program); *DOJ Asks District Court To Prevent State AG Investigation of NSA Program*, 74 U.S.L.W. 2768 (June 20, 2006) (discussing the Department of Justice's attempt to prevent the New Jersey Attorney General from continuing an investigation regarding wiretaps); Eric Lichtblau, *Gonzales Invokes Actions of Other Presidents in Defense of U.S. Spying*, N.Y. TIMES, Jan. 25, 2006, at A19 (discussing the Bush administration's defense of its domestic eavesdropping program); Eric Lichtblau et al., *Wider Spying Fuels Aid Plan for Telecoms*, N.Y. TIMES, Dec. 16, 2007, at A1 (discussing the Bush administration's desire for legislation to grant retroactive immunity to phone companies that aided the NSA wiretapping program); Eric Lichtblau & David Johnston, *Court To Oversee U.S. Wiretapping in Terror Cases*, N.Y. TIMES, Jan. 18, 2007, at A1 (explaining the Bush administration's decision to give a secret court jurisdiction over the NSA wiretapping program); Walter Pincus, *Judge Discusses Details of Work on Secret Court*, WASH. POST, June 26, 2007, at A4 (recounting Judge Royce Lamberth's experiences on the FISA court).

31 See Anuj C. Desai, *Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy*, 60 STAN. L. REV. 553, 562–68 (2007) (reviewing the Framers' statutory efforts to preserve privacy in the mail, stemming from their experience with British interception of letters).

32 Given that such "suicide pact" arguments for limiting civil liberties have been leveled at the Constitution itself, e.g., RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006), I have little confidence that postal privacy statutes would safely avoid them.

to mind—and which again is not merely a theoretical concern considering President George W. Bush, his “War on Terror,” and the resulting 2001 USA PATRIOT Act<sup>33</sup>—is library records.<sup>34</sup> Such records are not located in the home and thus would enjoy no Fourth Amendment protection. Again, Professor Steinberg might find comfort in the possibility that such material might benefit from statutory protections,<sup>35</sup> but again I find the fragility of such protections little comfort.<sup>36</sup>

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33 The 2001 USA PATRIOT Act, made law in the aftermath of the September 11, 2001 terrorist attacks on the United States, greatly expanded the government’s surveillance abilities. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107–56, 115 Stat. 272 (2001). It was signed into law on October 26, 2001.

34 See Alison Leigh Cowan, *U.S. Ends a Yearlong Effort To Obtain Library Records Amid Secrecy in Connecticut*, N.Y. TIMES, June 27, 2006, at B6 (explaining that the federal government decided to end its attempts to gain access to library records in Connecticut); Alison Leigh Cowan, *Four Librarians Finally Break Silence in Records Case*, N.Y. TIMES, May 31, 2006, at B3 (describing how the librarians resisted the government’s efforts); Eric Lichtblau, *F.B.I., Using Patriot Act, Demands Library’s Records*, N.Y. TIMES, Aug. 26, 2005, at A11 (describing the government’s early efforts to obtain the library records); Anahad O’Connor, *Librarians Win as U.S. Relents on Secrecy Law*, N.Y. TIMES, Apr. 13, 2006, at B1 (recounting the government’s decision not to pursue the library records).

35 Some of the USA PATRIOT Act’s surveillance provisions were highly controversial. See *supra* note 33. This led to intense lobbying as it came up for reauthorization, which finally occurred on March 9, 2006. USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109–177, 120 Stat. 192 (2006); USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, Pub. L. No. 109–178, 120 Stat. 278.

As reauthorized, the Act now provides greater protections against governmental searches—including library records—than it did in its original form, though groups such as the American Library Association continue to protest that insufficient protections exist. See Alison Leigh Cowan, *Librarian Is Still John Doe, Despite Patriot Act Revision*, N.Y. TIMES, Mar. 21, 2006, at B3 (describing librarians’ and civil liberties lawyers’ ongoing frustration). With respect to library records, the controversies regarding the USA PATRIOT Act have principally revolved around the government’s ability to demand records through two mechanisms: (1) a § 215 order, or (2) a national security letter demand under § 505. See Susan N. Herman, *The USA PATRIOT Act and the Submajoritarian Fourth Amendment*, 41 HARV. C.R.-C.L. L. REV. 67, 73–74 (2006) (explaining these provisions as two of the most controversial provisions in the Act).

Originally, under § 215 the government could obtain from a judge or magistrate an *ex parte* order for the production of records based upon an assertion that the records were “sought for an authorized investigation . . . to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities,” and the Act generally made it unlawful for a subject to disclose, even in an attorney consultation, that the order had been received. 50 U.S.C. §§ 1861(b), (d) (Supp. II 2002). Under the reauthorized Act, the government must now make a showing to the judge or magistrate of “reasonable grounds to believe that” the records sought are “relevant to an authorized investigation,” and the subject may disclose receipt of the order to “an attorney to obtain legal advice or assistance with respect to the production of things in response to the order.” § 106, 120 Stat. 196–97 (to be codified at 50 U.S.C. §§ 1861(b)(2), (d)(1)(A), (B)).

Section 505 national security letters were designed to serve as administrative subpoenas allowing the government to obtain records from communications providers (which, at least as originally understood, could have included libraries with public computer terminals that could access the Internet). Herman, *supra*. Section 505 authorized the government to demand records, solely upon executive assertion and without a warrant or other judicial involvement, upon an assertion that the records were "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities," and made it unlawful to disclose receipt of the letter if the executive branch unilaterally claimed that disclosure would be dangerous. 18 U.S.C. §§ 2709(b)(1), (2), (c)(1) (Supp. II 2002); 18 U.S.C. § 2709(c)(1) (2000). No provision was made for challenging a national security letter. The reauthorized Act remains ambiguous regarding whether libraries are subject to national security letters. Some language directly contends they are not when they are functioning in their traditional roles, including providing Internet access. § 5, 120 Stat. 281 (to be codified at 18 U.S.C. § 2709(f)). But language from this same subsection makes them subject to such letters when they are providing an "electronic communication service," *id.*, which includes "any service which provides users with the ability to send or receive wire or electronic communications," 18 U.S.C. § 2510(15) (2000). Subjects may now disclose receipt of national security letters under similar terms as they may disclose receipt of § 215 orders. § 4(b), 120 Stat. 280 (to be codified at 18 U.S.C. § 2709(c)(1)). Also, recipients are now allowed to challenge national security letters and attendant nondisclosure requirements in federal district court. § 3511, 120 Stat. 211 (to be codified at 18 U.S.C. §§ 3511(a), (b)(1)).

- 36 For example, the Department of Justice has admitted to instances in which the FBI improperly, and in some cases illegally, used both the § 215 orders and § 505 national security letters discussed previously, *supra* note 35. See OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF SECTION 215 ORDERS FOR BUSINESS RECORDS (Mar. 2007), <http://www.usdoj.gov/oig/special/s0703a/final.pdf> (providing the first Office of the Inspector General review of Section 215, as required under the USA PATRIOT Improvement and Reauthorization Act of 2005); OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF NATIONAL SECURITY LETTERS (Mar. 2007), available at <http://www.usdoj.gov/oig/special/s0703b/final.pdf> (containing the Office of the Inspector General's report on the FBI's use of national security letters); *Attorney General: There Is "No Excuse" for Errors in FBI Requests for Records*, 75 U.S.L.W. 2549 (Mar. 20, 2007) (discussing the Justice Department's response to criticisms of FBI investigations); Carl Hulse & Scott Shane, *Congress Expands Scope of Inquiries into Justice Department Practices and Politics*, N.Y. TIMES, Mar. 25, 2007, at A25 (reporting on the varied concerns Congress expressed about the Justice Department); David Johnston & Eric Lipton, *U.S. Report To Fault Wide Use of Special Subpoenas by F.B.I.*, N.Y. TIMES, Mar. 9, 2007, at A1 (describing a report from the Justice Department, criticizing the FBI for subpoenaing thousands of phone, business and financial records). Moreover, recent governmental reports continue to identify FBI abuses under § 215 and § 505. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE FBI'S USE OF SECTION 215 ORDERS FOR BUSINESS RECORDS IN 2006 (Mar. 2008), <http://www.usdoj.gov/oig/special/s0803a/final.pdf>; OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, A REVIEW OF THE FBI'S USE OF NATIONAL SECURITY LETTERS: ASSESSMENT OF CORRECTIVE ACTIONS AND EXAMINATION OF NSL USAGE IN 2006 (Mar. 2008), <http://www.usdoj.gov/oig/special/s0803b/final.pdf>. Additionally, the risks relate not just to the tenuousness of existing statutory protections, but also to the prospect that even minimal statutory protections can be voided. As an example, on September 28, 2006, the House of Representatives passed a bill, H.R. 5825, that would give the President power to authorize surveillance without any judicial involvement if he deemed to exist an "imminent threat of attack likely to cause death, serious injury,

Peering into the future should also give us pause when considering the implications of Professor Steinberg's thesis. We glimpsed the future in *Kyllo v. United States*,<sup>37</sup> which provided a quite modern example of governmental use of technology to search the home absent a physical intrusion. In *Kyllo*, the Supreme Court ruled that the government's use of a thermal imaging device to scan a home constituted a Fourth Amendment "search" that was "presumptively unreasonable without a warrant."<sup>38</sup> Under Professor Steinberg's approach, since no *physical* search of the home was at issue, no Fourth Amendment protections existed.<sup>39</sup> Police did not need a warrant, and thus the search would have been constitutional as conducted.

There is every reason to expect such technologically-enabled searches to proliferate as technology advances. For example, the prospect exists for the government to use radio frequency identification to remotely detect information about a person or thing inside the home, such as location or movement.<sup>40</sup> Already, qualms have been raised about new body-scanning x-ray technology that, through the use of software, can generate an image of the outer body so detailed that civil liberties advocates have described it as a "virtual strip-search."<sup>41</sup> It does not take much of a leap of imagination to foresee a day when this technology can be applied to home interiors. Indeed, this problem was predicted in a precursor case to *Katz*.<sup>42</sup>

As we consider these situations, it is valid to ask how meaningful and useful Professor Steinberg's standard is (physical home searches require specific warrants; in all other contexts, anything goes), when increasingly the government will not need to conduct a physical search to uncover desired information from inside the home. Will his standard require the government to obtain a specific warrant to search a personal computer located in the home? One might think

or substantial economic damage to the United States." *House Passes Bill To Allow Surveillance Without Warrant in Face of Imminent Threat*, 75 U.S.L.W. 2182 (Oct. 3, 2006).

37 533 U.S. 27 (2001).

38 *Id.* at 40.

39 Steinberg, *Sense-Enhanced Searches*, *supra* note 2, at 480.

40 See Timothy P. Terrell & Anne R. Jacobs, *Privacy, Technology, and Terrorism: Bartnicki, Kyllo, and the Normative Struggle Behind Competing Claims to Solitude and Security*, 51 EMORY L.J. 1469, 1508 n.128 (2002) (explaining different systems for identifying specific information about a person's location).

41 Paul Giblin & Eric Lipton, *New Airport X-Rays Scan Bodies, Not Just Bags*, N.Y. TIMES, Feb. 24, 2007, at A1 (quoting "[l]awyers for the American Civil Liberties Union").

42 *Olmstead v. United States*, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting) ("Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home.").

so, presuming that the search requires the government to physically intrude into the home. But what if the government wants to compel production of the computer, or just a duplicate of its hard drive, outside the home? Can the government evade Professor Steinberg's standard that way? What if technological developments make it possible for the government to obtain the same information from a remote search that occurs outside the home, a possibility that seems more and more likely with the increasing ubiquity of wireless technology (particularly if the home computer can connect wirelessly to the Internet)? What if the government is able to accomplish the same result by delivering free software under false pretenses ("Free porn!"), which in actuality loads a trojan horse or some other software variant onto the suspect's home computer that allows the government to remotely track the computer's activities or access its hard drive? Is this a "physical" search "inside" the home?

## II. CONCERNS REGARDING PROFESSOR STEINBERG'S METHODOLOGY

Having made the case that Professor Steinberg's standard would place vast amounts of governmental search activity beyond the Fourth Amendment's reach while still leaving us with difficult interpretative questions (for example, as technology advances, what constitutes a "physical" search "inside" the home),<sup>43</sup> I now turn to a critique of the historical analysis supporting Professor Steinberg's thesis. My concerns fall into two broad categories. First, he places too great of an emphasis upon rhetorical arguments that were made during the Framers' time, rather than upon the actual concerns evinced in concrete search and seizure disputes from the era. Public search and seizure rhetoric admittedly focused upon the home, but for the understandable political aim of inflaming passions in favor of the Revolution and then later a limited federal power (this is why the vast majority of post-Independence rhetoric about searches and seizures and the home come from anti-Federalists). Actual search and seizure disputes, by contrast, clearly focused not just upon the home, but also upon varied commercial interests, suggesting that the constitutional concern was far broader than Professor Steinberg acknowledges. Second, a major difficulty that I have with his approach is that, in terms of his methodology, he is insufficiently disciplined for my taste. This lack of discipline is evident on three different levels: (1) inconsistent recognition of the jurisprudential reality during the

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43 See *supra* Part I.C.

Framers' era, which resulted in a substantial overlap between common law, statutory law, and constitutional principles; (2) reliance upon state evidence that is not sufficiently demonstrative of the Framers' intent; and (3) inconsistent and incomplete application of chronological criteria.

#### A. *Myopic Focus upon Concern with House Searches*

The evidentiary heart of Professor Steinberg's thesis is the admittedly abundant concern during the Framers' era about abusive governmental home searches. As Professor Steinberg ably demonstrates in numerous articles,<sup>44</sup> home searches were a core concern in the colonies and then in the new nation. As a result, it must be admitted that his thesis is plausible. But that does not mean his thesis is correct, or even the best reading of the historical evidence.

Professor Steinberg errs in concentrating too intensely upon the concern with home searches in the historical record because the predominance of that evidence does not necessarily mean that the Fourth Amendment was meant to protect only homes. I will address in turn several of the major search and seizure controversies that influenced the Framers and explain why Professor Steinberg is viewing them too narrowly.

##### 1. *Massachusetts Writs of Assistance Case*

In support of his thesis, Professor Steinberg relies in part upon litigation that occurred in Massachusetts in 1761, known under various rubrics such as the *Writs of Assistance Case* or *Paxton's Case* (Paxton was the defendant), which challenged the legality of colonial writs of assistance.<sup>45</sup> Massachusetts merchants initiated the challenge, seeking a ruling that writs of assistance, which customs officers used to conduct searches, were unlawful. This litigation generally is viewed as having had some impact upon colonial thinking with regard to

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44 See *supra* note 2.

45 See M.H. SMITH, *THE WRITS OF ASSISTANCE CASE* (1978) (providing the most comprehensive treatment of the litigation); *id.* at 257, 388–89, 391–95, 412 (briefly recounting the case's chronology); see also POLYVOIS G. POLYVIU, *SEARCH & SEIZURE: CONSTITUTIONAL & COMMON LAW* 10 (1982) (explaining how Boston merchants challenged the renewal of writs when they were set to expire following King George II's death); Scott E. Sundby, *Protecting the Citizen "Whilst He Is Quiet": Suspicionless Searches, "Special Needs" and General Warrants*, 74 *MISS. L.J.* 501, 507–08, 537–42 (2004) (describing James Otis's fight against writs of assistance during this litigation).

proper search and seizure limitations,<sup>46</sup> though that has been disputed.<sup>47</sup>

Though merchants who desired search protections for their commercial interests (such as ships, cargo, and warehouses) initiated this litigation, Professor Steinberg takes the position that the litigation supports his thesis that the Fourth Amendment was meant to apply only to home searches. Certainly, he is correct that the content

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46 A solid case can be made that the litigation likely influenced colonial thought, at least among some colonial leaders and some of the Framers. Sklansky, *supra* note 7, at 1776 n.230. The argument made in the litigation against the writs of assistance "was well known among the founding fathers." TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 38 (1969). Also, it was locally published and transmitted to at least one other colony. See JOSIAH QUINCY, JR., *REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY, 1761-1772*, at 486-94 (1865) (reprinting several local press accounts concerning the Writs of Assistance Case and arguments made during the litigation); SMITH, *supra* note 45, at 239 (noting transmittal of argument against writs of assistance to Connecticut Committee of Correspondence); Davies, *Original Fourth Amendment*, *supra* note 1, at 562 n.20 (opining that, though "[i]t is difficult to assess how widely news of [the] argument [against the writ of assistance] may have spread," it was "widely known in Boston" and may well have spread more widely within the colonies); Joseph R. Frese, *James Otis and Writs of Assistance*, 30 *NEW ENG. Q.* 496, 498, 507-08 (1957) (noting that John Adams probably shared his notes of the argument with his friends, and that the argument was later transmitted to the Connecticut Committee of Correspondence). James Otis, who made the primary argument against writs of assistance during the litigation, later "was a delegate to the Stamp Act Congress in 1765" where he met "other colonial leaders," including one "with whom he later corresponded regarding the general writ of assistance." Davies, *Original Fourth Amendment*, *supra* note 1, at 562 n.20. The 1765 Stamp Act Congress, which the Supreme Court has described as "the First Congress of the American Colonies," played an important role in the development of the new nation. *Duncan v. Louisiana*, 391 U.S. 145, 152 (1968); see generally EDMUND S. MORGAN & HELEN M. MORGAN, *THE STAMP ACT CRISIS: PROLOGUE TO REVOLUTION* (1995) (providing detailed discussion about the Stamp Act Congress). Additionally, John Adams witnessed the litigation as a young man and publicly lauded it when he was older. NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 58-59 (Leonard W. Levy ed., Da Capo Press 1970) (1937); SMITH, *supra* note 45, at 379-84; William John Cuddihy, *The Fourth Amendment: Origins and Original Meaning, 602-1791*, at 1240-41 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (on file with UMI Dissertation Service). For the context of the dissertation, see Arcila, *In the Trenches*, *supra* note 2, at 4 n.7. What he witnessed likely influenced him when he later drafted the 1780 Massachusetts Constitution, which contained a search provision that served as a model for the Fourth Amendment. LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* 238-39 (1988); Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 *SUFFOLK U. L. REV.* 53, 66-67 (1996) [hereinafter Amar, *Writs of Assistance*].

47 Some scholars discount the influence that the litigation had on the Fourth Amendment. E.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 *HARV. L. REV.* 757, 772 (1994) [hereinafter Amar, *Fourth Amendment*]; O.M. Dickerson, *Writs of Assistance as a Cause of the Revolution*, in *THE ERA OF THE AMERICAN REVOLUTION* 40-43 (Richard B. Morris ed., 1939).

of the argument on behalf of the merchants focused upon controversial house searches.<sup>48</sup> But this argument was raised to challenge searches of *commercial* interests.

Ultimately, the litigation was resolved without deciding this coverage issue, so a conclusive answer is not available. Consequently, what meaning this litigation has for the Fourth Amendment is debatable. Maybe it signifies that, as Professor Steinberg would have it, the consensus view was that constitutional search principles applied only to homes, leaving the merchants in the disadvantageous position of having to argue for an extension of existing law. But even if this is so, at a minimum the litigation offers some meaningful evidence that views were expressed in colonial times that constitutional search and seizure protections *should* extend beyond the home.

## 2. *Townshend Act*

A key argument against colonial writs of assistance was that they lacked any legal basis. Writs had to be statutorily created because the common law did not authorize them.<sup>49</sup> British legislation authorized writs in Great Britain, but the colonial view was that this legislation did not extend into the colonies.<sup>50</sup> Six years after the *Writs of Assistance Case* in Massachusetts,<sup>51</sup> Great Britain sought to resolve this ambiguity through passage of the Townshend Act of 1767, which was intended to formally legalize the writs in the colonies.<sup>52</sup> As Professor Steinberg notes, the colonies resisted the Townshend Act.<sup>53</sup> He contends that the importance of this resistance centers on the colonial concern with the impact that writs of assistance could have on home searches.<sup>54</sup>

It is rather remarkable to claim that colonial resistance to British legislation that would be used principally to search commercial interests—colonial ships, cargo, and dockside warehouses, for example—shows that the Framers were concerned only with extending constitutional search protections to homes. Yet, that is Professor Steinberg's position. It is true, as he emphasizes, that opposition to the Town-

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48 Steinberg, *Uses and Misuses*, *supra* note 2, at 587 & nn.23–25, 605 & nn.124–125.

49 Arcila, *In the Trenches*, *supra* note 21, at 10–11.

50 *Id.* at 11.

51 *See supra* Part II.A.1.

52 Arcila, *In the Trenches*, *supra* note 21, at 11–12, 12 n.32.

53 Steinberg, *Uses and Misuses*, *supra* note 2, at 605–607; *see also* Arcila, *In the Trenches*, *supra* note 21, at 11–12.

54 Steinberg, *Uses and Misuses*, *supra* note 2, at 606.

shend Act sometimes (perhaps even often) used rhetoric concerning house searches to create animosity toward the legislation. But it is a leap to say that the opposition was therefore concerned only with extending constitutional protections for home searches. Contrary to his position, colonial opposition to the Townshend Act should be considered relevant to whether the Framers thought commercial interests deserved search and seizure protections of a constitutional nature, given that writs under the Act were most likely to result in searches implicating those interests.

In contrast to Professor Steinberg's position, it is more likely that colonial rhetoric about house searches was employed simply to maximize its political impact. This does not necessarily mean that concern for constitutional protections was limited to the subject of the rhetoric.

### 3. *Hamilton's 1791 Excise Act*

Another problem with Professor Steinberg's thesis that the Fourth Amendment was meant to provide protections only in the context of home searches is that he does not adequately account for Alexander Hamilton's 1791 Excise Act. His thesis includes the claim that "early Americans believed that house searches should take place only pursuant to a specific warrant."<sup>55</sup> But the Excise Act is strong evidence against such an absolutist claim.

Hamilton's 1791 Excise Act allowed searches of some private homes (namely, those that had registered as distillery operations) without either a warrant or even prior suspicion.<sup>56</sup> Passed contemporaneously with the Fourth Amendment,<sup>57</sup> this Excise Act shows that at a minimum the Framers were much more flexible about home searches, at least for regulatory purposes, than Professor Steinberg

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55 *Id.* at 596.

56 The Excise Act provided for warrantless and suspicionless searches of registered distillers. Act of Mar. 3, 1791, ch. 15, §§ 25–26, 29, 1 Stat. 199, 205–06. It also repeatedly refers to the possibility that distillery operations might be in a "house" as opposed to some other kind of commercial premise. *Id.*

57 Hamilton's Excise Act was passed on March 3, 1791, *see supra* note 56, while the Fourth Amendment became effective on December 15, 1791, when the Bill of Rights was ratified. COMMISSION ON THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION, 1791–1991: THE BILL OF RIGHTS AND BEYOND 7 (Herbert M. Atherton & J. Jackson Barlow eds., 1991); *see also* 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1201–02 (1971).

recognizes. Moreover, the Framers seem to have granted identical search authority in three subsequent statutory acts.<sup>58</sup>

Though he does not acknowledge Hamilton's 1791 Excise Act (or its three progeny) in his Article to which I am responding, Professor Steinberg has discounted it elsewhere, writing that although "this statute explicitly used the word 'houses,' the statute probably was intended to cover only commercial premises used to distill and store liquor."<sup>59</sup> In this assertion, Professor Steinberg relies upon Professor Davies' work, and the latter's opinion that "when Congress enacted this statute, the legislators understood that they 'had leeway to confer general search authority on revenue officers regarding commercial premises—though not for places actually used as dwellings.'"<sup>60</sup>

The problem with Professor Davies' view is that he does not adequately explain the Act's use of the term "house." He discounts this usage, pointing to comments by numerous proponents of the Act who minimized the extent to which it allowed intrusions into the home.<sup>61</sup> On the basis of these comments, Professor Davies concludes that at most the Act allowed minimal warrantless and suspicionless intrusions into homes, limited for the most part to only those portions of homes that the distiller himself registered with authorities, such as a room used to store liquor, for example.<sup>62</sup> i

The primary difficulty with this reasoning is that Professor Davies, and Professor Steinberg by extension, are arguing that the Framers meant two different things when they used the same term—"house"—in the Fourth Amendment and in Hamilton's 1791 Excise Act, even though the two provisions were promulgated concur-

58 In these three subsequent statutory acts, the Framers seem to implicitly authorize warrantless home searches. In one of these acts, the Framers provided that previous provisions for securing and collecting excise taxes on distilled spirits remained in force, "subject only to the alterations hereby made." Act of Mar. 3, 1797, ch. 11, § 5, 1 Stat. 504, 505. Since this Act made no changes with respect to the terms under which premises could be searched, it seems to have extended the authority to conduct warrantless home searches in accordance with the terms of Hamilton's 1791 Excise Act. In the other two acts, the Framers provided that penalties and forfeitures were recoverable in accordance with Hamilton's 1791 Excise Act. Act of June 5, 1794, ch. 49, § 19, 1 Stat. 378, 381; Act of May 8, 1792, ch. 32, § 17, 1 Stat. 267, 271. Though the precise scope of incorporation is subject to debate, arguably they incorporated the terms under which Hamilton's 1791 Excise Act allowed home searches since those terms were part of the statutory structure through which penalties and forfeitures could be obtained.

59 Steinberg, *Original Misunderstanding*, *supra* note 2, at 264.

60 *Id.* at 264 n.198 (citing Davies, *Original Fourth Amendment*, *supra* note 1, at 712).

61 Davies, *Original Fourth Amendment*, *supra* note 1, at 712 n.471.

62 *Id.*

rently.<sup>63</sup> In their view, “house” in the Fourth Amendment means exactly what it says. But “house” in Hamilton’s 1791 Excise Act does not. Instead, it generally means only “part of a house,” is not properly construed as allowing warrantless and suspicionless searches of an entire “house” (what if the distiller registered the “house,” without limitation?), and in any case does not undermine the notion that specific warrants were *required* to search houses. This reading is forced and unnatural.

Another difficulty with Professor Steinberg’s interpretation is that it creates an exception that belies the very standard he is advocating. Even if he is correct that Hamilton’s 1791 Excise Act meant to allow warrantless and suspicionless searches only of limited parts of homes, that exception still stands in contrast to the broad claim he makes that “early Americans believed that house searches should take place *only* pursuant to a specific warrant.”<sup>64</sup> Those two propositions cannot happily co-exist. Because he is wrong about the scope of the Fourth Amendment’s protection for the home, it is fair to question whether he has accurately divined the Framers’ intent regarding whether the Fourth Amendment protected interests unrelated to the home.

#### 4. *Early Statutory Warrant Requirements for Building Searches*

The previous section sought to discredit Professor Steinberg’s thesis that the Fourth Amendment was intended to require specific warrants for all home searches by pointing to early statutory enactments—Hamilton’s 1791 Excise Act and its three progeny—in which the Framers allowed warrantless searches of some homes. This current section also relies upon early statutory enactments, but to discredit another aspect of Professor Steinberg’s thesis: namely, his assertion that through the Fourth Amendment the Framers intended to extend constitutional search and seizure protections *only* to homes.<sup>65</sup>

This proposition is questionable in light of the Framers’ ubiquitous imposition of warrant requirements for building searches in early civil search statutes. It seemed to make no difference to the Framers whether a search was of a home or some other type of building, such as a commercial premise. In most instances when the Framers authorized building searches through statute, they imposed

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63 See *supra* note 57.

64 Steinberg, *Uses and Misuses*, *supra* note 2, at 596 (emphasis added). See *supra* note 55 and accompanying text.

65 See *supra* note 3 and accompanying text.

a search warrant requirement regardless of the particular category of building, whether a home, store, or other premise. Over the period that for my own purposes I have elsewhere identified as “the Framers’ era,” namely 1787 to 1825,<sup>66</sup> the Framers imposed search warrant requirements for building searches—whether a home or some other type of building, such as a store—at least eight times.<sup>67</sup> Apart from Hamilton’s 1791 Excise Act and its three progeny (which are discussed in the previous section), I am unaware of any instances in which the Framers statutorily authorized a warrantless building search.

These statutory requirements for warrant-based building searches are sufficient to cast doubt on Professor Steinberg’s assertion that the Fourth Amendment was meant to protect only the home, though probably they cannot conclusively disprove it. The reason they probably cannot conclusively disprove it is because, during this early part of our history, the common law and statutory law subsumed constitutional values.<sup>68</sup> This leaves us with several alternate explanations for why the Framers often statutorily required warrants not just for home searches specifically but also for building searches generally. It could be that these *statutory* enactments reflected the Framers’ views about *constitutional* search and seizure protections. If so, these statutory enactments *would* conclusively disprove Professor Steinberg’s home-centered Fourth Amendment interpretation. But it is also possible that these statutory enactments simply reflected the Framers’ preferred non-constitutional legal views, perhaps derived from their understanding of strictly common law protections. If this is the case, these statutory enactments tell us nothing about the Framers’ Fourth Amendment views.

Despite this ambiguity, the Framers’ inclination towards statutorily required warrants for building searches seems more likely to reflect the Framers’ constitutional views, for several reasons. First, these statutory enactments were promulgated around the same time as the

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66 Arcila, *In the Trenches*, *supra* note 21, at 4 n.8.

67 Act of Mar. 3, 1815, ch. 100, § 10, 3 Stat. 239, 241; Act of Mar. 3, 1815, ch. 94, § 2, 3 Stat. 231, 232; Act of Feb. 4, 1815, ch. 31, §§ 2, 4, 3 Stat. 195, 195–97; Act of Mar. 2, 1799, ch. 22, § 68, 1 Stat. 627, 677–78; Act of Aug. 4, 1790, ch. 35, § 48, 1 Stat. 145, 170; Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29, 43. In addition, in two other acts the Framers implicitly extended a statutory warrant requirement for premises searches by granting search authority to customs officers in accordance with the authority as “he or they now have by law.” Act of Mar. 1, 1809, ch. 24, § 8, 2 Stat. 528, 530; Act of Apr. 18, 1806, ch. 29, § 5, 2 Stat. 379, 380. Since all other statutes granting authority to search premises required warrants, so did these acts.

68 See *infra* Part II.B.

Fourth Amendment. As such, it seems more likely that the Framers were considering the proper scope of search and seizure protections in a general sense, in terms of constitutional thresholds. Given the complexity of their undertaking in seeking to rule a new nation, it is a bit of a stretch to believe that they were drawing very fine and unspoken distinctions between the common law, statutory law, and constitutional values. Second, a good argument can be made that grappling with warrant requirements at this high level of constitutional generality was consistent with the influence that the natural law had on their views about constitutional protections. The Framers' Lockean views of the natural law placed preeminent importance upon property.<sup>69</sup> No doubt a fundamental crucible of property rights was the home, but it was consistent with their Lockean views to also value commercial property,<sup>70</sup> which both resulted from "the labour of individuals" and provided the means for men to maximize their well-being and happiness,<sup>71</sup> which were aims of the natural law.<sup>72</sup> Given the vagueness of natural law reasoning, I do not contend that the Framers would have viewed the natural law as requiring the use of search warrants for both homes and other buildings. My contention is simply that this would have been an easy conclusion for the Framers to reach based on a belief that the natural law protected both homes and other premises, such as commercial buildings, which again provides reason for doubting Professor Steinberg's home-centered Fourth Amendment thesis.

### *B. Inconsistent Recognition of Jurisprudential Reality During Framers' Era*

Professor Steinberg makes much hay about the lack of Fourth Amendment constitutional invocations and interpretations in certain case law contexts during the period he surveys. He notes that "[i]n those rare situations where early American law enforcement officers

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69 JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 137–38 (1988); Walton H. Hamilton, *Property—According to Locke*, 41 *YALE L.J.* 864, 873, 876 (1932); Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 *HARV. L. REV.* 945, 949–50 (1977).

70 See Eduardo Moisés Peñalver, *Redistributing Property: Natural Law, International Norms, and the Property Reforms of the Cuban Revolution*, 52 *FLA. L. REV.* 107, 205 (2000) (“[B]ecause the natural law views productive behavior to be part of expressive dignity, commercial property in general does not labor under any disability with respect to expropriation by the state.”).

71 STEPHEN BUCKLE, *NATURAL LAW AND THE THEORY OF PROPERTY: GROTIUS TO HUME* 150–51 (1991); see also WALDRON, *supra* note 69, at 171–77.

72 BUCKLE, *supra* note 71, at 145.

needed to obtain a warrant, the warrant requirement appeared in statutes rather than in constitutional interpretations.”<sup>73</sup> He opines that “the dearth of published eighteenth-century and early nineteenth-century opinions on constitutional search and seizure provisions is remarkable.”<sup>74</sup> In a potentially powerful retort to those (like me) who find maritime jurisprudence from the era relevant to the Fourth Amendment, he claims that “[e]arly ship seizure cases cast further doubt on the existence of a Framing-era reasonableness requirement” because “in the early nineteenth-century cases that reached the United States Supreme Court, the Justices never invalidated a ship seizure on Fourth Amendment grounds. More significantly, *the attorneys representing the shipowners never even argued that the ship seizures had violated the Fourth Amendment.*”<sup>75</sup>

The problem with this line of argument is that it ignores the jurisprudential reality during the Framers’ time. In that era, Fourth Amendment constitutional adjudication as we know it today simply did not exist. As is well known, “[f]or nearly a century after the Constitution was adopted there was no constitutional search and seizure jurisprudence. Instead, search and seizure claims were litigated through common law trespass or civil law forfeiture.”<sup>76</sup>

As a result, Professor Steinberg’s measure—that no explicit Fourth Amendment invocation means no Fourth Amendment coverage—can easily lead us awry. For example, if we apply his measure to his own thesis, a solid argument could be made that the Fourth Amendment does not protect even the home, because in this early period searches and seizures involving the home were litigated not through Fourth Amendment constitutional claims but under common law trespass.<sup>77</sup> Does the resounding absence of Fourth Amend-

<sup>73</sup> Steinberg, *Uses and Misuses*, *supra* note 2, at 587; *see also id.* at 586–587 & nn.18–19.

<sup>74</sup> *Id.* at 588.

<sup>75</sup> *Id.* at 590; *see also id.* at 590 & nn.42–45 (discussing two Supreme Court cases: *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), and *The Apollon*, 22 U.S. (9 Wheat.) 362 (1824)).

<sup>76</sup> Arcila, *In the Trenches*, *supra* note 21, at 5–6 (footnote omitted).

<sup>77</sup> *See, e.g.*, *Wells v. Hubbard*, 29 F. Cas. 657 (C.C.D.C. 1822) (holding that one who breaks open doors to seize goods is liable for trespass); *Anonymous*, 1 Minor 52 (Ala. 1821) (involving a plaintiff who sued in trespass after the defendant broke into and entered house under pretense of a warrantless search for stolen money); *Simpson v. Smith*, 2 Del. Cas. 285, 291 (Del. 1817) (involving a plaintiff who brought a trespass action against an individual who accompanied an officer during search); *Kennedy v. Terrill*, 3 Ky. (Hard.) 498 (1808) (holding that if a justice of the peace issues an illegal warrant under the color of his office, an action of trespass will lie against him); *Sandford v. Nichols*, 13 Mass. (13 Tyng) 286 (1816) (involving a plaintiff who brought a trespass action against inspectors for a search conducted in plaintiff’s home); *Bell v. Clapp*, 10 Johns. 263 (N.Y. Sup. Ct. 1813) (involving a plaintiff who brought a trespass action when an officer broke into and

ment invocations in home search cases from the era validly allow the conclusion that this constitutional provision was not intended to apply to the home? Clearly Professor Steinberg would disagree with this proposition. Yet, he does not explain why the absence of a Fourth Amendment invocation is a valid measure in non-home contexts but an invalid one in cases involving home searches. Once one recognizes “the connection between the Fourth Amendment and the common law trespass doctrine”<sup>78</sup> during this early period of our history, the inappropriateness of Professor Steinberg’s measure becomes evident: the absence of Fourth Amendment invocations in common law trespass claims *does not* mean the Fourth Amendment was inapplicable, because the trespass claim itself protected the constitutional value. Thus, his willingness to apply his measure in non-home contexts, but not to the home context he believes the Fourth Amendment does cover, is odd given that the language quoted in the preceding sentence is his, implying that he realizes that the common law subsumed constitutional values. And, just as the common law subsumed constitutional Fourth Amendment values in the new nation, so did its civil forfeiture law.

Though I am not certain how Professor Steinberg would respond, I certainly acknowledge that it is possible to dispute my position. For example, a perfectly plausible counterargument could latch on to the distinction between state and federal law in an attempt to explain why some failures to invoke the Fourth Amendment have substantive import in determining the scope of its protections, while others do not. This counterargument would point out that common law trespass suits usually occurred in state court, and during this early part of our nation’s history the Fourth Amendment was inapplicable to such state law claims.<sup>79</sup> Thus, this counterargument would proceed, the failure to mention it in these early cases is of no moment with regard to whether it was meant to protect the home. By contrast, from the inception of our nation, civil forfeiture proceedings occurring under federal statutory law fell exclusively within federal court jurisdiction,<sup>80</sup> and thus the Fourth Amendment was potentially applicable law. Therefore, the failure to mention the Fourth Amendment in these

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entered his dwelling to search for and seize stolen articles); *Gardner v. Neil*, 4 N.C. (Car. L. Rep.) 104 (1814) (holding that action for trespass is a proper remedy against one who entered plaintiff’s house, under a warrant, to search for a runaway slave).

78 Steinberg, *Original Misunderstanding*, *supra* note 2, at 253.

79 The Fourth Amendment was not deemed even partially applicable to the states until *Wolf v. Colorado*, 338 U.S. 25, 27–28 (1949).

80 *Slocum v. Mayberry*, 15 U.S. (2 Wheat.) 1, 9–10 (1817).

federal law cases could show that it was not deemed to protect the commercial interests that were often at stake, such as ships, cargo, etc., which instead received only statutory—not constitutional—protections.

The problem with this counterargument is that the law during this early period was not sufficiently disciplined and developed to allow these conclusions. For example, though it is true that during this early period the Fourth Amendment was not applicable to the states,<sup>81</sup> it was not at all uncommon for it to be invoked in state law cases as if it was applicable.<sup>82</sup> Moreover, we are still left with the complication that the failure to invoke the Fourth Amendment was of no moment, since the common law trespass and civil law forfeiture claims subsumed constitutional search and seizure values and protections.

Thus, originalist arguments need to recognize that Fourth Amendment invocations cannot be a definitive measure of what the Fourth Amendment was intended to protect. Rather, *whatever* the Fourth Amendment was intended to protect, those values were protected through common law trespass and the statutes applicable to civil law forfeiture. It is terrifically difficult to discern what parts of common law trespass and civil law forfeiture jurisprudence reflected *constitutional* norms, given that those norms were intertwined with common law and statutory standards. For example, common law trespass claims were not limited to the home context. Examples can be found where trespass actions were invoked for searches directed at a carpenter shop,<sup>83</sup> a store,<sup>84</sup> a stagecoach,<sup>85</sup> and an open public horseshed.<sup>86</sup> It could be, therefore, that the trespass analyses in some or all of those cases involved a *constitutional* search and seizure norm, albeit one subsumed into the common law. Does this necessarily mean that Professor Steinberg's thesis, with its limitation to the home, is incorrect? No. But given the jurisprudential ambiguity with which we are confronted in the historical record, it is difficult to justify taking an extremely narrow view about constitutional norms of the era, such as Professor Steinberg's.

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81 See *supra* note 79.

82 Arcila, *In the Trenches*, *supra* note 21, at 51 & n.190 (citing several case examples); see also *Banks v. Farwell*, 38 Mass. (21 Pick.) 156, 158–159 (1838); *Sandford*, 13 Mass. (13 Tyng) at 287.

83 *Banks*, 38 Mass. (21 Pick.) at 156.

84 *Grumon v. Raymond*, 1 Conn. 40, 40 (1814).

85 *Jones v. Gibson*, 1 N.H. 266 (1818).

86 *Sailly v. Smith*, 11 Johns. 500 (N.Y. Sup. Ct. 1814).

### C. Inapt Use of State Evidence

Professor Steinberg's methodology also suffers from inapt comparisons to the extent that he relies upon state statutory and state constitutional provisions to make his Fourth Amendment case, though certainly this is a matter about which scholars could reasonably disagree. Here, Professor Steinberg takes advantage of easy pickings, as it is well-known that states showed a marked interest in minimizing search and seizure protections. This is not problematic in and of itself, as pickings could well be easy *and* be relevant. But I have serious doubts about the extent to which state provisions are relevant for determining Fourth Amendment intent.

The problem is that state intent is only an indirect measure of the Framers' federal intent. Even those aspects of state intent that would seem most relevant to the Framers' federal intent—for example, state constitutional provisions that served as models for the Fourth Amendment, or the intent of the Fourth Amendment's state ratifiers—are distinct from that federal intent and might well be different from it. For example, if we knew that a conflict existed between a particular state's ratifiers and the Framers with regard to the Fourth Amendment's scope, which should prevail? Presumably, at least in most cases, the federal intent should govern. Professor Steinberg appears to agree since he speaks in terms of identifying the Framers' intent.<sup>87</sup>

Thus, methodologically speaking, it is better to focus upon more direct measures of federal intent and include state intent only insofar as one can make the case that it directly influenced the Framers. This, fortunately, is a standard that still leaves us with plenty of evidence to mull over. Examples include the common and statutory law (some English, some colonial) that informed the Framers' thinking as they adopted the Fourth Amendment, as well as federal statutes involving search and seizure that the Framers implemented contemporaneously with, and then in the years after adopting, the Fourth Amendment, which reveal their thinking about search and seizure as they attempted to rule a new nation.<sup>88</sup>

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<sup>87</sup> Steinberg, *Original Understanding*, *supra* note 2, at 1075–76.

<sup>88</sup> This material is far too voluminous to cite here. Much of it has been subject to examination by Professor Steinberg, *see supra* note 2, myself, and other scholars. *E.g.*, Amar, Terry & Fourth Amendment, *supra* note 1; Amar, *Writs of Assistance*, *supra* note 46; Amar, *Fourth Amendment*, *supra* note 47; Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1718 (1996); Thomas Y. Davies, *The Fictional Character of Law-And-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in*

### D. *Inconsistent & Incomplete Chronological Criteria*

Professor Steinberg's methodology sometimes suffers from inconsistent and incomplete application of chronological criteria. For example, he relies heavily upon Justice Cooley's views about the Fourth Amendment. (Justice Cooley sat on Michigan's Supreme Court during the 1800s.) In particular, Professor Steinberg relies upon Cooley's 1868 treatise and an 1874 state case Cooley helped decide.<sup>89</sup> Professor Steinberg does so, however, while discounting the United States Supreme Court's 1886 decision in *Boyd v. United States*,<sup>90</sup> which applied the Fourth Amendment to business records, on the basis that *Boyd* was decided too late to be indicative of the Framers' intent.<sup>91</sup> Without any additional explanation for why this is so, Professor Steinberg simply declares that *Boyd*, "[d]ecided almost 100 years after the Framers adopted the Fourth Amendment, . . . offers little insight into the intentions of the Framers."<sup>92</sup> Why a state justice's opinions about the Fourth Amendment from the period around 1868 and 1874 is indicative of the Framers' intent, but the United States Su-

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Atwater v. Lago Vista, 37 WAKE FOREST L. REV. 239 (2002) [hereinafter Davies, *Fictional Originalism*]; Davies, *Original Fourth Amendment*, *supra* note 1; Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895 (2002); Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925 (1997); Sklansky, *supra* note 7. Unsurprisingly, given the complexity of the task, these works regularly reach different conclusions even after considering the same body of material.

I have examined the common law, as well as early federal statutory law, for their implications about what the Framers thought about probable cause. The conclusion I draw from these inquiries is that the Framers conceived of probable cause quite differently than we do today. My common law analysis provides abundant reasons to believe that even after the Fourth Amendment's adoption—and contrary to practice today—many judges believed they could issue search warrants without independently assessing the adequacy of probable cause. Arcila, *In the Trenches*, *supra* note 21, at 24–40. The analysis of early federal statutory law indicates that the Framers used probable cause towards a surprising end: to protect the government, rather than the public. They did so by establishing probable cause as an immunity standard. Another important finding is that they nearly always displaced the jury's common law role in assessing probable cause in favor of having federal judges make the immunity determination. These factors show that the Framers' tendency was to decrease access to search remedies. Fabio Arcila, Jr., *Originalism and Early Regulatory Searches: The Misunderstood Statutory History of Suspicion and Probable Cause* (forthcoming) (on file with author).

89 Steinberg, *Uses and Misuses*, *supra* note 2, at 590–591, 590 n.48 (discussing Cooley's 1868 treatise); *id.* at 591 & nn.51–54 (discussing Cooley's 1874 decision in *Weimer v. Bunbury*, 30 Mich. 201 (1874)); *see also* Steinberg, *Original Misunderstanding*, *supra* note 2, at 250–51 (discussing the *Weimer* decision).

90 116 U.S. 616 (1886).

91 Steinberg, *Uses and Misuses*, *supra* note 2, at 606–607.

92 *Id.* at 607.

preme Court's opinion from the only slightly later period of 1886 is not, is a mystery he does not address.

Moreover, even if Professor Steinberg is right about the relevance of considering Cooley's views from 1868 and 1874, he ignores the United States Supreme Court's 1877 decision in *Ex parte Jackson*.<sup>93</sup> As I have noted elsewhere, the conclusion seems inescapable that the Supreme Court was invoking the Fourth Amendment in *Ex parte Jackson* (albeit in dicta).<sup>94</sup> Importantly for present purposes, it did *not* do so in the context of a physical home search, the only context to which Professor Steinberg believes the Fourth Amendment was supposed to apply. Rather, it did so when discussing the (il)legality of the federal government intercepting and inspecting sealed mail while it was in transit through the federal postal system. I have a hard time imagining why Cooley's views in an 1874 *state* case are relevant to determining the Framers' intent with regard to the Fourth Amendment, but not the *Supreme Court's* views in an 1877 case.

### III. THEORETICAL IMPLICATION: ROLE OF MAJORITARIANISM

Like originalist arguments in general, Professor Steinberg's thesis is ultimately animated by, and promotes, majoritarianism. This is a theoretical implication that we would benefit from him exploring. Implicit in his thesis is a type of distrust of judges: he supports his minimalist approach to the Fourth Amendment because, he tells us, judges have rendered it a mess<sup>95</sup> (certainly a widely-held opinion, as he acknowledges<sup>96</sup>). Better, therefore, to leave the vast majority of search and seizure issues to majoritarian control.<sup>97</sup> This is a remarkable claim for numerous reasons. In the absence of constitutional re-

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93 96 U.S. 727 (1877).

94 Arcila, *In the Trenches*, *supra* note 21, at 5 n.12.

95 See, e.g., Steinberg, *Uses and Misuses*, *supra* note 2, at 583–584 (referring to “doctrinal incoherence of Fourth Amendment law” and “the unsatisfactory quality of Fourth Amendment doctrine”); Steinberg, *Original Understanding*, *supra* note 2, at 1083 n.230 (“In short, having nine appointed Supreme Court justices reinvent the Fourth Amendment based on their personal views about ‘unreasonable searches and seizures’ is not the most sensible way to regulate police discretion.”); *id.* at 1084 (“The chaos in Fourth Amendment doctrine has resulted from attempts to apply the Fourth Amendment in situations where the Amendment never was intended to apply.”).

96 Steinberg, *Original Understanding*, *supra* note 2, at 1083 n.232 (“While Fourth Amendment scholars may not agree on much, they almost universally agree on the unsatisfactory state of current Fourth Amendment doctrine.”).

97 See *id.* at 1083 n.230 (“Police discretion could be constrained by elected officials who supervise police departments, by statutes, or by amendments to state constitutions or the Federal Constitution.”).

straints, it is not at all clear that any other search and seizure restraints exist apart from those available through the majoritarian process. Certainly, Professor Steinberg does not identify any restraints other than majoritarianism.<sup>98</sup> Moreover, the Constitution and the Bill of Rights were adopted in large measure to place constitutional limits upon majoritarian rule.<sup>99</sup> Therefore, Professor Steinberg's thesis can reasonably be described as counterintuitive.

It seems fairly clear that, at least to date, the Supreme Court has eschewed a majoritarian approach to the Fourth Amendment. Perhaps the clearest proof lies in *Chandler v. Miller*,<sup>100</sup> in which the Supreme Court invalidated a suspicionless drug testing program that Georgia legislators had imposed upon themselves (as well as other elected officials).<sup>101</sup> As I have noted elsewhere, "[o]ther than a referendum, there is no greater example of majoritarian will than legislative action becoming law, and there is no constituency better able to use the majoritarian process to protect itself than legislators."<sup>102</sup> Thus, "*Chandler's* rejection of the suspicionless drug testing regime that legislators imposed on themselves strongly hints that the Court is disinclined from adopting a completely majoritarian approach to the Fourth Amendment."<sup>103</sup> Given the majoritarian undertones of Professor Steinberg's thesis, he must of necessity be hostile to *Chandler*, and indeed has indicated that he is.<sup>104</sup>

Though it seems safe to say that majoritarianism has not yet gained much currency with the Court, this could well change. As dramatic as Professor Steinberg's thesis is in its departure from current Fourth Amendment law, the idea that constitutional search and seizure protections should be much more limited than under current jurisprudence—and in ways that resonate with Professor Steinberg's approach—has had adherents,<sup>105</sup> and appears to have gained at least

98 See *supra* note 24.

99 See Jonathan Riley, *American Democracy and Majority Rule*, in MAJORITIES AND MINORITIES 267 (John W. Chapman & Alan Wertheimer eds., 1990) (citing many examples of "anti-majoritarian obstacles" written into the Constitution).

100 520 U.S. 305 (1997).

101 *Id.* at 309.

102 Fabio Arcila, Jr., *Special Needs and Special Deference: Suspicionless Civil Searches in the Modern Regulatory State*, 56 ADMIN. L. REV. 1223, 1260 (2004).

103 *Id.*

104 Steinberg, *Original Understanding*, *supra* note 2, at 1086 ("[T]he lack of deference exhibited by the Justices in *Chandler* is genuinely disturbing.").

105 See *United States v. Chadwick*, 433 U.S. 1, 6–7 (1977) (describing the government's argument that "the Fourth Amendment Warrant Clause protects only interests traditionally identified with the home," which encompass the home, office, and communications), *overruled in part by California v. Acevedo*, 500 U.S. 565 (1991).

Justice Scalia's influential backing.<sup>106</sup> Moreover, as I indicated above, since the 1990s the Court has repeatedly expressed an interest in Fourth Amendment originalism.<sup>107</sup> This arguably serves as an indirect endorsement of at least some sort of Fourth Amendment majoritarianism, given the link between originalism and majoritarianism.

Both past and present search and seizure controversies show that it is worthwhile to consider what role, if any, majoritarianism should have in Fourth Amendment jurisprudence. For example, when we were closer in time to the height of the inner-city drug epidemic, the "War on Drugs" led to an argument that majoritarianism should be a controlling factor in search protections, so that a supermajority of public housing tenants should be allowed to democratically waive their Fourth Amendment right against suspicionless sweep searches of each others' private homes.<sup>108</sup> Ostensibly, Professor Steinberg would find such a use of majoritarianism unconstitutional because it would violate the sanctity of the home, the only interest that he thinks the Fourth Amendment protects. But it is useful to consider whether there are any circumstances in which the majoritarianism that undergirds his thesis would allow inroads into the home's constitutionally protected sphere. Considering this issue could easily raise other theoretical problems, like the interaction with waiver doctrine, either explicit or implicit, or the limits of regulatory searches.

Current controversies also raise large issues about the majoritarianism that Professor Steinberg prefers, especially with regard to our new "War on Terror." A prime example involves the warrantless NSA wiretapping program mentioned above.<sup>109</sup> Presumably, Professor Steinberg believes that the Fourth Amendment provides no protection against this program, since it is hard to argue that "physical" searches are involved.<sup>110</sup> But putting the "physical" search issue aside, it would be fascinating to hear what Professor Steinberg thinks about its Fourth Amendment constitutionality in terms of his "home" criterion. Would it matter if at least one end of the conversation were occurring in a home located within the United States? What if the one

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106 See *Acevedo*, 500 U.S. at 583–84 (Scalia, J., concurring) (urging that common law be used to determine scope of Fourth Amendment's Warrant Clause, which would require retiring the presumptive warrant rule).

107 See *supra* note 9 and accompanying text.

108 Lundy Langston, *Sweep Searches—The Rights of the Community, and the Guarantees of the Fourth and First Amendments: Moms of the Chicago Public Housing Complex, Revisit Your Civil and Constitutional Rights and Save Your Babies*, 11 WIS. WOMEN'S L.J. 259, 261 (1996).

109 See *supra* note 30 and accompanying text.

110 See *supra* notes 26–30 and accompanying text.

end of the telephone call was occurring in the United States, but on a cell phone being used in a public place, and the other end of the call was occurring in a home located in a foreign country? Could calls involving cell phones located in the United States be subject to Fourth Amendment protections if one cell phone was being used inside a private home, but lose protections as soon as the cell phone was taken outdoors, even during the same phone call? Would it matter if the outdoor location was in the protected curtilage? (Does Professor Steinberg even believe the Fourth Amendment protects curtilage?<sup>111</sup>) In a different context—traditional criminal law enforcement—Professor Steinberg has suggested that wiretapping could be freed from Fourth Amendment restraints and its use regulated only through the majoritarian process.<sup>112</sup> Does he hold a similar opinion about something like the NSA wiretapping program? There are many reasons to question whether majoritarian controls would suffice for such a program, such as because of the racial, national identity, and religious issues that intersect with it.<sup>113</sup> Or perhaps, in light of his thesis, Professor Steinberg believes that *by definition* majoritarian controls would suffice even for such a program. Clarifying and expanding upon the theoretical implications of his thesis would be helpful in advancing the scholarly debate.

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111 Fourth Amendment protections can extend to the curtilage. See *United States v. Dunn*, 480 U.S. 294, 300–01 (1987) (setting forth factors for determining extent of protected curtilage); *California v. Ciraolo*, 476 U.S. 207, 213–14 (1986) (establishing that no Fourth Amendment protection exists from police flyover of curtilage at 1,000 feet involving police use of standard camera).

112 See Steinberg, *Sense-Enhanced Searches*, *supra* note 2, at 471–72 (explaining that statutes have played an important role in regulating wiretaps); Steinberg, *High School Drug Testing*, *supra* note 2, at 292–93 (noting that “legislatures often have proven quite willing to impose restrictions on law enforcement officers,” and pointing to federal statutes making “unauthorized wiretapping a felony” and imposing “restrictions on the interception of [I]nternet communications”).

113 Abundant evidence already exists concerning governmental overreaching in constitutionally suspect ways in pursuit of the “War on Terror.” Eric Lipton, *Nominee Says U.S. Agents Abused Power After 9/11*, N.Y. TIMES, Feb. 3, 2005, at A19 (describing how federal authorities arrested immigrants in “wholly unacceptable” ways after the September 11th attacks); *cf. Tabbaa v. Chertoff*, 509 F.3d 89, 92 (2d Cir. 2007) (finding no constitutional or statutory violation of religious freedom or search and seizure protections when U.S. border patrol detained five United States citizens returning from an Islamic conference in Canada; these citizens were detained for four to six hours based upon intelligence that persons with terrorist ties might attend Islamic conferences, despite lack of criminal records or any individualized suspicion of terrorism).

## CONCLUSION

Professor Steinberg's provocative thesis that the Fourth Amendment protects only interests connected with the home raises one of originalism's fundamental challenges: justifying why an early constitutional interpretation should continue to prevail today. That is, even if we accept as true Professor Steinberg's thesis that the Fourth Amendment was supposed to protect only the home, should we adhere to that constitutional interpretation? Originalists would tend to say yes, largely based on a theory that such a judicial approach would, on the whole (though not necessarily in terms of Fourth Amendment jurisprudence itself), do the least damage or be the least dangerous, leaving to the majoritarian process—rather than to an unaccountable or elitist or subjective or [insert other pejorative here] judge—the decision about how we govern ourselves.

But the Fourth Amendment provides one of the starkest challenges to this originalist premise because of how remarkably conditions have changed since the nation's founding. During that early era, search and seizure protections were founded upon common law concepts. The regulatory state was extremely limited, and the statutory search and seizure provisions that did exist were largely modeled upon the common law. No professionalized police force existed.<sup>114</sup> Today, by contrast, Fourth Amendment jurisprudence has departed significantly from common law formulations,<sup>115</sup> including by adopting a privacy model,<sup>116</sup> and we live in a highly developed regulatory state in which searches are pervasive, with large professional police forces charged with traditional criminal law enforcement duties and significant civil workforces charged with enforcing myriad civil regulatory schemes. Indeed, the regulatory state has expanded to such an extent that today there is no doubt that the amount of any day's civil regulatory searches absolutely dwarfs the amount of criminal law enforcement searches.

It is certainly not an innovative position to conclude that such radical changed circumstances require departing from original in-

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114 See Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 824 (1994) (“[A]t the time of the drafting and ratifying of the Fourth Amendment, nothing even remotely resembling a modern law enforcement existed.”).

115 E.g., Davies, *Fictional Originalism*, *supra* note 88; Davies, *Original Fourth Amendment*, *supra* note 1.

116 See *supra* notes 26–29 and accompanying text.

tent.<sup>117</sup> Consequently, we see here yet another implication of Professor Steinberg's thesis that we would benefit from having him explore: why would we be better off, in a constitutional sense, by following his prescription? To date, his answer seems to be that Fourth Amendment jurisprudence is presently such a mess that we could hardly do worse by returning to his limited view of constitutional search and seizure protections.<sup>118</sup>

But the dramatic implications of his view, as sketched out above, demand more than such a blithe answer. It is not even clear, for example, how many originalists would agree with his thesis. Originalism comes in many forms.<sup>119</sup> Of the many ways to parse originalism, one distinction can be drawn between original meaning and original application.<sup>120</sup> Original meaning attempts to divine the underlying rules or principles of the constitutional text and makes those controlling.<sup>121</sup> Original application attempts to divine how the constitutional text would have been applied during the Framers' era and limits constitutionality accordingly.<sup>122</sup> It is not clear to me whether Professor Steinberg is embracing one or the other of these approaches, a combination, or perhaps even some other type of originalism. But Professor Steinberg would advance his project by providing greater specificity on this score, as it would help inform the extent to which other originalists agree or disagree with him.

Moreover, majoritarianism harbors its own evils.<sup>123</sup> Evils, incidentally, that were at least in a broad sense familiar to the Framers. John

117 *E.g.*, *Steagald v. United States*, 451 U.S. 204, 217 n.10 (1981) (“[I]t would . . . be naive to assume that those actions a constable could take in an English or American village three centuries ago should necessarily govern what we, as a society, now regard as proper.”).

118 *See* Steinberg, *High School Drug Testing*, *supra* note 2, at 293 (“[E]ven if one accepts that elected officials or police officers sometimes will authorize intrusive searches, the Fourth Amendment is not necessarily the cure for such problems.”).

119 *E.g.*, Stanley Fish, *Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law*, 29 *CARDOZO L. REV.* 1109, 1110 (2008) (referring to “textual originalism” and “intentional originalism”).

120 Jack M. Balkin, *Abortion and Original Meaning*, 24 *CONST. COMMENT.* 101, 104–06 (2007); Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 *GEO. L.J.* 569, 586–94 (1998).

121 *See* Greenberg & Litman, *supra* note 120, at 592 (“[T]he strict meaning of a constitutional provision is a rule, and its applications are the practices that the society would take to be covered by it.”); *see also* Balkin, *supra* note 120, at 104–05 (“Fidelity to the Constitution as law means fidelity to the words of the text, understood in terms of their original meaning, and to the principles that underlie the text.”).

122 Balkin, *supra* note 120, at 106; Greenberg & Litman, *supra* note 120, at 592.

123 Professor Steinberg seems to recognize this pitfall. *See* Steinberg, *High School Drug Testing*, *supra* note 2, at 293 (“[I]t would be hopelessly naive to suggest that legislatures always impose appropriate limitations on searches . . .”).

Adams worried about the tyranny of the masses,<sup>124</sup> in particular after witnessing the French Revolution's carnage. James Madison raised the concern numerous times in the *Federalist Papers*.<sup>125</sup> Even Thomas Jefferson, the anti-Federalist and advocate of popular rights, recognized a "sacred principle, that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect, and to violate would be oppression."<sup>126</sup> Concerns about majoritarian rule have manifested themselves in the past (for example, extensive search powers granted to enforce slavery<sup>127</sup>), and are recurring now, with the "War on Terror" encouraging a fearful majority to take direct aim at a discrete minority, with one weapon being overweening searches.<sup>128</sup> In light of such concerns, Professor Steinberg would perform a valuable service by conducting an in-depth inquiry into the majoritarian implications of his thesis, which could become more persuasive if he could explain why majoritarianism should be viewed not only as an acceptable theoretical model for the Fourth Amendment, but also a preferred one.

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124 Adams wrote that "every page of history" provides proof "that the people, when they have been unchecked, have been as unjust, tyrannical, brutal, barbarous, and cruel, as any king or senate possessed of uncontrollable power. The majority has eternally, and without one exception, usurped over the rights of the minority." 6 CHARLES FRANCIS ADAMS, *THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES* 10 (Boston, Little & Brown 1851). He also opined that the masses are more prone to "intemperance and excess." *Id.* at 94.

125 *THE FEDERALIST NOS. 10, 51, 55* (James Madison).

126 Thomas Jefferson, First Inaugural Address (Mar. 1, 1804), in *THOMAS JEFFERSON: WRITINGS* 492-93 (Merrill D. Peterson ed., 1984).

127 For an excellent discussion of the Fourth Amendment, its link to slavery, and the implications of Reconstruction, see generally ANDREW E. TASLITZ, *RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789-1868* (2006).

128 See *supra* note 113 (providing examples of searches being aimed at an insular minority).