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The Framers' Fourth Amendment Exclusionary Rule: The Mounting Evidence

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INTRODUCTION

The Fourth Amendment to the United States Constitution protects Americans from unreasonable searches and seizures and requires that any warrants to search or seize “persons, houses, papers, and effects” be based upon probable cause and granted only upon sworn declarations that specifically name and describe whom or what is sought and where he or it may be found.¹ The Amend-

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¹ U.S. CONST. amend. IV.

ment's drafters and ratifiers left few words voicing their views on how the Amendment was to work in practice.² This dearth of original legislative discussion has sparked a number of recurring questions, over which modern courts and scholars argue frequently.³

For more than a century, judges on America's highest courts have disagreed with one another over whether illegally seized physical evidence should be excluded from subsequent criminal trials, or whether the Amendment should be limited to other remedies (such as the availability of civil lawsuits). Although the "exclusionary rule" has been the law of the land in all federal courts since the 1914 United States Supreme Court holding in *Weeks v. United States*⁴ and has been imposed on all state courts since the Court's 1961 holding in *Mapp v. Ohio*,⁵ there is a loud movement within the law to abolish the rule.⁶

The assault on the exclusionary rule has been multipronged. But by far its strongest and sharpest prong is the "originalist" claim that the men who wrote and approved the Fourth Amendment in 1791 knew nothing of the exclusionary rule, or even that the rule *defies* the Framers' original intent.⁷ The self-styled originalist scholars who make this claim contend that the Framers intended that criminal courts would admit evidence in criminal trials regardless of whether it was obtained unlawfully.⁸ They claim that the Framers intended that aggrieved victims of unlawful searches and seizures had only one remedy available: they

² Fabio Arcila, Jr., *The Framers' Search Power: The Misunderstood Statutory History of Suspicion & Probable Cause*, 50 B.C. L. REV. 363, 364 (2009).

³ See, e.g., *id.* at 364 n.1 (offering numerous examples of the ongoing discussion).

⁴ *Weeks v. United States*, 232 U.S. 383, 398 (1914), *overruled on other grounds by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁵ *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

⁶ The *New York Times* reported in 2009 that four of nine Supreme Court justices now on the bench (Roberts, Scalia, Thomas, and Alito) are eager to abolish the exclusionary rule. See Adam Liptak, *Supreme Court Edging Closer to Repeal of Evidence Ruling*, N.Y. TIMES, Jan. 31, 2009, at A1. In 2005 these four justices brought forth an argument in *Hudson v. Michigan*, 547 U.S. 586 (2006), that modern police have become so "professional" that they can be trusted to comply with the technicalities of Fourth Amendment law in the absence of the exclusionary rule. *Hudson*, 547 U.S. at 598–99. They made this assertion while staring straight-faced at a case in which police had willfully violated knock-and-announce rules that had prevailed for centuries. *Id.* at 588–89. This "professionalized police" argument is lost on other anti-exclusion scholars who have argued that the exclusionary rule should be abolished because it has made police less professional and *more corrupt*. See, e.g., WALTER P. SIGNORELLI, *THE CONSTABLE HAS BLUNDERED: THE EXCLUSIONARY RULE, CRIME, AND CORRUPTION* 3 (2010).

⁷ See, e.g., *The Jury and the Search for Truth: The Case Against Excluding Relevant Evidence at Trial: Hearing on S. 3 Before the S. Comm. on the Judiciary*, 104th Cong. 8 (1995) (statement of Akhil R. Amar, Southmayd Professor of Law, Yale Law School) (calling the exclusionary rule "a perverse rule rejected by the Founders.").

⁸ Norman M. Robertson, Comment, *Reason and the Fourth Amendment—The Burger Court and the Exclusionary Rule*, 46 FORDHAM L. REV. 139, 140 (1977).

could file civil lawsuits⁹—but only if innocent of wrongdoing.¹⁰ Thus, opponents of the exclusionary rule would reduce the Fourth Amendment to a mere restatement of the law of trespass (or less).

A version of this claim goes further and contends that some vast jurisprudence of the nineteenth century forbade the exclusionary rule, such that a “common-law rule”¹¹ of nonexclusion was settled in the law until the U.S. Supreme Court’s outrageously radical opinion in *Boyd v. United States* upset this “doctrine of nonexclusion.”¹² According to this view, the Court’s rulings in *Boyd* (which held that a compulsory production of purely evidentiary materials violated the Fourth Amendment as well as the Fifth Amendment freedom from compulsory self-incrimination, and that such materials were therefore inadmissible), *Weeks v. United States* (which imposed exclusion as a rule of evidence on all federal courts in 1914), and *Mapp v. Ohio* (which imposed the exclusionary rule on all state courts in 1961) were affronts to constitutional law.¹³ One

⁹ See Arcila, *supra* note 2, at 371 (“[T]he default remedy for a wrongful search or seizure was common law trespass,” or the availability of civil suit); Robertson, *supra* note 8 (“The remedy available in the English common law did not involve the admissibility of illegally seized evidence in subsequent criminal proceedings. Rather, the aggrieved subject had a civil action of trespass against those committing the improper official action.”).

¹⁰ Jeffry R. Gittins, Comment, *Excluding the Exclusionary Rule: Extending the Rationale of Hudson v. Michigan to Evidence Seized During Unauthorized Nighttime Searches*, 2007 BYU L. REV. 451, 455–56 (“If the evidence proved the defendant’s guilt, the government officials who illegally obtained the evidence had a ‘complete defense against charges that the search was a violation of the defendant’s rights.’”). See Patrick Tinsley et al., *In Defense of Evidence and Against the Exclusionary Rule: A Libertarian Approach*, 32 S.U. L. REV. 63, 65 (2004) (“[T]he common law not only did not exclude illegally-obtained evidence, but it even allowed that evidence to *retroactively justify* what would otherwise be an illegal search and seizure.”).

¹¹ See James Etienne Viator, *The Fourth Amendment in the Nineteenth Century*, in THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 172, 178–79 (Eugene W. Hickok, Jr. ed., 1991) (referring to the “long-standing common-law rule” of nonexclusion); Jon W. Bruce, Note, *The Extent of the Exclusionary Rule*, 9 WM. & MARY L. REV. 193, 193 n.3 (1967) (“The common law tradition was that the manner of obtaining evidence is not cause for its suppression in a civil or criminal proceeding.”); Sanford E. Pitler, Comment, *The Origin and Development of Washington’s Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy*, 61 WASH. L. REV. 459, 466 (1986) (“The common law rule of nonexclusion remained unchallenged until 1886, when the United States Supreme Court reached its landmark decision in *Boyd v. United States*.”).

¹² See Pitler, *supra* note 11 (“Under the common law, a strict nonexclusionary rule required a court to admit all competent and probative evidence regardless of its source. This doctrine of nonexclusion developed from the common law courts’ paramount concern with truth-seeking and punishing the guilty.”); Tinsley, *supra* note 10, at 64 (“At common law, and continuing for one hundred years after the passage of the Fourth Amendment, evidence of the defendant’s guilt was never excluded just because it was obtained illegally. The common law excluded evidence that was tainted by unreliability or suspect probative value—as with the hearsay rule—but probative evidence, regardless of its source, was admissible, since it tended to establish the truth, and, thus, help achieve justice.”).

¹³ See 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2184a (John T. McNaughton Rev. 1961) (“[T]he heretical influence of *Weeks v. United States* spread, and

prominent Ivy League law professor even testified before Congress in 1995 that “thousands and thousands of criminal cases” upheld this supposed common law rule of nonexclusion before the Supreme Court lost its way by adopting the exclusionary rule.¹⁴ Another scholar has claimed that the Fourth Amendment was intended to be so limited that the government could search, seize, and monitor anything it desired except within people’s homes.¹⁵

While the Fourth Amendment exclusionary rule survives in a very limited form today, the anti-exclusion narrative has won the day. Professor Thomas K. Clancy noted in a recent article that there are not even any justices currently on the Supreme Court who articulately describe the exclusionary rule as mandated by the Constitution.¹⁶ “The view that the exclusionary rule is constitutionally based has lost the debate within the Court.”¹⁷ By some accounts, “[p]roponents of the exclusionary rule are playing a goal-line defense,” and mostly waiting for the rule to be abolished.¹⁸

This dominant conventional-originalist view has wrought incredible harms upon the jurisprudence of the Fourth Amendment. The American people—once among the freest on earth—are today confined in an “electronic concentration camp”.¹⁹ Warrantless surveillance and monitoring of Americans’ electronic communications (which now constitute the bulk of their communications) have

evoked a contagion of sentimentality in some of the State Courts, inducing them to break loose from long-settled fundamentals.”); Ellis Washington, *Excluding the Exclusionary Rule: Natural Law vs. Judicial Personal Policy Preferences*, 10 DEAKIN L. REV. 772, 778–79 (2005) (claiming *Weeks* “was a radical opinion because the Court, without any controlling precedent, or legitimate case law to base its opinion on, cavalierly overruled over 135 years of Supreme Court case law and over 280 years of America’s historical respect to the rule of law.”); G. Chris Olson, Note, *North Carolina Adopts the Inevitable Discovery Exception to the Exclusionary Rule—State v. Garner*, 15 CAMPBELL L. REV. 305, 307 (1993). (“The common law rule, reaffirmed as late as 1904 by the United States Supreme Court in *Adams v. New York*, provided that all relevant evidence the government possessed was admissible regardless of how it had been obtained.” (footnote omitted)).

¹⁴ *The Jury and the Search for Truth*, *supra* note 7, at 10 (statement of Akhil R. Amar) (“We are talking here about thousands and thousands of criminal cases, and no exclusion.”).

¹⁵ David E. Steinberg, *Restoring the Fourth Amendment: The Original Understanding Revisited*, 33 HASTINGS CONST. L.Q. 47, 48 (2005) (“If one asked the framers what the amendment provided with respect to other types of government searches or seizures, the answer would be: ‘Nothing at all.’”).

¹⁶ Thomas K. Clancy, *The Fourth Amendment’s Exclusionary Rule as a Constitutional Right*, 10 OHIO ST. J. CRIM. L. 357, 358, 361 (2013) (saying that although the view that the exclusionary rule was required by the Constitution “prevailed, unchallenged, for many years” on the Supreme Court during the mid-twentieth century, there are “no articulate proponents on the current Court who embrace *Weeks*’s view that the rule is constitutionally based.”).

¹⁷ *Id.* at 367.

¹⁸ Rohith V. Srinivas, *The Exclusionary Rule as Fourth Amendment Judicial Review*, 49 AM. CRIM. L. REV. 179, 180 (2012).

¹⁹ A depiction coined in JOHN W. WHITEHEAD, *A GOVERNMENT OF WOLVES: THE EMERGING AMERICAN POLICE STATE* 24 (2013).

become almost ubiquitous. Every year, hundreds of thousands of Americans are stopped by police while walking or standing in public and thrown against walls or sidewalks so that their pockets and bags may be searched by government agents.²⁰ It has become routine for police to shout at and humiliate the American people. When I first began researching this topic, it was utterly noncontroversial. This is to say that every constitutional scholar who expressed any opinion on the origins of the Fourth Amendment exclusionary rule repeated the claim that the rule is in defiance of the Framers' original intent.²¹ But I came across a discussion of a flawed search warrant in a 1787 Connecticut case entitled *Frisbie v. Butler*.²² The case began when Mr. Butler lost "about twenty pounds of good pork" under suspicious circumstances. Butler suspected that a local man named Frisbie had taken the meat. Butler applied for and received a search warrant from a local magistrate commanding a man named John Birge to accompany Butler and "search all suspected places and persons that the complainant thinks proper" until the pork was found and a suspect was made to "appear before some proper authority."²³ The two men tracked down Frisbie and arrested him.²⁴

The issuing justice convicted Frisbie of theft, and Frisbie filed a petition for a writ of error to the Connecticut Superior Court. It was obvious to all concerned that the search and arrest warrant in the case was a general warrant. Reversing Frisbie's conviction, the Superior Court wrote: "And the warrant in the present case, being general, to search all places, and arrest all persons, the complainant should suspect, is clearly illegal; yet, how far this vitiates the proceedings upon the arraignment, may be a question, which is not necessary now to determine."²⁵

In the plainest language imaginable, the Connecticut Superior Court concluded in 1787 that the use of an unlawful warrant "vitiates" subsequent criminal proceedings.²⁶ The only question was "how far."²⁷ The statement was dicta, in that the precise grounds for reversal were that "[t]he complaint . . . contained no direct charge of the theft, . . . nor, indeed, does it appear to have been theft that [Frisbie] was even suspected of, but only a taking away of the plaintiff's property, which might amount to no more than a trespass."²⁸ However, the

²⁰ *See id.* at 88.

²¹ *See* Roger Roots, *The Originalist Case for the Fourth Amendment Exclusionary Rule*, 45 GONZ. L. REV. 1, 3–8 (2009/10).

²² *Frisbie v. Butler*, 1 Kirby 213 (Conn. Sup. Ct. 1787).

²³ *Id.* at 213–14 (reporter syllabus).

²⁴ *Id.* at 214 (reporter syllabus).

²⁵ *Id.* at 215.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

court's invocation of the idea of exclusion—or something very close to exclusion—was unmistakable.

The *Frisbie* opinion was published in the very first volume of *Kirby's Reports*, the first case reporter ever published in America.²⁹ Thus, the *Frisbie* case predated by many years the case that anti-exclusionists generally cite as representative of the “universal rule against exclusion” that supposedly reigned before 1886: the 1841 Massachusetts case of *Commonwealth v. Dana*.³⁰ And the supposed rejection of exclusion in the 1841 *Dana* case was itself dicta.³¹ Yet the legal academy constantly cites *Dana* as precedent condemning the exclusionary rule while ignoring *Frisbie* as precedent supporting the exclusionary rule. Why?

In 2009, I authored an article entitled, *The Originalist Case for the Fourth Amendment Exclusionary Rule*, which was published in the *Gonzaga Law Review*.³² The article cut what I believed was a deep new trail into the discourse of this topic. I pointed to the *Frisbie v. Butler* case and to other historical evidence refuting the view that the founding generation rejected the exclusionary rule. I argued that the exclusionary rule is supported by almost everything we know about the original public meanings of the Fourth Amendment's terminology, as well as by common practices in the American courts of the early nineteenth century.

In the years following the publication of the *Gonzaga Law Review* article, I have come upon even more support for my position than I was aware of in 2009. This article is intended to lay out and summarize some of these more recent findings.

At least five arguments common to anti-exclusion “originalist” discourse have been disproven by this research: (1) the claim that there was a “common law rule of nonexclusion” prior to the U.S. Supreme Court's decision in *Boyd v. United States* in 1886;³³ and thus (2) that *Boyd*, *Weeks*, and *Mapp* were radical departures from this settled common law; (3) the claim that Lord Camden's 1763 exclusionary-rule-implicating remarks in *Entick v. Carrington* were the lonely thoughts of Camden alone;³⁴ (4) the related claim that the Fourth Amendment's Framers were ignorant of Camden's remarks, or even the very

²⁹ See John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 Colum. L. Rev. 547, 573 (1993).

³⁰ *Commonwealth v. Dana*, 43 Mass. (2 Met.) 329 (1841).

³¹ Donald E. Wilkes, Jr., *A Critique of Two Arguments Against the Exclusionary Rule: The Historical Error and the Comparative Myth*, 32 WASH. & LEE L. REV. 881, 893–94 (1975) (referring to *Dana*'s exclusionary-rule discussion as “unadulterated dicta”).

³² *Roots*, *supra* note 21.

³³ See, e.g., DAVID FELLMAN, *THE DEFENDANT'S RIGHTS TODAY* 295 (1976).

³⁴ See, e.g., Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment “Search and Seizure” Doctrine*, 100 J. CRIM. L. & CRIMINOLOGY 933, 955 (2010) (“that particular notion seems to have been rather idiosyncratic to Camden.”).

idea of exclusion; and (5) the seemingly contradictory claim that the Framers affirmatively *rejected* the idea of Fourth Amendment exclusion.³⁵

I show in the discussion that follows (1) that the exclusionary principle was embedded in the most prominent cases and writings accompanying the discourse of searches and seizures prior to the enactment of the Fourth Amendment; (2) that writings in support of the exclusionary rule abounded in early America, including in the libraries and studies of prominent Founding Fathers; and (3) that, to the extent that any oppositional writings existed, they represented the arguments of pro-Tory voices which the Fourth Amendment's Framers would have opposed, if not despised.

I. THE ACTUAL COMMON LAW HISTORY OF THE FOURTH AMENDMENT

Much of what most legal historians think they know about the history of the Fourth Amendment exclusionary rule stems from a revisionist history promulgated and spread by the "Dean of Evidence Law," John Henry Wigmore. Wigmore wrote in his treatise on evidence in 1904 that "it has long been established that the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence. The illegality is by no means condoned; it is merely ignored."³⁶ Wigmore repeated these claims, and similar claims, in every edition of this treatise, and in numerous prominent articles and lectures of the early twentieth century.³⁷

Wigmore was a zealous advocate for his position, and displayed a hostile attitude toward the exclusionary rule that belied his scholarly persona.³⁸ He exaggerated and even misstated the holdings of many of the cases he cited.³⁹ Before long, courts began to copy and cite Wigmore's claims in their own decisions. In some jurisdictions, Wigmore's claims even helped alter the law of search-and-seizure remedies to disfavor the exclusionary rule.⁴⁰

As Donald E. Wilkes showed in an underappreciated article in 1975, Wigmore's depiction of common law history was quite inaccurate:

³⁵ See, e.g., *The Jury and the Search for Truth*, *supra* note 7, at 8 (statement of Akhil R. Amar) (calling the exclusionary rule "a perverse rule rejected by the Founders").

³⁶ JOHN HENRY WIGMORE, 3 A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW ON EVIDENCE § 2183 (1904).

³⁷ See *Roots*, *supra* note 21, at 55–61.

³⁸ See Wilkes, *supra* note 31, at 897 ("What could have motivated Wigmore to commit the egregious error of perpetuating a myth? The answer lies in Wigmore's hostile attitude toward the Exclusionary Rule . . .").

³⁹ See *Roots*, *supra* note 21, at 59–60 ("Wigmore misstated, deliberately it would seem, the holdings in some of the cases he cited.").

⁴⁰ *Id.* at 60–61 (showing that some states switched from an original exclusionary rule to an inclusionary rule "in the wake of Wigmore's initial writings"). "Significantly, some jurisdictions that switched from an exclusionary rule to an inclusionary rule even cited Wigmore's assertions among their *grounds* for doing so." *Id.* at 61 (citing cases in Maryland, Tennessee and Idaho).

Before 1740 there was not a single reported case in England dealing with the issue of whether to admit improperly obtained evidence. As late as 1800 there was but one reported case involving the issue [*Jordan v. Lewis*⁴¹]. Until the nineteenth century, therefore, the English courts practically never considered the admissibility of improperly obtained evidence, and consequently the absence of a common law rule of exclusion during this period cannot be interpreted to indicate that such evidence was admissible. The issue simply had not arisen frequently enough for the courts to resolve it one way or another.⁴²

In addition, as Professor Wilkes noted, the 1740 *Jordan* case did not squarely address the question. “*Jordan* . . . decided a rather narrow issue by holding that an improperly obtained copy of an indictment could be admitted into evidence in a malicious prosecution action.”⁴³ Yet the 1841 Massachusetts *Dana* opinion referenced the *Jordan* case as proof that the common law knew no exclusionary rule.⁴⁴ As Professor Wilkes explained:

[T]he [*Dana*] court’s reliance on the two cited English cases [*Jordan v. Lewis*, decided in 1740, and *Legatt v. Tollervey*,⁴⁵ decided in 1811] was misplaced. Neither of these cases had decided the broad question of whether a court could take notice of the manner in which a given piece of evidence had been obtained. As was shown above, the “common law rule” admitting improperly obtained evidence in a civil or criminal case did not become generally recognized in England until the last quarter of the nineteenth century. . . . Moreover, these cases did not furnish a direct precedent on the issue of whether the government can prosecute for crime by using evidence obtained in violation of constitutional protections. Although the court failed to mention it, *Jordan* and *Legatt* plainly involved wrongfully, rather than illegally, obtained evidence, and civil, rather than criminal cases.⁴⁶

The error in the Massachusetts *Dana* case was then repeated in prominent evidence treatises:

Prior to *Dana* the English treatises and compilations on evidence in general use in the United States contained no reference to the rule of admissibility which the *Dana* court thought had been promulgated in *Jordan* in 1740. Nor was such a rule mentioned in the first two editions of Greenleaf’s *Treatise on the Law of Evidence*. In the third edition of this work, however, published five years after *Dana* in 1846, a new section was inserted, which provided: . . . “there is no valid objection to [the admissibility of illegally seized evidence if it is] pertinent to the issue.” . . . In a footnote to the section, three cases were cited as authority: *Jordan*, *Legatt*, and *Dana*.⁴⁷

⁴¹ *Jordan v. Lewis*, (1740) 93 Eng. Rep. 1072 (K.B.).

⁴² Wilkes, *supra* note 31, at 886 (footnotes omitted).

⁴³ *Id.* at 894–95.

⁴⁴ *Commonwealth v. Dana*, 43 Mass. (2 Met.) 329, 337–38 (1841). *See* Wilkes, *supra* note 31, at 895 (“*Jordan* and *Legatt* plainly involved wrongfully, rather than illegally, obtained evidence, and civil, rather than criminal cases.”).

⁴⁵ *Legatt v. Tollervey*, (1811) 104 Eng. Rep. 617 (K.B.).

⁴⁶ Wilkes, *supra* note 31, at 894–95 (footnotes omitted).

⁴⁷ *Id.* at 895 (footnotes omitted).

I showed in *The Originalist Case for the Fourth Amendment Exclusionary Rule* that the first true “nonexclusion” case in America was probably *Commonwealth v. Welsh*, an 1872 Massachusetts decision.⁴⁸ The *Welsh* Court upheld the admission into evidence of seized liquor in a criminal trial with the remark that “[i]f the officer was guilty of any misconduct in his mode of serving the warrant, he may perhaps have rendered himself liable to an action, or indictment; but the fact that intoxicating liquors were found in the safe would not thereby be rendered incompetent as evidence.”⁴⁹ This language itself was not perfectly on point, as it sounds almost like the statement of a hypothetical—and if so, it was dicta. Nonetheless, I pronounced it to be the first case where any American court imposed a rule of nonexclusion.⁵⁰

The *Welsh* case was one of only two pre-*Boyd* cases I identified which plainly upheld the admission of illegally seized physical evidence (or at least officer testimony that such evidence was found) in criminal trials over objections based on constitutional search-and-seizure protections. The other case is *Commonwealth v. Henderson*, an 1885 decision also from Massachusetts.⁵¹ Thus, only two cases—both from a single state and rendered quite recently before *Boyd*—squarely stood for the “doctrine of nonexclusion” that so many self-styled originalists claim existed before *Boyd*. There were many precedents from other states that stood for the proposition that improprieties in the manner of search or seizure required the outright discharge of defendants from custody—the ultimate form of exclusion.⁵² In this light, *Boyd* hardly seems like the radical ruling it has been painted to be.

A. Lord Camden’s Exclusionary-Rule-Implicating Remarks

Those who argue that the Framers were ignorant or scornful of the exclusionary rule have long had difficulty explaining away the exclusionary statements in the *Entick v. Carrington* and *Wilkes v. Woods* opinions of the 1760s. Both cases are widely acknowledged as the English cases that most inspired the Framers of the Fourth Amendment.⁵³ Both opinions were authored by Lord

⁴⁸ See *Roots*, *supra* note 21, at 57.

⁴⁹ *Commonwealth v. Welsh*, 110 Mass. 359, 360 (1872).

⁵⁰ I would like to invite anyone knowing of any additional case or cases of nonexclusion to alert me to them by emailing me at rogerroots@msn.com.

⁵¹ *Commonwealth v. Henderson*, 5 N.E. 832, 833 (Mass. 1885) (upholding conviction and stating “[i]t is immaterial whether the proceedings of the officer in serving the search-warrant were regular and lawful or not”).

⁵² See *Roots*, *supra* note 21, at 20–31 (detailing the application of habeas corpus principles to unlawful seizures of persons during the nineteenth century).

⁵³ The Court in *Boyd* called the *Entick* decision “one of the landmarks of English liberty” and held that the Fourth Amendment was intended to incorporate its rulings. *Boyd v. United States*, 116 U.S. 616, 626–27 (1886). The U.S. Supreme Court has repeated this claim in more than a half dozen Fourth Amendment decisions. See, e.g., *Berger v. New York*, 398 U.S. 41, 49 (1967) (“Almost a century thereafter this Court took specific and lengthy notice

Camden, and both contain snippets of the principle that the seizure of illegally-seized papers or property is akin to the illegal coercion of incriminating statements. In *Entick v. Carrington* (1765):

[T]he law obligeth no man to accuse himself . . . and it should seem, that search for evidence is disallowed upon the same principle.⁵⁴

And in *Wilkes v. Wood* (1763), in a discussion of the seizure of physical evidence:

Nothing can be more unjust in itself, than that the proof of a man's guilt shall be extracted from his own bosom.⁵⁵

This connection is important because what later became the constitutional prohibition against compulsory self-incrimination in the *Fifth* Amendment contains an explicitly stated exclusionary rule: "nor shall [any person] be compelled in any criminal case to be a witness against himself."⁵⁶ The idea that judges should look to the Fifth Amendment for an applicable remedy for Fourth Amendment violations is hardly absurd. The two provisions are, after all, connected to each other and their relevant clauses are separated by only a few words.

In 1886, Justice Bradley referenced the "same principle" language of *Entick v. Carrington* in his application of the exclusionary principle in *Boyd v. United States*. Justice Bradley wrote that "[t]he principles laid down in [*Entick*] affect the very essence of constitutional liberty and security In this regard the Fourth and Fifth Amendments run almost into each other."⁵⁷ Justice Hugo Black, the crucial fifth vote in *Mapp v. Ohio*, provided a detailed discussion of the "interrelationship between the Fourth and Fifth Amendments" (which Jus-

of *Entick v. Carrington*, finding that its holding was undoubtedly familiar to and 'in the minds of those who framed the Fourth Amendment'" (alteration in original) (citation omitted) (quoting *Boyd*, 116 U.S. at 626–27)); *Stanford v. Texas*, 379 U.S. 476, 484 (1965) (describing *Entick* as a "wellspring of the rights now protected by the Fourth Amendment"); *Lopez v. United States*, 373 U.S. 427, 454 (1963) (Brennan, J., dissenting) ("In the celebrated case of *Entick v. Carrington*, Lord Camden laid down two distinct principles: that general search warrants are unlawful because of their uncertainty; and that searches for evidence are unlawful because they infringe the privilege against self-incrimination. Lord Camden's double focus was carried over into the structure of the Fourth Amendment." (footnote and citation omitted)); *Frank v. Maryland*, 359 U.S. 360, 363 (1959) ("In 1765, in England, what is properly called the great case of *Entick v. Carrington* announced the principle of English law which became part of the Bill of Rights" (citation omitted)); *United States v. Lefkowitz*, 285 U.S. 452, 466 (1932) ("Lord Camden declared that one's papers are his dearest property, showed that the law of England did not authorize a search of private papers to help forward conviction even in cases of most atrocious crime The teachings of that great case were cherished by our statesmen when the Constitution was adopted.").

⁵⁴ *Entick v. Carrington*, (1765) 19 How. St. Tr. 1029 (C.P.) 1073.

⁵⁵ *Wilkes v. Wood*, (1763) 98 Eng. Rep. 489 (C.P.) 490.

⁵⁶ U.S. CONST. amend. V.

⁵⁷ *Boyd*, 116 U.S. at 630.

tice Black called “the *Boyd* doctrine”) in his *Mapp* concurrence.⁵⁸ Justice Black wrote that he was “not persuaded that the Fourth Amendment, standing alone, would be enough to bar the introduction into evidence against an accused of papers and effects seized from him in violation of its commands.”⁵⁹ “Reflection on the problem, however,” led Justice Black “to conclude that when the Fourth Amendment’s ban against unreasonable searches and seizures is considered together with the Fifth Amendment’s ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule.”⁶⁰

Anti-exclusion writers in the legal academy have employed several arguments to evade the impact of Lord Camden’s invocation of the exclusionary principle on the American Fourth Amendment. Professor Amar has simply directed his readers to look away from *Entick*’s exclusionary discussion: Amar writes that “*Boyd* claimed roots in a landmark English case that followed *Wilkes v. Wood*, but [others] ha[ve] shown that the murky dictum on which *Boyd* relied was most probably off point.”⁶¹

Professor Thomas Y. Davies, an important scholar of the Fourth Amendment’s origins, has given voice to a new argument in recent years. In a footnote to an article Davies authored in 2005, he pronounced that *Boyd*’s invocation of the *Entick* “same principle” language was a “prochronistic error.”⁶² According to Davies, “Justice Bradley put the interpretation of both the Fourth and Fifth Amendments off to a false start in *Boyd v. United States* [in 1886] when [Bradley] assumed that the American [Constitutional] Framers had been familiar with a passage attributed to Lord Camden in a 1765 English case.”⁶³ Davies doubts “that the Framers of the Fourth Amendment would have been familiar with the passage upon which Bradley based *Boyd*.”⁶⁴ Moreover, Davies has written, the “idea involved—that a search of papers amounts to a compelled confession—*did not appear in other sources*.”⁶⁵

In a half dozen law review articles, Davies has pointed out that the first set of law books that published the “same principle” language in *Entick v. Carrington* was not published until 1781. Davies contends that this eleven-volume set of law books, Francis Hargrave’s 1781 *A Complete Collection of State-trials and Proceedings for High Treason and Other Crimes and Misdemeanours*

⁵⁸ *Mapp v. Ohio*, 367 U.S. 643, 662 (1961) (Black, J., concurring).

⁵⁹ *Id.* at 661.

⁶⁰ *Id.* at 662.

⁶¹ AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 23 (1997) (referencing Telford Taylor’s *Two Studies in Constitutional Interpretation: Search, Seizure, and Surveillance* (1969)).

⁶² Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105, 116 n.34 (2005).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* (emphasis added).

(Fourth Edition) was both expensive and of little practical use to lawyers in early post-Revolutionary America.⁶⁶ For these reasons, Davies argues that there were few sets of Hargrave's *State Trials* in circulation in the America of the late 1780s, and that the Framers who drafted, considered, and debated the Fourth Amendment in 1791 would have had few opportunities to read Camden's "same principle" paragraph in *Entick v. Carrington* and to draw the connection between silence rights and search and seizure protections in their own minds.

Here was a new "originalist" argument against the exclusionary rule. Davies was not so much arguing—as Amar and maybe Telford Taylor had⁶⁷—that the Framers disregarded or dismissed the *Entick* language. Davies was arguing that the Framers never even read the *Entick* opinion before they enacted the Fourth Amendment, and thus, *Boyd*'s pronouncements were erroneous as a matter of fact.⁶⁸ Interestingly, Davies has repeated these assertions in at least five published law review articles.⁶⁹

⁶⁶ Davies asserts that Framing-Era lawyers may not have had much need for Hargrave's *Complete Collection of State Trials* in their daily practices. The Complete Collection was an expensive set of books, and "because it is unclear that reports of treason trials or attainder proceedings in Parliament would have been of much practical value for American lawyers or judges, especially after 1775 [when the Revolutionary War began], it seems doubtful that many Americans obtained these reports prior to the framing." Thomas Y. Davies, *Revisiting the Fictional Originalism in Crawford's "Cross-Examination Rule": A Reply to Mr. Kry*, 72 BROOK. L. REV. 557, 598 (2007).

⁶⁷ Amar has relied heavily on Telford Taylor's well-written *Two Studies in Constitutional Interpretation* (1969) for its text-centric analysis of the Fourth Amendment and its common law antecedents. Taylor, a professor of law at Columbia University, stated that the *Boyd* Court "embraced that part of Lord Camden's opinion . . . which criticized searches for evidence." TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 60 (1969). "Undeniably, the fourth amendment was intended to prohibit the abuses denounced by Lord Camden . . . but it is going much further to say that it accepted every point and argument in his opinion." *Id.* at 60–61. Taylor suggested that Camden's statements "must be read in the context" of a mass of papers seized pursuant to a general warrant. *Id.* at 61.

⁶⁸ Davies goes further and argues that the block of ideas that ultimately formed the Fourth Amendment were conjoined not in 1791 but as early as 1780 when John Adams penned the Massachusetts Constitution—before the publication of Camden's exclusionary notions in the Hargraves edition of *Entick v. Carrington*. See Thomas Y. Davies, *Can You Handle the Truth? The Framers Preserved Common-Law Criminal Arrest and Search Rules in "Due Process of Law"—"Fourth Amendment Reasonableness" is Only a Modern, Destructive, Judicial Myth*, 43 TEX. TECH L. REV. 51, 118 (2010) (claiming that because Lord Camden's detailed opinion in *Entick v. Carrington* was not published until 1781, "Americans could not have been familiar with the assertions that Bradley quoted when John Adams introduced the phrase 'unreasonable searches and seizures' in the 1780 Massachusetts provision"). This "set in stone in 1780" argument emphasizes certain commonalities of phrasing in both the Fourth Amendment and Adams' Massachusetts Constitution. Adams' contributions to the DNA of the Fourth Amendment are indeed quite significant. But the Amendment's lineage can also be traced to other contributors, such as Richard Henry Lee. Just ten days after the famed Philadelphia Convention adjourned in 1788, Lee "sought to wreck the ratification process by moving that Congress adopt a bill of rights." LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 173 (1999). Lee proposed a bill of rights that contained a strongly-worded search

Davies's footnotes prompted me to do my own inquiry into the matter beginning in 2008. I began by consulting online library catalogs e.g., WorldCat⁷⁰ and the English Short Title Catalogue⁷¹ (). I also consulted rare book discussion and auction websites. Using this combination of data sources, I identified 121 sets of *Hargrave's State Trials* currently in the United States. There are undoubtedly more. I then inquired of various librarians and archivists around the country as to the known sources of their sets of *Hargrave's State Trials*.

Before long I found myself engaged in a detective story that would last several years and would take me to the four corners of the United States. In the process, I visited many of America's grandest and most beautiful libraries, including the Library of Congress, the Huntington Library in California, the Peabody library in Baltimore, the Firestone Library at Princeton, the Beinecke and Sterling Libraries at Yale, and the Houghton and Widener Libraries at Harvard.

Library science has a word for what I was researching: "provenance."⁷² I looked for any marks or insignia on the books, including library plates, hand-

and seizure clause: "the Citizens shall not be exposed to unreasonable searches, seizures of their papers, houses, persons, or property." *Id.* Lee's 1788 clause included phraseology that was later included in the Fourth Amendment, but not in Adams' clause: the term "effects." *See id.* at 173–74. Moreover, there were plenty of exclusionary-rule-advocating texts circulating around John Adams while he was drafting the Massachusetts Constitution in 1780. Furthermore there is every reason to believe Adams would have agreed with these texts (even if Adams hadn't read the "long version" of *Entick v. Carrington* in 1780). *See infra* note 69.

⁶⁹ Davies has made this argument in at least five published articles. *See* Davies, *supra* note 68, at 117–18 ("Bradley's originalist claim was unsound because the passage he quoted had not appeared in the initial report of the 1765 case which was published in 1770 . . . but appeared only in a later expanded case report that was not published until 1781" and "it is unlikely that the later report would have been imported in significant numbers during the remainder of the framing era."); Davies, *supra* note 34, at 955, 956 n.92 ("In a flourish of fictional originalism, Justice Bradley's majority opinion cited [*Entick*] . . . as authority" "However, it does not appear that Hargrave's edition of *State Trials* was likely to have been imported in sufficient numbers by 1789 for the later version of *Entick* to have come to the Framers' attention"); Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of "Due Process of Law"*, 77 MISS. L.J. 1, 202 (2007) (calling Justice Bradley's reference to Lord Camden "an early instance of fictional originalism" and stating "[t]he case report of *Entick* that [Justice Bradley] treated as evidence of the Framers' understanding was actually published too late to have significantly informed the Framers' understanding of the phrase 'unreasonable searches and seizures.'"); Davies, *supra* notes 62–63 and accompanying text; Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 727 (1999) ("Justice Bradley erroneously invoked Lord Camden's statements from the later version of *Entick*, the version of which the Framers were probably unaware, as though they demonstrated that the Framers would have equated a search or seizure of papers for use as evidence with a violation of the right against compelled self-accusation.").

⁷⁰ OCLC WORLDCAT, <http://www.worldcat.org/> (last visited Dec. 9, 2014).

⁷¹ ENGLISH SHORT-TITLE CATALOG (1473–1800), <http://estc.ocr.edu/> (last visited Dec. 9, 2014).

⁷² I am thankful to Mark Ramseyer, editor of the *Journal of Legal Analysis*, who tipped me off to a published book by Owen Gingerich entitled *The Book Nobody Read: Chasing the*

written names, dates, signatures, and especially underscoring or notes in the margins adjacent or near the *Entick* exclusionary-rule paragraph. “Pay dirt” would be measured by finding any original set of *Hargrave’s* that could be traced to the library of a Fourth Amendment Framers. Such a find would prove a claim of “original intent” originalism (I argue that the “original public meaning” originalist case for the exclusionary rule is already well established).⁷³

I personally visited and examined seventy-three sets of *Hargrave’s State Trials*. I found that many sets had unfortunately been rebound; thus, any marks or writings on their original bindings or cover pages were lost. Conditions of these books vary greatly. Some sets, like sets at the University of Wisconsin, Madison; the University of Chicago, UCLA; and the Toledo, Ohio Public Library (of all places) were in almost pristine condition. Others were in near tatters.

My findings? The exact dates of arrival in America for most of the 121 sets or partial sets of *Hargrave’s State Trials* proved elusive. I did not hit “pay dirt.” However, I found enough evidence to support the 1886 statements of Justice Bradley in *Boyd v. United States* that the Framers of the Fourth Amendment must have been familiar with the *Entick v. Carrington* “same principle” discussion. Indeed, at least five sets of the law books that contain this language were traced to noteworthy attorneys of the Framing period. Specifically, a set at Yale Law School’s rare book library seems to have descended from the library of Matthew Griswold, the Constitution’s most prominent advocate in Connecticut.⁷⁴ A set at Columbia University’s Treasure Room belonged to New York

Revolutions of Nicolaus Copernicus (2004). Gingerich’s book detailed a research project methodologically similar to mine, involving *De revolutionibus* (On the Revolutions of the Heavenly Spheres) by Nicolaus Copernicus. Gingerich went on a quest to locate every extant copy of Copernicus’ great work, conclusively demonstrating that the book had wide impact on early astronomical thought throughout Europe and refuting more recent claims that the 1543 work had gone mostly unread.

⁷³ Over time, most originalist scholars have increasingly oriented their approach toward original public meaning. Thus, as Gregory Maggs writes, “This meaning is not what Hamilton, Madison, or the other Framers subjectively intended, not what the numerous participants at the ratification debates actually understood, but instead what a reasonable person of the era would have thought.” Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. REV. 801, 806 (2007).

⁷⁴ Griswold was a bona fide Founding Father, who in each election from 1769 to 1784, was elected Deputy Governor of Connecticut. In that position, he also served as Chief Justice of the Superior Court. As president of the Convention ratifying Connecticut, Griswold “had the honor of informing Congress of Connecticut’s ratification of the new” Constitution. *Matthew Griswold: Governor of Connecticut, (1784–1786)*, CONN. ST. LIBR., <http://www.cslib.org/gov/griswoldm.htm> (last visited Oct. 6, 2014). The Yale Law School set was donated by Mr. Wolcott G. Lane, an alumnus of Yale. In a letter accompanying the donation, Lane stated:

Inasmuch as some of the books go back 250 years, it might be of interest to you to know their history. My father, William Griswold Lane, Yale 1843, was a practicing lawyer in Sandusky, Ohio, and a Judge in the Court of Common Pleas, and my grandfather, Judge Ebenezer Lane,

Chancellor James Kent, a champion of the Constitution in the New York ratification proceedings.⁷⁵ The Kent set at Columbia even bares an ink line along one border of the *Entick* exclusion discussion, indicating that someone, perhaps Kent himself, took notice of the statements.

A set at Virginia's Hampden-Sydney College apparently belonged to a member of the Cabell family, a powerful Revolutionary War family often associated with Jeffersonian politics in Virginia and with the founding of Jefferson's University of Virginia.

Two sets at the University of Virginia bear signatures of noteworthy names: Josiah Quincy and John Purviance. Unfortunately, both names were shared by several members of their respective families, and my ability to decipher which Josiah Quincy or John Purviance signed the UVA sets was admittedly speculative.⁷⁶ The name Josiah Quincy designates a half-dozen members of a large influential line of Boston judges and lawyers that was intertwined with the John Adams lineage.⁷⁷ But the Josiah most likely responsible for the signature on the set now at the University of Virginia was Josiah Quincy III (1772–1864), a U.S. Congressman (1804–1812), mayor of Boston, president of Harvard University, and the biographer of his famous father.⁷⁸ The John Purvi-

Harvard 1812, was one of the early settlers in Ohio, having gone there in 1818, and was Chief Justice of the Supreme Court of Ohio, 1835–1845. His father-in-law was Roger Griswold, Governor of Connecticut, 1810–1812, and his grandfather Matthew Griswold was Governor of Connecticut, 1784–1786, and Deputy Governor during the Revolution. Many of the books bear the name of Matthew Griswold and have come down from him through these various persons.

Letter from Wolcott G. Lane to Yale Law School (July 21, 1930) (on file at Yale Law School Rare Book Room).

⁷⁵ Kent was a protégé of John Jay and a friend of Alexander Hamilton. See Charles J. Reid, Jr., *Judicial Precedent in the Late Eighteenth and Early Nineteenth Centuries: A Commentary on Chancellor Kent's Commentaries*, 5 AVE MARIA L. REV. 47, 47 (2007) ("Kent was among the founders of American law; he taught at Columbia University in the 1790s and returned there following his retirement from the bench; he also served briefly in the New York legislature, where he worked closely with John Jay."). Chicago-Kent Law School is named for Kent. *Chancellor James Kent*, IIT CHI.-KENT C. L., <http://www.kentlaw.iit.edu/the-c-k-experience/history/chancellor-james-kent> (last visited Dec. 10, 2014). Kent's *Commentaries* sold widely throughout the country and made him one of New York's wealthiest citizens. See Langbein, *supra* note 29, at 566. Although a young man in 1787, Kent was the Constitution's man in Poughkeepsie, where New Yorkers met in convention in June and July 1788. In his own words, Kent "laid aside all other business and avocations, and attended the Convention as a spectator . . . during the whole six weeks of its sessions." *Id.* at 557.

⁷⁶ I am admittedly not an expert in the analysis of the relevant signatures and did not endeavor to carefully analyze them; perhaps a competent signature analysis could verify which Josiah Quincy or John Purviance signed the volumes.

⁷⁷ The Boston suburb of Quincy, where Adams was born and resided, was named after Colonel John Quincy, maternal grandfather of Abigail Adams. The name of John Adams' son John Quincy Adams also reflects this lineage. DANIEL MUNRO WILSON, *THREE HUNDRED YEARS OF QUINCY* 58–59 (1926).

⁷⁸ Josiah Quincy Jr. was a close associate and colleague of John Adams, a major leader of Revolutionary forces in Boston. But Quincy Jr. was infected with tuberculosis from an early age and died aboard a ship returning to the American colonies immediately prior to the

ance who owned the other set of *Hargrave's* at UVA was probably John Henry Purviance, a "prominent member of the Maryland bar and friend of President James Monroe."⁷⁹ Or the set may have belonged to Purviance's father John Purviance Sr., who, according to Carlton F. Larson, was hired by the Continental Congress to be a manager of the United States Lottery in November 1776, and who served on a committee to arrest "such persons as are deemed inimical to the cause of American Liberty."⁸⁰ A third John Purviance (also possibly related to the first two) was a justice of the peace in North Carolina, a colonel in the American Revolution, and then a minister in the Tennessee frontier after the War.⁸¹

It was frequently the case that volumes of *Hargrave's* bore quill signatures that I was unable to decipher. For example, one (of two) sets at Cornell University bears a stamp stating, "New Hampshire State Library" and a signature on the third title page of "W. Bigg" or "Bogg" or "Brigg" or "Bugg" "1796;" a set at the Iowa State Library in that State's Capitol building bears the signature "Dudley Humfey" or "Housey" or "Huesy" or "Humfrey" on one volume and another signature of "Walter Humfrey [or Humfey] Griffith"; a set at the University of Georgia Law Library bears the quill signature of "John Keating Lunus" or "Linus" or "Lurch" or "Luther."

Some sets bear markings or insignia that eliminate them as having influenced the American Fourth Amendment. For example, the set at Arizona State University bears the bookplate of Sir William Curtis, the Lord Mayor of London in the 1790s. The set at the rare book library at Smith College in Massachusetts seems to have been purchased from an English book dealer in 1934.

Perhaps the most important discovery of all was that *Hargrave's State Trials* just barely qualifies as a set of rare books. There are libraries that place their sets of *Hargrave's* on the general stacks with library card pockets glued to them so that students can check the books out and take them home. Villanova's Law Library, for example, has a set in very good condition sitting on its general stacks ready for lending out. The same goes for Princeton University, which keeps one of its two sets on the general stacks with a library checkout card in its inside cover.

The familiarity of Framing-Era lawyers with the *Hargrave's* set can also be seen by looking at the earliest dates in which cases from *Hargrave's* were cited or referenced in American legal opinions. Members of the U.S. Supreme Court

events of April 19, 1775. JOSIAH QUINCY, MEMOIR OF THE LIFE OF JOSIAH QUINCY, JUNIOR, OF MASSACHUSETTS BAY: 1744–1775, at 25, 287 (Eliza Susan Quincy ed., 3d ed. 1875).

⁷⁹ Jeffrey Orenstein, *Joseph Almeida: Portrait of a Privateer, Pirate & Plaintiff, Part II*, 12 GREEN BAG 35, 43 (2008).

⁸⁰ Carlton F.W. Larson, *The Revolutionary American Jury: A Case Study of the 1778–1779 Philadelphia Treason Trials*, 61 SMU L. REV. 1441, 1461 (2008) (quoting Minutes of the Supreme Executive Council (Sept. 1, 1777), in 11 COLONIAL RECS. PA. 286).

⁸¹ DAVID PURVIANCE, THE BIOGRAPHY OF ELDER DAVID PURVIANCE 9–11 (Levi Purviance ed., 1848).

referenced cases from *Hargrave's* at least three times before 1800.⁸² Thus, the Supreme Court had access to *Hargrave's* from its inception in New York City (where the Bill of Rights was introduced and enacted).⁸³ Goebel's study of the *Law Practice of Alexander Hamilton* also showed that "Hamilton appears to have used both the Emlyn and the Hargrave editions" of *State Trials* based on his occasional references to cases in the sets in his law practice.⁸⁴

This inquiry into Davies's revisionist theory regarding the Framers' knowledge of Lord Camden's *Entick* opinion could stop here. The evidence—though not conclusive—tends to refute Davies's contentions and to support the Supreme Court's 1886 statement in *Boyd v. United States* that "it may be confidently asserted that [*Entick's*] propositions were in the minds of those who framed the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures."⁸⁵

But Davies has gone further, and so does the evidence refuting some of his assertions.⁸⁶ Davies claims that the very idea behind *Entick's* exclusionary principle—"that a search of papers amounts to a compelled confession—*did not appear in other sources.*"⁸⁷ Davies even states that the idea of excluding illegally-seized evidence was such a "novel claim" at the time of the Fourth

⁸² A federal circuit court ruling by U.S. Supreme Court Justice William Paterson in 1792 cited "[t]he examination of *Sterne and Boroski*," "Vaughan's Case," "Harrison's Case," and "Lay's Case." *United States v. Maunier*, 26 F. Cas. 1210, 1211 (C.C.D.N.C. 1792) (No. 15,746) (citing 3 State Tr. 470, 5 State Tr. 229, 7 State Tr. 118, and 8 State Tr. 474, 8 Mod. 89). *Maunier's* heavy reliance on cases published in *State Trials*, indicates that Justice Paterson—a true Framers who had authored sections of the Constitution—had ready access and familiarity with the set. Another Constitutional Framers, Luther Martin of North Carolina, was the "Mr. Martin" who argued for the prisoner in the *Maunier* case. Shortly later, in the famed 1793 case of *Chisholm v. Georgia*—the decision that generated such a backlash that the Eleventh Amendment was enacted to overrule it—the Supreme Court referenced "the banker's case in the 11th volume of the State trials." *Chisholm v. Georgia*, 2 U.S. 419, 425 (1793), *superseded by constitutional amendment*, U.S. CONST. amend. XI, *as recognized in Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984). The opinion was authored by Justice James Wilson, an influential Framers who had contributed a number of textual changes to the Constitution and the Bill of Rights.

⁸³ The Supreme Court was first assembled in February 1790, almost two years before the Bill of Rights was ratified. The Court's initial business was conducted in the Merchants Exchange Building in New York City, which was then the nation's capital. The Court spent its first session organizing itself and determining its own powers. See Maeva Marcus, *The Earliest Years (1790–1801): Laying Foundations*, in *THE UNITED STATES SUPREME COURT: THE PURSUIT OF JUSTICE* 26, 31 (Christopher Tomlins ed., 2005). The first Supreme Court justices heard and decided their first case in 1791. *West v. Barnes*, 2 U.S. 401 (1791); see also Marcus, *supra*, at 37.

⁸⁴ 1 *THE LAW PRACTICE OF ALEXANDER HAMILTON* 865 (Julius Goebel Jr. ed., 1964).

⁸⁵ *Boyd v. United States*, 116 U.S. 616, 626–27 (1886).

⁸⁶ For the record, I regard Davies as a Brilliant scholar and a genuine treasure among American legal scholars, his errors regarding these matters notwithstanding.

⁸⁷ Davies, *supra* note 62, at 116 n.34 (emphasis added).

Amendment's ratification that it was enunciated by only one man—Lord Camden.⁸⁸ Davies does so while acknowledging that certain other pre-Framing texts—in addition to Camden's *Entick* opinion—also mention the exclusionary principle.⁸⁹ For example, Davies concedes that Camden's widely-read opinion in the *Wilkes v. Wood* (1763) case also contains a snippet of the exclusionary principle: "Nothing can be more unjust in itself, than that the proof of a man's guilt shall be extracted from his own bosom," in reference to the seizure of Wilkes's papers.⁹⁰

B. *Father of Candor's Influence on the Bill of Rights*

Davies mentions in a footnote, but gives very short shrift to, a pamphlet that also discussed the search-and-seizure exclusionary rule: Father of Candor's *An Enquiry into the Doctrine Lately Propagated Concerning Libels, Warrants, and the Seizure of Papers* (later republished as *A Letter Concerning Libels, Warrants, the Seizure of Papers, and Sureties for the Peace or Behaviour; with a View to Some Late Proceedings*). The Father of Candor ("FOC") pamphlet

⁸⁸ Davies, *Recovering the Original Fourth Amendment*, *supra* note 69, at 726 n.511 ("Moreover, Camden's treatment in *Entick* of a search of papers as a form of self-incrimination appears to have been novel claim.").

⁸⁹ *See id.* at 727 n.513. Davies summarized:

The analogy between a search of papers and compelled self-incrimination does not appear to have been developed in common law sources . . . Likewise, I have located only two pre-*Entick* claims that a search of papers constituted compelled self-incrimination: one appears in a cryptic report of Pratt's (Camden's) remarks during the 1763 trial in *Wilkes v. Wood* ("Nothing can be more unjust in itself, than that the proof of a man's guilt shall be extracted from his own bosom."); the other appears in a single passage in the 1764 pamphlet FATHER OF CANDOR (Father of Candor may have been Pratt.)

Id. (citations omitted). *See also* Davies, *supra* note 34, at 955 ("[T]hat particular notion seems to have been rather idiosyncratic to Camden . . .").

⁹⁰ Davies, *Recovering the Original Fourth Amendment*, *supra* note 69, at 727 n.513. Even this snippet of discussion in *Wilkes v. Wood* must have been read by hundreds of prominent Americans prior to the creation of the Fourth Amendment. Like the exclusionary language in *Entick v. Carrington*, the *Wilkes v. Wood* opinion was published in *Hargrave's State Trials*. 11 FRANCIS HARGRAVE, A COMPLETE COLLECTION OF STATE-TRIALS AND PROCEEDINGS FOR HIGH-TREASON AND OTHER CRIMES AND MISDEMEANOURS 302 (4th ed. 1781). It was also published in a two-volume set of case reports published in 1770 entitled *Reports of Cases Argued and Adjudged in the King's Courts at Westminster* (known as Wilson's Reports). Research of the prevalence of Wilson's Reports in modern American libraries using the WorldCat database reveals at least 18 original copies which are presently on the bookshelves of American rare book libraries. The librarian website and discussion group "LibraryThing," which reconstructs "Legacy Libraries" of certain noteworthy historical figures, identifies five influential Founders and Framers, including Robert Treat Paine, Alexander Hamilton, John Worthington, Francis Dana, and Thomas Jefferson, who owned copies of the two-volume *Wilson's set. Reports of Cases Argued and Adjudged in the King's Courts at Westminster in Two Parts by George Wilson*, LIBRARYTHING, <https://www.librarything.com/work/7222399> (last visited Dec. 8, 2014).

drew the connection between the right to remain silent and the freedom from unlawful search and seizure in explicit detail:

The laws of England, are so tender to every man accused, even of capital crimes, that they do not permit him to be put to torture to extort a confession, nor oblige him to answer a question that will tend to accuse himself. How then can it be supposed, that . . . any common fellows under a general warrant . . . [may] seize and carry off all his papers; and then at his trial produce these papers . . . in evidence against himself . . . This would be making a man give evidence against and accuse himself, with a vengeance. And this is to be endured, because the prosecutor wants other sufficient proof, and might be traduced for acting groundlessly, if he could not get it; and because he does it truly for the sake of *collecting evidence*.⁹¹

Davies shrugs off the FOC pamphlet by suggesting that Father of Candor was just a pseudonym for Lord Camden. While this is a possibility, most historians suspect other figures of the period to be the author of the FOC pamphlets.⁹² The mystery of Father of Candor's identity endures despite repeated inquiries into the question by various men of letters. At Cornell University, I came across an original copy of a sixth edition of the FOC pamphlet (published in 1764) that was heavily underscored, corrected, and annotated in quill, apparently by the British writer T. Holt White in an attempt by White to identify FOC around the 1790s.⁹³

The FOC pamphlet went through seven printings by 1770 and was almost certainly the most popular tract on the topic of search-and-seizure law in Eng-

⁹¹ FATHER OF CANDOR, A LETTER CONCERNING LIBELS, WARRANTS, THE SEIZURE OF PAPERS, AND SURETIES FOR THE PEACE OR BEHAVIOUR; WITH A VIEW TO SOME LATE PROCEEDINGS, AND THE DEFENCE OF THEM BY THE MAJORITY 55–56 (5th ed. 1765).

⁹² Most observers of the period suspected Father of Candor was a retired British lawyer. John Almon, the printer who published the pamphlets, introduced them by writing that Father of Candor was “a learned and respectable Master in Chancery.” C.W. Previt -Orton, *Polital Literature (1755–1775)*, in 10 THE CAMBRIDGE HISTORY OF ENGLISH LITERATURE 400 (A.W. Ward & A.R. Waller eds., 1913). Others suspected Lord Temple, or Sir Philip Francis, or Lord Ashburton, or John Wilkes or perhaps John Almon himself. The editor of Temple's papers in 1853 concluded after examining FOC's writing style that FOC was Lord Temple. 3 THE GRENVILLE PAPERS: BEING THE CORRESPONDENCE OF RICHARD GRENVILLE EARL TEMPLE, K.G., AND THE RIGHT HON: GEORGE GRENVILLE, THEIR FRIENDS AND CONTEMPORARIES clviii (William James Smith ed., 1853). However, Previt -Orton concluded that samples of Father of Candor's handwriting were consistent with the handwriting of Sir Philip Francis, a libertarian pamphleteer and Pitt loyalist who was also widely suspected of being “Junius.” Previt -Orton, *supra*. Previt -Orton also concludes that the same author later wrote certain tracts which were published in 1770 “anonymously and under the name Phileleutherus Anglicanus.” *Id.* at 400 n.1. “[T]he resemblance in manner to the Candor pamphlets is made obvious by extracts.” *Id.* (citing THE GRENVILLE PAPERS, *supra*, at clxxvi).

⁹³ The bound volume bears the quill identifier on its first pages: “T. Holt White 1799.” It apparently made its way to Cornell by way of the collector Benno Loewy.

land and the American colonies before the American Revolution.⁹⁴ Thousands of FOC pamphlets must have poured from Almon's presses into markets on both sides of the Atlantic, and it seems probable that many hundreds of these pamphlets have been cast into fireplaces and ashcans over the generations. Yet, fully seven copies of the original pamphlets survive in 2014 in the New York Public Library alone. Yale University owns ten original copies.⁹⁵ Harvard University possesses another six original copies. The U.S. Library of Congress has another seven. The University of Texas holds another five. There are generally at least two of these original pamphlets offered for sale at any given time by American booksellers on such websites as AbeBooks.com.⁹⁶

In all, I have located 177 copies of FOC pamphlets in their various editions that are currently in the United States, and I have personally examined more than 100. One original copy is in a bound volume of pamphlets (which also includes Candor's *Letter to the Public Advertiser*) in the George Washington papers at Harvard's Houghton Library. The volume was apparently a gift to General Washington from the British publisher of the pamphlets, John Almon, as the inside cover bears Almon's signature along with the inscription "1777." Thus, this bound book of pamphlets must have been shipped across the Atlantic during the midst of the Revolutionary War, a gift from a brave admirer in London to the highest commander of the rebellious forces in America.

There are two editions of FOC pamphlets in the Benjamin Franklin Collection at Yale University's Sterling Memorial Library. There are three FOC pamphlets (one of the second edition, and two original copies of Father of Candor's *Postscript* pamphlet) at the New York Historical Society which were owned by Rufus King, a constitutional Framer who was not only a delegate (from Massachusetts) at the 1787 Constitutional Convention in Philadelphia, but was also a member of the "Committee of Style" that had a direct role in the Constitution's authorship and a member of the first U.S. Senate, which adopted and ratified

⁹⁴ See 2 PAUL FINKELMAN, *ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES 1749* (2006) (calling the Father of Candor letter "one of the more remarkable documents in English political and legal thought."). "The book went through several editions," Finkelman continued, "was read on both sides of the Atlantic," and was "well-known to patriot leaders by the time the Continental Congress met in Philadelphia." *Id.* See also LEVY, *supra* note 68, at 163 (saying Americans of the founding period knew well the arguments in the Father of Candor pamphlet); THE GRENVILLE PAPERS, *supra* note 92 ("The LETTER CONCERNING LIBELS, WARRANTS, &c., was one of the most important of the political pamphlets which were written in that very pamphlet-writing age . . .").

⁹⁵ The author also located one copy of Father of Candor's pamphlet in the University's Beinecke Library which was bound with Candor's Letter and other pamphlets, which was cataloged as a copy of Candor's Letter but not found in the catalog under FOC listings (Call # 764 C3).

⁹⁶ See *Father of Candor, First Edition*, ABEBOOKS.COM, <http://www.abebooks.com/servlet/SearchResults?an=father+of+candor&fe=on> (last visited Dec. 8, 2014) (As of December 2014, Garrett Scott, a bookseller from Ann Arbor, Mich., is offering a copy for \$250 and Kennys Bookshop of Galway, Ir. is offering a copy for €305).

the Fourth Amendment.⁹⁷ In fact, King “helped organize the first formal call for a bill of rights.”⁹⁸

At the New York Public Library, just blocks away from the Historical Society, can be found a bound collection of FOC pamphlets bearing the library plate of “Robert R. Livingston, Esq., of Clermont.” This was the same Livingston who was selected along with Thomas Jefferson, John Adams, Benjamin Franklin, and Roger Sherman to draft the Declaration of Independence in 1776. Livingston was also the first Chancellor of New York, the highest-ranking judge in the State, and was instrumental in the writing of the New York Constitution. It was Livingston who swore in George Washington as the first President, in New York City, which was the capitol of the United States at the time of Washington’s inauguration. (There were no federal court judges in existence at that time, so Chancellor Livingston was something of a substitute for the Chief Justice of the United States.)

A bound collection of FOC pamphlets now at the Library of Congress bears the signature of Samuel Chase, an important Framers who authored Maryland’s 1776 Constitution and was a delegate to the Continental Congress and a member of the United States Supreme Court beginning in 1796. Another bound collection of the Candor and Father of Candor pamphlets now held by the U.S. Library of Congress bears a signature that appears to be that of William Plumer (1759–1850), a lawyer and major figure in early New Hampshire politics who eventually became a U.S. Senator.

The FOC pamphlets circulated in such numbers that every learned person who took any interest in search-and-seizure law must have been familiar with them. The ubiquity of the FOC pamphlets, with their proclamation that the introduction of unlawfully seized physical evidence in a criminal trial “would be making a man give evidence against and accuse himself, with a vengeance,” demonstrates that the exclusionary principle was embedded in the DNA of the Fourth Amendment from the Amendment’s onset.

Like *Hargrave’s State Trials*, the FOC pamphlets are today so common that some of the American libraries that possess them do not even consider them rare books. Several university libraries (including libraries with rare book departments) shelve original FOC pamphlets from the 1760s on their general stacks so that students or even members of the public may check them out and take them home.⁹⁹

⁹⁷ *America’s Founding Fathers*, NAT’L ARCHIVES, http://www.archives.gov/exhibits/charters/constitution_founding_fathers_massachusetts.html (last visited Oct. 6, 2014).

⁹⁸ ROBERT K. WRIGHT, JR. & MORRIS J. MACGREGOR, JR., U.S. ARMY, SOLDIER-STATESMEN OF THE CONSTITUTION 99 (1987), available at http://www.history.army.mil/html/books/071/71-25/cmhPub_71-25.pdf.

⁹⁹ For example, Yale, University of Georgia Law School, and University of Michigan display copies on their stacks.

C. *Other Pre-Framing Texts That Speak of the Exclusionary Principle*

During the course of this research, a fourth, a fifth, a sixth, and a seventh Founding-Era source for the proposition that search and seizure violations require exclusion of evidence were discovered. Generally, these writings were discovered by accident, and I assume there must be others.¹⁰⁰

1. *Candor's Letter to the Public Advertiser*

The Father of Candor pamphlet discussed above was something of a sequel to an earlier pamphlet, Candor's *A letter from Candor, to the Public Advertiser: Containing a Series of Constitutional Remarks on Some Late Interesting Trials, and Other Points, of the Most Essential Consequence to Civil Liberty*. The letter was published in John Almon's newspaper *The Public Advertiser* in 1764. Just as with the FOC pamphlets, the authorship of the Candor pamphlets is an enduring mystery, and many have suggested that Candor and Father of Candor were one and the same.¹⁰¹

The first edition of Candor's *Letter* states that using illegally seized papers is "the most odious and infamous act, of the worst sort of inquisitions, by the worst sort of men, in the most enslaved countries."¹⁰² The second edition of Candor's *Letter* contains the statement that seizing papers is "the most odious and infamous act, of the worst sort of inquisitions, by the worst sort of men, in the most enslaved countries: It is, in short, putting a man to the torture, and forcing him to give evidence against himself."¹⁰³ Thus, the author rewrote this section between the publication of the first edition and the second edition (both in 1764) to include a specific reference to "torture." Of course, the reference to "the worst sort of inquisitions" in both editions can be construed as a reference to torture; but the second edition's description is stronger on this point.

Original copies of Candor's *Letter to the Public Advertiser* can be found today in the papers of George Washington at Harvard University, the papers of Landon Carter (a prominent politician, judge, and landowner in pre-Revolutionary Virginia) at the University of Virginia, and the bound collection of Samuel Chase's pamphlets at the Library of Congress (which also includes the FOC pamphlet discussed above). There is also a copy at Brown University's John Carter Brown Library that may have originally been owned by John Brown himself. Brown was not only instrumental in the founding of Brown

¹⁰⁰ To see a summary of publications the author identified that were circulating in America in the pre-Framing era, discussing exclusion, see Supplement Table S1, available at <http://scholars.law.unlv.edu/nlj/vol115/iss1/3/>.

¹⁰¹ See, e.g., D.E., *Dunning's Eloquence*, in 2d ser. 5 NOTES AND QUERIES 121, 122 (1858).

¹⁰² CANDOR, A LETTER TO THE PUBLIC ADVERTISER 30 (1st ed. 1764).

¹⁰³ CANDOR, A LETTER FROM CANDOR, TO THE PUBLIC ADVERTISER (31) (2d ed. 1764).

University, but he was a genuine Founding Father who supported the Revolution and was named as a delegate to the Continental Congress.¹⁰⁴

2. *Meredith's Reply to the Defence of the Majority*

While perusing manuscripts in Yale Law School's rare book library in 2008, I discovered a fourth pre-Framing document that stated that exclusion was the (or a) remedy for search-and-seizure violations. It was a pamphlet entitled *A Reply to the Defence of the Majority, on the Question Relating to General Warrants*. Although the pamphlet was printed anonymously, it has been generally attributed to Sir William Meredith, a member of the British Parliament identified with the libertarian Whig faction. Among Meredith's more noteworthy remarks in his *Reply* was the following discussion:

[O]f all those Laws, under which we live and are protected, there is none more sacred than that Law, which says, that no Man shall be obliged to furnish Evidence against Himself. In Felony, you may search for stolen Goods, but not for other Evidence against the Thief. In Treason, you may search for and seize Papers, in order to discover Treason, *but cannot use those Papers in Evidence against the Man in whose Custody they are found.*¹⁰⁵

There are at least forty-one original copies of Meredith's *Reply* currently in American libraries. One of them is bound with other pamphlets in the Benjamin Franklin Collection at Yale University. Another copy is bound with pamphlets in the Landon Carter collection at the University of Virginia. One original copy at the Butler Rare Book Library of Columbia University shows quill ink writing in the margin precisely adjacent to the exclusionary discussion quoted above.

Another British pamphlet, dated May 19, 1763 and entitled *A Letter to the Right Honourable the Earls of Egremont and Halifax, His Majesty's Principal Secretaries of State, on the Seizure of Papers*, can be added to this mix of writings. I discovered the relevant passages in the *Letter on the Seizure of Papers* while examining other tracts at Cornell University in 2009. The document contains much discussion of the notion of excluding evidence, including the applicability of habeas corpus principles to seizures of physical evidence¹⁰⁶:

When a person is brought upon his trial for any offence, he is not bound, nor will any court suffer him to give evidence against himself; but by this method

¹⁰⁴ *Brown, John, (1736–1803)*, BIOGRAPHICAL DIRECTORY U.S. CONGRESS <http://bioguide.congress.gov/scripts/biodisplay.pl?index=B000927> (last visited Dec. 10, 2014).

¹⁰⁵ WILLIAM MEREDITH (attributed), *A REPLY TO THE DEFENCE OF THE MAJORITY, ON THE QUESTION RELATING TO GENERAL WARRANTS* 21–22 (1764) (emphasis added).

¹⁰⁶ See generally ANONYMOUS, *A LETTER TO THE RIGHT HONOURABLE THE EARLS OF EGREMONT AND HALIFAX, HIS MAJESTY'S PRINCIPAL SECRETARIES OF STATE, ON THE SEIZURE OF PAPERS* (1763) [hereinafter *LETTER ON THE SEIZURE OF PAPERS*]. The *Letter on the Seizure of Papers* suggested that unlawfully-seized papers could be redeemed from captivity through habeas corpus law or something like habeas corpus law. *Id.* at 6–7. “I doubt not,” wrote the author, “but there is some legal method of recovering papers, as well as any other goods, which are unlawfully detained from the right owner.” *Id.* at 6.

[seizure and introduction of private papers], if allowed, though a man's tongue is not permitted to bear testimony against him, his thoughts are to rise in judgment, and to be produced as witnesses to prove the charge. A man's WRITINGS lying in his closet, NOT PUBLISHED, are no more than his thoughts, hardly brought forth even in his own account, and, to all the rest of the world, the same as if they yet remained in embryo in his breast. . . . It was thus in the infamous proceedings which robbed that hero of patriotism, the great SYDNEY, of his life. *Scraps* of an *unfinished manuscript* were the evidences upon which he was condemned, when the rest of that very writing was not produced.¹⁰⁷

The "Sydney" mentioned in the discussion above was Algernon Sydney, an English martyr who was executed in 1683 for allegedly conspiring to kill King Charles II.¹⁰⁸ The name was widely known and revered in pre-Revolutionary America—and the Founders' veneration for Algernon Sydney provides yet further support for the originalist case for the exclusionary rule.¹⁰⁹ Sydney had been convicted at a trial in which unlawfully seized political writings from Sydney's home were produced as evidence of his treason. This notorious example of a search-and-seizure violation—and of the impropriety of courts allowing such evidence into trial—was widely remembered by the British (and British-American) freedom fighters of the late seventeenth and the eighteenth centuries. The *Letter on the Seizure of Papers* was one of many tracts discussing the injustice of Sydney's trial that the American Framers would have read with great interest.

Did the American Founders regard the admission of illegally seized evidence in Algernon Sydney's 1683 trial to be lawful and proper "since it tended to establish the truth, and, thus, help achieve justice"?¹¹⁰ Or did the Founders regard the admission to be lawful and proper because of their "paramount concern with truth-seeking and punishing the guilty"?¹¹¹ Hardly. The injustice of Sydney's conviction inspired the Glorious Revolution of 1688.¹¹² And the Founding generation revered Sydney and bewailed his unjust conviction and

¹⁰⁷ *Id.* at 20–21.

¹⁰⁸ Chris Baker, *Algernon Sidney: Forgotten Founding Father*, 47 FREEMAN 625, 625 (1997).

¹⁰⁹ Historians often note the Framers' focus on such Enlightenment figures as Locke and Hume. In a compiled list of the top forty authors relied on by the Framers, number thirty-three is Algernon Sidney. See DONALD S. LUTZ, A PREFACE TO AMERICAN POLITICAL THEORY 136 tbl.5.2 (1992).

¹¹⁰ Tinsley, *supra* note 10, at 64 ("At common law, and continuing for one hundred years after the passage of the Fourth Amendment, evidence of the defendant's guilt was never excluded just because it was obtained illegally. . . . [P]robative evidence, regardless of its source, was admissible, since it tended to establish the truth, and, thus, help achieve justice.").

¹¹¹ Pitler, *supra* note 11, at 466 ("Under the common law, a strict nonexclusionary rule required a court to admit all competent and probative evidence regardless of its source. This doctrine of nonexclusion developed from the common law courts' paramount concern with truth-seeking and punishing the guilty." (footnote omitted)).

¹¹² *Cf.* Baker, *supra* note 108, at 625–26.

execution.¹¹³ Massachusetts adopted its motto, “*Ense petit placidam sub libertate quietem*,” from a quote by Algernon Sidney.¹¹⁴ The motto is translated to mean “By the sword we seek peace, but peace only under liberty.”¹¹⁵

In fact, the three colleges most identified with Jeffersonian Virginia all reflected the philosophical influence of Algernon Sydney. Lectures at the College of William and Mary often emphasized Sydney’s writings and philosophy.¹¹⁶ Jefferson’s University of Virginia was explicitly founded upon Sydney’s libertarian philosophy.¹¹⁷ And Hampden-Sydney College, founded in what is now Hampden Sydney, Virginia, by such prominent Virginians as Patrick Henry, was even honored with Sydney’s name (and that of Presbyterian martyr John Hampden). Jefferson is known to have idolized Sydney with peculiar fascination.¹¹⁸ He cited Sydney as one of his four inspirations for the Declaration of Independence.¹¹⁹ Jefferson even commissioned (unsuccessfully) a painting of Algernon Sydney to hang in Monticello.¹²⁰

¹¹³ Cf. *id.* at 628.

¹¹⁴ MASSACHUSETTS ENCYCLOPEDIA 4 (Jack Tager & Jennifer L. Herman eds., 2008).

¹¹⁵ *Id.*

¹¹⁶ Future President John Tyler remarked that his professor at William and Mary College, Bishop James Madison (cousin of the more famous President James Madison), trained students to be “disciples of Locke and of Algernon Sidney.” Terry L. Meyers, *Thinking About Slavery at the College of William and Mary*, 21 WM. & MARY BILL RTS. J. 1215, 1243 n.157 (2013). See also Thomas B. McAfee, *Restoring the Lost World of Classical Legal Thought: The Presumption in Favor of Liberty over Law and the Court over the Constitution*, 75 U. CIN. L. REV. 1499, 1567 n.337 (2007) (“[W]hen [William and Mary Professor] Madison recommended to Jefferson the scholars that would most aid the political education of students at the University of Virginia, he emphasized the works of John Locke and Algernon Sidney.”).

¹¹⁷ In 1825, as founder of the University of Virginia, Thomas Jefferson issued this statement: “Resolved that it is the opinion of this Board that as to the general principles of liberty and the rights of man, in nature and in society, the doctrines of Locke in his ‘Essay concerning the true original extent and end of civil government,’ and of Sidney in his ‘Discourses on government,’ may be considered as those generally approved by our fellow citizens of this, and the United States” Minutes of the Board of Visitors of the University of Virginia (Mar. 4–5, 1825), in 19 THE WRITINGS OF THOMAS JEFFERSON 361, 460–61 (Albert Ellery Bergh ed., 1907).

¹¹⁸ See Harlan M. Goulett, *God Hath Created the Mind Free: Toward a Jeffersonian Theory of Rights*, 37 SUFFOLK U. L. REV. 983, 992 (2004).

¹¹⁹ See *id.* (“It was natural for the colonists to celebrate ‘republican’ martyr Algernon Sidney, who Jefferson cited as one of four inspirations for the Declaration.”); Timothy Sandefur, *Liberal Originalism: A Past for the Future*, 27 HARV. J.L. & PUB. POL’Y 489, 511 (2004) (“Jefferson . . . wrote that Locke, Algernon Sidney, Cicero, and Aristotle were the ‘elementary books of public right,’” which Jefferson most relied on during his drafting of the Declaration of Independence); *id.* at 512 (“Locke and Sidney, he wrote, were ‘those [writers] generally approved by our fellow citizens of this, and the United States.’” (quoting Minutes of the Board of Visitors, *supra* note 117)).

¹²⁰ See SUSAN R. STEIN, THE WORLDS OF THOMAS JEFFERSON AT MONTICELLO 128 (Mark Greenberg ed., 1993). While in Paris in January 1789, Jefferson wrote to John Trumbull in London to have Trumbull obtain portraits of Bacon, Newton, Locke, Sidney, Hampden and Shakespeare. Trumbull was successful in acquiring paintings of only the first three. *Id.*

The *Letter on the Seizure of Papers* even suggested that the exclusionary rule is required as a matter of basic human rights: "The rack itself is hardly a more inhuman mode of accusation, or tyrannical method of proof."¹²¹ "Both," stated the pamphlet, "are equally against the first laws of nature; and nothing can be more unlike the benign spirit of our happy constitution."¹²² The Letter also drew the connection between habeas corpus principles and the exclusion of unlawfully obtained evidence;¹²³ a point I emphasized in *The Originalist Case for the Fourth Amendment Exclusionary Rule*.¹²⁴

The *Letter on the Seizure of Papers* further stated that

[f]air trials, and *gentle* prosecutions, are the peculiar glory of this country; and no man should be deprived of any benefit, or advantage, his own silence, or the secrecy of papers *not published*, can afford to protect him against conviction. As he can keep his mouth shut, so his privacies ought to be sacred, and his repositories secure.¹²⁵

The *Letter on the Seizure of Papers* went on to discuss the illegality of using other illegally seized objects in addition to papers, for evidentiary purposes. "But if the partitions of a man's closet, (which is but another bosom) are to be . . . exposed at the humour or malice of every . . . justice of peace," it would mean the "END OF LIBERTY" and "a FATAL BLOW [against] the most precious and valuable rights of mankind."¹²⁶

The *Letter on the Seizure of Papers* also suggested any legal precedents allowing illegally seized evidence in court could only have been rendered under despotic regimes, and no such precedents existed "in TIMES OF LIBERTY and JUSTICE."¹²⁷

Like the authorship of the FOC pamphlets, the authorship of *A Letter on the Seizure of Papers* is in dispute. The British political writer Junius (whose true identity also remains unknown) proclaimed, without apparent fear of contradiction, that the *Letter* was a joint production of Lord Dunning and Lord Camden.¹²⁸ Most authorities, however, attribute the *Letter on the Seizure of Papers* to Lord Temple, a friend of John Wilkes who argued in the House of Lords for increased search-and-seizure protections.

Today there are at least thirty-one original copies of the *Letter on the Seizure of Papers* in American rare book libraries. One copy is held at Brown University's Hay Library and may have belonged to John Brown, the Universi-

¹²¹ LETTER ON THE SEIZURE OF PAPERS, *supra* note 106, at 21.

¹²² *Id.*

¹²³ *See id.* at 6–7.

¹²⁴ *See* Roots, *supra* note 21, at 30–33.

¹²⁵ LETTER ON THE SEIZURE OF PAPERS, *supra* note 106, at 24–25.

¹²⁶ *Id.* at 25.

¹²⁷ *Id.* at 15, 28.

¹²⁸ *Who Was the Real Author of These Letters?*, in 1 THE LETTERS OF JUNIUS: STAT NOMINIS UMBRA 64, 113–14 (Robert Heron ed., 2d ed. 1804).

ty's founder and namesake. Another copy is bound together with the FOC pamphlet bearing the William Plumer signature at the Library of Congress. Another original copy is found in the Benjamin Franklin collection at Yale University, bearing the plate of William Smith Mason, a Franklin collector.

3. *Lord Temple's Letter from Albemarle Street*

An additional pamphlet discussing search-and-seizure issues hit the streets of London in 1764. It was given the undistinguishing title *A Letter from Albemarle Street to the Cocoa-Tree, on Some Late Transactions*.¹²⁹ Albemarle Street and the Cocoa Tree were rival clubs of elites in Parliament.¹³⁰ The pamphlet was purportedly authored by "London Albemarle" but has been attributed to Richard Grenville (Lord Temple) by almost all authorities. The *Letter from Albemarle Street* restated many of the same themes as the other pamphlets described above.¹³¹

The use of illegally seized evidence in criminal court, wrote Temple in the tract, is "to make the offender a witness against himself, and to condemn him out of his own cabinet," much like the practices of the infamous Star Chamber.¹³² I located fifteen original copies of this short pamphlet in current American libraries, of which I visited four. None were identified as possibly owned by noteworthy figures of the Founding period.

4. *The Gentleman's Magazine, The London Magazine, and The Universal Magazine*

The relative ubiquity of these documents suggests that those most literate in the language of search and seizure law during the years preceding the enactment of the Bill of Rights must have been well aware of the idea that illegally seized evidence must be excluded from criminal proceedings. And there is reason to believe that these pamphlets were the tip of a much larger iceberg. Consider that several of these same writings were *reprinted* in the most widely-circulating news magazines of the day, including *The Gentleman's Magazine*, *The Universal Magazine*, and *The Scots Magazine*.

The Gentleman's Magazine was the most widely read periodical in the eighteenth century. It is generally assumed that the Founders adopted the motto on the Great Seal of the United States, "*E pluribus unum*" (from many, one),

¹²⁹ RICHARD GRENVILLE, LORD TEMPLE (attributed), *A LETTER FROM ALBEMARLE STREET TO THE COCOA-TREE ON SOME LATE TRANSACTIONS* (2d ed. 1764) [hereinafter *LETTER FROM ALBEMARLE STREET*]. The author of the *Letter from Albemarle Street* (undoubtedly Lord Temple, see *infra*) wrote that the search-and-seizure issues raised by the Wilkes prosecution had "divided the Cocoa-tree" and that his intention was to convince members of the House of Lords to adopt his own libertarian views with regard to general warrants. *Id.* at 9.

¹³⁰ *Editorial Response to J. Wilkins*, in 3d ser. 11 *NOTES AND QUERIES* 58, 58 (1867).

¹³¹ *LETTER FROM ALBEMARLE STREET*, *supra* note 129, at 4–5.

¹³² *Id.* at 13.

from *The Gentleman's Magazine*, which featured the Latin phrase on its covers. "Until at least the early years of the nineteenth century," wrote R.B. McKerrow, "*The Gentleman's Magazine* was a magazine of standing and importance such as would be found in the homes of most gentlemen of worth."¹³³

Father of Candor's *Letter Concerning Libels* was reprinted in full in the *Gentleman's Magazine*.¹³⁴ It was reprinted again in *The Universal Magazine*,¹³⁵ another widely circulating magazine of the period. The *Letter on the Seizure of Papers* was published in *The Gentleman's Magazine*,¹³⁶ and in *The Scots Magazine*.¹³⁷ Meredith's *Reply to the Defence of the Majority* was published in full in *The Scots Magazine*¹³⁸ and in *The Gentleman's and London Magazine*.¹³⁹

D. *There Were Oppositional Pamphlets as Well, Written by Tories*

The originalist case for the Fourth Amendment exclusionary rule is further supported by the fact that oppositional writings also circulated prior to the American Revolution—written from the “Tory” perspective in Parliament. For example, a forty-eight-page anonymous pamphlet entitled *Considerations on the Legality of General Warrants, and the Propriety of a Parliamentary Regulation of the Same* hit the streets of Britain and her colonies in 1765. Although the author is unknown, the pamphlet unflinchingly defended the legality of the proceedings against John Wilkes, and of Lord Halifax's infamous 1763 general warrant (the warrant at issue in *Wilkes v. Wood*). Defending general warrants, the author asks: “[h]ow can a Warrant to arrest the Author or Printer of a certain Paper, extend to any one who is not the Author or Printer?”¹⁴⁰ According to this perspective, search warrants need not “particularly describ[e] the place to be searched, and the persons or things to be seized,” as the Fourth Amend-

¹³³ R.B. McKerrow, *The First Magazine*, 17 REV. ENG. STUD. 107, 109 (1941) (reviewing C. LENNART CARLSON, *THE FIRST MAGAZINE: A HISTORY OF THE GENTLEMAN'S MAGAZINE* (1938)).

¹³⁴ *A Letter Concerning Libels, Warrants, and the Seizure of Papers* (pts. 1 & 2), 34 GENTLEMAN'S MAG. & HIST. CHRON. 618 (1764), 35 GENTLEMAN'S MAG. & HIST. CHRON. 19 (1765).

¹³⁵ *Extract from A Letter Concerning Libels, Warrants, and the Seizure of Papers*, 36 UNIVERSAL MAG. KNOWLEDGE & PLEASURE 21, 21–27 (1765).

¹³⁶ *On the Seizure of Papers*, 33 GENTLEMAN'S MAG. & HIST. CHRON. 273, 273–77 (1763).

¹³⁷ *A Letter to the Earls of Egremont and Halifax, on the Seizure of Papers*, 25 SCOTS MAG. 396, 396–400 (1763).

¹³⁸ *A Reply to the Defence of the Majority, on the Question Relating to General Warrants*, 26 SCOTS MAG. 707, 707–12 (1764).

¹³⁹ *A Reply to the Defence of the Majority, on the Question Relating to General Warrants*, 35 GENTLEMAN'S & LONDON MAG. 9, 9–21 (1765).

¹⁴⁰ ANONYMOUS, *CONSIDERATIONS ON THE LEGALITY OF GENERAL WARRANTS, AND THE PROPRIETY OF A PARLIAMETARY REGULATION OF THE SAME* 5 (1765) [hereinafter *CONSIDERATIONS ON THE LEGALITY OF GENERAL WARRANTS*].

ment would later require.¹⁴¹ Undeniably, the Framers of the Fourth Amendment would not have shared such a perspective.

Most significantly, *Considerations on the Legality of General Warrants* invested four detailed paragraphs into debunking the exclusionary rule described by Father of Candor. The unknown author—perhaps channeling the “originalist” scholarship that would come to flood the law reviews two centuries later—referred to the search-and-seizure exclusionary rule as “a most groundless Principle.”¹⁴²

No Man, says [Father of Candor], is to furnish Evidence against himself; therefore the Seizure even of Papers relating to a Crime committed by him is unwarranted by Law. A general Rule of Evidence is here assumed.

. . . [D]oes it follow that every thing in his Possession is sacred, and that nothing found in his Custody is to be used in Evidence by his Accuser? Does not the daily Practice prove the Falsity of that Idea? Are not Persons arrested on Suspicion of Felony constantly searched [incident to arrest]? Are not the Papers or Goods found upon him produced in Evidence against him? Is his House more sacred than his Person? Is his Closet protected, when his very Pockets may be rifled?¹⁴³

Here indeed, in 1765, was an assertion of a “doctrine of nonexclusion.” Yet it was voiced not by any American Founder or by any judge, but by a prosecution British pamphleteer of obvious Tory disposition, in disagreement with Wilkes, Camden, and the libertarian pamphleteers the Americans revered. Moreover, the pamphlet’s remarks appear to be conditional, being prefaced upon an assessment regarding evidence taken lawfully, not unlawfully.¹⁴⁴

A search in WorldCat for original copies of *Considerations on the Legality of General Warrants* identified at least twenty-seven original copies with catalog numbers in American libraries. One copy held by the Library of Congress appears to have belonged to Thomas Jefferson. Another copy is found in the Benjamin Franklin collection at Yale University. Additionally, the text of the pamphlet—just as the texts of the Candor, Father of Candor, Meredith, and Temple pamphlets—was republished in the pages of the widely-read *Gentleman’s Magazine* in March 1765.¹⁴⁵

¹⁴¹ U.S. CONST. amend. IV.

¹⁴² CONSIDERATIONS ON THE LEGALITY OF GENERAL WARRANTS, *supra* note 140, at 12.

¹⁴³ *Id.* at 12–13.

¹⁴⁴ *See id.* at 13. *Considerations on the Legality of General Warrants* recounts an exchange of letters between John Wilkes and Lord Halifax, in which Wilkes had demanded that his seized property be returned to him. *Id.* at 13–14. *Considerations on the Legality of General Warrants* recounted that Halifax had asserted a right to “keep such Papers as tended to a Proof of [Wilkes’s] Guilt.” *Id.* at 14. “The Law authorised them to seize all such, and to produce them in Evidence at the Trial.” *Id.* (emphasis added).

¹⁴⁵ *Considerations on the Legality of General Warrants, and the Propriety of a Parliamentary Regulation of the Same*, 35 GENTLEMAN’S MAG. & HIST. CHRON. 114, 114–17 (1765).

E. Father of Candor's Postscript

Father of Candor rebutted the claims asserted in *Considerations on the Legality of General Warrants* with an additional pamphlet in 1765, entitled *A Postscript to the Letter, on Libels, Warrants, &c. In Answer to a Postscript [sic] in the Defence of the Majority, and Another Pamphlet, Entitled, Considerations on the Legality of General Warrants*.¹⁴⁶ The Postscript asserted that property rights trump any interests of the state in using seized property for evidentiary purposes. The author of *Considerations*, wrote Father of Candor, “proceeds very sillily to suppose that evidence will not be admissible, if got by violence, and asks a foolish question upon this strange supposition.”¹⁴⁷ “[O]nce admit the principle [that ‘the prosecutor is at liberty to avail himself of whatever he can find . . . to prove the truth of his charge’],” wrote Father of Candor, and “all the consequences of an unlimited State Inquisition follow of necessity.”¹⁴⁸ Father of Candor then described the anti-exclusion author as something of an ignorant buffoon: “The only thing that is plain from this raw writer is, that he himself has no certain notion about the matter at all.”¹⁴⁹

Today, Father of Candor’s *Postscript* is found in the papers of Rufus King at the New York Historical Society; bound together with the FOC and Candor pamphlets in George Washington’s collection at Harvard’s Houghton Library, and found in the Benjamin Franklin collection at Yale.

Historians of the Fourth Amendment acknowledge that the Amendment’s Framers were influenced by the *Wilkes v. Wood* and *Entick v. Carrington* cases. But they have missed this major feature of the story: the fact that *Wilkes* and *Entick* generated a massive discourse that vastly eclipsed the two legal opinions in readership and influence. The most prominent and widely-circulating writings on search-and-seizure law were not the *Wilkes* or *Entick* opinions but the pamphlets, newspapers pieces, and magazine articles about the *Wilkes* and *Entick* cases. And the most abundant of these writings discussed and favored the exclusionary rule. No one concerned with search-and-seizure law during the ratification period could have been unaware of such texts.

II. THE FRAMERS MUST HAVE BEEN ON THE SIDE OF EXCLUSION

Now I proceed to the argument, which I regard as indisputable, that the Fourth Amendment’s Framers—having full knowledge of the concept of exclusion, as well as arguments against it—must have fully intended for the rule of exclusion to follow the Fourth Amendment. This is a circumstantial case, to be

¹⁴⁶ FATHER OF CANDOR, *A POSTSCRIPT TO THE LETTER, ON LIBELS, WARRANTS, &C.* (2d ed. 1765).

¹⁴⁷ *Id.* at 19.

¹⁴⁸ *Id.* at 18.

¹⁴⁹ *Id.* at 19.

sure,¹⁵⁰ but in light of the socio-cultural background of the Constitution's Framers, it is open and shut.

A few words should be said here about the political backdrop behind all of the written works described above. The *Entick* decision in 1765 involved a London printer named John Entick whose home and print shop were raided and who was prosecuted for seditious libel. The case arose in the midst of a general crackdown by Royal authorities on allegedly seditious commentary in the English press. Similar search and seizure issues were brought out in other cases such as *Wilkes v. Wood* and *Money v. Leach*. The *Wilkes* and *Leach* cases involved the radical member of Parliament John Wilkes, whose pamphlet *The North Briton Number 45* attacked certain speeches of King George III and his ministers.¹⁵¹

Much has been written about the connection between the search and seizure of John Wilkes and his papers in London in 1763 and the Fourth Amendment that was enacted twenty-eight years later in the United States. Wilkes, a member of the British Parliament and of the libertarian-leaning Pitt voting bloc in British politics, was given to writing and publishing (often pseudonymously) scathing and sometimes obscene essays and articles about the royal ministers of the period. Soon after *The North Briton Number 45* hit the streets, Secretary of State Lord Halifax issued a warrant commanding royal agents "to make strict and diligent search for the authors, printers and publishers of a seditious and treasonable paper intitled the North Briton Numb. 45."¹⁵² The warrant was a general one, failing to name and describe the specific targets, but allowing investigators to search and seize evidence and suspects at their own discretion.

After more than forty printers were questioned and arrested, the royal investigators zeroed in on Wilkes. Wilkes's home was invaded and his personal papers were summarily bagged up and carted away as Wilkes himself was arrested.¹⁵³ The arrest generated immense hysteria in the British newspapers, and the pamphlets already described were part of a barrage of pamphlets decrying the investigation. "Overnight, [John Wilkes] became the darling of London and

¹⁵⁰ I concede that I have not yet found any letter or diary entry by a Fourth Amendment Framer indicating that the Amendment was intended to require exclusion of evidence. But the same is true for almost every other detail of search-and-seizure law, the entire law of evidence, the entirety of grand jury law, the entirety of habeas corpus law, the requirement that guilt be proven beyond a reasonable doubt in criminal cases, and many other foundational components of the Constitution's criminal-procedure provisions. And the originalist case for the Fourth Amendment exclusionary rule is supported by far greater evidence than that which supports many other rules of constitutional criminal procedure and evidence we take for granted today.

¹⁵¹ The author of *North Briton 45* (now known to have been Wilkes) went so far as to assert that resistance against a cider tax was justifiable. IRA STOLL, *SAMUEL ADAMS: A LIFE* 36 (2008).

¹⁵² FATHER OF CANDOR, *supra* note 91, at 43.

¹⁵³ See ARTHUR H. CASH, *JOHN WILKES: THE SCANDALOUS FATHER OF CIVIL LIBERTY* 2 (2006).

the foremost spokesman of the hereditary 'rights of Englishmen.'¹⁵⁴ There were even a few mob riots in the London streets.

It was from this episode that much of the DNA of what later became the Fourth Amendment was forged. "Wilkes's every move was followed in the American press, and his victories over government celebrated in the colonies."¹⁵⁵ Never before or after did the esoteric technicalities of search and seizure law become so widely discussed among common people.¹⁵⁶ And the popular hysteria surrounding the seizure of Wilkes and his personal possessions so inflamed the hearts and minds of Englishmen that for a time such matters were chief among the topics of the day.

Today's Americans often forget that the British Parliament of the late 1700s was often split over the constitutional questions developed by the American uprising. There was a vibrant libertarian wing in Parliament—often led in the 1760s and 1770s by Wilkes and such noteworthy politicians as William Pitt the Elder (a.k.a. Lord Chatham),¹⁵⁷ Richard Grenville (Lord Temple), Charles Pratt (Lord Camden), William Meredith, John Horne Tooke, and Isaac Barre.

¹⁵⁴ Robert R. Rea, *John Almon: Bookseller to John Wilkes*, IND. Q. FOR BOOKMEN 20, 21 (1948).

¹⁵⁵ CASH, *supra* note 153. See also *London, Dec. 8*, 71 PROVIDENCE GAZETTE; & COUNTRY J., Feb. 25, 1764, at 2 (reporting Wilkes's court appearance before "the truly patriotic and Right Honorable Lord Chief Justice Pratt" and the thousand-pound damage award in Wilkes's favor. "It was thought there was the greatest concourse of people in Westminster-hall ever known, who shewed the profoundest attention to the discussion of a cause that in the highest degree affected the most sacred and invaluable rights and liberties . . ."). See also *London, Dec. 5*, in PROVIDENCE GAZETTE, *supra* (reporting on Wilkes's difficulties, the ordered burning of No. 45 of the North Briton, and resulting mob violence, including the "pelting of the Constables"). The violent London mob, according to the Providence Gazette, "would not suffer the [firewood] to be lighted" and then pelted the sheriff's chariot with burning debris. *Id.* See also Nauticus, Letter to the Editor, *To the Printer's [sic] of the New-York Chronicle*, 1 N.Y. CHRON. 65, 65 (1769) (hailing from a "New-York Coffee-House," writing that "if general warrants, seizure of papers, [and] alteration of records" were allowed, government would be rendered "not only contemptible, but detestable, in the eyes of a people" and distrust would "prevail through every rank and order in the nation.").

¹⁵⁶ See LETTER FROM ALBEMARLE STREET, *supra* note 129, at 9. Lord Temple, in his pseudonymously published Letter from Abemarle Street to the Cocoa-Tree, wrote that "[i]his is a subject, that has attracted the attention of the whole nation, to a degree that no other thing has done for many years, and hardly any one ever did more . . ." *Id.* Father of Candor wrote that "the discourse of late has run so much upon libels, warrants, and resolutions of parliament, that every body's thoughts have been turned to these points." FATHER OF CANDOR, *supra* note 91, at 6.

¹⁵⁷ Pitt the Elder had been a staunch militarist as Prime Minister throughout the 1750s and had commandeered Britain's victories over France in the Seven Years War. By the 1760s, however, Pitt was out of power except as a member of the House of Commons and became identified with the minority in Parliament opposed to the cider tax, general warrants and suppression of the press. In 1766, Pitt argued forcefully for the repeal of the American Stamp Act, agreeing with rebels in the colonies that the Act violated the fundamental rights of Englishmen living in the colonies. In defiance of Pitt and the libertarians, however, the Repeal Act was passed along with a censure of the American assemblies, and a declaration

The libertarians in Parliament were often in the minority and tended to side with the Americans in votes regarding questions of individual liberty. And the American rebels were intellectually, philosophically, and politically aligned with the libertarian voting bloc in Parliament. Americans dotted their countryside with town and county names which honored the radicals in British politics. Pittsburgh, Pennsylvania is just one of dozens of places named for Pitt (and his title of nobility, the Earl of Chatham).¹⁵⁸ Wilkes-Barre, Pennsylvania—and many other towns and places—were named for John Wilkes. (The “Barre” in Wilkes-Barre was Isaac Barre, another prominent Whig orator in the British House of Commons.) Camden, New Jersey; Camden, Maine; Camden Yards (where the Baltimore Orioles play baseball); and several other Camdens in America were named for the libertarian judge Lord Camden.

In the wake of the John Wilkes prosecution, the Americans adopted Wilkes and the number “45” as a chief symbol of their cause. Indeed, “45” became a symbol of American resistance to authoritarian government no less than the boxes of tea in Boston Harbor and the Liberty Bell. In Boston, “45” was painted and carved on doors and windows throughout the town. John Hancock named a ship *The Liberty* in honor of Wilkes.¹⁵⁹ In South Carolina, a ship mast was planted as a liberty tree and decorated with forty-five lights while a crowd of patriots fired forty-five rockets. A group of forty-five men carrying candles marched in parade.¹⁶⁰ When a New York City pamphleteer named Alexander McDougall was arrested for printing seditious pamphlets, forty-five men came to feast at his jail cell, consuming forty-five pounds of beef cut from steers forty-five months old.¹⁶¹ Forty-five toasts were offered, which doubtlessly include one or more to “Wilkes and Liberty.”¹⁶² In 1768, Paul Revere crafted a large “Sons of Liberty Bowl,” a bowl now housed at Boston’s Museum of Fine Arts bearing the engravings: “No. 45” and “Wilkes and Liberty.”¹⁶³ “The bowl weighed forty-five ounces and . . . held 45 gills of rum punch, the beverage preferred by colonists during the boycott of government-taxed tea.”¹⁶⁴ Samuel Adams and John Hancock were present at the bowl’s unveiling.

that Parliament had authority over the colonies “in all cases whatsoever.” During this period Pitt often spoke with approval of the right of colonists to resist British authority. *See generally* JEREMY BLACK, PITT THE ELDER (1992).

¹⁵⁸ Consider the University of Pittsburgh; Pittsburg and Pittsfield, New Hampshire; Pitt County, North Carolina; Pittsfield, Massachusetts; Pittston, Pennsylvania; Pittsboro, North Carolina; and Pittsylvania County, Virginia. Late in his life, Pitt ascended to the House of Lords and was named the Earl of Chatham. Chatham University; Chatham, Virginia; Chatham, New Hampshire; Chatham, New Jersey; Chatham County, Georgia; and Chatham County, North Carolina were all named for Lord Chatham.

¹⁵⁹ CASH, *supra* note 153, at 231.

¹⁶⁰ *Id.* at 232.

¹⁶¹ *Id.*

¹⁶² *See id.*

¹⁶³ STOLL, *supra* note 151, at 69.

¹⁶⁴ *Id.* (internal quotation marks omitted).

Americans reveled in corresponding with Wilkes and other British Whigs in the years before the American Revolution. In 1768, a group of forty-five prominent Bostonians met at Boston's Whig Tavern and signed a celebratory letter to John Wilkes in praise of his courage and honor. Signers included John Adams, Samuel Adams, James Otis, John Hancock, Richard Dana, Joseph Warren, Benjamin Kent, Thomas Young, and Josiah Quincy Jr.¹⁶⁵ Wilkes returned a letter on July 19, 1768, thanking them and discussing the rights of all Englishmen to liberty.¹⁶⁶ During the worst of Wilkes's troubles with the British authorities, the Commons House of South Carolina even sent Wilkes a monetary gift of £1,500 and "closed down the provincial government rather than obey the royal governor's demand to rescind the gift."¹⁶⁷

Wilkes also corresponded individually with prominent leaders in the American cause, including Samuel Adams, Kent, Warren, Young, and Benjamin Church. William Palfrey, secretary to the Sons of Liberty in Boston and chief clerk for John Hancock's trading enterprises, corresponded almost monthly with Wilkes.¹⁶⁸ Wilkes also corresponded with the Real Whigs, a philosophical club whose members included Benjamin Franklin, the brothers Arthur and William Lee, Richard Price, Joseph Priestly, and Stephen Sayre.¹⁶⁹ Samuel Adams is also known to have corresponded with Lord Camden "[o]n behalf of the Massachusetts House of Representatives" on January 29, 1768.¹⁷⁰

And when Americans traveled to Britain, they sought out Wilkes and other anti-government luminaries. While Wilkes was imprisoned in 1769, he entertained the Philadelphia physician Benjamin Rush, a future signer of the Declaration of Independence, who wrote that "Mr. Wilkes abounded in anecdotes and sallies of wit."¹⁷¹ Josiah Quincy Jr. sailed to England during the buildup to the Revolution, where he and fellow American William Palfrey met with John Wilkes (by then the Lord Mayor of London) and other British salons in hopes of convincing British officials to withdraw their standing armies from Boston.¹⁷²

Although Brits disagreed with each other over matters relating to search and seizure law, it is certain that the American colonists favored the Wilkes and

¹⁶⁵ See CASH, *supra* note 153, at 232.

¹⁶⁶ *Id.* at 233.

¹⁶⁷ *Id.* at 2.

¹⁶⁸ *Id.* at 233.

¹⁶⁹ *Id.* at 234.

¹⁷⁰ STOLL, *supra* note 151, at 62. Interestingly, when the disgraced Massachusetts colonial governor Thomas Hutchinson returned to England in 1774 to meet with King George, he told the King that Boston's Tea Party leader Samuel Adams was "a sort of Wilkes in New England." *Id.* at 124.

¹⁷¹ CASH, *supra* note 153, at 234.

¹⁷² See *id.* at 319.

Camden side of these controversies by great margins.¹⁷³ Indeed, the intellectual battles of the minority Whig faction in the eighteenth-century British parliament defined the positions of the American Founding Generation. The American colonists followed bills and debates in the British Parliament as closely as the Atlantic Ocean would permit, and the Americans clearly and overwhelmingly favored the “circle of political radicals” in England.¹⁷⁴ “Understanding the United States Constitution,” writes David B. Kopel, “requires understanding the British practices that drove the Americans to armed revolution.”¹⁷⁵ Justice Harlan echoed similar sentiments in *Poe v. Ullman*: judges interpreting the Constitution must know both “the traditions from which it developed as well as the traditions from which it broke.”¹⁷⁶

The Revolution and drafting of the U.S. Constitution can thus be seen as a political “vote” that overturned the enactments of the British majority and replaced them with the politics of the libertarian Whig minority in Parliament. And what became the Fourth Amendment exclusionary rule was part and parcel of this libertarian triumph.

CONCLUSION

The men who wrote, considered, and approved the Fourth Amendment were awash in writings that stated that the right to be free from unreasonable searches and seizures included a right to insist that items taken in violation of the right would be inadmissible in criminal court. Such writings were by far the most popular writings on the subject of search and seizure law that the Framing Generation would have encountered. Indeed, to the extent that there were any pre-Framing texts circulating in pre-Constitutional America that decried the exclusionary rule, such texts constituted a mere smidgen of the total discourse on this issue, and their claims would have been rejected by those who supported the Bill of Rights.

As evidence accumulates, the originalist case for the Fourth Amendment exclusionary rule becomes increasingly difficult to overcome. I am aware that the conventional “originalist” narrative—which paints the exclusionary rule as being in defiance of Framers’ intent—continues to enjoy something of a consensus among hardline “law and order originalists.” But my hunch is that the narrative cannot continue to prevail after this evidence becomes widely known.

¹⁷³ Late in his life, Jefferson commented that “all” of America’s pre-Framing lawyers had been “whigs” and lamented that the new country’s lawyers seemed to be embracing the more government-friendly doctrines of Mansfield and Blackstone and were beginning “to slide into toryism.” Letter to James Madison (Feb. 17, 1826), in 7 THE WRITINGS OF THOMAS JEFFERSON 432, 433 (H.A. Washington ed., 1854). In fact, Jefferson despaired that “nearly all the young brood of lawyers” in the 1820s were “of that hue.” *Id.*

¹⁷⁴ REA, *supra* note 154, at 20.

¹⁷⁵ David B. Kopel, *How the British Gun Control Program Precipitated the American Revolution*, 6 CHARLESTON L. REV. 283, 283 (2012).

¹⁷⁶ *Id.* at 284. See also Arcila, *supra* note 2, at 364 (There is “little doubt that one catalyst for independence was colonial hostility to the royal authorities’ search power.”).