

# THE FRAMERS' SEARCH POWER: THE MISUNDERSTOOD STATUTORY HISTORY OF SUSPICION & PROBABLE CAUSE

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**Abstract:** Originalist analyses of the Framers' views about governmental search power have devoted insufficient attention to the civil search statutes they promulgated for regulatory purposes. What attention has been paid concludes that the Framers were divided about how accessible search remedies should be. This Article explains why this conventional account is mostly wrong and explores the lessons to be learned from the statutory choices the Framers made with regard to search and seizure law. In enacting civil search statutes, the Framers chose to depart from common law standards and instead largely followed the patterns of preceding British civil search statutes. The overwhelming tendency was to link official immunity with probable cause and displace the jury by reserving the issue for federal judges. These choices are surprising because such provisions had been highly contested in the colonies when the British had implemented them. The Framers also promulgated a plethora of other procedural devices that limited access to search remedies. For these reasons, and because probable cause was a poorly understood concept at the time, the Framers' choices show that, once in power, the Framers became more interested in protecting governmental search power than in limiting it.

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## INTRODUCTION

Fourth Amendment scholars have not paid sufficient attention to the nation's early civil search statutes. The lack of attention to these laws is regrettable because those statutes provide perhaps the best evidence of the Framers' views about governmental search power. The Framers' thinking about the nature and proper limits of the government's search power is accessible through their statutory enactments in a manner that is unavailable from other sources. This is partly due to the paucity of primary historical material related to the Fourth Amendment's drafting and adoption, and partly to the nature of the common law, which is judge-made and thus tells us what judges—not necessarily the Framers—thought.

Focusing upon these early statutes is important because they hold surprising lessons for us. We often presume that our understanding of the Fourth Amendment is consistent with the Framers', or at least that the Framers' views about it are familiar. But in many respects we are wrong.<sup>1</sup> Our mistake is easy to make. The historical record, after all, leaves little doubt that one catalyst for independence was colonial hostility to the royal authorities' search power. This power was the main enforcement tool for the collection of badly needed government revenue, which in large measure was derived from customs duties and other impost taxes. The royal desire for revenue was pervasive and growing in

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<sup>1</sup> For example, Professor Thomas Davies has taken frequent aim at the Supreme Court's use of history in its Fourth Amendment jurisprudence, arguing that the justices (as well as other judges) are distorting history rather than acknowledging the tremendous changes that have taken place in search and seizure jurisprudence over time. See Thomas Y. Davies, *Correcting Search-and-Seizure History: Now Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of "Due Process of Law,"* 77 MISS. L.J. 1, 14 (2007) [hereinafter Davies, *Correcting Search-and-Seizure History*]; Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239, 246, 255–65 (2002) [hereinafter Davies, *Fictional Character*]; Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 550–52 (1999) [hereinafter Davies, *Original Fourth Amendment*]. Other scholars, Professors Cloud, Maclin, and Sklansky among them, have made the same basic point. See Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1707–10 (1996); Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 895–96 (2002) [hereinafter Maclin, *Let Sleeping Dogs Lie*]; Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 201 (1993) [hereinafter Maclin, *Central Meaning*]; David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1809 (2000). I have argued that significant differences likely exist between the original and modern conceptions and treatment of probable cause. See Fabio Arcila, Jr., *In the Trenches: Searches and the Misunderstood Common-Law History of Suspicion and Probable Cause*, 10 U. PA. J. CONST. L. 1 (2007).

the years leading to independence—and so was the claimed search power. Some of the Framers who were high-ranking merchants and leaders of commerce experienced the consequences of this power first-hand. Given their experiences, it is natural for us to presume that the Framers conceived of probable cause as a limiting principle on the government's search power. Because we use probable cause today in such a manner, most obviously as a hurdle the government must clear before it may obtain a search warrant, we easily lapse into a belief that our conception of probable cause is consistent with the Framers'.

But this may not be true, and here we reach the first surprising part of our search-and-seizure history. Today, we view probable cause as primarily serving to restrain the government's search power. It serves *to protect the public by limiting the government*. The two purposes are consistent with each other. It is easy for us to presume that the Framers had a similar conception of probable cause. After all, common law legal doctrine and colonial rhetoric in the years leading to independence repeatedly made the point that probable cause could serve to protect the public. But, from the First Congress, the Framers were developing and overlaying a civil search jurisprudence over common law search and seizure standards, and had to make their own choices about whether, and if so how, to use probable cause.

The choice the Framers made is surprising: they used probable cause *to protect the government from the people*. Once in power, they promulgated statutes that embraced the use of probable cause as a means of protecting government agents from liability for the searches and seizure they had conducted. Specifically, the Framers repeatedly relied upon probable cause as a standard for conferring immunity upon searchers. Note what this means: the Framers used probable cause *to protect officials* who were conducting searches. This is a striking realization given that we primarily conceive of probable cause today as serving precisely the opposite purpose of *protecting the public from officials*.<sup>2</sup> Stun-

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<sup>2</sup> Some commentators on this article feel that, to the contrary, probable cause continues to be used today to protect officials from the public. This protection can be direct and overt, as well as subtler. Probable cause can directly serve this function when, for example, it is used as a defense in a 42 U.S.C. § 1983 or *Bivens* lawsuit challenging the propriety of a search. See, e.g., *Swint v. City of Wadley*, 51 F.3d 988, 996 (11th Cir. 1995); *Meiners v. Moriarity*, 563 F.2d 343, 348 (7th Cir. 1977). In this situation, probable cause serves as a formal legal protection that is substantively equivalent to the immunity that the Framers conferred through probable cause determinations. The protection that probable cause can confer on public officials also derives from the practical consequences of Fourth Amendment jurisprudence and its deference towards law enforcement interests. Arcila, *supra* note 1, at 57 & n.208. According to this view, search warrants insufficiently safeguard the public

ningly, the Framers repeatedly made this choice though colonists had protested this use of probable cause by royal authorities. In doing so, the Framers created a conflict, in which the use of probable cause to protect the government could undermine the concept's ability to protect the people.

There are several more remarkable parts to this story. The second surprising point is that the Framers embraced probable cause in a system that virtually guaranteed that its government-protection and citizenry-protection functions would conflict. It is certainly possible for probable cause to protect the public and the government at the same time, and for the latter use not to undermine the former. For this to occur, probable cause must be a well-understood concept that is applied with discipline and rigor. For instance, if judges consistently serve as aggressive probable cause sentries prior to issuing search warrants, then probable cause can protect both the public and the government. The public gains protection because a search occurs only when an adequate level of suspicion justifies it. The government is rewarded for observing this limitation by escaping liability for an otherwise reasonable search. But—and here we reach the third surprising part of this history—the Framers used probable cause in the absence of either a consensus concerning the judicial role in monitoring it or even a fulsome understanding of the concept.<sup>3</sup>

To fully understand the relationship between the second and third propositions, it is necessary to appreciate the search-and-seizure legal regime that the Framers confronted. In the Framers' era,<sup>4</sup> search and seizure claims were litigated through common law trespass or civil law forfeiture. Constitutional Fourth Amendment jurisprudence as we know it simply did not exist. This led to an important intersection between the common law and statutory enactments. One significant development resulting from this intersection involved the treatment of probable cause, and gives us reason for doubting that judges in the

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because they do not effectively protect against rogue police behavior. This outcome can occur, for instance, if judges do not sufficiently challenge assertions of probable cause when issuing warrants, or if police opportunistically use a warrant to engage in a more wide-ranging search due to the proliferating exceptions to a Warrant Clause requirement.

<sup>3</sup> Arcila, *supra* note 1, at 24–48. One commentator on this Article asked whether the Framers created this conflict intentionally or whether it resulted incidentally from the lack of consensus. The answer is not clear, though the incidental explanation seems most likely given that the concept remained poorly understood at the time.

<sup>4</sup> For the purposes of this Article, I use the phrase "Framers' era," and others like it, to refer to the period roughly bounded by 1787 (when the Constitution was drafted) and 1825 (when a new generation was succeeding the Framers).

Framers' era actively monitored probable cause prior to issuing search warrants. As I have shown elsewhere, there are abundant reasons for believing that, under the *common law*, judges did not consistently act as meaningful probable cause sentries prior to issuing such warrants.<sup>5</sup> Rather, it appears that under the common law juries had the primary responsibility for assessing probable cause *ex post*. The intersection of common law with *statutory law*, the latter of which is discussed here, becomes important because it emphasizes the point that the Framers likely had a very different conception of probable cause than we do. Specifically, not only did the Framers promulgate statutes that used a probable cause standard for conferring immunity upon searchers, but in virtually all of those statutory enactments the Framers chose to take the probable cause issue away from juries in favor of reserving it for judges. This in itself is extraordinary given that vociferous colonial protests had been raised against the loss of a jury trial right in many search and seizure cases. But there is more. What is vital to understand about this statutory system is that *it often may have used only ex post probable cause determinations, without the ex ante determinations we associate today with judicial sentryship of probable cause.*

Finally we reach the fourth and, for purposes of this Article, last surprising part of our search and seizure history, and it is one that continues to challenge our understanding of the search and seizure remedies from the Framers' era. The conventional scholarly account is that the Framers were of two minds with respect to providing search remedies, sometimes making it harder to access a remedy, sometimes making it easier. Though this conventional account has been influential, it is mistaken. A detailed review of the Framers' civil search statutes shows a remarkably consistent tendency to place numerous obstacles in the way of those seeking to challenge searches, of which using probable cause as an official immunity standard was only one. This evidence indicates that once in power the Framers sought to protect governmental search authority, even though they eagerly had adopted the Fourth Amendment to limit such authority after having experienced perceived royal abuses that had animated independence.

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<sup>5</sup> The strongest evidence favoring judicial sentryship comes from legal doctrine in the Framers' era. However, abundant evidence supports the claim that judges who actually issued search warrants may not have consistently acted as probable cause sentries before issuing those warrants. Arcila, *supra* note 1, at 24–48. The evidence demonstrating that the doctrine of judicial sentryship was undermined in actual practice is briefly recited below. See *infra* notes 39–48 and accompanying text.

If these propositions are correct, they have implications for how we understand the adequacy of search remedies in the Framers' era. Perhaps most dramatically, they (in conjunction with evidence that there was no real consensus about what satisfied probable cause)<sup>6</sup> provide a basis for questioning the Framing-era effectiveness of mechanisms for assuring prior suspicion, at least in terms of the practical reality of our early history. The path to this potential outcome started at the beginning of the search warrant application process, which followed common law principles. It culminated in an enacted statutory regime of search and seizure law that made remedies available for wrongful seizures,<sup>7</sup> but only after a plaintiff overcame numerous obstacles to relief, including the immunity determinations discussed above that were based upon *ex post*, rather than *ex ante*, probable cause determinations. Virtually all of these statutes, which I will detail below, displaced the jury, giving federal judges increased prominence in the probable cause/immunity determination. Importantly, none of these statutes provides any additional reason, beyond those already acknowledged elsewhere, for believing that judges consistently monitored probable cause *prior* to a search. To the contrary, these statutes arguably *decreased* incentives for judges to do so because they authorized *retrospective* probable cause findings. The statutory displacement of the jury with a judge to determine probable cause would not have encouraged an aggressive judicial sentryship duty prior to issuing warrants because, under civil search statutes, judges determined probable cause *ex post*. Moreover, the increased use of probable cause as an immunity standard, subject to an *ex post* judicial determination, may have encouraged searches because the immunity standard provided more protection for authorities conducting searches, while at the same time decreasing the effectiveness of tort actions as a remedy for abusive searches.

This Article will explore these topics below, starting in Part I with an overview of the search remedy available under the common law, which sounded in trespass. Then it will examine how that jurisprudence dealt with probable cause.<sup>8</sup> Under this system, search immunity often

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<sup>6</sup> See Arcila, *supra* note 1, at 24–48.

<sup>7</sup> The Framers' civil search statutes spoke in terms of remedies for *seizures*, saying nothing about *searches*. Thus, in a technical sense, the common law trespass remedy may have been the only available means to challenge a search. Yet, due to the way that the civil search statutes conditioned immunity, the civil forfeiture process applicable to seizures seems to have held the common law search remedy hostage. For more details, see *infra* notes 153–179 and accompanying text.

<sup>8</sup> See *infra* notes 27–60 and accompanying text.

depended upon whether a search warrant had been obtained or whether the search had proved successful.<sup>9</sup> This regime is quite foreign to us today given that probable cause played no role in establishing immunity. This is not to say that probable cause was immaterial—far from it. Probable cause was an important validating element of a search. Under common law trespass, this probable cause issue was reserved for the jury. If it is true that judges in the Framers' era did not consistently assess whether probable cause existed before issuing search warrants,<sup>10</sup> then the jury's *ex post* probable cause determination was crucial because in many cases it was the only legal mechanism for assuring that probable cause supported a search.<sup>11</sup>

Part II turns to the civil law and explores how statutory reforms, initially in Great Britain and then in our new independent nation, affected the treatment of probable cause.<sup>12</sup> The extent to which the Framers used probable cause to expand access to search immunity, and removed the probable cause determination from claimant-friendly juries and gave it to more government-friendly judges, has not been sufficiently recognized.<sup>13</sup> It is likely that these measures restricted access to search remedies. Based on these findings, I critique the conventional account that the Framers were of two minds with regard to making search remedies accessible.

Part III supports the conclusion that the Framers almost exclusively sought to restrict access to search remedies.<sup>14</sup> Moving beyond the probable cause/immunity obstacle, it surveys the myriad other procedural devices the Framers used to discourage legal challenges to searches, which included authorizations for searchers to plead the general issue;<sup>15</sup> authorizations to raise the president's rules in defense and submit the statutory act and "any special matter" into evidence;<sup>16</sup> granting double or even treble costs to successful defendants;<sup>17</sup> depriving successful claimants of their costs;<sup>18</sup> placing the burden of proof upon claimants;<sup>19</sup>

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<sup>9</sup> See *infra* notes 31–34 and accompanying text.

<sup>10</sup> See *infra* notes 39–48 and accompanying text.

<sup>11</sup> See *infra* notes 49–60 and accompanying text.

<sup>12</sup> See *infra* notes 61–244 and accompanying text.

<sup>13</sup> See *infra* notes 180–198, 231–244 and accompanying text.

<sup>14</sup> See *infra* notes 245–268 and accompanying text.

<sup>15</sup> See *infra* notes 252–255 and accompanying text.

<sup>16</sup> See *infra* notes 256–257 and accompanying text.

<sup>17</sup> See *infra* notes 258–259 and accompanying text.

<sup>18</sup> See *infra* notes 260–261 and accompanying text.

<sup>19</sup> See *infra* notes 262–266 and accompanying text.

authorizing the court to summarily adjudge the case;<sup>20</sup> and even allowing the removal of cases from state court *after* judgment, with the new federal proceeding being conducted *de novo*.<sup>21</sup>

Part IV sketches out some of the implications that arise from this historical review.<sup>22</sup> This review shows that, contrary to the accepted historical account, the Framers usually sought to limit access to search remedies. Two of the most surprising findings are that, in their statutory enactments, the Framers consistently used probable cause to protect the government and nearly always displaced the jury's role in search and seizure disputes.<sup>23</sup> Finally, this review provides reason for questioning whether the modern distinction between probable cause and reasonable cause/suspicion is consistent with the historical use of those terms.<sup>24</sup>

The Article concludes with a brief discussion of the impact that these implications might have, particularly in connection with originalism.<sup>25</sup> Though scholars have paid insufficient attention to the nation's early civil search statutes, the same cannot be said for Fourth Amendment history in general, which increasingly has enjoyed attention from scholars. Among others, legal scholars such as Professors Amar, Clancy, Cloud, Davies, Lerner, Maclin, Sklansky, Steinberg, and Taslitz, as well as historian William Cuddihy, have trained their sights on Fourth Amendment history.<sup>26</sup> For the most part, these scholars are in agreement about

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<sup>20</sup> See *infra* note 267 and accompanying text.

<sup>21</sup> See *infra* note 268 and accompanying text.

<sup>22</sup> See *infra* notes 269–285 and accompanying text.

<sup>23</sup> See *infra* notes 272–278 and accompanying text.

<sup>24</sup> See *infra* notes 279–285 and accompanying text.

<sup>25</sup> See *infra* notes 286–297 and accompanying text.

<sup>26</sup> See generally WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING*, 602–1791 (2009); ANDREW E. TASLITZ, *RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789–1869* (2006); Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53 (1996) [hereinafter Amar, *Writs of Assistance*]; Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) [hereinafter Amar, *Fourth Amendment*]; Akhil Reed Amar, Terry and Fourth Amendment First Principles, 72 ST. JOHN'S L. REV. 1097 (1998); Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483 (1995); Cloud, *supra* note 1; Davies, *Correcting Search-and-Seizure History*, *supra* note 1; Davies, *Fictional Character*, *supra* note 1; Davies, *Original Fourth Amendment*, *supra* note 1; Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951 (2003); Maclin, *Central Meaning*, *supra* note 1; Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925 (1997) [hereinafter Maclin, *Fourth Amendment Complexity*]; Maclin, *Let Sleeping Dogs Lie*, *supra* note 1; Sklansky, *supra* note 1; David E. Steinberg, *High School Drug Testing and the Original Understanding of the Fourth Amendment*, 30 HASTINGS CONST. L.Q. 263 (2003); David E. Steinberg, *An Original Misunderstanding: Akhil Amar and Fourth Amendment History*, 42 SAN DIEGO L. REV. 227 (2005); David E. Steinberg, *The Original Understanding of Unreasonable Searches and Seizures*, 56 FLA.

the various data points. On numerous topics, however, they have strong disagreements about the implications that can be drawn from this data. This Article shows that there is more work to be done in gathering data. Mining a mostly unexamined source, the survey conducted here of the Framers' civil search statutes provides yet more material with which to explore originalism's utility as a guiding constitutional theory.

## I. THE COMMON LAW: TRESPASS AS SEARCH REMEDY

To fully understand the implications of the Framers' civil search statutes and the significance of the choices they made in the civil search legislation that they promulgated after nationhood, one must first understand the common law system that would have served as the default legal regime in the absence of those statutes. During the Framers' era, the default remedy for a wrongful search or seizure was common law trespass.<sup>27</sup> For present purposes, a few key characteristics of this trespass jurisprudence are important. First, trespass doctrine made it possible for a searcher to enjoy immunity from liability if a search was challenged. At common law, immunity often depended upon whether the searcher had operated under a search warrant or engaged in a successful search by finding contraband.<sup>28</sup> As will become apparent once we compare the common law trespass remedy with statutory reforms, it is important to appreciate that, under the common law, probable cause alone was insufficient to establish immunity. Second, there are abundant reasons for believing that, under the common law, judges did not consistently monitor the adequacy of probable cause prior to issuing search warrants.<sup>29</sup> Third, if this is true, then under the common law the primary mechanism for assuring probable cause was through an ex post jury determination.<sup>30</sup> Judges did not necessarily serve that function on an ex ante basis.

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L. REV. 1051 (2004); David E. Steinberg, *Sense-Enhanced Searches and the Irrelevance of the Fourth Amendment*, 16 WM. & MARY BILL RTS. J. 465 (2007).

<sup>27</sup> BRADFORD P. WILSON, ENFORCING THE FOURTH AMENDMENT: A JURISPRUDENTIAL HISTORY 15–16, 31–33 (1986); Amar, *Fourth Amendment*, *supra* note 26, at 774; William C. Heffernan, *Fourth Amendment Privacy Interests*, 92 J. CRIM. L. & CRIMINOLOGY 1, 10, 12 (2001); Maclin, *Fourth Amendment Complexity*, *supra* note 26, at 932–33, 936 n.59.

<sup>28</sup> See *infra* notes 31–34 and accompanying text.

<sup>29</sup> See *infra* notes 39–48 and accompanying text.

<sup>30</sup> See *infra* notes 49–60 and accompanying text.

A. *Immunity Dependent upon Warrant or Successful Search,  
Not Probable Cause*

In terms of established legal doctrine, whether immunity was available under the common law often depended upon whether a search was conducted with or without a warrant. In both the United States and Great Britain, possession of a valid warrant immunized officials from after-the-fact tort suits, regardless of whether the search was successful.<sup>31</sup> Thus, an official who had obtained a valid warrant knew *before* going into the search that he enjoyed immunity so long as he avoided outrageous behavior.<sup>32</sup> Even an official proceeding in good faith under what turned out to be a technically invalid search warrant would enjoy immunity so long as the warrant was not patently defective.<sup>33</sup> Conse-

<sup>31</sup> *American Rule. E.g.*, *Simpson v. Smith*, 2 Del. Cas. 285, 290–91 (Del. 1817); *Bell v. Clapp*, 10 Johns. 263, 265–66 (N.Y. Sup. Ct. 1813); RICHARD BURN, *BURN'S ABRIDGMENT, OR THE AMERICAN JUSTICE* 358 (Dover, N.H., Eliphalet Ladd 1792) [hereinafter BURN, *AMERICAN JUSTICE ABRIDGMENT* 1792] (explaining that a warrant justifies an officer searching for stolen goods in suspected house, regardless of whether contraband is found or doors are broken to gain entry); 7 NATHAN DANE, *A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW* § 2, at 245 n.\* (Boston, Cummings, Hilliard & Co. 1824) (same). Though I have cited here to only one American manual for justices of the peace (Burn's 1792 manual), this proposition was ubiquitous in American justice manuals published in both the 1700s and 1800s. I have identified such manuals elsewhere. Arcila, *supra* note 1, app. at 60–63. Citations to these manuals for this proposition, which are omitted here due to space considerations, are available from the author.

*English Rule. E.g.*, *Cooper v. Boot*, 4 Dougl. 339, 348, 99 Eng. Rep. 911, 916 (K.B. 1785); *Cooper v. Booth*, 3 Esp. 135, 145, 170 Eng. Rep. 564, 568 (K.B. 1785) (different reported version of same case); *Bostock v. Saunders*, 3 Wils. 434, 440, 95 Eng. Rep. 1141, 1145 (K.B. 1773) (de Grey, C.J.); *Bostock v. Saunders*, 2 Blackstone 912, 914 n.(r), 96 Eng. Rep. 539, 541 n.(r) (K.B. 1773) (different reported version of same case); 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 288 (Univ. of Chi. Press photo. reprint 1979) (1765–1769); 2 SIR MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 151 (Sollom Emlyn ed., London, E. Rider 1800) [hereinafter HALE, *PLEAS OF THE CROWN* 1800]; 2 SIR MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 151 (photo. reprint 1971) (Sollom Emlyn ed., n.p., E. & R. Nutt & R. Gosling 1736) [hereinafter HALE, *PLEAS OF THE CROWN* 1736].

*Bostock* had created an exception to this rule in cases where the officer himself swore out the warrant. In such a case, the warrant would not immunize an unsuccessful search. *Cooper* later overruled *Bostock* on this ground. Arcila, *supra* note 1, at 48 & n.176.

<sup>32</sup> *Cooper*, 4 Dougl. at 348–49, 99 Eng. Rep. at 916 (explaining that, if a search warrant was “executed maliciously from corrupt motives,” the searcher “may be liable in a special action on the case”; that “the regular execution” of a warrant-based search cannot be a trespass, but “[i]f improperly executed, an action on the case will lie”; and, finally, “[w]henever an officer acts malâ fide . . . he may be sued in a special action on the case”).

<sup>33</sup> *E.g.*, *Grumon v. Raymond*, 1 Conn. 40, 47–48 (1814); *Sanford v. Nichols*, 13 Mass. (1 Tyng) 286, 288–89 (1816); BURN, *AMERICAN JUSTICE ABRIDGMENT* 1792, *supra* note 31, at 267; DANIEL DAVIS, *A PRACTICAL TREATISE UPON THE AUTHORITY AND DUTY OF JUSTICES OF THE PEACE IN CRIMINAL PROSECUTIONS* 76 (Boston, Cummings, Hilliard & Co. 1824)

quently, searching under an apparently valid warrant was safer because the searcher knew ahead of time that he would enjoy immunity. These searchers had no reason to care whether the search was successful. In contrast, absent an independent justification, such as a permissible search incident to arrest, an official who conducted a warrantless search would be immune only if he succeeded in finding contraband.<sup>34</sup>

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[hereinafter, DAVIS, *TREATISE FOR JUSTICES* 1824]; FRANCOIS-XAVIER MARTIN, *THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE, AND OF SHERIFFS, CORONERS, &C.* 279 (Newbern, N.C. 1791) (no publisher listed) [hereinafter MARTIN, *THE NORTH CAROLINA JUSTICE* 1791].

This safe harbor existed because an officer was obligated to execute a “legal” warrant. *E.g.*, *Sanford*, 13 Mass. (1 Tyng) at 288; *Connor v. Commonwealth*, 3 Binn. 38, 43 (Pa. 1810); BURN, *AMERICAN JUSTICE ABRIDGMENT* 1792, *supra* note 31, at 267; 7 DANE, *supra* note 31, § 5, at 249; 2 SERJEANT WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* 132 (Thomas Leach ed., London, His Majesty’s Law-Printers 6th ed. 1787); 2 WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* 82 (Garland Publishing, Inc. 1978) (n.p., Eliz. Nutt & R. Gosling 1721); MARTIN, *THE NORTH CAROLINA JUSTICE* 1791, *supra*, at 280.

<sup>34</sup> *American Rule.* BURN, *AMERICAN JUSTICE ABRIDGMENT* 1792, *supra* note 31, at 358 (explaining that, “[i]f the door be shut” and not opened upon request, “the officer may break open the door” without punishment “if the stolen goods be in the house”); *accord* RICHARD BURN, *AN ABRIDGMENT OF BURN’S JUSTICE OF THE PEACE AND PARISH OFFICER* 323 (Boston, Joseph Greenleaf 1773) [hereinafter BURN, *JUSTICE OF THE PEACE ABRIDGMENT* 1773]; JAMES EWING, *A TREATISE ON THE OFFICE AND DUTY OF A JUSTICE OF THE PEACE* 506 (Trenton, James Oram 1805) [hereinafter EWING, *TREATISE ON JUSTICE OF THE PEACE* 1805] (adopted to New Jersey law); JOHN FAUCHERAUD GRIMKE, *THE SOUTH CAROLINA JUSTICE OF PEACE* 399 (New York, T. & J. Swords 3d ed. 1810) [hereinafter GRIMKE, *SOUTH CAROLINA JUSTICE OF PEACE* 1810]; WILLIAM WALLER HENING, *THE NEW VIRGINIA JUSTICE* 414 (Richmond, Aug: Davis 1799); HENRY HITCHCOCK, *THE ALABAMA JUSTICE OF THE PEACE* 407 (Cahawba, Ala., William B. Allen 1822) [hereinafter HITCHCOCK, *THE ALABAMA JUSTICE* 1822]; *A NEW CONDUCTOR GENERALIS: BEING A SUMMARY OF THE LAW RELATIVE TO THE DUTY AND OFFICE OF JUSTICES OF THE PEACE* 405 (Albany, D. & S. Whiting 1803) [hereinafter *NEW CONDUCTOR GENERALIS FOR JUSTICES* 1803] (adopted to New York law); JAMES PARKER, *THE CONDUCTOR GENERALIS: OR, THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE* 316 (Phila., Charless 1801) [hereinafter PARKER, *CONDUCTOR GENERALIS FOR JUSTICES OF THE PEACE* 1801]; HENRY POTTER, *THE OFFICE AND DUTY OF A JUSTICE OF THE PEACE* 274 (Raleigh, N.C. 1816) (publisher illegible) (adopted to North Carolina law); *see also* 3 DANE, *supra* note 31, § 8, at 521 (“Officers enter houses to seize run goods &c., at their peril of finding some there.”).

*English Rule.* 2 HALE, *PLEAS OF THE CROWN* 1800, *supra* note 31, at 151 (stating that “[i]f the door be shut” and not opened upon request, “the officer may break open the door” without punishment “if the stolen goods be in the house”); *accord* 2 HALE, *PLEAS OF THE CROWN* 1736, *supra* note 31, at 151. This guidance repeatedly appeared in the English version of Richard Burn’s justice manual, from the earliest to a late edition. *E.g.*, 2 RICHARD BURN & JOHN BURN, *THE JUSTICE OF THE PEACE, AND PARISH OFFICER* 132 (Dublin, John Rice 18th ed. 1793); 2 RICHARD BURN, *THE JUSTICE OF THE PEACE, AND PARISH OFFICER* 349 (London, Henry Lindtot 1755). Burn’s justice manual has been described as “[t]he most influential justicing handbook of the eighteenth century.” BARBARA J. SHAPIRO, “BEYOND REASONABLE DOUBT” AND “PROBABLE CAUSE”: HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE 138 (1991).

Accordingly, searching without a warrant was riskier because the official could not know until *after* the search whether he might enjoy immunity. In sum, under the common law the availability of immunity often depended upon one of two factors: (1) whether an ostensibly valid warrant had been obtained, or (2) whether the search had been successful.

One striking aspect about this description is what it omits: probable cause. In the years preceding the Framers' era, suggestions had been made in Great Britain's courts that, if probable cause justified a warrantless search, immunity should be granted.<sup>35</sup> But when the Framers were devising a legal system for the new nation, it appears that the common law had not yet recognized probable cause alone as a sufficient immunity-conferring standard. A 1728 British case had rejected probable cause as justification for an unsuccessful seizure, though it is not exactly clear whether this ruling rested upon the common law or statutory law.<sup>36</sup> Though its guidance was less clear, the common law also

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The passages upon which I rely above, with the exception of *Dane's*, appear in a discussion of warrant-based searches. Nonetheless, these passages seem to apply to warrantless searches as well, particularly when compared to surrounding paragraphs. Of note is that the factor controlling immunity—the finding of contraband—is irrelevant to warrant-based searches, in which immunity exists as a result of the warrant itself and regardless of whether the search was successful. *See supra* note 31.

Professor Davies has challenged whether the common law recognized a successful-search immunity doctrine. Davies, *Original Fourth Amendment, supra* note 1, at 647–48. I intend to address this issue in a future publication.

<sup>35</sup> Several justices in the famous *Bostock* decision, a 1773 British case, had suggested that an excise officer who had conducted an unsuccessful search might have gained immunity if he had presented facts supporting probable cause to the jury. 3 Wils. at 440, 95 Eng. Rep. at 1145. The 1785 British decision in *Cooper* overruled *Bostock* on a separate immunity issue. Arcila, *supra* note 1, at 48 & n.176. For present purposes, *Cooper* is interesting because a litigant had pointed out that a probable cause immunity standard had been suggested in *Bostock*. *Cooper*, 4 Dougl. at 343, 99 Eng. Rep., at 913. Yet, even after *Cooper*, the common law still did not recognize probable cause alone as a justification for a search. One reason why *Cooper* did not establish a common law probable cause immunity standard was because the challenged search had occurred pursuant to a warrant. The court, therefore, was satisfied to adhere to the warrant-based immunity standard that existed under common law. As a result, it rejected an argument that, regardless of the warrant, immunity should be conferred only if the jury was persuaded that probable cause had supported the search. *Cooper*, 4 Dougl. at 349, 99 Eng. Rep. at 916. In any case, the Framers may have been unaware of *Cooper*. Arcila, *supra* note 1, at 48 & n.177. But quite likely they were aware of *Bostock*, which was first published in 1775, and then again in 1781. *Id.* at 46; Davies, *Original Fourth Amendment, supra* note 1, at 652 n.294.

<sup>36</sup> *Leglise v. Champante*, 2 Strange 820, 820, 93 Eng. Rep. 871, 871 (1728). *Leglise* was an action against a customs officer for seizing French wine. *Id.* As such, it was likely a civil (not common law) case because customs officers were statutorily authorized to conduct such searches and seizures. Indeed, the *Leglise* reporters include a notation identifying a statute, 19 Geo. 2, ch. 34, § 16 (1746) (Eng.), that apparently was at issue. If this notation is correct, it undercuts the holding's validity because the statute created a probable cause

appeared to reject probable cause as a justification for an unsuccessful search.<sup>37</sup> This is important (but difficult) to recognize given that probable cause or some variant of it (such as reasonable suspicion) is so often the defining feature of a valid warrantless search in today's Fourth Amendment jurisprudence.<sup>38</sup>

### B. *Judges Did Not Consistently Act as Ex Ante Probable Cause Sentries*

Elsewhere, I have articulated the case against aggressive judicial sentryship of probable cause during the Framers' era,<sup>39</sup> so it will only be summarized here. Briefly stated, the colonial experience is unlikely to have imbued judges with the ethic of monitoring probable cause

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safe harbor. *Id.* Perhaps for some reason the court was relying upon its understanding of the common law to reject the probable cause defense. In any case, *Leglise's* holding appears to have resonated. For example, it was reiterated in the Boston writs of assistance litigation. See 2 LEGAL PAPERS OF JOHN ADAMS 125 & n.62 (L.K. Wroth & H.B. Zobel eds., 1965) [hereinafter LPJA]; M.H. SMITH, THE WRITS OF ASSISTANCE CASE 310 & n.32, app. I at 544 (1978).

<sup>37</sup> As discussed above, under the common law the propriety of a search often turned upon whether it had been conducted under an ostensibly valid warrant, or whether the search was successful, not upon whether probable cause supported the search. See *supra* notes 31–34 and accompanying text. In the years preceding the Framers' era, courts in Great Britain had opportunities to adopt a common law probable cause immunity standard for searches, but had not done so. See *infra* notes 54–56 and accompanying text. Dane's American Abridgement, discussing searches, expressly stated as late as 1824 that "suspicion does not always excuse the officer." 7 DANE, *supra* note 31, § 2, at 244–45. I have found no common law authority from this era indicating that immunity extended to a searcher who had operated under probable cause but without a warrant.

I disagree with a commentator on this Article who questioned my conclusion that the common law did not confer immunity based solely upon a probable cause standard. This commentator pointed out that the common law can be seen as indirectly requiring some important threshold of suspicion prior to a search, such as through its rules that searchers could be liable for acting out of "corrupt motives," or for conducting a warrantless search if no contraband was found. See *supra* notes 32, 34 and accompanying text. The common law's indirect incentives cannot be equated with a probable cause requirement because important differences exist between these approaches. For example, the common law incentives were necessarily enforced *ex post*. Probable cause, by contrast, can be enforced either *ex ante*, *ex post*, or through some combination. See William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 885–89 (1991). As a result, a probable cause scheme can present very different incentives and disincentives to search. See *infra* notes 215–217 and accompanying text. This occurs, at least in part, because the immunity implications are quite different between the common law standards and a probable cause regime. For example, the common law successful-search immunity standard demanded perfection. Probable cause does not; it allows a margin of error, making immunity available in some cases even when no contraband is found.

<sup>38</sup> See, e.g., *New Jersey v. TLO*, 469 U.S. 325, 341–42 (1985); *United States v. Jacobsen*, 466 U.S. 109, 115 (1984); *United States v. Santana*, 427 U.S. 38, 42 (1976); *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

<sup>39</sup> Arcila, *supra* note 1, at 9–16, 24–54.

prior to issuing search warrants. The colonial experience focused upon controversies with writs of assistance and the general search warrants that were challenged in the Wilkes cases from Great Britain.<sup>40</sup> Each of those contexts resulted in a focus upon particularity, not probable cause.<sup>41</sup>

Although it is true that some major treatises and a few case decisions did articulate a probable cause sentryship duty as a matter of doctrine and that these sources may have influenced the Framers,<sup>42</sup> there are many reasons to doubt that such a duty was consistently embraced in practice. Justices of the peace, the non-elite judges who actually issued search warrants, had reason to believe that judicial sentryship of probable cause was often optional. Treatises and manuals for justices of the peace,<sup>43</sup> as well as legal forms,<sup>44</sup> civil search statutes,<sup>45</sup> and case law<sup>46</sup> all provide evidence supporting this conclusion. Further evidence can be found in the slow and extended development of probable cause sentryship jurisprudence, which continued well past 1960.<sup>47</sup> Finally, in seeking to determine the likelihood that an aggressive probable cause sentryship ethic had permeated throughout the judicial system, it is important to acknowledge the laxity in legal education and judicial training, as well as the limitations on legal research, during the Framers' era.<sup>48</sup> These factors contribute to the implausibility that judges consistently monitored probable cause prior to issuing search warrants.

### C. *Juries Decided Probable Cause Ex Post*

Trespass was a legal doctrine premised upon *after-the-fact* review of probable cause.<sup>49</sup> This may have important implications for whether, under the common law, judges engaged in aggressive judicial sentryship of probable cause prior to issuing search warrants. Nothing in

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<sup>40</sup> Writs of assistance were legal documents through which colonial authorities controversially claimed to be granted wide-ranging search powers to enforce customs laws. *Id.* at 10–11. The “Wilkes cases” refers to litigation related to the arrest in Great Britain of Parliamentarian John Wilkes for publishing a paper deemed seditious and treasonous. *Id.* at 14 n.41.

<sup>41</sup> *Id.* at 9–16.

<sup>42</sup> *Id.* at 18–23.

<sup>43</sup> *Id.* at 24–31.

<sup>44</sup> Arcila, *supra* note 1, at 31–40.

<sup>45</sup> *Id.* at 45–48.

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

<sup>47</sup> *Id.* at 49–54.

<sup>48</sup> *Id.* at 25–26 & nn.88–90, 34–35 & nn.112–17.

<sup>49</sup> Maclin, *Fourth Amendment Complexity*, *supra* note 26, at 932, 935–36.

trespass doctrine or practice would have encouraged judges to scrutinize the adequacy of probable cause *prior* to issuing a warrant. This is because trespass law presented the probable cause issue to the jury, not the judge. Lord Mansfield recognized this in *Money v. Leach*,<sup>50</sup> a seminal 1765 British case.<sup>51</sup> He clarified that “[w]hether there was a probable cause or ground of suspicion,” was a matter for the jury to determine.”<sup>52</sup> This is especially reliable evidence given that, as Professor Amar has noted, Lord Mansfield was “a judge with notoriously statist sympathies.”<sup>53</sup>

The evidence does not stop there. In the later 1773 *Bostock v. Saunders* decision, the leading British excise case in the Americas concerning probable cause,<sup>54</sup> several justices indicated that the officer might have avoided liability had he submitted the facts supporting probable cause to the jury.<sup>55</sup> In *Cooper v. Booth* (also reported as *Cooper v. Boot*), a British excise case decided twelve years later, a party followed up on this

<sup>50</sup> 19 How. St. Tri. 1001, 97 Eng. Rep. 1075 (K.B. 1765); 3 Burr. 1742 (K.B. 1765) (different reported version of same case).

<sup>51</sup> Arcila, *supra* note 1, at 14–15.

<sup>52</sup> *Money v. Leach*, 19 How. St. Tri. at 1026, 97 Eng. Rep. at 1087 (quoting from plaintiff’s contentions); *Money v. Leach*, 3 Burr. at 1765 (different reported version of same case, reporting same language but with some of it emphasized). Later in the very same opinion, Lord Mansfield indicates that *judges* were to assess whether probable cause existed, writing “[i]t is not fit, that the receiving or judging of the information should be left to the discretion of the *officer*. The *magistrate* ought to judge; and should *give certain directions* to the officer. This is so, upon reason and convenience.” *Money*, 3 Burr. at 1766 (emphasis original to Burrow reporter); see also *Money*, 19 How. St. Tri. at 1027, 97 Eng. Rep. at 1088. Lord Mansfield appears to be directing the passage in the text at the jury’s role as *ex post* determinant of probable cause after a trespass trial, and the passage quoted above in this footnote to a judicial sentryship duty prior to issuing search warrants (thus his reference to giving directions to the officer, which addresses the warrant particularity requirement). *Money*, 19 How. St. Tri. at 1026–27, 97 Eng. Rep. at 1087–88; *Money*, 3 Burr. at 1765–66. I have previously acknowledged that Lord Mansfield’s quoted passage in this footnote supports a judicial probable cause sentryship duty. Arcila, *supra* note 1, at 20. Yet, for reasons stated in the same article and summarized above in Part I(B), there are many reasons to doubt that judges consistently engaged in such a role when actually reviewing search warrant applications. *Id.* at 24–54.

<sup>53</sup> Amar, *Fourth Amendment*, *supra* note 26, at 776.

<sup>54</sup> Arcila, *supra* note 1, at 46.

<sup>55</sup> *Bostock*, 3 Wils. at 441, 95 Eng. Rep. at 1145 (Gould, J.) (“[I]f, upon the facts pleaded a probable cause had been sh[o]wn, he might (perhaps) have been justified in the opinion of the jury, although no goods were found . . . .”) (this language does not appear in the other reports of the decision, *Bostock*, 2 Blackstone 912, 96 Eng. Rep. 539); 3 Wils. at 442, 95 Eng. Rep. at 1146 (Nares, J.) (opining that the officer “ought to have proved upon the trial . . . what *that cause and ground of suspicion* was, that the jury might judge whether there was any probable cause or ground of suspicion”) (emphasis original to Wilson reporter) (the other two reports of the decision note only that Judge Nares was “of the same opinion,” *Bostock*, 2 Blackstone at 914, 96 Eng. Rep. at 540).

argument, pointing out that the *Bostock* court “did not say what might have been their determination if the grounds of the officer’s suspicion had appeared.”<sup>56</sup>

Interestingly, in Great Britain the law’s treatment of probable cause may have been in flux during the period when the Framers were developing their new civil search jurisprudence. In 1785, Lord Mansfield contradicted the statements he had made twenty years earlier in *Money v. Leach* about probable cause being a jury issue. Lord Mansfield made his contradictory statement in *Cooper*, in which he announced a departure from the common law standard, apparently as a result of a newfound distrust of the jury:

[R]easonableness of suspicion would have so much latitude to a jury, that no officer would be safe: the Act was made to remedy these inconveniences; the oath of the officer is made evidence of the truth of the fact; and the probability of the suspicion duly left to the magistrate to judge of.<sup>57</sup>

In the intervening period, perhaps for some reason Lord Mansfield had lost faith in the jury’s willingness to make retrospective probable cause determinations rationally.<sup>58</sup> This is because nothing in the Act to which he refers expressly cries out for a departure from the previous

<sup>56</sup> *Cooper*, 4 Dougl. at 343, 99 Eng. Rep. at 913; see also *Cooper*, 3 Esp. at 138, 170 Eng. Rep. at 565–66 (different reported version of same case) (“[A]s the officer did not state it to the jury at the trial, the Court cannot judge whether the suspicion was well founded or not. It was said in *Bostock v. Saunders*, that if the officer had given in evidence any circumstance to prove a reasonable ground of suspicion, he would have been justified. . . . It was thought . . . that the officer ought at the trial to produce in evidence the grounds of his suspicion.”).

<sup>57</sup> 3 Esp. at 146–47, 170 Eng. Rep. at 568; accord *Cooper*, 4 Douglas at 349, 99 Eng. Rep. at 916 (different reported version of same case) (stating that, under the Act in question, “[t]he granting of the warrant is made evidence of the suspicion, whatever the event may afterwards be; otherwise too much would be left to the jury, and no officer would be safe”).

<sup>58</sup> Lord Mansfield helped lead an effort to restrict the jury by limiting its competence to fact issues, most notably in seditious cases. He ruled in one very prominent case, for example, that “the jury was to determine only if the defendant had printed and sold the objectionable literature; whether the words were libelous was a question of law for the court.” JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS* 59 (1986) [hereinafter REID, *CONSTITUTIONAL HISTORY OF RIGHTS*]; see also JAMES OLDHAM, *ENGLISH COMMON LAW IN THE AGE OF MANSFIELD* 211, 220–30, 235 (2004); 1 JAMES OLDHAM, *THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY* 82–99 (1992). Perhaps Lord Mansfield’s description in *Cooper* of the jury’s role with respect to probable cause, and its apparent contradiction with his declaration on the same subject twenty years earlier in *Money*, can be attributed to this effort.

common law standard.<sup>59</sup> In any case, it is unclear whether American lawyers and judges during the Framers' era would have been aware of Lord Mansfield's change of heart.<sup>60</sup>

## II. STATUTORY REFORMS & THEIR IMPACT: LIMITING ACCESS TO SEARCH REMEDIES BY MAKING IMMUNITY DEPENDENT UPON PROBABLE CAUSE, WHICH JUDGES (NOT JURIES) DECIDED EX POST

In addition to the common law system, a distinct statutory civil search jurisprudence was being developed to address special governmental revenue collection concerns. As a result, and in contrast to the common law trespass jurisprudence described above,<sup>61</sup> the situation was quite different in colonial vice-admiralty courts, which were civil law courts and not part of the common law system.<sup>62</sup> These vice-admiralty courts were central to the enforcement of customs laws, which served as a primary source of governmental revenue. In the colonies, it was generally in vice-admiralty courts where customs forfeitures were litigated, in part for one very important reason: to avoid juries.<sup>63</sup> Jury trials were a defining feature of common law courts but were unavailable in admiralty courts.<sup>64</sup> This was a tremendously important advantage in the colonies, where pervasive smuggling sought to avoid customs enforce-

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<sup>59</sup> The statute at issue in *Cooper* was 10 Geo., ch. 10, § 13 (1723) (Eng.). *Cooper*, 3 Esp. at 136, 144, 170 Eng. Rep. at 565, 567; 4 Dougl. at 340, 348, 99 Eng. Rep. at 912, 916 (different reported version of the same case). This statutory act, for example, omits any authorization for judges to make probable cause determinations. 10 Geo., ch. 10.

It is possible to distinguish *Money* from *Cooper* in that the former was a trespass decision controlled by the common law, while the latter was a statutory excise case controlled by civil law. Because the statute is silent about probable cause, however, it appears that Lord Mansfield in *Cooper* drew upon his apparently revised understanding of the common law and the jury's role with regard to probable cause.

<sup>60</sup> Arcila, *supra* note 1, at 48 & nn.176–77 (explaining that it is unclear how well known *Cooper* was to the Founding generation).

<sup>61</sup> See *supra* notes 27–60 and accompanying text.

<sup>62</sup> CARL UBBELOHDE, *THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION* 18–19 (1960); Davies, *Original Fourth Amendment*, *supra* note 1, at 605 & n.149 (citing 1 MATTHEW BACON, *A NEW ABRIDGMENT* 629 (6th rev. ed. 1793) (“All Maritime Affairs are regulated chiefly by the Civil Law . . .”).

<sup>63</sup> REID, *CONSTITUTIONAL HISTORY: RIGHTS*, *supra* note 58, at 53; UBBELOHDE, *supra* note 62, at 15, 21; David S. Lovejoy, *Rights Imply Equality: The Case Against Admiralty Jurisdiction in America, 1764–1776*, 16 WM. & MARY Q. 459, 461 (1959).

<sup>64</sup> See DAVID W. ROBERTSON, *ADMIRALTY AND FEDERALISM* 34 & n.26 (1970); SMITH, *supra* note 36, at 14–15; UBBELOHDE, *supra* note 62, at 6. The general rule that there is no right to a jury trial in admiralty continues to this day. FED. R. CIV. P. 38(c); THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW* § 19–10, at 1100 (4th ed. 2004).

ment,<sup>65</sup> and juries were hostile to authorities.<sup>66</sup> As a result, effective customs enforcement in the colonies depended upon the use of vice-admiralty courts and the avoidance of common law juries.

The characteristic institution of customs law enforcement, seizure of offending ships and cargoes, was viable only if the customs officer could be confident of following it up with the necessary court process of condemnation. . . . Condemnation by a common law court was usually out of the question (at any rate in a contested case), because it depended upon the verdict of jurors who were likely to favor the custom house's adversary. In a vice-admiralty court, on the other hand, condemnation was decided by the judge alone.<sup>67</sup>

As the need for greater customs revenue, and hence greater customs enforcement, increased, the admiralty advantages of jury avoidance and judicial control were no longer deemed sufficient. This is what led directly to the rise of probable cause, which began playing a critical role in British civil search statutes. But, contrary to what we would presume today, given that we perceive probable cause as a great bulwark against the government's search power, it appears certain that the probable cause concept was implemented to make it *harder* to access a search remedy, not to increase the citizenry's protection against searches. As

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<sup>65</sup> See CUDDIHY, *supra* note 26, at 511; NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 52-54 (1937); EDMUND S. MORGAN & HELEN M. MORGAN, THE STAMP ACT CRISIS: PROLOGUE TO REVOLUTION 43, 61 (rev. ed. 1962) [hereinafter MORGAN, STAMP ACT CRISIS] (discussing evasions of Molasses Act); Clancy, *supra* note 26, at 502-03.

<sup>66</sup> 4 CHARLES M. ANDREWS, THE COLONIAL PERIOD OF AMERICAN HISTORY: ENGLAND'S COMMERCIAL AND COLONIAL POLICY 225 (1938); see also Lovejoy, *supra* note 63, at 468. In 1726, a colonial customs officer complained to superiors in Great Britain that "it is a thing impossible to get a jury in the country that will do the king justice upon these tryalls." 4 ANDREWS, *supra*, at 264. Thirty-five years later, one of colonial Massachusetts' royal governors stated the problem bluntly: "A Custom house officer has no chance with a jury . . . ." Letter from Sir Francis Bernard, Massachusetts Governor, to Lords of Trade (Aug. 2, 1761), in JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDICATED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY 1761-1772, at 553, 557 n.4 (1865) (reporting the case *Erving v. Craddock*). Note that Quincy gives the letter's date as August 2, 1761, but cites to "2 Bernard Papers, 51, 51," in which the letter is dated August 27, 1761.

<sup>67</sup> SMITH, *supra* note 36, at 96; see also 4 ANDREWS, *supra* note 66, at 265 (quoting a British Attorney General's report that "[n]either will the officers of the customs adventure to make seizures, if they be obliged to pursue to get condemnations at common law where they are sure to be cast by the juries and condemned in cost and damages.>"). On the technical distinction between admiralty courts and vice-admiralty courts, see *infra* notes 84-85 and accompanying text.

will be explained in greater detail below, it appears that the Framers followed this example with the exact same aim. If so, this suggests that our historical understanding of probable cause is deeply misguided.

### A. *The British Experience*

In Great Britain, policymakers chose to accomplish by statute the important legal changes mentioned above regarding the role of the jury and probable cause. During the 1600s, forfeiture and condemnation proceedings in Great Britain had generally occurred in the Court of Exchequer, which made some sense given that the Exchequer specialized in governmental revenue.<sup>68</sup> These courts could operate without a jury, but it is likely that “a jury verdict in a contested customs condemnation case was indispensable.”<sup>69</sup> In the period leading up to the revolution, jury trials continued to be available in forfeiture and condemnation proceedings in Great Britain, even when customs enforcement was at issue.<sup>70</sup> Though juries had already earned a pro-claimant and antigovernment reputation in Great Britain,<sup>71</sup> the right to jury trial was preserved there as a result of persistent efforts to assure the primacy of the common law over civil admiralty courts.<sup>72</sup>

Later, Great Britain changed the playing field with regard to searcher immunity. As far as I have been able to determine, the abrogation of the common-law rule regarding search immunity did not occur in Great Britain until the mid-1700s, when British statutes granted immunity based only upon probable cause.<sup>73</sup> It appears that the first of these, promulgated in 1746, authorized judges to immunize officials by

<sup>68</sup> SMITH, *supra* note 36, at 12–13; UBBELOHDE, *supra* note 62, at 19.

<sup>69</sup> SMITH, *supra* note 36, at 55; *see also* UBBELOHDE, *supra* note 62, at 19.

<sup>70</sup> SMITH, *supra* note 36, at 14; UBBELOHDE, *supra* note 62, at 18–19; *see also, e.g.*, 13 & 14 Car. 2, ch. 11, § 28 (1662) (Eng.) (authorizing suits “in his majesty’s court of exchequer,” where jury trials were available); 12 Car. 2, ch. 19, § 4 (1660) (Eng.) (specifying that aggrieved claimant could seek redress in trespass action, ostensibly in any common law court and before jury).

<sup>71</sup> 4 ANDREWS, *supra* note 66, at 223–24.

<sup>72</sup> *Id.* at 224, 259; UBBELOHDE, *supra* note 62, at 18–19; Lovejoy, *supra* note 63, at 461. For a review of the long battle within Great Britain to assure primacy of the common law courts over admiralty courts, *see* ROBERT G. WILLIAMS, *A TREATISE ON THE JURISDICTION AND PRACTICE OF THE ENGLISH COURTS IN ADMIRALTY ACTIONS AND APPEALS 1–12* (3d ed. 1902).

<sup>73</sup> *See* 2 LPJA, *supra* note 36, at 125 n.62; SMITH, *supra* note 36, at 13 & n.9, 310 & n.32. Note that Smith appears to mistakenly cite “[t]he act 19 Geo. 2 c. 35 (1746).” SMITH, *supra* note 36, at 13 & n.9. However, that act says nothing about probable cause. Smith probably meant to cite to 19 Geo. 2, ch. 34 (1746) (Eng.), which is discussed immediately below. *See infra* note 74 and accompanying text.

certifying that probable cause had supported a seizure.<sup>74</sup> This certification also deprived the claimant of any meaningful damages and costs.<sup>75</sup> By its own terms, and as supplemented through later statutory enactments, this act remained in force until the end of the parliamentary session following September 29, 1764.<sup>76</sup>

Thus, by 1746 Great Britain had established through civil search statutes significant departures from the common law tradition: it had made search immunity dependent upon probable cause, and reserved that issue for judges, thereby displacing the jury's common law role with respect to that specific issue. These statutory reforms were terrifically important because, as we shall see, they set the pattern that would be extended into the colonies, and which the Framers would adopt.

### B. *The Colonial Experience*

The relations between Great Britain and the American colonies reached a crucial milestone in 1764 and 1765, as the mother country attempted to solidify the displacement of juries and the role of probable cause in establishing search immunity. Great Britain's territorial expansion in the New World increased the empire but came with huge costs.<sup>77</sup> Financing the wars necessary to winning those territories left Great Britain with huge debts, and the territories also came with the large future financial obligations necessary to defending them.<sup>78</sup> Consequently, Great Britain looked for ways to have the colonies contribute to these costs.<sup>79</sup> A primary candidate was to improve customs enforcement, decreasing losses resulting from smuggling as well as lax, or even corrupt, customs officers,<sup>80</sup> and from resistant colonial courts.<sup>81</sup> Another option was to increase customs levies because "customs duties

<sup>74</sup> 19 Geo. 2, ch. 34, § 16.

<sup>75</sup> *Id.*

<sup>76</sup> 32 Geo. 2, ch. 18, § 1 (1759) (Eng.); 26 Geo. 2, ch. 32, § 1 (1753) (Eng.); 19 Geo. 2, ch. 34, § 17.

<sup>77</sup> MORGAN, STAMP ACT CRISIS, *supra* note 65, at 36–37.

<sup>78</sup> *Id.*; PROLOGUE TO REVOLUTION: SOURCES AND DOCUMENTS ON THE STAMP ACT CRISIS, 1764–1766, at 3 (Edmund S. Morgan ed., 1959) [hereinafter PROLOGUE TO REVOLUTION] (noting that the end of the Seven Years War, which included the French and Indian War and its struggle for control of the American colonies, left Great Britain "with a national debt that had nearly doubled," and having to finance the cost of keeping troops in the colonies).

<sup>79</sup> PROLOGUE TO REVOLUTION, *supra* note 78, at 3.

<sup>80</sup> MORGAN, STAMP ACT CRISIS, *supra* note 65, at 38–39, 60; UBBELOHDE, *supra* note 62, at 24.

<sup>81</sup> MORGAN, STAMP ACT CRISIS, *supra* note 65, at 61–62; UBBELOHDE, *supra* note 62, at 24–25.

had been designed to regulate the flow of trade rather than fill the Treasury.”<sup>82</sup>

As Great Britain sought to increase the revenue flow from the colonies around 1764, it was not confronted with a blank slate. For nearly 70 years, Great Britain had been treating American colonists differently than Englishmen in the home country with respect to jury trials.<sup>83</sup> In 1696, Great Britain had passed a statutory act that had placed the colonies into a dramatically different legal framework: it granted jurisdiction to colonial admiralty courts—thus avoiding juries—when penalties and forfeitures were sought in colonial customs matters.<sup>84</sup> This change required the establishment of admiralty courts in the colonies (“actually vice-admiralty courts, since the colonial governors to whom they nominally belonged were commissioned vice-admirals, not admirals”<sup>85</sup>), and it was significant that these courts were “under the immediate control of the Admiralty [Board] and the High Court [of Admiralty]” in Great Britain,<sup>86</sup> rather than under colonial control.<sup>87</sup>

Initially, the colonial vice-admiralty courts constituted only “a minor grievance.”<sup>88</sup> One historian has concluded that, “[t]hese were not serious or constitutional complaints because the vice-admiralty was a trade court, enforcing the Navigation Acts, a matter Americans acknowledged to be within the constitutional discretion of Parliament.”<sup>89</sup> Another commentator has opined that colonists

<sup>82</sup> MORGAN, *STAMP ACT CRISIS*, *supra* note 65, at 39; *see also id.* at 117 (describing colonial view that customs duties had historically served a regulatory, not revenue-generating, purpose given that “the average annual remittance [to Great Britain’s treasury] from such duties during the past thirty years had been less than £2000, while the cost of collecting them had been £7600. Duties which cost four times as much to collect as they produced might well be justified as regulations of trade, but they could scarcely be regarded as taxes levied for the purpose of revenue.” (citation omitted)).

<sup>83</sup> Lovejoy, *supra* note 63, at 461–62.

<sup>84</sup> 7 & 8 Will. 3, ch. 22, § 7 (1696) (Eng.); *see also id.* §§ 4, 6 (extending earlier customs enforcement provisions to the colonies, which previously had been in effect only in Great Britain).

<sup>85</sup> SMITH, *supra* note 36, at 15; *see also* UBBELOHDE, *supra* note 62, at 6. Prior to this statutory act, “there were no courts of vice-admiralty” in the colonies, and admiralty matters there had often been resolved before juries in common law courts. 4 ANDREWS, *supra* note 66, at 224–25; *see also id.* at 259; SMITH, *supra* note 36, at 15, 55 & n.5; Lovejoy, *supra* note 63, at 461. One scholar has opined that “[j]ury trial was almost invariably the rule.” 4 ANDREWS, *supra* note 66, at 225.

<sup>86</sup> 4 ANDREWS, *supra* note 66, at 226.

<sup>87</sup> *Id.* at 227.

<sup>88</sup> REID, *CONSTITUTIONAL HISTORY: RIGHTS*, *supra* note 58, at 178.

<sup>89</sup> *Id.* *But see* Lovejoy, *supra* note 63, at 465 (opining that, when “courts of admiralty were charged with enforcing the acts of trade in America . . . they were thoroughly disliked”).

had no other recourse than to adjust themselves to the situation . . . [and] in the years before 1763, they came to recognize the unquestioned fact that, except here and there and in individual cases, the acts of trade affected but little either their commercial activities or their financial prosperity.<sup>90</sup>

## 1. 1764 Sugar Act

Given this colonial history, it seemed unexceptional to the British to continue to displace colonial juries in favor of colonial vice-admiralty courts through passage of the 1764 Sugar Act,<sup>91</sup> even though “Parliament’s purpose had been to take jurisdiction away from the colonial judiciaries and place it with an imperial tribunal. More important, determination of guilt was transferred from the common-law jury to a civil-law judge appointed by the Crown . . . .”<sup>92</sup> The 1764 Sugar Act also implemented a new colonial statutory reform, extending into the colonies the probable cause/immunity standard that already applied in Great Britain itself.<sup>93</sup>

The earlier introduction of vice-admiralty jurisdiction into the colonies had lulled Great Britain into complacency because British authorities failed to appreciate the extent to which the 1764 Sugar Act’s replacement of the jury with a single judge struck at values that colonists considered fundamental.<sup>94</sup> Colonists grated at this reform because it was a “perversion,” which ignored that “a judicial process of condemnation” had originated as a matter of common, not civil, law.<sup>95</sup> Colonial hostility also was fueled by knowledge that, in Great Britain, the common law had triumphed, leaving admiralty with only a narrow jurisdiction.<sup>96</sup>

<sup>90</sup> 4 ANDREWS, *supra* note 66, at 228.

<sup>91</sup> 4 Geo. 3, ch. 15, § 41 (1764) (Eng.); *see* 4 ANDREWS, *supra* note 66, at 268–69 & n.1; 2 LPJA, *supra* note 36, at 224 n.8; Davies, *Original Fourth Amendment*, *supra* note 1, at 653 n.295.

<sup>92</sup> JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY TO TAX* 203 (1987) [hereinafter REID, *CONSTITUTIONAL HISTORY: TAX*].

<sup>93</sup> 4 Geo. 3, ch. 15, § 46 (authorizing judges in colonial condemnation cases to determine and certify that probable cause supported the seizure, which would immunize officials and deprive claimants of meaningful damages and costs). For information concerning the prior statutory implementation of the probable cause/immunity standard in Great Britain, *see supra* notes 73–76 and accompanying text.

<sup>94</sup> 4 ANDREWS, *supra* note 66, at 225, 258; REID, *CONSTITUTIONAL HISTORY: RIGHTS*, *supra* note 58, at 180–82.

<sup>95</sup> SMITH, *supra* note 36, at 56.

<sup>96</sup> 4 ANDREWS, *supra* note 66, at 225; SMITH, *supra* note 36, at 56.

Though the colonies previously had tolerated vice-admiralty jurisdiction, their passivity began to end with the 1764 Sugar Act. “Americans . . . protested—and protested angrily—as unconstitutional . . . the section [of the 1764 Sugar Act] vesting enforcement of the law’s criminal parts in the court of vice-admiralty.”<sup>97</sup> The reasons are subject to debate. Perhaps the 1764 Sugar Act was perceived as raising revenue more than simply regulating trade,<sup>98</sup> or perhaps colonists now began to grate at being treated differently from those in the mother country, who enjoyed more plenary access to jury trials.<sup>99</sup>

In any case, the colonial response reverberated. New York sent a petition for repeal to the House of Commons, which included among numerous objections the jury’s displacement that resulted from the jurisdictional grant to the vice-admiralty courts.<sup>100</sup> The New York General Assembly approved a resolution raising this issue, which also contested the judicial power to grant immunity (though it did not specifically attack the applicable probable cause standard).<sup>101</sup> The Connecticut Assembly issued a resolution decrying admiralty jurisdiction and the loss of jury trials,<sup>102</sup> and the Massachusetts legislature issued a similar protest to the colony’s royal governor.<sup>103</sup> One colonial leader, attacking the 1764 Sugar Act, passionately protested its displacement of the jury, as well as the power it gave to a single judge to grant search immunity through a probable cause certification.<sup>104</sup>

Another example of the colonial hostility towards the 1764 Sugar Act is evident in two South Carolina forfeiture trials from the late 1760s. These two forfeiture proceedings involved the ship *Ann* and the schooner *Active*, and resulted in acquittal judgments. The single judge presiding over both trials, however, granted immunity for the seizures by decreeing that probable cause had supported them, thus assuring that the claimant whose ships had been wrongly seized could not col-

<sup>97</sup> REID, CONSTITUTIONAL HISTORY: TAX, *supra* note 92, at 203. For an insightful discussion about the values that the colonists believed juries protected, see REID, CONSTITUTIONAL HISTORY: RIGHTS, *supra* note 58, at 48–52.

<sup>98</sup> See REID, CONSTITUTIONAL HISTORY: TAX, *supra* note 92, at 194–207.

<sup>99</sup> See REID, CONSTITUTIONAL HISTORY: RIGHTS, *supra* note 58, at 182–83.

<sup>100</sup> New York Petition to the House of Commons (Oct. 18, 1764), in PROLOGUE TO REVOLUTION, *supra* note 78, at 8, 13.

<sup>101</sup> Minutes of 3 March 1775, in JOURNAL OF THE VOTES AND PROCEEDINGS OF THE GENERAL ASSEMBLY OF THE COLONY OF NEW-YORK, FROM 1766 TO 1766, INCLUSIVE 52–53 (1820).

<sup>102</sup> Connecticut General Assembly Resolution ¶ 8 (Oct. 1765), in 12 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 421, 424 (Charles J. Hoadley ed., 1881) [hereinafter Connecticut Resolution].

<sup>103</sup> REID, CONSTITUTIONAL HISTORY: TAX, *supra* note 92, at 203 & n.19.

<sup>104</sup> OXENBRIDGE THACHER, THE SENTIMENTS OF A BRITISH AMERICAN 7–8, 11 (1764).

lect damages.<sup>105</sup> As for the *Ann*, the judge premised his probable cause certification upon the rare procedure of obtaining from the search official an oath of calumny, in which the official swore (to all appearances falsely) that he had not prosecuted the forfeiture from malice or revenge.<sup>106</sup> Henry Laurens, the claimant who had ownership interests in the vessels, launched a publicity campaign against the proceedings. Among other grievances, he questioned how the judge could have found probable cause as to the *Active* after holding that “not the least *Shadow or Pretence*” supported a customs violation.<sup>107</sup>

## 2. 1765 Stamp Act

Colonists greeted the 1765 Stamp Act<sup>108</sup> with an exponentially greater degree of vitriol.<sup>109</sup> Like the 1764 Sugar Act,<sup>110</sup> it granted jurisdiction to admiralty courts and vice-admiralty courts in the colonies,<sup>111</sup> thus authorizing displacement of juries.<sup>112</sup> The Stamp Act did not expressly condition immunity upon a judge’s certification that probable cause had existed, as had the Sugar Act. The Stamp Act was silent on this issue. But, as a British revenue statute, it apparently was controlled in this respect by the preceding Sugar Act.<sup>113</sup>

<sup>105</sup> HENRY LAURENS & BENJAMIN CHEW, EXTRACTS FROM THE PROCEEDINGS OF THE HIGH COURT OF VICE-ADMIRALTY IN CHARLES-TOWN, SOUTH CAROLINA 19–40 (2d ed. 1769) [hereinafter LAURENS, EXTRACTS 1769]; HENRY LAURENS & BENJAMIN CHEW, EXTRACTS FROM THE PROCEEDINGS OF THE COURT OF VICE-ADMIRALTY IN CHARLES-TOWN, SOUTH CAROLINA; IN THE CAUSE, *GEORGE ROUPELL, ESQ. v. THE SHIP ANN AND GOODS*, at iii–20 (1768) [hereinafter LAURENS, EXTRACTS 1768]; see 11 LAWRENCE HENRY GIPSON, *THE BRITISH EMPIRE BEFORE THE REVOLUTION* 553–59 (1965); UBBELOHDE, *supra* note 62, at 109–14.

<sup>106</sup> LAURENS, EXTRACTS 1769, *supra* note 105, at 32–37; LAURENS, EXTRACTS 1768, *supra* note 105, at 10–13; DAVID DUNCAN WALLACE, *THE LIFE OF HENRY LAURENS* 143 (Russell & Russell 1967) (1915); see also EGERTON LEIGH, *THE MAN UNMASKED, OR, THE WORLD UNDECEIVED* 77–90 (1769).

<sup>107</sup> LAURENS, EXTRACTS 1769, *supra* note 105, at 40; HENRY LAURENS & BENJAMIN CHEW, AN APPENDIX TO THE EXTRACTS FROM THE PROCEEDINGS OF THE HIGH COURT OF VICE-ADMIRALTY IN CHARLES-TOWN, SOUTH CAROLINA 39–40 (1769); see also 11 GIPSON, *supra* note 105, at 557–59; UBBELOHDE, *supra* note 62, at 110–13; WALLACE, *supra* note 106, at 142–49.

<sup>108</sup> 5 Geo. 3, ch. 12 (1765) (Eng.).

<sup>109</sup> REID, *CONSTITUTIONAL HISTORY: TAX*, *supra* note 92, at 194–97, 208–09.

<sup>110</sup> For discussion of relevant Sugar Act provisions, see *supra* notes 91–107 and accompanying text.

<sup>111</sup> 5 Geo. 3, ch. 12, §§ 57–58.

<sup>112</sup> REID, *CONSTITUTIONAL HISTORY: RIGHTS*, *supra* note 58, at 52.

<sup>113</sup> See 4 Geo. 3, ch. 15, § 46 (stating that “from and after the twenty ninth day of *September*, one thousand seven hundred and sixty four,” its creation of a probable cause/immunity link would extend to trials “in *America*, on account of any seizure of any ship or

The colonies reacted with fury to the Stamp Act, including with violent resistance in the Stamp Act Riots.<sup>114</sup> One animating factor for the colonists was their belief that Parliament's legislative power was limited. The colonies accepted Parliament's right to legislate for the colonies, which included the power to regulate and to incidentally tax in support of such regulation, but not Parliament's power to otherwise tax the colonies absent consent.<sup>115</sup> To the colonists, Parliament's legitimate taxing power was limited to "external" regulation and merely paid for the regulatory apparatus, such as through customs duties, but the taxing power was illegitimate with regard to "internal" taxes, such as the excise taxes the Stamp Act levied, which had the distinct purpose of

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goods as forfeited by this or any other act of parliament relating to his Majesty's customs") (underscore emphasis added). Further evidence supporting this interpretative link between the 1764 Sugar Act and 1765 Stamp Act can be found in a passage from a George Mason letter, quoted at length below. *See infra* text accompanying note 136. After protesting the 1765 Stamp Act probable cause/immunity standard, he wrote that "[t]hese things did not altogether depend upon the Stamp-Act, and therefore are not repealed with it." Letter from George Mason to the Committee of Merchants in London (June 6, 1766), in 1 THE PAPERS OF GEORGE MASON 1725–1792, at 65, 67 (Robert A. Rutland ed., 1970) [hereinafter MASON]. Great Britain repealed the Stamp Act on March 4, 1766. *See infra* note 138 and accompanying text. Apparently, the reason that the 1765 Stamp Act's repeal did not put an end to the probable cause/immunity link is because the preceding 1764 Sugar Act controlled that issue.

<sup>114</sup> MORGAN, STAMP ACT CRISIS, *supra* note 65, at 163–68, 189–93, 249 (describing mob riots in Boston, Rhode Island, and New York); *see also* *The New York Agreement*, PA. GAZETTE (Phila.), Nov. 7, 1765, *reprinted in* PROLOGUE TO REVOLUTION, *supra* note 78, at 106, 106; Letter from Governor Bernard to Lord Halifax (Aug. 15, 1765), in PROLOGUE TO REVOLUTION, *supra* note 78, at 106, 106–08; Letter from Thomas Hutchinson to Richard Jackson (Aug. 30, 1765), in PROLOGUE TO REVOLUTION, *supra* note 78, at 108, 108–09; Letter from Dr. Thomas Moffat to Joseph Harrison (Oct. 16, 1765), in PROLOGUE TO REVOLUTION, *supra* note 78, at 109, 109–13. Once initiated, the protests spread quickly because "[a]fter Boston and Newport had shown the way, the mere threat of violence was sufficient in most other colonies." MORGAN, STAMP ACT CRISIS, *supra* note 65, at 196. In many instances, threatening mobs were formed. *See id.* at 198–203.

<sup>115</sup> This view holds that the colonies drew a distinction between Parliament's power to regulate through legislation on the one hand, and to tax on the other. MORGAN, STAMP ACT CRISIS, *supra* note 65, at 99, 115–117, 119 (reviewing an argument by Daniel Dulany, an influential colonial pamphleteer against the Stamp Act); *id.* at 145, 150, 341–42; Lovejoy, *supra* note 63, at 469; *see also* Connecticut Resolution, *supra* note 102, ¶¶ 5–6, at 423–24.

raising revenue.<sup>116</sup> The colonists were drawing an extremely fine distinction on this point, but they fervently asserted it.<sup>117</sup>

Many of the colonial protests against the Act contested Parliament's legislative power to displace the jury trial right.<sup>118</sup> To the colonies, this provision was even more objectionable in the Stamp Act than it had been in the 1764 Sugar Act because the Stamp Act did not merely regulate external trade,<sup>119</sup> but was an internal tax with a distinctly revenue-generating purpose.<sup>120</sup> Adding to the controversy was that Stamp Act offenses "arose 'on Land—within the Body of a County—as remote from Admiralty Jurisdiction on every constitutional Principle, as a Suit on a Bond, or an Ejectment for a Freehold.'"<sup>121</sup> The Stamp Act thus helped crystallize for colonists that a constitutional jury grievance might be at stake.<sup>122</sup>

Colonial opposition to the Stamp Act occurred both on an organized basis among numerous colonies, and also within individual colonies. The organized effort occurred through a Stamp Act Congress, initiated by Massachusetts and held in New York in October 1765, to which nine colonies sent representatives.<sup>123</sup> The Stamp Act Congress focused upon the Act's jury displacement through its jurisdictional

<sup>116</sup> MORGAN, STAMP ACT CRISIS, *supra* note 65, at 116–17, 271, 276, 342–46; REID, CONSTITUTIONAL HISTORY: TAX, *supra* note 92, at 34–39, 44–52. Unsurprisingly, royal authorities such as Parliament were inclined to reject this distinction (as did Massachusetts's royal governor, though he agreed with the colonial position that Parliament lacked power to tax the colonies). MORGAN, STAMP ACT CRISIS, *supra* note 65, at 271–72, 277, 348–50; Lovejoy, *supra* note 63, at 469–70.

<sup>117</sup> As one scholar has explained:

[d]ue subordination . . . meant submission to Parliamentary legislation but not to Parliamentary taxation. The line between the two might be difficult to perceive in Westminster, but it was plain in America. The [Stamp Act] congress could see it; Daniel Dulany could see it; and the several colonial assemblies could see it, as they showed by endorsing the proceedings of the congress or by resolutions and petitions of their own or by both.

MORGAN, STAMP ACT CRISIS, *supra* note 65, at 150 (citation omitted). For a brief review of the Stamp Act Congress, see *infra* notes 123–126 and accompanying text.

<sup>118</sup> MORGAN, STAMP ACT CRISIS, *supra* note 65, at 150–51.

<sup>119</sup> REID, CONSTITUTIONAL HISTORY: RIGHTS, *supra* note 58, at 52.

<sup>120</sup> *Id.* at 178.

<sup>121</sup> *Id.* (quoting *Letter II from Philadelphia*, BOSTON EVENING POST, June 27, 1774, at 1, col. 2).

<sup>122</sup> REID, CONSTITUTIONAL HISTORY: RIGHTS, *supra* note 58, at 52; see also MORGAN, STAMP ACT CRISIS, *supra* note 65, at 98, 364; Lovejoy, *supra* note 63, at 469–70.

<sup>123</sup> PROLOGUE TO REVOLUTION, *supra* note 78, at 45. For a detailed discussion about the Stamp Act Congress and the declarations it issued, see MORGAN, STAMP ACT CRISIS, *supra* note 65, at 138–54. The Stamp Act Congress was "the First Congress of the American Colonies." *Duncan v. Louisiana*, 391 U.S. 145, 152 (1968).

grant to admiralty courts, but did not mention the probable cause/immunity issue. The Congress declared an “indispensable Duty . . . to endeavour . . . to procure the Repeal of the Act” because it subverted trial by jury, “the inherent and invaluable right of every British subject in these colonies.”<sup>124</sup> In a petition to the king, the Congress emphasized that jury trials protected against arbitrary executive power, and that admiralty jurisdiction was being extended beyond its historical limits, depriving colonists of the common law and placing them at the mercy of a single vice-admiralty judge.<sup>125</sup> In separate communications to the House of Lords and the House of Commons, the Congress emphasized that colonists were being subjected to unequal treatment compared to those in Great Britain.<sup>126</sup>

Of the many colonies that individually protested the Stamp Act, “[m]ost . . . denied the authority of Parliament to extend the jurisdiction of admiralty courts.”<sup>127</sup> For example, the colonial assemblies of Pennsylvania,<sup>128</sup> Maryland,<sup>129</sup> Connecticut,<sup>130</sup> Massachusetts,<sup>131</sup> South

<sup>124</sup> Resolutions of the Stamp Act Congress: Declaration of Rights ¶¶ 7–8 (Oct. 19, 1765), in *SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS* 270, 270–71 (Richard L. Perry ed., 1959) [hereinafter *SOURCES OF OUR LIBERTIES*].

<sup>125</sup> Stamp Act Congress Petition to the King, in *PROLOGUE TO REVOLUTION*, *supra* note 78, at 63, 64–65.

<sup>126</sup> Stamp Act Congress Memorial to the House of Lords, in *PROLOGUE TO REVOLUTION*, *supra* note 78, at 65, 65–66; Stamp Act Congress Petition to the House of Commons, in *PROLOGUE TO REVOLUTION*, *supra* note 78, at 66, 67. The communication to the House of Commons included a reference to the possibility of being carried “from one End of the Continent, to the other,” which appears to be a reference to the authorization royal authorities enjoyed to seek condemnation of seized ships and goods in a vice-admiralty court located in Halifax, Nova Scotia. See REID, *CONSTITUTIONAL HISTORY: RIGHTS*, *supra* note 58, at 178–79; Lovejoy, *supra* note 63, at 466. British officials “were not impressed with” colonial complaints about jury displacement resulting from the grants of jurisdiction to vice-admiralty courts but “were interested in the” colonial complaint that the Halifax vice-admiralty court’s location was too inconvenient. 4 ANDREWS, *supra* note 66, at 270; see also UBBELOHDE, *supra* note 62, at 70–72; Lovejoy, *supra* note 63, at 472. Thus, the British soon established an additional set of colonial vice-admiralty courts in Boston, Philadelphia, and Charleston. See *infra* notes 139–142 and accompanying text.

<sup>127</sup> MORGAN, *STAMP ACT CRISIS*, *supra* note 65, at 134.

<sup>128</sup> Pennsylvania Assembly Resolves on the Stamp Act ¶ 8 (Sept. 21, 1765), in *PROLOGUE TO REVOLUTION*, *supra* note 78, at 51, 52.

<sup>129</sup> Maryland Assembly Resolves on the Stamp Act ¶ 5 (Sept. 28, 1765), in *PROLOGUE TO REVOLUTION*, *supra* note 78, at 52, 53.

<sup>130</sup> Connecticut Assembly Resolves on the Stamp Act ¶ 8 (Oct. 25, 1765), in *PROLOGUE TO REVOLUTION*, *supra* note 78, at 54, 55.

<sup>131</sup> Massachusetts Assembly Resolves on the Stamp Act ¶ 13 (Oct. 29, 1765), in *PROLOGUE TO REVOLUTION*, *supra* note 78, at 56, 57.

Carolina,<sup>132</sup> New Jersey,<sup>133</sup> and New York<sup>134</sup> protested the Stamp Act's displacement of juries through the granting of jurisdiction to admiralty courts. The Massachusetts Assembly also raised a similar concern with the colony's royal governor.<sup>135</sup> Like the Stamp Act Congress, the individual colonies failed to protest the probable cause/immunity link.

At least one colonial leader—George Mason—also joined the fray in his individual capacity, and, in addition to grating against jury displacement, did make a clamor about the probable cause/immunity link:

To make an odious Distinction between us & your fellow Subjects residing in Great Britain, by depriving us of the ancient Tryal, by a Jury of our Equals, and substituting in its' place an arbitrary Civil Law Court—to put it in the Power of every Sycophant & Informer . . . to drag a Freeman a thousand Miles from his own Country (whereby he may be deprived of the Benefit of Evidence) to defend his property before a Judge, who, from the Nature of his office, is a Creature of the Ministry, liable to be displaced at their Pleasure, whose Interest it is to encourage Informers, as his Income may in a great Measure depend upon his Condemnations, and to give such a Judge a Power of excluding the most innocent Man, thus treated, from any Remedy (even the recovery of his Cost) by only certifying that *in his Opinion* there was a *probable* Cause of Complaint; and thus to make the property of the Subject, in a matter which may reduce him from Opulence to Indigence, depend upon a word before an unknown in the Language & Style of Laws! Are these among the Instances that call for our Expression of “filial Gratitude to our Parent-Country?” These things did not altogether depend upon the Stamp-Act, and therefore are not repealed with it.<sup>136</sup>

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<sup>132</sup> South Carolina Assembly Resolves on the Stamp Act ¶¶ 8–9 (Nov. 29, 1765), in PROLOGUE TO REVOLUTION, *supra* note 78, at 57, 58.

<sup>133</sup> New Jersey Assembly Resolves on the Stamp Act ¶ 10 (Nov. 30, 1765), in PROLOGUE TO REVOLUTION, *supra* note 78, at 59, 60.

<sup>134</sup> New York Assembly Resolves on the Stamp Act (Dec. 18, 1765), in PROLOGUE TO REVOLUTION, *supra* note 78, at 60, 61.

<sup>135</sup> Answer of the House of Representatives of Massachusetts to the Governor's Speech (Oct. 23, 1765), in 1 THE WRITINGS OF SAMUEL ADAMS: 1764–1769, at 13, 19–20 (Harry Alonzo Cushing ed., 1904).

<sup>136</sup> Letter from George Mason to the Committee of Merchants in London (June 6, 1766), in 1 MASON, *supra* note 113, at 65, 67; *see also* Letter from George Mason to the Committee of Merchants in London (June 6, 1766), in PROLOGUE TO REVOLUTION, *supra* note 78, at 158, 159–60 (reprinting same letter). Mason's protest about the possibility of a

One scholar has opined that, by the end of 1766, “the unpopularity of vice-admiralty courts in the colonies was greater than ever.”<sup>137</sup>

The colonists won a substantial victory when Parliament agreed to repeal the Stamp Act, though it was short lived. Parliament repealed the 1765 Stamp Act on March 4, 1766, though it did so only after enacting the 1766 Declaratory Act, which purported to reaffirm Great Britain’s authority to pass binding laws on the American colonies.<sup>138</sup>

Colonists soon realized that their battle for jury supremacy would continue. The next year, in 1767, Parliament passed the Townshend Acts in response to colonial complaints about the inconvenience of the vice-admiralty court in Halifax.<sup>139</sup> Instead of reinstating the right to jury trial, Parliament provided for new colonial vice-admiralty courts in Boston, Philadelphia, and Charleston<sup>140</sup> and imposed additional taxes on goods in the colonies, again making suits “for recovery of forfeitures and penalties inflicted by the new taxes . . . cognizable in the courts of admiralty.”<sup>141</sup> As one commentator has described, “[t]he establishment of more courts in America with better opportunities for their use by customs collectors only antagonized the colonists and provoked louder complaints.”<sup>142</sup>

Though we widely perceive probable cause today as being a fundamental protection against governmental searches, and there certainly is some evidence that at least some of the Framers perceived it similarly,<sup>143</sup> it is also true that the colonial experience with probable cause was not necessarily a happy one. The historical record demonstrates that, although probable cause may have been conceived as a shield the citizenry could brandish against governmental searches, in practice it could also shield the government from liability for those same searches. The decisionmaker controlling probable cause, therefore, was crucially important. An honest broker could ensure that probable cause legitimately played its dual roles. The competing candidates were juries and judges.

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colonist being dragged “a thousand Miles from his own Country” is probably a complaint about the vice-admiralty court in Halifax. *See supra* note 126.

<sup>137</sup> SMITH, *supra* note 36, at 88.

<sup>138</sup> MORGAN, STAMP ACT CRISIS, *supra* note 65, at 332–52.

<sup>139</sup> *See supra* note 126.

<sup>140</sup> 4 ANDREWS, *supra* note 66, at 270–71; UBBELOHDE, *supra* note 62, at 130–33; Lovejoy, *supra* note 63, at 474–75; *see also* 8 Geo. 3, ch. 22, § 1 (1767) (Eng.).

<sup>141</sup> Lovejoy, *supra* note 63, at 474.

<sup>142</sup> *Id.* at 475.

<sup>143</sup> *See* Arcila, *supra* note 1, at 12 & n.36 (discussing seizure of John Hancock’s ships and resulting protests that asserted a lack of probable cause).

Colonial history, including the Stamp Act controversy, made it perfectly clear that the right to jury trial was one of the most jealously guarded colonial rights, and that Great Britain's use of probable cause as an immunity standard had been controversial. These concerns certainly had not diminished as independence approached. For example, the First Continental Congress reiterated, in its 1774 Declaration of Rights, the importance of the common law right to jury trials,<sup>144</sup> and even protested that several specified British revenue statutes,

which impose duties for the purpose of raising a revenue in America, extend the power of the admiralty courts beyond their ancient limits, deprive the American subject of trial by jury, [and] authorise the judges [sic] certificate to indemnify the prosecutor from damages, that he might otherwise be liable to,

all of which was "subversive of American rights."<sup>145</sup>

Thus, one might suppose that the Framers would have been inclined to use an immunity standard other than probable cause and to reserve the issue for juries. But whether juries would be allowed to play that role, or whether judges would dominate, remained to be seen.

### C. *Nationhood*

Though Fourth Amendment scholars have insufficiently focused upon search statutes from the Framers' era, they have given such legislation some attention. The conventional account focuses upon two statutory acts, the 1789 Collection Act and Hamilton's 1791 Excise Act.<sup>146</sup> This focus is justified to some extent given that the Framers promulgated these Acts so close in time to when the Fourth Amend-

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<sup>144</sup> Declaration and Resolves of the First Continental Congress ¶ 5 (Oct. 14, 1774), in SOURCES OF OUR LIBERTIES, *supra* note 124, at 286, 288.

<sup>145</sup> *Id.* at 288–89; *see also* 4 ANDREWS, *supra* note 66, at 263 n.1 (citing WILLIAMS, *supra* note 72, at 5 n.1) (discussing a resolution by the Massachusetts House of Representatives "shortly before the Revolution," which continued to protest admiralty jurisdiction and jury displacement).

<sup>146</sup> *E.g.*, CUDDIHY, *supra* note 26, at 735–39, 757–58, 764–65, 769–70 (focusing analysis upon these two statutory acts); *accord* Amar, *Writs of Assistance*, *supra* note 26, at 59 & nn.29–30; Cloud, *supra* note 1, at 1740–43; Maclin, *Fourth Amendment Complexity*, *supra* note 26, at 950–54.

ment was drafted and adopted,<sup>147</sup> and thus the Acts certainly illuminate the Framers' thinking about governmental search powers.

As detailed below, the conventional account is straightforward: in the Collection Act, the Framers made it difficult to access a search remedy, but they changed course a mere two years later with the Excise Act, in which they made it easier to access to a search remedy.<sup>148</sup> This conventional account is largely premised upon the assertion that the Collection Act allowed courts to grant immunity through retrospective probable cause findings, while the Excise Act did not. Here we reach an important lesson, gleaned from reexamining our history: this conventional account is incorrect. A close examination of these Acts shows that the Excise Act did indeed make immunity available through retrospective probable cause findings. Thus, in this respect, claimants under the Excise Act faced the same obstacle to accessing a search remedy as they experienced under the Collection Act.

Having made this point, it is important to acknowledge that the picture is more nuanced than the conventional account recognizes due to a procedural distinction that it overlooks. Specifically, the Collection Act displaced the common law's preference for the jury and gave judges the power to make the probable cause/immunity determinations.<sup>149</sup> Although the Excise Act—like the Collection Act—also made immunity available through a retrospective probable cause finding, it did so in a significantly different way, specifically by returning the probable cause issue to the jury.<sup>150</sup> Because all indications suggest that juries were friendly to claimants and more likely to hold the government liable for a challenged search than were judges,<sup>151</sup> it may be that the

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<sup>147</sup> The Constitution was written in 1787 and became effective in 1789. The process of adopting the Bill of Rights was completed on December 15, 1791. Arcila, *supra* note 1, at 32 n.106.

<sup>148</sup> See *infra* notes 180–188 and accompanying text.

<sup>149</sup> Act of July 31, 1789, ch. 5, § 36, 1 Stat. 29, 47–48.

<sup>150</sup> Act of Mar. 3, 1791, ch. 15, § 38, 1 Stat. 199, 208.

<sup>151</sup> This description is consistent with the trends evident in British and colonial history, as well as with evidence about perceptions of juries in the new nation. See *supra* notes 63–67, 71, 74–87, 91–99, 105–107, 111–112 and accompanying text; see *infra* note 219 and accompanying text. Nonetheless, some commentators on this Article have challenged this assertion. For instance, judges were likely to have been community leaders, so perhaps they would have closely identified with, and favored, the merchant-claimants whose property the federal government sought to condemn after seizure. Perhaps jurors would have felt little connection or sympathy for such claimants, and thus would have been more willing to rule in favor of the government, particularly if their approach was context-sensitive and they were happy to have someone else—the claimant—contribute to the national treasury. I cannot reject such possibilities. Thus, although the evidence favors my descrip-

conventional account's conclusion—that the Excise Act made it easier to access a search remedy than had the Collection Act—is correct, though for the wrong reason.

It is also useful to focus more broadly upon civil search statutes from the Framers' era given that the conventional account so narrowly focuses upon only two statutory acts. Widening one's scope is important because a definitive trend becomes apparent. In civil search statutes—in the 1789 Collection Act and many others—the Framers repeatedly gave advantages to search officials defending themselves from suit and placed procedural obstacles in the way of claimants, all to limit claimants' access to search remedies. One implication is that the conventional account errs in giving too much prominence to Hamilton's 1791 Excise Act. A wider view suggests that this Act—though important—may not be generally representative of the Framers' views about governmental searches.<sup>152</sup>

### 1. 1789 Collection Act

As Professors Cuddihy and Maclin have explained, English law contained numerous procedural obstacles that plaintiffs had to overcome before obtaining trespass relief, and the Framers incorporated these obstacles into American civil search statutes.<sup>153</sup> In Great Britain during the years preceding the Revolution, “legal obstacles helped shield officers from liability: penalizing unsuccessful plaintiffs; petitioning judges to find retrospective probable cause; and pleading the general issue.”<sup>154</sup> At roughly the same time they were considering the Fourth Amendment, the Framers included each of these obstacles in a federal civil search statute, the 1789 Collection Act. In it the Framers mandated the assessment of double costs against unsuccessful plaintiffs,<sup>155</sup> authorized retrospective probable cause findings,<sup>156</sup> and allowed defendants to plead the general issue.<sup>157</sup>

My present focus is upon the statutory provision for retrospective probable cause findings. It merits special attention as a revolutionary

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tion of claimant-friendly juries and government-friendly judges, I acknowledge that this is a broad generalization and should not be interpreted as a categorical assertion.

<sup>152</sup> See *infra* notes 231–244 and accompanying text.

<sup>153</sup> See CUDDIHY, *supra* note 26, at 763–64; Maclin, *Fourth Amendment Complexity*, *supra* note 26, at 933–35.

<sup>154</sup> Maclin, *Fourth Amendment Complexity*, *supra* note 26, at 934 (footnotes omitted).

<sup>155</sup> Act of July 31, 1789, ch. 5, § 27, 1 Stat. at 43.

<sup>156</sup> *Id.* § 36, 1 Stat. at 47.

<sup>157</sup> *Id.* § 27, 1 Stat. at 43.

departure from the common law and the standard under which it had extended immunity to searchers.

It is both remarkable and instructive that, in spite of the colonial hostility to the 1764 Sugar Act, its displacement of the common law jury trial right, and its probable cause immunity standard,<sup>158</sup> the Framers saw fit to adopt these statutory measures in the 1789 Collection Act, which likewise regulated external trade.<sup>159</sup> Under this legal regime, though a common law trespass remedy could be sought from a jury in state court after a seizure, the federal court exercised great indirect control over the trespass claim because it—and more specifically the federal judge—controlled immunity.

This control stemmed from the combined operation of the 1789 Judiciary Act and the Collection Act. Among other important measures, the Judiciary Act folded both common law and admiralty jurisdiction into the federal district courts, provided for jury trials in all cases except admiralty matters, and gave federal district courts exclusive jurisdiction over all cases involving seizures, forfeitures, and penalties under federal law, regardless of whether the seizure occurred on water or land.<sup>160</sup> This exclusive jurisdiction limited a claimant's ability to seek redress after a seizure. As the Supreme Court explained:

If the officer has a right, under the laws of the United States, to seize for a supposed forfeiture, the question, whether that forfeiture has been actually incurred, belongs exclusively to the federal courts, and cannot be drawn to another forum; and it depends upon the final decree of such courts whether such seizure is to be deemed rightful or tortious. If the seizing officer should refuse to institute proceedings to ascertain the forfeiture, the district court may, upon the application of the aggrieved party, compel the officer to proceed to adjudication, or to abandon the seizure. And if the seizure be finally adjudged wrongful, and without reasonable cause, he may

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<sup>158</sup> See *supra* notes 91–107 and accompanying text.

<sup>159</sup> See *infra* notes 162–163 and accompanying text.

<sup>160</sup> Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 73, 76–77; see also *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 246, 312 (1818) (“[B]y the judiciary act of 1789, ch. 20. s. 9. the district courts are invested with *exclusive* original cognizance of all civil causes of admiralty and maritime jurisdiction, and of all seizures on land and water, and of all suits for penalties and forfeitures incurred under the laws of the United States.”); *id.* at 315; *Slocum v. Mayberry*, 15 U.S. (2 Wheat.) 1, 9 (1817) (“The judiciary act gives to the federal courts exclusive cognizance of all seizures made on land or water.”); 6 DANE, *supra* note 31, § 3, at 348 (noting that district courts possess all powers of an admiralty court); *id.* § 8, at 349.

proceed, at his election, by a suit at common law, or in the admiralty for damages for the illegal act.<sup>161</sup>

The federal district court controlled the immunity issue under the Collection Act because it had exclusive jurisdiction over the forfeiture proceeding. If the seizure was found proper, this was a complete defense against a claimant's damages claim. If not, the Collection Act specified that "the same court"—namely the federal judge—was required to "cause a proper certificate or entry to be made" of "a reasonable cause of seizure" if it believed such cause had supported the search.<sup>162</sup> Such a certification immunized the customs officer and the prosecutor.<sup>163</sup>

Similar to what had occurred under the controversial 1764 Sugar Act and the detested 1765 Stamp Act, this left a claimant at the mercy of the federal judge in the forfeiture proceeding. If the claimant sought a remedy for the search or seizure in state court,<sup>164</sup> then the state court and the state jury were hostage to the federal judge's resolution of the probable cause/immunity issue, which had to be resolved before the

<sup>161</sup> *Slocum*, 15 U.S. (2 Wheat.) at 9–10.

<sup>162</sup> Act of July 31, 1789, ch. 5, § 36, 1 Stat. at 47–48; see Davies, *Original Fourth Amendment*, *supra* note 1, at 653 n.295. Note that I am discussing "probable cause" while the Collection Act refers to "reasonable cause." I am purposely equating the two because evidence indicates that, during the Framers' era (and indeed perhaps well beyond), no distinction would have been drawn between the two. This evidence comes from a 1878 Supreme Court case, *Stacey v. Emery*, 97 U.S. 642, 646 (1878). The case did not involve the 1789 Collection Act but rather the 1799 Collection Act. See *id.* at 643. Nonetheless, the Court considered whether any difference existed between "probable cause" and "reasonable cause" and concluded:

In the case before us, the certificate was of "probable cause of seizure."

The authorities we have cited speak of "probable" cause. The statute of 1799, however, uses the words "reasonable cause of seizure." No argument is made that there is a substantial difference in the meaning of these expressions, and we think there is none. If there was a probable cause of seizure, there was a reasonable cause. If there was a reasonable cause of seizure, there was a probable cause. In many of these reported cases the two expressions are used as meaning the same thing . . . .

*Id.* at 646 (referring to Act of Mar. 2, 1799, ch. 22, § 89, 1 Stat. 627, 695–96).

<sup>163</sup> Act of July 31, 1789, ch. 5, § 36, 1 Stat. at 47–48; see Davies, *Original Fourth Amendment*, *supra* note 1, at 653 n.295.

<sup>164</sup> Though the 1789 Judiciary Act's Section 9 gave federal courts exclusive jurisdiction over in rem actions against vessels and over seizures, forfeitures, and penalties arising under federal law, its savings clause ("saving to suitors . . .") left all other types of actions (such as trespass) subject to concurrent jurisdiction in federal and state courts. See Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. at 76–77; ROBERTSON, *supra* note 64, at 18–19, 123–35; SCHOENBAUM, *supra* note 64, §§ 2–4, at 99–100.

state court could know whether any trespass remedy was available. The Supreme Court addressed just this situation when it wrote:

[A]t what time and under what circumstances will an action of trespass [in a state common law court] lie? If the action be commenced while the proceedings *in rem* for the supposed forfeiture are pending in the proper court of the United States, it is commenced too soon; for until a final decree, it cannot be ascertained whether it be a trespass or not, since the decree can alone decide whether the taking be rightful or tortious. The pendency of the suit *in rem* would be a good plea in abatement, or a temporary bar of the action, for it would establish that no good cause of action then existed. If the action be commenced after a decree of condemnation, or after an acquittal, and there be a certificate of reasonable cause of seizure, then . . . the decree and certificate are each good bars to the action. But if there be a decree of acquittal and a denial of such certificate, then the seizure is established conclusively to be tortious, and the party is entitled to his full damages for the injury.<sup>165</sup>

Though many (probably most) forfeiture proceedings took place under admiralty jurisdiction, and therefore without juries, it was still theoretically possible for federal juries to determine the seizure's propriety if it had occurred outside of admiralty jurisdiction. Even then, however, the federal jury was still hostage to the federal judge's probable cause/immunity determination. In such non-admiralty forfeiture cases, the federal jury could express its disapproval of a seizure through an acquittal judgment. Yet, by issuing a certificate of probable cause, the federal judge could grant immunity from damages despite the federal jury's decision that the seizure was wrongful.

To summarize, a judge or a jury—whether a state jury in a trespass action or a federal jury in a non-admiralty forfeiture proceeding—would be barred from granting a damages remedy *unless* “there be a decree of acquittal *and* a denial of such certificate” in the federal proceeding.<sup>166</sup> Only if both conditions were satisfied could a judge grant damages in a federal admiralty proceeding or a jury grant damages in a state court trespass action or a non-admiralty federal proceeding.

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<sup>165</sup> *Gelston*, 16 U.S. (3 Wheat.) at 313–14.

<sup>166</sup> *Id.* at 314 (emphasis added).

Through this process, the Collection Act significantly departed from the common law standard for search immunity. No longer did immunity depend upon whether the search had occurred under authority of a warrant, or resulted in finding contraband, which were typically controlling factors under the common law.<sup>167</sup> This is particularly noteworthy given that the Collection Act required warrants for land-based searches of premises,<sup>168</sup> and hence the Framers had the option of retaining an immunity standard based at least partially upon warrants. Instead, when searches conducted under the Collection Act were involved, immunity depended only upon a retrospective probable cause determination. And, under the Collection Act, a federal judge made this determination. The jury, at the core of the common law system, had been cast aside when it came to deciding immunity.

The significance of the statutory choices the Framers made becomes evident when compared to the prevailing understanding of the jury's role during this early period. The well-accepted historical account—with which I agree—is that the jury was treasured in the new nation as an important and valued inheritance from the British common law system.<sup>169</sup> Juries were valued in the new nation for numerous reasons, including that they advanced local primacy, restricted governmental power—especially federal power—and gave effect to the common man's sense of justice, which was not always in harmony with the law or the views of judges or lawyers.<sup>170</sup>

I have encountered resistance to my jury displacement findings from several colleagues familiar with this accepted history. Their first objection is general in nature, and points to the stark contrast between the prevailing common law account of jury primacy and my account of persistent statutory jury displacement. I acknowledge this incongruity. Indeed, it is what makes my account important. I emphasize that my argument here is solely textual. Through the statutory language they drafted, the Framers clearly expressed their intent to provide for exclu-

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<sup>167</sup> See *supra* notes 31–34 and accompanying text.

<sup>168</sup> Act of July 31, 1789, ch. 5, § 24, 1 Stat. at 43. The Act authorized warrantless searches in other circumstances, such as maritime searches. *Id.* §§ 22–24, 1 Stat. at 42–43.

<sup>169</sup> LLOYD E. MOORE, *THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY* 95–110 (2d ed. 1988); REID, *CONSTITUTIONAL HISTORY: RIGHTS*, *supra* note 58, at 47–48.

<sup>170</sup> JEFFREY ABRAMSON, *WE, THE JURY* 22–33, 75–77, 89 (1994); JAMES ALEXANDER, *A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER* 24–26 (Stanley Nider Katz ed., 1963); REID, *CONSTITUTIONAL HISTORY: RIGHTS*, *supra* note 58, at 48–52. *But see* Cloud, *supra* note 1, at 1735–37 (reviewing some evidence that “civil juries did not earn universal praise from the participants in the constitutional debate,” such as from Noah Webster and Alexander Hamilton).

sive federal jurisdiction in cases dealing with the consequences of searches that occurred pursuant to federal statutes.<sup>171</sup> And they could hardly have been clearer in textually expressing their intent that the probable cause/immunity issue usually should be reserved for judges<sup>172</sup> (the exceptions being Hamilton's 1791 Excise Act and its three progeny).<sup>173</sup> Their statutory text reveals the Framers' clear intent largely to displace juries.

The second objection complements the first but is more specific, and concerns the role that section nine of the 1789 Judiciary Act plays in my account.<sup>174</sup> I place some importance upon section nine's grant of exclusive federal jurisdiction in cases involving seizures, forfeitures, or penalties under federal law.<sup>175</sup> The second objection asserts that section nine's grant of exclusive federal jurisdiction was enforced as the exception rather than the rule. This objection discounts my textual account in favor of its view of actual practice during the Framing era. There are several problems with this position. It does not engage me on the terms of my argument, but instead attempts to change the argument from a textual one to an experiential one. Moreover, though this is indeed an issue that would benefit from greater scholarly attention, the experiential objection may proceed from a questionable historical premise. I acknowledge that, in apparent conflict with section nine's grant of exclusive federal jurisdiction with regard to land-based searches, I have found one state case in which a state jury resolved such a claim through a common law action.<sup>176</sup> However, consistent with my account of section nine's grant of exclusive federal jurisdiction, evidence supports my position that land-based seizures under federal law were litigated in federal court. A non-exhaustive research effort uncovered numerous state court cases *rejecting* attempts to obtain redress from land-based federal civil searches and seizures where the seized goods had previously been condemned through *federal* proceedings.<sup>177</sup>

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<sup>171</sup> See *supra* note 160 and accompanying text. There were some exceptions. See *infra* note 179 and accompanying text.

<sup>172</sup> See *supra* notes 162–166 and accompanying text; see *infra* notes 228–229, 240–241 and accompanying text.

<sup>173</sup> See *infra* notes 199–200, 230 and accompanying text.

<sup>174</sup> See Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. at 76–77.

<sup>175</sup> See *supra* notes 160–161 and accompanying text.

<sup>176</sup> *Arthur v. Wilson*, 16 Ky. (1 Litt. Sel. Cas.) 76, 76–77 (1808) (state court trover action against federal excise officer who seized horse, apparently pursuant to Hamilton's 1791 Excise Act, without any mention of a federal proceeding).

<sup>177</sup> *E.g.*, *Sailly v. Smith*, 11 Johns. 500, 500 (N.Y. Sup. Ct. 1814); *Buchanan v. Biggs*, 2 Yeates 232, 233 (Pa. 1797); *Steel v. Fisk*, *Brayt.* 230, 230–31 (Vt. 1816). A few other cases appear to follow the same pattern, though some uncertainty exists as to whether the fed-

The second objection also makes a related point: perhaps the Framers' imperative was not to favor federal over state tribunals, but to favor judges over juries. On this point, I agree. The most salient part of my statutory jury displacement story is that the Framers so often preferred to give judges—not juries—the power to make retrospective probable cause/immunity determinations.<sup>178</sup> The federal/state dichotomy appears to have been of less interest to them. Indeed, in numerous instances, the Framers chose to depart from section nine's grant of exclusive federal jurisdiction through an explicit statutory enactment providing for limited concurrent jurisdiction.<sup>179</sup>

## 2. The Exception: Hamilton's 1791 Excise Act & Jury Prominence

The conventional account of Hamilton's 1791 Excise Act concludes that it increased protections against wrongful searches as compared to the preceding 1789 Collection Act, and in this it is probably correct, though for the wrong reason. Professors Cuddihy and Maclin are the standard bearers for the conventional account. Assessing their account is complicated because they make several interrelated but different points, while failing to account for some of the Excise Act's most important provisions. To begin the critique, it is helpful to separate their claims. Their argument is that: (1) the Excise Act omitted several obstacles to tort relief and included an important burden-shifting pro-

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eral search and seizure was land-based. *Plumb v. McCrea*, 12 Johns. 490, 490 (N.Y. Sup. Ct. 1815); *Bulkly v. Orms*, Brayt. 124, 124 (Vt. 1815). Another case referred to what must have been a land-based seizure by federal customs inspectors, after which the seized goods were condemned through a federal court action. *Buel v. Enos*, Brayt. 56, 56 (Vt. 1820).

<sup>178</sup> The Framers nearly always preferred judges on this score. See *supra* notes 162–166 and accompanying text; see *infra* notes 228–229, 240–241 and accompanying text. In only four instances did they favor jury primacy. See *infra* notes 199–200, 230 and accompanying text.

<sup>179</sup> It was not uncommon for the Framers to provide for concurrent state court jurisdiction in instances where revenue act enforcement actions arose or accrued more than 50 miles “from the nearest place by law established for the holding of a district court.” *E.g.*, Act of Jan. 18, 1815, ch. 23, § 24, 3 Stat. 186, 191; Act of Jan. 18, 1815, ch. 22, § 21, 3 Stat. at 185–86; Act of Dec. 21, 1814, ch. 15, § 21, 3 Stat. 152, 157–58; Act of Aug. 2, 1813, ch. 53, § 13, 3 Stat. 77, 80–81; Act of Aug. 2, 1813, ch. 39, § 5, 3 Stat. at 73; Act of July 24, 1813, ch. 26, § 10, 3 Stat. 44, 47; Act of July 24, 1813, ch. 25, § 6, 3 Stat. at 44; Act of July 24, 1813, ch. 21, § 14, 3 Stat. at 38; see also Act of June 5, 1794, ch. 49, § 9, 1 Stat. 378, 380 (“from the nearest place established by law for holding a district court”).

Hamilton's 1791 Excise Act provided that “unless brought in a court of the United States,” any action under the Act “shall be laid in the county in which the cause of action shall have arisen.” Act of Mar. 3, 1791, ch. 15, § 42, 1 Stat. at 209. Whether this was intended to be a stark departure from the exclusive federal jurisdiction that Section 9 of the 1789 Judiciary Act conferred, see *supra* note 160 and accompanying text, or merely an acknowledgement that federal jurisdiction might not always be practical, is not clear.

vision, all of which advantaged claimants; (2) as a result the Act made it easier for claimants to access a tort remedy; and (3) this in turn discouraged searches.

Cuddihy's and Maclin's mistake is that they fail to appreciate the Excise Act's complexity. Specifically, they (1) err in focusing upon the Act's procedural impact when a warrant-based search was challenged, (2) are wrong in asserting that the Act omitted the type of retrospective probable cause provision that the 1789 Collection Act included, and (3) fail to appreciate the jury's resurrected role under the Excise Act. All else being equal, the Excise Act's provision authorizing immunity to be conferred via a retrospective probable cause finding would have continued to ease the way for searchers to gain immunity, and thus made it harder to access a search remedy. All else was far from equal, however, because the Excise Act—echoing the common law—restored the jury's role in determining probable cause. This change in direction, coming so soon after the 1789 Collection Act had displaced that jury role, was important because even after nationhood juries likely continued to be claimant-friendly. Juries, less disposed to find probable cause than judges, would have been less inclined to grant search immunity. Thus, the conventional account likely is correct that claimants under the Excise Act had an easier time in accessing a tort remedy than they had under the Collection Act. This is not, however, because of the Excise Act's burden-shifting provision, as the conventional account asserts, but because of the jury's reinstatement.

To fully explain my position, a more detailed review of the conventional account is necessary. Cuddihy and Maclin point to the Excise Act as evidence that the Framers sometimes made it easier to access a tort remedy for a wrongful search. Their argument is straightforward: the 1789 Collection Act made it harder to access a tort remedy for a wrongful search, while Hamilton's 1791 Excise Act made it easier. To substantiate this point, Cuddihy asserts that Hamilton's Excise Act omitted significant obstacles to tort relief that were included in the 1789 Collection Act. According to Cuddihy, Hamilton's Excise provided for unsuccessful plaintiffs to pay the defendant's costs but, unlike the Collection Act, did not double those monetary penalties or authorize retrospective probable cause findings.<sup>180</sup> Maclin reiterates this descrip-

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<sup>180</sup> CUDDIHY, *supra* note 26, at 764–65.

tion.<sup>181</sup> This conventional account has been influential, as evidenced by others who have echoed it.<sup>182</sup>

The main point that Cuddihy and Maclin emphasize is that Hamilton's Excise Act included a burden-shifting provision.<sup>183</sup> Under this provision, "[a]n owner of seized goods . . . did not have to prove that a customs officer had lacked probable cause; the officer had to prove that he had possessed it."<sup>184</sup> Cuddihy places great importance upon this provision, writing that "[u]nlike the Collection Act, and common law tradition, the Excise Act placed the burden of proof on customs officers."<sup>185</sup> Maclin took similar note of it.<sup>186</sup>

Based largely upon these procedural features, Cuddihy and Maclin conclude that Hamilton's Excise Act strengthened the tort action as a Fourth Amendment enforcement mechanism. Cuddihy wrote:

The Excise Act of 1791 tilted as strongly against the performers of search and seizure as the Collection Act of 1789 did in their favor.

. . . .  
 . . . By obstructing [legal actions against those who committed unreasonable searches] . . . the Collection Act gave those agents little incentive to observe the [Fourth A]mendment. The Excise Act reversed course. By transposing the burden of proof and otherwise stimulating litigation, Hamilton's excise strongly discouraged the searches . . . that the amendment forbade.<sup>187</sup>

Maclin has drawn the same conclusion, writing that, "although the Collection Act of 1789 established legal obstacles to suing officers who searched pursuant to its provisions, the Excise Act of 1791, also passed by the First Congress, made it much easier to sue."<sup>188</sup>

Cuddihy's and Maclin's analysis is incorrect. They are right in noting that Hamilton's Excise did not impose double costs upon unsuc-

<sup>181</sup> Maclin, *Fourth Amendment Complexity*, *supra* note 26, at 935 n.57.

<sup>182</sup> *E.g.*, Lerner, *supra* note 26, at 974.

<sup>183</sup> Act of Mar. 3, 1791, ch. 15, § 38, 1 Stat. 199, 208. The relevant text of this statute appears *infra* in the text accompanying note 194.

<sup>184</sup> CUDDIHY, *supra* note 26, at 764.

<sup>185</sup> *Id.*

<sup>186</sup> Maclin writes that "under the Excise Act the burden of proving probable cause for a seizure was placed on customs officers, not the claimant of the property." Maclin, *Fourth Amendment Complexity*, *supra* note 26, at 935 n.57.

<sup>187</sup> CUDDIHY, *supra* note 26, at 764-65.

<sup>188</sup> Maclin, *Fourth Amendment Complexity*, *supra* note 26, at 935 n.57.

cessful plaintiffs.<sup>189</sup> But contrary to their presentation, Hamilton's Excise Act did (like the Collection Act) authorize retrospective probable cause findings.<sup>190</sup> Additionally, and as Maclin recognizes, it also continued to allow defendants to plead the general issue.<sup>191</sup>

The retrospective probable cause provision in Hamilton's Excise Act continued the practice—started in the colonies under the 1764 Sugar Act<sup>192</sup> and in the new nation under the 1789 Collection Act<sup>193</sup>—of statutorily altering search officials' access to immunity. Cuddihy's and Maclin's failure to appreciate this impact is surprising because the immunity provision immediately follows the burden-shifting provision upon which they place such importance. Hamilton's 1791 Excise Act provided that

it shall be necessary for [a supervisor or search official] to justify himself by making it appear that there was probable cause for making the said seizure; *upon which, and not otherwise, a verdict shall pass in his favour.*<sup>194</sup>

Cuddihy and Maclin emphasize the first portion of this passage, but ignore the second. Seizing upon the burden-shifting provision in the initial portion of this passage—that it was necessary for the official “to justify himself by making it appear that there was probable cause for making the said seizure”—they are distracted by a procedural side-show. In ignoring the immediately ensuing text—“upon which, and not otherwise, a verdict shall pass in his favour”—they overlooked one of the most significant substantive provisions in Hamilton's Excise Act for assessing the adequacy of search remedies in the Framers' era.

To appreciate this point, it is necessary to understand the impact that Hamilton's Excise Act had upon the availability of search immunity. As discussed above, in the 1789 Collection Act, the Framers continued to depart from the common law standard and made immunity available

<sup>189</sup> Act of Mar. 3, 1791, ch. 15, § 42, 1 Stat. at 209 (providing that, if sued, officers could recover costs if they won, but omitting any multiplier); *cf.* Act of July 31, 1789, ch. 5, § 27, 1 Stat. at 43 (providing for double costs under the 1789 Collection Act).

<sup>190</sup> Act of Mar. 3, 1791, ch. 15, § 38, 1 Stat. at 208. The relevant language through which Hamilton's Excise Act authorized retroactive probable cause findings is provided *infra* in the text accompanying note 194. The relevant language from the Collection Act's similar provision can be found *supra* in the text accompanying note 162.

<sup>191</sup> Act of Mar. 3, 1791, ch. 15, § 42, 1 Stat. at 209; Maclin, *Fourth Amendment Complexity*, *supra* note 26, at 935 n.57; *cf.* Act of July 31, 1789, ch. 5, § 27, 1 Stat. at 43 (authorizing defendants to plead the general issue under the 1789 Collection Act).

<sup>192</sup> See *supra* note 93 and accompanying text.

<sup>193</sup> See *supra* notes 162–163 and accompanying text.

<sup>194</sup> Act of Mar. 3, 1791, ch. 15, § 38, 1 Stat. at 208 (emphasis added).

to searchers based upon probable cause.<sup>195</sup> Hamilton's 1791 Excise Act extended the probable cause immunity standard under the new nation's revenue laws from impost duties essentially collected at the border (under the Collection Act) to domestic excise taxes.<sup>196</sup> This was a revolutionary measure, for it extended the probable cause/immunity standard from "external" revenue laws, the enforcement of which often invoked maritime matters falling within admiralty jurisdiction, to "internal" taxation laws, the enforcement of which occurred on land and otherwise would have fallen within common law jurisdiction. A failure to respect the colonists' external/internal distinction had been a motivating factor in the colonial Stamp Act uprising against the Crown.<sup>197</sup> Further, it dramatically altered the availability of search immunity from the standard that would have applied under the common law. While immunity was available under the common law for a warrant-based search or if a successful search had occurred,<sup>198</sup> the Excise Act continued the statutory reform of enshrining a new probable cause immunity standard.

The treatment that Hamilton's Excise Act gave to the probable cause/immunity issue, however, was different from the 1789 Collection Act in one crucial way: while the latter made the probable cause/immunity issue subject to a federal judge's determination, the former returned to jury primacy.<sup>199</sup> Hamilton's Excise Act provided for jury trials in any "action or prosecution" under the Act, including those against a "supervisor or other officer, for irregular or improper conduct in the execution of his duty."<sup>200</sup> Thus, as to the jury's role, this Excise Act re-

<sup>195</sup> See *supra* notes 68–76, 162–163 and accompanying text.

<sup>196</sup> See Act of Mar. 3, 1791, ch. 15, § 38, 1 Stat. at 208.

<sup>197</sup> See *supra* notes 115–122 and accompanying text.

<sup>198</sup> See *supra* notes 31–34 and accompanying text.

<sup>199</sup> Compare Act of Mar. 3, 1791, ch. 15, § 38, 1 Stat. at 208, with Act of July 31, 1789, ch. 5, § 36, 1 Stat. at 47–48.

<sup>200</sup> Act of Mar. 3, 1791, ch. 15, § 38, 1 Stat. at 208. In making jury trials available in these excise cases, Hamilton (a Federalist) was responding to an important objection that anti-Federalists had made to the Constitution and the absence of a Bill of Rights. In this objection, the anti-Federalists directly targeted the government's civil search power and the absence of jury trials in admiralty jurisdiction, where many of these searches were litigated. 5 THE COMPLETE ANTI-FEDERALIST 9, 14 (Herbert J. Storing ed., 1981). This objection built upon a long tradition of wariness towards a governmental search power dedicated to the enforcement of revenue laws. For example, after briefly mentioning the benefits of an excise tax, Blackstone wrote that such laws "seem hardly compatible with the temper of a free nation" due to the frauds they enabled, the search powers given to revenue officers, and the attendant summary proceedings that disregarded the common law and displaced juries. See 1 BLACKSTONE, *supra* note 31, at 308. Of the excise tax, Blackstone also wrote that "from it's [sic] first original to the present time, it's [sic] very name has been odious to the people of England." *Id.* at 310. The legendary economist Adam Smith

turned full circle: the common law had enshrined jury primacy, the 1789 Collection Act had followed the British trend of displacing it in favor of having federal judges decide the probable cause/immunity issue, and the Excise Act returned the issue to the jury.

These two Excise Act measures—continuing to link immunity to probable cause but returning this issue to the jury—had an important impact. To understand this point, it is necessary to explore the different sorts of searches that the Act authorized—warrant-based and warrantless—because its impact differed in each context.

Unlike customs laws, which could involve water- or land-based searches, Hamilton's Excise Act usually would have involved only land searches, specifically of distillers. The Act authorized searches of distillers on various terms, depending upon whether a distiller had registered with local authorities, as the Act mandated.<sup>201</sup> The Act required the use of warrants to search nonregistered premises<sup>202</sup> but provided for warrantless (and suspicionless) searches of registered distillers.<sup>203</sup>

As to warrant-based searches of nonregistered premises, the Act's probable-cause immunity provision may have had an impact. Under the common law, a searcher could access immunity simply by proceeding under an ostensibly valid warrant.<sup>204</sup> With respect to immunity, it was

used the same adjective for it because, he asserted, it exposed private families to searches. 5 ADAM SMITH, *WEALTH OF NATIONS* 539 (C.J. Bullock ed., P.F. Collier & Son Co. 1909) (1776). Despite Hamilton's inclusion of measures in his Excise Act designed to inhibit wrongful searches (like the right to jury trial, for example), Cuddihy reports that Hamilton's Excise Act "triggered apocalyptic protests." CUDDIHY, *supra* note 26, at 743; *see also id.* at 743–44 & n.276.

One commentator on this Article wondered about the relevance of the jury issue to my topic, questioning whether these jury trials focused upon the legality of the search or whether a litigant owed taxes. It appears that these jury trials could focus upon either issue. These trials could focus upon whether property was properly seized and subject to forfeiture, or subject to return to the claimant, or, according to the statutory language, whether an officer had acted "irregular[ly]" or "improper[ly]," which ostensibly could include a challenge to the manner or propriety of a search, such as whether it was unjustified because it lacked probable cause. *See* Act of Mar. 3, 1791, ch. 15, § 38, 1 Stat. at 208. The first two of these issues could turn upon either the propriety of the search or upon whether taxes were owed, and by definition the third would involve a search issue. Thus, often these jury trials could focus upon the legality of the search, and the jury's role on this issue is important to a proper understanding of the Framers' views regarding search powers. *See infra* notes 217–222, 231–244 and accompanying text.

<sup>201</sup> Act of Mar. 3, 1791, ch. 15, § 25, 1 Stat. at 205.

<sup>202</sup> *Id.* § 32, 1 Stat. at 207. The standard for obtaining a warrant was "reasonable cause of suspicion." *Id.* Though this differs in syntax from the Fourth Amendment "probable cause" standard for obtaining a warrant, it appears these two phrasings were considered to have the same substantive meaning. *See supra* note 162.

<sup>203</sup> Act of Mar. 3, 1791, ch. 15, §§ 25–26, 29, 1 Stat. at 205–06.

<sup>204</sup> *See supra* notes 31–33 and accompanying text.

immaterial whether a jury believed that probable cause had existed. The absence of probable cause was an element of a trespass claim,<sup>205</sup> but the presence of probable cause did not necessarily defeat a trespass claim because, under the common law, probable cause alone did not confer immunity.<sup>206</sup> Of course, the warrants that the Act's enforcers used for these land-based searches may by definition have assured that probable cause supported the search, given that the Fourth Amendment came into force soon after the Excise Act.<sup>207</sup> This, however, depends upon whether judges from the era consistently acted as probable cause sentries prior to issuing search warrants, a proposition subject to doubt.<sup>208</sup> If they did not, a searcher could obtain a warrant satisfying the constitutional oath and particularity standards based upon a mere assertion that he had probable cause. He could premise his assertion of probable cause upon a mere hunch or suspicion, provided that he was willing to bet that the search would be successful, in which case he could still access immunity under the common law.<sup>209</sup>

The Act took away this option because it limited immunity to those instances in which the searcher could show that "there was probable cause for making the said seizure."<sup>210</sup> Searchers operating under a warrant that was defective for a lack of probable cause could no longer rely upon success to gain immunity. In this context, it was significant that the Act displaced the common law immunity standards in favor of a probable cause standard.

As for the warrantless searches of registered distillers, Hamilton's Excise Act was revolutionary. It was understood that extending immunity to searchers provided a crucial enforcement incentive.<sup>211</sup> Indeed, the common law granted immunity to searchers operating under a warrant<sup>212</sup> to encourage officials to search. After all, they "could not

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<sup>205</sup> See *supra* notes 49–52 and accompanying text.

<sup>206</sup> See *supra* notes 31–37 and accompanying text.

<sup>207</sup> Hamilton's Excise Act was promulgated on March 3, 1791. Act of Mar. 3, 1791, ch. 15, 1 Stat. at 199. The Bill of Rights became effective on December 15, 1791. See Arcila, *supra* note 1, at 32 n.106. As I indicated above, though the Excise Act makes warrants available on "reasonable cause," this phrase appears to have been interpreted as equivalent to the Fourth Amendment's "probable cause" standard. See *supra* note 162.

<sup>208</sup> Arcila, *supra* note 1.

<sup>209</sup> See *supra* note 34 and accompanying text.

<sup>210</sup> See Act of Mar. 3, 1791, ch. 15, § 38, 1 Stat. at 208.

<sup>211</sup> Cf. Amar, *Writs of Assistance*, *supra* note 26, at 63 ("[W]ithout the absolute guarantee of immunity provided by a warrant, an officer might hesitate to perform the surprise search for fear of a future lawsuit.").

<sup>212</sup> See *supra* notes 31–33 and accompanying text.

know whether the goods were there, till search made.”<sup>213</sup> But under the common law, officials conducting a warrantless search often could not know until *after* the search whether an immunity defense would be available to them, since immunity often depended upon whether contraband was found.<sup>214</sup>

By making immunity available for *warrantless* searches if *probable cause* had existed,<sup>215</sup> the Excise Act authorized an immunity explosion. No longer was the availability of immunity determinable only *after* the warrantless search, depending upon whether the searcher fortuitously found contraband, as was the case under the common law. After enactment of Hamilton’s Excise Act, enforcement officials conducting a warrantless search gained greater control over an immunity defense, *prior* to the search, simply by assuring that afterwards they could recite facts supporting probable cause to the jury. No longer were they consigned to crossing their fingers and hoping that the search would be successful. It is true that searchers operating under the 1789 Collection Act had enjoyed the same advantages.<sup>216</sup> But warrantless searches under the Collection Act were limited to essentially maritime searches of ships and their cargo. By extending the same advantage to land-based excise searches, Hamilton’s Excise Act seems to have greatly expanded the potential scope of such searches beyond anything previously known in customs enforcement.

This statutory power excise searchers enjoyed to justify their actions through a probable cause assertion likely would have had the effect of *encouraging* searches and making it *harder* to obtain a tort remedy,<sup>217</sup> but for one thing: the Excise Act provision that resurrected the

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<sup>213</sup> BURN, AMERICAN JUSTICE ABRIDGMENT 1792, *supra* note 31, at 358; *accord* BURN, JUSTICE OF THE PEACE ABRIDGMENT 1773, *supra* note 34, at 324; DAVIS, TREATISE FOR JUSTICES 1824, *supra* note 33, at 48; JOHN A. DUNLAP, THE NEW-YORK JUSTICE 371 (N.Y., Isaac Riley 1815) (adopted to New York law); EWING, TREATISE ON JUSTICE OF THE PEACE 1805, *supra* note 34, at 506; GRIMKE, SOUTH CAROLINA JUSTICE OF PEACE 1810, *supra* note 34, at 399; WILLIAM WALLER HENING, THE NEW VIRGINIA JUSTICE 403 (Richmond, T. Nicholson 1795); HITCHCOCK, THE ALABAMA JUSTICE 1822, *supra* note 34, at 407; NEW CONDUCTOR GENERALIS FOR JUSTICES 1803, *supra* note 34, at 405; PARKER, CONDUCTOR GENERALIS FOR JUSTICES OF THE PEACE 1801, *supra* note 34, at 316.

<sup>214</sup> See *supra* note 34 and accompanying text.

<sup>215</sup> Act of Mar. 3, 1791, ch. 15, § 38, 1 Stat. at 208.

<sup>216</sup> See Act of July 31, 1789, ch. 5, § 36, 1 Stat. at 47.

<sup>217</sup> Imagine yourself a Framing-era official contemplating a warrantless search of a home or business to enforce the Excise Act: would you prefer immunity to hinge upon whether you could establish probable cause based on the facts you believed to be true *prior* to the search? Or upon whether you actually found contraband, something you could not know until *after* the search? My guess is that the former scenario is far more advantageous. It gives the searcher much more control over immunity. On an abstract level, it goes far in

jury.<sup>218</sup> A crucial wildcard in assessing the adequacy of search remedies under Hamilton's Excise Act concerns the role of the jury. Given the time in which they lived, and the colonial history with which they would have been intimately familiar, jurors likely continued to act as they had prior to nationhood: friendly to claimants and suspicious of government power, especially federal power.<sup>219</sup>

Thus, with respect to the Excise Act, I reach a conclusion similar to that of Cuddihy and Maclin, who have argued that Hamilton's Excise Act made it *easier* to obtain a tort remedy.<sup>220</sup> But I reach my conclusion for a very different reason. Cuddihy and Maclin rest their conclusion on some minor procedural mechanisms in the Excise Act, including a claimant-friendly burden-shifting provision.<sup>221</sup> But it is more likely that the Act's treatment of the probable cause/immunity link, and in particular of the jury, play much larger roles in determining the adequacy of remedies for Excise Act searches.

Finally, to the extent Cuddihy and Maclin imply that Hamilton's Excise Act *discouraged* searches, they may or may not be correct. A searcher who is more confident about gaining immunity, as searchers operating under a probable cause/immunity regime would have been, is *more* likely to search, not less.<sup>222</sup> From this perspective, the Act would

freeing the searcher from fate's whimsy. On a more concrete level, it no longer places the searcher at the mercy of a cunning smuggler, who might either purposefully or coincidentally move the contraband prior to the search. Enjoying the greater certainty that immunity would apply, this official would have less fear of conducting warrantless searches.

On the other hand, some colleagues have made the valuable contribution of questioning my speculation that probable cause provided better immunity protection. One raised the prospect of an informer. What if the searcher is relying upon a trusted informer, but does not want to reveal the informer's identity? The searcher may prefer to rely upon the prospect of the search being successful, rather than upon an opportunity to show probable cause. Another colleague made the related argument that, although in some contexts searchers might have benefited from a probable cause immunity standard, this might not necessarily have been true in all contexts.

<sup>218</sup> Act of Mar. 3, 1791, ch. 15, § 38, 1 Stat. at 208.

<sup>219</sup> See *United States v. The Schooner Betsey and Charlotte*, 8 U.S. (4 Cranch) 443, 446 n.\* (1808) (Chase, J.) ("The reason of the legislature for putting seizures of this kind on the admiralty side of the court was the great danger to the revenue if such cases should be left to the caprice of juries."). Indeed, this probably explains why the Framers nearly always displaced the jury in civil search statutes they promulgated. As I explain below, the Framers displaced juries in the 1789 Collection Act and in at least 32 other statutory civil search acts. See *infra* notes 227–229 and accompanying text. As far as I have been able to determine, they reinstated juries only in Hamilton's 1791 Excise Act and three other statutory civil search acts. See *infra* note 230 and accompanying text.

<sup>220</sup> See *supra* notes 180–188 and accompanying text.

<sup>221</sup> See *supra* notes 180–188 and accompanying text.

<sup>222</sup> See *supra* note 217 and accompanying text.

have *encouraged* excise searches. Conversely, however, the Act may have worked to *reduce* the number of searches to the extent that officials would have made greater efforts to restrict their searches to those predicated upon probable cause, particularly if they feared suffering a jury's wrath.

### 3. Other Acts from the Framers' Era: The 1789 Collection Act as Dominant Model

Though the conventional account focuses upon only two statutory acts, namely the 1789 Collection Act and Hamilton's 1791 Excise Act, many more civil search statutes were enacted during the Framers' era.<sup>223</sup> When one considers these other statutory acts with respect to probable cause and the jury displacement issue, an unmistakable trend becomes evident: the Framers almost always followed the 1789 Collection Act model of linking immunity to probable cause and entrusting the probable cause issue to judges, not juries.<sup>224</sup> Importantly, this trend became universal in 1815, when the Framers chose to displace juries even in contexts that previously had followed the 1791 Excise Act model.<sup>225</sup> I will address this significant development below.<sup>226</sup>

During 1787 through 1825, the period I have treated as the "Framers' era,"<sup>227</sup> the Framers followed the 1789 Collection Act model in at least 32 other statutory acts addressing civil searches. The Framers were explicit about linking immunity to probable cause and displacing juries in only a few of these acts, including the two direct successors to the 1789 Collection Act, which were enacted in 1790 and 1799.<sup>228</sup> In the rest, the Framers indirectly implemented these standards by cross-

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<sup>223</sup> See *supra* note 4.

<sup>224</sup> See *infra* notes 228–229 and accompanying text.

<sup>225</sup> See *infra* notes 240–241 and accompanying text.

<sup>226</sup> See *infra* notes 240–241 and accompanying text.

<sup>227</sup> See *supra* note 4.

<sup>228</sup> Act of Mar. 3, 1815, ch. 100, § 14, 3 Stat. 239, 242–43 ("probable cause") (concerning internal excise taxes, this Act is of tremendous importance in understanding the Framers' views about a jury's role in assuring search and seizure protections, see *infra* notes 240–241 and accompanying text); Act of Mar. 3, 1815, ch. 94, § 7, 3 Stat. 231, 234–35 ("reasonable cause"); Act of Feb. 4, 1815, ch. 31, § 9, 3 Stat. 195, 199 ("probable cause"); Act of Mar. 2, 1799, ch. 22, § 89, 1 Stat. 627, 695–96 ("reasonable cause"); Act of Aug. 4, 1790, ch. 35, § 67, 1 Stat. 145, 176–77 ("reasonable cause"). For an explanation of why no distinction appears to have been drawn between "reasonable cause" and "probable cause," see *supra* note 162.

referencing earlier enactments that had been explicit on these issues.<sup>229</sup>

On the other hand, during the same period, the Framers followed the model represented by Hamilton's 1791 Excise Act—linking immunity to probable cause, but reinstating the jury's role in deciding that issue—in only three other statutory acts addressing civil searches.<sup>230</sup> In each of these three acts, the Framers indirectly implemented these standards by cross-referencing to Hamilton's Excise Act.

#### 4. Implications from the Dominance of the 1789 Collection Act Model

This survey of civil search statutes from the Framers' era shows that the conventional account is overly simplistic in asserting that the Framers were of two minds with regard to the availability of search remedies, with Hamilton's 1791 Excise Act manifesting a concern with limiting governmental search power by making it easier for the citizenry to access a search remedy.<sup>231</sup> This Act likely did make it easier to access a search remedy to the extent that it restored the jury's role in determining probable cause.<sup>232</sup> Furthermore, the jury's resurrection may have essentially nullified the effect of making immunity available based upon *ex post* probable cause determinations, which otherwise would have tended to limit access to search remedies.<sup>233</sup>

But Hamilton's 1791 Excise Act is not broadly representative of the Framers' views for two reasons. First, the model it represented—of reinstating juries and giving them responsibility for the probable cause/

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<sup>229</sup> Act of May 22, 1824, ch. 136, § 5, 4 Stat. 25, 30; Act of Mar. 3, 1823, ch. 58, § 5, 3 Stat. 781, 782; Act of Mar. 1, 1823, ch. 21, § 35, 3 Stat. 729, 739; Act of Mar. 2, 1821, ch. 14, § 3, 3 Stat. 616, 617; Act of May 15, 1820, ch. 122, § 4, 3 Stat. 602, 604; Act of Mar. 3, 1819, ch. 82, § 4, 3 Stat. 515, 515; Act of Apr. 20, 1818, ch. 129, § 5, 3 Stat. 469, 470; Act of Apr. 20, 1818, ch. 103, § 4, 3 Stat. 460, 461; Act of Apr. 20, 1818, ch. 98, § 4, 3 Stat. 458, 459; Act of Apr. 20, 1818, ch. 79, § 25, 3 Stat. 433, 438; Act of Apr. 18, 1818, ch. 70, § 4, 3 Stat. 432, 433; Act of Mar. 1, 1817, ch. 31, § 2, 3 Stat. 351, 351; Act of Apr. 27, 1816, ch. 107, § 7, 3 Stat. 310, 314; Act of July 29, 1813, ch. 35, § 6, 3 Stat. 49, 51–52; Act of Apr. 4, 1812, ch. 49, § 4, 3 Stat. 700, 701; Act of June 28, 1809, ch. 9, § 4, 2 Stat. 550, 551; Act of Mar. 1, 1809, ch. 24, § 18, 2 Stat. 528, 532–33; Act of Apr. 25, 1808, ch. 66, § 14, 2 Stat. 499, 502; Act of Apr. 18, 1806, ch. 29, § 8, 2 Stat. 379, 380–81; Act of July 8, 1797, ch. 15, § 3, 1 Stat. 533, 534; Act of Jan. 29, 1795, ch. 17, § 6, 1 Stat. 411, 411; Act of June 7, 1794, ch. 54, § 6, 1 Stat. 390, 392; Act of May 22, 1794, ch. 33, § 4, 1 Stat. 369, 370; Act of Feb. 18, 1793, ch. 8, § 35, 1 Stat. 305, 317; Act of Dec. 31, 1792, ch. 1, § 29, 1 Stat. 287, 298–99; Act of Dec. 27, 1790, ch. 1, § 1, 1 Stat. 188, 188; Act of Sept. 1, 1789, ch. 11, § 21, 1 Stat. 55, 60.

<sup>230</sup> Act of Mar. 3, 1797, ch. 11, § 5, 1 Stat. 504, 505; Act of June 5, 1794, ch. 49, § 19, 1 Stat. 378, 381; Act of May 8, 1792, ch. 32, § 17, 1 Stat. 267, 271.

<sup>231</sup> See *supra* notes 180–188 and accompanying text.

<sup>232</sup> See *supra* notes 199–200, 218–221 and accompanying text.

<sup>233</sup> See *supra* notes 218–221 and accompanying text.

immunity determination—is quantitatively rare, having been followed, as far as I have determined, in only three subsequent statutory acts,<sup>234</sup> for a total of four. By contrast, the 1789 Collection Act model—of displacing juries and making federal judges responsible for the probable cause/immunity determination—was followed in at least 32 subsequent statutory acts, for a total of 33.<sup>235</sup>

Second, starting in 1815 the Framers made a groundbreaking decision to abandon the jury model represented by Hamilton’s 1791 Excise Act even when “internal” excise taxes were at issue, and instead applied the 1789 Collection Act jury displacement model. Until 1815, the Framers had applied the 1789 Collection Act model only to “external” activities, those at or past the nation’s borders, such as to customs efforts to collect impost duties.<sup>236</sup> Extensive precedent supported this approach. Since 1696, these matters had been placed within the jurisdiction of colonial vice-admiralty courts, which lacked juries.<sup>237</sup> It was only after the 1764 Sugar Act’s passage that colonists had started raising constitutional protests to this practice.<sup>238</sup> But these were much more muted than were the protests against the 1765 Stamp Act, which was more objectionable because it regulated “internal” matters more traditionally subject to the common law.<sup>239</sup>

It appears that, until 1815, the Framers distinguished between acceptable and unacceptable jury displacement based upon whether the regulated activity was “external” or “internal.” The Framers implemented civil search statutes that displaced juries if those statutes addressed “external” matters, such as impost duties in the customs context (as did the 1789 Collection Act), but the Framers preferred the jury if the statutes concerned “internal” matters, such as wholly domestic enforcement of excise taxes (as did Hamilton’s 1791 Excise Act). This approach was roughly consistent with the colonial reactions to both the 1764 Sugar Act, which imposed impost duties, and the 1765 Stamp Act, which imposed excise taxes. The former addressed “external” matters, while the latter addressed “internal” matters. Both displaced juries. Arguably, before 1815 the Framers felt that jury displacement was acceptable for “external” matters, implying that the

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<sup>234</sup> See *supra* note 230 and accompanying text.

<sup>235</sup> See *supra* notes 228–229 and accompanying text.

<sup>236</sup> See *supra* notes 115–116 and accompanying text for a brief review of the important distinction colonists made between whether regulated activity was “external” or “internal.”

<sup>237</sup> See *supra* note 84 and accompanying text.

<sup>238</sup> See *supra* notes 91–107 and accompanying text.

<sup>239</sup> See *supra* notes 108–137 and accompanying text.

more muted protests against the 1764 Sugar Act were really about the taxation-without-representation issue, but jury displacement was unacceptable with regard to “internal” matters, suggesting that the 1765 Stamp Act protests included sincere outrages over a constitutional jury grievance.

But this view holds only until 1815, when the Framers made the radically different choice in the Act of March 3, 1815, chapter 100, of displacing juries in the context of civil search statutes regulating “internal” matters, namely the collection and enforcement of excise taxes.<sup>240</sup> The Act is important not only for this choice, but even more so for the Framers’ decision to make this choice applicable to *all* acts involving “internal” excise taxes, whether passed earlier or later!<sup>241</sup> The Act, therefore, not only sharply departed from the model represented by Hamilton’s 1791 Excise Act, but also repudiated it in favor of the 1789 Collection Act model. Thus, since the conventional account correctly identifies the 1789 Collection Act as being designed to limit access to search remedies, it follows that, by March 1815, the Framers had decided to take the same approach for “internal” search and seizure matters such as excise tax enforcement.

Thus, even if the net impact of Hamilton’s Excise Act was to increase access to a search remedy, the conventional account nevertheless suffers from placing too much emphasis upon it and failing to acknowledge (1) the distinction between “external” and “internal” matters that prevailed in the early nation prior to March 1815, and (2) the Framers’ decision in March 1815, with regard to civil search and seizure measures, to embrace jury displacement not only for “external” matters (i.e., customs enforcement of impost duties) but also for “internal” matters (i.e., enforcement of excise taxes). From this standpoint, Hamilton’s Excise Act and its three progeny<sup>242</sup> can be considered singular. It is the 1789 Collection Act, and its use of a probable cause/immunity link joined with a displacement of juries, that was the dominant model for the Framers.<sup>243</sup> They followed this pattern in at least 32 subsequent statutory acts, which eventually addressed both “external” and “internal” search and seizure contexts. Therefore, the 1789 Collection Act model is the most informative about the Framers’ views regarding gov-

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<sup>240</sup> See Act of Mar. 3, 1815, ch. 100, § 14, 3 Stat. at 242–43.

<sup>241</sup> *Id.* § 16, 3 Stat. at 243.

<sup>242</sup> See *supra* notes 199–200, 230 and accompanying text.

<sup>243</sup> See *supra* notes 162–163, 228–229 and accompanying text.

ernmental search powers and the scope of remedies available to the citizenry.<sup>244</sup>

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<sup>244</sup> Some colleagues have raised concerns about my conclusion. First, some have expressed doubts about whether my account is really relevant to search and seizure jurisprudence at all. They point out that, during 1787–1825 (the period of my statutory survey, *see supra* note 4), the new nation was rife with extreme political dissension (e.g., Federalists versus Anti-Federalists), shifting centers of political power (e.g., Hamiltonians, who favored the federal government and judges, versus Jeffersonians, who favored state governments and juries), and was affected by hostilities between more powerful nations (i.e., the Napoleonic War between Great Britain and France). This objection doubts whether, with the new nation caught in so many cross-currents, my thesis of remarkable continuity in the Framers' views about statutory search and seizure protection is legitimate, since so many different and competing motivations may have influenced the Framers over this extended period. Second, some have confronted me with a difficult question: why? Given the high and persistent value that was placed upon the jury during this early period, *see supra* notes 169–170 and accompanying text, why would the Framers have so consistently displaced the jury in their civil search statutes?

My response is two-fold. First, my account of tremendous continuity is all the more powerful given that these violent cross-currents certainly did exist. In spite of them all, the Framers' tendency was almost always to move in the same direction—towards jury displacement and having federal judges determine the probable cause/immunity issue. *See supra* notes 228–229 and accompanying text. Second, this was a rational response given the crucial and pervasive need throughout this period for federal revenue, and the persistent concern that juries were claimant-friendly. This seems a compelling and satisfactory answer, particularly given that it was the reason Justice Chase offered in 1808. *See supra* note 219. Given that Justice Chase was located so much closer in time to the relevant period, I would defer to him. Yet, some of my colleagues have questioned whether this is a sufficient explanation, particularly once the Jeffersonians came into power, given that they favored a small federal government. Moreover, a doubt about Justice Chase's explanation has been expressed in the scholarship. Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 74–75 (1923) (characterizing Justice Chase's position as "a rather insufficient explanation, in view of the insistence on jury trial shown by the Congress throughout other portions of the Act") (footnote omitted). *But see* WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789* app. I (Wythe Holt & L.H. LaRue eds., 1990) (critiquing Warren's account, though not on this specific issue). I acknowledge, therefore, that this issue deserves more scholarly attention.

One colleague who is not persuaded by the revenue-generation explanation asked the further question: why did the Framers so favor probable cause as an immunity standard? I recognized above that whether probable cause was a more protective immunity standard might have depended upon context. *See supra* note 217. This colleague agrees. Even though probable cause might not necessarily have favored the government in every case, he suggests an alternate reason for why the Framers might have preferred it as an immunity standard: it provided the decisionmaker greater discretion than, for example, the successful search immunity standard. If one accepts the evidence that judges tended to favor the government more than did juries, *see supra* note 66, then this could explain the Framers' approach because the allocation to the decisionmaker becomes crucial. As my colleague stated, in this view, the adoption of a probable cause immunity standard "was of a piece" with the allocation of the issue to judges, a point as to which I am in full agreement.

### III. OTHER PROCEDURAL DEVICES THAT LIMITED ACCESS TO SEARCH REMEDIES

When civil search statutes from the Framers' era are viewed more broadly than the 1789 Collection Act and Hamilton's 1791 Excise Act, the general trend towards making it harder to access civil search remedies—Hamilton's Excise Act notwithstanding—becomes even more apparent. In these statutory acts the Framers used a plethora of other procedural devices—beyond linking immunity to probable cause and reserving the issue for judges—to make it harder for the citizenry to access a remedy for civil searches. These measures included (1) authorizing officers to plead the general issue;<sup>245</sup> (2) authorizing them to plead the president's rules in defense, or to submit into evidence the statutory act and its authorization for civil searches, as well as “any special matter”;<sup>246</sup> (3) granting successful defendants double, or even treble, costs;<sup>247</sup> (4) depriving even successful claimants of costs if the judge made a probable cause certification;<sup>248</sup> (5) placing the burden of proof upon the claimant if a judge determined that probable cause had been present;<sup>249</sup> (6) authorizing the court to summarily adjudge the case;<sup>250</sup> and, (7) quite remarkably, allowing removal of a case from state court even after a judgment, with the federal court then proceeding *de novo*.<sup>251</sup>

#### A. Authorizing Officers to Plead General Issue

Pleading the “general issue” is a procedural device that is unfamiliar to us today, but the Framers used it repeatedly when they fashioned civil search regimes. The Framers authorized searchers to plead the general issue in no less than 34 statutory acts from the Framers' era.<sup>252</sup>

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<sup>245</sup> See *infra* notes 252–255 and accompanying text.

<sup>246</sup> See *infra* notes 256–257 and accompanying text.

<sup>247</sup> See *infra* notes 258–259 and accompanying text.

<sup>248</sup> See *infra* notes 260–261 and accompanying text.

<sup>249</sup> See *infra* notes 262–266 and accompanying text.

<sup>250</sup> See *infra* note 267 and accompanying text.

<sup>251</sup> See *infra* note 268 and accompanying text.

<sup>252</sup> Of these 34 statutory acts, seven of them explicitly authorized search officers to plead the general issue, including the 1799, 1790, and 1789 Collection Acts. Act of Mar. 3, 1815, ch. 100, § 13, 3 Stat. 239, 241–42; Act of Mar. 3, 1815, ch. 94, § 6, 3 Stat. 231, 233–34; Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 195, 198–99; Act of Jan. 9, 1809, ch. 5, § 10, 2 Stat. 506, 509–10; 1799 Collection Act, Act of Mar. 2, 1799, ch. 22, § 71, 1 Stat. 627, 678; 1790 Collection Act, Act of Aug. 4, 1790, ch. 35, § 51, 1 Stat. 145, 170; 1789 Collection Act, Act of July 31, 1789, ch. 5, § 27, 1 Stat. 29, 43–44.

Pleading the general issue in the Framers' era would be equivalent to a "general denial" today.<sup>253</sup> Though a defendant's ability to make a general denial today does not meaningfully disadvantage a plaintiff, the situation was quite different during the Framers' era. While discussing British procedural mechanisms that discouraged suits against searchers, Professor Cuddihy described the ability to plead the general issue as the "*pièce de résistance*" because it

exposed the meaning of the laws as well as the facts of the case to challenge and interpretation, thus freeing law enforcement personnel from the necessity of producing special evidence in their behalf. Such a plea automatically increased the burden of proof on the challenger to a search by denying every allegation in his brief and forcing him to prove each one.<sup>254</sup>

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The remaining 27 were not explicit, but appear to have extended such an authorization indirectly by incorporating other statutory acts that were explicit. Act of May 22, 1824, ch. 136, § 5, 4 Stat. 25, 30; Act of Mar. 3, 1823, ch. 58, § 5, 3 Stat. 781, 782; Act of Mar. 1, 1823, ch. 21, § 35, 3 Stat. 729, 739; Act of Mar. 2, 1821, ch. 14, § 3, 3 Stat. 616, 617; Act of May 15, 1820, ch. 122, § 4, 3 Stat. 602, 604; Act of Mar. 3, 1819, ch. 82, § 4, 3 Stat. 515, 515; Act of Apr. 20, 1818, ch. 129, § 5, 3 Stat. 469, 470; Act of Apr. 20, 1818, ch. 103, § 4, 3 Stat. 460, 461; Act of Apr. 20, 1818, ch. 98, § 4, 3 Stat. 458, 459; Act of Apr. 20, 1818, ch. 79, § 25, 3 Stat. 433, 438; Act of Apr. 18, 1818, ch. 70, § 4, 3 Stat. 432, 433; Act of Mar. 1, 1817, ch. 31, § 2, 3 Stat. 351, 351; Act of Apr. 27, 1816, ch. 107, § 7, 3 Stat. 310, 314; Act of July 29, 1813, ch. 35, § 6, 3 Stat. 49, 51–52; Act of Apr. 4, 1812, ch. 49, § 4, 3 Stat. 700, 701; Act of June 28, 1809, ch. 9, § 4, 2 Stat. 550, 551; Act of Mar. 1, 1809, ch. 24, § 18, 2 Stat. 528, 532–33; Act of Apr. 25, 1808, ch. 66, § 14, 2 Stat. 499, 502; Act of April 18, 1806, ch. 29, § 8, 2 Stat. 379, 380–81; Act of July 8, 1797, ch. 15, § 3, 1 Stat. 533, 534; Act of Jan. 29, 1795, ch. 17, § 6, 1 Stat. 411, 411; Act of June 7, 1794, ch. 54, § 6, 1 Stat. 390, 392; Act of May 22, 1794, ch. 33, § 4, 1 Stat. 369, 370; Act of Feb. 18, 1793, ch. 8, § 35, 1 Stat. 305, 317; Act of Dec. 31, 1792, ch. 1, § 29, 1 Stat. 287, 298–99; Act of Dec. 27, 1790, ch. 1, § 1, 1 Stat. 188, 188; Act of Sept. 1, 1789, ch. 11, § 21, 1 Stat. 55, 60.

The ability to plead the general issue had been a well-established pleading rule under the common law. David Millon, *Positivism in the Historiography of the Common Law*, 1989 Wis. L. Rev. 669, 677; Ellen E. Sward, *A History of the Civil Trial in the United States*, 51 U. KAN. L. Rev. 347, 351 (2003). Thus, one might ask why the Framers saw fit to codify this plea so frequently via statutory enactments. One part of the answer appears to relate to the increasingly complex pleading rules that existed at the time. Blackstone reported in the 1760s that the legislature in many instances had "permitted the general issue to be pleaded" because "the science of special pleading [had] been frequently perverted to the purposes of chicane and delay." 3 BLACKSTONE, *supra* note 31, at 305–06. Another part of the answer is that, even under the common law, specific authorization had to exist to plead the general issue. By codifying this pleading right in statutes, the Framers avoided any uncertainty regarding whether search officials could use the plea.

<sup>253</sup> William H. Lloyd, *Pleading*, 71 U. PA. L. REV. 26, 32 (1922); Millon, *supra* note 252, at 675.

<sup>254</sup> CUDDIHY, *supra* note 26, at 432.

Given the state of pleading during the eighteenth century, authorizations to plead the general issue probably did raise meaningful obstacles to claimants.

Consisting of a mere summary denial and giving no notice of the nature of the defense the effect was to send the whole case to trial without distinguishing fact from law and without defining the exact question to be tried. The result was that the parties were obliged to prepare for the proof of every conceivable fact that might bear on the case, resulting in an unnecessary accumulation of proof and, consequently, of expense. . . . The result was that what was seemingly gained through simplicity of pleading was lost through the confusion resulting from trials without well-defined issues, and motions for new trials multiplied in consequence.<sup>255</sup>

This state of affairs was more likely to disadvantage claimants than government officials. Thus, Cuddihy is correct in identifying the plea of the general issue as a meaningful obstacle to claimants seeking a search remedy.

B. *Authorizing Officers to Plead President's Rules in Defense, and Submit Acts and "Any Special Matter" into Evidence*

On several occasions, the Framers granted search officials other pleading advantages beyond the ability to plead the general issue. In the 1809 Embargo Act, the Framers authorized searchers to plead the president's rules as a defense.<sup>256</sup> In 12 later acts, the Framers granted statutory authority for searchers to submit those acts, as well as "any special matter," into evidence.<sup>257</sup>

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<sup>255</sup> Lloyd, *supra* note 253, at 32 (citation omitted). At the same time, the ability to plead the general issue was commonly seen as a palliative to the complex special pleading rules that otherwise would have applied. For a detailed discussion of pleading the general issue, why it was deemed useful, and its history and development, see 9 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 319–30 (1926). Holdsworth noted that Bentham "epigrammatically summed up the situation" in writing that "[g]eneral pleading conveys no information, but there is an end to it: if any information is conveyed by pleading, it is by special pleading, but there is no end to it." *Id.* at 323; see 4 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, SPECIALLY APPLIED TO ENGLISH PRACTICE 267 (Fred B. Rothman & Co. 1995) (1827).

<sup>256</sup> Act of Jan. 9, 1809, ch. 5, § 10, 2 Stat. 506, 509–10.

<sup>257</sup> Of these 12 statutory acts, three of them explicitly authorized these defenses. Act of Mar. 3, 1815, ch. 100, § 13, 3 Stat. at 241–42; Act of Mar. 3, 1815, ch. 94, § 6, 3 Stat. at 233–34; Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. at 198–99.

### C. *Granting Double or Even Treble Costs to Successful Defendants*

To help discourage legal challenges to civil searches, the Framers were very fond of imposing double costs upon unsuccessful claimants. They included such provisions in no less than 33 statutory acts.<sup>258</sup>

In one instance, the Framers' zeal for imposing cost multipliers against unsuccessful claimants seemed to reach a fever pitch. No longer was the prospect of having to pay double costs deemed a sufficient deterrent for those who might challenge a civil search. In a statutory act of 1809, the Framers authorized the imposition of treble costs against unsuccessful claimants.<sup>259</sup>

### D. *Depriving Even Successful Claimants of Costs If Judge Made Probable Cause Certification*

Potential claimants who worried about facing cost multipliers if their legal challenge to a search or seizure was unsuccessful also faced a

The remaining nine were not explicit, but appear to have extended such an authorization indirectly by incorporating other statutory acts that were explicit. Act of May 22, 1824, ch. 136, § 5, 4 Stat. at 30; Act of May 15, 1820, ch. 122, § 4, 3 Stat. at 604; Act of Mar. 3, 1819, ch. 82, § 4, 3 Stat. at 515; Act of Apr. 20, 1818, ch. 129, § 5, 3 Stat. at 470; Act of Apr. 20, 1818, ch. 103, § 4, 3 Stat. at 461; Act of Apr. 20, 1818, ch. 98, § 4, 3 Stat. at 459; Act of Apr. 18, 1818, ch. 70, § 4, 3 Stat. at 433; Act of Mar. 1, 1817, § 2, 3 Stat. at 351; Act of Apr. 27, 1816, ch. 107, § 7, 3 Stat. at 314.

<sup>258</sup> Of these 33 statutory acts, six of them explicitly authorized the imposition of double costs against unsuccessful claimants, including the 1799, 1790, and 1789 Collection Acts. Act of Mar. 3, 1815, ch. 100, § 13, 3 Stat. at 242–43; Act of Mar. 3, 1815, ch. 94, § 6, 3 Stat. at 233–34; Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. at 198–99; 1799 Collection Act, Act of Mar. 2, 1799, ch. 22, § 71, 1 Stat. at 678; 1790 Collection Act, Act of Aug. 4, 1790, ch. 35, § 51, 1 Stat. at 170; 1789 Collection Act, Act of July 31, 1789, ch. 5, § 27, 1 Stat. at 43–44.

The remaining 27 were not explicit, but appear to have extended such an authorization indirectly by incorporating other statutory acts that were explicit. Act of May 22, 1824, ch. 136, § 5, 4 Stat. at 30; Act of Mar. 3, 1823, ch. 58, § 5, 3 Stat. at 782; Act of Mar. 1, 1823, ch. 21, § 35, 3 Stat. at 739; Act of Mar. 2, 1821, ch. 14, § 3, 3 Stat. at 617; Act of May 15, 1820, ch. 122, § 4, 3 Stat. at 604; Act of Mar. 3, 1819, ch. 82, § 4, 3 Stat. at 515; Act of Apr. 20, 1818, ch. 129, § 5, 3 Stat. at 470; Act of Apr. 20, 1818, ch. 103, § 4, 3 Stat. at 461; Act of Apr. 20, 1818, ch. 98, § 4, 3 Stat. at 459; Act of Apr. 20, 1818, ch. 79, § 25, 3 Stat. at 438; Act of Apr. 18, 1818, ch. 70, § 4, 3 Stat. at 433; Act of Mar. 1, 1817, ch. 31, § 2, 3 Stat. at 351; Act of Apr. 27, 1816, ch. 107, § 7, 3 Stat. at 314; Act of July 29, 1813, ch. 35, § 6, 3 Stat. at 51–52; Act of Apr. 4, 1812, ch. 49, § 4, 3 Stat. at 701; Act of June 28, 1809, ch. 9, § 4, 2 Stat. at 551; Act of Mar. 1, 1809, ch. 24, § 18, 2 Stat. at 532–33; Act of Apr. 25, 1808, ch. 66, § 14, 2 Stat. at 502; Act of Apr. 18, 1806, ch. 29, § 8, 2 Stat. at 380–81; Act of July 8, 1797, ch. 15, § 3, 1 Stat. at 534; Act of Jan. 29, 1795, ch. 17, § 6, 1 Stat. at 411; Act of June 7, 1794, ch. 54, § 6, 1 Stat. at 392; Act of May 22, 1794, ch. 33, § 4, 1 Stat. at 370; Act of Feb. 18, 1793, ch. 8, § 35, 1 Stat. at 317; Act of Dec. 31, 1792, ch. 1, § 29, 1 Stat. at 298–99; Act of Dec. 27, 1790, ch. 1, § 1, 1 Stat. at 188; Act of Sept. 1, 1789, ch. 11, § 21, 1 Stat. at 60.

<sup>259</sup> Act of Jan. 9, 1809, ch. 5, § 10, 2 Stat. 506, 509–10.

flip-side deterrent: even if they succeeded in their legal challenge, they might be denied their own costs. This prospect existed because, in addition to cost multipliers imposed against unsuccessful claimants, the Framers had another cost-related procedural device at the ready: denying costs to even successful claimants. In at least 22 statutory acts from the Framers' period, successful claimants were denied costs if the judge made an ex post determination that probable cause had supported the search or seizure.<sup>260</sup> Thus, the judge's power to make such a probable cause determination often provided immunity to the search official,<sup>261</sup> depriving even the successful claimant of damages, and also could leave such a claimant without reimbursement of his costs.

Successful claimants would not walk away empty handed. They would have reclaimed their seized property. But, so long as a judge decreed ex post that probable cause had existed, that is apparently all such a claimant would walk away with. No damages would line his pockets, and moreover he would have had to bear his own costs from pursuing litigation.

#### *E. Placing Burden of Proof upon Claimant If Judge Determined That Probable Cause Had Been Present*

In addition to manipulating costs, the Framers used other procedural devices as deterrents against pursuing a search remedy. One popular device was to place the burden of proof upon the claimant if the judge decided ex post that probable cause had supported the

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<sup>260</sup> Of these 22 statutory acts, three of them—the 1799, 1790, and 1789 Collection Acts—explicitly barred the granting of costs to successful claimants, dependent upon a probable cause certification. 1799 Collection Act, Act of Mar. 2, 1799, ch. 22, § 89, 1 Stat. at 695–96; 1790 Collection Act, Act of Aug. 4, 1790, ch. 35, § 67, 1 Stat. at 176–77; 1789 Collection Act, Act of July 31, 1789, ch. 5, § 36, 1 Stat. at 47–48.

The remaining 19 were not explicit, but appear to have authorized the denial of costs to successful claimants because they specified that penalties and forfeitures could be sued for in accordance with either the 1799, 1790, or 1789 Collection Acts. Act of May 22, 1824, ch. 136, § 5, 4 Stat. at 30; Act of Mar. 3, 1823, ch. 58, § 5, 3 Stat. at 782; Act of Mar. 1, 1823, ch. 21, § 35, 3 Stat. at 739; Act of Mar. 2, 1821, ch. 14, § 3, 3 Stat. at 617; Act of Apr. 20, 1818, ch. 79, § 25, 3 Stat. at 438; Act of July 29, 1813, ch. 35, § 6, 3 Stat. at 51–52; Act of Apr. 4, 1812, ch. 49, § 4, 3 Stat. at 701; Act of June 28, 1809, ch. 9, § 4, 2 Stat. at 551; Act of Mar. 1, 1809, ch. 24, § 18, 2 Stat. at 532–33; Act of Apr. 25, 1808, ch. 66, § 14, 2 Stat. at 502; Act of Apr. 18, 1806, ch. 29, § 8, 2 Stat. at 380–81; Act of July 8, 1797, ch. 15, § 3, 1 Stat. at 534; Act of Jan. 29, 1795, ch. 17, § 6, 1 Stat. at 411; Act of June 7, 1794, ch. 54, § 6, 1 Stat. at 392; Act of May 22, 1794, ch. 33, § 4, 1 Stat. at 370; Act of Feb. 18, 1793, ch. 8, § 35, 1 Stat. at 317; Act of Dec. 31, 1792, ch. 1, § 29, 1 Stat. at 298–99; Act of Dec. 27, 1790, ch. 1, § 1, 1 Stat. at 188; Act of Sept. 1, 1789, ch. 11, § 21, 1 Stat. at 60.

<sup>261</sup> See *supra* notes 162–163, 228–229 and accompanying text.

search or seizure. Such a provision was included in no less than 13 statutory acts from the Framers' era.

The provision first appeared in 1795,<sup>262</sup> and was again included in the 1799 Collection Act.<sup>263</sup> Interestingly, the latter Act phrased the provision in such a way that the Framers might have perceived it as advantaging claimants. It provided that

in actions, suits or informations to be brought, where any seizure shall be made pursuant to this act, if the property be claimed by any person, in every such case the *onus probandi* shall lie upon such claimant. . . . [B]ut the *onus probandi* shall lie with the claimant only where probable cause is shown for such prosecution, to be judged of by the court before whom the prosecution is had.<sup>264</sup>

It certainly does seem fair to describe this provision as advantaging claimants when probable cause was absent, as in such situations the burden of proof would lie with the prosecution that was seeking forfeiture of the seized goods. But it also seems fair to describe this provision as disadvantaging claimants when probable cause had existed, since in such situations the burden of proof was placed upon claimants. Keep in mind evidence indicating that judges were not always disciplined about making these probable cause determinations, either due to excessive deference towards the government or because probable cause was interpreted as having a much less rigorous meaning than it is given today.<sup>265</sup>

The remaining 11 statutory acts that included such a provision were not explicit, but they appear to have included it because they specified that penalties and forfeitures could be sued for in accordance with the 1799 Collection Act.<sup>266</sup>

<sup>262</sup> Act of Feb. 26, 1795, ch. 31, § 2, 1 Stat. 420, 420–21.

<sup>263</sup> Act of Mar. 2, 1799, ch. 22, § 71, 1 Stat. at 678.

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

<sup>265</sup> Arcila, *supra* note 1, at 40–44, 53–54; Lerner, *supra* note 26; *see supra* notes 159–179 and accompanying text.

<sup>266</sup> Act of May 22, 1824, ch. 136, § 5, 4 Stat. at 30; Act of Mar. 3, 1823, ch. 58, § 5, 3 Stat. at 782; Act of Mar. 1, 1823, ch. 21, § 35, 3 Stat. at 739; Act of Mar. 2, 1821, ch. 14, § 3, 3 Stat. at 617; Act of Apr. 20, 1818, ch. 79, § 25, 3 Stat. at 438; Act of July 29, 1813, ch. 35, § 6, 3 Stat. at 51–52; Act of Apr. 4, 1812, ch. 49, § 4, 3 Stat. at 701; Act of June 28, 1809, ch. 9, § 4, 2 Stat. at 551; Act of Mar. 1, 1809, ch. 24, § 18, 2 Stat. at 532–33; Act of Apr. 25, 1808, ch. 66, § 14, 2 Stat. at 502; Act of Apr. 18, 1806, ch. 29, § 8, 2 Stat. at 380–81.

### F. *Authorizing Court to Summarily Adjudge Case*

In the 1809 Embargo Act, the Framers authorized the summary adjudication of claims.<sup>267</sup> The substantive import of this provision is not exactly clear to me, given that the statute provides no other description of the procedures that would apply to such a summary adjudication. Perhaps such a provision was meant to aid claimants by providing them a quick remedy. But given the plethora of other procedural devices the Framers used to disadvantage claimants, it seems unlikely that this provision would be an exception to the general pattern. More likely, this type of provision was meant to disadvantage claimants by depriving them of procedural rights they otherwise would have enjoyed.

### G. *Authorizing Removal of Case from State Court Even After Judgment, with Federal Court Proceeding De Novo*

A stunning example of the lengths to which the Framers were willing to go to disadvantage claimants and deter them from seeking a search remedy is found in 11 statutory enactments from the Framers' era. The relevant provisions are remarkable for the degree to which the Framers were quite evidently unconcerned with federalist and comity concerns between the state and federal courts.

In these acts, the Framers authorized the removal of any suit against a customs officer from state court *even after* a judgment had been rendered and, as if this were not enough of an affront to federalist notions, they also provided that such a removed case would then proceed in federal court *de novo*—a process that explicitly authorized federal courts to completely displace and ignore valid state court judgments.<sup>268</sup> It takes little imagination to speculate that this provision existed to authorize customs officers not only to escape from a state proceeding, but to do so only after it had turned out badly.

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<sup>267</sup> Act of Jan. 9, 1809, ch. 5, § 10, 2 Stat. 506, 509–10.

<sup>268</sup> Of these 11 statutory acts, two of them were explicit in granting these authorizations. Act of Mar. 3, 1815, ch. 94, § 6, 3 Stat. at 233–34; Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. at 198–99.

The remaining nine acts were not explicit, but appear to have granted similar authorization by incorporating the Act of Mar. 3, 1815, ch. 94, through language referring to “existing laws” or to United States “revenue laws,” for example. Act of May 22, 1824, ch. 136, § 5, 4 Stat. at 30; Act of May 15, 1820, ch. 122, § 4, 3 Stat. at 604; Act of Mar. 3, 1819, ch. 82, § 4, 3 Stat. at 515; Act of Apr. 20, 1818, ch. 129, § 5, 3 Stat. at 470; Act of Apr. 20, 1818, ch. 103, § 4, 3 Stat. at 461; Act of Apr. 20, 1818, ch. 98, § 4, 3 Stat. at 459; Act of Apr. 18, 1818, ch. 70, § 4, 3 Stat. at 433; Act of Mar. 1, 1817, ch. 31, § 2, 3 Stat. at 351; Act of Apr. 27, 1816, ch. 107, § 7, 3 Stat. at 314.

#### IV. FOUR IMPLICATIONS FROM THIS HISTORICAL REVIEW

##### A. *The Framers Usually Sought to Limit Access to Search Remedies*

The first implication relates to the Framers' views about how accessible search and seizure remedies should be. The conventional account posits that they were of two minds, sometimes wanting to increase access, sometimes wanting to decrease it.<sup>269</sup> A more thorough analysis of the many civil search statutes they promulgated, however, shows that their overwhelming tendency was to *limit* access to search remedies.<sup>270</sup> At a minimum, this arguably provides a basis for flexible Fourth Amendment protections, at least with regard to civil regulatory searches.<sup>271</sup>

##### B. *The Framers Used Probable Cause to Protect the Government*

The second implication is that the role of probable cause in Fourth Amendment jurisprudence is more complicated than we have acknowledged. This implication recognizes that one of the Framers' primary mechanisms for limiting access to search remedies was to use probable cause as an immunity standard.<sup>272</sup> Given that they often were more interested in using probable cause to protect the government than the people, an originalist analysis of the nation's early civil search statutes provides reasons to question whether our conception of constitutional probable cause is the same as the Framers' view.<sup>273</sup> Although modern jurists tend to think of probable cause as protecting the people, the Framers more directly conceived of it as serving dual purposes: perhaps to protect the people by requiring that warrants issue only upon an ade-

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<sup>269</sup> See *supra* notes 180–188 and accompanying text.

<sup>270</sup> See *supra* notes 155–157, 162–163, 166, 228–229, 231–244, 252–268 and accompanying text.

<sup>271</sup> I will expand upon this point below. See *infra* notes 295–296 and accompanying text.

<sup>272</sup> See *supra* notes 156, 162–163, 228–229, 235 and accompanying text.

<sup>273</sup> Of course, this point depends upon whether one believes that civil searches have anything to teach us about the Fourth Amendment. It is certainly possible to argue that the Fourth Amendment was not meant to apply to civil searches. See Ricardo J. Bascuas, *The Unconstitutionality of "Hold Until Cleared": Reexamining Material Witness Detentions in the Wake of the September 11th Dragnet*, 58 VAND. L. REV. 677, 716–19 (2005) (arguing that the Fourth Amendment's probable cause requirement applies only to criminal matters); Davies, *Original Fourth Amendment*, *supra* note 1, at 603–08 (contending that the Framers did not intend the Fourth Amendment to cover searches of ships or commercial premises, especially regulatory civil searches); David E. Steinberg, *The Uses and Misuses of Fourth Amendment History*, 10 U. PA. J. CONST. L. 581, 583, 599 (2008) (arguing that the Fourth Amendment protects only homes through imposition of specific warrant requirements).

quate level of suspicion, but certainly to protect the government by serving as a basis to extend immunity for warrant-based searches.

C. *The Framers Generally Restricted the Jury's Role in Search and Seizure Disputes*

A third implication concerns Professor Amar's theory regarding the role that juries played, and should play, in Fourth Amendment jurisprudence. Amar argues along originalist lines that juries should be given a greater role in determining Fourth Amendment reasonableness.<sup>274</sup> Amar's view on this point analogizes between common law trespass claims during the Framers' era, in which juries were prominent, and search and seizure claims today. But on the jury issue, Amar does not adequately account for the contribution that the Framers' statutory law makes to originalism. As we have seen, the Framers' civil search statutes used probable cause to protect *searchers*, rather than the *searched*.<sup>275</sup> And the Framers had no trouble in displacing the jury in favor of having judges determine probable cause *ex post*.<sup>276</sup> This provides a reason for questioning Amar's jury prescription, at least if one is willing to consider the Framers' civil search statutes as relevant to search and seizure claims today.<sup>277</sup> No doubt such a comparison is arguably problematic because it crosses lines—between the common law, criminal law, and civil law—but it is a plausible comparison. For example, the comparison might be apt because it was not uncommon for civil search statutes in the Framers' era, though regulatory in nature, to contain criminal penalties such as imprisonment.<sup>278</sup>

D. *The Modern Distinction Between "Probable Cause" and "Reasonable Cause/Suspicion" Is Contrary to Originalism*

The fourth implication relates to the distinction that the modern Supreme Court has created between "probable cause" and "reasonable cause" or "reasonable suspicion." This distinction came into important effect in *Terry v. Ohio*,<sup>279</sup> and now allows some warrantless searches to

<sup>274</sup> Amar, *Fourth Amendment*, *supra* note 26, at 817–19.

<sup>275</sup> See *supra* notes 156, 162–163, 228–229, 235 and accompanying text.

<sup>276</sup> See *supra* notes 162–166, 228–229, 240–241 and accompanying text.

<sup>277</sup> See *supra* note 273 and accompanying text.

<sup>278</sup> See, e.g., Act of Feb. 4, 1815, ch. 31, § 10, 3 Stat. 195, 199–200; Act of Feb. 4, 1815, ch. 31, § 3, 1 Stat. 195, 196; 1799 Collection Act, Act of Mar. 2, 1799, ch. 22, § 109, 1 Stat. 627, 703; 1799 Collection Act, Act of Mar. 2, 1799, ch. 22, § 82, 1 Stat. at 692; 1790 Collection Act, Act of Aug. 4, 1790, ch. 35, § 66, 1 Stat. 145, 175.

<sup>279</sup> 392 U.S. 1 (1968).

be conducted under “reasonable suspicion,” a lower standard than “probable cause.”<sup>280</sup> By contrast, a review of the nation’s early civil search statutes demonstrates that the Framers used the two phrases interchangeably.<sup>281</sup> Indeed, they sometimes used both terms within the same statutory enactment, such as in the 1799 Collection Act.<sup>282</sup> All of this implies that the Framers understood the two phrases to be substantively identical, and indeed two Supreme Court decisions—one old<sup>283</sup> and one moderately aged<sup>284</sup>—adopted just this interpretation. At least one scholar has suggested that the Court’s modern distinction between these two standards is contrary to an originalist analysis,<sup>285</sup> and the review conducted here adds another reason for believing that this is so.

### CONCLUSION

The specific role of probable cause remained surprisingly murky as the new nation developed its own search and seizure law. Clearly, under both the 1789 Collection Act and Hamilton’s 1791 Excise Act, probable cause was taking on increased prominence in civil search jurisprudence and was displacing the common law immunity standards applicable to searchers. Even so, this may not have resulted in a meaningful increased emphasis upon suspicion as a mechanism for protecting Fourth Amendment interests. This is because there is abundant reason to believe that the Framers conceived of probable cause more as a concept to protect government officials from suit than to protect the public,<sup>286</sup> and because probable cause likely was not given the same meaning as we give it today.<sup>287</sup> Rather, during the Framers’ era it appears that the probable cause concept was in flux, and often likely satisfied by a search official’s flimsy assertion.<sup>288</sup> At some later point, the concept underwent a gradual transformation towards the detailed, fact-specific inquiry with which we are familiar, a process that extended into the last century.

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<sup>280</sup> See, e.g., *United States v. Arvizu*, 534 U.S. 266, 273–74 (2002); *Illinois v. Wardlow*, 528 U.S. 119, 123–24 (2000).

<sup>281</sup> See *supra* notes 162, 228 and accompanying text (instances in which Framers used “reasonable cause” rather than “probable cause”).

<sup>282</sup> Compare Act of Mar. 2, 1799, ch. 22, § 71, 1 Stat. at 678 (using “probable cause”), with Act of Mar. 2, 1799, ch. 22, § 89, 1 Stat. at 695–96 (using “reasonable cause”).

<sup>283</sup> See *Stacey v. Emery*, 97 U.S. 642, 646 (1878).

<sup>284</sup> *Carroll v. United States*, 267 U.S. 132, 144–45 (1924).

<sup>285</sup> Lerner, *supra* note 26, at 997–98.

<sup>286</sup> See *supra* notes 156, 162–163, 228–229, 235 and accompanying text.

<sup>287</sup> Arcila, *supra* note 1, at 43–44.

<sup>288</sup> *Id.* at 43–44, 49–53.

In the Framers' view, probable cause became important when a search was challenged, at which point probable cause would have been subjected to an ex post review. Under virtually all of the new nation's civil search statutes, a federal judge would have conducted this ex post review.<sup>289</sup> It was possible in a minority of cases for a jury to enjoy this responsibility. Federal juries could have done so if the case arose under Hamilton's 1791 Excise Act or one of its three progeny.<sup>290</sup> Or, federal or state juries could have done so if the seizure and subsequent condemnation proceeding fell outside of admiralty jurisdiction.<sup>291</sup> In any case, it is likely that common law juries seldom controlled this ex post review process because in the majority of cases they likely were captive to a federal judge's ex post probable cause determination during a civil forfeiture proceeding.<sup>292</sup>

The outcome of this ex post probable cause review process was not what we might expect, given that we tend to conceive of probable cause as protecting the citizenry. This is because in the Framers' era probable cause was used as an immunity standard.<sup>293</sup> Thus, the ex post review of probable cause was used to protect *the government*, not *the people*. It would have been in search officials' interest to do their utmost to assure they would obtain immunity. Consequently, the people might have benefited from this system because this immunity standard increased the chances that they would be subject only to searches supported by probable cause. Nonetheless, there is considerable evidence that this benefit was ancillary to the main goal of safeguarding search officials from lawsuits challenging their conduct. One of the most powerful pieces of such evidence is that the Framers usually placed the probable cause determination in judges' hands, displacing juries from the role they enjoyed under the common law.<sup>294</sup> Juries likely were more claimant-friendly and therefore less likely to find probable cause, while judges probably leaned more towards the government and therefore were more likely to confer immunity.

This historical review raises several implications, which I have set forth above, and these are important because of the potential impact they might have on the Reasonableness Clause versus Warrant Clause

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<sup>289</sup> See *supra* notes 162–166, 228–229, 240–241 and accompanying text.

<sup>290</sup> See *supra* notes 199–200, 230 and accompanying text.

<sup>291</sup> See *supra* notes 164–165 and accompanying text.

<sup>292</sup> See *supra* notes 165, 228–229 and accompanying text.

<sup>293</sup> See *supra* notes 156, 162–163, 228–229, 235 and accompanying text.

<sup>294</sup> See *supra* notes 162–166, 228–229, 240–241 and accompanying text.

debate.<sup>295</sup> If the Framers were more interested in limiting rather than expanding access to search remedies, and one accepts that this provides a basis for more flexible Fourth Amendment protections, at least with regard to civil searches, then it is easier to advocate for a Fourth Amendment jurisprudence grounded in reasonableness. This suggests that the Burger and Rehnquist Courts' movements away from a Fourth Amendment jurisprudence grounded in the Warrant Clause (which the Warren Court had favored), and the Court's movement towards a Reasonableness Clause approach in civil search cases, such as through its "special needs" jurisprudence over the last twenty years,<sup>296</sup> can also be justified on originalist terms.

On the other hand, perhaps the Framers felt more positively about warrants than has been recognized, which could suggest a stronger role for the Warrant Clause. Professor Amar, arguing in favor of a Reasonableness Clause approach, has opined that the Framers "did not exalt" warrants, due to their immunizing effect.<sup>297</sup> The findings in this article support a more nuanced view. Given abundant evidence that the Framers sought to protect searchers, a plausible argument can be made that the Framers favored warrants' immunizing effects.

At the heart of these implications is a challenge to originalism. One difficulty, of course, is to correctly identify original intent, a challenge evidenced in the ambiguity described in the preceding two paragraphs. Even if that can be overcome, another challenge is whether

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<sup>295</sup> This debate concerns whether the Reasonableness Clause or the Warrant Clause should be the touchstone of Fourth Amendment constitutionality. Fabio Arcila, Jr., *Special Needs and Special Deference: Suspicionless Civil Searches in the Modern Regulatory State*, 56 ADMIN. L. REV. 1223, 1226–27 (2004).

<sup>296</sup> See Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2490–91 (1996) (acknowledging that "the Burger and Rehnquist Courts' constructions of the Fourth Amendment have . . . moved the understanding of acceptable police practices," most significantly through "(1) the definition of voluntary cooperation with the police . . . ; (2) the definition of 'reasonable expectations of privacy' . . . ; and (3) the development of a category of searches reflecting 'special needs' that render the warrant requirement inapplicable," though contending that "this shift does not represent as significant a departure from the Warren Court's Fourth Amendment jurisprudence as might superficially appear"); George C. Thomas III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451, 1457–58 (2005) (arguing that even "the Warren Court . . . began to favor a more nuanced approach that relegated the warrant 'requirement' to a subcategory of cases and sought to apply the Reasonableness Clause to a large expanse of government conduct"). For a brief discussion about this movement away from the Warrant Clause and towards the Reasonableness Clause, see Arcila, *supra* note 295, at 1227.

<sup>297</sup> Amar, *Fourth Amendment*, *supra* note 26, at 771–72.

originalist analysis is of real utility given changed circumstances, which can render a historical account of little use in resolving current controversies. As time marches on, the Framers' world seems increasingly unfamiliar compared to ours today. For example, given the explosion of the regulatory state since the Framers' era, which has greatly expanded the scope of state intrusion into our daily lives, including through exercise of the search power, how much weight should we give to a belief that the Framers preferred to limit access to search remedies? This difficulty suggests that originalism, while remaining an important and relevant technique of constitutional interpretation, may not be as determinative as at least its strongest adherents would like to believe.