OFFICIAL IMMUNITY AT THE FOUNDING

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INTRODUCTION

It is unclear to me that originalists' qualified immunity debate is framed in the correct terms. Or that it is framed in the correct time period. The current debate turns on whether officers enjoyed common-law tort immunities in 1871, when Congress passed the Enforcement Act that today appears in 42 U.S.C. § 1983.[1] But the constitutional claims underlying qualified immunity cases often come from the Bill of Rights—not Reconstruction.[2] So the originalist inquiry should focus (at least in the first instance) on whether officers enjoyed constitutional immunities in 1791. And the historical pleading practices embraced in English common law and by our first Congresses suggest the answer is "yes."[3]

This Article challenges the premises of the current debate by considering the archetypal qualified immunity case: a Fourth Amendment plaintiff's claim against an officer who allegedly executed an "*unreasonable*" search or seizure. In 1791, the word "unreasonable" meant "against the reason of the common law."[4] That common law brought with it a host of immunities for officers charged with

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1. *See infra* notes 10–20 and accompanying text.

2. *See* discussion *infra* Section V.

3. *See* discussion *infra* Sections III and IV.

4. Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1270 (2016).

searching and seizing.[5] Thus, it is possible that a Fourth Amendment claim at the Founding required plaintiffs to show that an officer's search or seizure was not only wrongful, but *so* wrongful that the plaintiff could overcome the officer's common-law immunities. If that is correct, then today's originalist critics of qualified immunity must broaden their focus and shift their debate in both time (from 1871 to 1791) and focus (from torts to the Constitution).

I. THE CURRENT DEBATE

Qualified immunity is a hot topic. It is the rare legal doctrine that has captured the attention of mainstream news and everyday Americans.[6] It has stimulated debates and prompted Congress to consider whether to amend § 1983[7]—the material provisions of which have remained unaltered since its enactment in 1871. Qualified immunity generates *a ton* of federal court litigation[8] and has created a serious divide amongst courts and legal scholars.[9]

5. *See* discussion *infra* Section III and IV; Malley v. Briggs, 475 U.S. 335, 340 (1986) (explaining that common law is generally referenced for guidance in recognizing official immunity).

6. *See, e.g.*, Editorial, *End the Court Doctrine that Enables Police Brutality: A Series on George Floyd and America*, N.Y. TIMES (May 22, 2021), https://www.nytimes.com/2021/05/22/opinion/qualified-immunity-police-brutality-misconduct.html [https://perma.cc/U2CK-EVPL].

7. *See* George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. § 102 (2021).

8. *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 9 (2017). In just five out of the 94 federal judicial districts there were 1,183 cases filed under § 1983 over two years by individuals against law enforcement officers. *Id.*

9. *See* Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 GEO. L.J. 229, 231–33 (2020) (describing these debates).

The part of the present debate that I find most interesting is whether originalists must abjure qualified immunity. Some—Professor William Baude chief among them—have argued yes.[10] Others—most recently Scott Keller—have argued no.[11] The fault line between them is whether some form of immunity had some form of common-law provenance in 1871.[12] If so, Congress might have silently enacted that immunity when expressly making state officials liable for deprivations of constitutional rights under § 1983.[13]

But this focus on 1871 obscures the way that § 1983 interacts with the underlying constitutional rights it protects. Take the archetypal § 1983 case: A suspect sues a police officer for using excessive force during his arrest. The suspect—let's call him Adam—files suit under § 1983 against the arresting officer—let's call her Amanda. Section 1983 gives Adam a cause of action for money damages against Amanda when she:

> under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects [Adam], or causes [Adam] to be subjected, . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution.[14]

What is the right, privilege, or immunity secured by the Constitution of which Amanda allegedly deprived Adam? It is the right against "unreasonable . . . seizures" protected by the Fourth Amendment.[15]

But in the current qualified immunity debate, the Federal Constitution (specifically, the Fourth Amendment) and its original public meaning (in 1791) are irrelevant. The debate instead centers on state law (namely, torts) at some point between the present day and 1871,

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10. William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 88 (2018).

11. Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1399–1400 (2021).

12. *See id.* at 1344.

13. *See id.* at 1341.

14. 42 U.S.C. § 1983.

15. U.S. CONST. amend. IV.

the year of § 1983's enactment. The Supreme Court's canonical qualified immunity decision, *Pierson v. Ray*,[16] looked to Mississippi tort law for the source of that immunity.[17] Professor Baude likewise frames his argument around "constitutional torts" and argues that *Pierson* misread state law.[18] Scott Keller's impressive historical analysis starts from the same premise—namely, that immunity doctrine relates closely to tort law—and disputes Professor Baude's interpretation of the nineteenth-century common law.[19] And similarly, some judges construe the Fourth Amendment as a judicial license to promulgate an ever-evolving and ever-expanding corpus of federal tort law that is not rooted in anything beyond other twenty-first century qualified immunity cases.[20]

On the one hand, this makes some sense. After all, Amanda committed a *tort* in the sense that she allegedly battered (or falsely arrested) Adam, and that tort became *unconstitutional* because Amanda did so under color of state law. Moreover, as Professor Baude points out, early cases adjudicating the scope of Fourth Amendment rights arose in the context of state law tort suits.[21] For example, Adam would sue under state law for battery or false arrest; Amanda would then defend by invoking her power to arrest with or without a warrant; and hence the meaning of Adam's

16. 386 U.S. 547 (1967).

17. *Id.* at 555–57. The officers accused of wrongdoing in *Pierson* argued successfully that they "should not be liable if they acted in good faith and with probable cause in making an arrest under a statute that they believed to be valid." *Id.* at 555. The Court, relying in part on a torts treatise and the Restatement (Second), agreed that "that the defense of good faith and probable cause" was available to the officers. *Id.* at 555–57 (first citing RESTATEMENT (SECOND) OF TORTS § 121 (AM. L. INST. 1965); and then citing 1 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 3.18, at 277–78 (1956)).

18. *See* Baude, *supra* note 10, at 52–55.

19. *See* Keller, *supra* note 11, at 1344, 1375.

20. *See, e.g.*, Joseph *ex rel.* Est. of Joseph v. Bartlett, 981 F.3d 319, 331 n.40 (5th Cir. 2020) (finding "value in addressing the constitutional merits" of § 1983 cases "to develop robust case law on the scope of constitutional rights"); Roque v. Harvel, 993 F.3d 325, 332, 329 (5th Cir. 2021) (reiterating that "value" and holding federal courts have power under the Fourth Amendment to promulgate standards to measure where "the reasonableness rope ends")

21. *See* Baude, *supra* note 10, at 51–52.

Fourth Amendment rights against Amanda would be liquidated in the context of a state law tort dispute.

On the other hand, this fixation on state law obscures an important point. As Chief Justice Marshall famously put it, "we must never forget, that it is *a constitution* we are expounding."[22] And it seems to me that a central question in *Adam v. Amanda*—as in *Pierson v. Ray*—is whether the original public understanding of the Fourth Amendment included some form of immunity for the arresting officer. There is at least some evidence that it did.

II. ORIGINALIST PRINCIPLES

Before considering the original public meaning of the Fourth Amendment and whatever immunities it did or did not include in 1791, I put forward two introductory propositions that I hope will be relatively uncontroversial.

The first is that English common law matters to the originalist enterprise.[23] The American public obviously understood the common law at the Founding—which is why some provisions of the Constitution are lifted directly from the law of our mother country.[24] That

22. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

23. By "common law," I simply mean the laws of England leading up to the Founding. *See* Atwater v. City of Lago Vista, 532 U.S. 318, 327 (2001) (recognizing that "common law" can be "understood strictly as law judicially derived or, instead, as the whole body of law extant at the time of the framing"); *id.* at 333 ("Quite apart from Hale and Blackstone, the legal background of any conception of reasonableness the Fourth Amendment's Framers might have entertained would have included English statutes, some centuries old . . . .").

24. To take just one example of our English constitutional parentage, England's 1689 Bill of Rights gave us all or some of the Take Care Clause, the Speech and Debate Clause, the First Amendment, the Second Amendment, and the Eighth Amendment. Other parts of the Constitution expressly disclaim the preexisting common law. For example, the Sixth Amendment guarantee of an "impartial jury," U.S. CONST. amend. VI, expressly disclaims the common-law rule that jurors could give evidence against defendants, *see, e.g.*, 3 WILLIAM BLACKSTONE, COMMENTARIES *375 (stating the rule, which "universally obtains," that a juror may "give his evidence publicly in court"). The important point for present purposes is that the common law formed the backdrop for the Constitution—no matter whether a given provision of constitutional text adopted or rejected that backdrop.

is also why, in cases too numerous to count or cite, the Supreme Court interprets the Constitution generally, and our Bill of Rights specifically, against the backdrop of English common law.[25] And that is why the Supreme Court so often invokes William Blackstone, whose *Commentaries* were widely read and "accepted [by the public at the Founding] as the most satisfactory exposition of the common law of England."[26]

My second (hopefully uncontroversial) introductory proposition is that the practices of the first Congresses matter. Those Congresses were obviously closer in time to the Founding. The first Congresses understood the original public meaning of the Constitution because they represented members of the relevant original public. And they were tasked with filling the great many holes left by the Constitution to democratic interpretation and implementation. As Professor David Currie put it in his masterwork, *The Constitution in Congress*, "the Constitution, as Chief Justice Marshall would later remind us, laid down only the 'great outlines' of the governmental structure."[27] The Framers left the details to Congress, which they thought was better situated to "translat[e] the generalities of this noble instrument into concrete and functioning institutions."[28] Congress's task "was one partly of interpretation and partly of interstitial creation."[29] In this way, "the First Congress was

25. *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020) (Sixth Amendment); Gamble v. United States, 139 S. Ct. 1960, 1969–78 (2019) (Double Jeopardy Clause); District of Columbia v. Heller, 554 U.S. 570, 582 (2008) (Second Amendment); Eldred v. Ashcroft, 537 U.S. 186, 200 n.5 (2003) (Copyright Clause); Harmelin v. Michigan, 501 U.S. 957, 966–75 (1991) (Eighth Amendment); Dimick v. Schiedt, 293 U.S. 474, 480–85 (1935) (Seventh Amendment); *Ex parte* Wells, 59 U.S. (18 How.) 307, 310–15 (1855) (Pardon Clause).

26. Schick v. United States, 195 U.S. 65, 69 (1904).

27. David P. Currie, The Constitution in Congress, 1789–1801, at 3 (1997) (quoting *McCulloch*, 17 U.S. at 407).

28. *Id.*

29. *Id.*

a sort of continuing constitutional convention, and not simply because . . . many of its members . . . helped to compose or to ratify the Constitution."[30]

The first Congresses' active role in translating, interpreting, and creating the Constitution is why the Court so often turns to the first Congresses to understand the Constitution's meaning, again in cases too numerous to count or cite. When it comes to interpreting Article III, no early statute is more influential than the Judiciary Act of 1789.[31] As noted by the greatest legal treatise of our time, "the first Judiciary Act is widely viewed as an indicator of the original understanding of Article III and, in particular, of Congress' constitutional obligations concerning the vesting of federal jurisdiction."[32] But the Court's reliance on early congressional practice is by no means limited to the First Judiciary Act. Other examples abound.[33]

Most importantly for present purposes, the Court has repeatedly used both of these originalist sources—English common law and

30. *Id.* at 3–4.

31. *See, e.g.*, Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888) (stating that the Judiciary Act of 1789 "was passed by the first congress assembled under the constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning"), *overruled on other grounds by* Milwaukee Cnty. v. M.E. White Co., 296 U.S. 268 (1935).

32. Richard H. Fallon, Jr. et al., Hart and Wechsler's The Federal Courts and The Federal System 21 (7th ed. 2015).

33. *See, e.g.*, Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2197–98 (2020) (Appointments Clause); Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1657–58 (2020) (Article IV); Eldred v. Ashcroft, 537 U.S. 186, 200 (2003) (Copyright Clause); *Harmelin*, 501 U.S. at 980(Eighth Amendment); Marsh v. Chambers, 463 U.S. 783, 787–90 (1983) (Establishment Clause).

early congressional practice—to understand the Fourth Amendment.[34] That makes sense because the Amendment prohibits "*unreasonable* searches and seizures."[35] And in 1791, "'unreasonable' conveyed a particular meaning: namely, against reason, or against the reason of the common law."[36] As Professor Laura Donohue explains: "That which was consistent with the common law was reasonable and, therefore, legal. That which was inconsistent was unreasonable and illegal. General warrants, being against the reason of the common law, were thus unlawful, or void."[37] This understanding of the word "unreasonable" was shared by John Locke, William Blackstone, the Founders, and the public more generally.[38]

III. OFFICIAL IMMUNITY AT ENGLISH COMMON LAW

With these principles in place, we can now consider official immunity at common law in England. As explained below, officer immunities were robust.[39] But to fully understand the content and operation of those immunities, it is first necessary to know something about common-law pleading. So that is where I begin, with Joseph Chitty's authoritative *Treatise on Pleading* as a guide.[40]

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34. *See, e.g.*, Collins v. Virginia, 138 S. Ct. 1663, 1675–76 (2018) (Thomas, J., concurring) (discussing common-law warrantless curtilage searches); Birchfield v. North Dakota, 136 S. Ct. 2160, 2174–75 (2016) (discussing common-law search-incident-to-arrest doctrine); Atwater v. City of Lago Vista, 532 U.S. 318, 327–35 (2001) (discussing common-law origins of officers' warrantless misdemeanor arrest power); Wilson v. Arkansas, 514 U.S. 927, 931–36 (1995) (discussing the common-law knock-and-announce rule); United States v. Verdugo-Urquidez, 494 U.S. 259, 267–68 (1990) (discussing early congressional practice).

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

36. Donohue, *supra* note 4, at 1270.

37. *Id.* at 1270–71.

38. *See id.* at 1271–76 (collecting sources).

39. *See infra* text accompanying notes 55–118.

40. *See* 1 Joseph Chitty, A Practical Treatise on Pleading (New York, Robert M'Dermut 1809).

Plaintiffs at common law filed a "declaration" much like today's complaint.[41] Defendants could then file a "plea in bar" explaining why the plaintiff could not maintain a cause of action.[42] Pleas in bar fell into three categories: "1st. The general issue. 2dly. A denial of a particular allegation in the declaration. And 3dly. A special plea of new matter not apparent on the face of the declaration."[43] Pleading the "general issue" operated as a general denial that allowed a defendant to "question the truth of every material allegation in the plaintiff's pleading."[44] Thus, the general issue and the particular denial both provided ways for a defendant to attack the plaintiff's prima facie case. The special plea, on the other hand, functioned more like an affirmative defense. It permitted a defendant to "admit[] the facts alleged in the declaration" and still "avoid[] the action by matter which the plaintiff would not be bound to prove or dispute in the first instance."[45]

So far, those pleading rules look a lot like today's rules of civil procedure.[46] The catch is that defendants at common law had to choose one plea and stick with it; disputing the plaintiff's prima facie case while also pleading an affirmative defense simply was not an option.[47] And the rule barring multiple pleas was strictly enforced. An illustrative case involved a plaintiff who sued for battery

41. *See id.* at *248 ("The declaration is a specification, in a methodical and legal form, of the circumstances which constitute the plaintiff's cause of action.").

42. *See id.* at *434–35.

43. *Id.* at *465 (emphases omitted).

44. BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 382 (2d ed. 1995); *see also* CHITTY, *supra* note 40, at *465.

45. CHITTY, *supra* note 40, at *497.

46. *See* FED. R. CIV. P. 8(b)(3), (c) (providing for "General and Specific Denials" along with "Affirmative Defenses").

47. *See* CHITTY, *supra* note 40, at *511–12 ("Every plea must in general be single, and if it contain two matters, either of which would bar the action, and require several answers, it will in general be subject to a special demurrer for duplicity . . . ." (emphases omitted)); *id.* at *540 ("We have already seen . . . that the defendant could not plead several defences to the same part of a declaration . . . .").

after the defendant lost control of the horse he was riding and trampled the plaintiff.[48] The defendant attempted a special plea of justification—"that his horse, being frightened, ran . . . upon the plaintiff, against the defendant's will."[49] Unfortunately, the defendant failed to admit to the plaintiff's factual allegations as part of his special plea.[51] That meant he had pleaded both a "special matter" and the "general issue."[50] A sympathetic court recognized that the defendant might have been acquitted had he made a single plea.[51] But it held for the plaintiff nonetheless.[52]

These technical rules and the rigidity with which they were enforced did not last forever. Eventually, a statute of Queen Anne made it "lawful for any defendant . . . to plead as many several matters thereto[] as he shall think necessary for his defence."[53] But as we will see, officers of the Crown got that pleading privilege nearly a century early, in addition to other protections.[54] And they got much more too.[55] Indeed, what they got looks a lot like the "defense to liability" and "limited 'entitlement not to . . . face the . . . burdens of litigation'" that today we call qualified immunity.[56]

Consider for example a 1609 English statute aptly named "An act for ease in pleading troublesome and contentious suits prosecuted against justices of the peace, mayors, constables, and certain other

48. *See id.* at *511 (citing Gibbons v. Pepper (1695) 91 Eng. Rep. 922; 1 Ld. Raym. 38 (KB)).

49. *Id.* at *511.

[51] *Id.*

50. See *id*.

51. See *id*.

52. *Id.*

53. *Id.* at *540–41 (quoting An Act for the Amendment of the Law, and the Better Advancement of Justice 1705, 4 Ann. c. 16, § 4, *reprinted in* 4 THE STATUTES AT LARGE 205 (Owen Ruffhead ed., London, Woodfall & Strahan 1763)).

54. *See infra* notes 57–61

55. *See infra* notes 74–80.

56. Ashcroft v. Iqbal, 556 U.S. 662, 672 (2009) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)).

[royal] officers, for the lawful execution of their office."[57] The statute began by reciting the "many causeless and contentious suits which . . . daily are commenced and prosecuted" against these officers "to their great . . . discouragement in doing of their offices."[58] Then it offered a solution. When officers faced "any action, bill, plaint or suit, upon the case, trespass, battery or false imprisonment" due to "any matter, cause or thing . . . done by virtue or reason of their . . . offices," they had options.[59] An officer could "plead the general issue [] that he is not guilty."[60] And he could "give such special matter in evidence to the jury which shall try the same, which special matter being pleaded had been a good and sufficient matter in law to have discharged the said . . . defendants of the . . . matter laid to . . . their charge."[61] While the rest of England had to choose between pleading the general issue and pleading special matter, executive officers could do both.

That unique entitlement shares some interesting similarities with qualified immunity. The entitlement increases plaintiffs' burden of proof by forcing them to prove a prima facie case and then go a step further.[62] It gives officers a defense that ordinary defendants lack.[63] And it predicates that defense on concerns about officers being unable to perform their duties.[64]

57. 7 Jac. 1 c. 5, *reprinted in* 7 THE STATUTES AT LARGE 226–27 (Danby Pickering ed., Cambridge, Joseph Bentham 1763).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Cf.* District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018) ("Under our precedents, officers are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time." (internal quotation marks omitted)).

63. *Cf.* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (limiting qualified immunity to certain "executive officials").

64. *Cf. id.* at 816 (noting "the general costs of subjecting officials to the risks of trial," including "distraction of officials from their governmental duties").

Parliament later clarified that the same protections it afforded officers in the 1609 immunity statute also applied in the specific context of searches and seizures. Take the Fraud Act of 1662,[65] for example. The Fraud Act required captains of incoming and outgoing ships to formally declare the contents on board with customs officials.[66] It also authorized customs officers to "enter aboard any ship or vessel" and search for undeclared goods "in any private or secret place, in or out of the hold of the ship or vessel."[67] And upon discovery of any such goods, the Act permitted the searching officer to "bring [them] on shore into his Majesty's store-house."[68] Then came the immunity from suit. The statute provided that "in every action, suit, indictment, information or prosecution, wherein . . . the officers of his majesty's customs . . . have been . . . sued, indicted, prosecuted or molested," officers could "plead the general issue."[69] They also could plead an affirmative defense by "giv[ing] this . . . act[] of parliament . . . in evidence, in any of his majesty's courts of justice, or other courts where the said matter shall be depending."[70] As a result, judges were "strictly enjoyned and required to admit the same, and to acquit and indemnify [officers] . . . from all such [actions], for or concerning any matter or thing acted or done in the due and necessary performance and execution of their respective trusts and imployments therein."[71] So once again, officers received statutory authorization to "plead the general issue" and also plead an affirmative defense.

Only this time Parliament went further. Instead of permitting officers to plead and prove *preexisting* "special matters" as an affirmative defense (as it did in the 1609 statute),[72] Parliament created an

65. An Act for Preventing Frauds and Regulating Abuses in His Majesties Customes 1662, 14 Car. 2 c. 11, *reprinted in* 8 THE STATUTES AT LARGE, *supra* note 57, at 78–94.

66. *See id.* §§ 2–3.

67. *Id.* § 4.

68. *Id.*

69. *Id.* § 16.

70. *Id.*

71. *Id.*

72. *See supra* notes 60–61 and accompanying text.

entirely new defense. And that defense was incredibly powerful. Once an official demonstrated he had been sued for anything "done in the due and necessary performance" of his office, he could submit the Fraud Act in evidence and automatically avoid liability.[73]

The immunities did not stop there. Parliament also imposed substantial financial penalties to discourage plaintiffs from suing officers or otherwise interfering with their duties.[74] As the towering historian and Fourth Amendment expert William Cuddihy explains: "As early as 1512, anyone obstructing the efforts of the curriers, one of the companies that could only search its members, incurred a forty shilling fine."[75] But these fines increased: "The excises of 1696 and 1723 escalated some penalties to thirty and one hundred pounds."[76] Given that the average family income in 1688 was "thirty-two pounds, with an individual margin of survival of only nine shillings, the intent of the measure was self-evident."[77]

To further disincentivize officer suits, Parliament added to its 1609 immunity statute that "if the verdict shall pass with the said defendant . . . , or the plaintiff . . . therein become nonsuit[ed] or suffer any discontinuance thereof, . . . the justices . . . shall . . . allow unto the defendant . . . double costs, which he . . . shall have sustained by reason of the[] wrongful vexation in defence of the said action."[78] Given these and other provisions,[79] it's little wonder

73. 14 Car. 2 c. 11, § 16.

74. *See* William J. Cuddihy, The Fourth Amendment: Origins and Original Meaning 602–1791, at 431 (2009).

75. *Id.*

76. *Id.*

77. *Id.*

78. Constable Protection Act 1662, 7 Jac. 1 c. 5, *reprinted in* 7 THE STATUTES AT LARGE, *supra* note 57, at 226–27.

79. For additional examples of similar officer immunity statutes, see Further Relief for Poor Prisoners, (1650) II ACTS & ORDS. INTERREGNUM 378; Habeas Corpus Act 1679, 31 Car. 2 c. 2, § 20, *reprinted in* 8 THE STATUTES AT LARGE, *supra* note 57, at 432–39; Constable Protection Act 1751, 24 Geo. 2 c. 44, *reprinted in* 20 THE STATUTES AT LARGE 279–80 (Danby Pickering ed., Cambridge, Joseph Bentham 1765).

that English historian Henry Hallam once complained that Parliament had "shield[ed] the officers of the crown[] as far as possible[] from their responsibility for illegal actions."[80]

Officer immunities are also evident in the two English cases that were more influential than any other to the framing of our Fourth Amendment.

The first case was *Wilkes v. Wood*.[81] It began with the anonymous publication of the forty-fifth issue of an opposition periodical called *The North Briton*.[82] This particular issue spared no punches; it lambasted England's secretaries of state as "wretched" puppets of a "corrupt[] and despot[ic]" prime minister, and it even criticized the king.[83] Unamused, Secretary of State Lord Halifax signed a general warrant demanding a "strict and diligent search" for the authors and printers of the "seditious" publication.[84]

Chaos followed. Halifax and his messengers received a second-hand tip that John Wilkes, a suspected author of *The North Briton*, had spent some time at one Dryden Leach's printing shop.[85] The search party raided Leach's house later that night, removed him from his bed next to his wife, and combed through his belongings for six hours.[86] The messengers similarly searched suspected publisher George Kearsley and did the same to suspected printer Richard Balfe.[87] Finally, they arrived at Wilkes's residence.[88] Wilkes protested, so some officers whisked him away.[89] Those who remained searched the residence and another of his houses for eighteen hours.[90] Wilkes returned to find dozens of damaged doors, scores

80. 3 Henry Hallam, The Constitutional History of England from the Accession of Henry VII to the Death of George II, at 384 (Boston, Wells & Lily 1829).

81. (1793) 98 Eng. Rep. 489; Lofft 1 (CP).

82. *See* CUDDIHY, *supra* note 74, at 440.

83. *Id.* (quoting 2 N. BRITON, Apr. 23, 1760, at 227, 235).

84. *Id.*

85. *Id.* at 441.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 442.

90. *Id.*

of rummaged trunks, hundreds of broken locks, and thousands of papers dumped "promiscuously" on the floor.[91]

As expected, Wilkes and others sued in trespass.[92] The success of that litigation is well-documented and incredibly important.[93] But the Crown's litigation strategy is just as interesting. As Cuddihy explains, "the Crown's lawyers moved to bar the actions . . . on grounds that the Vagrancy Act of 1744 immunized constables against suits for enforcing certain kinds of general warrants from justices of the peace."[94] Under this reasoning, "state secretaries, as the kingdom's paramount officials, necessarily assumed all powers of its most basic magistrates, the justices of peace."[95] And messengers, as "deputies of the secretaries," then "implicitly qualified as constables."[96] In other words, officer immunity remained a central part of search-and-seizure litigation well into the eighteenth century. And while the Crown's immunity argument didn't persuade Chief Justice Pratt, that was more a feature of the Vagrancy Act than anything else.[97]

The second foundational case was *Entick v. Carrington*.[98] Officer immunity played a prominent role there too. Much like John Wilkes, John Entick contributed to an opposition periodical called *The Monitor or British Freeholder*.[99] He too was the victim of a general warrant signed by Lord Halifax and an invasive search performed

91. *Id.*

92. *Wilkes*, 98 Eng. Rep. at 489.

93. *See, e.g.*, Griffin B. Bell & Perry E. Pearce, *Punitive Damages and the Tort System*, 22 U. RICH. L. REV. 1, 2–3 (1987).

94. CUDDIHY, *supra* note 74, at 444.

95. *Id.*

96. *Id.*

97. *See id.* (describing Pratt's reluctance to extend the Act to "protect secretaries and messengers that it nowhere mentioned").

98. (1765) 19 How. St. Tr. 1029 (CP).

99. *Id.* at 1031.

by messengers of the Crown.[100] So he too sued the messengers in trespass.[101]

The messengers' litigation strategy largely mirrored that in *Wilkes*. This time they invoked a 1751 statute regulating actions "brought against any constable . . . or other officer . . . acting by his order and in his aid, for any thing done in obedience to any warrant under the hand or seal of any justice of the peace."[102] The statute directed that if a defendant constable produced the authorizing warrant at trial, "the jury shall give their verdict for the defendant."[103] It also prescribed a method for service of process that the messengers contended Entick had disregarded.[104]

Chief Justice Pratt (now serving as Lord Camden) rejected the immunity argument and ruled for Entick.[105] But the way he did so highlights the prevalence of officer immunities in the years leading up to our Founding.

Mere pages before his celebrated defense of "sacred and incommunicable" property rights,[106] Camden conducted an extended discussion of officer immunity and officer pleas.[107] He began that discussion by quoting at length from the 1751 immunity statute invoked by the *Entick* defendants. Its title, he said, was "An Act for the rendering justices of the peace more safe in the execution of their offices, and for indemnifying constables and others acting in

100. *See id.* at 1030–31 (describing a four-hour, nonconsensual search in which officers of the Crown "broke open the boxes, chests, drawers, &c. of the plaintiff in his house . . . and read over, pryed into and examined all the private papers, books, &c. of the plaintiff there found").

101. *See id.* at 1030.

102. Constable Protection Act 1751, 24 Geo. 2 c. 44, § 6, *reprinted in* 20 THE STATUTES AT LARGE, *supra* note 79, at 279–81; *see Entick*, 19 How. St. Tr. at 1036–37 (quoting "the statute of the 24th of Geo. 2, c. 44").

103. 24 Geo. 2 c. 44, § 6.

104. *See id.*; *Entick*, 19 How. St. Tr. at 1036–37.

105. *See Entick*, 19 How. St. Tr. at 1060–62.

106. *Id.* at 1066.

107. *See id.* at 1060–62.

obedience to their warrants."[108] And its preamble found it "necessary that [these officers] should be, as far as is consistent with justice and the safety and liberty of the subjects over whom their authority extends, rendered safe in the execution of the said office and trust."[109]

Camden went on to note that those sentiments were part of a broader trend of English statutes "being made to change the course of the common law" to better protect and immunize officers.[110] Citing the same 1609 immunity statute I've already mentioned above,[111] Camden observed: The 1609 statute "is an act of like kind to relieve justices of the peace, mayors, constables, and certain other officers, in troublesome actions brought against them for the legal execution of their offices; who are enabled by that act to plead the general issue."[112] Camden continued: "If then that privilege of giving the special matter in evidence upon the general issue is contrary to the common law, how much more substantially is this [1751] act an innovation of the common law . . . ?"[113] That is because the 1751 Act "indemnifies the officer upon the production of the warrant and deprives the subject of his right of action."[114] He determined that for both general and special pleading, the "objects . . . are the same, and the remedies are similar in both, each of them changing the common law for the benefit of the [officers] concerned."[115] But they were there to supplement each other: "The first not being an adequate remedy in case of the several persons therein mentioned, the second is added to complete the work, and to make them as secure as they ought to be made from the nature of the case."[116]

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108. *Id.* at 1059.

109. *Id.*

110. *Id.* at 1062.

111. *See supra* text accompanying notes 57–61 (discussing "[a]n act for ease in pleading troublesome and contentious suits").

112. *Entick*, 19 How. St. Tr. at 1062.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

Granted, Camden wound up concluding that neither immunity statute applied in the case—Lord Halifax was not a "justice of the peace," and the defendant messengers were not "constables."[117] But Camden's analysis reveals just how much official immunities mattered to English search-and-seizure litigation in the late eighteenth century. And at the heart of it all was "the privilege of pleading the general issue[] and . . . the special matter."[118]

IV. FOURTH AMENDMENT IMMUNITY AT THE FOUNDING

The same principles emerged on our side of the Atlantic. But before the Framers could decide questions about immunities, they first had to settle the scope of the relevant right. Thus, Mercy Otis Warren lamented "the insecurity in which we are left with regard to warrants unsupported by evidence."[119] Patrick Henry protested that general warrants arbitrarily permitted "any man [to] be seized[,] any property [to] be taken, [and] . . . [e]very thing the most sacred [to] be searched and ransacked by the strong hand of power."[120] And other Anti-Federalists circulated a draft constitution declaring that general warrants were "grievous and oppressive and ought not to be granted."[121]

The Federalists eventually jumped on board too. Drawing heavily on a provision in the Massachusetts Constitution that had been

117. *See id.* at 1059–62.

118. *Id.* at 1062.

119. Mercy Otis Warren, *Observations on the Constitution* (1788), *reprinted in* 2 BIRTH OF THE BILL OF RIGHTS 143 (Jon L. Wakelyn ed., 2004).

120. Patrick Henry, Debates, *The Virginia Convention* (June 24, 1788), *in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1473, 1474 (John P. Kaminski & Gaspare J. Saladino eds., 1993).

121. Society of Western Gentleman, *A Declaration of Rights*, VA. INDEP. CHRON., Apr. 30, 1788, *reprinted in* 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 120, at 773.

written by John Adams and hearkened all the way back to the famous *Writs of Assistance Case*,[122] James Madison penned the following:

> The rights of the people to be secured in their persons[,] their houses, their papers, and their other property, from all *unreasonable* searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.[123]

As noted above, Madison did not choose the word "unreasonable" by accident. It had a distinct legal meaning at the time of the Founding—namely, against the reason of the common law.[124] For example, "[a]ccording to Samuel Johnson's *A Dictionary of the English Language*, 'reasonable' was understood at the time as 'agreeable to reason,' a formulation that reflected the meaning *consistent with the reason of the common law*."[125]

The Framers subsequently modified the text of the Fourth Amendment before asking the People to ratify it.[126] Crucially for present purposes, however, the Framers kept the word "unreasonable" at the center of its text:

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122. *See* CUDDIHY, *supra* note 74, at 605–06 (describing the connection between the Massachusetts Constitution, John Adams, and the *Paxton* case). There is no formal report of the case, which is also known as *Paxton v. Gray*. Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4, 30 n.105 (2001).

123. 1 ANNALS OF CONG. 452 (1789) (emphasis added).

124. *See supra* notes 35–37 and accompanying text.

125. Donohue, *supra* note 4, at 1274 (quoting *Reasonable*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1768)).

126. The import of these modifications is widely debated, especially when it comes to the relationship between reasonableness and warrants. *Compare, e.g.*, CUDDIHY, *supra* note 74, at 263–406 (describing the "evolution of the specific warrant as the orthodox method of search and seizure"), *with* William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 409 n.62 (1995) (rejecting the idea that "a broad modern-style warrant requirement [was] part of the Founders' picture of search and seizure law"). But that's a debate I leave for another day.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[127]

As explained above, the common law that existed at the Founding brought with it a series of protections for officers who were charged with executing searches and seizures.[128] It was only when the officers' searches and seizures transgressed the reason of the common law—including the common-law immunities discussed above—that those searches became *unreasonable*.[129] Thus, the plaintiff would have to show that the officer behaved so badly that he lost the various protections afforded to him by the common law.[130] Or put differently, the officer was not just wrong—he was *so* wrong that he lost the qualified immunity afforded to him by the common law.[131]

Early congressional practice supports this understanding, as three early statutes indicate. The first is the Collection Act of 1789.[132] As its name implies, the Act concerned "the due collection of . . . duties imposed by law."[133] And as its date implies, the Act was a product of the very same Congress that drafted the Fourth Amendment. To prevent merchants from concealing taxable goods,

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127. U.S. CONST. amend. IV.

128. *See supra* notes 92–97 and accompanying text (discussing *Wilkes*).

129. *See* Donohue, *supra* note 4, at 1274 (citing *Reasonable*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1768)).

130. *See supra* notes 98–118 and accompanying text (discussing *Entick*).

131. That bears an eerie resemblance to modern doctrine. *See* Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011) (holding qualified immunity "protects 'all but the plainly incompetent or those who knowingly violate the law'" (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986))).

132. Act of July 31, 1789, ch. 5, 1 Stat. 29 [hereinafter Collection Act of 1789].

133. *Id.* § 1.

the statute provided warrants for daytime searches on land and further authorized warrantless searches on ships.[134] It also granted searching officers a qualified immunity from suit. Specifically, any officer sued "for any thing done in virtue of the powers given by th[e] act" could "plead the general issue" and "give th[e] act in evidence" as a defense at trial.[135] Not only that, but the statute automatically placed the burden of proof upon the plaintiff and entitled prevailing defendants to "recover double cost[s]."[136]

The second statute is "[a]n Act to prohibit intercourse with the enemy."[137] Like the Collection Act, this statute authorized collectors and naval officers to perform warrant-based searches on land and warrantless searches on ships for taxable goods.[138] It also permitted searches and seizures upon probable cause that a suspect was transporting weapons and other supplies to hostile nations.[139] More importantly, it continued the pattern of recognizing the searchers' immunity. Defendant officers retained the right to "plead the general issue," "give th[e] act . . . in evidence," and "recover double costs."[140] But this time the officers got more. Even in cases where "judgment [was] given against the defendant," Congress directed the judge to absolve the officer of all liability "if it shall appear to the court . . . that there was probable cause" for the officer to do what he did.[141]

The third statute is largely a reiteration of the first two.[142] Like its predecessors, the statute authorized collectors to perform warrant-based searches of "any particular dwelling-house, store, building,

134. *See id.* § 24.
135. *Id.* § 27.
136. *Id.*
137. Act of Feb. 4, 1815, ch. 31, 3 Stat. 195 [hereinafter Collection Act of February 1815].
138. *Id.* §§ 1–2.
139. *Id.* §§ 3–4.
140. *Id.* § 8.
141. *Id.* § 9.
142. *See* Act of Mar. 3, 1815, ch. 100, 3 Stat. 239 [hereinafter Collection Act of March 1815].

or place" upon "cause to suspect a concealment of any goods, wares, or merchandise."[143] Also like its predecessors, the statute granted collectors a qualified immunity. It specified that "any officer or other person, executing or aiding or assisting in the seizure of goods, wares, or merchandise" who was "sued or molested for any thing done in virtue of the powers given by this act . . . or by virtue of a warrant granted by any judge or justice" had options.[144] That officer could "plead the general issue."[145] He could also "give this act and the special matter in evidence."[146] And then he could "recover double costs" in suits where "the plaintiff is non-suited, or judgment pass[es] against him."[147]

These three statutes bear remarkable similarities to the English immunity statutes I discussed earlier.[148] In each statute Congress addressed places—like dwelling-houses—where the Fourth Amendment applied.[149] Congress recognized the officers' rights to search those places.[150] And Congress recognized the officers' immunities against suits arising from those searches.[151] On both sides of the Atlantic, officers could "plead the general issue."[152] Officers had equal right to "give the [immunity] act in evidence" as a "special matter."[153] And prevailing officers were entitled to "recover double costs."[154]

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143. *Id.* § 10.

144. *Id.* § 13.

145. *Id.*

146. *Id.*

147. *Id.*

148. *See supra* notes 53–77 and accompanying text.

149. *Compare* Collection Act of 1789, *supra* note 132, § 1, *with* Collection Act of February 1815, *supra* note 137, § 2, *and* Collection Act of March 1815, *supra* note 142, § 10.

150. *Compare* Collection Act of 1789, *supra* note 132, § 24, *with* Collection Act of February 1815, *supra* note 137, § 1–4, *and* Collection Act of March 1815, *supra* note 142, § 10.

151. *Compare* Collection Act of 1789, *supra* note 132, § 1, *with* Collection Act of February 1815, *supra* note 137, § 9, *and* Collection Act of March 1815, *supra* note 142, §13.

152. Collection Act of March 1815, *supra* note 142, § 13. *Compare id.*, *with* 14 Car. 2 c. 11, § 16.

153. Collection Act of 1789, *supra* note 132, § 27. *Compare id.*, *with* 14 Car. 2 c. 11, § 16.

154. Collection Act of March 1815, *supra* note 142, § 13. *Compare id.*, *with* 7 Jac. 1 c. 5.

Indeed, a side-by-side comparison shows that two of the statutes are materially identical. Here again is a slightly abbreviated version of the immunity provision in Parliament's 1609 "act for ease in pleading" troublesome suits:

> [B]e it therefore enacted . . . [t]hat if any action . . . shall be brought . . . against [certain officers] . . . for or concerning any . . . thing . . . done by virtue or reason of their . . . offices, [t]hat it shall be lawful to and for every such [officer] . . . to plead the general issue[] that he [is] not guilty, . . . and to give such special matter in evidence to the jury which shall try the same, . . . and that if the verdict shall pass with the said defendant[s] . . . , or the plaintiff[s] . . . therein become nonsuit[ed], or suffer any discontinuance thereof, [t]hat in every such case the justices or justice . . . shall by force and virtue of this act allow unto the defendant[s] . . . their double costs.[155]

And here is the immunity provision from the first Congress's Collection Act of 1789:

> [B]e it further enacted, [t]hat if any officer . . . aiding and assisting in the seizure of goods[] shall be sued or molested for any thing done in virtue of the powers given by this act . . . , such officer . . . may plead the general issue, and give this act in evidence; and if in such suit the plaintiff be nonsuited, or judgment pass against him, the defendant shall recover double cost[s].[156]

It seems that the first Congress—which drafted both the Collection Act and the Fourth Amendment—understood the official immunities that searching officers enjoyed at the Founding. Those immunities were part of the common law. And hence it appears the Fourth Amendment prohibited searches and seizures that ran

155. 7 Jac. 1 c. 5, *reprinted in* 7 THE STATUTES AT LARGE, *supra* note 57, at 226–27.
156. Collection Act of 1789, *supra* note 132, § 27.

against that common law—taking account of the officers' preexisting immunities.

V. RESPONSES

That's all quite interesting, you might say, but it's irrelevant to § 1983. In fact, it arguably proves that qualified immunity has no legal basis. After all, the 1871 Congress chose not to include anything in § 1983 about pleading the general issue or any official immunities—unlike the pre-Founding statutes in England, the Collection Act, &c. Mustn't we presume that Congress's omission was intentional, you might ask?

Maybe not. As an initial matter, the presumption of intentional omission arises where Congress includes some language in one section of a statute and omits it from another section of the same statute.[157] It's not obvious that any presumption applies when Congress writes different statutes on different topics at different times in different ways. As Justice Scalia put it, "the presumption of consistent usage"—and its corollary, the presumption of intentional omission—"can hardly be said to apply across the whole *corpus juris*."[158] And the presumptions are particularly inapposite when statutes are not "enacted at the same time" and do not "deal[] with the same subject."[159]

But more to the point, I am not suggesting that *§ 1983* implicitly carries with it any immunity generally or qualified immunity specifically. Section 1983 provides the cause of action, but in our archetypal case, the *Fourth Amendment* provides the substantive right.[160] The substantive right protected by the Fourth Amendment runs against "unreasonable" searches and seizures—and hence imports

157. *See, e.g.*, Dean v. United States, 556 U.S. 568, 573 (2009); Russello v. United States, 464 U.S. 16, 23 (1983).

158. ANTONIN SCALIA & BRYAN GARNER, READING LAW 172 (2012).

159. *Id.* at 173.

160. *See* Albright v. Oliver, 510 U.S. 266, 271 (1994) ("Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979))).

the reason of the common law into the constitutional right. The common law that predates the Founding—and the statutory law that postdates it—makes me wonder whether the concept of unreasonableness could bring with it official immunities.

Let me provide an example that's near and dear to my heart: habeas corpus. The Great Writ is mentioned exactly one time in the Constitution. It appears in Article I, § 9, which specifies certain powers that are expressly denied Congress. In clause 2 of that section, the Constitution says: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[161] Thus the Constitution prohibits Congress from "suspend[ing]" the privilege—but it says nothing at all about the scope of the privilege, where it comes from, which courts can vindicate it under what circumstances, &c.[162] So if you only read Article I, § 9, you might wonder whether the Constitution guarantees *any* habeas corpus rights at all.

It gets worse. The Supreme Court has said that state courts cannot issue habeas writs to federal officers.[163] So if an individual is detained without cause or charge by the United States Army, for example, his only recourse lies in a habeas writ from a federal court.[164] But we know from the Madisonian Compromise that the Constitution does not guarantee the existence of inferior federal courts—only the Supreme Court.[165] We also know that the Supreme Court has no power to grant habeas corpus unless it does so through its appellate jurisdiction.[166] So if Congress could abolish the inferior courts (which thus could not trigger the Supreme Court's appellate jurisdiction) and if state courts cannot issue writs to federal officers (and thus not trigger the Supreme Court's appellate jurisdiction),

161. U.S. CONST. art. I, § 9, cl. 2.
162. *Id.*
163. *See* Tarble's Case, 80 U.S. (13 Wall.) 397, 411–12 (1871).
164. *See id.* at 409–10.
165. *See* U.S. CONST. art. III, § 1.
166. *See Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807).

does that mean that the Constitution does not guarantee *any* habeas corpus rights at all for our hypothetical Army detainee?

A potential answer to this troubling line of questions lies in the First Judiciary Act.[167] In that Act, Congress gave all federal courts the power to issue writs of habeas corpus.[168] It's possible that was pure statutory grace on Congress's part. But it's also possible that the first Congress—which was closer in time and understanding to the Founding than we are—understood that the habeas power is part of "[t]he judicial power" vested by Article III.[169] In that sense, the grant of habeas power in the First Judiciary Act is as much an interpretation about how Article III works as it is anything else.

By analogy, think again about the Collection Act.[170] It's possible that it's just a statute. But it's also possible that the first Congress was explaining how the Fourth Amendment works. The Fourth Amendment contemplates searches. The statute authorized them. The Fourth Amendment contemplates limits on searches. The statute provided them. And the Fourth Amendment contemplates a remedy for a right that "shall not be violated." Couldn't the statute be part of that remedy? Isn't it possible that the same enforcement mechanism widely embraced by English statutes and prominently featured in *Wilkes* and *Entick* was also the mechanism that the People ratified? Isn't it possible that when the People prohibited "unreasonable searches and seizures," they meant searches and seizures that ran contrary to the reason of the common law—including the protections of the 1609 Act and their materially identical twins in the Collection Act?

But suppose you take the contrary position—that the Collection Act is just another statute and tells us nothing about the Fourth Amendment. That creates its own problems. For example, if the Collection Act is just an exercise of legislative grace, then presumably we should infer meaning from Congress's failure to enact

167. Judiciary Act of 1789, ch. 20, 1 Stat. 73.
168. *Id.* § 14.
169. U.S. CONST. art. III, § 1.
170. Collection Act of 1789, *supra* note 132, § 1.

modern statutes like it. That is, Congress's failure to provide for pleading the general issue in modern statutes means that Congress implicitly prohibited it. But of course, the Collection Act did more than that. It also authorized searches and specified the parameters for reasonable searches. And we would never argue that Congress's failures to authorize searches and specify the parameters for reasonable ones means that Congress prohibited them too.

Take for example the Controlled Substances Act.[171] It prohibits certain kinds of possession of certain kinds of drugs.[172] It says nothing about searches, the places or times where searches can be conducted, or immunity. But we would never say that officers cannot search for drugs prohibited by the Controlled Substances Act; rather, we'd say that the Fourth Amendment—regardless of the statute—allows such searches so long as they're reasonable. That is, the Fourth Amendment authorizes a reasonable search–just as the Collection Act did—even when Congress fails to say so in post-Collection Act statutes. My question is whether the Fourth Amendment also authorizes official immunity—just as the Collection Act did—even when Congress fails to say so in post-Collection Act statutes.

Well hold on, you might say, didn't Lord Camden say that the 1609 Act was an "innovation" to the common law? Indeed, he did.[173] But it's unclear if that makes the 1609 Act and its progeny any less of the common law, against the reason of which the Fourth Amendment prohibited searches and seizures. The Framers rejected several search-and-seizure practices they didn't like.[174] But they didn't object to officer immunities. To the contrary, they positively enacted them.[175] It seems at least possible that the Collection Act—like the pre-Founding English laws on which the Framers

171. Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified as amended at 21 U.S.C. §§ 801–971).

172. See 21 U.S.C. §§ 841–843.

173. *See supra* note 113 and accompanying text (discussing *Entick*).

174. The most obvious was the general warrant. *See supra* notes 37–38.

175. *See, e.g.*, Collection Act of 1789, *supra* note 132, § 27.

modeled it—is part of the common law that the Fourth Amendment embraced.

Another potential response to all of this is: That is a narrow theory. Because it turns on the original public meaning of the Fourth Amendment, it will tell us nothing at all about official immunity (or the lack thereof) for, say, First Amendment or Eighth Amendment claims.

But that might be a virtue rather than a vice. We regularly apply different standards of review to different constitutional claims.[176] And even for those who think history and tradition should replace the traditional tiers of scrutiny, the history and tradition of the Religion Clauses is different from the history and tradition of the Second Amendment.[177] So of course the analysis is different for different constitutional rights. The real question in my view is why we would think the same qualified immunity inquiry applies regardless of the constitutional right at issue.

Finally, you might wonder whether we have gone a long way only to go nowhere. I started this Article by asking whether we should focus on 1791 and the original public meaning of the Fourth Amendment instead of 1871 and the enactment of § 1983. But what about the Fourteenth Amendment, ratified by the People in 1868?[178] Isn't *that* the relevant source of law and the relevant time period given that it is the Fourteenth Amendment that incorporates the Fourth against the States and state officers like Amanda?[179]

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176. *See* United States v. Virginia, 518 U.S. 515, 532–33 (1996) (applying intermediate scrutiny to claim of gender discrimination); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (applying strict scrutiny to claim of racial discrimination); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (applying specialized scrutiny to free speech claim).

177. *Compare* Town of Greece v. Galloway, 572 U.S. 565, 576–79 (2014) (Establishment Clause), *with* McDonald v. City of Chicago, 561 U.S. 742, 767–78 (2010) (Second Amendment).

178. *See McDonald*, 561 U.S. at 777.

179. *See* Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 979 (2012) ("An originalist who believes that the Fourteenth Amendment incorporated against state governments some or all of . . . the Bill of Rights should . . . be concerned

It is unclear to me how far that moves the ball. As an initial matter, even for Fourteenth Amendment Originalists, isn't it the substantive prohibition ratified in the *Fourth* Amendment that's doing the work to protect the People against unreasonable searches and seizures? Isn't the Fourteenth Amendment just providing the mechanism for making those substantive Fourth Amendment prohibitions applicable to the States, much as § 1983 provides the cause of action for vindicating constitutional rights without altering the content of those rights? If so, then the question remains what the Fourth Amendment means. Moreover, even if you think the Fourth Amendment meant something different in 1868 (when the People made it applicable to the States) than it did in 1791 (when the People ratified it), I would think the burden remains on the official-immunity critic to show how the People changed the reason of the common law in the intervening century between the two Amendments.

CONCLUSION

My project here is not to legitimize official immunity or suggest any particular answer to the current debate. I only hope to refocus that debate on the proper questions.

A proper understanding of this area of law must be rooted in the *constitutional* right at issue. For too long, originalist critics have focused on tort law to the exclusion of constitutional law. And worse, in Fourth Amendment qualified immunity cases, too many have read the word "unreasonable" as a judicial license to promulgate an ever-evolving body of twenty-first century federal tort law. Whatever the right answer might be, it should start and end with the meaning of the Constitution when the People ratified it.

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primarily (if not exclusively) with determining how the generation that ratified that amendment understood the scope and substance of the rights at issue.").