Enforcing the Fourth Amendment: The Original Understanding

Bradford Wilson
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INTRODUCTION

The fourth amendment to the United States Constitution has unquestionably been one of the most litigated provisions of the Bill of Rights. Its burgeoning case law in the 20th century has centered on the exclusionary rule, the function of which is to provide a legal formula for determining the circumstances under which a violation of the search and seizure requirements of the fourth amendment renders evidence inadmissible in a criminal proceeding. Under current doctrine all evidence obtained in such a manner is prohibited from a criminal trial in which the victim of the unconstitutional seizure is a defendant.

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


Since the inception of the exclusionary rule, nearly every search and seizure case that has reached the Supreme Court has addressed one crucial question: Was the evidence that was introduced at trial obtained in violation of the requirements of the fourth amendment, thereby rendering it inadmissible in the court proceeding? In order to answer this question, the Court must dutifully examine the fourth amendment in search of the constitutional standard governing the circumstances in the instant case. Thus, the invocation of the exclusionary rule results in an additional construction of the fourth amendment. As Jacob Landynski has noted, "[w]ithout the exclusionary rule, the illegality of the search would be immaterial to the admission of the evidence, and the judicial development of the Fourth Amendment as we know it would have proved impossible."

This special dependence of the modern history of the construction of fourth amendment rights on the rule of exclusion has encouraged many friends of fourth amendment liberties to favor the exclusionary rule as the method of enforcement most in harmony with the ends served by the amendment. Yet the Constitution had been in effect for nearly a century before the Supreme Court found in it any support for the exclusion of evidence procured in violation of the fourth amendment. This fact is significant for understanding the revolution in constitutional interpretation achieved by the Court's adoption of the exclusionary rule. It implies that, prior to 1886, before the fourth amendment was first invoked to exclude evidence from a trial proceeding, another view of the consequences of an unreasonable search and seizure predominated in American legal thought. This Article attempts to illustrate the preexclusionary under-

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4 J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 86 (1966); see 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 3 (1978) ("It is primarily because of the exclusionary rule that courts are called upon to meet the seemingly increasing challenge of marking the dimensions of the protections flowing from the Fourth Amendment").


6 See Boyd v. United States, 116 U.S. 616, 621-22 (1886). For a comprehensive account of the judicial creation and evolution of the exclusionary rule, see Wilson, The Origin and
Standing of the legal consequences following upon a violation of the fourth amendment, by outlining the positions taken by the Framers and the early judiciary and by reconstructing the political and jurisprudential context in which those positions were forged.

**The Fourth Amendment As Law**

In *Marbury v. Madison*, Chief Justice Marshall described one of the primary reasons why individuals live together in civil society. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." The Chief Justice set up his "first duty" as a standard by which to judge the still fledgling National Government. "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." As Marshall readily acknowledged, his understanding of the necessary relation between the security of rights and the effective operation of laws was derived from William Blackstone, the great English jurist. In Blackstone's *Commentaries on the Laws of England*, one finds an analysis of law that lies at the heart of the American legal order. Blackstone asserted that "it is a general and indisputable rule that where there is a legal right, there is also a legal remedy... whenever the right is invaded." According to Blackstone, every law consists of four parts; the declaratory, the directory, the remedial, and the vindicatory. The declaratory branch of the law postulates and defines the rights to be observed and the wrongs to be avoided; the directory branch enjoins those subject to the law to observe the rights and to avoid committing the wrongs; the remedial branch points out a method to recover private rights when they are wrongfully taken away, or to redress private wrongs; and the vindicatory branch...
designates the punishment to be inflicted on those who commit public wrongs, and fail in their duty.\(^\text{17}\)

directory branches] that laws must be very vague and imperfect without it. For in vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights, when wrongfully withheld or invaded. This is what we mean properly, when we speak of the protection of the law. \(\text{Id. at } *55-56\) (emphasis in original). A certain confusion may arise regarding Blackstone's definition of the remedial aspect of a law as a method of asserting or recovering rights, as well as the protection afforded by the law, which presumably is the object of the method. One commentator has stated that:

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\text{[I]t is because rights exist and because they are sometimes violated that remedies are necessary. The object of all remedies is the protection of rights. Rights are protected by means of actions or suits. The term "remedy" is applied either to the action or suit by means of which a right is protected, or to the protection which the action or suit affords.} \\
\text{Langdell, A Brief Survey of Equity Jurisdiction, 1 Harv. L. Rev. 111, 111 (1887).}
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Blackstone, however, apparently regarded the method-object distinction in this context as one without a substantive difference. "Method" as it is used here conveys the idea of the protection of a right or the redress of a wrong. Langdell himself, after making the above distinction, seems to slip into a Blackstonian viewpoint as he states that "[a]n action may protect a right in three ways . . . ." See \(\text{id.}\), 7 1 W. Blackstone, supra note 11, at *56-57. With regard to the sanction of laws which establish public duties, Blackstone writes:

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\text{Of all the parts of a law the most effectual is the vindicatory. For it is but lost labor to say, "do this, or avoid that" unless we also declare, "this shall be the consequence of your noncompliance." We must therefore observe, that the main strength and force of a law consists in the penalty annexed to it. Herein is to be found the principal obligation of human laws.} \\
\text{Id. at *57 (emphasis in original). It is submitted that Blackstone clearly agrees with the Hobbesian position that laws derive their obligatory character, not from their content, but from the effectiveness of the threat that lies behind them. Hobbes' view of human nature is the basis for Blackstone's agreement. This can be seen in the latter's statement that "[t]he dread of evil is a much more forcible principle of human actions than the prospect of good."} \\
\text{Id. at *56.}
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Because the law recognizes both private and public wrongs, there is a dual aim:

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\text{To redress the party injured, by either restoring to him his right, if possible, or by giving him an equivalent . . . . [and] also to secure to the public the benefit of society, by preventing or punishing every breach and violation of those laws which the sovereign power has thought proper to establish, for the government and tranquility of the whole.} \\
\text{4 Id. at *7. Although the distinction between private and public wrongs is not always easy to establish, see 1 J. Bishop, Commentaries on the Criminal Law § 33, at 17 (7th ed. 1882), this distinction provides the basis for the division of Anglo-American law into its civil and criminal components, see id. § 955, at 522. Blackstone states that "private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes . . . . are a breach and violation of the public rights and duties, due to the whole community . . . ." 4 W. Blackstone, supra note 11, at *5; see 3 Id. at *2. Public offenses, in most instances, also affect individuals. For example, murder is an injury of the most grievous sort to the individual. It is also a crime against society, however, because of the deprivation it causes and the moral example it sets}
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Blackstone's articulation of the rule of law informed the legal thought of the Founding Fathers. His work was viewed as "a manual of the received English law," and the basis for legislative and judicial development in the circumstances of the new world. Blackstone's Commentaries were published originally in 1765 and had appeared in ten editions by 1787. A cursory examination of early state and federal court decisions reveals the great authority commanded by Blackstone's thought among American jurists.

In Marbury, Chief Justice Marshall quoted the following statement from Blackstone: "For it is a settled and invariable principle in the laws of England, that every right, when withheld must have a remedy, and every injury its proper redress." The question of how the Framers of the Constitution expected constitutional rights to be enforced cannot properly be discussed except in light of this position maintained by both Blackstone and Marshall. As Justice Harlan later observed, the founding generation, following Blackstone's theory, "link[ed] 'rights' and 'remedies' in a 1:1 correlation." It is unclear, however, what light this sheds on the original understanding of the fourth amendment.

The fourth amendment consists of two clauses: the first prohibits the violation of the "right of the people to be secure in their persons, homes, papers, and effects, against unreasonable searches and seizures;" the second establishes certain necessary conditions for the lawful issuance of a warrant. Although it is not obvious from the language alone, the antecedent history of the amendment makes it clear that the second clause was intended by the Framers to provide a standard, though not necessarily the only standard, of what constitutes a reasonable or an unreasonable search or seizure. Thus, the language of the fourth amendment is both declaratory and directory: it declares rights and wrongs and directs for the rest of the community. Therefore, in some instances of wrongful conduct, both private action and public prosecution may be entirely appropriate modes of enforcing the laws.

See R. Pound, Criminal Justice in America 82 (1930).

Id. at 107.

Blackstone's Commentaries were not only an important influence on the Framers of the Constitution, but they continue to be a force in modern legal thought. Stone, We Inherit an Old Gothic Castle, 8 Hastings Const. L.Q. 923, 923-27, 945 (1981).

5 U.S. at 163 (quoting 3 W. Blackstone, supra note 11, at *109).


U.S. Const. amend. IV.

Id.

their observance. A problem arises, however, when one inquires into the remedial and vindicatory branches of the law.

No express provision for the enforcement of the fourth amendment can be found, either in the words of the amendment itself or in any other clause of the Constitution. On its face, there is thus an affirmation of a right without a provision for a corresponding remedy. In addition, if a violation of the right intended to be secured by the amendment is to be considered as a public wrong, no punitive sanction appears to be provided. It would therefore seem that the fourth amendment, by its terms, is an incomplete law. Given the common understanding of the nature of law at the time of the ratification of the fourth amendment, it is inconceivable that the Framers intended to recognize a right without simultaneously requiring that a method, either remedial or punitive, exist for its enforcement. Yet, with regard to such a method, the fourth amendment is silent.

How serious a problem does this present? We have ruled out the possibility that the Founding Fathers merely meant to recognize the right against unreasonable searches and seizures without intending for the amendment to address, or to contemplate, a means for its enforcement.

One possible solution is to derive from the amendment an obligation on the part of the National legislature, and perhaps on the part of the state legislatures, to provide remedies and sanctions for its violation. What Justice Story had to say with respect to the Fugitive Slave Clause is relevant here:

If . . . the Constitution guarantees the right, . . . the natural inference certainly is, that the national government is clothed with the appropriate authority and functions to enforce it. The fundamental principle applicable to all cases of this sort, would seem to be, that where the end is required, the means are given; . . . The clause is found in the national Constitution . . . . It does not point out any state functionaries, or any state action to carry its provisions into effect. The states cannot, therefore, be compelled to enforce them; and it might well be deemed an unconstitutional exercise of the power of interpretation, to insist that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or intrusted to them by the Constitution. On the contrary, the natural, if not the necessary conclusion is, that the national government, in the absence of all-positive provisions to the contrary, is bound, through its own proper departments, legislative, judicial, or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the Constitution. The remark of Mr. Madison, in the Federalist, No. 43, would seem in such cases to apply with peculiar force. "A right (says he) implies a remedy; and where else would the remedy be deposited, than where it is

** See supra text accompanying notes 8-22.
According to Justice Story, then, the Constitution, being national in character, obligates the federal government to provide, presumably through legislation, remedies for the violation of constitutionally guaranteed rights; the Constitution does not, however, compel a like obligation on the part of the states, unless it explicitly provides for such.\(^7\)

The Constitution is properly called national, however, not in the sense that it is the fundamental law of the nation as distinct from the states, but rather in the sense that it is the fundamental law for every part of the Union, including the states. Every one of its provisions is a part—the paramount part—of the laws of every state in the Union. Therefore, it does not appear to be contrary to the plan of the Constitution to suggest that an authority devolves upon the people of the United States to use their state legislatures, as well as their national legislature, to pass laws aiding in the execution of the fundamental compact binding them one to another.\(^9\)

The Supremacy Clause protects against any at-


\(^8\) Justice Story found support for his theory in a statement by James Madison in The Federalist No. 43: "A right implies a remedy; and where else would the remedy be deposited, than where it is deposited by the Constitution?" 41 U.S. (16 Pet.) 539, 616 (1842) (quoting The Federalist No. 43, at 274-75 (J. Madison) (W. Kendall & G. Carey ed. 1966)). Justice Story's attempt to enlist the authority of Madison to support his position is seriously defective. A glance at the context of Madison's remark, quoted by Story, reveals that Madison was discussing article IV, section 4, of the Constitution, which provides that:

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence. U.S. Const. art. IV, § 4. The right protected here is that of each state to a republican form of government and to security from invasion. See id. It obviously was given constitutional status because of the unreliability or the inadequacy of self-protection by the states; thus, the United States is expressly obligated to provide such protection. Therefore, the only contribution offered by The Federalist No. 43 to our understanding of the issue of constitutional enforcement is that the Federal Government has an obligation to enforce a constitutional guarantee when such a duty is given it in express terms by the Constitution. This undebatable proposition provides no support for Justice Story's claim that the Constitution depends solely on the Federal Government for enforcement of its provisions, except where the constitutional language relies explicitly on the states.

\(^9\) This was the position taken by Chief Justice Taney in response to Justice Story in Prigg. 41 U.S. (16 Pet.) at 633 (Taney, C.J., dissenting). In addition, this position is supported by Alexander Hamilton's statement in The Federalist No. 32, where it is argued that with regard to certain matters of national concern, the federal and state legislatures have concurrent power. See The Federalist No. 32, at 198 (A. Hamilton) (W. Kendall & G. Carey ed. 1966). He states:

[A]s the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before
tempt by the states to establish remedies for the violation of federal constitutional rights that conflict with remedies provided by the Constitution itself or created by the national legislature.

Was this the solution contemplated by the Framers of the fourth amendment? Was it generally understood that, upon ratification of the amendment, the state or National legislatures, or both, would promptly legislate remedies to be implemented through civil actions in the courts, or sanctions to be enforced through criminal prosecutions, in protection of fourth amendment rights? To maintain such a position, one would have to concede that the Framers had left the rights protected by the fourth amendment in an extraordinarily vulnerable condition. Perhaps the fourth amendment could be read as obliging Congress or the state legislatures to create legal consequences for fourth amendment violations, but, in the absence of such remedial legislation, the fourth amendment would, under this view, exist only as a form of words. It is suggested that such an understanding is in conflict with the founding generation's notion that the consequences of noncompliance are as much a part of law as are declarations and directives.

To understand what the Founding Fathers had in mind for the enforcement of constitutional rights, it is absolutely necessary to recall that they regarded themselves as building upon the English legal institutions that had been transplanted to the colonies. Since equity existed only in a rudimentary condition, these legal institutions were primarily those of the common law. It was generally accepted that, where no positively enacted law held otherwise, the common law governed rights and duties. This is highly significant for our coming to grips with the peculiar "in-

had, and which were not, by that act, exclusively delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union to which a similar authority in the States would be absolutely and totally contradictory and repugnant.

Id. (emphasis in original).


29 See J. Smith, Development of Legal Institutions, chs. 8-9 (1965); see also Jones, supra note 30, at 754.

30 See 1 W. Crosskey, supra note 30, at 598. For example, by approximately 1776, Virginia, New York, New Jersey, Maryland, and Delaware had made statutory admonitions which reflected the attitude that the English common law controlled unless changed by state statute. Id. The Virginia statute stated that "the common law of England . . . should be considered as in full force [in the state], until the same should be altered by the legislative power." Id.
completeness" of those constitutional provisions that pronounce the law regarding certain rights, but are silent as to the legal consequences which result from their violation. Alfred Hill has argued that the Founding Fathers gave little attention to the question of the implementation of constitutional provisions, since they anticipated that such would take place pursuant to the common law.33

Although the Framers surely did not intend to prohibit legislative action aiding in the enforcement of constitutional rights, such action was not required to complete the Constitution as law in Blackstone's sense. Professor Hill expresses this thought in a different manner by stating that "[i]t may fairly be assumed that the founding fathers did not contemplate a new species of constitutional tort. There is evidence that the transgression of a government officer was regarded as a trespass, in accordance with the vocabulary and outlook of the common law."34 To regard such transgressions as trespasses is not to limit the corresponding remedy to an action in trespass, understood in its strictest sense. As Professor Hill notes, the term "trespass" at common law was generally used in a broader sense "to describe the conduct of a government officer actionable at common law, even though strictly speaking a form of action other than trespass would have been appropriate in the particular case."35 The Framers' reliance upon the remedial institutions of the common law explains why although many legal rights could be found in the books without a corresponding remedy being specified, Chief Justice Marshall could confidently assert as binding, Blackstone's formulation that there are corresponding remedies for all legal rights.36

It must be conceded that a difficulty in implementation would arise if a right created by the Constitution had no common-law counterpart and no appropriate common-law remedy could be found to exist. The fourth amendment, however, is emphatically free of this problem. The language of the amendment does not purport to create the right to be secure

33 Hill, Constitutional Remedies, 69 COLUM. L. REV. 1109, 1131-32 (1969); see also Katz, The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood, 117 U. PA. L. REV. 1, 42-43 (1968) (arguing that "eighteenth century men may not have supposed there would be any difficulty of implementation so long as the Constitution was the 'Supreme Law of the Land' applicable in ordinary courts").

34 Hill, supra note 33, at 1132 (footnote omitted); cf. Ex Parte Young, 209 U.S. 123, 198 (1908) (state officer illegally restraining a person is a trespasser and his official status will not excuse the tort); In re Ayers, 123 U.S. 443, 506 (1887) (11th amendment does not impinge upon the principal suits against individual defendants who under color of authority from the state are guilty of trespass); Cunningham v. Macon & Brunswick R.R., 109 U.S. 446, 452 (1883) (court is not ousted of jurisdiction when an individual being sued asserts authority as a state officer).

35 Hill, supra note 33, at 1132.

36 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 W. BLACKSTONE, supra note 11, at *23).
against unreasonable searches and seizures, but merely recognizes it as an existing right." As Justice Story observed, the fourth amendment "is little more than the affirmance of a great constitutional doctrine of the common law." It is a historical fact that an integral part of that doctrine was that unreasonable searches and seizures were considered trespasses, and that officers of the government who abused their authority in such a manner were liable to those whose persons or property they caused to be invaded.

That this remedial aspect of the common law was well known to the Framers of the fourth amendment cannot be doubted. It was operative in the controversy over the legality of general warrants, which arose from the circumstances accompanying the Crown's arrest of John Wilkes for seditious libel during the reign of George III. The search and seizure of the books and papers of Wilkes and forty-eight other Englishmen under general warrants resulted in the earliest of such litigation in the English courts. The controversy spanned the years 1763 to 1765, and its fame in the colonies became second only to James Otis' attempt to prevent the issuance to customs officers of writs of assistance. Notably, every action brought by Wilkes and his associates for the unreasonable searches and seizures was one for damages against the officials who issued the warrants and the officers who executed them.

Therefore, when the common-law origins of the fourth amendment are recognized, and it is further observed that the amendment does not create a right but rather acknowledges an existing one, the amendment no longer appears to suffer from incompleteness. For the fourth amendment to be law in the fullest sense, it must be understood as requiring an

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7 See 1 T. Cooley, supra note 25, at 610-11. The fourth amendment is recognized as a codification of the common-law maxim that "every man's house is his castle" and as such is protected from unreasonable searches and seizures. Id.
8 See 3 J. Story, supra note 25, § 1895, at 748. The fourth amendment was passed partly as a result of "the strong sensibility excited, both in England and America, upon the subject of general warrants almost upon the eve of the American Revolution." Id.
9 See 1 T. Cooley, supra note 25, at 612 & n.1; 3 J. Story, supra note 25, § 1895, at 748.
10 See 1 T. Cooley, supra note 25, at 612 n.1. The practice of arresting persons under general warrants, without evidence of their guilt or identification, received "its death-blow from the boldness of Wilkes and the wisdom of Lord Camden." Id.
11 Id.
available remedy for violations of the right asserted. The Framers assumed that this demand was met by the remedial aspect of the common law regarding unreasonable searches and seizures.

It has been suggested by one scholar that the fourth amendment "guarantees that the injured person shall not be denied a cause of action against the trespasser." This position carries with it the necessary implication that the abrogation by legislative action of civil remedies for illegal searches and seizures would violate the fourth amendment, and presumably the due process clause of the fifth amendment as well. According to this view, the civil remedy against errant government officers was given constitutional sanction by the fourth amendment, and cannot lawfully be abridged.

We would agree that, in light of the Framers' understanding of the nature of law, the fourth amendment must be understood as guaranteeing the availability of a remedy for violations of the fourth amendment right; and if Congress should take affirmative action to deny such a remedy, its action would be unconstitutional and void. This is not to say, however, that the fourth amendment gives fixed constitutional status to any one remedy. That the Framers assumed that common-law remedies would be used to implement fourth amendment rights does not in any way imply that those specific remedies were themselves of constitutional status. Not only could other remedies and sanctions be added by governmental action to the forms of action characteristic of the common-law trespass remedy, but, in addition, Congress could legitimately replace the trespass remedy with a criminal or other action, provided that an effective means of enforcement, in harmony with the purposes of the fourth amendment, continued to be available for unreasonable searches and seizures. The point to be emphasized is that the Framers did not regard the fourth amendment as impotent in the absence of congressional remedial legislation. The common-law remedy of trespass historically had been available for unreasonable searches and seizures, and the fourth amendment guaranteed that it would continue to be so unless or until the Legislature chose to enact an effective substitute.

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44 Harno, Evidence Obtained by Illegal Search and Seizure, 19 Ill. L. Rev. 303, 307 (1925); see Atkinson, Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures, 25 Colum. L. Rev. 11, 21-22 (1925); see also Buckley, Status of Intoxicating Liquor Seized Under Authority of a Subsequently Declared Invalid Search Warrant, 12 Geo. L.J. 19, 21 (1923). Buckley states that "[t]he object of the fourth amendment . . . was to protect the citizen from domestic disturbance by the disorderly intrusion of administrative officials. Such official misconduct is expressly prohibited by the amendment and both a civil and criminal action is implied against the erring officers." Buckley, supra, at 21.

45 See Atkinson, supra note 44, at 21; cf. Adams v. New York, 192 U.S. 585, 598 (1904) (fourth amendment is intended to give remedy against usurpations of power which result in violations of private security).
There is less evidence for the view that the common law understood governmental oppression of individuals to be a public as well as a private wrong, thereby rendering offending officers subject to criminal prosecution by the sovereign. It is noteworthy, however, that such a view was expressed by Hamilton in The Federalist No. 83, wherein he attempted to assuage those who were fearful of oppressive modes of collecting the national revenue with the argument that

as to the conduct of the officers of the revenue, the provision in favor of trial by jury in criminal cases, will afford the security aimed at. Wilful abuses of a public authority, to the oppression of the subject, and every species of official extortion, are offenses against the government; for which, the persons who commit them, may be indicted and punished according to the circumstances of the case.\[46\]

At the time this was written there was neither a fourth amendment, nor a national Bill of Rights, and thus, the laws establishing the public rights and wrongs must have had their source in the common law.

If Hamilton’s reading of the common law is correct, the fourth amendment should perhaps be read as affirming both private and public rights, with their corresponding modes of redress. Indeed, it could be argued that the public nature of the right protected by the fourth amendment is indicated by the amendment’s language which speaks of "[t]he right of the people . . . ."\[47\] The natural sense of these words implies that the right is not only personal, but also collective or public. No American case, however, has treated the violation of the right protected by the common law and the fourth amendment as constituting a public crime in the absence of legislation making it so. Hamilton’s assumption that wilful abuses of a public authority are of a criminal nature does not, then, seem to have found support in common opinion.

Be that as it may, it must be observed that the trespass remedy is not devoid of a public end. So much is manifest in the common-law doctrine that recovery can be had beyond compensation for the injury received. This doctrine of punitive or exemplary damages received its definitive justification in Wilkes v. Wood.\[48\] In that case, Chief Justice Pratt upheld a large damage award for the victim of a trespass by the King’s officers. In doing so, he stated:

[A] jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future and as a proof of the detestation of the jury to the

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\[46\] The Federalist No. 83, at 500 (A. Hamilton).

\[47\] U.S. Const. amend. IV.

action itself.\(^4\)

Thus, the remedy considered appropriate by the founding generation for a violation of fourth amendment rights, that of trespass, served the purpose not only of redress, but of punishment, deterrence, and morality as well.

THE JUDICIAL PROTECTION OF THE FOURTH AMENDMENT RIGHT

Assuming that fourth amendment rights were intended to be implemented by means of the remedial institutions of the common law, the next logical inquiry is whether the state or federal courts, or some combination thereof, are to be instruments by which the wronged parties may pursue adequate redress. In defining the limits of the power of the federal judiciary, the Constitution provides that “[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . .”\(^0\) During the first few decades following the ratification of the Constitution, it was a matter of some controversy whether this clause was intended to extend the power of the federal courts to common-law cases.\(^5\) As previously indicated, Hamilton envisaged wilful abuses by a public authority to be offenses at common law.\(^5\) Since Hamilton considered such crimes to be subject to the constitutional requirement of trial by jury in criminal cases, it follows that he understood the federal judicial power to extend to common-law crimes. Moreover, if this power extends to wilful abuses of authority viewed as public wrongs, there would seem to be no ground for denying its extension to such abuses viewed as private wrongs.

But whatever the original disposition of the Constitution toward extending the power of the federal judiciary to violations of the common-law right to be secure against unreasonable searches and seizures, the ratification of the fourth amendment rendered the question practically

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\(^4\) Id.

\(^5\) U.S. CONST. art. III, § 2, cl. 1.


[F]or many years . . . there was a heated political contest between the Federalist and the Jeffersonian parties as to whether the Federal Courts possessed such jurisdiction . . . . [M]any eminent Judges and lawyers maintained at the outset and continued long to maintain, that such jurisdiction over crimes at common law . . . was intended to be vested in Federal Courts.

\(^7\) Id.

\(^8\) See supra text accompanying note 46.
moot. By incorporating the common-law doctrine regarding searches and seizures into its charter of national existence, the people of the United States gave it constitutional status, thereby placing all controversies arising under that law within the realm of the federal judicial power. It is axiomatic that for the federal judicial power to operate in all cases arising under the Constitution, federal courts must be endowed with the jurisdiction necessary for the exercise of that power. Article III of the Constitution vests in the Supreme Court original jurisdiction over all cases "affecting Ambassadors, other public Ministers and Consuls," and those in which a state shall be a party. As to other cases, the Supreme Court was given appellate jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make." While the Supreme Court is to be a repository of the judicial power of the United States, whether or not inferior federal courts shall exist, and what their jurisdiction will be, are matters left to the discretion of Congress.

In 1812, the United States Supreme Court ruled that no legislative act had conferred on the federal courts criminal jurisdiction over common-law cases. Because federal courts are dependent on Congress for their jurisdiction (except for the few areas of original jurisdiction marked off for the Supreme Court by the Constitution in the second section of article III), the Court found it unnecessary to reach the question of whether the judicial power was intended to extend to common-law crimes. United States v. Hudson and Goodwin, 11 U.S. (7 Cranch) 32 (1812); see also United States v. Coolidge, 14 U.S. (1 Wheat) 415 (1816); Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834).

Charles Warren, on the other hand, has argued on the basis of his examination of an early draft of the Judiciary Act of 1789, 1 Stat. 73, that section 9 of that law, which gives federal courts exclusive cognizance of "all crimes and offences that shall be cognizable under the authority of the United States," id. at 76, is intended to give federal courts jurisdiction over common-law crimes and crimes under the law of nations, Warren, supra note 51, at 73, 77. Warren's interpretation has recently been challenged by Julius Goebel. See J. GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS to 1801 495-96 (The Oliver Wendell Holmes Devise, Vol. 1, 1971).

U.S. CONST. art. III, § 2, cl. 2.

Id.

Id. § 1.

Id. It is clear that article III leaves Congress free to establish any inferior federal courts it deems appropriate, Lockerty v. Phillips, 319 U.S. 182, 187 (1943), and it is equally clear that Congress may determine the scope of jurisdiction of such inferior federal courts, Federal Power Comm'n v. Pacific Power & Light Co., 307 U.S. 156, 159 (1939).

The Supreme Court has described the constitutional requirements for exercise of the jurisdiction of the inferior courts as follows:

As regards all courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction, whether original or appellate. The Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it. Their concurrence is necessary to vest it. It is the duty of Congress to act for that purpose up to the limits of the granted power.

Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 252 (1867). Herbert Wechsler described the jurisdictional plan of the Constitution in the following manner:

Congress would decide from time to time how far the federal judicial institution
ENFORCING THE FOURTH AMENDMENT

Today, with our heavy reliance on the federal judiciary as courts of first instance in cases involving federal questions, we have a tendency to forget that throughout our early history, the principal forum for the vindication of constitutional rights had been the state court.\(^5\) It is a striking fact that, prior to 1875, Congress deemed it neither necessary nor desirable to provide federal courts with original jurisdiction over cases involving rights claimed under the Constitution.\(^6\) Yet, one must remain cognizant of the fact that Supreme Court decisions reveal a variety of opinions regarding the question of whether and to what extent the jurisdiction of state courts extends to cases involving federal rights.\(^6\)

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\(^5\) See Warren, Federal Criminal Laws and the State Courts, 38 Harv. L. Rev. 545, 545 (1925). As to the jurisdiction of state courts in the early days of the federal judicial system, Charles Warren stated:

Large numbers of American statesmen were, from the outset of the Government, in favor of allowing the State Courts to exercise primary, or at least concurrent, jurisdiction in most of the cases to which the Federal judicial power was extended by the Constitution; and they regarded the exercise of the Federal judicial power as chiefly necessary in the appellate tribunal.

*Id.* These American statesmen assumed, of course, that the judicial power of the states extended to such cases.

In Warren's historical analysis of the Judiciary Act of 1789, he discusses the debate on the Draft Bill:

The first issue was whether there should be any District Courts of the United States at all, or whether the functions of executing the Federal laws should be left in the first instance with the State Courts. It is a singular fact, not always recalled, that many ardent pro-Constitutionalists had already expressed the belief that the State Courts might well be entrusted with such power, subject to appeal to the Federal Supreme Court.

Warren, supra note 51, at 65 (footnote omitted).

\(^6\) See Act of March 3, 1875, ch. 137, 18 Stat. 470. This Act established general jurisdiction over federal questions in the lower federal courts, subject to a minimum monetary jurisdictional requirement. *Id.* For a discussion of the history of the Judiciary Act, see Warren, supra note 51, at 62 & n.30.


The question of state court power to assume jurisdiction over actions enforcing federal
That some confusion would arise from the plan of the Constitution was not unforeseen by its Framers. Hamilton observed:

The erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may, in a particular manner, be expected to flow from the establishment of a constitution founded upon the total or partial incorporation of a number of distinct sovereignties. 'Tis time only that can mature and perfect so compound a system, can liquidate the meaning of all the parts, and can adjust them to each other in a harmonious and consistent WHOLE. Aspiring, however, to start this "maturation process" off on the proper foot, Hamilton devoted The Federalist No. 82 to the questions posed by the new federal structure to the judicial department, and, in particular, to those questions relating to "the situation of the State courts in regard to those causes, which are to be submitted to federal jurisdiction." In that essay, the role envisioned by the Constitutionalists for the state courts in the execution of federal law comes into focus.

What is written in The Federalist No. 82 comes as no surprise to the reader. It had been presaged in earlier essays. For example, in The Federalist No. 16, Hamilton stated that opposition to the national government by seditious individuals "could be overcome by the same means which are daily employed against the same evil under the State governments." Moreover, in The Federalist No. 27, Hamilton asserted that "[t]he plan reported by the convention, by extending the authority of the federal head to the individual citizens of the several States, will enable the government to employ the ordinary magistracy of each, in the execution of its laws." Though these passages refer to the state judicial enforcement of laws enacted by Congress, the principle embodied therein would lend support to state judicial enforcement of federal constitutional law as well, since state magistrates are "equally the ministers of the law of the land, from whatever source it might emanate."

An objection has occasionally been raised to this position on the rights was not answered by the Supreme Court until 1876, when the Court ruled that such power is inherent in the constitutional structure. Claflin v. Houseman, 93 U.S. 130, 136 (1876). A unanimous Court relied heavily upon Hamilton's discussion in The Federalist No. 82. See 93 U.S. at 138.

61 The Federalist No. 82, at 491 (A. Hamilton) (emphasis in original).
62 Id.
63 Id., No. 16, at 117 (A. Hamilton). Hamilton noted:

The magistracy, being equally the ministers of the law of the land, from whatever source it might emanate, would doubtless be as ready to guard the national as the local regulations from the inroads of private licentiousness.

Id. at 117.
64 Id., No. 27, at 176 (A. Hamilton).
65 Id., No. 16, at 117 (A. Hamilton).
ground that state courts simply lack jurisdiction over those cases to which the judicial power of the United States extends and which involve national rights and policy. Despite some appearances to the contrary, Hamilton does not appear to have entertained the possibility of such a restrictive view of state jurisdiction. His thesis in *The Federalist No. 82* regarding state court jurisdiction under the Federal Constitution envisaged the plan of the Federal Convention as "partly federal, and partly national." As it intends "only . . . a partial union or consolidation, the State governments . . . clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States." Therefore, in regard to the judicial power of the states, the state courts retain all jurisdiction not taken away by the Constitution. Since there is no clause in the Constitution confining cases within federal cognizance to the federal courts, state courts clearly hold concurrent jurisdiction over those cases falling within that description of cases over which the state courts previously had cognizance. Hamilton

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66 Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 335 (1816). Justice Story, writing for the majority in *Hunter's Lessee*, stated the Court's position concerning state court jurisdiction over "national policy" cases as follows:

[A]s to cases arriving [sic] under the constitution, laws, and treaties of the United States . . . the state courts could not ordinarily possess a direct jurisdiction. The jurisdiction over such cases could not exist in the state courts previous to the adoption of the constitution, and it could not afterwards be directly conferred on them; for the constitution expressly requires the judicial power to be vested in courts ordained and established by the United States.

Id. at 334-35. Justice Story indicated that these remarks extended to cases affecting ambassadors, other public ministers and consuls, and to cases of admiralty and maritime jurisdiction.

Id. at 335.

It should be noted that this argument must be considered in conjunction with Justice Story's analysis that "the constitution is imperative upon congress to vest all the judicial power of the United States, in the shape of original jurisdiction, in the supreme and inferior courts created under its own authority." Id. at 336. In Story's scheme of things, if this power of Congress were merely discretionary, the Constitution would be in effect a blueprint for ineffectiveness, since a vast number of constitutional rights and obligations would be judicially enforceable only at the discretion of Congress. See id. at 338-39.

67 See *The Federalist No. 82*, at 491 (A. Hamilton). Hamilton, discussing state court causes of action which are submitted to federal jurisdiction, questioned whether federal jurisdiction was to be exclusive, or if both "courts [were] to possess a concurrent jurisdiction."

Id. Hamilton appears to have answered this question by noting that "[a]states will retain all preexisting authorities which may not be exclusively delegated to the federal head; and that this exclusive delegation can . . . exist . . . where an exclusive authority is, in express terms, granted to the Union . . . " Id. at 492 (emphasis in original).

68 Id., No. 39, at 246 (J. Madison).

69 Id., No. 32, at 198 (A. Hamilton) (emphasis in original).

70 Id., No. 82, at 492 (A. Hamilton). Although Hamilton states that the doctrine of concurrent jurisdiction is applicable to cases in which state courts had recognized jurisdiction in the past, he proceeds to note that "[i]t is not equally evident in relation to cases which may
regarded as incontestable the proposition that state courts would have
jurisdiction over those cases arising under the Constitution which in-
volved rights and obligations that were actionable in state courts prior to
the ratification of the Constitution. He also asserted the legitimacy of
state jurisdiction over cases arising under the Constitution over which
there was no preexisting state jurisdiction, provided such jurisdiction was
not expressly denied by Congress.\textsuperscript{71}

It is not completely clear, however, whether Hamilton regarded juris-
diction over this latter class of cases as devolving upon state courts purely
by virtue of the states existing as parts of one whole, or whether he be-
lieved such jurisdiction to be dependent on positive grants by the state
legislatures. His statement that “the state courts would have a concurrent
jurisdiction in all cases arising under the laws of the union, where it was
not expressly prohibited”\textsuperscript{72} does not indicate a contingent character to
that jurisdiction. For the purposes of the argument here, however, it is
unnecessary to determine whether the Constitution indeed directly pro-
vides state jurisdiction over cases to which the federal judicial power ex-
tends absent congressional prohibition. The preexistent nature of the
right protected by the fourth amendment, and the fact that state courts
universally possessed jurisdiction over common-law trespasses by govern-
ment officers, place all cases arising under that amendment in the cate-
gory of cases that “grow out of,” but are certainly not “peculiar to” the
Constitution.\textsuperscript{73} According to Hamilton’s analysis, state judicial authority
over such cases is unquestionable.

Hamilton’s position on state jurisdiction over federal issues was de-

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\textsuperscript{71} See \textit{id.}

\textsuperscript{72} \textit{id. at 493-94.}

\textsuperscript{73} See \textit{id.} Story has commented upon “private injustice” and the jurisdictionally permissible
relief in the following manner:

[T]he national government is per se incapable of any merely personal wrong. . . . In
regard to property, the remedy for injuries lies against the immediate perpetrators,
who may be sued, and cannot shelter themselves under any imagined immunity of the
government. . . . Cases, indeed, may occur, in which he may not always have ade-
quate redress, without some legislation by Congress. As for example, in places ceded
to the United States, and over which they have an exclusive jurisdiction . . . [b]ere
he must rely on the justice of Congress, of the executive departments.

\textsuperscript{3} J. \textit{Story}, \textit{supra} note 25, at 539-40.
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fended by John Marshall during the Virginia Ratifying Convention in the context of a discussion of the legal consequences of oppressive behavior by federal collection officers. According to Marshall, the state courts could try individual actions against federal officers, as could the federal courts, assuming Congress gives them appropriate jurisdiction. With respect to the federal courts, Marshall may have agreed with Hamilton that their jurisdiction would reach wrongs at common law, or he may have anticipated federal legislation. As to state courts, the source of the law could be either positive state law, the common law as it is in force in the states, or federal law.

Marshall noted that “[t]he state courts will not lose the jurisdiction of the cases they now decide. They have a concurrence of jurisdiction with the federal courts in those cases in which the latter have cognizance.” Therefore, state court jurisdiction over cases arising from the right to be free from unreasonable searches and seizures was assured, both before and after the ratification of the fourth amendment.

The Framers’ view that the state courts would have jurisdiction over cases involving federal rights has led one prominent scholar to make the assertion that “[i]n the scheme of the Constitution, [the state courts] are the primary guarantors of constitutional rights . . . .” This statement is founded in the recognition that the Federal Judiciary Act of 1789, which established the jurisdiction of the federal courts, was the product of a compromise between the Federalists and the Anti-Federalists, “so framed as to secure the votes of those who, while willing to see the experiment of a Federal Constitution tried, were insistent that the federal courts should be given the minimum powers and jurisdiction.”

The Judiciary Act did

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* See 3 Elliot’s Debates 554 (1937). George Mason initiated the debate over the legal consequences of the oppressive behavior of federal collection officers by waging an attack on the extent of the judicial power delegated by the Constitution. Id. at 524. Federal court jurisdiction, he stated, as granted in article III, section 2, clause 1 of the Constitution, will encompass “all cases affecting revenue, exercise, and custom-house officers.” Id. Mason queried that if it is difficult to bring federal officers to justice in state courts, what relief can be expected from federal judges? Id.

Marshall argued against this proposition, stating that an injured party indeed would trust an inferior federal court, and would receive the appropriate redress. Id. at 554. Furthermore, added Marshall, “[t]here is no clause in the Constitution which bars the individual member injured from applying to the state courts to give him redress.” Id.

* See id.

* Id.


* Ch. 20, §§ 1-35, 1 Stat. 73-93 (codified as amended in scattered sections of 28 U.S.C. (1976)).

* Id. § 9.

* Warren, supra note 51, at 53.
not confer the entire judicial power on inferior federal courts. Neither
the district nor the circuit courts received general jurisdiction of
cases arising under the Constitution, laws, or treaties of the United
States. Nor were those courts given cognizance of suits or proceed-
ings against federal officers for their conduct in executing the laws.\footnote{Although the circuit and district courts were conferred somewhat limited powers in relation to the powers that could have been granted, see supra note 78, the circuit courts did receive jurisdiction over diversity of citizenship cases, Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78 (1789), and the district courts were given admiralty and maritime jurisdiction, id. § 9, 1 Stat. 76-77.}

The intention of the Judiciary Act, therefore, was to leave the enforcement of remedies against federal officers to the state courts. When the decision contravened a right or immunity claimed under the Federal Constitution or under a federal treaty, statute or commission,\footnote{See Judiciary Act of 1789, ch. 20, §§ 9, 11, 25, 1 Stat. 76-77, 78-79, 85-86 (codified as amended at 28 U.S.C. § 1251 (1976)).} national supervision was to be exercised by a writ of error from the highest court of the state to the Supreme Court of the United States.\footnote{Id. § 9, 1 Stat. 76-77. With respect to the subject of seizures, the Judiciary Act provided: [t]hat the district courts shall have . . . exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; a saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; and shall also have exclusive original cognizance of all seizures on land, on other waters than as aforesaid, made, and of all suits, for penalties and forfeitures incurred, under the laws of the United States.}

The Judiciary Act conferred original jurisdiction on the district
courts over all actions involving seizures occurring both on land and
at sea.\footnote{15 U.S. (2 Wheat.) 1 (1817).} Chief Justice Marshall had occasion to explain the significance of this provision for the question of unreasonable seizures in \textit{Slocum v. Mayberry}.\footnote{Id. at 2.} That case resulted from the seizure of a vessel and its cargo by a federal customs surveyor.\footnote{Id. at 2-3.} The owners of the cargo had brought a writ of replevin in the state court of Rhode Island to have their property restored, and procured a judgment against the surveyor.\footnote{Id. at 3.} Claiming that the state court lacked jurisdiction, the customs surveyor removed the case to the United States Supreme Court.\footnote{id.} Chief Justice Marshall held that, if an officer has a right under a federal law to seize for a supposed forfeiture, which is to be proceeded against in a federal court, jurisdiction over the question whether such forfeiture was "rightful or tortious" lies exclu-
sively with the federal courts, "and cannot be drawn to another forum." It is noteworthy that Chief Justice Marshall also held that the state courts may determine the question of whether the federal law under which the officer claims his authority applies to the matter seized. In the case at hand, the cargo, as distinct from the vessel, was not subject to seizure under any law of the United States. Since no act of Congress forbade the state courts to take cognizance of suits arising from the seizure of such goods, the state court in *Slocum* properly exercised its jurisdiction over the officer's unauthorized seizure.

The gist of this holding was restated by Chancellor Kent in his *Commentaries on American Law*:

If the officer of the United States who seizes, or the court which awards the process to seize, has jurisdiction of the subject-matter, then the inquiry into the validity of the seizure belongs exclusively to the federal courts. But if there be no jurisdiction in the instance in which it is asserted, as if a marshal of the United States, under an execution in favor of the United States against A, should seize the person or property of B, then the state courts have jurisdiction to protect the person and the property so invaded illegally; and it is to be observed that the jurisdiction of the state courts in Rhode Island was admitted by the Supreme Court of the United States, in *Slocum v. Mayberry*, upon that very ground.

Kent's statement of this jurisdictional doctrine was later expressly repudiated by the Supreme Court in *Freeman v. Howe* and in *Buck v. Colbath*. In *Freeman*, Justice Nelson, writing for the majority, correctly

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88 *Id.* at 9-10.
89 *Id.* at 10. Chief Justice Marshall, writing for the Court, stated that:
90 *Id.* at 11.
91 *Id.* at 12-13.
92 1 J. Kent, *supra* note 60, at 410.
93 *Id.* at 410.
95 70 U.S. (3 Wall.) 334 (1865).
perceived that Kent's position allows the state courts to determine the jurisdiction of the federal courts awarding process to seize, thereby drawing into the state courts questions both of seizures of property and of arrests made under the authority of the federal courts.\(^7\) To this, Justice Nelson remarked that "no Government could maintain the administration or execution of its laws, civil or criminal, if the jurisdiction of its judicial tribunals were subject to the determination of another."\(^8\) It is to be remembered, however, that a state court ruling against the jurisdiction of a federal court to issue a process to seize would be subject to appeal to the federal judiciary, and would therefore not necessarily be inimical to national supremacy, contrary to the implication of Justice Nelson's opinion.\(^9\)

Justice Nelson attempted to disassociate Marshall's opinion in \textit{Slocum} from Kent's position by asserting that in \textit{Slocum} the property over which the state court exercised its legitimate jurisdiction had not been "seized" by the officer, and therefore, its replevin was no obstruction to the jurisdiction of the federal courts.\(^10\) This argument is problematic. A replevin action was deemed necessary by the plaintiff in \textit{Slocum} because his property was being detained by the federal officer. A seizure surely had taken place. The issue was whether such seizure and detention were lawful.\(^11\) The only difference between Chief Justice Marshall's opinion in \textit{Slocum} and Kent's comment is that Marshall limited his discussion to the question of the jurisdiction of the federal officer to seize and detain, and did not reach that of the jurisdiction of federal courts to issue process to seize.\(^12\) There is no evidence that Marshall's willingness to allow state determination of certain federal jurisdictional questions in the course of state court proceedings to protect the rights of their citizens did not extend to questions of judicial, as well as executive jurisdiction. Justice Nelson, in \textit{Freeman}, invoked \textit{United States v. Peters}\(^13\) to establish that "it belongs to the Federal courts to determine the question of their own jurisdiction . . . ."\(^14\) However, \textit{Peters} essentially stands for the proposition that "the ultimate right to determine the jurisdiction of the courts of the union . . . necessarily resides in the supreme judicial tribunal of the nation . . . ."\(^15\) This obviously did not exclude initial determination of such matters by state courts, but merely assured the right to appeal such

\(^{7}\) 65 U.S. (24 How.) at 458-59.
\(^{8}\) \textit{Id.} at 459.
\(^{9}\) See \textit{Riggs v. Johnson County}, 73 U.S. (6 Wall.) 166, 197 (1867).
\(^{10}\) 65 U.S. (24 How.) at 458.
\(^{12}\) \textit{Id.} at 10-11.
\(^{13}\) 9 U.S. (5 Cranch) 115 (1809).
\(^{14}\) 65 U.S. (24 How.) at 459-60.
\(^{15}\) 9 U.S. (5 Cranch) at 136 (emphasis added).
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decisions to the federal Supreme Court.

The doctrine enunciated in *Freeman* was refined by the Court in *Buck v. Colbath*. In that case, Justice Miller asserted the ruling principle to be:

> [W]henever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court, and under its control for the time being; and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises. . . .

Whenever the litigation is ended, or the possession of the officer or court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not.

According to Justice Miller, therefore, a writ of replevin could not be instituted in a state court to retrieve property seized and held under federal process.

In the *Buck* case, however, replevin was not the remedy at issue; rather, the federal officer had been sued in trespass for wrongful seizure. Justice Miller held that such an action did not interfere with the principle stated, since the possession of the property by the federal court was not in dispute. The case in the federal court, which was an attachment suit, could proceed at the same time that the trespass action was being determined in the state court. The fact that similar questions might be at issue in both trials was not necessarily a fatal objection. Justice Miller's position is eminently sensible. It goes beyond that outlined by Marshall in *Slocum* by virtue of the fact that it apparently places all property, whether lawfully or unlawfully seized by federal officers under color of process, outside the jurisdiction of the state courts until the federal courts have finished with it. However, it falls short of Justice Nelson's rather extreme position in *Freeman* in that it allows for actions in state courts involving seizures by federal officers, which actions may raise questions of federal jurisdiction, as long as those actions do not obstruct the federal courts in the execution of their duties. This course

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106 70 U.S. (3 Wall.) at 341-42.
107 *Id.*
108 *Id.* at 340-41.
109 *Id.* at 342.
110 See *id.* at 345. Justice Miller stated in *Buck* that although a court has obtained jurisdiction of a case, this does not preclude other courts from deciding other matters closely related to "those before the first court, and, in some instances, requiring the decision of the same questions exactly." *Id.*
would "maintain the dignity and just authority of every court," and at the same time would permit swift determination in the state courts of alleged wrongs to individuals by federal officers.

**CONCLUSION**

It has been argued here that neither the silence of Congress regarding the implementation of the fourth amendment right, nor the unavailability of a federal court for the redress of that right, were understood to affect in any way the existence of a remedy or the availability of that remedy in a suit at law. The remedy was assumed to exist as a matter of right under the fourth amendment, and the state courts commonly were understood to have jurisdiction to enforce the remedy. Moreover, when one studies the case reports of the first three-quarters of the 19th century, one finds that, in cases alleging a wrongful search or seizure by a federal officer, traditional common-law forms of action associated with trespass were indeed, without exception, the modes of redress invoked. For those of us weaned on modern procedural law, however, in which it is a settled practice to declare, when relevant, the constitutional source of the right being asserted, it appears curious that in those early cases, the officer commonly is charged with acting outside his legitimate authority to search or seize, without any reference to the fact that the action with which he is charged is in violation of a constitutional right. And often, officers are described as liable "in suits at common law." Does this imply that the right to a remedy in such cases arises under the common law, and not under the fourth amendment? Does the liability of the federal officer derive not from the Constitution, but from a law of less than constitutional stature?

Initially, it must be observed that it would be erroneous to assume that a trespass by a government officer was not understood by the Framers of the Constitution and the Bill of Rights to be a constitutional case. At the very least, the Constitution would bear on the officer's defense. For example, if the federal officer attempted to plead a warrant in justification of his action, the fourth amendment's requirements for the issuance

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111 Id. at 341.


of a warrant provided the standard of judging the validity of the warrant, whether it issued from a state or a federal judicial officer. In other words, the fourth amendment "supplies the controlling behavioral standard . . . ." Secondly, one must keep in mind the relationship between the common law and the Constitution. Even if the right to recover must be found in the common law, the common law does not, in the United States, have an existence independent of the Constitution. The common law has always absorbed and given effect to interests created by statutes and constitutions in the same way that it has given effect to interests created by judicial decision. If the Constitution is viewed as an integral aspect of the common law, as it ought to be, the dichotomy of Constitution and common law becomes a false one. A description of this phenomenon is provided by Professor Hill:

The process of adaptation of the forms of action to serve statutory and constitutional ends was sometimes tortuous, but it was a significant part of the common law system and a reason for its continued vitality. If, in the case of an officer charged with an unconstitutional encroachment, the remedy of trespass or ejectment was deemed to be 'given' by the common law, it was nevertheless the Constitution that determined the outcome. To say that the remedy of trespass in search and seizure cases was deemed to be "given" by the common law, however, is not necessarily to deny that the right to such a remedy would be, under certain circumstances, constitutionally dictated as well.

The fourth amendment, when viewed in light of its common-law origins and the view shared by the founding generation of the nature of law, should be understood as requiring the availability of an effective remedy or sanction for fourth amendment violations. In the absence of legislative provision for such a remedy, the available common-law remedy would thereby exist as a matter of constitutional right. Since the fourth amendment is "little more than the affirmance of a great constitutional doctrine of the common law," and since the Founding Fathers clearly relied on the remedial institutions of the common law for the implementation of the Constitution, it should not cause surprise that little occasion was found for reference to the fourth amendment in suits involving unreason-

115 See, e.g., Sandford v. Nichols, 13 Mass. 286, 288-89 (1816). Sandford involved a trespass action against federal revenue inspectors. Id. at 286. The warrant under which they pleaded their defense had issued from a justice of the peace. Id. The court referred to the fourth amendment as the standard for the validity of the warrant. Id. at 289.
116 Hill, supra note 33, at 1159.
117 Id.
118 Id. at 1133.
119 3 J. STORY, supra note 25, at 748.
able searches or seizures. Except for one or two of the specifics which the amendment requires for the issuance of warrants, no difference between it and the common law on the subject existed. Indeed, the common law provided the guidance for the interpretation of the general terms of the amendment. Thus, in conformity with the pleading conventions that existed prior to the advent of the modern system of code pleading, which "conventions had a foundation in English history wholly unrelated to any attempt to identify the sovereign source of an asserted right in a federal system," suits "at common law" were considered perfectly adequate to vindicate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

180 Hill, supra note 33, at 1130.
181 Cf. Jaffin, Federal Procedural Revision, 21 Va. L. Rev. 504, 525-26 (1935). Concerning the various instances in which a common-law suit could be used to raise a constitutional issue, Jaffin stated:

After centuries of evolution in England, litigation had become synonymous with the forms of action at Common Law and the bills in Equity. What safer way, then, of raising a constitutional question than [sic] by an action by trespass quare clausum fregit, ejectment, replevin in the ceptit, detinue, trover, action on the case, covenant, special or indebitatus assumpsit, or a bill for equitable relief?

Id. (footnotes omitted).
182 U.S. Const. amend. IV.