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SLAVES NO MORE!: THE IMPLICATIONS OF
THE INFORMED CITIZEN IDEAL FOR
DISCOVERY BEFORE FOURTH
AMENDMENT SUPPRESSION HEARINGS

Andrew E. Taslitz†

INTRODUCTION

Pre-trial discovery in criminal cases is extraordinarily limited.¹ In the federal system, for example, witness depositions are very rare and require hard-to-obtain prior judicial approval.² Moreover, government witness statements need not be provided to the defendant until after the witness testifies at a trial or critical hearing.³ Furthermore, the definition of “statement” is

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2. See id. at 781; see also FED. R. CRIM. P. 15.

3. See 18 U.S.C. § 3500 (1994). Section 3500 is commonly known as the “Jencks Act,” codifying the Court’s holding in Jencks v. United States, 353 U.S. 657 (1957), that the Government must disclose its witness’ statements whether or not they are inconsistent with their trial testimony. See Jencks, 353 U.S. at 667-69. But this disclosure need not be made until after the witness has testified at trial. See id. Federal Rule of Criminal Procedure 12(b), adopted in 1983, extends the Jencks Act rule to pretrial suppression.

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quite limited.\textsuperscript{4} Neither interrogatories nor requests for admissions are allowed.\textsuperscript{5} Mandatory discovery by the prosecution to the defense is limited to a few narrow categories, such as certain prior statements made by the defendant; the defendant’s prior criminal record; documents and tangible items obtained from or belonging to the defendant or “material to the preparation of his defense”\textsuperscript{6} (a phrase given a very narrow reading); and the results of certain prosecution experts’ examinations and tests, with a brief summary of their bases.\textsuperscript{7} These limited statutory and rule-based discovery obligations are a far cry from the relatively wide-open discovery procedures in civil cases, in which parties answer interrogatories, requests for admissions, and document requests; routinely depose witnesses; and, in some federal districts, must voluntarily disclose a wide array of “core” information.\textsuperscript{8}

A variety of arguments have been made to justify the sharp limitations on criminal, relative to civil, discovery. Advance notice to suspects is said to encourage perjury, tip the balance hearings, again requiring disclosure only upon defense motion \textit{after} the witness has testified at the hearing. \textit{See FED. R. CRIM. P. 12(0).}

\textsuperscript{4} \textit{See} 18 U.S.C. § 3500(e) (1994) (defining a “statement” within the meaning of the Jencks Act to include only written statements adopted by the witness, stenographic or mechanical transcripts that purport to be almost verbatim accounts of oral statements, and any statements, however recorded, made to a grand jury); United States v. Farley, 2 F.3d 645, 654-55 (6th Cir. 1993) (explaining that nonverbatim summary of a witness’ account, if not adopted by the witness, is not a Jencks Act “statement”). Furthermore, a “statement” need not be disclosed, even if relevant, unless it relates to the subject matter of the witness’s testimony. \textit{See} 18 U.S.C. § 3500(b) (1994); United States v. Susskind, 4 F.3d 1400, 1404 (6th Cir. 1993) (explaining that the test is “whether the statement relates to the subject matter as to which the witness has testified”) (quoting 18 U.S.C. § 3500(b) (1994)). Thus, prosecutors can sometimes legitimately conceal relevant, inculpatory information, or delay its disclosure until trial, by careful orchestration of whom they call as witnesses at suppression hearings and what questions they ask. \textit{See infra} text accompanying note 18 (discussing supposed absence of constitutional obligation to disclose inculpatory evidence to the defense); Interview with Professor Peter Krauthamer (Sept. 15, 1998) (describing prosecution strategy in the District of Columbia). Professor Krauthamer is a clinician and well-known criminal defense lawyer. \textit{See id.} Many states follow the Jencks Act approach, although some demand an initial showing by the defense of a probable conflict between the testimony and the pre-trial statement before requiring disclosure. \textit{See SALZBURG & CAPRA, supra} note 1, at 779.

\textsuperscript{5} \textit{See FED. R. CRIM. P. 12, 15, 16, 28; SALZBURG & CAPRA, supra} note 1, at 785-86, 781.

\textsuperscript{6} \textit{FED. R. CRIM. P. 16(a)(1)(C).}

\textsuperscript{7} \textit{See SALZBURG & CAPRA, supra} note 1, at 772-82.

\textsuperscript{8} \textit{See id.} at 785; FED. R. CIV. P. 26; R. LAWRENCE DESSEM, PRETRIAL LITIGATION: LAW, POLICY AND PRACTICE 203-319 (2nd ed. 1998).
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of advantage against a prosecution already burdened by the "beyond a reasonable doubt" standard of proof, and expose witnesses to dangers of violent retaliation from suspects seeking to silence witness testimony.\(^9\)

Many have long criticized these justifications for limiting discovery by the defense, arguing that they depend upon unsupported assumptions and a sporting theory of justice.\(^10\) Given the enormous power of the prosecution to marshal evidence and public sympathy against the accused, these critics contend, we need not fear an untoward tipping of the scales of advantage toward the defense.\(^11\) Nor is perjury likely to be any greater a danger in criminal than in civil cases, especially given the prosecutor's ability to "freeze" evidence in criminal cases in ways that are hard for the defense to rebut.\(^12\) For example, search warrants enable the Government to obtain by surprise tangible evidence of a suspect's guilt; electronic eavesdropping helps the Government to condemn a suspect with words out of his or her own mouth; and the Government can, through the grand jury, secretly obtain witness statements under oath.\(^13\) Finally, danger to witnesses has not proven great in jurisdictions where prosecutors voluntarily open their files to defense lawyers and is particularly small in white collar crime cases; discovery can also be limited if there is evidence of danger in a specific case.\(^14\) Indeed, the risks of witness harm and

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9. See SALZBURG & CAPRA, supra note 1, at 767-69.
11. See Tracy L. Meares, Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives, 64 FORDHAM L. REV. 851, 877 (1995) ("The criminal defendant does not have the same access to information that the prosecutor does."); Richard A. Rosen, Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger, 65 N.C. L. REV. 693, 694 (1987) ("A prosecutor ... has at his or her disposal a large array of investigative capabilities, generally commands resources vastly superior to those available to the defense attorney. ... "); see also Bennett L. Gershman, The New Prosecutors, 53 U. PITT. L. REV. 393, 449 (1992) (recommending expanded defense discovery as a way to equalize the balance of power); cf. Brennan, supra note 10, at 284-88 (arguing that without discovery, indigent defendants are seriously handicapped in preparing a defense).
12. See SALZBURG & CAPRA, supra note 1, at 768.
13. See id.
14. See id. at 770 (noting that in many states when prosecutors voluntarily exercise their discretion to open their files to the defense, they take concerns such as witness safety into account in individual cases); see also W. Bradford Middlekauff, What Practitioners Say About Broad Criminal Discovery Practice: More Just—or Just More
undue prosecution burdens can be reduced by such devices as limiting discovery to information that is relevant or likely to lead to relevant evidence, respecting evidentiary privileges, and allowing for the case-specific use of protective orders and sanctions for discovery abuse.\textsuperscript{15}

The Supreme Court has given the critics of narrow discovery rules little ammunition with which to wage their campaign, repeatedly stating that "[t]here is no general constitutional right to discovery in a criminal case. . . ."\textsuperscript{16} That statement does not mean, however, that the Constitution offers the critics no solace. Most importantly, the prosecution has a constitutional duty to disclose material exculpatory evidence to the accused.\textsuperscript{17} Arguably, however, the courts have given cramped interpretations to the terms "material" and "exculpatory," and, in practice, much is left to the sound discretion of the prosecutor.\textsuperscript{18} Furthermore, "inculpatory" evidence—arguably the kind of evidence that counsel most needs notice of to

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\textit{Dangerous?}, 9 CRIM. JUST. 14, 18, 58 (Spring 1994). Middlekauff describes witness safeguards and concludes:

In some cities with broad discovery practice, such as San Diego, Philadelphia, Detroit, and Newark, prosecutors saw no significant causal link between discovery and witness intimidation. In Los Angeles and Chicago, on the other hand, prosecutors acknowledged that there might be some link between discovery and witness intimidation but noted that there were sufficient methods available to protect witnesses. Even in these cities, there was not a strong view that currently broad disclosure rules should be made more limited.


17. \textit{See} Brady v. Maryland, 373 U.S. 83, 87-88 (1963) ("A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty . . . [is] an architect of a proceeding that does not comport with standards of justice . . . ."). Furthermore, the prosecutor is charged with the knowledge of his fellow prosecutors of any exculpatory material. \textit{See} Giglio v. United States, 405 U.S. 150, 154 (1972).

\end{footnotesize}
prepare a proper defense—need not be turned over under this constitutional rule. Even when constitutionally mandated disclosure is made, the disclosure falls far short of what, for example, a deposition would reveal.

This Article argues that the Constitution mandates broader pretrial disclosure by the prosecution of one particular class of evidence: that which is relevant to the litigation of motions to suppress evidence as obtained in violation of the Fourth Amendment prohibition against unreasonable searches and seizures. This constitutional mandate imposes a duty on legislatures—not only courts—to remedy the problem of inadequate pre-suppression-hearing discovery. The mandate arises from the Constitution’s embodiment of the Framers’ concept of an informed citizenry.

An informed citizenry is one made aware of the facts and arguments that enable it to monitor and curb Governmental abuses. This recognition of the importance of an informed citizenry was celebrated by the Founders and enshrined in the Bill of Rights. For example, First Amendment protections of free speech, press, and religion enable ordinary citizens, publishers, and clergy to disseminate and debate the wisdom of various Governmental actions. Similarly, rights to a public trial, confrontation of witnesses, and compulsory process help to reveal Governmental wrongdoing. The modern Court has also read the Sixth Amendment right to counsel at post-indictment interrogations in a way that shows a fear of the Government’s ability to shape evidence through secret

19. See Sarah Lowman & Cheryl L. Vinall, Discovery, 85 GEO. L.J. 1088, 1090-91 (1997) (discussing limits of Brady). Other rules may, however, require the prosecution to disclose some inculpatory evidence to the defense. For example, Rule 16 of the Federal Rules of Criminal Procedure requires disclosure to the defense of both exculpatory and inculpatory statements by the defendant. See FED. R. CRIM. P. 16(a)(1)(A). The defendant’s own statements are, however, often but a small part of the prosecution’s case, or the defendant may have made no statement. Inculpatory evidence other than the defendant’s statements may therefore be as important, or more important, than access to the defendant’s statements, especially because, in theory, the defendant has access to his or her own statements even if there is no discovery.

20. See infra Parts I and II.
21. See infra Parts I and II.
22. See infra Parts I and II.
23. See U.S. CONST. amend. I.
24. See U.S. CONST. amend. VI.
inquisitions. The Court’s creation of a Fifth Amendment right to the presence of counsel during questioning and of a required series of warnings to ensure the defendant’s awareness of this right and related rights shows a similar concern about Governmental abuses when state agents’ conduct is shielded from the light of day. The goal of such provisions is not only to reveal Government wrongdoing but to discourage such wrongdoing by rulers fearful that their unmasking will provoke citizen outrage.

The Fourth Amendment in particular has long served a rarely recognized function in promoting an informed citizenry. The Framers saw the Amendment as a way to educate jurors about the “unreasonableness” of Government searches and seizures, particularly those directed at political opponents. The Fourth Amendment, originally applicable only against the federal Government, was incorporated against the states by the Fourteenth Amendment, and thus events surrounding that latter amendment’s adoption altered the Fourth Amendment’s meaning. The drafters of the Fourteenth Amendment were concerned with protecting Republican and abolitionist critics of slavery and of the post-slavery reactionary policies of the Southern regime, whose governments had subjected those critics to abusive searches and seizures to silence dissent. However, the Fourteenth Amendment’s drafters also saw that unreasonable searches and seizures directed at conduct less obviously political could nevertheless serve to discourage citizen debate and promote citizen ignorance. Southerners thus understood that every exercise of free movement by slaves—every escape, slowdown, or act of disobedience—had an


28. See U.S. CONST. amend. IV.


30. See infra Part III.B.
expressive component. Every successfully escaped slave sent the message to his brethren, "You too can be free" and to White Northerners, "We, the slaves, wish to be free."\textsuperscript{31} The Fourteenth Amendment's Framers, like those of the Bill of Rights, saw an intimate link between banning unreasonable searches and seizures and promoting an informed citizenry.

The Fourteenth Amendment's Framers, again like the Constitution's original Framers, saw Northern juries as one way to inform the citizenry about wrongful searches and seizures.\textsuperscript{32} The Northerners worried that White Southern juries would not offer the same protection. They hoped, without fully thinking the issue through, that the Reconstruction Amendments as a whole would promote sufficient black political representation to help cure this problem.\textsuperscript{33} However, one of their overriding purposes was to promote an informed citizenry. Sound principles of constitutional interpretation suggest that they should not have been seen as wedded to any particular institutional arrangement for achieving that goal.\textsuperscript{34}

In the modern world, civil tort actions before juries have proved inadequate to foster a citizenry informed about Fourth Amendment abuses.\textsuperscript{35} The Supreme Court recognized that failure and moved instead to the exclusionary rule as a primary remedy for such Governmental wrongdoing.\textsuperscript{36} Moreover, in

\begin{footnotesize}
31. See infra Part III.B.
32. See infra Part III.B.
33. See infra Part III.B.
34. See infra Parts III.B, V.
35. See Susan Bandes, "We the People" and Our Enduring Values, 96 Mich. L. Rev. 1376 (1998). In criticizing Akhil Amar's assault on the exclusionary rule, Bandes notes:
   Amar never deals with the evidence—both empirical and anecdotal—that tort remedies have been massively ineffective in cases against police officers. For multiple reasons, including lack of incentive to sue, lack of jury sympathy for defendants, state-law immunities, and the fact that police misconduct often consists of small, incremental violations rather than dramatic episodes, the likelihood of significant damage awards is extremely small. Moreover, even a longstanding series of large settlement awards, totalling tens of millions of dollars a year, has failed to cause cities like New York or Chicago to re-examine their policies on police brutality, or even to discipline the individual officers involved.

Id. at 1408.
36. See, e.g., Daniel J. Meltzer, Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General, 88 Colum. L. Rev. 247, 286 (1988) ("The Supreme Court has recognized the shortcomings of traditional tort remedies—and has accordingly embraced deterrent remedies—most
today's complex society, no citizen can be fully informed about all areas of politics. Rather, our citizenry is best seen as specialized, with members focusing on areas of particular interest to them and for which they are particularly well suited to monitor the Government. A criminal suspect remains a citizen, but one with a strong interest in uncovering Government abuse—avoiding the stigma and punishment stemming from a criminal conviction by excluding wrongfully seized evidence. Furthermore, because of the right to counsel, a lawyer-assisted criminal defendant is particularly well suited to uncover such abuse.

Defense counsel cannot aid the defendant in serving this constitutional role, however, without broad pre-suppression-hearing discovery. Broad discovery does not mean unlimited discovery. Restrictions imposed by doctrines of relevance, privilege, and the like should still apply. But wider discovery than is now allowed is necessary to promote an informed citizenry as an effective monitor of Governmental criminal investigation-related behavior. In an article of this length, I do not propose a comprehensive statement of what the new system should look like. Instead, my primary goal is to explain that there is a constitutional mandate for action. At a minimum, that action requires ready availability of depositions of police officers involved in searches and seizures in criminal cases and the early provision to the defense of the "statements" of such officers. Because it is officers and not ordinary citizens who are involved, the risk of physical danger so often touted as an argument against discovery in criminal cases is sharply reduced. Arguments about unnecessarily favoring the defense or fearing defense perjury similarly have less force in pre-suppression hearing discovery, when seen as a tool designed to uncover police abuses of constitutional rights and police perjury. However, case-by-case solutions by the courts are likely to be ineffective. Congress, therefore, has the constitutional duty and, under Section 5 of the Fourteenth Amendment and other constitutional provisions, the constitutional authority to

37. For the authorities supporting the arguments summarized in the remainder of this introduction, and for a more detailed defense of those arguments, see infra Part IV.
act. Indeed, I will argue, state legislatures have a similar duty to
cure this problem.38

While the implications of my argument may be numerous, I
focus on three current illustrative legal doctrines that are
inconsistent with the conception of an informed citizenry
defended here. First, an officer’s averments in an affidavit
supporting probable cause to search or seize are presumed true,
and the defense bears a high burden of proving otherwise in
challenging the legality of a search with a warrant.39 It is
inconsistent with the informed citizen idea, however, to impose
this burden on the defense and deprive it of the tools—wide-
open discovery methods—for exposing police perjury or
recklessness to the light of day.

Second, and related to the first point but arising in
warrantless searches, is the well-documented problem of police
“testifying.”40 “Testifying” is the practice of police officers who
perjure themselves in a way that brings their conduct in
searching or seizing evidence within a recognized “exception”
to the warrant or other Fourth Amendment requirements.41
Testifying is often suspected—as where a judge notices that
many officers claim that a defendant “abandoned” contraband—
but is notoriously hard to prove, leading commentators to
recommend some arguably radical solutions.42 Broader
discovery would give the defense the tools necessary to expose
egregious testifying.

detailing defense of the argument that the Constitution can grant authority to, and
impose corresponding obligations on, Congress and state legislators to act even where
the Court may not.

39. See Franks v. Delaware, 438 U.S. 154, 171-72 (1978); TASLITZ & PARIS, supra note
29, at 193-96.

40. See Christopher Slobogin, Testifying: Police Perjury and What to Do About It, 67
U. COLO. L. REV. 1037, 1040 (1996) (defining “testifying”); CITY OF NEW YORK,
COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-
CORRUPTION PROCEDURES OF THE POLICE DEPT', COMMISS'N REPORT 38 (1994) (Milton
Mollen, Chair) [hereinafter MOLLEN REPORT].

41. See Slobogin, supra note 40; infra Part V.A.

42. See Slobogin, supra note 40, at 1042-43, 1045 (cataloguing types of police lies and
noting judicial failure to correct these obvious injustices); infra Part V.A. Professor
Slobogin has recommended abolition of the exclusionary rule as one way, among others,
to reduce police officer’s incentives to lie about how they conduct searches and seizures,
a perhaps popular but unquestionably radical solution to the police perjury problem. See
Slobogin, supra note 40, at 57-59.
Third, the Court apparently considers evidence of a police officer's racism irrelevant in resolving Fourth Amendment questions. Yet the dangers of harm from police officer racism, and the perception of such harm by minority communities, are acute. The Court has responded by suggesting that redress is possible under the Fourteenth Amendment's Equal Protection Clause rather than the Fourth Amendment. But the Court has created a burden of proof for obtaining discovery in civil rights suits under the Equal Protection Clause that is so high as to render this "remedy" for police racism meaningless. Once the informed citizen function of the Fourth Amendment suppression hearing is understood, both the Court's imposition of a high burden for civil discovery in civil rights cases and its shifting of the remedy for police abuses away from the criminal suppression procedure and toward the civil tort system seem constitutionally unjust. The Court's decisions rendering police racism irrelevant under the Fourth Amendment should be overruled.

This Introduction has offered an overview of the nature of the problems to be addressed. Part I explains the meaning of the "informed citizen" concept as understood by the Framers. Part II examines the embodiment of that concept in the Bill of Rights. Part III explores the role of informed citizen ideas in the Fourth Amendment, first as originally understood, then as understood by the Reconstruction Congress. Part III also responds to potential critics of my approach to constitutional interpretation. Part IV develops the idea of "monitorial citizens," specialized citizen watchdogs needed to give informed citizenry impulses modern expression. Part V examines the implications of the monitorial citizen concept for claims of police lies or recklessness in search warrant affidavits, testifying, and racism. Part VI outlines the contours of a solution for these problems.

44. See Taslitz & Paris, supra note 29, at 396-418.
45. See id. at 411-12.
46. See United States v. Armstrong, 517 U.S. 456 (1996) (holding that to obtain discovery in a civil case based on alleged equal protection violations, a plaintiff must first show both that the plaintiff was singled out for prosecution on the basis of race and that other similarly situated individuals of different races were not prosecuted); infra Part V.C.
further explaining why the solution lies with the legislatures, not the judiciary.

I. THE IDEOLOGY OF THE INFORMED CITIZEN

The ideology of the informed citizen has deep roots in British and colonial political thinking. This ideology viewed ignorance as opening the way to tyranny. In the words of William Livingston, a mid-eighteenth century New York author, "the Strength of a People ... [has] always been the Consequence[ ] of the Improvement and Cultivation of their Minds." But this cultivation, said Livingston, served political purposes, for when men know their rights, "they will at all Hazards defend them, as well against the insidious Designs of domestic Politicians, as the undisguised Attacks of a foreign Enemy..." This strain of thought—that the minds of even the lower ranks must play a prominent role in political thought—was then unconventional. But the informed citizen ideology gained

47. See generally Richard D. Brown, The Strength of a People: The Idea of an Informed Citizenship in America 1850-1870 (1996), on which I rely for much of my analysis of the informed citizen ideology. Note that I articulate an ideology, not whether in practice the people were adequately informed. While the ideology has changed over time, not all have agreed about the meaning and purpose of being informed, though "[f]or at least two centuries, Americans have believed in the idea that citizens should be informed in order to be able to exercise their civic responsibilities wisely." Id. at xiii. Indeed, the ideology that was widely proclaimed by notable leaders at the republic's birth quickly became a central theme in American political life, and, by the Civil War era, "had grown into an article of national faith." Id. Here I paint with a broad brush, emphasizing dominant themes that helped to define this ideology without exploring all the variations on its meaning throughout our history, a task already ably performed by Professor Brown and one unnecessary to my argument. I wish only to give a sense of the ideology's meaning, with a more central focus in later sections of this Article on the ideology's role in American thinking about search and seizure.

48. See generally id. at 1-84.


50. Id. On the other hand, said Livingston, when men have been uninformed, "triumphant Ignorance [opens] its Sluices, and the Country [overflows] with Tyranny, Barbarism, ecclesiastical Domination, Superstition, Enthusiasm, corrupt Manners, and an irresistible confederate Host of Evils, to its utter Ruin and Destruction." Id.

51. See Brown, supra note 47, at 39-40. The implicit assumption at the time, however, was that women, African-Americans, and Native Americans were excluded from the active political community, and, thus, not in need of being informed. See id. For women, unlike African-Americans and Native Americans, there were possibilities in education, albeit ones focused on competing in the marriage market and on household
ground in the colonies between 1763 and 1775, when self-styled colonial gentlemen sought to resist a series of British Parliamentary acts and administrative policies. These gentlemen included planters, merchants, and almost everyone with a college degree, as well as master tradesmen, like shipbuilders, printers, and iron masters. What these gentlemen discovered was that mobilizing broad-based opposition among the citizenry by legislative resolutions, public meetings, newspapers, and pamphlets was a powerful political tool in resisting royal administrations.

But the intellectual elites among these gentlemen also saw theoretical value in creating informed citizens, for “they would always know their rights and not fall prey to the machinations of tyrants.” Before Independence, John Adams and Thomas Paine were the leading exponents of this view.

Adams, in his Dissertation on the Canon and Feudal Law, explained that under widespread monarchy the people “were little higher... in the scale of intelligence than the Camells and Asses and Elephants.” But history shows that “whenever... a general [k]nowledge and sensibility have prevailed among the People, Arbitrary Government and every kind of oppression, have lessened and disappeared in [p]roportion.” Adams believed that the people had a divine right to knowledge of the “characters and conduct of their rulers.” This right was more important among the lowest ranks than all the property of all the rich men in the country.

Paine’s anonymous pamphlet, Common Sense, was not only directed at a wide audience of common men, but also at an

management. See id. At the same time, the perceived ignorance of these groups was often seen as justifying their exclusion from, and subordination by, the active political community. See id. at 43-44.

52. See id. at 52-54.
53. See id.
54. See id.
55. Id. at 54.
56. See id. at 54-58.
58. Id.
59. Id. at 120-21.
60. See id. at 121.
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elevated citizenry of gentlemen and masters of business. Its impressive success—circulating into perhaps 100,000 homes—was clear evidence that the idea of an informed common man had gained general currency. Paine's tract mattered, therefore, more for what it assumed than what it said about an informed citizenry. But the tract showed an ambitious faith in that ideology, challenging not so much particular wrongs by the British, but the entire political system, seen as "too rotten, too corrupt to ever be corrected." Once revolutionary leaders achieved independence and the process of forming republican Governments was under way, they began to widely recognize the significance of the groundwork laid by Adams and Paine. Reliance on an informed citizenry now gripped the revolutionary political imagination, as leaders set about creating institutions that would make the informed citizenry a permanent feature of the new society. These institutions included free speech and press; the Post Office, which permitted cheap and speedy dissemination of information; the churches, whose role was disputed, but viewed by many as an effective channel for informing the citizenry; schools, colleges, and universities; libraries; and learned societies. The state was seen by many as playing a particularly vital role in creating, encouraging, and protecting these institutions' informational roles.

61. See BROWN, supra note 47, at 63-65 (explaining importance of Paine's pamphlet). Paine's anonymous pamphlet was first printed in Philadelphia in January 1776, but was "then reprinted up and down the coast until by the end of the year it had gone through nineteen American editions, with a total of perhaps 150,000 copies printed." Id. at 64. See generally THOMAS PAINE, COMMON SENSE (Isaac Krammick ed., 1976).

62. See BROWN, supra note 47, at 64-65. John Dickinson's Letters From a Farmer in Pennsylvania, published in Philadelphia during the Fall and Winter of 1767-68, also did much to propel the informed citizen idea forward. See id. at 58-59. Dickinson adopted the persona of a liberty-loving farmer, a rhetorical strategy that proved to be exceptionally popular. See id. at 59. "Central to the legitimacy and authority of the farmer was his self-proclaimed stature as an independent, informed citizen . . . ." Id.

63. See id. at 64.

64. Id.

65. See id. at 66.

66. See id.

67. See id. at 67-84.

68. See id. at 83, 85-86.
There was, however, dispute over the purpose of citizen political education. 69 Most agreed on the watchdog role: "a broad base of discerning, watchful citizens who would be qualified to choose wisely among their liberally educated leaders." 70 The informed citizen would choose virtuous rulers, and if they misbehaved, rout them at the next election. 71 But the republican system was still an elitist one, for the representatives needed greater education to enable informed deliberation about the issues of the day. 72 While the elite might also have had an obligation to use superior learning to aid in broader dissemination of knowledge, the people as a whole were expected to play little role in daily governance. 73

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69. See id. at 68-80. One of the principal differences was over the proper place of religion in a republican society. Evangelicals believed knowledge of Christ's message promoted unselfish, virtuous citizens, and many mainstream Protestants held a similar view. See id. at 80-81. Others, like Jefferson, favored greater separation between church and state, focusing more on the value of information in monitoring the state. See id. at 77, 82-83.

70. Id. at 77 (describing Jefferson and Madison's reasons for favoring widespread education in Virginia in the 1779 Bill For the More General Diffusion of Knowledge).

71. See id. Thus, Jefferson justified the need for public schooling to promote political understanding among common men: "It will avail them of the experience of other nations; it will qualify them as judges of the actions and designs of men; it will enable them to know ambition under every guise it may assume; and knowing it, to defeat its views." Thomas Jefferson, Notes on the State of Virginia, in 4 THE WRITINGS OF THOMAS JEFFERSON 61, 64 (Paul Leicester Ford ed., 1804-05).

72. See BROWN, supra note 47, at 74-77, 85-86.

73. See MICHAEL SCHUDSON, THE GOOD CITIZEN: A HISTORY OF AMERICAN CIVIC LIFE 72, 81-89 (1988). Professor Schudson is more skeptical than Professor Brown about the function of informed citizen ideology. Schudson notes that the Founders' rhetorical praise of an informed citizenry was often accompanied by practices that showed a fear of the wide diffusion of knowledge. See id. at 70-72. For example, few of the Founders supported public involvement in education, and those who did, like Jefferson, had limited objectives for the common man. See id. at 71-72. Schudson suggests that this apparent inconsistency can be resolved by seeing the Founders' promotion of an informed citizenry as a way to create a compliant populace. See id. at 71. Some support for this view comes from the fear of some Founders that a growing popular disrespect for higher education in the mid-1700s "would lead to rule by parochial, self-interested demagogues." BROWN, supra note 47, at 78. For Schudson, a serious concern with an informed citizenry arose only with the Alien and Sedition Act crisis, in which Founders such as Madison discovered a passion for free speech that they previously lacked; the current form of the ideology, Schudson argues, took hold only in the Progressive era. See SCHUDSON, supra, at 5-6, 69-81. Furthermore, according to Schudson, the type of knowledge the Founders expected of common people was limited, a local knowledge not of laws or principles but of the character of potential leaders. See id. at 81. Brown's view is more generous, noting that the Founders expected citizens to have a knowledge of public affairs, although it was disputed for two generations whether only a knowledge
Some, like Jefferson, were still ambivalent; they favored widespread public deliberation and debate about critical issues before their representatives acted. Such debate helped to create a political community and supplement electoral control as a way to limit the play of elected leaders’ self-interest. Virtually all agreed, however, that an informed citizenry was necessary to safeguard the historic fragility of republican Governments. Such a citizenry required information, a right of access that served as the guardian of other rights. To be sure, this broad agreement on many of the basic principles of the informed citizen ideology did not mean that those principles were consistently put into practice. Cramped notions of what “free” speech and press meant, as evidenced by the 1798 adoption of the Sedition Act, especially plagued the early republic. But the ideology had a life of its own, becoming a

of one’s rights or instead of a more comprehensive body of knowledge was required. See Brown, supra note 47, at 88. Both Brown and Schudson agree, however, that the Founders’ rhetoric favored informed citizens as Government watchdogs. Additionally, I will argue that at the time of the adoption of the Reconstruction Amendments, informed citizen rhetoric had particular force among both the elites and the common man that in at least one area—combating oppressive searches and seizures—belie a cynical interpretation. See infra Part III.B.

14. See Cass R. Sunstein, Government Control of Information, 74 Cal. L. Rev. 889-94 (1986). This observation does not mean that Jefferson expected or desired the citizenry to be actively involved in Government. Rather, widespread public debate serves as a safeguard against abusive Government in two ways: first, public discussion supplements electoral control as a way to ensure against representatives acting in their self interest rather than the people’s interest; second, critical public scrutiny reduces the likelihood that powerful factions will dominate Government processes, thus, rendering Government decisions the “product of public deliberation rather than factional pressure.” Id. at 892. But see Schudson, supra note 73, at 88-89 (describing Jefferson’s theory of Government as assuming a relatively passive citizenry yet conceding that he and Madison “expected and hoped . . . that public opinion would find its voice in and through the formal institutions of Government”).

75. See Sunstein, supra note 74, at 891-82.

76. See Brown, supra note 47, at 85-86.

77. The phrase “the guardian of every other right” has traditionally been associated with rights in property. See James W. Ely, Jr., The Guardian of Every Other Right: A Constitutional History of Property Rights (2d ed. 1998). But a fair reading of the history of the idea of the informed citizen shows that, at least at the level of rhetoric, the rights of each citizen and of the citizenry as a whole were also seen in part as serving a guardian function. See generally Brown, supra note 47.

78. Professor Schudson has indeed argued that the failure of the founding generation to do much to make informed citizens a reality suggests a cynical interpretation of their lofty rhetoric as but another means of social control. See supra note 73 and accompanying text.

79. See Brown, supra note 47, at 90; Schudson, supra note 73, at 54-81. The Sedition
central theme in American political life, and, over time, expanding the scope of citizen entitlement to information, its function, and even the definition of citizenship.\footnote{See Brown, supra note 47, at 80; Schudson, supra note 73, at 54-81 (documenting many Founders’ narrow notions about free speech). Even Madison articulated more generous notions of speech’s constitutional role only at the end of the Sedition Act crisis, for only then “did Americans boldly embrace a free press as a necessary bulwark of a liberal civil order.” Cf. Brown, supra note 47, at 88 (“In truth, Jefferson, like many others of his generation, was ambivalent about newspapers and the consequences of a free press.”); see also SILENCING THE OPPOSITION: GOVERNMENT STRATEGIES OF SUPPRESSION 1-17 (Craig R. Smith ed., 1996) (documenting the election of President Jefferson, who was inaugurated in 1801, as constituting in part a rejection of the view that limited protection is due to free speech, a view that led to the despised Sedition Act).}

However, the informed citizen ideology had troubling applications at times. It became an excuse for excluding the illiterate as uninformed and even free Blacks, given the racist assumptions of the day, as incapable of becoming informed.\footnote{See Brown, supra note 47, at 156-62. The informed citizen ideology never had the strength in the South that it had in the North and in the South took an especially racist turn (though such racism was evident in the North as well). See id. at 112, 156-62.}

Furthermore, there seemed little point in informing those, such as women, who could not vote.\footnote{See id. at 157-60.} If women were to be educated, it was in the ways of raising virtuous sons, who could then mature into active citizens.\footnote{See Mark E. Kann, A Republic of Men: THE AMERICAN FOUNDERS, GENDERED LANGUAGE, AND PATRIARCHAL POLITICS 80-84, 96-100, 173-77 (1998) (noting that republican manhood, in the Founders’ view, required husbands to govern their wives, whose primary function as republican citizens was to be the moral monitors and civic educators of the family); Brown, supra note 47, at 184-85 (citing the belief that women should be informed only as is necessary to enable them to positively influence the active citizens—their husbands and sons).}

Yet, this same ideology became a source of resistance by subordinated groups.\footnote{See Brown, supra note 47, at 154-95.} African-Americans in particular began to argue that they were entitled to equal and active citizenship because they were as fully capable as Whites of becoming informed. It was the social circumstance of slavery, not any innate incapacity, that barred their learning.\footnote{See id. at 157, 170-75, 188-95.
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and slavery, knowledge and freedom are inseparably connected. The argument, of course, had little lasting effect, and it was especially inconsistent with growing Southern neoclassical republicanism, which openly repudiated the vision of equal human worth embodied in the Declaration of Independence. While the Civil War and Reconstruction did not come close to ending racism, the Reconstruction Amendments did reject one of racism's most virulent forms, the argument of total black incapacity. The Thirteenth, Fourteenth, and especially Fifteenth Amendments rejected the idea of a black incapacity so extreme as to be unable to comprehend politics or responsibly exercise the vote.

More liberal justifications for citizen knowledge increasingly supplemented, and eventually eclipsed, the informed citizen republican political ideology. Knowledge was seen as a route to personal fulfillment, social and economic advancement, and entertainment. We will see, however, that the informed citizen

86. The Reverend Samuel Stillman, Feb. 6, 1788, in CONNECTICUT COURANT, Mar. 31, 1788, at 2.
87. See BROWN, supra note 47, at 154-95.
88. See id. at 158-58, 179-85. Working men campaigning in the North against long hours argued that limited time and exhaustion made it impossible for them to be informed citizens. See id. at 158-59. They compared their lot to peoples of color as a way to help win their cause: "The inferiority of our colored population," they argued, "arises chiefly from their ignorance; and were the whites deprived of their present opportunities of knowledge, they would soon relapse into the degradation and barbarism of the enslaved African and the savage Indian." Id. at 159 (quoting To the Citizens and Legislators of the United States of America, Feb. 22, 1833, at 3-4).
90. See BROWN, supra note 47, at 205-06. Professor Brown divides the history of the informed citizen idea into four periods: (1) the Revolutionary Era, in which the goal was to recognize and confront the approach to tyranny; (2) the Early Republic, in which being informed also became important for choosing wiser, and thus even more informed, rulers; (3) the 1830s through the adoption of the Reconstruction Amendments, in which citizens informed about particular issues were to organize to elect servants to do their bidding on cultural issues, and being informed was seen to aid occupational, cultural, and recreational self-interest, in addition to serving a political function; and (4) today, in which economic competitiveness, cultural diversity, and plebiscitary democracy are offered as further justifications for the informed citizen idea. See id. In Brown's view, the failure of women to achieve suffrage in the Fifteenth Amendment
idea still had a profound impact on Reconstructionist thinking about the polity, especially about search, seizure, and arrest.\footnote{See id. at 188-95. But even if Brown’s observations are correct—and an alternative reading is simply that patriarchal ideology had an even stronger appeal than Republican ideals—that does not alter the powerful role that informed citizen concepts played in the events leading up to adoption of the Reconstruction Amendments, as the rest of this Article demonstrates. Brown also argues that we should create an ideology of deference toward elected leaders of high character who are better informed than the average citizen, yet committed to raising the citizen’s level of knowledge. I too will argue for the relevance of specialized knowledge by certain citizens, but, unlike Brown, I do not see information specialization as justifying deference to elected leaders so much as altering the ways in which informed citizens can most effectively guard against Governmental abuses. See infra Part IV.} Moreover, the political aspects of the ideology have continued to have both rhetorical and practical political force. They have played a role in the rise and decline of parties, the expansion of the electorate, the growth of economic competitiveness, struggles for plebiscitary democracy, and growing respect for subordinated racial, ethnic, and religious groups in a multicultural society.\footnote{See infra Part III.B.} Furthermore, the informed citizen ideology was enshrined in the Bill of Rights, particularly as the Bill later came to be understood, and as it was redefined by the Civil War, America’s “second revolution.”\footnote{See supra note 47, at xiii-xvii, 186-207.}

II. THE BILL OF RIGHTS: INSTITUTIONALIZING THE INFORMED CITIZEN IDEOLOGY

The Bill of Rights, when read holistically,\footnote{See supra note 47, at xiii-xvii, 186-207.} reveals a fundamental concern with an informed citizenry. Evidence of the Framers’ intentions, the changing constitutional culture in the nineteenth and twentieth centuries, and an exploration of demonstrated that the informed citizen ideal at that moment became more rhetorical ideal than reality, because many woman who lacked the vote were more informed than many men who had the right to vote. See id. at 188-95. But even if Brown’s observations are correct—and an alternative reading is simply that patriarchal ideology had an even stronger appeal than Republican ideals—that does not alter the powerful role that informed citizen concepts played in the events leading up to adoption of the Reconstruction Amendments, as the rest of this Article demonstrates. Brown also argues that we should create an ideology of deference toward elected leaders of high character who are better informed than the average citizen, yet committed to raising the citizen’s level of knowledge. I too will argue for the relevance of specialized knowledge by certain citizens, but, unlike Brown, I do not see information specialization as justifying deference to elected leaders so much as altering the ways in which informed citizens can most effectively guard against Governmental abuses. See infra Part IV.

91. See supra note 47.
92. See supra note 47, at xiii-xvii, 186-207.
93. See supra note 47, at xiii-xvii, 186-207.
94. See supra note 47, at xiii-xvii, 186-207.
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the functions served by the Bill’s provisions, and the gloss placed upon them by the Court, reflect that concern.95

Indeed, the mere existence of the Bill was meant in part to teach “maxims by which every wise and enlightened people will regulate their conduct . . . ,”96 maxims that, “as they become incorporated with the national sentiment, counteract the impulses of interest and passion.”97 James Madison, in advocating the Bill, a concept he originally opposed,98 explained that “[w]henever] usurped acts of the Government [occur] . . . , a bill of rights will be a good ground for an appeal to the sense of the community.”99 The people, in other words, aware of their rights, would monitor the Government for abuses and act to correct them. Said Madison: “The people who are the authors of this blessing [the Constitution], must also be its guardians.”100

The Bill helped create the institutions necessary to make the informed citizen a permanent part of the constitutional landscape.101 The First Amendment most obviously did so. While at the time of its adoption, the freedoms of speech and press

95. See infra Part III.C (explaining and justifying further my approach to constitutional interpretation).


97. 11 PAPERS OF JAMES MADISON 298-99 (Robert A. Rutland et al. eds., 1983) [hereinafter MADISON PAPERS].


99. MADISON PAPERS, supra note 97, at 299.

100. 14 THE PAPERS OF JAMES MADISON 218 (Robert A. Rutland et al. eds., 1983). Madison did not, of course, argue that an informed citizenry alone was an adequate safeguard of rights. Rather, he also stressed the need for Governmental structures to limit both majoritarian and Governmental abuses (on the former point, we will see, he was ahead of his time). See MOORE, supra note 98, at 152-67. Moreover, he considered judges and state legislatures as important bodies that would “appeal to the sense of the community” if the federal Government overstepped its bounds. Id. at 167. But he still viewed an informed public opinion as central to sound republican Government. See id. at 168. This position is best understood as reflective of the Founders’ general concern with an informed citizenry. See generally BROWN, supra note 47, at 49-99 (commenting on Founders’ general rhetorical commitment to an informed citizenry); see also AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 131-33 (1980) [hereinafter AMAR, BILL OF RIGHTS] (explaining Madison’s and Jefferson’s commitments to a politically educated people as guardians of liberty).

101. See AKHIL REED AMAR & ALAN HIRSCH, FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS xii-sv (1998) (citing the importance to the Bill’s Framers of informed people at large, juries, and militia); AMAR, BILL OF RIGHTS, supra note 100, at 133 (describing church, militia, and jury as constitutionally-protected devices for educating a sovereign populace).
may have received narrow interpretations, after the Sedition Act those freedoms were seen more generously and came to more clearly reflect George Mason’s view, concerning the 1776 Virginia Declaration of Rights, that "freedom of the Press is one of the greatest bulwarks of liberty, and can never be restrained but by despotick Governments." Free speech and press promoted the flow of information that enabled citizens to choose and monitor their representatives wisely. Rights of petition, assembly, and association similarly empowered the people to hear and learn from one another, to seek to hold the Government accountable, and to expose abuses to the light of day. Freedom of religious conviction and from an established church further empowered the clergy to educate citizens of Republican virtue, watching for Government efforts toward an oppressive orthodoxy.

Too often ignored or minimized, however, is the important role that the Bill’s criminal procedure provisions play in promoting an informed citizenry. Many of these provisions cluster around two specific protections: the rights to a public trial and to a trial by jury.

A public trial involves the citizenry more actively in the daily monitoring of Governmental abuse than do periodic elections. The open nature of trial proceedings makes it hard for judges to give in to partiality. Public scrutiny of witnesses, of course, makes it harder for them to lie because any member of the public gallery stands ready to challenge the perjury, as our modern press does every day. This also makes it harder for Government officials or friends of judges to hide their own

102. See supra note 78 and accompanying text.
104. See AMAR, BILL OF RIGHTS, supra note 100, at 20-26; BROWN, supra note 47, at 87-91.
105. See AMAR, BILL OF RIGHTS, supra note 100, at 28-32.
106. See id. at 32-45; see also BROWN, supra note 47, at 68 (making a similar point but noting the dispute among the Framers about the proper role of organized religion in a republican state).
108. See AMAR, BILL OF RIGHTS, supra note 100, at 110-14.
109. See id.
misbehavior. The public’s scrutiny adds to that of the jury’s to prevent the injustices that stem from private and secret examinations.

The Confrontation Clause was similarly designed to aid, by public disclosure, in “making crucial workings of the Government visible and keeping the overwhelming prosecutorial powers of the government in check.” Cross-examination accomplishes this because it helps to bring out more information than the Government would otherwise make available. Blackstone clearly linked the Confrontation Clause and public trial ideas to serve these purposes:

The oath administered to the witness is not only that what he deposes shall be true, but that he shall depose the whole truth . . . . And all this evidence is to be given in open court, in the presence of the parties, their attorneys, the counsel, and all by-standers; and before the judge and jury.

This open examination of witnesses viva voce, in the presence of all mankind, is . . . conducive to the clearing up of the truth . . . . Besides, the occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled: and the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial.

The Compulsory Process Clause serves a similar function by allowing the defendant to use his or her own witnesses, “to tell the jury and the gallery what the prosecutor’s witnesses had left out.” The right to counsel was, of course, necessary to make any of this work, for there is no reason to believe that even the most intelligent of defendants will be skilled in witness examination or learned in courtroom procedure and rules of evidence. The modern Court has similarly extended the Sixth Amendment right to the assistance of counsel so that an

110. See id.
111. See id.
114. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 372-73 (1765).
115. AMAR, BILL OF RIGHTS, supra note 100, at 115.
116. AMAR, FIRST PRINCIPLES, supra note 107, at 138-39.
indicted defendant’s uncounseled statements may not be induced by the Government, thus demonstrating a concern with the Government’s ability to shape evidence in secret through inquisitions.\footnote{See Massiah v. United States, 377 U.S. 201 (1964); Berger, supra note 25, at 588-87 (interpreting Massiah); Taslitz, supra note 25, at 123 (applying this reading of Massiah to principles of discovery of expert witness’s opinions in criminal cases).} Similarly, the Court has held that there is a Sixth Amendment right to counsel at a post-indictment lineup because of the danger that an improperly conducted lineup arranged by the Government will result in a secretly-induced suggestive identification.\footnote{See United States v. Wade, 388 U.S. 218 (1967); Taslitz, supra note 25, at 123 (interpreting Wade).}

The modern understanding of the Fifth Amendment extends precautions against the State’s secret shaping of evidence to the pre-indictment phase. In \textit{Miranda v. Arizona},\footnote{384 U.S. 436 (1966).} the Court required the police to give warnings that educate the suspects about, and show respect for, their privilege not to speak.\footnote{See id.} Those warnings have been widely effective in educating the public more generally about their rights.\footnote{See Lawrence M. Friedman, \textit{Crime and Punishment in American History} 303-04 (1993).} The \textit{Miranda} decision also created a Fifth Amendment right to counsel during custodial interrogation, even in the pre-indictment phase.\footnote{See Taslitz & Paris, supra note 29, at 666.} In the Court’s view, counsel would, in part, serve as a monitor who could bring to light any police abuses. The mere shaming of that light would deter police misconduct. “With a lawyer present the likelihood that the police will practice coercion is reduced and if coercion is nevertheless exercised the lawyer can testify to it in court.”\footnote{Miranda, 384 U. S. at 470-71.} Modern critics of \textit{Miranda} often accept the case’s underlying theme that opening police practices to public scrutiny deters abuse, but they contend that other methods better deter abuse. Professor Paul Cassell, for example, while critical of the \textit{Miranda} rules, would replace them with videotaping and a revised set of warnings.\footnote{See Paul G. Cassell, Miranda’s Social Costs: An Empirical Reassessment, 90 NW. U. L. REV. 387, 493-97 (1996).} He rejects \textit{Miranda}’s insistence on an affirmative waiver requirement and

\begin{footnotes}
\item[117.] See Massiah v. United States, 377 U.S. 201 (1964); Berger, supra note 25, at 588-87 (interpreting Massiah); Taslitz, supra note 25, at 123 (applying this reading of Massiah to principles of discovery of expert witness’s opinions in criminal cases).
\item[118.] See United States v. Wade, 388 U.S. 218 (1967); Taslitz, supra note 25, at 123 (interpreting Wade).
\item[119.] 384 U.S. 436 (1966).
\item[120.] See id.
\item[121.] See Lawrence M. Friedman, Crime and Punishment in American History 303-04 (1993).
\item[122.] See Taslitz & Paris, supra note 29, at 666.
\item[123.] Miranda, 384 U. S. at 470-71.
\end{footnotes}
a Fifth Amendment right to counsel, but not the need for citizen
watchfulness. 125 Other critics, such as Professor Akhil Amar,
support many of Miranda's goals, but complain that the case
breached its "promise to open up the black box of the police
station ... ." 126

Professor Amar would also recast our current understanding
of the core right on which Miranda was based—the Fifth
Amendment privilege against compelled self-incrimination or
"right to silence." 127 He would read the Amendment, based upon
its text, history, and function, as protecting against the use of
suspects' statements against them at trial, but not against using
physical evidence and other fruits from those statements. 128
Furthermore, he would view interrogation as a Fourth
Amendment search, permissible only upon a showing of
probable cause. 129 Whether or not Amar's reading is right, it is
consistent with informed citizenry concepts. The state must
publicly and adequately justify its reasons for interrogations. 130
Moreover, because defendants can be interrogated prior to trial,
Amar would use depositions and pre-trial judicial examinations,
rather than secret police interrogations, under the judiciary's
(and, in the world of modern technological media, the public's)
watchful eye. 131

The second cluster of provisions that promote an informed
citizenry centers on the petit and grand jury. For the Framers,
the criminal jury was fundamentally a political institution,

125. See id.
126. AMAR, FIRST PRINCIPLES, supra note 107, at 56.
127. See U.S. CONST. amend. V; George C. Thomas III, The Twenty-First Century: A
(Richard A. Leo & George C. Thomas III eds., 1986) (characterizing Miranda's reading
of the Fifth Amendment as creating a "right to silence," a phrase that does not appear
in the Constitution).
128. See AMAR, FIRST PRINCIPLES, supra note 107, at 70-77.
129. See id. at 87.
130. Under the Fourth Amendment, a seizure must be "reasonable," which, under
present case law, is presumed to require probable cause and a warrant or good reasons
for departing from those requirements. See TASLITZ & PARIS, supra note 29, at 150-57,
183-97, 290-91. A warrant requires the state to articulate persuasive reasons for
permitting it to act before it does so. See id. at 207-24. But even where a warrant is not
required, the state will have to publicly justify its actions later, at a suppression hearing.
See infra Part IV.
131. See AMAR, FIRST PRINCIPLES, supra note 107, at 87.
embodying republican self-Government.\textsuperscript{132} Jury service teaches citizens their rights and duties, while requiring their active participation in Government.\textsuperscript{133} The Anti-Federalists, whose efforts led to the addition of the Bill of Rights, put it thus in the \textit{Federal Farmer} essay: "[T]he people's] situation, as jurors and representatives, enables them to acquire information and knowledge in the affairs and Government of the society; and to come forward, in turn, as the sentinels and guardians of each other."\textsuperscript{134} Jury service was linked closely to the right to vote, its "fraternal twin." Tocqueville explained:

The jury system as understood in America seems to me as direct and extreme a consequence of the . . . sovereignty of the people as universal suffrage. They are both equally powerful means of making the majority prevail . . . . [T]he jury is above all a political institution [and] should be made to harmonize with the other laws establishing the sovereignty . . . . [F]or society to be governed in a settled and uniform manner, it is essential that the jury lists should expand or shrink with the lists of voters. [In general, in America all citizens who are electors have the right to be jurors.\textsuperscript{135}

Just as voters must be informed to choose and monitor wise rulers, so must jurors be fully informed at trials to make wise judgments.\textsuperscript{136} But, via the public trial protections, what the juries learn will educate the public as well.\textsuperscript{137} In so doing, jurors, ordinary citizens drawn from the community, check Governmental wrongdoing, serving in the words of an Anti-Federalist pamphlet, as "sentinels and guardians" of the people.\textsuperscript{138} Another Anti-Federalist pamphlet further explained:

"Judges, unincumbered [sic] by juries, have been ever found much better friends to Government than to the people. Such

\textsuperscript{132} See AMAR & HIRSCH, supra note 101, at 51-88.
\textsuperscript{133} See id.
\textsuperscript{135} ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 293-94 (Phillips Bradley ed., 1946).
\textsuperscript{136} See AMAR, BILL OF RIGHTS, supra note 100, at 83-84, 83-94 (commenting that informed jurors help to prevent Governmental overreaching).
\textsuperscript{137} See id. at 93-96.
\textsuperscript{138} See id. at 83-96, 104-08.
judges will always be more desirable than juries to [would-be tyrants], upon the same principle that a large standing army . . . is ever desirable to those who wish to enslave the people."  

The grand jury, at least as originally conceived, played an even greater informational function. The grand jury could thwart unfounded prosecutions, especially those used by incumbents against their critics. Colonial grand juries twice refused to indict publisher John Peter Zenger, who was later acquitted by a petit jury when the Government instead proceeded by information. Grand juries of the 1760s and 1770s also refused to indict Stamp Act protestors and other rebellious speakers.

Most important, the grand jury had the power of presentment—a document publicly stating its accusations. Through this document, the grand jury could publicize suspicious government non-prosecution decisions. Furthermore, "[t]hrough presentments and other customary reports, the American grand jury in effect enjoyed a roving commission to ferret out official malfeasance or self-dealing of any sort and bring it to the attention of the public at large." James Wilson said of the grand jury:

All the operations of Government, and of its ministers and officers, are within the compass of their view and research. They may suggest publick [sic] improvements, and the modes of removing publick inconveniences: they may expose to publick inspection, or to publick punishment, publick bad men, and publick bad measures.

If the modern grand jury often fails in these noble goals, the goals remain, and the grand jury still sometimes succeeds, as in

140. See U.S. CONST. amend. VI.
141. See AMAR, BILL OF RIGHTS, supra note 100, 84-85.
142. See id.
143. See id.
144. See id. at 85.
145. See id. at 85-87.
146. Id. at 85.
the campaign of the "Rocky Flats" grand jury to halt environmental pollution.\footnote{In August 1993, the Justice Department announced a plea bargain with Rockwell Corporation for environmental crimes committed at Rocky Flats. See Jonathan Turley, \textit{A Brave Grand Jury Challenges a Cozy Deal and Does Its Duty}, \textit{Las Vegas Rev.-J.}, Aug. 16, 1993, at B5. The grand jurors were angered at the failure to punish individuals and the imposition of what the jurors saw as too modest a fine. See Mark Obmascik, \textit{Flats Yields No Easy Answers: Past Sheds Light on Toxic Present}, \textit{Denver Post}, Oct. 4, 1997, at C1. Accordingly, contrary to prosecutors' wishes, the grand jurors issued their own report to the supervising federal judge, after having met on their own, outside the presence of the prosecutor, and issued individual indictments that the prosecutors refused to sign. \textit{See id.}}

The Bill of Rights contains one final criminal procedure protection that requires more extended focus: the Fourth Amendment.\footnote{\textit{See U.S. Const. amend. IV.}} That focus will, in turn, require us to more closely examine how the Fourteenth Amendment, and the wrenching political events that led to its adoption, mutated the Fourth Amendment's meaning.

III. THE FOURTH AMENDMENT AS WATCHDOG

\textbf{A. At the Founding}

At its inception, the Fourth Amendment was linked to concepts of an informed citizenry. The Amendment was, in the words of Professor Amar, particularly designed to allow the people to be "watchful of Government efforts to use search-and-seizure powers to interfere with the people's political activities," such as attending political meetings, assembling in convention, and circulating petitions.\footnote{\textit{Amar, Bill of Rights}, \textit{supra} note 100, at 65.} The Amendment was drafted by those well aware of \textit{Wilkes v. Wood},\footnote{98 Eng. Rep. 489 (1763), 19 Howell's State Trials 1153.} a 1763 English case included among the handful of leading search-and-seizure cases on the books in 1789.\footnote{\textit{See Amar, Bill of Rights}, \textit{supra} note 100, at 65-66.} Wilkes, a member of the House of Commons, had used the press to communicate with his constituents and to criticize George III's government. The government reacted with general warrants, breaking into his house and rummaging through his personal papers. He
successfully challenged the legality of those searches and of his subsequent Tower of London imprisonment.\textsuperscript{153} The Founders also likely expected that the jury would play at least some role in protecting the people from an overreaching government's silencing of dissenters like Wilkes by abusive searches and seizures.\textsuperscript{154} In 1787, a Pennsylvania Anti-Federalist essay described trial by jury as "our safest resource" to deter federal constables from excesses such as "pull[ing] down the clothes of a bed in which there was a woman, and search[ing] under her shift" in a quest for stolen goods.\textsuperscript{155} In the Pennsylvania ratifying convention, the Wilkes trial—which was before a jury—was praised as demonstrating that general warrants show how easily judges can be corrupted.\textsuperscript{156} Another Anti-Federalist essayist, Hampden, declared that only juries can protect against the abuse of private citizens,\textsuperscript{157} and royal officials in the 1760s bemoaned customs officials' having "no chance with a jury.”\textsuperscript{158} During the Maryland ratification debates, an essayist summarized the argument:

[S]uppose, for instance, that an officer of the United States should force the house, the asylum of a citizen by virtue of a general warrant, I would ask, are general warrants illegal by the [C]onstitution of the United States? . . . . [N]o remedy has yet been found equal to the task of deterring and curbing the insolence of office, but a jury—[i]t has become an invariable maxim of English juries, to give ruinous damages whenever an officer had deviated from the rigid letter of the law, or been guilty of any unnecessary act of insolence or oppression. [By contrast,] an American judge, who will be judge and jury too [would probably] spare the public purse, if not favour a brother officer.\textsuperscript{159}

Other scholars have argued, however, that by the time of the Fourth Amendment’s ratification, searches and seizures were

\textsuperscript{153} See id. at 65-67.
\textsuperscript{154} See id. at 68-76.
\textsuperscript{155} Essay of a Democratic Federalist, reprinted in The Complete Anti-Federalist, supra note 140, at 58, 61.
\textsuperscript{156} See Amar, First Principles, supra note 107, at 14.
\textsuperscript{157} See id.
\textsuperscript{158} Id.
\textsuperscript{159} Essays by a Farmer (I), reprinted in 5 The Complete Anti-Federalist 27, 70-71 (Herbert J. Strong ed., 1981).
increasingly conducted pursuant to specific warrants, much like those ultimately provided for in the Amendment.\textsuperscript{160} These specific warrants avoided the abuses of general warrants but still immunized the executing officials from suit.\textsuperscript{161} Because all warrants—whether specific or general—were issued by judges in secret ex parte proceedings, immunity meant that no jury trial would bring governmental abuses to light.\textsuperscript{162} Yet, these commentators argue that the Fourth Amendment was drafted in part precisely to express a preference for warrants. If these commentators are right, that might undermine a reading of the Fourth Amendment as committed to promoting an informed citizenry.\textsuperscript{163}


\textsuperscript{161} See Maclin, supra note 160, at 932. While officers making warrantless searches were not immunized, there were nevertheless substantial barriers to bringing a successful tort suit. See \textit{id.} at 932-38.

\textsuperscript{162} See AMAR, BILL OF RIGHTS, supra note 100, at 69 (“Moreover, the warrant proceeding was a secret affair, unlike a tort suit open to the watchful eye of a public able to monitor its judicial agents.”).

\textsuperscript{163} Akhil Amar's reading of history is quite the opposite: that the Framers feared searches pursuant to warrants because they indeed immunized officers from tort suits and jury trials. See AMAR, FIRST PRINCIPLES, supra note 107, at 12-16. Amar's reading is thus more obviously consistent with informed citizen ideology. Amar's critics seem, however, more persuasive in arguing that the Fourth Amendment when originally drafted indeed embodied a warrant preference rule. More precisely, the critics have shown that the Framers' primary concern was to limit promiscuous searches, ones of wide scope or lacking probable cause, and to enforce these limits “with various mechanisms, including independent judicial review.” Morgan Cloud, \textit{Searching Through History; Searching for History}, 63 U. CHI. L. REV. 1707, 1731 (1996). Therefore, judges should fairly be seen as part of the solution. See Maclin, supra note 160, at 938 n.59. Furthermore, the original Bill of Rights more broadly expressed a thematic concern, reflected in revolutionary history, with informed citizen ideas. See supra Part II. Additionally, ante-bellum, Civil War, and Reconstruction history demonstrates a deep concern at the time of the Fourteenth Amendment's adoption with the connection between informed citizen concepts and the law of search and seizure. See \textit{infra} Part III.B. Furthermore, the Fourteenth Amendment's Framers at least viewed Northern juries passionately as an important safeguard against abusive searches and seizures. See \textit{infra} Part III.B. Finally, history's ultimate function in constitutional interpretation should be to discern, where possible, the \textit{values} that led to the text. See, \textit{e.g.}, Maclin, supra note 160, at 958 (making similar argument in Fourth Amendment context). In the modern world, judges, via the suppression hearing, help to serve informed citizenry.
Taslitz: Slaves No More!: The Implications Of The Informed Citizen Ideal 

Such a reading, however, fails to recognize the informed citizen themes permeating the Bill of Rights, which should be read as a whole. Furthermore, most scholars agree that the Amendment, as originally drafted, was intended to deter abusive searches akin to those done pursuant to general warrants, with the dispute centering on when a search is abusive and whether the judge or the jury is better suited to deter abuse. Changed circumstances, however, have led to the failure of the tort system in regulating police behavior, and thus the exclusionary rule and accompanying motion to suppress have largely superceded that system. The suppression hearing brings police abuses to public light in much the same way that an eighteenth-century jury trial did. In addition, warrants and supporting affidavits are generally subject to public exposure and examination. The warrant affidavit then in effect mandates police officers to publicly state adequate reasons that justify their actions. Moreover, under current law, the warrant does not necessarily immunize the police officer from later suit, however unlikely that may be. More
importantly, however, is the increasing link between the Fourth Amendment and informed citizenry ideas revealed by antebellum and reconstruction history.

B. The Abolitionists' Fourth Amendment

1. Free Speech and Press

During the Antebellum period, large percentages of Whites were not slaveholders, and most slaveholders owned only a few slaves. 171 Only a small percentage of citizens, mostly large plantation owners, had large numbers of slaves. 172 This led the large planters in the early Antebellum years to fear universal suffrage, for they worried that Whites with few or no slaves would have little reason to support the slaveocracy. 173 The ultimate spread of universal suffrage, the rising public attention to the abolitionist cause, and fear of their own slaves led them toward an ever-greater hysteria about abolitionist thought. 174 They reacted with repressive measures designed to squelch free speech and press. 175 Unjustified and discriminatory searches and seizures were among their primary weapons for silencing dissenters and promoting citizen ignorance. 176

Bans were imposed on incendiary publications, mail was censored, dragnet sweeps were made of suspected fugitive-slave harborers, outside agitators were excluded, and dissenters were banished. 177 The most infamous banishment case was that of Samuel Hoar, who went to South Carolina with his daughter in 1844 to defend the rights of free Blacks. He was ridden out of

172. See id. at 37-41, 65-88.
175. See Curtis, supra note 174, at 1123-34 (documenting this repression); accord AMAR, BILL OF RIGHTS, supra note 100, at 234-36 (similar).
176. See Curtis, supra note 174, at 1117 ("Republicans invoked rights referred to in the... Fourth Amendment (involving unreasonable searches and seizures aimed at antislavery activists and publications)... to criticize state political repression that the 'slave power' aimed at opponents of slavery.").
177. See AMAR, BILL OF RIGHTS, supra note 100, at 234-35, 287.
town on a rail after the state legislature passed an act of attainder and banishment.178

In 1854, North Carolina provided that a first offense for anti-slavery agitation was punishable by whipping.179 In 1860, the punishment was changed to death.180 Mobs throughout the nation assaulted abolitionists who received no protection from the law.181 The South placed increasing pressure on the North to engage in similar repression.182

The pro-slavery Government of the Kansas Territory similarly made expressing anti-slavery opinions a crime and imposed the death penalty for helping slaves to escape.183 The Governor of Alabama sought extradition of an abolitionist from New York.184

In Virginia, slaves distributing abolitionist literature were to be whipped.185 More importantly, a Virginia statute required postmasters to notify justices of the peace if incendiary documents were found in the mails. The justices were required to burn the documents.186

When Hinton Helper published a book urging immediate abolition in the South, booksellers were arrested for distributing his book.187 Upon learning that a certain Mr. Bryles had a copy of the book, Judge Dick of North Carolina issued a search warrant for Bryles’ home, instructing the sheriff to “search for books.”188 Statutes also allowed the whipping of ministers who advocated anti-slavery gospel.189

178. See id. at 236.
179. See id. at 279.
180. See id.
182. See BERRY, supra note 181, at 55-60.
183. See Curtis, supra note 174, at 1129.
184. See id. at 1131-32.
185. See id. at 1134.
186. See id. at 1134-36.
187. See id. at 1141-42, 1155.
188. See id. at 1162.
189. See id. at 1171.
2. Free Movement and Southern Fears

Repressive searches and seizures were not directed solely at those engaged in blatant political speech. The South had a growing fear of slave revolt and violent retribution.\(^{190}\) That fear was magnified in 1831, after Virginia slave Nat Turner led a revolt in which sixty Whites died before the insurrection was repressed.\(^{191}\) John Brown’s 1859 raid in Harper’s Ferry, aimed at sparking widespread slave rebellion, yet again heightened Southern fears.\(^{192}\) Southerners understood that slave resistance was, like abolitionist speech, expressive conduct. Every slave who successfully fled North sent a message to his brethren that freedom was in their grasp.\(^{193}\) Also, every escaped slave was a potential Frederick Douglass who would use his or her freedom to speak out for the abolitionist cause.\(^{194}\) The South came to see

\(^{189}\) See id. at 1116-17, 1123-25.

\(^{190}\) See Clement Eaton, Freedom of Thought in the Old South 89-117 (Harper & Row 1984) (1940); cf. Johnson & Smith, supra note 181, at 308-12 (numbering white deaths at “at least” 57).

\(^{191}\) See Johnson & Smith, supra note 181, at 421-29, 438.

\(^{192}\) See Oakes, Slavery and Freedom, supra note 173, at 169-70.

Consider the “problem” of fugitive slaves. As resistance went, running away was a modest but consequential act. Its political significance could be direct—as in the fugitive-slave crisis of the 1850’s—or indirect, as when abolitionists used escapes for propaganda purposes. And in some contexts, as we shall see, the political significance of running away could reach revolutionary proportions. In each of these ways, running away contributed to the crisis that divided the United States by forcing the federal Government to take up an issue that the slaveholders wanted left out of national politics altogether.

Id. Oakes also recounts the slaves’ “grapevine telegraph,” their system of gossip that later kept them apprised of the Civil War’s progress and prompted a snowballing fugitive exodus from farms and plantations. See id. at 184-85; see also Johnson & Smith, supra note 181, at 85-86, 165-86 (slaveowners brutally repressed individual slave flight for fear that it would lead to bands of runaways and, thus, organized insurrection; also noting John Adams’ 1775 observation that, even then, the slaves had “a wonderful art of communicating intelligence among themselves; it will run several hundreds of miles in a week or fortnight”).

\(^{193}\) See James Brewer Stewart, Holy Warriors: The Abolitionists and American Slavery 141 (1986) (“In this age of romantic sentimentalism, fugitive slaves turned public speakers made perhaps the most effective black contribution to the crusade against slavery.”); Oakes, Slavery and Freedom, supra note 173, at 173 (“Fugitive-slave narratives are well known . . . for their formulaic quality: the slave too often seethes under the weight of his or her oppression . . . . And finally, . . . [t]he slave escapes and, once secure, works tirelessly to advance the cause of freedom for all slaves . . . .”). See generally Waldo E. Martin, Jr., The Mind of Frederick Douglass 3-108 (1984) (recounting Douglass’ escape from slavery and his subsequent abolitionist career).
every slowdown, breach of rules, minor theft, or other act of "insolence" as a direct threat to the entire social order. Repression thus increased at all levels, taking the form of brutal and legally sanctioned interference with free movement and privacy.

Thus, every Southern state but Delaware established legislation to create and regulate county-wide slave patrols. The primary duty of these patrols was to keep order among slaves and especially to prevent runaways and thefts. While the importance of the patrols waxed and waned over the Antebellum period, they attained special importance during the Civil War. In some states, patrollers could even arrest and summarily punish White persons for keeping company with slaves.

Southern jails also became warehouses for runaways and even for slaves thought likely to try an escape. Many states established procedures to imprison runaways, including Mississippi, which in 1846 required close confinement but permitted jailers to take slaves out to work on public projects. The Fugitive Slave Act of 1850, which made the capture of runaways easier, led to greater visibility of Southern repression in the North.

Anti-literacy laws spread, making it a crime to teach slaves to read and write. In 1833, Florida authorized White citizen

196. See infra text accompanying notes 197-223.
198. See id. at 112.
199. See id.
200. See id.
201. See id. at 110.
202. See id.
203. See Amar, Bill of Rights, supra note 100, at 278-79 ("The infamous federal Fugitive Slave Act of 1850 deprived blacks of some of the most basic fair-trial rights: confrontation, cross-examination, and an unbiased decisionmaker, to name just three."); Berry, supra note 181, at 57-58 (recounting outbreaks of violence in the North after passage of the Fugitive Slave Act as free blacks and whites refused to "countenance the incarceration and reenslavement of persons who had lived among them for years").
204. See Curtis, supra note 174, at 1134.
patrols to search the homes of slaves and free Blacks, seize any firearms found, and summarily punish Blacks who could not offer a proper explanation for the firearms' presence. In 1846, and again in 1861, the Florida legislature provided for such citizen patrols, but also enacted a pass system for free Blacks and slaves. The primary function of the searches and passes was to "terrorize blacks into accepting their subordination." Whipping quickly became the "disciplinary centerpiece of plantation slavery." The law frequently sanctioned these beatings as necessary to social order. Assemblies of slaves, often regardless of the purpose, were prohibited as giving rise to "such circumstances of terror as cannot but endanger the public peace ... ." Other states prohibited assemblages for certain purposes, such as teaching reading and writing, but often made an exception for religious activities. The crime of slave "insolence" more directly linked slave speech and arrest. Frederick Douglass explained that a slave committed this crime "in the tone of an answer; in answering at all; in not answering; in the expression of countenance; in the motion of the head; in the gait, manner and bearing of the slave." One example was the 1851 trial of the slave Sole or Solomon for insolence to patrollers. One patroller testified that Sole used "some very improper or unbecoming language such as asserting his Equality with any man and that he would

206. See id.
207. Id.
208. OAKES, SLAVERY AND FREEDOM, supra note 173, at 167.
209. See MORRIS, supra note 195, at 183 (noting laws appearing to protect slaves from white violence in fact "decriminalized' violence to the extent that it was thought a 'necessary' or 'ordinary' incident of slavery"); WAHL, supra note 197, at 142-51 (stating that there were few legal limits on cruelty toward slaves).
210. MORRIS, supra note 195, at 346 (quoting 1 HAWKINS, TREATISE OF THE PLEAS OF THE CROWN 158 (1724)); see WAHL, supra note 197, at 137 (noting that many states passed statutes outlawing slave assemblages).
211. See MORRIS, supra note 195, at 348-47.
212. See id. at 298-99.
214. See MORRIS, supra note 195, at 298.
die before he would submit to being whippt [sic] to death.”215 The magistrates sentenced Sole to two hundred lashes.216

The Slave Power sought to justify its repression of speech, press, and slave resistance and dissension in varying ways. John Calhoun represented one line of defense. Calhoun was skeptical about the existence of inalienable equal human rights, describing the Declaration of Independence’s ethical appeal as “the most dangerous of all political errors. . . .”217 Calhoun instead embraced a philosophy in which communities, not the individual, were at the core, and it was the White community’s preservation that mattered.218 Jefferson Davis, on the other hand, embraced the Declaration of Independence, but saw Blacks as outside its ambit.219 To challenge slavery was to challenge the inalienable White right to property.220 Moreover, argued some Southern rights theorists, slavery fortified the White spirit of freedom,221 and states, not the federal Government, were the best institution to protect those freedoms.222 What all these strands of thought shared, however, was a conception of Black moral incapacity to engage in reasoned debate and, thus, to be the bearers of any rights.223

3. Abolitionism and Northern Reaction

Southern repression of free speech and growing rights skepticism did much for the abolitionist’s cause.224 The Slave
Power came to be perceived as a direct threat to the very concept of inalienable equal rights. Free Whites, not only enslaved or free Blacks, were being attacked, gagged, searched, and imprisoned in the name of preserving slavery. Furthermore, the Slave Power's belief in Black moral incapacity challenged the Lockean notion of toleration that was at the core of his concept of equal inalienable rights. All persons in Lockean theory were entitled to equal respect by virtue of their moral powers to rationally assess and pursue ends and thus be equal bearers of rights. This notion of tolerance conflicted with the idea of people having different moral status, which is determined in advance by nature or a hierarchical social structure. Such a hierarchical social theory rejected the idea that it needed to be justified in a crucial testing by other ideas and world views; the result would be a repressive orthodoxy. While perhaps not thinking of such sophisticated Lockean concepts, much of the Northern public increasingly came to understand that the practice of slavery justified widespread repression of dissenters of all races and ultimately the rejection of the Declaration of Independence's generous version of a rights-based philosophy. Thus, the 1856 Republican Party campaign slogan: "Free Speech, Free Press, Free Men, Free Labor, Free Territory, and Fremont."

Republicans increasingly invoked rights to free speech, press, petition, and assembly as part of the definition of "republican

incorporated into the Fourteenth Amendment.

225. See Richards, Conscience, supra note 69, at 125-92 ("The idea of a slave power was a central contribution of political abolitionism to antebellum moral and constitutional debate. Its normative component was defined by the unjustifiable abridgements of inalienable human rights . . . ").

226. See Amar, Bill of Rights, supra note 100, at 160-61, 234-38.

227. See Richards, Conscience, supra note 89, at 58, 73, 80-89.

228. See id. at 63-64.

229. See id.

230. See id. at 63-73.

231. See Amar, Bill of Rights, supra note 100, at 234-35; Curtis, supra note 174, at 1148-59; Stewart, supra note 194, at 157-58. Northern rhetoric did accurately describe Southern conduct but often oversimplified elite theories justifying slave society. See supra notes 217-23 and accompanying text (explaining that some Southern theorists rejected entirely the Declaration's moral philosophy of equality, but others embraced it, arguing instead that slavery enabled true republican equality for white men).

Government." But they also understood that the Slave Power repressed these rights, primarily by offending the privacy and free movement of slaves, free Blacks, resident Southern anti-slavery Whites, and visiting Northern abolitionist Whites. Republican condemnation of slavery after the Civil War drew on a variation of Madison's theory of faction. Madison favored a large republic to allow the war of so many factions that no one could gain dominance. He also feared oppression of minorities from unjust combinations of the majority. In Madison's view, slavery created a property-based faction in which "the mere distinction of colour [was] made . . . a ground of the most oppressive dominion ever exercised by man over man." Before the war, some Northern republican constitutional theorists believed that slavery would die of its own accord. But by the end of the Civil War, many came to understand that race-based slavery had survived and grown because it bred its own faction that entrenched the institution. That faction bred two political evils: slavery, which led to general intolerance and oppression, and "unreasonable" racial prejudice, which led to a caste-based philosophy inimical to the very notion of republican Government. This does not mean that most Republicans were not, by modern standards, racist. They were, but, by the end

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233. See ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 91-102, 136-43, 192, 207-11 (1985) (hereinafter FONER, FREE SOIL) (examining ideology of many Republicans that the slave power was inconsistent with free institutions); ERIC FONER, THE STORY OF AMERICAN FREEDOM 90-91 (1989) (stating that Lincoln well expressed a world-view of slavery as incompatible with the Founders' ideals and the essential premises of American freedom); AMAR, BILL OF RIGHTS, supra note 100, at 234-38.

234. See AMAR, BILL OF RIGHTS, supra note 100, at 267.

235. See RICHARDS, CONSCIENCE, supra note 89, at 121-30 (making similar argument).


237. See AMAR, BILL OF RIGHTS, supra note 100, at 21.

238. 1 THE RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787, 135 (Max Farrand ed., 1868) (quoting Madison); RICHARDS, CONSCIENCE, supra note 89, at 24 (interpreting Madison).

239. See FONER, FREE SOIL, supra note 233, at 115-16, 205-08; RICHARDS, CONSCIENCE, supra note 89, at 125-28.

240. See RICHARDS, CONSCIENCE, supra note 89, at 124-30.


242. See, e.g., DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 255-57 (1990) (noting that widespread Northern racism, even among Republicans, led some to oppose slavery's pre-war extension to the territories to keep
of the Civil War, that racism focused on a denial of social status rather than the moral capacity necessary for equal civil and political rights.\textsuperscript{243}

The most glaring evidence of the continuing factional power of the slaveocracy was the adoption of Black Codes to replace the pre-Civil War Slave Codes.\textsuperscript{244} The Black Codes sought to reinstitute the functional equivalent of slavery by impinging upon Black privacy, property, and freedom of movement.\textsuperscript{245} The Codes provided for the arrest and return of Blacks who breached labor contracts with their employers, prohibited Black servants from leaving their masters' premises, and authorized hiring out Black children and Blacks unable to pay vagrancy fines.\textsuperscript{246} The Codes made certain conduct criminal for Blacks, but not for Whites.\textsuperscript{247} These criminal laws were powerfully reminiscent of the Southern law of slavery. The Mississippi Black Code made it a crime for Blacks to make "insulting gestures" or to function as ministers of the gospel without a license from some White church.\textsuperscript{248} South Carolina created a separate court system for Blacks accused of crimes.\textsuperscript{249} Senator Trumbull, in proposing national legislation, which eventually became the Civil Rights Act of 1866,\textsuperscript{250} described the Black Codes as follows:

\begin{quote}
blacks out); \textsc{stewart supra} note 194, at 184 ("Republicans ... assured their constituents that abolishing slavery would in no way alter the nation as preeminently a white man's country. White supremacy in the North, they pointed out, had not been subverted by emancipation in the 1790s ... Why should anyone fear a different result in 1865?").
\textsuperscript{243} \textsc{see eric foner, reconstruction: america's unfinished revolution}, 1863-1877, 369 (1988) [hereinafter \textsc{foner, reconstruction}] (quoting a Southern White Republican: "I am willing to give the Negro political and civil rights, but social equality, never."); \textsc{william e. nelson, the fourteenth amendment: from political principle to judicial doctrine} 133-36 (1988) (making the point that in 1860 most Americans probably favored segregated schools); \textsc{richards, conscience, supra} note 89, at 128-30 (discussing political equality and the Fourteenth Amendment).
\textsuperscript{244} \textsc{see john hope franklin, reconstruction after the civil war} 47-51, 56 (2d ed. 1994) (describing Northern anger over Southern adoption of the Black Codes).
\textsuperscript{245} \textsc{see id.} at 47-51; \textsc{foner, reconstruction, supra} note 243, at 199-201, 208-09, 225.
\textsuperscript{246} \textsc{see w. e. b. du bois, black reconstruction in america 1860-1880}, 167-80 (touchstone 1995) (1935); \textsc{farber & sherry, supra} note 242, at 298; \textsc{foner, reconstruction, supra} note 243, at 199-201, 208-09, 225.
\textsuperscript{247} \textsc{see randall kennedy, race, crime, and the law} 84-85 (1997).
\textsuperscript{248} \textsc{see id.} at 85.
\textsuperscript{249} \textsc{see id.}
\textsuperscript{250} \textsc{see richards, conscience, supra} note 89, at 127.
\end{quote}
They provide that if any colored person, any free negro or mulatto, shall come into that State for the purpose of residing there, he shall be sold into slavery for life. If any person of African descent residing in that State travels from one county to another without having a pass or a certificate of his freedom, he is liable to be committed to jail and to be dealt with as a person who is in the State without authority ... [...] and one provision of the statute declares that for "exercising the functions of a minister of the Gospel free negroes and mulattoes, on conviction, may be punished by any number of lashes not exceeding thirty-nine on the bare back, and shall pay the costs." ... The statutes of South Carolina make it a highly penal offense for any person, white or colored, to teach [former] slaves ...\(^{251}\)

The Codes thus sought to repress Black freedom of movement, privacy, and property as an expression of an intolerable idea of equality. Apart from the Codes, other Governmental and pseudo-Governmental conduct served similar functions. For example, in 1866 various Southern White militias, "composed of Confederate veterans still wearing their gray uniforms ... frequently terrorized the [B]lack population, ransacking their homes to seize shotguns and other property and abusing those who refused to sign plantation labor contracts."\(^{252}\) The Ku Klux Klan, in action by 1866, played a particularly brutal role in intimidating, whipping, and beating blacks into signing onerous labor contracts with their landlords, contracts that, once signed, worked in conjunction with the Black Codes to limit Black freedom of movement.\(^{253}\) When Blacks and their White Republican allies convened in 1866 in a New Orleans hall to discuss extending the franchise to freedmen, "they were attacked and slaughtered by a mob led by the city police, a force largely made up of militant Confederate veterans."\(^{254}\) Similarly, in Memphis, city police played a key role in triggering racial violence against former Black servicemen.\(^{255}\)

\(^{252}\) FONER, RECONSTRUCTION, supra note 243, at 203.
\(^{253}\) See HERBERT SHAPIRO, WHITE VIOLENCE AND BLACK RESPONSE: FROM RECONSTRUCTION TO MONTGOMERY 5 (1988) (discussing Ku Klux Klan's role); supra text accompanying notes 244-52 (discussing Black Codes and free movement).
\(^{254}\) SHAPIRO, supra note 253, at 6.
\(^{255}\) See id. at 6-7.
A similar wave of violence against White Republicans and friends of the freedmen swept the South.\footnote{256} The Republicans who debated the Fourteenth Amendment understood the close connection among the kinds of rights that the Fourth Amendment protected, free speech and press, and the nature of free movement and privacy as central aspects of the expression of a message of equality.\footnote{257} Whenever persons can be subject to arbitrary search and seizure, especially when race or political views are a factor, there can be no debate among an informed citizenry. The Lockeian philosophy of tolerance, the deliberation necessary to sound political judgment, and the respect for all persons' moral reasoning powers that the idea of equal inalienable human rights entailed required protection from unreasonable and arbitrary arrest, search, and seizure.\footnote{258} The Fourteenth Amendment was partly intended to ensure the constitutionality of the 1866 Civil Rights Act, which effectively outlawed the Black Codes.\footnote{259} The Reconstruction Congress meant to halt the designation of Blacks as special targets for various searches and seizures.\footnote{260} Privacy protection and equality values became inseparably linked. John Bingham, the author of Section 1 of the Fourteenth Amendment, clearly saw protection of Fourth Amendment values against state action as necessary

\footnote{256. \textit{See id.} at 7-16, 20-29. Racial violence also sometimes erupted in the North as well. \textit{See id.} at 16-19.}

\footnote{257. \textit{AMAR, BILL OF RIGHTS, supra} note 100, at 267. Professor Amar put it this way: The Slave Power had grossly offended this privacy—of slaves, of free blacks, of resident southern antislavery whites, and of visiting northern abolitionist whites—in countless ways, from dragnet sweeps of those suspected of harboring fugitive slaves, to intrusions upon the mails and suspicious sojourners, to unprecedented search warrants directed at political pamphlets. In response, Reconstruction Congressmen and commentators affirmed Fourth Amendment rights as basic "privileges" and "immunities" that henceforth should never be abridged by any American Government. \textit{Id.} Curiously, Professor Amar fails to see the full implications of his own observations. He adopts an interpretation of the Fourth Amendment very solicitous of state power generally but recognizes the need for special scrutiny where First Amendment or equality values are implicated, for example, respectively using searches to silence the press or to harass a particular race. \textit{See AMAR, FIRST PRINCIPLES, supra} note 107, at 36-40. What he fails to appreciate is the extent to which, both in logic and for the Fourteenth Amendment's Framers, expression, race, privacy, and free movement were inextricably intertwined, as this article seeks to demonstrate.}

\footnote{258. \textit{See supra} text accompanying notes 171-257.}

\footnote{259. \textit{See FARBER & SHERRY, supra} note 242, at 298-302.}

\footnote{260. \textit{See AMAR, BILL OF RIGHTS, supra} note 100, at 268.}
to protect against majority tyranny over minorities. During House debates over the Fourteenth Amendment, he poignantly included the Fourth Amendment among the privileges and immunities of United States citizenship. Similarly, Senator Howard quoted Corfield v. Coryell on the Senate floor and listed the "right to be exempt from unreasonable searches and seizures" among the privileges of national citizenship. There is little serious doubt that the Fourteenth Amendment was meant to ensure the application of the Bill of Rights, including the Fourth Amendment, to the states.

The procedural question remained, however, of how search and seizure rights would be enforced. The North had long thought juries were critical to that role, thus echoing many of the themes sounding at the time of adoption of the Fourth Amendment. In particular, the jury's role shaped the battle over the fugitive slave law. Thus, Salmon P. Chase, an abolitionist lawyer (later Chief Justice of the Supreme Court) had argued in 1837 that surely his client, Matilda Lawrence, a free Black woman in Ohio, "was entitled to a jury before her liberty could be snatched away . . . [by] some greedy [W]hite man [who] called her his slave." Chase lost the case, leading various Northern states to respond with personal liberty laws guaranteeing alleged fugitive slaves a jury trial. The Supreme Court ultimately struck down a personal liberty law in Prigg v. Pennsylvania, and in 1850, Congress adopted the Fugitive

261. See id. at 171, 186-87, 267-68, 291-94, 303, 388 n.141 (making similar points and citing sources).
262. See id. at 267; CONG. GLOBE, 42d Cong., 1st Sess. 84 app., 475 (1871) (remarks of John Bingham and Henry Dawes).
263. 6 F. Cas. 546 (E.D. Pa. 1823) (No. 3230).
264. See CONG. GLOBE, 39th Cong., 1st Sess. 2765-68 (1866). Corfield v. Coryell, 6 F. Cas. 546, 551 (E.D. Pa. 1823) (No. 3230), was important in the debates over the Reconstruction Amendments because of its definition of "privileges and immunities" in Article IV of the original Constitution, and helped to define the identical term as it occurs in the Fourteenth Amendment. See AMAR, BILL OF RIGHTS, supra note 100, at 178-78.
265. See AMAR, BILL OF RIGHTS, supra note 100, at 163-214 (undermining effective counter-arguments as to incorporation).
266. See id. at 68-76, 80, 87-88, 268-80.
267. See id. at 269-71.
268. Id. at 270; see also SALMON P. CHASE, SPEECH OF SALMON P. CHASE IN THE CASE OF THE COLORED WOMAN, MATILDA 31, 38 (Cincinnati: Pugh & Dodd 1837).
269. See AMAR, BILL OF RIGHTS, supra note 100, at 270.
270. 41 U.S. (16 Pet.) 539 (1842).
Slave Act, denying alleged fugitive slaves the benefit of a jury trial.271 The jury, we have seen, was long viewed as essential to the monitoring function of an informed citizenry.272 Senator Charles Sumner railed against the abomination of interfering with this function by taking the seizure decision from the jury’s hands:

In denying the Trial by Jury [this Act] is three times unconstitutional; first as the Constitution declares “the right of the people to be secure in their persons against unreasonable seizures;” secondly as it further declares, that “No person shall be deprived of life, liberty, or property without due process of law;” and thirdly, because it expressly declares that “in suits at common law... the right of jury trial shall be preserved.” By this triple cord did the framers of the Constitution secure the Trial by Jury in every question of Human Freedom.273

Immediately after the Civil War, Republicans had a similar faith in the jury trial, but they viewed it, unlike the Framers did, solely as a civil, not a political, right.274 They came again to recognize the jury’s political nature as their understanding grew that Southern juries could not be counted on to protect free

271. See id.; AMAR, BILL OF RIGHTS, supra note 100, at 270.
272. See supra Part II.
273. AMAR, BILL OF RIGHTS, supra note 100, at 270 (quoting EMANCIPATOR AND REPUBLICAN, Nov. 14, 1850) (emphasis deleted). John Bingham had similarly agreed that the 1850 Fugitive Slave Act violated rights to due process and a jury trial. See CONG. GLOBE, 36th Cong., 2d Sess. 83 (1861). The United States Supreme Court, however, found the Act constitutionally unproblematic. See Ableman v. Booth, 62 U.S. (21 How.) 506, 528 (1858). Amar notes that “the federal act that Taney and his colleagues found so unproblematic permitted summary and ex parte proceedings, forbade the alleged fugitive from testifying, and went on to create a biased fact finder: in a case of possibly mistaken identity, a commissioner would receive ten dollars if he ruled for the slave catcher but only five dollars if he ruled for the alleged slave.” AMAR, BILL OF RIGHTS, supra note 100, at 270-71 n.*.
274. See AMAR, BILL OF RIGHTS, supra note 100, at 271. “Civil rights” belong to all free members of the larger society, while political rights belong only to members of the polity, that is, to first-class citizens of the political community. See id. at 48. Leading Republican sponsors and supporters of the Civil Rights Act of 1866 took pains to deny in debates opponents’ claims that the Act’s conferring of “civil” rights meant that blacks could serve on juries, a “political” right. See id. at 271. There might be a civil right to be tried by a jury but not a political right to serve on one. See id. However, by the time the Fifteenth Amendment was drafted, Republicans came to understand that juries also serve a political function, representing the voice of the community. See id. at 271-72. Thus, all needed to be able to serve on juries, regardless of race. See id.
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Blacks. For an informed citizenry to function effectively in the jury’s monitoring function, all citizens needed representation on the jury. Similarly, the Republicans had come to understand that informed citizens could not choose wise leaders or monitor their rulers’ abuses unless all citizens had a say; thus, the Republicans pressed for passage of the Fifteenth Amendment, which Professor Amar has argued must be understood as guaranteeing Blacks the right to vote both as electors and as jurors.

While the Fifteenth Amendment aimed in part to create a properly functioning jury to serve an informed citizenry, the Fourteenth Amendment’s incorporation of the Bill of Rights should not be understood in restrictive terms. The Amendment’s sponsors and ratifiers likely understood themselves to be primarily engaged in the political task of enacting broad moral principles rather than in the bureaucratic task of enacting particular solutions. Among the major moral principles enacted were: (1) an important link exists between the Fourth Amendment and informed citizenry concepts; (2) in incorporating the Bill of Rights against the states, the Fourteenth Amendment shifted the Bill’s emphasis from libertarian concerns, toward a greater concern with protecting minorities from majority tyranny—including the tyranny of suppressing ideas in a way that aids minority subordination; and (3) monitoring Governmental abuses of the power of search and seizure is necessary to guard against such subordination. These values should be kept in mind in interpreting the Fourth Amendment today. As we will shortly see, the suppression hearing before a judge may today more effectively secure these purposes than would sole reliance on the jury.

C. Professor Akhil Amar’s Challenge

Before examining the suppression hearing’s role in a modern informed citizen ideology, however, I must briefly respond to a challenge raised by Professor Akhil Amar, whose work was significantly relied upon in this Article. Amar is, of course, well-

275. See id. at 271.
276. See id. at 271-72.
277. See NELSON, supra note 243, at 80.
known for arguing that the Fourteenth Amendment refined the meaning of the Bill of Rights guarantees by incorporating them against the states and for urging a holistic reading of that Bill.\textsuperscript{278} Amar has rightly been criticized, however, for ignoring the implications of these insights for the criminal procedure protections of the Bill; for oddly concentrating on, contrary to his own professed methodology, the Framers' intentions of 1791, rather than on the Framers' intentions of the 1860s; and for relying on a highly selective Framers' history at that.\textsuperscript{279} As a result, Amar has crafted an approach to search and seizure law dominated by the "first principle" of the search for truth, downplaying sometimes truth-undermining process values, such as promoting human dignity and judicial integrity, uncovering and determining abuses of Government power, and enhancing equality.\textsuperscript{280} Amar would thus dispense with the exclusionary rule because it hampers the search for truth, relying instead solely on the good sense of American juries.\textsuperscript{281} Amar does recognize a need for heightened substantive Fourth Amendment standards where searches or seizures overtly impinge on free speech and press or involve race or gender discrimination.\textsuperscript{282} But he sees these situations as exceptions to a general reasonableness balancing approach that gives great weight to "truth" and the needs of law enforcement, and apparently would trust only juries to render judgment, even for these difficult "exceptions."\textsuperscript{283} Here, I agree with Amar that juries played a special role for both the Framers and the Reconstruction Congress in enforcing search and seizure rights. However, in relying solely on juries, Amar adopts a variant of a narrow brand of originalism with well known flaws that are effectively articulated elsewhere.\textsuperscript{284} History matters, as this

\textsuperscript{278} See Amar, BILL OF RIGHTS, supra note 100, at 137-230. See generally Amar, Constitution, supra note 94, at 1136-37.

\textsuperscript{279} See Bandes, supra note 35, at 1377, 1409-10 nn.5, 137 (making similar points and citing additional sources).

\textsuperscript{280} See id. at 1379-1402.

\textsuperscript{281} See AMAR, FIRST PRINCIPLES, supra note 107, at 20-45.

\textsuperscript{282} See id. at 35-40.

\textsuperscript{283} See id.; Bandes, supra note 35, at 1388-1401, 1409.

\textsuperscript{284} See, e.g., TASSITZ & PARIS, supra note 29, at 10-13 (critiquing various originalist theories and collecting sources). Amar's narrow originalist approach on criminal procedure questions is curiously out of sync with his more structural, values-oriented approach on other questions of constitutional law. See id. at 13-14 (summarizing Amar's
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Article has indeed assumed, but it matters to identify the nature of the problems that particular constitutional provisions were meant to solve and the values they sought to implement.\(^{235}\) History further matters to inform our evolving sense of the meaning that those values should have in resolving current challenges.\(^{236}\) Whether the Framers of the Reconstruction Congress thought of a particular institutional arrangement when choosing broad, values-based language that did not expressly embody such an arrangement is irrelevant.\(^{237}\) Under such a particularistic intentions approach, *Brown v. Board of Education*\(^{238}\) was wrongly decided since the Reconstruction Congress probably assumed that enforced racial segregation in public education would survive adoption of the Fourteenth Amendment, a result Amar would likely disapprove of.\(^{239}\)

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structuralist approach); Bandes, *supra* note 35, at 1377, 1409-10 nn.5, 137 (critiquing Amar’s narrow originalism on criminal procedure questions and citing additional sources). Amar, of course, claims to be applying the same approach to all constitutional questions, but that is not what he does, and on criminal procedure questions his use of history is sometimes too selective in a way that his careful historical analysis in other areas is not. See id.; Maclin, *supra* note 160, at 965-72 (outlining Amar’s selective use of history on the warrant requirement).


236. *See Richards, Conscience, supra* note 89, at 17.

Constitutional interpretation must make use of historical argument constructively to articulate the thread of legal texts, principles, and institutions that constitute over time the struggle for a political community in the genre of American revolutionary constitutionalism. Such interpretation must use the best available political theory of human rights to make contextual sense of the ultimate rights-based normative ends of the constitutional project.

_id_.


239. Historian William Nelson thus declares: “Historians who conclude that most Americans in 1868 favored segregated schools are probably correct in their assessment.” NELSON, *supra* note 243, at 135. However, he argues, “[I]t is also important to focus on the fact that Congress never institutionalized this judgment in its debates on the Fourteenth Amendment; the segregation issue simply was not an important one in those debates.” _Id_; see also PERRY, *supra* note 265, at 44-45 (explaining that most scholars, even Robert Bork, reject an intentionalism so “strict” as to require overruling *Brown v. Board of Education*, 347 U.S. 483 (1954), which outlawed racially segregated public schooling, on the theory that the Fourteenth Amendment’s ratifiers, contrary to the
Indeed, Amar is himself inconsistent in his originalism. On the one hand, he seeks to jettison the exclusionary rule because it subverts the particularist intention that juries judge the reasonableness of searches. On the other hand, he proposes a range of alternative remedies, such as the “structural injunction,” never contemplated by the Framers of our Second Revolution.290

Even Amar’s specific reading of the Fourteenth Amendment’s history of search and seizure issues is unduly narrow. It is true that suppression of overtly political speech and press publications were among the major concerns of the abolitionist Congress. But the limitations that first slavery, then Southern counter-revolution, imposed respectively on slaves’ and freedmen’s freedom of movement, privacy, and property were also central to Reconstructionist Congressional thinking.291 The roadblocks preventing Amar, other scholars, and the courts from fully understanding the significance of this last point are two-fold: first, a failure to see that beatings, pass systems, and discriminatory arrests during the Antebellum and Reconstruction period implicated Fourth Amendment values; and, second, a failure to see that Fourth Amendment values often implicate expressive values, as was true for runaway

Brown holding, (took racial separation for granted). One clear articulation of the flaws in a “strict” intentionalism is made by Scott Douglas Gerber, who distinguishes between “conservative” and “liberal originalism.” Liberal originalism “maintains that the Constitution should be interpreted in light of the political philosophy of the Declaration of Independence.” SCOTT DOUGLAS GERBER, FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS 47 n. * (1999). “Conservative originalism,” in contrast, maintains that the Constitution should be interpreted as the Framers themselves would have interpreted it.” Id. See generally SCOTT DOUGLAS GERBER, TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION (1985) (defending liberal originalism). I do not argue that Amar is a “conservative” originalist or “strict” intentionalist. I am confident that he would reject these labels. Indeed, his “holistic” approach to constitutional interpretation, his careful attention to text and constitutional structure, his theory that the Fourteenth Amendment mutated the Bill of Rights, and his analyses of the real-world consequences of constitutional doctrine are inconsistent with the “strict” intentionalist label. See supra notes 94, 100-01, 104, 115-16, 128-32, 138-58, 160-64, 177-80, 231-37, 257-78 and accompanying text. My disagreement with Amar is that he does not always practice what he preaches, that is, he sometimes behaves far more like a strict intentionalist than his own far more subtle and insightful theory would seem to allow.

290. See AMAR, FIRST PRINCIPLES, supra note 107, at 40-45 (suggesting alternative remedies to the exclusionary rule); Bandes, supra note 35, at 1404-06, 1410 (critiquing Amar’s position).

291. See supra Part III.B.
slaves and slaves otherwise resisting the rigid controls over their bodily movement by the Slave Power. The expressive nature of Fourth Amendment conduct can be widespread and nonobvious. For example, Professor Gilliom has written about how resistance to drug testing in the workplace is best seen as a struggle of ideas over how the labor-management relationship should be structured. Many workers fear that drug testing enables employers to harass those who “create trouble either through union activism or complaints about working conditions”, to amass power over intimate, private acts at workers’ expense; and to degrade and humiliate, and thus further subordinate, vulnerable workers. It is difficult and unwise to entrust police officers to make advance judgments about whether expressive values are implicated. A notable recent example is the Chicago v. Morales case, just decided by the United States Supreme Court. In Morales, a City of Chicago ordinance permitted police officers to order the dispersal of any group that gathers “with no apparent purpose” when the officer reasonably believes any one member of the group to be a gang member. Refusal to obey the dispersal order can result in arrest of all who refuse, the only defense being that no one in the group was in fact a gang member. Moreover, the ordinance is unclear about how far away those dispersed must go. The NAACP and other groups have challenged this ordinance because of its implications for the expressive and associational rights of all people, including law-abiding citizens who are prohibited from public contact with disfavored groups like gang members. Furthermore, the ordinance permits its selective enforcement in particular neighborhoods, creating the

292. See supra Part III.B.
294. Id. at 122.
295. See id. at 61-84, 119-23.
296. 177 Ill. 2d 440 (1992).
danger that police officers will seek to expel racial minorities from white, middle class neighborhoods where the ordinance might be enforced.\footnote{See id.}

Similarly, in a criminal justice system with a hugely disproportionate impact on African-Americans, it is impossible to know in advance whether a particular police practice has racially discriminatory purposes or effects.\footnote{See generally KENNEDY, supra note 247.} In my years as a prosecutor in Philadelphia, I prosecuted perhaps a handful of defendants who were not black. Almost every suppression motion I litigated involved black defendants. In such a world, it is better to extend to all searches and seizures the special solicitude Amar urges for Fourth Amendment activity involving racial equality.\footnote{See \textit{Am\'ar, FIRST PRINCIPLES}, supra note 107, at 37-38.}

Ultimately, what matters for my purposes here is the recognition that the Fourth Amendment, as mutated by the Fourteenth Amendment, is intimately tied to expressive concerns, especially where racial discrimination and majority tyranny may silence individual and group voices. The 1781 and 1866 Framers' emphasis on juries, therefore, matters more because it illustrates their concerns about an informed citizenry than because it straightjackets us into a single way—the jury—for educating the American people to be watchdogs for Governmental tyranny. The Court has recognized that judges have an especially important function in enforcing Fourth Amendment values.\footnote{See, e.g., Mapp v. Ohio, 367 U.S. 643 (1961) (extending the exclusionary rule remedy for Fourth Amendment violations to the states); see also TASLITZ& PARIS, supra note 29, at 486-89 (summarizing Court's justifications for the exclusionary rule, including "preserving judicial integrity," a justification that has become disfavored as of late, but never expressly jettisoned by the Court, that is tied to the law's educational or, in my terms, informed citizen function); cf. United States v. Leon, 468 U.S. 897, 973 n.29 (1984) (Stevens, J., dissenting) (noting social nature of suppression remedy in promoting a democratic citizenry).} The suppression hearing helps promote one of those values, furthering an informed citizenry, quite effectively, an observation better understood when we recognize certain changes in modern civic life that require a new republican citizen for a more complex world.
IV. THE MONITORIAL CITIZEN AND THE SUPPRESSION HEARING

[I]f democracy requires omnicompetence and omniscience from its citizens, it is a lost cause.\(^{304}\)

Two key developments have altered the meaning of citizenship at the end of the twentieth century. First, life has become more complex in a myriad of ways and, therefore, more specialized. In a world of rapid technological change, rising populations, and spreading market competitiveness and decentralization, no one is a jack of all trades.\(^{305}\) For example, fewer lawyers can seriously claim to be general practitioners, with many specializing in particular procedural and substantive areas, for it is impossible to keep up with developments in all legal fields at once.\(^{306}\) This is even more true in the daily life of the ordinary citizen, who cannot reasonably be expected to fully track or understand events in the stock market, foreign affairs, racial, gender, or other group-based discrimination, the decline of unions, global warming, growing economic concentration of certain industries, and the myriad other matters of concern that bombard us in daily media reports. A specialized citizenry is the only practical modern conception.\(^{307}\)

Second, alongside the idea of the informed citizen has grown the rights-bearing citizen. Citizens need not wait for elections to be active in their roles as citizens, nor need they limit between-election activities to calls and letters to representatives or the occasional random call to jury service. They can turn to courts and administrative agencies, and do so on a daily basis, for recognition and enforcement of a generous notion of their rights.\(^{308}\) Citizens have different rights in their different roles, locations, and activities. Rights govern what happens in schools,

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\(^{304}\) Schudson, supra note 73, at 310.

\(^{305}\) See id. at 310-13.

\(^{306}\) See Lawrence A. Frolik, The Developing Field of Elder Law: A Historical Perspective, 1 Elder L.J. 1-2 (1993) (celebrating the emergence of elder law as a specialty because of the growth in law and interest); Cary Griffith, As the World Accelerates, Your Firm Must Keep Up, 15-16 Legal Mgmt. 12, 14 (Sept./Oct. 1990) ("While general practices still exist, law firms are increasingly distinguishing themselves by becoming extremely specialized in one particular area of law.").

\(^{307}\) See Schudson, supra note 73, at 310-13.

\(^{308}\) See id. at 240-74, 299-309 (defining, defending, and tracing rise of the "rights-bearing citizen").
the workplace, the home, environmental protection, higher education, the professions, and the political process. Rights permeate our private as well as our public activities. Rights affect businesses, families, lovers, children, the elderly, and the ill. Talk of rights suffuses all our relationships and conduct. At its worst, rights-consciousness promotes isolation, selfishness, and conflict. At its best, it promotes responsibility and community. But for better or worse (I think usually for the better), rights-consciousness helps constitute our sense of self and society.

Rights-consciousness and the accessibility of courthouse and administrative agency doors have widely expanded the opportunities for civic participation because our everyday lives are deeply politicized. Citizen participation now exists in the “microprocesses of social life.” We are citizens in our homes, schools, and places of employment. Furthermore,

[w]omen and minorities self-consciously do politics just by turning up, so long as they turn up in positions of authority and responsibility in institutions where women and minorities were once rarely seen. They do politics when they walk into a room, anyone’s moral equals, and expect to be treated accordingly. The gay and lesbian couples in Hawaii in 1991 or in Vermont in 1997 are political when they try to be legally married . . . . Others do politics when they wear a “Thank You For Not Smoking” button or when they teach their children to read nutritional labeling at the supermarket or when they join in class action suits against producers of silicone breast implants, Dalkon shields, or asbestos insulation.

At the same time, history teaches us, as this article has sought to show, that a democracy needs a certain level of distrust of its institutions by its citizens. “Because of distrust, we have a Bill
of Rights; because of distrust, we have checks and balances; because of distrust, we are enjoined as citizens to be watchful."  

In a complex world requiring some degree of distrust of institutions, specialization, and widespread citizen participation in the personal as well as the political realm, the informed citizen must be re-thought of as, in Michael Schudson's words, the "monitorial citizen." Monitorial citizens do not expect to be fully informed about the issues of the day. Rather, they scan their environment, read newspapers, watch television, listen to radio or the sermons of the clergy, and observe discord and injustices facing them in their everyday lives. When they spot matters of grave concern to them, they read more and talk more about those subjects. When their interests, needs, and abilities demand, they particularly act in those specialized aspects of their lives in which they can have the most impact. A housewife or husband and an active P.T.A. participant work to improve schooling, a lawyer does pro bono work for the poor, a fishing enthusiast works for environmental causes, and a rape victim counsels the sexually abused.  

In such a world, those accused of criminal activity have a special role to play as monitors of police abuse. Their incentive to challenge abuses—avoiding the stigma of criminal conviction and the resulting loss of liberty—is high. Moreover, they have knowledge of individual abuses, because they were abused, that the rest of us lack. Furthermore, because even the indigent are constitutionally entitled to counsel, they have a special expertise, through their lawyers, to uncover official wrongdoing. The suppression motion and the general public nature of suppression hearings enable them to challenge police misconduct in a very visible fashion.  

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316. Id. at 301.  
317. See id. at 310-14 (elaborating on, and defending, the idea of the monitorial citizen and its connection to increasing citizen specialization).  
318. See Taslitz & Paris, supra note 29, at 668 (explaining the right to counsel and the role of lawyers in the criminal justice process).  
319. See Ray Surette, Media, Crime, and Criminal Justice: Images and Realities 103 (2d ed. 1998) (stating that suppression hearings are ordinarily open to the public); LaFave & Israel, supra note 18, at 510-14 (describing how suppression motions work).
suppression hearings will make its way into the press.\textsuperscript{320} When police officers have obtained warrants, warrant affidavits come to light, and thus police know when applying for warrants to state reasons for their requested search or seizure that are credible and persuasive enough to survive public scrutiny.\textsuperscript{321}

Additionally, many courts recognize that confrontation rights, including the opportunity for an effective cross-examination, apply at suppression hearings.\textsuperscript{322} As noted earlier, the Confrontation Clause and the right to counsel serve crucial roles in informed citizen ideology.\textsuperscript{323} Yet scholars, and increasingly courts, have recognized that effective confrontation rights, whether at trial or at a suppression hearing, turn on adequate discovery.\textsuperscript{324} In \textit{United States v. Salsedo},\textsuperscript{325} the court thus observed:

> The issue to be resolved in a warrantless search and seizure case is whether the Government had reasonable and probable cause. Thus in this case the hearing requires a particular and close examination of the events leading up to the stop in question and what the arresting officers knew at the time of the stop. That information can only be obtained from the arresting officers. It exists nowhere else and thus independent investigation by the defendant must almost always be fruitless. Accordingly, effective cross-examination on what the Government asserts it knew can only arise in a

\textsuperscript{320} I am not arguing that the news media always accurately report police behavior. To the contrary, police control over much information about their own behavior, and reporters' desire to have a steady police source of news about crime, combine to establish selective media coverage of police abuses. \textit{See Surette, supra} note 319, at 64. Nevertheless, the worst police abuses, especially tales of police crimes and corruption, are often reported. \textit{See id}. Moreover, in suppression hearings, the parties and the courts, not only the police, have some control over information about police behavior. These independent sources of information about police misconduct will be dramatically strengthened if criminal discovery is significantly expanded. \textit{Cf} Laurie L. Levenson, \textit{The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial}, 41 U.C.L.A. L. REV. 509, 515-25 (1994) (describing dismissal of criminal charges against Rodney King after the media broadcast of a private citizen's videotape showing the police beating King).

\textsuperscript{321} The reasons come to light, of course, in the suppression hearing and in the press. \textit{See supra} note 168 (citing sources).

\textsuperscript{322} \textit{See Wayne R. LaFave, 5 Search and Seizure: A Treatise on the Fourth Amendment} 16-17, 54 (3d ed. 1996).

\textsuperscript{323} \textit{See supra} Part II.

\textsuperscript{324} \textit{See LaFave, supra} note 322, at 17-19.

\textsuperscript{325} 477 F. Supp. 1235 (E.D. Cal. 1979).
context in which the defendants are permitted to searchingly examine the question at the hearing. Depriving the defendants of the Government's records as to what the agents knew at the time of the stop makes meaningful cross-examination almost impossible. Where the defendants are "... denied the right of effective cross-examination," the effect is "... constitutional error of first magnitude and no amount of showing of want of prejudice would cure it." 326

Because police misconduct is at issue, one of the primary justifications for limited discovery—protecting the identity and safety of private citizen-witnesses 327—is often of no avail. The bottom line in this: both historical and modern conceptions of an informed citizenry require a strong presumption in favor of full and thorough discovery well in advance of suppression hearings concerning facts relevant to potential constitutional violations.

V. IMPLICATIONS

This Article has articulated my two primary claims: first, the Fourth Amendment must be interpreted in a fashion that promotes an informed citizenry; and second, broad discovery prior to suppression hearings is one way to further that goal. These two claims may have broad implications. In Part V, I briefly illustrate this point by: (1) exploring the implications for police perjury or "testifying" at suppression hearings; (2) exploring the related problem of police lies in search warrant applications; and (3) examining the problem of racial pretext.

A. Testifying

Police perjury is so widespread that the police have their own word for it: "Testifying." 328 Testifying occurs under a wide range of circumstances but is believed to be most common at

327. See Salzburg & Capra, supra note 1, at 765-815.
328. See Slobogin, supra note 40, at 1040 ("Lying intended to convict the guilty—in particular, lying to evade the consequences of the exclusionary rule—is so common and so accepted in some jurisdictions that the police themselves have come up with a name for it: 'testifying.' ")
suppression hearings. The Mollen Commission, which investigated corruption in the New York City Police Department in the early 1990s, put it this way:

Officers reported a litany of manufactured tales. For example, when officers unlawfully stop and search a vehicle because they believe it contains drugs or guns, officers will falsely claim in police reports and under oath that the car ran a red light (or committed some other traffic violation) and that they subsequently saw contraband in the car in plain view. To conceal an unlawful search of an individual who officers believe is carrying drugs or a gun, they will falsely assert that they saw a bulge in the person’s pocket or saw drugs and money changing hands. To justify unlawfully entering an apartment where officers believe narcotics or cash can be found, they pretend to have information from an unidentified civilian informant or claim they saw the drugs in plain view after responding to the premises on a radio run. To arrest people they suspect are guilty of dealing drugs, they falsely assert that the defendants had drugs in their possession when, in fact, the drugs were found elsewhere where the officers had no lawful right to be.

Among the most well-known examples of police testifying is the “dropsy” case, “in which a policeman testifies that the defendant dropped the narcotics on the ground,” thus “abandoning” any protected Fourth Amendment interest. “Reportiling” also seems widespread in some jurisdictions: fabricating reports to meet Fourth Amendment standards. “Moreover, police keep dual sets of investigatory files; official

330. See Slobogin, supra note 40, at 1042.
331. MOLLEN REPORT, supra note 40, at 38.
332. Chin & Wells, supra note 329, at 249.
333. The idea of “abandonment” is an action showing an intent to relinquish all claim to an object. See LAFAVE & ISRAEL, supra note 18, at 134. Some courts do not treat articles thrown away because of illegal police conduct as “abandoned.” See id. “When the disposal is as a result of a police chase, the question then is whether the chase is itself Fourth Amendment activity which, absent a factual basis, makes the abandonment an illegal fruit.” Id. at 134 n.58. The United States Supreme Court has, unlike some state courts, answered “no” to this question. See California v. Hodari D., 499 U.S. 621 (1991); LAFAVE & ISRAEL, supra note 18, at 134 n.58, 208-08 (analyzing Hodari).
334. See Slobogin, supra note 40, at 1044 (defining “reportiling”).
files and 'street files.' Exculpatory material in the street files may be edited from the official record."\textsuperscript{335}

Many scholars believe that police perjury is widespread, with estimates sometimes ranging from between 20\% and 50\% of all police testimony.\textsuperscript{336} With rare exceptions,\textsuperscript{337} scholars recognize the problem to be far from unusual.\textsuperscript{338} Gabriel Chin and Scott Wells have noted that powerful cultural and institutional factors create a "blue wall of silence": a perhaps unspoken understanding among the police that they are neither to admit their own wrongdoing nor to expose that of brother officers.\textsuperscript{339} Officers who breach this wall face retaliation, ostracism, and harassment by fellow officers.\textsuperscript{340} That harassment can include physical violence.\textsuperscript{341} At the same time, the desire to get the "bad guys" and the corresponding belief that legal "technicalities" can block that goal, combined with a military, war-like mentality, lead many officers to bend the rules.\textsuperscript{342} In the case of perjury, they bend the rules despite the potential loss of their


\textsuperscript{336} See Myron W. Orfield, Jr., \textit{Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts}, 63 U. COLO. L. REV. 75, 82-83 (1992) (prosecutors in one study estimated that police commit perjury between 20\% and 50\% of the time that they testify on Fourth Amendment issues). Orfield goes on to note that the study estimated that judges disbelieve police testimony 18\% of the time. \textit{See id.} at 107.

\textsuperscript{337} Most notably, a 1988 American Bar Association study, chaired by Professor Samuel Dash, which involved hearings and a telephone survey, concluded that the problem of police perjury was "isolated" and that "no one has established the pervasiveness of the practice[]." \textit{Criminal Justice in Crisis: A Report to the American People and the American Bar on Criminal Justice in the United States: Some Myths, Some Realities, and Some Questions for the Future}, A.B.A. SEC. CRIM. JUST. L. REP. 2, 21-22 (1988).

\textsuperscript{338} Thus, Professor Kevin R. Reitz, who complains that the few studies that have been conducted are incomplete and "methodologically suspect," agrees that those studies raise a "red flag" that give impetus to further study and that "the best judgment and best guesses of the policy community" require at least measured, incremental reform. \textit{See} Kevin R. Reitz, \textit{Testifying as a Problem of Crime Control: A Reply to Professor Slobogin}, 67 U. COLO. L. REV. 1061, 1068 (1996); \textit{see also} Dripps, \textit{supra} note 335, at 693 ("Unfortunately, criminal procedure scholars agree that police perjury is not exotic.").

\textsuperscript{339} \textit{See} Chin & Wells, \textit{supra} note 329, at 250-61.

\textsuperscript{340} \textit{See id.} at 256-61.

\textsuperscript{341} \textit{See id.}

\textsuperscript{342} \textit{See id.}
jobs and the prospect of a prison term because they believe they can lie with impunity. 343

They are right. Prosecutors often admit to suspecting, yet ignoring, widespread police perjury. 344 The prosecutors know that, except perhaps where there is evidence of the excessive use of force, judges and juries retain a pro-police defendant bias. Factfinders will side with the police in an officer-defendant swearing contest. 345 Prosecutors also often have limited resources to prosecute police perjury and need a good working relationship with the police to manage cases successfully. 346 In the back of their minds, prosecutors further worry about police intimidation of "snitches." 347 Furthermore, prosecutors see their role as making their case, the question of an officer's credibility being one that the factfinder can and should decide. 348 While prosecutors are barred from "knowingly" using perjured testimony, they are not so constrained simply because they "believe" that the officer lies. 349

Judges are similarly all too willing to ignore police perjury. 350 Professor Morgan Cloud identifies five forces at work. First, the police are experienced witnesses, whose demeanor will be good and who are likely to tell plausible tales. Thus, perjury is hard to spot. 351 Second, recognizing police lies often requires the judge to accept the unpleasant burden of excluding evidence. 352 Third, many judges believe that most defendants are guilty. 353 Fourth, and relatedly, many judges assume that criminal defendants are liars, so why believe them over the officers? 354

343. See id. at 281-72; Slobogin, supra note 40, at 1045 ("That perjury persists despite these risks can be explained by one simple factor: police think they can get away with it.").
344. See MOLLEN REPORT, supra note 40, at 42.
346. See id. at 263.
347. See id. at 262-63 (describing the "odd things" that seem to happen to prosecution witnesses in police corruption cases).
348. See id. at 263.
349. See id.; STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, Standard 3-5.6(a) (American Bar Association, 1978).
351. See id. at 1321-22.
352. See id. at 1322.
353. See id. at 1323.
354. See id.
Fifth, judges do not like to call other Government officials—especially those frequently before the judge—liars.355

None of this means that judges will not find police perjury in an appropriate case. But the courts effectively operate under a presumption that the officer is telling the truth, placing a heavy burden on the defense to show otherwise.356

A wide variety of solutions to this problem have been recommended. The solutions are of two types: substantive and procedural. The substantive solutions try to eliminate or reduce officer incentives to lie at suppression hearings by changing substantive Fourth Amendment law. For example, “flexifying” probable cause to give substantial deference to officers’ experience-informed judgment and reducing the level of “probable cause” required as the intrusiveness of a search or seizure declines make suppression unlikely.357 Similarly, eliminating the exclusionary rule completely ends the danger of suppression.358 A somewhat different proposal has been to radically narrow the number of exceptions to the warrant requirement. The theory is that police must then rely on warrants, which require them to state their bases for probable cause before the search and thus before they have a reason to lie (for they do not yet know what they will find).359

All substantive solutions face the objection—which I find convincing—that we should not let the perjury tail wag the Fourth Amendment dog.360 In effect, we would be rewriting the Constitution to bow to a concerted police effort to undermine that Constitution by subverting the truth-finding function of a suppression hearing. That seems to make little sense. The third substantive proposal, narrowing exceptions to the warrant

355. See id. at 1323-24.
356. See id. at 1324, 1340-41.
357. These substantive remedies are also recommended by Professor Slobogin. See Slobogin, supra note 40, at 1055-60.
358. See id. at 1057-60 (advocating abolition of exclusionary rule).
360. See Dripps, supra note 335, at 702 (“So, in the end I am skeptical about letting the procedural tail wag the substantive dog.”).
requirement, has been noted, even by some of its proponents, to be unlikely to have a significant perjury-reduction effect. \(^{361}\) Officers may still lie during the warrant application process. \(^{362}\) Also, they are not above conducting surreptitious searches beforehand to ensure that “their story will later float when they swear out a warrant affidavit.” \(^{363}\) Furthermore, officers may still not bother to seek a warrant, believing that they can later cook up facts to fit within the “exigent circumstances” warrant exception that will necessarily remain in place. \(^{364}\)

Remarkably, the procedural solutions share a philosophy of increasing information, thus heightening public scrutiny of police as a deterrent to official wrongdoing. Such a philosophy is fully consistent with informed citizenry ideas.

Therefore, some courts have suggested requiring police to produce their informants before magistrates, thus frustrating the practice of inventing snitches. \(^{365}\) Another idea, drawing on similar systems in France and India, is to require lay citizens to observe house searches. \(^{366}\) One by-now common suggestion is to require police to videotape all searches and seizures. \(^{367}\) Still another commentator recommends that a suppression judge request both parties to submit to a polygraph examination. While the results would not bind a judge, in an appropriate case the judge can give the results dispositive weight. \(^{368}\) Each of

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361. See Slobogin, supra note 40, at 1049-50.
362. See id. at 1050.
363. Id.
364. See id.
368. See Dripps, supra note 335, at 714-16.
these solutions shares a belief that officers who know they are under the public’s watchful eye will avoid wrongdoing. 369

Each proposal, of course, has its own costs and weaknesses. From my perspective, the greatest weakness is that legal decisionmakers will consider many of these proposals both radical and costly. Informant production curtails telephonic warrants and makes the disclosure of informant identity routine. 370 The lay-citizen observer idea raises questions about where such citizens will come from and how often their testimony will conflict with that of the police. 371 Videotaping might endanger undercover police and cause even more serious privacy violations than searches not videotaped. 372 The lie-detection test proposal makes strong assumptions about the accuracy of the polygraph and requires a radical rethinking of the judge’s role as factfinder, creating the danger that the judge either will defer, or will be seen as deferring, to a machine. 373 Moreover, all these techniques (with the possible exception of the polygraph, if you accept its accuracy) can be circumvented

369. Gabriel Chin and Scott Wells suggest another information-enhancing solution: the impeachment of police witnesses at trial by extrinsic evidence demonstrating the existence and effect of the blue wall of silence, coupled with a jury instruction drawing attention to the suspect nature of biased or slanted testimony. See Chin & Wells, supra note 329, at 244. Chin and Wells’ recommendations make sense and, like the proposal made here, they have the virtue of being “consciously incremental and practical.” Id. at 244. Expanded discovery is also a partial solution but one that may have synergistic effects with other reforms, like those proposed by Chin and Wells.

Professor Reitz has recommended that we supplement, but not replace, the exclusionary rule with internal police department reforms and an experimental liquidated damages remedy as ways to reduce testifying. See Reitz, supra note 338, at 1073. This solution is neither substantive (as no change in Fourth Amendment standards is required) nor information-enhancing. I object to neither of Professor Reitz’s solutions—they are both wise. But I think it unlikely that they will be implemented, and even less likely that they will be effective, without more public scrutiny. If the police have more reason to fear that their lives will be uncovered, then they will indeed worry about departmental sanctions and damages remedies. Similarly, a significant risk of exposure of individual wrongdoing will encourage police department change at the organizational level. Enhanced discovery is thus essential to the success of Professor Reitz’s proposed solutions.

370. See Slobogin, supra note 40, at 1050. Enhanced discovery may result in the revelation of informant identity, but the disclosure will not be automatic. See id. at 1050.

371. See id. at 1051.

372. See id. at 1051-52.

373. There is an ongoing dispute among researchers about the relative accuracy and usefulness of the various polygraph tests. See 1 DAVID FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY 565-633 (1997).
by yet more perjury. Thus, officers can coach informants or get persons to lie about what information they have, police can claim emergencies that justify dispensing with lay observers or videotape, and police can lie about when the search began—and thus when the video camera needed to be triggered—and can tamper with the videotape.\footnote{See Slobogin, supra note 40, at 1049-54. At the same time, Professor Slobogin urges looking first for alternatives to the polygraph “techno-fix,” which will contribute to, rather than cure, the public’s distrust of police officers, who are then treated like “criminal suspects, suspected traitors, and job applicants.” \textit{Id} at 1054.}

Expanded discovery is a far less radical solution. Even the most generous forms of criminal case discovery techniques would not go beyond (and indeed would still fall well short of) those used in civil cases, with which judges are familiar.\footnote{See infra Part V. The most generous discovery procedures adopted thus far, a variant of which I endorse here, are those in Florida, where witnesses in criminal cases are subject to depositions. \textit{See infra} Part V. But even Florida does not use the common civil discovery tools of interrogatories or requests for admissions (which, if directed to the defendant, might implicate the privilege against self-incrimination).} Broadened discovery is already the informal practice in a significant number of jurisdictions.\footnote{See \textit{Introduction}, supra.} Furthermore, there is already growing attention being paid to the idea of expanding discovery (for example, the new National Association of Criminal Defense Lawyers task force on this question), and arguably a trend can be discerned toward expansion.\footnote{See Ellen S. Podgor, \textit{Criminal Discovery of Jencks Witness Statements: Timing Makes a Difference}, 15 Ga. St. U. L. Rev. 651 (1989).} Jurisdictions with broadened discovery seem to have few problems.\footnote{See \textit{Report of the Florida Supreme Court’s Commission on Criminal Discovery} 20 (Feb. 1, 1989) [hereinafter \textit{Florida Report}] (reporting on the observed success of Florida’s rules permitting depositions in criminal cases and stating: “[d]epositions make a unique and significant contribution to a fair and economically efficient determination of factual issues in the criminal process”).} Additionally, discovery can help to uncover evidence of police lies involved in the other solutions. Certainly broad discovery is one primary safeguard long accepted in civil cases for uncovering wrongdoing and deterring perjury.\footnote{See \textit{Fed. R. Civ. P.} 26 (providing broad discovery in civil cases). For an example of the kind of evidence of perjury civil discovery can uncover, if lawyers behave honestly, see JONATHAN HARR, \textit{A Civil Action} (1996).} Moreover, discovery seems to be an efficient solution, leading to more plea bargains as more information often more swiftly
and fully persuades criminal defense lawyers and their clients that they have a weak case.\footnote{380}

No technique, of course, is likely to do the job alone. Indeed, a consistent informed citizen philosophy would counsel decisionmakers at least to consider a combination of many or all of the public-scrutiny-heightening proposals. But expanded discovery should be a part of any solution and is more likely to be embraced by policymakers in the near future than are its alternatives.

\textit{B. Warrant Applications}

One type of police perjury—lies in affidavits supporting warrant applications—requires brief additional mention because of the Court's holding in \textit{Franks v. Delaware}.\footnote{381} Rejecting the lower court's approach, which absolutely banned suppression hearing evidence that tended to prove that the allegations in a facially-sufficient warrant were false, the \textit{Franks} Court adopted the following rule: evidence obtained by a search done pursuant to a facially valid warrant may be suppressed if, once statements that are knowingly false or made in reckless disregard of the truth are excised, the warrant no longer establishes probable cause. In crafting this rule, the Court recognized that "a flat ban on impeachment of veracity could denude the probable-cause requirement of all real meaning"\footnote{382} because officers could manufacture information, "remain[ing] confident that the ploy was worthwhile."\footnote{383} Moreover, noted the Court, because the warrant hearing before the magistrate is "necessarily ex parte" and will "frequently be marked by haste," it will "not always ... suffice to discourage lawless or reckless misconduct."\footnote{384}

Nevertheless, the Court required no \textit{Franks} hearing unless the defendant both points out the specific warrant portion claimed to be false and gives "a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of

\begin{footnotes}
\footnote{380. See \textsc{Florida Report}, \textit{supra} note 378, at 46-59 (concluding that elimination of depositions would likely increase trials or other judicial involvement in case disposition).}
\footnote{381. 438 U.S. 154 (1978).}
\footnote{382. \textit{Id.} at 168.}
\footnote{383. \textit{Id.}}
\footnote{384. \textit{Id.} at 169.}
\end{footnotes}
witnesses should be furnished, or their absence satisfactorily explained." Even if this threshold showing is made, the defendant bears the burden of proving by a preponderance of the evidence that statements in the warrant affidavit were either perjurious or made in reckless disregard of the truth.

Professors Wayne LaFave and Jerold Israel have properly criticized the Franks rule:

The Franks allocation of the burden is unjust; it should suffice that the defendant proves the statements false, after which the affiant should have to show that the false statement was not intentionally or deliberately made, for he alone is in a position to justify his errors. Indeed, without access to the informant it may be impossible for the defendant even to prove that the affiant (rather than the informant) lied, and thus it is to be doubted that this burden may constitutionally be imposed on defendant if at the same time the informer privilege is used to deny defendant the identity of the informant.

The Franks rule is, nevertheless, the law, and there is little reason to expect it to change. Given the heavy burden that Franks imposes on the defense, the defense should be given adequate discovery tools to meet that burden. Deposing the officers involved may be essential to meeting this burden, for, as LaFave and Israel point out, the officers "alone [are] in a position to justify [their] errors." Furthermore, as LaFave and Israel also note, the defense may have an especially difficult time proving its case when the affiant officer relied on an informant because the Government has a qualified privilege to keep the informant's identity secret. An informant's lies will, of course, not invalidate a search. But an affiant officer's lies about what the informant said or whether he even existed or the affiant's reckless disregard of the informant's untruthfulness may do so. The defendant faces yet another difficult burden—proving the need to overcome the informant's privilege—that he can meet only if armed with the information

385. Id. at 171.
386. LAFAVE & ISRAEL, supra note 18, at 159.
387. Id.
388. See id.
389. See id. at 158-59.
that comes from discovery. While the high defense burden imposed by the *Franks* Court may have been intended to discourage frivolous claims of police abuse, the Court still saw plausible challenges to an affiant’s veracity as essential to avoid “denud[ing] the probable-cause requirement of all real meaning.” That goal can be reconciled with *Franks*’ high defense burden only if there is full and complete discovery available to the defendant.

**C. Racial Pretext**

The history recounted here establishes that halting racially discriminatory searches and seizures was one of the goals of the Fourth Amendment as applied to the states through the Fourteenth Amendment. The incorporated Amendment must also be interpreted to promote an informed citizenry. Two recent Supreme Court cases—*Whren v. United States* and *United States v. Armstrong*—undermine both of these goals, effectively “denud[ing]” the Fourth Amendment of meaning as a restraint on racially pretextual searches and seizures.

*Whren* involved the traffic stop of a truck occupied by two African-American men in a “high drug area.” Plainclothes officers in an unmarked car stopped the truck after it had remained at an intersection for “an unusually long time”—more than twenty seconds—and then drove off at an “unreasonable” rate of speed after a police car approached it. The truck also had turned without signaling. During the traffic stop, an

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390. The Government may assert a privilege not to reveal the identity of an informer. See John William Strong et al., *McCormick on Evidence* § 111, at 407-11 (4th ed. 1992). The privilege may also extend to statements that may reveal the informer’s identity. See *id.* However, when the identity of the informer becomes important to establishing a defense, courts will require disclosure or, failing that, dismiss the case. See *id.* To prevent this from swallowing the rule, however, courts use an in camera hearing on the nature of the informer’s probable testimony. See *id.* The trial court “may then assess the balance between the value of that testimony to the defense and the significance of the considerations underlying the privilege in the particular case.” *Id.* at 411.

391. LaFave & Israel, *supra* note 18, at 158.


395. See *id.*

396. See *id.*
officer observed crack cocaine in the car. 397 The police arrested the occupants and searched the car; the District Attorney charged them with drug violations. 398 The defendants moved to suppress the fruits of the search on the ground that the traffic stop had been a "pretext," but the trial court denied the motion because the stop had been accompanied by probable cause to believe that the driver had violated traffic ordinances. 399 After the defendants' conviction and the unsuccessful appeal, the Supreme Court granted the defendants' petition for certiorari. 400

Justice Scalia, writing for a unanimous Court, emphasized that traffic stops are reasonable under the Fourth Amendment so long as police have probable cause to believe that a traffic violation has occurred, and the officers unquestionably had probable cause to stop Whren's vehicle for violations of multiple provisions of the District of Columbia traffic code. 401 The presence of probable cause, said the Court, was determinative. 402 The Court acknowledged the defendants' concerns that:

"[I]n the unique context of civil traffic regulations" probable cause is not enough. Since, they contend, the use of automobiles is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible, a police officer will almost invariably be able to catch any given motorist in a technical violation. This creates the temptation to use traffic stops as a means of investigating other law violations, as to which no probable cause or even articulable suspicion exists. Petitioners, who are both black, further contend that police officers might decide which motorists to stop based on decidedly impermissible factors, such as the race of the car's occupants. To avoid this danger, they say, the Fourth Amendment test for traffic stops should be, not the normal one (applied by the Court of Appeals) of whether probable cause existed to justify the stop; but rather, whether a police officer, acting reasonably, would have made the stop for the reason given. 403

397. See id. at 809.
398. See id.
399. See id.
400. See id.
401. See id. at 810.
402. See id. at 819.
403. Id. at 810.
But the Court concluded that its prior case law:

[F]oreclose[s] any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved. We of course agree . . . that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.404

Yet in Armstrong, the Court set an impossibly high burden for even obtaining the discovery needed to prove equal protection violations for selective prosecution.405 There, the defendants filed a motion for discovery in a federal crack cocaine prosecution.406 The motion sought information pertinent to the defendants' selective prosecution claim, which contended that the federal Government had chosen to prosecute African-American defendants while referring white defendants to state prosecutors operating under more lenient sentencing laws. Accompanying the motion for discovery was an affidavit from a federal public defender (FPD) alleging that in each of the FPD office's crack cases in 1991, the defendant was African-American.407 The motion was also accompanied by a study listing those defendants, their race, and status.408

After the district court ordered discovery, the Government moved for reconsideration, submitting its own affidavits and claiming that its decisions in each case rested on reasons other than race, such as the quantity of crack, the strength of evidence, and the number of sales.409 Additionally, the Government submitted portions of a 1989 Drug Enforcement Administration report concluding that large-scale crack distribution networks were controlled by Jamaican, Haitian, and African-American street gangs.410 In response, defendants
submitted an affidavit alleging that a drug treatment center intake coordinator had told defense counsel that there are equal numbers of caucasian and minority users and dealers.\textsuperscript{411} The defendants also submitted an affidavit from a criminal defense attorney, who stated that in his experience, many non-African-Americans had been prosecuted in state court for crack offenses, and a newspaper article reporting that federal crack criminals, all of whom were African-American, were punished far more severely than if they had possessed powder cocaine.\textsuperscript{412}

The district court denied the reconsideration motion and dismissed the case when the Government refused to comply with the discovery order.\textsuperscript{413} The Ninth Circuit, sitting \textit{en banc}, affirmed the dismissal, holding that a defendant is not required to demonstrate that the Government failed to prosecute those similarly situated.\textsuperscript{414} The Supreme Court reversed and remanded for proceedings consistent with its opinion.\textsuperscript{415}

The Court stressed that “the showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims.”\textsuperscript{416} This “significant barrier” required some evidence tending to show the existence of the essential elements of the defense.\textsuperscript{417} The Court concluded that the Ninth Circuit was wrong in starting from the presumption, for which it cited no authority, that all races commit all types of crimes and that no type of crime is the exclusive province of any particular racial or ethnic group.\textsuperscript{418} The Court stated that United States Sentencing Commission statistics, showing that more than 90\% of persons sentenced in 1994 for crack trafficking were African-American, while over 93\% of convicted LSD dealers were white, were “at war” with the Ninth Circuit’s presumption.\textsuperscript{419} Furthermore, according to the Court, it would “not have been an insuperable task” to prove that similarly situated defendants of other races were known to federal

\textsuperscript{411} See id.
\textsuperscript{412} See id. at 460-61.
\textsuperscript{413} See id. at 461.
\textsuperscript{414} See id.
\textsuperscript{415} See id. at 471.
\textsuperscript{416} Id. at 469-70.
\textsuperscript{417} See id. at 469.
\textsuperscript{418} See id.
\textsuperscript{419} See id. at 469-70.
prosecutors, but were not prosecuted in federal court.\textsuperscript{420} The Court was unconvincing by the defense study, which had not addressed non-African-Americans, or by the newspaper article, which addressed discriminatory sentencing rather than prosecution. Similarly, the Court characterized the defense affidavits as "hearsay and reported personal conclusions based on anecdotal evidence," an insufficient showing to meet the test for discovery.\textsuperscript{421}

The Court's decision in \textit{Armstrong} illustrates the difficulty of addressing problems of racism using the Equal Protection Clause. When defendants use equal protection theory to claim that police used improper racial considerations in determining probable cause or reasonable suspicion, they cannot even obtain discovery to support their claim without first showing the two essential elements addressed in \textit{Armstrong}. For example, they would have to establish a colorable basis for the proposition that similarly suspicious whites were not stopped or searched. This high burden renders race-based challenges of little concern to the police.

This Article has demonstrated that, contrary to the Court's position, considerations of race cannot be divorced from the Fourth Amendment inquiry; nor can Fourth and Fourteenth Amendment claims be severed. Rather, the Fourteenth Amendment mutated the Fourth Amendment, redefining the latter in the process in light of the forces that ended race-based slavery. By placing a high burden on a defendant attempting to obtain discovery concerning claims of racial pretext and by limiting such claims to the Fourteenth Amendment, the Court ignores these insights. Moreover, the high discovery burden ignores the overriding theme of this Article—that the Fourth Amendment must be read in a way that promotes an informed citizenry. Such a reading requires the overruling of \textit{Whren} and \textit{Armstrong}. Racial pretext matters, and it matters under the Fourth Amendment as well as the Fourteenth. When claims of racial pretext exist, only especially liberal discovery directed toward a more effective suppression hearing would make the aspirations of the mutated Fourth Amendment and the informed citizen ideal real.

\textsuperscript{420} See \textit{id.} at 470.
\textsuperscript{421} \textit{Id.}
CONCLUSION

As I explained in my introduction, my narrow goal in this Article has been to offer an intellectual framework, rooted in our constitutional history, for criminal suppression hearing discovery reform and not to offer a comprehensive scheme as to the precise shape such reform should take. Nevertheless, I want to make two concluding comments to guide the reform efforts now being explored by various professional associations.

First, discovery issues are not easily amenable to case-by-case solution without a framework of overarching rules. To leave discovery reform to common law development, based on constitutional challenges rooted in this Article's constitutional theory, would result in time-consuming satellite litigation and a patchwork of partial solutions.422 Moreover, courts are likely to be reluctant to overturn individual cases based on a novel constitutional doctrine. To the extent, therefore, that courts are constitutionally obligated to act to expand defense access to discovery, that action should take the form of the development of new written rules.

I have argued elsewhere, however, that when courts do not act, indeed even when they are constitutionally neither mandated nor authorized to act, legislatures may nevertheless be bound to do so.423 The Constitution does not speak only to the courts. Some matters, generally those not amenable to case-by-case solutions, are primarily within the competence of the legislatures, not the courts. Where that is so, the legislatures are constitutionally obligated to act, often in the first instance.424 This obligation extends to both Congress and the state legislatures.425 Indeed, when the Fourteenth Amendment declares that "[n]o State shall deprive any person of life, liberty, or property without due process of law,"426 the Amendment should be understood as requiring state Governments in the first instance to rectify such deprivations for which they are

422. See Taslitz, supra note 25, at 103 (making similar point about expert witness discovery reform).
423. See TASLITZ, supra note 38, at 148-51.
424. See id.
425. See id.
426. U.S. CONST. amend. XIV (emphasis added).
responsible. If the courts do not move expeditiously toward discovery reform, the legislatures can and should be pressed to act under the moral authority of a constitutional obligation.

Second, the "blue wall of silence" creates a substantial obstacle to discovering police abuses, whether intentional, reckless, or negligent. Defense discovery relevant to potential constitutional abuses by the police should, therefore, be as wide as countervailing considerations and common sense will permit. Florida’s scheme provides a helpful model. Rule 3.220 (a) of the Florida Rules of Criminal Procedure provides that "any party may, after the filing of the charging document, take the oral deposition of any person authorized by the rule." The rule specifically provides for the depositions of law enforcement officers, who must appear upon proper written notice, without subpoena. The scope of examination "shall be the same as that provided in the Florida Rules of Civil Procedure." The rules do require leave of court upon good cause shown to depose some categories of witnesses, and completely bar depositions of certain other categories. But most witnesses—including eyewitnesses, alibi witnesses, those present when statements were taken from the defendant or a co-defendant, investigating officers, expert witnesses who have not provided written reports or who will testify or give certain opinions, child hearsay witnesses, and any witnesses known by the prosecutor to have any material information tending to negate guilt—can be deposed without leave of court. Moreover, for every person who is subject to a deposition, the prosecution must provide the defense with any "statements" by that person. The term "statement" is broadly defined to include not only verbatim written or recorded statements but also "any statement of any kind or manner made by the person and written or recorded or

427. See TALSLITZ, supra note 38, at 148-51.
428. See supra Part IV.
429. FLA. R. CRIM. P. § 3.220(h) (1996). A defendant must, however, first file a notice of intention to participate in discovery at all. See id. § 3.220(a).
430. See id. § 3.220(h)(6).
431. See id. § 3.220(h)(1).
432. See id. § 3.220(b)(1), (h).
433. See id.
434. See id. § 3.220(b)(1)(B).
summarized in any writing or recording." Additionally, "all police and investigative reports of any kind prepared for or in connection with the case," except (unfortunately) for "the notes from which those reports are compiled," must be produced. The identity of confidential informants is not immediately subject to disclosure, but must be disclosed if the informant will testify at a hearing or trial or if "failure to disclose the informant's identity will infringe the constitutional rights of the defendant." Protective orders are also available upon a showing of good cause.

The Florida Rules are, in most respects, a model for how discovery should be structured. The discovery provided is broad, giving defense counsel ample opportunity to pursue leads well in advance of suppression hearings. At the same time, the rules impose reciprocal discovery obligations on the defense and provide for protective orders and initial protection of an informant's identity, thus respecting prosecution concerns about witness safety in particular cases in which a legitimate concern is shown and in which the prosecution demonstrates a need for secrecy to conduct an adequate investigation. The rules have worked well for a significant period of time and apparently have had the salutary effect of more and earlier guilty pleas by defendants confronted early on with strong prosecution evidence.

The only major problem with Florida's Rules is that depositions ordinarily may not be taken in misdemeanor or traffic offense cases in which other evidence is provided. While a cost-benefit analysis may suggest avoiding the cost of broader discovery in a relatively minor, run-of-the-mill case as to eyewitnesses and expert witnesses, informed citizen ideology suggests that open discovery of police witnesses should be available in all cases as a deterrent to police abuses. Indeed, for similar reasons, Florida's exclusion from the discovery process

435. Id.
436. Id.
437. Id. § 3.220(g)(2).
438. See id. § 3.220(h).
439. See id. § 3.220(a) (on timing of discovery).
440. See id. § 3.220(d), (g)(2), (h), (j).
441. See, e.g., FLORIDA REPORT, supra note 378, at 46-59.
of the original notes of police used to prepare their official reports seems unwise. Otherwise, however, at least as to issues relevant to potential suppression motions, Florida offers a sound model for future reform.

The movement to reform criminal discovery procedures deserves the greatest respect and attention from judges, defense counsel, prosecutors, and legislators. The issue is not one of legal “technicalities” or of narrow strategic issues of concern only to the criminal bar. Criminal discovery reform has profound implications for our concept of what “citizenry” means in modern America and the appropriate limits on state power. We should opt for a set of discovery rules that, in their own small way, help to revitalize the idea of an active, informed citizenry, a people of guardians who protect themselves by their own watchfulness from a government sometimes too easily tempted to overreach its legitimate powers.