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ARTICLES

PRESENT AT THE CREATION? A CRITICAL GUIDE TO *WEEKS v. UNITED STATES* AND ITS PROGENY

GERARD V. BRADLEY*

I. INTRODUCTION

The irony of it all is that the exclusionary rule's¹ most redoubtable and acerbic critic should now, posthumously, lead its rescue brigade. Northwestern Law School Dean and evidence don, John Wigmore, greeted the now hallowed decision in *Weeks v. United States*² by savaging it with Agnewesque vituperation.³ He compared the "high-mettled" Court⁴ to a "sensitive steed"⁵ sometimes frightened by a familiar object—here, the "sound and harmless doctrine"⁶ that illegally procured evidence was nonetheless admissible.⁷ "After being carefully led past the darksome object a few times, the steed finally became callous"⁸ enough to approve the doctrine in the 1904 *Adams v. New York*⁹ case. "But now in *Weeks* . . . horror has seized it again; it has thrown its rider over the fence; and another period of careful training seems to be

* Assistant Professor of Law, University of Illinois College of Law. Fred Heinrich, University of Illinois College of Law Class of 1985, provided truly exceptional research assistance as well as wise counsel during this Article's preparation. I thank him. Lynne Dombrowski aided final preparation of the manuscript and, along with Liz Doyle, Ruth Snyder, and Susan Atwood, is responsible for the research that went into footnotes 64 and 65 and which will bear further fruit as an article on the original understanding of the fourth amendment.

1. Whenever the terms "exclusion," "exclusionary rule," and "suppression" are used in this Article, they are intended as synonymous references to fourth amendment doctrine. When reference is made to the fifth amendment's prohibition on trial use of a certain class of evidence, it is specially denoted.

2. 232 U.S. 383 (1914).

3. Wigmore, *Evidence—Fourth Amendment—Documents Illegally Seized*, 9 ILL. L. REV. 43 (1915).

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. 192 U.S. 585 (1904).

necessary.”¹⁰ Despite his protestations and conditioning efforts, Wigmore later reported bitterly that *Weeks*' “heretical influence” had evoked a “contagion” of similar “sentimentality” among state courts,¹¹ and he promptly subjected those disciples to epithets evidently drawn from a turn of the century “Dirty Harry” script. He branded the nostrum that “[i]t is better that the guilty escape punishment in some instances than that [the] securities of liberty be violated”¹² as mere emotion “dragged in to protect petty lawbreakers”¹³ and as nothing other than “coddling the criminal classes.”¹⁴ Detestably, it was fast becoming the “usual cant.” These “throttling interpretations on the natural and legitimate processes of law enforcement”¹⁵ that needlessly endangered society, were rooted in a misguided judicial “sentimentality,” and would have astonished our constitutional forefathers to boot.¹⁶ Finally, an exasperated Wigmore wondered aloud: “[H]ow are police officers going to arrest dynamiters in emergencies?”¹⁷

Wigmore apparently even consulted the venerable Gibbon for his satirical account of the *Weeks* fallacy:

“Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you *both* go free. We shall not punish Flavius directly, but shall do so by reversing Titus' conviction. This is our way of teaching people like Flavius to behave, and of teaching people like Titus to behave, and incidentally of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else.”¹⁸

Wigmore would correct the error “by sending for the high-handed marshal . . . who . . . searched without a warrant, imposing a thirty-day imprisonment for his contempt of the Constitution,”¹⁹ and then proceed to affirm the *Weeks* conviction.²⁰

Where there is such sustained hostile fire from a preeminent source, surely there is an accurately cited target. Sympathic commentators—to the exclusionary rule, not to Wigmore—have increasingly

10. *Id.*

11. Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A. J. 479, 480 (1922).

12. *Id.* at 482 n.1 (quoting *Tucker v. Mississippi*, 90 So. 845, 847 (1922)).

13. *Id.* at 481 n.1.

14. *Id.* at 482.

15. *Id.*

16. *Id.* at 483 n.1.

17. *Id.* at 481 n.1.

18. *Id.* at 484 (emphasis in original).

19. *Id.*

20. *Id.*

joined this insight to *Weeks*' undeniable lack of empirical generalization—especially regarding what we call “deterrence” and “cost-benefit” analysis—to construct a “principled” basis for suppressing evidence illegally obtained. The equation is simple: *Weeks* begat the exclusionary rule and a “principled” rationale begat *Weeks*. The sum drawn by the commentators is that exclusion's deterrence value—if any—has no bearing on the validity of the rule.

Wigmore's inflated rhetoric is a pivotal element of this calculus. Witnessing the momentous birth, he records that, truly, a bastard was sired, and thereby verifies the first half of the equation. Indeed, his Flavius is Cardozo's now legendary “blundering constable,”²¹ and the major “principled basis” articles contain extended conversations with Wigmore, not on *whether Weeks* articulated the exclusionary rule,²² but on whether it should have.²³ Here, Wigmore tends to confirm the latter half of the calculation as well. He sees emotion, not empiricism, in *Weeks* and mentions, without study or measurement, only the obvious detrimental loss of convictions because of the rule. He says nothing of deterrent “benefit,” engages in no balancing whatsoever, and denounces *Weeks* primarily as a gratuitous mongrelization of the law of evidence, an ill-conceived attempt to do “justice” on “a street car.”²⁴ According to Wigmore, the judicial rules of evidence were never meant to be an indirect process of punishment. A criminal trial is not the occasion to investigate and correct all injustices that might incidentally cross its path. While Wigmore would agree, and perhaps seems to say, that the rule inefficiently promotes compliance with the fourth amendment, it was obviously the well-schooled, traditional, evidence scholar and not the behaviorist or criminal justice expert in him that resented *Weeks*. Friend and notable foe thus concur on the meaning, if not the soundness, of the decision.

Assent to the *Weeks* equation permeates not only the past and present commentary, but our Supreme Court as well. That calculation literally framed the discussion in the recent “good faith exception” cases.²⁵ The majority in *United States v. Leon*,²⁶ in accord with recent precedents, described the exclusionary rule as “a judicially created

21. *People v. Defore*, 150 N.E. 585, 587 (1926).

22. All commentators, including Wigmore, assume that *Weeks* did articulate the exclusionary rule.

23. See Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a “Principled Basis” Rather Than an “Empirical Proposition”?*, 16 CREIGHTON L. REV. 565 (1983); Schrock & Welsh, *Up from Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974). For Wigmore references, see Kamisar, *supra*, at 585-88; Schrock & Welsh, *supra*, at 255 n.16, 328-33, 356.

24. Wigmore, *supra* note 11, at 479.

25. *United States v. Leon*, 104 S. Ct. 3405 (1984); *Massachusetts v. Sheppard*, 104 S. Ct. 3424 (1984).

26. 104 S. Ct. 3405 (1984).

remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the person aggrieved.'"²⁷ Not at all surprisingly, the majority did not respond to Justice Brennan's dissent that deterrence was never a relevant concern "in the early cases from *Weeks* to *Olmstead*."²⁸ In fact, the Court's opinion contains not a single reference to *Weeks*, even by Justices ordinarily impressed with originalist reasoning and who have never doubted the familiar claim that the exclusionary rule originated in *Weeks*.²⁹ More impressively, the majority rather brusquely disposed of *any* ties to pre-Burger Court precedent.³⁰ It is a fair attribution to prefix their (previously quoted) version of the rule with, "Notwithstanding *Weeks*"

"Notwithstanding *Weeks*" is precisely what rankled Justices Brennan and Marshall who, perhaps unexpectedly for them, mounted an explicit "original understanding" defense of the exclusionary rule—original understanding of the rule in *Weeks*, that is. They quoted copiously from Justice Day's opinion and, to buttress their reading of the *Weeks* case, cited the "principled basis" articles³¹ discussed herein. The dissenting opinion and these articles, stripped to essentials, are neither more nor less than the *Weeks* equation.

Thus the rewards of critically evaluating *Weeks* are apparent. It is the major contemporary defense of the exclusionary rule and, if established, carries the promise of eternal life, for its cardinal feature is sublime indifference to the vicissitudes of time and experience. As Professor Kamisar succinctly stated: "Until the exclusionary rule rests *once again* on a principled basis rather than an empirical proposition, *as it did originally and for much of its life*, the rule will remain in a state of unstable equilibrium."³² Moreover, until the rule's antagonists, both on and off the Supreme Court, stop ignoring and instead adequately respond to this thrust, the dismantling project under way will remain suspect, and any eventual extinction threatens to be temporary. Until the *Weeks* equation is honestly dealt with, judicial hostility to exclusion will continue to be regarded as thinly disguised law-and-order political conservatism.

The theoretical stakes get even higher. The ante is raised by the prevailing judicial insistence that the rule is binding upon state officers

27. *Id.* at 3412 (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)).

28. *Id.* at 3435 (footnote omitted) (Brennan, J., dissenting).

29. In his concurrence, Justice Blackmun noted that *Weeks* "opened" this volume of fourth amendment law. *Id.* at 3423 (Blackmun, J., concurring).

30. The only cases cited by the majority in support of its "good faith" exception were Burger Court opinions. *See, e.g., Stone v. Powell*, 428 U.S. 465 (1976); *United States v. Janis*, 428 U.S. 433 (1976).

31. *Leon*, 104 S. Ct. at 3432 n.3, 3435 n.6 (Brennan, J., dissenting).

32. Kamisar, *supra* note 23, at 565 n.1 (emphasis in original).

and courts even though it is, in some critical sense, *not* “part” of the federal Constitution. “Principled basis” discourse, while motivated more by solicitude for exclusion itself than for jurisprudential tidiness, effectively steps into this breach. More interestingly, the anomalous existence of the rule has prompted at least one noted scholar to develop an original constitutional theory to account for it,³³ and we shall see that principled basis proponents have similarly tailored theory solely to justify an exclusionary result. At a minimum, the proper basis for both the rule and its imposition upon the states is not readily apparent, at least from the perspective of traditional constitutional theories. Re-reading *Weeks* may cure this defect. This Article critically examines *Weeks* to gauge the truth value of (chiefly) the nonempirical defenses of the rule assertedly stemming from Justice Day’s opinion. One of the major findings is that while *Weeks* is best understood as a principled rationale, it does not, *pace* Wigmore and his conversational partners, rationalize the exclusionary rule. That is, *Weeks* is not an exclusionary rule case. Further, its principled basis is not that attributed to it by modern “principled basis” apologists. To be sure, the current Court’s “cost-benefit” calculus is also foreign to *Weeks*, but at least there is no pretense to the contrary. Obviously then, the relevance of *Weeks* to present controversies is different, and more understated, than ordinarily supposed. But that more subtle teaching is still instructive. The *Weeks* rule—that upon a pretrial motion for return of property illegally seized, a court *must* order restitution, even if the government is thereby deprived of its use at a subsequent trial³⁴—was produced by the familiar judicial obligation to provide a remedy for every legal injury. This ordinary judicial duty did lead some courts to the exclusionary rule within a decade or so of *Weeks*, and many in the years just before *Wolf v. Colorado*.³⁵ But the account in Part IV of this Article of exclusion’s origins and development after *Weeks* reveals an incubation period so doctrinally chaotic that the only intellectually tenable conclusion is a negative one—there is no identifiable “original understanding” of the exclusionary rule, and therefore, no justifiable originalist attack upon prevailing judicial rationales. Stated differently, there has never been a time when the basis for exclusion has been other than varied, confused, disputed, and uncertain. Whatever else may be claimed for the various rationales, an exclusive historical pedigree may not be. The second major conclusion demanded by the formative period of *Weeks* to *Wolf* is also negative: the principled theorists’ big play—the so-called personal right to exclusion—is unsupported, a simple case of imagining the past

33. Monaghan, *The Supreme Court, 1974 Term—Forward: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

34. 232 U.S. at 387.

35. 338 U.S. 25 (1949). See Kamisar, *supra* note 23, at 601-06; Schrock & Welsh, *supra* note 23, at 281-89.

and remembering the future.

Part II of the Article attends to a necessary preliminary: prospecting in the "principled basis" opus for a clear expression of the claim, or claims, about *Weeks* to be subsequently investigated. In other words, it asks, what are the claims advanced, and to what extent are they claims about, or dependent upon, the *Weeks* case. The raw materials examined here are the articles by Yale Kamisar and Professors Schrock and Welsh, and the *Leon* opinion of their leading judicial champion, Justice Brennan. This part is perhaps an extended, but necessary prelude, whose chief conclusion is that *Weeks* claims are indispensable to the principled basis enterprise because other putatively principled bases do not withstand critical scrutiny. Part III is about reading and understanding *Weeks* itself, in its context, not ours. This part demonstrates that the necessary, critical reliance upon *Weeks* distilled in Part II is thoroughly misplaced and that Justice Day's opinion lends *no* support to the various interpretations of it proffered by Kamisar and the others. Part IV confirms this discrepancy by tracing the understanding of *Weeks* among contemporary jurists. Specifically, Part IV explores all the federal and some state cases between *Weeks* and *Wolf* to see what *Weeks* was taken to mean. This exploration confirms what Part III asserted: *Weeks* did not say the things we are told it said, and this is verified by the fact that no one who read *Weeks* (at least before *Wolf*) saw them there. Nor did any of them even mention a "personal right to exclusion," much less ascribe it to *Weeks*. Part IV also recounts the actual development of suppression in the post-*Weeks* era and examines its origins. Finally, the Conclusion reevaluates the maligned and misunderstood *Wolf* decision in light of the advances made in preceding parts.

II. CANVASSING THE "PRINCIPLED BASIS" THEORIES

A. Kamisar's "Principled Basis" Approach

Professor Kamisar's 1983 principled basis article³⁶ is already seminal. Besides the luster it rightly enjoys because of its author's unsurpassed reputation, Justice Brennan featured it in *United States v. Leon*³⁷ as supporting a "personal right to exclusion."³⁸ Additionally, top shelf constitutional scholars like Laurence Tribe cite it enthusiastically for the same proposition.³⁹ The article itself is a pungently written, formidable collection of points in service of a non-empirical ground of exclusion. Indeed, it has the air of the kitchen sink about it. Lumped

36. Kamisar, *supra* note 23.

37. 104 S. Ct. 3405 (1984).

38. *Id.* at 3433 (Brennan, J., dissenting).

39. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 607 (1985).

together there with some persuasive arguments is a spate of vapid boilerplate and question-begging, naked restatements of the issue. These nonarguments may be disregarded without considering their relation, if any, to *Weeks*. Justice Brennan echoed some of these bases without bases in his *Leon* dissent, and we shall use his more compact expression of the Kamisarean themes here solely for stylistic ease. Brennan opened his critique of the "good faith" exception with the allegedly Madisonian insight that the Bill of Rights is judicially enforceable positive law.⁴⁰ Similarly, he later remarked that the judiciary is not "exempt" from the fourth amendment, and that courts must "respect" constitutional rights as surely as the executive must.⁴¹

One problem is that the initial, more general observation is not even true. The ninth and tenth amendments, as well as the first half of the second, are not "law" in any practical sense, and perhaps more of the Bill of Rights than we admit was intended to have the same precatory status. When limited to the fourth amendment, the claim is true, but is it not trivial as well? So far as I know, no exclusionary rule critic, including Wigmore, has suggested that police officers, disabled by the fourth amendment from arresting Al Capone on less than probable cause, could have called on an "exempt" federal magistrate to make the pinch for them. Arrests on less than probable cause are unconstitutional, no matter who makes them, even if a judge *has* issued a warrant authorizing the seizure. In other words, the question is not *whether* courts have fourth amendment duties, but *what* those duties are. Most specifically, the inquiry is whether there *is* a broad fourth amendment obligation to exclude illegally seized evidence, or whether that duty is discharged, as Wigmore suggested, by punishing the trespassing constable. Still it is difficult to overstate the mileage principled basis theorists would cover with this unexceptional observation, and there are many variations on the theme. A favored version is an out-of-context quotation of Justice Holmes' opinion in *Silverthorne Lumber Co. v. United States*.⁴² Without the exclusionary rule, the vital guarantees of the fourth amendment are reduced to nothing more than a "form of words."⁴³ Or in Professor Kamisar's formulation, without the rule, the guarantees are "in reality [in]effectual."⁴⁴

These are largely fancy ways of saying once again that the fourth amendment is law, not just supplicatory bilge, that it should be observed as if it were law, and that it places some duties upon courts. Again, no one to my knowledge has denied the above premises, and as shared premises, they cannot account for the divide over exclusion.

40. 104 S. Ct. at 3432 (Brennan, J., dissenting).

41. *Id.* at 3433.

42. 251 U.S. 385 (1920).

43. *Id.* at 392.

44. Kamisar, *supra* note 23, at 594.

Schrock and Welsh's *Marbury v. Madison*⁴⁵ argument, also endorsed by Professor Kamisar,⁴⁶ gets no farther from the starting gate. The exclusionary rule is, assertedly, "simply another name for judicial review."⁴⁷ Since the fourth amendment is superior to ordinary police conduct, the Constitution must govern in cases to which both apply.⁴⁸ Whether this is equivalent to the command to translate the fourth amendment into practice, as Professor Kamisar suggests,⁴⁹ does not matter. In either event, we are being told once again and, here for the last time, that courts are under fourth amendment duties. What those duties are is still the only issue of contention.

A compelling candidate for remainderman is *Marbury*. Particularly, consider Chief Justice Marshall's general proposition there that "the very essence of civil liberty" consists in the right of the citizen to legal protection "whenever he receives an injury."⁵⁰ In Marshall's words, "every right, when withheld must have a remedy, and every injury its proper redress."⁵¹ This is simply the ineradicable, indispensable core of a legal regime, and is this not at least a connotation of the "fourth amendment is law" argument? Curiously, and fatefully, Professor Kamisar repudiates this notion as a "principled basis." He says: "Nowhere in *Weeks* is the exclusionary rule called a 'remedy' and nowhere in the opinion is there any discussion, or even mention, of the effectiveness of the exclusionary rule versus the effectiveness of tort remedies, internal self-discipline or other alternatives."⁵² (No other principled basis theorist gainsays Kamisar on this). This is "fateful" because the *Marbury* remedial injunction is precisely the basis—and rather a principled one—on which *Weeks* rests.⁵³

The paramount principled basis argument is deceptively unadorned. In Justice Brennan's words, the fourth amendment "comprises a personal right to exclude all evidence secured by means of unreasonable searches and seizures."⁵⁴ The attempted justifications for this "exclusionary right," especially the originalist argument from *Weeks*, shall be examined shortly. At present, it is important to appreciate just why this position needs to be argued for, notwithstanding the insistence of reputable fourth amendment scholars that exclusion is an "inevitable" concomitant of the amendment. No matter. The text will

45. 5 U.S. (1 Cranch) 137 (1803).

46. See Kamisar, *supra* note 23, at 591-92.

47. Schrock & Welsh, *supra* note 23, at 325.

48. *Id.*

49. See Kamisar, *supra* note 23, at 591 n.168.

50. 5 U.S. at 164.

51. *Id.*

52. Kamisar, *supra* note 23, at 598.

53. See *infra* notes 134-202 and accompanying text.

54. *Leon*, 104 S. Ct. at 3433 (Brennan, J., dissenting).

always rebut the first assertion, and "inevitable" is a term out of vogue even in the physical sciences, which now realize that statistical probabilities, not necessities, are the stuff of natural forces. It is certainly a term not ordinarily used to explain a constitutional doctrine that came on the scene within the memory of men still living and may well pass away before they do.

That textual hurdle is fairly steep. Even in light of exotic modern definitional efforts, the claim has yet to be made, when a prosecutor rises from his courtroom chair after examining the arresting officer and offers the "smoking gun" into evidence, that either a "search" or a "seizure" is about to occur. Neither the attorney, the witness, nor the judge in admitting it, is engaged, by any articulated standard, in fourth amendment activity. If and when that argument is made, it should be disregarded. For one thing, there is no expectation of privacy in a weapon that has long since been in police possession. For another, to characterize the offer as a "search" or "seizure" would only mark the start of a circular path—would it be "unreasonable" to receive it in evidence? Even if illegally seized at some past time by the police, does the court need now make a new calculation of *its* fourth amendment obligation of "reasonableness," since a discreet, constitutionally significant event is occurring?

A modified version of the textual argument is less ambitious and warrants comment. It concedes that the fourth amendment, unlike the fifth, contains no exclusionary rule, but draws two, presumably helpful, conclusions. First, because the text is silent, the way is clear to add the exclusionary rule. Yet it is an odd constitutional theory which supposes that whatever is not contradicted by the text may, willy nilly, be read into it. Even so, the question is what justifies this particular amendment. A more reasonable deduction, one made by Professor Kamisar, is that the absence of a textual niche does *not* mean that the framers of the fourth amendment did not intend the exclusionary rule.⁵⁵ This, however, is one case in which the logical sum of two negatives should be dismissed, unless one cares to defend the implication that what is absent from the text *was* therefore intended by the framers. By such reasoning we might conclude that the framers intended Presidents to stand on their heads and wave their arms like a chicken while signing bills into law.

A second, and more subtle argument, again made by Kamisar, has more logical appeal. By controlling the warrant process via the second clause of the fourth amendment, the framers believed they had controlled searches.⁵⁶ Therefore, they included no exclusionary rule only because they thought very little, if at all, about after the fact control.

55. See Kamisar, *supra* note 23, at 576-78.

56. *Id.* at 578.

The tight fit between searches and warrants insured that little was left for post hoc treatment and that the absence of language is not a judgment at all. The framers simply had no "intentions" concerning exclusion. The corollary, and critical, claim is that the growth of warrantless searches in the realm of twentieth century circumstances authorizes courts to fashion a controlling device like the exclusionary rule.⁵⁷

This argument has several notable features. One is that it literally abandons textualism, and self-consciously so. Indeed, Professor Kamisar proclaims that the fourth amendment would be "'an empty gesture if . . . literally applied'"⁵⁸ and that courts must be concerned with "'broad purposes, not specific practices.'"⁵⁹ Remarkably, he announces that even if only the warrant clause (the second half) of the amendment had actually been ratified, courts "should" have added the reasonableness clause to it anyway.⁶⁰ Also abandoned then is any comfort gained from arguments, including Kamisar's, which try to show that the exclusionary rule is really "in" the fourth amendment. The text is just no longer self-justifying. In fact, as any student of modern decisions appreciates, the text long ago ceased to be any constraint at all upon search and seizure law, as the general warrants authorized by Title III⁶¹ and the warrants without particularity, which the Court in *Camara v. Municipal Court*⁶² required in the fourth amendment's name, amply demonstrate. There is no problem, so long as these text-erasing opinions serve broader purposes. But at a minimum, arguments from that same faded text are quite inconclusive.

Another problem is that the argument is incomplete. In fact, it is little more than warmed-over *Marbury*. At root, it derives from history the basic command that courts are guardians of the Constitution and that they must do *something* effectively to "police the police" under prevailing conditions. Whether that something need be exclusion is still not resolved. Most peculiarly, the argument *cannot be* completed. It is not principled at all, but precisely the kind of empirical calculation Kamisar expressly rejects. Whether exclusion more effectively than tort suits or departmental discipline "deters" police or "remedies" wrongs is the villain, not the hero, of the story. The exclusionary rule may indeed be the best way of "keep[ing] pace with the realities of the criminal

57. *Id.* at 580.

58. *Id.* at 574 (quoting E. GRISWOLD, *THE FIFTH AMENDMENT TODAY* 55 (1950)).

59. *Id.* (quoting *School Dist. v. Schempp*, 374 U.S. 203, 241 (1963) (Brennan, J., concurring)).

60. *Id.*

61. Omnibus Crime Control & Safe Streets Act of 1968, Pub. L. No. 90-351, Title III, §801, 82 Stat. 212 (1968), *as amended by* Pub. L. No. 95-511 (Oct. 25, 1978) (*codified as* History: Ancillary Laws and Directives of 18 U.S.C. §2510 (1982)).

62. 387 U.S. 523 (1967).

justice system,"⁶³ but the inquiry required to verify that is off-limits to principled basis defenders. Most ironically, acceptance of the key historical premise—that the number of searches was roughly comparable to the number of warrants issued—guts the entire project. Why did the framers include the reasonableness clause at all if it had no empirical referent to regulate? Was it also intended as no law, but mere exhortation?

In this scenario, the fourth amendment is a general, virtually unbounded commission to courts to do whatever they choose to do in governing search and seizure. The question remains: Why should a court choose the exclusionary rule, especially if empirical considerations are ruled out? If the criteria are thought (satisfactorily) to be subjective, then there is no basis at all upon which to criticize judges who decline to opt for exclusion, and all arguments, including principled basis ones, are matters of taste and personal preference. Such an impoverishment of criminal procedure is just too high a price to pay for the exclusionary rule.

It is therefore probably a minor criticism, but still interesting to note, that practically all of Kamisar's factual premises are historically inaccurate. Warrantless searches, then as now, were the rule rather than the exception, and each of the thirteen colonies, and then states, as a common statutory practice, authorized them.⁶⁴ The First Congress,

63. Kamisar, *supra* note 23, at 580.

64. See, e.g., THE FIRST LAWS OF THE STATE OF CONNECTICUT 214-15 (Cushing 1982) (1751 Act) (authorizes sheriffs, constables, grand jurors, and tithing men to arrest without a warrant, upon sight or knowledge, persons traveling unnecessarily on the Sabbath); *id.* at 224 (1784 Act) (authorizes sheriffs to arrest without a warrant those disturbing the peace); *id.* at 80-81 (1750 Act) (authorizes justices, upon complaint of forcible entry into any house, to go to the house and arrest such offenders without a warrant); *id.* at 258-59 (1750 Act) (permits constables and grand jurors, on public days of religious solemnity, to search all places suspected of harboring any persons assembled contrary to law); *id.* at 23 (1750 Act) (authorizes constables to arrest without a warrant, upon sight or present information of others, persons guilty of drunkenness, profane swearing, Sabbath breaking, vagrants, and unseasonable nightwalkers); CONN. LAWS, tit. 87 (An Act to Prevent Horse-Racing, and to Repeal the Existing Statute on that subject," passed Oct. 1803) (authorizes constables and grand jurors to seize without a warrant any horse used in a race upon which a bet was laid within six months of the placing of the bet); ACTS AND LAWS OF THE COLONY OF CONNECTICUT, 1716-1749, at 293 (Bates 1919) (1723 Act) (authorizes constables to enter and search any tavern, to break open any lock or door if necessary, and to arrest offenders of the Act who refuse to depart when commanded).

THE FIRST LAWS OF THE STATE OF DELAWARE, vol. 2, pt. 2, at 1355 (ch. 134, § 2) (Cushing 1981) (1797 Act) (authorizes state-appointed physician to board ships carrying passengers into the state, to search the vessel, and to investigate the health of its passengers); *id.* at 1246 (ch. 97, § 18) (1796 Act) (authorizes inspectors and their deputies to board vessels docked in the ports of New Castle and Port-Penn that store at least 50 casks of flour and to inspect the flour); *id.* at 1241 (ch. 97 § 5) (1796 Act) (authorizes inspectors and their deputies, upon suspicion or request of the buyer, to

which passed the fourth amendment, also authorized warrantless

inspect casks of flour for sale in the state).

DIGEST OF THE LAWS OF THE STATE OF GEORGIA 1755-1800, at 411 (Marbury & Crawford eds. 1802) (Act passed Mar. 4, 1762) (authorizes church wardens and constables to walk through their towns twice on Sunday, to arrest any offenders of the Sabbath laws, and to enter any public house to search for offenders); *id.* at 252 (authorizes justices of the peace and constables, upon information from any credible person or upon personal knowledge or having reasonable or just cause to suspect that persons are gaming in any licensed public house, to go to such house with two credible persons, demand admittance, and upon refusal, to break open the doors, and to arrest any persons gaming).

THE FIRST LAWS OF THE STATE OF MARYLAND, ch. 2 (Cushing 1981) (1977) (permitted any person to arrest without a warrant persons suspected of being deserters and to carry them before a justice of the peace for examination); *id.*, ch. 20 (1977) (authorizes the governor and council and magistrates, on their own knowledge or on information that any male 18 years or older who is a fugitive from another state has taken shelter in this state, to arrest such persons); *id.*, ch. 23 (1778) (permits the warrantless arrest, during an invasion of the state or an adjoining state, of any person whose going at large there are good grounds to believe will be dangerous to the state); *id.*, ch. 17 (1782) (authorizes special commissioners to enter upon the lots, grounds, and possessions of any person, through which the common sewers run or ought to run).

MASS. LAWS 812-13 (T.B. Wait & Co. 1814) (ch. 45, § 2, 1777 Act) (authorizes sheriff, under an arrest warrant issued against persons who pose a threat to the safety of the commonwealth, to break and enter any dwelling that he suspects is harboring such persons); *id.* at 826, 826 (ch. 50, 51, 1779 Act) (authorizes selectmen and committees of correspondence members to stop and search any team of horses or boat suspected of violating the Act by transporting certain articles out of the state); MASS. GEN. LAWS 1780-1798, vol. 1, at 520 (Boston 1823) (ch. 67, § 6, Act passed Mar. 7, 1797) (authorizes inspector to seize without a warrant any baskets used for measuring coal that fails to conform to Act standards); *id.* at 170 (ch. 30, 1784 Act) (authorizes state-council-appointed surveyors to board vessels and conduct warrantless searches of casks of flax seed to inspect for Act compliance); *id.* at 200 (ch. 25, Act passed Nov. 8, 1785) (authorizes inspectors to board vessels and conduct warrantless searches of tobacco intended for exploration); MASS. GEN. LAWS (Boston 1814) (ch. 43, § 6, Act passed May 1776) (permits selectmen of each town to seize citizens' guns for the army's use if receipt for reimbursement is given); MASS. LAWS 1780-1798, at 391 (Wells, Lilly, Cummings & Hilliard 1823) (ch. 8, § 4) (authorizes inspectors to board vessels and to conduct warrantless inspections of pot and pearl ashes shipped for exportation and to seize casks of pot and pearl ashes that are not branded according to the Act's requirements); *id.* at 497 (ch. 71, § 3) (authorizes citizens who find shellfish that have been taken from their town and placed on board a noncitizen's boat to seize such shellfish and keep it for up to 48 hours, at which time it must be attached by due process).

THE FIRST LAW OF THE STATE OF NEW HAMPSHIRE 85 (Cushing 1981) (ch. 1, 1777 Act) (authorizes sheriff, after demanding admittance, to break open any dwelling house or other building or apartment between sunrise and sunset in which he suspects any person required to be arrested by an arrest warrant under the Act is concealed); *id.* at 132-34 (1778 Act) (authorizes naval officers to go or send searchers on board any ship at any time without a warrant to investigate compliance with the Act); LAWS OF NEW HAMPSHIRE, SECOND CONSTITUTIONAL PERIOD, vol. 6, 1792-1801, at 593-94 (New Hampshire Secretary of State 1917) (ch. 10, 1799 Act) (authorizes town and district officers forcibly to stop and detain persons they suspect of traveling unnessa-

rily on the Lord's Day, to investigate as to the reasons for the travelling, and if the responses to such inquiries are insufficient, to detain the persons until a regular trial can be held); LAWS OF NEW HAMPSHIRE, FIRST CONSTITUTIONAL PERIOD, vol. 5, 1784-1792, at 825 (New Hampshire Secretary of State 1917) (ch. 40, 1791 Act) (authorizes inspectors to make warrantless searches of any ships in their jurisdiction to search for casks of pot or pearl ashes improperly branded, to seize any improperly branded casks, and to keep them until trial); *id.* at 263 (ch. 14, 1787 Act) (authorizes impost officers or their deputies, without a warrant, to board any vessel coming into port in the state, to examine the cargo and compare it with the duty report).

DIGEST OF THE LAWS OF NEW JERSEY 1709-1838, at 471 (Lucius Q.C. Elmer 1838) (Act passed Feb. 24, 1797) (authorizes justices, sheriffs or constables, and other citizens commanded to give assistance to arrest without a warrant any rioters who fail to disperse after a verbal warning and one hour time period, and forthwith to bring those arrested before a justice); *id.* at 586 (Act passed June 10, 1799) (requires constables and authorizes any other person to apprehend, without warrant or process, any disorderly person and to take him or her before the justice of the peace); *id.* at 414 (Act passed Mar. 11, 1774) (authorizes the constables or any inhabitants of the colony to apprehend any idle vagrants or beggars wandering about the county and to bring them before a justice of the peace); *id.* at 236 (Act passed Feb. 18, 1813) (permits a flour inspector to board any vessel between sunrise and sunset to search for flour or meal he may have reason to suspect was shipped in violation of the Act); *id.* at 207 (Act passed Nov. 27, 1821) (authorizes inspectors to enter on board any ship without a warrant to search for herring shipped for exportation); *id.* at 587 (Act passed Mar. 16, 1798) (authorizes a constable or other citizen to stop offenders of the Sabbath laws and to detain them until the next day, when they will be dealt with according to the law).

N.Y. LAWS 1777-1784, vol. 1, at 629 (Weed, Parsons & Co. 1886) (authorizes any person to seize unlawfully kept gunpowder found during any fire or alarm of fire and to keep it for his own use); *id.* at 601 (Act passed Mar. 22, 1784) (authorizes collectors, upon suspicion that a report from a vessel does not accurately reflect the goods therein, to enter the vessel and search for such goods and to seize any good not accounted for in the report); *id.* at 509 (Act passed July 22, 1782) (authorizes any person to seize all goods that are moving through the state and are thought to be from Great Britain); *id.* at 424 (Act passed Nov. 22, 1781) (authorizes a state agent to seize without a warrant for army use, all hogs fit for pork, grain, and forage, except what is required for the subsistence of families); *id.* at 359 (Act passed Mar. 26, 1781) (authorizes any person to arrest without a warrant hawkers or peddlers); *id.* at 114 (Act passed Mar. 5, 1779) (authorizes the administrator of the government, by and with the advice and consent of six legislature members, whenever he shall conceive the emergency to require it, to authorize the seizure of any flour, wheat, or meal in the state for the use of the army and to break and enter into any house, barn, or other place of storage if necessary); *id.* at 122 (Act passed Mar. 8, 1779) (authorizes the warrantless seizure by any person of any goods within the power of the enemy brought into the state without permission from the state administrator); *id.* at 19 (Act passed Mar. 14, 1778) (authorizes any district, precinct, or county committee or peace officer to seize and detain until trial any flour, meal, or grain suspected of being exported without special license and to seize and detain the vessel, slaves, cattle, and carriages attempting to export such items); *id.* at 68 (Act passed Mar. 16, 1785) (authorizes inspectors to board any vessel in the harbors of New York to search for flour shipped for exportation and seize any casks of flour not branded); *id.* at 666 (Act passed Apr. 23, 1784) (authorizes inspectors to board any vessel in their districts' harbors to search for and impost pot or pearl ashes); *id.* at 10 (Act passed Nov. 18, 1784) (authorizes appointed surveyor and searchers to go on board every ship coming into their port and to direct a land and tide waiter to remain until the duty is paid and longer if thought necessary); *id.* at 490 (Act

passed Mar. 24, 1787 (authorizes sheriffs, deputy sheriffs, constable marshals, and watchmen to arrest anyone seen breaking or carrying away glass lamps hung in front of houses); N.Y. LAWS 1797-1800, vol. 4, ch. 65, at 230 (Weed, Parsons & Co. 1887) (Act passed Mar. 30, 1798) (requires health officer to enter on board every vessel coming into the port of New York and to make strict search, examination, and inquiry about the health of those on board and into the state and condition of the vessel and her cargo); *id.*, ch. 70, at 395 (Act passed Mar. 30, 1799) (authorizes appointed inspectors, between sunrise and sunset, to enter into any building of any kind to examine the state thereof, whenever, he or they judge that the health of the city may require any regulations or alterations in that building); *id.*, ch. 97, at 551 (Act passed Apr. 4, 1800) (authorizes inspector of flour and meal to enter on board any vessel between sunrise and sunset to search for flour or meal that he may have reason to suspect has been shipped contrary to the Act and to seize any so found).

THE FIRST LAWS OF THE STATE OF NORTH CAROLINA, vol. 1, ch. 4, at 405 (J. Cushing 1984) (1780 Act) authorizes commissioners to seize the property of British sympathizers); *id.* at 406 (1780 Act) (authorizes sheriffs to seize plundered property brought in from South Carolina); *id.* at 413 (1781 Act) (authorizes commissioners, sheriffs, coroners, and justices, when confiscated property has been conveyed out of the county, to find and seize such property); *id.* at 503 (1784 Act) (authorizes collectors of the duty on tonnage to go on board any vessel in order to examine and determine the tonnage); *id.*, ch. 7 (1777 Act) (authorizes inspectors of tobacco to examine any tobacco brought to a public warehouse and authorizes any person to seize tobacco exported in violation of the Act).

THE FIRST LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 456 (J. Cushing 1984) (1781 Act) (authorizes the Inspector of Bread and Flour and his deputies to enter any ship to search for flour intended to be transported out of state); LAWS OF THE COMMONWEALTH OF PENNSYLVANIA, vol. 3, 1790-1802, at 177-83 (J. Bioren 1810) ("An Act for the Prevention of Vice and Immorality, and of Unlawful Gaming and to Restrain Disorderly Sports and Dissipation") (1794) (authorizes justices and magistrates to cause to have arrested without a warrant offenders of the Act).

RHODE ISLAND ACTS AND RESOLVES, 1779 Jan. to 1780 Nov., at 6 (J. Carter printer) ("An Act To Prevent Desertion," passed Dec. 1779) (authorizes any male inhabitants of the state who detect deserters to arrest them); *id.*, 1771 May (2d) to 1778 Dec., at 8 (Act of June 1778) (authorizes Intendants of Trade to search every vessel within their districts and to seize any quantity of provisions above that allowed); *id.* at 10 (Act of May 1778) (authorizes the Major-General to arrest all persons who are suspected or known to be unfriendly to this state or to the United States); *id.*, 1784 Feb. to 1785 Oct., at 27 (Act of May 1785) (authorizes Collector of Impost or Intendant of Trade, upon suspicion of any vessel failing to report the contents of its hold, to board such vessel and examine the hold); *id.* at 42 (Act of Oct. 1785) (authorizes Collectors of Impost to seize imported goods that are not weighed and marked as required under the Act and to seize the vehicles carrying such goods); *id.* at 16 (Act of Aug. 1784) (authorizes a sworn packer of the state to inspect all casks of beef, pork, or fish before their sale and to mark them if merchantable); *id.*, 1779 Jan. to 1780 Nov., at 15 (Act of July 1780) (authorizes any person to arrest without a warrant those persons who are furthering any unofficial correspondence with the Enemy).

THE STATUTES AT LARGE OF SOUTH CAROLINA, vol. 5, 1786-1814, at 113-14 (Cooper ed. 1839) (1789 Act) (permits state-appointed commissioners to erect warehouses where all tobacco being exported shall first be subject to inspection); *id.*, vol. 4, 1752-1786, at 550-52 (1783 Act) (authorizes a justice of the peace to seize goods unlawfully taken away, or reasonably suspected to have been taken away, from stranded ships when an unauthorized person attempts to sell the goods).

LAWS OF VIRGINIA, vol. 1, ch. 62, at 32 (S. Pleasants printer 1814) (Act of Nov.

searches.⁶⁵ Kamisar even suggests that general warrants were condemned only *because* they were similar to statutes authorizing warrantless searches.⁶⁶ This corpus of statutory warrantableness, was, in addition to common-law authority to search incident to arrest (constitutionally anointed in *Weeks*)⁶⁷ and the general power (prevailing until *Payton v. New York*⁶⁸ and *Steagald v. United States*)⁶⁹ to arrest without prior judicial approval. One may also presume that then, as now, emergencies trumped the normal warrant requirements. Note further that all of this occurred in preregulatory regimes with bare-

16, 1792) (authorizes the governor, with the advice of the state council, to cause to have arrested any suspicious persons who are subjects of lands that are at war with the United States); *id.* at 525 ("An Act to Amend the Act Entitled 'An Act to Prevent Unlawful Gaming' ") (authorizes magistrates to seize all monies exhibited for the purpose of betting); STATUTES AT LARGE OF VIRGINIA, vol. 12, 1785-1788, at 331-33 (W. Henning 1823) (authorizes two or more justices of the peace and a sheriff to arrest any rioters without a warrant).

It is also important to note that many statutes requiring the issuance of a warrant before certain searches and seizures do not require a probable cause determination and are in many cases "shorn" warrants. *See, e.g.*, N.Y. LAWS 1777-1784, vol. 1, ch. 29, at 55 (Weed, Parsons & Co. 1886) (Act passed Apr. 2, 1778) (authorizes commander of the army, during an incursion of the enemy, to issue a warrant at his discretion to take forage from any inhabitant of the state); MASS. LAWS, ch. XLV, at 812 (T.B. Wait & Co. 1814) (1777) (authorizes council to issue arrest warrants for any person whom the council deems a threat to the safety of the commonwealth); *id.*, ch. XLVI, § 1, at 814 (requires justices to issue arrest warrants against persons found to be traitors by a majority vote of the townspeople).

65. *See, e.g.*, 1 Stat. 29, 43, Sess. 1, ch. 5, § 23 (1789), identical statute passed in the next session, 1 Stat., Sess. 2, ch. 35, § 47 (1790) (authorizes customs officers, on suspicion of fraud, to open and examine in the presence of two or more reputable merchants any packages of goods to check that accurate entries of the contents were made and to seize any packages found that differ in their contents from the entry); 1 Stat. 29, 43, Sess. 1, ch. 5, § 24 (1789), identical statute passed in the next session, 1 Stat. Sess. 2, ch. 35 § 48 (1790) (authorizes collectors, naval officers, surveyors and appointed persons to enter any vessel in which they have reason to suspect that goods subject to a duty are concealed and to search for and seize such goods); 1 Stat. 29, 43, Sess. 1, ch. 5, § 26 (1786), identical statute passed in the next session, 1 Stat., Sess. 2, ch. 35 § 50 (1790) (permits officers authorized under the Act to conduct searches and seizures to do so outside as well as within their respective districts); 1 Stat. 199, 205-206, Sess. 3, ch. 15, § 26 (1791) (authorizes supervisors of the revenue for the districts in which there are distilleries of any kind to conduct warrantless inspections of such distilling operations and to take an exact count of the spirits therein to enter into his books); 1 Stat. 93., Sess. 1, ch. 21, § 2 (1789) (states that the forms of writs and executions and modes of process in federal court shall be the same in each state respectively as are now used or allowed in the supreme courts of the same); 1 Stat. 73, 91, Sess. 1, ch. 20, § 33 (1789) (authorizes the arrest of criminals against the United States by any justice of the peace or other magistrate of any of the states where the criminal may be found, using the usual mode of process against offenders in that state).

66. Kamisar, *supra* note 23, at 574.

67. 232 U.S. at 392.

68. 445 U.S. 573 (1980).

69. 451 U.S. 204 (1981).

bones nonprofessional law enforcement networks. While it remains true that the framers did not contemplate suppression, it cannot be because the warrant process mooted the general problem of what to do about illegal searches. Even if Kamisar's general observations were accurate, the framers still needed a mechanism for redressing illegal execution of warrants and for constables who search without the requisite judicial approval. Kamisar fails to appreciate that, at most, only a standard of liability was established. Articulating the law does not insure that everyone will in fact observe it. Then, as now, there is the problem of dealing with constables who blunder. In reality, tightening up the warrant process only solved the problem of judicially authorized abusive general warrants and nothing more. Further, there is no evidence whatsoever in the period preceding and including the fourth amendment's adoption that anything besides general warrants were on the people's minds.⁷⁰ And it simply will not do blithely to ignore the "ancient rule" of *Adams v. New York*⁷¹ admitting tainted evidence. If the conjunction of illegally seized property and criminal trial did not become common until recently, how could the "rule" be "ancient" by 1904?

Returning to the earlier point, Professor Kamisar repeats his error in striking back at Wigmore. For what it is worth, Kamisar notes that Wigmore's "'contempt of the Constitution'"⁷² action is no more textually demonstrable than exclusion.⁷³ Distinct, but similar, is his claim that other remedies and enforcement tools, such as tort suits and institutional discipline, no more follow from the Constitution than the *Weeks* rule.⁷⁴ Both are conclusions flowing from a single premise: "the fourth amendment has *nothing to say* about *any* consequences that might flow from its violation . . ."⁷⁵ In other words, the amendment does not contradict the exclusionary rule. But then neither does *Moby Dick*. Whether Melville or the Constitution *justifies* suppression is a different, and still unanswered, question. Here Kamisar seems to have forgotten precisely what it is he is trying to justify: that the rule is constitutionally necessary, not just constitutionally permissible, and so no ground at all has been gained. The entire account may even be reducible to *Marbury's* dictum to develop *an* appropriate remedy for constitutional wrongdoing,⁷⁶ a matter of judicial implication in light of

70. See Bradley, *The Reasonableness Clause as Mere Exhortation: Is There Really a Constitutional Invitation to Fashion a Common Law of Search and Seizure?*, (forthcoming).

71. 192 U.S. 585 (1904).

72. Kamisar, *supra* note 23, at 585 (quoting 8 J. WIGMORE, EVIDENCE § 2184, at 40 (3d ed. 1940)).

73. *Id.*

74. *Id.* at 598.

75. *Id.* at 585 (emphasis in original).

76. 5 U.S. at 164.

changing circumstances. Unfortunately, Kamisar has expressly eschewed this "remedial" description of the exclusionary rule.

It is not that Kamisar is now back to square one—he is behind it. By this point, the only contention firmly established is that the text is irrelevant to the exclusionary rule controversy. Not only is it "silent," it is totally without authority because Kamisar has robbed it of any objective force. Instead, he has proclaimed it the basis upon which judges may rely in fashioning the "just" regime of search and seizure. Indeed, even if exclusion were written in bold face across the front page of the Constitution, Kamisar has succeeded only in justifying its disregard by any court convinced that, in the present climate, it is no longer right or "effective."

One is thereby relieved of seriously entertaining certain other portions of his article. Specifically, his critical linguistic comparison of the first and fourth amendments⁷⁷ and contra-Wigmore propositions rooted in the text⁷⁸ are refuted by his own constitutional methodology. That method may even neuter his entire opus—constitutional authority resides in the well-informed, sensitized judicial conscience. The resemblance here to the wider "fundamental values" debate in constitutional theory is striking, and the wages of judicial subjectivism are no less formidable. According to the norms of Kamisar's article, the fourth amendment orders judges to do what they think is right. If they are appalled by the use in a criminal proceeding of evidence illegally obtained from the defendant, they must prevent it. If it is simply wrong (and this is precisely the rationale of the *Olmstead v. United States*⁷⁹ dissent relied upon by Kamisar⁸⁰ and others), there is sufficient warrant for judicial intervention. The problem, of course, is that while this may justify exclusion, it also justifies its opposite. It is akin to the Frankfurteric "shock-the-conscience" test of *Rochin v. California*.⁸¹ More prosaically, if the judicial stomach is turned, the Constitution is offended. But what if another Justice is more appalled at letting the

77. See Kamisar, *supra* note 23, at 588. Kamisar embraces the views of Atkinson and Dellinger, which attach significance to the first and the fourth amendments' similar affirmative language. The outcome of this linguistic analysis is that the language used means that the government should do nothing to impair the private rights granted in those amendments.

78. See *id.* at 585–88. Wigmore read the fourth amendment as granting an implied private civil action and a criminal contempt claim against the offending officials. *Id.* at 585. Kamisar dismisses Wigmore's "contempt of the Constitution" enforcement remedy as a "Draconian device" and states that Wigmore's reading is no less a "creative" or "judge-made" reading of the fourth amendment than is *Weeks*. *Id.* at 587–88.

79. 277 U.S. 438 (1928), *overruled in* *Katz v. United States*, 389 U.S. 347 (1967).

80. Kamisar, *supra* note 23, at 607.

81. 342 U.S. 165, 172 (1952) (law enforcement officials forced defendant to have his stomach pumped in an effort to secure evidence of narcotics).

guilty go free? Is she not equally justified? And what of the Justice whose sturdier digestive tract allows him to view either prospect without vomiting, but wants an intellectually satisfying reason for the course chosen? The difficulty is that if everything is justifiable, including burial of the exclusionary rule, the Constitution is incapable of misinterpretation. Needless to add, a methodology able to affirm and deny the same proposition with equal facility needs reexamination. At a minimum, Kamisar has now set himself a yeoman's task—he must adduce a principled but nontextual justification for the exclusionary rule.

The remainder of Kamisar's non-*Weeks* arguments may also be dispatched, though not quite as summarily. Part of the delay resides in the fuzziness of his claims. At one point, Kamisar assumes that even if the use of unconstitutionally seized evidence does not violate the fourth amendment, the due process clause is evidently still offended.⁸² Reasoning that courts must eventually assess the police conduct, general due process principles, and the nature of our criminal justice system yields this synthesis: "Challenging the legality of a search or seizure at *some* stage of the criminal process—when it *is* practicable to do so—means the exclusionary rule. That's *all* the exclusionary rule means."⁸³

If so, then "all" is certainly not enough. Nor is the deficit erased by the apparently corollary maxim that, but for the exclusionary rule, there would be no adversary testing of the police procedure.⁸⁴ Implicit in the latter claim is the observation that, but for the exclusionary rule, there might be a systemic dearth of interested parties with sufficient incentive to litigate the search and seizure. Only the latter assertion is novel. The due process argument simply stirs together some familiar ingredients—that "courts must police the police," that "courts are bound by the Constitution," and the fourth amendment must be "effective" —in the synergistic hope that, somehow, a magic elixir labelled "exclusion" can be concocted. Alas, the alchemist's dream is yet unrealized, and the whole does not exceed the sum of the parts. But there may still be a golden nugget here. Surely the pretrial suppression proceeding is a convenient vehicle by which to transport these various aspirations. Without exclusion, would there in fact result a system in which the fourth amendment was but "a mere form of words"? Perhaps, but I doubt it. The problem is that the exclusionary rule that we *do* have induces only a tiny fraction of aggrieved parties to pursue suppression. Why? Most obviously, "innocent" search victims, that is, those from whom no evidence is seized, are conclusively cut off from it by the absence of criminal proceedings against them. "Guilty" search victims, on the other hand, are *practically* cut off. In a regime in which ninety

82. Kamisar, *supra* note 23, at 596.

83. *Id.* (emphasis in original).

84. *Id.* at 597.

percent or more of the prosecutions are resolved through plea bargaining, little litigation of any kind actually occurs, especially if there are search issues in the case. The defendant with an arguably legitimate search grievance has bargaining leverage in the bank; he will summon a more attractive plea offer precisely because the prosecutor faces dismissal if litigation ends unfavorably for her.

In any event, the fatal counterpunch to principled basis theorists is that these are *all* empirical questions: Do police, in fact, observe fourth amendment constraints in a suppression regime more than they did, or would, in one in which the "high-handed constable" is thrown into the slammer or, more realistically, is suspended without pay for sixty days? Indeed, as Professor Kamisar adverts, one virtue of the exclusionary rule is that it does *not* very effectively constrain police officers who, after all, escape the fray personally unscathed. To put the point (and it is one we shall return to) differently, these are deterrence questions, and there are, as Wigmore suggested, many more effective ways to deter police illegality than the exclusionary rule. Overwhelmingly principled is Kamisar's generic claim that the government should not profit from its wrongdoing.⁸⁵ Even if the *Weeks* opinion fails to incorporate it into fourth amendment law, its intuitive appeal was sufficient for Dean Wellington to deploy it as a classic "principle" of common-law adjudication,⁸⁶ and perhaps it *ought* to justify the exclusionary rule. One obstacle is a familiar, purely theoretical one: what is the warrant for locating this particular ethical judgment in a constitutional, as opposed to a common-law, calculus? A warrant *is* necessary, for no one claims *general* constitutional authority to exclude evidence unethically secured. The notion that it would be *unethical* to receive unconstitutionally secured evidence is similar enough to require support, and the formulation does have, as Chief Justice Burger remarked, a "sporting contest" flavor to it. The government must play fair or lose the game.⁸⁷ Further, into the twentieth century and well past *Weeks*, the government was generally not liable for the unconstitutional behavior of its police agents.

More problems attend Kamisar's precise formulation. "The government whose agents violated the Constitution should be in no better position than the government whose agents obeyed it"⁸⁸ But this "unjust enrichment" theme is hardly a ratchet: is it *more* ethically palatable that the criminal go free when the constable blunders? Many would say that it is not. Further, the pure ethical command is twice

85. See *id.* at 593.

86. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 222-29 (1973).

87. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 414 (1971) (Burger, C.J., dissenting).

88. Kamisar, *supra* note 23, at 593.

removed from the final Kamisar rendition. That one should not profit from one's own wrongdoing might apply if the real profitmaking party were the wrongdoer, but neither the offending agent, nor its government employer bears the consequences. The community of mostly law-abiding people does. The strawman of the remote regime plays his part here most effectively, for the proffered ethical calculation is calculated to obscure what the maligned Cardozoism seeks to illumine: the exclusionary rule is uniquely ill-suited to apportion moral opprobrium to those most deserving of it. A better place to balance equities is the ordinary remedial equation. The defendant may indeed be made whole and, more importantly, all "profit" incentive eliminated without invoking the exclusionary rule.

B, *The Schrock and Welsh "Evidentiary Transaction" Model*

What appear to be the remaining thrusts of Professor Kamisar's article provide a convenient transition to discussing the thesis propounded by Professors Schrock and Welsh. Kamisar's twin claims—that the rule is an exercise of "defensive judicial review"⁸⁹ and that admission is a "distinct constitutional violation"⁹⁰—are so similar to each other and so grounded in the latter's work that they are best examined along with their general propositions. Critically, the work of Schrock and Welsh is largely, but certainly not entirely, an interpretation of *Weeks*. They described the relationship as follows: "We do not attribute to [Justice] Day all the reasoning we set forth here. We only claim that, while the reasoning is our own, it has been prompted by our reading of the *Weeks* opinion, is consistent with it, and is perhaps demanded by it."⁹¹ We shall investigate the *Weeks* claims later. For now, their thesis and any value attributable to it, independent of its *Weeks* pedigree, are the tasks at hand.

The end result of their exegetical efforts is the discovery of an exclusionary right grounded in the fourth amendment that guarantees the criminal defendant a personal constitutional right to have unconstitutionally seized evidence excluded from his trial. The conclusion is endorsed by Professor Kamisar,⁹² as well as by Justice Brennan in *Leon*,⁹³ where it is repeated almost verbatim. More important, while *Weeks* looms large in Justice Brennan's justificatory universe, he specifically endorses the rationale of Schrock and Welsh as well.⁹⁴ That reasoning is in fact attributed to Justice Day, but can be expressed and evaluated,

89. *Id.* at 592.

90. *Id.* at 595.

91. Schrock & Welsh, *supra* note 23, at 297.

92. See Kamisar, *supra* note 23, at 595.

93. 104 S. Ct. at 3433 (Brennan, J., dissenting).

94. *Id.* at 3432 n.3.

shorn of its *Weeks* connection.

So barbered, much of the reasoning sounds familiar. Exclusion is the way the court itself avoids committing a wrong by violating the rule of law. Or it is the "only appropriate and timely method the court has to show its respect for the rule of law."⁹⁵ The difficulty with the obvious connotations has been explored, but the authors provide a unique gloss that lends new meaning. That gloss is the "unitary model" of government, starkly and unalterably opposed to the "fragmentary" conception beneath the deterrence-based theories of Justice Powell, for example. "[P]ioneered in *Weeks*,"⁹⁶ this model asserts "an indissoluble institutional and moral tie between the Courts and the executive."⁹⁷ This "conceptual linkage" between seizure and use of evidence produces an "evidentiary transaction," including search and trial, which is the subject of fourth amendment protection.⁹⁸ Thus, the amendment itself is permitted to speak directly and not derivatively as "enforcer" or remedy-giver, to the admitting court. In contrast, the discarded "fragmentary" model allegedly designates the executive as "sole addressee" of the amendment, because it alone actually invades privacy by searching and seizing.⁹⁹ Hence, the constitutional violation is, in a critical sense, "complete" *before* judicial activity commences. The proffered unity is then ultimately in aid of a rarefied, pure textualism. The language plus the indissoluble nexus yields an explicit injunction. For the authors, as well as Justice Day whom they claim as confrere, "the rule [is] not 'an enforcement tool,' but was *itself* a 'Fourth Amendment guarantee.'"¹⁰⁰ It does not "give content and meaning" to the . . . amendment . . . , it is *part* of that meaning."¹⁰¹ (The antinomies are theirs, not mine).

We shall critically examine the effective substitution of "evidentiary transaction" for "search and seizure" shortly, but attention to its details should not obscure that, effectively, it is the alchemist's dream come true. A constitutional provision speaking only of search and seizure, which are confessedly foreign to the judicial office, nevertheless speaks directly to judges. Notably, this interpretative event is *not* mediated by traditional extratextual sources such as historical understanding or intention, governmental practice, precedent (at least before *Weeks*), tradition, consensus in the contemporary community; existing philosophical systems, or even the raw judicial preferences that have occasionally made the Constitution say unexpected things. Indeed, those sources are all rather more supportive of the "fragmentary"

95. Schrock & Welsh, *supra* note 23, at 257.

96. *Id.* at 258, n.25.

97. *Id.* at 258.

98. *Id.* at 281.

99. *Id.* at 295.

100. *Id.* at 288 (emphasis in original).

101. *Id.* (emphasis in original).

model implicit in the "ancient rule" of *Adams*. Interest in the warrants for reading the amendment by the unitary model's light predictably runs high. Even Schrock and Welsh effectively concede that upon its acceptance rests their entire argument. The key justificatory passage is as follows:

The unitary, "evidentiary transaction" theory implicit in Justice Day's opinion insists upon a fourth amendment exclusionary duty and right because it assumes a conceptual and moral connection between the trial court and the evidence-seizing police. This connection exists because every search for or seizure of evidence points beyond itself to use at trial. Search, seizure, and use are all part of one "evidentiary transaction," and every such transaction presupposes a court as well as a policeman. Because the court is integral to the evidentiary transaction, it cannot insulate itself from responsibility for any part of that transaction, and specifically not from responsibility for the manner in which evidence is obtained. The only way the court can avoid consummating an unconstitutional course of conduct in which, wittingly or unwittingly, it has been involved from the beginning, is to abort the transaction by excluding the evidence. To admit the evidence is for the court to implicate itself in the unconstitutional police misconduct and to violate the Constitution.¹⁰²

Before unpacking this intriguing account, two caveats are necessary. The less important is the authors' unqualified rejection of "judicial integrity" rationales.¹⁰³ Supportable connotations arising from "unwitting consummation" and avoiding "implication" in police misconduct suggest the presence of a "clean hands" justification. Nevertheless, it, and opinions like the *Olmstead* dissents that rely on it, are abandoned. More critically, and this time despite contrary intimations by Schrock and Welsh, the burden of proof is on them.

The confusion of that issue is aggravated by persistent attribution of the "fragmentary" model to the polemical endeavors of Justice Powell, rather than to the Constitution itself. Powell "tries to read" that model into the fourth amendment; it is Powell's "thesis" that the authors' "evidentiary transaction" is illusory.¹⁰⁴ Elsewhere, Justice Powell (and not the text) "denies" the "exclusionary right" theory, and "fragments the government as much as possible."¹⁰⁵ "[I]n other words, fragmentation of the transaction is as arbitrary as fragmentation of the government."¹⁰⁶ Indeed, but no less so, and if by "arbitrary" the authors mean "stipulated by the Constitution," as in the separation of powers, they are quite right. For it is here worth noting, and it is not

102. *Id.* at 298-99 (footnote omitted).

103. *Id.* at 265.

104. *Id.* at 294-95.

105. *Id.* at 294.

106. *Id.* at 302.

mere obduracy to insist, that the amendment actually says "search and seizure," and is not, literally or "thematically"¹⁰⁷ (to use their term) concerned with "evidentiary transactions." Further, the hardly novel observation that searches and seizures are frequently a prelude to court proceedings did *not* prompt the framers to condemn "evidentiary transactions," a concept that appears to have occurred to no one, in any form, before Justice Day in 1914. Nor will emphatic repetition of "indissolubility" and "inseparability" prevent us from continuing to think in "fragmentary" modes unless, or until, a persuasive reason for recasting our thoughts is provided. It is *easy* to conceptualize seizure and admission at trial as discrete events, and the great weight of the evidence suggests that the fourth amendment, along with Justice Powell, does so. And it is idle to suggest, as the authors do, that the fragmentary model is wedded to the notion that the executive is the "sole addressee," as if the obvious inadequacies of that formulation supported their one government model. Again, no one, to my knowledge, has ever denied that all three branches bear fourth amendment duties. After all, the courts are the "sole addressees" of the warrant clause, for they alone issue warrants.

The tripartite division of governmental responsibility evidences the naiveté of these dichotomous formulations. And the authors' slighting, if not bludgeoning, of separation of powers principles is the first crack in their unitary model. Simply substitute, as the authors do, "evidentiary transactions" for "search and seizure" and see what happens. Now, a court that is ordinarily supposed to possess no "general supervisory" power over criminal justice (especially in the states because of the added weight of federalism concerns) most assuredly does. Where the fourth amendment heretofore authorized the Court to fashion a common law of search and seizure with constitutional status, it now requires a common law of evidentiary transactions. The changes so wrought are enormous. When "search" and "seizure" were operative words of limitation, discussion of canine sniffs,¹⁰⁸ beepers,¹⁰⁹ pen registers,¹¹⁰ physical surveillance,¹¹¹ and "plain view"¹¹² was animated by the immunity conferred in decreeing them "not searches." That is all academic now, for they are surely evidence gathering techniques, even

107. *Id.* at 300.

108. *See* *United States v. Place*, 462 U.S. 696 (1983) ("sniff test" of luggage by a narcotics detection dog was not a fourth amendment search).

109. *See* *United States v. Knotts*, 460 U.S. 276 (1983) (monitoring via beepers was not a search or seizure).

110. *See* *Smith v. Maryland*, 442 U.S. 735 (1979) (use of pen register was not a search within the meaning of the fourth amendment).

111. *See* Y. KAMISAR, W. LAFAVE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 256-57 (5th ed. 1980).

112. *See* *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

if they are not searches. They are productive of evidentiary transactions and thus susceptible to judicial regulation in the name of reasonableness. More generally, all police investigative activity previously shielded from judicial oversight by the *Katz v. United States*¹¹³ "expectation of privacy" and *United States v. Place*¹¹⁴ "search" doctrines for instance, is now prodded into the sunlight of judicial scrutiny. While this result may be welcome news to some, including perhaps Schrock and Welsh, it surely reveals the considerable inconsistency between prevailing bedrock fourth amendment principles and what the authors now claim the text actually says.

Frisbie v. Collins,¹¹⁵ holding that the defendant is not a "suppressible fruit," is now an easy case too. Where courts faced with the problem of the illegally seized defendant have all but universally declined to "exclude" the body—and thereby dismiss the prosecution—the text now tells them to do just that. Since there is no question that such seizures occur for the sole purpose of vesting the court with jurisdiction, the conceptual link between seizure and prosecution is empirically airtight. For instance, no longer need federal courts worry about their authority to decline jurisdiction expressly vested in them by Congress, for separation of powers is overcome by the unitary model. Or if Congress retains authority, notwithstanding the fourth amendment's "thematic content," to compel entertainment of the prosecution, why does not its power to prescribe rules of evidence for the federal courts overcome the similarly grounded right to exclude evidence?

If *Frisbie* is an easy case, so presumably is *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.¹¹⁶ While the situations are only analogous, once congressional power over jurisdiction is subordinated to the revamped fourth amendment, there is at least no obstacle to recognizing a cause of action "implied" by the amendment. The article II doctrine of prosecutorial discretion is also endangered by this loosening of doctrinal bonds.¹¹⁷ While its pedigree and contours have never been precisely articulated, the Supreme Court has frequently asserted that some prosecutorial decisionmaking, such as whether to prosecute, what charges to lodge, and whether to withdraw charges, is an executive function not amenable to judicial control, except in discrete, carefully justified, and delineated instances.¹¹⁸ No more. With a com-

113. 389 U.S. 347 (1967).

114. 462 U.S. 699 (1983).

115. 342 U.S. 519 (1952).

116. 403 U.S. 388 (1971). See *supra* text accompanying note 87.

117. See generally Bradley, *Law Enforcement and the Separation of Powers*, (forthcoming).

118. See, e.g., *Allen v. Wright*, 104 S. Ct. 3315 (1984); *United States v. Batchelder*, 442 U.S. 114 (1979); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *United States v. Nixon*, 418 U.S. 683 (1974); *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973);

mon law of evidentiary transactions comes a common law of prosecution. If police and courts are "conceptually indissoluble," what about prosecutors caught in between? They are simple conduits. All they do is present evidence before courts. Presumably, unreasonable prosecutorial behavior is now condemned by the fourth amendment. The troubled life of *Miranda v. Arizona*¹¹⁹ is also soothed, if not as a fifth amendment case, than as a fourth amendment one. So long as search and seizure are robbed of privacy invasion connotations, which is the primary aim of the Schrock and Welsh analysis, police-suspect conversation, and not just "confessions," coerced or otherwise, easily fit the evidentiary transaction mold. Such exchanges are at least as "inseparable" from evidence gathering for trial as seizures of tangible objects, and probably more so. A common law of witness statements, including but not limited to suspects, and with constitutional potency is thereby authorized. *Miranda* may be a troubled technique for ferreting out "involuntary" confessions, but surely it passes muster as a "reasonableness" requirement. For that matter, the authors' unitary model neuters sixth amendment confession doctrines, especially the pre- and post-indictment hinge.¹²⁰ Such textbound, talismanic analyses are subsumed by the new fourth amendment colossus.

If only a fraction of these logical consequences were actually to occur, the "one government" model would explode upon the constitutional scene with enough destructive force to pulverize the infrastructure of criminal procedure, if not all constitutional law. But the authors neither appreciate nor pay the price of their Rambo jurisprudence. It is not so much that they do not account for the perhaps unwitting effects of their work, it is that the destructive effects are gratuitous because, when all is said and done, the fourth amendment still does not contain an exclusionary rule. Put differently, they painstakingly, if not successfully, establish that courts are direct, nonderivative addressees of the amendment, but it turns out that the amendment has nothing to say to them. Assuming that the text forbids "unreasonable evidentiary transactions" and that it therefore, contains a "personal right to exclusion" separate and distinct from an earlier privacy invasion, one would expect some separate and distinct analysis of that right. That is, if distinguishable rights are doing business together as one amendment as, for example, in the first, fifth, sixth, and eighth amendments, distinguishable analyses should emerge. One asks—without response—what actually makes admission "unreasonable." Under what circumstances is the receipt of illegally seized evidence "reasonable"? What is the scope of

Oyler v. Boles, 368 U.S. 448 (1962).

119. 384 U.S. 436 (1966).

120. See generally Y. KAMISAR, W. LAFAYE & J. ISRAEL, *supra* note 111, at 636-65.

the exclusionary right? Does it apply to *all* judicial proceedings and, if so, why? In short, what reflective process is supposed to occur in the judicial brain prior to exclusion of evidence?

Quite clearly, the answer is none, and that is why the proposed way of thinking is ultimately senseless. Schrock and Welsh explicitly require exclusion each and every time, without exception, there has been an antecedent unlawful invasion of privacy by the police or, in other words, when there has been an illegal "search" or "seizure."¹²¹ The rule is thus completely derivative after all, but the triggering events have been analytically annihilated. Having conditioned us to think "thematically" along a continuum of "evidentiary transactions," and to stop thinking of discrete events called "searches" and "seizures," the authors now rely exclusively upon the displaced terms.

Reconceptualization is one thing, but blithe indifference to contradiction at the center is still a flaw in any way of thinking. Schrock and Welsh insist on effacing the language of the text long enough to squeeze trials and judges into it, but then invest the faded words with the same talismanic significance they originally, and in the authors' opinion, unjustifiably possessed.

Intellectual honesty requires one to pay the piper. Here the cost is, presumably to the authors, prohibitive. They justify the exclusionary rule on its own ground and as precisely what they proclaim it to be—admission is condemnable as, or at least part of, an unreasonable evidentiary transaction. In either event, they must explain why, for example, even a reasonable mistake of law by a well-intentioned officer always conclusively taints a separable trial decision. What if *this* constable's blunder sets a murderer free? Is it an obviously "unreasonable" evidentiary transaction to admit the evidence anyway? Indeed, the longer and more complex the continuum, the less amenable it is to the absolute judgment of "unreasonableness" the authors wish to justify. When a flaw in one pole of a transaction, the acquisition, literally determines the result at the other end, exclusion, we have not changed our thinking after all. An illegal search and seizures triggers exclusion. And we are left still wondering, why? The only event of constitutional and analytic significance continues to be the initial police misconduct. That is what Justice Powell has been saying all along.

The invitation to rethink the fourth amendment should be declined for further, just as powerful reasons. Returning to the central justificatory passage, Schrock and Welsh's "indissoluble connection" rests upon an empirical observation buttressed by a single inference. As a matter of experience, every search or seizure points beyond itself, or contemplates use at trial. Consequently, there is a single evidentiary transaction in the event, and the amendment condemns an entire transaction.

121. Schrock & Welsh, *supra* note 23, at 303.

Since the text does not so read, the critical inference is supplied by the one government or unitary model. As best I can decipher, the notion is as follows: what is in fact joined by contemplation or some other unity is or should be joined in constitutional analysis. Unfortunately, the inference just does not follow.

Consider a few examples that are hardly hypothetical. Congress goes to a great deal of trouble appropriating money and articulating budget allocations, surely "contemplating" that the money will be so spent. Yet there is the constitutional problem of executive impoundment. Also, Congress may allocate some of this money to the army and navy it has raised to fight the war it has duly declared. Yet the President, as commander-in-chief, may refuse to commit troops to actual combat. Congress also writes criminal laws and gives money to Justice Department prosecutors expecting that criminals will, at least ordinarily, be prosecuted. Nevertheless, the Supreme Court suggests that neither Congress nor the judiciary can control the executive's exercise of prosecutorial discretion. With respect to Congress, that position is, in my view, well overstated. That there is tension, conflict, incomplete or divided authority or, in other words, fragmentation, in the constitutional structure, is to say that there is a separation of powers which is neither airtight nor exhaustively delineated. And what is more, this built-in uncertainty is frequently thought of as a virtue of our Constitution. It is simply not a self-justifying, working premise of constitutional interpretation to "unify" what the Constitution has "fragmented." One may do so, but only after persuasive argument.

More vulnerable is the empirical base itself. The "conceptual and moral connection" argued for "exists because every search for or seizure of evidence points beyond itself to use at trial."¹²² "[E]videntiary seizures . . . make no sense without an expectation of judicial use."¹²³ "[A] policeman . . . being *out* there in a law enforcement . . . capacity is only intelligible on the expectation that he will come *in* to court."¹²⁴ Furthermore, "one can understand what . . . the marshal does when he makes searches and seizures in lawful guise, only by reference to a court."¹²⁵ While these formulations may have slightly varying nuances, they are obviously intended by Schrock and Welsh to convey the same crucial, core observation.

It is therefore noteworthy that the observation is irredeemably flawed. To begin with, only seizures have the theoretical capacity to give rise to the proffered expectations because unproductive searches do not yield anything to be used in court. Yet searches remain prototypi-

122. *Id.* at 298.

123. *Id.* at 302.

124. *Id.* at 300 (emphasis in original).

125. *Id.*

cal fourth amendment activity without *any* relation to courts. The available field of inquiry can be further narrowed at the outset. The authors are *not* referring to all seizures, but rather to seizures of inanimate entities. Their discussion is about "judicial use," "evidentiary transactions," and "excluding evidence." They are obviously factoring out seizures of persons, including arrests of defendants. In any event, many seizures, such as on the street detention for brief investigative purposes or pure harassment, occur without the requisite contemplation of judicial proceedings, and arrests by themselves do not lead to exclusionary consequences. Only a fraction of police search and seizure efforts is even available to support assertions about *all* searches and seizures.

Further difficulties diminish even this remainder, with one previously mentioned general gloss casting a giant shadow over their claim. In the real world of plea bargaining that we inhabit, police officers need not contemplate "judicial use" of seized evidence. They may reasonably think of theirs as the job of acquiring leverage for negotiations. While courtroom proceedings, even trial, are always a possibility, the actualities of criminal justice allow officers to operate with little expectation that a judge will ever be asked to admit the fruits of their seizures as trial evidence. What is left of the authors' beleaguered observation is further whittled down by the realities of modern policing. For instance, the authors ignore all seizures in which the mere act of confiscation satisfies police objectives. Self-protective frisks and seizures of weapons contemplate self-preservation, not prosecution. Police officers routinely disarm potentially hostile persons in crowds gathered about an arrest scene out of fear, not prescribed duty. The facts of *Ybarra v. Illinois*¹²⁶ are illustrative here. Officers, armed with a warrant to search a particular individual, executed the warrant in a crowded bar.¹²⁷ Everyone in the bar was frisked,¹²⁸ no doubt as a precaution more than as a prelude to prosecution. In addition, much contemporary urban policing strives to disarm the populace generally, especially young men. The weapons seized are frequently thrown away or end up collecting dust in police lockers. Still, law enforcement objectives are satisfied.

Drug seizures also evidence the rewards of mere confiscation. A large scale pusher can be run out of business, if not into jail, by seizing his stash and throwing it away. On a less ambitious scale, individual (frequently young) buyers are shaken down by officers seeking information precisely in exchange for not going to court with the seized drugs. Officers frequently accost buyers and take their drugs with *only* the expectation that intelligence, not evidence, may be gathered. Stolen

126. 444 U.S. 85 (1979).

127. *Id.* at 87-88.

128. *Id.* at 88.

goods are another illustration. Even if no one is prosecuted, their return to rightful ownership is part of police routine. Ironically, full understanding of the realities of police behavior more likely supports the view that officers ordinarily conduct search and seizure operations as if they *never*, rather than always, had to go to court. This is hardly a matter of oversight. Police trainees learn, if not formally then informally, largely to disregard the litigation consequences of their acts. The reasoning may well be shared by a majority of the ordinary population from which the recruits are drawn: because the rules of criminal procedure are seen as either so morally perverse or so out of touch with reality, or both, the *only* way to do the job of policing is not to worry about what lawyers and judges will say. Another facet of police culture distressingly overlooked by Schrock and Welsh adds to the at least relative indifference of officers to trial results. Successful, productive officers are generally known by the quantity of arrests they make. A "big collar" man, an officer who makes a lot of arrests, is a "good cop." In addition, informal "quotas" assigned to officers and detectives by their supervisors are for arrests, not convictions. Finally, it is frequently true from an economic perspective that an arrest, regardless of conviction, makes sense because arrests, especially if made late in an officer's regular tour of duty, lead to overtime pay.

But Schrock and Welsh make an even bigger, this time, categorical mistake. They proffer a connection between "search and seizure" and judicial use. Their proof consists entirely of estimates (vastly overstated) of some police activity. The problem is that the police establishment is only one of many fourth amendment agencies. In the present regime to which the authors make reference, neither police officers nor "law enforcement" generally enjoy a monopoly on searches and seizures. After *Katz*, any governmental actor who defeats a legitimate expectation of privacy engages in fourth amendment activity. Teachers and school administrators,¹²⁹ as well as welfare bureaucrats¹³⁰ and firemen,¹³¹ conduct "searches" these days, and the degree to which they "expect" judicial use of things seized is certainly less than total.

These are all, of course, among the reasons why the exclusionary rule is at most a marginal deterrent of police misconduct, which is why the authors' argument is practically self-refuting. If police officers were so "indissolubly" wedded to judicial proceedings, a principled basis would be unnecessary since deterrence would unquestionably justify the

129. *New Jersey v. T.L.O.*, 105 S. Ct. 733 (1985) (searching of purse of high school student suspected of drug dealing was reasonable search).

130. *Cf. Wyman v. James*, 400 U.S. 309 (1971) (requirement of home visit in order to receive welfare benefits was a search not within the protection of the fourth amendment).

131. *See Michigan v. Tyler*, 436 U.S. 499 (1978) (no warrant necessary to enter property to fight fire or to remain for a reasonable time to investigate cause of blaze).

rule. That a principled basis is sought implicitly concedes that deterrence is a shaky foundation for exclusion. In other words, if the evidentiary transaction were empirically verified, there would be no need to insert it in the Constitution as a "way of thinking" about the law. Highlighting the precariousness of the project highlights the necessity of *Weeks* to it. If Justice Day's opinion embodied these implausible views, there would at least be an argument, for we know from *Brown v. Board of Education*¹³² and *Roe v. Wade*,¹³³ for instance, that persuasive reasoning is not essential to watershed status in constitutional law.

Independent of any respectability acquired through a *Weeks* ancestry, the "evidentiary transaction," "unitary model" thesis has just one virtue—it *sounds* like more than a mere assertion of belief in the exclusionary rule. Even when supplemented by Professor Kamisar's varied contentions, the whole is little more persuasive than a sermon preached to the choir. The unconverted have been given no reason to mend their ways, and will (should) stay their course unless or until Justice Day persuades them otherwise.

III. UNDERSTANDING *Weeks* IN ITS OWN CONTEXT

Weeks talk is incurably infected by the exclusionary rule synthesis in criminal procedure history. Because principles articulated, but not originated, by Justice Day did, after considerable refraction and external aid from the truly seminal *Boyd v. United States*¹³⁴ case, eventuate in the rule, *Weeks* itself is universally read as if it were talking about and justifying the exclusionary rule. It did neither. That it did not do so is at least suggested by the absence of any language in the opinion denoting its outcome as "exclusion" or "suppression." Even Professor Kamisar notes, although incorrectly, that the *Weeks* rule was not referred to as "exclusion" until 1943.¹³⁵ It is correct that *Weeks* itself did not employ that hallowed term. Further, even allowing for intergenerational definitional vagaries, *Weeks* contains no discussion of exclusion under any nomenclature. There is *effectively* no mention of it either, save as a foreseeable consequence of what *was* under investigation. In Justice Day's words, the issue was "the right of the court in a criminal prosecution to retain for the purposes of evidence"¹³⁶ unlawfully seized papers of the accused, when the defendant had filed a timely, pretrial petition for return.¹³⁷ Still more revealing is the opinion's distinction and express approval of the exclusionist's *bête noire*—the ancient rule

132. 347 U.S. 483 (1954).

133. 410 U.S. 113 (1973).

134. 116 U.S. 616 (1885).

135. Kamisar, *supra* note 23, at 590 n.162.

136. *Weeks*, 232 U.S. at 393.

137. *Id.*

of *People v. Adams*:¹³⁸ “[T]he court, when engaged in trying a criminal cause, will not take notice of the manner in which [a] wit[ness] [has] possessed [himself] of [subjects of evidence] which are material and properly offered in evidence.”¹³⁹ In fact, defense counsel even cited *Adams* in support of *Weeks*’ position.¹⁴⁰ *Adams* and *Weeks* were inapposite, according to Justice Day, and the “ancient rule” survived the case, allegedly establishing a “personal right to exclusion.” The basis for Wigmore’s vitriol, and for the case’s celebrity among principled defenders of exclusion, is therefore neither obvious nor simple.

Recovering the real *Weeks*, and assessing its lessons, is therefore a subtle undertaking. Necessarily, one must resist the apparently ubiquitous temptation in constitutional law, evidenced by Kamisar, Justice Brennan, and Professors Schrock and Welsh, to place retrieval of the past in service of intervention in the present. *Weeks* may indeed tell us as much, but we must read *it*, and not their commentary, to see what it has to say. The starting point must be the facts of *Weeks*, which were least conducive to exclusionary rule development.

A. *Weeks: The Facts*

Fremont Weeks operated an interstate lottery racket out of Kansas City, Missouri,¹⁴¹ which was rather successful, it would appear, from the account given in the Supreme Court’s opinion. Police officers seized from Weeks’ residence, in addition to “certain other property” they were “unable to describe,” a \$500 bond, mining stock valued at \$12,000, and unvalued certificates issued by the San Domingo Mining Loan and Investment Company.¹⁴² The officers also seized candies, a tin box, a leather grip, and a “newspaper published about 1790, an heirloom,” all of whose evidential value was never explained.¹⁴³ The seizers were a comparably diverse group. An initial and evidently larger search was conducted solely by the local constabulary.¹⁴⁴ Later, they returned with a United States Marshal who personally searched the defendant’s room and “carried away certain letters and envelopes found in the drawer of a chiffonier,” or fancy dresser.¹⁴⁵ The take from the earlier sweep was also turned over to federal agents, and eventually all the items seized wound up under the control of the federal prosecutor.

138. 176 N.Y. 351 (1903).

139. *Id.* at 358, quoted in *Weeks*, 232 U.S. at 395–96.

140. *Weeks*, 232 U.S. at 384.

141. *Id.* at 386. The factual account in the text is drawn exclusively from the official report of the *Weeks* opinion.

142. *Id.* at 387.

143. *Id.*

144. *Id.* at 386.

145. *Id.*

Mr. Weeks was arrested at work and without a warrant. More importantly, each search was conducted with neither a warrant nor valid consent,¹⁴⁶ and in the absence of emergency conditions, if not probable cause. In any event, not even the United States Attorney contended that the seizures comported with fourth amendment requirements, and both the district court and the Supreme Court had little difficulty concluding that the Constitution had been violated.¹⁴⁷ Nevertheless, *Weeks* was indicted, tried, convicted, and sentenced to prison for mailing lottery paraphernalia. The evidence unlawfully taken from his home was crucial to this result.

The fundamental error asserted was not the use of tainted evidence at trial, but rather the trial court's inadequate response to *Weeks*' pretrial "Petition to Return Private Papers, Books and Other Property."¹⁴⁸ Set out fully in the text of the opinion, the motion prayed for return of *all* the seized property then in federal hands.¹⁴⁹ The moving papers imprecisely lumped into two piles a host of events and laws that we would more fully distinguish. The two invasions and seizures, subsequent receipt, ongoing retention by federal personnel, and contemplated use at trial were collectively and indiscriminately violative of the fourth and fifth amendments as well as their Missouri counterparts. Still, the single prayer for relief was return.¹⁵⁰ The trial court then cut into this mass along an entirely new vector by ordering return of all property not pertinent to the charge, without regard for its initial collection by state, as opposed to federal officers—a distinction the Supreme Court would not fail to make.¹⁵¹ The government promptly complied, and Weeks renewed his petition to return the remainder after the jury had been sworn, and again when the evidence was actually introduced. The objection was based upon the fourth and fifth amendments to the federal Constitution. Each effort being unsuccessful, the path was cleared for Supreme Court review.

B. *The Remedial Basis of Weeks*

"The defendant assigns error . . . in the court's refusal to grant his petition for the return of his property and in permitting the papers to be used at trial."¹⁵² So stated by Justice Day, this was the curtain call of the defendant's undifferentiated, scatter-shot argument. Day immediately applied the scalpel and critically realigned the discussion

146. *Id.*

147. *Id.* at 398.

148. *Id.* at 387.

149. *Id.* at 387-88.

150. *Id.* at 388.

151. *Id.*

152. *Id.* at 389.

along two axes. "It is thus apparent that the question presented involves the . . . duty of the court with reference to the motion . . . for the return of certain letters, as well as other papers, taken from his room by the United States Marshal . . ." ¹⁵³ Filtered out completely were the depredations of the state police. Also removed from the analytical plan of the opinion was trial use of the evidence. That is, the "exclusionary rule" was but a parasite attached as a known consequence to the pretrial return motion that was the real subject of dispute. From the Court's view, *Weeks*' petition was justifiably the center of the controversy. For the return motion raised a contentious, practically momentous, analytically difficult, currently unresolved issue with constitutional overtones. Divining the proper solution and adequately justifying it was challenge enough for one opinion, and *its* resolution alone, shorn of any exclusionary rule synthesis, was significant and would have marked *Weeks* an important case, albeit not a landmark one, in American criminal procedure. Put differently, had the exclusion synthesis been short circuited, say by congressional action at the onset of Prohibition, we would, or at least should, still remember *Weeks*. That an "exclusion-less" *Weeks* was demonstrably significant also supports the view here expressed that *Weeks* was "exclusion-less." The heated rhetoric of the opinion (much of it dictum in any event) so frequently quoted by Justice Brennan and others might seem hopelessly misplaced if exclusion is not being justified after all. If not exclusion, what is all the commotion about? It is instead about an important development in constitutionally grounded remedial law that *did* need a boost from bombast. At the same time, given the context discussed below, the *Weeks* opinion is much too understated to support the breathtaking "personal right to exclusion" that Brennan, Kamisar, Schrock, and Welsh find there and even say was consciously put there by Justice Day. Only divine intervention could have explained *that* development. In fact, *Weeks* is perhaps a barely overstated rationale for returning illegally seized property, even if it has evidentiary value.

Since no one doubted the illegality of the marshal's acquisition, resolution of the motion to return was all that needed attention. But what looked like a simple replevin case could not be resolved by application of replevin principles. At common law, property with evidential value could not be returned to its rightful owner, who need not be the defendant, until the government was done with it. ¹⁵⁴ Moreover, pretrial restoration of *any* property seized from a defendant was, before *Weeks*, virtually unknown and its legal propriety very unsettled. The first such

153. *Id.*

154. See Grant, *Constitutional Basis of the Rule Forbidding the Use of Illegally Seized Evidence*, 15 S. CAL. L. REV. 60 (1942).

motion in American courts was made in 1908,¹⁵⁵ and the application was confidently denied because the seizure had been lawful. The court in *United States v. Wilson*,¹⁵⁶ however, deeply questioned its authority to entertain the motion at all. The court finally located jurisdiction in "general principle," but not before convincing itself that the *Adams* rule—"so well recognized that it cannot be the subject of much discussion"—was not in the way.¹⁵⁷ The general jurisdictional principle located was *not* the federal Constitution, but an inherent power to dispose of property in the court's control.¹⁵⁸ In dictum, the *Wilson* opinion made clear that in no event should evidential property be returned before the trial concluded.

Perhaps expectedly, *Weeks* did not cite *Wilson* as authority for pretrial return of evidence, but Justice Day did note everything else in the field. He explicitly addressed the jurisdictional hurdle—the "right" of the court to "deal" with papers and documents held by the District Attorney and other officers subject to its authority.¹⁵⁹ The Court jumped astride a single case, *Wise v. Henkel*,¹⁶⁰ but that "right" was not uneventfully established there, either. In *Wise*, the United States Attorney in Manhattan was jailed for refusing to obey an order to return evidential property.¹⁶¹ His petition revealed the magnitude of countervailing forces: the district court was "without jurisdiction" to issue the order, and the subsequent contempt order therefore violated the Constitution.¹⁶² Again in dictum, the Supreme Court remarked:

[i]t was within the power of the court to take jurisdiction of the subject of the return and pass upon it as the result of its inherent authority to consider and decide questions arising before it concerning an alleged unreasonable exertion of authority in connection with the execution of the process of the court.¹⁶³

The critical premise turns out to be that the property had been seized pursuant to a warrant.

For the propriety of actually restoring "papers" wrongfully seized, Justice Day cited the eminent Bishop on Criminal Procedure, who in turn cited two 1835 English cases, *Rex v. Kinsey*¹⁶⁴ and *Rex v. Bar-*

155. Fraenkel, *Concerning Search and Seizure*, 34 HARV. L. REV. 361, 371 (1921).

156. 163 F. 338 (C.C.S.D.N.Y. 1908).

157. *Id.* at 340.

158. *Id.* at 343-44.

159. 232 U.S. at 398.

160. 220 U.S. 556 (1911).

161. *Id.* at 557.

162. *Id.*

163. *Id.* at 558.

164. 173 Eng. Rep. 198 (1836), cited in *Weeks*, 232 U.S. at 398.

nett.¹⁶⁵ The Court double-dipped here by citing *Kinsey* and *Barnett* itself. Each compelled return of only nonevidential property. In addition, Day relied upon *United States v. McHie*,¹⁶⁶ a 1912 lower court ruling that recognized jurisdiction to return, but that did not address the evidential versus nonevidential distinction. *McHie* also noted that the common-law replevin action was technically unavailable in the *Weeks* context.¹⁶⁷ Finally, the *Weeks* court cited *United States v. Mills*,¹⁶⁸ a 1911 circuit court case that did order return of books and papers which were evidential, but not for the offense for which the defendant had been indicted.¹⁶⁹ Also, the *Mills* court noted its adherence to the prevailing *Adams* rule.¹⁷⁰

And that was all the *Weeks* court could muster. Justice Day found no case from any court which held as he was about to hold—hence the high-stakes, uncertain gamble of *Weeks*. The detriment to law enforcement was unmistakable. The *Weeks* litigation itself made it clear that relief would necessarily mean reversal of the conviction. Genuine authority was scant, if any existed, and so the opinion needed assistance. More important to our purpose is recognition of the underpinnings of *Weeks* in the theory of the cases it cited. Jurisdiction in *Henkel*, *Mills*, and *McHie*, for instance, stemmed from some general, inherent authority of courts over their processes and over property in their constructive custody.¹⁷¹ As a matter of historical fact, each involved documentary evidence unlawfully seized under color of judicial process—i.e., warrants—leading to deposit of the seized items with the court. Critically, not a word was spoken of the Constitution in general, or the fourth amendment in particular, in any of those cases. Justice Day, in his key justificatory paragraph, added none. The *Weeks* “infrastructure” was established without any reliance at all on constitutional analysis, only on the nature and powers of courts. There is no intimation that the fourth amendment in this pre-*Bivens* regime either required or justified this exercise of judicial power.

The “superstructure” of *Weeks*, that the proper rule of law was indeed restoration, necessarily participated in fourth amendment doctrine. If the initial seizure had been lawful, the Court had no duty to perform. That it was unlawful was an essential premise, not of jurisdiction, but of the holding in *Weeks*: “[T]here was involved in the order refusing the application a denial of the constitutional rights of the accused, and . . . the court should have restored these letters to the ac-

165. 172 Eng. Rep. 563 (1829), cited in *Weeks*, 232 U.S. at 398.

166. 194 F. 894 (N.D. Ill. 1912), cited in *Weeks*, 232 U.S. at 398.

167. *Id.* at 898.

168. 185 F. 318 (C.C.S.D.N.Y. 1911), cited in *Weeks*, 232 U.S. at 398.

169. *Id.* at 320.

170. *Id.*

171. See *supra* text accompanying notes 160–70.

cused.”¹⁷² In other words (and *contra* principled basis defenders), “return” and not exclusion was in some crucial sense constitutionally required. That the “sense” is subtle is apparent by the absence of constitutional overtones in the infrastructure. Here is where the otherwise misguided analogy to *Marbury* may help: “The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”¹⁷³ Fremont Weeks was injured. What “protection” did the “laws” afford him, if not return?

Very little. Or none. The government had already stripped him of the first line of defense—the always risky and dangerous option of resisting unlawful entry at the doorstep,—because the police ransacked his home while he was in custody. In general, very few citizens could be counted upon to resist the usually overwhelming official display of power and authority at the point of entry. Simple replevin, we have seen, was unavailable. Weeks could have sued the marshal for trespassing, but only in state court where, then as now, juries were slow to take money from police officers in order to compensate an apparent criminal.¹⁷⁴ Besides, and especially when a warrant had issued, the officer was protected by various defenses. The *Weeks* case also arose before the All Writs Act,¹⁷⁵ which specifically provided for prosecution for abuse of process, although time would reveal that it, too, was an illusory sanction. Even a money judgment was problematic. Collecting from the marshal could be difficult,¹⁷⁶ and significantly, the federal government could not be made a party.¹⁷⁷ Note that the doctrine of respondeat superior had not found its way into fourth amendment law even when the “unitary model” had supposedly been developed by the Supreme Court. Thus, the “deepest pocket” was out of reach. Finally, except (very arguably) for *Boyd*, “suppression” or “exclusion” had never occurred in a reported case.

Weeks was thus practically without recourse, and the *Marbury* injunction lobbied for innovation. Because Weeks’ position was typical of persons aggrieved by unlawful federal police action, the general increase in federal law enforcement activity after 1900 further pressured the Supreme Court. Most particularly, while the exponential leap of Prohibition was at best predictable, ratification of the Income Tax Amendment in 1913 surely portended a drastic expansion of coercive

172. 232 U.S. at 398.

173. 5 U.S. (1 Cranch) at 161.

174. Grant, *Circumventing the Fourth Amendment*, 14 S. CAL. L. REV. 359, 365 (1941).

175. 40 Stat. 217 (1917).

176. See Grant, *supra* note 174, at 359.

177. Grant, *supra* note 154, at 61.

federal intrusion into daily life.¹⁷⁸ It is thus quite true, in such a context, that “[i]f letters and private documents can thus be seized and held and used in evidence,”¹⁷⁹ fourth amendment protection is of “no value” and “might as well be stricken from the Constitution,”¹⁸⁰ not because some “personal right to exclusion” was somehow “in” the amendment, but because *Weeks* was otherwise remediless. There was involved “a denial of [Weeks’] constitutional rights” by the lower court because he was denied an indispensable remedy. Yes, there were, as principled basis writers contend, two “constitutional wrongs” in *Weeks*—one by the marshal for unlawful seizure and one by the trial court for ignoring the *Marbury* command. But exclusion is still omitted from the list.

That *Weeks* articulated a constitutionally inspired *remedy* is variously demonstrable. First, it is literally a transplantation of the ordinary common-law remedy of replevin. Second, the cases cited by Justice Day were all rooted in the courts’ inherent power to redress wrongs committed within their purview. Third, Justice Day excluded state officers from *Weeks*’ reach, stating, “[W]hat *remedies* the defendant may have against *them* we need not inquire.”¹⁸¹ Fourth, *Weeks*’ insistence on a timely, pretrial motion turned the proceeding (as courts interpreting *Weeks* clearly saw)¹⁸² into an independent civil action in which the fourth amendment was the standard of care and restoration the mandated relief. Fifth, prevailing rules of procedure precluded pretrial objection to the use of evidence¹⁸³ so that the “timely application” of *Weeks* could not be seen as a trial issue for exclusion, but for some other remedial action. Sixth, and more inclusive, is the internal theoretical effect of the opinion’s nonincorporationist stand. It permits, though it does not require, the holding to unfold within nonconstitutional bounds. In this, *Weeks* and the frequently quoted *Olmstead* “judicial integrity” dissents¹⁸⁴ are cognate—neither opinion was intended as constitutional law.

Related but different is the obvious absence of anything like the “unitary model” Schrock and Welsh attribute to *Weeks*, which would link restoration, but still not yet exclusion, more directly to the Constitution than *Marbury*. In other words, besides the positive evidence that

178. Between 1901 and 1932, for instance, the number of federal prosecutions increased by a factor of five. Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1441 (1984).

179. *Weeks*, 232 U.S. at 393.

180. *Id.*

181. *Id.* at 398 (emphasis added).

182. See *infra* notes 301–23 and accompanying text.

183. *Weeks*, 232 U.S. at 393.

184. See *supra* text accompanying note 139.

a remedy is afoot, is evidence negating any other theoretical basis. There is, of course, no express attempt to link return to the constitutional text itself, nor effectively so via traditional interpretive aids like historic intent. The extended praise in *Weeks* for the fourth amendment itself and for the social importance of its binding effect upon the entire government has an identifiable function, but as we shall see, that function is *not* to justify some unitary model/personal right to exclusion thesis. *Adams* remains the insuperable obstacle to personal rights theorizing, considering its survival of *Weeks* and (more so) the almost obsessive effort of Justice Day to affirm its validity and distinguish it from the case before him. This fear of *Adams* also pervaded *Wilson*, *Mills*, and *McHie* even as they affirmed jurisdiction to return.¹⁸⁵ *Adams'* deference was not, as Wigmore would have it, some inexcusable failure to confess a break with the past¹⁸⁶ but, quite the contrary, the heart of *Weeks'* justificatory scheme. The logic was that, while the fourth amendment could justify return, it could not by itself justify exclusion. The *Weeks* court, along with the others, was painfully aware that its justificatory problems were aggravated, perhaps insurmountably, if the trial itself was swept within the analytical scheme. "General principles not covered by the rules of evidence" nicely captures the available freedom of action. The rules of evidence, that is, the "ancient rule" admitting all competent material—was a qualitatively different, exceedingly formidable barrier to further development of the remedial scheme. Put differently, if the fourth amendment itself (in a strong, more than *Marbury* sense) or a unitary model were propelling *Weeks*, the rules of evidence could be trampled like an ant. That a subconstitutional remedial scheme was at work is clear from the diffidence with which it approached the surely nonconstitutional rules of evidence. *Weeks'* explicit retention of the "silver platter" doctrine, which permitted retention and use of evidence illegally seized by state officers, reinforces¹⁸⁷ the relative modesty of the *Weeks'* theoretical base, as well as the formidableness of trial. That a genuine constitutional command would, and did, trample the rules of evidence is shown by the contemporaneous capacity of the fifth amendment to exclude, among other things, evidence seized in violation of the fourth amendment.

Why then did Justice Day spend pages in praise of the fourth amendment, chastising aggressive law enforcement with a constitutional jeremiad?¹⁸⁸ If *Weeks* is a remedial and not a "personal rights" case, why this ode to the framers? Specifically, what is the message in the passage excerpted by Justice Brennan in *Leon*?¹⁸⁹ Most of the tur-

185. See *supra* text accompanying notes 156–70.

186. Wigmore, *supra* note 3, at 43.

187. *Weeks*, 232 U.S. at 398.

188. *Id.* at 392–94.

189. 104 S. Ct. at 3434 (Brennan, J., dissenting).

gid rhetoric can and should be accommodated by the *Marbury* duty adequately to remedy constitutional violations. Not easily so cabined are, for example, these admonitions:

The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.¹⁹⁰

The efforts of the courts and [federal] officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.¹⁹¹

To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of . . . the Constitution.¹⁹²

The *Marbury* influence lingers, but there is more here. That excess is supplemented by Justice Day's lengthy recollection of the revered *Boyd* opinion,¹⁹³ in which Justice Bradley paid such homage to the fourth amendment's genesis that a neutral observer might mistake the subject of discussion for the Sermon on the Mount. Granted that the fourth amendment is a fundamental controlling norm and that police officers (emphatically) *must* observe it, why the high pitch and stamping of feet in this case? Remember, no one doubted that the marshal had violated the Constitution, and the hagiographic rendition of Justice Bradley's opinion and of the framers is surely dictum, if not entirely misplaced—misplaced, however, only until the hidden agenda of *Weeks* is coaxed into the open. Think of it this way: because the amendment is *so* important, courts are *obliged* (and not too reluctantly) to follow *Marbury* and provide the appropriate remedy *even if it hampers law enforcement efforts*, "praiseworthy as they are." Restoration is the appropriate remedy, and it shall be ordered regardless of the foreseeable effect that, at least in theory, an entire prosecution might be mooted. (Whether *Weeks* was retried without the tainted evidence, and if so, convicted, is unknown). This is heady stuff, perhaps heroic, for it clearly, if implicitly, takes a stand on the exclusionary rule dilemma. Should the criminal go free when the constable blunders? *Weeks* answers a resounding yes.

190. *Id.* (quoting *Weeks*, 232 U.S. at 392).

191. *Id.* (quoting *Weeks*, 232 U.S. at 392).

192. *Id.* (quoting *Weeks*, 232 U.S. at 394).

193. *Weeks*, 232 U.S. at 391.

No other case had done so. For the first time what we now take for granted was effectively articulated—that the government (and of course, derivatively, society) was punishable for an officer's misconduct. Previously, as we have seen, tort judgments ran only against the blunderers and did not affect the availability of evidence in any way. That is, to repeat, replevin had never before been ordered for property of evidentiary value.¹⁹⁴ That *Weeks* did so hold is no doubt what ignited Wigmore. This conclusive but implicit settlement of Cardozo's dilemma—that the proper remedial course would not be diverted by law enforcement utility—is a necessary premise of the exclusionary rule. The enormousness of the moment was not lost on Justice Day. All of this may have been implicit, but it was not obscure, and his recognition is detectable in the very structure of the opinion. Having treated his readers to an orgiastic feast of fourth amendment values, he then slips his properly intoxicated guests the bill—law enforcement will sometimes be sacrificed to save the Constitution.

There is no attempt in *Weeks* to gauge this "cost." It is enough to remark that there was a cost to law enforcement and that it must be paid. Nor is there any consideration of what we call deterrence. There are peremptory observations that the fourth amendment must be obeyed by police officers and courts, but nowhere are they connected up with the propriety of restoring the property. Whether return would, or would not, affect police behavior presumably can, like the personal rights theories, be forced upon disparate passages from *Weeks*. In either case, those theories shall remain foreign to the opinion.

None of this should console principled basis defenders. The structural settlement is writ, not on a "personal rights" theory of replevin (much less exclusion), but on the "adequate remedy" scheme they expressly disown. Conversely, the remedial account in *Weeks* is not that hybrid now in vogue—that exclusion "remedies" fourth amendment violations generally through its deterrent effect. There is, in other words, much more of the Hohfeldian jurist than the social scientist in Justice Day. Still, the specter of empiricism, with the added gloss of common-law reasoning, prevents the principled from rejoicing. Whether return or exclusion is required by the *Marbury* injunction depends upon specifics of the extant remedial regime. *Bivens* and the application of respondeat superior principles to the government, among other developments, differentiate the present climate from that of *Weeks*. Thus "return" and, again, exclusion, may no longer be necessary.

More important than the empirical threat is the devastating blow struck by the remedial confinement of *Weeks*. While return might indeed be an appropriate remedy (and ordered notwithstanding exclu-

194. See *supra* text accompanying notes 154-55.

sionary effects), exclusion surely is not, and cannot be made to be. Exclusion is not a remedy at all, and *Kamisar* and others implicitly concede it by rejecting this theory of *Weeks*. Return is appropriate because it has a common-law counterpart, replevin, which is perfectly proportional—only what was illegally taken is restored to the rightful owner whose peaceful possession was unjustifiably disturbed—and flows directly from the wrongdoer or, if necessary, the present custodian, to the aggrieved. Further, and as *Weeks* laboriously established, it does minimal damage to surrounding external bodies of law like evidence, criminal procedure, and separation of powers. In contrast, exclusion has no antecedent, common-law or otherwise. It is not proportional, does not aspire to be, and has no inherent capacity to develop the requisite sense of balance. As Chief Justice Burger remarked in *Bivens*, exclusion amounts to “universal ‘capital punishment.’”¹⁹⁵ Further, while the aggrieved party benefits from exclusion, often disproportionately so, the wrongdoer suffers no personal diminution. Indeed, and clearly during the *Weeks* era, an innocently bystanding, law-abiding society pays the price of what in legal contemplation was the tortious act of a stranger. In addition, while the jurisdictional issues presented by return were difficult, they were (with some chutzpah) honestly and respectably resolved in favor of the defendant. But finding inherent authority to return property when asked to in a remedial proceeding independent from the criminal trial is (as Justice Day saw) one thing, exclusion (as his distinction of *Adams* attests) is quite another. In short, one must avoid overstating *Weeks*’ significance, large as it was. Exclusion itself was not justified under any theory proffered there, and the theory that justified return was at most an *alpha* point in the subsequent development of the exclusionary rule.

The final and most important factor limiting *Weeks*’ impact is the unfortunate but evidently intentional neglect by the principled theorists of the fifth amendment’s self-incrimination clause. The confluence of the two amendments, so bitterly lamented by Wigmore, is abundantly evident in *Weeks*. At all points, the defendant sought relief under both the fourth and fifth amendments and their Missouri equivalents, and so Justice Day restated *Weeks*’ legal position.¹⁹⁶ Indeed, the structure of each side’s presentation as recounted in the opinion, reflects a prevailing view: that introduction at trial of papers acquired in violation of the fourth amendment offended the fifth amendment (and *not* the fourth).¹⁹⁷ Even though Justice Day clearly identified *Weeks* as a fourth amendment discussion,¹⁹⁸ he nevertheless intertwined the two

195. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 419 (1971) (Burger, C.J., dissenting).

196. *Weeks*, 232 U.S. at 389.

197. *Id.* at 385.

198. *Id.* at 389.

great guarantees. His extended treatment of *Boyd* (which was actually a fifth amendment case with lots of overheated dictum about the fourth) and his supporting quotation from *Bram v. United States*¹⁹⁹ (an involuntary confession case inexplicably neglected by fifth amendment researchers) confirm the continuing conjunction. Moreover, the ellipsis in the grand rhetorical flourish quoted by Justice Brennan left out only the fifth amendment reference.²⁰⁰ The *Weeks* original complained of the "tendency" to secure convictions by "unlawful seizures and enforced confessions."²⁰¹ The principled basis commentators barely notice this critical mutuality, and absolutely ignore its analytical significance. A more complete account of this fateful entanglement, instigated by *Boyd*, carried by *Weeks*, and not conclusively separated until 1966 by *Schmerber v. California*,²⁰² is found in Part IV of this Article. For now, three critical effects may be observed:

1) Most theoretically, the fifth amendment's preemptive power was understood as a clear textual command directed to judges regarding their trial duty. By inference, the absence of a similar understanding of the fourth amendment cuts deeply into the purely interpretive justification for a "personal right to exclusion." No "unitary model" here—just deference to the straightforward direction of the text.

2) The yeoman's work done by the self-incrimination clause eliminated any judicial incentive to develop a fourth amendment exclusionary rule, at least in the pre-Prohibition *Weeks* environment where it appears that the confiscated property was usually documentary evidence. As noncontraband, it could be returned; as writings they were susceptible to fifth amendment analysis.

3) The "cost" paid in returning Fremont Weeks' purloined letters was greatly diminished, since the fifth amendment may have barred their use at trial anyway. We will never know what Justice Day intended, if anything, for the trial objection itself. Return rendered the evidence unavailable, and thus, there could be no offer to prompt an objection. At a minimum, we should affix an asterisk to the *Weeks* set-

199. 168 U.S. 532 (1897), cited in *Weeks*, 232 U.S. at 391. Justice Day quoted from the following passage in *Bram*:

[I]t was in that case demonstrated that both of these Amendments contemplated perpetuating, in their full efficacy, by means of a constitutional provision, principles of humanity and civil liberty, which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change.

168 U.S. at 544.

200. See *Leon*, 104 S. Ct. at 3434 (Brennan, J., dissenting) (quoting *Weeks*, 232 U.S. at 392).

201. *Weeks*, 232 U.S. at 392.

202. 384 U.S. 757 (1966) (blood sample taken without consent to determine whether petitioner was intoxicated at the time of the accident).

tlement and reduce its encomium to "almost heroic." Put differently, the total bill was never presented to the *Weeks* Court, and only educated surmise can now reckon that Court's response.

Weeks' debt to the fifth amendment is difficult to overstate. Consider again that all the federal cases relied upon by Justice Day—with the exception of *Bram*, which was most clearly a confession case—involved the unlawful seizure of documentary evidence and "merely" so. That is, *Boyd*, *Adams*, *McHie*, *Mills*, *Henkel*, and *Weeks* were classic fifth amendment exclusion cases. "Mere" evidence, at that juncture, was never subject to a lawful seizure. In addition, they seemed to the judicial mind just the kind of self-incriminatory activities the fifth amendment detested. It was only when later events such as the large-scale seizure of nonreturnable contraband liquor during Prohibition drove a wedge between the two amendments that the exclusionary rule began to collect in the mists of history.

IV. EXCLUSION AFTER *Weeks*

Surveying the mushroomed search and seizure corpus as the second World War commenced, Professor Grant reported that the exclusionary rule was a "liberalization" of *Weeks*,²⁰³ and my survey of that same decisional opus (and up to the 1949 decision in *Wolf v. Colorado*)²⁰⁴ warrants concurrence. But one must insist with Grant that it was the *Weeks* return remedy that was liberated,²⁰⁵ and *not* from its *Marbury* theoretical home. Return became suppression, but suppression remained a remedy. My concurring opinion must further insist, again for the most part with Grant, that *Weeks* boosted exclusion by its transmission from *Boyd* to beyond of the fifth amendment exclusionary thesis. Indeed, even as the Supreme Court talked of suppression as deterrence in *Wolf*,²⁰⁶ it transmitted fifth amendment influences all the way to 1966 when *Schmerber v. California*²⁰⁷ conclusively separated exclusion from self-incrimination. Most importantly, careful inspection of *all* the pre-*Wolf* cases, and of a substantial portion of the immediate post-*Weeks* state decisions, provides literally *no* support for a personal right to exclusion, based either in *Weeks* or on a "unitary" reading of the fourth amendment. Here, one can neither confirm nor deny a Grantism, because those principled bases of exclusion never occurred to him or to anyone else in the era reviewed. Looking for confirmation of the personal rights thesis before *Wolf* is thus about as satisfying as waiting for Godot. Professor Kamisar concedes almost as much by re-

203. Grant, *supra* note 154, at 62–63.

204. 338 U.S. 25 (1949).

205. Grant, *supra* note 154, at 62–63.

206. 388 U.S. at 31.

207. 384 U.S. 757, 767–68 (1966).

marking (inaccurately) that the rationale of exclusion was unattended between *Weeks* and *Wolf*.²⁰⁸

Wolf concludes this survey because, according to principled exponents, it is the seminal heretic, the demonic cult figure, that introduced a deterrence rational at war with the original understanding of the rule in *Weeks*. Part III of this Article demonstrated that *Weeks* does not bear the understanding so attributed (although *Weeks* may be a virtual stranger to *Wolf* too). The following examination of the interim decisions explicates a further, equally dangerous deficiency in the principled project—there was no “original understanding” of the exclusionary rule. Rather, there was an abundance of justifications in the formative post-*Weeks* period. The fifth amendment served throughout, although to varying extents, as the fourth amendment’s exclusionary rule. The *Weeks* remedial scheme remained an important thrust, but as “return” transmitted into “suppression” (an evolutionary process outlined below), courts increasingly departed from the “original” Hohfeldian conception of it precisely because exclusion appeared less and less like an equitable means of compensating aggrieved individuals. In other words, as it became clearer that exclusion, and not return, needed justifying (when, for example, contraband was involved), *Weeks* became *less* relevant. Put still differently, just as the rule became one of “exclusion,” a plurality of rationales developed to fill the void left by *Weeks*’ irrelevance. Tacitly (and sometimes expressly) conceding that more than *Weeks* was necessary, courts developed all the familiar rationales: judicial integrity, general deterrence of police misconduct, punishment or “sanction” of individual offending officers, and variously accentuated uses of the term “remedy.”²⁰⁹ Conspicuously, *all* the cases treated exclusion as a derivative issue and not part of the fourth amendment itself. Thus the ultimate denial of *Weeks* as “personal rights” innovator: no one in an entire succeeding generation of jurists who painstakingly read and applied that case found the principled basis assertedly heralded there.

For heuristic purposes, discussion of the cases is divided by first isolating the Supreme Court and then examining lower court opinions in two blocks balanced upon the contentious 1928 *Olmstead v. United States* decision.²¹⁰ For reasons of obvious authority, the Supreme Court warrants separate treatment, and the reasons for the *Olmstead* fulcrum are apparent in the discussion. As with form of organization, order is thereby exaggerated. There was in fact, for example, a great upward movement of ideas, as Supreme Court pronouncements were frequently

208. Kamisar, *supra* note 23, at 601.

209. The support for these propositions is in the negative. The authors and Justice Brennan made no effort to place their thesis in post-*Weeks*/pre-*Wolf* case law.

210. 277 U.S. 438 (1928), *overruled in* *Katz v. United States*, 389 U.S. 347 (1967).

previewed in the lower courts. Also, the general decisional trends described below obscure the stray case either before or after its time or simply contrary to the weight of authority. On one point, however, there are no *caveats*—there are no unitary model cases and no cases explicating a personal constitutional right to exclusion.

A. *The Search for Weeks, I: The Supreme Court and Exclusion, 1885-1949*

In the beginning was *Boyd v. United States*,²¹¹ and its kerygmatic opinion possessed both the tone and effect of a Delphic pronouncement. While tightly packed with rhetorical gunpowder and evocations of great (long dead) civil libertarians, *Boyd* was unfortunately guilty of neither clarity nor analytical sophistication. There was a judicial order, effectively (as the concurring Justices understood), a subpoena duces tecum, issued upon statutory authorization at the United States Attorney's request, requiring the claimant of forfeited goods to produce his books and invoices.²¹² Failure to produce was, according to the statute, proof that the prosecutor's allegations were confessed.²¹³ Understandably, *Boyd* (like *Weeks*) was not conducive to exclusionary rule development. The constable not only had not blundered, he had done nothing at all, and controversy circulated exclusively about judicial conduct pursuant to statute. In the event, the claimant obeyed the order and produced the invoices under protest and further objected to their introduction at trial. As recounted by Justice Bradley, the objection was that "no evidence can be compelled from the claimants themselves, and also that the statute, so far as it compels production of evidence to be used against the claimants is unconstitutional and void."²¹⁴ Later, Bradley reported a contention that the enabling statute contravened both the fourth and fifth amendments.²¹⁵ The Solicitor General sensibly replied that, at most, the statute was tantamount to compulsory production and that search and seizure were not involved. "That is so," replied Justice Bradley, but he continued:

It is true that certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching amongst his papers, are wanting, . . . but it [the statute] accomplishes the substantial object of those [prior] acts [which had authorized search and seizure] in forcing from a party evidence against himself. It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him

211. 116 U.S. 616 (1885).

212. *Id.* at 617.

213. *Id.*

214. *Id.* at 621-22.

215. *Id.* at 630.

. . . is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient, and effects the sole object and purpose of search and seizure.²¹⁶

The symbiosis established between the two amendments was breathtaking and keenly felt by Justice Bradley. The "intimate relation" between the amendments permitted them to "throw great light on each other."²¹⁷ Indeed, the amendments "run almost into each other."²¹⁸ Rather, the Court shoved them together, but the effect was the same and disposed of the second issue stated by Bradley—was the proceeding an "unreasonable" search and seizure? It was, principally because the result was compulsory self-incrimination. According to the *Boyd* Court, "[b]reaking into a house and opening boxes and drawers"—that is, actual search and seizure—were only "circumstances of aggravation"; the encompassing sacred right of "personal security, personal liberty and private property" produced the fourth amendment's condemnation.²¹⁹ That sacred right engendered the fifth amendment as well, so that the amendments' collision, had it been fatal, would have been fratricide.

The *Boyd* Court further confused this mutuality by adding to the affinity of consanguinity what sounds like the "evidentiary transaction" immortalized by Schrock and Welsh. Why do the two guarantees shed mutual illumination?

For the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man "in a criminal case to be a witness against himself," which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms.²²⁰

Sounding much more directly supportive than anything in *Weeks*, it is still easy to see why the passage is of no value to principled basis theorists. The fifth amendment is a necessary ingredient in the exclusionary recipe. The evidentiary transaction is climaxed by the trial ap-

216. *Id.* at 622 (emphasis added).

217. *Id.* at 633.

218. *Id.* at 630.

219. *Id.*

220. *Id.* at 633.

pearance of the self-incrimination clause. Indeed, the fourth is assigned the supporting role in that the "unreasonableness" is largely a function of self-incrimination. Consequently, a fourth amendment violation was, a fortiori, self-incrimination, and thus, the fifth amendment's trial prohibition was called into play.

Later in the opinion, Justice Bradley explicated what had been implicit—the fifth amendment was both a necessary and sufficient ground for reversal, while the fourth amendment was neither (as the concurring Justices pointed out).²²¹ Most important, one can now see how *Boyd* could be read for the proposition that evidence seized in violation of the fourth amendment is inadmissible *without* being authority for the exclusionary rule.

Only the exclusionists' great nemesis—*Adams v. New York*²²²—stands between *Boyd* and *Weeks*, and there is much more to it than simple confirmation of the "ancient rule." Writing for a unanimous Court, Justice Day assumed the relevance of the fourth and fifth amendments to the state proceeding reviewed. Objection at trial was directed at certain private papers tending to show that the defendant knowingly possessed policy slips. Presumably, they were not subject to lawful seizure, especially when, as in *Adams*, the warrant authorized seizure only of the gambling paraphernalia itself.²²³ Nevertheless, the Court evidently assumed illegality since it squeezed the entire controversy into the ancient rule: *if* the papers were competent evidence, could there be *any* constitutional impediment to admission?²²⁴ There was none. If competent, they were admissible on the authority of the (copiously excerpted) cases applying the ancient rule. Of *Boyd*, Justice Day unenthusiastically observed that it had been "frequently cited" by the Court and foreswore any "wish to detract from its authority,"²²⁵ sounding much like presidential candidate Nixon who travelled to the Bible-belt to inform his audience that he would *not* discuss John Kennedy's Catholicism. The *Adams* Court (containing several members of the *Weeks* Court)²²⁶ thought *Boyd* distinguishable because no judicial process issued for *Adams*' papers, thereby freeing the judiciary of complicity in prohibited fourth amendment behavior.²²⁷ The Court in *Adams* thus implicitly rejected the evidentiary transaction analysis. The fourth amendment was violated by unlawful "invasion" of the home, and the security intended included a duty to "give remedy against such

221. *Id.* at 637.

222. 192 U.S. 585 (1904).

223. *Id.* at 594.

224. *Id.* at 588.

225. *Id.* at 597.

226. The common members were Justices Day, Holmes, White, and McKenna.

227. 192 U.S. at 598.

usurpations when attempted."²²⁸ But "the English and nearly all of the American cases have declined to extend this [remedial] doctrine to the extent of excluding testimony which has been obtained by such [illegal] means, if it is otherwise competent."²²⁹ According to *Adams*, *Boyd* was an American exclusionist case because there the law "virtually compelled the defendant to furnish testimony against himself" and ran counter to the fourth and fifth amendments.²³⁰ Then, in what must have been music to Wigmore's ears, *Adams* cut into *Boyd's* extravagance: the fifth amendment was "designed to protect against compulsory testimony from a defendant against himself in a criminal trial."²³¹

The incision did not take, for along with the remedial theory of *Adams* (if not its precise calculation), *Weeks* transmitted the fifth amendment conflation of *Boyd* to the Prohibition era. For now one need only further appreciate the inertial forces working upon *Weeks*—the fifth amendment might exclude evidence, but the fourth could not and should not. Courts must avoid effecting unreasonable searches and seizures as, for instance, in *Boyd*, and they must remedy the "usurpations" of others. Thus, it is fairly evident that a "personal right to exclusion" thesis marked a breathtaking theoretical discovery. There is no evidence of such a find in *Weeks*, and jurists, including Supreme Court Justices, assiduously reading *Weeks* detected no such evidence.

The stream of continuity from *Boyd* and *Adams* through *Weeks* is amply verified in the case that uniquely contributed to its ultimate diversion into a simple rule of fourth amendment exclusion. The case is *Silverthorne Lumber Co. v. United States*,²³² and it, at least as much as *Weeks*, was identified in succeeding cases with the exclusionary precept. In all accounts (including those asserting the primacy of *Weeks*), Justice Holmes' brief opinion is an essential reference. The famous passage refused the government's attempt to use tainted evidence, lest the fourth amendment be reduced to a "form of words."²³³ Further, "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."²³⁴

Sounds good. Maybe even sounds like the exclusionary rule is somehow woven into the Constitution itself. But that would assume that the noisemaker is the fourth amendment itself, as opposed to, for example, *Weeks*. The underlying constitutional violation was just the

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. 251 U.S. 385 (1920).

233. *Id.* at 392.

234. *Id.*

same as in *Weeks*: after arresting the defendants, federal officers went to their place of business and swept it clean of all books and papers.²³⁵ A prompt motion for return ensued, and eventually the district court ordered the documents returned, but not before the prosecutors copied them.²³⁶ The District Attorney then served the defendants with a subpoena for the originals he had just returned,²³⁷ apparently because the court had impounded the reproductions. Appeal was ultimately taken from the contempt citation for disobeying the court's compliance order, which issued despite a finding of unconstitutionality in the initial seizure.

"The proposition could not be presented more nakedly," Justice Holmes announced.²³⁸ "The Government now, while in form repudiating and condemning the illegal seizure, seeks to maintain its right to avail itself of the knowledge obtained by that means which otherwise it would not have had."²³⁹ Properly distilled, the government would reduce the Constitution's protection to "physical possession"—that is, the defendants may physically regain the papers—"but not any advantages" acquired by the illegality.²⁴⁰ *Weeks*, "to be sure," meant that laying the papers before the grand jury was "unwarranted," but "it is taken [by the government] to mean only that two steps are required instead of one."²⁴¹ Here the obscurity of *Silverthorne* gives way: the government would circumvent *Weeks*, and (because *Weeks* is traceable via *Marbury* to the fourth amendment) the Constitution as well. Holmes correctly saw that *Weeks* was meaningless if not fortified by *Silverthorne* and that, without shoring up *Weeks*, the *Marbury* duty was endangered. Holmes' opinion can and should be read as it was basically intended: a perfection, and not a remodeling, of the *Weeks* remedy and especially *not* a theoretical reworking of *Weeks*' fourth amendment theory. There is ample evidence that such was the design. First, *Adams* is addressed and distinguished, not overruled.²⁴² Second, the chief supporting case cited by Holmes—*Flagg v. United States*²⁴³—is best understood as an instance of *Marbury* analysis: like *Silverthorne*, a quest for the adequate remedy. Third, Holmes adopts as a premise of *Silverthorne* the fragmentary model. The marshall's blunders could not be considered "the wrongful act of a stranger," as they ordinarily would be in fourth amendment contemplation, because the District At-

235. *Id.* at 390.

236. *Id.* at 390-91.

237. *Id.* at 391.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* at 391-92.

242. 251 U.S. at 392.

243. 233 F. 481 (2d Cir. 1916).

torney had lent color to them by arming the officers with an invalid subpoena.²⁴⁴ Thus, the "Government" was a party to wrongdoing. The district court also soiled its hands by improperly remedying this usurpation. Fourth, the constitutional temper of the opinion is muted by the articulation of the independent source exception to (what was sounding like, in Holmes' hands) the exclusionary rule.

Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed.²⁴⁵

This sounds more like the nonconstitutional, "clean hands" rationale of the *Olmstead* dissenters (Holmes, by the way, among them). Fifth, the opinion never fully escapes the fifth amendment. Granted, Holmes denotes it a fourth amendment case, presumably because the corporate defendant could not invoke the self-incrimination privilege. Still, there was no doubt (from *Boyd* to *Weeks* to the soon to follow cases) that the United States enjoyed a "windfall" in *Silverthorne* because the fifth amendment *would* have protected noncorporate defendants in the same circumstances. Justice Holmes thus understandably showed signs of a visceral desire to read this fourth amendment case broadly enough to achieve parity in the unavailability of investigative techniques whether the subject was a natural person or one artificially created by state corporation law.

That the self-incrimination clause remained the lodestar of exclusion was graphically depicted to the Court by the Attorney General in *Silverthorne*, who asserted that all the post-*Weeks* cases (save one)²⁴⁶ were explainable as fifth amendment cases.²⁴⁷ This self-incrimination ascendancy was definitely confirmed one year later by an identical, and unanimous, Supreme Court. *Gouled v. United States*²⁴⁸ conclusively effected the transformation, underway for years, of the amendments as seamless partnership per *Boyd*, into a relay team anchored by self-incrimination. The black-letter rule of *Gouled* was traceable to, but still toned differently from, *Boyd*. Now, evidence seized in violation of the fourth amendment was rendered inadmissible by the fifth. When evidence is illegally acquired from the accused, he is an "unwilling source" and, in legal contemplation, compelled to be a witness against

244. *Silverthorne*, 251 U.S. at 391.

245. *Id.* at 392.

246. The exception was *In re Tri-State Coal & Coke Co.*, 253 F. 605 (W.D. Pa. 1918) (exception made for another corporate defendant was clearly within a remedial orbit).

247. *Silverthorne*, 251 U.S. at 386-87 (citations omitted).

248. 255 U.S. 298 (1921).

himself.²⁴⁹ *Gouled* is justly remembered for its incorporation of the "mere evidence" rule into fourth amendment jurisprudence; that is, papers solely of evidential value cannot be lawfully seized.²⁵⁰ Unnoticed was the diminution so accomplished. Because the fourth amendment was always offended by documentary seizures, the fifth was allowed to move on down the analytical line. Self-incrimination might comfortably be relieved of acquisition vigilance and thus more completely attend to the trial. Conversely, the clarity of *Gouled's* "if, then" syllogism was conducive to a trial eclipse of the fourth amendment. Indeed, the two guarantees were placed on a perfectly balanced see-saw. As the self-incrimination protection expanded (for instance, from documents to all tangible evidence), the search and seizure guarantee was, proportionately, a trial superfluity. Or as the stock in Wigmore's fifth amendment—limited to actual trial testimony—went up, the exclusionary rule gained prominence.

The initial displacement of the fourth amendment and *Weeks* as the locus of exclusion can be traced through the Supreme Court's gradual devaluation of *Weeks'* procedural requisites, a development already underway in lower federal courts.²⁵¹ In *Gouled*, for example, the trial court denied return and later refused to entertain an objection based upon the illegal seizure, thus following the ancient procedure that courts will not stop a trial to inquire into the collateral issue of illegal acquisition.²⁵² In other words, the judge applied *Adams*. But where *Adams* had intimidated the *Weeks* Court, the *Gouled* Justices did not flinch: only "[a] rule of practice," it "must not be allowed for any technical reason to prevail over a constitutional right."²⁵³ Similarly, in *Gouled's* companion case, *Amos v. United States*,²⁵⁴ the return petition was delayed until after trial commenced (in violation of *Weeks*), and the succeeding trial objection was overruled on the strength of *Adams*.²⁵⁵ The Supreme Court, citing *Gouled*, found error on each count.²⁵⁶

That the crystallization of self-incrimination as excluder explains the deflation of *Adams* was emphasized four years later in *Agnello v. United States*.²⁵⁷ By then it was "well settled that, when properly invoked, the Fifth Amendment protects every person from incrimination by the use of evidence obtained through search or seizure made in vio-

249. *Id.* at 306.

250. *Id.* at 310.

251. See *infra* notes 345-50 and accompanying text.

252. 255 U.S. at 304-05.

253. *Id.* at 313.

254. 255 U.S. 313 (1921).

255. *Id.* at 316.

256. *Id.*

257. 269 U.S. 20 (1925).

lation of his rights under the Fourth Amendment,"²⁵⁸ for which the Court string cited *Boyd*, *Weeks*, *Silverthorne*, *Gouled*, and *Amos*.²⁵⁹ Revealingly, Frank Agnello *never* made a return request; rather he sought exclusion at the time of the government's offer.²⁶⁰ A unanimous Court, by now precisely the same as that which two years hence would produce the fractious *Olmstead* decision, opined:

Where, by uncontracted facts, it appears that a search and seizure were made in violation of the Fourth Amendment, there is no reason why one whose rights have been so violated and who is sought to be incriminated by evidence so obtained, may not invoke protection of the Fifth Amendment immediately and without any application for the return of the thing seized. "A rule of practice must not be allowed for any technical reason to prevail over a constitutional right."²⁶¹

Barely implicit is the suggestion that "return" was a non-fifth-amendment, constitutionally inferior, remedial procedure.

The fifth amendment's role assignment as the fourth amendment's exclusionary sanction was regularly cited by the Supreme Court up to and beyond *Wolf*. A sampling would begin with the 1927 decision in *Marron v. United States*²⁶² and would perhaps climax in the 1946 observation of Justice Frankfurter, who authored *Wolf* just three years later: "Unjustified search and seizure violates the Fourth Amendment . . ."²⁶³ Furthermore, "use, in any criminal proceeding, of the contents of the papers so examined . . . constitutes a violation of the Fifth Amendment."²⁶⁴ But clear *Gouled*-like statements like these were relatively rare after 1930 and were confined, as was Frankfurter's, to documents cases. The fifth amendment's function was more accurately portrayed in 1946 in *Zap v. United States*²⁶⁵—"the law of searches and seizures as revealed in the decisions of this Court is the product of the interplay of the Fourth and Fifth Amendments."²⁶⁶ Most important, the supremacy crowned by *Marron* was short-lived, for after *Olmstead*, things were never again so tranquil. Sure, *Silverthorne* had deflected consensus by alluding to a fourth amendment ban on "use" of tainted documents, but *Gouled* restored relative calm. And Prohibition-era in-

258. *Id.* at 33-34.

259. *Id.*

260. *Id.* at 29.

261. *Id.* at 34-35 (quoting *Gouled*, 255 U.S. at 313).

262. 275 U.S. 192 (1927).

263. *Davis v. United States*, 328 U.S. 582, 608-09 (1946) (Frankfurter, J., dissenting) (quoting *Olmstead*, 277 U.S. at 477-78 (Brandeis, J., dissenting)).

264. *Id.*

265. 328 U.S. 624 (1946) (use of wiretapped conversation in evidence did not violate defendant's fifth amendment right).

266. *Id.* at 628.

ferior courts were already finding that return was impractical when most illegally seized property was contraband liquor. So they reached suppression via the remedial route of *Weeks*. But the Supreme Court, even though it encountered contraband in *Agnello* (cocaine), *Amos*, and *Marron* (liquor), had yet to label exclusion a product of the unaided fourth amendment. By the 1940's, however, not only was exclusion attributed to *Weeks* (and to a much lesser degree, *Silverthorne*) without any mention of prior return, exclusion and *Weeks* were linked to the fourth amendment by a fistful of rationales, with the Hohfeldian remedial account notably in the background. More noticeably invisible though was any suggestion that exclusion was a personal right of the accused. This potpourri justification, detailed below, was invited by the remarkable collection of opinions in *Olmstead*.

Olmstead is most recollected in exclusionary rule history for Justice Brandeis' "judicial integrity" dissent. Lost is the fact that Brandeis did not offer the "clean hands" doctrine as constitutional analysis. Instead, he, along with every other member of the *Olmstead* Court who addressed the constitutional status of exclusion, agreed that what was seized in violation of the fourth amendment was excludable by the fifth.²⁶⁷ Chief Justice Taft, however, writing for a five member majority, was at first more coy: "There is no room in the present case for applying the Fifth Amendment unless the Fourth Amendment was first violated."²⁶⁸ Taft reasoned that because the telephone conversations intercepted were in no way coerced, only the fourth amendment potentially applied to the acquisition.²⁶⁹ Then, before concluding that wiretapping was not fourth amendment activity, the Chief Justice (in what was thus dictum) assessed the entire *Boyd-Weeks* line of cases.²⁷⁰ With neither reticence nor apology, he concluded that in *Gouled* admission had been a fourth amendment violation,²⁷¹ a judgment he extended to the narcotics in *Agnello* (at least he mentioned the fifth amendment there),²⁷² and he insinuated that admission of the whiskey in *Amos* violated the fourth amendment alone.²⁷³ More remarkably, *Weeks* and progeny now stood for "the sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction."²⁷⁴

The *only* reason proffered for the ancient rule's murder by the

267. 277 U.S. at 462 (Taft, C.J., writing for the majority); *id.* at 469 (Holmes, J., dissenting); *id.* at 471 (Brandeis, J., dissenting); *id.* at 486 (Butler, J., dissenting).

268. *Id.* at 462.

269. *Id.*

270. *Id.* at 458-67.

271. *Id.* at 462.

272. *Id.*

273. *Id.* at 461.

274. *Id.* at 462.

fourth amendment—other than *Weeks*—was fear that otherwise that guarantee “would be much impaired.”²⁷⁵ Taft left clues that some type of remedial progression extended from *Adams* to *Olmstead* through *Weeks*, but no more than that. This was a wafer-thin justification for an original (at least in Supreme Court annals) and far-reaching proposition. There was really nothing but *Weeks* and its disciples, and they simply had not produced, much less rationalized, a fourth amendment exclusionary rule.

Little wonder then that after *Olmstead*, the doctrinal discipline of *Weeks* and *Gouled* gave way. The Court had created an exclusionary rule without a return address. As frequently is the case, some treated the messenger as the origin of the news, and *Olmstead* became a source of rationales. First, the Supreme Court consistently followed Chief Justice Taft in attributing the rule to *Weeks*. Even when the fifth amendment was mentioned in this connection, *Weeks* (and sometimes with *Boyd*) was still cited as authority. Second, Justice Taft's unhelpful, even cautious, generalization gained respectability. In 1948, Justice Reed repeated it verbatim, saying that use of tainted evidence “would impair the protection” of the fourth amendment.²⁷⁶ There were a lot of minor variations on this undifferentiated rationale, too. Some opinions made exclusion instrumentally valuable in that it somehow serviced that privacy ensconced in the Constitution. *United States v. Wallace & Tiernan Co.*²⁷⁷ for example, decided in the *Wolf* Term, opined that exclusion was “designed to safeguard the privacy of people, and to prevent” unlawful seizures, lest the fourth amendment be reduced to “‘a form of words.’”²⁷⁸ The majority in *Goldstein v. United States*²⁷⁹ cited *Weeks* for exclusion, reasoning that “otherwise the policy and purpose of the Amendment might be thwarted.”²⁸⁰ The deterrence connotations here were drawn out a bit by Justice Frankfurter in 1947 in *Harris v. United States*:²⁸¹ exclusion deterred the tendency of police to disregard constitutional constraints.²⁸² One year earlier he was more explicit: the issue in *Davis v. United States*²⁸³ was civil liberty and its protection against future inroads.²⁸⁴

The imprecision level increased dramatically when those other

275. *Id.* at 463.

276. *Upshaw v. United States*, 335 U.S. 410, 425 (1948) (Reed, J., dissenting).

277. 336 U.S. 793 (1949).

278. *Id.* at 798-99.

279. 316 U.S. 114 (1942).

280. *Id.* at 120.

281. 331 U.S. 145 (1947) (Frankfurter, J., dissenting).

282. *Id.* at 172.

283. 328 U.S. 582 (1946) (Frankfurter, J., dissenting). Here Frankfurter referred to the exclusionary sanction as well as to the general fourth and fifth amendment issues presented in *Davis*.

284. *Id.* at 594.

than Frankfurter spoke. Justice Murphy, for instance, determined that exclusion was "indispensable" to the amendment's purpose "to protect the citizen against oppressive tactics."²⁸⁵ The *Wallace* Court described it as an extraordinary sanction, imposed by the court to limit searches to those conducted in compliance with the Constitution and thus "stem[med] from the Fourth Amendment."²⁸⁶ In 1948, the Court reasoned that "the law provides as a sanction against the flouting of this constitutional safeguard the suppression of evidence,"²⁸⁷ citing *Weeks*. Whether "sanction" was a synonym for deterrence, or denoted a just punishment for illegal behavior, or a compensatory individual remedy, or a combination of all these, was unexplored. On another occasion, Justice Murphy wed sanction to the nonconstitutional judicial integrity rationale of Brandeis' *Olmstead* dissent. In the *Weeks* line of cases, the Court "refused to make itself a participant in lawless conduct by sanctioning the use in open court"²⁸⁸ of tainted evidence. A variation of this "clean hands" doctrine appeared in the 1946 *Zap v. United States* opinion.²⁸⁹ As *Weeks* was explained in *Silverthorne*, "evidence so obtained is suppressed on the theory that the Government may not profit from its own wrongdoing."²⁹⁰ That the theoretical fuel of these concerns was neither a "unitary model" nor the Constitution, in some other unmediated sense, was apparent in the better known case of *McNabb v. United States*,²⁹¹ in which the the Court boldly stated that rules of admissibility were at least partly derived from "a decent regard for the duty of courts as agencies of justice and custodians of liberty."²⁹²

The boldest pre-*Wolf* statement was that of Justice Rutledge. In *Maliniski v. United States*,²⁹³ he announced in a lone dissent that "the Constitution does not tolerate the use of evidence obtained by unconstitutional methods."²⁹⁴ *Maliniski*, however, was a confession case, and Rutledge cited only two cases for this Olympian pronouncement: *Boyd* and *Weeks*. Thus, the fifth amendment continued to influence the Justices' exclusionary rule war of rationales.

The problem is readily apparent. By *Wolf's* eve, the whole parade of rationales had passed by, and there was Supreme Court authority

285. *Goldman v. United States*, 316 U.S. 129, 142 (1942) (Murphy, J., dissenting).

286. 336 U.S. at 798.

287. *McDonald v. United States*, 335 U.S. 451, 453 (1948).

288. *Goldstein v. United States*, 316 U.S. 114, 128 (1942) (Murphy, J., dissenting).

289. 328 U.S. 624 (1946).

290. *Id.* at 630.

291. 318 U.S. 332 (1943).

292. *Id.* at 347 (Reed, J., dissenting).

293. 324 U.S. 401 (1945).

294. *Id.* at 423 (Rutledge, J., dissenting).

for practically every one of them. Most remarkably, all the while the Justices cast about for a persuasive rendering of exclusion, they consistently ascribed both the rule itself and their account of it to *Weeks*. Absent from the post-*Olmstead* opinions (though it reappeared, at least ostensibly, in *Wolf*) was the pure remedial basis of *Weeks*, with Justice Rutledge's words as the nearest approximation to a personal right to exclusion. In truth, the Supreme Court's "original understanding" of the exclusionary rule is a lot like Oakland: there is no there, there. The rationale extravaganza of the 1940's as well as the rule itself, were *all* said to be in *Weeks*. What was in *Weeks*, the remedial duty, was left out of the festivities.

B. *The Search for Weeks, II: Inferior Courts 1914-1928*

The appropriate metaphor for fourth amendment jurisprudence at the time of *Weeks* is that of a turn-of-the-century, small, rural (probably Southern) town on a murderously hot August afternoon, where the humidity of the climate is matched only by the torpor of the inhabitants, a place where change is measured by decades, if not by generations. In such steamy environs, only urgent problems of an elemental nature are addressed, and they are resolved with minimal exertion, both physical and mental. The United States Supreme Court would feel at home there. First, there was *Boyd*, twenty years later *Adams*, and *Weeks*, a decade after that. This sleepy existence was, at most, perceptibly disturbed by Justice Day's remedial novelty, and the slumber continued until the onslaught of search and seizure litigation billboarded the remarkably unsophisticated state of fourth amendment law. Illustrative were some of the *Weeks* progeny. In one state supreme court case, the testimony of trespassing officers about observations made during their trespass was excluded as an "illegal confession"—of the defendant!²⁹⁵ In *Haywood v. United States*,²⁹⁶ the court denied a motion to suppress documentary evidence (there, the "subversive" literature of the I.W.W. or "Wobblies," a labor organization) on the theory that, like stolen items and smuggled goods, such "outlaw property" could *never* be illegally seized.²⁹⁷ In another federal case, evidence obtained by searching an automobile was admitted as lawfully incident to the "arrest" of the car.²⁹⁸ The uncertain grasp on fundamentals exemplified by these courts was hardly condemnable. After all, *Boyd* was barely less confused, and the Supreme Court had done little in *Adams* and *Weeks* to put its theoretical house in order. The point is that, overall and including the Supreme Court (as the previous section made

295. *Tucker v. State*, 90 So. 845, 847 (Miss. 1922).

296. 268 F. 795 (7th Cir. 1920).

297. *Id.* at 803.

298. *United States v. Rembert*, 284 F. 996, 998-99 (S.D. Tex. 1922).

painfully clear), search and seizure law was cobbled together in *Weeks* and its successors from a variety of diverse, preexisting sources. Prominent in this recipe were the amalgamated fourth and fifth amendments. Added to the brew were a host of common-law search doctrines like the search incident affirmation of *Weeks*, as well as Justice Day's borrowing of the familiar replevin remedy. A third: the "mere evidence" rule of *Gouled*. A fourth example was the *Olmstead* insistence that "persons, hours, papers, and effects" were to be taken literally as terms of limitation, and finally, the "ancient rule itself." Most important is the implicit realization that, while the constitutional doctrines of search and seizure were coming fast and furiously, there was little, if any, *theoretical* reflection, much less invention, going on. This much is apparent as late as the 1960's, when, in addition to *Schmerber's* disentanglement efforts, *Warden v. Hayden*²⁹⁹ finally discarded the *Gouled* rule, and *Katz v. United States*³⁰⁰ conclusively stripped search and seizure of its longstanding dependence on ordinary property concepts.

A fundamental obstacle to the personal right to exclusion thesis is then exposed. It would have been, and is, a truly innovative, theoretically sophisticated fourth amendment analysis, inviting breathtakingly new ways of thinking about government, police, courts, and the Constitution. Its appearance in the *Weeks* line of cases examined here would thus be more than unexpected—like an electronic scoreboard in the Roman Coliseum, it would truly be an anachronism.

Stated as strongly as possible, given their theoretical simple-mindedness, *Weeks* and progeny *could* not have produced the evidentiary transaction thesis. The cases here discussed confirm that they did not. Those cases *could* not have produced *any* supporting rationale for a personal right to exclusion, and examination reveals that they did not. Furthermore, the pre-*Olmstead* cases did not clearly produce the exclusionary rule, much less an assertion (without rationale) of a constitutional right to it. Before Chief Justice Taft refashioned *Weeks* in *Olmstead* and attributed both exclusion and a fourth amendment basis for it to Justice Day, suppression was just emerging in the cases as a refraction of the original *Weeks* return remedy. Put differently, one *can* detect the exclusionary rule in some pre-*Olmstead* cases, but one cannot find, even on those infrequent occasions, anything more than the *Marbury* duty fulfilled under difficult and changing conditions.

The earliest post-*Weeks* cases are just what one would expect. Typically, *Weeks* was noted for its confirmation of judicial authority to order return of evidence and for the declared duty to do so. *United States v. Hart*³⁰¹ was decided within months of *Weeks* and appears to

299. 387 U.S. 294 (1967).

300. 389 U.S. 347 (1967).

301. 216 F. 374 (N.D.N.Y. 1914). The *Hart* litigation produced two district

have been the first exegetical effort. There the district court said that *Weeks* affirmed a court's power to order return of documents unlawfully seized even if they were in the actual possession of the United States Attorney.³⁰² Similarly, the 1916 *United States v. Jones* case³⁰³ remarked that tainted papers "must be returned" (citing *Weeks*) and "that the court has power, and it is its duty, under such circumstances, to direct and compel the United States Attorney to whom such papers have been delivered to return same to the owner."³⁰⁴ In neither case were constitutional principles involved. Each saw *Weeks* as *Weeks* saw itself: establishing jurisdiction to do the *Marbury* duty.³⁰⁵ The common current was stated most lucidly by the court in *United States v. Maresca*:³⁰⁶

Whenever an officer of the court has in his possession or under his control books or papers, or (by parity of reasoning) any other articles in which the court has official interest, and of which any person (whether party to a pending litigation or not) has been unlawfully deprived, that person may petition the court for restitution. This I take to be an elementary principle, depending upon the inherent disciplinary power of any court of record.

Attorneys are officers of the court, and the United States attorney does not by taking office escape from this species of professional discipline. Thus power to entertain this motion depends on the fact that the party proceeded against is an attorney, not that he is an official known as the United States attorney. It is further true that the right to move does not at all depend on the existence of this indictment; it might be made, were no prosecution pending.³⁰⁷

Maresca's vision did not falter when addressing the rule of decision appropriate to the jurisdiction so established. Correctly detecting the fifth amendment specter in *Weeks*, *Maresca* made clear that a pretrial return proceeding was *not* a fifth amendment inquest. "The only ground on which this or any similar motion can rest is that the prosecutor's possession of the book or paper is the result of" a fourth amend-

court opinions, each taking note of *Weeks*. The reference in this Article is to the August 1914 opinion. For the June opinion, see 214 F. 655 (N.D.N.Y. 1914).

302. 216 F. at 376-77.

303. 230 F. 262 (N.D.N.Y. 1916).

304. *Id.* at 266.

305. That the Constitution was involved via the remedial command is evident from other early cases that viewed continued impoundment by the court in the face of a proper motion for return as unlawfully "continuing" the certifiable initial seizure. See, e.g., *Coastwise Lumber & Supply Co. v. United States*, 259 F. 847, 853 (2d Cir. 1919); *Perlman Rim Corp. v. Firestone Tire & Rubber Co.*, 244 F. 304, 305 (S.D.N.Y. 1917).

306. 266 F. 713 (S.D.N.Y. 1920).

307. *Id.* at 717.

ment violation.³⁰⁸

The early cases are also a good measure of *Weeks*' theoretical underpinnings before Prohibition and *Silverthorne*'s "use" terminology that transformed its rule into one of suppression. The best illustrations are the two cases that presaged *Silverthorne*'s famous Holmesian quotes and that, in fact, were the only two cases cited in support of the relief granted there. The defendant in *Flagg v. United States*³⁰⁹ applied for return of papers within three days of their illegal seizure.³¹⁰ They were returned eighteen months later, after (in the court's words) the government had "worked over them" and "obtained all the information desired."³¹¹ Not good enough, said the Second Circuit. Returning them then was "an idle ceremony."³¹² Retention of "'secondary evidence'" after giving up the "'primary evidence'" simply would not do.³¹³ On similar facts, the same court in *Linn v. United States*³¹⁴ determined that the "wrong done in the seizure of the books was not cured by the idle ceremony of returning them after the authorities . . . had obtained their desired information."³¹⁵ *Flagg* concurred, Judge Veeder, saw two things in the majority opinion quite clearly. One was that, like *Silverthorne*, this super-return remedy sounded a lot like exclusion.³¹⁶ Second, that whatever it was, it was a species of remedy.³¹⁷

The remedial quality of *Weeks* was implicitly recognized by many cases³¹⁸ and explicitly by some. Crisp articulation is found in an early opinion by the Michigan Supreme Court.³¹⁹ After a lengthy and sympathetic study of *Boyd*, *Adams*, and *Weeks*, the court harmonized them as follows:

The principle underlying the decisions admitting the evidence is that an objection to an offer of proof made on the trial of a cause raises no other question than that of the competency, relevancy, and materiality of the evidence offered, and that consequently the court, on such an objection, cannot enter on the trial of a collateral issue as to

308. *Id.* at 718. The court added (without explanation) "disregard" of due process to the grounds for return.

309. 233 F. 481 (2d Cir. 1916).

310. *Id.* at 483.

311. *Id.*

312. *Id.* at 486.

313. *Id.*

314. 251 F. 476 (2d Cir. 1918).

315. *Id.* at 480.

316. *Id.* at 486 (Veeder, J., concurring).

317. *Id.* at 486-87.

318. See, e.g., *Nunes v. United States*, 23 F.2d 905 (1st Cir. 1928); *Tucker v. United States*, 299 F. 235 (7th Cir. 1924); *Wiggins v. United States*, 272 F. 41 (2d Cir. 1921); *Youngblood v. United States*, 266 F. 795 (8th Cir. 1920); *Lyman v. United States*, 241 F. 945 (9th Cir. 1917) (cases insisting on observation of *Weeks*' strict procedural requirements).

319. *People v. Marxhausen*, 171 N.W. 557 (Mich. 1919).

the source from which the evidence was obtained. But, since there is a right, there must of necessity be a remedy, and the remedy is to be found in the making of a timely application to the court for an order directing the return to the applicant of the papers unlawfully seized. On such an application, the question of the illegality of the seizure may be fully heard, and if the court erroneously refuses to order a return of the papers, and thereafter receives them in evidence against the applicant over his objection, it is an error for which a judgment of conviction must be reversed.³²⁰

The California Supreme Court in *People v. Mayen*³²¹ similarly read the federal authorities and affirmed the *Weeks*' insight that the *Marbury* duty trumped police efficiency. Upon timely application, "there should not be an arbitrary refusal to grant the demand in order to hold the ill-gotten articles as evidence."³²² The court further stated:

The right of one whose goods have been unlawfully seized to recover their possession, and that irrespective of its effect in depriving the state of their use in evidence, is not disputed; but the contention, which we think is maintained by the great weight of authority, is that the proceeding for such recovery is independent of the criminal proceeding in which it is sought to use such articles as evidence. Even conceding the right to demand such recovery by motion before the court in which such criminal action is pending, as is apparently the rule in the federal courts and as recognized in some of the state decisions . . . upon what theory can it be held that such proceeding is an incident of the trial, in such a sense that the ruling thereon goes up on appeal as part of the record and subject to review by the appellate court? It seems to us rather an independent proceeding to enforce a civil right in no way involved in the criminal case. The right of the defendant is not to exclude the incriminating documents from evidence, but to recover the possession of articles which were wrongfully taken from him. That right exists entirely apart from any proposed use of the property by the state or its agents.³²³

Clarity of expression like this was uncommon, but the substance expressed was not. Moreover, the remedial account of *Weeks* occupied the whole field of fourth amendment rationales for exclusion prior to *Olmstead*. That is, no alternative fourth amendment theory, like a personal right to exclusion, was developed. But that field was just a small playground compared to the vast expanse covered by the fifth amendment. One group of cases was typified by *United States v. Mandel*,³²⁴ a 1927 Massachusetts District Court opinion that repeated the by-then

320. *Id.* at 561.

321. 205 P. 435 (Cal. 1922).

322. *Id.* at 441.

323. *Id.* (citations omitted).

324. 17 F.2d 270 (D. Mass. 1927).

familiar *Gouled* formula:

It is the Fourth Amendment which protects the individual against unreasonable searches and seizures, and, whenever evidence is obtained by encroaching upon these rights, to offer it in evidence at the trial of the persons whose rights have been thus invaded is to compel the defendant to give evidence against himself, which comes within the inhibitions of the Fifth Amendment.³²⁵

In addition to these cases quite explicitly invoking self-incrimination³²⁶ are those disguising some uncertainty by first stating the rule that illegally seized evidence is inadmissible, and second, string citing (more or less) *all* the Supreme Court cases from *Boyd* to *Amos*, even including *Adams*. Sometimes lower federal court cases were thrown in for good measure,³²⁷ but the constant presence of *Gouled*, and the occasional absence of *Weeks*, prevent them from emerging as true exclusionary rule cases. A third sizeable group was made up of group one refugees: they are fifth amendment cases, but you have to look carefully to see it.³²⁸

Wigmore, for one, did not see the fifth amendment in these cases, or at least he so intensely disliked what he saw that he acted as if it were not there. And an excursus on Wigmore's blind spot may well tell us why others, including modern principled basis theorists, have ignored self-incrimination's role in exclusionary rule development. It appears from reading his batch of hypercritical articles on exclusion that two things made him livid: letting the guilty go unpunished for *any* reason and mishandling the fifth amendment—that is, broadening it beyond testimonial compulsion. One can now predict Wigmore's outrage when the two occurred simultaneously, when criminals went free as a result of distortions of self-incrimination. Wigmore's boiling point

325. *Id.* at 272.

326. *See, e.g.*, *Nunes v. United States*, 23 F.2d 905 (1st Cir. 1928); *Lee v. United States*, 14 F.2d 400, 406 (1st Cir. 1926) (Anderson, J., dissenting); *Tucker v. United States*, 299 F. 235 (7th Cir. 1924); *Murby v. United States*, 293 F. 849 (1st Cir. 1923); *Synder v. United States*, 285 F. 1 (4th Cir. 1922); *United States v. Mattingly*, 285 F. 922 (D.C. Cir. 1922); *Honeycutt v. United States*, 277 F. 939 (4th Cir. 1921); *Rice v. United States*, 251 F. 778 (1st Cir. 1918); *United States v. Burns*, 4 F.2d 131 (S.D. Fla. 1925); *United States v. Myers*, 287 F. 260 (W.D. Ky. 1923); *United States v. Harnich*, 289 F. 256 (D. Conn. 1922); *In re Tri-State Coal & Coke Co.*, 253 F. 605 (W.D. Pa. 1918).

327. *See, e.g.*, *Park v. United States*, 294 F. 776 (1st Cir. 1924) (no cite to *Weeks*); *Voorhies v. United States*, 299 F. 275 (5th Cir. 1924); *Giles v. United States*, 284 F. 208 (1st Cir. 1922); *United States v. Codde*, 22 F.2d 620 (E.D. Mich. 1927); *United States v. O'Dowd*, 273 F. 600 (N.D. Ohio 1921); *United States v. Bush*, 269 F. 455 (W.D.N.Y. 1920).

328. *See, e.g.*, *Watson v. United States*, 6 F.2d 870 (3d Cir. 1925); *United States v. Jajswiec*, 285 F. 789 (D. Mass. 1923); *United States v. Maresca*, 266 F. 713 (S.D.N.Y. 1920); *United States v. Abrams*, 230 F. 313 (D. Vt. 1916).

is apparent from the uncharitable tenor of his articles, but a close look at those pieces shows more than a scholar losing his cool. His defense mechanism turns out to be of the "see no evil" variety. Cases condoning lawbreaking via unsound fifth amendment analysis were *not* fifth amendment cases. *Gouled* is one such example. From Wigmore's discussion of that case one would never know that the fifth amendment was even mentioned there.³²⁹ There are other case analyses in which he committed, or intended, the same mistake,³³⁰ but a series of Georgia Supreme Court decisions especially hammered by Wigmore are most illustrative. The starting point is the 1897 decision in *Williams v. State*,³³¹ applauded by Wigmore for its adherence to the "ancient rule" admitting illegally and, in that case, reprehensibly acquired evidence.³³² *Of Hammock v. State*,³³³ a gun possession case decided a decade later, Wigmore said: "[T]his is a flat repudiation of *Williams v. State* . . . although the opinion endeavors to distinguish it . . . on the ground that there was a compulsory self-incrimination, but this is unsound."³³⁴ Furthermore and most importantly,

the opinion frankly avows "a public policy which would rather see the guilty go unpunished than have the guilt of the accused established" in this manner. Powell, J., the writer of the opinion, is one of our most accomplished living judges; but in a country so cursed by the use of concealed weapons the "public policy" thus declared is the worst kind of a policy; and it is undoubtedly doing just what it confesses to, viz. letting the guilty go unpunished.³³⁵

In actuality *Hammock* said:

In *Williams v. State* the objection was not made to the testimony [sic] on the ground that the defendant had been compelled to furnish testimony tending to incriminate herself, but merely on the ground that the search and seizure, by which the testimony was disclosed, was unlawful, and the decision of the court was upon this point alone.³³⁶

329. See Wigmore, *supra* note 11, at 484 n.1.

330. For example, see Wigmore's analysis of the following cases: *Hughes v. State*, 58 S.E. 390 (Ga. Ct. App. 1907); *Calhoun v. State*, 87 S.E. 893 (Ga. 1916); *Tucker v. State*, 90 So. 845 (Miss. 1922); *State v. Gibbons*, 203 P. 390 (Wash. 1922). Wigmore, *supra* note 11, at 480 n.1.

331. 28 S.E. 624 (Ga. 1897).

332. Wigmore, *supra* note 11, at 480 n.1 *Williams* is also remarkable for an exceedingly thoughtful opinion by Chief Justice Lumpkin, who most emphatically affirmed the fourth amendment duties of courts, but who did *not* think exclusion an appropriate judicial response to police misconduct. 28 S.E. at 627-28.

333. 58 S.E. 66 (Ga. Ct. App. 1907).

334. Wigmore, *supra* note 11, at 480 n.1.

335. *Id.*

336. 58 S.E. at 67.

[W]e hold that, when a person is subjected to an illegal arrest accompanied by an unlawful search of his person, whereby he is involuntarily compelled to disclose evidence of a crime which, in the absence of his volition being destroyed, he would not otherwise have disclosed, the evidence so obtained shall not be received against him on a prosecution for the crime.³³⁷

The "policy" bitterly denounced by Wigmore was that mandated by the state constitution: the law would rather let the guilty go unpunished than establish guilt "by violently and unlawfully compelling him to furnish evidence against himself."³³⁸

Hammock preserved the ancient rule of *Williams*, eschewed exclusion, and like most courts of its time, saw the fifth amendment as the Supreme Court did in *Gouled*, but at the same time in a way that we do not. Wigmore's "definition" of the exclusionary rule is now out in the open: whenever the analytical starting point is illegal search and seizure and the ending is failure to receive the evidence, you have exclusion. In a layman's sense that is good enough, but Wigmore was not a layman. In between those two poles may be a variety of doctrinal paths, including the fifth amendment, as in *Hammock* and *Gouled*, the remedial duty undertaken in *Weeks*, which tolerated loss of evidence as the cost of *Marbury*, maybe even a fourth amendment personal right to exclusion. Wigmore's undifferentiated trashing of all these "crime coddling" techniques may be the stuff of a good editorial, but it certainly impoverishes legal analysis. Regrettably, the redneck rhetoric seems to be our chief inheritance from the rule's "Great Critic," and it has much obscured the original bases of exclusion.

One thing Wigmore did not obscure, but which principled basis theorists do, is the theoretical quality of the *Weeks* rule. Wigmore judged return and subsequent unavailability at trial exceedingly misguided, but at least he understood it as misguided remedial doctrine. But again, Wigmore failed to illumine this normative framework because he thought the application of it unsound. He dispatched *Weeks*' preservation of *Adams* by seizing hold of the collateral/material distinction in the ancient rule: once trial begins, the means of acquisition do not affect admissibility.³³⁹ *Weeks*' insistence on a pretrial motion for return, based upon remedial principles, did not undermine *Adams* because no collateral issue could then be tendered at trial. "But surely this is an unsound use of the term collateral,"³⁴⁰ Wigmore fulminated. "[A] defendant cannot turn a collateral fact into a material fact by merely making a formal motion before trial"³⁴¹ The categorical

337. *Id.*

338. *Id.*

339. Wigmore, *supra* note 3, at 43.

340. *Id.*

341. *Id.*

error is plain. No one, other than Wigmore, is talking about a trial issue, main or otherwise. The remedial course is run on an independent track, and while its outcome may affect the trial, no "trial issue" is thereby generated. No suggestion that the means of acquisition affected competence was made. And here, too, Wigmore helps to confuse rather than to illumine the exclusionary rule story, for he neglects, or at least neuters, that vast number of pre-*Olmstead* cases which took *Weeks'* distinction of *Adams* seriously. *Adams* and *Weeks* are regularly cited in harmony. As late as 1951, one federal court cited *Adams* as good law.³⁴² The largest single group of *Weeks* cases before 1928 consisted of opinions *insisting* that a timely pretrial motion for return be made to invoke *Weeks'* protection.³⁴³ Conversely, these same opinions routinely remarked that illegally seized evidence was admissible, unless the defendant had previously moved for return. Courts frequently received tainted evidence in the absence of that motion, rather happily relying on *Adams*.³⁴⁴

Others did not. Professor Grant is no doubt correct in noting that judicial disapproval of the Volstead Act induced modification of the procedural requisites of *Weeks*.³⁴⁵ It is just as surely true that in many cases, the fifth amendment trial objection subsumed *Weeks*, and its firm constitutional footing could overcome the "merely procedural" *Adams* rule. In addition, what appears to be a simple equitable sense softened *Weeks*. When the defendant did not know until trial of the search and seizure, the motion was dispensable.³⁴⁶ When the facts adduced at trial were undisputed and sufficient to determine illegality, no "collateral issue" was raised.³⁴⁷ In a state case striving to follow *Weeks* and sounding very much like a true exclusionary rule case, trial was soon enough to object because the *Weeks* pretrial proceeding was unauthorized by state law.³⁴⁸ At the same time, Prohibition itself, and not just judicial hostility to it, further modified *Weeks* until it looked just

342. *United States v. Edmonds*, 100 F. Supp. 862 (D.C.D.C. 1951).

343. *See, e.g.*, *Nunes v. United States*, 23 F.2d 905 (1st Cir. 1928); *Tucker v. United States*, 299 F. 235 (7th Cir. 1924); *Winkle v. United States*, 291 F. 493 (8th Cir. 1923); *Wiggins v. United States*, 272 F. 41 (2d Cir. 1921); *Haywood v. United States*, 268 F. 795 (7th Cir. 1920); *Youngblood v. United States*, 266 F. 795 (8th Cir. 1920); *Laughter v. United States*, 259 F. 94 (6th Cir. 1919); *Rice v. United States*, 251 F. 778 (1st Cir. 1918); *Lyman v. United States*, 241 F. 945 (9th Cir. 1917); *In re Tri-State Coal & Coke Co.*, 253 F. 605 (W.D. Pa. 1918); *United States v. Friedberg*, 233 F. 313 (E.D. Pa. 1916); *United States v. Abrams*, 230 F. 313 (D. Vt. 1916); *United States v. Lombardo*, 228 F. 980 (W.D. Wash. 1915).

344. *See, e.g.*, *Winkle v. United States*, 291 F. 493 (8th Cir. 1923); *Farmer v. United States*, 223 F. 903 (2d Cir. 1915).

345. Grant, *supra* note 174, at 364-65.

346. *Harkline v. United States*, 4 F.2d 526 (8th Cir. 1925); *Landwirth v. United States*, 299 F. 281 (3d Cir. 1924).

347. *Salata v. United States*, 286 F. 125 (6th Cir. 1923).

348. *Youman v. Commonwealth*, 224 S.W. 860 (Ky. Ct. App. 1920).

like "suppression." Since contraband liquor was increasingly the subject of illegal seizure, return was increasingly implausible. Through casuistic reasoning, a few judges convinced themselves that illicit booze was returnable,³⁴⁹ but most faced the dilemma squarely and devised a Solomonic solution. The liquor was not returned *and* the government could not use it at trial.³⁵⁰ Sometimes fifth amendment analysis produced this compromise, but more often it was undistilled *Weeks* remedial reasoning. In a short time, the relevant motion (which was still ordinarily pretrial) was for "suppression."

These various developments contributed to a single salient result—the *Weeks* earmarks of remedy disappeared. The theoretical flags denoting independent remedial proceeding, the obvious equity of simple replevin, and the bright *Adams* line between *Weeks* and the trial itself were lowered. And Wigmore, while not a reliable reporter of events, turned out to be gifted prophet. For practical purposes, *Weeks* now presented a trial issue, and the issue was exclusion. The way was thus prepared for Chief Justice Taft to proclaim that *Weeks*' account of the fourth amendment included exclusion of illegally seized evidence.

The historical details of the path from return to suppression are not as important as their analytical significance. The question here is not the exclusionary rule's true date of birth, but the normative climate in which it was born. What has perhaps been implicit in the developmental account should be made crystal clear: there is nothing of either the evidentiary transaction or the "personal right to exclusion" in it. A few cases, like *Olmstead*, sound as if they are finding exclusion "in" the fourth amendment, but they do not contemplate a right to an untainted trial and say nothing in support of their "constitutional" interpretation, save for *Weeks*. The cases *do* say a number of discreet things that contradict such exaggerations. First, there is the common judicial insistence that a *Weeks* motion for return, suppression, or both be filed and litigated before trial.³⁵¹ While sometimes honored in the breach, no court appears to have denied it as the preferred practice. This procedural requirement signals the remedial rationale, for it was still a general principle that trial objections could neither be made nor litigated before the jury was sworn. The *Adams* wedge between exclusion and trial, and therefore the wedge between suppression and a personal con-

349. See, e.g., *Geraghty v. Potter*, 5 F.2d 366 (D. Mass. 1925); *United States v. Kelih*, 272 F. 484 (S.D. Ill. 1921); *Connelly v. United States*, 275 F. 509 (N.D.N.Y. 1921).

350. See, e.g., *United States v. Kaplan*, 286 F. 963 (S.D. Ga. 1923); *United States v. O'Dowd*, 273 F. 600 (N.D. Ohio 1921); *United States v. Rykowski*, 267 F. 866 (S.D. Ohio 1920).

351. This longstanding practice was later incorporated into FED. R. CRIM. P. 41(E). See *In re Fried*, 161 F.2d 453, 458 (2d Cir.), cert. dismissed, 332 U.S. 807 (1947).

stitutional right to it, is preserved. A second contradiction is standing. Articulated at the same time that exclusion was,³⁵² it means that suppression is some kind of response to antecedent police misconduct and not itself a trial creature. Otherwise, exclusion would be available to whomever was on trial and not just to those aggrieved by the constable. While standing was an issue in only a few cases, no opinion questioned the doctrine, and no defendant excluded evidence illegally obtained from someone else. A third and less direct contradiction is the near celebration of the "silver platter doctrine." With the approval of the Supreme Court, inferior courts without remorse received evidence unlawfully seized by state police officers (as in *Weeks*)³⁵³ and by private individuals.³⁵⁴ Obliquely suggested by the doctrine's good health is the presence of a much less powerful theoretical charge than principled basis theorists may safely acknowledge. A final contradiction resides in the next section of this Article. As post-*Olmstead* "suppression" courts cast about for a reason underlying a rule whose originating impulse was now obscured, they said an assortment of things, none of them supportive of the proffered principled bases. In this they imitated Justices of the Supreme Court, and a brief review of the much larger sample of lower court cases provides valuable confirmation of the hypotheses already developed.

C. *The Search for Weeks, III: Inferior Courts 1929-1949*

Do not be misled by the separation into pre- and post-*Olmstead* cases, for there is little new here. The overriding characteristic of these later decisions is continuity. They look a lot like their predecessors as well as their contemporaries in the United States Reports. The single, detectable shift was glacial and affected the fifth amendment's predominance as the locus of exclusion. After 1928, it remained an important justificatory device, the single most cited rationale for exclusion,³⁵⁵ con-

352. See *Agnello v. United States*, 269 U.S. 20 (1925).

353. See, e.g., *Robinson v. United States*, 292 F. 683 (9th Cir. 1923); *Rowan v. United States*, 281 F. 137 (5th Cir. 1922).

354. *Burdeau v. McDowell*, 256 U.S. 465 (1921).

355. See, e.g., *Felman v. United States*, 322 U.S. 487, 490 (1944); *United States v. Lefkowitz*, 285 U.S. 452 (1932); *Marron v. United States*, 275 U.S. 192 (1927); *McGuire v. United States*, 273 U.S. 95, 99 (1927); *Lotto v. United States*, 157 F.2d 623, 625 (8th Cir. 1946); *United States v. Lindenfeld*, 142 F.2d 829, 832 (2d Cir. 1944); *Takahashi v. United States*, 143 F.2d 118, 122 (9th Cir. 1944); *Bozel v. Hudspeth*, 126 F.2d 585, 587 (10th Cir. 1942); *Price v. Johnston*, 125 F.2d 805, 812 (9th Cir. 1942); *Valli v. United States*, 94 F.2d 687, 691 (1st Cir. 1938); *Brown v. United States*, 83 F.2d 383, 386 (3d Cir. 1936); *Safarik v. United States*, 62 F.2d 892, 898 (8th Cir. 1933); *Donahue v. United States*, 56 F.2d 94, 99 (9th Cir. 1932); *Kroska v. United States*, 51 F.2d 330, 332 (8th Cir. 1931); *United States v. Gowen*, 40 F.2d 593, 597 (2d Cir. 1930); *Day v. United States*, 37 F.2d 80, 81 (8th Cir. 1929); *In re Meader*, 60 F. Supp. 80, 82 (E.D.N.Y. 1945); *United States v. Richmond*, 57 F. Supp.

sidering each of the fourth amendment reasons—deterrence, judicial integrity, sanction—separately. Taken as a whole, however, the search and seizure guarantee itself was more frequently the ultimate source of exclusion. The bulk of these cases were in still a different category in which no rationale at all was offered. Judges routinely pronounced that “illegally obtained evidence must be suppressed” without any citation,³⁵⁶ and just as frequently, the sole precedent was *Weeks*.³⁵⁷ In other words, to the judicial mind, by 1949, exclusion had become both self-evident and virtually self-justifying. Put differently still, that slothful manana mentality prevailed. Before *Olmstead*, the fifth amendment was a disincentive to theoretical progress; after it, the familiarity among suppression, *Weeks*, and the fourth amendment heralded by Taft wrought a similar judicial lassitude. Yes, there *are* cases that make deterrence noises, some rather audibly.³⁵⁸ There *are* disparate holdings sounding like the “give effect” Taft opinion³⁵⁹ or vaguely akin to the judicial integrity rationale,³⁶⁰ but they are dwarfed by those that take the rule for granted. Typical of the justificatory malaise (though not of judges suffering from it) is Learned Hand’s 1945 opinion in *United States v. Pugliese*,³⁶¹ a case that among other things, confirmed the silver platter doctrine:

As we understand it, the reason for the exclusion of evidence competent as such, which has been unlawfully acquired, is that exclusion is the only practical way of enforcing the constitutional privilege. In

903, 907 (S.D. W. Va. 1944); *In re Andrews' Tax Liability*, 18 F. Supp. 804, 807 (D. Md. 1937); *United States v. Maggio*, 51 F.2d 397, 399 (W.D.N.Y. 1931); *Camden County Beverage Co. v. Blair*, 46 F.2d 648, 650 (D.N.J. 1930); *United States v. A Certain Distillery*, 24 F.2d 557, 558 (E.D. La. 1928); *United States v. Napela*, 28 F.2d 898, 903 (N.D.N.Y. 1928).

356. See, e.g., *Worthington v. United States*, 166 F.2d 557, 561 (6th Cir. 1948); *In re Fried*, 161 F.2d 453, 466 (2d Cir. 1947); *Fraternal Order of Eagles No. 778 v. United States*, 57 F.2d 93, 94 (3d Cir. 1932); *Wilson v. United States*, 59 F.2d 390, 394 (3d Cir. 1932); *United States v. Novero*, 58 F. Supp. 275, 278 (E.D. Mo. 1944); *United States v. Fifty-Eight Drums of Material Designed for Mfr. of Intoxicating Liquor*, 38 F.2d 1005, 1005 (W.D. Pa. 1930); *United States v. Leach*, 24 F.2d 965, 966 (D. Del. 1928).

357. See, e.g., *United States v. Krulewitch*, 167 F.2d 943, 945 (2d Cir. 1948); *Elwood v. Smith*, 164 F.2d 449, 451 (9th Cir. 1947); *In re Ginsburg*, 147 F.2d 749, 750 (2d Cir. 1945); *Harris v. United States*, 151 F.2d 837, 839 (10th Cir. 1945); *Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, Inc.*, 32 F.2d 195, 202 (2d Cir. 1929); *House v. Mayo*, 85 F. Supp. 365, 368 (S.D. Fla. 1949); *United States v. A Certain Distillery*, 24 F.2d 557, 558 (E.D. La. 1928).

358. See, e.g., *In re Fried*, 161 F.2d 453, 466 (2d Cir. 1947) (Hand, J., dissenting in part); *Nueslein v. District of Columbia*, 115 F.2d 690, 694 (D.C. Cir. 1940); *In re Dooley*, 48 F.2d 121, 122 (2d Cir. 1931).

359. See e.g., *Fraser v. United States*, 145 F.2d 139, 145 (6th Cir. 1944); *Fraternal Order of Eagles No. 778 v. United States*, 57 F.2d 93, 94 (3d Cir. 1932).

360. See, e.g., *Day v. United States*, 37 F.2d 80, 81 (8th Cir. 1929).

361. 153 F.2d 497 (2d Cir. 1945).

earlier times the action of trespass against the offending official may have been protection enough; but that is true no longer. Only in case the prosecution which itself controls the seizing officials, knows that it cannot profit by their wrong, will that wrong be repressed. If so, when the offenders are not responsible to the prosecution, they have too remote an interest in its success, if they have any at all, to make exclusion a remedy. Be the explanation what it may, the distinction is too well established to be questioned in the lower courts.³⁶²

Here are practically all the available rationales in a single paragraph, coupled with the resignation appropriate to what, by then, was an enconced tradition no longer in need of careful justificatory attention.

A few important events confirm the nondevelopment of anything like a personal right to exclusion. One is the persistence of standing limitations in a pure fourth amendment regime.³⁶³ That is, once exclusion was clearly traced to the fourth, and not the fifth, amendment, the persistence of standing shows that only a response to antecedent police misconduct was involved and not a right to be free of entire "evidentiary transactions." The continued good health of both the silver platter doctrine³⁶⁴ and the seasonable assertion requirement³⁶⁵ reveal the presence of the originating *Weeks* remedial impulse, even when exclusion was *not* viewed (and Hand is not to the contrary) as a Hohfeldian remedy. The new doctrine that the defendant's statements of ownership in aid of his suppression motion may be used at trial³⁶⁶ also witnesses a sub- or nonconstitutional understanding of exclusion. It suggests that exclusion is not seen as a true equal of the search and seizure guarantee itself.

Prohibition and its proliferation of federal law enforcement personnel induced two remaining, rare instances of judicial reflection on the origins of exclusion. Could a *Weeks*-inspired court order the return of evidence in custody not of federal marshals, then viewed as court adjuncts, but in the control of Prohibition agents³⁶⁷ or the Federal Bureau of Investigation?³⁶⁸ Yes, answered the Supreme Court in *Go-Bart*

362. *Id.* at 499.

363. *See, e.g.*, *Whitcombe v. United States*, 90 F.2d 290, 293 (3d Cir. 1937), and cases cited therein.

364. *See, e.g.*, *United States v. Liss*, 105 F.2d 144, 145 (2d Cir. 1939); *Ex parte Vilarino*, 50 F.2d 582, 585 (9th Cir. 1931); *In re Guzzardi*, 84 F. Supp. 294, 295 (N.D. Tex. 1949).

365. *See, e.g.*, *Takahashi v. United States*, 143 F.2d 118, 122 (9th Cir. 1944); *Durkin v. United States*, 62 F.2d 305, 307 (1st Cir. 1932); *United States v. Alabama Highway Express*, 46 F. Supp. 450, 452 (N.D. Ala. 1942); *United States v. Napela*, 28 F.2d 898, 903 (N.D.N.Y. 1928).

366. *Heller v. United States*, 57 F.2d 627, 630 (7th Cir. 1932).

367. *See Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931).

368. *See United States v. Antonelli Fireworks Co.*, 53 F. Supp. 870 (W.D.N.Y. 1943).

Importing Co. v. United States.³⁶⁹ Agents are "subject to the proper exertion of the disciplinary powers of the court. And on the facts here shown it is plain that the district court had jurisdiction summarily to determine whether the evidence should be suppressed and the papers returned to the petitioners."³⁷⁰ The Court in *United States v. Antonelli Fireworks Co.*³⁷¹ found FBI agents similarly within the courts' "powers."³⁷² Each holding locates the authority to suppress not in the Constitution itself, but where *Weeks* found it—in the inherent remedial powers of the judge.

V. CONCLUSION

Casting *Wolf* as a heretic makes about as much sense as portraying Judas as Jesus' most faithful disciple. *Wolf* said literally *nothing* that had not been said better before. One cannot even say it consummated a developmental or formative process. Since *Wolf* capped an era of nondevelopment, a necessary premise is lacking. "Consummation" is inapposite in any event, for it implies some surpassing—if only a better organization of existing materials. *Wolf* is, instead, the epitome of stagnation. Its proper relationship to previously articulated doctrine is like that of a summer rerun to a premiere. Among the many scenes replayed by Frankfurter's opinion for the Court are the following: First, "[in] *Weeks* . . . this Court held that in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure Since then it has been frequently applied and we stoutly adhere to it."³⁷³ Second, we must hesitate to treat this remedy as an essential ingredient of the [Fourth Amendment] right.³⁷⁴ Frankfurter went on to add that

the ways of enforcing such a basic right raise questions of a different order. How such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution.³⁷⁵

. . . . Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by

369. 282 U.S. 344 (1931).

370. *Id.* at 355 (citing *Weeks, Wise, Mills, and McHie*).

371. 53 F. Supp. 870 (W.D.N.Y. 1943).

372. *Id.* at 873.

373. 338 U.S. at 28.

374. *Id.* at 29.

375. *Id.* at 28.

the Due Process Clause a State's reliance upon other methods, which, if consistently enforced, would be equally effective.³⁷⁶

The remaining *Wolf* opinions were less original. Justice Douglas added that but for "that rule of evidence of evidence [exclusion] the Amendment would have no effective sanction."³⁷⁷ Justice Murphy lucidly muddied the waters with this rhetorical query: "[W]hat an illusory remedy this is, if by 'remedy' we mean a positive deterrent to police and prosecutors tempted to violate the Fourth Amendment."³⁷⁸ He then showed up the illusion by demonstrating how the Hohfeldian plaintiff was inadequately afforded the *Marbury* quantum of relief.³⁷⁹ Justice Black observed that exclusion was "a judicially created rule of evidence which Congress might negate,"³⁸⁰ but a flabbergasted Justice Rutledge "reject[ed] any intimation that Congress possessed such authority," an issue he thought settled by *Boyd* and confirmed by (of all cases) *Adams*.³⁸¹ Rutledge further noted that "[t]he view that the Fourth Amendment itself forbids the introduction of evidence illegally obtained in federal prosecutions is one of long standing and firmly established."³⁸² The irrepressible Rutledge hedged his bet upon this "personal right to exclusion" by siding with Murphy that "the Amendment without the sanction is a dead letter."³⁸³ And the caution was well founded, for all he mustered in support of his regal pronouncement was *Olmstead*,³⁸⁴ specifically Taft's reinvention of *Weeks*. That Rutledge never escapes the fifth amendment's influence in his two page opinion ultimately neuters his "personal rights" threat.

On the only important point, every member of the *Wolf* Court (with a caveat for the puzzled Rutledge) got it right and was consistent with every prior opinion: suppression was not part of the fourth amendment. A fortiori, the unitary model had yet to be constructed, and the evidentiary transaction was still unconsummated.

That is about all the insight *Wolf* mustered. Largely parroting the melange of rationales previously uttered, *Wolf* is firmly within the tradition of undifferentiated use of terms like "remedy" and "sanction" and judicial failure to scrutinize critically their true justificatory capacity. The result—there is no "original understanding." Once the remedial quality of *Weeks* was lost in the transition from return to exclusion (and Frankfurter opined that suppression did not fit the *Marbury*

376. *Id.* at 31.

377. *Id.* at 40 (Douglas, J., dissenting).

378. *Id.* at 42-43 (Murphy, J., dissenting).

379. *Id.* at 43-44.

380. *Id.* at 40 (Black, J., concurring).

381. *Id.* at 48 (Rutledge, J., dissenting).

382. *Id.*

383. *Id.* at 47.

384. *Id.* at 48.

model),³⁸⁵ there is no rationale possessing temporal priority. Put most explicitly, the *Wolf* Court could not swallow exclusion as a Hohfeldian remedy. The rule it ingested was therefore not theoretically traceable to *Weeks*. And *Wolf*, which involved unlawful seizure of documentary evidence, exemplifies the eclipse of the fifth amendment basis for the exclusionary rule. The remaining rationales are then reduced to the status of mere contenders for the title, and they all strutted their stuff in *Wolf*. Thus, if you like, there are a host of "original" (though largely unexplored) understandings, for *Wolf* is more the "original" case than *Weeks*, since the incorporation it wrought obliged the Court to confront directly exclusion's constitutional status. *Wolf*'s unsatisfying pluralistic account simply means that, for us, there is no avoiding a square confrontation with both the inherent soundness and the constitutional authority of the exclusionary rule.

The search for a "principled basis" will probably continue, though it takes some figuring to determine why. A plausible constitutional basis for exclusion—deterrence, in its various guises—is hardly without principle, though it does depend upon contemporary reality for life.³⁸⁶ And its evident unattractiveness to Professor Kamisar and Justice Brennan, for instance, propels the ironies of exclusionary rule discourse back to the surface. These proponents of a "living Constitution"—one whose cardinal interpretive norm is currency with modernity—are unexpectedly possessed by a desire to govern one of our day's thorniest social problems with a 1914 opinion, and it is fair to say that especially in criminal procedure, where case lives are measured by the term, no case older than *Weeks* is considered authoritative by such modernizers. Only a little less surprising is the spectacle of judicial "conservatives," who would gladly seek conclusive authority in eighteenth-century analogues, blithely ignoring, but not denying, an apparently potent originalist argument of more recent vintage.

The ironies may of course be plunged back into the depths by looking beyond intellectual and jurisprudential integrity. When judges and commentators perform such somersaults, it is usually because they smell the scent of a preferred result. The exclusionary rule has become a litmus test, not of constitutional law or theory so much as the moral worth of the entire social system. Viewed on one side as the symbol of our commitment to fair treatment of the accused, exclusion on the other side is seen as a morally indefensible inversion of the law's priori-

385. *Id.* at 28 (Frankfurter, J., writing for the majority).

386. Whether the federal judiciary possesses "inherent" power to fashion a "remedy" on this basis without congressional authorization, or in the teeth of a congressional prohibition, is uncertain. For an enlightening discussion of these issues, see Van Alstyne, *The Role of Congress in Determining Prudential Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 36 OHIO ST. L.J. 788 (1975).

ties and purposes. In either event, the debilitating effect upon the integrity of constitutional law is the same. Precisely this kind of result-oriented jurisprudence has virtually bankrupted constitutional criminal procedure by robbing it of any semblance of objective, neutral content. Justice Stevens' charge that a majority of the Court has abandoned doctrinal discipline to become a prosecutorial cheering section is only one symptom of the disease.³⁸⁷ That he who casts the first stone need not be without sin is apparent from Stevens' bitter dissent in *Moran v. Burbine*,³⁸⁸ in which with Wigmoreish vigor, he blasted the majority's careful (and basically correct) distinction of constitutional doctrine (*Miranda*) from objectionable police behavior (deception of an unretained attorney). Instead, Stevens would begin constitutional reflection with his moral calculator and *then* fashion doctrine suited to the problem.³⁸⁹ That Justices Marshall and Brennan trail doctrine in the wake of personal moral philosophy has long been apparent, not only from their support of Stevens in *Moran*, but also from their continued dissent in capital punishment cases fully a decade after their philosophy was decisively scotched by the law.³⁹⁰ The final irony is that the search for a "principled basis" typified herein is also typical of that bankruptcy and its cause. These commentators pass off strident posturing and unconvincing polemics as constitutional interpretation and do so in pursuit solely of something, anything, to save the exclusionary rule from Wigmore's descendants.

387. See, e.g., *New Jersey v. TLO*, 104 S. Ct. 3583, 3584 (Stevens, J., dissenting from order to reargue).

388. 54 U.S.L.W. 4265, 4270-71 (U.S. Mar. 10, 1986) (No. 84-1485) (Stevens, J., dissenting).

389. *Id.* at 4270.

390. See, e.g., *Moore v. Texas*, 54 U.S.L.W. 3558 (U.S. Feb. 21, 1986). (No. 85-6372).