

# 1 Plugging into the Fourth Amendment's Matrix

## Entering the Matrix: State Violence as Politics

In the now-classic movie *The Matrix* the humans of the future are almost entirely enslaved by intelligent machines, which have created a “matrix,” a massive, shared, interactive computer program that simultaneously runs through each human’s mind. To the humans, the program in their heads *is* reality. They therefore remain complacent, divided, and blind to their condition.<sup>1</sup>

A small band of free humans living in the real world venture forth to do battle with the machines. Much of that battle takes place when they plug in to the matrix, searching for enslaved humans whom they can convince of the need to break their literal and mental chains. “Agents”—programs that look like the movie-stereotype of FBI law enforcement—prowl the matrix, using brutal violence on behalf of the machine “state” to locate and crush the fully sighted dissenters. The agents mean not merely to kill but to humiliate, to send the message of their invincibility and absolute rule. But the agents are afraid too, for they know that the rules that govern their world, the laws that define their society, are at stake.<sup>2</sup>

The agents ultimately arrest a human known as “Neo” on the pretense of suspecting him of computer crimes, but really to seek his aid in locating the renegade humans, whom they identify to Neo as “criminals.” When he refuses, insisting on his rights to silence and to an attorney, the agents make Neo’s lips grow together into a silencing mask. They next plant an electronic bug on him, inserting it into his abdomen, so that they can track his movements. Ultimately, however, Neo makes common cause with the renegades and discovers that he is likely “the One,” the savior who will free all humanity, uniting them

in the consciousness that they are all indeed one. He returns to the matrix, battling the machines until he learns that he can bend their laws to his will, thus stopping bullets, defying gravity, and even defying his death. In the two sequels that follow, Neo brings this all-pervasive violence into the real world, crushing the machines' tyranny, replacing it with the laws of a unified mankind and human love.<sup>3</sup>

Perhaps only a law professor would see in *The Matrix* a metaphor for the origins and social function of the Fourth Amendment. Nevertheless, the metaphor is an apt one. The agents of the state in the matrix use violence in the form of arrests, searches, and electronic surveillance for *political* purposes, to silence dissent, to reinforce governing social norms, and to maintain the current distribution of power. Of course, the state's ability to use force—to govern—is necessary to any state's existence and to the safety of its people. *The Matrix* sequels notably reveal violence at work in the governance of the somewhat militaristic human city of Zion—the sole haven for the few free humans. But the humans use violence to liberate, unify, and protect. Ultimately it is the clash of these two forms of political violence, one degrading and the other uplifting, that are at the core of *The Matrix* films and of the everyday violence of policing. Likewise, the Fourth Amendment is best understood as serving to tame everyday political violence, an insight ignored by other commentators and having important implications for constitutional doctrine and police practice.<sup>4</sup>

Absent a citizen's voluntary consent, all police activity involves violence or its threat. A "search" is by definition an unwanted, thus forced, invasion of a reasonable expectation of privacy. A "seizure" similarly is an unwanted interference with a person's freedom of movement or his possessory interest in property. Any film or novel about the police makes the violence of their work stark. If that violence is usually less stark in everyday policing, it is no less real. A tremor of fear, however fleeting and mild, runs through any driver stopped for a traffic violation, who worries that he or she may be subject to arrest or that saying or doing the wrong thing may anger the officer. The uniform, the holstered weapons, the command voice are all designed to make the threat of violence clear.<sup>5</sup>

When that threat becomes real, it can be degrading, as both the majority and the dissenters on the U.S. Supreme Court recently recognized in *Atwater v. City of Lago Vista*, in which a mother unsuccessfully challenged the reasonableness of her being arrested for driving without a seatbelt, an offense punishable by a fine only. There the majority declared that "the physical incidents of [Atwater's] arrest were merely gratuitous humiliations." The Court continued: "Atwater's claim to live free of pointless indignity and confinement clearly outweighs anything the city can raise against it specific to her case."<sup>6</sup>

Such violence may often be legitimate, necessary to enforcing the law, to

encouraging respect for it, and to catching the bad guys. But whether legitimate or not, police violence is always “political” in three related ways: first, it is committed by the state, the police’s employer; second, it often affects the distribution of power resources among social groups; and third, it is essential to the coherence and survival of political society.<sup>7</sup>

### Lockean Liberals and Virtuous Republicans

This last point is implicit in both the Lockean social contract and republican virtue theories that animated the Framers of the U.S. Constitution and form the backdrop for understanding the real meaning of the Fourth Amendment. In Lockean liberalism, a community or a People forms from the consent of individuals who, to protect themselves, transfer the personal right to execute the law of nature—to use force—to the community. The community serves as an impartial judge and as the single authoritative interpreter of nature’s law. The community in turn creates a government, a set of institutions entrusted by the community to bring about the social peace and the preservation of natural rights for which the community was created. A legitimate state will pass, interpret, and execute laws for the noble purpose of preserving citizens’ “property,” meaning their lives, liberties, and possessions. Such a state thereby rightly acquires “political power.”<sup>8</sup> Locke explains:

Political power, then, I take to be a right of making laws with penalties of death, and consequently all lesser penalties, for the regulating and preserving of property, and of employing the force of the community in the execution of such laws, and in the defense of the commonwealth from injury, and all this only for the public good.<sup>9</sup>

The “public” or “common good” is the good of *all* the People, not of any subset or elite, preserving both the People’s safety and their existence as “a People.” The kind of state force involved in stops, arrests, searches, and seizures is therefore necessary to the very existence of a People and of a state. Yet Lockean liberals are simultaneously distrustful of the state, fearful that it will use its awesome force to serve factions rather than the People as a whole, imposing tyrannical rule in ways both large and small. The state’s use of force must therefore be monitored and tamed by the People or by institutions legitimately acting on their behalf. The Fourth Amendment’s declaration that the state use force to effect “searches and seizures” only when “reasonable” is sensibly understood as constitutionalizing the mandate that the People tame state power.<sup>10</sup>

Republican (as opposed to liberal) theory likewise recognized that the state must serve the common good rather than that of a faction. But the common

good can be discerned only by virtuous citizens shaping a virtuous state and vice versa. Virtuous citizens' qualities include a willingness to invoke their rights in a way that makes them part of a deliberative dialogue over what kind of state and People we should be. Yet those Framers most heavily influenced by republican thinking still accepted that this political conversation could successfully be undertaken only in the context of a neo-Lockean social contract. For republicans, however, that contract was political, in the sense that it required institutions to encourage the sense of shared values necessary to an effectively functioning People. Only such a united People could tame otherwise unbridled state violence. For republicans too, therefore, the Fourth Amendment channels state force to productive purposes.<sup>11</sup>

For both liberals and republicans, the use of state violence to enforce the laws—modernly, the function of the police—is thus a necessary precondition to Peoplehood and to social stability. Yet neither sort of thinker trusted the state. Rules and institutions were understood to be necessary to monitor the state and to prevent its abusing its authority to use force to crush the People or to undermine the equality principles embraced by the social contract, serving the needs of a faction or elite. The Fourth Amendment is best understood, or so this book will argue, as just such an attempt to tame political violence, ensuring its service to the “security” of a free People by prohibiting unreasonable exercises of the state’s use of force. Among the political dangers that constitute the state’s abuse of violence are conduct sending degrading messages about human worth, insulting individuals or groups, undermining rather than reinforcing desirable republican norms, and suppressing dissenting voices. Abuse also arises when the police de-individualize justice, treating persons on the basis of stereotype or surmise rather than as “unique, a ‘universe of one,’” as judged by ample and trustworthy evidence.<sup>12</sup>

## The Original Fourth Amendment

This book’s approach is historical, in part 1 recasting the history of the original Fourth Amendment of 1791 as one about the taming of expressive political violence. The origins of the amendment indeed lay in part in efforts to suppress dissent in infamous seditious-libel prosecutions. But the amendment’s origins also lay in a violent dispute over what it means for the state to “represent” the People. Mob actions during the Revolutionary period were prompted to protest not simply “taxation without representation” but rather the enforcement of the tax laws by general searches, ones without adequate individualized evidence of wrongdoing. But the very authority for those searches was ostensibly granted by Parliament—the British legislature—so that mob complaints extended also to Americans’ lack of voice in the decision about when and how

searches may happen. The dispute over search and seizure policy was thus at the very heart of the passions and political theory motivating the Revolution.<sup>13</sup>

Part of the Revolutionaries' concern with oppressive general searches lay also in the insult of being subjected to actual or threatened state force. Part of that insult was class based: subordinate, uneducated, and "low-born" officers searched the homes of higher-ranked free householders. But the colonists were insulted too not simply by *who* did the searches but by *how* the suspects were chosen: arbitrarily, without adequate supporting evidence of *individual* wrongdoing and without guidelines limiting officer discretion. This arbitrary violation of principles of individualized justice was so dear to the Revolutionaries' hearts that they described it as the equivalent of slavery, the ultimate political evil. By "slavery" the colonists did not mean "chattel slavery," which they ultimately protected via specific provisions in the original Constitution of 1789. Rather, for the colonists slavery was the absence of corporate political liberty and economic independence for individuals. General searches symbolized this ultimate political degradation, marking the colonists (in their view) as outside the community of recognized political equals, silencing their voices and making them dependent on the whims of a tyrannical empire.<sup>14</sup>

The sense of insult stemmed not only from voiceless deindividualization but also from the related idea that the state must not use force against any citizen without strong, reliable evidence of individual wrongdoing. The American passion for this evidentiary principle—later encapsulated in the idea of "probable cause"—had its roots in fears of Continental-style inquisitions, but developed into a fairly complex and robust set of common-law concepts. The colonists were alert to the need for significant assurances of evidentiary reliability. Mere surmise or weakly supported allegations of individual wrongs would not suffice. The "probable cause" concept served to restrain state force, protecting both individuals from violence and the People from subjugation to a power other than their own. Making this point clear requires an explanation of the meaning of the "common law" and its significance in interpreting the Fourth Amendment and an explanation of the respective roles of the People, the Congress, the judiciary, and the executive in making Fourth Amendment freedoms real. Although the judiciary was assigned a special role in this process (the warrant-issuing prerogative), commentators too often de-emphasize the multi-branch responsibilities created by the amendment.<sup>15</sup>

Finally, part 1 of this book ends by analyzing the modern implications of understanding the original Fourth Amendment as regulating the everyday political violence of the state. These implications focus on the amendment's role in building a "monitorial," politically attentive, unified "People" from social diversity and on the expressive nature of police conduct and its consequences. More specifically, the final section of part 1 suggests a number of lessons to be drawn from the amendment's early history that require changes in current

doctrine. Such changes should include the creation of incentives for other branches to create more People-inclusive search and seizure institutions, a serious commitment to individualized justice in deed and not just in words, a more careful quest for *reliable* evidence of wrongdoing, a heartfelt embrace of the close link between First and Fourth Amendment values, and a deeper appreciation for the way poorly conceived search and seizure policies can insult individuals and groups and undermine both governmental legitimacy and public safety.

### The Fourth Amendment Is Not a Mere Technicality

Part 2 of this book was originally prompted by the question, Why do many minority communities experience rage at certain police search and seizure practices involving their communities' members? My apparently obvious answer: because the police act in ways that make minority communities feel disrespected. In reaching that answer, I came to recognize, however, that members of the majority also often bear the brunt of disrespectful search and seizure practices. Minorities and the majority may differ in when they believe that "respect" has been shown. History, philosophy, and social science converge in establishing that "respect" should nevertheless be at the center of all Fourth Amendment reasoning. What "respect" is, how it is conceived of by minority versus majority communities, and what psychological and social processes lead to its loss are, however, not so obvious. Nor has it yet become clear to the U.S. Supreme Court what role respect-based concerns should play in Fourth Amendment analysis. Those concerns have significant implications for every current search and seizure doctrine. Understanding the Court's current approach and its failures, and defending a respect-enhancing alternative, first requires an analysis of the dominant "mere technicality" vision of the Fourth Amendment. That vision seems at odds with the amendment's sweeping language:<sup>16</sup>

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.<sup>17</sup>

The right was of central importance to our nation's founders. It was included in the Bill of Rights, which the people demanded be added to the 1789 Constitution as the price for its ratification. Images of King George's troops violating "a man's castle" in search of contraband come readily to mind. The brave colonists' resistance to monarchy seems embodied in this amendment's

lofty words.<sup>18</sup> Whatever noble ideals the amendment's ringing language might seemingly inspire, however, the amendment is in practice modernly seen by many as a pointless annoyance. Consider this scenario:

Two police officers, Cagney and Lacey, pay off a local stool pigeon for information about a planned cocaine sale. The stoolie's information is vague, and he refuses to reveal his sources. Nevertheless, based on this tip, Cagney and Lacey guess that a cocaine sale will happen that night at a Water Street warehouse and set up a stakeout. Unable to see much, they choose to break in. Inside, they find not only a massive quantity of cocaine but also a large shipment of illegal firearms ready to hit the street. Their elation at a job well done is quickly ended when a judge suppresses the evidence. Because the search was done without a warrant or probable cause, the trial judge barred the jury from hearing or seeing anything about the drugs and weapons confiscated by the detectives. Lacking evidence, the prosecution was forced to withdraw the case, and another dangerous criminal walked free.

This image of left-wing judges allowing criminals to exploit the Fourth Amendment and other legal technicalities has long been standard fare in movies, television shows, and newspaper stories. The media feeds the impression of a massive, increasingly violent crime problem. That problem is portrayed as exacerbated by the helpless system's flooding of the streets with guilty men freed by wily lawyers. Recent reports of a declining crime problem have begun to combat the media-driven crime hysteria. That decline is portrayed by the media, however, as caused by new tough-on-crime measures to keep criminals behind bars, combined with the appointment of stricter judges. Political campaigns embrace assaults on any judges who insist on enforcing a generous constitutional vision.<sup>19</sup>

Amazingly, despite the media onslaught, a large majority of the public, according to at least one study, opposes the admission of illegally obtained evidence. Yet many members of the public are swayed by the reduction of a core constitutional right—namely, freedom from unreasonable searches and seizures—to a mere annoyance that obstructs justice. Perhaps more important, the decision makers and policy advisers who decide when and how searches and seizures shall be done reduce the Fourth Amendment to a mere technicality. “The criminal is to go free because the constable has blundered” is the rallying cry. Academics insist that finding the truth is what trials are all about, and the Fourth Amendment must not undermine that goal. Of course, some of these pundits pay tribute to the value of the amendment, objecting only to the remedy of suppression. They propose alternative remedies, however, that have either proven fruitless in the past or that are obviously politically dead-on-arrival. Furthermore, they pay tribute to the amendment only fleetingly,

in small amounts, their tone emphasizing the social calamity caused by the amendment more than the social benefits it might bring.<sup>20</sup>

The police embrace this same sort of skepticism about the amendment's value. Police often perjure themselves at hearings to suppress evidence, a phenomenon so widespread that it has its own name: "testilying." They lie when they know that they have violated the amendment because they do not want to see the illegally obtained evidence suppressed. Nor do they want to see the department or themselves named in a lawsuit or to be demoted because of a pattern of Fourth Amendment suppression.<sup>21</sup>

And the officers know that judges usually feel the same way. Judges routinely deny suppression motions when they know that the police are lying. For example, the Fourth Amendment does not protect a defendant who has abandoned his property. Therefore, officers repeatedly testify that defendants suddenly and intentionally "drop" drugs while fleeing from the police, in the suspects' purported hope that they cannot thus be linked to the drugs. One judge explained: "[W]hen one stands back from the particular case and looks at a series of cases . . . [it] becomes apparent that policemen are committing perjury in at least some . . . [of the cases], and perhaps in nearly all of them." This judge admits that he nevertheless routinely accepts an officer's dropsy testimony as truthful in a particular case. Judges do so, he explains, because at some level they share the officers' attitude:<sup>22</sup>

Policemen see themselves as fighting a two-front war—against criminals in the street and against "liberal" rules of law in court. All's fair in this war, including the use of perjury to subvert "liberal" rules of law that might free those who "ought" to be jailed. . . . It is a peculiarity of our legal system that the police have unique opportunities (and unique temptations) to give false testimony. When the Supreme Court lays down a rule to govern the conduct of the police, the rule does not enforce itself.<sup>23</sup>

While police "testilying" may help to subvert Supreme Court rulings, the Court too has generally accepted the view of the Fourth Amendment as a mere technicality: "After all it is the defendant, not the constable, who stands trial." Most major decisions over the past three decades increasingly stress the importance of the truth-finding function at trial. The Court subjects individual citizens' Fourth Amendment interests to a "balancing" test in which the needs of law enforcement get ever-heavier weight. Though there are important exceptions, and though the Court occasionally praises the amendment's value, the general trend is to narrow the scope of Fourth Amendment rights and, even when such rights are recognized, to narrow still further when the exclusionary remedy will be available to enforce the amendment.<sup>24</sup>

The burden of this narrowing vision of Fourth Amendment rights has often fallen hardest on racial and ethnic minorities. The Court purports to endorse a colorblind search and seizure jurisprudence. Ignoring race, however, is often precisely what promotes racial disparities.<sup>25</sup>

To use the most obvious example, an officer who stops a car going one mile over the speed limit has probable cause to believe that the law has been violated. If the officer only stops those speeders who are African American, or Hispanic American or Asian American, that seems wrong. It unsettles American notions of equal treatment. Yet if, as the Court suggests, we cannot consider the officer's racial attitudes and assumptions, or perhaps not even whether his conduct has a disparate racial impact, this "racial profiling" is tolerated by the state. The Court's position on profiling and the role of race in search and seizure decisions is a bit more complex and subtle than my claim here that they entirely ignore race. But the bottom line point would be unchanged by exploring those complexities: a colorblind search and seizure jurisprudence often results in racial injustice.<sup>26</sup>

Racial minorities indeed have less trust in the police than do whites. The level of trust is lowest among young African American males. Even minority-group members who may trust their local police are probably more troubled by invasive police conduct than are many whites. Many minority-group members are attentive to, and especially worried by, police violence, the stopping of young black males with little justification, or searches of homes without warrants. Correspondingly, they worry that police offer minorities inadequate and unequal protection from crime. Minority communities yearn for a police force that promotes community safety while valuing community rights. They agitate for a police force free from conduct that insults and denigrates minority communities.<sup>27</sup>

What is lost in the mere-technicality vision of the Fourth Amendment, therefore, is an appreciation for the ways that it affects the fate of communities of identity. The Fourth Amendment protects core interests essential to human flourishing, interests in privacy, property, and freedom of movement. Media images, police talk, and jurisprudence that address primarily the costs of the amendment and only secondarily its benefits—and that too narrowly define those benefits—miss the central point. The image of the drug hustler manipulating the justice system to his own advantage both misleads the public (drawing attention from police wrongdoing) and ignores the many benefits that the amendment bestows upon the innocent. Innocent people are stopped on the street every day, while rushing to work, walking to church, or heading for day care. Property is seized—from cars to cash to homes—from the innocent. Homes are invaded with little cause and perhaps no apology when no evidence of wrongdoing is found. These invasions are psychologically painful.<sup>28</sup> They

send a message to their victims that they are unworthy of the government's respect:

[S]hocking images of combat-ready officers battering their way into a private home are routine in America's cities today thanks to the war on drugs, as well as the war on illegal immigration. All across the country, the SWATification of policing has led to a proliferation of special units trained to rely on aggressive tactics, barging into homes and swooping down on citizens with impunity. . . .

Unfortunately, there seems to be little public enthusiasm for this debate. That's because few voters live in neighborhoods where gang units are likely to enter their kids' names and photos into the department database merely for wearing their hats backward. Nor do most of us lose sleep worrying whether the police might batter down our doors by mistake in search of drugs.<sup>29</sup>

Law professor David Cole goes further, seeing discriminatory and unjustifiable police practices as encouraging distrust, anger, and even criminality among those individuals affected.<sup>30</sup>

But individuals' identity is often linked closely to those groups that matter most to them. When individuals are wrongly stopped because of their race, the disrespect they feel may be felt by others in their racial community. When many persons of a certain race are regularly so stopped, the impact on the broader racial community is deeper. Minority communities sense, in a way that the Court does not, that strong Fourth Amendment protections are central to fostering respect for both individuals and their communities. At the same time, as grass-roots activism and some community policing efforts have shown, respect-enhancing police actions improve law enforcement effectiveness. Citizens more actively and eagerly cooperate with a respectful police force. The result is crime reduction.<sup>31</sup>

"Respect" is in part about status or esteem. Each person feels respected when treated as significant and of equal worth with every other person. Groups too struggle for equal status.<sup>32</sup> But respect is also about inclusion, about being considered full members of the wider political community. When African Americans in Jim Crow America could not sit at white lunch counters, they felt excluded from the American community. Yet what is rarely recognized is that Jim Crow laws went to the heart of the Fourth Amendment by regulating where certain citizens could choose to work, live, eat, and play. Similarly, today, when officers employ racial profiling to stop young African American males walking down the street, the officers insult and degrade the young men and their racial group, making them feel less than full members of the American polity.<sup>33</sup>

Respect requires recognizing that group identity is at the core of individual

identity. The state must, therefore, embrace salient groups as equal partners in creating and implementing criminal justice policy. Group voices must be heard. But individuals must also be treated as unique, judged for what they do rather than what group they belong to. There is thus a healthy tension between group and individualized justice. Moreover, each citizen and his or her group must feel that the state intrudes upon their freedoms only when there is ample and trustworthy evidence of individual wrongdoing. Furthermore, all branches of government must recognize their constitutional obligation to express respect for citizens while enforcing the law. As the testilying example illustrates, the courts cannot do the job alone. They must rely on the executive branch of police, prosecutors, state governors, and the national president, as well as the political will of state and federal legislators, to enforce constitutional mandates.<sup>34</sup>

Nevertheless, the courts must continue to play their role of setting “a constitutional floor protecting individuals and constraining government.” That floor too often collapses under the weight of the mere-technicality vision.<sup>35</sup> I am not making a sharp analytical distinction here between “mere technicalities” and “rules of substance.” Rather, I am describing an attitude whose strength may vary from one situation to another.<sup>36</sup> Judges indeed likely understand—in a way that the lay public, the police, and the media may not—that even technicalities serve purposes. Filing deadlines, for example, discourage lawyer laziness, intentional delay, and simple indifference to client needs. But if a rule is even subconsciously viewed as merely a technicality, the courts will far more easily let it bend to countervailing concerns and will defer to other legal actors’ judgments about whether the rule has been met or requires an exception. To avoid that result in the area of search and seizure law, a substantive vision of the Fourth Amendment’s value to our republic must replace the nearsighted view of mere technicalities. This book seeks to articulate such a vision, one rooted in the substantive value of respect.<sup>37</sup>

## The Mutated Fourth Amendment

Part 2 of this book thus seeks to understand respect by extending the history recounted in part 1.<sup>38</sup> In interpreting the Fourth Amendment, courts and commentators consistently focus solely on the events surrounding the Framers’ drafting, and the People’s ratifying, the Bill of Rights in 1791. Although I argue in this book that other thinkers have misunderstood the significance of those events, here I take the story one step further, examining search and seizure practices during antebellum slavery, then during Reconstruction. That history matters because the original Fourth Amendment applied solely to the federal, not the state, governments. But the struggle against slavery and the Civil War

led the victorious North to lead the way to the ratification of three new constitutional amendments during the period of Reconstruction: the Thirteenth Amendment, ending slavery; the Fourteenth Amendment, prohibiting any state from denying any person due process or equal protection of the laws or the privileges or immunities of U.S. citizens; and the Fifteenth Amendment, guaranteeing all male citizens the vote. One effect of the Fourteenth Amendment's Due Process Clause was that it for the first time applied most of the Bill of Rights, including the Fourth Amendment, to the states. Understanding the meaning of today's Fourth Amendment therefore requires study of the evolving meanings of search and seizure during the fight to end slavery, for it was that fight that motivated and defined the drafting and ratification of the Fourteenth Amendment. The Fourteenth Amendment thus mutated the meaning of the constitutional rules governing search and seizure. The Framers of the nineteenth century matter, therefore, as much as those of the eighteenth.

Chattel slavery was central to the nineteenth-century American experience, and that institution's violent death throes birthed the Reconstruction amendments to the Constitution. It is rarely noted, however, that slavery was sustained largely by search and seizure practices. Slave patrols, designed to prevent runaways and maintain slave discipline, consisted of state officials whose authority stemmed from an antebellum version of general warrants. State and federal fugitive-slave laws provided fairly cursory warrant procedures for the capture and return of suspected runaways, while fostering an ever-increasing federal enforcement presence that involved reluctant Northerners in enforcing the dictates of the system of bondage that many of them increasingly came to detest. State laws authorized masters' and state officials' violent punishment of "recalcitrant" or "insolent slaves," searches of slave cabins, and seizures of what slaves viewed as their property, though the law recognized no such right of slaves to "own" property. In the antebellum Southern mind, the idea of property (the slave) owning property was absurd. American slavery was thus defined by state-initiated or state-sanctioned interferences with slaves' freedom of movement, privacy, and property. Many court cases of the era concerned precisely these issues.

But Southern and federal search and seizure practices affected whites as well, particularly in an effort to suppress the speech of those who sought the abolition of human bondage. Although the abolitionists were unpopular in the North, many Northerners were nevertheless outraged by Southern and federal efforts to silence these dissenters. Abolitionist mail was seized and even burned by postal authorities, their persons banished from the Southern realm, their arrest eagerly sought to muzzle these advocates of human freedom. Southern arrests and seizures, or their threat, extended even beyond abolitionists, reaching Northern-state moderates and free Northern-state blacks, for example, arresting and selling into slavery (absent payment of the costs of arrest and

deportation) black Northern seamen on ships temporarily docking in certain Southern ports. Many Northerners, despite their racism, thus came to fear that an aristocratic "Slave Power" enriched by human bondage threatened white civil liberties. The expansion of slavery into Western territories and the Supreme Court's enthusiastic endorsement of the Southern vision in such infamous cases as *Dred Scott* further fanned the flames of Northern fear and anger.

The Civil War came to seem the fulfillment of Northern anxieties. As slaves deserted plantations in massive numbers despite Southern efforts to tighten patrols and myriad other restraints on slaves' free movement, and as black troops fought bravely for Union when dire circumstances pressed the federal government into permitting escaped slaves to join the fight, Northern ideas evolved about race, the nature of "property," and the political meaning of freedom to locomote and "privacy" (though not then using that word). Northern, especially Republican Party, commitment to a "free labor" ideology, which valorized both literal and metaphorical (up the social ladder) movement and glorified private property, had always been inconsistent with slavery's spread. Now the ideology flatly rejected slavery's survival and required acceptance of some degree of recognition of slave humanity. This evolution did not come easily, however, and again grew from continuing struggles over whether fugitive-slave laws were still binding in the face of rebellion and what freedom should mean for the slaves.

After the war's end, during early Reconstruction, Southerners engaged in a counterrevolution designed to re-create slavery in fact if not in law. Under the infamous "black codes," blacks could be arrested for leaving plantations or for other "crimes" that could not be committed by whites, while facing continuing violence—sometimes overtly state-sanctioned, sometimes by "private" mobs often led by state officials—and seizures of their property. These events led in particular to the Fourteenth Amendment. Public and courtroom antebellum debates had expressly invoked the Fourth Amendment in a variety of important instances. Because the Supreme Court had clearly held, however, that the Bill of Rights did not then apply to the states, many of these debates invoked Fourth Amendment concepts but under other legal and political rubrics. The Fourteenth Amendment is best understood, however, as in important part serving to fix this problem by applying the Fourth Amendment to the states.

Search and seizure as a tool for racial domination was, of course, a major concern of the late-nineteenth-century constitutional drafters and ratifiers in a way that was not true for their eighteenth-century peers. Yet, though that concern with questions of race sparked my interest in the period, the history reveals a continuing—perhaps even further strengthened—emphasis on many of the same issues that motivated the American Revolutionaries—individualized justice, a reliance on trustworthy evidence supporting probable cause, and protection of political dissent topping the list. But many of these issues were

viewed through a different lens, raising several new questions, which I will explore shortly. That exploration also reveals the continuing link among state-expressive violence in the form of searches and seizures and the political subjugation of individuals and groups, in short, with the denial of respect.

My approach to respect proceeds from the bottom up. All persons are entitled to respect. Yet certain marginalized groups in our society disproportionately bear the burden of state-imposed disrespect. Moreover, there are sometimes on-average differences in these groups' perceptions and experiences as compared to more privileged members of the polity. Understanding respect's meaning in the Fourth Amendment context therefore requires being especially attentive to whatever salient differences there may be between minority- and majority-group perspectives. Where there are differences, which group's view prevails will be a question of political morality. But it will often be the case that what benefits the oppressed benefits other people as well. Furthermore, it will always be the case that examining minority viewpoints will better inform an otherwise unduly constricted constitutional analysis.<sup>39</sup> Likewise, my approach to political history is to view it as a conversation between elites and ordinary men and women. Law as it is lived, including constitutional law, consists of more than the dry words of cases or statutes. Constitutional law is born and made real in the struggles of Americans on the streets of their nation—in protests, mobs, and street-corner conversations too. It is this that I mean when I speak of “law on the street.” The Fourth Amendment, like all constitutional provisions, is thus a creature of the street, a text whose roots lie first in the English citizens' battle with state tyranny, then in the Americans' struggle to break free from that same mother country's smothering grip, and, finally, in that young nation's internal struggle against its own political demons.<sup>40</sup>