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ARTICLES

CROSS-ENFORCEMENT OF THE FOURTH AMENDMENT

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CROSS-ENFORCEMENT OF THE FOURTH AMENDMENT

Orin S. Kerr*

This Article considers whether government agents can conduct searches or seizures to enforce a different government's law. For example, can federal officers make stops based on state traffic violations? Can state police search for evidence of federal immigration crimes? Lower courts are deeply divided on the answers. The Supreme Court's decisions offer little useful guidance because they rest on doctrinal assumptions that the Court has since squarely rejected. The answer to a fundamental question of Fourth Amendment law — who can enforce what law — is remarkably unclear.

After surveying current law and constitutional history, the Article offers a normative proposal to answer this question. Each government should have the power to control who can enforce its criminal laws. Only searches and seizures by those authorized to act as agents of a sovereign trigger the government interests that justify reasonableness balancing based on those interests. The difficult question is identifying authorization: questions of constitutional structure suggest different defaults for enforcement of federal and state law. Outside the Fourth Amendment, governments can enact statutes that limit how their own officers enforce other laws. The scope of federal power to limit federal enforcement of state law by statute should be broader, however, than the scope of state power to limit state enforcement of federal law.

INTRODUCTION

Imagine you are a state police officer in a state that has decriminalized marijuana possession.¹ You pull over a car for speeding, and you smell marijuana coming from inside the car. Marijuana possession is legal under state law but remains a federal offense.² Can you search the car for evidence of the federal crime even though you are a state officer?³

Next imagine you are a federal immigration agent driving on a state highway.⁴ You spot a van that you have a hunch contains undocumented immigrants. You lack sufficient cause to stop the van to investigate an immigration offense, but you notice that the van is speeding in

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¹ See generally Lea Brilmayer, *A General Theory of Preemption: With Comments on State Decriminalization of Marijuana*, 58 B.C. L. REV. 895 (2017) (noting marijuana decriminalization efforts).

² See 21 U.S.C. § 844(a) (2012) (criminalizing the possession of controlled substances, including marijuana).

³ See, e.g., *Commonwealth v. Craan*, 13 N.E.3d 569, 577–78 (Mass. 2014) (discussing the question).

⁴ This hypothetical is based on *United States v. Sealed Juvenile 1*, 255 F.3d 213, 215 (5th Cir. 2001).

violation of state traffic law. Can you pull over the van for speeding even though you are a federal agent?⁵

These scenarios ask whether the Fourth Amendment permits what I call “cross-enforcement.” Cross-enforcement asks whether an officer employed by one government can justify a search or seizure based on a violation of a different government’s law.⁶ The constitutionality of a search or seizure often depends on whether an officer has sufficient cause to believe a public law has been violated.⁷ Evidence of the law violation justifies the search or seizure by rendering it constitutionally reasonable. In our federal system, that prompts an important question: What laws count? If an officer lacks reason to believe that his home jurisdiction’s law has been violated, and a search would violate the Fourth Amendment based only on that law, can the officer invoke the broader laws of another jurisdiction to make the search constitutional?

The legality of cross-enforcement is a recurring question that often touches political flashpoints. The federal and state governments have different constitutional roles, and their values frequently diverge. Those clashes lead to different criminal laws. Some crimes, such as immigration offenses, are exclusively federal. Other offenses, like traffic laws, are mostly state and local.⁸ And sometimes the federal and state governments have concurrent authority but make different choices. The recent trend toward marijuana legalization is a timely example. As of 2018, ten states and the District of Columbia have recently legalized recreational marijuana use.⁹ But as state laws are going one way, the federal government is pointing in the opposite direction: federal law retains its broad ban on marijuana possession,¹⁰ and the Trump Administration recently announced a new policy permitting prosecutions for the federal

⁵ See *id.* at 216 (discussing the question in the context of a customs agent stopping and detaining a juvenile defendant).

⁶ The violation usually will refer to a criminal law, but it could also refer to a civil traffic violation. See, e.g., *Whren v. United States*, 517 U.S. 806, 819 (1996) (holding that probable cause to believe a civil traffic law was violated permits a stop of the automobile).

⁷ As the Supreme Court stated in *Whren*: “For the run-of-the-mine case, . . . we think there is no realistic alternative to the traditional common-law rule that probable cause justifies a search and seizure.” *Id.* For example, probable cause to believe evidence of crime will be found in a car permits a search of the car. See *California v. Carney*, 471 U.S. 386, 390 (1985) (citing *Carroll v. United States*, 267 U.S. 132 (1925)). Similarly, probable cause to believe that a person committed a crime permits an arrest of that person. See *United States v. Watson*, 423 U.S. 411, 423–24 (1976).

⁸ The federal government regulates speeding on federal park land, making such speeding a federal misdemeanor. See 36 C.F.R. § 4.21(c) (2017) (“Operating a vehicle at a speed in excess of the speed limit is prohibited.”). Of course, most roads are not on federal park land.

⁹ See *State-by-State Marijuana Policies*, NAT’L CANNABIS INDUSTRY ASS’N, <https://thecannabisindustry.org/state-marijuana-policies-map/> [<https://perma.cc/7MEL-T2BU>].

¹⁰ See 21 U.S.C. § 844(a) (2012) (criminalizing the possession of controlled substances, including marijuana).

crime of marijuana possession even when that possession is legal under state law.¹¹

The differences among criminal laws create a ripe environment for cross-enforcement. In some instances, governments may adopt a formal policy of enforcing the criminal laws of other jurisdictions. Arizona's recent effort to encourage zealous state enforcement of federal immigration laws,¹² partially struck down in *Arizona v. United States*¹³ on preemption grounds, offers a prominent example. In other instances, the scope of cross-enforcement may come up in an isolated case. For example, a prosecutor faced with an apparent constitutional violation based on her own jurisdiction's law may try to avoid the exclusionary rule and win by invoking another jurisdiction's law. In both cases the question is the same: Can officers from one jurisdiction search and seize based on the laws of another jurisdiction?

At this point you may be thinking that the law of Fourth Amendment cross-enforcement must be settled. Surprisingly, it isn't. Lower courts disagree about when cross-enforcement is permitted. Consider the hypothetical that introduced this paper, in which a state officer searches a car for marijuana in a state that has decriminalized its possession. Lower courts have recently disagreed on whether the state officer can justify the search based on the federal offense. Some courts say the search is unconstitutional because the officer is a state employee and the state's decriminalization controls.¹⁴ Other courts say the search is constitutional because marijuana possession remains a federal crime.¹⁵

The puzzle of cross-enforcement is made even more challenging because the topic has been all but ignored by scholars.¹⁶ This is a surprising oversight. How the Fourth Amendment addresses cross-enforcement

¹¹ See Sadie Gurman, *Sessions Terminates US Policy that Let Legal Pot Flourish*, ASSOCIATED PRESS (Jan. 4, 2018), <https://apnews.com/19f6bfec15a74733b40eaf0ff9162bfa> [<https://perma.cc/6ZDN-YA6J>] (discussing new policy on marijuana enforcement permitting prosecution for marijuana possession even when state law has decriminalized the act).

¹² Support Our Law Enforcement and Safe Neighborhoods Act, 2010 Ariz. Sess. Laws 450 (codified as amended in scattered sections of ARIZ. REV. STAT. ANN. tits. 11, 13, 23, 28, and 41).

¹³ 567 U.S. 387 (2012).

¹⁴ See, e.g., *Commonwealth v. Craan*, 13 N.E.3d 569, 577–79 (Mass. 2014).

¹⁵ See, e.g., *United States v. Sanders*, 248 F. Supp. 3d 339, 347 (D.R.I. 2017) (“For better or worse, and regardless of what the R.I. General Assembly has declared, possession of marijuana is still unlawful under federal law.” (citing 21 U.S.C. § 841 (2012))); *United States v. Eymann*, No. 15-cr-30021, 2016 WL 5842251, at *13 (C.D. Ill. Oct. 5, 2016) (“Illinois has recently taken steps on the road to marijuana legalization — the state has legalized medical marijuana and decriminalized possession of small amounts of non-medical marijuana — but marijuana possession remains a federal crime.”).

¹⁶ The only modern discussion of the problem is a passage by Professor Kevin Cole on whether state officers can enforce federal criminal law. Kevin Cole, *Probable Cause to Believe What? Partial Marijuana Legalization and the Role of State Law in Federal Constitutional Doctrine*, CRIM. L. BULL. (forthcoming 2018) (manuscript at 19–24), <https://ssrn.com/abstract=3022874> [<https://perma.cc/S2KD-5GBF>]. Cole concludes that the issue is “in need of resolution” and “will be of more general

pairs practical importance with fundamental questions about the nature of Fourth Amendment law. Search and seizure law imposes rules on government officials in light of the government interests advanced by their investigations. But what exactly triggers those interests? Even just identifying the subject is tricky. Should the constitutionality of cross-enforcement be solely a Fourth Amendment issue? Is it a subject for state constitutions, or a matter for Fourteenth Amendment law, or a question of structural federalism? Or is it some combination of all of the above? The scholarship has failed to ask, much less answer, these questions.¹⁷

This Article offers a comprehensive analysis of Fourth Amendment cross-enforcement. It has three goals: one doctrinal, one historical, and one normative. The doctrinal goal is to show that courts are deeply split on the legal standards for cross-enforcement under the Fourth Amendment. When state officers look to federal criminal law to justify searches or seizures, lower courts have adopted five different standards. Courts have adopted three different views on the correct standard when federal agents try to rely on state criminal law to justify searches and seizures. The central disagreement concerns whether state or federal law must affirmatively authorize the enforcement. Some courts say yes, others say no, and different courts disagree on whether state or federal law (or both) is required.

import to Fourth Amendment doctrine” in light of marijuana decriminalization. *Id.* (manuscript at 25). In addition, a brief discussion of the question based on pre-incorporation law appeared in Judson A. Parsons, Jr., *State-Federal Crossfire in Search and Seizure and Self Incrimination*, 42 CORNELL L.Q. 346, 362–68 (1957). As Part II demonstrates, however, the pre-incorporation law on cross-enforcement no longer offers a relevant standard.

¹⁷ There is significant scholarship on the issues raised by cross-enforcement outside the Fourth Amendment, but none of it touches on the Fourth Amendment. *See, e.g.*, John B. Corr, *State Searches, Federal Cases, and Choice of Law: Just a Little Respect*, 23 PEPP. L. REV. 31 (1995) (addressing statutory issues raised by cross-enforcement); Jenia Iontcheva Turner, *Interstate Conflict and Cooperation in Criminal Cases: An American Perspective*, 4 EUR. CRIM. L. REV. 114 (2014) (addressing state-to-state cooperation during cross-enforcement); Jay T. Jorgensen, Comment, *The Practical Power of State and Local Governments to Enforce Federal Immigration Laws*, 1997 BYU L. REV. 899 (addressing preemption issues raised by cross-enforcement); Megan McGlynn, Note, *Competing Exclusionary Rules in Multistate Investigations: Resolving Conflicts of State Search-and-Seizure Law*, 127 YALE L.J. 406 (2017) (addressing state constitutional issues raised by horizontal cross-enforcement); *cf.* Nicholas L. Lopuszynski, Comment, *Father Constitution, Tell the Police to Stay on Their Own Side: Can Extra-Jurisdictional Arrests Made in Direct Violation of State Law Ever Cross the Fourth Amendment’s “Reasonableness” Line?*, 53 DEPAUL L. REV. 1347 (2004) (discussing whether arrests made outside an officer’s jurisdiction should violate the Fourth Amendment).

A few articles have suggested in passing — and without mentioning the Fourth Amendment — that the Framing-era understanding was that state agents could enforce federal criminal laws. *See, e.g.*, Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 303–09 (1989) (discussing early state enforcement of federal criminal law).

The historical goal of the paper is to show that the Supreme Court's case law on cross-enforcement offers little useful guidance today. The Court did develop a framework for cross-enforcement in the era before the Fourth Amendment applied to the states. That case law is obsolete today, however, as it rests on assumptions that the Court has since squarely rejected. Rules that the Court adopted for a federal-only Constitution no longer make conceptual sense when all officers are subject to constitutional limits. The early case law also reflects a long-forgotten understanding of the Fourth Amendment that affirmative authorization was required to search or seize. The Supreme Court firmly rejected that understanding, without realizing its historical roots, in the 2008 case of *Virginia v. Moore*.¹⁸ These dramatic changes in Fourth Amendment doctrine have rendered existing Supreme Court case law largely obsolete.

The last Part of the Article offers a normative proposal. It argues that the legality of cross-enforcement should depend on whether the government that enacted the criminal law has authorized its enforcement by the officer conducting the search or seizure. Cross-enforcement requires officers from one government to harness the reasonableness balance derived from the government interests of a different government. That should be permitted only when the government that enacted the law to be enforced has authorized the officer to take that kind of enforcement action. This leads to a rule that is simple to state: Officers can rely on a government's criminal law to justify a search or seizure only when that government has authorized the officer to search or seize. Authorization of the enacting government, not the officer's home government, should control.

Although this rule is easy to state, it can be complex to apply. Some jurisdictions have clear rules on which officers can enforce which laws. In those jurisdictions, determining authorization is simple. When a government is silent on who can enforce its laws, however, questions of constitutional history and structure justify different presumptions. On one hand, state and local officers should presumptively be allowed to search or seize to enforce federal criminal laws unless Congress has expressly forbidden it. On the other hand, federal officers should not be allowed to search or seize to enforce state or local laws unless existing statutes or case law affirmatively allow it. Each government can choose who enforces its laws, but constitutional history and the special role of federal criminal law justify different presumptions.

This does not leave governments powerless to control their own officers. Even when the Fourth Amendment permits cross-enforcement, other governments don't have to play along. Governments have several legitimate ways to block their employees from engaging in cross-

¹⁸ 553 U.S. 164 (2008).

enforcement outside the Fourth Amendment. Congress has broad powers to block state efforts to authorize federal enforcement of state laws. For example, Congress can prohibit the admissibility of the fruits of state cross-enforcement of federal law in either federal or state court. State powers to block cross-enforcement are also significant, although the remedies may be somewhat more limited. States can forbid their employees from cross-enforcing federal law, backing that up with remedies such as a suppression remedy in state court or employee disciplinary rules. On the other hand, the Supremacy Clause would likely invalidate state efforts to limit the admissibility of such evidence in federal court.

The Article proceeds in three Parts. Part I frames the discussion by surveying the existing lower court case law. It shows that lower courts are deeply divided on the proper Fourth Amendment standards for cross-enforcement. Part II considers the history of Fourth Amendment cross-enforcement at the Supreme Court. It demonstrates that existing Supreme Court decisions on cross-enforcement are obsolete and provide no useful answers today. Part III advocates the normative proposal.

I. THE CURRENT LAW OF CROSS-ENFORCEMENT

We first get our bearings by surveying existing Fourth Amendment case law on cross-enforcement. Although courts agree that cross-enforcement is permitted in at least some circumstances, they disagree on what those circumstances should be. The major dispute is about the role of authorization: Must the officer's home jurisdiction, or the jurisdiction that enacted the criminal law, affirmatively bless the cross-enforcement? Courts are deeply divided on the answer.

Here's an overview of the disagreement. First consider when state officers search and seize to enforce federal law, what I will call *cross-enforcement up*. In those circumstances, courts are divided five ways. Some courts require state law to first authorize the cross-enforcement; others say cross-enforcement is lawful regardless of what federal or state law says; some indicate that either state or federal law must approve of the cross-enforcement; some say cross-enforcement is permitted unless state or federal law affirmatively bans the cross-enforcement; and others require federal law to authorize the cross-enforcement.

Next consider when federal officers search and seize to enforce state law, or what I will call *cross-enforcement down*. Again, decisions are mixed. Most courts first require state authorization; some require either state or federal authorization; and some say cross-enforcement is lawful regardless of what federal or state law says.

Finally, the law is surprisingly unclear on when state officers can search and seize to enforce the laws of other states, what I call *horizontal cross-enforcement*. The uncertainty partly results from the Interstate

Rendition Clause of the Constitution,¹⁹ which requires every state to permit arrests for those who have been charged with out-of-state crimes. State statutes reflecting that directive help ensure that the limits of state-to-state cross-enforcement are rarely tested.

That's the overview. Now let's take a closer look.

A. Cross-Enforcement Up: State Enforcement of Federal Law

The cases on cross-enforcement up reflect five approaches that are explored below. This section starts with cases holding that cross-enforcement up is permitted only when state law authorizes it; turns next to decisions saying it is permitted regardless of state law; next turns to decisions holding that it is permitted if either federal or state law approves it; then presents rulings holding it is authorized unless state or federal law expressly prohibits it; and concludes with opinions indicating it is permitted if federal law affirmatively permits it.

i. Cross-Enforcement Up Is Permitted If State Law Authorizes It. — Many cases on state enforcement of federal law focus on whether state law authorizes it. If state statutory or common law authorizes state officers to enforce federal law, these courts reason, then the cross-enforcement is constitutional. On the other hand, if the state law does not authorize it, the cross-enforcement is unconstitutional.

The Ninth Circuit's decision in *Gonzales v. City of Peoria*²⁰ provides an often-cited example. Arizona state officers arrested eleven people for federal immigration crimes. The arrestees sued, claiming that the state arrests for federal crimes violated the Fourth Amendment.²¹ The Ninth Circuit ruled that the arrests were constitutional because they complied with Arizona's arrest statute.²² The state arrest statute allowed state officers to make arrests for "a misdemeanor [that] has been committed in [the officer's] presence."²³ Because the federal immigration crimes were misdemeanors, the Ninth Circuit held that the arrests were lawful.²⁴ The Ninth Circuit's approach is consistent with the Fourth Circuit's summary of the law in a recent decision: "[L]ocal law enforcement officials may detain or arrest an individual for criminal violations of federal immigration law without running afoul of the Fourth

¹⁹ See U.S. CONST. art. IV, § 2, cl. 2.

²⁰ 722 F.2d 468 (9th Cir. 1983), *overruled on other grounds by* *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999) (en banc).

²¹ *Id.* at 472.

²² *Id.* at 476 ("We therefore conclude that [Arizona's arrest statute] authorizes Peoria police to enforce the criminal provisions of the Immigration and Naturalization Act.").

²³ *Id.* (quoting ARIZ. REV. STAT. ANN. § 13-3883 (1978)).

²⁴ See *id.* at 474-76.

Amendment, so long as the seizure is supported by reasonable suspicion or probable cause and is authorized by state law.”²⁵

An example of this approach outside the immigration context is the Fifth Circuit’s ruling in *United States v. Bowdach*.²⁶ State officers arrested the defendant on a federal arrest warrant after a federal judge revoked the defendant’s bond following his federal conviction for felony extortion.²⁷ The Fifth Circuit held that “the arrest of the defendant in this case by state police would be valid” under the Fourth Amendment “if authorized by state law.”²⁸ State law allowed state officers to make arrests when they had a reasonable belief the person committed a felony, which included federal felonies.²⁹ As a result, the Fourth Amendment permitted the state officers to arrest for a federal crime.³⁰

Some courts have applied this approach when states have decriminalized possession of small amounts of marijuana. A Massachusetts Supreme Judicial Court decision, *Commonwealth v. Craan*,³¹ is particularly interesting. State officers stopped Craan’s car at a drunk driving checkpoint and smelled unburnt marijuana emanating from the car.³² Possession of one ounce or less of marijuana had recently been decriminalized at the state level, but it remained a federal criminal offense.³³ The officer searched the car and found marijuana, ecstasy, and rounds of .38 ammunition.³⁴ Criminal charges followed in state court, and Craan moved to suppress.³⁵ The state argued that searching the car was lawful based on the odor of marijuana, because the officer had probable cause to believe there was evidence in the car of the federal crime of marijuana possession.³⁶

The Massachusetts Supreme Judicial Court ruled in *Craan* that the officer could not cross-enforce federal narcotics law under the Fourth Amendment because it was inconsistent with state law.³⁷ Citing *Peoria*, the court reasoned that state law controlled whether state cross-

²⁵ *Santos v. Frederick Cty. Bd. of Comm’rs*, 725 F.3d 451, 464 (4th Cir. 2013) (citing *United States v. Guijon-Ortiz*, 660 F.3d 757, 763 & n.3 (4th Cir. 2011)). Notably, however, *Guijon-Ortiz* does not say this. Further, because an officer’s subjective intent is generally irrelevant in Fourth Amendment law, the legal question is whether state law authorized the arrest and not whether the officer was attempting to enforce state law. See *United States v. Roblero-Mejia*, 218 F. App’x 773, 774 (10th Cir. 2007).

²⁶ 561 F.2d 1160 (5th Cir. 1977).

²⁷ *Id.* at 1163–65.

²⁸ *Id.* at 1168.

²⁹ *Id.*

³⁰ *Id.* In addition, the officers knew a warrant had been issued for the defendant’s arrest. *Id.*

³¹ 13 N.E.3d 569 (Mass. 2014).

³² *Id.* at 572–73.

³³ See *id.* at 577.

³⁴ *Id.* at 573.

³⁵ *Id.*

³⁶ See *id.* at 577.

³⁷ See *id.* at 577–79.

enforcement was permitted.³⁸ When the state had decriminalized marijuana possession at the state level, it had signaled its intent to “curtail[] police authority to enforce the Federal prohibition of possession of small amounts of marijuana.”³⁹ Because state officers were creatures of state law, the state’s decriminalization withdrew state authorization to enforce contrary federal law. At least absent a formal joint state-federal investigation, and in light of the federal government’s apparent lack of interest in prosecuting low-level marijuana possession, the state officers could not invoke federal law to justify the automobile search for marijuana.⁴⁰

The cases that require state law authorization for state enforcement of federal law generally derive their approach from an interpretation of a string of Supreme Court cases from the 1940s through the 1960s: *United States v. Di Re*,⁴¹ *Johnson v. United States*,⁴² *Miller v. United States*,⁴³ and *Ker v. California*.⁴⁴ These four cases are often cited, somewhat interchangeably, for the idea that the Fourth Amendment permits state officers to conduct searches and seizures to enforce federal criminal law only if state law allows it.⁴⁵ As we will see in Part II, those four cases don’t actually say that. But some judges believe they do, and that

³⁸ See *id.* at 577 (quoting *Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983), *overruled on other grounds* by *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999) (en banc)) (citing *Miller v. United States*, 357 U.S. 301, 305 (1958); *Johnson v. United States*, 333 U.S. 10, 15 n.5 (1948); *Goulis v. Stone*, 140 N.E. 294, 296 (Mass. 1923)).

³⁹ *Id.* at 578.

⁴⁰ *Id.* at 578–79. For another case with somewhat similar reasoning, see *People v. Denison*, 79 Cal. Rptr. 2d 524, 537 (Ct. App. 1998) (depublished) (“In these circumstances, to permit respondent to claim probable cause to arrest based on federal law would undermine this legislative intent.”). The flip side of *Craan*’s state-focused approach is the Maryland high court’s decision in *Robinson v. State*, 152 A.3d 661 (Md. 2017). When Maryland decriminalized possession of less than ten grams of marijuana in 2014, it enacted an accompanying statute that marijuana possession was a civil offense and that the switch from criminal to civil treatment could “not be construed to affect the laws relating to . . . seizure and forfeiture.” *Id.* at 674 (quoting MD. CODE ANN., CRIM. LAW § 5-601(d) (LexisNexis 2012 & Supp. 2017)). Faced with the same question the Massachusetts court confronted in *Craan*, Maryland’s high court reached the opposite result because of the different state law scheme. *Id.* at 680. Because the Maryland statute still permitted seizure of small amounts of marijuana, the court reasoned that “law enforcement officers may still search for marijuana.” *Id.* at 681. Enforcement was still permitted under state law, so no cross-enforcement was required.

⁴¹ 332 U.S. 581 (1948).

⁴² 333 U.S. 10 (1948).

⁴³ 357 U.S. 301 (1958).

⁴⁴ 374 U.S. 23 (1963).

⁴⁵ See, e.g., *Gonzales v. City of Peoria*, 722 F.2d 468, 475 (9th Cir. 1983) (citing *Ker*, 374 U.S. at 37), *overruled on other grounds* by *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999) (en banc); *Arizona v. United States*, 567 U.S. 387, 438 (2012) (Thomas, J., concurring in part and dissenting in part) (citing *Di Re*, 332 U.S. at 589, for the view that “States, as sovereigns, have inherent authority to conduct arrests for violations of federal law, unless and until Congress removes that authority”); *id.* at 447 (Alito, J., concurring in part and dissenting in part) (citing *Miller*, 357 U.S. at 305; *Di Re*, 332 U.S. at 589; and *Peoria*, 722 F.2d at 475, for the view that “state and local officers generally have authority to make stops and arrests for violations of federal criminal laws”).

understanding has led at least some courts to focus on state law authorization to determine if state officers can search and seize to enforce federal criminal law.

2. *Cross-Enforcement Up Is Permitted Even If State Law Prohibits It.* — Other lower courts adopt a different standard: They hold that state cross-enforcement of federal criminal law is permitted even if state law prohibits it. These decisions are not a model of clarity, in that they leave uncertain whether federal law must authorize an officer's act. Nonetheless, they reject the view that state law authorization is required for cross-enforcement up.

For example, in *United States v. Turner*,⁴⁶ local officers searched Turner's car for drugs and found a box of ammunition.⁴⁷ Because Turner was a felon, his possession of ammunition was a federal crime.⁴⁸ The local officers seized the ammunition, contacted federal agents, and detained Turner so he could be charged federally.⁴⁹ After federal charges followed, Turner argued that his detention by state officers violated the Fourth Amendment because it exceeded the officers' authority under state law.⁵⁰ His argument relied on *United States v. Di Re*,⁵¹ one of the quartet of historical Supreme Court cases that (as noted above⁵²) has sometimes been interpreted as requiring officers to comply with state law to conduct cross-enforcement up.

The Tenth Circuit rejected Turner's argument and held that whether the officers violated state law was irrelevant. According to the Tenth Circuit, the Supreme Court's 2008 decision in *Virginia v. Moore* had characterized *Di Re* as a case on the federal supervisory powers instead of the Fourth Amendment.⁵³ Under *Moore*, whether state officers violated state law had no bearing on whether they violated the Fourth Amendment.⁵⁴ Because the officers acted reasonably in seizing the ammunition and holding Turner for federal officials, their Fourth Amendment seizures were constitutional even if they violated state law.⁵⁵

⁴⁶ 553 F.3d 1337 (10th Cir. 2009).

⁴⁷ See *id.* at 1341.

⁴⁸ *Id.* at 1340; see 18 U.S.C. §§ 922(g)(1), 924(a) (2012).

⁴⁹ *Turner*, 553 F.3d at 1341.

⁵⁰ *Id.* at 1345.

⁵¹ *Id.* at 1346 (citing *Di Re*, 332 U.S. at 589).

⁵² See cases cited *supra* note 45.

⁵³ See *Turner*, 553 F.3d at 1346 (citing *Virginia v. Moore*, 553 U.S. 164, 172 (2008)). This characterization is explored in detail in sections II.E.1 and II.F.

⁵⁴ See *id.* (citing *Moore*, 553 U.S. at 178). I discuss *Moore*, and its relationship to *Di Re*, in great detail in Part II.

⁵⁵ For a similar case involving a plain view seizure, see *United States v. Tolbert*, No. 11-CR-186, 2012 WL 404875 (E.D. Wis. Feb. 7, 2012). *Tolbert* permitted a state officer enforcing state law to justify the plain view seizure of ammunition because it was immediately apparent that it was evidence of a federal crime. See *id.* at *5.

United States v. Janik,⁵⁶ an opinion for the Seventh Circuit by Judge Posner, provides another example. State officers who were investigating a case together with federal agents arrested Janik for the federal offense of failing to register a weapon.⁵⁷ Janik argued that the officers could not make the arrest because it was not authorized by state law.⁵⁸ Judge Posner concluded that whether the arrest violated state law was irrelevant because the “[t]he criterion for such misconduct is federal.”⁵⁹ According to Judge Posner, the state officers acted reasonably in making the arrest because they “reasonably believed that the federal agents would want Janik arrested” once they realized he had committed a federal crime.⁶⁰ Even if state law was violated, the officers “acted reasonably,”⁶¹ and therefore the arrest “was not an unreasonable seizure under the Fourth Amendment.”⁶²

Some recent trial court decisions on marijuana decriminalization have taken an analogous view without detailed analysis. For example, in *United States v. Sanders*,⁶³ a Rhode Island state trooper smelled marijuana during a lawful traffic stop.⁶⁴ Like Massachusetts, Rhode Island had recently decriminalized the possession of one ounce or less of marijuana.⁶⁵ The federal district court in Rhode Island rejected reliance on state law.⁶⁶ The court ruled that Rhode Island’s decriminalization of marijuana possession, and its intent that its officers not enforce federal law, was irrelevant: “For better or worse, and regardless of what the R.I. General Assembly has declared, possession of marijuana is still unlawful under federal law.”⁶⁷

3. *Cross-Enforcement Up Is Permitted If Either Federal or State Law Permits It.* — Some courts have suggested a third approach: Cross-enforcement up is permitted if either federal or state law permits it. Consider the New York Court of Appeals’ ruling in *People v. LaFontaine*,⁶⁸ which involved the execution of a federal arrest warrant by state officers. The federal warrant had been issued for the defendant’s arrest based on his crimes in New Jersey.⁶⁹ The defendant happened to live

⁵⁶ 723 F.2d 537 (7th Cir. 1983).

⁵⁷ *See id.* at 541–42.

⁵⁸ *Id.* at 548.

⁵⁹ *Id.* at 549.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 548 (internal quotation marks omitted) (citing *Fisher v. Wash. Metro Area Transit Auth.*, 690 F.2d 1133, 1138 (4th Cir. 1982); *Street v. Surdyka*, 492 F.2d 368, 372 (4th Cir. 1974)).

⁶³ 248 F. Supp. 3d 339 (D.R.I. 2017).

⁶⁴ *See id.* at 341–42.

⁶⁵ *Id.* at 347 (citing R.I. GEN. LAWS § 21-28-4.01(c)(2)(iii) (Supp. 2017)).

⁶⁶ *See id.*

⁶⁷ *Id.* (citing 21 U.S.C. § 841 (2012)).

⁶⁸ 705 N.E.2d 663 (N.Y. 1998).

⁶⁹ *See id.* at 664.

in New York, and New Jersey police traveled to New York and arrested him there under the authority of the federal warrant.⁷⁰ Drugs were discovered in his apartment, leading to drug charges in New York state court.⁷¹ The defendant moved to suppress the evidence, arguing that the New Jersey officers acted unlawfully because they were not authorized to execute warrants in New York.⁷² On appeal following conviction, the intermediate appellate court ruled that the evidence should not be suppressed: “At worst” the question of authorization went to compliance with statutory law, and that was not relevant to the Fourth Amendment.⁷³

The New York Court of Appeals, the state’s highest court, reversed.⁷⁴ Neither federal nor state law had authorized them to act, which the court apparently saw as determinative of the Fourth Amendment question and not just statutory law.⁷⁵ The court relied on *United States v. Di Re* and its progeny for the view that the law of the state where the search or seizure occurred determined whether state officers could enforce federal law.⁷⁶ Under New York state case law, an out-of-state police officer could not generally execute a warrant.⁷⁷ Further, the Federal Rules of Criminal Procedure allowed only federal marshals or “some other officer authorized by law”⁷⁸ to make arrests on federal warrants. “New Jersey officers were not Federal Marshals,” the court noted, “nor were they, de jure or de facto, authorized as Federal equivalent officers in these circumstances.”⁷⁹ The arrest was illegal and the evidence subject to suppression because neither state nor federal law blessed the New Jersey officers’ conduct.⁸⁰

4. *Cross-Enforcement Up Is Permitted Unless Either Federal or State Law Prohibits It.* — The First Circuit has suggested a fourth ap-

⁷⁰ *See id.*

⁷¹ *Id.*

⁷² *People v. LaFontaine*, 664 N.Y.S.2d 587, 589 (App. Div. 1997), *rev'd*, 705 N.E.2d 663 (N.Y. 1998).

⁷³ *Id.* at 592 (“At worst, the New Jersey officers violated procedural statutes that confer the power to arrest and execute warrants on a specific class of persons.”).

⁷⁴ *LaFontaine*, 705 N.E.2d at 666.

⁷⁵ *See id.* I say “apparently” because the New York Court of Appeals neither specifically mentioned the Fourth Amendment nor addressed the lower court’s conclusion that the exclusionary rule should not apply because any violation was merely statutory. On balance I think *LaFontaine* is best read as a constitutional case, but I concede it is not clear on the point.

⁷⁶ *Id.* (citing *United States v. Bowdach*, 561 F.2d 1160, 1168 (5th Cir. 1977); *United States v. Di Re*, 332 U.S. 581 (1948)).

⁷⁷ *Id.* (citing *People v. Floyd*, 288 N.Y.S.2d 950 (Sup. Ct. 1968), *aff'd*, 307 N.Y.S.2d 832 (App. Div. 1969), *rev'd on other grounds*, 260 N.E.2d 815 (N.Y. 1970)).

⁷⁸ *Id.* (quoting FED. R. CRIM. P. 4(d)(1)).

⁷⁹ *Id.*

⁸⁰ *See id.*

proach, that cross-enforcement up is permitted unless either state or federal law prohibits it. The key case is *United States v. Smith*,⁸¹ a decision by then-Judge Breyer.

The facts of *Smith* were very similar to those of *Turner*. State police officers searched a felon's home for drugs and found weapons.⁸² The officers seized the weapons as evidence of the federal offense of being a felon in possession of a firearm.⁸³ Judge Breyer held the seizure for federal evidence constitutional. "[W]e are not aware," Judge Breyer wrote, "of any state or federal law that prohibits state police from seizing a weapon, in plain view, that they reasonably believe constitutes evidence of a federal crime."⁸⁴ "That being so," he continued, "we do not see how the seizure, whether or not state law specifically authorizes it, could constitute an 'unreasonable' seizure of the sort the Fourth Amendment prohibits."⁸⁵

Smith's contours are admittedly murky. It does not say how the Fourth Amendment might apply if state or federal law *did* prohibit the act, or, if so, whether state or federal law (or both) controlled. At the same time, *Smith* seems most naturally read as permitting cross-enforcement up as long as no affirmative prohibition on it exists.

5. *Cross-Enforcement Up Is Permitted Only If Authorized by Federal Law.* — A fifth approach to state cross-enforcement has been adopted for border searches. Under the border search exception to the Fourth Amendment, the government can conduct warrantless searches at the border to further the sovereign's interest in ensuring that contraband and other illegal items do not enter the country and that property not permitted to exit does not.⁸⁶ Lower courts have held that law enforcement officers cannot rely on the border search exception unless they are authorized to conduct border searches by federal law.⁸⁷

Notably, this rule is based on a general theory of the border search exception rather than a specific concern with cross-enforcement. The border search power belongs to the federal government and empowers its agents to search property entering or exiting the United States. Accordingly, courts have held, the border search exception applies only to

⁸¹ 899 F.2d 116 (1st Cir. 1990).

⁸² *See id.* at 117.

⁸³ *Id.* at 118.

⁸⁴ *Id.* (emphasis omitted).

⁸⁵ *Id.* (citing *United States v. Bayko*, 774 F.2d 22, 23 (1st Cir. 1985) (per curiam)).

⁸⁶ *See Almeida-Sanchez v. United States*, 413 U.S. 266, 272–73 (1973) (articulating the rationale of the border search exception).

⁸⁷ *See* cases cited *infra* note 88.

searches conducted primarily by officers authorized by statute to conduct border searches.⁸⁸ The federal authorization statute, 19 U.S.C. § 482, is construed as a “delegation of authority to this agent to conduct this search.”⁸⁹ Searches by agents who lack the statutorily delegated powers — whether federal or state — cannot use the constitutional exception.

Requiring delegation of statutory authority means that searches by government officials who are not specifically delegated border search authority fall outside the border search exception. The statute only empowers “officers or persons authorized to board or search vessels” to conduct border searches — in other words, federal customs agents and officials, the Coast Guard, and other border agents.⁹⁰ This means that a Federal Bureau of Investigation (FBI) agent cannot use the border search exception.⁹¹ It also means that state officers will be unable to use the border search exception unless they are acting at the direction of — and are therefore the agents of — federal border agents.⁹²

It could be argued that this authority raises somewhat distinct issues from cross-enforcement. The border search exception involves the power to conduct warrantless (and usually suspicionless) searches at the border rather than to enforce a specific federal criminal law. Nonetheless, to the extent the issues are close enough, the border search exception appears to raise a fifth approach to cross-enforcement up.

B. Cross-Enforcement Down: Federal Enforcement of State Law

Now let’s reverse our orientation and look at cases on cross-enforcement down instead of up. Can *federal* agents make searches and

⁸⁸ See, e.g., *United States v. Alfonso*, 759 F.2d 728, 735 (9th Cir. 1985); *United States v. Soto-Soto*, 598 F.2d 545, 548–49 (9th Cir. 1979); *United States v. Thompson*, 475 F.2d 1359, 1361–63 (5th Cir. 1973); *United States v. McDaniel*, 463 F.2d 129, 133–34 (5th Cir. 1972).

Lower court cases adopting the authorization rule for border searches appear to trace it to precedents from the Prohibition era. For example, in *Olson v. United States*, 68 F.2d 8 (2d Cir. 1933), Coast Guard agents stopped and searched a boat that was carrying illegal liquor to New York. *Id.* at 9. The Second Circuit held that boarding the boat satisfied the Fourth Amendment because the border search statute included the Coast Guard among those officers empowered to board and search vessels. *Id.* at 9–11. As we will learn in Part II, this was not only how the Prohibition-era cases treated the border search power: at the time, it was the approach applied widely in Fourth Amendment cases. But modern case law treats the authorization requirement as specific to the border search power, and it therefore generally prohibits state cross-enforcement in that context.

⁸⁹ *Soto-Soto*, 598 F.2d at 549.

⁹⁰ 19 U.S.C. § 482 (2012); see *Thompson*, 475 F.2d at 1362–63; *McDaniel*, 463 F.2d at 134 (“Border Patrol agents wear two hats, one as an immigration officer and the other as a customs officer.”); *Olson*, 68 F.2d at 9 (concluding that Coast Guard officers, because they are authorized by statute to board and search vessels, may conduct border searches pursuant to 19 U.S.C. § 482).

⁹¹ See *Soto-Soto*, 598 F.2d at 549.

⁹² Cf. *Alfonso*, 759 F.2d at 735 & n.2 (determining that a search partially conducted by an FBI agent falls under the border search exception when the agent acts under the direction of federal customs officials).

seizures based on reason to believe that a *state* crime has been committed? At first blush, you might assume the answer must match that for cross-enforcement up. But it is worth flagging at least two possible differences. First, federal and state governments have different sources of legal authority. The states have the general police power,⁹³ while the federal government has only limited powers to enact criminal laws drawn from specific grants of constitutional authority.⁹⁴ Second, the federal government has the power to preempt state enforcement under the Supremacy Clause,⁹⁵ giving Congress the ultimate say (if it chooses) over state practices within spheres of federal authority. It is at least possible, in light of such differences, that courts might approach cross-enforcement down differently than they do cross-enforcement up.

But do they? Existing law on cross-enforcement down is roughly similar but not identical to that of existing law on cross-enforcement up. As we see below, most decisions on cross-enforcement down require some kind of authorization. Most cross-enforcement down cases require state authorization, although others suggest either state or federal authorization is sufficient. Finally, some cases suggest no authorization is required.

I. Cross-Enforcement Down Requires Some Grant of Authority. —

The majority of cases on cross-enforcement down permit federal agents to search or seize based on violations of state law only if some legal authorization exists to do so. Many of the cases involve border patrol agents. In one common fact pattern, a border patrol agent spots a car that the agent suspects is carrying undocumented immigrants.⁹⁶ Developing reasonable suspicion of a federal immigration violation may be difficult, but spotting a state traffic law violation may be easy. Does the federal border patrol agent have a state officer's Fourth Amendment authority to pull over the car based on the state traffic violation?

Lower courts have held that the answer is “no.”⁹⁷ Federal border patrol agents cannot make traffic stops to enforce state traffic codes,

⁹³ Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 535–36 (2012) (“The States thus can and do perform many of the vital functions of modern government — punishing street crime, running public schools, and zoning property for development, to name but a few — even though the Constitution’s text does not authorize any government to do so. Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the ‘police power.’” (citation omitted)).

⁹⁴ See *id.*

⁹⁵ See U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

⁹⁶ See, e.g., United States v. Valdes-Vega, 685 F.3d 1138 (9th Cir. 2012), *aff'd en banc*, 738 F.3d 1074 (9th Cir. 2013); United States v. Rodriguez-Rivas, 151 F.3d 377 (5th Cir. 1998).

⁹⁷ Valdes-Vega, 685 F.3d at 1145 n.6; Rodriguez-Rivas, 151 F.3d at 381; State v. Garcia-Navarro, 226 P.3d 407, 409 (Ariz. Ct. App. 2010).

courts have held, because neither Congress nor the state legislatures have empowered them to do so. “As federal officers,” the Ninth Circuit has reasoned, “Border Patrol agents are limited to their statutory powers.”⁹⁸ Because border patrol agents have limited powers, and their powers do not include state traffic enforcement, the Fourth Amendment is violated when border patrol agents enforce the traffic code. “To hold otherwise,” courts have said, “would grant Border Patrol agents unfettered discretion to investigate suspected violations of *any and all* cognizable criminal laws.”⁹⁹ This “would, in effect, give to the Border Patrol the general police power that the Constitution reserves to the States.”¹⁰⁰

Notably, the border patrol cases don’t identify what changes in state or federal law might alter that result. Could Congress alone empower border patrol agents to enforce state traffic codes? Must state law authorize it? Both? The cases don’t offer a clear answer, if only because neither Congress nor state legislatures have tried to bestow that authority.

2. *Cross-Enforcement Down Requires Authorization from State Law.* — Several cases on cross-enforcement down look to state law for authorization.¹⁰¹ The state-focused cases often involve arrests by federal agents for state law crimes. For example, in *United States v. Johnson*,¹⁰² federal Secret Service agents investigating a suspect for counterfeiting in Texas learned that he had an outstanding warrant for his arrest in California on theft charges.¹⁰³ The federal agents made the arrest on the state warrant and questioned the suspect about counterfeiting activities.¹⁰⁴ When federal charges were brought, the defendant argued that the Secret Service had violated the Fourth Amendment when the federal agents made the arrest on a state warrant.¹⁰⁵ The Fifth Circuit disagreed on the ground that Texas state law affirmatively authorized the

⁹⁸ *United States v. Juvenile Female*, 566 F.3d 943, 948 (9th Cir. 2009) (citing *Ortiz v. U.S. Border Patrol*, 39 F. Supp. 2d 1321, 1326 (D.N.M. 1999); *United States v. Santa Maria*, 15 F.3d 879 (9th Cir. 1994); *United States v. Diamond*, 471 F.2d 771, 773 (9th Cir. 1973)).

⁹⁹ *Id.* (quoting *United States v. Perkins*, 166 F. Supp. 2d 1116, 1126 (W.D. Tex. 2001)).

¹⁰⁰ *Id.* (quoting *Perkins*, 166 F. Supp. 2d at 1126).

¹⁰¹ *See, e.g.,* *People v. Redd*, 229 P.3d 101, 125, 128 (Cal. 2010) (concluding that a federal agent had authority to detain and arrest a defendant on property owned by the City and County of San Francisco because a state statute designated “[d]uly authorized federal employees” as “peace officers when they are engaged in enforcing applicable state or local laws on . . . any street, sidewalk, or property adjacent” to federal land, *id.* at 125); *cf. United States ex rel. Coffey v. Fay*, 344 F.2d 625, 629 n.1 (2d Cir. 1965) (suggesting in dicta that the FBI cannot make arrests for state crimes).

¹⁰² 815 F.2d 309 (5th Cir. 1987).

¹⁰³ *Id.* at 311.

¹⁰⁴ *See id.*

¹⁰⁵ *See id.* at 312–13.

arrest.¹⁰⁶ This was so, among other reasons, because a Texas state statute listed federal Secret Service agents as among those granted “the powers of arrest, [and] search and seizure” for Texas state felony crimes.¹⁰⁷

An interesting subset of cross-enforcement down case law looks to the citizen’s arrest power. At common law, the arrest powers of private citizens and government officials were very similar.¹⁰⁸ Today, the states generally retain the common law citizen’s arrest powers in some form in their statutory authorities.¹⁰⁹ This creates an intriguing dynamic: When federal agents make a stop or arrest for a state crime, courts will sometimes rule that the conduct satisfies the Fourth Amendment because a private citizen would have been authorized by state law to act as the federal agent did. It would be “counter-intuitive”¹¹⁰ and even “ridiculous”¹¹¹ for federal agents to have less arrest power than a private citizen, courts have reasoned. As a result, a federal agent’s search or seizure for a state law violation is constitutional if a private citizen would be legally authorized under state law to perform that act.¹¹²

The Fifth Circuit’s ruling in *United States v. Sealed Juvenile 1*¹¹³ offers an example. A United States Customs Service agent was driving home after work in a government-owned car when he spotted an erratic and dangerous driver.¹¹⁴ The agent turned on his car’s strobe lights and siren. A high-speed chase followed, ending in the driver’s capture and the discovery that she possessed illegal drugs.¹¹⁵ When federal drug charges followed, the driver-turned-defendant moved to suppress the

¹⁰⁶ *Id.* at 313.

¹⁰⁷ *Id.* (quoting TEX. CODE CRIM. PROC. ANN. art. 2.121 (West 2005 & Supp. 2017)).

¹⁰⁸ *See, e.g.,* *United States v. Coplton*, 185 F.2d 629, 634 (2d Cir. 1950) (L. Hand, J.) (comparing the arrest authority of government officers and private parties).

¹⁰⁹ *See* M. CHERIF BASSIOUNI, *CITIZEN’S ARREST: THE LAW OF ARREST, SEARCH, AND SEIZURE FOR PRIVATE CITIZENS AND PRIVATE POLICE* 6–13 (1977) (detailing the citizen’s arrest power).

¹¹⁰ *United States v. Sealed Juvenile 1*, 255 F.3d 213, 218 (5th Cir. 2001).

¹¹¹ *State ex rel. State v. Gustke*, 516 S.E.2d 283, 293 (W. Va. 1999) (quoting *State v. Phoenix*, 428 So. 2d 262, 266 (Fla. Dist. Ct. App. 1982)).

¹¹² *Sealed Juvenile 1*, 255 F.3d at 218 (“[I]t would be counter-intuitive to deny the right of citizen’s arrest to a citizen who happens to be a federal law enforcement officer. . . . [I]t would lead to absurd results: a federal agent who witnesses a felony or a breach of the peace would remain helpless to stop the offender, but a private citizen without any law enforcement background could pursue a fleeing felon.” (citing *Gustke*, 516 S.E.2d at 293)); *Johnson*, 815 F.2d at 313 (holding that federal Secret Service agents “can make an arrest when Texas law authorizes such an arrest by a ‘private person’” (citing *Sanchez v. State*, 582 S.W.2d 813, 815 (Tex. Crim. App. 1979))); *United States v. Garcia*, 676 F.2d 1086, 1093 n.22 (5th Cir. 1982) (stating in dicta that “[o]f course, an employee of the Parks and Wildlife Department may, like any other private citizen, effect a citizen’s arrest”); *Gustke*, 516 S.E.2d at 293.

¹¹³ 255 F.3d 213.

¹¹⁴ *See id.* at 215.

¹¹⁵ *See id.*

drugs on the ground that the customs agent was not authorized to stop her to enforce state traffic laws.¹¹⁶

The court ruled that the customs agent's stop satisfied the Fourth Amendment.¹¹⁷ Assuming the customs agent was acting as a federal officer on his way home, the court reasoned, he was still governed by Texas law about the arrest powers of private citizens.¹¹⁸ The driver's dangerous swerving on a public road was a breach of the peace in the agent's presence that authorized an arrest under Texas statutory law, the Fifth Circuit held.¹¹⁹ The fact that the agent had chased after and stopped the car rather than just arrested the driver was no problem, the court held, because the chase and stop were implicitly part of the process of making an arrest.¹²⁰ Because the citizen's arrest statute permitted anyone to arrest the driver for breach of the peace, a federal agent could take steps toward making an arrest under the same circumstances.¹²¹

3. *Cross-Enforcement Down Requires No Authorization (The State Search Warrant Cases)*. — An additional set of cases on cross-enforcement down involves the execution of state search warrants by federal agents. Joint state and federal execution of search warrants appears to be exceedingly common.¹²² Courts have allowed federal agents to execute state warrants without requiring any statutory or other authorization. These cases are not necessarily inconsistent with the more common holding that federal agents need state authorization to conduct state searches. Perhaps the warrant itself could be considered the needed authorization. Nonetheless, the irrelevance of an officer's federal status in the state search warrant context is a helpful counterpoint to the cases that require state statutory authorization for federal agents to search and seize based on state law violations.

An example of the cases from this genre is *United States v. Gilbert*,¹²³ from the Eleventh Circuit. Federal agents persuaded a state's attorney to obtain a state warrant that directed state officers to search a home

¹¹⁶ See *id.*

¹¹⁷ See *id.* at 218.

¹¹⁸ See *id.* at 217–18.

¹¹⁹ *Id.* at 218 (holding that the defendant's dangerous driving was a breach of the peace because the driving "placed [her] own life and the lives of the other motorists in danger" (alteration in original) (quoting *Ruiz v. State*, 907 S.W.2d 600, 604 (Tex. App. 1995))).

¹²⁰ See *id.* at 218–19.

¹²¹ See *id.* at 217–19.

¹²² See, e.g., *United States v. Benford*, 457 F. Supp. 589, 595 (E.D. Mich. 1978) (arguing that the incorporation of the Fourth Amendment creates a "climate for full cooperation in connection with searches" and that "courts should not continue to look askance each time such cooperation takes place"). Such joint efforts are sufficiently common that legal challenges may not even raise Fourth Amendment issues. See, e.g., *United States v. Krawiec*, 627 F.2d 577, 578–79 (1st Cir. 1980) (addressing a challenge to federal involvement in a state warrant based on statutory objections).

¹²³ 942 F.2d 1537 (11th Cir. 1991).

for evidence of illegal weapons under state law.¹²⁴ Federal agents and several local police officers paired up and conducted the search under the warrant — no state officers were involved — and they found evidence of federal crimes.¹²⁵ When federal charges followed, the Eleventh Circuit rejected the defendant’s argument that the search violated the Fourth Amendment because the warrant had authorized only state agents and not federal agents to execute it.

According to the Eleventh Circuit, the warrant’s failure to designate the proper officers to execute it was only a state statutory violation and not a constitutional violation.¹²⁶ More broadly, federal agents could execute a state warrant without raising any Fourth Amendment concerns: the statutory error of wrongly indicating who would execute the warrant “implicated none of the interests that the Fourth Amendment protects.”¹²⁷ The Sixth Circuit has a somewhat similar line of cases, by which federal agents can help execute a state warrant so long as they are genuinely executing the state warrant and not using it as a pretext to search for evidence of federal crimes.¹²⁸

*C. Horizontal Cross-Enforcement:
State Enforcement of Another State’s Law*

Let’s turn now to horizontal cross-enforcement, in which state officers conduct searches or seizures to enforce the laws of another state. The case law here is surprisingly sparse. That likely is the case for three reasons. First, the territorial scope and common features of state criminal laws make horizontal cross-enforcement relatively limited. State criminal laws usually apply predominantly inside each state’s territory.¹²⁹ Second, although states can enact criminal laws that extend beyond their borders, unusual or outlier state criminal laws that extend beyond a state’s borders are often subject to invalidation under the dormant commerce clause.¹³⁰ And third, when state laws are the same in different states, an officer need not rely on a different state’s law to justify a search or seizure. For all of these reasons, there are relatively

¹²⁴ *Id.* at 1539.

¹²⁵ *See id.*

¹²⁶ *See id.* at 1541–42.

¹²⁷ *Id.* at 1541.

¹²⁸ *See* United States v. Castro, 881 F.3d 961, 967 (6th Cir. 2018) (Sutton, J.) (“In our circuit, federal officers may help state officials search for evidence of a crime in connection with a state warrant so long as they are searching for the same evidence as the state officers and the same evidence authorized by the state warrant.” (citing United States v. Garcia, 496 F.3d 495, 509–10 (6th Cir. 2007))).

¹²⁹ *See generally* Rollin M. Perkins, *The Territorial Principle in Criminal Law*, 22 HASTINGS L.J. 1155 (1971).

¹³⁰ *See, e.g.*, Am. Booksellers Found. v. Dean, 342 F.3d 96, 103–04 (2d Cir. 2003).

few situations in which the legality of horizontal cross-enforcement arises.¹³¹

There is one common fact pattern in horizontal cross-enforcement litigation: In many cases, an officer in one state will arrest a defendant based on an arrest warrant issued by a judge in another state. Courts have held that state officers can execute the out-of-state warrant because the out-of-state judge found probable cause. For example, in the Tenth Circuit's ruling in *United States v. Smith*,¹³² a California state investigator tipped off the Oklahoma City Police Department that two suspects were running a meth lab out of a home in Oklahoma City.¹³³ California state warrants had been issued for one suspect's arrest, and Oklahoma officers executed one warrant at the second suspect's home.¹³⁴ In the process, they discovered a large-scale meth lab.¹³⁵ When federal charges followed, the defendants argued that the fruits of the warrant execution should be suppressed because Oklahoma agents could not execute a California warrant.¹³⁶

The Tenth Circuit disagreed in a short paragraph.¹³⁷ "The purpose of the warrant requirement is not jurisdictional," the court wrote, "but is to interpose a neutral magistrate's determination of probable cause between the zealous officer and the citizen."¹³⁸ The California warrant was enough for the Fourth Amendment: "Where state officers are arresting a person within their state, neither precedent nor logic requires a second arrest warrant to be obtained when a valid warrant has been issued in another state."¹³⁹ The Fourth Amendment required a warrant, but a warrant from another state was sufficient.¹⁴⁰

¹³¹ Horizontal cross-enforcement can raise interesting questions of state constitutional law, but they are outside the federal Fourth Amendment. See generally McGlynn, *supra* note 17.

¹³² 131 F.3d 1392 (10th Cir. 1997).

¹³³ See *id.* at 1395.

¹³⁴ See *id.*

¹³⁵ See *id.*

¹³⁶ *Id.* at 1397.

¹³⁷ See *id.* at 1397–98.

¹³⁸ *Id.* at 1397 (citing *Payton v. New York*, 445 U.S. 573, 602 (1980)).

¹³⁹ *Id.* (citing *United States v. Johnson*, 815 F.2d 309, 313–14 (5th Cir. 1987)).

¹⁴⁰ See *id.* At least a few civil suits have been filed by arrestees arguing that their Fourth Amendment rights were violated when officers from one state arrested them based on out-of-state warrants. But courts have declined to reach the merits in those cases, instead ruling that qualified immunity attaches because there is no clearly established law that arrests made in reliance on out-of-state warrants are impermissible. See, e.g., *Lowrance v. Pflueger*, 878 F.2d 1014, 1020 (7th Cir. 1989) (holding that officers in Wisconsin were entitled to qualified immunity for arrest based on a Tennessee warrant); *Donta v. Hooper*, 774 F.2d 716, 721 (6th Cir. 1985) (holding that Ohio police were entitled to qualified immunity for arrest based upon a message from Kentucky state police that they had obtained a warrant); cf. *Whiteley v. Warden*, 401 U.S. 560, 568 (1971) ("[P]olice officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause.").

The relative lack of scrutiny for state execution of out-of-state arrest warrants is perhaps understandable in light of the Constitution's Interstate Rendition Clause.¹⁴¹ The Clause states that a person "charged in any State" with a crime, who has fled from justice and is located in another state, "shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."¹⁴² A federal statute first enacted in 1793 mandates the proper procedure, which includes an arrest on the out-of-state charge.¹⁴³ Every state has an implementing statute allowing arrests by home-state officers for those facing out-of-state charges.¹⁴⁴

The Interstate Rendition Clause and its implementing statutes place the imprimatur of the Constitution and every jurisdiction's law behind making arrests for out-of-state crimes. Before the Fourth Amendment applied to the states, the Interstate Rendition Clause and the Fourth Amendment did not intersect: the Fourth Amendment applied to the federal government and the Interstate Rendition Clause obligated states, so horizontal cross-enforcement raised no Fourth Amendment issues at all. Today the Fourth Amendment applies to interstate extradition.¹⁴⁵ In light of the Interstate Rendition Clause, however, it is no surprise out-of-state arrest warrants have not been treated as problematic.¹⁴⁶ How horizontal cross-enforcement works outside the arrest context remains surprisingly unclear.

* * *

Let's summarize. The lower court cases on cross-enforcement are a mess. They offer no clear answer to when it is allowed. Where they offer clear answers, those answers conflict with decisions from other circuits. Why such confusion? Part of the reason is that courts seem surprisingly unaware of other decisions on cross-enforcement. Cases on cross-enforcement rarely cite each other; they seem to operate in a doctrinal vacuum. Where courts have realized common roots, they mostly trace their varying approaches to a set of Supreme Court decisions from

¹⁴¹ U.S. CONST. art. IV, § 2, cl. 2.

¹⁴² *Id.*

¹⁴³ See 18 U.S.C. § 3182 (2012).

¹⁴⁴ See UNIF. CRIMINAL EXTRADITION ACT § 14 (withdrawn 1982), 11 U.L.A. 599 (2003) (describing procedures for arrest without a warrant); see also, e.g., VA. CODE ANN. § 19.2-100 (2015) (enacted 1950); SEC'Y OF THE COMMONWEALTH, COMMONWEALTH OF VA., VIRGINIA EXTRADITION MANUAL 4 (2016), <https://www.commonwealth.virginia.gov/media/governorvirginiagov/secretary-of-the-commonwealth/pdf/extraditionmanual.pdf> [<https://perma.cc/NH94-GUWA>] (explaining the process for arresting fugitives from other states who are found in Virginia).

¹⁴⁵ See *Kirkland v. Preston*, 385 F.2d 670, 676 (D.C. Cir. 1967) (concluding, in the wake of *Mapp v. Ohio*, 367 U.S. 643 (1961), that extradition arrests at the state level "must be preceded by a finding of probable cause" under the Fourth Amendment).

¹⁴⁶ Cf. *State v. Martinez*, 408 P.3d 721, 728 (Wash. Ct. App. 2018) (permitting Washington state police to conduct a warrantless search of an image of a computer hard drive that had been seized under a Texas state warrant).

the middle of the twentieth century that lower courts believe either answered or at least gave some guidance for when cross-enforcement is allowed. But modern courts seem unsure of what to make of those cases. The next Part turns to the history of Fourth Amendment cross-enforcement, framing and then exploring the historical cases that modern decisions have treated as authority.

II. RECOVERING THE LOST HISTORY OF FOURTH AMENDMENT CROSS-ENFORCEMENT

The division in current doctrine on cross-enforcement rests in part on divergent interpretations of Supreme Court cases from the early and middle parts of the last century. This Part takes a close look at those cases to identify their lessons. It reveals a remarkable dynamic. The old Supreme Court cases, on which lower courts rely today, rest on assumptions that have since been overturned. Although the Supreme Court did develop a body of cases on cross-enforcement starting in the Prohibition era, the cases reflect often-forgotten premises that the modern Supreme Court has subsequently rejected.

This discovery creates a puzzle for modern courts looking for Supreme Court precedent on cross-enforcement. Dramatic changes in Fourth Amendment doctrine in intervening years make reading the old cases something like reading Shakespeare for the first time. You think you know the language. You recognize most of the words. But because of changes over time, it's surprisingly easy to miss what the old cases mean. And when you realize what the cases mean, it's hard to translate them to the modern Fourth Amendment.

An overview of the three major changes detailed in this Part may help guide the reader. First, when the Supreme Court developed its cross-enforcement case law, the Fourth Amendment did not apply to the states. Cross-enforcement involved the relationship between a federal government regulated by the Fourth Amendment and state governments outside it. That is no longer true. In *Wolf v. Colorado*¹⁴⁷ in 1949, and in *Mapp v. Ohio*¹⁴⁸ in 1961, the Supreme Court "incorporated" the Fourth Amendment and applied it to the states through the Fourteenth Amendment. After *Mapp*, cross-enforcement asks a question the Supreme Court has never answered: whether an officer from one government regulated by the Fourth Amendment can search and seize to enforce the law of another government also regulated by the Fourth Amendment.

The second historical principle concerns the role of subjective intent. Back when the Fourth Amendment applied only to the federal government, it turns out, whether cross-enforcement was permitted hinged on

¹⁴⁷ 338 U.S. 25 (1949), *overruled by Mapp*, 367 U.S. 643.

¹⁴⁸ 367 U.S. 643.

the officer's subjective intent. The constitutional implications of an officer's search or seizure depended on whether the officer was trying to enforce state law (outside the Fourth Amendment) or federal law (within it). Modern Fourth Amendment law rejects that approach. It is a basic canon of black-letter law that Fourth Amendment rules do not consider an officer's subjective intent.¹⁴⁹ What matters now is the officer's actions rather than the officer's thoughts.¹⁵⁰

The third historical principle was that the Fourth Amendment generally required affirmative authorization, either granted by statute or common law, to make a search or seizure constitutional. This concept has been forgotten. I confess it astonished me when I unearthed it. It turns out that, in the past, Fourth Amendment law generally permitted searches and seizures only if they were *both* authorized by statutory or common law and *also* within constitutional limits. As a result, the legality of searches and seizures — including cross-enforcing searches and seizures — often depended on what statutes allowed. That is no longer thought to be true. In *Virginia v. Moore*, the Supreme Court largely detached statutory law from the Fourth Amendment without realizing the tradition of required authorization.¹⁵¹ Under *Moore*, grants or limits on authority are thought to no longer have constitutional relevance.¹⁵²

The upshot of the history, I will argue, is that the Supreme Court's existing case law is largely useless as a matter of precedent. The cases don't mean what they may seem to mean at first blush, and what they did mean at the time often answers questions that Fourth Amendment doctrine no longer asks. Remarkably, the Supreme Court has never considered whether the Fourth Amendment should permit cross-enforcement as we know it today. Despite the importance of the issue, at the Supreme Court it is a *tabula rasa*.

This Part explores the history of cross-enforcement in three stages. It begins with a brief discussion of cross-enforcement before Prohibition in the early twentieth century. It then focuses in detail on the Prohibition era, when cross-enforcement doctrine first matured. It concludes by considering four closely related Supreme Court cases in the mid-twentieth century that have had a significant but misunderstood influence on the modern law of cross-enforcement.

A. *The Early History of Fourth Amendment Cross-Enforcement*

The history of Fourth Amendment cross-enforcement before the Prohibition era is largely a story of silence. Few decisions document

¹⁴⁹ See, e.g., *Whren v. United States*, 517 U.S. 806, 813 (1996) (“Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”).

¹⁵⁰ See *id.*

¹⁵¹ 553 U.S. 164 (2008).

¹⁵² See *id.* at 176 (holding that “state restrictions do not alter the Fourth Amendment’s protections”).

whether it occurred and whether it was deemed lawful. The two systems of state and federal law enforcement rarely met in litigation, resulting in little evidence to support whether the Fourth Amendment permitted officers to search and seize based on the authority of other jurisdictions' laws. And when cross-enforcement did arise, it was not understood to raise Fourth Amendment issues.

It is helpful to understand why the issue rarely arose. First, the Fourth Amendment was understood to regulate only the federal government.¹⁵³ State constitutions included Fourth Amendment–like limits on search and seizure that limited state officers.¹⁵⁴ The federal Fourth Amendment did not apply, however, to the state or local officers responsible for the overwhelming majority of law enforcement.¹⁵⁵ Further, the exclusionary rule was not established for Fourth Amendment violations until *Weeks v. United States*¹⁵⁶ in 1914. The exclusionary rule is a powerful engine for generating case law, and its absence until the twentieth century meant that Fourth Amendment issues of any kind were litigated only rarely before then. Some cross-enforcement occurred, but it ordinarily did not lead to litigation that could explore the meaning of the Fourth Amendment.¹⁵⁷

The first major case that implicated the legality of cross-enforcement was *Weeks* itself. The defendant was arrested and his house searched by state or local police officers who found evidence of a federal crime

¹⁵³ See *Reed v. Rice*, 25 Ky. (2 J.J. Marsh.) 44, 45 (1829) (“The 4th article of the amendments to the constitution of the U. S. intended to operate upon the government of the U. S. not of the states.”); *Commonwealth v. Murray*, 4 Va. (2 Va. Cas.) 504, 507 (1826) (“The article too, lays down a rule for the Federal authorities, and not for the State authorities.”).

¹⁵⁴ See, e.g., *Murray*, 4 Va. (2 Va. Cas.) at 507–08 (“The people of the several States then existing, had already by their Constitutions and Laws, guarded themselves as effectually, as they thought it necessary, against the abuse of power by their own governments, and if there was any defect, they retained within themselves, the power to establish such additional rules as might thereafter be necessary.”).

¹⁵⁵ See Daniel C. Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, in 2 BOUNDARY CHANGES IN CRIMINAL JUSTICE ORGANIZATIONS 81, 83 (Charles M. Friel ed., 2000).

¹⁵⁶ 232 U.S. 383 (1914).

¹⁵⁷ One significant opportunity was in the enforcement of the Fugitive Slave Acts of 1793 and 1850. With little preexisting federal law apparatus to enforce the Fugitive Slave Acts, the laws relied in part on state magistrates and state officers. For example, in *Commonwealth v. Griffith*, 19 Mass. (2 Pick.) 11 (1823), the defendant came to Massachusetts and obtained the aid of a local deputy sheriff to arrest a fugitive slave from Virginia under the authority of the 1793 federal slave act. See also *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 542 (1842) (stating that “state magistrates, may, if they choose, exercise . . . authority [under the Fugitive Slave Act,] unless prohibited by state legislation”). Such arrests may not have implicated the lawfulness of cross-enforcement, however, for a tragic reason: the arrested slaves were deemed to have no Fourth Amendment rights according to *Griffith*, so there was no need for state agents to harness federal law to justify their arrest. *Griffith*, 19 Mass. (2 Pick.) at 13–14 (“[T]he clause against unreasonable searches and seizures does not protect a slave, and he may be seized without the intervention of a warrant.”).

and turned the case over to a federal marshal.¹⁵⁸ The officers and the marshal went together to the suspect's home, where the marshal conducted a second search.¹⁵⁹ Federal charges were brought, and the Supreme Court famously held that the evidence found by the marshal should be suppressed.¹⁶⁰ The overlooked second holding of *Weeks* is the one relevant to cross-enforcement: the Court also held that the "papers and property seized by the policemen" should not be suppressed because the officers were not federal agents.¹⁶¹ The record did not disclose "under what supposed right or authority" the police acted, or whether they were state or local officials.¹⁶² The answers did not matter, the Court held, because "the Fourth Amendment is not directed to individual misconduct of such officials."¹⁶³ Whether state officers could enforce federal law was apparently not a question the Fourth Amendment of the day considered.

B. Cross-Enforcement Up in the Prohibition Era

Everything changed with the arrival of Prohibition. It is in 1919, with the ratification of the Eighteenth Amendment's ban on "the manufacture, sale, or transportation of intoxicating liquors,"¹⁶⁴ that the history of Fourth Amendment cross-enforcement really begins. Prohibition was a perfect storm for confronting the legality of cross-enforcement. The text of the Eighteenth Amendment granted both "Congress and the several States" the "concurrent power to enforce" the nationwide liquor ban.¹⁶⁵ Many states were far ahead of Congress in this regard. By October 1919, when Congress enacted the National Prohibition Act¹⁶⁶ — widely known as the Volstead Act for its lead proponent, Representative Andrew Volstead — many states had already adopted their own state prohibition laws.

The Volstead Act itself envisioned a role for states in the enforcement of federal law. State judges could issue warrants for federal Volstead Act violations,¹⁶⁷ and state prosecutors could bring nuisance actions to enjoin Volstead Act offenses.¹⁶⁸ Further, Prohibition arrived just five years after the exclusionary rule of *Weeks*, meaning that defendants had an incentive to litigate whether cross-enforcement was lawful under the Fourth Amendment. Search and seizure cases flooded the federal courts

¹⁵⁸ See *Weeks*, 232 U.S. at 386.

¹⁵⁹ See *id.*

¹⁶⁰ *Id.* at 398.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ U.S. CONST. amend. XVIII, § 1 (repealed 1933).

¹⁶⁵ *Id.* § 2 (repealed 1933).

¹⁶⁶ Ch. 85, 41 Stat. 305 (1919) (repealed 1935).

¹⁶⁷ *Id.* tit. II, § 25; Act of June 15, 1917, Pub. L. No. 65-24, tit. XI, 40 Stat. 217, 228.

¹⁶⁸ See National Prohibition Act, tit. II, § 22.

for the first time. In that period, courts developed doctrines both on whether state officers could search and seize to help enforce federal law and on whether federal officers could search and seize to help enforce state law.

This section considers the lawfulness of state enforcement of federal law, what I have called cross-enforcement up, in the Prohibition era. As we will see, when state officers searched and seized to enforce federal law, courts considered two questions beyond the usual issue of whether a search or seizure satisfied Fourth Amendment limits. The first question was whether the state officer subjectively intended to enforce federal law, which was needed to subject the officer's action to Fourth Amendment regulation. The second question was whether a source of law had affirmatively granted state officers the power to enforce federal law.

I. Triggering the Fourth Amendment. — The Supreme Court first confronted the lawfulness of cross-enforcement during Prohibition in two 1927 decisions. The first case, *Byars v. United States*,¹⁶⁹ involved a joint investigation between state officials and a federal prohibition agent in the dry state of Iowa.¹⁷⁰ A local police officer obtained an invalid state warrant to search premises for illegal alcohol and then invited a federal prohibition agent to join him in executing it.¹⁷¹ Their joint search led them to find counterfeit stamps for whiskey bottles that the federal agent collected for prosecution.¹⁷² The Supreme Court held that the Fourth Amendment applied because “the search in substance and effect was a joint operation of the local and federal officers.”¹⁷³ The search took on a federal character because the federal agent was present and acting in his official capacity: “[T]he effect is the same as though [the federal agent] had engaged in the undertaking as one exclusively his own.”¹⁷⁴ The invalid warrant doomed the search, leading the Supreme Court to overturn Byars's conviction.¹⁷⁵

The second case, *Gambino v. United States*,¹⁷⁶ involved liquor enforcement in a state, New York, that had recently repealed its prohibition law. New York state troopers arrested two men near the Canadian border for violating the Volstead Act despite lacking probable cause to make the arrest.¹⁷⁷ The troopers searched the suspects' car, found illegal

¹⁶⁹ 273 U.S. 28 (1927).

¹⁷⁰ *Id.* at 28–29.

¹⁷¹ *See id.* at 29–32.

¹⁷² *See id.*

¹⁷³ *Id.* at 33.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 33–34.

¹⁷⁶ 275 U.S. 310 (1927).

¹⁷⁷ *See id.* at 312–13.

liquor, and seized it.¹⁷⁸ The troopers turned over the arrestees and the seized alcohol to federal agents for prosecution.¹⁷⁹ The Supreme Court held that the Fourth Amendment applied because “the search and seizure was made solely for the purpose of aiding the United States in the enforcement of its laws.”¹⁸⁰ Because the Fourth Amendment applied and the agents had lacked probable cause, the arrest and seizure violated the Fourth Amendment and the convictions were overturned.¹⁸¹

Importantly, *Gambino* adopted a subjective test to identify whether the Fourth Amendment applied. The issue was what the state troopers were thinking: Were they trying to enforce state law when they committed the search and seizure, or were they acting “solely for the purpose of aiding the United States in the enforcement of its laws”?¹⁸² The clues in *Gambino* pointed to the latter. New York had repealed its state prohibition law one year earlier, so the agents clearly were not trying to enforce state law.¹⁸³ New York’s governor, on announcing the repeal of the state law, had declared that state law enforcement must enforce the Volstead Act “with as much force and as much vigor as they would enforce any State law or local ordinance.”¹⁸⁴ Further, one of the state troopers had worked at the border before the New York prohibition law had been repealed.¹⁸⁵ Because the officers had searched and seized “solely on behalf of the United States,”¹⁸⁶ the Fourth Amendment applied and the arrests without probable cause justified suppression of the evidence.¹⁸⁷

Gambino’s subjective test often turned Prohibition-era cross-enforcement cases into disputes over conflicting testimony. In several cases from New York, state troopers pulled over drivers and searched

¹⁷⁸ See *id.* at 312.

¹⁷⁹ *Id.* at 312–13.

¹⁸⁰ *Id.* at 317.

¹⁸¹ See *id.* at 316–17.

¹⁸² *Id.* at 317.

¹⁸³ See *id.* at 314 (“The Mullan-Gage Law — the state prohibition act — had been repealed in 1923. Act of June 1, 1923, c. 871, 1923 N.Y. Laws, p. 1690. There is no suggestion that the defendants were committing, at the time of the arrest, search and seizure, any state offense; or that they had done so in the past; or that the troopers believed that they had.”).

¹⁸⁴ *Id.* at 315 (quoting Alfred E. Smith, Memorandum filed with Assembly Bill, Introductory No. 1614, Printed No. 1817 (June 1, 1923), reprinted in HENRY MOSKOWITZ, ALFRED E. SMITH 248, 252 (1924)).

¹⁸⁵ *Id.* at 316 (“It appears that one of the troopers who made the arrest and seizure here in question had been stationed at the Canadian border for eighteen months prior thereto, the greater part of that period being after the repeal of the Mullan-Gage law.”).

¹⁸⁶ *Id.*

¹⁸⁷ See *id.* (“We are of opinion that the admission in evidence of the liquor wrongfully seized violated rights of the defendants guaranteed by the Fourth and Fifth Amendments. The wrongful arrest, search and seizure were made solely on behalf of the United States.”).

their cars to find liquor.¹⁸⁸ The troopers turned over the defendants to federal agents for prosecution under the Volstead Act. On a motion to suppress, the trooper would testify that he was merely investigating a state traffic offense. The defendant would instead testify that the trooper made clear he was really looking for illegal liquor. The trial judge would have to choose which testimony was true, invariably endorsing the trooper's version of events. Judges saw the problem. Judge Learned Hand recognized that "an easy complaisance in any plausible tale may deprive defendants of their constitutional rights," and he lamented that "except in plain cases," appellate judges "cannot tell from the cold record where the truth lies."¹⁸⁹ But *Gambino* had adopted a subjective test, and lower courts (for the most part¹⁹⁰) followed it.

2. *Authorization to Search and Seize*. — When state agents triggered the Fourth Amendment by acting with a purpose to enforce federal law, the next question was whether the officers were empowered to conduct the searches and seizures. This question implicates a feature of Prohibition-era case law that seems utterly foreign today: compliance with the Fourth Amendment was understood to require both staying within Fourth Amendment limits and also having affirmative authority to act. As the Supreme Court stated in *Carroll v. United States*¹⁹¹ in 1925, the Fourth Amendment required action to be undertaken by a "competent official authorized to search."¹⁹²

To modern ears, the notion that the Fourth Amendment requires legislative authorization for an officer to act sounds entirely wrong. The Supreme Court effectively buried this understanding of the Fourth Amendment in its 2008 opinion in *Virginia v. Moore*.¹⁹³ *Moore* considered whether a search incident to an arrest "based on probable cause but prohibited by state law" violated the Fourth Amendment.¹⁹⁴ Justice

¹⁸⁸ See, e.g., *Marsh v. United States*, 29 F.2d 172, 172 (2d Cir. 1928); *United States v. Jankowski*, 28 F.2d 800, 800-01 (2d Cir. 1928); *United States v. Bumbola*, 23 F.2d 696, 696 (N.D.N.Y. 1928).

¹⁸⁹ *Marsh*, 29 F.2d at 173.

¹⁹⁰ Mostly, but not uniformly. See *Parsons*, *supra* note 16, at 368 n.100 ("As might be expected, the reception of [*Gambino*] in the lower federal courts has been mixed."). For an example of a case seemingly rejecting the subjective test of *Gambino*, consider *Miller v. United States*, 50 F.2d 505 (3d Cir. 1931). State troopers testified that they thought they were enforcing the Volstead Act when they conducted a search. *Id.* at 508. The court resisted the conclusion that this was determinative: "this was merely their personal opinion which alone cannot give a federal character to their action," the Third Circuit wrote, "particularly in view of the fact that Pennsylvania has a state liquor law of its own to be enforced and that the State Constabulary ordered the troopers to this task without any instructions to enforce the federal law." *Id.*

¹⁹¹ 267 U.S. 132 (1925).

¹⁹² *Id.* at 154. The full holding of *Carroll* was that "those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise." *Id.*

¹⁹³ 553 U.S. 164 (2008).

¹⁹⁴ *Id.* at 166.

Scalia, writing for the majority, scoffed at the idea that the state's arrest law was relevant to the Fourth Amendment.¹⁹⁵ The state's authorization was merely a statutory rule governing the police that might offer greater protection than the Fourth Amendment but that had no impact on the Fourth Amendment.¹⁹⁶ As the unanimous decision in *Moore* indicates, the modern assumption is that Fourth Amendment standards generally operate independently of statutory grants of or limits on the power to search or seize.

The Prohibition-era understanding was different, as the following materials will show. At the time, an affirmative grant of power to search and seize was assumed to be needed to satisfy the Fourth Amendment. An officer making an arrest had to have authority to make it — typically granted by statute — in addition to probable cause.¹⁹⁷ A search was lawful if it was authorized by statute.¹⁹⁸ A search incident to arrest satisfied the Fourth Amendment only if the arrest was both based on probable cause and the officer had the lawful authority — typically granted by statute — to make it.¹⁹⁹ A judge issuing a warrant needed jurisdiction where the warrant was to be executed or else the search was void even if probable cause existed.²⁰⁰

This is a sufficiently startling point today that it's worth detailing how it worked. The Supreme Court's decision in *United States v. Lee*²⁰¹ serves as a useful example. The Coast Guard searched a boat twenty-four miles from the coast and found illegal liquor.²⁰² When the boat owner moved to suppress on Fourth Amendment grounds, the merits of the claim hinged on whether the Coast Guard had the affirmative legal authority to search the boat that far from shore, assuming it had probable cause, so as to authorize the Fourth Amendment seizure and search of the boat.²⁰³ Writing for the majority, Justice Brandeis concluded that the search was lawful because a statute gave Coast Guard officials broad

¹⁹⁵ See *id.* at 178 (“We reaffirm against a novel challenge what we have signaled for more than half a century.”).

¹⁹⁶ See *id.*

¹⁹⁷ See, e.g., *Marsh v. United States*, 29 F.2d 172 (2d Cir. 1928) (discussed in section II.C below).

¹⁹⁸ See, e.g., *Carvalho v. United States*, 54 F.2d 232 (1st Cir. 1931) (focusing on statutory authority of prohibition agents to enter distillery).

¹⁹⁹ See, e.g., *Marsh*, 29 F.2d 172.

²⁰⁰ See, e.g., *Weinberg v. United States*, 126 F.2d 1004, 1006–07 (2d Cir. 1942).

²⁰¹ 274 U.S. 559 (1927).

²⁰² See *id.* at 560.

²⁰³ See *id.* at 561–62. Although the Supreme Court's decision in *Lee* speaks of “illegal search and seizure” generally rather than the Fourth Amendment specifically, *id.* at 560, the First Circuit's decision below speaks plainly of the issue of search and seizure as being the Fourth Amendment, see *Lee v. United States*, 14 F.2d 400, 402 (1st Cir. 1926) (“It is contended on behalf of Lee that the visitation and search of his motorboat, and seizure of the boat and the liquor by the Coast Guard, was illegal and in violation of the Fourth Amendment of the Constitution . . .”), *rev'd*, 274 U.S. 559.

authority to seize vessels subject to forfeiture for failure to comply with revenue laws.²⁰⁴ The power to seize a vessel implied a power to board and search it even if the boat was far from land.²⁰⁵ The Coast Guard was affirmatively empowered by statute to stop and search the boat, permitting such conduct under the Fourth Amendment so long as the requisite standards of probable cause were met.²⁰⁶

The Fourth Circuit's decision in *Thompson v. United States*²⁰⁷ provides another example. A state constable and a federal prohibition agent obtained a state warrant to search the suspect's home for illegal liquor.²⁰⁸ They executed the warrant and found the booze, leading to federal charges under the Volstead Act.²⁰⁹ The Fourth Circuit held that the search had triggered the Fourth Amendment because it was a joint federal/state investigation under *Byars*.²¹⁰ The court then suppressed the evidence, even though a warrant was obtained, because the warrant had failed to satisfy the statutory requirements of the Volstead Act.²¹¹ The statute prohibited the issuance of warrants to search a "private dwelling" unless it was "used for the unlawful sale of intoxicating liquor" or for a business purpose such as a hotel or boarding house.²¹² The state warrant had not provided any evidence of such a use, however, and as a result it violated the Volstead Act and the fruits of the search were properly suppressed.²¹³

Understanding the authorization requirement often found in Prohibition-era Fourth Amendment case law is critical to appreciating how courts in that period analyzed cross-enforcement up. Because searches and seizures required authorization, the lawfulness of state enforcement of federal law hinged on whether the proper authorization had been given for states to enforce federal law. The requirement of authorization looks to modern eyes like a special requirement just for cross-enforcement. But at the time, it was simply an application of a

²⁰⁴ See *Lee*, 274 U.S. at 562 ("Officers of the Coast Guard are authorized . . . to seize on the high seas beyond the twelve-mile limit an American vessel subject to forfeiture for violation of any law respecting the revenue. From that power it is fairly to be inferred that they are likewise authorized to board and search such vessels when there is probable cause to believe them subject to seizure for violation of revenue laws, and to arrest persons thereon engaged in such violation." (citations omitted)).

²⁰⁵ See *id.* at 562–63.

²⁰⁶ See *id.* at 563.

²⁰⁷ 22 F.2d 134 (4th Cir. 1927).

²⁰⁸ See *id.* at 135.

²⁰⁹ See *id.* at 134.

²¹⁰ *Id.* at 135.

²¹¹ *Id.* at 134–35.

²¹² See National Prohibition Act, ch. 85, tit. II, § 25, 41 Stat. 305, 315 (1919) (repealed 1935) ("No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house.").

²¹³ *Thompson*, 22 F.2d at 135.

background understanding that Fourth Amendment law required authorization to act.

Unfortunately, it is not clear why the early courts imposed an authorization requirement. As far as I can tell, the courts never explained it.²¹⁴ A possible explanation is that the Fourth Amendment had traditionally been understood as a limit on a privilege from tort liability. Before the exclusionary rule was introduced in 1914, Fourth Amendment issues arose primarily as affirmative defenses.²¹⁵ An officer would be sued for trespass or wrongful imprisonment and he would assert a special law enforcement privilege cabined by Fourth Amendment law to avoid liability. Perhaps it seemed natural in that period that an officer would need the backing of governmental authorization to benefit from the legal privilege that the Fourth Amendment helped define.²¹⁶ If the law provides a special defense to those empowered to enforce the law, the argument might run, surely the defense applies only if the officer was actually so empowered. But this understanding of the authorization requirement is just speculation on my part.²¹⁷ As far as I can tell, its origins were never discussed.

*C. A Leading Example of Cross-Enforcement Up
During Prohibition: Marsh v. United States*

I want to delve into one more important example, the delightful case of *Marsh v. United States*.²¹⁸ *Marsh* is significant for several reasons, among them the clarity of its thought; the prominence of its judges (Learned Hand, Augustus Hand, and Thomas Swan²¹⁹); and its careful engagement with some of the conceptual issues cross-enforcement raises. *Marsh* also provides a direct bridge to the Supreme Court cases that modern courts analyzing cross-enforcement have studied and misunderstood. As a result, a close look at *Marsh* will be richly rewarded.

Marsh was one of several cases in which a New York state trooper pulled over a car near the Canadian border and found booze inside.²²⁰ The trooper arrested the defendant, seized the alcohol, and brought the

²¹⁴ The first comprehensive treatise on the Fourth Amendment, published during the Prohibition era, does not discuss the authorization requirement. See ASHER L. CORNELIUS, *THE LAW OF SEARCH AND SEIZURE* (1st ed. 1926).

²¹⁵ See, e.g., *Entick v. Carrington*, (1765) 95 Eng. Rep. 807 (K.B.) (awarding damages in trespass for a search and seizure of private papers after rejecting a defense of reliance on a warrant).

²¹⁶ I return to this theme in section III.A.

²¹⁷ An alternative explanation is that search and seizure law in the 1920s did not draw as sharp a distinction between statutory and constitutional powers as courts draw today.

²¹⁸ 29 F.2d 172 (2d Cir. 1928).

²¹⁹ See *id.* at 172.

²²⁰ See *id.* Not only are the facts of *Marsh* and *Gambino* similar: both cases were defended by the same lawyer, Irving K. Baxter.

defendant to federal officials for federal Volstead Act charges.²²¹ The defendant moved to suppress the alcohol and the testimony of its seizure.²²² The district court in *Marsh* found that the trooper had initially pulled over the car for running a red light, a state-law intent that prevented the stop from being subject to Fourth Amendment limits under *Gambino*.²²³ In his opinion for the Second Circuit, Judge Learned Hand deferred, albeit uncomfortably, to this finding.²²⁴

Judge Hand next turned to the subsequent search of the car and seizure of the alcohol, which evidently was undertaken with the Fourth Amendment-triggering goal of enforcing the federal Volstead Act.²²⁵ This raised the authorization question: Did the trooper have “any power to search at all,”²²⁶ and then to seize the alcohol, given that the crime being investigated was federal and not state? Judge Hand first had to consider the source of law that would be sufficient to empower the trooper to make a search or seizure. “This, as we view it, is a question only of state law, unless we have recourse to some common law of federal criminal procedure, if any there be.”²²⁷ The possibility that some “common law of federal criminal procedure”²²⁸ might provide the affirmative authority to search for a federal offense was raised but not answered: “We think that the state law authorized what he did, and find it unnecessary to consider the alternative.”²²⁹

The remainder of *Marsh* offers a detailed analysis of New York common law and statutory law governing the search and seizure authority of state troopers.²³⁰ Judge Hand ruled that the search of the car and seizure of the alcohol was legal because it combined two powers granted to state troopers under state law: first, the power to arrest “for a crime, committed or attempted in his presence,” granted by Section 177 of the New York Code of Criminal Procedure,²³¹ and second, the power to

²²¹ See *id.* at 173.

²²² See *id.* at 172.

²²³ See *id.* This was critical because Judge Hand understood *Carroll* to require more than mere suspicion of a federal offense to conduct the stop. See *id.* at 173. Had the officer subjectively intended to enforce the Volstead Act when he made the stop, the stop would have violated the Fourth Amendment. See *id.*

²²⁴ See *id.* (calling the trooper’s story “somewhat doubtful,” warning that “an easy complaisance in any plausible tale may deprive defendants of their constitutional rights,” and “tak[ing] this occasion to press upon the District Judges that they search the testimony in such cases with care, remembering that the protection of defendants must in most cases rest finally with them”).

²²⁵ See *id.*

²²⁶ *Id.*

²²⁷ *Id.* (citing *Logan v. United States*, 144 U.S. 263, 303 (1892); *Rosen v. United States*, 245 U.S. 467, 469 (1918)).

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.* at 173–75.

²³¹ *Id.* at 173 (quoting N.Y. CODE CRIM. PROC. § 177 (Consol. 1928)).

search the area around a defendant incident to arrest under state procedural law.²³²

The bulk of Judge Hand's attention was on the interpretive question of whether "a crime" under the New York arrest statute should be read to include a federal offense.²³³ Judge Hand ruled that the word "crime" should be read as encompassing federal crimes for two reasons. First, it was the "universal practice of police officers in New York to arrest for federal crimes," bolstered by the Governor's statement, when the New York prohibition law was repealed, that state officials should continue to enforce the Volstead Act.²³⁴ If state troopers regularly did and were supposed to make arrests for federal crimes, presumably the state officials interpreted the state arrest law to authorize it.²³⁵

Second, Judge Hand argued that "we should be disposed a priori" to construe the state law as allowing federal arrests for reasons of constitutional structure.²³⁶ Judge Hand's explanation deserves to be reprinted in full:

Section 2 of article 6 of the Constitution makes all laws of the United States the supreme law of the land, and the National Prohibition Law is as valid a command within the borders of New York as one of its own statutes. True, the state may not have, and has not, passed any legislation in aid of the Eighteenth Amendment, but from that we do not infer that general words used in her statutes must be interpreted as excepting crimes which are equally crimes, though not forbidden by her express will. We are to assume that she is concerned with the apprehension of offenders against laws of the United States, valid within her borders, though they cannot be prosecuted in her own courts.²³⁷

This appears to be a legal presumption: in light of the Supremacy Clause, courts should construe state laws that empower state officials to act as implicitly allowing them to act to enforce federal laws just as they can enforce state laws.

Judge Hand then turned to whether a federal arrest statute dictated a different result.²³⁸ The statute directed that a person arrested for a federal offense could be brought before any judge, including a state judge, "agreeably to the usual mode of process against offenders in such State."²³⁹ Some case law had suggested that a federal statute might

²³² *Id.* (citing *People v. Chiagles*, 142 N.E. 583 (N.Y. 1923); *Agnello v. United States*, 269 U.S. 20, 30 (1925); *Marron v. United States*, 275 U.S. 192, 199 (1927)).

²³³ *See id.* at 173-74.

²³⁴ *Id.* at 173.

²³⁵ *Id.* at 173-74.

²³⁶ *Id.* at 174.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ 18 U.S.C. § 591 (1925-1926) (repealed 1980). The statute now appears in modified form at 18 U.S.C. § 3041. In its 1928 version, it stated as follows:

forbid warrantless arrests by state officers for federal crimes.²⁴⁰ Judge Hand disagreed. In his view, even if the federal statute was read to prohibit warrantless arrests by federal officers — a view he described as “incredible” — it would be “unreasonable” to read it as prohibiting warrantless arrests for federal crimes by state officers.²⁴¹ This was particularly so given that the Eighteenth Amendment gave concurrent jurisdiction to the states in enforcing Prohibition: it made little sense for the Eighteenth Amendment to give states a role in enforcing Prohibition and then to read the federal arrest statute as blocking state laws that permit states to enforce the Volstead Act.²⁴²

The striking aspect of *Marsh*, when understood in context, is that it was primarily about statutory interpretation. Fourth Amendment law was understood to require some source of affirmative authority to search or seize. The constitutionality of cross-enforcement therefore hinged on whether positive law had authorized the New York officers to make the arrest.

D. Cross-Enforcement Down in the Prohibition Era

If the Prohibition-era law of cross-enforcement up looks strange today, the law of cross-enforcement down looks even stranger. When federal agents enforced state law, subsequent prosecutions naturally ended up most often in state court. The cases are of little help today, however, because they mostly addressed a question that seems hard to fathom today: whether federal searches raised Fourth Amendment issues that state courts could adjudicate at all.

On one hand, some state courts took the view that the Fourth Amendment applied equally in state and federal courts. In *State v. Rebasti*,²⁴³ a 1924 decision from the Missouri Supreme Court, federal agents obtained a defective federal search warrant in the course of helping state agents with a state case.²⁴⁴ The court ruled that the evidence discovered should be suppressed.²⁴⁵ The prosecution had argued that the court could not “take notice” of the Fourth Amendment because the

For any crime or offense against the United States; the offender may, by any justice or judge of the United States, or by any United States commissioner, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense.

¹⁸ U.S.C. § 591.

²⁴⁰ See *Marsh*, 29 F.2d at 174–75 (citing cases).

²⁴¹ *Id.* at 174.

²⁴² See *id.*

²⁴³ 267 S.W. 858 (Mo. 1924) (en banc).

²⁴⁴ See *id.* at 860–61.

²⁴⁵ See *id.* at 861–62.

case was in state court.²⁴⁶ But the court disagreed: “It is unthinkable that a state court is powerless to protect the constitutional rights of its citizens guaranteed by the federal Constitution.”²⁴⁷ From a modern perspective, of course, this seems obviously correct.

On the other hand, some state courts did not find this so unthinkable. They reasoned that if state officers were treated as private actors in federal court, then federal officers should be treated as private actors in state court.²⁴⁸ Consider *State v. Gardner*,²⁴⁹ which had facts similar to *Rebasti*. When the defendant challenged the allegedly defective federal warrant, the Montana Supreme Court concluded it could not be concerned with the acts of federal agents, “over whom the state has no control.”²⁵⁰ The state government was not responsible for the acts of federal officers, “over whom it has [no] authority and control in their official capacity.”²⁵¹ Federal agents were “strangers to the government,” and the state government should not be punished for evidence that “come[s] innocently into the hands of government officers.”²⁵²

The strangeness of the Prohibition-era cross-enforcement down cases is likely explained by the fact that it was not until 1947, in *Testa v. Katt*,²⁵³ that the Supreme Court held that state courts must adjudicate federal causes of action. The state court decision reversed in *Testa* had

²⁴⁶ *Id.* at 861.

²⁴⁷ *Id.* Several other state supreme courts agreed that the Fourth Amendment was fully applicable in state court. *See, e.g.*, *State v. Arregui*, 254 P. 788, 796 (Idaho 1927); *Walters v. Commonwealth*, 250 S.W. 839, 841 (Ky. 1923); *Little v. State*, 159 So. 103, 104 (Miss. 1935); *Hughes v. State*, 238 S.W. 588, 591 (Tenn. 1922); *State v. Hiteshew*, 292 P. 2, 4 (Wyo. 1930).

²⁴⁸ *See Rebasti*, 267 S.W. at 864 (Blair, J., dissenting) (“[T]he acts of federal officers stand upon the same footing as acts of private individuals.”).

²⁴⁹ 249 P. 574 (Mont. 1926).

²⁵⁰ *Id.* at 577.

²⁵¹ *Id.* at 578.

²⁵² *Id.* For similar reasoning, see *State ex rel. Kuhr v. District Court*, 268 P. 501, 504 (Mont. 1928), which compared information provided by lawbreaking federal agents to information provided by lawbreaking private citizens and concluded that the former, just like the latter, should be admissible. Although the contrast between *Rebasti* and *Gardner* is striking, it involves only the preliminary issue of whether state courts can enforce the Fourth Amendment. The only case I have found on whether cross-enforcement down was permitted during Prohibition if the Fourth Amendment applies is *Novak v. State*, 200 N.W. 369 (Wis. 1924), *amended on denial of reh'g*, 202 N.W. 336 (Wis. 1925). A group of state and federal prohibition officers together visited a soft drink parlor and searched it for an illegal still. *Id.* at 369. A federal officer found hidden bottles of booze and turned them over to the state officers, leading to state liquor charges against the parlor owner. *Id.* The defendant argued that the state statute that granted state officers the right to search the parlor without a warrant did not authorize federal agents to search. *Id.* In its initial opinion, the court adopted *Gardner*-like reasoning and ruled the liquor was admissible because a state court would not scrutinize the acts of federal agents. *See id.* On denial of rehearing, however, the court ruled the liquor admissible on the narrower ground that the state statute permitted the search because the state officers “supervise[d] and direct[ed] the search” by the federal officers who were acting as their agents. 202 N.W. at 336.

²⁵³ 330 U.S. 386 (1947).

embraced reasoning closely resembling *Gardner*,²⁵⁴ by which the states and the federal government were considered foreign to each other.²⁵⁵ That reasoning seems bizarre today, making the Prohibition-era cross-enforcement down cases of limited use.

E. The Search-Incident-to-Arrest Cases

We are now ready, finally, to understand the Supreme Court cases on cross-enforcement that have influenced and confused the lower courts. The cases are a quartet of closely related decisions from 1948 to 1963: *United States v. Di Re*,²⁵⁶ *Johnson v. United States*,²⁵⁷ *Miller v. United States*,²⁵⁸ and *Ker v. California*.²⁵⁹ As Part I explained, modern courts have often interpreted these cases as saying that cross-enforcement requires compliance with state law. It turns out, though, that these cases have been badly misunderstood. We need to take a detailed look at the foundational case of *Di Re*, followed by a very quick look at its progeny *Johnson*, *Miller*, and *Ker*, to understand what these cases meant in their day and how they have been subsequently misinterpreted.

The takeaway of this section is that these four cases were part of a now-forgotten era in which statutory or common law authorization was required for a lawful search or seizure. All four cases involved the search-incident-to-arrest doctrine, which allows a warrantless search upon a lawful arrest. At the time, it was understood that a search incident to a lawful arrest under the Fourth Amendment required a lawful arrest under whatever source of law — statutory or common law — authorized arrests. *Di Re*, *Johnson*, *Miller*, and *Ker* were simply cases echoing *Marsh* about where one went to find the governing arrest law when determining the lawfulness of an arrest. This meaning has been lost, leading the cases to be misread either not as Fourth Amendment cases at all or else as cases on whether state officers have the constitutional authority to cross-enforce federal laws. Understood in context, these cases were nothing of the sort.

i. The Important Case of United States v. Di Re. — Much of the misunderstanding is based on *United States v. Di Re*,²⁶⁰ making a close look at *Di Re* essential. The case occurred at the time of gasoline rationing during World War II.²⁶¹ A federal investigator from the now-defunct Office of Price Administration (OPA), the agency in charge of

²⁵⁴ *Testa v. Katt*, 47 A.2d 312, 313 (R.I. 1946), *rev'd*, 330 U.S. 386.

²⁵⁵ See *Robinson v. Norato*, 43 A.2d 467, 474 (R.I. 1946), *cited in Testa*, 47 A.2d at 313.

²⁵⁶ 332 U.S. 581 (1948).

²⁵⁷ 333 U.S. 10 (1948).

²⁵⁸ 357 U.S. 301 (1958).

²⁵⁹ 374 U.S. 23 (1963).

²⁶⁰ 332 U.S. 581.

²⁶¹ See Second War Powers Act, ch. 199, § 301, 56 Stat. 176, 177–80 (1942) (repealed 1946).

enforcing the gasoline rationing laws, received an informant's tip that a man named Buttitta would sell him illegal gasoline coupons at a particular place and time.²⁶² The investigator came to the scene together with a local police detective,²⁶³ which may have been necessary because Congress had not specifically authorized OPA investigators to make arrests.²⁶⁴ When the officers went to make the arrest, however, Buttitta was with another man, Di Re.²⁶⁵ The police officer arrested both Buttitta and Di Re,²⁶⁶ and a search of Di Re yielded the illegal coupons.²⁶⁷ Di Re was charged in federal court and convicted of possession of the coupons.²⁶⁸

Di Re challenged his conviction on Fourth Amendment grounds before the Second Circuit, where the case was largely a replay of *Marsh* two decades earlier.²⁶⁹ By coincidence, two of the judges on the panel from *Marsh* were also on the panel in *Di Re* — Judges Learned Hand and Thomas Swan.²⁷⁰ As in *Marsh*, Judge Hand wrote the Second Circuit's opinion.²⁷¹ "The only question necessary to discuss upon this appeal," Judge Hand explained, "is whether the documents upon which [Di Re's] conviction was based, were obtained in violation of the Fourth Amendment."²⁷² Specifically, "[i]f the arrest of [Di Re] was lawful, the search of his person was lawful, and the conviction must be affirmed; if the arrest was not lawful, the search was unlawful, and the conviction cannot stand."²⁷³

The parties agreed that the lawfulness of the arrest was governed by the New York arrest statute, Section 177 of the New York Code of Criminal Procedure, which you'll recall is the same statute Judges Hand and Swan had interpreted in *Marsh*.²⁷⁴ Judge Hand ruled that Di Re's arrest violated Section 177 because the officers lacked reasonable cause

²⁶² See *Di Re*, 332 U.S. at 583. The Office of Price Administration was created in 1942 to establish price controls on goods during World War II. See Emergency Price Control Act of 1942, ch. 26, § 201, 56 Stat. 23, 29 (1942) (terminated 1947). The Office was abolished in 1947 after the war's end. See Liquidation of the Office of Price Administration, 12 Fed. Reg. 1858 (Mar. 14, 1947).

²⁶³ *Di Re*, 332 U.S. at 583.

²⁶⁴ See *id.* at 591 (describing the federal officers as having "no power of arrest").

²⁶⁵ See *id.* at 583.

²⁶⁶ Although the fact section of the opinion does not state who arrested Di Re, the analysis section states that "the arresting officer" was "a state officer." *Id.* at 588.

²⁶⁷ *Id.* at 583.

²⁶⁸ See *id.* at 582.

²⁶⁹ *United States v. Di Re*, 159 F.2d 818 (2d Cir. 1947) (L. Hand, J.), *aff'd*, 332 U.S. 581.

²⁷⁰ See *id.* at 818.

²⁷¹ See *id.*

²⁷² *Id.*

²⁷³ *Id.* at 819.

²⁷⁴ See *id.* (citing *Marsh v. United States*, 29 F.2d 172 (2d Cir. 1928)).

to think that *Di Re* was in a conspiracy with Buttitta to sell the illegal gasoline coupons.²⁷⁵

At this point it is helpful to step back and recall the affirmative authorization requirement of early Fourth Amendment law discussed earlier. In the early twentieth century, searches and seizures required both affirmative authorization and compliance with constitutional limits to satisfy Fourth Amendment doctrine. In *Marsh*, for example, Judge Hand had parsed Section 177 to determine if a federal Volstead Act violation was “a crime” to determine if Marsh’s arrest was lawful, which then would trigger search powers incident to the lawful arrest.²⁷⁶ This understanding meant that searches incident to arrest required an arrest by an officer granted the legal power to make it.

But here’s the rub: Identifying the proper source of lawful power to make an arrest was particularly tricky on the facts of *Di Re*. It’s like a law school exam question. A federal investigator and a state police officer were working together. The federal investigator was regulated by the Fourth Amendment but had no explicit arrest authority. The state officer was a Fourth Amendment federal actor under *Gambino*, and he had state law arrest authority for a federal crime under *Marsh*. In such a case, should the relevant arrest law be federal or state?²⁷⁷

Even figuring out the proper arrest standard for purely federal investigations could be difficult.²⁷⁸ Congress was surprisingly lax in specifying the arrest powers of federal agents. It did not specifically empower FBI agents to make arrests until 1934.²⁷⁹ In the absence of clear federal statutory arrest authority, lower courts had struggled to adopt a clear rule for when a federal arrest was authorized. Some courts had looked to federal common law for federal arrest standards.²⁸⁰ Other

²⁷⁵ See *id.* at 819–20. Judge Charles Clark dissented on the ground that he thought reasonable cause existed. See *id.* at 820–22 (Clark, J., dissenting).

²⁷⁶ See *Marsh*, 29 F.2d at 173–74.

²⁷⁷ The difficulty of the question was ameliorated somewhat by its uncertain importance. The differences in arrest standards were usually modest, as most jurisdictions followed common law arrest standards with only relatively minor variations. See Supplemental Memorandum for the United States, *United States v. Di Re*, 332 U.S. 581 (1948) (No. 61) (“The necessity for distinguishing between state and federal law has seldom arisen, since the power to arrest in most cases is the same.” *Id.* at 7.).

²⁷⁸ As the United States acknowledged in its supplemental brief filed in the Supreme Court in *United States v. Di Re*: “There is, it is true, no very clear cut decision as to just what law does govern the right to make an arrest without a warrant for a federal crime, even where the arrest is made by federal employees not specifically authorized to arrest by federal statute.” *Id.* at 7; see also *United States v. Coplon*, 185 F.2d 629, 634 (2d Cir. 1950) (L. Hand, J.) (discussing the uncertain legal standard).

²⁷⁹ See 18 U.S.C. § 3052 (2012); *Coplon*, 185 F.2d at 634 (citing 18 U.S.C. § 3052).

²⁸⁰ See, e.g., *Rouda v. United States*, 10 F.2d 916 (2d Cir. 1926) (L. Hand, J.). In *Rouda*, the question was whether federal prohibition agents could make a warrantless arrest for a misdemeanor in the officer’s presence that was not a breach of the peace. See *id.* at 918–19. Judge Hand looked to federal law for guidance to answer the question. See *id.* at 919. Judge Hand also noted that

courts had held that the lawfulness of an arrest by a federal agent for a federal crime should be measured by reference to the state arrest law where the arrest occurred.²⁸¹

The latter rule might seem strange, but Congress had harnessed state powers for federal officers before. The Judiciary Act of 1789 had stated that federal criminal defendants should be arrested “agreeably to the usual mode of process against offenders in such state.”²⁸² And when Congress specified the enforcement powers of federal marshals in 1792, it gave marshals the “same powers” to execute United States law as state sheriffs had “in their respective states.”²⁸³ Absent federal legislation on the arrest power, Congress’s traditional reliance on state law procedure in the state of the arrest made state arrest law a particularly plausible standard.

It was therefore not surprising that the parties assumed in *Di Re* that New York state law, and particularly Section 177, provided the relevant arrest standard. But when *Di Re* reached the Supreme Court, a different section of the New York Code apparently drew the Justices’ attention at oral argument.²⁸⁴ No transcript or audio is available of the argument.²⁸⁵ But we know from post-argument filings that Justice Frankfurter in particular pressed the United States on why the arrest hadn’t violated a different section of the New York Code, Section 180,

New York state law gave that power, but that it was not relevant because Congress had not incorporated the state law powers with respect to prohibition agents:

For nearly 50 years in New York the power has extended to all crimes (Code Cr. Proc. § 177), even to the point of breaking (section 178); but, as the National Prohibition Act has not incorporated the state procedure in this respect (as R. S. § 788 [Comp. St. § 1312], has in the case of marshals and their deputies), the New York law does not help to a solution here.

Id.

²⁸¹ See, e.g., *United States v. Park Ave. Pharmacy, Inc.*, 56 F.2d 753, 756 (2d Cir. 1932) (prohibition officer could make arrest because, even if he was treated as a private citizen, a private citizen could have made that arrest under New York state law); *United States v. Gowen*, 40 F.2d 593, 596 (2d Cir. 1930) (analyzing whether an arrest by federal prohibition agents complied with New York Criminal Code Section 183 to determine the admissibility of searches incident to that arrest), *rev’d on other grounds sub nom. Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931); *Cline v. United States*, 9 F.2d 621, 621 (9th Cir. 1925) (federal officer could arrest defendant for a felony not committed in his presence without a warrant because Arizona law permitted the practice); see also *Prize Ship & Crew — How to Be Disposed Of*, 1 Op. Att’y Gen. 85, 86 (1798).

²⁸² Ch. 20, § 33, 1 Stat. 73, 91.

²⁸³ Congress vested United States Marshals and their deputies with “the same powers in executing the laws of the United States, as sheriffs and their deputies in the several states have by law, in executing the laws of their respective states.” Act of May 2, 1792, ch. 28, § 9, 1 Stat. 264, 265 (repealed 1795).

²⁸⁴ Supplemental Memorandum for the United States, *supra* note 277, at 1–2 (discussing need for extra briefing in light of Justices’ questioning at oral argument).

²⁸⁵ The Supreme Court did not begin recording oral arguments until 1955. See *Argument Audio*, SUP. CT. U.S., https://www.supremecourt.gov/oral_arguments/argument_audio/2017 [<https://perma.cc/B7TY-UNDG>].

which required the arresting officer to state the reason for the arrest and state his authority to make the arrest.²⁸⁶

The United States responded with a post-argument supplemental brief. After arguing lamely that Section 180 was substantially satisfied,²⁸⁷ the United States next argued that the lawfulness of the arrest should be measured by reference to federal common law instead of state law. The arrest “was in every sense a federal undertaking,”²⁸⁸ the government argued, being directed by a federal agent based on evidence developed in a federal investigation.²⁸⁹ Under an appropriate view of federal common law, the United States reasoned, the arrest should be deemed lawful.²⁹⁰

The Supreme Court affirmed the Second Circuit in an opinion by Justice Robert H. Jackson.²⁹¹ The question, Justice Jackson explained, was whether the “search of Di Re was justified as incident to a lawful arrest.”²⁹² “If [Di Re] was lawfully arrested,” he continued, “it is not questioned that the ensuing search was permissible. Hence we must examine the circumstances and the law of arrest.”²⁹³ Justice Jackson began by noting that “[s]ome members of this Court rest their conclusion that the arrest was invalid on § 180 of the New York Code of Criminal Procedure,” which had arisen for the first time at oral argument.²⁹⁴ Because the issue was not raised below, however, the Court decided not to “undertake to determine on this record whether Di Re’s arrest satisfied this provision of the New York law.”²⁹⁵

Justice Jackson then turned to the government’s new argument, expressed for the first time in its supplemental brief, that the lawfulness of the arrest should be decided as a matter of federal common law instead of state law. Jackson instead offered the following standard for when the lawfulness of an arrest should be determined based on state or federal law:

[I]n absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity. By one of the earliest acts of Congress, the principle of which is still retained, the arrest by judicial process for a federal offense must be “agreeably to the usual mode of process against offenders in such state.” There is no reason to

²⁸⁶ See Supplemental Memorandum for the United States, *supra* note 277, at 1–6 (quoting N.Y. CODE CRIM. PROC. § 180 (Consol. 1928)).

²⁸⁷ See *id.* at 2–3.

²⁸⁸ *Id.* at 9.

²⁸⁹ *Id.* at 7–11.

²⁹⁰ See *id.*

²⁹¹ *United States v. Di Re*, 332 U.S. 581 (1948).

²⁹² *Id.* at 583–84.

²⁹³ *Id.* at 587.

²⁹⁴ *Id.* at 588.

²⁹⁵ *Id.*

believe that state law is not an equally appropriate standard by which to test arrests without warrant, except in those cases where Congress has enacted a federal rule. Indeed the enactment of a federal rule in some specific cases seems to imply the absence of any general federal law of arrest.²⁹⁶

As noted earlier, this was not a new approach. It was, for the most part, the understanding that lower courts had adopted in the decades prior to implementing the search-incident-to-arrest doctrine.

Justice Jackson then looked to federal statutes to see if Congress had enacted a law governing *Di Re*'s arrest. He concluded that it had not: "Turning to the Acts of Congress to find a rule for arrest without warrant, we find none which controls such a case as we have here and none that purports to create a general rule on the subject."²⁹⁷ Reviewing the federal arrest statutes, Jackson found them "meager, inconsistent and inconclusive"²⁹⁸:

No act of Congress lays down a general federal rule for arrest without warrant for federal offenses. None purports to supersede state law. And none applies to this arrest which, while for a federal offense, was made by a state officer accompanied by federal officers who had no power of arrest. Therefore the New York statute provides the standard by which this arrest must stand or fall.²⁹⁹

Justice Jackson subsequently devoted several pages of analysis to whether the facts of the case satisfied Section 177 of the New York Code.³⁰⁰ He agreed with Judge Hand that they did not, and he therefore affirmed the Second Circuit's ruling that *Di Re*'s conviction could not stand.³⁰¹

The key lesson to draw from *Di Re* is that the Court's analysis was simply an application of the then-accepted rule that the Fourth Amendment's search-incident-to-arrest exception required an affirmatively permitted (and thus lawful) arrest. For a federal offense arrest, that was ultimately a standard for Congress to provide. But because Congress had not enacted a general federal rule for warrantless federal arrests, and it had failed to provide a rule specifically for arrests by OPA agents, no federal rule was available to apply. The Court simply needed some kind of rule from Congress to apply the existing legal test. Absent clear federal legislation, *Di Re* held, courts should infer congressional intent to defer to the arrest standard in the state where the arrest occurred in light of Congress's longstanding reliance on state law practice for the permitted mode of arrest.

²⁹⁶ *Id.* at 589–90 (footnote omitted) (quoting 18 U.S.C. § 591 (1925–1926) (repealed 1980)).

²⁹⁷ *Id.* at 590.

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 591.

³⁰⁰ *Id.* at 591–95.

³⁰¹ *Id.* at 595.

2. *The Follow-Up Cases of Johnson, Miller, and Ker.* — With *Di Re* explained in glorious (or mind-numbing) detail, we can very quickly run through the similar decisions in *Johnson, Miller, and Ker*. *Johnson v. United States*³⁰² was decided less than a month after *Di Re*.³⁰³ In *Johnson*, a Seattle police detective and federal agents came to a hotel, stood in the hallway, and smelled opium coming from inside one of the rooms.³⁰⁴ The officers knocked, Johnson opened the door, and then the officers searched the room and found opium.³⁰⁵ The federal agents did not have arrest authority, but the police detective did.³⁰⁶ The government tried unsuccessfully to defend the search based on exigent circumstances and the search-incident-to-arrest doctrine.³⁰⁷ In rejecting the latter argument, Justice Jackson applied Washington State's case law on when arrests were lawful.³⁰⁸ This was the correct standard, according to a short footnote in *Johnson*, because "[s]tate law determines the validity of arrests without warrant" under the weeks-old decision in *Di Re*.³⁰⁹

*Miller v. United States*³¹⁰ followed a decade later with facts very similar to those of *Johnson*. A federal narcotics agent and a local Washington, D.C., police officer went to the defendant's apartment looking for fruits of drug dealing.³¹¹ The police officer had warrantless arrest authority under local case law, but no law gave arrest authority to the federal agent.³¹² After the defendant opened the door a crack, the officers broke into the apartment, searched it for evidence, and placed the defendant under arrest.³¹³ The government later argued that the search of the apartment was justified as a search incident to arrest, and the Court initially held that the standard for the lawfulness of the arrest should be determined by local District of Columbia law:

This Court has said, in the similar circumstance of an arrest for violation of federal law by state peace officers, that the lawfulness of the arrest without warrant is to be determined by reference to state law. *United States v. Di Re*, 332 U. S. 581, 589; *Johnson v. United States*, 333 U. S. 10, 15. By like

³⁰² 333 U.S. 10 (1948).

³⁰³ *Di Re* was argued October 17, 1947, and decided January 5, 1948; *Johnson* was argued December 18, 1947, and decided February 2, 1948.

³⁰⁴ *Johnson*, 333 U.S. at 12.

³⁰⁵ *See id.*

³⁰⁶ *Id.* at 13.

³⁰⁷ *See id.* at 15–16, 16 n.7.

³⁰⁸ *Id.* at 15–17, 15 n.5, 16 n.7.

³⁰⁹ *Id.* at 15 n.5 (citing *United States v. Di Re*, 332 U.S. 581 (1948)).

³¹⁰ 357 U.S. 301 (1958).

³¹¹ *See id.* at 302–03.

³¹² *Id.* at 305 & n.4 ("Agent Wilson did not have statutory authority to arrest without a warrant although officer Wurms, as a member of the Metropolitan Police Department, did have such authority." *Id.* at 305 (footnote omitted).)

³¹³ *Id.* at 303–04.

reasoning the validity of the arrest of petitioner is to be determined by reference to the law of the District of Columbia.³¹⁴

This holding in *Miller* was rendered largely symbolic, however, due to a sly maneuver by the majority author, Justice Brennan. According to Justice Brennan, the case law standard developed by the D.C. Circuit (then acting as the District of Columbia's local appeals court³¹⁵) for the lawfulness of an arrest was "substantially identical" to that of a federal statute, 18 U.S.C. § 3109.³¹⁶ This created an opportunity for broader clarification of the law: because the meaning of the federal statute was of greater public importance than that of local District of Columbia case law, and yet the latter "bears such a close relationship" to the former, the Court ruled on whether the federal statute was violated instead of applying the local D.C. case law.³¹⁷ *Miller* then held that § 3109 requires officers to proclaim their purpose before entering a home.³¹⁸ Because the officers had failed to do so, the evidence found was suppressed.³¹⁹

The last of the quartet, *Ker v. California*,³²⁰ was handed down two years after the Supreme Court's blockbuster decision in *Mapp v. Ohio*, which fully applied the Fourth Amendment to the states.³²¹ *Ker* also involved a search incident to arrest, but with the post-*Mapp* twist that the arrest was by state officials for a state crime with no federal involvement.³²² Officers entered *Ker*'s home without a warrant and arrested him.³²³ During a search incident to *Ker*'s arrest, the officers found drugs.³²⁴ California courts upheld the search and seizure under state

³¹⁴ *Id.* at 305–06.

³¹⁵ The D.C. Circuit acted as the District of Columbia's local appeals court until 1970, when the District of Columbia Court Reorganization Act of 1970 established the D.C. Court of Appeals. See generally John W. Kern, *The New District of Columbia Court System: A Dose of the Conventional Wisdom and a Dash of Innovation*, 20 AM. U. L. REV. 237 (1970–1971).

³¹⁶ *Miller*, 357 U.S. at 306 (quoting 18 U.S.C. § 3109 (2012)) (citing *Accarino v. United States*, 179 F.2d 456, 465 (D.C. Cir. 1949)).

³¹⁷ See *id.*

³¹⁸ *Id.* at 313.

³¹⁹ *Id.* at 313–14.

³²⁰ 374 U.S. 23 (1963).

³²¹ 367 U.S. 643, 655 (1961).

³²² One might wonder why this problem wasn't also an issue after *Wolf* in 1949, as in theory the Fourth Amendment applied fully to the states by then (but without the exclusionary rule). *Wolf v. Colorado*, 338 U.S. 25, 27–28, 33 (1949), overruled by *Mapp*, 367 U.S. 643. The answer seems to have been provided by the Supreme Court in *Elkins v. United States*, 364 U.S. 206 (1960), the year before *Mapp*, when the Court suggested that the importance of *Wolf* to state investigations was simply lost on most courts: "This removal of the doctrinal underpinning for the admissibility rule has apparently escaped the attention of most of the federal courts, which have continued to approve the admission of evidence illegally seized by state officers without so much as even discussing the impact of *Wolf*." *Id.* at 213–14 (footnote omitted).

³²³ *Ker*, 374 U.S. at 28–29 (Clark, J.) (plurality opinion).

³²⁴ *Id.*

law, which had a state exclusionary rule.³²⁵ While the case was on appeal, however, *Mapp* was handed down.³²⁶ Now the Fourth Amendment exclusionary rule applied, and the Supreme Court took the case to decide how.

No majority opinion emerged on how the Fourth Amendment applied. Eight Justices divided evenly on the merits, and Justice Harlan refused to go along with applying the Fourth Amendment to state investigators in the same way it applied to federal investigators.³²⁷ But in assessing the lawfulness of the arrest, the plurality opinion by Justice Clark began by applying the state law standard from *Di Re*, *Johnson*, and *Miller*:

This Court, in cases under the Fourth Amendment, has long recognized that the lawfulness of arrests for federal offenses is to be determined by reference to state law insofar as it is not violative of the Federal Constitution. *Miller v. United States*, *supra*; *United States v. Di Re*, 332 U. S. 581 (1948); *Johnson v. United States*, 333 U. S. 10, 15, n. 5 (1948). *A fortiori*, the lawfulness of these arrests by state officers for state offenses is to be determined by California law.³²⁸

This made the case easy. Because the case had come from a state court, there was already a ruling below that the arrest complied with state law.³²⁹ Justice Clark deferred to that decision, and he then concluded that the arrest also satisfied Fourth Amendment reasonableness standards.³³⁰

Justice Brennan dissented on that point.³³¹ He phrased the issue, as presented by the plurality, as being whether the court should “defer to state law in gauging the validity of an arrest under the Fourth Amendment.”³³² This was proper when the state law did not violate the Constitution, Justice Brennan asserted.³³³ But in his view, the California arrest law’s standards were insufficient: “Since the California law of arrest here called in question patently violates the Fourth Amendment, that law cannot constitutionally provide the basis for affirming these convictions.”³³⁴

³²⁵ *Id.* at 29–30.

³²⁶ See *People v. Ker*, 195 Cal. App. 2d 246, 257 (1961) (citing *Mapp*, 367 U.S. 643) (noting the change in the law triggered by *Mapp* while the case was on appeal).

³²⁷ See *Ker*, 374 U.S. at 44–46 (Harlan, J., concurring in the result).

³²⁸ *Id.* at 37 (Clark, J.) (plurality opinion).

³²⁹ See *People v. Ker*, 195 Cal. App. 2d at 255–56.

³³⁰ See *Ker*, 374 U.S. at 37–38, 40–41 (Clark, J.) (plurality opinion).

³³¹ *Id.* at 64 (Brennan, J., concurring in part and dissenting in part).

³³² *Id.* at 62.

³³³ *Id.*

³³⁴ *Id.* at 62–63.

*F. Why Supreme Court History No Longer Provides
Useful Guidance on Cross-Enforcement*

Why does all of this history matter? It matters because it shows that the Supreme Court has never answered how the Fourth Amendment should deal with cross-enforcement in the post-*Mapp* era. The old cases were based on a different world. It was a world in which the Fourth Amendment applied only to the federal government; in which subjective intent mattered; and in which authorization was required to make conduct lawful under the Fourth Amendment. When we look closely at the cases in historical context, we can see that they have no obvious relevance in a world in which all three of the pre-*Mapp* principles have been overturned.³³⁵

Because so much has changed in Fourth Amendment law, modern efforts to interpret early case law take their holdings far out of context. As explained in Part I, some of those lower court cases look to the quartet of search-incident-to-arrest cases and see a standard that state law controls cross-enforcement by state agents. Other lower court cases look to early Supreme Court precedents for the idea that federal authority is required to trigger the border search exception. Whatever the normative merits of these rules, however, their precedential support is not what it seems. They are drawing holdings from a lost era in which authorization was required for all searches and seizures. The holdings of those cases made sense only in that context; they were simply applications of that now-defunct general rule.

Trying to deduce modern principles from the early cases is particularly risky because intervening changes have altered the consequence of cross-enforcement. Consider cross-enforcement up. Before the incorporation of the Fourth Amendment, the federal Fourth Amendment acted as a limit on a state officer's power. The fact that officers were enforcing federal law (at federal instruction) meant that the added restrictions of the Fourth Amendment applied to their acts. Post-*Mapp*, however, the opposite is true. Under *Mapp*, it is a given that the Fourth Amendment applies. Now a state officer's enforcement of federal law gives the officer additional power. If a state officer can cross-enforce federal law, the officer can conduct searches and seizures justified by suspicion of federal law violations when the officer's acts would be illegal otherwise. Incorporation flips the role of the doctrine. Cross-enforcement up once was the citizen's sword. Now it is the police officer's shield.

Even the common idea that cross-enforcement hinges on state law, rooted in modern interpretations of *Di Re*, is based on a fundamental misunderstanding. Our close look at *Di Re* shows that *Di Re* did not

³³⁵ True, one of the four cases postdated *Mapp*: *Ker v. California* was decided two years after it. 374 U.S. 23 (1963). But in addition to not reaching a majority opinion, the Justices in *Ker* never paused to consider whether the language from pre-*Mapp* case law still made conceptual sense after *Mapp*.

rule that state law applies for federal arrests. Rather, the Court assumed that *Congress* controlled the lawfulness of federal arrests for purposes of the search-incident-to-arrest doctrine — but that in the absence of an answer from Congress, the federal statutory tradition of using state law procedures controlling federal arrests made state law a default standard. Justice Jackson’s nuanced and contextual ruling in *Di Re* has been misunderstood because its background assumptions became so foreign. The modern misunderstanding is something like a game of judicial telephone, in which *Di Re*’s holding and its meaning have been lost over time.

The irrelevance of the Court’s older precedents is equally true if you see the authorization cases as based in the federal supervisory power instead of the Fourth Amendment. That was the view of the Justices in *Moore*. Writing for the Court, Justice Scalia dismissed the relevance of *Di Re* and *Johnson* on the ground that they were not Fourth Amendment decisions at all.³³⁶ According to Justice Scalia, the *Di Re* decision “rested on our supervisory power over the federal courts, rather than the Constitution.”³³⁷ That must have been the case, Justice Scalia reasoned, because the case had stated that Congress could, if it wanted to, enact an arrest statute that would control the lawfulness of the arrest.³³⁸ The possibility of statutory reform indicated that *Di Re* was “plainly not a rule we derived from the Constitution.”³³⁹ In a concurrence, Justice Ginsburg expressed the view that *Di Re* was “somewhat difficult to parse” but agreed that *Di Re* had adopted “a choice-of-law rule not derived from the Constitution.”³⁴⁰ If *Di Re* and its progeny are not even considered Fourth Amendment cases, then presumably they shed no light on the Fourth Amendment law of cross-enforcement.

To be sure, it seems clear from our detailed look at *Di Re* that it was a Fourth Amendment decision: the *Moore* Court was simply wrong to see it as a supervisory powers case. *Di Re*’s focus on congressional control reflected an understanding that Congress impliedly intended for

³³⁶ See *Virginia v. Moore*, 553 U.S. 164, 172–73 (2008).

³³⁷ *Id.* at 172 (citing *United States v. Di Re*, 332 U.S. 581 (1948)).

³³⁸ See *id.* at 172–73 (quoting *Di Re*, 332 U.S. at 589, 589–90).

³³⁹ *Id.* at 172 (“This was plainly not a rule we derived from the Constitution, however, because we repeatedly invited Congress to change it by statute — saying that state law governs the validity of a warrantless arrest ‘in [the] absence of an applicable federal statute,’ and that the *Di Re* rule applies ‘except in those cases where Congress has enacted a federal rule.’” *Id.* at 172–73 (alteration in original) (internal citations omitted) (quoting *Di Re*, 332 U.S. at 589, 589–90)).

³⁴⁰ *Id.* at 179 n.2 (Ginsburg, J., concurring). The Court has also suggested that *Miller* may be about the federal supervisory power instead of the Fourth Amendment. In *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), the Court noted that although “*Miller* is not clear about its authority for requiring suppression,” there was some authority that it was an advisory power case. *Id.* at 346 (citing *Ker*, 374 U.S. at 31). The thinking would presumably be that *Miller* had suppressed evidence for a statutory violation even though the statute had no suppression remedy. The source of the exclusionary remedy, it might wrongly appear, is the exercise of supervisory powers.

state arrest standards to govern authorization in the absence of a federal statute identifying different federal standards. Some source of law had to govern authorization, under the law at the time, and that was ultimately a question for Congress to address. *Moore* simply didn't realize that this doctrinal world existed. Because the supervisory powers doctrine is the only judge-made criminal procedure doctrine familiar to the modern Supreme Court that gives ultimate control to Congress,³⁴¹ the *Moore* Court simply assumed that *Di Re* must be such a case. But whether the Justices were right or wrong,³⁴² the early cases shed little or no light on the proper standards for cross-enforcement after *Mapp v. Ohio*.

The challenge, then, is to develop an approach to cross-enforcement that can “rest on its own bottom”³⁴³ in the world of the modern Fourth Amendment. The next Part takes up that challenge.

III. A PROPOSAL FOR FOURTH AMENDMENT CROSS-ENFORCEMENT

This Part offers a normative proposal to resolve when the Fourth Amendment permits officers to search or seize based on a different jurisdiction's criminal law. It argues that the legality of cross-enforcement under the Fourth Amendment should depend on whether the government that enacted the criminal law to be enforced has authorized it. Officers should have the power to search and seize based on violations of a government's law only when the enacting government has authorized those officers to take that kind of enforcement action.

Authorization of the enacting government is critical because the enacting government controls the government interests that form the justification for Fourth Amendment reasonableness standards. Fourth Amendment reasonableness balances the advancement of government interests against the intrusion of the government's acts. An officer

³⁴¹ See *United States v. McNaughton*, 848 F. Supp. 1195, 1204 (E.D. Pa. 1994) (stating that “a federal court's general supervisory powers . . . are subject to the control of Congress” (citing *United States v. Crook*, 502 F.2d 1378, 1380–81 (3d Cir. 1974))).

³⁴² Notably, the Supreme Court recently relied on *Di Re* as a Fourth Amendment precedent in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), for the view that a “basic guidepost[]” of interpreting the Fourth Amendment was to recognize the Framers' aim that it should “place obstacles in the way of a too permeating police surveillance.” *Id.* at 2214 (quoting *Di Re*, 332 U.S. at 595); see also *id.* at 2223 (quoting *Di Re*, 332 U.S. at 595) (making a similar point). Before *Carpenter*, separate opinions in *Arizona v. United States*, 567 U.S. 387 (2012), also cited *Di Re* as a Fourth Amendment decision. See *id.* at 438 (Thomas, J., concurring in part and dissenting in part) (citing *Di Re*, 332 U.S. at 589, for the view that “States, as sovereigns, have inherent authority to conduct arrests for violations of federal law, unless and until Congress removes that authority”); *id.* at 447 (Alito, J., concurring in part and dissenting in part) (citing *Miller v. United States*, 357 U.S. 301, 305 (1958), and *Di Re*, 332 U.S. at 589, for the view that “state and local officers generally have authority to make stops and arrests for violations of federal criminal laws”).

³⁴³ *Riley v. California*, 134 S. Ct. 2473, 2489 (2014).

should be permitted to invoke a legal standard based on a different government's interests only when that government has recognized that enforcement as genuine and legitimate. Permitting cross-enforcement without authorization would permit an officer to piggyback on government interests that his searches and seizures are unlikely to advance. Authorization provides the best signal that an officer's conduct genuinely advances the government interests that justify it.

When a government is silent on who can enforce its laws, questions of constitutional history and structure justify different presumptions. State officers should be allowed to search or seize to enforce federal criminal laws unless Congress has forbidden it. On the other hand, federal officers should not be allowed to search or seize to enforce state laws unless state statutory or case law affirmatively allows it. In either case, the Fourth Amendment rule should be based on express or implied authorization from the government that enacted the criminal law that provided the cause to search or seize.

This does not mean governments are powerless to control their own officers. If a government wants to stop its officers from helping another government enforce its laws, it has several legislative tools to do so. Indeed, the range of legislative tools suggests a sort of Coasean aspect to cross-enforcement: no matter what the initial Fourth Amendment rule is, legislatures may be able to legislate around that default rule to arrive at the institutional settlement they prefer for the role of their own officers. The limits of those settlements raise some potentially complex and novel questions about the scope of state and federal power.

A. *The Interest Balancing of Fourth Amendment Reasonableness*

The first step to developing a proper law of Fourth Amendment cross-enforcement is recognizing that the issue arises in the context of determining the constitutional reasonableness of searches and seizures. Fourth Amendment law generally breaks down into three basic questions. First, what is a search or seizure? Second, when are searches and seizures constitutionally unreasonable? And third, what legal remedies follow from unreasonable searches and seizures?³⁴⁴ Cross-enforcement implicates the second question. An officer who has conducted a search or seizure will try to justify it as reasonable based on a violation of a different jurisdiction's law. Fourth Amendment law typically requires "some quantum of individualized suspicion"³⁴⁵ that a law was violated to render a search or seizure reasonable. Cross-enforcement asks

³⁴⁴ See, e.g., Orin S. Kerr, *The Effect of Legislation on Fourth Amendment Protection*, 115 MICH. L. REV. 1117, 1123–24 (2017) (discussing the three basic questions addressed by Fourth Amendment law).

³⁴⁵ *Delaware v. Prouse*, 440 U.S. 648, 654–55 (1979) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976)).

whether an officer employed by one jurisdiction can rely on the evidence that another jurisdiction's law was violated to establish the reasonableness of the search or seizure.

Answering that question requires understanding that the reasonableness inquiry generally acts as a rough cost-benefit test.³⁴⁶ To arrive at a rule governing reasonableness in a specific context, the Supreme Court generally “balance[s] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.”³⁴⁷ “Absent more precise guidance from the founding era,”³⁴⁸ if the “promotion of legitimate governmental interests” advanced by the “particular law enforcement practice” outweighs “its intrusion on the individual's Fourth Amendment interests,” the search or seizure is reasonable.³⁴⁹

The Supreme Court's rules on reasonableness usually implement this balancing through categorical rules.³⁵⁰ When the government's claimed interest is in enforcing its criminal laws, for example, government searches and seizures typically require a warrant based on probable cause.³⁵¹ The notion is that probable cause to believe that evidence of a crime will be obtained — or in the case of an arrest, probable cause that a criminal will be detained — sufficiently advances the government's legitimate interest in enforcing its criminal laws and outweighs the corresponding privacy and security invasions of the search or seizure.³⁵²

Of course, we can always debate whether the Supreme Court's weighing of the competing interests is accurate.³⁵³ And even a plausible categorical balancing in the general run of cases will be incorrect in particular instances.³⁵⁴ But the fundamental principle of reasonableness doctrine in Fourth Amendment law is that the Court permits searches

³⁴⁶ See Orin S. Kerr, *An Economic Understanding of Search and Seizure Law*, 164 U. PA. L. REV. 591, 620–24 (2016).

³⁴⁷ *United States v. Place*, 462 U.S. 696, 703 (1983).

³⁴⁸ *Riley*, 134 S. Ct. at 2484.

³⁴⁹ *Prouse*, 440 U.S. at 654.

³⁵⁰ See, e.g., *Michigan v. Summers*, 452 U.S. 692, 705 n.19 (1981) (“[I]f police are to have workable rules, the balancing of the competing interests . . . ‘must in large part be done on a categorical basis — not in an ad hoc, case-by-case fashion by individual police officers.’” (quoting *Dunaway v. New York*, 442 U.S. 200, 219–20 (1979) (White, J., concurring))).

³⁵¹ See, e.g., *Camara v. Mun. Court*, 387 U.S. 523, 528–29 (1967) (noting that in the ordinary case, “a search of private property without proper consent is ‘unreasonable’ unless it has been authorized by a valid search warrant”).

³⁵² See *id.* at 534–35.

³⁵³ See, e.g., Shima Baradaran, *Rebalancing the Fourth Amendment*, 102 GEO. L.J. 1 (2013) (asserting such arguments).

³⁵⁴ See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318, 346–47 (2001) (permitting an arrest for the very minor offense of a seatbelt violation, and recognizing that “[i]f we were to derive a rule exclusively to address the uncontested facts of this case, [the arrestee] might well prevail,” *id.* at 346, because her “claim to live free of pointless indignity and confinement clearly outweighs anything the [government] can raise against it specific to her case,” *id.* at 347).

and seizures when the public interest they tend to advance is greater than the civil liberties harms they tend to impose.

Under this balancing framework, the government's power to search or seize depends on the government interests promoted by the search or seizure. The introduction of government interests beyond the enforcement of criminal laws justifies greater search or seizure powers. Consider the law of automobile traffic stops. The Supreme Court has held that the police can pull over a car based on probable cause to believe that the driver has violated any civil traffic law.³⁵⁵ The stop "justifies a police investigation of that violation"³⁵⁶ while the car and its occupants are seized "to address the traffic violation that warranted the stop and attend to related safety concerns."³⁵⁷ The legitimate government interest in "ensuring that vehicles on the road are operated safely and responsibly"³⁵⁸ justifies a broad government power to pull over cars and detain drivers even for the most minor and common civil traffic infractions.³⁵⁹ The government interest in safety, which is distinct from the government interest in enforcing criminal laws, justifies a broad power to make traffic stops even when no criminal law has been violated and no warrant obtained.

Why does this matter for the law of cross-enforcement? It matters because a cross-enforcing officer necessarily invokes the government interest of a different jurisdiction to justify the officer's search or seizure. The officer will seek to rely on a reasonableness rule created to balance promotion of a different government's interests against the typical Fourth Amendment intrusion of the act. Under the reasonableness balance based on the government interests of the officer's employer, the act's costs will have been construed to exceed the government benefit. The question is, when can the officer invoke the government interests of a different government so that the public benefits of the act are construed, as a matter of law, to exceed its costs?

*B. When Should Officers Be Allowed to Invoke
the Government Interest of Another Government?*

Let's take a first crack at answering the question by proposing an ideal answer. The ideal answer to when an officer can invoke a different government's interest in enforcing the law should be when the officer's action genuinely advances that interest. When the officer's search or seizure genuinely advances the foreign jurisdiction's interest, the cross-

³⁵⁵ *Whren v. United States*, 517 U.S. 806, 819 (1996) (holding that "probable cause justifies a search and seizure" in the context of a civil traffic offense).

³⁵⁶ *Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015).

³⁵⁷ *Id.* (internal citations omitted).

³⁵⁸ *Id.* at 1615.

³⁵⁹ *See Whren*, 517 U.S. at 808–10, 819.

enforcement ideally should get the benefit of the rule balancing that interest. On the other hand, when the search or seizure does not advance that foreign government's interest, reasonableness should be measured only by the reference point of the officer's home law.

This answer is ideal because it preserves the cost-benefit function of reasonableness doctrine. Allowing an officer to cross-enforce when his search or seizure does not actually advance the interest of the different jurisdiction permits the costs of the act to be imposed without the benefits claimed to justify it. It allows a phantom government benefit to justify an act that should be recognized as impermissible based on the actual government interests the conduct advances. Put another way, cross-enforcement when the different government's interest is not actually implicated amounts to a false claim of public benefit used to make a harmful search or seizure appear in the public interest.

Consider the hypothetical of a federal border patrol agent who wants to pull over a car for speeding based on his hunch that the car contains undocumented immigrants. As noted earlier, the state has an important interest in enforcing the state traffic code to ensure safe driving on state roads.³⁶⁰ The Fourth Amendment grants state officers broad powers to advance that state interest, including the power to pull over any speeding cars.³⁶¹ At the same time, a federal border patrol officer presumably has no genuine interest in enforcing the state's traffic code. The federal agent won't and probably can't issue a ticket for that state offense.³⁶² Instead, he presumably seeks only to advance the federal interest in immigration enforcement. Considering federal interests alone, reasonableness doctrine would say that the federal agent's mere hunch that the car contains undocumented immigrants is not enough to justify the stop to enforce federal immigration law.³⁶³ If the federal agent has no genuine interest in enforcing state law, why should the existence of a different government's interest change the calculus?

If this is the ideal answer, the challenge is figuring out how to approximate it in practice. How should we determine when cross-enforcement actually furthers the government interest of the different government? On one hand, *Whren v. United States*³⁶⁴ suggests that we cannot use the officer's subjective intent as the guide. In *Whren*, the Supreme Court

³⁶⁰ *Rodriguez*, 135 S. Ct. at 1615; *Delaware v. Prouse*, 440 U.S. 648, 658 (1979) ("We agree that the States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed.").

³⁶¹ *Whren*, 517 U.S. at 819.

³⁶² See *United States v. Juvenile Female*, 566 F.3d 943, 948 (9th Cir. 2009).

³⁶³ See *id.* Under the federal interest standard, the officer would need reasonable suspicion that a federal immigration crime had been committed that would justify a stop under the principles of *Terry v. Ohio*, 392 U.S. 1 (1968).

³⁶⁴ 517 U.S. 806.

rejected the claim that the officer's subjective reason for making a traffic stop can invalidate its objective reasonableness.³⁶⁵ Under the categorical rules of Fourth Amendment law, probable cause to believe that a traffic law was violated justifies a stop "whatever the subjective intent" of the officer.³⁶⁶ The reasonableness of a search or seizure ordinarily depends on the quantum of suspicion the officers had to justify the stop, not the "actual motivations of the individual officers involved."³⁶⁷ In light of *Whren*, a Fourth Amendment cross-enforcement test presumably cannot hinge on whether the officer subjectively intended to advance the different government's interest.

With that said, *Whren* does not foreclose articulating objective tests that distinguish real government interests from false ones. Such tests are routine in Fourth Amendment law. Consider the law of searches incident to arrest. In *Arizona v. Gant*,³⁶⁸ the Court narrowly tailored the government's power to search a car incident to a recent occupant's arrest because a broad rule would not further "genuine safety or evidentiary concerns" and would merely "provide a police entitlement."³⁶⁹ Allowing officers to routinely search a car after arresting its driver or passengers would not be necessary to advance "law enforcement safety and evidentiary interests" because those interests were already protected by other exceptions to the warrant requirement.³⁷⁰ The scope of government power was limited by the Court's assessment of the "genuine" government interest advanced by the proposed broad rule.³⁷¹

Similarly, in *Riley v. California*,³⁷² the Court rejected an exception to the warrant requirement for searching cell phones incident to arrest in part on the ground that the government's interest in preserving evidence was too speculative to justify a rule protecting it.³⁷³ The Court weighed the claim of government interest with skepticism, finding it wanting in light of technological and legal alternatives.³⁷⁴ As these cases suggest, *Whren*'s rejection of subjective intent as a test to invalidate pretextual searches does not stop courts from crafting objective rules that limit government powers to the promotion of "genuine" and "legitimate" government interests.

³⁶⁵ *Id.* at 813 ("We think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved. . . . Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.")

³⁶⁶ *Id.* at 814.

³⁶⁷ *Id.* at 813.

³⁶⁸ 556 U.S. 332 (2009).

³⁶⁹ *Id.* at 347.

³⁷⁰ *Id.* at 346.

³⁷¹ *Id.* at 347.

³⁷² 134 S. Ct. 2473 (2014).

³⁷³ *See id.* at 2485–88.

³⁷⁴ *See id.*

*C. Authorization of the Enacting Jurisdiction as the
Key to Cross-Enforcement*

This brings us to my proposed framework: Officers should be permitted to cross-enforce a jurisdiction's criminal law when that jurisdiction has authorized the officer to enforce that law. When the government whose law is being enforced has explicitly or implicitly authorized the enforcement, an authorized officer should be permitted to rely on the violation of that jurisdiction's law to search or seize. In short, the power to control cross-enforcement under the Fourth Amendment should rest on the decision of the government that enacted the law enforced.

Put aside, for now, the tricky question of what constitutes a proper authorization. Instead, let's consider why the enacting jurisdiction's authorization is the proper focus. The enacting jurisdiction should control cross-enforcement, in my view, because the government that creates the interest in enforcement should retain control of who exercises it. Fourth Amendment doctrine relies on a government's decision to prohibit conduct as a basis for measuring the government's interest in a search or seizure. In cross-enforcement matters, who is better to answer whose search or seizure advances the government's interest than the government itself? The government that created the criminal law has the interest in its enforcement, and the government with the interest in its enforcement can best answer whose searches and seizures are "genuine" and advance that "legitimate" interest.

Of course, the enacting government can't know if a particular search by a particular officer will actually advance the government's interest. But Fourth Amendment doctrine generally focuses on categorical rules rather than individual cases.³⁷⁵ Governments that enact criminal laws must always rely on agents to collect evidence that can advance the public interest in the laws' enforcement.³⁷⁶ This designation is ordinarily controlled by the government that creates the laws to enforce. In the easy case, a government will hire full-time employees dedicated to enforcing its laws. This will be uncontroversial direct enforcement instead of cross-enforcement. But there is no reason that the enforcement power must be vested only in full-time employees. Temporary or volunteer agents can be just as much agents of the government as salaried employees.

³⁷⁵ See *Michigan v. Summers*, 452 U.S. 692, 705 n.19 (1981) ("[I]f police are to have workable rules, the balancing of the competing interests . . . 'must in large part be done on a categorical basis — not in an ad hoc, case-by-case fashion by individual police officers.'" (quoting *Dunaway v. New York*, 442 U.S. 200, 219–20 (1979) (White, J., concurring))).

³⁷⁶ See Kerr, *supra* note 346, at 598 ("The role of search and seizure law can be helpfully understood as a response to a principal-agent problem created by this arrangement. The public, acting through its elected officials, hires the police to investigate and solve crimes to achieve benefits such as deterrence, retribution, and incapacitation." (footnotes omitted) (citations omitted)).

From this perspective, there is nothing unique about cross-enforcement. A government most often gives enforcement power to agents by hiring them as employees. But the enforcement power is not all-or-nothing. Governments can grant enforcement power to private parties, such as through the citizen's arrest power.³⁷⁷ Governments can deputize individuals to act temporarily on their behalf.³⁷⁸ What matters is whether the government has authorized the enforcement. Authorization triggers the "genuine" enforcement power that Fourth Amendment law recognizes as "legitimate," justifying reliance on the reasonableness doctrine that accounts for that interest.

But is this standard consistent with *Virginia v. Moore*?³⁷⁹ Recall that *Moore* held that violation of a statutory limit of an officer's arrest power does not change whether the officer's conduct is reasonable under the Fourth Amendment. Virginia local officers had arrested Moore for driving without a license in violation of a Virginia state law that did not permit arrests for that offense.³⁸⁰ The Court held that "while States are free to regulate such arrests however they desire, state restrictions do not alter the Fourth Amendment's protections."³⁸¹

Moore is consistent with my authorization standard because both approaches are rooted in the same government interest analysis. *Moore* teaches that a categorical rule of Fourth Amendment law already provides the "calculus"³⁸² that balances the relevant Fourth Amendment interests for an arrest. An arrest based on probable cause is reasonable under the Fourth Amendment, *Moore* reasoned, because the established rule balanced privacy interests and "the promotion of legitimate governmental interests"³⁸³ to permit arrests whenever "an officer has probable cause to believe a person committed even a minor crime in his presence."³⁸⁴ The state's interest is reflected in the crime itself, and the probable cause standard already measures how much an arrest promotes that interest. A limitation on whether a state officer could make an arrest for a violation of state law was merely "a State choos[ing] to

³⁷⁷ See generally BASSIOUNI, *supra* note 109.

³⁷⁸ See Paul J. Larkin, Jr., *Deputizing Federal Law Enforcement Personnel Under State Law*, HERITAGE FOUND. LEGAL MEMORANDUM NO. 209 (July 12, 2017), https://www.heritage.org/sites/default/files/2017-07/LM-209_1.pdf [<https://perma.cc/PGN2-QGM9>] (discussing federal-state task forces and cooperation and the role of deputizing officials from other jurisdictions).

³⁷⁹ 553 U.S. 164 (2008).

³⁸⁰ See *id.* at 166–67.

³⁸¹ *Id.* at 176.

³⁸² *Id.* at 171.

³⁸³ *Id.* (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

³⁸⁴ *Id.*

protect privacy beyond the level that the Fourth Amendment requires³⁸⁵ that did not “change[] the nature of the Commonwealth’s interests for purposes of the Fourth Amendment.”³⁸⁶

My proposed approach deals with an antecedent question: When should a person’s search or seizure trigger the categorical balancing of interests that *Moore* recognizes? The arresting officers in *Moore* were police officers for a Virginia city ultimately responsible to and a part of the state.³⁸⁷ The unlawful nature of the arrest did not render the arrest ultra vires: the officers remained state agents even when they exceeded statutory limits on their conduct.³⁸⁸ Because the officers were agents of the state, the interests advanced by their seizures were understandably evaluated by reference to the categorical Fourth Amendment standard that balances the promotion of the government’s interest in the arrest with the infringement on the individual’s freedom.³⁸⁹

Cross-enforcement raises the different problem of whether an officer is an agent of the government who can trigger its interests at all. An officer who is not authorized to act as an agent of a government does not search or seize in furtherance of that government’s interests. As an outsider to the government’s interests, the unauthorized officer does not act with the genuine and legitimate interests of the government at issue in the reasonableness balancing. Because authorization to enforce the law triggers the legitimate enforcement interest, an employee of the government promotes the Fourth Amendment interest regardless of statutory limits while an officer not authorized to enforce the law at all does not.

From this perspective, *Moore* is inapposite. *Moore* deals with the Fourth Amendment implications of an officer whose acts are attributable to the government regardless of whether the officer complies with

³⁸⁵ *Id.*

³⁸⁶ *Id.* at 174–75.

³⁸⁷ The arresting officers worked for the City of Portsmouth. *Id.* at 166. A city officer enforcing state law is not engaged in cross-enforcement because city law enforcement exercises delegated state law police power. See Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1063 (1980) (“State law, in short, treats cities as mere ‘creatures of the state.’”). For example, a Virginia city officer exercises state power delegated to the city, making him in effect a state officer. See *Richmond, F. & P. R. Co. v. City of Richmond*, 133 S.E. 800, 806 (Va. 1926) (“[T]he state may delegate to a city the exercise of so much of its police power within its limits as it may see fit . . .”). For that reason, an individual city officer who violates the Fourth Amendment can be sued under 42 U.S.C. § 1983, just as an individual state officer can, for acting “under color of any statute, ordinance, regulation, custom, or usage, of any State.” 42 U.S.C. § 1983 (2012); see also *Monroe v. Pape*, 365 U.S. 167, 192 (1961) (holding that City of Chicago officers could be held liable for violating § 1983).

³⁸⁸ But see Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 660–63 (1999) (arguing that the original public understanding of the Fourth Amendment was that an officer’s acts in violation of the Fourth Amendment were ultra vires).

³⁸⁹ See *Moore*, 553 U.S. at 176 (holding that “warrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Constitution, and that while States are free to regulate such arrests however they desire, state restrictions do not alter the Fourth Amendment’s protections”).

limits on his power. Cross-enforcement deals with the Fourth Amendment implications of granting special powers to foreign agents whose acts are not otherwise attributable to that government.

D. Identifying Authorization and Assigning Authorization Defaults

If the reader agrees with my proposal so far, I will consider this Article a success. But my proposed authorization test is easier to state than to apply. An important question to consider is which government acts count as authorization. Two kinds of acts should suffice, in my view. First, at a macro level, statutory authorization should be sufficient to confer the power of cross-enforcement on a general class of officers. Second, at a micro level, the executive's authorization extended to a particular officer in a particular case should be sufficient as well, at least where not disallowed by statutory law. This section justifies those two authorization standards and then explores the question of what defaults should be applied when authorization is unclear.

Statutory authorization should be sufficient to trigger an enforcement interest because it reflects the same mechanism that controls the government interest in criminal law enforcement. A basic premise of Fourth Amendment balancing is that the legislature's decision to criminalize conduct creates a government interest promoted by searches and seizures to collect evidence of that crime. If the legislature can determine what evidence furthers its interests, it should also be able to determine which officers further its interests in collecting that evidence. As a result, statutory authorization expressly permitting cross-enforcement should constitute a valid authorization empowering the cross-enforcing officers to search and seize within the scope of the authorization.

Texas state law provides a helpful example of what express authorization looks like. The Texas Code of Criminal Procedure is admirably clear on who can enforce its laws. First, Texas law gives full power to enforce Texas criminal law to thirty-five categories of state and local officials defined as "peace officers."³⁹⁰ Second, Texas law has an explicit cross-enforcement down provision that gives the status of "special investigators" to federal agents from fourteen agencies, including the FBI and the United States Secret Service, granting them "the powers of arrest, search, and seizure under the laws of this state as to felony offenses only."³⁹¹ Finally, Texas law includes a horizontal cross-enforcement provision giving state officers from other states the powers of Texas peace officers subject to certain limitations while in Texas.³⁹² These explicit

³⁹⁰ See TEX. CODE CRIM. PROC. ANN. art. 2.12 (West 2005 & Supp. 2017) (defining "peace officers"); *id.* art. 2.13 (giving peace officers the right and duty to "use all lawful means" to "preserve the peace within the officer's jurisdiction," including "to prevent or suppress crime").

³⁹¹ *Id.* art. 2.122(a).

³⁹² *Id.* art. 2.124.

provisions should govern the law of Fourth Amendment cross-enforcement of Texas state law.³⁹³

Outside of statutory authorization, it should also be proper for the executive to grant case-by-case authorization, at least where not prohibited by the jurisdiction's law. The executive branch ordinarily does its own hiring, extending the authorization power of the government to those made employees of the government. The same branch of government should have some analogous power to control cross-enforcement in individual cases unless the government has affirmatively negated that power. For example, a state attorney general might deputize a federal agent and extend the enforcement power to him for purposes of a particular case.³⁹⁴ At least where the legislature has not prohibited the individual authorization, the attorney general's legal authority to hire officers for the state implies a lesser power to deputize officers to engage in cross-enforcement.

The next difficult question is how to interpret legislative silence. Many legislatures have only sparse rules on who can enforce their laws. This raises an important question: Should legislative silence on cross-enforcement be deemed assent to it, or should some affirmative law permitting cross-enforcement be required?

In my view, the default should be different for different kinds of cross-enforcement because of history and constitutional structure. On one hand, statutory silence from Congress should be deemed assent to state enforcement of federal law. On the other hand, some affirmative law should be required from the state legislature or the common law for federal agents to cross-enforce state law. In other words, cross-enforcement up should be presumed valid unless affirmatively forbidden. Cross-enforcement down should be presumed invalid unless affirmatively approved. Finally, I express no view on the default rule for horizontal cross-enforcement because it appears that the issue does not come up in practice.

Let's begin with cross-enforcement up. Here there is a long history of cross-enforcement in the absence of specific statutory permission.

³⁹³ A similarly clear situation arises when state, local, and federal agents work together in joint narcotics task forces. Such task forces informally began with the Drug Enforcement Administration in 1970 and were formalized in a 1986 statute. *Task Forces*, U.S. DRUG ENF'T ADMIN., <https://www.dea.gov/task-forces> [<https://perma.cc/8UBH-BYDT>]. The federal enacting statute says that "[s]tate, tribal, or local law enforcement officer[s] designated by the Attorney General" have the same authority to enforce federal narcotics laws as does a federal narcotics agent. 21 U.S.C. § 878(a) (2012). State statutes mirror the federal statute, extending state enforcement power to federal agents in such task forces. *See, e.g.*, ME. REV. STAT. ANN. tit. 25, § 1502-A (Supp. 2017).

³⁹⁴ *Cf., e.g.*, MICH. COMP. LAWS ANN. § 780.561 (West 2007) ("The attorney general may deputize any person regularly employed by another state for such purposes to act as an officer and agent of this state in effecting the return of any person who has violated the terms and conditions of parole as imposed by this state.").

Since the time of the Founding, Congress has looked to state and local law enforcement to help enforce federal criminal laws. The federal law enforcement apparatus began as quite limited, and it naturally relied on the broad powers of the states. As Judge Hand emphasized in *Marsh v. United States*, it was the “universal practice of police officers in New York to arrest for federal crimes.”³⁹⁵

This history is bolstered by constitutional structure. As Judge Hand also noted in *Marsh*, the Supremacy Clause “makes all laws of the United States the supreme law of the land.”³⁹⁶ Further, the command of federal law is “as valid a command within the borders of [a state] as one of its own statutes.”³⁹⁷ This creates a presumption that a state is properly “concerned with the apprehension of offenders against laws of the United States, valid within her borders, though they cannot be prosecuted in her own courts.”³⁹⁸ The presumption of state interest in federal enforcement supports a presumption that searches and seizures by state officers trigger federal interests recognized by Fourth Amendment reasonableness.

Granted, this history of cross-enforcement up is not necessarily *Fourth Amendment* history. As Part II showed, the Fourth Amendment history of cross-enforcement came much later. Nonetheless, the long history of permitting cross-enforcement up weighs in favor of a constitutional presumption permitting it. Here we can recall the lessons of *Di Re*. At a time when Congress had not yet legislated arrest powers, the Supreme Court permitted cross-enforcement by looking to state authorities on the presumption that Congress would have looked to state law rules. That approach suggests a historical reliance on cross-enforcement up that justifies a presumption in its favor even in the absence of explicit statutory authorization. If Congress has said nothing about whether state officers can enforce a particular set of criminal laws, Congress’s silence should be deemed assent to state cross-enforcement.

In my view, the opposite presumption should apply to cross-enforcement down. Federal officers should be presumed unable to cross-enforce state law unless there is some affirmative grant of state power, either by statute or common law rule, to do so. A presumption against cross-enforcement down is justifiable on two grounds, one structural and the other historical.

The structural reason not to presume power to cross-enforce down is that it would amount to an enormous grant of constitutional authority to search and seize that should not be lightly presumed. The states have

³⁹⁵ 29 F.2d 172, 173 (2d Cir. 1928).

³⁹⁶ *Id.* at 174.

³⁹⁷ *Id.*

³⁹⁸ *Id.*

the general police power,³⁹⁹ while the federal government has only limited powers to enact criminal laws drawn from specific grants of constitutional authority.⁴⁰⁰ As a result, the scope of state criminal law is typically far broader than federal law. Of course, states penalize the traditional common law *malum in se* crimes, such as murder, theft, and robbery.⁴⁰¹ But state criminal laws also regulate an extraordinary range of day-to-day affairs, ranging from traffic to local noise to student misconduct at public schools.

The broad scope of state criminal law means that allowing any federal officer to enforce any state law by default, without express authorization, would dramatically expand the search and seizure power of federal agents.⁴⁰² As a few lower courts have recognized, allowing federal agents to cross-enforce state law by default “would, in effect, give [federal agents] the general police power that the Constitution reserves to the States.”⁴⁰³

A rule requiring affirmative authorization from states for cross-enforcement down also generally accords with history and practice. The history of federal officers enforcing state laws is much more sparse than that of state officers enforcing federal laws. In part this may result from federal officers themselves being more rare. Federal law enforcement was quite limited until the twentieth century. But it also reflects the constitutional design that states had the general police power while federal officers served narrow roles. It is consistent with that design to require affirmative approval from states to grant law enforcement power to search and seize to federal agents. Further, to the extent the existing cases have a majority view, it is that some affirmative state authorization is required for federal officers to cross-enforce state criminal law. It is at least possible that some state legislatures have legislated with that background rule in mind, suggesting that maintaining the status quo may avoid upsetting expectations about the governing rule.

E. The Role of an Officer's Home Jurisdiction's Law

Under the approach outlined above, the enacting jurisdiction determines whether an officer can cross-enforce that government's criminal law under the Fourth Amendment. Governments have the power to determine who can search and seize based on violations of their laws.

³⁹⁹ Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 535–36 (2012) (“The States thus can and do perform many of the vital functions of modern government — punishing street crime, running public schools, and zoning property for development, to name but a few — even though the Constitution's text does not authorize any government to do so. Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the ‘police power.’” (citation omitted)).

⁴⁰⁰ See *id.*

⁴⁰¹ See PETER W. LOW, CRIMINAL LAW 86–88 (3d ed. 2007).

⁴⁰² United States v. Juvenile Female, 566 F.3d 943, 948 (9th Cir. 2009).

⁴⁰³ *Id.* (quoting United States v. Perkins, 166 F. Supp. 2d 1116, 1126 (W.D. Tex. 2001)).

This does not mean that an officer's home jurisdiction is powerless, however. To be sure, an officer's home jurisdiction cannot change the Fourth Amendment answer to whether its officers can cross-enforce another government's laws. But home jurisdictions retain the power to enact laws that can partially or entirely block cross-enforcement by means outside the Fourth Amendment.

This power is entirely appropriate because home jurisdictions may have valid reasons to oppose their officers being used to cross-enforce another government's law even when such searches and seizures would be reasonable under the Fourth Amendment. Fourth Amendment reasonableness doctrine uses categorical rules that defer to the legislative judgment about the government interests in the enforcement of particular crimes. The doctrine treats the state's interest in enforcing all criminal laws as equally legitimate, no matter how minor, quirky, or puzzling the offense.⁴⁰⁴ But other governments are not so cabined. They don't have to play along with Fourth Amendment doctrine's categorical rule. Instead, other governments can make case-by-case judgments about when they want their employees to spend their resources enforcing particular laws from other governments. Each government can take its ball and go home if it wishes, opting out of cross-enforcement even when Fourth Amendment doctrine would permit it.

Consider Congress's options in limiting cross-enforcement down. Imagine that a state authorizes federal agents to make searches or seizures to enforce state law, but the federal government does not want federal agents to help the states. Perhaps the state law is out of sync with national concerns, and the federal government wants no role in its enforcement. Congress has several options to limit the cross-enforcement down that the states otherwise authorize. Congress could enact a statute prohibiting the admission of evidence obtained as a result of a federal search or seizure made to enforce state law. The law might be general (imposing exclusion for the fruits of any federal search and seizure justified by a cause to believe state law was violated), or it might be specific (imposing exclusion just with respect to particular kinds of prosecutions). Either way, the effect would be to impose Fourth Amendment-like limits by federal statute.

Congress would likely have the constitutional authority to enact such a law. Congress obviously has the power to enact a statutory limit in

⁴⁰⁴ See *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (“[T]he standard of probable cause ‘applie[s] to all arrests, without the need to “balance” the interests and circumstances involved in particular situations.’ If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.” (alteration in original) (internal citation omitted) (quoting *Dunaway v. New York*, 442 U.S. 200, 208 (1979))).

federal court on the admissibility of evidence obtained by federal officials.⁴⁰⁵ But it also has the power to regulate the admissibility of evidence in state court. For example, Congress has enacted special rules that limit the admissibility of wiretapping evidence in state court: for wiretapping evidence to be admitted, the state legislature must enact a special narrow wiretapping statute.⁴⁰⁶ Courts have upheld those laws as permitted under the Commerce Clause.⁴⁰⁷ If Congress can regulate the admissibility of state-obtained evidence in state court, of course it has the authority to regulate the admissibility of *federally* obtained evidence in state court.

Congress would also have at least some means to allow cross-enforcement of a state's laws — or at least the substance of them — even if a state did not authorize it. Consider the converse of the problem above: Imagine a state does not authorize federal agents to make searches or seizures to enforce state law, but the federal government wants federal agents to help the state anyway. Congress could enact a new criminal law that tries to mirror the scope of the state criminal law to be enforced. Federal agents could then make searches and seizures based on the new federal criminal law. This would be direct enforcement designed to achieve objectives of cross-enforcement. The limit on this, of course, would be Congress's constitutional authority. Congress lacks general police power, so any federal criminal law would need to fit within the Commerce Clause power or other federal authority.⁴⁰⁸ Those authorities have been construed broadly, but they are not without limit,⁴⁰⁹ which would in turn limit the federal government's ability to mirror a state law.

Now flip the picture and consider state efforts to regulate cross-enforcement up. States would have important powers to regulate cross-enforcement up, although they are likely more modest than Congress's power to regulate cross-enforcement down. Imagine that the federal government authorizes state agents to make searches and seizures to enforce federal law, but a state government does *not* want state agents to help the federal government. This might occur in the context of marijuana decriminalization. The federal government may authorize state

⁴⁰⁵ See *Olmstead v. United States*, 277 U.S. 438, 465–66 (1928) (“Congress may of course protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evidence.”).

⁴⁰⁶ See 18 U.S.C. § 2516(2) (2012).

⁴⁰⁷ See, e.g., *Halpin v. Superior Court*, 495 P.2d 1295, 1305 (Cal. 1972) (en banc).

⁴⁰⁸ See *United States v. Lopez*, 514 U.S. 549, 567 (1995) (“To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.”).

⁴⁰⁹ See *id.*

officers to enforce federal narcotics laws, but a state may not want its employees to help.

What are the state's options? One possibility is an approach recently adopted by the city council in Berkeley, California. In February 2018, the city council voted to make Berkeley a "sanctuary city" against federal marijuana enforcement.⁴¹⁰ Under that approach, city agencies and employees are prohibited "from turning over information on legal cannabis activities and assisting in enforcing federal marijuana laws."⁴¹¹ The Fourth Amendment permits city agencies and employees to search and seize based on federal law, but the city can expressly prohibit the cross-enforcement that Congress has implicitly allowed.

A state can also enact a statute (or a state constitutional amendment) prohibiting the admission of evidence obtained by state officers based on cause to believe evidence of a federal crime would be found. What are the constitutional limits of such a state provision? States have the authority to control the admissibility of evidence in state court even if it was obtained by federal officers,⁴¹² so it seems obvious that they can impose such limits in state court for evidence obtained by state officers. At the same time, it seems unlikely that states can regulate the admissibility of state-obtained evidence in federal court. States often impose statutory limits on surveillance practices that exceed federal Fourth Amendment limits. In federal court, courts have ignored such limits under the Supremacy Clause on the ground that there was no federal law violation.⁴¹³ Under this reasoning, the states have the power to exclude the fruits of state cross-enforcement of federal law if the case ends up in state court but not if the case ends up in federal court. Although this is only a limited power, it still gives states considerable ability to discourage their own officers from cross-enforcing federal law if the state disapproves of it.

The power of governments to enact rules outside the Fourth Amendment to influence the scope of cross-enforcement raises the question of how much the Fourth Amendment even matters. The Fourth Amendment can always permit more cross-enforcement than the officer's own jurisdiction might want to allow. No matter what Fourth

⁴¹⁰ See Annie Ma, *Berkeley City Council Votes to Become Sanctuary City for Cannabis, Likely a First*, S.F. CHRON. (Feb. 14, 2018, 7:18 AM), <https://www.sfchronicle.com/bayarea/article/Berkeley-City-Council-votes-to-become-sanctuary-12612148.php> [<https://perma.cc/526L-8V5Z>].

⁴¹¹ *Id.*

⁴¹² See, e.g., *People v. Conklin*, 522 P.2d 1049 (Cal. 1974) (en banc), *appeal dismissed for want of substantial federal question*, 419 U.S. 1064 (1974); *Halpin*, 495 P.2d 1295; *People v. Jones*, 30 Cal. App. 3d 852 (1973), *appeal dismissed for want of substantial federal question*, 414 U.S. 804 (1973).

⁴¹³ See, e.g., *United States v. Hall*, 543 F.2d 1229, 1235 (9th Cir. 1976) ("In the absence of any federal violation, therefore, we are not required to exclude the challenged material; the bounds of admissibility of evidence for federal courts are not ordinarily subject to determination by the states.").

Amendment rule emerges, the home jurisdiction ultimately has considerable power outside the Fourth Amendment to limit its own officers' acts.

CONCLUSION

You might think, more than 200 years after the Fourth Amendment was enacted, that the legality of cross-enforcement must be settled. This Article has shown why it isn't. Cross-enforcement is a byproduct of the mid-twentieth-century incorporation doctrine. Incorporation brought the Fourth Amendment to the states and local governments, making it possible for the first time that a Fourth Amendment actor hired by one government could search and seize to enforce the laws of another. Lower courts have divided on how to apply the law because they have not realized the novelty of the question. They have relied mostly on pre-incorporation case law that answered very different questions, and they have disagreed on how to apply it.

Solving the puzzle of cross-enforcement with fresh eyes requires answering fundamental questions of what the Fourth Amendment is and what relationship with a government should trigger it. Appreciating the interest balancing that underlies constitutional reasonableness should lead to a simple rule: every government has the power to decide whether officers from other governments can harness its interests and cross-enforce its laws under the Fourth Amendment. By deciding whether to authorize cross-enforcement, governments can decide whether other officers can conduct searches and seizures justified by violations of their laws. At the same time, an officer's home jurisdiction always retains at least some power to blunt that decision as to its own officers by means outside the Fourth Amendment.