

THE HAPPY FOURTH AMENDMENT: HISTORY AND THE PEOPLE’S QUEST FOR CONSTITUTIONAL MEANING

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I. INTRODUCTION

I will argue here that history should play an expansive, though by no means decisive, role in giving the Fourth Amendment meaning. By expansive, I mean two things: first, temporally expansive, the broad swathe of American history and not just some “founding moment” matters; second, morally expansive, history as a guide to wisdom about how best to understand the evolving political morality embraced by the Fourth Amendment.¹

Although I will draw on some history to make my point, my argument is thus an unabashedly normative one about the “morally” right way to use history in constitutional interpretation.² My turn to morality, however, is neither meant to be overly abstract nor to give interpreters unlimited freedom to roam about history or rewrite it to justify predetermined outcomes. History *can* play some moderately constraining role.³

But, it is not enough to say that history should be mined for lessons without knowing just what to look for in the past. My primary goal in this article is to argue that one important historical inquiry for crafting modern Fourth Amendment law is to look for ways to promote the collective happiness of the American People.

The Declaration of Independence is the formal document that recognized the existence of a distinctive American People and set as its goal the “pursuit of happiness.”⁴ The Constitution can be understood in part as a

1. I have defended both points elsewhere but on different grounds than those articulated here. See Andrew E. Taslitz, *Search and Seizure History as Conversation: A Reply to Professor Bruce Smith*, 6 OHIO ST. J. CRIM. L. 765, 770-71 (2009) [hereinafter *History as Conversation*].

2. Other scholars have articulated their own visions of the moral uses of history to inform modern constitutional interpretation. See, e.g., ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 36-44 (1994).

3. See *History as Conversation*, *supra* note 1, at 784-89.

4. See THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

mechanism designed to implement this overriding goal. The Fourth Amendment, as part of the Constitution, must, therefore be informed by an understanding of the pursuit of happiness.

The meaning of “happiness” is much contested, and I will not fully resolve debates over the term’s meaning or that of cognate concepts like “well-being” here, though I will set forth my own position and some useful working definitions.⁵ What can bring happiness to individuals and collectivities, however, necessarily changes somewhat with time and circumstances.⁶ Moreover, our understanding today can be advanced by the march of social science on the question.⁷ Philosophers also have much to offer in understanding happiness’s nature.⁸

I thus view the idea of the pursuit of happiness as a concept that evolves and that requires a conversation among historians, empiricists, and philosophers. Interpreters of constitutional provisions may and should turn to history, but the act of interpretation requires far more than a reliance on history alone. Interpreters must get the history right—they must not rely on fictions or poor or incomplete examinations of evidence.⁹ But the lessons to be drawn from that history and their translation into law require a turn to a broader reservoir of sources.¹⁰

My argument proceeds in the following steps:

1. A “people” is defined by its commitments.
2. Constitutional language is best understood as flexibly but gradually evolving to reflect changing understandings of those commitments. This vision of language better illuminates what it means to be a “people” with shared commitments.
3. The Declaration of Independence formally brings into being a recognized American people defined in part by its commitment to the pursuit of happiness.
4. Both social science and history reveal that the happiness of the American People lay partly in high quality government—government that gives individuals and collectivities effective voice about how they are governed, holds government officials accountable, promotes their effectiveness in protecting citizens and

5. See *infra* Section IV.A.

6. See *infra* Section IV.A.

7. See *infra* Section V.

8. See *infra* text accompanying notes 145-54.

9. See Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15, 71 n.326 (2003) (discussing the use of narratives as a primary source of history in defining “a people”); *History as Conversation*, *supra* note 1, at 771 n.18.

10. See Andrew E. Taslitz, *A Feminist Approach to Social Scientific Evidence: Foundations*, 5 MICH. J. GENDER & L. 1, 19-23 (1998) [hereinafter *Feminist Approach*] (explaining the difference between interpretive and realistic acts, that is, between recreating events and giving them meaning).

their rights, honors the rule of law, and controls corruption. Happiness also lay in protecting certain forms of political equality.

5. These lessons about how best to pursue happiness are particularly apt under the Fourth Amendment and in regulating the police. More specifically, they suggest, for example, that those communities most affected by policing should have some real voice in how police go about their work, that fostering racial equality is a legitimate function of the Fourth Amendment, and that Fourth Amendment protections need to be especially robust when they impinge upon freedom of expression.

Part II of this article thus defines peoplehood and defends the idea that language must be seen as capacious enough to link past, present, and future conceptions of the pursuit of happiness in a way that gives specific constitutional provisions gradually evolving meanings. This part is the most abstract in the article but is worth slogging through because it lays the foundation for the more specific analyses to come. Part III explains why the Declaration's idea of the pursuit of happiness should inform constitutional interpretation. Part IV explores the nature of happiness. Part V addresses how government can help in its pursuit for individuals, collectivities, and the American People as a whole. Part VI explores America's intellectual history concerning how government can work with its citizenry to promote happiness's pursuit. Part VII recounts illustrative implications of happiness's pursuit for modern Fourth Amendment doctrine and practice. Part VIII, the conclusion, summarizes the argument and examines ways to move forward.

II. PEOPLEHOOD

The Fourth Amendment speaks of the right of "the People" to be free from unreasonable searches and seizures, so it seems wise to define just what it means to be a "people."¹¹ Various commentators have offered numerous definitions of this term.¹²

Liberals, for example, traditionally tend toward a relatively shallow notion of individuals associating for narrow and wholly instrumental reasons, such as safeguarding property and overseeing the market.¹³ Communitarians, by contrast, define peoplehood by a deeper set of shared

11. See U.S. CONST. amend. IV.

12. See, e.g., JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 45-48 (2001).

13. See *id.* at 148.

beliefs, interests, and values, something hard to find in so diverse a place as the United States.¹⁴

But, the liberal conception effectively denies the reality of peoplehood entirely, viewing it as a useful fiction.¹⁵ The communitarian conception, on the other hand, requires a considerable degree of homogeneity and like-mindedness that may unduly undermine individual autonomy.¹⁶

Jed Rubenfeld has articulated a more appealing and useful conception. He defines a people as individuals' "co-existence, *over time*, under the rule of a given legal and political order."¹⁷ Understanding what Rubenfeld means by this definition, and adapting it to my own uses here, first requires understanding what it means to be a person, because Rubenfeld models his idea of peoplehood after individual personhood.¹⁸ Indeed, I begin with a discussion of personhood because my entire argument in this article repeatedly turns on certain parallels between individual persons and the People as a collectivity. Understanding that collectivity's nature is a prerequisite to understanding what best promotes the People's happiness.

A person and a people both consist of component parts that must work together harmoniously. The successful resolution of tensions among those parts is essential to each entity's health and happiness.

A. Temporal Individual Personhood

What defines an individual as a unique "person" with a single, coherent identity? Each person constantly changes yet is always the same. At forty years of age, Andrew is of a different size, shape, and appearance than was true when he was age ten. He has had many different life experiences over the course of three extra decades of life, and even the molecules in his body are not the same ones that were there when he was a child. Yet, he is still "Andrew" and not "Tom."¹⁹

What defines him as still the same person is a narrative linking into one continuing tale his past, present, and hoped-for future.²⁰ His

14. See *id.* at 149-50 (noting that linguo-nationalists hold "in order to be a people, [persons] have to share a common way of looking at the world and at themselves, a shared set of values, attitudes, understandings, and interests"). The danger in such a vision, of course, is that it promotes homogeneity, "liberalism's dystopia." *Id.* at 150-51. But see R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 42-56 (2001) (arguing that the boundaries are blurring between liberalism and communitarianism so that it is now possible to speak of communitarian-liberals or liberal-communitarians).

15. See RUBENFELD, *supra* note 12, at 145-49.

16. See *id.* at 148-51. I exclude from this criticism those communitarian theorists who have fused their ideas with liberal insights. See DUFF, *supra* note 14, at 42-60.

17. RUBENFELD, *supra* note 12, at 153 (emphasis added).

18. See *id.* at 145.

19. See RUBENFELD, *supra* note 12, at 131-42 (making a similar point).

20. See Taslitz, *Feminist Approach*, *supra* note 10, at 34-46; JEROME BRUNER, MAKING STORIES: LAW, LITERATURE, LIFE 63-89 (2002) (discussing the narrative creation of the self); Theodore R.

understanding of the past, and thus of himself, may change with hindsight.²¹ Moreover, he defines himself in part by the moral lessons and expectations life gives him.²² His self-definition also changes with changes in his connection to various groups and communities, whether religious, social, or familial.²³ In a real sense, Andrew *is* the tale he tells.

Yet, that tale can be an inauthentic one.²⁴ If Andrew lies to himself about the nature of events in his life, ignores the best available evidence of those events or of their meaning, or shunts into his near-subconscious matters that contradict his conscious self-understanding, he paints a highly partial and inaccurate picture of his life.²⁵ Authenticity is often acclaimed

Sarbin, *The Narrative as a Root Metaphor for Psychology*, in NARRATIVE PSYCHOLOGY: THE STORIED NATURE OF HUMAN CONDUCT 3, 11 (Theodore R. Sarbin ed., 1986) (“Our plannings, our rememberings, even our loving and hating, are guided by narrative plots.”).

21. See MARK FREEMAN, HINDSIGHT: THE PROMISE AND PERIL OF LOOKING BACKWARD 4-5 (2010) (“Looking backward, we can frequently see things that we could not, or would not, see earlier on.”); JOSEPH MCGRATH & FRANZISKA TSCHAN, TEMPORAL MATTERS IN SOCIAL PSYCHOLOGY: EXAMINING THE ROLE OF TIME IN THE LIVES OF INDIVIDUALS AND GROUPS 27-66 (2003). Of course, it is important to guard against the danger of “hindsight bias,” of believing that what you know now you knew all along. See FREEMAN, *supra*, at 22 (describing hindsight bias), 107 (noting that hindsight can, at its worst, “be defensive; it can create an illusory appearance of order and coherence; it can interweave the real and the imagined in a way that utterly falsifies the past”); Scott A. Hawkins & Reid Hastie, *Hindsight: Biased Judgments of Past Events After the Outcomes Are Known*, 107 PSYCHOL. BULL. 311 (1990) (offering a more technical definition of hindsight bias and exploring the evidence of its existence). There are other dangers in relying on memory that must likewise be compensated for so that hindsight is enlightening rather than misleading. See DANIEL SCHECHTER, THE SEVEN SINS OF MEMORY 4-5 (2001) (describing the “seven sins of memory” as including “a weakening or loss of memory over time” (transience); “assigning a memory to the wrong source” (misattribution); and referring to memories “that are implanted as a result of leading questions, comments, or suggestions when a person is trying to call up a past experience” (suggestibility)); see also DANIEL SCHECHTER & ELAINE SCARY, MEMORY, BRAIN, AND BELIEF 3 (2000) (“[O]ne’s memories of past experiences can be influenced by one’s current beliefs” (suggestibility)); ANDREW E. TASLITZ, MARGARET L. PARIS & LENESE C. HERBERT, CONSTITUTIONAL CRIMINAL PROCEDURE 887-88 (4th ed. 2010) (describing the reconstructive nature of memory). None of these dangers eliminate the substantial benefits of aiming for the clarity of informed hindsight.

22. See FREEMAN, *supra* note 21, at 5 (“[H]indsight,” therefore, “plays an integral role in shaping and deepening moral life.”); *id.* at 25 (noting the continuity between living and telling, with the telling of hindsight as “the primary inroad” to self-understanding).

23. See Taslitz, *Feminist Approach*, *supra* note 10, at 22-23. Alisdair McIntyre explains:

[T]he story of my life is always embedded in the story of those communities from which I derive my identity. I am born with a past; and to try to cut myself off from that past, in the individualist mode, is to deform my present relationships. The possession of an historical identity and the possession of a social identity coincide. . . . What I am, therefore, is in key part what I inherit, a specific past that is present to some degree in my present. I find myself part of a history and that is generally to say, whether I like it or not, whether I recognize it or not, one of the bearers of a tradition.

ALISDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 221 (2d ed. 1981).

24. See Andrew E. Taslitz, *Bullshitting the People: The Criminal Procedure Implications of a Scatological Term*, 39 TEX. TECH. L. REV. 1383, 1395-97 (2007) [hereinafter *Bullshitting the People*] (explaining the connection between accuracy and authenticity); Taslitz, *Feminist Approach*, *supra* note 10, at 33-35 (discussing the importance of historical accuracy in understanding a person’s mental states).

25. For a philosophical and empirical examination of the psychology of self-deception, see Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 HARV. J. L. & GENDER 381, 388-98 (2005) [hereinafter *Willfully Blinded*]. As Freeman again explains:

to be a moral and psychological good.²⁶ If that is so, a person should struggle to find his *authentic* self even if that is a quest that is never wholly completed.²⁷

Finally, though all our history matters to self-definition, we tend to privilege some events over others.²⁸ The day we married, had our first child, graduated from law school, or divorced are all days that we see as permanently changing our life's trajectory.

B. The Temporal "People"

1. What Is a "People"?

a. Narrative and Commitment

So it is with a "People." Although the precise persons constituting a people change through death, birth, immigration, and emigration, the people live on.²⁹ Although the goals, activities, and beliefs of people change, we are still the American people. We are defined by the story of our collective past, present, and future.³⁰

Yet, this move from the individual to a people seemingly raises problems. Diversity among members of a nation means that many stories will abound.³¹ Even when there is agreement over events and actions, there will be disagreement over their interpretation.³² In what sense is there a

[S]ome people have images of their past and of themselves that are patently false, that fly in the face of what virtually everyone else sees and knows: her life was not the ceaseless string of traumas she made it out to be; his life was not the romantic odyssey he had always said it was but something else, bleaker and darker.

See FREEMAN, *supra* note 21, at 180 (arguing that autobiographical understanding requires overcoming self-deception). "One of the tragic truths of the human condition is that we are often morally 'late': caught up in this or that moment, with its limited view of things, it is often only later, with the passage of time, that we can see the errors of our ways." *Id.* at 42.

26. See Taslitz, *Bullshitting the People*, *supra* note 24, at 1395-97.

27. See Taslitz, *Feminist Approach*, *supra* note 10, at 33-35 (discussing the importance of historical accuracy in understanding a person's mental states); FREEMAN, *supra* note 21, at 155 (noting that author James Frey, in his purported memoir, *A Million Little Pieces*, relied not only on his memories of his life, but also on supporting documents, such as his medical records and therapists' notes, to recreate events; yet, concludes Freeman, Frey went too far in then adding entirely made up events and details while still presenting his book as a "memoir" because outright lies do not a "life" make).

28. FREEMAN, *supra* note 21, at 25, 51 (describing the author's conversation with his father during a four-hour ride home, and only two months before the latter's death, as "a kind of mythic moment, a *founding* moment, that ended up inaugurating an entirely different way of thinking about him, me, and the relationship between us").

29. See RUBENFELD, *supra* note 12, at 148-59.

30. See *id.*

31. See Andrew E. Taslitz, *Hate Crimes, Free Speech and the Contract of Mutual Indifference*, 80 B.U. L. REV. 1283, 1316-29 (2000) [hereinafter *Contract of Mutual Indifference*] (recounting differing interpretations of slavery's meaning between the antebellum, through the immediate post-Civil War, South and North).

32. See *id.*

common story that unites us as a people? The answer to this question lies in the second part of Rubenfeld's definition of peoplehood: living under the rule of a given legal and political order.³³ The precise rules of such an order, of course, change over time.³⁴ What makes it the same legal and political order is a shared set of commitments.³⁵

Again, an analogy to individual personhood is helpful. A commitment is an enduring normative determination made in the past to govern the future.³⁶ Commitments give purpose and direction to our lives. Each of us has numerous commitments.³⁷ We initially choose some commitments while circumstances may impose other commitments on us, such as when we are born into a family.³⁸ "To be a son, in the normative sense . . . is to be committed to certain familial values, to find important aspects of my good in the life and flourishing of this family, to recognize certain obligations to other members of the family."³⁹

This son may, out of thoughtlessness or limited abilities, fail fully to honor his commitments to his family.⁴⁰ If they are still *his* commitments, however, he will feel guilty about his failures and try better next time.⁴¹ But, this last point reveals an unusual aspect of commitments: they must be open to constant reflection and occasional change.⁴² Their normative force stems from the sense that they are chosen and that they help to define us. If we cannot re-evaluate the wisdom of our commitments and accordingly change them, they are no longer chosen, and thus, no longer ours.⁴³ On the other hand, if our commitments change too readily, they are no longer enduring, and instead become momentary preferences.⁴⁴

To make a commitment does not mean to understand all that the commitment entails. Our understanding of what our commitments require necessarily changes over time.⁴⁵ The son does not really know what it fully

33. See generally RUBENFELD, *supra* note 12, at 153-58 (discussing the role of the rule of a political-legal order in delineating a people).

34. See generally *id.* at 153-58 (discussing the temporal extension of a political-legal order).

35. See *id.* at 154-58. Rubenfeld initially declares that he cannot precisely define "rule" under the same "order," but then describes its characteristics as including the temporal extension of shared commitments. See *id.* at 154-56.

36. See *id.* at 92.

37. See *id.* at 94-95.

38. See *id.* at 91-102.

39. DUFF, *supra* note 14, at 50.

40. See *id.* at 50-52.

41. See *id.* at 50-53.

42. See RUBENFELD, *supra* note 12, at 96-100.

43. See *id.*

44. See *id.* at 96, 100.

45. See *id.* at 95. Rubenfeld writes that the committed person is "entrained in the task of working out the implications and possibilities of certain engagements he already has with the world." *Id.*

means to be a son until he must care for an aging parent.⁴⁶ Indeed, that aspect of “son-hood” may never have previously crossed the son’s mind.⁴⁷

b. Constitutionalism and the Legal and Political Order

A legal and political order consists of a people’s commitments. As with the son, a people’s commitments must endure, but may change.⁴⁸ And, as with the son, what a people’s commitments require may only be realized over time.⁴⁹

Diversity among individuals does not preclude this shared commitment. Persons who radically disagree about a commitment’s meaning in one circumstance versus another may actually share commitments.⁵⁰ If enough individuals seem prepared to live under institutions embodying shared legal and political commitments, it is fair to consider them a people despite their interpretive disagreements.⁵¹

Constitutionalism in a democracy is therefore a people’s struggle over time to craft and live out its most fundamental commitments, even if those commitments are contrary to the popular will at any given moment in time.⁵² Understanding the meaning of a constitutional provision therefore requires exploring both its relevant history and salient current social

46. *See id.*

47. *See id.* at 96 (stating that commitments “may call on us to change, shake up, to destabilize”).

48. *See id.* at 96.

49. *See id.* at 54-58.

50. *See id.* at 156.

51. *See id.* This definition of peoplehood thus reconciles commonality with diversity. *See id.* at 158-59 (“To recognize a people as a subject persisting over time, despite the heterogeneity of its composition, is ultimately no more mystical than recognizing individuals as subjects persisting over time despite the heterogeneity of their composition.”).

52. *See DUFF, supra* note 14 at 59, 69 (arguing that the “common law” is a phrase best understood not as judge-made law, but as law that “embodies the shared values and normative understandings of the community,” meaning the shared commitments to certain political values). In an analogous argument, Professor George Fletcher argues that the Reconstruction Amendments embodied a recognition that we had moved from a loose collection of individuals at the founding to an “organic nation.” *See* GEORGE P. FLETCHER, *OUR SECRET CONSTITUTION: HOW LINCOLN REDEFINED AMERICAN DEMOCRACY* 57-74 (2001); RUBENFELD, *supra* note 12, at 183-84. Rubenfeld would likely argue that we were always one people, whether we realize it or not, because who we are, were, and will be defines us. *See* RUBENFELD, *supra* note 12, at 56-73, 80-88, 158. Fletcher is inconsistent, but seems to use the terms “people” and “nation” interchangeably. *See id.* at 73. Both scholars would agree, however, that our current sense of political commitment requires exploring our past, particularly the changes wrought by slavery and Reconstruction. *See* FLETCHER, at 33 (“[A] practice can become part of the accumulated historical constitution without this being the purpose of those who initiated the practice,” just as Lincoln’s Gettysburg address has become “the preamble to a new order of nationhood, equality, and democracy.”); RUBENFELD, *supra* note 12, at 80, 199 (“In any particular nation, this *we* will have been the product of a history, a constitutional struggle, usually made at the cost of considerable blood and fortune,” as the paradigm case of the struggle against the post-Civil War black codes illustrates.); *cf.* ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* 1-40, 192-98 (1994) (arguing that history matters to help inform us how we shall constitute ourselves as a people today).

practices.⁵³ Importantly, commitments derive from passion. Indeed, we enact our most important commitments “*not [in moments] of sober rationality, but of high political feeling . . .*”⁵⁴ This passion is part of what unites us over time.⁵⁵ Commitmentarianism “captures the sometimes superior claim of feeling over reason—of an enduring normative passion over day-to-day rationality.”⁵⁶

Furthermore, the members of a people, like the members of a family, owe obligations to one another.⁵⁷ These obligations arise from the people’s shared commitments.⁵⁸ The political-legal order helps both to express those commitments and to encourage members to fulfill the obligations that they accordingly owe each other.⁵⁹

2. History and Peoplehood

a. The Connection Among Peoplehood, Happiness, and History

The consequences of this conception of peoplehood for the role of history in constitutional interpretation are straightforward. The American people are defined by their past, present, and imagined future.⁶⁰ Only the careful study of the broad sweep of American history and its nature today reveals the evolving commitments that tie this temporal melange together. We must understand the “facts” of that history as accurately and as free of self-deception as is feasible. We look at that history today, however, to divine political-moral lessons as well as the current state of our political commitments as a people. Hindsight, at its best, gives us clarity in divining those commitments and understanding what they imply for modern constitutional practice. This act of interpretation will sometimes foster disputes over the lessons to be drawn, but those disputes are often bounded, and always informed by, historical fact.

Moreover, certain periods of constitutional history—like the birthdays and anniversaries that mark the passage of an individual’s life—will be privileged; that is, those periods bear special weight as we mine them for

53. See RUBENFELD, *supra* note 12, at 56-73, 80-88, 158.

54. *Id.* at 129.

55. See generally DUFF, *supra* note 14, at 47 (stating that communities are bound together by shared and defined values, mutual respect, and concern).

56. *Id.* at 94.

57. See ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW & SOCIAL EQUALITY 70 (1996) (“Where stigma exists, there is already community—and therefore communal obligations.”); *cf.* DUFF, *supra* note 14, at 46-48 (describing how members of a liberal political community share obligations to one another, including the duty to respect and encourage diversity).

58. See DUFF, *supra* note 14, at 46-47.

59. See *supra* note 57 and accompanying text.

60. See generally BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 37 (1993) (“The story you and I tell each other about the nature and history of our constitutional past will, in turn, shape the meanings we are prepared to give to our country’s present and future.”).

political-moral lessons. What periods should be privileged may itself be subject to dispute. Yet, at a minimum, the Founding and Reconstruction periods fit the bill, because in both instances constitutional amendments embody their experience.⁶¹ Likewise, relatively few people would dispute the eras of the Great Depression and the New Deal as privileged ones.⁶²

Whether looking at these privileged periods or others, however, few, if any, would dispute one shared commitment of the American people: namely the “pursuit of happiness” as we understand it.⁶³ The phrase’s meaning, of course, is ambiguous and contested.⁶⁴ Nevertheless, looking to our past for lessons on the phrase’s modern meaning seems one sound goal—a guidepost to what we must look for when we examine American history. This paper will shortly seek to flesh out the phrase’s meaning, further narrowing and guiding the historical quest, and will explain its relevance for understanding the Fourth Amendment.⁶⁵

b. The Nature of Constitutional Language

Before doing so, however, I want briefly to turn to another subject: examining the broad sweep of American history to understand the evolving meanings of constitutional language, which, as I recommend here, is an approach that is a far cry from an originalist approach to constitutional interpretation.⁶⁶ Criticisms of the varied versions of originalism abound.⁶⁷ I will not repeat them here. Nevertheless, I do want to note that this expansive view of constitutional language as having evolving meanings drawing lessons from, but not fixed by, history itself has long roots in American constitutional thought and practice, beginning with the framing

61. See ANDREW E. TASLITZ, *RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789-1868* (2006) [hereinafter *RECONSTRUCTING THE FOURTH AMENDMENT*] (supporting this argument).

62. See ACKERMAN, *supra* note 60, at 58-80 (arguing that these two periods ushered in new constitutional “regimes”).

63. See CHARLES MURRAY, *IN PURSUIT: OF HAPPINESS AND GOOD GOVERNMENT* 24-27 (1994).

64. See *id.*; PAUL R. ABRAMSON ET AL., *SEXUAL RIGHTS IN AMERICA: THE NINTH AMENDMENT AND THE PURSUIT OF HAPPINESS* 70-74 (2003) (arguing that the pursuit of happiness mandates sexual autonomy); THEODORE ROOSEVELT MALLOCH & SCOTT T. MASSEY, *RENEWING AMERICAN CULTURE: THE PURSUIT OF HAPPINESS* (2006) (arguing that the pursuit of happiness is a fundamentally spiritual endeavor).

65. I recognize that my description of my approach to the use of history in constitutional interpretation and how I would respond to critics is incomplete. That is so because my focus in this paper is solely on the role of happiness in constitutional interpretation of the Fourth Amendment. Those interested in further detail concerning my approach to the role of history in constitutional interpretation more broadly and in my response to critics should read *History as Conversation*, *supra* note 1.

66. See ORIGINALISM: A QUARTER-CENTURY OF DEBATE 1-40 (Steven G. Calabresi ed., 2007) (collecting, in part, some of the leading works defining and defending originalism).

67. See DENNIS J. GOLDFORD, *THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM* 90-121 (2005) (analyzing the content of originalist theorists and their critics); DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 4 (2010) (arguing for a “living constitutionalism” as superior to the dead one of the originalists).

era.⁶⁸ Moreover, this view of language itself embraces a view of healthy peoplehood as requiring a gradual evolution of narrative commitments linking historical periods in the People's life.⁶⁹

i. The Anti-Federalist Vision of Language

Recent historical work on the founding generation's conception of language, especially political language, enlightens our understanding of constitutional interpretation. During the years surrounding the American Revolution, two theories of political language predominated.⁷⁰ The theory in ascendance at the time of the 1776 Declaration of Independence used language "as if it constituted a fixed and unvarying medium of expression existing apart from the changing contexts of history, a medium stable in its grammar and vocabulary, certain in its meanings, and unambiguous in its capacity to express universal truth."⁷¹

This view stemmed from fear of the sort of abuses of power to which the British had subjected the colonists, and from a belief that clear and exact language could control future abuses.⁷² This view sounded in language of the "rule of law, and not of men," and represented an almost religious "confidence in the redemptive power of language precisely framed and deeply revered."⁷³ The Anti-Federalists continued to embrace through the time of the Constitution's ratification this "profoundly conservative" view of language guided by a concern to "fend off historical change, preserve familiar values, and prescribe the limits of acceptable political behavior."⁷⁴ Indeed, much of the Anti-Federalist objection to the Constitution charged that its language was too ambiguous to protect republican liberty, its words given too radical and new meanings by the Federalists, and its content devoid of a clear Bill of Rights.⁷⁵

ii. The Victorious Federalist Vision

By the time of ratification, however, the competitor, a more expansive vision grounded less in reason than in experience, had eclipsed this conservative vision of language.⁷⁶ The Federalists passionately embraced this view.⁷⁷ They had come to see the "virtuous" republicanism of 1776 as

68. See JOHN HOWE, LANGUAGE AND POLITICAL MEANING IN REVOLUTIONARY AMERICA 199-200 (2004).

69. See *infra* text accompanying notes 102-06.

70. See HOWE, *supra* note 68, at 5.

71. See *id.*

72. See *id.* at 5-8, 204-09.

73. *Id.* at 8.

74. *Id.* at 5.

75. See *id.* at 5-8, 204-09.

76. See *id.* at 213-16.

77. See *id.* at 204-17.

naïve.⁷⁸ State constitutions and bills of rights had thus far proven ineffective in preventing political turmoil, democratic license, majoritarian abuses, and dangerous violence such as Shay's Rebellion.⁷⁹ Virtue had, in Federalist eyes, proven a fragile basis for liberty, and governmental power was not entirely dangerous to liberty, but sometimes necessary for its protection.⁸⁰ Faction was inevitable and needed to be funneled to productive purposes.⁸¹

Moreover, Federalists came to recognize that they were involved in an experiment and that, just as past experience since 1776 had taught the new nation much about governance, so would future experience teach new lessons.⁸² Constitutional language had the capacity to embody general principles and to provide them with special authority.⁸³ But, that same language necessarily needed to be capacious enough to allow experience to reveal better ways to further those principles and to vest the language with still greater authority.⁸⁴

For the Federalists, therefore, constitutional texts were seen "as guides to innovative action, as blueprints encompassing the best judgments of the 'science of politics,' judgments inevitably imperfect and subject to change as the future unfolded."⁸⁵ Furthermore, reaching agreement on the terms of a constitution required political compromise, and that, in turn, required a certain level of generality in language, allowing politicians to wage disputes over meaning in political contest and debate.⁸⁶ The leading historian of American political language, John Howe, summarized the Federalist view thus:

By contrast, other political writers [such as the Federalists] understood that language, far from constituting an autonomous realm of universal meaning separated from the flux of history, was inextricably embedded in

78. *See id.* For a concise discussion of evolving republican ideas on virtue from the Founding through Reconstruction, see Andrew E. Taslitz, *Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation Are Wrong*, 40 B.C. L. REV. 739, 765-66 (1999) [hereinafter *Racist Personality*].

79. *See* HOWE, *supra* note 68, at 209-17; *see generally* WOODY HOLTON, UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION (2007) (discussing Shay's Rebellion and its historical significance).

80. *See* HOWE, *supra* note 68, at 210-11.

81. *See id.* at 204-17 (discussing faction in Federalist thinking generally); *see also* GARY ROSEN, AMERICAN COMPACT: JAMES MADISON AND THE PROBLEM OF FOUNDING 4, 12, 39-41, 61-63 (1999) (discussing faction in Madison's thinking); GEORGE W. CAREY, THE FEDERALIST: DESIGN FOR A CONSTITUTIONAL REPUBLIC 9-12, 15-20, 25-27, 31-32, 61-62, 81-82 (1989) (analyzing faction in the writings of Publius).

82. *See* HOWE, *supra* note 68, at 209-17.

83. *See id.* at 213.

84. *See id.* at 213-16.

85. *Id.* at 213.

86. *See id.* at 204-17. Madison himself thought greater clarity impossible to achieve his desired political ends. *See* THE FEDERALIST NO. 37 (Alexander Hamilton).

human experience. As a consequence, not only its vocabulary and grammar but its very uses and signification changed over time. Given its evolving, adaptive nature, language was suited to serve not primarily as an agent of political preservation and control, but as an instrument of political exploration and creativity to be deployed in the construction of a continuously unfolding political future. Fluid rather than stable in its structure and meaning, language mirrored nature imperfectly and thus served as a medium through which nature's truths, in politics as elsewhere, were continuously contested.⁸⁷

This fluidity did not render language meaningless. Nor is this vision of language inconsistent with an important role for history in creating meaning. History leading up to a provision helps in understanding the content of the evolving principles therein embodied.⁸⁸ Later history and earlier history can combine to teach new lessons about the best ways to serve those principles in the face of new challenges.⁸⁹ History can reveal a people's commitments and exercise a restraining hand to slow commitmentarian evolution so that commitments are neither so ephemeral as to be meaningless nor so unchanging as to be pointless.⁹⁰

For Howe, the Federalist victory in ratifying the Constitution was thus likewise a victory for the experience-informed Federalist concept of language.⁹¹ The Anti-Federalists did ultimately succeed in their quest for a Bill of Rights;⁹² but it was a Bill of Rights that James Madison's hand guided,⁹³ and Madison was imbued with the Federalist vision of adaptive language and had written expressly about that vision's wisdom.⁹⁴ The Federalist victory was never complete, however, for the Anti-Federalists' view continued to contend with Federalist views throughout much of American history.⁹⁵

87. HOWE, *supra* note 68, at 5.

88. *See id.* at 5, 7 (implying this point in discussing the connection between history and language as well as the flaws in originalism).

89. *See* Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15, 54-58 (2003) [hereinafter *Respect*] (illustrating some ways that history can teach new lessons about principles and practices); *supra* text accompanying notes 77-86.

90. *See supra* text accompanying notes 42-43 (commitments must be open to change but must evolve *slowly*).

91. *See* HOWE, *supra* note 68, at 12 ("Federalism's triumph in 1787-88 brought the legitimation . . . of a newly inventive language of political discourse . . .").

92. *See* MARK E. BRANDON, *FREE IN THE WORLD: AMERICAN SLAVERY AND CONSTITUTIONAL FAILURE* 43-44 (1998) (summarizing Anti-Federalist efforts to obtain a Bill of Rights).

93. *See* RICHARD E. LABUNSKI, *JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS* 2 (2008).

94. *See* HOWE, *supra* note 68, at 222-24.

95. *See generally* DAVID J. SIEMERS, *RATIFYING THE REPUBLIC: ANTIFEDERALISTS AND FEDERALISTS IN CONSTITUTIONAL TIME* 219-22 (2002) (explaining how Anti-Federalism played a role in the creation of a loyal opposition tradition in America).

iii. Constitutional Lawyers and Language

Whether Howe is right that Federalist language concepts achieved a decisive victory, those concepts are most consistent with the soundest understandings of how lawyers should use history. The intellectual historian must document the thinking of a generation and must include many multiple and contradictory views.⁹⁶ But, “[t]he task of the constitutional interpreter is to determine which, if any, of those details are relevant to the modern construal of the constitution.”⁹⁷ Lawyers must “look for a story that best brings principled coherence to as much of the Constitution as possible, and . . . discard the rest.”⁹⁸

Lawyers must take care to portray the historical record accurately and to acknowledge conflicting currents.⁹⁹ But, in choosing which currents to navigate and which lessons to fish from them, “lawyers must acknowledge that they are transforming the historical record into legal material, and they must accept their responsibility for that creative process.”¹⁰⁰ Thus, lawyers ultimately use history as a source of insight into how others answered similar questions in the past to illuminate how we should constitute our political community today.¹⁰¹

iv. The Role of Metaphor and the “Body” of the People

The Federalist vision of political language included an acceptance of the power of metaphor to structure thought and to convey what “literalist” language cannot, and one metaphor has special resonance here: that of the People as a “body,” or perhaps as a growing child’s body.¹⁰² Under this metaphor, some constitutional choices breed “corruption” and “disease” in the “body politic,” undermining the harmonious functioning of its varying parts, stunting its growth, perhaps leading it to wither and die.¹⁰³ Other constitutional choices, however, promote healthy maturation; strong, smooth, and skilled operation; and a healthy mind and soul, which are essential links to a prospering body.¹⁰⁴

96. DAVID C. WILLIAMS, *THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC* 17-18 (2003).

97. *Id.*

98. *Id.* at 19.

99. *See id.* at 16-20.

100. *Id.* at 18-19.

101. *See, e.g., Racist Personality, supra* note 78, at 780 (citing additional sources); *see also* STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND* 351 (2001) (making an analogous point); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 *HARV. C.R.-C.L. REV.* 401, 430 (1987) (illustrating an analogous approach).

102. *See* HOWE, *supra* note 68, at 98-127 (analyzing the role of metaphors of the body, the family, and the theater, and their interaction in the political thinking of the founding generation).

103. *See id.* at 108-09.

104. *See id.* at 105-10.

The Federalists sought a healthy body politic, and all the Constitution's provisions should be understood as aimed toward that end.¹⁰⁵ This aspiration is little more than an attitude toward words, empty in itself. The experience embodied in history, however, can teach lessons—admittedly ones informed by political value choices about of what “health” consists—about how to keep the American people, as the patient, prospering. It is foolish to believe that history can reveal simplistic solutions or incontestably determinate answers to complex modern problems. But, history can inform, including informing Fourth Amendment interpretation, at least in crafting a small set of principles, or, perhaps even better, “lessons” that derive from evolving historical commitments. Those lessons can help to guide and structure Fourth Amendment interpretive construction.¹⁰⁶

3. The “American” People

Up until now, this article has argued that a people is defined by its enduring but evolving commitments. Nevertheless, that leaves open the question of what constitutes the specifically *American* people. A global answer to that question would be subject to heated dispute, fraught with danger, and too large for this article. Nevertheless, I will address one important aspect of American peoplehood: the American commitment to the pursuit of happiness. After briefly defining happiness and cognate concepts below, this paper will address how to pursue happiness and its Fourth Amendment implications. My immediate task in the next subsection, however, is first to offer a brief defense of why the pursuit of happiness, mentioned in the Declaration of Independence, should play a role in interpreting the later-written federal Constitution.

III. THE PURSUIT OF HAPPINESS

Numerous thinkers have argued for the Declaration of Independence to play a role in constitutional interpretation.¹⁰⁷ Some critics have vilified some of these thinkers for particular theories that seem to accord to judges

105. *See id.* at 108-10.

106. *See Racist Personality*, *supra* note 78, at 780 (concerning relevance of slavery's history to modern hate crimes legislation); *cf.* Morgan Cloud, *Quakers, Slaves, and the Founders: Profiling to Save the Union*, 73 *MISS. L. J.* 369, 418 (2003) (concerning relevance of slavery's history to modern racial profiling).

107. *See, e.g.*, WALTER BERNS, *TAKING THE CONSTITUTION SERIOUSLY* 11 (1987); Martin Diamond, *The Declaration and the Constitution: Liberty, Democracy, and the Founders*, 41 *PUB. INT. L. REP.* 39 (1975); Harry Jaffa, *What Were the “Original Intentions” of the Framers of the Constitution of the United States?*, 10 *U. PUGET SOUND L. REV.* 351, 355 (1987); Walter F. Murphy, *The Art of Constitutional Interpretation: A Preliminary Showing*, in *ESSAYS ON THE CONSTITUTION OF THE UNITED STATES* 130 (M. Judd Harmon ed., 1978).

an untrammelled power to make of “natural rights” whatever they want.¹⁰⁸ Yet, there are ways to modify such theories to embrace important restraints.¹⁰⁹ I find the most convincing theory of the Declaration’s relevance to constitutional interpretation is that of Professor Scott Douglas Gerber.¹¹⁰ I do not, however, embrace Gerber’s originalism, nor every jot and tittle of his theory.¹¹¹ Nevertheless, I rely heavily, though not entirely, on it here, as he concisely articulates the Declaration’s *constitutional* relevance in a way that enlightens my project.¹¹²

Gerber first analyzes the Declaration’s text.¹¹³ The Declaration itself begins, of course, with this bold statement: “We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights; that among these are Life, Liberty, and the Pursuit of Happiness”¹¹⁴ But, this sentence is not only a statement of broad political philosophy. It is also meant to serve practical purposes.¹¹⁵

108. See Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL’Y 63, 64, 68 (1989) (“[T]he Constitution is a logical extension of the principles of the Declaration of Independence The higher-law background of the American Constitution . . . provides the only firm basis for a just, wise, and *constitutional* decision.”). Thomas was vilified for this position during his confirmation hearings, as one author explains:

Before Thomas, no member of the Supreme Court had publicly advocated interpreting the Constitution in light of the Declaration since the turn of the century. And those justices—Joseph Bradley, David Brewer, Stephen Field, and Rufus Peckham—have been widely criticized for their “simplistic” reading of that philosophy, believing as they erroneously did . . . that the Declaration of Independence is primarily a statement of laissez-faire economics.

SCOTT DOUGLAS GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* 3 (1995); see BERNARD SCHWARTZ, *THE NEW RIGHT AND THE CONSTITUTION: TURNING BACK THE LEGAL CLOCK* 93 (1990) (decrying this “simplistic” reading).

109. See Taslitz, *History as Conversation*, *supra* note 1, at 779-84 (discussing ways to constrain constitutional interpretive methods of varied sorts and discussing other literature on the topic).

110. See GERBER, *supra* note 108, at 13-15.

111. Gerber does not believe in an originalism, however, that looks to the Framers’ intent as providing mechanical solutions to narrow constitutional problems. See *id.* at 13-15. Indeed, Gerber agrees with the historical analyses of H. Jefferson Powell and Leonard Levy, who conclude that “the Framers did not wish future generations of Americans to adhere to their intentions on specific issues.” *Id.* at 15; see H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 948 (1985); LEONARD LEVY, *ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION* 1-29, 284-321 (1988). Instead, Gerber’s originalism is a “moderate” one that describes intent “at the general level of philosophical principle.” GERBER, *supra* note 108, at 13. Or, in the words of Professor Paul Brest, one “concerned with the framers’ intent on a relatively abstract level of generality—abstract enough to permit the inference that it reflects broad social consensus rather than notions peculiar to a handful of the adopters.” Paul Brest, *The Misconceived Quest for Original Understanding*, in *INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT* 227, 235 (Jack N. Rakove ed., 1990).

112. See GERBER, *supra* note 108, at 2-3.

113. See *id.*

114. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

115. See GERBER, *supra* note 108, at 15. Explains Gerber:

The Constitution, in other words, is a political document in the noblest sense. It establishes a framework of government through which certain underlying philosophical principles are to be advanced. *And those philosophical principles are the natural-rights principles of the*

Thus, the Declaration continues, “Governments are instituted among Men . . . to secure these Rights”¹¹⁶ These governments are created by the People “in such form as to them shall seem most likely to effect their Safety and Happiness.”¹¹⁷

The Declaration, insists Gerber, therefore stated the principles to guide the creation of a government, but it did not itself create one.¹¹⁸ The ultimately failed Articles of Confederation first served that task, followed by the Constitution.¹¹⁹ Reading the Declaration and the Constitution together, therefore, supports a textual reading of the Constitution as the mechanism designed to effectuate the Declaration’s purposes. The modern English writer G.K. Chesterton captured the idea well, if perhaps relying more on cultural observations than textual ones:

The American Constitution . . . is founded on a creed That creed is set forth with dogmatic and even theological lucidity in the Declaration of Independence; perhaps the only piece of practical politics that is also theoretical politics and also great literature.¹²⁰

Gerber next turns to an analysis of the Constitution’s Preamble, finding it to have substantive, not merely rhetorical, value.¹²¹ The Preamble declares that “We, the People of the United States, in Order to form a more perfect Union, establish justice . . . promote the general Welfare, and secure the Blessings of Liberty to ourselves and to our Posterity, do ordain and establish this Constitution for the United States of America.”¹²² “Justice,” as used in the Preamble, argues Gerber, means securing natural rights by restraining against injustice, an understanding shared, in his view, by Madison.¹²³

Likewise, the term “general welfare,” insists Gerber, “is properly understood as the ‘public good’ or ‘public happiness’ of society, something

Declaration of Independence. To ignore this fact is to ignore the reason we are a nation. *Id.* (emphasis added).

116. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

117. *Id.*

118. See GERBER, *supra* note 108, at 15.

119. See *id.* at 6 nn.9, 15.

120. G.K. CHESTERTON, WHAT I SAW IN AMERICA 7 (1922).

121. See GERBER, *supra* note 108, at 60.

122. U.S. CONST., pmb1.

123. See David F. Epstein, *The Political Theory of the Constitution*, in CONFRONTING THE CONSTITUTION 77, 82-83 (Allan Bloom ed., 1990) (arguing that the Framers did not see the Preamble’s reference to justice as an ideal progressively to be pursued by government so much as an arrangement of governmental institutions to restrain injustice); 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 134 (1911) (quoting James Madison: “The necessity of providing more effectually for the security of private rights, and the steady dispensation of Justice; Interferences with these were evils which had more perhaps than any thing else produced this convention.”); GERBER, *supra* note 108, at 61 (arguing that the Preamble’s reference to establishing “justice” was intended to create a form of government by which natural rights would be secured).

that was frequently measured as ‘the permanent and aggregate interests of the community,’ rather than simply as the protection of the natural rights of individuals.’¹²⁴ Gerber goes on to catalogue references to the happiness of the People and of individuals, or to synonymous language rooted in the Declaration, in the Federalist papers, in writings of other leading Founders about the Constitution, and in the general philosophy of the day.¹²⁵ Moreover, argues Gerber, the capacious terms of the Bill of Rights and of many terms of similar breadth in the Constitution were purposely cast to allow for infusion into them of the Declaration’s spirit.¹²⁶

Others argue that the Declaration had, at the time of its writing, far more pedestrian purposes.¹²⁷ But, it is hard to argue that it was not given a more noble meaning by the time of the Constitution’s ratification.¹²⁸

Moreover, throughout the course of American history, constitutional conflict has often played out via rhetoric embracing one supposed meaning or another of the Declaration as a statement of broad philosophy—a document foundational to the nation and the Constitution.¹²⁹ Abolitionists relied on it, just as did Abraham Lincoln himself.¹³⁰ It has played a role in the labor movement, in the modern civil rights movement, and in the numerous minority struggles for equal respect.¹³¹ Even internationally, it is

124. GERBER, *supra* note 108, at 62 (recognizing, despite the author’s emphasis on natural rights, that at least as to happiness, the Declaration and the Constitution were designed to protect both individual and collective pursuit); *see also* MORTON WHITE, *PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION* 211 (1987) (“[W]hy would Madison have referred so often to the mischief of violating private rights *and* to that of acting in contravention to the public good if he had not distinguished between these two kinds of mischief?”).

125. *See* GERBER, *supra* note 108, at 19-92.

126. *See id.* at 69-74, 162-95.

127. *See* PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 175-89 (1998) (arguing that the Declaration of Independence has not always been viewed as a sacred document).

128. *See* GERBER, *supra* note 108, at 15.

129. *See generally* ALEXANDER TESIS, *THE LIFE AND TIMES OF THE DECLARATION OF INDEPENDENCE* (forthcoming 2011 Oxford University Press) [hereinafter TESIS, *LIFE AND TIMES*] (draft manuscript) (articulating a book-length defense of this point).

130. *See* ALEXANDER TESIS, *WE SHALL OVERCOME: A HISTORY OF CIVIL RIGHTS AND THE LAW* 57-58, 83-86 (2008) [hereinafter TESIS, *OVERCOME*].

131. *See id.* at 9 (“A closer look at over two centuries of speeches and writings reveals that the Declaration of Independence has had a remarkable influence on the American political and legal culture. Not only have civil rights activists drawn inspiration from its proclamation of inalienable rights, but individuals decrying the abuse of official authority have also turned to the document’s enumeration of British ‘tyranny.’”). Tesis summarized his book thus:

I have chosen to concentrate on how politicians, associates, and individuals have relied on the Declaration of Independence’s central words to justify changing policies, activism, and laws. Dialogue about public values, aspirations, and purposes has set the path to social and political renewal. The Declaration’s terms are broad enough to allow for differing opinions, but its statement of human equality is irreconcilable with discriminatory regulation, adjudication, and law enforcement. The manifesto has entered so many milestone events in United States history that it is surely no mere ornament of the past, but part of the national dialogue about rights and governmental powers.

Id.

understood as a central part of the American Creed and as an inspiration to liberation movements around the globe.¹³² In short, even if the modern United States Supreme Court rarely gives the Declaration's ringing language a nod, the language has played a long, powerful role in the constitutional theory of the eighteenth and nineteenth centuries, and in the constitutional struggles that animate or lead to new constitutional language.¹³³

Unlike Gerber, I do not, however, rest my argument on the idea that the Framers *intended* the Declaration's natural rights philosophy to guide any later documents instituting a government to rule the political community that the Declaration recognized.¹³⁴ But, the history of the framing era and of the nation ever since lends support to the idea that the Declaration's text, and popular and elite understandings of it over the nation's lifetime, can inform the meaning of ambiguous constitutional terms.¹³⁵ I do not, however, rely solely on history in the pages to come, but argue as well that there are sound prudential reasons for considering the Declaration's embrace of the pursuit of happiness in the quest for modern constitutional meaning.

Courts may not often turn to the Declaration precisely because they fear that its terms are so capacious that one may give the term any meaning one chooses.¹³⁶ The document can thus be seen as more a call to arms—an effort to rouse citizens' passion—than a serious statement of a guiding governmental philosophy.¹³⁷ I am concerned not solely, albeit partially, with courts, however, who serve as but one set of constitutional actors. In the pages to come, I hope to show, nevertheless, that both history and modern social science can give enough specificity to the idea of the pursuit of happiness to make it of practical utility in interpreting the Constitution, and in particular, the Fourth Amendment. Social science helps us to understand just what it is we are chasing when we “pursue” happiness and how to do so most fruitfully.¹³⁸

Any reader who rejects the idea that the Declaration should have *any* role in constitutional interpretation, who sees social science as irrelevant to constitutional meaning, or who embraces the narrowest sorts of originalism

132. See DAVID ARMITAGE, *THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY* 103-04 (2007) (making this argument).

133. See GERBER, *supra* note 108, at 3; TESIS, *LIFE AND TIMES*, *supra* note 129.

134. My own approach to constitutional interpretation is more accurately described as a “conversational” one. See Taslitz, *History as Conversation*, *supra* note 1, at 767, 785-86.

135. See *id.*

136. See *supra* notes 108-09 and accompanying text.

137. From another view, passion is essential to, and not inconsistent with, constitutional “reason.” See RUBENFELD, *supra* note 12, at 129-30.

138. See *infra* Parts IV.B, D.

will readily reject my arguments here.¹³⁹ Constraints of space prevent me from defending the Declaration's role further. But, I remind such readers that I argue for a very modest role for the Declaration—as a way to guide sojourners in constitutional history. The pursuit of happiness embraced by the Declaration is thus but a lantern in the night: neither the end of the journey nor the dictator of its path.

IV. INDIVIDUAL AND COLLECTIVE HAPPINESS: THEIR MEANING AND SIGNIFICANCE

If Americans are entitled to pursue “happiness,” deciding how they may best do so requires first defining happiness itself. This section briefly defines its meaning for individuals and explores some of its benefits for them and some of the obstacles barring their achieving it. The section argues that individual happiness ultimately turns in significant part on collective action and institutional change. If happiness's pursuit, as well as that of its cousin, individual “well-being” (leading the “good life,” including *deserved* happiness), turns on collective action, that in turn enables us to talk about the happiness of a “People.” That lays the groundwork for exploring in the next two sections, respectively, what makes a People and its individual members happy and how the Fourth Amendment may be read in a way that advances that cause.

A. *What Is Individual Happiness?*

Defining happiness is a challenge for philosophers and empiricists alike.¹⁴⁰ Here, I attempt a usable working definition of individual happiness. Happiness, as I use the term here, is a descriptive concept, not an evaluative one.¹⁴¹ To some extent, happiness needs no definition. We

139. For persuasive arguments that fact-finding inevitably underlies constitutional reasoning and that social science is essential to such fact-finding, see DAVID L. FAIGMAN, *CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS* (2008); DAVID L. FAIGMAN, *LABORATORY OF JUSTICE: THE SUPREME COURT'S 200-YEAR STRUGGLE TO INTEGRATE SCIENCE AND THE LAW* (2004); Tracey L. Meares, *Three Objections to the Use of Empiricism in Criminal Law and Procedure—and Three Answers*, 2002 U. ILL. L. REV. 851, 851-52 (2002).

140. See DEREK BOK, *THE POLITICS OF HAPPINESS: WHAT GOVERNMENT CAN LEARN FROM THE NEW RESEARCH ON WELL-BEING* 9 (2010) (“No single definition can do full justice to all that . . . [happiness] embraces.”); ARTHUR C. BROOKS, *GROSS NATIONAL HAPPINESS: WHY HAPPINESS MATTERS FOR AMERICA—AND HOW WE CAN GET MORE OF IT* 4 (2008) (“Not surprisingly, psychologists and philosophers have long searched for more quantifiable ways of describing and measuring happiness.”); EDUARDO PUNSET, *THE HAPPINESS TRIP: A SCIENTIFIC JOURNEY* 38 (2007) (describing happiness, more simply, as an emotion managed by the limbic system).

141. Not everyone would embrace a purely descriptive definition. See BROOKS, *supra* note 140, at 5 (describing Aristotle's conception of happiness as “the well-lived life, in which a person realizes his or her true potential,” which is a definition “absolutely compatible with psychological *unhappiness*”). I consider both the descriptive and normative concepts important but for different reasons, thus reserving

know it when we see it.¹⁴² Indeed, much empirical work on happiness shows that individuals queried about it agree on many of its determinants even if the term itself is undefined.¹⁴³

Professor Ed Diener defines happiness loosely as experiencing life satisfaction and frequent joy, while only infrequently experiencing unpleasant emotions like sadness or anger.¹⁴⁴ Diener's definition's emphasis on frequency makes an important temporal point: only occasionally or momentarily feeling happy is not the kind of happiness that matters most in life.¹⁴⁵ Longer-lasting, more frequent emotions of happiness have greater intrinsic value and thus more readily affect individual life outlook, behavior, and motivation.¹⁴⁶

But, by emphasizing "life satisfaction," Diener confuses a significantly normative analysis—how satisfied we are with how our lives are going relative to our goals—with a more heavily affective one—how good we are feeling.¹⁴⁷ It is more useful to precisely distinguish between the emotional experience of happiness and our individual and collective conscious

"happiness" as the descriptive label and "well-being" as the normative one. *See infra* text accompanying notes 186-98.

142. *See* BROOKS, *supra* note 140, at 4 (explaining that Supreme Court Justice Potter Stewart's statement concerning pornography, "I know it when I see it," could just as aptly refer to happiness).

143. *See* BOK, *supra* note 140, at 9-10; BROOKS *supra* note 140 (providing a book-length recitation of people's views on happiness).

144. *See* Ed Diener, Eunkook M. Suh & Shigehiro Oishi, *Recent Findings on Subjective Well-Being*, 24 INDIAN J. OF CLINICAL PSYCHOL. 215 (1997).

145. *See* DANIEL NETTLE, HAPPINESS: THE SCIENCE BEHIND YOUR SMILE 18-20, 33-34 (2005) (distinguishing among momentary feelings of joy and pleasure, "life satisfaction," which concerns overall contentment with life, and "*eudaimonia* . . . [which means] a life in which the person flourishes, or fulfills their true potential").

146. Here, I am referring to "longer lasting" happiness in the sense of "psychic affirmation," as opposed to ephemeral or fleeting experiences of happiness. *See* DANIEL M. HAYBRON, THE PURSUIT OF UNHAPPINESS: THE ELUSIVE PSYCHOLOGY OF WELL-BEING (2008). Logic would also suggest that people should prefer more of the *absolute* level of overall satisfaction with one's life, a concept that is fraught with more potential methodological and conceptual problems than the concept of *relative* life satisfaction. *See id.* at 79-101 (reviewing these problems). *But see* BOK, *supra* note 140 at 9 (noting that, though "happiness" "seems to refer to one's immediate feelings and impressions," and "satisfaction connotes a more cognitive appraisal of one's life as a whole . . . investigators find that groups of people respond quite similarly whether they are asked how happy or how satisfied they feel about their lives"; on the other hand, there are "occasional cases" where the precise words lead to meaningfully different responses). On the other hand, even absolute life satisfaction measures can be a useful piece of the conceptual puzzle. *See* HAYBRON, *supra*, at 80-81. Moreover:

[R]elative levels of life satisfaction across large populations may usually be quite informative, since different groups of individuals may not differ systematically in the ways they generate life satisfaction reports; variations in the norms each individual employs, for instance, may wash out over large samples.

Id. at 101. Haybron argues that the real concern in life satisfaction studies should be with how "people perceive their lives [to be] going *in relation to the things they care about*," not because that matters in itself but because it is one important *indicator of* how their lives are really going. *See id.* at 102 (emphasis added). He further insists that "treating people with respect demands that we pay attention to what they think about their lives when making policies that affect them." *Id.* at 101.

147. *See* HAYBRON, *supra* note 146, at 101-02.

evaluations of it, its worth, and the worth of other important aspects of our lives.¹⁴⁸

Empirically-informed philosopher Daniel Haybron does just that. Happiness occurs, argues Haybron, when we experience broadly positive, central affective states leading us to three stances: endorsement, engagement, and attunement, with negative central affective states playing a minor role in our lives.¹⁴⁹ “Endorsement” is the emotional affirmation of our lived experience as positive—the paradigm state of cheerfulness.¹⁵⁰ “Engagement” describes the degree of our commitment to our life situation and activities as worth our time and effort.¹⁵¹ Having a “passion for life” captures the idea.¹⁵² “Attunement” is feeling at home in one’s life instead of defensive about it.¹⁵³ You are in your element, feeling comfortable with who you are and how you live.¹⁵⁴ Attunement requires a combination of inner peace or calm, confidence, and openness or expansiveness of spirit, which suggests a sense of freedom.¹⁵⁵

148. See *infra* text accompanying notes 186-98 (comparing the feeling of happiness to the more normative conception of well-being).

149. See HAYBRON, *supra* note 146, at 128-33. Haybron distinguishes happiness from “pleasure,” whether physical or otherwise, on the grounds that pleasure is ephemeral, episodic, unproductive of other important emotional conditions, superficial, not helpfully predictive, and not important in most life course or political deliberations. See *id.* at 61-77. Eating even your favorite crackers or solving a puzzle do not lead to profound and lasting emotional states. See *id.* at 63. Whatever pleasure is, and whatever its costs and benefits, it is not itself “happiness.” See *id.* at 77. Some thinkers do not define pleasure as narrowly as Haybron. See MORTEN L. KRINGELBACH, *THE PLEASURE CENTER: TRUST YOUR ANIMAL INSTINCTS* 5 (2009) (“The experience of pleasure involves intentionality and at least four distinct stages: engagement, acceptance, continuation, and subsequent return.”). Psychiatry Professor Morton L. Kringselbach does distinguish between pleasure and happiness but concludes that “[h]appiness is seldom present when pleasure is missing, anhedonia, which is a common form of mental illness.” *Id.* at 228. Other thinkers find close links among pleasure, social norms, and varied evaluative mental states. See PAUL BLOOM, *HOW PLEASURE WORKS: THE NEW SCIENCE OF WHY WE LIKE WHAT WE LIKE* 6-24, 203-22 (2010). Resolving the interrelationship, if any, between pleasure and happiness beyond these brief comments is, however, unnecessary for my purposes here.

150. See HAYBRON, *supra* note 146, at 113-14.

151. See *id.* at 114-15.

152. See *id.* at 114. The exuberant forms of engagement are typified in ideals of passionate living among romantics and artists. See *id.*; B. Reginster, *Happiness as a Faustian Bargain*, in *DAEDALUS*, 52-59 (Spring 2004); Robert C. Solomon, *The Virtues of a Passionate Life: Erotic Love and the Will to Power*, in *VIRTUE AND VICE* 91-118 (Ellen Frankel Paul, Fred D. Miller Jr. & Jeffrey Paul eds., 1998). “Flow” describes a quieter form of engagement—a loss of all sense of self-awareness or time passage, or perhaps of any feeling at all—because of giving thoroughgoing attention to the activity at hand. MIHALY CSIKSZENTMIHALYI, *FLOW: THE PSYCHOLOGY OF OPTIMAL EXPERIENCE* 53 (1990); see HAYBRON, *supra* note 146, at 115.

153. See HAYBRON, *supra* note 146, at 116-18.

154. See *id.* at 116.

155. See *id.* at 116-17.

B. *The Benefits of Individual Happiness*

Happiness is not all that matters in life.¹⁵⁶ Yet, it seems strongly correlated to overall well-being and is urgently sought by most human beings.¹⁵⁷ Happiness and its pursuit, therefore, play an important role in what choices we make, how we deliberate about them, how we evaluate our overall well-being, and how we predict and explain our own and others' emotions and behavior.¹⁵⁸

Helping others, it turns out, for example, contributes to happiness, but correspondingly, happy people are more likely to help others.¹⁵⁹ This example points out that causality can run both ways; happy circumstances make happy people and vice-versa.¹⁶⁰ In some areas, it may be difficult to tease out the direction of the causal arrow, but in many other areas, researchers have shown it likely that certain circumstances or actions cause

156. *See id.* at 123. Bok thus points out that politics must have additional goals, such as complying with constitutional dictates (even when squarely inconsistent with happiness), avoiding artificial happiness (think of the drug-induced state of citizens in Aldous Huxley's dystopian novel *Brave New World*) that promotes political lassitude, and promoting justice (justice might require helping the beggar who is perfectly happy in his poverty). *See* BOK, *supra* note 140, at 45-54.

157. *See* BOK, *supra* note 140, at 45 ("According to opinion surveys, happiness usually ranks at the top of the goals people hope to achieve, a high regard that should surely count for something in a democratic state."). Bok continues still more forcefully:

[Counter-examples] . . . cannot justify a broad legislative disregard for reliable evidence of their constituents' happiness. In a democracy, citizens should be the judges of their own well-being unless their feelings conflict with clear and generally accepted principles of justice. The fact that legislators happen to have different values or subscribe to different theories or ideologies should not be sufficient reason to ignore the feelings of their constituents. Otherwise, those in authority would assume too great a license to impose their own views about what is best for the human beings they represent. Rather, slavery, false imprisonment, and fraud should be regarded as special cases involving basic principles of fairness that are so widely accepted that they compel government intervention regardless of the feelings of the victims.

Id. at 56.

Bok also responds to claims that government can do little to improve happiness, noting that various public policies affect happiness and that genes account for *at most* fifty percent of one's happiness level, assuming that it makes any sense to separate the influence of genes from that of environment at all. *See id.* at 47-48, 53-54. Bok does, however, caution that there is much individual variation in what makes people happy, so lawmakers should generally take care not to impose a one-size-fits-all recipe for happiness enhancement on all citizens. *See id.* at 48.

158. *See* BRUNO S. FREY, *HAPPINESS: A REVOLUTION IN ECONOMICS* 8-10 (2008) (arguing that understanding happiness can improve economic predictions); *infra* text accompanying notes 172-84 (explaining how happiness can play an important role in individual and collective decisions, but we can still jointly, or severally, be poor at knowing what makes us happy and how to achieve it); *see generally* ED DIENER & ROBERT BISWAS-DIENER, *HAPPINESS: UNLOCKING THE MYSTERIES OF PSYCHOLOGICAL WEALTH* (2008) (discussing the roles happiness plays in all these areas, particularly concerning work, religion, marriage, and other social relationships).

159. *See* FREY, *supra* note 158, at 11; BROOKS, *supra* note 140, at 180 (noting that charity most likely "makes people happy *and* happy people tend to be the most charitable").

160. *See* FREY, *supra* note 158, at 11.

happy people rather than happy people alone being drawn to those circumstances.¹⁶¹

Moreover, a happy person is simply less self-centered and better capable of empathy and action than an unhappy one.¹⁶² More broadly, as this paper will examine shortly, many contributors to, and consequences of, happiness in Western democracies correlate nicely, though far from precisely, with modern notions of the virtuous life.¹⁶³

Happiness is also central to self-definition—to each individual’s sense of who he uniquely is.¹⁶⁴ A generally upbeat person who is inexplicably sad says he is “not himself” today.¹⁶⁵ That is more than an empty phrase. Because happiness, as here defined, affects how we interpret the world, how we interact with it, and how we perceive our role in it, our degree of happiness and what we see as spurring it are fundamental aspects of individual identity.¹⁶⁶ We weave the things that make us happy and our

161. *See id. passim* (analyzing causation versus correlation and the direction of the causal arrow in a wide range of circumstances, and concluding, for example, that the *main* causal effect of unhappiness among the unemployed is their unemployment (rather than unhappy people doing poorly in the labor market); that democracy *causes* increased levels of happiness; and that researchers have made at least a prima facie case that we can increase happiness by supporting marriage, self-employment, and voluntary work). Methods used to reach causal, and not merely correlational, conclusions include qualitative studies, psychological tests, re-surveying the same individuals over time (for time-invariant effects), longitudinal analyses considering a specific happiness “set-point” for each individual, and natural experiments. *See id.* at 24-25, 93-94.

162. *See* BOK, *supra* note 140, at 205 (noting that “the most important sources of happiness include having close relationships with family and friends, helping others, and being active in community, charitable, and political activities”). Accordingly, concludes Bok, “the successful pursuit of happiness promises not merely to be self-serving but to contribute to a better, stronger, more caring society.” *Id.*

163. *See infra* text accompanying notes 186-201. Bok wisely points out some important limitations on using happiness research in crafting public policy. *See* BOK, *supra* note 140, at 60. Notably, it may be hard to predict all the consequences of specific legislation, and some of its benefits may be so intangible or hard to measure that they will not be evident to citizens. *Id.* Other legislation may turn on value judgments, values sometimes conflicting with pursuing happiness. *See id.* Nevertheless, argues Bok, happiness research can help governments to choose among priorities—recurring or analogous legislative proposals may create a track record making effects more predictable—and “happiness research may be able to throw light on possible institutional changes in government itself.” *Id.* at 61. It is this last use that most interests me here.

164. *See* HAYBRON, *supra* note 146, at 182.

165. *See id.* at 183.

166. Daniel Haybron makes the point thus:

Central emotional reactions somehow constitute temporary changes *in* us, and are not just things that happen *to* us. Indeed, changes in emotional state, particularly mood propensity, are tantamount to temporary changes in personality: they alter the way we perceive things, how we evaluate things, the inferences we make, how we react (emotionally and otherwise) to events, what we desire, our physiology, and so on . . . Suitably extended changes in emotional state can quite literally amount to differences in personality: a once dour person may now be high-spirited, a serene individual may become anxious, etc. . . . The language here is interesting: we say “I *am* happy,” versus “I am *experiencing* pleasure”—i.e., more or less, “Pleasure is happening to me.” Such talk appears to construe happiness as a property of the person, and pleasure as something that impinges on the person.

Id. at 183.

experience of happiness into the individual narrative that constitutes the self, and the nature of the self is importantly constitutive of well-being.¹⁶⁷

C. *Obstacles to Individual Happiness*

There can be many obstacles to happiness. Notably, self-deception and a weak ability to know today what will make us happy tomorrow can stand in the way of a happy life.¹⁶⁸ Most important here, however, is this: many of the sources of happiness—such as social engagement and meaningful life activities geared to our abilities—are not easily recognized or changed by an individual acting in isolation.¹⁶⁹ In particular, happiness depends heavily upon social context.¹⁷⁰ Having a sense of control over one's daily activities is one important contributor to happiness, yet poverty, familial obligations, under-education, or a host of other factors may, for example, make it hard to agitate for more control in a debilitating job or to leave it for another that gives you greater control.¹⁷¹ Having a sense of

167. See *id.* at 193; Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 387, 393-440 (1996) [hereinafter *Patriarchal Stories*] (discussing the central role that narrative plays in human reasoning, particularly about individual character); *infra* text accompanying notes 186-201.

168. See HAYBRON, *supra* note 146, at 200-01; Taslitz, *Willfully Blinded*, *supra* note 25, at 394-98 (defining self-deception and explaining the constitutive psychological processes); see generally DANIEL GILBERT, *STUMBLING ON HAPPINESS* (2006) (articulating a book-length discussion of why we are so bad at predicting what will bring us future happiness). Other psychological phenomena may stand in the way of our attaining happiness as well. For example, most people ignore the phenomenon of adaptation; that is, that some things, including particularly material goods above a certain level, make us happy only for a brief period of time. See BROOKS, *supra* note 140, at 117-20. Furthermore, limited experience leads to a "grass is always greener" phenomenon—imagining that something we have never done will make us happy only to find that it does not. See *id.* at 119. We also pay undue attention to salient aspects of our environment—such as the flashy new X-box or iPod—while under-attending to more subtle aspects of our lives that in fact breed greater happiness. See DIENER & BISWAS-DIENER, *supra* note 158, at 185 (noting that we tend to pay the most attention to potential dangers, social cues, and certain relevant aspects of the immediate sensory environment). "Affective ignorance," our inability at times even to know what we are feeling, can also play a role. See HAYBRON, *supra* note 146, at 199 ("[T]here are good reasons for doubting that any of us have a firm grasp on the quality of our experience of life, in particular its affective character. Possibly, many of us are profoundly ignorant about such matters, to the point that we often don't know whether we are happy or unhappy, or even whether[] our experience is pleasant or unpleasant.").

169. See DIENER & BISWAS-DIENER, *supra* note 158, at 50 (noting that close social relationships, such as close family and friends, are strongly correlated with happiness and with dual-direction causation—relationships make us happy and happiness makes better social relationships); *id.* at 73-85 (explaining that meaningful jobs offering opportunities for personal control, variety, decent pay, supportive supervisors, job fit, and the "right amount of challenge"—not so much as to cause anxiety, not so little as to cause boredom—are major contributors to human happiness). "Close" relationships are those "characterized by mutual understanding, caring, and validation of the other person as worthwhile." *Id.* at 51; see also HAYBRON, *supra* note 146, at 125 (noting that it is hard to change the basics of how we live, particularly concerning many of the things most productive of happiness, such as "social engagement, and meaningful activities that are well-matched to your abilities").

170. See HAYBRON, *supra* note 146, at 125.

171. *Id.* at 125 ("If the problem lies chiefly in the way you live, and this in turn depends heavily on the kind of society you inhabit, then positive thinking techniques and the like are only going to get you

control thus requires having a fair number of life options and freedom to choose among them.¹⁷²

D. Individual Happiness Requires Collective Action

Yet, options are insufficient, and unbounded options are often counter-productive.¹⁷³ This is because of a very basic reason: happiness is profoundly dependent upon the health and vitality of the various communities in which we live.¹⁷⁴ To the extent that we behave as largely isolated, individual choosers, disconnected from communities and from neighbors, thus favoring mobility of home, job, and pass-times over trust and human struggle, we will find greater levels of happiness elusive.¹⁷⁵

Correspondingly, social institutions can create a context that steers us toward or away from the things that make us happy—without dictating our choosing them.¹⁷⁶ Yet, too much emphasis on community and institutions that are too coercive so limit our effective range of choices as to crush any real sense of control.¹⁷⁷ A stultifying conformity, the “compression” of ourselves into others’ image, means the “sleep of individuality,” which is a partial death of the self.¹⁷⁸

These obstacles pose difficulties for fostering human happiness, but also teach several helpful lessons. Perhaps most importantly, an individual

so far.”); *see id.* at 258 (stating that having a sense of control over one’s daily activities is an important contributor to happiness).

172. Thus, cognitive philosopher Daniel Haybron, a critic of excessive option freedom, nevertheless concedes that there are indeed good reasons to believe that some degree of such freedom is inherently beneficial. *See id.* at 258. First, it permits space for privacy. *See id.* Second, it promotes a “liberating sense of optimism and possibility.” *Id.* Third, it creates a sense of control over daily activities, even if not necessarily over the “basic features of [one’s life].” *Id.*

173. *See id.* at 259 (summarizing research showing that *too much* option freedom can undermine happiness); B. SCHWARTZ, *THE PARADOX OF CHOICE* (2004) (arguing that increasing option choice for Americans explains much of the increased depression rates by contributing to declining social cohesiveness, rising expectations, and increasing self-blame for failures); S.S. Iyengar & M.R. Lepper, *When Choice Is Demotivating: Can One Desire Too Much of a Good Thing?*, 79 *J. PERSONALITY & SOC. PSYCHOL.* 995, 201-17 (2000) (noting that shoppers are more likely to buy and feel satisfied with jam when they have six rather than thirty choices); S.S. Iyengar, R.E. Wells & Barry Schwartz, *Doing Better But Feeling Worse: Looking for the “Best” Job Undermines Satisfaction*, 17 *PSYCHOL. SCIENCE* 143, 147-48 (2006) (noting that undergraduates applying for more jobs got higher-paying ones but had less satisfaction than those applying for fewer jobs); S. Botti & S.S. Iyengar, *The Dark Side of Choice: When Choice Impairs Social Welfare*, 25 *J. PUB. POL’Y AND MARKETING* 24, 31 (2006) (concluding that employees are less likely to use employer retirement savings plans when given too many from which to choose).

174. *See* HAYBRON, *supra* note 146, at 261-62.

175. *See id.*

176. *See id.* at 264; *cf.* RICHARD THALER & CASS SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 83-102, 255-56 (2009) (arguing for the wisdom and effectiveness of constructing situations to steer people toward making wise choices without mandating them).

177. *See* HAYBRON, *supra* note 146, at 120.

178. *See id.*

cannot achieve happiness in isolation.¹⁷⁹ Happiness's growth requires varied levels of collective action, from the level of friends, Elks lodges, neighborhood associations, and churches, to the corporation or non-profit association, all the way up to mass political and electoral action.¹⁸⁰

E. From Collective Action to Collective Happiness: Defining the Happiness of a "People"

Lastly, because individual happiness turns on context, community, and political and social institutions, we can speak of "collective happiness" as the outcome of social arrangements, including legal arrangements, which maximize the likelihood of great numbers of individuals achieving significant degrees of happiness.¹⁸¹ Guaranteeing individual happiness is impossible, but engineering the collectivity may improve individuals' chances.¹⁸²

Another way to view the problem, however, is to draw on the argument made earlier in this article that the "people" have a socially real existence *apart from* the individual members.¹⁸³ If that is so, then we can begin to speak of "collective happiness" as distinct from that of the individuals comprising the collectivity.

This terminology raises problems of its own because it is hard to speak of the "emotional state" of a collectivity. Rather than delving into the thorny philosophical question of whether such collectivized emotions exist, however, it is simpler to speak of a "happy People" (the collectivity) as the People that result, given a particular legal order's history and culture, from institutions likely to maximize individuals' chances for achieving happiness.¹⁸⁴ However phrased, the larger point is that collective happiness can be seen as something real and that, properly defined, does not require submersion of the individual into the collective whole.¹⁸⁵

179. *See id.* at 261-62.

180. *Id.* Close social relationships, as I have noted, promote happiness, as does community. *See supra* text accompanying notes 159-63, 169-70. But, we will soon see that some forms of more direct involvement in government do so too. *See infra* text accompanying notes 202-40. Moreover, achieving greater daily control over one's life, particularly when social and political circumstances limit such control and otherwise create an anti-happiness context, likely requires group action to achieve difficult change. *See HAYBRON, supra* note 272, at 258. Group action can, of course, itself sometimes foster close relationships, and expanding the community to enhance happiness definitionally requires group involvement. *See Taslitz, Feminist Approach, supra* note 10, at 21-22.

181. *See* Jonathan Haidt, J. Patrick Seder & Selin Kesebir, *Hive Psychology, Happiness, and Public Policy*, 37 J. LEGAL STUD. 133, 135 (2008).

182. *See HAYBRON, supra* note 146, at 263-67.

183. *See supra* Part II.B.1.

184. This conclusion follows from the earlier-defended definition of "peoplehood." *See supra* text accompanying notes 29-65.

185. Relevant to this last point is the work of Jonathan Haidt, J. Patrick Seder, and Selin Kesebir on the "hive mind." *See Haidt, supra* note 181, at 133 *passim*. Haidt and his colleagues accept the probable truth of the "moral community hypothesis, which states that people need to be bound into a

F. A Comparison to Well-Being

“Well-being” is also a contested concept.¹⁸⁶ One way to think about well-being, however, is as dictating how we should live our lives, the sorts of persons we should aspire to be in a way that maximizes the expression of both each individual’s common humanity with others and of his unique needs and personality.¹⁸⁷ Achieving that balance, Daniel Haybron again argues, demands self-fulfillment, and that in turn requires not simply happiness but “authentic” happiness—happiness that reflects who we truly are.

To be authentically happy, argues Haybron, requires information, autonomy, and richness.¹⁸⁸ “Information” means that our choices are based upon enough accurate information to demonstrate that they stem from reality rather than illusion.¹⁸⁹ “Autonomy” means that we have some reasonable range of options.¹⁹⁰ The “happy slave” lacks both autonomy and information (namely about what freedom is like), so her happiness is inauthentic.¹⁹¹ “Richness” means that happiness is grounded in complex ways of living that more fully express individuality.¹⁹² Notice that identifying “authentic” happiness is an evaluative judgment, not a

community that shares norms and values to flourish.” *Id.* at 135. They offer two caveats, however. First, that groups that are too binding and conformist can become counter-productive; second, that individual personality differences mean that some people will chafe at the constraints created by communal connection. *See id.* at 136. But, they also go further, arguing that the “hive hypothesis”—meaning that occasionally losing one’s self “by becoming part of an emergent social organism” to maximize human flourishing—is also often true. *See id.* at 136. Hiving, they argue, has evolutionary roots and can enhance social capital. *See id.* at 137-47. But, they caution that hiving works best in small groups of dozens, hundreds, or thousands of people. *See id.* at 148. Hiving involves deindividuation, as does mobbing, but unlike with mobbing, hiving is deindividuation in the service of communion and celebration, not anger. *See id.* at 148-49. Fostering thousands or more local hives will combat the anomie that promotes fascism while increasing trust, cooperation, love, and interdependence. *See id.* at 148. But, fostering a single national hive risks repression akin to fascism. *See id.* The right balance is necessary. Finally, these authors worry that too much diversity can undermine the sense of national commonality—of many hives and individuals forming a single community. *See id.* at 151. On this last point, I disagree; other research shows that strong racial and ethnic identity can, under the right circumstances, be consistent with and even promote broader national identification. *See* Andrew E. Taslitz, *Racial Auditors and the Fourth Amendment: Data with the Power to Inspire Political Action*, 66 L. & CONTEMP. PROBS. 221, 286-87, 251 & n.242 (2003) [hereinafter *Racial Auditors*].

186. *See* HAYBRON, *supra* note 146, at 155-58 (surveying some of the major theories of well-being).

187. *See* HAYBRON, *supra* note 146, at 19-28; *see also supra* text accompanying notes 36-47 (discussing the importance of commitments to narrative self-hood). Rephrased, well-being requires both attention to what makes each unique individual happy and to his commitments to others because both are central aspects of the “self.” *See* HAYBRON, *supra* note 146, at 181-85, 193; *supra* text accompanying notes 19-28 (discussing the importance of commitments to narrative self-hood).

188. *See* HAYBRON, *supra* note 146, at 185-86.

189. *See id.*

190. *See id.* A reasonable, but not vast, range is required. *See supra* notes 172-73 and accompanying text.

191. *See* HAYBRON, *supra* note 146, at 185-86.

192. *See id.*

descriptive one.¹⁹³ Authenticity articulates grounds for declaring one's happiness that also promotes well-being. But, just the same, you may be happy, albeit inauthentically so.

The authenticity of happiness is not the only conceivable constraint on when happiness can be deemed praiseworthy.¹⁹⁴ But, it is a crucially important component of such praiseworthiness. What all these observations have in common is that they concern normative concepts of well-being—of what it means for a person to lead a “good life.” Happiness is part of that, but not all of it.¹⁹⁵ Indeed, Haybron himself concludes that the Declaration of Independence's embrace of “life, liberty, and the pursuit of happiness” is largely about pursuing well-being, of individual flourishing, and not merely individual happiness as here defined.¹⁹⁶ Whether Haybron is right, we will see shortly.¹⁹⁷

If well-being, however, turns partly on living out our self-definitional commitments, then, given that those commitments partly define a people, it may also be possible to speak of the People's well-being. That collective well-being, like the individual one, turns partly on happiness: how and why we attain it, what weight we give it relative to other values, when we think it admirable to experience, and when not.¹⁹⁸ These things as well may be part of the Declaration's message.

G. Taking Stock

Just as the definition of peoplehood turned on a comparison to individual personhood, so has this section sought to understand the meaning of collective happiness—the happiness of a people—by comparing it to the meaning of individual happiness. Here I want to summarize the lessons learned and their implications for the Fourth Amendment.¹⁹⁹

Lesson One: The happiness of a people requires institutions that promote the development of unique individuals who are nevertheless partly defined by their links to other groups and capable of joining in collective action and expression. The protection of privacy and free movement that the Fourth Amendment provides, as I and others have explained

193. *See id.*

194. *See supra* notes 157-59 and accompanying text (discussing how happiness enhancement sometimes conflicts with other values, such as achieving justice).

195. *See* HAYBRON, *supra* note 146, at 182, 193.

196. *See id.* at 30.

197. *See infra* text accompanying notes 255-392.

198. *See supra* text accompanying notes 29-59.

199. These lessons follow from the analyses in the preceding portions of this section and thus require no further citation.

elsewhere,²⁰⁰ helps to foster just these goods. A government that too readily invades privacy shames and frightens its citizens into uniformity, passivity, and isolation. Individuals need spaces free of the state's watchful eye to experiment with self-definition and to develop individual and group relationships without fear of governmental disapproval or pressure toward conformity.

Lesson Two: Neither individuals nor a people can pursue happiness effectively without collective action. Social institutions affect individual and group happiness. Governmental institutions likewise have such an effect. If happiness's pursuit is partly definitional of the American people, then no governmental institution can be entirely legitimate that is not open to collective action to change that institution's nature and behavior. Given that the police are a governmental institution authorized to use force against its citizens, legitimacy seems particularly to require police institutional openness to input from the citizenry. The Fourth Amendment thus should be interpreted in a way that maintains such police institutional openness concerning police search and seizure practices.

Lesson Three: For the happiness of a people to be "authentic," it must be based upon complete and accurate knowledge of the history that helps to define it and the current social practices that sustain it. The people and its individual members must also have high degrees of autonomy—of informed control over their life choices—to achieve authenticity. Furthermore, the people must be free to foster their own unique path while permitting the full expression of the varied natures of the individuals and groups that compose the people. Authentic happiness is in turn a central component of the people's well-being—the sense that the narrative the people live is a good one.

For purposes of interpreting the Fourth Amendment, this quest for authenticity thus suggests corollary lessons: (1) history and current social practices and their consequences should be candidly explored in making Fourth Amendment guarantees real (this follows from the importance of making informed decisions and of understanding history as central to understanding individual and collective identity); and (2) the privacy and locomotive freedom protected by the Fourth Amendment and that foster individuality and free choice must not too easily be sacrificed (this follows from the central role of autonomy).

These lessons are suggested by the nature of collective happiness and well-being. Further support for these lessons, and an elaboration upon them, comes from examining the social science on just what it is that makes

200. See, e.g., Andrew E. Taslitz, *The Fourth Amendment in the Twenty-First Century: Technology, Privacy, and Human Emotions*, 65 LAW & CONTEMP. PROBS. 125 (2002) [hereinafter *Twenty-First Century*].

us happy as individuals (and thus, as a people)—a task to which this article now turns.

V. WHAT MAKES US HAPPY? RELEVANT ASPECTS: THE SOCIAL SCIENCE

Ample social scientific evidence converges on a relatively small number of factors widely agreed upon as affecting individual happiness.²⁰¹ Here, I focus on the few that are relevant to my task: (1) the quality of government, (2) certain forms of inequality, and (3) control and its cognate idea of privacy.

A. *The Quality of Government*

The quality of government plays an important role in levels of individual and national happiness. Four aspects of governmental quality are particularly relevant here: voice and accountability, effectiveness, rule of law, and the control of corruption.²⁰²

Voice and accountability refers to the “degree to which citizens participate in choosing their government and the degree of freedom accorded to speech, association, and media expression.”²⁰³ Government effectiveness means the quality of policy formation and implementation, as

201. See generally BOK, *supra* note 140, at 23, 181 (summarizing many of the publicly-oriented factors); BROOKS, *supra* note 140, at 111-32 (summarizing many of the privately-oriented factors). Haybron’s conceptual analysis, discussed earlier, relies heavily on current empirical work. See *id.* at 215-21. Although he points out weaknesses in that work, he does it mostly to examine the limits to what conclusions the work *does* support, and he ultimately finds that work reliable enough to make sound judgments about what affects relative levels of happiness while also supporting his conceptual distinctions. See *id.* at 221-22. The measures used in happiness research are diverse and include surveys asking people how happy or satisfied they are with their lives, experience sampling asking people to log how they feel at various points throughout the day, and day-reconstruction methods asking subjects to recall what they did and how they were feeling during each activity the preceding day. See BOK, *supra* note 140, at 10, 32-33. Other methods include brain scans of the portions of the brain associated with positive sensations, smile frequency studies, and studies correlating positive affective reports with life experiences assumed to be emotionally desirable, such as strong marriages and health. See *id.* at 38. Other methods compare the reports of friends and family—do they see the subject as being as happy or unhappy as he does?—to find strong correlations. See HAYBRON, *supra* note 146, at 222. The “law of large numbers”—teaching that random variations should cancel each other out in a large enough sample—also adds to the reliability of much of the research. See GILBERT, *STUMBLING ON HAPPINESS* 67-70 (2006) (making this point, though favoring real-time reports of subjective experience as the research method of choice); FREY, *supra* note 158, at 17-26; see also BOK, *supra* note 140, at 32-44 (surveying and critiquing the various methodologies). Commentators from a wide variety of fields have concluded that, despite its flaws, much of the research is amply reliable and remarkably consistent. See BOK, *supra* note 140, at 44, 62, 204 (writing from a policy analyst’s perspective); see FREY, *supra* note 158, at 26 (writing from an economist’s perspective); HAYBRON, *supra* note 146, at 199-200, 221-22 (writing from an empirically-informed philosopher’s perspective and defending the value of much current research, even given “AI”—affective ignorance—about much of what we really feel, being a “live hypothesis”).

202. See BOK, *supra* note 140, at 23, 181.

203. *Id.* at 181.

well as the quality of the civil service charged with that task.²⁰⁴ The rule of law combines concerns about the “likelihood of crime and violence, the effectiveness of the police and courts, and the extent to which officials abide by the rules of the society.”²⁰⁵ In wealthier Western countries such as the United States, the “rules of society” especially include muscular guarantees of personal freedom.²⁰⁶ Trust in public officials, particularly the police, is a critical contributor to happiness.²⁰⁷ When the police adhere to procedural and other guarantees of personal freedom and treat persons subject to their authority with dignity, trust is maximized.²⁰⁸ Police and other public agencies’ responsiveness to citizen demands also matters.²⁰⁹

Additionally, equality concerns play a prominent role.²¹⁰ “According to a World Values study,” Bok explains, “tolerance of minority groups—whether defined by race, religion, gender, or sexual orientation—is likewise associated with greater happiness, not merely for the groups directly

204. *See id.*

205. *Id.*

206. *See id.* at 22-23. Economic freedom matters more in poorer nations, personal freedom in richer ones. *See id.* at 23. One study found that rising freedom was the most important factor explaining rising happiness levels in 42 of 52 nations between 1981 and 2007. *See* Ronald Inglehart, Robert Foa, Christopher Peterson & Christian Welzel, *Development, Freedom, and Rising Happiness: A Global Perspective (1981-2007)*, 3 PERSPS. ON PSYCHOL. SCI. 264, 266 (2008). Concerning causation, at least one study has found that the causal arrow runs both ways: democracy contributes to happiness, and happy people enhance democracy and improve governmental quality. *See* BOK, *supra* note 140, at 22-23; Ronald Inglehart, *Democracy and Happiness: What Causes What?* (a paper presented at Notre Dame Conference on New Directions on the Study of Happiness, Oct. 22-24, 2006). This same study found, however, that the “more potent” of the two effects was that happy people improve the quality of their government. *See* BOK, *supra* note 140, at 22-23; *see also* BROOKS, *supra* note 140, at 199 (“Political, economic, and religious freedoms are crucial to our happiness.”). *But see* FREY, *supra* note 158, at 68 (arguing that the more potent causal arrow points to democracy’s *causing* happiness).

207. *See* BOK, *supra* note 140, at 23; John F. Helliwell & Haifang Huang, *How’s Your Government? International Evidence Linking Good Government and Well-Being* (2006) (unpublished). Interestingly, on all major measures of the quality of government for the years they have been tracked, the United States, though high on an absolute scale among all the nations of the Earth, declined from 1996 to 2006. *See* Daniel Kaufman, Art Kraay & Massimo Mastruzzi, *Governance Matters VI: Aggregate and Individual Governance Indicators 1996-2006*, at 76-94 (World Bank Research Working Paper 4280, 2007). When compared to the other six “leading” democracies (Sweden, Canada, the United Kingdom, Germany, Japan, and France), moreover, the United States’ performance is below average. *See id.*; BOK, *supra* note 140, at 183-84.

208. *See* BOK, *supra* note 140, at 23, 181-82, 201-02. On trust’s social significance more generally, *see* MAREK KOHN, TRUST 8-16, 104-08, 124-33 (2008); Margaret L. Paris, *Trust, Lies, and Interrogation*, 3 VA. J. SOC. POL’Y & L. 3, 9-31 (1996); Carol Steiker, *Brandeis in Olmstead: “Our Government Is the Potent, the Omnipresent Teacher”*, 79 MISS. L. J. 149, 169-70 (2009) (arguing that modern social science supports the idea, articulated by Brandeis in his *Olmstead* dissent, that governments that breach Fourth Amendment and other constitutional mandates governing the police break down governmental trust and legitimacy, contributing to anarchy); Scott Sundby, *“Everyman’s” Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1763-66 (1994) (arguing that the Fourth Amendment must be interpreted in a way that promotes trust between individuals and their government).

209. *See* BOK, *supra* note 140, at 23.

210. *See id.* at 97.

affected but for the entire population.”²¹¹ Finally, happiness requires corruption control—officials avoiding using their power for private gain and minimizing the influence of special interests.²¹² As applied to the police, therefore, happiness is enhanced by a fair, honest, and responsive police force that respects individual freedoms and equal citizen dignity, while effectively combating crime and giving an attentive ear to the concerns of those policed.²¹³

The economists’ idea of “procedural utility” sheds light on these observations, particularly those concerning voice and accountability.²¹⁴ Procedural utility emphasizes well-being, including happiness’s role in it.²¹⁵ Procedural utility is concerned not with outcomes, but with the happiness and well-being associated with pursuing them via certain processes.²¹⁶ Even when the pursuit of happiness fails, its occurring under the right processes itself promotes happiness.²¹⁷ The trip can matter even more than the destination.

Procedures matter because of the feedback information they convey to the self.²¹⁸ Specifically, procedures address three core psychological needs: autonomy, relatedness, and competence.²¹⁹ Autonomy encompasses the experience of being causal—of being able to organize one’s own actions in an effort to affect the world.²²⁰ Relatedness includes the desire to connect to others in relationships of care and to be treated as a respected member of salient social groups.²²¹ Competence concerns one’s “predisposition to control the environment and to experience oneself as capable and effective.”²²²

Voice is therefore important because it promotes a sense of autonomy and competence.²²³ To achieve this result, “effective voice” is required—that is, a voice perceived as having the real prospect of at least sometimes

211. *Id.* at 23; see Inglehart, Foa, Peterson & Welzel, *supra* note 206, at 271.

212. *See* BOK, *supra* note 140, at 23.

213. *See* BOK, *supra* note 140, at 182. Police on the take would thus constitute one form of “corruption,” much as arguably would the police primarily serving the interests of one social group (for example, middle class whites) far more effectively than that of another social group (for example, poor urban blacks). *See id.*

214. *See* FREY, *supra* note 158, at 107.

215. *See id.*

216. *See id.* The economists’ idea of “procedural utility” thus largely tracks the psychologists’ idea of “procedural justice.” *See* Tom R. Tyler & E. Allan Lind, *Procedural Justice*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 65 (Joseph Sanders & V. Lee Hamilton eds., 2001).

217. *See* FREY, *supra* note 158, at 107.

218. *See id.*

219. *See id.* at 109.

220. *See id.*

221. *See id.*

222. *Id.* Procedural justice meted out by relevant institutions also contributes to a positive sense of self. *See id.*

223. *See id.* at 110.

changing outcomes.²²⁴ Ineffective voice conveys the sense of empty ritual—of not really being “listened to.”²²⁵ Effective voice, on the other hand, addresses relatedness too because such a voice “is an important signal about one’s standing in a group.”²²⁶ Individuals involved in arbitrations, mediations, civil or criminal trials, or other dispute resolution mechanisms giving them voice are far more likely to accept negative outcomes as legitimate.²²⁷ They are also far more likely to respect and obey the law in the future.²²⁸ On a broader scale, more democratic institutions achieve similar results in the political realm because they enhance individuals’ autonomy perceptions.²²⁹ Indeed, a number of studies, most famously one involving Swiss cantons, suggest that the more opportunities available for direct democratic participation in government and other institutions affecting everyday life, the greater the levels of happiness.²³⁰

224. See ANDREW E. TASLITZ, *RAPE AND THE CULTURE OF THE COURTROOM* 137-41 (1999) [hereinafter *RAPE AND THE CULTURE OF THE COURTROOM*].

225. See *id.*

226. See FREY, *supra* note 158, at 110.

227. See *id.*

228. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 161-78 (2006).

229. See FREY, *supra* note 158, at 113. The primary determinants of procedural utility are the degrees of voice and treatment with dignity and impartiality by trustworthy superiors or authorities. See *id.* at 112. Fairness is particularly important in legal procedures. See *id.* at 121-22. The importance of voice matters in all institutions, not just governmental ones. See *id.* at 111. For example, in one experiment in a nursing home, residents on one floor were granted, while those on another floor were denied, a vote concerning two simple decisions: what night should be movie night, and which plants should be on their floor (and who would care for them). See BROOKS, *supra* note 140, at 89. The senior citizens on the two floors were equal in health and happiness when the experiment began. See *id.* One-and-one-half years later, the senior citizens who were given a choice were more alert, active, and happy, and died at only half the rate of those not given a choice. See *id.*; Ellen J. Langer & Judith Rodin, *The Effects of Choice and Enhanced Personal Responsibility for the Aged: A Field Experiment in an Institutional Setting*, 34 J. PERSONALITY & SOC. PSYCHOL. 191, 191-98 (1976). Happiness economist Bruno Frey also emphasizes that the mere *right* to participate, even if not exercised, enhances happiness, with multiple social benefits:

A large literature in the social sciences, especially in psychology, political science, and sociology, attributes a positive value to participation, because it enhances individuals’ perception of self-determination. The rights to participate in political decisions are essential to any democratic institution. Those rights include voting in elections, launching and voting on referenda, and running for a seat in the legislature. Citizens may gain procedural utility from such participation rights over and above the outcome generated in the political process, because they provide a feeling of being involved and having political influence, as well as feelings of inclusion, identity, and self-determination. By being able to participate, citizens may feel that the political sphere takes their wishes seriously into account in a fair political process; if participation is restricted, they may feel alienation and apathy toward the political institution.

FREY, *supra* note 158, at 116. These effects will be greatest when participation rights are a “comprehensive characteristic of political institutions” rather than being available “during a restricted period of political activation.” *Id.*

230. See FREY, *supra* note 158, at 117. One group of researchers challenged the results of the Swiss Canton study. See David Dorn, Justine A.V. Fischer, Gebhard Kirchgassner & Alfonso Sousa-Poza, *Direct Democracy and Life Satisfaction Revisited: New Evidence for Switzerland*, 9 J. OF HAPPINESS STUDS. 227 (2008). Still, this critique remains just a small minority. Perhaps more importantly, ample

Institutions thus affect levels of happiness, and the law plays an important role in shaping and reflecting those institutions.²³¹ Institutions can shape how individuals interact and how they feel about it.²³² Institutions can leave room for fair procedures to emerge at varying levels of daily life or block them.²³³ Among the most important contributors to procedural utility are the nature and expansiveness of constitutional rights, and the degree to which law-related institutions make them real.²³⁴ As happiness economist Bruno Frey explains:

At the level of society, the most important formal systems for reaching decisions are the price system (i.e., the market), democracy, hierarchy, and bargaining. . . . People may gain procedural utility from these institutions because they express judgments about the people involved. For example, a constitution that secures civil liberties such as freedom of speech may greatly contribute to people's self-worth. In contrast, a constitution that denies offenders their political rights may be deeply disturbing to individuals' sense of self, irrespective of instrumental outcome. Institutions have a direct effect on individuals' well-being by addressing innate needs of autonomy, relatedness, and competence.²³⁵

Frey expressly considers the connection between respect for constitutional rights and combating terrorism or ordinary crime.²³⁶ Reducing crime, of course, makes the population happier.²³⁷ Curtailing rights, however, in the quest for crime control imposes its own costs on happiness.²³⁸ Correspondingly, argues Frey, empirical evidence and logic suggest that "a positive anti-terrorism policy [that] tries to lead terrorists back into civil society" by adequately respecting their rights and those of ordinary citizens will have fewer negative side effects and is more effective.²³⁹ Many studies in other fields also confirm that freedom and safety need not always be traded off and that oftentimes pursuing one furthers the other, which enhances overall happiness.²⁴⁰

research in numerous settings supports similar conclusions. See FREY, *supra* note 158, at 62-70, 117-19 (summarizing much of this research and defending the Swiss Canton study).

231. See FREY, *supra* note 158, at 111.

232. See *id.* at 111-12.

233. See *id.* at 112-13.

234. See *id.* at 121-25; see PUNSET, *supra* note 140, at 92 ("[A] reduction of income by two-thirds causes only a modest decrease in happiness, but the erosion of political liberties unleashes a cataclysm that, just like divorce, unemployment, or deteriorating health, causes the happiness rate to plummet.").

235. FREY, *supra* note 158, at 111.

236. See *id.* at 143-47, 158.

237. See *id.* at 158.

238. See *id.*

239. *Id.*

240. See, e.g., DAVID COLE & JULES LOBEL, *LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR* (2009); DAVID COLE & JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTIONAL SACRIFICE OF CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* (rev. & updated ed. 2006).

B. Equality

Contrary to progressive sensibilities, greater income equality does not significantly promote happiness—at least in America.²⁴¹ It may promote individual and collective well-being—a partly normative judgment—but income equality is simply not in itself significantly happiness-promoting in the United States.²⁴²

Other sorts of equality, however, can be happiness-promoting.²⁴³ Inequality of imprisonment, violation of constitutional rights, and irrational attitudes undervaluing the accomplishments of salient social groups, such as racial groups and their individual members, can do much to promote

241. See BOK, *supra* note 140, at 79-88. The story of money, equality, and happiness is complex—too complex to address thoroughly here. A clarifying point is worth noting: Cross-nationally, nations with greater income equality are not happier overall than those with less income equality. See *id.* at 80. In Europe, however, the poor suffer increased unhappiness from inequality. See FREY, *supra* note 158, at 58. That is not true in the United States. See *id.*; BOK, *supra* note 140, at 81-82. Apparently, this difference is due to varying European and American attitudes about the causes of low income: Americans believe their society is one of high social mobility, financial and occupational success thus resulting from ability and hard work. See BOK, *supra* note 140, at 81. Europeans are far more likely to believe that social mobility is low and that luck or other circumstances beyond their control account for income differences. See *id.*; FREY, *supra* note 158, at 58. Differences in absolute levels of income across countries do make a significant difference when comparing very poor and rich countries. See BROOKS, *supra* note 140, at 115. But, above fairly modest absolute incomes, the greater richness of a country buys relatively little happiness. See *id.* at 116; FREY, *supra* note 157, at 43. The same is true for rising overall income levels over time within any single country. See BROOKS, *supra* note 140, at 114. On the other hand, at any given time *within* a specific country, “richer individuals tend to be happier than poorer folks.” *Id.* at 120. But, there is strong reason to believe that it is not the income itself that accounts for this observation, though explanations vary. One explanation is that in the United States, income is culturally viewed as an indicator of success. See *id.* at 121-22. In other words, we view having greater income than others from our efforts as evidence that we have created *greater value*, and thus are more successful. See *id.* at 122. Persons who feel equally successful despite income differences will thus not experience income-related happiness differentials. See *id.* But, marginal utility declines—*above a certain level, greater relative income yields increasingly less additional happiness*, with differences in income overall counting “for a low proportion of the differences in happiness among persons.” FREY, *supra* note 158, at 29. None of this means, however, that extreme deprivation does not increase unhappiness or even that the ever-present threat of financial hardship does not do so. To the contrary, both are likely to have ill effects on happiness. See BOK, *supra* note 140, at 108, 111-12. Likewise, unemployment can have devastating and long-run negative impacts on happiness. See *id.* at 108-09; BROOKS, *supra* note 140, at 153-74; FREY, *supra* note 158, at 45-53.

242. See *supra* note 241 and accompanying text (discussing effects of money, income, and inequality on happiness); *supra* text accompanying notes 186-98 (distinguishing happiness from well-being).

243. See Betsey Stevenson & Justin Wolfers, *Happiness Inequality in the United States*, in LAW & HAPPINESS 33 (Eric A. Posner & Cass R. Sunstein eds., 2010). Within-group happiness inequality, even within narrowly-defined demographic groups, has pervasively declined. See *id.* Nevertheless, the decline in happiness inequality has continued to reverse over the last decade or so, and “nonwhites remain substantially less happy—on average—than whites.” *Id.* at 34-35, 56, 74. Given that income inequality increased while happiness inequality decreased over this time span, the authors conclude that nonpecuniary factors account for the decrease in happiness inequality. See *id.* at 35. They speculate that antidiscrimination legislation, affirmative action, and a host of related social changes therefore account for this observation. See *id.* On the other hand, they offer little to explain why originally decreasing happiness inequality is now trending in the opposite direction. See *id.*

unhappiness.²⁴⁴ Extreme levels of status inequality can themselves cause unhappiness, while also contributing to ill health, strained family relationships, social isolation, and perceived reduced control over one's life course; the effects of each of these further fan unhappiness's flames.²⁴⁵ Indeed, arbitrary inequality of opportunity and associated inequality of access to quality education and health care can breed anger and alienation.²⁴⁶

Political inequality is particularly troubling. The actual or perceived inequality of access to political institutions is a form of voice-suppression—a significant injury to happiness.²⁴⁷ Yet, voice-suppression snowballs;

244. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 95-136 (2010) (documenting racial inequality in the distribution of imprisonment and other law enforcement practices and in the protection of constitutional rights); BOK, *supra* note 140, at 88-98 (discussing happiness-diminishing effects of political inequality and of inequality of opportunity). Bok, after reviewing the data showing stark political inequality resulting partly from income inequality, declares:

These findings leave the ideal of political equality in shambles. Superior resources and organization give certain groups of citizens much more power than others. Poor people are by far the most disadvantaged since they have neither the time nor the organization to have a significant effect on the decisions that affect their lives. The result is something of a vicious circle. As poor people realize how little effect they have on public policy, their interest in government and politicians wanes, and they vote and participate politically even less.

BOK, *supra* note 140, at 90.

Equality of opportunity, Bok explains, is a principle widely and deeply endorsed by Americans that “enhances the possibilities for all people to achieve their full potential and thus contributes to a broader conception of well-being that embraces human flourishing and self-realization as well as happiness, a goal with roots in philosophy extending back at least to Aristotle.” *Id.* at 94-95. Moreover, equality of opportunity enables those living in harsh conditions to combat adaptation to such conditions while avoiding leaving justice decisions to legislators. *See id.* at 95. Equal opportunity accomplishes this feat by “giving everyone a more equal chance to become sufficiently educated and informed to resist exploitation and to defend themselves by appealing to the courts or to their political representatives when arbitrary restraints and disadvantages do occur.” *Id.* Yet, concludes Bok, such arbitrary exclusions and disadvantages that prevent individuals from living fuller lives—the very definition of denial of equal opportunity—abound in American life and are once again significantly linked to lower income. *See id.* at 95-97. Bok concedes that his conclusion that greater equality of political access and opportunity will increase aggregate happiness contains some speculation, but it also finds significant supporting empirical data. *See id.* at 97; Alberto Alesina & George-Marios Angeletos, *Fairness and Redistribution*, 95 AM. ECON. REV. 960, 965 (2005) (concluding that “[p]eople enjoy great satisfaction when they know (or believe) that they live in a just world, where hard work and good behavior ultimately pay off”); Alberto Alesina & Eliana LaFerrara, *Preferences for Redistribution in the Land of Opportunities*, 89 J. PUB. ECON. 897 (2005) (making a similar point). But, Bok finds it likely, based on existing evidence, that such enhanced equality will bring greater satisfaction to low-income Americans, will expand well-being by making any happiness a better-informed one, and will, in any event, help realize principles widely embraced by Americans, and thus is worth doing in a democracy for that reason alone. BOK, *supra* note 140, at 96-97.

245. See Andrew E. Taslitz, *Judging Jena's D.A.: The Prosecutor and Racial Esteem*, 44 HARV. C.R.-C.L. L. REV. 393, 420-21 (2009) [hereinafter *Judging Jena's D.A.*].

246. See BOK, *supra* note 140, at 88-98.

247. Andrew E. Taslitz, *Fourth Amendment Federalism and the Silencing of the American Poor*, 85 CHI.-KENT L. REV. 277 (2010) [hereinafter *Political Silencing*] (analyzing the link among political inequality, voice-suppression, and poverty in criminal justice legislation); see *supra* text accompanying notes 223-40 (analyzing voice-suppression).

individuals that feel excluded from the political process become even less likely to participate in it because they see it as a sham.²⁴⁸ When government policies indeed reflect exclusion of certain groups' perspectives, that exclusion feeds the perception and reality of sham-like processes.²⁴⁹ But, exclusion also undermines individual and collective wellbeing.²⁵⁰ As former Harvard University President Derek Bok put it:

Although some people have more knowledge of public affairs than others, political equality is now considered necessary because no one, however well informed, can be trusted to fully understand the concerns of others or to weigh their interests as perceptively and as sympathetically as those directly affected by the government's policies.²⁵¹

Income inequality may thus not itself necessarily significantly increase unhappiness. Yet, many of the resources described above, whose unequal distribution affects happiness, are linked to income inequality.²⁵² They are also linked to race. Indeed, there is substantial evidence that African Americans are less happy on average than White Americans, though the causes of the disparity may be debatable.²⁵³ Poor racial minorities are, in the context most relevant here, likely to suffer status, voice, health, and other inequalities vis-à-vis policing practices that substantially contribute to individual and collective unhappiness, as numerous other works have extensively documented.²⁵⁴

248. See BOK, *supra* note 140, at 90.

249. See Taslitz, *Political Silencing*, *supra* note 247, at 283-93, 298-99.

250. See *supra* text accompanying note 244.

251. BOK, *supra* note 140, at 89.

252. See *supra* notes 241-44 and accompanying text. Some people may see this observation as the flip side of why richer Americans are more likely to be modestly happier than poorer ones. Feelings of success and greater relative status may partly explain the enhanced happiness of wealthier people. See DIENER & BISWAS-DIENER, *supra* note 158, at 106 (making the status argument); see BROOKS, *supra* note 140, at 121-22 (making the enhanced success argument). But, more money can, if used properly, bring more happiness by enhancing "feelings of personal control, a sense of security, and unique opportunities to make a lasting contribution to society." DIENER & BISWAS-DIENER, *supra* note 158, at 106-10. It seems equally likely that low incomes would bring the opposite—lower status, security, personal control, and opportunity—and that these losses would decrease happiness.

253. See Stevenson & Wolfers, *supra* note 243, at 34, 56, 76.

254. See *Judging Jena's D.A.*, *supra* note 245, at 420-21 (analyzing status); Taslitz, *Political Silencing*, *supra* note 247, at 280-82 (analyzing voice and policing). Professor Arthur C. Brooks goes too far, therefore, when he flatly declares that happiness-promotion requires limited government. See BROOKS, *supra* note 140, at 204. Brooks bases his conclusion partly on embracing the public choice theory literature arguing that rent-seeking minorities generally use government to further their own selfish purposes over the public good. See *id.* at 204. But this strand of public choice theory did not grow from happiness studies and is subject to serious challenge. See Andrew E. Taslitz, *Interpretive Method, and the Federal Rules of Evidence: A Call for a Politically-Realistic Hermeneutics*, 32 HARV. J. ON LEGIS. 329, 355-58 (1995). Brooks further argues that governments are inherently wasteful and foster individual dependency, political conclusions that are subject to much debate, even though there may, in softer forms, be consensus that there is *some* truth in them. See HAYBRON, *supra* note 146, at 277-78 (conceding that governments make mistakes, may have limited capacities, and risk excessive

VI. HAPPINESS'S MEANING AND LIMITS IN THE FRAMING AND POST-FRAMING ERA

The meaning of happiness and how to obtain it were hotly disputed during the framing and immediate post-framing eras—roughly the mid-to-late eighteenth century through the early mid-nineteenth century.²⁵⁵ Nevertheless, there were several currents of thought best seen as informing the meaning of the idea of the “pursuit of happiness” at the time the phrase appeared in the Declaration of Independence and during its early post-Declaration evolution.²⁵⁶ I must make several initial observations about these currents of thought. First, some writers separated the experience of happiness from what *should* make us happy.²⁵⁷ Others seemed to fuse these two questions into the very idea of happiness.²⁵⁸ Either way, whether as limiting happiness's proper attainment or defining happiness itself, writers generally agree that virtue of some sort—whether secular or religious—plays an important role in constituting or channeling the happiness quest.²⁵⁹ Furthermore, they distinguish ephemeral happiness from the more lasting sort, and generally agree that promoting virtue favored happiness's durability.²⁶⁰

Second, happiness's meaning and pursuit frequently required resolving or accepting various tensions. For example, liberal thinkers stressed the isolated individual, his needs, and competition for resources as sound driving forces in political economy.²⁶¹ Republicans viewed the development of a virtuous citizen character and the search for a *common*

paternalism while, in far more moderate fashion than Brooks, concluding that “it would take a fairly radical—and empirically extremely bold—skepticism about government efficacy to justify a blanket dismissal of all such [happiness-enhancing] measures as hopelessly ineffective.”). Brooks further insists that government lowers our happiness even when working well because “anything that strips away our sense of control will lower our happiness.” BROOKS, *supra* note 140, at 205. But this assertion is false. First, it assumes that government action necessarily limits individual control. Government situational nudges, however, decrease neither actual nor perceived individual control. *See supra* notes 224-25 and accompanying text. Second, *how* government makes decisions matters, and even decisions with which we disagree can be accepted if the procedures are perceived as just. Indeed, some decision-procedures can themselves enhance the sense of individual choice, enhancing happiness. *See infra* text accompanying notes 259-306. Third, control is not the only determinant of happiness, and sound government policies can improve other sources of happiness, including community. *See supra* text accompanying notes 217-26; HAYBRON, *supra* note 146, at 277 (suggesting some such government policies).

255. *See* DARRIN M. MCMAHON, HAPPINESS: A HISTORY 312-62 (2006) (summarizing the various currents of happiness thought during this period).

256. *See infra* text accompanying notes 257-393.

257. *See infra* text accompanying notes 302-93.

258. *See infra* text accompanying notes 270-301.

259. *See infra* text accompanying notes 304-18.

260. *See infra* text accompanying notes 270-89.

261. *See* ANTHONY KENNY & CHARLES KENNY, LIFE, LIBERTY AND THE PURSUIT OF UTILITY 14-54 (2006) (summarizing concisely the various philosophical perspectives on happiness and their history); *supra* text accompanying notes 172-85.

good as more essential to the good society than the glorification of the individual.²⁶² Yet, many thinkers vastly overstate the dichotomy between these philosophies.²⁶³ A more accurate picture of early American history is one in which liberal and Republican thinking fused.²⁶⁴ Sometimes this fusion might reveal the tension between the concepts.²⁶⁵ Other times this fusion seemed second nature and any strictly logical inconsistencies between the two schools of thought were seen as not relevant or even worthy of attention.²⁶⁶

Third, writers often wrote about both the happiness of the individual *and* of the People.²⁶⁷ Though the People may not have been defined clearly, nearly all major political thinkers of the time assumed that peoples exist and can move toward or away from greater *collective* happiness.²⁶⁸

Fourth, however, happiness and its pursuit were two distinct concepts, each playing a role in the well-ordered society and each dependent upon the other.²⁶⁹

A. Pursuing Happiness

John Locke, who in many ways had varying degrees of influence on the Framers' political thinking, viewed happiness itself in highly individualistic, pleasure-oriented terms.²⁷⁰ Short-run happiness, at least, lay in pursuing pleasures and avoiding pains.²⁷¹ Locke did not applaud the untrammelled pursuit of such pleasures (a point to which I return below).²⁷² But, he did see what gives each person pleasure or pain as highly variable

262. See Andrew E. Taslitz, *The Jury and the Common Good: Synthesizing the Insights of Modern and Postmodern Legal Theories*, in FOR THE COMMON GOOD: A CRITICAL EXAMINATION OF LAW AND SOCIAL CONTROL 312, 317-22, 325-27 (Robin Miller & Sandra Lee Browning eds., 2004).

263. See Taslitz, *Racist Personality*, *supra* note 78, at 766 nn.156-57.

264. See *id.*

265. See *id.* at 767-88 (describing how these tensions operated); Andrew E. Taslitz, *Slaves No More!: The Implications of the Informed Citizen Ideal for Discovery Before Fourth Amendment Suppression Hearings*, 15 GA. ST. U. L. REV. 709, 725-26 (1999) [hereinafter *Slaves No More!*] (discussing liberal ideas on informed citizen knowledge eventually replacing more purely republican ones).

266. Cf. S. HERBERT, JUST DEMOCRACY: A THEORY OF DEMOCRACY AND INTERNATIONAL RELATIONS IN THE CLASSIC LIBERAL TRADITION OF THE AMERICAN REVOLUTION 382-96 (2010) (relying on sources purportedly showing that the American democratic tradition is a purely classical one, thus giving insufficient weight—indeed little, if any, serious attention—to republican themes).

267. See *infra* text accompanying notes 270-89, 305-30.

268. See *infra* text accompanying notes 332-63.

269. See *infra* text accompanying notes 271-94.

270. See MCMAHON, *supra* note 255, at 325.

271. See *id.* at 320.

272. See *infra* notes 334-39 and accompanying text. Perhaps for this reason, political theorist Scott Douglas Gerber argues that there is a communitarian strand in Locke's moral thought that most scholars ignore. See GERBER, *supra* note 108, at 43.

with the individual.²⁷³ The difficulties of attaining pleasure-enhancement are ever-changing tastes and their individual variation, which leaves men in a state of “uneasiness.”²⁷⁴ Given our “multitude of wants, and desires, we are beset with in this imperfect State,” he explained, as “no sooner is one action dispatch’d, which by such determination of the will we are set upon, but another uneasiness is ready to set us on work.”²⁷⁵ In this sense, happiness is ever-pursued, but never attained.²⁷⁶

Dr. Samuel Johnson’s definitions of pursuit and its cognates in his *Dictionary of the English Language* of the time captured this link of pursuit to uneasiness: “To pursue,” declared Johnson, was “[t]o chase; to follow in hostility.”²⁷⁷ Pursuit itself was defined as “[t]he act of following with hostile intention.”²⁷⁸ Linking pursuit to happiness thus portrayed happiness as a fugitive to hunt, but never capture.²⁷⁹ Thus, it was the *desire* for happiness rather than its final attainment that played the major role in human affairs.²⁸⁰ Philosopher David Hume, who died in 1776 and whose work was well known to many of the Framers, including to Jefferson, *The Declaration of Independence’s* nominal author, agreed.²⁸¹ Hume saw the seemingly trivial day-to-day pursuit of our passions as at least serving the role of distracting us from our pained efforts to solve the riddles of existence.²⁸² Hume thought attaining true, long-term happiness lie elsewhere than in striving for the petty enjoyments of common life.²⁸³ Yet, we have “happily deceived” ourselves into believing these petty efforts worthwhile.²⁸⁴ That deceit brought happiness of a sort and was central to social and individual growth and improvement.²⁸⁵

Adam Smith—whose work, *The Theory of Moral Sentiments*, published in 1759, Jefferson studied closely—also praised the benefits of

273. See JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 268 (Peter H. Nidditch ed., 1975) (explaining that the “variety of pursuits shows that every one does not place his happiness in the same thing”).

274. See *id.* at 383.

275. *Id.*

276. More precisely, happiness would never be attained in life but might be found in the *afterlife*. See KENNY & KENNY, *supra* note 261, at 62.

277. MCMAHON, *supra* note 255, at 320; GARRY WILLS, INVENTING AMERICA: JEFFERSON’S DECLARATION OF INDEPENDENCE 245 (1979).

278. See MCMAHON, *supra* note 255, at 320.

279. See *id.* at 320-21.

280. See *id.*

281. See *id.* at 314, 327-28.

282. See *id.* at 327-28; DAVID HUME, A TREATISE ON HUMAN NATURE 269 (1992); MICHAEL IGNATIEFF, THE NEEDS OF STRANGERS 89 (2001) (citing and analyzing Hume).

283. See David Hume, *The Sceptic*, in ESSAYS, MORALS, POLITICAL, AND LITERARY 168-69 (Eugene F. Miller ed., 1987).

284. *Id.*

285. See *id.*; MCMAHON, *supra* note 255, at 328.

such illusions.²⁸⁶ Smith saw this self-deception as leading to seeking satisfaction in the pursuit of wealth.²⁸⁷ It is this deception, said Smith, “which rouses and keeps in continual motion the industry of mankind,” prompting men “to found cities and commonwealths, and to invent and improve all the sciences and arts, . . . which have entirely changed the whole face of the globe”²⁸⁸ The resulting advance of civilization through the freedom to pursue affluence in a commercial society benefitted the whole, even if it ultimately gave the individual no true, lasting happiness.²⁸⁹

From early on, Americans heartily embraced the right to engage in this perhaps fruitless struggle, including for (but not limited to) material goods. Freedom to pursue happiness perhaps suggested a staunchly libertarian philosophy.²⁹⁰ Many Americans, perhaps consistently with such a philosophy, came to see government as at least obligated to stay out of the individual’s way.²⁹¹ This may be one way to understand the hundreds of nineteenth-century lawsuits accusing not only fellow citizens, but governments alike, of impeding their right to happiness.²⁹² Yet, over time, various Americans, particularly dissenting groups, saw the government as obligated affirmatively to guarantee at least a fair chance to wrestle with the

286. See WILLS, *supra* note 277, at 202; ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 149, 181 (D.D. Raphael & A. L. Macie eds., 1982); see generally WILLS, *supra* note 277, at 202 (offering a similar analysis of Smith).

287. See SMITH, *supra* note 286, at 263.

288. *Id.* at 263-64; see also CHARLES W. GRISWOLD, JR., ADAM SMITH AND THE VIRTUES OF ENLIGHTENMENT 217-27 (1999) (analyzing Smith’s views on happiness).

289. SMITH, *supra* note 286, at 267. Smith illustrated the emptiness of this pursuit of happiness through chasing for material goods via the hypothetical of the poor man envying the rich’s supposed “felicity” and “tranquility,” and thus working around-the-clock to acquire wealth. See *id.* at 181. When he finally attains it, however, the results are not to his liking:

Through the whole of his life he pursues the idea of a certain artificial and elegant repose which he may never arrive at, for which he sacrifices a real tranquility that is at all times in his power, and which, if in the extremity of old age he should at last attain to it, he will find to be in no respect preferable to that humble security and contentment which he had abandoned for it. It is then, in the last dregs of life, his body wasted with toil and diseases, his mind galled and ruffled . . . that he begins at last to find that wealth and greatness are mere trinkets of frivolous utility, no more adapted for procuring ease of body or tranquility of mind, than the tweezer-cases of the lover of toys

Id. at 260-61.

290. See BROOKS, *supra* note 140, at 2-3, 201-07 (finding in his reading of the Declaration of Independence and of the relevant social science support for libertarian policies of a limited government that stays out of regulating the number of hours worked or the distribution of income).

291. See MCMAHON, *supra* note 255, at 330-31 (noting that Jefferson’s view was that happiness lay in individual self-restraint, education, and public-mindedness, “reflect[ing] a wider eighteenth-century assumption and article of faith: that individual interest and the greater good, private and public happiness, could be reconciled”).

292. See HOWARD MUMFORD JONES, THE PURSUIT OF HAPPINESS 29-61 (1953) (describing such lawsuits). This interpretation of at least some of these suits is one that I see as plausible. Others have argued, however, that the lawsuits instead reflect a fuzziness about the difference between government permitting the pursuit of happiness and guaranteeing its attainment. See MCMAHON, *supra* note 255, at 332.

fugitive happiness.²⁹³ Slaves and abolitionists, for example, sought government action to free slaves to *pursue* individual and familial happiness rather than to serve as tools to another's pursuit of those goals.²⁹⁴

One of the most astute observers of early American political culture, Alexis de Tocqueville, likewise noted Americans' particularly frenetic pursuit of an often materialistic conception of happiness.²⁹⁵ Tocqueville believed that "a cloud habitually covered their features, and they appeared to me grave and almost sad even in their pleasures."²⁹⁶ That sadness seemed odd to him because Americans were, in his view "the freest and most enlightened men placed in the happiest condition that exists in the world."²⁹⁷ But, Americans' prosperity fostered ever-newer desires, ever-rising expectations, and also disquiet about the possibility of something still better over the horizon.²⁹⁸ Lest Americans miss that something better in their short lives, they became restless—even frantic—living life as a race whose course is ever-changing "for fear of missing the shortest road that would lead them to happiness."²⁹⁹ Free countries like America are, in their rush to attain happiness, generally "richer and more prosperous than the one that appears so satisfied with its lot."³⁰⁰ But the individual's pointless quest ends only when "death steps in and stops him before he has grown weary of this useless pursuit of a complete felicity that always flees from him."³⁰¹

B. Virtue

Yet, the role of material wealth in happiness's pursuit is too easily overstated. Scholars who have portrayed Jefferson's choice of the word happiness as a synonym and mere smokescreen for Locke's concept of property are simply wrong—equally wrong as well in also giving Lockean property an unduly narrow meaning.³⁰² If Locke himself offered a too-individualistic, pleasure-centered meaning of happiness, he saw the

293. See MCMAHON, *supra* note 255, at 331-33.

294. See *id.*; CARL M. CANNON, THE PURSUIT OF HAPPINESS IN TIMES OF WAR 59-63 (2004) (discussing Frederick Douglass's argument that the government was obligated to help slaves have the same freedom to pursue happiness as did their white masters).

295. See 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 506-08 (George Lawrence trans., J.P. Mayer ed. 1988).

296. *Id.* at 511.

297. *Id.*

298. See 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 359 (Harvey C. Mansfield & Delba Winthrop trans., Univ. of Chicago Press 2000) (1835).

299. 2 DE TOCQUEVILLE, *supra* note 295, at 512.

300. 1 DE TOCQUEVILLE, *supra* note 298, at 231.

301. 2 DE TOCQUEVILLE, *supra* note 295, at 512.

302. See GERBER, *supra* note 108, at 44-45 (arguing that Locke defined property to include an interest in one's person, indeed, to include natural rights, not simply an interest in goods).

unfettered pursuit of such a state as dangerous.³⁰³ He accordingly emphasized the use of reason to understand God's will as a limitation on our pursuit of "transient pleasure."³⁰⁴

Many eighteenth-century men and women shared this view.³⁰⁵ As the reverend Noah Hobart, pastor of Fairfield, Connecticut's First Church of Christ, preached to his flock, Christian "morality" and "virtue" were "so essentially necessary to Social Happiness, that he deserves to be an Enemy to mankind, who endeavours to weaken [them]."³⁰⁶ Norwich's Congregationalist pastor, Benjamin Lord, similarly declared that "Religion and Government subsisting together in Society, [are] Necessary to their Compleat Happiness and Safety."³⁰⁷ Hundreds of preachers' sermons and other writings "concurred that to think of happiness without love of one's neighbor—without Christian charity, denial, and constraint—was profane."³⁰⁸

Jefferson, though in his practice closest to a Unitarian—and adhering to a rationalistic conception of religion—himself believed that the "doctrines of Jesus are simple, and tend all to the happiness of man."³⁰⁹ That belief was widely shared as a way of restraining the narrow pursuit of pleasure.³¹⁰ Tocqueville similarly applauded American religiosity—and its frequent focus on the here-and-now as much as the afterlife—as a necessary check on pleasure's narrow pursuit.³¹¹ Religion's spirit would prod Americans away from their frequent selfish embrace of their own small worlds, prodding them to serve others.³¹² "Those who possess [privilege]," he wrote, "have enough material enjoyments to conceive the taste for these

303. See MCMAHON, *supra* note 255, at 321 (noting that Locke "worried deeply about being led along by desire on pointless pursuits. It is for this reason that he placed such stock in reason to guide us along the path to God.").

304. See *id.* ("The prospect of salvation opened up by a reasonable Christianity exerted an incentive to not chase desire anywhere it led, to resist our baser instincts Precisely because tomorrow we would die—and then be judged—we could not always eat and drink with abandon.").

305. See *id.*

306. *Id.* at 322 (quoting Noah Hobart, Civil Government, the Foundation of Social Happiness, A Sermon Preached before the General Assembly of the Colony of Connecticut, at Hartford, On the Day of Their Anniversary Election (May 10, 1750) (New London: T. Green, 1751)).

307. *Id.* (quoting Benjamin Lord, Religion and Government Subsisting Together in Society, Necessary to their Compleat Happiness and Safety, a Sermon Delivered in the Audience of the General Assembly of the Colony of Connecticut on Their Anniversary Election at Hartford (May 9, 1751)).

308. *Id.* at 322.

309. *Id.* at 323 (quoting Letter from Thomas Jefferson to Dr. Joseph Priestley (April 9, 1803), in THE BASIC WRITINGS OF THOMAS JEFFERSON 774 (Philip S. Foner ed., 1950)).

310. See *id.* at 323.

311. See *id.* at 340-41. Thus, de Tocqueville noted of America's preachers:

The better to touch their hearers, they are forever pointing out how religious beliefs favor freedom and public order, and it is often difficult to be sure when listening to them whether the main object of religion is to procure eternal felicity in the next world or prosperity in this.

Id. at 340 (quoting 1 DE TOCQUEVILLE, *supra* note 298, at 530).

312. See MCMAHON, *supra* note 255, at 341.

enjoyments and not enough to be content with them.”³¹³ Indeed, “[i]n democratic peoples as elsewhere, it is only by resisting a thousand particular little everyday passions that they can come to satisfy the general passion for happiness that torments them.”³¹⁴ Religion played a central role in this task.³¹⁵ “[A]s the lights of faith are obscured,” he concluded, “men’s view shrinks[,] killing the public-mindedness that makes democracies work.”³¹⁶

There was, of course, a necessary tension that Americans somehow resolved. “An American occupies himself with his private interests as if he were alone in the world,” observed Tocqueville.³¹⁷ Yet, he continues, but a “moment later” this same American “gives himself over to the public” as if he had forgotten his own interests entirely.³¹⁸ “The human heart cannot be divided in this manner,” Tocqueville insisted.³¹⁹ Americans, therefore, rejected any distinction between the freedoms of the public sphere and the pursuits of the private.³²⁰ Instead, the passions for both welfare and freedom “are united and intermingled at [the] same place” of the American character.³²¹ “Americans see in their freedom the best instrument and the greatest guarantee of their welfare; [t]hey love these two things for each other.”³²²

More secular philosophies gave virtue a similar role. If liberalism stressed individual freedom, republican theories always strongly tempered liberal ones, at least through ratification of the Reconstruction Amendments to the Federal Constitution.³²³ Eighteenth-century republicanism conceived of liberty not merely as freedom from invasion of natural rights, but as including active participation in public life and in government.³²⁴ “[L]iberty emerged from active devotion to the public good (civic virtue).”³²⁵ “And from civic virtue emerged happiness, both individual and

313. 2 DE TOCQUEVILLE, *supra* note 295, at 507.

314. *Id.* at 523.

315. *See id.* at 517-21.

316. *Id.* at 523.

317. *Id.* at 516.

318. *Id.*

319. *Id.* at 517.

320. *See id.* Thus, de Tocqueville titled this section of *DEMOCRACY IN AMERICA*, *How the Taste for Material Enjoyments Among Americans Is United with Love of Freedom and With Care for Public Affairs*; *see also* MCMAHON, *supra* note 255, at 330-31 (arguing that the “pursuit of happiness” was a phrase imbued with the coexistence of both private and public welfare, reflecting “a wider eighteenth century assumption and article of faith: that individual interest and the greater good, private and public happiness, could be reconciled”).

321. 2 DE TOCQUEVILLE, *supra* note 295, at 517.

322. *Id.*; *see also* CANNON, *supra* note 294, at 7-8 (discussing these passages of de Tocqueville).

323. *See* MCMAHON, *supra* note 255, at 324-25 (concerning eighteenth-century American views); Taslitz, *Racist Personality*, *supra* note 78, at 778-80 (concerning nineteenth-century American views).

324. *See* MCMAHON, *supra* note 255, at 324-25.

325. *Id.* at 324.

social.”³²⁶ Civic virtue “demand[ed] self sacrifice, denial, and pain,” rather than pleasure.³²⁷ Indeed, excessive egotism and luxury “turned individuals away from the pursuit of the larger social good.”³²⁸ The self-interested quest to serve only individual desires constituted a corruption of both the individual and the state.³²⁹ Such corruption in turn tainted “civic virtue and hence the happiness of individuals and society as a whole.”³³⁰

As noted earlier, many thinkers have argued that liberal ideals quickly outpaced republican ones in early America, ignoring substantial evidence of a (perhaps uneasy) fusion of the two.³³¹ The sharp division between early American versions of these philosophies is likely an overstated proposition.³³² In Lockean liberalism, a community or a people forms from the consent of individuals who, to protect themselves, transfer their personal right to execute the law of nature—to use force—to the community.³³³ The community serves as an impartial judge and as the single authoritative interpreter of nature’s law.³³⁴ The community in turn creates a government—a set of institutions entrusted by the community to bring about the social peace and the preservation of natural rights for which the community began.³³⁵ A legitimate state will create, interpret, and execute laws for the noble purpose of preserving citizens’ property, meaning their lives, liberties, and possessions.³³⁶ Such a state thereby rightly acquires “political power.”³³⁷ Locke explains:

Political power, then, I take to be a right of making laws with penalties of death, and consequently all lesser penalties, for the regulating and preserving of property, and of employing the force of the community, in the execution of such laws, and in the defence of the commonwealth from foreign injury; and all this only for the public good.³³⁸

326. *Id.*

327. *Id.*

328. *Id.*

329. *See id.*

330. *Id.*

331. *See* Taslitz, *Racist Personality*, *supra* note 78, at 766 nn.156-57.

332. *See* MCMAHON, *supra* note 255, at 324, 330-31; Taslitz, *Racist Personality*, *supra* note 78, at 766 nn.156-57.

333. *See* DAVID C. WILLIAMS, THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC 30-31, 38, 181-83 (2003); D.A. LLOYD THOMAS, LOCKE ON GOVERNMENT 23, 30 (1995).

334. *See* sources cited *supra* note 333.

335. *See* sources cited *supra* note 333.

336. *See* sources cited *supra* note 333.

337. *See* sources cited *supra* note 334.

338. JOHN LOCKE, THE SECOND TREATISE, *in* TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION § 3, at 100-01 (Ian Shapiro ed., 2003).

The “public” or “common good” is the good of *all* the People, not of any subset or elite, preserving both the People’s safety and their existence as a People.³³⁹

Republican (as opposed to liberal) theory likewise recognized that the state must serve the common good rather than that of a faction.³⁴⁰ Only virtuous citizens shaping a virtuous state can discern the common good, however, and vice-versa.³⁴¹ Virtuous citizens’ qualities include a willingness to invoke their rights in a way that makes them part of a deliberative dialogue over what kind of state and people we should be.³⁴² Yet, those Framers most heavily influenced by republican thinking still accepted that this political conversation could successfully be undertaken only in the context of a neo-Lockean social contract.³⁴³ For Republicans, however, the contract was political in the sense that it required institutions to encourage the shared values necessary to form an effectively functioning People.³⁴⁴

Whether liberal, republican, or a fusion political culture in fact prevailed at the time, there is little doubt that “there were many in eighteenth century America and the Constitutional Convention who would have interpreted the ‘pursuit of happiness’ in just these classical republican terms.”³⁴⁵ As historian Darrin M. McMahon put it, “[I]ike Christianity,” the virtue theory of republicanism was “part of the harmonizing sentiments of the day, helping to ensure that Lockean pleasure was tempered and controlled by a strong dose of public virtue.”³⁴⁶ A similar observation might apply as well about the attitudes toward happiness in the later Northern culture of the Reconstruction Era—the culture that fostered ratification of the Fourteenth Amendment, the amendment that in turn, for the first time, incorporated the Fourth Amendment against the states.³⁴⁷

Moral sense theorists also embraced virtue’s link to happiness.³⁴⁸ Frances Hutcheson, for example, believed in an innate human capacity to respond to goodness in ourselves and others.³⁴⁹ Accordingly, the surest

339. See *id.* §§ 131, 135; THOMAS, *supra* note 333, at 63-64.

340. See WILLIAMS, *supra* note 333, at 14, 22-24, 49-50, 87-88; GORDON S. WOOD, *THE AMERICAN REVOLUTION: A HISTORY* 91-95, 123 (2002).

341. *Accord Racist Personality*, *supra* note 78, at 765-80; see Taslitz, *Slaves No More!*, *supra* note 265, at 719-26; see sources cited *supra* note 340.

342. See sources cited *supra* notes 340-41.

343. See sources cited *supra* notes 340-41.

344. See sources cited *supra* notes 340-41.

345. MCMAHON, *supra* note 255, at 325.

346. *Id.*

347. See Taslitz, *Racist Personality*, *supra* note 78, at 773-77 (discussing the Northern Reconstruction era culture); Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 *FORDHAM L. REV.* 2257, 2268-69 (2002) (discussing incorporation of the Fourth Amendment against the states via the Fourteenth Amendment).

348. See MCMAHON, *supra* note 255, at 326.

349. See *id.*

route to happiness lay in performing benevolent acts and doing “publicly useful” things.³⁵⁰ This theory—which taught that virtue was natural and led to happiness, at least in healthy environments—was then a popular one.³⁵¹ The moral sense theory of happiness certainly had considerable sway with “enlightened Americans” like Jefferson, shaping their understandings of happiness.³⁵² Some critics, though perhaps overstating their case, have gone so far as to assert that this “benevolent conception of the ‘pursuit of happiness’ lay at the heart of Jefferson’s understanding of the term.”³⁵³ Indeed, late in life Jefferson declared that, though happiness is the “aim of life,” “virtue is the foundation of happiness.”³⁵⁴ This sentiment echoed Benjamin Franklin’s observation that “virtue and happiness are mother and daughter” and Adam Smith’s insistence that true happiness—“tranquility and enjoyment”—lay more with virtue than wealth-accumulation.³⁵⁵

Tocqueville, too, thought Americans of the time largely reflected the “doctrine of self-interest well understood.”³⁵⁶ By this, he meant a “cultural ethos” finding “points of convergence between . . . individual interests and those of the social whole.”³⁵⁷ Said Tocqueville of Americans: “The enlightened love of themselves constantly brings them to aid each other and disposes them willingly to sacrifice of their time and their wealth to the good of the state.”³⁵⁸

Goodness required self-control and sacrifice, for “one can acquire a lasting happiness only in refusing a thousand passing enjoyments, and finally that one must constantly triumph over oneself to serve oneself better.”³⁵⁹

A number of authors thus agree that Jefferson’s idea of the pursuit of happiness embraced the necessary co-existence of private pleasure with public welfare.³⁶⁰ This embrace was not merely Jefferson’s or that of the intellectuals of the time, but also of the common people—a central element of early American culture.³⁶¹

350. *Id.*

351. *See id.*

352. *Id.* at 326-27; *see generally* WILLS, *supra* note 277, at 199-200, 240-55 (making such an argument as to Jefferson).

353. MCMAHON, *supra* note 255, at 326-27.

354. *Id.* at 330; CHARLES B. SANFORD, *THE RELIGIOUS LIFE OF THOMAS JEFFERSON* 36 (1984) (quoting Jefferson).

355. Benjamin Franklin, *Poor Richard*, in *WRITINGS* 1238 (1987); ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 185 (D.D. Raphael and A.L. Macfie eds., 1988).

356. 2 DE TOCQUEVILLE, *supra* note 295, at 502.

357. MCMAHON, *supra* note 255, at 338.

358. 2 DE TOCQUEVILLE, *supra* note 295, at 526-27.

359. *Id.* at 504.

360. *See* MCMAHON, *supra* note 255, at 330-31.

361. *See id.*

As Jefferson himself and others have noted, the Declaration's use of the phrase "pursuit of happiness" was more a reflection of the American mind than of Jefferson's alone.³⁶² So it remains today.³⁶³

Yet, some thinkers, notably Hannah Arendt, insist that this public-private tension has been erased from Jefferson's original idea, devolving into the raw pursuit of pleasure, wealth, and a narrowly defined self-interest.³⁶⁴

Other thinkers see this pessimistic description as oversimplifying and exaggerating the later course of American history.³⁶⁵ Yet, at least one such thinker concedes that the trajectory has veered more toward private than public spiritedness.³⁶⁶ Of the dangers of such a trajectory, Tocqueville himself presciently warned; Tocqueville worried that America would veer toward the solipsism of private pursuits.³⁶⁷ That path would lead to the "tyranny" or "despotism" of the majority who might themselves become slaves of the state and of their own unbridled passions.³⁶⁸ Tocqueville feared that growing equality of opportunity for material gain would render its pursuit each person's overriding passion, and thus foster a withdrawal from the public sphere.³⁶⁹ On this point, Tocqueville is worth quoting at length:

I am trying to imagine under what novel features despotism may appear in the world. In the first place, I see a multitude of men, alike and equal, constantly circling around in pursuit of the petty and banal pleasures with which they glut their souls. Each one of them, withdrawn into himself, is almost unaware of the fate of the rest.

Over this kind of men stands an immense, protective power, which is alone responsible for securing their enjoyment and watching over their fate. That power is absolute, thoughtful of detail, orderly, provident, and gentle It likes to see the citizens enjoy themselves, provided that they think of nothing but enjoyment. It gladly works for their happiness, but wants to be the sole agent and judge of it.³⁷⁰

362. *Id.* at 323 (quoting Letter from Thomas Jefferson to Dr. Joseph Priestley (April 9, 1803), in THE BASIC WRITINGS OF THOMAS JEFFERSON 802 (Philip S. Foner ed., 1950)).

363. *See generally* TESIS, LIFE AND TIMES, *supra* note 129, at 785-89 (outlining a wide-ranging history of the Constitution's meaning across generations).

364. *See* HANNAH ARENDT, *The Pursuit of Happiness*, in ON REVOLUTION 131-32 (1990) (1963) ("Jefferson's new formula . . . was almost immediately deprived of its double sense and understood as the right of citizens to pursue their personal interests and thus to act according to the rules of private self-interest."); *cf.* DAVID BROOKS, BOBOS IN PARADISE 189-217 (2000) (arguing that this is still a good description of American culture).

365. *See* MCMAHON, *supra* note 255, at 331.

366. *See id.*

367. *See id.* at 342-43.

368. *Id.* at 342.

369. *See id.* at 342-43.

370. *Id.* at 342 (quoting 2 DE TOCQUEVILLE, *supra* note 295, at 535-36).

Notice that here Tocqueville worries not so much about equality of material opportunity as apparently also equality of character—an undue sameness of wants, beliefs, and attitudes.³⁷¹ The dangers of such conformity echo John Stuart Mill’s thought on the subject.³⁷² Mill thought happiness attainable only by indirection—by fixing the mind on other goals, in particular, “the happiness of others, on the improvement of mankind, even on some art or pursuit, followed not as a means, but as itself an ideal end.”³⁷³ Some pleasures were better than others, and happiness lay in pursuing the “nobler feelings” and “higher pleasures.”³⁷⁴ Yet, happiness is meaningless if it is not *your* happiness—a way of fulfilling your uniquely individual and authentic character.³⁷⁵ It was in individuality that personal happiness and social welfare lay.³⁷⁶ Diversity of viewpoint and needs were essential to a wise society.³⁷⁷ Liberty that promotes individual uniqueness thus trumps narrower conceptions of happiness.³⁷⁸ Mill was convinced, however, that society has “now fairly got the better of individuality; and the danger which threatens human nature is not the excess, but the deficiency, of personal impulses and preferences.”³⁷⁹

Neither Tocqueville nor the America of the time likely entirely embraced the degree of individualism sometimes espoused by Mill.³⁸⁰ Yet, Mill’s theory and Tocqueville’s theory implicitly embraced diversity of viewpoint in the public sphere as an aspect of the happy individual and society, even if they did not use those precise words or contemplate all their later implications.³⁸¹ The common good matters, but given too much emphasis, it can mutate into mere majoritarian extinguishment of individuality’s fire.³⁸² Protecting diverse individuals’ uniqueness is, in modern parlance, the particular function of privacy.³⁸³ Privacy, in turn, is at the core of the Fourth Amendment’s protections.³⁸⁴

371. *See id.*

372. *See id.* at 343.

373. JOHN STUART MILL, AUTOBIOGRAPHY OF JOHN STUART MILL 117-18 (John M. Robson ed., 1989) (1873).

374. *See* JOHN STUART MILL, UTILITARIANISM 140-41 (John Gray ed., 1991) (1861).

375. *See* MCMAHON, *supra* note 255, at 350-51 (summarizing Mill’s writings relevant to this point).

376. *See* JOHN STUART MILL, ON LIBERTY 63, 75 (John Gray ed., 1991) (1861) [hereinafter MILL, ON LIBERTY] (defining one’s own conduct and character as “one of the principal ingredients of human happiness” without which persons cannot “obtain their fair share of happiness”).

377. *See* MCMAHON, *supra* note 255, at 350.

378. *See id.*

379. MILL, ON LIBERTY, *supra* note 376, at 68.

380. *See supra* text accompanying notes 261-66 (addressing the continuing tension in American culture between liberal, individualistic tendencies and republican, communitarian tendencies).

381. *See supra* text accompanying notes 296-302.

382. *See supra* text accompanying note 379; *see* John Stuart Mill, *The Subjection of Women*, in ON LIBERTY AND OTHER ESSAYS 576 (1991) (“He who would rightly appreciate the worth of personal independence as an element of happiness, should consider the value he himself puts upon it as an ingredient of his own.”).

383. *See Twenty-First Century*, *supra* note 200, at 152-54.

384. *See id.* at 152-54.

I make one final comment on the link between equality and happiness. Exploring that link more fully requires far more space than I have here. Yet, the struggle of various groups and individuals to gain equal opportunity to pursue happiness is a hallmark of American history.³⁸⁵ It can be seen as the animating spirit in abolitionism, the modern civil rights movement, the gay liberation movement, and a host of other equality struggles.³⁸⁶ As one commentator flatly stated, “The history of the pursuit of happiness in America, in this respect, is the history of the pursuit of equality and freedom—the slow, ever imperfect extension of the right to pursue happiness to all.”³⁸⁷

Framing-era conceptions of happiness thus required equal, virtuous citizens actively involved in the public sphere, including the machinery of government.³⁸⁸ Virtuous citizens pursued their own individuality, but with an eye toward the common good.³⁸⁹ They actively participated in debates on public issues, and, while pursuing their diverse goals, limited their purely selfish pursuits, exercising the restraint and discipline needed to serve their religious and similar communities, their families, and the common good of all the people.³⁹⁰ This notion of happiness is one consistent with the relevant teachings summarized above of social science on the nature of happiness.³⁹¹ Framing-era virtue, however, was about a happiness worth having, a notion not merely of happiness as an emotion, but also of broader well-being.³⁹² In application, this conception of happiness had serious concrete limitations; many, such as slaves, Native Americans, and women were entirely or partially beyond the scope of those entitled to happiness’s pursuit.³⁹³ Yet, the core ideas are ones that have animated much of American history since, and in their essentials, they provide a valuable frame for studying American constitutional history, including that of the Fourth Amendment.

VII. IMPLICATIONS AND ILLUSTRATIONS

I close with several illustrations of how using history to learn lessons relevant to the People’s happiness can inform Fourth Amendment doctrine and practice.

385. See TSEISIS, *OVERCOME*, *supra* note 130 (articulating a book-length defense of this point).

386. See *id.*; ERIC MARCUS, *MAKING GAY HISTORY: THE HALF CENTURY FIGHT FOR LESBIAN AND GAY EQUAL RIGHTS* 21-70 (2002).

387. MCMAHON, *supra* note 255, at 333.

388. See CANNON, *supra* note 294, at 34-40.

389. See *id.* at 219 (quoting Jefferson).

390. See MCMAHON, *supra* note 255, at 332-33; see *supra* text accompanying notes 309-16.

391. See *supra* Part IV.

392. See *supra* text accompanying notes 302-30.

393. See TSEISIS, *LIFE AND TIMES*, *supra* note 129; TSEISIS, *OVERCOME*, *supra* note 130, at 22-25, 36-40.

A. Race and the Fourth Amendment

If understanding the nature of the American people requires exploring the full story of America, it is hard to understand why only the framing era's history should matter.³⁹⁴ On the question of race, such an approach seems particularly odd.³⁹⁵ Remember that, although all search and seizure history in America is relevant to understanding its People, as with major events such as marriage or loss of a loved one in the life of an individual, so certain dates or time periods may play a particularly important role in the life of a People.³⁹⁶ On the question of race, surely the period of ratification of the Fourteenth Amendment, effectively applying the Fourth Amendment to the states, plays such a role.³⁹⁷ Yet, that date's meaning for the American people is empty without in turn understanding the events involving race and search and seizure during Antebellum slavery, and also during the Civil War and Reconstruction.³⁹⁸

Race-based concepts of search and seizure and of reasonableness were critical supports for slavery and for efforts to resurrect it, as I have addressed at length elsewhere.³⁹⁹ The equivalent of general warrants—so despised by the colonists when used by the British—were routinely issued to authorize searches and seizures of slaves, particularly those out and about without passes.⁴⁰⁰ Such warrants also authorized searches of even whites' homes where slaves might be hiding.⁴⁰¹ Law enforcement could arrest and punish slaves on grounds entirely inapplicable to whites.⁴⁰² Law authorized and, when necessary, the state directly enforced, even purportedly private white control over every aspect of slaves' privacy, property, and freedom of movement on plantations.⁴⁰³ It is simply impossible to read this history and not be struck by the use of disparate search and seizure practices to enforce white domination.⁴⁰⁴

That same history says much about honoring a segment of the American people—African Americans—as of equal worth, meriting equal

394. See TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT, *supra* note 61, at 11-12.

395. See *id.* at 12, 138-39, 207-10.

396. See *supra* text accompanying notes 60-63.

397. See TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT, *supra* note 61, at 11-12.

398. See *id.* at 12-13.

399. See *id.*

400. See *id.* at 12, 56, 91, 112-16, 109, 219-20, 259.

401. See *id.* at 107-08.

402. See *id.* at 131-34; Andrew E. Taslitz, *The Slave Power Undead: Criminal Justice Successes and Failures of the Thirteenth Amendment*, in THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 245, 246-47 (Alexander Tsesis ed. 2010).

403. See Taslitz, *Contract of Mutual Indifference*, *supra* note 31, at 1333-35; Taslitz, *History as Conversation*, *supra* note 1, at 789-92.

404. See generally, TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT, *supra* note 61 (reciting a book-length history in support of this point).

voice in their government, having the autonomy needed to pursue their visions of happiness, and possessing the resources to be useful citizens.⁴⁰⁵ All these forms of equality and opportunity were, of course, thoroughly denied to slaves and, once again, state-enforced restrictions on slaves' privacy, freedom of movement, and property—in short, searches and seizures—were among the primary tools used to deny slaves these entitlements.⁴⁰⁶

These sorts of denials continued in mutated form during much of Reconstruction.⁴⁰⁷ Nevertheless, these practices had ill effects, from the perspective of individual and social well-being, on whites as well.⁴⁰⁸ By Reconstruction, Northern Republicans had certainly long berated the entire Southern slave society for undermining any sound culture of civic virtue, particularly as applied to whites.⁴⁰⁹ Whites, the Republicans insisted, became used to using violence, cold-heartedness, and cruelty, to a form of civic corruption that promoted tyranny rather than republican, individual character.⁴¹⁰ Cumulatively, all Southern society had become a disease eating away at republican liberty.⁴¹¹ In the language of this article, Northerners roundly condemned Southern society as unvirtuous because it denied individuals and the American people well-being and the quest for the only kind of happiness worth having.⁴¹²

If history is at least worth consulting in constitutional interpretation, surely resolution of issues of search and seizure and race should occur only after consulting Antebellum and Reconstruction history on those questions. Yet, in the one relatively recent case in which the Court has expressly addressed race, *Whren v. United States*, the Court did no such thing.⁴¹³ The Court simply held that racial animus was irrelevant under the Fourth Amendment.⁴¹⁴ The Court's reasoning was largely textual and ahistorical.⁴¹⁵ The Fourth Amendment mandates only that all searches and seizures be "reasonable."⁴¹⁶ But, reasonableness is an objective concept.⁴¹⁷ Therefore, the Court concluded that subjective mental states of the police are irrelevant.⁴¹⁸

405. See Taslitz, *History as Conversation*, *supra* note 1, at 772, 796-97.

406. See *id.* at 776, 796-97.

407. See TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT, *supra* note 61, at 242-57.

408. See *infra* text accompanying notes 410-13.

409. See Taslitz, *Racist Personality*, *supra* note 78, at 773-77.

410. See *id.*; Taslitz, *Contract of Mutual Indifference*, *supra* note 31, at 1316-17.

411. See Taslitz, *Racist Personality*, *supra* note 78, at 773-77; Taslitz, *Contract of Mutual Indifference*, *supra* note 31, at 1316.

412. See *supra* text accompanying notes 139-54.

413. *Whren v. United States*, 517 U.S. 806 (1996).

414. See *id.* at 813.

415. See *id.*

416. See *id.*

417. See *id.* at 814.

418. See *id.* at 813-14.

There are a number of logical, descriptive, and practical flaws with this syllogism. For example, deterring subjective racial animus might reduce the likelihood of unreasonable searches and seizures, that is, of unreasonable *conduct*, because motivations often cause resulting behavior.⁴¹⁹ Subjective mental states can, therefore, still be relevant in a regime seeking to regulate objectively observable behavior.⁴²⁰

Moreover, a form of “objective animus” can be relevant, that is, focusing on conduct that a reasonable observer would understand as reflecting racial animus without actually inquiring into the presence of such animus in individual officers’ minds.⁴²¹ That the very appearance of such animus does grave harm and perhaps masks subconscious bias justifies an objective approach, thus avoiding proof problems with actual, conscious bias as a standard, including avoiding pre-textual claims that race played no role in police conduct; moreover, objective animus is highly likely to co-occur with actual, subjective racial bias.⁴²² Contrary to the Court’s assertions, some of the briefs in *Whren* argued for just such an objective approach.⁴²³

Furthermore, rejecting racial animus does not necessarily require rejecting some role for race, such as looking to disparate racial impact.⁴²⁴ Indeed, the Court’s later embrace of a form of systemic negligence as grounds for suppressing wrongly seized evidence under the exclusionary rule is at least consistent with a systemic disparate racial impact approach.⁴²⁵

My point is only that text did not dictate the Court’s position, but exploration of policing and racial history may have enlightened that position. Indeed, I am not arguing that only Antebellum and Reconstruction history matter. American history since Reconstruction reinforces the relevance of race to regulating police conduct under the Fourth Amendment.⁴²⁶ But, Antebellum and Reconstruction history deserve a privileged place for the reasons I have noted, and ignoring that history does little more than evade candidly resolving a difficult, complex,

419. STEVEN I. FRIEDLAND, PAUL BERGMAN & ANDREW E. TASLITZ, *EVIDENCE LAW AND PRACTICE* 95-99, 180-84 (4th ed. 2010) (comparing “character” to “motive” and explaining their significance in the fact-finding processes).

420. *See id.*

421. *See* Tracey Maclin, *Race and the Fourth Amendment*, 51 *VAND. L. REV.* 333, 355-62 (1998).

422. *See id.* at 376-93 (making several of these points explicitly and others implicitly).

423. *See* Brief for Petitioners at 21, *Whren v. United States*, 517 U.S. 806 (1996) (No. 95-5841).

424. *See* TASLITZ, PARIS & HERBERT, *supra* note 21, at 500-19.

425. *See* *Herring v. United States*, 129 S. Ct. 695, 702-04 (2009); Andrew E. Taslitz, *The Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule*, 76 *MISS. L.J.* 483, 487-93 (2006).

426. *See, e.g.*, MARILYNN S. JOHNSON, *STREET JUSTICE: A HISTORY OF POLICE VIOLENCE IN NEW YORK CITY* 57-86 (2004); HARLAN, HAHN & JUDSON L. JEFFRIES, *URBAN AMERICA AND ITS POLICE* 123-43 (2003).

and central constitutional question—namely, what role should race serve in interpreting the Fourth Amendment?—by little more than an *ipse dixit*.

B. Freedom of Speech

Again, even if we looked only to the Antebellum and Reconstruction tensions surrounding slavery, we would find that search and seizure practices were routinely used as means to silence free speech.⁴²⁷ Northerners who came to protest perceived Southern abuses in Southern courts were banished by statute, then “ridden out of town on a rail,” rather than permit them to “poison” Southern courtrooms or newspapers with their words.⁴²⁸ Southern postal services never delivered pamphlets, letters, newspapers, and other publications carrying abolitionist messages to their recipients.⁴²⁹ Instead, the mail was seized, often burned.⁴³⁰ Teaching slaves to read, preaching to them religious abolitionism, and educating them about alternatives to slavery were themselves crimes, resulting in arrests and serious punishments.⁴³¹

This attention to the connection between search and seizure and free speech had, of course, also entered the minds of the Revolutionaries, particularly in searches and seizures involving seditious libel.⁴³² Only after 1800, however, did free speech concepts become more robust, partly in reaction to the Alien and Sedition laws.⁴³³ Additionally, Southern silencing of abolitionists further brought attention to the close search-and-seizure link to free speech and to the need for robust speech protections when the states’ use of force via actual or threatened arrest or search occurred.⁴³⁴ Later American history, as is true with race, of course further emphasizes this connection.⁴³⁵

One solution when issues of speech and search and seizure intersect, though admittedly not the only solution, is to protect with particular vigor those individuals threatened by police action under such circumstances, at least when free speech and Fourth Amendment protections both point in the

427. See Taslitz, *Contract of Mutual Indifference*, *supra* note 31, at 1369-70.

428. See *id.* at 1337, 1368-73.

429. See *id.* at 1368-73.

430. See *id.*

431. See *id.* at 1322-24; Andrew E. Taslitz, *The Slave Power Undead: Criminal Justice Successes and Failures of the Thirteenth Amendment*, in *THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT* 245 (Alexander Tsesis ed., 2010).

432. See TASLITZ, *RECONSTRUCTING THE FOURTH AMENDMENT*, *supra* note 61, at 18-23.

433. See MICHAEL KENT CURTIS, *FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE”*: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 4-7 (Neal Devins ed., 2000).

434. See TASLITZ, *RECONSTRUCTING THE FOURTH AMENDMENT*, *supra* note 61, at 22.

435. See Daniel Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 132-42 (2007); see generally ANTHONY D. ROMERO & DINA THEMPLERASTON, *IN DEFENSE OF OUR AMERICA: THE FIGHT FOR CIVIL LIBERTIES IN THE AGE OF TERROR* xv (2007) (providing examples of significant civil liberties cases in America).

same direction.⁴³⁶ Yet, in the most infamous case in which this happened, *Zurcher v. Stanford Daily*, when police executed a search warrant at a student newspaper, the Court did no such thing.⁴³⁷ Both the freedom of the press and the privacy of the newspaper's business, its reporters, and its sources were at stake.⁴³⁸ Strict scrutiny would arguably, at a minimum, have demanded a less restrictive alternative, such as obtaining the documents sought via a subpoena.⁴³⁹ A subpoena would have left selection of the documents to the newspaper itself, thus avoiding overbroad searches invading the privacy of those unconnected with the case that the police were investigating.⁴⁴⁰ A subpoena would also thus have avoided the effects of the search: the surprise, the humiliation, and the interference with newspaper operations.⁴⁴¹ Moreover, the newspaper could have moved to quash the subpoena, allowing the parties to air the privacy and free speech issues involved before a neutral judge in an adversarial hearing before any potential rights invasion took place.⁴⁴² Yet, the Court readily dismissed this option, simply finding the search reasonable under the Fourth Amendment.⁴⁴³

Little comment should be necessary to establish that free speech rights particularly involve the American idea of the pursuit of happiness—perhaps the nature of that idea among all peoples. Free speech is a prerequisite to groups and individuals having a voice in public affairs and in holding governmental institutions accountable for their conduct.⁴⁴⁴ Free speech is essential to encouraging the virtuous character of a citizen willing to speak his mind, to stand up to governmental and social efforts at conformity, to allow dissent to inform public debate, and to question authority.⁴⁴⁵ Police, because of their power to use force, pose a particular threat to free speech.⁴⁴⁶ Police action directed at the press should seem especially worrisome.⁴⁴⁷

Accordingly, *Zurcher* seemed to cry out for an examination of the sweep of American history on issues of policing and speech suppression.

436. See generally Solove, *supra* note 435, at 119-23 (laying out the importance of preserving First Amendment freedoms).

437. See *Zurcher v. Stanford Daily*, 436 U.S. 547, 551, 558-60 (1978).

438. See *id.* at 571-74 (Stewart, J., dissenting).

439. See MILTON R. KONVITZ, *FUNDAMENTAL RIGHTS: HISTORY OF A CONSTITUTIONAL DOCTRINE* 16-17 (2007) (defining strict scrutiny).

440. See HARRY I. SUBIN ET AL., *THE PRACTICE OF FEDERAL CRIMINAL LAW: PROSECUTION AND DEFENSE* 335-37 (2006) (explaining subpoena practice).

441. See *id.*

442. See *id.*

443. See *Zurcher*, 436 U.S. at 568.

444. See generally RAPE AND THE CULTURE OF THE COURTROOM, *supra* note 224, at 101-23, 134-55 (noting the importance of free speech in “obligating state legislatures to ensure rape victims’ meaningful voice at rape trials”).

445. See *id.*

446. See Solove, *supra* note 435, at 123 (implying effects of police power on free speech).

447. See *Zurcher*, 436 U.S. at 571-72 (Stewart, J., dissenting).

Yet, the case is devoid of any serious historical analysis of this sort.⁴⁴⁸ Such an examination would, at a minimum, have forced the Court to justify a position so seemingly at odds with history's lessons. Even if it was not history, but only the modern manifestation of historically rooted ideas and emotions, Congress itself seemed shocked by the Court's refusal to see a free press uncowed by governmental search authority as essential to the pursuit of the happiness of a free people, because Congress partially reversed *Zurcher* by statute.⁴⁴⁹ Congress is, of course, free to expand but not contract the Court's articulation of liberties.⁴⁵⁰ But, this statute is sensibly understood to be of constitutional magnitude in the sense that it constituted a rejection of the Court's cramped understanding of the relevant constitutional rights at issue.⁴⁵¹

C. Minority Community Governance

I do not want to repeat the brief summaries of historical periods above or write an unduly lengthy piece, so I will keep my recitations of history in the remainder of this article very short. One fair reading of much of American history is that policing has worked to silence the voices of those most affected by police conduct, particularly racial minorities.⁴⁵² This silencing includes overtly preventing direct involvement with formal political institutions—such as by discouraging voting—and indirectly reducing relative access to such institutions by using the police's greater material resources (at least relative to the poor) to affect legislative and executive action.⁴⁵³ Police also have muted, stopped, or re-directed informal acts of protest, whether via marches or other media; and police have silenced minorities by simply turning a blind eye to their complaints about police behavior, sometimes indeed ratcheting up abusive policing in service of the majority's call for harsher law-and-order policies at the minorities' expense.⁴⁵⁴ These complaints may sound in free speech as well,

448. See *id.* at 547.

449. See Privacy Protection Act of 1980, 42 U.S.C. § 2000aa. (2000).

450. See *id.*; TASLITZ, PARIS, & HERBERT, *supra* note 21, at 1.

451. See TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM, *supra* note 224, at 148-51 (discussing the "legislative constitution").

452. See Taslitz, *Contract of Mutual Indifference*, *supra* note 31, at 1336-37; Taslitz, *Political Silencing*, *supra* note 247, at 282; CURTIS, *supra* note 433.

453. See Taslitz, *Political Silencing*, *supra* note 247, at 300-01 (illustrating that greater law enforcement undermines political resources); ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 207 (2009) (noting that "sheriffs arrested and beat black protestors [seeking the franchise] and their white allies").

454. See TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES 59-60 (2009) (discussing the policing of public protests); DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 20-21, 42 (1999) (discussing the racial and class politics of policing); see generally ZERO TOLERANCE: QUALITY OF LIFE POLICING AND THE NEW POLICE BRUTALITY IN NEW YORK CITY, 3-12 (Andrea McArdle & Tanya Erzen eds.,

but they are broader than just free speech and involve state inaction as well as action; yet, even inaction can at least sometimes implicate the Fourth Amendment.⁴⁵⁵ I do not argue that most police today engage in this conduct, nor that it is intentional, but only that it is still widespread and likely has been for much of American history.⁴⁵⁶ An examination of such history would do much to advance particular issues.

For example, in *Virginia v. Moore*, a Virginia statute prohibited police from making arrests for certain traffic offenses.⁴⁵⁷ Nevertheless, the police did so in that case and engaged in a search incident to arrest that revealed contraband.⁴⁵⁸ The statute provided no remedy for its violation, so the defendant, Moore, raised a Fourth Amendment claim, arguing that the arrest was invalid, rendering the search incident to it equally invalid.⁴⁵⁹ Accordingly, Moore argued that the search's fruits should be suppressed.⁴⁶⁰ Moore lost his suppression motion, a position with which the Court on appeal agreed.⁴⁶¹ The argument that the Court was wrong is that the state, by passing the statute, concluded that under its local conditions (perhaps a rash of police arrests for minor offenses), the individual's interest in freedom of movement outweighs the state's crime control interests.⁴⁶² But, that balancing is yet another way of saying that arrests for minor offenses are "unreasonable."⁴⁶³ Instead, the Court concluded first, that state statutes are irrelevant to the constitutional question and, second, that because the state statute provided no remedy, the state must not have considered the no-arrest rule that important anyway.⁴⁶⁴

But, there is another way to view the remedies question. Ample social science research reveals that urban racial minorities—among those most affected by policing—usually have a very weak voice in state and federal legislative policymaking on policing and other issues of crime control.⁴⁶⁵

2001) (collecting essays documenting political forces leading to more aggressive policing of minorities in New York City and a police refusal to engage resulting minority complaints).

455. See TASLITZ, PARIS & HERBERT, *supra* note 21, at 321-23 (surveying case law holding that the failure to provide a prompt probable cause hearing violates the Fourth Amendment).

456. See, e.g., LEONARD N. MOORE, BLACK RAGE IN NEW ORLEANS: POLICE BRUTALITY AND AFRICAN AMERICAN ACTIVISM FROM WORLD WAR II TO HURRICANE KATRINA 17-42 (2010) (describing police-racial-minority-community relations after World War II in a major American city); see generally RONALD WEITZER & STEVEN A. TUCH, RACE AND POLICING IN AMERICA: CONFLICT AND REFORM 1-25 (2006) (analyzing modern police-racial-minority-community relations).

457. *Virginia v. Moore*, 553 U.S. 164, 167 (2008).

458. *Id.* at 166-67.

459. *Id.* at 168.

460. *Id.*

461. *Id.*

462. See Taslitz, *Political Silencing*, *supra* note 247, at 279-82.

463. See U.S. CONST. amend. IV (barring only "unreasonable" searches and seizures); TASLITZ, PARIS & HERBERT, *supra* note 21, at 176-83 (explaining the Fourth Amendment interpretive process of balancing interests).

464. See *Moore*, 553 U.S. at 172.

465. See Taslitz, *Political Silencing*, *supra* note 247, at 283-89.

Such minorities also often suspect that police use arrests of minorities for minor offenses as a pretext for investigating more serious crime.⁴⁶⁶ In the Virginia legislation, minority and majority interests apparently coincided, allowing passage of legislation prohibiting arrests for small justification.⁴⁶⁷ Police, facing this demonstration of political power, will understand that still tougher policy might follow if they ignore the statute as applied to majorities.⁴⁶⁸ But, because minorities acting alone have little voice in state-level legislation, the absence of a remedy for violating the no-arrest statute has no practical or political consequences for police who ignore the statute's dictates as applied to minorities.⁴⁶⁹

Thus, consciously or not, police are likely to take advantage of this opportunity to pursue their job more zealously. The result is two rules: one for racial majorities and one for racial minorities. That raises a disparate impact issue.⁴⁷⁰ But, it also raises a question of minority involvement in governance. If all people subjected to police violations of the statute had a remedy available, including suppression, then individual minorities, ultimately acting on behalf of the minority community as a whole, would have a voice, at least in the courts, to compensate for their usual lack of legislative voice.⁴⁷¹ The history of minority exclusion from governance would strengthen such an argument.⁴⁷² Indeed, some commentators have argued that that history, combined with a history of racially motivated police abuses, prompted the Warren Court's criminal procedure revolution in the first place.⁴⁷³ The Warren Court never expressly recounted that history, but perhaps it should have.

VIII. CONCLUSION

My few illustrations here have focused on two sorts of minority experiences: racial minorities and viewpoint minorities. I have done so because I think that they provide particularly stark examples of the themes struck here. But, a peoplehood-and-happiness-focused history can have relevance to a wide array of other Fourth Amendment issues. The peoplehood notion alone requires awareness of a broader sweep of American history than the Court usually demonstrates, even if the quest for

466. Cf. COLE, *supra* note 454, at 34-41 (discussing racially pretextual policing in America generally).

467. See Taslitz, *Political Silencing*, *supra* note 247, at 298-99.

468. See *id.* at 298-300.

469. See *id.* at 283-89.

470. Cf. *supra* text accompanying notes 425-26.

471. See Taslitz, *Political Silencing*, *supra* note 247, at 283-89, 310-11 (explaining the lack of legislative voice).

472. See *id.*

473. See Dan M. Kahan & Tracey L. Meares, Foreword to *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1156 (1998).

that People's happiness is taken out of the picture.⁴⁷⁴ Furthermore, questions of governance, equality, and citizen virtue, central to the happiness half of the equation, permeate policing.⁴⁷⁵ Nevertheless, I do not claim that understanding the American people's quest for happiness is the only justifiable use of history in interpreting the Fourth Amendment nor that it always, or even routinely, leads mechanically to decisive results.

But, I do claim that the pursuit of happiness is one important guide to how to use American history in understanding the constitutional law of search and seizure, and, when relevant, it will helpfully inform constitutional analysis. The mere availability of this one use of history suggests that the Court should explore more than only the framing era in its analyses and should often mine that history at least to see what plausible lessons it can teach about policing and the pursuit of happiness today.⁴⁷⁶ To link policing to happiness seems an odd pair but, properly understood, it is a very American pairing and it deserves the Court's recognition.

474. See TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT, *supra* note 61 *passim*.

475. See DAVID L. HARRIS, GOOD COPS: THE CASE FOR PREVENTIVE POLICING (2000) (addressing ways that police can promote all those goals, though not always using the same language).

476. Cf. DAVID ALAN SKLANSKY, DEMOCRACY AND THE POLICE 157-58 (2008) (defending at book-length the idea that policing practices and fundamental aspects of democracy are tightly interactive).