CROSS-ENFORCEMENT OF THE
FOURTH AMENDMENT


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Abstract

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

After surveying current law and constitutional history, the Article offers a normative proposal to answer this question. Drawing on principles of agency law, it proposes that each government should have the power to control who can enforce its criminal laws. Only those authorized to act as agents of a sovereign should enjoy the privilege of searching and seizing to enforce its laws. The difficult question is identifying authorization: Questions of constitutional structure suggest different defaults for enforcement of federal and state law. Outside the Fourth Amendment, governments can enact statutes that limit how their own officers enforce other laws. The scope of federal power to limit federal enforcement of state law by statute should be broader, however, than the scope of state power to limit state enforcement of federal law.

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

Next imagine you are a federal immigration agent driving on a state highway. You spot a van that you have a hunch contains undocumented immigrants. You lack sufficient cause to stop the van to investigate an immigration offense, but you notice that the van is speeding in violation of state traffic law. Can you pull over the van for speeding even though you are a federal agent?

These scenarios ask whether the Fourth Amendment permits what I call “cross-enforcement.” Cross-enforcement asks whether an officer employed by one government can justify a search or seizure based on a violation of a different government’s laws.

The constitutionality of a search or seizure often depends on whether an officer has sufficient cause to believe a criminal law was violated. In our federal system, that prompts an important question: What criminal laws count? If an officer’s search violates the Fourth Amendment based on the law of the officer’s home jurisdiction, can the broader criminal laws of another jurisdiction be invoked to make the search constitutional?

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2 See 21 U.S.C. § 844(a) (criminalizing the possession of controlled substances including marijuana).
4 This hypothetical is based on United States v. Juvenile Female, 566 F.3d 943, 948 (9th Cir. 2009), discussed infra at footnotes 123-127.
5 See id. (evaluating the question in the context of border patrol agents).
6 The violation usually will refer to a criminal law, but it could also refer to a civil traffic violation. See, e.g., Whren v. United States, 517 U.S. 806 (1996) (holding that probable cause to believe a civil traffic law was violated permits a stop of the automobile).
7 As the Supreme Court stated in Whren: “For the run-of-the-mine case, . . . we think there is no realistic alternative to the traditional common-law rule that probable cause justifies a search and seizure.” Whren, 517 U.S. at 819. For example, probable cause to believe evidence of crime will be found in a car permits a search of the car. See California v. Carney, 471 U.S. 386, 390 (1985) (citing Carroll v. United States, 267 U. S. 132 (1925)). Similarly, probable cause to believe that a person committed a crime permits an arrest of that person. See United States v. Watson, 423 U.S. 411, 423 (1976) (same).
The legality of cross-enforcement is a recurring question that often touches political flashpoints. The federal and state governments have different constitutional roles, and their values frequently diverge. Those clashes lead to different criminal laws. Some crimes, such as immigration offenses, are exclusively federal. Other offenses, like traffic laws, are mostly state and local. And sometimes the federal and state governments have concurrent authority but make different choices. The recent trend toward marijuana legalization is a timely example. As of 2018, eight states and the District of Columbia have recently legalized recreational marijuana use. But as state laws are going one way, the federal government is pointing in the opposite direction: Federal law retains its broad ban on marijuana possession, and the Trump Administration recently announced a new policy permitting prosecutions for the federal crime of marijuana possession even when that possession is legal under state law.

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

At this point you may be thinking that the law of Fourth Amendment cross-enforcement must be settled. Surprisingly, it isn’t. Lower courts disagree about when cross-enforcement is permitted. Consider the hypothetical that introduced this paper, in which a state

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

9 See NATIONAL CANNABIS INDUSTRY ASSOCIATION, STATE BY STATE MARIJUANA POLICIES, available at https://thecannabisindustry.org/state-marijuana-policies-map/ (last visited February 7, 2018).

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

11 See Sadie Gurman, Sessions Terminates US Policy That Let Legal Pot Flourish, ASSOCIATED PRESS, Jan. 4, 2018 (discussing new policy on marijuana enforcement permitting prosecution for marijuana possession even when state law has decriminalized the act).


14 See Part I(a), infra (discussing examples).

15 See Part I infra.
officer searches a car for possession of marijuana in a state that has decriminalized its possession. Lower courts have recently disagreed on whether the state officer can justify the search based on the federal offense. Some courts say the search is unconstitutional because the officer is a state employee and the state’s decriminalization controls. Other courts say the search is constitutional because marijuana possession remains a federal crime.

The puzzle of cross-enforcement is made even more challenging because no scholarship on the topic exists. This is a surprising oversight. How the Fourth Amendment addresses cross-enforcement pairs practical importance with fundamental questions about the nature of Fourth Amendment law. Search and seizure law gives the government a special privilege. It lets government agents do what private parties cannot do. But what exactly bestows that power? Even just identifying the subject is tricky. Should the constitutionality of cross-enforcement be solely a Fourth Amendment issue? Is it a subject for state constitutions, or a matter for Fourteenth Amendment law, or a question of structural federalism? Or maybe it is some combination of all of the above? The scholarship has failed to ask, much less answer, these questions.

16 See notes 1 to 3, supra.
17 See, e.g., Craan, 13 N.E.3d at 577-78.
18 See, e.g., United States v. Sanders, 248 F.Supp.3d 339, 347 (D.R.I. 2017) (“For better or worse, and regardless of what the R.I. General Assembly has declared, possession of marijuana is still unlawful under federal law.”); United States v. Eymann, 2016 WL 5842251 at *13 (C.D. Ill. 2016) (“Illinois has recently taken steps on the road to marijuana legalization—the state has legalized medical marijuana and decriminalized possession of small amounts of non-medical marijuana—but marijuana possession remains a federal crime.”).


This article offers a comprehensive analysis of Fourth Amendment cross-enforcement. It has three goals: one doctrinal, one historical, and one normative. The doctrinal goal is to show that courts are deeply split on the legal standards for cross-enforcement under the Fourth Amendment. When state officers look to federal criminal law to justify searches or seizures, lower courts have adopted five different standards.\(^{21}\) Courts have adopted three different views on the correct standard when federal agents try to rely on state criminal law to justify searches and seizures.\(^{22}\) The central disagreement concerns whether state or federal law must affirmatively authorize the enforcement. Some courts say yes, others say no, and different courts disagree on whether state or federal law (or both) is required.\(^{23}\)

The historical goal of the paper is to show that the Supreme Court’s caselaw on cross-enforcement offers little useful guidance today. The Court did develop a framework for cross-enforcement in the era before the Fourth Amendment applied to the states.\(^{24}\) That caselaw is obsolete today, however, as it rests on assumptions that the Court has since squarely rejected. Rules that the Court adopted for a federal-only constitution no longer make conceptual sense when all officers are subject to constitutional limits. The early caselaw also reflects a long-forgotten understanding of the Fourth Amendment that affirmative authorization was required to search or seize.\(^{25}\) The Supreme Court firmly rejected that understanding, without realizing its historical roots, in the 2008 case of *Virginia v. Moore*.\(^{26}\) These dramatic changes in Fourth Amendment doctrine have rendered existing high court caselaw largely obsolete.

The last section of the article offers a normative proposal. It argues that legality of cross-enforcement should depend on whether government that enacted the criminal law has authorized its enforcement by the officer conducting the search or seizure.\(^{27}\) The Fourth Amendment is a law enforcement privilege bestowed on agents (in the principal-agent sense) of a government. Drawing on traditional principles of agency law, officers should be deemed agents of a government only when the government has authorized that officer to take that kind of enforcement action.\(^{28}\) This leads to rule that is simple

\(^{21}\) See Section I.A, infra.
\(^{22}\) See Section I.B, infra.
\(^{23}\) See Section I.C, infra.
\(^{24}\) See Section II.A, infra.
\(^{25}\) See Section II.B, infra.
\(^{26}\) 553 U.S. 164 (2008).
\(^{27}\) See Section III.A, infra.
\(^{28}\) See Section II.C, infra.
to state: Officers can rely on a government’s criminal law to justify a search or seizure only when that government has authorized the officer to search or seize. Authorization of the enforcing government, not the officer’s home government, should control.

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

Does this mean that governments are powerless to control their own officers? Fortunately, it does not. The Fourth Amendment is only part of the cross-enforcement picture. Looking beyond it, governments have several ways to regulate their employees. Congress can readily block state efforts to authorize federal enforcement of state laws. For example, Congress can prohibit the admissibility of the fruits of state cross-enforcement of federal law in either federal or state court. State powers are likely more limited. On one hand, states can discourage state officers from enforcing federal law by forbidding it under state law, which could be enforced by remedies such as a suppression remedy in state court. On the other hand, the Supremacy Clause would likely invalidate state efforts to limit the admissibility of that evidence in federal court.

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

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

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

Next consider when federal officers search and seize to enforce state law, or what I will call *cross-enforcement down*. Again, decisions are mixed. Most courts first require state authorization; some require either state or federal authorization; and some say cross-enforcement is lawful regardless of what federal or state law says. Finally, the law is surprisingly unclear on when state officers can search and seize to enforce the laws of other states, what I call *horizontal cross-enforcement*. The uncertainty partly results from the Interstate Rendition clause of the Constitution, which requires every state to permit arrests based on out-of-state warrants. That universal statutory provision means that the limits of state-to-state cross-enforcement are rarely tested.

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

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

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

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33 See Section I.A, infra.
34 See Section I.B, infra.
35 See Section I.C, infra.
36 See U.S. CONST. Ar. IV, Sec. 2, Cl. 2.
1. Cross-Enforcement Up is Permitted If State Law Authorizes It

Many cases on state enforcement of federal law focus on whether state law authorizes it. If state statutory or common law authorizes state officers to enforce federal law, these courts reason, then the cross-enforcement is constitutional. On the other hand, if the state law does not authorize it, the cross-enforcement is unconstitutional.

The Ninth Circuit’s decision in *Gonzales v. City of Peoria* provides an often-cited example. Arizona state officers arrested eleven people for federal immigration crimes. The arrestees sued, claiming among other things that the state arrests for federal crimes violated the Fourth Amendment. The Ninth Circuit ruled that the arrests were constitutional because they complied with Arizona’s arrest statute. The state arrest statute allowed state officers to make arrests for “a misdemeanor [that] has been committed in [the officer’s] presence.” Because the federal immigration crimes were misdemeanors, the Ninth Circuit held, the arrests were lawful. The Ninth Circuit’s approach is consistent with the Fourth Circuit’s summary of the law in a recent decision: “Local law enforcement officials may detain or arrest an individual for criminal violations of federal immigration law without running afoul of the Fourth Amendment . . . so long as the seizure is supported by reasonable suspicion or probable cause and is authorized by state law.”

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

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37 722 F.2d 468, 475-76 (9th Cir. 1983), overruled on other grounds, Hodgers-Durgin v. de la Vina, 199 F.3d 1037 (9th Cir. 1999)
38 Id. at 474.
39 Id. at 475 (citing Ker v. California, 374 U.S. 23, 37 (1963))
41 See id. at 474-76.
42 Santos v. Frederick County Bd. of Com’rs, 561 F.2d 1160 (5th Cir. 1977).
43 561 F. 2d 1160 (5th Cir. 1977).
44 Id. at 1168.
which included federal felonies. As a result, the Fourth Amendment permitted the state officers to arrest for a federal crime.²⁴⁵

Some courts have applied this approach when states have decriminalized possession of small amounts of marijuana. A Massachusetts Supreme Judicial Court decision, Commonwealth v. Craan,²⁴⁶ is particularly interesting. State officers stopped Craan’s car at a drunk driving check-point and smelled unburnt marijuana emanating from the car. Possession of one ounce or less of marijuana had recently been decriminalized at the state level, but it remained a criminal federal offense.²⁴⁷ The officer searched the car and found marijuana, Ecstasy, and rounds of .38 ammunition.²⁴⁸ Criminal charges followed in state court, and Craan moved to suppress. The state argued that searching the car was lawful based on the officer’s smell, because the officer had probable cause to believe there was evidence of the federal crime of marijuana possession in the car.²⁴⁹

The Massachusetts Supreme Judicial Court ruled in Craan that the officer could not cross-enforce federal narcotics law under the Fourth Amendment because it was inconsistent with state law.²⁵⁰ Citing Peoria, the court reasoned that state law controlled whether state cross enforcement was permitted.²⁵¹ When the state had decriminalized marijuana possession at the state level, it had signaled its intent to “curtail police authority to enforce the Federal prohibition of possession of small amounts of marijuana.”²⁵² Because state officers were creatures of state law, the state’s decriminalization withdrew state authorization to enforce contrary federal law. At least absent a formal joint state/federal investigation, and in light of the federal government’s apparent lack of interest in prosecuting low-level marijuana possession, the state officers could not invoke federal law to justify the automobile search for marijuana.²⁵³

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²⁴⁵ Id. In addition, the officers knew a warrant had been issued for the defendant’s arrest. See id.
²⁴⁷ See id. at 29.
²⁴⁸ See id. at 27.
²⁴⁹ See id. at 33-34.
²⁵⁰ See id.
²⁵¹ See id.
²⁵² See id. at 33.
²⁵³ See id. at 34-35. For another case with somewhat similar reasoning, see People v. Denison, 79 Cal. Rptr. 2d 524 (Ct. App. Cal. 1998) (“In these circumstances, to permit respondent to claim probable cause to arrest based on federal law would undermine this legislative intent.”). The flip side of Craan’s state-focused approach is the Maryland high court’s decision in Robinson v. State, 51 Md. 94 (2017). When Maryland decriminalized possession of less than 10 grams of marijuana in 2014, it enacted an accompanying statute that marijuana possession was a civil offense and that the switch from a criminal to civil treatment could “not be construed to affect the laws relating to ... seizure and forfeiture.” Faced with the same question the Massachusetts court confronted in Craan, Maryland’s high court reached the opposite result because of the different state law scheme. Because the Maryland statute still permitted seizure
The cases that require state law authorization for state enforcement of federal law generally derive their approach from an interpretation of a string of Supreme Court cases from the 1940s through the 1960s: United States v. Di Re, Johnson v. United States, Miller v. United States, and Ker v. California. These four cases are often cited, somewhat interchangeably, for the idea that the Fourth Amendment permits state officers to conduct searches and seizures to enforce federal criminal law only if state law allows it. As we will see in Part II, those four cases don’t actually say that. But some judges believe they do, and that understanding has led at least some courts to focus on state law authorization to determine if state officers can search and seize to enforce federal crimes.

2. Cross-Enforcement Up is Permitted Even If State Law Prohibits It

Other lower courts adopt a different standard: They hold that state cross enforcement of federal criminal law is permitted even if state law prohibits it. These decisions are not a model of clarity, in that they leave uncertain whether federal law must authorize an officer’s act. Nonetheless, they reject the view that state law authorization is required for cross-enforcement up.

For example, in United States v. Turner, local officers searched Turner’s car for drugs and found a box of ammunition. Because Turner was a felon, his possession of ammunition was a federal crime. The local officers seized the ammunition, contacted federal ATF agents, and detained Turner so he could be charged federally. After charges followed, Turner argued that his detention by state officers violated the Fourth Amendment because it exceeded the officers’ authority under state law. His argument relied in United States v. Di Re, one of the
quartet of historical Supreme Court cases that (as noted above\textsuperscript{66}) has sometimes been interpreted as requiring officers to comply with state law to conduct cross-enforcement up.

The Tenth Circuit rejected Turner’s argument and held that whether the officers violated state law was irrelevant. According to the Tenth Circuit, the Supreme Court’s 2008 decision in \textit{Virginia v. Moore}\textsuperscript{67} had characterized \textit{Di Re} as a case on the federal supervisory powers instead of the Fourth Amendment.\textsuperscript{68} Under \textit{Moore}, whether state officers violated state law had no bearing on whether they violated the Fourth Amendment.\textsuperscript{69} Because the officers acted reasonably in seizing the ammunition and holding Turner for federal officials, their Fourth Amendment seizures were constitutional even if they violated state law.\textsuperscript{70}

\textit{United States v. Janik},\textsuperscript{71} an opinion for the Seventh Circuit by Judge Richard Posner, provides another example. State officers who were investigating a case together with federal agents arrested Janik for the federal offense of failing to register a weapon.\textsuperscript{72} Janik argued that the officers could not make the arrest because it was not authorized by state law. Judge Posner concluded that whether the arrest violated state law was irrelevant because the “[t]he criterion for such misconduct is federal.”\textsuperscript{73} According to Posner, the state officers acted reasonably in making the arrest because they “reasonably believed that the federal agents would want Janik arrested”\textsuperscript{74} once they realized he had violated a federal crime. Even if state law was violated, the officers “acted reasonably,” and therefore the arrest “was not an unreasonable seizure under the Fourth Amendment.”\textsuperscript{75}

Some recent trial court decisions on marijuana decriminalization have taken an analogous view without detailed analysis. For example, in \textit{United States v. Sanders},\textsuperscript{76} the defendant invoked the Massachusetts decision in \textit{Craan} in a similar case involving the smell of marijuana in Rhode Island. Like Massachusetts, Rhode Island recently decriminalized the possession of one ounce or less of marijuana. The federal district

\textsuperscript{66} See note 58, supra.
\textsuperscript{67} See \textit{Moore}, 128 S.Ct. at 1608.
\textsuperscript{68} See id. This characterization is explored in detail in Section II.E.
\textsuperscript{69} See \textit{Turner}, 553 F.3d at 1347 (citing \textit{Moore}, 128 S.Ct. at 1608). I discuss \textit{Moore}, and its relationship to \textit{Di Re}, in great detail in Part II.
\textsuperscript{70} For a similar case involving a plain view seizure, see \textit{United States v. Tolbert}, 2012 WL 404875 at *5 (E.D.Wisc 2012) (permitting a state officer enforcing state law to justify the plain view seizure of ammunition because it was immediately apparent that it was evidence of a federal crime).
\textsuperscript{71} 723 F.2d 537 (7th Cir. 1983).
\textsuperscript{72} See id. at 541-42.
\textsuperscript{73} Id. at 549.
\textsuperscript{74} Id.
\textsuperscript{75} Id. at 549.
\textsuperscript{76} 2017 WL 1232435 (D.R.I. 2017).
court in Rhode Island rejected Craan’s reliance on state law.77 The fact that the states had decriminalized marijuana possession, or had intended its officers to not enforce federal law, was irrelevant: “For better or worse, and regardless of what the R.I. General Assembly has declared, possession of marijuana is still unlawful under federal law.”78

3. Cross Enforcement Up is Permitted If Either Federal or State Law Permits It.

Some courts have suggested a third approach: Cross-enforcement up is permitted if either federal or state law permits it. Consider the New York Court of Appeals’ ruling in People v. LaFontaine,79 which involved the execution of a federal arrest warrant by state officers. The federal warrant had been issued for the defendant’s arrest based on his crimes in New Jersey.80 The defendant happened to live in New York, and New Jersey state police traveled to New York and arrested him there under the authority of the federal warrant.81 Drugs were discovered in his apartment, leading to drug charges in New York state court. The defendant moved to suppress the evidence, arguing that the New Jersey state officers acted unlawfully because they were not authorized to execute the federal warrant.82 On appeal following conviction, the intermediate appellate court ruled that the evidence should not be suppressed: “At worst” the question of authorization went to compliance with statutory law, and that was not relevant to the Fourth Amendment.83

New York Court of Appeals, the state’s highest court, reversed.84 Neither federal nor state law had authorized them to act, which the Court apparently saw as determinative of the Fourth Amendment question and not just statutory law.85 The court relied on United States v. Di Re and its progeny for the view that the state law where the search or seizure occurred determined whether state officers could enforce federal law.86 Under New York state caselaw, an out of state police officer could not generally execute a warrant.87 Further, the Federal Rules of Criminal

77 See id. at *6.
78 Id.
80 See id. at 472.
81 See id.
82 See id. at 473.
83 People v. LaFontaine, 235 A.D.2d 93, 100 (App. Div. 1997) (“At worst, the New Jersey officers violated procedural statutes that confer the power to arrest and execute warrants on a specific class of persons.”)
84 LaFontaine, 92 N.Y.2d at 475.
85 I say “apparently” because the New York Court of Appeals neither specifically mentions the Fourth Amendment nor addresses the lower court’s conclusion that the exclusionary rule should not apply because any violation was merely statutory. On balance I think LaFontaine is best read as a constitutional case, but I concede it is not clear on the point.
86 See id. at 475-76.
87 Id. (citing People v Floyd, 56 Misc. 2d 373 (1968)).
Procedure allowed only federal marshals or “some other officer authorized by law” to make arrests on federal warrants. “New Jersey officers were not Federal Marshals,” the court held, “nor were they, de jure or de facto, authorized as Federal equivalent officers in these circumstances.” The arrest was illegal and the evidence subject to suppression because neither state nor federal law blessed the New Jersey officer’s conduct.

4. Cross Enforcement Up is Permitted Unless Either Federal or State Law Prohibits It.

The First Circuit has suggested a fourth approach, that cross-enforcement up is permitted unless either state or federal law prohibits it. The key case is United States v. Smith, a decision by then-Judge Stephen Breyer.

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

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

5. Cross-Enforcement Up is Permitted Only if Authorized By Federal Law

A fifth approach to state cross-enforcement has been adopted for border searches. Under the border search exception to the Fourth Amendment, the government can conduct warrantless searches at the border to further the sovereign’s interest in ensuring that contraband and other illegal items should not enter the country and property not

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88 Id. at 475 (quoting Fed. R. Crim. Pro. 41(d)).
89 Id. at 475.
90 See id.
91 899 F.2d 116 (1st Cir. 1990).
92 See id. at 117.
93 Id. at 118.
94 Id.
permitted to exit should not.95 Lower courts have held that state officers
cannot rely on the border search exception unless they are authorized to
counter border searches by federal law.96

Notably, this rule is based on a general theory of the border
search exception rather than a specific concern with cross-enforcement.
The border search power belongs to the federal government and
empowers its agents to search property entering or exiting the United
States. Accordingly, courts have held, the border search exception
applies only to searches conducted by officers authorized by statute to
counter border searches.97 The federal authorization statute, 19 U.S.C.
482, is construed as a “delegation of authority to this agent to conduct
this search.”98 Searches by agents who lack the statutorily delegated
powers – whether federal or state -- cannot use the constitutional
exception.

Requiring delegation of statutory authority means that searches
by government officials who are not specifically delegated border search
authority fall outside the border search exception. The statute only
empowers “officers or persons authorized to board or search vessels” to
conduct border searches – in other words, federal customs agents and
officials, the coast guard, and other border agents.99 This means that an
FBI criminal investigator cannot use the border search exception.100 It
also means that state officers will be unable to use the border search
exception unless they are acting at the direction of – and are therefore
the agents of – federal border agents.101

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95 See Almeida-Sanchez v. United States, 413 U.S. 266, 272-74 (1973)
(articulating the rationale of the border search exception).
96 See sources cited in note 97, infra.
97 See, e.g., United States v. Soto-Soto, 598 F. 2d 545 (9th Cir. 1979); United
States v. Thompson, 475 F.2d 1359, 1362-63 (5th Cir.1973); United States v.
McDaniel, 463 F.2d 129 (5th Cir. 1972); United States v. Alfonso, 759 F.2d 728, 735
(9th Cir. 1985)
Lower court cases adopting the authorization rule for border search power
appear to trace it to precedents from the Prohibition era. For example, in Olson v.
United States, 68 F.2d 8 (2d Cir. 1933). Coast Guard agents stopped and searched a
boat that was carrying illegal liquor from Jamaica to New York. The Second Circuit
held that boarding the boat satisfied the Fourth Amendment because the border search
statute included the Coast Guard among those officers empowered to “board or search
vessels.” Id. at 10-11. As we will learn in Part II, this was not only how the Prohibition
era cases treated the border search power: At the time, it was the approach applied
widely in Fourth Amendment cases. But modern caselaw treats the authorization
requirement as specific to the border search power, and it therefore generally prohibits
state cross-enforcement in that context.
98 Soto-Soto, 598 F.2d at 549.
99 See Thompson, 475 F.2d at1362-63; McDaniel, 463 F.2d at 129 (border
patrol agents wear “two hats,” one as an immigration officer and the other as a customs
officer); Olson, 68 F.2d at 8 (concluding that Coast Guard officers, because they are
authorized by statute to “board and search vessels,” may conduct border searches
pursuant to 19 U.S.C. § 482).
100 See Soto-Soto, 598 F.2d at 549.
101 United States v. Alfonso, 759 F.2d 728, 735 (9th Cir. 1985).
It could be argued that this authority raises somewhat distinct issues from cross-enforcement. The border search exception involves the power to conduct warrantless (and usually suspicionless) searches at the border rather than to enforce a specific federal criminal law. Nonetheless, to the extent the issues are close enough, the approach of the border search exception appears to raise a fourth approach to state enforcement.

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

Now let’s reverse our orientation and look at cases on cross-enforcement down instead of up. Can federal agents make searches and seizures based on reason to believe that a state crime has been committed? At first blush, you might assume the answer must match that for cross-enforcement up. But it is worth flagging at least two possible differences. First, federal and state governments have different sources of legal authority. The states have the general police power,102 while the federal government has only limited powers to enact criminal laws drawn from specific grants of constitutional authority.103 Second, the federal government has the power to preempt state enforcement under the Supremacy Clause,104 giving Congress the ultimate say (if it chooses) over state practices within spheres of federal authority. It is at least possible, in light of such differences, that courts might approach cross-enforcement down differently than they do cross-enforcement up.

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

1. Cross-Enforcement Down Requires Some Grant of Authority

The majority of cases on cross-enforcement down permit federal agents to search or seize based on violations of state law only if some legal authorization exists to do so. Many of the cases involve border patrol agents. In one common fact pattern, a border patrol agent will spot

102 National Federation of Independent Business v. Sebelius, 567 U.S. 519, 535-35 (2012) (“The States thus can and do perform many of the vital functions of modern government—punishing street crime, running public schools, and zoning property for development, to name but a few—even though the Constitution’s text does not authorize any government to do so. Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the ‘police power.’”).
103 See id.
104 See U.S. CONST. Art. VI, Cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”)
a car that the agent suspects is carrying undocumented immigrants. Developing reasonable suspicion to believe a federal immigration violation may be difficult, but spotting a state traffic law violation may be easy. Does the federal border patrol agent have a state officer’s Fourth Amendment privilege to pull over the car based on the state traffic violation?

Lower courts have held that the answer is “no.” Federal border patrol agents cannot make traffic stops to enforce state traffic codes, courts have held, because neither Congress nor the state legislatures have empowered them to do so. “As federal officers,” the Ninth Circuit has reasoned, “Border Patrol agents are limited to their statutory powers.” Because border patrol agents have limited powers, and their powers do not include state traffic enforcement, the Fourth Amendment is violated when border patrol agents enforce the traffic code. “To hold otherwise,” courts have said, “would grant Border Patrol agents unfettered discretion to investigate suspected violations of any and all cognizable criminal law.” This “would, in effect, give to the Border Patrol the general police power that the Constitution reserves to the States.”

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

2. Cross-Enforcement Down Requires Authorization From State Law

Several cases on cross-enforcement down look to state law for authorization. The state-focused cases often involve arrests by federal agents for state law crimes. For example, in United States v. Johnson, federal Secret Service agents investigating a suspect for counterfeiting in

\[105\text{ See, e.g., United States v. Valdes-Vega, 685 F.3d 1138 (9th Cir. 2012); U.S. v. Rodriguez-Rivas, 151 F.3d 377 (5th Cir. 1998); State v. Garcia-Navarro, 226 P.3d 407 (Ct. App. Az. 2010).}
\[106\text{ Valdes-Vega, 685 F.3d at 1146; Rodriguez-Rivas, 151 F.3d at 377; Garcia-Navarro, 226 P.3d at 407.}
\[107\text{ United States v. Juvenile Female, 566 F.3d 943, 948 (9th Cir. 2009) Id. at 948 (quoting United States v. Perkins, 166 F.Supp.2d 1116, 1126 (W.D.Tex. 2001)) (emphasis in original).}
\[108\text{ Id.}
\[109\text{ Cf. U. S. ex rel. Coffey v. Fay, 344 F.2d 625 n.1 (2d Cir. 1965) (suggesting in dicta that the FBI cannot make arrests for state crimes); See, e.g., People v. Redd, 229 P.3d 101, 125, 128 (Cal. 2010) (concluding that a federal agent had authority to detain and arrest defendant on property owned by the City and County of San Francisco because a state statute designated “[d]uly authorized federal employees” as peace officers “when they are engaged in enforcing applicable state or local laws on . . . any street, sidewalk, or property adjacent” to federal land).}
\[111\text{ 815 F.2d 309 (5th Cir. 1987).} \]
Texas learned that he had an outstanding warrant for his arrest in California on theft charges. The federal agents made the arrest on the state warrant and questioned the suspect about counterfeiting activities. When federal charges were brought, the defendant argued that the Secret Service had violated the Fourth Amendment when the federal agents made the arrest on a state warrant. The Fifth Circuit disagreed on the ground that Texas state law affirmatively authorized the arrest. This was so, among other reasons, because a Texas state statute listed federal Secret Service agents as among those granted “the powers of arrest, [and] search and seizure” for Texas state felony crimes.

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

The Fifth Circuit’s ruling in United States v. Sealed Juvenile offers an example. A United States Customs Service agent was driving

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112 See id. at 311.
113 See id. at 313.
114 Id. (quoting Tex. Code of Crim. Pro. Art. 2.121).
115 See, e.g., United States v Coplon, 185 F.2d 629, 634 (2d Cir. 1950) (L. Hand, J.) (comparing the arrest authority of government officers and private parties).
117 United States v. Sealed Juvenile 1, 255 F.3d 213 (5th Cir. 2001).
118 State v. Gustke, 516 S.E.2d 283, 293 (W.Va. 1999) (describing such a result as “ridiculous”).
119 United States v. Johnson, 815 F.2d 309, 313 (5th Cir.1987) (holding that federal Secret Service agents “can make an arrest when Texas law authorizes such an arrest by a ‘private person.”’); Garcia, 676 F.2d at 1093 n. 22 (stating in dicta that “[o]f course, an employee of the Parks and Wildlife may, like any other private citizen, effect a citizen’s arrest”); United States v. Sealed Juvenile 1, 255 F.3d 213 (5th Cir. 2001) (“It would be counter-intuitive to deny the right of citizen’s arrest to a citizen who happens to be a federal law enforcement officer” and “it would lead to absurd results: a federal agent who witnesses a felony or a breach of the peace would remain helpless to stop the offender, but a private citizen without any law enforcement background could pursue a fleeing felon”); Gustke, 516 S.E.2d at 293 (describing a contrary result as “ridiculous”).
120 255 F.3d 213 (5th Cir. 2001).
home after work in a government-owned car when he spotted an erratic and dangerous driver.\textsuperscript{121} The agent turned on his car’s strobe lights and siren. A high-speed chase followed, ending in the driver’s capture and the discovery he possessed illegal drugs.\textsuperscript{122} When federal drug charges followed, the driver-turned-defendant moved to suppress the drugs on the ground that the customs agent was not authorized to stop him to enforce state traffic laws.

The court ruled that the customs agent’s agent stop satisfied the Fourth Amendment.\textsuperscript{123} Assuming the customs agent was acting as a federal officer on his way home, the court reasoned, he was still governed by Texas law about the arrest powers of private citizens. The driver’s dangerous swerving on a public road was a breach of the peace in the agent’s presence that authorized an arrest under Texas statutory law, the Fifth Circuit held.\textsuperscript{124} The fact that the agent had chased after and stopped the car rather than just arrested the driver was no problem, the court held, because the chase and stop was implicitly part of the process of making an arrest.\textsuperscript{125} Because the citizen’s arrest statute permitted anyone to arrest the driver for breach of the peace, a federal agent could take steps toward making an arrest under the same circumstances.\textsuperscript{126}

3. Cross-Enforcement Down Requires No Authorization (The State Search Warrant Cases)

An additional set of cases on cross-enforcement down involves the execution of state search warrants by federal agents. Joint state and federal execution of search warrants appears to be exceedingly common.\textsuperscript{127} Courts have allowed federal agents to execute state warrants without requiring any statutory or other authorization.\textsuperscript{128} These cases are not necessarily inconsistent with the more common holding that federal agents need state authorization to conduct state searches. Perhaps the warrant itself could be considered the needed authorization. Nonetheless, the irrelevance of an officer’s federal status in the state search warrant context is a helpful counterpoint to the cases that require

\textsuperscript{121} See id. at 215.
\textsuperscript{122} See id.
\textsuperscript{123} Id. at 218.
\textsuperscript{124} Id. at 218 (holding that the defendant’s dangerous driving was a breach of the peace because the driving “placed her own life and the lives of the other motorists in danger.”)
\textsuperscript{125} Id.
\textsuperscript{126} Id. at 219.
\textsuperscript{127} See, e.g., United States v. Benford, 457 F.Supp. 589, 595 (M.D. Tenn. 1978) (arguing that the incorporation of the Fourth Amendment creates a “climate for full cooperation in connection with searches” and that “courts should not continue to look askance each time such cooperation takes place.”). Such joint efforts are sufficiently common that legal challenges may not even raise Fourth Amendment issues. See, e.g., United States v. Krawiec, 627 F.2d 577 (1st Cir. 1980) (challenging federal involvement in a state warrant based on statutory objections).
\textsuperscript{128} See notes 128 to 136, infra.
state statutory authorization for federal agents to search and seize based on state law violations.

An example of the cases from this genre is United States v. Gilbert, from the Eleventh Circuit. Federal agents persuaded a state’s attorney to obtain a state warrant that directed state officers to search the home for evidence of illegal weapons under state law. Federal agents and several local police officers paired up and conducted the search under the warrant -- no state officers were involved -- and they found evidence of federal crimes. When federal charges followed, the Eleventh Circuit rejected the defendants’ argument that the search violated the Fourth Amendment because it had only authorized state agents and not federal agents to execute it.

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

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

Let’s turn now to horizontal cross-enforcement, in which state officers conduct searches or seizures to enforce the laws of another state. The caselaw here is surprisingly sparse. That likely is the case for three reasons. First, the territorial scope and common features of state criminal laws makes horizontal cross-enforcement relatively limited. State criminal laws usually apply predominantly inside each state’s territory. Although states can enact criminal laws that extend beyond their borders, unusual or outlier state criminal laws that extend beyond a state’s borders are often subject to invalidation under the Dormant Commerce Clause. When state laws are the same in different states,

129 942 F.2d 1537 (11th Cir. 1991).
130 See id. at 1538-39.
131 See id. at 1541-42.
132 Id. at 1541.
133 See United States v. Castro, __ F.3d __ at *4 (6th Cir. 2018) (Sutton, J.) (“In our circuit, federal officers may help state officials search for evidence of a crime in connection with a state warrant so long as they are searching for the same evidence as the state officers and the same evidence authorized by the state warrant.”) (citing United States v. Garcia, 496 F.3d 495, 509–10 (6th Cir. 2007)).
135 See e.g., American Booksellers Foundation v. Dean, 342 F.3d 96, 103–04 (2d Cir. 2003).
an officer need not rely on a different state’s law to justify a search or seizure. For all of these reasons, there are relatively few situations in which the legality of horizontal cross-enforcement arises.

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

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

The relative lack of scrutiny for state execution of out of state arrest warrants is perhaps understandable in light of the Constitution’s

136 131 F.3d 1392 (10th Cir. 1997)
137 See id. at 1395.
138 See id.
139 See id. at 1397.
140 Id.
141 Id.
142 See id. At least a few civil suits have been filed by arrestees arguing that their Fourth Amendment rights were violated when officers from one state arrested them based on out-of-state warrants. But courts have declined to reach the merits in those cases, instead ruling that qualified immunity attaches because there is no clearly established law that arrests made in reliance on out of state warrants are impermissible. See, e.g., Lowrance v. Pflueger, 878 F.2d 1014, 1020 (7th Cir.1989) (holding that officers in Wisconsin were entitled to qualified immunity for arrest based on a Tennessee warrant); Donta v. Hooper, 774 F.2d 716, 721 (6th Cir.1985) (holding that Ohio police were entitled to qualified immunity for arrest based upon a message from Kentucky state police that they had obtained a warrant) Cf. Whiteley v. Warden, 401 U.S. 560, 568 (1971) ("[P]olice officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause.")
Interstate Rendition Clause.\textsuperscript{143} The Clause states that a person “charged in any state” with a crime, who has fled from justice and is located in another state, “shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.”\textsuperscript{144} A federal statute first enacted in 1793 mandates the proper procedure, which includes an arrest on the out-of-state charge.\textsuperscript{145} Every state has an implementing statute allowing arrests by home state officers on out-of-state warrants.\textsuperscript{146}

The Interstate Rendition Clause and its implementing statutes place the imprimatur of the Constitution and every jurisdiction’s law behind executing out of state arrest warrants. Before the Fourth Amendment applied to the states, the Interstate Rendition Clause and the Fourth Amendment did not intersect: The Fourth Amendment applied to the federal government and the Interstate Rendition Clause obligated states, so horizontal cross-enforcement raised no Fourth Amendment issues at all. Today the Fourth Amendment applies to interstate extradition.\textsuperscript{147} In light of the Interstate Rendition Clause, however, it is no surprise out-of-state arrest warrants have not been treated as problematic.\textsuperscript{148} How horizontal cross-enforcement works outside the warrant context remains surprisingly unclear.

* * *

Let’s summarize. The lower court cases on cross-enforcement are a mess. They offer no clear answer to when it is allowed. Where they offer clear answers, those answers conflict with decisions from other circuits. Why such confusion? Part of the reason is that decisions seem surprisingly unaware of other decisions on cross-enforcement. Cases on cross-enforcement rarely cite each other; they seem to operate in a doctrinal vacuum. Where courts have realized common roots, they mostly trace their varying approaches to a set of Supreme Court decisions from the middle of the Twentieth Century that lower courts believe either answered or at least gave some guidance for when cross-enforcement is allowed. But modern courts seem unsure of what to make of those cases. The next section turns to the history of Fourth Amendment cross-enforcement, framing and then exploring the historical cases that modern decisions have treated as authority.

\textsuperscript{143} U.S. CONST. Article IV, Section 2, Clause 2.
\textsuperscript{144} Id.
\textsuperscript{145} See 18 U.S.C. § 3182.
\textsuperscript{146} See Unif. Crim. Extradition Act § 14, Arrest Without a Warrant. See, e.g., Va. § 19.2-100 (enacted 1950).
\textsuperscript{147} See Kirkland v. Preston, 385 F. 2d 670, 676 (D.C. Cir. 1967) (concluding, in the wake of Mapp v. Ohio, that extradition arrests at the state level “must be preceded by a finding of probable cause” under the Fourth Amendment).
II. RECOVERING THE LOST HISTORY OF FOURTH AMENDMENT CROSS-ENFORCEMENT

The division in current doctrine on cross-enforcement rests in part on divergent interpretations of Supreme Court cases from the early and middle parts of the last century.\(^{149}\) This section takes a close look at those cases to identify their lessons. Its reveals a remarkable dynamic. The old Supreme Court cases, on which lower courts rely today, rest on assumptions that have since been overturned. Although the Supreme Court did develop a body of cases law on cross-enforcement starting in the Prohibition era, it reflects often forgotten premises that the modern Supreme Court has subsequently rejected.\(^{150}\)

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

An overview of the three major changes detailed in this section may help guide the reader. First, when the Supreme Court developed its cross-enforcement caselaw, the Fourth Amendment did not apply to the states.\(^{151}\) Cross-enforcement involved the relationship between a federal government regulated by the Fourth Amendment and state governments outside it. That is no longer true. In *Wolf v. Colorado*\(^{152}\) in 1949, and in *Mapp v. Ohio*\(^{153}\) in 1961, the Supreme Court “incorporated” the Fourth Amendment and applied it to the states through the Fourteenth Amendment.\(^{154}\) After *Mapp*, cross-enforcement asks a question the Supreme has never answered: Whether an officer from one government regulated by the Fourth Amendment can search and seize to enforce the law of another government also regulated by the Fourth Amendment.

The second historical principle concerns the role of subjective intent. Back when the Fourth Amendment only applied to the federal government, it turns out, whether cross-enforcement was permitted hinged on the officer’s subjective intent.\(^{155}\) The constitutional implications of an officer’s search or seizure depended on whether the officer was trying to enforce state law (outside the Fourth Amendment)

\(^{149}\) See notes 36-39, 42-48, and 66-82, supra.

\(^{150}\) See Section II, infra.

\(^{151}\) See Section II(a)-(b), infra.

\(^{152}\) 338 U.S. 25 (1949).


\(^{154}\) See Section II(c), infra.

\(^{155}\) See Section II(a), infra.
or federal law (within it). Modern Fourth Amendment law rejects that approach. It is a basic canon of black-letter law that Fourth Amendment rules do not consider an officer’s subjective intent. What matters is now the officer’s action rather than the officer’s thoughts.

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

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

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

A) The Early History of Fourth Amendment Cross-Enforcement

The history of Fourth Amendment cross-enforcement before the Prohibition Era is largely a story of silence. Few decisions document whether it occurred and whether it was deemed lawful. The two systems

156 See Section II(c), infra.
157 See, e.g., Whren v. United States 517 U.S. 806, 813 (1996) (“Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”)
158 See id.
159 See Section II(b), infra.
160 See Section II(b), infra.
162 See id. at 1607 (holding that “state restrictions do not alter the Fourth Amendment's protections”). 
of state and federal law enforcement rarely met in litigation, resulting in little evidence to support whether the Fourth Amendment permitted officers to search and seize based on the authority of other jurisdiction’s laws. And when cross-enforcement did arise, it was not understood to raise Fourth Amendment issues.

It is helpful to understand why the issue rarely arose. First, the Fourth Amendment was understood to regulate only the federal government.\(^{163}\) State constitutions included Fourth Amendment-like limits on search and seizure that limited state officers.\(^{164}\) The federal Fourth Amendment did not apply, however, to the state or local officers responsible for the overwhelming majority of law enforcement.\(^{165}\) Further, the exclusionary rule was not established for Fourth Amendment violations until \textit{Weeks v. United States}\(^{166}\) in 1914. The exclusionary rule is a powerful engine of generating caselaw, and its absence until the 20th century meant that Fourth Amendment issues of any kind were litigated only rarely before then. Some cross-enforcement occurred, but ordinarily did not lead to litigation that could explore the meaning of the Fourth Amendment.\(^{167}\)

The first major case that implicated the legality of cross-enforcement was \textit{Weeks} itself. The defendant was arrested and his house searched by state or local police officers who found evidence of a federal crime and turned the case over to a federal marshal. The officers and the marshal went together to the suspect’s home, where the marshal

\(^{163}\) \textit{See} Reed v. Rice, 2 J.J.Marsh. 442 (Ct. Ky 1829) (“The 4th article of the amendments to the constitution of the U. S. intended to operate upon the government of the U. S. not of the states.”); Commonwealth v. Murray, 2 Va.Cas. 504 (Va. 1826) (“The article too, lays down a rule for the Federal authorities, and not for the State authorities.”)

\(^{164}\) \textit{See}, e.g., Commonwealth v. Murray, 2 Va.Cas. 504 (Va. 1826) (“The people of the several States then existing, had already by their Constitutions and Laws, guarded themselves as effectually, as they thought it necessary, against the abuse of power by their own governments, and if there was any defect, they retained within themselves, the power to establish such additional rules as might thereafter be necessary.”).


\(^{166}\) 232 U.S. 383 (1914).

\(^{167}\) One significant opportunity was in the enforcement of the Fugitive Slave Acts of 1793 and 1850. With little preexisting federal law apparatus to enforce the fugitive slave acts, the laws relied in part on state magistrates and state officers. For example, in Commonwealth v. Griffith, 2 Pick. 11, 19 Mass. 11 (1823), the defendant came to Massachusetts and obtained the aid of a local deputy sheriff to arrest a fugitive slave from Virginia under the authority of the 1793 federal slave act. \textit{See also} Prigg v. Pennsylvania, 41 U.S. 539 (1842) (stating that “state magistrates may, if they choose, exercise . . authority [under the fugitive slave act,] unless prohibited by state legislation.”). Such arrests may not have not implicated the lawfulness of cross enforcement, however, for a tragic reason: The arrested slaves were deemed to have no Fourth Amendment rights according to \textit{Griffith}, so there was no need for state agents to harness federal law to justify their arrest.
conducted a second search.\textsuperscript{168} Federal charges were brought, and the Supreme Court famously held that the evidence found by the marshal should be suppressed. The overlooked second holding of \textit{Weeks} is the one relevant to cross-enforcement: The Court also held that the “papers and property seized by the policemen”\textsuperscript{169} should not be suppressed because they were not federal agents. The record did not disclose “under what supposed right or authority”\textsuperscript{170} the police acted, or whether they were state or local officials. The answers did not matter, the Court held, because “the 4th Amendment is not directed to individual misconduct of such officials.”\textsuperscript{171} Whether state officers could enforce federal law was apparently not a question the Fourth Amendment of the day considered.

\textbf{B) Cross Enforcement Up in the Prohibition Era}

Everything changed with the arrival of Prohibition. It is in 1919, with the ratification of the Eighteenth Amendment’s ban on “the manufacture, sale, or transportation of intoxicating liquors”\textsuperscript{172} that the history of Fourth Amendment cross-enforcement really begins. Prohibition was a perfect storm for confronting the legality of cross-enforcement. The text of the Eighteenth Amendment granted both “Congress and the several states” the “concurrent power to enforce” the nationwide liquor ban.\textsuperscript{173} Many states were far ahead of Congress in this regard. By October 1919, when Congress enacted the National Prohibition Act\textsuperscript{174}—widely known as the Volstead Act for its lead proponent, Representative Andrew Volstead—many states had already adopted their own state Prohibition laws.

The Volstead Act itself envisioned a role for states in the enforcement of federal law. State judges could issue warrants for federal Volstead Act violations,\textsuperscript{175} and state prosecutors could bring nuisance actions to enjoin Volstead Act offenses.\textsuperscript{176} Further, Prohibition arrived just five years after the exclusionary rule of \textit{Weeks}, meaning that defendants had an incentive to litigate whether cross-enforcement was lawful under the Fourth Amendment. Search and seizure cases flooded the federal courts for the first time. In that period, courts developed doctrines both on whether state officers could search and seize to help enforce federal law and whether federal officers could search and seize to help enforce state law.

This section considers the lawfulness of state enforcement of federal law in the Prohibition era, what I have called cross enforcement

\textsuperscript{168} See \textit{Weeks}, 232 U.S. at 386.
\textsuperscript{169} Id. at 398.
\textsuperscript{170} Id.
\textsuperscript{171} Id.
\textsuperscript{172} U.S. CONST. Amend. XVIII Sec 1.
\textsuperscript{173} U.S. CONST Amend. XVIII Sec 2.
\textsuperscript{175} Act of June 15, 1917, c. 30, Title XI, 40 Stat. 217, 228.
\textsuperscript{176} See Pub. L. 66-66, Title II, Sec 22.
up. As we will see, when state officers searched and seized to enforce federal law, courts considered two questions beyond the usual issue of whether a search or seizure satisfied Fourth Amendment limits. The first question was whether the state officer subjectively intended to enforce federal law, which was needed to subject the officer’s action to Fourth Amendment regulation. The second question was whether a source of law had affirmatively granted state officers the power to enforce federal law.

1. Triggering the Fourth Amendment

The Supreme Court first confronted the lawfulness of cross-enforcement during Prohibition in two 1927 decisions. The first case, *Byars v. United States*, involved a joint investigation between state officials and a federal prohibition agent in the dry state of Iowa. A local police officer obtained an invalid state warrant to search premises for illegal alcohol and then invited a federal prohibition agent to join him. Although joint search yielded no alcohol, the agents found counterfeit stamps for whiskey bottles and turned over the stamps to the federal agent for prosecution. The Supreme Court held that the Fourth Amendment applied because the search “in substance and effect was a joint operation of the local and federal officers.” The search took on a federal character because the federal agent was present and acting in his official capacity: “[T]he effect is the same as though [the federal agent] had engaged in the undertaking as one exclusively his own.” The invalid warrant doomed the search, leading the Supreme Court to overturn Byars’ conviction.

The second case, *Gambino v. United States*, involved liquor enforcement in a state, New York, that had recently repealed its prohibition law. New York state troopers arrested two men near the Canadian border for violating the Volstead Act despite lacking probable cause to make the arrest. The troopers searched the suspect’s car, found illegal liquor, and seized it. The troopers turned over the arrestees and the seized alcohol to federal agents for prosecution. The Supreme Court held that the Fourth Amendment applied because “the search and seizure was made solely for the purpose of aiding the United States in the enforcement of its laws.” Because the Fourth Amendment applied and the agents had lacked probable cause, the arrest

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178 See id. at 30-32.
179 See id.
180 Id. at 33.
181 Id.
182 275 U.S. 310 (1927).
183 See id. at 312-13.
184 See id. at 312.
185 Id. at 317.
and seizure violated the Fourth Amendment and the convictions were overturned.186

Importantly, Gambino adopted a subjective test to identify whether the Fourth Amendment applied. The issue was what the state troopers were thinking: Where they trying to enforce state law when they committed a search or seizure, or where they acting “solely for the purpose of aiding the United States in the enforcement of its laws”?187 The clues in Gambino pointed to the latter. New York had repealed its state Prohibition law one year earlier, so the agents clearly were not trying to enforce state law.188 New York’s governor, on announcing the repeal of the state law, had declared that state law enforcement must enforce the Volstead Act “with as much force and as much vigor as they would enforce any State law or local ordinance.”189 Further, one of the state troopers had worked at the border before the New York prohibition law had been repealed.190 Because the officers had searched and seized “solely on behalf of the United States,”191 the Fourth Amendment applied and the arrests without probable cause justified suppression of the evidence.192

Gambino’s subjective test often turned Prohibition-Era cross-enforcement cases into disputes over conflicting testimony. In several cases from New York, state troopers pulled over drivers and searched their cars to find liquor.193 The troopers turned over the defendants to federal agents for prosecution under the Volstead Act. On a motion to suppress, the trooper would testify that he was merely investigating a state traffic offense. The defendant would instead testify that the trooper made clear he was really looking for illegal liquor. The trial judge would have to choose which testimony was true, invariably endorsing the trooper’s version of events. Judges saw the problem. Learned Hand

186 See id. at 316-17.
187 Id. at 315.
188 See id. at 314 (“The Mullan-Gage Law — the state prohibition act — had been repealed in 1923. Act of June 1, 1923, c. 871, 1923 N.Y. Laws, p. 1690. There is no suggestion that the defendants were committing, at the time of the arrest, search and seizure, any state offense; or that they had done so in the past; or that the troopers believed that they had.”)
189 Id. at 315 (quoting Memorandum filed with Assembly Bill, Introductory No. 1614, Printed No. 1817, p. 2.)
190 Id. at 316 (“It appears that one of the troopers who made the arrest and seizure here in question had been stationed at the Canadian border for eighteen months prior thereto, the greater part of that period being after the repeal of the Mullan-Gage law.”).
191 Id.
192 See id. (“We are of opinion that the admission in evidence of the liquor wrongfully seized violated rights of the defendants guaranteed by the Fourth and Fifth Amendments. The wrongful arrest, search and seizure were made solely on behalf of the United States.”).
193 See, e.g., Marsh v. United States, 29 F.2d 172, 173 (2d Cir. 1928); United States v. Jankowski, 28 F.2d 800 (2d Cir. 1928); United States v. Bumbola, 23 F.2d 696 (NDNY 1928).
recognized that “an easy complaisance in any plausible tale may deprive
defendants of their constitutional rights,” and he lamented that “except
in plain cases,” appellate judges “cannot tell from the cold record where
the truth lies.” But Gambino had adopted a subjective test, and lower
courts (for the most part) followed it.

2. Authorization to Search and Seize

When state agents triggered the Fourth Amendment by acting
with a purpose to enforce federal law, the next question was whether the
officers were empowered to conduct the searches and seizures that they
did.196 This question implicates a feature of Prohibition-era caselaw that
seems utterly foreign today: Compliance with the Fourth Amendment
was understood to require both following Fourth Amendment limits and
also having affirmative authority to act. As the Supreme Court stated in
Carroll v. United States197 in 1925, the Fourth Amendment required
action to be undertaken by a “competent official, authorized to
search.”198

To modern ears, the notion that the Fourth Amendment requires
legislative authorization for an officer to act sounds entirely wrong. The
Supreme Court effectively buried this understanding of the Fourth
Amendment in its 2008 opinion in Virginia v Moore.199 Moore
considered whether the “search incident to a lawful arrest” required a
lawful arrest under the state law of arrest, as compared to merely an
arrest on probable cause.200 Justice Scalia, writing for the majority,
scoffed at the idea that the state law of arrest was relevant to the Fourth
Amendment.201 The statutory authorization was merely a statutory rule
governing the police that might offer greater protection than the Fourth

194 Marsh, 29 F.2d at 173.
195 Mostly, but not uniformly. See Parsons, supra note 6, at n.100 (“As might
be expected, the reception of Gambino in the lower federal courts has been mixed.”)
For an example of a case seemingly rejecting the subjective test of Gambino, consider
Miller v. United States, 50 F.2d 505 (3d Cir. 1931). State troopers testified that they
thought they were enforcing the Volstead Act when they conducted a search. The court
resisted the conclusion that this was determinative: “[T]his was merely their personal
opinion which alone cannot give a federal character to their action,” the Third Circuit
wrote, “particularly in view of the fact that Pennsylvania has a state liquor law of its
own to be enforced and that the State Constabulary ordered the troopers to this task
without any instructions to enforce the federal law.” Id. at 508.
196 See notes 200 to 232, infra.
197 267 U.S. 132 (1925).
198 Id. at 153. The full holding of Carroll was that “those lawfully within the
country, entitled to use the public highways, have a right to free passage without
interruption or search unless there is known to a competent official, authorized to
search, probable cause for believing that their vehicles are carrying contraband or
illegal merchandise.” Id.
200 See id. at 166.
201 See, e.g., id. at 178 (“We reaffirm against a novel challenge what we have
signaled for more than half a century.”)
Amendment but that had no impact on the Fourth Amendment.202 As the unanimous decision in Moore indicates, the modern assumption is that Fourth Amendment standards generally operate independently of statutory grants of or limits on the power to search or seize.

The Prohibition-era understanding was different, as the following materials will show. At the time, an affirmative grant of power to search and seize was assumed to be needed to satisfy the Fourth Amendment. An officer making an arrest had to have authority to make it -- typically granted by statute -- in addition to probable cause.203 A search was lawful if it was authorized by statute.204 A search incident to arrest satisfied the Fourth Amendment only if the arrest was both based on probable cause and the officer had the lawful authority -- typically granted by statute -- to make it.205 A judge issuing a warrant needed jurisdiction where the warrant was to be executed or else the search was void even if probable cause existed.206

This is a sufficiently startling point today that it’s worth detailing how it worked. The Supreme Court’s decision in United States v. Lee207 serves as a useful example. The Coast Guard searched a boat 24 miles from the coast and found illegal liquor.208 When the boat owner moved to suppress on Fourth Amendment grounds, the merits of the claim hinged on whether the Coast Guard had the affirmative legal authority to search the boat that far from shore, assuming it had probable cause, so as to authorize the Fourth Amendment seizure and search of the boat.209 Writing for the majority, Justice Brandeis concluded that the search was lawful because a statute gave Coast Guard officials broad authority to seize vessels subject to forfeiture for failure to comply with revenue laws.210 The power to seize a vessel implied a power to board and search

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202 See id.
203 See, e.g., Marsh v. United States, 29 F.2d 172 (2d Cir. 1928), discussed in Part II.C below.
204 See, e.g., Carvalho v. United States, 54 F.2d 232 (3d Cir. 1931) (focusing on statutory authority of prohibition agents to enter distillery).
205 See, e.g., Marsh v. United States, 29 F.2d 172 (2d Cir. 1928).
206 See, e.g., Weinberg v. United States, 126 F.2d 1004, 1006-7 (2d Cir. 1942).
207 274 U.S. 559 (1927).
208 See id. at 560.
209 See id. Although the Supreme Court’s decision in Lee speaks of “illegal search and seizure” generally rather than the Fourth Amendment specifically, id., the First Circuit’s decision below speaks plainly of the issue of search and seizure as being the Fourth Amendment. See Lee v. United States, 14 F.2d 400 (1st Cir. 1926) (“It is contended on behalf of Lee that the visitation and search of his motorboat, and seizure of the boat and the liquor by the Coast Guard, was illegal and in violation of the Fourth Amendment of the Constitution[].”).
210 See Lee, 274 U.S. at 562. (“Officers of the Coast Guard are authorized. . . to seize on the high seas beyond the twelve-mile limit an American vessel subject to forfeiture for violation of any law respecting the revenue. From that power it is fairly to be inferred that they are likewise authorized to board and search such vessels when there is probable cause to believe them subject to seizure for violation of revenue laws, and to arrest persons thereon engaged in such violation.”)
it even if the boat was far from land.\textsuperscript{211} The Coast Guard was affirmatively empowered by statute to stop and search the boat, permitting such conduct under the Fourth Amendment so long as the requisite standards of probable cause were met.\textsuperscript{212}

The Fourth Circuit’s decision in \textit{Thompson v. United States}\textsuperscript{213} provides another example. A state constable and a federal prohibition agent obtained a state warrant to search the suspect’s home for illegal liquor.\textsuperscript{214} They executed the warrant and found the booze, leading to federal charges under the Volstead Act. The Fourth Circuit held that the search had trigged the Fourth Amendment because it was a joint federal/state investigation under \textit{Byars}.\textsuperscript{215} The court then suppressed the evidence, even though a warrant was obtained, because the warrant had failed to satisfy the statutory requirements of the Volstead Act.\textsuperscript{216} The statute prohibited the issuance of warrants to search a “private dwelling” unless it was “used for the unlawful sale of intoxicating liquor” or for a business purpose such as a hotel or boarding house.\textsuperscript{217} The state warrant had not provided any evidence of such a use, however, and as a result it violated the Volstead Act and the fruits of the search were properly suppressed.\textsuperscript{218}

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

It is unfortunately unclear why the early courts imposed an authorization requirement. As far as I can tell, the courts never explained it.\textsuperscript{219} The most likely explanation is that the Fourth Amendment had traditionally been understood as privilege from tort liability. Before the

\textsuperscript{211} See id. at 562-63.
\textsuperscript{212} See id.
\textsuperscript{213} 22 F.2d 134 (4th Cir. 1927).
\textsuperscript{214} See id. at 134.
\textsuperscript{215} Id. at 135.
\textsuperscript{216} Id. at 134.
\textsuperscript{217} See Section 25 of title 2 of the National Prohibition Act (then codified at 27 USCA § 39) (“No search warrant shall issue to search any a private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house.”).
\textsuperscript{218} \textit{Thompson}, 22 F.2d at 134-35.
\textsuperscript{219} The first comprehensive treatise on the Fourth Amendment, published during the Prohibition era, does not discuss the authorization requirement. See generally \textsc{Arthur Cornelius}, \textsc{Search and Seizure} (2d ed. 1930).
exclusionary rule was introduced in 1914, Fourth Amendment issues arose primarily as affirmative defenses. An officer would be sued for trespass or wrongful imprisonment and he would assert a Fourth Amendment claim as a special law enforcement privilege to avoid liability. Perhaps it seemed natural in that period that an officer would need the backing of governmental authorization to benefit from the legal privilege. If the law provides a special defense to those empowered to enforce the law, the argument might run, surely the defense only applies if the officer was actually so empowered. But this understanding of the authorization requirement is just speculation on my part. As far as I can tell, its origins were never discussed.

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

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

Marsh was one of several cases in which a New York state trooper pulled over a car near the Canadian border and found booze inside. The trooper arrested the defendant, seized the alcohol, and brought the defendant to federal officials for federal Volstead Act charges. The defendant moved to suppress the alcohol and the testimony of its seizure. The district court in Marsh found that the trooper had initially pulled over the car for running a red light, a state-law intent that prevented the stop from being subject to Fourth Amendment limits under Gambino. In his opinion for the Second

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220 See, e.g., Entick v. Carrington, 19 Howell, St.Tr. 1029 (1765) (awarding damages in trespass for a search and seizure of private papers after rejecting a defense of reliance on a warrant).
221 I return to this theme in Part III.A.
222 An alternative explanation is that search and seizure law in the 1920s did not draw as sharp a distinction between statutory and constitutional powers that the courts draw today.
223 29 F.2d 172 (2d Cir. 1928).
224 See id. at 172.
225 See id. at 172. The facts of Marsh are not only similar to the facts of Gambino: Both cases were defended by the same lawyer, Irving K. Baxter.
226 See id.
227 See id.
228 This was critical because Judge Hand understood Carroll to require more than mere suspicion of a federal offense to conduct the stop. Had the officer
Circuit, Judge Learned Hand deferred albeit uncomfortably to this finding.\(^\text{229}\)

Judge Hand next turned to the subsequent search of the car and seizure of the alcohol, which the government conceded was undertaken with the Fourth-Amendment-triggering goal of enforcing the federal Volstead Act. This raised the authorization question: Did the trooper have “any power to search at all,”\(^\text{230}\) and then to seize the alcohol, given that crime being investigated was federal and not state? Judge Hand first had to consider the source of law that would be sufficient to empower the trooper to make a search or seizure. “This, as we view it, is a question only of state law, unless we have recourse to some common law of federal criminal procedure, if any there be.”\(^\text{231}\) The possibility that some “common law of federal criminal procedure”\(^\text{232}\) might provide the affirmative authority to search for a federal offense was raised but not answered: “We think that the state law authorized what he did, and find it unnecessary to consider the alternative.”\(^\text{233}\)

The remainder of Marsh offers a detailed analysis of New York common law and statutory law governing the search and seizure authority of state troopers.\(^\text{234}\) Hand ruled that the search of the car and seizure of the alcohol was legal because it combined two powers granted to state troopers under state law: First, the power to arrest for “a crime, committed or attempted in his presence,”\(^\text{235}\) granted by Section 177 of the New York Code of Criminal Procedure;\(^\text{236}\) and second, the power to search the area around a defendant incident to arrest under state procedural law.\(^\text{237}\)

The bulk of Judge Hand’s attention was on the interpretive question of whether “a crime” under the New York arrest statute should be read to include a federal offense.\(^\text{238}\) Judge Hand ruled that the word “crime” should be read as encompassing federal crimes for two reasons. First, it was the “universal practice of police officers in New York to arrest for federal crimes,”\(^\text{239}\) bolstered by the Governor’s statement, subjectively intended to enforce the Volstead Act when he made the stop, the stop would have violated the Fourth Amendment.

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\(^{229}\) See id. at 173 (calling the trooper’s story “somewhat doubtful,” and warning that “an easy complaisance in any plausible tale may deprive defendants of their constitutional rights,” and “tak[ing] this occasion to press upon the District Judges that they search the testimony in such cases with care, remembering that the protection of defendants must in most cases rest finally with them.”).

\(^{230}\) Id. at 173.

\(^{231}\) Id. at 173.

\(^{232}\) Id.

\(^{233}\) Id.

\(^{234}\) Id. at 173-75.

\(^{235}\) Id. at 173 (quoting Section 177 of the New York Code of Criminal Procedure).

\(^{236}\) Id. at 174.

\(^{237}\) Id. at 173.

\(^{238}\) See id. at 173-74.

\(^{239}\) Id. at 173.
when the New York prohibition law was repealed, that state officials should continue to enforce the Volstead Act. If state troopers regularly did and were supposed to make arrests for federal crimes, presumably the state officials interpreted the state arrest law to authorize it.  

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

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

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

Judge Hand then turned to whether a federal arrest statute dictated a different result. The statute directed that a person arrested for federal offense could be brought before any judge, including a state judge “agreeably to the usual mode of process against offenders in such State.” Some caselaw had suggested that federal statute might forbid warrantless arrests by state officers for federal crimes. Hand disagreed. In his view, even if the federal statute was read to prohibit warrantless arrests by federal officers – a view he described as “incredible” – it would be “unreasonable” to read it as prohibiting

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240 *Id.* at 173-74.
241 *Id.* at 174.
242 *Id.* at 174.
243 The statute 18 U.S.C. 591, has since been repealed; it now appears in modified form as 18 U.S.C. 3041. In its 1928 version, it stated as follows:

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

244 *See* *Marsh*, 29 F.2d at 174-75 (citing cases).
warrantless arrests for federal crimes by state officers. This was particularly so given that the Eighteenth Amendment gave concurrent jurisdiction to the states in enforcing Prohibition: It made little sense for the Eighteenth Amendment to give states a role in enforcing Prohibition and then to read the federal arrest statute as blocking state laws that permit states to enforce the Volstead Act.

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

D) Cross Enforcement Down in the Prohibition Era

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

On one hand, some state courts took the view that the Fourth Amendment applied equally in state and federal courts. In State v. Rebasti, a 1924 decision from the Missouri Supreme Court, federal agents obtained a defective federal search warrant in the course of helping state agents with a state case. The court ruled that the evidence discovered should be suppressed. The prosecution had argued that the court could not “take notice” of the Fourth Amendment because the case was in state court. But the court disagreed: “It is unthinkable that a state court is powerless to protect the constitutional rights of its citizens guaranteed by the federal Constitution.” From a modern perspective, of course, this seems obviously correct.

On the other hand, some state courts did not find this so unthinkable. They reasoned that if state officers were treated as private actors in federal court, then federal officers should be treated as private

245 Id. at 174.
246 See id.
247 267 S.W. 858 (Mo. 1924) (en banc).
248 See id. at 859.
249 See id. at 347-48.
250 Id. at 347.
251 Id. Several other state supreme courts agreed that the Fourth Amendment was fully applicable in state court. See, e.g., State v. Arregni, 254 Pac. 788 (Idaho 1927); Walters v. Commonwealth, 199 Ky. 182, 200 S.W. 839 (1923); State v. Hiteshaw, 42 Wyo. 147, 292 Pac. 2 (1930); Little v. State, 159 So. 103 (Miss. 1925); Hughes v. State, 238 S.W. 588 (Tenn. 1922).
actors in state court. Consider State v. Gardner, which had facts similar to Rebasti. When the defendant challenged the allegedly defective federal warrant, the Montana Supreme Court concluded it could not be concerned with the acts of federal agents, over whom “the state has no control.” The state government was not responsible for the acts of federal officers, “over whom it has [no] authority and control in their official capacity.” Federal agents were “strangers to the government,” and the state government should not be punished for evidence that “come[s] innocently into the hands of government officers.”

The strangeness of the Prohibition-era cross-enforcement down cases is likely explained by the fact that it was not until 1947, in Testa v. Katt, that the Supreme Court held that state courts must adjudicate federal causes of action. The state court decision reversed in Testa had embraced reasoning closely resembling Gardner, by which the states and the federal government were considered foreign to each other. That reasoning seems bizarre today, making the Prohibition-era cross-enforcement down cases of limited use.

E) The Search Incident to Arrest Cases

We are now ready, finally, to understand the Supreme Court cases on cross-enforcement that have influenced and confused the lower courts. The cases are a quartet of closely-related decisions from 1948 to 1963: United States v. Di Re, Johnson v. United States, Miller v.  

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252 See Rebasti, 306 Mo. at 355 (Blair, J., dissenting) (“[T]he acts of federal officers stand upon the same footing as acts of private individuals.”)
253 249 P. 574 (Mont. 1926).
254 Id. at 577.
255 Id. at 578.
256 See id. For similar reasoning, see Kuhr v. District Court, 268 P. 501 (Mont. 1928). Although the contrast between Rebasti and Gardner is striking, it only involves the preliminary issue of whether state courts can enforce the Fourth Amendment. The only case I have found on whether cross-enforcement down was permitted during Prohibition if the Fourth Amendment applies is Novak v. State 200 N. W. 369 (Wis. 1924), amended on rehearing 202 N. W. 336 (Wis. 1925). A group of state and federal prohibition officers together visited a soft drink parlor and searched it for an illegal still. A federal officer found hidden bottles of booze and turned it over to the state officers, leading to state liquor charges against the parlor owner. The defendant argued that the state statute that granted state officers the right to search the parlor without a warrant did not authorize federal agents to search. In its initial opinion, the court adopted Gardner-like reasoning and ruled the liquor was admissible because a state court would not scrutinize the acts of federal agents. See id. at 370. On rehearing, however, the court ruled the liquor admissible on the narrower ground that the state statute permitted the search because the state officers “supervise[d] and direct[ed] the search” by the federal officers who were acting as their agents. Id.
United States,\textsuperscript{262} and Ker v. California.\textsuperscript{263} As Part I explained, modern courts have often interpreted these cases as saying that cross-enforcement requires compliance with state law.\textsuperscript{264} It turns out, though, that these cases have been badly misunderstood. We need to take a detailed look at the foundational case of Di Re, followed by a very quick look at its progeny Johnson, Miller, and Ker, to understand what these cases meant in their day and how they have been subsequently misinterpreted.

The takeaway of this section is that these four cases were part of a now-forgotten era in which statutory or common law authorization was required for a lawful search or seizure. All four cases involved the search-incident-to-arrest doctrine that allows a warrantless search upon a lawful arrest. At the time, it was understood that a search incident to a lawful arrest under the Fourth Amendment required a lawful arrest under whatever source of law – statutory or common law – authorized arrests. Di Re, Johnson, Miller, and Ker were simply cases echoing Marsh about where one went to find the governing arrest law when determining the lawfulness of an arrest. This meaning has been lost, leading the cases to be misread either not as Fourth Amendment cases at all or else as cases on whether state officers have the constitutional authority to cross-enforce federal laws.\textsuperscript{265} Understood in context, these cases were nothing of the sort.

(1) The Important Case of United States v. Di Re

Much of the misunderstanding is based on United States v. Di Re,\textsuperscript{266} making a close look at Di Re essential. The case occurred at the time of gasoline rationing during World War II.\textsuperscript{267} A federal investigator from the now-defunct Office of Price Administration (OPA), the agency in charge of enforcing the gasoline rationing laws, received an informant’s tip that Buttitta would sell him illegal gasoline coupons at a particular place and time.\textsuperscript{268} The investigator came to the scene together with a local police detective,\textsuperscript{269} which may have been necessary because Congress had not specifically authorized OPA investigators to

\textsuperscript{261}333 U. S. 10 (1948).
\textsuperscript{262}357 U.S. 301 (1958).
\textsuperscript{263}374 U.S. 23 (1963).
\textsuperscript{264}See Part I.E., supra.
\textsuperscript{265}See Part III.F, infra.
\textsuperscript{266}332 U.S. 581 (1948)
\textsuperscript{268}See id. at 583. The Office of Price Administration was created in 1942 to establish price controls on good during World War II. See Emergency Price Control Act, Pub. L. 77-421, January 30, 1942. The Office was abolished in 1947 after the war’s end. See General Liquidation Order, OTC Administrator, March 14, 1947.
\textsuperscript{269}Di Re, 332 U.S.
make arrests. When the officers went to make the arrest, however, Buttitta was with another man, Di Re. The police officer arrested both Buttita and Di Re, and a search of Di Re yielded the illegal coupons. Di Re was charged in federal court and convicted of possession of the coupons.

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

The parties agreed that the lawfulness of the arrest was governed by the New York arrest statute, Section 177 of the New York Code, which you’ll recall is the same statute Judges Hand and Swan had interpreted in Marsh. Judge Hand ruled that Di Re’s arrest violated Section 177 because the officers lacked “reasonable cause” to think that Di Re was in a conspiracy with Buttita to sell the illegal gasoline coupons.

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

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270 See id. at 591 (describing the federal officers as having “no power of arrest.”)
271 See id. at 583.
272 Although the fact section of the opinion does not state who arrested Di Re, the analysis section states that “the arresting officer” was “a state officer.” Id. at 588.
273 See id.
274 United States v. Di Re, 159 F.2d 818 (2d Cir. 1947) (L. Hand, J.).
275 See id. at 818.
276 Id. at 818.
277 Id. at 819.
278 See id. at 820. Judge Charles Clark dissented on the ground that he thought reasonable cause existed. See id. at 820-22 (Clark, J., dissenting)
279 See notes 182 to 194, supra.
280 See Marsh, 29 F.2d at 173-74.
But here’s the rub: Identifying the proper source of lawful power to make an arrest was particularly tricky on the facts of Di Re. It’s like a law school exam question. A federal investigator and a state police officer were working together. The federal investigator was regulated by the Fourth Amendment but had no explicit arrest authority. The state officer was a Fourth Amendment federal actor under Gambino, and he had state law arrest authority for a federal crime under Marsh. In such a case, should the relevant arrest law be federal or state?281

Even figuring out the proper arrest standard for purely federal investigations could be difficult.282 Congress was surprisingly lax in specifying the arrest powers of federal agents. It did not specifically empower FBI agents to make arrests until 1934.283 In the absence of clear federal statutory arrest authority, lower courts had struggled to adopt a clear rule for when a federal arrest was authorized. Some courts had looked to federal common law for federal arrests standards.284 Other courts had held that the lawfulness of an arrest by a federal agent for a federal crime should be measured by reference to the state arrest law where the arrest occurred.285

281 The difficulty of the question was ameliorated somewhat by its uncertain importance. The differences in arrests standards were usually modest, as most jurisdictions followed common law arrest standards with only relatively minor variations. See Supplemental Brief of United States in United States v. Di Re (1948).

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

283 See 18 U.S.C. 3052; Coplon, 185 F.2d at 634.

284 See, e.g., Rouda v. United States, 10 F.2d 916 (2d Cir. 1926) (L. Hand, J.). In Rouda, the question was whether federal prohibition agents could make an arrest for a misdemeanor in the officer’s presence that was not a breach of the peace. Judge Hand looked to federal law for guidance to answer the question. Judge Hand also noted that New York state law gave that power, but that it was not relevant because Congress had not incorporated the state law powers with respect to prohibition agents:

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

Id. at 919.

285 See, e.g., United States v. Gowen, 40 F.2d 593 (2d Cir. 1930), reversed on other grounds sub nom Go-Bart Importing Co. v. United States 282 U.S. 344 (1931) (analyzing whether an arrest by federal prohibition agents complied with New York Criminal Code Sec 183 to determine the admissibility of searches incident to that arrest); United States v. Park Ave. Pharmacy, 56 F.2d 753 (2d Cir. 1932) (prohibition officer could make arrest because, even if he was treated as a private citizen, a private citizen could have made that arrest under New York state law); Cline v. United States, 9 F.2d 621 (9th Cir. 1925). See also 1 Ops.Attys.Gen. 85, 86.
The latter rule might seem strange, but Congress had harnessed state powers for federal officers before. The Judiciary Act of 1789 had stated that federal criminal defendants should be arrested “agreeably to the usual mode of process against offenders in such state.”286 And when Congress specified the enforcement powers of federal marshals in 1792, it gave marshals the “same powers” to execute United States law as state sheriffs had “in their respective states.”287 Absent federal legislation on the arrest power, Congress’s traditional reliance on state law procedure in the state of the arrest made state arrest law a particularly plausible standard.

It was therefore not surprising that the parties agreed in Di Re that New York state law, and particularly Section 177, provided the relevant arrest standard. But when Di Re reached the Supreme Court, a different Section of the New York code apparently drew the Justices’ attention at oral argument.288 No transcript or audio is available of the argument.289 But we know from post-argument filings that Justice Frankfurter in particular pressed the United States on why the arrest hadn’t violated a different section of the New York code, Section 180, which required the arresting officer to state the reason for the arrest and state his authority to make the arrest.290

The United States responded with a post-argument supplemental brief. After arguing lamely that Section 180 was substantially satisfied,291 the United States next argued that the lawfulness of the arrest should be measured by reference to federal common law instead of state law. The arrest “was in every sense a federal undertaking,” the government argued, being directed by a federal agent based on evidence developed in a federal investigation.292 Under an appropriate view of federal common law, the United States reasoned, the arrest should be deemed lawful.293

The Supreme Court affirmed the Second Circuit in an opinion by Justice Robert H. Jackson.294 The question, Justice Jackson explained, was whether the “search of Di Re was justified as incident to a lawful

286 Act of September 24, 1789 (5 Stat. 9), Section 33.
287 Congress invested United States marshals and their deputies with “the same powers in executing the laws of the United States, as sheriffs and their deputies in the several states have by law, in executing the laws of their respective states.” Act of May 2, 1792, c. 28, § 9, 1 Stat. 265.
288 United States v. Di Re Supplemental Brief of United States at 1-6 (discussing need for extra briefing in light of Justices’ questioning at oral argument).
290 See United States v. Di Re Supplemental Brief of United States at 1-6.
291 See id.
292 Id. at 7-11.
293 See id.
arrest.”

“If [Di Re] was lawfully arrested,” he continued, “it is not questioned that the ensuing search was permissible. Hence we must examine the circumstances and the law of arrest.”

Jackson began by noting that “Some members of this Court rest their conclusion that the arrest was invalid on § 180 of the New York Code of Criminal Procedure,” which had arisen for the first time at oral argument. Because the issue was not raised below, however, the Court decided not to “undertake to determine on this record whether Di Re's arrest satisfied this provision of the New York law.”

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

[In absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity. By one of the earliest acts of Congress, the principle of which is still retained, the arrest by judicial process for a federal offense must be “agreeably to the usual mode of process against offenders in such state.” There is no reason to believe that state law is not an equally appropriate standard by which to test arrests without warrant, except in those cases where Congress has enacted a federal rule. Indeed the enactment of a federal rule in some specific cases seems to imply the absence of any general federal law of arrest.]

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

Justice Jackson then looked to federal statutes to see if Congress had enacted a law governing Di Re’s arrest. He concluded that it had not: “Turning to the Acts of Congress to find a rule for arrest without warrant, we find none which controls such a case as we have here and none that purports to create a general rule on the subject.”

Reviewing the federal arrest statutes, Jackson found them “meager, inconsistent and inconclusive”:

295 Id. at 583-84.
296 Id. at 587.
297 Id. at 588.
298 Id. at 588.
299 Id. at 589-90.
300 See notes [] to [], supra.
301 See id.
302 Di Re, 332 U.S. at 590.
303 Id.
No act of Congress lays down a general federal rule for arrest without warrant for federal offenses. None purports to supersede state law. And none applies to this arrest which, while for a federal offense, was made by a state officer accompanied by federal officers who had no power of arrest. Therefore the New York statute provides the standard by which this arrest must stand or fall.\footnote{Id. at 591.}

Justice Jackson subsequently devoted several pages of analysis to whether the facts of the case satisfied Section 177 of the New York Code.\footnote{Id. at 591.} He agreed with Judge Hand that it did not, and he therefore affirmed the Second Circuit’s ruling that Di Re’s conviction could not stand.\footnote{Id. at 591.}

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

(2) The Follow-Up Cases of Johnson, Miller, and Ker

With Di Re explained in glorious (or mind-numbing) detail, we can very quickly run through the similar decisions in Johnson, Miller, and Ker. United States v. Johnson\footnote{333 U.S. 10 (1948).} was decided less than a month after Di Re.\footnote{Di Re was argued October 17, 1947, and decided January 5, 1948, Johnson was argued December 18, 1947, and decided February 2, 1948.} In Johnson, a Seattle police detective and federal agents came to a hotel, stood in the hallway, and smelled opium coming from inside one of the rooms.\footnote{Johnson, 333 U.S. at 12.} The officers knocked, Johnson opened the door, and then the officers searched the room and found opium.\footnote{See id. at 12} The federal agents did not have arrest authority, but the police detective did.\footnote{Id. at 13.} The government tried unsuccessfully to defend the search based on exigent circumstances and the search incident to arrest doctrine. In rejecting the latter argument, Justice Jackson applied Washington state’s caselaw on...
when arrests were lawful.\textsuperscript{312} This was the correct standard, according to a short footnote in \textit{Johnson}, because “[s]tate law determines the validity of arrests without warrant” under the weeks-old decision in \textit{Di Re}.\textsuperscript{313}

\textit{United States v. Miller} followed a decade later with facts very similar to those of \textit{Johnson}.\textsuperscript{314} A federal narcotics agent and a local Washington, DC, police officer went to the defendant’s apartment looking for fruits of drug dealing. The police officer had warrantless arrest authority under local caselaw, but no law gave arrest authority to the federal agent.\textsuperscript{315} After the defendant opened the door a crack, the officer broke into the house, searched the apartment for evidence, and placed the defendant under arrest. The government later argued that the search of the apartment was justified as a search incident to arrest, and the Court initially held that the standard for the lawfulness of the arrest should be determined by local District of Columbia law:

This Court has said, in the similar circumstance of an arrest for violation of federal law by state peace officers, that the lawfulness of the arrest without warrant is to be determined by reference to state law. United States v. \textit{Di Re}, 332 U. S. 581, 589; \textit{Johnson} v. United States, 333 U. S. 10, 15. By like reasoning the validity of the arrest of petitioner is to be determined by reference to the law of the District of Columbia.\textsuperscript{316}

This holding in \textit{Miller} was rendered largely symbolic, however, due to a sly maneuver by the majority author Justice Brennan. According to Justice Brennan, the caselaw standard developed by the D.C. Circuit (then acting as the District of Columbia’s local court\textsuperscript{317}) for the lawfulness of an arrest was “substantially identical”\textsuperscript{318} to that of a federal statute, 18 U.S.C. § 3109. This created an opportunity for broader clarification of the law: Because the meaning of the federal statute was of greater public importance than that of local District of Columbia caselaw, and yet the latter “bears such a close relationship” to the former, the Court ruled on whether the federal statute was violated instead of applying the local D.C. caselaw.\textsuperscript{319} \textit{Miller} then held that § 3109 requires officers to proclaim their purpose before entering a

\begin{footnotes}
\footnote{312} Id. at 15.
\footnote{313} Id. at 15 n.5.
\footnote{314} 357 U.S. 301 (1958).
\footnote{315} Id. at 305 (“Agent Wilson did not have statutory authority to arrest without a warrant although officer Wurms, as a member of the Metropolitan Police Department, did have such authority.”)
\footnote{316} Id. at 305-06.
\footnote{318} Id. at 306.
\footnote{319} Id. at 306.
\end{footnotes}
home. Because the officers had failed to do so, the evidence found was suppressed.

The last of the quartet, Ker v. California, was handed down two years after the Supreme Court’s blockbuster decision in Mapp v. Ohio that fully applied the Fourth Amendment to the states. Ker also involved a search incident to arrest, but with the post-Mapp twist that the arrest was by state officials for a state crime with no federal involvement. Officers entered Ker’s home without a warrant and arrested him. During a search incident to Ker’s arrest, the officers found drugs. California courts upheld the search and seizure under state law, which had a state exclusionary rule. While the case was on appeal, however, Mapp was handed down. Now the Fourth Amendment exclusionary rule applied, and the Supreme Court took the case to decide how.

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

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

This made the case easy. Because the case had come from a state court, there was already a ruling below that the arrest complied with state

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320 Id. at 313.
321 Id. at 314.
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324 One might wonder why this problem wasn’t also an issue after Wolf in 1949, as in theory the 4th Amendment applied fully to the state by then (but without the exclusionary rule). The answer seems to have been provided by the Supreme Court in Elkins v. United States 364 U.S. 206 (1960), the year before Mapp, when the Court suggested that the importance of Wolf to state investigations was simply lost on most courts: “This removal of the doctrinal underpinning for the admissibility rule has apparently escaped the attention of most of the federal courts, which have continued to approve the admission evidence illegally seized by state officers without so much as even discussing the impact of Wolf.” Id. at 213-14.
325 Ker, 374 U.S. at 28-29.
326 See People v. Ker, 195 Cal. App. 2d 246, 257 (1961) (noting the change in the law triggered by Mapp while the case was on appeal).
327 See Ker, 374 U.S. at 44-46 (Harlan, J., concurring in the result).
328 Id. at 37 (Clark, J., plurality).
Justice Clark deferred to that decision, and he then concluded that the arrest also satisfied Fourth Amendment reasonableness standards. 

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

(F) Why Supreme Court History No Longer Provides Useful Guidance on Cross-Enforcement

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

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

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330 See Ker, 374 U.S. at 37 (Clark, J., plurality).
331 Ker, 374 U.S. at 62 (Brennan, J., concurring).
332 See id. (Brennan, J., concurring).
333 Id. at 62 (Brennan, J., concurring).
334 Id. at 62-63 (Brennan, J., concurring).
335 True, one of the four cases post-dated Mapp: Ker v. California was decided two years after it. 374 U.S. 23 (1963). But in addition to not reaching a majority opinion, the Justices in Ker never paused to consider whether the language from pre-Mapp caselaw still made conceptual sense after Mapp.
336 See Section I, supra.
337 See id.
those cases only made sense in that context; they were simply applications of that now-defunct general rule.

Trying to deduce modern principles from the early cases is particularly risky because intervening changes have changed the consequence of cross-enforcement. Consider cross-enforcement up. Before the incorporation of the Fourth Amendment, the federal Fourth Amendment acted only as a limit on state officer power. The fact that officers were enforcing federal law (at federal instruction) meant that the added restrictions of the Fourth Amendment applied to their act. Post-

Mapp, however, the opposite is true. Under Mapp, it is a given that the Fourth Amendment applies. Now a state officer’s enforcement of federal law only gives the officer additional powers – or, if you prefer, additional immunity. If a state officer can cross-enforce federal law, the officer can conduct searches and seizures justified by suspicion of federal law violations when the officer’s acts would be illegal otherwise. Incorporation flips the role of the doctrine. Cross-enforcement up once was the citizen’s sword. Now it is the police officer’s shield.

Even the common idea that cross-enforcement hinges on state law, rooted in modern interpretations of Di Re, is based on a fundamental misunderstanding.338 Our close look at Di Re shows that Di Re did not rule that state law applies for federal arrests. Rather, the Court assumed that Congress controlled the lawfulness of federal arrests for purposes of the search incident to arrest doctrine -- but that in the absence of an answer from Congress, the federal statutory tradition of using state law procedures controlling federal arrests made state law a default standard.339 Justice Jackson’s nuanced and contextual ruling in Di Re was misunderstood over time because its background assumptions became so foreign. The modern misunderstanding is something like a game of judicial telephone, in which Di Re’s holding and its meaning has been lost over time.

The irrelevance of the Court’s older precedents is equally true if you see the authorization cases as based in the federal supervisory power instead of the Fourth Amendment. That was the view of the Justices in Moore. Writing for the Court, Justice Scalia dismissed the relevance of Di Re and Johnson on the ground that they were not Fourth Amendment decisions at all.340 According to Justice Scalia, the Di Re decision “rested on our supervisory power over the federal courts rather than the Constitution.”341 That must have been the case, Justice Scalia reasoned, because the case had stated that Congress could, if it wanted to, enact an arrest statute that would control the lawfulness of the arrest.342 The possibility of statutory reform indicated that Di Re was “plainly not a

338 See Section I, supra.
339 See notes [] to [], supra.
340 See Moore, 553 U.S at 172.
341 Id.
342 See id. at 172-73.
rule we derived from the Constitution.” In a concurrence, Justice Ginsburg expressed the view that Di Re was “somewhat difficult to parse” but agreed that Di Re had adopted “a choice-of-law rule not derived from the Constitution.” If Di Re and its progeny are not even considered Fourth Amendment cases, then presumably they shed no light on the Fourth Amendment law of cross-enforcement.

To be sure, it seems clear from our detailed look at Di Re that it was a Fourth Amendment decision: The Moore court was simply wrong to see it as a supervisory powers case. Di Re’s focus on Congressional control reflected an understanding that Congress impliedly intended for state arrest standards to govern authorization in the absence of a federal statute identifying different federal standards. Some source of law had to govern authorization, under the law at the time, and that was ultimately a question for Congress to address. Moore simply didn’t realize that this doctrinal world existed. Because the supervisory powers doctrine is the only judge-made criminal procedure doctrine familiar to the modern Supreme Court that gives ultimate control to Congress, the Moore Court simply assumed that Di Re must be such a case. But whether the Justices were right or wrong, the early cases shed little or no light on the proper standards for cross-enforcement after Mapp v. Ohio.

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343 Id. (“This was plainly not a rule we derived from the Constitution, however, because we repeatedly invited Congress to change it by statute—saying that state *law governs the validity of a warrantless arrest “in [the] absence of an applicable federal statute,” id., at 589, 68 S.Ct. 222, and that the Di Re rule applies “except in those cases where Congress has enacted a federal rule,” id., at 589–590, 68 S.Ct. 222.”)

344 Moore, 553 U.S. at 179 n.2 (Ginsburg, J., concurring). The Court has also suggested that Miller may be about the federal supervisory power instead of the Fourth Amendment. In Sanchez-Llamas v. Oregon, 48 U.S. 331 (2006), the Court noted that although “Miller is not clear about its authority for requiring suppression,” there was some authority that it was an advisory power case.” Id. at 346. The thinking would presumably be that Miller had suppressed evidence for a statutory violation even though the statute had no suppression remedy. The source of the exclusionary remedy, it might wrongly appear, is the exercise of supervisory powers.

345 See notes 234-56, supra.

346 See id.

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

348 Notably, several Justices have more recently cited Di Re as a Fourth Amendment decision. See Arizona v. United States, 132 S.Ct. 2492, 2523 (2012) (Thomas, J. concurring in part and dissenting in part) (citing Di Re for the view that “States, as sovereigns, have inherent authority to conduct arrests for violations of federal law, unless and until Congress removes that authority”); id. at 2528 (Alito, J., concurring in part and dissenting in part) (citing Miller, Di Re, and Peoria for the view that "state and local officers generally have authority to make stops and arrests for violations of federal criminal laws.").
The challenge, then, is to develop an approach to cross-enforcement that can “rest on its own bottom”\(^{349}\) in the world of the modern Fourth Amendment. The next section takes up that challenge.

### III. A PROPOSAL FOR FOURTH AMENDMENT CROSS-ENFORCEMENT

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

The key to this proposal is that the Fourth Amendment is a law enforcement privilege enjoyed by those acting as agents of a government principal.\(^ {350}\) The law gives agents special privileges because of the public interest in enforcing criminal laws. To ensure that the law enforcement privilege is awarded to agents of a government, Fourth Amendment law look to the traditional agency law test for when a principal is liable for the tortious acts of an agent.\(^ {351}\) General principles of agency law teach that a principal is liable for an person’s tortious conduct when, based on the principal’s objective conduct, a reasonable observer would believe that the principal has authorized the person to act as his agent based on the principal’s manifestations.\(^ {352}\) Translating that principle to search and seizure law yields the rule that a government’s legal authorization to an officer to enforce that government’s laws should control cross-enforcement.

When a government is silent on who can enforce its laws, questions of constitutional history and structure justify different presumptions.\(^ {353}\) State officers should be allowed to search or seize to enforce federal criminal laws unless Congress has forbidden it. On the other hand, federal officers should not be allowed to search or seize to enforce state law unless state statutory or caselaw affirmatively allows it. In either case, the Fourth Amendment rule should be based on express or implied authorization from the government that enacted the criminal law that provided the cause to search or seize.\(^ {354}\)

\(^ {349}\) Riley v. California, 134 S. Ct. 2473, 2489 (2014).
\(^ {350}\) See Section III.A, infra.
\(^ {351}\) See Section III.B, infra.
\(^ {352}\) See Section III.C, infra.
\(^ {353}\) See Section III.D, infra.
\(^ {354}\) See id.
This does not mean governments are powerless to control their own officers. If a government wants to stop its officers from helping another government enforce its laws, it has several legislative tools to do so. Indeed, the range of legislative tools suggests a sort of Coasean aspect to cross-enforcement: No matter what the initial Fourth Amendment rule is, legislatures may be able to legislate around that default rule to arrive at the institutional settlement they prefer for the role of their own officers. The limits of those settlements raise some potentially complex and novel questions about the scope of state and federal power.

A) The Fourth Amendment is a Law Enforcement Privilege

The first step toward developing an appropriate test for cross-enforcement is recognizing that the Fourth Amendment is a law enforcement privilege that is bestowed on agents of the government. That is, the Fourth Amendment grants a limited exemption to the usual legal limits on conduct for the group of those enforcing the law. This role was obvious at the time of the amendment’s ratification. The common law of searches and seizures provided those enforcing criminal laws special powers to act lawfully. For most people, it was a civil wrong to trespass: But not, courts held, when those trespassing had a valid warrant authorizing the search. For most people, it was a civil wrong to imprison another: But not, courts held, when those imprisoning another had sufficient authority to make a valid arrest. The law of searches and seizures that the Fourth Amendment was designed to embrace gave those enforcing the law an affirmative defense to liability that others faced.

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355 See Section III.E, infra.
356 I use the term “privilege” here in what I take to be the usual sense in law, as a “a special favor given to the individual or a narrow class,” consistent with the Roman root, privilegeum, meaning “a private law.” See Glanville Williams, The Concept of Legal Liberty, 56 Colum. L. Rev. 1129, 1131-32 (1956). See also BLACKS LAW DICTIONARY (defining “privilege” as “[a] particular and peculiar benefit or advantage enjoyed by a person, company, or class, beyond the common advantages of other citizens. An exceptional or extraordinary power or exemption. A right, power, franchise, or immunity held by a person or class, against or beyond the course of the law.”).
357 See, e.g., Alderman v. United States, 394 U.S. 165, 206 (1969) (Harlan, J., concurring in part and dissenting in part) (“The Fourth Amendment is not merely a privilege accorded to him whose domain has been lawlessly invaded.”); United States v. Rabinowitz, 339 U.S. 56 (describing the Fourth Amendment as a privilege) (quoting United States Rabinowitz, 176 F.2d 732, 735 (2d Cir. 1949) (L. Hand, J.)).
358 See id.
360 See, e.g., Entick v. Carrington, 19 Howell, St.Tr. 1029 (1765) (awarding damages in trespass for a search and seizure of private papers after rejecting a defense of reliance on a warrant).
361 4 BLACKSTONE, COMMENTARIES Ch. 21.
Understanding the Fourth Amendment as a privilege is less obvious now that direct causes of action exist for Fourth Amendment violations. Modern remedies have effectively restructured the context of constitutional litigation. In a criminal case, a defendant will file a motion to suppress. In a civil case, a plaintiff will sue the officer under Bivens or Section 1983. Instead of an officer invoking the Fourth Amendment as an affirmative defense shield, the subject of a search or seizure now invokes it himself as a sword. With the affirmative defense now treated as a cause of action, the Fourth Amendment usually comes across less a privilege for law enforcement than as a limit on law enforcement. We normally ask what the Fourth Amendment forbids rather than what it allows.

Despite this switch, the appreciation of the Fourth Amendment as a privilege should remain intact. The modern Fourth Amendment continues to grant enforcers of the law special freedom from liability. Law enforcers can do things without facing legal liability that others cannot. Law enforcers can break into homes and take away what they find inside. Law enforcers can grab people and take them away to the police station. They can knock a person’s car off the road to end a high-speed chase. These privileges remain so long as officers stay within the bounds of existing law to benefit from it. In the event of a civil suit, the contours of Fourth Amendment doctrine will continue to provide an effective defense to liability.

By way of example, consider the law of arrest. Both at common law and today, probable cause to believe a person committed a felony permits an officer to arrest that person. The both creates a special privilege to law enforcers by granting rights to arrest that others may not have and also limits that privilege to arrests based on probable cause. If a person is arrested and claims that the government assaulted them, the principles of Fourth Amendment law still go the jury as an affirmative defense. Modern remedies have changed the most frequent litigation

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363 See 42 U.S.C. § 1983 (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ”); Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (creating cause of action against federal officials who violate the Fourth Amendment).
365 The modern cause of action for constitutional violations essentially moves the affirmative defense over to a negation of the cause of action itself. If the officers did not violate the Fourth Amendment, for example, a suit claiming a Fourth Amendment violation will fail on the merits.
context, to be sure. But they have not fundamentally altered the Fourth Amendment’s role.

B) Only Agents of a Government Should Be Allowed to Invoke the Fourth Amendment Privilege

Understanding the Fourth Amendment as law enforcement privilege implies an important limit on who should be entitled to invoke it: Only agents of the government whose law is being enforced should have the privilege of search and seizure to enforce it. To be clear, I am using the word “agents” in the sense of agency law – those acting on another’s behalf at the other’s direction – and not just those formally employed by the government with the title of agent.\(^{367}\) Achieving the deterrent and retributive benefits of criminal law requires enforcement, and enforcement requires investigation. Governments are the principals of criminal law, and those enforce the government’s laws on the public’s behalf are its agents.\(^ {368}\) Agents in this sense should be the only actors who benefit from Fourth Amendment privileges from liability.

The law enforcement privilege of the Fourth Amendment is properly limited to the agents of the government whose law is being enforced because enforcement of public law triggers a special balance of interests.\(^ {369}\) Ordinarily, when private parties take steps like breaking in to another’s home or taking another’s property, the law condemns those acts as wrongful. The social harm the acts cause is ordinarily not justified by any corresponding benefit. When actors take investigative steps to enforce criminal laws, on the other hand, we recognize that such steps can advance the public interest in revealing evidence of crime and protecting public safety. That balance is fundamental to Fourth Amendment law. When the government acts, the Supreme Court tells us, the law generally allows their conduct if “the importance of the governmental interests alleged to justify the intrusion” outweighs “the nature and quality of the intrusion on the individual's Fourth Amendment interests.”\(^ {370}\) Search and seizure law privileges the acts of government agents, in specific contexts, because it recognizes the public interest advanced by steps that enforcing criminal laws.

We can now appreciate the problem with allowing an officer to cross-enforce another government’s law when she not a bona fide agent

\(^{367}\) See, e.g., Restatement of Agency (Third), Section 1.01.

\(^{368}\) See generally Orin S. Kerr, An Economic Understanding of Search and Seizure Law, 164 U. PA. L. REV. 591, 598 (2016) (“The role of search and seizure law can helpfully understood as a response to a principal-agent problem created by this arrangement. The public, acting through its elected officials, hires the police to investigate and solve crimes to achieve benefits such as deterrence, retribution, and incapacitation.”).

\(^{369}\) See United States v. Place, 462 U. S. 696, 703 (1983) (“We must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.”).

\(^{370}\) Id.
of that government. Such cross-enforcement would diminish constitutional protections and undermine the balance that Fourth Amendment law tries to achieve. The problem is that cross-enforcement is a one-way street, at least after Mapp. It always expands government power. The government will argue that a search or seizure that would be illegal based on that jurisdiction’s law became lawful because a different jurisdiction had a broader criminal law. If cross-enforcement is universally permitted, an officer investigating criminal violations in a jurisdiction with narrower criminal laws will always be able to harness the enforcement power granted by another jurisdiction with broader criminal laws. Every officer will have the enforcement power granted by the broadest criminal law that could apply.

That raises the serious concern that cross-enforcement will work merely as an ex-post prosecutor’s argument to circumvent Fourth Amendment’s protections. And because the Fourth Amendment test is objective, the prosecutor need not (indeed, cannot) argue that the officer subjectively intended to enforce that other jurisdiction’s law. Instead, the government will argue merely that the officer had an objective basis to do so.\footnote{See, e.g., Devenpeck v. Alford, 543 U.S. 146 (2004) (holding that the constitutionality of an arrest is based on whether the officer knew facts that, according to the court, established probable cause, and that whether the officer wrongly thought that the arrest was justified by a different criminal law is constitutionally irrelevant).} And would be true even if the officer didn’t know that the broad criminal law of the other jurisdiction existed at the time of the search or seizure. Because subjective intent cannot be considered, all that will matter is that the prosecutor can later find a criminal law that applies.\footnote{See id.} If cross-enforcement is universally permitted, an officer can conduct a search based on a different sovereign’s judgment as to a law that the officer is not actually enforcing and may not even be aware exists.

\section*{C) The State Action Doctrine In a World With Multiple Principals}

But here’s the key puzzle: What legal doctrine should identify those acting as agents that trigger the law enforcement privilege? Answering this puzzle is the key to identifying the proper approach to cross-enforcement. When an officer cross-enforces another government’s laws, the officer is invoking the law enforcement privilege on behalf of that government. When should that be allowed?

At first blush, we might look to the existing Fourth Amendment doctrine that traditionally identifies who is a government agent: The state action doctrine.\footnote{See WAYNE R. LAFAYE, SEARCH AND SEIZURE § 1.8 (October 2017 update) (describing state action doctrine of Fourth Amendment law).} The test for identifying who is regulated by the Fourth Amendment asks who is “an instrument or agent of the
Government.’” A government employee acting in the course of his official duties is obviously a government actor. But private parties can act as Fourth Amendment agents, too. The federal circuits have developed slightly different tests for this. For example, several circuits look at three factors: whether the government knew or acquiesced in the act; whether the government encouraged or participated in the act; and whether the private party intended to assist law enforcement. Other circuits look only at only two of these factors, generally pairing private actor intent with either government encouragement or knowledge. In all of the forms, however, the state action doctrine closely resembles an agency test.

Is the state action doctrine the key to identifying the limits of cross-enforcement? On one hand, the state action doctrine worked well to identify who is an agent of the government before the Supreme Court incorporated the Fourth Amendment and applied it to the states. Before Wolf v. Colorado and Mapp v. Ohio, there was only one Fourth Amendment principal: The federal government. State and local officers were ordinarily private actors under the Fourth Amendment. In that era, the law of Fourth Amendment cross-enforcement was fairly simple. It mostly required a “federal action” doctrine at that time to say when the acts of non-federal employees counted as federal actors in Fourth Amendment cases. The Court provided such a doctrine in Byars and

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374 Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 614 (1989) (“Although the Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative, the Amendment protects against such intrusions if the private party acted as an instrument or agent of the Government.”).

375 See, e.g., United States v. Ackerman, 831 F.3d 1292 (10th Cir. 2016).

376 See, e.g., United States v. Pervaz, 118 F.3d 1, 6 (1st Cir. 1997); United States v. Smythe, 84 F.3d 1240, 1242-43 (10th Cir. 1996); United States v. McAllister, 18 F.3d 1412, 1417-18 (7th Cir. 1994); United States v. Malbrough, 922 F.2d 458, 462 (8th Cir. 1990).

377 See, e.g., United States v. Miller, 688 F.2d 652, 657 (9th Cir. 1982) (private action counts as government conduct if the government knew of or acquiesced in the intrusive conduct, and the party performing the search intended to assist law enforcement efforts); United States v. Paige, 136 F.3d 1012, 1017 (5th Cir. 1998) (same); United States v. Lambert, 771 F.2d 83, 89 (6th Cir. 1985) (holding that a private individual is a government actor if the police encouraged or participated in the search, and the private party had intent to help the government).

378 Indeed, the Supreme Court has expressed it as an agency test. See Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 614 (1989) (“Although the Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative, the Amendment protects against such intrusions if the private party acted as an instrument or agent of the Government.”).


381 See Section II.A., supra.

382 During the period of the authorization requirement, it also required a framework to determine whether the required authorization was state or federal. See Part II.B.
Gambino, adopting a test quite similar to the agency test found in the modern Fourth Amendment government action doctrine.\textsuperscript{383}

But that brings us to the problem. The incorporation of the Fourth Amendment muddies this clear picture. Incorporation upsets the framework by creating multiple Fourth Amendment principals for government agents. Every state government officer is now bound by the Fourth Amendment just like a federal government officer is.\textsuperscript{384} A single agent might now serve multiple principals all controlled by the same set of constitutional rules. A New York police officer would of course be an agent of the New York legislature; she can directly enforce New York criminal law subject to Fourth Amendment limits imposed under the Fourteenth Amendment. But that same officer might also be an agent of Congress who can cross-enforce federal criminal law, and she might also be an agent of another state cross-enforcing the other state’s law. Any one officer is a government actor who potentially serves as the agent of multiple governments at the same time.

One answer to this puzzle might be to have a principal-specific government action doctrine. Perhaps we could say that a state officer is a government actor with respect to the Fourteenth Amendment but a private actor with respect to the Fourth Amendment. Conversely, a federal officer could be a government actor with respect to the Fourth Amendment but a private actor with respect to the Fourteenth Amendment.\textsuperscript{385} This framework might retain the role of the state action doctrine in determining who is an agent of a government principal and therefore determine when cross-enforcement is permitted.

This approach seems clever at first but is beset by practical and theoretical problems. The core difficulty is that federal and state courts are required to enforce both the Fourth and Fourteenth Amendments.\textsuperscript{386} As long as an officer is a government actor with respect to one of the Amendments, it shouldn’t matter that she is not a government actor with respect to another any more than it mattered before incorporation that federal agents were only government agents with respect to the federal Fourth Amendment. And given that the search and seizure rules under the Fourth and Fourteenth Amendments are the same, it would seem more like quantum physics than law to say that an officer is both a government agent and not a government agent at the same time.\textsuperscript{387}

\textsuperscript{383} See Section II.C, supra.

\textsuperscript{384} See Mapp, 367 U.S. at 660.

\textsuperscript{385} Caselaw on civil remedies sometimes needs to make a somewhat analogous classification. When state and federal agents search together, for example, targets who feel that their rights were violated must decide whether to sue under Section 1983 or Bivens based on whether a search was more state or federal in character.

\textsuperscript{386} Teasta ev. Katt

\textsuperscript{387} See Werner Heisenberg, Physics and Philosophy: The Revolution in Modern Science 47-48 (1958) (making the observation of quantum physics that the more precisely the position of a particle is determined, the less precisely the momentum of that particle can be known). See also Laurence H. Tribe, The Curvature
Whether framed as a matter of Fourth Amendment law or Fourteenth Amendment law, the same question arises whether a search or seizure can be justified based on cause from a different sovereign’s law.\textsuperscript{388}

We can therefore assume that officers are government actors generally. The limits to be imposed on cross-enforcement, if any, should come from rules specifically concerning cross-enforcement and not the state action doctrine. In a post-\textit{Mapp} world with multiple Fourth Amendment principals, the traditional role of the state action doctrine in identifying who is an agent of a government must come from elsewhere.

\textit{D) Authorization of the Enforcing Law Jurisdiction as the Key to Cross-Enforcement}

This brings us to my proposed rule: An officer can cross-enforce a jurisdiction’s criminal law when that jurisdiction has authorized the officer to enforce that criminal law. When the government whose law is being enforced has explicitly or implicitly authorized the enforcement, cross-enforcement should be permitted and the officer should be permitted to rely on the law violation of that jurisdiction. The power to control cross-enforcement under the Fourth Amendment should rest on the decision of the government that enacted the law enforced.

This is the proper test, I think, because it accurately reflects widely adopted common law concepts of agency law. Agency law has a long-established rule for when a principal is liable for an individual’s tortious conduct: The principal is liable when, based on the principal’s objective conduct, a reasonable observer would believe that the principal has authorized the person to act as his agent.\textsuperscript{389} The most faithful translation of this traditional concept to the Fourth Amendment is that an officer can cross-enforce another jurisdiction’s criminal law when the jurisdiction that enacted the law has authorized the officer to enforce it.

A summary of the basic principles of agency law may be helpful. In agency relationship is created when the principal manifests assent to the agent acting on the principal’s behalf subject to the principal control, and the agent also manifests assent to so act.\textsuperscript{390} The assent is generally manifested by objective conduct, observable by others, that an observer


\textsuperscript{388} For example, imagine a state officer searches a car for evidence of a federal crime, leading to federal charges, and further imagine that the law treats the state officer as a government actor for Fourteenth Amendment purposes and a private actor for Fourth Amendment purposes. Presumably the defendant can move to suppress the evidence on Fourteenth Amendment grounds, incorporating the Fourth Amendment, and the result will be the same as if the officer were a government actor for Fourth Amendment purposes.

\textsuperscript{389} See notes 390-400, \textit{infra}.

\textsuperscript{390} \textit{Restatement of Agency (Third), § 1.01} ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.").
would interpret in context as the principal’s authorization to act on the principal’s behalf. A principal is then responsible for an agent’s torts in two contexts. First, a principal is liable for employees’ torts in the course of their employment. Second, principals are liable for the torts committed by non-employee agents who are acting with the apparent authority of the principal. Apparent authority exists when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal’s manifestations.

Applying these principles to law enforcement searches and seizures suggests that an officer has a government’s apparent authority to cross-enforce that government’s substantive laws when its procedural laws authorize that person to do so. The relevant issue is not whether the officer was in technical compliance with the details of the government’s procedural authorization – in agency law terms, the government’s actual authority. Rather, the proper question is whether the government generally authorized that agent to search or seize on the government’s behalf, such that an officer has a government’s apparent authority to conduct searches or seizures to enforce that government’s laws.

Restating the standard, analogies to agency law suggest that an officer can cross-enforce a jurisdiction’s law when that jurisdiction has authorized the officer to do so. If a jurisdiction has authorized officers from other sovereigns to enforce their laws, then those officers’ searches or seizures are made with the apparent authority of the jurisdiction. The officer’s conduct can be evaluated based on the standards of that jurisdiction as found in that jurisdiction’s criminal laws. The constitutionality of cross-enforcement should hinge on whether the government of the law to be enforced authorized it, whether explicitly or implicitly.

When a legislature has expressly legislated on the scope of who can enforce its criminal laws, the rules of cross-enforcement should be relatively straightforward. For example, Texas state law is admirably clear on who can enforce its laws. First, Texas law gives full power to

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391 United States v. Great American Ins. Co. of New York, 738 F.3d 1320, 1334 (Fed. Cir. 2013); Restatement of Agency (Third), § 1.03.
392 Restatement of Agency (Third), § 7.07 (respondeat superior).
393 Restatement of Agency (Third), § 7.08 (agent acts with apparent authority)
394 Restatement of Agency (Third), § 2.03 (explaining apparent authority)
395 The Justice Department’s Office of Legal Counsel has contended that state police have an inherent authority to enforce federal criminal laws, including immigration, and that no authorization from Congress is required. See DEP’T OF JUSTICE, OFFICE OF LEGAL COUNSEL, NON-PREEMPTION OF THE AUTHORITY OF STATE AND LOCAL LAW ENFORCEMENT OFFICIALS TO ARREST ALIENS FOR IMMIGRATION VIOLATIONS, at 8 (Apr. 3, 2002). In a memo on state immigration enforcement, OLC reasoned that states are sovereign entities that retain the sovereignty as to the police power that they had before joining the union. When state police enforce federal law, they are acting as sovereign entities just like if foreign countries enforce federal law: They are not exercising Article II power, and therefore do not need a grant of Article II enforcement power from Congress. See id.
enforce Texas criminal law to 34 categories of state and local officials defined as “peace officers.”

Second, Texas law has an explicit cross-enforcement down provision that gives the status of “special investigators” to federal agents from fourteen agencies, including the Federal Bureau of Investigation and the United States Secret Service, granting them “the powers of arrest, search, and seizure under the laws of this state as to felony offenses only.”

Finally, Texas law includes a horizontal cross-enforcement provision giving state officers from other states the powers of Texas peace officers subject to certain limitations while in Texas. These explicit provisions should govern the law of Fourth Amendment cross-enforcement of Texas state law.

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

Moore is consistent with the agency standard I am proposing because there is an important difference between whether a government employee has complied properly with limits placed on his powers and whether the jurisdiction has authorized a person to act as its agent at all. When the officer made the arrest in Moore, he was still a police officer.

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396 See TEX. CODE CRIM. PRO. ART. 2.12 (defining “peace officers”); TEX. CODE CRIM. PRO. ART. 2.13 (giving peace officers the right and duty to “use lawful means” to “preserve the peace” in the officer’s jurisdiction, including “to prevent or suppress crime”).
397 TEX. CODE CRIM. PRO. ART. 2.122.
398 TEX. CODE CRIM. PRO. ART. 2.124.
399 A similarly clear situation arises when state, local, and federal agents work together in joint narcotics task forces. Such task forces informally began with the DEA in 1970 and were formalized in a 1986 statute. https://www.dea.gov/ops/taskforces.shtml The federal enacting statute says that “[s]tate, tribal, or local law enforcement officer designated by the Attorney General” have the same authority to enforce federal narcotics laws as does a federal narcotics agent. See 21 U.S.C. 878. State statutes mirror the federal statute, extending state enforcement power to federal agents in such task forces. JEROME P. BJELLOPERA & KRISTIN FINKLEA, DOMESTIC FEDERAL LAW ENFORCEMENT COORDINATION: THROUGH THE LENS OF THE SOUTHWEST BORDER available at https://fas.org/sgp/crs/homesec/R43583.pdf
400 553 U.S. 164 (2008).
401 See id. at 166.
402 Id. at 176.
for a Virginia city ultimately responsible to and a part of the state. The arresting officer worked for the City of Portsmouth. See id. at 166. A city officer enforcing state law is not engaged in cross-enforcement because city law enforcement exercises delegated state law police power. See generally Gerald Frug, The City as a Legal Concept, 93 HARV. L. REV. 1059, 1063 (1980) (“State law, in short, treats cities as mere ‘creatures of the state.’”). For example a Virginia city officer exercises state power delegated to the city, making him in effect a state officer. See Richmond, F. & P.R. Co. v. City of Richmond, 145 Va. 225, 246 (1926) (“[T]he State may delegate to a city the exercise of so much of its police power within its limits as it may see fit[,]”). For that reason, an individual city officer who violates the Fourth Amendment can be sued under 42 U.S.C. § 1983, just as an individual state officer can, for acting “under color of any statute, ordinance, regulation, custom, or usage, of any State . . . .” 42 U.S.C. § 1983. See Monroe v. Pape, 365 U.S. 167, 176, 1987 (1961) (holding City of Chicago officers liable for violating § 1983).

Cross-enforcement raises a different problem. When a legislature permits officers from a different jurisdiction to enforce its criminal laws, the legislature has authorized those officers to act as its agents only in a limited capacity and subject to its express limitations. An officer from a foreign jurisdiction is no different from a private citizen from an agency perspective: The specific grant of authority to enforce its laws is a limited manifestation of the legislature’s authorization to act as its agent. Whereas the government’s employee is an agent of that government throughout the scope of his employment, a cross-enforcing officer is only an agent of the government granting authority to the extent it complies with the limits on the power granted.

This distinction echoes the agency law distinction between a principal’s liability for torts of its employees and for non-employee agents. A principal is broadly liable for the torts of its employees in the course of business. That rule echoes Moore, in that an employee’s violation of technical limits placed on his acts is irrelevant. On the other hand, a principal is only liable for the torts of its non-employee agents when a third party would reasonably believe the agent has authority to act on behalf of the principal and that belief is traceable to the principal’s manifestations. That rule echoes my proposed approach to cross-enforcement: The reasonableness of a belief that the cross-enforcing officer was acting as an agent of the state does not determine whether his actual conduct was lawful.

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

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

403 The arresting officer worked for the City of Portsmouth. See id. at 166. A city officer enforcing state law is not engaged in cross-enforcement because city law enforcement exercises delegated state law police power. See generally Gerald Frug, The City as a Legal Concept, 93 HARV. L. REV. 1059, 1063 (1980) (“State law, in short, treats cities as mere ‘creatures of the state.’”). For example a Virginia city officer exercises state power delegated to the city, making him in effect a state officer. See Richmond, F. & P.R. Co. v. City of Richmond, 145 Va. 225, 246 (1926) (“[T]he State may delegate to a city the exercise of so much of its police power within its limits as it may see fit[,]”). For that reason, an individual city officer who violates the Fourth Amendment can be sued under 42 U.S.C. § 1983, just as an individual state officer can, for acting “under color of any statute, ordinance, regulation, custom, or usage, of any State . . . .” 42 U.S.C. § 1983. See Monroe v. Pape, 365 U.S. 167, 176, 1987 (1961) (holding City of Chicago officers liable for violating § 1983).

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405 See Moore, 553 U.S. at 176 (holding that “warrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Constitution, and that while States are free to regulate such arrests however they desire, state restrictions do not alter the Fourth Amendment's protections.”)
agent has authority to act on the government’s behalf is defined by the permitted scope of cross-enforcement.

From this perspective, Moore is inapposite. Moore deals with the Fourth Amendment implications of an officer whose acts are attributable to the government regardless of whether the officer complies with limits on his power. Cross-enforcement deals with the Fourth Amendment implications of granting special powers to foreign agents whose acts are not otherwise attributable to that government.

E) Authorization Defaults Both Up and Down

My proposed authorization test is easy to state but can be difficult to apply. As noted above, some cases are straightforward: When the legislature has enacted clear rules on cross-enforcing its laws, those rules govern. But what if the legislature is silent? Many legislatures have only sparse rules on who can enforce its laws. This raises an important question: Should silence on cross-enforcement be deemed assent to it, or should some affirmative law permitting cross-enforcement be required?

In my view, the default should be different for cross-enforcement up and down because of history and constitutional structure. On one hand, statutory silence from Congress should be deemed assent to state enforcement of federal law. On the other hand, some affirmative law should be required from the legislature or the common law for federal agents to cross-enforce state law. In other words, cross-enforcement up should be presumed valid unless affirmatively forbidden. Cross-enforcement down should be presumed invalid unless affirmatively approved.

Let’s begin with cross-enforcement up. Here there is a long history of cross-enforcement in the absence of specific statutory permission. Since the time of the Founding, Congress has looked to state and local law enforcement to help enforce federal criminal laws.406 The federal law enforcement apparatus began as quite limited, and it naturally relied on the broad powers of the states.407 As Judge Hand emphasized in Marsh v. United States,408 it was the “universal practice of police officers in New York to arrest for federal crimes.”409

This history is bolstered by constitutional structure. As Judge Hand also noted in Marsh, the Supremacy Clause “makes all laws of the United States the supreme law of the land.”410 Further, the command of federal law is “as valid a command within the borders of [a state] as one of its own statutes.”411 This creates a presumption that states are properly “concerned with the apprehension of offenders against laws of

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406 See Section IIA, supra.
407 See id.
408 29 F.2d 172 (2d Cir. 1928).
409 Id. at 173.
410 Id.
411 Id.
the United States, valid within her borders, though they cannot be prosecuted in her own courts.\textsuperscript{412}

Granted, this history of cross-enforcement up is not necessarily \textit{Fourth Amendment} history. As Part II showed, the Fourth Amendment history of cross-enforcement came much later. Nonetheless, the long history of permitting cross-enforcement up weighs in favor of a constitutional presumption permitting it. Here we can recall the lessons of Di Re. At a time when Congress had not yet legislated arrest powers, the Supreme Court permitted cross-enforcement by looking to state authorities based on the presumption that Congress would have looked to state law rules.\textsuperscript{413} That approach suggests a historical reliance on cross enforcement up in the absence of explicit statutory authorization that justifies a presumption in its favor. If Congress has said nothing about whether state officers can enforce a particular set of criminal laws, Congress’s silence should be deemed assent to state cross-enforcement.

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

The structural reason not to presume powers to cross-enforce down is that it would amount to an enormous grant of constitutional authority to search and seize. The states have the general police power,\textsuperscript{414} while the federal government has only limited powers to enact criminal laws drawn from specific grants of constitutional authority.\textsuperscript{415} As a result, the scope of state criminal law is typically far broader than federal law. Of course, states penalize the traditional common law \textit{malum in se} crimes, such as murder, theft, and robbery.\textsuperscript{416} But state criminal laws also regulate an extraordinary range of day-to-day affairs, ranging from traffic laws to local noise ordinances to student misconduct at public schools.

The broad scope of state criminal law means that allowing any federal officer to enforce any state law by default, without express authorization, would dramatically expand the search and seizure power of federal agents.\textsuperscript{417} As a few lower courts have recognized, allowing

\begin{itemize}
\item \textsuperscript{412} Id. at 174.
\item \textsuperscript{413} See notes [] to [], supra.
\item \textsuperscript{414} National Federation of Independent Business v. Sebelius, 567 U.S. 519, 535-35 (2012) (“The States thus can and do perform many of the vital functions of modern government—punishing street crime, running public schools, and zoning property for development, to name but a few—even though the Constitution’s text does not authorize any government to do so. Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the ‘police power.’”).
\item \textsuperscript{415} See id.
\item \textsuperscript{416} See generally PETER W. LOW, CRIMINAL LAW 86-88 (3d ed. 2007)
\item \textsuperscript{417} United States v. Juvenile Female, 566 F.3d 943, 948 (9th Cir. 2009).
\end{itemize}
federal agents to cross-enforce state law by default “would, in effect, give [federal agents] the general police power that the Constitution reserves to the States.”\footnote{Id. (quoting United States v. Perkins, 166 F.Supp.2d 1116, 1126 (W.D.Tex.2001).)} Second, a rule requiring affirmative authorization from states for cross-enforcement down generally accords with history and practice. The history of federal officers enforcing state laws is much more sparse than that of state officers enforcing federal laws. In part this may result from federal officers themselves being more rare. Federal law enforcement was quite limited until the Twentieth Century.\footnote{See Part II.A-B, supra.} But it also reflects the constitutional design that states had the general police power while federal officers served narrow roles. It is consistent with that design to require affirmative approval from states to grant law enforcement power to search and seize to federal agents. Further, to the extent the existing cases have a majority view, it is that some affirmative state authorization is required for federal officers to cross-enforce state criminal law.\footnote{See Part I.D., supra.} It is at least possible that some state legislatures have legislated with that background rule, suggesting that maintaining the status quo may avoid upsetting expectations about the governing rule.

\textbf{E) The Role of An Officer’s Home Jurisdiction Law}

Under the approach outlined above, the law of the jurisdiction enforced determines whether an officer can cross-enforce that government’s criminal law under the Fourth Amendment. Governments enjoy the power to determine who can search and seize justified by violations of their own laws. This does not mean that an officer’s home jurisdiction is powerless, however. To be sure, an officer’s home jurisdiction cannot change the Fourth Amendment answer to whether its officers can cross-enforce another government’s laws. But home jurisdictions retain the power to enact laws that can partially or entirely limit cross-enforcement by means outside the Fourth Amendment.

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

Congress would likely have the constitutional authority to enact such a law. Congress obviously has the power to enact a statutory limit in federal court on the admissibility of evidence obtained by federal officials.\(^{421}\) But Congress also has the power to regulate the admissibility of evidence in state court. For example, Congress has enacted special rules that limit the admissibility of wiretapping evidence in state court: For wiretapping evidence to be admitted, the state legislature must enact a special narrow wiretapping statute.\(^{422}\) Courts have upheld those laws as permitted under the Commerce Clause. If Congress can regulate the admissibility of state-obtained evidence in state court, of course it has the authority to regulate the admissibility of federally-obtained evidence in state court.

Congress would also have at least some means to allow cross-enforcement of a state’s laws – or at least the substance of it – even if a state did not authorize it. Consider the converse of the problem above: Imagine a state does not authorize federal agents to make searches or seizures to enforce state law but the federal government wants federal agents to help the states anyway. Congress could enact a new criminal law that tries to mirror the scope of the state criminal law to be enforced. Federal agents could then make search and seizures based on the new federal criminal law. This would be direct enforcement designed to achieve objectives of cross-enforcement. The limit on this, of course, would be Congress’s constitutional authority. Congress lacks general police power, so any federal criminal law would need to fit within the Commerce Clause power or other federal authority.\(^{423}\) Those authorities have been construed broadly but they are not without limit,\(^{424}\) which would in turn limit the federal government’s ability to mirror a state law.

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

\(^{421}\) See Olmstead v. United States, 277 U.S. 438, 465-66 (1928) (“Congress may, of course, protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials by direct legislation, and thus depart from the common law of evidence”).

\(^{422}\) See 18 U.S.C. § 2516(2).

\(^{423}\) See United States v. Lopez, 514 U.S. 549, 567 (1995) (“To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.”).

\(^{424}\) See id.
state officers to enforce federal narcotics laws, but a state may not want its employees to help.

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

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

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

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425 See Annie Ma, Berkeley City Council Votes To Become Sanctuary City For Cannabis, Likely A First, SAN FRAN. CHRON., February 13, 2018, available at https://www.sfchronicle.com/bayarea/article/Berkeley-City-Council-votes-to-become-sanctuary-12612148.php
426 Id.
428 See, e.g., United States v. Hall, 543 F.2d 1229 (9th Cir. 1976) (en banc) (“In the absence of any federal violation, therefore, we are not required to exclude the challenged material; the bounds of admissibility of evidence for federal courts are not ordinarily subject to determination by the states.”)
considerable power outside the Fourth Amendment to limit its own officers’ acts.

CONCLUSION

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

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