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ARTICLE

Deportation Arrest Warrants

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Abstract. The common conception of a constitutionally sufficient warrant is one reflecting a judicial determination of probable cause, the idea being that the warrant process serves to check law enforcement. But neither the Constitution nor the Supreme Court has fully defined who can issue arrest warrants within the meaning of the Fourth Amendment, the constitutional significance of arrest "warrants" that are not within it, or when (if ever) warrants of any type are constitutionally required for deportation-related arrests. In that void, the largest federal law-enforcement agency—the Department of Homeland Security (DHS)—is on pace to issue over 150,000 administrative "warrants" annually, authorized by only its own enforcement officers.

More than sixty years ago, in *Abel v. United States*, the Supreme Court recognized that administrative warrants authorizing arrest for deportation proceedings—"warrants" issued not by neutral magistrates, but by immigration-enforcement officers—give rise to a significant constitutional question. The Court went on to muse in dicta that "deportation arrests" pursuant to this type of authorization have the "sanction of time" and that the constitutional validity of this practice is "confirmed by uncontested historical legitimacy." DHS and lower courts have relied heavily on this "forceful" dictum in the years since. But *Abel* missed and misunderstood critical aspects of the relevant history.

This Article takes a closer look at expulsion laws from the Framing era, including likely the most prevalent removal laws in the early Republic. This examination shows that, in widely shared and deeply rooted expulsion laws of the time, arrest for purposes of civil removal proceedings—including for expulsion beyond sovereign borders—was not left to the unfettered discretion of the officers responsible for enforcement; these removal laws

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only authorized arrest pursuant to warrants, and those warrants were issued by magistrates or tribunals with judicial power. Ultimately, this Article argues that while *Abel*'s dictum may be forceful, it should no longer persuade.

This excavation is important in correcting the record, but it has significant practical implications as well. It undermines the centerpiece of DHS's defense of arrests pursuant to administrative warrants: *Abel*'s affirmation of this practice's uncontested historical legitimacy and the subsequent case law that has relied on it. More broadly, this Article gives courts a reason to consider the constitutional issue anew and casts doubt on the constitutional validity of a significant portion of interior immigration arrests.

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Introduction

The common conception of a constitutionally sufficient warrant is one reflecting a judicial determination of probable cause, the idea being that the warrant process serves to check law enforcement. But neither the Constitution nor the Supreme Court has fully defined who can issue arrest warrants within the meaning of the Fourth Amendment, the constitutional significance of arrest "warrants" that are not within it, or when (if ever) warrants of any type are constitutionally required for deportation-related arrests. In that void, the federal government's largest law-enforcement agency[1]—the Department of Homeland Security (DHS)—is on pace to issue over 150,000 administrative "warrants" annually, authorized by only its own enforcement officers with no judicial or even neutral review whatsoever.[2]

Administrative arrest warrants are unusual in the world of federal law enforcement[3] but are common when it comes to civil immigration

1. CONNOR BROOKS, U.S. DEP'T OF JUST., FEDERAL LAW ENFORCEMENT OFFICERS, 2016—STATISTICAL TABLES 3 tbl.1 (2019), https://perma.cc/G7XV-TZ4U (showing that DHS has the most federal law-enforcement officers with firearm and arrest authority of any agency in the federal government).

2. According to reports issued by Immigration and Customs Enforcement (ICE), which is just one of DHS's subcomponents, it now issues administrative warrants to accompany "all" detainers that it issues, and it reported issuing 177,147 detainers in fiscal year 2018 and 165,487 in fiscal year 2019. U.S. IMMIGR. & CUSTOMS ENF'T, FISCAL YEAR 2018 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 9 (2018), https://perma.cc/3D77-Z24Y; U.S. IMMIGR. & CUSTOMS ENF'T, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT FISCAL YEAR 2019 ENFORCEMENT AND REMOVAL OPERATIONS REPORT 16 (2019), https://perma.cc/YCQ6-D3J8. These administrative warrants include both administrative arrest warrants and administrative removal warrants, *see infra* notes 62-70 and accompanying text (discussing the difference in these types of warrants), but a significant portion are administrative arrest warrants. ICE itself seemingly has no information regarding the precise number of administrative arrest warrants (versus removal warrants) issued annually. *See* Letter from Catrina M. Pavlik-Keenan, FOIA Officer, U.S. Dep't of Homeland Sec., U.S. Immigr. & Customs Enf't, to author (Dec. 17, 2019) (on file with author) (explaining that when obligated to provide records showing precisely how many administrative arrest warrants it issued in FY 2018 and FY 2019 (as of the date of the request), ICE was unable to identify any records reflecting how many it had issued).

3. While many federal law-enforcement officers are authorized to make arrests based on judicially issued warrants, it appears from a combination of Westlaw searches and Freedom of Information Act requests that federal law enforcement's use of administrative arrest warrants is largely confined to DHS and the U.S. Parole Commission. *See, e.g.*, 28 C.F.R. § 2.44 (2020) (permitting the U.S. Parole Commission to issue warrants of arrest for parolees alleged to have violated conditions of release); *see also* Sherman v. U.S. Parole Comm'n, 502 F.3d 869, 870, 876-80 (9th Cir. 2007) (considering whether an arrest based on this type of administrative warrant violated the Fourth Amendment). Employees of the military use a similar mechanism—ex ante authorizations by specific officers, though ones who must be "impartial"—in some cases to make arrests. *See* JOINT SERV. COMM. ON MIL. JUST., MANUAL FOR COURTS-MARTIAL

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enforcement.[4] In some respects, the administrative arrest warrants used in the immigration context resemble ordinary (judicial) arrest warrants: They are labeled "warrant," they authorize a law-enforcement officer to seize an individual who has allegedly violated the law, and they purport to be based on a finding of probable cause.[5] And, like ordinary arrest warrants, these administrative warrants have important signaling effects, as the existence of a warrant—even an administrative one—lends an air of legitimacy to on-the-ground enforcement.[6] But the purpose of an ordinary arrest warrant is, at bottom, "to allow a neutral judicial officer to assess whether [law enforcement has] probable cause to make an arrest."[7] And in that sense the warrants that DHS uses differ significantly: They are issued by DHS enforcement officers with no probable cause review by a judge or a neutral arbiter of any kind.[8]

Although the federal government's use of administrative arrest warrants in connection with removal proceedings is not new, the current scale of its use, impact of its use, and way it leverages them are new. These warrants are the linchpin of DHS's largest interior enforcement program: its force-multiplying partnerships with state and local law-enforcement agencies.[9] In the past, these

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UNITED STATES R.C.M. 302(e)(2)(C) (2019), https://perma.cc/YQW9-FSLP; *id.* MIL. R. EVID. 315(d). The military previously used the term "warrant" for this type of authorization in at least some instances. *See, e.g.*, United States v. Stuckey, 10 M.J. 347, 356 (C.M.A. 1981).

4. *See infra* Part I.B. Indeed, administrative warrants are the only type of warrant ICE uses for this purpose, and ICE takes the position that "no judge in this country has the authority to issue a warrant for a civil immigration violation." *ERO Letter to the American Public: Know the Facts*, ICE (Sept. 12, 2019), https://perma.cc/L35N-ZFR9.

5. *See, e.g.*, U.S. Dep't of Homeland Sec., Form I-200: Warrant for Arrest of Alien (2016), https://perma.cc/T6AH-KW63. The term "ordinary" comes from *Sherman v. United States Parole Commission*, which considered whether, in a statute discussing warrants for arrests for parole violations, Congress had "use[d] the term 'warrant' in the ordinary sense of a judicial warrant." 502 F.3d at 876 (quoting 18 U.S.C. § 3606).

6. *See infra* notes 55-56 and accompanying text.

7. Steagald v. United States, 451 U.S. 204, 212 (1981).

8. *See* Lopez-Lopez v. County of Allegan, 321 F. Supp. 3d 794, 799 (W.D. Mich. 2018) ("Administrative warrants differ significantly from warrants in criminal cases because they do not require a detached and neutral magistrate."); 8 C.F.R. § 287.5(e)(2) (2020) (listing over fifty types of immigration-enforcement officers who may issue Form I-200 (administrative arrest warrants), and providing that any other officers who have been delegated warrant-issuing authority and have completed "any required immigration law enforcement training" may also issue these warrants).

9. *See* Gonzalez v. ICE, 416 F. Supp. 3d 995, 1002 (C.D. Cal. 2019) (describing the role of administrative warrants in DHS's Secure Communities program, which harnesses "interoperability technology as a new tool for immigration enforcement" such that ICE could target and request that local law enforcement detain suspected noncitizens based on a single automatic database query), *rev'd*, 975 F.3d 788 (9th Cir. 2020); Transactional Recs. Access Clearinghouse Immigr., *Deportations Under ICE's Secure Communities Program*, SYRACUSE UNIV., at tbl.1 (Apr. 25, 2018), https://perma.cc/K5WP-5E4B

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partnerships operated through immigration detainers—requests from Immigration and Customs Enforcement (ICE) that the federal government claimed gave nonfederal officers the authority to detain people for suspected violations of civil immigration law.[10] But as courts across the nation held that detention by local law enforcement pursuant solely to immigration detainers violated the Fourth Amendment,[11] and ICE's local partners became reluctant to participate, ICE has successfully used administrative warrants to persuade these local law-enforcement officers that they can make constitutionally permissible arrests.[12] As a result, the question whether these law-enforcement-

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[hereinafter TRAC, *ICE's Secure Communities Program*] (reporting that over 80% of all civil immigration arrests in the interior of the United States in FY 2017 (the last year for which ICE released this data) were through the Secure Communities program or its predecessor program). The use of the Secure Communities program has dramatically increased arrests by state and local agencies. In 2012, for example, ICE issued 263,020 detainers to local law-enforcement agencies, a nearly forty-fold increase since 2005. Transactional Recs. Access Clearinghouse Immigr., *Detainer Use Stabilizes Under Priority Enforcement Program*, SYRACUSE UNIV., at tbl.1 (Jan. 21, 2016), https://perma.cc/XGS7-UUCQ; Press Release, U.S. Dep't of Homeland Sec., Secretary Napolitano and ICE Assistant Secretary Morton Announce That the Secure Communities Initiative Identified More Than 111,000 Criminal Aliens in Its First Year (Nov. 12, 2009), https://perma.cc/4QGV-MNMX.

10. *ICE Detainers: Frequently Asked Questions*, ICE (Dec. 28, 2011), https://perma.cc/PLA5-LW75 (explaining that detainers do not authorize detention beyond the first forty-eight hours (excluding weekends and holidays)); IMMIGR. & NATURALIZATION SERV., U.S. DEP'T OF JUST., THE LAW OF ARREST, SEARCH, AND SEIZURE FOR IMMIGRATION OFFICERS: M-69, ch. VII, at VII-2 (1993) (describing the authority conferred by a "detainer" that "applies only when the individual is no longer subject to detention by the criminal justice agency" and explaining that it "authorizes the alien to be maintained in custody for 'a period not to exceed forty-eight hours, in order to permit assumption of custody by the Service'" (quoting 8 C.F.R. § 242.2(a)(4) (removed and reserved 1997)).

11. *See* Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigr. & Customs Enf't; Megan Mack, Officer, Off. of C.R. & C.L., U.S. Immigr. & Customs Enf't; Philip A. McNamara, Assistant Sec'y for Intergovernmental Affs., U.S. Immigr. & Customs Enf't 2 & n.1 (Nov. 20, 2014), https://perma.cc/SY4B-GRMQ (recognizing "the increasing number of federal court decisions that hold that detainer-based detention by state and local law-enforcement agencies violates the Fourth Amendment" and collecting cases). Courts found that these arrests violated the Fourth Amendment because the detainers did not even purport to be based on a finding of probable cause and, unlike ICE, state and local officers generally lack authority to make probable cause determinations that might justify a warrantless arrest for civil immigration purposes. *See* Arizona v. United States, 567 U.S. 387, 407, 410 (2012) ("If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent. . . . Congress has put in place a system in which state officers may not make warrantless arrests of aliens based on possible removability except in specific, limited circumstances.").

12. *See, e.g.*, Blake Aued, *Sheriff Ira Edwards Is Detaining Athens Inmates for ICE to Deport*, FLAGPOLE (Dec. 13, 2017), https://perma.cc/FS3M-R644 (quoting the Clarke County Sheriff's Office's press release explaining that, because "ICE detainers that are [now]

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issued warrants alleviate the Fourth Amendment concerns that arise from these arrests is now enormously consequential both for the subjects of these warrants and for a major component of the immigration-enforcement regime.[13]

The question whether arrest warrants issued by federal immigration-enforcement officers can claim "constitutional validity" is not a new one. More than sixty years ago, the Supreme Court recognized that these warrants give rise to a significant and open constitutional question. The issue arose in *Abel v. United States*, which involved a challenge in criminal proceedings to evidence obtained when federal immigration officers arrested Abel, a suspected Soviet spy, and commenced civil deportation proceedings using an arrest warrant issued by an executive officer responsible for immigration enforcement.[14] The

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supported by a Warrant for Arrest or Warrant for Removal/Deportation," it would begin detaining subjects of these warrants who had been arrested on other criminal charges); Jessica Opatich, *Suffolk County Reverses Policy, Will Now Hold Immigrants for Deportation*, WSHU PUB. RADIO (Dec. 28, 2016), https://perma.cc/H2W3-8K9M (describing how Suffolk County, New York, had declined to detain people for ICE because of Fourth Amendment concerns, but reversed its policy because ICE started issuing administrative warrants with detainers); Press Release, ICE, ICE Launches Program to Strengthen Immigration Enforcement (updated May 6, 2019), https://perma.cc/AX7W-XPJU (describing the launch of the Warrant Service Officer program, which allows sheriffs to detain potentially removable noncitizens pursuant to DHS-issued arrest warrants); Chantal Da Silva, *Police Who Help ICE Detain Undocumented Immigrants Could Be "Violating Fourth Amendment," Experts Say*, NEWSWEEK (Feb. 20, 2018, 9:33 AM EST), https://perma.cc/Y7N2-LMYU ("Since President Donald Trump was elected in 2016, ICE has shifted its focus from prioritizing the arrest of undocumented immigrants with serious criminal convictions to issuing warrants for virtually anyone who is being investigated by the agency."); *id.* (quoting Sarah Rodriguez, ICE spokesperson, as saying that "[t]he Fourth Amendment has long permitted civil immigration arrests and detention, regardless of the fact that probable cause determination for such violations are made by Executive Branch officials rather than a magistrate").

13. Following courts' invalidation of arrests based on the prior version of detainers (which did not even allege a finding of probable cause), ICE also changed its detainers to attest to a finding of probable cause. To the extent that an arrest is based only on the ex ante determination of probable cause memorialized in the detainer, it appears to be similar to arrests based on DHS-issued arrest warrants in terms of its constitutional implications. *See, e.g.*, TOMPKINS CNTY. SHERIFF'S OFFICE, G.O. 719, GENERAL ORDERS: IMMIGRATION ENFORCEMENT (2020) (describing the current version of a detainer and a DHS-issued warrant as synonymous).

14. 362 U.S. 217, 233 (1960); *see also* United States v. Abel, 258 F.2d 485, 487, 491 (2d Cir. 1958*)* (noting that Abel was arrested based on a charge that he was deportable for failing to notify the Attorney General of his address in the United States and that he was subsequently charged criminally with conspiracy to commit espionage on behalf of the Soviet government), *aff'd*, 362 U.S. 217 (1960). In *Abel*, the arrest warrant was issued on June 20, 1957, by the district director of the Immigration and Naturalization Service (INS, which contained ICE's predecessor), 362 U.S. at 221-22, who was charged with federal immigration-enforcement functions. 17 Fed. Reg. 11,613, 11,616-18, §§ 1.36-.39 (Dec. 19, 1952) (delegating, among other things, warrant-issuing and other

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Abel Court observed that it had never addressed "the constitutional validity" of administrative warrants like the one used in Abel's arrest and that that type of arrest authorization "ha[d] never been directly challenged in reported litigation,"[15] but it ultimately declined to decide the issue because it had been waived.

Yet the Court went on to make its instincts clear in dictum, devoting five pages of the opinion to the belatedly raised Fourth Amendment challenge.[16] In so doing, the Court focused on the historical pedigree of this type of arrest but cited only federal statutes—virtually all of which were enacted almost a century after the Fourth Amendment was framed.[17] It observed that "[s]tatutes

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enforcement authority to district directors and officers under their authority). Under the 1952 regulatory delegation of functions, district directors had both enforcement and adjudicatory functions. In addition to supervising enforcement functions, they originally supervised special inquiry officers (the predecessor to modern immigration judges), but that function had moved into a separate structure by the time of Abel's proceedings. *See* Immigration and Service Notice, 21 Fed. Reg. 116, 116 (Jan. 6, 1956); Sidney B. Rawitz, *From* Wong Yang Sung *to Black Robes*, 65 INTERPRETER RELEASES 453, 458 (1988) (explaining that, as a result of the 1956 regulation, special inquiry officers "were removed from operational supervision by District Directors and placed organizationally under a Chief Special Inquiry Officer . . . [who] was made responsible solely to the Commissioner").

15. *Abel*, 362 U.S. at 233-34 ("This Court seems never expressly to have directed its attention to the particular question of the constitutional validity of administrative deportation warrants."). The *Abel* Court did not sharply distinguish between arrests pursuant to administrative warrants and administrative arrests based on executive determinations of adequate cause without a formal warrant. *See id.* But, subsequently in the opinion, the Court made clear that the ex ante probable cause authorization was important to its analysis, emphasizing that the determination that there was adequate cause to arrest in that case was reviewed by an "independent" officer (albeit another enforcement officer) "to whom a prima facie case of deportability must be shown" and not left *only* to the arresting officers. *Id.* at 236-37 ("It is to be remembered that an I.N.S. officer may not arrest and search on his own. Application for a warrant must be made to an independent responsible officer, the District Director of the I.N.S., to whom a prima facie case of deportability must be shown."). The opinion thus suggests that the Court believed that some form of cause review by someone separate from the arresting officer was constitutionally significant and perhaps required, but the Court did not address the neutrality of the warrant issuer.

16. *Id.* at 230-34 (discussing this claim at length even though it was "expressly disavowed" below).

17. *Id.* at 233. The Court stated that the first statute "authoriz[ing] the arrest of deportable aliens by order of an executive official" was adopted in 1798, An Act Concerning Aliens, ch. 58, § 2, 1 Stat. 570, 571 (1798) (expired 1800), and went on to cite the following acts: Act of Oct. 19, 1888, ch. 1210, 25 Stat. 565, 566; An Act to Regulate the Immigration of Aliens into the United States, ch. 1012, § 21, 32 Stat. 1213, 1218-19 (1903); An Act to Regulate the Immigration of Aliens into the United States, ch. 1134, § 20, 34 Stat. 898, 904-05 (1907); An Act to Regulate the Immigration of Aliens to, and the Residence of Aliens in, the United States, ch. 29, § 19, 39 Stat. 874, 889-90 (1917) (repealed 1952); An Act to Exclude and Expel from the United States Aliens Who Are Members of the Anarchistic and Similar Classes, ch. 186, § 2, 40 Stat. 1012, 1012 (1918)

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authorizing administrative arrest to achieve detention pending deportation proceedings have the sanction of time," are "confirmed by uncontested historical legitimacy," and are part of a "long-sanctioned practice."[18] Ultimately, it concluded that even apart from the waiver problem, the issue required no further consideration given the "impressive historical evidence of acceptance of the validity of statutes providing for administrative deportation arrest from almost the beginning of the Nation."[19]

Since *Abel*, the Supreme Court has recognized that a detached and neutral magistrate is a critical feature of the process for issuing a warrant within the meaning of the Constitution.[20] In the criminal context, the Court has also found that even where officers are not required to obtain a warrant before making an arrest, the Fourth Amendment requires that a detached and neutral magistrate review the officer's determination of probable cause promptly after an arrest.[21] But although DHS's administrative warrant regime has no neutral probable-cause-review mechanism at either the front or back end,[22] the

(repealed 1952); An Act to Deport Certain Undesirable Aliens and to Deny Readmission to Those Deported, ch. 174, 41 Stat. 593, 593 (1920) (repealed 1952); Internal Security Act of 1950, ch. 1024, tit. I, § 22, 64 Stat. 987, 1006-08 (repealed 1952). *Abel*, 362 U.S. at 233.

18. *Abel*, 362 U.S. at 230.

19. *Id.* at 234.

20. Coolidge v. New Hampshire, 403 U.S. 443, 450 (1971), *overruled in part on other grounds by* Horton v. California, 496 U.S. 128 (1990); *see also* Griffin v. Wisconsin, 483 U.S. 868, 877 & n.5 (1987) (discussing warrants for administrative-inspection searches and explaining that warrants may in at least some contexts be issued by "neutral officer[s]" (quoting Marshall v. Barlow's Inc., 436 U.S. 307, 323 (1978))); United States v. U.S. Dist. Ct., 407 U.S. 297, 317-18 (1972) (stating, in dictum, that "[t]he Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates" and that executive officers' "duty and responsibility are to enforce the laws, to investigate, and to prosecute").

21. Gerstein v. Pugh, 420 U.S. 103, 126 (1975).

22. Shortly before this Article went to press, a divided Ninth Circuit panel issued a decision marking the first major change to this scheme, so depending on the outcome of certain open issues, the government may have to begin changing its postarrest probable cause review practices for some subset of people. *See infra* notes 84-91 and accompanying text. But as it stands now and as has long been the case, there is currently no probable cause review by a neutral officer of any type after an arrest for deportation proceedings. *See infra* notes 84-91 and accompanying text. Individuals are processed by DHS officers, and their first opportunity to see an even arguably neutral decisionmaker is their first appearance before an immigration judge; this appearance is not an opportunity for probable cause review and, in any event, is often weeks or months after the initial arrest. *See* Michael Kagan, *Immigration Law's Looming Fourth Amendment Problem*, 104 GEO. L.J. 125, 157-58, 163 (2015) (explaining that "the closest existing rules come to providing an immediate neutral review of the arrest" is the "requirement that another ICE officer review an arrest," which is "analogous to allowing police detectives to have their warrantless arrests reviewed by fellow detectives in the same department"); Paul Moses & Tim Healy, *"The Bizarro-World" Immigration Courts Where the Constitution Isn't Applied*, DAILY BEAST (updated June 4,

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Supreme Court has not revisited the issue left open in *Abel*. That is, it has not explained whether administrative arrest warrants have any constitutional significance or whether neutral probable cause review is constitutionally required for deportation arrests.

Abel is now the centerpiece of DHS's defense of these warrants,[23] and lower courts have often followed its "forceful" dictum in finding that arrests pursuant to warrants issued by immigration-enforcement officers are consistent with the Fourth Amendment.[24] Indeed, many courts have relied almost entirely on *Abel* in holding that arrests based on DHS-issued arrest warrants satisfy the Fourth Amendment, though their reasoning—beyond the tea leaves they read from *Abel*—is not always clear or uniform.[25] A recent Fifth

2020, 10:01 AM ET), https://perma.cc/YLF9-JNVK (finding, after an analysis of data from the Executive Office for Immigration Review (the DOJ subcomponent that contains immigration courts), that "[d]etainees can be held for weeks or months before seeing a judge").

23. *See, e.g.*, Memorandum of Law of Amicus Curiae the United States of America at 21-24, People *ex rel.* Wells v. DeMarco, 88 N.Y.S.3d 518 (App. Div. 2018) (No. 2017-12806); Statement of Interest by the United States at 29-32, Rojas v. Suffolk Cnty. Sheriff's Off., 73 N.Y.S.3d 860 (Sup. Ct. 2018) (No. 06316/2017).

24. Flores *ex rel.* Galvez-Maldonado v. Meese, 913 F.2d 1315, 1337 (9th Cir. 1990) (citing *Abel*'s "forceful" dictum in finding that the Fourth Amendment does not require postarrest probable cause review by a neutral and detached magistrate when arrest is for civil removal proceedings), *rev'd en banc*, 942 F.2d 1352 (9th Cir. 1991), *rev'd on other grounds sub nom.* Reno v. Flores, 507 U.S. 292 (1993); *see, e.g.*, *infra* note 25 (collecting cases). Courts have also relied on *Abel* in making a similar finding with respect to warrants in the parole-violation and military contexts. *See, e.g.*, Sherman v. U.S. Parole Comm'n, 502 F.3d 869, 876-78, 885 (9th Cir. 2007) (finding that executive-officer-issued parole-violation warrants under 18 U.S.C. § 4213 do not violate the Fourth Amendment and analogizing the history of executive parole-violation arrest warrants to *Abel*'s description of history); United States v. Lucas, 499 F.3d 769, 776-77 (8th Cir. 2007) (en banc) (finding similarly to *Sherman* with respect to a parole "retake" warrant issued by a state correctional service agency and citing *Abel*); *see also* United States v. Stuckey, 10 M.J. 347, 360-61 (C.M.A. 1981) (citing *Abel* in finding that an administrative search "authorization" was reasonable within the meaning of the Fourth Amendment and that a judicial warrant was not required).

25. *See, e.g.*, Rios v. Jenkins, 390 F. Supp. 3d 714, 719, 728 (W.D. Va. 2019) (relying on *Abel* and its progeny in denying a Fourth Amendment challenge to an arrest based on an ICE warrant and detainer, finding that it did not violate clearly established federal law under 42 U.S.C. § 1983); Lopez-Lopez v. County of Allegan, 321 F. Supp. 3d 794, 799 (W.D. Mich. 2018) (relying on *Abel* in finding that an ICE-issued warrant is constitutionally sufficient, without further explaining its reasoning); Tenorio-Serrano v. Driscoll, 324 F. Supp. 3d 1053, 1065-66 (D. Ariz. 2018) (relying on *Abel* in rejecting the argument that a judicial warrant is constitutionally required); City of El Cenizo v. Texas, 890 F.3d 164, 187 (5th Cir. 2018) (relying on *Abel* in stating that "[i]t is undisputed that federal immigration officers may seize aliens based on an administrative warrant attesting to probable cause of removability" (emphasis omitted)); State v. Rodriguez, 854 P.2d 399, 408 (Or. 1993) (en banc) (relying on *Abel* in finding that warrants issued by the INS were "not 'unreasonable'" within the meaning of the Fourth Amendment); Min-Shey Hung v. United States, 617 F.2d 201, 202 (10th

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Circuit decision makes the ramifications of *Abel*'s dictum plain: Citing only *Abel*, the court stated that "federal immigration officers may seize aliens based on an administrative warrant attesting to probable cause of removability" and—finding that this probable cause could be "imputed to local officials"—rejected a challenge to a law requiring localities to comply with ICE detainers.[26] Of course, not all courts have simply deferred to the government's reliance on *Abel*: At least one court has pointedly rejected the argument that an arrest pursuant to a DHS-issued warrant establishes probable cause for purposes of immunity from suit, reasoning that the arrest must be considered warrantless where the warrant was issued by a "non-neutral executive official[]."[27] And, just recently, a divided Ninth Circuit panel attempted to harmonize *Abel* with its conclusion that neutral, postarrest probable cause review was required for deportation arrests by deciding that such review could

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Cir. 1980) (citing *Abel* in finding that the INS district director's probable cause determination was "basically the same as a criminal proceeding before a magistrate" and "was sufficient to meet the constitutional standards and to commence the deportation proceedings"); Spinella v. Esperdy, 188 F. Supp. 535, 540-41 (S.D.N.Y. 1960) (relying on *Abel* in finding that INS arrest warrants were not required to comply with the oath-or-affirmation requirement of the Fourth Amendment); *see also* United States v. Tsung Min Yu, No. 17-cr-180, 2019 WL 202206, at *4 (W.D. Ky. Jan. 15, 2019) ("An arrest pursuant to a valid administrative warrant permits the officer to conduct a search incident to arrest akin to that following execution of a judicially-issued arrest warrant." (citing Abel v. United States, 362 U.S. 217, 235-37 (1960))); Roy v. County of Los Angeles, Nos. cv-12-09012 & cv-13-04416, 2017 WL 2559616, at *6-8, *10 (C.D. Cal. June 12, 2017) (describing the government's argument focused on *Abel* and finding that "it is not unconstitutional under the Fourth Amendment for the Legislature to delegate a probable cause determination to an executive officer, such as an ICE agent, rather than to an immigration, magistrate, or federal district court judge"), *aff'd in part and rev'd in part sub nom.* Gonzalez v. U.S. ICE, 975 F.3d 788 (9th Cir. 2020). *But see Gonzalez*, 975 F.3d at 825-26 (finding that *Abel* was consistent with the court's conclusion that postarrest probable cause review by a neutral executive officer—not necessarily a judge—was constitutionally required, but remanding for the district court to consider whether the presence of an administrative warrant would change this calculation).

26. *City of El Cenizo*, 890 F.3d at 174, 187-88 (emphasis omitted) (rejecting a facial challenge to the law).

27. *See* El Badrawi v. Dep't of Homeland Sec., 579 F. Supp. 2d 249, 275-76 (D. Conn. 2008) (rejecting the government's argument that an arrest based on an ICE warrant should be considered warrant-based, such that it would confer immunity from a damages suit, and treating DHS-issued warrant as warrantless for Connecticut tort and federal constitutional purposes because the "arrest warrant was signed by . . . an ICE Agent intimately involved in the investigation" and "[n]o neutral magistrate, or even a neutral executive official, ever examined the warrant's validity"); *see also* N.S. v. Hughes, 335 F.R.D. 337, 342, 345-47 (D.D.C. 2020) (recognizing, in a statutory challenge to the U.S. Marshals Service's arrests based on DHS-issued warrants, that "the I-200 form accompanying the detainer is not a true warrant, as it is not issued by an independent judicial officer; instead, it is issued by an ICE agent, causing concerns about a lack of neutrality").

be performed by neutral executive officers. But the court remanded for the district court to decide whether and how this conclusion might change if, as in *Abel*, the arrest was conducted based on an administrative warrant.[28] Other courts, perhaps recognizing the unsettled issue, have sidestepped the constitutional question entirely.[29] However, on the whole, *Abel*'s dictum has played a decisive role in jurisprudence involving these administrative arrest warrants.

But, as this Article shows, *Abel* missed and misunderstood important aspects of the relevant history when it concluded that deportation arrests pursuant to this type of warrant or law-enforcement authorization have been sanctioned since the beginning of the nation.[30] *Abel* looked only to federal law—largely to laws enacted from the late nineteenth century onward.[31] But if history is to be our guide, the more relevant historical question—at least given originalist trends in constitutional interpretation today[32]—is what was considered reasonable when the Amendment was framed. *Abel* did not

28. *Gonzalez*, 975 F.3d at 825-26 & n.27 (noting that remand was "especially appropriate" given the government's subsequently adopted policy of issuing an administrative warrant alongside any immigration detainer).

29. *See, e.g.*, People *ex rel.* Wells v. DeMarco, 88 N.Y.S.3d 518, 535 n.9 (App. Div. 2018) (declining to decide the Fourth Amendment issue and instead deciding the validity of an arrest based on a DHS warrant under "a narrow issue of New York law").

30. *Abel*, 362 U.S. at 233-34.

31. *Id.* at 233. *Abel*'s historical account appears to have been based on the Solicitor General's assertion in briefing. Supplemental Brief for the United States on Reargument at 35-36, *Abel*, 362 U.S. 217 (No. 2), 1959 WL 101556:

> The legislative construction of the Fourth Amendment—that the issuance of warrants of arrest in deportation cases by executive officers was not prohibited—commencing early in our history when the first occasion for this manner of proceeding arose, continuing without exception thereafter, and repeatedly relied upon by the executive, legislative, and judicial branches, is entitled to great weight in deciding whether the issuance of such warrants is constitutionally prohibited.

32. There are a range of different approaches that fall under the umbrella of originalism. *See* William Baude, Essay, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2354-56, 2397-98 (2015) (collecting and offering examples of variations). This Article uses the term in a general sense to refer to the practice of determining the application of a constitutional provision largely by reference to practice and understandings at the time that the Constitution was framed. *See, e.g.*, Gamble v. United States, 139 S. Ct. 1960, 1965 (2019) (looking to Framing-era understandings to interpret the Double Jeopardy Clause); Atwater v. City of Lago Vista, 532 U.S. 318, 327-39 (2001) (considering laws adopted by the states during the Framing era); Wilson v. Arkansas, 514 U.S. 927, 933-34 (1995) (considering the knock-and-announce rules that states adopted in their statutes and constitutions); *see also* David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1743 (2000) ("[The Court] has made the principal criterion for identifying violations of the Fourth Amendment 'whether a particular governmental action . . . was regarded as an unlawful search or seizure under the common law when the Amendment was framed.'" (alteration in original) (quoting Wyoming v. Houghton, 526 U.S. 295, 299 (1999))).

adequately consider or, in some respects, accurately assess that history: It misunderstood the significance of the only early federal law that it cited and entirely missed a critical source of relevant law—removal laws adopted by the states, the primary entities that regulated migration during the Framing era. This Article seeks to rectify those mistakes. Its survey is not exhaustive, but it shows that—with remarkable consistency—neither warrantless arrests nor warrants issued by officers responsible for enforcement were the norm in the civil expulsion laws it identifies. On the contrary, those laws authorized arrest for removal proceedings—including for expulsion beyond sovereign borders—only pursuant to warrants, and those warrants were issued by magistrates and tribunals with judicial power. Ultimately, this Article argues that while *Abel*'s dictum may be forceful, it should no longer persuade.

To be clear, this Article makes neither an argument for originalism nor a claim about what the Fourth Amendment requires. Rather, it shows that a more robust understanding of the relevant laws from the Framing era discredits *Abel*—the central authority for the claim that arrests for removal proceedings are exempt from neutral probable cause review. This claim is in some ways narrow, but it is critically important now for at least three reasons. First, lower courts have unquestioningly relied on *Abel*'s dictum to validate arrests based on warrants issued by immigration-enforcement officers, reinscribing into case law *Abel*'s incomplete—and in some respects inaccurate—historical account.[33] Second, lower courts are currently grappling with this issue in the wave of litigation resulting from the uptick in DHS's use of administrative warrants. As courts consider DHS's *Abel*-based defense of these warrants, they should recognize the dictum's flawed foundation and how it undermines the Court's conclusion in *Abel*. Third, a more developed understanding of the relevant Framing-era law is important because originalism often guides the way that courts—in particular the Supreme Court—decide the scope of the Fourth Amendment today.[34] Thus, if the Supreme Court confronts the question whether these DHS-issued warrants can claim constitutional significance or whether neutral-magistrate review of probable cause is required for some or all deportation arrests, a fuller and more accurate picture of Framing-era law will be essential.[35]

33. *See supra* notes 24-26 and accompanying text.

34. *See infra* Part II.A.

35. Fully resolving this question may require addressing it in multiple different scenarios, because—as noted at various points in this Article—different factual circumstances (for example, whether the person arrested is entering the country versus physically within it, whether the person has already been found to be removable, and so on) give rise to different legal issues that could affect the outcome. As explained in note 43 below, this Article does not address all of the factual scenarios that could be encompassed within this question, but rather focuses on the specific scenario presented in *Abel*: one in which

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The question left open in *Abel* remains open in scholarship. To be sure, legal scholars have persuasively argued in recent years that Fourth Amendment protections—as currently conceived—must be applied to DHS's arrest regime, regardless of any historical acceptance that its arrest practices have enjoyed.[36] And there is no shortage of excellent scholarship on the Framing-era context of the Fourth Amendment and its significance for how we understand its protections today.[37] Much of this scholarship appears to assume that the "warrants" referred to in the Fourth Amendment would be issued by a member of the judiciary.[38] In a recent article, Laura Donohue has

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an individual physically within a sovereign state is alleged to be deportable and is arrested for proceedings to determine whether they should be removed.

36. *See, e.g.*, Mary Holper, *The Fourth Amendment Implications of "U.S. Imitation Judges,"* 104 MINN. L. REV. 1275, 1279, 1290-92 (2020) (arguing that, under recent immigration precedents and Fourth Amendment law in the criminal context, prompt, postarrest probable cause review must be conducted by a federal magistrate judge because immigration judges lack the requisite independence and neutrality); Kagan, *supra* note 22, 161-64, 169-70 (arguing that, under *Gerstein v. Pugh* and other recent precedents, ICE arrests—with or without administrative warrants—raise constitutional concerns and proposing that immigration-arrest warrants should be issued and postarrest probable cause review should be conducted by immigration judges); *see also* Christopher N. Lasch, *Federal Immigration Detainers After* Arizona v. United States, 46 LOY. L.A. L. REV. 629, 696-98 (2013) (arguing that under recent Fourth Amendment precedent in the criminal context, ICE arrests pursuant to immigration detainers violate the Fourth Amendment).

37. *See, e.g.*, LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 150-79 (1999); Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1193 (2016); Michael J. Zydney Mannheimer, *The Contingent Fourth Amendment*, 64 EMORY L.J. 1229, 1236-37 (2015); Fabio Arcila, Jr., *In the Trenches: Searches and the Misunderstood Common-Law History of Suspicion and Probable Cause*, 10 U. PA. J. CONST. L. 1, 5-7 (2007); Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in* Atwater v. Lago Vista, 37 WAKE FOREST L. REV. 239, 263 & n.64, 417 n.593 (2002) [hereinafter Davies, *Fictional Character of Law-and-Order Originalism*]; Sklansky, *supra* note 32, at 1744-45; Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 571-90 (1999) [hereinafter Davies, *Recovering*]; Martin Grayson, *The Warrant Clause in Historical Context*, 14 AM. J. CRIM. L. 107, 116-17, 122 (1987); Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 929 (1997); Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse than the Disease*, 68 S. CAL. L. REV. 1, 13, 20-21 (1994); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 763-67, 771-81, 801 (1994). *See generally* WILLIAM JOHN CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING, 602-1791 (1990) (examining over a thousand years of search-and-seizure law and related politics in England and the United States to understand the types of searches and seizures that the Fourth Amendment originally embraced).

38. *See, e.g.*, Davies, *Fictional Character of Law-and-Order Originalism*, *supra* note 37, at 372, 424-25 (discussing "the Framers' expectation that arrests would usually be made pursuant to judicial warrants"). *But see* Amar, *supra* note 37, at 772-73 (arguing that the role of the judge in the warrant-issuing process has been overstated and pointing to warrant issuers who had both judicial and nonjudicial functions).

described the important structural role that the Framers, in adopting the Fourth Amendment, intended warrants to play—one that only worked if they were issued by members of the judiciary.[39] Phillip Hamburger has argued that the Fourth Amendment was intended to require *judicial* warrants and that at least some administrative warrants used for searches and inspections violate the Constitution, but he does not discuss arrest warrants, much less the type used in modern immigration enforcement.[40] Many have written about the earliest federal removal law,[41] and others have documented and analyzed the significant role that states played in immigration-related regulation, including removal, during the Framing and antebellum eras.[42] But no scholar has

39. *See* Donohue, *supra* note 37, at 1322-24 ("The Founders' fundamental insight was that the executive branch could not be impartial when its interests were involved.").

40. PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 177-90 (2014) (arguing that these administrative warrants—some of which are, as he notes, issued by courts, but give substantial discretion to the agency—violate the Constitution).

41. For especially thorough and insightful discussions of the relationship between this law and developing conceptions of federal power regarding immigration, see generally Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002); and Matthew J. Lindsay, *Immigration, Sovereignty, and the Constitution of Foreignness*, 45 CONN. L. REV. 743 (2013). For a fascinating and thoughtful argument that the federal government sought to indirectly effect removal in the early Republic through policies designed to compel people to leave U.S. territory, see K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878, 1882-83, 1912 n.164 (2019) (contesting "the idea that in the absence of federal direct removal policy, there was no federal removal policy," and arguing that legal strategies to produce "self-deportation"—that is, policies that functioned to make the targets' lives unbearable—served as an indirect removal policy in effect from the nation's earliest history).

42. *See, e.g.*, KUNAL M. PARKER, MAKING FOREIGNERS: IMMIGRATION AND CITIZENSHIP LAW IN AMERICA, 1600-2000, at 79-86 (2015); DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 39-43 (2007) [hereinafter PARKER, MAKING FOREIGNERS]; GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 19-43 (1996); E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798-1965, at 396-404 (1981); BENJAMIN JOSEPH KLEBANER, PUBLIC POOR RELIEF IN AMERICA, 1790-1860, at 601-50 (1976); Kerry Abrams, *The Hidden Dimension of Nineteenth-Century Immigration Law*, 62 VAND. L. REV. 1353, 1357-58, 1361 (2009); Robert J. Steinfeld, Comment, *Subjectship, Citizenship, and the Long History of Immigration Regulation*, 19 LAW & HIST. REV. 645, 652-53 (2001); Kunal M. Parker, *State, Citizenship, and Territory: The Legal Construction of Immigrants in Antebellum Massachusetts*, 19 LAW & HIST. REV. 583, 586 (2001) [hereinafter Parker, *State, Citizenship, and Territory*]; Kunal M. Parker, *From Poor Law to Immigration Law: Changing Visions of Territorial Community in Antebellum Massachusetts*, 28 HIST. GEOGRAPHY 61, 65 (2000); Mary Sarah Bilder, *The Struggle over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 MO. L. REV. 743, 747-48, 751 (1996); Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1834-35 (1993) [hereinafter Neuman, *Lost Century*]. *See generally* HIDETAKA HIROTA, EXPELLING THE POOR: ATLANTIC SEABOARD STATES AND THE NINETEENTH-CENTURY ORIGINS OF AMERICAN IMMIGRATION POLICY (2017) (examining early state-level

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examined the accuracy of *Abel*'s assertions about the history of deportation arrest warrants.

This Article does so, and it proceeds in three parts. Part I sets out the foundation for the inquiry that follows. Specifically, it describes the function of warrants generally and the role of administrative arrest warrants in contemporary immigration enforcement. Part II turns to the question at the heart of this Article: whether arrests for removal proceedings were historically sanctioned if executed without a warrant or with a warrant issued by the officers responsible for enforcement. It does this by looking to, among other sources, the critical body of law that *Abel* neglected: Framing-era civil removal laws enacted by states, the primary entities that regulated immigration at that time. This examination shows that, in widely shared and deeply rooted expulsion laws of the time, arrest for purposes of civil removal proceedings—including for expulsion beyond sovereign borders—was not left to the unfettered discretion of the officers responsible for enforcement. These removal laws authorized arrest pursuant only to warrants, and those warrants were issued by magistrates or tribunals with judicial powers.[43] This Part then examines the only early federal deportation statute cited by *Abel* and shows that, contrary to *Abel*'s account, this law did not reflect historical sanction for the arrest at issue in *Abel*: It did not authorize that type of arrest, its validity was far from "uncontested," and it was neither used nor tested before courts. In brief, this Part contradicts *Abel*'s assertion that this type of arrest was broadly accepted and tells a counterstory. Part III turns back to the present, briefly considering whether and how this history matters. Ultimately, this Article

migration control in the northeastern United States and arguing that these state systems were the origin of the federal immigration system).

43. This Article focuses on arrests in the interior of the United States for purposes of proceedings to expel someone from the country, as opposed to arrests for (1) exclusion or (2) enforcement against "enemy aliens," as those cases are distinct in important ways. *See* Landon v. Plasencia, 459 U.S. 21, 25 (1982) (describing the then-longstanding statutory distinction between "[t]he deportation hearing [which] is the usual means of proceeding against an alien already physically in the United States, and the exclusion hearing [which] is the usual means of proceeding against an alien outside the United States seeking admission"); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212-13 (1953) (recognizing that noncitizens stopped at the border are deemed to be outside the country and lack certain constitutional rights even if physically permitted in, whereas noncitizens who have entered the United States, lawfully or unlawfully, are entitled to relatively greater protections); Johnson v. Eisentrager, 339 U.S. 763, 769 n.2, 771-72 (1950) (recognizing that enemy aliens—"subject[s] of a foreign state at war with the United States"—are subject to distinct "disabilities," but those are "an incident of war and not . . . an incident of alienage"), *abrogated by* Rasul v. Bush, 542 U.S. 466 (2004); *cf.* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1982-83 (2020) (reaffirming *Mezei*'s distinction but indicating that certain noncitizens detained "shortly" after physical entry (in this case twenty-five yards) should be treated, for purposes of certain constitutional rights, as if they had been stopped at the border).

shows that a more robust historical account undermines the foundation for *Abel*'s conclusion and an *Abel*-based defense of arrests pursuant to these warrants, allows courts to consider the constitutional question anew, and—at least under Fourth Amendment jurisprudence today—casts doubt on these warrants' constitutionality.

I. Arrest Warrants in Removal Proceedings Today

Before turning to the historical question, it is worth pausing to consider the role of warrants in modern immigration enforcement. Arrest warrants issued by DHS are increasingly at the center of public debate, state and local policymaking, and media coverage regarding immigration enforcement. But the anomalous nature of these law-enforcement-issued arrest warrants is often obscured. This is unsurprising given that DHS-issued warrants are styled much like ordinary warrants within the meaning of the Fourth Amendment, and, at times, DHS officers purposefully elide the distinction.[44] This Part briefly explains the role that warrants have traditionally played in law enforcement and then turns to the unique nature of DHS-issued arrest warrants.

A. Warrants Generally

Warrants are, at the most basic level, direction or authorization to take an action, often to conduct a search or seizure.[45] The Fourth Amendment's Warrant Clause establishes the floor for warrants authorizing search and seizure, at least when a warrant within the meaning of the Constitution is required. Specifically, it provides that warrants must be based "upon probable cause, supported by Oath or affirmation, and particularly describ[e] the place to

44. *See, e.g.*, Julia Reinstein, *These Neighbors Formed a Human Chain to Protect a Dad and Son from ICE*, BUZZFEED NEWS (updated July 23, 2019, 11:04 PM ET) https://perma.cc/HDG2-GKJC ("[ICE officers] 'were here with an administrative order that they wrote themselves . . . . It doesn't give them the authority to break down a door like you would with a normal warrant. They didn't try to do that. But they still lied to the individuals inside and to people on the scene about, "No, this does give us that authority."'" (quoting an attorney at the scene)); NowThis News, *How This Citizen Stopped ICE from Arresting 2 Immigrants*, YOUTUBE (Mar. 28, 2019), https://perma.cc/YQ3Y-7GKR (to locate, click "View the live page") (showing DHS officers insisting that a DHS-issued warrant "*is* a lawful warrant" even in the face of protestations that only warrants issued by judges are constitutionally valid); *see also* Da Silva, *supra* note 12 (describing an arrest based on an administrative arrest warrant despite a local policy of not detaining people for ICE because officers did not know the difference between an administrative and a judicial arrest warrant).

45. *Warrant*, BLACK'S LAW DICTIONARY (9th ed. 2009) (explaining that warrants can confer authority to take other types of actions as well but that they are commonly understood to authorize or direct searches and seizures by law-enforcement officers).

be searched, and the persons or things to be seized."[46] At times, legislatures or other entities have separately required officers to obtain certain forms of authorization before taking enforcement actions and have in some instances called those authorizations "warrants."[47] But it has long been clear that no statutory or regulatory process, no matter the name, can dispense with or displace the Fourth Amendment's mandates.[48]

The Supreme Court has explained that "[t]he purpose of a warrant is to allow a neutral judicial officer to assess whether the police have probable cause to make an arrest or conduct a search."[49] In other words, the warrant-seeking process should serve as a check: It constrains law-enforcement discretion by interposing a neutral arbiter between officers and the enforcement action they seek to take.[50] Thus, at least in theory, requiring government officers to obtain a warrant should protect the public from overzealous agents or overreaching enforcement initiatives and offer structural protection as well.[51] That is, it should constrain not only enforcement but also any legislature that seeks to authorize it.[52]

Warrants can also benefit law enforcement. As discussed in Part II, the Fourth Amendment does not require warrants for every search or seizure,[53]

46. U.S. CONST. amend. IV.

47. *See supra* note 3.

48. Nathanson v. United States, 290 U.S. 41, 47 (1933) ("The [Fourth] Amendment applies to warrants under any statute; revenue, tariff, and all others. No warrant inhibited by it can be made effective by an act of Congress or otherwise.").

49. Steagald v. United States, 451 U.S. 204, 212 (1981).

50. *See* Wong Sun v. United States, 371 U.S. 471, 481-82 (1963) ("The arrest warrant procedure serves to insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police . . . ."); Johnson v. United States, 333 U.S. 10, 14 (1948) (explaining that the Fourth Amendment requires "a neutral and detached magistrate" rather than relying solely on "the officer engaged in the often competitive enterprise of ferreting out crime"); United States v. Lefkowitz, 285 U.S. 452, 464 (1932) ("[T]he informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests.").

51. *See* Jules Lobel, Essay, *Separation of Powers, Individual Rights, and the Constitution Abroad*, 98 IOWA L. REV. 1629, 1654 (2013) (noting that the Warrant Clause serves "a dual structural and individual function"); *see also* United States v. Chadwick, 433 U.S. 1, 9-10 (1977) (explaining in dictum the "protections a judicial warrant offers against egregious governmental intrusions"), *overruled on other grounds by* California v. Acevedo, 500 U.S. 565 (1991).

52. *See, e.g.*, Donohue, *supra* note 37, at 1321-22 (explaining that, in adopting the Fourth Amendment, the Framers sought to limit Congress's authority).

53. For example, officers are not required to obtain a warrant for many arrests in the criminal context. *See supra* note 21 and accompanying text. If they do not obtain judicial sanction prior to an arrest, a neutral magistrate must determine probable cause

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but even where officers are not constitutionally required to obtain a warrant beforehand, a warrant provides important assurance of immunity from suit if the search or seizure is subsequently found to be flawed. For instance, if an investigation is flawed or probable cause is found to be lacking, officers will generally be immune from suit if they acted based on a valid warrant.[54]

Finally, for better or worse, warrants can play a significant role in public perceptions of the legitimacy of enforcement actions. Aggressive searches or seizures appear less like political prosecutions or rogue actions if approved beforehand by a detached and neutral magistrate.[55] Indeed, the legitimacy-conferring quality of warrants can make a significant difference in on-the-ground enforcement because individuals who may otherwise be inclined to question the propriety of searches or arrests tend to more readily submit if the officers have warrants in hand.[56] Thus, for all of the ways that the warrant process falls short of the ideal in implementation,[57] the existence of a warrant

promptly thereafter. Gerstein v. Pugh, 420 U.S. 103, 124-25 (1975) (requiring that a neutral magistrate determine probable cause "as a condition for any significant pretrial restraint of liberty . . . either before or promptly after arrest").

54. *See, e.g.*, Malley v. Briggs, 475 U.S. 335, 344-45 (1986) (holding that an arresting officer acting pursuant to a warrant will always be shielded by qualified immunity unless "the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable" (citing United States v. Leon, 468 U.S. 897, 923 (1984))); St. Hilaire v. City of Laconia, 71 F.3d 20, 28 (1st Cir. 1995) (finding that officers who relied on a warrant are entitled to qualified immunity "[w]hether or not there was probable cause for the warrant"); Rodriguez v. Ritchey, 539 F.2d 394, 400-01, 404 (5th Cir. 1976) (affirming a grant of qualified immunity to arresting officers based solely on an arrest warrant, despite the finding that numerous investigatory mistakes had led to "utterly groundless charges"), *rev'd*, 556 F.2d 1185, 1193-94 (5th Cir. 1977) (finding no cause of action against arresting officers because the arrest was "made under authority of a properly issued warrant," which "breaks the causal chain and insulates an initiating party").

55. *See, e.g.*, Ashcroft v. al-Kidd, 563 U.S. 731, 738-39 (2011) (refusing to give credence to the respondent's argument that the warrant for his arrest was based on "improper motives" because a "warrant based on individualized suspicion in fact grants . . . protection against the malevolent and the incompetent" (footnote omitted)).

56. Individuals will often submit to searches even if the officer merely states that they *will* or *can* obtain a warrant. *See, e.g.*, United States v. Cunningham, 413 F.3d 1199, 1202 (10th Cir. 2005) (noting that the appellant consented to a search after officers told him they "would obtain a search warrant should he refuse to provide consent"); United States v. Savage, 459 F.2d 60, 61 (5th Cir. 1972) (per curiam) (finding that the consent to search was valid where individual consented after officers told him "[y]es, we probably can [get a warrant]"); United States *ex rel.* Gockley v. Myers, 378 F.2d 398, 399 (3d Cir. 1967) (finding that the appellant consented to a search after officers told him they were "going to get a search warrant"); United States v. Bracer, 342 F.2d 522, 524-25 (2d Cir. 1965) (affirming a judgment where the appellant "volunteered to take [two agents] to the apartment" after they told him that they "were going to get a search warrant").

57. In practice, the warrant-seeking process does not always play the role envisioned. *See, e.g.*, Jessica Miller & Aubrey Wieber, *Warrants Approved in Just Minutes: Are Utah Judges Really Reading Them Before Signing Off?*, SALT LAKE TRIB. (updated Jan. 16, 2018),

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and the warrant-seeking process remain important components of our law-enforcement structure.

Perhaps it goes without saying that the neutrality of the warrant issuer is a critical feature of this process. In recent years—especially since *Abel*—the Supreme Court has recognized in various circumstances that warrants within the meaning of the Fourth Amendment must be issued by a neutral decisionmaker. For example, in considering a criminal search warrant issued by a state attorney general who was also prosecuting the case in question, the Supreme Court recognized that even though the attorney general issued the warrant in his capacity as a justice of the peace, the warrant was invalid for Fourth Amendment purposes because prosecuting officers "cannot be asked to maintain the requisite neutrality with regard to their own investigations."[58] But the Court has also said that the Fourth Amendment does not always require the warrant issuer to be a judge or even a lawyer, and it has explicitly declined to decide whether or when "warrants" within the meaning of the Fourth Amendment can be issued by "someone entirely outside the sphere of the judicial branch."[59] The Court has never fully defined the boundaries of who can issue warrants within the meaning of the Constitution or the constitutionality of warrants issued by an entity beyond those bounds. Most important for present purposes, the Court has never articulated whether or when a warrant of any type is required for deportation-related arrests.

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https://perma.cc/VT3Q-GYHN (to locate, click "View the live page"). Court deference to law enforcement, for example, can undermine the value of a neutral magistrate or simply relocate officer discretion to other stages of the process. *See, e.g.*, Laurence A. Benner & Charles T. Samarkos, *Searching for Narcotics in San Diego: Preliminary Findings from the San Diego Search Warrant Project*, 36 CAL. W. L. REV. 221, 265-66 (2000) (describing the rise of "generic boilerplate assertions" in warrant affidavits and explaining that judges "will seldom have cause to question" them). Still, the requirement of neutral review can play a major role in preventing government abuse and overreach.

58. Coolidge v. New Hampshire, 403 U.S. 443, 446-47, 450 (1971), *overruled in part on other grounds by* Horton v. California, 496 U.S. 128 (1990); *see also* United States v. U.S. Dist. Ct., 407 U.S. 297, 317 (1972) (explaining in dictum that "[t]he Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates," at least where "[t]heir duty and responsibility [was] to enforce the laws, to investigate, and to prosecute").

59. Shadwick v. City of Tampa, 407 U.S. 345, 351-52 (1972) (finding that an arrest warrant issued by a municipal court clerk was constitutionally sufficient, at least for lower-level offenses); Griffin v. Wisconsin, 483 U.S. 868, 877-78, 877 n.5 (1987) (discussing warrants for administrative searches and explaining that warrants may, at least in some contexts, be issued by "neutral officer[s]" who are not necessarily "neutral judge[s]" (first quoting Marshall v. Barlow's, Inc., 436 U.S. 307, 323 (1978); and then quoting *Griffin*, 483 U.S. at 887 (Blackmun, J., dissenting))).

B. DHS-Issued Arrest Warrants

The full span of administrative warrants—or even administrative arrest warrants—is beyond the scope of this Article. It suffices to say that nonjudicial arrest warrants are unusual in the world of federal law enforcement.[60] DHS, however, does not use judicial warrants for civil removal arrests at all.[61] Instead, as this Subpart explains, its interior enforcement regime relies heavily on administrative warrants for civil removal arrests.

One preliminary clarification is necessary. In addition to arrest warrants, which DHS uses to take custody of individuals when initiating removal proceedings or in connection with pending removal proceedings (that is, before the person is adjudicated removable or ordered removed), DHS may also take custody of people based on administrative "warrants of removal."[62] Removal warrants are distinct from arrest warrants because they authorize seizure for purposes of effectuating a removal only if the noncitizen (1) has already had some form of process; (2) has already been adjudicated removable and ordered removed—generally by an immigration court for interior arrests; and (3) is nevertheless in the United States.[63]

The distinction between these two types of warrants matters here. First, arrests pursuant to warrants of removal involve a distinct set of legal issues. Perhaps chief among the legal differences is the fact that, at the warrant-of-arrest stage, arrestees' citizenship, status, and connections to the United States have not been determined—and are often unknown to ICE.[64] This means that

60. *See supra* note 3.

61. In fact, ICE's position is that "no judge in this country has the authority to issue a warrant for a civil immigration violation." *ERO Letter to the American Public: Know the Facts*, *supra* note 4.

62. *Compare* 8 C.F.R. §§ 241.2-.3 (2020) (authorizing the issuance of warrants of removal after an administrative final removal order is issued, and the assumption of custody based on the warrant of removal), *and* U.S. IMMIGR. & CUSTOMS ENF'T, DEP'T OF HOMELAND SEC., FORM I-205: WARRANT OF REMOVAL/DEPORTATION (2007), https://perma.cc/R8ZB-X99Q, *with* 8 C.F.R. § 236.1 (authorizing the issuance of warrants to arrest alleged noncitizens at the initiation of removal proceedings or while such proceedings are pending), *and* IMMIGR. & CUSTOMS ENF'T, FORM I-200 (WARRANT FOR ARREST OF ALIEN) (rev. 2016), https://perma.cc/XJ9Y-C3U3.

63. *See* 8 C.F.R. §§ 241.2-.3; U.S. IMMIGR. & CUSTOMS ENF'T, DEP'T OF HOMELAND SEC., FORM I-205, *supra* note 62.

64. Indeed, one of the very questions to be proven and adjudicated in removal proceedings is the individual's alienage. *See* 8 C.F.R. § 1240.8(c) ("In the case of a respondent charged as being in the United States without being admitted or paroled, the Service must first establish the alienage of the respondent."). And the government frequently errs in its initial assessment of whether someone is a noncitizen. *See* Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL'Y & L. 606, 608 (2011) ("Recent data suggests that in 2010 well over 4,000 U.S. citizens were detained or deported as aliens, raising the total since 2003 to more than 20,000 . . . ."); *see also infra* notes 66-67.

the subject of a warrant may well be a U.S. citizen, a deeply rooted lawful resident, or a noncitizen who is not deportable at all.[65] This risk is not merely hypothetical: The government's own records show that ICE has routinely asserted probable cause in error to detain thousands of U.S. citizens,[66] exposing them to all of the usual harm to person, property, and livelihood that detention entails.[67] And this should be important for, among others, those who question whether the Fourth Amendment applies to deportation arrests on the theory that some noncitizens do not fall within its protections.[68] The extent of the

65. *See, e.g.*, *infra* notes 66-67.

66. *See, e.g.*, Gonzalez v. ICE, 416 F. Supp. 3d 995, 1003-04, 1011-12 (C.D. Cal. 2019) (noting that "there is no national database of all U.S.-born citizens" or "of derivative or acquired citizens," and finding that even "not exhaustive" evidence showed that ICE erroneously found probable cause to detain "dozens" of U.S. citizens), *rev'd*, 975 F.3d 788 (9th Cir. 2020); Paige St. John & Joel Rubin, *ICE Held an American Man in Custody for 1,273 Days. He's Not the Only One Who Had to Prove His Citizenship*, L.A. TIMES (Apr. 27, 2018, 5:00 AM), https://perma.cc/BQ22-TG79 (to locate, click "View the live page") (explaining that "[s]ince 2012, ICE has released from its custody more than 1,480 people after investigating their citizenship claims, according to agency figures," and reporting the number of people found to be citizens by ICE and the number of cases terminated or suspended by immigration judges because the citizenship claims warranted investigation); AARTI KOHLI, PETER L. MARKOWITZ & LISA CHAVEZ, SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS 2, 4 (2011), https://perma.cc/SRP5-XLU8 (estimating that, between October 2008 and April 2011, "[a]pproximately 3,600 United States citizens have been arrested by ICE through the Secure Communities program"); *see also* David J. Bier, *U.S. Citizens Targeted by ICE: U.S. Citizens Targeted by Immigration and Customs Enforcement in Texas*, CATO INST. (Aug. 29, 2018), https://perma.cc/G3EW-8374 (estimating that ICE erroneously found probable cause to detain hundreds of U.S. citizens in just one county in Texas from FY 2006 to FY 2017).

67. *After More than 3 Weeks, ICE Releases U.S. Citizen from Custody*, POLITICO (July 23, 2019, 11:03 PM EDT), https://perma.cc/G5D8-4N5F (reporting that ICE has wrongly detained U.S. citizens from anywhere from three weeks to more than three years); Michael Herzenberg, *US Citizen Detained by Immigration Authorities Files Notice of Claim*, SPECTRUM NEWS NY1 (Apr. 6, 2018, 1:11 PM ET), https://perma.cc/MM29-PJ8Q (describing how a U.S. citizen held in ICE detention for sixty-eight days became suicidal); Andy East, *U.S. Citizen Jailed in Immigration Status Mistake*, TEX. TRIB. (Feb. 27, 2016, 6:00 AM), https://perma.cc/E5MB-JWUK (reporting that, after ICE detained him, a U.S. citizen lost his car and his job, fell behind on bills, and missed multiple doctor appointments due to his detention).

68. This view is based on the fact that, in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), a "plurality of the Court" embraced the view that the Fourth Amendment protects only citizens and those noncitizens who have substantial connections to the United States. *See* Lamont v. Woods, 948 F.2d 825, 835 & n.7 (2d Cir. 1991); *Verdugo-Urquidez*, 494 U.S. at 265 (reasoning that "the people" protected by the Fourth Amendment was used as a "term of art" in the Constitution and "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community"); Laura K. Donohue, *Customs, Immigration, and Rights: Constitutional Limits on Electronic Border Searches*, 128 YALE L.J. F. 961, 1013 (2019) (making a similar point and emphasizing that some noncitizens (that is, "legal resident[s]") retain Fourth

footnote continued on next page

warrant subject's connections to the United States—and therefore the scope of their Fourth Amendment rights even under this narrow view—are undetermined and often unknown by ICE at the arrest stage. Second, the difference between arrest and removal warrants is important here because the warrant at issue in *Abel* was one of arrest.[69] Accordingly, this Article focuses on DHS-issued arrest warrants, which authorize seizure for removal proceedings (that is, before the person is found to be removable).[70]

DHS derives its authority to issue arrest warrants for civil immigration violations from federal statute. Specifically, the Immigration and Nationality Act (INA) provides that "[o]n a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States."[71] Through the relocation of

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Amendment protections even under this view). The *Verdugo-Urquidez* opinion is denominated as a majority opinion, but courts and scholars have characterized this view as a plurality view because Justice Kennedy—the fifth vote—markedly declined to agree with that limited definition of those protected by the Fourth Amendment. *Verdugo-Urquidez*, 494 U.S. at 275-78 (Kennedy, J., concurring); *see, e.g.*, *Lamont*, 948 F.2d at 835 & n.7; Martinez-Aguero v. Gonzalez, No. 03-ca-411, 2005 WL 388589, at *5 (W.D. Tex. Feb. 2, 2005) (treating "[t]he definition of 'the people' advanced in *Verdugo-Urquidez*" as only "merely persuasive authority" and not binding in light of Justice Kennedy's concurrence), *aff'd*, 459 F.3d 618 (5th Cir. 2006); Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 681 (2003) ("Somewhat bafflingly, Justice Kennedy disagreed with Chief Justice Rehnquist's analysis but nonetheless joined the majority opinion in full, providing the fifth vote for the Court's opinion."); Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 972 (1991) (noting that Justice Kennedy's concurrence "diverged so greatly from Rehnquist's analysis and conclusions that Rehnquist seemed to be really speaking for a plurality of four").

69. United States v. Abel, 258 F.2d 485, 491 (2d Cir. 1958) ("The decision to use an administrative warant [sic] was, in effect, a decision that Abel should be held for a deportation hearing . . . ."), *aff'd*, 362 U.S. 217 (1960); *see supra* note 14 and accompanying text (describing the charge upon which the government initiated Abel's removal proceedings).

70. As used here, the phrase "found to be removable" refers to the ultimate determination that DHS may remove the person from the United States, *see* 8 U.S.C. § 1229a(c)(1)(A), not the threshold finding of removability, *see id.* § 1229a(e)(2), which is just one phase of the adjudicator's ultimate determination that DHS may remove the person. *See* Morales-Izquierdo v. Gonzales, 486 F.3d 484, 491 (9th Cir. 2007) (en banc) ("To order an individual removed, the immigration judge must make two determinations: (1) whether the individual is removable from the United States; and, if so, (2) whether the individual is otherwise eligible for relief from removal."); Jennifer Lee Koh, *Rethinking Removability*, 65 FLA. L. REV. 1803, 1813-14 (2013) (explaining the distinct removability and relief phases of proceedings to determine whether a person may be removed from the United States).

71. 8 U.S.C. § 1226(a); *see also* Immigration and Nationality Act, ch. 4, § 236, 66 Stat. 163, 200 (1952) (codified as amended at 8 U.S.C. § 1226); 8 C.F.R. § 236.1(b)(1) (2020) ("At the time of issuance of the notice to appear, or at any time thereafter and up to the time removal proceedings are completed, the respondent may be arrested and taken into custody under the authority of Form I-200, Warrant of Arrest.").

immigration-enforcement functions to DHS, this authority was transferred from the Attorney General to the DHS Secretary.[72] Thus, Congress vested the DHS Secretary with the power to authorize arrests in connection with the initiation or prosecution of removal proceedings based on civil immigration violations, and it conditioned these arrests, as a default, on the issuance of some version of an administrative warrant.

While neither the statute nor the accompanying regulations prescribe the contours of DHS-issued arrest warrants, the current iteration of these warrants tracks the Warrant Clause's requirements for a constitutionally valid warrant in most respects. DHS warrants purport to be based on a finding of probable cause, specifically identify the person to be arrested, and command arresting officers to make an arrest.[73] But these administrative arrest warrants differ in a critical respect: No judge or other neutral officer determines whether the DHS officer has probable cause to make the arrest.

By regulation, the DHS Secretary has delegated her warrant-issuing authority to a range of immigration officers and the Secretary has left room to delegate that authority to still others.[74] At present, more than fifty types of officers within DHS may issue these warrants; this group runs the gamut from district directors to officers in charge of detention facilities to "Immigration Enforcement Agents."[75] These warrant-issuing officers generally have enforcement responsibilities and may even be "intimately involved in the

72. 6 U.S.C. § 557 (providing that references to the Attorney General should be interpreted to refer to the DHS Secretary where functions have been transferred); 8 U.S.C. § 1103(a)(1) (providing that the "Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as . . . such laws relate to the powers, functions, and duties conferred upon the President" and other executive officers).

73. *See supra* note 5 and accompanying text; *cf.* U.S. CONST. amend. IV (providing that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized"). The regulations (like the statute) do not distinguish between noncitizens who had lawful status and face removal for some act or omission and those who are alleged to lack lawful status entirely. *See* 8 U.S.C. § 1226(a); 8 C.F.R. § 287.5(e)(2).

74. *See* 8 C.F.R. § 287.5(e)(2) (listing over fifty types of immigration-enforcement officers who may issue Form I-200 (administrative arrest warrants) and providing that any other such officers delegated warrant-issuing authority and who successfully complete "any required immigration law enforcement training" may also issue these warrants).

75. *Id.* Immigration Enforcement Agents are "responsible for performing a variety of enforcement functions related to the investigation, identification, apprehension, prosecution, detention and deportation of aliens and criminal aliens, and apprehension of absconders from removal proceedings." Moore v. Beers, No. cv-13-6614, 2017 WL 515004, at *4 (D.N.J. Feb. 8, 2017), *aff'd sub nom.* Moore v. Sec'y U.S. Dep't of Homeland Sec., 717 F. App'x 179 (3d Cir. 2017).

investigation" or in the arrest of the person whose arrest they authorize.[76] Thus, by signing a form labeled "warrant for arrest," DHS law-enforcement officers may authorize their colleagues or themselves to arrest an individual for the purpose of prosecuting removal proceedings.[77]

DHS enforcement officers have also long been permitted to essentially "self-warrant" probable cause on the back end. The INA permits DHS officers to make arrests without even an administrative warrant if there is "reason to believe"—which is generally construed as probable cause[78]—that the person is "likely to escape before a warrant can be obtained for his arrest."[79] If a DHS officer makes an arrest without even a DHS-issued warrant, the statute requires postarrest review by an administrative officer.[80] In that sense, Congress may have intended at least some version of probable cause review, but it is nevertheless review conducted by officers from the enforcement agency. As Michael Kagan has explained, it is "analogous to allowing police detectives to have their warrantless arrests reviewed by fellow detectives in the same department."[81] Moreover, while the regulations provide that the noncitizen *should* "be examined by an officer other than the arresting officer," even that examination is not required if another officer is not "readily available" or it would "entail unnecessary delay."[82] In sum, this regime has permitted probable cause determinations for arrests to be made, at the front and back end, by the officers within the agency that serves as police, jailer, and

76. *See, e.g.*, El Badrawi v. Dep't of Homeland Sec., 579 F. Supp. 2d 249, 276 (D. Conn. 2008) (involving an "arrest warrant [that] was signed by . . . an ICE Agent intimately involved in the investigation"). *Compare* 8 C.F.R. § 287.5(e)(2) (listing enforcement officers who are authorized to issue civil immigration warrants), *with id.* § 287.5(e)(3) (listing officers authorized to serve those warrants—which include some of the same types of officers authorized to issue warrants).

77. In some cases, ICE officers have not even followed these requirements. *See* Bob Ortega, *ICE Supervisors Sometimes Skip Required Review of Detention Warrants, Emails Show*, CNN (updated Mar. 13, 2019, 7:03 AM ET), https://perma.cc/6DDZ-3ZCA (reporting that deportation officers across a five-state region "had improperly signed warrants on behalf of their supervisors" and that "[s]ome supervisors even gave their officers pre-signed blank warrants—in effect, illegally handing them the authority to begin the deportation process").

78. Tejeda-Mata v. INS, 626 F.2d 721, 725 (9th Cir. 1980) ("The phrase 'has reason to believe' has been equated with the constitutional requirement of probable cause.").

79. 8 U.S.C. § 1357(a)(2).

80. *Id.* (requiring that "the alien arrested [without an administrative warrant] shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States").

81. *See* Kagan, *supra* note 22, at 157.

82. 8 C.F.R. § 287.3(a) (2020) ("If no other qualified officer is readily available and the taking of the alien before another officer would entail unnecessary delay, the arresting officer, if the conduct of such examination is a part of the duties assigned to him or her, may examine the alien.").

prosecutor in these proceedings—and sometimes by the very officers involved in those functions.[83] Given these procedures, there is some reason to question whether there is a significant distinction between a warrant, a detainer attesting to probable cause, and a line officer's initial assessment of probable cause.

All of this said, the Ninth Circuit recently issued a decision that signifies the first real change to the probable cause review scheme in the deportation-arrest context. That decision, *Gonzalez v. ICE*, arose from a class action that challenged, among other things, the government's policy of issuing detainers for the arrest and detention of noncitizens without prompt, postarrest probable cause review by a detached and neutral officer.[84] Before the district court, the *Gonzalez* plaintiffs had argued that under the Supreme Court's decision in *Gerstein v. Pugh*—which found that the Fourth Amendment required that a neutral and detached magistrate conduct probable cause review in the criminal context—it was unconstitutional to arrest and detain alleged noncitizens solely pursuant to DHS-issued detainers and without prompt review by a judicial officer.[85] In 2017, the district court granted summary judgment to the government on that claim, holding based on *Abel* and other precedents that *Gerstein*'s mandate did not apply to the civil immigration context.[86] On appeal to the Ninth Circuit in late 2020, a divided panel rejected the district court's reasoning, holding that "the Fourth Amendment principle that *Gerstein* articulated applies to the civil immigration context."[87] It reasoned that "the 'broad congressional power over immigration . . . cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens,'" and therefore "the Fourth Amendment requires a prompt probable cause determination by a neutral and detached magistrate to justify detention beyond that which may be initially justified by any probable cause

83. In this respect, the current regime arguably differs from the one *Abel* seemed to bless. While the *Abel* majority was not troubled by an arrest warrant issued by the district director—who was part of the enforcement component of INS—it was careful to note that the warrant there was issued by an "independent responsible officer" not involved in the actual investigation. Abel v. United States, 362 U.S. 217, 236-37 (1960). Accordingly, it is not clear how *Abel* would have come out if only officers involved in the arrest or intimately involved in the investigation had determined probable cause.

84. Roy v. County of Los Angeles, Nos. cv-12-09012 & cv-13-04416, 2017 WL 2559616, at *1-3 (C.D. Cal. June 12, 2017), *aff'd in part and rev'd in part sub nom.* Gonzalez v. U.S. ICE, 975 F.3d 788 (9th Cir. 2020).

85. *Id.* at *4-5 (describing the plaintiffs' reliance on *Gerstein v. Pugh*, 420 U.S. 103, 111-13, 126 (1975), as well as the related case *County of Riverside v. McLaughlin*, 500 U.S. 44, 56-57 (1991)).

86. *Id.* at *6, *8, *10-11.

87. *Gonzalez*, 975 F.3d at 824.

determination of removability."[88] The panel distinguished *Abel* on the basis of the administrative warrant used in Mr. Abel's arrest (in contrast to the detainer-based arrest policy at issue in *Gonzalez*). The panel concluded that even if *Abel* were to apply, it could be harmonized with *Gerstein* and the plaintiffs' request insofar as each of them could be satisfied by a neutral executive officer (rather than a judge) conducting the postarrest probable cause review.[89] *Gonzalez* could dramatically alter probable cause determinations in the deportation arrest context for at least some subset of DHS arrests, and it could pave the way for broader change. However, at this point, much about the decision remains uncertain: The government has obtained an extension of time as it decides whether to seek rehearing or rehearing en banc,[90] and, even if the panel decision stands, the Ninth Circuit remanded to the district court to decide, among other things, how *Gerstein* applies, who the executive officer conducting neutral probable cause review should be, and—importantly here—whether the government's more recent policy of issuing administrative warrants to accompany detainers satisfies *Gerstein*.[91]

As *Gonzalez* suggests, DHS-issued arrest warrants play an important role in immigration enforcement today. The history of precisely when and how these administrative arrest warrants became a common immigration-enforcement tool is the subject of a future paper, but their use in recent years has been prolific.[92] Perhaps unsurprisingly, the INA's carveout for flight risks means that DHS officers often forgo obtaining even administrative warrants when effecting arrests. But DHS officers still use these arrest warrants, presumably in part because the ability to flash a document labeled "warrant" can have significant on-the-ground benefits.[93]

88. *Id.* (alteration in original) (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975)).

89. *Id.* at 824-25.

90. Order, *Gonzalez*, Nos. 20-55175 & 20-55252 (Nov. 20, 2020), ECF No. 84 (granting the government's motion for a second extension of time to file a petition for panel or en banc rehearing).

91. *Gonzalez*, 975 F.3d at 826 & n.27 (noting that "[r]emand is especially appropriate here because, in the time since the district court considered Plaintiffs' *Gerstein* claim, the Government has changed its immigration detainer policy to require the issuance of an administrative warrant alongside any immigration detainer" and that "[a]lthough Plaintiffs argue that this policy still violates *Gerstein*, the district court never considered that issue").

92. *See supra* notes 2, 4, 9-12 and accompanying text.

93. *See supra* note 44 (collecting examples of instances in which ICE officers have touted the fact that they have "warrants" in the face of questions or resistance); *supra* note 56 (describing the impact on on-the-ground enforcement when officers merely state that they *can* get a warrant).

More importantly, DHS-issued warrants have been essential for its largest interior enforcement mechanism: programs in which state and local officers make the initial arrest for purposes of civil immigration enforcement.[94] As discussed above, these partnerships previously operated largely through detainers—requests through which ICE asked state and local partners to detain noncitizens who were already in criminal custody beyond the end of their criminal proceedings so ICE could take them into custody.[95] After courts began finding that these detainer-based arrests violated the Fourth Amendment and local law enforcement became reluctant to participate, ICE began issuing administrative warrants along with a revised version of its detainers, which—based on its reading of *Abel*—it claims permits state and local officers to make constitutionally permissible civil immigration arrests.[96]

ICE has also recently begun using administrative warrants to attempt to circumvent state and local "sanctuary" policies that restrict law-enforcement officers' participation in immigration enforcement.[97] As some jurisdictions have pushed back on the use of these administrative warrants by, for example, forbidding local officers to make arrests pursuant to these warrants[98] or

94. *See* TRAC, *ICE's Secure Communities Program*, *supra* note 9, at tbl.1 (reporting that, out of 81,603 removals based on interior apprehensions in FY 2017 (the last year for which ICE released this data), 67,792 individuals were taken into custody through the Secure Communities program (or its predecessor program)); Gonzalez v. ICE, 416 F. Supp. 3d 995, 1001-03, 1015 (C.D. Cal. 2019) (explaining the role of administrative warrants in DHS's Secure Communities program), *rev'd*, 975 F.3d at 797-98, 826 n.27 (remanding to allow the district court to consider a challenge to detainer-based arrests in light of the government's subsequently adopted policy of issuing administrative warrants along with detainers).

95. *See supra* notes 10-11 and accompanying text.

96. *See supra* notes 11-12 and accompanying text; *see, e.g.*, Roy v. County of Los Angeles, Nos. cv-12-09012 & cv-13-04416, 2017 WL 2559616, at *6-8 (C.D. Cal. June 12, 2017) (describing the government's argument, which focuses largely on *Abel*), *aff'd in part and rev'd in part sub nom. Gonzalez*, 975 F.3d at 825 (similar); *see also* Appellants' Principal Brief at 28-29, *Gonzalez*, 975 F.3d 788 (Nos. 20-55175 & 20-55252), 2020 WL 2772169, ECF No. 35.

97. *See generally* Christopher N. Lasch, R. Linus Chan, Ingrid V. Eagly, Dina Francesca Haynes, Annie Lai, Elizabeth M. McCormick & Juliet P. Stumpf, *Understanding "Sanctuary Cities,"* 59 B.C. L. REV. 1703 (2018) (providing a thoughtful discussions of the concept, types, and value of so-called "sanctuary" policies); Barbara E. Armacost, *"Sanctuary" Laws: The New Immigration Federalism*, 2016 MICH. ST. L. REV. 1197 (same).

98. *See, e.g.*, N.Y.C., N.Y. ADMIN. CODE § 9-205(b)(1) (providing that the New York City Department of Probation may not detain someone based on ICE's request unless "federal immigration authorities present the department with a *judicial* warrant for the detention of the person" (emphasis added)); *see also, e.g.*, U.S. IMMIGR. & CUSTOMS ENF'T, ENFORCEMENT AND REMOVAL OPERATIONS: WEEKLY DECLINED DETAINER OUTCOME REPORT FOR RECORDED DECLINED DETAINERS FEB 11-FEB 17, 2017, at 10-23 (2017), https://perma.cc/52SL-24RJ (collecting municipal policies regarding detainers, including those which require "judicial determination of probable cause or a warrant from a judicial officer").

forbidding ICE arrests in certain spaces without a *judicial* warrant,[99] ICE has attempted to use administrative arrest warrants in new ways. For example, it is currently rolling out a new program that allows local officers to serve an administrative warrant and execute an arrest "on behalf of ICE," and that program is explicitly geared toward law-enforcement officers who "wish to honor immigration detainers but are prohibited due to state and local policies that limit cooperation with the agency."[100] States and localities have pushed back on the use of these warrants generally, but they have tended to lead with federalism-based claims, recently focusing in particular on limitations imposed by state law or local policy.[101] And, correct or not, ICE has proven successful in convincing local law-enforcement agencies that these administrative warrants alleviate the Fourth Amendment concerns that otherwise exist when local officers conduct civil immigration enforcement.[102]

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99. *See, e.g.*, Directive from Michael Magliano, Chief of Dep't, Off. of the Chief Admin. Judge, State of N.Y. Unified Ct. Sys., to All Uniformed Officers, Directive No. 1-2019: Protocol Governing Activities in Courthouses by Law Enforcement Agencies (rev. Apr. 17, 2019), https://perma.cc/P4PB-FFTK ("Arrests by agents of U.S. Immigration and Customs Enforcement may be executed inside a New York State courthouse only pursuant to a *judicial* warrant or *judicial* order authorizing the arrest." (emphasis added)).

100. Press Release, ICE, *supra* note 12 (reporting that ICE's new Warrant Service Officer program "has gained interest from several other local law-enforcement agencies . . . and additional signings are expected soon"); Abigail Hauslohner, *ICE Provides Local Police a Way to Work Around "Sanctuary" Policies, Act as Immigration Officers*, WASH. POST (May 6, 2019, 3:19 PM PDT), https://perma.cc/RVA7-28KW (to locate, click "View the live page"); Jacqueline Thomsen, *ICE Announces Program to Allow Local Law Enforcement to Make Immigration Arrests*, HILL (May 6, 2019, 3:40 PM EDT), https://perma.cc/25JH-72DM ("Local jurisdictions that join the new program will be temporarily exempted from any local or state rules preventing them from cooperating in immigration arrests or detention . . . .").

101. *See, e.g.*, Memorandum of Law on Behalf of the New York State Attorney General at 1-2, People *ex rel.* Wells v. DeMarco, 88 N.Y.S.3d 518 (App. Div. 2018) (No. 2017-12806) (arguing that New York state law prohibits New York law-enforcement officers from making arrests for civil immigration purposes based on DHS-issued warrants).

102. *See supra* note 100; Public Safety Committee of the Suffolk County Legislature Meeting Minutes (Feb. 2, 2017), at 13, https://perma.cc/CZ85-SFA8 (statement of Vincent DeMarco, Suffolk County Sheriff) ("Now, with the administrative warrants with probable cause, which is transferable, we believe that we are in full compliance with the Fourth Amendment."); *see also supra* note 12 and accompanying text (describing localities' decisions to begin detaining people for ICE because detainers are now issued with administrative warrants); Press Release, Pinellas Cnty. Sheriff's Off., 19-074 Joint Press Conference—ICE Launches Program to Strengthen Immigration Enforcement (May 6, 2019), https://perma.cc/GWV6-HZ6J (quoting Pinellas County Sheriff Bob Gualtieri as saying that "[t]he Warrant Service Officer program allows sheriffs to lawfully help ICE keep criminal illegal aliens in jail and off the street by serving ICE arrest warrants").

In short, these administrative warrants and their presumed constitutional significance have played an enormous role in ground-level enforcement and subfederal policy. This state of affairs is largely justified by *Abel*. But as the following Part shows, *Abel* cannot bear that weight.

II. Arrest Warrants in Removal Proceedings in the Framing Era

Although warrants serve important purposes in interactions between law enforcement and the public, a "warrant" within the meaning of the Fourth Amendment is not constitutionally required for every search or seizure.[103] Rather, as the Supreme Court has said many times since *Abel*, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'"[104] The Fourth Amendment requires an officer to obtain a warrant ex ante only if, without one, the seizure would be "unreasonable."[105] As explained below, the Court often determines what the Fourth Amendment requires for a particular arrest in significant part by resort to history. So, to put *Abel*'s reliance on past practice in the Fourth Amendment terminology used today, the important historical question is whether the type of seizure at issue in *Abel*—an arrest of someone within the United States for purposes of removal proceedings—was considered reasonable if it was based on only an enforcement-officer-issued warrant or no warrant at all.[106]

This Part seeks to answer that question. It begins by briefly explaining why, if history is to be our guide, the law from the Framing era is the more relevant reference point, at least under contemporary case law.[107] This Part then examines sources that have been considered significant in understanding the expectations, in terms of process, for a particular type of seizure at the time of the Framing: the English example; contemporaneous laws enacted by the states (the primary entities that regulated migration in that period); and early

103. *See, e.g.*, Florida v. Jimeno, 500 U.S. 248, 249-50 (1991) ("The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable.").

104. Brigham City v. Stuart, 547 U.S. 398, 403 (2006); *see also* Riley v. California, 573 U.S. 373, 381-82 (2014); United States v. Knights, 534 U.S. 112, 118-19 (2001).

105. *See, e.g.*, Wilson v. Arkansas, 514 U.S. 927, 934, 936 (1995); *cf.* Groh v. Ramirez, 540 U.S. 551, 571-72 (2004) (Thomas, J., dissenting) ("The precise relationship between the Amendment's Warrant Clause and Unreasonableness Clause is unclear. . . . [T]he Court has vacillated between imposing a categorical warrant requirement and applying a general reasonableness standard.").

106. As discussed in Part III below, this may not be the only historical question necessary to determine what the Fourth Amendment permits or requires with respect to warrants in the context of deportation proceedings. *See infra* note 330 and accompanying text. It is, however, the issue that was important in *Abel*.

107. *See infra* Part II.A.

federal law.[108] It briefly discusses two bodies of English law seen as precursors of U.S. deportation law; surveys two important categories of state-removal laws; and finally turns to the only early federal removal law, which neither authorized arrests analogous to the arrest at issue in *Abel* nor was met with widespread acceptance in the way that *Abel* claimed. Taken together, these civil expulsion laws vary in several respects but are remarkably consistent in terms of arrest authority and paint a very different picture than the one *Abel* described. They show not an acceptance of warrantless arrests or enforcement-officer-issued warrants in this context, but rather an expectation that arrests for purposes of these proceedings—including for deportation—were authorized only pursuant to warrants issued by a magistrate or tribunal with judicial power.

A. Relevance of Framing-Era Law

While the constitutionality of arrests based solely on DHS-issued warrants remains an open issue, the question of how to determine what the Fourth Amendment requires in a particular context is more familiar terrain. Originalism has played a major role over the past few decades in particular, as evidenced by the frequent discussion of Framing-era law in the Supreme Court's Fourth Amendment arrest jurisprudence and the Court's reliance on the common law and statutes enacted at the time of the Framing.[109] The Court has recognized that history does not always resolve the constitutional inquiry, explaining that if "history has not provided a conclusive answer," courts should apply the "traditional standards of reasonableness," balancing an individual's privacy interests against legitimate governmental interests.[110] But

108. *See infra* notes 115, 123 (collecting examples of Supreme Court cases considering these sources).

109. *See, e.g.*, Atwater v. City of Lago Vista, 532 U.S. 318, 327-39 (2001); *Wilson*, 514 U.S. at 931-36; United States v. Watson, 423 U.S. 411, 418-21 (1976).

110. Virginia v. Moore, 553 U.S. 164, 168-71 (2008) (explaining that if "history has not provided a conclusive answer," the Court will "'assess[], on the one hand, the degree to which [the arrest] intrudes upon an individual's privacy and, on the other, the degree to which [the arrest] is needed for the promotion of legitimate governmental interests'" (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999))); *see also Riley*, 573 U.S. at 385 (reaffirming that the Court applies this balancing analysis "[a]bsent more precise guidance from the founding era"). While the balancing test is framed in terms of an individual's privacy interests, scholars have explained that it ends up, in practice, focusing more on reasonableness and preventing abuse of government power. William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1824, 1828 & n.24 (2016) (arguing that the individual interest is not really "privacy in the typical sense" and citing others who have suggested the same).

the inquiry now "begin[s] with history" from that period[111] and may end there too.[112]

Framing-era law is seen as relevant not because the Fourth Amendment necessarily incorporated a particular body of law wholesale,[113] but because prevailing legal principles can show what the Framers and their contemporaries would have considered reasonable within the meaning of the Amendment.[114] As such, courts attempting to ascertain the understanding of the Framing generation often look to pre-Framing English law, as well as state and federal law from the Framing era.[115] The states were not originally bound by the Fourth Amendment,[116] nor—obviously—was England. But pre-Framing English law can illuminate the background set of understandings and law that the Framers intended to incorporate and show what they might have thought to be reasonable.[117] And state law is at least as revealing: Broad surveys of laws adopted by the states that ratified the Bill of Rights can illustrate which aspects of English law the states that ratified the Constitution incorporated[118] and,

111. *Moore*, 553 U.S. at 168.

112. *See, e.g.*, *Wilson*, 514 U.S. at 933-36 (noting that the "knock and announce principle" had been "woven quickly into the fabric of early American law" and deciding the case based entirely on that history).

113. *See, e.g.*, *id.* at 933 (considering whether early states had, through legislation or their constitutions, incorporated a specific principle of English common law into early American law); *Watson*, 423 U.S. at 418-20 (considering not only what the "ancient common-law rule" was, but also whether states had adopted it).

114. *See* Payton v. New York, 445 U.S. 573, 591 (1980) ("An examination of the common-law understanding of an officer's authority to arrest sheds light on the obviously relevant, if not entirely dispositive, consideration of what the Framers of the Amendment might have thought to be reasonable." (footnote omitted)); *Atwater*, 532 U.S. at 326 (quoting *Payton* for the same proposition).

115. *See, e.g.*, *Atwater*, 532 U.S. at 333-34, 337 (considering statutes adopted by Parliament and the states, among other sources); *Wilson*, 514 U.S. at 932-33 (looking to English law, and state statutes and constitutions, among other sources); *Watson*, 423 U.S. at 419-21 (considering the "prevailing rule under state constitutions and statutes" as relevant); Mannheimer, *supra* note 37, at 1237 (explaining that while the Court often indicates that it looks to common law, it "has also interpreted the term 'common law' broadly to include not just case law but 'an amalgam of cases, statutes, commentary, custom, and fundamental principles'" (quoting Sklansky, *supra* note 32, at 1795)); *see also* Sklansky, *supra* note 32, at 1795 (arguing that the "common law" of Coke and Blackstone "was an amalgam of cases, statutes, commentary, custom, and fundamental principles").

116. *See* Timbs v. Indiana, 139 S. Ct. 682, 687 (2019) ("When ratified in 1791, the Bill of Rights applied only to the Federal Government.").

117. *Atwater*, 532 U.S. at 333 ("[T]he legal background of any conception of reasonableness the Fourth Amendment's Framers might have entertained would have included English statutes . . . ."); *Wilson*, 514 U.S. at 931-33 (looking to English law as a way to understand "[t]he meaning ascribed to [the Fourth Amendment] by the Framers").

118. *See, e.g.*, *supra* note 113.

more generally, reveal prevailing notions of reasonableness at that time.[119] This is particularly true since many states had adopted provisions similar to the Fourth Amendment in their own constitutions.[120]

While it is fairly clear that the relevant period—referred to here as the "Framing era"—includes, at minimum, the period in which the Constitution and the Bill of Rights were framed, the precise span of the relevant timeframe is less clear.[121] This Article defines it functionally, to focus on laws that would reflect then-prevailing notions about whether and what type of warrants were required for this type of seizure. In concrete terms, this Article focuses on U.S. laws (state and federal) that were adopted from roughly 1776 through 1800 and briefly discusses earlier English laws that have been described as precursors of modern U.S. deportation law. It begins its discussion of U.S. law with 1776 because general expectations for warrants, and even the basic conception of warrants, changed dramatically in the few decades before independence.[122] Because legislation enacted shortly after ratification can also be revealing of general norms at the time and show what legislatures understood the Fourth Amendment—and the predecessor provisions adopted by the states—to permit,[123] this Article's coverage extends a decade past the ratification of the

119. *See, e.g.*, *Atwater*, 532 U.S. at 337-39 (considering legislation enacted by the states during the Framing era); *Wilson*, 514 U.S. at 933-34 (looking to the knock-and-announce rule that states adopted in their statutes and constitutions); *Watson*, 423 U.S. at 419-20 (indicating that the "prevailing rule under state constitutions and statutes" is relevant).

120. *Atwater*, 532 U.S. at 339 ("A number of state constitutional search-and-seizure provisions served as models for the Fourth Amendment . . . ."); *see, e.g.*, DEL. DECLARATION OF RIGHTS § 17 (1776), *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 344, 344 (Neil H. Cogan ed., 2d ed. 2015) [hereinafter COMPLETE BILL OF RIGHTS]; N.H. CONST. pt. I, art. XIX (1783), *reprinted in* COMPLETE BILL OF RIGHTS, *supra*, at 344, 344; VT. CONST. ch. I, art. 11 (1777), *reprinted in* COMPLETE BILL OF RIGHTS, *supra*, at 345, 345; MASS. CONST. pt. I, art. XIV (1780), *reprinted in* COMPLETE BILL OF RIGHTS, *supra*, at 344, 344; PA. CONST. ch. I, art. X (1776), *reprinted in* COMPLETE BILL OF RIGHTS, *supra*, at 345, 345; VA. DECLARATION OF RIGHTS art. X (1776), *reprinted in* COMPLETE BILL OF RIGHTS, *supra*, at 345, 345.

121. *Compare* Gamble v. United States, 139 S. Ct. 1960, 1970, 1975-76 (2019) (declining to credit sources published as early as 1802 as evidence of original understanding of the Fifth Amendment and instead looking to pre-adoption authority), *with Atwater*, 532 U.S. at 337-39 (considering, among other things, laws adopted in 1799 and finding postadoption authority to be relevant).

122. *See generally* CUDDIHY, *supra* note 37, at 346-53, 1299, 1302 (documenting a shift in the conception of warrants, particularly after 1760). This shift did not end in 1776. Even as the concept of a particularized warrant became more widely reflected in legislation and constitutions, concepts such as probable cause and judicial sentryship were still developing. *Id.* at 1526-29.

123. *See, e.g.*, *Atwater*, 532 U.S. at 337-39 (considering legislation enacted by the Second Congress and the postratification legislation adopted by states that had constitutional search-and-seizure provisions like the Fourth Amendment); *Watson*, 423 U.S. at 420-21 (considering legislation adopted by the Second Congress).

Bill of Rights. This timeframe is also useful for the present inquiry because, as explained below, it includes a unique period in which states were understood to hold the sovereign power that now grounds the federal power to deport.[124]

B. English Law

The background law in England—be it statutory or judicially derived—is often an important feature of Fourth Amendment analyses.[125] But for two reasons, identifying the relevant English law is somewhat more complicated here. First, during the period that might have informed the Framing generation's views of reasonableness, "England had nothing like modern immigration restrictions";[126] that is, it did not have a general law for deportation in the way we understand it today.[127] "Aliens"[128] and unnaturalized "alien born" individuals who resided in England were required to pay special duties and were denied certain rights,[129] but they were not—at least as a practical matter—generally subject to deportation from England simply because they had not been naturalized or granted formal permission to remain.[130]

Second, the question of what the common law permitted in terms of deportation—and the corresponding processes—is the subject of significant debate. It is clear that, at common law, the English monarch had at least a

124. *See infra* notes 284-87 and accompanying text.

125. *See supra* note 115.

126. Dep't of Homeland Sec. v. Thuraissigam, 140 S. Ct. 1959, 1973 (2020).

127. W.F. Craies, *The Right of Aliens to Enter British Territory*, 6 LAW Q. REV. 27, 33-37 (1890) ("England was a complete asylum to the foreigner who did not offend against its [criminal] laws, and . . . the Crown had no power over him except for breach of English law," and "in this respect [aliens] really stood in no different position from subjects who were equally liable to exile on conviction of crime."). This began to change in 1793. *See* Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law*, 14 GEO. IMMIGR. L.J. 115, 130 (1999) ("[T]he historical evidence shows that through most of the eighteenth century there was virtually no regulation of aliens—at least until 1793."); J.R. DINWIDDY, *The Use of the Crown's Power of Deportation Under the Aliens Act, 1793-1826*, *in* RADICALISM AND REFORM IN BRITAIN, 1780-1850, at 149, 149-50 (1992) (describing the passage of an aliens bill, 33 Geo 3 c. 4 (1793)); *see also Thuraissigam*, 140 S. Ct. at 1973 & n.19 (citing Craies, *supra*, at 35, and others).

128. The term "alien" is undoubtedly an offensive term today. I use this term only where, as here, preferable terms—for example, noncitizen or undocumented person—have connotations based on modern law that do not fit this context.

129. 1 WILLIAM BLACKSTONE, COMMENTARIES *358-63 (explaining the legal distinctions between aliens (or "stranger[s]"); "denizens" (a category of "alien born" individuals who were relieved of some disabilities imposed on aliens); natural-born subjects; and naturalized subjects).

130. *See supra* note 127; *infra* notes 136-42 and accompanying text.

qualified right to exclude aliens who were not physically present in the territory.[131] But there is no clear scholarly consensus on whether—or through what procedures—the monarch could unilaterally expel aliens who were already present within England's borders.[132] Blackstone, for example, believed that the King had unfettered power to remove aliens,[133] but other treatise authors and historians contended that, except for those designated enemy aliens in times of war, the King could expel those physically within the realm through only the processes prescribed by Parliament.[134] Regardless of the source of expulsion authority and any theoretical constraints on the attendant process at common law, it is clear that, as a practical matter in the seventeenth and eighteenth centuries, the power to remove individuals from England was

131. Blackstone, for instance, indicated that this power was absolute. 1 BLACKSTONE, *supra* note 129, at *244-52, *259-60; *see also* Peter L. Markowitz, *Straddling the Civil–Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 320 (2008) (citing Blackstone for the proposition that "[t]he King had complete control over the physical entrance of noncitizens into England"). Vattel believed that the sovereign had this right, but also suggested that it may be qualified based on the sovereign's need to protect itself. EMER DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS bk. 1, §§ 230-31, at 226-27, bk. 2, § 94, at 309 (Béla Kapossy & Richard Whatmore eds., Thomas Nugent trans., Liberty Fund 2008) (1758).

132. *See* Markowitz, *supra* note 131, at 321 ("There is no . . . scholarly consensus regarding the nature and source of the power to expel noncitizens from within England."). While international law may have permitted a sovereign to expel a foreigner, a number of authorities have drawn a sharp distinction between a sovereign's right to expel as a matter of international law and the English monarch's power as a matter of domestic law. *See, e.g.*, Craies, *supra* note 127, at 36-37 (footnote omitted):

> The Crown can have no prerogative by the law of nations. It may be perfectly true that in international law independent states are entitled, if strong enough, to exclude or expel alien friends from their territories, subject to any treaties then existing. But this determines nothing as to the existence of any constitutional power in a perfectly independent state to exclude or expel strangers.

133. 1 BLACKSTONE, *supra* note 129, at *251-52.

134. Markowitz, *supra* note 131, at 321; Fong Yue Ting v. United States, 149 U.S. 698, 757 (1893) (Field, J., dissenting) (noting that "deportation from the realm has not been exercised in England since Magna Charta, except in punishment for crime, or as a measure in view of existing or anticipated hostilities"); 1 HENRY JOHN STEPHEN, NEW COMMENTARIES ON THE LAWS OF ENGLAND: PARTLY FOUNDED ON BLACKSTONE 138 (1841) ("[N]o power on earth, except the authority of parliament, can send any subject of England *out of* the land against his will; no, not even a criminal. For exile was never sanctioned by the common law, except in cases of abjuration [a voluntary sworn renunciation of citizenship or of the privilege of returning without the King's permission] . . . ."); Craies, *supra* note 127, at 34 ("The expulsion, then, of lay aliens, even in the seventeenth century, was restricted to the cases provided by statute, viz. breaches of the law of the land."); *Alien Law of England*, 42 EDINBURGH REV. 99, 112 (1825) ("[T]he King alone can impose no species of exile, in however honourable a shape . . . ."); *see also* Neuman, *supra* note 68, at 924 n.74 ("At common law, aliens within the realm were regarded as local, temporary subjects.").

exercised only through the processes adopted by Parliament.[135] And, as noted, Parliament did not adopt deportation laws in that period.

But Parliament did adopt two types of laws that are important to consider for present purposes.[136] The first was a criminal removal process instituted most harshly through transportation to the colonies.[137] This criminal penalty is sometimes seen as the precursor of civil deportation in the United States[138] but has been distinguished because it was criminal in nature.[139] The second, a noncriminal removal process, was authorized through a series of "poor laws" that provided for the removal of certain outsiders or transients who were deemed undesirable. During the eighteenth century, this system focused on removal between geographic units within England's sovereign borders,[140] but it is important to consider here because it served as the model for early-American removal laws.[141] Moreover, the system of poor laws has been described as being, in an important sense, "the foundation of American

135. *See* Markowitz, *supra* note 131, at 321-24; *Fong Yue Ting*, 149 U.S. at 707-08 (quoting a "leading" law of nations expert as stating that "in some states, such as England, strangers can only be expelled by means of special acts of the legislative power" (quoting L. BAR, INTERNATIONAL LAW: PRIVATE AND CRIMINAL § 147, at 708 n.2 (G.R. Gillespie trans., 1883))); *id.* at 757 (Field, J., dissenting); Craies, *supra* note 127, at 34 (explaining that expulsion of aliens was limited to "the cases provided by statute," which then included only statutes authorizing expulsion as a criminal punishment); *Alien Law of England*, *supra* note 134, at 102-03 (arguing that the fact that Parliament alone had exercised the power to expel aliens "century after century," whereas executive authority in this respect "should never have been discovered" during that time, was evidence that parliamentary authorization was required).

136. Parliament often "made no sharp distinction" between civil and criminal offenses in this era. Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 937 (1926). But the proceedings described in this Part have since been distinguished as criminal and noncriminal (or "civil"), respectively.

137. *See infra* Part II.B.1.

138. *See, e.g.*, Peter L. Markowitz & Lindsay Nash, *Pardoning Immigrants*, 93 N.Y.U. L. REV. 58, 86 (2018) ("[A]s a historical matter, the precursor to deportation was transportation, which was penal in nature."); Bleichmar, *supra* note 127, at 129; *see also* United States v. Ju Toy, 198 U.S. 253, 269-70 (1905) (Brewer, J., dissenting) (stating that both "transportation" and "deportation" refer to the banishment or "forcible removal of a citizen from his country"); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1909 (2000) (describing the deportation of a long-term legal resident for postentry conduct as "more akin" to transportation than border-control regulation).

139. Padilla v. Kentucky, 559 U.S. 356, 365 (2010) ("[R]emoval proceedings are civil in nature."); *Fong Yue Ting*, 149 U.S. at 728, 730 (explaining that removal proceedings are "in no proper sense a trial and sentence for a crime or offence" and that, in contrast to a condition or order of transportation, "[t]he order of deportation is not a punishment for crime").

140. *See infra* Part II.B.2.

141. *See infra* note 205 and accompanying text.

immigration law."[142] Neither process is a perfect analog for civil deportation in the United States, but they are important to understand because both are seen as antecedents in different ways. This Subpart briefly describes these mechanisms for removal and the associated arrest authority.

1. Criminal-history-based removal

In England, "banishment" generally referred to the criminal penalty of removal from the country, which could be imposed at the conclusion of a criminal proceeding and was applied to native subjects, naturalized subjects, and aliens alike.[143] Over the years, banishment through the criminal process took different forms.[144] Beginning in the early eighteenth century, "transportation"—removal from England, often to the American colonies for a period of years[145]—became the dominant mode of criminal expulsion from England.[146]

142. HIROTA, *supra* note 42, at 42-43 ("The roots of immigration law in America dated to the British poor law[,] . . . [which] became the foundation of American immigration law."); *see also* MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 58 (2004) ("In a sense, legal provisions for the deportation of unwanted immigrants existed in America since colonial times, the principle having been derived from the English poor laws."); PARKER, MAKING FOREIGNERS, *supra* note 42, at 73 (explaining that "the governing logic of 'immigration restriction' exercised by states derived from the poor laws"); KANSTROOM, *supra* note 42, at 33-34 (referring to the early state poor laws, which were based on England's 1662 settlement and removal law, and noting that "much of the regime of modern deportation law may be traced to mechanisms for the exclusion and the forced relocation of poor people").

143. Bleichmar, *supra* note 127, at 130; Craies, *supra* note 127, at 34 (noting that aliens and native subjects "were equally liable" to be exiled if convicted).

144. Bleichmar, *supra* note 127, at 120-23; 3 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 303-04, 306-07 (3d ed. 1923). From the thirteenth century through the early eighteenth century, for example, abjuration of the realm—confessing and voluntarily agreeing to leave the realm to avoid other criminal punishment—was a common form of banishment. HOLDSWORTH, *supra*, at 303-04, 306; Markowitz, *supra* note 131, at 322; J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660-1800, at 500-01 (1986).

145. BEATTIE, *supra* note 144, at 500-01, 503. *See generally* Bleichmar, *supra* note 127 (providing a thorough and detailed summary of the history of English transportation).

146. *See* Markowitz, *supra* note 131, at 323. In addition to authorizing transportation beyond England's borders, criminal vagrancy laws also authorized the removal of people to other places within England's borders after conviction. *See, e.g.*, Justices Committee Act 1743, 17 Geo. 2 c. 5, §§ 1, 7 (authorizing the punishment of vagrants and similar categories of individuals); *see also* Poor Relief Act 1662, 14 Car. 2 c. 12, § 6 (authorizing transportation for vagrants and similar categories of individuals "to the English Plantations"). While vagrancy provisions were at times enacted as part of laws that also provided for civil removal, the vagrancy provisions were criminal in nature. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 161 (1972) ("[V]agrancy laws became criminal aspects of the poor laws" in England); BEATTIE, *supra* note 144, at 477-78, 513; SIDNEY WEBB & BEATRICE WEBB, ENGLISH LOCAL GOVERNMENT FROM THE REVOLUTION TO THE MUNICIPAL CORPORATIONS ACT: THE PARISH AND THE COUNTY 300-01, 420 (1906);
footnote continued on next page

The arrests that occurred in proceedings that could result in orders of transportation, however, were for criminal prosecution and punishment. An order or condition of transportation was imposed during or after the penalty phase of a criminal proceeding;[147] following an order of transportation, a defendant was to be committed to jail until a merchant transported them abroad.[148] In this process, because the convicted person was generally in custody and the removal (transportation) order or condition was already imposed, there would not have been a separate arrest for determining removability or even for effectuating the transportation sentence. And even if the person sentenced to transportation returned prior to the expiration of their term of transportation, they were not rearrested for purposes of a second removal; the penalty for unlawful return was death.[149] Accordingly, though transportation was the dominant process for expulsion from England, well known in the colonies,[150] and parallels modern deportation in important ways, it is not the most analogous model for arrests for deportation proceedings.

2. Public-charge-based removal

England's laws providing for the noncriminal removal of certain outsiders on the basis of their economic status, by contrast, did provide a model for

3 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 266 (1883) (noting that vagrancy was an offense "usually punished by courts of summary jurisdiction" that "may be regarded as a part of the criminal law").

147. BEATTIE, *supra* note 144, at 470, 472-73, 478, 501, 503 (explaining that initially transportation was imposed as a condition of a pardon, but after the Transportation Act streamlined the process, courts directly ordered transportation).

148. *See* 3 RICHARD BURN & JOHN BURN, THE JUSTICE OF THE PEACE, AND PARISH OFFICER 649 (17th ed. 1793); BEATTIE, *supra* note 144, at 479. As a matter of practice, there were recorded instances of jails releasing people who had been sentenced to transportation—generally when no merchant would transport them—but that was deemed impermissible, and the English government attempted to prevent that from happening by converting to a system in which it paid merchants to execute the order of transportation. *See* BEATTIE, *supra* note 144, at 479, 481-83, 501, 504-05; Bleichmar, *supra* note 127, at 126 (explaining that "perhaps [the] most important innovation of the [Transportation] Act [of 1717] was the allocation of public funds to ensure that felons were in fact taken to the colonies and not let loose by unscrupulous merchants"); Markowitz, *supra* note 131, at 323 (explaining that the Transportation Act "provided, for the first time, public funding to send people sentenced to transportation to the American colonies").

149. Piracy Act 1717, 4 Geo. c. 11, § 2.

150. This was particularly true in the years immediately preceding the Framing, as the Piracy Act of 1717 dramatically increased transportation to the colonies, an influx that did not abate until independence. Bleichmar, *supra* note 127, at 126-28. During that time, the colonies absorbed many people—some estimate over 50,000—through transportation from England. *Id.* at 127.

arrests for purposes of civil removal proceedings—including for deportation—in the early Republic.[151] While English law had long provided for removal through the criminal process,[152] Parliament created a noncriminal removal process in the seventeenth century by adopting a law known as the "Poor Relief Act of 1662"; this law governed poor individuals' rights to remain in a territory and, where they lacked those rights, provided for their removal.[153] The law simultaneously provided (1) relief for poor people who, by virtue of their length of residency in a parish and other factors, could establish the territorial right to remain—that is, "legal settlement" in the parish, and (2) a mechanism for ordering the removal of poor outsiders—individuals who did not have "legal settlement"—and were (or were likely to become) chargeable to the parish in which they resided.[154] This law thus created a mechanism to send paupers likely to be public charges from the parish in which they resided to the parish in which they had legal settlement through a noncriminal removal process.[155] Because, in the eighteenth century, this process permitted removal only to other parishes that could be made responsible for providing poor relief, it did not authorize removals to "extra-parochial places"—that is, places outside of England's sovereign territory.[156]

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151. *See supra* note 142; *see also infra* Part II.C.2.

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

153. Poor Relief Act 1662, 14 Car. 2 c. 12, § 1. This law also provided for the criminal prosecution and removal of vagrants. *Id.* c. 12, §§ 6, 23; *see also supra* note 146; David Feldman, *Migrants, Immigrants and Welfare from the Old Poor Law to the Welfare State*, 13 TRANSACTIONS ROYAL HIST. SOC'Y 79, 88 (2003) (describing vagrancy prosecutions as criminal, in contrast to removal prosecutions under England's poor laws which were not); WEBB & WEBB, *supra* note 146, at 418-20 (contrasting appeals involving "criminal" vagrancy cases with pauper-removal litigation).

154. Poor Relief Act 1662, 14 Car. 2 c. 12; *see* BURN & BURN, *supra* note 148, at 623-25; *see also* 1 BLACKSTONE, *supra* note 129, at *350-53 (summarizing England's settlement and removal laws).

155. Feldman, *supra* note 153, at 85, 89-90; 2 MICHAEL NOLAN, TREATISE OF THE LAWS FOR THE RELIEF AND SETTLEMENT OF THE POOR 130 (1805). This description generally reflects the process as modified through 1805.

156. 2 NOLAN, *supra* note 155, at 138 (noting that "[p]ersons born in extra-parochial places, not having overseers, cannot be sent thither" and that this principle "seems . . . to apply to the case of persons not born in England or Wales, and not having gained a legal settlement there"); *see also* Inter the Inhabitants of the Forest of Dean and the Parish of Linton (1699) 91 Eng. Rep. 419, 419; 2 Salkeld K.B. 487, 487. Wales was not considered a separate sovereign at that time. *See* Gamble v. United States, 139 S. Ct. 1960, 1973 (2019) (rejecting the argument that a seventeenth-century Welsh prosecution was a foreign prosecution from a sovereign distinct from England because "Wales was then part of the 'kingdom of England'" and "its laws were 'the laws of England and no other'" (quoting 4 BLACKSTONE, *supra* note 129, at *94-95)). Beginning in the early nineteenth century, Parliament began enacting amendments to allow removal outside of England and Wales, for example permitting the removal of Irish people who lacked settlement in England to Ireland if they came within the purview of the poor laws. *See* Feldman,

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Proceedings under English settlement and removal laws were required to commence with a complaint, and individuals could be arrested for purposes of removal proceedings (that is, before the determination of removability or issuance of the removal order).[157] When an inhabitant of a parish who did not have legal settlement there became chargeable to the parish or seemed likely to become so, local officers could initiate removal proceedings by filing a complaint before a justice of the peace to seek to remove the poor outsider from the parish.[158] The pauper alleged to lack legal settlement in the parish was generally entitled to receive notice—through a summons or otherwise—and be afforded an opportunity to "be heard."[159] The justice would issue a summons requiring the individual to appear before two justices of the peace, who would then examine the pauper, adjudicate the matter, and, if warranted, order that she be removed to her last place of settlement or birth.[160] If, during this process, the pauper refused to appear before the justices as the summons required, she could be arrested, but only on a warrant issued by a justice.[161]

Who were these warrant-issuing justices of the peace? They were, among other things, low-level judicial officials in the local judicial system.[162] To be

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supra note 153, at 93; *see also* Frank Neal, *The English Poor Laws, the Irish Migrant and the Laws of Settlement and Removal, 1819-1879*, *in* PROBLEMS AND PERSPECTIVES IN IRISH HISTORY SINCE 1800: ESSAYS IN HONOUR OF PATRICK BUCKLAND 95, 100 (D. George Boyce & Roger Swift eds., 2004).

157. Poor Relief Act 1662, 14 Car. 2 c. 12; 2 NOLAN, *supra* note 155, at 130-34, 140.

158. Poor Relief Act 1662, 14 Car. 2 c. 12; *see also* 2 NOLAN, *supra* note 155, at 138.

159. 2 NOLAN, *supra* note 155, at 139.

160. *Id.* at 139-41; Feldman, *supra* note 153, at 85 (explaining that the exceptions to the English poor laws "provided a number of ways through which migrants could gain a settlement and gain access to the official network of collective solidarity within the parish" and that "[o]n the other hand, those migrants who stood in need of poor relief but had not gained a new settlement could be removed to their last parish of legal settlement or, if this could not be determined, their place of birth").

161. 2 NOLAN, *supra* note 155, at 140 (explaining that a pauper could be arrested and held in detention); *see* Inter the Inhabitants of Ware and Stansted-Mount-Fitchet (1699) 91 Eng. Rep. 419, 420; 2 Salkeld K.B. 488, 488 ("The statute directed, and the practice was, to make complaint to one justice, and he grants his warrant to bring the poor man before two justices, and then they two examine and remove . . . ."). There is less clarity on whether a removal order authorized the arrest of a pauper who was ordered removed, but did not comply. It is clear that a justice of the peace could issue a warrant to authorize the individual's arrest in order to enforce the removal order. *See* 2 NOLAN, *supra* note 155, at 157 ("If the paupers refuse to remove in obedience to the order, the parish may obtain a warrant, under the hand and seals of the magistrates, to enforce it by compulsory means."). Arrests in this latter circumstance would be more akin to a modern-day instance in which ICE takes custody of an individual based on a warrant of removal.

162. *See* Frankfurter & Corcoran, *supra* note 136, at 923, 928-29 (describing the early role of justices of the peace as "local criminal courts of the realm" and their gradual accretion of "summary jurisdiction" permitting them to adjudicate a wide range of "'inferior

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sure, justices of the peace exercised both judicial and nonjudicial—even law enforcement—functions at that time.[163] But their role in adjudicating these removal proceedings was considered to be judicial[164] and structurally distinct from that of the overseers of the poor who brought these cases and that of the constables who executed the arrest warrants.[165] This meant that the discretion to determine when and whether the individual facing removal should be arrested was placed with the judicial figure in these cases, and *not* with officers charged with prosecuting these cases or arresting the person they sought to remove.

In sum, although English law provided no perfect analog to show what individuals in the Framing era might have thought to be reasonable for deportation-related arrests, its settlement and removal regime shares significant parallels with the modern deportation regime. This is particularly true for the instant inquiry into the process for adjudicating the removability of outsiders alleged to lack territorial rights to remain in a particular area.[166] More importantly, as the next Subpart will show, this example is important for present purposes because it provided the template for and guided the

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offenses'" (quoting 3 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 292 (3d ed. 1768))); WEBB & WEBB, *supra* note 146, at 301, 389-90 (describing the range of duties performed by a justice of the peace, including presiding over and adjudicating "purely judicial hearings").

163. WEBB & WEBB, *supra* note 146, at 391 (explaining that, in some cases, "[t]he law enabled, and in some cases positively enjoined, [a justice] to go out . . . to discover cases in which parish officials were neglecting their duties, and to hunt out the crimes and misdemeanours of private persons").

164. 2 NOLAN, *supra* note 155, at 140-41 ("[T]his [removal] order is a judicial act."); *id.* (explaining that justices had discretion in deciding whether to issue an arrest warrant as well as deciding whether to hold a pauper in detention).

165. *See supra* note 161 (describing roles of government officers in these removal proceedings); R v. Inhabitants of Great Yarmouth (1827) 108 Eng. Rep. 589, 589-90; 6 B. & C. 646, 649-50 (quashing removal order where one of the justices of the peace issuing the removal order was also a churchwarden (who functioned like an overseer of the poor) in the parish because "the same person cannot, in point of law, be the complainant and the person hearing the complaint").

166. *See also* Norma Landau, *The Regulation of Immigration, Economic Structures and Definitions of the Poor in Eighteenth-Century England*, 33 HIST. J. 541, 541 (1990) ("In the eighteenth century, parish officers used the laws of settlement to regulate the immigration of the poor to their parishes."); Feldman, *supra* note 153, at 86 (quoting one member of Parliament explaining the general perception of the process in 1735 as "[e]very parish . . . regards the poor of all other places as aliens," noting that each "cares not what becomes of them if it can [but] banish them from its own society" (quoting WILLIAM HAY, REMARKS ON THE LAWS RELATING TO THE POOR, WITH PROPOSALS FOR THEIR BETTERMENT AND RELIEF (1735), *reprinted in* REPORT OF GEORGE COODE, ESQ. TO THE POOR LAW BOARD ON THE LAW OF SETTLEMENT AND REMOVAL OF THE POOR 295, 296 (1851))).

interpretation of early state laws authorizing civil removal, including beyond sovereign borders.

C. Contemporaneous State Law

Looking to the states for deportation law may seem counterintuitive to the modern reader. Indeed, the *Abel* Court seemed to think that federal law was the only place to look. But while the regulation of immigration is now understood to be federal,[167] states dominated that sphere in the early Republic.[168] Well before the enactment of any federal removal statute, warrants of removal that provided for civil expulsion were a well-established feature of state law.[169] This Subpart examines two important bodies of Framing-era state laws providing for civil expulsion—including beyond sovereign borders—and the associated authority to arrest individuals for purposes of those proceedings.

As constitutional law scholar Gerald Neuman has powerfully demonstrated, the United States's earliest immigration laws are contained in state legislation.[170] The states' role in regulating immigration has not always been immediately recognized because migration regulation was often contained in laws governing other subject matter.[171] The early state laws that regulated migration differed from the general conception of modern immigration laws in another respect worth recognizing for present purposes:

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167. *See, e.g.*, Arizona v. United States, 567 U.S. 387, 409 (2012) (explaining that decisions regarding removability "touch on foreign relations and must be made with one voice"); Galvan v. Press, 347 U.S. 522, 531 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are . . . entrusted exclusively to Congress . . . ."); Truax v. Raich, 239 U.S. 33, 42 (1915) ("The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government."). Presumably for this reason, the states' early role in these matters has been ignored or overlooked at times. *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 761 (1972) ("Until 1875 alien migration to the United States was unrestricted."); Abel v. United States, 362 U.S. 217, 233 (1960) (exclusively discussing federal law).

168. *See* Neuman, *Lost Century*, *supra* note 42, at 1834; *see also* Sessions v. Dimaya, 138 S. Ct. 1204, 1247 (2018) (Thomas, J., dissenting) (recognizing that "[t]he States enacted their own removal statutes"); PARKER, MAKING FOREIGNERS, *supra* note 42, at 72-73 (explaining that, in the late eighteenth century, "'immigration law'—the routine regulation of aliens' access to and presence within territory—remained in the hands of the states and not the federal government").

169. *See, e.g.*, Act of Mar. 7, 1788, ch. 62, 1788 N.Y. Laws 731, 732-33 (authorizing justices of the peace to issue warrants of removal); Act of Apr. 17, 1784, ch. 35, 1784 N.Y. Laws 651, 651-52 (same); Act of Mar. 11, 1774, ch. 590, § 23, 1774 N.J. Laws 403, 414 (same).

170. *See* Neuman, *Lost Century*, *supra* note 42, at 1841-42; *see also* HIROTA, *supra* note 42, at 3 (arguing that early "state-level immigration control . . . laid the foundations for American [national] immigration policy").

171. *See, e.g.*, Neuman, *Lost Century*, *supra* note 42, at 1846 ("[S]ome of the most important provisions of state immigration law are sprinkled through the state poor laws.").

They frequently applied to individuals who were citizens of the relevant sovereign as well as to those who were not, and they relatedly regulated movement within as well as across sovereign borders.[172] But these were immigration laws nonetheless, as they regulated the movement of "foreigners"—including those lacking citizenship in the relevant political state—across sovereign borders.[173]

Accounts of early state immigration legislation often group these laws by the substantive characteristics for which people were targeted for regulation: certain criminal histories, likelihood of becoming public charges, propensity to threaten public health, race, and status as an enslaved person.[174] While these accounts frequently focus more heavily on laws that provided for the exclusion of outsiders,[175] the state-removal laws providing for the expulsion of those already within the sovereign's territory are more relevant and

172. *See infra* Parts II.C.1-.3.

173. *See infra* Part II.C.3. Neuman classifies a statute as one regulating immigration "if it seeks to prevent or discourage the movement of aliens across an international border, even if the statute also regulates the movement of citizens, or movement across interstate borders, and even if the alien's movement is involuntary." Neuman, *Lost Century*, *supra* note 42, at 1837-38. As he points out, the federal statutory definition is broader: It defines "immigration laws" as including the INA—which regulates the movement of U.S. citizens across borders—and "all laws, conventions, and treaties of the United States relating to the immigration, exclusion, deportation or expulsion of aliens." *Id.* at 1838 n.21 (quoting 8 U.S.C. § 1101(a)(17) (1988)). The statutory language of § 1101(a)(17) has remained substantially the same despite the 1996 overhaul and recodification of the INA. *See* 8 U.S.C. § 1101(a)(17). As is explained below, some of the laws relevant here were enacted before the states ratified the Constitution, a period when "no national citizenship was recognized," Peter L. Markowitz, *Undocumented No More: The Power of State Citizenship*, 67 STAN. L. REV. 869, 877 (2015), and when the states were understood to be independent sovereigns that then held the type of sovereign authority that now undergirds the federal deportation power. *See infra* Part II.C.3. Given that, it is appropriate for the purposes of this Article to consider laws that regulated movement of individuals who lacked citizenship in the relevant sovereign and across borders of sovereign political states. *See infra* Part II.C.3.

174. *See, e.g.*, Neuman, *Lost Century*, *supra* note 42, at 1841-83 (discussing "five major categories of immigration policy implemented by state legislation: regulation of the movement of criminals; public health regulation; regulation of the movement of the poor; regulation of slavery; and other policies of racial subordination"); *see also* BILL ONG HING, DEFINING AMERICA THROUGH IMMIGRATION POLICY 13 (2004) (grouping state immigration laws into similar categories); HUTCHINSON, *supra* note 42, at vii-ix.

175. *See, e.g.*, KLEBANER, *supra* note 42, at 617-26 (focusing largely on the state laws that required the reporting, bonding, and sometimes removal of incoming passengers); *see also* HUTCHINSON, *supra* note 42, at 396-404 (similar). These types of passenger regulations were the subject of several Supreme Court decisions in the nineteenth century. *See, e.g.*, Chy Lung v. Freeman, 92 U.S. 275, 277-78, 280-81 (1876); The Passenger Cases, 48 U.S. (7 How.) 283, 283 (1849); Mayor of N.Y. v. Miln, 36 U.S. (11 Pet.) 102, 130-32 (1837).

illuminating here.[176] In order to isolate the laws most directly applicable to the situation presented in *Abel* and that existed across most of the ratifying states,[177] this Subpart focuses on two important categories of removal laws: those providing for the expulsion of outsiders with certain criminal convictions, and those governing the expulsion of outsiders who were or were likely to become public charges.[178] This latter category is particularly important to consider, as these removal regimes have been described as the foundation for the modern federal deportation system.[179] This Article does not purport to provide an exhaustive account of every Framing-era law that relates to these categories of removal laws, which would be nearly impossible[180] and unnecessary to gain an understanding of broad perceptions, but it does provide an uncurated account based on diligent research.

A prefatory note on vocabulary before turning to substance. The terms that seem so important in contemporary deportation schemes—for example,

176. *See supra* notes 35, 43 (explaining why laws providing for the exclusion of noncitizens are not covered in this Article).

177. The term "ratifying states" refers to the thirteen original states as well as Vermont. Vermont was not one of the original states recognized under the Articles of Confederation, WILLIAM BREWSTER, THE FOURTEENTH COMMONWEALTHS: VERMONT AND THE STATES THAT FAILED, at xi (1960), and had declared itself an independent republic, Ryan C. Williams, *The "Guarantee" Clause*, 132 HARV. L. REV. 602, 637, 641-43 (2018). Vermont is included here because it entered the Union on March 4, 1791, Act of Feb. 18, 1791, ch. 7, 1 Stat. 191, before the Bill of Rights was ratified, Lewis F. Powell, Jr., *Our Bill of Rights*, 25 IND. L. REV. 937, 941 n.20 (1992), and because its laws from that time period are considered to be a reflection of understandings at that time. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 601 (2008) (considering a provision adopted by Vermont in 1777 when interpreting the Second Amendment); *id.* at 642 (Stevens, J., dissenting) (similar).

178. As Neuman observes, some laws covered both categories. Neuman, *Lost Century*, *supra* note 42, at 1842-49; *see, e.g.*, An Act Providing for the Relief, Support, Employment and Removal of the Poor, §§ 8, 13, 17, 1798 R.I. Pub. Laws 348, 352-53, 356-58.

179. *See* HIROTA, *supra* note 42, at 43 (describing the British poor law, on which American poor laws were modeled, as "the foundation of American immigration law"); KANSTROOM, *supra* note 42, at 35 ("Legal mechanisms [for implementing state pauper-removal laws] increasingly resembled modern deportation systems."); HUTCHINSON, *supra* note 42, at 396-404 (similar).

180. It would, for example, be extremely difficult and prohibitively time-consuming to conduct a search that would allow one to represent that they had identified every Framing-era law that even arguably regulated the removal of people who were or were likely to become public charges. That is in part because of the sheer volume of laws related to the administration of poor relief enacted during this period. *See* William P. Quigley, *Reluctant Charity: Poor Laws in the Original Thirteen States*, 31 U. RICH. L. REV. 111, 112 n.2 (1997) ("No single article can catalog each of the many poor laws of this time period."). It is also due to the difficulty of the research. Even when these laws are available in databases like HeinOnline (which is not the case for many local laws) and even when the statutes are text-searchable (which is not always the case), laws enacted by different states used different terms.

citizen, alien, removal, deportation—do not always map neatly onto a discussion of Framing-era laws. This definitional change is due in part to changes in the meaning of the terms and to the shifting nature of the terms given, among other things, the changes in the sovereign status of the relevant states.[181] Accordingly, two initial clarifications are important.

Removal. Under current immigration law, "removal" is a legal term for what is colloquially known as "deportation."[182] The term "removal" was used in Framing-era statutes (both state and federal) for this purpose as well.[183] But, at that time, its meaning was also broader. It referred to expulsion from a sovereign territory (what we now think of as deportation), and it also referred to expulsion from one place to another place within sovereign borders.[184] In that period, the term "deportation" appears to have been rarely (if ever) used, and even laws that provided *only* for deportation (that is, removal from a sovereign political state) used the term removal (not deportation).[185] This Subpart will nevertheless use the term "deportation" for clarity to refer to the expulsion of "foreigners" from a sovereign political state.[186] It uses "removal,"

181. *See infra* notes 284-87 and accompanying text (describing the shift in the sovereign status of states that occurred after the ratification of the U.S. Constitution).

182. *See* Kawashima v. Holder, 565 U.S. 478, 481 n.2 (2012) (explaining that "[b]efore 1996, there were two procedures for removing aliens from the country: 'deportation' of aliens who were already present, and 'exclusion' of aliens seeking entry or reentry into the country," but as a result of statutory amendments, there is now "a unified procedure, known as 'removal,' for both exclusion and deportation" (citing 8 U.S.C. §§ 1229, 1229a)); 8 U.S.C. § 1229a (providing for removal proceedings and setting forth the procedure for an immigration judge to conduct proceedings and issue an "order of removal").

183. *See, e.g.*, An Act Concerning Aliens, ch. 58, § 2, 1 Stat. 570, 571 (1798) (expired 1800) (authorizing the President to order certain "aliens" to be "removed out of the territory"); An Act Respecting Alien Enemies, ch. 66, § 1, 1 Stat. 577, 577 (1798) (codified as amended at 50 U.S.C. §§ 21-22) (providing that all unnaturalized "natives, citizens, denizens, or subjects of the hostile nation or government" who were men at least fourteen years old were "liable to be apprehended, restrained, secured, and removed"); Act of Mar. 7, 1788, ch. 62, 1788 N.Y. Laws 731, 734, 736-37 (providing for criminal penalties if a person who was "removed or transported" returned to the state or place from which they were removed, and providing a right to appeal a "warrant of removal").

184. *See infra* Part II.C.3.

185. *See, e.g.*, *infra* Part II.D (discussing the earliest federal law providing for removal from the United States, which used the term "remov[e]" and not the term "deport"); *see also* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1973 (2020) ("As late as 1816, the word 'deportation' apparently 'was not to be found in any English dictionary.'" (quoting DINWIDDY, *supra* note 127, at 150 n.4)).

186. *See* Fong Yue Ting v. United States, 149 U.S. 698, 707-09 (1893) (collecting statements of "leading commentators on the law of nations" that describe "[t]he right of a nation to expel or deport foreigners" as the "'right to send [the foreigner] elsewhere'"; the right of the "'government of each state . . . to compel foreigners who are found within its territory to go away, by having them taken to the frontier'"; the right of "'the

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by contrast, to refer to a removal in the broader sense (removal from a place of residence within *or* without a sovereign territory).

Foreigner. While modern immigration law uses terms such as "alienage" and "citizenship," this Article uses the term "foreigner." This is in part for readability—during part of the period covered here, an individual's state citizenship was the only relevant citizenship.[187] This is also due to the fact that terms like "foreigner" and "stranger" were the relevant terms at the time, and the terms used in foundational authorities on deportation.[188]

1. Criminal-history-based removal laws

In the early Republic, removal through the criminal process, including banishment from a state or from the United States, was authorized by many states.[189] At least initially, as in England, criminal banishment could be imposed against individuals regardless of alienage or citizenship.[190] But it "was always 'adjudged a harsh punishment even by men who were accustomed to brutality in the administration of criminal justice.'"[191] More importantly, as

government of a state'" to "'require and compel [strangers'] departure from [the state]'"; and the right of a state to "'convey [foreigners] to the frontier'" (first quoting EMER DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS bk. 1, § 231 (1758); then quoting M. THÉODORE ORTOLAN, DIPLOMATIE DE LA MER bk. 2, at 297 (4th ed. 1864); then quoting 1 ROBERT PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW § 219 (3d ed. 1879); and then quoting L. BAR, INTERNATIONAL LAW: PRIVATE AND CRIMINAL § 148, at 711 (G.R. Gillespie trans., 1883))).

187. *See supra* note 173.

188. *See supra* note 186 and accompanying text; *see also infra* notes 265-72 and accompanying text.

189. *See, e.g.*, Act of Dec. 24, 1795, ch. 82, § 2, 1795 Md. Laws 72, 72 (authorizing the governor to "commute or change" any death sentence to banishment from the state (for free people) and from the United States (for enslaved persons)); Act of Mar. 8, 1780, ch. 154, § 5, 1780 Pa. Laws 319, 320 (authorizing a pardon on condition of banishment from the United States to individuals sentenced to death upon conviction of treason or a felony); CLAUDE HALSTEAD VAN TYNE, THE LOYALISTS IN THE AMERICAN REVOLUTION 237 (1902) (stating that eight of the original thirteen states adopted laws specifically to banish British loyalists shortly after declaring independence).

190. Neuman, *Lost Century*, *supra* note 42, at 1844 ("To the best of my knowledge, no state statutes singled out aliens for expulsion from the state or the United States as punishment for serious crime, but aliens were subject to these generally applicable sanctions." (footnote omitted)); *see, e.g.*, Act of Dec. 24, 1795, ch. 82, § 2, 1795 Md. Laws at 72 (containing no limitation regarding the alienage of the offender); Act of Mar. 8, 1780, ch. 154, § 5, 1780 Pa. Laws at 320 (same).

191. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 n.23 (1963) (quoting David. W. Maxey, *Loss of Nationality: Individual Choice or Government Fiat?*, 26 ALB. L. REV. 151, 164 (1962)); *see also* GWENDA MORGAN & PETER RUSHTON, BANISHMENT IN THE EARLY ATLANTIC WORLD: CONVICTS, REBELS AND SLAVES 103 (2013) (explaining that criminal banishment was not adopted in the colonies on the same scale as in England).

noted above, the criminal penalty of banishment is distinct from deportation, which is considered a civil penalty under U.S. law;[192] as a result, early laws that imposed banishment as a punishment do not provide a useful model for understanding the Framing-era process for arrests for civil deportation proceedings.

While early Americans may have been more reluctant than the British to use expulsion as a punishment, they were eager to prevent outsiders with convictions from becoming part of the community. Perhaps the earliest coordinated states-wide effort to enact restrictive immigration legislation focused on excluding and expelling convicted individuals who were transported to America from Europe. Colonial legislatures had begun this effort, but, unsurprisingly, English authorities often disallowed colonial legislation intended to inhibit the effectuation of criminal transportation orders imposed by English courts.[193] Independence gave Americans the opportunity to revise and strengthen their laws to prevent the immigration of individuals with certain criminal convictions. States began doing so shortly after the cessation of war with England, an effort that was supported (and likely hastened) by the Congress of the Confederation's 1788 recommendation that the states "pass proper laws" to prevent the transportation of convicted foreign "malefactors."[194]

Between independence and 1800, a majority of the states passed legislation to this effect.[195] Most of these laws simply imposed restrictions on the "importation" of convicted individuals into the state and authorized the imposition of penalties on importers who violated those prohibitions.[196]

192. *See supra* note 139.

193. *See, e.g.*, Neuman, *Lost Century*, *supra* note 42, at 1841 ("Several colonies attempted to pass restrictive legislation [to prevent the immigration of people convicted of crimes], but after the enactment of the Transportation Act of 1718 such legislation was frequently vetoed by the British government." (footnotes omitted)). Some have surmised that the relatively sparse and generally ineffective restrictive legislation in the colonies was due to pushback from the Crown. *See, e.g.*, Maxine S. Seller, *Historical Perspectives on American Immigration Policy: Case Studies and Current Implications*, LAW & CONTEMP. PROBS., Spring 1982, at 137, 143.

194. 34 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 528 (Roscoe R. Hill ed., reprt. 1968).

195. Despite searching for legislation using similar terms as the criminal-history-based legislation enacted by the other ratifying states, I was unable to find any indication that this type of legislation was enacted between 1776 and 1800 in Delaware, Maryland, New Hampshire, New York, North Carolina, or Vermont.

196. *See, e.g.*, Act of Jan. 1798, § 17, 1798 R.I. Pub. Laws 348, 357-58; Act of Feb. 26, 1794, ch. 32, 1794 Mass. Acts 375, 384; Act of Nov. 13, 1788, ch. 12, 1788 Va. Acts 9, 9; Act of Nov. 4, 1788, 1788 S.C. Acts 5, 5-6; Act of Oct. 9, 1788, 1788 Conn. Pub. Acts 367, 367-68; Act of Feb. 14, 1789, § 7, 1789 Mass. Acts 467, 469. These laws fall more into the category of laws that regulate entry and exclusion than laws providing for expulsion, but they are included to show that there was no provision for arrest for expulsion proceedings

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Pennsylvania and New Jersey went further with respect to removal; specifically, they adopted laws in 1789 and 1797, respectively, that provided that if the importer (or those aiding the importer) were convicted, the court could require them to post a bond with sufficient sureties to remove the imported "felon convict" from the United States.[197] But while these laws provided for the detention of convicted importers (or those who facilitated the importation) who failed to provide sufficient surety, neither law authorized the arrest of the imported felon.[198]

One of these "foreign malefactor" laws did, however, authorize the arrest of the convicted foreigner for purposes of removal proceedings: Georgia's 1787 law enacted under the Articles of Confederation.[199] It was clear in targeting foreigners, explicitly providing for the removal of "felons transported from other states or nations" and directing the executive to "ship or otherwise" expel them from the state if they were found removable.[200] The statute also provided for the alleged transported felon to be taken into custody, apparently even before being afforded their opportunity to "counteract" the prima facie proof against them—and therefore before the court made a final determination as to their removability.[201] This statute is vague about some aspects of the process,

(in contrast to Georgia's criminal-history-based civil removal law, for example, *see infra* notes 199-202 and accompanying text).

197. *See* Act of Mar. 27, 1789, ch. 1404, § 3 (repealed 1860), *reprinted in* 13 PA. STATS. AT LARGE FROM 1682 TO 1801, at 261, 262 (1908) (providing that if the importer (or those aiding the importer) were convicted, the court could require them to post a bond "with sufficient sureties" to remove the imported "felon convict" to "some place or places without the bounds, limits and jurisdiction of the United States"); Act of Jan. 28, 1797, ch. 611, § 3, 1797 N.J. Laws 131, 131 (providing for a similar penalty for anyone who imported or helped to import "any felon, convict, or person convicted of an infamous crime, or under sentence of death, or other legal disability incurred by a criminal prosecution, or who shall be delivered or sent to him or her from any prison or place of confinement in parts out of the United States"). To the extent that the removal obligation might be construed as a state-sanctioned arrest, the law notably imposes it only after the determination of removability (as part of the court's order after conviction for importing or helping import a person whose entry was prohibited).

198. *See supra* notes 196-97.

199. Act of Feb. 10, 1787, 1787 Ga. Laws 40, 40. Georgia's law was both an entry restriction and an expulsion law, as is reflected in its title: "An Act to prevent Felons Transports from other States coming into or residing in this." *Id.* It is possible that Georgia's law was so different from the laws of other states was because, unlike the other laws discussed in this Subpart, it was adopted before the Congress of the Confederation's recommendation.

200. *Id.*

201. *See id.* Unlike other provisions discussed in this Subpart, there is no reported case law discussing this law or, therefore, stating that it is civil in nature. Additionally neither the House Journal from the then-unicameral legislature, *see* 1787 Ga. House J. 44, 67, 102, 182, nor the subject-matter jurisdiction of the justices presiding over these cases provide confirmation, *see* Scott D. Gerber, *The Origins of the Georgia Judiciary*, 93 GA.

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but despite that and the legislature's evident desire "to prevent the dangerous evils" that it believed transported felons posed to the state's "otherwise . . . good citizens," it notably provided for them to be taken into custody by a "warrant" issued by "the Chief Justice of the state, or one of the Justices of the Court where such proof shall be established."[202]

2. Public-charge-based removal laws

A second major category of state removal legislation in the early Republic was focused on outsiders—individuals who had not obtained legal settlement in a particular area—who were or were likely to become public charges.[203] These are likely the most broadly shared civil expulsion laws in the early Republic,[204]

HIST. Q. 55, 71-73 (2009) (explaining that the Chief Justice and other justices resolved cases in, among other things, the state superior courts, which heard "all pleas civil and criminal, and of all causes of what nature or kind soever" (quoting Act of Mar. 1, 1778, § 1, *in* 1 FIRST LAWS OF THE STATE OF GEORGIA 219-20 (John D. Cushing ed., 1981))). I believe that the removal provision of this law is civil because this type of provision is contained in other subsequently enacted provisions that were understood to be civil, and given the view that nations should not punish individuals for crimes they committed that resulted in their banishment from another country. *See* VATTEL, *supra* note 131, at bk. I, § 232, at 227 ("If an exile or banished man has been driven from his country for any crime, it does not belong to the nation in which he has taken refuge, to punish him for that fault committed in a foreign country."); *see also* THE GEORGIA JUSTICE OF THE PEACE 79-80 (Augusta, Ga., George F. Randolph ed., 1804) (stating that only if the "felon transport[ ]" were to return after being removed from Georgia would he be "guilty of felony"); 8 ANNALS OF CONG. 1954-57 (1798) (statement of Rep. Albert Gallatin) (referring to the "alien felons" laws through which states provided for removal as an example of states exercising the sovereign power of deportation, not criminal prosecution).

202. Act of Feb. 10, 1787, 1787 Ga. Laws at 40. This law also permitted the justices to issue a "mittimus," *id.*, which was an order authorizing the commitment of a person and was generally required "for more than brief detention." Gerstein v. Pugh, 420 U.S. 103, 115 n.14 (1975). This type of authorization for detention was used in both criminal and civil cases. *See, e.g.*, *id.* at 114-15 n.14 (discussing its use in a criminal case); Cap. Traction Co. v. Hof, 174 U.S. 1, 23-24 (1899) (discussing a Pennsylvania statute authorizing justices to issue a mittimus in a civil-damages case).

203. The requirements for obtaining "legal settlement" varied across states but typically included at least some term of residence and often other requirements. *See, e.g.*, Act of Mar. 7, 1788, ch. 62, 1788 N.Y. Laws 731, 731 (providing that residents acquired settlement in a city or town after two years of residence and, for example, payment of taxes or a year's service in a civic office and that individuals entering "from some foreign port or place" acquired legal settlement after a year of residence). Some states' settlement laws contained provisions that explicitly required citizenship in "any of the United States" to obtain legal settlement (and thereby avoid removal). *See, e.g.*, Act of Feb. 11, 1794, ch. 8, §§ 4-5, 9, 1794 Mass. Acts 347, 347-48.

204. Most of the ratifying states entered independence with inherited public-charge laws modeled on the English law previously discussed, and almost all of the states also enacted this type of legislation in the Framing era. *See infra* notes 207-29 and accompanying text. I was unable to find public-charge-based removal laws adopted (or

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and they have important parallels with modern deportation laws. While these state laws drew heavily on English settlement and removal laws,[205] the states innovated in ways that are important here: They often made the application of these laws to foreigners quite explicit and provided for removal beyond sovereign borders.[206] And while some aspects of these laws varied across states, the laws and practice materials show that these laws were remarkably consistent in terms of arrest authority: They only authorized arrests for purposes of civil expulsion proceedings pursuant to warrants issued by magistrates or tribunals with judicial power.

The legislation adopted by New Jersey in 1774, which it retained through the Framing era, is illustrative.[207] Like England's settlement and removal law, it authorized the arrest of individuals who allegedly lacked legal settlement and were public charges (or likely to become so), but only on warrants issued by justices of the peace.[208] Once the individual was brought before the justices, the justices could conduct an examination of the person's right to remain in

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in operation) during this period in Georgia. *See* MYLDRED FLANIGAN HUTCHINS, THE HISTORY OF POOR LAW LEGISLATION IN GEORGIA 1733-1919, at 35-59 (1985) (describing poor laws in the Framing era, none of which appear to provide for removal); KLEBANER, *supra* note 42, at 485-86 (noting that at least as late as 1770, Georgia had not adopted settlement legislation).

205. The public-charge removal laws adopted during this period were based on (and, in some cases, reenactments of) similar settlement and public-charge removal laws adopted during the colonial period, which were based on the English model. *See* Shapiro v. Thompson, 394 U.S. 618, 628 n.7 (1969) ("The 1662 law and the earlier Elizabethan Poor Law of 1601 were the models adopted by the American Colonies."), *overruled in part by* Edelman v. Jordan, 415 U.S. 651 (1974). The descriptions that follow are narrowly focused, but regulation of the poor in this period (and before) was complex and varied across and sometimes within states. For one of the many excellent accounts of this regulation, see generally O'BRASSILL-KULFAN, *supra* note 204. Other exceptional accounts include various works by William P. Quigley as well as Ruth Wallis Herndon's phenomenally in-depth reconstruction of poor law administration in Rhode Island. *See* Quigley, *supra* note 180; RUTH WALLIS HERNDON, UNWELCOME AMERICANS: LIVING ON THE MARGIN IN EARLY NEW ENGLAND (2001).

206. *See infra* Part II.C.3. For thorough and thoughtful accounts of the intersection of poor laws and immigration in early America through a legal and social lens, see HIROTA, *supra* note 42, and Kunal Parker's various works, especially Parker, *State, Citizenship, and Territory*, *supra* note 42. As Hirota puts it: "The story of early American immigration control . . . is about how British laws for regulating the movement of the poor were transformed into laws to restrict the admission of particular foreigners and deport them, and economic considerations . . . were paramount in this transformation." HIROTA, *supra* note 42, at 43.

207. Act of Mar. 11, 1774, ch. 590, § 23, 1774 N.J. Laws 403, 414. The 1774 law continued in force postindependence. *See* JOSEPH BLOOMFIELD, LAWS OF THE STATE OF NEW JERSEY 46-47 (1811). New Jersey enacted its public-charge removal law that governed through the Framing era just before independence, so although it was adopted when New Jersey was a colony, it is included in this Subpart.

208. Act of Mar. 11, 1774, ch. 590, § 23, 1774 N.J. Laws at 414.

their place of residence, adjudicate the person's removability, and, if warranted, order their removal,[209] a process that sounds much like removal proceedings today. The civil arrest provision neither authorized the overseers of the poor (local officers responsible for prosecuting the case) to issue a warrant nor—in contrast to the statute's criminal provisions—permitted a warrantless arrest.[210]

New York adopted a similar expulsion law under the Articles of Confederation and retained it after ratifying the federal Constitution.[211] This law provided for arrest in civil removal proceedings prior to a removal order and the subsequent removal of "stranger[s]" who were residing in a city or town, had not obtained legal settlement, and were or were likely to become public charges.[212] Like New Jersey, New York explicitly authorized arrest for purposes of civil removal proceedings, pursuant only to warrants issued by justices of the peace.[213] Indeed, the fact that this warrant was critical for a lawful arrest is evident in an early-nineteenth-century decision where New York's highest common law court recognized a false-arrest claim where an otherwise valid warrant for the arrest of a person who was alleged to lack the

209. *Id.*

210. *Compare id.*, *and* Hildreth v. Overseers of the Poor, 13 N.J.L. 5, 6 (N.J. 1831) (finding that proceedings for the removal of public charges lacking settlement are "'action[s] or suit[s] of a civil nature'" and in "contradistinction to the criminal jurisdiction of the court" (quoting New Jersey law)), *with* Act of Mar. 11, 1774, ch. 590, §§ 33-34, 1774 N.J. Laws at 418-19 (providing for the warrantless criminal arrest and prosecution of "idle Vagrants, Vagabonds, and Beggars," and appearing to be modeled on the vagrancy provisions of England's 1662 settlement and removal law). *See generally* Atwater v. City of Lago Vista, 532 U.S. 318, 337 (2001) (listing vagrancy laws, including New Jersey's 1799 vagrancy statute that penalized the same conduct as § 33 of the 1774 Act, as authorizing a "misdemeanor arrest[]").

211. Act of Mar. 7, 1788, ch. 62, 1788 N.Y. Laws 731, 732-33. New York had adopted an earlier version of poor legislation in 1784 that was similar to the 1788 law in some respects but did not explicitly authorize arrest for purposes of removal proceedings. *See* Act of Apr. 17, 1784, ch. 35, 1784 N.Y. Laws 651, 651-52.

212. Act of Mar. 7, 1788, ch. 62, 1788 N.Y. Laws at 732-33; *see also* Hoose v. Sherrill, 16 Wend. 33, 38, 44-45 (N.Y. Sup. Ct. 1836) (Bronson, J., dissenting) (using a pauper-removal case as an example of the application of a principle that, in civil proceedings, justices of the peace are "confined strictly to the authority which the statute has conferred").

213. Act of Mar. 7, 1788, ch. 62, 1788 N.Y. Laws at 732-33. This statute separately mandated that the master of a vessel enter into a bond with sufficient sureties if the master brought any person who was likely to be a public charge. The bond was meant to guarantee that the master either remove the person or ensure that the person would not become a public charge. *Id.* at 743. This law was modified in 1797 to require the vessel master "to give bond *before* landing emigrants from foreign countries." Neuman, *Lost Century*, *supra* note 42, at 1854. The 1797 law eliminated the option of requiring bond as surety for the vessels' removal of people who were likely to become paupers and instead required them to post bond with sufficient sureties to cover "all and every expence" if the passenger were to become a public charge. Act of Apr. 3, 1797, ch. 101, 1797 N.Y. Laws 134, 135.

right to remain was improperly served. And it found that, because the arrest was unlawful, the underlying removal order was void.[214]

Massachusetts also overhauled its poor laws during this period and adopted a similar, if more expansive, system.[215] Like New York and New Jersey, it provided that, upon complaint of the overseers of the poor, an entity with judicial power—there, justices of the peace or, in some cases, the Court of Common Pleas—could summon, authorize the apprehension of, and ultimately order the removal of those who were potentially or actually public charges.[216] Some aspects of removal proceedings varied depending on whether the removal sought was within the state or out of state because in-state removal typically imposed obligations and costs on the receiving town.[217] But in both cases the potential or actual paupers could be arrested for the purpose of these proceedings only on a warrant issued by a justice of the peace or the Court of Common Pleas—that is, by a magistrate or tribunal with judicial power.[218]

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214. Reynolds v. Orvis, 7 Cow. 269, 273-74 (N.Y. Sup. Ct. 1827) (per curiam) (finding a removal order void on account of the unlawful arrest); *see also* William J. Jenack Est. Appraisers & Auctioneers, Inc. v. Rabizadeh, 5 N.E.3d 976, 982 (N.Y. 2013) (describing the New York Supreme Court of Judicature as "the highest common-law court in the state" at that time).

215. Before the 1794 overhaul discussed below, Massachusetts had enacted a poor law in 1789 that provided for removal but was silent regarding arrests. Act of Feb. 14, 1789, § 8, 1789 Mass. Acts 467, 469-70.

216. Act of Feb. 26, 1794, ch. 32, 1794 Mass. Acts 375, 379-83; *see* Commonwealth v. Blue-Hill Tpk. Corp., 5 Mass. (4 Tyng) 420, 424 (1809) (describing a pauper-removal case as a "civil cause"); *see also* City of Boston v. Inhabitants of Westford, 29 Mass. (12 Pick.) 16, 21 (1831) (distinguishing paupers from individuals detained "as criminals and convicts, to be punished for their offences"). In addition to the mechanism for seeking removal orders described below, this statute also permitted towns to seek reimbursement for costs expended on public charges from the town in which they had settlement in an ordinary civil suit. It also permitted the overseers of towns within Massachusetts to attempt to resolve the question of responsibility for a pauper and removal of a pauper between the two towns (without litigation) but did not authorize pre-removal order arrest. Act of Feb. 26, 1794, ch. 32, 1794 Mass. Acts at 379, 383.

217. For removal within Massachusetts (in which the individual being removed and the receiving town were parties), the overseers could file a complaint against the receiving town with a justice of the peace who was not an inhabitant of the same county or with the Court of Common Pleas and, if they prevailed, could also recover costs expended on the individual being removed. Act of Feb. 26, 1794, ch. 32, 1794 Mass. Acts at 379-82. For litigation solely to remove an actual (chargeable) pauper from the state (in which there was no other municipal party because the action did not seek costs or impose a duty of care), the overseers could file a complaint with a justice of the peace in their county, and, if the justice ordered removal, the state would pay the cost. *Id.* at 383.

218. Although the summons, arrest, and examination process is described in the section that provided for litigation and removal between two towns within Massachusetts, and not in the section describing out-of-state removal, the sample forms were "general," and meant to be "adapted . . . to the circumstances of the case," Inhabitants of Walpole v. Inhabitants of W. Cambridge, 8 Mass. (7 Tyng) 276, 279 (1811), and it appears that the in-state process was used for out-of-state removals. *See, e.g.*, HIROTA, *supra* note 42, at 45

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Vermont, like Massachusetts, initially adopted a civil removal law that lacked explicit authority for pre-removal-order arrests.[219] In terms of practice, Vermont's removal laws were often construed to conform to England's settlement and removal law in the state's early years,[220] so they may have—like the laws discussed below—permitted arrests based on justice-of-the-peace warrants in practice. In any event, when Vermont amended this law a decade later in 1797 (after joining the Union), it explicitly provided for arrest prior to the order of removal, again, only on a warrant issued by a justice of the peace.[221]

Other ratifying states—Connecticut,[222] Delaware,[223] Maryland,[224] North

(describing the process applied to foreign paupers, including their being summoned to appear before justices); *Foreign Paupers Sent Back*, BOS. DAILY COURIER, Sept. 10, 1851 (describing the process being applied to paupers ultimately ordered deported to England, Ireland, and Scotland); *Horrid Case of Kidnapping!*, BOS. PILOT, May 3, 1851, at 7 (printing affidavit of woman ordered deported to Ireland and describing the statutory process being applied in her case); *see also* JONATHAN LEAVITT, A SUMMARY OF THE LAWS OF MASSACHUSETTS, RELATIVE TO THE SETTLEMENT, SUPPORT, EMPLOYMENT AND REMOVAL OF PAUPERS 43-44, 46 (1810) (providing sample summonses and warrants without any distinction as to the place of removal).

219. Act of Mar. 9, 1787, 1787 Vt. Acts & Resolves 111, 116.

220. *See, e.g.*, Town of Chester v. Town of Wheelock, 28 Vt. 554, 556 (1856) (noting that "many of the earlier judges [in the state] adhered more strictly to the English practice," even where it conflicted with "the form given in our statute"); Overseers of the Poor v. Overseers of the Poor, 1 Aik. 241, 251-52 (Vt. 1826).

221. Act of Mar. 3, 1797, ch. 39, § 3, 1797 Vt. Acts & Resolves 383, 384-85; *see* State v. Batchelder, 6 Vt. 479, 487 (1834) (describing a removal proceeding under the poor laws as a civil proceeding).

222. Act of May 10, 1792, 1792 Conn. Pub. Acts 412; Act of Oct. 8, 1789, 1789 Conn. Pub. Acts 383, 384, 386 (repealing and replacing—in modified form—the 1784 foreigner-specific act); An Act to Prevent Foreigners Carrying on Insidious Designs or Practices in this State, 1784 Conn. Pub. Acts 82.

223. Act of Jan. 29, 1791, ch. 218, §§ 19-20, 2 Del. Laws 988, 996; Act of Mar. 29, 1775, ch. 225, § 19, 1 Del. Laws 544, 553; *see also id.* § 11, 1 Del. Laws at 548-49 (authorizing justices of the peace to require those who "imported" people into Delaware who were likely to become public charges to remove them and permitting justices to compel the arrest of the alleged importers for this proceeding); Act of Jan. 29, 1791, ch. 218, § 19, 1791 2 Del. Laws 988, 996 (permitting "Trustees [of the Poor]" to adjudicate proceedings against the importer but otherwise mirroring § 11).

224. It does not appear that Maryland enacted a new general poor-removal law in the Framing era, but rather continued to use the one previously in effect. Act of May 1768, ch. 29, § 18, 1768 Md. Laws 274, 281; *see also* THOMAS HERTY, A DIGEST OF THE LAWS OF MARYLAND, BEING AN ABRIDGMENT, ALPHABETICALLY ARRANGED, OF ALL THE PUBLIC ACTS OF ASSEMBLY NOW IN FORCE, AND OF GENERAL USE 426-31 (1799) (indicating that Maryland's 1768 Act remained in effect at least as late as 1799).

Carolina,[225] Pennsylvania,[226] Rhode Island,[227] South Carolina,[228] and Virginia[229]—adopted civil removal laws that were styled like England's 1662 settlement and removal statute in terms of process. That is, the statutes provided for the initiation of removal proceedings based on the filing of a complaint,[230] but were silent regarding authority for arrests for removal proceedings.

Evidence of practice, however, indicates that these laws—or at least many of them—were interpreted to operate similarly to the English and state removal laws discussed above.[231] Justice-of-the-peace manuals published in that era—long regarded as critical authorities on procedure of that period given their widespread use and the dearth of reported case law[232]—are illuminating.

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225. Act. of Dec. 24, 1777, ch. 7, § 23, 1791 N.C. Sess. Laws 326, 329.

226. Act of Mar. 9, 1771, ch. 635, § 22, 1771 Pa. Laws 332, 340-41; Act of Mar. 24, 1778, ch. 57, § 2, 1778 Pa. Laws 117 (reenacting Act of Mar. 9, 1771). In 1782, the adjudicatory authority that the 1771 Act provided to the mayor, recorder, and alderman of Philadelphia was reassigned to justices of the peace. Act of Mar. 25, 1782, ch. 7, § 10, 1782 Pa. Laws 17, 20. Pennsylvania enacted a number of amendments and supplemental laws in this area through the early nineteenth century, but the 1771 law remained its main poor relief and removal law during the Framing era. *See* WILLIAM CLINTON HEFFNER, HISTORY OF POOR RELIEF LEGISLATION IN PENNSYLVANIA, 1682-1913, at 206 (1913) (explaining that Pennsylvania's 1771 law was "revis[ed]" in 1836).

227. Act of Jan. 1798, § 8, 1798 R.I. Pub. Laws 348, 352-53.

228. Based on the laws described in a widely used justice of the peace manual published in South Carolina in 1810, it does not appear that South Carolina enacted a new general poor-removal law in the Framing era, but rather continued to use the one previously in effect. *See* Act of Dec. 12, 1712, No. 334, § 5, 1712 S.C. Acts 104, 105; THE SOUTH-CAROLINA JUSTICE OF PEACE; CONTAINING ALL THE DUTIES, POWERS, AND AUTHORITIES OF THAT OFFICE, AS REGULATED BY THE LAWS NOW OF FORCE IN THIS STATE, AND ADAPTED TO THE PARISH AND COUNTY MAGISTRATE 354-55 (3d ed. 1810) [hereinafter THE SOUTH-CAROLINA JUSTICE OF PEACE] (indicating that South Carolina's 1712 Act continued in force until at least 1788); Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in* Crawford v. Washington, 71 BROOK. L. REV. 105, 185 n.256 (2005) ("The name of the author does not appear in the [*South-Carolina Justice of the Peace*] manual itself; however, it has been attributed to Judge John Faucheaud Grimké.").

229. Act of Dec. 26, 1792, ch. 102, §§ 7, 27, 1803 Va. Acts 180, 181, 185 (compiling and reenacting prior laws still in effect).

230. *See supra* Part II.B (describing procedure under English settlement and removal laws).

231. *See supra* Part II.B.2; *supra* notes 207-21 and accompanying text.

232. *See* Birchfield v. North Dakota, 136 S. Ct. 2160, 2174 (2016) ("An 18th-century manual for justices of the peace provides a representative picture of usual practice shortly before the Fourth Amendment's adoption . . . ." (referring to the 1788 edition of *The Conductor Generalis*)); Davies, *Fictional Character of Law-and-Order Originalism*, *supra* note 37, at 276-77, 277 n.115 (explaining that case reports were scarce and often prohibitively expensive for most American lawyers during the Framing era, so the "primary sources" for criminal procedure were justice-of-the-peace manuals, treatises, and other practice materials).

For example, *The Conductor Generalis*, a justice-of-the-peace manual considered indicative of "usual practice" from that period,[233] explained the process as follows: A party facing removal charges could appear in these proceedings "voluntarily . . . at the *request* of the overseers," but where he did not, a justice of the peace could issue a warrant to the constables to compel his arrest.[234] The manual thus makes clear that the alternative to voluntary appearance was not warrantless arrest by the constables or arrest on the warrant of the overseers, but rather a warrant issued by the justice of the peace. Other Framing-era manuals—including those keyed to the laws of Virginia and South Carolina—contain sample warrants through which a justice of the peace could authorize arrest for removal proceedings.[235] These samples make no mention of warrantless arrests, suggesting that justices of the peace could issue arrest warrants and that warrantless arrests likely were not permitted.[236] A later-published treatise suggests the same with respect to Pennsylvania law.[237] And records from actual pauper-removal cases in Rhode Island (whose law was also silent regarding arrest)[238] reflect the same practice. Specifically, they show that

233. *Birchfield*, 136 S. Ct. at 2174.

234. THE CONDUCTOR GENERALIS: OR, THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE, HIGH-SHERIFFS, UNDER-SHERIFFS, CORONERS, CONSTABLES, GAOLERS, JURY-MEN, AND OVERSEERS OF THE POOR 326-27 (John Patterson ed., 1788) [hereinafter THE CONDUCTOR GENERALIS] (emphasis added) (providing that a justice of the peace "may issue his warrant to bring the party before him" but that the party could also appear voluntarily if he "is willing").

235. *See* WILLIAM WALLER HENING, THE NEW VIRGINIA JUSTICE, COMPRISING THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE, IN THE COMMONWEALTH OF VIRGINIA 343-44 (1795) (containing sample warrant); THE SOUTH-CAROLINA JUSTICE OF PEACE, *supra* note 228, at 356 (same); Nathaniel J. Berry, *Justice of the Peace Manuals in Virginia Before 1800*, 26 J.S. LEGAL HIST. 315, 328 (2018) ("Hening's *New Virginia Justice* was the most published and widely circulated of the Virginia manuals . . . ."); CUDDIHY, *supra* note 37, at 1514 & n.305 (describing Grimké's manual as one of the manuals that served as the "principal authority" on the "customary practices of arrest").

236. *Cf.* Davies, *Fictional Character of Law-and-Order Originalism*, *supra* note 37, at 317 & n.232 (making this same inference regarding sample justice-of-the-peace warrants and the absence of a discussion of warrantless arrests in the context of a different type of arrest).

237. *See* CALVIN G. BEITEL, A TREATISE ON THE POOR LAWS OF PENNSYLVANIA 543 (1899) (publishing a sample justice-of-the-peace warrant to bring an alleged pauper before the justice).

238. Act of Jan. 1798, §§ 8-10, 1798 R.I. Pub. Laws 348, 352-55 (providing that, upon complaint of the overseers, the Town-Council was "empowered to enquire" into the alleged pauper's last place of settlement, "adjudge" her place of settlement, and order her removed). The early practical manual for justices of the peace, town council members, and other government officers in Rhode Island covers removal orders, but provides no further information regarding arrest processes. *See* THE RHODE-ISLAND CLERK'S MAGAZINE, OR CIVIL OFFICER'S ASSISTANT: CONTAINING FORMS OF WRITINGS USEFUL TO EVERY MEMBER OF SOCIETY 188-89 (1803).

the "Town-Council"—a tribunal that had both judicial and administrative functions and original jurisdiction over poor-removal cases[239]—would summon the alleged pauper,[240] but, if necessary, the Town-Council would instruct or issue a warrant to the local law-enforcement officers—the "Town-Sergeant" or constables—to arrest and compel her to appear.[241]

Finally, while New Hampshire entered the Framing era with a removal process that appears to have been somewhat similar in terms of practice to the laws just described,[242] it subsequently repealed this law and had no pauper-expulsion process until it adopted a different system in late 1797.[243] The 1797 law provided that people who had "no visible means of support"; who had no settlement in the town or place where they were residing; and who had been "duly warned" and refused to leave within fourteen days could be removed under a warrant of removal issued not by justices of the peace, but by the local selectmen—town officers who managed a range of town affairs.[244] This process

239. *See* HERNDON, *supra* note 205, at 117 n.6 ("Rhode Island town councils functioned as the lowest court in the colony's judicial system, responding to complaints from townspeople, taking depositions from witnesses, and issuing rulings on local matters."); *see also* Amasa M. Eaton, *The Development of the Judicial System in Rhode Island*, 14 YALE L.J. 148, 158 (1905) (describing town councils' judicial role as probate courts); GEORGE G. WILSON, TOWN AND CITY GOVERNANCE IN PROVIDENCE 53-54 (1889) (describing the duties of the Providence town council, even as it "retain[ed] its probate and judicial functions").

240. HERNDON, *supra* note 205, at 6, 10.

241. *See, e.g.*, *id.* at 188-89; Tiverton Town Council and Probate Records (Mar. 2, 1752), at 46 (on file with author) (minutes showing that the Town Council voted to "send out a Warrant Directed to ye Town Sargeant [sic] Requesting him to apprehend" a pauper and "her safely Keep" until she could be examined).

242. *See* An Act Regulating Townships, Choice of Town Officers, and Setting Forth Their Power, 1719 N.H. Laws 29, 30, 34 (providing that individuals—regardless of economic status—who had been "orderly warned" by selectmen and who failed to depart could be removed under a warrant issued by a justice of the peace); Town of Northwood v. Town of Durham, 2 N.H. 242, 243-44 (1820) (applying a procedural provision of the 1719 law to a question of settlement based on incidents that took place in 1789).

243. An Act in Addition to the Laws of this State Respecting Paupers, ch. 43, 1797 N.H. Laws 468, 468 (stating that, as of late 1797, "no provision is made by the Laws of this State for the Removal of Paupers"); Gilford v. Epping, 12 N.H. 498, 499-500 (1842) (describing the 1792 repeal of the 1719 statute); An Act for the Punishment of Idle and Disorderly Persons—for the Support and Maintenance of the Poor—and for Designating the Duties, and Defining the Powers of Overseers of the Poor, ch. 76, 1791 N.H. Laws 691, 694 (revising the state's settlement law and warning-out system and not containing an expulsion provision). The 1791 statute also mandated that the master of a vessel who brought any person who was likely to be a public charge report the person at entry and enter into a bond with sufficient sureties to guarantee that the master would either remove the person or ensure that the person would not become a public charge. *See* An Act for the Punishment of Idle and Disorderly Persons, ch. 76, 1791 N.H. Laws at 695.

244. *See* An Act in Addition to the Laws of this State Respecting Paupers, ch. 43, 1797 N.H. Laws at 468-69; *see also* An Act for the Punishment of Idle and Disorderly Persons,
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thus appeared to permit a type of removal warrant that might be characterized, for purposes of mapping it onto contemporary practice, as prosecutor (or perhaps executive) issued. However, unlike the statute's other, apparently criminal provisions, this section made no provision for a pre-removal order arrest or even a formal adjudicatory process.[245] The statute also authorized a different process applicable to paupers who had no settlement within the state and failed to depart after being "duly warned."[246] It provided that justices of the peace could "apprehend[]" and examine paupers, and, if the justice found that the person indeed had no visible means of support, the justice should warn her to depart within ten days.[247] If the pauper did not depart within this period, the justice could "proceed against him or her as against the person voluntarily returning after removal"—which meant arrest, conviction, and public whipping.[248] On one hand, it seems fair to characterize this provision as criminal because it imposes only punishment and makes no mention of the removal of people who lacked settlement in the state.[249] On the other hand, an early-nineteenth-century report regarding the state's pauper laws suggests that out-of-state removals occurred in at least some circumstances,[250] but I have found no indication of the process used or the authority for such removals. Ultimately, although it is difficult to know what to make of this provision of New Hampshire's law, including whether it was in fact a civil removal provision—and, if so, how apprehensions by a justice of the peace (who also adjudicated the matter) might affect the way we think about its significance today—it suffices to say that even if this provision permitted civil expulsion, that would not detract from the general consistency of the practices used by the ratifying states.

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ch. 76, 1791 N.H. Laws at 694 (describing the formal warning process used to direct an outsider to leave a town, which was a way to prevent them from establishing settlement); An Act Regulating Townships, Choice of Town Officers, and Setting Forth their Power, 1719 N.H. Laws at 30 (explaining that selectmen were responsible for "ordering and managing the prudential affairs of such town, and other town officers, for the executing other matters and things in the laws, appointed by them to be done and performed").

245. *Compare* An Act in Addition to the Laws of this State Respecting Paupers, ch. 43, 1797 N.H. Laws at 468-69 (saying nothing about arrest or examination), *with id.* at 469 (providing for justices of the peace to "apprehend" the individual and, depending on the offense, either "determine the offense" or "convene him or her . . . for examination").

246. *Id.* at 468-69.

247. *Id.* at 469.

248. *Id.*

249. *Id.* at 468-69.

250. *See* LEVI WOODBURY & THOMAS WHIPPLE, REPORT CONCERNING THE PAUPER LAWS OF NEW HAMPSHIRE 13 (1821) (arguing for a repeal of the state's poor-relief laws and stating that "[p]ersons from other states, who become paupers, could then, as now, be sent home, if their infirmities permitted and the distance was small").

While these state removal regimes varied in some respects, the general consistency when it came to pre-removal order arrests is revealing: The statutes and practice materials show that Framing-era state laws authorized arrest for civil removal proceedings only pursuant to a warrant issued by a magistrate (generally a justice of the peace) or a tribunal with judicial powers. To be sure, most of the magistrates and tribunals discussed above were not entirely independent judicial figures in the way that we often think of members of the judicial branch today.[251] Justices of the peace—the most common warrant issuers under these regimes—handled a range of administrative and executive duties in addition to their judicial functions,[252] but their role in removal proceedings was broadly understood to be judicial.[253] As part of their role in handling pauper-removal cases, they typically also had

251. Mary Sarah Bilder, *Expounding the Law*, 78 GEO. WASH. L. REV. 1129, 1139-40 (2010) (explaining that, in the 1770s through the 1790s, "the meaning of separation of powers for the judiciary was not always so clear").

252. *See* James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-contentious Jurisdiction*, 124 YALE L.J. 1346, 1356 (2015) ("Justices of the peace, the workhorses of eighteenth- and nineteenth-century American adjudication, resolved disputes and handled a range of legislative and administrative chores at the county level."); Davies, *Fictional Character of Law-and-Order Originalism*, *supra* note 37, at 286 n.139 ("A justice of the peace held a judicial commission that entitled him to make decisions and exercise discretion within the jurisdiction of the office. Justices of the peace sometimes also exercised some local governmental administrative functions." (citation omitted)).

253. *See, e.g.*, Town of Bethlehem v. Town of Watertown, 47 Conn. 237, 239 (1879) (explaining that in Vermont pauper-removal proceedings were considered to be judicial); Overseers of Porter Twp. v. Overseers of Jersey Shore, 82 Pa. 275, 279 (1876) (explaining that the responsibility to maintain a pauper that results from a removal order has been "ascertained judicially"); Youngs v. Overseers of the Poor, 14 N.J.L. 517, 519 (N.J. 1834) ("The legal residence of the pauper, must first be *judicially* determined, as in other cases, and an order of removal regularly made out." (emphasis added)); Stratford v. Sanford, 9 Conn. 275, 282 (1832) (noting that "[i]n England, and in the state of New-York . . . the [poor-removal] proceeding is held to be judicial"); Voorhis v. Whipple, 7 Johns. 89, 91 (N.Y. Sup. Ct. 1810) (explaining that, prior to issuing the removal order, justices must make "an adjudication of the place of legal settlement"); Overseers of the Poor v. Overseers of the Poor, 1 Yeates 366, 366 (Pa. 1794) (quashing an order of removal that lacked an adjudication that the person was likely to become a public charge); *see also* 2 NOLAN, *supra* note 155, at 140-41 (describing the issuance of a removal order under English law—on which colonial laws were modeled—as "a judicial act"). The one exception that I have found is a Connecticut decision concluding that proceedings to remove a pauper who was actually chargeable were ministerial because there was no need for a justice to adjudicate whether the pauper was likely to become chargeable. *Stratford*, 9 Conn. at 282. However, the Framing-era Connecticut laws also provided for removal of people likely to be public charges, so seemingly at least some removal decisions would not have been governed by *Stratford*'s logic and may have been considered judicial.

discretion to determine whether and when to issue an arrest warrant.[254] It is true that the language in two of the statutory warrant provisions was more ministerial than judicial in the traditional sense,[255] but that was not uncommon for warrant provisions at the time[256] and was even used for congressionally authorized warrants for home searches[257] (which are at the heart of what the "ordinary" judicial warrant requirement protects[258]). But most importantly here, across all of these laws, the power to authorize arrest was consistently assigned to actors who "were understood to be *judicial* officers."[259] This is one reason why the assignment of a function to a justice of the peace, as one leading Fourth Amendment scholar has explained in another context, "mattered."[260] It matters because the point here is not that these laws

254. *See, e.g.*, Act of Mar. 3, 1797, ch. 39, § 3, 1797 Vt. Acts & Resolves 883, 884 ("[I]t shall be lawful for any two justices of the peace . . . to issue their warrant . . . commanding [the constable] to bring such stranger before them . . . ."); Act of Feb. 26, 1794, ch. 32, 1794 Mass. Acts 375, 379-80 (providing that the justice "may, if he see cause, compel the appearance of the [party to be removed] by warrant"); *supra* notes 239-41 and accompanying text (showing that town councils in Rhode Island typically issued "citations" (the term in Rhode Island for summonses), but could authorize arrest); *see also* THE CONDUCTOR GENERALIS, *supra* note 234, at 326-27 (describing justices' warrant-issuing authority in discretionary terms). The question whether the issuance of these warrants was discretionary is arguably relevant because the line between judicial and nonjudicial duties is often drawn by distinguishing functions as either "ministerial" ("thereunto commanded by an higher authority") or "judicial" (guided "by his own discretion"). SAMUEL BAYARD, AN ABSTRACT OF THOSE LAWS OF THE UNITED STATES WHICH RELATE CHIEFLY TO THE DUTIES AND AUTHORITY OF THE JUDGES OF THE INFERIOR STATE COURTS, AND THE JUSTICES OF THE PEACE, THROUGHOUT THE UNION 17-18 (1804) (explaining that, at common law and according to their commission by statute, justices of the peace had both ministerial and judicial functions).

255. *See* Act of Mar. 7, 1788, ch. 62, 1788 N.Y. Laws 731, 732 (providing that justices of the peace are "hereby authorized and required to issue their warrant to a constable of such city or town, thereby commanding him to bring [the] stranger before them"); Act of Mar. 11, 1774, ch. 590, § 23, 1774 N.J. Laws 403, 414 (providing that the justices of the peace "are hereby required and empowered to issue their Warrant to a Constable" to bring the person to be removed before the justice).

256. CUDDIHY, *supra* note 37, at 1525-26 (collecting examples of state statutes adopted from the Framing era that made the issuance of warrants "obligatory rather than optional").

257. *See* Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29, 43 (providing that officers who have reason to suspect that dutiable goods were concealed and "in any particular dwelling-house, store, building, or other place . . . *shall, upon application* on oath or affirmation to any justice of the peace, *be entitled* to a warrant to enter such house, store, or other place" to conduct a search and to seize any evidence found (emphasis added)).

258. *See* Payton v. New York, 445 U.S. 573, 585-86 (1980) ("[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." (quoting United States v. U.S. Dist. Ct., 407 U.S. 297, 313 (1972))).

259. Davies, *supra* note 228, at 203.

260. *Id.* at 203-04 (arguing that the assignment of sworn witness depositions to justices of the peace in the Framing era "mattered" because "[j]ustices of the peace were understood

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assigned warrant-issuing authority to a member of an independent judiciary—some states did not have one at all in this period[261] and even the courts within the federal judicial branch performed ministerial functions.[262] Rather, the point is that these removal laws reflect a broadly held view that warrant issuing in these proceedings was the responsibility and right of the entity with judicial power—and not the individuals responsible for arrests or enforcement.[263]

3. Removal as deportation

The state laws described above authorized civil processes for removal from an individual's place of residence. That alone may provide an indication of what individuals from that period expected in terms of procedure for such arrests. But some may wonder whether the version of arrest-for-removal proceedings authorized by these laws should be seen as categorically distinct from the "deportation arrest" at issue in *Abel*. As this Subpart shows, the answer is no: While the full reach of some of these removal laws has been difficult to discern, it is clear that, when enacted and during the Framing era, a number of these removal laws authorized deportation—that is, expulsion of foreigners from a sovereign political state.[264]

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to be *judicial* officers in 1789" and had both an authority and a role distinct from the complainants and the constables in those proceedings).

261. *See, e.g.*, *Overview of the Supreme Court: History of the Supreme Court*, ST. CONN. JUD. BRANCH, https://perma.cc/YPY3-H6WF (archived Nov. 30, 2020) (explaining that, "in 1818, the Connecticut Constitution established an independent judiciary" for the first time in the state).

262. James E. Pfander, *Judicial Compensation and the Definition of Judicial Power in the Early Republic*, 107 MICH. L. REV. 1, 26, 39 & n.199, 40-41 n.208 (2008) (collecting examples of instances from the early Republic in which Congress assigned ministerial functions to district courts).

263. As others have noted, justices of the peace sometimes acted as prosecutors or even law-enforcement officers. *See, e.g.*, Amar, *supra* note 37, at 772-73. In the statutes described in this Article, however, the overseers of the poor were the prosecutors. *See, e.g.*, Act of Feb. 26, 1794, ch. 32, 1794 Mass. Acts 375, 383 (providing that in removal actions between towns or against an individual, the overseers of the poor or a person appointed by them "shall and may . . . prosecute or defend" the action); Respublica v. Fisher, 1 Yeates 350, 351-52 (Pa. 1794) (exempting an attorney from serving as an overseer of the poor because of the risk that he would have to advocate on both sides of removal proceedings); *see also supra* note 165 (describing an English case requiring a distinction between individuals performing these functions). The 1788 New York law did provide that a justice could act if "otherwise informed" of a potential public charge (even if not on a complaint from the overseers). Act of Mar. 7, 1788, ch. 62, 1788 N.Y. Laws 731, 732. But it was unique in that respect and nevertheless assigned warrant-issuing authority to the entity specifically responsible for adjudication, not the entity responsible for enforcement. *Id.*

264. *Cf. supra* note 186.

Although the citizenship terms common to immigration law today do not appear in most of these statutes, the statutes' texts make clear that they applied to those who were not citizens of the relevant sovereigns.[265] Indeed, many of them clearly regulated the territorial rights of "foreigners" as that term is used in foundational descriptions of "[t]he right of a nation to . . . deport."[266] Georgia's law providing for the removal of "felon transports," for example, specifically applied to "felons transported from other states or nations."[267] New Jersey's law contained explicit provisions related to "Mariners coming into this Province, and having no Settlement in this nor any of the neighbouring Colonies, and every other healthy Person directly coming from Europe into this Province."[268] New York similarly enacted specific provisions applicable to individuals from abroad, including one making it easier for those entering from "some foreign port or place" to gain legal settlement (and thereby avoid becoming removable "stranger[s]").[269] And the state subsequently adopted a specific provision applicable to individuals who came from "Upper or Lower Canada."[270] Connecticut enacted a public-charge removal law that explicitly applied only to "foreigners"[271] and later replaced it with a law that dramatically limited the ability of those who were not "inhabitant[s] of this

265. Legal historians have taken a range of positions on precisely what citizenship and foreignness meant, in terms of territorial rights, in this context. Some have argued that, with respect to foreigners already living in the United States, focusing on citizenship when discussing this period runs the risk of anachronism. *Compare* Matthew J. Lindsay, *Immigration, Sovereignty, and the Constitution of Foreignness*, 45 CONN. L. REV. 743, 777 (2013) (arguing that, "[w]ith respect to . . . foreigners already present within a state's territory, non-citizenship only gradually became a constitutive aspect of immigrants' legal identity, over the first several decades of the nineteenth century"), *and* Parker, *State, Citizenship, and Territory*, *supra* note 42, at 586-87 (arguing that citizenship "came to function . . . as a barrier to the individual's right to enter, and remain within, territory" in Massachusetts only through a heavily contested process that developed through the early nineteenth century), *with* Steinfeld, *supra* note 42, at 651-52 (arguing that regulation on the basis of citizenship was an important part of Massachusetts's 1794 settlement and removal laws).

266. Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893); *see also supra* note 186.

267. Act of Feb. 10, 1787, 1787 Ga. Laws 40, 40.

268. Act of Mar. 11, 1774, ch. 590, § 1, 1774 N.J. Laws 403, 403.

269. *See* Act of Mar. 7, 1788, ch. 62, 1788 N.Y. Laws 731, 731-32; *see also* Overseers of the Poor v. Overseers of the Poor, 19 Johns. 56, 56-57 (N.Y. Sup. Ct. 1821) (per curiam) (explaining that with the term "foreign port," "[t]he legislature had in view imported paupers, or poor emigrants from Europe" (emphasis omitted)).

270. Act of Apr. 5, 1817, ch. 177, § 3, 1817 N.Y. Laws 176, 176-77.

271. An Act to Prevent Foreigners Carrying on Insidious Designs or Practices in this State, 1784 Conn. Pub. Acts 82. This law was adopted while under the Articles of Confederation, and it uses the term "foreigner" to refer to both people who had settlement in other sovereign states as well as those with settlement in other nations. *Id.*

State, or of any of the United States" to establish settlement in Connecticut.[272] Massachusetts largely conditioned the ability to gain lawful settlement—and thereby avoid removal—first on being a citizen of Massachusetts[273] and, after it ratified the Constitution, on "being a citizen of this or any of the United States."[274]

At least as importantly, many of the state laws discussed above authorized deportation—expulsion from a sovereign political state—when they were enacted.[275] Through the nineteenth century, as states' relationships to each other and the nation as a whole coalesced, the reach of these civil removal laws contracted, leaving in place civil removal systems that provided for removal only to places within each state.[276] However, during the Framing era, these laws often reached beyond sovereign borders. For example, the above-discussed laws enacted by Georgia and New York while under the Articles of Confederation, as well as Vermont's 1787 law, explicitly provided for expulsion from what were—at that point—sovereign states understood to possess the now-federal authority to deport.[277] The broad reach of removal

272. *See* Act of Oct. 8, 1789, Conn. Pub. Acts 383, 383. The 1789 law prevented those who were not "inhabitant[s] of this State, or of any of the United States" from establishing settlement even without a showing of likelihood of becoming a public charge and provided for the removal of individuals from other states who were found to be likely to become public charges. *See id.* at 383-84; *see also* Edward Warren Capen, *The Historical Development of the Poor Law of Connecticut*, *in* 22 STUDIES IN HISTORY ECONOMICS AND PUBLIC LAW 7, 72 (Columbia Univ. Pol. Sci. Fac. eds., 1905) (describing the 1784 law and its 1789 repeal).

273. Act of June 23, 1789, ch. 14, 1789 Mass. Acts 408, 408-09 (setting forth a number of bases for acquiring settlement, all of which were either only meant for insiders—for example, marriage—or required that the person be "a citizen of this Commonwealth").

274. Act of Feb. 11, 1794, ch. 8, 1794 Mass. Acts 347, 347-48 (setting forth a number of bases for acquiring settlement, all of which were either only meant for insiders, for example, marriage, or required U.S. citizenship); Act of Feb. 26, 1794, ch. 32, 1794 Mass. Acts 375, 383 (providing for removal). As Robert Steinfeld has explained, "[c]omplete outsiders could acquire a town settlement under the statute by demonstrating a capacity to support themselves over a period of time—*but only if they were American citizens*," because the 1794 statute "explicitly prohibited aliens from acquiring a town settlement by demonstrating that they were capable of supporting themselves." Steinfeld, *supra* note 42, at 651-52.

275. *See supra* note 186 (collecting definitions of deportation used by the Supreme Court and the "leading" law of nations authorities it has relied on).

276. *See, e.g.*, Winfield v. Mapes, 4 Denio 571, 573 (N.Y. Sup. Ct. 1847) ("We had abandoned the practice which at one time prevailed, of sending paupers who had gained no settlement here, to the state where they had a legal settlement . . . ."); Overseers of Alexandria v. Overseers of Kingwood, 8 N.J.L. 370, 372 (N.J. 1826) (similar).

277. Act of Mar. 7, 1788, ch. 62, 1788 N.Y. Laws 731, 732-33 (enacted under the Articles of Confederation) (providing for removal "out of this State into the State from whence he or she came into this State, as the case may require"); Act of Mar. 9, 1787, 1787 Vt. Acts & Resolves 111, 116 (enacted prior to Vermont's joining the Union) (authorizing removal "out of the state" to the pauper's place of settlement); Act of Feb. 10, 1787, 1787

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was perhaps clearest in the laws enacted by Georgia, Massachusetts, Connecticut, and later New York, which respectively authorized the expulsion of foreign convicts by "ship or otherwise"; paupers lacking lawful settlement "to any place beyond sea, where he belongs"; "any Foreigner . . . likely to become chargeable to the State" to "some Place within the Jurisdiction of the State or Nation to which he belongs"; and potential public charges back to Upper and Lower Canada.[278]

The reach of other states' removal laws is less clear from the face of their statutes, but evidence of actual removals under those laws indicates that they were interpreted to authorize deportation. Pennsylvania's law adopted while under the Articles of Confederation, for example, permitted the removal of poor outsiders "to the city, borough, township, province, or place, where he, she or they was or were last legally settled,"[279] and evidence of practice indicates that it permitted removal, at a minimum, out of the state.[280] New Jersey's 1774 law was similarly opaque in authorizing removal to the pauper's "Place of his, her or their legal Settlement," but evidence of implementation shows that it was interpreted, at least in some cases, to permit expulsion from the state.[281] Evidence of removals from Virginia suggests that its civil removal

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Ga. Laws 40, 40 (enacted while under the Articles of Confederation) (providing for the imported convict to be "ship[ped] or otherwise" removed from Georgia). I have thus far been unable to determine whether the removal provision discussed above in New York's 1788 law was understood to permit removal to Quebec or Lower Canada.

278. Act of Feb. 10, 1787, 1787 Ga. Laws 40, 40 (authorizing the removal of transported felons by "ship or otherwise" from the state); Act of Feb. 26, 1794, ch. 32, 1794 Mass. Acts 375, 383 (authorizing removal "by land or water . . . to any place beyond sea, where he belongs"); An Act to Prevent Foreigners Carrying on Insidious Designs or Practices in this State, 1784 Conn. Pub. Acts 82, 82; Act of Apr. 5, 1817, ch. 177, § 3, 1817 N.Y. Laws 176, 176-77 (providing for people from other states and "Upper or Lower Canada" to be removed "directly to the place where such person was last legally settled without this state").

279. Act of Mar. 9, 1771, ch. 635, § 22, 1771 Pa. Laws 332, 340-41. Delaware's law used nearly identical language. Act of Mar. 29, 1775, ch. 225, § 19, 1 Del. Laws 544, 553 (authorizing removal to the "hundred, province or place, where he, she or they was or were last legally settled").

280. *See* KLEBANER, *supra* note 42, at 598-99 & 599 n.2 (collecting examples of out-of-state Pennsylvania removal orders issued under the Pennsylvania statute); Overseers of the Poor v. Overseers of the Poor, 87 Pa. 294, 298 (1878) (recognizing that, at least in an amended version of the 1771 poor law, "provision is made for the removal of paupers into other states," though Pennsylvania could not impose obligations of support out of state); *see also* HEFFNER, *supra* note 226, at 206 (explaining that the 1771 law was "revis[ed]" in 1836 and, "with a few later amendments," remained in place until at least 1913).

281. Act of Mar. 11, 1774, ch. 590, § 23, 1774 N.J. Laws 403, 414 (authorizing removal to the pauper's "former Settlement" or "legal Settlement" during New Jersey's colonial period). New Jersey's civil removal provision was apparently understood to permit removal beyond New Jersey's sovereign borders during the Framing era. *See* Overseers

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provision was understood to authorize removals at least as far as England.[282] In sum, when these laws were enacted, and through much of the Framing era, the arrest-for-expulsion proceedings they authorized often mapped onto the one in *Abel v. United States*.[283]

For those still skeptical, it is worth clarifying that state sovereignty for much of the period examined was different than it is today, in federalism's dual-sovereign structure. Today, states are considered sovereign,[284] but that does not mean that they hold the sovereign power to deport.[285] Many of the laws discussed above, however, were adopted before the Constitution was

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of Alexandria v. Overseers of Kingwood, 8 N.J.L. 370, 371-72 (N.J. 1826) (describing the removal of paupers from New Jersey to New York); KLEBANER, *supra* note 42, at 598-99 & 599 n.2 (noting that a treatise published in 1805 reported New Jersey's practice of removing people to Pennsylvania). In the nineteenth century, the reach of this provision was limited by the enactment of another state law and thereafter construed to permit removal only to other places within the state of New Jersey. *Overseers of Alexandria*, 8 N.J.L. at 372 (reversing a removal order to Pennsylvania based on 1807 legislation that prohibited process, including for the removal of paupers, from crossing state boundaries).

282. *See* Howard Mackey, *The Operation of the English Old Poor Law in Colonial Virginia*, 73 VA. MAG. HIST. & BIOGRAPHY 29, 29, 31 nn.7 & 10, 34 n.20, 36 n.28, 38-39, 39 n.38 (1965) (showing, in a study of parish records that spanned the colonial period through independence, evidence of removals to England). The period studied by Mackey began in the colonial period, so it is possible that these removals were under an earlier version of Virginia's poor-removal law. However, the removal law in effect for much of the period covered by the sources that he cites for this proposition was in effect for much of the Framing era and was similar to the provision in Virginia's 1792 law, so presumably it would have been applied similarly in this respect. *See, e.g.*, Act of Dec. 26, 1792, ch. 102, § 7, 1792 Va. Acts 180, 181 (indicating that the removal provision adopted by the 1748 Act had remained in effect and was reenacted in a very similar form to permit removal to the county or district in which the person was last lawfully settled); 22 Geo. 2 c. 13, § 6 (1748) (applying to Virginia and providing for removal to the parish where the person was last legally settled).

283. *See* Park, *supra* note 41, at 1900, 1906-07 (making a similar argument with respect to policies that (largely indirectly) resulted in the deportation of Native Americans to, among other places, the western lands of the United States); Abrams, *supra* note 42, at 1356 (making a similar argument that, in the nineteenth century, "[s]tate-to-territory migration . . . was also considered 'immigration'" because "there was no guarantee that the western territories would ever become a part of the United States" and "moving to a territory was, in important ways, like moving to another country").

284. Arizona v. United States, 567 U.S. 387, 398 (2012) ("Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect.").

285. *See id.* at 409 ("[T]he removal process is entrusted to the discretion of the Federal Government."); Galvan v. Press, 347 U.S. 522, 531 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are . . . entrusted exclusively to Congress . . . ."); Truax v. Raich, 239 U.S. 33, 42 (1915) ("The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government.").

ratified by the then-"'Free and Independent States,'" which was "an international-law term of art for sovereign nations."[286] Whether the states ceded some attributes of sovereignty to the federal government during that period (and which attributes they might have ceded) is not critical here; the Supreme Court has recognized that, during that time, the states individually held precisely the type of sovereignty regarding foreigners that grounds the current federal deportation power.[287] Accordingly, the laws that provided for expulsion from the "Free and Independent States" are properly understood as deportation statutes.

Of course, this review of state legislation does not tell the entire story. States may have adopted other types of civil removal laws that regulated foreigners during this time[288] and, even if it were possible to examine every state law that provided for removal, that would still leave out local laws that operated in this space.[289] But the purpose of the examination in this Article is

286. Gregory Ablavsky, *Empire States: The Coming of Dual Federalism*, 128 YALE L.J. 1792, 1812 (2019) (quoting THE DECLARATION OF INDEPENDENCE para. 5 (U.S. 1776)); *see also* Jeff Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J. 1317, 1320, 1368-69 (1982) (explaining that "[t]he Union under the Articles of Confederation was a loose alliance of quite separate states, in which 'each State retain[ed] its sovereignty, freedom, and independence,'" and describing it, in contrast to the post-Constitution union, as "an alliance of sovereignties" (second alteration in original) (quoting ARTICLES OF CONFEDERATION OF 1781, art. II)); James T. Knight II, Note, *Splitting Sovereignty: The Legislative Power and the Constitution's Federation of Independent States*, 17 GEO. J.L. & PUB. POL'Y 683, 706 (2019) ("[T]he Articles did not establish any national sovereignty for the United States."); Williams, *supra* note 177, at 621-22, 622 n.114 (collecting sources evidencing the view that states were independent sovereigns in the law of nations sense, including a 1784 letter from Edmund Randolph to Thomas Jefferson stating that "Virginia and [South Carolina] are as distinct from each other as France and [Great] Britain, except in the instances, provided for by the confederation" (alteration in original) (quoting Letter from Edmund Randolph to Thomas Jefferson (Jan. 30, 1784), *in* 6 THE PAPERS OF THOMAS JEFFERSON 513, 514 (Julian P. Boyd, Mina R. Bryan & Elizabeth L. Hutter eds., 1952))).

287. *See* Mayor of N.Y. v. Miln, 36 U.S. (11 Pet.) 102, 132 (1837) (recognizing the "truism" of New York's sovereign power to regulate the admission of "'foreigners'" while under the Articles of Confederation (quoting VATTEL, *supra* note 186, at bk. 2, § 94)); *see also supra* note 186; Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889) (describing the power to exclude "foreigners" as "a part of those sovereign powers delegated [to the federal government] by the Constitution").

288. Gerald Neuman, for example, has shown that states regulated immigration in a number of other areas. Neuman, *Lost Century*, *supra* note 42, at 1859-84 (describing laws focused on the migration of individuals suspected of carrying contagious diseases and the movement of free black people).

289. *See, e.g.*, Act of Aug. 13, 1783, No. 1191, § 4, *in* 7 THE STATUTES AT LARGE OF SOUTH CAROLINA 97, 98 (David J. McCord ed., 1840) (granting the Charleston city council the authority to legislate for "the care of the poor"); *see also* James W. Ely, Jr., *Poor Laws of the Post-revolutionary South, 1776-1800*, 21 TULSA L.J. 1, 5-13 (1985) (describing poor legislation enacted at the local level).

not to show that there was never a statute in the early Republic that permitted warrantless arrests or law-enforcement-issued arrest warrants in the civil removal context. Rather, this Article seeks to understand whether *Abel*'s categorical assertion about the historical pedigree of arrest warrants for deportation proceedings was correct. And the laws identified through this survey—like surveys relied on by the Supreme Court when faced with similar questions[290]—show that it was not.

D. Earliest Federal Law

While the states had a long history of adopting (and using) laws authorizing civil expulsion, the federal government's role in this respect began much later. The earliest federal legislation authorizing deportation—and the only such federal legislation for almost a century—was enacted in 1798 as part of the now-infamous Alien and Sedition Acts. This legislation was adopted amid international and domestic turmoil and—though controversial—was justified by its proponents as necessary in light of growing hostilities with France.[291] Two of the laws in this body of legislation authorized the executive removal of certain individuals who lacked U.S. citizenship, permitting a form of expulsion that could take place entirely outside of the judicial process. One law, known as the "Alien Enemies Act," applied only to individuals of a nation with whom the United States was at war and was triggered by formal war declaration.[292] It has been recognized "as an incident of war and not as an

290. *See supra* note 115.

291. JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 90, 92 (1956); JOHN C. MILLER, CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS 39, 41-42 (1951) ("At no time since the American Revolution had political feeling run as high as in 1798."); Nathan S. Chapman, *Due Process of War*, 94 NOTRE DAME L. REV. 639, 696 (2018) ("To protect national security without the decisive step of declaring war, Federalists in Congress enacted the Alien Enemy Act of 1798, the Alien Friends Act, and the Sedition Act of 1798."); Cleveland, *supra* note 41, at 91 ("[A]rguments from necessity in light of the French hostilities played a prominent role in the defense of the [Alien] Act.").

292. An Act Respecting Alien Enemies, ch. 66, § 1, 1 Stat. 577, 577 (1798) (codified as amended at 50 U.S.C. §§ 21-22) (providing that all unnaturalized "natives, citizens, denizens, or subjects of the hostile nation or government" who were men at least fourteen years old were "liable to be apprehended, restrained, secured and removed"). A version of this law remains the law today in modified form. *See* 50 U.S.C. § 21 (providing for executive detention and removal of "alien enemies" where there has been "declared war," "invasion[s]," or "predatory incursion[s]"); *see also* Ludecke v. Watkins, 335 U.S. 160, 162 & n.1, 170-71 (1948) (explaining that, with the exception of a "few minor changes in wording," the "Alien Enemy Act has remained the law of the land, virtually unchanged since 1798," and describing it as an exercise of the war power).

incident of alienage."[293] The other law, known as the "Alien Friends Act,"[294] was a more general removal law that applied to non-U.S. citizens from any country and outside of declared war. It was the first—if short-lived—federal deportation statute[295] and the only Framing-era removal law cited in *Abel*.[296] This Subpart describes the Alien Friends Act and its reception. It shows that this removal law did not authorize the type of arrest at issue in *Abel* and was highly disputed at the time—in part because it placed judicial power in the executive. In doing so, this Subpart presents a necessary corrective to *Abel*'s report of broad historical acceptance.

Unlike modern immigration law, which provides for expansive regulation of noncitizens seeking to enter and remain in the United States, the Alien Friends Act was adopted to remedy a particular problem: The country was in an undeclared war with France, and there was a perception that then-pending legislation to permit the removal of enemy aliens during formal war would not offer adequate protection from hostile and radical foreigners living in the United States.[297] To provide such a tool, the Federalist-controlled Congress enacted a law granting the President temporary authority to unilaterally "order all such aliens as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof, to depart

293. Johnson v. Eisentrager, 339 U.S. 763, 771-72 (1950), *abrogated by* Rasul v. Bush, 542 U.S. 466 (2004); *see also* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 983-84 (2002) (explaining that the principles that govern alien enemies "apply only in a time of declared war to citizens of the country with which we are at war" and "should not be generalized to justify treatment of aliens when . . . no war has been declared, and there is no identifiable enemy nation" (emphasis omitted)); 8 ANNALS OF CONG. 1979-80 (1798) (statement of Rep. Gallatin) (concluding that the Alien Enemies Act was constitutional even as he opposed legislation providing for executive removal of those who were not enemy aliens).

294. Sessions v. Dimaya, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring in part and concurring in the judgment).

295. An Act Concerning Aliens, ch. 58, § 2, 1 Stat. 570, 571 (1798) (expired 1800). The Act expired two years after passage. *Id.* § 6, 1 Stat. at 572.

296. *See supra* note 17 (collecting all of the statutes that *Abel* cited).

297. *Dimaya*, 138 S. Ct. at 1229 (Gorsuch, J., concurring in part and concurring in the judgment) (explaining that the Alien Friends Act "was understood as a temporary war measure, not one that the legislature would endorse in a time of tranquility"); 8 ANNALS OF CONG. 1575 (1798) (statement of Rep. Otis) (opining that such legislation was necessary given the "crowd of spies and inflammatory agents which overspread the country like the locusts of Egypt[,] . . . fomenting hostilities against this country[,] . . . [and] alienating the affections of our own citizens"); *see also* MILLER, *supra* note 291, at 41; SMITH, *supra* note 291, at 50; *see generally* Kevin Arlyck, *The Courts and Foreign Affairs at the Founding*, 2017 BYU L. REV. 1, 53 & n. 259.

out of the territory of the United States."[298] Thus, the Act authorized the President to impose an order of removal entirely outside of the judicial process and without a hearing of any kind.[299]

In all but affirming the validity of an administrative warrant for arrest when initiating deportation proceedings, *Abel* cited the Alien Friends Act as the first example of a statute that "authorized the arrest of deportable aliens by order of an executive official."[300] But the Act did not authorize the type of arrest at issue in *Abel*. Rather, it permitted the President to "cause to be arrested" any alien found in the United States *after* the President had ordered the person removed (if public safety required it).[301]

That the arrests allowed under the Alien Friends Act were authorized after a removal order is evident not only in the statute, but also in other materials of the day. For example, in the House debates, Representative Edward Livingston made clear that the removal order was the trigger for the consequences in the Act, protesting that "the unfortunate stranger will never know either of the law, of the accusation, or of the judgment, until the moment it is put in execution."[302] This interpretation is also reflected in the never-executed form

298. An Act Concerning Aliens, ch. 58, § 1, 1 Stat. at 570-71 (emphasis omitted). The legislature that adopted this statute was very different from the one that approved the language of the Fourth Amendment. Only thirteen members of the latter were part of the 140-member Fifth Congress when the Alien Friends Act was enacted. *See* MICHAEL J. DUBIN, UNITED STATES CONGRESSIONAL ELECTIONS, 1788-1997: THE OFFICIAL RESULTS OF THE ELECTIONS OF THE 1ST THROUGH 105TH CONGRESS 1-3, 14-18 (1998).

299. An Act Concerning Aliens, ch. 58, §§ 1-2, 4, 1 Stat. at 570 n.(a), 571-72.

300. Abel v. United States, 362 U.S. 217, 230, 233-34 (1960) (finding "historical legislative recognition of the propriety of administrative arrest for deportable aliens such as petitioner").

301. An Act Concerning Aliens, ch. 58, § 2, 1 Stat. at 571 (providing for the arrest and removal from the United States of "such of those aliens as shall *have been ordered* to depart therefrom and shall not have obtained a license" where, in the view of the President, public safety required "a speedy removal" (emphasis added)). The presidential license referenced would enable an alien to remain in the United States according to the terms that the President set, but it was only issued to aliens who had already been "ordered to depart." *Id.* § 1, 1 Stat. at 571. The Act also provided that the President may order the removal of "any alien who may or shall be in prison in pursuance of this act," which suggests imprisonment prior to the order of removal. *Id.* § 2, 1 Stat. at 571. It is unclear whether "in pursuance of this act" modifies the President's order or the alien's imprisonment, but to the extent that it modifies imprisonment, it may refer to imprisonment authorized by the criminal provisions of the Act. *See id.* §§ 1-2, 1 Stat. at 571 (providing for the conviction and imprisonment of, for example, aliens who violated the terms of their license to remain in the United States or who returned without authorization following removal by the President).

302. 8 ANNALS OF CONG. 2008 (1798) (statement of Rep. Livingston); *see also id.* at 2010 (statement of Rep. Livingston) (explaining that, under the Act, people who lacked U.S. citizenship would be "ignorant of his offence and the danger to which he is exposed, never hears of either until the judgment is passed and the sentence is executed"); *id.* at

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warrants prepared for and in a few cases signed by President Adams—the very officer charged with enforcement of the Act. These warrants ordered the marshal to "give notice" to the subject that "he is hereby ORDERED to depart out of the territory," but did not authorize arrest prior to a removal order.[303] Indeed, the fact that the Act only provided for postorder arrest for immediate deportation was a chief complaint of Secretary of State Timothy Pickering. Soon after the Act was enacted, he complained that "an embarrassment will arise . . . out of the law itself, in its not authorizing the Executive to apprehend [and] confine, or require sureties for their going, until they can be sent off, or that they depart from the U[nited] States."[304] Thus, to the extent this Act has any import today, it is better understood as a Framing-era precedent for the modern-day administrative warrant of removal (issued for purposes of removal *after* a determination of removability). It is not a historical example of the distinct administrative warrant of arrest (issued before the individual's removability has been determined) like the one in Mr. Abel's case.[305]

Given the weight that *Abel* ascribed to the Alien Friends Act as an early illustration of broad consensus, it is also worth briefly considering the Act's reception. Contrary to *Abel*'s assertions that the Act reflected the "uncontested historical legitimacy" of this practice from "almost the beginning of the Nation,"[306] the Alien Friends Act was "widely condemned" and vigorously attacked, including for authorizing the executive to perform judicial acts.[307]

2016 (statement of Rep. Kittera) (defending the Act on the basis that it allowed the President to remove aliens without having to give them a "legal trial").

303. An Act Concerning Aliens Warrant (1798), 54 Timothy Pickering Papers 1 (on file with the Massachusetts Historical Society) (including a blank warrant signed by John Adams). Adams signed three blank warrants for removal under the Act, but they were never executed—nor was any removal executed pursuant to the Alien Friends Act. *See* WENDELL BIRD, CRIMINAL DISSENT: PROSECUTIONS UNDER THE ALIEN AND SEDITION ACTS OF 1798, at 337 (2020); FRANK M. ANDERSON, THE ENFORCEMENT OF THE ALIEN AND SEDITION LAWS 115 (1914).

304. Letter from Timothy Pickering, U.S. Sec'y of State, to John Adams, U.S. President (Aug. 28, 1798), NAT'L ARCHIVES FOUNDERS ONLINE, https://perma.cc/9BS2-GXPT (archived Dec. 1, 2020); *see also* BIRD, *supra* note 303, at 328, 337, 356 (explaining Pickering's complaint that "once the president ordered foreigners to be expelled, they could hide and avoid deportation, since the law did not provide for their being held or placed under punitive bonds until they left" and describing this "defect[] in the Alien Act" as a major reason that it was not enforced).

305. *See supra* note 62 and accompanying text (describing the difference between warrants of removal and warrants of arrest).

306. Abel v. United States, 362 U.S. 217, 230, 234 (1960).

307. Sessions v. Dimaya, 138 S. Ct. 1204, 1229-30 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) ("[I]t was widely condemned as unconstitutional by Madison and many others."); SMITH, *supra* note 291, at 53-59; Chapman, *supra* note 291, at 697-98 (explaining that "[d]isagreements over [the Alien Friends Act's] constitutionality were deep and broad" and included arguments that it "gave the

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Even after this bill was enacted, the controversy raged on in some states, notably sparking the Virginia and Kentucky Resolutions, which were a set of political statements adopted by those states' legislatures declaring the Alien Friends Act, among other aspects of the Alien and Sedition Laws, unconstitutional on a number of grounds.[308] As relevant here, the Virginia Resolutions—written by James Madison,[309] who initially drafted the Fourth Amendment[310]—argued that the Alien Friends Act violated the Constitution by placing the decision to deprive an individual of their liberty in the hands of the executive rather than the judiciary.[311] In short, the Alien Friends Act was widely contested then, and it has fared even worse through history.

The Alien Friends Act expired by its own terms in 1800 without being used, reenacted, or replaced,[312] making it impossible to know how it would have been implemented or received by courts.[313] But it suffices to note that President Adams himself thought that the Act should be "give[n] . . . a strict

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President too much legislative and judicial power over 'dangerous' aliens, and that it ran afoul of the Bill of Rights" (footnote omitted)); Cleveland, *supra* note 41, at 92 n.638 ("[O]pponents argued that the enormous discretionary power the Act granted to the Executive violated the Constitution's careful separation of powers and the Article III command that the judicial power should be vested in the courts."); KANSTROOM, *supra* note 42, at 56 (describing the Act as "deeply controversial"); Fong Yue Ting v. United States, 149 U.S. 698, 747 (1893) (Field, J., dissenting) (noting that the Act was "severely denounced by many of [the country's] ablest statesmen and jurists as unconstitutional and barbarous").

308. Virginia Resolutions of 1798, *in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528, 528-31 (Jonathan Elliot ed., Washington, D.C., 2d ed. 1836) [hereinafter 4 DEBATES]; Kentucky Resolutions of 1798 and 1799, *in* 4 DEBATES, *supra*, at 540, 541-42.

309. Johnson v. Eisentrager, 339 U.S. 763, 774 n.6 (1950) ("James Madison was the author of the Virginia Resolutions . . . ."), *abrogated by* Rasul v. Bush, 542 U.S. 466 (2004).

310. Davies, *Recovering*, *supra* note 37, at 693-94.

311. Madison's Report on the Virginia Resolutions, *in* 4 DEBATES, *supra* note 308, at 546, 555, 559-60 (arguing that the Act violated the Constitution because it "unites legislative, judicial, and executive powers, in the hands of the President" and contravened "sacred . . . principles of . . . preventative justice" because, among other things, "[t]he ground of suspicion is to be judged of, not by any judicial authority, but by the executive magistrate alone").

312. KANSTROOM, *supra* note 42, at 60-62; SMITH, *supra* note 291, at 93; *see also* J. Gregory Sidak, *War, Liberty, and Enemy Aliens*, 67 N.Y.U. L. REV. 1402, 1406 (1992) (explaining that the Act "expired on June 25, 1800 . . . never having been enforced").

313. It is worth noting that even Adams, who favored using the Act in some instances, was skeptical that it would be well received by courts and expressed concern to Pickering that the "alien law . . . will upon trial be found inadequate to the object intended." Letter to T. Pickering, Secretary of State (Aug. 13, 1799), *in* 9 THE WORKS OF JOHN ADAMS 13, 14 (Boston, Little, Brown & Co. 1854).

construction,"[314] and neither the text of the temporary law nor the structure of its process suggests that it authorized the type of arrest at issue in *Abel*.[315] The Alien Friends Act was, moreover, the subject of significant dispute, the only federal statute of this type enacted during the Framing era, and said shortly thereafter to have "left no permanent traces in the constitutional jurisprudence of the country."[316] Given "this fuller view" of the circumstances surrounding the Act, "it seems doubtful the Act tells us a great deal" about expectations regarding arrest warrants for removal proceedings at that time,[317] particularly when compared to the widely used state expulsion laws of the time.

III. Implications

This Article aims to be primarily descriptive, focused on looking beneath the assertions in *Abel*. Given the pivotal role that *Abel*'s dictum has played in case law and modern immigration enforcement, however, the potential implications of the preceding Part merit a brief discussion. This Part therefore considers the interaction between the body of law discussed in Part II and the dictum in *Abel*, sketching out some potential ramifications for the modern immigration-enforcement regime in which these warrants are so prolific.

A. Implications for *Abel*

At a minimum, this account of Framing-era removal laws shows that *Abel* missed and, in some cases, misunderstood critical aspects of the history that

314. Letter to T. Pickering, Secretary of State (Oct. 16, 1798), *in* 8 THE WORKS OF JOHN ADAMS, *supra* note 313, at 606, 606-07, 607 n.1 (Boston, Little, Brown & Co. 1853) (rejecting Pickering's suggestion that he delegate this authority to other "heads of departments" in "cases as shall appear to require despatch [sic]" and concluding that "we ought to give the act a strict construction, and therefore doubt the propriety of delegating the authority").

315. In this respect, the language of the Act was markedly distinct from the language in the contemporaneously enacted Alien Enemy Act, which explicitly permitted alien enemies to be "apprehended, restrained, secured, and removed" at the President's direction. An Act Respecting Alien Enemies, ch. 66, § 1, 1 Stat. 577, 577 (1798) (codified as amended at 50 U.S.C. §§ 21-22); *see also supra* note 292 (quoting the Act); Lockington v. Smith, 15 F. Cas. 758, 760 (C.C.D. Pa. 1817) (No. 8,448) (interpreting the Act's language to vest the President with authority that was "unqualified" and "as unlimited as the legislature could make it").

316. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES bk. 3, ch. 27, § 1293 (Thomas M. Cooley ed., Boston, Little, Brown & Co. 4th ed. 1873).

317. Sessions v. Dimaya, 138 S. Ct. 1204, 1229-30 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (explaining that the Act was "widely condemned[,] . . . went unenforced, may have cost the Federalist Party its existence, and lapsed a mere two years after its enactment," and that, "[w]ith this fuller view, it seems doubtful the Act tells us a great deal about aliens' due process rights at the founding").

formed the basis for its conclusions. *Abel* found broad acceptance of arrests based on administrative warrants (or no warrants at all) in this context, relying largely on federal legislation enacted almost a century after the period often seen as critical for Fourth Amendment purposes and a contested, unused early federal law that authorized a different type of warrant. At the same time, it failed to consider any state removal laws, much less the civil removal regime described in Part II that was deeply woven into the fabric of early American law and rooted in English practice.[318] In so doing, *Abel* missed important evidence indicating that Framing-era Americans understood arrests for purposes of civil removal proceedings—including of foreigners and for removal beyond sovereign borders—to require warrants issued not by enforcement officers, but by entities with judicial power.[319]

Readers may wonder whether the state laws above are, in their own ways, distinguishable. After all, they may initially seem different in some respects than deportation laws today. For instance, the state laws authorized removal not just based on the person's status as an outsider (in some cases very clearly their status as a foreigner), but also based on their economic status or past convictions.[320] But many modern deportation provisions allow for removal after noncitizens have committed certain acts,[321] including the provision at issue in *Abel*.[322] In fact, federal law now, like state law then, contains grounds of deportability based on a person's lack of territorial rights in combination with their status as a public charge[323] or their past criminal history.[324] Others might seek to distinguish the state law provisions on the basis that they authorized expulsion from the sovereign or to the place from which the

318. *See supra* Part II.C; *cf.* Wilson v. Arkansas, 514 U.S. 927, 933 (1995) (finding principles interwoven into state law to be important in understanding the conception of reasonableness at the time of the Founding).

319. There may be evidence of other understandings with respect to types of removal-related arrests not addressed here—for example, arrests for exclusion or for postremoval order action—but the laws discussed offer a useful analog for deportation arrests of individuals residing in the United States today.

320. *See supra* notes 199-202 and accompanying text; *supra* Part II.C.2.

321. *See, e.g.*, 8 U.S.C. § 1227(a)(3)(A) (providing that a noncitizen who willfully fails to comply with change-of-address notification requirements is deportable); *id.* § 1227(a)(6)(A) (providing that a noncitizen who "has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation is deportable").

322. *See supra* note 14 (explaining that Abel was charged as deportable for failing to notify the Attorney General of his address in the United States).

323. 8 U.S.C. § 1227(a)(5) ("Any alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable.").

324. *Id.* § 1227(a)(2) (providing for the deportability of noncitizens who have been convicted of various types of criminal offenses).

foreigner came, not necessarily to their country of origin (which is often where people are deported to today). But these expulsion provisions are consistent with the established concept of deportation[325] as well as modern deportation law.[326]

Still others may think that the arrests authorized by these state laws seem different because the arrest was intended primarily to compel a litigant's appearance for removal proceedings, not for preservation of public safety—an often-touted rationale for immigration arrests today.[327] But while community safety may be one basis for pre-removal order detention, that is only one justification today; the other is ensuring that a noncitizen will appear before the court for purposes of participating in the removal proceedings and resolving the case.[328] In the end, the real basis of distinction may boil down to something more visceral than legal: Stripped of rhetoric about dangerousness and the need for militaristic enforcement, these state laws just don't always feel like modern deportation laws.[329]

Ultimately, this Article does not claim that the history discussed above compels a particular answer to the percolating constitutional question discussed at the outset. *Abel* offered an easy and uncomplicated historical account of the early executive power to arrest and expel foreigners residing in the United States, but that account was incomplete and, in some important respects, is contradicted by a more robust understanding of the relevant history. In fact, the question of what Framing-era authorities would have had to say about arrests for removal from an individual's community by federal

325. *See supra* note 186 (collecting authorities describing deportation in these terms).

326. 8 U.S.C. § 1231(b) (authorizing the government to remove a person to a range of countries, including the country from which they came to the United States).

327. *See, e.g.*, *Detainer Non-cooperation Threatens Public Safety*, ICE (updated Nov. 30, 2020), https://perma.cc/594W-VKXE; Press Release, U.S. Dep't of Homeland Sec., Acting Secretary Wolf Addresses Dangerous Sanctuary Policies in North Carolina with Law Enforcement and State Officials (Nov. 26, 2019), https://perma.cc/D5QT-JS5R.

328. *See* Guerra, 24 I. & N. Dec. 37, 40 (B.I.A. 2006) (finding detention justified by either flight risk or dangerousness); Demore v. Kim, 538 U.S. 510, 513 (2003) (finding that a justifiable concern about noncitizens' "fail[ure] to appear for their removal hearings" was a legitimate basis for requiring that they "be detained for the brief period necessary for their removal proceedings"); 8 C.F.R. §§ 236.1(c)(8), 1236.1(c)(8) (2020).

329. Kunal M. Parker and Hidetaka Hirota, among others, have written about the evolution of how the Massachusetts public-charge laws in particular came to be used as nativist sentiment grew in Massachusetts beginning in the 1830s, at a time when the rhetoric surrounding the law made it sound much closer to the discussion of deportation laws today. *See* Parker, *State, Citizenship, and Territory*, *supra* note 42, at 611, 627 (describing the "renewed interest in the 1794 poor law" with the focus on "immigrant poor alone" in the 1830s and 1840s and explaining that, especially at the height of nativism in Massachusetts politics, "the state's treatment of the immigrant poor became grotesque in its brutality"); HIROTA, *supra* note 42, at 52-54 (similar).

officers—particularly when the arrestee may be a citizen or substantially connected to the sovereign—is more complicated. Other scholars have explored some of the subsidiary questions,[330] and, of course, there are other aspects of Framing-era history (which may be relevant to other types of removal arrests) that are yet to be explored.[331] But regardless of the answers to any of these questions it is now clear that *Abel* does not answer the larger constitutional question. And—most immediately and critically—this vitiates the claim that was discussed at the outset and that has proven so successful with lower courts: that because of *Abel*, DHS-issued warrants resolve any Fourth Amendment concerns that otherwise exist when state and local officers make civil immigration arrests.

B. Broader Implications

This Article's claim is in some ways narrow, but identifying the flawed foundation of *Abel*'s dictum has important implications today. First, discrediting this aspect of *Abel* allows courts to consider anew the constitutional question: whether an arrest for removal proceedings is consistent with the Fourth Amendment if it is based only on a law-enforcement officer's probable cause determination. Lower courts now evaluating the validity of DHS-issued warrants should find that *Abel*'s dictum—

330. As previously discussed, some have questioned whether at least some individuals without any form of legal status or sufficient connections were and are protected by the Fourth Amendment. *See supra* note 68 and accompanying text (discussing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990), and the view of four justices that the Fourth Amendment's protections extend only "to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community"). It is not clear whether or how that would apply in this context given that, at the warrant-of-arrest stage, it has not been determined whether the subject of the warrant is within that class of persons. *See supra* Part I.B. In any event, scholars have argued that these assertions are unfounded and that all noncitizens are entitled to the Fourth Amendment's protections. *See, e.g.*, Neuman, *supra* note 68, at 911, 914, 974-75 (arguing that the "municipal law approach"—as opposed to the social-contract approach espoused in *Verdugo-Urquidez*'s dictum—prevailed in the Framing era and that, therefore, noncitizens were protected by the Fourth Amendment); Joseph Ricchezza, Note, *Are Undocumented Aliens "People" Persons Within the Context of the Fourth Amendment?*, 5 GEO. IMMIGR. L.J. 475, 503-04 (1991) (arguing that the Fourth Amendment does protect undocumented noncitizens because, among other reasons, "[t]he history of the Fourth Amendment clearly shows that the Framers' intent was not to hinder the protection of any individual based on his or her status, but rather to bring to a halt arbitrarily imposed governmental oppression").

331. *See, e.g.*, *supra* notes 35, 43. Another question may be whether, even if the relevant sovereigns *opted* to use warrants in the context of arrests for removal proceedings against foreigners who were already physically within the United States, they could have lawfully used other procedures if they so chose.

which was never binding—no longer persuades.[332] Second, when courts consider this question, they can do so based on a more robust historical record that supplies a fuller picture of the law that is often so pivotal in contemporary analyses. Third, even if courts choose to see *Abel* as offering one valid account of arrest in the context of removal in our nation's early history, they should recognize that the laws discussed above show other norms for arrest in the deportation context that were actually used and that were adopted outside the seeming brink of war.

If courts find that this account indicates that warrants for purposes of removal proceedings should be issued by a neutral magistrate—because this history either suggests an answer or forecloses a "conclusive" one and contemporary considerations compel neutral warrant issuers[333]—that finding could have major ramifications for federal immigration enforcement. It is thus worth briefly discussing what would happen if courts reconsidering this issue were to conclude that an arrest based only on DHS-issued warrants, or no warrant at all, violates the Fourth Amendment.

If courts were to find that federal immigration officers have to obtain warrants from a neutral magistrate prior to some or all arrests for removal proceedings, that would not mean an end to immigration enforcement. Removal and arrests for removal proceedings could and surely would continue. ICE could simply use a summons-like document to compel noncitizens to appear in immigration court. Indeed, it already does this by issuing a "notice to appear" in cases in which it does not or cannot detain the individual during their removal proceedings.[334] ICE could also continue to make arrests. But finding that ICE may not, consistent with the Constitution, make its own probable cause determinations without any neutral review

332. *See* Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 548 (2013) ("[W]e have written that we are not necessarily bound by dicta should more complete argument demonstrate that the dicta is not correct."); Cent. Green Co. v. United States, 531 U.S. 425, 431 (2001) (noting that "dicta 'may be followed if sufficiently persuasive' but are not binding" (quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 627 (1935))); Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231, 234-35 (1959) (disregarding language in multiple prior Supreme Court opinions as "dicta" which were "neither binding nor persuasive").

333. *See* Virginia v. Moore, 553 U.S. 164, 168-71 (2008) (explaining that if history does not "provide[ ] a conclusive answer," the Supreme Court will balance "'the degree to which [the arrest] intrudes upon an individual's privacy'" and "'the degree to which [the arrest] is needed for the promotion of legitimate governmental interests'" (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999))).

334. 8 U.S.C. § 1229(a)(1)(G)(i) (providing for the issuance of a "notice to appear," which specifies, among other things, "[t]he time and place at which the [removal] proceedings will be held"); *see also* Pereira v. Sessions, 138 S. Ct. 2105, 2114-15 (2018) (explaining that notices to appear play an essential role in facilitating noncitizens' appearance at their removal proceedings).

would create a significant structural check. It would mean that ICE officers would have to demonstrate probable cause to a neutral magistrate instead of allowing the agency to make that determination.[335]

How much the interposition of a neutral magistrate would mean, as a practical matter, would depend on implementation. Scholars who have drawn upon modern case law to argue for impartial pre- and postarrest review of probable cause in this context have proposed different solutions. Michael Kagan, for example, has suggested that immigration judges—administrative "judicial" officers within the Department of Justice—could play that role, as they are part of a different agency that is, importantly, not simultaneously charged with enforcement.[336] The Ninth Circuit, in *Gonzalez*, seemed inclined to agree.[337] More recently, though, Mary Holper has argued that immigration judges lack the requisite neutrality and independence and that this responsibility should be assigned to federal magistrate judges.[338] Depending on the outcome of the open issues in *Gonzalez*, that litigation may provide the first real insight into this question and guide future thinking in this area.

This Article takes no position on what type of decisionmaker is required or advisable in this context, but it offers two parting thoughts. First, requiring ICE officers to establish some level of investigation and cause before *any* nonprosecutorial decisionmaker seems like a significant step in protecting the right of citizens and noncitizens alike.[339] Second, introducing a neutral and detached decisionmaker into this aspect of the process would be an important step toward not only protecting individual rights, but also checking the largely unrestrained arrest discretion now exercised by immigration-enforcement

335. This would be a significant improvement even if this neutral probable cause review were conducted promptly after an arrest rather than through the issuance of a warrant ex ante.

336. Kagan, *supra* note 22, at 168-69.

337. Gonzalez v. U.S. ICE, 975 F.3d 788, 825-26 (9th Cir. 2020) (suggesting but not deciding that immigration judges might be an appropriate adjudicator to make probable cause determinations in the deportation-arrest context and remanding to the district court to consider that issue, among others).

338. Holper, *supra* note 36, at 1278-82; *see also* Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1665, 1667 (2010) (listing the "[p]oliticization of EOIR [Executive Office for Immigration Review]" and "[t]hreats to [d]ecisonal [i]ndependence" as among the problems with the current EOIR adjudication process (emphasis omitted)).

339. *See supra* note 66 (collecting evidence showing that ICE has erroneously found probable cause to detain thousands of United States citizens); *supra* note 67 (describing harm to U.S. citizens who have been erroneously detained).

officers—discretion that has proven particularly ill placed,[340] improperly exercised,[341] and consequential[342] of late.

Conclusion

The law-enforcement-issued arrest warrants that play such an important role in the current immigration-enforcement regime do not just sound anomalous to the modern ear. The account above shows that they *were* anomalous in important and widely used removal laws in the Framing era. Ultimately, this Article provides further support for the chorus of voices arguing that a neutral magistrate is necessary and required to check federal officers who use their arrest authority to bring individuals—citizens or not—into the adversarial, carceral, and increasingly politicized removal process.

340. *See, e.g.*, John Burnett, *Immigration Advocates Warn ICE Is Retaliating for Activism*, NPR (Mar. 16, 2018, 10:29 AM ET), https://perma.cc/DM76-7QUW; Erik Ortiz, *"Sanctuary" Cities Targeted by ICE in Immigration Raids as Nearly 500 Arrested*, NBC NEWS (updated Sept. 29, 2017, 6:58 AM CDT), https://perma.cc/RAK5-8CMZ; *see supra* note 77 (describing misconduct in the ICE warrant-issuing process).

341. *See supra* note 66.

342. *See supra* note 67.