

**CAN YOU HANDLE THE TRUTH? THE FRAMERS  
PRESERVED COMMON-LAW CRIMINAL ARREST  
AND SEARCH RULES IN “DUE PROCESS OF  
LAW”—“FOURTH AMENDMENT  
REASONABLENESS” IS ONLY A MODERN,  
DESTRUCTIVE, JUDICIAL MYTH**

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## I. INTRODUCTION

Should Fourth Amendment decisions be based on history? And, how well does the Supreme Court do in setting out Fourth Amendment history? These questions—obviously prompted by “originalist” claims in some recent Supreme Court search-and-seizure rulings—were posed to the symposium panel on Fourth Amendment history. The normative question whether decisions about arrest or search law should be based on history is pertinent, however, only if Fourth Amendment history can be accurately recovered—and then only if the authentic historical doctrine connects up sufficiently with modern conceptions.

The authentic history, including the original understanding of the constitutional protections regarding arrests and searches, can be substantially recovered. That is so because the historical record presents a rich lode of evidence, and it is fairly straightforward. Indeed, substantial

progress has been made in recovering the Framers' understanding of arrest and search doctrine.<sup>1</sup>

When authentic historical arrest and search doctrine is recovered, however, it turns out to be quite foreign to modern doctrine and conceptions—so much so that it will rarely be feasible to resolve a specific issue posed in modern search-and-seizure doctrine by looking to the historical doctrine. The reason for that disconnect is that American judges, especially the justices of the U.S. Supreme Court, have not actually made a serious effort to conform to the historical understandings during the centuries since the framing. Instead, they have drastically revised and relaxed arrest and search standards.

Notwithstanding recent originalist rhetoric, the actual course of search-and-seizure decisions reveals that the justices of the Supreme Court have made arrest and search decisions on the basis of the majority's ideological predilections and then have sometimes advanced or concocted historical claims to justify their decisions.<sup>2</sup> The justices, however, have invoked historical claims only intermittently and selectively.<sup>3</sup>

In fact, the Supreme Court's version of "originalism" has usually amounted to an exercise in creative textualism rather than genuine historical inquiry. The justices selectively parse the words of a constitutional

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1. See, e.g., Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 551-52 (1999) [hereinafter Davies, *Original Fourth*] (documenting that the Fourth Amendment was originally understood only to set warrant standards, but not to create any generalized reasonableness standard for warrantless arrests or searches); 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. City of Lago Vista*, 37 WAKE FOREST L. REV. 239, 243-47 (2002) [hereinafter Davies, *Arrest*] (contrasting actual framing-era arrest law to the historical claims in recent Supreme Court opinions); Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of "Due Process of Law,"* 77 MISS. L.J. 1, 5 (2007) [hereinafter Davies, *Correcting History*] (documenting that the law of arrest was a salient component of "law of the land" and "due process of law" provisions, rather than of the Fourth Amendment); Thomas Y. Davies, *How the Post-Framing Adoption of the Bare-Probable-Cause Standard Drastically Expanded Government Arrest and Search Power*, 73 J.L. & CONTEMP. PROBS. 1 (2010) [hereinafter Davies, *Probable Cause*] (documenting the drastic relaxation of common-law arrest standards that occurred when nineteenth-century courts adopted probable cause of crime as the standard for criminal arrests and warrants); see also Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment "Search-and-Seizure" Doctrine*, 100 J. CRIM. L. & CRIMINOLOGY 933 (2010) [hereinafter Davies, *Search and Seizure Century*] (tracing the development and subsequent destruction of Fourth Amendment protections by the Supreme Court over the last century). I hasten to add that I make no claim my historical research is definitive. Authentic history is a matter of evidence, and interpretations must always be open to new evidence, revised analyses, or corrections. Claims that are not rooted in significant evidence, however, should not be confused with history.

2. This assessment, of course, is merely a variant on the basic insight of the Legal Realists. For a still classic example of the Legal Realist perspective on the ideological character of decision making in the Supreme Court, see generally FRED RODELL, *NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955* (1955).

3. See generally Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 895-96 (2002); Davies, *Arrest*, *supra* note 1, at 252-62.

provision (sometimes using historical dictionaries) and announce the so-called “original public meaning” of a provision.<sup>4</sup> That approach, however, ignores the actual historical concerns that animated the Framers, as well as the doctrinal conceptions and traditions that shaped the Framers’ choice of language. Indeed, most of the constitutional provisions that relate to criminal procedure did not involve creative drafting; rather, they were framed to reiterate and preserve already settled understandings of common-law legal rights by invoking traditional formulations of those rights.<sup>5</sup> As a result, textual “originalism” does not hew to historical meaning; instead, it allows the justices to invent novel “original” meanings that the Framers would never have imagined, let alone have endorsed.<sup>6</sup>

In the case of the Fourth Amendment, the creative textualism has consisted of assigning a historically false content to the reference to the

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4. In normal usage, “original meaning” would connote the way the persons involved in the adoption of a constitutional provision understood that text at the time of its adoption. But the justices and commentators who identify themselves as originalists do not seek out the actual historical meaning of a provision, but instead parse the language of the text with a historical dictionary to arrive at what they term the original public meaning. In practice, the creative textualism that can be accomplished by this method allows the originalist justices and commentators to impose their own preferred meaning on the text while pretending to adhere to the original meaning—even though their version bears little similarity to the historical meaning. See Thomas Y. Davies, *Selective Originalism: Sorting Out Which Aspects of Giles’s Forfeiture Exception to Confrontation Were or Were Not “Established at the Time of the Founding,”* 13 LEWIS & CLARK L. REV. 605, 670-72 (2009) [hereinafter Davies, *Selective Originalism*].

5. See generally SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS (Richard L. Perry & John C. Cooper eds., 1959) [hereinafter SOURCES] (tracing the Anglo-American tradition of rights from Magna Carta to the American Bill of Rights). The most obvious example is the Eighth Amendment. That provision, which was also included in several state declarations of right, was taken verbatim from the English Bill of Rights of 1689. See *id.* at 235.

6. The defects and deficiencies of textual originalism are also evident in recent Supreme Court opinions construing the Sixth Amendment Confrontation Clause. In *Crawford v. Washington*, 541 U.S. 36 (2004), Justice Scalia’s majority opinion made two assertions about framing-era law: (1) that the use of the term “witnesses” in the Sixth Amendment demonstrated that “casual” hearsay would have been admissible in criminal trials without regard to cross-examination or confrontation, but (2) that “testimonial hearsay” such as sworn Marian witness examinations taken at the time of a defendant’s arrest, would have been inadmissible at trial in the absence of the defendant’s having had an opportunity for cross-examination. *Id.* at 50-51, 53-54. These claims, however, lead to results that are opposite to the actual historical doctrine. Sworn Marian witness examinations of witnesses who had become genuinely unavailable prior to trial were admissible in evidence regardless of an opportunity for cross-examination, but unsworn informal hearsay was barred by a strict doctrinal understanding that hearsay—which was defined to include any unsworn statement—could not constitute evidence. With the lone exception of dying declarations, which were regarded as having been made under the functional equivalent of an oath, the various modern exceptions to the ban on hearsay were all invented after the framing by judges who disregarded the earlier, stronger understanding of the confrontation right. See Davies, *Selective Originalism*, *supra* note 4, at 664-66; Thomas Y. Davies, *Not “the Framers’ Design”*: *How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford-Davis “Testimonial” Formulation of the Scope of the Original Confrontation Right*, 15 BROOK. J.L. & POLICY 349 *passim* (2007) [hereinafter Davies, *Not Framers’ Design*]; 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, 189-200 (2005) [hereinafter Davies, *Crawford*].

right against “unreasonable searches and seizures” in the opening clause of that provision:

*The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*<sup>7</sup>

The first clause is now often referred to as “the Reasonableness Clause,” while the second clause (not italicized) is now referred to as “the Warrant Clause.”<sup>8</sup> Recent Supreme Court opinions sometimes quote only the Reasonableness Clause as though that constitutes the Fourth Amendment.<sup>9</sup>

Actually, however, the second clause originally set out the operative content of the provision. Indeed, little attention was given to the phrase “unreasonable searches and seizures” during the century following the framing. During that period, as during the framing era itself, the Fourth Amendment was simply regarded as a ban against “general warrants”—that is, it forbade warrants that were unparticularized as to the place or things to be searched for or that lacked specific factual grounds justifying the search.<sup>10</sup> Thus, the standards for valid warrants set out in the Warrant Clause were understood to be the essence of the provision. During the late nineteenth and twentieth centuries, however, Supreme Court opinions began to treat the phrase “unreasonable searches and seizures” as though it carried a broader content than the warrant standards set out in the second Warrant Clause.

Initially, justices who sought to protect business records seized on that phrase to declare that any government intrusion that was “unreasonable” (by their lights) was unconstitutional, even if it satisfied the requisites for a valid warrant set out in the Warrant Clause.<sup>11</sup> More recently, justices with a more statist bent have seized on the same phrase to declare that any government intrusion that is “reasonable” in the circumstances (again by their lights) is constitutional.<sup>12</sup> The beauty of “Fourth Amendment reasonableness”—at least from the justices’ points of view—is that it can carry whatever content the justices choose to give it.

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7. U.S. CONST. amend. IV (emphasis added).

8. See Davies, *Original Fourth*, *supra* note 1, at 557-58.

9. See *id.* at 558 n.11.

10. See *id.* at 723-24. There was some variation in the use of the term general warrant. It was sometimes used specifically to mean a warrant that lacked particularity, and sometimes used more broadly to mean a warrant that lacked either particularity or an adequate showing of cause to arrest or search. See *id.* at 558 n.12. This inconsistency in usage may have played a role in the appearance of statements of a right regarding “searches and seizures.” See *infra* notes 244-45 and accompanying text. For convenience, however, I use the term general warrant in the broader sense in this article.

11. See *infra* notes 336-52 and accompanying text.

12. See *infra* notes 401-45 and accompanying text.

Of course, the justices have been constrained by their awareness that the institutional standing of the Court would be eroded if it were obvious that they were simply announcing their personal ideological predilections in the guise of law, so they have sometimes purported to look to framing-era common-law doctrine as the standard for assessing the reasonableness of arrests and searches.<sup>13</sup> On those occasions, however, they have frequently misstated the historical doctrine in ways that fit the desired result. In sum, the “history” announced in opinions has been shaped by the desired result, not the other way around.<sup>14</sup>

Indeed, there is ample evidence that Fourth Amendment reasonableness is only a modern judicial myth. The historical record shows that the Framers did not write the Fourth Amendment to control criminal arrest and search standards; rather, the primary aim for that Amendment was to prohibit the use of general warrants for revenue searches of houses for untaxed goods. The historical record shows that the state and federal Framers actually sought to preserve the common-law standards for criminal arrests and related searches in other constitutional provisions that required compliance with “the law of the land,” or more precisely, with the requisites of “due process of law.”

#### A. Overview

This article begins by identifying the salient differences between the authentic history and the conventional history of the subject now called “search and seizure”—a broad, modern label for arrests, searches, and other government intrusions that itself reflects the influence of the Supreme Court’s Fourth Amendment mythology.<sup>15</sup>

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13. See, e.g., *infra* notes 405-07 and accompanying text.

14. Professor Reid has nicely summed up the typical judicial use of history:

Today a judge writing a decision in, let us suppose, a native American land case, does not say to his clerk, “What rule does history support?” Rather, the judge tells her, “We’re going to adopt such-and-such rule. Find me some history to support it.” It will not matter to the judge or his colleagues on the court the quality of the historical evidence that she finds.

John Phillip Reid, *The Jurisprudence of Liberty: The Ancient Constitution in the Legal Historiography of the Seventeenth and Eighteenth Centuries*, in *THE ROOTS OF LIBERTY: MAGNA CARTA, ANCIENT CONSTITUTION, AND THE ANGLO-AMERICAN TRADITION OF RULE OF LAW* 147, 228 (Ellis Sandoz ed., 1993).

15. Search warrants for revenue enforcement commanded excise or customs officers to search for and seize untaxed goods, and the Wilkesite search warrants ordered king’s messengers to seize papers that were evidence of seditious libel and then also used that term to command the apprehension of the person who possessed the papers. See Davies, *Original Fourth*, *supra* note 1, at 697. Although there were some instances in which “seize” was used in the context of a warrantless arrest, *see id.* at 697 n.362, the far more common synonyms for arrest were terms such as “apprehend,” “take,” or “imprison.” See, e.g., *infra* note 71 (imprison), note 94 (take), note 125 (apprehend), text accompanying note 148 (take, imprison), note 237 (apprehend), text accompanying notes 241-42 (take, imprison), note 327 (apprehend).

Part I sketches out the salient features of the conventional search-and-seizure history of Fourth Amendment reasonableness and identifies some of the salient shortcomings of that account.

Part II discusses the authentic original understanding of constitutional arrest and search standards. It first describes the *common-law* rules for criminal arrests and searches made incident to such arrests and further explains why those rules were understood to be settled and noncontroversial components of the requisites of “due process of law,” which the federal Framers undertook to preserve in the Fifth Amendment. It then describes how the Fourth Amendment was primarily a response to the lack of settled limits on *statutory* authority for search warrants for revenue searches of houses. This part concludes by stepping back and extracting three salient features of the Framers’ design for arrest and search authority:

- (1) Framing-era doctrine structured arrest and search authority according to an assessment of “necessity”; in particular, broad warrantless arrest authority was permitted only for the most serious crimes which demanded an immediate response, and there was no form of criminal warrantless search other than a search incident to a lawful arrest.
- (2) Framing-era doctrine provided protections against arbitrary arrests and searches either in the form of prior judicial assessment of the need for the intrusion in the warrant process or by exposing the person who initiated a warrantless arrest and search to personal trespass liability. In some instances involving house searches, framing-era doctrine imposed both forms of protection.
- (3) Framing-era doctrine did not impose the same degree of protection on all premises; rather, protection was focused on the domestic security of the house and personal papers, but relaxed with regard to commercial premises.

Part III then traces some of the important episodes in which Supreme Court justices destroyed the Framers’ design for controlling arrest and search authority and erected modern search-and-seizure doctrine in its place. It begins by tracing how nineteenth-century judges jettisoned the original understanding of due process of law and then describes how Supreme Court justices subsequently reinvented criminal procedure under the rubric of Fourth Amendment reasonableness. It also traces how the justices and commentators formulated the conventional account of Fourth Amendment history around their formulation of an overarching reasonableness standard, and it then describes how the right-of-center majority that has dominated the Court for the last four decades has used “reasonableness” to justify the evisceration of constitutional limits on government arrest and search authority.

Finally, a brief conclusion argues that current Fourth Amendment reasonableness doctrine has effectively allowed the justices to repudiate each of the three salient features of the Framers' design for arrest and search authority. Thus, it argues that any attempt to rehabilitate constitutional arrest and search protections should begin with the rejection of the historically false concept of Fourth Amendment reasonableness. It also expresses doubt, however, that the civil right against arbitrary arrest and search will be restored. Rather, the authentic history of arrest and search doctrine is the story of the judicial destruction of an earlier conception of a citizen's right to be secure.

## II. CONVENTIONAL (SUPREME COURT) FOURTH AMENDMENT (SEARCH-AND-SEIZURE) HISTORY

The conventional account of Fourth Amendment history was initially sketched out in the 1886 Supreme Court decision *Boyd v. United States*,<sup>16</sup> and the justices subsequently announced the modern conception of Fourth Amendment reasonableness in the 1925 decision *Carroll v. United States*.<sup>17</sup> Political scientist Nelson B. Lasson then published a more elaborate treatment of the historical origins of the Fourth Amendment and its subsequent development in Supreme Court opinions in 1937.<sup>18</sup> More recently, historian William J. Cuddihy has compiled a more elaborate treatment of the Amendment's origins that essentially enlarges upon Lasson's account but stops with the ratification of the Bill of Rights in 1791.<sup>19</sup>

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16. See *Boyd v. United States*, 116 U.S. 666 (1886) (discussed *infra* notes 326-52 and accompanying text).

17. See *Carroll v. United States*, 267 U.S. 132 (1925) (discussed *infra* notes 255-386 and accompanying text).

18. See NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 100-03 (1937). Lasson's monograph was his dissertation: Nelson B. Lasson, *The History and Development of the Fourth Amendment* (1934) (Ph.D. dissertation, Political Science, Johns Hopkins University); see also Davies, *Correcting History*, *supra* note 1, at 27 n.45; JACOB W. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION* (1966) (reiterating Lasson's treatment of the origins of the Fourth Amendment and updating the discussion of Supreme Court rulings).

19. See WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 602-1791 (2009) (publishing William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* (1990) (Ph.D. dissertation, History, Claremont Graduate School)). The general deficiencies in Cuddihy's analysis are discussed *infra* note 395; see also *infra* notes 189, 207, 214, 231, 235, 384 (discussing Cuddihy's shortcomings). Some aspects of the conventional history have also recently been reiterated in Thomas K. Clancy, *The Framers' Intent: John Adams, his Era, and the Fourth Amendment*, 86 IND. L.J. (forthcoming summer 2011) (available at SSRN: <http://ssrn.com/abstract=158583>, posted April 6, 2010). Salient deficiencies in Clancy's analysis are discussed *infra* note 225.



A. *The Salient Claims of the Conventional Account*

According to the conventional account, the original content of the Fourth Amendment was shaped by several salient pre-framing legal cases.<sup>20</sup> In particular, the American state and federal Framers remembered the strong words in which Lord Camden and other English judges had condemned the illegality of unparticularized general warrants during trespass cases brought in London during the early 1760s against king's messengers who had searched the houses and seized the papers of the opposition politician John Wilkes and several of his supporters.<sup>21</sup> Likewise, they remembered the stirring, but unsuccessful, argument that James Otis had made during the 1761 *Writs of Assistance Case* in Boston against the legality of the general writ of assistance—an extreme form of general warrant which provided customs officers with standing authority to make discretionary searches of houses in the American colonies.<sup>22</sup>

Upon gaining independence, the Framers in several of the states then ensured that no such abuses would occur in the future by including bans against general warrants when they adopted declarations of rights.<sup>23</sup> Although the earliest of those provisions simply banned general warrants, the 1776 Pennsylvania provision went farther by including an opening statement of a broader right to be “free from search or seizure,” and the 1780 Massachusetts provision rephrased that as a right against “unreasonable searches and seizures.”<sup>24</sup> Subsequently, during the debates over ratification of the proposed Constitution, Anti-Federalists who championed the need for a federal bill of rights then embraced the Massachusetts language by calling for the adoption of a broad ban against “unreasonable searches and seizures.”<sup>25</sup>

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20. See, e.g., William Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 396-97 (1995) (asserting that the origin of the Fourth Amendment can be found in “three cases”).

21. See, e.g., LASSON, *supra* note 18, at 43-50. These cases are collectively referred to herein as the “Wilkesite cases.” See Davies, *Original Fourth*, *supra* note 1, at 562-65 (giving a brief overview of the Wilkesite cases, noting the delayed publication of the case reports themselves, and identifying the limited information about those cases that was actually available to framing-era Americans).

22. As used in the North American colonies, a writ of assistance conferred standing search authority on the customs officer to whom it was issued to search any place, including dwelling houses, in which the officer suspected untaxed goods might be hidden. See, e.g., LASSON, *supra* note 18, at 53-55. English courts drew a distinction between writs of assistance and search warrants, but there is no evidence that the American colonists or Framers did. See Davies, *Original Fourth*, *supra* note 1, at 561 n.19.

23. See, e.g., LASSON, *supra* note 18, at 79-82.

24. See, e.g., *id.* at 81-82; CUDDIHY, *supra* note 19, at 605-07.

25. See, e.g., LASSON, *supra* note 18, at 92-96; CUDDIHY, *supra* note 19, at 676-77; see also Akhil R. Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53, 67, n.54 (1996) (describing Anti-Federalist statements as “vivid examples” of a “standalone reasonableness requirement”). But see *infra* note 234 and accompanying text (noting that Anti-Federalist writers appear to have used the phrase “unreasonable searches and seizures” interchangeably with “unreasonable warrants”).

In response to these calls, James Madison submitted a proposed provision for what would become the Fourth Amendment.<sup>26</sup> After noting the “rights of the people to be secured . . . from all unreasonable searches and seizures,” Madison’s single-clause proposal then simply condemned the use of unfounded or unparticularized general warrants.<sup>27</sup> But when this single-clause provision was considered in the full House of Representatives, it was objected that this did not go far enough, and a motion was made to divide the text into two clauses so as to create a broad reasonableness standard.<sup>28</sup> Although that motion was voted down, the change was surreptitiously made anyway by the committee that prepared the proposed amendments for transmission to the Senate, and it was ultimately approved by both houses of Congress when the Bill of Rights was agreed to.<sup>29</sup> As a result, the text was divided into two clauses for the purpose of converting the statement of a right against unreasonable searches and seizures into a free-standing, across-the-board reasonableness standard for assessing all government searches or arrests, including those made without warrants.<sup>30</sup>

### B. *The Shortcomings of the Conventional Commentaries*

Although this conventional account has been frequently repeated, it is actually chock-full of errors, anomalies, and incongruities. Putting aside the patently bizarre story that the text of the proposed Fourth Amendment was changed surreptitiously (it was not),<sup>31</sup> the fundamental shortcoming of the conventional account is that it does not explain why the Framers would have adopted a standard as vague as reasonableness, what such a standard would have accomplished beyond banning general warrants, or where the idea for the supposed concept of a broad reasonableness standard would have come from.

Indeed, the most significant feature of the conventional commentaries is that none of them have ever identified any evidence of a broad reasonableness standard regarding arrests or searches in the historical record—not in pre-framing-era arrest or search doctrine,<sup>32</sup> not in the

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26. See, e.g., LASSON, *supra* note 18, at 97-100.

27. See, e.g., *id.* at 100, n.77. The conventional commentators have usually concluded that Madison’s proposed text addressed only general warrants. See Davies, *Original Fourth*, *supra* note 1, at 697-99, n.434; Clancy, *supra* note 19, at 87.

28. See, e.g., LASSON, *supra* note 17, at 97-100, n.77.

29. See, e.g., LASSON, *supra* note 18, at 101-03.

30. See, e.g., *id.* at 103; LANDYNSKI, *supra* note 18, at 41-43; see also Davies, *Original Fourth*, *supra* note 1, at 719 n.489 (summarizing the views expressed in Akhil R. Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994), and CUDDIHY, *supra* note 19).

31. See *infra* notes 271, 273 and accompanying text.

32. See Davies, *Original Fourth*, *supra* note 1, at 591-92.

Wilkesite cases,<sup>33</sup> not in the legislative history of the framing of the state bans against general warrants,<sup>34</sup> not in the actual controversies that preceded the framing of the Fourth Amendment,<sup>35</sup> and not even in the cases and commentaries that appeared during the aftermath of the framing.<sup>36</sup>

Additionally, the conventional account implicitly but implausibly charges the Framers with incompetent drafting. As commentators have frequently noted, the text of the Fourth Amendment now seems to be “brief, vague, general, [and] unilluminating.”<sup>37</sup> The text plainly does not provide any criteria for assessing the reasonableness of a search or seizure beyond the warrant standards set out so precisely in the second clause. Indeed, the two-clause text of the Amendment does not even indicate whether or when warrants that comply with the standards set out in the second clause would be necessary for the reasonable searches or seizures supposedly commanded by the first clause. It is implausible on its face that the Framers would have been content with such a patently deficient provision.

But the conventional histories have overlooked an alternative explanation for the seeming deficiencies of the text—namely, that the text now seems inadequate only because modern Supreme Court rulings have misconstrued the Fourth Amendment to address more than it was actually intended to address. The fact that Madison’s proposed text only banned general warrants was no fluke. Rather, the historical record indicates that the Fourth Amendment was not intended to do anything more than ban too-loose, general warrants.<sup>38</sup> Indeed, if one actually reconstructs framing-era

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33. *See id.* at 592-94 (noting, in part, that Professor Amar purported to have found such a reference in one of the Wilkesite cases, but did so only by selectively editing out a passage that refuted the claim); *see also infra* note 406 (discussing an similar unfounded claim by Justice Scalia).

34. *See id.* at 595-96.

35. *See id.* at 596-600, 609-11.

36. *See id.* at 611-19; *see also infra* note 328.

37. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 353-54 (1974). Although the conventional accounts certainly imply that the Framers were careless or incompetent drafters, they stop short of saying so explicitly. Lasson did not grapple with the seeming ambiguities of the text, but simply jumped from the framing to a discussion of modern Supreme Court rulings. *See* LASSON, *supra* note 18, at 106-12. Landynski briefly noted that the text had the “the virtue of brevity and the vice of ambiguity,” but did not attempt to explain why the Framers left the text in that state. LANDYNSKI, *supra* note 18, at 42-48. Cuddihy cut off his discussion with the ratification in 1791 and did not research the application of the text or the interpretation of the text during the decades that followed the framing; thus he apparently was unaware of the virtual absence of any discussion of a concept of “unreasonable” searches during that period and did not address the modern debate. *Cf.*, CUDDIHY, *supra* note 19, at 765-72.

38. Several previous commentaries have concluded that the Fourth Amendment only banned general warrants, but erroneously inferred that this meant that the Framers did not intend to impose any constitutional limits on warrantless arrests and searches. *See, e.g.*, TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION: SEARCH, SEIZURE, AND SURVEILLANCE AND FAIR TRIAL AND FREE PRESS* 19-46 (1969); Gerald V. Bradley, *The Constitutional Theory of the Fourth Amendment*, 38 DEPAUL L. REV. 817, 833-55 (1989); David E. Steinberg, *The Original Understanding of Unreasonable Searches and Seizures*, 56 FLA. L. REV. 1051 (2004). The principal deficiency that these commentaries share (apart from a variety of sometimes significant historical errors and distortions) is that they erroneously assumed that the Fourth Amendment was the *only* constitutional provision that addressed

arrest and search doctrine, a crucial step which the conventional commentaries omitted, it is patent that there was neither a need for—nor even room for—any over-arching reasonableness standard.

The conventional commentaries are fundamentally flawed because they never asked whether there actually was historical evidence of a broad reasonableness standard for arrests and searches. Instead, they merely undertook to embellish the historical account that the Supreme Court had already sketched out. As a result, the conventional commentaries did not focus on the framing-era materials that most directly illuminate the actual original understanding, but instead undertook to describe the “origins” of the Fourth Amendment in earlier developments.

Unlike original understanding, however, origins is a rather mushy, over-inclusive concept that overemphasizes earlier events at the expense of reconstructing framing-era legal doctrine itself. As a result, the search for origins is vulnerable to the post-hoc-ergo-propter-hoc fallacy and misdirects the inquiry to matters in the distant past that exerted little, if any, influence on the Framers’ thinking.<sup>39</sup> Recovery of the original understanding of a constitutional provision requires a more disciplined focus. The Framers’ knowledge of and understanding of historical events and doctrines is certainly relevant for recovering the original understanding, but the past events themselves are not. Likewise, historical legal materials are relevant if, but only if, it is likely that framing-era Americans actually consulted them.<sup>40</sup>

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arrests and searches and, as a result, they failed to notice that criminal warrantless arrest and search standards were addressed in *other constitutional provisions* requiring compliance with the law of the land or due process of law. See *infra* notes 138-58 and accompanying text.

39. The post-hoc-ergo-propter-hoc fallacy (that is, it happened afterwards so it must have been caused by the earlier event) is evident, for example, in Lasson’s devoting sixty-six pages to pre-framing-era materials and events, starting with Biblical and Roman law. See LASSON, *supra* note 18, at 13-78. In contrast, Lasson devoted only four pages to the state declarations of rights and their warrant provisions, *id.* at 79-82, four pages to Anti-Federalist concerns and proposals for a federal warrant provision, *id.* at 92-96, and five pages to the framing of the Fourth Amendment itself, *id.* at 99-103. Cuddihy has also given disproportionate attention to early matters at the expense of the framing-era materials and developments themselves. See *infra* note 395.

40. In particular, prior opinions and commentaries have carelessly cited reports of the Wilkesite cases without regard to the dates of the publication of the various reports. For example, Justice Bradley’s seminal 1886 interpretation of the history of the Fourth Amendment relied heavily on a version of one Wilkesite case that became available in America too late to have plausibly influenced the Framers. See, e.g., *infra* notes 344-50 and accompanying text.

Errors involving anachronistic sources also appear in the commentaries. For example, Professor Clancy has recently treated the report of the Wilkesite general warrant trespass case *Wilkes v. Wood*, which he cited as “98 Eng. Rep. 489 (K.B. 1763),” as though it influenced John Adams’s introduction of the phrase “unreasonable searches and seizures” in the 1780 Massachusetts declaration. Clancy, *supra* note 19, at 38-39, n. 148. In fact, however, the only report of the 1763 *Wilkes* ruling in the Court of Common Pleas (not King’s Bench) was first published at Lofft 1 (subsequently reprinted at 98 Eng. Rep. 489), and Lofft’s reports were not published until 1776, a year *after* the outbreak of fighting in the American Revolution. Hence, it seems implausible that Americans would have imported that volume earlier than the end of fighting in 1781—that is, *after* Adams had already used “unreasonable searches and seizures” when he drafted the 1780 Massachusetts declaration. Moreover, the reference Clancy

The conventional commentaries, moreover, failed to grasp the foreignness of the legal past. The conventional account was born in an apparent effort to embellish the Supreme Court's version of the Fourth Amendment and thus was shaped by an *assumption* that the modern Supreme Court's articulation of the concept of Fourth Amendment reasonableness represented a "development" of the original meaning.<sup>41</sup> Thus, Lasson and Cuddihy have prochronistically imposed the *modern conception* of an overarching reasonableness standard on historical sources that never expressed any such notion.<sup>42</sup> Likewise, the conventional accounts have fitted various aspects of the history to that preconceived notion,<sup>43</sup> while they have ignored anomalies that plainly do not fit.<sup>44</sup> A very different picture emerges, however, if one examines the historical evidence without the assumption that there "must have been" a broad reasonableness standard.

### III. THE AUTHENTIC HISTORY OF CONSTITUTIONAL ARREST AND SEARCH STANDARDS

To get the history right, one must approach the framing era as a foreign country and take it on its own terms without making assumptions about what "must have been." If one does that, it is possible to learn a great deal about that country because there is a rich lode of evidence about the Framers' understanding of arrest and search authority and about their

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cites for the contents of John Adams's library at the Boston Public Library does *not* include a copy of Lofft's reports. Cf. Clancy, *supra*, at 39 n.153 (reporting Adams's ownership of another, earlier set of English case reports by James Burrow). Thus, although Lofft's case report of *Wilkes* is widely cited in conventional commentaries, it is actually a matter of some doubt as to whether any of the federal Framers would have been familiar with it. See also *infra* note 204 (identifying another error of this sort in commentaries that have treated a 1785 English case on the liability of a revenue officer for an unsuccessful warrant search as an influence on the Framers of the Fourth Amendment without noting that no report of the case was ever published until 1801).

41. See LASSON, *supra* note 18, at 106 (titling the chapter on Supreme Court search rulings as "Development of the Principle by the Supreme Court"); see also *id.* at 143 (concluding, with a celebratory claim, that the Court's "development of the Fourth Amendment" was marked "by a fine sensibility for the spirit and purpose of this fundamental safeguard").

42. A "prochronism" is a specific form of anachronism in which aspects of a later period in time are erroneously imposed on an earlier period. For example, Lasson referred to "[t]he principle that search and seizure must be reasonable" in a discussion of English law circa 1660 without identifying any source from that time that referred to any such principle. LASSON, *supra* note 18, at 34. He also referred to the *Wilkes* cases as "the final establishment of the principle of reasonable search and seizure" without identifying any reference to a reasonableness principle in those cases. See *id.* at 42-43. Cuddihy has done likewise. See *infra* note 214 and accompanying text; Davies, *Original Fourth*, *supra* note 1, at 592 n.107.

43. For example, Cuddihy has strained to stretch the Framers' concerns beyond searches of houses under too-loose warrants. See *infra* note 189 (rebutting Cuddihy's erroneous claim that there was an issue regarding warrantless customs searches of houses); *infra* note 200 (rebutting Cuddihy's assertion that the protection of "houses, papers, and effects" included ships).

44. See *infra* notes 52-54 and accompanying text.

understanding of the constitutional provisions that addressed those subjects. For example, one can read the same legal authorities that framing-era Americans read, including the leading treatises,<sup>45</sup> justice of the peace manuals,<sup>46</sup> commentaries,<sup>47</sup> and other works.<sup>48</sup> In addition, one can consult records of the pertinent pre-framing controversies<sup>49</sup> and examine the

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45. The leading treatises included volumes two, three, and four of EDWARD COKE, *THE INSTITUTES OF THE LAWE OF ENGLAND* (written prior to Coke's death in 1634, but first published in 1642, 1644, and 1644, respectively. *See* 1 *A LEGAL BIBLIOGRAPHY OF THE BRITISH COMMONWEALTH OF NATIONS* 258, 360, 546 (W. Harold Maxwell & Leslie F. Maxwell eds., 2d ed. 1955) [hereinafter 1 MAXWELL]); MATTHEW HALE, *HISTORY OF THE PLEAS OF THE CROWN* (two volumes, written prior to Hale's death in 1675 but published in 1636; *see* 1 MAXWELL, *supra* at 362); WILLIAM HAWKINS, *PLEAS OF THE CROWN* (two volumes, first published 1716 and 1721, respectively; later editions were published with no change to the texts in 1724-1726, 1739, 1762, and 1771, and Thomas Leach edited two later editions in 1787 and 1795 in which he added substantial new material; *see* 1 MAXWELL, *supra* at 362-63).

46. Justice of the peace manuals were more substantial than the term "manual" suggests; they were abridgments that set out the prominent points from the treatises regarding the topics that justices of the peace dealt with, including arrests, arrest warrants, examinations of arrestees and witnesses, search warrants for stolen goods, etc. The leading, late-eighteenth century English manual was RICHARD BURN, *JUSTICE OF THE PEACE AND PARISH OFFICER* (first published in two volumes in 1755 and expanded to four volumes in the 1770 eleventh edition, *see* 1 MAXWELL, *supra* note 45, at 225-26).

A number of manuals were also published in several American cities prior to the framing of the Bill of Rights, several of which essentially pirated verbatim the most relevant material from Burn's manual. These American manuals included, among others, *CONDUCTOR GENERALIS: THE OFFICE, DUTY, AND AUTHORITY OF JUSTICES OF THE PEACE* (first published New York, 1711, followed by a number of later editions issued in various cities by different printers as identified in subsequent citations; the entries in the 1764 and later editions draw directly from the entries in Burn's English manual) [hereinafter *CONDUCTOR GENERALIS*]; *AN ABRIDGMENT OF BURN'S JUSTICE OF THE PEACE AND PARISH OFFICER* (Boston, Joseph Greenleaf ed. 1773); *SOUTH CAROLINA JUSTICE OF PEACE* (Philadelphia, 1788, attributed to John Fauchaud Grimke). Manuals published in America in the aftermath of the framing of the Bill of Rights also continued to draw upon Burn's manual, including *BURN'S ABRIDGEMENT OR THE AMERICAN JUSTICE* (Dover, N.H., Eliphalet Ladd ed. 1792); WILLIAM WALLER HENING, *THE NEW VIRGINIA JUSTICE* (Richmond, 1795). For additional information on framing-era American manuals, *see* Davies, *Correcting History*, *supra* note 1, at 73 n.220.

47. The leading commentary on common law during the framing era, and a work which was widely read by Americans, was WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (four volumes first published in London 1765-1769; 1st American ed. printed in Philadelphia, 1771-1772; *see* 1 MAXWELL, *supra* note 45, at 27-29). Unless otherwise noted, all citations in this article are to the first American edition. Note that the numerous later editions that use "star" page numbers actually reprint the text of the 1783 ninth London edition because it was the last to which Blackstone personally made changes; that edition, however, includes changes and additions that were not in the edition that framing-era Americans would have been most likely to consult.

48. There were a number of abridgments and legal dictionaries which were in the nature of legal encyclopedias. *See, e.g.,* Davies, *Arrest*, *supra* note 1, at 278 n.120 (identifying legal dictionaries); 1 MAXWELL, *supra* note 45, at 6-12, 16-20 (identifying legal dictionaries and abridgements).

49. It is important, however, not to overemphasize the case reports that now are readily available on law library shelves today, but were not nearly as accessible during the framing era. *Cf.,* Thomas Y. Davies, *Revisiting the Fictional Originalism in Crawford's "Cross-Examination Rule,"* 72 *BROOK. L. REV.* 557, 597-98 (2007) (discussing the difficulties framing-era Americans had with accessing reports). Indeed, the most important pre-framing American controversy over general warrants did not leave any official case reports, and, for that reason, has been overlooked or understated in the conventional accounts. *See infra* notes 172-85 and accompanying text.

evolution of the relevant proposals and texts.<sup>50</sup> If one does that, it turns out that the sources set out arrest and search standards rather consistently and the pertinent constitutional texts reveal a rather consistent content.<sup>51</sup>

Important evidence also takes the form of dogs-that-do-not-bark-in-the-night—that is, in anomalies in the facts recounted in the conventional account. For example, why, if there already was a broad principle of reasonable search and seizure, did Madison’s proposal plainly address only general warrants? Likewise, why was there no debate when the House made the last-minute change to the phrasing that produced the two-clause format?<sup>52</sup> And, perhaps most telling of all, why is there no indication that anyone ever actually discussed the content of any supposed concept of “unreasonable searches and seizures” during the framing era?<sup>53</sup> The conventional commentaries largely ignored these and other incongruities. Historical anomalies, however, should never be ignored because they indicate that the real past was somehow different than our expectations suggest.<sup>54</sup> The bottom line is that the authentic history of arrest and search doctrine cannot be recovered if one makes the modern Supreme Court’s fictions the starting point.

Instead, one must go directly to the framing-era sources and recover historical arrest and search doctrine as comprehensively as possible within the larger structure of framing-era doctrine. Then, one must complete the story by working forward in time to the present, while being sensitive to indications of changes and novelty—as well as of disappearances—along the way. If one does that, it becomes evident that what we now call search-and-seizure doctrine—including the foundational notion of Fourth Amendment reasonableness—is largely a product of twentieth-century judicial innovations.

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50. There is some legislative history of pertinent debates in the First Congress, but there is little legislative history of the adoption of the earlier state declarations of rights beyond the formal texts themselves. Nevertheless, the evolution of the language in those provisions reveals a good deal about the Framers’ concerns and understandings.

51. Commentaries that assert that common-law arrest and search standards were inconsistent or confused simply reflect inadequate familiarity with the common-law sources. *See* Davies, *Arrest*, *supra* note 1, at 281 n.123.

52. The conventional accounts note these facts but offer no explanation for them. For example, Lasson noted that Madison’s text only banned general warrants, but offered no explanation for that focus. Lasson, *supra* note 17, at 100. Likewise, although the source that Lasson consulted regarding the deliberations of the House indicated that there had been significant debate on other proposed amendments, Lasson simply recited the brief record of the adoption of the Fourth Amendment text in the House without commenting on the pregnant fact that there was no indication of significant discussion or debate. *Id.* at 101.

53. *Cf.*, Clancy, *supra* note 19, at 67 (observing that John Adams does not seem to have discussed the content of the provision in which he introduced the phrase “unreasonable searches and seizures”); *id.* at 73 (observing that there were “no tracts or detailed discussions about a search and seizure provision” during the ratification debates but that “commentary urging the adoption of a search and seizure provision was fragmentary and isolated”).

54. *Cf.*, RICHARD FORTEY, DRY STOREROOM NO. 1, at 93 (2008) (discussing the importance of the study of anomalies in modern evolutionary biology).

### A. Criminal Arrests and Revenue Searches

In contrast to conventional Fourth Amendment history, the historical sources reveal that there was no single, unified body of legal doctrine regarding arrests and searches during the period in which the state and federal bills of rights were initially framed (1776-1789).<sup>55</sup> Instead, the sources reveal that there were two different, though somewhat overlapping, bodies of doctrine: common law controlled criminal arrests and searches, while statutes provided authority for searches and seizures for other purposes, especially for customs or excise revenue collections.<sup>56</sup>

Moreover, the American Framers did not conflate these two doctrinal topics when they framed constitutional provisions. They sought to preserve the common-law standards for criminal arrests and related searches in provisions that required that criminal prosecutions be initiated in compliance with “the law of the land” or “due process of law,” while they undertook to place firmer limits on statutory authority for revenue searches of houses and the contents of houses in provisions that banned legislative authorization of too-loose or “general” warrants.

Because the two bodies of doctrine overlapped in a variety of ways—for example, both involved use of judicially-issued warrants and both treated houses as meriting special protection—there was a degree of redundancy in this treatment. For example, although the common-law authorities had condemned criminal general arrest or search warrants since the early eighteenth century, the Fourth Amendment nevertheless included seizures of “persons” as well as of things in its ban against general warrants.<sup>57</sup> Nevertheless, there is no indication the Framers sought to

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55. The earliest state declaration was the Virginia Declaration of Rights, adopted shortly prior to the Declaration of Independence in June 1776. See Davies, *Correcting History*, *supra* note 1, at 93. The federal Bill of Rights was framed in Congress during the summer of 1789, submitted to the states in September 1789, and finally ratified in December 1791. See Davies, Crawford, *supra* note 6, at 158-59. For the purposes of assessing whether materials could have influenced the Framers’ original understanding of provisions of the Bill of Rights, however, the date of the framing in 1789, not the ratification in 1791, is the appropriate cutoff. See *id.* at 157-60.

56. There were two other bodies of doctrine that potentially involved detentions of persons. See, e.g., THE LAW OF ARREST IN BOTH CIVIL AND CRIMINAL CASES 3-130 (attributed to “An Attorney at Law,” London, 1742) [hereinafter THE LAW OF ARREST]; *supra* note 45 (identifying the entries for “Surety of the Peace” or “Surety for the Good Behavior” that were routinely included in the justice of the peace manuals). One was the use of arrest to bring defendants in civil damages lawsuits to court. See, e.g., THE LAW OF ARREST IN BOTH CIVIL AND CRIMINAL CASES 3-130 (attributed to “An Attorney at Law,” London, 1742). The other was a process by which a person who had threatened another with violence could be made to present sureties who would guarantee his good behavior and who would suffer monetary losses if he transgressed. See, e.g., *supra* note 46. Because it seems unlikely that these doctrines played a significant role in the emergence of modern Fourth Amendment search-and-seizure doctrine, they are not discussed in this article.

57. See *infra* notes 123-25 and accompanying text (describing the early-eighteenth century condemnations of general arrest and search warrants); *supra* note 7 and accompanying text (setting out the text of the Fourth Amendment).



address these two bodies of doctrine in a single constitutional provision, and to get the history right, their stories must each be recovered separately.

*B. Criminal Arrest Standards as “Due Process of Law”*

Framing-era criminal procedure differed from modern procedure in several basic aspects. One was that common-law criminal procedure was accusatory rather than investigatory in character.<sup>58</sup> Except for coroners’ inquests into possible homicides,<sup>59</sup> government officers usually did not initiate criminal prosecutions or collect evidence for prosecutions. Instead, that role fell to private victim-complainants. The government role was largely limited to providing the necessary force to bring accused persons to trial, often and perhaps even usually, by means of judicially-issued arrest warrants.<sup>60</sup> Except when executing such warrants, framing-era peace officers—usually constables—generally had no more arrest authority than private persons beyond some order-maintenance duties to detain drunks, vagrants, and “night-walkers.”<sup>61</sup>

Common-law procedure was also accusatory in the sense that criminal arrest authority usually depended on a victim-complainant’s sworn accusation that a crime had already been committed “in fact.”<sup>62</sup> That accusation had to be made under oath by a named and potentially accountable complainant either prior to the issuance of an arrest warrant<sup>63</sup> or immediately after a warrantless arrest.<sup>64</sup> Because the rule during the framing era was still that “hearsay is no evidence,”<sup>65</sup> there was no allowance for second-hand information provided by confidential

58. See Davies, *Arrest*, *supra* note 1, at 421-33.

59. The authority and procedure for a coroner’s inquest were discussed in the entries for “Coroner” that were included in the justice of the peace manuals. See, e.g., the manuals identified *supra* note 45.

60. See *infra* note 119 and accompanying text.

61. See, e.g., 2 HAWKINS, *supra* note 45, at 80 (“[A]s to the justifying of . . . Arrests by the Constable’s own Authority; it seems difficult to find any Case, wherein a Constable is impowered to arrest a Man for a Felony committed or attempted, in which a private Person might not as well be justified in doing it.”); Davies, *Arrest*, *supra* note 1, at 345-53 (discussing the scope of a constable’s order-maintenance authority).

62. The crime “in fact” standard was so fundamental that the term “fact” was often used as a synonym for a committed crime. See, e.g., 2 HAWKINS, *supra* note 45, at 75 (“[T]o raise a Hue and Cry, you ought to go to the Constable of the next Town, and declare the Fact, and describe the Offender, and the Way he is gone. . . .”); 4 BLACKSTONE, *supra* note 47, at 301 (stating that the name of the township “in which the fact was committed” must be included in an indictment). See also *infra* note 177 and accompanying text (discussing the use of the “evidence of a fact committed” standard in several of the state bans against general warrants).

63. See *infra* notes 120-22 and accompanying text.

64. See *infra* notes 101-02 and accompanying text.

65. See Davies, *Not Framers’ Design*, *supra* note 6, at 404-05, 407, 410 (setting out the renditions in framing-era authorities of the general ban against hearsay (unsworn) statements, including statements to the effect that a sworn account of a prior unsworn statement made by another person could not cure that lack of the oath for the prior statement).

informants.<sup>66</sup> Instead, arrests and arrest warrants had to be based on sworn testimony by persons with direct knowledge of the crime.<sup>67</sup>

Framing-era criminal procedure also differed from modern procedure insofar as arrest authority was the big topic. In fact, it seems that common-law criminal search authority usually arose only in connection with a lawful arrest (what we now call a search “incident to arrest”).<sup>68</sup>

### 1. *The Salience of Arrest Standards at Common Law*

The prominence accorded arrest standards was partly the result of history and partly the result of the realities of the time. Arbitrary arrests on orders of the early Stuart monarchs had provoked a political crisis in early seventeenth-century England, and Parliament responded in the Petition of Right of 1628 by condemning such arrests and insisting on access to the remedy of habeas corpus.<sup>69</sup> Sir Edward Coke, then a leader in the House of Commons, took a lead role in the debate and invoked Magna Carta.<sup>70</sup>

Specifically, Parliament asserted in the Petition of Right that the arbitrary arrests ordered by the crown violated provisions in Magna Carta and subsequent statutes that banned any person being “taken” or “imprisoned” (terms that were understood to connote arrest)<sup>71</sup> except in conformance with “the law of the land” or “due process of law.”<sup>72</sup> Subsequently, Coke also set out common-law arrest standards in some detail and characterized them as features of the requirement of “due process of law” in his discussion of Magna Carta’s “law of the land” chapter in the second volume of his *Institutes*—certainly among the most famous of his

66. See *infra* note 312 and accompanying text.

67. See, e.g., 2 HAWKINS, *supra* note 45, at 76. The framing-era authorities often required that arrests be made only by a person who personally had knowledge of the crime and grounds to suspect the person to be arrested. See *id.* This likely reflected the framing-era ban against hearsay evidence. See Davies, *Probable Cause*, *supra* note 1, at 14-15.

68. See, e.g., *Chimel v. California*, 395 U.S. 752 (1969); *United States v. Robinson*, 414 U.S. 218 (1973). At the time those cases were decided, searches could be made incident to arrest only if the arrest was itself legal, but that is no longer the case. See *infra* notes 440-43.

69. See SOURCES, *supra* note 5, at 62-75.

70. See *id.* at 65-69.

71. See, e.g., 3 BLACKSTONE, *supra* note 47, at 127 (“Every confinement of the person is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets.”); THOMAS WOOD, AN INSTITUTE OF THE LAWS OF ENGLAND 17 (10th ed. 1772) (“Imprisonment is a Restraint of a Man’s Liberty under the Custody of another.”).

72. See SOURCES, *supra* note 5, at 73, 74 (quoting Articles III and IV of the Petition of Right); Davies, *Correcting History*, *supra* note 1, at 44-47. Coke invoked the version of Magna Carta that had been enacted by Parliament during the ninth year of Henry III (1225), in which the “law of the land” chapter was numbered 29. See 2 COKE, *supra* note 45, at 1. Hence, although the chapters in the original 1215 version of Magna Carta were not numbered, and modern historical treatments generally treat the “law of the land” chapter as chapter 39, framing-era sources still followed Coke and numbered it 29. See Davies, *Original Fourth*, *supra* note 1, at 671 n.332.

writings.<sup>73</sup> Thus, the right to be free from arbitrary arrest—enforced by access to the remedy of habeas corpus—later became a salient feature of the Whig canon regarding what Blackstone would later term “the personal liberty of individuals,” one of the three branches of “the absolute rights of every Englishman.”<sup>74</sup>

Arrest authority was also a more salient topic than search authority for practical reasons. There were no possessory criminal offenses comparable to modern drug laws.<sup>75</sup> Additionally, there was no significant forensic science.<sup>76</sup> As a result, there was little to search for other than fugitives and stolen goods—the usual objects of the search warrants mentioned in framing-era authorities.<sup>77</sup> Otherwise, criminal search authority was rarely mentioned.

This silence does not mean that criminal searches were not made. Rather, it appears that criminal search authority was simply viewed as being contingent on authority to make a lawful arrest.<sup>78</sup> The explanation for this

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73. For example, William Penn caused the 1225 version of Magna Carta to be printed in Philadelphia in 1678 as *THE EXCELLENT PRIVILEGE OF LIBERTY & PROPERTY BEING THE BIRTH-RIGHT OF THE FREE-BORN SUBJECTS OF ENGLAND* (reprinted in modern printing and facsimile, Philadelphia 1897; reprinted by The Lawbook Exchange 2005). That volume set out the provisions of the 1225 version of Magna Carta and also included an abridged version of Coke’s chapter on the “law of the land” provision as “The Comment on Magna Charta.” *Id.* at 43-68 (modern reprinting); *id.* at [19]-[34] (facsimile of original printing). Essentially the same abridged version of Coke’s chapter was still being included as an appendix to justice of the peace manuals to the end of the eighteenth century. *See, e.g.*, *CONDUCTOR GENERALIS* (New York, 1788, printed by Hugh Gaine), *supra* note 46, at 440-46; *id.* (Philadelphia, 1792, printed for Robert Campbell) at 440-46.

74. 1 BLACKSTONE, *supra* note 47, at 127, 134-38. The first chapter of the *Commentaries*, titled “Of the Absolute Rights of Individuals,” set out the central tenets of Lockean social contract ideology and specifically described Magna Carta, the Petition of Right (1628), the Habeas Corpus Act (1669), and the English Bill of Rights (1689) as the basic expressions of the birthright of liberty of the English people. *Id.* at 127-28. Blackstone again discussed these texts in his discussion of “the personal liberty of individuals.” *Id.* at 134-35; *see also* 4 BLACKSTONE, *supra* note 47, at 416-17, 429-34 (discussing Magna Carta, the Petition of Right, the Habeas Corpus Act, and the English Bill of Rights in an essay in the concluding chapter of the *Commentaries* on the progress of English law).

75. Possession of counterfeit coins might seem to fit the bill, but the discussions of counterfeiting in framing-era authorities do not seem to have included search authority. *See, e.g.*, 1 BURN (1770 ed.), *supra* note 46, at 336-45 (entry for Coin).

76. In fact, framing-era works on the law of evidence do not discuss the admission of physical items as evidence (other than certain kinds of documents such as deeds or official records, which were referred to as “written evidence”). *See, e.g.*, GEOFFREY GILBERT, *THE LAW OF EVIDENCE* 5 (Dublin 1754; reprinted Philadelphia, 1788); discussions in the “Evidence” entries in the justice of the peace manuals identified *supra* note 46.

77. The framing-era authorities typically mentioned criminal search warrants for fugitives and stolen goods in the course of condemning the earlier use of unparticularized general warrants (*see infra* notes 123-25 and accompanying text), and they also specifically discussed the specific search warrant for stolen goods (*see infra* notes 82-86 and accompanying text). They do not seem to have discussed criminal search authority otherwise.

78. A constable’s authority to search a person arrested for weapons or stolen goods following an arrest was stated with confidence in an essay offering advice to constables that was sometimes reprinted in American publications. *See, e.g.*, *CONDUCTOR GENERALIS* (Woodbridge, N.J., 1764, printed by James Parker), *supra* note 46, at 111, 117 (setting out, in the entry on “Constable,” excerpts from an

treatment probably lies in the fact that personal liberty was enforced largely by the remedy of various forms of trespass actions for damages.<sup>79</sup> Because detaining a person to conduct a search would have constituted an arrest and trespass at common law, the critical legal issue was whether there were grounds for a warrantless arrest. If the arrest was justified, the search was not an additional trespass; if the arrest could not be justified, neither could the search. In contrast to modern doctrine, however, the framing-era sources did not recognize any form of criminal warrantless search authority other than a search incident to a lawful arrest.

In a similar vein, it appears that authority to search a house for stolen goods was probably understood to be an implicit incident of a valid arrest made in the house, at least if the arrest was for theft. In the discussions of when the door to a house could be “broken” (which might have meant simply opening a closed door)<sup>80</sup> to make an arrest, the framing-era authorities indicated that a warrant was usually required in the absence of exigent circumstances.<sup>81</sup> Because the emphasis was on the justification for entering a house, however, it appears that an arrest warrant probably was understood to also confer authority to search the house, at least when the arrest was for theft.

The framing-era authorities did recognize a “search warrant for stolen goods,” but this warrant had a more limited use than the name suggests and is actually the clichéd exception that proves the rule that search warrant authority usually was *not* needed to search if there had been a lawful arrest.<sup>82</sup> The key fact (which I previously overlooked)<sup>83</sup> is that the forms for such warrants routinely included a statement that goods had been feloniously stolen “by some person or persons unknown” but then recited that the victim-complainant had probable cause as to the current location of the stolen goods.<sup>84</sup> So this search warrant was created to allow the victim of a theft to recover his property when he was either unable or unwilling to obtain an arrest warrant for the thief—which suggests that this warrant

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essay by Saunders Welch, a former high-constable in London); *id.* (New York, 1788, printed by John Patterson) at 109, 117 (same).

79. See 3 BLACKSTONE, *supra* note 47, at 138 (identifying the damages remedy for false imprisonment). Different causes of action were available depending on the circumstances. See *infra* notes 102, 109-10 and accompanying text.

80. See, e.g., 4 BLACKSTONE, *supra* note 47, at 226 (discussing “breaking” a house in the context of the elements of burglary).

81. See, e.g., 2 HAWKINS, *supra* note 45, at 86-87; 1 BURN (1770 ed.), *supra* note 46, at 98-100. But see *infra* note 94 and accompanying text (discussing authority for a warrantless entry of an actual felon’s house if the actual felon was there).

82. See 2 HALE, *supra* note 45, at 113, 150-51; 4 BURN (1770 ed.), *supra* note 46, at 104-07 (entry for “Search Warrant”).

83. See Davies, *Original Fourth*, *supra* note 1, at 645 n.271.

84. See, e.g., 4 BURN (1770 ed.), *supra* note 46, at 106-07 (setting out a single form for a “search warrant”); CONDUCTOR GENERALIS (Woodbridge, N.J., 1764, printed by James Parker), *supra* note 46, at 386-87; *id.* (New York, 1788, printed by Hugh Gaine) at 424-25 (same).

served the individual owner's interest in recovering property more than the public interest in enforcing criminal law.<sup>85</sup> Perhaps for that reason, the complainant who obtained such a search warrant was strictly liable for trespass if the stolen goods were not found.<sup>86</sup> Notably, there is no indication that a search warrant was ever required or issued in addition to an arrest warrant, and that dog-that-does-not-bark-in-the-night silence strongly implies that the authority that an arrest warrant carried regarding entrance to the arrestee's house also implicitly extended to searching the arrestee and his house if the arrest was made there.<sup>87</sup>

Thus, the common-law standards for warrantless arrests and arrest warrants comprised the salient topic in pre-trial criminal procedure during the framing era. Moreover, those arrest standards appeared to be settled and noncontroversial because the rules recited in framing-era sources were virtually unchanged from Coke's time.<sup>88</sup> But because Whig ideology dictated that common-law arrest standards were to be formulated according to an assessment of "necessity,"<sup>89</sup> and because the necessity for making a

85. The unusual character of the search warrant for stolen goods may explain why Lord Camden described the issuance of search warrants for stolen property as a practice that had "crept into the law by imperceptible practice." *Entick v. Carrington*, 11 State Trials (Francis Hargrave ed., 4th ed) 313, 321; 19 Howell's State Trials 1029, 1067 (C.P. 1765). Camden's discussion in *Entick* was also paraphrased in 1787 when Thomas Leach updated Hawkins's treatise:

His Lordship said, that warrants to search for stolen goods had crept into the law by imperceptible practice, that it is the only case of the kind to be met with, and that the law proceeds with great caution. For first, There must be a full charge upon oath of a theft committed. 2dly, The owner must swear that the goods are lodged in such a place. 3rdly, He must attend at the execution of the warrant to show them to the officer, who must see that they answer the description. And lastly, the owner must abide the event at his peril; for if the goods are not found, He is a trespasser; and the officer being an innocent person will be always a ready and convenient witness against him.

2 HAWKINS (Thomas Leach ed., 1787), *supra* note 45, at 135 n.6.

86. See *supra* preceding note; see also 2 HALE, *supra* note 45, at 151; 4 BURN (1770 ed.), *supra* note 46, at 106; CONDUCTOR GENERALIS (New York, 1788, printed by John Patterson), *supra* note 46, at 383-84.

87. Important evidence of differences between modern and historical doctrine often take the form of a "dog that did not bark in the night." See Davies, *Original Fourth*, *supra* note 1, at 591 n.105 (taking the phrase from the Sherlock Holmes story *Silver Blaze*). The absence of any discussion of a lawful criminal search warrant other than the "search warrant for stolen goods" in the framing-era authorities is a silence that strongly implies that criminal search authority was simply understood to be an incident of criminal arrest warrants. See Davies, *Probable Cause*, *supra* note 1, at 21-23.

88. See Davies, *Correcting History*, *supra* note 1, at 72-81.

89. James Wilson, a Framers and early Supreme Court Justice, stated the necessity principle in his 1790-1791 law lectures in Philadelphia as follows:

Every wanton, or causeless, or unnecessary act of authority, exerted, or authorized, or encouraged by the legislative over the citizens, is wrong, and unjustifiable, and tyrannical: for every citizen is, or right, entitled to liberty, personal as well as mental, in the highest possible degree, which can consist with the safety and welfare of the state.

2 THE WORKS OF JAMES WILSON 649 (Robert G. McCloskey ed., 1967); see also 3 BLACKSTONE, *supra* note 47, at 127 (describing arrest authority as arising "from some [judicial] warrant or "from some other special cause warranted, for the necessity of the thing" either by common law or statute); 2 HAWKINS, *supra* note 45, at 86 (stating that "the Law doth never allow of such Extremitities [as breaking the door of a house] but in Cases of Necessity").

prompt warrantless arrest varied according to the danger posed to the community and the strength of the culprit's incentives to escape, the common-law arrest standards cannot be reduced to a single formulation.<sup>90</sup>

*a. Warrantless Arrests for Felonies*

Warrantless arrest authority was broadest for felonies—the set of very serious and usually violent crimes that threatened public safety<sup>91</sup> and that were potentially subject to the most severe punishments, including forfeiture of all property and death.<sup>92</sup> There were two alternative standards by which a warrantless arrest for a felony could be lawful: one was *ex post* and one was *ex ante*.

The *ex post* rule, which has now fallen into disuse, was that a felony arrest was lawful if the person arrested was actually guilty—that is, was subsequently convicted of the felony for which the arrest was made.<sup>93</sup> This actual-guilt-of-felony rule, which was sometimes discussed simply as an arrest of a “felon” or “known felon” in the historical authorities, even seems to have justified a warrantless breaking of an actual felon’s house to make the arrest (provided the actual felon was actually found there).<sup>94</sup> This *ex*

This necessity standard, in turn, reflected the emphasis that Whig (or Lockean) social contract ideology placed on the protection of the rights of the individual. See 1 BLACKSTONE, *supra* note 47, at 124. According to Whig ideology, the purpose of government was the protection of the rights of the individual, especially as to the rights to personal security, liberty, and property. See, e.g., *id.* at 124, 127-40. Hence, a central tenet of Whig ideology was that interference with an individual’s liberty was permissible only when demanded by necessity. See *id.* at 125-26 (reciting that “every wanton and causeless restraint of the will of the subject . . . is a degree of tyranny”). This tenet would seem to underlie the principle that it was more important to avoid wrongful convictions of the innocent than to obtain convictions of the guilty. See 4 BLACKSTONE, *supra* note 47, at 352 (reciting that “it is better that ten guilty persons escape, than that one innocent suffer”); see also Davies, *Arrest*, *supra* note 1, at 429 n.632 (quoting Alexander Hamilton).

90. See Davies, *Arrest*, *supra* note 1, at 319-26.

91. Felonies constituted a narrower category of offenses under common law than under modern statutes. For example, crimes such as assault, battery, wounding, false imprisonment, and kidnapping were not felonies at common law. See, e.g., 4 BLACKSTONE, *supra* note 47, at 216; see also *id.* at 241-42 (explaining that attempted robbery is not a felony until made so by statute).

There were a few serious but non-felony offenses that also called for prompt response and probably were treated similarly to felonies for purposes of lawful warrantless arrests. See Davies, *Arrest*, *supra* note 1, at 307-17.

92. See, e.g., 4 BLACKSTONE, *supra* note 47, at 94.

93. See Davies, *Original Fourth*, *supra* note 1, at 631-32. This standard was typically included in nineteenth-century state criminal arrest statutes. See *id.* at 628.

94. Some authorities indicate that a warrantless breaking and entry of a house was justified if it resulted in the arrest of a “felon”—that is, a person who was *actually a felon*. Success was crucial, however, if the felon was not there, or if the person so arrested was not convicted of felony, there was strict liability for the trespass of the house. See, e.g., 2 HALE, *supra* note 45, at 82 (stating that a private person who broke a house to arrest for felony did so at his peril because it was justifiable only if the person “in truth be a felon”); *id.* at 90 (stating, in a case when a “felony is *certainly* committed,” that “[a constable] may break open doors to take the felon, if the felon be in the house”) (emphasis in original). Blackstone, citing Hale, also wrote that:

[I]n case of felony actually committed, or a dangerous wounding whereby felony is likely to

*post*, actual-felon standard may have simply recognized the reality of a convicted felon's situation. There was neither an exclusionary rule that a defendant could invoke to challenge an arrest or search prior to trial,<sup>95</sup> nor was there an opportunity for a convicted felon to appeal after a felony conviction.<sup>96</sup> Instead, the convicted felon usually was promptly executed (or perhaps transported).<sup>97</sup> Hence, there simply was no opportunity for a convicted felon to contest the lawfulness of the arrest or house-breaking.

The other warrantless felony arrest standard—the *ex ante* standard—defined the degree to which a mistaken felony arrest of an “innocent” person could still be lawful. A warrantless felony arrest satisfied this *ex ante* standard if, but only if, the complainant (1) proved a felony had actually been committed “in fact,” and (2) also provided sworn information showing “probable cause of suspicion” or “reasonable suspicion” (the two terms seem to have been used interchangeably) that the arrestee had been the culprit.<sup>98</sup>

This *ex ante* standard defined the leeway for excusable error because it was the standard that applied in a trespass action for false imprisonment. So it seems likely that it would have been the standard that would have been important to a person contemplating a warrantless felony arrest. This standard was commonly referred to—but somewhat inaptly—as an arrest “on suspicion.”<sup>99</sup> Note, however, that it was still crucial for the complainant to prove that a felony had actually been committed in fact—a

ensue, [a constable] may upon probable suspicion arrest the felon; and for that purpose is authorized (as upon a justice's warrant) to break open doors, and even to kill the felon if he cannot otherwise be taken . . . .

4 BLACKSTONE, *supra* note 47, at 289 (citing 2 HALE, *supra* note 45, at 88-96). The critical point is that Hale and Blackstone appear to have used the term “the felon” to mean a person *actually guilty of felony*, not simply a person who was suspected of having committed a felony. *Id.* (citing 2 HALE, *supra* note 45, at 88-96). Thus, while discussing warrantless arrests “when a felony is [actually] committed,” Blackstone wrote that “[u]pon probable suspicion also a private person may arrest *the felon, or other person so suspected.*” *Id.* at 290 (emphasis added). The distinction between arrest of the felon and that of a suspected person is also evident in the statement by James Wilson quoted *supra* note 89. WILSON, *supra* note 89, at 640.

95. The exclusionary rule was not addressed until the early twentieth century because there was no conception that an unlawful search could constitute a violation of a constitutional standard prior to that time. *See infra* note 370.

96. The writ of error for review of federal criminal convictions did not appear until the late nineteenth century. *See* ERWIN C. SURRENCY, HISTORY OF THE FEDERAL COURTS 312-14 (2d ed. 2002).

97. *See, e.g.*, 4 BLACKSTONE, *supra* note 47, at 397 (noting the statutory standard of 25 GEO. II C. 37 that the execution for murder was “to be performed on the next day but one after sentence passed” and endorsing the principle “that the punishment should follow the crime as early as possible”).

98. For example, in his 1790-1791 lectures, James Wilson summarized the two standards for warrantless felony arrests as follows:

It is a general rule, that, at any time, and in any place, every private person is justified in arresting a traitor or a felon [the *ex post* actual-felon standard]; and, if a treason or felony has been committed, he is justified in arresting even an innocent person, upon his reasonable suspicion that by such person it has been committed [the *ex ante* standard].

2 THE WORKS OF JAMES WILSON, *supra* note 89, at 685.

99. *See* Davies, *Original Fourth*, *supra* note 1, at 632-33.

mere showing of probable cause that a felony might have been committed (the modern bare probable cause standard) *never* sufficed to justify a warrantless arrest under framing-era doctrine. Rather, “suspicion” applied only to the identity of the felon.<sup>100</sup>

Moreover, under the Marian committal procedure used during the framing era, a person making a warrantless felony arrest was required to promptly take the arrestee to a justice of the peace, and thus, had to be ready to prove the fact of felony as well as probable ground of suspicion of the arrestee’s involvement when the arrest was made.<sup>101</sup> If not, the justice could discharge the arrestee; in which case the arresting complainant was exposed to trespass damages in an action by the arrestee for false imprisonment, usually coupled with claims for assault and battery as well.<sup>102</sup> Hence, being the complainant for a warrantless felony arrest was not to be taken lightly.

Indeed, a person who undertook a warrantless felony arrest also faced a second kind of peril. At common law it was lawful for a person to forcibly resist an unlawful warrantless arrest, and if the person attempting an unlawful warrantless arrest was killed, that was recognized to be sufficient provocation to reduce the homicide to manslaughter rather than murder.<sup>103</sup> Thus, when framing-era sources said that a complainant made a warrantless arrest “at his peril,” they meant physical as well as pecuniary peril. Additionally, constables or other persons assisting in an unlawful warrantless arrest were usually as exposed to trespass damages and resistance as the complainant who initiated the arrest<sup>104</sup> (the exception being when a felony arrest was made pursuant to “hue and cry”—a procedure

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100. Framing-era authorities allowed probable cause of suspicion to be established in various ways, but these lists typically ended with an admonition to the effect that “generally no such cause of suspicion . . . will justify an arrest, where in truth no such crime has been committed.” *See, e.g.*, 1 BURN (1770 ed.), *supra* note 46, at 95; CONDUCTOR GENERALIS (New York, 1788, printed by John Patterson), *supra* note 46, at 25; *see also* 2 HAWKINS, *supra* note 45, at 76; *Wakely v. Hart*, 6 Binn. 316, 318 (Pa. 1814) (stating that even a private person could make a warrantless felony arrest on probable cause of suspicion but that he did so “at his peril, for nothing short of proving the felony will justify the arrest”).

101. The Marian committal procedure (so named because it was required by a statute passed during the reign of Mary Tudor) was a standard aspect of procedure in felony arrests in both England and America during the late eighteenth century. *See* Davies, Crawford, *supra* note 6, at 107-08, 134. Among other things, the justice was required to take and record, in writing, the sworn information of the complainant (often called the “informer”) and any additional witnesses the complainant could provide. These were then sent to the trial court where they could be used to detect any change in the complainant’s or witnesses’ testimonies. *See id.* at 126-29, 202-04. Because the general rule was “hearsay is no evidence,” the factual justification for the arrest had to be provided by witnesses with personal knowledge of the events and circumstances. *See supra* notes 65-67 and accompanying text.

102. *See* 3 BLACKSTONE, *supra* note 47, at 138.

103. *See* Davies, *Original Fourth*, *supra* note 1, at 625 n.204.

104. *See id.* at 633-34. This rule was changed in England in 1780 when the Court of King’s Bench ruled that a peace officer, but not a private person, could justify a warrantless felony arrest on the basis of a “charge” of felony made by another person. *See id.* at 634. The person making the charge, however, remained liable for trespass if the felony was not proven. *See infra* notes 298-300 and accompanying text.



which operated somewhat like an emergency arrest warrant in the immediate aftermath of a robbery or other felony).<sup>105</sup> The perils that usually attended a warrantless felony arrest explain the importance accorded to criminal arrest warrant authority.

*b. Felony Arrests by Arrest Warrant*

Use of an arrest warrant largely removed the perils associated with warrantless felony arrests. Because an arrest warrant was a form of judicial process, it was always unlawful for an arrestee to forcibly resist an arrest by warrant, and the constable was entitled to use deadly force to effectuate the arrest if necessary.<sup>106</sup> Moreover, a constable who executed a specific arrest warrant (and anyone he commanded to assist) was “indemnified” against trespass liability in doing so because he was only doing what his duty required.<sup>107</sup> That indemnity was lost, however, if he executed an unparticularized general arrest warrant because the constable was expected to know that no magistrate could legally issue such a warrant.<sup>108</sup>

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105. Entries on the hue and cry arrest procedure were routinely included in the treatises and justice of the peace manuals. *See, e.g.*, 2 HALE, *supra* note 45, at 98-104; 2 HAWKINS, *supra* note 45, at 75; 2 BURN (1770 ed.), *supra* note 46, at 434-40 (entry widely copied in American manuals). The hue and cry allowed for somewhat enlarged arrest authority in the immediate aftermath of a robbery or other felony. *See* 2 HALE, *supra* note 45, at 98. It arose when a victim or witness of a felony cried out or went to the local constable, and the constable and local inhabitants were then required to search for and catch the felon. *See id.* at 100. Additionally, if the felon escaped the local area, the constable was to alert the constables of neighboring locales, usually in writing (and, if time allowed, by a warrant issued by a local justice of the peace). *See* HAWKINS, *supra* note 45, at 74. Under the hue and cry, anyone who arrested or assisted in making the arrest had broad indemnity against false imprisonment liability, even if no felony had actually been committed, but the person who falsely raised the hue and cry remained liable. *See, e.g.*, 2 BURN (1770 ed.), *supra* note 46, at 438.

It is unclear how frequently the hue and cry procedure was still actually used in framing-era America. *See* Davies, *Original Fourth*, *supra* note 1, at 622 n. 198 (citing a statement in a 1794 commentary to the effect that hue and cry was seldom used in Virginia). The use of hue and cry, however, may have varied among the states and may have persisted into the nineteenth century in some. *See, e.g.*, JOSEPH BACKUS, *THE COMPLETE CONSTABLE* 13, 15 (Hartford, 1812) (a manual often appended to and bound with JOSEPH BACKUS, *THE JUSTICE OF THE PEACE* (Hartford, 1816)) (discussing duty of Connecticut constables to raise hue and cry and the indemnity enjoyed by a constable when arresting on hue and cry). The hue and cry procedure probably became redundant when bare probable cause was adopted as the standard for warrantless felony arrests by peace officers during the mid-to-late nineteenth century. *See infra* notes 304-07 and accompanying text.

106. *See, e.g.*, 1 BURN (1770 ed.), *supra* note 46, at 100-01.

107. *See, e.g.*, 2 HAWKINS, *supra* note 45, at 82 (stating that the better opinion was that it was lawful for a constable or other person *to execute* a particularized arrest warrant even if it developed that no felony had actually been committed, but that a justice of the peace “may be punishable for granting such a Warrant without sufficient Grounds”). I previously paraphrased Hawkins’s statement too loosely, as though it meant that a warrant was “valid” even if no felony had actually occurred. *See* Davies, *Correcting History*, *supra* note 1, at 78. Actually, however, Hawkins’s point seems to have applied only to the protection the warrant afforded an officer; he did not suggest that a sworn statement of a felony-in-fact was not required for *the issuance* of an arrest warrant. *See* 2 HAWKINS, *supra* note 45, at 82.

108. *See* Davies, *Original Fourth*, *supra* note 1, at 588.

In addition, the complainant who had obtained an arrest warrant was also largely insulated against trespass liability because it appears that an innocent person who was arrested by warrant could seek damages only in an action for malicious prosecution rather than for false imprisonment.<sup>109</sup> That difference appears to have been significant because probable cause was regarded as a complete defense to malicious prosecution; as a result, it seems it was quite difficult for a plaintiff who had been wrongly arrested by warrant to win damages.<sup>110</sup> Presumably, however, a complainant might have been exposed to a prosecution or action for perjury if it could be proved that he lied in obtaining the warrant.<sup>111</sup>

Additionally, the arrest warrant was especially important for justifying “breaking” a house to make a felony arrest. Coke had asserted in his *Institutes* that breaking a house without the authority of a felony arrest warrant based on an indictment would violate Magna Carta’s “law of the land” guaranty.<sup>112</sup> Although later authorities asserted that a valid arrest warrant could be issued without there first being an indictment, they did not disagree with the need for a warrant to justify breaking a house.<sup>113</sup> Thus, the doctrine that “a man’s house is his castle” was a settled facet of common law.<sup>114</sup>

Breaking a house without a warrant was an actionable trespass if (1) the person to be arrested was not found in the house, or (2) he was found but turned out to be innocent of felony.<sup>115</sup> In those instances, it appears that the breakers were strictly liable for trespass.<sup>116</sup> Additionally, it was especially perilous to break a house without a warrant because it was not entirely clear that it was unlawful for residents of a house to use lethal force

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109. “False imprisonment” was sometimes defined as an arrest “without legal process.” *See, e.g.*, WOOD, *supra* note 71, at 561 (defining false imprisonment as being brought “for imprisoning one without Cause, or for unlawfully detaining him without legal Process”). An arrest constituted “imprisonment.” *See supra* note 71. The term “process” was sometimes defined to include an arrest warrant. *See, e.g.*, WOOD, *supra* note 71, at 610 (defining “The Process before Presentment or Indictment” to include a “Warrant”).

110. *See* 3 BLACKSTONE, *supra* note 47, at 126-27 (noting that “where there is any, the least, probable cause” courts disfavored actions for malicious prosecution); Davies, *Probable Cause, supra* note 1, at 48-49, 50 n. 225 (discussing early nineteenth century American cases that treated probable cause as a defense to an action for malicious prosecution).

111. *See, e.g.*, 4 BLACKSTONE, *supra* note 47, at 136-37 (defining the crime of perjury to apply to false statements made under oath before a magistrate).

112. 4 COKE, *supra* note 45, at 176-77.

113. *See* Davies, *Correcting History, supra* note 1, at 76-77.

114. *See, e.g.*, 4 BLACKSTONE, *supra* note 47, at 223 (noting that “the law of England has so particular and tender a regard to the immunity of a man’s house, that it stiles it his castle, and will never suffer it to be violated with impunity”); Davies, *Original Fourth, supra* note 1, at 642-46.

115. *See supra* note 94.

116. *See, e.g.*, 3 BLACKSTONE, *supra* note 47, at 209-10 (broadly stating that “[e]very unwarrantable entry” of a man’s close is a trespass within the meaning of a writ of trespass, and “every such entry or breach of a man’s close carries necessarily along with it some damage”).

against persons attempting an unlawful breaking.<sup>117</sup> Thus, because there were strong incentives for complainants to make felony arrests by obtaining a warrant, arrest warrant authority loomed larger in framing-era doctrine than it does today.<sup>118</sup> As James Wilson put it almost contemporaneously with the adoption of the Bill of Rights, “[a] warrant is the first step usually taken for [the apprehension of a criminal].”<sup>119</sup>

The standard for obtaining a felony arrest warrant in advance of an arrest was the same as for justifying a felony warrantless arrest “on suspicion” immediately after the arrest: the complainant had to (1) prove that a felony had actually been committed “in fact” and (2) present information showing at least probable grounds to suspect that the person to be arrested was the culprit.<sup>120</sup> The warrant process provided protection against hasty or groundless arrests insofar as the justice of the peace was required to closely assess the sufficiency of the complainant’s allegations. As the leading treatise by Hawkins put it:

[S]ince the undue execution of [an arrest warrant] may prove so highly prejudicial to the Reputation as well as the Liberty of the Party, a Justice of Peace cannot be too tender in his Proceedings of this Kind, and seems to be punishable not only at the suit of the king, but also of the Party grieved; if he grant any Warrant groundlessly and maliciously, without such a probable cause, as might induce a candid and impartial Man to suspect the Party to be guilty.<sup>121</sup>

The frequent quotation of this passage and others like it in justice of the peace manuals clearly directed magistrates to issue arrest warrants only if they were satisfied with the complainant’s testimony.<sup>122</sup>

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117. See, e.g., 4 BLACKSTONE, *supra* note 47, at 223 (noting, in a discussion of burglary, the resident’s “natural right of killing the aggressor” of a habitation). Killing an intruder during an attempted burglary was justifiable homicide. See, e.g., 2 BURN (1770 ed.), *supra* note 46, at 412. Additionally, a person could lawfully gather up to eleven friends to assist in defending his house without committing unlawful assembly. See 4 BLACKSTONE, *supra* note 47, at 223-24.

118. Framing-era authorities often advised that it was “best” to obtain an arrest warrant even in circumstances in which it was not absolutely necessary to do so. See, e.g., 2 HALE, *supra* note 45, at 76.

119. 2 THE WORKS OF JAMES WILSON, *supra* note 79, at 684 (the quoted passage appears at the beginning of Wilson’s lecture on arrest authority).

120. See, e.g., 4 BLACKSTONE, *supra* note 47, at 287 (stating that “it is fitting [for the magistrate] to examine upon oath, the party requiring the warrant, as well to ascertain that there *is* a felony, or other crime actually committed, without which no warrant should be granted; as also to *prove* the cause and probability of suspecting the party against whom the warrant is prayed”).

121. 2 HAWKINS, *supra* note 45, at 84-85. Hawkins also stated that a justice of the peace could issue an arrest warrant “upon strong Grounds of Suspicion for a Felony or other Misdemeanor.” *Id.* at 84. Note that “a Felony or other Misdemeanor” appears to be shorthand for the crime-in-fact prong.

122. Professor Fabio Arcila has recently claimed that justices of the peace did not assess the sufficiency of the factual grounds for warrants—what he terms “judicial sentryship”—before issuing arrest or search warrants. Fabio Arcila, Jr., *In the Trenches: Searches and the Misunderstood Common-Law History of Suspicion and Probable Cause*, 10 PENN. J. CON. L. 1, 4-5 (2007). Arcila concedes that the treatises stated this requirement. *Id.* at 18-23. He contends, however, that the justice of the peace

manuals did not, and thus, that “non-elite justices of the peace” would not have thought there was any need for such “sentryship,” but would have issued arrest and search warrants simply on the applicant’s conclusory claim that he had grounds for the intrusion. *Id.* at 24. However, that claim is insubstantial.

The fulcrum for Arcila’s claim is merely a passage in the manuals that paraphrased a statement in Hale’s treatise along the following lines: “*It is convenient, though not always necessary*, that the party who demands the warrant be first examined on oath, touching the whole matter whereupon the warrant is demanded, and that examination put into writing.” *See id.* at 24 (quoting ABRIDGMENT OF BURN’S JUSTICE (1773), *supra* note 46, at 372) (emphasis added by Arcila). This passage does appear in the entry on “Warrants” in all editions of Burn’s manual and in most of the framing-era and immediate post-framing American justice of the peace manuals. *See, e.g.*, 4 BURN (1770 ed.), *supra* note 46, at 372. As Arcila notes, it paraphrased a statement in the first volume of Hale’s treatise. 1 HALE, *supra* note 45, at 582; Arcila, *supra* at 25. Arcila’s suggestion that this passage would have been understood to mean that a magistrate’s assessment of the grounds for suspicion was merely “optional,” however, is incorrect.

To begin with, the phrase “[i]t is convenient” likely connoted “it is proper” during the eighteenth century, not just “it is easiest.” *See* 3 THE OXFORD ENGLISH DICTIONARY 861 (2d ed. 1989) (including among definitions for “convenient” the obsolete definitions “[a]ccordant, congruous, consonant (to),” “[s]uitable to the conditions or circumstances; befitting the case; appropriate, proper, due,” and “[m]orally or ethically suitable or becoming; proper”). So in modern idiom, Hale’s statement was that “It is proper, but not always necessary,” or “it is best, but not always necessary.”

Moreover, Arcila fails to mention that the quoted passage is always followed in the manuals by two citations to Hale’s treatise—“1 H.H. 582. 2 H.H. 111.” *See, e.g.*, ABRIDGMENT OF BURN’S JUSTICE (1773), *supra* note 46, at 372. The second citation is to a passage that Arcila does not mention: “The party that demands [an arrest warrant] ought to be examined upon his oath touching the whole matter, whereupon the warrant is demanded, and that examination put into writing.” 2 HALE, *supra* note 45, at 111. Additionally, a page earlier Hale had written:

But that I may say it once for all, it is fit in all cases of warrants for arresting for felony, much more for suspicion of felony, to examine upon oath the party requiring a warrant, as well whether a felony were done, as also the causes of his suspicion, for [the justice of peace] is in this case a competent judge of those circumstances, that my induce the granting of a warrant to arrest.

2 HALE, *supra* note 45, at 110. Thus, at most, the Hale passage paraphrased in the manuals meant that the requirement of recording the allegations in writing, which would have involved some delay, could be relaxed somewhat if there was an urgent need to arrest for felony promptly. Hale plainly did not mean that judicial assessment of the grounds for a warrant was merely “optional.”

Moreover, even if a justice of the peace might have been unaware of these latter passages in Hale’s treatise, the same point about the need for a magistrate to assess the factual grounds for an arrest warrant was made in other passages in the very same entries on arrest warrants in the manuals that Arcila cites. Arcila mentions that some of the manuals “elsewhere suggested a sentryship role.” *Id.* at 25. That is a gross understatement. As Arcila acknowledges—but only in a footnote—the entries on warrants in the manuals also paraphrased Hale’s explanation that it was proper for a justice of the peace to issue a felony arrest warrant, even before indictment, because issuance of a warrant was a “judicial act” and the justice of the peace was the “judge of the reasonableness” of the grounds for the warrant. *Id.* at 25 n.82.

Additionally, Arcila totally omitted an even more salient passage that also appears in virtually all of the arrest warrant entries in the manuals. Immediately after the paraphrase of Hale’s “judge of the reasonableness” passage, the manuals also quoted the passage from Hawkins’s treatise (set out *supra* in the text accompanying note 121) to the effect that a justice could issue an arrest warrant “upon strong grounds of suspicion, for a felony or other misdemeanor” and could be “punished” if he granted a warrant in the absence of a showing of “a probable cause as might induce a candid and impartial man to suspect the party to be guilty.” *See, e.g.*, 4 BURN (1770 ed.), *supra* note 46, at 330 (quoting 2 HAWKINS, *supra* note 45, at 85); ABRIDGMENT OF BURN’S JUSTICE (1773), *supra* note 46, at 373 (same); CONDUCTOR GENERALIS (New York, 1788, printed by John Patterson), *supra* note 46, at 442 (same); SOUTH CAROLINA JUSTICE OF THE PEACE (Philadelphia, 1788), *supra* note 46, at 493 (same); CONDUCTOR GENERALIS (New York, 1788, printed by Hugh Gainie), *supra* note 46, at 367 (same); BURN’S ABRIDGMENT (1792), *supra* note 46, at 418-19 (same); HENING (1795 ed.), *supra* note 46, at 450 (providing a shortened statement, citing to Hale’s and Hawkins’s treatises, that justices “should be

In addition, the requirement that arrest warrants be issued only for specific persons had already taken root prior to the framing era. Although some early seventeenth century sources had still endorsed use of unparticularized warrants to arrest “all suspected persons” or to search “all

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well satisfied of the reasonableness of the accusation”); *id.* (1810 ed.) at 598 (same); RICHARD BACHE, THE MANUAL OF A PENNSYLVANIA JUSTICE OF THE PEACE 137 (1814) (quoting the passage in Hawkins’s treatise as well as Blackstone’s statement set out *supra* note 120). The manuals plainly directed justices to assess the sufficiency of the grounds for the requested arrest warrant.

Professor Arcila also extended his error by asserting that he saw no reason why search warrants would not also be subject to the “optional” analysis he imposed on arrest warrants. Arcila, *supra*, at 27. But strict enforcement of the procedure and requirements for issuing search warrants made sense because, unlike felons on the loose, stolen goods did not pose a danger to the community. Thus, the entries on the search warrant for stolen goods in the manuals did not indicate any leeway in the requirement that the justice assess the factual grounds for the warrant. Rather, they explicitly required judicial assessment of the adequacy of the grounds for the search. *See, e.g.*, ABRIDGMENT OF BURN’S JUSTICE (1773), *supra* note 46, at 323 (stating that “in case of a complaint, and oath made, of goods stolen, and that the party suspects that goods are in such a house, and shews the cause of his suspicion; the justice may grant a warrant to search”). Virtually identical passages appear in the entries for “Search Warrant” in other manuals. *See, e.g.*, CONDUCTOR GENERALIS (New York, 1788, printed by John Patterson), *supra* note 46, at 383; CONDUCTOR GENERALIS (New York, 1788, printed by Hugh Gaine), *supra* at 323; BURN’S ABRIDGMENT (1792), *supra* note 46, at 357. *See also* Frisbie v. Butler, 1 Conn. 213 (1787) (stating that it is the duty of a justice of the peace who issues a search warrant “to limit the search to such particular place or places, as he, from the circumstances, shall judge there is reason to suspect”); HENING (1795 ed.), *supra* note 46, at 402 (stating that search warrants for stolen goods are “not to be granted without oath made before the justice of a felony committed, and that the party complaining hath probable cause to suspect [the goods] are in such a house or place, and do shew his reasons of such suspicion,” and noting that such warrants are “judicial acts, and must be granted upon examination of the fact”); JAMES EWING, JUSTICE OF THE PEACE 505 (Trenton, 1805) (making essentially the same statement as HENING, *supra*); HENING (1810 ed.), *supra*, at 524 (same); *id.* (1825 ed.) at 621 (same).

Additionally, framing-era state statutes explicitly required the applicant to show adequate cause for issuance of a revenue search warrant. *See* statutes cited *infra* note 202.

Professor Arcila’s analysis also ignored the plain language of the state constitutional provisions on warrants. For example, Virginia prohibited warrants that lacked “evidence of a fact committed,”—that is, sworn factual allegations of an actual crime. *See infra* note 195 and accompanying text. Pennsylvania required an oath “affording a sufficient foundation” for the warrant (*see infra* text accompanying note 209)—surely “sufficient” implied a judicial assessment. Massachusetts required that “the cause or foundation [be] previously supported by oath”—a formulation which also demands more than just a conclusory oath. *See infra* text accompanying note 212. Likewise, the Fourth Amendment’s requirement of “probable cause, supported by Oath” requires an assessment of factual grounds. *See supra* text accompanying note 7.

Finally, although evidence of actual practice is scarce, at least one incident from the aftermath of the framing era indicates that a complainant’s grounds of suspicion were expected to be fully aired prior to the issuance of an arrest warrant. During arguments in *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), Chief Justice Marshall asked Attorney General Caesar Rodney if there would not have been an opportunity for a defendant to cross-examine his accusers during a post-arrest felony committal proceeding. Rodney replied that a defendant would not necessarily have had that opportunity because the court could use, in place of a further examination of the complainant’s factual allegations, the complainant’s *ex parte* affidavit from the earlier proceeding at which the arrest warrant had been issued. *Id.* at 124. So the Attorney General of the United States apparently thought there would be a record of the factual allegations upon which an arrest warrant had been issued.

In sum, Professor Arcila’s rejection of “judicial-sentryship” of warrants rests on nothing more than his omission of almost all of what the pertinent sources actually stated. Another erroneous claim by Professor Arcila is discussed *infra* note 204.

suspected” houses for stolen goods or fugitives,<sup>123</sup> the leading treatises by Hale and Hawkins both condemned such unparticularized warrants when they were published in the early eighteenth century.<sup>124</sup> Thereafter, the forms for unparticularized general search warrants in the justice of the peace manuals were replaced with forms for the *specific* search warrant for stolen property described above.<sup>125</sup> Thus, it was understood that an unparticularized warrant offered none of the protections conferred by a specific warrant,<sup>126</sup> and the illegality of general criminal arrest or search warrants was already a long-settled aspect of common law when the American declarations and bills of rights were framed.<sup>127</sup>

### c. Arrests for Less than Felony Offenses

In keeping with the “necessity” criterion, warrantless arrest authority for less-than-felony offenses was considerably more restricted than that for

123. The source usually cited regarding the earlier approval of general warrants of this type is MICHAEL DALTON, *THE COUNTRY JUSTICE* (first published 1618; last edition 1746; see 1 MAXWELL, *supra* note 45, at 227 (discussing the publication history of *THE COUNTRY JUSTICE*)). However, justice of the peace manuals in the latter half of the eighteenth century routinely stated that Dalton’s view had been rejected by the treatises of Hale and Hawkins. See, e.g., 2 BURN (1755 ed.), *supra* note 46, at 348; CONDUCTOR GENERALIS (Woodbridge, N.J., 1764, printed by James Parker), *supra* note 46, at 384-85; ABRIDGMENT OF BURN’S JUSTICE, *supra* note 46, at 322; CONDUCTOR GENERALIS (New York, 1788, printed by Hugh Gaine), *supra* note 46, at 322-23. It seems likely that Dalton’s manual was generally regarded as being obsolete by the time of the framing era.

124. 2 HALE, *supra* note 45, at 150; 2 HAWKINS, *supra* note 45, at 82. These condemnations of general warrants were widely cited and paraphrased in the entries for “Warrants” in framing-era justice of the peace manuals. See *supra*, note 123.

125. The change is apparent in the successive editions of *Conductor Generalis*, the most widely used of the justice of the peace manuals printed in the American colonies. The 1722 edition still set out a form for an unparticularized warrant authorizing a search of all suspected houses for stolen goods. CONDUCTOR GENERALIS (Philadelphia, printed by Andrew Bradford, 1722), *supra* note 46, at 93 (setting out “Another Warrant to search for suspected Persons, &c. and to apprehend &c.”). But in the 1749 edition—the first after the publication of the treatises by Hawkins and Hale—that warrant form was replaced with a form for a *particularized* warrant to search a specified house for stolen goods. CONDUCTOR GENERALIS (New York, printed by James Parker, 1749), *supra* note 46, at 113 (setting out form for “Warrant to Search for Stolen Goods, and apprehend the Felon”).

Additionally, the 1755 first edition of Burn’s leading late-eighteenth century English manual noted that unparticularized general warrants to search any suspected houses for fugitives or stolen goods had been “generally condemned by the best authorities.” 2 BURN (1755 ed.), *supra* note 46, at 348 (entry for “Search Warrant”) (quoting the treatises by Hale and Hawkins). That statement and the pertinent passages from Hale’s and Hawkins’ treatises were repeated in all of the later editions of Burn’s Manual. See, e.g., 4 BURN (1770 ed.), *supra* note 46, at 104. That same statement was also included in the American justice of the peace manuals that borrowed heavily from Burn’s manual. See, e.g., CONDUCTOR GENERALIS (Woodbridge, N.J., printed by James Parker, 1764), *supra* note 46, at 384; ABRIDGMENT OF BURN’S JUSTICE (Boston, printed by Joseph Greenleaf, 1773), *supra* note 46, at 322; CONDUCTOR GENERALIS (New York, printed by John Patterson, 1788), *supra* note 46, at 382.

126. Because a justice had no authority to issue a general warrant, a constable was not indemnified if he executed one. See Davies, *Original Fourth*, *supra* note 1, at 588 n.99.

127. Some conventional commentators have asserted that the illegality of general warrants at common law was still unsettled well into the framing era, but the evidence offered is unpersuasive. See *id.* at 655-57 n.299.

felonies.<sup>128</sup> In fact, lawful warrantless non-felony arrests usually were limited to an ongoing “breach of the peace” offense—a term of art that usually connoted an offense that caused public fear or threatened public order.<sup>129</sup> Because a warrantless arrest for an ongoing breach of the peace was necessary to restore order and prevent further injuries, a warrantless arrest could be made for an ongoing breach of the peace, but only by a person who was present and actually observed the ongoing breach.<sup>130</sup> As a practical matter, this standard meant that lawful warrantless non-felony arrests could rarely be made except in the context of an ongoing “affray” (an ongoing fight).<sup>131</sup> Of course, the limitation of such arrests to a person who was present and witnessed the breach also effectively limited such arrests to situations in which the arrestee was actually guilty.<sup>132</sup>

After a breach of the peace ended, however, a constable or private person could make a lawful arrest only by procuring an arrest warrant from a justice of the peace.<sup>133</sup> The standard for issuing an arrest warrant for a non-felony offense seems to have been the same as for a felony arrest warrant; that is, the complainant would have to (1) prove the fact that an offense had actually been committed, and (2) provide information constituting at least probable cause of suspicion as to the identity of the culprit.<sup>134</sup> There was some debate as to whether an arrest warrant for a less-than-felony offense could justify breaking a house, but the trend seems to have been to recognize that it did.<sup>135</sup>

#### *d. The Absence of Arrest Authority for Petty Offenses*

In contrast to felonies and ongoing breaches of the peace, there was no urgency to deal with nuisances or other regulatory or petty offenses. Hence, although constables, but not private persons, had order-maintenance authority to temporarily detain drunks, vagrants and night-walkers, there was no warrantless arrest authority at all for most minor offenses.<sup>136</sup>

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128. See Davies, *Arrest*, *supra* note 1, at 323-26.

129. See *id.* at 283-87. However, this definition was sometimes stretched, under the concept of a “constructive breach” (that is an act likely to provoke someone else to violence), to include “barratry” (stirring up quarrels). See *id.* at 286-87.

130. See *id.* at 324.

131. Because an ongoing affray posed a danger of serious injury, a constable could enter a house without a warrant if he became aware of an ongoing affray within. Additionally, a constable could follow a fleeing affrayer who went into a house (but only after knocking and demanding entry). See Davies, *Original Fourth*, *supra* note 1, at 644-45, nn.268-69.

132. See Davies, *Arrest*, *supra* note 1, at 323.

133. See *id.* at 324-25 n.253.

134. See *supra* note 120 and accompanying text.

135. See Davies, *Original Fourth*, *supra* note 1, at 644-45.

136. See Davies, *Arrest*, *supra* note 1, at 345-53.

Instead, they were to be dealt with by issuance of a summons to appear before a magistrate.<sup>137</sup>

In sum, framing-era authorities set out criminal arrest standards with sufficient consistency that those standards appeared to be quite settled during the period in which the American Framers drafted the initial state declarations of rights and the federal Bill of Rights. Because the arrest standards were complex and varied according to the necessity created by different offenses, however, the Framers did not attempt to spell them out in the constitutional texts. Instead, they simply invoked those settled standards by using the traditional labels “the law of the land” or “due process of law.”

## 2. *The (Unsuccessful) Attempt to Preserve Common-Law Arrest Standards as “Due Process of Law”*

As noted above, Coke had used the term “the law of the land” and the somewhat more precise term “due process of law” as labels for the legal requisites for initiating criminal prosecutions.<sup>138</sup> Moreover, he had specifically described the common-law standards for lawful arrests, including *warrantless* arrests,<sup>139</sup> as components of those concepts.<sup>140</sup> That was still the meaning that those terms carried during the framing era.<sup>141</sup> Somewhat surprisingly, the term “due process of law” was rarely used in eighteenth century legal sources but, when it was used, it was used as Coke had used it—as a label for the requisites for initiating valid criminal prosecutions.<sup>142</sup> As a result, when the American Framers sought to prevent legislative relaxation of common-law criminal arrest standards they did so by simply invoking the traditional and settled understandings connoted by the terms “the law of the land” or “due process of law.”

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137. See, e.g., 2 THE WORKS OF JAMES WILSON, *supra* note 89, at 689-90 (stating that “[o]n an indictment for any crime under the degree of treason or felony, the proper process to be first awarded, at the common law, is a *venire facias*, which, from the very name of it, is only in the nature of a summons to require the appearance of the party”); 4 BLACKSTONE, *supra* note 47, at 278-80 (discussing the use of summons in summary proceedings for petty offenses); Davies, *Arrest*, *supra* note 1, at 322 n.240.

138. See Davies, *Correcting History*, *supra* note 1, at 47-62.

139. Coke may have innovated in treating *warrantless* arrest standards as aspects of due process of law insofar as the term “process” usually referred to the written authority for the initiation of a legal proceeding. See Davies, *Correcting History*, *supra* note 1, at 53. Coke did this by including both arrests by “warrant in deed” (that is, by written warrant) and arrests by “warrant . . . in law without writ” (that is, a warrantless arrest, using the word “warrant” as a synonym for “authority”). See *id.*; see also *id.* at 84-85 n.257. “Process” was not a synonym for “procedure” in framing-era usage. See *infra* note 155 and accompanying text.

140. See Davies, *Correcting History*, *supra* note 1, at 54-61.

141. See *id.* at 81-86.

142. See *id.* at 82-83.



a. *The State “Law of the Land” and “Due Process of Law” Provisions*

In keeping with the importance accorded to common-law arrest standards, the state framers almost always included provisions that paraphrased Magna Carta’s “law of the land” chapter in the initial state constitutions and declarations of rights—indeed, those provisions are more common than the antecedents of the Fourth Amendment that banned general warrants.<sup>143</sup> For example, the criminal procedure provision in the 1776 Virginia declaration prohibited a person being deprived of his “liberty” except by “the law of the land.”<sup>144</sup> Notably, when John Adams drafted the 1780 Massachusetts declaration, he included a provision explicitly prohibiting a person being “arrested” except according to “the law of the land,” and he placed that ahead of the warrant provision in which he introduced the phrase “unreasonable searches and seizures.”<sup>145</sup> Thus, Adams plainly was not addressing warrantless arrests in the later provision.

The change from “law of the land” to “due process of law” terminology was initiated in 1787 when the New York legislature adopted a bill of rights.<sup>146</sup> In response to assertions that state statutes could alter the law of the land, Alexander Hamilton initiated a shift to Coke’s due process of law terminology while arguing that the requisites of due process of law were judicial in nature and, thus, immune from legislative interference.<sup>147</sup> New York thus became the first state to adopt a provision prohibiting a person being “taken or imprisoned” except according to “due Process of Law.”<sup>148</sup> The later state ratification conventions that proposed rights amendments to the new constitution typically included provisions along the lines of the state law of the land provisions.<sup>149</sup> The New York convention

143. *See id.* at 93-127 (setting out and discussing all of the state provisions on arrests and warrant standards adopted prior to the framing of the Federal Bill of Rights).

144. *See id.* at 96. Notably, the Virginia law of the land provision focused on deprivation of “liberty” but did not mention deprivation of property interests. *See id.*

145. *See id.* at 113. After providing for other criminal procedure protections, Article 12 of the Massachusetts Declaration provided that “no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.” *See id.* The ban against general warrants, in which “unreasonable searches and seizures” first appeared, was in the subsequent Article 14. *See id.* at 114-15.

146. *See id.* at 121.

147. *See id.* at 121-23.

148. *See id.* at 123-25. The 1787 New York arrest provision, which still reflected Coke’s view of the importance of criminal indictments as a requisite for a felony prosecution, required either arrest by indictment or arrest in keeping with the common-law standards denoted as due process of law:

*Third*, That no Citizen of this State shall be taken or imprisoned for any Offence upon Petition or Suggestion, unless it be by indictment or Presentment of good and lawful Men of the same Neighborhood where such Deeds be done, in due Manner, or by due Process of Law.

*See id.* at 124.

149. *See id.* at 131-35.

proposed a provision that forbade a person being “taken” or “deprived of . . . Liberty” except by “due Process of Law.”<sup>150</sup>

*b. The “Due Process of Law” Clause of the Fifth Amendment*

James Madison then followed Hamilton’s lead when he included the guaranty of due process of law in the proto-Fifth Amendment.<sup>151</sup> In keeping with the understanding that due process of law referred to the requisites for *initiating* a criminal prosecution, Madison put that provision along with others that pertained to the initiation of criminal prosecutions in the proto-Fifth Amendment,<sup>152</sup> which he placed at the beginning of the criminal provisions in the Bill.<sup>153</sup>

Two lessons are evident in this part of the authentic history. One is that parsing the words of constitutional rights provisions is not an adequate methodology for recovering the original understandings of such provisions.<sup>154</sup> The original meaning of the terms “the law of the land” and “due process of law” cannot be teased out from the language alone,<sup>155</sup> but the content connoted by that terminology was plainly provided by the Colean tradition with which the Framers’ generation was thoroughly familiar.<sup>156</sup>

The other lesson, of course, is that the legal requisites for criminal arrests and searches—a large part of the content now assigned to the Fourth Amendment under the rubric of “searches and seizures”—had actually been addressed in the law of the land and due process of law provisions.<sup>157</sup> Put another way, there was neither a need for an overarching reasonableness standard that would include arrest standards, nor was there even room for such a standard. Remarkably, the conventional Fourth Amendment commentaries have been so blinded by the modern concept of Fourth Amendment reasonableness that they never bothered to consider the

150. *See id.* at 135-36.

151. *See id.* at 146-48.

152. *See id.* at 143-46. The Fifth Amendment was not a miscellaneous collection of clauses, but rather a collection of provisions that related to the requisites for the initiation of valid criminal prosecutions. *See id.*

153. *See id.* at 140-41. In Madison’s ordering, the proto-Fifth Amendment was followed by the proto-Eighth Amendment, which prohibited excessive bail, and then the proto-Fourth Amendment banning general warrants, and finally the proto-Sixth Amendment, which pertained to criminal trial rights. *See id.* Why the ordering was later changed remains unclear. *See infra* note 274 and accompanying text.

154. *See* Davies, *Correcting History*, *supra* note 1, at 81-86.

155. *See id.* Close attention to the meaning of “process” in framing-era usage, however, would have disclosed that it did not mean “procedure,” as is commonly assumed today. *See id.* at 81-82. Court procedure was referred to as “course of law,” not as “process of law.” *See id.*

156. *See id.* at 83-86.

157. *See id.* at 155-58. It is possible that the federal Framers were less concerned with arrest authority than the state Framers, but there is no reason to think that they had a different understanding of due process of law than the state Framers. *See id.*

historical content that the more numerous “law of the land” and “due process of law” constitutional provisions actually carried during the framing era.<sup>158</sup>

*C. The Original Fourth Amendment and the Fear of Revenue Searches of Houses*

What then was the original content of the Fourth Amendment? The Fourth Amendment simply prohibited Congress from authorizing the use of general warrants for searches and seizures involving persons, houses, papers, and effects (the latter being a catch-all for the sorts of moveable property found in houses, such as furniture or goods).<sup>159</sup> Although the inclusion of “persons” shows that the text was framed broadly enough to also prohibit general criminal arrest or search warrants (and may reflect memory of the Wilkesite general warrants),<sup>160</sup> the historical record shows that its Framers were primarily concerned with prohibiting legislative authorization of general warrants for searches of houses to enforce customs or excise tax collections, but seldom expressed any concern with general arrest warrants.<sup>161</sup>

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158. See *id.* at 39 (discussing the superficial treatment of Coke’s discussion of “the law of the land” in LASSON, *supra* note 18). Cuddihy also completely overlooked the significance of the framing-era understanding of “the law of the land” and “due process of law” (neither of which terms even appears in the index to his book). Although Cuddihy did briefly discuss Coke’s view of Magna Carta’s law of the land chapter, he did so only with a narrow focus on Cole’s view of warrants, and discussed why (in his view) Coke was in error—rather than the far more important topic of how the American Framers understood Coke’s broader discussion of Magna Carta. Thus, Cuddihy never mentioned Coke’s treatment of warrantless arrest authority as an aspect of “due process of law.” See CUDDIHY, *supra* note 19, at 106-24, 140-45. Likewise, Cuddihy never mentioned any of the state constitutional “law of the land” or “due process of law” provisions in his remarkably superficial discussion of the initial state constitutional provisions or of the state ratification convention proposals for a federal Bill of Rights. See *id.* at 602-13, 673-86.

159. See *infra* note 261 and accompanying text.

160. See *supra* note 15.

161. See Davies, *Probable Cause*, *supra* note 1, at 37 (Noting that only two expressions of concern about criminal general arrest warrants have been identified in the ratification debates preceding the framing of the federal Bill of Rights). Moreover, framing-era Americans do not seem to have feared that general warrants might become recognized as lawful authority for criminal arrests. For example, a statement by Patrick Henry during the Virginia ratification convention—one of the two expressions of concern regarding criminal warrants that have been identified in the ratification debates—indicates that he assumed that a person arrested under a general arrest warrant would be entitled to relief on habeas corpus, and thus, implies that he assumed that the illegality of such a warrant would be recognized; instead, the concern he voiced was simply that such an arrest might occur “many hundreds of miles from the judges”—that is, it would be logistically difficult to obtain the writ. *Id.*

1. *The Perceived Threat of Legislative Authorization of General Warrants for Revenue Searches*

As noted above, the conventional history of the Fourth Amendment has been erected around the English Wilkesite general warrant cases of the early 1760s and the 1761 *Writs of Assistance Case* in Boston.<sup>162</sup> But that treatment does not adequately capture the concern that actually prompted the American Framers to ban general warrants. The Wilkesite cases did not involve the issue of whether general warrants could be used in ordinary criminal law enforcement—it was already settled doctrine that they could not.<sup>163</sup> Rather, the Wilkesite cases involved a more limited and precise issue—whether the high office of Secretary of State possessed a unique authority to convey discretionary search authority to several of the king’s messengers by issuing general warrants.<sup>164</sup> When the English judges ruled that even the Secretary of State had no power to confer discretionary search and arrest authority through general warrants they eliminated any possibility that general criminal warrants could be legal as a matter of common law.<sup>165</sup> Because there do not seem to have been American colonial controversies comparable to the Wilkesite general warrant searches, however, the Wilkesite cases would seem to have been of largely symbolic importance to Americans.<sup>166</sup>

The controversy over the use of general writs of assistance for revenue searches of houses was the far more important catalyst. Unlike the settled common-law standards for criminal arrests and searches, the permissible scope for *statutory* authority for revenue search warrants was problematic.<sup>167</sup> As creatures of legislation, rather than of common law, revenue search warrants were not necessarily controlled by the traditional content assigned to due process of law.<sup>168</sup> Indeed, there are indications that the collection of the revenue was sometimes accorded a higher priority than

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162. See *supra* notes 20-22 and accompanying text.

163. See *supra* notes 123-24 and accompanying text.

164. The king’s messengers who were defendants in the Wilkesite trespass cases did not attempt to defend the legality of general warrants as an ordinary matter. Rather, their defense was essentially that the Secretary of State had authority to issue general warrants under the precedent of that office’s long-standing practice of that office and, as a result, the officers were entitled to indemnity under a statute, 24 GEO. II. C. 44, which barred trespass liability against officers acting under a warrant. See, e.g., 4 BLACKSTONE, *supra* note 47, at 288 n. i (discussing the 1765 ruling of the Court of King’s Bench in the Wilkesite trespass case *Money v. Leach*).

165. In Blackstone’s summary, the rulings of the English courts meant that a general warrant, including one such as was used in the Wilkesite cases, was “illegal and void for its uncertainty” and thus was “no legal warrant” and “in fact no warrant at all: for it will not justify the officer who acts under it.” *Id.*

166. Notably, no references to the Wilkesite cases seem to have been identified in the Anti-Federalist tracts or ratification debates that preceded the framing of the Bill of Rights. See Davies, *Original Fourth*, *supra* note 1, at 562 n.20; *infra* note 350 and accompanying text.

167. See *id.* at 657-59.

168. See *id.* at 673 n.338.

enforcement of criminal law.<sup>169</sup> Additionally, there was no long-settled understanding that legislation could not authorize general revenue search warrants; indeed, under the theory of parliamentary sovereignty, Parliament claimed unlimited authority.<sup>170</sup> As a result, colonial courts had divided regarding the legality of general writs of assistance when such writs became the subject of a widespread colonial controversy a few years after the largely local 1761 Boston case.<sup>171</sup>

The widespread colonial controversy regarding the legality of general warrants erupted in 1767 when Parliament reauthorized the use of general writs of assistance for customs searches in the North American colonies in the Townshend Duties Act.<sup>172</sup> This controversy was especially intense because the 1765 Stamp Act had put Americans on notice that Parliament did not respect their claim to the rights of Englishmen.<sup>173</sup> Although Parliament promptly repealed the Stamp Act at the behest of English merchants when the colonists boycotted English goods, Parliament accompanied that repeal by reasserting its unlimited power over the colonies in the Declaratory Act of 1766.<sup>174</sup> Parliament then again outraged the colonists by imposing new customs duties in the Townshend Duties Act of 1767—and by also reauthorizing the use of general writs of assistance for North American customs searches, including searches of houses.<sup>175</sup> Thus, Parliament's reauthorization of general writs of assistance in 1767 produced a strong and widespread grievance precisely because it occurred in the context of other developments that led Americans to perceive that Parliament was denigrating their rights as Englishmen.<sup>176</sup>

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169. See Davies, *Probable Cause*, *supra* note 1, at 31 n.128.

170. Indeed, although Parliament itself condemned the illegality of the Wilkesite general warrants, *see* 4 BLACKSTONE, *supra* note 47, at 288 n.i., it expressly reserved to itself the power to authorize such warrants in the future. See LASSON, *supra* note 18, at 48-49 (discussing the resolutions of Parliament regarding general warrants and noting that the House of Commons declared “that general warrants were universally invalid, except as provided for by act of Parliament”).

171. See Davies, *Original Fourth*, *supra* note 1, at 561-62 n.20.

172. See Oliver M. Dickerson, *Writs of Assistance as a Cause of the Revolution*, in *THE ERA OF THE AMERICAN REVOLUTION* 40 (Richard B. Morris ed., 1939). Note that Dickerson's important research on the general writ controversies that arose from the Townshend Duties Act was published a few years after Lasson's book was published in 1937. See *id.*; LASSON, *supra* note 18. Perhaps for that reason, those controversies generally have not received the attention they merit in commentaries on the history of the Fourth Amendment.

173. See SOURCES, *supra* note 5, at 72, 75. Colonial opposition to the Stamp Act was grounded on the principle that the collection of an “internal” tax was constitutional only if it were approved by the colonial legislature. This principle—no taxation without “common consent by act of parliament”—was established in the Petition of Right of 1628. See *id.* Because the American colonies had no representation in the English Parliament, American Whigs reformulated this principle as “no taxation without representation.” See *id.* at 263.

174. See *id.* at 268-69.

175. See *id.* at 276-77.

176. See JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS* 197 (1986) (“For Americans, writs of assistance were grievous because they

The colonists' grievance against the Townshend Act general writs was undoubtedly intensified by their knowledge—gained from brief newspaper accounts—that the English courts had condemned the illegality of general warrants only a few years earlier during the then-recent Wilkesite cases.<sup>177</sup> Additionally, leaders in many of the colonies probably had also become aware of the earlier Boston litigation because James Otis had been a delegate in 1765 to the first of the continental gatherings—the Stamp Act Congress.<sup>178</sup> So, when customs officers applied to the colonial courts for issuance of the general writs authorized by the Townshend Act, colonists challenged the legality of such writs in the courts in most of the colonies.<sup>179</sup>

Some of the colonial courts simply declined to act on requests by customs officers;<sup>180</sup> others ruled that such writs were so “discretionary” that they were illegal.<sup>181</sup> The Virginia court even declared the general writs “unconstitutional.”<sup>182</sup> But there were two important exceptions—in Massachusetts the 1761 case was precedent for the legality of such writs,<sup>183</sup> and in South Carolina the judges who opposed the writs were replaced by judges who did not.<sup>184</sup> Thus, the inconsistent colonial court rulings did not firmly establish that legislation could not authorize general writs for revenue searches of houses. Although it does not appear that large numbers of searches were actually conducted under such writs, the fact that Parliament had authorized general writs remained a powerful symbolic grievance, especially in Massachusetts where the general writ was a staple of American protests as late as the early 1770s.<sup>185</sup>

Although the general warrant grievance became less prominent as hostilities between the colonies and England came to a head, the memory of the threat to the house posed by the Townshend Act's legislative authorization of general writs prompted the Framers in the newly independent states to include bans against general warrants in several of the initial state declarations of rights adopted from 1776 through 1784.<sup>186</sup> An

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were authorized by Parliament and were yet another potential threat to rights posed by Parliament's claim to legislative supremacy.”).

177. See Davies, *Original Fourth*, *supra* note 1, at 563-67 (setting out examples of the brief newspaper reports of the Wilkesite cases, but noting that no case reports of any of the cases had been published as of the period of the controversy over the Townshend Act writs).

178. See *id.* at 561-62 n.20, 602 n.138. Cf., M. H. SMITH, THE WRITS OF ASSISTANCE CASE 492-97 (1978) (discussing the effect of Otis's 1761 argument on the widespread 1767 controversies over the Townshend Act writs of assistance).

179. See Dickerson, *supra* note 172, at 60-64.

180. See Davies, *Original Fourth*, *supra* note 1, at 566 n.26.

181. See Dickerson, *supra* note 172, at 60-61 (Pennsylvania judges); *id.* at 64 (East Florida judge).

182. See *id.* at 69.

183. See Davies, *Original Fourth*, *supra* note 1, at 566 n.26.

184. See *id.* at 582 n.83.

185. See *id.* at 602 n.139 (quoting a report of a Boston town meeting in late 1772).

186. See generally Davies, *Correcting History*, *supra* note 1, at 89-127 (discussing the “law of the land” and “due process of law” provisions that addressed arrest authority and the provisions that banned general warrants in the state declarations of rights adopted prior to the framing of the federal Bill of

examination of the textual evolution of those provisions reveals when and why the term “unreasonable searches and seizures” came to be included in the ban against general warrants.

## 2. *The Initial State Bans Against General Warrants*

The Framers in the newly independent states were not engaged in an abstract enterprise when they drafted the initial round of declarations of rights. The new states absorbed common law when they became independent, and—at least for the most part—the state Framers simply included language to identify and preserve the basic rights that were already recognized at common law.<sup>187</sup> But they had to be more creative when it came to prohibiting legislative authorization of general warrants, so they drafted provisions that addressed the actual dimensions of the colonial grievance.

Importantly, the salient colonial controversy over revenue searches had not been about whether some form of warrant was needed to justify house searches. Probably because of the settled maxim that “a man’s house is his castle,” the need for some kind of legal warrant to enter a house was simply taken as a given.<sup>188</sup> As a result, it does not appear that customs officers argued that they could enter houses without any form of warrant during the general writ cases, and it does not appear that there had been any significant legal controversy involving warrantless revenue searches of houses, either.<sup>189</sup> Rather, the colonial grievance had been focused on the illegality

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Rights); Davies, *Original Fourth*, *supra* note 1, at 674-93 (discussing the texts of the state bans against general warrants adopted prior to the framing of the Fourth Amendment).

187. See Davies, *Correcting History*, *supra* note 1, at 89-93; Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a “Trial Right”* in *Chavez v. Martinez*, 70 TENN. L. REV. 987, 1007-09 (2003); Davies, *Original Fourth*, *supra* note 1, at 670-74.

188. See Davies, *Original Fourth*, *supra* note 1, at 642-46.

189. See *id.* Conventional commentaries have obscured the focus of the colonial grievance on general warrants by claiming that the colonial grievance extended to warrantless searches of houses as well as to searches by general warrants. Indeed, that claim is essential to the plausibility of the conventional account of Fourth Amendment reasonableness: Why would the Framers have adopted a broad reasonableness standard to apply to warrantless searches if there had not been any claim that revenue officers could conduct warrantless searches of houses? However, the conventional commentaries simply misinterpret the relevant evidence.

The primary evidence offered for a supposed grievance over warrantless house searches is a 1772 complaint by a Boston town meeting that the commissions issued to the “Commissioners of His Majesty’s Customs in America” included a power to search “any House, Shop, Celler of any other Place” where untaxed goods were suspected, and several reiterations of that complaint through 1774. See CUDDIHY, *supra* note 19, at 779-80. Even if this minimal number of complaints was about warrantless customs searches of houses, it would be rather meager evidence that warrantless house searches were actually a salient issue. But in reality, these complaints were actually only artful propaganda. The important fact is this discretionary search power was included only in the commissions of the five “Commissioners of Customs”—the bigwigs in the operation who were much too lofty to conduct searches themselves—but no such power was included in the commissions of the officers who

of unparticularized general warrants in the form of general writs of assistance.<sup>190</sup> As a result, the state Framers did not undertake to specify when warrants were needed, but simply addressed the actual controversy that had arisen by banning the issuance of too-loose search warrants.<sup>191</sup>

Because there was no traditional formulation of a ban against general revenue warrants, the state Framers had to draft fairly detailed statements of minimum warrant requirements from scratch. Unsurprisingly, the provisions condemned unparticularized or unfounded warrants and directed that they “ought not be granted.”<sup>192</sup> The 1776 provisions adopted by Maryland and Delaware left it at that.<sup>193</sup> The other states that adopted bans against general warrants also included some formulation of the “cause” that had to be shown prior to issuance of a warrant. The 1776 Virginia provision, copied by North Carolina in 1777, hewed fairly close to common-law requisites for a criminal warrant by requiring that a warrant be supported by “evidence of a fact committed.”<sup>194</sup>

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would actually conduct any searches. As Cuddihy concedes, the “subordinate customs officers”—those who would actually do any searching—had no such search power in their commissions; rather, *they could do so only under a writ of assistance*. *Id.* at 780 n.51 (suggesting that the Boston complaint “erred in asserting that subordinate customs officers enjoyed these powers of search by commission, ignoring the requirement for writs of assistance”). Hence, the complaint about the search powers of the “Commissioners” was symbolic, not a description of search abuses that actually occurred. (I speculate that the five Commissioners were given direct search authority in their own commissions because they would have been viewed as having a status as high as the colonial judges who issued writs to ordinary customs officers.) It is also worth noting that Cuddihy accurately characterized the 1774 complaints as part of the larger “debate on general warrants” in his initial discussion of those complaints. *Id.* at 543.

It may be that one can find complaints about house searches that do not explicitly mention general warrants in the historical record, but those statements have to be appraised against the general expectation that breaking and searching a house required some kind of warrant. Thus, the complaints about house searches implicitly rested on a complaint about general or too-loose warrants. *See, e.g., Davies, Original Fourth, supra* note 1, at 609-10.

190. *See supra* note 22 and accompanying text.

191. *See Davies, Correcting History, supra* note 1, at 18-20 (arguing that the Framers did not undertake to craft abstract or comprehensive catalogs of rights, but rather addressed the rights that had actually been contested in the recent or distant past—what Madison referred to as “those essential rights ‘thought to be in danger’”).

192. *See Davies, Original Fourth, supra* note 1, at 720.

193. The 1776 Maryland provision read:

That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons without naming or describing the place, or the person in special, are illegal, and ought not to be granted.

*See id.* at 676 n.351 (quoting MD. CONST. of 1776, § 23). Delaware adopted a similar provision in 1776. *See id.*

194. The 1776 Virginia provision read:

That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

*See id.* at 674 (quoting VA. CONST. of 1776, art. X). North Carolina copied this provision in 1776. *See id.* at 676 n.351.



Other states, however, used less precise formulations of the requisite showing of cause. The 1776 Pennsylvania provision, copied by Vermont in 1777, required testimony establishing “a sufficient foundation” for the search,<sup>195</sup> while the 1780 provision that John Adams drafted for Massachusetts forbade issuance of warrants if “the cause or foundation of them be not previously supported by oath or affirmation.”<sup>196</sup> The most plausible explanation for these different formulations of the cause required for issuance of a warrant is that the Framers in Pennsylvania and Massachusetts—states with major ports and thus with substantial customs revenues—did not wish to overly restrict the use of *revenue search warrants*.

The offense-in-fact standard for criminal warrants would have been too rigid for effective revenue enforcement because, although criminal justice could rely on complaints initiated by crime victims, revenue enforcement would usually depend upon the initiative of customs officers themselves. Thus, eighteenth century English revenue statutes set out bare “probable cause” of a violation as sufficient grounds for issuance of a revenue search warrant.<sup>197</sup> Americans also seem to have accepted that relaxed standard for issuance of revenue search warrants; for example, Pennsylvania used the bare “probable cause” standard in the search warrant provision in a 1786 customs statute.<sup>198</sup> Hence, to accommodate the different standards for issuing criminal warrants and revenue warrants, the Pennsylvania and Massachusetts provisions did not specify a single cause standard, but instead seem to have implicitly incorporated the recognized legal standard for the type of warrant at issue.

The use of the bare probable cause standard for revenue search warrants was probably palatable to the American Framers because the rule at the time was that an informer who initiated a revenue search warrant was exposed to a significant risk of trespass liability if the resulting search was unsuccessful. Specifically, although a revenue officer who only executed a revenue search warrant was indemnified by the warrant, the English Court of Common Pleas ruled in 1773 in *Bostock v. Saunders*, first published by George Wilson in 1775, that an excise officer who personally acted as the informer in procuring a search warrant was liable for trespass damages if no untaxed goods were found during the search and the officer failed to show probable cause for the search to the satisfaction of the jury in a subsequent trespass action.<sup>199</sup> It is especially likely that Americans would have been

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195. See *infra* text accompanying note 209 (setting out the 1776 Pennsylvania provision). That provision was copied by Vermont in 1777. See Davies, *Original Fourth*, *supra* note 1, at 683.

196. See *infra* text accompanying note 212 (setting out the 1780 Massachusetts provision). That provision was copied by New Hampshire in 1784. See Davies, *Original Fourth*, *supra* note 1, at 684.

197. See Davies, *Probable Cause*, *supra* note 1, at 33-34.

198. See *id.* at 37.

199. *Bostock v. Saunders*, 2 Wils. (titled “Part III, Reports of Cases Argued and Adjudged in the the Court of Common Pleas”) 434 (C.P. 1773), reprinted 3 Wils. (3d ed., 1799) 434, 95 Eng. Rep. 1141

aware of this ruling prior to the framing of the Fourth Amendment because a second report of *Bostock* by William Blackstone, one of the judges in the case, was published in 1781.<sup>200</sup> In addition, the case was summarized in some detail in the entry on “Excise” in the 1785 edition of Burn’s justice of the peace manual.<sup>201</sup>

American endorsement of the rule that an officer-complainant was liable for an unsuccessful revenue search is also suggested by the explicit use of the “search warrant for stolen goods” as the model for revenue search warrants in several framing-era state statutory provisions—complainants were liable for trespass in the event of unsuccessful searches under those search warrants.<sup>202</sup> Indeed, as late as 1824, Nathan Dane still cited the 1773 ruling in *Bostock* as the American rule on the potential liability of the complainant for a revenue search warrant and also linked that rule to the liability rule for the search warrant for stolen goods.<sup>203</sup> Thus, it appears that even a revenue officer acted with significant peril when he *initiated* a search by obtaining a revenue search warrant,<sup>204</sup> though he was indemnified when

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(reporting that the judges of Common Pleas expressed differing views as to whether a magistrate was obligated to issue an excise search warrant sought by a revenue officer or whether the magistrate was required to review the adequacy of the grounds for issuing the warrant, but concluding that the officer who had procured the warrant was subject to trespass liability for a failed revenue search when he failed to demonstrate adequate probable cause for it); see also Davies, *Probable Cause*, *supra* note 1, at 35-36.

The Court of Common Pleas had earlier ruled in 1770 that a customs officer who searched an English house on his own initiative under a writ of assistance was liable for an unsuccessful revenue search in which no uncustomed goods were found: *Bruce v. Rawlins*, 2 Wils. 61; 95 Eng. Rep. 934 (C.P. 1770), discussed in Davies, *Original Fourth*, *supra* note 1, at 652-53 n.294.

200. *Bostock v. Saunders*, 2 Bl. Rep. 912, 96 Eng. Rep. 539 (C.P. 1773).

201. 2 BURN (1785 ed.), *supra* note 46, at 69-71; 2 BURN (1797 ed.), *supra* note 46, at 91-93. The 1776 and 1780 editions of this work do not seem to discuss the 1773 ruling in *Bostock*.

202. See, e.g., Session Laws of New Jersey, Act of June 24, 1782, ch. 32, § 18 (providing for search warrants to enforce the prohibition against trading with the enemy “as in [the] case of stolen Goods” provided “due and satisfactory Cause of Suspicion shewn” to the magistrate); Session Laws of Pennsylvania, Act of Dec. 21, 1780, ch. 190, § 11 (limiting searches of dwellings to instances in which “due cause of suspicion hath been shewn to the satisfaction of a . . . [magistrate], as in the case of stolen goods”). One feature of the search warrant for stolen goods was that the complainant who obtained the warrant was liable for trespass if the stolen goods were not actually found. See *supra* notes 85-86 and accompanying text.

203. 7 NATHAN DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW 244-46 (volume published 1824). Dane qualifies as one of the Framers, having been one of the drafters of the Northwest Ordinance of 1787 while a member of the Continental Congress. See Davies, *Correcting History*, *supra* note 1, at 149, 475.

204. A later 1785 English case accorded revenue officers protection from trespass liability for an unsuccessful revenue search made pursuant to a search warrant even if they had procured the search warrant. *Cooper v. Booth*, 3 Esp. 135, 143-46, 170; Eng. Rep. 564, 567-68 (K.B. 1785). The ruling in *Cooper*, however, not only came well after American independence, but also was *never published until 1801*. See Davies, *Original Fourth*, *supra* note 1, at 561 n.19. Indeed, the ruling in *Cooper* does not even seem to have become widely known in England, because it still was not mentioned in English commentary on revenue searches as late as 1797. See, e.g., 2 BURN (1797 ed.), *supra* note 46, at 91-93 (still discussing the earlier 1773 ruling but not mentioning *Cooper*). Hence, it is patent that the ruling in *Cooper* could not have affected the thinking of framing-era Americans.

Unfortunately, several commentators have ignored the fact that the American Framers had no way of knowing about *Cooper* when the Fourth Amendment was framed and ratified, and consequently

he simply executed a search warrant and also enjoyed significant protections when he erroneously seized goods under mistaken applications of customs regulations in the normal course of customs enforcement.<sup>205</sup>

The Pennsylvania and Massachusetts Framers' concern with preserving room for effective revenue searches is also evident in another aspect of the Pennsylvania and Massachusetts warrant provisions—the addition of preamble statements that defined the right against general search warrant authority to extend to persons, houses, papers, and possessions.<sup>206</sup> The import of that formula was to exclude ships and warehouses from the scope of the right, thus leaving them potentially subject to discretionary search authority.<sup>207</sup> Notably, both of these states soon enacted revenue

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they have incorrectly treated it as though it reflected the American understanding at the time of the framing. For example, Professor Amar has quoted a statement by Lord Mansfield in *Cooper* as authority for “the immunity [a warrant] conferred” at the time of the framing of the Fourth Amendment, but never even mentioned the strong liability rule set out in the earlier 1773 *Bostock* case. Amar, *supra* note 30, at 778; see also Davies, *Original Fourth*, *supra* note 1, at 586 n.97. More recently, Professor Fabio Arcila has followed Amar in incorrectly treating *Cooper*'s immunity rule as though it was the standard at the time of the framing, while omitting any mention of *Bostock*, and has also ignored the important distinction between the indemnity of a revenue officer who merely executed a search warrant and the potential liability of an officer who acted as the complainant/informer in obtaining the warrant. Fabio Arcila, Jr., *The Framers' Search Power: The Misunderstood Statutory History of Suspicion & Probable Cause*, 50 B.C. L. REV. 363, 372-75 (2009).

205. A revenue officer who seized goods that were later ruled not to be in violation of the revenue laws in a subsequent forfeiture proceeding was subject to a trespass lawsuit to be tried by jury. See Davies, *Original Fourth*, *supra* note 1, at 652 n.294. However, English statutes authorized the judge who decided that seized goods were not forfeit (because there had been no actual customs violation) to nevertheless issue a certificate of probable cause, which effectively barred any trespass action against the officer by the owner of the wrongfully seized goods. See *id.* at 653 n.295. The American 1789 Collections Act similarly provided that a court could issue a certificate of probable cause that would bar any trespass action against the revenue officer if the court found “there was a reasonable cause of seizure.” *Id.*

This certificate may appear to be related to the use of probable cause as a search standard, and I previously wrongly treated it that way. See Davies, *Arrest*, *supra* note 1, at 370 n.451 (treating the certificate of probable cause as though it were related to the use of probable cause in the Fourth Amendment and misconstruing George Mason's 1766 complaint that such a certificate could be issued merely on the “*Opinion*” of the judge as though it were a complaint about the probable standard itself). However, this certificate seems to have been issued when an officer misconstrued the *legal rules* for customs compliance and wrongly *seized* goods; it does not seem to have had any application to an officer who conducted an illegal or unsuccessful *search* for untaxed goods. Thus, the certificate of probable cause did not usually involve an assessment of inferences that could be drawn from factual circumstances, as the assessment of probable cause for a search always did. See Davies, *Probable Cause*, *supra* note 1, at 31-32.

206. See the provisions set out *infra* notes 209, 212 and accompanying text.

207. The exclusion of ships and commercial premises from search warrant protections was a fairly standard feature of statutory provisions regarding revenue searches, and both English and American revenue statutes routinely extended the special protection of the specific search warrant to dwelling houses, but withheld that protection from ships and various commercial premises. For example, the English customs statutes permitted warrantless searches of ships but required use of writs of assistance for searches of houses, and English excise statutes required search warrants for houses, but allowed warrantless inspections of commercial premises. See Davies, *Probable Cause*, *supra* note 1, at 33-34. That was also the case with early state revenue statutes. See *id.* at 30 n. 127 (setting out the search provisions of a 1780 Pennsylvania customs statute and a 1783 Massachusetts excise statute that each

statutes that required specific warrants for searches of dwelling houses but did not require warrants for searches of ships or commercial premises.<sup>208</sup>

### 3. How “Unreasonable” Came to be Added to the Massachusetts Preamble

The Pennsylvania and Massachusetts warrant provisions also illuminate how and why the qualifier “unreasonable” was added to the preamble statement of the scope of the right and how that term was understood. The full Pennsylvania ban against general warrants read as follows:

That the people have a right to hold themselves, their houses, papers, and possessions free from search or seizure; and therefore warrants without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are contrary to that right, and ought not to be granted.<sup>209</sup>

The “therefore” in this provision makes it clear that the right articulated in the preamble was a protection against the too-loose warrants condemned in the remainder of the provisions. Setting out a right that “therefore” led to a specific legal standard seems to have been a favorite format of the Pennsylvania Framers; they used it in five of the fifteen provisions of their

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required specific warrants for searches of dwelling houses but allowed warrantless searches of commercial premises). The same was also the case with the federal 1789 Collections Act and the 1791 Hamilton Excise Act. *See id.* at 40-41 (noting that the 1789 Collections Act required search warrants only for searches of places on land, but not for ships, and that the 1791 Excise Act required search warrants for house searches but permitted warrantless searches of commercial premises).

The explanation for the heightened protections afforded the house was that the house was entitled to special protection at common law, *see supra* note 188, but no comparable doctrine applied to ships, which were creatures of the civil law of admiralty, rather than of common law. *See Davies, Original Fourth, supra* note 1, at 605 n.149 (citing 1 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 629 (6th ed. 1793) (“All Maritime Affairs are regulated chiefly by the Civil Law.”)). As a result, ships were subject to warrantless searches by customs officers. *See id.* at 711 n.470; Davies, *Probable Cause, supra* note 1, at 33. Cuddihy, who initially overlooked the significance of the houses, papers, possessions (or effects) formula in the American bans against general warrants, has recently asserted that ships cannot have been excluded from the protection of the Fourth Amendment because Congress gave the federal district courts exclusive admiralty jurisdiction, but “saved” the common law remedy to those owners whose ships or cargos were wrongfully seized. CUDDIHY, *supra* note 19, at 781-82. He did not explain, however, why that assignment of jurisdiction regarding adjudication of ship seizures or remedies for wrongful seizures has any bearing on the scope of the *search warrant* protections provided in the state warrant provisions or Fourth Amendment, and no such reason is apparent. Indeed, it appears the common-law remedies were pursuable only in state courts. *See infra* note 286.

208. *See Davies, Original Fourth, supra* note 1, at 681-83. The focused protection of the house and its contents was also evident in a 1785 Pennsylvania statute that enforced the state’s constitutional ban against general warrants by repealing earlier colonial legislation that had allowed revenue officers to make warrantless searches of houses. *See id.* at 683.

209. *See id.* at 677.

declaration.<sup>210</sup> But in this case the preamble statement of the right was awkwardly stated because it seemed to announce an *absolute* right against searches and seizures that was plainly inconsistent with the implicit approval of warrants that met the standards set out in the remainder of the provision.<sup>211</sup>

John Adams, who was a skilled lawyer, undoubtedly noted the awkwardness of the Pennsylvania formulation of the right when he worked from the Pennsylvania language while drafting the 1780 Massachusetts ban against general warrants. Specifically, he would have recognized that some qualifier was needed to indicate that the right regarding searches and seizures was conditional. So Adams inserted the qualifier “unreasonable.” Adams’s provision was as follows:

Art. XIV. Every subject has a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the person or objects of search, arrest, or seizure: And no warrant ought to be issued, but in cases, and with the formalities, prescribed by laws.<sup>212</sup>

Why did Adams choose “unreasonable” as the modifier of the “right” regarding “searches and seizures”? He did not take the term from any existing broad standard for arrest or search authority. Contrary to the imaginings of conventional commentators, no broad “reasonableness” standard for arrests or searches had been articulated in the Wilkesite cases or had appeared in any of the framing-era treatises, justice of the peace manuals, or commentaries.<sup>213</sup> As a conventional commentator recently conceded, “Davies is correct in asserting that the historical record before 1780 rarely yoked searches and seizures with the adjectives ‘reasonable’ or ‘unreasonable.’”<sup>214</sup> Translation: no broad reasonableness standard appears in the pre-framing authorities.

210. *See id.* at 680 n.366.

211. *See id.* at 678-80.

212. *See id.* at 684. Some conventional commentators have accorded significance to the fact that the Massachusetts preamble took the form of a separate sentence. *See, e.g.*, Clancy, *supra* note 19, at 66-67. However, that treatment ignores the implications of the “therefore” at the start of the next sentence that set out *only* warrant standards but did not otherwise address search or seizure standards. The apparent explanation for Adams’s use of several sentences in the provision is that it was unusually long because Adams also included the additional point that warrants could be used only for purposes provided for by statutory authority. Thus, he (or a later drafter) probably broke the long provision with a period and colon simply to avoid an ungainly run-on sentence.

213. *See supra* notes 32-35 and accompanying text.

214. CUDDIHY, *supra* note 19, at 778. In response to my noting the absence of any historical reasonableness standard, Cuddihy has cited two purported exceptions. One was a 1447 protest by

Adams likely was aware, however, of precedents that had applied the pejorative “unreasonable” *specifically* to general warrants. During his legal practice, Adams apparently consulted a passage in a 1742 treatise on arrest law that had condemned “the Unreasonableness, and seeming Unwarrantableness of [the practice of issuing general warrants].”<sup>215</sup> Additionally, Adams likely was familiar with a passage in the report of one of the Wilkesite cases in which counsel for one of the victims of the general search warrant had specifically condemned that general warrant as “unreasonable or unlawful.”<sup>216</sup>

Additionally, it seems highly probable that Adams recalled James Otis’s use of “against reason” while condemning the general warrant during the 1761 Writs of Assistance Case. Specifically, Otis had invoked Coke’s famous passage in *Dr. Bonham’s Case*<sup>217</sup> when Otis declared that if a statute authorized a general writ of assistance to search houses it would be “against common right and reason” and thus “void.”<sup>218</sup> Adams knew Otis’s argument intimately; he had been Otis’s protégé and had personally taken notes of Otis’s argument during the 1761 hearing.<sup>219</sup>

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London tailors that their houses were searched without “cause reasonable.” *Id.* However, that is just a variant of the probable cause standard and it is far too early to be relevant to the original meaning of the Fourth Amendment. The other was an early 1738 Virginia statute that forbade “unreasonable seizures and distresses.” *Id.* However, this example is irrelevant because it did not involve the kind of government search and seizure that was the subject of constitutional concern; rather, a “distress” was a landlord’s seizure of property, such as livestock, as a private civil remedy for a tenant’s nonpayment of rent on land. See, e.g., 1 BURN (1755 ed.), *supra* note 46, at 264-75 (entry for “Distress”). When used in connection with a quantity (such as the number of seized livestock), the adjective “unreasonable” was sometimes used to indicate the quantity was patently excessive. See, e.g., 1 *id.* at 268 (stating that “[d]istresses shall be reasonable, and not too great; and he that taketh great and unreasonable distresses, shall be grievously amerced [that is, fined]”).

215. THE LAW OF ARRESTS, *supra* note 56, at 173-74 (“And yet there is a Precedent of such general Warrant in *Dalton’s Justice*, notwithstanding the Unreasonableness, and seeming Unwarrantableness of such practice”). In this passage, “Unwarrantable” would have meant “unauthorizable.” Adams cited this passage in his notes for a 1762 proceeding. See 1 THE LEGAL PAPERS OF JOHN ADAMS 102 n.74 (L. Kevin & Hiller B. Nobel eds., 1965). Adams also seems to have referred to this work on other occasions during his practice. See 1 *id.* at 102-03 nn. 72-76.

216. Sergeant John Glynn condemned the general warrant used in one of the Wilkesite cases as “unreasonable or unlawful,” and also condemned the practice of the Secretary of State’s office of issuing such warrants as “unreasonable, contrary to common right, or purely against law” and “void.” *Entick v. Carrington*, 2 Wils. 275, 283, 95 Eng. Rep. 807, 812-13 (C.P. 1765). Note that “unreasonable, contrary to common right” appears to be derived from Coke’s famous dictum, discussed *infra* notes 217, 224 and accompanying text.

It is quite likely Adams would have been familiar with this case report prior to his drafting of the 1780 declaration because it was published in 1770, prior to the outbreak of the Revolution. See Davies, *Original Fourth*, *supra* note 1, at 565 n.25. Moreover, there is direct evidence that a copy of *Entick* was circulating in Whig circles in Massachusetts prior to the Revolution. See SMITH, *supra* note 178, at 241.

217. *Dr. Bonham’s Case*, 8 Coke Rep. 113b, 118a; 77 Eng. Rep. 646, 653 (C.P. 1610) (stating that “when an Act of Parliament is against common right and reason, . . . the common law will countroul it, and adjudge such Act to be void”). See also Davies, *Original Fourth*, *supra* note 1, at 687.

218. See Davies, *Original Fourth*, *supra* note 1, at 689-91. Adams’s notes of Otis’s argument contain only a citation to Coke’s dictum from *Dr. Bonham’s Case*, but Otis obviously recited Coke’s famous statement. See *id.* at 690-91.

219. See *id.* at 690, 691 n.413.

Moreover, “unreasonable” was the perfect qualifier for a right against searches of houses under general warrants. Coke had used “against . . . reason” in *Dr. Bonham’s Case* to signify that the principle of law in that case (that no man could be judge in his own case) was so fundamental that even a statute could not permit its violation.<sup>220</sup> That is also how Otis had used “against . . . reason” when he invoked Coke’s dictum in his 1761 argument and declared (according to Adams’s notes) that “[t]his Writ is against the fundamental Principles of Law. The Priviledge of House.”<sup>221</sup> Thus, Otis argued that the general writ of assistance was so grossly illegal, so against “common right and reason,” that even a statute could not validly authorize such a writ. And that is precisely what Adams wanted to say: that the general warrants that his provision condemned were so contrary to legal principle that even the legislature of Massachusetts was prohibited from authorizing them.<sup>222</sup> Indeed, Adams invoked Coke’s “against reason” in precisely that context on another occasion when, acting as co-counsel with Otis in 1765, Adams argued that the Stamp Act was unconstitutional because it was “against reason.”<sup>223</sup> But Adams updated “against reason” to “unreasonable” in the 1780 warrant provision—probably because Blackstone had also done that in his discussion of Coke’s ruling in *Dr. Bonham’s Case*.<sup>224</sup>

Is there any reason to think that John Adams meant to do anything more than prohibit general or unfounded warrants in his Article XIV? No, there is not.<sup>225</sup> For one thing, the only legal standards set out in Article XIV

220. See *supra* note 217.

221. 2 THE LEGAL PAPERS OF JOHN ADAMS, *supra* note 215, at 125-28. See also Davies, *Original Fourth*, *supra* note 1, at 642-43 (discussing the historical “castle” doctrine regarding the house).

222. See Davies, *Correcting History*, *supra* note 1, at 116; Davies, *Original Fourth*, *supra* note 1, at 689-91.

223. See Davies, *Original Fourth*, *supra* note 1, at 691.

224. See 1 BLACKSTONE, *supra* note 47, at 91 (discussing Coke’s dictum and citing “8 [Coke] Rep. 118” but substituting “unreasonable” for Coke’s “against reason”). See also Davies, *Original Fourth*, *supra* note 1, at 692 n.418 (discussing another passage in Coke’s writings in which Blackstone substituted “unreasonable” for Coke’s “against reason”). “John Adams” is the first name in the alphabetical list of subscribers to the first American edition (1771-1772) of Blackstone’s *Commentaries*. See 4 BLACKSTONE, *supra* note 47 (unnumbered 22-page listing of subscribers prior to titled page).

225. Professor Thomas Clancy has recently asserted that John Adams exerted a critical influence on the framing of the Fourth Amendment, and that Adams intended to create a broad reasonableness standard when he drafted the warrant provision in the 1780 Massachusetts declaration and introduced the phrase “unreasonable searches and seizures.” Clancy, *supra* note 19, *passim*. The most notable features of Clancy’s commentary, however, are the absence of evidence that actually supports these claims, and Clancy’s frequent omission of strong contrary evidence.

Most importantly, Clancy omitted three salient facts about Adams’s use of “unreasonable searches and seizures” when drafting the Massachusetts declaration. First, Clancy nowhere mentioned that Adams had already included another provision in the Massachusetts declaration that forbade a person being “arrested” except pursuant to “the law of the land”. See *supra* notes 68, 78 and accompanying text. That provision already dealt with arrests and, by implication with searches incident to arrest. Thus, it dealt with much of the content that is now assigned to “unreasonable searches and seizures” under modern Fourth Amendment doctrine. Clancy’s omission of Adams’s treatment of arrest is surprising, moreover, because Clancy was present when I featured that aspect of Massachusetts

were the requirements for legal warrants. Adams was more thorough in that regard than prior drafters insofar as he also included a statement limiting the issuance of warrants to purposes authorized by legislation. But he did not mention any standard applicable to warrantless intrusions.

Moreover, as noted above, Adams had already included a provision in Article XII that required that “arrest[s]” comply with “the law of the land,” and that plainly covered warrantless arrests and effectively also covered criminal searches made incident to arrest.<sup>226</sup> What work was left for a broad reasonableness standard to do? None is apparent. Indeed, the fact that Adams does not seem to have ever discussed the content of the phrase

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declaration prominently in the presentation that I made at the University of Mississippi Law School at Clancy’s invitation. I also stressed the significance of Adams’s treatment of arrest in the Massachusetts law of the land provision in my article in the resulting symposium issue of the Mississippi Law Journal. See Davies, *Correcting History*, *supra* note 1, at 9, 113-14. Clancy wrote the introduction to that symposium. Thomas K. Clancy, *Foreword*, 77 Miss. L.J. i (2007).

Second, Clancy skirted the likelihood that Adams’s choice of “unreasonable” was influenced by James Otis’s invocation of Coke’s famous claim that statutes that were “against reason” were “void” during Otis’s condemnation of the illegality of the statutory authority for the writ of assistance during the 1761 *Writs of Assistance Case*. According to Clancy, Otis addressed only the power of a court to review a statute rather than the illegality of the general writ itself. Clancy, *supra* note 19, at 28, n.113. That is incorrect; Otis invoked Coke’s famous dictum regarding “void” statutes in *Dr. Bonham’s Case* as authority for his condemnation of the discretionary character of the general writ authorized by statute: Otis asserted that “if an Act of Parliament should made, *in the very Words of this Petition* [for a general writ], it would be void.” See Davies, *Original Fourth*, *supra* note 1, at 690 (emphasis added). Otis plainly meant that the discretionary general writ itself was “against reason.” Additionally, Clancy ignored the fact that Adams later invoked Coke’s “against reason” himself in 1765 when he argued, as co-counsel with his mentor Otis, that the Stamp Act was unconstitutional and void. See *supra* note 223 and accompanying text.

Third, Clancy also omitted to mention the several earlier instances in which English authorities had *specifically* condemned general warrants as “unreasonable” that Adams was likely to have been familiar with. See *supra* notes 215, 216 and accompanying text.

Taken together, these facts indicate that it is highly likely that Adams simply used “unreasonable searches and seizures” as a pejorative label for searches under general warrants. Notably, Clancy did not identify any historical precedent for Adams’s use of “unreasonable,” and did not present any evidence of any content that Adams would have assigned to that term other than general warrants. Indeed, Clancy ignored the implications of his own observation that Adams never seems to have discussed the Massachusetts warrant provision. Clancy, *supra*, at 67, n. 297. Yet, that silence is inconsistent with the notion that Adams had introduced a novel broad reasonableness standard in that provision (especially since Adams is not known to have been shy about taking credit). Instead, Clancy offered only historical filler regarding Adams’s earlier law practice, drawn from the previous publication of Adams’s legal papers, and simply asserted that “[t]he concern with a ‘general warrant’ was just part of the broader mosaic [of search issues.]” *Id.* at 42.

With regard to later events, Clancy also ignored the fact that Anti-Federalists seem to have used the terminology of “unreasonable searches and seizures” interchangeably with references to “unreasonable warrants.” *Id.* at 81 (referring to comments by Richard Henry Lee); see also *infra* note 234 and accompanying text. Additionally, like the prior conventional commentators, Clancy offered no actual evidence for his repetition of the conventional claim that the final change made in the text of the Fourth Amendment in the House was intended to create a broad reasonableness standard. See Clancy, *supra* note 19, at 90-91.

Overall, Clancy’s article is significant only as a demonstration that academics who are heavily invested in the modern concept of Fourth Amendment reasonableness will likely adhere to that concept regardless of what the historical evidence does or does not show.

226. See *supra* notes 68, 78 and accompanying text.



“unreasonable searches and seizures” strongly suggests that he used “unreasonable” simply as the obvious pejorative label for searches under general warrants, rather than as a broad search standard in its own right.<sup>227</sup>

The plain fact is that the first six of the state provisions that address warrant standards cannot be read to do anything other than ban general warrants, and there is no reason to think the addition of the phrase “unreasonable searches and seizures” in the Massachusetts provision (copied by New Hampshire) involved anything more.<sup>228</sup> The crucial fact is that the Massachusetts (and New Hampshire) Framers set out fairly detailed standards for warrants for house searches, but did not undertake to do anything more in that provision.

#### 4. *Anti-Federalist Agitation and Proposals*

Anti-Federalist agitators rekindled fears regarding the potential that general warrants might be used for revenue searches of houses during the 1787-1788 debates over ratification of the proposed Constitution. There was a slight shift in emphasis; the colonial controversies had focused on customs searches of houses under general writs, but the Anti-Federalist agitation during the ratification debates was targeted primarily at the potential that Congress would authorize general warrant searches of houses by hordes of federal “excisemen.”<sup>229</sup>

Excise taxes, which could potentially be levied on a wide variety of domestic commodities such as beer, cider, or liquor, had already become a source of complaint and controversy in several states as well as in England.<sup>230</sup> Indeed, excise searches posed more of a threat to the typical homeowner because, unlike customs searches which mostly threatened the houses of merchants in port cities, excise tax searches could apply to houses anywhere in the country. So, Anti-Federalists began to demand that a federal bill of rights should include a ban against general warrants.<sup>231</sup>

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227. See *supra* note 225.

228. See Davies, *Correcting History*, *supra* note 1, at 119 (noting that New Hampshire in 1784 copied both the Massachusetts arrest provision and the Massachusetts warrant provision).

229. Examples of the flavor of the Anti-Federalist demagoguery regarding the potential threat posed by excise searches are presented in George Thomas, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451, 1475-77 (2005) (reciting examples of Anti-Federalist hyperbole regarding the threat to the house posed by federal excisemen); Davies, *Original Fourth*, *supra* note 1, at 609-10.

230. The Collection of excise taxes had become a prominent issue in England prior to the framing of the Fourth Amendment. See Davies, *Original Fourth*, *supra* note 1, at 609 n.164; Davies, *Probable Cause*, *supra* note 1, at 34 n. 141. The collection of excise taxes had also become an issue in some American jurisdictions. See Davies, *Original Fourth*, *supra* note 1, at 601 n.134.

231. Cuddihy has recently insisted that the issue extended to warrantless excise searches of houses as well as use of general warrants because “[o]f the fifteen pamphleteers and essayists who addressed search and seizure in the aftermath of the constitutional convention of 1787, nearly half, six of fourteen, blasted warrantless house searches as well as general warrants.” CUDDIHY, *supra* note 19, at 780-81. It is not possible to assess the validity of this statement, because—as with many of his other claims and

Interestingly, however, the Anti-Federalist agitation does not seem to have invoked the prior general warrant controversies to any significant degree—references to the earlier colonial general writ of assistance controversy were rare,<sup>232</sup> and no references to the Wilkesite general warrant cases have been identified in the Anti-Federalist tracts.<sup>233</sup>

Anti-Federalist writers used a variety of shorthand references when they listed rights and protections that should be included in a federal bill of rights. With regard to searches, they sometimes borrowed the label from the Massachusetts ban against general warrants and called for a ban against “unreasonable searches and seizures,” but they seem to have used that terminology interchangeably with “hasty and unreasonable warrants” or simply “general warrants.”<sup>234</sup> Notably, the Anti-Federalist writers who proposed provisions for a federal Bill of Rights do not appear to have ever assigned any content to a concept of “unreasonable searches” other than the condemnation of too-loose, general warrants.<sup>235</sup>

The renewed fears regarding the potential for federal general warrants then prompted several of the state ratification conventions to propose that a federal bill of rights should include a ban against Congress authorizing issuance of general warrants.<sup>236</sup> The early proposals made in the Maryland and Pennsylvania conventions simply called for bans against too-loose or general warrants but did not include any preamble statement of a right regarding “searches and seizures”<sup>237</sup>—a notable departure from the 1776

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interpretations, Cuddihy did not quote the pertinent passages so that the reader could judge their content for herself. (In fact, the footnote to this claim, *id.* at 781 n. 53, erroneously leads the reader only to prerevolutionary statements, not to ratification-era materials; Cuddihy’s discussion of the ratification pamphlets, however, does not seem to provide the necessary information, *id.* 673-80.) Moreover, this sort of claim tends to conflate the patently demagogic rants of those Anti-Federalist pamphleteers who would claim anything to paint a parade of horrors with the statements of the serious Anti-Federalists who actually advanced proposals for a federal bill of rights. So far as I can determine, none of the actual Anti-Federalist proposals for a federal constitutional search protection undertook to address or forbid house searches *per se*; rather, they forbade house searches made pursuant to too-loose, general warrants. See Davies, *Original Fourth*, *supra* note 1, at 609-11, 694-96.

232. See Davies, *Original Fourth*, *supra* note 1, at 721 (quoting a 1788 Anti-Federalist pamphlet written by James Otis’s sister, Mercy Otis Warren).

233. See *id.* at 561 n.20.

234. See *id.* at 596-600, 694-96. The conventional commentators have tended to omit or downplay the interchangeability of complaints against unreasonable searches and seizures with those against unreasonable warrants in the Antifederalist commentary. See *id.* at 599 n.129.

235. See *id.* at 609-11.

236. See Davies, *Correcting History*, *supra* note 1, at 127-36 (setting out state ratification convention proposals); Davies, *Original Fourth*, *supra* note 1, at 694-96 (noting that only some of the Anti-Federalist calls for a federal ban against general warrants used the terminology “unreasonable searches and seizures”).

237. The Maryland Anti-Federalists proposed the following:

That all warrants without oath, or affirmation of a person conscientiously scrupulous of taking an oath, to search suspected places, or seize any person or his property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend any person suspected, without naming or describing the place or person in special, are dangerous, and ought not to be granted.

Pennsylvania warrant provision which would be inexplicable if the Anti-Federalists had sought to address a broader topic than the fear of general warrants itself.<sup>238</sup>

However, a January 1788 installment of the influential *Letters of a Federal Farmer* (actually an Anti-Federalist tract)<sup>239</sup> proposed that a federal bill should both ban “unreasonable searches and seizures” in the form of general warrants and also ban any person being “molested in his person or effects” unless “according to the law of the land.”<sup>240</sup> Thereafter, Anti-Federalists in the Virginia and New York conventions promoted a coordinated set of proposals that drew upon the *Federal Farmer’s* proposal.

As a result, each of these state conventions proposed provisions that paraphrased Magna Carta’s arrest protection: Virginia proposed “[t]hat no freeman ought to be taken, imprisoned . . . but by the law of the land,”<sup>241</sup> and New York proposed “[t]hat no Person ought to be taken [or] imprisoned . . . or be . . . deprived of . . . Liberty . . . but by due process of Law.”<sup>242</sup>

Additionally, both the Virginia and New York conventions proposed almost identical (and rather wordy) warrant provisions that referred to “a right to be secure from all unreasonable searches and seizures” that “therefore” mandated a ban against too-loose warrants:

That every freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers and his property; all warrants, therefore, to search suspected places, or seize any freeman, his papers or property, without information upon Oath (or affirmation of a person religiously scrupulous of taking an oath) of legal and sufficient cause, are grievous and oppressive; and all general Warrants to search suspected places, or to apprehend any suspected person, without specially naming or describing the place or person, are dangerous and ought not to be granted.<sup>243</sup>

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*See id.* at 695 n.426. The distinction between unfounded warrants (those “without oath”) and unparticularized general warrants tracked the language in the 1776 Maryland warrant provision. *See supra* note 183. The Pennsylvania Anti-Federalist proposal was similarly focused on banning unparticularized or unfounded warrants, but did not use the term “general warrant” itself. *See Davies, Original Fourth, supra* note 1, at 695 n. 426.

238. *See supra* text accompanying note 209 (setting out the 1776 Pennsylvania provision).

239. Both sides in the ratification debates claimed the title “federal,” but the *Federal Farmer* was on the side now called the Anti-Federalists. *See Davies, Original Fourth, supra* note 1, at 597 n.121. The identity of the author or authors of the *Federal Farmer* is unclear. *See id.*

240. *See Davies, Correcting History, supra* note 1, at 131 n.415.

241. *Id.* at 134 n.426.

242. *Id.* at 135-36.

243. The block quotation in the text is the Virginia convention’s proposal. *See id.* at 134 n. 429. The nearly identical New York proposal is set out *id.* at 136 n.436. Somewhat surprisingly, these proposals did not explicitly mention the house; instead, they seem to have focused on what might be searched for and seized—persons, papers, and property. It may be that the term “house” was omitted

A peculiarity in these proposed warrant provisions is noteworthy: like the earlier Maryland Anti-Federalist proposal, it used the label “general Warrants” only when condemning unparticularized warrants; although it also condemned unfounded warrants (those lacking sworn showings “of legal and sufficient cause”), it did not label them “general warrants” and did not give them any other name, either. In contrast, the 1776 Virginia provision had applied the label “general warrants” to both unfounded and unparticularized warrants.<sup>244</sup>

This inconsistent usage of the term “general warrant” suggests another possible reason why a preamble statement of a right regarding “searches and seizures” was added to some earlier state warrant provisions and proposals—namely, that the drafters of those provisions were not confident that the term “general warrant” captured warrants that were particularized but insufficiently supported by evidence.<sup>245</sup> Hence, some broader term such as “searches and seizures” was needed for the topic addressed, and some qualifying adjective such as “unreasonable” was then needed for that label.<sup>246</sup>

However that may be, the patent feature of the state convention proposals for a federal provision regarding “unreasonable searches and seizures” was that—like the earlier state convention proposals that had not used that phrase—they set out only the requisites for valid warrants. Hence, these proposals did not employ any concept of “reasonableness” broader than the requisites for valid warrants.

### 5. *The Framing of the Fourth Amendment*

James Madison undertook the task of drafting proposals for a federal bill of rights and submitted them to Congress in June 1789.<sup>247</sup> After setting out provisions that regulated the initiation of criminal prosecutions in the proto-Fifth Amendment (including a prohibition against depriving a person of “liberty” except according to “due process of law”), and that banned excessive bail and punishment in the proto-Eighth Amendment, he proposed the proto-Fourth Amendment<sup>248</sup>—a provision he repeatedly

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because the drafters assumed that was the only place for which a search warrant would be required. The omission of “house” and the limited use of the term “general warrant” to refer only to unparticularized warrants (as opposed to unfounded warrants) in these provisions seem to have been drawn from the ban against too-loose warrants proposed by the Maryland Anti-Federalists. *See supra* note 237.

244. *See supra* note 194.

245. It is noteworthy that two provisions that introduced a preamble statement of a right—the 1776 Pennsylvania provision and the 1780 Massachusetts provision—eschewed use of the term “general warrant” and instead simply spelled out the sorts of warrants that were banned. *See supra* notes 209, 212 and accompanying text.

246. *See supra* notes 215-24 and accompanying text.

247. *See* James Madison, *Speech to the House of Representatives* (June 8, 1789), in 12 THE PAPERS OF JAMES MADISON 196, 200-03 (Charles F. Hobson & Robert A. Rutland eds., 1979).

248. *See id.* at 201; Davies, *Correcting History*, *supra* note 1, at 140-41.

characterized as a protection against “general warrants” and which he described as being necessary to make it clear that Congress could not authorize general warrants for revenue searches under the Necessary and Proper Clause.<sup>249</sup>

Perhaps because he disliked the there-is-a-right-so-therefore format used in earlier warrant provisions and proposals, Madison innovated stylistically<sup>250</sup> and proposed the following:

The rights of the people to be secured in their persons, their houses, their papers, and their other property from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.<sup>251</sup>

This single-clause provision plainly banned only the use of too-loose, general warrants.<sup>252</sup>

There was one substantive innovation in Madison’s proposal—its use of the bare “probable cause” standard as the specific standard for issuing a particularized warrant.<sup>253</sup> That standard had not been used in any of the prior state warrant provisions or any of the proposals for a federal warrant provision. Rather, some of the state provisions had used less precise formulations to accommodate both the crime-in-fact prong of the standard for criminal warrants and the bare probable cause standard for revenue warrants.<sup>254</sup> The most likely reason why Madison used “probable cause” in his draft was that he and the other federal Framers were primarily concerned with regulating revenue search warrants rather than criminal warrants, and bare probable cause had already become the recognized standard for revenue search warrants.<sup>255</sup>

The federal Framers certainly expected that federal officers would make customs or excise searches; indeed, customs and excise taxes were to

249. See Davies, *Original Fourth*, *supra* note 1, at 699-701. Madison likely employed the term “general warrant” broadly to include either unfounded warrants, unparticularized warrants, or both. See *id.* He had been a member of the Virginia legislature in 1776, see *id.* at 696, when that body adopted a provision that used “general warrant” to condemn both sorts of defects. See *supra* note 194.

250. The formulation of a right that “therefore” required a particular rule had been quite commonly used in the state declarations. See, e.g., *supra* text accompanying notes 209, 212; Davies, *Original Fourth*, *supra* note 1, at 680 n.366. Madison was certainly familiar with the “therefore” format because he had served on the committee of the Virginia ratification convention that drafted the Virginia proposal for a federal warrant provision. See *id.* at 696. Madison, however, apparently disliked the therefore format because he never used it in any of his proposals. See *id.* at 697 n.433.

251. See Davies, *Original Fourth*, *supra* note 1, at 697 (emphasis added).

252. See *supra* note 27 and accompanying text (noting that conventional commentators generally agree that Madison’s proposed text only addressed warrant standards).

253. See Davies, *Original Fourth*, *supra* note 1, at 703-04.

254. See *supra* notes 195-98 and accompanying text.

255. See Davies, *Probable Cause*, *supra* note 1, at 31-34, 36-38; Davies, *Original Fourth*, *supra* note 1, at 703-06.

be the primary sources of revenue for the new federal government.<sup>256</sup> But, it is unlikely that the federal Framers anticipated that federal officers would be much involved in ordinary criminal law enforcement; rather, that subject had not been included in the enumerated powers of Congress but had been left to the plenary powers of the states.<sup>257</sup> Indeed, that surmise is supported by the actual pattern of federal legislation in the aftermath of the framing of the Bill of Rights.

Although the early Congresses enacted legislative authority for customs and excise searches and search warrants,<sup>258</sup> they did not enact standards for criminal warrants or warrantless arrests; instead, the Judiciary Act of 1789 simply directed federal courts and officers to use the mode of “process” (a term that would include warrants) used in the state in which they served.<sup>259</sup> Moreover, state common law continued to set the standards for warrantless arrests by federal officers because Congress did not adopt statutory authority for warrantless arrests until the mid-twentieth century.<sup>260</sup>

Although the committee that initially reviewed Madison’s proposals made a variety of minor stylistic changes to his draft, it accepted his single-clause format that plainly banned only too-loose warrants and made only one substantive change: it replaced the potentially expansive term “other property” in the formula defining the scope of the protected interests with the narrower term “effects,” a label that referred to moveable personal property or goods.<sup>261</sup> Thus, as in the Pennsylvania and Massachusetts

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256. See Davies, *Probable Cause*, *supra* note 1, at 36, 40-41.

257. See *id.* at 27.

258. See Davies, *Probable Cause*, *supra* note 1, at 40-41 (discussing the search provisions of the 1789 Collections Act and the 1791 Hamilton Excise Act); Davies, *Original Fourth*, *supra* note 1, at 711-14 & nn.467-72 (same).

259. See Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91 (1789) (providing for federal arrest warrants to be issued “agreeably to the usual mode of process” of the state in which the arrest would be made).

260. See Davies, *Correcting History*, *supra* note 1, at 211-12; see also Davies, *Arrest*, *supra* note 1, at 355 (discussing erroneous conventional claims that a 1792 federal statute conferred warrantless arrest authority on federal marshals but documenting that provision was actually part of a “Militia Bill” which, in anticipation of opposition to the collection of the 1791 Hamilton excise tax, simply gave federal marshals the power to call out the local *posse comitatus* to put down public unrest in the event the local sheriff failed or refused to do so, but made not mention of arrest standards).

261. See Davies, *Original Fourth*, *supra* note 1, at 706-11 (discussing changes from “possessions” to “other property” to “effects” in the formulations of the scope of the ban against general warrants); *id.* at 708 nn.461-62 (discussing the use and meaning of the term “effects” in framing-era legal sources); see also 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (defining “effect” as “8. In the plural, effects are goods; moveables; personal estate. The people escaped from the town with their effects.”); WILLIS MASON WEST, THE STORY OF AMERICAN DEMOCRACY 191 (1922) (reproducing “a handbill circulated by the New York Sons of Liberty [during the Stamp Act protests prior to the American Revolution]” that read: “The first Man that either distributes or makes use of Stamp Paper, let him take Care of his House, Person, & Effects”); 1 THE WORKS OF JAMES WILSON, *supra* note 89, at 304 (reprinting a statement in Wilson’s 1790-91 lectures on law that “[The minority] have a right to retire, to sell their lands, and to carry off their effects”); Henry Laurens, *Extracts from the Proceedings of the Court of Vice-Admiralty* (Pamphlet, Charleston, 1769), reprinted in TRACTS OF THE AMERICAN REVOLUTION 1763-1776, at 206 (Merrill Jensen ed., 1967) (stating that because of

warrant provisions, the language of the federal warrant protection indicates it was not intended to apply to searches of ships, or even warehouses.<sup>262</sup>

As reported by the committee, the proto-Fourth Amendment read:

The right of the people to be secure in their persons, houses, papers, and effects, shall not be violated *by warrants issuing*, without probable cause supported by oath or affirmation, and not particularly describing the places to be searched, and the persons or things to be seized.<sup>263</sup>

Oddly, the committee's report omitted the phrase "from all unreasonable searches and seizures"—apparently by accident.<sup>264</sup> That mistake was corrected when the provision was addressed in the full House of Representatives and the phrase "against unreasonable searches and seizures" was reinserted, but the word "all" was again omitted from the correction and permanently disappeared from the text<sup>265</sup>—an omission would be hard to explain if members of the House actually had been intent on adopting a broad provision that did more than ban general warrants.

During the deliberations on the Bill of Rights in the House, a further change was made. A member of Congress, probably Elbridge Gerry,<sup>266</sup> objected to the phrase "by warrants issuing" (see the italics in the quotation above), and moved to replace it with "and no warrant shall issue."<sup>267</sup> The entire record of the proposed change—there is no indication the motion prompted any debate—is as follows:

Mr. [Gerry] objected to the words "by warrants issuing." This declaratory provision was good as far as it went, but he thought it was not sufficient; he therefore proposed to alter it so as to read "and no warrant shall issue."<sup>268</sup>

Note that the objection was quite specific—it was about the "declaratory" rather than mandatory character of "the words 'by warrants issuing.'" Thus, the only apparent purpose for the changed language was to make the statement more *imperative* by explicitly commanding that general warrants not be issued. Notably, there was nothing novel in the language proposed: each of the prior state provisions and state ratification convention proposals

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oppressive customs regulations merchants "will be induced to draw their effects out of trade as much as possible").

262. See *supra* notes 206-08 and accompanying text.

263. See Davies, *Correcting History*, *supra* note 1, at 166 n.521 (emphasis added).

264. See *id.* at 167 n.521.

265. See *id.* at 166 n.521.

266. See Davies, *Original Fourth*, *supra* note 1, at 717-18; 721-22 (noting that there are inconsistencies in the reports of this motion but arguing that the weight of the evidence is that Elbridge Gerry made the motion, not Egbert Benson as conventional accounts usually state).

267. See *id.* at 717-18.

268. See *id.* (substituting Gerry for Benson in the account quoted).

had included the command that general warrants “ought not be granted.”<sup>269</sup> The motion simply updated the “ought” in that traditional language to Madison’s stylistic preference for “shall,” and substituted “no warrant shall issue” in place of “by warrants issuing.”<sup>270</sup>

The conventional commentators have repeatedly asserted that this last-minute change was made *for the purpose* of creating a broad, overarching reasonableness standard—however, none has produced so much as a scintilla of evidence that supports that claim.<sup>271</sup> Indeed, the absence of any indication that the motion prompted any debate refutes the assertion that the change was understood to be significant. Rather, the resulting division of the text into two clauses was merely a side effect of punching up the expression of the prohibition against general warrants, not the purpose of the change.<sup>272</sup>

With that substitution, and a small further adjustment of the language that was needed to accommodate the substitution, the Fourth Amendment took its final form.<sup>273</sup> But for reasons that are unclear (because no evidence

269. See Davies, *Correcting History*, *supra* note 1, at 168-69.

270. Some commentators have claimed that “ought” was less imperative than “shall,” but that is incorrect; the two terms were equivalent and simply reflected a changing style. See Davies, *Original Fourth*, *supra* note 1, at 675 n.350.

271. Instead of confronting the mundane nature of the motion to substitute “no warrant shall issue” for the previous “by warrants issuing,” Lasson seized on an erroneous report of the proceedings and reported that the motion had failed to pass in the House of Representatives, but that the substitution had nevertheless been made surreptitiously by the committee that put the proposed constitutional amendments in order for transmission to the Senate. See LASSON, *supra* note 18, at 101. According to Lasson, Egbert Benson (who Lasson identified as the person who had made the motion for the substitution) made the change anyway when he later chaired this committee. See *id.* (identifying this as the “most interesting” aspect of the legislative history of the Fourth Amendment); *supra* notes 29-30 and accompanying text.

But this bizarre tale is grossly implausible on its face—surely some member of Congress would have noticed the change. Indeed, Lasson’s story is also inconsistent with his claim that the substitution of “and no warrant shall issue” for the earlier “by warrants issuing” had been made for the purpose of enlarging the content of the amendment by creating a broad reasonableness standard. If that had been the case, it is hardly likely that the later insertion of such a drastic substantive change could have been made without someone who voted against the substitution taking notice of it. Remarkably, however, this tale has been widely and uncritically repeated by later commentators. See Davies, *Original Fourth*, *supra* note 1, at 718 n.484 (listing commentaries). In fact, however, a subsequent motion in the House provides strong evidence that the motion to substitute “and no warrant shall issue” must have passed. See *infra* note 273 and accompanying text.

272. See Davies, *Correcting History*, *supra* note 1, at 167-69; Davies, *Original Fourth*, *supra* note 1, at 719-22.

273. See Davies, *Original Fourth*, *supra* note 1, at 719-22. There was a subsequent motion to adjust the statement of the probable cause and particularity requirements for warrants to the new “and no warrant shall issue” language. Specifically, the “without/or not” in the committee’s phrasing (“warrants issuing without probable cause . . . , or not particularly describing”) was changed to “but upon/and” (“and no warrant shall issue but upon probable cause . . . , and particularly describing”). See *id.* at 719 n.486. The adjustments made in this subsequent motion, which was reported to have passed, demonstrate that the prior motion to substitute “and no warrant shall issue” for “by warrants issuing” must have passed in the House—otherwise there would have been no reason for anyone to propose these further adjustments in the language. Hence, this motion disproves the conventional story that the substitution of “and no warrant shall issue” was voted down and then made surreptitiously. See *id.* at



has survived) a committee then rearranged the proposed amendments into the present order when the proposals were sent from the House to the Senate, and moved the Fourth Amendment ahead of the criminal procedure provisions in the Fifth, Sixth, and Eighth Amendments.<sup>274</sup>

*D. The Framers' Design for Arrest and Search Authority*

To sum up, there was no standard as flimsy as reasonableness in framing-era search doctrine, and the Framers did not intend to create any such broad standard. Indeed, they did not intend to do anything more in the Fourth Amendment than ban the issuance of general warrants. The law of criminal arrest and search at the time of the framing was a law of rules, and the Framers undertook to preserve those rules in the Fifth Amendment “due process of law” clause. They also articulated the warrant standards in the Fourth Amendment simply to remove any possibility that legislation could authorize general warrants, even for revenue searches.

If one steps back from the details of the framing-era doctrine presented above, three broad features of the Framers' conception of arrest and search authority come into focus. The first is the way the proportionality of arrest and search authority was defined by an underlying notion of necessity. Criminal arrest authority was quite broad when it pertained to responding to the exigency presented by the then-narrow category of felonies or instances of ongoing violence, but it was quite restrained with regard to less serious offenses. Indeed, there was no arrest authority, with or without a warrant, for petty offenses. To put it another way, there was an appreciation that excessive intrusions by law enforcement were themselves an evil to be avoided.<sup>275</sup>

A second feature was that framing-era doctrine always provided some form of protection against arbitrary or abusive arrest or search. This protection either took the form of a particularized warrant (which precluded the exercise of discretion by ordinary officers) issued after judicial assessment, based on the sworn testimony of persons with direct knowledge, of the need for an arrest or search,<sup>276</sup> or it took the form of the inhibiting effect of the personal peril and accountability that attended a private complainant or officer who initiated an arrest without such a warrant.<sup>277</sup> Indeed, both forms of protection were applied to searches of houses for stolen goods or untaxed goods insofar as the complainant (including an officer who acted as complainant) not only had to obtain a

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718-19. Other evidence also shows the change was made before the appointment of the committee that supposedly made the change. *See id.* at 719 n.485.

274. *See* Davies, *Correcting History*, *supra* note 1, at 169-71.

275. *See supra* note 89 and accompanying text.

276. *See supra* notes 120-27 and accompanying text.

277. *See supra* notes 101-05 and accompanying text.

particularized search warrant prior to the search, but also remained exposed to personal liability for damages if the search did not actually locate the goods as predicted.<sup>278</sup>

A third feature, which also reflected a form of proportionality standard, was the heightened protection afforded to the house and its domestic contents versus the much lower protections afforded commercial premises. Because the house was closely associated with the preservation of the personal autonomy, security, and privacy of the citizen, it was due the heightened protections associated with the warrant—that is, the protections accorded by sworn testimony and prior judicial scrutiny of the adequacy of the grounds for an intrusion.<sup>279</sup> Ships and warehouses, however, which lacked any comparable association, were open to government inspection.<sup>280</sup>

The salient theme in the story of arrest and search doctrine since the framing is the judicial destruction of all three of these features. The Framers' sensibilities were lost and suppressed when nineteenth century state judges abandoned the Cokean tradition of due process of law, and when the justices of the Supreme Court subsequently reduced first search doctrine, and then arrest doctrine, to an undisciplined morass of Fourth Amendment reasonableness—and then used that rubric as a cover to vastly expand government arrest and search powers.

#### IV. THE JUDICIAL DESTRUCTION OF THE FRAMERS' DESIGN

A striking gap occurs in the history of constitutional arrest and search standards. The need for a federal bill of rights had been a salient issue during the ratification debates of 1787-1788.<sup>281</sup> Yet, once the Bill of Rights was adopted it ceased to be the object of much interest.<sup>282</sup> During roughly the next century there were only a few cases that invoked the Fourth Amendment in the context of statutes that provided for novel or unusual sorts of “warrants”—but none that were significant.<sup>283</sup> There were even fewer reported cases that addressed the arrest protections in the Fifth Amendment due process of law clause.<sup>284</sup> This seems mysterious because

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278. See *supra* note 86 and accompanying text (discussing the liability of the complainant who obtained a search warrant for stolen goods if the goods were not found); *supra* note 199-204 (discussing the potential liability of a revenue officer who acted as informer to obtain a revenue search warrant if untaxed goods were not found).

279. See *supra* note 188 and accompanying text.

280. See *supra* note 207 and accompanying text.

281. See *supra* Part III.C.4-5.

282. See *infra* note 286 and accompanying text.

283. See Davies, *Original Fourth*, *supra* note 1, at 613-18.

284. See Davies, *Correcting History*, *supra* note 1, at 175 n. 551 (discussing references to due process of law in federal cases that involved unusual forms of arrest).

federal officers certainly made arrests and searches—including unlawful arrests and searches—during this period.<sup>285</sup>

The usual explanation offered for this gap in the application of provisions of the Bill of Rights is the narrow scope of federal criminal jurisdiction during this period.<sup>286</sup> But a deeper explanation lies in a basic legal doctrine that is no longer the law and, for that reason, has become obscure. The understanding at the time of the framing—in fact, until the early twentieth century—was that an officer acted as the government only when he acted within the lawful authority of his office.<sup>287</sup> If the officer acted outside of that lawful authority, he acted *only as a private trespasser*—which is why the usual remedy was some form of trespass lawsuit for damages.<sup>288</sup> Hence, unlawful arrests or searches could not violate the constitutional standards because, by definition, the constitution regulates only government action.<sup>289</sup> Instead, only statutes or court orders (including general warrants) could violate constitutional standards.<sup>290</sup>

This understanding of the boundary of government action meant that neither the Fifth Amendment “due process of law” clause nor the Fourth Amendment was originally understood to directly control the conduct of officers. Instead, they both constituted limits on Congressional power. The “due process of law” clause was intended to prohibit Congress from relaxing the settled common-law standards for criminal arrests and searches, and the Fourth Amendment was intended to prohibit Congress from authorizing general warrants for any purpose that affected persons, houses, papers, and effects.<sup>291</sup> Indeed, the Bill of Rights was initially debated with the expectation that the proto-Fifth and proto-Fourth

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285. Cf. Davies, *Original Fourth*, *supra* note 1, at 625-26.

286. See, e.g., LASSON, *supra* note 18, at 106. The federal courts had no broad “federal question” jurisdiction until 1875. See SURRENCY, *supra* note 86, at 133-34. Moreover, trespass actions against federal revenue officers for a search or seizure that did not comply with federal statutory standards may have been viewed as falling outside of the federal court jurisdiction provided for in federal revenue statutes. See, e.g., *Slocum v. Mayberry*, 15 U.S. (2 Wheat.) 1, 9-12 (1817) (ruling that, in a case in which a federal court ruled that revenue officer acted beyond the scope of the authority provided by federal statutes, “[t]he common law tribunals of the United States are closed against [a suit for damages brought by a party whose goods were declared non-forfeit]” and such cases “could be prosecuted only in the state court,” because “[t]he common law courts of the United States have no jurisdiction in the case”).

287. See Davies, *Original Fourth*, *supra* note 1, at 660-67.

288. In another article in this symposium issue, Professor George Thomas argues that the Fourth Amendment is best understood as an effort to preserve the law of trespass remedies. George C. Thomas III, *Stumbling Toward History: The Framers’ Search and Seizure World*, 43 TEX. TECH L. REV. 199 (2011). I think that is essentially the remedial side of the common law arrest and search standards that I discuss in this article.

289. See Davies, *Original Fourth*, *supra* note 1, at 660-63. The conception of government action was enlarged to include unlawful conduct performed in connection with a government office in the early twentieth century, which is why the exclusionary rule appeared at that time. See *infra* note 370.

290. See Davies, *Original Fourth*, *supra* note 1, at 663.

291. See Davies, *Correcting History*, *supra* note 1, at 138-40; Davies, *Arrest*, *supra* note 1, at 403-06; Davies, *Original Fourth*, *supra* note 1, at 700-02.

Amendments—as well as nearly all of the rest of the provisions we know as the Bill of Rights—would be *inserted into* the limitations on the power of Congress in Article I, section 9, of the Constitution itself.<sup>292</sup> The decision to instead set the Bill out as a supplemental document, which was made after the texts of the proto-Fifth and proto-Fourth Amendments had already been agreed upon in the House, seems to have been prompted by the reluctance of some Framers to alter the language of the original Constitution.<sup>293</sup>

The upshot of this original understanding of the boundary of government conduct was that no constitutional issue arose under the Fifth Amendment or Fourth Amendment unless Congress passed a forbidden statute. Because Congress did not do that, there were no significant occasions for the federal courts to construe the meanings of those provisions during roughly the first century following the framing of the Bill of Rights.<sup>294</sup> That gap in construction allowed a good deal of constitutional amnesia to develop, and that amnesia, in turn, eventually created the opportunity for the Supreme Court to reinvent criminal procedure within the novel rubric of Fourth Amendment reasonableness.

A. *The Loss of the Original Understanding of “Due Process of Law”*

The original meaning of “due process of law” is now obscure because the Cokean tradition was lost during the decades that followed the framing. The American political class had fervently embraced the Cokean tradition of limited criminal justice power during the framing era because they still feared the potential for oppression by their new governments.<sup>295</sup> But that fear seems to have dissipated as the elite became more concerned with rising property crime and urban disorder.<sup>296</sup> The result was that American state judges were quite receptive when English judges relaxed the common-law standard for warrantless felony arrests to facilitate more aggressive policing.<sup>297</sup>

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292. See Davies, *Correcting History*, *supra* note 1, at 138-40. The only provisions not aimed at Congress were the criminal trial provisions that eventually became the Sixth Amendment; they were initially proposed as part of a substantial expansion of the criminal jury trial provision in Article III. See *id.* at 138-40, 152-55.

293. See *id.* at 140. The proto-Fifth Amendment and proto-Fourth Amendment were agreed to by the House of Representatives sitting as a committee of the whole on August 17, 1789. See 5 *The Roots of The Bill of Rights* 1107, 1111-12 (Bernard Schwartz ed., 1980) (reprinting 1 *Annals of Congress*). The decision to set the amendments out in a supplemental format rather than insert them into the existing text of the Constitution was made on August 19, 1789. See *id.* at 1121, 1125-26.

294. See *supra* notes 283-84 and accompanying text.

295. See generally the sources identified in Davies, *Original Fourth*, *supra* note 1, at 670 nn.329-30 (discussing criminal justice during the framing era).

296. See Davies, *Correcting History*, *supra* note 1, at 183.

297. See *id.*

English judges began to expand the warrantless felony arrest authority of peace officers in 1780 by ruling that a peace officer, but not a private person, could arrest on the basis of an unsworn “charge” of felony made by another person.<sup>298</sup> In effect, this “on charge” standard allowed the officer to act with the sort of indemnity that had previously been provided only by a judicial warrant or a hue and cry.<sup>299</sup> The person making the charge, however, remained potentially liable for false imprisonment if no felony had actually been committed or if there had been a lack of probable cause to suspect the arrestee.<sup>300</sup> Of course, this novel 1780 English ruling was not part of the common law which the American states absorbed when they became independent in 1776.<sup>301</sup> Nevertheless, an American commentator noted the new “on charge” standard for warrantless felony arrests by peace officers as early as 1795,<sup>302</sup> and an American state court adopted that standard as early as 1829.<sup>303</sup>

English judges took a further step in 1827 by jettisoning the felony-in-fact requirement and ruling that a peace officer, but not a private person, could make a warrantless *felony* arrest merely upon bare probable cause that a felony might have been committed, even if none actually had been.<sup>304</sup> Moreover, because the officer could assess probable cause on the basis of unsworn hearsay without anyone else actually charging that a felony had been committed, this new standard effectively dispensed with the requirement of a named and accountable complainant—probably the chief protection that framing-era law had afforded against malicious or groundless warrantless arrests.<sup>305</sup> American state courts then began to import this new bare probable cause standard for warrantless felony arrests by peace officers during the 1840s, and it became widely accepted by the end of the nineteenth century.<sup>306</sup> Unlike the “on charge” standard, however, this expansion of warrantless felony arrest authority met with some resistance and was not uniformly adopted until the mid-twentieth century.<sup>307</sup>

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298. See *id.* at 184-85 (discussing *Samuel v. Payne*, 1 Dougl. 359; 99 Eng. Rep. 230 (K.B. 1780)).

299. See *supra* note 105.

300. See Davies, *Correcting History*, *supra* note 1, at 185 n.582.

301. See *id.* at 185; cf. Davies, Crawford, *supra* note 6, at 152-62 (criticizing Justice Scalia’s treatment of English decisions from 1787, 1789, and 1791 as evidence of the American Framers’ understanding of the Sixth Amendment’s Confrontation Clause).

302. See Davies, *Correcting History*, *supra* note 1, at 185 n.585.

303. See *id.* at 186. It is possible, however, that the on-charge standard was sometimes interpreted so loosely as to anticipate the bare probable cause standard. See, e.g., 3 DANE, *supra* note 203, at 72 (volume published 1824) (omitting mention of *Samuel’s* “charge of felony” requirement and instead describing the case as though it had simply ruled that “a peace officer may arrest on reasonable suspicion of felony without warrant, though no felony has been committed”).

304. See Davies, *Correcting History*, *supra* note 1, at 187-88 (discussing *Beckwith v. Philby*, 6 B. & C. 635, 638-39; 108 Eng. Rep. 585, 586 (K.B. 1827)).

305. See *id.* at 190-91.

306. See *id.* at 188-90.

307. See *id.* at 189 n.595, 210-12 (noting that New York retained the felony in fact requirement until the early twentieth century and that Congress initially included the felony-in-fact requirement when

The adoption of the bare probable cause standard for warrantless felony arrests by officers seems to have initiated a virtual revolution in criminal procedure.<sup>308</sup> For one thing, the relaxed bare probable cause standard for warrantless felony arrests reduced the need for police to obtain arrest warrants, and thus undermined judicial supervision prior to arrests.<sup>309</sup> Likewise, the relaxed bare probable cause standard for warrantless felony arrests soon also became the accepted showing of cause for issuance of an arrest warrant.<sup>310</sup> That change, in turn, meant that the “oath” required for issuance of a warrant was diluted to an officer’s mere affirmation that he had received *unsworn* hearsay information from someone else—which fell far short of the meaning of “supported by oath” in 1789.<sup>311</sup> The allowance of hearsay to establish probable cause also opened the way for police to develop networks of unnamed “confidential informants.”<sup>312</sup> Additionally, the relaxation of felony arrest standards created the opportunity for police to begin to interrogate suspects.<sup>313</sup> Thus, the adoption of the bare probable cause standard for warrantless felony arrests effectively ended accusatory criminal procedure and ushered in modern investigatory procedure. But note that the warrantless arrest standard was reduced only as to *felonies*, not as to less-than felony offenses.<sup>314</sup>

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it finally got around to enacting statutory authority for warrantless felony arrests by federal officers in the 1930s).

308. See *id.* at 191-94. For a discussion of the emergence of modern policing during the nineteenth century, see Wesley M. Oliver, *The Neglected History of Criminal Procedure, 1850-1940*, 62 RUTGERS L. REV. 447, 448 (2010).

309. See Davies, *Correcting History*, *supra* note 1, at 191. The adoption of the bare probable cause standard probably especially facilitated police arrests for thefts, the most common crime at that time and one that usually constituted a felony. Under the earlier standards, a police officer acted at his peril if he made an arrest for a suspected theft without the charge of a victim-complainant; if no victim was located, the felony in fact could not be proved, and the officer, as well as the complainant, was liable for false imprisonment. See *id.* at 182. For example, in the initial trial in the 1780 case *Samuel v. Payne*, 1 Dougl. 359; 99 Eng. Rep. 230 (K.B. 1780) (discussed *supra* notes 298-300 and accompanying text), the jury, following the court’s instructions, found both the complainant and the officer who had assisted in making an unlawful warrantless felony arrest to be liable for trespass and false imprisonment. But under the bare probable cause standard, the officer was justified so long as he could identify grounds (including hearsay information) that lead to suspect a person was in possession of stolen goods, regardless of whether there actually had been a theft or not. See Davies, *Correcting History*, *supra* note 1, at 184-85.

310. See Davies, *Probable Cause*, *supra* note 1, at 52.

311. See Davies, *Not Framers’ Design*, *supra* note 6, at 396-97, 400-01, 407-08, 410, 420, 422 n.171 (quoting framing-era and early nineteenth-century authorities’ statements that unsworn statements could not be evidence and that an oath by a witness as to what another said—hearsay—did not cure the unsworn character of the initial statement).

312. See Davies, *Correcting History*, *supra* note 1, at 193 n.603 (discussing Supreme Court cases that accepted use of hearsay from confidential informants).

313. See *id.* at 192.

314. See *infra* notes 376-78 and accompanying text (discussing continued adherence to common-law restrictions on warrantless arrests for less than felony offenses). The complete loss of proportionality in arrest doctrine is a relatively recent development. See *infra* notes 431-43 and accompanying text.

Significantly, common-law arrest standards were not undermined by legislation, as the Framers had feared, but by judges. Unsurprisingly, the state judges did not mention their state law of the land or due process of law provisions when they relaxed the previous felony warrantless arrest standard.<sup>315</sup> Instead, they pretended to be simply applying “common law”—without acknowledging that it was nineteenth century English common law rather than the common law the American states had absorbed in 1776.<sup>316</sup>

The state judges, however, did not entirely disregard “due process of law” during this period. Rather, they began to exploit that concept to protect private property interests against government actions—a potential dimension of Magna Carta’s law of the land chapter that had previously received little attention.<sup>317</sup> So when the modern regulatory state began to emerge during the mid- to late-nineteenth century, state judges began to invoke due process as a constitutional limit on governmental interference with private property and business matters.<sup>318</sup> Due process also became an important source of federal judicial power in 1868 when the Fourteenth Amendment extended that standard to the actions of state governments.<sup>319</sup> Notably, within a decade the Supreme Court adopted “*reasonableness*” as the usual standard for assessing compliance with the new doctrine of substantive due process<sup>320</sup> and also announced in 1886 that business entities were “persons” and thus enjoyed the full protections of due process.<sup>321</sup> Thus, reasonableness became a flexible excuse for the justices to assert their personal economic predilections as constitutional law.<sup>322</sup>

The justices had little interest in criminal justice protections, however, and they effectively read the original criminal procedure content out of due process of law in the 1884 ruling in *Hurtado v. California*.<sup>323</sup> Although

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315. On the rare occasions when early nineteenth century state courts did discuss the constitutionality of arrest authority, however, they seem to have done so under the state “law of the land” provision rather than the state warrant provision. See, e.g., Davies, *Correcting History*, *supra* note 1, at 119-21 (discussing *Mayo v. Wilson*, 1 N.H. 53 (1817)). Some mid nineteenth century commentators also still discussed constitutional limits on arrest authority in terms of the state “law of the land” provision. See, e.g., E. HAMMOND, *JUSTICE OF THE PEACE* 308 (West Brookfield, Mass. 1841) (opening a discussion of arrest authority by discussing article XII of the Massachusetts declaration).

316. See, e.g., Davies, *Original Fourth*, *supra* note 1, at 639-40 n.252 (tracing how judicial opinions and commentary invented and embellished the myth that bare probable cause had always been the historical common-law warrantless felony arrest standard).

317. See Davies, *Correcting History*, *supra* note 1, at 40-41.

318. See *id.* at 176-78.

319. See *id.* at 199-200.

320. *Munn v. Illinois*, 94 U.S. 113, 113 (1877).

321. *Santa Clara Cnty. v. S. Pac. R.R.*, 118 U.S. 394, 396 (1886).

322. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905) (holding that a New York law limiting the number of hours a baker could work was “unreasonable and entirely arbitrary”).

323. *Hurtado v. California*, 110 U.S. 516, 538 (1884) (holding that the requirement of indictment by grand jury as a requisite for a felony prosecution was not sufficiently fundamental to constitute a requirement of due process).

Justice Harlan's lone dissenting opinion still correctly described the criminal procedure content of the Cokean formulation of due process of law, the other justices brushed it aside in a flurry of fraudulent originalist claims.<sup>324</sup> Thus, the Framers' understanding of criminal arrest and search standards had been effectively obliterated by the beginning of the twentieth century, and uncritical commentators then invented a largely fictional historical pedigree for the new content the justices had invented for due process.<sup>325</sup>

The erasure of the criminal procedure content of due process of law, in turn, opened the way for the justices to later reinvent criminal procedure under the rubric of the Fourth Amendment. Indeed, the justices of the Supreme Court began to inject new meaning into the text of the Fourth Amendment in 1886—only two years after jettisoning the original meaning of due process of law in *Hurtado*—when Justice Bradley formulated the first installment of the official, but fictional, history of the Fourth Amendment in *Boyd v. United States*.<sup>326</sup> In a real sense, everything in the Fourth Amendment story since then is a judicial invention—and much of it has been justified by phony judicial-chambers history.<sup>327</sup>

### B. The Invention of “Fourth Amendment Reasonableness”

The earliest constitutional commentaries described the Fourth Amendment simply as a ban against general warrants and usually ignored the phrase “unreasonable searches and seizures.”<sup>328</sup> That changed,

324. See Davies, *Correcting History*, *supra* note 1, at 197-99 (noting that Coke had treated the requisite of indictment by grand jury as a salient feature of due process of law and that Justice Harlan correctly called attention to Coke's writings on that point in his dissenting opinion in *Hurtado*).

325. See *id.* at 39-42 (discussing, *inter alia*, RODNEY L. MOTT, *DUE PROCESS OF LAW: A HISTORICAL AND ANALYTICAL TREATISE OF THE PRINCIPLES AND METHODS FOLLOWED BY THE COURTS IN THE APPLICATION OF THE CONCEPT OF THE “LAW OF THE LAND”* (1926)).

326. *Boyd v. United States*, 116 U.S. 616 (1886).

327. The common label for historical claims produced for the purpose of advocacy is “law-office history,” but judges and justices also advocate for preferred positions when they write opinions, and they have shaped our constitutional history far more than lawyers have. Indeed, many of the false historical claims that appear in Supreme Court opinions never appeared in a brief but were simply injected, after briefing and oral argument, by the justice who was assigned to author the opinion. Thus, the more appropriate pejorative is “judicial-chambers history.” See Davies, *Arrest*, *supra* note 1, at 418-19; *cf.* Davies, Crawford, *supra* note 6, at 113 n.28.

328. See Davies, *Original Fourth*, *supra* note 1, at 618 (discussing the characterization of the Fourth Amendment as a ban against general warrants in early nineteenth-century commentaries by St. George Tucker, William Rawle, and Justice Joseph Story).

Further evidence of St. George Tucker's views has recently come to light in the form of his lecture notes on the Fourth Amendment (which he still referred as “article vi”) for a law course at the College of William and Mary, and the notes are unusual insofar as Tucker did attempt to understand the significance of the term “unreasonable searches and seizures.” Tucker's notes have been presented as follows:

The right of the people to be secure in their persons, houses, papers & effects, against unreasonable searches and seizures, shall not be violated—What shall be deemed



however, in 1868 when Thomas Cooley's *Constitutional Limitations* discussed the implications of the Fourth Amendment under the heading of "Unreasonable Searches and Seizures."<sup>329</sup> Cooley was primarily interested

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unreasonable searches and seizures. The same article informs us, by declaring, "that no warrant shall issue, but first, upon probable cause—. . . which cause secondly, must be supplied by oath or affirmation; thirdly the warrant must particularly describe the place to be searched, and fourthly—the persons or things to be seized. All other searches or seizures, except such as are thus authorized, are therefore unreasonable and unconstitutional. And herewith agrees our State bill of rights—Art. 10.

The case of general warrants, under which term all warrants except such as are above described are included, was warmly agitated in England about thirty years ago—and after much altercation they were finally pronounced to be illegal by the common law—see [Report] of *Money v. Leach* 3 Burrow 1743. 1 B[lackstone] Rep[orts]: 555; vi \_\_\_ 4 B[lackstone's] C[ommentaries] 291.

But this clause does not extend to repeal, or annul the common law principle that offenders may in certain cases be arrested, even without warrant. As in the case of riots, or breaches of the peace committed within the view of a Justice of the Peace, or other peace officer of a county, who may in such cases cause the offender to be apprehended, or arrest him, without warrant.

Nor can it be construed to restrain the authority, which not only peace officers, but every private person possesses, by the common law, to arrest any felon if they shall be present when the felony is committed.

See David T. Hardy, *The Lecture Notes of St. George Tucker: A Framing Era View of the Bill of Rights*, 103 NW. U. L. REV. 1527, 1535-36 (2009) (footnote omitted) (quoting lecture notes probably composed while Tucker was a professor at William and Mary) (bracketed material corrected or added by the present author: The two case citations are to different reports of the King's Bench 1765 ruling condemning general warrants in the Wilkesite case, *Money v. Leach* in 3 Burrows Reports 1692, 1743 [reprinted at 97 Eng. Rep. 1050, 1075], and in 1 Blackstone's Reports 555 [reprinted at 96 Eng. Rep. 320]; the citation "4 B.C. 291" is to 4 BLACKSTONE (9th London ed., 1783), *supra* note 47, at 291 (condemning general warrants and also citing *Money v. Leach*)).

What do Tucker's notes reveal? They suggest that Tucker was somewhat puzzled by the use of the phrase "unreasonable searches and seizures" in the Fourth Amendment, but that he concluded that it was simply an expression of the ban against too-loose or general warrants. That is the implication of what he says the text of the amendment "informs us." Moreover, although he says that "all other searches and seizures" that do not comply with the sworn probable cause and particularity standards for warrants are "unreasonable and unconstitutional," it does not appear that he meant that literally, because this passage in his notes goes on to indicate that the Fourth Amendment did "not extend" to alter the common-law standards for warrantless arrests.

Additionally, in the notes Tucker added when he later published his own edition of *Blackstone's Commentaries*, he presented the Fourth Amendment (which he still referred to as the Sixth Article of Amendment) as being comparable to Article 10 of the Virginia declaration, which simply banned general warrants (see *supra* note 194). 5 BLACKSTONE'S COMMENTARIES 291 n.4 (St. George Tucker ed., Philadelphia, 1803) [hereinafter TUCKER'S BLACKSTONE] (reprinting the fourth volume of BLACKSTONE (9th London ed., 1783), *supra* note 47, with added notes). Tucker also described the Fourth Amendment, like Virginia Article 10, as a provision "for trying the legality of any warrant." *Id.* at 301. However, he did not cite the Fourth Amendment as having any other content. Thus, Tucker does not seem to have given unreasonable searches and seizures any content beyond the ban against searches under general warrants.

329. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE UNITED STATES OF THE AMERICAN UNION 299 (1868). Later editions were published in 1871, 1873, 1878, and 1883.

The term "unreasonable searches and seizures" was treated as a constitutional standard in its own right on an earlier occasion when Samuel P. Chase argued in *Jones v. Van Zandt*, 46 U.S. (5 How.) 215 (1847), that the 1793 Fugitive Slave Act violated the constitutional guarantee against unreasonable seizures. See ANDREW E. TAZLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF

in formulating constitutional limits on government interference with private property and, especially, papers. In that context, he rooted the Amendment's origin primarily in the Wilkesite cases,<sup>330</sup> while also mentioning the 1761 Boston case.<sup>331</sup> He also asserted—without authority or explanation—that a search warrant for papers “for the sole purpose of obtaining evidence” would violate the Fourth Amendment,<sup>332</sup> and that a seizure of a paper as evidence would also violate the Fifth Amendment's prohibition against compelled self-incrimination.<sup>333</sup>

Although Cooley declined to discuss searches and seizures of books and papers made under the authority of the federal revenue laws, he opined in later editions that “[p]erhaps, under no other laws are such liberties taken by ministerial officers” but noted that federal court decisions had upheld searches under the revenue statutes “however unreasonable they may seem.”<sup>334</sup> Justice Bradley, who was undoubtedly familiar with Cooley's work, then seems to have set out to remedy that situation in *Boyd*.

1. *The Condemnation of “Unreasonable Seizures” of Papers in Boyd*  
(1886)

*Boyd* arose from a customs forfeiture of thirty-five cases of imported plate glass.<sup>335</sup> The issue was the constitutionality of a federal statute that had provided authority for the government to obtain a court order directing the importer to produce an invoice to prove the value of the imported

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SEARCH AND SEIZURE, 1789-1868, at 167-68 (2006) (quoting Van Zandt, *An Argument by S. P. Chase, in 1 FUGITIVE SLAVES AND AMERICAN COURTS: THE PAMPHLET LITERATURE* 431-36 (Paul Finkelman ed., 1988)). The Supreme Court, however, rejected that argument without discussion. *Jones*, 46 U.S. at 232. Chase's argument is not set out in the case report.

330. COOLEY, *supra* note 329, at 300 n.1 (quoting extensively, in a lengthy footnote, from the discussion of the Wilkesite general warrant cases in “May's Constitutional History of England, c. 11”). Cooley also asserted that the Fourth Amendment was primarily concerned with the seizure of papers in a later work. THOMAS COOLEY, *PRINCIPLES OF CONSTITUTIONAL LAW* 212 n.2 (1880) (asserting that “[t]he seizure of the papers of Algernon Sidney, which were made use of as the means of convicting him of treason, and of those of Wilkes, about the time that the controversy between Great Britain and the American Colonies was assuming threatening proportions, was probably the immediate occasion for [the Fourth Amendment]”) (note, however, that this work may not have been widely available prior to a second edition published in 1891). *But see* LASSON, *supra* note 18, at 39 n.96 (commenting that Cooley's attribution of the Fourth Amendment to Sidney's trial was “entirely too broad”). I concur with Lasson on this point; I have not located any mention of Sidney's trial in the framing-era sources pertinent to criminal arrest or search law.

331. COOLEY, *supra* note 329, at 301-03 (briefly discussing the 1761 Boston *Writ of Assistance Case*). The historical research on the 1767 Townshend Writ controversies had not been done at the time that Cooley wrote. *See supra* note 172.

332. COOLEY, *supra* note 329, at 305, n. 5. Cooley also asserted in a later passage that “[a] search warrant for libels and other papers of a suspected party was illegal at common law.” *Id.* at 307 n. 1.

333. *Id.* at 305 n.5.

334. *Id.* (1874 ed.) at 344 (\*303) n.1.

335. *Boyd v. United States*, 116 U.S. 616, 617 (1886).

glass.<sup>336</sup> Notably, the order to produce appears to have been based on a showing of probable cause for the production of particular documents, and thus appears to have satisfied the specific standards set out in the Warrant Clause of the Fourth Amendment.<sup>337</sup> Additionally, the setting in *Boyd* was far removed from the Framers' concern for the sanctity of the dwelling house and private papers.<sup>338</sup> But the justices were not deterred by these considerations. In keeping with their campaign to protect business interests from government regulation, Justice Bradley's majority opinion declared that the statutory order to produce was unconstitutional.<sup>339</sup>

In a burst of judicial creativity that closely tracked Cooley's assertions, Bradley declared that the order to produce an invoice was equivalent to "an unreasonable search and seizure"<sup>340</sup> and violated the Fourth Amendment because there was no legitimate public interest in private papers<sup>341</sup> (a doctrine that became the "mere evidence" doctrine)<sup>342</sup> and because mandatory production of a paper constituted a violation of the Fifth Amendment right against compelled self-accusation (a claim that effectively ignored the restriction of that right to "any criminal case").<sup>343</sup>

Bradley justified these claims by quoting extensively from a report of Lord Camden's 1765 ruling in one of the Wilkesite cases, *Entick v. Carrington*.<sup>344</sup> In particular, Bradley quoted a passage in which Camden condemned any search for papers as "void" and as a form of compelled self-accusation.<sup>345</sup> Bradley also asserted that it cannot be doubted that the Framers relied upon "the language of Lord Camden . . . as furnishing the criteria of the reasonable and 'unreasonable' character of such seizures."<sup>346</sup> But Bradley's originalist claim was unsound because the passage he quoted

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336. *Id.* at 617-20. The statute had replaced an earlier statute which authorized a search warrant for such invoices. *Id.* at 620-21.

337. *See id.* at 619-20 (quoting the statute to the effect that a government attorney "may make a written motion particularly describing such book, invoice or paper, and setting forth the allegation which he expects to prove").

338. *See supra* notes 188, 206-07 and accompanying text.

339. *Boyd*, 116 U.S. at 638.

340. *Id.* at 634-35.

341. *Id.* at 623-24.

342. *See* Davies, *Original Fourth*, *supra* note 1, at 727 n.513.

343. *See Boyd*, 116 U.S. at 629-30, 633-34. Bradley's *Boyd* opinion ran roughshod over the criminal/noncriminal boundary by declaring that the customs forfeiture proceedings "though they be civil in form, are in their nature criminal." *Id.* at 634. The Framers would have understood the Fifth Amendment to prohibit compelling a person to produce an *incriminating* paper. *See* Davies, *Original Fourth*, *supra* note 1, at 726 n.511; Davies, *supra* note 187, at 1008. It is highly unlikely, however, that they would have thought that the Fifth Amendment right, which was explicitly limited to "any criminal case," had any bearing in a civil customs forfeiture proceeding. *See* Davies, *Original Fourth*, *supra* note 1, at 705 n.450. Rather, it appears likely that the phrase "in any criminal case" was specifically inserted into the Fifth Amendment to indicate that the right did not apply in customs enforcement. *See id.*

344. *Boyd*, 116 U.S. at 626-29, quoting *Entick v. Carrington*, 19 How. St. Tr. 1029, 1066-74 (C.P. 1765).

345. *Boyd*, 116 U.S. at 629.

346. *Id.* at 630.

had not appeared in the initial report of the 1765 case which was published in 1770 (with which many framing-era Americans undoubtedly were familiar),<sup>347</sup> but appeared only in a later expanded case report that was not published until 1781.<sup>348</sup> Thus, Americans could not have been familiar with the assertions that Bradley quoted when John Adams introduced the phrase “unreasonable searches and seizures” in the 1780 Massachusetts provision.<sup>349</sup> Moreover, because it is unlikely that the later report would have been imported in significant numbers during the remainder of the framing era, it seems highly doubtful Americans would have become familiar with Camden’s notion that a search warrant for papers was inherently illegal even by the time of the framing of the Fourth Amendment in 1789.<sup>350</sup> Indeed, the language of the Fourth Amendment seems to

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347. The ruling in *Entick* was first reported in the second part of the first volume of George Wilson’s reports, published in 1770. *Entick v. Carrington*, 1 Wils. (Part II) (1st ed. 1770) 275 (C.P. 1765). There is clear evidence that Americans became familiar with this report of *Entick* prior to the Revolution. See, e.g., SMITH, *supra* note 178, at 241 (noting that a line from Wilson’s report of *Entick* was inserted in a version of Otis’s 1761 argument against general writs that was circulated in Massachusetts prior to the Revolution). Wilson’s report of *Entick* was subsequently reprinted, with the same pagination and without changes, in 1 Wils. (Part II) (2d ed., 1779) 275; 2 Wils. (3rd ed., 1799) 275, 95 Eng. Rep. 807. However, although Wilson’s report set out the court’s condemnation of the general warrant used in that case and also reported the court’s statement that “there is no law in this country to justify” such a search warrant for papers, it did not contain the stronger assertions either that a search for papers was inherently illegal or a form of compelled self-incrimination; instead, the court seemingly recognized Parliament’s power to authorize searches for papers when it stated that “if the legislature be of that opinion [that libels should be searched for and seized] they will make [warrants to search for papers] lawful.” *Entick*, 1 Wils. (Part II) (1st ed. 1770) at 292; 2 Wils. (1799 ed.) at 292, 95 Eng. Rep. at 818.

Although Americans also had access to some newspaper accounts of the ruling in *Entick*, these accounts were extremely short and said nothing about a search for papers amounting to self-incrimination. See Davies, *Original Fourth*, *supra* note 1, at 563 n. 22.

348. The stronger condemnations of paper searches that Justice Bradley quoted in *Boyd* first appeared in an enlarged version of the opinion of the Chief Justice of Common Pleas, Lord Camden, in *Entick* that was published in 1781. See *Entick*, 11 St. Tr. 313 (appendix) (Francis Hargrave ed., 4th Edition, volume published 1781). A note by Hargrave at the beginning of this report states that the report provides an more complete presentation of Camden’s ruling than had appeared in Wilson’s report. *Id.* at 313. Hargrave’s enlarged report was subsequently reprinted in Howell’s edition of the State Trials Reports during the early nineteenth century—the source which Bradley quoted from. See *Boyd*, 116 U.S. at 626-30, quoting *Entick*, 19 How. St. Tr. 1029, 1066-74.

Additionally, the notions that a search warrant for papers was inherently illegal or that a seizure of papers constituted compelled self-incrimination may have been largely idiosyncratic to Lord Camden, because they do not seem to appear in other framing-era legal authorities and are not much evident elsewhere in framing-era sources. See Davies, *Original Fourth*, *supra* note 1, at 727 n. 513.

349. See *supra* note 212 and accompanying text.

350. Because the illegality of general warrants was already firmly settled in state declarations of rights by the end of the Revolutionary War, it seems improbable that Americans would have searched out the later enlarged 1781 case report of Camden’s ruling in *Entick* when it finally became available during the mid to late 1780s. Indeed, because Americans had earlier editions of the State Trials Reports, and Hargrave’s edition of the State Trials Reports was an expensive multi-volume set sold by subscription, it seems unlikely to have been widely imported by Americans prior to 1789. See Davies, *Original Fourth*, *supra* note 1, at 565 n. 25.

Moreover, the 1781 version of *Entick* does not seem to have been noted in other English commentaries until the very eve of the framing of the Fourth Amendment—and even then the references

anticipate that a search warrant *could be issued* for papers provided it were particularized and based on probable cause. Why else would the Framers have specified those standards regarding search warrants for “houses, papers, and effects” rather than simply ban search warrants for papers outright?<sup>351</sup>

Bradley’s claim that the order of production was “unreasonable” and unconstitutional *even though it satisfied* the explicit standards for warrants set out in the Fourth Amendment was raw judicial activism. Nevertheless, Bradley’s *Boyd* opinion gave new content and prominence to the concept of an unreasonable seizure. Notably, however, Bradley treated reasonableness as a categorical rather than relativistic or balancing standard—all searches for or seizures of papers were “unreasonable.”<sup>352</sup>

The Supreme Court gradually backed down from *Boyd*’s burst of fictional originalism by permitting federal grand juries to obtain corporate records by subpoenaing corporate officers.<sup>353</sup> However, a new threat to business records appeared in 1911 when federal marshals, acting without any warrant or legal process, simply seized all of the records of a New York import firm,<sup>354</sup> and that episode appears to have prompted the justices to further elaborate the protections of the Fourth Amendment in the seminal 1914 decision *Weeks v. United States*.<sup>355</sup>

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were cryptic. When Thomas Leach edited the 1787 sixth edition of Hawkins’s treatise he added a note on *Entick*, citing the 1781 case report, which reported that Camden had ruled “that a warrant to seize and carry away PAPERS in the case of a seditious libel is illegal and void”—but the rest of the note had to do with Camden’s comments on the strict requirements for a search warrant for stolen goods. 2 HAWKINS (Thomas Leach ed., 1787 ed.), *supra* note 44, at 135 n. 6 (citing “11 State Trials 321”). It also appears likely that most of the copies of Leach’s edition of Hawkins’s treatise imported by Americans were of a 1788 Dublin printing, so it is improbable that the Framers of the Bill of Rights were even familiar with that source by 1789. *See Davies, Arrest, supra* note 1, at 277 n.118.

The earliest reference I have found to the later report of *Entick* in an American publication is a nearly verbatim repetition of Leach’s 1787 note on *Entick* in the entry on search warrants for stolen goods in the 1795 first edition of Hening’s Virginia justice of the peace manual. HENING (1795 ed.), *supra* note 46, at 402, 404.

Bradley’s claims regarding the Framers’ supposed familiarity with the details of Camden’s statements in *Entick* are also undercut by the absence of references to the Wilkesite cases generally, or to *Entick* particularly, in the surviving records of the discussions of the need for a ban against general warrants during the ratification debates of 1787-1788. *See supra* note 161; *Clancy, supra* note 19, at 43 n. 174 (noting the absence of any mention of *Entick* either by John Adams or elsewhere in the “voluminous commentary” regarding the need for a federal Bill of Rights between 1787 and 1791).

351. *See supra* text accompanying note 7 (quoting text of Fourth Amendment).

352. *See Davies, Original Fourth, supra* note 1, at 728.

353. *See Davies, Search and Seizure Century, supra* note 1, at 955.

354. *See Davies, Original Fourth, supra* note 1, at 729 n.516 (discussing the justices’ review, in 1911, of an episode in which a federal prosecutor in New York City simply had officers make a warrantless seizure of all of the business records of an importing company and had then declined to comply with an order by a federal judge to return the records).

355. *Weeks v. United States*, 232 U.S. 383, 393-99 (1914).

2. *The Application of the Fourth Amendment to Unlawful Searches by Officers in Weeks (1914)*

Police arrested Fremont Weeks for the offense of using the mails to promote a lottery.<sup>356</sup> After the arrest, a federal marshal and local police searched Weeks's residence and seized various incriminating papers, but did so without obtaining a warrant.<sup>357</sup> Weeks's attorney moved for the return of the papers prior to trial, but the motion was denied and Weeks was convicted.<sup>358</sup> Weeks then appealed to the Supreme Court, which reversed his conviction on the ground that the motion should have been granted and the papers excluded from evidence.<sup>359</sup>

Justice Day's *Weeks* opinion made three important innovations in the course of ruling in Weeks's favor. The most fundamental change was that it interpreted the Fourth Amendment to prohibit unlawful searches by federal officers.<sup>360</sup> That was revolutionary; as noted above, the framing-era understanding had been that an officer's conduct lost all official character if it was unlawful,<sup>361</sup> and the justices had reaffirmed that understanding as recently as 1908.<sup>362</sup> In 1913, however, the Supreme Court changed course and ruled that even the conduct of state regulators who acted contrary to state law constituted "state action" for purposes of applying the Fourteenth Amendment Due Process Clause.<sup>363</sup> In *Weeks*, the justices simply transferred that expanded understanding of government action to federal law enforcement by ruling, for the first time ever, that the unlawful conduct of a federal marshal could violate the Fourth Amendment.<sup>364</sup>

Second, *Weeks* treated the genuine historical common-law requirement of a warrant for a lawful search of a house as a component of the Fourth Amendment itself, and thus created the modern warrant requirement.<sup>365</sup> But the *Weeks* opinion did not invoke the history of search authority other than

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356. *Id.* at 386.

357. *Id.*

358. *Id.* at 388-89.

359. *Id.*

360. See Davies, *Original Fourth*, *supra* note 1, at 729-30.

361. See *supra* notes 288-89 and accompanying text.

362. *Ex parte Young*, 209 U.S. 123, 160 (1908) (ruling that the Eleventh Amendment did not bar legal action in federal court against a state attorney general who sought to enforce an unconstitutional statute because the unlawful character of his conduct "stripped [him] of his official or representative character").

363. *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 287 (1913); see also Davies, *Original Fourth*, *supra* note 1, at 666-67 (discussing the development of "state action" doctrine under the Fourteenth Amendment).

364. See *Weeks*, 232 U.S. at 394 (ruling that the mandate of the Fourth Amendment "is equally extended to the action of the Government and officers of the law acting under it"); see also Davies, *Original Fourth*, *supra* note 1, at 730 n.519 (noting the significance of the *Weeks* decision).

365. See *Weeks*, 232 U.S. at 398 (ruling that the warrantless house search and seizure of papers was an action "in direct violation of the constitutional rights of the [resident]"); Davies, *Original Fourth*, *supra* note 1, at 730.

to note the long acceptance of the axiom that “a man’s house is his castle.”<sup>366</sup>

Third, *Weeks* also invoked the genuinely ancient logic of “nullity”—which traces to Magna Carta<sup>367</sup> and was the basis for *Marbury v. Madison*<sup>368</sup>—and declared that the courts could not receive as evidence items that were seized in violation of the Constitution.<sup>369</sup> Although this exclusionary rule was a novel application of the nullity principle, it was a logical extension of the application of the Fourth Amendment once the unlawful conduct of an officer was reconceived as unconstitutional government action.<sup>370</sup>

Justice Day’s *Weeks* opinion, however, said little about the history of the Fourth Amendment beyond a perfunctory bow to *Boyd*.<sup>371</sup> Moreover, it did not construe the Fourth Amendment to do anything beyond requiring a valid warrant for a search of a house. It did not suggest that the Fourth Amendment applied to arrests,<sup>372</sup> and, most notably, it did not say much of anything about a reasonableness standard beyond referring to “unreasonable searches and seizures, such as were permitted under the general warrants.”<sup>373</sup>

### 3. *The Invention of Modern “Fourth Amendment Reasonableness” in Carroll (1925)*

The next big development—the invention of the concept of Fourth Amendment reasonableness—was prompted by a doctrinal quandary posed by the searches that were essential for the enforcement of the possessory

366. *Weeks*, 232 U.S. at 390.

367. See SOURCES, *supra* note 5, at 11, 21 (quoting the crown’s promise in the original 1215 version of Magna Carta that, if anything had been wrongly obtained by the crown, “let it be invalid and void”); *id.* at 30 (quoting from the 1297 confirmation of Magna Carta (Confirmatio Cartarum) that if any judgment by justices or ministers is contrary to the charter “it shall be undone, and holden for nought”).

368. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) (holding that federal courts lack jurisdiction to enforce an unconstitutional statute because “a law repugnant to the constitution is void; and . . . courts, as well as other departments, are bound by that instrument”).

369. *Weeks*, 232 U.S. at 398 (indicating that the denial of the motion to exclude the papers from evidence was “a denial of the constitutional rights of the accused”); Davies, *Original Fourth*, *supra* note 1, at 730 n.521.

370. See Davies, *Original Fourth*, *supra* note 1, at 730 n.521; see also Thomas Y. Davies, *An Account of Mapp v. Ohio that Misses the Larger Exclusionary Rule Story*, 4 OHIO ST. J. CRIM. L. 619, 622-25 (explaining that the recognition of the exclusionary rule was not “late” but rather occurred contemporaneously with the recognition that an unlawful search by an officer constituted government action); cf. Yale Kamisar, *The Writings of John Barker Waite and Thomas Davies on the Search and Seizure Exclusionary Rule*, 100 MICH. L. REV. 1821, 1852-62 (2002) (discussing the implications of the changed conception of unlawful conduct by officers for assessing the appearance of the exclusionary rule in *Weeks*).

371. *Weeks*, 232 U.S. at 389-90.

372. The *Weeks* opinion explicitly noted that it did not question warrantless searches made incident to lawful arrests for fruits of crime or burglar tools. *Id.* at 392.

373. *Id.* at 390.

offenses created by Prohibition. In particular, the use of automobiles to transport illegal liquor created a genuine exigency for law enforcement, and it was not feasible for police to obtain warrants prior to searching moveable autos—indeed, in the 1920s police did not even have radios to call for backup when they stopped vehicles.<sup>374</sup>

Existing arrest standards also did not permit searches of autos incident to warrantless arrest. The difficulty arose because Prohibition violations were usually misdemeanors rather than felonies,<sup>375</sup> but the common-law standard for warrantless arrests had been relaxed only for felonies, not for misdemeanors.<sup>376</sup> Warrantless misdemeanor arrests still were lawful only if an ongoing breach of the peace was actually observed by the arresting person or officer.<sup>377</sup> Hence, because liquor being transported in a car was usually not in plain view when a car was stopped, the occupants could not be lawfully arrested, which meant that searches of vehicles could not be justified as searches incident to lawful warrantless arrests.<sup>378</sup> Moreover, the fact that the Fourth Amendment's protections had already been extended beyond the house and its contents made it difficult for judges to deny that those protections also applied to autos.<sup>379</sup>

Perhaps because federal judges had less concern for bootleggers than for businessmen, they responded to the conundrum presented by the combination of Prohibition and automobiles by engaging in creative textualism.<sup>380</sup> They noted that the Fourth Amendment did not say that all warrantless searches were unconstitutional; rather, it made only “unreasonable” searches unconstitutional. Hence, they announced that if a search of an auto was based on probable cause, it would be “reasonable” and thus constitutional<sup>381</sup>—even though a warrantless arrest in that

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374. Rather than reinstitute a warrant requirement for automobile searches when the genuine exigency disappeared (for example, with the introduction of police radios), the Supreme Court converted the emergency *Carroll* “automobile exception” into a categorical form of search authority based on only a fictional exigency in *Chambers v. Maroney*, 399 U.S. 42, 50-51 (1970).

375. *See Carroll v. United States*, 267 U.S. 132, 154 (1925) (construing section 29, title II of the National Prohibition Act).

376. *See supra* note 314 and accompanying text.

377. *See supra* notes 130-33 and accompanying text.

378. *See, e.g., Carroll v. United States*, 267 U.S. 132, 156-57 (1925) (noting that police who stopped a car with probable cause to believe it was transporting illegal liquor could not make a lawful arrest for that misdemeanor offense).

379. *See, e.g., Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 390-93 (1920) (applying Fourth Amendment to a search of a business office for business records); *Gouled v. United States*, 255 U.S. 298, 306 (1921) (same).

380. The creative textualism in the lower federal court rulings may have been inspired by a 1921 commentary, Osmund K. Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 366 (1921) (noting that “[i]t is significant that the [Fourth] Amendment itself is in two parts—one which forbids ‘unreasonable searches,’ and the other which requires certain specific particulars to be observed before warrants may be issued”).

381. *See, e.g., Lambert v. United States*, 282 F. 413, 416-17 (9th Cir. 1922); *Green v. United States*, 289 F. 236, 238 (8th Cir. 1923); *United States v. Snyder*, 278 F. 650, 658 (N.D. W. Va. 1922); *United*



circumstance would be illegal. Moreover, once the liquor was discovered during the reasonable search, the driver could then be lawfully arrested because the Prohibition offense would then be committed in the view of the arresting officer. The Supreme Court then endorsed that novel formulation in the 1925 decision *Carroll v. United States*.<sup>382</sup>

Chief Justice Taft's *Carroll* opinion propped up this novel construction of the Fourth Amendment by asserting that it was consistent with the Framers' intentions. As evidence, he noted that the First Congress had permitted a warrantless search of a ship if a customs officer had probable cause and asserted that this showed that a search of a vehicle on probable cause did not offend the Fourth Amendment.<sup>383</sup> But Taft's analysis ignored two prominent historical facts. First, Taft ignored the fact—which he surely must have known—that the Court had never so much as mentioned the Fourth Amendment in any of the numerous ship seizure cases it had decided since the framing.<sup>384</sup> The reason was that the Fourth Amendment plainly had not applied to ships at all because ships plainly did not constitute “persons, papers, houses, or effects”—they were ships.<sup>385</sup> Thus, what Congress allowed with regard to ship searches had no bearing on the restrictions that the Fourth Amendment imposed on searches of personal property.

Second, when Taft claimed that a warrantless search could be justified in circumstances that would not justify a warrantless arrest, he ignored the fact that framing-era doctrine treated stopping a person for a search as an arrest; in 1789 a lawful warrantless search could be conducted only as an incident of a lawful arrest.<sup>386</sup> Thus, fictional originalism was again in vogue in *Carroll*.

#### 4. *The Invention of Conventional “Fourth Amendment History”*

Chief Justice Taft's creativeness also likely inspired the first (and thus most influential) of the academic commentaries on Fourth Amendment history. In 1937, political scientist Nelson Lasson published his Ph.D. dissertation in which he treated the Court's new reasonableness formulation as though it were the historical meaning of the Fourth Amendment.<sup>387</sup>

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States v. McBride, 287 F. 214, 216 (S.D. Ala. 1922). Notably, none of these cases cited prior authority for that construction of the Fourth Amendment.

382. *Carroll v. United States*, 267 U.S. 132 (1925).

383. *Id.* at 150.

384. See Davies, *Original Fourth*, *supra* note 1, at 607-08. The Taft Court also omitted any Fourth Amendment analysis in two ship search cases decided in the years immediately following *Carroll*. See Davies, *Search and Seizure Century*, *supra* note 1, at 968 n. 161.

385. See *supra* note 207 and accompanying text.

386. See *supra* note 71 (noting the broad definition of “imprisonment” in framing-era doctrine).

387. LASSON, *supra* note 18, at 102-03 (asserting that “the prohibition against ‘unreasonable searches’ was intended . . . to cover something other than the form of the warrant”). Lasson appears to

Lasson did not probe whether there had been any reasonableness standard in the pre-framing legal authorities. Instead, he emphasized the Wilkesite cases and the 1761 Boston case (neither of which announced any broad reasonableness standard for searches)<sup>388</sup> and even incorrectly read a broad reasonableness standard into a state warrant provision which had not used any such terminology.<sup>389</sup>

Regarding the framing of the Fourth Amendment itself, Lasson admitted that Madison's single-clause proposal for the Amendment had been aimed only at banning general warrants, but he did not attempt to explain that seeming incongruity.<sup>390</sup> Instead, he asserted that the subsequent motion in the House in which "and no warrant shall issue" was substituted for Madison's "by warrants issuing"—the change that resulted in the Fourth Amendment being divided into two clauses—was made *for the purpose* of creating an overarching "reasonableness" standard for all government searches and seizures (presumably including those arrests and searches made without a warrant).<sup>391</sup> But Lasson did not offer a scintilla of evidence for that claim, because there is none. Rather, as discussed above, the legislative record indicates that the change was made simply to insert a more emphatic and explicit command that general warrants were not to be issued.<sup>392</sup> Instead, Lasson formulated the grossly implausible story that the supposedly crucial change in the text was voted down by the House but then surreptitiously made anyway by a later committee.<sup>393</sup>

Despite the superficiality and implausibility of Lasson's account of the framing, it dovetailed nicely with the justices' own concoction of Fourth Amendment reasonableness in *Carroll*. As a result, Lasson's flawed account became the foundation for the conventional academic account of the original understanding of the Fourth Amendment and has been

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have been influenced by an earlier commentary. See *id.* at 103 n.89 (citing the 1921 commentary by Fraenkel, *supra* note 380).

388. *Id.* at 43-68. Lasson mentioned the general writ provision of the 1767 Townshend Act but gave only brief attention to the important controversies that provision provoked. *Id.* at 70-76. This probably reflected the fact that the detailed research on those controversies was not published until 1939, after Lasson's book was published. See *supra* note 172.

389. LASSON, *supra*, note 18, at 80-81 (incorrectly imposing a broad reasonableness standard on the 1776 Pennsylvania ban against general warrants, which is set out *supra* text accompanying note 209); see also CUDDIHY, *supra*, note 19, at 607 (asserting, without explanation, that "[a]lthough the Pennsylvania constitution renounced all searches and seizures, it assumed that only unreasonable ones were prohibited").

390. LASSON, *supra* note 18, at 100 (noting that "[t]he wording of [Madison's] clause was such that it seemed to be directed against improper warrants only").

391. *Id.* at 101-03. Lasson did not specify the supposed content of the reasonableness standard other than by describing the Supreme Court's search decisions through the late 1920s. See *id.* at 142-43. Because the Court had applied the Fourth Amendment only to searches, but not arrests, by that time, Lasson never discussed the application of the Fourth Amendment to arrests, either with or without warrant.

392. See *supra* notes 268-70 and accompanying text.

393. See *supra* note 271.

frequently cited and reiterated in judicial opinions<sup>394</sup> and has been followed in subsequent Fourth Amendment commentaries.<sup>395</sup>

5. *The “Warrant Requirement” Versus “Generalized Reasonableness” Interpretations*

For much of the rest of the twentieth century, the central issue for Fourth Amendment search-and-seizure doctrine was the relative weight to be assigned to the *Weeks* warrant requirement or the *Carroll* reasonableness formulation. The seeming ambiguity of the intended relationship between the two clauses of the text allowed two competing constructions of Fourth Amendment reasonableness to emerge.

Justices sometimes asserted that, except for a limited number of carefully delineated exceptions, a reasonable search required use of a warrant that met the standards set out in the second clause of the text (the approach known as the “warrant requirement” or “warrant preference” interpretation).<sup>396</sup> Advocates of this construction have asserted that the

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394. See Davies, *Original Fourth*, *supra* note 1, at 569 n.39 (identifying opinions).

395. See *id.* at 569 n.38 (identifying commentaries). Lasson’s conventional analysis has also been reiterated and embellished in CUDDIHY, *supra* note 19, undoubtedly the lengthiest of the conventional commentaries (in part because of considerable redundancy its organization and documentation). Notwithstanding its length, Cuddihy’s commentary replicates the salient deficiencies and flaws of the other conventional commentaries. The most basic defect is that Cuddihy never questioned *whether* there was a broad reasonableness standard prior to the framing of the Fourth Amendment; instead, he set out to describe the “origins” of that standard—a rather mushy concept in its own right—and prochronistically imposed the modern reasonableness concept on earlier materials that never used any such notion. See, e.g., *supra supra* notes 42, 389 and accompanying text. CUDDIHY, *supra* note 19, at 669-768 (discussing the formation and original meaning of the Fourth Amendment). Moreover, although Cuddihy made scattered references to arrest law, he never systematically reconstructed *framing-era* criminal arrest and search doctrine from the legal authorities of the time; thus, he never confronted the absence of either a need for nor room for any broad “reasonableness” standard and never recognized the inclusion of criminal arrest standards in the framing-era understanding of the law of the land or due process of law provisions. See *supra* note 158.

Additionally, Cuddihy paid remarkably little attention to the most germane materials for assessing the original meaning of the Fourth Amendment: the actual textual evolution of the state provisions that banned general warrants, the state ratification convention proposals for a federal ban against general warrants that preceded the framing of the Fourth Amendment, and the framing of the Amendment itself. See CUDDIHY, *supra* note 19, at 603-13 (discussing the state constitutional bans against general warrants without quoting any of the provisions in full); 680-86 (discussing the state ratification convention proposals but quoting only two that used “unreasonable searches and seizures” but omitting those that did not); 691-98 (discussing the drafting and adoption of the Fourth Amendment in Congress without quoting the existing record of the substitution of language that resulted in the final two-clause structure (discussed *supra* note 268 and accompanying text)). Finally, he artificially cut off his research with the ratification of the Bill of Rights in 1791. See *id.* at 712-23. As a result, he apparently never noticed that no one construed the Fourth Amendment to announce a broad reasonableness standard in the decades after the framing. Overall, Cuddihy’s research is quite useful for identifying some potentially relevant sources, but his analysis is unsound and misdirected at numerous points and ultimately only embellished the conventional myth of a broad “reasonableness” standard.

396. See, e.g., *Trupiano v. United States*, 334 U.S. 699, 710 (1948) (stating that a search warrant must describe with particularity the place to be searched and the items to be seized); *Katz v. United*

Framers attached great importance to the protection a judicial search warrant offered against discretionary and groundless intrusions by government officers, especially of houses.<sup>397</sup> Yet, advocates of the warrant preference construction did not explain why the Framers did not clearly express their preference for warrants in the text of the Fourth Amendment.<sup>398</sup>

Advocates of this view also have sometimes overstated the protections provided by framing-era law. For example, Justice Frankfurter invoked history in support of a rigorous search warrant requirement in his dissenting opinions in cases decided in 1947 and 1950 in which the majority allowed searches of a residence or office to be made incident to a lawful arrest by warrant.<sup>399</sup> In those dissents, Frankfurter insisted that the Framers would have required a search warrant for a search of a residence or office even when an arrest by warrant had been made in the premises—indeed, he concluded that “it makes a mockery of the Fourth Amendment to sanction search without a search warrant merely because of the legality of an arrest.”<sup>400</sup> As noted above, however, it appears that this misconstrued framing-era common-law doctrine insofar as a criminal arrest warrant likely would have been understood to also carry implicit authority to search the arrestee’s house, at least if the arrest was made there.<sup>401</sup>

On other occasions, other justices have asserted that the Amendment merely imposed a generalized requirement that government intrusions be “reasonable” in the circumstances but did not emphasize, or even denigrate, use of warrants (the approach known as the “generalized reasonableness approach”).<sup>402</sup> Indeed, some advocates of the generalized reasonableness construction have asserted that the Framers did not actually value warrants but instead set out minimum warrant standards in the second clause of the Fourth Amendment in the hope of inhibiting the use of

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States, 389 U.S. 347 (1967) (refusing to create an exception to formalities of search warrants if officers acted with restraint, but still did not follow proper judicial process).

397. See, e.g., Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse than the Disease*, 68 S. CAL. L. REV. 1, 4-25 (1994) (discussing the conventional accounts that emphasized the specific warrant); Davies, *Original Fourth*, *supra* note 1, at 560-70 (same).

398. See Davies, *Original Fourth*, *supra* note 1, at 571, 738-40.

399. *Harris v. United States*, 331 U.S. 145, 157-63 (1947); *United States v. Rabinowitz*, 339 U.S. 56, 60 (1950).

400. *Rabinowitz*, 339 U.S. at 70-71 (Frankfurter, J., dissenting).

401. Under framing-era law, no additional search warrant would have been required if the entry of a house was justified by an arrest warrant. See *supra* note 87 and accompanying text. A search warrant for stolen property was needed and used only when issuance of an arrest warrant could not have been justified. See *supra* notes 83-85.

402. See, e.g., *Rabinowitz*, 339 U.S. at 65-66 (majority opinion by Minton, J.) (asserting that the validity of searches “turn upon the reasonableness under all the circumstances . . . . The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable”).

warrants.<sup>403</sup> However, advocates of this interpretation have not explained how that conception could mesh with the Framers' patent contempt for discretionary search authority.<sup>404</sup> Additionally, the specific historical claims that have been made in support of this construction do not withstand scrutiny.<sup>405</sup> For example, Justice Scalia and Professor Amar have claimed that colonial juries decided trespass actions on the basis of "reasonableness" but they have presented no historical evidence to support that claim.<sup>406</sup>

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403. See Davies, *Original Fourth*, *supra* note 1, at 571-74 (discussing and debunking the historical arguments for a generalized reasonableness approach set out in TAYLOR, *supra* note 38, and Amar, *supra* note 30).

404. See Maclin, *supra* note 412, at 4-25; Davies, *Original Fourth*, *supra* note 1, at 736-38; Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 931-36 (1997).

405. See, e.g., Davies, *Original Fourth*, *supra* note 1, at 575-90, 736-38.

406. In a 1991 opinion, Justice Scalia endorsed "the first principle that the 'reasonableness' requirement of the Fourth Amendment affords the protection that the common law afford[ed]," but also suggested that the Framers meant to "restrict use of warrants," and asserted that "colonial juries" employed a "reasonableness" standard when deciding trespass cases. *California v. Acevedo*, 500 U.S. 565, 581-82, 584 (1991) (Scalia, J., concurring). The only support Justice Scalia offered for the historical claim regarding a reasonableness standard was a citation to one of the Wilkesite cases, *Huckle v. Money*, 2 Wils. 205; 95 Eng. Rep. 768 (C.P. 1763), and a citation to Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L. J. 1131, 1178-80 (1991). Although *Huckle* was a trespass case, there was no mention of any reasonableness standard. Additionally, although Professor Amar's article did make a seemingly historical assertion that juries assessed the reasonableness of a search, the only support he offered for that claim was a "Cf." citation to an earlier, purely normative claim that Justice Scalia had previously made in a law review article to the effect that reasonableness was the appropriate standard for assessing searches. Amar, *supra* at 1179 n.214 (citing Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1181-86 (1989)). Thus, there actually was no historical evidence for Justice Scalia's claim—he was simply repeating his own earlier normative claim.

In a later 1994 article, Amar purported to offer a pre-framing example of use of a reasonableness standard to assess a search in a trespass trial. See Amar, *supra* note 30, at 776 (quoting a statement by Lord Mansfield in the Wilkesite case *Leach v. Money*, 3 Burr. 1742, 1765; 97 Eng. Rep. 1075, 1087 (K.B. 1765)). Amar created that appearance, however, only by cutting off the quoted source too quickly, and, in doing so, evading the fact that Mansfield went on to rule that the officers' reasonableness *did not matter*. See Davies, *Original Fourth*, *supra* note 1, at 592-94.

Justice Scalia's majority opinion in a 1999 decision also identified framing-era criminal procedure doctrine as the first consideration for assessing whether a particular police practice met the standard of Fourth Amendment reasonableness. *Wyoming v. Houghton*, 526 U.S. 295, 299-300 (1999). In actuality, however, the historical claims Justice Scalia has made regarding framing-era search and arrest standards in that and other opinions have often been superficial or incorrect. See Davies, *Arrest*, *supra* note 1, at 263-65 (giving examples).

The other prominent originalist currently on the Court, Justice Clarence Thomas, has also made incorrect historical claims. See *id.* at 264; see also *Groh v. Ramirez*, 540 U.S. 551, 572 (2004) (Thomas, J., dissenting) (asserting, in a case involving a search of a residence, that the history of the Fourth Amendment is not clear as to whether warrants were "ever" understood to be required for lawful searches). There plainly was an understanding that a search warrant was required for a revenue search of a house and that a warrant was usually required for a criminal search of a house. See *supra* notes 188-89 and accompanying text (searches for revenue warrants); notes 83-84 and accompanying text (search warrant for stolen property); notes 111-16 and accompanying text (usual need for arrest warrant to justify breaking a house).

The debate between these two camps has been so frequently discussed, however, that there is no reason to set it out further here.<sup>407</sup> The important point is simply that the flexible concept of Fourth Amendment reasonableness has provided a vehicle for various Justices to formulate search and arrest law according to their own ideological predilections.<sup>408</sup> On its face, the flexible concept of Fourth Amendment reasonableness may sound neutral. In reality, however, because the Supreme Court bench has had a decidedly rightward tilt in recent decades, the assessment of reasonableness has also tilted decidedly in the direction of expansive government arrest and search power. For example, the authority of police to stop and frisk on the basis of the decidedly weak standard of “reasonable suspicion” has been expanded far beyond the exigent setting of a threat of violent crime in which it was initially announced.<sup>409</sup> Likewise, the use of the “reasonable expectation of privacy” formulation of the scope of Fourth Amendment protections has allowed the justices to make considerable inroads on the protections previously accorded the house and private papers.<sup>410</sup> Flexible reasonableness has also facilitated an expansive doctrine of consent to police intrusions.<sup>411</sup> Most recently, the notion that bare probable cause suffices to establish Fourth Amendment reasonableness has also served as a platform for the complete evisceration of the historical limitations on warrantless arrests and searches for less than felony offenses.<sup>412</sup>

#### 6. *The Exaggerated Importance of Bare “Probable Cause” Under “Fourth Amendment Reasonableness”*

The Supreme Court applied the Fourth Amendment only to assess searches, not arrests, during the first half of the twentieth century.<sup>413</sup> The understanding during that period was that arrest standards were set by state

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407. See, e.g., JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE 167-76 (4th ed. 2006) (providing an overview of the debate).

408. Statistical analysis removes any doubt as to the potency of ideological influences. See, e.g., LAWRENCE BAUM, THE SUPREME COURT 122-25 (CQ Press, 10th ed. 2010) (presenting a scalogram analysis that indicates a strong ideological pattern in criminal decisions); see also Davies, *Search and Seizure Century*, *supra* note 1, *passim* (noting that the success rate of government parties in search and seizure cases fluctuated according to changes in the ideological mix among the justices).

409. The Warren Court endorsed this novel standard in *Terry v. Ohio*, 392 U.S. 1, 9, 24 (1968), in the context of what appeared to be an imminent attempt to rob a store; however, later decisions have extended the *Terry* doctrine far beyond that setting. See, e.g., DRESSLER & MICHAELS, *supra* note 407, at 302-09.

410. See *id.* at 80-105.

411. See *id.* at 261-76.

412. See *supra* notes 128-35 (discussing historical limitations on less than felony arrests).

413. See Davies, *Correcting History*, *supra* note 1, at 208-09.

statutes that essentially codified common-law standards;<sup>414</sup> as a result, warrantless arrests by federal officers were assessed according to the pertinent state standard.<sup>415</sup> When Congress finally began to enact statutory standards for warrantless arrests for various categories of federal officers, it continued to limit warrantless arrest authority of federal officers for less-than-felony offenses to situations in which the arresting officer actually witnessed an ongoing offense.<sup>416</sup> Congress also initially adopted the historical felony-in-fact requirement for warrantless felony arrests by federal officers but then dropped that requirement and adopted the relaxed bare probable cause standard for warrantless felony arrests in 1948.<sup>417</sup> Thereafter, the Supreme Court equated the federal statutory arrest standard for a warrantless felony arrest standard to the Fourth Amendment's probable cause standard in the 1959 ruling in *Draper v. United States*.<sup>418</sup> Of course, when the Fourth Amendment was incorporated into the Fourteenth Amendment in 1961 in *Mapp v. Ohio*, that constitutional standard was also extended as the minimum standard for state warrantless felony arrests.<sup>419</sup>

Subsequently, opinions in Burger Court cases announced a fictional history to the effect that bare probable cause had always been the standard for warrantless felony arrests. For example, in 1975, Justice Powell conflated historical and modern citations when he erroneously claimed that the modern bare probable cause standard for warrantless felony arrests comported with the "Fourth Amendment and its common-law antecedents."<sup>420</sup> A year later, Justice White made a similar erroneous claim.<sup>421</sup> Actually, however, historical doctrine treated a warrantless felony arrest "on suspicion" as lawful only if the named complainant also proved that a felony had been committed "in fact."<sup>422</sup>

Having made bare probable cause the standard for warrantless felony arrests and warrantless searches, the Burger Court then drastically relaxed the traditional definition of probable cause in the 1983 ruling *Illinois v. Gates*.<sup>423</sup> In that case, the Court announced that "probable cause" was satisfied by information that merely indicated a "fair probability" or

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414. See Davies, *Arrest*, *supra* note 1, at 373-76 (noting that although state courts widely accepted bare probable cause as the standard for warrantless felony arrests, the state courts retained the historic restrictions on less-than-felony arrests).

415. See Davies, *Correcting History*, *supra* note 1, at 209 n.666.

416. See *id.* at 211 n.668.

417. See *id.* at 210-12.

418. *Draper v. United States*, 358 U.S. 307, 310-12 (1959); see also Davies, *Correcting History*, *supra* note 1, at 212-13 (discussing the *Draper* decision).

419. *Mapp v. Ohio*, 367 U.S. 643, 655-56 (1961).

420. *Gerstein v. Pugh*, 420 U.S. 103, 111 (1973).

421. *Watson v. United States*, 423 U.S. 411, 418 (1976) (asserting that "[t]he balance struck by the common law in generally authorizing felony arrests on probable cause, but without warrant, has survived substantially intact").

422. See *supra* notes 98-100 and accompanying text.

423. *Illinois v. Gates*, 462 U.S. 213, 230-31 (1983).

“substantial chance” of criminal activity.<sup>424</sup> Notably, Justice Rehnquist’s opinion omitted any mention of the prior settled definition of probable cause as trustworthy information sufficient to justify a prudent person’s belief that a person was engaged in criminal activity—a definition that had been used for roughly the previous two and a half centuries.<sup>425</sup> Instead, Justice Rehnquist justified his “fair probability” standard by quoting a passage from an obscure 1813 customs condemnation proceeding—which had not involved any assessment of a search—to the effect that probable cause merely required “circumstances which warrant suspicion.”<sup>426</sup>

This relaxation of the probable cause standard in *Gates* was especially significant because earlier cases had also allowed police to base probable cause on hearsay information obtained from confidential informants—that is, from informants whose identity remained undisclosed, even to the courts, let alone the arrestee.<sup>427</sup> Thus, after *Gates* the operative standard was more like plausible cause or possible cause than probable cause.<sup>428</sup>

Additionally, a year after *Gates*, the Burger Court announced in *United States v. Leon* that it would no longer actually enforce even the relaxed *Gates* fair probability standard when a warrant was involved, but instead would treat a warrant search as being good enough to allow its fruits to be admitted as evidence provided only that police had acted in “objectively

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424. *Id.* at 238, 245 n.13, 246.

425. See Davies, *Probable Cause*, *supra* note 1, at 20 (reviewing the definition of probable cause set out in 1721 in 2 HAWKINS, *supra* note 45, at 84-85, as “strong grounds of Suspicion for a Felony or other Misdemeanor” and “such a probable Cause, as might induce a candid and impartial Man to suspect the Party to be guilty”); *id.* at 48-49 (discussing *Munns v. De Nemours*, 17 Fed. Cas. 993 (C.C.D. Pa. 1811) (No. 9926) (opinion by Washington, J.)) (defining probable cause in a malicious prosecution action as “a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief, that the person accused is guilty of the offense with which he is charged”); *id.* at 50-51 (discussing the same standard in *Stacey v. Emery*, 97 U.S. 642 (1878); *id.* at 51 n. 229 (discussing *Carroll v. United States*, 267 U.S. 132, 162 (1925)) (defining probable cause as being met if “the facts and circumstances within [the officers’] knowledge and of which they have reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that [an offense is being committed]”); *id.* at 51 (noting use of the same standard as *Carroll* in *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949)).

426. *Gates*, 462 U.S. at 235 (quoting *Locke v. United States*, 11 U.S. (7 Cranch) 339, 348 (1813)). The probable cause standard was not used in the customs condemnation proceeding in *Locke* to assess the validity of the seizure or forfeiture of imported goods; rather, the government’s showing of probable cause that a customs violation had occurred simply shifted the burden of proof from the government to the importer as to whether customs regulations had been complied with. See Davies, *Probable Cause*, *supra* note 1, at 49-50.

427. *McCray v. Illinois*, 386 U.S. 300, 304 (1967) (identity of informant need not be disclosed to court during hearing on legality of arrest and search); *Rugendorf v. United States*, 376 U.S. 528, 533-34 (1964) (informant identity need not be disclosed to defendant). Of course, the absence of any requirement that police identify the informant creates an opportunity for police to invent fictional informant tips after the fact. See, e.g., Myron Orfield, *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 COLO. L. REV. 75 (1992).

428. Indeed, after *Gates* there was little practical difference between probable cause to arrest or search and the reasonable suspicion standard for the police stops and frisks permitted by *Terry v. Ohio*, 392 U.S. 1 (1968).



reasonable reliance” on the judicially-issued warrant.<sup>429</sup> Additionally, the Burger Court majority also announced that police reliance on a warrant would be “objectively reasonable” provided merely that the showing of cause in the warrant affidavit had not been “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.”<sup>430</sup> In other words, a search by warrant would be upheld so long as the justification for the warrant was not entirely lacking some indicia of a “fair probability” of criminal activity. The warrant process may still have practical value after *Gates* and *Leon* insofar as it prompts some degree of consultation among police, prosecutors, and magistrates before a house is violated, but the probable cause warrant standard explicitly stated in the Fourth Amendment no longer carries much significance.

More recent Rehnquist and Roberts Court opinions, have also made the minimalist notion of probable cause in *Gates* the sole standard even for *less-than-felony* arrests, including custodial arrests for petty regulatory offenses. As noted above, framing-era law restricted warrantless arrests for less-than-felony offenses to situations involving an ongoing breach of the peace (such as a fight occurring in public) and withheld arrest authority entirely for petty offenses.<sup>431</sup> The Rehnquist Court majority, however, obliterated the historical restriction against arrests for petty offenses in the 2001 decision *Atwater v. City of Lago Vista*.<sup>432</sup>

In an opinion that set something of a record for amassing fraudulent historical claims, Justice Souter’s *Atwater* opinion ran roughshod over the framing-era distinction between “breaches of the peace” and petty offenses<sup>433</sup> in order to justify the custodial arrest, complete with handcuffs, of a housewife for the offense of failing to use a seatbelt while driving slowly on a suburban street.<sup>434</sup> Justice Souter then announced that Fourth Amendment reasonableness did not prohibit warrantless arrests for even the most minor of offenses so long as there was probable cause the offense had been committed.<sup>435</sup> Additionally, although it was not at issue in the case (because the officer had actually observed Atwater’s failure to use a seat belt), Justice Souter included dicta indicating that the majority justices were also inclined to disregard the genuinely historical restriction of warrantless non-felony arrests to instances in which an ongoing offense was being

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429. *United States v. Leon*, 468 U.S. 897, 922, n.23 (1984).

430. *Id.* at 923.

431. *See supra* notes 128-39 and accompanying text.

432. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001). For a cogent criticism of *Atwater*, see Wayne A. Logan, *Reasonableness as a Rule: A Paean to Justice O’Connor’s Dissent in Atwater v. City of Lago Vista*, 79 MISS. L.J. 115 (2009).

433. *See Davies, Arrest, supra* note 1, at 274-366 (identifying and criticizing the numerous bogus historical claims made in Justice Souter’s *Atwater* opinion).

434. *Atwater*, 532 U.S. at 352; Davies, *Arrest, supra* note 1, at 266-68, 274-327.

435. *Atwater*, 532 U.S. at 354; Davies, *Arrest, supra* note 1, at 367-73.

committed in the officer's view.<sup>436</sup> In effect, the *Atwater* majority treated the already twice-watered-down standard for *felony* warrantless arrests<sup>437</sup> as though it had been the framing-era standard for warrantless arrests for *petty offenses*—offenses which actually had not been arrestable at all in 1789.<sup>438</sup> And by piling up historical lies, the *Atwater* majority blamed that sham exercise in “reasonableness” on the Framers!

The justices, moreover, did not stop with *Atwater*.<sup>439</sup> In the 2009 Roberts Court ruling in *Virginia v. Moore*, the justices unanimously ruled that the Fourth Amendment permits an arrest whenever officers have probable cause that an offense of some kind was committed—even if there was *no legal authority for an arrest for that offense* because the local law that defined the offense provided only for the issuance of a summons.<sup>440</sup> Justice Scalia's opinion explained that probable cause suffices for Fourth Amendment reasonableness because it is the only requisite for a constitutional arrest; hence, any additional state law requisites for a lawful warrantless arrest are irrelevant for purposes of determining the constitutionality of the arrest.<sup>441</sup>

Remarkably, *Moore* ignored the Court's prior understanding, reiterated in a number of cases, that constitutional searches made incident to arrest depended on the lawfulness of the arrest and instead admitted evidence seized in a search made incident to the constitutional but *illegal* arrest.<sup>442</sup> Thus, *Moore* effectively created a new search-incident-to-illegal-arrest exception to the Fourth Amendment search warrant requirement.<sup>443</sup> Moreover, the analysis in *Moore* would even appear to have terminated—at least as a matter of federal constitutional law—the long-standing and genuinely historical rule that warrantless arrests for less-than-felony

436. *Atwater*, 532 U.S. at 340 n.11; see also Davies, *Arrest*, *supra* note 1, at 382-87.

437. The standard for warrantless felony arrests was first diluted when nineteenth-century judges jettisoned the felony-in-fact standard, see *supra* notes 304-07 and accompanying text, and then was diluted again when *Gates* relaxed the definition of probable cause, see *supra* notes 423-30 and accompanying text.

438. Under framing-era doctrine, less than breach of the peace offenses were to be handled by issuance of a summons rather than by arrest. See *supra* notes 137-39 and accompanying text.

439. See *Devenpeck v. Alford*, 543 U.S. 146, 155-56 (2004) (ruling that a warrantless arrest is valid under the Fourth Amendment, regardless of the absence of probable cause for the offense that was charged, so long as the alleged conduct could have constituted probable cause of the commission of *some other offense*).

440. *Virginia v. Moore*, 553 U.S. 164, 167-74 (2008).

441. *Id.* at 170-77.

442. See *id.* at 167-74; see also *supra* note 378 and accompanying text (noting that Chief Justice Taft's opinion in the 1925 *Carroll* case recognized that police could not arrest for a misdemeanor violation unless they witnessed the commission of the offense and thus *could not justify a search* on that basis); see also, e.g., *United States v. Robinson*, 414 U.S. 218, 221 n.1, 224-27, 229, 233-36 (1973) (majority opinion by Rehnquist, J.) (referring repeatedly to the doctrine of a search incident to “a lawful arrest,” or noting that the arrest at issue was “lawful” insofar as it was authorized by local statutes).

443. See *Moore*, 553 U.S. at 176-78.

offenses are limited to ongoing offenses witnessed by the arresting officer.<sup>444</sup>

Understandably, Justice Scalia did not attempt to offer historical support for these bizarre statist claims. Rather, he opined that there was no need to revisit that subject because the Court had already dealt with the relevant history in *Atwater*.<sup>445</sup> Thus, *Atwater*'s fraudulent originalism became settled history as *stare decisis*! The justices are not confined to revising the Constitution; they also rewrite its history and declare the matter settled!

## V. CONCLUSION

Returning to a question posed to the symposium panel: How well have the justices of the Supreme Court done in setting out Fourth Amendment history? At best they have made fundamental errors; at worst they have told significant lies. The official history that appears in Supreme Court opinions bears little resemblance to the authentic history that appears in the historical record. The official history holds out a pretense of continuity, but the authentic history reveals a series of drastic changes, departures, and relaxations.

Importantly, the changes and departures have run overwhelmingly in the direction of reducing citizens' protections against arbitrary arrests and searches, and the sometimes ignorant and sometimes fraudulent historical claims in recent Supreme Court opinions have primarily been asserted in the course of justifying the expansion of discretionary government arrest and search authority. In particular, the historically false concept of Fourth Amendment reasonableness has smoothed the way for this destruction of rights.

In the abstract reasonableness may sound like a neutral balancing standard, but in the real world the flexibility inherent in a reasonableness standard operates to facilitate, serve, and reinforce—not restrain—power. The result is that it is now a bit of a stretch to pretend that citizens still possess a meaningful right to be free of arbitrary detention, frisk, arrest, and search.<sup>446</sup> Rather, today's police badge confers the sort of discretionary authority that only a general warrant could have conferred in 1789.

It cannot be denied that some doctrinal adjustments and some expansions of government authority were in order during the preceding

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444. See *supra* notes 128-39 and accompanying text. See also Davies, *Search and Seizure Century*, *supra* note 1, at 1020-22;

445. *Moore*, 553 U.S. at 168-69 n.2.

446. See generally Davies, *Search and Seizure Century*, *supra* note 1 (arguing that current search-and-seizure doctrine, which consists of such a web of exceptions and limitations to purported principles that it amounts to little more than a rhetorical apparition, does not provide meaningful protections against arbitrary arrest and search).

two-plus centuries. It is patent that the law could not stand still in the face of the massive social, institutional, and technological changes that have occurred during that time. The common-law standards of 1789 were still fashioned to serve a relatively homogeneous society in which people interacted primarily with persons who were known. Those standards would not be adequate for preserving order in our diverse, mobile, and urbanized society in which people interact as strangers. Indeed, the common-law standards were designed to enforce a much simpler criminal law, at a time when people expected the government to do less than we now do. In particular, the framing-era limitation of warrantless arrest authority to complaints of felony in fact would be too restrictive for the policing required by modern conditions. Thus, at least in criminal procedure, the abstract debate over the normative validity of originalism is pointless. Regardless of how fervently would-be originalists might wish to visit their fictional versions of 1789, going back to the authentic doctrines of 1789 is not an option.

But recognizing that *some* adjustments and enhancements of government arrest and search power were in order is a far cry from endorsing the almost complete debasement of the right of personal liberty and security that has actually occurred. The authentic history of arrest and search authority not only maps out the course of the changes and departures by which search-and-seizure doctrine has reached its current condition, but it also provides a baseline that illuminates how drastic the expansion of government power has been.

Moreover, although the authentic history by itself cannot inform us whether any of the *specific* changes that have been made were for the better or worse, it does illuminate some deep changes that are especially deserving of our attention. Indeed, it is evident that modern reasonableness doctrine has now obliterated all three of the broad features of the Framers' design for arrest and search authority identified above.<sup>447</sup>

Modern reasonableness doctrine has allowed the Supreme Court to obliterate the historical proportionality of arrest and search authority that derived from the criterion of "necessity." That earlier formulation implied a restraint on power that "reasonableness" utterly lacks. Thus, framing-era doctrine provided broad authority for warrantless arrests and related searches to deal with felonies and perhaps other serious crimes that posed immediate threats to the peace and demanded immediate response, but it imposed significant limits on warrantless arrest authority for lesser breach of the peace offenses and it withheld arrest authority entirely regarding mere petty regulatory offenses. That proportionality has been totally destroyed by the recent rulings in *Atwater* and *Moore*. Framing-era

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447. See *supra* notes 274-80 and accompanying text.

Americans would have been outraged by the statist persiflage offered as justification for those decisions.

Additionally, modern reasonableness doctrine has allowed the Supreme Court to eviscerate the historical protections against discretionary arrest and search authority. Framing-era doctrine provided substantial protections against arbitrary government intrusions either by requiring prior judicial assessment during the warrant process of the need for an arrest or search, or by inhibiting rash intrusions by exposing the officer who initiated a warrantless arrest and search to personal trespass liability. But neither form of protection has survived the erosive effects of modern reasonableness doctrine. The value of the warrant process has been severely undermined by the allowance of hearsay from confidential and sometime anonymous (or possibly even fictional) informants and by the debasement of the probable cause standard in *Gates* and *Leon*. Further, recently invented notions of official “immunity” now protect the officer who initiates an unlawful warrantless arrest or search from trespass liability, and related doctrines also protect the municipality that employs him.<sup>448</sup> Likewise, although the *Weeks* exclusionary rule previously provided some systemic incentives for police departments to seek compliance with constitutional standards, recent rulings have also undercut whatever deterrent efficacy that doctrine may once have exerted.<sup>449</sup>

The notion that the Fourth Amendment was intended to impose a uniform reasonableness standard on all government intrusions has also undercut the earlier understanding that some interests—in particular, the house and its contents—were entitled to especially strong protection.<sup>450</sup> Although Supreme Court opinions still nod to the special status of the

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448. See, e.g., *Anderson v. Creighton*, 483 U.S. 635 (1987) (creating expansive “qualified immunity” applicable to police officers sued for violating constitutional rights); *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988) (rejecting respondeat superior municipal liability for violations of constitutional rights by employees and instead limiting municipal liability to formal policies or decisions made by the final decision maker for the municipality). Taken together, these rulings effectively preclude the enforcement of Fourth Amendment standards through damage lawsuits. See *Davies, Search and Seizure Century*, *supra* note 1, at 1030-31, 1033.

449. See *Hudson v. Michigan*, 547 U.S. 586 (2006) (withdrawing the exclusionary sanction when the discovery of evidence was “attenuated” from the police constitutional violation); *Herring v. United States*, 129 S. Ct. 695 (2009) (withdrawing the exclusionary sanction when the police constitutional violation occurred as a “result of isolated negligence attenuated from [the discovery of evidence]”). See also *Davies, Search and Seizure Century*, *supra* note 1, at 1027-32.

450. See *supra* notes 114, 188 and accompanying text. Of course, history cannot tell us how personal automobiles should be treated because no comparable category existed in 1789. However, searches of motorists and automobiles have clearly been the Achilles’ heel of Fourth Amendment protections since *Carroll*, see *supra* notes 380-86 and accompanying text, and especially since the Rehnquist Court gave the green light to pretextual traffic stops for law enforcement investigatory purposes in *Whren v. United States*, 517 U.S. 806 (1996), and the Court also permitted custodial arrests for minor traffic violations notwithstanding state law limits on such arrests in *Atwater* and *Moore*, see *supra* notes 432-44 and accompanying text.

house, even that status now appears to be precarious.<sup>451</sup> Moreover, the warrant process is as debased when it comes to a search of a house as for any other place, so the Court's reiterations of the supposed special concern for the house ring hollow.

Current Fourth Amendment doctrine is not merely confused. It is fraudulent. Its centerpiece—Fourth Amendment reasonableness—is a judicially invented historical myth that has served as a guise for the destruction of the protections against arbitrary and discretionary government intrusions that the Fourth and Fifth Amendments were actually meant to preserve. Meaningful search-and-seizure protections will be regained only if arrest and search doctrine is substantially reformulated as a law of rules. Although history cannot provide appropriate specific rules for modern needs and conditions, the three salient features of authentic framing-era doctrine identified above plainly would merit attention. Conversely, the concept of Fourth Amendment reasonableness should be rejected as a formula that has proven to be not merely worthless, but virtually antithetical to the concept of constitutional rights.

I confess, however, that I am quite pessimistic that arrest and search protections can be rehabilitated. Fourth Amendment reasonableness has permitted such a thorough judicial destruction of earlier standards that little remains for a doctrinal foundation on which to rebuild. The unfortunate truth is that the justices of the Supreme Court have now reduced the constitutional protections that might have restrained arbitrary arrest or search to little more than rhetorical apparitions.<sup>452</sup>

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451. The special protection of the house is currently precarious, and it is threatened most of all by justices who purport to be originalists. *See, e.g.*, *Groh v. Ramirez*, 540 U.S. 551, 572 (2004) (Thomas, J., dissenting, joined by Scalia, J.) (expressing doubt, in a case involving a search of a residence, whether a search warrant was “ever” historically required) (discussed *supra* note 406). Recent decisions have also allowed warrantless police entries of residences under strained “exigent circumstances” analyses. *See, e.g.*, *Brigham City, Utah v. Stuart*, 547 U.S. 398 (2006); *Michigan v. Fisher*, 130 S. Ct. 546 (Dec. 7, 2009). *See also* Davies, *Search and Seizure Century*, *supra* note 1, at 1022-23.

452. *See* Davies, *Search and Seizure Century*, *supra* note 1, *passim*.