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PROHIBITION AND THE FOURTH AMENDMENT: A NEW LOOK AT SOME OLD CASES

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The effort to ban alcoholic beverages has received significant attention from American historians, especially in the last two decades. Much of the historiography has focused on the question of defining the nature of the prohibition movement, that is, determining whether it was a progressive social reform, as the enactment of the eighteenth amendment[1] at the end of the Progressive Era indicates,[2] or whether it was really a pseudo-reform, as its repeal[3] by the New Deal administration[4] suggests.

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1 U.S. CONST. amend. XVIII, § 1 (repealed 1933): "After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

2 *See* C. CHAMBERS, SEEDTIME OF REFORM 76 (1963) (including the Women's Christian Temperance Union as one of the groups that could be called out to support progressive causes during the 1920s); R. WIEBE, THE SEARCH FOR ORDER, 1877-1920, 290-91 (1967) (indicating the factual evidence available to support prohibition). *Cf.* J. GUSFIELD, SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT (1963) (interpreting prohibition as a conflict over status between a traditional America centered in rural, middle-class, Protestant values and a modern America identified with cosmopolitan, urban, and immigrant values). *See generally* N. CLARK, DELIVER US FROM EVIL: AN INTERPRETATION OF AMERICAN PROHIBITION 10 (1976); J. TIMBERLAKE, PROHIBITION AND THE PROGRESSIVE MOVEMENT, 1900-1920 *passim* (1963).

3 U.S. CONST. amend. XXI, § 1: "The eighteenth article of amendment to the Constitution of the United States is hereby repealed."

4 *See, e.g.*, R. HOFSTADTER, THE AGE OF REFORM (1955); *see generally* A. SINCLAIR, PROHIBITION: THE ERA OF EXCESS *passim* (1962) (interpreting prohibition as exemplary of an American tendency to excessive moralism). Scholars who interpret prohibition as a pseudo-reform tend to treat the patriotism associated with the World War I mobilization effort as an important factor in producing the eighteenth amendment. *E.g., id.* at 20; R. HOFSTADTER, *supra* at 290; *cf.* C. MERZ, THE DRY DECADE 25 (1931) ("The war did three things for prohibition. It centralized authority in Washington; it stressed the importance of saving food; and it outlawed all things German.") *But see* H. ASBURY, THE GREAT ILLUSION: AN INFORMAL

Other analysts, however, have tried to go beyond this preliminary question to explain how the "noble experiment" of prohibition influenced American life and habits. Their studies have identified a variety of effects, from encouraging single-issue pressure groups,[5] to discrediting moderate attempts to promote temperance,[6] to discouraging proposals for governmental regulation of the personal lives of American citizens.[7] This article explores an aspect of prohibition's influence that has been largely ignored: the impact of the Prohibition Amendment on American law.[8]

Even a cursory glance indicates that the eighteenth amendment's impact on the court system and legal thought was significant. Prohibition drastically increased the caseloads of federal courts and ushered in a widespread system of plea bargaining.[9] Its enforcement filled the federal government's antiquated prisons and stimulated construction of new penal facilities.[10] The flood of prohibition decisions required lawyers to integrate the eighteenth amendment into existing law, by creating new doctrines[11] and stimulating the refinement of relatively

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HISTORY OF PROHIBITION 136 (1950) ("At most the war may have hastened ratification by a few years."). For relatively balanced assessments of the war's impact on the adoption of the eighteenth amendment by a contemporary observer and a modern scholar, *see* P. ODEGARD, PRESSURE POLITICS: THE STORY OF THE ANTI-SALOON LEAGUE 78 (1928); N. CLARK, *supra* note 2, at 122-30.

5 P. ODEGARD, *supra* note 4, *passim*.

6 A. SINCLAIR, *supra* note 4, at 28; *cf.* D. KYVIG, REPEALING NATIONAL PROHIBITION 201 (1979) ("Organized opponents of national prohibition showed concern for creating a temperate society and establishing more effective control over the liquor traffic, but they foreclosed certain approaches to a solution . . . . [T]hey rejected a compromise often suggested during the 1920s, that is, modification of prohibition to allow beer and wine while continuing to outlaw more potent distilled spirits . . . . Furthermore, by their opposition to federal solutions, the wets bear, willingly of course, considerable responsibility for the fragmented pattern of liquor control which emerged in the United States after repeal.").

7 D. KYVIG, *supra* note 6, at 199-200.

8 One illustration of the failure of general historians to recognize the significance of prohibition's impact on American legal thought should suffice to illustrate the point. David Kyvig's 1979 study of the repeal movement refers to Olmstead v. United States, 277 U.S. 438 (1928), as "[t]he last major Supreme Court decision concerning prohibition enforcement." *Id.* at 34.

9 NATIONAL COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON THE ENFORCEMENT OF THE PROHIBITION LAWS OF THE UNITED STATES 55-56 (1931) [hereinafter referred to as PROHIBITION ENFORCEMENT REPORT]. *See also* H. ASBURY, *supra* note 4, at 168-73; H. JOHNSTON, WHAT RIGHTS ARE LEFT? 57 (1930); D. KYVIG, *supra* note 6, at 29-30, 108; C. MERZ, *supra* note 4, at 303; A. SINCLAIR, *supra* note 4, at 211.

10 D. KYVIG, *supra* note 6, at 30, 108; PROHIBITION ENFORCEMENT REPORT, *supra* note 9, at 58; A. SINCLAIR, *supra* note 4, at 212; M. TILLIT, THE PRICE OF PROHIBITION 53-54 (1932).

11 *See, e.g.*, Sorrells v. United States, 287 U.S. 435 (1932) (entrapment); National Prohibition Cases, 253 U.S. 350 (1920) (concurrent jurisdiction). On the development of the entrapment defense, *see generally* Murchison, *The Entrapment Defense in Federal Courts: Emergence of a Legal Doctrine*, 47 MISS. L.J. 211 (1976).

undeveloped areas.[12]

This article analyzes prohibition's impact on American legal thought by examining the extent to which prohibition influenced the development of fourth amendment doctrines.[13] The analysis includes five parts: a survey of the history of prohibition and the Supreme Court's prohibition cases; a description of the state of fourth amendment doctrine at the beginning of the prohibition era; a discussion of the doctrinal changes that occurred during the thirteen years of national prohibition; a review of the state of fourth amendment doctrine at the end of the prohibition era; and, finally, an evaluation of the significance of prohibition as a force in the doctrinal developments.

I. THE BACKGROUND MILIEU

Like many reform movements in the United States, the organized effort to suppress alcoholic beverages began in the early 1800s.[14] Although this early prohibition activity focused primarily on voluntary abstinence, a number of states enacted prohibitory legislation during the 1850s.[15] As was true with other reform movements of the nineteenth century, the prohibition movement was eventually dwarfed by the anti-slavery movement. By 1869, only three states retained statewide prohibition.[16]

Prohibition reappeared as a significant political force roughly contemporaneously with the emergence of the populist movement in the late nineteenth century. In a second wave of state prohibition, several states enacted new statutes forbidding the manufacture, sale, and transportation of intoxicating liquors. This second wave also receded, however, and in 1893 the number of states with prohibition statutes again

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12 For examples other than those discussed in the text, *see* Richbourg Motor Co. v. United States, 281 U.S. 528 (1930) (forefeiture of automobiles); Raffel v. United States, 271 U.S. 494 (1926) (self-incrimination); United States v. Lanza, 260 U.S. 377 (1922) (double jeopardy).

13 The larger study of which this article forms a part involves a general evaluation of prohibition's impact on criminal law doctrines used by the federal courts. An earlier article documented the rise of the defense of entrapment during the prohibition era. *See* Murchison, *supra* note 11.

14 No organized prohibition movement existed in colonial America. Indeed, "even the immoderate use of liquors was common at church functions and especially at weddings, church councils, and funerals," E. CHERRINGTON, THE EVOLUTION OF PROHIBITION IN THE UNITED STATES 14 (1969 reprint). *See also* H. ASBURY, *supra* note 4, at 3. For a recent attempt to explain the rise of the temperance movement in the early part of the nineteenth century, *see* W. RORABAUGH, THE ALCOHOLIC REPUBLIC: AN AMERICAN TRADITION (1979).

15 N. CLARK, *supra* note 2, at 45.

16 E. CHERRINGTON, *supra* note 14, at 39-46, 89-96, 135-45. Several students of the prohibition movement have observed that leaders of the early prohibition effort also tended to be leaders in the anti-slavery movement. *Id.* at 145; N. CLARK, THE DRY YEARS: PROHIBITION AND SOCIAL CHANGE IN WASHINGTON 64-66 (1965); W. RORABAUGH, *supra* note 14, at 37, 214-15.

dropped to three.[17]

In the 1890s, a new group, the Anti-Saloon League, emerged to direct the political campaign of the prohibitionists.[18] Unswervingly committed to prohibition,[19] but always practical in working out tactics,[20] the Anti-Saloon League secured the enactment of prohibitory laws in twenty-six states and the passage of a federal statute forbidding the transportation of intoxicating liquor into a state in violation of state law. The League also led the successful battle for national prohibition, first seizing on patriotic fervor to secure enactment of wartime prohibition and then persuading Congress to propose the eighteenth amendment and the states to ratify it approximately thirteen months after its submission.[21]

Ultimately, however, national prohibition proved to be an experiment that failed, for the eighteenth amendment remained in effect for only thirteen years.[22] In the first half of the 1920s national prohibition seemed to enjoy a significant amount of public support. Various bits of evidence confirm that prohibition was initially popular with the American people: the rapid ratification of the eighteenth amendment,[23] the overwhelmingly favorable margin of the ratification vote in the state

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17 E. CHERRINGTON, *supra* note 14, at 170-71, 249.

18 C. MERZ, *supra* note 4, at 9-10. *See generally* E. CHERRINGTON, THE STORY OF THE ANTI-SALOON LEAGUE *passim* (1910); P. ODEGARD, *supra* note 4, *passim*.

19 *See* P. ODEGARD, *supra* note 4, at 79, 85-86. The Anti-Saloon League was willing to overlook personal indiscretions of legislators who voted for their position. *See* H. ASBURY, *supra* note 4, at 182 ("[O]ne congressman served a term in prison for accepting a bribe of five thousand dollars in a case involving the withdrawal of four thousand cases of whiskey in Pittsburgh. When he was released he ran for re-election and was supported by the Anti-Saloon League; he had always voted dry.").

20 H. ASBURY, *supra* note 4, at 131-32; E. CHERRINGTON, *supra* note 14, at 278; N. CLARK, *supra* note 2, at 98; N. CLARK, *supra* note 16, at 82; V. DABNEY, DRY MESSIAH: THE LIFE OF BISHOP CANNON 58 (1949). One early manifestation of this practicality was the choice of the group's name. *See* P. ODEGARD, *supra* note 4, at 38:

> The very name Anti-Saloon League was chosen to focus interest on the institution which was the fountain of the poisonous product which the "Pledgers" shunned and the [Women's Christian Temperance Union] would outlaw. Moderate drinkers and total abstainers, who balked at the ideal of absolute prohibition, were willing to admit that the American saloon had become a noisome thing.

See also H. ASBURY, *supra* note 4, at 112; H. FELDMAN, PROHIBITION: ITS ECONOMIC AND INDUSTRIAL ASPECTS 379 (1927).

21 U.S. CONST. amend. XVIII (repealed 1933); H. ASBURY, *supra* note 4, at 94-100; V. DABNEY, *supra* note 20, at 123; C. MERZ, *supra* note 4, at 8-17, 25-47. For a summary of the accomplishments of the prohibition movement at the state and local levels, *see* E. CHERRINGTON, *supra* note 14, at 254-55, 319-20. On the significance of the Webb-Kenyon Act, which prohibited interstate transportation of intoxicating liquors in violation of state law, *see* A. SINCLAIR, *supra* note 4, at 154.

22 U.S. CONST. amend. XXI. For the text of the amendment, *see supra* note 3.

23 E. CHERRINGTON, *supra* note 14, at 329-30; D. KYVIG, *supra* note 6, at 12; C. MERZ, *supra* note 4, at 39-42.

legislatures,[24] the prompt passage of the relatively strict Volstead Act (officially known as the National Prohibition Act) by which Congress implemented its power to enforce the eighteenth amendment,[25] and the growth in the number of prohibition supporters in the congressional elections following adoption of the eighteenth amendment.[26]

By 1926, organized opposition to prohibition had begun to develop and to call for modification or repeal of the existing law.[27] The new opposition was not strong enough to thwart the prohibition leadership, however.[28] As the passage of the Jones Act[29] in 1929 illustrates, prohibitionists continued to dominate the political scene. The Jones Act refined the sentencing policy of the Volstead Act to encourage leniency for youthful and casual offenders while actually increasing penalties for multiple offenders and those who were habitually involved in the liquor traffic.

Early in the 1930s, prohibition opponents gained strength.[30] After the 1929 crash, supporters of prohibition were increasingly isolated, and

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24 V. DABNEY, *supra* note 20, at 132 ("Every state except Rhode Island and Connecticut ultimately ratified Federal prohibition, and more than eighty percent of the members of the forty-six ratifying legislatures voted in the affirmative.") *See also* E. CHERRINGTON, *supra* note 14, at 330-31. Opponents of prohibition discounted the overwhelmingly favorable vote on ratification as further evidence of the influence of war hysteria. C. MERZ, *supra* note 4, at 42-43.

25 Pub. L. No. 66-66, 41 Stat. 305 (1919) (repealed 1935). For a summary of the congressional action, *see* C. MERZ, *supra* note 4, at 48-50.

26 I. FISHER & H. BROUGHAM, PROHIBITION STILL AT ITS WORST 231-32 (1928). At least one commentator argued, however, that some of those counted as prohibition supporters had only a limited commitment to the dry cause. C. MERZ, *supra* note 4, at 188-90.

27 H. ASBURY, *supra* note 4, at 328-31; C. MERZ, *supra* note 4, at 208-32; A. SINCLAIR, *supra* note 4, at 335. Prohibition supporters responded to this criticism by arguing that prohibition had improved the American economy. *See, e.g.*, H. FELDMAN, *supra* note 20, *passim*; I. FISHER & H. BROUGHAM, *supra* note 26, *passim*. For a brief summary of some of the rhetorical excesses of both sides, *see* C. MERZ, *supra* note 4, at 158-62.

28 Most scholars, for example, agree that prohibition was a factor in the defeat of Al Smith in the presidential election of 1928, especially in the South. *See, e.g.*, W. LEUCHTENBURG, THE PERILS OF PROSPERITY, 1914-32 235 (1958).

29 Pub. L. No. 70-899, 45 Stat. 1446 (1929) (repealed 1935), provides in pertinent part:

> [w]herever a penalty or penalties are prescribed in a criminal prosecution by the National Prohibition Act, as amended and supplemented, for the illegal manufacture, sale, transportation, importation, or exportation of intoxicating liquor, as defined by section 1, Title II, of the National Prohibition Act, the penalty imposed for each such offense shall be a fine not to exceed $10,000 or imprisonment not to exceed five years, or both: *Provided*, That it is the intent of Congress that the court, in imposing sentence hereunder, should discriminate between causal or slight violations and habitual sales of intoxicating liquor, or attempts to commercialize violations of the law.

See C. MERZ, *supra* note 4, at 233.

30 Most observers agree that support for prohibition had eroded substantially by the end of the decade. *See, e.g.*, C. CHAMBERS, *supra* note 2, at 234; N. CLARK, *supra* note 16, at 206-17; M. TILLIT, *supra* note 10, at 3-9. Despite this erosion, repeal was not a foregone conclusion even for opponents of prohibition. *See* F. BLACK, ILL-STARRED PROHIBITION CASES 149 (1931).

opponents now argued that repeal would create jobs as well as protect personal liberty.[31] In fact, a leading historian of the New Deal reports that the biggest ovation at the Democratic Convention of 1932 came at the reading of the plank advocating repeal of the eighteenth amendment.[32] After the election, the lameduck Congress that met in December of 1932 submitted the repeal amendment without waiting for the new Democratic administration.[33] Acting in special conventions elected solely to consider repeal, the states ratified the twenty-first amendment even more rapidly than they had ratified the eighteenth.[34]

The pattern of Supreme Court decisions in prohibition cases parallels the three stages of political debate over prohibition—strong initial support, gradual growth of doubts, and eventual repudiation. During the early years of national prohibition, Supreme Court decisions rejected attacks on the new amendment and the law implementing it[35] and were nearly uniform in strengthening the power of state and federal prosecutors.[36] Typical of the decisions were those upholding Congress'

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31 H. ASBURY, *supra* note 4, at 328-31; D. KYVIG, *supra* note 6, at 116, 131; *cf.* N. CLARK, *supra* note 16, at 234-35 (correlation in the state of Washington of votes for repeal and votes for Hoover). For an anti-prohibition work emphasizing the economic issue, *see* C. WARBURTON, THE ECONOMIC RESULTS OF PROHIBITION (1932).

32 A. SCHLESINGER, THE CRISIS OF THE OLD ORDER, 1919-1933 302 (1957).

33 S.J. Res. 211, 72d Cong., 2d Sess., 47 Stat. 1625 (1933) (ratified as U.S. CONST. amend. XXI). One of the new Democratic Congress' first actions was to amend the Volstead Act to permit the sale of light beers and wines even before the twenty-first amendment had been ratified. Pub. L. No. 73-3, 48 Stat. 16 (1933) (repealed in part, 1935).

34 *See generally* D. KYVIG, *supra* note 6, at 169-82; U.S. DEPT. OF STATE, RATIFICATION OF THE TWENTY-FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES (1934).

35 Heitler v. United States, 260 U.S. 438 (1923); Dillon v. Gloss, 256 U.S. 368 (1921); National Prohibition Cases, 253 U.S. 350 (1920). *See also* Rainier Brewing Co. v. Great Northern Pac. S.S. Co., 259 U.S. 150 (1922) (construction of the Webb-Kenyon Act to forbid transportation of intoxicating liquor except in accordance with state permit requirements); Williams v. United States, 255 U.S. 336 (1921) (upholding the validity of the Webb-Kenyon Act). Near the end of the prohibition era, the Supreme Court also rejected a challenge to the method of ratifying the eighteenth amendment. United States v. Sprague, 282 U.S. 716 (1931); *cf.* Leser v. Garnett, 258 U.S. 130 (1922) (rejection of a challenge to the nineteenth amendment, which granted women the right to vote).

36 For examples in addition to those referred to in the text, *see* Druggan v. Anderson, 269 U.S. 36 (1925) (ruling that the eighteenth amendment authorized the federal government to regulate the sale of intoxicating liquor and to pass the Volstead Act prior to the effective date of the amendment); Samuels v. McCurdy, 267 U.S. 188 (1925) (upholding a state law that banned mere possession of intoxicating liquor); United States v. Valante, 264 U.S. 563 (1924) (refusing to allow objections to the judge's sentencing authority to be raised by writ of habeas corpus); Wyman v. United States, 263 U.S. 14 (1923); Brede v. Powers, 263 U.S. 4 (1923) (allowing federal prosecutors to use informations rather than indictments to charge misdemeanors under the Volstead Act); Cunard S.S. Co. v. Mellon, 262 U.S. 100 (1923) (construing the Volstead Act to cover intoxicating liquor kept as part of a ship's store); United States v. Lanza, 260 U.S. 377 (1922) (holding that federal and state governments could prosecute a defendant for the same act without violating the constitutional prohibition against double joepardy).

power to levy a tax on the intoxicating liquors that the Act had made it illegal to produce;[37] sustaining a Georgia law establishing a presumption that persons who occupied real property on which a distilling apparatus was found knew of its existence;[38] and construing the eighteenth amendment and the Volstead Act to supersede an existing treaty with Great Britain and to forbid the transportation through the United States of liquor going from Canada to a third country.[39]

The occasional exceptions to this general pattern in the early years of national prohibition usually involved the protection of existing property rights. For example, the Court construed the Volstead Act to permit an individual to store liquor owned prior to the effective date of the Act,[40] and it required a hearing before the taxes and penalties imposed by the Act could be collected.[41]

In the middle 1920s, the dominant theme of the Supreme Court's opinions was a continuing willingness to allow both state and federal governments broad authority to enforce prohibition.[42] For example, the

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37 United States v. Yuginovich, 265 U.S. 450 (1921); *cf.* Vigliotti v. Pennsylvania, 258 U.S. 403 (1922) (upholding the continued validity of a state liquor license law after passage of national prohibition).

38 Hawes v. Georgia, 258 U.S. 1 (1922). Congress never established such a presumption in the federal enforcement statute. The lack of the presumption proved fortunate for Senator Morris Sheppard, one of the sponsors of the eighteenth amendment, when a Texas prohibition raid uncovered a still hidden away on a farm he owned. H. ASBURY, *supra* note 4, at 44.

39 Grogan v. Hiram Walker & Sons, Ltd., 259 U.S. 80 (1922).

40 Street v. Lincoln Safe Deposit Co., 254 U.S. 88 (1920). *But see* James Everard's Breweries v. Day, 265 U.S. 545 (1924) (upholding provisions of Voltead Act proscribing sales of existing liquor stocks); Corneli v. Moore, 257 U.S. 491 (1922) (construing the Volstead Act to preclude releasing intoxicating liquors from a warehouse in order to transport them to the owner's home for private consumption).

41 Lipke v. Lederer, 259 U.S. 557 (1922); Regal Drug Corp. v. Wardell, 260 U.S. 386 (1922).

42 The following decisions offer examples additional to those mentioned in the text: Grosfield v. United States, 276 U.S. 494 (1928) (upholding the "padlock" provisions of the Volstead Act that authorized the closing of premises on which certain liquor violations occurred); United States v. Sullivan, 274 U.S. 259 (1927) (requiring individuals to report gains from illicit traffic in intoxicating liquor on their federal tax returns); Ford v. United States, 273 U.S. 593 (1927) (construing the Volstead Act to reach a conspirator who never entered the United States as a member of the conspiracy); McGuire v. United States, 273 U.S. 95 (1927) (holding that unlawful destruction of part of a stock of intoxicating liquor did not preclude the prosecution from introducing the remaining samples into evidence); Murphy v. United States, 272 U.S. 630 (1926) (allowing a nuisance abatement to continue even after the owner of the property was found not guilty in related criminal proceedings); Dodge v. United States, 272 U.S. 530 (1926) (upholding the validity of forfeiture proceedings even though the person making the seizure was not authorized to make seizures under the Volstead Act); Hebert v. Louisiana, 272 U.S. 312 (1926) (ruling that a state could convict a defendant of violating a state prohibition law even though the same acts had formed the basis for a previous conviction of violating the Volstead Act); Raffel v. United States, 271 U.S. 494 (1926) (concluding that a defendant who voluntarily testified had completely waived his fifth amendment privilege against self-incrimination).

Court construed the Volstead Act to give the Commissioner of Internal Revenue authority to deny permits to persons he determined were not fit to deal in non-beverage alcohol,[43] it declared that automobiles used to transport alcoholic beverages in violation of state or federal liquor laws could be forfeited,[44] and it recognized Congress' authority to override a physician's judgment about the medicinal value of intoxicating liquor.[45]

Nonetheless, a careful examination of the opinions of the mid-1920s exposes the Court's underlying doubts about the techniques used to enforce prohibition. Not only did the Court continue to respect property rights,[46] but it also decided in favor of defendants in several other cases.[47] Moreover, even when the Court decided in favor of the government, the decisions were less likely to be unanimous. For example, the Court split five-to-four in two of the most widely publicized pro-government decisions.[48]

As public opposition to prohibition grew in the final years before prohibition's repeal, the judiciary also proved increasingly willing to develop doctrines that made the job of prohibition enforcement officials more difficult. Although the transition to this new stage was neither abrupt[49] nor constant,[50] a different approach was evident.[51] Illustrative

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[43] Ma-King Products Co. v. Blair, 271 U.S. 479 (1926).

[44] Van Oster v. Kansas, 272 U.S. 465 (1926); United States v. One Ford Coupe Automobile, 272 U.S. 321 (1926).

[45] Lambert v. Yellowley, 272 U.S. 581 (1926).

[46] *See* Commercial Credit Co. v. United States, 276 U.S. 226 (1928); Port Gardner Inv. Co. v. United States, 272 U.S. 564 (1926); United States v. Zerbey, 271 U.S. 332 (1926). *But see* United States v. One Ford Coupe Automobile, 272 U.S. 321 (1926) (automobile used to "conceal" liquor on which the tax had not been paid could be forfeited under the general forfeiture provisions of the tax laws).

[47] Shields v. United States, 273 U.S. 583 (1927); Tumey v. Ohio, 273 U.S. 510 (1927); United States v. Katz, 271 U.S. 354 (1926).

[48] Olmstead v. United States, 277 U.S. 438 (1928); Lambert v. Yellowley, 272 U.S. 581 (1926). For a discussion of the *Olmstead* case, *see* notes 86-111 and accompanying text *infra*.

[49] *E.g.*, United States v. Norris, 281 U.S. 619 (1930) (plea of nolo contendere held to be as conclusive as a plea of guilty on the issue of guilt or innocence); Danovitz v. United States, 281 U.S. 389 (1930) (relying on liberal rule of construction applicable to the Volstead Act, the Court accepts a broad definition of the term "manufacture"); Patton v. United States, 281 U.S. 276 (1930) (defendant allowed to waive his constitutional right to a trial by a jury of twelve).

[50] *See, e.g.*, Rossi v. United States, 289 U.S. 89 (1933) (convictions for carrying on the business of a distiller, and having possession of a still, affirmed as constituting separate offenses); McCormick & Co. v. Brown, 286 U.S. 131 (1932) (state's authority to subject all alcoholic preparations to its prohibition statute upheld); United States v. The Ruth Mildred, 286 U.S. 67 (1932) (forfeiture provisions of customs laws apply when a ship licensed for fishing trade is caught with a cargo of intoxicating liquor); General Motors Acceptance Corp. v. United States, 286 U.S. 49 (1932) (in cases of illegal importation of intoxicating liquor, the government may elect whether to use the forfeiture provisions of the Tariff Act or those of the Volstead Act); Callahan v. United States, 285 U.S. 515 (1932) (illegal importation of intoxi-

of this new trend were decisions emphasizing that the relatively strict provisions of the Volstead Act had to be followed whenever the government wanted to forfeit a vehicle that had been used to transport intoxicating liquor,[52] rulings that a permit to produce non-beverage alcohol granted before the passage of the Volstead Act was not affected by the Act,[53] holdings that purchasing liquor was not a crime under the Volstead Act,[54] decisions defining the new defense of entrapment,[55] and opinions allowing a defendant's wife to testify in his behalf.[56]

Following repeal, the Court, like the country as a whole, sought to put behind it the prohibition experience, and the problems associated with prohibition enforcement. Less than a year after the ratification of the twenty-first amendment, the Court held that the adoption of the repealing amendment operated to abate pending prosecutions.[57] It subsequently expanded that ruling to include cases in which convictions were being appealed.[58]

Not surprisingly, the Court's fourth amendment decisions follow the general pattern of its prohibition opinions. The early decisions display a reluctance to exclude evidence seized in searches for alcoholic beverages.[59] The Court's opinions during the middle years reflected an

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cating liquor held a violation of the Tariff Act of 1922 and prosecutable under that statute); Dunn v. United States, 284 U.S. 390 (1932) (conviction for maintaining a nuisance affirmed despite contemporaneous acquittal on related possession charge); United States v. Ryan, 284 U.S. 167 (1931) (general forfeiture provisions, rather than the stricter provisions of the Volstead Act, held applicable to saloon furnishings even when the owner was criminally prosecuted under the Volstead Act); Various Items of Personal Property v. United States, 282 U.S. 577 (1931) (forfeiture of property that formed the basis of a prior conviction under the Volstead Act held not to constitute double jeopardy).

51 For examples other than those mentioned in the text, *see* Cook v. United States, 288 U.S. 102 (1933) (construing a treaty with Great Britain to deny customs officials authority to board British vessels); United States v. La Franca, 282 U.S. 568 (1931) (denying the government the right to recover civil penalties for acts that had formed the basis for a prior conviction under the Volstead Act); United States v. Benz, 282 U.S. 304 (1931) (recognizing the power of a federal district judge to reduce sentences imposed under the Volstead Act).

52 Richbourg Motor Co. v. United States, 281 U.S. 528 (1930).

53 Campbell v. W.H. Long & Co., 281 U.S. 610 (1930); Campbell v. Galeno Chemical Co., 281 U.S. 599 (1930).

54 United States v. Farrar, 281 U.S. 624 (1930).

55 Sorrels v. United States, 287 U.S. 435 (1932).

56 Funk v. United States, 290 U.S. 371 (1933).

57 United States v. Chambers, 291 U.S. 217 (1934).

58 Massey v. United States, 291 U.S. 608 (1934). *But see* United States v. Mack, 295 U.S. 480 (1935) (liability on bond releasing ship seized under Volstead Act held not to have been extinguished by repeal of the eighteenth amendment when the crew had pleaded guilty prior to repeal).

59 *See* Dumbra v. United States, 268 U.S. 435 (1925); Steele v. United States, 267 U.S. 505 (1925); Steele v. United States, 267 U.S. 498 (1925); Carroll v. United States, 267 U.S. 132 (1925); Hester v. United States, 265 U.S. 57 (1924). *But see* Amos v. United States, 255 U.S. 313 (1921).

ambivalent awareness of the problems in enforcing prohibition.[60] Finally, in the last years, a new emphasis on the need for a liberal construction of the fourth amendment appeared.[61]

Sections II and III summarize the state of fourth amendment doctrine at the beginning of the prohibition era and analyze the fourth amendment decisions in more detail. These sections provide the background necessary for evaluating the significance of prohibition in the evolution of fourth amendment doctrine.

II. THE LAW OF SEARCH AND SEIZURE AT THE OUTSET OF PROHIBITION

The law relating to search and seizure was ripe for development at the beginning of the prohibition era. The Supreme Court's 1914 decision in *Weeks v. United States*[62] had recently given the fourth amendment increased significance in federal criminal trials. Over Dean Wigmore's vociferous objections,[63] the Court had carved out a fourth amendment exception to the rule that illegally obtained evidence could be introduced into evidence at trial. *Weeks* required that evidence seized in violation of the fourth amendment's prohibition against unreasonable searches and seizures be excluded from evidence in any subsequent federal criminal prosecution. To admit the evidence, the Court declared, would render the fourth amendment of "no value" to those who had been the victims of such searches.[64]

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[60] *See* Olmstead v. United States, 277 U.S. 438 (1928); Gambino v. United States, 275 U.S. 310 (1927); Marron v. United States, 275 U.S. 192 (1927); United States v. Lee, 274 U.S. 559 (1927); Byars v. United States, 273 U.S. 28 (1927).

[61] *See* Nathanson v. United States, 290 U.S. 41 (1933); Sgro v. United States, 287 U.S. 206 (1932); Grau v. United States, 287 U.S. 124 (1932); Taylor v. United States, 286 U.S. 1 (1932); United States v. Lefkowitz, 285 U.S. 452 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931). *But see* Husty v. United States, 282 U.S. 694 (1931).

[62] 232 U.S. 383 (1914). The Court first advanced the thesis that the admission of evidence obtained in violation of the fourth amendment would violate the fifth amendment privilege against self-incrimination in Boyd v. United States, 116 U.S. 616 (1886), but Adams v. New York, 192 U.S. 585 (1904), seemed to retreat from this position. For summaries of the Court's vacillation prior to *Weeks, see* Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A. J. 479, 480 (1922); Comment, *Search, Seizure, and the Fourth and Fifth Amendments*, 31 YALE L.J. 518, 520-21 (1922); Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 951-57 (1977).

[63] *See, e.g.*, 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2184 (McNaughton rev. ed. 1961) [hereinafter cited as J. WIGMORE, EVIDENCE]; Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A. J. 479 (1922) [hereinafter cited as Wigmore, *Using Evidence*].

[64] 232 U.S. at 393. The *Weeks* Court failed to explain the precise analytic basis for this conclusion. However, the earlier *Boyd* decision reasoned that introduction of evidence seized in violation of the fourth amendment violated the owner's fifth amendment privilege against self-incrimination. Boyd v. United States, 116 U.S. 616, 633 (1886); *accord*, Gouled v. United States, 255 U.S. 298, 306 (1921). Wigmore severely criticized this reliance on an interrelation-

Notwithstanding the clarity of the exclusionary rule, the doctrinal framework remained largely inchoate. Because the *Weeks* rule was new, relatively few details of the doctrine had been established by the time the Court began to consider search issues in prohibition cases. To be sure, *Weeks* itself recognized an exception to the normal warrant requirement for searches conducted incident to the lawful arrest of a suspect, and limited the exclusionary rule to evidence obtained in searches conducted by federal officials.[65] Moreover, other opinions fleshed out the basic concept by extending the protection of the amendment to papers in the mail,[66] by refusing to allow the government to use the results of one illegal search as the basis for obtaining a subsequent search warrant,[67] by applying the exclusionary rule to evidence obtained in searches accomplished by guile as well as those accomplished by force,[68] by permitting corporations to claim protection against unreasonable searches,[69] and by postulating a liberal rule of construction for the rights protected by the fourth amendment.[70] Nonetheless, fourth amendment doctrine remained relatively undeveloped, and large segments of modern doctrine—for example, the applicability of the fourth amendment to

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ship between the fourth and fifth amendment rights, *see* J. WIGMORE, EVIDENCE, *supra* note 63, at § 2264; and some commentators who praised *Weeks'* exclusionary rule defended it on a different basis. They argued that it was justified as the only reasonable means of deterring unreasonable police conduct. *See, e.g.*, Chaffee, *The Progress of the Law, 1919-1922: Evidence*, 35 HARV. L. REV. 673, 694-95 (1922). *But cf.* Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures*, 25 COLUM. L. REV. 11 (1925) (accepting both justifications).

One of the most confusing aspects of the law of search and seizure was the rule concerning the type of objection necessary to preserve a fourth amendment claim. *Weeks* relied on the pretrial objection as a reason for not invoking the evidentiary rule precluding consideration of collateral issues, and the Court even distinguished Adams v. New York, 192 U.S. 585 (1904), on the ground that the defendant in *Adams* had offered his objection when the seized evidence was offered at trial. 232 U.S. at 396, *criticized in* Wigmore, *Using Evidence, supra* note 63, at 481. But some later decisions considered fourth amendment claims in the absence of pretrial objections. *See, e.g.*, Agnello v. United States, 269 U.S. 20 (1925) (lack of pretrial objection ignored because the facts concerning the search were not in dispute); Amos v. United States, 255 U.S. 313 (1921) (application not made until after jury was sworn ruled to be timely); Gouled v. United States, 255 U.S. 298 (1921) (lack of pre-trial objection ignored because defendant had no knowledge of the illegal seizure until the evidence was offered at trial). *See generally* Atkinson, *Prohibition and the Doctrine of the Weeks Case*, 23 MICH. L. REV. 748, 753-57 (1925).

65 232 U.S. at 392, 398; *cf.* Burdeau v. McDowell, 256 U.S. 465 (1921) (exclusionary rule inapplicable to evidence seized by persons who were not governmental agents).

66 *Ex parte* Jackson, 96 U.S. 727 (1877).

67 Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

68 Gouled v. United States, 255 U.S. 298, 305-06 (1921). *But cf.* Stroud v. United States, 251 U.S. 15, 21 (1919) (fourth amendment did not require exclusion of an inmate's letters when "[t]hey came into the possession of the officials of the penitentiary under established practice, reasonably designed to promote the discipline of the institution.").

69 Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1919).

70 Gouled v. United States, 255 U.S. 298, 304 (1921).

electronic surveillance and automobile searches—had received no judicial attention at all.

These early cases reflected some common themes. In establishing the exclusionary rule, *Weeks* protected two values that were deeply rooted in the Anglo-American property tradition: the sanctity of an individual's home as a sanctuary from government intrusion, and the personal character of an individual's papers.[71] Most of the pre-prohibition cases in which the Court upheld fourth amendment claims concerned the "papers" aspect of the property tradition,[72] and the opinions in those cases often produced ringing endorsements of the virtues of fourth amendment values.

Particular facts occasionally forced the Court to move beyond the core concepts of the sanctity of the home and the personal nature of an individual's papers. In those situations, qualifications began to creep into the doctrine. Long before *Weeks* established the exclusionary rule, the Court treated customs cases that involved the seizure of contraband as exceptional and permitted warrantless searches based on probable cause.[73] Moreover, *Weeks* itself limited the scope of the amendment to exclude from its protection a lawfully arrested defendant. In dictum, the Court recognized an exception to the normal warrant requirement for searches conducted incident to arrest.[74] In other decisions, when considering whether corporations were "people" under the fourth amendment, the Court granted corporations protection from "unreasonable" searches,[75] but allowed the government the right to inspect corporate records under its visitorial powers so long as the government's request was reasonable.[76]

Aside from *Weeks*, two of the most important fourth amendment cases arising before the prohibition era were the 1877 decision in *Ex parte Jackson*,[77] which extended the fourth amendment protection to mailed

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71 232 U.S. at 390. The property origins of fourth amendment rights received even greater emphasis in Boyd v. United States, 116 U.S. 616 (1886).

72 *See, e.g.*, Gouled v. United States, 255 U.S. 298 (1921); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); *Ex parte* Jackson, 96 U.S. 727 (1877).

73 *See, e.g.*, Boyd v. United States, 116 U.S. 616, 623 (1886) (dictum). This special treatment has continued down to the present. United States v. Ramsey, 431 U.S. 606 (1977).

74 232 U.S. at 392.

75 Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920); Hale v. Henkel, 201 U.S. 43, 76 (1906).

76 Wilson v. United States, 221 U.S. 361, 382-83 (1911); Hale v. Henkel, 201 U.S. 43, 74-75 (1906). *See also* Wheeler v. United States, 226 U.S. 478 (1913) (officers of dissolved corporation cannot refuse to produce corporate records that would incriminate them).

77 96 U.S. 727 (1877). While upholding Congress' power to make the mailing of lottery tickets a crime, *Jackson* declared that the fourth amendment's protection extended to all mailed matter that is "intended to be kept free from inspection, such as letters, and sealed packages subject to letter postage." 96 U.S. at 733. Even after this type of mail had been turned over to the Post Office for delivery to the addressee, it remained "as fully guarded

matter, and the 1921 decision in *Gouled v. United States*,[78] which held that the amendment covered searches conducted by stealth and that the government had no authority to search for "papers of evidentiary value only." Both illustrate the broad and sympathetic reading of the fourth amendment the Court adopted in the pre-prohibition "papers" cases. The decisions also developed specific doctrinal points that were important in the prohibition cases.

III. DOCTRINAL DEVELOPMENTS DURING THE PROHIBITION ERA

This section examines the ways in which the prohibition era cases altered existing fourth amendment doctrines. It analyzes the Supreme Court's decisions in five areas: definition of basic terms; exceptions to the warrant requirement; cooperation with non-federal investigators; the probable cause requirement; and warrant-related issues.

A. THE DEFINITION OF TERMS

Once *Weeks* established the exclusionary rule, the Court faced the problem of defining the limits of the doctrine. That process of definition was the principal focus of the two important prohibition cases discussed

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from examination and inspection, except as to . . . outward form and weight," as if the party forwarding it had retained it in his own domicile. *Id.* Since the fourth amendment applied, mail could "only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household." *Id.*

[78] 255 U.S. 298 (1921). *Gouled* involved a number of important constitutional issues, but two holdings were particularly significant with respect to the development of fourth amendment doctrine during the prohibition era. Ruling that the amendment covers searches conducted by stealth as well as those relying on direct governmental authority the Court said:

> [W]hether entrance to the home or office of a person suspected of crime be obtained by a representative of any branch or subdivision of the government of the United States by stealth, or through social acquaintance, or in the guise of a business call, and whether the owner be present or not when he enters, any search and seizure subsequently and secretly made in his absence, falls within the scope of the prohibition of the Fourth Amendment. . . .

255 U.S. at 306. Furthermore, *Gouled* unequivocally declared that the fourth amendment did not authorize the issuance of search warrants for any papers having "evidential value" as to crimes committed by the owner of the papers. To the contrary, search warrants were proper only when:

> a primary right to [the] search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken.

Id. at 309. The Court justified both holdings by applying the rule of liberal construction that demanded that the fourth and fifth amendments be construed "so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts, or by well-intentioned but mistakenly overzealous, executive officers." *Id.* at 304.

below. In essence, the Court was deciding what types of activities the amendment covered.

Fourth amendment law prior to prohibition reflected a judicial willingness to avoid narrow interpretations that would severely restrict the scope of the amendment's reach. Two of the clearest examples of this expansive approach are *Jackson*[79] and *Gouled*.[80]

During the prohibition era, the Court was considerably less generous in extending the reach of the fourth amendment. For example, in 1924, *Hester v. United States*[81] circumscribed the amendment's reach by distinguishing lawful observations of enforcement authorities from searches and by excluding "open fields" surrounding a house from the amendment's protection.

The facts in *Hester* were relatively simple. Having received information on Hester, revenue agents hid approximately 100 yards from the house where Hester lived. Standing on land they "supposed" to belong to Hester's father, who owned the house under observation, the agents watched a man drive near the house and saw Hester come out and give the visitor a quart bottle. After sounding an alarm, the agents arrested Hester and examined the liquid in the quart bottle, the contents of a jug Hester extracted from a nearby car, and the residue in a jar lying on the ground near the house. According to the testimony of the experienced agents, all three contained whiskey.[82]

Justice Holmes rejected the claim that the agents had committed an illegal search or seizure. He distinguished searches covered by the amendment from permissible police surveillance. Even if the agents had committed a trespass, he concluded, their testimony "was not obtained by an illegal search or seizure," for Hester's "own acts, and those of his associates, disclosed the jug, the jar and the bottle."[83] Moreover, "there was no seizure in the sense of the law when the officers examined the contents" of the containers, because they had been thrown aside when the officers sounded the alarm.[84]

Nor did the examination of the containers on the land outside the

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79 *See supra* note 77 and accompanying text.

80 *See supra* note 78 and accompanying text.

81 265 U.S. 57 (1924).

82 *Id.* at 58. Justice Holmes did not specify what "information" prompted the agents to watch Hester's house, and the record provides only slightly more information. One of the prohibition agents testified that "we had destroyed distilleries near [Hester's] house before and we had information that he kept whiskey there." The Court, however, struck "that statement" on the ground the agent could not "state what his information was." Record at 15, Hester v. United States, 265 U.S. 57 (1924). The agents did, in fact, search Hester's house, but Justice Holmes dismissed the search as "immaterial" because the search of the dwelling did not uncover any evidence.

83 265 U.S. at 58.

84 *Id.*

house amount to an illegal search. The fourth amendment, Holmes noted, afforded protection to the people only in their "persons, houses, papers and effects." That protection did not extend to "open fields," for "[t]he distinction between the [open fields] and the house is as old as the common law."[85]

A second important prohibition era opinion defined the term "search" as restrictively as *Hester* had defined the phrase "persons, houses, papers, and effects." In 1928, *Olmstead v. United States*[86] presented the question whether evidence obtained by surreptitious "tapping" of an individual's telephone could be introduced into evidence at his criminal trial.

Olmstead had established a highly successful smuggling operation in Seattle, Washington.[87] In 1924, the chief assistant in the Seattle office

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[85] *Id.* at 59 (citing 4 W. BLACKSTONE, COMMENTARIES 223, 225, 226).

Relatively few lower federal court opinions during the prohibition era dealt with the definitional problems addressed in these Supreme Court cases. This paucity of decisions suggests that *Hester* and *Olmstead* involved techniques that were infrequently used in prohibition enforcement. *Hester*'s exclusion of "open fields" from the scope of the fourth amendment's protection would rarely help prohibition agents in urban areas where enforcement encountered its most serious difficulties and where few urban dwellings would contain a large yard in which agents could conceal themselves while observing the dwelling. Nor would *Hester* be useful when suspects kept their supplies and transactions inside, because, even in the prohibition era, the Court normally required warrants to justify intrusions into a dwelling. *See* Amos v. United States, 255 U.S. 313 (1921); *cf.* Grau v. United States, 287 U.S. 124 (1932) (dwelling did not lose the special protection to which it was entitled under the Volstead Act merely because intoxicating liquor was manufactured there). *But see* Agnello v. United States, 269 U.S. 20 (1925) (dictum) (warrantless searches of houses that are the sites of lawful arrests are lawful).

[86] 277 U.S. 438 (1928). For a harsh critique of the *Olmstead* decision, *see* Black, *An Ill-Starred Prohibition Case: Olmstead v. United States*, 18 GEO. L.J. 120 (1930), *reprinted in* F. BLACK, *supra* note 30, at 79-90.

[87] The story leading up to the *Olmstead* decision begins in 1920, when a highly regarded young police lieutenant was attracted by the financial opportunities associated with bootlegging in Seattle, Washington. Early in his new endeavor, he was apprehended by prohibition agents and fined $500. This escapade led to his dismissal from the police force, and so he turned his full attention to a new career in smuggling liquor from Canada. Supported by eleven investors who contributed $1000 each, Olmstead soon established a highly successful smuggling operation. By the simple device of clearing the ships on which he carried his Canadian liquor for Mexico rather than the United States, he avoided Canada's heavy export tax on liquor cleared for the United States. He also secured cash discounts for his large volume purchases and developed an efficient distribution system. The net result of these innovations was that Olmstead succeeded in underselling his competition by as much as thirty percent; he thus established a virtual monopoly of the Seattle bootlegging business. Olmstead's close contacts within the local political structure and police force allowed him to operate with near impunity. He was a well-known and apparently respected citizen of Seattle. The definitive history of prohibition in Washington even credits him with stabilizing the price of liquor so "that good whiskey in Seattle cost only two dollars more a bottle than it did in the government stores of British Columbia." N. CLARK, *supra* note 16, at 161. The summary of Olmstead facts is derived from Clark's account as well as the Court's opinion and the record and briefs filed in the Supreme Court.

of the Prohibition Bureau hired a free lance wiretapper as a prohibition agent, and had him insert taps on phones at Olmstead's office and at several other locations.[88] The government did not introduce transcripts of the tapped conversations into evidence. Agents did, however, testify regarding the conversations, and they were allowed to refresh their memories by consulting the transcripts. The trial court overruled objections to this testimony. A jury then convicted Olmstead of violating the Volstead Act, and the district judge sentenced him to a four-year term of imprisonment.[89] The Ninth Circuit affirmed the conviction.[90]

As it had done in *Hester*, the Supreme Court decided the merits in favor of the prosecution, but this time the Court split five-to-four in so doing. Chief Justice Taft declared that "[t]he reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house, and messages while passing over them, are not within the protection of the Fourth Amendment."[91] According to the majority, none of the Court's earlier decisions had found a violation of the fourth amendment except in situations involving "an official search

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88 According to Olmstead, the wire tapper had originally tried to sell him a transcript of taped conversations for $10,000. *Id.* at 168. Although Olmstead was aware of the tapes, he did not significantly alter his operations; he apparently remained confident that a Washington statute forbidding wiretaps, WASH. COMP. STAT. § 2656-18 (Remington, 1922), would make evidence obtained against him inadmissible in any criminal prosecution.

89 While serving his prison term, Olmstead embraced the Christian Science faith and became convinced "that liquor [was] bad for man and society." N. CLARK, *supra* note 16, at 218.

90 19 F.2d 842 (9th Cir. 1927). A divided panel defined the purpose of the fourth amendment as preventing "the invasion of homes and offices and the seizure of incriminating evidence found therein." *Id.* at 847. Without addressing the question of whether tapping telephone wires is "an unethical intrusion upon the privacy of persons who are suspected of crime," the court concluded that "it is not an act which comes within the letter of the prohibition of constitutional provisions." *Id.* Evidence obtained by wiretaps was thus indistinguishable, the court said, from secret observation or eavesdropping.

Judge Rodkin dissented. *Id.* at 848-50. He argued that the chief purpose of the fourth and fifth amendment was to protect "the individual in his liberty and in the privacies of life." *Id.* at 849. The proper case for analogy was *Jackson*, for "[a] person using the telegraph or telephone [was] not broadcasting to the world," but was sealing his conversation "from the public as completely as . . . the instrumentalities employed will permit." *Id.* at 850. Thus, to further the purpose of the fourth amendment, he interpreted it to deny a "federal officer or federal agent . . . a right to take [a person's] message from the wires, in order that it may be used against him." *Id.*

91 277 U.S. at 466. The Chief Justice prefaced his rejection of the constitutional argument with a lengthy survey of the Court's earlier decisions construing the fourth amendment.

He also rejected the suggestion that the Court should fashion a nonconstitutional rule excluding the evidence because the wiretaps had violated state law. "The common-law rule," he noted, "is that the admissibility of evidence is not affected by the illegality of the means by which it was obtained." *Id.* at 467. *Weeks'* exclusionary rule was a narrow exception to that rule "required by constitutional limitations." *Id.* Since the constitutional limitations were inapplicable in *Olmstead*, "[t]he common-law rule must apply." *Id.* at 468.

and seizure of [an individual's] person or such a seizure of his papers or his tangible material effects or an actual physical invasion of his house 'or curtilage' for the purpose of making a seizure." From this definition of the principle underlying earlier cases, the Court concluded that "the wire tapping here disclosed did not amount to a search or seizure within the meaning of the Fourth Amendment."[92]

In large measure, the Court's ultimate conclusion was based on its narrow reading of *Gouled*[93] and *Jackson*.[94] *Gouled*, the Chief Justice argued, "carried the inhibition against unreasonable searches and seizures to the extreme limit," and its authority would not be "enlarged by implication."[95] When thus confined to its facts, *Gouled* was distinguishable because a government agent actually entered "into the private quarters of [the] defendant and . . . [took away] something tangible"; by contrast, the *Olmstead* testimony only concerned "voluntary conversations secretly overheard."[96] *Jackson* was also easily distinguishable, according to the Chief Justice. Since a "letter is a paper, an effect, and in the custody of a government that forbids carriage, except under its protection," it fell "plainly within the words of the amendment to say that the unlawful rifling by a government agent of a sealed letter is a search and seizure of the sender's papers or effects."[97] By contrast, the amendment could not naturally apply to the government's actions in *Olmstead*. The federal government did not take "such care of telegraph or telephone messages as of mailed sealed letters."[98] Even more importantly, the wiretapping case involved neither "searching" nor "seizure"; the agents secured the evidence "by the use of the sense of hearing and that only," without any "entry of the houses or offices of the defendants."[99]

In contrast, the Chief Justice found the narrow approach of *Hester* a persuasive precedent. Even though the officers in *Hester* were guilty of a trespass, the Court nonetheless found that they had not engaged in a search of the defendant's person, house, papers, or effects.[100]

Justice Brandeis' dissent[101] charged that the majority's narrow ap-

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92 *Id.* at 466.

93 *See supra* note 78 and accompanying text.

94 *See supra* note 77 and accompanying text.

95 277 U.S. at 463.

96 *Id.* at 464.

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.* at 465.

101 *Id.* at 471-85. "Independently of the constitutional question" that is discussed in the text, Justice Brandeis would have excluded the *Olmstead* testimony because it was obtained in violation of state law. *Id.* at 479-80. Although these unlawful acts "were crimes only of the officers individually" when they were committed, the government "assumed moral responsibility for the officers' crimes" when it tried "to avail itself of the fruits of these acts . . . to

proach in *Olmstead* was inconsistent with the spirit of the Court's own precedents. "Time and again," he asserted, these precedents had rejected "an unduly literal construction" of the fourth amendment.[102] Thus, he argued that the Court should construe the fourth and fifth amendments to confer "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."[103] To enforce that right, the Court should declare "every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed," a violation of the fourth amendment.[104]

While *Olmstead* initially might appear to have offered prohibition officials an enforcement method that would be frequently employed, such a conclusion ignores the political reality of the times. By the time *Olmstead* was decided, the federal government, as the dissenting opinion in *Olmstead* itself emphasized,[105] had disavowed the use of wiretaps as an enforcement device.[106] Indeed, the internal opposition to wiretapping within the government was so significant that the Assistant Attorney General, originally assigned to handle the appeal for the government, asked to be relieved of the assignment after the Supreme Court granted certiorari.[107] In the prohibition years after the 1928 *Olmstead* decision, opposition to the eighteenth amendment grew substantially.[108] Consequently, it is not surprising that the officials in charge of prohibition enforcement failed to exploit an investigatory technique that was likely to strengthen and to crystallize opposition to their work.

Even though *Hester* and *Olmstead* involved relatively isolated and episodic problems, the Supreme Court's treatment of them is consistent with the general trend of the decisions. As one of the early prohibition cases, the unanimous opinion in *Hester* conformed to the public approval

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accomplish its own ends." *Id.* at 483. When "the government becomes a lawbreaker," he concluded in a rhetorical flourish, "it breeds contempt for the law . . . [and] invites anarchy." *Id.* at 485. Since declaring "that in the administration of the criminal law the end justifies the means . . . would bring terrible retribution," he urged the Court "resolutely [to] set its face" against "that pernicious doctrine." *Id.*

102 *Id.* at 476.

103 *Id.* at 478. *See generally* Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

104 277 U.S. at 478.

105 277 U.S. at 483 n.15 (Brandeis, J., dissenting).

106 Brief for the Government at 41, Olmstead v. United States, 227 U.S. 438 (1928); *see also* N. CLARK, *supra* note 16, at 174; *cf.* M. WILLEBRANDT, THE INSIDE OF PROHIBITION 231 (1929) (statement of opposition to wiretapping by Assistant Attorney General in charge of prohibition cases). A 1927 report submitted to Congress expressed general disapproval of illegal conduct by prohibition agents, S. DOC. NO. 198, 69th Cong., 2d Sess., pt. 1, at IV; pt. 2, 2 (1927); and wiretapping was illegal in most states. *See* Olmstead v. United States, Brief for Amicus Curiae, at 11.

107 N. CLARK, *supra* note 16, at 176; M. WILLEBRANDT, *supra* note 106, at 232.

108 *See supra* notes 27-34 and accompanying text.

of prohibition. By accepting surreptitious trespass on the property of private citizens as a natural incident of effective enforcement of the eighteenth amendment, the Court indicated that it—like the general public—had not yet developed serious reservations about techniques of prohibition enforcement. Moreover, precedents did not dictate this narrow construction of the reach of the amendment; in fact, the opinion does not cite any of the Court's earlier opinions as authority for its decision. Indeed, in comparison with the small group of arguably relevant precedents, *Hester* reflects more of a break with tradition than a continuation of it. The earlier decisions manifest an approach to the fourth amendment that is far less literal than the *Hester* opinion.

By the time the Court decided *Olmstead*, doubts about the value of prohibition and its effects on American life were widespread. The supporters of prohibition, however, still dominated the political scene. The passage of the Jones Act[109] in 1929 illustrates the political climate of the late 1920s. Congress encouraged leniency for casual offenders but significantly increased the penalties for others.

The split in the *Olmstead* Court seems to reflect the tensions underlying the Jones Act, that is, the desire to punish blatant violators but not casual offenders. While the dissenters in *Olmstead* perceived significant dangers in unbridled prohibition enforcement, the majority refused to endorse an approach that would allow a defendant, whose violations of the law were serious and pervasive, to go free. After all, Olmstead was not merely a casual, minor offender of prohibition. The operation that formed the basis of the defendants' convictions was "a conspiracy of amazing magnitude to import, possess, and sell liquor unlawfully" with aggregate yearly sales exceeding $2,000,000.[110] In this conspiracy, Olmstead's role was preeminent. The *New York Times* later described Olmstead's Seattle operation as "one of the most gigantic rumrunning conspiracies in the country."[111]

Thus, in defining fourth amendment activity, the two major Supreme Court opinions exemplify the change in public mood. Although both decisions favored the government, the seeds of opposition to the narrow interpretation of the fourth amendment can be seen in the *Olmstead* dissent.

B. EXCEPTIONS TO THE WARRANT REQUIREMENT

The fourth amendment contains no explicit requirement that officials obtain a warrant before conducting a search. The warrant require-

109 Pub. L. No. 70-899, 45 Stat. 1446 (repealed 1935).

110 277 U.S. at 455-56; *see also* M. WILLEBRANDT, *supra* note 106, at 234-36.

111 N.Y. Times, May 27, 1930, at 1, col. 7.

ment is, however, a natural implication of the amendment's juxtaposition of its prohibition of "unreasonable" searches next to the probable cause requirement that must be satisfied before a warrant can be issued. Although the Supreme Court has generally accepted the implication, it has recognized exceptions to the warrant requirement. The prohibition cases were significant in developing the content of some of the major exceptions.

1. Incident-to-Arrest Searches

A well recognized exception to the warrant requirement allows police officers to search persons they have arrested. Dicta in *Weeks* itself confirmed the existence of this "incident-to-arrest" exception,[112] but *Agnello v. United States*[113] was the first case to uphold an incident-to-arrest search as constitutional. *Agnello* was rendered at the beginning of the prohibition era and involved a violation of the Harrison Anti-Narcotic Act.[114] The decision sanctioned the search of persons arrested, and the search of the premises on which the arrests occurred.[115] Nonetheless, the Court decided that the arrest of the *Agnello* defendants did not justify searching a dwelling "several blocks distant" from the place where the arrest occurred. The Court held that by the time the second search had occurred, "the conspiracy was ended and the defendants were under arrest and in custody elsewhere."[116]

Agnello was not the final word on the scope of the incident-to-arrest exception. Determining the confines of the exception proved to be a

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112 232 U.S. at 392.

113 269 U.S. 20 (1925).

114 Pub. L. No. 63-223, 38 Stat. 785 (1914).

115 269 U.S. at 30 ("The legality of the arrests, or of the searches and seizures made at the home of Alba, is not questioned. Such searches and seizures naturally and usually appertain to and attend such arrests.").

116 *Id.* at 31. In making this distinction, Justice Butler's opinion for a unanimous Court displayed a reluctance to approve warrantless searches of private dwellings. Conceding that the Supreme Court had never "directly decided" the point, he emphasized that "it has always been assumed that one's house cannot lawfully be searched without a search warrant, except as incident to a lawful arrest therein." *Id.* at 32 (citing Boyd v. United States, 116 U.S. 616, 624 et seq.); Gouled v. United States, 255 U.S. 298, 308 (1921); Silverthorne Lumber Co. v. United States; 251 U.S. 385, 391 (1919); Weeks v. United States, 232 U.S. 383, 393 (1914). Later in the opinion, he repeated the assumption (in an only slightly less dogmatic form) as a rule. 269 U.S. at 33 ("Save in certain cases as incident to arrest, there is no sanction in the decisions of the courts, federal or state, for the search of a private dwelling house without a warrant."). In addition, he emphatically denied the existence of any general probable cause exception to the rule: "Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause." *Id.* For a criticism of *Agnello*'s refusal to allow arrests to justify searches in places other than where the arrest occurred, *see* Note, *The Effect of the Agnello Case on "Incidental" Searches and Seizures*, 35 YALE L.J. 612 (1926).

continuing problem for the Court, which rendered opinions addressing the subject in four different prohibition cases. The first decisions, rendered in the middle years of the prohibition decade, involved serious offenders, and the Court adopted an expansive reading of the exception. Decisions rendered at the end of the prohibition, however, began to restrict the reach of the exception, simultaneously with an increase in public concern over techniques of prohibition enforcement.

The Court initially dealt with the incident-to-arrest exception in *United States v. Lee*,[117] decided in the 1926 term. *Lee* involved the seizure of a motorboat containing seventy-one cases of grain alcohol "in a region commonly spoken of as Rum Row, at a point 24 miles from land."[118] The principal issue concerned the authority of customs officials to search American vessels beyond the twelve mile boundary.[119] Almost as an afterthought, Justice Brandeis offered the incident-to-arrest exception as an alternate justification for the search.

In explaining the incident-to-arrest exception, *Lee* implicitly treated the motorboat as the "premises" on which the search occurred. Search of the boat was thus permissible, especially since the trial had produced no evidence of "any exploration below decks or under hatches" and "[f]or aught that appears, the cases of liquor were on deck and, like the defendants, were discovered before the motorboat was boarded."[120] The person making the arrest had scanned the boat with a searchlight when making the arrest, but that action did not violate the Constitution because "[s]uch use of a searchlight is comparable to the use of a marine glass or a field glass."[121]

United States v. Marron,[122] decided the following year, was the Court's first detailed consideration of the incident-to-arrest exception in a prohibition case. It exemplifies the approach identified earlier as char-

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117 274 U.S. 559 (1927).

118 *Id.* at 560.

119 The Court held that Coast Guard officers had such authority "when there is probable cause to believe [vessels] subject to seizure for violation of revenue laws." *Id.* at 562.

120 *Id.* at 563.

121 *Id.*

122 275 U.S. 192 (1927). A United States Commissioner had issued a warrant authorizing the search of the premises leased by Marron. The warrant described the things to be seized as "intoxicating liquors and articles for their manufacture." Prohibition agents went to the premises the next day and, after securing admission by ringing the doorbell, observed about a dozen persons in the place, "some of [whom] were being furnished intoxicating liquors." *Id.* at 193-94. The agents handed the warrant to the individual in charge and placed him under arrest; they then "searched for and found large quantities of liquor, some of which [were] in a closet." *Id.* at 194. The agents also found and seized certain items not named in the warrant. In the closet, they uncovered "a ledger showing inventories of liquors, receipts, expenses, including gifts to police officers, and other things relating to the business"; and "beside the cash register," they discovered "a number of bills against petitioner for gas, electric light, water, and telephone service furnished on the premises." *Id.*

acteristic of the prohibition cases in the second half of the 1920s—an ambivalent Court beginning to perceive the dangers in prohibition enforcement but unwilling to let serious offenders go free. Justice Butler's unanimous opinion in *Marron* refused to allow agents to use a search warrant to justify seizure of items not named in the warrant. The opinion, however, ultimately upheld the challenged seizures by broadly defining the "premises" that could be searched pursuant to an arrest and the things that could be seized as instruments of the crime for which the arrest was made. When the agents arrived at the premises to be searched, they immediately arrested the individual in charge. That individual "was actually engaged in a conspiracy to maintain, and was actually in charge of, the premises where intoxicating liquors were being unlawfully sold."[123] Thus, the arrest was lawful as one for a "crime committed in [the agent's] presence,"[124] and the agents "had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise."[125] Pursuant to this authority, the agents could seize both the ledger and various bills and receipts. Seizing the ledger was permissible because "it was . . . a part of the outfit or equipment actually used to commit the offense," and seizing the bills was constitutional because "they were convenient, if not in fact necessary, for the keeping of accounts" and "so closely related to the business" that it was "not unreasonable to consider them as used to carry it on."[126]

In two cases decided near the end of the prohibition era, the Court again returned to the incident-to-arrest exception. In unanimous decisions, the Court held a challenged seizure invalid in each case and set aside the convictions obtained through use of the seized evidence.[127] Not surprisingly, these decisions claim doctrinal continuity with earlier cases, but the shift in focus is dramatic. Both opinions emphasize the need for a broad construction of the fourth amendment to protect all individuals—innocent and guilty alike—from arbitrary governmental power.[128]

In *Go-Bart v. United States*, prohibition agents falsely claimed to have

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123 275 U.S. at 198.

124 *Id.*

125 *Id.* at 199. Moreover, the Court emphasized, the seizure of the ledger was valid even though it was found in a closet. The area that the officers could search incident to a valid arrest "extended to all parts of the premises used for the illegal purpose." *Id.* The closet where the ledger was found "was used as a part of the saloon" and thus was part of the area in the "immediate possession and control" of the person arrested. *Id.*

126 *Id.*

127 Lefkowitz v. United States Attorney, 285 U.S. 452 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).

128 285 U.S. at 464; 282 U.S. at 357.

warrants and searched the three room office of Go-Bart Importing Company. The agents forced the President and Secretary Treasurer whom they had arrested to open locked desks in the office. In the course of the search, they seized an assortment of intoxicating liquor, and numerous records which pertained to officers' unlawful dealings in intoxicating liquors.[129]

The Court treated "the arrests as lawful and valid."[130] It nonetheless ruled that the agents had violated the fourth amendment and required the seized papers to be returned to the company.[131]

Emphasizing the generality of the fourth amendment's prohibition against "unreasonable searches and seizures,"[132] the *Go-Bart* Court underscored that "reasonableness" must be decided on the facts and circumstances of a particular case.[133] The Court viewed the search of Go-Bart's office as "a lawless invasion of the premises and a general exploratory search in the hope that evidence of crime might be found."[134] Without specifying precisely which facts were crucial in reaching this conclusion, the *Go-Bart* opinion enumerated four factors: the lack of any evidence that a crime was being committed at the time the arrests were made; the failure to obtain a search warrant even though the special agent in charge "had an abundance of information and time to swear out a valid warrant"; the "pretension of right and threat of force" used in the search; and "the general and apparently unlimited [nature of the] search, ransacking the desk, safe, filing cases and other parts of the office."[135]

The Court was vague in distinguishing *Marron*. Although the opinion vehemently asserted that "[p]lainly" the two cases were "essentially different," it merely catalogued a series of factual distinctions[136] without explaining their significance.

The Supreme Court further limited the incident-to-arrest exception in *United States v. Lefkowitz*,[137] the other decision rendered at the end of the prohibition era. Armed with an arrest warrant charging the *Lefko-*

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129 282 U.S. at 351.

130 *Id.* at 356. The Court also noted that no objection was made to the searches of the persons arrested.

131 282 U.S. 344 (1931).

132 *Id.* at 357.

133 *Id.*

134 *Id.* at 358.

135 *Id.*

136 The Court specifically mentioned three differences: the person arrested in *Marron* was one "who in pursuance of a conspiracy was actually engaged in running a saloon"; the things seized in Marron were "visible and accessible and in the offender's immediate custody"; and the agents who made the *Marron* seizure did so "without threat of force" and without engaging in a "general search or rummaging of the place." *Id.*

137 285 U.S. 452 (1932).

witz defendants with conspiracy to sell and transport intoxicating liquors,[138] prohibition agents arrested Lefkowitz and searched the room in which he was arrested. In searching the room, "[t]he agents opened all the drawers of both desks, examined their contents, took . . . away books, papers and other articles. They also searched the towel cabinet and took papers from it . . . . They also took the contents of the baskets and later pasted together pieces of paper found therein."[139]

Echoing the "reasonableness" emphasis of the *Go-Bart* opinion, Justice Butler declared that the "only question presented" in *Lefkowitz* was "whether the searches of the desks, cabinet and baskets and the seizures of the things taken from them were reasonable as an incident of . . . . valid arrests under the warrant."[140] He concluded that they were unreasonable. The conduct of the agents "was unrestrained" as shown by the number and variety of things taken. Moreover, the officers wanted the papers "solely for use as evidence of crime of which [the defendants] were accused or suspected."[141] Searches and seizures of such papers was impermissible "even under a search warrant issued upon ample evidence and precisely describing such things and disclosing exactly where they were." The incident-to-arrest exception "certainly" did not confer greater search authority "than that conferred by a search warrant issued upon adequate proof and sufficiently describing the things to be obtained."[142]

As in *Go-Bart*, Justice Butler distinguished *Marron* by cataloging a number of factual differences without explaining why the differences were significant. In *Marron*, "prohibition officers . . . arrested the bartender for crime openly committed in their presence"; the officers did not search for the ledger and bills seized but merely picked up items "in plain view"; and the ledger and bills seized were being used "to carry on the criminal enterprise" for which the defendants were convicted. By contrast, the *Lefkowitz* record failed "to support the claim that, at the time of the arrest . . . any crime was being committed in the presence of

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138 On January 12, 1931, a prohibition agent filed a complaint before a United States Commissioner charging that the *Lefkowitz* defendants, "commencing June 21, 1930, and continuing to the time of making the complaint," had engaged in a conspiracy "to sell, possess, transport, furnish, deliver and take orders for intoxicating liquor" in violation of the Volstead Act. According to the complaint, the defendants solicited orders from a certain room identified by its address; they then arranged for orders to be delivered by common carriers and collected the proceeds of the sale. Since "[t]he allegations of the complaint show[ed] that the complaining witness had knowledge and information of facts amply sufficient to justify the accusation," the commissioner issued the warrant. 285 U.S. at 458.

139 285 U.S. at 458-60. For a detailed listing of the items, *see id.* at 459 n.1, 460 n.2.

140 *Id.* at 463.

141 *Id.* at 464.

142 *Id.* at 464-65.

the officers";[143] the searches conducted by the agents "were exploratory and general and made solely to find evidence of [the defendants'] guilt of the alleged conspiracy or some other crime"; and "the papers and other articles found and taken were in themselves unoffending," although they were "intended to be used to solicit orders for liquor in violation of the Act."[144] Even though the Court indicated that the last difference was the crucial one,[145] it made no further effort to elaborate upon the differing character of the items in *Marron* and *Lefkowitz*, but chose instead to follow the more recent authority of *Go-Bart*.[146]

When one surveys the incident-to-arrest cases as a group, they seem fully consistent with the general "drift" of the Supreme Court's prohibition cases. The first two decisions display the ambivalence characteristic of opinions rendered between 1926 and 1930. On the one hand, both supported prosecutors in their struggles against large scale violators of the law. *Lee* involved an arrest in the notorious "Rum Row" that was the center of the smuggling trade,[147] while *Marron* challenged a raid on a saloon-type operation that seemed to have operated quite openly.[148] On the other hand, in *Marron* the Court demonstrated an increasing awareness of potential enforcement abuses. Most of the *Marron* opinion deals with an issue the Court could have ignored, the rejection of the government's alternate rationale that officers could seize things not specifically described when conducting a search authorized by a valid search warrant. The Court's own explanation for rendering this dictum on seizing items not listed in the warrant rests on the assertion in the government's brief "that the facts of this case present one of the most frequent causes of appeals in current cases."[149] In light of this explanation, one can best understand the *Marron* opinion as striving to strike a balance between freeing a serious offender and sanctioning increasingly obvious abuses in the enforcement of the prohibition laws.

The last two incident-to-arrest cases came in the decade of the 1930s and reflect a return to a "liberal" construction of the fourth

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143 *Id.* at 463.

144 *Id.* at 465.

145 *Id.* at 465-66.

146 *Id.* at 467.

147 *See generally* H. ASBURY, *supra* note 4, at 241-55; C. MERZ, *supra* note 4, at 113-15; A. SINCLAIR, *supra* note 4, at 198-99. For a very optimistic assessment of the government's success in routing Rum Row, *see* M. WILLEBRANDT, *supra* note 106, at 220-30; *see also* R. HAYNES, PROHIBITION INSIDE OUT 69-86 (1923).

148 275 U.S. at 193-94 ("There were six or seven rooms containing slot machines, an ice box, tables, chairs, and a cash register. The evidence shows that the place was used for retailing and drinking intoxicating liquor. About a dozen men and women were there, and some of them were being furnished intoxicating liquors."). *See also* Marron v. United States, 8 F.2d 251, 253 (9th Cir. 1925).

149 275 U.S. at 195.

amendment, even when that construction results in freeing some relatively serious offenders.[150] The Court's own confusion is apparent in the conflicting justifications it offered. In *Go-Bart*, the Court emphasized the nature of the criminal activity and the general nature of the search conducted. *Lefkowitz* understandably cited *Go-Bart* as the controlling precedent, but then shifted the emphasis to the nature of the items seized. The Court's increased concern about abusive enforcement techniques provides a more likely explanation for the decisions.

2. *Automobile Searches*

The incident-to-arrest exception was not the only circumstance in which the Supreme Court permitted warrantless searches during the prohibition era. A second major exception developed for automobile searches.

The automobile began to exert its enormous influence on American life in the first two decades of the twentieth century.[151] Its impact on American legal institutions is easily discernible in a number of statutory[152] and judicial[153] developments. It is not surprising, therefore, that automobiles also required special treatment in the law of search and seizure. The increased availability of automobiles during the 1920s was a boon to bootleggers. Not only did it greatly enhance their transportation capabilities, but the mobility of automobiles also made use of

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150 The evidence obtained in both Go-Bart, 282 U.S. at 351, and Lefkowitz, 285 U.S. at 462-63, suggested an on-going business of soliciting and filling orders for intoxicating liquors.

151 The number of automobiles increased dramatically after the turn of the century; total registrations rose from eight thousand in 1900 to more than nine million in 1920 and then to twenty-six and one-half million in 1929. J. RAE, THE AMERICAN AUTOMOBILE 238 (1965) (Table 7); *see also* J. FLINK, AMERICA ADOPTS THE AUTOMOBILE, 1895-1910 55-60 (1970). By the 1920s, the automotive industry was the largest in the county. Two million automobiles were manufactured in 1920, and this figure grew to five and one-half million by 1929. The development of techniques of mass production and consumer credit helped to reshape American life as well as to stimulate a variety of associated industries like highway construction and steel manufacturing. J. RAE, THE AMERICAN AUTOMOBILE at 48-52, 56-91, 238 (Table 6); *see also* D. BOORSTIN, THE AMERICANS: THE DEMOCRATIC EXPERIENCE 422-27, 546-55 (1973); J. RAE, THE ROAD AND THE CAR IN AMERICAN LIFE 40-59 (1971).

152 *See, e.g.*, Federal Highway Act of 1921, Pub. L. No. 67-87, 42 Stat. 212 (1921); Road Aid Act of 1916, Pub. L. No. 64-156, 39 Stat. 355 (1916); J. FLINK, *supra* note 151, at 165-91 (summary of state regulation of registration, licensing, and speed); Chamberlain, *Compulsory Insurance of Automobiles*, 12 A.B.A. J. 49 (1926).

153 *See, e.g.*, Brown, *The Status of the Automobile*, 17 YALE L.J. 223 (1908); Chamberlain, *Automobiles and Vicarious Liability*, 10 A.B.A. J. 788 (1924); Falknor, *The Doctrine of Joint Adventure in Automobile Law*, 1 WASH. L. REV. 113 (1925); McCabe, *The Duty of an Automobile Owner to a Gratuitous Guest*, 6 NOTRE DAME LAW. 300 (1931); Note, *The Family Car Doctrine*, 15 GEO. L.J. 471 (1927). An interesting interplay between statutory and judicial developments occurred with respect to state court jurisdiction. Legislatures passed new "long-arm" statutes, and the Supreme Court modified the restraints of the due process clause to accommodate them. *See generally* Murchison, *Jurisdiction Over Persons, Things, and Status*, 41 LA. L. REV. 1053, 1061-64 (1981).

search warrants difficult, since the automobile might move to another location or finish delivering its illicit cargo while agents were seeking the warrant. Early in the prohibition enforcement effort, lower federal courts recognized the unique mobility of automobiles by fashioning a new exception to the warrant requirement.[154] The Supreme Court placed its imprimature on the automobile exception in *Carroll v. United States*.[155]

Prohibition agents in the Detroit area suspected Carroll of bootlegging liquor. While on patrol they spotted Carroll's roadster and gave chase, suspecting him to be a "run." The agents searched the car and found sixty cases of liquor Carroll had hidden behind the back seat.[156]

On appeal, the Supreme Court affirmed the convictions of the *Carroll* defendants.[157] In upholding the seizure of the whiskey, the opinion narrowed the scope of the warrant requirement in two respects: by sanctioning a broad exception for vehicular searches in prohibition cases; and by expanding the traditional doctrine concerning a police officer's authority to arrest without a warrant.

Chief Justice Taft's majority opinion established the validity of a special exception to the warrant requirement in automobile cases. The text and legislative history of the Volstead Act convinced him that Congress intended to distinguish "between the necessity for a search warrant in the searching of private dwellings and in that of automobiles and other road vehicles."[158] Thus, the issue before the Court was whether "such a distinction [was] consistent with the fourth amendment." The Chief Justice concluded the distinction was permissible because the amendment "does not denounce all searches or seizures, but only such as

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154 *E.g.*, Boyd v. United States, 286 F. 930 (4th Cir. 1923); Lambert v. United States, 282 F. 413 (9th Cir. 1922); United States v. Rembert, 284 F. 996 (S.D. Tex. 1922). For a particularly tolerant lower court decision, see United States v. Batement, 278 F. 231, 235 (S.D. Cal. 1922).

155 267 U.S. 132 (1925). The special treatment for automobiles has continued to the present. *See* Chambers v. Maroney, 399 U.S. 42 (1970). *But see* Arkansas v. Sanders, 442 U.S. 753 (1979) (warrant required to search luggage taken from automobile in a valid warrantless search); Delaware v. Prouse, 440 U.S. 648 (1979) (random checks for drivers' licenses and registration certificates violate the reasonableness standard of the fourth amendment); United States v. Chadwick, 433 U.S. 1 (1977) (warrant required to search locked footlocker in an automobile parked at a curb).

156 267 U.S. at 134-36.

157 Justice McReynolds filed a dissenting opinion in which Justice Sutherland concurred. *Id.* at 163-75. He denied the existence of any special exception to the warrant requirement for automobiles. Thus, the seizure could be justified only if it fell within the incident-to-arrest exception, and that exception was inapplicable since "[t]he facts known when the arrest occurred were wholly insufficient to engender reasonable belief that [the defendants] were committing a misdemeanor and the legality of the arrest cannot be supported by facts ascertained through the search which followed." *Id.* at 175.

158 *Id.* at 147.

are unreasonable."[159] He formulated the "true rule" governing such seizures: "[I]f the search and seizure without a warrant are made upon probable cause, that is upon a belief reasonably arising out of circumstances known to the seizing officer, that an automobile . . . contains that which by law is subject to seizure . . ., the search and seizure are valid."[160]

Applying this test, the Court upheld the validity of the *Carroll* seizure. The Court emphasized the following factors as justifying the search: the Carroll automobile was proceeding from the direction of Detroit, which "is one of the most active centers for introducing illegally into this country spiritous liquors"; the prohibition agents were conducting a "regular patrol" along one of the main highways between Detroit and Grand Rapids; the agents "had convincing evidence to make them believe" that the *Carroll* defendants were "bootleggers" in Grand Rapids; the agents had attempted to follow the defendants from Grand Rapids to Detroit two months earlier; the defendants were travelling "in the same automobile they had been in the night when they tried to furnish the whiskey to the officers"; and the defendants "were coming from the direction of the great source of supply for their stock to the place . . . where they plied their trade."[161] On the basis of these facts, the Court concluded that the officers "had reasonable cause" for believing that the defendants were carrying liquor."[162]

The Court distinguished the automobile exception to the warrant requirement from the incident-to-arrest exception and expanded the common law by allowing an officer to make warrantless arrests for misdemeanors committed in his presence. The traditional common law rule allowed warrantless arrests only when a misdemeanor amounting to a breach of peace was committed in the officer's presence,[163] but *Carroll* dropped the breach of peace element.[164] On the basis of this reformulation of the rule, the *Carroll* majority justified the arrest of the defendants. Since the defendants were committing the misdemeanor of illegally transporting intoxicating liquors in the presence of the prohibition agents, the agents could arrest them without seeking a warrant.

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159 *Id.*

160 *Id.* at 149.

161 *Id.* at 160. Detroit's position as a principal point of entry for liquor smuggled from Canada was a matter of general knowledge. *See, e.g.*, Selden, *Rum Row in the Middle West*, THE TWENTIES: FORD, FLAPPERS & FANATICS 105 (G. Mowry ed. 1963) [hereinafter cited as THE TWENTIES].

162 267 U.S. at 160.

163 *See generally* 9 HALSBURY, LAWS OF ENGLAND §§ 523, 607-17 (1909); *see also* 3 AMERICAN LAW INSTITUTE, COMMENTARIES ON TORTS 40-41 (1927) [hereinafter cited as ALI COMMENTARIES]; Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541, 673-76, 703-04 (1924).

164 267 U.S. at 156-58; *see* F. BLACK, *supra* note 30, at 31-32.

The reasonableness standard established in *Carroll* was flexible, allowing the Court to exclude evidence from searches found objectionable. *Gambino v. United States*[165] exemplifies the Court's use of this flexibility to find a search violative of the fourth amendment. The government contended that the search in *Gambino* was permissible under the *Carroll* test, and that the factual information available to the officers was not insignificant when compared to that available in *Carroll*.[166] The Supreme Court, however, did not even bother to compare the factual background with that found sufficient in *Carroll*. Instead, the Court curtly dismissed the government's contention "on the facts, which [the Court believed were] unnecessary to detail."[167]

Notwithstanding the Supreme Court's willingness to apply the *Carroll* standard more stringently in *Gambino*, the standard remained viable throughout the prohibition era. As late as 1931, the Court reconfirmed the automobile exception in *Husty v. United States*.[168] Justice Stone's opinion for a unanimous Court invoked the *Carroll* rule to conclude that the facts presented at the suppression hearing were sufficient to establish probable cause. While the Court upheld the convictions of the *Husty* defendants, it refused to approve the rather harsh sentences that the trial court had imposed under the Jones Act. It stopped short of finding the Jones Act inapplicable, but it did remand the case to the district court for resentencing.[169]

Although the Supreme Court never abandoned the automobile exception, the Court rebuffed an attempt to expand the exception to allow searches of garages near the end of the prohibition era, when support for prohibition had eroded. *Taylor v. United States*[170] involved the nocturnal search of a garage adjacent to the building where Taylor lived.[171] The Supreme Court found the search invalid and reversed the *Taylor* convictions, without attempting to decide whether the garage constituted part of the private dwelling.[172]

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165 275 U.S. 311 (1927). *See infra* notes 200-06 and accompanying text.

166 For a more detailed comparison of the facts known to the officers in *Gambino* with those available in *Carroll*, *see infra* note 217 and accompanying text.

167 275 U.S. at 313.

168 282 U.S. 694 (1931).

169 *Id.* at 703.

170 286 U.S. 1 (1932).

171 Having received complaints "over a period of about a year," a group of prohibition agents decided to investigate the Taylor premises. As they approached the garage, they detected the "odor of whiskey coming from within." Looking through "a small opening," they saw a number of cardboard boxes "which they thought probably contained jars of whiskey," and so they broke the door fastening. After entering the garage, they found the 122 cases of whiskey that formed the basis for Taylor's indictment. *Id.* at 5-6.

172 The garage, which the Court described as "a small metal building," was located "on the corner of a city lot and adjacent to the dwelling in which . . . Taylor resided." *Id.* at 5.

The *Taylor* Court conceded that the agents had sufficient evidence to obtain a search warrant. Nonetheless, it emphasized that the availability of such evidence does not allow officials to search a building without obtaining a warrant.[173]

The automobile cases like the prohibition cases generally, reflect the Court's tendency to mirror public opinion. *Carroll*'s sympathy to the practical needs of enforcement is typical of the early prohibition cases.[174] The *Carroll* opinion aided prohibition officials in two distinct ways.[175] First, *Carroll*'s recognition of an exemption from the search warrant requirement in automobile cases obviously saved time. Furthermore, the *Carroll* Court's willingness to find probable cause on meager evidence suggested that courts should avoid second-guessing the judgment of officials whose suspicions about contraband proved to be correct. Second, *Carroll* allowed officers to make arrests for misdemeanors that did not involve a breach of the peace. The American Law Institute's *Commentaries on Torts* acknowledged the novelty of the new approach by observing that until the *Carroll* decision legal commentators agreed that "there was no privilege to arrest without warrant for a misdemeanor other than breach of peace."[176] The *Commentaries* failed to note that the *Carroll* reformulation was particularly useful in Volstead Act cases. Since transportation of intoxicating liquors was a misdemeanor until the passage of the Jones Act in 1929,[177] and would not amount to a breach of the peace, it would not, by itself, justify a warrantless arrest.

The only aspect of the *Carroll* decision that was not typical of the general trend in prohibition cases was the lack of unanimity. As indicated above,[178] dissents did not become common in prohibition cases until the second half of the 1920s. The *Carroll* dissent is probably best explained by the extremely sketchy showing that the majority was willing to accept as adequate to demonstrate probable cause.[179]

Gambino, the one decision in the latter half of the 1920s, reflects the Court's increasing ambivalence toward prohibition in that period. On

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173 The Court also dismissed the incident-to-arrest exception as inapplicable because the garage was empty when the agents entered it. *Id.* at 6.

174 *See supra* notes 35-41 and accompanying text.

175 For an index listing of automobile search cases from the prohibition era, *see* FEDERAL DIGEST, *Intoxicating Liquor* § 249(g) (1941). For some extreme examples of overzealous enforcement, *see* F. BLACK, *supra* note 30, at 52-57.

176 3 ALI COMMENTARIES, *supra* note 163, at 40.

177 *See* Pub. L. No. 70-899, 45 Stat. 1446 (1929) (repealed 1935) (Jones Act); Pub. L. No. 66-66, § 29, 41 Stat. 316 (1919) (repealed 1933) (Section 29 of Title II of the Volstead Act).

178 *See supra* note 48 and accompanying text.

179 *See* 267 U.S. at 171-74 (McReynolds, J., dissenting); *see also* F. BLACK, *supra* note 30, at 45-47; H. MCBAIN, PROHIBITION: LEGAL AND ILLEGAL 85-86 (1928).

the one hand, *Gambino* demonstrates the Court's willingness to apply the *Carroll* test stringently in a case involving a Volstead Act violation that was relatively minor.[180] At the same time, *Gambino* also manifests the caution characteristic of the decisions rendered in the middle third of the prohibition era. Although the *Gambino* Court did not modify the *Carroll* test for automobile searches, it found the evidentiary showing insufficient in the later case.

By the time the Court decided *Taylor* in 1932, it had returned to a "liberal" construction of the fourth amendment even when that construction resulted in freeing some relatively serious offenders.[181] Notwithstanding the serious nature of the defendant's violation—agents seized 122 cases of whiskey from Taylor's garage—the Court emphatically reasserted the need for a warrant to search any building and rejected any lesser standard for structures not used as dwellings.[182]

Husty, the other automobile decision of the 1930s, seems initially to contradict the thesis of this article. Near the end of the prohibition era, *Husty* upheld the validity of an automobile search, and the Supreme Court gave no consideration to whether *Carroll* should be overruled in light of changing attitudes toward prohibition. The Court simply accepted *Carroll* as stating the applicable rule, and the only search issue that received any significant consideration was the issue of whether the officials had sufficient information to support a probable cause finding. Since the factual information known to the investigators was considerably greater than in *Carroll*, the Court affirmed the conviction.

What *Husty* suggests is that one aspect of legal ideology, the reluctance to overrule existing precedents, operated as a significant internal limit on the Supreme Court's doctrinal response to changing attitudes about prohibition. Together with *Go-Bart* and *Lefkowitz*,[183] *Gambino* demonstrated that the Court was willing to go to great lengths to distinguish early prohibition decisions. Yet in none of those cases did the Court expressly consider overruling an earlier opinion, and reluctance to overrule was typical of both the Taft and Hughes courts.[184] In *Husty*, the Court confronted a case that it was unable to distinguish from a decision rendered at the very beginning of the prohibition era. In that

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180 Record at 19, Gambino v. United States, 275 U.S. 311 (1927).

181 *See supra* note 150 and accompanying text.

182 One must, of course, concede that *Taylor* was an easy case, for the Solicitor General essentially asked for the reversal by advising the Court that, in his opinion, the search was illegal. 286 U.S. at 5.

183 *See supra* note 150 and accompanying text.

184 *See* A. MASON, THE SUPREME COURT FROM TAFT TO WARREN 15-16, 50 (1968 ed.); 1 W. SWINDLER, COURT AND CONSTITUTION IN THE TWENTIETH CENTURY 224-25 (1969); 2 *id.* at 37-38 (1970).

situation, it adhered to the earlier precedent, although it did manage to find a way to send the case back for resentencing.

C. COOPERATION WITH NONFEDERAL INVESTIGATORS

Prior to the prohibition era, Supreme Court decisions had confirmed that the fourth amendment applied only to searches by federal officials.[185] They established the so-called "silver platter" doctrine, which in federal criminal trials allowed the use of evidence obtained by non-federal investigators in searches that would have violated the fourth amendment if conducted by federal officials.[186] *Weeks* applied this rule to evidence obtained by state officials in a search conducted prior to the federal search that *Weeks* declared invalid.[187] Similarly, *Burdeau v. McDowell*[188] applied the silver platter doctrine to evidence obtained in a search by private citizens.

Of course, mere participation by state officials or private citizens did not transform a search conducted by federal officials into a nonfederal search. In fact, several lower court decisions early in the prohibition era applied the sanctions of the fourth amendment to searches conducted jointly by federal prohibition agents and state (or local) officers.[189] However, none of these cases challenged the basic rule that evidence obtained by nonfederal investigators was admissible regardless of the means by which it was obtained, and the Supreme Court summarily confirmed the rule in a one-sentence per curiam opinion during the 1924 term.[190]

Two Supreme Court decisions rendered during the middle years of the prohibition era reflected increased willingness to apply the fourth amendment to searches conducted by state officials with limited federal involvement. *Byars v. United States*[191] ruled that the ban on unreasonable

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185 Weeks v. United States, 232 U.S. 383, 398 (1914); National Safe Dep't Co. v. Stead, 232 U.S. 58, 71 (1914). *See also* Twining v. New Jersey, 211 U.S. 78 (1908); Ohio *ex rel.* Lloyd v. Dollison, 194 U.S. 445, 447 (1904).

186 The "silver platter" appellation apparently originated in a concurring opinion of Justice Frankfurter. Lustig v. United States, 338 U.S. 74, 79 (1949). *See generally* Grant, *The Tarnished Silver Platter: Federalism and Admission of Illegally Seized Evidence*, 8 U.C.L.A. L. REV. 1 (1961). The Court finally overruled the silver platter doctrine in 1960. Elkins v. United States, 364 U.S. 206, 208 (1960).

187 232 U.S. at 386.

188 256 U.S. 465 (1921).

189 *E.g., In re* Schuetze, 299 F. 827 (W.D.N.Y. 1924); United States v. Falloco, 277 F. 75 (W.D. Mo. 1922); *cf.* United States v. Bush, 269 F. 455 (W.D.N.Y. 1920) (arrest by city police does not preclude inquiry into prior search conducted by federal agents). *But see* Comment, *The Meaning of the Federal Rule on Evidence Illegally Obtained*, 36 YALE L.J. 536, 538-39 (1927) (summary of cases refusing to find joint action).

190 Center v. United States, 267 U.S. 575 (1925). For a brief description of the *Center* facts, *see* Gambino v. United States, 275 U.S. 311, 317 (1927).

191 273 U.S. 28 (1927).

searches applied to a search where the federal prohibition agent's involvement began after local police officers had secured a search warrant from a state court. In the following term, *Gambino v. United States*[192] held the amendment applicable to a search conducted by state officials "solely" for the benefit of the federal government.

In *Byars*, a state court issued a search warrant authorizing local police officers to search Byars' home. At the request of the officer in charge of the search, a federal prohibition agent accompanied the police officers and assisted in the search. The search uncovered "counterfeit strip stamps of the kind used on whiskey bottled in bond." The federal agent confiscated the stamps, and they formed the basis for the prosecution and conviction of Byars.[193]

The Supreme Court reversed Byars' conviction in a unanimous opinion by Justice Sutherland. The federal prohibition agent's participation as a federal enforcement officer prompted the reversal.[194] Two facts were essential: the police officer specifically asked a federal official whom he knew to be a prohibition agent to accompany him; and all of the stamps, "which were not within the purview of the state search warrant, ... were surrendered to the exclusive possession of the federal agent—a practical concession that he was there in his federal character."[195] Because the federal official thus participated "under color of his federal office," the search assumed the character of "a joint operation of the local and federal officers."[196]

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192 275 U.S. 310 (1927).

193 273 U.S. at 30-32. The Eighth Circuit affirmed Byars' conviction. 4 F.2d 507 (8th Cir. 1925), *rev'd*, 273 U.S. 28 (1927). Although the court acknowledged that the warrant would have been invalid if evaluated by federal standards, *id.*; *accord*, 273 U.S. at 29, it nonetheless admitted into evidence the stamps that were seized on the ground that the fourth amendment did not apply to searches by nonfederal investigators. According to the court of appeals, the underlying rule was clear: "[I]n order that the government may be bound by the action of the state officers, the search must have been initiated by government officers or government officers must have so far participated in that search as to make it in effect a federal undertaking." 4 F.2d at 508. Applying that rule in *Byars*, the court found insufficient federal involvement since state officers planned the raid, without the assistance or knowledge of the federal prohibition agent, and the expedition was brought to the federal agent's notice only when it was about to start.

The court of appeals insisted that sustaining Byars' conviction would have required a considerable broadening of the rule concerning the extent of federal participation necessary to make a search a federal undertaking. In effect, it would have required a holding "that, no matter how incidentally a government officer happens to be present, or to take part as a citizen in a state proceeding, that happening automatically converts a state search into a government proceeding." Since state officials had seized part of the evidence, "[that] part, in any view, [was] free from any participation on the part of the prohibition agent, unless his presence converted the entire search into a federal, as distinguished from a state, undertaking." *Id.*

194 273 U.S. at 32.

195 *Id.* at 32-33.

196 *Id.* at 33.

Notwithstanding its willingness to find federal participation sufficient to trigger the fourth amendment in *Byars*, the Court included two important qualifications. First, the Court emphasized "that the *mere* participation in a state search by one who is a federal officer does not render it a federal undertaking."[197] Something more was required, that the federal official participate "under color of his federal office" or "in his federal character."[198] Second, *Byars* reaffirmed the basic silver platter doctrine recognized by *Weeks*; it refused to "question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account."[199]

The Supreme Court returned to the task of distinguishing state and federal searches in the term following the *Byars* decision. *Gambino* excluded evidence seized by state officials without the active assistance of any federal officers, because the state officials conducted the search "solely" for the benefit of the federal government.

To understand *Gambino*, one must appreciate the atypical New York experience in the prohibition era. Although New York initially passed a state enforcement statute after the eighteenth amendment was ratified, the legislature repealed the state act just two years later.[200] The governor signed the repeal measure, however, only after he formally advised the legislature that the state police would continue to cooperate in enforcing the Volstead Act in New York.[201] As a result of this policy of cooperation, New York police authorities continued to apprehend violators of the Volstead Act and to conduct searches as part of their enforcement efforts.[202]

Gambino involved a search of the defendant's automobile by two New York state troopers.[203] Justice Brandeis' opinion for a unanimous Court held the fourth amendment applicable even though "[n]o Federal official was present at the search and seizure" and the defendants offered no evidence indicating that the "search and seizure were made in cooperation with federal officials."[204] The Court based its decision on the finding "that the state troopers believed that they were required by law

197 *Id.* at 32.

198 *Id.* at 33.

199 *Id.*

200 1923 N.Y. Laws 871 (repealed 1925).

201 275 U.S. at 314-16.

202 *Id.* at 315 n.2. *See also* Comment, *Prohibition Searches by New York State Police*, 37 YALE L.J. 784, 785 (1928) ("[A]lthough the [New York] enforcement [statute] has been repealed, the United States attorneys have generally based their prosecutions upon evidence secured by local police.").

203 For a description of the factual circumstances involved in the search, *see infra* note 225 and accompanying text.

204 275 U.S. at 315.

to aid in enforcing the [Volstead] Act" and "in the performance of that supposed duty" they conducted the *Gambino* search "solely for the purpose of aiding in the federal prosecution."[205] According to Justice Brandeis, the subsequent federal prosecution was, "in effect, a ratification of the arrest, search and seizure made by the troopers on behalf of the United States."[206] This ratification sufficiently involved the federal government to bring the fourth amendment into play.

Gambino was the last Supreme Court decision to address the cooperation issue during the prohibition era. Although one commentator observed that "[i]t would be but a short step from the *Gambino* case to hold that the constitutional guarantees of [the fourth and fifth] amendments restrict the activities of state agencies generally,"[207] the Supreme Court did not take that step until long after prohibition.[208] Nor did the lower courts expand the *Byars-Gambino* rules in subsequent prohibition cases. Only occasionally did they apply fourth amendment standards to searches in which the federal involvement was significant.[209] When the federal involvement was minimal, lower courts continued to apply the silver platter doctrine until the end of the prohibition era.[210]

At first glance, these decisions might seem inconsistent with the general pattern of decisions, for they are less ambivalent than other decisions of the middle years. *Byars* and *Gambino*, for example, can easily be contrasted with *Olmstead* and *Marron*; the cooperation cases actually reversed convictions and did not merely reflect some general misgivings.

That analysis, however, ignores two crucial features of the cooperation cases. First, *Byars* and *Gambino* involved relatively modest violations when compared with the large quantities of liquor seized in *Marron* or the huge smuggling operation involved in *Olmstead*. When police executed the *Byars* search warrant, they found neither intoxicating liquor nor any liquor manufacturing equipment. They only discovered a handful of counterfeited bonding stamps of the type used for bonded whiskey.[211] Similarly, the *Gambino* search uncovered only fourteen cases

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205 *Id.* The Court declined to determine "[w]hether the laws of the state actually imposed on the troopers the duty of aiding the Federal officials in the enforcement of the . . . Act." *Id.* at 317.

206 *Id.* at 317.

207 Comment, *supra* note 202, at 789.

208 Mapp v. Ohio, 367 U.S. 643 (1961).

209 *E.g.*, Crank v. United States, 61 F.2d 981 (8th Cir. 1932); Hall v. United States, 41 F.2d 54 (9th Cir. 1930); United States v. DeBousi, 32 F.2d 902 (W.D. Mass. 1929).

210 *E.g.*, Aldridge v. United States, 67 F.2d 956 (10th Cir. 1933); United States v. Myers, 46 F.2d 317 (M.D. Penn. 1931); United States v. Walker, 41 F.2d 538 (E.D. Tenn. 1930).

211 Large scale bootleggers often had much larger quantities of stamps. *See* H. ASBURY, *supra* note 4, at 275 (describing the seizure of "more than eight hundred thousand liquor labels and almost one hundred thousand internal-revenue stamps" as "not an especially large haul.").

of ale in the defendant's automobile. Further, neither decision necessarily precluded prosecution of offenders. *Gambino* was a decision with limited applicability, for only six other states joined New York in repealing their state enforcement statutes,[212] and the rationale did not apply to searches by state officials in states with their own prohibition enforcement laws. Moreover, states were still free to use evidence obtained in joint state-federal searches in state trials.[213]

Thus, the *Byars* and *Gambino* decisions seem fully consistent with the trend of decisions in the middle years of prohibition. Relatively minor offenders were released while serious offenders could be punished in the vast majority of states that maintained state enforcement statutes.

Byars and *Gambino* were the only prohibition era Supreme Court decisions on nonfederal cooperation with federal investigators, but the lower federal courts continued to struggle with the problem during the prohibition era. Although the evidence is far from conclusive, decisions of the district courts and courts of appeal suggest that the lower federal courts shared the Supreme Court's increasing concern over the methods of prohibition enforcement. As one would expect, the lower court decisions reflect less innovation when modifying judicial rules. Nonetheless, in the final years of prohibition the lower courts were willing to apply federal standards to "joint" searches.[214] Moreover, in several of the post-*Gambino* decisions finding insufficient the extent of federal involvement, the facts indicate that the search would have satisfied fourth amendment standards in any event.[215]

D. THE PROBABLE CAUSE REQUIREMENT

In *Carroll*, one of the early prohibition cases, the Supreme Court applied the fourth amendment's requirement that search warrants issue only "upon probable cause" to warrantless searches of automobiles. The question of what constituted "probable cause" was therefore frequently litigated, and the Supreme Court dealt with the question throughout the prohibition era.

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212 *See* A. SINCLAIR, *supra* note 4, at 196. As late as 1930, only four states had repealed their enforcement statutes.

213 However, the number of states adopting the exclusionary rule as a matter of state law increased significantly during the prohibition era. *See* Andrews, *Historical Survey of the Law of Searches and Seizures*, 34 LAW NOTES 42, 46 (1930); Fraenkel, *Recent Developments in the Law of Search and Seizure*, 13 MINN. L. REV. 1, 2-6 (1928); Comment, *supra* note 189, at 537 n.2.

214 *See* Crank v. United States, 61 F.2d 981 (8th Cir. 1932); Hall v. United States, 41 F.2d 54 (9th Cir. 1930); United States v. DeBousi, 32 F.2d 902 (W.D. Mass. 1929).

215 *E.g.*, Aldridge v. United States, 67 F.2d 956 (10th Cir. 1933); United States v. Walker, 41 F.2d 538 (E.D. Tenn. 1930); United States v. One Ox-5 American Eagle Airplane, 38 F.2d 106 (W.D. Wash. 1930). *But see* Miller v. United States, 50 F.2d 505 (3d Cir. 1930) (evidence seized by state officers in warrantless search of building held admissible).

By the time of prohibition, the Court had developed a reasonableness test for probable cause that it applied in challenges to warrants and warrantless searches throughout the prohibition era. The commonly invoked formulation of the test came from a nineteenth century decision: "If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient."[216]

Despite the formal consistency in the Supreme Court's definition of probable cause in prohibition-era cases, analysis of the facts of the cases reveals an uneven application of the definition. The Court imposed an increasingly stringent probable cause requirement as the years passed.

Carroll was the first of the probable cause decisions during the prohibition. The Court found that the officers had "reasonable cause" for believing the defendants were "carrying liquor" on the basis of five factors: (1) the prohibition agents' observation of the defendants as they were headed from the direction of "one of the nation's most active centers for introducing illegally into this country spirituous liquor"; (2) the availability of "convincing evidence" (never described in the opinion) which made the agents believe that the defendants were bootleggers; (3) the agents' aborted attempt to follow the defendants into Detroit two months earlier; (4) the defendants' use of the automobile used two and one-half months earlier when they had offered but failed to provide the agents with alcoholic beverages; and (5) the direction of the defendants' travel, from "the great source of [their liquor] supply . . . to the place . . . where they plied their trade."[217] Relying only on this sparse evidence, the Court required no particular evidence indicating that the defendants were carrying liquor on the day in question. The facts relied upon would have existed anytime the defendants were traveling from the direction of Detroit toward Grand Rapids in the particular automobile they were using.

The probable cause issue also surfaced in two other 1925 decisions. In both cases, the Court found the facts sufficient to establish probable cause, although neither upheld the validity of a search based on evidence as flimsy as that offered in *Carroll*.

The principal issue in *Steele v. United States (Steele I)*[218] was the adequacy of the warrant's description of the place to be searched. However, the defendants also argued that the magistrate improperly issued the warrant since the prohibition agents had not sufficiently established probable cause. In contrast to *Carroll, Steele I* was a simple case. A pro-

216 267 U.S. at 161 (quoting Stacey v. Emery, 97 U.S. 642, 645 (1879)).

217 267 U.S. at 160.

218 267 U.S. 498 (1925).

hibition agent had observed workers unloading cases with the word "whiskey" on them. Based on this testimony, the Supreme Court dismissed the probable cause issue, concluding that the prohibition agent's observations were sufficient to support a probable cause finding.[219]

The evidence of probable cause was more equivocal in *Dumbra v. United States*,[220] although it was certainly stronger than the evidence in *Carroll*. The *Dumbra* defendants owned a winery that had a permit to produce wine for non-beverage purposes, and they also owned a grocery store adjacent to the winery. At the grocery store, prohibition agents purchased wine they observed being carried from the winery.[221]

As in *Steele I*, the Supreme Court unanimously rejected the contention that the agents lacked probable cause to make the seizures in the winery.[222] The Court reasoned that the facts submitted to the magistrate "lead to the inference that the suspected premises were the source of supply" and thus "gave rise to a reasonable belief that the liquors . . . [in the winery] were possessed for the purpose and with the intent of selling them unlawfully to casual purchasers."[223]

Gambino was the only probable cause decision during the middle years of prohibition.[224] It adhered to the *Carroll* probable cause formulation in a warrantless search of an automobile but found the officers lacked probable cause. The opinion is enigmatic; the Court merely announced its conclusion without explaining why the facts known to the investigating officers were insufficient. Nonetheless, the record indicates that the Court applied the *Carroll* standard in a more stringent fashion, since the information which officers had was at least as strong as the evidence employed by the *Carroll* court to uphold the probable cause finding.[225]

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219 *Id.* at 504. The investigation leading to the *Steele* warrant was conducted by Isidor Eistein and Moe Smith, probably the two most celebrated prohibition agents in the country. *See* H. ASBURY, *supra* note 4, at 211-13; C. MERZ, *supra* note 4, at 135-37; Talley, *Einstein, Rum Sleuth*, THE TWENTIES, *supra* note 161, at 107.

220 268 U.S. 435 (1925).

221 To secure a warrant authorizing a search of the grocery store and winery and seizure of any intoxicating liquor possessed in violation of the Volstead Act, the prohibition agents advised the United States Commissioner about the purchases but neglected to mention that the winery had a valid permit.

222 The Court did criticize the agents' failure to disclose to the magistrate that the defendants had a permit to manufacture wines for nonbeverage purposes. 268 U.S. at 438.

223 *Id.* at 441.

224 275 U.S. 311 (1927).

225 Two experienced prohibition agents observed the defendants' car about eleven miles from the border traveling away from Canada on a road that was frequently used by bootleggers. The rear end of the defendants' car "hung pretty low," suggesting to the officers that "[t]here was a load of booze." The officers followed the defendants to a nearby village, where the defendants stopped the car and got out to go into a garage owned by an individual who had "a reputation of being a bootlegger." After a brief conversation with the defendants, the

During the final years of the prohibition era, the Court continued to apply the probable cause requirement rather strictly, especially when reviewing search warrant cases.[226] The best example of this strict review is *Grau v. United States*,[227] in which the Court found the facts presented to the magistrate insufficient to establish probable cause. *Grau* involved a provision of the Volstead Act limiting the right to search private dwellings in enforcing prohibition. Under the Act, a magistrate could issue search warrants for private dwellings only when prohibition agents had probable cause to believe either that intoxicating liquor was being sold on the premises or that the residence was "in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house."[228] For any other type of building, probable cause to believe that any offense under the Act was being committed was sufficient to authorize issuance of the warrant.[229]

The issue in *Grau* was whether evidence that large quantities of intoxicating liquor were being manufactured in a dwelling could constitute probable cause to infer a selling operation. According to the affidavit for the warrant, the affiant saw people haul cans commonly used in hauling whiskey up to the dwelling, and then haul similar containers away from it, apparently heavily loaded. He also "smelled odors and fumes of cooking mash coming from the place," from which he concluded that "there [was] a still and whiskey mash on the premises."[230] After the United States Commissioner issued a warrant, prohibition agents seized a still and 350 gallons of whiskey.

The Supreme Court reversed Grau's conviction in a unanimous opinion by Justice Roberts.[231] The Court criticized the Sixth Circuit's

officers searched the automobile and discovered fourteen cases of ale. Record at 19, Gambino v. United States, 275 U.S. 311 (1927).

226 *See* Sgro v. United States, 287 U.S. 206 (1932); Nathanson v. United States, 290 U.S. 41 (1930).

227 287 U.S. 124 (1932).

228 Volstead Act, ch. 85, 41 Stat. 315 (repealed 1935).

229 *Id.*

230 287 U.S. at 127. The affidavit did not describe the place to be searched as a residence.

231 56 F.2d 779 (6th Cir. 1932), *rev'd*, 287 U.S. 124 (1932). The court of appeals relied on one of its earlier precedents which held that the Act's provision allowing dwellings to be searched for sale offenses only was "satisfied by an affidavit establishing probable cause for the charge that the premises are being used for the prosecution of commercial sales, involving not only manufacture, but storage, delivery to purchasers, the filling of orders, and, generally the maintenance of the premises to be searched as a headquarters for supervising a selling business." *Id.* at 781 (citing Kasprowicz v. United States, 20 F.2d 506 (6th Cir. 1927)). In adopting this rationale for its decision, the court of appeals deliberately avoided "the question whether the manufacture of intoxicating liquor in large quantities in a dwelling house may be of such commercial character as to justify a search warrant on the theory that the dwelling is used in part for a business purpose." 56 F.2d at 781.

Judged by this standard, the court concluded that the *Grau* affidavit was sufficient to establish probable cause to believe that the dwelling was "being used for the unlawful sale of

"broad construction" of the Act, through which it found the allegations adequate to warrant a belief that the dwelling was being used as the headquarters for a merchandising effort. According to Mr. Justice Roberts, such a construction "unduly narrow[ed] the guaranties of the Fourth Amendment, in consonance with which the statute was passed," and it thereby conflicted with the rule that fourth amendment protections are to be liberally construed.[232]

Justice Roberts declared that the *Grau* warrant should be judged by the reasonableness standard.[233] He concluded that "[w]hile a dwelling used as a manufactory or headquarters for merchandising may well be and doubtless often is the place of sale, its use for those purposes is not alone probable cause for believing that actual sales are there made."[234]

Of course, the Court's application of a stricter standard of probable cause does not mean that the Supreme Court struck down every search. Nonetheless, the cases in which the Court did find an adequate showing of probable cause were supported by considerable evidence.

Husty provides an example of such a case. As described above,[235] *Husty* reaffirmed the *Carroll* rule allowing warrantless searches of private automobiles when supported by probable cause. The Court held that the facts known to the officers in the particular case were adequate; however, the factual showing was quite substantial. One of the prohibition agents involved in the *Husty* search "testified that he had known Husty to be a 'bootlegger' for a number of years," that he had arrested Husty on two earlier occasions for violating the Volstead Act, and that both arrests had resulted in convictions. On the day the search occurred, an informant advised the agent that Husty "had two loads of liquor in automobiles of a particular make and description, parked in particular places on named streets." The prohibition officer had known the informant "for about eight years," and on prior occasions, the informant had given the officers "similar information" that had proved reliable. When the officers proceeded to one of the locations the informant had named, they found one of the described automobiles unattended. They later observed the *Husty* defendants get into the car. After Husty started the car, the agents stopped him and conducted the

intoxicating liquor." *Id.* "One does not," the court noted, "manufacture liquor for his own use in such quantities as to require wholesale deliveries of . . . [the] ingredients of mash"; nor does whiskey manufactured for personal use ordinarily involve shipment "from the premises in cans, by automobile or truck loads" or the return of cans for refilling. *Id.* Since the *Grau* affidavits contained such allegations, they were "clearly adapted to warrant the belief that the dwelling [was] being used as headquarters for the merchandising of liquor." *Id.*

232 Grau v. United States, 287 U.S. at 128.

233 *Id.*

234 *Id.* at 128-29.

235 *See supra* notes 168-69 and accompanying text.

search that uncovered eighteen cases of whiskey.[236]

The factual showing in *Husty* provides a vivid contrast to that made in *Carroll*, the case that originated the probable cause test applied in *Husty*. When the Court decided *Carroll* at the very beginning of the prohibition era, it permitted the warrantless search of an automobile on little more than a suspicion that the vehicle's occupants were bootleggers.[237] By the time that *Husty* was decided in 1931, however, the Court approved the search only after the introduction of much more substantial evidence that the automobile to be searched contained intoxicating liquors.

The prohibition decisions that address the probable cause issue illustrate that although the formulation of the probable cause standard remained constant, the Court's application of the rule shifted substantially. The early cases consistently found probable cause, even in cases where factual support for the finding was minimal. In the middle years, the Court required a greater showing of probable cause in a case involving a warrantless automobile search that uncovered a relatively minor violation. Finally, towards the end of the prohibition, *Grau* applied the probable cause standard restrictively to a search warrant, in a case involving an operation of commercial dimensions. Yet despite the increasingly strict application of the reasonableness standard, the Court never abandoned the standard itself; *Husty* indicates that the Court remained willing to find probable cause when presented with a strong factual basis for doing so.

E. WARRANT REQUIREMENTS

The language of the fourth amendment imposes two limits on the issuance of warrants: the place to be searched and the persons or things to be seized must be particularly described, and probable cause to issue the warrant must be supported by oath or affirmation. In addition, the Volstead Act added a host of statutory requirements applicable to warrants issued for prohibition searches.[238] This subsection analyzes Supreme Court decisions construing and applying these constitutional and statutory restrictions.

One statutory issue litigated fairly early in the prohibition era was whether prohibition agents were authorized to execute warrants issued

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236 282 U.S. 694, 700 (1931).

237 *See supra* note 217 and accompanying text.

238 The Volstead Act incorporated the procedural requirements of the Espionage Act, ch. 30, 40 Stat. 228 (1917), by reference. Volstead Act, ch. 85, § 3, 41 Stat. 308 (repealed 1935). *See also id.* at 315 (Section 25 of Title II allowing private dwellings to be searched only when they are used for unlawful sales of intoxicating liquors or when they are used in part for business purposes).

under the Volstead Act. Under the Act, a magistrate issued a warrant "to a civil officer of the United States."[239] The Constitution employs a similar phrase, "[o]fficers of the United States," in a manner that excludes prohibition agents,[240] and earlier Supreme Court decisions had indicated that, "when employed in the statutes of the United States," the constitutional phrase is "usually [taken] to have the limited constitutional meaning."[241]

Notwithstanding the superficial appeal of this semantic argument, the early decision of *United States v. Steele (Steele II)*[242] concluded that a prohibition agent was a person to whom warrants could properly be directed under the statute. Chief Justice Taft insisted that the Court had occasionally "given [the phrase] an enlarged meaning,"[243] and he found such an enlarged construction justified in the warrant context because the purpose of the statutory phrase was to require "that the person designated shall be a civil and not a military agent of the government."[244]

In *Steele I*[245] the Supreme Court considered the constitutional requirement that the warrant particularly describe the place to be searched. The warrant attacked in *Steele I* authorized the search of a building described as "the garage located in the building at 611 West 46th Street," together with "any building or rooms connected or used in connection with said garage."[246] The building searched was a four story building that housed two related businesses, Indian Head Auto Truck Service and Indian Head Storage Warehouse. Even though the businesses had separate street addresses (No. 609 and No. 611), the Supreme Court concluded that "the garage business covering the whole first floor and the storage business above were of such a character and so related

239 Espionage Act, ch. 30, 40 Stat. 229 (1917). This provision was incorporated by reference from the Espionage Act. *See* note 238 *supra*.

240 U.S. CONST. art. II, § 2 (even "inferior" officers must be appointed by the President, the courts or department heads).

241 Steele v. United States, 267 U.S. 505, 507 (1925) (Steele II) (citing Burnap v. United States, 252 U.S. 512 (1920)); United States v. Smith, 124 U.S. 525 (1888); United States v. Mouat, 124 U.S. 303 (1888).

242 267 U.S. 505 (1925).

243 *Id.* at 507.

244 *Id.* To support this interpretation of the Act, the Court emphasized three arguments: (1) the restrictive interpretation would exclude many persons who would otherwise satisfy the Espionage Act's language, that the person to whom the warrant is issued shall be one "duly authorized to enforce or assist in enforcing any law of the United States"; (2) the use of similar phrases in various parts of the Volstead Act in circumstances that support the broader construction; and (3) the negative implication of the provision in the Volstead Act making it a misdemeanor for a prohibition agent to search a dwelling without a warrant. *Id.*

245 Steele v. United States, 267 U.S. 498 (1925) (Steele I), was a companion case that involved the same individual whose conviction was affirmed in *Steele II*.

246 *Id.* at 500.

. . . that there was no real division in fact or in use of the building into separate halves."[247]

In executing the warrant, the prohibition agents searched the entire building. They seized large quantities of liquor from the 611 side of the building, listed in the warrant, as well as from the 609 side of the building, not specifically mentioned in the warrant.[248]

Chief Justice Taft's opinion for a unanimous Court summarily dismissed the suggestion that the description in the warrant was inadequate to justify the search. The Chief Justice found that the warrant indicated the whole building as the place to be searched.[249] All that was required, the Chief Justice emphasized, was a sufficient description so "that the officer with a search warrant can with reasonable effort ascertain and identify the place intended."[250]

Nor did the Chief Justice find any merit in the suggestion that the search went "too far."[251] The affiants received permission to search any building or rooms connected with or used in connection with the garage, and thus the search was justified because "the elevator of the garage connected it with every floor and room in the building and was intended to be used with it."[252]

Steele I was the only Supreme Court decision that attempted to define the precision with which the warrant must describe the premises to be searched. Two cases decided during the middle years of prohibition, however, raised a related issue: the need for a description of the items to be seized. Both were less sympathetic to enforcement authorities than *Steele I*.

The description issue surfaced directly in *Marron* when agents executing a valid search warrant discovered incriminating evidence not specifically named in the warrant. The *Marron* Court ultimately sustained the legality of the search as incident to a lawful arrest.[253] Nonetheless, it adopted a rather strict approach to the description requirement. De-

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247 *Id.* at 502-03. The building contained three entrances: "One on the 609 side, which [was] used, and which [led] to a staircase running up to the four floors"; a similar staircase on the 611 side, which was closed; and, in the middle of the building, "an automobile entrance . . . into a garage and opposite to the entrance . . . an elevator reaching to the four stories." *Id.* at 502.

248 From the third floor on the 609 side of the building, they seized "150 cases of whiskey, 92 bags of whiskey, and one five-gallon can of alcohol"; and from the second floor of that side, "33 cases of gin." On the second floor of the 611 side, they seized "six 5-gallon jugs of whiskey, 33 cases of gin, 102 quarts of whiskey, . . . two 50-gallon barrels of whiskey, and a corking machine." *Id.* at 503.

249 *Id.*

250 *Id.*

251 *Id.*

252 *Id.*

253 *See supra* notes 122-26 and accompanying text.

claring that the purpose of the requirement was to ensure that "nothing is left to the discretion of the officer executing the warrant,"[254] it found that the search warrant used by the officer did not allow the seizure of the goods involved. Without explanation, *Marron* avoided two obvious methods for introducing flexibility into the warrant execution: (1) broadly construing the warrant language which covered "intoxicating liquors and articles for their manufacture," to include items associated with the disposal of illegally manufactured liquor and thus to cover the ledger and bills seized; or (2) fashioning an incident-to-warrant exception paralleling the rule permitting the seizure of items discovered pursuant to a valid arrest.

Byars manifested a similarly rigid construction of warrant language, even though the Court never explicitly discussed the description issue. The state warrant involved in *Byars* authorized seizure of "instruments and materials used in the manufacture of such [intoxicating] liquor,"[255] and the items seized were counterfeit bonding stamps, the most obvious use for which was to give bootleg whiskey the appearance of a reputable brand.[256] Nonetheless, the *Byars* opinion dismissed the applicability of the warrant with the dogmatic assertion that its language did not cover the items seized.

During the final years of prohibition, the Court strictly construed both statutory and constitutional provisions governing warrants. For example, *Grau* introduced, in almost off-hand dictum, a new procedural safeguard requiring a warrant to be supported by "evidence which would be competent in the trial of the offense before a jury."[257]

Two subsequent decisions displayed similarly strict attitudes toward procedural requirements. In *Sgro v. United States*,[258] the Court refused to allow a magistrate to "reissue" a warrant when the warrant's ten-day period of validity[259] had expired. Explicitly embracing the liberal rule of construction for fourth amendment rights announced in the pre-prohibition cases,[260] the Court emphasized that the statutes imposed certain conditions that had to be satisfied. A magistrate could not escape those conditions "by describing the action as a reissue" of an earlier

254 275 U.S. at 196.

255 273 U.S. at 29. The actual holding of *Byars* is described in greater detail in the text accompanying notes 193-99 *supra*.

256 *See* H. ASBURY, *supra* note 4, at 274-75.

257 287 U.S. at 128. For contemporaneous criticism of this dictum, see Note, *The Probable Cause Requirement for Search Warrants*, 46 HARV. L. REV. 1307, 1310-11 (1933).

258 287 U.S. 206 (1932).

259 The ten-day limit was included in Section 11 of Title XI of the Espionage Act, ch. 30, 40 Stat. 229 (1917), which was incorporated into the Volstead Act by reference. *See supra* note 238.

260 287 U.S. at 210, 211.

warrant. Similarly, *Nathanson v. United States*[261] held that the fourth amendment requires that the affidavit presented to the magistrate be based on "facts or circumstances" within the affiant's knowledge. "Mere affirmance of belief or suspicion," the Court asserted, was "not enough."[262]

The warrant cases address a wider array of issues than do the cases in the other doctrinal subcategories discussed above. Nevertheless, when considered as a group, they demonstrate a similar pattern. The early cases, *Steele I* and *II*, uniformly supported the government's position. In *Marron* and *Byars*, the decisions of the middle years, the Court became more critical of prohibition enforcement techniques, but not to the point of allowing serious violators to go free.[263] Finally, in the last years of national prohibition, the Court resurrected the pre-prohibition rule calling for liberal construction of the fourth amendment. During this period, *Grau* introduced a new procedural rule by way of dictum, *Sgro* construed a federal statute to deny magistrates discretion to reissue warrants, and *Nathanson* introduced an actual-knowledge element into the fourth amendment's affidavit requirement.

IV. Fourth Amendment Doctrine at the End of the Prohibition Era

Analysis of the fourth amendment cases at the repeal of prohibition reveals two dramatic changes in the nature of fourth amendment problems. First, fourth amendment doctrine became more complex during the prohibition era. Second, the cases increasingly involved factual circumstances not easily analyzed in terms of the "home" and "papers" categories that dominated the cases decided before 1920.[264]

The most obvious change is the increased complexity of fourth amendment doctrine. By the end of the prohibition era, an assortment of new exceptions, qualifications, and refinements abound. In effect, the Court had molded a rather limited group of precedents into a detailed body of doctrine that has retained its basic structure to the present.[265]

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261 290 U.S. 41 (1933).

262 *Id.* at 47. Although the Volstead Act contained an oath or affirmation requirement, the statutory requirement did not apply in *Nathanson* because the search was conducted by a customs agent pursuant to a warrant issued by a state judge. *Id.* at 44-45. The customs agent had, however, received his information "from prohibition officials and from an unnamed informer." Nathanson v. United States, 63 F.2d 937 (3d Cir. 1933), *rev'd*, 290 U.S. 41 (1933).

263 *Marron*, the conviction that the Supreme Court affirmed, involved a saloon-type operation that was apparently open to the public, *see supra* note 122 and accompanying text. By contrast, the defendant whose conviction was overturned in *Byars* had a relatively modest collection of counterfeit banding stamps. *See supra* notes 191, 211 and accompanying text.

264 *See supra* notes 71-76 and accompanying text.

265 Although not limited to Supreme Court cases, secondary sources confirm the extent to

The Court contributed to the growth of doctrinal complexity in two ways. One was to create new doctrinal categories by holding that the fourth amendment's protection of the home does not extend to "open fields,"[266] that the amendment does not apply to the tapping of telephone conversations,[267] and that the warrant requirement does not apply to automobile searches.[268] More commonly, the Court refined subcategories that had remained undeveloped in pre-prohibition cases. For example, the Court expanded the common law of arrest[269] and struggled to define the scope of warrantless searches conducted incident to such arrests.[270] It also defined the degree of federal involvement necessary to apply the fourth amendment to searches conducted in whole or in part by state or local officers;[271] it struggled to explain and to apply the probable cause standard in a variety of circumstances;[272] and it gave content to statutory and constitutional provisions governing the issuance of search warrants.[273]

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which the content of fourth amendment doctrine expanded during the prohibition era. The first treatise on the subject appeared in 1926 when Asher Cornelius published his 925 page *Law of Search and Seizure*. Just four years later, he published a second edition of 1265 pages; in explaining the need for the new edition, he called attention to the "[h]undreds of new questions [that] have been presented to the courts for solution" since the preparation of the manuscript for the first edition. He claimed that the revised version incorporated "fifty late decisions by the United States Supreme Court, in which search and seizure are involved." A. CORNELIUS, LAW OF SEARCH AND SEIZURE iii (2d ed. 1930).

One can detect additional evidence of the increasing complexity of fourth amendment doctrine in the growth of the indexing system to the National Reporter System. As originally presented in the *Century Edition of the American Digest*, the category "Searches and Seizures" was divided into seven "key" numbers. 43 *Century Edition of the American Digest* 2803 (1903). When the *Third Decennial Digest* (covering cases decided in the period 1916-1926) was published in 1929, it added thirty-nine subtopics. 24 *Third Decennial Edition of the American Digest* 1157 (1929). Thus the new digest contained more than six times as many indexing categories.

266 Hester v. United States, 265 U.S. 57, 59 (1924); *see supra* notes 81-85 and accompanying text.

267 Olmstead v. United States, 277 U.S. 438 (1928); *see supra* notes 86-111 and accompanying text.

268 Husty v. United States, 282 U.S. 694 (1931); Carroll v. United States, 267 U.S. 132 (1925); *see supra* notes 155-69 and accompanying text.

269 Carroll v. United States, 267 U.S. 132 (1925); *see supra* notes 163-64, 176-77 and accompanying text.

270 Lefkowitz v. United States Attorney, 285 U.S. 452 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); Marron v. United States, 275 U.S. 192 (1927); United States v. Lee, 274 U.S. 559 (1927); Agnello v. United States, 269 U.S. 20 (1925). *See supra* notes 121-63 and accompanying text.

271 Gambino v. United States, 275 U.S. 310 (1927); Byars v. United States, 273 U.S. 28 (1927). *See supra* notes 185-215 and accompanying text.

272 Grau v. United States, 287 U.S. 124 (1932); Husty v. United States, 282 U.S. 694 (1931); Gambino v. United States, 275 U.S. 310 (1927); Dumbra v. United States, 268 U.S. 435 (1925); Steele v. United States, 267 U.S. 498 (1925); Carroll v. United States, 267 U.S. 132 (1925).

273 Nathanson v. United States, 290 U.S. 41 (1933); Sgro v. United States, 287 U.S. 207 (1932); Grau v. United States, 287 U.S. 124 (1932); Marron v. United States, 275 U.S. 192

Section III documents the changing trends in the Supreme Court's treatment of five doctrinal categories during the prohibition era. Because no single trend continued throughout the period, simple characterization of the body of doctrine extant in 1934 as pro-government or pro-defendant is impossible. Different doctrinal subcategories reflect restrictive, ambivalent, or sympathetic approaches to the fourth amendment depending on when the Court rendered the decisions.

Increasing doctrinal complexity is not the only change that occurred in the search and seizure cases decided during the prohibition era. A significant number of decisions were not easily compartmentalized in pre-prohibition categories.

As indicated above,[274] the early fourth amendment cases primarily addressed two problems: protecting an individual's home as a sanctuary and maintaining the secrecy of papers that related to the personal or business affairs of individuals. Historically[275] and linguistically,[276] these concepts formed the core of the fourth amendment, and the Supreme Court zealously protected both interests in the early twentieth century cases. But in certain borderline cases, the Court was more tolerant of governmental searches. It carved an early exception in customs (i.e., smuggling) cases, when the government was looking for contraband; it also recognized an incident-to-arrest exception to the customary warrant requirement, when the individual seeking protection was a person whom the government could lawfully arrest. In addition, the Court struggled with the vexing problem of how to fit corporations into a provision designed to make "the people" secure.

Naturally, cases involving the core concepts of house and papers[277] continued to arise during the prohibition era. In cases challenging searches of places that would obviously fall within the definition of "houses," the Supreme Court was relatively consistent in continuing the pre-prohibition protection of the defendant's home. From *Amos* to *Grau*, the Court adopted a strict approach when reviewing searches of buildings in which individuals lived.

(1927); Byars v. United States, 273 U.S. 28 (1927); Steele v. United States, 267 U.S. 505 (1925); Steele v. United States, 267 U.S. 498 (1925). *See supra* notes 238-62 and accompanying text.

274 *See supra* notes 71-76 and accompanying text.

275 *See* Weeks v. United States, 232 U.S. 383, 389-90 (1914); Boyd v. United States, 116 U.S. 616, 625-30 (1886); Andrews, *supra* note 213, at 42-46; Wood, *The Scope of the Constitutional Immunity Against Search and Seizure*, 34 W. VA. L.Q. 1, 1-10 (1927-28).

276 U.S. CONST. amend. IV: "The right of the people to be secure *in their persons, houses, papers, and effects*, against unreasonable searches and seizures, shall not be violated. . . ." (emphasis added).

277 Grau v. United States, 287 U.S. 124 (1932); Lefkowitz v. United States Attorney, 284 U.S. 452 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); Marron v. United States, 275 U.S. 192 (1927); Amos v. United States, 255 U.S. 313 (1921).

Nevertheless, the Court's protection of the rights of the defendant in "house" and "papers" cases was not absolute. Dictum in *Agnello*, the one drug case of the period, approved searches of houses where arrests took place,[278] and considerably less consistency is evident in cases concerning seizures of papers. The latter cases can be better summarized by reference to the general pattern of prohibition decisions.[279]

More importantly, the general tendency of the prohibition cases was not to refine doctrine within core areas but to expand the borders of the central categories. Again and again, the Court had to provide more precise definitions of the places and things protected by the amendment. Did "houses" include the open fields surrounding them[280] or garages located near them?[281] Did telephone conversations fall within the protection afforded to "papers and effects"?[282] Did the "effects" protected by the amendment include liquor that the Volstead Act[283] declared was contraband to which no property rights attached? In general, should one appeal to the narrower approach of the smuggling cases or the broader approach of the papers cases?[284]

Applying the amendment proved particularly difficult in cases involving automobiles. The warrant clause of the fourth amendment required particular description of "the place to be searched" and "the things to be seized." Unfortunately, that language does not literally apply to an automobile search that involves the search (not merely the seizure) of a "thing" rather than a "place." In the face of the amendment's ambiguity, the Court's response was understandable, if not predictable. It improvised by jettisoning the normal warrant requirement and applying a watered down version of fourth amendment protection.

Seen in this light, *Carroll* represents an important step in the evolution of fourth amendment doctrine for it presages the modern emphasis on reasonable expectations of privacy.[285] *Carroll* adopted the very approach that the majority in *Olmstead* later rejected. It dislodged fourth amendment doctrine from its property moorings, which protected the

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278 269 U.S. at 30.

279 For a discussion of the major "paper" cases, *Marron, Go-Bart*, and *Lefkowitz*, *see supra* notes 122-46 and accompanying text.

280 Hester v. United States, 265 U.S. 57 (1924). *See supra* notes 81-85 and accompanying text.

281 Taylor v. United States, 286 U.S. 1 (1932). *See supra* notes 170-73 and accompanying text.

282 Olmstead v. United States, 277 U.S. 438 (1928). *See supra* notes 81-111 and accompanying text.

283 Ch. 85, 41 Stat. 315 (1919) (Section 25 of Title II of the Act).

284 *See supra* notes 71-73 and accompanying text. Even the "papers" cases of the prohibition era tended to push at the boundary because they were invariably connected with the management of an illegal enterprise.

285 *See, e.g.*, Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

house as sanctuary and papers as things free from government scrutiny, and reconceptualized the interest protected by the fourth amendment. The defendant lost the procedural protection afforded by the customary warrant requirement that interposed a neutral magistrate in the process. At the same time, the redefined right was made broader because what was being protected was not a particular place or thing but the desire of "persons lawfully using the highways" to avoid "the inconvenience and indignity" of having their automobiles searched for no particular reason.[286]

Carroll's reformulation of fourth amendment rights provides a noticeable shift in emphasis from the pre-prohibition cases. Rather than focusing upon property rights, the Court began to recognize a more generalized (and less absolute) right to privacy as the interest deserving protection. A few other fourth amendment decisions[287] as well as some scholarly literature of the prohibition era[288] described fourth amendment interests in privacy terms, and the new approach provided the seed for the modern fourth amendment emphasis on reasonable expectations of privacy.[289]

One should not, however, attach excessive importance to this analytical shift during the prohibition era.[290] The property aspects of fourth amendment doctrine remained important in cases like *Olmstead*, *Go-Bart*, and *Lefkowitz*, decided long after *Carroll*. Moreover, the analytical shift does not explain the trend of prohibition cases any better than does an attempt to view them as an uninterrupted continuation of themes established in pre-prohibition cases. As the preceding section shows, all the boundary cases decided during the prohibition era tend to follow a zig-zag pattern that crossed both analytical categories and background circumstances. The early cases consistently favored the government and restricted the reach of the fourth amendment. The decisions in the middle years reflected divided sentiments that permitted the reversal of some convictions, but only for relatively casual offenders. In the final years, the Court's opinions revived the rule of liberal construction and used the amendment to protect serious offenders as well.

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286 267 U.S. 132, 154 (1925).

287 *E.g.*, United States v. Lefkowitz, 285 U.S. 452, 464 (1932). The most consistent exponent of the privacy rationale was Justice Brandeis. *See* Olmstead v. United States, 277 U.S. 438, 478-79 (1928) (Brandeis, J., dissenting).

288 *E.g.*, Atkinson, *Prohibition and the Doctrine of the Weeks Case*, 23 MICH. L. REV. 748, 757-59 (1925); Wood, *supra* note 275, at 137.

289 *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967).

290 *But cf.* Note, *supra* note 62 (identifying this shift as the most significant development of the 1920s).

V. CONCLUSIONS

The foregoing summary of fourth amendment doctrine during the prohibition era raises the question of the role prohibition played in the course of fourth amendment doctrinal development.

At a minimum, the prohibition era provided the catalyst for the development of more complex fourth amendment doctrines. The sheer volume of the prohibition cases and the accompanying growth in doctrinal complexity supports this conclusion. Indeed, scholarly analyses of fourth amendment doctrine during the prohibition era routinely acknowledged "the rapid development of the subject under prohibition."[291]

The recognition that much fourth amendment doctrine developed during the prohibition era provides a historical framework from which to view modern fourth amendment cases. Explaining when and why the federal courts created a unified body of fourth amendment doctrine helps one to understand the influence of the federal law of search and seizure in modern times. Initially, uniform application of fourth amendment law was achieved when state courts voluntarily followed the Supreme Court's example. During the 1920s, for example, a number of states abandoned earlier precedents to the contrary and adopted the exclusionary rule as a rule of state law.[292] Ultimately, however, the Supreme Court required states to follow the federal rule when *Mapp v. Ohio*[293] held that the exclusionary rule was binding on the states. Although *Mapp* came after prohibition was repealed, the prohibition developments were an important preparatory step. By establishing and refining most of the modern categories, the federal standards established in the prohibition cases provided a benchmark against which state rules could be measured. Without such a development, the ultimate federalization almost certainly would have been delayed. The Court probably would have hesitated to impose a requirement that had never been refined through federal litigation. Moreover, even if a general require-

291 Fraenkel, *supra* note 213, at 1. *See also* Atkinson, *supra* note 288, at 748-49; Carroll, *The Search and Seizure Provisions of the Federal and State Constitutions*, 10 VA. L. REV. 124 (1923); Roberts, *Does the Search and Seizure Clause Hinder the Proper Administration of the Criminal Justice?*, 5 WIS. L. REV. 195 (1929).

A student commentator even tried to quantify the explosion that prohibition had produced in the number of reported cases. According to his count of cases in the *American Digest*, "more than 700 cases involving the admissibility of illegally obtained evidence [had been] reported" since the Volstead Act went into effect, and approximately 575 of the cases had involved prosecutions for violations of liquor laws. Moreover, the number of cases was still growing when he published his account in the *Yale Law Journal* in 1927; on an annual basis, "the number of liquor cases turning upon the rule had increased from four, during the first year, to more than 220 during the past year." Comment, *supra* note 189, at 537 n.2.

292 *See supra* note 213.

293 367 U.S. 643 (1961).

ment had been imposed, state courts unsympathetic to the federal rule could easily have frustrated its implementation while the Supreme Court spent years refining the general concepts.

Recognizing prohibition as the impetus for the development of fourth amendment doctrine is significant in another respect. It suggests that those interested in understanding modern doctrine should give serious attention to the prohibition cases. Since categories and distinctions developed in prohibition cases form the basis for the modern law of search and seizure, understanding these cases should help one appreciate the basic themes and tensions of fourth amendment doctrine.

The evidence, however, justifies going beyond the initial recognition of prohibition as a catalyst. It is important to understand that changing attitudes toward prohibition and prohibition enforcement had a substantive role in the development of fourth amendment doctrine. Whether the prohibition cases are considered as a whole, or within their traditional doctrinal subcategories, the trend of the prohibition era decisions closely mirrors the changing public attitudes toward prohibition. The early cases strongly supported those enforcing the prohibition laws by upholding the validity of searches against fourth amendment challenges. The decisions in the middle years reflected incipient doubts about some of the techniques of prohibition enforcement, while generally affirming convictions of serious violators. Finally, after 1930, the Court rediscovered the need for a liberal interpretation of fourth amendment rights and became increasingly strict in construing exceptions to fourth amendment protections.

Although no prohibition era commentator sketched the process described above in full, some recognized the prohibition's influence on the initial abandonment of the rule of liberal construction. Even before the first major group of Supreme Court opinions, an article in the *Central Law Journal* encouraged the Court to construe the eighteenth amendment as implicitly repealing the fourth amendment in liquor cases.[294] Although the author conceded that this approach would eliminate some safeguards in prohibition cases,[295] he argued that decreased protection in prohibition cases was necessary to avoid the even greater danger that "the host of decisions constantly arising under the Volstead Act will serve as precedents by which the guarantees in question will be permanently undermined for all purposes."[296]

The federal courts never formally embraced the implied repeal ar-

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294 Johnson, *Some Constitutional Aspects of Prohibition Enforcement*, 97 CENT. L.J. 113, 122 (1924).

295 He argued that repeal of the fourth amendment would still leave minimum common law protection against unreasonable searches and seizures. *Id.* at 122-23.

296 *Id.* at 123.

gument,[297] and most commentators did not even discuss the prohibition's possible role in influencing the course of doctrinal development.[298] But a few observers did detect the changing emphasis of the early prohibition cases. In 1927, a student noted that courts had often found the policy of the exclusionary rule incompatible with the task of enforcing prohibition laws. Faced with this dilemma, the courts elected to set aside constitutional protections in order to accomplish the enforcement goal, and "[a]s a result of this tendency, many exceptions and limitations of the federal rule have arisen which had greatly narrowed the scope that the rule was originally thought to have."[299]

The most outspoken advocate of the view that judicial decisions in the prohibition era had restricted American liberties was Forrest Revere Black, a law professor at the University of Kentucky. In 1930, he published a book of essays entitled *Ill-Starred Prohibition Cases*, and three of the book's nine essays attacked decisions he regarded as restricting the individual liberty protected under the fourth amendment.[300] The existence of a causal link between prohibition and the decline in liberties is the implicit assumption of the entire work, but Black never defined the exact relationship with any precision. Perhaps the best summary of his argument is the following excerpt from the introduction to his essay on the *Carroll* case:

> In the last decade, the American Government has been engaged in "the noble experiment" of enforcing constitutional prohibition. As the direct result of this effort, it is being discovered that Bills of Rights, federal and state, are being denaturized; certain old landmarks in the law are crumbling and the relation between the nation and the states is being altered.[301]

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297 *But see* Milam v. United States, 296 F. 629, 631 (4th Cir. 1924) ("The obligation to enforce the Eighteenth Amendment is no less solemn than that to give effect to the Fourth and Fifth Amendments. The Courts are therefore under the duty of deciding what is an unreasonable search of motor cars, in light of the mandate of the Constitution that intoxicating liquors shall not be manufactured, sold, or transported for beverage purposes."); United States v. Bateman, 278 F. 231, 233 (S.D. Cal. 1922) ("The Eighteenth Amendment must be considered in determining the question of what is an unreasonable search and seizure as prescribed by the Fourth Amendment. If there were no Eighteenth Amendment to the Constitution to be enforced, the court might have an entirely different idea of what is an unreasonable search or seizure as disclosed in this case.").

298 *See, e.g.*, Atkinson, *supra* note 288, at 749: "The Eighteenth Amendment prohibits the manufacture, transportation and sale of liquor. Does this mean that in the case that other provisions of the Constitution come in the way of efficient enforcement of the prohibition amendment, they must fall so far as liquor offenses are concerned? Clearly not. . . . As a matter of fact, it seems too clear for argument that the Eighteenth Amendment is merely an enlargement of the federal power to deal with liquor offenses and was never intended to alter in any way the constitutional safeguards and personal guarantees."

299 Comment, *supra* note 189, at 537 (footnotes omitted).

300 F. BLACK, *supra* note 30, chs. I, III, VII.

301 *Id.* at 15.

Even those contemporary observers who suggested that prohibition exerted an influence on the direction of fourth amendment decisions noticed only part of the process, the retreat from the rule of liberal construction in earlier cases. The obvious reason for this inattention to later developments is the date of the writings, for the commentaries stressing the link between prohibition and the trend of judicial opinions appeared before the final shift in approach of the cases during the last years of prohibition.

The repeal of prohibition within a very few years after the appearance of the new approach offers a plausible explanation for the lack of scholarly attention to the later cases.[302] If search and seizure issues were merely symptoms of a broader "prohibition" problem, one should not find it surprising that scholars ignored the symptoms once the significance of the underlying problem diminished in the face of far greater concern over the depression.

Accepting prohibition as one of the causal factors in the development of fourth amendment doctrine is significant for two reasons. First, it helps the modern lawyer understand the non-harmonious character of the law of search and seizure, and suggests a method or approach for contemporary scholarship in this area. The basic fourth amendment categories were created at a time of shifting attitudes toward the substantive goals that prohibition searches were designed to further. Different categories thus reflected commitments to differing interests depending on the time period in which the decisions defining the particular category were rendered. As a result, any attempt to justify and reconcile all of the prohibition cases from the perspective of a single definition of the value to be protected by the amendment seems doomed to failure. Modern scholars would do well, therefore, to take an explicitly normative approach to the fourth amendment decisions. The contemporary commentator should study the decisions to determine which ones reflect a set of value preferences that he or she is willing to support and defend. Then the commentator should identify the tenets of contemporary doctrine which conflict with those value preferences and outline how judicial acceptance of the chosen value would remold the entire doctrinal corpus.

Understanding prohibition's causative influence on the development of fourth amendment doctrines should also affect the way modern

302 An additional explanation for the lack of critical literature with respect to the later cases may lie in the nature of the subsequent decisions. They seem less drastic. Rather than carving out new subcategories, they tend to refine, limit, and apply qualifications that had been created in the earlier decisions. Thus, these developments might have seemed to contempararies to lie more completely within an autonomous zone of legal concepts than did the earlier prohibition cases, which boldly created new doctrinal categories.

courts interpret those doctrines. To the extent that a movement long since gone from the American political scene influenced the underlying character of current doctrines, courts should be willing to reconsider the basic premises on which those doctrines are based. Occasionally, the Supreme Court has shown such willingness as, for example, in *Katz v. United States*,[303] when it overruled *Olmstead* to hold that modern technology required that wiretaps be treated as searches under the fourth amendment. But more frequently, modern decisions have simply refined and modified prohibition era categories such as automobile searches[304] and searches incident-to-arrest.[305]

The most obvious candidate for a complete reappraisal is the exception to the warrant requirement for automobile searches, which *Carroll* created at the beginning of the prohibition era. As early as 1927, the Court recognized the doctrine's potential for abuse and began to emphasize probable cause as a requirement for the warrantless searches.[306] As a result of the general, but incomplete,[307] adherence to the probable cause requirement in recent decisions, the automobile exception has become a confusing morass. Police officers face potential frustration when they wish to use the automobile search as the basis for a prosecution, but it still provides significant opportunities for police harassment.

Once one acknowledges the inadequacy of the conceptual framework of the prohibition era, the way out of the confusion is clear. The exception to the warrant requirement should depend upon the circumstances surrounding the search rather than the character of the thing to be searched. If adequate protection of society requires a search, and obtaining a warrant is not feasible, a warrantless search of an automobile or anything else is reasonable and constitutional. On the other hand, if obtaining a warrant would not preclude satisfactory enforcement of the law, or a warrantless search would unduly restrict an individual's reasonable expectation of privacy, a warrantless search of an automobile or anything else is impermissible. Of course, difficult factual situations would continue to arise, but the hard cases could be addressed in the context of a test consistent with the general principles of modern fourth amendment doctrine.

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303 389 U.S. 347 (1967).

304 *See* cases cited *supra* note 155, and *infra* 307.

305 *E.g.*, New York v. Belton, 101 S. Ct. 2860 (1981); United States v. Robinson, 414 U.S. 218 (1973); Chimel v. California, 395 U.S. 752 (1969).

306 Gambino v. United States, 275 U.S. 310 (1927). *See supra* notes 165-67, 200-06 and accompanying text.

307 *See* cases cited *supra* note 155; *see also* South Dakota v. Opperman, 428 U.S. 364 (1976); Cardwell v. Lewis, 417 U.S. 583 (1974); Cady v. Dombrowski, 413 U.S. 433 (1973); Harris v. United States, 390 U.S. 234 (1968); Cooper v. California, 386 U.S. 58 (1967); Preston v. United States, 376 U.S. 364 (1964).

Accepting prohibition as one causal element also has importance with respect to the history of American legal thought. Without retreating to a consensual view of American history, it cautions against an exclusively economic interpretation of the forces behind the growth of legal rules and doctrines. Prohibition was an historical epoch characterized by conflict, but the conflicting values of the era cannot be easily explained in purely economic terms nor can they be dismissed as irrational. As Joseph Gusfield has persuasively argued, prohibition was an incident in a broader conflict over symbolic values intimately associated with the status of various groups in American society.[308]

This article documents how the prohibition conflict exerted an influence over the law's development in one area of criminal procedure, the law of search and seizure. Furthermore, evidence supports the belief that the conflict over prohibition affected other areas of criminal law.[309]

One can even persuasively argue that prohibition was not just an influence but was rather the primary influence in the development of fourth amendment doctrine. The obvious danger of such an argument is reductionism rather than timidity of interpretation. To counteract that tendency three possible misinterpretations should be anticipated and disavowed. First, the primary cause formulation makes no claim as to the specific causes of particular decisions, for other factors undoubtedly assumed importance in individual cases. Instead, what is offered is an explanation of the direction, the trend, the drift of the decisions as a whole.[310] Second, the formulation makes no attempt to deny the reality of multiple causation. Other factors (e.g., the existence of the fourth amendment, prior decisions, and the background of the justices) surely exerted influence on the decisional trend. Nevertheless, the claim advanced here asserts that none of these was as significant as prohibition in prompting the general trend of the decisions. Third, the primary cause

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308 J. GUSFIELD, *supra* note 2, *passim*.

309 *E.g.*, Funk v. United States, 290 U.S. 371 (1933) (defendant's wife competent to testify in his behalf); Sorrels v. United States, 287 U.S. 435 (1932) (defense of entrapment recognized); Hebert v. Louisiana, 272 U.S. 312 (1926) (double jeopardy not applicable to separate prosecutions by state and federal governments); Raffel v. United States, 271 U.S. 494 (1926) (defendant's decision to testify in his own behalf a complete waiver of his fifth amendment privilege against self-incrimination); United States v. Lanza, 260 U.S. 377 (1922) (double jeopardy inapplicable to separate prosecutions by state and federal governments). *See also* Murchison, *supra* note 11, *passim* (defense of entrapment).

310 *Cf.* L. FRIEDMAN, THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE 143 (1975) ("*Some* form of social theory, then, must occupy a central place in the theory of law. . . . Roscoe Pound strongly attacked the 'economic interpretation.' The 'taught tradition of law,' he felt, rather than class interests, explained the *particular* decision. Yet Pound admitted that in the long run, the economic prevailed. . . . We can concede with Pound that 'legal tradition' may best explain some *particular* decision, but rarely a trend or drift.") (emphasis in original). *See also* Murchison, Book Review, 19 A.F.L. REV. 421, 423-24 (1978).

formulation makes no attempt to quantify the precise scope of the causal relationship. As a result, one simply does not know what fourth amendment doctrine would have been like had America not instituted the "noble experiment" of prohibition.

The preceding sections have marshalled evidence for the claim that prohibition was the primary cause of that era's fourth amendment developments. Two aspects of the evidence—the three shifts in attitude discernible in the prohibition decisions and the degree to which the general pattern manifests itself in all aspects of the doctrinal structure—deserve special emphasis.

As related above, the Supreme Court's approach to fourth amendment problems shifted three times during the prohibition era. First the Court moved from a liberal construction of fourth amendment rights in the pre-prohibition cases to a strict construction in the early prohibition cases. Next came the ambivalence of the middle years. Then, finally, the cases at the end of the prohibition era rediscovered the rule of liberal construction. These shifts in approach support the description of prohibition as primary cause in two respects. First, multiple levels of correlation between changing public attitudes toward prohibition and the trend of the fourth amendment decisions decreases the likelihood that the phenomenon can be dismissed as mere coincidence. Second, the erratic course of fourth amendment decisions makes them difficult to explain by reference to other factors that do not display a similarly erratic course.

The degree to which the general trend reappears in many subcategories of the doctrinal structure furnishes additional justification for the claim of primacy. The consistency with which the pattern is repeated makes it more credible that the pattern offers the best general explanation for the decision as a whole. At the same time, the consistency of repetition largely eliminates the possibility that the broader pattern of the cases was the product of some other dynamic operating within individual subcategories.

Needless to say, the evidence presented in Sections II, III, and IV does not prove the causative relationship between prohibition and fourth amendment developments in a logical or statistical sense. It simply supports a judgment that the prohibition backdrop provides a reliable guide for understanding the fourth amendment decisions. One can, however, support the conclusion by considering alternate explanations. If the alternatives provide a less persuasive explanation of the decisions, one can reasonable claim that the prohibition backdrop provides a more reliable guide to the fourth amendment decisions than any other explanation.

One alternative that must be considered is the possibility that the course of the decisions can be explained by reference to precedent or autonomous legal reasoning. The cases discussed above illustrate that such an explanation is unsatisfactory. On too many occasions, the Court reached different results in similar cases. Sometimes it achieved its objective by expanding doctrinal categories and exceptions. *Weeks*, for example, allowed the use of evidence seized by state officials in a search conducted immediately before a search by federal officials, but *Byars* excluded all evidence seized in a search where the federal official participated in his federal capacity. *Marron* allowed the introduction of a ledger and bills as instrumentalities of a crime, while *Lefkowitz* applied the ban on the seizure of "mere" evidence to exclude very similar records. On other occasions, the application of rules shifted noticeably even when the rules themselves remained constant. Comparison of the facts known to the officers in *Carroll* and *Gambino* offers a good example of this form of indeterminancy within the system of legal concepts.

Legal training and tradition do appear to have influenced one aspect of the fourth amendment decisions—the Court's reluctance to overrule prior decisions. The Court was willing to manipulate doctrinal categories and to apply rules differently, but in no instance did the Court explicitly overrule a prior precedent.[311] That limited influence on the way lawyers (or, at least, Supreme Court justices) reason does not change the basic point, however. Reference to prohibition provides a better guide to the trend of the decisions as a whole than do the professional techniques of analysis used by lawyers.

Another possible explanation of the prohibition cases would describe the changing pattern of decisions as produced by a change in the Court's analytic approach,[312] but this hypothesis is ultimately unpersuasive. As Section IV of the article indicates,[313] some of the prohibition cases did tend to deemphasize the property element of fourth amendment doctrine, but this shift in emphasis does not provide a reliable guide to understanding the trend of the decisions. The most obvious inadequacy is the argument's inability to account for more than one change in the Court's approach to fourth amendment questions. In fact, the initial shift to a restrictive interpretation was reversed in the decisions rendered at the end of the prohibition era. Furthermore, although the prohibition cases relentlessly pushed at the property moorings of fourth amendment doctrine, the Court never completely abandoned the property focus. Indeed, it vigorously reiterated the property aspects in

311 The automobile cases provide the most graphic illustration of this reluctance to overrule. *See supra* notes 152-84 and accompanying text.

312 *See generally* Note, *supra* note 62.

313 *See supra* notes 281-89 and accompanying text.

several opinions handed down in the middle or later years of prohibition.

A third possible way to explain a changing pattern of decisions would look for dramatic changes in the make-up of the Supreme Court, but no such changes occurred during the prohibition era. The Court was extremely stable throughout the era, especially after 1924 when the first group of restrictive fourth amendment decisions was handed down. Three justices served during the entire 1920-1933 period,[314] and a clear majority of the Court served throughout the three shifts in approach that the opinions reflect.[315] Moreover, most of the prohibition decisions were unanimous, including those at the beginning and end of the era when the contrast in approaches was most vivid.[316] Justices who authored or concurred in the early opinions were not outvoted in the last cases; they authored or concurred in the new opinions as well.[317] In short, the contrast with the doctrinal changes concerning congressional power that came a few years later[318] could not be more vivid. The factor that issued the ultimate triumph of an expanded vision of the Commerce Clause was Roosevelt's appointment of five justices between 1937 and 1941.[319] To the contrary, during the prohibition era, members of the Court merely changed their positions; they were neither replaced nor outvoted.

Some significance could be attached to one change in the Court's make-up, Charles Evans Hughes' replacement of William Howard Taft as Chief Justice in 1930. Although both men opposed the adoption of the eighteenth amendment, their personal responses to prohibition differed greatly.[320] Once the prohibition amendment became law, Taft vigorously supported it and became a teetotaler; Hughes, by contrast,

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314 The three were Van Devanter, McReynolds, and Brandeis. W. SWINDLER, *supra* note 184, at 317-18.

315 In addition to the three who served throughout the prohibition era, Sutherland and Butler remained on the Court from 1922 to the end of the era. Furthermore, Stone joined the Court in 1925 and was still an associate justice when the eighteenth amendment was repealed. *Id.* at 319-20.

316 Of the seventeen prohibition era decisions discussed in the text, dissents were filed in only three cases, *Olmstead, Carroll*, and *Sgro*. The dissent in the first two cases encouraged a pro-defendant stance, while the *Sgro* dissent would have been more favorable to the government. Nonetheless, Justice Brandeis sided with the dissenters in all three cases.

317 Perhaps the most dramatic evidence of this change can be seen in Justice Butler's authorship of unanimous opinions in both *Marron* and *Go-Bart*. *See supra* notes 122-36 and accompanying text.

318 *See generally* W. SWINDLER, *supra* note 184, at 28-100; Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 883 (1946) (pt. II).

319 The seven were Justices Black, Reed, Frankfurter, Douglas, Murphy, Byrnes and Jackson. G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 152 n.* (10th ed. 1980).

320 *See generally* A. SINCLAIR, *supra* note 4, at 140-46.

never abandoned his fondness for good liquor or his willingness to satisfy it when the occasion presented itself. Since the revival of the liberal construction of fourth amendment rights came in cases decided after Hughes became Chief Justice in 1930, his influence in prompting the change should not be totally discounted. Yet accepting this argument requires an assumption that Chief Justice Hughes had an influence over his colleagues that he was unable to exert in other contexts.[321] To view the new Chief Justice's hostility to prohibition as helping to promote the revival of the rule of liberal construction seems reasonable; to postulate his appointment as the decisive force in shaping the course of doctrinal development stretches thin evidence too far.

Another potential explanation for the fourth amendment decisions during the prohibition era could focus on the importance of the individual cases, arguing that the more serious the violation, the more likely the Court was to adopt a restrictive approach to fourth amendment rights. Section III suggests[322] that the severity of the violation does seem to correlate with the Court's approach in the middle years of prohibition. Furthermore, most of the restrictive decisions of the early years did involve serious violations. But while the severity of the violation may help to explain the decisions in the early and middle years of prohibition, it is inadequate to reconcile cases that span the entire prohibition period. Several of the decisions that favored defendants in the last years—for example, *Taylor, Go-Bart, Lefkowtz*, and *Sgro*—involved violations of the prohibition laws that cannot be dismissed as minor.[323]

Finally, the lack of any obvious economic or behavioral justification for the decisions of the prohibition era also reinforces the explanation of the prohibition cases as the product of major shifts in public opinion. The myriad exceptions and qualifications to *Weeks*' exclusionary rule were clearly not designed to maximize the efficiency of enforcement techniques, for only some favored the government. At any rate, prohibition officials vigorously protested that the restrictions under which they operated hampered their enforcement efforts.[324] Nor are the decisions better explained as serving any simple behavioral objective such as controlling police conduct or protecting innocent citizens from official intrusion into their lives. Indeed, a student commentator, who attempted

321 *See* G. WHITE, THE AMERICAN JUDICIAL TRADITION 214-15 (1976).

322 *See supra* notes 105-11, 295-96 and accompanying text.

323 *Taylor* involved the seizure of 122 cases of whiskey, 286 U.S. at 5; the evidence obtained in both *Go-Bart*, 282 U.S. at 351, and *Lefkowitz*, 285 U.S. at 462-63, suggested on-going businesses of soliciting and filling orders for intoxicating liquors; and the search in *Sgro* uncovered a pint of gin and three and one-half barrels of beer after the information to support the search was obtained in a prior purchase by the prohibition agent. Record at 2-3, 17, Sgro v. United States, 287 U.S. 206 (1932).

324 *See, e.g.*, Roberts, *supra* note 291.

to prepare a realist-style analysis of the decisions from the admittedly scanty data base available, concluded that they did not accomplish either of those objectives in practice.[325]

Acceptance of the primary cause claim contributes to understanding on two fronts. It clarifies a portion of the historical development of American legal thought, and it enhances appreciation of the nature of doctrinal inquiry.

As a thesis of historical development, the primary cause claim both explains the particular incident and suggests a hypothesis for further research. As an explanatory tool, it provides a basis for understanding a discordant group of decisions rendered at a specific time in history. It also suggests that prohibition was a significant influence upon other portions of legal tradition and points out the need for further research to test that hypothesis. To some degree, both the explanatory and suggestive features were present in the earlier claim that prohibition was merely a causative force. However, asserting that prohibition exerted a primary influence, and was not merely one cause among many, strengthens both features. It provides a better explanation for the specific historical incident, and it renders more compelling the hypothesis that prohibition also exerted influence in other areas.

The primary cause claim also contributes to an understanding of the nature of doctrinal inquiry, for it demonstrates the ultimately political character of rights and liberties that the judiciary protected during the prohibition era. Thus, the study of the development of fourth amendment doctrine in the prohibition era illustrates, by way of a specific example, that the course of doctrinal growth is not always controlled by some internal logic or some special "legal reasoning" that is the exclusive domain of professionals. To the contrary, it suggests that the direction of doctrinal growth is primarily determined by changing views on underlying substantive issues. To state the matter in a crude and reductionist way, one who was convinced that prohibition was a noble reform and should be strictly enforced tended to contract the reach of the fourth amendment's exclusionary rule; on the other hand, one who became convinced that prohibition was a terrible mistake was more likely to advocate liberal construction of fourth amendment rights.

Naturally, that crude summary does not tell a complete story. No decisions are ever the product of any single influence, especially decisions, like those of the Supreme Court, that require collegial agreement. The existence of search and seizure precedents and the very existence of the fourth amendment itself operated to limit the range of choices that

325 Comment, *Enforcing Prohibition Under the Federal Rule on Unreasonable Searches*, 36 YALE L.J. 988 (1927).

were entertained by, and even suggested to, the Court. For example, no opinion urged that the government was free to search anywhere and to seize anything it pleased or even that the government was generally free to dispense with the need for a search warrant to search one's home. In effect, the existence of the amendment and litigation about its meaning tended to keep the argument at the periphery, leaving basic rights unchallenged.

The important point is to recognize that the degree of restraint imposed by these traditions and precedents was indeterminate, that is, their influence tended to expand or contract not as the result of an internal dynamic but in response to external stimuli. Once this indeterminancy of the influence of general concepts and existing precedents is perceived, the ultimately political nature of the judicial process becomes clear. One simply cannot distinguish the judicial from the political on the ground that the constitutional language and tradition play a role in the judicial process. To take the case of prohibition, the fourth amendment exerted an impact upon the Volstead Act as well as upon Supreme Court decisions. The Act went beyond existing Supreme Court precedents[326] and required that affidavits for search warrants be based on facts within the personal knowledge of the affiant.[327] In addition, the Act also forbade searches of purely private dwellings unless they were being used for sales of intoxicating liquor.[328]

How then can one distinguish the judicial from the political? At least four institutional characteristics tend to give greater coherence and continuity to general concepts and past precedents in the judicial process than in executive or legislative functions. First, the judge's training and role emphasize the continuity of tradition. Judges are not free to disregard the language of the text or prior decisions as political activists may do; they must justify their decisions by reference to a received tradition. Second, individual judicial decisions are largely immune from direct challenge in electoral politics. Federal judges are appointed for life and even in states where judges are elected, campaigns are rarely waged on the merits of a specific decision. Third, the judicial method empha-

326 Not until the very end of the prohibition era did *Nathanson* require that affidavits be based on the personal knowledge of the affiant. *See supra* notes 261-62 & accompanying text *supra*. Prior to *Nathanson*, state authorities were split on the issue. *See* Note, *Probable Cause for the Issuance of Search Warrants*, 76 U. PA. L. REV. 305 (1928).

327 Espionage Act, ch. 30, 40 Stat. 228 (1917). This provision was Section 5 of Title XI of the Espionage Act, incorporated by reference into the Volstead Act. Volstead Act, ch. 85, 41 Stat. 308 (repealed 1935). *See supra* note 238. *See also* Act of November 23, 1921, Pub. L. No. 67-96, § 6, 42 Stat. 222 (1921) (amendment to the Volstead Act making it a misdemeanor for any officer of the United States to "search any private dwelling . . . without a warrant directing such search" or to make a warrantless search of any other building "maliciously and without reasonable cause.").

328 Volstead Act, ch. 85, 41 Stat. 315 (repealed 1935).

sizes the element of rationality. Judges must connect the particular decision to the received tradition by a process of reasoning, and the power of the individual decision will be measured, at least in part, by the extent to which the judge is able to convince readers of the strength of the connection. Fourth, judges (and probably all lawyers) are reluctant to rethink old solutions. Many modern courts are more willing to overrule precedents than the Supreme Court was during the prohibition era, but the predominate techniques are limitation, qualification, and exception, rather than rejection. As a result of these institutional characteristics, the judicial process tends to serve a conspicuously conservative political agenda. Nonetheless, the extent of this institutional conservatism is indeterminate, that is, courts can and do transform legal doctrine to reach substantive goals.

If this account of the judicial process and the nature of doctrinal change is correct, it seems to carry important implications for those who are concerned with the protection of individual rights and liberties in modern America. Concern for civil liberties should never lead one to ignore the substantive proposals that require infringement of rights and liberties if they are to be successfully implemented. The substantive proposals themselves must be defeated in the political arena if individual rights are to be adequately protected. Neutral principles[329] or an abstract approach to judicial decision making[330] may serve to help strengthen the role that the historical conception of a right plays in influencing the decisional process. But the experience with prohibition suggests that neither will suffice to impede the accomplishment of substantive goals indefinitely.

329 *See* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

330 *See* Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975). For an attempt to develop a Dworkian approach to fourth and fifth amendment issues, *see* Note, *supra* note 62.