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THE SUPREME COURT GIVETH AND THE SUPREME COURT TAKETH AWAY: THE CENTURY OF FOURTH AMENDMENT “SEARCH AND SEIZURE” DOCTRINE

BY THOMAS Y. DAVIES*

[I]ndependent tribunals of justice . . . will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the [Bill of Rights].

—James Madison**

I. INTRODUCTION

The century during which the *Journal of Criminal Law and Criminology* has been published roughly matches the lifespan of Fourth Amendment “search and seizure” doctrine. The *Journal* appeared in 1910, while it is generally (and correctly) accepted that the 1914 decision *Weeks v. United States*¹ marks the birth of the modern Fourth Amendment.²

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In addition to his academic articles on search and seizure topics, the author appeared “of counsel” and assisted with the defendants’ brief on reargument in *Illinois v. Gates*, 462 U.S. 213 (1983), and did likewise in *Illinois v. Rodriguez*, 497 U.S. 177 (1990). He has also testified before the United States Senate Committee on the Judiciary in opposition to legislative proposals to curtail the operation of the exclusionary rule.

** 1 ANNALS OF CONG. 440 (J. Gales ed. 1834) (speech by James Madison to the House of Representatives Proposing a Bill of Rights, June 8, 1789).

¹ 232 U.S. 383 (1914).

² See, e.g., *United States v. Robinson*, 414 U.S. 218, 224 (1973) (“Because the rule requiring exclusion of evidence obtained in violation of the Fourth Amendment was first enunciated in *Weeks v. United States* . . . it is understandable that virtually all of this Court’s search-and-seizure law has been developed since that time.”).

Unsurprisingly, the *Journal* has published many articles on search and seizure issues since that time.³

However, the two stories have now diverged. The *Journal* continues to be a vibrant institution, but over roughly the last four decades the continuing conservative majority of the justices of the Supreme Court have reduced Fourth Amendment doctrine to little more than a rhetorical apparition. Hence, it is appropriate to refer to “the” century of search and seizure doctrine. Although it is unclear whether the justices will refrain from explicitly ending enforcement of constitutional limits on government arrest and search powers, they have already drained those limits of almost all of their practical content. And, notwithstanding the usual clichés regarding historical pendulums (where does such nonsense come from?), it seems quite unlikely that destruction will be reversed.

My assignment for this Symposium is to tell the story of the invention, development, and dismantling of Fourth Amendment search and seizure doctrine over the last century. Of course, readers will likely already be familiar with at least the landmarks. Hence, my ambition is to broadly sketch out what might be called the trajectory of search and seizure doctrine while at least beginning to link that story to the larger history of the Supreme Court itself—that is, to the shifting concerns that motivated the justices as the Court’s membership and the politics of criminal procedure changed.

The Fourth Amendment reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁴

It is fashionable to lament the maddeningly cryptic character of the Fourth Amendment’s text⁵ as well as the confused or unmoored state of

³ A word search of the titles of articles and comments published in the *Journal* indicates that the first search and seizure piece appeared in 1947. Thereafter, pieces on constitutional search and arrest issues began to appear more frequently, especially after the *Journal* instituted an annual review of Supreme Court decisions in the 1970s. A large proportion of the cases discussed in the latter part of this article have been the subject of such commentary.

Authors of search and seizure articles in the *Journal* have included many of the leading commentators including, to name only a few, Francis Allen, Joseph Grano, Fred Inbau, Yale Kamisar, and Wayne LaFave.

⁴ U.S. CONST. amend. IV.

⁵ See, e.g., Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 353-54 (1974) (characterizing the text as “brief, vague, general[, and] unilluminating”).

search and seizure doctrine.⁶ Indeed, those complaints may seem painfully obvious if one attempts to systematically set out the rationales and content of current search and seizure doctrine and to then relate that doctrine to the text. However, such doctrinal incoherence should hardly come as a surprise. If the professional pretense that the law develops through judicial discovery of the true meaning of a text or of the internal logic of principles and precedents was ever tenable, it surely no longer is.

Instead, the basic contention advanced by the legal realists more than a half century ago—that textual interpretations and doctrinal conceptions are shaped by the outcomes that judges seek to justify far more than the other way around—is patently obvious. Indeed, the realists' insight provides a particularly powerful explanation of Supreme Court decisions regarding ideologically charged topics such as criminal procedure.⁷ Although the potential for appellate review means that lower court judges are constrained to hew to the legal doctrine set out by the high court to some significant degree, the justices of the Supreme Court are not similarly confined.

Perhaps because no other institution has the power to review constitutional rulings by the Supreme Court,⁸ the justices' behavior often resembles that of a vote-casting legislature at least as much as a court in the usual sense.⁹ Indeed, the case could be made that the history of constitutional law has been largely (one might be tempted to say merely) the story of who held the fifth swing vote when decisions were made.

However, a realist perspective does not go so far as to claim that legal doctrine does not matter at all. The public expects judicial decisions to be

⁶ See, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994) (describing Fourth Amendment doctrine as "rudderless and badly off course").

⁷ For a still classic example of the legal realist perspective on the Supreme Court, see FRED RODELL, *NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790-1955* (1955).

⁸ Although the Court's constitutional rulings are unreviewable in the short term, it has long been evident that the course of Supreme Court decisions ultimately follows public opinion, albeit with a sometimes considerable lag-time. See, e.g., ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 105-11 (1956) (observing, with regard to judicial review, that the Supreme Court might delay but would not stop "a persistent law making majority").

⁹ The tendency of Supreme Court justices to distort existing doctrine to produce the desired results is not a recent development. Rather, the justices have been revising the Constitution almost from the beginnings of the Supreme Court. I hope to publish an article in the near future that will document that the Marshall Court concocted the famous claim of unconstitutionality in *Marbury v. Madison*, 5 U.S. 137 (1803), by deliberately evading the then-settled understanding that mandamus was an inherent superintending power of the supreme court in a country or state, and thus imposed a novel meaning on the limits on the Supreme Court's "original jurisdiction" in Article III of the Constitution that the Framers would not have imagined.

justified in terms of precedent and principle, and also expects that the justices usually should change the law incrementally. Thus, because the justices seek to provide public rationales for their rulings, the course of doctrinal development is shaped to a significant degree by the opportunities or weaknesses that the justices perceive in existing doctrine. Hence, in much the same way that the course of a stream seeks out weaker strata, the rationales in opinions (which, of course, do not necessarily reflect the actual motivations for the justices' votes) often exploit the state of the existing doctrinal terrain.

The realist perspective suggests that the seeming doctrinal confusion in arrest and search law should be explainable enough as a historical concretion that reflects ongoing ideological adjustments to prior doctrine. I think it is. Indeed, the story of the century of search and seizure doctrine can be told largely in terms of five distinct periods that mark shifts in the ideological composition of the Court and in the issues the justices either preferred or felt obligated to address.¹⁰

A. THE FIVE PERIODS OF THE CENTURY OF SEARCH AND SEIZURE DOCTRINE

During the initial period of the century of search and seizure (discussed in Part III), the justices were primarily engaged in an ongoing campaign to restrain government regulation of business—and that included restraining government access to business records. The justices' anti-regulation orientation seems to have provided the impetus for the invention of what we now call Fourth Amendment "search and seizure" doctrine in 1914 in *Weeks*. Although *Weeks* is generally described as the case that invented the Fourth Amendment exclusionary rule, that was only the final of several doctrinal innovations made in that ruling. In a burst of activist creativity, the *Weeks* justices extended the Fourth Amendment's protections to regulate the conduct of officers as well as legislation and court orders. They also reinvigorated the traditional understanding that a warrant was required for a lawful search of a house. And to give the new protections

¹⁰ Prior to 1925, most of the Supreme Court's docket consisted of cases that the justices were obliged to decide. In 1925, legislation expanded the Court's certiorari docket, so that the Court's docket became largely a matter of the justices' discretion. In 1988, further legislation eliminated almost all of the remainder of the mandatory docket. See *Writ of Certiorari*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 154 (Kermit L. Hall ed., 2d ed. 2005). Of course, certiorari allows the justices to choose only among the issues brought before them by petition. Thus, a full history of the Supreme Court's treatment of search and seizure doctrine would also address changes in the character of the arrest and search cases reaching the Court. This Article does not address that dimension of the history.

operational substance, they created the Fourth Amendment exclusionary rule. In subsequent cases they simply ignored the historical concern with the protection of the house and its contents and applied the *Weeks* warrant requirement to searches of offices for business papers.

The second period (discussed in Part IV) arose not from a change in the orientation of the justices but from a change in the issues the justices were pressed to address. Specifically, they were confronted with the question of whether or how the newly reinvented Fourth Amendment applied to the police searches that were an inexorable part of Prohibition enforcement. Prohibition involved an unprecedented extension of federal criminal law to a possessory offense. That, in turn, posed novel search imperatives for law enforcement—especially searches of automobiles used to transport illegal liquor. Because the justices had already adopted a generous conception of the scope of the Fourth Amendment’s protections, they could not accommodate the perceived needs of law enforcement by simply declaring that searches of automobiles fell outside of the Amendment’s protections. Instead, the justices watered down the new warrant requirement by inventing the novel concept of “Fourth Amendment reasonableness.” Specifically, in the 1925 ruling in *Carroll v. United States*,¹¹ they adopted the view that the Fourth Amendment did not condemn all warrantless searches, but only those that the justices did not find to be “reasonable” in the circumstances. Because automobiles presented an exigency, the justices concluded that warrantless searches of automobiles would be “reasonable” and therefore constitutional provided they were based on probable cause. However, the flurry of search and seizure cases declined significantly when Prohibition was repealed.

The third period (discussed in Part V) commenced after the end of World War II. By then, judicial resistance to New Deal economic regulation had collapsed, and President Franklin D. Roosevelt had repopulated the Court’s bench with supporters of New Deal regulation. Hence, the earlier “conservative” ideological inclination to protect business records became moot. Roosevelt’s appointees often possessed both strong personalities and views, but they were chosen for their endorsement of the federal government’s economic powers, not for a shared perspective on the civil liberties issues that began to take center stage. Likewise, President Harry Truman’s appointees were chosen largely on the basis of cronyism rather than for their views on civil liberties or criminal justice. Hence, the Roosevelt and Truman appointees divided when they addressed search and seizure issues.

¹¹ 267 U.S. 132 (1925).

The central issue for search doctrine during this postwar period was the relative importance to be assigned to the *Weeks* warrant requirement versus the *Carroll* reasonableness formulation. Ultimately, the balance in search cases tipped toward a flexible “reasonableness” interpretation, and away from a rigorous search warrant requirement. Likewise, the balance tipped against both the first stirrings of the “incorporation” doctrine and the brief attempt to use the Fourteenth Amendment Due Process Clause as a surrogate for a national search and seizure regime. But dissenting opinions in closely divided cases indicated that the subject was not settled. Notably, the search cases decided by the Court to this point had not yet involved any violent crime prosecutions.

Of course, the fourth period of the search and seizure story (discussed in Part VI) is the so-called due process revolution of the Warren Court. The left-of-center Warren Court majority—which was, to a significant degree, the product of appointment missteps by the Eisenhower administration—reversed direction and made a number of changes that strengthened search and seizure protections, particularly the search warrant requirement. However, the thrust of the Warren Court’s agenda went toward enlarging federal court supervision of state criminal proceedings through the application of the “selective incorporation” doctrine, and the Warren Court’s arrest and search rulings are probably best understood in that context. Hence, the extension of the Fourth Amendment and its exclusionary rule to state proceedings in 1961 in *Mapp v. Ohio*¹² is best understood as a component of a larger campaign to impose minimum national standards on state criminal justice. Although the Warren Court majority seldom explicitly acknowledged as much, it appears that their primary goal was to mobilize federal court supervision to curb the racist tendencies of many state criminal justice institutions.

Unsurprisingly, the extension of federal standards to state proceedings led to a sharp increase in the number of search and seizure cases. Additionally, the extension of federal constitutional protections to street criminals in state cases, which sometimes involved violent crimes, fundamentally changed the politics of criminal justice. Indeed, although the Warren Court actually made a number of decisions that were quite accommodative of law enforcement interests, the Court nevertheless became a target of political attacks for being soft on criminals.

The fifth period (discussed in Part VII) consists of the full-blown dismantling of earlier search and seizure doctrine during the Burger, Rehnquist, and Roberts Courts. This retrenchment—which is still continuing—commenced in the early 1970s when President Richard Nixon

¹² 367 U.S. 643 (1961).

tipped the Court's balance sharply to the right by choosing four appointees who were known to be opposed to the Warren Court's criminal procedure rulings. Since then the interaction of presidential elections with vacancies on the Court has preserved a right-of-center crime-control majority. And the majority justices have pursued a multi-prong campaign to free police of constitutional constraints by restricting the coverage of Fourth Amendment protections, by weakening or even eviscerating the substance of search and seizure standards, and by largely eliminating the consequences of unconstitutional intrusions.

Although the crime-control justices have often marched under the banner of "strict construction" and its more recent progeny, "originalism,"¹³ for the most part they have stopped short of explicitly overruling earlier Fourth Amendment landmarks. Instead, they have exploited the inherent flexibility of the concept of "Fourth Amendment reasonableness" to expand law enforcement search powers by announcing a multitude of doctrinal limitations and exceptions that make the earlier protections largely meaningless in practice. As a result, and notwithstanding continuing public concerns regarding release of dangerous criminals because of supposed search and seizure "legal technicalities," the reality is that there now are only minimal legal constraints on police intrusions. The remaining question is whether the majority justices will choose to continue to maintain the illusion of constitutional protections, or whether they will give in to ideological zeal and completely kill off what is left of the warrant requirement (or, as it is now often called, "the warrant preference") and the exclusionary rule.

In the following pages, I add some flesh to the bones of this account. My sense is that the five shifts described above explain at least the big cases and developments quite well.¹⁴ However, the account outlined above is

¹³ Although "originalism" is commonly understood to denote an effort to follow the historical meanings of constitutional provisions, that is not an accurate description of what the justices who purport to be originalists actually do. Instead of reconstructing how provisions were actually understood at the time they were adopted, originalist justices engage in creative textualism by purporting to "read" the text with the use of historical dictionaries. In doing so, they ignore the legal traditions that actually informed the Framers' understanding of the texts and instead invent new meanings that accord with their own ideological predilections. See, e.g., Thomas Y. Davies, *Selective Originalism: Sorting Out Which Aspects of Giles's Forfeiture Exception to Confrontation Were or Were Not "Established at the Time of the Founding,"* 13 LEWIS & CLARK L. REV. 605, 670-72 (2009).

¹⁴ Of course, the significance of the cases is a matter of judgment. I think it is useful to distinguish between those that announced or modified law to be applied in lower courts and those that simply corrected misinterpretations or misapplications of existing doctrine by lower courts or legislatures (for example, whether particular facts did or did not meet the then-prevailing definition of probable cause). However, I have opted to err in the direction of over-inclusiveness in an attempt to avoid excessive selectivity.

incomplete insofar as it omits any discussion of arrest and search law from the framing of the Bill of Rights in 1789 to the end of the nineteenth century. Although that history is beyond my assignment for this Symposium Article, it is nevertheless pertinent insofar as it explains how the Supreme Court came to be free to invent modern Fourth Amendment doctrine at the beginning of the *Journal's* century. Indeed, it also explains why the text of the Fourth Amendment now seems perversely inchoate. Hence, I begin with a brief detour to that earlier and now decidedly foreign period.

II. BEFORE THE JUSTICES INVENTED "SEARCH AND SEIZURE" DOCTRINE

The essential rule for recovering authentic legal history is to never take judicial statements about that history at face value. Judges routinely innovate and change existing doctrine, but they typically cover up their innovations by inventing fictional accounts of precedent and history.¹⁵ Sycophantic academics then come along and embellish the judicial fictions. (How else are commentators to get "cited" in Supreme Court opinions?) To complete the cycle, the justices then cite the commentaries as confirmations of their own inventions. The overall result is that the conventional doctrinal history that is derived from judicial claims often turns out to be drastically different from the authentic history.¹⁶

¹⁵ Professor Reid has nicely summed up the typical judicial use of history:

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

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

¹⁶ I have been engaged in recovering historical arrest and search law for nearly two decades. In a 1999 article, I initially documented that the Fourth Amendment was originally understood to only set warrant standards, but was not meant to create any generalized reasonableness standard for warrantless arrests or searches. See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999) [hereinafter Davies, *Original Fourth*]. I then reconstructed the actual content of framing-era arrest law and contrasted it to the historical claims announced in recent Supreme Court opinions. See Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239 (2002) [hereinafter Davies, *Arrest*]. I next documented that the American state and federal Framers undertook to preserve the common law standards for arrest, as well as the need for a criminal warrant to lawfully "break" a house, in "law of the land" and "due process of law" provisions in the state declarations and federal Bill of Rights. See Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of "Due Process of*

Indeed, the reason that the text of the Fourth Amendment now seems too cryptic is simply that Supreme Court justices during the last century have assigned it a much broader task than the Framers ever intended or imagined it would serve. As explained below, the federal constitutional provision that was supposed to generally preserve common law criminal arrest and search standards was actually the “due process of law” clause of the Fifth Amendment; the Fourth Amendment was primarily intended to set minimum standards for the issuance of noncriminal revenue search warrants. Hence, the story of modern Fourth Amendment search and seizure doctrine begins in the void left by the disappearance of the Framers’ understanding of criminal arrest and search doctrine as a body of seemingly settled common law rules.

A. CRIMINAL ARREST AND SEARCH AUTHORITY AS “DUE PROCESS OF LAW”

There was no single, unified body of legal doctrine regarding arrests and searches when the Bill of Rights was framed in 1789. Instead, there were two different although somewhat overlapping bodies of doctrine. Common law defined the standards for criminal arrests and related searches, while legislation defined the standards for searches to enforce customs and excise revenue (tax) collections.¹⁷ The important point for present purposes is that the Fourth Amendment, like at least most of the earlier state provisions that banned issuance of “general warrants,” was formulated primarily to maintain minimum standards for *revenue search warrant authority*.

However, it is quite unlikely that the Fourth Amendment was understood to have any significant bearing on *criminal* arrest and search authority and especially on warrantless arrest authority. That is apparent

Law,” 77 MISS. L.J. 1 (2007) [hereinafter Davies, *Correcting Search History*]. Most recently, I have documented how the bare “probable cause” standard in the Fourth Amendment was derived from English statutory authority for excise search warrants rather than from common-law criminal procedure. See Thomas Y. Davies, *How the Post-Framing Adoption of the Bare-Probable-Cause Standard Drastically Expanded Government Arrest and Search Power*, 73 J.L. & CONTEMP. PROBS. 1 (2010) [hereinafter Davies, *Probable Cause*]; see also Thomas Y. Davies, *Can You Handle the Truth? The Framers Preserved Common-Law Criminal Arrest and Search Rules in “Due Process of Law”—“Fourth Amendment Reasonableness” Is Only a Modern, Destructive Judicial Myth*, 43 TEX. TECH L. REV. (forthcoming 2010) [hereinafter Davies, *Truth*] (summarizing salient points in previous articles on arrest and search history).

¹⁷ One might say there were three bodies of doctrine if one also includes the use of arrest and “attachment” of defendants at the beginning of framing-era civil lawsuits. However, because that body of doctrine did not involve search authority, it has little bearing on the present story, and I omit it.

because the American Framers actually sought to preserve the standards for criminal arrests and related searches in state constitutional provisions that guaranteed government compliance with “the law of the land” or its virtual synonym, “due process of law,” as well as in the federal “due process of law” clause in the Fifth Amendment¹⁸—not in the Fourth Amendment or its state antecedents. Thus, one dimension of the prelude to modern search and seizure doctrine is the story of what “due process of law” originally meant and how nineteenth-century judges destroyed that meaning.

1. Common Law Arrest and Search Doctrine

During the American framing era, criminal arrest and search authority was still a component of common law.¹⁹ In contrast to modern doctrine, arrest authority was the salient topic, while criminal search authority was essentially an appendage of arrest authority. Indeed, in the absence of forensic science or possessory offenses like modern drug laws, there was little physical evidence of crime to search for other than stolen property.²⁰ (Smuggling was dealt with through civil forfeiture proceedings rather than criminal prosecution.²¹) Thus, while there was a settled understanding that it was usually unlawful to “break” a house (that is to enter a house through a closed door) to make an arrest without an arrest warrant, it appears that an arrest warrant for theft probably also conveyed implicit search authority.²²

¹⁸ For clarity, I depart from the usual convention and use “due process of law” to refer to the framing-era understanding of that term and reserve the customary “due process” label for the modern understanding.

¹⁹ See Davies, *Correcting Search History*, *supra* note 16, at 80-81.

²⁰ See Davies, *Original Fourth*, *supra* note 16, at 627.

²¹ For example, when John Hancock was accused of smuggling in Boston in 1769, he was subjected to a civil law forfeiture proceeding in the Vice-Admiralty Court, not to criminal prosecution. See Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 106, 122 n.52 (2005); see also *infra* note 93.

²² Although Coke had asserted that Magna Carta’s “law of the land” provision demanded that “breaking a house” (that is, entering through a closed door) be justified by a valid felony arrest warrant, it seems likely that such an arrest warrant would also have carried the authority to search a house in which an arrest was made, at least if the arrest was for theft. That appears to have been the case because the only form of criminal search warrant discussed in the framing-era sources was the “search warrant for stolen goods.” However, that warrant seems to have been developed to address the situation in which the victim of a theft had probable cause as to the location of his stolen goods, but was unable or unwilling to make an allegation *as to the identity of the thief*. That is, the search warrant for stolen goods seems to have been used only when the standard for issuance of an arrest warrant could not be met. Perhaps because the search warrant for stolen goods was conceived to be an intrusion on a potentially innocent person’s house, a search conducted under such a warrant was valid only if the stolen goods actually were found; otherwise the complainant who

Additionally, a lawful warrantless arrest carried authority to search the arrestee for weapons or stolen goods. However, framing-era authorities did not recognize any form of warrantless criminal search other than what we now call a search incident to arrest.²³

Moreover, the settled common law criminal procedure standards were accusatory rather than investigatory in character. In contrast to modern doctrine, bare probable cause that a crime might have been committed was never enough to justify either a warrantless felony arrest or the issuance of an arrest warrant. Instead, criminal justice authority seems to have been conceived to arise from the "fact" that a crime had been committed. Hence, a felony arrest was lawful only if a named complainant (usually a crime victim) could (1) prove that a felony actually had been committed "in fact,"²⁴ and (2) could also present evidence showing "probable cause of suspicion" that the arrestee was the felon.²⁵ A person who made a warrantless felony arrest had to be prepared to make these showings to a justice of the peace immediately after the arrest.²⁶ A person who sought issuance of an arrest warrant had to make these showings to a justice of the peace prior to the issuance of a warrant.²⁷

In keeping with the general ban against the use of hearsay evidence, which forbade the use of virtually all unsworn statements, neither warrantless arrests nor arrest warrants could be based on information from

obtained the warrant was liable for trespass damages, though an officer who merely executed the warrant was not. See Davies, *Probable Cause*, *supra* note 16, at 17.

²³ See *id.* at 16.

²⁴ See *id.* at 11, 13-14. This required allegation that a crime had been committed "in fact" was so important that the term "fact" was often used as a synonym for a committed crime in framing-era sources. See *id.* at 11 n.29.

²⁵ See *id.* at 11, 14.

²⁶ In framing-era America, Marian committal procedure (so named because it was required by statutes enacted during the reign of Mary Tudor) served as roughly the equivalent of the modern *Gerstein* probable cause hearing that is now required to test the grounds for a warrantless arrest. Under Marian procedure, anyone who made a felony arrest (either with or without warrant) was required to promptly take the arrestee to a justice of the peace for the justice to decide whether to bail the arrestee, commit him to prison, or release him. The justice was required to take and record in writing the sworn information of the complainant (often called the "informer") and any additional witnesses the complainant could provide. In effect, this procedure meant that a complainant had to be ready to offer prima facie sworn proof of the guilt of the arrestee contemporaneously with the arrest. See Davies, *supra* note 21, at 126-29 (describing Marian committal procedure). Thus, unlike modern practice, there was no delay between an arrest and the beginning of the prosecution. Rather, under the Marian committal procedure used in framing-era America, a person who made a warrantless arrest had to promptly take the arrestee before a justice of the peace and there make a sworn complaint that a crime had been committed and also testify as to the grounds for suspecting the arrestee.

²⁷ See Davies, *Probable Cause*, *supra* note 16, at 18-20.

“confidential informants.”²⁸ Indeed, the requirement that a named and thus potentially accountable complainant make a sworn accusation constituted the salient legal protection against malicious arrests.²⁹ Additionally, and unlike a modern police officer, a framing-era constable had no larger authority to make a warrantless felony arrest than any other person, and if he assisted another person in making an unlawful warrantless arrest he was equally at risk for forcible resistance or trespass liability.³⁰

Moreover, because arrest authority was structured according to assessments of “necessity,” warrantless arrest authority for less-than-felony offenses was more restricted than for felonies.³¹ Warrantless arrests for less-than-felony offenses were limited to situations involving ongoing breaches of the peace, such as fights in public. Once the breach of the peace ended, however, a lawful arrest could be made only by a judicial arrest warrant.³² There usually was no arrest authority at all for petty offenses that did not rise to the level of breaches of the peace; those were simply handled with issuance of a summons.³³

²⁸ The general rule at the time of the framing of the Bill of Rights was that any unsworn statement was “hearsay” and “hearsay is no evidence”; hence, the factual justification for an arrest had to be provided under oath by persons with personal knowledge of the events and circumstances. *See generally* Thomas Y. Davies, *Not “The Framers’ Design”: How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford-Davis “Testimonial” Formulation of the Scope of the Original Confrontation Clause*, 15 J.L. & POL’Y 349 (2007) (describing the prominence of the ban against hearsay in framing-era evidence doctrine and the original understanding of the Sixth Amendment Confrontation Clause).

²⁹ The named complainant was exposed to potential liability for false imprisonment or malicious prosecution, depending on the circumstances. *See* Davies, *Probable Cause*, *supra* note 16, at 13.

³⁰ *See, e.g.*, 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 80-81 (1721) (stating that “[a]s to the justifying of . . . arrests by the Constable’s own authority; it seems difficult to find any Case, wherein a Constable is impowered to arrest a Man for a Felony committed or attempted, in which a private Person might not as well be justified in doing it”). The second volume of Hawkins’s treatise was the leading authority on criminal procedure and evidence during the framing era. *See, e.g.*, Davies, *supra* note 28, at 394-95.

³¹ *See* Davies, *Arrest*, *supra* note 16, at 320-26 (discussing the different justifications and standards for felony and less-than-felony breach of the peace arrests).

³² *See id.* at 323-24.

³³ *See id.* at 322. For examples of the absence of warrantless arrest authority for less-than-breach-of-the-peace petty offenses, *see, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES *278-80 (1769) (discussing summary proceedings before justices of the peace for “divers petty pecuniary mulcts [that is, fines], and corporal penalties, [and] many disorderly offenses” as being instances in which “it is necessary to *summon* the party accused”); 2 THE WORKS OF JAMES WILSON 689-90 (Robert Green McCloskey ed., 1967) (reprinting Wilson’s lectures on law given in Philadelphia 1790-91) (“On an indictment for any crime under the degree of treason or felony, the process proper to be first awarded, at the common law, is a *venire facias*, which, from the very name of it, is only in the nature of a summons to require

2. Arrest Doctrine as an Aspect of "Due Process of Law"

In keeping with the writings of Sir Edward Coke, these accusatory common law arrest standards were understood to be salient aspects of "due process of law." During the early seventeenth century, Coke had asserted that the common law arrest standards were components of Magna Carta's guarantee that no freeman was to be "taken" or "imprisoned"—that is, arrested—except according to "the law of the land."³⁴ Indeed, Coke set out common law arrest standards in some detail in his discussion of that provision.³⁵ Additionally, Coke followed earlier reaffirmations of Magna Carta in treating the term "due process of law" as a more precise label for the common law requisites for initiating a criminal prosecution and discussed arrest standards, including warrantless arrest standards, as forms of "process of law."³⁶ Notably, that was still the meaning attached to "due process of law" in framing-era authorities.³⁷

Thus, when the framers of the initial state declarations of rights undertook to prevent legislative relaxation of the seemingly settled common law arrest standards, they did so by including provisions that forbade a person being "taken," "imprisoned," or "arrested" except according to "the law of the land."³⁸ To emphasize that criminal procedure requisites were protected against legislative relaxation, Alexander Hamilton initiated a shift to Coke's alternative "due process of law" terminology when New York

the appearance of the party On an indictment for felony or treason, a *capias* [that is, an arrest warrant] is always the first process.").

³⁴ See Davies, *Correcting Search History*, *supra* note 16, at 43-50.

³⁵ See *id.* at 54-62.

³⁶ See *id.* at 47-67.

³⁷ See *id.* at 81-86. During the framing era, "process" did not mean "procedure." Rather, "process" still referred to the source of authority, usually in writing, for initiating a legal proceeding. However, Coke asserted that "process of law" for arrest included both a written warrant, which he called a "warrant in deed," and the legal authority for warrantless arrest, which he called "warrant in law" (using "warrant" as a synonym for "authority"). Thus Coke brought the various justifications for warrantless arrests into his discussion of Magna Carta's ban against arrests except by "due process of law." See *id.* at 50-52. Contrary to modern expectations, Coke did not address criminal trial procedure in his discussion of "due process of law." Instead, in framing-era usage, fair trial procedure was referred to as "due course of law," never as "due process of law." See *id.* at 67-69, 81-82.

³⁸ See *id.* at 93-120 (setting out and discussing the initial state arrest and general warrant provisions). The 1780 Massachusetts declaration is especially revealing because John Adams explicitly used "arrested" rather than the more traditional "taken" language when he drafted the "law of the land" provision in that declaration. Because Adams had clearly dealt with arrests in that provision, it is patent that he was referring only to searches under general warrants when he first introduced the phrase "unreasonable searches and seizures" in a later provision that banned issuance of general warrants. Hence, it is patent that Adams understood that phrase to be simply a pejorative label for searches conducted under too-loose warrants. See *id.* at 112-18.

adopted an arrest protection in a statutory bill of rights in 1787.³⁹ Two years later, James Madison followed Hamilton's phrasing when he included the prohibition against depriving a person of "liberty" except by "due process of law" in the proto-Fifth Amendment.⁴⁰

The federal Framers probably did not anticipate that the new federal government of enumerated powers would be much involved in criminal law enforcement; rather, that subject was left to the plenary powers of the state governments. Hence, it is possible they were less concerned with preserving common law arrest standards than the state framers had been. Nevertheless, there is no reason to think that they would have assigned a different meaning to "due process of law" than that found in the authorities of the time.⁴¹ Rather, the fact that Madison proposed putting the proto-Fifth Amendment at the beginning of the criminal procedure provisions in the Bill of Rights confirms that "due process of law" was understood to connote the common law legal requisites for *initiating* criminal prosecutions.⁴²

3. The Loss or Rejection of the Original Understanding of "Due Process of Law"

The reason that the historical meaning of "due process of law" now sounds quite strange is that nineteenth-century American judges either forgot or, more likely, intentionally jettisoned the original Cokean understanding of "due process of law" in order to clear the way for enlarging the warrantless arrest powers of newly invented police officers. In 1827, English judges responded to a rising tide of urban property crime and disorder by disposing of the felony-in-fact requirement and allowing peace officers (but not private persons) to make warrantless felony arrests on mere "probable cause" that a felony had been committed.⁴³ That change meant that there was no longer a need for a named complainant. Instead, an

³⁹ See *id.* at 121-27.

⁴⁰ See *id.* at 146-47.

⁴¹ See *id.* at 155-58. It is worth noting that the early Congresses did not enact any statutory standards for warrantless arrests by federal officers. That silence indicates that it was understood that the arrest standards of the relevant state—that is, the common law standards—would apply. See *id.* at 157, n. 491.

⁴² Indeed, the noncriminal character of the Fourth Amendment was clearer in the original ordering of the amendments. As proposed and debated in the House, the ban against general warrants was not at the beginning of the criminal procedure protections. Rather, they began with the pretrial criminal requisites, including "due process of law," in the proto-Fifth Amendment, and then the ban against excessive bail in the proto-Eighth Amendment, then the ban against general warrants in the proto-Fourth Amendment, and then the criminal trial protections of the proto-Sixth Amendment. See *id.* at 140-43.

⁴³ See *id.* at 187-88.

officer could make a warrantless felony arrest on the basis of unsworn hearsay information he had received.⁴⁴

American state judges, who likely shared the same concerns as their English counterparts, then began to import that relaxed standard for warrantless felony arrests around the middle of the nineteenth century.⁴⁵ However, as is usually the case with judicial innovation, the judges did not admit their innovation but rather pretended to be merely applying settled “common law.” In effect, state judges deconstitutionalized the law of arrest and the related law of incident searches to permit more aggressive policing. Unsurprisingly, they said little about their state “law of the land” provisions while doing so.⁴⁶

The justices of the Supreme Court then completed the eradication of the original understanding of “due process of law” in the 1884 ruling in *Hurtado v. California*⁴⁷ when, over the lone dissent of the first Justice Harlan (who still correctly invoked Coke’s writings), they effectively excised criminal procedure requisites from the two federal Due Process Clauses, and thus allowed those provisions to be used as the vehicles for the other meanings that they preferred to invent under that rubric.⁴⁸ Thus, by the time the *Journal* began publication in 1910, framing-era criminal arrest and search standards as well as the original understanding of “due process of law” were largely (though not entirely) forgotten.⁴⁹

Two years after *Hurtado*, the justices also invented a new understanding of the Fourth Amendment in the 1886 decision *Boyd v. United States*.⁵⁰ However, to appreciate *Boyd*’s novelty, one has to first put aside the modern myths that have been partly shaped by *Boyd* itself and instead recover the original understanding of the Fourth Amendment.

⁴⁴ See Davies, *Probable Cause*, *supra* note 16, at 46.

⁴⁵ See Davies, *Arrest*, *supra* note 16, at 188-90. However, the restrictions on warrantless arrests for less than felony offenses were not relaxed. See Davies, *Probable Cause*, *supra* note 16, at 54.

⁴⁶ See Davies, *Correcting Search History*, *supra* note 16, at 173-81. For additional discussions of the emergence of modern policing during the nineteenth century, see Wesley M. Oliver, *The Neglected History of Criminal Procedure, 1850-1940*, 62 RUTGERS L. REV. 447 (2010). This article is derived from material in Wesley M. Oliver, *The Nineteenth and Early Twentieth Century Origins of Modern Criminal Procedure: A View from the New York Police Department* (Dec. 2009) (unpublished D.S.L. dissertation, Yale University) (on file with author).

⁴⁷ 110 U.S. 516 (1884).

⁴⁸ See Davies, *Correcting Search History*, *supra* note 16, at 197-200.

⁴⁹ When Congress finally got around to enacting statutory authority for various categories of federal officers to make warrantless arrests during the mid-twentieth century, it initially included the felony “in fact” requirement, but then deleted it and adopted a bare probable cause standard in 1948. See *id.* at 210-12.

⁵⁰ 116 U.S. 616 (1886).

B. THE ORIGINAL FOURTH AMENDMENT AS A REGULATION OF
REVENUE SEARCHES OF HOUSES

The conventional history of the Fourth Amendment is correct insofar as it treats that Amendment, like the several state predecessors, as a response to a prerevolutionary colonial grievance against “general warrants.”⁵¹ However, the conventional account obscures the point that that American colonial controversy was not about criminal searches because it overemphasizes the significance of the English Wilkesite cases of the mid-1760s. In those cases, English judges had reaffirmed earlier common law authorities by condemning the illegality of general warrants used to search the houses and papers of John Wilkes, an English opposition politician, and several of his supporters for evidence of seditious libel.⁵² However, the important, though often overlooked, fact is that there were no comparable episodes to the Wilkesite cases in the American colonies.

Instead, the colonial grievance arose from Parliament’s authorization of the use of unparticularized general warrants in the form of “writs of assistance” *for customs searches of houses* in the North American colonies. The initial episode of controversy arose in Boston in 1761 when James Otis unsuccessfully argued that general writs were “against common right and reason” because they subverted the common law “Privilege of House” by exposing it to the whims of petty officers.⁵³

However, the more widespread and important episode of controversy erupted when Parliament reauthorized use of general writs of assistance for North American customs enforcement in the 1767 Townshend Duties Act—

⁵¹ See, e.g., NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 43-78 (1937) (discussing the English Wilkesite cases of the early 1760s and the 1761 Boston litigation regarding the general writ of assistance); JACOB W. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION* 28-37 (1966) (same).

⁵² In the English Wilkesite controversies of the early 1760s, the Secretary of State had issued general warrants that officers used to arrest, search the homes, and seize the papers of John Wilkes, an opposition politician, and several of his supporters. English judges, especially Lord Camden, then declared such warrants to be illegal and void. See Davies, *Original Fourth*, *supra* note 16, at 562-65. Contemporaneously with the Wilkesite cases, Parliament also condemned general warrants—but reserved authority to itself to authorize issuance of general warrants. See *id.* at 658.

⁵³ See *id.* at 561, 568, 580-81. Otis argued that the general writ was so fundamentally contrary to “common right and reason” (a phrase he took from Coke) that even a Parliamentary statute could not make it legal. Otis’s protégé, John Adams, took notes of the argument. I think that Otis’s invocation of Coke’s phrase “against reason” was the most likely inspiration for Adams’s introduction of the phrase “unreasonable searches and seizures” in the 1780 Massachusetts ban against general warrants. See *id.* at 689-91. However, Adams almost certainly would also have been aware of prior instances in which general warrants had been labeled “unreasonable” warrants. See *id.* at 692.

that is, after Americans had already been angered by the Stamp Act in 1765 and after they also had learned from brief newspaper accounts that English judges had confirmed the illegality of general warrants in the Wilkesite cases.⁵⁴ Unsurprisingly, when customs officers petitioned the colonial courts to issue writs under that statutory authority, colonists challenged the legality of such writs, and a number of the colonial judges either declined to act or actually rejected applications for new writs of assistance on the ground that such writs gave discretionary search authority to customs officers and thus were "unconstitutional."⁵⁵ As a result, the general writs for customs searches of houses became an early symbol of Parliament's disregard for colonists' common law rights.⁵⁶

Although the general writ controversy was soon displaced by more grievous colonial complaints against the Intolerable Acts, memory of the still-recent grievance against general writs prompted the state framers to include bans against the issuance of general warrants in several of the initial state declarations of rights adopted prior to the framing of the Bill of Rights (though such provisions were not as commonly adopted as the "law of the land" and "due process of law" arrest provisions described above).⁵⁷ Additionally, the memory of the general writ grievance was revived during the ratification debates of 1787-1788 when anti-federalist agitators embellished fears of new federal taxes by predicting that approval of the new Constitution would mean that the new Congress would authorize use of general warrants for excise tax collection and thus expose private dwellings to invasion by hordes of voracious national "excisemen."⁵⁸ In response to

⁵⁴ Americans were familiar with the basic facts of the English general warrant controversies from brief newspaper accounts, but *none of the case reports* of the Wilkesite cases that are routinely cited in conventional accounts of Fourth Amendment history were published during the period of intense colonial controversy. The earliest of the case reports was not published until 1770, and most were not published until after the outbreak of the Revolutionary War. Thus, it is a historical error to treat the contents of the case reports, which were not available until *after* the period of intense colonial controversies, and even after the adoption of bans against general warrants in the state declarations of rights, as though they shaped American views. See *id.* at 565; see also *infra* notes 89-92 and accompanying text.

⁵⁵ See Davies, *Original Fourth*, *supra* note 16, at 566-67, 581, 601-04.

⁵⁶ See JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 197 (1986) ("For Americans, writs of assistance were grievous because they were authorized by Parliament and were yet another potential threat to rights posed by Parliament's claim to legislative supremacy.").

⁵⁷ See Davies, *Correcting Search History*, *supra* note 16, at 89-127.

⁵⁸ See Davies, *Original Fourth*, *supra* note 16, at 609-11, 721-22. Excise tax searches were even more objectionable than customs searches because collection of excise taxes was not confined to port cities, but could apply to houses throughout the country. See Davies, *Probable Cause*, *supra* note 16, at 33-34, 37.

these dire predictions, several state ratification conventions called for including a ban against general warrants in a federal Bill of Rights.⁵⁹

James Madison then responded to the state proposals in 1789 when he included what he characterized as a ban against “general warrants” in his proposals for a federal Bill.⁶⁰ After a committee that reviewed Madison’s proposals made several stylistic but largely non-substantive changes,⁶¹ the text of the proto-Fourth Amendment read

The right of the people to be secure in their persons, houses, papers, and effects, [against unreasonable searches and seizures,] shall not be violated by warrants issuing, without probable cause supported by oath or affirmation, and not particularly describing the places to be searched, and the persons or things to be seized.⁶²

Three aspects of the proto-Fourth Amendment are noteworthy. One is that it innovated by using a sworn showing of bare “probable cause” as the standard for particularized warrants. That standard, which had not been used in any of the earlier state bans against general warrants, was lower than the settled common law standard for criminal arrest or search warrants insofar as it did not require a sworn allegation of a crime in fact. Instead, the bare probable cause standard appears to have been borrowed from the English statutory standard for issuance of an excise search warrant for a specific house.⁶³ So, although the inclusion of “persons” and “papers” in the Fourth Amendment shows that it was written broadly enough to ban all uses of general warrants, the adoption of the bare “probable cause” standard

⁵⁹ See Davies, *Correcting Search History*, *supra* note 16, at 127-36.

⁶⁰ See Davies, *Original Fourth*, *supra* note 16, at 699-700 (noting several instances in which Madison described the proto-Fourth Amendment as a protection against general warrants but noting the absence of any statements by Madison regarding warrantless intrusions).

⁶¹ See *id.* at 710-16. The only change of substance was that the committee replaced Madison’s “other property” with the somewhat narrower term “effects”; a term that usually connoted moveable property such as furniture and goods. See *id.* at 706-14.

⁶² See *id.* at 710 n.465. The bracketed phrase “against unreasonable searches and seizures” was initially omitted from the committee report—apparently as a copying error—but was reinserted by motion in the House. See *id.* at 715. Madison’s initial draft had condemned “all unreasonable searches and seizures” but the “all” was not reinserted in the final text. See *id.*

⁶³ The only area of law in which bare “probable cause” of a violation could justify issuance of a warrant in the late eighteenth century was revenue enforcement. See Davies, *Original Fourth*, *supra* note 16, at 703-04; Davies, *Probable Cause*, *supra* note 16, at 31-34. English excise statutes permitted issuance of an excise search warrant on the basis of an officer’s sworn showing of probable cause, and a 1787 Pennsylvania statute had also adopted that standard for a customs search warrant. Thus, because the federal Framers were concerned primarily with revenue searches, they adopted the standard for revenue search warrants, rather than the more rigorous standard for criminal warrants. See *id.* at 36-38, 40-41; see also *infra* note 83.

reveals that the federal Framers were specifically concerned with regulating revenue search warrants.

Interestingly, although it was understood that a judicially issued warrant was required to justify a search of a house,⁶⁴ it appears that it was also accepted that a revenue search warrant could be issued under a less restrictive standard than a criminal arrest warrant. This probably reflected a recognition that the crime-in-fact requirement for criminal warrants would have been unworkable given the absence of victim-complainants regarding customs violations; hence, it was necessary to rely on customs officers to initiate revenue searches. As a practical matter, that meant that a judicial assessment of an officer's showing of probable cause that a violation had occurred was as much as could realistically be demanded.⁶⁵ Additionally, the looser standard for revenue as opposed to criminal warrants may have reflected a judgment that revenue collection was actually of more importance to the government and society than the prosecution of crimes.⁶⁶

The second noteworthy feature of Madison's proposed provision is that it consisted of only a single clause and thus was obviously aimed *solely* at regulating warrant standards.⁶⁷ However, a change was made in the House of Representatives at the last minute, and apparently accepted without debate, to make it clear that even *issuing* general warrants was forbidden.⁶⁸ Specifically, the change consisted of replacing Madison's "by warrants issuing" with "and no warrant shall issue"—a command that had appeared in all of the prior state provisions banning general warrants, as well as all of the state ratification convention proposals for a federal ban.⁶⁹

⁶⁴ See Davies, *Correcting Search History*, *supra* note 16, at 19 (noting that the common law requirement of a warrant to justify breaking a house was assumed when the Fourth Amendment was drafted); *id.* at 63-64 (discussing Coke's treatment of the requirement of a warrant to break a house as an aspect of Magna Carta's "law of the land" protection).

⁶⁵ Judicial assessment of the grounds for a search was important because revenue officers had pecuniary interest in discovering and seizing uncustomed or untaxed goods. However, the rule at the time of the framing was that a revenue officer was exposed to trespass damages if he made an unsuccessful search under a warrant he had procured. See Davies, *Probable Cause*, *supra* note 16, at 35-36.

⁶⁶ See *id.* at 31 n.128 (noting that Jeremiah Gridley made that claim while representing the customs office during the 1761 Writ of Assistance case in Boston, and that Lord Mansfield later made a similar claim).

⁶⁷ Prior commentaries generally concede that Madison's draft was aimed solely at banning general warrants. See Davies, *Original Fourth*, *supra* note 16, at 699 n.434.

⁶⁸ The conventional accounts of Fourth Amendment history have often claimed that the proposed change was initially voted down but then made surreptitiously by a later committee; however, the weight of the evidence is plainly that the change was approved. See *id.* at 717-19.

⁶⁹ See Davies, *Correcting Search History*, *supra* note 16, at 34-37, 167-69.

That final change had the side-effect of breaking the provision into a two-clause text:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, *and no Warrants shall issue*, but upon probable cause, supported by Oath or affirmation, and particularly describing the places to be searched, and the persons or things to be seized.⁷⁰

Today, judicial opinions and conventional commentaries routinely claim that the Framers divided the Fourth Amendment into two clauses *for the purpose* of creating an overarching “reasonableness” standard for all government intrusions, including warrantless arrests and searches.⁷¹ However, that is only a prochronistic fantasy.⁷² There is not so much as a hint in the legislative record that the change was meant to have anything to do with creating a “reasonableness” standard for warrantless arrests or searches,⁷³ and it is noteworthy that the post-framing commentaries also did not identify any such standard in the text.⁷⁴

Rather, even after the final change, the Fourth Amendment was still understood to be focused on the standards for issuing warrants; the phrase “unreasonable searches and seizures” (which had been borrowed from John Adams’s 1780 Massachusetts ban against general warrants⁷⁵) was merely a pejorative label for the gross illegality of searches conducted under general

⁷⁰ See *id.* at 167-68 (emphasis added).

⁷¹ See Davies, *Original Fourth*, *supra* note 16, at 568-70 (identifying opinions and commentaries regurgitating the conventional account).

⁷² A prochronism is the specific form of anachronism in which aspects of a later period are incorrectly imposed on an earlier period. See, e.g., Davies, *supra* note 21, at 116 n.34 (presenting examples of how prochronistic expectations based on modern doctrine can pose a serious obstacle to recovering accurate legal history).

⁷³ Indeed, the fact that there is no record that the substitution of “no warrant shall issue” for “by warrants issuing” prompted any debate in Congress is inconsistent with the claim that the change was substantive. See Davies, *Probable Cause*, *supra* note 16, at 40 n.164. That is especially the case because the adoption of an overarching “reasonableness” standard would have constituted a drastic departure from common law that did not recognize any “reasonableness” standard regarding arrests or searches. See Davies, *Original Fourth*, *supra* note 16, at 591-600. Moreover, there do not seem to have been colonial complaints about warrantless searches or arrests during the period of the customs search controversies. See *id.* at 600-11. Although one complaint voiced in Boston in 1772 may appear to be about customs officers searching only on the basis of their “commissions,” the fact is that commissioned customs officers were routinely issued a standing writ of assistance in Boston under the authority of the 1761 ruling upholding such writs. Hence, that complaint was actually about customs searches under general warrants, and the omission of any mention of the general writ was probably a rhetorical device for underscoring the illegitimacy of the writ. See *id.* at 603-04.

⁷⁴ *Id.* at 611-19.

⁷⁵ See *supra* note 38.

warrants.⁷⁶ Indeed, the initial clause in the Fourth Amendment’s text was probably included in the text for the purpose of setting out the “persons, houses, papers, and effects” definition of the scope of the Amendment’s protection—a formula that excluded ships, and probably even commercial warehouses, from the specific warrant requirement.⁷⁷

The third noteworthy feature of the proto-Fourth Amendment is that it, like almost all of the provisions that ultimately became the Bill of Rights (including the “due process of law” clause in the Fifth Amendment), was initially intended to be inserted in the limitations on the power of Congress set out in Article I, Section 9 of the Constitution.⁷⁸ That intended placement reflects both the Framers’ fear of legislative excess and the traditional understanding that an unlawful act by an officer did not constitute government action, but only a personal trespass. So the Fourth Amendment was not intended to regulate the conduct of officers directly. Rather, the Framers presumed that the common law would control the officer by providing a damages remedy for an officer’s unlawful search; the important constitutional task was to prevent Congress from loosening the standard for the issuance of warrants by courts.⁷⁹

Thus, the Fourth Amendment was originally intended and understood primarily to prohibit Congress from authorizing general warrants for federal revenue searches of houses and their contents. However, even if the federal Framers were less concerned with criminal arrests than the state framers, there is no reason to think they intended for the Fourth Amendment to undercut the more rigorous requirement of an allegation of crime committed “in fact” for criminal arrest warrants.⁸⁰ Indeed, that standard was still understood to be an aspect of the requirement of “due process of law” set

⁷⁶ See Davies, *Original Fourth*, *supra* note 16, at 686-93 (discussing the significance and meaning of “unreasonable” in late eighteenth century legal discourse and tracing the phrase “unreasonable searches and seizures” to Coke’s condemnation of statutes that were contrary to common law and thus “against . . . reason”).

⁷⁷ See Davies, *Probable Cause*, *supra* note 16, at 30 n.127 (noting that Pennsylvania and Massachusetts, which used the “persons, houses, papers, and possessions” formula in state bans against general warrants, both enacted revenue search warrant statutes that required strict warrant standards only for searches of dwellings, but allowed warrantless searches of commercial premises or ships); *see also id.* at 38-38; Davies, *Original Fourth*, *supra* note 16, at 604-08 (noting the absence of colonial controversies over ship searches as contrasted to customs racketeering in the form of seizures of ships or cargo made under arbitrary enforcement of customs regulations).

⁷⁸ See Davies, *Original Fourth*, *supra* note 16, at 700-02.

⁷⁹ See *id.* at 660-67 (documenting that unlawful conduct by persons holding an office was not viewed as government action until the early twentieth century); *infra* notes 108-109 and accompanying text.

⁸⁰ See Davies, *Correcting Search History*, *supra* note 16, at 155-58.

out in the Fifth Amendment.⁸¹ Moreover, shortly after adopting the Bill of Rights, the First Congress directed federal courts to use the warrant procedures of the state in which the federal court sat, which meant that federal arrest warrants also had to comply with the state constitutional standards for criminal warrants.⁸²

Hence, the text of the Fourth Amendment was actually well-suited to the task for which it was intended. Indeed—and in contrast to the Fifth Amendment “due process of law” clause—the Fourth Amendment accomplished its intended purpose because neither Congress nor the courts authorized general warrants.⁸³ Moreover, because Congress did not violate the Amendment’s commands by authorizing general warrants, there was no occasion for significant litigation relating to the Amendment during roughly the first century after its enactment.⁸⁴ Thus, there was a substantial gap during which the Amendment was not construed in judicial opinions, and its original purpose and understanding likely receded from memory. However, nearly a century after the framing a decidedly activist Supreme Court majority imposed its own gloss on the Amendment in the 1886 *Boyd* ruling, and that ruling planted the seed of modern doctrine.

C. BOYD’S REINVENTION OF THE FOURTH AMENDMENT AS A PROTECTION OF BUSINESS RECORDS

Even during the aftermath of the Civil War, customs collections continued to be the primary source of federal government revenue. The specific issue in *Boyd* involved the constitutionality of a federal statute that undertook to improve those collections by providing authority for customs

⁸¹ See *supra* notes 24-27, 41 and accompanying text. In the ordering of the amendments debated in Congress, the “due process of law” clause of the proto-Fifth Amendment came before the Fourth Amendment. See Davies, *Correcting Search History*, *supra* note 16, at 140-41, 169-71.

⁸² Notably, the early Congresses enacted statutory authority for revenue searches (*see infra* note 83 and accompanying text), but did not enact any statutory standards for criminal arrest warrants. Rather, the 1789 Judiciary Act simply directed federal courts and officers to use the modes of process used in the state in which they served, and “process” would have included warrants. See Judiciary Act of 1789, ch. 20, sec. 33, 1 Stat. 73, 91. Likewise, Congress did not create federal statutory authority for warrantless arrests by federal officers, which meant that such arrests were subject to state law standards. See Davies, *Correcting Search History*, *supra* note 16, at 157 n.491.

⁸³ The 1789 Collections (Customs) Act, enacted shortly before Congress adopted the Bill of Rights, required “reasonable cause” for issuance of a customs search warrant for places on land, while the 1791 Excise Act was even more explicit in requiring judicial assessment of the sworn showing of “reasonable cause” for issuance of an excise search warrant. See Davies, *Probable Cause*, *supra* note 16, at 41.

⁸⁴ See Davies, *Original Fourth*, *supra* note 16, at 613-15. Notably, the few cases typically involved legislation authorizing some form of “warrant.” *Id.*

officials to obtain a court order requiring an importer to produce an invoice to prove that the claimed value of imported goods was accurate. The statute also provided that an importer's refusal to comply with the order would be deemed to be an admission that the government's estimate of the value was correct.⁸⁵ In a flourish of fictional originalism, Justice Bradley's majority opinion cited a passage from one of the English Wilkesite cases as authority that an order to produce an invoice constituted an "unreasonable seizure" because it also amounted to compelled self-incrimination.⁸⁶ Thus, Justice Bradley announced that the statute at issue violated the Fourth Amendment because it violated the Fifth Amendment.⁸⁷ After declaring the statutory authority for the order to compel production to be unconstitutional, the *Boyd* opinion ordered, without further explanation, that the "seized" invoice not be admitted into evidence on retrial.⁸⁸

However, the radical ruling in *Boyd* actually had no material roots in history or precedent. Justice Bradley asserted that "every American statesmen, during our revolutionary and formative period as a nation, was undoubtedly familiar" with Lord Camden's "memorable discussion" in the 1765 ruling in *Entick v. Carrington*, and thus "it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment."⁸⁹ He then quoted Camden to the effect that a "paper-search" amounted to "compelling self-accusation."⁹⁰ However, that particular notion seems to have been rather idiosyncratic to Camden,⁹¹ and it did not appear in the report of *Entick* with which the Framers were likely

⁸⁵ *Boyd v. United States*, 116 U.S. 616, 619-20 (1885) (quoting "[t]he 5th section of the act of June 22, 1874").

⁸⁶ *Id.* at 626-29 (quoting *Entick v. Carrington*, 19 Howell's State Trials 1029 (C.P. 1765)). However, that edition of the State Trials case reports was not published until the early nineteenth century. Justice Bradley's analysis appears to have tracked that of an earlier commentary. See THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE UNITED STATES OF THE AMERICAN UNION 299-304 (1st ed. 1868); *id.* at 365-69 (*299-304) (5th ed. 1883).

⁸⁷ *Boyd*, 116 U.S. at 627-30. A concurring opinion by Justice Miller, joined by Chief Justice Waite, agreed with the majority that the proceeding was sufficiently "criminal" that the order to produce violated the Fifth Amendment protection against self-incrimination but rejected the claim that the statute worked a "seizure" to which the Fourth Amendment would apply. *Id.* at 638-41 (Waite, C.J. & Mille, J., concurring).

⁸⁸ *Id.* at 638. Note that although *Boyd* has sometimes been cited as the initial announcement of the exclusionary rule, it dealt only with the evidentiary consequence of an unconstitutional statute rather than of the conduct of officers.

⁸⁹ *Id.* at 626-27.

⁹⁰ *Id.* at 629.

⁹¹ See Davies, *Original Fourth*, *supra* note 16, at 727 n.513 (noting that the only other source from the period that seems to have made a similar self-incrimination claim regarding a seizure of papers was a pamphlet that Camden is thought to have authored).

to have been familiar.⁹² Hence, Justice Bradley's historical claim is almost certainly incorrect.

Additionally, Justice Bradley's expansive notion of a "seizure" of papers ignored the focused historical concern with house searches, as well as the obvious distinction between the personal letters and diaries seized in *Entick* and other Wilkesite cases and the commercial invoice at issue in *Boyd*. Likewise, his opinion distorted the original meaning of the Fifth Amendment by disregarding the non-criminal character of a customs forfeiture proceeding.⁹³ Notably—and in contrast to modern doctrine—Justice Bradley's conception of an "unreasonable" seizure did not depend on any assessment of the specific circumstances; rather, he used the term to announce a categorical condemnation of any legal process by which the government might obtain business documents.⁹⁴

Hence, the *Boyd* ruling is best understood as a component of the justices' late nineteenth century campaign to create constitutional barriers against government regulation of business entities. Notably, the justices decided *Boyd* shortly after they reinvented the Due Process Clause of the Fourteenth Amendment to confer authority on the federal courts to assess the "reasonableness" of government regulations of business.⁹⁵ In the same year, they enlarged the potential reach of this new substantive due process doctrine by unanimously announcing—after declining to hear argument on

⁹² It is plausible that many of the Framers would have been familiar with the earliest report of the 1765 Court of Common Pleas ruling in *Entick*, as reported in 2 Wils. 275 (1st ed., 1770), reprinted in 95 Eng. Rep. 807. However, that report did not contain the passage treating a paper-search as a form of self-accusation. The report of *Entick* that Bradley quoted from in *Boyd* was an expanded rendition of *Entick* that was first published in London in 1781 in 11 State Trials 313 (Francis Hargrave ed., 4th ed. 1781), and then reprinted in Howell's later edition of State Trials. However, it does not appear that Hargrave's edition of State Trials was likely to have been imported in sufficient numbers by 1789 for the later version of *Entick* to have come to the Framers' attention, even assuming they would have had reason to read that version after bans against general warrants had already been included in the state declarations of rights. See Davies, *Original Fourth*, *supra* note 16, at 565-66 n.25, 727 n.512.

⁹³ It appears that the phrase "in any criminal case" was added to the Fifth Amendment protection against compelled self-incrimination for the specific purpose of making it clear that that provision did not relate to the oaths required in customs procedures. See Davies, *Original Fourth*, *supra* note 16, at 705 n.450. Moreover, although *Boyd* characterized the revenue statute as being "criminal" in character, 116 U.S. at 634, that characterization was a departure from earlier cases in which the Court had ruled that revenue statutes did not constitute criminal statutes. See, e.g., *Taylor v. United States*, 44 U.S. 197, 210-11 (1845) (noting that although revenue statutes might be loosely termed "penal," they are actually "remedial").

⁹⁴ See Davies, *Original Fourth*, at 727-28.

⁹⁵ See *Munn v. Illinois*, 94 U.S. 113 (1876).

the point—that a corporation was a “person” for purposes of applying Fourteenth Amendment protections.⁹⁶

However, even for its time, *Boyd*’s sweeping protection of business records plainly went too far. In the decades that followed, federal attorneys seem to have adjusted by inventing the investigatory federal grand jury⁹⁷ and acquiring business records by subpoenaing executives to produce corporate records. The Supreme Court eventually acquiesced in this gambit by declaring that although corporations were protected by the Fourth Amendment, they did not have a right against self-incrimination,⁹⁸ and by also ruling that business executives did not have personal standing under the Fifth Amendment to decline to produce corporate papers.⁹⁹ Thus, competing concerns regarding government review of business records seemed to have produced an accommodation in which the government could subpoena but not search for business records—an accommodation that effectively provided businesses with a significant degree of control over the disclosure of corporate records.¹⁰⁰

Fourth Amendment doctrine might have congealed at that point—in which case it would never have become a significant topic for the *Journal*. Indeed, the justices demonstrated their continuing disinterest in regulating criminal searches in their 1904 ruling in *Adams v. New York*¹⁰¹ when they adopted a rule that barred raising a “collateral issue” as to how police had obtained evidence during a criminal trial¹⁰²—and thus seemed to preclude any consideration of a federal exclusionary rule.¹⁰³ However, the

⁹⁶ See *Santa Clara County v. S. Pac. R.R.*, 118 U.S. 394 (1886). In the same year, the justices severely limited state power to regulate railroads. See *Wabash, St. Louis & Pac. R.R. Co. v. Illinois*, 118 U.S. 557 (1886).

⁹⁷ Cf. Davies, *Arrest*, *supra* note 16, at 427-28.

⁹⁸ *Hale v. Henkel*, 201 U.S. 43, 74-75 (1906) (ruling that corporations enjoy Fourth Amendment but not Fifth Amendment self-incrimination protections).

⁹⁹ *Wilson v. United States*, 221 U.S. 361, 377-85 (1911) (ruling that a corporate officer could not invoke the Fifth Amendment right against producing corporate records, even if he had written them); see also *Wheeler v. United States*, 226 U.S. 478 (1913).

¹⁰⁰ Unlike a search warrant, a subpoena could be contested in advance of the government obtaining any documents. Additionally, unlike a search warrant, a grand jury subpoena left some leeway for a recalcitrant business to withhold disclosing information, and thus, as a practical matter, allowed a business that was the target of an investigation to exercise a degree of control over disclosure of its records.

¹⁰¹ 192 U.S. 585 (1904).

¹⁰² *Id.* at 595.

¹⁰³ The logic of exclusion was essentially the same logic of legal nullity that the Supreme Court announced in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)—that is, an unconstitutional search is void and a legal nullity so courts have no constitutional jurisdiction to receive evidence so obtained. The obviousness of the logic may explain why *Boyd* had offered no explanation when it ordered the return of invoices obtained through an

accommodation regarding business records appears to have broken down at about the same date that the *Journal* began publication. And that breakdown appears to have provided the motivation for the justices to invent modern search and seizure doctrine in *Weeks*.

III. BUSINESS RECORDS AND THE BIRTH OF MODERN SEARCH AND SEIZURE DOCTRINE

Perhaps emboldened by the ruling in *Adams*, in 1911, federal marshals in New York City, acting at the direction of a prosecutor but without any warrant or other form of legal process, seized all of the business records of an import firm suspected of customs violations. Citing *Boyd* as authority, the firm quickly obtained an order from the local federal court commanding the return of the documents.¹⁰⁴ However, the United States Attorney, Henry A. Wise, refused to comply. Instead, Wise asserted that the court lacked authority to order the return. The court then held Wise in contempt and had him jailed. Wise then filed both an appeal and a petition for habeas corpus in the Supreme Court, arguing that the federal court lacked authority to order return of the seized records.¹⁰⁵

The justices dismissed Wise's filings on procedural grounds. Significantly, they limited their comment on the merits to simply stating that the lower court's order for returning the papers was not "so *dehors* the authority of the court as to cause it to be void" and justify Wise's refusal to obey it.¹⁰⁶ However, the justices side-stepped the issue of whether the seizure of the papers had violated a constitutional right.¹⁰⁷

The justices' disinclination to address the merits may now seem puzzling, but their hesitation was probably prompted by a then-settled facet of traditional constitutional doctrine that has since been forgotten. Unlike the situation in *Boyd*, which had involved the constitutionality of a *statutory provision*, the episode involving Wise involved only allegedly *unlawful conduct by federal officers*. However, as noted above, the traditional

unconstitutional statutory procedure. See *supra* note 88 and accompanying text. Moreover, at least one state court had begun to apply the logic of nullity to illegal searches prior to *Adams*. See, e.g., *State v. Sheridan*, 96 N.W. 730 (Iowa 1903). Those developments may have prompted the justices to preemptively block emergence of a federal exclusionary principle in *Adams*. In that case, the argument for suppression had been made to the New York Court of Appeals, but that court had ruled against suppression. *People v. Adams*, 68 N.E. 636, 640 (N.Y. 1903). The federal justices then affirmed that ruling.

¹⁰⁴ See *United States v. Mills*, 185 F. 318, 318-20 (C.C.S.D.N.Y. 1911).

¹⁰⁵ See *Wise v. Mills*, 220 U.S. 549 (1911); *Wise v. Henkel*, 220 U.S. 556 (1911).

¹⁰⁶ *Mills*, 220 U.S. at 555.

¹⁰⁷ *Henkel*, 220 U.S. at 558 (stating that the lower court had authority to decide the motion for the return of the firm's papers "irrespective of whether there was a constitutional right to exact the return of the books and papers").

understanding was that an officer's conduct could not violate a constitutional standard because unlawful conduct by an officer was not considered to be government action; instead the conduct of a person holding an office lost any official character if it was unlawful.¹⁰⁸ Indeed, the justices had recently reaffirmed that traditional doctrine in their 1908 ruling in *Ex Parte Young*.¹⁰⁹

However, the traditional conception of the boundary of government action had become outmoded as the scope of government activity increased during the late nineteenth century and more and more discretionary authority was conferred on government officials and officers. Indeed, only two years after the *Wise* rulings, the justices recognized that new reality and expanded the boundary of government action in their 1913 ruling in *Home Telephone and Telegraph Co. v. City of Los Angeles*,¹¹⁰ in which they enlarged their ability to review state regulation of businesses under the Fourteenth Amendment by ruling that even conduct by state regulators that allegedly violated state law constituted "state action" for purposes of applying federal constitutional protections.¹¹¹ By analogy, that expansion of the boundary of government action also opened the way for the justices to rule that unlawful conduct by federal officials—including federal prosecutors and law enforcement officers—could now constitute a government violation of a constitutional right.¹¹²

It may also be significant that the justices' expansion of the boundary of government action in *Home Telephone and Telegraph* coincided with other developments that portended further enlargement of the federal government's involvement in economic affairs. One was the enactment in 1913 of an income tax applicable to corporations and wealthy individuals.¹¹³ Another was that the Federal Trade Commission Act and Clayton Antitrust Act were pending in Congress in early 1914, and would soon be enacted.¹¹⁴ Notably, each of these developments implied that the

¹⁰⁸ See *supra* note 79 and accompanying text.

¹⁰⁹ 209 U.S. 123 (1908). The rule in *Young* is now commonly labeled a "fiction," but that was not the case at the time. Indeed, Woodrow Wilson was among those who described the traditional doctrine as being basic to our constitutional order. See Davies, *Original Fourth*, *supra* note 16, at 661-62 n.312.

¹¹⁰ 227 U.S. 278 (1913).

¹¹¹ See Davies, *Original Fourth*, *supra* note 16, at 666-67.

¹¹² For a sketch of the gradual appearance of the concept that unlawful conduct by officers nevertheless constituted government action, see *id.* at 666-67 n.323.

¹¹³ See Tariff of 1913 (Revenue Act of 1913), Pub. L. No. 16, 38 Stat. 114, 166 (1913). A corporate excise tax on net profits had been enacted a few years earlier. See Tariff of 1909 (Corporate Excise Tax of 1909), ch. 6, § 38, 36 Stat. 11, 112-17 (1909).

¹¹⁴ See Federal Trade Commission Act, Pub. L. No. 63-212, 38 Stat. 717 (1914); Clayton Antitrust Act, Pub. L. No. 63-212, 38 Stat. 730 (1914).

federal government would have heightened interest in obtaining business records.

These developments, coupled with the unsettling *Wise* litigation, likely motivated the justices to establish a firmer protection of personal and corporate financial records. Additionally, the expansion of the boundary of government action to include even unlawful acts by officers provided an opportunity to deal directly with situations such as that presented by the *Wise* litigation. Taken together, these events and developments appear to have set the stage for the justices to fundamentally reinvent the Fourth Amendment in the seminal 1914 ruling in *Weeks v. United States*.¹¹⁵

A. THE INVENTION OF MODERN SEARCH AND SEIZURE DOCTRINE IN *WEEKS*

After Fremont Weeks was arrested for the offense of using the mails to distribute lottery tickets, a federal marshal and local police had gone to Weeks's residence, without obtaining a search warrant, and had searched it and seized various papers for use as evidence.¹¹⁶ Weeks's attorney dodged the *Adams* "collateral issue" rule by the simple expedient of making a motion for return of the papers prior to rather than during Weeks's trial.¹¹⁷ After the motion was denied and Weeks was convicted, he challenged the admission of the seized papers into evidence in an appeal to the Supreme Court.¹¹⁸

Writing for a unanimous Court in *Weeks*, Justice Day made three important doctrinal innovations. First, by treating the warrantless search as a "direct violation of the constitutional rights of the defendant," Justice Day treated the common law principle that a house could not be searched without a warrant as an aspect of the Fourth Amendment itself.¹¹⁹ Second, he drew upon the enlarged conception of government action to announce that the Amendment applied to the conduct of officers as well as to legislation and court orders (however, he finessed this point so nicely that it is almost invisible to a modern reader).¹²⁰ Then, having found that the search at issue was unconstitutional, Justice Day made a third innovation by

¹¹⁵ 232 U.S. 383 (1914).

¹¹⁶ *Id.* at 386.

¹¹⁷ *Id.* at 387, 395-97. The filing of the motion prior to trial by Weeks' attorney may have been inspired by another Kansas City case. In 1913, a defendant successfully obtained an order for return of documents seized without a warrant by making the motion prior to trial (and thus avoiding the *Adams* "collateral issue" rule) in *United States v. MounDay*, 208 F. 186 (D. Kan. 1913).

¹¹⁸ *Weeks*, 232 U.S. at 386.

¹¹⁹ *Id.* at 398; see also Davies, *Original Fourth*, *supra* note 16, at 730 n.520.

¹²⁰ See Davies, *Original Fourth*, *supra* note 16, at 729-30 n.519.

announcing that the denial of the defendant’s motion for return of the papers was “a denial of the constitutional rights of the accused”¹²¹ and made the exclusionary rule a feature of the Fourth Amendment’s protections.¹²²

However, *Weeks* still stopped short of creating the full scope of what we now call search and seizure doctrine. In particular, the justices did not address *arrest* authority at all; rather, the *Weeks* opinion was focused on the need for a warrant to authorize a *search*. Indeed, Justice Day explicitly noted that the ruling did not alter the traditional common law understanding that a person who was “legally arrested” could be searched without a warrant for incriminating evidence such as burglar tools.¹²³ Likewise, Justice Day did not invoke any “reasonableness” standard beyond a general invocation of the prior ruling in *Boyd*.¹²⁴ Rather, he cited “[t]he maxim that ‘every man’s house is his castle’ while simply announcing a constitutional rule that a search of a house required a search warrant.”¹²⁵

The *Weeks* ruling also had one characteristic that favored business interests: unlike *Boyd*, it did not combine the Fourth Amendment’s protection with the Fifth Amendment right against self-incrimination. Rather, it based its holding—and the new exclusionary rule—solely on the Fourth Amendment. That was significant because businesses could claim the protection of the Fourth Amendment, but not of the Fifth Amendment’s Self-Incrimination Clause.¹²⁶

Unsurprisingly, the *Weeks* decision, and especially the new exclusionary rule, provoked comment. Northwestern’s own Dean John

¹²¹ *Weeks*, 232 U.S. at 398.

¹²² In contrast to later treatments, the rationale Justice Day offered for exclusion was expressed in the formalist jurisprudence of authority rather than the language of a mere policy of deterrence of future illegality. Thus, in addition to describing the failure to return the papers as a denial of the constitutional right of the accused, he wrote “[t]hat papers wrongfully seized should be turned over to the accused.” *Id.* at 398. Likewise, Justice Day did not simply endorse what is now known as the “judicial integrity” rationale; rather, he stated that “[t]he effect of the Fourth Amendment is to put *the courts of the United States* and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority.” *Id.* at 391-92 (emphasis added).

¹²³ *Id.* at 392 (indicating that the Court was not disapproving “an assertion of the right on the part of the Government . . . to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime . . . [n]or is it the case of burglar’s tools or other proofs of guilt found upon his arrest within the control of the accused”).

¹²⁴ *Id.* at 389-90.

¹²⁵ *Id.* at 390 (quoting COOLEY, *supra* note 86) (Justice Day cited pages “425. 426” in that work without identifying an edition, however the page citations appear to be erroneous; the passage Justice Day quoted appears at pages 299-300 in the 1868 first edition of that work, and on page 365 (*299-300) in the final 1883 fifth edition).

¹²⁶ See *supra* notes 98-99 and accompanying text.

Henry Wigmore attacked the new exclusionary rule as dangerous nonsense that would “coddle the criminal classes of the population.”¹²⁷ However, other commentators endorsed the ruling.¹²⁸ The *Weeks* ruling also prompted a legislative response: in 1917, Congress finally rectified a long-standing lapse by enacting statutory authority for federal courts to issue criminal search warrants.¹²⁹

Admittedly, the circumstances in *Weeks* did not look much like a business records case. Indeed, because *Weeks* involved a warrantless search of a residence for papers, it easily fell within the “houses, papers, and effects” formulation in the Fourth Amendment’s text. The same was true when the justices applied the warrant requirement to a search of a house for whiskey in 1921, and ruled that the unconstitutionally seized whiskey also could not be admitted as evidence—but that the contraband need not be returned, either.¹³⁰ However, the justices’ concern for business records soon became evident as additional Fourth Amendment cases were decided.¹³¹

B. PROTECTING BUSINESS RECORDS AND OFFICES IN *SILVERTHORNE LUMBER CO. AND GOULED*

As had been the case in the earlier ruling in *Boyd*, the justices ignored the specific reference to “houses” in the Fourth Amendment’s text when they extended the *Weeks* warrant requirement to searches of business offices in the 1920 decision in *Silverstone Lumber Co. v. United States*.¹³² In that case, a federal prosecutor made a warrantless raid of the office of a company suspected of defrauding the government and seized all of the company’s records. The prosecutor then returned the seized documents—

¹²⁷ John H. Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A. J. 479, 482 (1922). This article was an enlargement of a shorter note that Wigmore had published shortly after *Weeks* was announced: *Comment on Recent Cases: Evidence—Fourth Amendment—Documents Illegally Seized*, 9 ILL. L. REV. [renamed NW. U.L. REV.] 43, 43-44 (1915) (signed “J.H.W.”) (criticizing the *Weeks* Court for departing from the “sound and harmless doctrine that documents obtained by a search illegal under the Fourth Amendment are nevertheless admissible in evidence” and instead pursuing a “mechanical idea of justice”).

¹²⁸ See, e.g., Connor Hall, *Letter to the Editor Titled “Evidence and the Fourth Amendment,”* 8 A.B.A. J. 646 (1922).

¹²⁹ See Espionage Act of 1917, ch. 30, tit. XI, 40 Stat. 217, 228-30 (1917). Notably, § 16 required return of papers that were seized without valid warrant authority.

¹³⁰ *Amos v. United States*, 255 U.S. 313 (1921).

¹³¹ Discussion of the early cases in this Article is necessarily limited to those that now seem most important. Readers interested in a fuller treatment of the early cases should consult LANDYNSKI, *supra* note 51, at 66-117 (discussing post-*Weeks* search cases to 1964).

¹³² 251 U.S. 385 (1920).

but not before making copies of them. The prosecutor then served a subpoena on the company officials to produce the documents that were deemed pertinent (a strategy meant to exploit the Court's prior rulings that a business entity did not have a right against self-incrimination and that company officials did not have standing to object to producing company records).¹³³

In the Supreme Court, the government conceded the illegality of the original seizure, but it asserted that *Weeks* only required the return of the documents themselves and did not expressly prohibit the use of the information so obtained to further the prosecution. However, Justice Holmes's majority opinion rebuked the government for "reduc[ing] the Fourth Amendment to a form of words."¹³⁴ Instead, Justice Holmes announced what has come to be known as the "fruit of the poisonous tree" doctrine by declaring that "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."¹³⁵ (Dicta in Holmes's opinion also recognized the opposing principle that has come to be known as the "independent source" doctrine.¹³⁶)

Notably, the Court's ruling in *Silverthorne Lumber* prohibited use of the unconstitutionally seized business records against members of the Silverthorne family as well as against the company itself. Specifically, it condemned the use of company records "seized in violation of the *parties'* constitutional rights."¹³⁷ Thus, the ruling rejected any notion that Fourth Amendment rights should be subject to a standing limitation comparable to that which limited enforcement of the Fifth Amendment's right against self-incrimination. However, Justice Holmes' opinion for the Court was so curt that that aspect of the ruling was virtually invisible.

As a result, the *Silverthorne Lumber* opinion left the door open for the Seventh Circuit Court of Appeals to announce the opposite rule a few months later in *Haywood v. United States*,¹³⁸ a case in which union documents seized during an raid on the union's office under a defective warrant had been introduced as evidence in a prosecution of Industrial Workers of the World labor organizers. The court of appeals judges disregarded the collective phrasing of the Fourth Amendment as a "right of

¹³³ See *supra* notes 98-99 and accompanying text.

¹³⁴ *Silverstone Lumber*, 251 U.S. at 392.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 391 (emphasis added).

¹³⁸ 268 F. 795 (7th Cir. 1920). *Silverthorne Lumber* was decided in January 1920; *Haywood* was decided in December 1920.

the people”¹³⁹ and ruled that the Fourth Amendment right, like the right against self-incrimination, was only personal in nature. Hence, union officials could not complain that a search of the union’s offices violated their Fourth Amendment protection.¹⁴⁰ (One can only wonder if the ruling would have been the same if the defendants in *Haywood* had been businessmen.)

Because the Supreme Court did not revisit the standing issue until much later, the *Haywood* standing rule then became the leading authority for a Fourth Amendment standing requirement.¹⁴¹ Thus, the standing requirement—one of the most important limitations on the enforcement of Fourth Amendment standards—came about essentially through poor communication. For decades, the standing requirement remained the *only* limitation on the otherwise strict operation of the *Weeks* exclusionary rule.

The justices also made their protection of business papers less visible, but not less effective, by making a doctrinal adjustment in the 1921 decision in *Gouled v. United States*.¹⁴² Writing for a unanimous Court, Justice Clarke’s opinion announced that papers were not due any special protection under the Fourth Amendment.¹⁴³ However, he also harkened back to *Boyd*’s pseudo-history to announce what came to be known as the “mere evidence” doctrine—the bizarre rule that a search warrant could not be issued “solely for the purpose of making search to secure evidence to be used against [the defendant] in a criminal or penal proceeding.”¹⁴⁴ Thus,

¹³⁹ In all likelihood, the Fourth Amendment was stated as a “right of the people” because the general warrants that it condemned presented a threat to the entire community. See Davies, *Correcting Search History*, *supra* note 16, at 161-63. Indeed, the phrasing of the provisions of the Bill of Rights as either collective protections (“the right of the people”) or individual protections (“person,” “the accused”) appears to have been quite deliberate. *Id.*

¹⁴⁰ *Haywood* involved a conspiracy prosecution against officers of the Industrial Workers of the World in which documents had been seized during a raid of the I.W.W. office that was conducted under a patently invalid search warrant that lacked both particularity and probable cause. 268 F. at 801. The union officers asserted that the union was a partnership and that the individual rights of the officers, as partners, had been violated. *Id.* at 804. However, the circuit judges rejected that argument and ruled that the seizure of union documents “did not impinge upon the rights of any defendant under the Fourth Amendment.” *Id.*

¹⁴¹ The justices did not address the standing issue until *Goldstein v. United States*, 316 U.S. 114 (1942), discussed *infra* notes 181-182 and accompanying text.

¹⁴² 255 U.S. 298 (1921).

¹⁴³ *Id.* at 309. The justices had already punctured the special protection that *Boyd* had extended to papers in *Schenck v. United States*, 249 U.S. 47 (1919) (upholding the seizure of an organization’s papers by search warrant and allowing the admission of the papers in a criminal prosecution for attempting to cause insubordination in the military).

¹⁴⁴ *Gouled*, 255 U.S. at 309. The Court further explained that a search warrant could be constitutionally issued “only when a primary right to such 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

the justices restricted use of warrants that *satisfied* the Fourth Amendment’s particularity and probable cause standards to searches and seizures of contraband or the fruits or instrumentalities of crime—categories that typically would not include business records. However, the justices also ruled in 1921, over the dissents of Justices Holmes and Brandeis, that the Fourth Amendment did not bar the government from using documents unlawfully stolen by a private person and turned over to the government.¹⁴⁵

Overall, these early cases suggest that the justices who invented the modern Fourth Amendment did so largely in response to an ideological predilection to protect elite interests against the increasing intrusions of progressive government. However, the characterization of a legal right cannot always be contained to the initially intended application. Indeed, the history of legal rights may be largely the story of how doctrines that lawyers and judges invented for the benefit of elite interests were subsequently pressed into service beyond the initial setting. Something of that sort occurred when Prohibition posed new questions about the protections afforded by the Fourth Amendment.

IV. PROHIBITION AND THE INVENTION OF “FOURTH AMENDMENT REASONABLENESS”

The political elite, like the public, had mixed attitudes toward enforcement of Prohibition. There seems to have been a consensus that searches of residences for illegal liquor were unacceptable—indeed, Congress restricted such searches by statute.¹⁴⁶ However, there was less sympathy for those who dealt in illegal liquor. Moreover, the increasing use of automobiles presented a new difficulty for enforcing Prohibition, so the federal courts were soon presented with the issue of whether the Fourth Amendment permitted warrantless searches of automobiles suspected of transporting illegal liquor.

As a practical matter the new possessory offense created by Prohibition was more akin to revenue enforcement than to traditional criminal law enforcement insofar as there usually was no complaining witness to initiate a prosecution.¹⁴⁷ Instead, Prohibition enforcement

possession of the property by the accused unlawful and provides that it may be taken. *Id.* at 623, 624 (citing *Boyd v. United States*, 116 U.S. 616 (1885)).

¹⁴⁵ *Burdeau v. McDowell*, 256 U.S. 465 (1921).

¹⁴⁶ Section 25 of Title II of the National Prohibition Act, ch. 85, tit. II, § 25, 41 Stat. 315 (1919) (repealed 1935), provided that a search warrant could be issued for a dwelling house only if there was evidence that it was used for the sale of liquor, but not if the evidence indicated only that liquor was manufactured there. See *Grau v. United States*, 287 U.S. 124, 127-28 n.4 (1932).

¹⁴⁷ See *supra* note 65 and accompanying text.

depended upon the initiative taken by law enforcement officers themselves. Hence, it was not surprising that the lower federal courts sought to uphold the validity of warrantless auto searches. But they could not do so under existing doctrine.

For one thing, searches of automobiles for liquor usually could not be justified under the traditional doctrine that permitted searches incident to *lawful* arrests. The doctrinal obstacle was that American courts still looked to common law or statutory standards to assess the lawfulness of an arrest. Under those regimes, a law enforcement officer could make a warrantless arrest for a suspected *felony* on bare probable cause; however, he could not make a warrantless arrest for a misdemeanor unless he actually observed the ongoing commission of the misdemeanor in his presence.¹⁴⁸ The different arrest standards mattered because Prohibition violations typically were *misdemeanors*¹⁴⁹ and the illegal liquor being transported in autos was rarely in plain view. Hence, traditional arrest doctrine barred the sort of investigatory searches that were necessary if police were to be able to enforce Prohibition. In addition, Supreme Court decisions that had already applied the protections of the Fourth Amendment beyond the house and its contents effectively foreclosed the lower courts from simply declaring that the Fourth Amendment did not apply to private property such as automobiles.¹⁵⁰

After advancing several alternative justifications for automobile searches that were plainly deficient,¹⁵¹ lower federal courts invented a novel solution when they began to construe the reference to a right against “unreasonable searches and seizures” in the first clause of the Fourth Amendment as though it created a free-standing “reasonableness” standard for assessing government searches. Thus, they announced that the Fourth Amendment did not forbid all warrantless searches—rather, it forbade only

¹⁴⁸ See *supra* notes 30-32 and accompanying text (discussing common law restrictions on warrantless arrests for less than felony offenses). Nineteenth century judges had relaxed the standard for felony arrests to bare probable cause, but had not altered the restrictions on warrantless misdemeanor arrests. See *supra* notes 42-44 and accompanying text.

¹⁴⁹ Except for repeat offenses, the National Prohibition Act defined most violations as misdemeanors. See *Carroll v. United States*, 267 U.S. 132, 154 (1925) (construing section 29, title II of the National Prohibition Act).

¹⁵⁰ However, the justices would rule in 1924 that the Fourth Amendment did not apply to searches or seizures conducted in an open field. *Hester v. United States*, 265 U.S. 57 (1924).

¹⁵¹ See, e.g., *United States v. Fenton*, 268 F. 221, 222-23 (D. Mont. 1920) (ruling that the United States was “vested with the right of property and possession” in illegal liquor, and thus was entitled to seize it); *United States v. Bateman*, 278 F. 231, 235 (S.D. Cal. 1922) (holding that “it is not unreasonable for a prohibition enforcement officer to stop automobiles upon the public highway and search them for intoxicating liquors without a warrant and that the finding of liquor justifies the search”).

“unreasonable” warrantless searches—and they further asserted that a warrantless search would be “reasonable,” given the exigency presented by the mobility of an automobile, so long as the officers had bare probable cause that a Prohibition violation was occurring.¹⁵² Notably, none of the lower courts cited any precedent for that formulation.

Nevertheless, the Supreme Court adopted that novel construction of the Fourth Amendment’s text in the 1925 decision *Carroll v. United States*.¹⁵³ Although Chief Justice Taft’s majority opinion conceded that the warrantless search of the auto in that case could not be justified as a search incident to a lawful arrest (because no lawful misdemeanor arrest could have been made),¹⁵⁴ it nevertheless upheld the warrantless search on the basis that the officer’s bare probable cause that the vehicle was transporting illegal liquor made the search “reasonable” and constitutional.¹⁵⁵

Two features of Chief Justice Taft’s majority opinion in *Carroll* are noteworthy. One is that there was something of a disconnect between the definition of “probable cause” recited in the opinion and the application of that definition to the facts. On the one hand, Chief Justice Taft reiterated the by-then traditional formulation that the standard was satisfied if “the facts and circumstances within [the officers’] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that [an offense has been or is being committed].”¹⁵⁶ On the other hand, as Justice McReynolds pointed out in a pithy dissent, the facts in *Carroll* were such that the majority had found probable cause to search merely “because a man once agreed to deliver whisky, but did not . . . [and] thereafter he venture[d] to drive an automobile on the road to Detroit!”¹⁵⁷

¹⁵² See, e.g., *United States v. Snyder*, 278 F. 650, 658 (N.D. W.Va. 1922); *Lambert v. United States*, 282 F. 413, 416-17 (9th Cir. 1922); *Green v. United States*, 289 F. 236, 238 (8th Cir. 1923).

¹⁵³ 267 U.S. 132, 156-59 (1925).

¹⁵⁴ *Id.* at 156-58.

¹⁵⁵ *Id.* at 149, 159.

¹⁵⁶ *Id.* at 162. This definition of probable cause traced back to Justice Washington’s jury instruction in *Munns v. De Nemours*, 17 F. Cas. 993, 995 (C.C. Pa. 1811). The definition in *Munns*, in turn, was an adaptation of that given in the leading framing-era treatise on criminal procedure by Serjeant Hawkins, which defined probable cause of suspicion as information that would create a “strong” suspicion sufficient to cause a prudent man to suspect a person to be guilty of a crime. 2 HAWKINS, *supra* note 30, at 84-85. The principal change that had occurred since the framing era was that American judges had elevated cause to “suspect” to cause to “believe.” See Davies, *Probable Cause*, *supra* note 16, at 48-50. The rendering of the definition of probable cause in *Carroll* was subsequently repeated with minor changes in *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949). See *infra* notes 193-195 and accompanying text.

¹⁵⁷ *Carroll*, 267 U.S. at 174.

The second noteworthy feature of Chief Justice Taft's opinion was the purportedly originalist claim he offered to bolster the notion that warrantless searches of vehicles could be "reasonable" and thus constitutional. Specifically, he noted that the First Congress in the 1789 Collections Act had authorized customs officers to make warrantless searches of ships if the officer had "reason to suspect" a customs violation; and he asserted that this proved the Fourth Amendment authorized warrantless searches of vehicles based on bare probable cause.¹⁵⁸ However, Chief Justice Taft's claim ignored the definition of the Fourth Amendment's scope as "persons, houses, papers, and effects"—a formula that, in keeping with common law doctrine, *excluded ships* and probably even warehouses from the warrant requirement.¹⁵⁹ Thus, there is no reason to think that the Framers would have thought that the Fourth Amendment had any bearing on customs searches of ships—or vice versa. And Chief Justice Taft surely knew that his claim was fictional because none of the numerous ship seizure decisions by the Supreme Court between 1789 and 1925 had even so much as mentioned the Fourth Amendment.¹⁶⁰ In fact, the Taft Court still did not mention the Fourth Amendment in two later cases dealing with ship searches.¹⁶¹ Like Justice Bradley's opinion in *Boyd*, Chief Justice Taft did not make the decision in *Carroll* on the basis of history; rather, he distorted the history to fit the desired result.

¹⁵⁸ *Id.* at 150 (citing 1789 Collections Act, 1 Stat. 29, 43). This originalist claim seems to have been composed by Chief Justice Taft; it does not appear in the briefs filed in *Carroll*.

¹⁵⁹ See *supra* note 77 and accompanying text.

¹⁶⁰ See Davies, *Probable Cause*, *supra* note 16, at 55; Davies, *Original Fourth*, *supra* note 16, at 607-08.

¹⁶¹ In 1926, a year after *Carroll*, the Taft Court upheld the condemnation of a "motor boat," which police discovered was transporting illegal liquor, in *Dodge v. United States*, 272 U.S. 530 (1926). Justice Holmes' opinion for the unanimous Court did not analyze the seizure of the boat under the Fourth Amendment but instead noted the inapplicability of that provision by curtly commenting that "[t]he exclusion of evidence obtained by an unlawful search and seizure stands on a different ground" than the search and seizure of the vessel at issue. *Id.* at 532. A year later, in 1927, the justices also extensively discussed the authority of the Coast Guard to board, search, and seize ships in *Maul v. United States*, 274 U.S. 501 (1927). However, there was no mention of the Fourth Amendment in either Justice Van Devanter's opinion for the Court or in the even more detailed discussion in Justice Brandeis's concurring opinion.

It does not appear that the Supreme Court ever applied the Fourth Amendment to a search or seizure involving a boat, ship, or other vessel until the 1983 decision in *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983) (upholding the suspicionless boarding by customs officers of a forty-foot sailboat for inspection of its documents during which marijuana was discovered). Notably, Justice Rehnquist's majority opinion proceeded on the premise that the Fourth Amendment applied to that situation without citing any prior authority for that premise. *Id.* at 584-88.

Carroll's treatment of the first clause of the Fourth Amendment as a free-standing Reasonableness Clause also appears to have inspired the fabrication of the academic version of conventional Fourth Amendment history. In a Ph.D. dissertation published in 1937, political scientist Nelson B. Lasson asserted that the last-minute change that had been made to the Fourth Amendment's text in the House—the one in which Madison's "by warrants issuing" had been replaced with "and no warrant shall issue"—had been made for the purpose of creating an overarching "reasonableness" standard for all government searches.¹⁶² Although Lasson did not provide a shred of evidence for that claim (because there was none),¹⁶³ it dovetailed so nicely with Supreme Court's own textual creativity that it became the cornerstone for the conventional academic account of Fourth Amendment history.¹⁶⁴

Prohibition continued to supply the Court with liquor search cases until it was repealed in 1933; indeed, nearly all of the search and seizure cases decided during the period 1925 to 1933 involved Prohibition prosecutions.¹⁶⁵ In two cases decided in 1927, the justices recognized what came to be called the "silver platter doctrine"—that evidence seized by state officers could be admitted in federal trials even if the search or seizure would have violated the Fourth Amendment if conducted by federal officers—but in both cases the justices found that federal officers were sufficiently involved to deem the seizures to be federal matters.¹⁶⁶

¹⁶² See LASSON, *supra* note 51, at 100-03. Lasson's monograph was based on his dissertation: Nelson B. Lisansky, *The History and Development of the Fourth Amendment* (1934) (unpublished Ph.D. dissertation, Political Science, Johns Hopkins University); see also Davies, *Correcting Search History*, *supra* note 16, at 27 n.45.

Lasson also advanced a rather implausible claim that the motion to substitute "and no warrant shall issue" was voted down in the House, but that the proposed change was surreptitiously made anyway by the later committee on style. See LASSON, *supra* note 51, at 101-02. However, although there are conflicting accounts of the House debate, including even the identity of the person who made the motion, the weight of available evidence clearly indicates that the motion for the substitution carried. See Davies, *Original Fourth*, *supra* note 16, at 716-21.

¹⁶³ See *supra* notes 67-77 and accompanying text.

¹⁶⁴ See Davies, *Original Fourth*, *supra* note 16, at 568-70 (citing opinions and commentaries that have uncritically repeated Lasson's claims).

¹⁶⁵ See WILLIAM W. GREENHALGH, *THE FOURTH AMENDMENT HANDBOOK: A CHRONOLOGICAL SURVEY OF SUPREME COURT DECISIONS* 23-26 (1995) (indicating that eighteen of the twenty-one search and seizure cases decided by the Supreme Court during the years 1925 through 1933 involved illegal liquor or enforcement of the National Prohibition Act).

¹⁶⁶ *Byars v. United States*, 273 U.S. 28, 33 (1927) (recognizing "the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account" but finding involvement of federal officers in illegal search at issue required suppression of the evidence so seized); *Gambino v. United States*, 275 U.S. 310,

In another of the Prohibition cases, and in a still unusual five-to-four split decision, the Court declined to apply Fourth Amendment protections to the surreptitious warrantless seizure of conversations by police in *Olmstead v. United States*,¹⁶⁷ and thus opened the way for the police to not only use wiretaps, but also use undercover eavesdroppers.¹⁶⁸ In an omen of things to come, one of the few non-Prohibition cases the Court decided during this period seems to have been the first to involve a seizure of cocaine.¹⁶⁹ Notably, however, none of the Fourth Amendment cases decided by the Supreme Court during this period involved a violent crime prosecution.¹⁷⁰

Because Prohibition involved both federal and state law enforcement, it also presented state courts with search issues. Moreover, because the protections of the federal Bill of Rights did not yet apply to state proceedings,¹⁷¹ state courts faced the question of whether their state constitutions required a state exclusionary rule. Virtually all of the states addressed the issue; slightly less than half adopted exclusion, while slightly more than half did not.¹⁷² New York was among the latter, and state Judge Benjamin Cardozo famously opined that exclusion was defective because “the criminal is to go free because the constable has blundered.”¹⁷³ California rejected a state rule on the formalistic ground that the constitutional violation was “complete” when the illegal search ended, so the use at trial of evidence so seized worked no additional violation.¹⁷⁴

313 (1927). This doctrine was described as allowing state officers to present improperly seized evidence on “a silver platter” in a federal trial in *Lustig v. United States*, 338 U.S. 74, 79 (1949).

¹⁶⁷ 277 U.S. 438 (1928).

¹⁶⁸ Wiretapping itself was subsequently limited by § 605 of the Federal Communications Act, 48 Stat. 1103 (1934). The justices ruled that this statutory provision required exclusion of wiretap evidence obtained by federal officers in a federal criminal trial but noted that this was “a question of policy for the determination of the Congress” rather than a constitutional requirement. *Nardone v. United States*, 302 U.S. 379, 381, 383 (1937).

¹⁶⁹ *Agnello v. United States*, 269 U.S. 20 (1925).

¹⁷⁰ See GREENHALGH, *supra* note 165, at 21-26.

¹⁷¹ See *Barron v. Mayor of Baltimore*, 32 U.S. 243 (1833).

¹⁷² See *Wolf v. Colorado*, 338 U.S. 25, 33-39 app. (1949). According to that source, every state but Rhode Island ruled on the merits of a state exclusionary rule after the *Weeks* decision. Although that source does not give the dates of the state rulings, virtually all of them occurred during prohibition. See also Francis A. Allen, *The Exclusionary Rule in the American Law of Search and Seizure*, 52 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 246, 250 (1961) (noting that prohibition prompted state courts to adopt exclusionary rules).

¹⁷³ *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926). Although rejecting exclusion, Judge Cardozo wrote that the search at issue was unlawful and thus “[t]he officer might have been resisted, or sued for damages, or even prosecuted for oppression.” *Id.* at 586-87.

¹⁷⁴ *People v. Mayen*, 205 P. 435, 440 (Cal. 1922). Justice Powell would resurrect this analysis when he announced that exclusion was not required by the Fourth Amendment in 1974. See *infra* note 330.

Virginia, adhering to the earlier conception of misconduct by officers as private wrongdoing, ruled that exclusion was uncalled for because an unlawful search by a police officer did not constitute state action.¹⁷⁵

The flow of search cases to the federal Supreme Court was reduced to a trickle when Prohibition was repealed in 1933. In fact, there were less than a handful of Fourth Amendment cases from 1933 to the end of the Second World War. However, the justices did make two rulings that bolstered the warrant requirement. In the 1932 decision *Grau v. United States*,¹⁷⁶ they stated, in the course of invalidating a search warrant, that probable cause could not be based on hearsay information. Additionally, in the 1933 ruling *Nathanson v. United States*,¹⁷⁷ they unanimously ruled that mere conclusory allegations (such as that the suspect was known to be a criminal) were insufficient to show probable cause for issuance of a warrant.

Of course, for much of this period the justices of the Supreme Court were primarily occupied with the issue of whether the national government was to play a dominant role in the nation's economy. That issue, however, was effectively settled when a majority began to uphold New Deal legislation in the famous 1937 "switch in time that saved nine."¹⁷⁸ Among other things, that shift effectively ended the use of the Fourth Amendment to shield business records. Or to put it more broadly, that shift meant that justices who were ideologically aligned with elite economic interests no longer had any reason to be committed to a strong Fourth Amendment. The ideological poles were reversing. Unsurprisingly, Fourth Amendment doctrine became unsettled.

¹⁷⁵ *Hall v. Commonwealth*, 121 S.E. 154, 155-56 (Va. 1924) (stating that a police officer acting under a void search "ceases to be [the state's] agent" and, therefore, it would be inappropriate "to impose an indirect penalty on the commonwealth" by excluding incriminating evidence). The traditional understanding that an officer's conduct ceased to be official if it was unlawful is discussed *supra* notes 108-112 and accompanying text.

¹⁷⁶ 287 U.S. 124 (1932).

¹⁷⁷ 290 U.S. 41 (1933).

¹⁷⁸ The phrase refers to Justice Roberts's switch from opposing to supporting New Deal legislation in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), which was widely perceived as mooting FDR's "Court-packing" plan. That shift from five to four rulings striking down New Deal legislation to five to four rulings upholding the economic powers of the federal government is widely regarded as a major transformation in constitutional law. See, e.g., *History of the Supreme Court*, in *THE OXFORD COMPANION TO THE SUPREME COURT*, *supra* note 10, at 432, 454.

V. THE ROOSEVELT/TRUMAN JUSTICES' DIVIDE REGARDING THE
WARRANT REQUIREMENT AND INCORPORATION

By the time of his death in 1945, President Franklin D. Roosevelt had appointed all but one of the nine Supreme Court justices. Of course, F.D.R. chose nominees primarily on the basis of their favorable attitude toward New Deal economic regulation. Although his nominees generally had a positive attitude toward government power, they did not coalesce around any consistent ideological attitude toward civil liberties or criminal procedure issues.

Indeed the split was evident in the only two significant statements the justices made regarding the Fourth Amendment during World War II—*Goldstein v. United States*¹⁷⁹ and *Goldman v. United States*.¹⁸⁰ In *Goldstein*, dicta in Justice Roberts's majority opinion endorsed the *Haywood* standing doctrine as a limitation on Fourth Amendment enforcement,¹⁸¹ while Justice Murphy, in a dissent joined by Chief Justice Stone and Justice Frankfurter, observed that the standing limitation was difficult to square with the language of Justice Holmes's opinion in *Silverthorne Lumber Co.*¹⁸²

In *Goldman*, the other wartime case, the majority adhered to the earlier ruling in *Olmstead* by declining to apply the Fourth Amendment to the police use of a "detectaphone" to surreptitiously listen in on conversations between the defendants.¹⁸³ Here, too, Chief Justice Stone and Justices Frankfurter and Murphy broke from the majority and indicated that they favored overruling *Olmstead*.¹⁸⁴ Divisions also appeared in three Fourth

¹⁷⁹ 316 U.S. 114 (1942).

¹⁸⁰ 316 U.S. 129 (1942).

¹⁸¹ *Goldstein*, 316 U.S. at 121. The case actually turned on the interpretation of a statute. Justice Roberts invoked the Fourth Amendment standing doctrine as a pertinent analogy to the statutory treatment, while noting that the Fourth Amendment standing requirement "ha[d] been applied in at least fifty cases by the Circuit Courts of Appeals in nine circuits, and in the Court of Appeals for the District of Columbia, not to mention many decisions by District Courts." *Id.* at 121 n.12.

¹⁸² *Id.* at 127 n.4. As noted above, Justice Holmes's opinion in *Silverthorne Lumber* had actually but implicitly rejected the government's standing argument. See *supra* note 137 and accompanying text.

¹⁸³ *Goldman*, 316 U.S. at 134-35. The ruling in *Goldman* had far reaching implications insofar as it effectively endorsed use of eavesdropping undercover informants, and even "wired" undercover informants—although it appears those practices had already become standard investigatory techniques. See Wesley M. Oliver, *America's First Wiretapping Controversy in Context and as Context*, 43 HAMLINE L. REV. (forthcoming 2011).

¹⁸⁴ *Goldman*, 316 U.S. at 140-41.

Amendment rulings in 1946. Although the government won all three cases, there was a dissenting opinion in each of them.¹⁸⁵

In contrast to F.D.R.’s nominees, President Truman’s selections—some of whom seem to have been chosen largely on the basis of cronyism—tended to have a more consistent pro-government tilt in criminal procedure cases. However, despite their presence, the Court split along several ideological dimensions when the justices decided several important search cases during the post-War period.

A. SEARCH CASES

Although the Supreme Court still decided relatively few search and seizure cases during the immediate post-War years, several of those that were decided addressed the degree to which the “reasonableness” approach articulated in *Carroll* had displaced the warrant requirement announced in *Weeks*. In these cases, Chief Justice Vinson and Justices Black, Reed, and Burton were proponents of a reasonableness approach, while Justices Frankfurter, Murphy, Rutledge, and Jackson were proponents of a rigorous warrant requirement. Justice Douglas seems to have initially provided the swing vote.

For example, in the 1947 decision *Harris v. United States*,¹⁸⁶ police officers had made an arrest in a residence pursuant to an arrest warrant for a forged check offense and had then conducted a search of the premises for evidence of that offense. During that search they found and seized a stolen draft card. The five-justice majority, including Justice Douglas, ruled that the search was valid. The four dissenters would have required a search warrant.

A year later, in *Johnson v. United States*,¹⁸⁷ Justice Douglas tipped the vote the other way. In that case, police officers had made a warrantless arrest in a dwelling and then conducted a search during which opium was found. This time the justices ruled five to four that a post-arrest warrantless search of a residence violated the Fourth Amendment. During the same

¹⁸⁵ See *Zap v. United States*, 328 U.S. 624 (1946) (ruling five to three, with Justices Frankfurter, Murphy, and Rutledge dissenting, that defendant consented to waive Fourth Amendment rights by signing government contract); *Davis v. United States*, 328 U.S. 582 (1946) (ruling six to two, with Justices Frankfurter and Murphy dissenting, that gasoline rationing coupons were properly seized without warrant by consent); *Oklahoma Press Publ’n. Co. v. Walling*, 327 U.S. 186 (1946) (ruling seven to one, with Justice Murphy dissenting, that a subpoena regarding compliance with Fair Labor Standards Act did not violate the Fourth Amendment).

¹⁸⁶ 331 U.S. 145 (1947).

¹⁸⁷ 333 U.S. 10 (1948).

term, in *Trupiano v. United States*,¹⁸⁸ the justices also ruled, again five to four, that police were required to obtain a search warrant prior to a post-arrest search whenever it was reasonably practical to do so.¹⁸⁹

However, the Court changed direction again two years later in the 1950 decision *United States v. Rabinowitz*.¹⁹⁰ In that decision, the justices reversed *Trupiano* by a five-to-three vote. The change in direction reflected the fact that Justice Tom Clark had replaced Justice Murphy and that Justice Douglas did not participate. Justice Minton's majority opinion in *Rabinowitz* upheld a warrantless search of a residence incident to an arrest made in the premises while opining that the pertinent issue was only whether the police search was "reasonable" in the circumstances, not whether the police had had an ample opportunity to obtain a search warrant (as had been the case).¹⁹¹ Thus, as of 1950, the *Weeks* warrant requirement seemed considerably weakened.

The Roosevelt and Truman appointees also divided along much the same ideological fracture over the application of the "probable cause" standard. In the 1948 ruling in *United States v. Di Re*,¹⁹² Justice Jackson's opinion for a seven-to-two majority concluded that a person's mere presence at the scene of an offense did not constitute probable cause to justify an arrest or search incident to arrest. However, a year later Justice Jackson was in dissent (joined by Justices Frankfurter and Murphy) in *Brinegar v. United States*,¹⁹³ when the majority upheld an automobile search under the *Carroll* automobile exception. Justice Rutledge's majority opinion repeated the traditional formulation of probable cause previously

¹⁸⁸ 334 U.S. 699 (1948).

¹⁸⁹ There may have been a relationship between the ruling in *Trupiano* and some of the federal statutory standards for warrantless arrests by federal officers (there were different statutes for different agencies) that were then in effect. In particular, some of those statutory provisions allowed warrantless arrests only when the officer had reasonable grounds to fear that the person to be arrested would escape while an arrest warrant was being obtained. However, that requirement was deleted in 1950. See Davies, *Correcting Search History*, *supra* note 16, at 211-12.

¹⁹⁰ 339 U.S. 56 (1950).

¹⁹¹ *Id.* at 65-66.

¹⁹² 332 U.S. 581 (1948).

¹⁹³ 338 U.S. 160 (1949).

set out in *Carroll*,¹⁹⁴ but as in *Carroll*, the majority found that standard was met by rather minimal factual allegations.¹⁹⁵

The majority in *Brinegar* also overruled *Grau* by endorsing the use of hearsay to establish probable cause.¹⁹⁶ Of course, that allowance of hearsay effectively nullified the Fourth Amendment’s explicit requirement that probable cause for a warrant be “supported by Oath or affirmation”—an officer-affiant’s mere oath that he had received unsworn hearsay information from someone else would hardly have been recognized as evidence “supported by oath” during the era when the Bill of Rights was framed.¹⁹⁷

B. INCORPORATION AND DUE PROCESS

The other important controversy that emerged during this period was that regarding the “incorporation doctrine”—whether the provisions of the federal Bill of Rights should be applied to state legal proceedings through the Fourteenth Amendment Due Process Clause.¹⁹⁸ Although the Supreme Court had begun to apply the Due Process Clause itself to intervene in horrendous miscarriages of justice such as that in the 1932 *Scottsboro Case*,¹⁹⁹ a majority of the justices had declined to actually apply the more

¹⁹⁴ In his *Brinegar* majority opinion, Justice Rutledge followed Chief Justice Taft’s earlier formulation in defining probable cause as “exist[ing] where ‘the facts and circumstances within [the officers’] knowledge and of which they [have] reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that’ an offense has been or is being committed.” 338 U.S. at 175-76 (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

¹⁹⁵ In *Brinegar*, the defendant’s car was stopped and searched on the officers’ suspicion that he was transporting liquor legally purchased in Missouri to his dry home state Oklahoma. The arresting officers’ suspicions were largely based on Brinegar’s reputation for transporting liquor. Two lower courts had concluded that the officers lacked probable cause. *Brinegar*, 338 U.S. at 163, 164, 171. Nevertheless, the majority concluded that standard was met. *Id.* at 170.

¹⁹⁶ *Id.* at 174-75 n.13. The contrary rule in *Grau* is discussed *supra* note 176 and accompanying text.

¹⁹⁷ The framing-era understanding was that:

tho’ a Person testify what he hath heard upon Oath, yet the Person who spake it was not upon Oath; . . . [thus,] if the first Speech was without Oath, an Oath that there was such a speech makes it not more than a bare speaking, and so of no value in a Court of Justice, where all Things were determined under the Solemnities of an Oath.

SIR GEOFFREY GILBERT, *THE LAW OF EVIDENCE* 107-08 (Dublin 1754); *id.* at 149-50 (4th ed., Phila. 1788). For a discussion of the strong ban against hearsay in framing-era criminal proceedings, see Davies, *supra* note 28, at 390-424 (2007).

¹⁹⁸ For a general overview of the “incorporation doctrine,” see *Incorporation Doctrine*, in *THE OXFORD COMPANION TO AMERICAN LAW* 415-16 (Kermit L. Hall ed., 2002).

¹⁹⁹ *Powell v. Alabama*, 287 U.S. 45 (1932) (*Scottsboro Case*); see also *Brown v. Mississippi*, 297 U.S. 278 (1936).

specific federal constitutional protections to state proceedings.²⁰⁰ Nevertheless, in the 1949 decision in *Wolf v. Colorado*,²⁰¹ the justices took up the issue of whether the Fourth Amendment should apply to the states.

The opinions in *Wolf* demonstrated the multiple dimensions of the various justices' views of the Fourth Amendment. Although Justice Frankfurter had been a proponent of a strong construction of the Fourth Amendment in federal cases, he wrote a majority opinion in *Wolf* that not only declined to apply the Fourth Amendment exclusionary rule to the states, but even suggested that Congress might overrule the federal exclusionary rule if it so chose.²⁰² However, Justice Frankfurter also opined that the Fourteenth Amendment Due Process Clause overlapped with the "core" of Fourth Amendment protections insofar as it forbade the states from affirmatively sanctioning "arbitrary" searches by state officers.²⁰³ (Note that Frankfurter condemned "arbitrary" state searches, but used the Fourth Amendment terminology of "unreasonable" searches only when referring to federal searches.²⁰⁴) Thus, the *Wolf* majority indicated that the states were forbidden to endorse arbitrary police intrusions, but left the formulation of the means of protecting against arbitrary searches to the states themselves.

In contrast, Justice Black was a vigorous advocate for incorporation, although he had not endorsed a particularly strong construction of the federal Fourth Amendment right itself. Thus, in *Wolf* Justice Black (mis)characterized Justice Frankfurter's opinion as though it had applied the Fourth Amendment itself to the states and then concurred with the majority

²⁰⁰ See *Palko v. Connecticut*, 302 U.S. 319 (1937) (ruling that the Due Process Clause of the Fourteenth Amendment included only those legal rights "implicit in the concept of ordered liberty" and declining to apply the Fifth Amendment protection against double jeopardy to the states on the ground that it was insufficiently fundamental); *Adamson v. California*, 332 U.S. 46 (1947) (applying the same analysis as *Palko* when declining to apply the Fifth Amendment protection against compelled self-incrimination to state proceedings).

²⁰¹ 338 U.S. 25 (1949).

²⁰² *Id.* at 33.

²⁰³ *Id.* at 27 (stating that security "against arbitrary intrusion by the police—which is at the core of the Fourth Amendment" is an aspect of the Fourteenth Amendment Due Process Clause); *id.* at 28 (stating the issue decided as "whether the basic right to protection against arbitrary intrusion by police demands the exclusion of logically relevant evidence obtained by unreasonable search and seizure because it would be excluded in a federal prosecution for a federal crime").

²⁰⁴ Perhaps because Justice Frankfurter structured his *Wolf* opinion to reject the extension of the federal exclusionary rule to the states without actually ruling on other issues—including whether the police conduct at issue violated any federal constitutional standard—that opinion has often been misread. See Thomas Y. Davies, *An Account of Mapp that Misses the Larger Exclusionary Rule Story*, 4 OHIO ST. J. CRIM. L. 619, 626 n.24 (2007) (discussing common errors in descriptions of *Wolf*).

in *Wolf* that the states need not apply the Fourth Amendment exclusionary rule on the ground that the Fourth Amendment did not itself require an exclusionary rule.²⁰⁵

Justices Douglas, Murphy, and Rutledge favored both a strong federal right enforced by the exclusionary rule and incorporation of that right, so they dissented in *Wolf*. Justice Murphy’s dissenting opinion innovated by asserting that the exclusionary rule was the only efficacious means of deterring future illegal searches—and thus added deterrence to the *Weeks* legality rationale for exclusion.²⁰⁶

Justice Frankfurter’s suggestion that the Fourteenth Amendment Due Process Clause forbade “arbitrary searches” by state officers was given content in 1952 in *Rochin v. California*²⁰⁷ when the justices confronted a situation in which police had obtained incriminating drugs by forcibly pumping a suspect’s stomach. Justice Frankfurter’s opinion for the Court found the police conduct so “shock[ing to] the conscience” that it constituted a Due Process violation requiring dismissal of the prosecution.²⁰⁸

However, the limitations of the Due Process approach to regulating police search conduct became evident two years later in *Irvine v. California*²⁰⁹ when the justices divided five to four while ruling that the warrantless planting of a microphone in a suspect’s bedroom was not sufficiently “shocking” to constitute a Due Process violation.²¹⁰ In an unusual move, two of the justices who did not find a Due Process violation in *Irvine* (Justice Jackson joined by the new Chief Justice, Earl Warren)

²⁰⁵ In his concurring opinion, Justice Black rather coyly claimed that Justice Frankfurter’s opinion had concluded “that the Fourth Amendment’s prohibition of ‘unreasonable searches and seizures’ is enforceable against the states.” *Wolf*, 338 U.S. at 39. However, that was misleading insofar as Justice Frankfurter used the usual Fourth Amendment phrasing of “unreasonable” searches only when referring to federal searches or proceedings but instead referred to “arbitrary” intrusions when referring to state searches and proceedings. See *supra* note 203 and accompanying text.

²⁰⁶ *Wolf*, 338 U.S. at 44-46. Note, however, that Justice Black had earlier made a similar statement in *United States v. Wallace & Tiernan Co.*, 336 U.S. 793, 798 (1949) (describing the *Weeks* exclusionary rule as having been “devised by this court to prevent violations of the Fourth Amendment”).

²⁰⁷ 342 U.S. 165 (1952).

²⁰⁸ *Id.* at 172. Note that the consequence of a due process violation was not simply the exclusion of the evidence, as required at that time for a Fourth Amendment violation, but the dismissal of the prosecution.

²⁰⁹ 347 U.S. 128 (1954).

²¹⁰ *Id.* at 133-34. The police conduct in *Irvine* clearly would have constituted a Fourth Amendment violation if performed by federal officers because, notwithstanding the *Olmstead* ruling that conversations were not protected by the Fourth Amendment, the planting of the microphone had involved a warrantless physical trespass into a house.

called for a federal criminal investigation of the California police who had been responsible for planting the microphone.²¹¹ However, that investigation concluded that criminal prosecution would be inappropriate because the police had acted with the full knowledge of the local district attorney and pursuant to local law.²¹² A year after *Irvine*, the California Supreme Court also confronted a comparable illegal police practice and concluded that creation of a state exclusionary rule was the only meaningful response to such persistent police illegality.²¹³

VI. THE WARREN COURT: CIVIL RIGHTS, INCORPORATION, AND THE REVITALIZATION OF THE WARRANT REQUIREMENT

Of course, we now come to the Warren Court period, and the famed “due process revolution.” At least by the late 1950s, the justices were beginning to divide fairly predictably along the “crime control” (now called “conservative”) and “due process” (now called “liberal”) ideological orientations that Herbert Packer described.²¹⁴ The conventional wisdom regarding this period is that the liberal majority of the Warren Court produced an explosion of pro-defendant rulings. However, at least with regard to search and seizure rulings, the actual story is considerably more complex.

It certainly is true that the Warren Court made a fundamental innovation by “incorporating” federal criminal procedure protections and thus making federal standards applicable to state proceedings. It is also true that some of the Warren Court’s search and seizure rulings seem to have had the aim of facilitating federal court review of state court rulings. And it is definitely true that the volume of search and seizure cases, and of criminal procedure cases more generally, increased markedly as a result of the incorporation of the Fourth Amendment and of the other federal criminal procedure protections.

However, the ideological balance of the Court during the sixteen years in which Earl Warren served as Chief Justice was not as “liberal” as is

²¹¹ *Irvine*, 347 U.S. at 137 (Jackson, J., concurring).

²¹² See LANDYNSKI, *supra* note 51, at 139 n.88.

²¹³ *People v. Cahan*, 282 P.2d 905 (Cal. 1955).

²¹⁴ See Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, (1964) (contrasting the “crime control model” which involves substantial deference to and trust in law enforcement professionals to the “due process model” which arises from fears of errors and excesses and places strong emphasis on compliance with legality criterion). My sense is these “models” of ideological orientations to criminal law and procedure capture the salient division of the late twentieth century quite well. However, I think the simpler “conservative” and “liberal” labels are sufficient for present purposes, so I usually use those in this Article.

sometimes assumed. As indicated below, a dependable five-vote liberal majority existed for only the decisions rendered during the last two years in that era, 1968 and 1969. Likewise, the content of the search and seizure rulings was not as one-sided as the conventional wisdom would have it. In fact, several Warren Court rulings expanded police power or confirmed expansive police power in significant ways.

A. THE EARLY WARREN COURT

The early Warren Court was shaped by five Eisenhower appointments. Three of these, Justices Harlan, Stewart, and Whittaker, were Republican judges who were elevated from the lower federal courts. However, Chief Justice Warren was appointed at least partly as a result of an arrangement he had made with Eisenhower during the 1952 election.²¹⁵ Additionally, Justice Brennan's appointment seems to have reflected a combination of the Eisenhower Administration's attempt to appeal to urban Catholic voters in the upcoming 1956 election and limited ideological vetting by Eisenhower's Attorney General, Herbert Brownell.²¹⁶ During the latter part of the 1950s, the justices continued to divide in search and seizure decisions. However, although the number of cases was still small, defendants fared somewhat better, and Truman appointees Justices Clark and Burton were often in dissent.²¹⁷ In particular, the justices continued to disagree about whether particular factual allegations constituted "probable cause." In the 1959 decision *Draper v. United States*, they ruled six to one that an informant's tip was sufficiently detailed and corroborated by police observation to constitute probable cause,²¹⁸ while in another case decided the same year they reiterated that suspicion alone was not enough.²¹⁹

²¹⁵ See, e.g., *Earl Warren*, in THE OXFORD COMPANION TO THE UNITED STATES SUPREME COURT 1067-68 (Kermit Hall et al. eds., 2d ed. 2005); see also BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 10 (1979) (quoting Eisenhower as saying that appointing Chief Justice Warren was "the biggest damned-fool mistake I ever made").

²¹⁶ HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS 207-08 (5th ed. 2008); cf. HERBERT BROWNELL, ADVISING IKE: THE MEMOIRS OF HERBERT BROWNELL 179-80 (1993).

²¹⁷ See *Kremen v. United States*, 353 U.S. 346 (1957) (ruling seven to two that search of cabin incident to arrest was excessive); *Miller v. United States*, 357 U.S. 301 (1958) (ruling seven to two that failure to knock prior to warrantless entry to arrest was illegal); *Giordenello v. United States*, 357 U.S. 480 (1958) (ruling six to three that arrest warrant and subsequent search incident to arrest were invalid); *Jones v. United States*, 357 U.S. 493 (1958) (ruling seven to two that daytime search warrant could not justify nighttime execution of warrant).

²¹⁸ 358 U.S. 307, 312-14 (1959).

²¹⁹ *Henry v. United States*, 361 U.S. 98 (1959).

The justices made an important innovation in *Draper* when they explicitly stated that the Fourth Amendment's "probable cause standard" was also the constitutional test for assessing the legality of a *warrantless felony arrest*.²²⁰ Prior to that ruling (and perhaps because Congress had been exceedingly slow to enact warrantless arrest standards for federal officers²²¹), the justices had assessed the lawfulness of warrantless arrests by applying the law of the applicable state.²²² Surprising as it may now seem, prior to this time the justices had not actually assessed the constitutionality of arrests, but only the constitutionality of searches.²²³

The treatment of arrest as a Fourth Amendment issue in its own right in *Draper* was significant insofar as it laid the groundwork for a later 1963 extension of the fruit of the poisonous tree doctrine to incriminating statements that police had obtained as a result of an unconstitutional arrest.²²⁴ However, the Warren Court's big innovation was the extension of Fourth Amendment protections to state proceedings under the incorporation doctrine.

²²⁰ *Draper*, 358 U.S. at 310 (equating "'probable cause' within the meaning of the Fourth Amendment, and 'reasonable grounds' within the meaning of [the pertinent federal statute for warrantless narcotics arrests]").

²²¹ Congress finally enacted statutory warrantless felony arrest standards for specific categories of federal officers beginning in the 1930s, but did not settle upon probable cause standing alone as the standard until amendments made in 1948 and 1950. See Davies, *Correcting Search History*, *supra* note 16, at 210-12.

²²² See, e.g., *United States v. Di Re*, 332 U.S. 581, 590 (1948) (noting the absence of any general statutory standard for warrantless arrests by federal officers).

²²³ The concept that an arrest or stop constitutes a "seizure" of a person subject to the Fourth Amendment is simply missing from the discussions in the earlier cases. For example, there is no discussion of the legality of the police pulling over the car in the 1949 ruling in *Brinegar*. Although Justice Rutledge wrote at one point that "[t]he crucial question is whether there was probable cause for Brinegar's arrest," that may have been a typographical error because he did not otherwise discuss the validity of the arrest or the search incident to arrest doctrine, but rather upheld the search and seizure of liquor under *Carroll*'s automobile search doctrine and discussed only the constitutionality of the search in the remainder of the opinion. See *Brinegar v. United States*, 338 U.S. 160, 160, 164 (1949). Likewise, in the 1950 ruling in *Rabinowitz* Justice Minton's opinion discussed the validity of searches incident to arrest under the Fourth Amendment and noted that "a search without warrant incident to an arrest is dependent initially on a valid arrest," but never actually assessed the constitutionality of the arrest. See *Rabinowitz v. United States*, 339 U.S. 56, 60-61 (1950).

²²⁴ *Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (ruling that statements taken during an illegal arrest must be suppressed as "fruit of the poisonous tree"); see also *Fahy v. Connecticut*, 375 U.S. 85 (1963).

B. THE "REVOLUTION": INCORPORATION AND THE FEDERALIZATION OF CRIMINAL PROCEDURE

The limitation of the Fourth Amendment to only federal, but not state, proceedings had been a source of tension since *Weeks* itself.²²⁵ Indeed, that feature of constitutional doctrine had produced the so-called silver platter doctrine, which permitted state officers, who had conducted searches that would have violated Fourth Amendment standards had they been committed by federal officers to nevertheless present their evidence in federal criminal trials.²²⁶ The Warren Court began the process of federalization by curtailing this doctrine.

In the 1956 decision *Rea v. United States*,²²⁷ the five-to-four majority invoked the supervisory power of the Supreme Court to prohibit federal officers from presenting evidence obtained in violation of the Fourth Amendment in state cases. A few years later in 1960, and again by a five-to-four decision, the majority ruled in *Elkins v. United States*²²⁸ that evidence obtained by state officers could not be introduced in federal trials if the seizure would not have satisfied federal search and arrest standards had it been made by federal officers.

However, language in Justice Stewart's majority opinion in *Elkins* went considerably beyond the specific issue. In particular, Justice Stewart's opinion characterized (I think *mis*characterized) Justice Frankfurter's *Wolf* opinion as though it had already made the Fourth Amendment applicable to the states.²²⁹ Thus, *Elkins* effectively, though not formally, announced the full extension of the Fourth Amendment to the states.²³⁰

²²⁵ *Weeks v. United States*, 232 U.S. 383, 398 (1914) (noting that the Fourth Amendment did not apply to the local policemen who participated in the search of Weeks's house and declining to address any remedies Weeks might have regarding their conduct).

²²⁶ See *supra* note 166; see also *Lustig v. United States*, 338 U.S. 74, 79 (1949).

²²⁷ 350 U.S. 214 (1956).

²²⁸ 364 U.S. 206 (1960); see also *Rios v. United States*, 364 U.S. 253 (1960).

²²⁹ *Elkins*, 364 U.S. at 213-14. However, language in earlier decisions had also asserted that *Wolf* had effectively extended the substance of Fourth Amendment standards to the states. See *Irvine v. California*, 347 U.S. 128, 134 (1954) (plurality opinion) (stating that the Court had applied "the basic search and seizure protections of the Fourth Amendment" to the states in "June of 1949"—that is, in *Wolf*); *Rea*, 350 U.S. at 220 (Harlan, J., dissenting) (asserting that the "substance" of the constitutional commands in *Wolf* and *Weeks* were the same).

²³⁰ Because *Elkins* was a federal case, it could not provide a vehicle for formally applying the Fourth Amendment to state proceedings. The dissenting justices nevertheless recognized the broad implications of the decision. In a memo written to the majority justices shortly after *Elkins* was decided in conference, but before it was announced, the four dissenters proposed that the justices should defer a decision on the issue of incorporation and instead refer it to an advisory committee on criminal rules. See Felix Frankfurter, Tom C. Clark, John M. Harlan & Charles E. Whittaker, Memorandum to the Majority in the Silver

Justice Stewart's opinion in *Elkins* also blended the legality and deterrence rationales for exclusion with the recognition that exclusion was the only feasible response to unconstitutional searches. Thus he wrote that "[t]he rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."²³¹

It only remained for the majority justices to find an appropriate case to formalize the incorporation of the Fourth Amendment into the Fourteenth Amendment Due Process Clause. A year later, *Mapp v. Ohio*²³² was pressed into serving that purpose. It was an odd choice, insofar as *Mapp* was briefed and argued as an obscenity prosecution. Likewise, the winning coalition in *Mapp* was oddly composed. The opinion was authored by Justice Clark, who had been a dissenter in *Elkins*,²³³ but did not include Justice Stewart, who objected that the Fourth Amendment issue had been neither briefed nor argued in *Mapp*.²³⁴ Instead, Justice Clark seems to have decided to use *Mapp* as the vehicle for incorporation after being assigned the opinion in the case, and he negotiated to obtain a concurrence from Justice Black (apparently without approaching Justice Stewart²³⁵), with the result that *Mapp* rested partly on Justice Black's quixotic version of the Fourth Amendment (rooted in *Boyd*'s historical fiction).²³⁶

Platter Cases, (Apr. 13, 1960) (copy on file with author). The author is indebted to Professor Dennis Dorin for providing him with a copy of this memo from the files of Justice Clark.

²³¹ *Elkins*, 364 U.S. at 217.

²³² 367 U.S. 643 (1961).

²³³ Justice Clark's views on incorporation were complex. As a former attorney general, he apparently found the divergence of state and federal standards intolerable. Thus, in 1956 he wrote in *Irvine* that he joined the majority opinion in that case in the hope of forcing a reconsideration of *Wolf*'s rejection of incorporation. Yet, he dissented in *Elkins*, and generally favored the government in rulings on Fourth Amendment standards. For an attempt to explain Clark's views on incorporation, see Dennis D. Dorin, "Seize the Time": Justice Tom Clark's Role in *Mapp v. Ohio*, in *LAW AND THE LEGAL PROCESS* 21 (Victoria L. Swigert ed., 1982).

²³⁴ 367 U.S. at 672 (declining to express an opinion "as to the merits of the constitutional issue"). It seems obvious that Justice Stewart would have supported full incorporation of the Fourth Amendment. Indeed, he said as much in a later commentary. See Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1379-80 (1983) (stating that "[i]n a way, the *Elkins* opinion may have made the holding in the *Mapp* case inevitable" because *Elkins* held "the fourth amendment's limitations on state governments were coextensive with the fourth amendment's limits on the federal government").

²³⁵ Justice Stewart later wrote that he was surprised when he read Justice Clark's draft opinion. See *id.* at 1368.

²³⁶ Harkening back to *Boyd*'s formulation, Justice Black insisted that the exclusion of evidence seized unconstitutionally in violation of the Fourth Amendment was required by

Why did Justice Clark seize on *Mapp* to finalize the incorporation of the Fourth Amendment’s protections? I speculate that *Monroe v. Pape*²³⁷ may be part of the explanation.²³⁸ The justices were considering *Monroe* in the same term that *Mapp* was decided, and the decision in *Monroe* was announced only a few weeks prior to that in *Mapp*. *Monroe* is the case in which the Warren Court revived (some would say reinvented) 42 U.S.C. § 1983 as a damages remedy for violations of federal constitutional rights by state officers. However, the important point for the present story is that *Monroe*, like *Mapp*, involved an abusive search of black citizens by white police officers. Indeed, the oppressiveness of the police search and arrest without charges in *Monroe* was considerably more extreme than that in *Mapp* itself.²³⁹ Hence, the confluence of racist police abuse in *Mapp* and *Monroe* may have convinced Justice Clark that it was past time to extend federal supervision to state criminal justice—and *Mapp*, as a state case involving an abusive warrantless search, provided the only immediately available vehicle for doing so.²⁴⁰ Of course, given the passions that had been unleashed by the 1954 school desegregation ruling in *Brown v. Board of Education*,²⁴¹ it would have served no useful purpose for the justices to have presented the ruling in *Mapp* as a civil rights measure. Nevertheless, the impetus for incorporation in *Mapp* surely traces back directly to the horrors of lynch justice in the *Scottsboro Case*,²⁴² *Brown v. Mississippi*,²⁴³ and far too many others.²⁴⁴

the Fifth Amendment right against compelled self-incrimination. *Mapp*, 367 U.S. at 661-63, 666.

²³⁷ 365 U.S. 167 (1961).

²³⁸ Another case decided in 1961 may have also played a role in prompting Justice Clark to use *Mapp* to announce incorporation. In *Wilson v. Schnettler*, 365 U.S. 381 (1961), the justices divided six to three in affirming the dismissal of an injunction barring use of evidence seized by federal officers in a state proceeding, but that ruling did not preclude the use of an injunction in other cases. Justice Clark may not have welcomed the prospect of further injunction cases.

²³⁹ See *Monroe*, 365 U.S. at 169 (reciting allegations that thirteen Chicago police officers broke into the Monroe’s home in the early morning, routed them from bed, made them stand naked in the living room, ransacked every room, emptied drawers and ripped mattress covers, and then detained Mr. Monroe incommunicado for ten hours on “‘open’ charges” (that is, without any charge) before releasing him).

²⁴⁰ It may also be that Clark recognized that it could be sometime before a better case than *Mapp* would become available to the justices. In the absence of a state exclusionary rule, state courts would rarely make rulings on the legality of searches for the Court to review. *Mapp* was unusual insofar as that issue had been argued in the state courts even though the Ohio Supreme Court had previously rejected exclusion. See CAROLYN N. LONG, *MAPP V. OHIO: GUARDING AGAINST UNREASONABLE SEARCHES AND SEIZURES* 15-32 (2006) (describing the litigation in the Ohio state courts).

²⁴¹ 347 U.S. 483 (1954).

²⁴² *Powell v. Alabama*, 287 U.S. 45 (1932) (*Scottsboro Case*).

Needless to say, the extension of the Fourth Amendment's protections and its exclusionary rule to state criminal justice proceedings provoked an outpouring of academic commentary. One of the more notable exchanges over *Mapp* occurred in a debate in the *Journal*, between Northwestern's own Professor Fred Inbau, who opposed the decision,²⁴⁵ and Professor Yale Kamisar, who applauded it.²⁴⁶

The Warren Court's liberal wing was bolstered in 1962 when Justice Goldberg was appointed to the seat vacated by Justice Frankfurter's retirement. The justices then proceeded to "selectively" incorporate virtually all of the criminal procedure provisions of the federal Bill of Rights and also undertook to reinforce incorporation by pursuing a variety of other strategies for facilitating federal court review of state proceedings. The most basic was the announcement of the right to appointed counsel in 1963 in *Gideon v. Wainwright*.²⁴⁷ Additionally, the majority enlarged federal habeas corpus review of state convictions in the same year in *Fay v. Noia*.²⁴⁸ The Warren Court also underscored that the entire Fourth Amendment applied to the states in the 1963 ruling in *Ker v. California*.²⁴⁹

The Warren Court also facilitated review of state arrest and search warrants by elaborating the prior treatments of probable cause for a warrant in the 1964 ruling in *Aguilar v. Texas*.²⁵⁰ In that six-to-three decision, the majority required that when probable cause was to be based on information provided by an informant, the warrant affidavit had to provide the issuing magistrate with information regarding both the informant's basis of knowledge and the informant's veracity.²⁵¹ Because that ruling was

²⁴³ 297 U.S. 278 (1936).

²⁴⁴ The association of support for search and seizure restrictions on police with liberal or progressive political ideology during the post war period appears to represent virtually a 180 degree shift from that at the outset of the century of search and seizure doctrine. During the late-nineteenth and early-twentieth centuries, it appears that political progressives tended to favor aggressive police action against criminal elements. See Oliver, *supra* note 46, at 468-93 (discussing policing in New York).

²⁴⁵ Fred E. Inbau, *Public Safety v. Individual Civil Liberties: The Prosecutor's Stand*, 53 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 85 (1962).

²⁴⁶ Yale Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and "Theories,"* 53 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 171 (1962).

²⁴⁷ 372 U.S. 335 (1963).

²⁴⁸ 372 U.S. 391 (1963).

²⁴⁹ 374 U.S. 23 (1963). However, *Ker* also demonstrated that some complexities as to the relevance of state and federal standards remained.

²⁵⁰ 378 U.S. 108 (1964). *Aguilar* developed the earlier warrant probable cause standard set out in *Giordenello v. United States*, 357 U.S. 480 (1958).

²⁵¹ *Aguilar*, 378 U.S. at 114, n.5 (stating that warrant affidavit must inform the magistrate "of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from

subsequently reiterated and strengthened in 1969 in *Spinelli v. United States*,²⁵² the combined doctrine came to be labeled the *Aguilar-Spinelli* "two-prong" standard for probable cause based on an informant's tip.

C. WARREN COURT RULINGS THAT STRENGTHENED OR WEAKENED FOURTH AMENDMENT PROTECTIONS

Despite *Mapp*, there still were relatively few search and seizure decisions during the early through mid-1960s, and the justices may have been more occupied with self-incrimination issues during some of those years.²⁵³ Moreover, although the justices' rulings in search and seizure cases during this period often favored defendants, the government still won a substantial portion of the cases.

The *Harvard Law Review* began to annually tabulate Supreme Court search and seizure rulings in federal criminal cases decided by opinion in 1952 and did likewise regarding state criminal cases in 1959.²⁵⁴ Although these statistics are sometimes slightly overinclusive for present purposes insofar as they can include a few search cases that did not involve Fourth Amendment standards themselves,²⁵⁵ and sometimes slightly underinclusive insofar as they do not include constructions of Fourth Amendment standards in noncriminal cases such as § 1983 lawsuits, they are nevertheless quite instructive for present purposes insofar as they include all of the decisions that involved the issue of exclusion of evidence.²⁵⁶

which the officer concluded that the [confidential informant] was 'credible' or his information 'reliable'").

²⁵² 393 U.S. 410 (1969).

²⁵³ See, e.g., *Massiah v. United States*, 377 U.S. 201 (1964); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Miranda v. Arizona*, 384 U.S. 436 (1966).

²⁵⁴ The *Harvard Law Review* has presented annual statistics breaking down subject categories and whether the government party won or lost for federal criminal cases since the 1951 term and for state criminal cases since the 1958 term. See the "Statistics" presented in the Supreme Court review in each volume. For simplicity, I depart from the formal dating of cases by the "term" in which they were decided (which the *Harvard Law Review* uses) and present them instead by the calendar year in which they were decided. That discrepancy occurs because, although the Supreme Court's annual term commences in October, virtually all of the opinions are released (that is, "decided") during the spring and early summer of the next calendar year. Note that my choice may occasionally misdescribe a case in the odd situation in which a case was actually decided before December 31, but those are fairly rare.

²⁵⁵ The Harvard statistics also indicate whether search cases involved a constitutional issue, but do not link that to the breakdown of the cases the government won or lost.

²⁵⁶ The statistics reported in this Article combine the "search and seizure" cases from federal criminal cases, state criminal cases, and federal and state habeas corpus cases as set out in Table 1. In a few instances in which the Harvard breakdown identifies "exclusionary rule" cases distinctly from search and seizure cases, those are also included in the statistics I recite.

As indicated in Table 1, at the end of this Article, the annual *Harvard Law Review* statistics indicate there were twenty search and seizure rulings in criminal cases from 1959 through 1966, of which the government won seven and defendants thirteen. The number of search and seizure rulings in criminal cases then spiked to eleven decisions in 1967, of which the government won seven. Thus, from 1959 through 1967, the government won fourteen of the thirty-one cases (45%), while defendants won seventeen.

There was a marked change in case outcomes after Justice Thurgood Marshall replaced the retiring Justice Clark in October 1967 and provided a reliable liberal fifth vote. Defendants won fourteen of the nineteen cases decided in 1968 and 1969, while the government won only five. However, as noted below, that liberal surge was confined to those two final years of Earl Warren's tenure as chief justice.

1. Decisions that Strengthened Fourth Amendment Protections

The Warren Court made a number of decisions that strengthened Fourth Amendment protections. Early on, in the 1960 decision *Jones v. United States*,²⁵⁷ the justices unanimously adopted a fairly broad conception of the standing required to challenge the legality of police conduct when they adopted a rule of automatic standing for defendants in prosecutions for possessory offenses. The justices also ruled in the same case that anyone who was legitimately on premises that were subjected to a police intrusion possessed standing to challenge the legality of the intrusion. In the 1963 decision in *Wong Sun v. United States*,²⁵⁸ the justices also ruled, five to four, that incriminating statements police obtained as a result of an illegal arrest were subject to exclusion from evidence as "fruit of the poisonous tree"—at least if they were not too attenuated from that illegal conduct.²⁵⁹ Additionally, in the 1964 ruling in *Stoner v. California*,²⁶⁰ the justices unanimously limited the degree to which the police could rely upon consent by ruling that landlords and hotel keepers could not waive the Fourth Amendment rights of their tenants.

The justices also made three important pronouncements in the 1967 decision in *Katz v. United States*.²⁶¹ First, over Justice Black's dissent, the

²⁵⁷ 362 U.S. 257 (1960).

²⁵⁸ 371 U.S. 471 (1963); see also *Fahy v. Connecticut*, 375 U.S. 85 (1963) (ruling that the admission of statements obtained by unconstitutional arrests did not constitute harmless error).

²⁵⁹ *Wong Sun*, 371 U.S. at 487-88.

²⁶⁰ 376 U.S. 483 (1964).

²⁶¹ 389 U.S. 347 (1967).

justices overruled the 1927 *Olmstead* decision and the 1942 *Goldman* decision by extending the protections of the Fourth Amendment to private conversations.²⁶² Second, Justice Harlan’s concurring opinion formulated the revised scope of the Amendment’s protections in terms of a person’s “reasonable [or legitimate] expectation of privacy.”²⁶³ And, third, the justices reaffirmed the importance of the warrant requirement by declaring that all warrantless searches were “presumptively unreasonable” and thus unconstitutional unless they fell within one of the “few specifically established and well-delineated exceptions” to the warrant requirement that the Court had already recognized.²⁶⁴

Several other late Warren Court rulings also indirectly bolstered the enforcement of the warrant requirement. For example, in 1968 in *Bumper v. North Carolina*,²⁶⁵ over the dissent of Justices Black and White, the majority placed a boundary on the “consent” justification for a search by ruling that a person’s mere acquiescence to an assertion of authority by police did not constitute voluntary consent. Additionally, in the 1969 ruling in *Chimel v. California*,²⁶⁶ and over the same dissent, the majority limited the scope of a warrantless search made incident to a lawful arrest in a residence to the area in which the arrestee could potentially reach for a weapon or evidence. The majority also enhanced a defendant’s ability to contest the legality of searches by ruling in *Simmons v. United States*²⁶⁷ that inculpatory statements made by a defendant to establish his standing during a suppression hearing could not be admitted against the defendant at trial.

However, Chief Justice Warren’s 1968 majority opinion in *Terry v. Ohio*²⁶⁸ produced results that defy easy classification. On the one hand, *Terry* extended Fourth Amendment protections to a police “stop and frisk” practice that was already commonplace in American cities, and thus subjected that practice to legal review. On the other hand, the majority invented an entirely new standard commonly referred to as “reasonable suspicion”—a lower threshold than probable cause—as the test for the constitutional validity of a “stop and frisk.” And reasonable suspicion did

²⁶² *Id.* at 352-53.

²⁶³ *Id.*

²⁶⁴ *Id.* at 357. Justice Stewart’s unpredictability during this period is evident in that fact that in the prior term, in *Cooper v. California*, 386 U.S. 58 (1967), he had joined Justice Black’s majority opinion in a five to four decision (liberal justices dissenting) that followed *Rabinowitz* in giving very broad authority for a warrantless police search of an auto being “held as evidence” following an arrest for narcotics.

²⁶⁵ 391 U.S. 543 (1968).

²⁶⁶ 395 U.S. 752 (1969).

²⁶⁷ 390 U.S. 377 (1968).

²⁶⁸ 392 U.S. 1 (1968).

not seem to require anything more than an officer's ability to articulate some factual basis for suspicion. Thus, although the facts in *Terry* itself involved fairly strong grounds for the officer to suspect an armed robbery was being planned, and although the justices also attempted to give concreteness to the new reasonable suspicion standard by bracketing *Terry* between a decision that found an absence of justification for any police detention in *Sibron v. New York*,²⁶⁹ and another that found sufficient "probable cause" for a warrantless arrest in *Peters v. New York*,²⁷⁰ the new standard remained disturbingly formless and potentially permissive.

2. Pro-Government Decisions

Other decisions during the Warren Court period favored law enforcement. In particular, Justices Black and White often voted for the government in search cases, and they were not infrequently joined by Justice Clark (until his retirement at the end of the 1967 cases) as well as Justices Stewart and Harlan. Additionally, the so-called liberal justices also voted for the government in a number of cases. For example, in 1966, Justice Brennan authored the five-to-four majority opinion in *Schmerber v. California*,²⁷¹ which concluded that taking a blood sample from a defendant charged with drunk driving without a warrant did not violate either the Fourth or Fifth Amendments.

Additionally, in 1966, the justices overruled one of the more significant aspects of the 1921 *Gouled* decision by allowing an undercover agent to make a warrantless entry of a house through deception in *Lewis v. United States*,²⁷² and also upheld the admissibility of the testimony of an undercover government informer who gained entry to private conversations through deception in *Hoffa v. United States*.²⁷³ A 1967 majority opinion by Justice Brennan in *Warden v. Hayden*²⁷⁴ also overruled the "mere evidence" doctrine that had been articulated in *Gouled* (although it is likely that doctrine was largely ignored in practice by that date as lower courts found creative ways to bring evidence within the "fruit or instrumentality of crime" categories). More significantly, *Hayden* also indicated that the

²⁶⁹ 392 U.S. 40, 62-66 (1968) (announced the same day as *Terry*).

²⁷⁰ 392 U.S. 40, 66-68 (1968) (announced the same day as *Terry*, and decided in the same opinion as *Sibron*).

²⁷¹ 384 U.S. 757 (1966).

²⁷² 385 U.S. 206 (1966).

²⁷³ 385 U.S. 293 (1966).

²⁷⁴ 387 U.S. 294 (1967).

justices were prepared to accept a fairly expansive treatment of the “exigent circumstances” exception to the search warrant requirement.²⁷⁵

Several Warren Court rulings also indirectly but significantly undermined the protection offered by the warrant requirement. In the 1960 ruling in *Jones v. United States*²⁷⁶ the justices (eight to one) followed *Brinegar* in allowing probable cause to be based on an officer’s recitation of hearsay information. Next, in the 1964 ruling in *Rugendorf v. United States*,²⁷⁷ the Court divided five to four (Chief Justice Warren and Justices Douglas, Brennan, and Goldberg dissenting) in upholding the use of hearsay to show probable cause for a warrant and also ruling that the informants whose information was the basis for probable cause need not be produced or even identified to the magistrate who issued the warrant. Then, in a similar five-to-four decision in 1967 in *McCray v. Illinois*,²⁷⁸ the majority further ruled that the identity of the confidential police informant whose information was the basis for probable cause for a warrantless arrest need not be disclosed to the defendant or court during a pretrial hearing on the validity of the arrest and incident search. These rulings made it virtually impossible for a defendant to challenge the veracity of allegations attributed to informants in warrant affidavits, and thus eased the way for police to meet the *Aguilar-Spinelli* standard by inventing fictional and perjurious allegations.²⁷⁹

A Warren Court ruling also facilitated warrantless searches of cars. Although the justices previously had unanimously ruled that a warrantless search of an impounded automobile could not be justified as a search incident to arrest,²⁸⁰ they ruled in the 1968 decision *Harris v. United States*²⁸¹ that discovery of evidence in plain view when an officer opened a car door to prepare the auto for impoundment pursuant to police regulations did not constitute a “search” to which the Fourth Amendment applied—and thus did not require either probable cause or a warrant.

²⁷⁵ *Id.* at 298-300 (allowing a warrantless search of an entire house, including the contents of a washing machine in the basement, for weapons in connection with a warrantless arrest for armed robbery made in the house shortly after the report of the robbery).

²⁷⁶ 362 U.S. 257 (1960).

²⁷⁷ 376 U.S. 528 (1964).

²⁷⁸ 386 U.S. 300 (1967).

²⁷⁹ For evidence that the police sometimes resorted to perjury in warrant applications, see, e.g., Myron W. Orfield Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 95-114 (1992).

²⁸⁰ *Preston v. United States*, 376 U.S. 364 (1964).

²⁸¹ 390 U.S. 234, 236 (1968).

Additionally, Justice Clark's 1965 opinion in *Linkletter v. Walker*²⁸² seriously undermined the rationale for the exclusionary rule. The issue in the case was whether the ruling in *Mapp* was to be given retroactive effect. Unsurprisingly, the justices were not anxious to make a ruling that risked a "wholesale release" of convicted prisoners in states that had not enforced search standards prior to *Mapp*.²⁸³ However, instead of simply noting that those states had acted in reliance on *Wolf*, Justice Clark justified ruling against retroactivity²⁸⁴ by emphasizing that the purpose of the exclusionary rule was to deter future police misconduct, but omitted the legality and judicial integrity rationales that had also been attributed to the rule (but that arguably supported retroactivity).²⁸⁵ Although a majority of the justices later rejected a narrow deterrent conception of the exclusionary rule in the 1969 ruling in *Kaufman v. United States*,²⁸⁶ the deterrence formulation in *Linkletter* nevertheless played into the hands of critics of exclusion, such as Judge Warren Burger, who were already arguing that exclusion failed as a deterrent.²⁸⁷

However, notwithstanding *Linkletter*'s embrace of the deterrence rationale for exclusion, the Warren Court declined to make a change that would have substantially increased the exclusionary rule's potency as a deterrent when the justices declined to broaden the standing required to challenge police conduct. The goal of deterrence obviously is undercut when the government can deliberately violate person A's privacy with impunity to gain evidence against person B—which is what the standing requirement permits.²⁸⁸ In 1955, the California Supreme Court—alone among all the states—had recognized as much by eliminating the standing requirement for challenging a search.²⁸⁹ However, in the 1969 ruling in

²⁸² 381 U.S. 618 (1965).

²⁸³ *Id.* at 637.

²⁸⁴ Justice Clark's majority opinion in *Linkletter* conceded that the ruling against retroactivity represented a break with the prior understanding that newly recognized constitutional standards did apply retroactively. *See id.* at 628-29 n.13.

²⁸⁵ The emphasis on deterrence in Justice Clark's *Linkletter* opinion did not entirely square with the actual ruling in the case that permitted partial retroactivity by ruling that *Mapp* would not apply to all convictions that were "final" on the date when *Mapp* was announced. *Id.* at 639-40. Thus, *Linkletter* actually allowed *Mapp* to be applied to some prosecutions in which the police search had occurred prior to the *Mapp* decision, but in which the period for appeal had not expired as of the date of the *Mapp* decision.

²⁸⁶ 394 U.S. 217 (1969).

²⁸⁷ *See infra* notes 303, 333 and accompanying text.

²⁸⁸ *See, e.g.,* *United States v. Payner*, 447 U.S. 727 (1980); *see also* *Amsterdam, supra* note 5, at 362-72.

²⁸⁹ *People v. Martin*, 290 P.2d 855, 857 (Cal. 1955) (ruling that unconstitutionally obtained evidence "is inadmissible whether or not it was obtained in violation of the

Alderman v. United States,²⁹⁰ the Warren Court declined to follow California’s lead. Although Justices Fortas and Douglas would have expanded standing to include a person who was the target of a police intrusion, the other justices adhered to the narrower standing rule announced in prior cases.

D. INCORPORATION AND THE POLITICS OF CRIME

The Warren Court’s “due process revolution” and incorporation decisions had effects beyond the regulation of police conduct and the resolution of criminal prosecutions themselves. In retrospect, it appears likely that the search and exclusionary rule decisions merged in the public mind with the Court’s other criminal procedure rulings, especially *Miranda v. Arizona*,²⁹¹ that enforced the protections of the Fifth Amendment protection against compelled self-incrimination. And those extensions of constitutional protections to street criminals in state prosecutions fundamentally changed and intensified the politics of criminal justice.

Prior to the incorporation doctrine, federal constitutional standards had largely applied either to the sorts of white collar crimes that did not overly scare or incite the public, or to the alcohol or drug cases that fell within the limited reach of federal court jurisdiction. However, the incorporation doctrine of *Elkins* and *Mapp*, and the comparable self-incrimination rulings in *Malloy v. Hogan*²⁹² and *Miranda*, meant that violent street criminals also could claim federal constitutional protections. As a result, the search cases that reached the Court were no longer confined to booze, drugs, and white-collar crimes; now they sometimes also included burglary, armed robbery, rape, and murder.²⁹³ And the extension of constitutional protections to persons accused of violent crimes did incite and scare the public.²⁹⁴

Moreover, viewed in terms of public acceptance, the timing of the Court’s embrace of incorporation was infelicitous at best. The decade

particular defendant’s constitutional rights”). *Martin* was subsequently overruled in *In re Lance*, 694 P.2d 744 (Cal. 1985).

²⁹⁰ 394 U.S. 165 (1969).

²⁹¹ 384 U.S. 436 (1966).

²⁹² 378 U.S. 1 (1964) (incorporating the Fifth Amendment right against compelled self-incrimination).

²⁹³ See, e.g., *Stoner v. California*, 376 U.S. 483 (1964) (armed robbery); *Linkletter v. Walker*, 381 U.S. 618 (1965) (burglary); *Warden v. Hayden*, 387 U.S. 294 (1967) (armed robbery); *Bumper v. North Carolina*, 391 U.S. 543 (1968) (rape); *Davis v. Mississippi*, 394 U.S. 721 (1969) (rape); *Frazier v. Cupp*, 394 U.S. 731 (1969) (second-degree murder); *Chimel v. California*, 395 U.S. 752 (1969) (burglary); *Shipley v. California*, 395 U.S. 818 (1969) (robbery); *Chambers v. Maroney*, 399 U.S. 42 (1970) (armed robbery).

²⁹⁴ See, e.g., FRED P. GRAHAM, *THE SELF-INFLICTED WOUND* 8-25 (1970) (describing negative reaction to the Warren Court’s criminal procedure decisions).

during which the federal criminal procedure protections were extended to state proceedings coincided with what was widely perceived to be an unprecedented crime wave, with the emergence of the drug counter-culture, with race riots, and with intense political strife over the Vietnam War. Additionally, because street crime appears to have been widely perceived by white America in terms of race, the backlash against *Mapp* and *Miranda* probably blended with continuing resentment of *Brown v. Board of Education* and the use of school busing as a remedy for segregated schools. In hindsight, it is apparent that the liberal Warren Court majority was far more concerned with the rights of criminal suspects than the public.²⁹⁵

VII. THE LAW-AND-ORDER REACTION AND THE BURGER COURT

There is a large degree of truth in the cliché that the Supreme Court follows the elections. That is so, of course, because shifts in the Court's membership tend to track presidential elections and presidential agendas. However, the accidents or machinations by which vacancies occur (there are a number of examples of carefully timed retirements), coupled with variations in presidential influence (or lack thereof), means that some elections matter more than others. The 1968 election was hugely important. Richard Nixon not only harnessed public opposition to the Warren Court when running for the presidency, but was also soon presented with an unusual opportunity to remake the high bench.²⁹⁶ Indeed, because President Nixon soon had four vacancies to fill on the Court, his election was a tipping point for constitutional criminal procedure and especially for search and seizure doctrine.

A. NIXON'S AGENDA AND THE BURGER COURT'S PLUNGE TO THE RIGHT

Chief Justice Earl Warren foresaw the likelihood that Nixon would win the November 1968 election. So, in mid-1968 Chief Justice Warren informed President Lyndon Johnson that he would resign from the Court when his replacement was confirmed. President Johnson then nominated Justice Fortas to replace Chief Justice Warren, and a Texas crony, Judge Homer Thornberry, to take the seat Justice Fortas would be vacating.²⁹⁷ But Chief Justice Warren had acted too late, and President Johnson's

²⁹⁵ One indication of public dissatisfaction was the introduction in 1971 in Congress of a bill to curtail the Fourth Amendment exclusionary rule. See LONG, *supra* note 240, at 164-65.

²⁹⁶ See WOODWARD & ARMSTRONG, *supra* note 215, at 10.

²⁹⁷ See Thornberry, William Homer, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, *supra* note 10, at 1019-20.

decision to elevate Justice Fortas unraveled when Justice Fortas became embroiled in a financial scandal that soon forced his resignation from the Court.²⁹⁸ The net result was that President Nixon was immediately given two vacancies to fill—one of them for chief justice.

President Nixon then nominated Judge Warren Burger, an outspoken critic of the Warren Court’s criminal procedure rulings, to be Chief Justice.²⁹⁹ President Nixon also named Judge Harry Blackmun, a personal friend of Burger’s, to fill Justice Fortas’s vacant seat. When Justices Black and Harlan both retired shortly before their deaths in the fall of 1971, President Nixon had two more vacancies. After two failed nominations,³⁰⁰ President Nixon then named Lewis Powell and William Rehnquist, and they took their seats midway through the 1971 Term.³⁰¹ In all of these appointments, President Nixon chose nominees known for varying degrees of hostility toward the Warren Court’s pro-defendant rulings. Indeed, one insider has reported that President Nixon had two salient criteria for appointees: opposition to the Warren Court’s criminal procedure rulings and opposition to busing as a remedy for segregated schools.³⁰²

President Nixon’s nominees plainly met the criminal procedure criterion. Chief Justice Burger had gained visibility as an outspoken critic of the exclusionary rule.³⁰³ Chief Justice Burger apparently vouched for Justice Blackmun’s views.³⁰⁴ Although regarded as a political moderate, Justice Powell, a former American Bar Association president, was noted for speaking “vigorously and emphatically on . . . the necessity for the control of crime.”³⁰⁵ And Justice Rehnquist’s opposition to the Warren Court’s rulings was also well known in the administration. In fact, while serving in the Justice Department, Rehnquist had written a memorandum that

²⁹⁸ See *Fortas, Abe* and *Fortas Resignation*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, *supra* note 10, at 356-57.

²⁹⁹ See WOODWARD & ARMSTRONG, *supra* note 215, at 12, 115.

³⁰⁰ See, e.g., LAWRENCE BAUM, THE SUPREME COURT 46 (9th ed. 2007) (discussing the failed nominations of judges Clement Haynsworth and G. Harrold Carswell).

³⁰¹ See *Succession of the Justices* [table], in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, *supra* note 10, at 1145, 1148.

³⁰² JOHN W. DEAN, THE REHNQUIST CHOICE 57 (2001); see also *id.* at 16 (discussing the ideological content of “strict constructionism”), 232 (noting potential nominees’ opposition to busing), 257 (noting nominees’ views on criminal procedure).

³⁰³ See, e.g., Warren E. Burger, *Who Will Watch the Watchmen?*, 14 AM. U. L. REV. 1 (1964) (arguing that the exclusionary rule failed as a deterrent of police illegality); see also DEAN, *supra* note 302, at 12-13.

³⁰⁴ See DEAN, *supra* note 302, at 23.

³⁰⁵ J. HARVIE WILKINSON III, SERVING JUSTICE: A SUPREME COURT CLERK’S VIEW 114 (1974); see also WOODWARD & ARMSTRONG, *supra* note 215, at 161, 163 (noting Powell’s membership on Lyndon Johnson’s National Crime Commission and his public support for warrantless wiretapping of domestic radicals).

advocated the formation of a presidential commission to propose revisions of the criminal procedure provisions of the Bill of Rights—an aspect of his career that was not disclosed to the Senate during his confirmation proceedings.³⁰⁶

Although the rulings of the Burger Court were not as robustly conservative across the board as some expected—indeed, it decided *Roe v. Wade*³⁰⁷—there was a plunge to the right in criminal procedure, as the four Nixon appointees combined with Justice White, and sometimes Justice Stewart, to produce a dependable pro-government majority.³⁰⁸ Moreover, because prosecutions for possessory offenses almost always involved a search and seizure, the so-called war on drugs provided a substantial and continuing flow of potential cases.³⁰⁹ The effects of that combination on search and seizure were fairly dramatic.

One effect was a sharp change in the source of the Court's Fourth Amendment cases. From 1925, when the justices acquired discretion to select the cases they would hear through certiorari,³¹⁰ through the end of the Warren Court in 1969, the large majority of search cases the justices decided to decide came to the Court as certiorari petitions filed by criminal defendants. However, starting with the 1973 decisions, government petitions, often filed by states, became the dominant source of the Court's search and seizure cases.³¹¹

³⁰⁶ Rehnquist's memorandum is discussed in DEAN, *supra* note 302, at 268-70. However, the citation to the location of the document in the National Archives given in Dean's book, *id.* at 268 n.14, is to an incorrect box number. The correct location in the archives of the Nixon Administration is WHSF: Dean: Box 24: Crime and the Rights of the Accused, NARA.

Interestingly, Rehnquist's memorandum is aimed principally at curtailing the Court's rulings regarding police interrogation, but says little regarding search and seizure.

³⁰⁷ 410 U.S. 113 (1973).

³⁰⁸ See WILKINSON, *supra* note 305, at 147 (observing that although the early Burger Court was moderate in other respects, including the protection of criminal trial rights, "[a] quite significant change has occurred in those Warren Court cases inhibiting police discretion in their hunt for evidence" insofar as Burger Court rulings "broadening police search and seizure powers . . . and prosecutors' use of evidence once thought to be wrongly obtained, have primarily been directed toward freeing the hand of official crime detection").

³⁰⁹ The federal effort to suppress drug use commenced with the Comprehensive Drug Abuse Prevention and Control Act of 1970. That campaign then took on a more punitive character during the 1980s, especially in the Anti-Drug Abuse Acts of 1986 and 1988. See *Drugs, Illegal*, in THE OXFORD COMPANION TO AMERICAN LAW, *supra* note 198, at 230-31.

³¹⁰ See *supra* note 10.

³¹¹ Using Professor Greenhalgh's compilation of search and seizure cases decided by the Supreme Court (and making occasional adjustments in instances where a case appears to be inappropriate for the present inquiry), it appears that during the period 1914 through 1972, the Supreme Court decided 117 cases initiated by defendants or other private parties, and only fourteen initiated by a government party. However, from 1973 through 1991 (the last

The other and more important effect was a marked shift in case outcomes. As noted above, the annual *Harvard Law Review* statistics set out in Table 1 indicate that government and defendant victories were nearly balanced in criminal search and seizure rulings during the eight years 1959 through 1967. Then defendants won fourteen of the nineteen cases decided in 1968 and 1969, the last two years of the Warren Court. Defendants still won two of the three cases decided in 1970, after Chief Justice Burger took his seat. During that year, the government was victorious in *Chambers v. Maroney*,³¹² in which the justices nearly unanimously extended the *Carroll* automobile exception to the warrant requirement to a decidedly non-emergency setting. However, over Chief Justice Burger's and Justice Black's dissents, the majority maintained the warrant requirement for a house search in *Vale v. Louisiana*.³¹³

However, there was a marked change during the next six years, 1971 to 1976 (that is, beginning with the first year in which both Chief Justice Burger and Justice Blackmun participated) when the government won twenty-six of the thirty-one criminal search and seizure cases, bringing the total for the first seven years of the Burger Court to twenty-seven government victories in thirty-four cases (79%). As these statistical shifts indicate, the early Burger Court effectively reversed the effects of the incorporation of the Fourth Amendment; instead of requiring state courts to apply higher federal standards, the Burger Court majority reached out to strike down state rulings that went beyond their view of appropriate federal standards.

Indeed, the conservative majority of the early Burger Court engaged in a multi-prong campaign to loosen Fourth Amendment restraints on police. For example, the justices upheld warrantless controlled drug buys in which the informant wore a wire³¹⁴ and confirmed that police factual errors that were understandable in the circumstances did not defeat probable cause.³¹⁵ The new majority also adopted an expansive interpretation of a *Terry*

year included in the compilation), the Court decided 104 cases initiated by a government party (predominantly state governments as opposed to the federal government), and only forty-two initiated by a defendant or other private party. See GREENHALGH, *supra* note 165, at 21-102.

³¹² 399 U.S. 42 (1970) (applying the *Carroll* automobile exception to the warrant requirement to an auto parked in front of the police station).

³¹³ 399 U.S. 30 (1970) (ruling that a warrantless arrest made outside of the arrestee's house could not justify a search inside the house).

³¹⁴ *United States v. White*, 401 U.S. 745 (1971).

³¹⁵ *Hill v. California*, 401 U.S. 797 (1971).

frisk³¹⁶ and expanded the opportunities for police to conduct warrantless searches of automobiles.³¹⁷

In addition, the majority gave a new twist to “Fourth Amendment reasonableness” in *United States v. Robinson*³¹⁸ by making police authority to search an arrestee’s person and possessions an automatic feature of any lawful arrest, regardless of whether there was any indication the arrestee was dangerous or whether there was any potential that evidence would be found regarding the offense for which the arrest was made. This shift to the use of “reasonableness” rhetoric to justify categorical rules that empower government intrusions, rather than the fact-based, case-by-case analyses usually associated with that concept, would become a hallmark of the conservative drive to expand government search authority.³¹⁹

In two other decisions, the new majority also made it easier for police to obtain consent for searches—meaning that no further justification would be required. In *Schneckloth v. Bustamonte*,³²⁰ the majority ruled that police could obtain consent for searches without informing the subject of the search of his or her right to refuse consent. And in *Matlock v. United States*,³²¹ the majority also held that a co-inhabitant could give third-party consent for a search of a dwelling. This expansive interpretation of consent

³¹⁶ *Adams v. Williams*, 407 U.S. 143 (1972) (allowing an officer to approach and frisk on the basis of a tip from an informant who had provided incorrect information on prior occasions).

³¹⁷ *Cady v. Dombrowski*, 413 U.S. 433 (1973); *Cardwell v. Lewis*, 417 U.S. 583 (1974).

³¹⁸ 414 U.S. 218 (1973); *see also* *Gustafson v. Florida*, 414 U.S. 260 (1973).

³¹⁹ In addition to the categorical treatment of search incident to arrest authority in *Robinson*, this categorical treatment was also evident in the expansion of the *Carroll* automobile search exception to the warrant requirement (discussed *supra* notes 153-155 and accompanying text). When that doctrine was announced in 1925, prior to advent of police radios, police stopping a car were faced with a genuine exigency. However, that was not the case in the 1970 decision involving an automobile parked in front of the police station in *Chambers* (discussed *supra* note 312 and accompanying text). In addition, the conservative majority expanded the reach of that categorical source of police search authority when they applied it to any and all vehicles, including a recreational vehicle used as a residence, in the 1985 ruling in *California v. Carney*, 471 U.S. 386 (1985). For a more recent example, the Court initially approved suspicionless random drug testing of high school students in *Vernonia School Distict*, 47 *J. v. Acton*, 515 U.S. 646 (1995), in which the high school involved was allegedly experiencing an epidemic of student drug use. Thereafter, however, in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002), the majority found it was also reasonable to allow such testing in a high school where there was only a potential threat of drug use—which would seem, as a practical matter, to categorically permit that practice in every high school.

³²⁰ 412 U.S. 218 (1973); *see also* WOODWARD & ARMSTRONG, *supra* note 215, at 270-71 (reporting that Justice Stewart deliberately delayed circulation of his majority opinion in an attempt to foreclose a wider debate among the justices over the Fourth Amendment).

³²¹ 415 U.S. 164 (1974).

would prove to be of huge importance—by most estimates the overwhelming mass of warrantless police searches are justified on the basis of consent.³²²

Among the minority of cases that a government party lost, a majority of the justices ruled that only a “neutral” magistrate could issue a warrant and also placed an outer limit on the application of the search incident to arrest doctrine to automobiles in the 1971 ruling in *Coolidge v. New Hampshire*.³²³ In a case that exhibited patent racial discrimination, the justices also struck down a vague vagrancy ordinance that effectively created discretionary arrest authority.³²⁴

B. THE EARLY BURGER COURT AND THE INITIAL CURTAILMENT OF EXCLUSION

Of course, abolition of the Fourth Amendment exclusionary rule would have been the most direct way to free law enforcement from arrest and search restrictions. By the early 1970s, several justices had expressed an inclination to curtail or abolish the *Weeks-Mapp* exclusionary rule, and that subject had been broached within the Court in 1971 during the deliberations in *Coolidge v. New Hampshire*.³²⁵ Chief Justice Burger also added to his prior criticisms of the rule³²⁶ by calling for replacing exclusion with a statutory tort remedy in his 1971 dissenting opinion in *Bivens v. Six Unknown Named Federal Agents*.³²⁷ Justice Blackmun expressed similar sentiments.³²⁸ Thus, it appeared that the handwriting was on the wall when the majority adopted a costs and benefits approach to the exclusionary rule in 1974 in *United States v. Calandra*.³²⁹

³²² See, e.g., RICHARD VAN DUIZEND ET AL., THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, AND PRACTICES 19-21 (1984) (quoting a detective’s estimate that as many as 98% of warrantless searches are justified by consent).

³²³ 403 U.S. 443 (1971). The justices also ruled unanimously that an executive branch official’s approval of a domestic electronic surveillance warrant did not meet the “neutral” standard in *United States v. United States District Court of Eastern District of Michigan*, 407 U.S. 297 (1972), but they permitted a municipal court clerk to issue arrest warrants for ordinance violations in *Shadwick v. City of Tampa*, 407 U.S. 345 (1972).

³²⁴ *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

³²⁵ See WOODWARD & ARMSTRONG, *supra* note 215, at 115-19 (noting that Chief Justice Burger and Justices Black, Harlan, and White voiced some interest in curtailing exclusion, but that it was ultimately decided that *Coolidge* was not an appropriate occasion).

³²⁶ See *supra* notes 287, 299, 303 and accompanying text.

³²⁷ 403 U.S. 388 (1971); see also WOODWARD & ARMSTRONG, *supra* note 215, at 67-69.

³²⁸ *Bivens*, 403 U.S. at 430 (opining that “for the truly aggrieved person other quite adequate remedies [that is, other than exclusion] have always been available,” but not identifying those remedies).

³²⁹ 414 U.S. 338 (1974).

Justice Powell's majority opinion in *Calandra* rejected the earlier understanding that exclusion of unconstitutionally seized evidence was required by the Fourth Amendment itself.³³⁰ Instead he announced that the exclusionary rule was merely a policy aimed at deterring police from committing illegal intrusions in the future, and as such, it should be applied only in settings in which the rule's deterrent benefits exceeded its social costs.³³¹ In *Calandra* itself, the justices voted six to three to withdraw the exclusionary rule from grand jury proceedings.³³² However, the adoption of the deterrence formulation also had a broader implication—it appeared to set the stage for the outright abolition of the exclusionary rule.

Then-Judge Warren Burger had laid out the strategy for justifying abolishing the exclusionary rule by labeling it as a failed deterrent as early as 1964.³³³ Academic critics of exclusion had then produced articles claiming to offer empirical proof that exclusion failed as a deterrent.³³⁴ Thus, it seemed that the exclusionary rule was ripe for extinction. Indeed, I recall from my student days that Professor Fred Inbau (then affectionately known among Northwestern students as “Freddy the Cop”) was so confident that the rule would be abolished that he excised most of the material on the exclusionary rule from his criminal procedure casebook.

However, the Burger Court stopped just shy of abolishing the rule in two 1976 decisions,³³⁵ *Janis v. United States*³³⁶ and *Stone v. Powell*.³³⁷

³³⁰ Justice Powell asserted that admission of unconstitutionally seized evidence did not constitute a constitutional violation in its own right, because the violation of the Fourth Amendment was “fully accomplished” when the unconstitutional search and seizure was made, and hence use of that unconstitutionally seized evidence “work[ed] no new Fourth Amendment wrong.” *Id.* at 354. That analysis was borrowed, without attribution, from *People v. Mayen*, 205 P. 435 (Cal. 1922) (declining to adopt a state exclusionary rule). See *supra* note 174 and accompanying text.

³³¹ *Calandra*, 414 U.S. at 348-52.

³³² Prior to *Calandra*, it was understood that the exclusionary rule prohibited the use of unconstitutionally seized evidence in all proceedings. See *supra* note 135 and accompanying text.

³³³ See *supra* note 303.

³³⁴ See Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); James E. Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243 (1973).

³³⁵ The Court actually granted certiorari in a third exclusionary rule case, *Colorado v. Quintero*, No. 82-1711. However, the case was mooted when the petitioner died prior to argument. Because that case involved the issue of suppression of evidence in a violent crime prosecution, it was widely thought at the time that it presented opponents of the rule with the most attractive vehicle for announcing the abolition of exclusion.

³³⁶ 428 U.S. 433 (1976). *Janis* limited an earlier ruling that exclusion did apply in criminal forfeiture proceedings. See *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 696 (1965).

³³⁷ 428 U.S. 465 (1976).

Although the academic claims that the rule failed as a deterrent had been deflated by other commentaries,³³⁸ it appears that Justice Powell simply balked at taking the extreme step of outright abolition.³³⁹

Instead, the majority justices settled for a patently non-behavioral, split-the-difference approach to "deterrence"; namely, they would continue to assume that exclusion had some deterrent effect when unconstitutionally seized evidence was excluded from the prosecutor's case-in-chief in a criminal trial, but would also assume that there would be no "additional" deterrent benefit from suppressing evidence in other procedural settings. Thus, in *Janis* the majority withdrew the rule from a civil tax proceeding that paralleled a criminal prosecution (even though "the civil proceeding served as an adjunct to the enforcement of the criminal law"³⁴⁰), and in *Stone* the majority generally barred review of state search rulings in federal habeas corpus proceedings, and thus drastically reduced the potential for federal court review of state rulings.³⁴¹

Moreover, the majority's stance in *Janis* and *Stone* portended that exclusion would also be withdrawn from every procedural setting except the prosecutor's case-in-chief in a criminal trial—and that is what subsequently occurred. In later decisions the continuing conservative majority permitted use of unconstitutionally obtained evidence to impeach a defendant who testified in a criminal trial³⁴² (but not to impeach other

³³⁸ See Bradley C. Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681 (1973) (reporting a variety of indications that the threat of exclusion improved police behavior, for example by increasing use of warrants and increasing training); Thomas Y. Davies, *Critique: On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 NW. U. L. REV. 740 (1974) (criticizing the Oaks and Spiotto studies and arguing that it was not feasible to validly measure the deterrent effect of exclusion on police conduct).

³³⁹ See WOODWARD & ARMSTRONG, *supra* note 215, at 429-30.

³⁴⁰ *Janis*, 428 U.S. at 463 (Stewart, J., dissenting). It seems likely that the civil tax penalty in *Janis* of \$89,026.09, *id.* at 437 (majority opinion), was at least as important to the government as the criminal prosecution.

³⁴¹ During the "due process revolution," the Warren Court expanded the potential for federal court review of state criminal convictions by expanding the reach of federal habeas corpus review. See, e.g., *Fay v. Noia*, 372 U.S. 391 (1963). Thereafter, state search rulings could be challenged in habeas corpus proceedings in the lower federal courts, as well as in petitions for certiorari to the Supreme Court. After *Stone*, however, the only path for federal review of a state search ruling is a certiorari petition to the Supreme Court following appellate review by the state courts themselves.

³⁴² *United States v. Havens*, 446 U.S. 620 (1980) (permitting use of unconstitutionally seized evidence for impeachment whenever the defendant testified in his own defense at trial). The Warren Court had previously allowed a narrower use of unconstitutionally seized evidence to impeach a defendant who had specifically testified that he had not possessed the suppressed item. *Walder v. United States*, 347 U.S. 62 (1954).

defense witnesses³⁴³), and also permitted use of unconstitutionally seized evidence in deportation proceedings.³⁴⁴

Lower courts then also invoked the *Calandra-Janis-Stone* formula to permit the government to freely use unconstitutionally obtained evidence in preliminary hearings, bail proceedings, sentencing proceedings, and parole revocation proceedings.³⁴⁵ As a result, because few criminal prosecutions are actually disposed of by trial, prosecutors can now freely use unconstitutionally obtained evidence in the mass of criminal justice settings, which are typically crucial in the disposition of criminal charges. Hence, notwithstanding their use of “deterrence” rhetoric, the message that the Burger Court majority actually sent to police officers and prosecutors in *Calandra*, *Janis*, *Stone*, and their progeny was that unconstitutional searches would likely pay off for the government.³⁴⁶

C. THE HIATUS IN THE CONSERVATIVE RULINGS AND THE REINFORCEMENT OF THE WARRANT REQUIREMENT

The fact that the exclusionary rule escaped outright abolition in the 1976 cases may also reflect the indirect moderating influence of the Watergate scandal.³⁴⁷ Indeed, Watergate had one important specific effect—it meant that President Gerald Ford, the only unelected president in the nation’s history, had little choice but to avoid an ideological fight when Justice Douglas was finally persuaded to retire in late 1975. So President

³⁴³ *James v. Illinois*, 493 U.S. 307 (1990).

³⁴⁴ *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

³⁴⁵ See 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE: INVESTIGATION 387 (4th ed. 2006) (reviewing lower court rulings removing the exclusionary rule from various proceedings).

³⁴⁶ Not surprisingly, the decidedly arbitrary and non-data-based treatment of “deterrence” in the 1976 decisions discouraged and effectively ended attempts to measure the exclusionary rule’s deterrent efficacy. See Davies, *supra* note 204, at 632-34.

³⁴⁷ It seems likely that the continuing fallout from the Watergate scandal—which was widely perceived as an abuse of executive power by the Nixon administration, and which arose from an unlawful search of a political office by persons connected to the administration—may have made 1976 an infelicitous time to remove one of the most visible checks on governmental abuse of power. The Watergate burglary occurred in June 1972, a few months before Nixon’s reelection in November of that year. In March 1973, one of the burglars implicated high White House officials, including Attorney General John Mitchell. In July 1973, the existence of White House tapes came to light, and in December 1973 the infamous eight-and-a-half minute gap was discovered. Litigation over the tapes then reached the Supreme Court, which ordered Nixon to turn them over to the special prosecutor on July 24, 1974. Nixon resigned in disgrace on August 9, 1974, and Gerald Ford, who then assumed the presidency, gave Nixon a full pardon shortly thereafter. See *Pardon Power*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, *supra* note 10, at 718, 719.

Ford nominated a moderate Republican, Judge John Paul Stevens, to that vacancy.³⁴⁸

Justice Stevens's appointment had no immediate effect on 1976 search rulings, during which the government won all six cases.³⁴⁹ One of those cases, the ruling in *South Dakota v. Opperman*,³⁵⁰ which endorsed a broad warrant exception for inventory searches of impounded automobiles on the basis of the government's administrative interests, would become a major exception to the warrant requirement as it was applied expansively in later cases.³⁵¹

However, something of a hiatus in the law-and-order tilt occurred during the five years 1977 through 1981, when the government won seventeen criminal search and seizure cases but defendants also won seventeen. During this period, Justices Stewart, Blackmun, and especially Stevens sometimes voted with the two remaining liberals—Justices Brennan and Marshall. Some of the pro-defendant decisions were noncontroversial and even unanimous: for example, in *Connally v. Georgia*³⁵² the justices ruled that warrants could not be issued by magistrates who were paid a fee for doing so; in *Lo-Ji Sales, Inc. v. New York*³⁵³ the justices condemned a magistrate's personal participation in a search conducted under a still blank warrant; and in *Brown v. Texas*³⁵⁴ they ruled that a person could not be seized by police simply for refusing to identify themselves. Other rulings that went against the government were divided. For example, in 1979, the justices ruled six to two in *Dunaway v. New York*³⁵⁵ that "pick[ing] up" a suspect and taking him to the police

³⁴⁸ See WOODWARD & ARMSTRONG, *supra* note 215, at 400-01.

³⁴⁹ See *infra* Table 1. Casting a wider net than the six criminal search cases themselves, Justice Brennan identified a total of nine government search victories during that term that contributed to the "continuing evisceration of the Fourth Amendment." See *United States v. Martinez-Fuerte*, 428 U.S. 543, 567 (1976) (Brennan, J., dissenting).

³⁵⁰ 428 U.S. 364 (1976) (permitting warrantless inventory search of impounded car for safety and administrative reasons, and thus deeming that there need be no showing of probable cause).

³⁵¹ The Burger Court also used the same safety/administrative rationale when it endorsed inventory searches of the person and possessions of arrestee in *Illinois v. Lafayette*, 462 U.S. 640 (1983). In addition, in the 1983 decision *Texas v. Brown*, 460 U.S. 730 (1983), the Burger Court permitted an inventory search of an auto to be conducted at the scene of an arrest that followed a stop at a driver's license checkpoint, and in the 1987 decision *Colorado v. Bertine*, 479 U.S. 367 (1987), the Rehnquist Court subsequently upheld an inventory search of an auto conducted at the scene of an arrest under police regulations that allowed police to choose to either impound or simply park the vehicle.

³⁵² 429 U.S. 245 (1977).

³⁵³ 442 U.S. 319 (1979).

³⁵⁴ 443 U.S. 47 (1979).

³⁵⁵ 442 U.S. 200 (1979).

station without probable cause constituted a de facto unconstitutional arrest. Additionally, in a 1979 ruling of continuing significance the justices ruled six to three in *Ybarra v. Illinois*³⁵⁶ that a search warrant did not authorize the search of everyone who was simply present in the premises when the warrant was executed.

The most important ruling that strengthened Fourth Amendment protections during this period was the 1980 ruling in *Payton v. New York*.³⁵⁷ The Burger Court had previously ruled in the 1976 decision in *United States v. Watson*³⁵⁸ that a warrantless felony arrest based on probable cause could be made in any place accessible to the public. Conversely, in 1978, the justices had also rejected creation of a “murder scene” exception to the search warrant requirement for a house search.³⁵⁹ The issue in *Payton* was whether police with probable cause could justify a warrantless entry of a residence to make a felony arrest. The justices ruled six to three that, in the absence of consent or emergency circumstances, warrantless entry of a residence to make an arrest violates the Fourth Amendment regardless of the police having probable cause to support the arrest. The importance of the warrant was similarly underscored a year later in *Steagald v. United States*,³⁶⁰ when the majority further ruled that a search warrant for the person to be arrested (not just an arrest warrant) was required to enter a house, other than the residence of the wanted suspect, to make an arrest.³⁶¹

Nevertheless, the government still won its share of contested cases during these years. For example, in 1978 a six-to-two majority adopted “attenuation” analysis in the course of refusing to suppress the testimony of a witness whose identity was discovered unconstitutionally.³⁶² In addition, in the 1978 ruling in *Rakas v. Illinois*³⁶³ a five-to-four majority invoked the reasonable expectation of privacy formulation to strip passengers in an auto of standing to challenge a search of the auto. The majority also used the same rationale to impose strict standing requirements in three 1980 decisions.³⁶⁴

³⁵⁶ 444 U.S. 85 (1979).

³⁵⁷ 445 U.S. 573 (1980).

³⁵⁸ 423 U.S. 411 (1976).

³⁵⁹ *Mincey v. Arizona*, 437 U.S. 385 (1978).

³⁶⁰ 451 U.S. 204 (1981).

³⁶¹ The showing of probable cause required for a search warrant is more demanding than that for an arrest warrant insofar as it requires information indicating that the person to be arrested would be found at a particular location in addition to information indicating that the person to be arrested was involved in criminal activity.

³⁶² *See, e.g., United States v. Ceccolini*, 435 U.S. 268 (1978).

³⁶³ 439 U.S. 128 (1978).

³⁶⁴ *Rawlings v. Kentucky*, 448 U.S. 98 (1980); *United States v. Salvucci*, 448 U.S. 83 (1980); *United States v. Payner*, 447 U.S. 727 (1980).

Additionally, in the 1981 ruling in *New York v. Belton*,³⁶⁵ a six-to-three majority again took a categorical approach to Fourth Amendment reasonableness and extended the bright-line automatic search incident to arrest rule previously announced in *Robinson* to include the passenger area of an auto in which an arrestee had been riding. Even so, a knowledgeable commentator suggested in 1982 that the Burger Court's rulings in criminal procedure cases had not turned out to be as different from those of the Warren Court as might have been expected.³⁶⁶ But that was about to change.

D. THE LATER BURGER COURT'S RENEWED CAMPAIGN TO LOOSEN FOURTH AMENDMENT PROTECTIONS

There were no vacancies on the Court during President Jimmy Carter's single term—thus, his was an election that the Court did not follow. In contrast, President Ronald Reagan had a vacancy almost at the outset of his term when Justice Stewart retired in 1981. In line with a campaign pledge, President Reagan named the first woman to the Court, Justice Sandra Day O'Connor.

Justice O'Connor's arrival provided a striking demonstration of the potential importance of the fifth vote. Where Justice Stewart had sometimes sided with defendants, Justice O'Connor leaned strongly toward the government in search cases. Indeed, whatever might be said of Justice O'Connor's moderation in other areas, during the late Burger Court she provided a reliable fifth vote for the law-and-order majority (along with Chief Justice Burger and Justices White, Powell, and Rehnquist). Thus, there was another plunge to the right as the government won thirty of thirty-seven search and seizure cases (81%) decided in the years 1982 through 1986.³⁶⁷

One development was that the conservative majority continued to use the *Katz* "reasonable [or legitimate] expectation of privacy" formulation as a way to justify narrowing rather than expanding the scope of Fourth Amendment protections. In the seven-to-two decision in 1976 in *United States v. Miller*³⁶⁸ and in the five-to-three decision in 1979 in *Smith v. Maryland*,³⁶⁹ a majority of the justices had ruled that bank records and

³⁶⁵ 453 U.S. 454 (1981).

³⁶⁶ See Yale Kamisar, *The Warren Court (Was It Really So Defense-Minded?), The Burger Court (Is It Really So Prosecution-Oriented?), and Police Investigatory Practices*, in *THE BURGER COURT, THE COUNTER-REVOLUTION THAT WASN'T* 62 (Vincent Blasi ed., 1983). This book went to press in late 1982. See *id.* at 284 n.120.

³⁶⁷ See *infra* Table 1.

³⁶⁸ 425 U.S. 435 (1976).

³⁶⁹ 442 U.S. 735 (1979).

phone company records of numbers that had been dialed from a phone were exempt from Fourth Amendment protection because the complaining party had exposed that information to others and thus had assumed the risk that the information could be provided to the government. The conservative majority then used that same rationale as the basis for ruling that the Fourth Amendment did not apply to police surveillance from overhead by airplane or helicopter because defendants had left their properties exposed to observation from above.³⁷⁰ Likewise, they ruled that the Amendment did not apply to police inspection of garbage left out for the garbage collector.³⁷¹ The majority also ruled that tracking a person's movement on public roads by using a helicopter to follow an electronic beeper did not constitute a "search,"³⁷² and that planting such a beeper in a container that a person was expected to purchase so that it could be followed also did not constitute a "seizure."³⁷³

Additionally, although the justices reaffirmed that one could have a "reasonable expectation of privacy" in a house and the "curtilage" around it, they ruled that there could never be a legitimate expectation of privacy in "open fields" (even if they were fenced and posted against trespassing).³⁷⁴ Notably, however, the majority seemed unconcerned with providing police with meaningful guidance when it later announced a highly flexible four-factor definition of "curtilage."³⁷⁵ "Deterrence" seems to have mattered to the majority primarily when that concept was useful as a rationale for withdrawing the exclusionary rule, not when it came to formulating search standards that would actually protect privacy from police intrusions.

The justices also significantly limited the reach of Fourth Amendment protections when they declared in 1983 in *United States v. Place*³⁷⁶ that an inspection of luggage by a trained police drug-detecting dog was not a "search" for Fourth Amendment purposes because the dog's sniff would not detect anything but contraband, and no one could have a legitimate expectation of privacy in forbidden items.³⁷⁷ Thus, police can randomly subject persons, luggage, or automobiles to a drug dog's sniff—because the sniff is not regarded as a "search," no Fourth Amendment or other constitutional standards apply.

³⁷⁰ *California v. Ciraolo*, 476 U.S. 207 (1986) (airplane); *Florida v. Riley*, 488 U.S. 445 (1989) (helicopter).

³⁷¹ *California v. Greenwood*, 486 U.S. 35 (1988).

³⁷² *United States v. Knotts*, 460 U.S. 276 (1983).

³⁷³ *United States v. Karo*, 468 U.S. 705 (1984).

³⁷⁴ *Oliver v. United States*, 466 U.S. 170 (1984).

³⁷⁵ *United States v. Dunn*, 480 U.S. 294 (1987).

³⁷⁶ 462 U.S. 696 (1983).

³⁷⁷ *See United States v. Jacobsen*, 466 U.S. 109 (1984).

There was a particularly notable spike of conservative activism during the years 1983 through 1985 when the Court ruled for the government in twenty-four of thirty criminal search cases.³⁷⁸ Many of the pro-government decisions during these years further developed limits on Fourth Amendment protections, or on enforcement of such protections, that the conservative justices had previously staked out. For example, the five-to-four ruling in 1983 in *City of Los Angeles v. Lyons*³⁷⁹ followed earlier Burger Court decisions in refusing to allow the use of an injunction to curb police use of a chokehold on motorists stopped for traffic infringements.³⁸⁰ Thus, that alternative to enforcing the Fourth Amendment through exclusion was effectively barred.

The conservative majority also took two huge steps toward minimizing the significance of the Fourth Amendment by eviscerating the probable cause standard in the 1983 ruling in *Illinois v. Gates*,³⁸¹ and then by effectively relaxing even that minimal probable cause standard for issuance of a warrant a year later in *United States v. Leon*.³⁸² Indeed, those two interrelated decisions epitomize the aggressive search and seizure agenda of the late Burger Court.

1. *The Evisceration of Probable Cause in Gates*

The justices initially granted certiorari in *Gates* to assess whether there had been probable cause for the search warrant for drugs issued in that case. The information for probable cause consisted of an anonymous tip and police attempts to corroborate aspects of the tip. Because the police did not know the identity of the informant,³⁸³ there was no direct way to satisfy the “informant-veracity” prong of the *Aguilar-Spinelli* standard.³⁸⁴ Moreover, the anonymous tip lacked basic information such as the specific address of the alleged drug dealers, and when police attempted to corroborate the informant’s predictions they found the tip was erroneous in significant

³⁷⁸ See *infra* Table 1.

³⁷⁹ 461 U.S. 95 (1983).

³⁸⁰ See *O’Shea v. Littleton*, 414 U.S. 488 (1974); *Rizzo v. Goode*, 423 U.S. 362 (1976). However, the Burger Court did endorse issuance of an injunction barring enforcement of a statute that authorized warrantless inspections of a business in *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 325 (1978).

³⁸¹ 462 U.S. 213 (1983).

³⁸² 486 U.S. 897 (1984).

³⁸³ *Gates*, 462 U.S. at 225 (noting that the tip was anonymous). Subsequent to the *Gates* decision I was told, by persons in a position to know, that the informant was actually the hairdresser of Sue Gates. She identified herself to the police department after reading about the case in the newspapers. Apparently, she provided the tip because she was irritated by Sue Gates’s bragging about not having to work.

³⁸⁴ See *supra* notes 250-252 and accompanying text.

ways.³⁸⁵ Because of those weaknesses, the Illinois Supreme Court had found a lack of probable cause.³⁸⁶

However, after the oral argument at the Supreme Court—and possibly because of the difficulties involved in attempting to rationalize a finding of probable cause—the conservative majority took an unusual step. With Justices Brennan, Marshall, and Stevens in dissent, the majority *sua sponte* ordered reargument in *Gates* on a different issue—whether there should be a “good faith mistake” exception to the exclusionary rule.³⁸⁷

Proposals for a “good faith mistake” or “good faith” exception to the exclusionary rule gained prominence after the justices refused to totally abolish the exclusionary rule in the 1976 decisions.³⁸⁸ Justice Rehnquist initially sketched out a rationale for such an exception in opinions in 1974 and 1975 that dealt with the narrow situation in which police officers had followed current law when making an arrest or search only to have the legal standard overturned in another case prior to trial.³⁸⁹ However, the “good faith” proposal was then broadened out, partly along the lines of the Burger Court’s invention and expansion of the doctrine of qualified immunity for alleged violations of constitutional rights by officials and officers in § 1983 lawsuits.³⁹⁰ Boiled down to its essence, the proposal for a good faith

³⁸⁵ The tip simply identified the address as being in a set of condominiums, but gave no number. See *Gates*, 462 U.S. at 225. That lack of detail indicated that it was unlikely the informant had been in the residence. In addition, the tip predicted a travel arrangement whereby one of the Gateses would always be in the residence, which supposedly held a large amount of drugs. *Id.* However, police observation indicated that Sue Gates was actually in Florida when Lance Gates arrived there. *Id.* at 226. That effectively undermined the tip’s claim of a large amount of drugs in the residence. See *id.* at 291-92 (Stevens, J., dissenting).

³⁸⁶ *Id.* at 216-17.

³⁸⁷ See Order for Reargument, *Illinois v. Gates*, 459 U.S. 1028 (Nov. 29, 1982). Justice White was the likely proponent of taking up the good faith issue in *Gates*. In a concurring opinion, he endorsed the good faith exception proposal, but then asserted that probable cause could be found under the existing *Aguilar-Spinelli* standard.

³⁸⁸ Although the 1976 rulings in *Janis* and *Stone* were widely viewed as having settled the issue, members of the Court persisted in calling for abolition of the exclusionary rule. See *California v. Minjares*, 443 U.S. 916, 928 (1979) (Rehnquist, J., dissenting from denial of stay); see also *Robbins v. California*, 453 U.S. 420, 437 (1981) (Rehnquist, J., dissenting).

³⁸⁹ See *United States v. Peltier*, 422 U.S. 531, 539 (1975); *Michigan v. Tucker*, 417 U.S. 433, 447 (1974); see also WOODWARD & ARMSTRONG, *supra* note 215, at 383-84 (noting the reaction within the Court when Rehnquist’s *Peltier* opinion went beyond the narrow retroactivity issue itself); Francis A. Allen, *Foreword—Quiescence and Ferment: The 1974 Term in the Supreme Court*, 66 J. CRIM. L. & CRIMINOLOGY 391, 397-98 (1976) (criticizing *Peltier* on this point). A similar retroactivity issue was also addressed in *Michigan v. DeFillippo*, 443 U.S. 31 (1979).

³⁹⁰ *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (creating qualified immunity for high state executive officials); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (extending qualified

exception rested on the unsupported assertion that most illegal searches were the result of police errors that occurred because of the confused state of doctrine. Advocates of the exception asserted that "good faith" police mistakes in applying Fourth Amendment standards were not susceptible to deterrence (though in my view none ever provided a plausible explanation why that should be so³⁹¹).

To say that the good faith exception proposal generated a massive law review commentary would be an understatement. The *Journal* published articles by proponents of the exception³⁹² and defenders of exclusion.³⁹³ Additionally, several bills proposing such an exception were introduced in Congress, as politicians vied for a "tough against crime" reputation.³⁹⁴ However, the Supreme Court passed up opportunities to take up the issue.³⁹⁵ In fact, the justices even denied a pre-briefing motion by Illinois to add the good faith exception issue to the grant of certiorari in *Gates*.³⁹⁶ Nevertheless, the order for reargument seemed to set the stage for the conservative majority to adopt the good faith exception in *Gates*. In fact, shortly after the order for reargument was issued, the Reagan Justice Department unveiled a new report that purported to prove that the

immunity to other executive officials); *Malley v. Briggs*, 475 U.S. 335 (1986) (extending qualified immunity to police officers accused of improperly obtaining arrest warrants).

³⁹¹ The proposal for a good faith mistake exception was presented rhetorically as though it were shaped by deterrence considerations but actually conflated a notion of fairness to the police with the behavioral implications of exclusion. In particular, the proposal ignored the point that deterrence is *forward-looking*; hence, as a behavioral matter it would make no difference whether the prior illegal conduct was deliberate or accidental, because either case would provide an educational opportunity for the Court to convey to police departments and law enforcement officers that there will be adverse consequences if the conduct is repeated in the future.

³⁹² See, e.g., Edna F. Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & CRIMINOLOGY 635 (1978); D. Lowell Jensen & Rosemary Hart, *The Good Faith Restatement of the Exclusionary Rule*, 73 J. CRIM. L. & CRIMINOLOGY 916 (1982); James R. Thompson, *Foreword—Remarks by Governor James. R. Thompson on the Attorney General's Task Force on Violent Crime*, 73 J. CRIM. L. & CRIMINOLOGY 867 (1982).

³⁹³ See, e.g., Pierre J. Schlag, *Assaults on the Exclusionary Rule: Good Faith Limitations and Damage Remedies*, 73 J. CRIM. L. & CRIMINOLOGY 875 (1982).

³⁹⁴ See *id.* at 875 n.2 (listing bills introduced in Congress in 1981 and 1982 proposing to adopt various forms of "good-faith exceptions").

³⁹⁵ See, e.g., *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980), *cert. denied*, 339 U.S. 1127 (1981).

³⁹⁶ See *Illinois v. Gates*, 455 U.S. 986 (Mar. 1, 1982) (denying motion by Petitioner Illinois moved to enlarge the question presented for review, filed Feb. 8, 1982); see also *Illinois v. Gates*, 459 U.S. 1028, 1029 (Nov. 29, 1982) (Stevens, J., dissenting from order for reargument).

exclusionary rule caused a major “loss” of criminal prosecutions in California³⁹⁷ (but did so only by grossly distorting the data³⁹⁸).

However, the majority justices had been so eager to take up the exception issue that they had overlooked some rather basic aspects of the record in *Gates*.³⁹⁹ In particular, the good faith exception issue had not been argued in the Illinois courts, probably because an Illinois statute, quoted in the defendants’ brief, expressly required suppression of any evidence seized pursuant to a warrant issued without probable cause.⁴⁰⁰ Thus, if there was no probable cause for the search warrant, there was an undeniable independent and adequate state ground for affirmance of the Illinois Supreme Court’s ruling regardless of any exception to the Fourth Amendment exclusionary rule the justices might wish to announce.⁴⁰¹ Conversely, if the majority found there was probable cause, then the search was legal and there was no occasion to address any “exception” to exclusion.⁴⁰² In view of these difficulties—but without mentioning the

³⁹⁷ See NAT’L INST. OF JUSTICE, *THE EFFECTS OF THE EXCLUSIONARY RULE: A STUDY IN CALIFORNIA* (1982) (commonly referred to as the “NIJ Study”).

³⁹⁸ See Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the “Costs” of the Exclusionary Rule: The NIJ Study and Other Studies of “Lost” Arrests*, 1983 AM. B. FOUND. RES. J. [renamed LAW & SOC. INQUIRY] 611 (presenting a detailed criticism of the distortions in the NIJ study and contrasting those claims to the much lower effects reported in a number of other studies).

³⁹⁹ One peculiarity was that there had been no factual findings about why the police acted as they did in *Gates*—in fact, no police officer had testified during the suppression hearing in the case, which had consisted solely of legal arguments regarding the sufficiency of the warrant affidavit itself.

⁴⁰⁰ ILL. REV. STAT., ch. 38, par. 114-12 (1976), discussed and quoted in Brief of Respondents at 24-26 app. 1a-2a, *Illinois v. Gates*, 462 U.S. 213 (1983). Illinois was among the states that adopted a state exclusionary rule prior to *Mapp*. See *People v. Brocamp*, 138 N.E. 728, 732 (Ill. 1923).

⁴⁰¹ See, e.g., *Henry v. Mississippi*, 379 U.S. 334, 446 (1965) (discussing the independent and adequate state ground for affirmance doctrine).

⁴⁰² Whether from embarrassment or for strategic reasons, Justice Rehnquist’s *Gates* opinion omits any mention of the Illinois statute. However, its significance was plain during the second *Gates* oral argument, at which I was present because I had assisted with the defendant’s brief. Extended time (forty-five minutes to each side) had been set for the reargument, but soon after it began, Justice Powell asked the attorney representing Illinois if Illinois required exclusion by state law. When the attorney conceded as much the justices were seen to lean back in their chairs and begin reading other materials. There were only a few polite questions from the bench during the remainder of the state’s argument. Justice Stevens asked the Solicitor General, Rex Lee, appearing as an amicus, how the Court was supposed to reach the exclusionary rule issue. Lee did not provide an answer. There were virtually no questions for the defendant’s attorney, and after a while he simply stopped reciting nice things that had been said about the exclusionary rule. The result was that what had been billed as the search argument of the decade became merely a peculiar nonevent. See, e.g., Jim Mann, *A Change of Heart at the High Court*, AM. LAW., May 1983, at 91, 91-

Illinois statute—the majority justices set aside the good faith exception issue with “apologies to all,” and returned to issue of whether the warrant was supported by probable cause.⁴⁰³ The *Gates* majority then declared the warrant valid by gutting the probable cause standard.

Justice Rehnquist’s majority opinion threw out the *Aguilar-Spinelli* two-prong standard for assessing probable cause on an informant’s tip and instead adopted a flexible “totality of the circumstances” approach to assessing probable cause.⁴⁰⁴ But it did not stop there. Justice Rehnquist’s opinion also ignored the settled definition of probable cause that had been followed since the framing era—that is, reliable information sufficient to justify a prudent person in *believing* there was criminal activity.⁴⁰⁵ Instead, and without ever even mentioning that traditional definition, Justice Rehnquist opined that information merely indicating a “*fair probability*” or “*substantial chance*” of criminal activity would suffice for probable cause.⁴⁰⁶

Even Justice White expressed concern that the new definition threatened to “eviscerate” the probable cause standard.⁴⁰⁷ Indeed, after *Gates* there was little if any discernible difference between “probable cause” and *Terry*’s “reasonable suspicion” standard—except that the latter was supposed to be less demanding than the former. After *Gates*, “probable cause” meant something more like “possible cause”—and that relaxed standard applied to warrantless arrests and searches as well as issuance of warrants.

92 (describing the *Gates* reargument as one in which the justices “seemed to be stricken by an epidemic of acute indifference”).

As a sidenote, the Illinois statute that required exclusion must have been an embarrassment for then Illinois Governor James Thompson, who was a prominent advocate for a good faith exception. The statute was amended in 1987 to include a “good faith” exception to exclusion. See 75 ILL. COMP. STAT. 5/114-12 (b).

⁴⁰³ *Gates*, 462 U.S. at 217.

⁴⁰⁴ Some courts and commentators initially resisted the conclusion that the *Aguilar-Spinelli* standard had been completely overruled, but the justices confirmed its complete extinction a year later in a per curiam decision in *Massachusetts v. Upton*, 466 U.S. 727 (1984).

⁴⁰⁵ Probable cause was defined in the 1949 *Brinegar* decision as “reasonably reliable information sufficient to warrant a prudent man in the belief that criminal activity was occurring.” That definition was not novel, Chief Justice Taft had given virtually the same definition in 1925 in *Carroll*, and the definition effectively was rooted in framing era law. See *supra* notes 156, 194 and accompanying text.

⁴⁰⁶ *Gates*, 462 U.S. at 238, 244 n.13, 246 (emphasis added). Justice Rehnquist purported to follow the treatment of probable cause in an 1813 customs forfeiture proceeding. *Id.* at 235. However, Justice Rehnquist did not identify the nature of that case, but simply described it as a treatment of probable cause “in a closely related context.” *Id.* See also Davies, *Probable Cause*, *supra* note 16, at 62.

⁴⁰⁷ *Id.* at 272 (White, J., concurring).

The majority's inability to adopt the good faith mistake exception in *Gates* quickly led to two further developments. One was that the *Gates* majority exposed its disdain for federalism in criminal procedure by preemptively hobbling the independent and adequate state ground doctrine in another opinion announced in the same term.⁴⁰⁸ Thus the majority made sure that it would not again be stymied as it had been in *Gates*. The other development was that, only two and one-half weeks after announcing *Gates*, the justices granted certiorari to again take up (and this time adopt) a "good faith" exception in *Leon*.⁴⁰⁹

2. *The Adoption of the Blame-the-Magistrate Exception to Exclusion in Leon*

There was never any suspense about the direction of the ruling that the justices would announce in *Leon*. As expected, Justice White's majority opinion brushed aside the strong likelihood that the warrant at issue in *Leon* was actually valid under the relaxed fair probability standard adopted in *Gates*,⁴¹⁰ and marched on to endorse the good faith mistake exception.⁴¹¹ However, the scope of the exception announced in *Leon* was significantly narrower than the more abstract exception for police good faith advocated for in *Gates*.

In particular, the exception announced in *Leon* was focused specifically on police *reliance* on a judicially issued (albeit unconstitutional) warrant. Indeed, although couched in *Calandra*'s cost-

⁴⁰⁸ *Michigan v. Long*, 463 U.S. 1032, 1037-44 (1983). For an example of this effect, see the broad application of *Long* in *Ohio v. Robinette*, 519 U.S. 33, 36-38 (1996).

The Burger Court majority's disregard for state courts was also evident in another aspect of *Gates*. Justice Rehnquist's opinion directed courts reviewing the adequacy of the showing of probable cause for a warrant to "pa[y] great deference" to the judgment of the magistrate who issued the warrant. See *Gates*, 462 U.S. at 236 (citing *United States v. Ventresca*, 380 U.S. 102 (1965)). Whether a state court is permitted to defer to a state magistrate who issues a warrant may be a matter of federal law. However, whether a state reviewing court should nevertheless exercise de novo, nondeferential review of decisions made by a state magistrate in granting a warrant would seem to be an appropriate decision for the state to make.

⁴⁰⁹ *United States v. Leon*, 463 U.S. 1206 (June 27, 1983) (granting certiorari). *Gates* was decided on June 8, 1983.

⁴¹⁰ The warrant in *Leon* was ruled deficient, prior to the *Gates* decision, because the probable cause for the search warrant was based on "stale" information. See *United States v. Leon*, 468 U.S. 897, 903 n.2 (1984). However, the "fair probability" version of probable cause announced in *Gates* would seem to allow more leeway in that regard.

⁴¹¹ The ruling in *Leon* also had virtually no effect on the disposition of the prosecutions in question because, as Justice White noted, evidence seized from the various defendants could be used against their co-defendants in any event because they each lacked standing to challenge the evidence found during the searches of the other defendants' houses or cars. *Id.* at 903 n.3.

and-benefit rhetoric,⁴¹² the rationale Justice White offered for the *Leon* exception took the form of a blame-the-magistrate syllogism composed of two false dichotomies. His major premise was that the exclusionary rule was meant to deter police “rather than” magistrates (a novel and false dichotomy).⁴¹³ His minor premise was that a bad warrant was the fault of a magistrate “rather than” the police (another false dichotomy).⁴¹⁴ Thus, he concluded that the exclusionary rule should not apply to evidence obtained pursuant to unconstitutionally issued warrants.⁴¹⁵

Hence, the *Leon* exception had little to do with police “good faith” in anything approaching the usual understanding of that term—especially because Justice White made it clear that the reasonableness of police reliance on a warrant was to be assessed “objectively” (that is, in terms of what a hypothetical reasonable officer might think) rather than “subjectively” (that is, in terms of what the real officers actually thought).⁴¹⁶ The significance of that distinction was evident in *Leon*’s companion decision in *Massachusetts v. Sheppard*⁴¹⁷ in which the majority ruled that police who knew they had presented a defective warrant to a magistrate (they knew the warrant form misstated the items to be searched for) could nevertheless “objectively reasonably” rely on the issued warrant *because they did not read it* after the judge signed it and gave it back while orally stating that it was corrected, and thus they remained unaware that the defect had not been corrected at all.⁴¹⁸

Most importantly, the *Leon* blame-the-magistrate exception meant that the Fourth Amendment’s explicit command that “no warrants shall issue, but upon probable cause” was no longer to be enforced by American

⁴¹² *Id.* at 907-08.

⁴¹³ *Id.* at 916-17 (stating that “the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates” and expounding on why magistrates would not be susceptible to deterrence in any event). In contrast, the *Weeks* opinion plainly stated that the obligation to comply with the Fourth Amendment falls on the entire government—courts and judges as well as officers.

⁴¹⁴ *Id.* at 920-21 (concluding that “[p]enalizing the officer for the magistrate’s error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations”). In actuality, of course, police apply for warrants. Moreover, Justice White’s analysis failed to address the key role played by prosecutors who typically “screen” warrant applications for their adequacy before they are submitted to magistrates.

⁴¹⁵ *Id.* at 922.

⁴¹⁶ *Id.* at 922 n.23 (stating that the “good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate’s authorization”).

⁴¹⁷ 468 U.S. 981 (1984).

⁴¹⁸ *Id.* at 989-90 (rejecting the argument that the officer should have examined the warrant when the magistrate returned it and refusing to conclude that an officer has a duty to read a warrant after a magistrate tells him it is valid).

courts.⁴¹⁹ In keeping with *Leon*'s "objectively reasonable reliance" formulation, evidence seized under a warrant was to be fully admissible so long as the warrant was not "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"⁴²⁰—a formulation that would appear to be satisfied by anything more than a blank or entirely conclusory warrant affidavit. Indeed, Justice White's *Leon* opinion advised lower courts that they had the option of simply applying the new exception without stopping to assess whether a warrant was actually supported by probable cause.⁴²¹ Unsurprisingly, lower courts choose that option.⁴²²

However, *Leon*'s blame-the-magistrate rationale had an inherent limitation. Although it could readily be extended (and soon was) to other instances in which an unconstitutional search could be blamed on someone other than the police—for example by blaming a legislature for an unconstitutional statute⁴²³ or a court clerk for an erroneous record of an outstanding warrant⁴²⁴—it could not excuse an unconstitutional *warrantless* search in which police were the only actors. Thus, the majority would have to justify further curtailments of the application of the exclusionary principle to warrantless intrusions in terms of something other than *Leon*'s good faith mistake rationale.⁴²⁵

Leon and *Sheppard* were not the only Orwellian rulings issued in 1984. On the same day those decisions were rendered, Chief Justice Burger's majority opinion in *Segura v. United States*⁴²⁶ announced that police who entered an apartment illegally and remained there for nineteen

⁴¹⁹ See *supra* text accompanying note 4 (quoting text of Fourth Amendment).

⁴²⁰ *Leon*, 468 U.S. at 923 (quoting *Brown v. Illinois*, 422 U.S. 590, 610-11 (1975) (Powell, J., concurring in part)). The blame-the-warrant syllogism was so crude that Justice White had to recognize that there were some limits on the situations in which police could "objectively reasonably rel[y]" on an unconstitutional warrant. However, he defined those limits very narrowly. Like the "entirely unreasonable" formulation of "indicia of probable cause," *Leon*, 468 U.S. at 923 (emphasis added) (quoting *Brown*, 422 U.S. at 610-11). Justice White also wrote that police could not rely on a warrant issued by a magistrate who "wholly abandoned his judicial role." *Id.* (emphasis added).

⁴²¹ *Id.* at 924-25 (concluding that lower courts can "turn[] immediately to a consideration of the officers' good faith" without deciding whether there was a Fourth Amendment violation).

⁴²² See, e.g., *United States v. Proell*, 485 F.3d 427, 430 (8th Cir. 2007).

⁴²³ *Illinois v. Krull*, 480 U.S. 340 (1987). Notably, Justice O'Connor, who was then the only justice with legislative experience, was among the four dissenters.

⁴²⁴ *Arizona v. Evans*, 514 U.S. 1 (1995).

⁴²⁵ See *infra* notes 542, 546 and accompanying text (discussing recent additional limitations imposed on exclusion by the Roberts Court on the basis of notions of "attenuation" and "isolated negligence").

⁴²⁶ 468 U.S. 796 (1984).

hours before obtaining a search warrant did not violate the Fourth Amendment. Chief Justice Burger opined that the police did not violate the defendant’s privacy because they did not search the apartment until a warrant was later procured, and he also opined that the police occupation of the apartment did not constitute an unreasonable seizure because it did not actually interfere with the occupants’ possessory interests because they were incarcerated at the time.⁴²⁷ The Chief Justice’s opinion also brushed aside any need to sanction the admittedly illegal initial police entry of the residence by stating that the majority was “unwilling to believe that officers will routinely and purposely violate the law as a matter of course.”⁴²⁸

In another 1984 ruling, the Burger Court majority also extended the independent source doctrine by recognizing a hypothetical “inevitable discovery” doctrine that would apply where the government proved by a preponderance of evidence that the police would have discovered evidence constitutionally had they not previously discovered it unconstitutionally.⁴²⁹

However, even the late Burger Court still placed some significant limits on police power. For example, in 1985 the justices unanimously limited surgical searches of an arrestee’s body for evidence in the form of an embedded bullet.⁴³⁰ In the same year, but over a dissent by Justice O’Connor, joined by Chief Justice Burger and Justice Rehnquist, a majority of the justices limited the use of deadly force to “seize” a crime suspect in *Tennessee v. Garner*⁴³¹ (although that ruling has since been severely diluted⁴³²). A majority of the justices also ruled in *Welsh v. Wisconsin*⁴³³ that the exigent circumstances exception to the warrant requirement did not apply to the entry of a home regarding a misdemeanor offense.

⁴²⁷ *Id.* at 805-13. Chief Justice Burger also wrote that “initial entry—legal or not—does not affect the reasonableness of the seizure [of a residence]” if police have probable cause. *Id.* at 811.

⁴²⁸ *Id.* at 812.

⁴²⁹ *Nix v. Williams*, 467 U.S. 431 (1984). The concept of an “independent source” was recognized in *Silverthorne Lumber* in 1921. See *supra* note 136 and accompanying text. The majority’s adoption of the preponderance of evidence standard in *Williams* contrasted with the Warren Court’s ruling in *Chapman v. California*, 386 U.S. 18 (1967), in which the justices held that a trial error involving a violation of a constitutional standard could be harmless only if the prosecution demonstrated beyond a reasonable doubt that the error had not affected the verdict.

⁴³⁰ *Winston v. Lee*, 470 U.S. 753 (1985).

⁴³¹ 471 U.S. 1 (1985) (a lawsuit for damages under 42 U.S.C. § 1983).

⁴³² The ruling in *Garner* has been undercut by *Scott v. Harris*, 550 U.S. 372 (2007) (holding that a police officer used reasonable force in ramming a car while trying to stop it for speeding with the result that the car crashed and left the driver a quadriplegic, and stating that the reasonableness of police use of force can be assessed only by “slosh[ing] . . . through the factbound morass of ‘reasonableness’”).

⁴³³ 466 U.S. 740 (1984).

VIII. THE CONTINUATION OF THE CONSERVATIVE REACTION DURING THE REHNQUIST AND ROBERTS COURTS

The Burger Court came to an end at the end of the 1986 decisions when Chief Justice Burger retired. President Reagan then elevated Justice Rehnquist to Chief Justice, and named Judge Antonin Scalia to Justice Rehnquist's vacant associate justice seat. Although there were several subsequent changes in membership during the Rehnquist Court years, there was no break in the conservative majority.⁴³⁴ Indeed, if anything there was at least a marginal increase in the intensity of the majority's rightward tilt.⁴³⁵ The same has been true of the Roberts Court, which began when

⁴³⁴ The substitutions of Chief Justice Rehnquist for Chief Justice Burger, and of Justice Scalia for Justice Rehnquist's vacated seat did not alter the overall ideological lineup on the Court, although the appointment of Justice Scalia did result in some intensification of the rhetoric of the conservative retrenchment. Subsequent changes in the Court's membership have also had only marginal effects on its search and seizure rulings. The rhetorical assault on the Fourth Amendment might have been more intense had Judge Robert Bork been seated when Justice Powell retired in 1987, but the Senate balked at that nomination and the seat went to Judge Anthony Kennedy instead. Although less conservative than Judge Bork likely would have been, Justice Kennedy has been a reliable vote for the government in Fourth Amendment cases.

Subsequent changes in the membership of the high bench have marginally strengthened the conservative majority. The last of the real "liberals" departed with the retirements of Justice Brennan in 1990 and of Justice Marshall in 1991. Justice Souter, who replaced Brennan, turned out to be somewhat like Justice Powell—that is, he sometimes took the defendant's side, but usually voted for the government and sometimes authored significant expansions of government power. There was a starker shift when Justice Clarence Thomas replaced Justice Marshall. Indeed, Justice Thomas has emerged as perhaps the most consistent statist in criminal procedure cases. However, the Marshall/Thomas change was somewhat offset when President Clinton named Judge Ruth Bader Ginsburg on the retirement of Justice White in 1993, and also named Judge Steven Breyer to replace Justice Blackmun in 1994. Although both Justice Ginsburg and Justice Breyer have often been to the right of Justice Stevens, they have usually been to the left of the Court's center in search cases. Following the appointment of Justice Breyer, there were no further changes in the Court's membership during the next eleven years—the longest period without a change in the history of the Court.

For a quantitative analysis of ideological balance of the Rehnquist Court during this period, see BAUM, *supra* note 300, at 124 fig.4-1 (presenting a scalogram analysis of the justices' votes in non-unanimous criminal cases decided in 2004 (the 2003 term) indicating that Justices Souter and Stevens were tied as the most liberal justices, then Justices Ginsburg and Breyer, while Justice Kennedy was the usually conservative swing vote (four liberal votes of fourteen cases), then Justices O'Connor and Scalia, and finally Justices Rehnquist and Thomas were tied as the most conservative).

⁴³⁵ The annual *Harvard Law Review* statistics are consistent with the view that the various changes in the membership of the Rehnquist Court did not appreciably alter the ideological *balance* among the justices. From the beginning of the Rehnquist Court in the 1987 cases through the replacement of Justice Marshall by Justice Thomas in the 1992 cases, the government won 21 of 26 cases (81%), while from Justice Breyer's replacement of Justice Blackmun in the 1995 cases to the end of the Rehnquist Court with the 2005 cases

Judge John Roberts was named Chief Justice in 2005, following the death of Chief Justice Rehnquist.⁴³⁶ The search and seizure decisions during the first five years of the Roberts Court appear to be essentially a continuation and further development of the direction set by the Rehnquist Court.

A. THE TRAJECTORY OF SEARCH AND SEIZURE CASES

The trajectory of Fourth Amendment rulings during the Rehnquist and Roberts Courts has followed the course that the ideological imbalance among the justices would lead one to predict. Again, the annual *Harvard Law Review* statistics indicate that the government won forty-eight of the sixty-two criminal search and seizure cases decided by the Rehnquist Court during the nineteen years 1987 through 2005. Likewise, the government has won nine of the twelve such rulings decided by the Roberts Court during the five years 2006 through 2010. Taken together, the government has won fifty-seven of the seventy-four cases (77%).⁴³⁷

Another statistic is also noteworthy: after a brief flurry of criminal search cases at the outset of the Rehnquist era, especially the sixteen decided in 1990, the volume of criminal search cases fell off during this twenty-three year span to average slightly less than three per year. One explanation might be that the lower courts have become so attuned to the conservative majority on the Supreme Court that they produce fewer cases that prompt the justices to grant certiorari to reverse a decision.⁴³⁸ Alternatively, it may be that Fourth Amendment protections have been so curtailed that there was relatively little work left for the conservative majority.

Nevertheless, the Rehnquist and Roberts Courts have found continuing opportunities to enhance law enforcement powers. Indeed, the rulings in this period lend the impression that the majority reached out to strike down any lower court decision that accorded a degree of substance to Fourth

the government won 26 of 33 cases (79%). See *infra* Table 1. Thus, unlike the Warren and Burger Courts, there have been no aberrant periods during the duration of the Rehnquist Court.

⁴³⁶ The appointment of Judge John Roberts as Chief Justice does not appear to have altered the ideological complexion of the bench. However, the Court probably tilted slightly more to the right when Justice Samuel Alito was appointed to the vacancy that occurred with the retirement of Justice O'Connor in 2006. The effect of Justice Sonya Sotomayor's appointment to replace Justice Souter in 2009 and of Justice Elena Kagan's appointment to replace Justice Stevens in 2010 are still too recent to be addressed in this Article.

⁴³⁷ See *infra* Table 1.

⁴³⁸ The justices usually reverse or alter the decision below in more than two thirds of the cases they decide on the merits. See BAUM, *supra* note 300, at 94. Hence, a grant of certiorari usually indicates that at least the requisite four justices are inclined to change the lower court decision.

Amendment limits on police power.⁴³⁹ With condolences to the reader, the only way to adequately convey the degree to which the Rehnquist and Roberts Courts have shut down Fourth Amendment protections is to review a substantial proportion of the more significant rulings.

One such ruling was the 1988 decision *Murray v. United States*.⁴⁴⁰ In that case the justices ruled four to three that marijuana could be admitted under the independent source doctrine in a case in which officers, following up on an informant's tip, had made an unconstitutional entry of a warehouse during which the marijuana was observed, and then subsequently obtained a warrant on the basis of the initial tip without mentioning their prior unconstitutional discovery. Because the earlier 1984 ruling in *Leon* makes evidence seized under a warrant admissible provided only that the warrant is not completely lacking some "indicia of probable cause," *Murray* would appear to provide police with a useful technique for curing otherwise unconstitutional intrusions.⁴⁴¹ Similarly, the Rehnquist Court majority provided police with a means of at least partly curing a violation of the *Payton* rule against making warrantless arrests in houses by announcing in 1990 in *New York v. Harris*⁴⁴² that incriminating statements made by an arrestee during a warrantless arrest in a house in violation of *Payton* would not be excluded as the fruit of the illegal entry and arrest if police had probable cause for the arrest and the arrestee repeated the statements when taken outside of the house.

The justices also underscored the flexibility of police authority in several cases. For example, in 1991 in *County of Riverside v. McLaughlin*⁴⁴³ the majority held that a person arrested without a warrant can be detained for up to forty-eight hours without the required assessment of probable cause by a magistrate.⁴⁴⁴ Likewise, in the 2001 ruling *Illinois v. McArthur*,⁴⁴⁵ they confirmed the broad authority of police to control access to a home while a search warrant was being obtained. Additionally, the

⁴³⁹ I say "impression" because a full assessment of this proposition would require an examination of the certiorari petitions presented to the Court, and the frequency with which the justices grant government petitions. I have not undertaken that examination except to the limited extent reported *infra* note 562.

⁴⁴⁰ 487 U.S. 533 (1988); see also Bradley C. Graveline, *Fourth Amendment—An Acceptable Erosion of the Exclusionary Rule*, 79 J. CRIM. L. & CRIMINOLOGY 647 (1988).

⁴⁴¹ Cf. Amar, *supra* note 6, at 794 n.137 (suggesting that *Murray*'s "inevitable discovery" doctrine should "be vastly widened").

⁴⁴² 495 U.S. 14 (1990).

⁴⁴³ 500 U.S. 44 (1991).

⁴⁴⁴ See also *Powell v. Nevada*, 511 U.S. 79 (1994) (finding that an arrestee's being held for four days prior to a probable cause hearing violated *McLaughlin*, but remanding without deciding whether that violation carried any consequence).

⁴⁴⁵ 531 U.S. 326 (2001).

justices reinforced a 1981 ruling that police could seize and detain any person who was present when a search warrant is executed⁴⁴⁶ by ruling in 2005 that police were entitled to use reasonable force to do so—including handcuffing any third parties who were present for the several hours that execution of a warrant search might take.⁴⁴⁷

B. REDUCING THE COVERAGE OF FOURTH AMENDMENT PROTECTION

A series of pro-government search rulings during the Rehnquist Court also expanded upon earlier Burger Court rulings by withdrawing Fourth Amendment protections from a variety of routine law enforcement practices. In particular, the Rehnquist Court majority decided several cases that enlarged the room for proactive police conduct by narrowing the definition of whether a person was “seized” for Fourth Amendment purposes—and thus allowed the police to act without probable cause or even reasonable suspicion of criminal activity. For example, in the 1991 ruling in *California v. Hodari D.*,⁴⁴⁸ the majority concluded that a person was not seized when police chased him; rather, a seizure occurred only when the person being chased either submitted to police authority or was forcibly restrained.⁴⁴⁹ Thus, the police did not have to justify the initial chase, and any contraband dropped or abandoned by the person being chased prior to being tackled would be admissible evidence. Likewise, the Court has ruled that a person would not be seized for Fourth Amendment purposes if police conduct unintentionally caused that person’s death—hence, the constitutionality of the police conduct would not be assessed according to the reasonableness of the police conduct.⁴⁵⁰

Likewise, the majority announced in the 1991 decision in *Florida v. Bostick*,⁴⁵¹ and again in the 2002 decision in *United States v. Drayton*,⁴⁵²

⁴⁴⁶ *Michigan v. Summers*, 452 U.S. 692 (1981).

⁴⁴⁷ *Muehler v. Mena*, 544 U.S. 93 (2005).

⁴⁴⁸ 499 U.S. 621 (1991).

⁴⁴⁹ The Court had earlier ruled that police chasing a person did not necessarily constitute a “seizure” subject to Fourth Amendment standards in *Michigan v. Chesternut*, 486 U.S. 567 (1988).

⁴⁵⁰ *County of Sacramento v. Lewis*, 523 U.S. 833, 842-45 (1998) (holding that a police high-speed vehicle chase that resulted in the death of the pursued motorist as a result of alleged deliberate or reckless indifference to life did not constitute a “seizure” under the Fourth Amendment and thus was not susceptible to assessment of the reasonableness of police conduct). The ruling in *Lewis* followed the analysis previously set out in dicta in *Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1989) (stating that a seizure subject to the Fourth Amendment occurs only when an individual’s freedom of movement is curtailed “through means intentionally applied”).

⁴⁵¹ 501 U.S. 429 (1991).

⁴⁵² 536 U.S. 194 (2002).

that seated bus passengers who were randomly approached, questioned, and asked to consent to searches of their persons or luggage by officers “working the buses” (that is, looking for possible drug couriers) were not seized because the encounters were “consensual.” The premise for that characterization seems to have been the justices’ rather naive (if not disingenuous) assumption that an average person would believe that police officers would simply leave them alone if they declined to cooperate. In the 1996 ruling in *Ohio v. Robinette*,⁴⁵³ the justices also ruled that a police officer who had concluded a traffic stop need not inform the person who had been detained that they were free to go, and thus allowed the previously detained person’s consent to a search of the auto to be characterized as “voluntary” and valid.

The Rehnquist Court majority also extended third-party consent for police to enter a residence to instances of mere “apparent consent” in the 1990 ruling in *Illinois v. Rodriguez*.⁴⁵⁴ Justice Scalia used his majority opinion in that case to advance the “generalized reasonableness” approach to the Fourth Amendment⁴⁵⁵ by announcing that police could be justified in making a warrantless entry of a home *either* if a genuine co-inhabitant actually gave consent *or* if it was reasonable for police to mistakenly believe that the person who had given consent was a co-inhabitant.⁴⁵⁶ Notably, Justice Scalia’s opinion did not require the police to make inquiries about the consenting person’s status, but simply allowed the police to assess apparent consent on “the facts available to the officer at the moment.”⁴⁵⁷ The Rehnquist Court also announced an expansive approach to assessing the scope of consent to a search in the 1991 ruling in *Florida v. Jimeno*⁴⁵⁸ when it construed a driver’s consent to search an auto “for drugs” to constitute consent to an unlimited and intensive search of any and all

⁴⁵³ 519 U.S. 33 (1996).

⁴⁵⁴ 497 U.S. 177 (1990).

⁴⁵⁵ Justice Scalia published an article shortly after joining the Court in which he argued that the rule of law should be a law of rules—except for search and seizure, which should be governed by a flexible reasonableness standard. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180-86 (1989). Those statements may seem to contrast the rule based approach he took in his inaugural search opinion in *Arizona v. Hicks*, 480 U.S. 321 (1987). However, Justice Scalia has since emerged as a leading advocate for a “generalized reasonableness” approach to Fourth Amendment issues. *See, e.g.*, *California v. Acevedo*, 500 U.S. 565, 581 (1991) (Scalia, J., concurring) (asserting that “colonial juries” employed a “reasonableness” standard when deciding trespass cases brought against officers). However, the historical claim Justice Scalia made in *Acevedo* was groundless. *See* Davies, *Arrest*, *supra* note 16, at 263 n.64.

⁴⁵⁶ *Rodriguez*, 497 U.S. at 186-89.

⁴⁵⁷ *Id.* at 188 (quoting *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968)).

⁴⁵⁸ 500 U.S. 248 (1991).

containers found in the auto. In addition, the Rehnquist Court ruled in 1990 that the Fourth Amendment does not apply to government searches or seizures beyond the national border.⁴⁵⁹

C. EXPANSIVE CONSTRUCTIONS OF *TERRY* “DETENTIONS” AND “FRISKS”

In addition to enlarging the arena in which the police could act without complying with any Fourth Amendment standard, the Rehnquist Court majority also advanced a permissive construction of the reasonable suspicion standard for *Terry* detentions and frisks. Thus, in the 1989 decision *United States v. Sokolow*,⁴⁶⁰ the majority effectively upheld detentions of air travelers under a “drug courier profile” while opining that reasonable suspicion merely required something more than an “inchoate and unparticularized suspicion or ‘hunch,’” but less than the “fair probability” required for probable cause.⁴⁶¹ Additionally, in the 1990 ruling in *Alabama v. White*,⁴⁶² the Court found that police had sufficient grounds for reasonable suspicion in a situation in which police observation had not borne out an important aspect of an anonymous tip regarding drug dealing. Similarly, the majority also interpreted reasonable suspicion expansively in 2000 in *Illinois v. Wardlow*⁴⁶³ by ruling that a person’s “flight” from the approach of police in a “high crime area” sufficed to meet that standard. However, the justices unanimously set a minimum threshold for reasonable suspicion in the 2000 ruling in *Florida v. J.L.*⁴⁶⁴ by holding that an anonymous tip that a person had a gun but that otherwise provided nothing more than a description of a person standing in a public location was inadequate to justify a *Terry* detention.

In a series of related rulings, the majority justices also used *Terry*’s approval of a pat-down “frisk” for weapons based upon reasonable suspicion that a suspect was dangerous as a basis for expanding police opportunities to conduct warrantless searches—albeit without using that term. The Burger Court had extended *Terry*’s “frisk” doctrine to an inspection of the interior of an automobile for weapons in the 1983 ruling in *Michigan v. Long*.⁴⁶⁵ In the 1990 ruling in *Maryland v. Buie*, the Rehnquist Court also used *Terry* as a basis for permitting a “protective sweep” of an

⁴⁵⁹ *United States v. Verdugo-Urguidez*, 494 U.S. 259 (1990).

⁴⁶⁰ 490 U.S. 1 (1989).

⁴⁶¹ *Id.* at 7 (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)); *Illinois v. Gates*, 462 U.S. 213, 238 (1983)).

⁴⁶² 496 U.S. 325 (1990).

⁴⁶³ 528 U.S. 119 (2000).

⁴⁶⁴ 529 U.S. 266 (2000).

⁴⁶⁵ 463 U.S. 1032 (1983).

entire house to locate any persons who might be present.⁴⁶⁶ These “frisks” and “sweeps” are especially important because they provide police with opportunities to locate incriminating evidence under the “plain view” doctrine according to which police can seize contraband or evidence they discover in the course of lawful conduct.⁴⁶⁷ Additionally, in 2004, the majority ruled that a person can be constitutionally arrested under a state stop-and-identify statute if he or she fails to identify themselves during a valid *Terry* stop.⁴⁶⁸ And in 2009, the Roberts Court ruled that an officer is entitled to conduct a *Terry* frisk for weapons during a minor traffic stop on the basis that the person in question appeared to be a gang member, even though there was no reasonable suspicion of criminal activity at the time.⁴⁶⁹ For all practical purposes, the “officer safety” rationale seems to have expanded to the point where police can frisk virtually anyone they have grounds to detain.

D. EXPANSION OF WARRANTLESS ARREST AUTHORITY AND AUTO SEARCHES INCIDENT TO SUCH ARRESTS

Particularly during its later years, the Rehnquist Court majority also effectively eradicated any vestige of privacy a driver or owner might have in an automobile. (As noted above, the Burger Court had earlier ruled that passengers had no standing to challenge a search of a car in which they had been riding.⁴⁷⁰) To begin with, a five-to-four majority held that police use of “sobriety checkpoints” to stop autos was “reasonable” in 1990 in *Michigan Department of State Police v. Sitz*,⁴⁷¹ notwithstanding doubts as to whether such checkpoints were actually efficacious for identifying inebriated drivers.

Although *Sitz* justified checkpoints on safety rather than criminal law enforcement grounds, Chief Justice Rehnquist and Justices Scalia and Thomas also would have approved the use of checkpoints for the primary purpose of detecting the transportation of illegal drugs in the 2000 case *City of Indianapolis v. Edmond*.⁴⁷² However Justice O’Connor’s majority

⁴⁶⁶ 494 U.S. 325 (1990).

⁴⁶⁷ The Rehnquist Court also enlarged the plain view doctrine somewhat in *Horton v. California*, 496 U.S. 128 (1990), when it ruled that “plain view” could apply to items the police anticipated finding, and thus overruled Justice Stewart’s 1971 opinion in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), insofar as it had limited “plain view” seizures to inadvertent discoveries.

⁴⁶⁸ *Hiibel v. Sixth Jud. Dist. Ct. of Nev.*, 542 U.S. 177 (2004).

⁴⁶⁹ *Arizona v. Johnson*, 129 S. Ct. 781 (2009).

⁴⁷⁰ See *supra* note 363 and accompanying text.

⁴⁷¹ 496 U.S. 444 (1990).

⁴⁷² 531 U.S. 32, 48 (2000).

opinion in *Edmond* ruled that to be an improper purpose—but included a footnote declining to rule on the propriety of “expand[ing] the scope of a license or sobriety checkpoint seizure in order to detect the presence of drugs in a stopped car”—a qualification that effectively allows the use of drug dogs to sniff cars properly stopped at a sobriety checkpoint.⁴⁷³ Thus, the *Edmond* majority opinion policed only the official label applied to the checkpoint, but actually left police free to use the checkpoint for a criminal law enforcement purpose. Likewise, in 2005 the justices, six to three, also approved of the use of a police drug-dog to inspect an auto during a traffic stop for speeding, providing the traffic stop was not unreasonably prolonged.⁴⁷⁴ Additionally, the justices unanimously ruled that police could operate a highway checkpoint to attempt to locate witnesses of a fatal accident in 2004 in *Illinois v. Lidster*.⁴⁷⁵ Thus, police do not lack opportunities to stop and inspect even motorists who are complying with traffic laws.

The Rehnquist Court majority also removed limitations which had earlier been placed on the *Carroll* automobile exception to the warrant requirement when, in the 1991 ruling in *California v. Acevedo*,⁴⁷⁶ the majority brushed aside earlier cases that had limited a warrantless search to a specific container in an automobile when police had probable cause only to believe contraband would be found in that specific container.⁴⁷⁷ Instead, in *Acevedo* the majority ruled that the entire auto as well as all containers found in it could be searched without warrant under *Carroll*.⁴⁷⁸

Additionally, Justice Scalia’s 1996 majority opinion in *Whren v. United States*⁴⁷⁹ departed from earlier decisions that had disapproved of pretextual police conduct and instead approved of police use of a traffic stop as a pretext for discovering drug offenses, notwithstanding that the

⁴⁷³ *Id.* at 47, n.2.

⁴⁷⁴ *Illinois v. Caballes*, 543 U.S. 405 (2005).

⁴⁷⁵ 540 U.S. 419 (2004).

⁴⁷⁶ 500 U.S. 565 (1991).

⁴⁷⁷ In 1979, the justices had ruled in *Arkansas v. Sanders*, 442 U.S. 753 (1979), that if police had probable cause to believe that contraband was in a container such as luggage that was only “coincidentally” in an auto, their warrantless search of the auto was limited to locating that specific container. The justices also applied that rule in *Robbins v. California*, 453 U.S. 420 (1981). However, the Court ruled in *United States v. Ross*, 456 U.S. 798 (1982), that if police had probable cause that contraband was somewhere in a car, but did not know where, they could search the entire car including any containers found in it. This “car/container” distinction was frequently cited by proponents of a good faith exception to the exclusionary rule as evidence that search law was too complex to be correctly applied by police. See Davies, *supra* note 398, at 682-83.

⁴⁷⁸ *Acevedo*, 500 U.S. at 580.

⁴⁷⁹ 517 U.S. 806 (1996).

plain clothes officers violated department regulations in doing so. In 1997, the justices also decided, by a vote of seven to two, that police could order passengers as well as the driver to get out a car during a traffic stop.⁴⁸⁰ And in the 1999 decision in *Wyoming v. Houghton*⁴⁸¹ the justices also ruled six to three that a purse a passenger left behind while exiting a stopped auto could be searched by police in the course of conducting an automobile search under *Carroll*.

The Rehnquist Court also expanded the potential for police to conduct searches of automobiles under the search of an auto incident to arrest doctrine, which the Burger Court had previously announced in *Belton*.⁴⁸² Although the justices unanimously disapproved of one state's attempt to permit car searches based merely on the issuance of a traffic citation,⁴⁸³ subsequent rulings suggest that the justices were again more concerned with policing the rhetoric by which car searches were justified than with regulating the searches themselves. Thus, in the 2001 ruling in *Atwater v. City of Lago Vista*,⁴⁸⁴ a five-to-four majority vastly increased the potential for searching automobiles incident to arrest by upholding a custodial arrest, complete with handcuffs, of a suburban "soccer mom" who had committed the heinous offense of driving slowly through a residential neighborhood without a seat belt. Writing for the majority, Justice Souter announced that the Fourth Amendment's reasonableness standard did not preclude custodial arrests for even trivial offenses. To justify that conclusion, Justice Souter presented a purportedly originalist analysis of framing-era doctrine that buried the genuine historical and traditional restrictions on less-than-felony warrantless arrests under a mass of fraudulent pseudo-historical claims.⁴⁸⁵ He also expressed doubts "whether warrantless misdemeanor arrests need constitutional attention,"⁴⁸⁶ and suggested that it would be sufficient for the Court to address such arrests if an "epidemic" of abuses developed.⁴⁸⁷

Additionally, in the 2003 ruling in *Maryland v. Pringle*,⁴⁸⁸ the justices ruled that police can have probable cause to arrest multiple occupants of a

⁴⁸⁰ *Maryland v. Wilson*, 519 U.S. 408 (1997). The Burger Court had earlier ruled in *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), that the police could legally order the driver to get out of the car during a traffic stop.

⁴⁸¹ 526 U.S. 295 (1999).

⁴⁸² See *supra* note 365 and accompanying text.

⁴⁸³ *Knowles v. Iowa*, 525 U.S. 113 (1998).

⁴⁸⁴ 532 U.S. 318 (2001).

⁴⁸⁵ See generally Davies, *Arrest*, *supra* note 16.

⁴⁸⁶ *Atwater*, 532 U.S. at 351-52.

⁴⁸⁷ *Id.* at 353.

⁴⁸⁸ 540 U.S. 366 (2003).

car in which contraband is found. And in the 2004 ruling in *Thornton v. United States*,⁴⁸⁹ the justices voted seven to two that autos could be searched incident to the arrest of a “recent occupant” who was no longer close to the car, as well as of a person who was in the car at the time it was stopped.

The Rehnquist Court further expanded police arrest powers in 2004 in *Devenpeck v. Alford*.⁴⁹⁰ Justice Scalia’s opinion announced that it was irrelevant that there was no probable cause for the offense for which a warrantless arrest was made (in this case, because the conduct alleged did not amount to the charged offense under state law), as long as the arrestee’s conduct later could be construed as probable cause regarding some other, albeit unrelated, offense.⁴⁹¹ Remarkably, not a single justice took issue with that treatment.

Additionally, in 2008, the Roberts Court further expanded the potential for warrantless arrests for minor offenses by ruling in *Virginia v. Moore*⁴⁹² that police could make a constitutional arrest for a minor offense (and, presumably, search the driver and auto incident to that arrest) so long as they had probable cause—that is, a “fair probability”⁴⁹³—that an offense might have been committed *notwithstanding that the law of the jurisdiction did not permit an arrest for the charged offense*. Writing for the Court, Justice Scalia explained that “probable cause” was the *only* constitutional requirement for an arrest under the Fourth Amendment, so any other limits imposed by state law were irrelevant to the federal constitutional issue. Notably, Justice Scalia’s opinion failed to mention that the Court had

⁴⁸⁹ 541 U.S. 615 (2004).

⁴⁹⁰ 543 U.S. 146 (2004).

⁴⁹¹ Alford was arrested for violating the Washington Privacy Act for tape recording his interaction with police officers; however that charge was dismissed because it had previously been ruled that the Privacy Act did not apply to conversations with police officers. Alford then sued for false arrest. The Ninth Circuit ruled that it was not adequate for police to defend the arrest on the ground that they could have asserted probable cause to arrest for another crime (impersonating a police officer) that was not at least “closely related” to the crime for which the arrest was made. The Supreme Court reversed and announced that a warrantless arrest is valid under the Fourth Amendment so long as the alleged conduct could have constituted probable cause for some offense, regardless of whether that offense was related to that charged.

Justice Scalia also rationalized this ruling, in part, by suggesting that otherwise officers might stop providing reasons for arrest—and thus implied that police could make constitutional arrests without any specific charge—the abuse that was condemned in the Petition of Right of 1628. See Davies, *Correcting Search History*, *supra* note 16, at 45–47.

⁴⁹² 553 U.S. 164 (2009). Of course, state courts could still rule the arrest illegal and suppress any evidence seized incident to the arrest under a state exclusionary rule, if the state had adopted one. However, Virginia was among the states that had never done so.

⁴⁹³ See *supra* note 406 and accompanying text.

created the automobile exception to the warrant requirement in *Carroll* precisely because the justices had recognized on that occasion that only a *lawful* arrest could justify a search as being incident to arrest.⁴⁹⁴ Among other results, the analysis in *Moore* would seem to have erased *all* of the historical limitations that previously applied to warrantless misdemeanor arrests, including the rule—recognized in *Carroll*—that such arrests can be made only for an offense committed in the officer’s view.⁴⁹⁵ Remarkably, not a single justice dissented from these extreme departures from prior doctrine in *Moore*.

The standard for a valid warrantless arrest was already weak prior to *Atwater*, *Devenpeck*, and *Moore*. In the aftermath of those decisions—and especially in light of the ubiquity of minor traffic violations—it is now difficult to discern any meaningful constraint on police discretion to arrest and search incident to arrest.

E. WARRANTLESS ENTRY OF HOUSES IN “EXIGENT CIRCUMSTANCES”

Two recent decisions also seem to chip away at the rigor of the basic rule, reiterated in *Payton* in 1980,⁴⁹⁶ that a warrant is required to justify police entry of a house in the absence of consent or exigent circumstances.⁴⁹⁷ In both cases, a large majority of the justices reversed state court assessments that there was no exigency sufficient to justify the warrantless entry of a house.⁴⁹⁸ In the 2006 ruling in *Brigham City, Utah v. Stuart*⁴⁹⁹ the justices overruled the Utah courts eight to one (Justice Stevens

⁴⁹⁴ See *supra* note 154 and accompanying text.

⁴⁹⁵ See *supra* notes 148, 154 and accompanying text.

⁴⁹⁶ See *supra* notes 357-361 and accompanying text. The warrant requirement for entry of a house has not been directly challenged since *Payton*. However, statements by Justices Scalia and Thomas advocating a “generalized reasonableness” approach to search issues have questioned the warrant requirement more generally. See, e.g., *Groh v. Ramirez*, 540 U.S. 551, 576-77 (2004) (Thomas & Scalia, JJ., dissenting) (asserting that a search of a residence under a defective warrant can nevertheless satisfy the Fourth Amendment “reasonableness” standard); *California v. Acevedo*, 500 U.S. 565, 581-82, 584 (1991) (Scalia, J., concurring) (asserting that the Framers meant to “restrict[] the issuance of warrants” and questioning whether the general rule that a warrant is required is consistent with Fourth Amendment reasonableness).

⁴⁹⁷ The justices also provided leeway for police errors in the execution of a search warrant in *Maryland v. Garrison*, 480 U.S. 79 (1987) (upholding the admissibility of drugs found “in plain view” when police entered an apartment for which they had no warrant (or probable cause) as a result of a mistaken belief, based on a reasonable investigation, that it was part of another apartment for which they did have a warrant).

⁴⁹⁸ These rulings seem to contrast with the deference the justices previously showed to a state court’s assessment that there was no exigency for a warrantless entry of a house in *Minnesota v. Olson*, 495 U.S. 91, 100-01 (1990).

⁴⁹⁹ 547 U.S. 398 (2006).

dissented) when they concluded that a “fracas” inside a house was sufficient to justify a warrantless entry when an officer, who was looking in through a screen door, saw a punch that resulted in a bloody nose. More recently, in the December 2009 ruling *Michigan v. Fisher*,⁵⁰⁰ the Court overruled the Michigan courts in a per curiam ruling (over the dissent of Justice Stevens, joined by Justice Sotomayor) that found that police had exigent grounds to make a forcible warrantless entry after the resident told them they could not enter without a warrant.⁵⁰¹ It is difficult to disagree with Justice Stevens’s conclusion that the majority was reaching out to “micromanag[e] the day-to-day business of state tribunals making fact-intensive decisions.”⁵⁰²

F. PRO-DEFENDANT RULINGS

Of course, even the Rehnquist Court occasionally rendered decisions that strengthened or upheld enforcement of Fourth Amendment limits on police authority. Indeed, the justices would hardly appear to be “neutral and detached” if that were not the case. The most significant ruling of this sort—though it is not immediately apparent without closely counting noses—is that a bare majority of five justices indicated in 1998 in *Minnesota v. Carter*⁵⁰³ that “social guests” who are present in a home when police make an unconstitutional warrantless search usually would have standing to challenge the constitutionality of the entry and seek suppression of evidence found during that search.⁵⁰⁴ That conclusion, which extended

⁵⁰⁰ 130 S. Ct. 546 (2009).

⁵⁰¹ After an officer attempted to enter, the resident was seen pointing a gun at the officer, and that observation formed the basis for the resident’s prosecution for assault with a deadly weapon. *Id.* at 547.

⁵⁰² *Id.* at 550-51. Lower federal courts also have shown a lack of interest in preserving the privacy of the house. *See, e.g.*, *United States v. Lemus*, 596 F.3d 512 (9th Cir. 2010) (Kozinski, C.J., dissenting) (objecting to the denial of rehearing en banc from the approval of “a police sweep of a person’s home without a warrant, without probable cause, without reasonable suspicion and without exigency—in other words, with nothing at all to support the entry except the curiosity police always have about what they might find if they go rummaging around a suspect’s home” which turned up “a gun ‘in plain view’—stuck between two cushions of the living room couch”).

⁵⁰³ 525 U.S. 83 (1998).

⁵⁰⁴ The judgment in the case, announced in Chief Justice Rehnquist’s opinion of the Court, was for the government. Additionally, Chief Justice Rehnquist and Justices O’Connor, Scalia, and Thomas were of the view that the defendants lacked standing to challenge a search of a house in which they did not reside. However, four Justices (Stevens, Ginsburg, Souter, and Breyer) expressed the view that guests in a home should always have standing to challenge a search of a residence. In an important concurring opinion, Justice Kennedy stated that “almost all social guests” would have standing to challenge a warrantless search of “their host’s home,” but stopped short of a per se rule to that effect. *Carter*, 525 U.S. at 99, 102-03 (Kennedy, J., concurring). However, because Justice Kennedy concluded that the defendants in that case did not constitute “social guests,” he

an earlier 1990 ruling that an overnight guest had such standing,⁵⁰⁵ indirectly bolstered the warrant requirement for house searches insofar as it made it less likely that the police could make use of evidence obtained during an unconstitutional entry of a residence. Additionally, in the 2004 decision in *Groh v. Ramirez*,⁵⁰⁶ five justices treated a search made pursuant to search warrant that omitted any description of the items to be searched for as such a patent violation of the Fourth Amendment's explicit particularity requirement as to overcome the officers' qualified immunity to § 1983 liability (and, presumably, to also fall outside of the *Leon* good faith mistake exception).

Other pro-defendant rulings handed down during the Rehnquist Court seem to be of less consequence—sometimes decidedly so. For example, the justices confined their earlier recognition of a “plain feel” exception to the warrant requirement⁵⁰⁷ by disapproving of a police practice of squeezing soft-sided luggage in the 2000 ruling in *Bond v. United States*.⁵⁰⁸ However, it seems questionable that would have become an important law enforcement technique in any event. Similarly, in the 2006 decision *Georgia v. Randolph*,⁵⁰⁹ the justices ruled five to four that a house search cannot be justified by consent if two co-inhabitants were present at the time and one objected, even though the other was agreeable. However, it appears that police could readily avoid that situation by making their request at a time when the person who could be expected to be most likely to object would be absent.

concurring with the judgment for the government. Thus, the government won the judgment but the doctrinal standard announced in the opinions tilted toward a broad recognition of standing for social guests in homes.

However, the justices continued to hold that passengers in autos lacked standing in *United States v. Padilla*, 508 U.S. 77 (1993) (rejecting a claim of standing based on joint control of an auto).

⁵⁰⁵ *Minnesota v. Olson*, 495 U.S. 91 (1990). Interestingly, Chief Justice Rehnquist and Justice Blackmun took the unusual step of dissenting without opinion in *Olson*. I speculate that they may have opted not to write in *Olson* because it would have been difficult to square their vote to deny standing to an overnight guest in *Olson* when they were endorsing police reliance on the “apparent” consent of a person who was not a co-resident at all in the *Rodriguez* decision during the same term. *Rodriguez* was argued roughly a month after *Olson*, and the defendant's brief in *Rodriguez* called attention to the relationship to the standing issue in *Olson*. See Brief for Respondent at 32 n. 24, *Illinois v. Rodriguez*, 497 U.S. 177 (1990).

⁵⁰⁶ 540 U.S. 551 (2004).

⁵⁰⁷ The Court recognized a “plain feel” doctrine, comparable to the “plain view” doctrine, in *Minnesota v. Dickerson*, 508 U.S. 366 (1993). However, the doctrine was of limited significance because it applied only when a police officer *immediately* recognized contraband by touch, without manipulating the object.

⁵⁰⁸ 529 U.S. 334 (2000).

⁵⁰⁹ 547 U.S. 103 (2006).

Indeed, one line of rulings in the Rehnquist Court that may initially have seemed to strengthen Fourth Amendment protections turned out to be meaningless. In his 1995 opinion for the Court in *Wilson v. Arkansas*,⁵¹⁰ Justice Thomas purported to follow framing-era common law (but did not actually follow it) by announcing that police were required to “knock and announce” prior to executing a warrant unless it would be “reasonable” to dispense with that requirement in the circumstances.⁵¹¹ Because Justice Thomas’s opinion in *Wilson* mentioned the potential for armed resistance or prompt destruction of evidence as circumstances that would excuse a knock, it was understandable that a lower court might conclude that knocking was never required in executing a warrant for drug dealing. However, in another opinion that policed search rhetoric more than it regulated search practices, the Court in 1997 struck down a per se exception for the execution of drug search warrants in *Richards v. Wisconsin*⁵¹²—and thus required lower courts to go through the motion of making a case-by-case evaluation before reaching the predictable result.

Next, in 2003 the justices held that police need wait only fifteen seconds after knocking before breaking down a door (a period based on how fast an occupant might destroy drugs rather than on how fast an occupant might open the door).⁵¹³ And then the justices capped off this line of cases in a 2006 decision, discussed below, by holding that a police violation of the by-then minimal constitutional knock-and-announce requirement would never result in suppression of the evidence seized in the ensuing search in any event.⁵¹⁴ Thus, three decisions later *Wilson*’s knock-and-announce rule turned out to be much ado about nothing.

The significance of some of the other seemingly pro-defendant rulings during the Rehnquist Court are still unclear. For example, in the 2001 ruling in *Kyllo v. United States*,⁵¹⁵ Justice Scalia’s majority opinion concluded that police use of a heat-detection device to identify a house in which marijuana was being grown indoors constituted an impermissible warrantless search of the house. Although the decision did underscore the importance accorded to the house, the substantiality of the announced prohibition was unclear insofar as it was rooted in the fact that such devices were not yet in common usage—a factor that could easily change over

⁵¹⁰ 514 U.S. 927 (1995).

⁵¹¹ I say Justice Thomas “purported” to follow common law because the common law knock-and-announce requirement actually was stated absolutely, not conditioned on the circumstances. See Davies, *Arrest*, *supra* note 16, at 264-65 n.67.

⁵¹² 520 U.S. 385 (1997).

⁵¹³ *Banks v. United States*, 540 U.S. 31 (2003).

⁵¹⁴ See *infra* notes 542-543 and accompanying text.

⁵¹⁵ 533 U.S. 27 (2001).

time.⁵¹⁶ Additionally, it seems quite possible that police could show a “fair probability” of criminal activity—that is, the *Gates* formulation of probable cause for issuance of a search warrant⁵¹⁷—simply by obtaining utility records for a house (which would be exempt from Fourth Amendment protection⁵¹⁸) showing consumption of unusual amounts of water and electricity. Indeed, any marijuana discovered in a search under a warrant issued on that basis would seem to be admissible under the *Leon* blame-the-magistrate exception, because the warrant would not be “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.”⁵¹⁹ So *Kyllo* also seems to have been much ado about nothing.

The practical significance of the 2009 ruling of the Roberts Court in *Arizona v. Gant*⁵²⁰ is also unclear. In *Belton*, the Burger Court had announced a bright-line rule that automatically permitted police to search the passenger compartment and any containers found there of an auto in which an arrestee had been present.⁵²¹ In *Thornton*, the Rehnquist Court had extended that rule to a car the arrestee had recently occupied, even though the arrest took place some distance from the car.⁵²² However, in the complex ruling in *Gant*, Justice Stevens’s opinion for a five-justice majority disapproved of the automatic search authority provided by *Belton*. Instead, Justice Stevens’s opinion ruled that a search of the passenger compartment was permissible only (1) if the arrestee was not yet handcuffed and still in close proximity to the car (thus creating the potential that the arrestee might reach into the car for a weapon or to destroy evidence), or (2) if there was “reason to believe,” based on the nature of the charged offense, that evidence of the offense might be found in the car.⁵²³

It is possible that *Gant* might limit the potential for auto searches that could be based on the enlargement of arrest authority for minor offenses

⁵¹⁶ *Id.* at 40 (referring in the holding of the case to the government’s use of “a device that is not in general public use”).

⁵¹⁷ See *supra* note 406 and accompanying text.

⁵¹⁸ See *supra* notes 368-370 and accompanying text.

⁵¹⁹ See *supra* note 420 and accompanying text.

⁵²⁰ 129 S. Ct. 1710 (2009).

⁵²¹ See *supra* note 365 and accompanying text.

⁵²² See *supra* note 489 and accompanying text.

⁵²³ *Gant*, 129 S. Ct. at 1723. Justice Scalia concurred in the ruling in *Gant*. He had previously called for limiting the automobile search incident to arrest doctrine to instances in which it was “reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.” *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring). That proposal would seem to accord with Justice Scalia’s endorsement of a “generalized reasonableness” approach to the Fourth Amendment in other cases. See *supra* note 455 and accompanying text.

announced in *Atwater* and *Moore*.⁵²⁴ However, it is also the case that the police often have other grounds by which they often can justify a search of an arrested driver's car. For example, police can still search on the basis of the arrestee's consent;⁵²⁵ and they also often have the option of impounding the car and conducting an intensive inventory search, including an inventory search at the scene.⁵²⁶ Indeed, even if police actually search a car on the scene in violation of *Gant*, any evidence they find may still be admissible under a *Williams* "inevitable discovery" analysis provided their department has the requisite written regulations to permit inventory searches.⁵²⁷ Moreover, police may be inclined to rely on these alternative justifications in any event because they permit a more thorough search of the entire car, including the trunk, than would the search incident to arrest doctrine, which is limited to a search of the passenger compartment.

Will *Gant* significantly reduce the incidence of police searches of autos? That seems unlikely. Given the web of overlapping alternative justifications that are now available for car searches, there are not many situations where the police would actually encounter significant legal constraints. Hence, it seems likely that *Gant*, like most of the other seemingly pro-defendant rulings in the Rehnquist and Roberts Courts, will turn out to hold relatively little practical significance.

G. THE RENEWED ATTACK ON EXCLUSION BY THE ROBERTS COURT MAJORITY

As the Supreme Court recognized as far back as *Marbury v. Madison*, a right without a remedy is a fictional nullity.⁵²⁸ Thus, even if the justices of the Rehnquist and Roberts Courts had been inclined to embrace substantial Fourth Amendment standards, those standards would hold practical significance only if there were effective means by which they

⁵²⁴ See *supra* notes 484-487, 492-495.

⁵²⁵ The concept of an arrested person giving "voluntary consent" to a search is strained, but the Burger Court upheld an arrestee's consent to search a car in *Watson*, 423 U.S. 411 (1976).

⁵²⁶ See *supra* notes 350-351 and accompanying text. The Rehnquist Court did uphold the requirement that inventory searches of impounded cars must be conducted according to written regulations in *Florida v. Wells*, 495 U.S. 1 (1990). However, Chief Justice Rehnquist's opinion in *Wells* stated that the regulations could provide that an officer can open and search any container whose contents cannot be determined from the outside. *Id.* at 4. Hence, the regulations can authorize an unlimited search of the car and any containers in it. Here, too, the Rehnquist Court imposed only a meaningless "requirement."

⁵²⁷ See *supra* notes 429, 526 and accompanying text.

⁵²⁸ 5 U.S. (1 Cranch) 137, 163 (1803) (stating that there must be a remedy for every violation of a legal right).

could be enforced. However like the Burger Court majority before them,⁵²⁹ the majorities on the Rehnquist and Roberts Courts have shown consistent hostility toward enforcement of even the rather weak Fourth Amendment standards that remain.

As described above, the Burger Court majority effectively barred use of injunctions to enforce Fourth Amendment restraints.⁵³⁰ The Rehnquist Court majority also effectively barred enforcement through damage lawsuits brought against state or local officers under § 1983⁵³¹ or against federal officers under the parallel *Bivens* doctrine.⁵³² In particular, Justice Scalia's 1987 majority opinion in *Anderson v. Creighton*⁵³³ made it virtually impossible for a plaintiff to overcome the qualified immunity defense available to officers (a doctrine which the Burger Court had invented⁵³⁴) if issues involving flexible standards or fact-based issues such as probable cause or reasonableness were involved—as they typically are in search and seizure cases.⁵³⁵ Two years later a four-justice plurality of the Rehnquist Court also severely limited the potential for obtaining damages for unconstitutional searches or seizures from municipal entities in *City of*

⁵²⁹ See *supra*, notes 340-345 and accompanying text (discussing the limitation of the exclusionary rule to the prosecutor's case-in-chief at trial); *supra* notes 415-424 and accompanying text (discussing the *Leon* blame-the-magistrate exception and its progeny).

⁵³⁰ See *supra* notes 379-380 and accompanying text.

⁵³¹ 42 U.S.C. § 1983 (2006).

⁵³² *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). The doctrines that define the qualified immunity of state officers in § 1983 lawsuits also generally apply to the qualified immunity of federal officers in lawsuits brought under the authority of *Bivens*. See, e.g., *Wilson v. Layne*, 526 U.S. 603, 609 (1999).

⁵³³ 483 U.S. 635 (1987).

⁵³⁴ See *supra* note 390 (identifying the cases in which the Burger Court invented and expanded the qualified immunity defense).

⁵³⁵ See, e.g., *Saucier v. Katz*, 533 U.S. 194 (2001). *Saucier* endorsed the rule that courts deciding § 1983 or *Bivens* lawsuits should determine whether the alleged conduct constituted a constitutional violation before deciding the issue of whether the officers had qualified immunity. Under that approach, lawsuits under § 1983 or *Bivens* cases could sometimes be used to establish a clear constitutional standard which then could be used to overcome qualified immunity if the same violation was committed in the future. See, e.g., *Wilson*, 526 U.S. 603 (holding that federal marshals violated the Fourth Amendment by taking media reporters along when they executed a search warrant in a house, but that the marshals were protected by qualified immunity in the instant case because that violation was not “clearly established” at the time of their conduct). However, in *Pearson v. Callahan*, 129 S. Ct. 808 (2009), the Roberts Court has recently ruled that a court need not decide whether a constitutional violation occurred prior to finding that officers enjoyed qualified immunity, and thus allowing the lawsuit to be dismissed on that ground. Hence, lower courts may now simply conclude that officer-defendants are entitled to qualified immunity without ruling on whether the officer's conduct violated the Fourth Amendment, in which case there will be no clearly established law upon which qualified immunity could be overcome in future cases.

St. Louis v. Praprotnik.⁵³⁶ Taken together, *Anderson* and *Praprotnik* ended any significant possibility that Fourth Amendment search and arrest standards could be enforced through constitutional tort litigation.

As noted above, the Burger Court also effectively withdrew the exclusionary rule from all procedural settings except the prosecutor’s case-in-chief in a criminal trial, and also minimized the potential that exclusion would result from a search pursuant to an unconstitutional warrant by adopting the so-called good faith exception in *Leon*. Thus, exclusion of unconstitutionally seized evidence had been thoroughly marginalized by the end of the Rehnquist Court. (Indeed, as an empirical matter, exclusion never exerted anywhere near the effect on arrest dispositions as its critics routinely claimed.⁵³⁷)

Given that marginalization (and the apparent collapse of Congressional attacks on exclusion⁵³⁸), one might have expected that the majority justices

⁵³⁶ 485 U.S. 112 (1988). Municipalities are not liable for acts of their officers in § 1983 lawsuits under the theory of *respondeat superior*. However, in the fragmented 1986 decision in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), the Burger Court had found municipal liability for a warrantless police intrusion that violated the *Steagald* search warrant rule (see *supra* notes 360-361 and accompanying text), when the intrusion was ordered by the city prosecutor. The Court changed direction in the 1988 ruling in *Praprotnik*, however, in which Justice O’Connor’s plurality opinion for the four conservatives (Justice Kennedy, just appointed, did not participate) effectively nullified *Pembaur* by announcing that an “isolated decision[] by municipal officials” generally could not be a basis for municipal liability. *Praprotnik*, 485 U.S. at 114. Because municipalities (a term that includes any local or lower than state level government agency) rarely adopt formal policies directing their police officers to violate constitutional standards, *Praprotnik* sets a threshold for municipal liability that effectively insulates municipalities against § 1983 liability for Fourth Amendment violations.

The Rehnquist Court majority also erected a high threshold of municipal liability based on a “failure to train” claim in a five-to-four ruling in *City of Canton v. Harris*, 489 U.S. 378 (1989), and did likewise regarding a “failure to screen” hires claim in the five to four ruling in *Board of the County Commissioners of Bryan County v. Brown*, 520 U.S. 397 (1997).

⁵³⁷ For an example of the typical claim by critics of exclusion, see *Bivens*, 403 U.S. at 416 (Burger, C.J., dissenting) (asserting that “countless guilty criminals” were released because of the Fourth Amendment exclusionary rule). In contrast, the available empirical data from the 1970s and early 1980s indicated that exclusion had only a very marginal effect on arrest dispositions and accounted for the loss of roughly 1% of arrests, primarily involving less serious drug cases. See Davies, *supra* note 398, at 679-80 (summarizing the existing studies). The data also revealed that violent crime prosecutions were rarely lost because of exclusion of evidence. *Id.* Because Fourth Amendment standards have been further relaxed and additional exceptions to exclusion have been created since the period when those studies were done, it seems highly likely that the effects of exclusion on arrest dispositions are now even lower.

⁵³⁸ The most recent round of attacks on exclusion in Congress occurred in 1995. House Republicans had included a pledge to abolish the exclusionary rule in their “Contract with America” during the 1994 elections, and—after winning control of the House—introduced legislation that would have at least created a broad good faith mistake exception to

would have been content to leave the Fourth Amendment exclusionary rule as a vestige of earlier doctrine. Indeed, the Rehnquist Court had pretty much taken that stance with regard to the remnants of *Miranda* and the Fifth Amendment right in the 2000 ruling in *Dickerson v. United States*.⁵³⁹ However, that has not been the case.

As noted above, even after *Leon*, there was still a potential for the exclusionary rule to be applied to an unconstitutional *warrantless* police search because the *Leon* blame-the-magistrate rationale was limited to instances in which someone other than the police could be blamed for a

exclusion. Meanwhile, the Republican-controlled Senate considered an alternative bill to create a sort of liquidated damages approach under which the federal government or states could pay a set amount of damages as an alternative “remedy” while the unconstitutionally seized evidence would be admissible. Both efforts eventually broke down. Apparently the National Rifle Association (NRA) was unwilling to see the exclusionary rule abolished with regard to searches by Alcohol, Tobacco & Firearms (ATF) agents and, when the NRA was unsuccessful in promoting a plan to keep exclusion only for ATF searches, it flexed its political muscle against any legislative curtailment of exclusion. See LONG, *supra* note 240, at 191-93.

I testified against the Senate Bill during the 1995 hearings and also followed some of the House debates at that time. I was struck by the degree to which proponents of the legislative good faith exception invoked instances in which police had made *factual errors* and wrongly assumed that such errors would cause a search to be illegal and subject to exclusion. However, as the Court had plainly ruled on a number of occasions, that was not the case. See, e.g., *Illinois v. Rodriguez*, 497 U.S. 177 (1990) (holding that factual mistake as to whether person was co-inhabitant does not void consent to enter residence); *Maryland v. Garrison*, 480 U.S. 79 (1987) (holding that factual mistake that there was one apartment when there actually were two does not make entry under search warrant illegal); *Hill v. California* 401 U.S. 797 (1971) (holding that mistaken identity does not make arrest or subsequent search incident to arrest illegal). Hence, Congress was largely engaged in providing a “good faith exception” for searches that the Court already deemed to be constitutional.

⁵³⁹ 530 U.S. 428 (2000). Although several Burger and Rehnquist Court decisions had characterized the warnings and waiver required by *Miranda v. Arizona*, 384 U.S. 436 (1966), as being only a prophylactic policy rather than constitutionally required, Chief Justice Rehnquist’s opinion in *Dickerson* reversed course and asserted that *Miranda* was constitutionally required and thus could not be overruled by Congress. I think there is a pragmatic explanation for that shift: by the time *Dickerson* was decided, the Court had already created so many limitations and exceptions to *Miranda* that that doctrine had only marginal practical significance; thus, overruling *Miranda* would have undone all of the limitations and exceptions and returned the problem of involuntary or coerced confessions back to square one. Notably, the conservative majority subsequently ignored their confirmation of the constitutional status of *Miranda* in *Dickerson* when they proceeded to announce further ways for police to deliberately evade *Miranda* in *Missouri v. Seibert*, 542 U.S. 600 (2004). An accurate appraisal of *Seibert* requires counting noses: Justice Kennedy’s concurring opinion combined with the dissenting opinion of Justice O’Connor, which Chief Justice Rehnquist and Justices Scalia and Thomas joined, provided five votes for the proposition that deliberate violations of *Miranda* could be readily cured by subsequent police conduct.

Fourth Amendment violation. The Roberts Court majority, however, has invented two new and somewhat differently based exceptions to exclusion in the 2006 ruling in *Hudson v. Michigan*⁵⁴⁰ and the 2009 ruling in *Herring v. United States*.⁵⁴¹

1. Hudson

In *Hudson*, a five-to-four majority of the Roberts Court ruled that a violation of the *Wilson* knock and announce requirement for executing warrants would no longer result in exclusion of evidence seized in the ensuing search. The specific ruling was of little consequence because the *Wilson* rule was itself of little consequence. However, the rationale Justice Scalia offered for the new exception—that the violation was too causally “attenuated” from the finding and seizure of the evidence⁵⁴²—was so amorphously abstract that its outer boundary is not obvious.⁵⁴³

Moreover, writing for himself, Chief Justice Roberts and Justices O’Connor and Thomas (but not Justice Kennedy), Justice Scalia also asserted in *Hudson* that the exclusionary rule was no longer necessary because § 1983 lawsuits now provided an alternative remedy⁵⁴⁴—a rather brazen claim considering that Justice Scalia, as the author of *Anderson* and as a member of the plurality in *Praprotnik*, had personally participated in crippling § 1983 enforcement.⁵⁴⁵ Thus, *Hudson* strongly implied that these four justices are inclined to abolish the *Weeks* exclusionary rule.

2. Herring

The conservative assault on exclusion was renewed in the 2009 *Herring* decision. Chief Justice Roberts wrote for the five-justice majority (with Justice Alito having replaced the retiring Justice O’Connor, and this time including Justice Kennedy as well as Justices Scalia and Thomas).

⁵⁴⁰ 547 U.S. 586 (2006).

⁵⁴¹ 129 S. Ct. 695 (2009).

⁵⁴² *Hudson*, 547 U.S. at 592-93 (stating that “the constitutional violation of an illegal manner of entry was *not* a but-for cause of obtaining the evidence [because w]hether that preliminary misstep had occurred *or not*, the police would have executed the warrant they had obtained, and would have discovered the [evidence] inside the house” and also stating that “[a]ttenuation . . . occurs when, even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained”).

⁵⁴³ See, e.g., Albert W. Alschuler, *The Exclusionary Rule and Causation: Hudson v. Michigan and Its Ancestors*, 93 IOWA L. REV. 1741, 1779 (2008) (noting that the logic of the attenuation rationale in *Hudson* would seem to also apply to instances in which the police could have obtained a warrant but did not).

⁵⁴⁴ *Hudson*, 547 U.S. at 597-98.

⁵⁴⁵ See *supra* notes 533-536 and accompanying text.

Chief Justice Roberts announced that the exclusionary rule would no longer be applied to instances in which an unconstitutional search incident to arrest was conducted “as the result of isolated negligence attenuated from the arrest.”⁵⁴⁶ Additionally, Chief Justice Roberts announced that the appropriateness of exclusion should “var[y] with the culpability of the law enforcement conduct.”⁵⁴⁷ The creation of the novel “negligence” exception in *Herring* was a significant departure from earlier proposals for a good faith exception to the rule. In fact, Justice Rehnquist had distinguished between police negligence and excusable mistakes in his initial proposal of a good faith mistake exception in *Peltier*.⁵⁴⁸

It seems likely that the continuing majority will look for further opportunities to extend these new attenuation or negligence based exceptions to exclusion to additional settings. The open question is whether the Roberts Court majority will stop there (per the treatment of *Miranda* in *Dickerson*), or whether they will pursue ideological purity and abolish the exclusionary rule outright. One suspects that Justice Kennedy will provide the answer to that question, at least to the extent that it is decided in the near future. Whether criminal search and seizure will be enforced at all now turns merely on the preference of the fifth vote.

H. “SPECIAL NEEDS”

A final set of rulings demonstrates the conservative majority’s reluctance to impose Fourth Amendment limits even on government activity that falls outside of criminal law enforcement per se. The liberal Warren Court majority had attempted to formulate an administrative version of the warrant process for regulatory inspections.⁵⁴⁹ However, the Burger Court changed direction by ruling that the Fourth Amendment need not apply to all government regulatory inspections,⁵⁵⁰ by confirming the

⁵⁴⁶ *Herring*, 129 S. Ct. at 698.

⁵⁴⁷ *Id.* at 701.

⁵⁴⁸ See *United States v. Peltier*, 422 U.S. 531, 538-39 (1975); see also *supra* note 389 and accompanying text.

⁵⁴⁹ In a five to four ruling in *Frank v. Maryland*, 359 U.S. 360 (1959), the conservative members of the Warren Court ruled that warrantless city health inspections of dwellings did not violate the Fourth Amendment. However, in 1967 in *Camara v. Municipal Court*, 387 U.S. 523 (1967), and *See v. City of Seattle*, 387 U.S. 541 (1967), the liberal majority overruled *Frank* and instead ruled that regulatory inspections must comply with an administrative warrant procedure.

⁵⁵⁰ See, e.g., *Wyman v. James*, 400 U.S. 309 (1971) (ruling that mandatory home visits of AFDC recipients by caseworkers do not constitute searches subject to Fourth Amendment).

broad powers of the government at the national border,⁵⁵¹ and especially by adopting a permissive approach to non-criminal justice government searches under the "special needs" doctrine formulated in the 1985 ruling in *New Jersey v. T.L.O.*⁵⁵² Under that doctrine, government institutions such as public schools are given considerable leeway to make *suspicionless* searches that would be unconstitutional if made in the course of criminal law enforcement. The Rehnquist Court further developed this doctrine by permitting a government employer to search the office of an employee,⁵⁵³ by permitting supervising officers to make warrantless searches of probationers⁵⁵⁴ and parolees,⁵⁵⁵ by permitting drug testing of certain public employees,⁵⁵⁶ and by even permitting random (that is, suspicionless) drug testing of any high school students who engage in extracurricular activities.⁵⁵⁷

However, the justices have identified some outer limits on the special needs doctrine. In 1997, the justices (eight to one) invalidated a state statute that required drug testing of candidates for elective office;⁵⁵⁸ in 2001, they disapproved (five to four) of a procedure for drug testing pregnant women that was closely tied to law enforcement;⁵⁵⁹ and most recently, the justices (eight to one) invalidated a strip search of a public school student suspected of possessing over-the-counter medications.⁵⁶⁰ Even so, the special needs doctrine means that the Fourth Amendment imposes only the weakest of restrictions on government intrusions outside of traditional criminal law enforcement.

Although some may be tempted to regard this line of cases as being of lesser significance than the criminal procedure rulings themselves, that would be a mistake. As government expands into more and more aspects of

⁵⁵¹ See, e.g., *United States v. Flores-Montano*, 541 U.S. 149 (2004); *United States v. Arvizu*, 534 U.S. 266 (2002); *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985); *United States v. Ramsey*, 431 U.S. 606 (1977).

⁵⁵² 469 U.S. 325 (1985). The "special needs" terminology for this doctrinal approach initially appeared in Justice Blackmun's concurring opinion in *T.L.O.* See *id.* at 351 (referring to "special needs beyond the normal need for law enforcement").

⁵⁵³ *O'Connor v. Ortega*, 480 U.S. 709 (1987).

⁵⁵⁴ *United States v. Knights*, 534 U.S. 112 (2001).

⁵⁵⁵ *Griffin v. Wisconsin*, 483 U.S. 868 (1987); see also *Samson v. California*, 547 U.S. 843 (2006).

⁵⁵⁶ *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

⁵⁵⁷ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002).

⁵⁵⁸ *Chandler v. Miller*, 520 U.S. 305 (1997).

⁵⁵⁹ *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).

⁵⁶⁰ *Safford United Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633 (2009).

life, citizens are as likely to experience arbitrary and demeaning intrusions by bureaucrats as by police. Moreover, the school search cases are particularly troubling for the message they convey to young people about subservience to authority. The “special needs” of the nanny state seem likely to become exorbitant.

IX. CONCLUSION: FOURTH AMENDMENT REMNANTS

So, where do things stand at the end of the century of Fourth Amendment search and seizure doctrine? That depends on precisely what question one asks.

The course of Fourth Amendment search and seizure doctrine during the *Journal's* century certainly confirms the basic tenets of legal realism. Search and arrest issues present an archetypal ideological contest between those who lean toward accommodating and empowering institutions of social control such as the police, and those who lean toward holding those institutions accountable for excesses. As recounted above, the direction of search rulings has shifted as the ideological outlook of the swing vote justice has shifted.

How strong are Fourth Amendment protections today? How significant are the remains of Fourth Amendment doctrine? There is certainly a large edifice of precedent—that is what occurs when court rulings create a web of exceptions and limitations to a set of purported principles. But there is little that could be characterized as a substantial legal constraint on police arrest and search power. Indeed, the exceptions that have been announced regarding the supposed principles now apply so frequently to the routine situations in which police interact with the populace that the doctrinal “exceptions” are the functional rules, and the instances when the supposed principles apply are now the genuine exceptions. Although it might be said that the recent Courts did not always cut back as severely as they might have,⁵⁶¹ it is nevertheless the case that they have left little of substance behind. Indeed, during the most recent term of the Court, prosecutors filed only six certiorari petitions regarding search and seizure issues, and those were mostly over mundane disputes such as whether there was reasonable suspicion in a particular situation. Since prosecutors plainly could have expected a friendly reception by the

⁵⁶¹ See Craig M. Bradley, *The Fourth Amendment: Be Reasonable*, in THE REHNQUIST LEGACY 81, 105 (Craig Bradley ed., 2006) (noting that Chief Justice Rehnquist “would have gone considerably further in limiting the rights of defendants” if the other justices would have gone along).

justices, the only apparent explanation for the small number of filings is that law enforcement has little left to complain about.⁵⁶²

The last four decades of search and seizure rulings have also demonstrated the gross inadequacy of "reasonableness" as a supposed standard for regulating government arrest and search authority. The Framers thought they were preserving rules for arrests and searches when they adopted the Fifth Amendment "due process of law" clause and the Fourth Amendment. But modern "Fourth Amendment reasonableness" is merely a creation of judges who sought a rubric for announcing their personal predilections as law. If government arrests and searches are to be brought under legal standards again, "Fourth Amendment reasonableness" has to be rejected. But there is so little left for a doctrinal foundation that it seems quite unlikely that search and seizure law can be revived.

That is not to say that the little that is left does not matter. Current doctrine sometimes still requires processes that likely inhibit hasty police intrusions. For example, even though the operative standard for issuing a valid warrant is now rather minimal, obtaining a warrant is still often required for a house search, and the warrant process causes investigating officers to consult with superiors and prosecutors who may be more likely to be thoughtful and in touch with community sentiments. But the restraint induced by the warrant process is now largely political and sociological in nature, not legal.

Likewise, even the now weakened exclusionary rule does one thing much better than any alternative remedy possibly could—although it rarely leads to suppression of evidence, it does make police arrest and search conduct visible to other actors through motion to suppress hearings. By requiring officers to explain their conduct, motions to suppress provide an important training function.⁵⁶³ Such motions also give local judges an

⁵⁶² A review of the certiorari petitions identified in United States Law Week, Proceedings of the Supreme Court, Cases Docketed, reveals that prosecutors filed only six petitions relating to any aspect of search and seizure issues during the period July 7, 2009 through August 17, 2010. These included: *Virginia v. Harris* (No. 09-3068) (anonymous tip insufficient for reasonable suspicion of drunk driving); *Michigan v. Dorsey* (No. 09-3084) (search of purse of visitor merely present during execution of search warrant invalid); *Virginia v. Rudolph* (No. 09-3304) (insufficient reasonable suspicion for *Terry* detention); *Minnesota v. Russell* (No. 09-3456) (identification invalid as fruit of illegal detention without reasonable suspicion); *Ohio v. Smith* (No. 09-3719) (warrantless search of call log on cell phone not valid search incident to arrest); *Kentucky v. King* (No. 09-3733) (warrantless entry of apartment on basis of odor of marijuana not justified by exigent circumstances).

⁵⁶³ See Myron W. Orfield, Jr., Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1033-41 (1987) (reporting the results of an interview study of the experiences of Chicago police officers during motion to suppress hearings).

overview of police conduct. Of course, there is no way to quantify the “benefits” resulting from that exposure. That, however, does not mean they are insubstantial.

In addition, the conclusion that little substance remains in Fourth Amendment doctrine as this is written in 2010 does not mean that the prior rulings that gave substance to Fourth Amendment protections made no difference. One never comes out of a century of history at the same point one went in. The development of Fourth Amendment doctrine during the first six decades of the century, and the continuation of some strands of that doctrine during some or all of the final four decades, has surely had broader systemic effects on law enforcement. It has prompted increased police training and has been a catalyst for increasing professionalism in law enforcement. It has also caused the media to become more attuned to such issues. It has also inhibited (though certainly not eliminated) the use of criminal justice to oppress minority communities and, at least indirectly, it has supported greater inclusiveness in local political systems.

The pressing question, as a practical matter, is whether the remaining search and seizure standards have essentially served their purpose and can now be dispensed with altogether. The conservative majority on the Court seems to have concluded that crime is a real problem, but the potential for police and government oppression is not. Thus, they have wagered that legal constraints on police are now unnecessary⁵⁶⁴ and law enforcement can be trusted to be a benign force.⁵⁶⁵ In effect, the justices have now dispensed with the concept that arrest and search authority should be limited by distinct constitutional rights and have instead folded search and seizure into the larger category of administrative law, in which social problems are turned over the supposed expert agencies and the courts stay out of the way so long as the agency conduct is not egregious or patently arbitrary. Thus, police and prosecutors are to be left alone to do their work—at least so long as abuses are only “isolated,” or at least do not become “epidemic.”⁵⁶⁶

I suspect the justices are not at variance with the weight of public opinion in these judgments. In the current climate, there is little likelihood

⁵⁶⁴ Of course, there is an alternative explanation: the majority justices are simply unconcerned with controlling excessive zeal on the part of the police because they perceive that aggressive police intrusions fall most heavily on particular segments of the community, especially minorities, with whom the justices do not empathize. Cf. Bradley, *supra* note 561, at 103 (“[B]eing stopped or searched by police would not seem to be a personal concern of [Chief Justice] Rehnquist’s. Nor does he empathize with those people for whom it is a more realistic possibility.”).

⁵⁶⁵ See, e.g., *Segura v. United States*, 468 U.S. 796, 812 (1984) (“We are unwilling to believe that officers will routinely and purposely violate the law as a matter of course.”).

⁵⁶⁶ See *supra* note 487 and accompanying text.

that elected officials will endorse either a regime of rules for criminal arrests and searches or enforcement of such rules through the exclusion of unconstitutionally seized evidence. Indeed, there is little likelihood that a president would nominate a justice who has been an outspoken supporter of Fourth Amendment rights and enforcement. And that is especially so in the age of terrorism. As this is written, media commentary is filled with denunciations of giving 9/11 suspects constitutional rights such as *Miranda* warnings.⁵⁶⁷ Hence, there does not seem to be any realistic potential that the destruction of the civil right against unwarranted arrest or search will be reversed.

So, as we reach the end of the century of search and seizure doctrine, one can only hope that the optimistic views expressed by the majority justices regarding benign policing will be proved right—albeit while fearing that they will not.⁵⁶⁸

⁵⁶⁷ The expressions of concern by the punditry indicate that the pundits are ignorant of how little content remains in *Miranda* doctrine. However, that is a subject for another time.

⁵⁶⁸ Another question is pertinent for legal academics. How should legal academics deal with the destruction of Fourth Amendment standards and enforcement during the last four decades? As an academic who has spent much of my career researching and teaching about search and seizure, I empathize with colleagues who may be tempted to minimize the degree to which search and seizure doctrine has been stripped of substance so as to continue to treat it as though it remains an important body of constitutional doctrine. But I question whether that stance misleads law students, and I seriously doubt that the strained and often patently disingenuous rationales that appear in recent search and seizure opinions are worthwhile models for professional study. More broadly, I fear that the pretense that Fourth Amendment rights still have content distorts the broader public discourse about criminal justice. Indeed, that pretense now props up a mere illusion of rights in what seems to be an increasingly collectivist society and an increasingly statist regime.

Table 1
*Supreme Court Search and Seizure Decisions**

Year Decided	<u>Federal Criminal</u>		<u>State Criminal</u>		<u>Habeas Cases</u>		<u>Totals</u>	
	Govt. Won	Def. Won	Govt. Won	Def. Won	Govt. Won	Def. Won	Govt. Won	Total Cases
1959	1						1	1
1960	1	3					1	4
1961		2		1			0	3
1962							0	0
1963	2	1	1	2			3	6
1964	1	1		1			1	3
1965	1			1			1	2
1966				1			0	1
1967	4	1	3	3			7	11
1968		3	2	2			2	7
1969	3	4		5			3	12
1970		1		1	1		1	3
1971	3		1	1		1	4	6
1972	1		1		1		3	3
1973	2			1	3	1	5	7
1974	4		1		1		6	6
1975	2	1					2	3
1976	4		1		1		6	6
1977	1	1		1			1	3
1978	1		1	3			2	5
1979	3		2	6			5	11
1980	5	1	1	3			6	10
1981	1	1	2	1			3	5
1982	1		2				3	3
1983	2	1	5	1			7	9
1984	5		4	1			9	10
1985	4		4	2		1	8	11
1986			3	1			3	4
1987	1		5	1			6	7
1988	1		2				3	3
1989	1		1				2	2

Table 1
(continued)

Year Decided	<u>Federal Criminal</u>		<u>State Criminal</u>		<u>Habeas Cases</u>		<u>Totals</u>	
	Govt. Won	Def. Won	Govt. Won	Def. Won	Govt. Won	Def. Won	Govt. Won	Total Cases
1990	1		5	4			6	10
1991			4				4	4
1992							0	0
1993	1			1			1	2
1994				1			0	1
1995			2				2	2
1996	1		1				2	2
1997			3				3	3
1998	1						1	1
1999			4	1			4	5
2000		1	1	2			1	4
2001		1	2	1			2	4
2002	3		1				4	4
2003				1			0	1
2004	3		3				6	6
2005			1				1	1
2006	1		4	1			5	6
2007				1			0	1
2008			1				1	1
2009	1		1	1			2	3

* The statistics in this table are derived from the annual summary of Supreme Court decisions by opinion reported in the *Harvard Law Review*. See *supra* notes 254-256 and accompanying text.

