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FRAMING THE FOURTH

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THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING, 602–1791.
By *William J. Cuddihy*. Oxford and New York: Oxford Press. 2009. Pp. lxxviii, 940. \$165.

INTRODUCTION

As late as 1988, Fourth Amendment scholars thought they knew all they needed to know about the amendment's history. After all, the right to be free from unreasonable search and seizure is a "made in America" privilege. Unlike other parts of the Bill of Rights, the protection against unreasonable search and seizure "provides us with a rich historical background rooted in American, as well as English, experience; it is the one procedural safeguard in the Constitution that grew directly out of the events that immediately preceded the revolutionary struggle with England."¹ The history of search and seizure in Britain and America was neatly described in books by Nelson Lasson and Jacob Landynski.² Through these books and related articles, scholars learned about the events and individuals that helped prompt the adoption of the Fourth Amendment.

Although this history was well known to judges and scholars, in the second half of the twentieth century Fourth Amendment history rarely mattered to the Supreme Court. To be sure, there were disagreements, both on and off the Court, regarding the relevance of history. The results in cases, however, rarely depended on how the Court interpreted the amendment's history.³

Our knowledge of the Fourth Amendment's history was fundamentally transformed when William Cuddihy completed his Ph.D. dissertation in 1990.⁴ Cuddihy's study was the most comprehensive and detailed examination of the history of search and seizure law and essential reading for anyone interested in the amendment's history. At first, Cuddihy's work was little known: only a few people noticed when the highly regarded constitutional

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1. JACOB W. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT* 19 (1966).

2. *Id.*; NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* (Da Capo Press 1970) (1937).

3. Professor Sklansky aptly observes that "by the early 1970s the history of the Fourth Amendment seemed increasingly beside the point." David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1741 (2000).

4. William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning: 602–1791* (1990) (unpublished Ph.D. dissertation, Claremont Graduate School).

historian Leonard W. Levy stated that “Cuddihy is the best authority on the origins of the Fourth Amendment.”⁵ Cuddihy finished his dissertation in 1990 and it remained unedited, unpublished, and largely unknown for several years—until Justice O’Connor made it famous by citing the dissertation thirteen times in her *Vernonia School District 47J v. Acton* dissent.⁶ Since *Acton*, a reassessment of Fourth Amendment history has been undertaken by criminal procedure scholars, and a “portion of the credit or blame may be due William Cuddihy.”⁷ Cuddihy’s work has generated the attention scholars dream about—not only was he cited by the Court, his work apparently convinced Justice O’Connor to change “her position on a fundamental issue in constitutional law.”⁸

A renewed interest in the Fourth Amendment’s history has also been fueled by the rhetoric of Justices Scalia and Thomas. In *Wyoming v. Houghton*,⁹ Justice Scalia announced that a historical inquiry is the starting point for every search and seizure case. Scalia explained that in determining whether police conduct violates the Fourth Amendment, the Court will first decide whether the intrusion “was regarded as an unlawful search or seizure under the common law when the Amendment was framed.”¹⁰ If the common law “yields no answer,” the Court will then decide the validity of the intrusion under a modern balancing test.¹¹

Although *Houghton* preached a commitment to historical inquiry, the Court has not adhered to its rhetoric. Holdings in Fourth Amendment cases seldom depend on the Court’s interpretation of history.¹² Indeed, as Professor Larry Yackle notes about the Court’s constitutional rulings, “results turn (as they should) on the justices’ own best judgment rather than on anything genuinely traceable to original understanding.”¹³ The Rehnquist and Roberts Courts, often claiming reliance on the text of the amendment, have applied a balancing, “reasonableness” formula to decide search and seizure cases.

5. LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION 441 n.1 (1988).

6. 515 U.S. 646, 669–73 (1995) (O’Connor, J., dissenting). See Thomas K. Clancy, *The Role of History*, 7 OHIO ST. J. CRIM. L. 811, 813 (2010) (book review) (noting that O’Connor’s dissent in *Acton* made Cuddihy’s dissertation “famous”). Prior to *Acton*, Cuddihy had caught the attention of Justice Brennan, who cited Cuddihy’s master’s thesis, *Search and Seizure in Great Britain and the American Colonies*. United States v. Verdugo-Urquidez, 494 U.S. 259, 288–89 (1990) (Brennan, J., dissenting).

7. Sklansky, *supra* note 3, at 1742.

8. Morgan Cloud, *Searching through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1711 (1996).

9. 526 U.S. 295 (1999).

10. *Houghton*, 526 U.S. at 299.

11. *Id.* at 299–300.

12. See generally Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895 (2002).

13. LARRY YACKLE, REGULATORY RIGHTS: SUPREME COURT ACTIVISM, THE PUBLIC INTEREST, AND THE MAKING OF CONSTITUTIONAL LAW 50 (2007).

Interestingly, Cuddihy's scholarship and conclusions have something to say about this approach as well.

Cuddihy's dissertation was 1,560 pages long. The book, *The Fourth Amendment: Origins and Original Meaning, 602–1791*, published by Oxford University Press in 2009, is now a solid 782 pages, with an additional 127 pages of appendices. Despite its smaller size, *Origins and Original Meaning* remains a unique resource for anyone interested in the history of the Fourth Amendment. A central purpose of Cuddihy's research is to identify the types of searches and seizures that "the amendment originally embraced as unreasonable or reasonable" (p. lxiv). Beginning his review in 602, Cuddihy ends his research in 1791 with the ratification of the Fourth Amendment, excluding much of the congressional debate and information beyond 1791 because he believes it to be unrevealing of the amendment's original intentions (p. lxvii). Over the course of twenty-four chapters, Cuddihy documents 1,189 years of political and intellectual development of search and seizure law in Britain and the United States. Cuddihy reviewed thousands of sources and the breadth of his research is immediately apparent; he has left little out. The details often overwhelm, but the patient reader will leave with a comprehensive knowledge and understanding of search and seizure history.

The book has four principal theses. First, Cuddihy finds that the protection intended by the Fourth Amendment is much broader than the protection granted by the Warrant Clause and that this broader protection captures many kinds of searches and seizures that the Framers found to be unreasonable (p. lxvi). Second, Cuddihy documents the emergence of the idea of a right against unreasonable search and seizure in Britain from its emergence among British intellectuals and through its political development (p. lxvi). Third, Cuddihy focuses on the development of the Warrant Clause on American soil, finding that America's contribution to the development of the clause outweighed Britain's contribution (p. lxvi). Finally, Cuddihy examines the political context in which the Fourth Amendment's ideas on search and seizure were formed, finding that the "ideas hinged on the character of the political and social environments of 1290–1791" (p. lxvii).

This Review examines some of Cuddihy's main arguments. Part I highlights certain aspects of search and seizure doctrine that Cuddihy finds had a consensus by 1791 and briefly looks at other areas that were unsettled. Part II describes some of the scholarly reaction that Cuddihy has ignited. Specifically, it outlines the points of agreement and disagreement between Cuddihy and Professors Thomas Davies and Fabio Arcila.¹⁴ Finally, Part III compares Justice Scalia's use of history in a recent case with Cuddihy's findings and offers a few comments on the guidance that Cuddihy's book can provide to modern judges.

14. Our selection of the scholarship of Davies and Arcila implies no disrespect for the many other scholars who have written about the history of the Fourth Amendment. Space limitations preclude consideration of other scholars' contributions.

I. LESSONS LEARNED FROM HISTORY

A founding principle of Cuddihy's work is that the Framers' ideas and intentions for the Fourth Amendment were molded by centuries of history (p. 734). What emerges is a picture of the gradual development of intellectual and popular movements against general searches in Britain and the acceleration of that movement in America in the decade and a half leading up to the American Revolution through the framing of the Fourth Amendment in 1791.¹⁵ Cuddihy's research demonstrates that there was no single meaning of the Fourth Amendment. After reading Cuddihy's book, however, it is possible to separate topics of search and seizure into three categories: types of unreasonable searches and seizures that had a concrete consensus by 1791, concepts that remained unsettled by 1791, and modern ideas that were given very little thought during the framing era.¹⁶

A. Consensus: Unreasonable Searches and Seizures

To the extent that there are definitive understandings of the Framers' intentions, Cuddihy argues they lie mainly in the categories of unreasonable search and seizure. By 1791, he finds the Framers had come to a consensus that general warrants and searches, multiple specific warrants, nocturnal searches, and no-knock entries were considered unreasonable (pp. 739–50).

1. General Warrants and General Searches

The general warrant was the “preponderant motivation behind the [Fourth A]mendment.”¹⁷ The colonial experience with the general search and writs of assistance led America to reject the general warrant and replace it with the specific warrant. Rejection of the general warrant originated in Britain in the late 1600s (p. 268). English legal commentators such as Henry Care, Giles Jacob, William Hawkins, and Sir Matthew Hale began advocating for the replacement of general warrants with specific warrants in areas that were of political interest to them (pp. 268–80). Narrow applications for the specific warrant resulted in a coexistence of the general and specific warrant in Britain through the early 1700s (p. 286). Ironically, by 1760, Britain had witnessed the condemnation of the general warrant, but simultaneously experienced a “parallel explosion” in the use of general warrants (p. 286).

Across the ocean, the colonists had a similar experience with general warrants and legislation authorizing general searches: “[d]oor-to-door

15. In fact, Cuddihy notes that the “colonists made about as much progress toward [the specific warrant] in the decade and a half before their revolution as the British had achieved in the preceding century and a half.” P. 538.

16. Bounded by a word limit, this Review highlights only some of Cuddihy's findings, the result being that many other important topics must be overlooked.

17. P. 771. General warrants did not limit searches to designated people, locations, or things. They were a “legal pass key to all doors.” P. lxxv.

searches and mass arrests characterized legislation in the colonies no less than in the mother country” (p. 193). Massachusetts began the revolt against general warrants and searches as it consistently clashed with Britain over excise searches and writs of assistance.¹⁸

In the three decades between 1730 and 1760, Massachusetts witnessed a sudden increase in the number of general searches, as applications for general searches more than doubled. Searches for small pox, naval impressments, impost and customs searches, and searches related to an unsuccessful land bank¹⁹ were marked by violence and greatly expanded the portion of the population that was subjected to promiscuous invasion of their homes (pp. 371–73, 357). Sir Edward Randolph, the chief customs agent of New England appointed by the Commissioners of Customs in Britain, vigorously employed the power of his commission to conduct general searches and “flout[ed] the colony’s sensitivities on search and seizure” (p. 353). Randolph’s tactics generated discontent in the Bay Colony that was further exacerbated by the Excise Act of 1754.

The Excise Act allowed tax collectors to “interrogate any citizen under oath concerning his annual consumption of spirits” (p. 356). While wealthy merchants were expected to bear the brunt of the tax, the Excise Act “required everyone to maintain an account of his family’s annual consumption and swear to its veracity if the local excise officer asked” (p. 365). These requirements exposed the “entire community . . . to . . . compulsory self-incrimination” (p. 365). As the last in a line of expanding general searches, the Excise Act was the final straw for some colonists. Critics argued that the interrogation clause violated “the constitution, Magna Carta, natural rights, and ‘that Security which every man enjoys in his own House’” (p. 356). Although the “[a]pocalyptic rhetoric” against the clause seemed overblown because the interrogation clause was less of a threat to privacy than ex officio searches long administered in the colony, the outrage ignited by the Act was due to the fact that “grievances over search and seizure had been accumulating in Massachusetts for over a quarter of a century” (p. 357). Furthermore, the “breadth and depth of the opposition to the interrogation clause transcended merchants and narrow class interests,” broadening the consensus against general searches and seizures (p. 365). Reaction to the Excise Act also bred legislation implementing specific

18. P. 375. An excise search was a search for items subject to tax. “By 1763, just about everything a Briton ate, drank, wore, or otherwise consumed was either taxable under the excise or recently had been: leather, soap, paper, most alcoholic beverages, coffee, tea, candles, glass, and much, much more.” P. 301. A writ of assistance was a court order to individuals to assist customs officers in the performance of their duties. Unlike a general warrant, the writ did not authorize a search; “[i]t merely vouched for the identity of the customs officers who by their commissions were authorized to search.” O. M. Dickerson, *Writs of Assistance as a Cause of the Revolution, in THE ERA OF THE AMERICAN REVOLUTION* 40, 45 (Richard B. Morris ed., Harper Torchbooks 1975) (1939).

19. The land bank scheme was never signed into law by Governor William Shirley but had proposed using general warrants to “recover the records of the bank’s directors” and allowed searches to “break open doors and chests.” P. 359.

warrants for impost and customs searches as a way to curb promiscuous searches (p. 369).

Finally, there was the furor over writs of assistance. By 1700, writs of assistance were the predominate type of revenue search in Britain. Their use was expanded in Massachusetts in the 1760s when Governor William Shirley ordered the customs service to obtain writs of assistance, which allowed the customs service to “enter and search all places,” and only expired six months after the reigning monarch’s death (p. 363). After the death of King George II in October of 1760, “sixty-three members of the ‘Society for Promoting Trade and Commerce Within the Province,’ an association of prominent merchants from Boston and Salem, asked the Superior Court to hear arguments against the writs” (p. 381). James Otis Jr. represented the merchants. Otis’s fiery argument in *Paxton’s Case* made the case a *cause célèbre* in Massachusetts.²⁰ Otis categorically repudiated general warrants and argued for use of the specific warrant as a replacement (p. 391). Although Otis lost his case, the result in *Paxton’s Case* “intensified public antipathy to the writs of assistance” (p. 395). British customs officers found themselves unable to carry out searches and seizures because attempts to seize goods would bring out mobs of locals who would quickly carry away the illegal goods (p. 501).

Hostility against writs of assistance and general searches spread to other colonies with the enforcement of the Townshend Revenue Act of 1767. The Townshend Act “empower[ed] . . . the highest court in each colony to issue writs of assistance” and was intended to make the issuance of writs of assistance easier on customs officials.²¹ Instead of obtaining writs with ease, however, British customs officials encountered resistance from colonial judges. While Massachusetts and New Hampshire had authorized new writs before the Act was passed, five other colonies refused to issue them (p. 513). In refusing to issue writs, colonial judges employed various tactics: in Maryland and South Carolina the courts “ignored rather than refused requests for the writs;” in Rhode Island the Superior Court postponed considering the writs “on grounds that two of its members were absent;” and in Connecticut the court refused to issue writs “on grounds that [the customs officers] had not submitted the formal memorial to the court” that it was accustomed to (pp. 513–14). New York’s highest court, which had initially agreed to issue writs, reversed its decision between 1769 and 1772 as “[j]udges pleaded illness, age, and inclemency of weather for absences that precluded a necessary quorum” to order writs (p. 523). While each court had different reasons for rejecting them, “[t]he near-uniform defeat of writs of assistance in colonial courts signified the beginnings of a dialogue on the writs and of a consensus against general warrants by the American judiciary” (p. 533).

20. For a wonderful study of *Paxton’s Case* and Otis, see M.H. SMITH, *THE WRITS OF ASSISTANCE CASE* (1978).

21. See p. 506.

By the American Revolution, the colonies had had their fill of general warrants and general searches. After independence, state constitutions made their thoughts on general warrants concrete. In Maryland, there was a repudiation of all “general warrants [as] ‘illegal,’” while the Massachusetts and Pennsylvania constitutions “condemned all general warrants as contrary to a broader right” (p. 605). The colonies’ extensive, violent, and politicized relationship with the general warrants and writs of assistance had created a consensus that general warrants were “the overriding threat to privacy” (p. 771).

2. Multiple-Specific Warrants for Location and Arrest

America’s rejection of the general warrant led to the use of specific warrants as a replacement. However, states that adopted the specific warrant did not always limit the scope of the search and would use “warrants to inspect multiple places” (p. 331). During the revolution states used multiple-specific warrants “to arrest persons by the dozen and to search houses for contraband” (p. 658). Despite the use of multiple-specific warrants, Cuddihy asserts that by 1791 the tide turned against their use with American legal treatises, state legislation, federal legislation, and a textual interpretation of the Fourth Amendment supporting particularity (pp. 740–41).

American legal treatises supporting specific warrants limited those warrants to single locations (p. 740). During the 1780s, the states enacted legislation requiring specific warrants. Massachusetts led the way shifting from “multiple-specific search warrants to warrants designating a single dwelling house, and finally, to warrants specifying individual stores as well as dwellings” (p. 659). Rhode Island, Delaware, and Virginia followed suit (p. 659). Federal legislation also lent support for the unreasonableness of multiple-specific warrants. The Collection Act of 1789 required all federal search warrants to specify a single location, “a house, store ‘or other place’” (p. 741). Finally, the language of the Fourth Amendment, with the words “particular” and “place,” indicated a restriction on multiple-specificity (pp. 741–42).

3. Nocturnal Searches and No-Knock Entries

Along with a consensus that general warrants, writs of assistance, and multiple specific warrants were unreasonable came agreement that certain techniques of search and seizure were also unreasonable. In particular, Cuddihy finds that by 1791 there was no tolerance for nocturnal searches or no-knock, forcible entries among the American states.

Opposition to nocturnal searches emerged as early as 1333 in Britain, and by the early 1600s, commentators such as Sir Matthew Hale were discouraging nocturnal searches (pp. 413, 661). But resistance to the nocturnal search did not translate into restrictions across all search and seizure law. In the colonies, “nocturnal searches remained the norm” until the 1690s (p. 428). Over the next century, however, American thinking regarding

nocturnal searches evolved from acceptance to “an almost categorical extinction of official entry at night” (p. 661).

The evolution was incremental and no state abolished all nocturnal entries (p. 748). Furthermore, Cuddihy notes that the unconstitutionality of nocturnal searches was implicit in the legislation passed during the framing era (p. 748). Legislation covering gaming, poaching, smuggling, and ammunition storage gradually incorporated daytime restrictions and by 1782, “statutes of all of the states except . . . Delaware generally forbade searches at night” (pp. 748, 661). The Collection and Excise Acts of 1789 and 1791 also permitted daytime-only searches, “even warrantless searches of distilleries” (p. 748). The breadth of legislation restricting searches to daylight hours leads Cuddihy to conclude that “the hidden unconstitutionality of nocturnal searches was the most certain feature of the amendment’s original understanding” (p. 748).

By 1791, there was also a consensus on the unreasonableness of no-knock entries in both colonial legislation and custom. “Every legal manual for American justices of the peace between 1788 and 1791 forbade unannounced, forcible entry to accomplish an arrest” and statutes restricted forcible entry unless a household refused to admit searchers or there were “necessary” circumstances. (p. 749). At least ten states had statutes restricting no-knock entries and the only applicable federal law, the Judiciary Act of 1789, required officers to adhere to the legal requirements of the states when engaging in a search or seizure.²²

Thus, according to Cuddihy’s research, the right embodied in the Fourth Amendment “reveals a depth and complexity that transcend” the textual prohibition “against unreasonable search[es] and seizure[s]” (p. 770). “To think of the amendment as a right against general warrants disparages its intricacy. The amendment expressed not a single idea but a family of ideas whose identity and dimensions developed in historical context” (p. 770). Foremost among the Framers’ thinking was the abolition of general warrants, multiple-specific warrants, nocturnal searches, and no-knock forcible entries.

B. *Unsettled Search and Seizure Topics*

While Cuddihy’s research reveals widespread opposition during the framing era to general warrants, multiple-specific warrants, nocturnal entries, and no-knock intrusions, his findings also show that other search and seizure concepts were extant, but not at the forefront of the Framers’ consciousness when the Fourth Amendment was adopted. Two areas that remained unsettled in 1791 were probable cause and search incident to arrest.

22. P. 750. In *Wilson v. Arkansas*, 514 U.S. 927, 933 (1995), the Court relied in part on this history to hold that the knock and announce rule is “a part of the reasonableness inquiry under the Fourth Amendment.” *Id.* at 929.

1. *Probable Cause*

Cuddihy concludes that ideas surrounding probable cause developed significantly between the 1750s and 1791. However, by the time of ratification, probable cause did not have a single meaning and its definitions were sometimes conflicting. A nascent concept of probable cause developed between the late sixteen hundreds and 1750, but it did not yet require strong judicial sentryship. In Britain, Parliament controlled the development of probable cause through statutes (p. 423). By 1723, developments had been made through antismuggling acts, which required “formal complaints under oath,” and through excise acts, which called for declarations of “the grounds of . . . knowledge or suspicion” (p. 423). The colonies did not progress much further than Britain, with the greatest strides being made by Maryland and Massachusetts (pp. 425–26). Smallpox, clothing, and baggage searches began in the 1750s, followed by searches for military deserters, game poaching, and the excise, with the Massachusetts General Court requiring specific warrants for each (pp. 337–38). These laws, which Cuddihy asserts were the “direct statutory ancestors to the specific warrant clause,” required informants to swear under oath that “they knew of probable illegality at the place alleged,” though they did not allow judges to withhold warrants (pp. 337–38).

By the 1760s, British legal scholars and commentators had taken up discussion of probable cause and its requirements. William Blackstone argued for judicial discretion to issue arrest warrants, saying that a magistrate “is a competent judge of the probability offered to him of . . . suspicion” (p. 581; internal quotation marks omitted). Despite comments by Blackstone, *London Magazine*, and other commentators, Cuddihy finds that these discussions represented the extreme of thought on probable cause, rather than the norm, and furthermore, that these ideas were not carried out in practice (p. 581).

In 1764, the Sugar Act added a new dimension to probable cause in relation to warrantless seizures of ships. Section 46 of the Sugar Act precluded lawsuits by ship owners if a judge found probable cause retroactively (p. 586). The inability to sue, even when ship owners had been financially damaged by the seizures, led to discontent over the use of probable cause to protect officials from groundless seizures, and this discontent intensified as the power to search expanded to naval officers. Litigation over the Sugar Act often centered around the use of retroactive probable cause as a shield for customs officials, and lawsuits over two ship seizures, Henry Laurens’s *Active* and John Hancock’s sloop *Liberty*, were widely publicized throughout the colonies (p. 590). While the discussion of probable cause relating to warrantless ship seizures did not itself create a cohesive understanding of probable cause, it does reveal that the concept had applicability in the case of both warrantless and warrant-required searches.²³

23. See Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 960–65 (1997) [hereinafter Maclin, *Complexity*].

State constitutions took the next step in the development of probable cause in the 1770s. In particular, Virginia's constitution implemented a strong version of probable cause by requiring warrants be supported by "evidence of a fact committed."²⁴ Virginia's formulation of search and seizure doctrine influenced other state constitutions, and the Virginia convention's proposal for the Fourth Amendment would become the "core recommendation" considered by James Madison.²⁵

Ultimately, Cuddihy finds that the meaning of probable cause remained unsettled and at odds with itself by 1791. The lack of a precise definition of probable cause is not surprising. Despite centuries of development, the concept of probable cause "never occasioned the intensity or depth of thought, adjudication, and legislation" that general warrants had (p. 771). "Why debate probable cause for a specific warrant to search one house when a general warrant laid entire towns open to government purview?" (p. 771). While legal commentators and state laws were advocating for judicial sentryship, requiring findings of "due and satisfactory Cause and Suspicion" or "reasonable cause of suspicion,"²⁶ Cuddihy concludes that these advancements continued to be experimental and outside of normal practice (p. 756). Congressional acts also were equivocal, with the Collection Act of 1789 providing no discretion to judges issuing warrants, while Hamilton's Excise Act in 1791 required "reasonable cause of suspicion to be made out to the satisfaction of . . . [a] judge or justice" (p. 757; alteration in original, internal quotation marks omitted). Textually, "probable" represented a looser standard than current formulations of "preponderance of the evidence," or a "more-likely-than-not" standard. Finally, definitions of probable cause

24. P. 604. Virginia's Constitution of June 12, 1776 read, "That general warrants whereby an officer may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive and ought not to be granted." P. 604.

25. P. 686. In 1790, the Virginia convention recommended that the "national government restrict itself to specific warrants . . . [and also] ground them on formal informations under oath 'of evidence of a fact committed.'" P. 686. The decision to exclude the phrase "of evidence of a fact committed" from the final draft of the Fourth Amendment is not discussed by Cuddihy, but has been found to be significant by Thomas Davies. See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 703–06 (1999) (explaining that under the common law, criminal arrest or search warrants had to include an allegation that an offense "in fact" had occurred, as well as "probable cause of suspicion;" the absence of any requirement in the Fourth Amendment of "an allegation of an offense 'in fact,' seems geared specifically to customs searches and indicates the federal Framers' specific concern with regulating revenue searches"). Professor Davies provides a thorough discussion on this topic in a recent article. See Thomas Y. Davies, *How the Post-Framing Adoption of the Bare-Probable-Cause Standard Drastically Expanded Government Arrest and Search Power*, L. & CONTEMP. PROBS., Summer 2010, at 1, 1 (explaining that framing-era search or arrest authority depended upon a "foundational accusation" that a crime actually had been committed "in fact;" the legal principle that probable cause alone was sufficient justification for a warrantless arrest or search did not emerge until long after the framing era).

26. P. 756. Benjamin Gale, a Connecticut justice of the peace, advocated for warrants "based on oath, and obtainable only if the informant was of substantial character, spoke from direct knowledge, and was not vindictively motivated," while statutes in Connecticut, New York, and New Jersey required judges to find "reasonable cause of suspicion." Pp. 755–56.

ranged from “likely” to “possible” to “credible” (p. 757). By 1791, differing concepts of probable cause “remained in force.”²⁷

2. *Search Incident to Arrest*

An official’s authority to search the surrounding location incident to an arrest warrant was another area of ambiguity in Fourth Amendment history.²⁸ Cuddihy’s research shows that most British legal experts assumed limits on searches incident to arrest (p. 578). For example, Chief Justice Charles Pratt “interpreted the common law as an implied prohibition of seizure incident to arrest” and insisted in 1763 that officers could “apprehend nothing but the Person” when effectuating an arrest (p. 578). However, here too, legal commentary did not match actual practice, with arrest warrants occasioning “not just entry but searches and seizures . . . [which] occurred not only during arrests but in a spacious periphery about them” (pp. 578, 417–19). Doctrine on searches incident to arrest saw almost no development during the 1780s and by 1791 still remained unsettled or unstated (pp. 664, 768).

Cuddihy credits the underdevelopment of the probable-cause standard and commentary on searches incident to arrest to the dominance of the general warrant up until the early 1780s. It was not until 1782 that the specific warrant had gained enough ground to allow consideration of subtler aspects of search and seizure doctrine, and thus “aspects of search and seizure beyond general warrants became the objects of neither law nor ideology” (p. 435). Before 1782, “general warrants had been the overriding threat to privacy and had siphoned off the commentary and thought that milder techniques of search and seizure might have attracted” (p. 771). It is therefore unsurprising that the doctrines surrounding probable cause and searches incident to arrest remained underdeveloped by 1791.

C. *The Limitations of a Historical Inquiry*

Probable cause and search incident to arrest may have remained underdeveloped in 1791, but there are other topics where history provides scant insight on the Framers’ thinking about particular types of searches and seizures. In the modern era, the Court has confronted cases concerning vehicle searches and searches of persons. Individuals, on and off the Court, have insisted that constitutional search and seizure doctrine be grounded on framing-era thinking. History, however, will not be helpful in resolving the

27. P. 758. Like the Framers, the modern Court has not offered an exact definition of probable cause. The Court has stated that “[a]rticulating precisely what . . . ‘probable cause’ mean[s] is not possible.” *Ornelas v. United States*, 517 U.S. 690, 695 (1996). The Court has instructed that probable cause and its counterpart “reasonable suspicion” should not be viewed as legal technicalities. Instead, the Court has embraced a totality-of-the-circumstances model for determining whether probable cause exists in a particular case. *See Illinois v. Gates*, 462 U.S. 213 (1983).

28. The scope of an officer’s authority to search incident to arrest has remained an unpredictable and controversial subject for the Court. *See infra* Part III.

questions presented by these cases because the historical record does not provide a sufficiently clear view of the Framers' views.

1. *Vehicle Searches*

Evidence of a legal consensus for vehicle searches is nonexistent. Cuddihy finds that the Framers' thoughts regarding vehicle searches are unknown, and neither legal rulings nor legislation provides answers (p. 767). In a footnote Cuddihy lays out the case law and legislation, which consists of three pieces of evidence.²⁹ None of this evidence provides a full understanding of a framing-era consensus regarding vehicles.

Moreover, the extent to which the Framers analogized searches of carts and wagons to warrantless searches of ships is "unknowable" (p. 767). The Collection Act of 1789 allowed ships to be searched without warrant, and Cuddihy identifies three possible reasons behind this exemption: (1) a ship's mobility allowed for the removal of evidence while a warrant is being sought; (2) ships were commercial spaces; and (3) privacy was diminished by the number of shipmen in a small space (pp. 767–68). While twentieth century cases, such as *Carroll v. United States*,³⁰ have cited mobility as the prime justification for warrantless ship and vehicle searches, Cuddihy concludes it is not possible to determine the Framers' thoughts on the constitutionality of warrantless searches of carts and wagons.

2. *Body Searches*

History is equally unhelpful in illuminating framing-era thought on personal searches. Cuddihy finds that body searches accompanying arrests "had been thoroughly established in colonial times, so much so that their constitutionality in 1789 can not be doubted" (p. 752). However, after 1776, most evidence of personal searches separate from arrest had wartime origins and involved searches of Tories, not regular searches of citizens (p. 752). To the extent that war had led to personal searches, Cuddihy finds them an unreliable indicator of the Framers' thought (p. 769). Legal treatises and commentary also provide little help. Benjamin Gale protested warrantless searches of highway travelers' saddlebags, pockets, and carriages, saying it was better to trade a little with the enemy than suffer the loss of "essential rights of a Free State" (p. 752). Besides Gale's comment, however, Cud-

29. P. 767 n.388. The historical record on "searches of carts and other wheeled conveyances is sparse." P. 767 n.388. There was one trial in Albany, New York, *Pretty v. Ankus*, where a court upheld a seizure of contraband pelts found on a cart without discussing the legality of the search. P. 767 n.388. Cuddihy also cites legislation enacted during the revolution "commanding searches of all suspicious wagons or conveyances." P. 767 n.388. Finally, he cites a 1780 Pennsylvania court ruling "against a general warrant to search ships for deserters" and a 1768 Massachusetts attorney general opinion stating that the authority to observe the "unloading of ships did not extend to searches below decks." P. 767 n.388.

30. 267 U.S. 132, 153 (1925) (analogizing vehicles to ships, claiming vehicle and ship searches did not require warrants because they "can be quickly moved out of the locality or jurisdiction in which the warrant must be sought").

dihy's research unearths little additional data on personal searches. To the extent that judges would like to ground personal searches in history, Cuddihy finds that personal searches are another type of intrusion that received little attention during the framing era.

D. Did the Framers Intend a General "Reasonableness" Standard?

For the past few decades, members of the Court—most notably Chief Justice Rehnquist and Justice Scalia—have insisted that an ad hoc “reasonableness” balancing model is the ultimate test for all search and seizure cases. Under this model, a Fourth Amendment claim is upheld only when police act irrationally. If the Court can identify any plausible goal or reason that promotes law enforcement interests, the police search or seizure is normally deemed reasonable. Proponents of this view repeatedly note that the text of the amendment, as well as the history surrounding its adoption, does not require that law enforcement officials obtain warrants prior to every search or seizure. Under this theory, the first clause, the Reasonableness Clause, declares a freedom from unreasonable searches and seizures. The second clause, the Warrant Clause, merely specifies the form and content of search and arrest warrants.

The opposing view is the “warrant preference” rule. This view contends that the Warrant Clause modifies the first clause.³¹ Although not an absolutist position, this theory holds that a warrant is a necessary precondition of a reasonable search, unless there is a compelling reason for proceeding without one. While the warrant preference rule is not mandated by the text, proponents of this rule argue that history and the Framers' experience with discretionary searches support the view that a search is unreasonable unless authorized by a judicial warrant.³²

Cuddihy's research reveals that an ad hoc reasonableness standard was not envisioned by the Framers. According to Cuddihy, the concept of “unreasonable searches and seizures” was adopted by the Framers because they “shared a general consensus on what those categories were” (p. lxxv). “Legislation, case law, legal treatises, pamphlets, newspapers, constitutional debates, and correspondence in America during the 1780s condemned not only the general warrant but also certain other methods of search and seizure so consistently that their constitutional designation as unreasonable would have been almost superfluous” (p. lxxv). In the minds of the Framers, “categories of unreasonable search and seizure were both multiple and identifiable,” and a consensus existed regarding general warrants, multiple-specific warrants, nocturnal searches, and no-knock entries (pp. 771–72). Despite the book's in-depth review of the intellectual and political developments in search and seizure doctrine, the history unearthed by Cuddihy does

31. See *United States v. Rabinowitz*, 339 U.S. 56, 83 (1950) (Frankfurter, J., dissenting).

32. *Id.* at 70 (“[T]he framers said with all the clarity of the gloss of history that a search is ‘unreasonable’ unless a warrant authorizes it, barring only exceptions justified by absolute necessity.”).

not demonstrate the intention or evolution of a “reasonableness” theory for deciding cases.

If one must identify a central concern of the Framers, Cuddihy’s findings reveal that “reasonableness” was not the goal they had in mind. Instead, “[p]rivacy was the bedrock concern of the amendment, not general warrants” (p. 766). The concept of privacy from federal intrusion was shaped by centuries of promiscuous searches in Britain and the colonies, and is what the Framers endeavored to protect by adopting the Fourth Amendment (p. 766). The Framers could not, in the year 1791, foresee modern search and seizure developments, and Cuddihy’s book indicates that if there is any guidance history can give us it is that the concept of privacy was at the forefront of the Framers’ thinking and should be in our minds as we encounter new Fourth Amendment cases.

II. SCHOLARLY REACTION

Cuddihy’s detailed examination of framing-era sources has rightly garnered much attention by criminal procedure scholars.³³ Because history is “an argument without an end,”³⁴ Cuddihy’s conclusions have unsurprisingly also prompted disagreements from Fourth Amendment scholars. This Part examines the writings of two scholars, Thomas Davies and Fabio Arcila, who have offered a different interpretation of the Fourth Amendment’s history.

A. Thomas Davies

In 1999 Professor Thomas Davies published an article documenting his research and conclusions on the history of the Fourth Amendment.³⁵ Over two hundred pages, Davies’s article is outstanding; it is one of the best articles ever written on the Fourth Amendment.³⁶ Professor Wayne LaFave has described it as “the most comprehensive, balanced and objective treatment of the origins of the Fourth Amendment and their significance for contemporary interpretation of the Amendment.”³⁷ When the *Michigan Law Review* celebrated its one hundredth anniversary, Professor Yale Kamisar selected Davies’s article as one of the best ever published in the journal.³⁸ Like Cud-

33. A quick Westlaw search reveals that *Origins and Original Meaning* has been cited in at least 106 different law review articles.

34. WEBSTER’S NEW WORLD DICTIONARY OF QUOTABLE DEFINITIONS 259 (Eugene E. Brussell ed., 2d ed. 1988) (quoting Pieter Geyl).

35. Davies, *supra* note 25.

36. Davies’s article is comparable with Anthony G. Amsterdam’s *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974), and Yale Kamisar’s *Does (Did) (Should) The Exclusionary Rule Rest on a “Principled Basis” Rather than an “Empirical Proposition”?*, 16 CREIGHTON L. REV. 565 (1983).

37. 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE, § 1.1(a), at 5 n.1 (4th ed. 2004).

38. See Yale Kamisar, *The Writings of John Barker Waite and Thomas Davies on the Search and Seizure Exclusionary Rule*, 100 MICH. L. REV. 1821, 1821 (2002).

dihi, Davies examined an enormous number of original sources. Indeed, Davies acknowledges that Cuddihy's "thorough research" was of "immense value" to him, and that he learned much from Cuddihy's work.³⁹ However, Davies does disagree with several of Cuddihy's conclusions.⁴⁰

It is impossible to summarize Davies's article in a sentence or two. For present purposes, it is important to note that he concludes that "the Framers did not perceive the problem of search and seizure authority in the same way we now do."⁴¹ According to Davies, the Framers were concerned "almost exclusively about the need to ban house searches under general warrants."⁴² He finds "that the Framers understood 'unreasonable searches and seizures' simply as a pejorative label for the inherent illegality of any searches or seizures that might be made under general warrants," and that they "did not address warrantless intrusions at all in the Fourth Amendment."⁴³ Equally significant, Davies finds no historical evidence for interpreting the amendment as embodying a broad "reasonableness" concept.⁴⁴ Another central theme of Davies's article is that nineteenth-century developments undermined the premises and expectations of the Framers regarding search and seizure law. Finally, Davies posits that any attempt to return to the original meaning "would subvert the larger purpose for which the Framers adopted the text; namely to curb the exercise of discretionary authority by officers."⁴⁵ Given his conclusions, Davies finds that Cuddihy's work, along with the writings of Nelson Lasson, Akhil Reed Amar, and Telford Taylor, to be "seriously flawed" because they have "taken for granted that the Framers must have intended to create a *comprehensive* constitutional standard or principle that would reach all searches or seizures conducted by officers, with or without warrant."⁴⁶

Davies's narrow view of the Framers' intent means there are large areas of disagreement between him and Cuddihy. However, despite the significant differences, Cuddihy and Davies share common ground on the underlying vision of the Fourth Amendment and the extent to which history can provide guidance for modern search and seizure doctrine.

39. Davies, *supra* note 25, at 569 n.40.

40. *Id.*

41. *Id.* at 551.

42. *Id.*

43. *Id.*

44. *See, e.g., id.* at 736 (describing that history does not support either the warrant preference or the generalized-reasonableness construction, and that the latter theory "is especially distant from the Framers' meaning"); *id.* ("There is no reason to think [the Framers] meant for 'reasonableness' to be understood as a flexible, relativistic standard for the exercise of discretionary authority.")

45. *Id.* at 556.

46. *Id.* at 590 (citing LASSON, *supra* note 2; TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION: SEARCH, SEIZURE, AND SURVEILLANCE AND FAIR TRIAL AND FREE PRESS (1969); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994)).

1. *Areas of Disagreement: What Did
“Unreasonable Searches and Seizures” Mean to the Framers?*

Davies takes issue with Cuddihy’s historical analysis of the first clause of the amendment, arguing that Cuddihy has “finessed the absence of evidence of a historical reasonableness standard by describing the entire development of Anglo-American search and seizure law leading up to the framing as though it constituted a development of an overarching ‘concept’ of unreasonable searches and seizures.”⁴⁷ Instead, Davies writes that the amendment’s use of “unreasonable search and seizure” only prohibited searches of houses by general warrant and does not extend to broad categories of search and seizure.⁴⁸

a. *Disagreement over the Appearance of
“Unreasonable Searches and Seizures”*

Davies makes much of the fact that the phrase “unreasonable searches and seizures” first appeared in the Massachusetts constitution in 1780.⁴⁹ The phrase’s late appearance in the framing era is an indication to Davies that a broad concept of reasonableness did not develop over a long period of time.⁵⁰ Cuddihy replies that this interpretation ignores too much history. Cuddihy finds that the term “reasonable” or “unreasonable” was used in 1447 when “leaders of the London Company of Tailors protested that officials of the Drapers’ Company had searched their houses ‘with outen matter [i.e., matter] or cause reasonable’” (p. 778; internal quotation marks omitted). He also notes that in 1738 the Virginia legislature “forbade ‘unreasonable seizures and distresses’” (p. 778). Cuddihy does concede, however, that before 1780 search and seizure was rarely described in terms of reasonableness (p. 778). Ultimately, Cuddihy believes that Davies’s focus on the use of the term “unreasonable” in 1780 improperly dismisses decades of historical evidence that gave meaning to the amendment’s principal clause.

b. *Disagreement over Whether the Fourth Amendment
Only Covers Houses or Additional Locations*

Davies argues that, historically speaking, there is no broad concept of unreasonable search and seizures; the amendment was only intended to prohibit Congress from authorizing general searches of houses. The Fram-

47. *Id.* at 592 n.107.

48. *Id.* at 603.

49. *Id.* at 595. The Massachusetts clause begins, “[E]very subject has a right to be secure from all unreasonable searches and seizures of his person, his house, his papers, and all his possessions.” *Id.* (alteration in original omitted) (internal quotation marks omitted).

50. *Id.* at 595–96. Davies was responding to Cuddihy’s dissertation manuscript when he wrote *The Original Fourth*. In his book, Cuddihy responds to Davies in an afterword. P. 777.

ers “were concerned that legislation might make general warrants legal in the future, and thus undermine the right of security in person and house.”⁵¹ As support for this thesis, Davies first looks at the concerns documented in pre-revolutionary controversies.⁵² He finds it significant that in *Paxton’s Case*, James Otis only argued for the illegality of general warrants in relation to homes and not as applied to warehouses or ships, even though Otis was representing merchants who were also owners of ships and warehouses.⁵³ Furthermore, Davies notes other commentators of the period—John Dickinson, Samuel Adams, and William Henry Drayton—only criticized writs of assistance as they applied to houses.

Davies next looks to the treatment of commercial buildings during the framing era. He finds that there is little support for the belief that commercial buildings were part of the original Fourth Amendment because, while there were complaints over general writs used on warehouses, “the record does not indicate that those complaints ever became part of the *legal* grievance over general warrants.”⁵⁴ The lack of legal arguments regarding commercial spaces is the “silence,” or the “dog that didn’t bark,” when deciphering the amendment’s original meaning.⁵⁵ For Davies, the silence means that “the Framers understood legislative authority for official inspection of commercial premises did not violate any common-law principle comparable to the castle doctrine.”⁵⁶

Additionally, Davies finds ships were not listed in the first clause of the amendment for a good reason: the Framers believed admiralty law governed the regulation and inspection of ships.⁵⁷ According to Davies, ship searches cannot be considered part of the original Fourth Amendment.⁵⁸ Unlike Cuddihy, Davies does not find complaints of ship seizures, such as those of Henry Laurens and John Hancock, add to our knowledge of probable cause or serve as examples of opposition to general searches. Instead, Davies finds these episodes are examples of discontent over “‘customs racketeering’ in the form of hypertechnical application of customs rules or forfeiture proceedings based on perjured testimony from informers.”⁵⁹

These arguments and the conclusion that the Fourth Amendment covers only houses are at odds with Cuddihy’s findings. Cuddihy agrees the home was a primary focus of the Fourth Amendment and that the effects of

51. Davies, *supra* note 25, at 590.

52. *Id.* at 601.

53. *Id.* at 601–02.

54. *Id.* at 608.

55. *Id.*

56. *Id.* The “castle doctrine” is the idea that a man’s house is his castle, protected from unwanted intrusions by the government. Castle doctrine played a large part in search and seizure rhetoric and was used to bolster arguments in Britain and the United States against unreasonable searches and seizures in the home.

57. *Id.* at 605–08.

58. *Id.* at 605.

59. *Id.* at 604.

general warrants and writs of assistance on the home incited the most discussion and discontent (p. 766). The concept of a man's house being his castle held a significant place in framing-era rhetoric, and Cuddihy acknowledges the importance of that concept (pp. lix–lxvi). However, he also asserts that ships, like commercial buildings, were intended to receive some level of protection (p. 746). In particular, Cuddihy finds that discontent over customs searches of ships shows that “Americans increasingly regarded not only houses but ships as castles” (p. 591). Cuddihy's theory on searches of ships draws on federal legislation. He notes that section 20 of the Judiciary Act of 1789 “gave federal district courts ‘exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction,’ including over all seizures made under U.S. law on the high seas and in harbors” (p. 782). Thus, Cuddihy maintains, the problem with Davies' view on ship searches is that probable cause had already been an essential inquiry under admiralty law, and that “Section 20 seems not to extinguish probable cause for maritime seizure but to afford potential for its operation” (p. 782). Cuddihy concedes, however, that the level of protection afforded ships and commercial buildings was ambiguous, and that “[s]tructures [were] afforded the privacy of houses to the extent that they resembled them. Dwelling houses were castles, but ships were not, and places of business affecting the public interest were somewhere in between” (pp. 743–46).

*c. Disagreement over Whether Warrantless Searches Are Included
in the Original Understanding of the Fourth Amendment*

Beyond issues of location covered by “unreasonable search and seizure,” Davies also argues that the amendment did not cover warrantless searches; it was intended to prevent the issuance of general warrants.⁶⁰ To support the point, Davies scrutinizes common-law search and seizure doctrine; specifically, he analyzes the authority of peace officers to engage in warrantless searches.

At the Fourth Amendment's framing, Davies finds that the duties of peace officers were narrow. “Constables were expected to preserve order by keeping an eye on taverns, controlling drunks, apprehending vagrants, and responding to ‘affrays’ (fights) and other disturbances”⁶¹ An officer's authority to make discretionary, warrantless arrests was very limited and required that he be certain of his facts.⁶² Warrantless searches were also very restricted. Absent exigency, common-law sources “did not identify *any* positive justification for a warrantless search of a house.”⁶³ In order to conduct searches of houses officers had to be given orders from a justice of the

60. *Id.* at 600–11.

61. *Id.* at 621.

62. *See id.* at 632–33.

63. *Id.* at 646.

peace.⁶⁴ The only means a justice of the peace had for issuing instructions to officers was through a warrant.⁶⁵ Silence regarding an officer's warrantless authority to enter houses for arrests or search, coupled with warrant requirements in order to direct their actions, leads Davies to conclude that the Framers understood searches and seizures could only be carried out by valid warrants.⁶⁶ Therefore, Davies concludes, the Framers only sought to restrict searches and seizures by general warrant.⁶⁷

Cuddihy concedes that the Framers did conceive of some warrantless searches being constitutional, but finds that the "constitutional scope for a major category of those searches cannot be calibrated, however, because . . . the evidence [is] inadequate" (p. 768). The legality of some warrantless searches, however, does not dissuade Cuddihy from believing that the Framers considered most warrantless searches unreasonable. Cuddihy finds support for this belief in the history of ship searches (pp. 591–92), but also in reaction to excise searches which he claims were "almost synonymous" with warrantless searches (p. 780). Regarding house-to-house searches, Cuddihy says that warrantless and warrant-required house searches were "interwove[n] to the point of interpenetration" (p. 781). Therefore, where Davies finds silence, Cuddihy finds evidence. In particular, Cuddihy draws on three declarations by the Continental Congress regarding customs searches as support for his view that warrantless intrusions are covered by the amendment.⁶⁸ Regarding legal commentators, Cuddihy says that "[o]f the fifteen pamphleteers and essayists who addressed search and seizure in the aftermath of the constitutional convention of 1787, nearly half . . . blasted warrantless house searches as well as general warrants" (pp. 780–81).

64. *Id.* at 623–24.

65. *Id.*

66. *Id.* at 649. Professor Steinberg disagrees with Davies's argument regarding warrantless intrusions. Steinberg finds that "the lack of debate about warrantless house searches likely occurred because in early America, 'the common law apparently provided no justification for a search of a house beyond the ministerial execution of a valid search warrant.' In other words, everyone agreed that warrantless house searches were impermissible." David E. Steinberg, *The Original Understanding of Unreasonable Searches and Seizures*, 56 FLA. L. REV. 1051, 1082 n.230 (2004) (citation omitted).

67. Davies, *supra* note 25, at 649–50.

68. P. 779. The first two declarations were made on October 21, 1774, and October 26, 1774, and were addressed to the American people and to King George III, respectively. P. 779. In one declaration, Congress "denounced the power of the Commissioners of Customs 'to break open and enter houses without the authority of any civil magistrate founded on legal information.'" P. 779. The third declaration was also made on October 26, 1774, in which Congress described excises to Quebec as " 'the horror of all free states . . . the most odious of taxes' whereby 'insolent' excise-men would enter 'houses the scenes of domestic peace and comfort and called the castles of English subjects in the books of their law.'" P. 779 (alteration in original).

2. *Agreement: The Use of History in Modern
Fourth Amendment Jurisprudence*

Davies and Cuddihy clash over the concept of “unreasonable search and seizures” and spar over the scope of the amendment. Despite these opposing interpretations, we find their differences are less important than their agreement on a larger point. When it comes to the question of how history can help the Supreme Court decide modern Fourth Amendment issues, Cuddihy and Davies share common ground.

Like Cuddihy, Davies concludes that illuminating the amendment’s history has limits because the Framers could not have anticipated the developments that have occurred in search and seizure doctrine.⁶⁹ Modern changes in criminal procedure, including the increase in police officer discretion and emphasis on legislative codes instead of the common law, have “destroyed the common-law premises that had grounded the Framers’ belief that a ban against general warrants would suffice to ensure the right to be secure in person and house.”⁷⁰ Instead, Davies believes the “value of recovering the authentic history of search and seizure doctrine lies largely in the broader perspective it provides.”⁷¹

The broader perspective provided by an understanding of history that Davies identifies is not significantly different than Cuddihy’s identification of “privacy” as being the Framers’ main concern. The underlying vision of the amendment, according to Davies, is checking the discretionary power of law enforcement officials. The Framers “focused on banning general warrants because they perceived the general warrant as the only means by which discretionary search authority might be conferred.”⁷² Davies believes that “[i]f there is any term in the text that might be described as the core or essence of the provision, ‘right to be secure’ is the leading candidate.”⁷³ Modern interpretations of the amendment should not “render the right to be secure a practical nullity.”⁷⁴

B. *Fabio Arcila*

Professor Fabio Arcila describes Cuddihy’s scholarship as “the leading historical account of the Fourth Amendment,”⁷⁵ and it is evident from Ar-

69. Compare pp. 771–72, with Davies, *supra* note 25, at 724.

70. Davies, *supra* note 25, at 725.

71. *Id.* at 748.

72. *Id.* at 741. Davies continues: the Framers “did not mean to approve of, nor facilitate the development of, warrantless discretionary authority; rather, they did not conceive of the possibility that future generations would confer discretionary authority on ordinary officers by means other than general warrants.” *Id.*

73. *Id.*

74. *Id.*

75. Fabio Arcila, Jr., *In the Trenches: Searches and the Misunderstood Common-Law History of Suspicion and Probable Cause*, 10 U. PA. J. CONST. L. 1, 5 (2007) [hereinafter Arcila, *Trenches*].

cila's many articles that Cuddihy has been an influential starting point for Arcila's research. Although Arcila recognizes Cuddihy's contributions, the two arrive at different places after examining the historical record regarding probable cause.

As an initial matter, Arcila agrees with Cuddihy that the historical record shows an unsettled and equivocal understanding of probable cause during the period between 1787 and 1825, which Arcila calls the "Framers' era."⁷⁶ Their conclusions diverge, however, on the question of judicial independence to issue warrants. For example, during the period between 1777 and 1782, Cuddihy finds that judicial sentryship "was still the exception" and that many state statutes "made the granting of the warrant obligatory rather than optional" (p. 756). Around the time of the Fourth Amendment's adoption, Cuddihy concludes that "probable cause was in a state of flux" because two federal statutes—the Collection Act of 1789 and the Excise Act of 1791—"embraced opposing concepts of judicial sentryship and different thresholds of reasonableness for search warrants" (p. 768). While the Collection Act did not give magistrates discretion in administering warrants and placed legal obstacles in front of citizens in order to shield officers, the Excise Act of 1791 allowed for "reasonable cause of suspicion to be made out to the satisfaction of . . . [a] judge or justice" (p. 757). For Cuddihy, these opposing concepts of probable cause show "not one but several 'original meanings [of] probable cause'" (p. 768).

Arcila, on the other hand, ultimately concludes that judicial sentryship, although a goal articulated by the Framers, was not part of the day-to-day practice of ordinary justices of the peace who issued warrants. While identifying an array of "legal elites" who advocated for the independence of judges, Arcila finds that "abundant reasons exist to believe that the non-elites who actually engaged in search warrant practice may not have followed" the guidance on judicial sentryship.⁷⁷ He examines American justice-of-the-peace manuals, legal treatises, legal forms, and search warrant forms, which he finds "easily could have led justices of the peace to believe that a sentryship role was, at most, optional."⁷⁸ Looking beyond the

76. *Id.* at 8. Regarding the meaning of probable cause during the framing era, Arcila writes that "the phrase 'probable cause' could easily have been equated with a mere unreasoned 'hunch,' rather than with a reasoned basis for belief grounded in an articulable set of underlying facts." *Id.* at 44. In a subsequent article, Arcila states that the concept of probable cause under the common law and in civil statutes remained "murky." Fabio Arcila, Jr., *The Framers' Search Power: The Misunderstood Statutory History of Suspicion & Probable Cause*, 50 B.C. L. REV. 363, 423 (2009) [hereinafter Arcila, *Search Power*].

77. Arcila, *Trenches*, *supra* note 75, at 24.

78. *Id.* at 24 (emphasis omitted). Arcila notes that the concept of judicial sentryship "may have significantly influenced the Framers and other elites of the legal profession. But evidence suggests that probable-cause sentryship may well have been treated quite differently in the lower courts, where non-elites implemented search and seizure law on a daily basis." *Id.* at 55. David Steinberg has taken issue with Arcila's treatment of judicial sentryship, finding that "Arcila describes warrant review in the black-and-white terms of 'sentryship' and 'ministerial,' [when] in truth, review of warrants probably often fell somewhere in the large gray area in between." David E. Steinberg, *Probable Cause, Reasonableness, and the Importance of Fourth Amendment History: A Response to Professor Arcila*, 10 U. PA. J. CONST. L. 1211, 1216 (2007). Furthermore, Steinberg

provisions of the Collection and Excise Acts to other framing-era civil-search statutes, Arcila concludes that the Excise Act's probable-cause formulation was exceptional and did not represent the Framers' views.⁷⁹ Thus, like Cuddihy, Arcila finds framing-era probable-cause doctrine to be unsettled. But Arcila argues that judges "may not" have exercised independence when issuing warrants,⁸⁰ and therefore concludes that judicial sentryship was not a major part of the original understanding of probable cause. In a later article, Arcila contends that it is not clear whether judges "would have inquired into the grounds of probable cause if, as was often the case, such information was not initially available."⁸¹ He also argues that because probable cause could be established by flimsy allegations during the framing era, the concept of probable cause did not offer "a meaningful level of search or seizure protection."⁸²

Arcila and Cuddihy also disagree on whether probable cause was required for warrantless searches. Unlike Cuddihy, who finds suspicion requirements for general searches of ships indicative of an evolving idea of probable cause, Arcila finds that the "Framers knew how to statutorily require prior suspicion, but consciously chose not to impose such a requirement for maritime customs searches."⁸³ While Cuddihy is unwilling to draw conclusions about the status of probable cause at the time of framing, Arcila reads history as confirming that probable-cause and suspicion requirements were not required to legitimize warrantless searches.⁸⁴ Indeed, he states that as a matter of text and history, "[t]he Framers never intended for the Fourth Amendment to impose any generalized suspicion requirement."⁸⁵

Arcila believes his historical conclusions help provide an answer to whether the Fourth Amendment requires a warrant to make a search constitutional. Specifically, Arcila contends his findings on the meaning of judicial sentryship and probable cause undermine arguments for the "warrant preference" rule.⁸⁶ While Arcila concedes that the suspicion and probable-cause

says that probable cause has always been a "fluid concept" that has evolved over time and that Arcila's characterization of probable cause dismisses the "clear trend . . . toward a thorough review process." *Id.* at 1216–17.

79. Arcila, *Search Power*, *supra* note 76, at 410–11 ("Hamilton's 1791 Excise Act is not broadly representative of the Framers' views for two reasons. First, the model it represented . . . is quantitatively rare, having been followed . . . in only three subsequent statutory acts, for a total of four. By contrast, the 1789 Collection Act model . . . was followed in at least 32 subsequent statutory acts, for a total of 33.")

80. Arcila, *Trenches*, *supra* note 75, at 55.

81. Fabio Arcila, Jr., *The Death of Suspicion*, 51 WM. & MARY L. REV. 1275, 1312 (2010) [hereinafter Arcila, *Death of Suspicion*].

82. *Id.* at 1314.

83. *Id.* at 1298–99.

84. *Id.* at 1303.

85. *Id.* at 1294. *But cf.* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 669 (1995) (O'Connor, J., dissenting) (noting that the Framers strongly opposed general searches without particularized suspicion); Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 528–29 (1995) (same).

86. *See generally* Arcila, *Death of Suspicion*, *supra* note 81.

requirements protect against governmental overreaching, he nevertheless asserts that the aggressive judicial sentryship that supporters of the Warrant Clause argue for is “at odds with an historical understanding of probable cause, in which it is likely that sentryship took an aggressive form only inconsistently at best, and may have often ranged from lax to essentially non-existent.”⁸⁷ Arcila believes that history supports an interpretation of the Fourth Amendment that comports with a “reasonableness” balancing model.⁸⁸

By concluding that evidence of weaker probable-cause standards implies the primacy of the Reasonableness Clause, Arcila dismisses the important points that Cuddihy’s (and Davies’) research reveals. Despite his review of thousands of sources, Cuddihy’s book does not reveal a developing concept of general reasonableness in the framing era as Arcila argues. As noted above, Cuddihy concludes that the term “unreasonable search and seizure” was not meant as a broad concept, but consisted of specific categories of search and seizure that had gained a consensus by 1791. Finally, Cuddihy’s review of history identifies an overarching principle of curbing government search and seizure discretion.⁸⁹ These findings undercut the view that the amendment was intended to embody a general reasonableness model.

III. THE SUPREME COURT AND FOURTH AMENDMENT HISTORY

The Fourth Amendment’s deep roots in the framing era mean that history inevitably has a certain attraction for some Justices when deciding search and seizure issues. Of all of the Justices who have served on the Court, Felix Frankfurter stands out as the one who “sought the fourth amendment’s meaning in its history”⁹⁰ Fittingly, a practice known to the Framers—unrestrained police searches of homes and businesses incident to arrest—prompted some of Frankfurter’s most memorable statements about history and the Fourth Amendment.⁹¹ Frankfurter’s reflections were an important part of a nearly century-long debate among the Justices over the scope of an officer’s authority to search incident to arrest. Starting in the late 1920s and continuing through the late 1960s, the Justices argued about the authority of the police to search premises in which an arrest was made.

87. Arcila, *Trenches*, *supra* note 75, at 59.

88. Arcila endorses Professor Amar’s claim that the Fourth Amendment is simply about “reasonableness.” Arcila, *Death of Suspicion*, *supra* note 81, at 1294–95 (citing Amar, *supra* note 46, at 782–85). Amar’s assertions have been thoroughly critiqued in numerous articles, including in Cuddihy’s afterword, and so will not be recounted here. Pp. 773–82; *see also* Davies, *supra* note 25; Donald Dripps, Akhil Amar on Criminal Procedure and Constitutional Law: “Here I Go Down That Wrong Road Again”, 74 N.C. L. REV. 1559 (1996); Maclin, *Complexity*, *supra* note 23.

89. Interestingly, Arcila states that “[l]imiting governmental discretion is probably the core Fourth Amendment value.” Arcila, *Death of Suspicion*, *supra* note 81, at 1326.

90. Amsterdam, *supra* note 36, at 397.

91. *See, e.g.*, United States v. Rabinowitz, 339 U.S. 56, 68–69 (1950) (Frankfurter, J., dissenting); Harris v. United States, 331 U.S. 145, 156–57 (1947) (Frankfurter, J., dissenting).

In 1981, the Justices fought over the power of the police to search vehicles incident to the arrest of a vehicle's occupant. *New York v. Belton* held that when police arrest the occupant of a car, they may, "as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."⁹² In the Court's latest rulings, *Arizona v. Gant*⁹³ and *Thornton v. United States*,⁹⁴ the Justices were divided over an officer's authority to search a car incident to the arrest of the driver. *Thornton* extended *Belton* and ruled that police could search the passenger compartment of a vehicle incident to the arrest of a person who had exited the vehicle. *Gant*, on the other hand, signaled a retreat from the direction of *Belton* and *Thornton*. Written by Justice Stevens, who sharply criticized the reasoning and holdings in *Belton* and *Thornton*, *Gant* announced a two-part holding: First, the Court held that the rule of *Belton* does not permit a search of a car "after the arrestee has been secured and cannot access the interior of the vehicle" at the time of the search. Second, adopting the rule Justice Scalia urged in his concurrence in *Thornton*, *Gant* concluded that "circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle."⁹⁵

In *Thornton* and *Gant*, Justice Scalia endeavored to have history guide his vote. In *Gant*, Scalia stated that "the historical scope of officers' authority to search vehicles incident to arrest is uncertain."⁹⁶ Because of this uncertainty, Justice Scalia looked to "traditional standards of reasonableness," and concluded "a vehicle search incident to arrest is *ipso facto* 'reasonable' only when the object of the search is evidence of the crime for which the arrest was made, or of another crime that the officer has probable cause to believe occurred."⁹⁷ Justice Scalia's conclusion that the historical scope of an officer's authority to search a vehicle incident to arrest is "uncertain" is fairly consistent with Cuddihy's findings, but the approaches taken by Scalia and Cuddihy to reach this conclusion are noticeably different.

Justice Scalia states that "numerous earlier authorities" support a general interest in seizing evidence relevant to the crime for which the suspect has been arrested.⁹⁸ However, Scalia only cites mid-nineteenth century and early twentieth century sources to support his claim. He concedes that historical sources support a "narrower focus" of an officer's search incident to arrest authority and he cites a 1758 essay on a constable's power and the influen-

92. 453 U.S. 454, 460 (1981).

93. 129 S. Ct. 1710 (2009).

94. 541 U.S. 615 (2004).

95. *Gant*, 129 S. Ct. at 1719 (internal quotation marks omitted).

96. *Id.* at 1724 (Scalia, J., concurring).

97. *Id.* at 1724–25.

98. *Thornton*, 541 U.S. at 629 (Scalia, J., concurring).

tial ruling in *Entick v. Carrington*.⁹⁹ Nonetheless, Justice Scalia finds that either a general interest in gathering evidence related to the crime of arrest or a narrow rule restricting an officer's search authority to preventing concealment or destruction of evidence "are plausible accounts of what the Constitution requires."¹⁰⁰ Because he finds "uncertainty" regarding the historical scope of an officer's power to search vehicles incident to arrest, Justice Scalia is willing to allow a general interest in evidence gathering to determine the outcome in *Thornton* and *Gant*.

Justice Scalia provides scant evidence on the Framers' view of a constable's power to search locations incident to arrest. Nor does he acknowledge the absence of evidence concerning the Framers' thinking on searches of wagons and carts. In fact, he offers "no historical evidence that automatic searches of places near arrestees for evidence of their crimes was, or would have been, acceptable to those who designed and adopted constitutional protection against unreasonable searches and seizures."¹⁰¹

In contrast to Scalia's analysis, Cuddihy's determinations concerning an officer's authority to search a location incident to arrest are specifically focused on the framing era. During the pre-revolutionary period, legal commentators did not recognize a constable's power to search an arrestee's home incident to arrest. Cuddihy explains that the "legal authors of 1761–76 agreed that houses could be broken into to consummate the arrest process, but they did not also say that houses could be searched during that process" (p. 578). "The assumption of most legal authorities, in other words, was that arrests and arrest warrants were not excuses to conduct general searches" (p. 578). Furthermore, in 1763, Chief Justice Charles Pratt, the author of *Entick v. Carrington*, "interpreted the common law as an implied prohibition of seizure incident to arrest" (p. 578). Pratt told William Pitt that while houses could be forcibly entered in cases involving felonies and flagrant situations, "the arresting officer could 'apprehend nothing but the Person' and thereby assumed that houses afforded privacy even in exigent circumstances" (p. 578). To be sure, constables did not always follow the teachings of framing-era legal experts; arrest warrants were occasionally used as means to conduct wide-ranging searches and seizures of homes and other premises (pp. 578, 419). In sum, "the arrest process permitted searches and seizures of vast scope in 1776," but a consensus was emerging among legal authorities that such intrusions "should be restrained" (p. 579).

Cuddihy reports that, after Independence, the scope of an officer's power to search incident to arrest remained unsettled. Between 1783 and 1789, neither the results from reported trials nor contemporaneous legal treatises had defined an officer's power to search a location incident to arrest. According to Cuddihy, "[T]reatises and cases said only that officials could

99. 95 Eng. Rep. 807 (1765). *Entick* held invalid the seizure of private papers pursuant to a search warrant. P. 453–58.

100. *Thornton*, 541 U.S. at 631 (Scalia, J., concurring).

101. James J. Tomkovicz, *Divining and Designing the Future of the Search Incident to Arrest Doctrine: Avoiding Instability, Irrationality, and Infidelity*, 2007 U. ILL. L. REV. 1417, 1459.

force open doors to serve arrest warrants, not if they could search after achieving entrance or how far” (p. 768). Therefore, although the historical sources of the framing era did not definitively resolve the question that we confront today, “[t]he men who wrote and ratified the Fourth Amendment assumed some ambit of search-incident-to-arrest, but they neglected to announce its perimeter” (p. 769).

Concededly, the quality and breadth of Cuddihy’s study has not been previously available to the Justices. Before Cuddihy, the Court cited Telford Taylor’s book as support for a broad interpretation of an officer’s power to search a home incident to arrest.¹⁰² Taylor claimed that the search of an “arrestee’s person and premises is as old as the institution of arrest itself,” and that this practice had “the full approval of bench and bar, in the time of George III.”¹⁰³ Indeed, Taylor wrote that there is “no evidence” that the persons who wrote the federal and early state constitutions “had in mind warrantless searches incident to arrest.”¹⁰⁴ The “original understanding” was that such searches “were quite normal and, in the language of the fourth amendment, ‘reasonable.’”¹⁰⁵

Cuddihy’s findings undermine Taylor’s assertion that there is “no evidence” that the Framers thought about searches incident to arrest. In addition, Davies has demonstrated the historical weakness of Taylor’s position. Davies’s research reveals that the common law recognized search warrants for stolen goods and permitted the seizure of “weapons or stolen property from the ‘possession’ of an arrestee as an ‘incident’ of a lawful arrest made with or without a warrant,” but that “those appear to have been the only forms of search authority recognized in framing-era common law.”¹⁰⁶ Davies has documented that the “[r]eported decisions regarding the allowable scope of search incident to arrest first became evident in court records during the late nineteenth century.”¹⁰⁷ He believes that the likely explanation for why courts started questioning police power to search a home or business incident to arrest was not that authority to search incident to arrest was taken for granted prior to the adoption of the Fourth Amendment, as Taylor asserts, but rather that state officers in the late 1800s had obtained ex officio power to make warrantless arrests and officers began “testing the limits of their expanded authority to make warrantless arrests and warrantless searches incident to them.”¹⁰⁸

Justice Scalia’s use of history in *Thornton* and *Gant* illustrates the pitfalls of deciding modern Fourth Amendment issues with a historical

102. United States v. Robinson, 414 U.S. 218, 233 n.3 (1973) (citing TAYLOR, *supra* note 46, at 44–45).

103. TAYLOR, *supra* note 46, at 28–29.

104. *Id.* at 39.

105. *Id.*

106. Davies, *supra* note 25, at 627.

107. *Id.* at 638 n.250.

108. *Id.*

analysis. But if the Court is adamant—as Scalia declared in *Houghton*—about consulting the Framers’ thinking on the subject of search incident to arrest, we believe that judges only make things worse by focusing on specific historical legal practices in order to identify the “original meaning” of the Fourth Amendment. “First, it is important to distinguish—as Justice Frankfurter did—between the use of background history to establish that the Framers of the Bill of Rights meant to limit or forbid a particular evil, and the use of background history to support the negative inference that they did not.”¹⁰⁹

Another problem with focusing on specific historical practices “is that modern judges have not been particularly successful in recounting the content of framing-era law.”¹¹⁰ Cuddihy’s scholarship reveals that the history of search and seizure law in Britain and America is too complex and insufficiently developed to provide clear answers for today’s cases.¹¹¹ Rather than deciding cases based on an enigmatic “original intent,” a better approach is to focus on the underlying value that the Framers sought to embrace when the Fourth Amendment was proposed. As one distinguished historian has written, “Bills of rights were educational documents; they provided the standards of certainty that enabled citizens to assess doubtful acts of government; and they worked best by inculcating the values they espoused among the people *and* their rulers.”¹¹² We know from Cuddihy’s work that the Framers wanted to protect privacy and control the discretionary search power of officials. That “original intent” cautions against allowing police the power to search a car incident to arrest of an occupant in the absence of probable cause.

CONCLUSION

The Fourth Amendment was adopted because the Framers experienced the suppression of liberty that came with discretionary searches and seizures. They knew that the privilege from unreasonable searches and seizures was essential to a free society. As Professor Kamisar rightly noted, “What good is freedom of speech or freedom of religion or any other freedom if law enforcement officers have unfettered power to violate a person’s privacy and liberty when he sits in his home or drives his car or walks the streets?”¹¹³

For those who want to study the history of search and seizure law, Cuddihy’s book “is the most ambitious history of the Fourth Amendment’s origins yet undertaken by a professional historian”—it *is* “essential

109. Amsterdam, *supra* note 36, at 397–98.

110. Davies, *supra* note 25, at 742.

111. See Cloud, *supra* note 8, at 1746.

112. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 324 (1996).

113. Yale Kamisar, *The Fourth Amendment And Its Exclusionary Rule*, THE CHAMPION, Sept./Oct. 1991, at 20, 21.

reading.”¹¹⁴ Cuddihy’s meticulous research provides a comprehensive understanding of the strengths and limits of a Fourth Amendment historical argument. His work helped to shape the last two decades of Fourth Amendment historical scholarship and will continue to do so with the publishing of *Origins and Original Meaning*. Anyone who studies Cuddihy’s book will emerge with a better understanding of why freedom was central to the Framers’ intent.

114. Cloud, *supra* note 8, at 1710, 1712–13.