

# The Role of History

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WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 602–1791*, (Oxford University Press 2009)

I became deeply interested in the Fourth Amendment<sup>1</sup> two decades ago. As an appellate litigator, I frequently briefed and argued search and seizure cases. At that time, a conservative majority held sway in the Supreme Court and was narrowing precedent that had favored criminal defendants. I had been looking for a voice, something to write about, and I finally found it in a series of cases construing the concept of a seizure of a person. I produced two articles on that topic, addressing then current Supreme Court cases.<sup>2</sup> I felt I had found an area of the law that truly interested me.

By 1991, *Michigan Department of State Police v. Sitz*<sup>3</sup> had been recently decided—wrongfully in my opinion. *Sitz* involved a DUI roadblock and the essential challenge was to the suspicionless nature of the stops. How could such stops be justified? It seemed to me that an essential promise of the Fourth Amendment was a requirement that the government have individualized suspicion of criminal activity in order to justify such intrusions. The *Sitz* majority, however, briefly dismissed that view and applied a balancing test to justify the intrusions.<sup>4</sup> So, I began to write about *Sitz* and, more generally, the role that individualized suspicion played in Fourth Amendment analysis. Then came the fundamental insight: What was the *constitutional* basis for my views? What support was there for my view beyond some intuition of what the Framers intended and how they

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<sup>1</sup> The Fourth Amendment provides:

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. U.S. CONST. amend. IV.

<sup>2</sup> Thomas K. Clancy, *The Future of Fourth Amendment Seizure Analysis after Hodari D. and Bostick*, 28 AM. CRIM. L. REV. 799 (1991); Thomas K. Clancy, *The Supreme Court's Search for a Definition of a Seizure: What is a "Seizure" of a Person Within the Meaning of the Fourth Amendment?*, 27 AM. CRIM. L. REV. 619 (1990).

<sup>3</sup> 496 U.S. 444 (1990).

<sup>4</sup> *Id.* at 449–50. In contrast, Justice Brennan in dissent argued: “Some level of individualized suspicion is a core component of the protection the Fourth Amendment provides against arbitrary government action.” *Id.* at 457. Brennan did not, however, provide a historical basis for his assertions. *Id.* at 457–59.

would view suspicionless stops of people? To understand the Fourth Amendment, I believed, one *must* know its history.

I stopped writing and read history for two or three years. At that time, there were a few historical accounts that were usually cited: Landynski;<sup>5</sup> Lasson;<sup>6</sup> and Taylor.<sup>7</sup> They were informative and remain so to this day. They are essential perspectives but they are rather short pieces that address the broad outlines of the past.

I felt that more was needed. In the formative years just before the Revolution, a series of British cases and the Writs of Assistance case influenced the Framers and those events have been repeatedly cited by the Supreme Court as important guides.<sup>8</sup> In addition to reading the cases and the aforementioned scholars' views of them, there were then two other important sources of historical information: Horace Gray's Appendix to *Quincy's Reports*<sup>9</sup> and M. H. Smith's book.<sup>10</sup> These two sources remain essential reading. Gray's focus was on the Writs of Assistance controversy in Massachusetts and its aftermath in that colony and elsewhere. Its focus is therefore on a narrow series of events close in time to the Revolution. Gray's work is nonetheless impressive for the depth of its treatment and the gathering of primary sources regarding the Writs of Assistance. Smith's work builds on Gray's but adds a somewhat broader perspective, including analysis of the evolution of the development of writs of assistance and general warrants in England.

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<sup>5</sup> JACOB W. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION* (1966).

<sup>6</sup> NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* (1937).

<sup>7</sup> TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION: SEARCH, SEIZURE, AND SURVEILLANCE AND FAIR TRIAL AND FREE PRESS* (1969).

<sup>8</sup> James Otis' argument in the Writs of Assistance case has often been cited by the Supreme Court. *See, e.g.*, *Frank v. Maryland*, 359 U.S. 360, 364 (1959); *Boyd v. United States*, 116 U.S. 616, 625 (1886). *See also* *Berger v. New York*, 388 U.S. 41, 58 (1967) (use of general warrants "was a motivating factor behind the Declaration of Independence"); *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting) (the revulsion was "so deeply felt by the Colonies as to be one of the potent causes of the Revolution"); *Harris v. United States*, 331 U.S. 145, 159 (1947) (Frankfurter, J., dissenting) (the abuses surrounding searches and seizures, "more than any one single factor[,] gave rise to American independence").

The principal English cases, *Wilkes v. Wood*, (1763) 98 Eng. Rep. 489 (K.B.), and *Entick v. Carrington*, (1765) 19 Howell's St. Tr. 1029, 1067, have also been repeatedly cited. *See, e.g.*, *Stanford v. Texas*, 379 U.S. 476, 484 (1965) (describing the *Entick* opinion as "a wellspring of the rights now protected by the Fourth Amendment"); *Boyd*, 116 U.S. at 626–27 (maintaining that it can be "confidently asserted" that the *Entick* case and its results "were in the minds of those who framed the Fourth Amendment").

<sup>9</sup> JOSIAH QUINCY, JR., *REPORTS OF CASES*, app. (1865).

<sup>10</sup> M. H. SMITH, *THE WRITS OF ASSISTANCE CASE* (1978). Smith's book has been accurately described as an "impressive accomplishment" and "a truly exhaustive study" of the English and colonial American history regarding the writs of assistance. Bruce H. Mann, *Smith: The Writs of Assistance Case*, 11 CONN. L. REV. 353, 354–55 (1979) (book review).

I continued my search for a broader perspective. Living in the Washington, D.C. area at the time gave me access to numerous libraries, including at the U.S. Supreme Court. There, in the stacks, I found an unpublished masters thesis by William J. Cuddihy.<sup>11</sup> No other source had such depth of research with citations to obscure sources and primary documents. I read it and cited it in my next article, published in early 1995, which summarized my understanding of history and examined the role of individualized suspicion in assessing the reasonableness of a search or seizure.<sup>12</sup>

Unknown to me at that time, Cuddihy had gone on to write a doctoral dissertation on the history of English and colonial search-and-seizure, which was submitted in 1990.<sup>13</sup> That unpublished dissertation was cited for the first time in a law journal article authored by Tracey Maclin in late 1994, wherein he described the dissertation as “monumental.”<sup>14</sup> It was then made famous when cited by Justice Sandra O’Connor in her dissent in *Vernonia School District 47J v. Acton*.<sup>15</sup> Citing Cuddihy’s work ten times in her opinion, Justice O’Connor described the dissertation as “one of the most exhaustive analyses of the original meaning of the Fourth Amendment ever undertaken.”<sup>16</sup>

The last fifteen years or so have seen a proliferation of scholarship on the history and meaning of the Fourth Amendment. That scholarship has taken many paths, with sometimes strongly worded claims about historical events and their meaning. Some claim insights that no one else has had. Broadly speaking, however, there remain two principal views regarding the history of the Fourth Amendment. The first is the conventional view of the Lasson-Landynski-Cuddihy camp, which has examined the broad sweeps of history and has found much that is complicated and contradictory. Nonetheless, they believe that some overall conclusions can be ascertained. Hence, as Landynski stated:

The first clause—“The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated”—recognized as already existing a right to freedom from arbitrary governmental invasion of privacy and did not seek to create or confer such a right. It was evidently meant to re-emphasize (and, in some undefined way,

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<sup>11</sup> William J. Cuddihy, *Search and Seizure in Great Britain and the American Colonies, from 1000 to 1791: A Comparative Study of Laws, Legal Opinion and Practice Respecting the Origins of the Fourth Amendment to the United States Constitution* (May 24, 1974) (unpublished M.A. thesis, California State University, Fullerton).

<sup>12</sup> Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483 (1995).

<sup>13</sup> William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602–1791* (1990) (unpublished dissertation).

<sup>14</sup> Tracey Maclin, *When the Cure for the Fourth Amendment is Worse Than the Disease*, 68 S. CAL. L. REV. 1, 15 (1994).

<sup>15</sup> 515 U.S. 646 (1995).

<sup>16</sup> *Id.* at 669.

strengthen) the requirements for a valid warrant set forth in the second clause. The second clause, in turn, defines and interprets the first, telling us the kind of search that is *not* “unreasonable,” and therefore not forbidden, namely, the one carried out under the safeguards there specified.<sup>17</sup>

Following this view, as recently stated by the Supreme Court, the analysis of reasonableness

begins, as it should in every case addressing the reasonableness of a warrantless search, with the basic rule that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.”<sup>18</sup>

The second view’s intellectual source is Telford Taylor, in his 1969 book, *Two Studies in Constitutional Interpretation*.<sup>19</sup> Taylor asserted that the Amendment was designed primarily as a limitation on the issuance of warrants and that the Framers took for granted the existence of warrantless searches because experience had given them no cause to be concerned about them.<sup>20</sup> Taylor added that the drafting process of the Fourth Amendment “reinforces the conclusion that it was the warrant which was the initial and primary object of the [A]mendment.”<sup>21</sup> He opined that neither the legislative history of the Amendment nor any other history “sheds much light on the purpose of the first clause. Quite possibly it was to cover shortcomings in warrants other than those specified in the second clause; quite possibly it was to cover other unforeseeable contingencies.”<sup>22</sup> Taylor concluded that the Amendment was designed to authorize warrants and was not a safeguard against oppressive searches. Therefore, in Taylor’s view, the Amendment was not designed to make most searches covered by warrants.<sup>23</sup>

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<sup>17</sup> LANDYNSKI, *supra* note 5, at 43. See also LASSON, *supra* note 6, at 103 (the phrase “‘unreasonable searches’ and seizures was intended . . . to cover something other than the form of the warrant”).

<sup>18</sup> *Arizona v. Gant*, 129 S. Ct. 1710, 1716 (2009) (citation omitted).

<sup>19</sup> TAYLOR, *supra* note 7. Taylor’s book has been repeatedly cited by the Supreme Court. See, e.g., *Virginia v. Moore*, 128 S. Ct. 1598, 1603 (2008); *Atwater v. City of Lago Vista*, 532 U.S. 318, 336 (2001); *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989). A standardless reasonableness test predates Taylor’s book. E.g., *United States v. Rabinowitz*, 339 U.S. 56, 63 (1950). But, Taylor’s work gave that test a plausible historical basis.

<sup>20</sup> TAYLOR, *supra* note 7, at 43.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

Akhil Amar and Thomas Davies each produced influential articles in the 1990s on the role and meaning of history. Each, however, are mutations of Taylor's views. Amar adopts Taylor's conclusion that reasonableness has no fixed meaning but rejects Taylor's premise that the Fourth Amendment was designed to regulate general warrants. Davies accepts Taylor's premise that the warrant was designed solely to regulate general warrants but rejects Taylor's conclusion that the modern concept of reasonableness is an undefined reasonableness analysis.<sup>24</sup>

Amar's principal article is in the *Harvard Law Review*, published in 1994.<sup>25</sup> It has been cited by the Supreme Court on a few occasions and by scholars and lower courts.<sup>26</sup> Numerous scholars have felt it necessary to reply to him.<sup>27</sup> Amar dedicated the article to Telford Taylor.<sup>28</sup> Yet, Amar differs from Taylor in that Amar did not draw the conclusion that the central purpose of the Amendment was to ban general warrants; instead, Amar asserted that all warrants "were friends of the searcher, not the searched."<sup>29</sup> Amar sees history simply and clearly and believes that general "reasonableness" is the proper measure of a search or seizure, not any warrant requirement.<sup>30</sup> He maintains: "We need to read the Amendment's words and take them seriously: they do not require warrants, probable cause, or exclusion of evidence, but they do require that all searches and seizures be reasonable."<sup>31</sup> For Amar, Fourth Amendment reasonableness has no fixed meaning.<sup>32</sup>

Thomas Davies' principal article on the subject was published in the *Michigan Law Review* in 1999.<sup>33</sup> Consistent with Taylor, Professor Davies views

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<sup>24</sup> Another permutation of Taylor's view, by Professor David Steinberg, further narrows the original purpose of the Amendment to protecting only the home from general warrants. Professor Steinberg's articles are collected and his views criticized in Fabio Arcila, Jr., *A Response to Professor Steinberg's Fourth Amendment Chutzpah*, 10 U. PA. J. CONST. L. 1229 (2008).

<sup>25</sup> Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994).

<sup>26</sup> E.g., *Virginia v. Moore*, 128 S. Ct. 1598, 1603–04 (2008); *Atwater v. City of Lago Vista*, 532 U.S. 318, 332 n.6 (2001).

<sup>27</sup> See, e.g., Maclin, *supra* note 14; Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820 (1994); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999) [hereinafter Davies, *Recovering the Original Fourth Amendment*]. I accept the view that Professor Amar's account "offered little evidence for [his] central historical claims." *Id.* at 576. The summary of the history contained in my treatise and my other writings is consistent with the conventional account of history. See THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* 23–43 (2008).

<sup>28</sup> Amar, *supra* note 25, at 757 n.\*.

<sup>29</sup> See *id.* at 774.

<sup>30</sup> *Id.* at 758–59.

<sup>31</sup> *Id.* at 759.

<sup>32</sup> See *id.* at 804–11.

<sup>33</sup> Davies, *Recovering the Original Fourth Amendment*, *supra* note 27. See also Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of "Due Process of Law,"* 77 MISS. L.J. 1 (2007).

the original purpose of the Fourth Amendment quite narrowly as solely a rejection of general warrants.<sup>34</sup> His views have been cited by numerous scholars and his work has even been described as the “leading originalist account.”<sup>35</sup>

Davies is in broad agreement with Taylor’s conclusion that the purpose of the Amendment was solely to prohibit general warrants. Davies, however, refuses to take the next step that Taylor took. Instead, he maintains that his goal in the *Michigan* article is merely to show that the “original meaning” of the Fourth Amendment “does not fully endorse either the warrant-preference or generalized-reasonableness construction; in fact, it shows that neither is really equivalent to the Framers’ understanding.”<sup>36</sup> Taylor’s view, in contrast, has more dramatic implications regarding the regulation of governmental intrusions. According to Taylor, the two clauses are distinct. The first clause substantively requires only that searches and seizures be “reasonable.” The second clause addresses only those searches and seizures conducted under warrants, saying nothing about when a warrant is necessary or about what factors are to be examined to determine reasonableness.

The Supreme Court’s collective opinion about the relationship of the clauses had for decades vacillated between the two competing views of the relationship of the clauses. Even today, the competition continues but has become more complex. One commentator three decades ago aptly summarized the Supreme Court’s interpretation of the relationship of the two clauses when he wrote: “The courts have said little of lasting significance about the relationship between the two clauses.”<sup>37</sup> That statement is even more accurate today; the Court has developed numerous models and frameworks for measuring reasonableness, beyond the warrant-preference and general-reasonableness models, all of which uneasily coincide in current Supreme Court case law.<sup>38</sup> As noted, the Court sometimes states that all searches and seizures are *per se* unreasonable, subject to enumerated exceptions, in the absence of a warrant.<sup>39</sup> At other times, the Court has rejected a

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<sup>34</sup> Davies, *Recovering the Original Fourth Amendment*, *supra* note 27, at 551 (“[T]he evidence indicates 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. In other words, the Framers did not address warrantless intrusions at all in the Fourth Amendment.”).

<sup>35</sup> 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, 4 (2007).

<sup>36</sup> Davies, *Recovering the Original Fourth Amendment*, *supra* note 27, at 736.

<sup>37</sup> See Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 48 (1974).

<sup>38</sup> See CLANCY, *supra* note 27, at 466–547 (2008) (discussing the various models the Court uses to measure reasonableness); Thomas K. Clancy, *The Fourth Amendment’s Concept of Reasonableness*, 2004 UTAH L. REV. 977.

<sup>39</sup> See, e.g., *Arizona v. Gant*, 129 S. Ct. 1710, 1716 (2009); *California v. Acevedo*, 500 U.S. 565, 580 (1991); *Arkansas v. Sanders*, 442 U.S. 753, 763 (1979); *Mincey v. Arizona*, 437 U.S. 385, 390 (1978); *Katz v. United States*, 389 U.S. 347, 357 (1967).

“categorical warrant requirement” and has looked to the totality of the circumstances to measure the validity of the government's activities.<sup>40</sup> Still other

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A main disciple of that view was Justice Frankfurter. See *United States v. Rabinowitz*, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting) (“[A] search is ‘unreasonable’ unless a warrant authorizes it, barring only exceptions justified by absolute necessity.”); *Harris v. United States*, 331 U.S. 145, 162 (1947) (Frankfurter, J., dissenting) (“[W]ith minor and severely confined exceptions, . . . every search and seizure is unreasonable when made without a magistrate’s authority expressed through a validly issued warrant.”); *Davis v. United States*, 328 U.S. 582, 605 (1946) (Frankfurter, J., dissenting) (The warrant clause of the Fourth Amendment was “the key to what the framers had in mind by prohibiting ‘unreasonable’ searches and seizures,” because “all seizures without judicial authority were deemed ‘unreasonable.’”). Referring to the Fourth Amendment, Justice Frankfurter has stated:

These words are not just a literary composition. They are not to be read as they might be read by a man who knows English but has no knowledge of the history that gave rise to the words. . . . One cannot wrench “unreasonable searches” from the text and context and historic content of the Fourth Amendment. It was the answer of the Revolutionary statesmen to the evils of searches without warrants and searches with warrants unrestricted in scope. Both were deemed “unreasonable.” Words must be read with the gloss of the experience of those who framed them. Because the experience of the framers of the Bill of Rights was so vivid, they assumed that it would be carried down the stream of history and that their words would receive the significance of the experience to which they were addressed—a significance not to be found in the dictionary. When the Fourth Amendment outlawed “unreasonable searches” and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the 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. Even a warrant cannot authorize it except when it is issued “upon probable cause . . . and particularly describing the place to be searched, and the persons or things to be seized.”

*Rabinowitz*, 339 U.S. at 69–70 (Frankfurter, J., dissenting) (citations omitted).

<sup>40</sup> *E.g.*, *United States v. Banks*, 540 U.S. 31, 42 (2003) (rejecting lower court’s categorical approach in favor of “‘totality of circumstances’ principle” to measure reasonableness); *United States v. Knights*, 534 U.S. 112, 118 (2001) (“general” approach to measuring reasonableness examines totality of circumstances). Perhaps the best statement of this view was in *Rabinowitz*, 339 U.S. 56:

What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are “unreasonable” searches and, regrettably, in our discipline we have no ready litmus-paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case.

*Id.* at 63. The Court added: “The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case.” *Id.* at 66.

Justice Rehnquist was a strong advocate at one point of Taylor’s view. Rehnquist argued that “nothing in the Fourth Amendment itself requires that searches be conducted pursuant to warrants. The terms of the Amendment simply mandate that the people be secure from unreasonable searches and seizures, and that any warrants which *may* issue shall only issue upon probable cause.” *Robbins v. California*, 453 U.S. 420, 438 (1981) (Rehnquist, J., dissenting). He rejected the “judicially created” preference for warrants, arguing that, in emphasizing the warrant requirement over the reasonableness of the search, the Court has stood the Fourth Amendment on its head. *Id.* (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 492 (1971) (Harlan, J., concurring) (quoting TAYLOR, *supra* note 7, at 23–24)). See also *Payton v. New York*, 445 U.S. 573, 621 (1980) (Rehnquist, J., dissenting) (the Court has misread the Fourth Amendment in connection with searches by mandating the warrant requirement).

cases engage in a contemporary balancing of individual and governmental interests,<sup>41</sup> adopt the common law as of 1791 as dispositive,<sup>42</sup> or mandate some level of individualized suspicion.<sup>43</sup> Thus, as I have said elsewhere:

There are at least five principal models that the Court currently chooses from to measure reasonableness: the warrant preference model; the individualized suspicion model; the totality of the circumstances test; the balancing test; and a hybrid model giving dispositive weight to the common law. Because the Court has done little to establish a meaningful hierarchy among the models, the Court in any situation may choose whichever model it sees fit to apply. Thus, cases decided within weeks of each other have had fundamentally different—and irreconcilable—approaches to measuring the permissibility of an intrusion.<sup>44</sup>

Looking at Supreme Court opinions over the course of time, it takes no great insight to say that the treatment and role of historical analysis has varied. Occasionally, historical analysis has been outright rejected as a basis to interpret the Amendment.<sup>45</sup> The Court has sometimes asserted that law enforcement practices are not “frozen” by those in place at the time the Fourth Amendment was adopted.<sup>46</sup> Hence, the Court has occasionally asserted that interpretation of the Amendment evolves to permit modern developments<sup>47</sup> and that the Amendment must be interpreted in light of contemporary norms and conditions.<sup>48</sup> Indeed, the

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In *Robbins*, Rehnquist accused the Court of failing to appreciate the impact of the warrant requirement on law enforcement. 453 U.S. at 438. He argued that the Court erroneously believed that police officers with probable cause to arrest or search were not hindered by the judicially created preference for a warrant. *Id.* He maintained that, even if the warrant process at one time served a useful function in preventing unreasonable searches and seizures, the Court’s ruling in *Shadwick v. City of Tampa*, 407 U.S. 345 (1972), which permitted untrained court clerks to issue arrest warrants, had undercut any argument for the warrant requirement. 453 U.S. at 439.

<sup>41</sup> *E.g.*, *Samson v. California*, 547 U.S. 843 (2006).

<sup>42</sup> *E.g.*, *Wyoming v. Houghton*, 526 U.S. 295 (1999).

<sup>43</sup> *E.g.*, *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

<sup>44</sup> CLANCY, *supra* note 27, at 468.

<sup>45</sup> *See, e.g.*, *Tennessee v. Garner*, 471 U.S. 1, 12–15 (1985) (changing the common law rule permitting police to shoot at fleeing suspects in part because modern felonies differ significantly from common law felonies and because of technological changes in weaponry).

<sup>46</sup> *Steagald v. United States*, 451 U.S. 204, 217 n.10 (1981); *Payton v. New York*, 445 U.S. 573, 591 n.33 (1980).

<sup>47</sup> *Cf.* *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985) (In applying the Amendment to searches of school children by school authorities, the Court recognized that the government’s interest included contemporary needs: “Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems.”).

<sup>48</sup> *E.g.*, *Wyoming v. Houghton*, 526 U.S. 295 (1999) (utilizing contemporary considerations in the balancing test to measure the reasonableness of a search or seizure as an alternative if historical



Warren Court era was known for a non-historical treatment of Fourth Amendment issues.<sup>49</sup>

On the other hand, the Supreme Court has often relied on the common law at the time of the Framing in 1791 as an important guide that influences how the Fourth Amendment is interpreted. Exactly how that tool has been used, as with other interpretative techniques, varies with who wrote the opinion.<sup>50</sup> Using the common law as the measure of what the Fourth Amendment requires is distinct from using the common law as the measure of the Framers' intent. As to the former, the common law rule as of 1791 *defines* Fourth Amendment terms, such as reasonableness, search, or seizure. As to the latter, the common law is consulted to ascertain the Framers' intent, which is in turn used to justify reliance on some conception of what the Amendment requires. Hence, sometimes there is a broader recognition that the Amendment was designed by the Framers to protect individuals from unreasonable governmental intrusion.<sup>51</sup> Such a view maintains

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analysis does not produce a dispositive answer); *Garner*, 471 U.S. at 12–15 (changing the common law rule that had permitted the police to shoot at fleeing suspects in part because modern felonies differ significantly from common law felonies and because of technological changes in weaponry); *Steagald*, 451 U.S. at 217 n.10 (“Crime has changed, as have the means of law enforcement, and it would therefore be naive to assume that those actions a constable could take in an English or American village three centuries ago should necessarily govern what we, as a society, now regard as proper.”); *Payton*, 445 U.S. at 600 (stating that “custom and contemporary norms necessarily play” a “large role” in assessing reasonableness). *But cf.* *Richards v. Wisconsin*, 520 U.S. 385, 392 n.4 (1997) (cautioning that “[i]t is always somewhat dangerous to ground exceptions to constitutional protections in the social norms of a given historical moment,” given the Fourth Amendment’s purpose of preserving that degree of privacy that was afforded at the time it was adopted).

<sup>49</sup> *E.g.*, *Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>50</sup> *See, e.g.*, *Oliver v. United States*, 466 U.S. 170, 183–84 (1984) (although “[t]he common law may guide consideration of what areas are protected by the Fourth Amendment,” common law rights are not coincident with the Fourth Amendment); *Payton*, 445 U.S. at 591 (common law view utilized to shed light on Framers’ intent); *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (common law acts as a guide to interpret Fourth Amendment). *See generally* David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739 (2000) (tracing Supreme Court treatment of the common law as an interpretative tool).

<sup>51</sup> *See, e.g.*, *United States v. Chadwick*, 433 U.S. 1, 9 (1977) (“What we do know is that the Framers were men who focused on the wrongs of that day but who intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth.”); *United States v. United States Dist. Ct.*, 407 U.S. 297, 313 (1972) (“Though physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed, its broader spirit now shields private speech from unreasonable surveillance.”); *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971) (“If times have changed, reducing everyman’s scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important.”); *United States v. Lefkowitz*, 285 U.S. 452, 467 (1932) (rejecting literal construction of words in favor of Amendment’s purpose). *See also* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 353 (1974) (“The Bill of Rights in general and the [F]ourth [A]mendment in particular are profoundly anti-government documents.”); Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 626–27 (1996) (arguing that the values underlying the Amendment, to protect individual rights, must be reflected in its application to modern conditions,

that the Framers intended not only to prohibit the specific evils of which they were aware but also, based on the general terms they used, to give the Constitution enduring value beyond their own lifetimes.<sup>52</sup> In other words, according to that view, the chief interpretative tool is to be consistent with the Framers' values but not mired in the details of the search-and-seizure practices of 1791.

In recent decades, Justice Scalia has had a particularly strong influence and, at times, his views of the *dispositive* nature of the common law at the time of the framing of the Amendment have been enshrined in majority opinions.<sup>53</sup> A recent illustration of how important history is to the current Court is *Atwater v. City of Lago Vista*,<sup>54</sup> which was a case where Justice Souter, writing for the majority, believed that probable cause historically justified all arrests. In responding to Justice O'Connor's dissent, which sought to modify that standard, the majority opined:

History . . . is not just "one of the tools" relevant to a Fourth Amendment inquiry[.] Justice O'Connor herself has observed that courts must be "reluctant . . . to conclude that the Fourth Amendment proscribes a practice that was accepted at the time of adoption of the Bill of Rights and has continued to receive the support of many state legislatures," *Tennessee v. Garner*, 471 U.S. 1, 26 (1985) (dissenting opinion), as the practice of making warrantless misdemeanor arrests surely was and has (citation omitted). Because here the dissent "claim[s] that [a] practic[e] accepted when the Fourth Amendment was adopted [is] now constitutionally impermissible," the dissent bears the "heavy burden" of justifying a departure from the historical understanding.<sup>55</sup>

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where scientific invention has made it possible for government agents to violate privacy rights without employing physical power).

<sup>52</sup> See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 1–2 (1980) ("[T]he Constitution proceeds by briefly indicating certain fundamental principles whose specific implications for each age must be determined in contemporary context. . . . That the complete inference will not be found there—because the situation is not likely to have been foreseen—is generally common ground."); Joseph D. Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 AM. CRIM. L. REV. 603, 620 (1982) ("The underlying grievances are certainly relevant to the interpretative task, but constitutional provisions cannot be properly viewed simply as shorthand statements for the specific grievances that gave rise to them."); James J. Tomkovicz, *California v. Acevedo: The Walls Close in on the Warrant Requirement*, 29 AM. CRIM. L. REV. 1103, 1137 (1992) ("Constitutional analysts generally agree that the document was meant to be more than a mere catalogue of forbidden actions." The Framers intended that the "underlying values" be honored.).

<sup>53</sup> E.g., *Houghton*, 526 U.S. 295. He first proposed that "the 'reasonableness' requirement of the Fourth Amendment affords the protection that the common law afforded" in *California v. Acevedo*, 500 U.S. 565, 583 (1991) (Scalia, J., concurring in judgment).

<sup>54</sup> 532 U.S. 318 (2001).

<sup>55</sup> *Id.* at 345–46 n.14.

Cuddihy has been mostly silent on the ongoing evolution of the treatment of history in Fourth Amendment jurisprudence for two decades. It was not until late in 2008 that Cuddihy's 1990 manuscript was finally published by Oxford University Press. The unpublished version had been typed and was a painfully long 1696 pages. The published version, with the same name, still runs a hefty 940 pages, but has been formatted and is now set in print. Unfortunately, there is little new in the published version—it is virtually the same as the 1990 manuscript, with a few new footnotes and an "Afterword." That Afterword contains a good summary of Cuddihy's views regarding the meaning of the broad sweep of historical events, but its primary aim is a sharp critique of Amar's and Davies' views.

As to Amar, who argued that reasonableness had no fixed meaning and that all warrants were seen as friends of the searcher, Cuddihy responds with a broad overview of the evolution of search and seizure principles and then observes:

Although specific warrants had originated as isolated enclaves in the intricate edifice of general warrants around 1607, by 1791 the proportions had inverted, leaving both warrantless intrusions on land and general warrants as islands in a sea of specific warrants. The problem with this evidence in regard to Amar is not just that he ignores it, but also that it overwhelms contrary data. In disparaging warrants, Amar disregards centuries of their proliferating centrality to evolving procedures of search and seizure. Although the earliest unambiguous search warrant to qualify as such bears the late date of 10 July 1607, its progeny multiplied rapidly until they preponderated as the orthodox protocol of search and seizure in 1791. (P. 776.)

Cuddihy emphasizes Amar's "dearth of original sources" and the "few citations" that support Amar's central claim. (P. 776.) He also observes that many of Amar's citations are to cases decided many years after the adoption of the Amendment, noting in particular one case that postdated the Amendment by seven decades. From this Cuddihy states: "Iterating the amendment of 1789 via litigation seventy years hence is like describing the New Deal Court of Chief Justice Hughes in the 1930s only through citations of its leading cases by today's Roberts Court." (P. 777.)

Cuddihy is even harsher about Davies' scholarship. He references authority that undermines much of Davies' historical claims, chastises Davies' selectivity, and asserts:

To Davies, "unreasonable searches and seizures" embrace little more than the declarations of the 81 members of the First Congress who framed the amendment and its immediate antecedents employing the identical phraseology. Davies excludes, sidetracks, and otherwise minimizes unarticulated but palpable assumptions, documentation

incompatible with his thesis, and most of the legacy of search and seizure before 1780. The reader is left with historical meaning without 99 percent of the history that vests meaning. Davies begins by quoting L.P. Hartley's aphorism that "the past is a foreign county: they do things differently there." Davies however, myopically narrows the "country" to which he takes us to little more than its preceding decade and views it only through the tunnel vision of textual literalism. (P. 778.)

Davies, in his article, used the metaphor of a silent dog who did not bark in the night to draw the conclusion that the Amendment did not create a broad reasonableness standard due to the lack of comments about such a standard in the Framing era.<sup>56</sup> In reply, Cuddihy maintains:

Reading legal precedent forwards from 692 yields not only a different perspective than reading them backwards from 1791 but also a different outcome. The Congressional protests of 1774 were probably published over seventy times, in every American colony, and were even available in German and French translation. The propagation of these congressional protests in pamphlets and newspapers was the most extensive dissemination of opinion ever involving search and seizure on the American continent before the amendment's framing. By providing a consensus against promiscuous, warrantless house searches that preceded national existence, they had already established a constitutional mandate against those searches before Adams, in 1780, furnished a terminology in the word "unreasonable." The problem, then, is not that the warrantless dog didn't bark but that Davies did not register the pitch at which it did so. (P. 781.)

Cuddihy, in my view, missed a great opportunity when he decided not to edit and revise his 1990 manuscript. First, it is not a significant source for post-1990 scholarship or case law interpreting the history of the Amendment, with the exception of the Afterword. Second, and more importantly, the book remains very difficult to navigate. For example, during the Revolution, Quakers in Pennsylvania became the targets of suspicionless detentions.<sup>57</sup> Cuddihy's discussion of those detentions and the responses to them is in numerous separate locations in his treatise. At one point he states that the "most extensive search of the revolution was that of the Philadelphia Quakers," noting that the Continental Congress had asked Pennsylvania authorities "to search the house of every Philadelphian of dubious loyalty." (P. 618.) Fifteen pages later he returns to the Quakers, noting that the searches and arrests were "an outgrowth of intercepted

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<sup>56</sup> Davies, *Recovering the Original Fourth Amendment*, *supra* note 27, at 591.

<sup>57</sup> See also Morgan Cloud, *Quakers, Slaves and the Founders: Profiling to Save the Union*, 73 *Miss. L.J.* 369, 369–70 (2003).

correspondence” and provides some contemporary disparagements of the Quakers. (P. 634.) Some twelve pages later he discusses the Quakers’ arguments as to why the detentions were illegal. (Pp. 645–46.) As another example, on the question of the legality of nocturnal searches, he has separate sections on the American prohibition of such searches “on the dawn of the amendment” (P. 661) and another addressing the post-Revolution rejection of them. (Pp. 747–48.) Yet, both sections contain a substantial amount of the same material. In his index, he cites to other locations in the book where their illegality (Pp. 412, 413, 661), unconstitutionality (P. 781), and restrictions (Pp. 427, 428) on them are discussed, but, he fails to note other references in the book where such searches had occurred or were criticized. (Pp. 107, 123.) The point I emphasize is that, for a person doing research on the permissibility of executing a warrant at night or any other topic, unless the researcher takes on the whole of Cuddihy’s book, he or she is liable to miss important material. The treatise has significant organizational flaws on every level, ranging from paragraphs and sections that interject unrelated or tangential material, to a vast amount of repetition and partial discussions of ideas, cases, or events in various locations.

The text of Cuddihy’s treatise is organized into six parts, with chapters within each part. The first three parts examine the historical trends to 1760. This portion of the book suffers the most from lack of organization. In Cuddihy’s defense, he had a Herculean task of organizing a vast amount of source materials, ranging over 1,000 years of history. The last three parts, which examine the period of time from 1760 to 1791,<sup>58</sup> are better organized. Nonetheless, partial discussions of some event, case, or view can be found scattered throughout the book.

The great strength of the book and what makes it necessary for any scholar who seeks to do serious work on search-and-seizure law, is simply the depth of Cuddihy’s research. To support this claim, one need only examine Cuddihy’s appendices, which are lists of primary resources, including English legal treatises between 1168 and 1581 (Appendix A), British guild searches between 1298 and 1692 (Appendix B), historical forms of search warrants (Appendix C), primary and secondary sources for the Writs of Assistance case (Appendix E), primary and secondary sources on the *Wilkes* cases (Appendices G–H), and numerous other historical documents. Those appendices are rich sources of material.

Turning to the 772-page-long main text of Cuddihy’s treatise, despite its organizational flaws, the breadth and depth of the material demonstrate that Justice O’Connor’s and Professor Maclin’s views still ring true: Cuddihy’s research is simply unparalleled. Any unbiased reader will have a different view of the history, origins, and meaning of the Fourth Amendment if he or she makes the commitment to read this book. The reader will also have a life-long research tool.

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<sup>58</sup> This is a logical break because, in that year, the controversy over the continued use of Writs of Assistance began. 1791 is the year that the Fourth Amendment became part of the Constitution.

There appears to be a never-ending debate whether the exact historical practices or broader values that are seen as underlying those practices are the important lessons of history. Should exact historical practices be dispositive of Fourth Amendment claims? Or should the underlying values of the Framers be the ultimate guide, permitting the evolution of the regulation of searches and seizures? The second method of analysis is only inconsistent with the common law as a tool of interpretation if the common law is seen to have dispositive effect. The *lessons* of history are not inconsistent with the belief that the Constitution is a living document. Historical analysis is arguably important primarily to identify the values of the Framers, which should be used to inform the Court's adaptation of the Fourth Amendment to modern conditions.

Perhaps, in the end, the choices the Court must make come down to two: Is the Amendment designed to regulate law enforcement practices or is it designed to protect individuals from overreaching governmental intrusions? The first impulse is reflected in *California v. Hodari D.*,<sup>59</sup> where the Court sought to establish the point at which a seizure of a person occurred. The Court did not construe the word literally but chose instead the common law definition of an arrest to measure when a seizure has occurred; that definition requires physical touching or submission to a show of authority.<sup>60</sup> Explaining its reasoning, the *Hodari D.* majority candidly stated: "We do not think it desirable, even as a policy matter, to stretch the Fourth Amendment beyond its words and beyond the meaning of arrest . . . . Street pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged."<sup>61</sup> Justifying its position, the *Hodari D.* majority added:

Only a few of those orders, we must presume, will be without adequate basis, and since the addressee has no ready means of identifying the deficient ones it almost invariably is the responsible course to comply. Unlawful orders will not be deterred, moreover, by sanctioning through the exclusionary rule those of them that are *not* obeyed. Since policemen do not command "Stop!" expecting to be ignored, or give chase hoping to be outrun, it fully suffices to apply the deterrent to their genuine, successful seizures.<sup>62</sup>

The second view is illustrated by *Boyd v. United States*.<sup>63</sup> In discussing why it construed the concept of a search-and-seizure broadly, that majority opined:

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<sup>59</sup> 499 U.S. 621 (1991).

<sup>60</sup> *Id.* at 626.

<sup>61</sup> *Id.* at 627.

<sup>62</sup> *Id.*

<sup>63</sup> 116 U.S. 616 (1886).

Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet . . . it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*, [“withstand beginnings”].<sup>64</sup>

Unfortunately, there appears to be no tiebreaker as to which view is correct. Cuddihy, who draws his own conclusions, does not end that debate. He does, however, provide abundant materials to utilize in that debate. How one uses history remains the central question.

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<sup>64</sup> *Id.* at 635.