

**RESPONDING TO THE CHALLENGES OF
CONTEXTUAL CHANGE AND LEGAL
DYNAMISM IN INTERPRETING THE
FOURTH AMENDMENT**

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INTRODUCTION

Our topic is what makes a search or seizure reasonable under the Fourth Amendment. The positive law on this point has become formulaic. First, we ask, under the *Edmond* and *Ferguson* cases, whether the government's primary purpose is criminal prosecution or something else.¹ If the answer is "something else" we engage in a multi-factor balancing process, taking account of the degree of intrusiveness on individual liberty or privacy, the weight of the government's interest, the requirement *vel non* of individualized suspicion, aspects of voluntarism, and so on.²

If the answer is "criminal prosecution," we first must characterize the Fourth Amendment event as a temporary detention under *Terry*, an arrest, or a free-standing search for evidence or contraband. A *Terry* stop is "reasonable" without judicial authorization given "articulable facts" short of "probable cause."³ An "arrest" by contrast is always unreasonable without "probable cause,"⁴ and entry into private premises to effect an arrest requires prior judicial authorization subject to such

¹ *Ferguson v. City of Charleston*, 532 U.S. 67, 84-86 (2001) (holding urinalysis program unconstitutional because directed towards generating evidence for law enforcement purposes); *City of Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000) (holding checkpoint program unconstitutional because it served no need beyond traditional law enforcement purposes).

² *See, e.g., Cassidy v. Chertoff*, 471 F.3d 67 (2d Cir. 2006) (rejecting Fourth Amendment challenge to suspicionless searches of passenger luggage on Lake Champlain ferry).

³ *See, e.g., Alabama v. White*, 496 U.S. 325, 330 (1990) ("Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause."); *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (affirming that probable cause is tested by asking whether under "the-totality-of-the circumstances . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place"); *Allen v. City of Los Angeles*, 66 F.3d 1052, 1056 (9th Cir. 1995) (plaintiff contends "that the methods the defendants used to detain him converted the initially lawful *Terry* stop into a full-fledged arrest for which probable cause was required, but was lacking . . ." There is, however, "no bright line rule for determining when an investigatory stop crosses the line and becomes an arrest.").

⁴ *See Dunaway v. New York*, 442 U.S. 200, 208-09 (1979) ("The [probable cause] standard applied to all arrests, without the need to 'balance' the interests and circumstances involved in particular situations.").

exceptions as emergency and consent.⁵ A “search” for evidence, unconnected to arrest or *Terry*-type detention, is presumed unreasonable absent probable cause and a warrant.⁶ Consent is an exception to both requirements,⁷ while exigency, search incident to arrest, and vehicle searches are recognized as exceptions to the warrant requirement.⁸

The Supreme Court sometimes has looked to founding-era common law to determine whether contested police actions were reasonable or unreasonable.⁹ Granting for purposes of argument the general theoretical case for interpreting the constitutional text according to some version of the original understanding, my thesis

⁵ *Payton v. New York*, 445 U.S. 573 (1980) (holding that Fourth Amendment requires a warrant to enter the suspect’s home absent exigency, “hot pursuit” or consent).

⁶ *See, e.g., Ferguson v. City of Charleston*, 532 U.S. 67, 86 (2001) (“The Fourth Amendment’s general prohibition against nonconsensual, warrantless, and suspicionless searches necessarily applies to [the city’s drug-testing] policy.”); *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (where agents obtained search warrant in part based on results of thermal-imager scan of defendant’s home, the Court held thermal-imager’s use constituted a search and remanded the case “to determine whether, without the evidence it provided, the search warrant issued in this case was supported by probable cause”); *Bond v. United States*, 529 U.S. 334 (2000) (holding that agent’s groping of bus passenger’s bag was a search in violation of the Fourth Amendment). The *Bond* Court did not say whether the “search” was illegal for want of probable cause or for want of a warrant. The opinions have not foreclosed the possibility that some “search” for evidence of crime outside the home might be justified on less than probable cause. The vehicle-search cases, however, excuse only the failure to obtain a warrant, not the absence of probable cause. Similarly, during a valid *Terry* stop, the police may “pat down” the suspect for weapons but not engage in a general search for evidence of the sort allowed incident to arrest. *See, e.g., Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993) (“If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed.” (citation omitted)).

⁷ *See, e.g., Illinois v. Rodriguez*, 497 U.S. 177 (1990) (upholding warrantless home search based on consent from individual with apparent but not actual authority to permit entry).

⁸ There are multiple exceptions, *see, for example, Craig Bradley, Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473-74 (1985) (identifying “over twenty exceptions”), but the exceptions listed in text are the ones commonly seen in litigation. *See id.* at 1475 (“As anyone who has worked in the criminal justice system knows, searches conducted pursuant to these exceptions, particularly searches incident to arrest, automobile and ‘stop and frisk’ searches, far exceed searches performed pursuant to warrants.” (footnote omitted)).

⁹ *See infra* Part I.

is that consulting founding-era practices at this level of particularity is not a faithful approach to the original understanding. I develop two lines of objection to specific-practices originalism (SPO). I call one the contextual critique and the second the dynamism critique.

The constitutional text was situated in the context of eighteenth-century institutions and doctrines that disappeared in the nineteenth century. The utter disappearance of the context means that we just don't know what the founders expected the Fourth Amendment to prohibit, or permit, in a radically different legal and technological environment. The degree of privacy and liberty in 1791 were a product of the contemporary criminal justice system, the economic and technological social circumstances, and the legal regime that limited search-and-arrest powers. Rules in 1791 had different consequences for liberty and security than those rules would have in a society like today's, with full-time proactive police and modern technology.

The dynamism critique points out that the 1791 rules of search-and-seizure were not static. Tort law was the legal regime regulating search-and-arrest powers. Illegal detention gave rise to actions for false arrest or false imprisonment. Illegal entries of private premises gave rise to trespass suits. But common law can change. Precedents can be overruled, and new factual contexts require debatable applications of old principles. Most dramatically, common-law rules can be trumped by statutes.

If the reasonableness clause perpetuates *all* the specific 1791 tort rules, the force of the contextual critique becomes overwhelming. If, however, the clause incorporates common-law rules subject to plenary statutory revision, the constitutional provision is nugatory. Either the Fourth Amendment freezes search-and-seizure law in the form it had before the advent of modern police and modern technology, or it permits any search or arrest authorized by statute. Some search for principled middle ground seems in order.

*Kyllo v. United States*¹⁰ gives the most plausible accommodation yet of originalism against the contextual critique.

¹⁰ 533 U.S. 27 (2001).

Justice Scalia's majority opinion in *Kyllo* read the Fourth Amendment as instantiating the degree of liberty and security enjoyed against government as of 1791.¹¹ This move surrenders specific-practice originalism in favor of an under-determined abstraction; it counters the contextual critique by surrendering some of the determinacy that makes originalism attractive in the first place.

Selecting the 1791 level of privacy and liberty, however, is arbitrary, because we have no reason to believe that those who ratified the Fourth Amendment believed the prevailing balance of liberty and security was ideal. In fact, the founders themselves tinkered with the common law of crimes and criminal procedure on an extensive scale.¹² Indeed, to actually restore the level of individual security that prevailed in 1791 would require abolishing modern police. Leaving aside the modern unthinkability of that notion, we have no reason to suppose that the founders would have thought a professional, proactive force as such was a violation of the Fourth Amendment.

We should not assume the founders meant to perpetuate the 1791 common law of torts against either statutory or judge-made changes, whether those changes favor the liberty of the citizen or the security of the public. The most that can be hoped for is to steer the messy body of precedents so as to achieve and maintain something resembling the overall balance of advantage between individual freedom and public security that we think the founders *would have wished* if they had faced the dangers and opportunities of the modern world. I call this approach "aspirational balance of advantage originalism" and frankly concede that it is less than a completely determinate theory. Indeed, given even some modest regard for precedent and some sense of legal tradition, the difference between treating "unreasonable searches and seizures" as incorporating modern

¹¹ *Id.* at 33-34. The Court's most recent Fourth Amendment decision returned to *Kyllo*'s descriptive balance-of-advantage standard. See *United States v. Jones*, 132 S. Ct. 945, 950 (2012) ("At bottom, we must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" (quoting *Kyllo*, 533 U.S. at 28)).

¹² See *infra* Part III.B.

values by reference, and treating that phrase as a term of art with some technical content, becomes so slight as to be of doubtful practical relevance.

So we proceed in four stages. First, we take SPO as our point of departure, briefly discussing the various Supreme Court decisions that have looked to 1791 rules as defining “unreasonable searches and seizures.” Second, we develop the contextual critique. We describe the eighteenth-century criminal justice system and the sweeping institutional and doctrinal changes to that system in the nineteenth century. We then explain how these massive contextual changes make specific founding-era rules and practices at best inconclusive guides to the original understanding.

Third, we develop the dynamism critique. The common-law regulating search and seizure was understood to be subject to revision by both courts and legislatures. The founders themselves departed from the common-law system in numerous ways, including modifying the search-and-seizures rules. Fourth, we turn to balance-of-advantage accounts and defend the aspirational balance of advantage theory as the most attractive originalist formulation of the Fourth Amendment.

I. SPECIFIC PRACTICE ORIGINALISM

The Supreme Court’s clearest articulation of SPO appears in *Wyoming v. Houghton*.¹³ The issue before the Court was whether police making a warrantless search of an automobile could look inside private containers (a purse and then a wallet) that might contain the suspected contraband. The Court, following prior cases, held the search reasonable.¹⁴ For our purposes, the interesting part of Justice Scalia’s majority opinion is the interpretive method it adopts:

[W]e inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed. Where that inquiry yields no answer, we must evaluate the search or seizure under

¹³ 526 U.S. 295 (1999).

¹⁴ *Id.* at 306-07.

traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.¹⁵

This approach reads the reasonableness clause as adopting by reference the common-law tort limits on law enforcement that prevailed at the founding.

This precise formulation has not guided all of the Court's Fourth Amendment cases. It has been criticized as an eccentric outlier,¹⁶ but remains important enough to be taken seriously, for two reasons. First, reading "unreasonable searches and seizures" as a term of art incorporating the body of common-law tort rules enjoys weighty support in the historical record.¹⁷ Second, the Court has followed this approach in a significant number of important cases over the years.

The Court has followed the *Houghton* formula in three more cases.¹⁸ In each of these cases, the Court concluded that the

¹⁵ *Id.* at 299-300 (citations omitted).

¹⁶ THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* 507-09 (2008).

¹⁷ Perhaps the most thorough historical study reaches just this conclusion. See WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 602-1791, at 739-58 (2009); *cf.* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999) (arguing that the Fourth Amendment prohibits general warrants and not any larger category of "unreasonable searches"). My current view is that reasonableness was thought to be a limit on search powers distinct from the ban on general warrants, in part, because of the evidence marshaled by Cuddihy, *see* CUDDIHY, *supra*, at 777-82 (criticizing Davies), and in part, because the text itself points so strongly in that direction. If Davies is right and Cuddihy is wrong, however, *all* of the Court's reasonableness decisions are off on the wrong historical foot, before they ever reach the question of just what makes a search reasonable.

¹⁸ *See* *Virginia v. Moore*, 553 U.S. 164, 168 (2008) ("We look to the statutes and common law of the founding era to determine the norms the Fourth Amendment was meant to preserve."); *Atwater v. City of Lago Vista*, 532 U.S. 318, 326-27 (2000) ("[T]he first step here is to assess Atwater's claim that peace officers' authority to make warrantless arrests for misdemeanors was restricted at common law . . ."); *Florida v. White*, 526 U.S. 559, 563 (1999) ("In deciding whether a challenged governmental action violates the Amendment, we have taken care to inquire whether the action was regarded as an unlawful search and seizure when the Amendment was framed." (citing *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999); *Carroll v. United States*, 267 U.S. 132, 149 (1925))).

citizen failed to establish that the search or arrest violated 1791 common law.¹⁹ Proceeding then to the second prong of the *Houghton* formula, the Court then ruled for the prosecution or the police after a balancing of interests.²⁰

SPO, however, has a long, if chequered, pre-*Houghton* history. In *Boyd v. United States*, the Court struck down a federal statute that required production of business records that were not themselves contraband.²¹ The *Boyd* Court reasoned that the founders expected the Fourth Amendment to prohibit warrants other than those known to the common law, namely, warrants to arrest and to search for stolen goods.²² In particular, *Boyd* read the English decision in *Entick v. Carrington* to prohibit the seizure of private papers for evidentiary use, even if the seizure was authorized by a specific warrant.²³

In *Carroll v. United States*,²⁴ the Court analogized automobile searches to warrantless searches of ships for undutied goods, a practice authorized by the First Congress and so intended as an instance of the Fourth Amendment's *no*-application.²⁵ In *Olmstead v. United States*,²⁶ the Court held that wiretapping was not a "search" because the Fourth Amendment protects only "persons, houses, papers and effects."²⁷ Absent a common-law trespass, there was no search at all.²⁸

¹⁹ See *Moore*, 553 U.S. at 170-71; *Atwater*, 532 U.S. at 336; *White*, 526 U.S. at 564.

²⁰ See *Moore*, 553 U.S. at 171; *Atwater*, 532 U.S. at 354; *White*, 526 U.S. at 566.

²¹ 116 U.S. 616 (1886).

²² *Id.* at 622-23.

²³ See *id.* at 626-29 (quoting extensively from *Entick v. Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (C. P. 1765)). The *Boyd* Court concluded:

Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation of that judgment [in *Entick*].

Id. at 630.

²⁴ 267 U.S. 132 (1925).

²⁵ See *id.* at 149-54.

²⁶ 277 U.S. 438 (1928).

²⁷ *Id.* at 465.

²⁸ See *id.* at 464 ("There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants.").

Those who follow Fourth Amendment jurisprudence will realize why I call SPO's history "chequered." *Boyd* and *Olmstead* have been overruled, and there is little discernible sympathy for a return to either.²⁹ Yet neither *Katz*, which overruled *Olmstead*, nor *Fisher* and *Doe*, which overruled *Boyd*, engage in any serious effort to show that the *Boyd* or *Olmstead* Courts were mistaken in their respective histories.

SPO has guided the analysis in several more modern pre-*Houghton* cases. In *United States v. Watson*,³⁰ the Court took the view that warrantless felony arrests were permitted because the Fourth Amendment adopted the common-law arrest rules.³¹ More recently, in *Wilson v. Arkansas*, the Court held that the Fourth Amendment bans execution of warrants except in compliance with founding-era common law's knock-and-announce requirement.³²

On its face, SPO seems perfectly plausible. The general phrase "unreasonable searches and seizures" references searches and seizures that would have been actionable at common law, or contrary to statute, as of 1791. Professor Sklansky's important criticism, that on many important issues the common law of 1791 was uncertain, either because there were no authorities or because the available authorities disagreed,³³ leads to *Houghton*'s second step. If no common-law consensus was established in 1791, the Court then balances interests in the spirit of American traditions.

²⁹ See *United States v. Doe*, 465 U.S. 605, 618 (1984) (O'Connor, J., concurring) ("The notion that the Fifth Amendment protects the privacy of papers originated in *Boyd* . . . but our decision in *Fisher v. United States* sounded the death-knell for *Boyd*. 'Several of *Boyd*'s express or implicit declarations [had] not stood the test of time[,] and its privacy of papers concept [h]ad long been a rule searching for a rationale' Today's decision puts a long-overdue end to that fruitless search." (citations omitted)); *Katz v. United States*, 389 U.S. 347 (1967) (overruling *Olmstead*).

³⁰ 423 U.S. 411 (1976).

³¹ See *id.* at 418 ("The cases construing the Fourth Amendment thus reflect the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest." (citations omitted)).

³² 514 U.S. 927, 929 (1995) ("[W]e hold that this common-law 'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment.").

³³ David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739 (2000).

I now develop two critiques of SPO even in those cases in which a definite 1791 rule or practice can be identified. The contextual critique points out that specific founding-era rules or practices have very different consequences in the criminal justice system that developed after the founding. The dynamism critique suggests that no informed and thoughtful person could have expected the common law of 1791, as it pertained to searches and seizures, to remain unchanged for decades, let alone centuries.

II. THE CONTEXTUAL CRITIQUE

A. *The Criminal Justice System in 1791*

There were no police of the modern type in colonial America. Sheriffs and constables executed warrants and could organize a posse in the face of armed resistance. There was a night watch.³⁴ There was, however, no round-the-clock professional force to keep order, and even if such a force existed, communications were too slow to have made it much use.

When a surly Boston crowd confronted a British sentry outside the customs house in March 1770, they were confronted by a stick-toting member of the watch, Edward Langford.³⁵ All Langford could do at the time was urge the crowd to disperse, with predictable futility.³⁶ Afterward Langford testified at one of the murder trials arising from the so-called Boston Massacre.³⁷ He had been converted from law officer to spectator by a crowd armed with snowballs, clubs, and oyster shells.³⁸ The military could disperse such a mob, but only by indulging, literally, in overkill. So British law forbade the military to fire on civilians until a justice of the peace had read the Riot Act.³⁹

³⁴ For a description of the constable-night watch system, see JOEL SAMAHA, CRIMINAL JUSTICE 139 (7th ed. 2006).

³⁵ The standard account of the Boston Massacre remains HILLER B. ZOBEL, THE BOSTON MASSACRE (1970).

³⁶ See 3 LEGAL PAPERS OF JOHN ADAMS 108 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965) (recording Adams' notes of Langford's testimony).

³⁷ *Id.*

³⁸ For an account of the confrontation, see ZOBEL, *supra* note 35, at 203.

³⁹ See 4 WILLIAM BLACKSTONE, COMMENTARIES *144 (describing the Riot Act adopted during the reign of George I).

Neither the watch nor the military had any established role in investigating suspected offenses. That mission was lodged in the justices of the peace and in the grand jury. From what we know of the common-law practice in the age of Blackstone, the typical felony prosecution originated with a complaint by the victim (or the victim's next of kin).⁴⁰ As Peter King's study of property crime in Essex County documents, a formal complaint to the justice of the peace might not happen for a variety of reasons.⁴¹ The offender might never be identified or apprehended; the victim might reach an accommodation with the offender; or the victim might not have the time, money, or taste for risking retaliation.⁴²

The formal process would be launched only absent these contingencies. The private prosecutor would describe the case to the justice of the peace.⁴³ If the arrest were not already accomplished, the justice of the peace could issue an arrest warrant.⁴⁴ The justice of the peace would then take sworn statements from the witnesses and put them under recognizance

⁴⁰ For a knowledgeable overview of the extensive historiography, see Bruce P. Smith, *English Criminal Justice Administration, 1650-1850: A Historiographic Essay*, 25 *LAW & HIST. REV.* 593 (2007). See also PETER J. KING, *CRIME, JUSTICE, AND DISCRETION IN ENGLAND 1740-1820*, at 17 (2001) ("It was the victim who provided the momentum, the driving force that moved a dispute towards a trial in the major courts.").

⁴¹ KING, *supra* note 40, at 17 (2001) ("It was the victim who provided the momentum, the driving force that moved a dispute towards a trial in the major courts.").

⁴² *Id.*

⁴³ On the English practice of private prosecutions, which continued in that country until late into the nineteenth century, see JAMES FITZJAMES STEPHEN, 1 *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 493-99 (1883); Norma Landau, *Indictment for Fun and Profit: A Prosecutor's Reward at Eighteenth Century Quarter Sessions*, 17 *LAW & HIST. REV.* 507 (1999); and Paul Rock, *Victims, Prosecutors and the State in Nineteenth Century England and Wales*, 4 *CRIM. JUST.* 331 (2004). For some qualifications, see Smith, *supra* note 40, at 620-21. Another caveat is that after the establishment of the Metropolitan Police, police officers prosecuted the cases they had investigated. See WILBUR R. MILLER, *COPS AND BOBBIES: POLICE AUTHORITY IN NEW YORK AND LONDON, 1830-1870*, at 74-75 (1977).

⁴⁴ The range of options open to the justice of the peace after arrest is illuminated by Peter King's study of the property-offense prosecutions in Essex County. See KING, *supra* note 40, at 82-125 (2000). Prior to contact with the justice of the peace, there could be, and often were, negotiations and settlements between victims and offenders.

to appear at the next court session, to be heard by the grand jury, and if necessary, at the trial.⁴⁵

Once arrested, the prisoner would be brought before the justice of the peace for examination.⁴⁶ The prisoner, unlike other witnesses at these pretrial examinations, was not sworn.⁴⁷ The tenor of the so-called Marian statutes authorizing the examination suggests that the justice of the peace had no discretion to discharge the prisoner, and the leading justice of the peace manuals suggest as much.⁴⁸ On the other hand, Blackstone stated that if at examination it “manifestly appears” that no crime had been committed, or that the suspicion against the prisoner was

⁴⁵ *Id.*

⁴⁶ The preliminary examination in English law arose from the so-called Marian statutes, the bail statute of 1554-1555, and the committal statute adopted in 1555. The seminal study of these statutes and the practice under them is JOHN H. LANGBEIN, *PROSECUTING CRIME IN THE RENAISSANCE: ENGLAND, GERMANY, FRANCE* (1974). For the text, and context, of the statutes themselves, see *id.* at 5-20. The basic procedure was described as follows:

WHEN a delinquent is arrested by any of the means mentioned in the preceding chapter, he ought regularly to be carried before a justice of the peace. And how he is there to be treated, I shall next shew, under the second head, of commitment and bail.

THE justice, before whom such prisoner is brought, is bound immediately to examine the circumstances of the crime alleged : and to this end by statute 2 & 3 Ph. & M. c. 10. he is to take in writing the examination of such prisoner, and the information of those who bring him : which, Mr. Lambard observes a, was the first warrant given for the examination of a felon in the English law. For, at the common law, *nemo tenebatur prodere seipsum* ; and his fault was not to be wrung out of himself, but rather to be discovered by other means, and other men. If upon this enquiry it manifestly appears, either that no such crime was committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cafes only it is lawful totally to discharge him. Otherwise he must either be committed to prison, or give bail; that is, put in securities for his appearance, to answer the charge against him.

BLACKSTONE, *supra* note 39, at *293-94 (footnotes omitted).

⁴⁷ See Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1098 (1994) (“All sources agreed on three critical points: (1) at the preliminary examination, the defendant was to be questioned unsworn; (2) his statements were to be made a matter of formal written record; and (3) his confession, if any, was to be admissible against him at trial.”).

⁴⁸ LANGBEIN, *supra* note 46, at 47 n.81.

“wholly groundless,” in “such cases only it is lawful to totally discharge him.”⁴⁹

If the justice of the peace committed the prisoner, bail ordinarily would be denied in felony cases.⁵⁰ Gaol conditions were dreadful.⁵¹ The character of eighteenth-century pretrial detention can be inferred from the practice of holding court sessions in the open air, thereby reducing the stench to tolerable levels.⁵² Those without friends to pay “fees” to the gaolers for such services as clothing and the removal of irons likely suffered the most from gaol conditions.⁵³

B. The Sweeping Changes in the Nineteenth Century

In 1790, Philadelphia undertook the first experiment with the penitentiary system by converting space at the Walnut Street Jail into a “penitentiary house” for “hardened and atrocious offenders.”⁵⁴ The first full-blown experiments took place decades later, at Auburn in New York in the 1820s⁵⁵ and then with the opening of Eastern State Penitentiary at Cherry Hills, Pennsylvania in 1829.⁵⁶ By the end of the century, the penitentiary had become the standard penalty for serious crimes. Capital punishment was confined almost exclusively to murder and rape, and as early as 1792 Pennsylvania made some murder

⁴⁹ BLACKSTONE, *supra* note 33, at *294.

⁵⁰ LANGBEIN, *supra* note 46, at 48-49. Blackstone says that felonies are bailable at common law, but then lists a long sequence of statutes barring bail for almost all felony cases. BLACKSTONE, *supra* note 39, at *295-97.

⁵¹ *Id.* at 49.

⁵² *Id.* at 50.

⁵³ On the practice of charging such fees, see JOHN HOWARD, *THE STATE OF THE PRISONS IN ENGLAND AND WALES*, at 25-27 (1777), available at http://books.google.com/books?id=4EhNAAAAYAAJ&printsec=frontcover&dq=john+howard+state+of+the+prisons&hl=en&ei=6fNpTP6ZKof6sAOX7Y2DBw&sa=X&oi=book_result&ct=result&resnum=2&ved=0CDEQ6AEwAQ#v=onepage&q&f=false.

⁵⁴ TODD R. CLEAR, GEORGE F. COLE & MICHAEL D. REISIG, *AMERICAN CORRECTIONS* 44 (9th ed. 2009).

⁵⁵ *Id.* at 45.

⁵⁶ *Id.*

punishable by imprisonment.⁵⁷ In 1846 Michigan abolished the death penalty altogether.⁵⁸

This change in the output of the criminal justice system had profound implications for the rest of the system. The common-law criminal process was full of escape-hatches such as hypertechnical pleading requirements, jury nullification, benefit of clergy, and pardons, all designed to defeat the actual infliction of capital punishment on minor offenders.⁵⁹ These devices were highly successful. For 1791, the most comprehensive database available records only eleven executions in the United States: seven for murder, two for forgery, and one each for rape and for burglary.⁶⁰ With the *de jure* decline of capital punishment, it became possible to rationalize the criminal process for the purpose of finding the truth rather than concealing it.

The growth of urban crime, including genuine riots, could not be contained by the old watch system. “The usual criticisms” of the watchmen “were they slept when they should have been watching; they shook their ‘rattles’ only to scare off criminals rather than apprehending them; and they ran away from real danger.”⁶¹ In New York, for example:

[W]ild young men about town . . . thought that a night’s spree would not be appropriately ended except they had played some practical joke on the City Watch, which took

⁵⁷ See STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 97 (2002) (“Pennsylvania’s 1786 penal reform, the first of many that would follow in the United States over the course of the next century, abolished capital punishment for robbery, burglary, sodomy, and buggery.”); *id.* at 98 (“Between 1794 and 1798 five states abolished the death penalty for all crimes other than murder, and three of the five even abolished it for certain kinds of murder. The first was Pennsylvania, which in 1794 provided prison sentences in place of death for treason, manslaughter, rape, arson, and counterfeiting. Murder remained the sole capital crime, and even murder, for the first time in any jurisdiction with a legal system based on that of England, was divided into degrees Two years later Virginia enacted a similar statute.”).

⁵⁸ Rhode Island (1852) and Wisconsin (1853) followed. *Id.* at 134.

⁵⁹ See, e.g., Michael Tonry, *Mandatory Penalties*, in 16 *CRIME AND JUSTICE: A REVIEW OF RESEARCH* 247-49 (M. Tonry ed., 1992) (discussing these response to mandatory death penalties in Britain).

⁶⁰ *Executions in the United States, 1608-2002: The ESPY File*, DEATH PENALTY INFORMATION CENTER available at <http://www.deathpenaltyinfo.org/documents/ESPYyear.pdf>.

⁶¹ SAMAHA, *supra* note 34, at 139.

the form generally of upsetting a watch-box with a snoring Leatherhead in it, or to lasso the sentry-box with a stout rope, and drag it along with its imprisoned occupant. But these experiences did not seriously ruffle the temper of the Watchmen, and so nobody was much the worse off for those irregular pleasantries.⁶²

Incremental efforts, such as hiring full-time watch captains and detectives, and creating watch-houses and police courts, failed to secure public order.

Disorder in American cities was such that vigilance committees were set up in Philadelphia in 1849⁶³ and in New York City during the 1850s.⁶⁴ The antebellum cities of the North suffered race riots, nativist/Irish riots, riots between rival volunteer fire companies, and a steady stream of violent crime.⁶⁵ Whether, as a statistical matter, street crime had become worse than it had been in earlier decades is unknowable. As a matter of perception, there was something of a crisis mentality; and there was evidence to support the perception of crisis.⁶⁶

⁶² AUGUSTINE E. COSTELLO, *OUR POLICE PROTECTORS* 72-73 (Patterson Smith ed., 3d ed. 1972).

⁶³ See DAVID R. JOHNSON, *POLICING THE URBAN UNDERWORLD: THE IMPACT OF CRIME ON THE DEVELOPMENT OF THE AMERICAN POLICE, 1800-1887*, at 30-31 (1979).

⁶⁴ See MILLER, *supra* note 43, at 140.

⁶⁵ See, e.g., SAMUEL WALKER, *A CRITICAL HISTORY OF POLICE REFORM: THE EMERGENCE OF PROFESSIONALISM* 4 (1977) (arguing that modern police forces were developed as a “consequence of an unprecedented wave of civil disorder that swept the nation between the 1830s and the 1870s”).

⁶⁶ See ROBERT C. WADMAN & WILLIAM THOMAS ALLISON, *TO PROTECT AND SERVE: A HISTORY OF POLICE IN AMERICA* 30-31 (2004) (The year 1834 was remembered as “the year of the riots” in New York City; police reform followed the notorious unsolved murder of Mary Rogers in 1841.); JOHNSON, *supra* note 63, at 15 (“No reliable statistics survive in sufficient quantities to verify these charges, and the picture of a crime-ridden society was probably exaggerated. But the rhetoric indicates a widespread belief that crime had become a major problem, and in the absence of any contrary evidence, that attitude became an important justification for changing the existing law enforcement machinery.” (footnote omitted)). The only skeptical challenge to the link between urban crime and the new police appears to be Professor Erik Monkkonen’s view. See ERIK H. MONKKONEN, *MURDER IN NEW YORK CITY* 7 (2001) (challenging assumption of police as “natural” response to urban crime). Monkkonen’s own account of police emerging as part of the service package provided by city governments, however, does not explain why some services including security services came to be provided primarily by urban government while other services remained private,

The first American police force, organized on the so-called “metropolitan model” of the London force, is usually said to be New York City’s, organized initially in 1845.⁶⁷ Boston also claims this distinction based on an authorizing statute passed in 1837,⁶⁸ but in any event, full-time police forces quickly became standard in major cities: Philadelphia in 1855; Chicago, Pittsburgh, and San Francisco in 1857; Washington, D.C. in 1861; and Cleveland in 1866.⁶⁹ The new, professional, round-the-clock, paramilitary police forces also undertook the task of investigating suspected offenses, even in the absence of any complaint from the citizenry.

By 1886, the year of the so-called Haymarket Riot in Chicago, order was kept by full-time, round-the-clock professional police armed with repeating firearms. Offenses were investigated by police detectives working with a public prosecutor who possessed a practical monopoly on charging decisions. So when a bitter crowd of labor sympathizers massed to protest police brutality, they were met by a column of hundreds of armed officers in uniform and under the observation of informants and plainclothes detectives in their midst.⁷⁰ After the immediate violence of the Haymarket Riot ended, the police conducted a brutal investigation in which the police, without warrants, ransacked homes and newspaper offices.⁷¹ Hundreds were arrested, interrogated by such means as

running the gamut from construction to the regulated utilities. And Monkkonen’s own subsequent study of homicide in New York shows that New York was indeed a more violent place than London or Liverpool. *See id.* at 134-50. That at least suggests that there was a security challenge in nineteenth-century American cities.

⁶⁷ JAMES F. RICHARDSON, *THE NEW YORK POLICE: COLONIAL TIMES TO 1901*, at 49 (1970).

⁶⁸ ROGER LANE, *POLICING THE CITY—BOSTON 1822-1825*, at 37 (1967).

⁶⁹ These dates are drawn from ERIC H. MONKKONEN, *POLICE IN URBAN AMERICA 164-68* (1981). Monkkonen used the date of the adoption of uniforms as a proxy for metropolitan departments of the modern type. *Id.*

⁷⁰ On the Haymarket affair, see generally PAUL AVRICH, *THE HAYMARKET TRAGEDY* (1986); and JAMES GREEN, *DEATH IN THE HAYMARKET* (2006).

⁷¹ *See AVRICH, supra* note 70, at 221 (“Meeting halls, newspaper offices, and even private homes were invaded and ransacked for evidence. In two days more than fifty gathering places of anarchists and socialists were raided and persons under the slightest suspicion of radical affiliation arrested, in most cases without warrants and with no specific charge lodged against them . . . The next few weeks saw the detention of hundreds of men and women, most of them foreigners, who were put through the ‘third degree’ to extract information and confessions.”).

the sweatbox.⁷² A handful of leading anarchists were selected by the state's attorney to be presented to the grand jury for indictment and trial.⁷³

In short: The 1791 criminal justice system was amateurish, reactive, and took little action absent judicial authorization. The modern system that emerged in the course of the nineteenth century was professional, proactive, and operated on an industrial scale, substantially without judicial oversight.

C. The Contextual Critique of SPO

The specific rules and practices regulating search and seizure in 1791 functioned in a system that otherwise vanished during the nineteenth century. To interpret the general language of the Fourth Amendment as instantiating the particular rules, after radical change to the system of which those rules were integral components, is *not* a faithful rendition of the original understanding. Simply put, any given 1791 search-and-seizure rule *is not the same rule* in a completely different criminal justice system.

I shall illustrate this claim with some specific examples. Following the helpful taxonomy developed by Professor Rubinfeld,⁷⁴ I divide these into two categories: founding-era application understandings and founding-era no-application understandings. An "application understanding" is an expectation that a constitutional provision prohibits some specific historical abuse. A "no-application understanding" is the expectation that the constitutional provision does not prohibit some rule or practice. Rubinfeld convincingly argues that in general "application understandings," especially those against the very practices that motivated the adoption of the constitutional provision, have proved more durable in our law than no-application understandings.⁷⁵ In the Fourth Amendment context,

⁷² *Id.*

⁷³ The legal proceedings eventually reached the U.S. Supreme Court, which refused to overturn the convictions. *See Ex Parte Spies*, 123 U.S. 131, 163-66 (1887).

⁷⁴ *See* Jed Rubinfeld, *The Paradigm Case Method*, 115 *YALE L.J.* 1977 (2006).

⁷⁵ *See id.* at 1981 ("American constitutional law adheres systematically to one kind of original understanding (which I call 'foundational Application Understandings'),

however, the Court has abandoned even core application understandings. The Court has done so for compelling reasons attending the revolutionary changes in the criminal justice system that took place in the century after the founding. Those changes not only mean that actual implementation of SPO would be bad, perhaps catastrophic, policy. The systemic changes also make SPO an illogical objection to what the Court has done.

1. Founding-Era Application Understandings

All agree that the Fourth Amendment was understood to ban general warrants and writs of assistance. General warrants, although widely used in both England and America, became objects of Whig outrage after royal officers arrested John Wilkes for criminal libel in 1763.⁷⁶ Wilkes had published a scurrilous, war-mongering pamphlet criticizing the government.⁷⁷ The government retaliated: “Upon an information for libel filed by the attorney-general, general search warrants were issued by one of the secretaries of state leading to the arrest of no less than forty-nine persons, including Wilkes, his printer, and his publisher.”⁷⁸ “Every closet, bureau, and drawer in one Wilkes residence was opened in an effort to find and confiscate the entirety of his papers.”⁷⁹ Hundreds of locks were broken and thousands of documents taken.⁸⁰

Freed by a writ of habeas corpus, Wilkes fled abroad and was convicted of criminal libel *in absentia*.⁸¹ Popular opinion was overwhelmingly on his side.⁸² Wilkes returned to England to serve

while routinely discarding all other original understanding (which I call ‘No-Application Understandings’).”).

⁷⁶ For an overview of the Wilkes affair, see CLANCY, *supra* note 16, at 35-38 (2008).

⁷⁷ For the famous pamphlet, *The North Briton*, No. 45, see THE NORTH BRITON NO I TO NO. XLVI INCLUSIVE 157 (1769).

⁷⁸ LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 145 (1960).

⁷⁹ CUDDIHY, *supra* note 17, at 442.

⁸⁰ *Id.* (“Although unquestionably exaggerated, Wilkes’ inventory of damages reflected outright plunder on a scale that neither the Huns, the Gestapo, nor the N.K.V.D. could have exceeded.”).

⁸¹ See LEVY, *supra* note 78, at 146.

⁸² See, e.g., JOHN BREWER, PARTY IDEOLOGY AND POPULAR POLITICS AT THE ACCESSION OF GEORGE III, at 178-79 (1976) (describing public demonstrations

his sentence and was elected to Parliament while in prison.⁸³ He and his associates brought tort actions against the officers who conducted the search.⁸⁴ The defendants could not deny that they had entered private premises and taken private property without consent.⁸⁵ That made them trespassers, unless they could point to some legal justification.

They claimed two such justifications. The first was a quasi-judicial immunity, based on the statutory immunity given to justices of the peace under the Vagrancy Act.⁸⁶ The second was the warrant issued by the secretary of state. The common-law courts of Common Pleas and King's Bench rejected both defenses.⁸⁷

The controversy over writs of assistance arose from British efforts to raise revenue in the American colonies.⁸⁸ John Adams heard, and was inspired by, James Otis' famous argument against the writs in 1761.⁸⁹ Based on English practice, the Massachusetts Superior Court rejected Otis' arguments and upheld the legality of the writs.⁹⁰ The Massachusetts court granted at least ten writs in the next four years.⁹¹ The colonial courts, however, generally refused to issue the writs or issued them in modified form.⁹² John

celebrating release of Wilkes in 1770 and a 1769 petition on his behalf that was signed by 55,000).

⁸³ LEVY, *supra* note 78, at 146.

⁸⁴ There were dozens of suits. See CUDDIHY, *supra* note 17, at 439-68.

⁸⁵ For example, in *Entick v. Carrington*, 19 How. St. Tr. 1030 (C.P. 1765), the jury by special verdict found that the defendants had forcibly entered and would be trespassers if they did not have a justification. *Id.* at 1036.

⁸⁶ See, e.g., *Entick*, 19 How. St. Tr. at 1039-41 (argument of defendant's counsel).

⁸⁷ The cases most commonly cited are: *Leach v. Money*, 97 Eng. Rep. 1050 (K.B. 1765); *Entick v. Carrington*, 95 Eng. Rep. 807 (C.P. 1765); *Huckle v. Money*, 95 Eng. Rep. 768 (C.P. 1763); and *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763). *Entick*, strictly speaking, did not involve the Wilkes warrant, but rather was brought by the publishers of another pamphlet, THE MONITOR, who had suffered arrest and search under an earlier general warrant. See *Entick*, 95 Eng. Rep. at 808.

⁸⁸ On the controversy generally, see M.H. SMITH, THE WRITS OF ASSISTANCE CASE (1978); and CUDDIHY, *supra* note 17, at 377-435, 489-536. For a sample of the writs in use in 1762, see WILLIAM MACDONALD, DOCUMENTARY SOURCEBOOK OF AMERICAN HISTORY 1606-1898, at 105-09 (1908).

⁸⁹ See 2 WORKS OF JOHN ADAMS 519-20 (1850).

⁹⁰ See CUDDIHY, *supra* note 17, at 394-95.

⁹¹ *Id.*

⁹² *Id.* at 530-36.

Adams would go on to draft Article 14 of the Massachusetts Declaration of Rights, the primary model for the Fourth Amendment.⁹³

The central meaning of the Fourth Amendment is that general warrants and writs of assistance are prohibited. “Yet in the case of administrative searches, the Supreme Court has required officials to secure ‘area warrants,’ the modern analogue of general warrants, which are issued upon a showing that there is not individualized probable cause.”⁹⁴ Is the “general warrant” for an administrative building inspection the same thing as the “general warrant” for promiscuous arrest and search issued against Wilkes? Or has government’s need for proactive enforcement, coupled with the minimally coercive nature of administrative inspections, made today’s “general warrants” not the same kind of “general warrants” the founders abhorred?

Inextricably connected to the ban on general warrants was the contemporaneous tort law, which made officers who entered private premises *without a particularized warrant* liable in damages. The Wilksite cases rejected any immunity for executive officers as such.⁹⁵ “Significantly, the defendants’ argument did not go in terms of executive privilege or immunity.”⁹⁶ A valid warrant defeated a trespass suit. An invalid warrant was the equivalent of no warrant at all, and without a good warrant, all trespassers, even public officers seeking in good faith to enforce the criminal law, were liable for both compensatory and punitive damages.⁹⁷

As Professor Pfander puts it, “[T]he origins of qualified immunity have never been adequately explored or explained

⁹³ See Thomas K. Clancy, *The Framers’ Intent: John Adams, his Era, and the Fourth Amendment*, 86 IND. L.J. 979, 1027-31 (2011).

⁹⁴ Louis Michael Seidman, *Acontextual Judicial Review*, 32 CARDOZO L. REV. 1143, 1147 (2011) (citing *Camara v. Municipal Court*, 387 U.S. 523 (1967) (holding that Fourth Amendment requires warrants for building inspections but warrants to inspect all buildings in a particular area are constitutional)).

⁹⁵ Louis L. Jaffe, *Suits Against Government and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 16 (1963) (discussing *Entick v. Carrington*, 19 How. St. Tr. 1030 (C.P. 1765)).

⁹⁶ *Id.*

⁹⁷ On the exemplary damages awarded in the Wilksite cases, see CUDDIHY, *supra* note 17, at 452 (noting that Beardmore, another plaintiff against Carrington, received £1000).

...”⁹⁸ It seems clear, however, that qualified immunity arose long after the founding. In *Little v. Barreme*, Chief Justice Marshall for a unanimous Court held that a navy captain who seized a vessel without statutory authority could not escape liability by proof of good-faith compliance with a presidential order.⁹⁹ Unfairness was mitigated by the congressional practice of passing private bills to indemnify sympathetic defendants.¹⁰⁰

In *Wise v. Withers*, the plaintiff, a justice of the peace, sued the defendant, a collector of militia fines, for trespass after the collector entered the plaintiff’s property and seized goods to satisfy a fine.¹⁰¹ The plaintiff argued that as a justice of the peace he was exempt from militia service by act of Congress.¹⁰² The Supreme Court, again per Chief Justice Marshall, agreed with the plaintiff that he was exempt from service. That being so, the order of a court martial imposing the fine gave the collector no defense: “[I]t is a principle, that a decision of such a tribunal, in a case clearly without its jurisdiction, cannot protect the officer who executes it. The court and the officer are all trespassers.”¹⁰³ Absent a warrant, there was no public-officer immunity from suit.¹⁰⁴ Indeed, even when a warrant was erroneously issued by a court of competent jurisdiction, the officers were still exposed to liability.¹⁰⁵

During Aaron Burr’s trial for treason charges, the defense moved for an attachment of the person (i.e., an order to arrest) General Wilkinson for arresting witnesses who were to testify at

⁹⁸ James E. Pfander, Iqbal, Bivens, and the Role of Judge Made-Law in *Constitutional Litigation*, 114 PENN. ST. L. REV. 1387, 1392 (2010) (footnote omitted).

⁹⁹ 6 U.S. 170, 179 (1804). To the same effect is *Otis v. Bacon*, 11 U.S. 589 (1813).

¹⁰⁰ See generally James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862 (2010).

¹⁰¹ 7 U.S. 331 (1806).

¹⁰² *Id.* at 332.

¹⁰³ *Id.* at 337.

¹⁰⁴ See David P. Currie, *Sovereign Immunity and Suits Against Government Officers*, 1984 SUP. CT. REV. 149, 153 (1985); David E. Engdahl, *Immunity and Accountability for Positive Government Wrongs*, 44 U. COLO. L. REV. 1, 41-47 (1972); David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61, 72 (1984).

¹⁰⁵ See Davies, *supra* note 17, at 649 (surveying early American cases, concluding: “[T]he common law apparently provided no justification for a search of a house beyond the ministerial execution of a valid search warrant.” (footnote omitted)).

the trial.¹⁰⁶ The defense theory was that these arrests, together with other misconduct by Wilkinson, amounted to a contempt of the trial court.¹⁰⁷ Chief Justice Marshall presided at the trial in the circuit court. Marshall rejected Burr's motion to have Wilkinson arrested because Wilkinson had acted under orders issued by Judge Hall.¹⁰⁸ Counsel for Burr argued that Hall was a puppet of Wilkinson's.¹⁰⁹

Marshall wrote as follows:

Whether the judge did or did not transcend the limits prescribed by law, those ministerial officers who obeyed his orders cannot be supposed to have acted with a knowledge that he had mistaken his power. Should it be admitted that this would be no defence for them in an action to obtain compensation for the injury, yet it furnishes sufficient evidence that no contempt was intended to this court by General Wilkinson, that he has not been guilty of any intentional abuse of its process, or of any oppression in the manner of executing it.¹¹⁰

He goes on to say that:

[W]here an attachment does not seem to be absolutely required by the justice due to the particular individual against whom the prosecution is depending, the court is more inclined to leave the parties to the ordinary course of law, than to employ the extraordinary powers which are given for the purpose of preserving the administration of justice in that purity which ought to be so universally desired.¹¹¹

The upshot seems to be that if the witnesses sued Wilkinson for false arrest, even warrants, such as those issued by Judge Hall, would provide no good-faith defense if the court trying the tort action concluded that the warrants were issued erroneously.

¹⁰⁶ United States v. Burr, 25 F. Cas. 41, 49 (C.C.D. Va. 1807) (14,692f).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 48-49.

¹⁰⁹ *Id.* at 47.

¹¹⁰ United States v. Burr, 25 F. Cas. 41, 49 (C.C.D. Va. 1807) (14,692f).

¹¹¹ *Id.*

*Pierson v. Ray*¹¹² and *Anderson v. Creighton*,¹¹³ the Court's decisions recognizing qualified immunity for law enforcement officers in actions, brought, respectively, under 42 U.S.C. § 1983 and *Bivens*,¹¹⁴ are bereft of founding-era support. So too are the various statutes and state court rulings recognizing "public function" qualified immunity against state tort claims.¹¹⁵ If we want to restore the tort regime the founders expected, we would need to return to the practice of holding officers strictly liable for entries on a bad warrant or without any warrant at all.

Is that what the founders would have hoped for if they knew that the criminal law would come to be enforced by full-time, professional, proactive police? Professional police change the consequences of strict liability. Constables and watchmen served episodically and often reluctantly. Full-time police need to be recruited and retained, and they care about remaining in good standing with their employers. They have incentives to comply with legal standards apart from the fear of liability; and fear of liability might discourage people from taking jobs in law enforcement and undue passivity by those who serve.

The last two points could be addressed by indemnification, but only at high cost to the public fisc. The scope and intrusiveness of modern policing, relative to eighteenth-century law enforcement, raised the potential cost of indemnification

¹¹² 386 U.S. 547 (1967).

¹¹³ 483 U.S. 635 (1987).

¹¹⁴ *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

¹¹⁵ See, e.g., OHIO REV. CODE ANN. § 2744.03(A)(6) (LexisNexis 2003). The statute creates tort immunity for an employee of a political subdivision unless:

(a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;

(b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;

(c) Civil liability is expressly imposed upon the employee by a section of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon an employee, because that section provides for a criminal penalty, because of a general authorization in that section that an employee may sue and be sued, or because the section uses the term 'shall' in a provision pertaining to an employee.

Id.

dramatically. Immunity has the effect of leaving the costs of constitutional violations on the aggrieved citizen, thereby holding down the public expenditures for a given level of law enforcement. This may be good or bad policy (I am inclined to think it is bad),¹¹⁶ but it is not a choice the founders could have harbored clear expectations about. At any rate, the *Houghton* formulation of SPO seems to call for the abolition of qualified immunity.

If we accept the historical account given in *Boyd v. United States*,¹¹⁷ the founders had a distinct application understanding that the Fourth Amendment prohibited the seizure of private papers for evidentiary use. The *Boyd* Court relied on the Wilkes affair, and in particular Lord Camden's opinion in *Entick v. Carrington*, to condemn the seizure of papers. In *Entick*, Camden proclaimed:

Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and therefore it is too much for us without such authority to pronounce a practice legal, which would be subversive of all the comforts of society.¹¹⁸

¹¹⁶ See Donald A. Dripps, *The "New" Exclusionary Rule Debate: From "Still Preoccupied with 1985" to "Virtual Deterrence,"* 37 *FORDHAM URB. L.J.* 733, 780 (2010) ("Given the prevalence of indemnification of individual officers, and the Supreme Court's extensive recognition of bright-line rules, tort liability sans immunity and sans exclusion might move us closer to optimal deterrence."). If we think that jury verdicts give a good estimate of the costs of Fourth Amendment violations, immunity, as compared to indemnification, amounts to subsidizing constitutional violations—leaving aside the officer-defendant's right to interlocutory appeal of an order denying immunity, which has a tendency to discourage even meritorious claims by increasing litigation costs.

¹¹⁷ 116 U.S. 616 (1886).

¹¹⁸ *Entick v. Carrington*, 19 *How. St. Tr.* 1030, 1066 (1765).

Boyd concluded that the founders embraced Camden's judgment and so meant to proscribe any seizure of private papers for evidentiary use against their owner.¹¹⁹

The *Boyd* Court's historical account deserves somewhat unusual deference, for two reasons. First, the opinion was written less than a century after the ratification of the Fourth Amendment. The justices had walked the earth with the founders.¹²⁰ If the passage of time makes the original understanding more difficult to recover, the *Boyd* Court has an advantage over us of more than a century.

Second, one of the members of the *Boyd* majority was Horace Gray, a legal historian. Significantly, he compiled the first archive of primary sources related to the Writs of Assistance controversy.¹²¹ "Here, in almost 145 pages, packed with footnotes, Gray delivered a magnificent display of research into the origin and use of search warrants up to and at the time of Otis' arguments."¹²² That archive remains "essential reading."¹²³ True, Gray was not an originalist.¹²⁴ But if Bradley's opinion had declared false history we would expect a deep student of the controversy over the writs, intimate with the grandson of John Adams,¹²⁵ to have known it and said something about it. In my view, the burden of proof is on those who assert that *Boyd* was wrong.

According to *Boyd*, the act struck down in that case:

¹¹⁹ *Boyd*, 116 U.S. at 630.

¹²⁰ Justice Bradley was born in 1813. JOSEPH P. BRADLEY, MISCELLANEOUS WRITINGS (Charles Bradley ed., 1902). Thomas Jefferson and John Adams famously expired on or about the Fourth of July, 1826. JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 20 (1st ed. 1996). John Marshall lived until 1835. *Id.*

¹²¹ Horace Gray, *Notes*, in REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY BETWEEN 1761 AND 1772, at 395 (Boston, Little, Brown, & Co. 1865).

¹²² Robert M. Spector, *Historian on the Supreme Court: Justice Horace C. Gray, Jr. and the Historical Method*, 12 AM. J. LEGAL HIST. 181, 194 (1968).

¹²³ Thomas K. Clancy, *The Role of History*, 7 OHIO ST. J. CRIM. L. 811, 812 (2010).

¹²⁴ Spector, *supra* note 122, at 209 ("Gray viewed the Federal Constitution as a living organism that meant one thing in 1789, an-other in 1860, and still another in his own time.").

¹²⁵ *Id.* at 209 (noting that Charles Francis Adams spent "many years of friendship" with Gray, although it appears that Adams thought Gray an unimaginative judge).

was the first act in this country, and we might say, either in this country or in England, so far as we have been able to ascertain, which authorized the search and seizure of a man's private papers, or the compulsory production of them, for the purpose of using them in evidence against him in a criminal case, or in a proceeding to enforce the forfeiture of his property.¹²⁶

Proving a negative is difficult, but I have not seen anything that would contradict the *Boyd* Court's assertion.

Professor Davies regards *Boyd's* reliance on Camden's opinion in Howard's State Trials as erroneous. Davies argues that:

Bradley's originalist claim was unsound because the passage he quoted had not appeared in the initial report of the 1765 case which was published in 1770 (with which many framing-era Americans undoubtedly were familiar), but appeared only in a later expanded case report that was not published until 1781. Thus, Americans could not have been familiar with the assertions that Bradley quoted when John Adams introduced the phrase "unreasonable searches and seizures" in the 1780 Massachusetts provision. Moreover, because it is unlikely that the later report would have been imported in significant numbers during the remainder of the framing era, it seems highly doubtful Americans would have become familiar with Camden's notion that a search warrant for papers was inherently illegal even by the time of the framing of the Fourth Amendment in 1789.¹²⁷

At least with respect to private papers, *Boyd* is defensible against these objections.

On an "original public meaning" version of originalism, the question is not what was expected by Adams in 1780, but by

¹²⁶ *Boyd v. United States*, 116 U.S. 616, 622-23 (1886).

¹²⁷ See Thomas Y. Davies, *Can You Handle the Truth? The Framers Preserved Common Law Criminal Arrest and Search Rules in "Due Process of Law"—"Fourth Amendment Reasonableness" is Only a Modern, Destructive, Judicial Myth*, 43 TEX. TECH L. REV. 51, 117-18 (2010) (footnotes omitted).

Congress and the people in 1791¹²⁸—by which time the expanded version of the report was in circulation.¹²⁹ Moreover, even Wilson’s 1775 report says that “we can safely say there is no law in this country to justify the defendants in what they have done ; if there was, it would destroy all the comforts of society ; for papers are often the dearest property a man can have.”¹³⁰

In the pamphlet wars in the 1760s, Whig polemicists identified the seizure of papers as an abuse distinct from general warrants.¹³¹ At the popular end of the spectrum, the anonymous *Brittania’s Intercession for the Deliverance of John Wilkes* declared, in mock-biblical rhetoric: “And they looked into his dwelling, and searched for his papers, and all his secret workings, and they took them every one.”¹³² The more cerebral “Father of Candor” laid out the same doctrine announced in *Boyd*: the seizure of papers was an “absolute illegality,” an “abominable outrage,”¹³³ and the use of

¹²⁸ See, e.g., Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEO. L.J. 329, 338-39 (2011) (“Today, most originalist scholars reject original intent originalism and instead seek evidence of original public understanding. This approach seeks to determine the likely public understanding of a proposed constitutional text, with special emphasis placed on those with the authority to ratify the text and make it an official part of the Constitution.” (footnotes omitted)).

¹²⁹ See Roger Root, *The Originalist Case for the Fourth Amendment Exclusionary Rule*, 45 GONZ. L. REV. 1, 41-42 n.260 (2009-2010) (“Moreover, the set of books containing the longer version (Hargrave’s *A Complete Collection of State-Trials and Proceedings For High-Treason, and other Crimes and Misdemeanours* (known as *State Trials*, 4th edition (1781))) was a fixture of late-eighteenth-century law libraries. Over a hundred of these sets survive in the rare book collections of American libraries today, and several libraries (e.g., Yale’s and Harvard’s) hold more than one complete set. The notion that all of these book sets, published in 1781, crossed the Atlantic only after the Fourth Amendment was proposed and ratified (between September 1787 and December 1791) seems highly unlikely.”).

¹³⁰ *Entick v. Carrington*, 95 Eng. Rep. 807, 817-18 (C.P. 1765).

¹³¹ See Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 VA. L. REV. 869, 896-907 (1985); CUDDIHY, *supra* note 17, at 459-60 (1990).

¹³² BRITANIA’S INTERCESSION FOR THE DELIVERANCE OF JOHN WILKES, ESQ. FROM PERSECUTION AND BANISHMENT TO WHICH IS ADDED, A POLITICAL AND CONSTITUTIONAL SERMON: AND A DEDICATION TO L— B—, at 7 (London, H. Woodgate 1768).

¹³³ A LETTER CONCERNING LIBELS, WARRANTS, THE SEIZURE OF PAPERS AND SURETIES FOR THE PEACE OF BEHAVIOUR; WITH A VIEW TO SOME LATE PROCEEDINGS, AND THE DEFENCE OF THEM BY THE MAJORITY 54 (London, J. Almon 5th ed. 1765), available at http://books.google.com/books?id=aVICAAAAMAAJ&pg=PA4&dq=candor+letter+concerning+libels&hl=en&ei=ns8kTunjNtDagQf_4W7DA&sa=X&oi=book_result&ct=result&resnum=1&ved=0CCkQ6AEwAA#v=onepage&q&f=false.

seized papers at a criminal trial “would be making a man give evidence against and accuse himself, with a vengeance.”¹³⁴ The letter further stated:

It must either be sworn that I have certain stolen goods, or such a particular thing that is criminal itself, in my custody, before any magistrate is authorized to grant a warrant to any man to enter my house and seize it. Nay further, if a positive oath be made, and such a particular warrant issued, it can only be executed upon the paper or thing sworn to and specified, and in the presence of owner or of somebody intrusted by him, with the custody of it.¹³⁵

American patriots revered Wilkes and paid close attention to his tribulations.¹³⁶

Davies further argues that the text of the Fourth Amendment implicitly authorizes searches of “papers.”¹³⁷ The reasonableness clause lists the interests protected by the right against unreasonable searches in descending order of priority: persons, houses, paper, then effects. Why mention papers at all? If “things” in the warrant clause is synonymous with “effects” in the reasonableness clause, then indeed the warrant clause implies that papers are not among the “things to be seized” even by valid warrant. If we equate “things” in the warrant clause with “effects” in the reasonableness clause, the text arguably cuts in exactly the other directions. “Things” can be seized, but papers are not like other “things” or other “effects.”

In any event, even under *Entick* and *Boyd* there could be reasonable seizures of papers: stolen papers or contraband papers such as libels and (later) lottery tickets. The constitutional status of the ban on warrants to search for and seize documentary evidence was recognized, long before *Boyd*, by the Massachusetts court in *Commonwealth v. Dana*, decided in 1841.¹³⁸ Dana was

¹³⁴ *Id.* at 55-56.

¹³⁵ *Id.* at 58.

¹³⁶ See BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 110-12 (Harvard Univ. Press 1967); Pauline Maier, *John Wilkes and American Disillusionment with Britain*, 20 WM. & MARY Q. 373 (1963).

¹³⁷ See Davies, *supra* note 127, at 118-19.

¹³⁸ 43 Mass. (2 Met.) 329 (1841).

convicted of possessing materials for a lottery, and moved in arrest of judgment on the ground, *inter alia*, that the papers used against him as evidence were obtained by the execution of an unconstitutional warrant.¹³⁹ Justice Wilde gave two grounds for rejecting Dana's position. The first was the lottery materials, once banned by the legislature, became subject to seizure like libels or stolen goods.¹⁴⁰ The second was that even if the warrant was illegal, Dana's remedy was to sue for trespass, not to exclude the evidence.¹⁴¹

On the second point *Dana* differs from *Boyd*, but not on the first. The *Dana* court quoted approvingly the "dearest property" language from *Entick*. The *Dana* opinion takes pains to note that the only papers seized were contraband, not mere evidence:

It has been objected further, that the warrant was illegally served, because the officer seized "books, &c.," and it is argued that books are not "materials for a lottery." But we think that books, kept in relation to the proceedings respecting a lottery, are to be considered as materials for a lottery; and it does not appear that any other books were seized.¹⁴²

The amendment does not speak to seizing any property, let alone "papers," for use in evidence without the right to confiscate them. While further investigation is justified, the evidence so far suggests that the original public meaning of the Fourth Amendment included a special hostility to seizing private papers.

Would that understanding have withstood prescient awareness of our government's need to combat fraud and terrorism in a computer age? That seems beyond any certain knowledge but on the whole unlikely. I suppose one might stretch the concept of "instrumentalities" of crime to cover far more documentary (or conversational) evidence than might be supposed

¹³⁹ *Id.* at 331-32.

¹⁴⁰ *Id.* at 337.

¹⁴¹ *Id.*

¹⁴² *Id.* at 337.

at first blush.¹⁴³ It would be stretched to the breaking point if that notion went so far as to include Ted Kaczynski's diary or every file stored on Zacarias Moussaoui's computer.

Terry stops provide a fourth example of the irrationality of privileging specific application understandings. Blackstone states:

To constitute the injury of false imprisonment there are two points requisite : 1. The detention of the person ; and, 2. The unlawfulness of such detention. Every confinement of the person is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets. Unlawful, or false, imprisonment consists in such confinement or detention without sufficient authority : which authority may arise either from some process from the courts of justice ; or from some warrant from a legal officer having power to commit, under his hand and seal, and expressing the cause of such commitment; or from some other special cause warranted, for the necessity of the thing, either by common law, or act of parliament ; such as the arresting of a felon by a private person without warrant, the impressing of mariners for the public service, or the apprehending of waggoners for misbehaviour in the public service, or the apprehending of waggoners for misbehaviour in the public highways.¹⁴⁴

The founders, then, would have expected the legality of a so-called *Terry* stop to be tested by an action for false imprisonment. If we

¹⁴³ Justice Brennan wrote, when *Boyd* was still good law, "that words, which are the objects of an electronic seizure, are ordinarily mere evidence and not the fruits or instrumentalities of crime, and so they are impermissible objects of lawful searches under any circumstances." *Lopez v. United States*, 373 U.S. 427, 462 (1963) (Brennan, J., dissenting). On the other hand, Justice Sutherland noted an important distinction in a memo he wrote while *Olmstead* was being decided. "In a general way my view is that the conversations which were heard as a result of the wire tapping did not relate to a past crime but were part of a crime then being committed." See Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 146 (2006). Sutherland denied that wiretapping was a search or a seizure, but assuming it were, Sutherland's point that forward-looking co-conspirator statements would be instrumentalities and so seizable under *Boyd* is perfectly logical.

¹⁴⁴ 3 WILLIAM BLACKSTONE, COMMENTARIES *127 (footnotes omitted).

characterize a *Terry* stop as forcible detention based on suspicion falling short of probable cause, these stops would have been actionable according to founding-era common law. Indeed, founding-era warrantless arrest standards were actually stricter than the modern probable cause formulation.¹⁴⁵

But to abstract the false imprisonment tort from the legal context would be misleading. At the founding, justices of the peace had statutory authority to try summarily, and punish corporally, offenses “such as common swearing, drunkenness, vagrancy, idleness, and a vast variety of others[.]”¹⁴⁶ The practice was common enough that one cost of these summary proceedings was that the press of cases made some unwilling to serve as a justice.¹⁴⁷

In the nineteenth century, the new police forces were given some broader arrest powers than enjoyed by private persons.¹⁴⁸ Their principal security against liability for false arrest or false imprisonment, however, appears to have been that the substantive law made suspicious public behavior of the sort, now dealt with under *Terry*, criminal. Between 1845 and 1850, the New York Police Department recorded 144,364 arrests.¹⁴⁹ Of these, 20,252 were for “Disorderly conduct,” 29,190 for “Intoxication and disorderly conduct,” 36,675 for “Intoxication” simpliciter, and 11,347 for “Vagrancy.”¹⁵⁰ Another 733 were for “Assault and interfering with Policeman.”¹⁵¹

In form, statutory provisions such as “vagrancy” and “disorderly conduct” define substantive offenses. In practice, they authorize arrest and search for suspicious behavior. A statute that made it a crime to refuse consent to search, or to “engage in

¹⁴⁵ See Davies, *supra* note 17, at 627-34 (founding-era common-law authorized warrantless arrest if the officer (or private citizen) actually saw an offense; if the arrested suspect was indeed guilty of a felony as established by his subsequent conviction; or when a felony was in fact committed and the officer had reasonable grounds for suspecting the person arrested of committing it).

¹⁴⁶ BLACKSTONE, *supra* note 39, at *278.

¹⁴⁷ *Id.* at *279.

¹⁴⁸ See Davies, *supra* note 17, at 634-42.

¹⁴⁹ COSTELLO, *supra* note 62, at 116.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

conduct that would cause a reasonably prudent person to believe that criminal activity may be afoot” would, I suppose, violate the Fourth Amendment. But vagrancy-type offenses were not struck down as void-for-vagueness on due-process grounds until the 1960s and 1970s.¹⁵²

Would the Framers have condemned *Terry* stops if they knew that the prohibition of vagrancy would be invalidated, and that police would be on proactive patrol at all hours? Perhaps they would have, but the utterly changed legal and institutional context makes such a judgment highly speculative.

Consider one more founding-era application understanding. William Cuddihy asserts that second only “to the requirement for specificity in warrants, the hidden unconstitutionality of nocturnal searches was the most certain feature of the amendment’s original understanding.”¹⁵³ The terrors of night-time home invasion, however, while not eliminated, are certainly dramatically reduced by electric light, telephone communications, and uniformed police. A “nighttime entry” in 1791 was a different experience than a “nighttime entry” in 2011.

In sum, on many points the founders probably regarded many specific modern practices to be “unreasonable.” These include warrantless entries for regulatory purposes, qualified immunity for police officers, warrants to search for and seize private papers as evidence, and *Terry* stops based on less than probable cause. It is far from clear, however, that these specific expectations should be regarded as controlling given the massive institutional changes in the criminal justice system since the founding.

Today we tolerate building inspections under general warrants, qualified immunity for warrantless police actions, and the routine seizure of papers for use in evidence. We do this because in the changed institutional context of modern, proactive law enforcement, we see nothing “unreasonable” in these particular practices. The founders saw them as prototypically unreasonable, but only in an institutional context so removed from

¹⁵² See *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965).

¹⁵³ CUDDIHY, *supra* note 17, at 1510.

ours that we cannot say their original expectations would have survived changed circumstances.

2. Founding-Era No-Application Understandings

Just as the founders aimed to prohibit specific practices we now tolerate, they also tolerated some practices that we now forbid. The most frequently mentioned example is eavesdropping, which absent a trespass required no warrant at common law. *Katz* is usually seen as a response to technological change. Institutional changes, however, were a major impetus toward regulating electronic surveillance.

In the founding era, eavesdroppers were private sneaks. Their snooping, even if not actionable under tort law, was a petty criminal offense.¹⁵⁴ The usual, and indeed powerful, reason given for expanding the Fourth Amendment to cover *electronic* surveillance is technological change.¹⁵⁵ Technology, however, is only half the story. Our intuitions about eavesdropping vary not only with the technology used, but also with the identity of the people using the technology. Consider private eavesdropping.¹⁵⁶ It is hard to think of a justification for *private* eavesdropping. Nor, at least until the internet age, was it plausible to think of private eavesdropping as offering private persons a surplus of benefits over costs that would threaten general confidence in conversations behind closed doors or over the telephone.

Eavesdropping *by government agents* is in another category altogether. Justice Black was right in *Katz* that the founders knew

¹⁵⁴ BLACKSTONE, *supra* note 39, at *169 (“Eaves-droppers, or such as listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance and presentable at the court-leet: or are indictable at the sessions, and punishable by fine and finding sureties for the good behavior.”).

¹⁵⁵ *See, e.g.*, *United States v. White*, 401 U.S. 745, 755 (1971) (Douglas, J., dissenting) (“What the ancients knew as ‘eavesdropping,’ we now call ‘electronic surveillance’; but to equate the two is to treat man’s first gunpowder on the same level as the nuclear bomb.”).

¹⁵⁶ *See, e.g.*, Don Van Natta Jr., *Suspicious about Former Editor in Battle over Story Complicate Hacking Scandal*, N.Y. TIMES, July 23, 2011 at A4 (eavesdropping allegedly used by employees of the tabloid press).

about eavesdropping.¹⁵⁷ I disagree, as did *Katz* and all subsequent cases, with Justice Black's further claim that "wiretapping is nothing more than eavesdropping by telephone."¹⁵⁸ Leaving the technological aspect aside, Justice Black was wrong about something else. The Framers were as ignorant of eavesdropping by proactive professional law-enforcement agents as they were of wiretapping.

It is at least arguable that institutional changes had more influence than technological ones on the Court's turn in *Katz*. Proactive enforcement transformed eavesdropping, by whatever means, from an eccentric private vice to a pervasive public threat. This transformation manifested itself in police spying on labor unions¹⁵⁹ and ferreting out homosexual liaisons.¹⁶⁰ Surely, however, the most salient fact about electronic surveillance by police was its troubling similarity to the practices of Nazi Germany and Soviet Russia.¹⁶¹

The term "police state" appears for the first time in a Supreme Court report in 1947. Dissenting from a holding premised on a broad view of the warrantless search power incident to lawful arrest, Justice Frankfurter declared: "The whole point about the Fourth Amendment is that 'Its protection extends to offenders as well as to the law abiding,' because of its important bearing in maintaining a free society and avoiding the dangers of

¹⁵⁷ *Katz v. United States*, 389 U.S. 347, 366 (1967) ("Tapping telephone wires, of course, was an unknown possibility at the time the Fourth Amendment was adopted. But eavesdropping (and wiretapping is nothing more than eavesdropping by telephone) was, as even the majority opinion in *Berger*, *supra*, recognized, an ancient practice which at common law was condemned as a nuisance." (citations omitted) (internal quotation marks omitted)).

¹⁵⁸ *Id.*

¹⁵⁹ See, e.g., Wesley M. Oliver, *The Neglected History of Criminal Procedure, 1850-1940*, 62 RUTGERS L. REV. 447, 521-22 (2010) (describing labor support for limits on wiretapping, backed by an exclusionary rule, in 1938 at the New York constitutional convention).

¹⁶⁰ See David Alan Sklansky, "One Train may Hide Another": *Katz*, *Stonewall*, and the Secret Subtext of Criminal Procedure, 41 U.C. DAVIS L. REV. 875, 879 (2008) ("[T]he conception of privacy championed in *Katz* resonated strongly with the concerns raised by toilet stall spying, and by the harassment of gay men and lesbians more broadly.").

¹⁶¹ See, e.g., *White*, 401 U.S. at 760 (electronic surveillance "uncontrolled, promises to lead us into a police state") (Douglas, J., dissenting).

a police state.”¹⁶² Freshly returned from prosecuting the leading Nazis, Justice Jackson separately dissented, and admitted that requiring warrants might shelter the guilty.¹⁶³ “But the forefathers thought this was not too great a price to pay for that decent privacy of home, papers and effects which is indispensable to individual dignity and self-respect.”¹⁶⁴ Indeed, a distinct streak of “anti-totalitarianism” ran through the Warren Court’s criminal procedure revolution.¹⁶⁵

What revulsion at totalitarian police practices, revulsion at political uses of police surveillance, and revulsion at police harassment of homosexuals have in common is so obvious we might miss it: police. Without professional proactive police, none of these concerns would be relevant to American law enforcement. The founders, as we have seen, knew constables and the night watch. To investigate their understanding of the Fourth Amendment in an institutional world where law enforcement power is used, and abused, by the modern police is at least as nonsensical as investigating the founders’ views of modern surveillance technology.

A less salient, but perhaps still clearer, example of how institutional changes have altered the presuppositions of founding-era no-application expectations is the use of deadly force to apprehend fleeing felons. In *Tennessee v. Garner*, the Supreme Court held that police violate the Fourth Amendment when they shoot a fleeing felony suspect unless the suspected offense, or the fugitive’s conduct, supports an inference that the fugitive poses a

¹⁶² *Harris v. United States*, 331 U.S. 135, 171 (1947) (Frankfurter, J., dissenting) (citation omitted).

¹⁶³ See Carol Steiker, *Second Thoughts about First Principles*, 107 HARV. L. REV. 820, 842 (1994) (“During the trial of 1945 to 1946, Justice Jackson gathered and presented evidence of the systematic use of Nazi police power to commit genocide—the most extreme and racially discriminatory use of law enforcement institutions the world had ever witnessed. Justice Jackson returned to the Supreme Court a fervent believer in the warrant requirement.”).

¹⁶⁴ *Harris*, 331 U.S. at 198 (Jackson, J., dissenting).

¹⁶⁵ See Richard Primus, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thoughts*, 106 YALE L.J. 423, 444-45 (1996) (noting how opinions in *Gideon* and *Escobedo* exploited the contrast with Soviet show-trials); Margaret Raymond, *Rejecting Totalitarianism: Translating the Guarantees of Criminal Procedure*, 76 N.C. L. REV. 1193, 1197 (1998).

potentially deadly threat.¹⁶⁶ The common-law rule clearly was to the contrary; deadly force could be used to apprehend any fleeing felon.¹⁶⁷ The *Garner* court openly repudiated the common-law rule,¹⁶⁸ emphasizing that the rule had originated when felonies were capital and when weaponry was crude.¹⁶⁹

The point that at the founding-era felonies were capital, although often made, seems far less forceful than one might suppose. On paper, the felonies were capital but after jury nullification, judicial scrutiny of the indictment on a motion in arrest, benefit of clergy, and application for a pardon, the chance that any given suspected felon would actually hang was very small. Recall that in 1791 only one person in America is known to have been executed for burglary.¹⁷⁰ The limited accuracy of founding-era firearms may have meant that deadly force would usually be resorted to only in hand to hand combat, but the common-law rule was articulated as a special one for apprehending fleeing felons, not a proxy for when self-defense principles would provide a defense.¹⁷¹

The far more convincing explanation is that the inefficiency of the eighteenth-century system put a high premium on apprehending offenders *in flagrante*. Court records were kept, but not police records (there were no police); communications were slow (even the telegraph was not yet invented); and identification utterly primitive (Alphonse Bertillon, the father of modern

¹⁶⁶ *Tennessee v. Garner*, 471 U.S. 1 (1985).

¹⁶⁷ *Id.* at 11-12.

¹⁶⁸ *See id.* at 13 (“Because of sweeping change in the legal and technological context, reliance on the common-law rule in this case would be a mistaken literalism that ignores the purposes of a historical inquiry.”).

¹⁶⁹ *Id.* at 14-15.

¹⁷⁰ *See Executions in the United States, 1608-2002: The ESPY File*, DEATH PENALTY INFORMATION CENTER available at <http://www.deathpenaltyinfo.org/documents/ESPYyear.pdf>.

¹⁷¹ *See* MICHAEL FOSTER, A REPORT OF SOME PROCEEDINGS ON THE COMMISSION FOR THE TRIAL OF THE REBELS IN THE YEAR 1742, IN THE COUNTY OF SURRY; AND OF OTHER CROWN CASES: TO WHICH ARE ADDED DISCOURSES UPON A FEW BRANCHES OF THE CROWN LAW 272 (London, E. & R. Brooke 3rd ed. 1809). Foster clearly distinguished the privilege to use deadly force to apprehend felons from the *se defendo* plea, pointed out that the execution of all felons was “a presumption against fact,” and rested the law-enforcement privilege on the public safety. *Id.*

identification science, was not born until 1853).¹⁷² Today there is a good chance of eventually making the case against the suspect even if he wins a footrace with arresting officers.

The basic point is that specific founding-era no-application expectations can be just as misleading as application understandings. Rules that made sense for a reactive amateur system may make no sense for a professional proactive system, and it is arbitrary to suppose that the founders would have clung to specific rules when a changed institutional context made those rules dysfunctional. In the words of Professor Davies, “Applying the original meaning of the language of the Fourth Amendment in a completely changed social and institutional context would subvert the purpose the Framers had in mind when they adopted the text.”¹⁷³ In any event, if there is a principled approach to interpreting the Fourth Amendment other than SPO, the various unpalatable outcomes SPO points toward are good reasons indeed for embracing that alternative.

III. THE DYNAMISM CRITIQUE

Joseph Story wrote that the Fourth Amendment “is little more than the affirmance of a great constitutional doctrine of the common law.”¹⁷⁴ The Framers, however, knew that common-law doctrine could change. Rules of the common law could be changed judicially, when the judges decided to overrule precedent or to follow one authority rather than another in conflict with the first. Common-law rules could also be changed by the legislature when it adopted statutes to supersede them. Let us consider the implications of a constitutional provision affirming common-law doctrine with respect to each avenue of common-law dynamism.

¹⁷² *Alphonse Bertillon* (1853-1914), SCIENCEMUSEUM, <http://www.sciencemuseum.org.uk/broughttolife/people/alphonbertillon.aspx> (last visited Feb. 22, 2012).

¹⁷³ Davies, *supra* note 17, 740-41.

¹⁷⁴ JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 709 (Boston, Hilliard, Gray & Co. 1833).

A. Judicial Changes in Common-Law Doctrine

The founders expected courts to observe the rule of stare decisis.¹⁷⁵ They did not, however, believe that precedents were never to be overruled. Blackstone wrote that precedents controlled but not when “flatly absurd or unjust.”¹⁷⁶ Blackstone’s view of precedent was more rigorous than Chancellor Kent’s, who wrote in 1826:

But I wish not to be understood to press too strongly the doctrine of stare decisis, when I recollect that there are one thousand cases to be pointed out in the English and American books of reports, which have been overruled, doubted, or limited in their application. It is probable that the records of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to [be] examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error. Even a series of decisions are not always conclusive evidence of what is law; and the revision of a decision very often resolves itself into a mere question of expediency, depending upon the consideration of the importance of certainty in the rule, and the extent of property to be affected by a change of it.¹⁷⁷

While the founders, like jurists today, had views on just *how strong* a reason is required for overruling precedent, they seem to have had views on overruling not very different from those that can be found today.¹⁷⁸

¹⁷⁵ For an extensive survey, see John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 823 (2009) (“Precedent was supported by the leading founders of the country, including James Madison, Alexander Hamilton, Thomas Jefferson, James Wilson, and John Adams, as well as by leading legal giants, including Coke, Hale, Blackstone, and Kent. This is a veritable who’s who of Founders and legal giants.”).

¹⁷⁶ 1 WILLIAM BLACKSTONE, COMMENTARIES *70.

¹⁷⁷ JAMES KENT, 1 COMMENTARIES ON AMERICAN LAW 477 (New York, O. Halsted 1826).

¹⁷⁸ See, e.g., Richard W. Murphy, 78 NOTRE DAME L. REV. 1075, 1089-90 (2003) (“[G]enerally speaking, they embraced the view that precedents should be treated as

There is a large body of literature addressing the question of whether a decision giving the Constitution an erroneous interpretation deserves continued fidelity.¹⁷⁹ The question here is quite different. It is to what extent a constitutional provision affirming a common-law doctrine freezes that doctrine as it stood upon ratification, or instead affirms that doctrine as it might evolve under a flexible rule of stare decisis.

To take a concrete example, think of the warrant for stolen goods. At common law, as stated in *Entick*, it had to be based on the citizen's oath that the goods were stolen, "strong reason" to believe the goods to be at a specific place, and "if the goods are not found *there*, he [the complainant] is a trespasser" and the officer is a witness to the trespass.¹⁸⁰ The rule in customs searches was different; the officers were not liable if the warrant was valid but the goods not found.¹⁸¹ But it was not until the 1831 New York case of *Beaty v. Perkins*¹⁸² that an American court rejected the common-law rule about stolen goods in trespass cases.

If SOP is right, *Beaty* is wrong. Leaving aside the unpalatable nature of that result, this seems to neglect the flexible view of stare decisis held by the Framers. If what the Fourth Amendment did was affirm "a great constitutional doctrine of the common law,"¹⁸³ it affirmed that doctrine in the dynamic form the founders knew characterized all common-law doctrines.

The risk of indeterminacy poses the obvious dilemma. Could modern courts approve general warrants or writs of assistance?

evidence of law that should be followed absent a demonstrably good reason to reject them.") (surveying views of Blackstone, Kent, Cranch, Swift, Wilson and Marshall).

¹⁷⁹ For an overview, see David L. Shapiro, *The Role of Precedent in Constitutional Adjudication: An Introspection*, 86 TEX. L. REV. 929, 930-40 (2008).

¹⁸⁰ *Entick v. Carrington*, 95 Eng. Rep. 807, 818 (C.P. 1765). There is a debate about whether liability was cut off automatically if the suspected goods were found. Compare Davies, *supra* note 17, at 647-48, with Fabio Arcila, Jr., *The Death of Suspicion*, 51 WM. & MARY L. REV. 1275, 1316-24 (2010). *Entick* seems clear that liability was automatic in the reverse situation; and Hale had stated the same view. See Davies, *supra* note 17, at 653 n.293.

¹⁸¹ *Cooper v. Boot*, 4 Dougl. 338, 348-49, 99 Eng. Rep. 911, 916 (K.B. 1785).

¹⁸² *Beaty v. Perkins*, 6 Wend. 382 (N.Y. Sup. Ct. 1831). *Beaty* was questioned in *Chipman v. Bates*, 15 Vt. 51 (1843), but the issue was avoided by holding that the defendant was not liable because no force was used in the entry.

¹⁸³ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 609 (1833).

Can we, that is, simply jettison the common-law precedents that provided the crucial framework for the Fourth Amendment's text? The dilemma is troubling, and gives good cause to look for middle ground. Before taking up that quest, let us consider the second aspect of common-law dynamism.

B. Statutory Revisions of Common-Law Rules

In England, if Parliament abrogated the common-law rule about liability attaching if stolen goods were not found, the statute would trump the common-law rule.¹⁸⁴ What, then, in the United States following ratification of the Fourth Amendment? If we think that *Beatty* was right to abrogate an unwise common-law doctrine, it would seem to follow that a legislature could abrogate the same rule by statute.

The early Congress enacted a variety of innovative limitations on the tort liability of federal revenue agents.¹⁸⁵ Notably, the 1791 Excise Act, in some ways more favorable to plaintiffs than the 1789 Revenue Act, cut off liability for warrantless searches on dry land given probable cause, even if the suspected articles were not discovered.¹⁸⁶ Indeed, the early Congress adopted a variety of statutory provisions limiting the liability of federal revenue officers. Professor Arcila identifies founding-era statutes:

- (1) [A]uthorizing officers to plead the general issue; (2) authorizing them to plead the President's rules in defense, or to submit into evidence the statutory act and its authorization for civil searches, as well as 'any special

¹⁸⁴ See, e.g., BLACKSTONE, *supra* note 176, at *89 ("Where the common law and a statute differ, the common law gives place to the statute.").

¹⁸⁵ See Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256, 1330 (2006) ("[T]he Collection Act of 1789 tried to discourage baseless suits against federal officials by allowing them to recover double their costs if the plaintiff lost his suit. Moreover, the court was allowed to absolve the defendant by finding reasonable cause for a seizure, even if a jury verdict had declared it illegal. Congress placed a similar provision in the 1799 Act regulating collection of tonnage duty." (footnote omitted)).

¹⁸⁶ See Fabio Arcila, Jr., *The Framers' Search Power: The Misunderstood History of Suspicion & Probable Cause*, 50 B.C. L. REV. 363, 407 (2009) (1791 Excise Act created new probable-cause defense for warrantless searches on land).

matter'; (3) granting successful defendants double or even treble costs; (4) authorizing the court to summarily adjudge the case; and (5) allowing removal of a case from state court even after judgment, with the federal court then proceeding de novo.¹⁸⁷

The early Congress was especially fond of discouraging suits against customs officers by imposing double (in one instance triple) costs on losing plaintiffs.¹⁸⁸

Where the searches subject to these rules were made on ships, the pre-constitutional law was admiralty rather than common law.¹⁸⁹ Whether the pre-constitutional law was common law or admiralty, the plethora of founding-era statutes limiting officer liability show that there was no original understanding of the Fourth Amendment as freezing the pre-constitutional tort law in 1791 form.

Just as with evolution by a course of judicial decisions, however, the flexibility provided by statutory changes comes at the price of determinacy. A statute immunizing complaining citizens, or police, when search under a valid warrant fails to turn up the stolen goods, does not seem unreasonable. What, however, about a statute that grants government agents *absolute immunity* for search and seizure? *Entick* held that the defendants were not entitled to the immunity conferred by statute on justices of the peace.¹⁹⁰ The statute apparently conferred only limited, rather than absolute, immunity.¹⁹¹ Parliament, however, had power to both extend the immunity to executive officers and to provide absolute rather than limited protection.

The effect of the hypothetical statute is to give the FBI the same power as would be conferred by a general warrant. That has to be unconstitutional. So we return to our dilemma. If we treat the pre-constitutional law of search and seizure as ossified by the

¹⁸⁷ Arcila, *supra* note 180, at 1315 (footnotes omitted).

¹⁸⁸ *Id.*

¹⁸⁹ There was at least some application of these liability limits to common-law trespass actions. *See Id.* at 1305-06 (discussing application of 1791 Excise Act to searches of distilleries).

¹⁹⁰ *Entick v. Carrington*, 95 Eng. Rep. 807, 817-18 (C.P. 1765).

¹⁹¹ *See Pfander & Hunt, supra* note 100, at 1928 n.290.

Fourth Amendment, we inflict bad policy on ourselves while defying the founding-era understanding that the common law was dynamic. If we say that the founding-era common law that gave the Fourth Amendment its context can be changed at will, we render the constitutional provision nugatory.

IV. DESCRIPTIVE BALANCE OF ADVANTAGE ACCOUNTS: ANALYSIS AND CRITIQUE

A. *The Balance of Advantage Concept*

Given the difficulty, even, perhaps, the impossibility, of deriving the original understanding of the Fourth Amendment from specific founding-era rules and practices, there is good reason to seek some other approach. The most plausible alternative is to look, not to specific founding-era rules, but to the scope of individual liberty and privacy that prevailed under the legal regime as a whole in the founding era. Justice Scalia took this approach in *Kyllo v. United States*.¹⁹²

The issue in *Kyllo* was whether the use of a thermal-imager to read infrared radiation emitted from inside a home constituted a “search.” At common law, *Kyllo* could not have sued the officer for trespass since there was no entry of his premises. Justice Scalia for the majority, however, balked at such a focus on the specific common-law tort rules, stating instead:

We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical “intrusion into a constitutionally protected area,” at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted. On the basis of this criterion, the information obtained by the thermal imager in this case was the product of a search.¹⁹³

¹⁹² 533 U.S. 27 (2001).

¹⁹³ *Id.* at 34-35 (citation omitted).

Now this is at least a praise-worthy recognition of how the specific common-law rules reflected political values, values the rules may cease to serve when other facets of the legal ecology change. It sacrifices a measure of determinacy for a measure of flexibility. It yields, however, only an incomplete account of the original understanding, because it imputes to the founders the confusion of *is* and *ought*.

B. Descriptive Balance-of-Advantage Accounts: A Critique

The founders might have hoped for a different “degree of privacy against government” than the one “that existed when the Fourth amendment was adopted.”¹⁹⁴ Indeed, the founding-era criminal justice system was not regarded as perfect by the founders. They changed some features of it with specific clauses like the Sixth Amendment Right to Counsel and Compulsory Process Clause. They instantiated some specific current practices with clauses such as the Confrontation Clause.

The Framers, however, held no uncritical reverence for the common law of crimes. For example, the first federal criminal code, adopted in 1790, eliminated capital punishment for larceny,¹⁹⁵ relaxed the pleading rules for indictments charging perjury,¹⁹⁶ and abolished the benefit of clergy.¹⁹⁷ We have already seen that the early revenue acts made extensive changes in the procedures for litigating tort suits against customs officers.¹⁹⁸

The Fourth Amendment, however, does not instantiate the then-existing tort rules of trespass and false imprisonment. Nor does it replace them with any concrete reform. To read the general language as instantiating the 1791 levels of liberty and privacy is arbitrary. The founders might well have favored a different balance if the institutional, technological, and doctrinal resources to achieve a different balance had been available to them.

¹⁹⁴ *Id.* at 28.

¹⁹⁵ An Act for the Punishment of Certain Crimes Against the United States, ch. 9, Stat. 112, 116 § 16 (1790) (larceny punished by fine four times the value of stolen goods plus public whipping “not exceeding thirty-nine stripes”).

¹⁹⁶ *Id.* § 19.

¹⁹⁷ *Id.* at 113 § 31.

¹⁹⁸ *See supra* notes 185-88 and accompanying text.

Think about what “the degree of privacy against government that existed when the Fourth Amendment was adopted” would actually mean. When the Fourth Amendment was adopted there were no pro-active professional police forces employing undercover agents or even engaged in pro-active patrol. Indeed, the absence of police and the private prosecution system left society’s lower classes substantially unprotected by the criminal law.¹⁹⁹ And the adjudication system had evolved with the aim of nullifying capital punishment rather than rational fact-finding.

What’s the point? The point is that the founders were not satisfied with their criminal justice system. They wanted one that would do more to protect public security without compromising individual freedom. Not until the nineteenth century would the wealth and the institutional sophistication emerge that would permit major increases in public security, increases that inevitably created some risk to individual liberty and privacy. The descriptive founding-era balance of advantage does not tell us that the founders would not have welcomed, as their posterity welcomed, the new instruments of social control such as the police and the penitentiary.

IV. ASPIRATIONAL BALANCE OF ADVANTAGE ORIGINALISM

Thus far I have argued that consulting specific common-law tort rules as a guide to the Fourth Amendment’s meaning is a mistake, and that descriptive balance-of-advantage accounts are also mistaken. The strongest version of Fourth Amendment originalism is an *aspirational* balance of advantage originalism. This approach asks whether searches and seizures threaten the priority of individual liberty and privacy, as against public security, that the founders aspired to.

Now I frankly concede that this is not a very determinate criterion. But it is not a hopeless enterprise. First, we start from

¹⁹⁹ See, e.g., JEREMY BENTHAM, ORGANIZATION OF JUDICIAL ESTABLISHMENTS IN IV WORKS 305, 391 (J. Bowring ed., 1843) (“Delinquency, which, whenever the law sleeps, is but the more vigilant and alert, takes note of all the conjectures when the situation of things refuses a voluntary prosecutor . . . where the parties concerned in interest are minors, females, absent, helpless, or insane, and the strongest suggests of interest are rendered fruitless by inability.”).

where we are today. When a case comes up that raises a new issue, or that calls upon the Supreme Court to reconsider precedent, we ask whether a ruling for one side or the other would move us closer to the privacy/security balance favored by the founders. Second, we can look to the specific rules and practices of the founding era as data points—as evidence of the aspirational balance of advantage.

I would, however, recognize both the profoundly different context of those specific practices and their dynamic nature. We need to recognize that rules for an amateur system may make no sense of a professional system of full-time, repeat players. We need to recall not just the rules, but the institutions, of founding-era criminal justice.

As to the dynamism point: With such founding-era practices as the ban on seizing documentary evidence and the stolen-goods-must-be-found-where-sought rule, I would treat the founding-era common-law cases with the same respect—no more, no less—than the Court treats its own constitutional precedents.²⁰⁰ The founders knew the common law could change and that statutes could modify the decisional law. The usual criteria for overruling—changed circumstances, conflicting lines of precedent, public reliance, and so on—have as much practical bearing on pre-ratification as on post-ratification precedents. And those criteria make overruling *Entick* on the private papers point as legitimate as overruling *Boyd* on the same issue.

Statutory impositions on liberty and privacy pose a different challenge. From what has been said, it follows that a statute that

²⁰⁰ As a matter of actual judicial practice, Chief Justice Rehnquist gave this rough and ready generalization: “While ‘*stare decisis*’ is not an inexorable command,’ particularly when we are interpreting the Constitution, ‘even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some ‘special justification.’” *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (citations omitted). My own view is that in criminal procedure cases, a field where the law is predominantly judge-made constitutional law, the justices should overrule cases that have lost majority support rather than seize upon arbitrary distinctions to reach desired results. See Donald A. Dripps, *Constitutional Theory for Criminal Procedure: Dickerson, Miranda, and the Continuing Quest for Broad-but-Shallow*, 43 WM. & MARY. L. REV. 1, 39-46 (2001). As with most disputes about *stare decisis* as a general matter, the difference with the Court’s formula is one of degree rather than kind.

overturns a founding-era rule should be held constitutional when the conditions exist that would justify judicial overruling of the founding-era practice. Beyond that, when a statute or executive practice trenches on liberty or privacy in the name of public security, aspirational balance of advantage enquires whether the statute or practice is consistent with the free society the Framers envisioned.

George Thomas developed this basic approach by proposing a thought-experiment in which the Framers are given knowledge of modern conditions, especially modern policing.²⁰¹ My aspirational balance account differs in some ways. Thomas focused on Madison individually, and tried to imagine the amendment Madison would have written given prescience.²⁰² Aspirational balance looks to the expectations of the ratifying generation as a guide to interpreting the decidedly plastic language the founders adopted.

I freely concede that this approach lacks the value-neutral determinacy of, say, the price term in a contract. From a methodological point of view, the aspirational balance approach is little different from the second Justice Harlan's approach.²⁰³ Justice Harlan was the father of modern stop-and-frisk doctrine.²⁰⁴ Professor Thomas regards stop-and-frisk on less than probable cause as contrary to founding-era values.²⁰⁵ The wise and learned, working hard and in good faith, will often disagree.

²⁰¹ George C. Thomas III, *Time Travel, Hovercrafts, and the Fourth Amendment: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451 (2005).

²⁰² *Id.*

²⁰³ See Donald A. Dripps, *Justice Harlan on Criminal Procedure: Two Cheers for the Legal Process School*, 3 OHIO ST. J. CRIM. L. 125, 132 (2005) ("Harlan's fundamental commitment to legality followed the legal process school rather than any species of formalism. The Court should carefully consider the institutional advantages and disadvantages of Congress, the states, and the Court itself. For the most part, important policy choices should be left to the states and to Congress, but when the Court acted within the proper sphere of its institutional competence, the justices had no choice but to consider values as well as facts in reaching their decisions. History counted, but you will not find Harlan asking the Framers for answers to questions that never occurred to them." (footnote omitted)).

²⁰⁴ See *Terry v. Ohio*, 392 U.S. 1, 31, 32-33 (1968) (Harlan, J., concurring).

²⁰⁵ See Thomas, *supra* note 201, at 1515 ("As Justice Scalia reads the history (and as I read the history) a search, even a frisk, of a suspicious person on the street requires probable cause."). Thomas would permit automatic search incident to arrest,

So to the objection that the enquiry I propose is too amorphous, the only riposte I have is that in the Fourth Amendment context this is where originalism takes you—by one route among many to the same normative issues that are bound to determine outcomes under this kind of text with this kind of history.²⁰⁶ History, precedent, and process theory can help discipline our normative deliberation, but they cannot excuse us from it, whatever our favored theory of constitutional interpretation.

CONCLUSION

An originalist approach to the Fourth Amendment based on specific founding-era practices is illogical and unwise. A search or seizure in 1791 took place in an institutional context so different from ours that it simply is not the same search or seizure it was then. The founders, moreover, understood the common law to be dynamic. The language they chose was crafted against a background they expected to evolve. They themselves tinkered extensively with the pre-constitutional tort law of searches and seizures.

Descriptive balance-of-advantage approaches, exemplified by *Kyllo*, are a promising response to the dual challenges of contextual change and common-law dynamism. The obvious problem with any approach that rejects ossification of the 1791 common law is determinacy. Aspirational balance-of-advantage originalism at least asks the right question about Fourth Amendment cases: Is the search or seizure at issue consistent with the balance of public security and individual freedom the founders hoped our society would achieve? If the quest for the original understanding, properly described by that question, leads

so if the Framers assumed the power to *arrest* those behaving suspiciously for vagrancy, *Terry* might actually give modern pedestrians more protections than was originally expected. *See supra* note 201 and accompanying text.

²⁰⁶ Without asserting it, I am inclined to suppose that the point applies to constitutional law generally and not solely to constitutional criminal procedure. *See* Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 *GEO. L.J.* 713 (2011) (arguing that the “new originalism” loses determinacy as it accounts for objections to the “old originalism”).

to reasonable disagreements about modern facts and modern values, so be it.