RESPONSES

PROBABLE CAUSE, REASONABLENESS, AND THE IMPORTANCE OF FOURTH AMENDMENT HISTORY: A RESPONSE TO PROFESSOR ARCILA

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I. INTRODUCTION

A. Professor Arcila's Topic

With his article, *In the Trenches: Searches and the Misunderstood Common-Law History of Suspicion and Probable Cause*,[1] Professor Fabio Arcila, Jr. has contributed a valuable work that significantly enhances our understanding of Fourth Amendment history. In the relatively few articles that go beyond a superficial glance at Fourth Amendment history, authors tend to focus on broad conclusions, attempting to derive some general theory of the original understanding of the Amendment. This big picture focus is certainly true of my own work on Fourth Amendment history, such as my article published in this Journal.[2]

Professor Arcila prudently focuses on a more narrow question: What did the probable cause requirement mean in the Framing era? Even more specifically, how did early American judges view their role in the warrant application process? As Professor Arcila puts it, did "judges act as vigilant sentries, aggressively inquiring into the merits

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* Professor, Thomas Jefferson School of Law. B.A., Northwestern University, 1982; J.D., Stanford Law School, 1986. I have learned a great deal about Fourth Amendment history from the landmark works of William Cuddihy and Thomas Davies. *See* William John Cuddihy, The Fourth Amendment: Origins and Original Meaning, 602–1791 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (on file with UMI Dissertation Service); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999). I am indebted to these fine scholars. My thanks to the Thomas Jefferson School of Law for their generous research funding.

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

2 David E. Steinberg, *The Uses and Misuses of Fourth Amendment History*, 10 U. PA. J. CONST. L. 581 (2008).

of a probable cause assertion?"[3] Or did judges act in a "merely ministerial manner, not engaging in gate-keeping at all?"[4] These are important questions, and Professor Arcila's analysis of these questions is both extremely thorough and extremely useful. Ultimately, I disagree with many of the conclusions that Professor Arcila draws. But my disagreements should in no way detract from the high quality of Professor Arcila's account.

B. Professor Arcila's Arguments

Professor Arcila raises at least four arguments regarding Fourth Amendment history, and the uses of this history by modern lawyers, judges, and scholars. First, Professor Arcila asserts that the probable cause standard was not uniform in early America, but differed depending on who was issuing the warrant. This argument is well-supported, consistent with other sources, and extremely convincing.

Second, Professor Arcila argues that, although the evidence is mixed, "one cannot say that judges consistently implemented a universal sentryship duty during the Framers' era,"[5] but instead tended to provide limited review of warrant applications. While recognizing the conflicting evidence, I do not believe that Professor Arcila has demonstrated that a ministerial review of warrant applications predominated over a more demanding probable cause review of warrant applications.

Third, Professor Arcila suggests that if Framing-era magistrates did not limit law enforcement powers through aggressive review of warrant applications, then this acquiescence supports a Fourth Amendment interpretation that emphasizes reasonableness, as opposed to a warrant preference rule. This argument is based on a modern false premise—the Fourth Amendment *must* either incorporate a warrant preference rule or a reasonableness requirement. As I argue in this Article, this is a false choice. The Framers did not endorse either a warrant preference rule or a reasonableness requirement. Instead, the Framers enacted the Fourth Amendment for the narrow purpose of requiring a specific warrant based on probable cause prior to any search of a house.

Last, but certainly not least, Professor Arcila expresses reservations about the value of history in interpreting the Fourth Amendment.

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3 Arcila, *supra* note 1, at 2.

4 *Id.*

5 *Id.* at 51.

Professor Arcila writes that the requirement of probable cause "was designed for a common law world of limited government" and today "would emasculate many desirable regulatory regimes."[6]

Professor Arcila is certainly not the first scholar to argue against an orginalist interpretation of the Fourth Amendment. But, like other commentators, Professor Arcila does not offer a plausible alternative to orginalist arguments. If we are not going to interpret the Fourth Amendment based on text and history, then how *should* we interpret the Amendment?

II. THE DIFFERING APPROACHES TO PROBABLE CAUSE

Professor Arcila asserts that during the Framing era, American lawyers endorsed two different approaches to probable cause and the magistrate's role in the process of issuing warrants. Under the sentryship model, magistrates would review warrant applications by "aggressively inquiring into the merits of a probable cause assertion."[7] Under the ministerial model, the magistrate would "not engag[e] in gate-keeping at all," but would only "oversee the production of a record for a later motion to suppress."[8]

Professor Arcila candidly notes that "in the treatises, the extent of guidance suggesting a probable cause sentryship role for the judiciary is impressive."[9] Professor Arcila then cites a long series of treatises and cases—including many English sources—which state the probable cause requirement, and favor searching judicial review of warrants.[10] Professor Arcila acknowledges that these authorities "undeniably constitute an impressive litany of doctrinal evidence in favor of judicial sentryship of probable cause."[11]

Professor Arcila then discusses other sources, which support a passive ministerial review of warrant applications. He focuses on American justice manuals from the Framing era—sources that previously have received little attention in Fourth Amendment historical scholarship. Professor Arcila writes: "At least seven American justice manuals from the Framers' era stated, in sections devoted to arrests,

6 *Id.* at 59.
7 *Id.* at 2.
8 *Id.*
9 *Id.* at 18.
10 *Id.* at 18–23.
11 *Id.* at 23.

that it was *convenient but not always necessary* for judges to engage in the probable cause sentryship role."[12]

Professor Arcila also reviews search warrant forms, noting that these forms often did not require that "the applicant . . . affirm, in general terms, that he had suspicion."[13] Professor Arcila continues: "The prevalence of legal forms that failed to demand the details underlying a probable cause claim is crucial because legal forms likely dominated search warrant practice."[14] Professor Arcila asserts that "justices of the peace reviewing these search warrant applications often lacked the necessary information to scrutinize probable cause, unless they took the initiative to obtain it orally from the applicant prior to issuing the requested warrant."[15] Professor Arcila reaches similar conclusions after reviewing "[a] plain text analysis of the secondary legal literature."[16]

Ultimately, Professor Arcila proves, quite convincingly, that the search warrant application process was not uniform in early America, but probably varied considerably. Other scholars also have noted a lack of uniformity in Framing-era search and seizure law. In his review of Professor William Cuddihy's landmark treatise on Fourth Amendment law,[17] Professor Morgan Cloud writes: "Search and seizure law was complex because law and practice were not uniform at any point in time, at least after 1600. Inconsistent rules were applied inconsistently in differing circumstances."[18] Professor Cloud continues: "With almost humorous regularity, Cuddihy documents how victims and critics of general searches and seizures complained bitterly and loudly, only to use the same methods against their adversaries when they had the chance."[19]

Professor Arcila focuses on distinguishing between "elites of the legal profession," who advocated "judicial sentryship of probable

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12 *Id.* at 24. Professor Arcila acknowledges that all of these justice manuals addressed arrests, not searches. However, Professor Arcila continues: "I can discern no reason why the law applicable to warrants would have differed depending upon whether an arrest or search was at issue." *Id.* at 27–28.

13 *Id.* at 33.

14 *Id.* at 34.

15 *Id.* at 38.

16 *Id.* at 40.

17 William John Cuddihy, The Fourth Amendment: Origins and Original Meaning, 602–1791 (1990) (unpuhlished Ph.D. dissertation, Claremont Graduate School) (on file with UMI Dissertation Service).

18 Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1716–17 (1996).

19 *Id.* at 1717.

cause," and "non-elite justices of the peace," who "may not have consistently acted as aggressive probable cause sentries prior to issuing search warrants."[20] But the historical record also suggests other distinctions in outlook and practice.

For example, the doctrine of unreasonable searches, warrants, and probable cause developed primarily in early American port cities—particularly Boston. Even more than the current War on Drugs dominates search and seizure doctrine, early American law enforcement focused on a single, specific crime—smuggling goods to avoid paying customs duties. It is no coincidence that the 1761 litigation in Paxton's case—the first significant American challenge to general warrants—was brought by a group of Boston merchants.[21] Nor is it any coincidence that one of the most strident attacks on British general warrants was issued in 1772 by Samuel Adams, again in Boston.[22]

Differences between the northern and southern states indicate yet another distinction in early search and seizure law. With few exceptions, northerners saw no value in mass searches pursuant to a general warrant requiring little justification. But in the South, such mass searches still served a purpose. The general warrant remained a valuable tool in the search for fugitive slaves.[23]

In short, the development of search and seizure law was not uniform in early America. Professor Arcila convincingly demonstrates that warrant issuance is yet another aspect of search and seizure law with considerable variance during the Framing era. This observation is a significant contribution to Fourth Amendment historical research.

However, Professor Arcila uses these inconsistencies in Fourth Amendment law as a springboard for a variety of other assertions. As discussed below, I find several of Professor Arcila's suggestions problematic.

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20 Arcila, *supra* note 1, at 55.

21 1 Quincy 51 (Mass. 1761). For a detailed description of Paxton's case, see David E. Steinberg, *The Original Understanding of Unreasonable Searches and Seizures*, 56 FLA. L. REV. 1051, 1066–67 (2004).

22 *A State of the Rights of the Colonists* (1772), *reprinted in* TRACTS OF THE AMERICAN REVOLUTION, 1763–1776, at 243–44 (Merrill Jensen ed., 1967) [hereinafter *A State of the Rights of the Colonists*] (typically attributed to Samuel Adams).

23 As of 1787, five American states preserved the general warrant as a device for capturing runaway slaves. *See* Cuddihy, *supra* note 17, at 1277–82; *see also* Cloud, *supra* note 18, at 1727–28.

III. FRAMING-ERA MAGISTRATES, PROBABLE CAUSE, AND THE FOURTH AMENDMENT

A. *Probable Cause and Shades of Gray*

Throughout his article, Professor Arcila describes two types of warrant review practiced by magistrates, contrasting the aggressive warrant review of "sentryship" with a limited or non-existent probable cause review, which Professor Arcila calls "ministerial."[24] Professor Arcila strongly implies that most magistrates during the Framing era practiced the lenient ministerial review, though he has no direct evidence to support this claim. As a result, Professor Arcila ends up making highly qualified statements, such as the following: "[N]on-elite justices of the peace often *may not have* consistently acted as aggressive probable cause sentries prior to issuing search warrants."[25]

Although Professor Arcila describes warrant review in the black-and-white terms of "sentryship" and "ministerial," in truth, review of warrants probably often fell somewhere in the large gray area in between. Probable cause has always been a fact-specific and "fluid concept."[26] Further, as Professor Arcila himself recognizes, probable cause standards have evolved over time.[27] As recently as the 1983 decision in *Illinois v. Gates*,[28] the Supreme Court replaced the relatively rigorous *Aguilar-Spinelli* approach to probable cause.[29] In *Gates*, the Court opted for a more flexible "totality-of-the-circumstances" probable cause test.[30] Was the *Gates* Court signaling that magistrates should adopt a "ministerial" approach when assessing warrants? To the contrary, the *Gates* decision hoped that a relaxed standard would encourage law enforcement officers to seek warrants more frequently.[31] The new probable cause test in *Gates* may result in greater magistrate involvement in reviewing search justifications, rather than less involvement.

By describing the Framing-era warrant process as involving either the rigorous review of sentryship decisions or the rubber-stamp review of ministerial decisions, Professor Arcila fails to recognize that

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24 Arcila, *supra* note 1, at 2.

25 *Id.* at 55 (emphasis added).

26 Illinois v. Gates, 462 U.S. 213, 232 (1983).

27 Arcila, *supra* note 1, at 52–54.

28 462 U.S. 213 (1983).

29 *See* Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964).

30 *Gates*, 462 U.S. at 233.

31 *Id.* at 237 (stating that a totality-of-the-circumstances test "better serves the purpose of encouraging recourse to the warrant procedure").

most warrant review decisions probably fell in the considerable gray area somewhere in between. As is true today, warrant applications probably were rubber-stamped by some Framing-era magistrates—particularly those with limited education or legal training. At the same time, warrant applications probably received intense scrutiny from other magistrates—particularly those with legal training or knowledge of recent innovations in search and seizure law. But most plausibly, most evaluations of warrants probably fell somewhere in between.

Regardless of the warrant application review process conducted by the majority of Framing-era magistrates, the clear trend was toward a thorough review process. Professor Arcila acknowledges the "centuries of history that confronted justices of the peace in the Framers' era, in which non-existent or low levels of suspicion had been sufficient to justify governmental intrusions."[32] In fact, the first court opinion *anywhere* that rejected a warrant issued on less than probable cause occurred in the English John Wilkes cases of the 1760s.[33] Given both the long tradition of authorizing general warrants on flimsy suspicion, and the newness of the probable cause concept, one should expect that some American magistrates continued to follow the "old school" method of rubber-stamping warrants. Nonetheless, the very adoption of the Fourth Amendment with its probable cause requirement demonstrated that the traditional acquiescence in unsupported search warrants was a thing of the past, and that the new trend was toward more aggressive review of warrants.

In short, many of Professor Arcila's arguments rely on his premise that most early American magistrates performed a ministerial function by rubber-stamping warrants without a meaningful probable cause review. Professor Arcila's premise does not adequately consider the Framing-era evolution in the role of the magistrate, away from a ministerial function, and toward a meaningful inquiry into probable cause.

B. Should Incorrect Fourth Amendment Interpretations Matter?

In support of his argument that Framing-era magistrates did not carefully review warrant applications, Professor Arcila relies in part

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32 Arcila, *supra* note 1, at 44.

33 The published opinions that arose out of suits initiated by John Wilkes and his followers include *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763); *Money v. Leach*, 97 Eng. Rep. 1050 (K.B. 1765); *Entick v. Carrington*, 95 Eng. Rep. 807 (K.B. 1765); and *Huckle v. Money*, 95 Eng. Rep. 768 (K.B. 1763).

on statements in early American justice manuals. According to the manuals, it was "convenient but not always necessary" for judges to require probable cause before issuing a warrant.[34] While the justice manuals contained such statements, the Fourth Amendment—and the search and seizure provisions in early state constitutions—did not.[35] The Fourth Amendment was both clear and unequivocal about whether probable cause was necessary prior to the issuance of a warrant. The Amendment provided that "no Warrants shall issue, but upon probable cause."[36] Early state declarations of rights typically also permitted the issuance of a warrant only after a heightened evidentiary showing.[37]

In providing that it was "convenient but not always necessary" for judges to require probable cause before issuing a warrant, the American justice manuals incorrectly described early American constitutional law on search and seizure. To the extent that magistrates relied on these errant texts in issuing warrants, their decisions also were wrong.

Professor Arcila seems to take the curious position that writings or practice that misread the plain text of a constitutional provision are relevant in interpreting that provision. Applying such an argument

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34 Arcila, *supra* note 1, at 24 (emphasis omitted).

35 Prior to the twentieth century, the Fourth Amendment applied only to the federal government and not to the states. *See, e.g.*, Smith v. Maryland, 59 U.S. 71, 76 (1855) (rejecting a Fourth Amendment challenge to a Maryland state statute, because the Fourth Amendment applied only to the federal government). During the Framing era, the federal government established very few crimes. *See, e.g.*, NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 106 (1937) (observing that in the nineteenth century "the limited criminal jurisdiction of the Federal Government was not exercised by Congress except in minor instances"). In early America, most criminal law investigations and prosecutions were brought in the state courts and governed by state law.

However, early state declarations of rights typically required some heightened evidentiary standard for the issuance of a warrant, similar to the probable cause requirement of the Fourth Amendment. *See, e.g.*, VA. CONST. of 1776, Bill of Rights, § 10, *reprinted in* 7 THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3814 (Francis Newton Thorpe ed., 1909) [hereinafter THE FEDERAL AND STATE CONSTITUTIONS] (proscribing general warrants issued "without evidence of a fact committed"); PA. CONST. of 1776, art. X, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, *supra* at 3083 (outlawing warrants "without oaths or affirmations first made, affording a sufficient foundation for them").

In short, a heightened evidentiary standard was required for warrants in both federal cases governed by the Fourth Amendment, and in state law cases governed by early state constitutional provisions.

36 U.S. CONST. amend. IV.

37 *See* sources cited in *supra* note 35.

outside the context of the Fourth Amendment would lead to some truly curious results.

To understand the extreme implications of Professor Arcila's argument about the probable cause requirement, consider the Equal Protection Clause of the Fourteenth Amendment. In *Plessy v. Ferguson*,[38] the Supreme Court held that the segregation of whites and blacks in "separate but equal" facilities did not violate the Equal Protection Clause.[39] As the Supreme Court later held in the landmark *Brown v. Board of Education* decision,[40] the Equal Protection Clause interpretation in *Plessy* was simply wrong. Separate schools for white and black students could never be equal, because of the stigma involved in excluding black students from a white school. As the *Brown* Court noted in a famous passage about black students: "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[41]

Yet Professor Arcila's approach would lead to serious questions about the *Brown* decision. At the time of the *Brown* ruling, courts had followed an unbroken practice of upholding "separate but equal" treatment for more than fifty years since *Plessy*.[42] Following Professor Arcila's argument, the *Brown* Court should have given considerable deference to this unbroken record, even though these decisions were inconsistent with the original understanding of the Equal Protection Clause.

Returning to the Fourth Amendment, the plain language of the Amendment proscribes the issuance of any warrant without probable cause. When American justice manuals provided that a magistrate need not require probable cause before issuing a warrant, the manuals were simply wrong. Any magistrates who issued warrants without probable cause violated constitutional search and seizure provisions. Even if Professor Arcila is correct that Framing-era magistrates typically issued warrants without assessing probable cause, it is not clear why such unlawful decisions are relevant to an interpretation of the Fourth Amendment.

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38 163 U.S. 537 (1896).

39 *Id.* at 543–50.

40 347 U.S. 483 (1954).

41 *Id.* at 494.

42 *Plessy v. Ferguson* cited prior decisions, demonstrating that courts had upheld the separate but equal interpretation of the Equal Protection Clause for more than twenty years prior to *Plessy*. *See Plessy*, 163 U.S. at 545, 548 (citing cases).

IV. THE ABSENCE OF A REASONABLENESS REQUIREMENT IN THE FRAMING ERA

As Professor Arcila accurately observes, many Fourth Amendment historical reviews assert that the Framers enacted the Fourth Amendment either to impose a warrant preference rule or to impose a reasonableness requirement. Professor Arcila ultimately sides with scholars who favor a reasonableness requirement.[43] However, as my earlier article in this Journal illustrates, *neither* the warrant preference rule *nor* the reasonableness requirement is an accurate interpretation of Fourth Amendment history.

Professor Arcila addresses the warrant preference rule/reasonableness requirement debate in the concluding section of his article. Professor Arcila rejects the warrant preference rule because:

> the probable cause protections that Warrant Clause adherents prefer, which are grounded in aggressive judicial sentryship, appear at odds with an historical understanding of probable cause, in which it is likely that sentryship took an aggressive form only inconsistently at best, and may often have ranged from lax to essentially non-existent.[44]

If a warrant preference rule did not provide protection from government searches and seizures, then certainly something in the Fourth Amendment had to provide that protection. Professor Arcila ultimately endorses arguments that the Fourth Amendment was intended to impose a global reasonableness requirement on all searches and seizures.[45]

As I have stated previously in this Journal, the original Fourth Amendment did not impose any warrant requirement in the vast majority of situations, with one very important exception—physical searches of residences. The overwhelming majority of searches in early America—both before and after the adoption of the Fourth Amendment—were conducted without warrants.[46]

Faced with this evidence, advocates of the warrant preference rule respond with a handful of statutes that required warrants outside of house searches. As I have previously noted in this Journal, a section of the federal Collections Act required a specific warrant before cus-

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43 Arcila, *supra* note 1, at 6–8.

44 *Id.* at 59.

45 *Id.* at 55–58.

46 *See* Gerard V. Bradley, *Present at the Creation? A Critical Guide to* Weeks v. United States *and Its Progeny*, 30 ST. LOUIS U. L.J. 1031, 1041–45 nn.64–65 (1986) (reviewing search and seizure statutes).

toms agents could search buildings.[47] Under a 1786 Rhode Island law, federal tax agents needed to obtain a specific warrant before searching a "Dwelling-House, Store, Ware-house, or other Building."[48] And in a 1786 statute, Delaware required specific warrants when searches of buildings sought cargo pilfered from shipwrecked vessels.[49] While some scholars cite these statutes as evidence of an early warrant preference rule, the statutes actually may undercut the warrant preference rule. Why did legislators need to enact a warrant requirement in statutes, if constitutional provisions already mandated such a requirement? And if constitutional search and seizure provisions mandated a broad warrant preference rule, why did the early statutes require a warrant in such narrow circumstances?

Although very little historical evidence supports a warrant preference rule, a global Fourth Amendment reasonableness requirement receives even less support from the historical evidence. Courts published fewer than fifty constitutional search and seizure cases before 1890. Based on this lack of decisions, early American lawyers and judges probably did not view constitutional search and seizure provisions as imposing a global reasonableness requirement on all searches and seizures. Further, in at least two ship seizure cases that reached the Supreme Court during the early nineteenth century, neither the litigants nor the Justices even mentioned the Fourth Amendment.[50] In an 1874 case involving a challenge to a state repossession statute, constitutional scholar and Michigan Supreme Court Justice Thomas Cooley wrote that a Michigan constitutional provision proscribing unreasonable searches and seizures was simply inapplicable.[51] In his landmark article discussing Fourth Amendment history, Thomas Davies addresses Fourth Amendment reasonableness arguments accurately and succinctly, with a section titled: "There Was No Historical 'Reasonableness' Standard."[52]

Arguments that the Framers enacted the Fourth Amendment primarily to impose a global reasonableness requirement on all searches face yet another impassable obstacle. If Fourth Amendment

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47 Collection Act of 1789, ch. 5, § 24, 1 Stat. 29, 43; *see also* Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 963 (1997) (noting that this section of the Collection Act required a specific warrant).

48 Cuddihy, *supra* note 17, at 1292.

49 *Id.* at 1293.

50 *See* The Apollon, 22 U.S. 362 (1824); Little v. Barreme, 6 U.S. 170 (1804).

51 *See* Weimer v. Bunbury, 30 Mich. 201, 208 (1874).

52 Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 591–94 (1999).

protection depended on reasonableness, and not warrants, then presumably some house searches could be reasonable, even if law enforcement officers had not obtained a prior valid warrant. Further, if the Framers viewed warrants as unimportant, or even dangerous, then warrantless house searches should have been completely lawful during the Framing era.

Yet, as I have stated in my earlier article: "The Fourth Amendment proscribed physical trespasses into houses pursuant to a general warrant, or no warrant at all."[53] While so many assertions about Fourth Amendment history lack support, statements about the impropriety of house searches pursuant to a general warrant are everywhere. Consider just a few examples. In his 1644 English treatise, Sir Edward Coke wrote: "One or more justice or justices of peace cannot make a warrant upon a bare surmise to break any mans house to search for a felon, or for stolen goods."[54] In the 1763 English case of *Wilkes v. Wood*,[55] Chief Justice Pratt wrote that where law enforcement officers claimed a right "to force persons houses, break open escrutores, seize their papers, &c. upon a general warrant," these actions were "totally subversive of the liberty of the subject."[56]

Coke's treatise and the John Wilkes cases provided authority for American opposition to house searches pursuant to writs of assistance—the American version of the general warrant. Speaking at a Boston town meeting in 1772, Samuel Adams attacked the writs of assistance with the following language: "[O]ur homes and even our bed chambers, are exposed to be ransacked, our boxes chests & trunks broke open ravaged and plundered by wretches . . . whenever they are pleased to say they *suspect* there are in the house wares etc. for which the dutys have not been paid."[57] Similarly, in a 1774 address to the American people, the Continental Congress protested against the power of customs officers "to break open and enter houses without the authority of any civil magistrate founded on legal information."[58]

Given the opposition to house searches pursuant to general warrants, it is inconceivable that the Framers would permit house

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53 Steinberg,*supra* note 2, at 605.

54 EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING THE JURISDICTION OF COURTS 176 (London, W. Clarke & Sons 1817) (1644). *See* Davies, *supra* note 52, at 578 n.74.

55 Wilkes v. Wood, 98 Eng. Rep. 489 (C.P. 1763).

56 *Id.* at 498.

57 *A State of the Rights of the Colonists*, *supra* note 22, at 243.

58 Cuddihy, *supra* note 17, at 1116 (internal quotation omitted).

searches without any warrant at all. A general warrant at least provided residents with some protection—albeit minimal protection. A law enforcement officer needed to draft the warrant, and then present the general warrant to a magistrate for review and (virtually automatic) approval. In contrast, warrantless house searches lacked even these minimal protections, judged inadequate in the Framing era. Once again, Thomas Davies summarizes the Framing-era law simply and eloquently: "[T]he common law apparently provided no justification for a search of a house beyond the ministerial execution of a valid search warrant."[59]

In the end, Professor Arcila's argument for a Fourth Amendment reasonableness regime seems based more on modern public policy concerns than historical evidence. Professor Arcila writes: "We now live in a nation with pervasive regulation, both statutory and regulatory, which permeates most aspects of our daily lives. To impose a probable cause or prior suspicion requirement in this context would emasculate many desirable statutory regimes."[60]

As a matter of public policy, I express no opinion on whether regulating government searches and seizures through a reasonableness regime is more desirable than regulating such searches through a regime based on warrants and probable cause. But as a matter of Fourth Amendment history, Professor Arcila's work does not support arguments for a Fourth Amendment global reasonableness requirement. Simply put, no historical evidence suggests that the Fourth Amendment was intended to impose such a requirement.

V. WHY HISTORY MATTERS

At the end of his piece, Professor Arcila concludes that historical evidence should be largely irrelevant to modern understandings of the Fourth Amendment. After noting the very limited reach of government during the Framing era, Professor Arcila writes: "Emphasizing probable cause or suspicion for the most part worked well in this context."[61] Professor Arcila continues: "We now live in a nation with pervasive regulation, both statutory and regulatory, which permeates most aspects of our daily lives. To impose a probable cause or prior

59 Davies, *supra* note 52, at 649.

60 Arcila, *supra* note 1, at 59.

61 *Id.*

suspicion requirement in this context would emasculate many desirable statutory regimes."[62]

Initially, Professor Arcila's conclusion seems hard to understand, given the focus of his article. Professor Arcila has written a carefully researched and detailed discussion of search and seizure law in the Framing era, only to conclude that such history should be irrelevant.

As one reviews Professor Arcila's historical observations more carefully, his conclusion is easier to understand. Having reviewed the historical evidence, Professor Arcila has found that the standards and practices were inconsistent and varied in early America. Scholars may be unable to identify a single "original understanding" on particular search and seizure issues, such as the standard for issuing warrants. This leads to an initial argument for rejecting Fourth Amendment originalism—that any original understanding of the Amendment is impossible to identify. Having found evidence to support this first argument, Professor Arcila incorporates a second argument—even if someone could identify the original understanding of the Fourth Amendment, that original understanding would be inconsequential, because times have changed.

As noted in my article previously published in this Journal, Professor Arcila certainly is not the first scholar to argue that modern Fourth Amendment doctrine should not look to the original understanding of the Amendment. Some scholars argue that evidence on the original understanding of the Fourth Amendment is too vague and ambiguous to provide modern courts with any guidance.[63] Like Professor Arcila, others contend that even if one could ascertain the original understanding of the Amendment with clarity, changing times have made that understanding obsolete.[64]

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62 *Id.*

63 *See, e.g.*, Cloud, *supra* note 18 (noting that the complexity of the Fourth Amendment defies simplistic generalizations asserted by the legal profession); Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 973 (2002) (concluding that the history of the Fourth Amendment presents, at best, an incomplete picture of the Framers' intentions).

64 *See, e.g.*, Davies, *supra* note 52, at 551–52 (arguing that the interpretation of the Fourth Amendment has necessarily changed over time); Yale Kamisar, *The Writings of John Barker Waite and Thomas Davies on the Search and Seizure Exclusionary Rule*, 100 MICH. L. REV. 1821, 1865 (2002) (noting Davies's explanation of why and how the passage of time has undermined the relevance of Fourth Amendment originalism); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 824 (1994) (asserting that interpretations of the Fourth Amendment's Reasonableness Clause should accommodate purposes more general than the Framers' intent).

However, the original understanding of the Fourth Amendment is not as vague as some scholars suggest. As I have written in this Journal and elsewhere, Framing-era discussions of unreasonable searches and seizures focused almost exclusively on a single issue—proscribing house searches pursuant to a general warrant, or no warrant at all.[65] Contrary to current doctrine, I have argued that the Fourth Amendment should only regulate house searches.[66]

Most criticisms of Fourth Amendment originalism suffer from a further limitation—a failure to offer specific alternatives to an originalist interpretation of the Fourth Amendment. Little consensus exists on most current search and seizure issues—other than the impropriety of warrantless physical entries into residences.[67]

Professor Arcila expresses a clear preference for a Fourth Amendment interpretation that emphasizes reasonableness, rather than warrants and probable cause.[68] However, over the past forty years, the Supreme Court has based the Fourth Amendment warrant requirement on the concept of reasonableness. The results of that body of law are not encouraging.

In *Katz v. United States*,[69] the Supreme Court rejected authority dating back to the Framing era, which held that the Fourth Amendment required a warrant only when police trespassed into a protected area. Despite Justice Hugo Black's dissenting argument that the Court improperly ignored the historical foundations of this trespass rule,[70] the *Katz* majority concluded that the reach of the Fourth Amendment "cannot turn upon the presence or absence of a physical intrusion into any given enclosure."[71] Instead, the Court determined that law enforcement officers must obtain a warrant if a person has exhibited a "reasonable expectation of privacy."[72]

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65 *See, e.g.*, Steinberg, *supra* note 21, at 1061–82 (examining the historical record, and concluding that the Framers intended the Fourth Amendment to only prohibit unlawful physical entries of residences).

66 *See* David E. Steinberg, *Restoring the Fourth Amendment: The Original Understanding Revisited*, 33 HASTINGS CONST. L.Q. 47, 81–82 (2005).

67 *Id.* at 70–74 (examining the continuing divisions within the Supreme Court on Fourth Amendment issues).

68 *See* Arcila, *supra* note 1, at 58–59.

69 389 U.S. 347 (1967).

70 *Id.* at 364–74.

71 *Id.* at 353.

72 The warrant test subsequently applied by the Court actually appears in Justice John Harlan's concurring opinion in *Katz*. The complete test reads: "My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second,

Subsequent applications of this reasonable expectation of privacy test have not produced consistent or coherent results. For example, *Katz* held that a warrantless wiretap of a public phone violated the Fourth Amendment.[73] But in *United States v. White*,[74] the Court upheld the warrantless use of an informant with a radio transmitter, even though some of the incriminating conversations took place in the defendant's home.[75] In *Kyllo v. United States*,[76] the Court held that the warrantless use of a thermal imaging unit to measure the heat emanating from a suspect's residence violated the Fourth Amendment.[77] But in *California v. Ciraolo*,[78] the Court upheld the warrantless use of an airplane to view marijuana plants in the defendant's backyard.[79] And so on.

The seemingly arbitrary nature of these cases not only is troubling as a matter of judicial review, but also raises serious institutional concerns. If Fourth Amendment law is nothing more than the ad hoc regulation of government searches and seizures, perhaps such regulation should come from elected legislators, rather than appointed justices. Legislators are popularly elected and have greater access to information through hearings and informal contacts. Also, undesirable legislation can easily be repealed.[80]

Professor Arcila does not assert that reasonableness should be the standard for requiring warrants. Instead, Professor Arcila proposes that a focus on the reasonableness of a search should replace warrants as the means of regulating searches under the Fourth Amendment. Nonetheless, the Court's experience in Fourth Amendment warrant clause decisions raises considerable questions about the viability of a Fourth Amendment regime built on the concept of reasonableness. Indeed, given the lack of consensus about the propriety of most search techniques, considerable doubts remain about any

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that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* at 361 (Harlan, J., concurring).

73 *Id.* at 347.

74 401 U.S. 745 (1971).

75 *Id.* at 748–54.

76 533 U.S. 27 (2001).

77 *Id.* at 33–41.

78 476 U.S. 207 (1986).

79 *Id.* at 211–15.

80 For further discussion of this institutional argument, see generally Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801 (2004), and David E. Steinberg, *Sense-Enhanced Searches and the Irrelevance of the Fourth Amendment*, 16 WM. & MARY BILL RTS. J. 465 (2007).

Fourth Amendment regime that is divorced from the original understanding of the Amendment.

VI. CONCLUSION

Having reread this response, I worry that I have been too critical of Professor Arcila. Without question, Professor Arcila's article is an important contribution to Fourth Amendment historical literature. Professor Arcila provides important new insights on the Framing-era magistrate's role in issuing warrants. Some Framing-era magistrates probably reviewed warrant applications aggressively for probable cause, while others probably rubber-stamped warrant applications. In documenting early American practices, Professor Arcila relies on sources such as the Framing-era justice manuals, which have received too little attention in prior discussions of Fourth Amendment history. All of this makes Professor Arcila's article a high quality and genuinely important work of legal scholarship.

Yet in the end, I worry that Professor Arcila's historical conclusions have been colored by his own preferences for Fourth Amendment reform. In particular, Professor Arcila contends that ministerial rubber-stamping of warrant applications was probably more common than aggressive sentryship review of these applications. This claim is nothing more than pure speculation, supported by no solid historical evidence.

However, this unsupported claim is important to Professor Arcila's program for the *modern* Fourth Amendment. Warrants and probable cause have been a central feature of much Fourth Amendment historical scholarship. If such accounts have been incorrect, then Fourth Amendment history apparently is hopelessly vague. This vagueness would support Professor Arcila's proposal that modern analysis should ignore Framing-era discussions of unreasonable searches and seizures. More importantly, if probable cause and warrants were not an important Framing-era restriction on searches and seizures, this evidence would support Professor Arcila's desire that modern Fourth Amendment analysis should emphasize reasonableness, not warrants and probable cause.

It is tempting to view the original understanding of the Fourth Amendment through the lens of modern conceptions and misconceptions about the Amendment. It is also misleading.

The Framers enacted the Fourth Amendment with one purpose—to proscribe searches of houses pursuant to a general warrant, or no warrant at all. Whether or not the Fourth Amendment should be similarly limited today is a topic worthy of discussion. But before we

decide on the importance of history in Fourth Amendment analysis, we must first come to an unbiased, candid understanding of that history.