THE AMERICAN STRUGGLE FOR THE INTERPRETATION OF THE FOURTH AND FOURTEENTH AMENDMENTS

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A Thesis Submitted in Partial Fulfillment of
The Requirements for the Degree of
Master of Arts in History
to the Office of Graduate and Extended Studies
of East Stroudsburg University of Pennsylvania

August 7, 2020

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ABSTRACT

A Thesis Submitted in Partial Fulfillment of the Requirements for the Degree of Master of Arts in History to the Office of Graduate and Extended Studies of East Stroudsburg University of Pennsylvania

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Title: The American Struggle for the Interpretation of the Fourth and Fourteenth Amendment

Date of Graduation: August 7, 2020

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Abstract

Lawmakers interpreted the Fourth and Fourteenth Amendments to the United States Constitution in a way that denied citizens their individual privileges and protections against unreasonable searches and seizures. To demonstrate this, primary and secondary sources were used including court cases, acts, laws, books, journals, periodicals, personal papers, correspondences, and government records. These sources have revealed that the historical ramifications of search and seizure laws and individual rights were intended to be interpreted based on the viewer's surrounding culture. The larger implications of this researcher's findings are that the Bill of Rights must be construed as a set of rules that can be interpreted in any era for the sake of all citizens to have equal access to life, liberty, and property.

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INTRODUCTION

Introduction to Fourth and Fourteenth Amendment

In a speech at Georgetown University in 1985 Supreme Court Justice William J. Brennan Jr. said this about interpreting the United States Constitution:

> We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world dead and gone, but in the adaptability of its great principles to cope with current problems.[1]

An example of Mr. Brennan's reference to a changing set of rules can be found in two fundamental amendments to the U.S. Constitution, the Fourth and Fourteenth.

This work will show that discrimination and greed led lawmakers to unjustly ignore the protections that the Fourth and Fourteenth Amendment guaranteed. By ignoring constitutional provisions in cases involving illegal intrusions of private property, black citizens suffered under Black Codes and Jim Crow until the 1960s. Legal precedent, such as the *Slaughterhouse Case of 1873,* and civil liberties, such as the Civil Rights Act of 1866, were struck down in favor of long held traditions, racial divide, and political favoritism.

From Reconstruction to the Civil Rights movement, parts of the American government actively worked to prohibit new government agencies, laws, and court cases that safeguarded individual rights. The Freedman's Bureau and Civil Rights Act of 1866

[1] Editorial, "Justice, Brennan Style," *Los Angeles Times,* October 16, 1985, accessed October 13, 2015, http://articles.latimes.com/1985-10-16/local/me-15116_1_constitution.

attempted to curtail Black Codes in the American South which "limited the rights of former slaves to move freely, to be gainfully employed, and to acquire property."[1] Although not initially successful in furthering equal protections and securing property for blacks, the Freedmen Bureau's Act and Civil Rights Act became vital precursors to Fourteenth Amendment legislation. After the Ratification of the Fourteenth Amendment defined citizenship, cases such as the *Ku Klux Klan Trials* (1871-1872) and *Slaughterhouse Cases* (1873) essentially erased the gains the Fourteenth Amendment provided for blacks. By ignoring the Constitution and setting detrimental precedent, Black Codes in the American South prohibited the Fourteenth Amendment from being considered in trials that had a chance to make the Fourth Amendment stronger.[2]

The landmark decision of *Boyd v US* (1886) trailblazed a new interpretation of the Fourth Amendment, challenging that an invasion of property and security equaled an invasion of liberty. In the early twentieth-century, decisions to prohibit evidence that were obtained illegally under the Fourth Amendment, and an inclusion that required states to abide by federal Fourth Amendment laws, furthered protections from unreasonable searches and seizures. By the Civil Rights Era, Supreme Court Justice William J. Brennan led the charge in interpreting the Fourth Amendment in a new image.

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[1] Richard Fleischman, Thams Tyson, and David Oldroyd, "The U.S. Freedmen's Bureau In Post-Civil War Reconstruction," The Accounting Historian's Journal 41, no. 2 (December 2014): 82, accessed on September 1, 2019, http://www.jstor.org/stable/43487011.

[2] Lou Faulkner Williams, *The Great South Carolina Ku Klux Klan Trials 1871-1872* (Athens, GA: University of Georgia Press, 1996), 66-73; Michael A. Ross, "Justice Miller's Reconstruction: The Slaughter-House Cases, Health Codes, and Civil Rights in New Orleans, 1861-1873," *The Journal of Southern History* 64, no. 4 (Nov. 1998): 651-652, accessed on January 27, 2019, https://www.jstor.org/stable/2587513.

His narrative challenged how variables like technology, police forces, and due process could or could not be used in cases that accessed personal privacy to make an arrest. [3]

Fourth Amendment Historiography

The Fourth Amendment has been written about by numerous scholars. Some of them study the era in which the amendment was founded and discern what words like "probable," "cause," and "unreasonable" meant to the Founding Fathers.[4] Other scholars study the growth of the Fourth Amendment. They analyze the Fourth Amendment and use court cases and laws as variables to show how search and seizure law has changed throughout American history.[5] Words like "probable," "cause," and "unreasonable" are arbitrary to different people. Scholars have outlined the causes and purposes of the Fourth Amendment by splitting the two clauses of the amendment in half. Two scholars, both writers of the 1970s, based their arguments on what they thought the purpose for the split of the first, the unreasonable seizure, and the second, the general search warrant clauses were. Jacob Ladynski contended that the first clause emphasizes the second. This provides that the warrant clause was an already defined "right to freedom from arbitrary

[3] Thomas Y. Davies, "Recovering the Original Fourth Amendment," Michigan Law Review, 98, (1998): 727-728, http://dx.doi.org/10.2139/ssrn.220868; Weeks v United States 232 US 383 (1914); Lawrence Lessig, "Translating Federalism: United States v Lopez." The Supreme Court Review 1995 (1995): 132-134, accessed on September 8, 2019, http://www.jstor.org/stable/3109612; Louis, Henkin, ""Selective Incorporation" in the Fourteenth Amendment," The Yale Law Journal 73, no. 1 (1963): 74-76, accessed on September 8, 2019, doi:10.2307/794594.

[4] William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning, 602-1791* (New York, NY: Oxford University Press, 2009).

[5] Andrew E. Taslitz, *Reconstructing the Fourth Amendment: A History of Search & Seizure, 1789-1868* (New York, NY: New York University Press, 2006).

governmental invasion of privacy and did not seek to create or confer such a right." He concluded that "the second clause, in turn, defines and interprets the first."[6]

Another contributor to arguing that the primary focus of the Amendment was the general warrant clause comes from Telford Taylor. Taylor's contention is different from Ladynski's in that Taylor does not consider the unreasonable seizure clause as anything more than "to cover shortcomings in warrants… or other unforeseeable contingencies." Taylor's main argument is that the colonists had little concern with unreasonable seizures and primarily worried about the threat of general warrants.[7]

These scholars had valid contentions in their own right. But if the contention here is to argue that Fourth Amendment law has an inherent connection with the protections of the Fourteenth Amendment, then there is a different way to analyze the purposes for the founding of the Fourth Amendment. In a more recent study Thomas K. Clancy points out that:

> There is a broader recognition that the amendment was designed by the framers to protect individuals from unreasonable governmental intrusion. Such a view maintains that the framers intended not only to prohibit the specific evils of which they were aware but also, based on the general terms they used, to give the Constitution enduring value beyond their own lifetimes.[8]

Using this hypothesis, there must be evidence that both clauses of the Fourth Amendment were written for the purpose of individuals having guaranteed protections in a nation that would evolve. Specifically, the meaning of the Fourth Amendment should have changed,

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[6] Jacob W. Ladynski, *Search and Seizure and the Supreme Court: A Study in Constitutional Interpretation* (Baltimore, MD: The Johns Hopkins Press, 1966), 43.

[7] Telford Taylor, *Two Studies in Constitutional Interpretation: Search, Seizure, and Surveillance and Fair Trial and Free Press* (Columbus, OH: University of Ohio State Press, 1969), 43.

[8] Thomas K. Clancy, "The Framer's Intent: John Adams, His Era, and the Fourth Amendment," *Indiana Law Journal* 86, no. 3 (Summer 2011): 988, accessed February 1, 2017, http://ilj.law.indiana.edu/articles/86/86_3_Clancy.pdf.

without altering the words, depending on the strength of new laws such as those in the Fourteenth Amendment.

Fourteenth Amendment Historiography

If Fourth Amendment historiography is complex, then the Fourteenth Amendment is Pandora's Box. Enacted to give slaves access to the same rights all free men had, the Amendment's impact is still viewed as more controversial than any other. The Fourteenth Amendment's most important first clause does four things. First, it grants US citizenship to anyone born or naturalized in the US. Second, it prohibits states from enacting laws that curtail the "privileges or immunities" of citizens of the United States. Next, it prohibits states from stripping "any person of life, liberty, or property, without due process of law." Finally, it prohibits states from denying any person in their state "equal protections of the laws."[9]

As legal scholar Earl M. Maltz puts in his work encompassing the Fourteenth Amendment, the force behind the Fourteenth Amendment was meant to be radical. However, pre-Civil War legal precedent and states' rights southern Democrats control of Congress by 1874 severely curtailed Fourteenth Amendment opportunities. Thus, Maltz states that scholarly work on the Fourteenth Amendment reviews "the Republican ideology of the early Reconstruction era as the benchmark against which the Court should be measured."[10]

[9] U.S. Constitution, Amendment XIV.

[10] Earl M. Maltz, *The Fourteenth Amendment and the Law of the Constitution* (Durham, NC: The University of North Carolina Press, 2003): vii-viii.

Historian Eric Foner dives into deeper detail on the Reconstruction Era and the Fourteenth Amendment by painting an ideological picture of the minds of Republicans leading up the drafting of the Amendment. Foner picks out three stances for which Republicans supported the Amendment:

> The break with the President, the need to find a measure upon which all Republicans could unite, and the growing consensus within the party around the need for strong federal action to protect the freedmen's rights, short of the suffrage.[11]

Foner outlines this stance with the idea that the broadness of the Amendment was meant to help its beneficiaries and reject its opponents. Foner states that Republicans refused to answer Democrats' claim that the Amendment was not specific enough. Instead their response was to a national crisis, and the Fourteenth Amendment was ratified to help heal the whole nation.

The works of Maltz and Foner are ideological thoughts of what the Fourteenth Amendment was meant to protect and guarantee. Ronald M. Labbe and Jonathan Lurie's book about *The Slaughterhouse Cases* shows how the Fourteenth Amendment was used in case law. As Labbe and Lurie point out, the Court struggled to agree on how far the Fourteenth Amendment extended its scope. Labbe and Lurie make the case that Supreme Court Justice Stephen Miller, who ruled 5-4 in favor of the state of Louisiana to regulate slaughterhouses, did not rule based on the Reconstruction Republican ideology of uplifting disenfranchised blacks. They explain that most contemporary Fourteenth Amendment scholars blame Justice Stephen's ruling in *Slaughterhouse* for setting precedent for *Plessy v Ferguson* thus driving the nation into a deeper divide socially and politically. Rather, Labbe and Lurie's thesis is a familiar rejection of *Slaughterhouse* with

[11] Eric Foner, *Reconstruction: America's Unfinished Revolution 1863-1877* (New York, NY: Harper & Row, 1988), 257.

the caveat that it was not "scandalously wrong" based on the broadness of the Fourteenth Amendment, the facts of sanitation reform in the case, and the political climate of Reconstruction.[12]

[12] Ronald M. Labbe and Jonathan Lurie, *Regulation, Reconstruction, and the Fourteenth Amendment: The Slaughterhouse Cases* (Lawrence, KS: University of Kansas Press, 2003): 1-4.

CHAPTER 1

SEVENTEENTH AND EIGHTEENTH-CENTURY ENGLISH LAW AND THE PRINCIPLE ORIGINS OF THE FOURTH AND FOURTEENTH AMENDMENTS

American Constitutional Historiography

American constitutional history is a complex subject founded upon tumultuous times. Several historians and legal scholars have commented on the subject. In the nineteenth-century, Alexis de Tocqueville published his work on American democracy after his travels in the United States and is widely considered the first political science work on American politics. Tocqueville was astonished, if not concerned, about "how much knowledge and discernment it [the Constitution] assumes on the part of the governed." [1] Tocqueville insisted that even if "the general theory is understood, there remain difficulties of application" including the power balance between the sovereignty of federal and state governments. In addition to the complexity of American constitutionalism, its ideologies were largely based off the government it was formed to be protected against.[2]

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[1] Alexis de Tocqueville, *Democracy in America,* ed. Harvey C. Mansfield and Delba Winthrop (Chicago: University of Chicago Press, 2000), 155-156.

[2] Tocqueville, *Democracy in America,* 155-156

Historian Mirjan R. Damska provides a vital comparison between English and American constitutionalism. In both aspects, constitutionalism has an overarching authority upon which its laws are based upon. For the English it was God. Every aspect of government applied to the law was divine. American constitutionalism also was founded upon strong authority. This authority was essentially "the People and their Charter." The Framers set up the Constitution to be the axel "the People" could wield their power from, with assistance from the central government. [1] Another historian that studies the theory of American constitutionalism states that British constitutionalism was founded to "be a set of documents that relate to the system of government of a given community." Since American constitutionalism was founded during the Revolutionary Era without a developed community, it was based off "a single law that had a special status as a paramount or fundamental law." This argument sets the stage for a story in which the American Constitution was construed for a new particular reason, rather than for an existing community. The American concept was that gathering representatives, debating ideologies, and ratifying laws for the particular reason to guarantee rights and protections meant that "people were the sole sovereign in the American government."[2]

Much like the framers of the American Constitution, the committees that formed and ratified the Fourteenth Amendment from 1866 to 1868 did not arbitrarily find reasoning for new analyses based on a passive resolution or orderly events. Before the ratification of the Fourteenth Amendment, the theory of constitutionalism for "the

[1] Mirjan R. Damaska, "Reflections on American Constitutionalism," *The American Journal of Comparative Law* 38 (1990): 422, accessed on September 11, 2019, doi:10.2307/840551.

[2] Stephen M. Griffin, *American Constitutionalism: From Theory to Politics* (Princeton: Princeton University Press, 1996), 11-12.

people" resonated in the Antebellum debates over individual rights and slavery. In Antebellum America when "privileges and immunities" were paired together it was often for "special," "peculiar," "exclusive," and "particular" reasons. Privileges and immunities did not resemble what they would in the Fourteenth Amendment, but rather referred to specific rights for certain instances. Antebellum debate about individual rights revolved around Article IV of the Constitution, often referred to as the Comity Clause, which states that "the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Antebellum Courts interpreted Article IV as requiring states to acknowledge *some* of the same privileges and immunities it recognizes for its own citizens, for citizens visiting their state. Privileges and Immunities that were not required to be granted included "political rights such as suffrage, and they excluded any liberty granted by the state to its own citizens."[3]

When Congressman John Bingham of Ohio presented his first draft of the Fourteenth Amendment to Congress in the winter of 1865, he based it on the muddled Comity Clause in Article IV of the Constitution. Bingham believed the Comity Clause forced states to impose the Bill of Rights. Bingham's Republican colleagues met him with vehement opposition and their points of debate are important to note. Republicans believed that Bingham's proposed amendment did not change the scope of the Comity Clause more than it was conventionally implied. Antebellum cases like *Dred Scott* made it clear that states were forced to regulate only some of their privileges and immunities for sojourning citizens. Another rejection came from Republican Congressman Robert

[3] Kurt T. Lash, *The Fourteenth Amendment and the Privileges and Immunities of American Citizenship* (New York, NY: Cambridge University Press, 2014): 16-25.

Hale who said that the proposed amendment "utterly obliterates State rights and State authority over their own internal affairs." Hale, and the rest of the majority of the Republican party believed the power of dual federalism was vital to enhancing individual rights. Finally, New York Republican Congressman Giles Hotchkiss insisted that Bingham's draft

> proposes to leave it up to Congress; and your legislation upon the subject would depend upon the political majority of Congress, and not upon the two thirds of Congress and three fourths of the States… why not provide an amendment to the Constitution that no State shall discriminate against any class of citizens; and let that amendment stand as part of the organic law of the land.

Realizing that his efforts had been squashed, Bingham abandoned his first draft.[4]

Two weeks after his initial draft was rejected, Bingham came back with a second draft which was considerably more accepted amongst his colleagues. The new draft protected "the privileges or immunities rights of citizens of the United States" rather than "the several states." Bingham exclaimed that his new proposal had the power to "protect by national law the privileges and immunities of all the citizens of the republic and inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State." After his colleagues in the House were satisfied, Senator Jacob Howard introduced the proposed amendment to the Senate. In Howard's speech he asserted that the passing of the new amendment incorporated the Bill of Rights. He combined Bingham's "privileges and immunities of the citizens of the United States" with an inclusion of

[4] Lash, *Privileges and Immunities,* 72, 98-99, 109-112; "The Constitutional Amendment." *The New York Times,* March 1, 1866.

enumerated rights of the Constitution, incorporating the all-important Article IV and the first eight amendments.[5]

Amongst these debates and the passing of the Fourteenth Amendment, Southern state legislatures still provided that their sovereignty outweighed government sanctioned processes like due process, equal protection, and privileges and immunities. The tensions between federal and state governments not only boiled over into the deadly Civil War but forced the Thirty-Ninth Congress to pave a new path of American constitutionalism. The new path only widened Southern white distrust of the federal government, who were now ordered by the Constitution to treat their ex-slaves as equal citizens.[6]

In turn, the interpretation of controversial laws born out of the Fourteenth Amendment shaped the nation based on polarizing opinions. In regards to *The Slaughterhouse Cases,* which essentially erased the Privileges or Immunities Clause check on state laws, Ronald M. Labbe quotes Supreme Court Justice Felix Frankfurter saying Supreme Court cases are "windows on the world."[7] In addition to the detrimental ruling in *Slaughterhouse*, the Supreme Court rejected the power Congress had under the Civil Rights Act of 1875 to force owners of private establishments to allow all races to use their facilities. The court argued:

> Civil Rights, such as are guaranteed by the constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws,

[5] Congressional Globe, 39th Congress, 1st Session, 2542 (1866); Lash, *Privileges and Immunities,* 150-151, 157-158.

[6] Garrett Epps, "The Antebellum Political Background of the Fourteenth Amendment." *Law and Contemporary Problems* 67, no. 3 (2004): 180. http://www.jstor.org/stable/27592056.

[7] Tony A. Freyer, review of *The Slaughterhouse Cases: Regulation, Reconstruction, and the Fourteenth Amendment,* by Ronald M. Labbé and Jonathan Lurie, *The American Historical Review* 110, no. 3 (2005): 803-04. doi:10.1086/ahr.110.3.803.

> customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong.[8]

Long before the framers of the Fourth and Fourteenth Amendments debated their ideologies, British lawyers and policy makers contested the scope of privacy rights and individual liberty. Considering the ebbs and flows of American constitutionalism from the Founding Era to Reconstruction, it is important to recognize the English influences on American lawmakers in developing American constitutionalism.

English Common Law Origins

Just as the Fourth and Fourteenth Amendments were formed out of controversy, they were also tied to other laws of the past. The words that form many of the amendments to the Constitution were formed out of English common law. From *Magna Carta* setting the standard for modern legal precedent, to William Blackstone recording the *Commentaries on the Laws of England* introducing Parliamentary sovereignty, English liberties transformed to validate persons and their property as a constitutional guarantee.[9] The framers of the Fourth Amendment and the committees that formed the Fourteenth Amendment looked to seventeenth and eighteenth-century English liberties for influence.[10] To understand the origins of American liberties, it is vital to introduce English law as one of the U.S. Constitution's most important references.

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[8] Maltz, *The Fourteenth Amendment,* 159.

[9] Alexander Lock, "Reform, Radicalism and Revolution: Magna Carta in Eighteenth- and Nineteenth-century Britain." In *Magna Carta: History, Context and Influence*, edited by Goldman Lawrence, 101-16, London: School of Advanced Study, University of London, 2018. http://www.jstor.org/stable/j.ctv5136sc.14; Howard L. Lubert, "Sovereignty and Liberty in William Blackstone's "Commentaries on the Laws of England".", *The Review of Politics* 72, no. 2 (2010): 271-97. http://www.jstor.org/stable/20780306.

[10] David A Sklansky, "The Fourth Amendment and Common Law," *Columbia Law Review* 100, no. 7 (2000): 1777-1778, doi:10.2307/1123590; Akhil Reed Amar, "The Bill of Rights and the Fourteenth Amendmen,." *The Yale Law Journal* 101, no. 6 (1992): 1268, doi:10.2307/796923.

Magna Carta

Popular historiography is right to treat common law as the most celebrated champion of legal justice, yet it seems impossible to overrate its importance. Common law's first step in international fame was the charter of *Magna Carta*. Almost one-hundred-fifty years after the Norman Conquest was completed, King John agreed to sign the *Magna Carta* in 1215. The reasoning for the charter came from John's barons, who were unhappy with the king's rule.[11] The charter consists of several chapters, but Chapter Thirty-Nine stands out as the most constitutionally significant section. "No free man is to be arrested, or imprisoned, or disseised [sic], or outlawed, or exiled, or in any other way ruined, nor will we go against him or send against him, except by the lawful judgement of his peers or by the law of the land."[12] The latter clause of this chapter is most important, declaring that "peers" and "the law of the land" are to judge civil matters. Although this in essence is an early declaration of common law, Magna Carta was not used to make law until many years later. From 1215 to 1300, Magna Carta was reissued six times, but not used to make any official law. In the later parts of the Middle Ages the enemies of English monarchy certainly did not reference Magna Carta, killing five kings from 1327 to 1485. Even during this time, Magna Carta was continuously reissued. However, there is no evidence that points to its text being a sound of reason in English politics.[13]

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[11] Sidney Painter, "Magna Carta," *The American Historical Review* 53 (1947): 42-43, accessed on September 26, 2016, http://www.jstor.org/stable/pdf/1843678.pdf.

[12] 39. Magna Carta, 1297, *Statutes of the Realm*, 25 Edw. 1.

[13] Nicholas Vincent, "Magna Carta: From King John to Western Liberty," In *Magna Carta: History, Context and Influence*, ed. Goldman Lawrence (London: School of Advanced Study, University of London, 2018), 35-36, http://www.jstor.org/stable/j.ctv5136sc.9.

Magna Carta was not the only treatise of the middle ages that would influence common law and individual rights. Henry Bracton published *On the Laws and Customs of England* in 1235, putting him on the top of the list as an early jurist to tackle common law. Bracton's purpose was to describe what the state of law was in England at the time. The introduction of Bracton's work asks questions of what different types of law there are. In a section called "What justice is," Bracton explains that law and custom, "give just judgement between man and man", and that, "justice is the constant and unfailing will to give each his right."[14] Bracton wrote his treatise in a time in which England was just barley beginning to recognize the responsibility for representation. By the mid-thirteenth-century the first Parliament was established and circuit courts were spread throughout the country. Along with these types of political and legal movements, Bracton's treatise provides a reference for how a judicial system could work in a primarily rural country.[15]

Property Common Law Origins

It was not until the seventeenth-century that common law started to become an established rule of law. In the English Stuart era, common law began to be defined simply as the practice of civil cases decided by judges. Civil cases during that time frequently involved rights of property. Disputes over property mostly arose amongst multiple individuals who claimed some type of ownership to the same land.[16] The term

[14] Henry of Bratton, *On the Laws and Customs of England*, c. 1220, vol. 2, 22-23, Bracton Online, The Ames Foundation Digital Collection of Legal History, Harvard Law School, accessed on September 26, 2016, http://bracton.law.harvard.edu/Unframed/English/v2/23.htm.

[15] Fred H. Blume, "Bracton and His Time," *Wyoming Law Journal* 2, no. 2 (January 2018), 44-46, accessed on September 24, 2019, https://pdfs.semanticscholar.org/daff/3749af8415bcfb0eda91282ce259214879ab.pdf.

[16] Barbara Shapiro, "Law Reform in Seventeenth Century England," *The American Journal of Legal History* 19, no. 4 (Oct., 1975): 280, 282, accessed on January 11, 2017, http://www.jstor.org/stable/pdf/845054.pdf.

"property" had just begun to take form in the legal community in the second half of the seventeenth-century. At this time "property" was considered to be, "things moveable." Thus, in civil cases, to further discern how certain property was defined, sub-definitions were required.[17] Arguments about property also addressed two fundamental inquires of individual rights. First, one's right to property was largely seen as guaranteed by natural law. Secondly, one's right to property also addressed guarantees upheld by common law.

In the seventeenth-century three lawyers wrote considerable treatises that strengthened common law, and in turn served as inspirations to American search and seizure law and individual rights. Specifically, the writings of Edward Coke, Matthew Hale, and William Hawkins gave American colonists an example as to why an illegal search or seizure of individual property violated their rights. Further, the fundamental law of individual liberty that the treaties observed was viewed by the framers of the Fourteenth Amendment as privileges and immunities that were incorporated in the Bill of Rights.

Sir Edward Coke's *Institutes*

Edward Coke's estimation of laws and judgement of cases were unmatched in the seventeenth-century. This is backed by his four-volume work of *The Institutes of the Laws of England* and thirteen volumes of *The Reports of Sir Edward Coke*. Within these texts, it is Coke's influence on the future framework of the Fourth and Fourteenth amendments that deserves attention. Many parallels to American legal procedures considering these Amendments can be found in Coke. Historians perceive Coke as the

[17] G. E. Aylmer, "The Meaning and Definition of "Property" in Seventeenth-Century England," *Past & Present*, no. 86 (Feb., 1980): 90, accessed on February 13, 2017, https://www.jstor.org/stable/pdf/650740.pdf.

bridge between Magna Carta and the Fourth Amendment because he was the first to reject general search warrants, especially in cases in which the federal government breached the privacy of one's home.[18] Coke's foundation for this violation was based on article thirty-nine of Magna Carta. The connection between Coke's denial of general warrants is not just about the words in the text or the cases argued. It is about the larger context of common law procedures being independent from legislative and executive influence. The English monarch felt so threatened by the influence of Coke's common law practices that after Coke's death, Charles I directed to have Coke's house pillaged and confiscate any papers that were "seditious … dangerous [and] disadvantageous to His Magesty's service."[19]

Coke's *Institutes* are a large work of definitions and legal procedures. Coke's third volume outlines common law's protection against "Pleas of the Crown." There, Coke explains in a subchapter titled, "Seizure of Goods before conviction," that, "the goods of any delinquent[20] cannot be taken and seized to the king's use before the same be forfeited."[21] Coke's main purpose here, and in the rest of the third volume, is to keep

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[18] Laura K. Donohue, "The Original Fourth Amendment," *The University of Chicago Law Review* 83, no. 3 (2016): 1207-1208, Accessed January 12, 2020. www.jstor.org/stable/43913852; Leonard W. Levy, "Origins of the Fourth Amendment," *Political Science Quarterly* 114, no. 1 (1999): 80, Accessed January 12, 2020. doi:10.2307/2657992; Thomas Y. Davies, "Recovering the Original Fourth Amendment," *Michigan Law Review* 98, no. 3 (1999): 670-673, Accessed January 12, 2020. doi:10.2307/1290314.

[19] William Cuddihy and Carmon B. Hardy, "A Man's House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution," *The William and Mary Quarterly* 37, no. 3 (1980): 375-377, doi:10.2307/1923809.

[20] Coke's use of the word 'delinquent' here is meaning an individual "accused or indicted of any treason, felony, or other offence before conviction and attainder." Coke, *Third Part Institutes,* 229.

[21] Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason; and other Pleas of the crown, and Criminal Cases* (London: W. Rawlins, 1680), 228, accessed on October 11, 2016, https://ia802706.us.archive.org/2/items/thirdpartofinsti03coke/thirdpartofinsti03coke.pdf.

common law completely sovereign from the monarch. Further, his definition of "seizure" is compelling based on his era. He remarks that there are two types of seizures: "verbal without taking", and "actual seizure." Coke leans on Bracton to define "verbal without taking" by saying that "before conviction, persons so imprisoned ought not to be disseised[22] of their lands nor despoiled of their goods, but [rather], while they are in prison, maintained out of them, until they have been delivered by judgment or convicted."[23]

This rudimentary development of protection of private property was followed up by a description on why it is unlawful to seize property:

> The begging of the goods or state of any delinquent accused or indicted of any treason, felony, of other offence before he be convicted or attainted, is utterly unlawful, because before conviction or attainder, as hath been said, nothing is forfeited to the king, nor grantable by him. And besides it either maketh the prosecution against the delinquent more precipitate, violent and undue, than the quiet and equal proceeding of law and justice would permit, or else by some underhand composition and agreement stop and hinder the due course of justice for exemplary punishment of the offender. Lastly, when he delinquent is begged, it discourageth both judge, juror, and witness to do their duty.[24]

This stance is monumental because it aligns an individual's protection against unlawful seizures with their right to property in court. Coke is claiming that before a suspect is charged, the king has no authority to their private goods because of the chance that said goods could damage a jury's opinion of a case. Coke follows his proclamation of unlawful seizures with a clause on reasonableness. "One or more justice or justices of peace cannot make a warrant upon a bare surmise to break any man's house to search for

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[22] In seventeenth-century England land was the most valuable entity for a low to middle class family. If you were "disseised" you were forced to give up your land, normally because of legal accusations.

[23] Bracton Online, *Harvard Law School Library*, vol. ii, 346, accessed October 11, 2016, http://bracton.law.harvard.edu/Unframed/English/v2/346.htm.

[24] Coke, *Third Part Institutes*, 229.

a felon, or for stolen goods, for they being created by an act of parliament have no such authority granted unto them by any act of parliament."[25] Seventeenth-century judicial review makes another appearance here and Coke ties his treatise together with a reference to the old laws of England. He proclaims that, "for justices of peace to make warrants upon surmises, breaking houses… is against Magna Carta… and against the English statute, of 42 E.3.cap"[26], which is a reference to a statute titled "Observance of Due Process of Law" decreed by King Edward III in 1368. The statute says, amongst other things, "that no man be put to answer without presentment before justices, or matter of record, or by due process and writ original, according to the old law of the land."[27] Once again, Coke's main purpose is to separate the King's prerogative from the court's sovereignty. But, he also grasped due process as legally connected to the legality of original writs.

Semayne's Case

In 1604, before his *Institutes* and *Reports* were published, Coke put his legal underpinnings to work. Viewed as a landmark case by modern legal scholars, *Semayne's Case* (1604) established the "knock before entering" and "castle doctrine" precedent that law enforcement is required to follow.[28] In *Semayne's Case,* a sheriff of the king was

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[25] John Mews, W.E. Gordon, and J. Spencer, eds., *The Law Journal Reports, For the Year 1897 in the Queen's Bench Division of the High Court of Justice, Including the Court for Crown Cases Reserved* (London: 119 Chancery Lane, 1897), 134, accessed on January 17, 2020.

[26] Edward Coke, *The Fourth Part of the Institutes Of the Laws of England: Concerning the Jurisdiction of Courts* (London: M. Flesher, 1644), 176-177, accessed October 12, 2016, https://ia601407.us.archive.org/15/items/fourthpartofinst04coke/fourthpartofinst04coke.pdf.

[27] Observance of Due Process of Law, 1368, 3 Edw. 42.

[28] Jonathan Witmer-Rich, "The Rapid Rise of Delayed Notice Searches, and the Fourth Amendment 'Rule Requiring Notice'", *Pepperdine Law Review* 41, no. 509 (2013-2014): 574, accessed on September 28, 2019, https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1652&context=fac_articles.

ordered to enter Richard Gresham's home, in which he refused entry, to obtain the goods of the deceased George Beriford who owed money to Peter Semayne. The confrontation led to Semayne suing Gresham for the debt inside Gresham's home. Coke In defense of Gresham, claimed that if "any house is recovered by any real action… the Sheriff may break the house."[29] Coke's reference of "real action" was to be understood as something that is not based upon surmise. Further, Coke said that if a sheriff did have reason to break a house he must announce his entry. These reasons could have been enough to dismiss the sheriff's intrusions. However, what drove Coke to decide upon Gresham's behalf was the simple right of personal property. Coke brought forth the famous "castle doctrine" legal standard which says:

> That the house of every one is to him as his Castle and Fortress as well for defence [sic] against injury and violence, as for his repose; and although the life of man is precious and favoured in law; so that although a man kill another in his defence [sic], or kill one per infortuntun' [sic], without any intent, yet it is felony, and in such case he shall forfeit his goods and chattels, for the great regard which the law hath of a mans life; But if theeves [sic] come to a mans house to rob him, or murder, and the owner or his servants kill any of the theeves [sic] in defence [sic] of himself and his house, it is no felony, and he shall lose nothing, and therewith agreeth [sic] 3 Edw. 3. Coron. 303, & 305. & 26 Ass. pl. 23. So it is holden [sic] in 21 Hen. 7. 39. every one may assemble his friends or neighbours to defend his house against violence: But he cannot assemble them to goe [sic] with him to the Market or elsewhere to keep him from violence: And the reason of all the same is, because domus sua cuique est tutissimum refugium.[30]

Coke essentially considered natural property rights to be more sacred than an intrusion based upon bare surmise. Further, the castle doctrine set a standard for individual rights setting a precedent for self-defense. *Semayne's Case* would set a standard of property rights, that would be strengthened by individual rights, as the most dignified personal rights of the era.

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[29] Edward Coke, *The Reports of Sir Edward Coke, Knt. In Thirteenth Parts, A New Edition, vol. III* (London: Joseph Butterworth and Son, 1826), 188-190, accessed on October 13, 2016, https://ia601405.us.archive.org/14/items/reportssiredwar00cokegoog/reportssiredwar00cokegoog.pdf.

[30] Coke, *The Reports, vol. V, 91a.*

Coke and the Monarch

In the early seventeenth-century, after the death of Elizabeth I and the accession of James I, it would have seemed as though a cloud of dust finally settled over England. The drama of plots to overthrow Elizabeth I and the lack of marriage from the virgin queen was over. Elizabeth was keen to taking political advice from a close group of advisors and took a liberal stance on the Court of Common Pleas in civil suits.[31] The opposite would become a theme of James's rule of England. By 1607, Coke had risen to be the Chief Justice of the Court of Common Pleas. Coke's initial challenge to protecting common law in his court was prohibiting the High Commission from ruling on non-ecclesiastical matters. In Coke's estimation of the Church's power, he claimed that ecclesiastical statute law "does not give them any such authority to arrest the body of any subject upon surmise." Coke also extended the limitations of statute law to local courts ruling that if justices in those courts cannot "determine felonies, or other criminal causes by writ", they cannot, "without an Act of Parliament… take them within another county."[32] These standards were an example of Coke elevating civil rights based on common law over the ecclesiastic statute law directed by the power of the Church and Monarch. Coke's clash with other branches of government was just beginning.

Coke's confrontations with church and local courts would not prove to be as tremendous as the one with the king. In 1608, James I received support from Coke in

[31] George Garnett, "Sir Edward Coke's Resurrection of Magna Carta", in *Magna Carta: History, Context and Influence*, edited by Goldman Lawrence, (London: School of Advanced Study, University of London, 2018): 56, http://www.jstor.org/stable/j.ctv5136sc.11; Ian Williams, "The Tudor Genesis of Edward Coke's Immemorial Common Law", *The Sixteenth Century Journal* 43, no. 1 (2012): 103-23, http://www.jstor.org/stable/23210757.

[32] Edward Coke, *The Reports of Sir Edward Coke*, xii, 50-53, accessed on September 28, 2016, https://ia800304.us.archive.org/0/items/reportssiredwar06cokegoog/reportssiredwar06cokegoog.pdf.

Calvin's Case (1608), which determined that any Scot born after the accession of James I were born sovereign and had the same rights as a native Englishman.[33] But things turned sour when on November 10th of that same year, the Archbishop of Canterbury approached James complaining about prohibitions of ecclesiastical courts. The Archbishop and James agreed that "concerning the high commission, the King himself may decide in his royal person; and that the Judges are but delegates of the King." Coke disagreed saying that the king could not judge cases and that "according to the law and custom of England… the court gives the judgment." It was important for Coke to distinguish the law here as a separate entity of government: "no man shall be put to answer without presentment before the Justices, matter or record, or by due process, or by writ original, according to the ancient law of the land." In his response James claimed the law was based on reason and that he and others had reason. Coke agreed but contested that "his Majesty was not learned in the laws of his realm of England."[34] It is reported that James almost struck Coke but he was pardoned when Coke pleaded his allegiance on his knees. However dramatic this encounter was, Coke's support of common law, specifically his reference to the court's requirement of due process and an original writ, is important. This standard would carry over to one of Coke's most important cases in his tenure.

[33] Coke, *Reports*, vii, 48.

[34] Coke, *Reports*, vii, 63-65, accessed on October 11, 2016.

Dr. Bonham's Case

Thomas Bonham was an educated physician who practiced in London. However, Bonham was not accredited to practice medicine by the College of Physicians. Thus, the college took it upon themselves to arrest Bonham for practicing without a license. Bonham responded by suing the college for false imprisonment. In *Dr. Bonham's Case*, heard in 1610, Coke ruled that the college had no right, like the king, to enact the law and only judges of the court could do so. Although what Dr. Bonham was doing was illegal and against acts of Parliament, it was not up to the college to decide so. Coke ruled that the common law may void acts of Parliament when they are "against common right and reason, or repugnant, or impossible to be performed."[35] This language is very similar not only to judicial review, founded almost two hundred years later, but interprets legal matters of having fundamental "reason" and "right." Even more so, one hundred fifty-one years later *Dr. Bonham's Case* would be referenced in James Otis's *Writs of Assistance* case in which John Adams said: "then and there the child Independence was born."[36]

Hale and Hawkins

Coke was the most prominent common law lawyer of the seventeenth-century. However, he was not the only one to comment on search and seizure law. Matthew Hale and William Hawkins both wrote prominent treatises during this era which also served as future references by American colonial revolutionaries. Hale made his case against

[35] Edward Coke, *The Selected Writings and Speeches of Edward Coke Volume I*, ed. Steve Sheppard (Indianapolis: Liberty Fund, 2002), 264, 275, accessed on October 11, 2016, http://lf-oll.s3.amazonaws.com/titles/911/0462-01_LFeBk.pdf.

[36] C. James Taylor, "Founding Families: Digital Editions of the Papers of the Winthrops and the Adamses (Boston: Massachusetts Historical Society, 2016), accessed on October 11, 2016, https://www.masshist.org/publications/apde2/view?id=ADMS-05-02-02-0006-0002-0001.

general warrants in *The History of the Pleas of the Crown*. He argued that if, under oath, there is suspicion and proof of probable cause, a justice may serve a warrant to detain the accused. Under said warrant, an arrest is legal and if no arrest is obtainable, an officer "may break doors to take him, if within a house."[37] Hale continued in his second volume in requiring a detailed description of what is to be searched when property is seized. He also supported the condition that a detailed process of the search must be documented. Hale's conclusion on general warrants and search and seizure procedures came in a chapter dedicated to the cause titled "Concerning warrants to search for stolen goods, and seizing them." He outright dismissed "a general warrant to search in all suspected places," but supported "only to search in such particular places, where the part assigns before the justice his suspicion and the probable cause thereof." Hale's simple explanation for these regulations was that "warrants are judicial acts, and must be granted upon examination of the fact."[38] In other words, Hale claimed that warrants could only be judged upon by the court, and not interfered with by the monarch.

William Hawkins' *Treatise of Pleas of the Crown* was published after Hale's and provided some additional details on the legality of warrants. Hawkins argued that if an arrest was made without a warrant nor with probable cause, a later warrant could not be used for the same arrest. Further, if an arrest was made with a warrant and the accused

[37] Matthew Hale, *History of the Pleas of the Crown vol 1* (London: E. and R. Nutt, and R. Gosling, 1736), 580, accessed on February 14, 2017, https://ia800301.us.archive.org/30/items/historiaplacitor01hale/historiaplacitor01hale.pdf.

[38] Hale, vol. 2, 113, 150, accessed on February 14, 2017, https://ia800203.us.archive.org/31/items/historiaplacitor00hale/historiaplacitor00hale.pdf.

was found to be not guilty, the same warrant to make the original arrest could not be used again.[39]

Most credit is deservedly given to Coke for setting precedent for some of the most important parts of English law. However, these sections of Hale and Hawkins would prove pivotal in the future of law as well. In the next century, Blackstone would use the treatises of Coke, Hale, and Hawkins to create the standard of English law. Additionally, courtrooms on both sides of the Atlantic would become filled with quotes from Hawkins, Hale, and Coke in protecting individuals against searches and seizures without probable cause and attacks on general warrants.

Blackstone and British Constitutionalism

Once Coke firmly established himself as a more loyal servant to liberty than the king, he would not waver. With reference to distinguished documents like *Magna Carta* and other ancient statutes Coke continued to thrive against the monarch's wish. Coke would survive to see the *Petition of Right* passed in 1628 which limited the monarch's prerogative and extended the liberties of individuals. But, Coke's life would end before serious constitutional liberties would be enforced. The *Habeas Corpus Act of 1640*, later edited by the *Habeas Corpus Act of 1679*, was just one document that Coke would have been proud to support. The *Habeas Corpus Act* served as an extension to *Magna Carta* by ensuring more protection for individual liberty. Although *Magna Carta* assured individuals protection from illegal imprisonment, it did not state anything about how one could sue for illegal imprisonment. Thus, the new act stated that a writ of habeas corpus

[39] William Hawkins, *A Treatise of the Pleas of the Crown* (London: E. Richardson and C. Lintot, 1762), 81, accessed on February 14, 2017, https://ia600206.us.archive.org/14/items/treatiseofpleaso00hawk/treatiseofpleaso00hawk.pdf.

had to prove that the process in which anyone accused of a crime and detained was done legally. This clause essentially limited prosecutors' power by granting due process for defendants. Additionally, *Habeas Corpus* would be used to protect those whose privacy was violated by illegal search and seizure.[40]

Locke, 1688 Revolution, Bill of Rights

Habeas Corpus and the *Petition of Right* were passed by Parliament to curb the monarch's privilege. However, politicians of the seventeenth-century were not the only ones realizing how increasingly threatening the power of the monarchy was. Reading, writing, and practicing of sciences became more pronounced in the seventeenth-century. One of the leading arts in the seventeenth-century was philosophy. John Locke, born in 1632, was the leading philosopher of the era. He thought that the connection between philosophy and law was influential to the general society. Locke's work contested the generally assumed principle that the king, the church, and judges determined law and order of society. Locke's *Second Treatise on Government,* written in 1689, challenged assumptions of divine right, political privilege, and consequences of breaking the "contract theory." This encouraged the common man to reconsider his role in social and political structures like government, law and order, and business. Thus, as English citizens began to re-evaluate the power individual liberty could have, a support for more representation in government began. The turbulent autocratic style of governmental rule culminated when Parliament overthrew the monarch in the 1688 Revolution. Subsequently, Parliament passed the English Bill of Rights in the same year turning an

[40] The Petition of Right, 1628, 3 How. St. Tr. 59, 222-34, accessed on January 17, 2017, http://press-pubs.uchicago.edu/founders/documents/amendV_due_processs3.html; Habeas Corpus Act, 1679, 31 Car. 2, chap. 2, accessed on January 17, 2017, http://press-pubs.uchicago.edu/founders/documents/a1_9_2s2.html.

absolute monarchy into a constitutional monarchy. The transformation from an autocracy to a constitutional monarchy allowed constitutional law to become the most profound political voice of the eighteenth-century.[41]

Blackstone

It has been argued which individual had the most influence on establishing the laws of England. Those who consider Coke the hero of English liberty and contend that his contributions to common law reign supreme should not be ignored.[42] However, William Blackstone is normally celebrated as England's most influential jurist responsible for civil liberty.[43] Born almost one hundred years after Coke's death, the transition of government power from the monarch to Parliament allowed Blackstone's jurisprudence to be read more liberally. Additionally, Blackstone's method in interpreting common law differed from Coke in that the former practiced a lecture style learning process while the latter contained his jurisprudence in court. What grew out of Blackstone's common law lectures would become four volumes of the *Commentaries on the Laws of England*.

[41] C.B. McPherson, ed., *John Locke Second Treatise of Government* (Indianapolis: Hackett Publishing Company, 1980), 4, 28-29, accessed on January 17, 2017, www.gutenberg.org/files/7370/7370-h/7370-h.htm.

[42] J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A study of English Historical Thought in the Seventeenth Century* (Cambridge: Cambridge University Press, 1987), 31, accessed on January 16th, 2020.

[43] Albert W. Alschuler, "Rediscovering Blackstone", *University of Pennsylvania Law Review* 145, no. 1 (1996): 2, accessed on January 20, 2020, https://www.jstor.org/stable/3312712.

References from the origins of the Fourth and Fourteenth American constitutional amendments can be found in Blackstone's *Commentaries*.[44] Origins of equal opportunity and protection of laws are found in Blackstone's first volume entitled "Of the Rights of Persons" and specifically the first chapter "Of the Absolute Rights of Individuals." In this section Blackstone details the difference between private protections and natural liberty. He explains this by listing famous English statutes such as *Magna Carta, Habeas Corpus, Bill of Rights*, and *Petition of Right* as "private protections" which is government's responsibility to uphold. He then explains that those protections "will appear… to be indeed no other, than either that *residuum* of natural liberty, which is not required by the laws of society to be sacrificed to public convenience."[45] Blackstone believed that natural liberty, defined as "acting how one sees fit," had a set place in public society. Thus, even with laws enforced by the government, there were certain settings of society that could not be judged by anyone without exception. Preserving individual property rights using common law was only part of the equation. Blackstone borrowed Locke's argument from *Two Treatises of Government* that "the original of

[44] Blackstone claimed in his first volume, "Of the Rights of Persons," that the separation of natural law and private law was essential safeguard individual liberty, a vital factor in ratifying the Fourteenth Amendment. William Blackstone, *Commentaries on the Laws of England, Book the First* (Oxford: Clarendon Press, 1765), 119-132, accessed on November 11, 2016, https://ia800300.us.archive.org/3/items/BlackstoneVolumeI/BlackstoneVolume1.pdf; Blackstone argued in his second volume, "Of Real Things," that personal property is both a private and natural right, an important implication in the Fourth Amendment Era to define what was protected against unreasonable searches and seizures. William Blackstone, *Commentaries on the Laws of England, Book the Second* (London: A. Strahan, 1825), 16-17, 20, accessed on November 23, 2016, https://ia800201.us.archive.org/22/items/commentaries_of_on_the_laws_of_englandvol2/Commentaries_on_the_laws_of_England___An.pdf.

[45] Blackstone, *Book the First*, 119-125, accessed on November 11, 2016.

private property is probably grounded in nature."[46] Blackstone basically took Coke's examples of private liberty and combined it with Locke's philosophy of natural liberty.[47]

Blackstone summed up this combination of natural liberty and private protections as "the rights of the people of England," which he said, "may be reduced to three primary articles; the right of personal security; the right of personal liberty; and the right of personal property." What concerns us here is Blackstone's definition of "the right of personal liberty" which, "consists of the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct." Blackstone was clear that this particular right was "strictly natural." Like personal security, individuals had the right to be free within themselves especially when it came to government rule. In a heated phrase Blackstone condemned "violence to confiscate his estate, without accusation or trial", as "so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom." In simpler words Blackstone considered unlawful confiscation of personal liberty and individual rights as tyrannical and despotic.[48]

Blackstone's second volume, titled "Of Real Things," identifies property law as "things real" and "things personal." Whether something is "real" or "personal," the identification of "things," in a legal sense, are completely private rather than natural. For example, things "real" encompass "lands, tenements, and hereditaments." Things "personal" are "goods, money, and all things moveable." Next, Blackstone equates "real"

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[46] Alschuler, "Rediscovering Blackstone," 29.

[47] Blackstone, *Book the First,* 121, accessed on November 22, 2016.

[48] Blackstone, *Book the First*, 125, 130-132, accessed on November 22, 2016.

and "personal" things as vital to individual rights. In things "real" Blackstone gives the example of one's house by saying that legally, "it signifies everything that may be holden [sic], provided it be of permanent nature." Blackstone identifies corporeal hereditaments as something that "consists wholly of substantial and permanent objects." Meanwhile, incorporeal hereditaments, is "a right issuing out of a thing corporate (whether real or personal) or concerning, or annexed to, or exercisable within, the same." The difference between corporeal and incorporeal hereditaments for most eighteenth-century English property law cases was important because it signified what type of property could be inherited. But for cases disputing illegal invasions, the purpose for differentiating types of property would prove to be important when arguing whether an invasion of something "real" or "personal" was legal.[49]

In the next section Blackstone tackled the property of "personal" things, in which he broke down into "possession" and "action." Specifically, titled property in "possession absolute" states that "a man hath, solely and exclusively, the right, and also the occupation, of any moveable chattels; so that they cannot be transferred from him, or cease to be his, without his own act or default." [50] If one has property in "action" it means that one has a right to property but not possession of it. Possession of property in "action" could be granted by a "suit or action at law."[51]

It is unlikely that Blackstone's property law definitions were written specifically to connect individual rights with search and seizure law. However, because he defined

[49] Blackstone, *Book the Second,* 16-17, 20, accessed on November 23, 2016.

[50] Blackstone, *Book the Second*, 389.

[51] Blackstone, *Book the Second,* 397.

Locke's principles of natural law and Coke's principles of common law as reliant on each other, the sum created a new standard in English constitutionalism. Blackstone was not setting out to establish a set of rules for a new government. *Commentaries* was simply a set of common law guidelines from Blackstone's lectures. Thus, because Blackstone was a lifelong supporter of the English Crown, and member of Parliament, it is ironic that his *Commentaries* became one of the most significant influences on the US Constitution.

1760s English Parliament Upheaval: Wilkes, Liberty, and Number 45

This introduction of English common law sets the stage for a few immediate examples of unreasonable searches and seizures being illegally used by the English Crown prior to the American Revolution. Those came from the remarkable opinions of two of the most distinguished judges in the Court of Common Pleas of the eighteenth-century. Charles Pratt, officially Earl of Camden, and William Pitt, officially Earl of Chatham, were very well respected British political leaders. However, they opposed the Crown persecuting citizens from any threat. Pitt and Pratt also rallied with the citizen population's opinion of equal and democratic rights. The rise of improved civil rights was spearheaded by four years of continual court cases. That movement was led by one Member of Parliament who, although indirectly, helped shape American constitutional influence for protections against general warrants and unreasonable searches and seizures.

Pratt and Pitt

Charles Pratt and William Pitt came from similar upbringings, having both attended Eton, a highly respected English boarding school. After their schooling both men made their way into political careers. Pratt's pursuits led him to be named Attorney

General in 1757 while Pitt became Prime Minister.[52] In 1758, Pratt introduced the Habeas Corpus Bill of 1758, aimed at extending habeas corpus to civil cases. Pratt's purpose for the bill was to give the wrongfully imprisoned a quicker road to recovering damages. Although denied by Parliament, Pitt was a vocal supporter of the bill. This would be an early of example of these politicians pushing for an extension of rights for individuals. In 1761 Pratt was announced as the new Chief Justice of the Court of Common Pleas and he officially took his seat the next year. In the years to follow, Pratt and Pitt would serve as two of the most powerful members of Parliament. However, they remained a relative minority. At a time when the monarch was still the most influential political figure in Britain, Parliamentarians generally followed the king's lead. The monarch and his followers would argue for administrative and divine-right rule. Thus, defense of individual rights for those whose private possessions had been illegally searched and seized would be one of the most heated debates in Parliament.[53]

Wilkes v. George III

In 1757 John Wilkes, a liberal member of Parliament, wrote William Pitt declaring his devotion to Pitt as a leader of the British government.[54] Although Wilkes worked in the legislature, his support of Pitt was the extent of his backing of the

[52] Marjie Bloy, "William Pitt the Elder, first Earl of Chatham (1708-78)", *A Web of English History*, January 12, 2016, accessed on December 12, 2016, http://www.historyhome.co.uk/pms/pitt-e.htm; "Charles Pratt, first Earl of Camden (1714-1794)", *A Web of English History*, January 12, 206, accessed on December 12, 2016, http://www.historyhome.co.uk/people/camden.htm.

[53] Kevin Costello, "Habeas Corpus and Military and Naval Impressment, 1756-1816", *Journal of Legal History* 26, no. 2 (August 2008): 220-222, accessed on January 19, 2017, http://eds.a.ebscohost.com/eds/pdfviewer/pdfviewer?sid=f0a22671-06a9-4998-91d4-194662a46220%40sessionmgr4009&vid=4&hid=4213.

[54] John, Earl of Chatham, eds., *Correspondence of William Pitt, Earl of Chatham* (London: John Murray, Albemarle Street, 1838), 239-240, accessed on December 12, 2016, https://ia801408.us.archive.org/13/items/correspondencewill01pitt/correspondencewill01pitt.pdf.

government. He vehemently disagreed with King George III's political actions and stated it publicly. In his anonymous newspaper, the *North Briton,* Wilkes wrote that the "crown has been obnoxious to the nation."[55] He expressed discontent for the very group he worked for saying that "acts of violence are committed by any minister" and described the Crown as "vulgar" and "wicked." However, it was his attack against the Peace of Paris in the infamous *North Briton 45* that pushed King George to charge the writer of the paper with seditious libel.[56]

Against Wilkes' will, messengers sent by King George ransacked Wilkes' home in the middle of the night on April 30th 1763. They were searching for a seditious libel against the king that would imprison Wilkes for treason. However, the warrant they obtained from Secretary of State Lord Halifax was faulty. Reported by London periodicals, the warrant did not specify the exact papers to seize nor proof beyond surmise that Wilkes was the author. The flawed warrant read: "These are in his Majesty's name to authorize and require you (taking a constable to your assistance) to make strict and diligent search for the authors printers and publishers of a seditious and treasonable paper entitled the *North Briton XLV Saturday April 23 1763* [. . .]"[57]

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[55] John Wilkes, *The North Briton, from No I to No XLVI inclusive* (London: W. Bingley, at No XXXI in Newgate Street, 1769), 156-157, accessed on December 12, 2016, https://ia801401.us.archive.org/22/items/thenorthbriton00unknuoft/thenorthbriton00unknuoft.pdf.

[56]Jeremy Black, *George III: Americas Last King* (New Haven: Yale University Press, 2006), 77, accessed on December 12, 2016, http://eds.a.ebscohost.com.navigator-esu.passhe.edu/eds/ebookviewer/ebook/ZTAwMHhuYV9fOTc3OTk3X19BTg2?sid=705b9b0a-9a24-4a7f-bf7a-c9fcd46924d9@sessionmgr4006&vid=7&format=EB&rid=11.

[57] Father of Candor, John Almon, *A. Letter Concerning Libels, Warrant, The Seizure of Papers, and Sureties for the Peace or Behaviors; With A View to Some Late Proceesings, and the Deference of Them by the Majority* (London: J. Almon, 1765): 43, accessed on January 22, 2020.

The monarch establishment did not expect such a vehement response from Wilkes and his supporters. Wilkes almost immediately filed suits of trespass against every official that was involved with the seizure of his possessions.[58] In addition, the Court of Common Pleas issued a writ of habeas corpus on behalf of Wilkes. However, according to Wilkes' defense, "though by reason of the pronothory's office not being open, such Habeas Corpus could not be sued out till four o'clock in the afternoon."[59] Wilkes was not only being deprived of his right of private property but was also being denied access to a judge; one of the most sacred rights of individual freedom. In the coming days Wilkes was finally able to see Chief Justice Pratt who considered Wilke's testimony valid enough to bring his suit to trial. The violations of unwarranted searches and seizures and denial of habeas corpus was published in the popular London periodical the *Gentleman's Magazine*. Interestingly enough, Britain periodicals were not the only sources covering the case. Similar accounts during the same time, sent by a supporter of Wilkes' cause, appeared in the American colonies and were distributed from Boston to Philadelphia.[60]

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[58] Levy, *Origins of the Fourth Amendment,* 86-87.

[59] John Oate, *The Gentelman's Magazine,* vol. 33 (London: St. John's Gate, 1763), 239.

[60] "An Authentick account of the proceedings against John Wilkes, Esq; Member of Parliament for Aylesbury, and late colonel of the Buckinghamshire militia. Containing all the papers relative to this interesting affair, from that gentleman's being taken into custody by His Majesty's messengers, to his discharge at the Court of Common Pleas. : With an abstract of that precious jewel of an Englishman, the Habeas Corpus Act. : Also the North Briton no. 45. Being the paper for which Mr. Wilkes was sent to the Tower. : Addressed to all lovers of liberty," printed in London, re-printed in Philadelphia and sold by W. Dunlap in Market Street, 1763, accessed on December 27th, 2016, http://quod.lib.umich.edu/e/evans/N07474.0001.001?rgn=main;view=fulltext; This article was also re-printed in Boston and sold by Richard and Samuel Draper in Newbury-Street; Thomas and John Fleet at Heart & Crown in Cornhill; and Edes and Gill, next the prison in Queen-Street, 1763, http://link.upsem.edu/portal/An-Authentick-account-of-the-proceedings-against/qm_DVThFzxw/.

Wilkes v. Wood

The case culminating from Wilkes' civil trespass suit against the state would come to be known as *Wilkes v. Wood*. Wood, one of the agents of the government who searched Wilkes' home, claimed that he was simply acting on behalf of orders from the state. Pratt quickly dismissed this claim saying that "if [. . .] a Secretary of State [. . .] can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject."[61] Wilkes' argument was much more passionate than Wood's. His defense's claim was that the warrants used to search his private property was in violation of English common law. The jury supported Pratt's opinion and ruled in favor of Wilkes and awarded him one-thousand pounds for damages done against him.[62]

Even more significant was Wilkes' retribution across the Atlantic. The British government's response to Wilkes and his associates' passionate appeals covered British tabloids and soon enough made it to the American colonies. Colonists immersed themselves in Wilkes' trial and revered his vehement opposition to general search warrants. The Sons of Liberty were at the forefront of Wilkes' rally, maintaining a correspondence with Wilkes, claiming he was an "incorruptly honest man and a patriot." They also respected his "perseverance of the good old cause." The Sons of Liberty also held "forty-five" themed rallies in reference to the infamous paper that started the resistance to the government.[63] When Wilkes faced trial again in 1768 and was

[61] *Wilkes v. Wood*, 98 Eng. Rep. 489, 498-99 C.P. 1763, http://presspubs.uchicago.edu/founders/documents/amendIVs4.html.

[62] *Wilkes v. Wood*.

[63] Levy, "Origins of the Fourth Amendment," 86-87.

imprisoned for seditious libel, American colonists showed their support for him by sending him two turtles from Boston and forty-five hogshead of tobacco from Maryland and Virginia. South Carolina sent him £2,500 "for the support of the just and constitutional rights and liberties of the people of Great Britain and America.[64]

Entick v. Carrington

While *Wilkes* proved to be a rallying cause for Trans-Atlantic civil liberty supporters, another search and seizure case was under way in Britain. The victories of Wilkes and his associates gave others confidence to come forward with an appeal that general warrants were used to prosecute them. *Entick v. Carrington* (1765) was very similar to *Wilkes v. Wood*. Like in *Wilkes,* Lord Halifax ordered messengers to search Carrington's private possessions for a seditious libel. It was reported that the messengers caused about two thousand dollars' worth of damage when searching through John Entick's papers and did not perform their search as strictly as their warrant allowed. Thus, when Entick brought suit against Carrington, Pratt considered the action of trespass versus whether the defense had the right to search Entick's possessions. Pratt simply opinioned that "by the laws of England, every invasion of private property, be it ever so minute, is a trespass." He concluded that there is nothing in the common law or statute law that gives anyone the right to abuse the power of a warrant by unreasonably searching one's private possessions against their will.[65]

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[64] Committee of the Boston Sons of Liberty, "Papers of John Adams, Volume 1," The Adams Papers (Boston June 6th 1768), 215, accessed on January 19, 2017, https://www.masshist.org/publications/apde2/view?id=ADMS-06-01-02-0070; Peter D.G. Thomas, *John Wilkes: A Friend to Liberty* (Oxford: Oxford University Press, 1996), 161-162.

[65] *Entick v. Carrington,* 19 St. Tr. 1029, 1765; Richard A. Epstein, "Criminal Procedure in the Spotlight: *Entick v. Carrington* and *Boyd v. United States*: Keeping the Fourth and Fifth Amendments on Track", *University of Chicago Law Review* 82, no. 27 (Winter 2015), 28-29, accessed on December 27th, 2016, http://www.lexisnexis.com.navigator-esu.passhe.edu/hottopics/lnacademic/

An important differential in *Entick* would prove to make it, as the US Supreme Court called it in *Boyd v US* (1886), "one of the landmarks of English liberty." In Pratt's estimation, allowing general warrants to be used by the government upon suspicion of seditious libel risked self-incrimination. Pratt theorized that an illegal warrant drawn up by a government official could not be used without violating the right against self-incrimination. A little over one hundred years later, the *Boyd* court would heavily rely on *Entick* and by result help launch Fourth Amendment law into a new view.[66]

Colonies In Upheaval

An understanding of the effect individual rights had on search and seizure law in the 1760s can mostly be found in Britain. Men like Wilkes and Entick had little reason to risk their lives for anyone in the colonies. Nonetheless, American colonial political activists were enthralled with English politics that favored strong rights for citizens and checked Crown authority by a constitutional legislature. Although primarily led by American colonists, a link between causes for liberty on each continent was established. At the same time, as colonists read reports of the Wilkes and Entick cases, acts that threatened colonists' protection against arbitrary searches of their property were being passed by the British government. For example, the Molasses Act, originally enacted in the seventeenth-century, allowed British customs officials to search any vessel for goods to be taxed without a descriptive warrant. Custom's agent's excuse for these kinds of searches were known as "writs of assistance" which were used in the Atlantic world since the thirteenth-century.[67] Those most affected by these searches were merchants of the

[66] Levy, "Origins of the Fourth Amendment," 88-89.

[67] Thomas N. McInnis, *The Evolution of the Fourth Amendment* (Lanham, MD: Lexington Books, 2010), 18.

middle class of colonial America. In a prominent colonial American search and seizure case, James Otis Jr. stepped in to defend the merchant. His defense was famously known as the *Writs of Assistance Case.* In the Boston courthouse to hear the proceedings was a young fiery patriot, John Adams, who concluded that "then and there the child Independence was born."[68]

[68] The Adams Papers Digital Editions, "Editorial Note", *Founding Families: Digital Editions of the Papers of the Winthrops and the Adamses*, ed. C. James Taylor (2017), in the Boston: Massachusetts Historical Society, accessed January 19, 2017, https://www.masshist.org/publications/apde2/view?id=ADMS-05-02-02-0006-0002-0001#LJA02d034n48.

CHAPTER 2

1761-1768: ORIGINS OF SEARCH AND SEIZURE AND INDIVIDUAL LIBERTY IN THE AMERICAN COLONIES

The Fourth Amendment to the United States Constitution states that: "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[1]

Otis, Adams, and *Writs of Assistance* (1761)

To argue that the Fourth Amendment was written to be reinterpreted one must consider the driving force behind ratification. The first legitimate threat to Britain's authoritative search and seizure power came from James Otis' *Writs of Assistance Case* in 1761. The dispute over whether writs of assistance were legal or not came into question when the British customs officials' writs expired the previous year. Under

[1] U.S. Constitution, Amendment IV.

British statute law, if writs of assistance were not renewed within six months after the death of the monarch the writs would expire.[1] When the writs expired, Boston merchants whose commercial businesses had been threatened by general warrants, petitioned the Massachusetts Bay Superior Court to abolish writs of assistance. The question that the court considered was whether the same form of old writs would be renewed or a new type of writs preventing general searches would become the law. Otis quoted statutes passed by Charles II in the 1660s as the basis for why writs of assistance were being issued.[1] This claim, as argued by Otis, was contradictory to common law. To support this Otis argued that in "more modern books you will find only special warrants to search such and such houses, specially named, in which the complaint has before sworn that he suspects his goods concealed; and will find it adjudged that special warrants only are legal."[2] It is safe to say that Otis' mention of "modern books" refers to Coke, Hale, Hawkins, and Blackstone. This is so because he also remarked on "old books concerning the office of a justice of the peace precedents of general warrants to search suspected houses"[3] which must be alluded to Charles II's rule.

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[1] Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United StatesConstitution* (Baltimore, MD: The Johns Hopkins Press, 1933), 57.

[1] "Charles II, 1660: An Act to prevent Fraudes and Concealments of His Majestyes Customes and Subsidyes.," in *Statutes of the Realm: Volume 5, 1628-80*, ed. John Raithby (s.l: Great Britain Record Commission, 1819), 250. *British History Online*, accessed January 21, 2017, http://www.british-history.ac.uk/statutes-realm/vol5/p250; "Charles II, 1662: An Act for preventing the frequent Abuses in printing seditious treasonable and unlicensed Bookes and Pamphlets and for regulating of Printing and Printing Presses.," in *Statutes of the Realm: Volume 5, 1628-80*, ed. John Raithby (s.l: Great Britain Record Commission, 1819), 428-435. *British History Online*, accessed January 20, 2017, http://www.british-history.ac.uk/statutes-realm/vol5/pp428-435.

[2] *Against Writs of Assistance*, Superior Court of Massachusetts (1761).

[3] See footnote 8, describes laws enacted by the monarch prior to the publishing of common law treatises.

Otis was also concerned about who or what in particular could take advantage of general warrants. Technically, private citizens could call on the government to deliver writs on their behalf. However, in colonial Boston the only writs to search and seize colonists' property were carried out by British officials on behalf of their colonial government. Thus, Otis' declaration that "every one with this writ may be a tyrant" was an attack on what the colonists viewed as an oppressive use of the writ by the British government. Otis simplified his argument against writs of assistance by referencing one of the most basic English legal standards: "A man's house is his castle; and whilst he is quiet, he is well guarded as prince in his castle."[4] Otis' case text was indeed longer than the record shows, but sources show that the remainder of his speech was summarized by John Adams.

John Adams was an ambitious young lawyer in 1761 when he witnessed Otis' passionate speech. Adams' testimony of Otis' case was arguably just as passionate as Otis' speech itself. Although seen in 1761 as radical, much of the phrases Adams would use to explain Otis' case would soon be promoted in the colonies and later be debated on at conventions in Philadelphia. One of Adams' conclusions of Otis' argument was the use of writs of assistance as an "Act of Trade." He said that "as revenue laws, they destroyed all our security of property, liberty, and life."[5] Towards the end of Adams' life, in a correspondence with William Tudor, he was asked about Otis' case. Adams included testimony of the case he didn't specifically summarize in 1761. According to Adams, Otis brought up the use of the Navigation Act of 1660 in the case. Otis did not deny the

[4] *Against Writs*.

[5] *Against Writs.*

general purposes of the act, nor the effect it had on creating revenue for the Britain. His problem with the act was that it was being used to create writs of assistance for non-tax purposes. Otis claimed, according to Adams, that "Houses were to be broken open, and if a piece of Dutch linen could be found, from cellar to the cock-loft, it was to be seized and become the prey of governors, informers, and majesty."[6]

Possibly the most accurate and informative source about the amplifications of the *Writs of Assistance* case comes from one of Adams' decedents. His grandson, Charles, wrote and edited the works of his grandfather in a multi-volume text. Additionally, a more distant relative to Adams, Josiah Quincy Jr., composed a detailed text of the *Writs* proceedings in a volume of Massachusetts Supreme Court cases from 1761-1772. Both of these publications support the nuts and bolts facts of Otis's case. However, they also include discussions, policies, and arrangements that point to a rigged conclusion of the case before it started.

Josiah Quincy Jr. was the mayor of Boston from 1845-1849 and grandson of Josiah Quincy II, a spokesman for the Sons of Liberty and a close confidant to John Adams. In Quincy's account of the *Writs of Assistance* case he explains that a letter from William Pitt ordered colonial customs officials to strictly suppress trade with the French. In Pitt's instructions, he says to "take every step, authorized by Law, to bring all such heinous Offenders to the most exemplary, and condign Punishment."[7] Although Pitt's orders specifically said to act within the law, it seems as though his passionate directive

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[6] Charles Francis Adams, *The Works of John Adams, Second President of the United States Vol X* (Boston, MA: Little, Brown and Company, 1856), 319.

[7] Gertrude Selwyn Kimball, *Correspondence of William Pitt when Secretary of State with Colonial Governors and Military and Naval Commissioners in America* (London: The Macmillan Company, 1906), 320-321.

was used by British colonial authority to condemn American colonists as well. Quincy concluded that this correspondence must have been an order for British Colonial Administrator Francis Bernard. Bernard was to request new writs from the colonial government. Further, in his autobiography, John Adams said that "the king sent instructions to his custom house officers to carry the acts of trade and navigation into strict execution." Adams must have been referring to the orders sent by Pitt because no other record shows those type of instructions sent to the colonial government that year. In the edited section of his autobiography, Charles Adams said that this deduction "is the only allusion, in the Diary, to this incident, which, according to the writer's own account had so great an influence over his subsequent career."[8] In other words, Otis's hard-fought arguments never had a chance to deny writs of assistance because the colonial government had already decided any resistance against them would be blocked.

The outcome of the case ruled in favor of the customs officials. They were granted new writs by newly appointed Chief Justice Hutchinson. Even though Pitt specifically instructed to abide by the law and Bernard ensured Pitt no stricter measures on trade and customs were necessary, the writs were enforced. The new writs of assistance became an easily streamlined way to enforce customs searches via the

[8] Charles Francis Adams, *The Works of John Adams, Second president of the United States Vol II* (Boston, MA: Charles C. Little and James Brown, 1850), 124, accessed on February 3rd, 2017, http://lf-oll.s3.amazonaws.com/titles/2100/Adams1431-02_Bk.pdf.

Navigation Act of 1660.[9] Further, a controversial battle for the new Chief Justice position put a British loyalist in charge. In 1760, Chief Justice Sewall died leaving the most powerful judicial seat in the Massachusetts colony court open. Former governor of Massachusetts, William Shirley had promised the seat to James Otis Sr. when Sewall died. However, with Bernard in charge, he gave the job to his lieutenant governor William Hutchinson. In 1760, the assumption for this move was probably just political motive. Otis was radical and Hutchinson was loyal. However, the evidence from the Bernard papers show that he had contact with over 350 different politicians in the colonies and England. Letters sent by Bernard to Hutchinson and other English loyalists prove that Hutchinson was appointed to alleviate illegal actions taken by customs officials. The *Writs of Assistance* case never had a chance.[10]

The writs of assistance Otis and other Bostonians protested sparked a series of events in which Great Britain sought to undermine the liberty of the American colonists. Because writs of assistance were renewed by the new sovereign George III, colonial customs officials could use them to enforce the Navigation Act. In turn, customs officials

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[9] The Navigation Act of 1660 is "For the increase of shipping and encouragement of the navigation of this nation, wherein, under the good providence and protection of God, the wealth, safety, and strength of this kingdom is so much concerned; be it enacted by the King's most excellent majesty, and by the lords and commons in this present parliament assembled, and by the authority thereof, That from and after the first day of *December* 1660, and from thenceforward, no goods or commodities whatsoever shall be imported into or exported out of any lands, islands, plantations or territories to his Majesty belonging or in his possession [. . .] in Asia, Africa, or America, in any other ship or ships, vessel or vessels whatsoever, but in such ships or vessels as do truly and without fraud belong only to the people of England or Ireland [. . .] and whereof the master and three fourths of the mariners at least are *English;* under the penalty of the forfeiture and loss of all the goods and commodities which shall be imported into or exported out of any of the aforesaid places in any other ship or vessel [. . .]" Danby Pickering, ed., *The Statutes at Large From the Thirty-ninth Year of Q. Elizabeth to the Twelfth Year of K. Charles II. Inclusive. Vol VII* (Cambridge: Joseph Bentham, 1763), 452.

[10] Josiah Quincy Jr, *Reports of Cases argued and adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay, between 1761 and 1772* (Boston, MA: Little, Brown, and Company, 1865), 410-412.

continued to search and seize ships that they thought contained taxable goods. However, more had to be done to raise revenue for the British empire after a large debt was created from the outcome of the Seven Year's War. The Sugar Act of 1764 was the first new colonial tax to cut into that debt. The Sugar Act basically reinforced the Molasses Act of 1733. The Molasses Act was put in place to tax non-imperial sugar imports, which were cheaper than British sugar. However, the British wholly ignored the Molasses Act so that they could compete with non-imperial sugar prices; specifically, those of the Spanish and French West Indies.[11]

Until 1763 this plan, called "salutary neglect," worked for the British who were willing to look the other way to regulate trade in their favor. But once substantial revenue was needed, the British enforced the tax by passing the Sugar Act. American colonists were outraged. To make things worse, two weeks after the Sugar Act was passed the Currency Act was enacted. The Currency Act disallowed colonists from printing their own money. Thus, American colonists had to now pay an outrageous tax that financially threatened their livelihood and they could not use their own money to pay such tax. Most of all though, in order for the Sugar Act to effectively police smuggling, every suspected ship containing sugar had to be searched. Because writs of assistance were renewed in 1761, this made opposing searches to levy the enforced tax impossible to stop.[12]

James Otis's reaction to these acts resonated as a threat to personal property. He questioned, "for what one civil right is worth a rush, after a man's property is subject to be taken from him at pleasure, without his consent? If man is not his own assessor in

[11] Cuddihy and Hardy, "A Man's House Was Not His Castle," 384.

[12] Taslitz, 23.

person, or by deputy, his liberty is gone, or lays entirely at the mercy of others."[13] A year later, in 1765, the British Parliament passed the Stamp Act effectively taxing colonists on documents and other pieces of paper. Although the Stamp Act would be repealed in 1766, the insinuation that the British government represented the "very zenith of arbitrary power" would lead American colonists, particularly Bostonians, on a crusade for the rights they deserved.[14]

Daniel Malcolm

On September 24th, 1766 colonial customs officials arrived at the home of Daniel Malcolm in Boston. Malcolm, who just so happened to be one of the merchants that Otis represented in 1761, was shown an order for writs of assistance by customs officials to search his wine cellar. Backed by an anonymous tip, the customs officials seemingly had the ability by law to search and seize Malcolm's goods. Malcolm refused entrance. Malcolm, a close friend of Otis and other well-known colonial activists observed a loophole. By 1766, Parliament was generally uninterested in colonial writs of assistance cases. They allowed it in the American colonies to raise revenue, but did not want to support it from overseas after the public negativity from the *Writs of Assistance Case*. Thus, local officials in Boston technically had the power to use writs of assistance, but Governor Bernard would not seek aid from England to support it. Further, part of the

[13] James Otis Jr., *Rights of the British Colonies Asserted and Proved* (Boston, MA: J. Almon, 1764), 58.

[14] *Against Writs.*

colonial writs of assistance argument was that since it was Parliamentary led law, it should not apply to the colonies.[15]

So, when Malcolm was faced with customs officials entering his wine cellar he knew that any backup officials called for would be ignored. The Attorney General of England, William de Grey, realized how the American colonists could legally avoid writs of assistance. In a letter written to the Commissioners of the Customs in London, de Grey pointed out that the phrase "and also to enter" should be directly before the phrase "the same Powers and Authorities" in the customs law books. Thus, saying, "the Officers of the revenue shall have the same Powers and Authorities as they have in England for visiting Shops etc. and also to enter Houses etc."[16] This was essentially an admission that the writs law was faulty. One scholar compares de Grey's legal responsibility for civic justice to John Adams' legal defense of British soldiers in the Boston Massacre case.[17]

History does not give much attention to Daniel Malcolm. However, he was deeply revered by colonial patriots, such as the Sons of Liberty, as one of the most ardent resisters of British customs laws.[18] His name shows up in smuggling and customs issues more than any other colonist in the second half of the 1760s. Just over a year after

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[15] Waldo Lincoln, "October Meeting, 1924. Dr. James Denormandie; Malcolm and Writs of Assistance; Henry and Elizabeth Poole; William Whately to Andrew Oliver; Lincoln Newton Kinnicutt," *Proceedings of the Massachusetts Historical Society* 58, no. 3 (Oct., 1924-Jun., 1925): 5, 11, accessed on March 28, 2017, https://www.jstor.org/stable/25080166?seq=21#page_scan_tab_contents.

[16] Lincoln, "Malcolm," 13, 21.

[17] Lincoln, "Malcolm," 22. The author questions: "Is it too much to say that in his ruling on the Writs of Assistance de Grey showed the same sense of public duty that led John Adams and Josiah Quincy to undertake the defense of Captain Preston?" Lincoln ponders the claim that de Grey felt a sense of duty to admit his country was illegally handling writs cases, however until this point de Grey was a staunch loyalist.

[18] Lincoln, "Malcolm," 14-15. Malcolm helped fund Samuel Adams' debt to the town of Boston. He also was present at dinner with the Sons of Liberty under the "Liberty Tree."

Malcolm avoided the search of his wine cellar, he maneuvered around the law once again. Governor Bernard wrote to Pownall that there was "a strong-handed landing a cargo of a Ship in defiance of law which still remains unpunished for want of Power rather than Discovery."[19] The "strong-handed landing" was by Malcolm. This record occurred in the Spring of 1768 which would be the last time the British allowed smuggling to go unattested. However, this was hardly the end of customs issues in 1768. The major customs issue of 1768 involved John Hancock and his ship, the *Liberty*, which would cause the British to send regular troops to Boston by the fall of 1768. They would not leave the North American continent until 1790.

Hancock and *Liberty*

Most American historical narratives credit the Boston Tea Party and Boston Massacre as major ignitions to the Revolutionary War. British troops were only at those confrontations because of the resistance customs officials received from angered colonist over search and seizures into their private quarters. Some historians argue that the creation of the American Board of Customs Commissioners by the British was one of their greatest mistakes in antagonizing even more colonial resentment. Reaction from common citizens to the wealthier merchants in Boston, centered around the resentment of this new political organization.[20] While Bostonians were in the midst of battling customs

[19] Massachusetts Historical Society, "March Meeting. Papers of William Livingston; Letters of Mary Storer; Stamp act Riot in Newport; Children's Story Books; Hancock's Sloop 'Liberty'," *Proceedings of the Massachusetts Historical Society*, no. 3, 55(Oct., 1921-Jun., 1922), 245, accessed on May 30, 2017, http://www.jstor.org/stable/pdf/25080130.pdf?refreqid=excelsior%3Ac2a108550228400a733a5c7e13005852.

[20] O.M. Dickerson, "England's Most Fateful Decision," *The New England Quarterly* 22, no. 3 (1949): 388-391, accessed on January 28, 2020, https://www.jstor.org/stable/361315.

officials, John Adams took note of what was happening in his city. Adams was stern and stubborn but certainly fair in his jurisprudence. He did not know it then, but his jurisprudence of search and seizure principles in 1768 and 1771 would represent both the British and the colonist's sides. It was Adams' defense of liberty for all men, regardless of nation, that helped lay the groundwork for the most steadfast political writing of the Revolutionary Era.

John Hancock is famously known for his large signature on the Declaration of Independence and serving as the first Governor of Massachusetts after American Independence. Before then, Hancock was one of the leading patriots in the resistance against British authority in Boston. Even more so, by 1768, Hancock was one of, if not the most, wealthy men in Boston. His fortune has controversially been discussed as a smuggling commerce operation that shipped and sold transatlantic products, mostly wine, while avoiding taxes. Historians have disagreed over Hancock's motives for the *Liberty* case based off his smuggling tactics saying he was trying to "score a victory" for personal gain. However, his trust from other notable Boston patriots, from Daniel Malcolm to John Adams, shows that Hancock's motives were for liberty.[21]

[21] Donald J. Proctor, "John Hancock: New Soundings on an Old Barrel," *The Journal of American History* 64, no. 3 (December 1977), 652-659, accessed on April 29, 2020, https://www.jstor.org/stable/1887235. Proctor's article discusses James Truslow Adam's biography of Hancock which completely derails the former as a businessman, politician, and academic. Truslow contends, based on an illegitimate quote, that John Adams stated that there will never be a biography written on Hancock because he was not worthy. Truslow uses that notion to disparage Hancock's public and private career. However, Adams actually said in 1817 of Hancock that "I profoundly admired him, and more profoundly loved him." Truslow tries to disparage Hancock by saying that Hancock used the *Liberty* for personal political gain. However, another historian William T. Baxter wrote a business history of the Hancock family based on the family's papers and concluded that as of 1768 Hancock was striving to greatly develop his business and that it was not until 1774 that he had assumed enough wealth to transition full time into politics.

What is normally called the *Liberty* affair began from instigation by customs officers to have John Hancock tried for forcibly removing a customs officer from his ship the *Lydia* on April 9th. Solicitor General Jonathan Sewell did not press charges. Next, on May 9th, Hancock's ship *Liberty* arrived in the Boston harbor from Madeira. It was recorded by two customs officials that twenty-five pipes of wine were the cargo of the ship and were properly taxed. However, it was suspected that more wine than reported would be smuggled in the near future. It was reported by Attorney General William de Grey later that year, that Hancock boasted before the *Liberty's* arrival that he would smuggle the rest of wine on shore.[22]

The following month, one of the customs officers, Thomas Kirk changed his story of what happened on May 9th. His new testimony involved the crew of the *Liberty* forcibly holding him under the deck while they removed the smuggled wine off the boat. Kirk was threatened by the ship captain, known as Marshall, to keep quiet. But, since May 9th, Marshall had died, relieving Kirk of his secret.[23] Thus, on June 10th, the day after Kirk's new testimony was reported to the Commissioners of the Customs, representatives Thomas Hallowell and Joseph Harrison went to inspect the *Liberty* again. They found two hundred barrels of oil and a couple barrels of tar. They deemed this was landed cargo that was not properly taxed, when in fact Hancock was just storing the oil and tar there. Watching this take place dockside was Daniel Malcolm and other Hancock

[22] D. H. Watson, "Joseph Harrison and the Liberty Incident," *The William and Mary Quarterly* 20, no. 4 (Oct., 1963): 586, accessed on May 31, 2017, http://www.jstor.org/stable/1923533?seq=2#page_scan_tab_contents; "Hancock's Sloop 'Liberty'", 273, accessed on May 31, 2017.

[23] L. Kinvin Wroth and Hiller B. Zobel, *The Adams Papers*, Legal Papers of John Adams, vol. 2, *Cases 31-62* (Cambridge, MA: Harvard University Press, 1965), 173-193, accessed on June 2, 2017, https://founders.archives.gov/documents/Adams/05-02-02-0006-0004-0001.

allies, who promised not to interfere. They also exclaimed to the officials that the mooring of the *Liberty* was not necessary because Hancock would not try to stop the seizure of her. Despite this, officials seized the *Liberty* and had it towed under the heavily armed gun ship, the *Romney*, to conduct their business. According to Harrison's personal account of the events, he and Hallowell walked off the boat, without being accosted. However, once in the streets, Harrison and his son received "volleys of stones, brickbats, sticks or anything that came to hand," from a mob. At one point the son "was knocked down and then laid hold of by the Legs, Arms and hair of his Head, and in the manner dragged along the Kennel in a most barbarous and cruel manner." Harrison and his son were eventually rescued by compassionate passer byers and slipped into safe homes. Hallowell received similar treatment and by seven o'clock that evening they had their families evacuate their homes fearing for their safety. The violent mob broke the windows of both homes and then turned back towards the wharfs. There they found Harrison's pleasure boat, "and from thence dragged up into the Common and there burned to Ashes."[24]

Harrison, like much of the British loyalists in Boston, did not associate the violent mob activities with Hancock's personality. Hancock was known as a giver to the poor and a respectable figure to the British. However, he was a leading figure of those who disobeyed authority. Harrison exclaimed that Hancock was, "the Idol of the Mob, just as Mr. Wilkes is in England. Hancock and Liberty being the Cry here, as Wilkes and Liberty is in London!" Like Wilkes, it is unlikely that Hancock supported violent mob activities.

[24] *The Boston Evening-Post,* June 20, 1768, page 2, column 1, accessed on June 13, 2017, http://www.masshist.org/dorr/volume/2/sequence/168.

Rather, leaders like Hancock and Wilkes were powerful proponents of liberty, especially in regards to the unlawful seizures of personal property, without involving violent tactics. In fact, 1768 is the year Wilkes was most liberally tied with American patriots, the Sons of Liberty to be precise. On June 6th, the Sons of Liberty wrote Wilkes congratulating him of his return to England after his seat in Parliament was taken and he was forced out of the country.[25]

Amidst the mob activities affecting public opinion in Boston, John Hancock was brought to trial by Jonathan Sewall, the British attorney general in Massachusetts, for libel. Represented by John Adams, Hancock was charged with lying to Kirk about the amount of wine brought off the *Liberty* and the storage of oil and tar on the same ship without paying duties. The charges of the storage of oil and tar were settled without too much action. However, the part of the trial about the smuggling of the wine, capture of Kirk, and the ensuing riot played a pivotal role in the future of colonial and British relations. Witnesses were required for trial. To Adams' advantage, most of the witnesses of the seizing of the ship and mob activities were patriots. When Bernard learned of the majority of witnesses he cursed the council responsible for gathering the witnesses saying, "This is a Devil Constitution!" Principal of all the witnesses was none other than Daniel Malcolm. The authenticity of the effect the Sons of Liberty, whom Malcom was a member of, had on trans-Atlantic opinions for liberty came in full effect. Hutchinson claimed "a few days earlier" that Malcolm was "a principal underwriter have resolved to address Mr. John Wilkes thanking him for the glorious confusion he is putting the

[25] Watson, 589; Committee of the Boston Sons of Liberty to John Wilkes, June 6th, 1768, in *Founding Families: Digital Editions of the papers of the Winthrops and the Adamses*, ed. C. James Taylor, vol. 1 (Boston: Massachusetts Historical Society), accessed on June 14, 2017, http://www.masshist.org/publications/apde2/view?id=ADMS-06-01-02-0070.

Government into at home and praying he would afford them his continence and encouragement in the like measures here."[26] The letter Hutchinson was referring to was probably the June 6th letter sent to Wilkes signed by well-known patriots including John Adams himself.[27] New developments of the *Liberty* case led to the discretization of the most important of the prosecution's witnesses and eventually charges were dropped.

Colonial organizing and British response: June-October 1768

While John Hancock stood trial, more concerning changes were happening in Boston. Since the riot resulting from the *Liberty* affair, reports from British customs officials described the present violent state of the colonists. Reports included rumors that another riot was going to ensue on June 11th. To resolve these issues, Hancock and Otis met with Bernard in good faith to resolve peace between the British and colonists. However, the British would only accept a written truce submission. No official resolve was reached. It seems that the riot on June 11th, and the Governor's refusal to declare any further protection caused British colonial officials to legitimately fear for their safety. This was enough to instigate the Board of Commissioners to seek refuge. By Monday

[26] *Liberty* Sloop, 256; Jonathan L. Fairbanks, "Paul Revere and 1768: His Portrait and the Liberty Bowl", in "New England Silver & Silversmithing", *The Colonial Society of Massachusetts* 70 (2001), 144, accessed on June 13, 2017, https://www.colonialsociety.org/node/1364#ren253.

[27] Committee of the Boston Sons of Liberty to John Wilkes, June 6th, 1768, in *Founding Families: Digital Editions of the papers of the Winthrops and the Adamses*, ed. C. James Taylor, vol. 1 (Boston: Massachusetts Historical Society), accessed on June 14, 2017, http://www.masshist.org/publications/apde2/view?id=ADMS-06-01-02-0070.

June 13th, Bernard agreed to allow the commissioners and their families to seek refuge at Castle William in the Boston Harbor.[28]

For the remaining summer of 1768 violent mob demonstrations stopped. Colonial attention turned to formal political organization. Town meetings, committee organizing, and petition writing kept the momentum of the tensions churning. The colonists' three major concerns were to permanently relinquish the Board of Commissioners, remove the *Romney* war ship from Boston Harbor, and make it so that "no man shall be govern'd [sic] nor taxed but by himself or Representative legally and fairly chosen; and in which he does not give his own consent."[29] This latter clause is the famous rally cry of the American Revolution era. However, the other two claims are results from violating future Fourth Amendment principles. The *Romney* was sent to Boston to enforce the Townshend Acts and was then used as "an armed force in hostile manner.. without any probable cause of seizure" to illegally seize the *Liberty* by "the Board of Commissioners with design to over awe and terrify the Inhabitants of this Town into base compliances." A committee that formed to officially launch these complaints concluded that they have

[28] *Letters to the Ministry from Governor Bernard, General Gage, and Commodore Hood. And also memorials to the Lords of the Treasury, from the Commissioners of the Customs. : With sundry letters and papers annexed to the said memorials* (Boston: Edes & Gill, in Queen-Street, 1769), in Evans Early American Imprint Collection, accessed on June 20, 2017, http://quod.lib.umich.edu/e/evans?type=bib&q1=Letters+to+the+Ministry+from+Governor+Bernard%2C+General+Gage%2C+and+Commodore+Hood.+And+also+memorials+to+the+Lords+of+the+Treasury%2C+from+the+Commissioners+of+the+Customs.+%3A+With+sundry+letters+and+papers+annexed+to+the+said+memorials.&rgn1=title&op2=and&q2=&rgn2=title&op3=and&q3=&rgn3=title&Submit=Search.

[29] *A Report of the Record Commissioners of the City of Boston, containing the Boston Town Records, 1758 to 1769* (Boston: Rockwell and Churchill City Printers No. 39 arch street, 1886), 254-258, accessed on June 21, 2017, https://ia802703.us.archive.org/14/items/recordsrelatingt16bost/recordsrelatingt16bost.pdf.

been "invaded with an armed force, Seizing, impressing the persons of our fellow Subjects contrary to express Acts of Parliament."[30]

As of July, Bernard did not see the need to ask for troops to be sent from England to restore order in Boston. However, the commissioners thought otherwise and considered all types of colonial political organization in Boston a threat. The first rumor of British troops in Boston in the capacity to quell colonists' aggression, was dispelled by Bernard who said, "I have kept quite clear of the applying or sending for troops… and I will not make any such Application unless they advise it." Bernard was referring to the council led by the Earl of Hillsborough. That council was to decide if the customs issues were serious enough to send troops to America. They made their decision and by at least September 12th Bernard sent a letter to a "Committee of the Boston Town Meeting" that "his Majestys troops are to be expected in Boston." By at least the end of September, 900 troops arrived in the Nantucket Harbor.[31]

The role search and seizure and customs issues had in Boston from 1761-1768 is crucial to understanding how a new nation would devise laws to protect their citizens against the threat of a powerful government. Otis certainly deserves credit for sparking the discussion about abusive governmental power of writs of assistance. The way individual liberty was treated in common colonial business practices must be given credit as well. Overall, the most consequential act of abuse by British colonial officers was

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[30] John K. Alexander, *Samuel Adams: America's Revolutionary Politician* (Lanham, MD: Rowman and Litefield, 2002), 58.

[31] Hancock's Sloop "Liberty", 258; Francis Bernard to a Committee of the Boston Town Meeting, September 12 or 13, 1768, in *The Papers of Francis Bernard*, ed. Colin Nicolson, vol. 4 (Boston, MA: Colonial Society of Massachusetts, 2015), 677; Oliver Morton Dickerson, *Boston Under Military Rule [1768-1769] as revealed in A Journal of the Times* (Boston: Chapman & Grimes, 1936), 1, accessed on June 28, 2017, https://babel.hathitrust.org/cgi/pt?id=mdp.39015008570163;view=1up;seq=21.

against Boston citizens' shipping businesses. Without the abusive Townshend Acts, Daniel Malcolm would not have become one of the most infamous smugglers in American colonial history and sparked popular resistance. John Hancock's *Liberty* also would not have ignited a legal battle, argued by John Adams, that nearly killed two British custom's officers. Without the implementation of "taxation without representation" rallying in the streets, British troops would not have been sent to the colonies either. But most of all, common citizens like Malcolm and leaders of the Sons of Liberty took this situation so seriously because they knew the fight for liberty was bigger than the 1760s and their private property. The only way American colonists could own their individual liberty, guaranteed to them by the prestigious English lawyers of the eighteenth-century, was to set the bar higher than immediate success. The only option colonists had was to rally around the common law right to individual liberty as a universal protection from unreasonable searches and seizures without probable cause.

CHAPTER 3

1770-1791: HOW THE FOURTH AMENDMENT WAS ADOPTED

Richardson v Rex (1770)

History usually gives credit to the Boston Massacre as the first patriot deaths from British hands. However, less than two weeks before the Boston Massacre, on February 22nd 1770, a young boy was shot and killed by Ebenezer Richardson. Richardson was a known loyalist merchant who was commonly harassed by Boston patriots. When Richardson refused to participate in a demonstration that was boycotting the consumption of British goods, he was chased by a crowd of boys back to his home where they threw stones and other debris at his house. According to witnesses, the group of boys broke windows and pushed at Richardson's door. In response, Richardson thrusted a shotgun through a window at the crowd and fired a shot resulting in the death of an eleven-year-old boy. Boston patriots were outraged, calling for Richardson's head. Two weeks later the Boston Massacre shook the town even harder and Richardson's chance for a fair trial was minimal. Like Captain Preston in the Massacre case, no one was interested in

representing Richardson. Eventually, Josiah Quincy agreed to act as Richardson's counsel.[1]

While John Adams was a bystander in the case, he did takes notes. Adams was intrigued enough by the case to include it in his personal papers. In his defense of Richardson, Quincy cited seventeenth and eighteenth-century common law to argue that Richardson's offence should not result in more than manslaughter. Quincy's first common law reference was to Hale's *Pleas of the Crown*. Hale's treatise served as a precedent to support the defense's claim saying, "if *A.* comes to enter with force, and in order thereunto shoots at his house, and *B.* the possessor, having other company in his house, shoots and kills *A.* this is manslaughter in *B.*"[2] Although the eleven-year-old victim did not shoot a gun at Richardson's home, the evidence that Richardson and his family's lives felt threatened supported the defenses' claim enough to make the jury consider a manslaughter charge. The second reference was to Sir Edward Coke's *Semayne's Case* which famously grants

> the house of every one to him as his castle and fortress, as well for his defence [sic] against injury and violence as for his repose… if thieves come to a man's house to rob him, or murder, and the owner or his servants kill any of the thieves in defence [sic] of himself and his house, it is not felony, and he shall lose nothing.[3]

The third reference Quincy used was from Volume 11 of the *Coke's Reports* stating that "if a Man is in his House, and he hears that others will come to his House to beat him, he may call together his Friends & into his House to aid him in Safety of his

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[1] "Editorial Note", *Founding Families: Digital Editions of the Papers of the Winthrops and the Adamses,* ed. C. James Taylor (2017) Massachusetts Historical Society, accessed on July 11, 2017, https://www.masshist.org/publications/apde2/view?id=ADMS-05-02-02-0010-0001-0001.

[2] Hale, *Pleas of the Crown*, 445.

[3] *Semayne's Case,* (1604) 5 Co Rep 91.

Person."[4] Thus, *Richardson v Rex* was an example of a pre-revolutionary case in which a patriot willingly defended a loyalist based on the common law and individual rights.

No one could have predicted the Boston Massacre. But, John Adams was pretty close. Around February 26, Adams recorded the details of Christopher Seider's funeral, the boy whom Richardson killed. In Adams's diary he noted the large crowd saying, "the procession extended farther than can well be imagined." Then he remarked, "This shewes [sic] There are many more Lives to spend if wanted in the Service of their Country. It Shewes [sic], too that the Faction is not yet expiring- that the Ardor of the People is not to be quelled by the Slaughter of one Child and the Wounding of another."[5] A week later the Boston Massacre claimed the lives of five Boston citizens and the unofficial beginning of the rebellion which culminated into the Revolutionary War. In response, the colonists began developing committees to organize serious political opposition against the British.

Committees of Correspondence (1772-73)

Before the Continental Congress gathered in 1774, a group of representatives formed the Committees of Correspondence in each of the thirteen colonies. The Massachusetts committee, formed in November 1772 in Boston, was the first and most effective. Their effectiveness did not come from secrecy or use of force like the Sons of

[4] Coke, *The Reports vol. III*, 186; Sir Edward Coke, *The Reports of Sir Edward Coke, Knt. In Thirteen Parts*, vol. 6, ed. John Henry Thomas and John Farquhar Fraser (London: Joseph Butterworth and Son, 43, Fleet Street; and J. Cooke, Ormond Quay, Dublin, 1826), 155, accessed on July 19, 2017, https://books.google.com/books?id=lVYDAAAAQAAJ&printsec=frontcover&dq=Edward+coke+volume+6&hl=en&sa=X&ved=0ahUKEwjMqNuc75XVAhWFGT4KHTy8BIYQ6AEIJDAA#v=onepage&q&f=false.

[5] "1770. Monday Feby. 26. Or Thereabouts.", *Founding Families,* ed. Taylor, accessed on July 25, 2017, https://www.masshist.org/publications/apde2/view?&id=DJA01d471.

Liberty. Rather, the two groups worked like a well-oiled machine. The Sons used underground brute tactics to undermine British control and the Committee organized for unity amongst the colonies to demonstrate political opposition to the British. The Boston Committees of Correspondence recorded a list of grievances and distributed them to Massachusetts colonists. The third grievance read that "tax collectors are entrusted with power too absolute and arbitrary", and that "private premises are exposed to search."[6] Other committees soon formed around Massachusetts and throughout the next two years each of the thirteen colonies formed committees, essentially aiming to replace their provincial governments. Local organizing, such as town hall meetings and published periodicals, were established ways of organizing. But, now the establishment of committees in all colonies could share political issues across towns and state borders. In turn, committees formed strong unity amongst colonial disproval of British activity. Concerns of illegal search and seizure practices were part of these disapprovals, and listed as grievances in towns all along the eastern seaboard.[7]

First Continental Congress Grievances (Fourth and Fourteenth Amendment)

In the summer of 1774 the First Continental Congress picked up the Committees of Correspondence template and gathered in Philadelphia. Elected by the people of the colonies and the Committees of Correspondence, the immediate cause for their meeting was to oppose the Intolerable Acts. Supported by the popular Sons of Liberty, the overall

[6] "The Committees of Correspondence: The Voice of Patriots," Boston Tea Party Ships & Museum, accessed on July 26, 2017, https://www.bostonteapartyship.com/committees-of-correspondence.

[7] Laura K. Donohue, "The Original Fourth Amendment," *The University of Chicago Law Review* 83, no. 3 (Summer 2016): 1263, accessed on July 26, 2017, https://www.jstor.org/stable/pdf/43913852.pdf?refreqid=excelsior%3Aca9cdfcc3dc3efda4ccfdd1ae74c0213.

common signifying goal of the congress was to show colonial authority to Britain. In late October of that year the congress made two declarations regarding unreasonable searches and general warrants which were read to the American people and sent to King George. On October 21, the Congress "denounced the power of the Commissioners of Customs 'to break open and enter houses without the authority of any civil magistrate founded on legal information.'" Four days later the Congress expressed concern of excise practices in Quebec as "'the horror of all free states [. . .] the most odious of taxes' whereby 'insolent' excise-men would enter 'houses the scenes of domestic peace and comfort and called the castles of English subjects in the books of their law."[8]

In another declaration, the representatives of Congress used their knowledge of common law and English constitutional cases to support their grievances. On October 14th, the Congress declared that they were, "entitled to all their rights, liberties, and immunities of free and natural-born subjects, within the realm of England", and "that their respective colonies are entitled to the common law of England… that these, his Majesty's colonies, are likewise entitled to all the immunities and privileges granted and conformed to them by royal charters, or secured by their several codes of provincial laws." After proclaiming their natural liberties based upon English common law and constitutional practices, the congress concluded their declaration by stating a series of acts of passed under the current king, George III, which infringed upon those individual rights. The first listed and most specific was:

[8] Tracy Maclin and Julia Mirabella, review of *The Fourth Amendment: Origins and Original Meanings, 602-1791*, *Michigan Law Review* 109, no. 6 (2011): 1067, accessed on July 25, 2017, http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1152&context=mlr.

> The several acts of Geo. III. ch. 15, and ch. 34.-5 Geo. III. ch.25.-6 Geo. ch. 52.-7 Geo.III. ch. 41 and ch. 46.-8 Geo. III. ch. 22. which impose duties for the purpose of raising a revenue in America, extend the power of the admiralty courts beyond their ancient limits, deprive the American subject of trial by jury, authorize the judges certificate to indemnify the prosecutor from damages, that he might otherwise be liable to, requiring oppressive security from a claimant of ships and goods seized, before he shall be allowed to defend his property, and are subversive of American rights.[9]

Since the delegates from each of the thirteen colonies could agree on this proclamation, support for some form of national regulation of search and seizure protection seemed inevitable. The First Continental Congress based their specific grievances on what their government was constitutionally supposed to provide them; rights enumerated as English subjects. Thus, the delegate's specific complaint about unfair taxation resulting in violations of searching personal property became a critical cause to revolt against the crown for American revolutionaries.

Before the Federal Constitution was ratified, each of the newly formed American states ratified their own state constitutions. Seven of the thirteen new state constitutions included an article that prohibited the use of general warrants, unreasonable searches and seizures, a requirement of probable cause for a search or seizure, or the combination of all three clauses. The Pennsylvania and Virginia Constitutions interpreted search and seizure most accurately with regards to individual liberty.[10] Another comprehensive article that would relate to the future federal Fourth Amendment was written in 1779 by

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[9] "Declaration and Resolves of the First Continental Congress," *The Avalon Project,* ed. Charles C. Tansill (1927), in the Documents Illustrative of the Formation of the Union of the American States, accessed on August 1, 2017, http://avalon.law.yale.edu/18th_century/resolves.asp.

[10] Francis Newton Thorpe, *The Federal and State Constitutions, Colonial Charters, and other Organic Laws of the States and Territories now or heretofore forming the United States of America, compiled and edited by Francis Newton Thorpe* (Washington: Government Printing Office, 1909) Vol. V New Jersey-Philippine Islands, p 3081, accessed on June 14th, 2019, https://oll.libertyfund.org/titles/2678; For Virginia see Volume VII, p 3812 "Declaration of Rights."

John Adams and drafted by the Massachusetts legislature the following year. Article 14 of the Massachusetts Constitution stated that:

> Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.[11]

Assuming that Adams intended for the articles of the Massachusetts Declaration of Rights to be as strong as possible, he would have envisioned them to work together. If that was the case then Article Ten of the Massachusetts Declaration of Rights would have given Article Fourteen stronger protection. Article Ten states, amongst other things, that, "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws." [12] The part of this Article giving individuals the right to be protected of his property, "according to law" must be assumed as: any law protecting one's individual rights protects their private property. Adams is not to fault for not writing it this way. Keeping natural rights and private protections separate makes for an ideal new set of government standards. But, interpreting the text as a creation to serve each other is also probable. Considering the value of each article's worth to the revolutionary society they were written in; newly formed constitutions would not have shied away from adapting principles to preserve liberty.

[11] Massachusetts Constitution of 1780, article XVI, article X, accessed on August 15, 2017, https://malegislature.gov/Laws/Constitution.

[12] Mass. Const. of 1780, art. XVI, art. X, accessed on August 15, 2017, https://malegislature.gov/Laws/Constitution.

The Virginia Constitution also displayed similar articles, although not as specific as the Pennsylvania ones.[13] James Madison, a writer of the Virginia Constitution and the future writer of the Federal Constitution, adopted articles describing citizens' rights to individual liberty. The first said, "all men are by nature equally free and independent and have certain inherent rights." Another article spoke of due process stating, "no person shall be deprived of his life, liberty, or property without due process of law," and, "to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex or national religion…" Additionally, Madison penned a detailed search and seizure right. Section Ten of the Virginia Bill of Rights outlawed general warrants,

> whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not be granted.

Once again, for constitutional interpretation's sake, this clause would have needed help determining what one thought was a "suspected place" and how an offense was exactly "particularly described."[14]

Adoption of the Fourth Amendment

By the late 1780s every state agreed about a federal provision banning general warrants. Each state had their own separate constitutions prohibiting general warrants, unreasonable searches and seizures, or the need for probable cause during a search or seizure. However, when discussing rights for the federal Constitution there was no

[13] Virginia Constitution of 1776, article I, https://avalon.law.yale.edu/18th_century/jeffcons.asp.

[14] Francis Newton Thorpe, *The Federal and State Constitutions, Colonial Charters, and other Organic Laws of the States and Territories now or heretofore forming the United States of America, compiled and edited by Francis Newton Thorpe* (Washington: Government Printing Office, 1909). Vol. VII Virginia-Wyoming-Index, p 3813-3814, accessed on June 14th, 2019, https://oll.libertyfund.org/titles/2680.

discussion about a federal provision for such purposes. In fact, there was little discussion for a federal bill of rights at all. When the initial terms of the Constitution were circulated to the states in 1787 no explicit mention of general warrants, unreasonable search and seizure, or Bill of Rights was included.[15]

The future writer of the bill of Rights, James Madison, and his cohorts were more concerned with federalism, structure, and power of governments.[16] A letter written by Richard Henry Lee, representative to the congress from Virginia, urged the need for a federal bill of rights to accompany the forming federal Constitution. He claimed, amongst other things, "That the Citizens shall not be exposed to unreasonable searches, seizure of their persona, papers, or property." Lee is also thought to be at least one of the minds behind the *Letters from the Federal Farmer*.[17]

Lee was part of the group of politicians who were concerned about the federal government's power of the Constitution, known as Anti-Federalists. Led by John Adams, the Anti-Federalists supported specific federal protections, including search and seizure rights. Borrowed most likely from Adams' Massachusetts provision, Anti-Federalists called for a preface to an amendment banning "unreasonable searches and seizures." The

[15] Donahue, "The Original Fourth Amendment," 1282-1283.

[16] Clancy, 1029, accessed on March 5, 2018.

[17] James Curtis Ballagh, *The Letters of Richard Henry Lee*, Vol. 2, New York: The MacMillan Company, 1914, accessed on March 5, 2018, https://babel.hathitrust.org/cgi/pt?id=mdp.39015011801084; Davies, "Recovering the Original Fourth", 695, accessed on March 5, 2018.

influential *Letters from the Federal Farmer*, an Anti-Federalist pamphlet also propagated Adams' provision to stir support for federal provisions.[18]

Anti-Federalist support for a search and seizure clause was not just to ensure the federal government would not abuse their power. The push was part of the larger rejection of a federally controlled constitution. After the Anti-Federalists voiced their opinion for an "unreasonable searches and seizures" clause, it was time for Federalists to meet them with a draft for an amendment. The concern amongst Federalists was about the inclusion of "general warrant" and "unreasonable searches and seizures," which they thought would weaken a strong central base. The Federalists started their own propaganda faction, known as *The Federalist,* and distributed propaganda to garner support for a strong central proclamation. At the end of 1787, the Anti-Federalists and Federalists were at a bind.

Debates amongst states became much stronger and echoed pre-Revolutionary Bostonian cries for liberty. Virginia led the charge in calling for a Bill of Rights and general warrants with its former governor Patrick Henry being the most vocal supporter. Thomas Jefferson, a lifetime adversary of Henry, called him "the greatest orator that ever lived." Henry began his rhetoric by denouncing the strength of federal officials in search and seizure cases. He exclaimed:

> "When these harpies are aided by excisemen, who may search, at any time, your houses, and most secret recesses, will the people hear it? If you think so, you differ from me. Where I thought there was a possibility of such mischiefs, I would grant power with a niggardly hand?[19]

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[18] Thomas Y. Davies, "Recovering the Original Fourth Amendment," *Michigan Law Review* 98, no. 3 (1999): 695, accessed on March 5, 2018, https://www.jstor.org/stable/pdf/1290314.pdf?refreqid=excelsior%3Af0080073d107e3fb2eb6b5b8ca2a611a.

[19] Jonathan Elliot, eds. *The Debates in the Several State Conventions on the Adoption of the Federal Constitutions Recommended by the General Convention at Philadelphia in 1787,* vol. III (1827): 58.

Henry continued arguing for a search and seizure clause in a Bill of Rights saying:

> They may, unless the general government be restrained by a bill of rights, or some similar restriction, go into your cellars and rooms, and search, ransack, and measure, every thing [sic] you eat, drink, and wear. They ought to be restrained within proper bounds.[20]

Henry specifically aligned with his hatred for general warrants, much like the 1760s Bostonians of Malcolm and Hancock had. Henry contended that the delegates have not made necessary adoptions to ensure individual rights.

> I feel myself distressed because the necessity of securing our personal rights seems not to have pervaded the minds of men; for many other valuable things are omitted: - for in- stance [sic], general warrants, by which an officer may search sus-pected [sic] places, without evidence of the commission of a fact, or seize any person without evidence of his crime, ought to be prohibited.[21]

The push for individual rights and search and seizure law was felt in New York as well. In the Anti-Federalist periodical *New York Journal,* an article was authored by a Son of Liberty on November 8, 1787. The authored railed against the current constitutional proposition as a "preposterous newfangled system" with "a few curses which will be entailed on the people of America." One piece read:

> Men of all ranks and conditions, subject to have their houses searched by officers, acting under the sanction of general warrants, their private papers seized, and themselves dragged to prison, under various pretences [sic], whenever the fear of their lordly masters shall suggest, that they are plotting mischief against their arbitrary conduct.[22]

On January 2, 1788, Madison wrote a letter to a friend, George Eve, describing the current state of his affairs. He had come to terms with the need for specific amendments for the new constitution; a bill of rights. Madison said that the amendments would "serve the double purpose of the minds of well-meaning opponents, and of

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[20] Elliot, *The Debates,* 448-449.

[21] Elliot, *The Debates,* 588.

[22] The Documentary History of the Ratification of the Constitution Digital Edition, ed. John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber and Margaret A. Hogan. Charlottesville: University of Virginia Press, 2009.

providing additional guards in favour of liberty."[23] Madison had already developed language that gave the federal government enough power to govern. However, he knew for the federal union to thrive, he had to cultivate a new set of principles that checked the new federal government's authority. On May 4, 1789, Madison announced to the House of Representatives that he would present to them a list of amendments.

Madison's first Fourth Amendment draft, presented in the spring of 1789, is as follows:

> "The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized."

On the surface this text looks fairly similar to the future text. However, as Professor Laura K. Donohue points out, the comma after "person" gives people the rights to be secure in their persons. For our sake, this rings the bell of an individual rights clause. In these terms, the amendment is much more than just a protection against unreasonable searches or a ban on general warrants. Because of "the people to be secured in their persons," an interpretation of the security of an individual to have such rights must be considered in alignment with the rest of the amendment. Not much was changed compared to the final draft of the Fourth Amendment. After two years being sent back and forth amongst the states, Congress, and committees, the final draft was put into law on December 15, 1791.[24]

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[23] *The Papers of James Madison,* edited by William T. Hutchinson, v. 1, (Chicago: University of Chicago Press), 478, accessed on March 29, 2018, http://press-pubs.uchicago.edu/founders/print_documents/v1ch14s48.html; 1 *Annals of Congress* 247 (May 4, 1789).

[24] Laura K Donahue, "The Original Fourth Amendment," *The University of Chicago Law Review* 83, no. 3 (Summer 2016): 1299-1305, accessed May 10, 2018, http://www.jstor.org/stable/pdf/43913852.pdf?refreqid=excelsior%3A5540e98b7978503a30407e24d2ca4698&loggedin=true.

In the ratifying era of the Fourth Amendment, the government considered what rights citizens had to protect themselves against unlawful rule. An even tougher test would be faced when the government had to consider how to guarantee those rights for newly enfranchised citizens. In addition to the cultural and philosophical revolution resulting in the Fourteenth Amendment and the end of slavery, a new era of constitutional interpretation arrived that threatened states' rights and the power of dual federalism. The Fourteenth Amendment had the power to change the legal basis of the Bill of Rights, overrule states in federal cases, and most of all, had the power to protect individuals more than ever before. However, as most political and legal American history, it was not that simple.

CHAPTER 4

1822-1868: PROTECTIONS AND GAURANTEES OF EQUAL INDIVIDUAL LIBERTIES AND PRIVACY

The first three parts of this work introduced the significance of the Fourth Amendment and how pre-Fourteenth Amendment ideals had a duty to uphold Fourth Amendment rights that were intended to protect citizens against a powerful government. The next section will focus on how the written Fourteenth Amendment law had reasonable responsibility to uphold Fourth Amendment rights. The Fourteenth Amendment is arguably the most important law for citizens past and present. Its values include a naturalization clause that gave ex-slaves citizenship and an equal protection clause which gave all naturalized citizens equal protection of laws. However, the rudimentary importance for the Fourteenth Amendment is not written but is agreed upon by human nature, the social contract. Amendments and court cases aside, the laws of nature determine the power of written law. If a sovereign being gives up some natural freedom, like abiding by laws, they gain protection, immunities, or opportunities in return. This could easily extend to the Fourth Amendment. One gives up the natural right to physical violence for the human right of protection of property.

More often than not it is the government that extends protections in return that the people do not violate their law. In this case, the Fourteenth Amendment is a source of protection both from the government and by the government. The British were to protect American Colonists' rights as British subjects. But the British government also threatened those rights. Not identical to the British, but in similar ways, the Fourteenth Amendment was passed to extend equal opportunity, immunity, and due process for new citizens and their property protected by the government. It was and remains the government's role to protect and not abuse those rights. Thus, natural rights were given up to be ruled by human law. As Justice David Davis put it in *Ex Parte Milligan* (1866), "By the protection of the law of human rights are secured; withdraw that protection and they are at the mercy of wicked rulers, or the clamor of an excited people."[1]

How do we get to the Fourteenth Amendment?

A new law can only be passed if the opposition party is to give up certain rights. One person cannot be given something without another losing it. Much like the social contract, the foundation of the Fourteenth Amendment had everything to do with giving up certain rights to gain others.[2] In this case, and for search and seizure purposes, it was stripping property rights from slaveholders. Chattel property rights were not checked until the Civil War forced the hand of Congress to protect newly freed slaves. Also affected by the Thirty-Ninth Congress were legal access to privileges and immunities and equal protection of laws, which had to be given up by white Southerners so newly freed

[1] Tastlitz, 242-244.

[2] Earl M. Maltz, "Fourteenth Amendment Concepts in the Antebellum Era," *The American Journal of Legal History* 32, no. 4 (1988): 320, accessed on January 31, 2020, https://www.jstor.org/stable/845741.

slaves could have them. The anti-slavery Republicans controlled a majority of the Thirty-Ninth Congress and made the federal protection of newly enfranchised blacks their legislative focal point. The years leading up to the Fourteenth Amendment started to challenge the validation of individual rights that enforce protection of property and possessions.

The outcome of the Civil War devastated the Southern economy. Cities, businesses, and transportation hubs were burned by either General William Tecumseh Sherman's "March to the Sea" campaign, or by southerners' own "scorched earth" policy devised so that Sherman's troops had nothing to use.[3] However, one thing that the South refused to part ways with, even more than slavery, was their honor. As historian Bertram Wyatt Brown states, "at the heart of honor lies the evaluation of the public." Brown points out that honor in the Old South came before slavery, and that slavery was created to preserve the South. Honor was not just Southern; in the North honor was found in godly institutions and commercialism. Honor was developed in the South as men embodying themselves having "power, prestige, and self-esteem and to immortalize these acquisitions through their progeny." Thus, slavery became so fitting with honor in the South that "white man's honor and black man's slavery became in the public mind of the

[3] Thom Basset, "Was the Burning of Columbia, S.C. a War Crime?," *NY Times,* March 10, 2015, accessed on May 4, 2020, https://opinionator.blogs.nytimes.com/2015/03/10/was-the-burning-of-columbia-s-c-a-war-crime/; Jeff Wilkinson, "Who really burned Columbia during the Civil War?," *The State,* October 29, 2018, accessed on May 4, 2020, https://www.thestate.com/news/local/article220228240.html. Studies continue to debate whether the Union or Confederate forces burned Columbia, S.C. Most sources agree that a majority of the burning of the city was probably an accident. Sherman's troops were converging on the city and the Southern forces that were defending it knew they were outmatched. Thus, the Southern forces burned the large amounts of cotton in the streets of the city. The city also contained warehouses of ammunition and cannons. It was reported that on February 16th and 17th, when the cotton was burned, it was very windy and the burning cotton spread easily throughout the city to highly flammable explosives in warehouses. Sherman claims that by the time his troops entered the city it was fully on fire.

South practically indistinguishable." So, when the discussion for all encompassing civil liberty for freedmen arose, Southerner's felt their honor was being stripped from them. They were not wrong and they were not a backwards thinking people. Their property, which had stimulated their lives, in the form of the persons, possessions, and movement of slaves, were being taken from them. This is precisely why the Fourteenth Amendment was so intensely personal: the law being made was in support for a portion of the population, changing lives for the entire nation.[4]

Comity Clause, Samuel Hoar, Negro Seamen's Act (1740)

An early example of Southerners holding true to their traditional ways of living came in 1822. South Carolina passed the Negro Seamen's Act (1740) which allowed state officials to board ships in the Charleston Harbor in search of free black sailors. When confronted, this law allowed the state to apprehend black sailors under their state law, protected by their perception of the federal Comity Clause. The Comity Clause of Article IV of the Federal Constitution states that "the Citizens of each State shall be entitled to all privileges and Immunities of Citizens in the several States."[5] Essentially, when a free citizen is in a state that they do not reside in, the laws of their residing state do not protect them from the laws of the state they are visiting. However, the Comity Clause is not valid when dealing with fundamental rights. One of those fundamental rights is the right of security of persons, protected by the Fourth Amendment.

[4] Bertram Wyatt Brown, *Southern Honor: Ethics and Behavior in the Old South, 25th Anniversary Edition* (New York: Oxford University Press, 2007), 14-16.

[5] U.S. Constitution, Article IV.

In 1844, in response to the Negro Seamen's Act, Massachusetts sent representative Samuel Hoar to South Carolina to dispute the act. He was banished from the state almost immediately when he brought a suit to the South Carolina legislature. As a free citizen of the United States, Samuel Hoar should have been protected by the Immunities and Privileges Clause. Although nothing was unreasonable searched and seized from Hoar, the "security of persons" clause of the Fourth Amendment was threatened. The Hoar case was the beginning of a series of bills and rules that challenged Southern ways. In turn, Southerners immediately responded in dissent which eventually lead up to the ratification of the Fourteenth Amendment.[6] In 1866, in debating the ratification of the Fourteenth Amendment, the architect of the Fourteenth Amendment, Ohio Representative John Bingham, referenced the Hoar case exclaiming that:

> With the help of this Congress and of the American people [. . .] by simply adding an amendment to the Constitution to operate on all the States of this Union alike, giving to Congress the power to pass all laws necessary and proper to secure to all persons [. . .] and if the tribunals of South Carolina will not respect the rights of citizens of Massachusetts under the Constitution of their common country, I desire to see the Federal judiciary[. . .] assert those rights by solemn judgement, inflicting upon the offenders such penalties as will compel a decent respect for this guarantee to all citizens of every State."[7]

Bingham's goal was to ratify an amendment that bound the states to the US Constitution, while allowing the states to maintain their autonomy. Thus, to "pass all laws necessary and proper to secure all persons" he needed to convince his colleagues to pass an amendment that incorporated rights that could "secure all persons." Bingham's final draft protected "the privileges or immunities rights of citizens of the United States" and included the incorporation of the Bill of Rights. Thus, his reference of Hoar was an

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[6] Michael Schoeppner, "Peculiar Quarantines: The Seamen Acts and Regulatory Authority in the Antebellum South," *Law and History Review* 31, no. 3 (August 2013): 583, accessed on November 4, 2018, https://www.jstor.org/stable/pdf/23489503.pdf?refreqid=excelsior%3Adcf6feaea0b3d6f356cb0835b6f2c941.

[7] Congressional Globe, 39th Congress, 1st Session, 158 (1866).

example of protecting the immunities and privileges of citizens when states deprived citizens of their constitutional rights.[8]

Freedmen's Bureau Act (1865)

It is commonly known that the Emancipation Proclamation turned the Civil War from a sectional dispute into a cause for liberation. Thus, the Union's new effect for winning the war was the freedom for over three million African Americans. However, the end of the War and the Thirteenth Amendment did not give blacks an equal chance or a guarantee to liberty. Almost all were landless and had no means to gain property or an opportunity at a decent job. To assist freedmen, new federal initiatives were brought forth to repair the nation in the aftermath of conflict. However, the transition was not smooth. First, the Bureau of Refugees, Freedmen, and Abandoned Lands, known as the Freedmen's Bureau, was born. Like the test case of Samuel Hoar and the Comity Clause, relentless Southern discrimination and dissent of African American rights would cause the initial goals of the Freedmen's Bureau to fail. Then, the passing of the Civil Rights Act of 1866, the first federal protection of civil rights in American history, ignited Congress to consider particular rights as necessary for the equal protection to be guaranteed for citizens.[9]

The Freedmen's Bureau Act (1865) was the first official attempt to give blacks civil rights. The proposed bill extended the financial life of the Freedman's Bureau,

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[8] Congressional Globe, 39th Congress, 1st Session, 2542 (1866); Lash, *Privileges and Immunities,* 157.

[9] Mark A. Graber, "Subtraction By Addition?: The Thirteenth and Fourteenth Amendments," *Columbia Law Review* 112, no. 7 (November 2012): 1539, accessed on June 15th, 2019, https://www.jstor.org/stable/41708157.

which delegated land to newly freed blacks. To stimulate the work of the Freeman's Bureau, the Freedman's Bureau Act allowed military force to be used in areas where freedmen were denied aid. L.H. Rousseau, a representative from Kentucky and sponsor of the bill outlined two specific clauses. Rousseau stated that the obligation of, "real and personal property, and to have full and equal benefit of all laws and proceedings for the security of person" was essential to the success of the Freedman's Bureau. Rousseau exclaimed to Congress how powerful a bill for freedmen like this would be because the Constitution "forbids in the provisions in regard to judicial power, to trial by jury and the security to person and property from unreasonable search" when it comes to freedmen.[10] However, the shortcomings of the Freedmen's Bureau was from a lack of political power for the bill. The Bureau's power relied on military force to enforce civil rights for freedmen, rather than concentrate power on judicial force. Thus, the bill was vetoed by President Andrew Johnson and did not receive enough votes in Congress to override. Rousseau and other liberals' voices were examples of what could be done. Fundamental rights, such as protections from unlawful searches and seizures, could be protected by a law guaranteeing security and equality for all people. Additionally, this is a prime example of how the Constitution was starting to be viewed as not based on originalism. Ideas for individual rights and nineteenth-century climates were changing the power of guaranteed rights and laws for freedmen.[11]

[10] Congressional Globe, 39th Congress, 1st Sessions, Appendix, 69 (1866).

[11] Paul Moreno, "Racial Classifications and Reconstruction Legislation," *The Journal of Southern History,* 61, no. 2 (May 1995): 284, accessed on November 15th, 2018, https://www.jstor.org/stable/2211578.

Privileges and Immunities and Civil Rights Act of 1866

By early 1865 Confederate supply lines were on its last legs and the Union Army was in control of the Civil War. President Abraham Lincoln was confident the Union would be secured. The Civil War ended a few months later. Lincoln won a second term as President of the United States and on March 4th, 1865 gave his Second Presidential Inaugural Address. Amongst other things, his address was a positive notation to the future of the United States.[12] The day after Lincoln's Address, the US Senators responsible for enacting the Civil Rights Act in 1866, convened in Washington DC for the first time. The Thirty-Ninth Congress met to discuss the aftermath of the pending end of the war. Their deliberations were about how the freedom of over one million constitutionally backed emancipated slaves would be protected. Their biggest obstacle and goal were to combat "Black Codes" enacted by Southern state legislatures, which enforced newly freed slaves to be subjected under the authority of state laws. The Civil Rights Act that Congress drew up to contest Black Codes, amongst other things,

> granted citizenship to all persons born in the United States.. as enjoyed by white citizens.. to make a enforce contracts, to sue, be parties, give evidence, to inherit, purchase, lease, sell, hold, and covey real and personal property, and to full and equal benefit of all laws and proceedings for security of person and property.[13]

In addition, a Privileges or Immunities Clause was introduced by the Thirty-Ninth Congress prior to the Civil Rights Act. A Privileges and Immunities Clause already existed in Article IV of the Constitution reading, "the Citizens of each State shall be entitled to all Privileges and Immunities in the several States." However, this

[12] Abraham Lincoln, Second Presidential Inaugural Address, March 4th, 1865, https://cdn.loc.gov/service/mss/mal/436/4361300/4361300.pdf.

[13] Congressional Globe, 39th Congress, 14 Stat. 27 (Apr. 9, 1866).

Revolutionary War Era clause left open legal interpretation in Reconstruction America. There was never a definition of specific "privileges and immunities" that citizens were protected from or guaranteed. Also, it was not specific whether a citizen from one state enjoyed the same privileges and immunities as a citizen from another state.[14]

The lack of distinction between the Article IV clause and the Fourteenth Amendment Clause allowed cases such as *Dred Scott* and *Slaughterhouse* to slip through the Supreme Court. Right before the controversial *Slaughterhouse Case* was decided, John Bingham, the writer of the Fourteenth Amendment, attempted to define the amendment's Privileges or Immunities Clause:

> Mr. Speaker, that the scope and meaning of the limitations imposed by the first section, fourteenth amendment of the Constitution may be more fully understood, permit me to say that the privileges and immunities of the citizens of the United States, as contradistinguished of a State, are chiefly defined in the first eight amendments to the Constitution of the United States.[15]

Coinciding with the Civil Rights Act, the Privileges or Immunities Clause introduced by Bingham guaranteed that "no State shall make or enforce and law which shall abridge the privileges or immunities of the citizens of the United States." Most scholars argue that the Privileges or Immunities Clause was meant to settle the Comity Clause debate regarding emancipated blacks. The Comity Clause assured citizens privileges and immunities "of each state.. in the several states." Thus, Privileges or Immunities Clause was meant to rectify the states that ignored the Comity Clause. The southern states that denied the Comity Clause argued that blacks were not citizens and thus were not entitled to the clause's benefits. Thus, the Privileges or Immunities Clause

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[14] U.S. Const. art. IV.

[15] Kurt T. Lash, *The Fourteenth Amendment and the Privileges and Immunities of American Citizenship* (Cambridge: Cambridge University Press, 2014): 249.

and Comity Clause worked off each other to protect and guarantee rights for citizens in every state. Congress's final task was to enact law providing citizenship for these clauses to be enforced.[16]

Ultimately, Congress did not include the clause because they believed it was not needed. The importance of this is that this clause laid the groundwork for a pivotal part of the Fourteenth Amendment. When the clause was finally included in the new Fourteenth Amendment, Congress had to debate exactly what rights were protected by "privileges and immunities." Would natural rights, such as property protected? Or was positive law like state rights and the Bill of Rights the main focus?[17]

Drafting of the Fourteenth Amendment

On May 23rd, 1866 the Committee of Fifteen, a bipartisan group of representatives responsible for leading the legislation on Reconstruction, announced to Congress their draft of a new amendment. Section One of the draft read that:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

Later, a citizenship clause would precede the Privileges and Immunities Clause because until then the only persons defined by the Constitution as citizens were the President and Senators. In describing exact "privileges and immunities" that states cannot abridge from citizens, Senator Jacob Howard was perplexed that the amendment didn't initially specify

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[16] Philip Hamburger, "Privileges or Immunities," *Northwestern University Law Review* 105, no. 1 (2011): 61-63, accessed on September 1, 2019, https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1181&context=nulr.

[17] Kurt T. Lash, "The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment," *Georgetown Law Journal* 99, no. 329 (2011): 369, accessed on November 23rd, 2018, http://georgetown.lawreviewnetwork.com/files/pdf/99-2/Lash.pdf.

a guarantee to the Bill of Rights. Howard echoed Bingham's concerns saying that, "whatever they may be.. for they are not and cannot be fully defined- to these should be added the personal rights guaranteed by the first eight amendments of the Constitution."[18] Howard importantly pointed out that there was no power granted in the Constitution to carry out these powers. They just simply existed for persons and courts to judge upon. A citizen had guaranteed power to use these privileges and immunities in everyday life, but a sovereign government entity held the higher hand. Additionally, since the Bill of Rights was not specified, states could determine the power the Bill of Rights had in their jurisdiction.

The Fourteenth Amendment would pass in Congress with a sizable vote margin; 75 percent in the Senate and 79 percent House of Representatives. Initially Southern states rejected the Amendment because it reduced their power. But legal pressure was being mounted against Southern states. In one instance, the Freedmen's Bureau was bringing a suit against the state of Mississippi under the Civil Rights Act "against local officers for infringing the freedmen's right to bear arms and the right against unreasonable search and seizure." Northern Congressmen were reluctant to give power back to Southern states. Thus, Congress resolved upon a Military Bill which divided the South in to five sections with military tribunals running state courts. Once Southern states wrote a constitution aligning with federal laws the states were given their power back. This deal was enough to compel Southern states to ratify the Fourteenth Amendment. The

[18] Congressional Globe, 39th Congress, 1st Session, 27, 65-66 (May 23, 1866).

Fourteenth Amendment only momentarily protected the Fourth Amendment from state infringement.[19]

Ku Klux Klan Trials (1871)

Following the drafting of the Fourteenth Amendment, the Ku Klux Klan struck fear into, and demoralized the liberty of, blacks across the South. Since the majority of southern state authority let the Klan's violent harassment to ensue, the Forty-First Congress implemented a series of bills and court cases to curtail Klan aggression. The Civil Rights Act of 1871, often referred to as the Ku Klux Klan Act, was passed in response to white nationalists' surge to dehumanize blacks across the South. This act, along with the Enforcement Act of 1870, were immediately used in a federal trial known as the South Carolina Ku Klux Klan Trials (1871). This was the first true test of the strength of the Fourteenth Amendment and whether the court would side with freemen in protecting their civil and personal liberties.[20]

The trial was more about civil rights precedent than getting convictions for the prosecution. The larger picture was about whether the Enforcement Act condemned conspiracies and the Civil Rights Act and Fourteenth Amendment protected political and civil rights. In one of the counts against the Klan, the court could affirm that the Fourteenth Amendment, in this case the right to bear arms and the safeguarding illegal search and seizures, protected individuals when the state failed to. The prosecution plead that Klansmen broke down doors of homes and places of business to raid firearms and

[19] Tazlitz, 255-256; Stephen P. Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876* (Westport, CT: Praeger Publishers, 1998), 59.

[20] Paul J Gardner, "Private Enforcement of Constitutional Guarantees in the Ku Klux Klan Act of 1871," *Constitutional Studies* 1, no. 2 (2016): 82, accessed on January 13th, 2018, https://muse.jhu.edu/article/648787/pdf.

personal belongings of freed blacks. The defense's rebuttal was that it was the state's responsibility to protect individual rights, thus a federal court could not prosecute what the state would rule on. District Attorney David T. Corbin pointed out that in this case the federal government was not trying to punish the state by not allowing them to rule on a state case. He pointed out that Congress, in empowering the use of the Fourteenth Amendment, would punish individuals of a state, not the state itself, who conspired to deny citizens their rights. Unsurprisingly, the South Carolina State Court could not come to a majority decision on the case, remaining that a ruling in favor of the prosecution over-reached a federal constitutional threshold. Their reasoning that Klansmen could not be indicted under the Fourth Amendment was that search and seizure rights "preexisted the Constitution as a part of common law" and that "the Fourth Amendment did not confer a right but acted as a restriction on the United States." The court rejected that the Fourteenth Amendment turned the Bill of Rights into law enforceable upon states. Thus, the case was moved to the Supreme Court.[21]

In the Supreme Court, pre-trials once again squashed the efforts of the government attorneys to bring Klansmen to justice. It all came down to how much presence the court decided the Fourteenth Amendment had in cases using the Bill of Rights. US Circuit Judge Hugh Lennox Bond was torn over the proceedings. He wanted to see the Klansmen brought to justice but did not want to ostracize himself politically. When he rejected the cases, he chose not to write a review to avoid scrutiny of his opinion. The only Klansmen that were prosecuted were charged with conspiracy crimes

[21] Lou Faulkner Williams, *The Great South Carolina Ku Klux Klan Trials 1871-1872* (Athens, GA: University of Georgia Press, 1996), 66-73.

and violation of the Fifteenth Amendment. Although no Klansmen were brought to justice for violating the Fourth and Fourteenth Amendments, the cases brought light to the possibility of the using the Fourteenth Amendment to safeguard the Fourth Amendment. The fact that a U.S District Attorney strongly petitioned the Supreme Court to interpret the Fourteenth Amendment as a clause to enforce individual rights that states could not abridge points to a positive notion of justice. However, Judge Bond's indecision to prosecute appeased the South and prevented any conflict that could have provoked states' rights leaders.[22]

The Ku Klux Klan trails was a precursor to how much the judicial system struggled to empower the Fourteenth Amendment, even with all the responsibility it held. The refusal of the court to hear the constitutionally relevant parts of the Ku Klux Klan trials can certainly not be forgiven or glossed over. In its infant age, interpreting the power the Fourteenth Amendment had was difficult. In not ruling in a decision in state cases, courts did not ostracize themselves from state legislatures. However, their discussions about the powers the Fourteenth Amendment could have enumerated had precedent impact. By not hearing the case the court did not have to make the tough decision in the middle of the troubling Reconstruction Era. It would not be long before the court was forced to make that tough decision. In the *Slaughterhouse Cases* of 1873 the US Supreme Court essentially killed the power the Fourteenth Amendment had in guaranteeing the privileges and immunities in state cases.[23]

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[22] Williams, *Klan Trials*, 75-76.

[23] Paul Finkelman, "Original Intent and the Fourteenth Amendment: Into the Black Hole of Constitutional Law," *Chicago-Kent Law Review* 89, no. 3 (June 2014): 1023, accessed on January 27th, 2019, https://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=4048&context=cklawreview.

Slaughterhouse (1873), Civil Rights, end to Reconstruction

In the *Slaughterhouse Cases* (1873), the Louisiana Legislature faced the question of whether they could exclude all butchers except the Crescent Livestock and Landing Company from operating in New Orleans. In return for these privileges, the state would be returned an investment percentage of the company. All other butchers were enraged and believed their privileges and immunities were being threatened. Meanwhile, the state of Louisiana believed their state sovereignty allowed them to work around any federal power which they believed to be unconstitutional and overreaching.[24] The Privileges and Immunities Clause of the Fourteenth Amendment says that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States… nor deny to any person within its jurisdiction the equal protection of the laws."[25] Thus, under this law, did the clause protect the state by stating that their "privileges and immunities" were being provided for under a working condition? Or were the individual butchers being denied equal protections of the law?

The Supreme Court gave their 5-4 decision in favor of the plaintiff, arguing that the immunities and privileges clause of the amendment was meant to only require states to guarantee equal rights of states. Importantly, the court "did not guarantee that all citizens, regardless of race, should receive equal economic privileges by state," and decided that "any rights guaranteed by the Privileges and Immunities Clause were limited to areas controlled by the federal government."[26] As historians have pointed out, the

[24] William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Cambridge: Harvard University Press, 1988), 155-156.

[25] U.S. Const. amend. XIV, sec. 1.

[26] "Slaughter-House Cases." Oyez. Accessed January 28, 2019. https://www.oyez.org/cases/1850-1900/83us36

decision was considered a conundrum. The Ulysses S. Grant administration took an abolitionist stance and appointed a Republican leaning Supreme Court. However, as of 1873, the support for the Northern Republicans were waning as more Southern Democrats gained seats in Congress and jobs in federal departments. Local periodicals and public displays of discontent for Reconstruction started to gain momentum in the years leading up to *Slaughterhouse*.[27]

Other historians argue that the Court was taking advantage of using a non-white case to downplay the power of the Fourteenth Amendment, while not enraging the Northern republicans who were in favor for getting black citizens more access to individual rights. Although the court supported moderate Republican Reconstruction, by this time they were reasoning with a strong resentment among northerners about the Republican Reconstruction crusade. A new Civil Rights Act, led by Charles Sumner, was being voted on at the time and passage of this act could further divide and extend any compromise to end Reconstruction. One more reason could be similar to that of the Klan trials case; the Court thought that an overpowering Fourteenth Amendment would threaten the tradition of American federalism.[28]

Civil Rights Act of 1875, *Civil Rights Cases of 1883*

The *Slaughter House Cases* was the Supreme Court's first major test in interpreting the Fourteenth Amendment. By this time government circles were aware how much power the Fourteenth Amendment encompassed. This included the privileges and

[27] Foner, *Reconstruction,* 524,528.

[28] Michael A. Ross, "Justice Miller's Reconstruction: The Slaughter-House Cases, Health Codes, and Civil Rights in New Orleans, 1861-1873," *The Journal of Southern History* 64, no. 4 (Nov. 1998): 651-652, accessed on January 27, 2019, https://www.jstor.org/stable/2587513.

immunities clause, which was unofficially to be incorporated in some of the Bill of Rights, including the Fourth Amendment. But, because there was no "official" incorporation, a case like *Slaughterhouse* could be deemed as an example of "a product of the era." Since the ratification of the Fourteenth Amendment, the construction of how states and the federal government approached the power of individual rights was not heavily tested. Now that the constitutional test failed to interpret the amendment, the Republican stance would get more intense.[29]

Charles Sumner's new Civil Rights Act found its way to pass the Senate in 1875 with a vote of 38 to 26, perhaps out of respect for the late senator. The Act was progressive stating:

> That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.[30]

Although the passing of the act was a positive step for anti-slavery Republicans, they were losing control of the House of Representatives for the first time since before the Civil War, effectively ending Reconstruction.[31]

Eight years later, amongst a Southern white sympathetic Congress, the Civil Rights Act was tested. Four cases were brought to the Supreme Court by black citizens claiming their civil rights were being violated. In these cases, black men were denied

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[29] Lash, *Fourteenth Amendment and Privileges and Immunities,* 232.

[30] Civil Rights Act of 1875, *US Statutes at Large* 18 (1875).

[31] Primus, Richard A. "The Riddle of Hiram Revels." *Harvard Law Review* 119, no. 6 (2006): 1718, accessed on September 5, 2019, http://www.jstor.org/stable/4093530.

admission to public places such as inns, restaurants, trains, and theatres. The court declared that:

> "the Fourteenth Amendment is prohibitory upon the states only, and the legislation authorized to be adopted by Congress for enforcing it is not *direct* legislation on the matters respecting which the states are prohibited from making or enforcing certain laws, or doing certain acts, but is corrective legislation, such as may be necessary or proper for counteracting and redressing the effects of such laws or acts."[32]

The Court continued the recent trend of preserving a peaceful end to Reconstruction, which had to include a united nation, rather than consider the broad scope of the Fourteenth Amendment and how its guaranteeing clauses affected other amendments. New civil rights legislation would not be passed for another eighty-two years.

In the two decades after the passing of the Fourteenth Amendment, the Supreme Court remained silent about how citizens of all colors could be protected by the amendment. They also had not judged on a case involving how the Fourth Amendment would be ruled if a state was involved in the case. Certainly, states' rights supporters and racism played a part in swaying Washington to ignore the all-encompassing Fourteenth Amendment. It seemed like things would become stagnant or less inclusive before progressive. Inclusion of the Fourth Amendment in cases in which the Fourteenth Amendment had jurisdiction should have trumped Black Codes and Jim Crow racial discrimination. The first major steps to these inclusions would come in cases that did not involve African American involvement. However, the transgressions of the nineteenth-century against blacks would not be forgotten. By the time the Supreme Court started to set the record straight on Fourth and Fourteenth Amendment jurisprudence, justices

[32] "Supreme Court of the United States. The United States v. Murray Stanley. Same v. Michael Ryan. Same v. Samuel Nichols. Same v. Samuel D. Singleton. Robinson v. Memphis and Charleston Railroad Co." *The American Law Register (1852-1891)* 31, no. 12 (1883): 790-807. doi:10.2307/3304580.

would rely on the evidentiary transgressions suffered by blacks in the nineteenth-century. It would prove to help the cause of all Americans in gaining the guaranteed rights of personal property they deserved.

CHAPTER 5

THE FOURTH AMENDMENT REVISITED IN THE US SUPREME COURT: *BOYD* AND TWENTIETH-CENTURY CIVIL RIGHTS

Boyd v US (1886)

Thirteen years after the Civil Rights Act of 1873 was deemed unconstitutional, the Supreme Court heard the case of *Boyd v United States* (1886). *Boyd* would become the first landmark federal case that challenged the authority of the Fourth Amendment. The context of the case are as follows. Boyd was being forced by a New York district court to hand over his private papers and books. Upon the forced submission it was revealed that the taxes on the invoices of glass plates in Boyd's possession were being investigated for fraud. Boyd refused to hand over his private effects, saying no evidence could be compelled from the claimants to justifiably seize the property. The district court seized it anyway and Boyd was charged with tax fraud. Boyd appealed to the Supreme Court claiming his Fifth Amendment protection against self-incrimination was violated.[1]

The Supreme Court unequivocally ruled that the invoices forced over by the district court self-incriminated Boyd, violating the Fifth Amendment. However, Supreme Court Justice Joseph Bradley dove deeper into the case, arguing that the forcible

[1] *Boyd v United States*, 116 US 630 (1886).

admission of Boyd's private papers had no reasonable cause behind it. He said that the Fourth and Fifth Amendments "throw great light on each other" because "unreasonable searches and seizures" is often used to "compel a man to give evidence against himself." Bradley continued about claimants using this method saying, "it may be that it is the most obnoxious thing in the mildest and least repulsive form; but unconstitutional practices get their first footing in that way. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed."[1] Essentially, Bradley was setting a standard for a strong liberal front to federal constitutionalism. Even if his goal was not to set this standard of a wide envelope of constitutional jurisprudence, *Boyd* became the benchmark case for Fourth Amendment jurisprudence to lean on for the next sixty years.[2]

Boyd was also a landmark win for due process. As laid out in this work until *Boyd*, the federal government had little to no interest in regulating search and seizure law. However, in Bradley's ruling, he laid out a defense of the Fourth Amendment that affected the search and seizure clause, previously untried in federal courts. He claimed that a search and seizure compelling a defendant to reveal evidence that could incriminate them, violated the Fourth Amendment. In Bradley's reasoning, he argued that the admission of evidence established a seizure that was unreasonable. Once Bradley ruled that the invoices that incriminated Boyd were unconstitutional, he excluded them from

[1] *Boyd.*

[2] Sklansky, "Fourth Amendment and Common Law," 1766.

testimony creating an exclusionary rule that would be strengthened by *Weeks v US* a number of years later.[3]

As Bradley extended the scope of the Fourth Amendment, his opinion also strengthened the Fourteenth Amendment's range. After laying down his opinion, Bradley concluded that "the principles laid down in this opinion affect the very essence of constitutional liberty and security." His proclamation that the Constitution applies to "all invasions on the part of the government," and "the sanctity of a man's home and the privacies of life", echoed fundamental liberties fought for by the framers of the US Constitution.[4] This protection of constitutionalism invoked a reference to the Founders about their inherent discredit in governmental power of search and seizures. Although Bradley's invocation of the founder's principles of liberty were used, his conclusion was more about laying the framework for a new understanding of Fourth Amendment law.

For the first time since the ratification of the Fourteenth Amendment, the Fourth Amendment was viewed as a law that required historical evidence to interpret what the words could mean in the current era. Bradley concluded that the invasion of Boyd's personal property and security equaled the invasion of his liberty. The Fourth Amendment was not being violated in this case regarding the breaking down of doors or rummaging through desks and drawers. Rather, the Fourth Amendment was being extended based on one's individual rights as a private citizen. Justice Bradley proclaimed that:

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[3] Thomas Y. Davies, "Recovering the Original Fourth Amendment," *Michigan Law Review,* 98, (1998): 727-728, http://dx.doi.org/10.2139/ssrn.220868; accessed on April 16th, 2019.

[4] *Boyd v United States*, 116 US 630 (1886).

> It is the invasion of his indefeasible right of personal security, personal liberty and private property [. . .] and 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 in the condemnation of that judgment.

Boyd began the expansion of interpreting laws that were encouraged to be judged together. In doing this, the Fourth and the Fourteenth Amendments would become stronger along with the constitutional rights of citizens.[5]

Weeks v US (1914) and Warrantless Searches

Boyd was certainly important in revolutionizing the rights a victim of unreasonable searches and seizures had. However, *Boyd* said nothing about the limits a warrantless officer had in conducting a search or seizure. In 1911, federal marshals arrested business operators in New York for alleged customs fraud and seized their papers without a warrant. The operators challenged the seizure of their papers and filed a motion for them to be returned before the trial. The federal court agreed with the defendants and ordered the papers returned. After District Attorney Henry A. Wise refused the court's order, the court held him in contempt. A back and forth exchange about whether the writ of error against Wise was lawful ensued. Chief Justice Edward Douglass White gave in saying "no conceivable constitutional right of the district attorney arose or could have been involved in committing him for contempt for refusing to obey the order of the court." Essentially, nothing held water constitutionally that could hold Wise in contempt and thus the writ of error was dismissed.[6]

[5] *Boyd v United States*, 116 US 630 (1886).

[6] Davies, "Recovering the Original Fourth Amendment", 729; *Henry A. Wise, Plff. In Err., v. Lawrence H. Mills et al.* 220 US 549 (1911).

Justices were rightfully startled of the loophole. The "security equals liberty test" failed in this instance. If due process and constitutionalism could protect officers of the court from being held in contempt, then its fundamental laws should defend against illegally seized evidence as well. The Supreme Court got their chance to correct this paradox in 1914 in *Weeks v US.* In 1911, Fremont Weeks was arrested for illegally sending lottery tickets through the mail. To prove his guilt, state and federal officials, on separate accounts, entered Weeks' home without a warrant and seized compelling papers. Weeks filed suit to regain his possessions, arguing that since they were seized illegally, they could not be used to convict him in court. Associate Justice William R. Day decided in favor of Weeks on fundamental grounds that the officer's intrusion of Weeks' property was without a warrant and unreasonable. Thus, the evidence gained from that intrusion was void.[7]

Day's opinion echoed the liberal view of constitutional philosophy that had similarly been considered in *Boyd.* His argument about the Fourth Amendment's "intentions" and "extensions" brought attention to the idea that the Fourth Amendment's boundaries were expandable. Citing *Boyd,* Day exclaimed that the Fourth Amendment

> "was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by the officers of the law, acting under legislative or judicial sanction" and the Fourth Amendment's intention "equally extended to the action of the government and officers of the law acting under it."[8]

Setting precedent that the government or its officers were not immune when violating Fourth Amendment protections was a relatively new revelation. Although this concept was addressed in *Boyd,* no precedent existed. This concept would turn into a critical legal

[7] *Weeks v United States* 232 US 383 (1914).

[8] *Weeks.*

innovation, known as the "exclusionary rule." The exclusionary rule prohibits the admission of any evidence that was gained during a search that violated the Fourth Amendment. The exclusionary rule, enacted as a legal remedy, was only applicable to federal cases like *Weeks*. It would not be for another fifty years that the exclusionary rule would be extended to the states. However, compared to where Fourth Amendment protections came from, this was a big step forward.[9]

Wolf v Colorado: The Last Straw

In the process interpreting a developed Fourth Amendment, a case came to the court in 1949. For the first time, the defendant attempted to apply the Fourteenth Amendment's Due Process Clause to the Fourth Amendment. In *Wolf v. Colorado* the defendant, Julius A. Wolf, was convicted of illegal abortion practices in Colorado under whose jurisdiction he was tried. The defendant claimed that state officials obtained evidence that would have been inadmissible if it were in federal court under the Fourth Amendment. However, as of 1949, state courts were sovereign from the jurisdiction of federal courts, having the ability to use illegally seized evidence. Thus, the evidence presented to the Colorado court was being viewed under Colorado law. Furthermore, the Colorado court also claimed that the exclusionary rule originated in *Weeks* was only valid in federal courts. In a 6-3 decision, the Supreme Court decided that the defendant's claim that the Fourteenth Amendment's Due Process Clause, which should legally validate the

[9] Thomas K. Clancy, "The Fourth Amendment's Exclusionary Rule as a Constitutional Right," *Ohio State Journal of Criminal Law* 10, no. 1 (2013): 358, accessed May 20th, 2019, http://moritzlaw.osu.edu/students/groups/osjcl/files/2013/03/2.-Clancy.pdf; Richard M. Re, "The Due Process Exclusionary Rule," *Harvard Law Review* 127, no. 1885 (2014): 1893, accessed May 20th, 2019, http://eds.a.ebscohost.com/eds/pdfviewer/pdfviewer?sid=87d83ad9-8127-4138-858f-149bfd67580e%40sessionmgr4005&vid=4&hid=4211.

Fourth Amendment, including the exclusionary rule, in state courts, did not hold water. The charge was upheld.[10]

Civil Rights, Brennan, and The Living Constitution

As of 1949 there was not a single federal court case that could explicitly claim that a citizen's Fourteenth Amendment rights, privileges, and immunities supported their constitutional Fourth Amendment rights. It is clear, however, that the Supreme Court was willing to comply with individual rights in relationship to the rights against unreasonable searches and seizures. However, not everyone was quite convinced. A glimpse at American society outside the courtroom can provide some answers as to why the court was conflicted about these rights. More importantly, one cannot ignore the beginning of Justice William J. Brennan's work on the Supreme Court in 1954 as a factor in the rise of the protection of individual rights. Brennan's work on the Supreme Court and the rise of civil movements beginning in the 1950s influenced a new interpretation of the Fourth and Fourteenth Amendment.

In 1954 when Brennan took his seat on the Supreme Court the polity of American society was complex. In the early 1950s if one traveled south of the Mason-Dixon Line it was mostly impossible to miss the racial tension between black and whites that resided in the South.[11] The equality of African-American rights was the main theme of the mid-twentieth-century civil rights movements but other activists mobilized as well. Asian-Americans were discriminated against and in turn mobilized for the cause of equal rights

[10] *Wolf v. Colorado,* 338 US 25 (1949).

[11] Leon F. Litwack, "Fight the Power! The Legacy of the Civil Rights Movement," *The Journal of Southern History* 75, no. 1 (February 2008): 4, accessed June 6, 2019, http://www.jstor.org/stable/pdf/27650400.pdf.

on the West coast.[12] Student movements challenging authority against the Vietnam War also gained prominence in the 1960s.[13] The essence of American politics adapted to these new influential groups by passing new legislation and promising change in the favor of progress. Amongst student and ethnic uprisings, the Supreme Court had to question whether they would adapt to the changing society around them or keep their opinions within the walls of conservatism that for so long ruled the land.

Supreme Court Justice William J. Brennan

Justice Brennan produced 1,360 opinions on the court on a tenure that lasted thirty-four years. Most of the famous cases he wrote opinions for had to do with First Amendment rights.[14] In a simple search about Brennan nothing appears exemplary about his involvement in Fourth Amendment cases. The underlying reason for this is because Brennan was a champion of virtually all individual rights. In the following Supreme Court cases of the 1960s Brennan wrote opinions, dissents, or agreed with opinions that connected the power of individual rights with the values of Fourth Amendment protections.

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[12] Robert S. Chang, "Toward an Asian-American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space," *California Law Review* 81, no. 5 (October 1993): 1251, accessed June 6, 2019, http://www.jstor.org/stable/pdf/3480919.pdf.

[13] Richard M. Burgess and C. Richard Hofstetter, "The 'Student Movement': Ideology and Reality," *Midwest Journal of Political Science* 14, no. 4 (November 1971): 687-688, accessed June 6, 2019, http://www.jstor.org/stable/pdf/2110048.pdf.

[14] Gerard E. Lynch, "William J. Brennan, Jr., American," *Columbia Law Review* 97, no. 6 (October 1997): 1603, accessed June 7th, 2019, https://www.jstor.org/stable/1123386; See: *Baker v. Carr, Craig v. Boren, Goldberg v. Kelly, New York Times Co. v. Sullivan.*

Mapp v Ohio (1961)

It is impossible to discuss the protection of citizens under the Fourth Amendment supported by the Fourteenth Amendment without referencing the landmark case *Mapp v. Ohio* (1961). Although Brennan did not give the opinion to the court he did rule in the majority of the opinion. In this case, the state of Ohio illegally obtained evidence based on an unreasonable and unwarranted search and admitted evidence from the search to the Cleveland Police Department for the prosecution. In *Weeks* it was upheld that evidence obtained by federal agents violating the Fourth Amendment could not be admitted to a federal trial under the exclusionary rule. Thus, the state of Ohio contended that since the exclusionary rule only applied to the federal government, the state could admit the evidence to the court. However, Justice Tom C. Clark found that the exclusionary rule should be applied to all levels of government.[15] *Mapp* is still criticized to this day because of the ambiguity of expanding the exclusionary rule, but no further reading than the Fourteenth Amendment is needed to explain its legality. The Due Process Clause in the first section of the Fourteenth Amendment says that "nor shall any state deprive any person of life, liberty, or property, without due process of law." The Incorporation of the Bill of Rights, part of the Due Process Clause of the Fourteenth Amendment, states that under due process of law the Bill of Rights are incorporated to the states.[16] The decision to incorporate fundamental constitutional rights for every single citizen began to inspire Brennan to continue to follow the Constitution and due process as his ultimate jurisprudence.

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[15] *Mapp v. Ohio* 67 US 635 (1961).

[16] U.S. Const. amend. XIV, sec. 1.

Lopez v United States (1963), *On Lee v United States* (1952)

On August 31, 1961 IRS Agent Roger S. Davis visited an inn owned by German S. Lopez under the suspicion of whether any dancing or other form of evening entertainment was going on. Lopez denied the questioning, but later that evening Davis returned and saw dancing. A few months later Davis returned to the inn and told Lopez he may owe a cabaret tax. Lopez avoided the accusation again, gave the agent $420, and invited him to return for more money and to stay for free at the inn. Davis left the inn and told his superiors about the bribe Lopez offered him. Next, Davis went back to the inn equipped with a wiretap to record the bribery, unbeknownst to Lopez. Lopez once again proposed bribes, this time officially recorded. In what culminated as *Lopez v United States*, these facts were presented by the prosecution for the conviction of Lopez as bribery of a federal agent. Lopez claimed that the agents' actions violated his rights as an unreasonable seizure of his personal property, but the Supreme Court affirmed the conviction.[17] Justice Brennan dissented.

In Brennan's dissent he cited two past decisions. In arguing to protect the expanse of individual rights guaranteed to Lopez, Brennan cited *Boyd*. Part of Justice Bradley's opinion in *Boyd,* which Brennan quoted, said that the right of privacy applies "to all invasions on the part of the government and its employes [sic] of the sanctity of a man's home and the privacies of life."[18] Brennan's premise was that the illegality of "all invasions" included wiretapping and the privacy of Lopez's personal security was violated. Brennan explained that "while conventional searches and seizures are regulated

[17] Brennan, 194-195.

[18] *Boyd.*

by the Fourth and Fourteenth Amendments and wiretapping is prohibited by federal statute electronic surveillance," it "poses the greatest threat of private freedom," and "is wholly beyond the pale of federal law."[19]

Brennan also backed up his dissent by referencing a similar case, *On Lee v United States* (1952), in which the defendant unknowingly confessed to an acquaintance disguised as a government informant wearing a wiretap. The Fourteenth Amendment comes into play here in which Brennan equated his dissent in *Lopez* with Justice Frankfurter's dissent in *On Lee.* Frankfurter was convinced that a "strong social policy" of the government and their agencies allowed On Lee to be convicted, which out rightly violated On Lee's constitutional guarantee to equal rights and due process in the Fourteenth Amendment. In the instances of *Boyd* and *On Lee*, Brennan was focused on the privacy of the defendants' personal security as a citizen who had equal access to all rights. In both instances the defendants' words were being unknowingly seized, which according to Brennan, equated to their persons. Brennan was convinced that under the Fourth and Fourteenth Amendments Lopez and On Lee were protected from a search or seizure of evidence in their private quarters without a warrant.[20]

During the mid 1960s, the possession and distribution of illegal drugs was a national phenomenon that police forces in every corner of the country were determined to deter. In these instances, sometimes police disregarded the legality of how a search for

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[19] "United States v Lopez." Oyez. Accessed September 8, 2019. https://www.oyez.org/cases/1994/93-1260.

[20] William J. Hoese, "Electronic Eavesdropping: A New Approach," *California Law Review,* 52 no. 142 (1964): 142-143, accessed on June 7th, 2019, https://doi.org/10.15779/Z38P18M; John A. Garfinkel, "The Fourteenth Amendment and State Criminal Proceedings-Ordered Liberty or Just Deserts," *California Law Review,* 41 no. 672 (1954): 686-687, accessed on June 7th, 2019, https://doi.org/10.15779/Z38578Q.

illegal drugs could be conducted. In *Ker v. California* (1963), police officers were tailing Roland Murphy whom they suspected was selling marijuana. Police officers saw Murphy pull up behind a car, get out and speak to the driver of the other car, George Ker. It was stated in the police report that the officers were too far away from the conversion to hear or see if any illegal activity was going on. However, they followed Ker anyway. Upon arriving at Ker's apartment, the officers entered without announcing their admission and without consent from the occupants and found a two-pound block of marijuana on the kitchen table. Ker and his wife were arrested for the possession of marijuana. Four justices claimed that the Kers' Fourth Amendment rights were not reduced by the police officers' entrance to the Kers' residence. Brennan did not agree.[21]

In his dissent, Brennan claimed that "dangers to individual liberty are involved in unannounced intrusions of the police into the homes of citizens." Brennan's remarks evoke a guarantee that a citizen's individual rights inherently ensure their right to be secure against an unwarranted intrusion illegal. He further claimed that "protections of individual freedom carried into the Fourth Amendment undoubtedly included this firmly established requirement." That requirement, Brennan would explain, was that police officers must announce their presence before breaking into an individual's home. Brennan also denounced Justice Tom C. Clark's opinion that the Kers "might have well been expecting the police." Brennan claimed that there must be evidence to prove that the Kers did in fact have knowledge that the police were in pursuit of them. "That the Kers were wholly oblivious to the Officers' presence is the only possible inference on the uncontradicted facts; the 'fresh pursuit' exception is therefore clearly unavailable." In this

[21] Brennan, 202-203.

case, the "fresh pursuit" exception would have been the pursuit of officers having reason to believe a suspect had just committed a crime. In this case there was no evidence that the Kers knew they were being followed, or any reasonable evidence the officers had for a "fresh pursuit." Brennan tied together his dissent by referencing lessons from *Mapp.* In *Mapp* the court equated the seriousness of the Fourth and Fourteenth Amendment's effects on personal liberty. "We can no longer permit them [rights] to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend their enjoyment." Brennan finished his dissent on a concerned tone: "I thought by these words we had laid to rest the very problems of constitutional dissonance which I fear the present case so soon revives."[22]

Schmerber v California (1966)

Brennan did not just dissent in controversial Fourth and Fourteenth Amendment cases. In *Schmerber v. California*, Armando Schmerber got in a car accident and was taken to a California hospital for treatment. A police officer who was observing the incident determined there were signs of Schmerber being drunk. The officer instructed a physician to withdraw blood from Schmerber, although his lawyer refused to consent to it. Schmerber's blood test results were introduced as evidence in a case to convict him of a DUI. Schmerber claimed that the blood test was an unreasonable search and seizure under the Fourth Amendment because he did not grant the officer access to his bloodwork being taken, which would have been protected by due process in the Fourteenth Amendment. Brennan, who gave the opinion to the court, based his decision on reasonable cause.[23]

[22] *Ker v. California* 374 US 23 (1963); *Mapp v. Ohio* 67 US 635 (1961)

The Fourth Amendment not only protects citizens from unreasonable searches and seizures of their "houses, papers, and effects," but also includes "persons" which is under the category of one's personal body.[24] In his opinion to the court Brennan addressed the question of whether the police officer obtained enough probable cause for him not to need a search warrant to search and seize Schmerber's "persons." Brennan pointed out that in DUI investigations the evidence of blood alcohol level is marginalized by time lapse. Thus, the time to obtain a warrant may contradict the objectiveness to test the evidence. Since time was of the essence, and the officer's reasonable opinion was that the petitioner was intoxicated, he made an arrest based on that probable cause. Next, Brennan concluded that the test taken to obtain evidence, the drawing of blood, was reasonable because the test was performed by a qualified physician. In his conclusion Brennan said that "the present record shows no violation of petitioner's right under the Fourth and Fourteenth Amendments to be free of unreasonable searches and seizures."[25]

Starting with the introduction of *Boyd* and ending with the progressive Supreme Court of the 1960s, there was substantial change on the Supreme Court. The new interpretation that evolved out of *Boyd* was a century long trial by error. Numerous Courts could not muster up enough resilience to actually judge the Constitution as a document that had to evolve with the growth of a liberal and less white nation. Between 1886 and 1966 the Supreme Court did not experience an identical revolution that formed the Bill of Rights or the Fourteenth Amendment. No internal rebellions paved a way for

[23] Brennan, 208-209.

[24] U.S. Const. amend. IV.

[25] *Schmerber v. California* 384 US 757 (1966).

new laws to be enacted to guarantee the rights citizens legally had. The development of this period on the Supreme Court had to do with the way justices read the Constitution and how they perceived those words in their current environment. America as a nation that had to look in the mirror and realize that progression started with justice for all.

CONCLUSION

This work has explained how factors like prejudice and political greed led lawmakers to unreasonably ignore the protections that the Fourth and Fourteenth Amendment guaranteed. The origins of the Fourth and Fourteenth Amendment came to fruition under English law, and were borrowed to form American constitutional law. However, American constitutionalism is entirely American. The lawmakers who debated the passing of the Fourth and Fourteenth Amendments had allegiance to passing laws that provided the most protections for their fellow American citizens. Decided under tumultuous times of rebellion, independence, and reconstruction, it is understandable how decisive the history is. Given that liberty was the ultimate reason for ratification of the Fourth and Fourteenth Amendment, their interpretation must be viewed under how they worked for citizens in their era of ratifying and ruling.

Starting with English common law, *Magna Carta* gave birth to the original common law standard stating that "lawful judgement of his peers or by the law of the land" defined the common law. *Magna Carta* was not seriously referenced until the mid-seventeenth-century when individual property rights became a fundamental guarantee to natural and private rights for English citizens. Along with the basis of *Magna Carta,* Sir

Edward Coke's writings became a cornerstone of future Fourth Amendment law. His stance on outlawing general warrants, the formation of the "castle doctrine", and firm opposition of executive authority on the law initiated English lawyers and government to consider the role common law had in society.

As English citizens and the government turned towards a constitutional authority, William Blackstone's *Commentaries* paved the way for natural and private law to be equalized in considering the individual rights citizens had. If a citizen did not overstep their natural right to movement or property, the government had no right to invade their liberties. As an indirect result of Coke and Blackstone declaring individual liberty was universal, radical parliamentarian John Wilkes continued his anonymous attacks on the monarch. What culminated out of *Wilkes v Wood* ignited American colonists to relish in Wilke's cause against unreasonable searches and seizures.

Amidst American colonial resistance of British rule was the popular opposition of British customs official's use of writs of assistance to search and seize colonial cargo. In the famous *Writs of Assistance* case, James Otis railed against the British use of writs to search colonists' private property without a warrant. Inspired by the *Writs* case, John Adams led the defense of John Hancock in the *Liberty* affair in which British officials searched Hancock's ship, without a warrant, and seized the cargo. While the British government dropped the case, their resentment of colonists avoiding search and seizure boiled over into the first British troops landing on American soil in September 1768.

The ratifying of the Fourth Amendment in 1791 only proved to be one obstacle to guarantee individual protection against unreasonable searches and seizures. James Madison and his cohorts left open the interpretation of who exactly could be protected

and where. The defining interpretation the South had of the US Constitution, in regards to individual rights, was that the Comity Clause of Article IV only guaranteed that some rights could protect citizens of the "several states." Thus, no protection made it clear that "privileges and immunities" were bound by the Constitution for every citizen of the United States. Further, case law like *Dred Scott* affirmed this notion the South held so tightly. After the Civil War devastated the South, and the Thirteenth Amendment left over three million newly freed slaves without land, the federal government stepped in the lead a reconstruction of the nation. At the heart of Reconstruction was how to fully represent the newly freed slaves, as citizens, and guarantee they had access to civil liberty. Because the South dissented so strongly, and President Andrew Johnson would not sign off on a resolution, legislation under the Freedman's Bureau and Civil Rights Act did not make the mark. The Thirty-Ninth Congress debated how a fully encompassing amendment to safeguard all immunities and privileges for citizens could work in a nation still healing after the Civil War. Devised by Congressman John Bingham, the Fourteenth Amendment protected the "privileges or immunities rights of citizens of the United States" instead of "the several states." This protection guaranteed national protection of all citizens of their immunities and privileges including "whenever the same shall be abridged or denied by the unconstitutional acts of any State." Included in this clause, the first eight amendments of the Constitution were incorporated.[1]

As this study has shown, taking one step forward for civil liberties meets resistance. Only a few years after the Fourteenth Amendment was ratified, the US

[1] Congressional Globe, 39th Congress, 1st Session, 2542 (1866); Lash, *Privileges and Immunities,* 150-151, 157-158.

Supreme Court's ruling on the *Slaughterhouse Cases* derailed the privileges and immunities clause. The court ruled that the immunities and privileges clause of the amendment only required states to guarantee equal rights of states. The court stated that "any rights guaranteed by the Privileges and Immunities Clause were limited to areas controlled by the federal government."[2] Only thirteen years after *Slaughterhouse* the US Supreme Court started to switch its trend. In *Boyd v US* the court ruled that an illegal search and seizure equaled an illegal seizure of personal liberty. Not only did Justice Bradley's in ruling in *Boyd* set precedent for Fourth Amendment law, but it fostered stronger protections of individual rights of United States citizens. Bradley summarized that the Fourth Amendment was being extended based on one's individual rights as a private citizen.

Case law of the twentieth-century opened up stronger individual protections under the Fourth and Fourteenth Amendments. In *Weeks v US* the Supreme Court ruled that the government was not invulnerable when violating the Fourth Amendment. Known as the "exclusionary rule," the opinion in *Weeks* set the precedent that evidence gained under violation of the Fourth Amendment was prohibited in court. Then, in 1949, the court ruled in *Wolf v Colorado* that the Fourteenth Amendment's Due Process Clause legally validated the Fourth Amendment, including the exclusionary rule. Although the Fourteenth Amendment's privilege and immunities clause incorporated the Bill of Rights, case law had not constitutionally validated the clause until *Wolf.*

[2] "Slaughter-House Cases." Oyez. Accessed January 28, 2019. https://www.oyez.org/cases/1850-1900/83us36.

In the second half of the twentieth-century the Supreme Court Justice William J. Brennan ruled in favor of, gave opinions on, and dissented on several Supreme Court cases that drove home the legacy of individual liberty. Justice Brennan followed in the footsteps of the framers of the Fourth Amendment who experienced British officials unjustly imposing unwarranted searches and seizures on American colonists. He also learned through the interpretation the Constitution that the hard-fought battle to ratify the Fourteenth Amendment was about correcting wrongs, and repairing the nation, outside the walls of the court. Brennan sat on the Supreme Court through the Civil Rights Era watching the federal government use forces to deter millions of protesters that deserved the immunities and privileges their constitution granted them. Instead of joining the effort in turning away marginalized communities, Brennan stepped up and read the text of the Constitution for what it meant in the times of ratifying the Fourth and Fourteenth Amendments, and applied it to the Supreme Court in the Civil Rights Era.

What Justice Brennan exclaimed at Georgetown University in 1985 gives the history of the times around passing a law a broader perspective. The injustice the American colonists faced was more than just about the city of Boston in the 1760s. Their fight personified what the future would look like; a future in which no unreasonable search and seizure, and no general warrant was allowed. Similarly, the atrocity of slavery personified a fight not just to be free, but sustain an American life that gave equal protections, immunities, and privileges to all Americans. Most recently, we can learn from Justice Brennan, who adapted the principles of the Fourth and Fourteenth Amendments and read them through a historical scope that made sense in his time.

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