HOW PROHIBITION REWROTE THE FOURTH AMENDMENT

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ABSTRACT

During Prohibition, legion defendants—armed with a liberal construction of the Fourth Amendment and the newly minted exclusionary rule—stormed the federal courts with challenges to the introduction of evidence obtained by the searches and seizures of federal officers. This was a period where, by all accounts, Prohibition was vastly altering American policing in lasting ways. Yet little study has been given to how federal courts facilitated that alteration.

This Article surveys and examines decisions, briefings, and contemporary legal commentary and uncovers that much of the judiciary interpreted the Fourth Amendment during Prohibition as having a doctrinal association with the Eighteenth. Federal courts practically reconstrued the meanings of "reasonable," "persons, houses, papers, and effects," and "searches and seizures" to adjust to the realities wrought by the new constitutional mandate of the Eighteenth Amendment to prohibit "intoxicating liquors." At the same time, decisions frequently reflected a desire to enforce national prohibition within the particular statutory bounds of the National Prohibition Act. The result was not only a policing landscape that differed greatly from preceding American history but also a Fourth Amendment landscape that exalted the home while offering second-class protections for searches and seizures occurring outside its walls—a jurisprudential legacy that lives on in the present day.

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* Judicial Law Clerk. An earlier draft of this paper earned the Roger and Madeleine Traynor Prize for best written work by a graduating student at the University of Virginia School of Law.

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INTRODUCTION

[S]ooner or later the spectators will challenge their government by asking an embarrassing question: "Shall there be two constitutions, one for prohibition and one for all other matters whatsoever?"

— FORREST REVERE BLACK, ILL-STARRED PROHIBITION CASES 78 (1931)

Up in the mountains of Montana, federal officers approached a lonely cabin.[1] They smelled fermentation and soon stumbled upon whiskey-making paraphernalia in a nearby open shed.[2] They turned back to the cabin and moved closer to look inside. Peering through a window, they saw two covered barrels, probable cause for the violation of liquor laws.[3] The officers decided to break in. Once inside, they opened the barrels and found odorous mash fermenting within.[4] They also found a still under the bed—more evidence that intoxicating liquors were being produced.[5] The only question federal district Judge George McClellan Bourquin asked in resolving the constitutionality of the officers' search was whether the cabin constituted a "private dwelling"[6] within the meaning of the National Prohibition Act.[7] It did not; no warrant was required.[8] Protection from such a search might—if at all—emanate from statute, not the Fourth Amendment.

The Prohibition Era abounds with stories like this: Brazen searches and seizures, the legality of which was determined by the desire to enforce a new constitutional mandate at the expense of the Fourth Amendment. Doing otherwise, as Judge Bourquin put it, would be "to sanction the most pernicious evil of the day, and to undermine obedience to law, respect for government, and national morality."[9] These words appear inconsistent with his personal beliefs: Prohibition was "silly," "beneath the dignity of the federal court," and "an absolutely disgraced act of the government trying to

1. United States v. Apple, 1 F.2d 493, 493 (D. Mont. 1924).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 494.
7. National Prohibition Act, ch. 85, tit. II, § 25, 41 Stat. 305, 315 (1919), *repealed by* U.S. CONST. amend. XXI.
8. *See Apple*, 1 F.2d at 494.
9. *Id.*

regulate personal conduct."[10] But on the bench, Judge Bourquin was not venting his personal opinions. He was expounding the law of the land. And the law of the land had recently felt a minor addition: The Eighteenth Amendment to the United States Constitution became effective on January 17, 1920, practically outlawing alcohol.[11] At that time, one could scarcely predict that by Prohibition's end, the new amendment would transmogrify American policing and, consequently, the protections of the Fourth Amendment.

The noble experiment of national alcohol prohibition was conducted not only by police but also by judges, who condoned increasingly bold criminal investigation tactics. The Supreme Court allowed police to trespass onto land and seize alcohol without a warrant,[12] pull over cars and tear up their upholstery looking for intoxicating liquors,[13] arrest tax filers for failure to report illicit alcohol-related gains,[14] and wiretap home and office phone lines to gather evidence for liquor prosecutions[15]—to cite a few momentous decisions. The lower federal courts similarly did their part.[16] Though it proved impossible to end the manufacture, sale, and transportation of alcohol, police were granted extraordinarily broad leeway in their attempts to do so. Thus, the judiciary facilitated intrusive criminal investigations by limiting the protections of the Fourth Amendment, helping carry out the nation's only ever constitutionally mandated drug war.

The Prohibition Era came to a brisk end in 1933 through the only constitutional repeal to date.[17] Nevertheless, the Eighteenth Amendment left lasting effects—Fourth Amendment search and seizure jurisprudence had been bent and molded to accommodate its newly estranged sibling. That jurisprudence was relied on in countless drug prosecutions following the end of Prohibition and influenced the trajectory of future doctrinal

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10. ARNOLD GUTFELD, TREASURE STATE JUSTICE: JUDGE GEORGE M. BOURQUIN, DEFENDER OF THE RULE OF LAW 14 (2013).

11. U.S. CONST. amend. XVIII § 1 ("After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.").

12. Hester v. United States, 265 U.S. 57 (1924).

13. Carroll v. United States, 267 U.S. 132 (1925).

14. United States v. Sullivan, 274 U.S. 259 (1927). *Sullivan* is not discussed in-depth in this paper as I have written about it elsewhere as a necessary product of the Sixteenth Amendment's enumerated power to allow the collection of taxes on income "from whatever source derived." Mitchell A. Del Bianco, *"The Government Can't Take Taxes from Illegal Money!" The Self-Incrimination Carveout for Taxes on Illicit Gains* (unpublished manuscript) (on file with author).

15. Olmstead v. United States, 277 U.S. 438 (1928).

16. *See* discussion *infra* Part II.A–B.

17. U.S. CONST. amend. XXI § 1 ("The eighteenth article of amendment to the Constitution of the United States is hereby repealed.").

development.[18] Many of the Prohibition Era search and seizure cases remain good law to this day.[19]

In the lone law review article comprehensively evaluating the effect of Prohibition on Fourth Amendment jurisprudence, legal historian Kenneth Murchison asserted that the Supreme Court's decisions were the "product of major shifts in public opinion" about the national prohibition of alcohol.[20] He also recognized that the influence of Prohibition on the Fourth Amendment had been "largely ignored" and called for further research.[21] Many historians in the interim have demonstrated that Prohibition, at least as a sociocultural phenomenon, brought about significant changes in the administrative state and policing.[22] But none have evaluated the impact of Prohibition as a constitutional phenomenon.

This Article approaches the question of Prohibition's impact by recognizing what made it distinctive: Congress and the states went beyond ordinary statutes to enshrine a "bone-dry" national prohibition in the Constitution.[23] With that, liquor prohibition was elevated to the same position of legal authority as the abolition of slavery and the freedoms manifested in the Bill of Rights, including the right to be free from unreasonable searches and seizures. In the absence of other published work on the impact of the Eighteenth Amendment specifically, this Article seeks to examine how the changes legal historians observed in policing occurred via judicial action at the constitutional site where criminal investigations and citizens meet: the Fourth Amendment.

Ultimately, this Article explores and posits an alternative hypothesis about Prohibition's significance to Fourth Amendment doctrine: The existence of the Eighteenth Amendment itself, a new constitutional provision, allowed the judiciary to interpret the Fourth Amendment in a new

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18. For an explanation of the Eighteenth Amendment's effects in this domain, see Kenneth M. Murchison, *Prohibition and the Fourth Amendment: A New Look at Some Old Cases*, 73 J. CRIM. L. & CRIMINOLOGY 471, 520–32 (1982).

19. For some examples, see discussion *infra* note 387.

20. Murchison, *supra* note 18, at 529.

21. *Id.* at 472, 530.

22. *See, e.g.*, DANIEL OKRENT, LAST CALL: THE RISE AND FALL OF PROHIBITION 157 (2010); LISA MCGIRR, THE WAR ON ALCOHOL: PROHIBITION AND THE RISE OF THE ADMINISTRATIVE STATE 5 (2015); SARAH A. SEO, POLICING THE OPEN ROAD: HOW CARS TRANSFORMED AMERICAN FREEDOM 113–55 (2019); MARA L. KEIRE, FOR BUSINESS AND PLEASURE: RED-LIGHT DISTRICTS AND THE REGULATION OF VICE IN THE UNITED STATES, 1890–1933 114–35 (2010); WESLEY M. OLIVER, THE PROHIBITION ERA AND POLICING: A LEGACY OF MISREGULATION (2018); *see also* BEVERLY GAGE, G-MAN: J. EDGAR HOOVER AND THE MAKING OF THE AMERICAN CENTURY 113–28, 173 (2022) (detailing relationships between the fledgling Federal Bureau of Investigation and Bureau of Prohibition in enforcement and administration).

23. RICHARD F. HAMM, SHAPING THE EIGHTEENTH AMENDMENT: TEMPERANCE REFORM, LEGAL CULTURE, AND THE POLITY, 1880–1920 232–33 (1995).

but doctrinally principled manner, reconstruing the meanings of "reasonable," "persons, houses, papers, and effects," and "searches and seizures"[24] in light of the constitutional mandate to prohibit the manufacture, sale, transportation, importation, and exportation of intoxicating liquors.

However, this focus on constitutional interpretation does not ignore external pressures faced by courts during the Prohibition Era. To be sure, national prohibition had real-world effects to which the judiciary responded: an influx of cases through which doctrinal development could occur[25] as well as widespread violent[26] and organized[27] crime that invited new police authority. Indeed, the Eighteenth Amendment transformed how courts could respond to those very pressures, providing judges a constitutional basis to reconfigure Fourth Amendment protections.

Approaching Prohibition holdings from this angle reveals that the Court did not simply track public opinion in its judicial decisions. Rather, when police pushed the boundaries of the Fourth Amendment for the enforcement of national prohibition, the Court validated and encouraged those efforts whenever they were consistent with the Eighteenth Amendment and its principal enforcing statute, the National Prohibition Act. Indeed, the only Fourth Amendment area that received regular protection in the period was the home—an area carefully carved out in national prohibition statutes for special treatment. This finding offers a novel historical explanation for the exceptionalism of the home in Fourth Amendment jurisprudence beginning in the Prohibition Era and carrying on into the present.

This Article proceeds in three parts. Part I explores several cases that culminated in the Supreme Court's development of the exclusionary rule and demonstrate the liberal construction provided to the rights of citizens

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24. *See* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

25. It is difficult to overstate just how significantly Prohibition affected the federal criminal legal system. In 1929, there were 56,455 Prohibition cases, making up 66.2% of the federal caseload—in 1920 by comparison, the total number of federal criminal cases was just 34,230. *See, e.g.*, JOHN C. GEBHART, PROHIBITION ENFORCEMENT: ITS EFFECT ON COURTS AND PRISONS 2 (1930). Even on the civil side, Prohibition also came to represent an outsize portion of the federal docket—in 1930, civil federal Prohibition cases numbered 12,938, 52.3% of federal civil cases; in 1920, the total number of federal civil cases was just 5,526. *Id.* at 7.

26. *See* U.S. Dep't of Com., HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, pt. 1, ser. H 971–986 (1975) (indicating that the number of homicides increased practically every year during Prohibition, rising from 5,815 in 1920 to 12,124 in 1933).

27. *See, e.g.*, The FBI and the American Gangster, 1924–1938, FED. BUREAU INVESTIGATION, https://www.fbi.gov/history/brief-history/the-fbi-and-the-american-gangster (last visited May 16, 2026) ("In one big city alone—Chicago—an estimated 1,300 gangs had spread like a deadly virus by the mid-1920s. . . . Dealing with the bootlegging and speakeasies was challenging enough, but the Roaring Twenties also saw bank robbery, kidnapping, auto theft, gambling, and drug trafficking become increasingly common crimes." (internal quotes omitted)).

subject to criminal investigations prior to Prohibition. Part II proceeds by examining how the lower federal courts interpreted the interaction between the Fourth Amendment and the Eighteenth Amendment and its enforcing act. Part III discusses the Supreme Court's holdings in the area.

I. THE PRE-PROHIBITION CONSTRUCTION OF THE FOURTH AMENDMENT

Any beginning schoolboy knows
there is an Eighteenth Amendment—
and if there is an Eighteenth there must be a Fourth.

—Arthur Chapman, *The Newly Discovered Fourth Amendment*, N.Y. TRIB., Sep. 25, 1921, at 53

To understand how the Eighteenth Amendment altered conceptions of the Fourth Amendment, it is necessary to peek at the early twentieth century view of criminal investigation jurisprudence. The rule that evidence obtained in violation of one's rights should be excluded from being used against them at trial—the exclusionary rule—has been a fixture of federal criminal law for over one hundred years, but at the beginning of Prohibition, it was novel. Also relatively novel was the fact of the Supreme Court interpreting the Fourth Amendment at all. The first two decisions of the Court substantially interpreting the Fourth Amendment were handed down in 1878[28] and 1886,[29] long after the Amendment entered the Constitution.[30]

By the time of Prohibition, Fourth Amendment protections were amalgamated with the Fifth Amendment protection against self-incrimination. The Fourth Amendment reads:

> 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.[31]

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28. Ex parte Jackson, 96 U.S. 727 (1878) (holding that the protections of the Fourth Amendment extended to sealed mail sent via the postal system).

29. Boyd v. United States, 116 U.S. 616 (1886).

30. *But see* Ex parte Burford, 7 U.S. (3 Cranch) 448 (1806); Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807); Stacey v. Emery, 97 U.S. 642 (1878).

31. U.S. CONST. amend. IV.

And the Fifth Amendment ratified alongside it,

> No person . . . shall be compelled in any criminal case to be a witness against himself.[32]

Neither provision denotes a remedy for a violation. Nor does either provision clearly reference the other.

Nonetheless, the Fourth and Fifth Amendments (and their remedies) became intertwined in the Supreme Court's second significant interpretation of the Fourth Amendment in *Boyd v. United States*.[33] In *Boyd*, the Court was faced with an importation of thirty-five cases of polished plate glass where duties had not been paid.[34] The government sought to obtain the invoices for the glass as evidence for their case against the importers for forfeiture of the glass.[35] The government cited a statute which authorized the collection of such evidence for civil and criminal penalties as well as forfeiture of the imported goods.[36] The Court found that forcing by government action (a subpoena) the production of a company's own invoices would be tantamount to compelling one to be a witness against himself and an unreasonable search and seizure, violating *both* the Fourth and Fifth Amendments even in a civil forfeiture action.[37] This liberal construction was not only helpful, but *required* to protect the rights themselves:

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32. U.S. CONST. amend. V.
33. *See Boyd*, 116 U.S. at 633.
34. *Id.* at 617–19.
35. *Id.* at 619–20.
36. *Id.* at 619–21 (discussing the statute).
37. *Id.* at 633–38. The Court also stated, "proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal." *Id.* at 633–34. Recall that the Fifth Amendment privilege against self-incrimination specifically applies "in any *criminal* case." U.S. CONST. amend. V (emphasis added).

> It may be that [the search and seizure here] is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.[38]

The Court then invalidated the statute and stated that the admission of the invoice into evidence had resulted in *an unconstitutional proceeding*.[39] The holding also indicated that compelling one to turn over documents—even if the means of compulsion took the form of a court-reviewed subpoena—was a search or seizure within the meaning of the Fourth Amendment. Through *Boyd*, the Fourth and Fifth Amendments became doctrinally linked, with the strong suggestion that evidence obtained in violation of either right could not be utilized in court.[40] Besides suggesting the exclusionary rule, *Boyd* also demonstrated a mode of constitutional interpretation that would carry forward into the Prohibition Era. Parts of the Constitution were not siloed. Rather, they contemplated one another and were thus interactive.

Eleven years later, the Court confronted a case with a crime more significant than failing to pay import duties. *Bram v. United States* presented an instance of murder on the high seas.[41] At midnight, First Officer Bram was assigned to take the deck.[42] At two in the morning, passenger Lester H. Monks heard a scream followed by a gurgling sound.[43] He investigated, entering the captain's room and finding the captain dead on the floor, his cot overturned.[44] Such was only the beginning of Monks's traumatic discoveries. He next went to the captain's wife's room and found blood on her bed.[45] He then went abovedeck to fetch Bram and took him below with

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38. *Boyd*, 116 U.S. at 635.
39. *Id.* at 638.
40. For a fascinating discussion on *Boyd*'s role (and eventual decline) in Fourth and Fifth Amendment jurisprudence, see Note, *The Life and Times of* Boyd v. United States *(1886–1976)*, 76 MICH. L. REV. 184 (1977).
41. 168 U.S. 532 (1897).
42. *Id.* at 535.
43. *Id.*
44. *Id.*
45. *Id.*

a lantern to investigate the scene of the brutal crime.[46] As it would turn out, the captain was not the only victim; his wife and the second mate were later found dead as well, each with gashes carved through their skulls.[47] Bram took command of the ship for four days until another man, detained by the crew for the murders, told the others that he saw Bram kill the captain.[48] Bram was overpowered by the crew and brought off the ship in chains, claiming his innocence all the while.[49]

Back on dry land, a police detective stripped and questioned Bram, inviting him to accept moral responsibility for the crime which he suggested involved multiple perpetrators.[50] Bram persistently denied any involvement but stated that he thought the man who claimed to see him kill the captain was the murderer.[51] The trial court allowed the detective to testify to the conversation and Bram was subsequently found guilty and sentenced to death.[52] The Supreme Court, reviewing the case, invoked *Boyd*, stating:

> [B]oth [the Fourth and Fifth] [A]mendments contemplated perpetuating, in their full efficacy, by means of a constitutional provision, principles of humanity and civil liberty which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change.[53]

Despite the seriousness of the crime, the Amendments were no less applicable in *Bram* than in *Boyd*. The Court held that no matter how slightly coercion was involved in obtaining Bram's responses, the existence of coercion *at all* meant his responses were not admissible at trial.[54] The language used by the Court was broad: "In this Court, the general rule that the confession must be free and voluntary—that is, not produced by inducements engendering either hope or fear—is settled."[55] Like in *Boyd*, the evidence could not be admitted without violating the Fourth and Fifth

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46. *Id.*
47. *Id.* at 535–36.
48. *Id.* at 536.
49. *Id.* at 536–37.
50. *Id.* at 539.
51. *Id.*
52. *Id.* at 540–41.
53. *Id.* at 543–44.
54. *Id.* at 565.
55. *Id.* at 557–58. For a discussion of the Supreme Court's treatment of *Bram*'s seemingly broad protection of the Fourth and Fifth Amendments, see Welsh S. White, Miranda*'s Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1234 (2001), and Paul Marcus, *It's Not Just About* Miranda*: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 VAL. U. L. REV. 601, 606–07 (2006).

Amendments. Showcasing the rarity of such issues rising to the Supreme Court prior to Prohibition, it would still take nearly two decades for the exclusionary rule to formally develop.[56]

Finally, in 1914, the Supreme Court began requiring the exclusionary remedy in federal criminal prosecutions. The perfect case to mandate such a remedy was one where police had ostentatiously violated the rights of a criminal defendant. In *Weeks v. United States*,[57] Fremont Weeks was arrested without a warrant and had his home searched; police seized "all of his books, letters, money, papers, notes, evidences of indebtedness, stock, certificates, insurance policies, deeds, abstracts, and other muniments of title, bonds, candies, clothes, and other property in said home."[58] Among those papers were lottery tickets and writings regarding the lottery which the government used in the prosecution of Weeks for the use of the postal system to distribute lottery tickets.[59] As in *Boyd* and *Bram*, the Court confidently vindicated the Fourth Amendment, stating, "[i]f letters and private documents can thus be seized and held and used in evidence . . . the protection of the Fourth Amendment . . . is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."[60] The Court held that the search of Weeks's home and the taking of his papers violated his constitutional rights and required the exclusionary remedy.[61] The Court was careful to circumscribe the remedy as limited to the federal government,[62] a choice that would remain in force well after Prohibition, until 1961.[63]

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56. Comment, *The Meaning of the Federal Rule on Evidence Illegally Obtained*, 36 YALE L.J. 536, 537 (1927) ("When, in 1886, the United States Supreme Court decided the *Boyd* case . . . the exigencies of a prohibition era could not have been foreseen. Cases in which evidence had been procured by unconstitutional searches and seizures were relatively infrequent.").

57. 232 U.S. 383 (1914).

58. *Id.* at 387.

59. *Id.* at 386, 388–89, 399.

60. *Id.* at 393. The Court went further, stating that "[t]o sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." *Id.* at 394.

61. *Id.* at 398.

62. *Id.* This choice had clear repercussions through the Prohibition Era, with many states allowing illegally seized evidence in state criminal proceedings. *See The Meaning of the Federal Rule on Evidence Illegally Obtained*, *supra* note 56 (discussing the variety of state approaches to illegally seized evidence).

63. Mapp v. Ohio, 367 U.S. 643 (1961) (requiring the exclusionary remedy in state prosecutions where the Fourth Amendment had been violated).

Over the span of almost thirty years, *Boyd*, *Bram*, and *Weeks* made evident that the Supreme Court was ready to unravel federal cases that utilized evidence gathered by Fourth Amendment violations—from cases of import tax evasion to triple homicide. During the period, no single item on the Fourth Amendment's list of "persons, houses, papers, and effects" seemed to receive special treatment—all found protection under the promise of a liberal construction of the Amendment. Moving into the Prohibition Era then, a question loomed: How liberally would courts construe the Fourth Amendment, violations of which required impairing prosecutions, when the Constitution itself mandated the prohibition of alcohol?

II. ENFORCING THE EIGHTEENTH AMENDMENT IN THE LOWER FEDERAL COURTS[64]

When men can seriously debate whether or not under the Eighteenth Amendment Congress is authorized to destroy the Fourth Amendment . . . a serious breach has been made in the fundamental law of the land.

—*The Sacred Law of Prohibition*, AMERICA, April 28, 1923, at 38

Beyond the holdings of the Supreme Court which often dominated the focus of law reviews of the era, those of the lower courts have great significance in demonstrating how the Eighteenth Amendment provided a constitutional, doctrinal mechanism for altering the meaning and protections of the Fourth Amendment. The first section of the Eighteenth Amendment, the Prohibition Clause, reads:

> After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.[65]

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64. The cases discussed in this section were identified through comprehensive searches of federal reporters for the period 1920–1935 (including two years after Prohibition to catch any straggler cases) using search terms including "Eighteenth Amendment," "National Prohibition Act," "Volstead Act," "Fourth Amendment," "unreasonable search," "unreasonable seizure," and "exclusionary rule." However, the volume of Prohibition cases made exhaustive analysis impossible. Nevertheless, the cases presented here reflect a strand of legal thought that transcended circuits, geographies, ethnicities (as indicated by origin of last name), and political party of appointing President. Contemporary legal commentary is also examined that bolsters that finding.

65. U.S. CONST. amend. XVIII, § 1.

And the second, the Enabling Clause:

> The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.[66]

Pursuant to the Enabling Clause, Congress preemptively passed the National Prohibition Act on October 28, 1919.[67] In the early Prohibition years, many courts construed the Amendment's provisions as explicitly modifying the protection of the Fourth and Fifth Amendments. But the relationship was not synergistic; that is, the Eighteenth Amendment did not peacefully coexist with the two amendments—it smothered them. A half-decade into Prohibition, Professor Thomas E. Atkinson noted in the *Michigan Law Review* that despite his opinion that Prohibition clearly did not modify the protections of the Constitution, there was evidence that *one* lower court had adopted such a view.[68]

A. In the Federal District Courts

A succinct statement of the perspective of many of these lower courts can be appreciated in *Falstaff Corporation v. Allen*.[69] The case concerned whether the Eighteenth Amendment allowed Congress to pass a statute to confiscate and destroy liquor created for *medicinal purposes* (as opposed to *beverage purposes* as textually prohibited in the Eighteenth Amendment) in possession of someone who had, in the early years of Prohibition, obtained a permit from the Attorney General for that liquor.[70] Eastern District of Missouri Judge Charles Breckenridge Faris, later elevated to the Court of Appeals for the Eighth Circuit, declared:

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66. U.S. CONST. amend. XVIII, § 2.
67. National Prohibition Act, Pub. L. No. 66-66, ch. 85, 41 Stat. 305 (1919).
68. Thomas E. Atkinson, *Prohibition and the Doctrine of the* Weeks *Case*, 23 MICH. L. REV. 748, 749 (1925) (citing United States v. Bateman, 278 F. 231 (S.D. Cal. 1922)).
69. 278 F. 643 (E.D. Mo. 1922).
70. *Id.* at 643–44, 649.

> If so it be, that the power so conferred upon Congress by the Eighteenth Amendment had the effect to narrow, or impinge upon, or wholly wipe out, constitutional rights and guaranties heretofore deemed vested and inviolable, the situation may be regrettable, but it cannot be helped. The Constitution when amended must be construed as a whole. If later amendments destroy, impinge upon, modify, or wipe out old provisions, the newer provisions must stand, because they are the last utterance of the people, who reserve to themselves the right to change the organic law, in the way provided by the organic law itself. Of course, the Constitution, when amended, should, if possible, be so construed as to give effect to both the old and the new parts thereof; but if this be impossible, if the new inevitably and unquestionably changes old provisions and destroys antecedent guaranties, the only help for the situation is an amendment which will restore these rights and guaranties.[71]

Judge Faris thought it straightforward that the new Eighteenth Amendment, while only enacting a prohibition of intoxicating liquors "for beverage purposes,"[72] gave Congress the authority to bar further activity related to liquor traffic for the purpose of enforcing the Amendment.[73] Moreover, asserting a due process violation for the taking of alcohol after the Eighteenth Amendment was "utterly futile" because accepting such a claim would rob the Eighteenth Amendment of "what it fairly and obviously mean[t]" as an instrument to effectively prohibit the sale and traffic of alcohol.[74]

Only a day earlier, the Southern District of California noted a similar ripple effect of the Eighteenth Amendment on the Constitution.[75] In *United States v. Bateman*, the court stated in plain language that the Eighteenth Amendment had altered the meaning of the Fourth Amendment.[76] The new interpretation of "unreasonable searches and seizures" stemmed from the

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71. *Id.* at 648–49.

72. U.S. CONST. amend. XVIII § 1.

73. *Falstaff*, 278 F. at 643–45.

74. *Id.* at 649 ("[U]pon the passage of the Act of November 23, 1921 (which outlawed a large quantity of beer thus made and held by complainant), [defendants] were threatening to destroy the same unless complainant dealcoholized it at once. . . . [S]uch loss, which, in my view, would have been tantamount to taking the property of complainant without due process of law . . . ."); *see* U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .").

75. United States v. Bateman, 278 F. 231 (S.D. Cal. 1922).

76. *Id.* at 233 ("The Eighteenth Amendment must be considered in determining the question of what is an unreasonable search and seizure. . . . If there were no Eighteenth Amendment to the Constitution to be enforced, the court might have an entirely different idea of what is an unreasonable search or seizure in this case.").

reality of enforcing the Eighteenth Amendment. Everyone travelling anywhere in the country had become a potential constitutional violator, hiding intoxicating liquors in their cars, suitcases, and satchels.[77] Warrants for such searches were formalities that would render the Eighteenth Amendment unenforceable.[78] A person carrying liquor, whether on their person or in their bag or car, was not subject to the protections of the Fourth Amendment.[79] If such protections were provided, Judge Oscar A. Trippet opined, "the Eighteenth Amendment would have been stillborn."[80]

Hundreds of cars and thousands of containers had already been warrantlessly searched and seized without issue.[81] For Judge Trippet, the failure of Congress to add additional protections in light of national prohibition meant that they had tacitly agreed that the Fourth Amendment would provide less protection: "[If it] was contrary to the Fourth and Fifth Amendments of the Constitution for these things to be done, it is most astounding that Congress did not pass laws regulating such searches and seizures."[82] Fourth Amendment jurisprudence was fundamentally altered to allow for post hoc reasonableness; it was now the case that the "finding of the liquor justifies the search."[83]

Atkinson (and decades later Murchison) attempted to claim the kind of perspectives espoused by Judges Faris and Trippet as aberrational.[84] Yet many district courts throughout the country were reconceptualizing their interpretations of the Fourth and Fifth Amendments to accommodate the Eighteenth.

In the District of Montana, Judge Bourquin, a jurist unmistakably concerned with federal prohibition enforcement,[85] held that unlawful arrests could not prevent the introduction of liquor into evidence because all liquor in transportation was forfeited to the United States government "the moment defendants embarked upon the unlawful transportation" under the National

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77. *Id.* at 234.

78. *Id.*

79. *Id.* ("If an automobile, a suit case, satchel, tin container, jug, or bottle could not be taken away without a search warrant, they could not be seized at all . . . . Before a search warrant could be obtained, of course, the effect to be searched would be out of reach.").

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 235. This rhetoric was not unique to federal cases and was adopted in the highest courts of some states. *See, e.g.*, Tranum v. Stringer, 113 So. 541, 543 (Ala. 1927) ("In dealing with the individual case the fact that the automobile upon search is found to be transporting contraband liquors is of decided weight in passing upon the reasonableness of the search without warrant.").

84. Atkinson, *supra* note 68, at 749 n.6 (citing only two examples of cases in which courts appreciated the change in Fourth and Fifth Amendment jurisprudence as a result of the Eighteenth Amendment); Murchison, *supra* note 18, at 522 n.297 (citing the same two cases).

85. *See* discussion *supra* accompanying notes 6–9.

Prohibition Act.[86] And one could have no Fourth Amendment interest in something that was not theirs.

More broadly, the National Prohibition Act's protections for the home, "private dwellings," with a warrant requirement[87] meant to many judges that the other enumerated categories were worthy of less protection[88]—or, for the more zealous among them, that the definition of private dwelling needed constraining to enforce the Eighteenth Amendment.[89]

The warrant requirement also begot other creative jurisprudence: probable cause itself would provide the grounds to enter a house to conduct an arrest, permitting a search incident to arrest of the home after the fact.[90] A Western District of Pennsylvania judge related that providing a liberal construction of the Fourth Amendment—requiring a warrant—would mean that federal judges were "aid[ing] or abet[ting]" in the commission of a crime.[91] The Eighteenth Amendment was easily rallied to negate the interests of the Fourth when liquor law enforcement was at issue.[92]

An especially innovative judge in the District of Rhode Island invoked the Amendment's purposes (and borrowed the words of his colleague Judge

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86. United States v. Fenton, 268 F. 221, 222 (D. Mont. 1920) ("An unlawful arrest of an offender does not work a pardon in his behalf, and seizure without process and by force of government property [liquor], of which it is entitled to immediate possession, does not entitle the offender . . . to exclusion of its use in evidence against him.").

87. National Prohibition Act, ch. 85, tit. II, § 25, 41 Stat. 305, 315 (1919) ("No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor . . . .").

88. *See, e.g.*, United States ex rel. Soeder v. Crossen, 264 F. 459, 462 (E.D. Pa. 1920) (indicating that while dwellings are subject to Fourth and Fifth Amendment protections, vehicles are not due to the National Prohibition Act).

89. *See, e.g.*, O'Connor v. United States, 281 F. 396 (D.N.J. 1922) (holding that the warrantless seizure of liquor in a back-office room of a saloon was not an unreasonable seizure because all liquor not in a private dwelling is forfeited to the government as of Prohibition); United States v. Apple, 1 F.2d 493, 493–94 (D. Mont. 1924); *see also* FORREST REVERE BLACK, ILL-STARRED PROHIBITION CASES: A STUDY IN JUDICIAL PATHOLOGY 134–36 (1931) (describing an unpublished case from the Eastern District of South Carolina's October 1925 term where Judge Ernest F. Cochran extended the logic of warrantless automobile searches to a houseboat on land).

90. United States v. Borkowski, 268 F. 408, 412 (S.D. Ohio 1920) (holding that police could warrantlessly enter a home upon smelling raisins cooking and search and seize incident to arrest of the people therein); *cf.* United States v. Lorenz, 17 F.2d 829, 829–30 (D. Mont. 1927) (permitting warrantless searches of three private dwellings where the odor of liquor provided probable cause).

91. United States v. A Quantity of Contraband Liquor & Miscellaneous Articles, 47 F.2d 321, 327–28 (W.D. Pa. 1930).

92. *See* United States v. Hilsinger, 284 F. 585, 588 (S.D. Ohio 1922) ("On the one side stand the fundamental rights of which I speak, upon the other side stands the impossibility of enforcing the Eighteenth Amendment and the law . . . ."), *aff'd*, 2 F.2d 241 (6th Cir. 1924); United States v. Ashworth, 7 Alaska 64, 79 (D. Alaska 1923) ("The searches and seizures [of liquor] were plainly authorized and adapted to constitutional ends, in view of the Eighteenth Amendment . . . ."); United States v. Vatune, 292 F. 497, 498 (N.D. Cal. 1923) ("[T]he real contention of defendant is that . . . the terms of the Fourth and Fifth Amendments actually protected him in the positive and flagrant violation of the Eighteenth Amendment.").

Bourquin over two thousand miles away) to justify a search of a private dwelling where there was suspicion of liquor *manufacture*, defying the plain language of the National Prohibition Act which only allowed warrants to issue for private dwellings where there was evidence of *sale*.[93] In the hands of federal judges, the Prohibition Clause could be weaponized to undercut protections of the principal statute passed under the Enabling Clause when a bootlegger might run free. Indeed, when a search turned up liquor, "whether a search warrant has issued or not," that meant to some judges that a "seizure not only is legal but mandatory."[94]

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93. United States v. Nobriga, 19 F.2d 92, 93–95 (D.R.I. 1927) ("To impute to Congress an intent to . . . put violations of [liquor statutes] beyond the pale of the law, is, as said in one case, 'to charge it with an intent . . . to sanction the most pernicious evil of the day.'" (quoting *Apple*, 1 F.2d at 494)), *rev'd*, 22 F.2d 507 (1st Cir. 1927).

Judge Bourquin, likely because of his well-received zealousness, soon found himself much closer to Rhode Island, temporarily assigned to the District of New Jersey to help with its massive caseload. *Jurors Praise Judge Bourquin in Liquor Cases*, L.A. TIMES, Apr. 2, 1925, at 19; *Quits New Jersey Bench*, N.Y. TIMES, Nov. 19, 1931, at 25. In his brief time on assignment in New Jersey, Judge Bourquin, "disposed of more cases in his two months' stay than usually were handled in a year. He assessed heavy fines and filled the jail in sentencing offenders, most of whom were tried for violation of the liquor laws." *Quits New Jersey Bench*, N.Y. TIMES, Nov. 19, 1931, at 25. Some of the prosecutorial success in Judge Bourquin's cases owed to the fact that in several liquor cases, Judge Bourquin stated "[t]he crimes have been proven," prejudicing juries. *6 Wet Convictions Upset*, N.Y. TIMES, May 10, 1932, at 22. For Judge Bourquin's most incendiary opinion in his time on the East Coast, see United States v. Rogers, 53 F.2d 874 (D.N.J. 1931), *aff'd in part sub nom*. Mabee v. United States, 60 F.2d 209 (3d Cir. 1932), *aff'd sub nom.* Burkis v. United States, 60 F.2d 452 (3d Cir. 1932), *aff'd sub nom.* Strogan v. United States, 60 F.2d 483 (3d Cir. 1932).

Judge Bourquin's harshness on defendants did not mean he was soft on prosecutors. To the contrary, poor prosecutorial practice in Bourquin's courtroom resulted in so many findings of contempt that *Washington Post* claimed, "it is probable no other judge has fined so many district attorneys." *Speedy Judge in Senate Race a Zestful Critic*, WASH. POST, June 3, 1934, at 6.

94. *See, e.g.*, United States v. Charles, 8 F.2d 302, 302–03 (N.D. Cal. 1925).

Of course, some judges attempted to stop the onslaught against the Fourth Amendment,[95] but the rhetoric of the pro-enforcement judges seemed to win out. As Alaska territorial Judge Gudbrand J. Lomen put it in 1923, only three years after the start of Prohibition, "[*t*]*he courts* have held that the Fourth Amendment must be construed in the light of the Eighteenth Amendment."[96]

Even if courts never adopted the position that the Eighteenth Amendment meant an implied repeal of the Fourth and Fifth Amendments,[97] taking that particular position is not essential to maintain the claim that courts changed Fourth and Fifth Amendment jurisprudence in the shadow of the Eighteenth Amendment. As one comment in a 1925 volume of the *Yale Law Journal* observed,

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95. *See, e.g.*, United States v. Rykowski, 267 F. 866 (S.D. Ohio 1920) ("The Eighteenth Amendment to the federal Constitution is as sacred as the Fourth and Fifth Amendments, but no more so. They stand on an equality. There is no inconsistency between them."); United States v. Marquette, 271 F. 120, 122 (N.D. Cal. 1920) ("The outlawing of liquor by the Eighteenth Amendment did not abrogate either the Fourth or Fifth Amendment to the Constitution, and the zeal of the enforcement officers in pursuing this recent outlaw cannot be permitted to carry them without warrant across the threshold of the home."); United States v. Mitchell, 274 F. 128, 129–30 (N.D. Cal. 1921) (similar); United States v. Vallos, 17 F.2d 390, 393 (D. Wyo. 1926) ("The Fourth and Fifth Amendments to the Constitution of the United States are as much a part thereof as the Eighteenth Amendment, and must be as equally observed."); United States v. Innelli, 286 F. 731, 732 (E.D. Pa. 1923) ("Let it not be forgotten that there were prohibitions in the Constitution before the Eighteenth Amendment. Among them are the Fourth and Fifth."); United States v. Rembert, 284 F. 996, 1004 (S.D. Tex. 1922) ("[It] cannot be the law in criminal cases that an illegal arrest or search could be legalized by the finding of evidence that a crime had been committed . . . ."); United States v. Allen, 16 F.2d 320, 322 (S.D. Fla. 1926) ("[I]t is incumbent upon those empowered to enforce the Eighteenth Amendment to be careful at the same time not to violate the rights guaranteed under the Fourth Amendment."); United States v. Falloco, 277 F. 75 (W.D. Mo. 1922) (finding that the exclusionary remedy was required where there was collusion between federal and state officers and state officers engaged in the search); United States v. Di Corvo, 37 F.2d 124, 132–33 (D. Conn. 1927) ("[T]he barn was not the dwelling house of the defendants. But this [point] could become of importance only if the defendants had insisted upon immunity [under] . . . the National Prohibition Act. The Fourth Amendment throws a mantle of protection around 'houses' generally—not merely dwelling houses.").

96. *Ashworth*, 7 Alaska at 71 (emphasis added).

97. So far as I can tell, such an argument was only raised in legal academic writing and was not advocated by the broader temperance movement. *See, e.g.*, Frederic A. Johnson, *Some Constitutional Aspects of Prohibition Enforcement*, 97 CENT. L.J. 113 (1924) (arguing that the means used to obtain evidence in Prohibition cases will usually be unlawful due to the Fourth and Fifth Amendment protections, and thus the Eighteenth, the newer amendment, meant the implied repeal of earlier amendments which render it inefficacious).

> The application of the federal [exclusionary] rule to these new conditions has not been easy. The purpose of the rule as an auxiliary to the Constitution has often been found incompatible with the task of enforcing present day laws, and courts have been willing to forego the former to accomplish the latter.[98]

* * *

The role of the district courts cannot be overstated. As trial courts, they were presented with the first opportunities to determine the interaction of the Eighteenth Amendment and the exigencies of its enforcement with the Fourth Amendment. Moreover, several of their opinions found their way into briefings before the Supreme Court.[99] The district courts were also quickly inundated with vast numbers of alcohol-related cases. By 1921, federal criminal Prohibition cases numbered 21,297, about 45% of the federal district court criminal docket.[100] In 1929, the cases numbered 56,455, 66% of the federal criminal docket.[101] District court judges found no respite from Prohibition in their handling of civil cases. The same year, there were 10,617 civil Prohibition cases, 50% of the federal government's civil district court docket—mainly padlock injunctions and forfeitures.[102] In total, federal district judges were confronted with at least 659,333 criminal and 113,165 civil Prohibition cases.[103] There were also indeterminate numbers of associated cases that flowed from liquor manufacture and

98. *The Meaning of the Federal Rule on Evidence Illegally Obtained*, *supra* note 56.

99. *See, e.g.*, *infra* Part III.A (discussing briefings in *Hester* and *Carroll*).

100. GEBHART, *supra* note 25, at 2.

101. *Id.*

102. GEBHART, *supra* note 25, at 5–8. *Cf.* above figures with numbers detailed *infra* note 103.

103. 1920 ATT'Y GEN. ANN. REP. 142 (7,291 criminal and 611 civil National Prohibition Act cases commenced); 1921 ATT'Y GEN. ANN. REP. 101 (29,114 criminal and 1,898 civil); 1922 ATT'Y GEN. ANN. REP. 82 (34,984 criminal and 2,137 civil); 1923 ATT'Y GEN. ANN. REP. 86 (49,021 criminal and 4,109 civil); 1924 ATT'Y GEN. ANN. REP. 120 (45,878 criminal and 5,741 civil); 1925 ATT'Y GEN. ANN. REP. 138 (50,743 criminal and 7,271 civil); 1926 ATT'Y GEN. ANN. REP. 132 (44,492 criminal and 8,642 civil); 1927 ATT'Y GEN. ANN. REP. 84 (40,709 criminal and 9,479 civil); 1928 ATT'Y GEN. ANN. REP. 92 (55,729 criminal and 9,928 civil); 1929 ATT'Y GEN. ANN. REP. 3 (56,786 criminal and 11,237 civil); 1930 ATT'Y GEN. ANN. REP. 110 (56,992 criminal and 11,882 civil); 1931 ATT'Y GEN. ANN. REP. 6 (57,405 criminal and 12,374 civil); 1932 ATT'Y GEN. ANN. REP. 8 (65,960 criminal and 15,455 civil); 1933 ATT'Y GEN. ANN. REP. 3 (57,553 criminal and 11,478 civil); 1934 ATT'Y GEN. ANN. REP. 3 (6,676 criminal and 923 civil). Note that these numbers only account for cases arising under the National Prohibition Act, not other liquor offenses.

trafficking: tax fraud,[104] racketeering,[105] homicides in defense of bootlegging,[106] kidnapping, and election fraud,[107] to give a few examples.

SEVEN SLAIN IN MASSACRE BY CHICAGO GANGSTERS

Victims Stood Up Against Wall and Mowed Down by Machine Guns; Killers Coolly Drive Off

Seven Slain in Massacre by Chicago Gangsters, L.A. TIMES, Feb. 15, 1929, at 1[108]

These massive increases in docket size foreclosed greater scrutiny into individual cases at the very moment when careful scrutiny was most needed, as searches and seizures multiplied exponentially. One federal judge, John F. McGee of the District of Minnesota, became known as the "bootlegger's terror," sentencing 112 defendants in 193 minutes—providing each defendant a little less than 2 minutes of attention.[109] But the terror of Prohibition was not felt by defendants alone in Judge McGee's court. On February 15, 1925, Judge McGee's daughter entered his chambers and

104. *See, e.g.*, United States v. Yuginovich, 256 U.S. 450 (1921).

105. *See, e.g.*, Perry v. United States, 18 F.2d 477 (8th Cir. 1927); Hogan v. United States, 48 F.2d 516 (5th Cir. 1931), *on reh'g*, 54 F.2d 924 (5th Cir. 1932).

106. *See, e.g.*, *Jury Charges Murder in Dry Agents' Deaths*, N.Y. TIMES, Jan. 24, 1930, at 19.

107. John Landesco, *Prohibition and Crime*, 163 ANNALS AM. ACAD. POL. & SOC. SCI. 120, 126 (1932).

108. This story, published in the *Los Angeles Times*, concerned the infamous Saint Valentine's Day Massacre, a sensational mass killing in Chicago. For a less sensational account of the facts from the period, see Calvin Goddard, *The Valentine Day Massacre: A Study in Ammunition-Tracing*, 1 AM. J. POLICE SCI. 61, 61 (1930).

109. *Federal Judge J.F. McGee Shoots Himself*, N.Y. TIMES, Feb. 16, 1925, at 1. Beyond the sheer volume of cases, Judge McGee was reputed for his harsh sentences. In 1923, he was noted as issuing "[t]he heaviest fines and the longest jail sentences ever recorded in Minnesota since the advent of national prohibition." *Fines, Prison Terms Startle Rum Violators*, MINNEAPOLIS DAILY STAR, July 11, 1923, at 2. One of those records was ten years imprisonment for two counts of liquor possession. *Id.*; *cf. Limit in Rum Penalties Fixed by Judge M'Gee*, MINNEAPOLIS DAILY STAR, Apr. 24, 1923, at 13 (recounting that for Judge McGee's first liquor cases, he gave prisoners the maximum fine, "a penalty exceeding in severity all records in Minneapolis.").

found her father dead from a gunshot to the heart.[110] In a handwritten note on his desk, Judge McGee reflected on the role that he found himself trapped in:

> About Jan. 10, last, I finished the St. Paul term in a very much exhausted condition, both mentally and physically. I have . . . held court since I went on the bench in March, 1923, six days in the week instead of five, and seven and one-half hours per day instead of five, winter and summer, without vacation, the matters heard and submitted piling up except when taken home nights and Sundays and worked on there.
>
> March, 1924, after one year of that sort of work, I practically collapsed but rested for a short time and when the April, 1924, term commenced, I went on with my work.[111]

But the work did not stop, and Judge McGee, despite advice from others, forged on: "I thought how foolish to say rest with my desk drawers filled with undecided cases and demands daily made upon me for decisions . . . and then on for another year with no rest in sight."[112] To Judge McGee, Prohibition had inexorably changed what it meant to be a federal judge, "the United States district court has become a police court for the trial of whisky and narcotic cases . . . . Those cases occupy 80 per cent of the court's time and are exciting and trying on the nerves with the end not in sight."[113] The docket was insurmountable: "I started, in March 1923, to rush that branch of litigation and thought I would end it, but it has ended me."[114]

* * *

By the waning years of Prohibition, sufficient time had passed for judges to master ruthlessly efficient prohibition enforcement. Judge Bourquin, grizzled by over a decade of experience in Prohibition cases, disposed of

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110. *See Federal Judge J.F. McGee Shoots Himself*, *supra* note 109, at 1; *cf. Judge M'Gee's Death is Laid to Overwork*, MINNEAPOLIS DAILY STAR, Feb. 16, 1926, at 1 (indicating cause of death as gunshot wound to forehead).

111. *Judge M'Gee's Death is Laid to Overwork*, *supra* note 110, at 1.

112. *Id.* at 2.

113. *Id.*

114. *Federal Judge J.F. McGee Shoots Himself*, *supra* note 109, at 1. Despite his reputation in the space, McGee garnered respect among his defendants. At his funeral, a group of bootleggers provided a floral wreath and another was quoted in the press as stating "[h]e was against bootlegging and he didn't make any secret of it. He was fighting in the open. He did a lot of good, too." *See Omaha Bootleggers Send Floral Tribute to McGee Funeral*, MINNEAPOLIS DAILY STAR, Feb. 19, 1925, at 3.

defendants at a rate of two per minute, almost three times as fast as the "bootlegger's terror."[115] As district court caseloads became disproportionately composed of cases involving liquor, judges were themselves judged on their stances in enforcing the Eighteenth Amendment and the National Prohibition Act—their performance reviews were not positive. As noted in the government's 1931 Report on the Enforcement of the Prohibition Laws of the United States—two years before the repeal of the Eighteenth Amendment—"[t]here has been a general bad effect upon the whole administration of justice. There has been a tendency to appraise judges solely by their zeal in liquor prosecutions."[116] In enforcing the Eighteenth Amendment, federal district courts had been transformed from "impressive tribunals of superior jurisdiction" into "police courts."[117] And inevitably, that sheer volume of cases generated important doctrinal momentum. "Out of the mass of printed precedent," the district courts began the project of crystallizing "a new federal rule defined to meet the needs of [P]rohibition."[118]

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115. *Speedy Judge in Senate Race a Zestful Critic*, WASH. POST, June 3, 1934, at 6.

116. NAT'L COMM'N ON LAW OBSERVANCE & ENF'T, REPORT ON THE ENFORCEMENT OF THE PROHIBITION LAWS OF THE UNITED STATES 103 (1931) [hereinafter REPORT ON PROHIBITION].

117. *Id.* at 101. For a far more vivid and poetic contemporary description of this transformation, see H.L. Mencken, *Editorial*, 1 AM. MERCURY 161 (1924).

118. Comment, *Enforcing Prohibition Under the Federal Rule on Unreasonable Searches*, 36 YALE L.J. 988, 988 (1927).

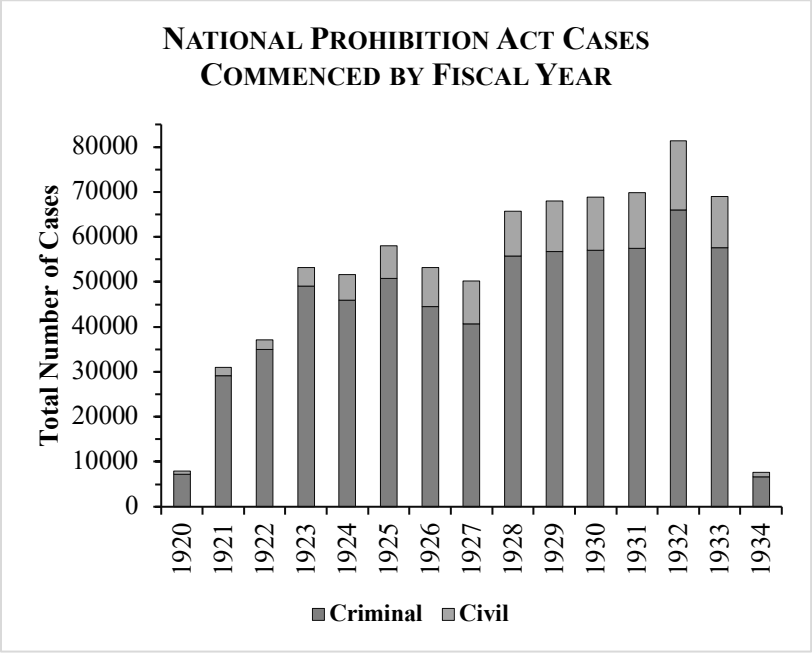

FIG. 1. NATIONAL PROHIBITION ACT CASES COMMENCED IN FEDERAL DISTRICT COURT BY FISCAL YEAR[119]

B. In the Federal Circuit Courts

Like many district courts, several circuit courts advanced the position that Prohibition altered the Fourth Amendment. In *Milam v. United States*, prohibition officers had notice a few days in advance that an automobile loaded with liquor would travel from Florida to Virginia.[120] Officers did not obtain a search warrant but instead camped in wait at a Virginia bridge they expected the automobile to cross.[121] On the night of August 16, 1922, the officers conducted a warrantless stop of a truck crossing the bridge.[122] The driver disclaimed that there was anything inside.[123] Opening the back of the truck, the officers did not find liquor; instead, they found eighteen undocumented Chinese immigrants.[124] The driver and immigrants were charged with conspiracy to "conceal, harbor, transport, and convey persons

119. Created using Reports discussed *supra* note 103.
120. Milam v. United States, 296 F. 629, 630 (4th Cir. 1924), *cert. denied*, 265 U.S. 586 (1924).
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*

of Chinese descent not duly admitted into the United States" and various other immigration offenses.[125]

Milam is unique because it provided a test case whereby an appellate court was faced with a rationale to search (for liquor) which was not justified by the findings (not liquor). However, the Fourth Circuit was quick to point out the extraordinary transformation that the Eighteenth Amendment had worked on the Constitution:

> The constitutional expression, "unreasonable searches," is not fixed and absolute in meaning. The meaning in some degree must change with changing social, economic and legal conditions. The obligation to enforce the Eighteenth Amendment is no less solemn than that to give effect to the Fourth and Fifth Amendments. The courts are therefore under the duty of deciding what is an unreasonable search of motor cars, in the light of the mandate of the Constitution that intoxicating liquors shall not be manufactured, sold, or transported for beverage purposes. Every constitutional or statutory provision must be construed, with the purpose of giving effect, if possible, to every other constitutional and statutory provision, and in view of new conditions and circumstances in the progress of the nation and the state.[126]

The court further expounded that "[o]bjections to such searches made by officers with due courtesy and judgment generally come, not from citizens interested in the observance of the law, but from criminals who invoke the Constitution as a means of concealment of crime."[127] Requiring a warrant meant the courts would be aiding the very crimes outlawed in the Constitution itself.[128] With this ardent rhetoric, the court upheld the constitutionality of the search on the grounds that searching for alcohol without a warrant was not an unreasonable search barred by the Fourth and Fifth Amendments.[129]

With cases like *Milam*, the Fourth Circuit presented the view that many district courts throughout the country pushed: The Eighteenth Amendment was a part of the Constitution that necessarily modified Fourth Amendment protections.

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125. *Id.* at 629–30.

126. *Id.* at 631; *cf.* Elrod v. Moss, 278 F. 123, 129 (4th Cir. 1921) (espousing this view in one of the Fourth Circuit's first Prohibition Era liquor search and seizure cases).

127. *Milam*, 296 F. at 631.

128. *Id.* ("To hold that such motor cars must never be stopped or searched without a search warrant would be a long step by the courts in aid of the traffic outlawed by the Constitution.").

129. *Id.* at 632.

But the Fourth Circuit was not alone in shifting Fourth Amendment jurisprudence to enforce the mandate of the Eighteenth. In *McBride v. United States*, the Fifth Circuit held there was no Fourth Amendment violation when prohibition officers trespassed past a property's gate, approached a stable on the property and, upon smelling whiskey, entered and opened a trapdoor inside, revealing two Black men and a still.[130] The court stretched the concept of searches incident to arrest to allow the officers' testimony about the search against the White estate owner. Despite recognizing that the officers trespassed onto the property while looking for violators of the National Prohibition Act before smelling any whiskey, the court held: "The entry on these premises and into the stable was not to search for evidence, but, upon ascertaining that whisky was in process of manufacture thereon, to arrest those engaged in the commission of an offense then in progress."[131] In doing so, the Fifth Circuit signaled that prohibition agents could trespass onto properties, articulate a non-evidentiary reason for their presence, and then, when discovering evidence of an ongoing crime, search the property, rendering the initial entry reasonable or otherwise not part of the search. Here, like in *Bateman*, the finding of the liquor seemed to justify the search.

The trend of degradation of the Fourth Amendment continued. The Fourth Circuit extended *Milam*'s doctrine to allow a warrantless search of a yard in a lot surrounded "on three sides by a high fence, with a barbed wire on top, and a wire fence in front" behind a store after warrantlessly searching the building and finding nothing.[132] The Ninth Circuit greenlit the warrantless searches of a double-layered package within an automobile,[133] the cabinets behind the bar of a soft drink parlor,[134] and a car parked inside a basement garage of a home.[135] Following a string of apparently coordinated state and federal raids in Kentucky, the Sixth Circuit held that the fact that a federal officer accompanied state officers fell short of the "minimum of participation" that "could justify invoking the Fourth Amendment" in the first place.[136] (Recall that the Fourth Amendment had not yet been incorporated.) In Pennsylvania, after state troopers unlawfully seized a truck for use in a federal prosecution, the Third Circuit was faced

130. 284 F. 416, 416–17 (5th Cir. 1922), *cert. denied*, 261 U.S. 614 (1923).
131. *Id.* at 419.
132. Jones v. United States, 296 F. 632, 633–34 (4th Cir. 1924).
133. Lambert v. United States, 282 F. 413, 413–17 (9th Cir. 1922).
134. Kathriner v. United States, 276 F. 808, 809–10 (9th Cir. 1921).
135. Earl v. United States, 4 F.2d 532, 532 (9th Cir. 1925).
136. Gatterdam v. United States, 5 F.2d 673, 673–74 (6th Cir. 1925) (citing Crawford v. United States, 5 F.2d 672 (6th Cir. 1925)) (holding that defendants who had their property searched, including a house, by state officers were not subject to the protection of the Fourth Amendment).

with the same problem from the opposite angle.[137] No matter; the court held that even where state troopers were accompanied by federal officers, took the defendant before a United States Commissioner, and subjectively believed ("merely their personal opinion") that they were enforcing the National Prohibition Act, those facts were not enough to "give a federal character to their action."[138] The Fourth Amendment was therefore unavailable. Though not every circuit decision proved destructive to the Fourth Amendment,[139] many of them bound district courts therein to interpret searches and seizures in a manner that would enforce the mandate of the Eighteenth.

Sometimes, not even the home was sacred. The Eighteenth Amendment provided the Eighth Circuit justification to effectively dispose of the National Prohibition Act's provision requiring warrants to search private dwellings for alcohol and allowing their issuance only when a dwelling was used for the sale of intoxicating liquors.[140] In *Wida v. United States*, officers without a warrant drove 120 miles to a home where they had "reasonable information" that the appellant was *manufacturing*, not *selling*, liquor.[141] Upon arriving at the house, they smelled fermentation.[142] When the appellant answered the door, he was arrested and questioned about the location of the alcohol.[143] The officers proceeded to search his home and basement, finding a still.[144]

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137. Miller v. United States, 50 F.2d 505, 507 (3d Cir. 1931).

138. *Id.* at 507–08.

139. *See, e.g.*, Murby v. United States, 293 F. 849, 852 (1st Cir. 1923) ("We must enforce the Fourth and Fifth Amendments and statutes intended to protect rights thus guaranteed, as faithfully as we enforce the Eighteenth Amendment and the National Prohibition Act."); Peru v. United States, 4 F.2d 881, 882 (8th Cir. 1925) ("[T]o enforce and give effect to the Eighteenth Amendment to the Constitution, the force of other amendments thereto should not be minimized. It is fully as important to enforce the Fourth and Fifth Amendments to the Constitution as it is to enforce the Eighteenth Amendment."); Kroska v. United States, 51 F.2d 330, 333 (8th Cir. 1931) (rejecting the use of information obtained from entry into curtilage for probable cause for an automobile search); Snyder v. United States, 285 F. 1 (4th Cir. 1922) (refusing to allow a search of a person for alcohol based on mere suspicion). The *Snyder* court also noted "[t]hat [the bottle] happened in this instance to contain whisky, we think, neither justifies the assault nor condemns the principle which makes such an act unlawful." 285 F. at 3.

140. National Prohibition Act, ch. 85, tit. II, § 25, 41 Stat. 305, 315 (1919). Puzzlingly, the court also acknowledged the National Prohibition Supplemental Act, ch. 134, § 6, 42 Stat. 222, 223 (1921), which made it a misdemeanor for any "officer, agent, or employee of the United States engaged in the enforcement of this Act, or the National Prohibition Act, or any other law of the United States, who shall search any private dwelling as defined in the National Prohibition Act, and occupied as such dwelling, without a warrant directing such search." Therefore, the court was well aware of the specific protections that the drafters of the National Prohibition Act intended but decided to sideline them in the practical interest of enforcing Prohibition.

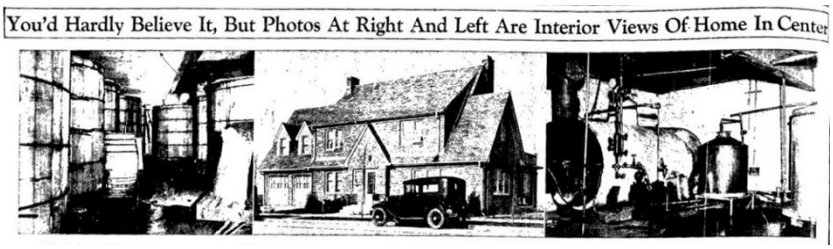
141. 52 F.2d 424, 425–26 (8th Cir. 1931).

142. *Id.* at 424.

143. *Id.*

144. *Id.*

The Eighth Circuit held that there had been no unreasonable search or seizure.[145] The court, noting the special difficulties of prohibition enforcement, retorted to would-be critics that holding otherwise would mean "a man could openly and notoriously conduct a distillery in his own house which the officers might . . . absolutely know was there, and yet there could be no search of these premises because the officers were unable to prove a sale of liquor on or from the premises."[146] With that, the court balked at the idea of requiring police officers to obtain a warrant to search a home for alcohol where they had probable cause, even when such a warrant was required and could not issue by the plain text of the National Prohibition Act.[147]



PHOTOS OF HOME DISTILLERY *in Huge Still Uncovered by Raiders*, SHEBOYGAN PRESS, May 6, 1932, at 6[148]

An Assistant United States Attorney's statement in the *New York Times* from eight years earlier now appeared prophetic:

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145. *Id.* at 426.

146. *Id.* at 425.

147. A similar rationale was provided for a home search in *United States v. Apple*, discussed *supra* Introduction. *See* 1 F.2d 493, 494 (D. Mont. 1924).

148. This home distillery, while not the one in *Wida*, demonstrates that homes could be an immense source of liquor traffic. The vats pictured in the left image contained "about 14,800 gallons of grain mash." *Huge Still Uncovered by Raiders*, SHEBOYGAN PRESS, May 6, 1932, at 6.

> For a hundred and forty-odd years, of course, we have had our Constitution, and in a vague way most people felt comfortable in the thought that under this document a man's home was, somehow or other, his castle. That castle was erected, however, many years ago; it seemed for a while after the commencement of the Volstead era that it had become antiquated and must crumble before the onslaughts of the minions of prohibition.[149]

Even earlier, in 1921, editors for the Jesuit magazine *America* wrote similar predictions for Catholic religious Free Exercise rights,[150] citing the destruction of the Fourth Amendment among others as precedent: "The Eighteenth Amendment has already destroyed a right reserved under the Constitution to the respective States. . . . In many parts of the country it has destroyed the right guaranteed by the Fourth Amendment. The next extension will be to destroy the Mass."[151] The article's title distilled the provocative question many Americans undoubtedly pondered: *Prohibition or the Constitution?*[152] Of course, as the reasoning of many lower courts laid bare, this was oversimplistic. The choice was not between Prohibition or the Constitution: The Bill of Rights and the Eighteenth Amendment were equally part of it. Instead, the choice was how to balance the Eighteenth Amendment's "inflexible and perpetual war" against liquor against other parts of the Constitution that stood in the way of that crusade.[153]

By the mid-1920s, the choices of lower courts in that balancing were widely felt. An Alabama farmer vented his frustration in a letter to the *Birmingham Post*: "They should have repealed the fourth amendment before passing the 18th. I am for 'liberty or death.'"[154] A Vermont editor similarly expressed, "[i]f prohibition enforcement is to be respected, there

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149. Victor House, *Search and Seizure Limits Under the Prohibition Act*, N.Y. TIMES, Feb. 11, 1923, at 148. Such an appraisal of the protection afforded to the home was not isolated. *See also* MCGIRR, *supra* note 22, at 89–95 (describing the particularly egregious treatment of the homes of minority groups and noting that an editor of one African-American newspaper wrote "[a] man's home used to be his castle. Now it is the United States government's castle and the rights and privileges have been taken away").

150. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

151. *Prohibition or the Constitution?*, AMERICA, Aug. 20, 1921, at 425.

152. *Id.* at 424. I have written at length on the interaction of the Eighteenth Amendment, the National Prohibition Act's exemption for sacramental wines, and the Free Exercise Clause. *See* Mitchell A. Del Bianco, *Free Exercise on the Rocks: Religious Liberty in the Prohibition Era*, 13 DARTMOUTH L.J. (forthcoming).

153. S. Rep. No. 65-52, at 5 (1917).

154. *Farmers' Views on Prohibition Widely Varied*, BIRMINGHAM POST, June 25, 1926, at 9 (quoting Patrick Henry, Speech at the Second Virginia Convention (Mar. 23, 1775)).

must be respect shown for the fourth amendment."[155] In Miami, a columnist railed against the state of policing and wrote exasperatedly, "[o]ne constitutional amendment cannot be invoked to cancel another. The two must harmonize. . . . For the sake of [Prohibition] itself[,] some of the enforcers must reform."[156] A New Jersey reader of the *Brooklyn Citizen* blamed judges clearly and directly, "[t]he courts everywhere, . . . have whittled away this amendment until there is nothing left but protection of the home."[157] Likewise, under a front-page headline blaring, "FOURTH AMENDMENT THREATENED," an editor in Nebraska wrote, "[i]t has been decided by thinking men and by those who have had occasion to define our laws . . . that the eighteenth amendment . . . directly opposes the fourth."[158] The editor had a threatening message for those "thinking men." If the Fourth Amendment continued to be trampled, "our thinking people are willing to fight and die again [like the founding generation] to maintain its sacredness."[159]

* * *

When examining the Eighteenth Amendment and the National Prohibition Act, a not insignificant number of district and appellate courts modified their Fourth Amendment jurisprudence in ways that accommodated the mission of Prohibition enforcement. On one hand, the finding of alcohol often seemed to render warrantless searches for alcohol per se reasonable. On the other, holdings like *Milam* explicitly stated that the Eighteenth Amendment had changed what was a reasonable search even when no alcohol was found. The Supreme Court, though not as brazen in its language as many of the lower courts, also indicated that the Eighteenth Amendment altered the meaning of the Fourth Amendment and the Constitution more broadly.

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155. *Search and Seizure*, RUTLAND DAILY HERALD, May 21, 1926, at 4.
156. *Illegal Dry Enforcement*, MIA. HERALD, Sep. 11, 1925, at 6.
157. William L. Fish, *Lawless Law Enforcement Only Hope of Prohibition*, BROOKLYN CITIZEN, Jan. 26, 1926, at 7.
158. *Fourth Amendment Threatened*, MEDIATOR, Feb. 6, 1925, at 1.
159. *Id.*

III. THE SUPREME COURT AND THE FOURTH AMENDMENT

He may be guilty . . . and this is a whisky case,
but [sound] law must be written even in whisky cases.

—Justice John Kennish,
Ex parte Creasy, 148 S.W. 914, 923 (Mo. 1912)

Even before it began deciding liquor search and seizure cases, the Supreme Court was clear that the Eighteenth Amendment had altered the fabric of the Constitution. In the early days of Prohibition, the Court expressed that constitutional changes were required for the country to adapt to "the progress of time and the development of new conditions."[160] In the *National Prohibition Cases*, confronted by challenges to the legitimacy of the Eighteenth Amendment, the Court made plain that alcohol prohibition was part of the supreme law of the land following its proper integration into the Constitution.[161] No legislature, court, public officer, or individual could violate the Prohibition Clause.[162] The Eighteenth Amendment also granted a new power to Congress by its Enabling Clause, allowing the legislature to take measures intended to further alcohol prohibition.[163] But more than that, new laws passed under the power would not simply fall within the authority of Congress; they would fulfill what the Court recognized as a "constitutional mandate."[164]

The Court was also clear from the beginning that the Eighteenth Amendment modified rights elsewhere in the Constitution. Regarding the

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160. Hawke v. Smith, 253 U.S. 221, 226 (1920).

161. 253 U.S. 350, 386 (1920) ("That amendment, by lawful proposal and ratification, has become a part of the Constitution, and must be respected and given effect the same as other provisions of that instrument."); *see also* United States v. Sprague, 282 U.S. 716 (1931) (rejecting, in the waning years of Prohibition, further challenges to the Amendment's enactment).

162. *National Prohibition Cases*, 253 U.S. at 386 ("The first section of the amendment—the one embodying the prohibition—is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers and individuals within those limits . . . .").

163. *Id.* at 387. For an example of the new plenary power in use, see *James Everard's Breweries v. Day*, where the Court held the 1921 Act Supplemental to the National Prohibition Act's provision banning the prescription of malt liquors a valid use of the power. 265 U.S. 545 (1924). *See also* Lambert v. Yellowley, 272 U.S. 581 (1926) (finding the same for the barring of liquor prescriptions in certain amounts); Selzman v. United States, 268 U.S. 466, 468–69 (1925) (holding the coverage of denatured alcohol not fit for consumption and poisonous to the consumer by the National Prohibition Act was valid under the "power of the federal government, granted by the Eighteenth Amendment, to enforce the prohibition of the manufacture, sale, and transportation of intoxicating liquor, [which] carries with it power to enact any legislative measures reasonably adapted to promote the purpose").

164. *National Prohibition Cases*, 253 U.S. at 387.

Fifth Amendment's Takings Clause,[165] the Court held that there was no violation when the government seized alcohol manufactured prior to the Eighteenth Amendment. Arguably, prior manufacture rendered the alcohol beyond the scope of the National Prohibition Act passed under a prospective-looking construction of the Eighteenth Amendment.[166] Instead, the Court declared that accepting a construction of the Eighteenth Amendment as limiting against such takings by the government of alcohol privately owned but stored by the government

> would defeat the purpose of the act and its achievement of the mandate of the Constitution. That mandate is, as will be seen by reference to section 1 of the amendment, 'that the transportation of intoxicating liquor within . . . the United States . . . for beverage purposes' shall be prohibited. And, as we have said, the [National Prohibition Act] declares (sec. 3) that all of its provisions shall be liberally construed 'to the end,' to quote its words, 'that the use of intoxicating liquor as a beverage may be prevented.'[167]

Accordingly, the Court was willing to accept that a liberal construction of the National Prohibition Act was necessary to accomplish the goals of the Eighteenth Amendment despite the act's incursions on the Fifth Amendment's protection against takings.[168]

The Court also made clear that implied repeal of statutes and treaties by the new constitutional provision, albeit unpreferred, was a natural

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165. U.S. CONST. amend. V ("[N]or [shall any person] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

166. Corneli v. Moore, 257 U.S. 491, 493–98 (1922). The appellant argued that his alcohol, stored in a bonded warehouse to be later taken home for personal use was allowed under the National Prohibition Act. *Id.* at 495–96. This was not a frivolous argument; the Court had earlier accepted that individuals could store alcohol in warehouses and retrieve it and transport it to the home for personal use without running afoul of the National Prohibition Act. *See* Street v. Lincoln Safe Deposit Co., 254 U.S. 88 (1920).

167. *Corneli*, 257 U.S. at 496 (1922); *but see* United States v. Katz, 271 U.S. 354 (1926) (declining to construe provision of National Prohibition Act to permit prosecution of non-authorized sellers of alcohol for failure to keep record of sales).

168. Yet the Court did reject the government's argument of implied repeal of the Takings Clause in this context. The Court noted that the government's construction was "contrary to the Fifth Amendment to the Constitution and that the Fifth Amendment [was] not repealed by the Eighteenth Amendment," issues "answered in all their phases by the *National Prohibition Cases*." *Corneli*, 257 U.S. at 498.

consequence of the constitutional evolution that had taken place.[169] To the Court, the Eighteenth Amendment represented a "great revolution" which was "obviously meant to upset a good many things on as well as off the statute book."[170]

In only two years, the Court had firmly established that the Eighteenth Amendment could bend other constitutional provisions[171] and correspondingly recognized the Amendment as revolutionary. The Court's jurisprudence also respected the dictates of section thirty-five of the National Prohibition Act, which mandated the repeal of all provisions of law inconsistent with it.[172] Notably, implied repeal was not entertained in cases where it would have constrained the government's ability to prosecute liquor cases.[173] The National Prohibition Act itself was "comprehensive and disclose[d] a legislative purpose fully to enforce the prohibition declared by the Eighteenth Amendment."[174]

In the early part of the 1920s, the Court took a number of Fourth Amendment cases not pertaining to alcohol in which it continued to occupy its traditionally protective role. In the 1920 case of *Silverthorne Lumber Co.*

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169. Grogan v. Hiram Walker & Sons, 259 U.S. 80, 89 (1922) ("The routine arguments . . . the repeal of statutes and a fortiori of treaties by implication is not to be favored. . . . We appreciate all this, but are of opinion that the letter [of the law] is too strong in this case."); *cf.* Ford v. United States, 273 U.S. 593 (1927) (illustrating the deference given to a treaty which would allow the search and seizure of vessels in international waters thought to contain liquor); *Cook v. United States*, 288 U.S. 102, 119 (1933) ("The purpose of the provisions for seizure in section 581, and their practical operation, as an aid in the enforcement of the laws prohibiting alcoholic liquors, leave no doubt that the territorial limitations there established were modified by the Treaty.").

170. *See Grogan*, 259 U.S. at 89; *see also* Cunard S.S. Co. v. Mellon, 262 U.S. 100, 129–31 (1923) (recognizing the Eighteenth Amendment's revolutionary impact and noting that the "sanction of antiquity, generality and statutory recognition" was not enough to allow ships sailing within the United States' jurisdictional waters to carry stores of liquor). In *Cunard*, Justice Sutherland's dissent highlights that the majority's interpretation of the Eighteenth Amendment granted power not contemplated by Congress and the states to prohibit alcohol outside the United States itself. *Id.* at 132–33.

171. *See also* United States v. Constantine, 296 U.S. 287, 294–95 (1935) (suggesting that the Eighteenth Amendment, while in effect, provided Congress the power to constitutionally utilize alcohol taxes as penalties exceeding the ordinary scope of the taxing power).

172. National Prohibition Act, ch. 85, tit. II, § 35, 41 Stat. 305–323, 317 (1919) ("All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency . . . ."). Importantly for tax evasion cases, the section also provided that the statute "shall not relieve anyone from paying any taxes or charges imposed upon the manufacture or traffic in such liquor." *Id.*

173. *See* Gen. Motors Acceptance Corp. v. United States, 286 U.S. 49 (1932) (declining to extend implied repeal by the National Prohibition Act in a scenario that would have limited the government's choices of law for asset forfeiture of liquor law violators); McCormick & Co. v. Brown, 286 U.S. 131 (1932) (declining to extend implied repeal to prior Congressional act that criminalized alcohol transport across state borders and affirming that the Eighteenth Amendment gave states the authority to legislate in ways that went beyond the provisions and contravened protections in the federal National Prohibition Act in order to enforce the Eighteenth Amendment).

174. Donnelley v. United States, 276 U.S. 505, 513 (1928).

v. United States,[175] the Court, staring at a *Boyd*-like scenario,[176] developed the fruit of the poisonous tree doctrine, affording the exclusionary remedy to byproducts, or *fruits*,[177] of violations of the Fourth or Fifth Amendment.[178] Where "any advantages" were gained stemming from an initial unconstitutional search, the government was not allowed to rely on them.[179]

Next, in the 1921 case of *Gouled v. United States*,[180] the Court was concerned with the surreptitious search by a military private who, at the direction of Intelligence Department officers, "under the pretense of a friendly call," went into Gouled's office and took possession of documents.[181] The military private then "abstracted" the papers and his abstractions were utilized at Gouled's trial.[182]

The Court recited the text of the Fourth and Fifth Amendments and cited *Boyd*, *Weeks*, and *Silverthorne*:

> The effect of the decisions cited is: That such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen . . . . It has been repeatedly decided that these amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned, but mistakenly overzealous, executive officers.[183]

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175. 251 U.S. 385 (1920).

176. The government had warrantlessly searched and seized papers and books which were returned, and then the trial court subpoenaed Silverthorne Lumber Company's same books and documents. *Id.* at 390–91. Compare this with the facts of *Boyd*, discussed *supra* Part I. One initial difference is that in *Silverthorne*, the government first unlawfully searched and seized the items, but barring that, the same *Boyd* problem would have arisen.

177. Note that the phrase "fruit of the poisonous tree" was not coined until 1939 in *Nardone v. United States* by Justice Frankfurter who derived the idea from "the *Silverthorne* case." 308 U.S. 338, 341 (1939).

178. *Silverthorne*, 251 U.S. at 385.

179. *Id.* at 391–92. The Court strongly vindicated the Fourth Amendment in rejecting the government's argument to the contrary, stating that to hold only the initial wrongly obtained evidence inadmissible "reduces the Fourth Amendment to a form of words." *Id.* at 392.

180. 255 U.S. 298 (1921).

181. Gouled v. United States, 264 F. 839, 839 (2d Cir. 1920).

182. *Id.* at 841.

183. *Gouled*, 255 U.S. at 304.

With that, it was evident the Court was still supplying a liberal construction of the Fourth Amendment with the aim of defending against its erosion by the judiciary or executive. The Court then declared that the surreptitious taking of documents by the government was a violation of the Fourth Amendment and that their derivative use in evidence against their owner was a Fifth Amendment violation per *Boyd*.[184] Notably, the Court had no reticence in finding the consensual (albeit under false pretenses) entry into the office and the abstraction of documents taken therefrom as within the scope of "searches and seizures."[185]

The Court also held that search warrants for homes and offices could only be issued when in the public interest, where the public has a right of possession of the property to be seized, or where police powers granted that the property inside may be taken.[186] These categories seemed to readily include the constitutionally prohibited intoxicating liquors. However, immediately after delineating those categories, the Court emphasized that those requirements were not limited to searches and seizures of any particular kind of property: "[t]here is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure."[187] With language so broadly protective,[188] it appeared the Court was prepared to be a bulwark against the lower courts and prohibition agents overzealous in enforcing the law at the expense of the Fourth and Fifth Amendments.[189]

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184. *Id*. at 304–06.

185. *Id.* at 305–06.

186. *Id.* at 309.

187. *Id.* Murchison's article ignores this in his review of *Gouled*, calling *Gouled* a "papers" case despite the Court making clear that its holding was intended to encompass all types of evidence. Murchison, *supra* note 18, at 483. An additional, subtler result of *Gouled*, later noticed by Justice Louis Brandeis, was that a search or seizure within the meaning of the Fourth Amendment occurred when "a friendly visitor abstracts papers from an office." *See* Olmstead v. United States, 277 U.S. 438, 476 (1928) (Brandeis, J. dissenting).

188. Note, however, the slight carveouts to *Silverthorne* and *Gouled* that came shortly after in other non-alcohol-related Prohibition cases. Burdeau v. McDowell, 256 U.S. 465 (1921) (allowing evidence passed to police by a private party, even if wrongfully obtained by the private party, to be used in criminal prosecution, and implicitly cabining the fruit of the poisonous tree doctrine to initial wrongful searches and seizures by police); Essgee Co. of China v. United States, 262 U.S. 151, 158 (1923) (permitting compulsory production of corporate documents not held by individuals qua individuals even where they may disclose the guilt of corporate officers who themselves hold the documents).

189. Fiery defenses of the rights seemed to be the norm in addressing police overreach to that point. *See* Fed. Trade Comm'n v. Am. Tobacco Co., 264 U.S. 298, 305–06 (1924) ("Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to . . . sweep all our traditions into the fire . . . ." (internal citations omitted)).

The Court's first true liquor prohibition Fourth Amendment case accompanied *Gouled*: *Amos v. United States*.[190] In *Amos*, the defendant's wife was confronted by investigators claiming they were looking for evidence of "violations of the revenue law."[191] She allowed them to search her and her husband's store and home.[192] The investigators found alcohol inside the home under a quilt on the bed and in a barrel of peas in the store "within *his* curtilage."[193] The government introduced these findings at trial.[194] The Supreme Court thought the investigators' behavior toward the defendant's wife constituted "implied coercion," rendering the warrantless searches of the home and resulting seizures unconstitutional.[195] On its face, *Amos* seemed to indicate that the Court would maintain its role as a champion of Fourth and Fifth Amendment rights. However, *Amos* was not a difficult case because it concerned a warrantless search and seizure of areas that fell squarely within the text of the Fourth Amendment: areas inside the four walls of a person's house. Further, the National Prohibition Act—though passed after the search had occurred—confirmed continuity of that principle into Prohibition by expressly requiring warrants for searches of the home and forbidding them from being issued except where the home was being used for the unlawful sale of liquor.[196]

Even with an expansive reading of the Eighteenth Amendment, the constraints enumerated in the National Prohibition Act barred any debate about the special carveout of protection for the home under the then-existing statutory regime.[197] Put another way, the Court acted to enforce alcohol prohibition consistent with the limits of the act effectuating the Eighteenth Amendment. Even viewed in a manner most charitable to the Court's Fourth and Fifth Amendment safeguarding role, *Amos* stood for the proposition that the coercion of a wife in the absence of her husband was not a permissible

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190. 255 U.S. 313 (1921). I call this a *true* Prohibition case because it was the first time the Court addressed the alleged encroachment of Fourth and Fifth Amendment rights in a case involving an alcohol search and seizure. Note, however, that the search occurred before Prohibition, in 1919.

191. *Id.* at 315.

192. *Id.* at 315–16.

193. *Id.* at 314–15 (internal quotes omitted) (emphasis added). Also, the point on the store being within the curtilage was uncontested by the government in this case. *See generally* Brief for Defendant in Error, Amos v. United States, 265 U.S. 313 (1924) (No. 114). Even if it were, it would not likely have impacted the analysis in the way that occurred in *Hester v. United States*, discussed at length *infra* Part III.A, because the search of the store involved a search of effects: an almost half-pint of liquor was found in a barrel of peas. *Amos*, 255 U.S. at 315.

194. *Id.* at 314–15.

195. *Amos*, 255 U.S. at 317.

196. National Prohibition Act, ch. 85, tit. II, § 25, 41 Stat. 305–323 (1919).

197. *But cf. Wida*, discussed *supra* Part II.B (demonstrating that the National Prohibition Act could be construed to allow searches of the home where someone was "openly and notoriously" engaging in manufacture therein by invoking the purpose of the Eighteenth Amendment and the National Prohibition Act).

means to conduct a complete search of a home, at best a mild expansion of the Fourth Amendment's protections in 1920s America.[198]

A. Open Fields and Automobiles

Three years after *Amos*, in 1924, the Court presided over its next alcohol search and seizure case. *Hester v. United States*[199] concerned what might have been considered a dramatic violation of a person's Fourth and Fifth Amendment rights under a different court.[200] The case arose from the intense enforcement of the Eighteenth Amendment's mandate in South Carolina that forced the Western District of South Carolina to hold a "special term" in January 1923.[201] Charlie Hester's case was 1 of a batch of 160—almost all for violations of the National Prohibition Act—scheduled for trial between January 8 and January 24.[202]

On "information" police went to the Hester family home without a search or arrest warrant.[203] They trespassed past a fence[204] onto land owned by Charlie Hester's father and "concealed themselves from fifty to one hundred yards away" from the house on the property.[205] Hiding beyond the fence and next to the Hester family's barn, the officers watched the back of the house.[206] As one officer put it "The first thing I *seed* was Hester hand the [quart] bottle to Henderson."[207] Thereafter, the officers alerted the men to their presence.[208] At the time of the alert, the officer admitted that he could not recognize the liquor from the distance but thought it a reasonable assumption since he recognized Hester, stating, "I know his reputation."[209] Hester and Henderson ran with an officer in tow, who fired his pistol, after

198. The Court also stated, "[w]e need not consider whether it is possible for a wife, in the absence of her husband, thus to waive his constitutional rights, for it is perfectly clear that under the implied coercion here presented, no such waiver was intended or effected." *Amos*, 255 U.S. at 317; *see also* Atkinson, *supra* note 68, at 754 (implying that *Amos* was an easy case).

199. 265 U.S. 57 (1924).

200. Joshua Windham & David Warren, *Good Fences? Good Luck*, 47 Regulation 10 (2024) (demonstrating the differing opinions of several state courts and legislatures on *Hester*); *see also* Oliver v. United States, 466 U.S. 170, 186 (1984) (Marshall, J., dissenting) (asserting that open fields are subject to Fourth Amendment protections).

201. *Big Docket for Special Term of U.S. Court Here Is Announced*, Greenville News, Dec. 22, 1922, at 2.

202. *Id.*

203. *Hester*, 265 U.S. at 58.

204. This detail is missing from the Court's recounting of the case. Transcript of Record at 16, *Hester*, 265 U.S. (No. 243) [hereinafter *Hester* Transcript of Record].

205. *Hester*, 265 U.S. at 58; *cf. Hester* Transcript of Record at 16, 19 (providing the testimony of the officer who stated he was "fifty to seventy-five yards" away on multiple occasions).

206. *Hester* Transcript of Record at 16.

207. *Id.* at 19.

208. *Hester*, 265 U.S. at 58.

209. *Hester* Transcript of Record at 20–21.

which Hester and Henderson dropped their whiskey-filled bottles.[210] Eight to ten other people on the side of the house were searched for "liquor and firearms."[211] The police then entered the house[212] and found another jar outside which contained whiskey.[213]

To Hester's attorneys, the loss in district court notwithstanding, this seemed an easy case. In their seven-page brief to the Supreme Court, they string-cited *Boyd*, *Weeks*, *Silverthorne*, *Gouled*, and *Amos*.[214] Surely, the broad protections of the Fourth Amendment and its liberal construction had to protect the "little country home."[215] Trespassers, police or otherwise, could legally be repelled with force—even deadly force if resistant—from every inch of one's property; they had no right to be there, much less to investigate.[216] So confident were Hester's attorneys that they ended their brief as follows:

> [T]he proceedings . . . were in direct and positive conflict with the Fourth and Fifth Amendments and in conflict with the decisions of this Honorable Court. We are not attempting to furnish to the court an elaborate argument, literally saturated with State, Circuit and U.S. court decisions. We have only attempted to show the facts briefly, to point out the grievous errors below and ask and demand that, not only the rights of this humble defendant be protected, but the rights of all the American people be protected from unreasonable searches and seizures.[217]

The government's twenty-three-page brief was defensive, fighting for probable cause when Hester's brief raised no such error, and asserting in the alternative that the evidence, even if unconstitutionally obtained, was still admissible in the form of testimony—an argument straightforwardly foreclosed by *Weeks* and *Silverthorne*.[218] Yet the government also found room in the law to go on the offensive. It took inspiration from the lower courts and cited cases, including *Bateman,* to imply that reasonableness had

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210. *Hester*, 265 U.S. at 58.

211. *Hester* Transcript of Record at 21.

212. *Hester*, 265 U.S. at 58; *cf. Hester* Transcript of Record at 21 ("I then started to search the house . . . .").

213. *Id.*

214. Brief for Plaintiff in Error at 5, Hester v. United States, 265 U.S. 57 (1924) (No. 243) [hereinafter Hester's Brief].

215. *Id.* at 4.

216. *Id.* at 6–7.

217. *Id.* at 7.

218. Brief for Defendant in Error at 8–19, Hester v. United States, 265 U.S. 57 (1924) (No. 243) [hereinafter Government's Brief in *Hester*].

shifted in the context of searching for intoxicating liquors.[219] Similarly, the government asserted a logic that percolated in some lower courts that made virtually any seizure of liquor reasonable: because alcohol was illegal and Hester had no property rights in intoxicating liquors as contraband, the government, even before the bottles were thrown, had the right to seize them as the only party with a "legitimate and proper interest" in them.[220] The government's least fleshed out reason for the constitutionality of the search was that there had been no search or seizure at all.[221]

The Court latched onto that final argument. In an opinion limited to a single paragraph, Justice Oliver Wendell Holmes, Jr. wrote that the testimony of the two prohibition officers could be utilized at trial.[222] The Court stated, "[i]t is obvious that even if there had been a trespass, [the testimony to those facts] was not obtained by an illegal search or seizure."[223] Further, the Court held that by dropping the containers of alcohol, the men had abandoned them so there was "no seizure in the sense of the law."[224] By this point in the short opinion, the Court indicated insult at the fact the case was appealed. It was "immaterial" to discuss the entry of the house; the "suggestion that the defendant was compelled to give evidence against himself d[id] not require an answer."[225] To the Court, the sole question worth investigating at all was whether the examination of the vessels on Hester's father's land was covered by the Fourth Amendment, and even that constituted a "shadow of a ground for bringing the case up."[226] With a minimum of explanation, the Court held that "open fields" were not covered by the Fourth Amendment because they were apparently distinguished from

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219. *Id.* at 9. Recall that *Bateman* is the case that outright posited the Eighteenth Amendment had changed the meaning of the Fourth Amendment. United States v. Bateman, 278 F. 231 (S.D. Cal. 1922); *see also* Lambert v. United States, 282 F. 413 (9th Cir. 1922).

220. Government's Brief in *Hester* at 18–19. Amongst other cases, the government cites *Fenton*, quoted *supra* note 86, which radically held that even if an arrest occurred unlawfully, liquor found therefrom was admissible as evidence because it is the government's property per the National Prohibition Act. *See also* United States v. Hilsinger, 284 F. 585 (S.D. Ohio 1922).

221. Government's Brief in *Hester* at 7–8.

222. *Hester*, 265 U.S. at 59.

223. *Id.* at 58.

224. *Id.*

225. *Id.* at 58–59.

226. *Id.* at 59.

"persons, houses, papers and effects,"[227] at common law[228]—a claim without support in the Court's citation of Blackstone or history.[229]

Through its decision in *Hester*, the Court also narrowed what constituted a search or seizure. Trespassing onto one's land and hiding near a home, then watching the activities immediately outside of it were not searches of the home, but at most searches of an open field,[230] which was not included in the Fourth Amendment's list of protected constructs. No inquiry into probable cause was necessary when officers came to a property with "information" and then saw an unidentified quart bottle change hands. Firing a gun and telling individuals to stop did not amount to coercion to give up the objects possessed by those individuals. Troublingly, the Court left open what constituted "open fields" and ignored that any area immediately outside the home could have been considered within the meaning of "houses" and the items immediately outside still as "effects."[231]

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227. U.S. CONST. amend. IV.

228. *Hester*, 265 U.S. at 59. The lack of descriptiveness by the Court on this point has been noted by others. *See, e.g.*, T. Michael Goldey, Oliver *and the Open Fields Doctrine*, 7 CAMPBELL L. REV. 253, 256 (1984) ("The Court mentioned the existence of a distinction between an open field and a house by noting that the difference is as old as the common law, however, no explanation of the actual difference was given."); *see also* Rowan Themer, *A Man's Barn is Not His Castle: Warrantless Searches of Structures Under the "Open Fields Doctrine"*, 33 S. ILL. L.J. 139, 139–40 (2008) (illustrating how "open fields" have been construed to encompass structures, which are neither "open" nor "fields").

229. Professor Chad Flanders has noted the Court's assertion of a historical distinction for open fields from the house and its curtilage has no rooting in the text of Blackstone the Court cites. Chad Flanders, Collins *and the Invention of "Curtilage"*, 22 J. CONST. L. 755, 769–72 (2020). My own study of legal dictionaries, treatises, and cases from the period reveals that such a distinction likely cannot be found elsewhere. *See* Mitchell A. Del Bianco, *What is a House? An Exhibit Investigating Common Law Origins of the Open Fields Doctrine*, UVA Law Special Collections (Dec. 22, 2024), https://archives.law.virginia.edu/exhibits/shaping-law-at-the-margins/del-bianco [https://perma.cc/YQ3X-A2S9]; Mitchell A. Del Bianco, *What is a House?: Searching for the Meaning and Scope of Curtilage at Common Law*, 94 FORDHAM L. REV. ONLINE 138 (2026).

230. Note that the Court could have also called the officer's actions in the fields a search. *See* discussion pertaining to *Olmstead infra* Part III.B.

231. Subsequent jurisprudence has addressed this by fleshing out a test for "curtilage" which is protected under the Fourth Amendment. *See e.g.*, United States v. Dunn, 480 U.S. 294 (1987) (providing a four-factor test). Curtilage was a concept that existed at the time of the decision. Amos v. United States, 255 U.S. 313, 313 (1921) (concerning "a search of defendant's house and store 'within his curtilage'"). Indeed, Hester's attorneys referenced it in their brief and one portion of Blackstone's commentaries cited by the Court states, "the capital house protects and privileges all its branches and appurtenants, if within the curtilage or home-stall." WILLIAM BLACKSTONE, COMMENTARIES *225; Hester's Brief at 6–7.

Curtilage was also protected in several state and federal courts with some care. *See, e.g.*, United States v. Kaplan, 286 F. 963, 965 (S.D. Ga. 1923) ("[T]he barn wherein the automobile was standing at the time certain papers were removed therefrom was within the curtilage, and the papers taken from the automobile shall be returned. It is held that the place where certain liquor was found was without the curtilage."); Childers v. Commonwealth, 250 S.W. 106, 107 (Ky. 1923) ("Both the pond and the garden were appurtenant to and used in connection with the residence, and so closely situated thereto as to be a part thereof."); McClannan v. Chaplain, 116 S.E. 495, 499 (Va. 1923) ("It is too manifest for further elaboration that the search without a warrant, of the plaintiff's premises, remote from his home and curtilage, and not even in his personal presence, *was not an 'unreasonable' search*, and hence was not forbidden by the common law." (emphasis added)).

Moreover, the Court ignored that its new doctrine created an anomalous carveout, privileging trespass onto private land and looking at items on that land beyond any ordinary search or seizure of a person's chattels.[232] Further, the Court's assertion that the men had *abandoned* the three containers of alcohol was strange, given that the men deposited the containers *on their property* which apparently extended far beyond where they dropped the containers.[233] The Court, like the Fifth Circuit in *McBride*, had practically authorized officers to trespass onto the land on which one's home was located specifically to obtain evidence. Because there was no illegal search in trespassing into one's open fields, there could be no fruit of the poisonous tree in the evidence gathered therefrom, even if it was police who created the exigencies which somehow resulted in the abandonment of an effect on one's own property. This was not the liberal interpretation of the Fourth Amendment promised by the Court,[234] but it was one that enforced the Eighteenth Amendment while conforming to the regulations of the National Prohibition Act by limiting the definition of the home to exclude much of the area around it.

After *Hester*, Prohibition roared on and violations of the law climbed. In 1924, there were 46,609 federal criminal Prohibition cases (63.9% of the docket) and 4,210 federal civil Prohibition cases (37.9% of the docket).[235] These cases involved not just consumers of alcohol but also traffickers who realized "[t]he money to be made by violating the Eighteenth Amendment's proscriptions . . . was spectacular."[236] Legislatures responded. Over a period of five months in 1925, Wayne B. Wheeler, renowned political operative and head of the Anti-Saloon League—the organization that drafted the Eighteenth Amendment[237]—reported the strengthening of dry laws in forty states and claimed Congress would be soon to follow, signaling lobbying

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232. This unusual result was recognized at the time of the opinion's release. *See* Merwyn Grant Leatherman, *Search of Automobile Without Warrant—When Reasonable*, 23 MICH. L. REV. 891, 893 (1925) ("If outlying property is not included in effects, it seems to be the only exception made or found.").

233. *Hester* Transcript of Record at 19 (indicating that Hester was about 150–200 yards behind the house when he threw the jug).

234. Such was apparent at the time the decision was reported. Reviewing *Hester*, the *Virginia Law Register* observed:

> It is quite refreshing every now and then to see Blackstone's Commentaries quoted, and the Supreme Court of the United States goes back to that venerable law writer in a case which at first sight looks as though it were in conflict with some of the earlier decisions of the Court in regard to the exclusion of evidence obtained by unlawful search.

Evidence—Liquor Taken without Warrant—Unlawful Search, 10 VA. L. REG. 281, 283 (1924).

235. GEBHART, *supra* note 25, at 2, 7.

236. OKRENT, *supra* note 22, at 157.

237. HAMM, *supra* note 23, at 229–30; *see also* Margot Opdycke Lamme, *The "Public Sentiment Building Society": The Anti-Saloon League of America, 1895–1910*, 29 JOURNALISM HIST. 123 (2003).

efforts to come.[238] Wheeler stated his assessment of the temperance movement's force in the *North American Review*: "Election returns, showing increased numbers of dry candidates elected, and the popular vote in referenda on enforcement of the law, reveal the strength of the dry public sentiment. The law is not being enforced against the American people. It is being obeyed by the American people . . . ."[239] Wheeler continued—"and enforced against the un-American, the alien, the lawless and the vicious minority."[240] That enforcement would increasingly occur on the nation's roads, where automobiles presented a primary means of liquor transportation and the next frontier for Fourth Amendment contraction.

The next Supreme Court Prohibition decision confronted an exercise of police power that put the Court's promise of a liberal construction of the Fourth Amendment to the test. As recognized by legal historian Sarah A. Seo, "[t]he convergence of Prohibition, the mass production of the automobile, and the rule of exclusion raised one of the most contentious questions in twentieth-century criminal procedure: when did the Fourth Amendment require a warrant to stop and search a car?"[241]

Telegraphing its answer, the Court denied certiorari in *Milam*—the case where the Fourth Circuit sanctioned the warrantless search of a vehicle that disclosed undocumented Chinese immigrants hiding within[242]—indicating that courts might be allowed to enforce the Eighteenth Amendment at the expense of a liberal construction of the Fourth in the automobile context.[243] Nevertheless, a year later, the contentious question still remained officially unanswered. The Court filled the void with its most significant Prohibition Fourth Amendment case, *Carroll v. United States*.[244]

In September 1921, agents attempted a controlled buy of alcohol that fell through; "the Carroll boys" never returned with the cases of alcohol the undercover officers had requested.[245] The officers had, however, identified and recorded information about the car the Carroll boys came to the apartment in.[246] In December, two and a half months after the initial failed sale, with no indication that the car was presently carrying alcohol, officers

238. Wayne B. Wheeler, *Gives Anti-Saloon Victories in 40 State Legislatures with None for Wet Side*, THE EVENING SUN, May 4, 1925, at 1, 2.

239. Wayne B. Wheeler, *Is There Prohibition? And to What Extent?*, 222 N. AM. REV. 29, 35 (1925).

240. *Id.*

241. SEO, *supra* note 22, at 119.

242. Discussed *supra* Part II.B.

243. Milam v. United States, 265 U.S. 586 (1924).

244. 267 U.S. 132 (1925). For a comprehensive look at the *Carroll* litigation, see SEO, *supra* note 22, at 113–15, 126–42.

245. *Carroll*, 267 U.S. at 133–35.

246. *Id.*

stopped it on the highway and proceeded to conduct an intrusive search, tearing up the upholstery and finding sixty-eight concealed bottles of liquor.[247] After a failed bribe, the Carroll boys were arrested and charged with violations of the National Prohibition Act.[248]

This case was the vehicle through which the Court provided that only probable cause, not a warrant, was required to search automobiles—and that police officers, rather than magistrates, would have the first pass at determining whether they indeed had probable cause. At first pass, *Carroll* may be striking to modern readers because the Court found probable cause on weak facts (a failed alcohol sale over two months earlier) and merely asserted without discussion that a non-owner of a car cannot object to its search and the use of resulting evidence.[249] However, the Court did something much more doctrinally significant. The Court did not straightforwardly find that the automobile created an exigency that made stopping a car with probable cause reasonable. That rationale would have gone something like: "Cars can quickly move between jurisdictions, so securing a warrant is impractical and thus searching based on probable cause is reasonable." Rather, it found automobile searches reasonable by looking at the Eighteenth Amendment and National Prohibition Act[250]—the

247. *Id.*

248. *Id.* at 135–36.

249. *Id.* at 159–62. Nevertheless, at least one modern reader recognizes the Court's framing of its decision as—at least in part—compelled by the Eighteenth Amendment. *See* G. EDWARD WHITE, 2 LAW IN AMERICAN HISTORY 300 (2016) ("[T]he Court decided to conform the 'unreasonable' search or seizure requirements of the Fourth Amendment to enforcement of the Eighteenth . . . .").

250. *Carroll*, 267 U.S. at 143–47. This approach was clearly at the forefront of Chief Justice William Howard Taft's mind as he wrote for the majority, as in his private letters he wrote to Justice Willis Van Devanter, "I shall try to steer away from the suggestion that we are introducing any new law and new principle of constitutional construction, but are only adapting old principles and applying them to new conditions created by the change in the National policy which the 18th Amendment represents." *See* Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 123–25 n.406 (2006) (quoting Letter from William Howard Taft to Willis Van Devanter (Dec. 23, 1924)). Post notes that the day before, in a letter to his son, Taft had written that *Carroll* was "having to establish 'some rather new principle.'" *Id.* (quoting Letter from William Howard Taft to Charles P. Taft II (Dec. 22, 1924)). Therefore, it was evident, at least to Taft, that the Eighteenth Amendment was being instrumentalized to change the reasonableness of a search.

approach suggested by the government's briefing that quoted the lower court decisions in *Milam* and *Bateman*.[251]

The Court examined legislative hearings around amendments to the National Prohibition Act which further codified the distinction between the searches of homes and other kinds of searches.[252] The Court acknowledged Congress's view that the Fourth Amendment did not require a warrant in "many cases, and especially . . . in the enforcement of liquor legislation."[253] Further, they acknowledged the concern that an amendment to the National Prohibition Act penalizing warrantless searches beyond the home would "make it impossible to stop the rum-running automobiles engaged in like illegal traffic."[254] The Court proceeded to reconstruct the Fourth Amendment in light of the mission of the Eighteenth:

> The intent of Congress to make a distinction between the necessity for a search warrant in the searching of private dwellings and in that of automobiles and other road vehicles in the enforcement of the Prohibition Act is thus clearly established. . . . Is such a distinction consistent with the Fourth Amendment? We think that it is. The Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable.[255]

Then, the Court revisited *Boyd*, *Weeks*, *Silverthorne*, *Gouled*, and *Amos* in quick succession to say that none of those cases concerned a search and seizure in the course of transportation, seemingly referring to the express

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251. Substituted Brief for the United States on Reargument at 39–41, *Carroll v. United States*, 267 U.S. 132 (1925) (No. 15). The government stopped short of endorsing implied repeal but made clear that their interpretation was that the Eighteenth Amendment played a certain, clear doctrinal role in the Fourth Amendment analysis:

> We do not contend that the Eighteenth Amendment must be enforced in such manner as to set aside the provisions of the Fourth, but we believe that *what is reasonable in the constitutional sense must be interpreted in the light of the fact that another constitutional provision of equal weight and importance* forbids the transportation of liquor. If the Eighteenth Amendment had forbidden only the manufacture and sale of intoxicating liquor, and the prohibition against transportation were contained only in an act of Congress passed for the purpose of carrying such amendment into effect, the question might be a materially different one.

Id. at 39–40 (emphasis added).

Additionally, like in *Hester*, the government's position was one on the defensive in comparison to that of Carroll's attorneys—as the content and lengths of the briefs reveal. *Compare id.* (providing an over one-hundred-page brief) *with* Brief for the Plaintiffs in Error on Reargument, *Carroll v. United States*, 267 U.S. 132 (1925) (No. 15) (providing a nineteen-page brief that addresses some of the arguments made by the government).

252. *Carroll*, 267 U.S. at 144–46.

253. *Id.*

254. *Id.* at 146.

255. *Id.* at 147.

prohibition of transporting liquor in the Eighteenth Amendment.[256] Contradicting its prior cases, the Court seemed to state that the Fourth and Fifth Amendments were mercurial and subject to being reconstrued "in a manner which will conserve public interests as well as the interests and rights of individual citizens."[257] The Court finally remarked:

> The main purpose of the Act obviously was to deal with the liquor and its transportation, and to destroy it. The mere manufacture of liquor can do little to defeat the policy of the Eighteenth Amendment and the Prohibition Act, unless the forbidden product can be distributed for illegal sale and use. Section 26 was intended to reach and destroy the forbidden liquor in transportation.[258]

The Court thus made clear that its decision was necessary to enforce the Eighteenth Amendment. Like the lower courts, the Supreme Court suggested that searching for intoxicating liquors ("contraband goods") seemed to justify the search.[259] The constitutional right to be free from unreasonable searches and seizures was subject to the conservation of public interests—which now principally entailed the enforcement of the Eighteenth Amendment. While *Carroll* was consistent with the demands of the new amendment, its reasoning evoked the fears of the earlier *Boyd* and *Gouled* Courts: a "gradual depreciation" of civil protections,[260] driven by the "imperceptible practices of courts."[261]

By the estimate of the *Baltimore Sun*, *Carroll* provided unassailable evidence that the Eighteenth Amendment was cannibalizing the rest of the Constitution.[262] The Court's decision was formally sanctioning the status quo of overzealous alcohol policing that had developed by 1925.[263] A note

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256. *Id.* at 148–49. Recall that the Eighteenth Amendment prohibits the "transportation of intoxicating liquors within . . . the United States and all territory subject to the jurisdiction thereof." U.S. CONST. amend. XVIII, § 1.

257. *Carroll*, 267 U.S. at 149.

258. *Id.* at 154–55.

259. *Id.* at 153; *see* BLACK, *supra* note 89, at 60–62 (demonstrating the connection of *United States v. Bateman*, 278 F. 231 (S.D. Cal. 1922), *United States v. Fenton*, 268 F. 221 (D. Mont. 1920), and *Carroll*). For a discussion of these lower court cases, see *supra* Part II.A.

260. Boyd v. United States, 116 U.S. 616, 635 (1886).

261. Gouled v. United States, 255 U.S. 298, 304 (1921).

262. *Has the Rest of the Constitution Been Repealed by the Eighteenth Amendment?*, BALT. SUN, Mar. 4, 1925.

263. *See id.* at 10 ("[S]ome enforcement officers have been doing this all along . . . whenever they pleased. . . . The decision of the Supreme Court legalizes these highway hold-ups, and will . . . tend to increase them, if not to make them one of the rules of the road."); *but see Andrews Upholds Search for Liquor in Boats and Autos*, N.Y. TIMES, Nov. 22, 1925, at 1–2 (indicating that the Treasury Department began requiring agents to search upon probable cause).

in the *Texas Law Review* expressed uncertainty about the balance struck by the Court, concluding that *Carroll* placed a "burden of unknown weight . . . upon the individual for the benefit of a newly appended amendment."[264] The author stated that the decision was a "decided back-swing of the pendulum" from the approach of cases like *Bram* which demanded that the Fourth and Fifth Amendments be interpreted as immune to legislative change.[265] Instead, that principle of immunity had been subordinated to "conserve public interests as well as the interests and rights of individual citizens"—that is, the interests of citizens in enforcing national prohibition.[266] Another author in the *Virginia Law Review* lamented the Court's finding of probable cause and worried that *Carroll* could be interpreted to confer undue deference to officers in making such determinations.[267] Yet another remarked that *Carroll* was decided by "'liberal construction' of the [National Prohibition] Act and strict construction of the Bill of Rights," in shameless derogation of *Boyd*.[268]

Through *Carroll*, the Eighteenth Amendment and the National Prohibition Act transformed the roads of America into a place where police had essentially unchecked discretion to stop and search automobiles. If officers were ever challenged, their determinations of probable cause would be deferentially examined using a Fourth Amendment bearing a practical carveout for the effectuation of the Eighteenth. Near the end of the Prohibition Era, legal scholar Forrest Revere Black remarked:

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264. John P. Bullington, *A New Interpretation of the Fourth Amendment*, 3 TEX. L. REV. 460, 469 (1925).

265. *Id.* at 469.

266. *Id.* (quoting Carroll v. United States, 267 U.S. 132, 149 (1925)). The author, despite his misgivings about the decision, also noted:

> [T]he prevalent idea of the Anglo-Saxon spirit of "individual freedom before all" must be taken with many qualifications. It is to be remembered that the Eighteenth Amendment, imposed upon themselves by the people, is in itself a direct subduction of individual freedom. A very respectable argument might be advanced that the Eighteenth Amendment qualified the Fourth Amendment in so far as necessary for the complete realization of the former.

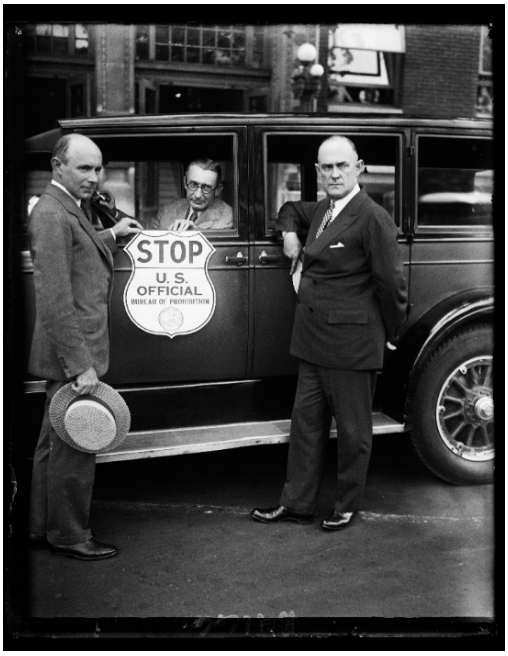
Id. at 471. Here again, legal minds seemed to consider that the Eighteenth Amendment was influencing Fourth Amendment jurisprudence in a principled, doctrinal manner.

267. Richard W. Hagan, Jr., Note, *Constitutional Law—Illegal Searches and Seizures*, 12 VA. L. REV. 573, 581–82 (1926) ("The license implied . . . would be in effect identical to the 'general search warrant' against which the Fourth Amendment was especially aimed. The Eighteenth Amendment is to be enforced with all rigor, but the guaranty of the Fourth Amendment in no respect is to be lessened to that end.").

268. Sterling E. Edmunds, *Mining and Sapping Our Bill of Rights*, 16 VA. L. REV. 1, 17 (1929).

> In the last decade, the American Government has been engaged in "the noble experiment" of enforcing constitutional prohibition. As the direct result of this effort it is being discovered that Bills of Rights, federal and state, are being denaturized; certain old landmarks in the law are crumbling and the relation between the nation and the states is being altered.[269]

Black's book traced those changes back to a single case: *Carroll*.[270]



STOP WHEN YOU SEE THIS SIGN, Aug. 25, 1930 (*archived at* Library of Congress)

After *Carroll*, the Fourth Amendment continued to be "denaturized." An officer's asserted experience with liquor law enforcement could be

269. BLACK, *supra* note 89, at 15.
270. *Id.*

considered in determining whether they had probable cause to search.[271] And with federal dockets crowded by liquor law enforcement cases, there was more than enough experience to go around. Officers could also unlawfully destroy seized liquor upon finding it and use samples to prove illegal possession of liquor.[272] Illegally seized evidence could be used at trial if a defendant failed to object.[273] Such a failure to object acted as a permanent waiver of a defendant's Fourth Amendment exclusionary remedy in their case.[274] When busting speakeasies, items considered in the "immediate possession and control" of a person for the purposes of a valid search incident to arrest went beyond plain view liquor and items near a person to include effects as distant as a ledger in a closet and bills next to a

271. *Compare* Steele v. United States, 267 U.S. 498, 504–05 (1925) ("What Einstein saw and ascertained was quite sufficient to warrant a man of prudence and caution *and his experience* in believing that the offense had been committed . . . ." (emphasis added)), *with* Carroll v. United States, 267 U.S. 132, 161 (1925) ("'If the facts and circumstances before the officer are such as *to warrant a man of prudence and caution* in believing that the offence has been committed, it is sufficient.'" (emphasis added) (quoting Stacey v. Emery, 97 U.S. 642, 645 (1878))). The importance of such a finding becomes apparent in the context of *Steele*, where the sole basis for the prohibition agent's warrant affidavit was that he saw a truck driver unloading boxes that, according to the officer, "were the size and appearance of whisky cases and I believe that they contained whisky." 267 U.S. at 500. The Court did not rely on the *Steele* articulation of probable cause when probable cause was obvious. *See* Dumbra v. United States, 268 U.S. 435, 441 (1925) (reiterating the old test for probable cause where undercover prohibition agents negotiated multiple purchases of wine and watched the seller retrieve the wine at the grocery store searched).

272. McGuire v. United States, 273 U.S. 95 (1927).

273. Segurola v. United States, 275 U.S. 106, 111–12 (1927).

274. *Id.* at 112.

cash register, even after the arrestee was in the custody of four prohibition agents.[275]

With each opinion, the liberal construction of the Fourth Amendment appeared more a relic of the pre-Eighteenth Amendment Constitution. At one point, the Court seemed to outright repudiate its historic approach, speaking of the Amendment in terms concerned with its burden on law enforcement rather than as an essential right of individuals:

> [W]e are concerned here not with [the officers'] liability but with the interest of the government in securing the benefit of the evidence seized, so far as may be possible without sacrifice of the immunities guaranteed by the Fourth and Fifth Amendments. A criminal prosecution is more than a game in which the government may be checkmated and the game lost merely because its officers have not played according to rule. The use by prosecuting officers of evidence illegally acquired by others does not necessarily violate the Constitution nor affect its admissibility.[276]

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275. Marron v. United States, 275 U.S. 192, 199 (1927) ("They had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise."). While there was a search warrant in the case that could have been used to support a plain view argument, the Court stated that the seizure of the ledger and bills was improper under the warrant. *Id.* at 198.

There were two liquor cases in this period that broke the streak of governmental victories, but they were not boons for civil libertarians of the era. *See* Gambino v. United States, 275 U.S. 310 (1927) (reversing a conviction where New York state officers stopped and searched an automobile without any state law authority). *Gambino*'s outcome, however, is not a repudiation of *Carroll*; the Court implies the facts were so clear as to the lack of probable cause that they were "unnecessary to detail." *Id.* at 313. The transcript of record in the case confirms this—the only information the officers provided in the affidavit in support of their stop and search was that they saw a car, heavily loaded, traveling at twenty-five to thirty-five miles per hour, with license plates from a county in the central part of the state. Transcript of Record at 17, *Gambino*, 275 U.S. (No. 226). Nevertheless, because the Court refuses to recite and analyze the facts in the opinion, no descriptive modification was made to *Carroll*'s easily meetable standard of probable cause. The state of the lower federal courts is also revealed by the reality that the federal district court and Second Circuit found no issue with probable cause in this case. *See* Gambino v. United States, 16 F.2d 1016 (2d Cir. 1927).

The other case, *Byars v. United States*, required the exclusionary remedy in federal cases where federal officers assisted state officers who found evidence used in a federal prosecution through an unconstitutional search. 273 U.S. 28, 32–33 (1927). Note also that in *Byars*, which concerned an unconstitutional home search, the Court attempted to revive its image of safeguarding the Fourth Amendment. *Id.* at 33–34 ("The Fourth Amendment . . . is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right."). Despite that strong statement, the Court also held that the federal government was able to use unconstitutionally seized evidence by state officers so long as they were not involved in the investigation. *Id.* at 33.

276. *McGuire*, 273 U.S. at 99. The Court went out of its way to make this statement, as the liquor used in evidence in the case was completely distinct from that which was destroyed (which the Court itself observed). *Id.*

With the Eighteenth Amendment in play, a liberal construction of the Fourth Amendment was inappropriate and a close and literal approach preferable.[277] The Court was well on its way in adapting the country to the new conditions imposed by the Eighteenth Amendment.[278] However, there were some limits. More mindful of the boundaries set in the National Prohibition Act than several of the lower courts, the Court continued to provide distinct protection to the home.[279]

B. Whispering Wires

The Eighteenth Amendment continued to influence the Supreme Court's Fourth Amendment jurisprudence as national prohibition enforcement showed no signs of slowing. By the end of 1927, alcohol prohibition cases still made up the majority of the federal criminal and civil docket.[280] Outright repeal was not yet a serious consideration. Most ordinary

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277. Compare this approach with that of *Boyd v. United States*, 116 U.S. 616, 633 (1886), discussed *supra* Part I. *See also* Olmstead v. United States, 277 U.S. 438, 466 (1928) (requiring a physical invasion of a constitutionally protected article or area for the Fourth Amendment to apply).

278. *See* Hawke v. Smith, 253 U.S. 221, 226 (1920).

279. *See* Agnello v. United States, 269 U.S. 20, 32–33 (1925). Agnello concerned an investigation for narcotics trafficking that culminated in a patently unlawful search of a home. *Id.* at 30–31 (indicating that Agnello was arrested several blocks away from his home and in custody when his home was warrantlessly searched). Nevertheless, the Court recognized the unlawfulness of the search in part by analysis that "[t]he search of a *private dwelling* is in itself unreasonable and abhorrent to our laws," citing the National Prohibition Act and its supplemental act. *Id.* at 32–33 (emphasis added). One of *Agnello*'s less-noted holdings applied the fruit of the poisonous tree doctrine to prohibit the use of illegally seized evidence as rebuttal (at least to answers provided via cross-examination). *Id.* at 35. For a discussion of the dismantling of this holding, see the argument between the majority and dissent in *United States v. Havens*. 446 U.S. 620 (1980). For an applied synthesis of many of the holdings of the Supreme Court up to 1927, see United States v. Lee. 274 U.S. 559, 563 (1927).

Maul v. United States, also decided in 1927, permitted searches and seizures of vessels beyond the coast guard's normal twelve-mile jurisdiction. 274 U.S. 501 (1927). Because that case concerns an admiralty seizure and issues of jurisdiction beyond the Fourth Amendment, I do not address it here. *See* The Underwriter, 6 F.2d 937 (D. Conn. 1925), *rev'd*, 13 F.2d 433 (2d Cir. 1926), *aff'd sub nom. Maul*, 274 U.S. 501; *see also* Dodge v. United States, 272 U.S. 530 (1926) (ratifying a prior seizure without authority when the federal government later pursued forfeiture proceedings for the seized vessel).

280. GEBHART, *supra* note 25, at 2, 7.

Americans likely supported continuing prohibition in a loosened form, while a small group sought even stricter enforcement.[281]

Interestingly, organized criminal empires also likely supported continued national prohibition due to the lucrative black-market opportunities it provided. Prohibition had "changed the organization and economics of illicit enterprise."[282] Through a combination of bloody competition and cartelization, vice markets became monopolies. Bootleg kingpins oversaw vast commercial enterprises. Among them, the lawyer-bootlegger George Remus ran operations that grossed fifty million dollars annually and employed thousands.[283] In 1933, Al Capone's *take-home pay* was conservatively estimated by the Internal Revenue Service as about $100,000 to $200,000 annually, an amount roughly equivalent to $2,500,000 to $5,000,000 today.[284] The illegal liquor trade in the United States was a behemoth—valued at two to three billion dollars annually by 1931, roughly forty-two to sixty-three billion modern dollars.[285]

One bust of this lucrative trade caught up former police lieutenant and then-"King of the Bootleggers"[286] Roy Olmstead.[287] Knowledgeable of the rules of evidence and operating in a state that criminalized wiretapping,[288] Olmstead appealed a sensational case of "whispering wires"[289] that

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281. *Prohibition Poll is 84% Wet to Date*, N.Y. TIMES, Feb. 19, 1932, at 3 (indicating that in 1922, about 72% of respondents supported modification or stricter enforcement and in 1930, about 59% supported the same); *see also Near Tie on Bonus in Digest's Ballot*, N.Y. TIMES, Aug. 14, 1922, at 5; *but see* H. H. Mitchell, *Prohibition and the Straw Ballot*, 35 SCI. MONTHLY 443 (1932) (criticizing the validity of the straw ballots and ultimately concluding that as of 1932, a clear majority would be in favor of modification to allow the sale of less-intoxicating liquors). Mitchell's opinion was supported by Franklin D. Roosevelt's brisk legalization of beer and wine with under 3.2% alcohol upon taking office. Beer Permit Act, Pub. L. No. 73-3, 48 Stat. 16 (1933). At the same time, polling by Literary Digest proved accurate regarding the later ratification of the Twenty-First Amendment despite the methodology of the polling. *See* Claude E. Robinson, *The Literary Digest Held Too Optimistic*, N.Y. TIMES, Mar. 12, 1933, at 57.

282. KEIRE, *supra* note 22, at 117, 121–22.

283. DOROTHY M. BROWN, MABEL WALKER WILLEBRANDT: A STUDY OF POWER, LOYALTY, AND LAW 64 (1984). An interesting tidbit is that Remus was later prosecuted by William Howard Taft's son, Charles Taft II, for the murder of his wife. *See Remus Near Blows with Prosecutors*, N.Y. TIMES, Nov. 19, 1927, at 19. Doubtless, criminals like these must have been on the minds of the Justices when they decided *Olmstead v. United States*, 277 U.S. 438 (1928) (*see* discussion *infra* Part III.B).

284. I.R.S., In Re: Alphonse Capone Report 2 (Dec. 21, 1933).

285. REPORT ON PROHIBITION, *supra* note 116, at 157.

286. William C. Lyon, *Seattle Rum 'King' to Have Rehearing*, N.Y. TIMES, Apr. 1, 1928.

287. Olmstead v. United States, 277 U.S. 438, 456 (1928) (recognizing Olmstead as the "leading conspirator and the general manager" whose operation grossed over two million annually).

288. Karen Abbott, *The Bootlegger, the Wiretap, and the Beginning of Privacy*, NEW YORKER (July 5, 2017), https://www.newyorker.com/culture/culture-desk/the-bootlegger-the-wiretap-and-the-beginning-of-privacy [https://perma.cc/Z3P4-ZFHC].

289. MABEL WALKER WILLEBRANDT, THE INSIDE OF PROHIBITION 232 (1930) (internal quotes omitted).

highlighted the role of the Eighteenth Amendment in altering Fourth Amendment jurisprudence.

Olmstead and ninety other defendants were indicted for conspiracy to violate the National Prohibition Act.[290] The prosecution relied on transcripts of conversations obtained through the warrantless months-long wiretap surveillance of the defendants' homes and Olmstead's main office.[291]

At the trial level, the wiretaps were cursorily dealt with by Western District of Washington Judge Jeremiah Neterer at two stages. First, the wiretaps, regardless of their propriety, could be used in the grand jury proceedings.[292] Then, at trial, evidence from the wiretaps could not be excluded because the interception of the telephone calls occurred beyond the four walls of the home and the defendants lacked any property right to the conversations themselves; the evidence was beyond the Fourth Amendment's scope.[293] At bottom, the contention of unconstitutionality was incomprehensible to Judge Neterer, who "kn[e]w of no rule of law or evidence which would exclude [the evidence], and no decision which, even by inference, sustains the contention of the defendant [in favor of suppression]."[294] Nevertheless, though indignant at the invocation of the Fourth Amendment to protect criminals, his conception of the bounds of the Amendment is a striking reminder of the constriction of its interpretation and scope to this point:

> The Fourth and Fifth Amendments cannot be emasculated so as to give criminals carte blanche in the use of the public telephone utility, whether the conspiracy is to violate the Eighteenth Amendment and [National Prohibition] Act[,] or for the destruction of life or property, ... These amendments do not make the walls of [a] house, or castle, co-extensive with the limits of the city, [s]tate, or nation, and give immunity. . . . [I]n light of the evil to be guarded against, which must be taken into consideration, such license cannot be given.[295]

And yet the irony was stark. Judge Neterer's rhetoric suggested that the Fourth Amendment had already been "emasculated" in another way. His invocation of "the evil to be guarded against"—including "conspiracy to

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290. Olmstead v. United States, 19 F.2d 842, 843 (9th Cir. 1927).
291. *Olmstead*, 277 U.S. at 456–57.
292. United States v. Olmstead, 7 F.2d 756, 759 (1925).
293. United States v. Olmstead, 7 F.2d 760, 763 (1925).
294. *Id.* Decisions which support suppression, at least by inference, are cited *infra* note 311.
295. Mabel Walker Willebrandt, *Telephone Wires Tapped to Smash Liquor Ring*, L.A. TIMES, Aug. 19, 1929, at 3 (quoting Judge Neterer).

violate the Eighteenth Amendment"—tied its narrow construction to the national prohibition mandate. Further, in a world where private dwellings were the boundary carved out for protection under the National Prohibition Act, imagining the Fourth Amendment applied in Olmstead's case required construction of a house encompassing an entire city. Olmstead was out of luck.

After Olmstead was convicted, he appealed on the theory that the transcripts should have been excluded because the wiretapping violated his Fourth and Fifth Amendment rights.[296]

OLMSTEAD RESIDENCE (1925) (*archived at* Museum of History & Industry)

Olmstead's arguments found little reception at the Ninth Circuit.[297] Wiretapping did not "come[] within the letter of the prohibition of constitutional provisions."[298] Listening was not searching and transcribing statements was not seizing. Nor did the government have to physically enter the home, an area protected by the National Prohibition Act and enumerated in the Fourth Amendment, to obtain the information. Judge Frank Rudkin dissented, examining wiretapping in a way that both invoked pre-Eighteenth Amendment jurisprudence and recognized the momentum of lower courts in its erosion:

296. *See* Olmstead v. United States, 19 F.2d 842 (9th Cir. 1927).
297. *Id.* at 848.
298. *Id.* at 847.

> [T]here is a growing tendency to encroach upon and ignore constitutional rights. For this there is no excuse. . . .
>
> But, whatever the tendency may be in the direction I have indicated, in other quarters, fortunately the Supreme Court has set its face against it. That court has consistently and persistently declared that the [Fourth and Fifth Amendments] must be liberally construed in favor of the citizen and his liberty, and that stealthy encroachments will not be tolerated. Nor are the guaranties contained in these amendments limited to houses and papers. Their chief aim and purpose was not the protection of property, but the protection of the individual in his liberty and in the privacies of life.[299]

Judge Rudkin and Roy Olmstead did not fully comprehend that the other judges on the panel—and the Justices of the Supreme Court—were not looking at the same Constitution anymore. The Eighteenth Amendment was now just as much a part of the Constitution as the Fourth. After the Court granted certiorari,[300] Mabel Walker Willebrandt, Assistant Attorney General in charge of alcohol prohibition cases (who had remarkably argued over forty cases before the Supreme Court)[301] withdrew in protest of the government's support of the "dangerous and unwarranted practice" of wiretapping.[302] Willebrandt knew the Supreme Court was being forced to make a decision it had already made again and again over the Prohibition Era: allow the flouting of the Eighteenth Amendment by finding a violation of the Fourth or conform the reading of the Fourth to vindicate the

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299. *Id.* at 849 (Rudkin, J., dissenting).

300. As an aside, this is the first instance of the Court "us[ing] certiorari to take particular questions instead of reviewing a case as a whole." Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793, 840 (2022). As Professor Johnson observes, differing perspectives over the scope of review using the writ colored the opinions of the dissenting Justices. *See id.* at 841–44.

301. *Celebrating the Women of the Department of Justice*, U.S. DEP'T OF JUST. (Mar. 15, 2012), https://www.justice.gov/archives/opa/blog/celebrating-women-department-justice-0 [https://perma.cc/N4R2-JC2U]. Willebrandt's arguments "set the basic interpretations of the scope of the . . . Eighteenth [A]mendment[] to the Constitution." BROWN, *supra* note 283, at xi. For a contemporary, succinct summary of Willebrandt's role in prohibition enforcement, see A.H. Ulm, *A Woman Directs the Dry Battle*, N.Y. TIMES MAG., Jan. 25, 1925, at 1, 22.

302. ROBERT C. POST, THE TAFT COURT, MAKING LAW FOR A DIVIDED NATION, 1921–1930, at 1063 (2024); WILLEBRANDT, *supra* note 289, at 232. Willebrandt later reflected on *Olmstead*, stating "[I] would still use my influence to prevent the *policy* of wire tapping being adopted as a prohibition enforcement measure, I nevertheless recognize the interpretation of the . . . Constitution against the lawbreaker and in favor of the government's right to apprehend him, was a prohibition victory of no small proportions." *See* WILLEBRANDT, *supra* note 289, at 237.

Eighteenth.[303] Her decision to withdraw indicated an awareness of what the Justices would choose.

The outcome of Olmstead's appeal was unsurprising provided the past eight years of prohibition-enforcing decisions handed down by the Court: Warrantless wiretaps did not violate the Fourth Amendment.[304] The rationale, however, resembled that of *Hester* rather than the other Prohibition Era cases: the Fourth Amendment did not cover the actions taken by police here. The home was not the fields around it,[305] nor the highways connecting them to society,[306] nor the telephone wires extending from it.[307] A close and literal interpretation of the Fourth Amendment meant that a *house* was the area within four walls and roof.[308] It also meant that the core inquiry was whether people, by using telephones, intended to put their voices beyond those walls, not whether they had a reasonable expectation that their words would be private.[309] Eavesdropping for months on telephone conversations and recording the words spoken was not a search.[310] *Boyd* could not help—the Court chose to take the "practical

303. That tension was becoming apparent to legal communities of the time. *See, e.g.*, *State Bar to Fight to Modify Dry Law*, N.Y. TIMES, Dec. 11, 1927 at 22 ("the resolution follow[s]: 'The Eighteenth Amendment is inconsistent with the spirit and purpose of the constitution of the United States and in derogation of the liberties of the citizens and rights of the States as guaranteed by the first ten amendments thereto.'" (quoting resolution of the New York City Bar Association)); Austin Haines, *The Crimes of Law Enforcement*, 33 NEW REPUBLIC 316, 316–18 (1923) (examining the bind of law enforcement to zealously enforce prohibition or respect fundamental rights and stating, "[a]lready many courts are growing tired of winking at such violations of fundamental rights and are making it more and more difficult to enforce prohibition."). For more, revisit the footnotes accompanying the discussion of *Carroll supra* Part III.A.

304. Olmstead v. United States, 277 U.S. 438, 466 (1928).

305. *Id.* at 465 (citing Hester v. United States, 265 U.S. 57 (1924)).

306. *Id.* (citing Carroll v. United States, 267 U.S. 132, 149 (1925)).

307. *Id.*

308. *Cf.* Brief for the United States at 41, *Olmstead v. United States*, 277 U.S. 438 (1928) [hereinafter Government's Brief in *Olmstead*] ("[C]learly the Constitution does not forbid [wiretapping] unless it involves actual unlawful entry into a house.").

309. *Olmstead*, 277 U.S. at 466 ("The reasonable view is that one [using a telephone] intends to project his voice to those quite outside, [in an area beyond] the protection of the Fourth Amendment. Here those who intercepted the projected voices were not in the house of either party to the conversation."). It is worth remembering that long before *Katz*, the latter approach could have been embodied by a liberal construction of the Fourth Amendment. *See id.* at 471–85 (Brandeis, J., dissenting); Katz v. United States, 389 U.S. 347 (1967) (formalizing the reasonable expectation of privacy test).

310. *Olmstead*, 277 U.S. at 464.

meaning" of *house* and *search*—no matter if they had long taken impractical meanings in non-liquor cases.[311]

Though the analysis could have ended there, with the actions of officers neither physically intruding upon the home nor a search, the Court appeared to deem the obtaining of evidence by conduct illegal under state law reasonable in any event.[312] The balancing language of the Court resembled *Carroll*'s, that reasonableness be determined "in a manner which will conserve public interests."[313] The Court was unequivocal:

> [Excluding evidence] obtained by other than nice ethical conduct by government officials, would make society suffer and give criminals greater immunity than has been known heretofore . . . [T]hose who realize the difficulties in bringing offenders to justice may well deem it wise that the exclusion of evidence should be confined to cases where rights under the Constitution would be violated by admitting it.[314]

At first glance, Chief Justice William Howard Taft's words seem like realist gold. The majority does not mention the Eighteenth Amendment and alcohol prohibition but rather general criminality. At the same time, the Court did not need to. In 1928, there was still little indication that the Eighteenth Amendment would be repealed entirely,[315] and alcohol prohibition cases still made up the majority of federal criminal and civil cases—even without considering any associated crimes.[316] In other words, behind *Olmstead* raged the continuing "inflexible and perpetual war against liquor." It was with this backdrop that the Court cited its Prohibition Era liquor search and seizure precedent in discussing what constituted a house

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311. *Id.* at 463–65; *cf.* Gouled v. United States, 255 U.S. 298 (1921) (finding a search where a surreptitious visitor *abstracted* from papers found in an office); Ex parte Jackson, 96 U.S. 727 (1878) (letters provided to the post are protected by the Fourth Amendment); Bram v. United States, 168 U.S. 532 (1897) (coercing a confession is a search and seizure); Boyd v. United States, 116 U.S. 616, 633 (1886) (lawful subpoenas to produce evidence are searches and seizures); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) (same).

312. *Id.* at 468. This was especially questionable provided that the Court's analysis foreclosed a reasonableness analysis in other cases involving wiretapping because no search or seizure occurs. It also raises the question of why the Court chose to say, in essence, "no search here" rather than "the search here was reasonable."

313. Carroll v. United States, 267 U.S. 132, 149 (1925).

314. *Olmstead*, 277 U.S. at 468.

315. *See, e.g.*, HOWARD LEE MCBAIN, PROHIBITION: LEGAL AND ILLEGAL 17 (1928) [hereinafter MCBAIN, PROHIBITION].

316. *See* GEBHART, *supra* note 25, at 14; *see also* discussion *supra* accompanying notes 99–103.

(*Hester*) and what was reasonable (*Carroll*) and cited pre-national prohibition precedent and non-liquor cases to show dissimilarity.[317]

Justice Louis Brandeis's dissent clarified the Eighteenth Amendment's role in the decision, asserting, "[t]he Eighteenth Amendment has not in terms empowered Congress to authorize any one to violate the criminal laws of a state" to suggest that the majority's allowance of such tactics must have precipitated from an embrace of the Eighteenth Amendment.[318] Even if he was correct in his assessment, Brandeis was hypocritical. Seven years earlier, he had joined the Court's unanimous judgment in *Hester* allowing officers to trespass to obtain evidence.[319] Further, when Justice Brandeis later wrote that the Fourth Amendment's clauses had to be adaptable to a changing world,[320] he missed that the country and his own jurisprudence[321] had changed the Constitution to accommodate a changing world, one with an Eighteenth Amendment that mandated the prohibition of alcohol.[322] Despite all the vigorous protest in *Olmstead*, the Court continued its practice of narrowing the scope of the Fourth Amendment to vindicate the Eighteenth. Justice Brandeis's wishful premonition that *Boyd* would live "as long as civil liberty lives in the United States" seemed immediately mistaken in the context of a dissent to an opinion that condoned illegal warrantless wiretapping.[323]

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317. *See generally Olmstead*, 277 U.S. at 458–65; *but cf. id.* at 461 (citing Amos v. United States, 255 U.S. 313 (1921)). The citation of *Amos* is not persuasive enough to show that the Court was ignoring the Eighteenth Amendment because *Amos* was an intrusion of the home case that was recognized as a straightforward decision at the time of its publication. *See* discussion *supra* Part III.

318. *Id.* at 482 (Brandeis, J., dissenting); *but see* POST, *supra* note 302, at 1092 nn.94, 96 (2024) (quoting letters from Justice Taft which demonstrate his resistance to the decision being categorized as a national prohibition decision). Nevertheless, Taft later writes of his decision as "stand[ing] by the law" and states that Holmes' dissent would lead to having "no constitution . . ." Letter from William Howard Taft to Horace D. Taft (June 8, 1928) (excerpted in POST, *supra* note 302, at 1094 n.98).

319. Also, the government had noted *Hester* in its briefing, citing it to support the proposition that "[e]vidence obtained by trespass, by fraud, by unethical or even criminal methods is admissible if the Fourth Amendment be not violated," providing daylight for the majority's adoption of that position. Government's Brief in *Olmstead* at 12.

320. *Olmstead*, 277 U.S. at 472 (Brandeis, J., dissenting).

321. Hester v. United States, 265 U.S. 57 (1924); Carroll v. United States, 267 U.S. 132 (1925); Steele v. United States, 267 U.S. 498 (1925); Dumbra v. United States, 268 U.S. 435 (1925); McGuire v. United States, 273 U.S. 95 (1927); Segurola v. United States, 275 U.S. 106 (1927); Marron v. United States, 275 U.S. 192 (1927); United States v. Lee, 274 U.S. 559 (1927) (authored by Brandeis); *but see* Gambino v. United States, 275 U.S. 310 (1927) (authored by Brandeis).

322. Recall the Court's statement that constitutional change was necessary to accommodate "the progress of time and the development of new conditions." Hawke v. Smith, 253 U.S. 221, 226 (1920).

323. *Olmstead*, 277 U.S. at 474.

The decision in *Olmstead* sent shockwaves through America. It was called the *Dred Scott*[324] of national prohibition.[325] Even the Anti-Saloon League decried the holding, scared that perceptions of the Court's decision as related to alcohol prohibition would engender "a certain amount of prejudice against the Eighteenth Amendment and the [National Prohibition] Act."[326]

With *Olmstead*, "[t]he highest tribunal of the land . . . placed the seal of its approval on methods which should shock the common man's sense of decency and fair play."[327] Even radical prohibition advocates knew that the Court's accommodation of the Eighteenth Amendment by "perforating the Bill of Rights" was unpopular.[328] Although cognizant of its unpopularity, Chief Justice Taft stood by the decision.[329] Constitutional scholar and progenitor of the term "living constitution," Howard Lee McBain was somber.[330] Surveying case law throughout the judiciary post-*Olmstead*, he wrote "[t]he family of the amendments is no longer happy and harmonious. This belligerent new brother is and will continue to be an alien and disturbing element."[331]

C. The Home Becomes Sacred

The Supreme Court did not address another alcohol search and seizure case until it found an easy one in 1931—and when it did, it did not reverse precedent to track the souring public opinion on the Eighteenth Amendment.[332] Go-Bart Importing Company had been provided a vague federal permit to import "other wines and distilled spirits" since 1920 and used it to create an illegal liquor distribution business.[333] Reportedly, thirty-

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324. Dred Scott v. Sandford, 60 U.S. 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV (1868).

325. RICHARD F. HAMM, *OLMSTEAD V. UNITED STATES*: THE CONSTITUTIONAL CHALLENGES OF PROHIBITION ENFORCEMENT 10 (2010) (quoting *A New* Dred Scott *Decision*, 149 THE OUTLOOK 293, 293 (1928)).

326. *Dr. Nicholson Backs Dry Wire-Tapping*, N.Y. TIMES, June 24, 1928, at 58.

327. BLACK, *supra* note 89, at 147–48.

328. OKRENT, *supra* note 22, at 286.

329. *See* discussion *supra* note 250 (letters of Taft).

330. HOWARD LEE MCBAIN, THE LIVING CONSTITUTION. A CONSIDERATION OF THE REALITIES AND LEGENDS OF OUR FUNDAMENTAL LAW 168 (1927).

331. MCBAIN, PROHIBITION, *supra* note 315, at 168.

332. The Great Depression was becoming serious and there was indication that Americans were shifting toward repeal. *See, e.g.*, Gary Richardson, *Banking Panics of 1930–31*, FED. RSRV. HIST., https://www.federalreservehistory.org/essays/banking-panics-1930-31 [https://perma.cc/UTT3-KFQT]. *Prohibition Poll is 84% Wet to Date*, N.Y. TIMES, Feb. 19, 1932, at 3 (comparing 1930 and 1932 polling figures and indicating that when the options were repeal versus maintenance of prohibition, voters were more likely to choose repeal).

333. *Find Accused 'Ring' Had Liquor Permit*, N.Y. TIMES, June 9, 1929, at 1.

seven *arrest* warrants were issued.[334] Unfortunately for the government, the arrest warrants issued "did not specify any building structure, location, or place, or set forth any particulars or other overt act or show any connection [to the] offense referred to in the complaint."[335] No *search* warrant was issued.[336]

To make matters worse for law enforcement, prohibition agents merely showed Bartels, the secretary-treasurer (and the *Bart* of *Go-Bart*), a piece of paper falsely claimed to be an arrest *and* search warrant, and then arrested him.[337] Gowens, the president of the company (and the *Go* of *Go-Bart*), arrived and was likewise arrested; under threat of force, he opened a desk and safe.[338] The facts got even worse for the government. The unspecific warrants did not authorize prohibition agents to make the arrests, rather they authorized a marshal and his deputies.[339] And in a "general exploratory search," the agents seized "papers, journals, account books, letter files, insurance policies, cancelled checks, index cards, and other things."[340] On these extraordinarily bad facts for the government, the Court, now led by Chief Justice Charles Evans Hughes (Chief Justice Taft's successor, who, by coincidence, had been first appointed to the Court by then-President Taft in 1910), unanimously held the warrant to be facially invalid.[341] While Gowens and Bart won, the Supreme Court doubled down on its broadened definition of immediacy regarding searches incident to arrest.[342] The Court was standing on its earlier decisions, not reining them in when public opinion waxed against the Eighteenth Amendment.

The Report on the Enforcement of the Prohibition Laws of the United States was released two days later. Therein, President Herbert Hoover's National Commission on Law Observance and Enforcement, chaired by George W. Wickersham—the former United States Attorney General under President Taft—bemoaned and diagnosed the failures of the "bad start" to Prohibition.[343] The Wickersham Commission found that a significant cause of the "bad start" was the very "attempt to enforce the National Prohibition

334. *Id.* at 3.
335. Go-Bart Importing Co. v. United States, 282 U.S. 344, 349 (1931).
336. *Id.* at 352.
337. *Id.* at 349.
338. *Id.*
339. *Id.* at 356.
340. *Id.* at 350, 358.
341. *Id.* at 356.
342. Specifically, the Court distinguished but unnecessarily endorsed *Marron,* described *supra* note 275, reiterating that the seized items there were "visible and accessible and in the offender's immediate custody" even though the key items seized were in a closet and the arrestee was in the custody of four prohibition officers. *Compare id.* at 358, *with* Marron v. United States, 275 U.S. 192, 194 (1927).
343. REPORT ON PROHIBITION, *supra* note 116, at 79.

Act as something on another plane from the law generally; an assumption that . . . constitutional guarantees and legal limitations on law enforcement . . . must yield to the exigencies or conveniences of enforcing it."[344] The Commission also expressed that "guarantees of liberty and [the] sanctity of the home" transgressed by law enforcement had actually been "deemed fundamental in [its] policy," the National Prohibition Act.[345] Ultimately, ten of the Commission's eleven members opposed repealing the Eighteenth Amendment but also opposed "legislation allowing more latitude for federal searches and seizures."[346] Through the Report on Enforcement, the public's disdain for the liquor searches and seizures that had multiplied over the past eleven years of Prohibition was now trumpeted by an investigative commission created by the reelection-seeking pro-national prohibition candidate, President Hoover.[347] The discontent with national prohibition had become undeniable.

In 1931, when confronted with an opportunity to roll back the holding of *Carroll* in *Husty v. United States*,[348] the Court stood firm.[349] The Eighteenth Amendment's impact on the Fourth Amendment was less masked this time, with the Court specific about its application in instances involving alcohol: "The Fourth Amendment does not prohibit the search, without warrant, of an automobile, *for liquor illegally transported or possessed*, if the search is upon probable cause; and arrest for the transportation or possession need not precede the search."[350] The same was true of the probable cause determination: "It is enough if the apparent facts which have come to his attention are sufficient, in the circumstances, to lead a reasonably discreet and prudent man *to believe that liquor is illegally possessed* in the automobile to be searched."[351] Faced with facts providing much greater probable cause than those of *Carroll*, the Court refused to qualify its earlier determination that information that someone had been

344. *Id.* at 81–82.

345. *Id.* at 82.

346. *Id.* at 145, 147.

347. President Hoover even found himself resolutely standing with the Eighteenth Amendment against the Wickersham Commission's suggestion of revision should enforcement difficulties continue. *See, e.g.*, Herbert Hoover, Message to Congress Transmitting the Report on Prohibition (Jan. 20, 1931) ("[I] must not be understood as recommending[] . . . revision of the eighteenth amendment . . . . My own duty and that of all executive officials is clear—to enforce the law with all the means at our disposal without equivocation or reservation.").

348. 282 U.S. 694 (1931).

349. *Id. But see* Murchison, *supra* note 18, at 501 (asserting that the legal ideology of "reluctance to overrule existing precedents" was the cause).

350. *Husty*, 282 U.S. at 700 (emphasis added) (citing Carroll v. United States, 267 U.S. 132 (1925)).

351. *Id.* at 701 (citing Dumbra v. United States, 268 U.S. 435, 441 (1925); Stacey v. Emery, 97 U.S. 642, 645 (1878)).

engaging in illegal activity months before constituted probable cause for an automobile search.[352] In the same case, the Court also went further than *Carroll*, allowing the search of containers within a vehicle on minimal probable cause that they contained liquor.[353] However, like in *Go-Bart*, the defendants had their sentences overturned[354] while the Court continued to affirm and rely on its earlier decisions as doctrinally sound.

The next year, in *United States v. Lefkowitz*,[355] the Court was confronted with an egregious search like that in *Go-Bart* where officers had attempted to use an arrest warrant to conduct a general exploratory search. Agents took a valid *arrest* warrant and went to an office "about ten feet wide and twenty feet long" divided by a partition to execute it.[356] Following the arrest and search of the person therein, police proceeded to search all the drawers of two desks, wastebaskets, and a towel cabinet, seizing books, binders, and papers.[357] The Court held that the search and seizure of the items in the room was illegal and limited the search incident to arrest power by clarifying that its earlier broad conferral to search incident to arrest was confined to instances of maintaining a nuisance—an offense class specifically

352. *Compare id.* at 700 (noting that police had received a reliable tip and that two of the passengers fled from the vehicle upon the traffic stop) *with Carroll*, 267 U.S. at 133–36.

353. The record of the suppression hearing contains the pertinent exchange between the defense attorney and the searching officer: "You saw bags? A. I saw bags, and I know whiskey bags. . . Q. Isn't it possible to put other goods in a bag that has the resemblance of a whiskey bag? A. I suppose it is . . . I knew it was whiskey." Transcript of Record at 27, *Husty*, 282 U.S. (No. 447). The holding of *Husty* as concerning the authority to search containers within automobiles was later verified in *United States v. Ross*. 456 U.S. 798, 818 (1982).

354. In *Husty*, the ground for reversal was improper sentencing. 282 U.S. at 702–04.

The same day *Husty* was decided, the Court decided *United States v. Sprague*, a case presenting the most ambitious opportunity for jurisprudential backtracking in the entire era. 282 U.S. 716 (1931). In the District of New Jersey, Judge William Clark was confronted with a prosecution of a local farmer, William Sprague, under the National Prohibition Act for transporting fifty "half-barrels of beer in his truck" on the Franklin Turnpike. *Clark Ruling Results From Beer Seizure*, WASH. HERALD, Dec. 17, 1930, at 2. In the background, a committee of volunteer lawyers had selected Sprague's case for something bigger than an ordinary liquor prosecution—the case, for its "simplicity," "presented a clear-cut issue of the constitutionality of Eighteenth Amendment." *Drive Began in 1927 for Dry Law Test*, N.Y. TIMES, Dec. 17, 1930, at 23. Accordingly, Sprague's argument for quashing his indictment went beyond the usual Fourth Amendment objections. His lawyers contended that the Eighteenth Amendment was improperly adopted and thus invalid, rendering the National Prohibition Act passed under its authority likewise invalid. *See generally* United States v. Sprague, 44 F.2d 967 (D.N.J. 1930). Judge Clark agreed. *Sprague*, 44 F.2d at 986. The Court, relying in part on its earlier holdings, enthusiastically did not. *See Sprague*, 282 U.S. at 734 ("[W]e reiterate what was said in the *National Prohibition Cases,* that the 'Amendment by lawful proposal and ratification, has become a part of the Constitution.'" (quoting 253 U.S. 350, 386 (1920))).

355. 285 U.S. 452, 465 (1932).

356. *Id.* at 458.

357. *Id.* at 459 n.1, 460 n.2 (listing the items seized).

delineated in the National Prohibition Act but not charged in the complaint in *Lefkowitz*.[358]

Lefkowitz, however, was not a radical pushback against Prohibition Fourth Amendment jurisprudence—had it been decided differently, officers would have more authority to search under a search incident to arrest than if they had obtained a search warrant.[359] Finding the search reasonable would have departed even from the Prohibition Era decisions protecting the interior of "one's house or place of business" from unreasonable searches and seizures.[360] The Court again left all of its recent decisions intact.

The Court was likewise provided an opportunity to roll back *Hester* and *Olmstead* by fleshing out the bounds of what constituted a house in *Taylor v. United States*, where officers searched an adjacent garage without a warrant despite having what the Court suggested to be ample probable cause.[361] Officers had received complaints over the course of a year about bootlegging; they finally went to the garage one early morning, smelled alcohol, and peered inside through a small crack, discovering many cases which they thought contained alcohol.[362] The officers then broke in and searched.[363] The Court punted the major questions. There was no need to decide whether or not the garage was a private dwelling or within the curtilage of the home—there was an easier way out that did not rely on a liberal construction of the Fourth Amendment. The officers' failure to make any effort to obtain a warrant after "abundant opportunity" (over a year) and with "no probability of material change in the situation" in the interim if

358. *Id.* at 462–63; National Prohibition Act, ch. 85, tit. II, § 21–22, 41 Stat. 305, 305–323 (1919). Note that the Court still did not back down from its holding in *Marron* but seemed to articulate a plain view rationale rather than immediate control. *Lefkowitz*, 285 U.S. at 462. However, this makes less sense when the Court takes issue with the fact that officers in *Lefkowitz* looked at the items to ascertain whether they were involved in crime—the papers in *Marron* taken from a closet were not evidently involved in crime. *Id.* at 464. A distinguishing feature of *Lefkowitz* may have been that the prosecution trickily charged nuisance after the fact in an attempt to rectify the search. Lefkowitz v. U.S. Att'y for S.D.N.Y., 52 F.2d 52, 53 (2d Cir. 1931).

359. *Lefkowitz*, 285 U.S. at 464 ("The authority of officers to search one's house or place of business contemporaneously with his lawful arrest . . . certainly is not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and the things sought to be obtained.").

360. *Id.* at 464; *see, e.g.*, Gouled v. United States, 255 U.S. 298, 305–06 (1921); Amos v. United States, 255 U.S. 313 (1921); *but cf.* Marron v. United States, 275 U.S. 192 (1927) (providing no such application to a place of business where the business itself was plainly illegal). This distinction of *Marron* is also evidenced by the Court's note that the search and seizure for "illicit liquor in order to prevent the commission of crime" is different from that to obtain evidence for prosecution. *Lefkowitz*, 285 U.S. at 465–66.

361. Taylor v. United States, 286 U.S. 1, 5 (1932).

362. *Id.*; Taylor v. United States, 55 F.2d 58, 59 (4th Cir. 1932) (indicating that the hole officers peeped through was a crack in the door of the garage), *rev'd*, *Taylor*, 286 U.S. at 6.

363. *Taylor*, 286 U.S. at 5.

they had gone to get one was unreasonable.[364] These "exceptional circumstances" made for an easy case that was hardly a blessing for the Fourth Amendment.[365] Despite saying nothing overtly about what constituted the home, the Court's recitation that officers could have validly obtained a warrant *after* smelling liquor and peeping inside the garage further confined the protections of the Fourth Amendment to enclosed private dwellings.[366] Indeed, greenlighting the issuance of a warrant after such a search indicated that officers *could* walk onto one's property and up to the edge of a garage adjacent to one's home, literally sniff around, and peek inside in the middle of the night without such constituting an unreasonable search, whether the area was encompassed in the curtilage of the home or not.[367]

By 1932, Franklin D. Roosevelt began openly campaigning on total repeal of the Eighteenth Amendment.[368] The decade of support for national prohibition was clearly over. Roosevelt positioned himself against the official position of an incumbent government that proposed modified enforcement as a solution to widespread misgivings about national prohibition.[369] But modification was not enough. Repeal was now on the table. Unlike the 1928 election, open contempt for Prohibition could now serve as a sturdy plank in a viable political platform.[370]

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364. *Id.*

365. *Id.* at 4.

366. *Id.* at 6.

367. *Id.* at 5–6. But because the case suggested that officers could trespass onto one's property up to the edge of a building for purely investigative purposes and look inside openings in the building to obtain probable cause, *Taylor* indicated that the area immediately outside one's house was *not* protected as within the curtilage of the home.

368. *See, e.g.*, Franklin D. Roosevelt, Campaign Address in Sea Girt, New Jersey (Aug. 27, 1932).

369. *See generally* REPORT ON PROHIBITION, *supra* note 116.

370. *See* TERRY GOLWAY, FRANK AND AL: FDR, AL SMITH, AND THE UNLIKELY ALLIANCE THAT CREATED THE MODERN DEMOCRATIC PARTY 190, 210 (2018).

WOMAN POINTING AT *ABOLISH PROHIBITION!* POSTER (1931)
(*archived at* Library of Congress)

The day before Roosevelt's landslide election in 1932, the Supreme Court continued its doctrinal balancing between the Fourth and Eighteenth Amendment, but for the first time, it was the Eighteenth Amendment that was forced to give—albeit in a rather inconsequential way.

In *Grau v. United States*, the Court dealt with a home search where police had failed to demonstrate that the "place to be searched is not a private dwelling [while] the record affirmatively shows it was."[371] The Court found a harmony that deferred to the Fourth Amendment's purpose rather than the Eighteenth's goal, but it relied on the National Prohibition Act in a manner reminiscent of the Wickersham Commission: "Congress intended, in adopting [section] 25 of Title 2 of the National Prohibition Act, to preserve, not to encroach upon, the citizen's right to be immune from

371. 287 U.S. 124, 128 (1932).

unreasonable searches and seizures."[372] In other words, the National Prohibition Act's contemplation of extra protection for private dwellings foreclosed interpreting the act in conflict with the Fourth Amendment's protections in that domain.[373] But the Court's reasoning suggested its logic in other cases: where Congress had not adopted specific protections, perhaps it had intended to encroach upon the other rights of citizens. Indeed, the Court could have, but did not, take other opportunities to rebalance its prior Eighteenth Amendment cases in ways that "preserve, not . . . encroach upon" the Fourth Amendment. In any event, *Grau*'s concern with the search of an area indisputably protected by the National Prohibition Act and the Fourth Amendment, the home's interior, limited its impact.[374]

The Supreme Court's final Prohibition Era liquor search and seizure decision, *Nathanson v. United States*, followed its line of home search cases and formalized a requirement that was self-evident—warrants could not be issued when an affiant did not provide "*any* statement of adequate supporting facts."[375] Had the Court held otherwise, officers could claim they had information to suspect someone of a crime and obtain a warrant without ever allowing a magistrate to examine the information that supported probable cause—vitiating the entire point of having an impartial party examine the evidence to make probable cause determinations.[376] The self-evidence of the decision likewise flowed from the preceding warrant cases of *Go-Bart* and *Lefkowitz*, where the Court held search warrants invalid because of the insufficiency of facts therein. If the facts alleged could be

372. *Id.*

373. *Id.* ("The broad construction of the act by the Court of Appeals unduly narrows the guaranties of the Fourth Amendment, in consonance with which the statute was passed.").

374. *Sgro v. United States*, 287 U.S. 206 (1932), similarly to *Grau*, concerned the use of a bad warrant to search a hotel room (an area also covered under the National Prohibition Act's private dwelling protections). The commissioner did not show any information to demonstrate probable cause to renew the warrant and "simply changed the date of the old warrant." *Id.* at 212. Also like *Grau*, *Sgro* falls into the line of private dwelling search cases, limiting discussion of the case as a departure from the Eighteenth Amendment's dictates. *See e.g.*, Gouled v. United States, 255 U.S. 298, 305–06 (1921); Amos v. United States, 255 U.S. 313 (1921); *see also* United States v. Berkeness, 275 U.S. 149 (1927) (extending the private dwelling protections of the National Prohibition Act to the Territory of Alaska). *Sgro* also relied on a discussion and straightforward language of the National Prohibition Act which required the execution of the warrant within ten days of its issuance. 287 U.S. at 209–10.

Nevertheless, the more important rule established by Sgro was that federal judges could not reissue warrants without a demonstration of probable cause in the subsequent application for a warrant. This, I think, Murchison misstates by writing that "*Sgro* construed a federal statute to deny magistrates discretion to reissue warrants" rather than ". . . deny magistrates discretion to reissue warrants when an affiant has not demonstrated probable cause and is merely asking for an old warrant to be redated." Murchison, *supra* note 18, at 515.

375. 290 U.S. 41, 46 (1933) (emphasis added).

376. This is not an exaggeration; the affidavit in *Nathanson* had only the belief and suspicion of an officer to support probable cause without any description of how the officer came to his conclusions. *Id.* at 44.

insufficient to justify a warrant, it followed that alleging no facts at all would also be insufficient.

The Court again demonstrated respect for the National Prohibition Act's concern for the home's interior ("private dwelling") in its holding, first stating, "[i]n some circumstances a public officer may make a lawful seizure without a warrant; in others he may act only under permission of one. In the present case the place of search and seizure was a private dwelling."[377] The Court continued, "[u]nder the Fourth Amendment, an officer may not properly issue a warrant *to search a private dwelling* unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough."[378] With that, the Court's final balancing of the Fourth and Eighteenth Amendment left a bubble of pre-Prohibition sanctity floating in the jurisprudence. The home, "a private dwelling," carved out for special protection in the National Prohibition Act, had become sacred to the Supreme Court—if sacred meant that individuals only obtained relief where there was a physical entry and search inside.[379]

* * *

In the end, though the Court most explicitly embraced the Eighteenth Amendment as modifying the interpretation of the Fourth Amendment in *Carroll*, the Prohibition Era saw more than searches of automobiles as reasonable or entirely outside the protection of the Fourth Amendment. In the late years of Prohibition, faced with mounting public opinion against National Prohibition and its enforcement, the Court stuck with its doctrinal developments rather than doubling back even when it ruled for

377. *Id.* at 46.
378. *Id.* at 46–47.
379. *See* Amos v. United States, 255 U.S. 313 (1921); Hester v. United States, 265 U.S. 57 (1924); Olmstead v. United States, 277 U.S. 438 (1928); Taylor v. United States, 286 U.S. 1 (1932).

defendants.[380] It continued to construe the protections against unreasonable searches and seizures in line with the mandate of the Eighteenth Amendment and the associated safeguards for the home in the National Prohibition Act. The Fourth Amendment—the legal site where criminal investigations and citizens meet—had been profoundly altered by the Eighteenth Amendment with virtual unanimity at the Supreme Court.

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380. From Part III.A: Amos v. United States, 255 U.S. 313 (1921) (9–0) (for defendant) (home search); Hester v. United States, 265 U.S. 57 (1924) (9–0); Carroll v. United States, 267 U.S. 132 (1925) (6–2, the opinion indicates that Justice Joseph McKenna would have voted with the majority but retired); Steele v. United States, 267 U.S. 498 (1925) (9–0); Dumbra v. United States, 268 U.S. 435 (1925) (9–0); Byars v. United States, 273 U.S. 28 (1927) (9–0) (for defendant) (home search); McGuire v. United States, 273 U.S. 95 (1927) (9–0); Segurola v. United States, 275 U.S. 106 (1927) (9–0); United States v. Berkeness, 275 U.S. 149 (1927) (9–0) (for defendant) (home search); Marron v. United States, 275 U.S. 192 (1927) (9–0); United States v. Lee, 274 U.S. 559 (1927) (9–0); Gambino v. United States, 275 U.S. 310 (1927) (9–0) (for defendant).

From Part III.B–C: Olmstead v. United States, 277 U.S. 438 (1928) (5–4); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931) (9–0) (for defendant); Husty v. United States, 282 U.S. 694 (1931) (9–0) (Fourth Amendment issue decided for government); United States v. Lefkowitz, 285 U.S. 452 (1932) (8–0) (for defendant); Taylor v. United States, 286 U.S. 1 (1932) (9–0) (for defendant); Grau v. United States, 287 U.S. 124 (1932) (7–2) (for defendant) (home search); Sgro v. United States, 287 U.S. 206 (1932) (7–2) (for defendant) (home search); Nathanson v. United States, 290 U.S. 41 (1933) (9–0) (for defendant) (home search).

PROHIBITION ERA LIQUOR SEARCH AND SEIZURE CASES AT THE SUPREME COURT[381]				
Year	*Case*	*Vote*	*Prevailing Party on 4A Claim*	*Private Dwelling*
1921	*Amos*	9–0	Defendant	Yes[382]
1924	*Hester*	9–0	Government	No, open fields
1925	*Carroll*	6–2	Government	No, automobile
	Steele	9–0	Government	No, commercial garage
	Dumbra	9–0	Government	No, grocery store
1927	*Byars*	9–0	Defendant	Yes
	McGuire	9–0	Government	Yes, but not covered by National Prohibition Act[383]
	Segurola	9–0	Government	No, automobile
	Berkeness	9–0	Defendant	Yes
	Marron	9–0	Government	No, speakeasy
	Lee	9–0	Government	No, marine vessel
	Gambino	9–0	Defendant	No, automobile
1928	*Olmstead*	5–4	Government	No, telephone wires
1931	*Go-Bart*	9–0	Defendant	No, office, bad warrant
	Husty	9–0	Government	No, automobile
1932	*Lefkowitz*	8–0	Defendant	No, office, bad warrant
	Taylor	9–0	Defendant	No, garage, "extraordinary circumstances"
	Grau	7–2	Defendant	Yes
	Sgro	7–2	Defendant	Yes
1933	*Nathanson*	9–0	Defendant	Yes

381. Provided that the "bad warrant" cases of *Go-Bart* and *Lefkowitz* concerned the requirements of deficient warrants to conduct exploratory searches and *Taylor*'s nature as an outlier case where officers had probable cause for over a year sufficient to obtain a warrant for a garage adjoining a private dwelling, the only case that appears to conflict at face value with my thesis is *Gambino*, addressed *supra* note 275.

382. Note that the search in *Amos* occurred prior to Prohibition.

CONCLUSION

God save you, reader—me no less,
And wet or dry, the old U.S.

—MICHAEL MONAHAN, DRY AMERICA 174 (1921)

It hardly took the first year of the Prohibition Era for the Supreme Court to conclude that the Eighteenth Amendment was meant to change the nature of law enforcement in the United States.[384] As alcohol manufacturers and traffickers, from rural moonshiners to international liquor kingpins, assailed the Eighteenth Amendment and invoked the Fourth Amendment for protection, they were defeated at the Court practically every time a search or seizure occurred outside of the (narrowly construed) home. The Court's decisions did not track public opinion. Even in the face of imminent repeal, the Justices continued to interpret the Fourth Amendment in a manner consistent with the vision of enforcement contemplated by the Eighteenth Amendment and the National Prohibition Act and refused to roll back recent doctrinal developments. Not for the judiciary's lack of trying to effectuate enforcement, on December 15, 1933, alcohol prohibition ceased to be part of the Constitution.[385]

Because courts relied on the Eighteenth Amendment as a constitutional, doctrinal tool to contract Fourth Amendment protections, perhaps its repeal by the Twenty-First Amendment should have resulted in a reconsideration of Prohibition Era doctrine and a return to the pre-Prohibition construction of the Fourth Amendment.[386] This would have meant the rebirth of a broadly liberal construction of the Amendment and a repudiation of the idea that protections for persons, papers, and effects are subordinate to that provided for houses.

Yet no such overt doctrinal recalibration occurred. Extraordinarily

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383. United States v. McGuire, 300 F. 98, 100 (N.D.N.Y. 1924) (indicating that the whole two-story building was seen as used for the sale of intoxicating liquors where the ground floor was a saloon and the upstairs was a residence where the liquors sold downstairs were kept, thus beyond the protections of the National Prohibition Act's warrant requirement). When the case reached the Supreme Court in the form of questions certified for review, the dispute over whether the residence upstairs was covered was not a relevant issue. McGuire v. United States, 273 U.S. 95 (1927).

384. *See* National Prohibition Cases, 253 U.S. 350, 386 (1920).

385. U.S. CONST. amend. XXI.

386. *See* United States v. Chambers, 291 U.S. 217, 223 (1934) ("Upon the ratification of the Twenty-first Amendment, the Eighteenth Amendment at once became inoperative. Neither the Congress nor the courts could give it continued vitality."); *cf.* Gretchen Ritter, *Jury Service and Women's Citizenship Before and After the Nineteenth Amendment*, 20 L. & HIST. REV. 479, 503–05 (2002) (describing the Court's revision of women's *Lochner* freedom of contract rights following the passage of the Nineteenth Amendment conferring suffrage).

powerful criminal investigatory authority may now rest on a partial vacuum in the Constitution created by the Twenty-First Amendment.[387] This profound legal lacuna was produced by the sanctioning of more intrusive criminal investigations at the expense of the Fourth Amendment during Prohibition. Those who aided enforcement included not only Congress and the executive but also legions of federal judges.

To many, the choice to build national prohibition into the Eighteenth Amendment was more consequential than producing a law with staying power: it made law that altered the functioning of other constitutional provisions. Across the federal judiciary, from district courts to the Supreme Court, the Fourth Amendment was not construed in a way that merely mapped onto public opinion about Prohibition. Rather, it was regularly transformed to effectuate the Prohibition Clause in liquor search and seizure cases. When significant alterations to the Fourth Amendment had been made for the enforcement of alcohol prohibition within the bounds set by the National Prohibition Act, the Court maintained them. The doctrinal project that percolated through the federal courts from 1920 to 1933, however principled or misguided, left lasting marks. The question of whether those marks ought to endure either as justified by practicality or on independent doctrinal grounds is left outstanding. But any answer will be impoverished if it does not first reckon with the history told here, namely: How Prohibition rewrote the Fourth Amendment.

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387. The most obvious is the continued allowance of warrantless searches of automobiles and land. *See e.g.*, California v. Acevedo, 500 U.S. 565 (1991) (automobile exception, relying on *Carroll*); United States v. Ross, 456 U.S. 798 (1982) (automobile exception, relying on *Husty* and *Carroll*); Oliver v. United States, 466 U.S. 170 (1984) (open fields exception, relying on *Hester*); United States v. Dunn, 480 U.S. 294 (1987) (same); Arizona v. Gant, 556 U.S. 332 (2009) (tracing search incident to arrest exception to *Marron*); Draper v. United States 358 U.S. 307 (1959) (relying on *Carroll*, *Husty*, *Dumbra*, and *Steele* for the benchmark of probable cause). The exceptionalism of the home ("first among equals") in the jurisprudence also looms large. *See, e.g.*, Florida v. Jardines, 569 U.S. 1, 6 (2013).