

*FERNANDEZ V. CALIFORNIA*: CO-OCCUPANT CONSENT  
SEARCHES AND THE CONTINUED EROSION OF THE FOURTH  
AMENDMENT

ABSTRACT

Consent searches allow the police to search a residence without a warrant when an occupant gives the police permission to do so. However, the situation becomes complicated when multiple individuals live at a residence and one of the residents allows the police to search over another resident's objection. In the 2006 case, *Georgia v. Randolph*, the Supreme Court somewhat limited ability of authorities to conduct co-occupant consent searches by declaring a search of a residence invalid when the objector was both expressly objecting and physically present. Justice Souter suggested in limiting dicta that a search would be invalid if there was evidence that the police removed a suspect from the scene for the purposes of avoiding a possible objection to a search. In the 2014 case, *Fernandez v. California*, the Court retreated from Souter's position, holding a co-occupant consent search valid even when the police arrest and remove the objector from the scene and then obtain consent from another occupant. Writing for the *Fernandez* majority, Justice Alito declared that as long as an officer's removal of the suspect from a crime scene was objectively reasonable, the search is valid. No subjective inquiry into officer motivations is required.

This Comment criticizes *Fernandez* on three reasons. First, it argues that *Fernandez* ignores the intention of the Fourth Amendment's drafters, who wanted to limit the arbitrary and discretionary authority of law enforcement. Second, it argues that *Fernandez* further demonstrates the inherently coercive nature of consent in consent-search cases. Finally, it contends that *Fernandez* further weakens the Court's already inadequate protections against potential police abuse in co-occupant consent-search cases.

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## INTRODUCTION

The Fourth Amendment of the United States Constitution protects “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” and ensures that court warrants for such searches will not be issued “but upon probable cause.”<sup>1</sup> Early twentieth-century Fourth Amendment jurisprudence focused on the protection of defendants from warrantless searches, even when a co-occupant consented to a search.<sup>2</sup> By the middle of the century, this protective stance evolved into the Court holding that warrantless searches are “per se unreasonable” under the Fourth Amendment.<sup>3</sup> In *Mincey v. Arizona*,<sup>4</sup> Justice Stewart even went so far as to declare that, “the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment.”<sup>5</sup>

Since the early 1970s, however, the Supreme Court has slowly eroded the Fourth Amendment protections against warrantless searches, especially in cases involving third-party consent to enter a premises, to

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1. U.S. CONST. amend. IV.

2. See e.g., *Amos v. United States*, 255 U.S. 313, 316 (1921) (declaring a co-occupant consent search of joint premises as being of “unconstitutional character”); see also George M. Dery, III & Michael J. Hernandez, *Blissful Ignorance? The Supreme Court’s Signal to Police in Georgia v. Randolph to Avoid Seeking Consent to Search from All Occupants of a Home*, 40 CONN. L. REV. 53, 56 (2007).

3. See *Katz v. United States*, 389 U.S. 347, 357 (1967); see also *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

4. 437 U.S. 385 (1978).

5. *Id.* at 393.

the extent that the exceptions have almost swallowed the original rule.<sup>6</sup> In *United States v. Matlock*,<sup>7</sup> the Court confirmed that consent of one co-occupant to conduct a search was sufficient to give the police the power to search the entire premises,<sup>8</sup> and in *Illinois v. Rodriguez*,<sup>9</sup> the Court held that the police only needed to reasonably believe that a consenting third party was an occupant, even if that belief was mistaken.<sup>10</sup>

More recently in *Georgia v. Randolph*,<sup>11</sup> the Court seemed to restore some constitutional protections when it held that a search is unconstitutional if conducted over the clear objections of a physically present co-occupant.<sup>12</sup> The Court also recognized the possibility that its ruling would give the police an incentive to simply remove potential objectors from the scene before an objection is made in order to avoid needing a warrant.<sup>13</sup> Consequently, the majority suggested that a search is invalid if there is evidence that the police removed a potential objector with the goal of avoiding an objection.<sup>14</sup>

This Comment will consider the Court's most recent third-party consent case, *Fernandez v. California*,<sup>15</sup> which held that a search based on third-party consent is valid even if the police removed a previously present objecting party.<sup>16</sup> Part I of this Comment briefly summarizes the historical development of the Court's third-party consent-search jurisprudence, starting with the early twentieth century. Part II summarizes the facts and Court's holding in *Fernandez*, which allowed a warrantless search of a home to stand when the police arrested the party objecting to the search and then obtained consent from the objector's live-in girlfriend. Part III criticizes the precedent set by *Fernandez* on three independent grounds: First, *Fernandez*, like other recent consent-search cases, ignores the Framers' original Fourth Amendment intent and perverts that intent by giving the police the discretion to override an objector by simply removing him from the scene.<sup>17</sup> Second, *Fernandez* largely ignores the coercive power that consent searches inherently create for the police. Third, *Fernandez* further exacerbates the incentives that the police already have to manipulate citizens in order to conduct a warrantless

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6. Marc McAllister, *What the High Court Giveth the Lower Courts Taketh Away: How to Prevent Undue Scrutiny of Police Officer Motivations Without Eroding Randolph's Heightened Fourth Amendment Protections*, 56 CLEV. ST. L. REV. 663, 664 (2008).

7. 415 U.S. 164 (1974).

8. *Id.* at 170.

9. 497 U.S. 177 (1990).

10. *Id.* at 185.

11. 547 U.S. 103 (2006).

12. *Id.* at 122–23.

13. *See id.* at 121.

14. *Id.*

15. 134 S. Ct. 1126 (2014).

16. *Id.* at 1134.

17. *Id.* at 1134–35.

search. This Comment concludes by briefly suggesting eliminating consent searches altogether as a solution to the issues discussed in Part III.

### I. BACKGROUND

Over the past century, the Supreme Court's position on warrantless searches authorized by a third party who also occupies the searched premises has evolved from rejection of such searches to near universal acceptance today.<sup>18</sup> In the early 1900s, the Court prioritized the privacy of defendants over searches authorized by third parties. For example, in *Amos v. United States*,<sup>19</sup> the defendant's wife consented to a search of their home when asked by government officers.<sup>20</sup> During the search, the officers found illegal whiskey, yet the Court declared the search unlawful because by the very nature of not having a warrant and requesting access to the home via the wife, the search implied coercion.<sup>21</sup>

Two decades after *Amos*, the Court began to loosen its restrictions on Fourth Amendment consent searches and began examining the voluntariness of the search in each case.<sup>22</sup> In *Davis v. United States*,<sup>23</sup> the Court upheld the warrantless search of a gas station, despite evidence that the government agents told the defendant that he was required to open the door and even tried to force a window open themselves.<sup>24</sup> Ignoring the evidence of possible government coercion, the Court held that the search was valid because the defendant eventually consented.<sup>25</sup> However, as recently as the early 1960s, the Court intermittently employed a strict application of the Fourth Amendment to third-party consent search cases, as evidenced by *Chapman v. United States*<sup>26</sup> and *Stoner v. California*,<sup>27</sup> in which the Court refused to allow searches of rented premises based on the consent of a landlord and hotel desk clerk respectively.<sup>28</sup> In *Stoner*, Justice Stewart noted that only the defendant himself could waive his Fourth Amendment rights.<sup>29</sup> The Court closed out the 1960s by adopting an assumption of the risk-based approach in the third-party consent case of *Frazier v. Cupp*.<sup>30</sup> In *Frazier*, the defendant and his cousin were jointly using a duffel bag for the storage of clothing.<sup>31</sup> In the course of a mur-

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18. See McAllister, *supra* note 6, at 664–65.

19. 255 U.S. 313 (1921).

20. *Id.* at 315.

21. *Id.* at 317.

22. See Tracey Maclin, *The Good and Bad News About Consent Searches in the Supreme Court*, 39 MCGEORGE L. REV. 27, 37 (2008).

23. 328 U.S. 582 (1946).

24. *Id.* at 586–87, 593–94.

25. *Id.* at 593.

26. 365 U.S. 610 (1961).

27. 376 U.S. 483 (1964).

28. See Dery & Hernandez, *supra* note 2, at 57–58 (summarizing the facts and holdings of *Chapman*, 365 U.S. at 611–12, 616–18, and *Stoner*, 376 U.S. at 484–86, 488).

29. *Stoner*, 376 U.S. at 489.

30. 394 U.S. 731, 740 (1969).

31. *Id.*

der investigation, the cousin consented to a police search of the bag, which produced incriminating evidence against the defendant.<sup>32</sup> The Court upheld the admissibility of the evidence, reasoning that in sharing the duffel bag, the defendant “assumed the risk” that his cousin would grant someone else permission to search the bag.<sup>33</sup>

The 1970s were a crucial decade in consent-search jurisprudence, containing three landmark cases. In *Schneckloth v. Bustamonte*,<sup>34</sup> a police officer requested and obtained permission to search a car during a traffic stop.<sup>35</sup> The central issue of the case revolved around whether the police obtained voluntary consent for the search.<sup>36</sup> In defining voluntariness, the majority ultimately decided that it is “determined from all the circumstances” surrounding the consent to search.<sup>37</sup> Such circumstances include subjective factors, such as the defendant’s intelligence and awareness of his rights, although no single factor, such as the awareness of the right to refuse, is dispositive.<sup>38</sup> However, the Court declined to require an obligatory warning regarding consent searches, such as it did with police interrogations and *Miranda* warnings, reasoning that unlike the constitutional right to remain silent, the right to refuse a search is not a constitutionally based right pertaining to the administration of a fair trial.<sup>39</sup>

*United States v. Matlock*, decided in 1974, built on *Frazier*’s assumption of the risk logic for third-party consent cases.<sup>40</sup> In *Matlock*, police arrested the defendant in his front yard on suspicion of committing bank robbery.<sup>41</sup> The police subsequently asked for and received permission to search the house from the defendant’s girlfriend, and upon searching their shared bedroom, discovered evidence tying the defendant to the robbery.<sup>42</sup> Holding that the search was valid, the Court declared searches permissible if “permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises.”<sup>43</sup> Explaining its rationale in a footnote, the Court reasoned that co-occupants essentially assume the risk that their housemates may allow a search.<sup>44</sup>

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32. *Id.* at 732, 740.

33. *Id.* at 740.

34. 412 U.S. 218 (1973).

35. *Id.* at 220.

36. *Id.* at 223.

37. *Id.* at 248–49.

38. *Id.* at 226.

39. *Id.* at 232, 237.

40. Maclin, *supra* note 22, at 45.

41. *United States v. Matlock*, 415 U.S. 164, 166 (1974).

42. *Id.*

43. *Id.* at 171.

44. *Id.* at 171 n.7 (recognizing that common authority to grant a search rests on the “mutual use of the property by persons generally having joint access or control for most purposes, so that it is

A decade later in 1990, *Illinois v. Rodriguez* drastically expanded the holding of *Matlock* by allowing a search even if the police mistakenly believed a third party actually had the authority to consent to such a search when the party in fact did not.<sup>45</sup> In *Rodriguez*, the police arrested defendant Rodriguez in his own apartment and subsequently seized drug paraphernalia after Ms. Fischer, who referred to the location as “our” apartment, granted them access.<sup>46</sup> However, Rodriguez contended that Ms. Fischer did not have authority to consent to a search because Ms. Fischer had moved out a few weeks prior and was not on the lease.<sup>47</sup> In holding the search valid, Justice Scalia adopted a reasonableness test that dictated that Fourth Amendment consent searches do not actually require “factual accuracy,” but only require that an officer’s actions “always be reasonable.”<sup>48</sup> Therefore, the law merely requires that the government’s actions were reasonable when evaluating whether a third party has consented to a warrantless search of co-occupied premises.<sup>49</sup>

The final major co-occupant consent-search case preceding *Fernandez* is *Georgia v. Randolph*, in which the Supreme Court attempted to rein in some of its prior rulings.<sup>50</sup> In *Randolph*, the police were intervening in a domestic dispute when they asked for defendant, Scott Randolph’s, permission to search his house after accusations from his wife regarding “drug evidence” in the house.<sup>51</sup> Mr. Randolph refused, so the police then sought permission from Mrs. Randolph, who consented and admitted the police into the house, where the police found incriminating evidence against Mr. Randolph.<sup>52</sup> Invalidating the search on both social and legal norms,<sup>53</sup> the Court issued a narrow rule declaring that “a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified” based solely on a co-occupant’s consent.<sup>54</sup> Fearing, however, that the police may abuse the Court’s new rule by simply removing potential objectors from the scene, the majority wrapped up a “loose end” by noting in dicta that there cannot be any evidence that the police removed the potentially objecting party solely for the purpose of avoiding an objection.<sup>55</sup>

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reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed th[at] risk”).

45. 497 U.S. 177, 183–88 (1990); see also McAllister, *supra* note 6, at 665.

46. *Rodriguez*, 497 U.S. at 179 (internal quotation marks omitted).

47. *Id.* at 180.

48. *Id.* at 185.

49. Maclin, *supra* note 22, at 69.

50. 547 U.S. 103, 109 (2006).

51. *Id.* at 107 (internal quotation mark omitted).

52. *Id.*

53. Dery & Hernandez, *supra* note 2, at 72.

54. *Randolph*, 547 U.S. at 120.

55. McAllister, *supra* note 6, at 666 (quoting and explaining *Randolph*, 547 U.S. at 120–22) (internal quotation marks omitted).

Through its narrow holding in *Fernandez*, the Court refined the *Randolph* holding, furthering the potential for police abuse, and ignoring the intent of the Founding Fathers.<sup>56</sup>

## II. *FERNANDEZ V. CALIFORNIA*

This section discusses the 2014 case of *Fernandez v. California*. Part A reviews the facts and procedural history of the case. Parts B through D examine the majority, concurring, and dissenting opinions.

### A. *Facts and Procedural History*

In October 2009, Walter Fernandez and four of his associates mugged Abel Lopez, kicking him and stealing \$400, his wallet, and cellular phone.<sup>57</sup> Two members of the Los Angeles Police Department arrived to investigate.<sup>58</sup> A man then tipped off the officers that Fernandez was in a nearby apartment, and the officers subsequently heard the sounds of an altercation coming from the apartment.<sup>59</sup> The officers knocked on the door of the apartment and Roxanne Rojas appeared, demonstrating visible signs of a possible beating, including a bloody shirt and injured hand.<sup>60</sup> One of the officers requested permission to do a protective sweep of the premises, and upon the officer's request, Fernandez came to the door, stating, "You don't have any right to come in here."<sup>61</sup> Based on the suspected assault against Rojas, the officers removed Fernandez, placed him under arrest, and transported him to the police station.<sup>62</sup>

Roughly one hour after Fernandez's arrest, the officers returned to the apartment and received both written and oral consent from Rojas to search the dwelling.<sup>63</sup> During the course of the search, the police discovered "gang paraphernalia, a butterfly knife, [and] clothing worn by the robbery suspect," as well as an illegally sawed-off shotgun.<sup>64</sup> Authorities subsequently charged Fernandez with, among other things, robbery, possession of a firearm by a felon, possession of a short-barreled shotgun, and infliction of corporal injury.<sup>65</sup>

The trial court denied Fernandez's motion to suppress the evidence from the apartment.<sup>66</sup> Fernandez was subsequently convicted of robbery

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56. See *infra* text accompanying notes 101–195 for a discussion of the Court's use of originalism in Fourth Amendment jurisprudence.

57. *Fernandez v. California*, 134 S. Ct. 1126, 1130 (2014).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* (internal quotation mark omitted).

62. *Id.*

63. *Id.* at 1130–31.

64. *Id.* at 1131.

65. *Id.*

66. *Id.*

and infliction of corporal injury.<sup>67</sup> California's Court of Appeal affirmed, the Supreme Court of California declined to review the case, and the United States Supreme Court then granted certiorari.<sup>68</sup>

### *B. Majority Opinion*

Justice Alito authored the majority opinion.<sup>69</sup> Chief Justice Roberts, as well as Justices Scalia, Kennedy, Thomas, and Breyer joined him.<sup>70</sup> The Supreme Court affirmed the California Court of Appeal's ruling, refusing to extend the protections of *Randolph* to Fernandez's situation.<sup>71</sup> The Court began by recognizing that consent searches are a permissible category of warrantless searches under the Fourth Amendment, reasoning that property owners may want to clear their names and obtaining needless warrants inconveniences all involved parties.<sup>72</sup>

The majority opinion then reviewed the Court's previous third-party consent jurisprudence, including *Matlock*, *Rodriguez*, and *Randolph*,<sup>73</sup> taking care to emphasize that a co-occupant third party may consent to a search unless the objecting party is (1) physically present and (2) expressly objecting.<sup>74</sup> Justice Alito emphasized how "[t]he Court's opinion [in *Randolph*] went to great lengths to make clear that its holding was limited to situations in which the objecting occupant is present."<sup>75</sup> He also emphasized the extent to which the Court limited *Randolph* to situations where a person is both objecting and present by noting that "[t]he Court's opinion could hardly have been clearer on [physical presence]."<sup>76</sup>

Justice Alito then rejected Fernandez's two main arguments.<sup>77</sup> First, he rejected the claim that because the police caused the objector's absence, the absence was irrelevant.<sup>78</sup> Interpreting Justice Breyer's protections in *Randolph* as merely a test of the objective reasonableness of the officers' conduct of removing the objector—as opposed to a subjective inquiry into the officers' motivations—Justice Alito dismissed Fernandez's claim because Fernandez never contested the reasonableness of the police removing him from the scene.<sup>79</sup> Accordingly, the majority ultimately held that an objecting occupant, who is removed by the police because of a "lawful detention or arrest," has no more Fourth Amendment protection against a co-occupant authorized search than an objector

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67. *Id.*

68. *Id.*

69. *Id.* at 1129.

70. *Id.*

71. *Id.* at 1130, 1137.

72. *Id.* at 1132.

73. *Id.* at 1132–34.

74. *Id.* at 1133.

75. *Id.*

76. *Id.* at 1134.

77. *Id.*

78. *Id.*

79. *Id.*

absent for any other reason.<sup>80</sup> Justice Alito also rejected the argument that Fernandez's objection to the search did not expire, reasoning that allowing objections to extend indeterminately into the future violates social expectations and creates practical complications such as extending objections for years if a party is absent due to incarceration.<sup>81</sup> Justice Alito further noted that allowing indefinite objections creates procedural issues for determining the scope of continuing objections and burdens law enforcement operations.<sup>82</sup> At no point in the course of the opinion did the majority consider the history behind the Fourth Amendment or the intent of the Framers.

### C. Concurring Opinions

In a nod to his originalist leanings, Justice Scalia's brief concurring opinion framed the issue using concepts from property law property law.<sup>83</sup> He noted that if traditional property law had dictated that Rojas could not admit a guest to the joint premises over Fernandez's objections, then the case would not be as clear-cut.<sup>84</sup> However, because traditional property law does not establish the above scenario as trespassing, the police did not infringe on any of Fernandez's property rights.<sup>85</sup>

Justice Thomas used his short concurring opinion to express his view that a consent searches are actually outside the scope of Fourth Amendment searches because a consent searches are voluntary.<sup>86</sup> Justice Thomas reasoned that if a person authorized to give consent provides it, then a warrantless search is permissible.<sup>87</sup> Co-occupants such as Rojas are authorized to give consent to search a shared residence because Fernandez assumed the risk that she would allow a search of the premises.<sup>88</sup>

### D. Dissenting Opinion

The dissenting opinion, authored by Justice Ginsburg and joined by Justices Sotomayor and Kagan, devoted significant consideration to emphasizing how the current Court deviated from previous precedent.<sup>89</sup> Noting how the Court previously declared warrantless searches "per se

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80. *Id.*

81. *Id.* at 1135–36.

82. *Id.* at 1136–37.

83. For more on the Court's (and especially Justice Scalia's) recent trend of deciding Fourth Amendment cases on the basis of property law, see David C. Roth, Comment, *Florida v. Jardines: Trespassing on the Reasonable Expectation of Privacy*, 91 DENV. U. L. REV. 551, 556, 560–63 (2014) (discussing how the Court insufficiently based its decision in *Florida v. Jardines*, 133 S. Ct. 1409 (2013) solely on property law and should have taken a privacy-based approach as well).

84. *Fernandez*, 134 S. Ct. at 1137–38 (Scalia, J., concurring).

85. *Id.*

86. *Id.* at 1138 (Thomas, J., concurring).

87. *Id.*

88. *Id.*

89. *Id.* at 1138–41 (Ginsburg, J., dissenting).

unreasonable,”<sup>90</sup> Justice Ginsburg compared the facts in *Fernandez* to those in *Randolph*, stressing that, like the objector in *Randolph*, *Fernandez* was actually present at the time he made his objection.<sup>91</sup> The dissent argued that *Randolph* in no way suggested that a previously present objector’s request “could be ignored if the police reappeared post the objector’s arrest.”<sup>92</sup>

The dissent also objected to the social expectations reasoning employed in *Randolph* and carried through into *Fernandez* by noting how the police “have power no private person enjoys.”<sup>93</sup> Even if a co-occupant has the power to admit a social guest over a housemate’s objection, unlike a social guest, the police have the power to arrest individuals and remove them from the house.<sup>94</sup> Justice Ginsburg then criticized the “practical problems” that the majority imagined by extending *Randolph* protections indefinitely into the future.<sup>95</sup> For example, if an objecting party is incarcerated, getting an actual search warrant should not be difficult and would solve the problem of an inmate withholding consent to search a residence.<sup>96</sup> Additionally, obtaining search warrants in the modern world is now an efficient process due to modern technology, so warrants do not represent the burden on law enforcement that they once did.<sup>97</sup> Lastly, the dissent invoked the intent of the Constitution’s Framers, noting that the law should require warrants because “the Framers saw the neutral magistrate as an essential part of the criminal process shielding all of us, good or bad, saint or sinner, from unchecked police activity.”<sup>98</sup>

### III. ANALYSIS

The Court set an unfortunate precedent in *Fernandez* because it further removed consent-search jurisprudence from the Framers’ underlying intent of the Fourth Amendment. In doing so, the Court also worsened the perverse incentives created in *Randolph* for the police to use their discretionary and coercive power to manipulate situations in order to conduct warrantless searches.

#### *A. Fernandez Continues the Trend of Ignoring the Framers’ Fourth Amendment Intent*

Recent Supreme Court jurisprudence has not given significant consideration to the intent of the Founding Fathers or the history behind the

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90. *Id.* at 1139 (emphasis omitted) (quoting *Mincey v. Arizona*, 437 U.S. 385, 390 (1978)) (internal quotation marks omitted).

91. *Id.* at 1139–40.

92. *Id.* at 1140.

93. *Id.*

94. *Id.*

95. *Id.* at 1141 (internal quotation mark omitted).

96. *Id.*

97. *Id.* at 1142.

98. *Id.* at 1143.

Fourth Amendment.<sup>99</sup> In those rare instances when the Court has used history as a guide, it has done so inconsistently.<sup>100</sup> The Court's neglect of the Framers' intent is particularly noteworthy given that two of the Court's current Justices have strong originalist leanings.<sup>101</sup> The *Fernandez* Court's neglect of history has given the police the discretionary ability to avoid warrants contrary to the Amendment's original intent, as revealed through the lens of past Fourth Amendment jurisprudence and historical research surrounding the Amendment's drafting.

When the Court has used history to interpret the Amendment, it has primarily taken two differing approaches. The first and earliest approach involves interpreting the Amendment by discerning the general intent of the Framers through the lens of the historical events that motivated them.<sup>102</sup> The second, more recent approach relies on a review of common law at the time of the nation's founding.<sup>103</sup> One of the most prominent early examples of the Supreme Court's use of history and the Framers' intent occurred in the late-nineteenth century case of *Boyd v. United States*.<sup>104</sup> In *Boyd*, the Court reviewed whether a forced production of a person's private papers in the course of a customs investigation was an unreasonable search or seizure as defined by the Fourth Amendment.<sup>105</sup> In determining the answer, Justice Bradley, writing for the majority, examined the state of search and seizure law in both the colonies and England in the mid-1700s and analyzed how developments at that time influenced America's Founding Fathers.<sup>106</sup> The *Boyd* Court paid particular attention to how English authorities in the colonies issued writs of assistance, which gave the English authorities a wide discretion to conduct searches.<sup>107</sup> The majority even quoted the famous eighteenth-century Massachusetts lawyer, James Otis,<sup>108</sup> who declared that England's search and seizure procedure was "the worst instrument of arbitrary power, the

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99. Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 896–97 (2002).

100. *See id.* (noting that during two Supreme Court terms during the early 2000s, the Court decided eleven Fourth Amendment cases, yet only significantly analyzed history in one).

101. Maclin, *supra* note 22, at 27.

102. *See infra* notes 115–129 and accompanying text.

103. *See infra* notes 130–147 and accompanying text.

104. 116 U.S. 616 (1886); David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1740 (2000).

105. *Boyd*, 116 U.S. at 622.

106. *Id.* at 624–25.

107. *Id.*

108. James Otis was a prominent lawyer in Massachusetts during the mid 1700s. Otis graduated from Harvard College and was practicing law by the age of twenty-three. Otis was the Massachusetts Bay Colony's Acting Advocate General when he was asked to represent various merchants in the *Writs of Assistance* case against the Crown. In order to argue the case, Otis had to give up his position as Advocate General and even refused to take compensation from the merchants following the case. *See* John M. Burkoff, "A Flame of Fire": *The Fourth Amendment In Perilous Times*, 74 MISS. L.J. 631, 635–38 (2004).

most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book.”<sup>109</sup>

The *Boyd* opinion also paid homage to the prominent eighteenth-century English case of *Entick v. Carrington*,<sup>110</sup> in which Lord Camden condemned the breaking open and seizure of the plaintiff’s desk and personal papers as an unwarranted violation of a man’s right to be secure in his property.<sup>111</sup> In reaching the conclusion that the forced production of the papers was unconstitutional, the *Boyd* Court asserted that the nation’s founders were surely familiar with the Lord Camden ruling and that Lord Camden’s propositions and language were on their minds as they drafted the Fourth Amendment.<sup>112</sup> Subsequent Supreme Court majorities and dissents have relied on *Boyd*’s analysis to justify their historical arguments in Fourth Amendment cases.<sup>113</sup>

In the early twentieth century, Justice Brandeis authored what would become a well-known dissent in *Olmstead v. United States*,<sup>114</sup> in which the Justice contested the constitutionality of wiretapping a suspect without a warrant.<sup>115</sup> Drawing heavily on the approach used by Justice Bradley in *Boyd*,<sup>116</sup> Justice Brandeis argued that the general intent of the Framers was to provide for citizens “against the government, the right be let alone.”<sup>117</sup> By the middle of the century, Justice Frankfurter took over

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109. *Boyd*, 116 U.S. at 625 (internal quotation marks omitted). Justice Bradley also quoted Founding Father John Adams, who referred to the Otis statement as “the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.” *Id.* (internal quotation mark omitted).

110. 95 Eng. Rep. 807 (C.P. 1765); 19 How. St. Tr. 1029.

111. *Boyd*, 116 U.S. at 626 (discussing the holding of *Entick v. Carrington*, 95 Eng. Rep. 807). Justice Bradley quoted Lord Camden’s opinion extensively, placing emphasis on the sections of the opinion where Lord Camden emphasized how “[t]he great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole.” *Id.* at 627 (internal quotation mark omitted).

112. *Id.* at 626–27, 630.

113. See, e.g., *Stanford v. Texas*, 379 U.S. 476, 481–82 (1965) (using *Boyd* to emphasize the connection between the Founders’ dislike of vague general warrants and the adoption of the Fourth Amendment); *Frank v. Maryland*, 359 U.S. 360, 364–65 (1959) (referring to *Boyd* to justify the holding on the constitutionality of a forced home health inspection); *id.* at 377 (Douglas, J., dissenting) (referring to *Boyd* to justify the position on the constitutionality of a forced home health inspection). But see Sklansky, *supra* note 104, at 1752–53 (questioning the historical validity of Justice Bradley’s analysis of intent in *Boyd* and declaring it “legal creativity” as opposed to “historical scholarship”).

114. 277 U.S. 438 (1928).

115. *Id.* at 471–86 (Brandeis, J. dissenting).

116. Sklansky, *supra* note 104, at 1740.

117. *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting). Leading off his protest against expansive Fourth Amendment powers, Brandeis lamented how the Court has continually given Congress power “over objects of which the [founding] fathers could not have dreamed.” *Id.* at 472. The majority in *Olmstead* had concluded that the Fourth Amendment did not protect against the wiretap because the Amendment only protect against the search and seizure of “things,” which voices over an electronic telephone line decidedly were not. *Id.* at 464–66. No items were searched or seized and “the evidence was secured by the use of the sense of hearing and that only.” *Id.* The majority gave a brief nod to history by examining some common law surrounding the exclusionary rule at the time of

as the Court's leading proponent of using history and the Framers' intent to interpret the Fourth Amendment.<sup>118</sup> In a series of dissenting opinions, Justice Frankfurter vigorously defended the Fourth Amendment's warrant requirement and sought to illuminate the general intent of the Amendment as opposed to its intricate applications.<sup>119</sup> In defending the need for strong constitutional protections against warrantless or unlimited searches, Justice Frankfurter noted how the Fourth Amendment was a reflection of the Framers' own experience with an unchecked police state and contended that the Amendment "was the answer of the Revolutionary statesmen to the evils of searches without warrants and searches with warrants unrestricted in scope."<sup>120</sup> Justice Frankfurter also analyzed the intent of the Fourth Amendment in light of the state constitution that the Founders modeled it after.<sup>121</sup> Given that the Fourth Amendment more closely resembles the Massachusetts Constitution's protection against "unreasonable" searches and seizures, as opposed to the Virginia Constitution's more loosely worded language of simply opposing broad and unlimited warrants, Justice Frankfurter concluded that Congress intended to create sweeping protections against the government's ability to conduct searches and seizures.<sup>122</sup>

Another revealing analysis of the Framers' original intent occurred in Justice Douglas's dissent in the 1974 case of *Matlock* where, in a footnote, Douglas analyzed the history of the searches in the colonies that motivated the creation of the Fourth Amendment.<sup>123</sup> The footnote suggested that the Framers added the "unreasonable" requirement to the searches and seizures language of the Amendment not to give courts discretion to allow warrantless searches, but to strengthen the protections of the Amendment.<sup>124</sup> Paralleling the historical account given in earlier

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the Fourth Amendment's passage, but only spent one sentence discussing why the Amendment was necessary in the first place. *See id.* at 463.

118. Sklansky, *supra* note 104, at 1763.

119. *See id.* at 1763–64 (noting how Justice Frankfurter sought to examine exactly what practices most incensed the Founding Fathers in order to discern their intent); *see also* *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting) (contending that search and seizure cases must be decided in the context "of what are really the great themes expressed by the Fourth Amendment").

120. *Rabinowitz*, 339 U.S. at 69–70 (Frankfurter, J., dissenting) (arguing that the Fourth Amendment "was a safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution"); *Davis v. United States*, 328 U.S. 582, 597 (1946) (Frankfurter, J., dissenting) ("[W]e are in danger of forgetting that the Bill of Rights reflects experience with police excesses."); *see also* *Harris v. United States*, 331 U.S. 145, 159 (1947) (Frankfurter, J., dissenting) ("[The Fourth Amendment] sought to guard against an abuse that more than any one single factor gave rise to American independence.").

121. *Harris*, 331 U.S. at 158 (Frankfurter, J., dissenting).

122. *Id.*

123. *United States v. Matlock*, 415 U.S. 164, 180 n.1 (1974) (Douglas, J., dissenting); *see also* Maclin, *supra* note 22, at 47.

124. *Matlock*, 415 U.S. at 180 n.1 (Douglas, J., dissenting) ("[T]he Framers added the first clause to give additional protections to the people beyond the prescriptions for a valid warrant, and not to give the judiciary carte blanche to later dilute the warrant requirement by sanctioning classes of warrantless searches.").

dissenting opinions by Justice Frankfurter, Justice Douglas supported his arguments by elaborating in-depth how the colonists were subject to, and detested, royally-issued “general warrant[s], . . . which gave the officials of the Crown license to search all places and for everything in a given place, limited only by their own discretion.”<sup>125</sup> Justice Douglas subsequently explained how during Virginia’s debate surrounding the Bill of Rights, a proposed amendment limiting government searches clearly presumed that unreasonable searches could only be avoided using a warrant.<sup>126</sup> When the First Congress convened and James Madison proposed constitutional amendments, a fear of general warrants motivated a searches and seizures amendment, as evidenced by the Fourth Amendment’s two distinct clauses.<sup>127</sup> Justice Douglas contended that the history of the Fourth Amendment’s clause of “and no warrant shall issue” indicates that it was “created in an effort to strengthen the prohibition of searches without proper warrants and to broaden the protections against unneeded invasions of individual privacy.”<sup>128</sup>

The entire Court subsequently ignored history and the Framers’ intent in Fourth Amendment cases from the 1970s until the 1990s, when the Court’s originalist Justices, such as Justices Thomas and Scalia, began inconsistently examining the common law in place at the time of the nation’s founding in order to determine intent in some Fourth Amendment cases.<sup>129</sup> The Court’s more recent emphasis on common law rules has been the focus of criticism and is in stark contrast to the Court’s earlier approach that emphasized the general intent of the Amendment.<sup>130</sup>

For example, in the 1995 case of *Wilson v. Arkansas*,<sup>131</sup> a unanimous opinion, authored by Justice Thomas, the Court declared that the police are required to knock and announce their presence when serving a warrant under the Fourth Amendment’s reasonableness test.<sup>132</sup> In arriving at that decision, the majority noted that the Court has “looked to the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing.”<sup>133</sup> The Court then examined common law during colonial times and concluded that the knock and announce rule was embedded in the early laws of the colonies.<sup>134</sup> However, the *Wilson* Court then deviated from a pure historical common law approach by announcing that there are exceptions to the

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125. *Id.*

126. *Id.*

127. *Id.* The two distinct clauses are “shall not be violated” and “no Warrants shall issue.” U.S. CONST. amend. IV; *Matlock*, 415 U.S. at 180 n.1 (Douglas, J., dissenting).

128. *Matlock*, 415 U.S. at 180 n.1 (Douglas, J., dissenting) (quoting U.S. CONST. amend. IV) (internal quotation marks omitted).

129. Maclin, *supra* note 99, at 895–96; Maclin, *supra* note 22, at 27.

130. See Maclin, *supra* note 99, at 897–98, 901; Sklansky, *supra* note 104, at 1744.

131. 514 U.S. 927 (1995).

132. *Id.* at 929.

133. *Id.* at 931.

134. *Id.* at 933.

knock and announce rule in the presence of “countervailing law enforcement interests.”<sup>135</sup> The *Wilson* Court arrived at this conclusion despite the fact that there is significant evidence that prior to the Fourth Amendment any exceptions to the knock and announce rule were extremely limited in scope and that colonial era scholars, and the English courts, did not recognize any exceptions to the rule at all.<sup>136</sup> Essentially, in *Wilson*, the Court selectively used common law to discern the Framers’ intent when convenient and ignored common law when carving out exceptions as the Court saw fit.<sup>137</sup>

The Court continued its inconsistent and seemingly contradictory common law approach to the question of Fourth Amendment intent in *Wyoming v. Houghton*,<sup>138</sup> which dealt with the question of whether a warrantless search of a container in an automobile was in violation of the Fourth Amendment.<sup>139</sup> Writing for the majority, Justice Scalia furthered the doctrine of common-law review by stating that the Court would first look at whether the search or seizure was legal at the time the Amendment was ratified and, if that approach did not provide an answer, would then look to other places.<sup>140</sup> However, when it came time to evaluate such common law, the Court found none and subsequently found the search constitutional based on eighteenth-century federal legislation granting warrantless searches of ships smuggling goods into the United States, ignoring the distinction between ships crossing international borders and cars traversing within the interior of the country.<sup>141</sup>

The 2001 case of *Atwater v. City of Lago Vista*<sup>142</sup> demonstrates how restricting an analysis of intent to the common law at the nation’s birth can create illogical results. In *Atwater*, the Court upheld the arrest of a driver for a misdemeanor seatbelt infraction as a permissible seizure under the Fourth Amendment.<sup>143</sup> To support such a conclusion, Justice Souter, writing for the majority, concluded that commentators disagree on whether or not English common law traditionally forbade misdemeanor arrests.<sup>144</sup> The Court then examined other historical factors to try to discern founding-era common law, such as the practices of colonial

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135. *Id.* at 934.

136. Maclin, *supra* note 99, at 911–13 (discussing how there were incredibly few exceptions in pre-Fourth Amendment American and English law to the knock and announce rule, including no exceptions for officer safety and noting how efforts to legislate such exceptions in England repeatedly failed due to widespread resistance).

137. *See id.* at 911–912; *see also* Sklansky, *supra* note 104, at 1770 (noting the tendency of Supreme Court justices, regardless of their interpretive method, to find the Framers’ views as incredibly similar to their own).

138. 526 U.S. 295 (1999).

139. *Id.* at 297.

140. *Id.* at 297, 299–300.

141. Maclin, *supra* note 99, at 924–25; Sklansky, *supra* note 104, at 1760.

142. 532 U.S. 318 (2001).

143. *Id.* at 323–24, 354.

144. *Id.* at 322, 332.

state legislatures.<sup>145</sup> Additionally, to support its assertion of the correct interpretation of common law and the Framers' views, the Court cited the acts of the very parliament that the colonists rebelled against, stating that, "throughout the period leading up to the framing, Parliament repeatedly extended warrantless arrest power to cover misdemeanor-level offenses."<sup>146</sup> The absurdity of this approach is apparent. Although the Founders surely intended to preserve many of the rights that they had as British subjects, it is illogical to conclude with any certainty that they intended to enshrine into American law many of the oppressive statutory British search and seizure practices that they were rebelling against.<sup>147</sup>

The best example of the contrast between the two historical approaches, and the case demonstrating that the general intent approach is better at protecting the rights of citizens and projecting the Framers' intent, is *Vernonia School District 47J v. Acton*.<sup>148</sup> In *Acton*, Justice Scalia, writing for the majority, upheld the constitutionality of a school district's drug program that included mandatory participation for all student athletes.<sup>149</sup> Despite the fact that the athletes being tested were not necessarily under suspicion for drug use, Justice Scalia first determined that there "was no clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted," and then applied a balancing test to determine that the district's interest in preventing drug abuse outweighed the students' expectation of privacy.<sup>150</sup> Rejecting Justice Scalia's contentions and writing for the dissent, Justice O'Connor argued that the Framers certainly would have intended to reject mass, suspicionless searches, despite the obvious lack of eighteenth-century common law addressing drug testing.<sup>151</sup> Supporting her argument, Justice O'Connor pointed to the fact that the Founders were most clearly against broad searches, such as general warrants or any other unrestrained intrusions and sought to eliminate such abuses.<sup>152</sup> There also was no historical evidence that the Framers would have preferred blanket, mandated searches of everyone over the detested general warrants, which allowed officials to search arbitrarily at their discretion.<sup>153</sup> Therefore, the dissent's approach in *Acton* better reflected what is known about the Framers' intent by casting the Fourth Amendment in broad

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145. *Id.* at 337.

146. *Id.* at 334.

147. See Maclin, *supra* note 99, at 958–59, 962.

148. 515 U.S. 646 (1995).

149. *Id.* at 648, 664–65.

150. *Id.* at 652–53, 661, 664–65.

151. Maclin, *supra* note 99, at 918–19.

152. *Acton*, 515 U.S. at 669–70 (O'Connor, J., dissenting).

153. *Id.* at 670. In a parenthetical, O'Connor quoted an earlier dissent by Justice Rehnquist, referring to the approval of blanket searches as the "misery loves company theory" of the Fourth Amendment." *Id.* (quoting *Delaware v. Prouse*, 440 U.S. 648, 664 (1979) (Rehnquist, J., dissenting)).

terms, as opposed to simply dismissing the significance of history when there is no eighteenth-century common law on point.<sup>154</sup>

The Court continued its trend of inconsistently using history and intent in its recent consent-search jurisprudence, as neither *Randolph* nor *Fernandez* attempt a significant discussion of the history surrounding the Amendment or attempt to discern the Framers' intent in depth. Nevertheless, the Court has used the common-law approach as recently as 2013, in *Florida v. Jardines*,<sup>155</sup> in which the Court declared the use of a drug-sniffing dog on the defendant's front porch to be an invalid warrantless search.<sup>156</sup> Writing for the majority, Justice Scalia used a common-law interpretation of the Amendment's intent, emphasizing the historic common-law focus on the sanctity of the home and expectations of privacy.<sup>157</sup>

In recent years, scholars have examined the historic underpinnings of the creation of the Fourth Amendment, and although their individual conclusions about what the Amendment's history means for modern day jurisprudence have differed somewhat, their historical accounts have essentially been the same.<sup>158</sup> Such consistent accounts verify the history behind the general intent approach to interpreting the Fourth Amendment.<sup>159</sup> Research indicates that the Fourth Amendment was significantly influenced by Founding Father John Adams and resulted from a combination of early search and seizure jurisprudence as well as historical events.<sup>160</sup> English legislation dating back to 1662 authorized colonial writs of assistance, which were essentially unlimited search warrants and enabled customs officers to search where they pleased, without reason or probable cause.<sup>161</sup> Early in John Adams's career, Adams observed the 1761 *Writs of Assistance* case, in which prominent Massachusetts lawyer, James Otis, argued against the renewal of the writs of assistance in

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154. See Maclin, *supra* note 99, at 919–20.

155. 133 S. Ct. 1409 (2013).

156. *Id.* at 1413–16, 1417–18.

157. *Id.* at 1412, 1414–15.

158. Compare Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 989–1052 (2011) (discussing the works of John Adams as a means of ascertaining the Framers' original intent), with Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 560–71 (1999) (arguing that some conventional accounts of Fourth Amendment history, while useful, provide little assistance in determining when a warrant is actually required), and Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 70–73 (2012) (examining search and seizure cases at the time of the nation's founding as a window into the Fourth Amendment), and Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 939–58 (1997) (reviewing how the evolution of general searches and specific warrants in Colonial America influenced the inception of the Fourth Amendment), and Maclin, *supra* note 99, at 959–61 (explaining how the Fourth Amendment was a reaction to heavy-handed British search and seizure practices).

159. See *supra* note 158.

160. Clancy, *supra* note 158, at 979–81.

161. *Id.* at 991–92 (discussing the virtually unlimited scope of writs of assistance and noting how that the informer who was authorized to do the searching under the writs was actually permitted to keep a percentage of any illicit goods).

the colonies.<sup>162</sup> The historical record shows that during the course of the argument Otis decried the writs as “plac[ing] the liberty of every man in the hands of every petty officer” and warned that because a judge did not review specific writs, individuals were subject to officials’ “arbitrary power.”<sup>163</sup> During and following the case, Adams compiled first-hand notes and a case abstract, which emphasized that the writs of assistance “place[d] the liberty of every man in the hands of every petty officer,” because the officers were “accountable to no person for [their] doings” and violated the traditional notion of protecting a man’s house as if it were his castle.<sup>164</sup>

The authorities’ use of writs of assistance in Colonial America created general hostility and is credited with directly starting the colonies down the path to revolution and inspiring the Fourth Amendment.<sup>165</sup> The implementation of the Townshend Acts by the English Parliament further authorized general writs of assistance in all of the colonies, creating additional hostility, as well as a rift between British officials and colonial judges.<sup>166</sup> Colonial judges even refused to issue the writs, fearing even more search and seizure discretion in the hands of English officials.<sup>167</sup> Following the Townshend Acts, Adams represented the town of Boston in opposing the seizure of fellow founder John Hancock’s ship, arguing that the seizure was unjustified due to lack of probable cause.<sup>168</sup> Based on some of Adams’s personal letters, Adams was also likely well-versed in the contentious, and often conflicting, English search and seizure cases of the time, such as the famous case of *Wilkes v. Wood*.<sup>169</sup> In *Wilkes*, Lord Camden<sup>170</sup> criticized a general warrant authorizing the search of all persons and places for the author of a supposedly treasonous paper, calling the process “totally subversive of the liberty of the subject.”<sup>171</sup>

162. *Id.* at 992. The previous writs of assistance needed to be renewed because of the death of the king. *Id.*

163. Davies, *supra* note 158, at 580–81 (internal quotation marks omitted).

164. Clancy, *supra* note 158, at 999–1000; *see also* Davies, *supra* note 158, at 602–03 (noting how colonial figureheads such as John Dickerson, William Henry Drayton, and Samuel Adams also specifically attacked arbitrary searches of private residences as particularly egregious).

165. Clancy, *supra* note 158, at 1002; Davies, *supra* note 158, at 566; *see also* Maclin, *supra* note 99, at 960.

166. Maclin, *supra* note 99, at 961.

167. Davies, *supra* note 158, at 581–82.

168. Clancy, *supra* note 158, at 1019. Further emphasizing the hatred that seizures inspired in the colonists, riots broke out in Boston following the seizure of Hancock’s ship, forcing the British to send in troops and led directly to the Boston Massacre. Interestingly, John Adams also represented the British soldiers accused in the massacre. *Id.* at 1019–20.

169. (1763) 98 Eng. Rep. 489 (K.B.).

170. At the time of the case, Lord Camden was known as Chief Justice Pratt, as he was not yet a lord. Clancy, *supra* note 158, at 1007.

171. *Id.* at 1006–07, 1011 (quoting and summarizing *Wilkes v. Wood*, (1763) 98 Eng. Rep. 489 (K.B.)) (internal quotation marks omitted). *But see* Sklansky, *supra* note 104, at 1800 (questioning the usefulness of many English search and seizure cases, such as *Wilkes*, because the inconsistent reasoning and holdings in many of the cases make them “amenable to any number of readings”).

Following the American Revolution, but prior to the adoption of the United States Constitution, many states adopted their own constitutions.<sup>172</sup> Many state constitutions contained search and seizure sections addressing general warrants, but John Adams, in drafting the Massachusetts Constitution, went a step further by incorporating language guaranteeing a citizen's right to be "secure" against "unreasonable" searches.<sup>173</sup> Additionally, Adams clarified that any issued warrants must be specific in nature and must follow certain legal formalities.<sup>174</sup> Following the adoption of the original provisions of the United States Constitution, James Madison was tasked with drafting a search and seizures proposal, which would become the Fourth Amendment.<sup>175</sup> Madison modeled his text after Adams's provision in the Massachusetts Constitution, including the "unreasonable" provision and the clause requiring specific warrants, with the only substantive change being the identification of "probable cause" as a proper level of suspicion.<sup>176</sup> In a speech to the House of Representatives accompanying his draft, Madison clearly stated that his intent was to ban general warrants.<sup>177</sup>

As the historical evidence shows, the Founding Fathers, including Adams and Madison, did not simply intend to enshrine sometimes contradictory English common-law into the Constitution, but desired to respond to the abuses that the colonists experienced under general warrants and writs of assistance to ensure that such abuses could not happen again.<sup>178</sup> After all, if the Framers had merely wanted to continue with the status quo of English common law regarding searches and seizures, an amendment outlining the scope of search and seizures practices was not needed. The mid-century opinions of Justices Brandeis and Frankfurter comport with this historical analysis by emphasizing the historic right of the people to be free from government interference and discretionary or unchecked police authority.<sup>179</sup>

The Court's holding in *Fernandez* frustrates the Framers' original intent and places the exact kind of discretion into the hands of law enforcement that the colonists themselves detested in the general warrants and writs of assistance of the eighteenth-century. Much as general warrants and writs of assistance allowed British officials to conduct almost

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172. Kerr, *supra* note 158, at 71.

173. Clancy, *supra* note 158, at 1028 (internal quotation marks omitted).

174. *Id.*

175. *Id.* at 1045–47.

176. *Id.* (internal quotation marks omitted).

177. *Id.* at 1045–46.

178. See Maclin, *supra* note 99, at 962.

179. See *United States v. Rabinowitz*, 339 U.S. 56, 69–70 (1950) (Frankfurter, J., dissenting) (arguing that the Fourth Amendment "was a safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution"); *Davis v. United States*, 328 U.S. 582, 597 (1946) (Frankfurter, J., dissenting); *Olmstead v. United States*, 277 U.S. 438, 471, 474–79 (1928) (Brandeis, J., dissenting); see also *Harris v. United States*, 331 U.S. 145, 159 (1947) (Frankfurter, J., dissenting).

limitless searches at their discretion, *Fernandez* gives the police broad discretion to arrest or otherwise lawfully detain and remove an objecting suspect, therefore avoiding the need for a warrant, simply because a consenting co-occupant is present. Additionally, *Fernandez* interpreted *Randolph*'s limiting dicta, which made a subjective inquiry into officer motivations so that the police could not remove an objector "for the sake of avoiding a possible objection,"<sup>180</sup> as a mere reasonableness test.<sup>181</sup> Therefore, officers may now remove an objecting suspect from a crime scene with the sole purpose of avoiding the warrant process, so long as the suspect's detention was reasonable.<sup>182</sup> Giving the police such powerful discretion as to override the expressly stated objections of an occupant merely by removing him from the scene, offends the Framers' desire to protect individuals from invasions of their privacy.<sup>183</sup> Because of the elimination of a subjective inquiry into officer motivations in *Fernandez*, the police may now at their discretion remove a suspect from a scene for the sole purpose of obtaining a warrantless consent search and still be within the law. This newfound discretion in the hands of police officers draws a parallel to John Adams's summary of the *Writs of Assistance* case, in which James Otis expressed his fear that an officer executing an unrestricted warrant was "accountable to no person for his doings."<sup>184</sup>

The *Fernandez* ruling also ignores the Court's more recent common-law approach to the Fourth Amendment—which it applied as recently as 2013 in *Jardines*—by emphasizing the traditional common law importance of expectations of privacy in the sanctity of one's home.<sup>185</sup> Yet, the *Fernandez* majority disregards the traditional position that a search of a home is a more serious matter deserving higher protection than a search of other places and simply analyzes the search from the lens of social expectations.<sup>186</sup> Given that it was neither *Fernandez*'s car nor his place of business, but his actual, private residence that the police searched, it is illogical that the majority opinion gave no mention to the precedent it continued to apply a mere year earlier stressing the importance of protecting the sanctity of the home from warrantless search-

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180. *Georgia v. Randolph*, 547 U.S. 103, 121 (2006).

181. *See Fernandez v. California*, 134 S. Ct. 1126, 1134 (2014) ("[T]he test [regarding an officer's actions] is one of objective reasonableness . . .").

182. *Id.* (stating that an officer's motivation does not void "objectively justifiable behavior under the Fourth Amendment" (quoting *Kentucky v. King*, 131 S. Ct. 1849, 1859 (2011)) (internal quotation mark omitted)).

183. *See United States v. Matlock*, 415 U.S. 164, 180 n.1 (Douglas, J., dissenting) (discussing how the grammatical construction of the Amendment indicates how it was formed to "strengthen the prohibition of searches without proper warrants and to broaden the protections against unneeded invasions of individual privacy").

184. *See Clancy*, *supra* note 158, at 1000.

185. *See Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) ("[W]hen it comes to the Fourth Amendment, the home is first among equals. At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961))).

186. *See Fernandez*, 134 S. Ct. at 1135.

es. In his concurrence, Justice Scalia tries to address this contradiction with *Jardines* by noting how under a traditional common-law, property-based approach to searches, a co-occupant would have been able to admit a guest to the house over Fernandez's objection without the guest committing trespass.<sup>187</sup> However, the *Fernandez* dissent noted the absurdity of Scalia's argument by commenting how a normal houseguest does not have the search and seizure powers of the police.<sup>188</sup>

Applying the more useful, general intent oriented approach of Fourth Amendment interpretation as Justice Frankfurter did in *Davis v. United States*, the Court's developing body of consent search law becomes absurd.<sup>189</sup> Justice Frankfurter noted that if the function of the courts is to place limits on searches, then it is illogical that the Constitution was "meant to make it legally advantageous not to have a warrant," allowing the police to conduct more expansive and discretionary searches when given an occupant's consent as opposed to a court's directive.<sup>190</sup> In Justice Frankfurter's view, consent searches were the very kind of unchecked state intrusion into the lives of private citizens that the Fourth Amendment intended to control.<sup>191</sup> Justice Frankfurter's position is supported by the experiences of the Founders dating back to the *Writs of Assistance* case, in which James Otis famously expressed such a fear that officials unchecked by judges could become "petty tyrants."<sup>192</sup> The *Fernandez* ruling creates such a potential by allowing the police to remove objectors from the scene and then conduct a warrantless search anyway. By simply removing an objecting individual from the premises via lawful detention or arrest, the police can now rely on a co-occupant's consent and conduct a more expansive search of the premises than if they sought an actual warrant from a court. This incentivizes police officers to conduct warrantless consent-based searches over seeking a warrant and is incompatible with the Fourth Amendment's general objective of protecting against invasions of privacy and promoting a government of limited powers. As Justice Brandeis argued in his dissent, the Fourth Amendment is best understood as guaranteeing citizens the "right to be let alone" and protecting the "privacy of the individual."<sup>193</sup> Justice Brandeis's contentions about the intent of the Fourth Amendment are corroborated by the Founders' arguments against the unlimited discretion of general warrants and writs of assistance.<sup>194</sup> In the *Fernandez* holding, the Supreme Court ignored such historical concerns by allowing the police

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187. *Id.* at 1137–38 (Scalia, J., concurring).

188. *Id.* at 1140 (Ginsburg, J., dissenting).

189. Maclin, *supra* note 22, at 40–41 (discussing *Davis v. United States*, 328 U.S. 582, 595 (1946) (Frankfurter, J., dissenting)).

190. *Davis*, 328 U.S. at 595 (Frankfurter, J., dissenting).

191. See Maclin, *supra* note 22, at 40–41.

192. See Clancy, *supra* note 158, at 993–94 (internal quotation marks omitted).

193. Maclin, *supra* note 22, at 13–14 (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)) (internal quotation marks omitted).

194. See Maclin, *supra* note 99, at 959.

the discretion to arrest an objector and conduct a search based on third-party consent.

*B. Fernandez Demonstrates How Even in Co-Occupant Consent Cases, the Notion of “Consent” May Include Coercion from the Police*

One of the primary questions concerning any sort of consent search is why would a rational suspect, or for that matter anyone who cares about and is living with a suspect,<sup>195</sup> consent to the search of premises in which he knows that there is incriminating evidence?<sup>196</sup> Yet, despite almost certain self-incrimination, or incrimination of a close family member or friend, individuals in such situations often consent to searches.<sup>197</sup> In fact, consent searches are incredibly frequent, occurring tens of thousands of times a year, and in a study of one city—albeit in the 1980s—an estimated 98% of police searches were consent searches.<sup>198</sup> In *Fernandez*, the defendant’s girlfriend, Roxanne Rojas, was the one who gave the officers permission to search the apartment after the police arrested Fernandez.<sup>199</sup> However, the current body of scholarly research on fear, human behavior, ignorance of the law, and race relations calls into question whether the police—either explicitly or implicitly—coerced Rojas.<sup>200</sup>

Many commentators have observed that even under the most casual and friendly encounters, most citizens would not feel free to deny a police officer’s request because common sense dictates that it is unwise to tell an officer no.<sup>201</sup> This is because in the presence of “an imposing authority figure,” many people feel that they do not actually have a right to refuse.<sup>202</sup> Various studies and psychological research over the past several decades have demonstrated that individuals will tend to acquiesce to

195. This assumes that any co-occupant does not wish to see the suspect convicted for his or her crimes. See *infra* text accompanying notes 239–45 for an in-depth discussion of this dynamic in *Fernandez*.

196. John M. Burkoff, *Search Me?*, 39 TEX. TECH L. REV. 1109, 1114 (2007).

197. As Professor John Burkoff, very bluntly, framed it in a hypothetical:

How much of an idiot—how stupid, moronic, imbecilic—would a person carrying a gram of crack cocaine stashed in her underwear, for example, have to be to really consent—“freely and voluntarily”—to being searched by a police officer, knowing full well that such a search would result inevitably in the discovery of the cocaine and a subsequent arrest?

*Id.* Some courts have even acknowledged the illogical absurdity of consent searches, with a judge on the Eight Circuit Court of Appeals expressing surprise that a defendant would freely consent to a search of a room and box that he knew contained drugs. *Id.* at 1128 (discussing *United States v. Heath*, 58 F.3d 1271, 1276 (8th Cir. 1995) (McMillian, J., concurring)).

198. Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 214 n.8 (2002).

199. *Fernandez v. California*, 134 S. Ct. 1126, 1130 (2014).

200. See Nirej Sekhon, *Willing Suspects and Docile Defendants: The Contradictory Role of Consent in Criminal Procedure*, 46 HARV. C.R.-C.L. L. REV. 103, 112 (2011) (discussing how a person may allow a search for reasons such as “fear, ignorance, or folly”); Strauss, *supra* note 198, at 213, 237 (discussing how most people will feel pressured into consenting to a search regardless of how politely a police officer makes the request).

201. Strauss, *supra* note 198, at 236.

202. Burkoff, *supra* note 196, at 1114.

apparent authority, even in the absence of overt coercion.<sup>203</sup> For example, in one study, researchers had actors make requests of strangers on the street, dressed in business attire, a milkman's uniform, or a security guard's uniform (without a weapon).<sup>204</sup> When asking the subjects to pick up trash, the security guard had an 82% success rate whereas the milkman and man in business attire had 64% and 36% success rates respectively.<sup>205</sup> When inconveniencing strangers by asking them to vacate a bus stop that they were perfectly entitled to be standing at, the guard had a 56% success rate whereas the success rate of the others was roughly 20%.<sup>206</sup> It is arguable that the above experiment is not applicable to consent-search situations in which a party personally has something to lose.<sup>207</sup> But as the bus stop experiment illustrates, people will defer to those with apparent authority, such as a police officer, even where there is inconvenience or harm to themselves.<sup>208</sup>

Studies also show that normal citizens are likely to interpret even polite requests by authority figures such as police officers as commands.<sup>209</sup> This is because the police often command others, conditioning the public to view any police request as an order.<sup>210</sup> Even if an officer is making a polite request, the subject of the request is likely to view the politeness as "face-maintaining because the [subject] understands that coercion may be used."<sup>211</sup> Consequently, even when making polite requests, officers will actually appear commanding to the average citizen because a significant part of any command is conveyed via the status of "the badge and gun."<sup>212</sup> Additionally, racial minorities are more likely than others to view police requests for a search as commands because, due to the racial biases in law enforcement, failing to acquiesce can lead to violent consequences.<sup>213</sup> The impacts of consent searches on minorities are particularly significant because the police are more likely to stop minorities and ask for a search on account of their color.<sup>214</sup>

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203. *Id.*

204. Strauss, *supra* note 198, at 238.

205. *Id.*

206. *Id.* at 238–39.

207. *Id.* at 239–40.

208. *Id.* Another prominent study demonstrating deference to authority is the famous Milgram's experiment, in which a notably high number of adults were willing to deliver electric shocks causing apparent pain to a victim at the command of an authority figure. *See id.* at 236–38.

209. Burkoff, *supra* note 196, at 1115.

210. *Id.*

211. *Id.*

212. *Id.* See also Strauss, *supra* note 198, at 241, where Professor Strauss emphasizes how "[i]n everyday life, demands are often phrased as polite requests," using a hypothetical of a boss asking if his secretary would mind fetching some coffee. The command may have been phrased as a polite request, but most secretaries would not feel comfortable refusing.

213. *See* Strauss, *supra* note 198, at 242–43 (noting how even some judges actually recognize that minorities cannot refuse a search without the risk of being detained, attacked, or shot).

214. *Id.* at 244; *see also id.* at 214 n.9 (noting the disparate impact that bus and traffic stops have on minorities).

Last but not least, citizens may also consent to a search that they would not otherwise consent to out of ignorance.<sup>215</sup> A person could believe that they have no legal right to object to a search; that even with an objection, the officer will conduct the search anyway; or that if they refuse, the refusal itself will then give the officer the necessary legal suspicion to conduct a search.<sup>216</sup>

Whether there is evidence of implicit coercion—such as fear, ignorance, or racial biases, or explicit coercion such as the implied use of force or actual police misconduct—courts have traditionally been hesitant to invalidate consent searches on the basis of coercion. One significant consent-search case involving voluntariness is the 1973 case of *Schneekloth v. Bustamonte*.<sup>217</sup> In *Schneekloth*, the Court denied a suspect's motion to suppress evidence obtained from a consent search, holding that the voluntariness of a search is to be determined from "all the circumstances."<sup>218</sup> In reviewing the circumstances, courts may consider numerous factors such as age, education, intelligence, whether the suspect was detained, and whether there was prolonged or repeated questioning.<sup>219</sup> The Court also declined to extend a *Miranda v. Arizona*<sup>220</sup> type of warning to consent searches,<sup>221</sup> reasoning that it would be impractical to impose such a warning informing suspects about their rights and expressing concern that "[c]onsent searches are part of the standard investigatory techniques of law enforcement agencies."<sup>222</sup> Ultimately, the *Schneekloth* Court seemed to be more concerned with protecting the ability of the police to conduct consent searches<sup>223</sup> than with protecting the rights of individuals to be free from the inherent psychological coercion that occurs when the police request a search.<sup>224</sup>

In practice, *Schneekloth* has done little to protect the rights of suspects as courts have rarely voided searches based on the totality of the circumstances test.<sup>225</sup> In a survey of hundreds of consent cases, courts actually analyzed the *Schneekloth* factors such as age and intelligence in

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215. Burkoff, *supra* note 196, at 1118.

216. *Id.*

217. 412 U.S. 218, 219 (1973).

218. *Id.* at 219–20, 248–49.

219. *Id.* at 226.

220. *Miranda v. Arizona*, 384 U.S. 436 (1966).

221. *See id.* at 498–99 (holding that before a suspect in police custody may be interrogated, they must be informed of their rights against self-incrimination). However, some question whether *Miranda* warnings are actually effective at protecting defendants because police still have some discretion as to how and when they give the warning. *See Sekhon, supra* note 200, at 126.

222. *Schneekloth*, 412 U.S. at 231–32. In a vigorous dissent, Justice Marshall contended that there is nothing impractical about a simple warning of the right to refuse at the time a consent search is requested and argued that the Court was more concerned with protecting "the continued ability of the police to capitalize on the ignorance of citizens." *Id.* at 286–88 (Marshall, J., dissenting).

223. Strauss, *supra* note 198, at 219–20.

224. *See id.* at 236–40 (discussing the various studies demonstrating how individuals will defer to authority figures); Burkoff, *supra* note 196, at 1115 (explaining how requests from authority figures are often interpreted as demands).

225. Strauss, *supra* note 198, at 221–22.

only a select few cases, and even when the court did analyze the factors, it often found the search to be voluntary.<sup>226</sup> In one instance, the D.C. Circuit determined that a suspect's consent was valid despite the fact that the suspect had psychological problems and an IQ of only 76.<sup>227</sup> In another case, the D.C. Circuit found that a suspect gave voluntary consent despite the fact that he only had a tenth-grade education and was encircled by several sizable officers at the time of consent.<sup>228</sup> In the rare instances that courts invalidated consent, it was often because of blatantly coercive police misconduct such as making threats, depriving the suspect of necessities, or falsely claiming that the police had the right to search.<sup>229</sup> Essentially, as long as the police do not grossly misbehave or lie about having an actual warrant, the courts will seemingly rubber stamp the suspect's consent, regardless of other extenuating circumstances.<sup>230</sup>

However, even in the face of overt police coercion or a show of force, courts are sometimes hesitant to invalidate consent searches.<sup>231</sup> For example, the Eleventh Circuit Court of Appeals found valid consent despite the fact that a suspect consented to a search only following a situation in which officers, who had their guns drawn, arrested him lying on the ground.<sup>232</sup> In another case, the First Circuit Court of Appeals validated a suspect's consent, despite the fact that the consent occurred at gunpoint, because the suspect routinely had encounters with law enforcement and therefore was less likely to be intimidated.<sup>233</sup> The Supreme Court validated the use of overt demonstrations of force in consent-search cases in the 2002 case of *United States v. Drayton*.<sup>234</sup> In *Drayton*, the Court upheld the consent search of two individuals on a bus, even though at the time of the search, officers stood at both the back and front of the bus, implying to the average passenger that they might not be free to leave.<sup>235</sup> The Court reasoned that when an officer asks for and receives consent, it "dispels inferences of coercion."<sup>236</sup>

Statistics confirm the courts' reluctance to invalidate consent searches. In a survey of all the federal appellate cases involving criminal consent search motions to suppress between 2005 and 2009, the defend-

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226. *Id.* at 222–23.

227. *Id.* at 223 (discussing *United States v. Hall*, 969 F.2d 1102 (D.C. Cir. 1992)).

228. *Id.* at 224 (discussing *United States v. Rodney*, 956 F.2d 295 (D.C. Cir. 1992)).

229. *See id.* at 225.

230. Burkoff, *supra* note 196, at 1131.

231. *See* Strauss, *supra* note 198, at 226.

232. *See id.* (summarizing the holding of *United States v. Espinosa–Orlando*, 704 F.2d 507 (11th Cir. 1983)).

233. *See* Burkoff, *supra* note 196, at 1127 (summarizing the holding of *United States v. Barnett*, 989 F.2d 546 (1st Cir. 1993)).

234. 536 U.S. 194, 206–07 (2002).

235. *Id.* at 197–98, 207.

236. *Id.* at 207.

ant prevailed in a mere 16 of 148 cases, an 11% success rate.<sup>237</sup> It is not surprising that the courts are hesitant to invalidate consent searches because consent searches are a significant tool in the law enforcement arsenal; and police forces even train their officers on how to talk their way into receiving consent.<sup>238</sup> Finally, as one scholar has pointed out, unlike forced confessions, which are of dubious reliability, coerced searches produce evidence that is just as concrete and reliable as uncoerced searches, and therefore give courts an incentive to find them valid.<sup>239</sup>

*Fernandez* continues the trend of the Supreme Court downplaying issues of coercion in consent-search cases. The Court brushed aside claims made in *Fernandez*'s brief that during the course of the encounter between the police and *Fernandez*'s girlfriend, Roxanne Rojas, an officer stated that the investigation would "determine whether or not we take your kids from you right now or not."<sup>240</sup> Such a statement is clearly a serious threat when directed at any mother. In the majority opinion, Justice Alito dismissed the defendant's claim of overt coercion as not within the necessary scope of the Court's ruling, as the trial court conducted the fact-finding and apparently had some doubts about Rojas's credibility.<sup>241</sup> Justice Alito's dismissal of the possible coercion continues the trend of courts ignoring all but the most outrageous police misconduct when evaluating coercion. Despite the fact that the burden of proving freely given consent belongs to the prosecution,<sup>242</sup> holdings such as *Fernandez* suggest that there is in reality a de facto burden on the defense to prove that the consent was coerced.

In addition to potential overt coercion, the *Fernandez* ruling ignores the inherent coercion that is present in all consent-search encounters.<sup>243</sup> After a traumatic experience in which she was apparently battered and witnessed the arrest of her boyfriend, two presumably armed police officers returned to Rojas's apartment and requested a search.<sup>244</sup> The Court failed to consider the psychological state Rojas may have been in after such an incident, especially when subsequently confronted by two authority figures. Given the circumstances, it is likely Rojas felt she had no choice but to consent. There is also no evidence that Rojas was aware of

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237. Nancy Leong & Kira Suyeishi, *Consent Forms and Consent Formalism*, 2013 WIS L. REV. 751, 778–79 & app. B. Interestingly enough, when police required defendants to sign consent search forms in criminal cases, the defendant success rate fell to an even more futile 5%, compared to a 9% success rate when no form was used. *Id.* For an in-depth discussion on the topic of consent search forms and their impact on the rights of defendants, see generally *id.*

238. See Burkoff, *supra* note 196, at 1121.

239. Strauss, *supra* note 198, at 229.

240. Brief for Petitioner at 4, *Fernandez v. California*, 134 S. Ct. 1126 (2014) (No. 12-7822), 2013 WL 3972445, at \*4 (internal quotation mark omitted).

241. *Fernandez*, 134 S. Ct. at 1130 n.2.

242. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973).

243. See Strauss, *supra* note 198, at 236–40 (discussing the various studies demonstrating how individuals will defer to authority figures); Burkoff, *supra* note 196, at 1115 (explaining how requests from authority figures are often interpreted as demands).

244. *Fernandez*, 134 S. Ct. at 1130.

her right to refuse a search or aware that her consent to a search would enable the police to prosecute her boyfriend for crimes unrelated to his assault on her. Thinking that she had no other option but to acquiesce to the police officer's request for a search, Rojas may have given in, thinking that the search would happen regardless of whether she consented. Therefore, the "consent" that Rojas gave is likely no more than a legal fiction. If the Court had applied the "totality of all the circumstances" test, as required in *Schneckloth*,<sup>245</sup> and further considered the inherent confusion and fear present in many consent-search cases,<sup>246</sup> it likely would have reached a drastically different conclusion on whether Rojas truly consented.

*C. Fernandez Weakened the Already Inadequate Protections Against Police Misconduct*

In *Fernandez*, the Court loosened *Randolph*'s already flimsy protections against police overreach by declaring that there need not be a subjective inquiry into the intent of police officers removing an objector.<sup>247</sup> Rather, the majority said that the officer's removal of an objector must merely be "objectively reasonable."<sup>248</sup> Even using a subjective standard, the protections in *Randolph* were already a failure, as they sent "a signal to police to move people as if they were pieces on a chessboard" in order to avoid having to obtain a warrant.<sup>249</sup> Because subjective intent is difficult to prove, *Randolph* fostered an environment in which it was advantageous for the police to create an implicit policy of not asking for consent so that a suspect could not object before the police had a chance to obtain consent from a separate co-occupant instead.<sup>250</sup> Therefore, *Randolph* sent a message to police that it was permissible to manipulate situations by separating individuals at the outset of an incident and then seek permission for a search from the co-occupant whom the police believed was the most likely to give it.<sup>251</sup>

*Fernandez* worsens incentives for police manipulation because it not only gives the police an incentive to separate individuals, but also it gives the police an incentive to arrest or detain objectors simply to remove them from the scene so that a search may be conducted based on co-occupant consent. Given that *Randolph*'s subjective inquiry protections were already inadequate, the complete elimination of an inquiry

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245. *Schneckloth*, 412 U.S. at 227.

246. See Sekhon, *supra* note 200, at 112.

247. *Fernandez*, 134 S. Ct. at 1134.

248. *Id.*

249. Dery & Hernandez, *supra* note 2, at 55.

250. *Id.* at 82. For an in-depth discussion of an alternate view arguing that subjectivity is of questionable utility in a Fourth Amendment analysis, see Orin S. Kerr, *Katz Has Only One Step: The Irrelevance of Subjective Expectations*, U. CHI. L. REV. (forthcoming), available at <http://ssrn.com/abstract=2448617>.

251. Dery & Hernandez, *supra* note 2 at 80, 82.

into officer motivations in *Fernandez* makes the situation worse. As long as the arrest or detention appears objectively reasonable, the warrantless search is legitimate, even if the sole reason the police removed the objector was to avoid the need for a warrant.<sup>252</sup> Professor Tracey Maclin predicted this exact scenario following the *Randolph* ruling in 2008, noting how “an absent suspect’s refusal to give consent will not be the final word when the police can obtain the consent of the suspect’s co-occupant. And if necessary, the police can always remove or arrest a suspect before seeking the co-occupant’s consent.”<sup>253</sup> *Fernandez* enshrined Professor Maclin’s fear into law by giving the police the ability to overrule objectors by detaining or arresting them if there is a consenting co-occupant present.

In *Fernandez*, the Court attempted to limit such abuses by creating the objective reasonableness standard.<sup>254</sup> However, the Court’s limit will protect objectors more in theory than in fact, as demonstrated by a survey of cases that attempted to take advantage of *Randolph*’s subjective protections since 2006.<sup>255</sup> Even though the test moved from a subjective examination of police motivations to an objective reasonableness test, there is reason to believe that courts will still use the same tactics to dismiss defendant claims of consent-search discretion abuse. It may even be easier for courts to dismiss *Fernandez* claims because now a court can outright ignore evidence of police manipulation, as long as the police or court can concoct any sort of “reasonable” reason for the objecting party’s detention or arrest.<sup>256</sup>

In a 2008 survey of cases in which objectors sought the protection of *Randolph* against police overreach, Professor Marc McAllister reviewed the various ways in which courts sought to side with the police in a consent-search dispute.<sup>257</sup> There is little reason to believe that these legal trends will change simply because *Fernandez* shifted the standard from a subjective to an objective one. For example, when applying the *Randolph* test that looked into the subjective motivations of police officers, the courts gave defendants a difficult burden of proving police impropriety.<sup>258</sup> In the 2006 case of *United States v. Parker*,<sup>259</sup> the Seventh Circuit Court of Appeals declined to extend *Randolph* protections to a defendant because the precise circumstances surrounding the police obtaining a co-occupant consent search were unclear and the defendant could not present concrete evidence of officer motivations in the rec-

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252. *Fernandez*, 134 S. Ct. at 1134.

253. Maclin, *supra* note 22, at 75–76 (footnote omitted).

254. *Fernandez*, 134 S. Ct. at 1134.

255. See McAllister, *supra* note 6, at 668, 672–90 (“[P]ost-*Randolph* courts have developed at least five ways to reject an otherwise legitimate *Randolph* claim . . .”).

256. See *Fernandez*, 134 S. Ct. at 1134 (“[T]he test is one of objective reasonableness . . .”).

257. See McAllister, *supra* note 6, at 668, 672–90.

258. *Id.* at 668.

259. 469 F.3d 1074 (7th Cir. 2006).

ord.<sup>260</sup> The court placed the burden of proving an unlawful removal on the defendant and denied the defendant's Fourth Amendment claim despite the fact that the police detained the defendant immediately upon arriving on the scene to investigate a report of shots fired.<sup>261</sup> The defendant in *Parker* never had an opportunity to object to a search because the police immediately removed him from the scene. Because the court was unwilling to extend Fourth Amendment protections to the *Parker* defendant under the previous subjective test even given the defendant's immediate removal, it is unlikely that courts will be any more sympathetic to detained or arrested defendants who subsequently have their homes searched under the new objective reasonableness test of *Fernandez*.

Even under the old subjective *Randolph* test, courts deferred to the police to such an extent that officers could openly admit to intentionally obtaining a consent search when the objector was not home with the purpose of avoiding the need for a warrant.<sup>262</sup> In the 2006 Pennsylvania case of *Commonwealth v. Yancoskie*,<sup>263</sup> the state court validated the search of a defendant's house based on the consent of his wife, even though the police admitted to planning their consent search around the fact that the defendant was out of town.<sup>264</sup> The state court reasoned that the defendant assumed this risk—his wife letting the police search the premises—every time he left the house.<sup>265</sup> At its most absurd, this assumption-of-the-risk reasoning would mean that every time a defendant left his house, the police could intentionally bypass the warrant process by seeking a co-occupant consent search. Essentially, under *Fernandez* and *Randolph*, the Fourth Amendment protects a citizen only when they are physically at home. Once a person steps outside or is otherwise removed from their dwelling, the Fourth Amendment protection of their home evaporates.<sup>266</sup>

Applying the new *Fernandez* rule, the police could even plan arrests to avoid the need for search warrants. For example, suppose the police have an arrest warrant for a defendant for a minor infraction, such as missing a court date for a public intoxication citation. The police also suspect that the defendant is running a methamphetamine operation on the side but do not have enough evidence to obtain a search warrant from a judge. Under the tests and logic of *Fernandez* and *Randolph*, the police could knock on the defendant's door, immediately arrest him on his failure-to-appear warrant, and then seek consent to search the house from another occupant. Under *Fernandez*, it would be completely irrelevant whether the defendant objected to the search when the police arrived at

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260. McAllister, *supra* note 6, at 672–73 (summarizing *Parker*, 469 F.3d 1074).

261. *Id.*

262. *Id.* at 682–83 (summarizing *Commonwealth v. Yancoskie*, 915 A.2d 111 (Pa. Super. Ct. 2006)).

263. 915 A.2d 111 (Pa. Super. Ct. 2006).

264. McAllister, *supra* note 6, at 682.

265. *Id.*

266. Dery & Hernandez, *supra* note 2, at 55, 80.

his house. This is despite the fact that the only reason the police aggressively pursued the failure-to-appear warrant for a minor infraction was that they wished to arrest the defendant in order to search his house for more serious infractions. Surely, under *Randolph*'s reasonableness test, the defendant's arrest was reasonable because he had an *actual* outstanding warrant.<sup>267</sup> Yet, the entire purpose of the arrest was not to bring the defendant to justice for his failure to appear, but to conduct a warrantless consent search of his house. It cannot be that the Framers, who likely envisioned the Fourth Amendment as protecting a citizen's right to privacy and "right to be let alone," would condone such unchecked police search powers.<sup>268</sup>

#### *D. A Possible Solution?*

Although a complete analysis of the fixing the problems created by co-occupant consent searches is outside the scope of this Comment, there is a solution to the perverse incentives and violation of the Framers' intentions created by *Fernandez*, and that solution is simply requiring a search warrant once any occupant, present or not, objects to a search.<sup>269</sup> The dissenting opinion in *Fernandez* suggested this approach.<sup>270</sup> Justices Ginsburg, Sotomayor, and Kagan noted that in a world of modern electronic communications, search warrants are as quick and effortless to obtain as they have ever been,<sup>271</sup> and that if police officers have a legitimate need to collect evidence, a warrant will easily overcome any defendant's objections.<sup>272</sup> This approach also comports with the views of the Framers, who "saw the neutral magistrate as an essential part of the criminal process."<sup>273</sup>

Some may object that eliminating consent searches by requiring warrants will hinder an innocent co-occupant's ability to work with law enforcement.<sup>274</sup> However, even an innocent person who may feel compelled to work with the police experiences an invasion of their privacy during a consent search.<sup>275</sup> For example, in the process of searching a common household, the police may uncover many completely legal, yet highly personal items, such as material related to an individual's sex life or medical conditions.<sup>276</sup> Such items, although legal, may be a source of significant embarrassment to both the suspect and the consenting co-

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267. See *Fernandez v. California*, 134 S. Ct. 1126, 1134 (2014) (declaring that a defendant is not protected when under a "lawful detention or arrest").

268. Maclin, *supra* note 22, at 39–40 (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)) (internal quotation marks omitted).

269. *Fernandez*, 134 S. Ct. at 1141 (Ginsburg, J., dissenting).

270. *Id.*

271. *Id.* at 1142.

272. *Id.* at 1141.

273. *Id.* at 1143.

274. See Burkoff, *supra* note 196, at 1125.

275. *Id.*

276. *Id.* at 1126.

occupant, who only allowed a search to begin with out of an implied obligation to help the police.<sup>277</sup> Additionally, consent searches, while convenient for the police, unnecessarily create significant “delay and inconvenience” for those who are being searched, often out of the mere sense that a search could not be refused.<sup>278</sup>

Furthermore, eliminating co-occupant consent searches would not significantly hinder the ability of the police to investigate crimes as some fear.<sup>279</sup> Because the police often utilize consent searches when they would have the necessary probable cause to search via a warrant anyway, consent searches often only save the police the actual and arguably minimal hassle of obtaining a warrant.<sup>280</sup> This means that often the only damage that the police and society would suffer from eliminating consent searches is that the police and the judiciary have to spend more time and energy on paperwork.<sup>281</sup> Therefore, in the majority of cases, eliminating consent searches would not result in the apprehension of fewer criminals, but would simply ensure that the police follow proper procedure when investigating crimes.<sup>282</sup> Additionally, in the event there is no time to get a warrant, the current exigency exceptions that the Court has carved out would give the police the ability to conduct a search anyways, as long as there is probable cause.<sup>283</sup>

#### CONCLUSION

With the *Fernandez* decision, the Supreme Court continued its trend of eroding Fourth Amendment protections in co-occupant consent searches. Both *Fernandez* and *Randolph* create perverse incentives for the police to manipulate situations and people for the purposes of avoiding the need for a search warrant. If they desire, the police may now plan arrests so as to immediately remove an objector from the scene and obtain consent to search a residence from a third-party to avoid a warrant. The subjective motivations of the police will not be examined even if the police are consciously trying to manipulate the need for a warrant. When officers arrest an objecting suspect, remove him from the scene, and conduct a search based on third-party consent, courts may only review the objective reasonableness of the arrest.

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277. *Id.*

278. *Id.*

279. See Strauss, *supra* note 198, at 260 (discussing how similar fears of an ineffective police force never materialized following the implementation of *Miranda* rights).

280. *Id.* at 261, 263 (contending that the police are often able to obtain the same information that is obtained in a consent search through more traditional investigatory techniques and thorough police work as well).

281. *Id.* at 261.

282. *Id.*

283. Strauss, *supra* note 198, at 261. For example, exigency exceptions to the warrant requirement can include when police need to enter a residence immediately to prevent the destruction of evidence. See *Kentucky v. King*, 131 S. Ct. 1849, 1858 (2011).

The resulting situations of warrantless searches violate the spirit and intent of the Fourth Amendment, which the Framers created to guarantee all citizens a degree of privacy and place reasonable restrictions on police power. Justice Frankfurter once proclaimed that it is illogical to think the Constitution was “meant to make it legally advantageous not to have a warrant,”<sup>284</sup> yet that is the scenario the *Fernandez* Court created, putting the exact kind of discretion in the hands of law enforcement that the nation’s Founding Fathers feared.

Peter Voorheis\*

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284. *Davis v. United States*, 328 U.S. 582, 595 (1946) (Frankfurter, J., dissenting).

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